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General Counsel.

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1, 32, 51, 61, and 69

[WC Docket Nos. 17–144, 16–143, 05–25; FCC 18–146]

Regulation of Business Data Services for Rate-of-Return Local Exchange Carriers; Business Data Services in an internet Protocol Environment; Special Access for Price Cap Local Exchange Carriers

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission continues its efforts to modernize its rules governing the pricing of business data services (BDS) by allowing rate-of-return carriers to voluntarily elect to transition their BDS offerings out of rate-of-return regulation to a lighter-touch regulatory framework. This action is intended to promote competition and reduce costly regulatory burdens which no longer serve the public interest. Under this new framework, rate-of-return carriers would be incentivized to use the savings realized from the regulatory relief to improve existing networks and service.

DATES: The amendments contained in this final rule shall become effective February 26, 2019.

ADDRESSES: Federal Communications Commission, 445 12th Street SW, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Justin Faulb, Pricing Policy Division of the Wireline Competition Bureau at 202–418–1540 or by email at *Justin.Faulb@fcc.gov*.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order, released October 24, 2018. A full-text version may be obtained at the following internet address: *https://www.fcc.gov/document/fcc-spurs-competition-rural-business-data-services-0*.

I. Background

1. In 1990, the Commission began the process of encouraging carriers to move from rate-of-return to incentive regulation by adopting price cap rules governing the largest incumbent LECs' interstate access charges and allowing other incumbent LECs to elect price cap regulation voluntarily. Price cap regulation was designed to ''reward companies that became more productive and efficient, while ensuring that productivity and efficiency gains are shared with ratepayers.'' Through a series of subsequent decisions, the Commission allowed other carriers to convert voluntarily from rate-of-return to price cap regulation.

2. Since then, the Commission has taken additional steps to transition certain services and revenues of rate-of-return carriers from rate-of-return regulation to other more efficient forms of regulation. In 2011, as part of comprehensive universal service and intercarrier compensation reform, the Commission imposed rate caps on rate-of-return carriers' switched access services, removing those services from the obligations that accompany traditional rate-or-return regulation. In the *USF/ICC Transformation Order,* 76 FR 73830, November 29, 2011, the Commission also changed its method for calculating high-cost universal service support received by rate-of-return affiliates of price cap carriers. Specifically, the Commission began to treat rate-of-return operating companies affiliated with price-cap holding companies as price cap LECs for the purposes of the Connect America Fund (CAF) Phase I distribution mechanism. As a result, rate-of-return carriers affiliated with price-cap companies now receive the same type of fixed universal service support that their price cap affiliates receive.

3. Two years ago, the Commission gave rate-of-return carriers the option of receiving forward looking, model-based universal service support based on the Alternative Connect America Cost Model (A–CAM), which more than 200 carriers opted to receive (A–CAM carriers). The Commission observed that ''the carriers that choose to take the voluntary path to the model are electing incentive regulation for common line offerings.'' Consequently, for A–CAM carriers, only their BDS offerings are currently subject to rate-of-return regulation.

4. In 2016, the Commission also adopted the *Alaska Plan Order,* 81 FR 69696, October 7, 2016, which allowed Alaskan rate-of-return carriers to elect fixed universal service support on a state-wide basis for a defined term in exchange for committing to deployment obligations. Specifically, the Commission provided a one-time opportunity for Alaskan rate-of-return carriers to elect to receive universal service support frozen at adjusted 2011 levels for a 10-year term in exchange for meeting individualized performance benchmarks to offer voice and broadband services. Subsequently, in 2016, the Wireline Competition Bureau (Bureau) authorized 13 Alaskan rate-of-return carriers to receive universal service support under the Alaska Plan (Alaska Plan carriers). Similar to A–CAM carriers, Alaska Plan carriers receive fixed universal service support that is not based on current cost, and only file cost studies for purposes of their BDS offerings.

5. In addition to encouraging carriers to migrate from cost-based to incentive regulation, over time the Commission has reduced ex ante pricing regulation in favor of relying on competition to the extent possible. In 1999, the Commission granted pricing flexibility to price cap carriers that provided service in areas where carriers could demonstrate threshold levels of deployment by competitive providers. Pricing flexibility allowed eligible carriers to offer BDS using contract tariffs, volume and term discounts and, in markets that demonstrated higher levels of competition, at unregulated rates. Beginning in 2007, the Commission granted forbearance from dominant carrier regulation, including tariffing and pricing regulation, to a number of price cap incumbent LECs for their newer packet-based broadband services. These forbearance orders concluded that forbearance from dominant carrier regulation was warranted given the existence of competition for these newer services, which ensured that rates and practices for these services remained just and reasonable, adequately protected consumers, and was in the public interest.

6. In 2017, the Commission adjusted BDS pricing regulation to the reality of a dynamically competitive BDS market in areas where incumbent LECs were subject to price cap regulation. The Commission premised its reductions in ex ante pricing regulation in part on a substantial data collection and in part on its predictive judgment that dynamic and growing competition in the BDS market, driven increasingly by the emergence of cable competition, would allow reliance on competition rather than regulation to ensure rates remain just and reasonable. The *BDS Order,* 82 FR 25660, June 2, 2017, represented yet another step in the process of reducing dominant carrier regulation in response to the growth of competition. In that order, the Commission found that reducing government intervention and allowing market forces to continue working would further spur entry, innovation, and competition in BDS markets served by price cap carriers.

The Commission applied ex ante pricing regulation ''only where competition is expected to materially fail to ensure just and reasonable rates'' and stated its preference to rely ''on competition rather than regulation, wherever purchasers can realistically turn to a supplier beyond the incumbent LEC.'' Based on the record before it, the Commission found that, on balance, competition was sufficient to ensure just and reasonable rates for packet-based business data services, TDM transport services, and higher bandwidth (*i.e.,* above a DS3-level) TDM services (including OCn services) in the absence of ex ante pricing regulation in areas served by price cap carriers. It also adopted a competitive market test for lower bandwidth TDM end user channel terminations (*i.e.,* DS3-level and lower) in price cap areas and refrained from ex ante pricing regulation of those services in areas deemed competitive by that test.

7. Recently, the Eighth Circuit Court of Appeals upheld all aspects of the *BDS Order* save the portions of the order affecting price cap carriers' TDM transport service, which it vacated and remanded on notice grounds—namely that the Commission had not provided sufficient notice that it might relieve those services of ex ante pricing regulation.

8. After the Commission adopted changes to its rules governing price cap carriers' BDS offerings, ITTA and USTelecom (together, Petitioners) filed a petition seeking the same regulatory treatment of BDS offerings for rate-of-return carriers receiving fixed support as that the Commission had recently adopted for price cap carriers (Joint Petition). According to Petitioners, rate-of-return regulation deters investment in networks and harms competition. Petitioners argue that the inflexibility of rate-of-return regulation makes it difficult to justify and fund upgrades to their rural networks. They point out that for rate-of-return carriers, ''the need to perform annual cost studies now applies only with respect to BDS.'' As a result, they argue that the expense associated with conducting cost studies and complying with other rate-of-return expenses are difficult to recover and burden rate-of-return carriers receiving fixed support but not their competitors. The Bureau sought and received comment on the Joint Petition.

9. Upon review of the record received in response to the Joint Petition, earlier this year, the Commission released a notice of proposed rulemaking (*NPRM*), 83 FR 22923, May 17, 2018, proposing to allow A–CAM and other rate-of-return carriers that receive fixed universal service support to voluntarily migrate their lower speed TDM-based BDS offerings to incentive regulation. The Commission also sought comment on adopting a competitive market test to determine when the market for lower speed TDM-based BDS offerings offered by rate-of-return carriers that receive fixed support are sufficiently competitive to justify eliminating ex ante pricing regulation of such offerings. Additionally, the *NPRM* sought comment on eliminating ex ante pricing regulation for such carriers' packet-based and higher speed TDM-based BDS offerings nationwide, while maintaining oversight authority through sections 201, 202, and 208 of the Communications Act of 1934, as amended (the Communications Act or the Act) to ensure BDS rates and practices remain just and reasonable.

II. An Administrable Framework for Business Data Services Offered By Rate-of-Return Carriers That Receive Fixed Support

10. Upon review of the record, we allow rate-of-return carriers receiving fixed universal service support to choose to migrate their BDS offerings to a new, comprehensive, lighter-touch regulatory framework that is better aligned to the competitive realities of the BDS markets they serve. The framework we adopt includes voluntary incentive regulation with pricing flexibility for electing carriers' lower capacity (DS3 and below) TDM transport and end user channel termination services. We also adopt a competitive market test for such carriers' lower capacity TDM end user channel termination services to identify competition by study area. In electing carriers' study areas that the competitive market test deems competitive, we eliminate ex ante pricing regulation for lower capacity TDM end user channel termination services. We also remove ex ante pricing regulation from electing carriers' packet-based and higher capacity (above a DS3 bandwidth level) TDM services and grant forbearance from tariffing requirements for those services. To reduce the burden of legacy rate-of-return regulation on electing carriers, we also grant forbearance from cost assignment and separations rules and related reporting requirements, because we determine that such action is warranted by the non-cost-based regulation that will apply to electing carriers and the competitive circumstances of their BDS markets.

11. We find that adopting the lighter-touch incentive regulatory framework proposed by the Commission for electing carriers will remove unnecessary regulatory burdens and encourage competition. Based on the record before us, we decline at this time to relieve electing carriers' lower capacity TDM transport (at or below a DS3-level) of ex ante pricing regulation nationwide, as Petitioners sought. Instead we allow electing carriers to move their lower speed TDM transport services to incentive regulation. Additionally, we adopt a competitive market test tailored to rate-of-return carriers' study areas, which will allow us to properly evaluate competition in the areas served by electing carriers and remove ex ante pricing regulation for end user channel terminations in areas deemed competitive, instead of basing our decision on the competitive characteristics of areas served by price cap carriers.

12. We decline to adopt Petitioners' proposal to apply to electing carriers' BDS offerings the regulatory framework and the results of the price cap competitive market test adopted in the *BDS Order* for price cap carriers' BDS offerings. Petitioners argue that applying the price cap BDS rules to electing rate-of-return carriers would result in regulatory parity that ''would promote competition and make the rules less complex.'' TDS Telecom asserts that adopting a separate incentive regulatory framework is unnecessary. The price cap BDS rules, however, were based on an analysis of BDS competition in areas served by price cap carriers, consistent with our obligation to ensure that the rates charged by common carriers are just and reasonable. The Commission found sufficient evidence of competition in these areas to discipline pricing and therefore adopt a lighter touch regulatory framework for these carriers. That same history and record of competition for BDS services does not exist in the study areas served by rate-of-return carriers that Petitioners seek to have covered by price cap BDS regulation. Thus, we find that adopting a separate, albeit largely parallel, regulatory framework for rate-of-return carriers receiving fixed support will be better suited to their circumstances.

A. Transitioning to a New Framework

13. Consistent with the Commission's proposal and the Joint Petition, we allow all rate-of-return carriers receiving fixed universal service support to voluntarily elect to move their BDS offerings out of rate-of-return regulation to the new lighter touch framework we adopt today. Carriers eligible to make this election include A–CAM carriers, rate-of-return carriers receiving fixed support by virtue of being affiliated with price cap carriers, Alaska Plan carriers,

and rate-of-return carriers that accept future offers of A–CAM support or otherwise transition away from legacy support mechanisms. The first three types of carriers receive fixed or model-based universal service support, rather than receiving high-cost support based on their costs, and therefore are currently required to prepare cost studies only for their BDS offerings. Relieving these carriers of rate-of-return regulation for their BDS will save them the expense of preparing burdensome cost studies only for those offerings.

14. Similarly, to the extent the Commission provides future offers of A–CAM support or otherwise transitions carriers away from legacy support mechanisms, carriers that receive such support will only have to prepare cost studies for purposes of their BDS offerings. Therefore, if the Commission announces future offers of A–CAM support or otherwise transitions carriers away from legacy support mechanisms, the actions we take in this Order will allow carriers eligible for or subject to such transitions to elect the same lighter touch regulatory framework we provide for other rate-of-return carriers that receive fixed support, and may provide further incentives for rate-of-return carriers to elect to receive non-legacy, fixed or model-based support. This will further the Commission's longstanding objective of providing universal service support based on forward-looking efficient costs as opposed to actual costs that may be less efficient.

15. Consistent with Commission precedent, we do not require all rate-of-return carriers receiving fixed support to migrate their BDS offerings away from rate-of-return regulation to the new framework, but instead allow each carrier to voluntarily make that determination based on its circumstances. When the Commission adopted price cap regulation in 1990, it made price cap regulation voluntary for all but the largest incumbent LECs. At that time, the Commission expressed concern that assigning one productivity factor on a mandatory basis to all LECs, regardless of size, could prove unduly burdensome for smaller and mid-sized carriers that may have fewer opportunities than larger companies to achieve cost savings and efficiencies. Commenters echoed those concerns in this proceeding. By making the election voluntary, we ensure that only carriers that can achieve sufficient efficiencies are likely to elect incentive regulation; our new framework will not, therefore, impose additional burdens on smaller carriers that cannot achieve such efficiencies.

16. We also adopt the Commission's proposal to require electing carriers to elect incentive regulation at the holding company-level for study areas in all states where that carrier receives fixed support. Commenters do not oppose requiring holding company-level election. AT&T requests that the Commission ''require that any A–CAM carrier that elects incentive regulation have that election apply across all its study areas'' because this prevents ''internal cost shifting among study areas.'' Holding company-level election will maximize the regulatory efficiencies achieved by incentive regulation, including maximizing cost savings from the elimination of cost studies for all electing carriers. It is also consistent with the Commission's past practices. For example, the Commission gave rate-of-return carriers the opportunity to elect between A–CAM and legacy cost-based support at a state-wide level. Likewise, the Commission required Alaska Plan carriers to elect fixed, frozen support on a state-wide basis. Requiring rate-of-return carriers receiving fixed support to elect regulatory treatment at the holding company-level is also consistent with the underlying premise of price cap regulation, which assumed a broad representation of carrier operations to provide a basis for establishing an industry-wide productivity factor.

17. We provide eligible carriers with two opportunities to elect to move their BDS offerings out of rate-of-return regulation—one to be effective as of July 1, 2019 and a second effective as of July 1, 2020—to encourage them to take advantage without undue delay of the benefits that will be realized by electing carriers under the new framework and to discourage potential gaming opportunities. We provide two opportunities to elect this new regulatory framework, in recognition of the fact that some carriers may not have sufficient time to assess their options in time for the July 1, 2019 effective date. Providing a second opportunity to elect incentive regulation will facilitate carriers' ability to assess incentive regulation for their BDS and ultimately enhance participation in the new regulatory framework, which will further reduce unnecessary regulatory burdens and positively impact competition in electing carriers' BDS markets.

18. Some commenters recommend that we provide an ''annual opportunity to elect the new regime'' based on ''business strategy and compliance measures.'' Giving eligible carriers an annual opportunity to elect incentive regulation, however, would also give them an incentive to increase their operating costs and rate base under rate-of-return regulation in order to raise rates prior to electing incentive regulation, then realize additional profits by cutting costs under incentive regulation at the expense of ratepayers. By providing only two opportunities to elect to move to the new framework, we discourage such gaming opportunities.

19. We prohibit electing carriers from returning their study areas to rate-of-return regulation. One of the rationales for the Commission's ''all-or-nothing'' rules for price cap carriers is to prevent carriers from potentially switching back and forth between rate-of-return and price cap regulation to take advantage of uneven cycles of investment. We are likewise concerned with potential gaming opportunities for electing carriers if they are allowed to switch back and forth between rate-of-return and incentive regulation. Electing carriers could inflate their revenues by opting-out of incentive regulation, building a larger rate base under rate-of-return regulation in order to raise rates, and then, returning to incentive regulation or opting into price cap regulation, thus reducing costs back to an efficient level. These gaming opportunities would distort carriers' decisions to invest and frustrate the public interest because ratepayers would not see the benefit of capped and decreased rates in the manner intended under incentive regulation. Further, in the 1990 *Price Cap Order,* 55 FR 42375, October 19, 1990, the Commission determined that for price cap regulation to work effectively and for incentives to develop and influence carrier behavior and earnings, an electing carrier must make a permanent commitment. We similarly find, that for incentive regulation to work properly, the election must be permanent. Accordingly, a carrier's voluntary election of incentive regulation will be irrevocable.

20. AT&T requests that the ''Commission decline to waive the 'all-or-nothing' rule for these carriers and require that any A–CAM carrier that elects incentive regulation have that election apply across all its study areas and, even more critically, across all of its interstate services within a study area.'' The all-or-nothing rule AT&T cites, however, applies to price cap carriers, not to rate-of-return carriers that elect incentive regulation. While the incentive regulation rules we adopt for electing carriers impose price caps on some of the BDS services offered by electing carriers, electing carriers do not become price cap carriers by virtue of their election; therefore the all-or-

nothing rule is simply not applicable here.

21. We allow electing carriers' switched access services to remain subject to the multi-year transition provided for rate-of-return carriers in the *USF/ICC Transformation Order.* We therefore decline to adopt AT&T's recommendation that electing carriers be required to convert all their services to price cap regulation, including their switched access services, which—compared to price-cap carriers' switched access services—benefit from a longer transition to bill-and-keep and no phase-out of Connect America Fund Intercarrier Compensation replacement support.

22. According to AT&T ''[w]hile different transitions for price cap carriers and rate-of-return carriers may have made sense in 2011, those distinctions should not unfairly benefit carriers'' electing incentive regulation and could lead to cost-shifting between types of services. We disagree with AT&T's assertion that electing carriers will ''unfairly benefit'' from our decision not to convert all of their offerings to incentive regulation. The Commission adopted different intercarrier compensation transitions in the context of a complex rulemaking that were the result of a careful analysis of a variety of factors and policy considerations, including the differential impact of universal service and intercarrier compensation reform on price cap as compared to rate-of-return carriers. As TDS Telecom explains, in the intervening seven years, carriers have relied on those transitions to plan their businesses and make investments. Changing those transitions at this point would disrupt these settled expectations and potentially undermine, rather than encourage, investment and innovation in electing carriers' BDS markets. We also find AT&T's concerns about cost-shifting unfounded because switched access rates were capped and therefore removed from cost-based regulation in 2011 by the *USF/ICC Transformation Order,* eliminating the incentive for inappropriate cost shifting.

23. Following the same logic, we decline to adopt AT&T's proposal that we require electing carriers to exit the National Exchange Carrier Association (NECA) tariff pool for their ''switched and special access services to avoid additional complexities in the annual tariff review process and to avoid potential gaming.'' As Petitioners argue, AT&T ''fails to explain how any cost shifting would be useful given the switched access rules [that cap rates].'' Moreover, the scrutiny inherent in the part 61 tariff review process helps reduce the risk of cost-shifting or other gaming by pool participants. We do, however, require electing carriers currently participating in the NECA traffic-sensitive tariff pool for their BDS or special access service offerings to remove their BDS and special access offerings from the pool since those services will be subject to incentive regulation.

24. We find that the lighter touch regulatory framework we adopt provides electing carriers the right balance of relief from the burdensome aspects of rate-of-return regulation and pricing discipline. The efficiencies gained from reducing regulatory burdens on electing carriers, including the increased flexibility to compete in the market, will foster network investment and impose downward pressure on prices. We also find here, as we did in the *BDS Order,* that ''minimiz[ing] unnecessary government intervention . . . allows market forces to continue working to spur entry, innovation, and competition.''

B. Applying Voluntary Incentive Regulation to Electing Carriers' Lower Speed TDM Transport and End User Channel Termination Services

25. In this section, we provide direction on implementing the voluntary incentive regulation we adopt today for electing carriers' lower capacity (*i.e.,* at or below a DS3-level) TDM transport and end user channel termination services as part of our comprehensive lighter touch regulatory framework for electing carriers' BDS. We treat electing carriers' lower capacity TDM transport and end user channel terminations differently from packet-based and higher speed TDM-based BDS offerings because the record shows that packet-based offerings are subject to competition that will ensure just and reasonable rates for those services. By contrast, the record shows that demand for lower speed TDM-based transport and end user channel terminations services is shrinking as purchasers increasingly prefer higher speed and packet-based services. Recognizing that the market is transitioning to new technologies, we provide protections for lower speed TDM-based transport and end user channel termination services. Based on the current record, we preserve ex ante pricing regulation for lower speed TDM-based transport services and adopt a competitive market test that will preserve ex ante pricing regulation in those study areas where we predict there is a substantial likelihood that competition will fail to ensure just and reasonable rates for the lower capacity TDM-based end user channel termination services.

26. Rate-of-return carriers that make this election will convert to incentive regulation for their lower capacity TDM transport and end user channel termination services as well as other generally lower capacity non-packet-based services that are commonly considered special access services. Specifically, among other matters, we adopt a methodology for electing carriers to set their initial rates, allow an unfreeze of separations category relationships for carriers that elected to freeze them in 2001, adopt a productivity factor and measure of inflation to adjust rates, and grant pricing flexibility to electing carriers for their lower capacity TDM services.

1. Initial Rate Levels

27. First, we adopt the methodology electing carriers must use to establish rates for their lower capacity TDM transport and end user channel termination services pursuant to incentive regulation. For rate-of-return carriers that file their own tariffed rates, we adopt the approach proposed in the *NPRM* to set initial BDS rate levels based on rates in effect on January 1, 2019 for carriers converting to incentive regulation as of July 1, 2019 and on rates in effect on January 1, 2020 for carriers that elect incentive regulation effective as of July 1, 2020. For rate-of-return carriers participating in the NECA traffic-sensitive tariff pool that elect incentive regulation effective July 1, 2019, we adopt the approach proposed in the *NPRM* for members exiting the pool to set their initial BDS rate levels by adjusting NECA pool rates in effect on January 1, 2019 by a net contribution or net recipient factor. Carriers electing incentive regulation as of July 1, 2020 must set their initial BDS rate levels by adjusting NECA pool rates in effect on January 1, 2020. Electing carriers will then adjust their rates using a methodology that is consistent with the price cap formulas in §§ 61.45 to 61.47 of our rules, by applying the productivity factor (X-factor), inflation factor (Gross Domestic Product-Price Index (GDP–PI)), and any required exogenous cost changes. Carriers may adjust these rates to reflect the pricing flexibility permitted by the pricing bands in the Special Access category.

28. Under rate-of-return regulation, incumbent LECs are permitted to recover through tariffed rates their revenue requirement, which is equal to their regulated operating costs plus a prescribed rate of return on their regulated rate base. Rate-of-return carriers set rates at levels that when

multiplied by demand will yield revenues equal to their revenue requirement, and are targeted to earn the Commission's prescribed rate of return. Rate-of-return carriers establish rates for BDS offerings either by filing their own interstate access tariffs and cost support pursuant to § 61.38 or § 61.39 of our rules or, for most rate-of-return carriers, by participating in the NECA traffic-sensitive tariff and traffic-sensitive pool. NECA sets the BDS rates in the traffic-sensitive tariff based on projected aggregate costs (or average schedule settlements) and demand of all pool members, which are targeted to earn the authorized rate of return for NECA pool members.

29. When the Commission launched price cap regulation in 1990, it found that interstate access rates as they existed on July 1, 1990, six months prior to the date price caps went into effect on January 1, 1991, were the most reasonable basis from which to set initial rate levels under price cap regulation. In other words, those rates created the starting point for the indexing of rates under price cap regulation—setting their price cap index, actual price index and service band index at a value of 100. The price cap index is adjusted by the productivity offset (X-factor) and inflation (GDP–PI) for the first year, and each year thereafter. The Commission reasoned that interstate rates that existed on July 1, 1990 ''while perhaps not perfect, in general represent the best that rate-of-return regulation can produce.''

30. Beginning with the *Windstream Order,* the Commission granted several waivers allowing price cap carriers to convert their rate-of-return study areas to price cap regulation. Carriers were, among other things, required to establish initial price cap indexes using the rates in effect on January 1 of the conversion year, six months prior to the July 1 effective date of conversion, the demand from the preceding year, and required to target their rates using the X-factor in effect at that time. In the *2012 Average Schedule Conversion Order,* the Commission permitted several rate-of-return carriers to, among other things, withdraw their average schedule study areas from the NECA pool and convert them to price cap regulation. In that order, the Commission approved a methodology for establishing initial price cap rates using existing NECA pool tariffed rates adjusted to reflect the extent to which the exiting study areas were either a net contributor to, or a net recipient from, the NECA pool.

31. *Carriers Currently Filing Their Own Tariffs.* Consistent with past practice, we adopt the proposal in the *NPRM* for carriers that currently file their own tariffs to use existing tariffed rates to set their initial BDS rates under incentive regulation. Carriers first will set their price cap indexes based on their tariffed interstate special access rates in effect on January 1, 2019, or based on those rates in effect on January 1, 2020 for carriers electing to convert to incentive regulation effective July 1, 2020. The price cap indexes (*i.e.,* the price cap index, actual price index, and service band index) will be assigned values of 100 as starting points, which correspond to rate levels in effect on January 1, 2019 or on January 1, 2020, as applicable. Carriers then will adjust the price cap index and the pricing band limits for each service category or subcategory consistent with §§ 61.45 through 61.47 of our rules, by applying the X-factor (2.0%), inflation factor (GDP–PI), and any required exogenous cost changes. Carriers, next, will set rates so that the actual price index, calculated pursuant to § 61.46, does not exceed the price cap index, and the service band indexes for each service category or subcategory, calculated pursuant to § 61.47, do not exceed the pricing band limits for each category or subcategory, for the first year of incentive regulation and each year thereafter.

32. *Carriers Participating in NECA Pool.* We also adopt the approach proposed in the *NPRM* for electing carrier study areas exiting the NECA traffic-sensitive tariff pool to establish their initial BDS rates under incentive regulation by multiplying the NECA pool rate in effect on January 1, 2019 by a net contribution or net recipient factor or by doing so using the NECA pool rate in effect on January 1, 2020 for carriers electing conversion in 2020. No commenters opposed this proposal. Electing carriers exiting the NECA pool will adjust the NECA pool rate to reflect the extent they are either a net contributor or net recipient in order to ensure their rates are just and reasonable. Each NECA pool member receives a settlement from the pool based on its costs plus a pro rata share of the earnings, or based on its settlement pursuant to the average schedule formulas. NECA pool rates are lower than necessary for a net recipient to recover its revenue requirement, or higher than necessary for a net contributor to recover its revenue requirement and must be adjusted by the extent to which the existing study area is a net contributor to, or net recipient from, the NECA pool in order to satisfy the just and reasonable standard. Without an adjustment, electing carriers' BDS rates would be either artificially high or low going forward.

33. First, to determine the appropriate net contributor or net recipient factor, electing carriers exiting the pool effective July 1, 2019 will determine their interstate special access revenue for the period July 1 to December 31, 2018. An electing carrier exiting the NECA tariff shall determine its pool settlements to be used in developing the factor based on costs for the period July 1 through December 31, 2018, which reflects the first six months of tariff year 2018–19, the 12-month period for which the costs underlying the January 1, 2019 rates were projected. The pool settlements shall be adjusted to reflect the 10.5% rate of return which was used to establish the revenue requirement for the January 1, 2019 rates. Second, carriers will calculate the difference between the exiting pool member's interstate special access revenues for July 1 to December 31, 2018 and special access pool settlements reflecting the authorized rate of return for this same period. Third, this net contribution or net recipient amount will then be divided by interstate special access revenues for the same period to produce a percent net contribution or net recipient factor. Fourth, carriers shall proportionately adjust their special access NECA pool rates in effect on January 1, 2019 downward by the net contribution factor or upward by the net recipient factor. Finally, carriers will adjust these rates further consistent with §§ 61.45 through 61.47 of our rules, in the manner described above for carriers that file their own tariffs, to set their initial BDS rates for the first year of incentive regulation. Carriers electing to exit the NECA pool effective July 1, 2020 will use the same methodology to adjust their rates but using the corresponding dates that are one year later.

34. We agree with Petitioners that recommend that initial rates be based on the existing tariffed rates at the time of a carrier's election of incentive regulation. AT&T and Sprint disagree and argue that the Commission should adjust initial BDS rates to account for the rate-of-return transition that is currently underway. The Commission adopted a six-year transition in 2016 to reduce the then-11.25% rate of return by 25 basis points per year until the rate of return reaches 9.75% in 2021. AT&T and Sprint argue that the Commission should adjust electing carriers' initial BDS rates to reflect the fully-transitioned 9.75% rate of return or, at a minimum, Sprint argues that the

Commission should adjust the price capped rates each year during the rate-of-return transition until it ends in 2021. AT&T claims that ''[s]etting electing A–CAM carriers' initial rate-of-return at the 9.75% level immediately upon converting to price cap, while not completely correcting, would help alleviate any rate disparities and aligns with the Commission's finding that a 9.75% rate of return is more than reasonable.''

35. We find that existing tariffed rates targeting the transitional 10.5% rate of return in effect is the more appropriate rate from which to launch incentive regulation for carriers electing to convert to incentive regulation effective July 1, 2019. AT&T and Sprint fail to accord any significance to the Commission's decision to implement changes in the prescribed rate of return over six years and the reasons for such a measured and lengthy transition. In granting a six-year transition, the Commission acknowledged that ''for almost 25 years, rate-of-return carriers have made significant infrastructure investments . . . and that represcribing the rate of return will have a financial impact on these carriers.'' Rate-of-return carriers' business plans and long-term capital investments are typically based on an expected multi-year revenue stream. The Commission determined that an immediate transition to a 9.75% rate of return would disrupt these carriers' reasonable reliance on these expected revenues. The Commission also recognized that ''rate-of-return incumbent LECs have been subject to significant regulatory changes in recent years, and that such changes are occurring at a time when these carriers are attempting to transition their networks and service offerings to a broadband world.'' Reflecting the balance of the six-year transition whether through a one-time adjustment, or through a series of three adjustments, would abandon this careful transition and would likely disrupt electing carriers' ability to invest in upgrading and transitioning their networks to provide broadband in the rural communities they serve.

36. We also find that once a carrier elects incentive regulation, its rates should be based on that form of regulation and not effectively a hybrid or combination of rate-of-return and incentive regulation, which would be the result were we to adopt the annual adjustment the Commission has applied to carriers that are subject to cost-based rate-of-return regulation as proposed by Sprint. Capping BDS rates of an electing carrier that will be subject to incentive regulation and reducing them annually by the X-factor going forward will be sufficient to ensure these rates are just and reasonable while at the same time creating the right incentives to operate efficiently—a goal we cannot expect to achieve by continuing to overlay rate-of-return obligations on top of an incentive regulation scheme. An annual 25 basis point adjustment would also be more administratively burdensome to implement. Rather than perpetuating policies associated with an inefficient rate-of-return system, we look to the ongoing operation of incentive regulation to spur carriers to be more efficient and productive than they were under rate-of-return regulation using X-factor-based rate reductions.

37. Finally, as some commenters explain, reducing initial BDS rate levels to account for the rate-of-return transition would ''reduce the motivation of a carrier to opt into incentive regulation'' contrary to the goals of this Order and the Commission's preference for incentive-based regulation. If initial BDS rates were adjusted to the fully-transitioned rate of return of 9.75%, carriers would be able to earn a higher return and revenue during the rate-of-return regulation transition that ends in 2021 than by moving to incentive regulation. This outcome is contrary to the Commission's long-standing policy preferring incentive-based regulation over rate-of-return regulation and encouraging conversions to incentive-based regulation. Incentive regulation will encourage electing carriers to be more efficient than they were under rate-of-return regulation, and pass some of these efficiencies on to consumers through rate reductions (or rates that are lower than otherwise) through the application of a price cap formula that reflects a properly calculated X-factor. Accordingly, we seek to encourage carriers to adopt incentive regulation by allowing electing carriers to set their initial rates under incentive regulation based on rates reflecting the transitional rate of return currently in effect.

38. We agree with Petitioners that initial rates for lower capacity TDM transport and end user channel termination services should be based on existing tariffed deemed lawful rates—rates that target the effective transitional rate of return. We therefore set initial rates for carriers electing to convert to incentive regulation as of July 1, 2019 for lower capacity TDM transport and end user channel termination services based on electing carriers' tariffed rates in effect on January 1, 2019, six months prior to when incentive regulation goes into effect on July 1, 2019. Similarly, initial rates for carriers electing to convert to incentive regulation as of July 1, 2020 will be based on the tariffed rates in effect on January 1, 2020. Existing tariffed rates filed pursuant to section 204(a)(3) of the Act that take effect, without prior suspension and investigation, are deemed lawful and conclusively presumed to be just and reasonable. Setting initial rates based on existing tariffed rates, as noted by commenters, is ''consistent with the methodologies used in the past when rate-of-return carriers have converted to price cap regulation.'' Further, the selection of tariffed rates in effect on a date that precedes the effective date of incentive regulation helps prevent rapid aggregate price increases in the period leading up to the incentive regulation that would inflate price cap baseline rates. Accordingly, price cap indexes under incentive regulation will be initially set at a value of 100 based on rates in effect on January 1, 2019 for carriers electing incentive regulation as of July 1, 2019, and on rates in effect on January 1, 2020 for carriers electing incentive regulation as of July 1, 2020. Business data services rates for carriers accepting future offers of A–CAM support or otherwise transition away from legacy support mechanisms will be effective on July 1 in the year following their election.

2. Category Relationships Unfreeze

39. We give electing carriers subject to the category relationships freeze of our separations rules, including any such carriers that accept future offers of A–CAM support or otherwise transition away from legacy support mechanisms, the opportunity to opt out of that freeze. We agree with Petitioners and WTA that the category relationships freeze creates a cost recovery hardship for certain carriers and a distortion in rates that should not be incorporated into rates that electing carriers set for lower capacity circuit-based business data services under incentive regulation.

40. *Background.* Rate-of-return incumbent LECs use their networks and other resources to provide both interstate and intrastate services. The Commission's part 36 jurisdictional separations rules are designed to help prevent the recovery of the same costs from both the interstate and intrastate jurisdictions and require that rate-of-return incumbent LECs divide their costs and revenues between the respective jurisdictions. The jurisdictional separations analysis begins with categorizing the incumbent LEC's regulated costs and revenues, a process requiring that the incumbent LEC assign the regulated investments, expenses, and revenues recorded in its part 32 accounts to various part 36

categories. The incumbent LEC then directly assigns to the interstate or intrastate jurisdiction, or allocates between those jurisdictions, the costs or revenues in each part 36 category.

41. In 1997, the Commission initiated a proceeding to comprehensively reform its jurisdictional separations rules and referred that matter to the Federal-State Joint Board on Jurisdictional Separations (Joint Board) for preparation of a recommended decision. In the *2001 Separations Freeze Order,* 66 FR 33202, June 21, 2001, the Commission froze the jurisdictional separations rules to allow time for the Joint Board to develop recommendations on comprehensive separations reform. Also, in that Order, the Commission granted rate-of-return carriers a one-time option to freeze their category relationships, enabling each carrier to determine whether such a freeze would be beneficial ''based on its own circumstances and investment plans.'' Carriers that elected this freeze assign regulated costs to separations categories based on separations category relationships from 2001, rather than on current data. Presently, approximately 28 rate-of-return carriers that receive fixed high-cost universal service support operate under this category relationships freeze.

42. The Commission has repeatedly extended the separations freeze. The most recent extension is set to expire on December 31, 2018. In the 2018 Separations Freeze Extension proceeding, the Commission proposed to extend the separations freeze for 15 years, while providing a one-time opportunity for carriers that had elected to freeze their category relationships to opt out of that freeze and categorize their costs based on current data rather than separations category results from 2001. The Commission has not yet acted on that proposal.

43. *Category Relationships Unfreeze.* The category relationships freeze has now been in place for more than 17 years, and our rules prohibit carriers that elected that freeze from withdrawing from it. Rate-of-return carriers that chose to freeze their category relationships in 2001 assign costs within part 32 accounts to categories using their separations category relationships from 2000. This means that these companies are still separating their costs based on the technologies and services that were in place in 2000, instead of being able to adjust the amounts assigned to separations categories to reflect the current network costs and services that would allow these carriers to properly recover their costs. Investment by carriers is becoming more weighted toward BDS and away from switched access and common line categories. Thus, we agree with Petitioners that the result is that some, if not all, carriers with frozen category relationships are unable to recover their BDS costs from BDS customers or from NECA traffic sensitive pool settlements.

44. We therefore allow electing carriers to unfreeze and update their category relationships in conjunction with setting their initial rates, which will enable such carriers to more closely align their BDS rates with their underlying costs as they set initial incentive regulation rates. Once an electing carrier implements incentive regulation rates for its BDS, it will no longer need to comply with the separations rules by virtue of our action below forbearing from application of the separations and other cost assignment rules to electing carriers. This, in turn, will allow the carriers and their customers to benefit from the efficiencies of incentive regulation.

45. The Commission originally allowed rate-of-return carriers the flexibility to choose whether to freeze their category relationships because those carriers' size, cost structures, and investment patterns vary widely. For similar reasons, we conclude that the burden on electing carriers, were we to require all impacted carriers to unfreeze and update their category relationships, would outweigh any benefits, and thus grant these carriers the flexibility to choose. For example, some carriers may have based their current business plans and investment on a continuation of the freeze since it has been in effect for such a long period and compelling these carriers to unfreeze their categories now could be disruptive. Further, it would impose a disproportionate burden on companies with cost structures that have not changed significantly enough to warrant the administrative costs that these carriers would incur in updating their relationships. Moreover, the process of unfreezing and updating category relationships is resource-intensive, requiring carriers to develop detailed analyses for new categorization cost studies. As a result, we recognize that some electing carriers may choose not to unfreeze their category relationships in conjunction with setting initial incentive regulation rates for lower capacity circuit-based business data services because of the administrative costs they would incur in updating these relationships. We see no need to require that electing carriers incur these costs, particularly since one of the principal goals of this proceeding is to reduce unnecessary regulatory burdens.

46. In adopting this option, we reject NARUC's contention that we are violating section 410(c) of the Communications Act by failing to meaningfully consult with, and receive a recommendation from the Joint Board. Section 410(c) applies only to the extent the Commission engages in ''the jurisdictional separation of common carrier property and expenses between interstate and intrastate operations.'' Here, we are not engaged in that process. Instead, we are determining which costs electing carriers should use to calculate their incentive regulation rates for lower capacity circuit-based BDS. In allowing electing carriers to set those rates using data from 2018, rather than 2000, we make no change to the jurisdictional separations rules.

47. As set forth more fully below, we direct each electing carrier that chooses to update its separations category relationships to conduct two cost studies for 2018 and to use those cost studies in determining its initial incentive regulation rates. In so doing, we are exercising our authority over interstate rates and are not in any way requiring state commissions to make similar intrastate adjustments. On the contrary, our forbearance from application of the separations rules to electing carriers will allow the states to adopt their own rules for determining the costs carriers incur in providing intrastate services to the extent they have authority under state law.

48. Moreover, even if we were to interpret 410(c) so broadly as to be applicable to the opportunity we provide electing carriers to unfreeze their category relationships, our actions are not in conflict with our obligations under section 410(c). In 2009, the Commission asked the Joint Board to consider whether the Commission should allow carriers a one-time opportunity to unfreeze their separations category relationships and requested that the Joint Board prepare a recommended decision on that matter. No recommendation has been forthcoming. Section 410(c) directs that, after a referral, the Joint Board ''shall prepare a recommended decision for prompt review and action by the Commission.'' Nothing in section 410(c) obligates the Commission to wait indefinitely for a recommended decision before acting. We conclude that the only reasonable interpretation of this statutory language allows the Commission to act unilaterally where, as here, an issue has been pending before the Joint Board for more than nine years without a recommended decision. Any contrary interpretation would allow the Joint Board to

indefinitely delay Commission action. Congress could not have intended that result while requiring that that the Commission act promptly once the Joint Board issues a recommended decision.

49. Section 410(c) also requires that the Commission ''afford the State members of the Joint Board an opportunity to participate in its deliberations'' on ''decisional action[s]'' regarding matters that have been referred to the Joint Board. To the extent this provision can be read as applying to this proceeding, the notice and comment periods and permit-but-disclose rules governing this proceeding have provided plenty of opportunity for the state members of the Joint Board to voice their opinions on allowing electing carriers to opt out of the category relationships freeze.

50. *Implementation.* To ensure that updated category relationships are properly reflected in incentive regulation rates, we require each electing carrier that chooses to update its frozen category relationships to conduct two 2018 cost studies—one based on frozen category relationships and one based on unfrozen relationships. To determine its incentive regulation rates for BDS, the carrier shall divide the BDS costs under the revised 2018 cost study by the BDS costs determined in the original 2018 cost study using frozen category relationships to develop a rate adjustment factor. The carrier shall apply this factor to the initial (prior to adjustments for the X-factor, inflation factor, and any exogenous cost changes) rates established in accordance with the procedures explained elsewhere in this Order to set the carrier's initial rates for lower capacity circuit-based BDS under incentive regulation. The carrier shall adjust these rates for the X-factor, inflation factor, and any exogenous cost changes and may adjust these rates to reflect any pricing flexibility allowed among services within the special access basket. Carriers that elect incentive regulation effective as of July 1, 2020 will follow these directions, except that if an electing carrier chooses to update its frozen category relationships it will conduct two 2019 cost studies and use the results of these cost studies to complete the steps described in this paragraph.

51. Unfreezing separations category relationships could result in a carrier recovering the same costs through higher BDS rates and unchanged switched access recovery. Incorporating updated category relationships into the 2018 cost study, or 2019 cost study for carriers electing the January 1, 2020 effective date, will change the costs assigned to the switched access category just as it will for BDS. The *USF/ICC Transformation Order* capped all interstate switched access rates at 2011 levels, subject to specified reductions over time. We do not permit electing carriers to increase their switched access rate caps. Unless cost reductions to interstate switched access are reflected in a carrier's revised base period revenue amount, a carrier will double-recover costs through its interstate switched access rates. To account for this effect, an electing carrier that unfreezes its separations category relationships must calculate the difference between the interstate switched access costs in the two 2018 cost studies. Each electing carrier must adjust its base period revenue by an amount equal to the interstate switched access cost difference between the two 2018 cost studies before applying the annual 5% reduction to the base period revenue. This is the process that the Commission employed in the Eastex proceeding. Carriers electing a January 1, 2020 effective date will do the same with 2019 cost studies.

52. An electing carrier that participates in the NECA interstate switched access tariff must report to NECA the interstate switched access cost difference between the two 2018, or, 2019, studies and its revised base period revenue amount. These procedures protect both carriers and customers from any unintended consequences of moving BDS from rate-of-return regulation to incentive regulation. Any electing carrier that opts out of the category relationships freeze shall include, in its 2019 or 2020, respectively, annual filing, workpapers showing how it implemented the measures set forth above. This does not eliminate the need for an electing carrier to adjust its Eligible Recovery for any other instances of double recovery. Finally, we require NECA to reflect these base period revenue changes in its settlement procedures.

53. We find that these measures provide a reasonable and not unduly burdensome method for ensuring that costs shifted from an electing carrier's unfreezing of its category relationships are carried forward into its incentive regulation rates for BDS without any double-recovery. Each electing carrier that chooses to update its category relationships will necessarily need to perform detailed calculations to implement that choice. We minimize the associated burdens by specifying that the electing carrier adjust its business data service rates to account for the changes in the category relationships using the 2018 cost study, or the 2019 cost study for carriers electing to convert effective July 1, 2020, that this Order requires of all electing carriers and therefore will impose only a minimal incremental burden on electing carriers.

3. Special Access Basket, Categories, and Subcategories

54. We retain the special access basket, categories and subcategories, and the attendant rules governing the allowed annual rate adjustments for price cap regulation for incentive regulation. Commenting parties support this approach. The category and sub-category requirements limit the degree to which a carrier can raise rates for particular groups of services in any given year. Each electing carrier that elects incentive regulation must set its initial price cap indexes for the special access basket and associated service band indices at 100 and use the rate adjustment rules for price cap carriers contained in §§ 61.45 to 61.48 of our rules, as appropriate, to reflect the prescribed productivity factor, the inflation factor, and any required exogenous cost adjustment in the price cap index. These steps will ensure that the carrier's actual price index does not exceed its price cap index, and that its service band indexes for each category or subcategory do not exceed their upper limits.

4. Productivity X-Factor and Measure of Inflation

55. Consistent with the price cap *BDS Order,* we adopt 2.0% as the productivity factor (X-factor) and the Gross Domestic Product-Price Index (GDP–PI) as the inflation factor used to adjust price cap indexes in the first year of incentive regulation, and each year thereafter. As proposed in the *NPRM,* we decline to incorporate a consumer productivity dividend adjustment into the X-factor.

56. *Background.* Under price cap regulation, the price cap index seeks to replicate the beneficial cost-reducing incentives of a competitive market by limiting the prices that a price cap LEC may charge for services. After price cap carriers set initial price cap indexes based on going-in rate levels, these indexes are adjusted annually based primarily on the productivity factor (X-factor) and inflation factor (GDP–PI) as well as any exogenous cost adjustments. The X-factor adjustment is intended to capture the amount by which incumbent LECs could be expected to outperform economy-wide productivity gains and to pass those gains on to consumers in the form of lower prices. In the past, the Commission has also

applied a consumer productivity dividend adjustment to the X-factor to capture for ratepayers a portion of the benefits from expected productivity gains exceeding those incumbent LECs had historically achieved under rate-of-return regulation. The inflation factor is intended to adjust prices to capture economy-wide rates of inflation. Historically, the Commission has used the U.S. Department of Commerce's Bureau of Economic Analysis's GDP–PI, a chain-weighted index of overall national prices, as the inflation factor.

57. In the *BDS Order,* the Commission adopted for price cap carriers a 2.0% productivity-based X-factor and retained GDP–PI as the inflation factor but declined to apply a consumer productivity dividend adjustment. The Commission found that 2.0% reflects its best estimate of the productivity growth that incumbent LECs will experience in the provision of BDS services relative to productivity growth in the overall economy. To determine the X-factor, the Commission applied a total factor productivity methodology, which measures the relationship between the output of goods and services to inputs. The Commission applied this methodology to the U.S. Bureau of Labor Statistics' Capital, Labor, Energy, Materials, and Services (KLEMS) dataset for the broadcasting and telecommunications industries for estimating incumbent LEC productivity and input prices. The Commission used these data to establish a zone of reasonable X-factor estimates based on four relevant time periods, and from this zone selected an X-factor of 2.0%. The Commission also retained GDP–PI as the measure of inflation. Accordingly, price cap LECs adjust their price cap indexes annually by the 2.0% X-factor and GDP–PI to ensure just and reasonable rates for these BDS services.

58. *Discussion.* Consistent with the *BDS Order,* we adopt 2.0% as the productivity factor electing carriers will use to adjust their price cap indexes. In so doing, we reaffirm the Commission's finding in the *BDS Order* that the 2.0% X-factor represents our best estimate of BDS productivity gains or losses relative to the general economy and is a reasonable productivity factor with which to adjust price cap indexes for purposes of incentive regulation.

59. WTA opposes adoption of the 2.0% productivity X-factor for incentive regulation, contending that ''given increasing broadband-related labor costs and the fact that the typical WTA member has only 10-to-20 employees, it does not appear possible for many small A–CAM and Alaska Plan companies to achieve productivity gains of two percent each year.'' We believe, however, that the 2.0% X-factor is the most reliable estimate of BDS productivity growth for carriers generally, including smaller carriers. The 2.0% X-factor was the product of an economically-sound total factor productivity methodology, consistent with past Commission practice, using the only reliable and internally consistent dataset in the record in the BDS proceeding, KLEMS, for measuring incumbent LEC productivity and input prices. WTA focuses on one type of input price—labor costs—for which KLEMS captures telecommunications industry trends, including broadband-related trends, for carriers of all sizes. WTA implicitly assumes that its members' labor costs will rise more quickly (or fall more slowly) than price cap carriers' labor costs. Even if we were to accept this assumption, WTA does not address whether other factors affecting BDS productivity growth, such as changes in BDS demand, offset any disparity in the rate of change in labor costs.

60. The Commission sought comment on alternative X-factors for electing carriers but received no data or other information that would allow us to calculate an alternative X-factor. And while WTA provides anecdotal data on a selected portion of its members' costs, it has ''not submitted the company-specific input price and output data that we would need to quantify'' the extent to which its members' productivity growth and ability to recover costs deviate from the industry average. In the *BDS Order,* the Commission declined to adjust the X-factor to account for conflicting and unquantifiable evidence in the record that the KLEMS dataset overstated or understated productivity growth. And the Eighth Circuit Court of Appeals upheld the Commission's decision not to adjust the KLEMS dataset ''in light of the conflicting evidence on what sort of adjustment was appropriate.'' In these circumstances, we see no valid basis on which to adopt an alternative X-factor.

61. Notwithstanding WTA's concerns, we believe that most electing carriers will be able to achieve the 2.0% X-factor. Petitioners support our use of a 2.0% X-factor, even though they state that rate-of-return carriers may generally achieve lower productivity growth than price cap carriers, and TDS Telecom endorses the regulatory framework adopted in the *BDS Order* that includes a 2.0% X-factor. Given that rate-of-return carriers receiving fixed support are not required to move to incentive regulation, carriers unable to achieve the 2.0% X-factor will avoid any harm by simply not electing incentive regulation. The voluntary nature of incentive regulation therefore renders moot any risk involved in attempting today to determine what an appropriate productivity factor would be for this group of carriers. Carriers themselves are in the best position to determine whether they will benefit from incentive regulation and we have afforded them that flexibility.

62. *Inflation Factor.* We adopt GDP–PI as the inflation factor as proposed in the *NPRM.* No commenter opposed this proposal. As we found in the *BDS Order,* there is no alternative measure of inflation presented in the record that is as accurate as GDP–PI in the medium- and long-term and that is not susceptible to carrier influence or manipulation. Accordingly, electing carriers will adjust their price cap indexes by GDP–PI during the first year of incentive regulation, and each year thereafter.

63. *Consumer Productivity Dividend.* We decline to incorporate a consumer productivity dividend adjustment into the X-factor adopted in this Order. No commenter opposed this proposal in the *NPRM.* In the *BDS Order,* the Commission found that the 2.0% X-factor reflected all anticipated future BDS productivity growth and declined to include a consumer productivity dividend adjustment in the X-factor. For similar reasons, and to avoid regulatory disparity with price cap regulation, we decline to include a consumer productivity dividend in the X-factor for incentive regulation.

5. Exogenous Costs

64. After reviewing the record, we adopt the proposal in the *NPRM* that exogenous costs be allocated based on a ratio of BDS revenues to total revenues from all regulated services and an electing carrier's universal service support payments. Exogenous costs are those costs that are beyond the control of the carrier, as determined by the Commission. We agree with Petitioners that allowing exogenous cost adjustments is appropriate. When costs are beyond the carrier's control, they are often of a nature that is not reflected in the measurement of productivity. It is therefore appropriate to allow adjustments to reflect exogenous events upon Commission approval.

65. We reject Sprint's proposal that any exogenous cost changes should be limited by applying the ratio of BDS revenues to total enterprise revenues. Sprint does not define ''total enterprise revenues'' or explain why it would result in a more relevant comparison to BDS revenues than using total regulated

revenues, and we find it too expansive for use here. The exogenous costs being allocated are those associated with regulated services as determined by the part 64 allocation rules for assigning costs associated with non-regulated activities. Thus, we find that regulated BDS revenues compared to all regulated revenues and related support receipts is the most relevant relationship to allocate a portion of exogenous costs related to regulated services to BDS.

66. Finally, we will not require electing carriers to incur the costs of filing a short form tariff review plan as price cap carriers are required to do. In recent years, the Bureau has waived the requirement that price cap LECs file the short form, finding that it would provide little value to the Commission, industry, and consumers. We find that the short form tariff review plan would also provide little value to the Commission, industry, and consumers in conjunction with incentive regulation for electing carriers. We accordingly do not require its filing.

6. Low-end Adjustment

67. We adopt the low-end adjustment mechanism proposed in the *NPRM* to provide an appropriate backstop to ensure that electing carriers are not subject to protracted periods of low earnings. A below-normal rate of return over a prolonged period could threaten a carrier's ability to raise the capital necessary to provide modern, efficient services to customers. The low-end adjustment mechanism will permit a one-time adjustment to a single year's BDS rates to avoid back-to-back annual earnings below a set benchmark. This course should allow electing carriers to meet their existing obligations to debtholders and attract sufficient capital while continuing to provide BDS.

68. We reject Sprint's argument that any low-end adjustment should be allowed only if a sharing mechanism is adopted for a carrier's earnings. A sharing mechanism is a process that allocates a portion of a carrier's excess earnings under price cap regulation to the consumer through a one-time reduction in a carrier's price cap index. The Commission eliminated the sharing mechanism for price cap carriers in 1997. There is no causal link between the low-end adjustment mechanism and earnings sharing, and the two have not previously been tied together in other incentive regulation programs. The *BDS Order* allowed a low-end adjustment without a sharing mechanism and Sprint provides no convincing basis for diverging from that approach.

69. We use 100 basis points below the authorized rate of return for rate-of-return carriers as the benchmark for establishing the low-end adjustment as we did in the *BDS Order.* This approach will approximate the transition to the authorized rate of return of 9.75%. A carrier asserting a claim for a low-end adjustment bears the burden of showing that its return is below the prescribed benchmark and that the revised rate(s) are consistent with the benchmark.

70. Finally, as the Commission proposed in the *NPRM,* electing carriers that exercise downward pricing flexibility (for example, by entering into a contract tariff with a customer), or use generally accepted accounting principles (GAAP) rather than the part 32 Uniform System of Accounts, will be ineligible for a low-end adjustment. No party has opposed this limitation to the availability of the low-end adjustment mechanism. This limitation is consistent with that imposed in the *BDS Order,* and we see no reason to diverge from that approach here.

7. Pricing Flexibility for Lower Capacity TDM Transport and End User Channel Termination Services

71. We adopt the proposal in the *NPRM* to grant pricing flexibility to electing carriers for their lower capacity TDM transport and end user channel termination services under incentive regulation similar to the pricing flexibility the Commission granted to price cap carriers' lower capacity TDM end user channel terminations in areas deemed non-competitive. We agree with commenters that permitting electing carriers to offer contract tariff pricing and volume and term discounts will benefit both carriers and customers and will promote competition in electing carriers' BDS markets. Requiring that electing carriers also maintain generally available tariff rates for their lower capacity TDM transport and end user channel termination services will ensure that the rates of customers that do not negotiate contract-based or term and volume discounted rates for such services will continue to be just and reasonable. Additionally, we condition this grant of pricing flexibility on the requirement that electing carriers remove contract tariff demand from the relevant incentive regulation basket for purposes of determining their price cap indexes and actual price indexes, which will ensure that those customers that do not negotiate contract tariffs will not cross-subsidize customers that do.

C. Removal of Ex Ante Pricing Regulation of Lower Capacity TDM End User Channel Termination Services in Areas Deemed Competitive

72. As part of our framework for moving electing carriers to less intrusive pricing regulation of their BDS offerings, we adopt a competitive market test to identify those areas served by electing carriers where competition or potential competition for lower speed (DS3 or less) TDM end user channel termination services justifies removing ex ante pricing regulation for those services. In adopting a competitive market test for electing carriers, we are guided by the Commission's previous work in developing a competitive market test for price cap carriers' BDS offerings. At the same time, we are persuaded by commenters that argue that the competitive market test should rely on evidence of competition in the study areas served by electing carriers.

73. We adopt a competitive market test for electing carriers that is based on a modified version of the second prong of the *BDS Order* competitive market test, which uses publicly available Form 477 data to measure whether a cable operator offers a minimum of 10/1 Mbps in 75% of census blocks in a study area served by a price cap provider. We will apply this test in electing carriers' study areas, and in those study areas deemed competitive by the competitive market test, we remove ex ante pricing regulation of lower capacity TDM end user channel terminations.

74. We are also constrained in the development of a competitive market test by the limited availability of data in the record regarding competition for BDS services in the study areas served by eligible rate-of-return carriers. We decline, however, to adopt any of the options we proposed in the *NPRM* for a competitive market test that would require a new data collection. Commenters strongly oppose a new information collection, arguing it would be burdensome and unnecessary. We agree. A new information collection for electing carriers would be especially burdensome given their relatively smaller size. The Commission similarly declined to require a new data collection even for larger price cap carriers in the *BDS Order,* as part of deciding to update the price cap competitive market test results, finding that the burdens would outweigh the benefits, and the burden of collecting the information would be considerable. Additionally, the burdens associated with an information collection could reduce incentives for eligible carriers to elect incentive regulation, counter to

our goals. A simple, administrable test will ensure more resources are available for competition and deployment in electing carriers' study areas.

75. In the *NPRM,* we sought comment on whether to include lower capacity TDM transport services in the competitive market test. Given the lack of data in our record, we find that including such transport services would be unworkable at this time. We therefore decline to adopt a competitive market test for lower capacity TDM transport in electing carriers' study areas.

1. Criteria for a Competitive Market Test

76. In this section, we address appropriate criteria for a competitive market test for electing carriers' lower speed TDM end user channel termination services, including the appropriate product market, number of competitors in a market, and geographic market.

77. *Product market.* When defining a product market, to ensure our action affects an appropriate group of services, we look to which services are sufficiently similar to reasonably be considered substitutes. We find the Commission's analysis of the relevant market in the *BDS Order* to be applicable to the current situation, and, therefore find the relevant product market includes circuit- and packet-based business data services, legacy hybrid-fiber-coaxial, and copper. For the same reason, we find that the product market also includes unbundled network elements, dark fiber, and fixed wireless services and facilities used to provision BDS. These services play competitive roles in BDS markets. While the Commission did not find best-efforts services to be close substitutes for all types of BDS in the *BDS Order,* we acknowledge here as the Commission did there that they nonetheless place a degree of competitive pressure on BDS suppliers, particularly for lower capacity services. Further, we believe a best-efforts supplier with its own ubiquitous wireline network has strong incentives to supply BDS to locations where it currently does not, and all the more so to the extent that an existing supplier is charging supra-competitive prices. We also continue to expect that suppliers exercising any short-term market power generally will be constrained by supply-side substitution over the medium term (3–5 years) in locations where other providers, such as cable companies, offer best-efforts or other telecommunications services over their own facilities. We therefore find that the product market analysis that the Commission conducted for price cap areas in the *BDS Order* applies equally to electing carrier areas.

78. *Competition Within a Study Area.* We must also determine the appropriate level of competition for any competitive market test. The Commission, in the *BDS Order* determined that a ''combination of either one competitive provider with a network within a half mile from a location served by an incumbent LEC or a cable operator's facilities in the same census block as a location with demand will provide competitive restraint'' more effectively than legacy regulation. The Commission decided that a ''nearby'' BDS competitor provides sufficient competition after analyzing three findings: (1) The geographic scope within which a likely BDS provider can realistically compete with an incumbent LEC; (2) a finding that one competitor in addition to the incumbent LEC provides a reasonable degree of competition; and, (3) the benefits of competition outweigh the potential unintended costs of regulation.

79. We do not have data showing where there is a competitive provider with a network half a mile from a location served by carriers eligible to elect the lighter touch regulatory framework we adopt today. We do, however, have Form 477 data which is organized on a census block-level. We can therefore identify the census blocks served by an electing carrier where cable broadband services are also deployed. We find it appropriate to use cable broadband in the census blocks that comprise the electing carrier's study area as a proxy for competition because, as the Commission previously determined, ''cable companies have focused investment on building fiber networks for higher-bandwidth Ethernet services, which is enabling them to overcome limitations of traditional coaxial-based cable systems that cannot meet higher bandwidth demand.'' Cable providers have shifted to offering ''higher (and more competitive) bandwidths. At the same time, cable operators' best efforts (and Ethernet over Hybrid Fiber-coaxial (EoHFC)) services continue to compete effectively against incumbent LECs' lower speed TDM services. The Commission also found that because cable operators have ''aggressive[ly] deploy[ed]'' it was ''highly likely the cable-only measure found in the Form 477 data will capture the vast bulk of additional deployments; it is likely that most non-cable competitive extension of business data services networks will occur where cable is also deploying or has already deployed.'' This rationale is equally applicable to electing carriers' provision of BDS in their study areas.

80. As the Commission found in the *BDS Order,* and as the Eighth Circuit Court affirmed, a single wireline competitor provides a substantial competitive effect by disciplining rates, terms, and conditions to just and reasonable levels. In industries with large sunk costs, such as wireline providers, the largest impact occurs with the entry of a second provider, with added benefits from additional competitors declining thereafter. This is because the presence of a nearby provider is likely to prevent or mitigate substantial abuse of market power, either through lack of innovation or high prices. This finding is not challenged in the record. Consistent with the analysis in the *BDS Order,* we find that the effect of a single BDS competitor is sufficient to limit anticompetitive behavior, and that the presence of a cable network offering a minimum of 10/1 Mbps broadband service in 75% of the census blocks in a study area is sufficient to deem a study area competitive for the purposes of the competitive market test for electing carriers.

81. *Geographic Market.* We find that an electing carrier's individual study area is the appropriate geographic market measure for the competitive market test because it is administratively feasible but is granular enough to capture reasonably similar competitive conditions. A study area is a geographic segment of a rate-of-return incumbent LEC's telephone operations that generally corresponds to the carrier's entire service territory within a state. Incumbent LECs determine eligibility for high-cost universal service support at the study area level, perform jurisdictional separations at the study area level and generally tariff their rates at the study area level. As a result, the Commission and the industry have substantial experience administering rules on a study area basis. What's more, a study area is granular enough to capture reasonably similar competitive conditions. Rate-of-return study areas vary in size but are significantly smaller than metropolitan statistical areas and generally smaller than counties and are therefore sufficiently granular to assess competitive conditions. Given their mostly rural nature, the average size of a rate-of-return study area is 992.82 square miles, compared to the average county, 1,180.40 square miles, and the average metropolitan statistical area, 2,720.95 square miles. Adopting study areas as the geographic market also avoids risk of competitive overlap by, for example, a rate-of-return study area

crossing county lines that are deemed competitive and noncompetitive.

82. We also reject other proposals in the record, including suggestions to build a competitive market test for electing carriers that uses counties or census blocks as the relevant geographic market. We agree with Smithville that the selection of counties for use in the price cap competitive market test was ''a well-documented effective approach for competitive area evaluation for larger price cap carriers that operate service areas dimensioned at statewide levels but does not work well for carriers that have sub-county service areas.'' To the extent such proposals seek to assess competition in electing carriers' study areas based on competition elsewhere within the county, we reject that proposition—any competitive market test must be based on the competitive conditions each carrier faces, not those another carrier faces somewhere else in a county. Additionally, some study areas cross county lines. Using counties would potentially require us to subdivide study areas along county boundaries, which would involve unreasonable administrative burdens and could lead to varying treatment of a single study area depending on the counties in which it is located.

83. In response to the *2017 Public Notice,* Smithville argues that using census blocks to assess competition in electing carriers' study areas would be a better approach. We decline to adopt census blocks as a geographic measure for our competitive market test. The Commission previously found that census blocks or census tracts are too numerous to efficiently administer. Additionally, they can be impacted by changes in demand as small as a single building and could lead to a patchwork of different regulations that vary from census block-to-census block, or even building-to-building. Study areas, on the other hand, are more administratively feasible because there are a limited number of study areas eligible to elect our BDS regulatory framework.

2. Competitive Market Test Methodology

84. In this section, we describe the specific structure of the electing carriers' competitive market test we adopt for electing carriers' lower capacity TDM end user channel termination services. In determining whether electing carriers with lower capacity TDM-based end user channel termination services (at a DS3 or below), face sufficient competition to allow competition, rather than ex ante pricing regulation, to ensure rates are just and reasonable, we adopt a competitive market test modeled on a modified version of the second prong of the existing price cap competitive market test using data from census blocks served by electing carriers. The second prong of the price cap competitive market test uses Form 477 data to measure whether a cable operator offers a minimum of 10/1 Mbps broadband service in 75% of the census blocks in the price-cap service areas within a county. Having decided that we will use only existing data to gauge competition in the study areas served by an electing carrier, for purposes of the electing carriers' competitive market test, if a cable operator or other competitive provider offers a minimum of 10/1 Mbps broadband service in 75% of the census blocks in an electing carrier's study area, we will deem the study area competitive.

85. We set 10 Mbps downstream and 1 Mbps upstream as minimum thresholds for a cable operator's service to be included in the competitive market test. Setting a minimum threshold ensures that the networks that supply these services are reasonable proxies for the type of network facilities needed to deliver BDS. As we observed in the *BDS Order,* ''when a cable provider is capable of providing internet broadband service within any census block, then generally they have the incentive to make the incremental investment necessary to serve locations with BDS demand in that census block, especially over the medium term.'' Cable operators are continuing to invest in and upgrade the capacities of their networks, which give us reasonable assurance that these networks will be capable of providing BDS competition over the short- to medium-term. Additionally, the 10/1 Mbps threshold is also the threshold that rate-of-return carriers accepting fixed A–CAM support are required to offer to funded locations.

86. Using Form 477 data for electing carriers' study areas is administratively simple for both the Commission and electing carriers. We already regularly require providers to update their Form 477 submissions, so we do not need to undertake a new data collection. Another benefit of the new electing carriers' competitive market test is the incorporation of the 78 rate-of-return-only counties that cannot be analyzed using the price cap competitive market test. Had we decided to allow electing carriers to opt-in to the price cap competitive market test, the competitive status of electing carriers serving any of those 78 rate-of-return-only counties would have been unresolved because they were not included in the original analysis.

87. We recognize that under the electing carriers' competitive market test, a relatively small percentage of electing carriers' study areas will be deemed competitive at this time. The current result of the competitive market test we adopt today for rate-of-return carriers receiving fixed support is consistent with the rural nature and the nascent deployment of cable in many eligible carriers' study areas. We expect the number of electing carriers' study areas deemed competitive by the competitive market test will increase as competition grows and cable companies expand their reach. This administratively simple competitive market test ensures that all carriers are included in the electing carriers' competitive market test and will have an opportunity to be deregulated as competition develops.

3. Declining To Use the Results of the Price Cap Competitive Market Test

88. Notwithstanding Petitioners' and some other commenters' request that we use the results of the price cap competitive market test adopted by the Commission in the *BDS Order* to determine where ex ante pricing regulation should be removed from electing carriers' lower capacity TDM end user channel termination services, we decline to do so. In arguing that the Commission should use the *BDS Order* price cap competitive market test for electing rate-of-return carriers, some commenters claim ''the same marketplace analyses the Commission undertook for price cap carriers apply equally to BDS provided by model-based rate-of-return carriers.'' While using the results of the existing competitive market test to determine whether an area served by an electing carrier is competitive would be fast, no data in the record support that approach. In fact, the result of the competitive market test we adopt for electing carriers, which results in very few study areas being deemed competitive, underscores our finding that application of the price cap competitive market test results to electing carriers—which would result in far more electing carriers' study areas being deemed competitive—would not accurately measure competition in the geographic areas served by rate-of-return carriers receiving fixed support.

89. The *BDS Order* relied upon the largest information collection in the history of the Commission to analyze and determine the competitive nature of price cap carrier study areas. Even if a county contained both price cap and rate-of-return study areas, the Commission's analysis only included

the price cap study area. The Commission created the price cap competitive market test after a thorough review of the *2015 Collection,* Form 477 data, and established the specific test metrics based upon an informed knowledge of the level of competition that existed and was necessary to protect consumers in the absence of regulation. Petitioners, however, offer no data showing the extent of BDS competition in areas served by rate-of-return carriers that receive fixed support. Instead, they argue that the level of competition on a county-by-county basis for price cap carriers' lower capacity TDM-based BDS offerings is comparable to the level of competition for lower capacity TDM-based BDS offerings of rate-of-return carriers that receive fixed support. The principal support Petitioners offer for this assertion is a study that purports to demonstrate that price cap rural areas immediately proximate to certain A–CAM study areas exhibit sufficiently similar characteristics that we should include A–CAM study areas in the same competitive market test that we used for price cap carriers. We find the Petitioners' study unpersuasive.

90. The study suffers from several methodological defects. First, the study is not based on a representative sample of electing carriers' study areas. Instead, it relies solely on Consolidated Communications' rate-of-return study areas. We are doubtful, for example, that the Consolidated study areas are a good proxy for the Alaska rate-of-return carriers that are eligible to elect our new regulatory framework. Second, two of the study's principal metrics (population and housing density) are unlikely to be the critical drivers of competitive BDS deployment.

91. Additionally, in some instances the study compares non-urbanized price cap areas with areas served by rate-of-return carriers that receive fixed support that include urbanized areas. These areas are not comparable. At least some of the counties included in the study's comparison were deemed non-competitive by the price cap competitive market test. Inclusion in the price cap competitive market test of A–CAM areas in these instances would have no effect on the regulatory status of these study areas. The study does not directly compare study areas with high cable presence with competitive counties and study areas with low cable presence with non-competitive counties, as would be expected if the study was trying to show similarities.

92. The study also compares the percentage of census blocks with cable broadband availability between price cap and nearby A–CAM areas and claims that, on average, ''the percentage of Census blocks in Consolidated tracts with cable service (21%) is similar to the surrounding rural price cap tracts (28%).'' But the study's use of average percentages obscures wide variations in percentage cable broadband deployment. For price cap study areas, cable broadband deployment was found to be 3.88% to 68.68%. For A–CAM study areas, broadband deployment in areas varied from 0.00% to 89.60%. The study further attempts to compare price cap areas with nearby A–CAM areas by claiming that the differences in the percentage of cable broadband deployment between the two sets of areas are small, ''only 15 percentage points.'' This is not small.

93. The study also does not state whether it limited its analysis of cable deployment in rate-of-return study areas to those deployments offering a minimum of 10/1 Mbps. The study may have included residential cable deployments at speeds lower than the threshold the Commission established for the price cap competitive market test. Any such deployments should not be included in a comparison of price cap and nearby A–CAM areas.

94. We are also unable to rely on the conclusions in the Petitioners' study since it is based on a misplaced reliance on inaccuracies inherent in the structure of the price cap competitive market test—inaccuracies the Commission acknowledged when it adopted the competitive market test in the *BDS Order.* In the *BDS Order,* the Commission conceded that its county-based competitive market test unavoidably included a relatively small number of areas that would be inappropriately regulated or inappropriately deregulated. It explained that the only competitive market test that would be free of such inaccuracies would be one that would be run at a building level—with over a million buildings with BDS demand, an administratively unworkable option. It adopted percentage thresholds for both prongs of the competitive market test and employed certain statistical tools to ensure those thresholds were set at levels that would minimize inaccuracies. It further reasoned that competitive options would become available for many of these areas in the short- to medium-term given the dynamic nature of the BDS marketplace.

95. The Petitioners' study attempts to compare A–CAM areas to some of the very price cap areas most likely to contain these inaccuracies and to argue that these inaccuracies justify inclusion of rural A–CAM areas in the price cap competitive market test. Extrapolating from the characterization of peripheral parts of price cap study areas to A–CAM areas is likely to exacerbate these inaccuracies. And unnecessarily so, since the competitive market test we adopt offers a simple way of estimating competition in A–CAM study areas. Further, these are areas the study concedes typically lack even the most basic evidence of BDS competition. Areas where there is little evidence of competition are also likely areas where there is little to no demand for BDS.

96. Given these methodological and conceptual flaws, we conclude that the Petitioners' study fails to establish the comparability of price cap and nearby A–CAM areas or provide a reasonable basis on which to include A–CAM areas in the price cap competitive market test. We therefore decline to apply the results of the price cap competitive market test to electing carriers' serving areas.

4. Updating Competitive Market Test Results

97. Consistent with the *BDS Order* competitive market test, we eliminate ex ante pricing regulation of circuit-based end user channel terminations at or below a DS3 level in study areas deemed competitive by the electing carriers' competitive market test. We direct the Bureau to release a Public Notice that lists the results of the competitive market test, and to provide the information on the Commission's website. We will re-run the electing carriers' competitive market test every three years to assess whether any additional electing carriers' study areas meet the 75% threshold. This will identify any additional electing carriers' study areas that should be deemed competitive. We believe a three-year timeframe balances the need to ensure the electing carriers' competitive market test remains accurate and the Commission's desire to avoid disrupting contracts and burdening carriers with overly frequent updates. The sunk and irreversible cost of providing business data services and deploying a network represents the biggest barrier to entry for providers. Once the barrier is overcome, the marginal cost of operating is low, so it is unlikely that competition will exit. Thus, electing carriers' study areas deemed competitive will not be reassessed.

98. To avoid confusion from both carriers and businesses stemming from updates from the price cap competitive market test and the electing carriers competitive market test, we direct the Wireline Competition Bureau to re-run the three-year updates for both the *BDS Order* price cap competitive market test,

and the electing carriers competitive market test concurrently. Thus, the electing carriers' competitive market test will initially be re-run in 2020, at the same time as the *BDS Order* price cap competitive market test, to align the tests' timing. The re-running of these tests will coincide with the initial running of the test for carriers electing to convert to incentive regulation as of July 1, 2020. After that, both tests will be re-run every three years. This approach will make it easier for stakeholders to determine the regulatory status of price cap and rate-of-return BDS providers since the results will be published all at once and ease the burden on Commission resources. The Bureau shall release a Public Notice that lists newly competitive counties (for price cap areas) and study areas (for electing carriers' study areas) and shall also provide this information on the Commission's website. As with the *BDS Order* competitive market test, parties may challenge the results of the electing carriers' competitive market test by filing petitions for reconsideration or by seeking full Commission review through an application for review.

5. Removal of Ex Ante Pricing Regulation of Electing Carriers' Lower Capacity TDM End User Channel Termination Services

99. We remove ex ante pricing regulation from electing carriers' lower capacity TDM end user channel termination services offered in study areas that are deemed competitive by the electing carriers' competitive market test. Such services are presumed to be subject to sufficient competitive pressure that removing this layer of regulation will not result in excessive rates. Removing this layer of regulation will reduce unnecessary regulatory burdens and will enable these carriers to contribute to BDS competition in their markets. Such services in such areas will be relieved of ex ante pricing regulation and detariffed in the same manner and with the same transition provisions as we adopt today for electing carriers' packet-based and higher capacity TDM BDS. As with packet-based and higher capacity TDM BDS, we continue to maintain our oversight over these TDM services pursuant to sections 201, 202, and 208 of the Act to ensure rates for these services remain just and reasonable. Lower capacity TDM transport and end user channel termination services in areas deemed noncompetitive by the competitive market test will continue to be subject to the incentive regulation and pricing flexibility we adopt today.

D. Ending Ex Ante Pricing Regulation for Electing Carriers' Packet-Based and Higher Capacity TDM BDS Offerings

100. We conclude that electing carriers' packet-based and higher capacity TDM-based BDS offerings above a DS3 bandwidth level (which includes both higher capacity TDM end user channel terminations and higher capacity TDM transport) should not be subject to ex ante pricing regulation and direct electing carriers to detariff these services following a transition period. Our decision to end ex ante pricing regulation for electing carriers' packet-based and higher capacity TDM BDS offerings will facilitate competition for and deployment of these packet-based and higher capacity TDM services and is consistent with the Commission's statutory obligation to ensure that rates are just and reasonable.

101. In the *BDS Order,* after reviewing an extensive record, the Commission found that in price cap markets nationwide there was no compelling evidence of incumbent LEC market power for packet-based and higher capacity circuit-based BDS. Specifically, the record demonstrated that demand for these services was increasing, prices were declining, and competitive investment was growing significantly. The Commission also determined that the price cap BDS market for packet-based and higher capacity TDM-based offerings had the characteristics of a bidding market such that even competitors that did not have pre-existing facilities to serve a potential customer were nonetheless capable and willing to bid on requests for proposals by customers, particularly those with higher bandwidth needs.

102. The record in this proceeding lacks the comprehensive and voluminous data collection available to the Commission in the price cap BDS proceeding. But, we recognize that re-creating such a similarly detailed data collection would have been more difficult for rate-of-return carriers that receive fixed support, because they have vastly fewer resources to produce such information and the benefits of such a data collection would likely be far outweighed by its costs. Instead, we draw parallels where we can from our conclusions in the *BDS Order* to inform our analysis of the record in this proceeding.

103. In the *BDS Order,* the fact that the Commission could not find compelling evidence to suggest market power in packet-based and higher capacity TDM BDS in price cap markets suggests that the same circumstances could exist in electing carriers' BDS markets. A variety of companies are investing in next generation networks, not legacy networks, to compete via different technologies, which is consistent with a lack of market power. Additionally, demand for high speed BDS exists nationwide. Customer requests for proposals (RFPs) are not restricted to price cap areas but seek proposals for service wherever they have demand. Thus, the characteristics of a bidding market that exist in price cap areas are also likely to be present in areas served by rate-of-return carriers that receive fixed support.

104. Relatedly, there is evidence that the deployment of fiber and sales of packet-based BDS such as Ethernet continue to grow substantially and pervasively. Analysts report that, for the first time, fiber-connected commercial building penetration exceeded 50% in 2017—the availability of optical fiber connectivity to large and medium size commercial buildings in the U.S. increased from 49.6% in 2016 to 54.8% in 2017. In 2018, 98% of our nation's elementary and secondary school districts are served by fiber optic or other high speed connections. An analyst's equipment revenue forecast for 2017 to 2022 projects that Ethernet access and aggregation will grow 9% annually. The record in this proceeding shows that these growth trends are also apparent in A–CAM carriers' served areas. For example, TDS Telecom, Great Plains, and Consolidated report a four-year average annual growth rate in Ethernet sales from December 2014 to 2017 of 10.7%, 15.4%, and 38.3%, respectively. Over the same periods, these carriers report declines in legacy BDS in study areas that were similar to declines in legacy BDS in price cap areas. At the same time, consistent with the Commission's findings in the *BDS Order,* analysts report actual and forecasted growth in cable revenues, deployment and market share for small to national enterprise customers that are significantly contributing to overall growth and competition in the BDS market.

105. There are other reasons to believe market power for packet-based and higher capacity TDM business data services is not present in areas served by rate-of-return carriers that receive fixed support. The record shows that large customers have significant bargaining leverage over relatively smaller rate-of-return carriers that receive fixed support, limiting what the carriers may negotiate when bidding on contracts. For example, ex ante pricing regulation is unnecessary to protect large and powerful entities, such as wireless

carriers, that purchase large quantities of BDS.

106. The Commission has repeatedly emphasized its preference for relying on competition instead of regulation. We seek to minimize the burdens of regulation while ensuring that rates and practices remain just and reasonable. The Commission previously identified packet-based services as the ''future of business data services'' that are also ''readily scalable.'' While legacy TDM BDS is declining, carriers, including rate-of-return carriers that receive fixed support, are generally investing aggressively to deploy high speed networks in their study areas. The record shows growing demand for packet-based and higher capacity TDM BDS consistent with the Commission's findings in the *BDS Order,* and we find the record persuasive.

107. Removing ex ante pricing regulation for packet-based and higher capacity TDM services, will also encourage innovation. As the Commission has previously found, the potential unintended costs of regulation are far greater for new services. The Commission has concluded that ex ante pricing regulation for these services should not be imposed even with ''insufficiently robust competition'' because it would be difficult to administer such complex regulations. We are keenly aware of the risk that heavy-handed regulation could discourage competitive investment which would have long-term negative consequences on competitive deployment over time.

108. These considerations also apply to the study areas of rate-of-return carriers that receive fixed support. Innovation does not stop at the borders of a price cap carrier's study areas. The record shows that all providers are accelerating their deployment of next generation packet-based services in response to customer demand. We find that the sensitivity of new and growing services to imprecise regulation, particularly rate regulation, is a factor in areas served by rate-of-return carriers receiving fixed support as well as areas served by price cap carriers. For that reason, consistent with our decision in the *BDS Order,* we find that the costs and potential risks of ex ante pricing regulation for packet-based and higher capacity TDM business data services exceed the benefits and we therefore eliminate such regulation. This result provides regulatory parity between electing carriers and price cap carriers in their provision of packet-based and higher capacity TDM business data services which will benefit consumers.

109. We eliminate ex ante pricing regulation on the provision of these services by electing carriers to hasten deployment of advanced services and because competition and the size of purchasers of these services is sufficient to protect consumers. We affirm, however, that the Commission retains authority under sections 201, 202, and 208 of the Act to ensure that packet-based and higher capacity TDM BDS rates and practices are just, reasonable, and not unreasonably discriminatory. The availability of the protections of sections 201 and 202, and the importance of the formal fast-track complaint process of section 208, will provide sufficient protection against unreasonable rates and practices in this increasingly competitive market.

E. Implementation Issues

110. We take a series of additional steps to ensure electing carriers will be able fully to implement the BDS regulatory framework we adopt today, including adopting deadlines for implementing incentive regulation, forbearing from cost assignment and jurisdictional separations rules, forbearing from § 54.1305 reporting requirements, forbearing from section 203 tariffing requirements, allowing electing carriers to elect to use GAAP accounting instead of part 32 accounting, and adopting certain transitional timeframes to facilitate the detariffing of electing carriers' packet-based and higher capacity TDM offerings.

1. Effective Date of Elections

111. We adopt the following requirements to implement voluntary incentive regulation for electing carriers. We adopt the proposal in the *NPRM* to make incentive regulation for electing carriers effective as of July 1, 2019 and add a second election date option for carriers that will be effective July 1, 2020. We agree with Petitioners that a January 1, 2019 effective date would be the least burdensome for carriers because cost studies are performed on a calendar year basis and ''would benefit customers and competition alike.'' However, a January 1, 2019 effective date is not practicable because the rules adopted in this Order contain new or modified information collection requirements triggering Paperwork Reduction Act review by the Office of Management and Budget (OMB), a process which takes approximately five months to complete. A January 1, 2019 effective date would also provide insufficient time for electing carriers in the traffic-sensitive NECA pool to remove their BDS offerings from the pool. Our rules require that annual access charge tariff filings be filed with a scheduled effective date of July 1. As such, a July 1 effective date is consistent with current tariffing procedures and will simplify the implementation of the changes adopted in this Order.

112. Similarly, we adopt July 1 as the effective date for any future election. July 1 is the most efficient effective date because allowing carriers accepting future offers of A–CAM support to set their initial rates on another date would add cost and complexity to the process. Petitioners suggest using a January 1 effective date but doing so would require an electing carrier to make an additional tariff filing beyond the required July 1 annual filing. NECA, and the Commission, would have to undertake their associated review of the tariff, and NECA would be required to conduct its mid-year cost studies for the remaining pool members, calculate support for existing members, reband, and undertake other steps it would not do otherwise. Additionally, a January 1 effective date would be based on the previous year's cost study. Relying on year-old data would undermine the validity of the tariff filings. It is possible that an electing carrier could prepare a cost study for only a portion of the current year and multiply the results of the study to estimate a year's data, but that approach creates additional burdens for carriers, complicates NECA's implementation, and would still not represent a fully accurate picture of the carrier's costs and demand. When considered together, we find that using July 1 as a deadline for setting initial rates in any future A–CAM offer is the most efficient and feasible approach.

113. Electing carriers currently in the NECA pool are required to notify NECA by March 1, 2019 that they will not participate in the upcoming NECA traffic-sensitive tariff for their BDS offerings consistent with § 69.3 of our rules. Similarly, NECA pool carriers that elect to convert to incentive regulation effective July 1, 2020, must notify NECA that they will not participate in the NECA traffic-sensitive pool for BDS offerings by March 1, 2020. NECA pool carriers that accept future offers of A–CAM support and elect the incentive regulation framework we adopt today or otherwise transition away from legacy support mechanisms must notify NECA by March 1 of their election year consistent with § 69.3. The Commission proposed requiring electing carriers to provide the Bureau with 120 days' notice of their election to facilitate implementation of the revised tariffs but we now agree with Petitioners that

opposed granting so much advanced notice. Accordingly, we require electing carriers electing to convert to incentive regulation effective July 1, 2019 to provide the Bureau with notice of their election by May 1, 2019. Carriers that elect our second incentive regulation option date, effective July 1, 2020, must notify the Bureau by May 1, 2020. Carriers that accept future offers of A–CAM support and carriers that otherwise transition away from legacy support mechanisms must provide notice of their election or transition to the Bureau by May 1 of the year of election or transition. Electing carriers that choose to update their separations category relationships pursuant to this Order shall include information to that effect in these notices to NECA and the Bureau.

2. Implementing Forbearance

114. As part of implementing our new regulatory framework for electing carriers' BDS, we grant forbearance from certain existing Commission rules and statutory requirements, including our tariffing obligations for electing carriers' packet-based and higher capacity (*i.e.,* above a DS3 bandwidth level) TDM business data services and lower capacity TDM end user channel termination services in study areas deemed competitive; our Cost Assignment Rules; and our § 54.1305 reporting requirements, for electing carriers' lower capacity (*i.e.,* at or below a DS3 bandwidth level) TDM transport and end user channel termination services. Forbearance will be effective July 1, 2019 for carriers electing incentive regulation of their business data services as of July 1, 2019, and July 1, 2020 for carrier's electing incentive regulation as of July 1, 2020. Section 10 of the Act requires that the Commission forbear from applying any provision of the Act, or any of the Commission's regulations, if the Commission determines that: (1) Enforcement of the provision or regulation is not necessary to ensure that a telecommunications carrier's ''charges, practices, classifications or regulations'' are ''just and reasonable and are not unjustly or unreasonably discriminatory,'' (2) enforcement of the provision or regulation is ''not necessary for the protection of consumers,'' and (3) forbearance is consistent with the public interest. In making the public interest determination, the Commission must also consider, pursuant to section 10(b), ''whether forbearance from enforcing the provision or regulation will promote competitive market conditions.'' We find that granting forbearance in these instances will meet the statutory forbearance requirements and will facilitate electing carriers' transition to incentive regulation, putting them on a footing similar to that of price cap carriers in their provision of BDS.

a. Forbearance from Tariffing Requirements for Packet-Based and Higher Capacity TDM Services and Lower Capacity TDM End User Channel Terminations in Study Areas Deemed Competitive

115. In order to effectuate our light-touch regulatory framework for packet-based and higher capacity TDM business data services above the DS3 bandwidth level, we grant forbearance, pursuant to section 10 of the Act, from section 203 tariffing requirements for these services offered by electing carriers. In addition, we grant forbearance for lower capacity TDM end user channel terminations offered in electing carriers' study areas deemed competitive by the competitive market test. Forbearance from section 203 tariffing obligations is warranted under section 10 of the Act, is consistent with our finding that electing carriers lack market power in packet-based and higher capacity TDM business data services, and end user channel terminations in study areas deemed competitive by the competitive market test, and will enhance competition and deployment of these next generation services.

116. Forbearance from section 203 tariffing requirements for packet-based and higher capacity TDM BDS offerings above the DS3 bandwidth level, and for lower capacity TDM end user channel terminations in study areas deemed competitive by the competitive market test, satisfies all three prongs of the forbearance analysis. First, pursuant to section 10(a)(1), we conclude in the context of growing demand for high speed services detariffing these services will promote competitive market conditions, which will result in lower prices and better services, thus ensuring that electing carriers' relevant charges, practices, classifications, and regulations are just and reasonable and not unreasonably discriminatory. Similarly, the existence of demonstrated competition for end user channel terminations in markets deemed competitive will restrain anticompetitive behavior, lower prices, increase innovation, and protect consumers from charges, practices, classifications, and regulations that are not just and reasonable and unreasonably discriminatory. Competition will serve to limit electing carriers' behavior. Absent forbearance, as commenters argue, Commission regulation could have the inverse effect and harm competition and network deployment.

117. We also conclude that, pursuant to section 10(a)(2), enforcement of our tariffing requirements for these services is ''not necessary for the protection of consumers.'' Indeed, by encouraging competition, granting forbearance from tariffing of these services will benefit consumers by increasing deployment and lowering cost. Competition among carriers and the roll-out of next generation packet-based and higher capacity TDM circuit-based BDS will lower prices and provide new services. In study areas deemed competitive, competition will also protect consumers. The Commission has previously found that tariffs were originally required to protect consumers but they are unnecessary if a provider faces competitive pressures. If an electing carrier harms a consumer the consumer can switch to other competitors present in the study area. This threat protects consumers. Of course, in the event that there is risk of consumer harm, sections 201, 202, and 208 remain applicable to enforce the Commission's rules and protect consumers' welfare. Based on competition in the market and our statutory mandate as a backstop, we find that section 203 is not necessary to protect consumers in electing carriers' packet-based and higher capacity TDM markets, and for lower capacity TDM end user channel termination in study areas deemed competitive by the electing carriers' competitive market test.

118. Third, we conclude that forbearance from these statutory and regulatory requirements is in the public interest. Forbearance from the tariffing requirement for these packet-based and higher capacity TDM services and for lower capacity TDM end user channel terminations in markets deemed competitive will promote competition, reduce compliance costs, increase investment and innovation, and facilitate the technology transitions. We therefore find that application of section 203 is not necessary under sections 10(a)(1) and 10(a)(2), and is in the public interest, consistent with sections 10(a)(3) and 10(b).

b. Cost Assignment Rules Forbearance

119. In light of our decision to relieve electing carriers of the obligation to conduct cost studies, we grant electing carriers forbearance, pursuant to section 10 of the Act, from the Commission's Cost Assignment Rules for their BDS services, although we grant forbearance for their lower capacity (*i.e.,* at or below

a DS3 bandwidth level) TDM transport and end user channel termination services after they have set initial rates for those offerings. Additionally, electing carriers that participate in the NECA pool must conduct cost studies for the calendar year prior to their election and the first half of the year of their election to comply with their pool settlement requirements.

120. *Background.* The Cost Assignment Rules generally require carriers to assign costs to build and maintain the network and revenues from services provided to specific categories. Categories include nonregulated or regulated service, the intrastate or interstate jurisdiction, and specific access services, such as local switching or common line. The Cost Assignment Rules also govern the accounting treatment of transactions between a carrier and its affiliate, such as the sale or transfer of assets between regulated and nonregulated affiliates. In addition, the rules include certain reporting requirements, which depend on the availability of data produced by the Cost Assignment Rules.

121. As part of the regulatory accounting process, carriers first record their costs, including investments and expenses, into various accounts in accordance with the Uniform System of Accounts (USOA) prescribed by part 32 of the Commission's rules. Next, using the Cost Assignment Rules in part 64, carriers directly assign, or allocate if direct assignment is not possible, the costs and revenues associated with their regulated and nonregulated activities. After costs and revenues are divided between those that are regulated and nonregulated, interstate and intrastate costs and revenues are separated as provided in part 36. Federal and state regulatory jurisdictions apply their own ratemaking processes to the amounts assigned to each jurisdiction. Finally, the access charge rules in part 69 require carriers to separate regulated interstate costs into interexchange costs and access costs, and then apportion the latter among access categories or elements.

122. The Commission adopted the Cost Assignment Rules to help ensure that carriers charge just and reasonable rates for the services they provide. The Commission adopted the Cost Assignment Rules prior to 1991 when all incumbent LECs were subject to rate-of-return regulation, so that it could set rates that allowed carriers to recover their costs and earn a specific return on their regulated investment. Subsequently, the Commission moved away from rate-of-return regulation for the larger incumbent LECs. In its place, it adopted price cap regulation, a form of incentive regulation that seeks to ''harness the profit-making incentives common to all businesses to produce a set of outcomes that advance the public interest goals of just, reasonable, and nondiscriminatory rates, as well as a communications system that offers innovative, high quality services.''

123. In 2008, the Commission granted AT&T conditional forbearance from the Cost Assignment Rules. The Commission conditioned the forbearance on, among other things, requiring AT&T to retain part 32 Uniform System of Accounts data and submit a compliance plan describing in detail how it would fulfill its statutory and regulatory requirements. The Commission granted similar conditional forbearance from the Cost Assignment Rules to Verizon and Qwest. Subsequently, Qwest, Verizon, and AT&T obtained conditional forbearance from certain financial reporting requirements that relied on the Cost Assignment Rules. In 2013, the Commission extended the conditional forbearance granted the three carriers to all price cap carriers.

124. In the *Part 32 Order,* 82 FR 20833, May 4, 2017, the Commission terminated the conditions that the Commission placed on a variety of carriers granted forbearance from our Cost Assignment Rules. The Commission noted that forbearance was expressly premised on the continued availability of part 32 accounting data and the filing of compliance plans consistent with that condition. The Commission determined that continuing to maintain these costly requirements on the speculation that at some point the Commission might do something with them failed any cost-benefit analysis.

125. *Discussion.* We find that applying the Cost Assignment Rules to electing carriers is no longer necessary to ensure that charges and practices are just, reasonable, and not unjustly or unreasonably discriminatory; to protect consumers; or to protect the public interest. Much of the reasoning in the Commission's earlier decisions to grant price cap LECs forbearance from the Cost Assignment Rules applies equally to rate-of-return carriers receiving fixed support that elect incentive regulation. With respect to ensuring charges, practices, classifications, and regulations are just and reasonable and not unjustly or unreasonably discriminatory, as discussed above, the Cost Assignment Rules were developed when the incumbent LECs' interstate rates and many of their intrastate rates were set under rate-based, cost-of-service regulation. Because the incentive regulation we adopt severs for BDS the direct link between regulated costs and prices just as price cap regulation did, a carrier is not able automatically to recoup misallocated nonregulated costs by raising BDS rates, thus reducing incentives to shift nonregulated costs to regulated services. To the extent incentives remain, we find our positive experience with the waivers of the all-or-nothing rule provides confidence that the additional costs of maintaining the Cost Assignment Rules outweighs any possible benefit of maintaining them. There is no reason to impose on electing carriers cost assignment requirements that were ''designed to parallel the level of detail in the cost-of-service calculations that LECs performed to develop their rates for interstate access services.'' Moreover, if the need arises for cost data from electing carriers, we find there are less costly ways to meet that need.

126. With respect to the second prong of the forbearance test, protecting consumers, the Commission adopted the Cost Assignment Rules in part to help protect consumers from improper cross-subsidization of competitive services provided on an integrated basis with noncompetitive services by dominant providers with individual market power. Because the rates for regulated services and the determination of the level of universal service support are no longer tied to accounting costs, electing carriers will have no incentive to shift costs between regulated and nonregulated services, or to services receiving universal service support, thus the consumer protection issues that animate the Cost Assignment Rules are not relevant for electing carriers.

127. We also find that forbearing from the Cost Assignment Rules for electing carriers is in the public interest. Because neither rates nor universal service support will be cost-based for electing carriers, relieving electing carriers of the expense of compliance with the Cost Assignment Rules will allow electing carriers to offer more competitive rates and more innovative service, thus furthering the public interest.

128. Finally, section 10(b) requires us to consider, as part of our analysis of the public interest prong, whether forbearance will promote competitive market conditions. We agree with Petitioners, TDS Telecom and other commenters that contend that forbearance will enhance competition. Eliminating unnecessary regulation will generally reduce electing carriers' costs and, in turn, benefit consumers through lower rates and/or more vibrant

competitive offerings. Because other providers of similar services are not subject to the rules, it also promotes competition by providing a more level playing field. Moreover, as noted above, we find that sufficient protections remain in place to prevent anti-competitive cross-subsidization.

129. We note that there still may be instances in which an electing carrier seeks some other type of relief from the Commission that requires supporting cost assignment data. In such instances, the burden is on the carrier to retain data sufficient to make the required showing to the Commission in support of such a carrier-initiated request.

130. As part of our forbearance from the Cost Assignment Rules, we also forbear from the NECA data reporting requirement in § 54.1305 of our rules and, by extension, from the related requirement to update information shared with NECA. Under the Commission's rules, incumbent LECs are required to report unseparated loop cost data to NECA annually. Price cap carriers and their affiliates have been exempt from this obligation since the Commission adopted the *USF/ICC Transformation Order* and various price cap cost assignment forbearance orders. This reporting requirement depends on the availability of data produced by the Cost Assignment Rules. As part of the forbearance adopted in this Order, we cease to require data that would otherwise be reported as part of a cost study. Retaining this obligation is thus inconsistent with our grant of forbearance and is inconsistent with past price cap carrier forbearance grants. Retaining this obligation would also eliminate one of the core incentives for rate-of-return carriers to elect incentive regulation—cost savings from the elimination of the obligation to undertake cost studies.

131. Granting forbearance from NECA reporting requirements satisfies all three prongs of the forbearance analysis. The NECA data collection requirement is not necessary to ensure that carrier charges and practices are just and reasonable, as evidenced by the fact that price cap carriers have been operating without NECA reporting for nearly six years without issue. While no longer including electing carriers' data in the calculation of the national average cost per loop will affect that calculation, we do not think that any impact it may have outweighs the benefits of removing these reporting obligations. Since the very goal of incentive regulation is to disconnect cost and rates to promote competition in the marketplace, reporting cost data to NECA is also unnecessary to protect consumers. Additionally, because forbearance from enforcing these rules is necessary to obtain the benefit of reducing unnecessary regulatory compliance costs this Order seeks, forbearance is consistent with the public interest. Retaining the data collection and reporting requirements of §§ 54.1305 and 54.1306 would force electing carriers to continue to perform annual cost studies and would thus eliminate one of the chief sources of cost savings of this Order. Forbearing from these requirements will promote competition by allowing these resources to be redirected to increase network investment and to accelerate the technology transition from legacy circuit-based services to packet-based services such as Ethernet.

3. GAAP Accounting

132. We allow electing carriers the option of using generally accepted accounting principles (GAAP) for keeping their accounts. The only commenters that oppose allowing electing carriers to use GAAP accounting incorrectly argue that for electing carriers part 32, cost studies and other protections are necessary because ''these electing carriers would continue to have certain of their interstate services under rate-of-return.'' In fact, as explained by Petitioners, all of the interstate telecommunications services offered by electing carriers will either be (1) subject to incentive regulation, (2) not subject to ex ante pricing regulation, or (3) capped and transitioning downward by the terms of the rate-of-return intercarrier compensation rules. Thus, there is no significant reason to continue to maintain burdensome part 32 accounting for electing carriers.

133. The Commission recently revised its part 32 accounting rules to allow price cap LECs to elect to use GAAP in recording and reporting their financial data, subject to two targeted accounting requirements. We subject electing carriers that choose to use GAAP accounting to the same data provisioning requirements as price cap carriers, including the requirements relating to the calculation of pole attachment rates. Electing carriers may either (a) calculate an Implementation Rate Difference between the attachment rates calculated by the carrier under the Uniform System of Accounts (USOA) and under GAAP as of the last full year preceding the carrier's initial opting-out of part 32 USOA accounting requirements; or (b) comply with GAAP accounting for all purposes other than those associated with setting pole attachment rates while continuing to use the part 32 accounts and procedures necessary to establish and evaluate pole attachment rates. Electing carriers must adjust their annually computed GAAP-based rates by the Implementation Rate Difference for a period of 12 years after the election. This will free electing carriers from having to maintain two sets of books: one for financial reporting purposes consistent with GAAP and one for regulatory reporting purposes consistent with the accounting requirements of part 32.

4. Transitions

134. Consistent with our actions in the *BDS Order,* our detariffing actions in this Order for electing carriers' study areas will be mandatory after a transition that will provide electing carriers sufficient time to adapt their business data services operations to a detariffing regime.

135. The transition period will begin on the date incentive regulation becomes effective for electing carriers, either July 1, 2019 or July 1, 2020, and will end thirty-six (36) months thereafter, a period that we find sufficient for electing carriers to adapt to a detariffing regime. In addition, for six (6) months following the date incentive regulation becomes effective, we require electing carriers to freeze the tariffed rates for their business data services that are no longer subject to ex ante pricing regulation, including lower speed TDM end user channel terminations in newly deregulated study areas, provided those services remain tariffed. These transition mechanisms will ensure that small businesses and other purchasers have time to adjust to the new regulatory framework we adopt.

136. Similarly, carriers electing incentive regulation in connection with a subsequent offer of A–CAM support, or carriers that the Commission otherwise transitions away from legacy support mechanisms must detariff the relevant business data services within thirty-six (36) months of the date on which their incentive-based rates take effect or their transition away from legacy support mechanisms becomes effective. Further, for six (6) months following such dates, such carriers will be required to freeze their tariffed rates for BDS that are no longer subject to ex ante pricing regulation, provided those rates remain tariffed.

137. Tariffing for these services will be permissive during the transition—we will accept new tariffs and revisions to existing tariffs for the affected services during this time period. Electing carriers may also detariff during the transition. Apart from the rate freeze noted above, carriers will no longer be required to

comply with ex ante pricing regulation for these services. Once the rules adopted in this Order are effective, carriers that wish to continue filing tariffs under the permissive detariffing regime are free to modify such tariffs to reflect the new regulatory structure outlined in this Order for the affected services. This will allow carriers to be more competitive and introduce new business data services as they adapt to detariffing.

138. Electing carriers may remove the relevant portions of their tariffs for the affected services at any time during the transition, and the rate freeze does not apply to services that are no longer tariffed. Electing carriers may not file or maintain any interstate tariffs for affected business data services once the transition ends. This will prevent electing carriers from obtaining ''deemed lawful'' status for tariff filings that are not accompanied by cost support and invoking the filed-rate doctrine in contractual disputes with customers. Business data service providers will also be prevented from picking and choosing when they are able to invoke the protections of tariffs.

139. We do not intend our actions to disturb existing contractual or other long-term arrangements—a contract tariff remains a contract even if it is no longer tariffed. As we stated in the *BDS Order,* contract tariffs, term and volume discount plans, and individual circuit plans do not become void upon detariffing. All carriers are to act in good faith to develop solutions to ensure rates remain just and reasonable.

III. Other Rule Changes

140. We adopt several other rule changes which can be found set out below. These rule changes include changes arising from this Order as well as corrections to inaccuracies in our current rules. Thus, we change (1) the cross reference to § 61.3(aa) in § 51.903(g) to § 61.3(bb), (2) the cross reference to § 61.3(ee) in § 61.41(d) to § 61.3(ff), (3) the cross reference § 61.3(x) in § 69.114 to § 61.3(ff), and (4) the cross reference to § 69.801(g) in § 69.805(a) to § 69.801(h). These cross references have been rendered inaccurate because of changes in the definitions contained in § 61.3.

IV. Final Regulatory Flexibility Analysis

141. As required by the Regulatory by the Regulatory Flexibility Act of 1980, as amended (RFA) an Initial Regulatory Flexibility Analysis (IRFA) was incorporated into the Notice of Proposed Rulemaking (*NPRM*) for the rate-of-return business data services (BDS) proceeding. The Commission sought written public comment on the proposals in the *NPRM,* including comment on the IRFA. The Commission received no comments on the IRFA. Because the Commission amends its rules in this Report and Order, the Commission has included this Final Regulatory Flexibility Analysis (FRFA). This present FRFA conforms to the RFA.

A. Need for, and Objectives of, the Rules

142. In the *NPRM,* the Commission proposed to adopt a form of incentive regulation for the provision of business data services by rate-of-return carriers receiving fixed universal service support, conduct a market analysis to evaluate the characteristics of BDS markets served by rate-of-return carriers receiving fixed support, and adopt a new lighter touch regulatory framework for these carriers' BDS that in most respects parallels the framework recently adopted for price cap carriers in the *BDS Order.* This Order provides a new framework for BDS offered by rate-of-return carriers that receive fixed support that minimizes unnecessary regulatory burdens on certain rate-of-return carriers and allows market forces to foster appropriate incentives for these carriers to be efficient, to innovate and to compete.

143. In this Order, the Commission takes the next step in a series of steps to encourage carriers to move from rate-of-return to incentive regulation, and to remove ex ante pricing regulation where competitive conditions justify doing so. This Order focuses on allowing rate-of-return carriers that currently receive fixed high-cost universal service support to voluntarily elect to transition out of rate-of-return regulation for their BDS offerings. In so doing, the Commission amends its rules to allow such carriers to move their lower capacity time division multiplexing (TDM) circuit-based transport and end user channel termination offerings to incentive regulation while providing a path for those carriers that elect our new framework (electing carriers) to demonstrate that their lower capacity circuit-based end user channel termination offerings are competitive, and therefore should not be subject to ex ante pricing regulation. We also remove ex ante pricing regulation from electing carriers' higher capacity circuit-based and their packet-based BDS offerings.

144. Allowing rate-of-return carriers that receive fixed support to move their BDS offerings away from rate-of-return regulation will help drive competition for BDS offerings in the communities served by those carriers. It will also reduce unnecessary regulatory burdens faced by electing carriers. They will no longer be required to provide cost-based justification for their BDS rates and will therefore no longer need to conduct annual cost studies to justify those rates. They will also no longer be required to file tariffs for their packed-based and higher capacity TDM-based end user channel terminations offerings in areas deemed competitive. The regulatory burdens on electing carriers, most of which are small entities, will be vastly reduced.

145. We take these steps while affirming our core statutory obligations pursuant to sections 201, 202, and 208 of the Communications Act to ensure that the rates and practices of these carriers' BDS remain just, reasonable and not unreasonably discriminatory. Collectively, these actions will streamline regulation, and spur entry, investment, innovation, and competition in the affected BDS markets to the benefit of businesses and other institutional users that rely on these services.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

146. The Commission did not receive comments specifically addressing the rules and policies proposed in the IRFA.

C. Response to Comments by the Chief Counsel for Advocacy of the Small Business Administration

147. The Chief Counsel did not file any comments in response to this proceeding.

D. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

148. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small-business concern'' under the Small Business Act. A small-business concern'' is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

1. Total Small Entities

149. Our proposed action, if implemented, may, over time, affect

small entities that are not easily categorized at present. We therefore describe here, at the outset, three comprehensive, statutory small entity size standards. First, as of 2013, the SBA estimates there are an estimated 28.8 million small businesses nationwide—comprising some 99.9% of all businesses. In addition, a ''small organization'' is generally ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' Nationwide, as of 2007, there were approximately 1,621,315 small organizations. Finally, the term ''small governmental jurisdiction'' is defined generally as ''governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.'' Census Bureau data for 2012 indicate that there were 90,056 local governmental jurisdictions in the United States. We estimate that, of this total, as many as 89,195 entities may qualify as ''small governmental jurisdictions.'' Thus, we estimate that most governmental jurisdictions are small.

2. Broadband internet Access Service Providers

150. *internet Service Providers (Broadband).* Broadband internet service providers include wired (*e.g.,* cable, DSL) and VoIP service providers using their own operated wired telecommunications infrastructure fall in the category of Wired Telecommunication Carriers. Wired Telecommunications Carriers are comprised of establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. The SBA size standard for this category classifies a business as small if it has 1,500 or fewer employees. U.S. Census data for 2012 show that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees. Consequently, under this size standard the majority of firms in this industry can be considered small.

3. Wireline Providers

151. *Wired Telecommunications Carriers.* The U.S. Census Bureau defines this industry as ''establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired communications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services, wired (cable) audio and video programming distribution, and wired broadband internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.'' The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees. Census data for 2012 show that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees. Thus, under this size standard, the majority of firms in this industry can be considered small.

152. *Incumbent Local Exchange Carriers (Incumbent LECs).* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent LEC services. The closest applicable size standard under SBA rules is for the category Wired Telecommunications Carriers as defined above. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 3,117 firms operated in that year. Of this total, 3,083 operated with fewer than 1,000 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by the rules and policies adopted. A total of 1,307 firms reported that they were incumbent local exchange service providers. Of this total, an estimated 1,006 have 1,500 or fewer employees.

153. Competitive Local Exchange Carriers (Competitive LECs), Competitive Access Providers (CAPs), Shared-Tenant Service Providers, and Other Local Service Providers. Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate NAICS Code category is Wired Telecommunications Carriers, as defined above. Under that size standard, such a business is small if it has 1,500 or fewer employees. U.S. Census data for 2012 indicate that 3,117 firms operated during that year. Of that number, 3,083 operated with fewer than 1,000 employees. Based on this data, the Commission concludes that the majority of Competitive LECS, CAPs, Shared-Tenant Service Providers, and Other Local Service Providers, are small entities. According to Commission data, 1,442 carriers reported that they were engaged in the provision of either competitive local exchange services or competitive access provider services. Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees. In addition, 17 carriers have reported that they are Shared-Tenant Service Providers, and all 17 are estimated to have 1,500 or fewer employees. Also, 72 carriers have reported that they are Other Local Service Providers. Of this total, 70 have 1,500 or fewer employees. Consequently, based on internally researched FCC data, the Commission estimates that most providers of competitive local exchange service, competitive access providers, Shared-Tenant Service Providers, and Other Local Service Providers are small entities.

154. We have included small incumbent LECs in this present RFA analysis. As noted above, a ''small business'' under the RFA is one that, *inter alia,* meets the pertinent small business size standard (*e.g.,* a telephone communications business having 1,500 or fewer employees), and ''is not dominant in its field of operation.'' The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not ''national'' in scope. We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

155. *Interexchange Carriers (IXCs).* Neither the Commission nor the SBA has developed a definition for Interexchange Carriers. The closest NAICS Code category is Wired Telecommunications Carriers as defined above. The applicable size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees. U.S. Census data for 2012 indicates that 3,117 firms operated during that year. Of that number, 3,083 operated with fewer than 1,000 employees. According to internally developed Commission data, 359 companies reported that their primary telecommunications service activity was the provision of interexchange services. Of this total, an estimated 317 have 1,500 or fewer employees. Consequently, the Commission estimates that the majority of IXCs are small entities that may be affected by our rules.

156. *Local Resellers.* The SBA has developed a small business size standard for the category of Telecommunications Resellers. The Telecommunications Resellers industry comprises establishments engaged in purchasing access and network capacity from owners and operators of telecommunications networks and reselling wired and wireless telecommunications services (except satellite) to businesses and households. Establishments in this industry resell telecommunications; they do not operate transmission facilities and infrastructure. Mobile virtual network operators (MVNOs) are included in this industry. Under that size standard, such a business is small if it has 1,500 or fewer employees. Census data for 2012 show that 1,341 firms provided resale services during that year. Of that number, all operated with fewer than 1,000 employees. Thus, under this category and the associated small business size standard, the majority of these prepaid calling card providers can be considered small entities.

157. *Toll Resellers.* The Commission has not developed a definition for Toll Resellers. The closest NAICS Code Category is Telecommunications Resellers. The Telecommunications Resellers industry comprises establishments engaged in purchasing access and network capacity from owners and operators of telecommunications networks and reselling wired and wireless telecommunications services (except satellite) to businesses and households. Establishments in this industry resell telecommunications; they do not operate transmission facilities and infrastructure. Mobile virtual network operators (MVNOs) are included in this industry. The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees. Census data for 2012 show that 1,341 firms provided resale services during that year. Of that number, 1,341 operated with fewer than 1,000 employees. Thus, under this category and the associated small business size standard, the majority of these resellers can be considered small entities. According to Commission data, 881 carriers have reported that they are engaged in the provision of toll resale services. Of this total, an estimated 857 have 1,500 or fewer employees. Consequently, the Commission estimates that the majority of toll resellers are small entities.

158. *Other Toll Carriers.* Neither the Commission nor the SBA has developed a definition for small businesses specifically applicable to Other Toll Carriers. This category includes toll carriers that do not fall within the categories of interexchange carriers, operator service providers, prepaid calling card providers, satellite service carriers, or toll resellers. The closest applicable NAICS Code category is for Wired Telecommunications Carriers as defined above. Under the applicable SBA size standard, such a business is small if it has 1,500 or fewer employees. Census data for 2012 show that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees. Thus, under this category and the associated small business size standard, the majority of Other Toll Carriers can be considered small. According to internally developed Commission data, 284 companies reported that their primary telecommunications service activity was the provision of other toll carriage. Of these, an estimated 279 have 1,500 or fewer employees. Consequently, the Commission estimates that most Other Toll Carriers are small entities that may be affected by rules adopted pursuant to the *Order.*

159. *Operator Service Providers (OSPs).* Neither the Commission nor the SBA has developed a small business size standard specifically for operator service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 33 carriers have reported that they are engaged in the provision of operator services. Of these, an estimated 31 have 1,500 or fewer employees and two have more than 1,500 employees. Consequently, the Commission estimates that the majority of OSPs are small entities.

4. Wireless Providers—Fixed and Mobile

160. *Wireless Telecommunications Carriers (except Satellite).* This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular services, paging services, wireless internet access, and wireless video services. The appropriate size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees. For this industry, U.S. Census data for 2012 show that there were 967 firms that operated for the entire year. Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more. Thus under this category and the associated size standard, the Commission estimates that the majority of wireless telecommunications carriers (except satellite) are small entities.

161. The Commission's own data—available in its Universal Licensing System—indicate that, as of October 25, 2016, there are 280 Cellular licensees that will be affected by our actions today. The Commission does not know how many of these licensees are small, as the Commission does not collect that information for these types of entities. Similarly, according to internally developed Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service, and Specialized Mobile Radio Telephony services. Of this total, an estimated 261 have 1,500 or fewer employees, and 152 have more than 1,500 employees. Thus, using available data, we estimate that the majority of wireless firms can be considered small.

162. *Wireless Communications Services.* This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined ''small business'' for the wireless communications services (WCS) auction as an entity with average gross revenues of $40 million for each of the three preceding years, and a ''very small business'' as an entity with average gross revenues of $15 million for each of the three preceding years. The SBA has approved these definitions.

163. *Wireless Telephony.* Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. As noted, the SBA has developed a small business size standard for Wireless Telecommunications Carriers (except Satellite). Under the SBA small business size standard, a business is small if it has 1,500 or fewer employees. According to Commission data, 413 carriers reported that they were engaged in wireless telephony. Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees. Therefore, a little less than one third of these entities can be considered small.

5. Cable Service Providers

164. Because section 706 requires us to monitor the deployment of broadband using any technology, we anticipate that

some broadband service providers may not provide telephone service. Accordingly, we describe below other types of firms that may provide broadband services, including cable companies, MDS providers, and utilities, among others.

165. *Cable and Other Subscription Programming.* This industry comprises establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis. The broadcast programming is typically narrowcast in nature (*e.g.* limited format, such as news, sports, education, or youth-oriented). These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers. The SBA has established a size standard for this industry stating that a business in this industry is small if it has 1,500 or fewer employees. The 2012 Economic Census indicates that 367 firms were operational for that entire year. Of this total, 357 operated with less than 1,000 employees. Accordingly, we conclude that a substantial majority of firms in this industry are small under the applicable SBA size standard.

166. *Cable Companies and Systems (Rate Regulation).* The Commission has developed its own small business size standards for the purpose of cable rate regulation. Under the Commission's rules, a ''small cable company'' is one serving 400,000 or fewer subscribers nationwide. Industry data indicate that there are currently 4,600 active cable systems in the United States. Of this total, all but eleven cable operators nationwide are small under the 400,000-subscriber size standard. In addition, under the Commission's rate regulation rules, a ''small system'' is a cable system serving 15,000 or fewer subscribers. Current Commission records show 4,600 cable systems nationwide. Of this total, 3,900 cable systems have fewer than 15,000 subscribers, and 700 systems have 15,000 or more subscribers, based on the same records. Thus, under this standard as well, we estimate that most cable systems are small entities.

167. *Cable System Operators (Telecom Act Standard).* The Communications Act also contains a size standard for small cable system operators, which is ''a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1% of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.'' There are approximately 52,403,705 cable video subscribers in the United States today. Accordingly, an operator serving fewer than 524,037 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate. Based on available data, we find that all but nine incumbent cable operators are small entities under this size standard. The Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million. Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250 million, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

168. *All Other Telecommunications.* ''All Other Telecommunications'' is defined as follows: This U.S. industry is comprised of establishments that are primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing internet services or voice over internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry. The SBA has developed a small business size standard for ''All Other Telecommunications,'' which consists of all such firms with gross annual receipts of $32.5 million or less. For this category, census data for 2012 show that there were 1,442 firms that operated for the entire year. Of these firms, a total of 1,400 had gross annual receipts of less than $25 million. Consequently, we estimate that the majority of All Other Telecommunications firms are small entities that might be affected by our action.

E. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

169. *Recordkeeping and Reporting.* The rule revisions adopted in the Order include changes that will require electing rate-of-return carriers receiving fixed universal service support to make various revisions to their business data service tariffs. For example, rate-of-return carriers receiving fixed support that elect incentive regulation will be required to file Tariff Review Plans and incentive regulation tariffs for their lower capacity TDM BDS. Packet-based BDS and higher capacity TDM BDS end user channel termination and lower capacity TDM BDS end user channel terminations offered by electing carriers in study areas deemed competitive by a competitive market test will be relieved of ex ante pricing regulation and will be subject to permissive detariffing for a period of 36 months at which time they will be subject to mandatory detariffing.

170. The Commission also incorporates a productivity factor (X-factor) of 2.0% and GDP–PI as the inflation factor used to adjust price cap indexes in the first year of incentive regulation, and each year thereafter for electing carriers. Electing carriers will be required to revise their rates and tariff review plans for business data services in filings with the Commission to reflect the new X-factor. Finally, the Commission grants forbearance from the requirement in § 54.1305 of our rules annually to report unseparated loop costs and other accounting data to NECA.

F. Steps Taken To Minimize the Significant Economic Impact on Small Entities and Significant Alternatives Considered

171. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include (among others) the following four alternatives: (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.

172. *Incentive Regulation.* In the Order, the Commission sheds burdensome rate-of-return regulation in favor of lighter touch incentive regulation for electing carriers' lower capacity TDM transport and end user channel termination services. Additionally, the Commission adopted the proposal in the *NPRM* to grant pricing flexibility to electing carriers' lower capacity TDM transport and end user channel termination services under

incentive regulation similar to the pricing flexibility the Commission granted to price cap carriers' lower capacity TDM end user channel terminations in areas deemed non-competitive in the *BDS Order.* The pricing flexibility available to electing carriers, most of which are small entities, will enable them to sell their BDS using contract tariffs and term and volume discounts, enhancing their ability to respond to competition.

173. *Competitive Market Test.* The Commission sought comment on four options for a competitive market test for electing rate-of-return carriers that receive fixed support. The option we selected is one of the least burdensome options and relies on existing Form 477 data, avoiding any additional burdensome data collection. We did not adopt the proposal to use both prongs of the *BDS Order* competitive market test to assess the competitiveness of study areas served by rate-of-return carriers that receive fixed support despite its apparent simplicity because we found methodological and conceptual flaws in the proposal and in the study submitted by Petitioners to support the proposal. Among the flaws the Commission identified is that the study does not claim to be based on a representative sample of model-based rate-of-return carriers that receive fixed support, the study compares non-urbanized price cap areas with model-based rate-of-return areas that in some instances include urbanized areas, and some of the relevant counties included in the study were deemed non-competitive by the price cap competitive market test. Further, the Commission declined to adopt the other two options from the *NPRM* which would have required costly, time consuming, burdensome data collections. Instead, the Order found that the record supports adopting the second option from the *NPRM* which uses the second prong of the *BDS Order* competitive market test that is based on Form 477 data. As a result, ex ante pricing regulation of lower capacity TDM end user channel terminations will no longer apply in study areas served by rate-of-return carriers that receive fixed support that are deemed competitive.

174. *Packet-based and Higher Capacity TDM Business Data Services.* The Commission removed ex ante pricing regulation for electing rate-of-return carriers' packet-based and higher capacity TDM business data services and directed electing carriers to detariff these services following a transition period. This action is consistent with the Commission's preference to minimize the burdens of regulation.

175. *X-factor.* Rate-of-return carriers that receive fixed support that elect incentive regulation are required to file revised annual access charge tariffs every year, which become effective on July 1. The annual filings include submission of tariff review plans that are used to support revisions to the rates, including revisions that pertain to the X-factor. To ease the burden on the industry in connection with this filing, and because base period demand and the value of GDP–PI reflected in the price cap indices typically are not updated during a tariff year, the Commission permits electing carriers to use, in their filings implementing the 2.0% X-factor, the same base period demand and value of GDP–PI as in the prior year's annual filing.

176. *Periodic Revision to Competitive Market Test.* Related to the competitive market test proposal, the Commission also proposed future periodic data collections to allow for market test updates for determining competitive and non-competitive areas. The periodic collections could have resulted in a significant reporting burden on small entities. Instead, the Commission adopted a process for updating the competitive market test every three years using the data from Form 477 that is already routinely filed by providers and thus entails no additional recordkeeping or reporting burden.

177. *Forbearance.* The Commission granted forbearance, pursuant to section 10 of the Act, from the Cost Assignment Rules for electing carriers, subject to the requirement relating to the calculation of pole attachment rates. The Commission found that the Cost Assignment Rules are no longer necessary to ensure that charges and practices are just, reasonable, and not unjustly or unreasonably discriminatory; to protect consumers; and to protect the public interest. The Commission found that the rules were no longer necessary for carriers converting to incentive regulation and that eliminating unnecessary regulation will generally reduce providers' costs and provide a more level playing field because other providers of similar services are not subject to these requirements.

178. *Detariffing.* To minimize economic impact, the Commission provides a transition period to provide electing rate-of-return carriers that receive fixed support with sufficient time to detariff their business data services. The Commission does not intend its actions to disturb existing contractual or other long-term arrangements, which it grandfathered and which continue to remain in effect for the length of the contract.

G. Report to Congress

179. The Commission will send a copy of the Report and Order, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act. In addition, the Commission will send a copy of the Report and Order, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the Order and FRFA (or summaries thereof) will also be published in the **Federal Register**.

V. Procedural Matters

180. *Paperwork Reduction Act Analysis.* It was determined that the final rule makes only non-substantive changes to currently approved information collections and therefore does not require separate Paperwork Reduction Act approval. The rules are effective 60 days after publication in the **Federal Register**. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, we previously sought specific comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees. We describe impacts that might affect small businesses, which includes most businesses with fewer than 25 employees, in the Final Regulatory Flexibility Analysis in Section IV above.

181. *Congressional Review Act.* The Commission will send a copy of this Report and Order to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

182. *Final Regulatory Flexibility Analysis.* As required by the Regulatory Flexibility Act (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated into the *NPRM.* The Commission sought written public comment on the possible significant economic impact on small entities regarding the proposals addressed in the *NPRM,* including comments on the IRFA. Pursuant to the RFA, a Final Regulatory Flexibility Analysis is set forth in Section IV above.

183. *Contact Person.* For further information about this proceeding, please contact Justin Faulb, FCC Wireline Competition Bureau, Pricing Policy Division, 445 12th Street SW, Washington, DC 20554, (202) 418–1589, *Justin.Faulb@fcc.gov.*

VI. Ordering Clauses

184. Accordingly, it is ordered that, pursuant to sections 1, 2, 4(i)–(j), 10, 201(b), 202(a), 214, 303(r), 403, of the

Communications Act of 1934, as amended, and section 706 of the Telecommunications Act of 1996, 47 U.S.C. 151, 152, 154(i)–(j), 160, 201(b), 202(a), 214, 303(r), 403, 1302, this Report and Order IS ADOPTED and shall be effective sixty (60) days after publication in the **Federal Register**, except to the extent expressly addressed below.

185. It is further ordered that parts 1, 32, 51, 61, and 69 of the Commission's rules, 47 CFR parts 1, 32, 51, 61, and 69, are amended as set forth below, and that such rule amendments shall be effective sixty (60) days after publication of this Report and Order in the **Federal Register**.

186. It is further ordered that pursuant to sections 201(b) and 202(a) of the Communications Act of 1934, as amended, 47 U.S.C. 201(b), 202(a), rate-of-return carriers electing to offer business data services shall freeze the tariffed rates for packet-based and higher capacity TDM services and for TDM end-user channel terminations at or below a DS3 in study areas deemed competitive that the rate-of-return carrier continues to tariff for six (6) months following the applicable effective date of the carrier's election.

187. It is further ordered that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, shall send a copy of this Report and Order to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

188. It is further ordered, that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, shall send a copy of this Report and Order to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects

47 CFR Part 1

Communications common carriers, Reporting and recordkeeping, Telecommunications.

47 CFR Part 32

Communications, Reporting and recordkeeping requirements, Telephone, Uniform System of Accounts.

47 CFR Part 51

Communications common carriers, Telecommunications.

47 CFR Part 61

Communications common carriers, Radio, Reporting and recordkeeping requirements, Telegraph, Telephone.

47 CFR Part 69

Communications common carriers, Reporting and recordkeeping requirements, Telephone.

Federal Communications Commission

Marlene Dortch,

Secretary.

RULES

The Federal Communications Commission amends 47 CFR parts 1, 32, 51, 61, and 69 as follows:

PART 1—PRACTICE AND PROCEDURE

■ 1. The authority citation for part 1 continues to read as follows:

Authority: 47 U.S.C. 151, 154(i) and (j), 155, 157, 160, 201, 224, 225, 227, 303, 309, 310, 332, 1403, 1404, 1451, 1452, and 1455.

■ 2. Section 1.1406 is amended by adding paragraph (e) to read as follows:

§ 1.1406 Commission consideration of the complaint.

* * * * *

(e) A price cap company, or a rate-of-return carrier electing to provide service pursuant to § 61.50 of this chapter, that opts-out of part 32 of this chapter may calculate attachment rates for its poles, ducts, conduits, and rights of way using either part 32 accounting data or GAAP accounting data. A company using GAAP accounting data to compute rates to attach to its poles, ducts, conduits, and rights of way in any of the first twelve years after opting-out must adjust (increase or decrease) its annually computed GAAP-based rates by an Implementation Rate Difference for each of the remaining years in the period. The Implementation Rate Difference means the difference between attachment rates calculated by the carrier under part 32 and under GAAP as of the last full year preceding the carrier's initial opting-out of part 32 USOA accounting requirements.

PART 32—UNIFORM SYSTEM OF ACCOUNTS FOR TELECOMMUNICATIONS COMPANIES

■ 3. The authority citation for part 32 continues to read as follows:

Authority: 47 U.S.C. 219, 220 as amended, unless otherwise noted.

■ 4. Section 32.1 is revised to read as follows:

§ 32.1 Background.

The revised Uniform System of Accounts (USOA) is a historical financial accounting system which reports the results of operational and financial events in a manner which enables both management and regulators to assess these results within a specified accounting period. The USOA also provides the financial community and others with financial performance results. In order for an accounting system to fulfill these purposes, it must exhibit consistency and stability in financial reporting (including the results published for regulatory purposes). Accordingly, the USOA has been designed to reflect stable, recurring financial data based to the extent regulatory considerations permit upon the consistency of the well-established body of accounting theories and principles commonly referred to as generally accepted accounting principles (GAAP). The rules of this part, and any other rules or orders that are derivative of or dependent on the rules in this part, do not apply to price cap companies, and rate-of-return telephone companies offering business data services pursuant to § 61.50 of this chapter, that have opted-out of USOA requirements pursuant to the conditions specified by the Commission in § 32.11(g).

■ 5. Section 32.11 is amended by revising paragraph (g) to read as follows:

§ 32.11 Companies subject to this part.

* * * * *

(g) Notwithstanding paragraph (a) of this section, a price cap company, or a rate-of-return telephone company offering business data services pursuant to § 61.50 of this chapter, that elects to calculate its pole attachment rates pursuant to § 1.1406(e) of this chapter will not be subject to this Uniform System of Accounts.

PART 51—INTERCONNECTION

■ 6. The authority citation for part 51 continues to read as follows:

Authority: 47 U.S.C. 151–55, 201–05, 207–09, 218, 225–27, 251–52, 271, 332 unless otherwise noted.

■ 7. Section 51.903 is amended by revising paragraph (g) to read as follows:

§ 51.903 Definitions.

* * * * *

(g) *Rate-of-Return Carrier* is any incumbent local exchange carrier not subject to price cap regulation as that term is defined in § 61.3(bb) of this chapter, but only with respect to the territory in which it operates as an incumbent local exchange carrier.

* * * * *

PART 61—TARIFFS

■ 8. The authority citation for part 61 continues to read as follows:

Authority: 47 U.S.C. 151, 154(i), 154(j), 201–05 and 403, unless otherwise noted.

■ 9. Section 61.41 is amended by revising paragraph (d) and adding paragraph (f) to read as follows:

§ 61.41 Price cap requirements generally.

* * * * *

(d) Except as provided in paragraph (e) of this section, local exchange carriers that become subject to price cap regulation as that term is defined in § 61.3(ff) shall not be eligible to withdraw from such regulation.

* * * * *

(f) Notwithstanding the requirements of paragraphs (c) and (d) of this section, a telephone company subject to rate-of-return regulation that is affiliated with a price cap local exchange carrier may provide business data services pursuant to § 61.50 without converting other services to price cap regulation.

■ 10. Section 61.50 is added to read as follows:

§ 61.50 Regulation of business data services offered by rate-of-return carriers electing incentive regulation.

(a) A rate-of-return carrier, as defined in § 51.903(g) of this chapter, may elect to offer its business data services subject to incentive regulation pursuant to this section. A rate-of-return carrier may elect to offer business data services subject to incentive regulation pursuant to this section only if all affiliated rate-of-return carriers meeting the requirements of paragraph (b) of this section make the election. A carrier's election under this section is irrevocable.

(b) A rate-of-return carrier is eligible to elect incentive regulation for its business data services if the carrier:

(1) Receives universal service payments pursuant to the Alternative-Connect America Cost Model pursuant to § 54.311 of this chapter;

(2) Is an affiliate of a price cap local exchange carrier operating pursuant to a waiver of § 61.41;

(3) Receives universal service payments pursuant to § 54.306 of this chapter; or

(4) Transitions away from legacy support mechanisms in the future.

(c) A rate-of-return carrier electing to offer business data services pursuant to this section shall employ the procedures outlined in §§ 61.42 through 61.49 to calculate rates for its business data services and adjust its indexes for those rates to the extent those sections are applicable to business data services, except that:

(1) Exogenous costs associated with regulated services shall be allocated to business data services based on relative regulated business data services revenues, compared to regulated revenues and related support receipts; and

(2) An electing carrier is not required to file a short form tariff review plan as required by § 61.49(k).

(d) A rate-of-return carrier electing to offer business data services pursuant to this section must remove its business data services from the NECA Traffic Sensitive Pool. Such a carrier may continue to participate in the NECA Traffic Sensitive Pool and tariff for access services other than business data services.

(e) A rate-of-return carrier offering business data services pursuant to this section may offer those business data services at different rates in different study areas.

(f) A rate-of-return carrier offering business data services pursuant to this section may make a low-end adjustment pursuant to § 61.45(d)(1)(vii) unless it:

(1) Exercises the regulatory relief pursuant to paragraph (g) of this section in any part of its service region; or

(2) Exercises the option to use Generally Accepted Accounting Principles rather than the part 32 Uniform System of Accounts pursuant to § 32.11(g) of this chapter.

(g) A rate-of-return carrier electing to offer business data services pursuant to this section may offer time division multiplexed transport and end user channel termination services at or below a DS3 bandwidth that include:

(1) Volume and term discounts;

(2) Contract-based tariffs, provided that:

(i) Contract-based tariff services are made generally available to all similarly situated customers; and

(ii) The rate-of-return carrier excludes all contract-based tariff offerings from incentive regulation; and

(3) The ability to file tariff revisions on at least one day's notice, notwithstanding the notice requirements for tariff filings specified in § 61.58.

(h) A rate-of-return carrier electing to offer business data services pursuant to this section shall comply with the requirements of § 69.805 of this chapter in its study areas deemed non-competitive pursuant to this section.

(i) The regulation of other services offered by a carrier that offers business data services pursuant to this section shall not be modified as a result of the requirements of this section.

(j)(1) The Wireline Competition Bureau will conduct an initial competitive market test for rate-of-return carriers eligible to elect incentive regulation pursuant to this section. Study areas of such carriers will be deemed competitive if 75 percent of the census blocks within the study area are reported to have a minimum of 10 Mbps download and 1 Mbps upload broadband service offered by a cable operator based on the most current publicly available Form 477 data. A list of study areas deemed competitive by the competitive market test will be published on the Commission's website.

(2) The Wireline Competition Bureau will conduct subsequent competitive market tests for rate-of-return carriers electing incentive regulation pursuant to this section contemporaneously with the subsequent tests mandated by § 69.803 of this chapter for price cap carriers.

(3) A study area of an electing carrier deemed competitive by the competitive market test will retain its status in subsequent tests.

(k)(1) Packet-based and time division multiplexed business data services above a DS3 bandwidth offered by a rate-of-return carrier pursuant to this section shall not be subject to ex ante pricing regulation.

(2) Time division multiplexed end user channel termination business data services at or below a DS3 bandwidth offered by a rate-of-return carrier pursuant to this section in study areas deemed competitive by the competitive market test shall not be subject to ex ante pricing regulation.

(3) A rate-of-return carrier electing incentive regulation for its business data services must detariff:

(i) All packet-based and time division multiplexed business data services above a DS3 bandwidth within thirty-six months after the effective date of its election of incentive regulation; and

(ii) All time division multiplexed end user channel termination business data services at or below a DS3 bandwidth in any study area deemed competitive by the competitive market test within thirty-six months after such services shall be deemed competitive in a study area.

(l)(1) A rate-of-return carrier electing incentive regulation for its business data services effective July 1, 2019 must notify the Chief of the Wireline Competition Bureau of its election by May 1, 2019 for it to become effective concurrent with the annual access tariff filing in 2019.

(2) A rate-of-return carrier electing incentive regulation for its business data services effective July 1, 2020 must notify the Chief of the Wireline Competition Bureau of its election by May 1, 2020 for it to become effective concurrent with the annual access tariff filing in 2020.

(3) A rate-of-return carrier accepting future offers of Alternative-Connect America Cost Model support or otherwise transitioning away from legacy support mechanisms and electing incentive regulation for its business data services must notify the Chief of the Wireline Competition Bureau of its election by May 1 following its acceptance of the offer for it to become effective concurrent with that year's annual access tariff filing.

■ 11. Section 61.55 is amended by revising paragraph (a) to read as follows:

§ 61.55 Contract-based tariffs.

(a) This section shall apply to price cap local exchange carriers permitted to offer contract-based tariffs under § 1.776 or § 69.805 of this chapter, as well as to the offering of business data services by rate-of-return carriers pursuant to § 61.50.

* * * * *

PART 69—ACCESS CHARGES

■ 12. The authority citation for part 69 continues to read as follows:

Authority: 47 U.S.C. 154, 201, 202, 203, 205, 218, 220, 254, 403.

■ 13. Section 69.114 is amended by revising paragraph (a) to read as follows:

§ 69.114 Special access.

(a) Appropriate subelements shall be established for the use of equipment or facilities that are assigned to the Special Access element for purposes of apportioning net investment, or that are equivalent to such equipment or facilities for companies subject to price cap regulation as that term is defined in § 61.3(ff) of this chapter.

* * * * *

[FR Doc. 2018–27528 Filed 12–27–18; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF HOMELAND SECURITY

48 CFR Parts 3019 and 3052

[Docket No. DHS–2018–0024]

RIN 1601–AA83

Rescinding Department of Homeland Security Acquisition Regulation (HSAR) Clause Regarding Small Business Subcontracting Plan Reporting (HSAR Case 2017–001)

AGENCY: Office of the Chief Procurement Officer, Department of Homeland Security (DHS).

ACTION: Final rule.

SUMMARY: This final rule amends the HSAR by removing the HSAR clause regarding small business subcontracting plan reporting because the requirements of this clause duplicate the requirements in a Federal Acquisition Regulation (FAR) clause. The HSAR clause is no longer needed to provide guidance to contractors and DHS proposes to remove the clause from the HSAR.

DATES: *Effective Date:* January 28, 2019.

FOR FURTHER INFORMATION CONTACT: Ms. Candace Lightfoot, Procurement Analyst, DHS, Office of the Chief Procurement Officer, Acquisition Policy and Legislation at (202) 447–0882 or email *HSAR@hq.dhs.gov* for clarification of content. When using email, include HSAR Case 2017–001 in the ''Subject'' line.

SUPPLEMENTARY INFORMATION:

I. Background

In a Notice of Proposed Rulemaking (NPRM) published in the **Federal Register** (83 FR 25638) on June 4, 2018, the Department of Homeland Security, Office of the Chief Procurement Officer, proposed to remove HSAR clause 3052.219–70 and the cross-reference to it found in paragraph (a) of 48 CFR 3019.708–70.

As explained in the NPRM, on December 4, 2003, DHS published an interim final rule to establish the Department of Homeland Security Acquisition Regulation (HSAR). 68 FR 67867 (Dec. 4, 2003). On May 2, 2006, DHS published a final rule, which adopted the interim rule with some changes in response to public comment (HSAR final rule). 71 FR 25759 (May 2, 2006). The HSAR final rule finalized, among other things, HSAR clause 3052.219–70, Small Business Subcontracting Reporting Plan (48 CFR 3052.219–70). HSAR clause 3052.219–70 requires contractors to: (a) Enter the information for the Subcontracting Report for Individual Contracts (formally the Standard Form 294 (SF–294)) and the Summary Subcontract Report (formally the Standard Form 295 (SF–295)) into the Electronic Subcontracting Reporting System (eSRS) at *www.esrs.gov;* and (b) include HSAR clause 3052.219.70 in all subcontracts that include the clause at (FAR) 48 CFR 52.219–9. The eSRS is a web-based system, which replaces the Standard Forms 294 and 295 as the mechanism for submitting reports required by the small business subcontracting program. On June 16, 2010, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council issued a final rule amending the Federal Acquisition Regulation (FAR) to require contractors' small business subcontract reports be submitted using the eSRS, rather than Standard Forms 294 and 295. 75 FR 34260; FAR Case 2005–040 (June 16, 2010). This change to the FAR was issued under Federal Acquisition Circular 2005–42 of June 16, 2010. 75 FR 34291 (June 16, 2010). As a result of the FAR revision HSAR clause 3052.219–70 is no longer needed to provide guidance to contractors on the eSRS requirements. Therefore, DHS is amending the HSAR to remove HSAR clause 3052.219–70 and the cross-reference to it found in paragraph (a) of 48 CFR 3019.708–70.

In addition, DHS is also to amending the authority citation for part 3019 to conform with the authority of the Positive Law Codification of Title 41, United States code, ''Public Contracts''. The new codification of Title 41 was enacted on January 4, 2011.[1]

II. Discussion and Analysis

Interested parties were given until July 5, 2018, to comment on the proposed changes. No public comments were submitted in response to the proposed rule. Accordingly, DHS will adopt the proposal as set forth in the NPRM without change.

III. Executive Orders 12866, 13563, and 13771

Executive Orders 13563 (''Improving Regulation and Regulatory Review'') and 12866 (''Regulatory Planning and Review'') direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Executive Order 13771 (''Reducing Regulation and Controlling Regulatory Costs'') directs agencies to reduce regulation and control regulatory costs and provides that ''for every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process.''

The Office of Management and Budget (OMB) has not designated this rule a ''significant regulatory action,'' under section 3(f) of Executive Order 12866. Accordingly, OMB has not reviewed it.

[1] *See* Public Law 111–350, (Jan. 4, 2011).