

July 19, 2016

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Re: *Business Data Services in an Internet Protocol Environment et al., WC
Docket Nos. 16-143, 15-247, and 05-25 and RM-10593*

Dear Ms. Dortch:

CenturyLink, Inc., AT&T Inc., Frontier Communications Corporation, FairPoint Communications, Inc., Consolidated Communications, and Cincinnati Bell Inc. (collectively, “Movants”) hereby supplement the Motion to Strike filed on June 17, 2016.¹ In that Motion, Movants demonstrated that cable providers’ recent submission of updated data required the Commission to strike from the record any analyses based on the original cable submissions, including the report prepared by the Commission’s independent economist, Dr. Marc Rysman (“Rysman Report”). On June 28, 2016, the Wireline Competition Bureau submitted new materials into the record² that further undermine the validity of Dr. Rysman’s original report, as well as a revised version of the report that itself raises significant new concerns.³ Whatever result the Commission reaches must be based on a fair and lawful process that properly accounts for all relevant information and responds to all of the agency’s statutory obligations. The newly released materials, in contrast, reflect a desire to find shortcuts toward a pre-determined outcome rather than a neutral commitment to evaluate the record evidence. Accordingly, and for the reasons detailed below, the Commission should grant the Motion to Strike and subject the Revised Rysman Report to peer review.

¹ CenturyLink, Inc. et al., Motion to Strike, WC Docket Nos. 16-143 et al. (filed June 17, 2016) (“Motion to Strike”).

² Letter from William Layton, Assistant Division Chief, Pricing Policy Division, Wireline Competition Bureau, FCC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-143 et al. (filed June 29, 2016) (“Layton Letter”).

³ *Id.* at 31 (“Revised Rysman Report”).

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Background. On the afternoon of the day opening comments in response to the FNPRM were due, the Commission released some 228 pages of new material relating to the Rysman Report, including the Revised Rysman Report. Dr. Rysman’s revised report asserts that his prior analysis “was primarily focused on facilities-based fiber competition,” and was therefore “essentially unaffected by [cable providers’] updated submissions,” because those submissions principally concerned “hybrid fiber coaxial cable (HFC) network that is linked to Metro Ethernet (MetroE) capable headends.”⁴ Put differently, Dr. Rysman flatly (and without any analysis or explanation) rejected both (a) the current ability of cable providers to compete with ILEC services using existing HFC plant and (b) the prospect that cable providers could deploy fiber facilities attached to these Metro Ethernet-enabled headends, and the ways in which their ability to do so in the future applies competitive pressure even today. The new record materials also included a pair of peer reviews by Professors Andrew Sweeting and Tommaso Valletti, dated April 26 and 28, respectively.⁵ Those peer reviews evaluated the original Rysman Report, not the Revised Rysman Report (which was issued nearly two months after they were completed). They therefore did not account for Dr. Rysman’s highly questionable approach to the revised cable data.

Dr. Rysman’s dismissal of new cable data is methodologically unsound and irreconcilable with Commission precedent. Dr. Rysman’s summary dismissal of the data showing cable providers’ ability to provision Metro Ethernet in 22 times as many census blocks as previously understood is, at the outset, inconsistent with his own methodology. Both versions of Dr. Rysman’s report presume that ILECs have the ability to compete in the provision of *all* types of BDS throughout their service territories,⁶ based on the fact that ILECs have deployed copper facilities throughout their footprints, even though they do not currently serve BDS

⁴ Revised Rysman Report at 2 n.6. *See also id.* at 2 n.8. In reality, non-fiber facilities played a central role in Dr. Rysman’s analysis. Indeed, all three aspects of his analysis (revenues, locations, prices) incorporated data associated with BDS provided over non-fiber facilities. *See, e.g., id.* at Tables 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 17, 18, 19, 20.

⁵ *Id.* at 11, 24 (“Sweeting Peer Review” and “Valletti Peer Review,” respectively). The FNPRM stated that peer reviews of the Rysman Report would be released “when they are completed.” *Business Data Services in an Internet Protocol Environment*, Tariff Investigation Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 4723, 4792 ¶ 164 (2016) (“FNPRM”). Given that they were completed during the week *before* the FNPRM’s release, it is not clear why they were not made public until the day opening comments were filed, some eight weeks *after* the FNPRM issued.

⁶ *See* Revised Rysman Report at 13, Table 5; *id.* at 15, Table 7. In this regard, Rysman’s suggestion that his prior analysis was “primarily focused on facilities-based fiber competition,” *id.* at 2 n.6, is simply incorrect, because his original and revised reports both rely on the assumption that ILECs – which lack fiber in most locations – provide BDS using copper facilities.

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customers in most locations, and have deployed fiber facilities only to a minority of buildings.⁷ These ILEC facilities “count” even when the provider must deploy additional plant to provision fiber-based BDS. But in the case of *cable* providers, he now adopts the contrary position: the presence of legacy facilities and the ability to upgrade to fiber does *not*, in his view, render a cable provider a relevant competitor in the provision of BDS.⁸ There is simply no basis for this arbitrary and contradictory approach.⁹

As the Motion to Strike explained, the Commission and the Wireline Competition Bureau (“Bureau”) have also emphasized the importance of potential competition generally and cable

⁷ See Joint Comments of CenturyLink, Inc., et al., WC Docket No. 16-143 et al., at 27-28 (filed June 28, 2016); see also Reply Comments of CenturyLink, WC Docket No. 05-25, RM-10593, at 39 n.137 (filed Feb. 19, 2016) (“CenturyLink Feb. 19 Reply Comments”) (citing Declaration of Julie Brown and David Williams ¶ 17 (“Brown/Williams Decl.”)).

⁸ See, e.g., Revised Rysman Report at 11 n.25 (noting that the revised report “excludes competition ... over an HFC network connection except where an active BDS or managed service sale was made”).

⁹ A “Staff Memorandum” issued by the Bureau suggests that cable facilities “did not appear to be a significant source of competition in 2013.” Staff Memorandum Attachment 3 at 1 (attached to Layton Letter at 168). The staff analysis, however, does nothing to address the concerns raised in the Motion to Strike or this letter, for two reasons. First, the Commission has held Dr. Rysman’s evaluation up as an *independent* analysis, indicating that he would “provide advice” to the agency. News Release, FCC, *FCC Takes Major Step in Review of Competition in \$40 Billion Special Access Market* (Sept. 17, 2015) (“Rysman News Release”). In order to serve as an independent justification for Commission action, the Rysman Report must stand on its own, and its methodology must be sound absent reliance on agency prejudgments regarding core issues. It would be entirely circular for the Commission to rely on the advice of an outside expert when that expert’s methodology and conclusions stemmed directly from the Commission’s own interpretations of the data. Second, the Staff Memorandum’s conclusion is based on an argument that Dr. Rysman himself has repudiated. Specifically, the Staff Memorandum states that “[i]f this cable infrastructure was having an influence on the ability to exercise market power, we would expect to observe that for products and areas where there is evidence of incumbent local exchange company (ILEC) market power (a statistically significant negative effect of facilities-based competition variables on ILEC prices) that the presence of the cable infrastructure has a statistically negative effect on prices.” Staff Memorandum, Attachment 3, at 1. It then determines that regression analysis shows little change in BDS pricing resulting from the presence of cable facilities, and that this means that potential competition from HFC facilities did not constrain ILEC prices. See Staff Memorandum, Attachment 3, at 6. But this presumption – that the absence of price reductions indicates continued market power notwithstanding cable entry – explicitly conflicts with the central premise underpinning Dr. Rysman’s report, which is that “if market power did not exist, for instance because the threat of entry held down prices in all local markets, we would not necessarily see any further decrease in price when actual entry did occur.” Revised Rysman Report at 2. In short, the Staff Memorandum takes evidence that Rysman believes demonstrates the absence of market power to signify exactly the opposite. Thus, the Staff Memorandum’s conclusions regarding cable competition cannot be used to justify Dr. Rysman’s disregard for HFC deployments.

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HFC networks in particular in evaluating the BDS marketplace.¹⁰ For example, in the 2013 *Data Collection Implementation Order*, the Bureau explained that it was “particularly interested in *Connections* that have been upgraded to business class Metro Ethernet (or its equivalent)” – regardless of whether they were currently being used to provide fiber-based service – because it “is reasonable to assume that such upgrades were made based on strong expectations as to the likelihood of sufficient demand for *Dedicated Service* and are sources of potential competition.”¹¹ Just two months ago, the Commission again underscored that cable providers had been required “to report all *Locations* with *Connections* owned or leased as an *IRU* that are connected to a *Node* (i.e., headend) that has been upgraded or was built to provide Metro Ethernet (or its equivalent) service, . . . regardless of the service provided over the *Connection* or whether the *Connection* is idle or in-service.”¹² The FNPRM issued in May, for its part, describes the competitive market test – the “core of the Commission’s proposal” – as being based on *both* “current and potential competition,”¹³ says that “competitive entry *and potential competition* are bringing material competitive benefits,”¹⁴ and emphasizes that “facilities-based competitors (both actual and potential)” must be relevant to any determinations.¹⁵ Likewise, in words that were meant to support the methodology of the *original* Rysman Report but that stand as a rebuke to the revised paper, peer reviewer Professor Sweeting stated that it is “quite standard” to “look[] at whether rivals are present in close proximity to customers.”¹⁶ Dr. Rysman’s decision to dispense with (rather than grapple with) the new evidence (including evidence of Metro Ethernet-capable headends “in close proximity to customers”) contravenes all of these points.

Dr. Rysman’s new approach also conflicts with cable providers’ own representations regarding their ability to provide service following their real, substantial, sunk investments in the marketplace.¹⁷ While these providers suggest in the abstract that their HFC-based offerings are

¹⁰ See, e.g., Motion to Strike at 23-25.

¹¹ *Special Access for Price Cap Local Exchange Carriers*, Report and Order, 28 FCC Rcd 13189, 13200-01 ¶ 26 (WCB 2013) (“*Data Collection Implementation Order*”) (citation omitted).

¹² FNPRM, 31 FCC Rcd at 4739 ¶ 34, quoting *Data Collection Implementation Order*, 28 FCC Rcd at 13199 ¶ 23. See also FNPRM, 31 FCC Rcd at 4834 ¶ 250 (noting that the Bureau had defined connections as capable of providing a dedicated service for data reporting purposes when they are connected to a Metro Ethernet-capable headend).

¹³ FNPRM, 31 FCC Rcd at 4726 ¶ 5.

¹⁴ *Id.* at 4725 ¶ 3 (emphasis added).

¹⁵ *Id.* at 4738 ¶ 30.

¹⁶ Sweeting Peer Review at 3 ¶ 6.

¹⁷ See, e.g., Press Release, Comcast, *Comcast Business Announces New Unit Targeting Fortune 1000 Enterprises* (Sept. 16, 2015), <http://corporate.comcast.com/news-information/news-feed/comcast-business-announces-new-unit-targeting-fortune-1000-enterprises> (reporting Comcast’s new business unit

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not substitutes for ILEC BDS services, their concrete representations to investors, potential customers, and even the Commission show that cable companies are using their existing plant to provide real competition to ILEC BDS offerings, and are both willing and able to extend fiber to interested customers as the marketplace requires. Comcast, for example, boasts of its “broadly available” BDS offerings, explaining that its dedicated Internet access service is “easily scalable and can grow alongside a business without requiring the addition of new lines” and “typically costs less per Mbps than DS-1 or DS-3 services.”¹⁸ Charter has told the Commission that, as a result of its fiber investments, “business services has been one of the fastest growing areas” within the company, with year-over-year revenue growth averaging just under 20 percent.¹⁹ Cox states that it has “been a leader in providing Ethernet service.”²⁰ NCTA states that cable companies are “extend[ing] BDS facilities to new buildings on a daily basis, replacing rapidly vanishing TDM services with superior Ethernet technology and leading the way in the IP transition.”²¹ Cable providers are not alone here: Sprint, for example, has announced plans to provision Ethernet over DOCSIS, relying on existing cable plant, as part of its strategy to offer Ethernet access to “95 percent of the country.”²² CenturyLink has also put voluminous evidence on the record showing that it purchases HFC-based Ethernet access services from cable providers and treats those as interchangeable with fiber-based Ethernet access services for a substantial

specifically marketing and selling enterprise services to Fortune 1000 companies nationwide); Thomson Reuters StreetEvents, *CMCSA – Q3 2015 Comcast Corp. Earnings Call*, Edited Transcript, at 9 (Oct. 27, 2015) (Neil Smit, President & CEO of Comcast Cable Communications, stating that Comcast is targeting “large enterprises that have 300 locations or more,” and that the company provides managed services “to more than 20 large enterprise companies and ha[s] already signed multiple eight figure deals.”); Charter, Spectrum Business, *Carrier Solutions*, <https://business.spectrum.com/content/carrier> (last visited June 16, 2016) (explaining that Charter had more than 10,000 fiber-lit buildings in early 2014; it currently has 12,000+ fiber lit buildings and 3,800 lit cell towers); Sean Buckley, *U.S. Fiber Penetration Reaches 39.3% of Buildings, Says VSG*, FierceTelecom (Apr. 4, 2014), <http://www.fiercetelecom.com/story/us-fiber-penetration-reaches-393-percent-buildings-says-vsg/2014-04-04> (reporting that Cox had, as of early 2014, “28,000 fiber lit buildings [and] 300,000 HFC serviceable buildings”).

¹⁸ Comments of Comcast Corporation, WC Docket No. 16-143 et al., at 11 (filed June 28, 2016).

¹⁹ Charter Communications, Inc. Response to FCC’s Information and Data Request, MB Docket No. 15-149, at 18 (filed Oct. 16, 2015).

²⁰ Comments of Cox Communications, Inc., WC Docket Nos. 16-143 & 05-25, at 8 (filed June 29, 2016).

²¹ Comments of the National Cable & Telecommunications Association, WC Docket Nos. 16-143 & 05-25 (filed June 29, 2016). NCTA also calls the Ethernet market “enormously competitive” (a fact it attributes to cable companies), *id.* at 4-5, and explains the ways in which “Ethernet services” such as those that its members provide “are superior” to legacy services, *id.* at 5.

²² See Sean Buckley, *Sprint ropes in Ethernet over Copper, Ethernet over DOCSIS into Ethernet strategy*, FierceTelecom (May 15, 2016), <http://www.fiercetelecom.com/story/sprint-ropes-ethernet-over-copper-ethernet-over-docsis-ethernet-strategy/2016-05-15>.

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portion of the Ethernet-based services it provides outside its ILEC footprint.²³ This evidence shows Dr. Rysman's decision to simply ignore HFC facilities to have been a convenient short-cut on the path to a pre-determined result, not a dispassionate analysis of new facts.

The Commission must, at the very least, submit the revised Rysman report to new peer review and seek comment on the resulting evaluations. Whether or not Dr. Rysman's choice to ignore Metro Ethernet-enabled cable headends currently served via HFC was sound, there can be no dispute that the Revised Rysman Report's validity turns on that choice. Dr. Rysman has now determined that data showing a 22-fold increase in the number of census blocks enjoying actual and/or potential competition from cable providers as of 2013 is simply not pertinent to his "examin[ation]" of "the nature of competition and marketplace practices in the supply of special access services."²⁴ This is precisely the type of methodological decision that peer review is designed to assess – a point that the Bureau has recognized in this proceeding²⁵ and that is reflected in the peer reviews the Commission has now made public.²⁶ Because the evaluations were completed long *before* Dr. Rysman made his choice regarding the subsequent cable filings, however, those analyses are by definition incomplete.

Reliance on the Revised Rysman Report absent renewed peer review would therefore violate the Administrative Procedure Act ("APA"), for it "is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data."²⁷ This problem is compounded here by parties' inability to comment meaningfully on the Revised Rysman Report or on any peer review accounting for the revised report's methodology. As the D.C. Circuit has emphasized, the "opportunity for comment must be a *meaningful* opportunity,"²⁸ and "[a]n agency commits serious procedural error when it fails to reveal portions of the technical basis for

²³ See, e.g., Reply Declaration of Carla Stewart, attached as Exhibit 3 to Comments of CenturyLink, Inc., WC Docket No. 05-25 & RM-10593, at ¶¶ 2, 4, 9 (filed Jan 28, 2016).

²⁴ Rysman News Release.

²⁵ See, e.g., Memorandum from Matthew S. DelNero, Chief, Wireline Competition Bureau, to Andrew Sweeting, Associate Professor, University of Maryland, *Peer Review of Analysis of the White Paper "Empirics of Business Data Services" by Dr. Marc Rysman (April 2016)*, at 2 (Apr. 14, 2016) ("WCB Peer Review Memo") ("The objective of this peer review is to establish whether the [Rysman Report] provides a solid foundation for analyzing the data collected in the BDS rulemaking proceeding.") (attached to Layton Letter at 4).

²⁶ See, e.g., Sweeting Peer Review at 1, ¶ 2, 3 ¶ 8, 12-13 ¶¶ 26-27 (addressing methodological underpinnings of the original Rysman Report); Valletti Peer Review at 2-7 (same).

²⁷ *Portland Cement Ass'n v. Ruckelhaus*, 486 F.2d 375, 393 (D.C. Cir. 1973).

²⁸ *Gerber v. Norton*, 294 F.3d 173, 179 (D.C. Cir. 2002) (emphasis added).

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a proposed rule *in time to allow for meaningful commentary*.”²⁹ The Commission has failed to do so here, and can only cure this defect by producing new peer reviews and allowing parties to comment on the revised report and those evaluations.

Failure to seek new peer reviews and put those reviews out for comment would also exacerbate the Commission’s violation of the Data Quality Act (“DQA”). OMB has emphasized the critical importance of peer review in ensuring the “quality, reliability, objectivity and utility” of data and studies on which an agency relies, and emphasized that “[p]ublic comments can be important in shaping expert deliberations.”³⁰ As the Bureau recognized in its memo to potential peer reviewers, the DQA required the Commission to obtain peer review of the Rysman Report.³¹ As it now stands, the current version of that report has not been subject to such review, and parties have been unable to comment on any such reviews. If the Commission does not take such steps, it cannot rely on the Rysman Report or the Revised Rysman Report in any final decision.³²

* * *

For all these reasons, the Movants again ask the Commission to grant their Motion to Strike. In addition, the Commission must subject Dr. Rysman’s new analysis to new peer reviews and publish the results for comment. These steps are not discretionary, but rather mandated by the APA, the DQA, and basic notions of procedural due process. Failure to take them would preclude reliance on either the original Rysman paper or the revised analysis in any final Commission order.

²⁹ *Conn. Light & Power Co. v. Nuclear Reg. Comm’n*, 673 F.2d 525, 530-31 (D.C. Cir. 1982) (emphasis added).

³⁰ Office of Management and Budget, *Final Information Quality Bulletin for Peer Review*, 70 Fed. Reg. 2664, 2670 (Jan. 14, 2005) (“OMB Bulletin”).

³¹ See WCB Peer Review Memo at 2.

³² Even new reviews and new opportunities for comment might be insufficient to fully cure the defects at issue here. As OMB has made clear, “it is important to obtain peer review *before* the agency announces its regulatory options so that any technical corrections can be made before the agency becomes invested in a specific approach or the positions of interest groups have hardened,” and “[i]f review occurs too late, it is unlikely to contribute to the course of a rulemaking. OMB Bulletin, 70 Fed. Reg. at 2668 (emphasis added).

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