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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

Business Data Services in an Internet Protocol Environment)	WC Docket No. 16-143
)	
Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans)	WC Docket No. 15-247
)	
Special Access for Price Cap Local Exchange Carriers)	WC Docket No. 05-25
)	
AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services)	RM-10593
)	

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EXECUTIVE SUMMARY

Agency rulemaking decisions must be grounded on a sound factual basis. Studies on which an agency relies must be based on accurate facts, for even a perfect methodology will produce useless results if applied to erroneous data. It has now become clear that the report prepared by Dr. Marc Rysman for use in this rulemaking, as well as nearly all other analyses submitted into the record, were based on an irretrievably flawed data set that severely understated cable providers' ability to provision true business data services ("BDS"). The record now shows that the major cable providers were able to provide Metro Ethernet – *not* what the Commission calls "best efforts" service – in *22 times* as many census blocks in 2013 as was reflected in the original data set on which the Rysman Report and many other analyses were based. The Administrative Procedure Act, the Data Quality Act, and bedrock principles of evidence require that these materials be stricken from the record. Indeed, given the central role the Rysman Report plays in the Commission's proposals, the agency should rescind the aspects of the May 2 FNPRM that cited or relied upon them, allowing the Commission and parties to conduct new analyses reflecting *accurate* data regarding the state of the marketplace. The Commission should then develop and seek comment on new proposals as appropriate.

The Commission has for years placed its mandatory data collection at the heart of its efforts to reform the BDS regulatory regime, repeatedly underscoring its interest in a data-driven framework reflecting the true state of competitive deployment. Chairman Wheeler, Acting Chairwoman Clyburn, and Chairman Genachowski all touted the data collection's centrality to this proceeding. The May 2 FNPRM fulfilled these promises – its analysis and proposals were based entirely on the initial data set and analyses of that data set.

It recently became apparent, however, that the original data set analyzed by Dr. Rysman and others had radically undercounted the availability of true Ethernet cable offerings. Indeed, data placed into the record just last week show that the four largest cable providers in 2013 were able to provide Metro Ethernet in *22 times* as many census blocks as had previously been reported. The Commission and the Wireline Competition Bureau have thus far downplayed or misunderstood the significance of the flawed data set, but there is no basis for doing so: The record now shows that the largest cable providers had upgraded their facilities to provide Metro Ethernet service (which the Commission has been clear is a true substitute for ILEC BDS) virtually everywhere in 2013. Even absent legal compulsion, the Commission should recognize that the public would be best served by granting the relief sought herein. Here, though, the Commission also *does* face an overwhelming legal compulsion to grant this relief.

First, the Administrative Procedure Act ("APA") demands that the evidence at issue be stricken from the record. In the D.C. Circuit's words, "[i]t is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data." Thus, courts have regularly invalidated agency actions that are based on flawed data or studies, or that lack a valid factual basis. The Commission itself has often been reversed for reliance on flawed evidence or analyses, in contexts ranging from the cable subscribership cap to the computation of the price-cap "X Factor" to the interference standards for broadband-over-powerline to broadcast ownership limits. These precedents make clear that the Commission may not rely on the

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Rysman Report or other analyses based on the original data set, which understated cable providers' ability to provision Metro Ethernet service by a factor of more than 20. Moreover, the Bureau's attempt to respond to this point in its June 8 *Extension Denial* utterly fails: The Bureau wrongly assumed that the new data concerned so-called best efforts service, and was thus (under the Commission's theory) not pertinent to the agency's analysis. In fact, as discussed herein, the new data's most important revelation concerns true Metro Ethernet service. Nor is there any basis for the Bureau's suggestion that parties can adequately analyze the new data set in the three weeks between when it was made available for review and when comments are due: It took Dr. Rysman himself six months to analyze the original data set, even with help from Commission staff. Simply put, the APA precludes reliance on the Rysman Report and similar analyses, and requires that parties be provided meaningful opportunity to review the new data and any Commission analyses or proposals based on those data.

Second, reliance on the Rysman Report and related studies is barred by the Data Quality Act ("DQA"). That statute requires the Commission to ensure that it maximizes the "quality, objectivity, utility, and integrity of information (including statistical information)" on which it relies in its decisions and demands that studies on which the agency relies be subjected to peer review. The Commission has declared that it is "dedicated to ensuring that all data it disseminates reflect a level of quality commensurate with technical information" and information and analyses on which it relies "shall be generated [and] developed[] using sound statistical and research methods." It should go without saying that analyses accounting for only one out of every 22 census blocks in which ILECs' principal competitors in the BDS marketplace were able to provide Metro Ethernet service in 2013 are fundamentally unsound. In addition, the Rysman Report has not been peer reviewed. While the Commission has committed to such review, it is not clear when it will be completed, or whether parties will be afforded a meaningful opportunity to comment on the review(s), as the Commission previously has recognized they must. The DQA thus bars reliance on the materials at issue.

Third, the materials at issue here would be inadmissible in federal court under the Federal Rules of Evidence, and should be excluded here as well. The courts have held that an expert opinion based on inaccurate facts is inadmissible under those rules, even where the methodology would be sound if applied to accurate data, because (in the Supreme Court's words) expert testimony must be "sufficiently tied to the facts of the case," such that it will assist the trier of fact to understand the evidence or determine a fact in issue. The principles reflected by the rules and court decisions applying them forbid introduction of the Rysman Report and similar analyses here. These materials obviously are *not* based on sufficient facts or data and are have been rendered unreliable by the underlying data on which they are premised. While the Commission is not a federal court, it *has* consulted the Federal Rules of Evidence in previous rulemaking proceedings, and should follow their guidance here.

For the reasons discussed above, the foundation on which the Commission intends to set its BDS framework is irredeemably flawed. The Commission can and must take remedial action to ensure that whatever regime it adopts serves the public interest and can withstand legal scrutiny. For the reasons presented herein, the Commission should (1) strike from the record the Rysman Report and other studies based on the flawed data set; (2) rescind the portions of the

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FNPRM that have been compromised by reliance on the Rysman Report and the flawed data set; (3) prepare or commission a new analysis to replace the Rysman Report, reflecting the corrected data set, and allow parties to do the same; and (4) put those new proposals and analyses out for comment.

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The most fundamental precept guiding rulemakings is that the agency’s decisions must be grounded on a sound factual basis. One corollary of this edict is that studies on which the agency relies must also be based on accurate facts, for even a perfect methodology will produce useless results if applied to erroneous data. In recent weeks, it has become clear that the report prepared by Dr. Marc Rysman for use in the instant proceeding,¹ as well as nearly all the other analyses submitted into the record, were based on an irretrievably flawed data set that severely understated cable providers’ ability to provision Metro Ethernet.² Specifically, the record now

¹ *Business Data Services in an Internet Protocol Environment*, Tariff Investigation Order and Further Notice of Proposed Rulemaking, FCC 16-54 (WCB rel. May 2, 2016) (“FNPRM”), App. B 197-243, Marc Rysman, *Empirics of Business Data Services*, White Paper (Apr. 2016) (“Rysman Report”).

² The IRW Study sponsored by seven ILECs, including CenturyLink, AT&T, FairPoint, and Frontier, combined the results of the Commission’s data collection with other data, including data from the National Broadband Map. As a result, the IRW Study reflected extensive cable deployment not accounted for by the Rysman Report or other analyses of the data. That assumption was based on the view that cable business Internet access service was a substitute for

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shows that the major cable providers were able to provide true business data services (“BDS”) through Metro Ethernet (*not* what the Commission calls “best efforts” service³) in 22 *times* as many census blocks as was reflected by their original responses to the agency’s data request.⁴ As a result, the Rysman Report and several other analyses based on the original data set are thoroughly compromised. CenturyLink, Inc., AT&T Inc., Frontier Communications Corporation, FairPoint Communications, Inc., Consolidated Communications, and Cincinnati Bell Inc. (collectively, “Movants”) hereby move the Commission to strike these materials from the record. Indeed, given the degree to which these analyses form the basis for the May 2, 2016 FNPRM, the Commission should rescind applicable portions of that Notice. Parties can then

ILECs’ BDS offerings. Mark Israel, Daniel Rubinfeld, and Glenn Woroch, Competitive Analysis of the FCC’s Special Access Data Collection (filed Jan. 27, 2016 by Compass Lexecon) (“IRW Study”). Movants recognize that the Commission might not agree with that view, but that dispute now appears to be moot, because – as described herein – new evidence shows that at least some major cable providers (and, in Movants’ experience, likely all of them) were, as of 2013, able to provide true Metro Ethernet service ubiquitously or nearly ubiquitously in all areas where they provided so-called “best efforts” service. Thus, the IRW Study assumed cable presence in the areas that now appear to be serviceable by cable Metro Ethernet facilities. That study therefore need not be stricken from the record.

³ Given the extensive service guarantees now provided with DOCSIS-based BDS, the term “best efforts” does not accurately describe such offerings. For ease of reference, because that issue is beside the point here (indeed, the new information shows that the debate over “best efforts” cable service is irrelevant, given the apparent ubiquity of true cable Metro Ethernet), Movants use the term “best efforts” here. Movants do not intend for this usage to suggest their agreement that the term properly reflects the capabilities of these services.

⁴ See Declaration of Glenn Woroch and Robert Calzaretta, WC Docket No. 16-143 *et al.* (June 17, 2016) (attached hereto). This figure aggregates data submitted by Comcast, Cox, Charter, and Time Warner Cable. Specifically, the number of census blocks in which these four companies had upgraded their facilities to be capable of providing Metro Ethernet service as of 2013 was 22 times as high as initially reported.

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conduct new analyses reflecting accurate data regarding the state of the marketplace, and the Commission can develop and seek comment on new proposals as appropriate.

The gap between the “factual” materials at issue and reality can only be described as gargantuan: As noted, cable providers now appear to have been capable of providing true Metro Ethernet service in roughly 22 times as many locations in 2013 as originally reported. Under these circumstances, the Commission has no choice but to start over. The Administrative Procedure Act and Data Quality Act preclude agency reliance on evidence as badly compromised as that here. Such evidence also would be inadmissible in a court of law under the Federal Rules of Evidence. Moreover, once the evidence is stricken, there will be no basis for the FNPRM’s analysis or its proposals that rely on that evidence. The Commission has promised for nearly five years a policy framework based on its data collection, and the FNPRM is based largely on assumptions drawn from the flawed analyses that must be removed from the record. If the Commission is serious about its commitment to a data-driven regime – as it should be – it must reconsider its proposals in light of the new evidence, and set forth a new plan, allowing parties sufficient time to comment on the new data set, the new analysis, and the new proposals alike. Failure to do so would deny parties due process of law, and any resulting rules would be arbitrary and capricious.

Ultimately, the Commission’s position is akin to that of a builder who, after years of planning, has poured a foundation for a new high-rise office building and announced a completion date, only to find that the foundation is irreparably flawed. The builder has two choices: It can move forward, citing its self-imposed deadline but knowing full well that the foundation simply cannot support the edifice it has promised to construct, or it can remove the faulty foundation and replace it with one on which its tower can stand. Like the builder, the

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Commission now knows that the foundation for its planned Order – the economic analysis based on the original data set it collected – is fundamentally deficient. Like the builder, it surely would like to move forward and meet its targeted completion date. But just like the builder, the Commission has only one *real* choice: It must scrap the inadequate foundation and construct a new one capable of supporting any regulatory framework it hopes to construct. It must acknowledge that the Rysman Report, and other studies based on the original data, are fundamentally flawed and must be stricken from the record here, and that the FNPRM, which is based on them, must itself be withdrawn and reconsidered. A competent builder would surely understand that there is nothing to be gained by completing a building that is doomed to collapse on its deficient foundation. The Commission should be just as wise here, and ensure that its construct is built on solid data, capable of enduring over the years to come.

BACKGROUND

This proceeding's history makes four points clear: (1) the Commission has for many years placed the data collection at the center of its efforts to reform the BDS regulatory regime; (2) the FNPRM and its proposals were, indeed, largely based on the initial data set and analyses of the data; (3) it then became apparent that the data set analyzed by Dr. Rysman and others radically undercounted the near-ubiquitous availability of facilities capable of providing true Ethernet (*not* “best efforts”) cable offerings, which we now know were *22 times* as prevalent in 2013 as had been reported; and (4) the Commission and Wireline Competition Bureau have thus far misunderstood the significance of the flawed data set.

1. The Commission Has Long Intended the Data Collection to Form the Basis for Any Regulatory Action. For over a decade, the Commission has emphasized that its regulatory framework for BDS would be premised on accurate, reliable, and comprehensive data. When the

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agency launched this rulemaking in 2005, it emphasized “our ongoing commitment to ensure that our rules, particularly those based on predictive judgments, remain consistent with the public interest as evidenced by empirical data.”⁵ To that end, the Commission set out to develop an extensive record that it sought to update as the marketplace evolved, including through the initially voluntary submission of data.⁶

When the Commission initiated the mandatory data collection at issue here, it left no doubt its intent that the resulting data set would serve as its lodestar for the rest of the proceeding. The agency made clear that its “goal is to ensure a comprehensive and detailed data collection,” determining that this data, in conjunction with a market analysis, “will best assist the Commission in evaluating market conditions for special access services and determining what regulatory changes, if any, are warranted in light of that analysis.”⁷ The data collection received unanimous support from then-Chairman Genachowski and all of the sitting Commissioners –

⁵ *Special Access Rates for Price Cap Local Exchange Carriers*, Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 1994, 2019 ¶ 71 (2005) (citation omitted); *see also, e.g., id.* at 2035 ¶ 128 (same); *id.* at 1996 ¶ 5 (“[W]e will examine whether the available marketplace data support maintaining, modifying, or repealing” the special access rules).

⁶ *See generally id.* at 2019-34 ¶¶ 73-127 (requesting empirical data, including econometric studies, on a variety of issues); *Parties Asked to Refresh the Record in the Special Access Notice of Proposed Rulemaking*, Public Notice, 22 FCC Rcd 13352, 13352-53 (WCB 2007) (inviting parties to refresh the record in light of “the continued expansion of intermodal competition” and other marketplace developments); *Data Requested in Special Access NPRM*, Public Notice, 25 FCC Rcd 15146 (WCB 2010); *Competition Data Requested in Special Access NPRM*, Public Notice, 26 FCC Rcd 14000 (WCB 2011).

⁷ *Special Access for Price Cap Local Exchange Carriers*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 16318, 16340 ¶ 53, 16345 ¶ 66 (2012) (“2012 *Special Access Order*”).

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three of whom remain in their positions today. Several Commissioners called the data collection the “foundation” for any further action.⁸

The Commission tasked the Wireline Competition Bureau (“Bureau”) with designing the data collection, which would require ILECs, CLECs, cable operators, and others to respond to specific questions about the number and locations of certain facilities, information about billing, and other issues. The Bureau reiterated that the Commission would use the data to “update its rules to ensure that they reflect the state of competition today and promote competition.”⁹ And then-Acting Chairwoman Clyburn declared the Bureau’s initial release of instructions for the collection “an important step forward in our data-driven examination of the marketplace for these services.”¹⁰ Chairman Wheeler committed to “move forward with data collection and fact-based analysis that will help the Commission better understand competition in this marketplace,

⁸ *Id.* at 16436 (Statement of Chairman Julius Genachowski) (calling the data collection “a strong and careful foundation for our action on this vital issue”); *id.* at 16439 (Statement of Commissioner Mignon Clyburn) (calling the order implementing the data collection and seeking comment on it “important next steps for analyzing the state of the marketplace” and that the data collection would facilitate a “data-driven” decision); *id.* at 16440 (Statement of Commissioner Jessica Rosenworcel) (“Through the data collection and rulemaking we initiate today, it is my hope that we can lay the foundation for a new system that promotes competition, investment, and deployment of high-capacity services across the country.”); *id.* at 16442 (Statement of Commissioner Ajit Pai Approving in Part and Dissenting in Part) (expressing his “hope that the data we collect will be sufficient to analyze the marketplace fully and complete this proceeding”).

⁹ *Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Report and Order, 28 FCC Rcd 13189, 13223 App. A (WCB 2013) (“*Data Collection Implementation Order*”).

¹⁰ News Release, *Statement from Acting Chairwoman Mignon Clyburn on Special Access Data Collection Order* (rel. Sept. 18, 2013); *see also id.* (stating that the collection “will give the Commission the detailed and comprehensive data we need to conduct a robust analysis of the entire special access market”).

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and the impact on consumers as we pursue the Commission’s statutory mandate to ensure special access services are provided at reasonable rates and on reasonable terms and conditions.”¹¹ The Bureau, for its part, emphasized that the “collection is *vital* to the Commission’s efforts to reform” its rules.¹²

Once the data had been collected and made available through the enclave in September 2015, the Commission commenced its analysis of the data just as seriously as it pursued the collection of it. In what it described as a “major step” in its process, the Commission engaged Dr. Marc Rysman to “produce a White Paper examining the nature of competition and marketplace practices in the supply of special access services.”¹³ During the subsequent review process, the Bureau issued a series of extensions to permit parties sufficient opportunity to review, analyze, and comment on the extensive data that had been collected (including when new data was added to the secure enclave),¹⁴ reflecting its continued view that the data collection was “a critical piece of the evidentiary record necessary for reforming the Commission’s business

¹¹ News Release, *Statement from FCC Chairman Tom Wheeler on OMB Approval of Special Access Data Collection* (rel. Aug. 18, 2014). The introduction to the news release described the data collection as “a plan to collect data from providers and purchasers of special access service for the purpose of conducting a comprehensive evaluation of competition in the marketplace.” *Id.*

¹² *Special Access for Price Cap Local Exchange Carriers*, Order on Reconsideration, 29 FCC Rcd 10899, 10899 ¶ 1 (WCB 2014) (emphasis added).

¹³ News Release, *FCC Takes Major Step in Review of Competition in \$40 Billion Special Access Market* (rel. Sept. 17, 2015). It also began to make the data available for public inspection through the Commission’s secure data enclave vendor, NORC – The University of Chicago (“NORC”). *See id.*

¹⁴ *See, e.g., Special Access for Price Cap Local Exchange Carriers*, Order, 30 FCC Rcd 14467, 14471 ¶ 15 (WCB 2015) (seeking to ensure “that commenters will have ample time to review and supplement any already-conducted analyses” after new data is made available); *Special Access for Price Cap Local Exchange Carriers*, Order, 30 FCC Rcd 12298 (WCB 2015).

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data services rules.”¹⁵ Numerous ILECs and CLECs invested considerable time and resources to prepare their own analyses of this data, which they submitted into the Commission’s record in January and February of this year.¹⁶

2. *The FNPRM and Its Proposals Were Premised Substantially on the Rysman Report and Other Analyses of the Original Data Set.* The Rysman Report was premised nearly entirely on the original data set. The FNPRM, in turn, reflected (and was affected by) the under-counting of cable providers’ ability to provision Metro Ethernet. From page one, and continuing throughout its nearly 200 pages, the FNPRM relied on and restated assumptions regarding the state of the BDS marketplace – and of particular relevance here, the state of cable Ethernet deployment – stemming from the Rysman Report and other evaluations of the data the Commission had collected. For example:

- The FNPRM stated without so much as a citation that “[c]ompetition in [the BDS] marketplace is uneven,” and “remains stubbornly absent” in connection with some products and some locations.¹⁷

¹⁵ *Special Access for Price Cap Local Exchange Carriers*, Order, 31 FCC Rcd 152, 152 ¶ 2 (WCB 2016) (citation omitted); *Special Access for Price Cap Local Exchange Carriers*, Order, 30 FCC Rcd 13412, 13412 ¶ 2 (WCB 2015) (same); *Special Access for Price Cap Local Exchange Carriers*, Order and Modified Data Collection Protective Order, 30 FCC Rcd 10027, 10028 ¶ 2 (WCB 2015) (same).

¹⁶ *See, e.g.*, IRW Study; Declaration of Jonathan B. Baker on Market Power in the Provision of Dedicated (Special Access) Services, (Jan. 22, 2016) (attached to Letter from Jonathan Baker to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 (filed Jan. 27, 2016)) (“Baker Declaration”); Declaration of Susan M. Gately (filed Jan. 28, 2016) (“Gately Declaration”) (Attach. 1 to Ad Hoc Telecommunications Users Committee Comments); Declaration of Stanley M. Besen and Bridger M. Mitchell (filed Jan. 27, 2016) (“Besen/Mitchel Declaration”) (attached to Comments of Sprint Corp., WC Docket No. 05-25 & RM-10593 (filed Jan. 27, 2016) (“Sprint Comments”)).

¹⁷ FNPRM ¶ 3.

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- The FNPRM’s discussion of “geographic concentration” relied on the original data set’s information regarding cable deployment of BDS. For example, Table 3, which purports to summarize the number of suppliers per unique location, was based on Dr. Rysman’s evaluation of cable Ethernet suppliers.¹⁸
- The FNPRM assumed that “[c]able providers encounter ... barriers to entry” similar to those faced by other competitors.¹⁹
- Based on “[its] own analysis, the Rysman White Paper, and the Baker Declaration,” the FNPRM found “direct evidence of [ILEC] market power in the supply of various services.”²⁰
- The FNPRM asserted that “the National Broadband Map ... may overstate ... the capabilities of cable,” because the map reports DOCSIS connections rather than Metro Ethernet-enabled connections.²¹
- The FNPRM asserted that “[t]he new framework, as proposed, builds on the analysis of the *2015 Collection*” of 2013 data.²²

The FNPRM, in short, was shot through with conclusions and assumptions premised on the Rysman Report and similar analyses, all of which were based on the original data set.

3. It Is Now Clear That Cable Providers Were, in 2013, Capable of Provisioning True Metro Ethernet Service in 22 Times As Many Locations as Reflected by the Original Data Set.

Immediately before the Commission adopted its FNPRM, however, evidence arose that the original data set – and, hence, the evaluations that relied on it and the FNPRM itself – suffered from a grave and systemic flaw that had led to extreme understatement of the extent to which

¹⁸ See *id.* ¶ 220 Table 3; *id.* ¶¶ 219-223.

¹⁹ *Id.* ¶ 231.

²⁰ *Id.* ¶ 237.

²¹ *Id.* ¶ 251.

²² *Id.* ¶ 270.

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cable providers were able to provide Metro Ethernet service.²³ In late April (just one week before the FNPRM was released, and months after other parties had submitted their economic studies), Comcast Corporation – the largest cable company in the country – filed an *ex parte* letter explaining that, in response to the data collection, it had not reported locations connected to nodes that had been physically upgraded to enable the provision of Ethernet-over-HFC service as of 2013.²⁴ Subsequently, Comcast filed a list of all business locations that could be served via Metro Ethernet-enabled headends in 2013.²⁵ Each of the other major cable companies – Cox Communications, Charter Communications, and Time Warner Cable (just before Commission approval of its acquisition by Charter) – revealed that they had made the same omission as

²³ In prior comments, various parties emphasized that the data collection suffered from various methodological shortcomings, which limited the data’s reliability as a measure of competition in the provision of business data services. For instance, by design, it only collected data from 2013, thus excluding from consideration a number of critical marketplace developments – most notably, the rapid ascent of cable operators as a competitive force. *See, e.g.*, Comments of CenturyLink, WC Docket No. 05-25, at 3 (filed Jan. 28, 2016) (noting cable industry’s year-over-year growth in commercial services revenue of 25 percent, compared to a reduction of 2.7 percent for the Regional Bell Operating Companies); *id.* at 11-25 (describing many pertinent marketplace developments that had occurred since 2013). These criticisms are not at issue in this Motion: Even assuming arguendo that they are meritless (which they are not), the relief sought here would be necessitated based on the new problem discussed herein.

²⁴ Letter from Matthew Brill, Counsel for Comcast, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, at 1-2 (filed Apr. 26, 2016) (“While Comcast responded to Section II.A.3 in its special access data submission based on its good-faith understanding of the defined term ‘Location,’ subsequent discussions with Commission staff have made clear their view that Comcast should have reported additional ‘Locations’ that were (as of 2013) connected to nodes that had been physically upgraded to enable the provision of Ethernet-over-HFC service, even if Comcast at the time had only recently begun offering that service and may not have been actively marketing the service to locations connected to every such node.”).

²⁵ Letter from Matthew Brill, Counsel for Comcast, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 (filed May 16, 2016). *See also* Letter from Matthew Brill, Counsel for Comcast, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 (filed June 1, 2016).

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Comcast.²⁶ As a result of this under-reporting, the final data set – which, again, supplied the basis for nearly all of the economic analyses of competition to date, including Dr. Rysman’s – did not account for wide swaths of the country where cable operators were capable of providing Metro Ethernet over hybrid fiber/coax (“HFC”) networks as of 2013. For the avoidance of any doubt, the facilities that were under-reported *are not limited to what the Commission and the Bureau have referred to as “best efforts cable” service provisioned over DOCSIS*; rather, the under-reported locations are those served by cable facilities that had been upgraded to provide *true Metro Ethernet service*.

The exclusion of this cable data massively distorted the competitive landscape evaluated by Dr. Rysman and others. For example, Time Warner Cable’s updated filing confirms that, in fact, “all of [its] headends throughout its entire service footprint were Metro-Ethernet-capable by 2013.”²⁷ The highly confidential portions of the filings made by Comcast, Charter, and Cox address the extent to which those companies had upgraded their head-ends to allow for provision

²⁶ Letter from Samuel Feder, Counsel for Charter Communications, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, at 1 (filed May 27, 2016) (“Charter now understands that Commission staff would like Charter’s response to include all Locations connected to a Metro-Ethernet-capable headend, even if such Locations were connected via best-efforts-Internet lines.”); Letter from Michael Pryor, Counsel for Cox Communications, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, at 2 (filed May 18, 2016) (“Commission staff has made clear their view that Cox should have reported all Locations connected to the HFC facilities that were in turn connected to a Metro Ethernet-capable headend and has requested the following information.”); Letter from Matthew Brill, Counsel for Time Warner Cable, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, at 1 (filed May 12, 2016) (“TWC May 12 Letter”) (“TWC now understands that Commission staff intended cable operators to identify all business locations connected directly or indirectly to a Metro-Ethernet-capable headend, even if such locations were connected through an intermediate node, i.e., the first Node on the network that did not also support a Dedicated service.”).

²⁷ TWC May 12 Letter at 1.

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of Metro Ethernet service as of 2013. Based on Movants' experience as in-region competitors to cable BDS and out-of-region purchasers of cable BDS, Movants would expect the new data to show that *all* the major cable operators have a ubiquitous or near-ubiquitous ability to provide Ethernet-based BDS.²⁸ Even if the upgraded cable facilities were not being used in 2013 to provision actual Metro Ethernet (for example, because upstream facilities were not configured to do so), there can be no doubt that this was the purpose for which the cable providers undertook the upgrades, and that they have been moving toward (or have now achieved) that capability.²⁹

The difference between the cable providers' initially reported capabilities to provide Metro Ethernet and the capabilities reflected in the revised data set is truly humongous. Analysis conducted in the limited amount of time available since revised cable figures were made available for review last week indicates that the number of census blocks in which cable

²⁸ See, e.g., Letter from Melissa E. Newman, CenturyLink, to Marlene H. Dortch, FCC, WC Docket Nos. 15-247, 05-25, RM-10593, at 2-8 (filed Apr. 8, 2016) (discussing extensive cable deployment of BDS services, including Metro Ethernet).

²⁹ See, e.g., *id.* (discussing availability of cable BDS service). See also 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 announcement of a new business unit created specifically to market and sell enterprise services to Fortune 1000 companies on a nationwide basis); Thomson Reuters StreetEvents, *CMCSA – Q3 2015 Comcast Corp. Earnings Call*, Edited Transcript, at 9 (Oct. 27, 2015) (“*Comcast Q3 Earnings*”) (quoting Neil Smit, Senior EVP Comcast Corp., President & CEO of Comcast Cable Communications, stating that Comcast is targeting “large enterprises that have 300 locations or more” and that it 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) (stating that Charter had more than 10,000 fiber-lit buildings in early 2014 and that it currently has 12,000+ fiber lit buildings, as well as 3,800 lit cell towers); Sean Buckley, *U.S. Fiber Penetration Reaches 39.3% of Buildings, Says VSG*, Fierce Telecom (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, Cox had “28,000 fiber lit buildings [and] 300,000 HFC serviceable buildings.”).

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providers could provision true Metro Ethernet in 2013 was some *22 times – 2,200 percent* – the number originally reported. Put another way, the Rysman Report, the Baker Declaration, the Gately Declaration, and the Zarakas/Gately Declaration are all premised on the mistaken view that cable operators’ collective presence in the Metro Ethernet marketplace is *merely 4.5 percent of what it actually is*.³⁰

Unsurprisingly, the gap between the original data set and reality has substantial implications for Dr. Rysman’s analyses and conclusions, which are replete with references to inaccurate data. Indeed, two of the three data sets underlying Dr. Rysman’s finding of ILEC market power are fatally flawed: the relative number of locations at which ILECs and others could provide BDS and the impact of competition on ILECs’ BDS prices.³¹ Both these analyses rely heavily on the dramatically understated “Locations” data submitted by cable providers, which Dr. Rysman defined as “all locations owned or leased as an IRU [by a cable provider] that are connected to a Metro Ethernet (MetroE)-capable headend.”³²

³⁰ As noted above, *see supra* note 2, the IRW Study assumed nearly ubiquitous availability of cable service. Although this assumption was based on the view that cable business Internet access service was a substitute for ILECs’ BDS offerings, it is now clear that at least some major cable providers (and, in Movants’ experience, likely all of them) were, as of 2013, able to provide true Metro Ethernet service ubiquitously or nearly ubiquitously. Thus, one need not agree with the IRW Study’s view regarding DOCSIS service in order to recognize that that study’s assumption was, in light of the facts as they are now known, correct.

³¹ Using a third data set, Dr. Rysman also performed a nationwide comparison of ILEC and CLEC revenues for BDS.

³² Rysman Report at 203. Dr. Rysman specifically noted that the availability of HFC-based BDS “would appear as cable [competitive provider] CP competition in the data on which my estimations are based,” *id.* at 202 n.10, which we now know generally was not the case.

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In his Locations analysis, Dr. Rysman compared the number of business locations to which competitive providers and ILECs reported serving or at least having a connection. The initial understatement of cable locations has rendered most of Dr. Rysman’s findings in this analysis invalid, including his conclusions that competitive providers serve or could serve only approximately 43 percent of the buildings in the FCC’s data set;³³ that the number of locations that are served or could be served by cable providers’ BDS services was “much smaller than ILECs”;³⁴ that there are “very few buildings with facilities-based competition”;³⁵ and, in general, the locations-related data presented in Tables 4, 5, 6, 7, 9, and 10.

Dr. Rysman’s “Locations” analysis does not appear to account for cable providers’ ability to provision Metro Ethernet service over their DOCSIS 3.0 facilities, other than those shown as connected to Metro Ethernet-capable headends in the vastly understated cable data submitted in the original data collection. For example, while the output files concerning Dr. Rysman’s work show that he analyzed census blocks where cable was providing DOCSIS 3.0-based service, he did not include that analysis in his report. Rather, Table 7, which purports to “show[] the number of competitors per building,” leaves out locations served by cable over DOCSIS 3.0. This choice had a very substantial impact on that table. As the following chart shows, the inclusion of cable would have led to findings of far more competition in the BDS market:

³³ *See id.* at 208-209.

³⁴ *See id.* at 211. Dr. Rysman reiterated that the locations that were served or could be served by cable providers in this comparison “are BDS locations, which I interpret to exclude residential broadband or connections to a non-MetroE cable headend that use DOCSIS to provide a best effort service.” *Id.* 211 n.26. All of the new locations recently reported by the cable providers fall outside this exclusion because they were connected to a MetroE cable headend.

³⁵ *See id.* at 212.

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Number of Providers	Percentage of Locations if UNE Locations Assumed ILEC, Per Rysman (Excluding Cable; Presented in Report)	Percentage of Locations if UNE Locations Assumed ILEC, Per Rysman (Including Cable; Not Presented in Report)	Percentage of Locations if UNE Locations Assumed CLEC, Per Rysman (Excluding Cable; Presented in Report)	Percentage of Locations if UNE Locations Assumed CLEC, Per Rysman (Including Cable; Not Presented in Report)
2	21.8	72.7	39.4	57.4
3	0.8	12.0	2.8	26.9

Put differently: Dr. Rysman performed his calculations (1) including cable DOCSIS 3.0 facilities and (2) excluding those cable facilities, and chose to present the results that excluded them. As a result, his estimate for the percentage of buildings with two providers, attributing UNEs to CLECs, was 39.4 percent, whereas the figure including cable would (by his own calculations) have been 57.4 percent. The number of buildings with three providers was listed as 2.8 percent, whereas the number including cable would have been 26.9 percent – nearly ten times as high. There can, in short, be no doubt that Dr. Rysman excluded relevant cable facilities from his analysis of BDS locations, and that this exclusion concretely and significantly affected his results.

Dr. Rysman’s second basis for his finding of ILEC market power – namely, his analysis of pricing data – is equally compromised by the vast understatements in the initial data collection. In that analysis, Dr. Rysman compares ILEC prices for DS1 and DS3 services in buildings and census blocks in which at least one non-ILEC competitor provides or could provide BDS, according to the 2013 data collection, to prices in those without such a competitor.³⁶ However, his indicators for the presence of competition, again, are based on data

³⁶ Dr. Rysman also performed other similar variations of this analysis for different geographic areas.

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now known to be woefully incomplete,³⁷ making the results of his regressions meaningless. The Commission thus could not reasonably rely on Dr. Rysman’s findings that the presence of competition in a building or census block is associated with lower prices for DS1s and/or DS3s. It also could not rely on the results reflected in Tables 14, 17, 18, and 20 of his report.

Given all of these flaws, the Commission cannot give any weight to Dr. Rysman’s conclusions that ILECs “dominate” the market for BDS service in their regions because they “serv[e] many more locations with facilities-based service than CPs” and his “[p]rice regressions tell a similar story.”³⁸ The reports filed by the CLECs are plagued with similar shortcomings.³⁹

4. *The Commission and the Bureau Have Misunderstood the Significance of the Flawed Data Set and Analyses.* Even before it was apparent just how systemically the original data set had undercounted cable Ethernet, parties began to raise concerns. In response to early criticisms regarding the data collection, the FNPRM noted that “no data set is perfect,”⁴⁰ arguing that the collection had required “[s]ignificant effort and time” and resulted in an “unprecedented”

³⁷ Dr. Rysman declined to treat the presence of DOCSIS 3.0 facilities in the National Broadband Map as an indicator of facilities-based competition in his regressions.

³⁸ Rysman Report at 221.

³⁹ See Baker Declaration ¶¶ 53-67 (regression analysis of ILEC pricing based on number of in-building and nearby facilities-based providers offering BDS); Besen/Mitchel Declaration ¶¶ 24-31 (using initial locations data to identify number of CLEC providers at purchaser locations and percentage of census blocks with CLECs); Declaration of William P. Zarakas and Susan M. Gately ¶¶ 19-22, 24, 28, Tables 4, 5, 6 (Jan. 27, 2016) (“Zarakas/Gately Declaration”) (using initial locations data to develop distribution of BDS providers by census block and number of providers reporting BDS by building or cell tower location) (attached to Sprint Comments).

⁴⁰ FNPRM ¶ 245.

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amount of information.⁴¹ The FNPRM mentioned the missing Comcast data, but while it purported to “take this omission seriously,” it dismissed any suggestion that the omission should affect the proceeding, claiming that “stakeholders will have the opportunity to consider the updated data and its impact on our analysis in the comment period.”⁴² Indeed, as described below, the FNPRM is largely predicated on the now-discredited data set and the analyses that purport to draw corresponding marketplace conclusions.

To the extent parties hoped that the Commission would come to recognize the severity of the problem, those hopes were dashed when the Bureau addressed the issue in more depth last week. Responding to arguments raised by USTelecom that the stunning revelations regarding cable deployment warranted a comment deadline extension, the Bureau wrongly asserted that the new data was irrelevant because “[t]he vast majority ... relates only to availability of best efforts service, which is distinguishable from the types of dedicated services considered in the *Further Notice*.”⁴³ As noted above, this premise is false: The new information demonstrates that the four largest cable providers were, in 2013, capable of providing *Metro Ethernet* in about 22 two times (2,200 percent) as many locations as previously reported. The Bureau also appeared to misunderstand Dr. Rysman’s conclusions regarding cable service: It quoted Dr. Rysman’s conclusion that “the distribution of cable technology ... does not change the conclusion ... that

⁴¹ *Id.* ¶¶ 245-47.

⁴² *Id.* ¶ 66.

⁴³ *Broadband Data Services in an Internet Protocol Environment*, Order, DA 16-641, at ¶ 10 (WCB rel. June 8, 2016) (“*Extension Denial*”).

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local competition affects BDS prices”⁴⁴ but that conclusion was expressly concerned with so-called “best efforts” cable service, and therefore was irrelevant to the new data regarding Metro Ethernet deployments. The Bureau further understated the new data’s significance by asserting conclusorily that the 21 days between when most of the new data had become available for review (June 7) and when comments were due (June 28) constituted “sufficient time” to analyze the new data, even though it had taken the Commission’s hired expert himself some six months to conduct his analysis of the initial, flawed data set.⁴⁵

Finally, adding insult to injury, although the Commission promised in the FNPRM to make available peer reviews of Dr. Rysman’s study when they are complete “in the near future,”⁴⁶ it still has not done so. As a result, Movants have not had the opportunity to see, let alone comment on, those peer reviews, which often comprise a critical component of the Commission’s deliberative process, and may address the impact of the flawed data.⁴⁷

* * *

Even absent any legal compulsion, the Commission should recognize that the public would be best served by striking the Rysman Report and other analyses that reflect fictitious understandings of cable deployment, conducting revised analysis of the corrected data set,

⁴⁴ *Id.*, quoting Rysman Report at 222.

⁴⁵ *Id.*

⁴⁶ FNPRM ¶ 164.

⁴⁷ *See, e.g.*, Final Information Quality Bulletin for Peer Review, 70 Fed. Reg. 2664, 2665 (Jan, 14, 2005) (“Peer Review Guidelines”) (“Peer review is one of the important procedures used to ensure that the quality of published information meets the standards of the scientific and technical community. It is a form of deliberation involving the exchange of judgments about the appropriateness of methods and the strength of the author’s inferences.”).

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allowing parties to do the same, and *then* issuing a revised proposal for comment. Here, as set out below, the Commission also *does* face an overwhelming legal compulsion to do so.

DISCUSSION

I. **THE ADMINISTRATIVE PROCEDURE ACT PRECLUDES ANY RELIANCE ON ANALYSES BASED ON THE INCOMPLETE DATA SET**

The APA does not tolerate agency reliance on analysis as thoroughly compromised as the Rysman Report and related submissions. As explained above, these analyses were based on a data set that accounted for *less than five percent* of the locations in which cable providers were capable of providing true Metro Ethernet service in 2013. The Commission must strike the Rysman Report and other analyses that failed to account for the expansive availability of cable-based Ethernet service.

A. **The APA Forbids Commission Reliance on the Rysman Report and Other Analyses Based on the Original Data Set.**

The APA requires that federal agencies ground their rules on valid record evidence. An agency “must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made.”⁴⁸ In contrast, “[a]n agency action is arbitrary and capricious if it rests upon a factual premise that is unsupported by substantial evidence.”⁴⁹ To the extent agencies base their rules on studies or similar expert findings, those sources must be methodologically sound and based on the evaluation of accurate data inputs. In the D.C. Circuit’s words, “It is not consonant with the

⁴⁸ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 968 (D.C. Cir. 1999).

⁴⁹ *Center for Automotive Safety v. Federal Highway Admin.*, 956 F.2d 309, 314 (D.C. Cir. 1992).

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purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data.”⁵⁰

Because the original data set was so pervasively flawed, the Rysman Report and other studies based on that data are irretrievably compromised, and must be stricken from the record. The Commission cannot use these sources as the basis for any findings or rules.⁵¹

Courts have readily vacated Commission actions that were premised on invalid or outdated data. For example, in *Comcast Corp. v. FCC*, the D.C. Circuit struck down the Commission’s cable subscribership cap as having been unlawfully based on outdated data that failed to incorporate recent pro-competitive developments.⁵² There, the agency had designed an economic model based on subscriber penetration data, and applied it to set a 30 percent subscriber cap. The court found, however, that the Commission’s model relied on stale data that failed to incorporate recent competitive trends, including the growth of Direct Broadcast Satellite service and the entry of telephone companies into the video services market. Rather than include the recent data, the model instead “relie[d] upon data from 1984-2001 and, as a result, fail[ed] to consider the impact of DBS companies’ growing market share (from 18 to 33 percent) over the six years immediately preceding issuance of the Rule, as well as the growth of fiber optic companies.”⁵³ The court criticized the Commission’s findings as “non-empirical” because they

⁵⁰ *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973).

⁵¹ Put simply, the FCC would violate “the inviolable law of data analysis, ‘garbage in; garbage out.’” *Mississippi v. EPA*, 723 F.3d 246, 264 (D.C. Cir. 2013).

⁵² 579 F.3d 1 (D.C. Cir. 2009).

⁵³ *Id.* at 14.

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were not grounded on current facts in the record and ignored facts that were available.⁵⁴ Given the “overwhelming evidence” as to the growth of competition, the Court held that the cap “was arbitrary and capricious.”⁵⁵ Indeed, the court found the “Commission’s dereliction in this case” to be “particularly egregious” given that the court had overturned the agency’s previous attempt to impose a cap as lacking the requisite factual basis.⁵⁶

The parallels between *Comcast* and the instant matter should be obvious. The Rysman Report and other analyses of the original data set are premised on data that are clearly inaccurate and thus seriously miscalculate the current level and composition of competitive BDS deployment. *Comcast* warns that the Commission must ensure that the data it relies on accurately incorporates facts on the ground regarding the current marketplace. Cable providers were, in 2013, able to provide Metro Ethernet service in 22 times as many census blocks as were reflected in the original data set. Thus, the Rysman Report and other analyses based on that data are, like the factual materials at issue in *Comcast*, worthless.

Comcast, of course, was not the only occasion on which the courts have stricken down Commission action premised on faulty or incomplete data. In *United States Telephone Ass’n v. FCC*,⁵⁷ the D.C. Circuit remanded the Commission’s six percent price-cap “X Factor,” finding

⁵⁴ *Id.*

⁵⁵ *Id.* at 18.

⁵⁶ *Id.* at 20 (citing *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001)). In that case, the court held that the Commission’s conclusions as to the potential for collusive behavior by cable firms, which led it to adopt the 30 percent cap, lacked any factual basis or supporting studies.

⁵⁷ 188 F.3d 521 (D.C. Cir. 1999).

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that the agency had discounted some productivity data but not other data, reaching conclusions that were not supported by the factual record.⁵⁸ The court also remanded a specific component of the X Factor, which was based on earlier data not relevant to the period under review.⁵⁹ In *American Radio Relay League, Inc. v. FCC*,⁶⁰ the D.C. Circuit invalidated a Commission rule regarding broadband over power line (“BPL”), finding that it had been based on a flawed study and that other studies in the record “cast doubt” on the Commission’s calculations.⁶¹ In *Sorenson Communications, Inc. et al. v. FCC*,⁶² the court struck a rule that was “not only unsupported by the evidence, but contradicted by it.”⁶³ And in *Prometheus Radio Project v. FCC*,⁶⁴ the Third Circuit held that the Commission’s adoption of numerical limits on broadcast station ownership was arbitrary and capricious because “no evidence support[ed]” the Commission’s underlying assumptions.⁶⁵

As these precedents should make clear, the Commission may not rely on the Rysman Report or other analyses based on the original data set, which understated cable providers’ ability to provision Metro Ethernet service by a factor of more than 20. Any such reliance would

⁵⁸ *Id.* at 526.

⁵⁹ *Id.* at 531.

⁶⁰ 524 F.3d 227 (D.C. Cir. 2008).

⁶¹ *Id.* at 240-41.

⁶² 755 F.3d 702 (D.C. Cir. 2014).

⁶³ *Id.* at 709.

⁶⁴ 373 F.3d 372 (3d Cir. 2004).

⁶⁵ *Id.* at 418-20.

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constitute reversible error under the APA. The Commission must instead strike these materials from the record, conduct or procure new analysis of the revised data set, and allow parties the time to do the same. Only then can it conduct a rulemaking not doomed by the flawed cable data.

B. The Bureau’s *Extension Denial* Misunderstood The Import of the Revised Cable Data, and Its Analysis Is Therefore Inapposite.

The Bureau’s June 8 *Extension Denial*⁶⁶ does nothing to address the APA’s insuperable barriers to reliance on the Rysman Report. As noted above, in reference to “the updated data recently provided by cable service providers,” the Bureau contends that “any cable-presence undercounting does not impact the conclusions in the Rysman White Paper regarding market power.”⁶⁷ This is so, the Bureau claims, because “[t]he vast majority of the submitted data relates only to availability of best efforts service, which is distinguishable from the types of dedicated services considered in the [FNPRM].”⁶⁸ As noted above, this is wrong. The new data is *not* limited to the availability of what the Commission calls “best efforts” service. Rather, it addresses, *inter alia*, the number of headends that cable providers have upgraded to provide true metro Ethernet service – a service that nobody disputes is a substitute for ILEC BDS offerings.⁶⁹ Specifically, it shows that the overwhelming majority of headends have been upgraded in this fashion (and had been upgraded by 2013) and thus are capable of providing alternatives to ILEC

⁶⁶ See *Extension Denial*.

⁶⁷ *Id.* ¶ 10.

⁶⁸ *Id.*

⁶⁹ See *supra* notes 28-31.

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service – *i.e.*, that cable providers are “potential competitors” of services that are full substitutes for BDS across much (if not most) of the country.

There is no basis for any suggestion that Metro Ethernet-capable headends are irrelevant to the Commission’s analysis.⁷⁰ Indeed, such upgrades demonstrate a cable provider’s intention to offer Metro Ethernet services in that geographic area, which must be reflected in any comprehensive evaluation of the BDS marketplace, particularly given that “it may already be or soon will be the case that cable companies are able to supply BDS everywhere they have deployed DOCSIS 3.0,” as the Commission acknowledged in the FNPRM.⁷¹ Deeming Metro Ethernet-capable headends irrelevant also is flatly inconsistent with the Commission’s repeated findings that potential competition is relevant to any market analysis⁷² and its recognition in the FNPRM itself that connections linked to a Metro Ethernet-capable node are relevant to BDS

⁷⁰ See, e.g., *Extension Denial* ¶ 10 (citing cable providers’ “belief that the filing of updated information was not relevant to the Commission’s inquiry”).

⁷¹ FNPRM ¶ 221.

⁷² See, e.g., *2012 Special Access Order*, 27 FCC Rcd at 16347 ¶ 69 n.152 (the Commission’s “analysis must take account of ... potential competition” as well as actual competition); *id.* at 16350 ¶ 73 (acknowledging the need for a “forward-looking” evaluation that accounts for prospective competition); FNPRM ¶ 3 (“The best available data suggest that competitive entry and potential competition are bringing material competitive benefits....”); FNPRM ¶ 5 (“[A]t the core of the Commission’s proposal is the adoption and application of a new Competitive Market Test designed to identify the markets in which current and potential competition is bringing material competitive effects to customers, most notably through lower prices.”); FNPRM ¶ 30 (citing relevance of “the number of facilities-based competitors (both actual and potential)”).

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competition.⁷³ It is also inconsistent with the Bureau’s own conclusions. In its 2013 *Data Collection Implementation Order*, the Bureau stated:

We are therefore particularly interested in *Connections* that have been upgraded to business class Metro Ethernet (or its equivalent) – whether or not those *Connections* are in service and regardless of the type of service provided – 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.⁷⁴

The suggestion that connections in which the Bureau was “particularly interested” in 2013 are suddenly irrelevant simply because their presence undermines the rationale for the agency’s proposed policy framework is puzzling, to say the least.⁷⁵

Nor can the Commission draw comfort from the Bureau’s conclusion that “the existing comment period provides sufficient time” for “stakeholders ... to account for the updated cable data in their ongoing analysis.”⁷⁶ The revised data were not available via the NORC Secure Data Enclave until June 7, 2016 – 36 days after the FNPRM was published and only 21 days before comments were due.⁷⁷ As the Bureau recognizes, the agency provided multiple successive

⁷³ See FNPRM ¶ 34. See also *id.* ¶ 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).

⁷⁴ *Data Collection Implementation Order*, 28 FCC Rcd at 13200-01 ¶ 26 (citation omitted).

⁷⁵ Still worse, the Bureau is implicitly suggesting that cable Metro Ethernet is relevant in areas where cable providers initially reported it, but not in areas where they only later reported its availability. There is, of course, no basis for any such distinction.

⁷⁶ *Extension Denial* ¶ 10.

⁷⁷ The *Extension Denial* also states that the “proprietary TomTom data” is available for review “through NORC.” See *id.* Movants’ economic consultants, however, have been unable to locate this data in the data enclave.

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extensions of time for parties to review the data set once it became available in the fall, ultimately affording them several months to review what was then thought to be the final collection. The Rysman Report was not published until nearly *six months* after that data set was made available, and he worked *with the help of Commission staff*.⁷⁸ Thus, the suggestion that a mere three weeks is a sufficient window for parties to review and fully analyze a completely new data set is untenable. As the courts have made clear, the “opportunity for comment must be a meaningful opportunity.”⁷⁹ In the D.C. Circuit’s words:

The purpose of the comment period is to allow interested members of the public to communicate information, concerns, and criticisms to the agency during the rule-making process... To allow an agency to play hunt the peanut with technical information ... is to condone a practice in which the agency treats what should be a genuine interchange as mere bureaucratic sport. An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule *in time to allow for meaningful commentary*.⁸⁰

In short, then, the Bureau has misstated the extent to which the revised data set changes the competitive analysis applicable here, and overstates the ability of parties to conduct meaningful review in the time allotted. There is no “timely resolution” exception to the APA;⁸¹ agencies must afford parties due process of law even when doing so is inconvenient and might marginally delay completion of a decade-old proceeding.

⁷⁸ Rysman Report at 197, n.1 (“I thank the FCC staff for excellent assistance in producing this paper.”).

⁷⁹ *Gerber v. Norton*, 294 F.3d 173, 179 (D.C. Cir. 2002) (citing cases).

⁸⁰ *Conn. Light & Power Co. v. Nuclear Regulatory Comm’n*, 673 F.2d 525, 530 (D.C. Cir. 1982) (emphasis added).

⁸¹ *See Extension Denial* ¶ 11 (stating that “a timely resolution of this proceeding will be beneficial for the industry and consumers”).

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C. Because the APA Forbids Reliance on the Analyses on Which Its Proposals Are Based, the Commission Must Rescind Portions of the FNPRM and Conduct New Analysis.

As demonstrated above, the Commission has for years now made clear that the data set it was compiling was meant to serve as the lodestar guiding this proceeding to its conclusion.⁸²

The FNPRM did not, in this regard, disappoint: Its pages prominently feature references to, and assumptions based on, the flawed original data set, the Rysman Report, and other analyses now known to be irredeemably deficient.

To be sure, the FNPRM does offer various means of evaluating the marketplace, including several presentations that appear to include so-called “best efforts” cable service. The presence of these analyses, however, does not cure the problems discussed here, for three reasons. First, the FNPRM makes clear that the Commission does not view these “best efforts” offerings as substitutes for ILEC BDS services.⁸³ There is thus reason to fear that the agency’s ultimate decisions will exclude such offerings, increasing the importance of acknowledging the cable Metro-Ethernet-capable facilities in place in 2013. Second, while the NPRM may in some areas recognize cable competition, in other places it dismisses such competition, or relies directly on the Rysman Report.⁸⁴ Third, the *Extension Denial*’s conclusion that the updated cable data “does not impact

⁸² See *supra* Background.

⁸³ See FNPRM ¶ 13 (“BDS is distinctly different from the mass marketed, ‘best efforts’ broadband Internet access services (BIAS) provided to residential end users ...”); see also *id.* ¶¶ 13-14 (describing purported differences between BDS and “best efforts” service).

⁸⁴ See, e.g., *supra* Background (listing instances in which FNPRM presumes absence of cable competition).

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the conclusions in the Rysman White Paper regarding market power” implies that the Commission may intend not to count the affected locations as capable of being served by cable BDS.

Given how completely the FNPRM’s proposals are based on these inherently compromised evaluations, the Commission has no choice but to rescind affected portions of the FNPRM, analyze the corrected data set (and allow parties to do the same), and issue new proposals based on the revised analyses, on which parties can comment. Had the original data set included the data that has since been supplied, and had Dr. Rysman and others evaluated that data set, the resulting FNPRM presumably would have looked far different from the one published on May 2. Indeed, any suggestion that the FNPRM would have made the very same proposals in response to wildly different factual inputs would amount to an admission that the agency was engaged in the type of outcome-oriented decisionmaking flatly proscribed by the APA.

II. **THE DATA QUALITY ACT PRECLUDES ANY RELIANCE ON THE RYSMAN REPORT OR OTHER ANALYSES BASED ON THE INCOMPLETE DATA SET**

The Data Quality Act (“DQA”) requires the Commission to ensure that it maximizes the “quality, objectivity, utility, and integrity” of information it relies on in rulemakings or other proceedings.⁸⁵ The DQA precludes Commission reliance on the Rysman Report and other analyses based on the original data collection. To comply with this statute, the agency must strike these analyses from the record now, before it and other parties waste additional resources evaluating and debating them.

Enacted in 2000, the DQA directed OMB to (1) issue guidelines requiring that federal agencies, including the FCC, maximize the “quality, objectivity, utility, and integrity of

⁸⁵ Treasury and General Government Appropriations Act for Fiscal Year 2001, § 515, Pub. L. No. 106-554, 114 Stat. 2763 (2000). The DQA is also sometimes referred to as the “Information Quality Act,” or “IQA.”

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information (including statistical information)” that they disseminate, and (2) require agencies to adopt their own agency-specific guidelines and to “establish administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency that does not comply with the guidelines.”⁸⁶ In several mandatory “Guidelines” released under its DQA mandate, OMB made clear that sponsoring the collection of data that is placed in the record or using that data as the basis for a new regulatory requirement each constitute “dissemination” of that information,” *even if the analysis at issue is prepared by a third party.*⁸⁷ OMB further interpreted the “objectivity” mandate to require assurance that such information, “as a matter of substance, is accurate, reliable, and unbiased,”⁸⁸ and was developed “using sound statistical and research methods.”⁸⁹ The DQA also requires that covered disseminations be subjected to peer review. OMB has made clear that “[p]eer review is one of the important procedures used to ensure that the quality of

⁸⁶ *Id.*

⁸⁷ Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 8452 (Feb. 22, 2002) (“OMB Guidelines”). OMB has defined “information” to mean “any communication or representation of knowledge such as facts or data, in any medium or form.” *Id.* at 8460 § V(5). Thus, reliance on information for rulemaking purposes constitutes “dissemination.” *See* Peer Review Guidelines, 70 Fed. Reg. at 2667 (explaining, by way of example, that use of information “as the basis for an agency’s factual determination that a particular behavior causes a disease” would constitute “dissemination”); *see also* Curtis W. Copeland & Michael Simpson, *CRS Report for Congress: The Information Quality Act: OMB’s Guidance and Initial Implementation*, at 1 (Aug. 19, 2004) (noting that distribution of “information [that] forms the basis of agencies’ regulations or other policies” constitutes “dissemination” for DQA purposes).

⁸⁸ OMB Guidelines, 67 Fed. Reg. at 8453. OMB defines the types of information covered as “factual inputs, data, models, analyses, technical information, or scientific assessments related to such disciplines as the behavioral and social sciences, public health and medical sciences, life and earth sciences, engineering, or physical sciences.” Peer Review Guidelines, 70 Fed. Reg. at 2667.

⁸⁹ OMB Guidelines, 67 Fed. Reg. at 8459.

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published information meets the standards of the scientific and technical community,” and issued Peer Review Guidelines to ensure that information disseminations governed by the DQA undergo such review.⁹⁰ In OMB’s words, “the insights offered by peer reviewers may lead to policy with more benefits and/or fewer costs,” and “peer review, if performed fairly and rigorously, can build consensus among stakeholders and reduce the temptation for courts and legislators to second guess or overturn agency actions.”⁹¹

The Commission adopted its own DQA Guidelines in 2002,⁹² declaring that “[t]he Commission is dedicated to ensuring that all data it disseminates reflect a level of quality commensurate with technical information,” and that “[t]his commitment applies to all data and information disseminated by the Commission.”⁹³ For example, the *FCC Guidelines* stated that all “data shall be generated, and the analytical results shall be developed, using sound statistical and research methods.”⁹⁴ The Commission stated that the DQA, and the Guidelines it was adopting, would apply to rulemakings.⁹⁵

Separate and apart from the APA problems identified above, the Commission must, in order to comply with its DQA obligations, strike from the record the Rysman Report and other analyses based on the original data set. Analyses that account for only one out of every 22

⁹⁰ See Peer Review Guidelines, 70 Fed. Reg. at 2665.

⁹¹ *Id.* at 2668.

⁹² *Implementation of Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Pursuant to Section 515 of Public Law No. 105-554*, Information Quality Guidelines, 17 FCC Rcd 19890 (2002) (“FCC Guidelines”).

⁹³ *Id.* at 19891 ¶ 5.

⁹⁴ *Id.* at 19896 App. A ¶ 11.

⁹⁵ *Id.* at 19891 ¶ 5.

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census blocks in which ILECs’ principal competitors in the BDS marketplace were able to provide Metro Ethernet service during the 2013 period being evaluated cannot plausibly be called “sound.” These sources lack the “quality, objectivity, utility, and integrity of information” required by statute. In addition, to Movants’ knowledge, the Rysman Report has not been peer reviewed. The Commission has stated that it “will release peer reviews of [the Rysman Report] when they are completed in the near future,”⁹⁶ but it has not done so, or committed to do so by a date certain. Given the brief time remaining before comments are due, parties have a clearly inadequate opportunity to review (let alone respond to) those future peer reviews. As the Commission has recognized in the past, parties must be afforded an opportunity to comment on peer reviews of reports on which it relies in rulemaking proceedings. For example, in the *Quadrennial Review* proceeding, the Commission informed the public of its peer review process for relevant studies through public notices and updates to its media ownership website, posted on its website the studies and the peer review reports, and released those peer reviews 58 days before comments on its rulemaking notice were due.⁹⁷ The contrast between the Commission’s process there, and the apparent rush to judgment here, is dramatic, and only underscores the paucity of legally requisite process here.

The Commission has declared countless times that its proceedings and actions will be “data-driven,” and that it will at all times seek to ensure that the data it relies on will be both

⁹⁶ FNPRM ¶ 164.

⁹⁷ *2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order and Order on Reconsideration, 23 FCC Rcd 2010, 2087 ¶ 148 (2008).

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sound and subject to scrutiny.⁹⁸ To remain true to those pronouncements and to its legal obligations under the DQA, the Commission should strike the Rysman Report and similar analyses from the record. This is the course chosen by numerous other federal agencies in the face of compromised analysis.⁹⁹ It should be the Commission’s path as well.

III. THE RYSMAN REPORT AND OTHER ANALYSES UNDERSTATING CABLE DEPLOYMENT WOULD BE STRICKEN FROM AN ADJUDICATION UNDER THE FEDERAL RULES OF EVIDENCE

Movants also note that the evidence at issue here would, without doubt, be stricken from an adjudicative proceeding under the standards set out by courts implementing the Federal Rules of Evidence (“FRE”).

The Commission presents the Rysman Report as a form of expert testimony.¹⁰⁰ In federal court, the admissibility of such evidence would be governed by Rule 702 of the FRE. That rule provides that an expert witness may testify in the form of an opinion or otherwise only if (i) the expert’s scientific, technical or other specialized knowledge will help the trier of fact to

⁹⁸ “One key component of the FCC’s administrative process is to focus like a laser on a fact-based, data-driven process.” Tom Wheeler, Chairman, FCC, *Net Effects: The Past, Present, and Future Impact of Our Networks* (Nov. 26, 2013), <https://www.fcc.gov/general/net-effects-past-present-and-future-impact-our-networks-0>.

⁹⁹ See, e.g., John Heilprin, *Agency Admits Using Faulty Data on Endangered Florida Panthers*, Associated Press (Mar. 22, 2005), <http://thecre.com/quality/ngos/18.html> (reporting on the Fish and Wildlife Service withdrawing and reissuing studies on an endangered species, after the studies were found to be based on faulty assumptions and data); Jim Titus, *Feds Will Stop Hyping Effectiveness of Bike Helmets*, OIRA Watch (June 5, 2015), <http://www.thecre.com/oira/?p=1843> (reporting on the withdrawal of faulty bicycle helmet statistics by Center for Disease Control and the National Highway Traffic Safety Administration, following the revelation pursuant to the Data Quality Act that the underlying data was flawed).

¹⁰⁰ See, e.g., FNPRM ¶ 164 (“[T]he Commission has engaged an outside econometrician, Dr. Marc Rysman, to conduct an independent competition analysis and produce a white paper with his conclusions. We have attached Dr. Rysman’s white paper to this Further Notice and will release peer review of the same when they are completed in the near future.”).

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understand the evidence or to determine a fact in issue; (ii) the testimony is based on sufficient facts or data; (iii) the testimony is the product of reliable methods and principles; and (iv) the expert has reliably applied the principles and methods to the facts of the case.¹⁰¹ The Supreme Court explained the core principles governing Rule 702’s application in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹⁰² Among other things, the proposed expert testimony “must be supported by appropriate validation – *i.e.*, ‘good grounds,’ based on what is known.”¹⁰³ Also, the expert testimony must be “sufficiently tied to the facts of the case,” such that it will assist the trier of fact to understand the evidence or determine a fact in issue.¹⁰⁴ Ultimately, the trier of fact must ensure that “an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand.”¹⁰⁵ Particularly important here, “*the focus . . . must be solely on principles and methodology, not on the conclusions that they generate.*”¹⁰⁶

¹⁰¹ FED. R. EVID. 702. *See also Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) (holding that Rule 702 is applicable to all expert testimony, not just expert testimony based on science). As described below, each of these factors counsels strongly in favor of striking the evidence at issue here.

¹⁰² 509 U.S. 579 (1993) (“*Daubert*”).

¹⁰³ *Id.* at 590. *See also McLean v. 988011 Ontario, Ltd.*, 224 F.3d 797, 800-801 (6th Cir. 2000), quoting *Pomella v. Regency Coach Lines, Ltd.*, 899 F. Supp. 335, 342 (E.D. Mich. 1995), quoting *Daubert* at 590 (an expert’s opinion “must be supported by ‘more than subjective belief and unsupported speculation’”).

¹⁰⁴ *Id.* at 591, quoting *United States v. Downing*, 753 F.2d 1224, 1242 (3rd Cir. 1985).

¹⁰⁵ *Id.* at 597. *See also Meterlogic, Inc. v. KLT, Inc.*, 368 F.3d 1017, 1019 (8th Cir. 2004), quoting *Children’s Broadcasting Corp. v. Walt Disney Co.*, 357 F.3d 860, 865 (8th Cir. 2004) (“The district court must exclude expert testimony if it is ‘so fundamentally unreliable that it can offer no assistance to the jury’ . . .”). Other federal agencies too have relied on *Daubert* for guidance when evaluating whether to exclude expert testimony. *See, e.g., Lobsters, Inc.*, Docket No. NE980310 FM/V, U.S. Department of Commerce, National Oceanic and Atmospheric Administration, 2003 NOAA LEXIS 15, *2 (July 2, 2003) (*citing Kumho*, 526 U.S. at 147) (“By

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Appellate courts have echoed *Daubert*'s emphasis on methodology. For example, as observed by the Tenth Circuit, the party seeking to introduce expert testimony “must show that the method employed by the expert in reaching the conclusion is scientifically sound and that the opinion is based on facts which sufficiently satisfy Rule 702’s reliability requirements.”¹⁰⁷

Hence, “any step that renders the analysis unreliable . . . renders the expert’s testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology.”¹⁰⁸

As the courts have properly recognized, an expert opinion based on inaccurate facts is inadmissible under FRE 702, even where the methodology would be sound if applied to accurate data. For instance, in *Meterlogic, Inc. v. KLT, Inc.*,¹⁰⁹ the Eighth Circuit found that the lower court properly excluded an expert’s testimony where, among other things, the expert relied on a report that was based in large part “on speculation . . . rather than any substantiated facts.”¹¹⁰ As

its terms, Rule 702 empowers a Judge to exclude expert testimony that is unreliable. *Daubert* affirms this principle, noting that Rule 702 imposes a ‘gatekeeping’ function on a Judge to ensure that scientific testimony is not only relevant, but reliable. Based upon these considerations, ALJs possess the authority to exclude expert testimony deemed irrelevant or unreliable.”).

¹⁰⁶ *Daubert*, 509 U.S. at 595 (emphasis added). See also *Bonner v. ISP Technologies, Inc.*, 259 F.3d 924, 929 (8th Cir. 2001) (“Both our cases and the decisions of the Supreme Court make clear that it is the expert witnesses’ methodology, rather than their conclusions, that is the primary concern of Rule 702.”) (citations omitted).

¹⁰⁷ *Mitchell v. Gencorp., Inc.*, 165 F.3d 778, 781 (10th Cir. 1999) (citations omitted).

¹⁰⁸ *Id.* at 782 (citation omitted).

¹⁰⁹ 368 F.3d 1017 (8th Cir. 2004).

¹¹⁰ *Id.* at 1019.

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another court succinctly put it, expert testimony should be excluded if it “is not based upon relevant and reliable data.”¹¹¹

Application of FRE 702’s test for admissibility, as explicated in *Daubert* and subsequent cases, makes clear that the Rysman Report and other analyses based on the original data set would be inadmissible in court. The materials at issue obviously are *not* based on sufficient facts or data. As shown above, cable providers were, in 2013, able to provision Metro Ethernet in 22 times as many locations as are presumed by the data set on which these analyses are based, rendering the various reports useless for purposes of evaluating the BDS market. Moreover, however well-meaning and able Dr. Rysman and other experts have been in evaluating the original data set, no application of “principles and methods” can be deemed reliable if the underlying data set is missing critical information. Thus, Rule 702 points firmly toward the conclusion that the Rysman Report and other analyses based on the original data set are inadmissible.¹¹²

To be sure, the Commission is not a federal court, and this is not a formal adjudication. Nevertheless, Movants note that the Commission has consulted the FRE in previous rulemaking

¹¹¹ *Johnson Elec. N. Am. Inc. v. Mabuchi Motor Am. Corp.*, 103 F. Supp. 2d 268, 283 (S.D.N.Y. 2000). See also *General Electric Company v. Joiner*, 522 U.S. 136, 146 (1997) (“A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.”) (citation omitted).

¹¹² There is no need to reach the other two inquiries contemplated by the four-pronged FRE 702 test – namely, whether the evidence is the product of reliable principles and methods. Given the flawed factual inputs that Dr. Rysman and others evaluated, however, these prongs also point firmly toward exclusion. An expert report based on materially flawed data *ipso facto* cannot help anyone understand the facts relevant to the questions presented in this proceeding. Further, even if the methodologies behind these analyses were theoretically sound, this cannot change the fact that those methodologies were applied to pervasively compromised inputs, rendering them unreliable.

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proceedings, and there is nothing in its rules that prevents it from doing so here.¹¹³ Further, as far as Movants know, it has not been the Commission’s practice to accept expert reports as credible where their material flaws are evident.¹¹⁴ Whether presented in a formal adjudication or a rulemaking, the Rysman Report and similar analyses are grounded on a bad data set and therefore cannot be a legitimate basis for a new BDS regulatory framework. Indeed, it would be highly prejudicial for the Commission to declare that its rules can be based on expert testimony that would be inadmissible in court.

CONCLUSION

The foundation on which the Commission intends to set its framework is irredeemably flawed; the Commission can and must take remedial action to ensure that whatever regime it adopts serves the public interest and can withstand legal scrutiny. For the reasons presented herein, the Commission should (1) strike from the record the Rysman Report and other studies based on the flawed data set (*e.g.*, the Baker Declaration, the Gately Declaration, and the Zarakas/Gately Declaration); (2) rescind portions of the FNPRM that are compromised by reliance on the Rysman Report and the flawed data set; (3) prepare or commission a new analyses reflecting the corrected data set, and allow parties to do the same; and (4) put those new proposals and analyses out for comment.

¹¹³ *See, e.g., Policy Regarding Character Qualifications in Broadcast Licensing*, Report, Order and Policy Statement, 102 FCC 2d 1179, 1196 n.40 (1986).

¹¹⁴ *See, e.g., Forward Commc’ns Corp. v. United States*, 46 RR 2d 591, 614 (1979) (“The record here is not only devoid of any evidence establishing the qualifications of the preparer of the appraisal report in question but fails even to disclose his identity. Therefore, the report does not meet the requirements of Rule 702 and hence is inadmissible as expert testimony with respect to the valuation of property.”).

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Respectfully submitted,

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June 17, 2016

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ATTACHMENT

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

Business Data Services in an Internet Protocol Environment)	WC Docket No. 16-143
)	
Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans)	WC Docket No. 15-247
)	
Special Access for Price Cap Local Exchange Carriers)	WC Docket No. 05-25
)	
AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services)	RM-10593
)	

**DECLARATION OF
GLENN WOROCH AND ROBERT CALZARETTA**

June 17, 2016

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I. INTRODUCTION

1. Our names are Glenn Woroch and Robert Calzaretta. Glenn Woroch is a Senior Consultant with the economic consulting firm Compass Lexecon. He has a Ph.D. in Economics and an M.A. in Statistics from the University of California at Berkeley, and a B.A. from the University of Wisconsin, Madison. Dr. Woroch has taught in the Economics Department of the University of California at Berkeley since 1993. He has also taught economics at the University of Rochester and Stanford University, served on the editorial boards of *Information Economics & Policy* and the *Journal of Regulatory Economics*, and currently sits on the editorial board of the journal *Telecommunications Policy*. He possesses considerable experience evaluating markets for special access services; while on the research staff of GTE Laboratories in the early 1990s, Dr. Woroch collected data on special access rates in local exchange areas throughout the country over time, which I used to analyze the role they play for entry by Competitive Access Providers. Dr. Woroch has submitted a number of filings in regulatory and court proceedings on these issues. Robert Calzaretta is an Economist with Compass Lexecon in Oakland, California, and has consulted on matters of antitrust litigation and international arbitration such as class certification, damage calculations, mergers and acquisitions, and predatory conduct. He holds degrees in Economics and Political Science from Boston College. He has conducted analysis on a variety of industries including casino gaming, consumer products, energy, telecommunications, and transportation. He has extensive experience in data analysis through the application of ArcGIS, QGIS, SAS and Stata.

2. We have been asked to analyze the extent to which new data regarding cable providers' deployment of Metro-Ethernet-capable facilities changes the appropriate scope of competitive deployment of Business Data Services ("BDS") as of 2013 (the year evaluated by the Commission's data set).

II. OVERVIEW

3. Charter Communications, Comcast Corp., Cox Communication, and Time Warner Cable submitted information as competitive providers in response to the Commission's Special Access Data Collection ("SADC"). In particular, each company supplied location and other information

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about special access connections in response to Question II.A.4 of the SADC. That question requested that cable operators report connections that are connected to a headend that is enabled for Metro Ethernet.¹ In May and June of 2016, these four cable operators acknowledged that they had not included in their original submissions locations that were connected to Metro-Ethernet-capable headends based on their interpretation of the SADC instructions. As a result, they subsequently supplemented the record. [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [END HIGHLY CONFIDENTIAL]

4. This declaration describes the extent to which the additional data submitted by the aforementioned cable companies expands the geographic scope of competition from Competitive Providers in the SADC. This declaration also explains the steps we undertook to measure the change in competition as a result of the recent submissions by Charter Communications, Comcast Corp., Cox Communication, and Time Warner Cable to the Commission. As the data from these four providers was not previously available to researchers, including the FCC’s expert Prof. Marc Rysman (whose White Paper is dated April 2016), the new data expose a deficiency in previously submitted analyses concerned with the extent of competition in an area.

¹ See, “Instructions for Data Collection For Special Access Proceeding,” WC Docket No. 05-25, RM-10593, updated December 5, 2014 at pp. 10-15. The relevant part of that question for this declaration is the instructions for cable operators: “If you are a cable system operator and reporting *Locations* within your FA, you must report those *Locations* with *Connections* that were connected to a *Node* (*i.e.*, headend) during the relevant reporting period that was upgraded or built to provide Metro Ethernet (or its equivalent) service regardless of the type of service provided over the *Connection* or whether the *Connection* is idle or in-service. In addition, for *Locations* with *Connections* that were not connected to a *Node* during the relevant reporting period that is capable of providing Metro Ethernet (or its equivalent), report only in-service *Connections* that were used to provide a *Dedicated Service* or a service that incorporates a *Dedicated Service* within the offering as part of a managed solution or bundle of services sold to the customer; do not report *Connections* that were used to provide a service that is substantially similar to services provided to residential customers, *e.g.*, one or two line telephone service or best-efforts Internet access and subscription television services.” [Emphasis original; footnotes excluded].

² See, Cox *Ex Parte* dated May 18, 2016, WC Docket No. 05-25; Time Warner Cable *Ex Parte* dated May 12, 2016, WC Docket No. 05-25.

³ See, Comcast Cable *Ex Parte* dated June 1, 2016, WC Docket No. 05-25; and Charter Communications, *Special Access Rates for Price Cap Local Exchange Carriers* dated May 27, 2016, WC Docket 05-25.

III. ANALYSIS OF REPORTED DATA

5. When we first analyzed the locations the four cable operators reported in response to Question II.A.4, we found [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] locations served by Charter, [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] such locations served by Comcast, [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] such locations served by Cox, and [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] such locations served by Time Warner in the data collection.⁴ Virtually all of these locations were assigned to a census block by the Commission, resulting in [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] Charter census blocks, [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] Comcast census blocks, [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] Cox census blocks, and [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] Time Warner census blocks served.⁵ If a cable operator had one or more locations in a census block, we counted them as a single competitive provider when assessing BDS competition.⁶ We added to all the census blocks with reported locations by competitive providers from Table II.A.4 the census blocks that are transected by a fiber optic cable as reported in Table II.A.5. We referred to the footprint of the combined census blocks as “functional competition.”⁷

6. The recent submissions by the four cable operators expand the competitive territories preexisting in the SADC. [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

⁴ A small percentage of the connections at these locations was provided using Unbundled Network Elements or Unbundled Copper Loops.

⁵ Of the locations they submitted to the SADC, [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] of Charter’s, [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] of Cox’s, and [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] of Time Warner’s were not assigned to a census block by the Commission’s cross walk. All of Comcast’s [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] locations were assigned to a census block.

⁶ Mark Israel, Daniel Rubinfeld and Glenn Woroch, “Competitive Analysis of the FCC’s Special Access Data Collection,” White Paper, Jan. 28, 2016 (“Israel-Rubinfeld-Woroch White Paper”) at fn. 6.

⁷ Israel-Rubinfeld-Woroch White Paper at pp. 6, 12, and 15.

[REDACTED]
[REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [END

HIGHLY CONFIDENTIAL]

7. The below table gives the number of census blocks reported by Cox and Time Warner to the original SADC in Tables II.A.4 and II.A.5. It also gives the number of census blocks found in the 2013 NBM in which those companies reported DOCSIS 3.0 service. The last column, labeled “NBM Only,” indicates the number of blocks that appear in the National Broadband Map as having DOCSIS3.0 service but do not appear in the special access footprint from II.A.4 or having a fiber line from II.A.5.

[BEGIN HIGHLY CONFIDENTIAL]

[REDACTED]

[END HIGHLY CONFIDENTIAL]

8. For instance, we found **[BEGIN HIGHLY CONFIDENTIAL]** [REDACTED] **[END HIGHLY CONFIDENTIAL]** blocks where Time Warner Cable reported having DOCSIS 3.0 service to the NBM but did not report as having special access service or a fiber to the SADC. If all of the company’s headends had been enabled for Metro Ethernet in 2013, then these blocks were “under reported” by Time Warner Cable. Given that we found **[BEGIN HIGHLY CONFIDENTIAL]** [REDACTED] **[END HIGHLY CONFIDENTIAL]** unique blocks either in the

⁸ NTIA’s State Broadband Initiative – December 31, 2013 National Broadband Map Dataset. See, also, Wireline Competition Bureau Staff, “FCC Special Access Data Collection Project: Additional Information on the Data and Information Hosted by NORC,” issued by NORC on June 7, 2016, which states, “Time Warner Cable and Cox indicated that in 2013, all of their headends were Metro Ethernet- capable. Accordingly, the census blocks served by Metro Ethernet-enabled headends is (sic) coterminous with the National Broadband Map data for its DOCSIS 3.0 census block coverage for 2013 for these two filers.”

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accounted for less than 3% of Charter’s actual footprint. That is, Charter is present in nearly [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] the number of blocks indicated by its filing in II.A.4. Similarly, Comcast reported a little more than [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] of its actual competitive footprint in II.A.4 and is present in [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [REDACTED] [END HIGHLY CONFIDENTIAL] as many areas as indicated by its filing in II.A.4.

11. We use these figures to estimate how much the footprint of the four cable companies expanded from their original submission to the SADC once we include their latest submissions. This was done by counting the unique census blocks as reported in Table II.A.4 for all four companies, plus those reported by Cox and Time Warner in the NBM as containing DOCSIS service, plus those reported by Charter and Comcast in their *Ex Parte* letters to the FCC, and dividing that quantity by the census blocks they originally reported to Table II.A.4.

12. Importantly, the census blocks in the numerator and denominator of this ratio do not duplicate blocks common across two or more cable companies. For instance, if TWC and Cox both reported a BDS connection in the same census block in Table II.A.4, we count two blocks for them in the denominator, and similarly for the numerator. The same would be true if the two cable companies reported Metro-Ethernet-capable locations in the same census block in their recent submissions, in which case we count two blocks in the numerator. Thus, the ratio is the number of cable company-census block combinations that should have been reported divided by the number of cable company-census block combinations that were originally reported.

13. Based on the above methodology, the ratio between the number of census blocks originally reported as housing cable services capable of providing Metro Ethernet and the number of census blocks that were actually served by a Metro-Ethernet-capable headend is about 1 to 22 (1:22). In other words, the number of census blocks with BDS facilities owned by these cable operators increased 22 fold from their original submission to the SADC. Even when researchers consider the four cable operators’ responses to II.A.5 in addition to II.A.4, there is still substantial underreporting.

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IV. CONCLUSION

14. The initial White Paper submitted by Mark Israel, Daniel Rubinfeld, and Glenn Woroch (“IRW”) included locations that these four cable companies, and other cable companies, reported to the NBM as provisioned with DOCSIS or optical fiber to the user. When these locations were added to the footprint of competitive providers, IRW referred to this as “comprehensive competition.” IRW reported the census blocks that satisfied this definition of competition in that White Paper. IRW included these locations under the belief that these connections could be provisioned for Business Data Services for a moderate additional cost. As is now apparent, some of the cost to enable those connections for BDS had been sunk by the cable operators when they upgraded their headends for Metro Ethernet as of 2013. However, researchers that did not factor in the wider DOCSIS 3.0 networks of these providers underestimated the extent of competition in the areas in which these four cable companies operate.

15. This completes our Declaration.

/s/ Glenn Woroch

Glenn Woroch

/s/ Robert Calzaretta

Robert Calzaretta