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

In the Matter of	)	
	)	
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

REPLY COMMENTS OF THE FREE STATE FOUNDATION[*]

These reply comments are submitted in response to the Commission's *Further Notice of Proposed Rulemaking* released May 2, 2016. The *Notice* seeks comment on the Commission's proposal to impose a new rate regulation framework on so-called "special access" or "business data services" (BDS).

The primary purpose of these brief reply comments is to call attention to critical ways in which the Commission's conduct of this proceeding and the proffered basis for its proposed rate regulations are contrary to widely accepted rule of law principles as well as to sound policymaking. In particular, the Commission has withheld and untimely released data and analysis proffered in support of its proposed rules. Also, the

[*] These reply comments express the views of Randolph J. May, President of the Free State Foundation and Seth L. Cooper, Senior Fellow. The views expressed do not necessarily represent the views of others associated with the Free State Foundation. The Free State Foundation is an independent, nonpartisan free market-oriented think tank.

Commission bases its proposed rules on an arbitrary assessment of the BDS services market that treats cable entrants and ILEC potential competition unequally. These deviations from rule of law principles are troubling in and of themselves. They also call into serious question the legality of the Commission's proposed rulemaking under the Administrative Procedure Act (APA). It is past time for the Commission finally to close this proceeding.

One scholar has encapsulated the elements of the rule of law as: (1) a system of binding rules; (2) of sufficient clarity, predictability, and equal applicability; (3) adopted by a valid governing authority; and (4) applied by an independent authority.[1] For the Commission to conform to the rule of law, it cannot regulate the affairs of private parties or sanction them for their conduct in the absence of such rules or without adhering to them in practice.

A process that adheres to rule of law norms takes on heightened importance where the proceeding and proposed rules have been characterized by special interest pleading and rent-seeking masked in public interest platitudes. Despite the undeniably increasingly competitive landscape for BDS, and the potential for further competition absent regulatory disincentives to invest, a narrow segment of providers has continuously called on the FCC to impose new BDS rate regulations. Special rent-seeking privileges are sought primarily by a segment of BDS competitors who serve sophisticated business enterprises, not by less sophisticated everyday residential or retail consumers. New rate controls would give these special interest pleaders price cuts on wholesale access to their competitors' facilities, including advanced IP-based broadband networks. It's easy to

[1] Ronald A. Cass, THE RULE OF LAW IN AMERICA 4 (2001).

understand why those who advocate rate-regulated access to their competitors' facilities want this, but it's difficult to understand why the Commission would indulge them.

By imposing rate controls, the Commission necessarily will curb financial returns on investment for business data facilities. This necessarily will discourage infrastructure deployment by both incumbents and by new facilities-based entrants like the cable operators. Rate regulation also discourages facilities-deployment and market entry by competitors who, given a choice, prefer regulatory arbitrage to facilities-based competition. Common sense recognition of the economic incentives involved was supplied by the D.C. Circuit in *Ad Hoc Telecommunications v. FCC* (2009): "Perhaps an obvious point, but a decision that gives owners of telecommunications lines more control over access to those lines tends to increase the incentive for competitors to build competing lines."[2]

At a time when business investment is hovering near all-time lows, FCC actions that discourage further investment are far from harmless to the nation's economy. After the release of the most recent government data on the nation's GDP and business investment, Gregory Daco, an economist at Oxford Economics, declared, "weakness in business investment is an important and lingering growth constraint."[3] In the same vein as many other stories reporting on the most recent anemic business investment figures, the WSJ story stated, "declining business investment is hobbling an already sluggish U.S. expansion…."[4]

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[2] 572 F.3d 903, 910-911 (D.C. Cir. 2009).
[3] Eric Morath and Jeffrey Sparshott, "U.S. GDP Grew a Disappointing 1.2% in Second Quarter," *Wall Street Journal*, July 29, available at: http://www.wsj.com/articles/u-s-economy-grew-at-a-disappointing-1-2-in-2nd-quarter-1469795649.
[4] *Id.*

Regrettably, the agency process for this proceeding has run afoul of the rule of law. It is a basic rule of law precept that all rules must be adopted by a valid governing authority. The government must act according to its rules and not act in an arbitrary manner. The rulemaking processes the government undertakes cannot exceed its authority in enacting rules, or abuse its authority. Yet the Commission's data dump just prior to the public comment deadline and its delayed release of updated peer reviews are particularly problematic when considered in light of the above rule of law precepts.

As public filings in this proceeding have amply described,[5] for nearly two months the Commission declined to publicly release critical peer reviews of the business data market analysis upon which its regulatory proposal is based. The Commission finally released a revised market analysis and other documents bearing on that analysis – totaling some 228 pages – the day public comments were due. On that same date, the Commission released a revised market analysis. The peer reviews were focused on the prior analysis, not the revised analysis. The Commission did not release the peer reviews of the revised analysis until approximately three weeks after the initial comment deadline had passed. Of course, this irregular procedure ensured that the work of its hand picked analyst – and the proffered basis of the proposed regulation – would avoid careful scrutiny in the initial round of public comments. It also ensured that only a limited window would exist for the public to make an adequate examination and file reply comments.

Filings in this proceeding have persuasively made the case that the Commission has acted contrary to the APA by its delayed release of data and analyses proffered in

[5] See CenturyLink, Inc., *et al*., Motion to Strike, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593 (June 17, 2016); CenturyLink, Inc., *et al*., Letter, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593 (July 19, 2016), at 2.

support of its proposed rulemaking.[6] "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."[7] Indeed, numerous court precedents expressly recognize that "opportunity for comment must be a meaningful opportunity, not a sham opportunity."[8]

There is another respect in which the Commission has disregarded rule of law principles. The market analysis that the Commission has apparently attempted to shield from full and careful public comment scrutiny is also irretrievably arbitrary in its dismissal of potential competition from one particular segment of competitors. The Commission's proposed rulemaking is therefore contrary to the idea that government can only impose rules that are clear, predictable, and that treat all alike equally.

When rules are adopted through an arbitrary process pressed by special interest pleadings and susceptible to rent-seeking lobbies, there is a heightened risk that the rules ultimately adopted will lack a firm foundation in principle and fact. This increases the likelihood that the rules eventually adopted will lack clarity, predictability, and equal application. As indicated, despite ever increasing facilities-based competition in most places, this whole decades-long proceeding, more than most, has been driven in large part by "special access" to the Commission's administrative processes by some parties engaging in special pleading to obtain special treatment. Indeed, while most parties before the Commission engage in special pleading at one time or another seeking to gain an advantage or avoid a disadvantage, here a special pleading argument is at the core of the Commission's proffered analytical basis for its proposed rulemaking.

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[6] *See* Motion to Strike, at 26.
[7] *Connecticut Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 530-531 (D.C. Cir. 1982) cert. denied, 459 U.S. 835, 103 S.Ct. 79 (1982).
[8] *See, e.g., Gerber v. Norton*, 294 F.3d 173, 179 (D.C. Cir. 2002) (citing several cases).

Dr. Marc Rysman's analysis of BDS market competition recognizes the potential competition offered by ILECs in geographic areas with copper-based facilities in place – facilities that could potentially be upgraded by fiber deployment.[9] Meanwhile, Dr. Rysman's analysis rejects the potential competition offered by cable entrants in areas with hybrid fiber-coaxial facilities that could also be upgraded.[10] Specifically, data submitted by cable entrants indicates they have the potential to provide BDS services via fiber deployments to Metro Ethernet capable headends in 22 times as many census blocks as previously recognized. The arbitrariness and capriciousness lies in Dr. Rysman's acceptance of one platform for potential competition and simultaneous rejection of a similar platform for potential competition. The unequal analytical treatment of cable and ILECs is at odds with the rule of law principle that the law treats all alike equally – or at least treats all equally absent an important justification requiring a departure from that principle. There is no justification for this unequal treatment of competing services.

Despite solid evidence of market competition, the Commission now seeks to impose sweeping new regulation based on a myopic and distorted picture of the market. Comments have rightfully emphasized the analysis' exclusion of cable entrant potential competition raises serious problems under the APA.[11] The Commission's pigeonholed picture of the market is so askew that imposing the proposed rules on that basis would also likely be contrary to the APA's requirement that an agency's action be supported by substantial evidence.[12] The Commission should not seek to implement proposed rules based on analytical foundations that are incorrect on the very same day they are adopted.

[9] *See* Letter, at 2-5 (internal cites omitted).
[10] *See* Letter, at 2-5 (internal cites omitted).
[11] Motion at 19-23; Letter at 6.
[12] *See* 5 U.S.C. § 706(2)(E).

It has also been persuasively argued that Dr. Rysman's analysis – upon which the proposed rulemaking so heavily relies – is contrary to the Data Quality Act (DQA) and the Commission's own implementing guidelines.[13] Those guidelines are intended to ensure the "quality, objectivity, utility, and integrity" of information disseminated by the Commission and apply to rulemakings.[14] Yet given the stunning extent to which the Rysman study disregards potential competition in BDS services by cable entrants, it is exceedingly difficult to conceive how the study meets with any reasonable understanding of the guidelines. No formal DQA complaint adjudication is needed for the Commission to recognize the arbitrariness and disconnect with market reality reflected in the study's analytical approach – and for the Commission to change course.

In the event the Commission seeks to implement its proposed rulemaking, its apparent APA violations are serious enough to risk reversal in court. The Commission's dubious process in this proceeding and its problematic market analysis are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[15] Rather than impose proposed BDS regulations generated through a process and analysis that defy rule of law norms and raise serious administrative law problems, the Commission should close this proceeding. The Commission should instead explore ways

[13] Motion at 28-32, Letter at 7; 44 U.S.C. § 3516 note.

[14] FCC, Information Quality Guidelines, at 5-8 (rel. Oct 8, 2002).

[15] 5 U.S.C. § 706(2)(A). *See also id.* at § 706(2)("observance of procedure required by law").

it can encourage competitive entry and investment in next-generation BDS facilities without catering to special pleading and rent-seeking appeals.

Respectfully submitted,

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