Federal Communications Commission
Washington, D.C. 20554

April 14, 2016

MEMORANDUM

TO: Tommaso Valletti
Professor of Economics, Imperial College London

FROM: Matthew S. DelNero MSD
Chief, Wireline Competition Bureau

SUBJECT: *Peer Review of Analysis of the White Paper "Empirics of Business Data Services" by Dr. Marc Rysman (April 2016)*

Overview

The Federal Communications Commission (Commission) is in the process of an ongoing rulemaking evaluating the appropriate regulatory framework for business data service (BDS) industry, i.e., special access, in areas where the incumbent local exchange carrier (ILEC) is subject to price cap regulation (WC Docket No. 05-25, RM-10593).[1] As part of this rulemaking, the Commission collected data and information from providers and purchasers in the industry for an analysis of the marketplace.[2] Through this memorandum, I request that you perform a peer review of the attached White Paper produced by Boston University Professor of Economics Marc Rysman examining the nature of competition and marketplace practices in the supply of BDS.

Background

On December 18, 2012, the Commission released the *Data Collection Order*, outlining a data collection for an analysis of the BDS marketplace.[3] Services covered by the collection included traditional special access service (including DS1s and DS3s), packet-based dedicated service such as Ethernet, and best efforts business broadband Internet access service."[4] Those

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[1] *Special Access Rates for Price Cap Local Exchange Carriers*; *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994, 1998, para. 11 (2005) (*2005 BDS NPRM*); *see also 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*, WC Docket No. 05-25, RM-10593, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 16318, 16320, para. 31 (2012) (*Data Collection Order* or *BDS NPRM*).

[2] *Data Collection Order*, 27 FCC Rcd at 16360, App. A.

[3] *Id.*

[4] *Id.* at 16326-27, paras. 16-19.

required to respond included providers and purchasers of BDS and certain entities providing best efforts business broadband Internet access service.[5]

Relying in part on this data collection, the Commission is in the process of conducting a one-time, multi-faceted market analysis of the BDS industry.[6] The analysis will evaluate "how the intensity of competition (or lack thereof), whether actual or potential, affects prices, controlling for all other factors that affect prices" and would provide an evidentiary record for reforming the Commission's BDS rules.[7] The analysis will evaluate market structure and include, to the extent practicable, econometric regressions "of the prices for special access on characteristics such as 1) the number of facilities-based competitors (both actual and potential); 2) the availability of, pricing of, and demand for best efforts business broadband Internet access services; 3) the characteristics of the purchased service; and 4) other factors that influence the pricing decisions of special access providers, including cost determinants (e.g., density of sales) and factors that deliver economies of scale and scope (e.g., level of sales)."[8] Because of the various factors that may influence competition at a particular location, the Commission designed the collection to obtain detailed data at the location level.[9] The Commission also proposed to analyze the information from purchasers, as well as providers, to assess the reasonableness of terms and conditions offered by ILECs for special access service.[10] To assist with its analysis of the collected data, the Commission contracted with Professor Rysman to produce the attached White Paper.

Parameters of Review

Before a federal agency may disseminate influential scientific information, such as the White Paper, as part of a rulemaking, the material must be peer reviewed to enhance the quality and credibility of the government's scientific information.[11] Guidance from the Office of Management and Budget (OMB) requires agencies to provide peer reviewers with "instructions regarding the objective of the peer review and the specific advice sought."[12] The objective of this peer review is to establish whether the White Paper provides a solid foundation for analyzing the data collected in the BDS rulemaking proceeding. Please note that the standards for evaluation are not necessarily the same as those one might apply in evaluating studies for publication in a professional journal. For example, it is not necessary that the study present new or novel theoretical results or empirical techniques. Consistent with the requirements of the OMB Bulletin, we are not asking you to "provide advice on policy" or to evaluate any policy implications that might arise from use of the White Paper.[13]

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[5] *Id.* at 16327-28, para. 22.

[6] *See BDS FNPRM*, 27 FCC Rcd at 16343-49, paras. 66-71.

[7] *See id.* at 16343-47, paras. 66-69.

[8] *Id.* at 16346, para. 68.

[9] *Id.* at 16327, para. 22.

[10] *Id.* at 16354-56, paras. 91-93.

[11] *See* FINAL INFORMATION QUALITY BULLETIN FOR PEER REVIEW, OFFICE OF MANAGEMENT AND BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, 70 Fed. Reg. 2664 (2005) (OMB Bulletin), *available at* https://www.whitehouse.gov/omb/memoranda_fy2005_m05-03/ (last visited Aug. 2, 2013).

[12] *Id.* at 2668.

[13] The OMB Bulletin states in relevant part: "Peer reviewers can make an important contribution by distinguishing scientific facts from professional judgments. Furthermore, where appropriate, reviewers

Guidance from OMB further requires that "[r]eviewers shall be informed of applicable access, objectivity, reproducibility and other quality standards under the Federal laws governing information access and quality."[14] The OMB Bulletin also requires that "peer reviewers ensure that scientific uncertainties are clearly identified and characterized."[15] Finally, please be aware of three other aspects of the peer review process. First, the peer review will not be anonymous. Reviewers are identified and reviews placed in the public record. Past peer reviews conducted for the FCC can be found at: http://www.fcc.gov/omd/dataquality/peer-agenda.html. Second, the agency will not be providing any financial compensation to reviewers; your time and effort will be considered as donated in contribution to science and public service.

Third, the OMB Bulletin requires us to assess whether potential peer reviewers have any potential conflicts of interest.[16] In particular, a "conflict of interest" would exist if you have "any financial or other interest that conflicts with the service of an individual . . . because it could impair the individual's objectivity or could create an unfair competitive advantage for a person or organization."[17] To assist our determination of whether there are any potential conflicts, please indicate whether you have participated in this rulemaking proceeding in any capacity. Please provide us any information relevant to evaluating whether you might have a real or perceived conflict of interest, including whether you have participated in the rulemaking in any capacity and whether or not you have financial ties to regulated entities, other stakeholders, and regulatory agencies.[18] We note that the OMB Bulletin makes clear that "work as an expert witness, consulting arrangements, honoria and sources of grants and contracts" could trigger a potential conflict.[19] To evaluate any real or perceived conflicts of interest, potential peer reviewers should consult applicable federal ethics requirements, applicable standards issued by the Office of Government Ethics and the prevailing practices of the National Academy of Sciences (NAS).[20]

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should be asked to provide advice on the reasonableness of judgments made from the scientific evidence. However, the charge should make clear that the reviewers are not to provide advice on the policy...." *Id.* at 2669.

[14] *See id.* at 2675. These standards are discussed in greater detail in OMB's GUIDELINES FOR ENSURING AND MAXIMIZING THE QUALITY, OBJECTIVITY, UTILITY, AND INTEGRITY OF INFORMATION DISSEMINATED BY FEDERAL AGENCIES, 67 Fed. Reg. 8452 (2002).

[15] OMB Bulletin, 70 Fed. Reg. at 2669. The Bulletin further states that since not all uncertainties have an equal effect on the conclusions drawn, reviewers should ensure that the potential implications of the uncertainties for the technical conclusions drawn are clear. In addition, peer reviewers might be asked to consider value-of-information analyses that identify whether more research is likely to decrease key uncertainties. Value-of-information analysis was suggested for this purpose in the report of the Presidential/Congressional Commission on Risk Assessment and Risk Management. A description of additional research that would appreciably influence the conclusions of the assessment can help an agency assess and target subsequent efforts. *Id.*

[16] *Id.* at 2670.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] Specifically, peer reviewers who are Federal employees (including special government employees) are subject to Federal requirements governing conflicts of interest. *See, e.g.*, 18 U.S.C. § 208; 5 C.F.R. part 2635 (2004). With respect to reviewers who are not Federal employees, agencies shall adopt or adapt the NAS policy for committee selection with respect to evaluating conflicts of interest. *See* POLICY AND PROCEDURES ON COMMITTEE COMPOSITION AND BALANCE AND CONFLICTS OF INTEREST FOR COMMITTEES USED IN THE DEVELOPMENT OF REPORTS, THE NATIONAL ACADEMIES, NATIONAL ACADEMY OF SCIENCES,

The Commission's Electronic Comment Filing System (ECFS) for WC Docket Nos. 05-25 and 15-247 and RM-10593, will assist you in identifying potential conflicts with parties participating in the BDS rulemaking proceeding.[21]

Report on Findings

I request that you provide a written report of your review that describes the nature and scope of your review and your findings and conclusions with regard to this influential scientific information by **April 29, 2016**. The report shall include a short paragraph on your credentials and relevant experiences.

Because the White Paper contains and relies on information submitted by companies in the underlying rulemaking proceeding that is non-public, commercially sensitive, and protected by a protective order, you previously executed a non-disclosure agreement prior to reviewing the White Paper and any Confidential or Highly Confidential information on file with the FCC for this proceeding. If you have any questions regarding this agreement, please contact William Layton, 202.418.0865, William.Layton@fcc.gov.

Attachments

Dr. Marc Rysman, *Empirics of Business Data Services* (April 2016)

FINAL INFORMATION QUALITY BULLETIN FOR PEER REVIEW, OFFICE OF MANAGEMENT AND BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, 70 Fed. Reg. 2664 (2005).

NATIONAL ACADEMY OF ENGINEERING, INST. OF MEDICINE, NATIONAL RESEARCH COUNCIL (May 12, 2003), *available at* http://www.nationalacademies.org/coi/bi-coi_form-0.pdf (last visited Aug. 2, 2013).

[21] *See* Electronic Comment Filing System (ECFS) Home Page, Federal Communications Commission, http://apps.fcc.gov/ecfs/.