



June 24, 2015

Ex Parte

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: *In the Matter of Technology Transitions (GN Docket No. 13-5); Special Access for Price Cap Local Exchange Carriers (WC Docket No. 05-25)*

Dear Ms. Dortch:

On Monday, June 22, 2015, Jonathan Banks, Patrick Brogan, and the undersigned of the United States Telecom Association (USTelecom) met with Matthew DelNero, Carol Matthey, Deena Shetler, Randy Clarke, Daniel Kahn, Michael Ray, David Zesiger, Eric Ralph, and Vanessa Riley of the Wireline Competition Bureau (WCB) in person, and Michele Berlove, Heather Hendrickson, and John Visclosky of WCB by telephone to discuss certain aspects of the above-referenced proceedings.

USTelecom stressed the overall importance of the Commission taking every step to encourage the transition to modern fiber and IP networks. These networks will bring consumers and businesses untold benefits from faster and more robust connectivity to the Internet, data and applications. We emphasized the need for reasonable guidelines and/or interim procedures to apply when incumbent LECs (ILECs) decide to retire their TDM-based products and services, consistent with the Commission's stated goal of "maintain[ing] established rules and decisions that provide for wholesale access to critical inputs" while the Commission works through the special access proceeding.¹ We explained that the proposals being offered by several entities that use ILEC wholesale inputs appear to be designed primarily to preserve their own particular approach to serving customers, potentially on a circuit-by-circuit basis, rather than to ensure that end user customers have an adequate replacement service option. The appropriate inquiry is whether there are adequate substitute services available from the end user customer's perspective. Further, we stated our belief that new rules, interim or otherwise, are not necessary to evaluate whether the loss of TDM-based services in a particular community would adversely affect the public convenience and necessity, because existing rules are adequate to identify and address any potential harms. Moreover, the

¹ *Technology Transitions, et al.*, Notice of Proposed Rulemaking and Declaratory Ruling, PS Docket No. 14-174, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, RM-10593, FCC 14-185, ¶ 110 (rel. Nov. 25, 2014).

Commission's discretion under section 214 is not an appropriate mechanism to address concerns with wholesale last mile inputs, especially if used to reestablish price regulation for certain inputs (Ethernet, e.g.) or to create new obligations to provide unbundled access to DS1 and DS3 capacity loops over fiber or UNE-P obligations after TDM-based services are discontinued.

We also explained that pricing for special access services, which are sold as retail, not wholesale services, is already subject to the Commission's just and reasonable standard throughout the country, and to additional levels of regulation depending on whether they are offered in a competitive geographic area subject to pricing flexibility, and that the Commission need not establish a new national framework to govern the pricing of such services when they replace TDM-based services. In addition, we asked that the Commission not otherwise modify regulations affecting the provision of special access services and ILEC services used as wholesale inputs by competitors until after it has assessed the special access data collected for the purpose of evaluating the competitiveness of those markets.

Regarding the section 214 process, we expressed our belief that additional restrictions proposed by several parties threaten to derail or significantly delay technology transitions by making ILECs choose between more investment in next generation networks and maintaining legacy networks. Likewise, the Commission's proposed rebuttable presumption that where a carrier seeks to discontinue, reduce, or impair a wholesale service, that action will discontinue, reduce, or impair service to a community or part of a community is unnecessary and not warranted, in part because it fails to consider the existence or adequacy of substitute services that the Commission has long recognized in both its UNE and Special Access proceedings.

We also referenced the 6 principles for governing section 214 discontinuances of TDM-based products as modified by COMPTTEL, acknowledging that having ground rules to facilitate the transition from TDM to IP is sound policy. However, we cautioned that the Commission should not accept the invitation to require that replacement products be provided at the same price as legacy products, nor resurrect abandoned requirements to provide UNE-P-type replacement services under the guise of preserving existing competition; such actions would overturn existing rules, and thus require a rulemaking. In the alternative, we proposed a more balanced approach that takes into account the costs to ILECs of maintaining multiple networks indefinitely, suggesting among other things that any transition measures adopted be limited in duration (one or two years, e.g.) to allow competitors who rely on wholesale inputs ample time to make alternative arrangements.

USTelecom also explained why the Commission should allow technology transitions to happen unencumbered by unwarranted restrictions and delay. Markets are open and competitive, even more so when competition from cable companies is taken into account. As detailed in the Attachment to this filing, non-ILECs already account for over 45% of business lines according to FCC data. The availability of other alternatives, including competitive facilities-based and special access services, make prolonged access to ILEC inputs post-transition unnecessary in all but potentially a few discrete geographic markets where competition may not yet be feasible. The Attachment also reviews data that show a trend away

Ms. Marlene Dortch
June 24, 2015
Page 3

from competitor reliance on ILEC UNEs; in particular, we discuss the relative development of facilities-based and wholesale competition in the marketplace.

Finally, we suggested that the Commission could credibly establish a presumption that ILECs, whose CLEC and cable competitors now control over 45 percent of business lines, are no longer dominant and have no true monopoly advantage in most or all voice markets nationwide, similar to how the Commission recently found that cable operators are now subject to effective competition because DBS providers have captured almost 34 percent of multichannel video programming distributor subscribers.²

Pursuant to Commission rules, please include this ex parte letter in the above-identified proceedings.

Please do not hesitate to contact me should you have any questions regarding this filing.

Sincerely,



Diane Griffin Holland
Vice President, Law & Policy

Attachment (1)

Copy via e-mail to:

Matthew DelNero
Carol Matthey
Deena Shetler
Randy Clarke
Daniel Kahn
Michael Ray
David Zesiger
Eric Ralph
Vanessa Riley
Michele Berlove
Heather Hendrickson
John Visclosky

² See *Amendment to the Commission's Rules Concerning Effective Competition, Implementation of Section 111 of the STELA Reauthorization Act*, Report and Order, MB Docket No. 15-53 (rel. Jun. 3, 2015).

Discussion of Competitive Developments in Enterprise Markets

The goal of the Communications Act and regulatory policy is to promote competition, not to favor particular competitors or to preserve every type of competitive business model. The deregulatory goals of the statute, as affirmed by the courts, imply a preference for facilities-based competition where it is feasible. The types of business models that work to deliver sustainable competition over the long term are properly sorted out in an increasingly deregulated marketplace.

In comparison with regulated wholesale access, facilities-based competition provides a more efficient and sustainable means of generating the investment, innovation, and differentiation needed to meet the ever-growing demand among diverse business users for communications services at reasonable prices. Policies that skew incentives toward maintaining wholesale competition where facilities-based competition is feasible, including last mile access, will perpetuate dependence on regulated wholesale to the detriment of facilities-based competition, and ultimately to the detriment of consumers.

In assessing wholesale access policies, regulators must look at the market holistically and dynamically. They must start with a vision for facilities-based competition which recognizes that its development involves a process of building traction in the marketplace and that this may arise in unanticipated ways from among a variety of business strategies and technologies. Some approaches will work and some will not; regulators must avoid the temptation to pick winners and losers.

In particular, regulators must formulate policies so as to not discourage entry by facilities-based providers or migration toward self-deployment. They must be skeptical of quick fixes based on wholesale rates that do not reflect market realities. Regulators must consider whether the absence of facilities-based competition in a given area is truly an indicator of infeasibility, as opposed to an artifact of historical business model choices and relatively favorable wholesale terms. Finally, and perhaps most important, regulators must be wary of extending regulated wholesale access to evolving next generation technologies to avoid precluding or limiting the development of facilities-based competition.

Selected Statistics on the Relative Development of Facilities-Based and Wholesale Competition

Non-ILECs Serve 45 Percent of Business Lines and Have Certain Advantages Compared to ILECs

According to the FCC report, “Local Telephone Competition: Status as of December 31, 2013,” and associated data, by the end of 2013 non-ILECs served 45 percent of business retail access lines and 44 percent of total retail access lines. While these figures include both customers served over non-ILEC-owned last mile facilities and wholesale facilities, they indicate a significant portion of retail revenues are going to non-ILECs. Presumably non-ILEC share gains have continued since 2013. This is important both because in a marketplace that is increasingly defined by facilities-based competition, providers have ample incentive to provide reasonable commercial wholesale so as to not lose customers to competing platforms, and because non-ILECs often cite ILEC scale as a competitive advantage. These data show that that advantage has declined dramatically since competition was introduced into local telecom markets. By the end of 2013, the number of lines served by ILECs had fallen from a peak of 188 million lines to 81 million switched and interconnected VoIP lines, including residential, business, and

wholesale lines. This represents a network that was at 43 percent of peak capacity in 2013 and declining. The traditional switched network, the source of the ILECs' legacy dominance, was even lower. By 2013, lines had fallen from 186 million to 70 million, or 38 percent of peak lines and falling.

While the sources of ILEC dominance as legacy providers are well known, non-ILECs have certain advantages as well. For example, while ILEC network utilization has been declining, non-ILEC network utilization is growing as non-ILECs add customers. Non-ILECs, including CLECs as well as cable operators, can benefit from serving anchor clients with large demand, thereby reducing the incremental user cost of adding new customers. In addition, unlike ILECs, non-ILECs have the ability to serve the densest, most profitable areas without serving higher-cost, low density areas. Finally, non-ILECs are allowed to increase scale and scope through consolidation, which they have.

Cable Entry into Business Services Represents a Significant Marketplace Development

Perhaps the most significant development in the enterprise marketplace in recent years has been the cable industry's competitive entry. Coming at this from a different angle than the typical CLEC, cable operators have achieved scale and scope in residential market by virtue of their residential video, broadband, and (recently) digital telephone service. With their footprints nearly ubiquitous in residential areas, and in anticipation of wireline telecommunications providers entering their traditional video business, they started out by serving small businesses, but have since expanded their sights to include medium and even large enterprises. As they have moved up market, sometimes needing to build out plant to previously unserved commercial areas, cable operators have focused on serving the "large local" verticals, such as hospitals, governments, educational institutions, and hotels and convention centers. They have also competed for wireless backhaul fiber upgrades. Such large anchor clients with significant demand can help reduce the incremental cost of serving additional customers, as infrastructure costs may be shared.

The cable industry has seized upon commercial services as a substantial growth opportunity. Cable industry commercial revenue grew from approximately \$4 billion in 2009, according to market research firm Pike & Fisher¹ to \$10 billion in 2014, according to Light Reading.² For example, the largest cable operator, Comcast, saw its commercial revenues grow by a factor of almost five during this same period, from \$828 million in 2009 to \$4 billion in 2014, according to Comcast financial documents. Comcast's capital investment for commercial services in 2014 was \$841 million, up from \$351 million in 2009. Cable commercial revenues are still growing at double digit rates, with Comcast commercial service growing 25 percent in 2014 and the next largest cable operator, Time Warner Cable commercial services revenue growing 22 percent in 2014.³

Importantly, cable operators typically serve end-user customers over their own last mile facilities, either hybrid fiber-coaxial cable or dedicated fiber. USTelecom has filed numerous Ex Parte letters with the

¹ Cable Commercial Services Strategies: Analysis and Revenue Forecast 3rd Edition (September 2010).

² See [http://www.lightreading.com/cable-video/cable-business-services/us-cable-nears-\\$10b-in-business-service-revenues/d/d-id/712347](http://www.lightreading.com/cable-video/cable-business-services/us-cable-nears-$10b-in-business-service-revenues/d/d-id/712347).

³ See Comcast and Time Warner Trending Schedules, available at <http://cmcsk.com/financials.cfm>; <http://ir.timewarnercable.com/investor-relations/quarterly-earnings/default.aspx>.

Commission providing evidence that cable networks provide business class service on par with ILEC TDM services.⁴ Cable operators are among the leaders in providing carrier class Ethernet services in the United States. As market research firm Vertical Systems Group has reported, three cable operators – Time Warner Cable, Comcast, and Cox – are among the top eight providers of carrier Ethernet service in the United States. An additional two cable operators – Charter Communications and Cablevision Lightpath – are among the top thirteen.⁵ Moreover, the major cable operators – Comcast, Time Warner Cable, Cox, Charter Spectrum, and Brighthouse, among others – have received certification from the Metro Ethernet Forum (MEF) as providers of carrier class Ethernet services.⁶ Heavy Reading estimated that cable operators had approximately 25 percent of carrier Ethernet services revenues in 2013 and that that figure would rise to more than a third over the next several years.⁷

Facilities-Based Competition Is Growing While UNE Loop Competition Is Declining

While individual non-ILECs may be utilizing wholesale UNE loops, indicators are that overall the portion of connections served over wholesale facilities is declining while the share served over self-deployed loops is increasing. An analysis of the FCC's Telephone Competition: Status as of December 31, 2013, the most current data available, indicates that by the end of 2013 the number of UNE loops reported sold by ILECs had declined to 2.7 million from 3.8 million in 2008 and a peak of 4.5 million in 2005. The ILEC-reported UNE loops are not standardized as voice grade equivalents (VGE) and may include loops leased for voice or data.

Non-ILEC UNE loop data are reported as VGE switched access lines. It appears that non-ILECs report only voice lines and not data. Nonetheless, the non-ILEC data indicate declining reliance on UNE loops for VGEs: 5.1 million at the end of 2013, or 8.8 percent of non-ILEC retail lines, compared to 7.6 million at the end of 2008, or 17.2 percent of non-ILEC lines. Even when removing cable lines (switched and interconnected VoIP lines purchased in a bundle over coaxial cable) from the denominator, UNE loops represented only 17.6 percent of lines at the end of 2013, compared to 29.6 percent at the end of 2008.⁸

Similar data are not readily available for special access. The FCC Form 477 Telephone Competition data include resold special access, but it is lumped in with other forms of resale, including total service resale, commercial UNE-P arrangements, and ISDN circuits. Each of these forms of resale has experienced its own set of dynamics in recent years, and therefore it is difficult to identify trends for any of the particular services.

⁴ See, e.g., especially Ex Parte Letter from Glenn Reynolds, USTelecom, WC Docket 05-25 (Dec. 3, 2012); Ex Parte Letter from Glenn Reynolds, USTelecom, WC Docket 05-25 (Jun. 4, 2014).

⁵ See <http://www.verticalsystems.com/vsglb/2014-u-s-carrier-ethernet-leaderboard/>.

⁶ See <http://www.mef.net/certification/services-certification-registry>. Among the attributes covered in the MEF standards are reliability and quality of service. See <https://www.mef.net/carrier-ethernet-services/carrier-ethernet-and-ce-2-0>.

⁷ Heavy Reading, Cable Industry Insider, Vol. 8, No. 4 (August 2013).

⁸ When discussing non-ILEC data, USTelecom limits the time period under consideration to 2008 or later because inconsistencies in reporting interconnected VoIP prior to the end of 2008 produced significant distortions in the data, though probably less so the further back one goes toward the beginning of the 2000s.