

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Special Access for Price Cap Local Exchange Carriers)	WC Docket No. 05-25
)	
)	
AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Service)	RM-10593
)	

**REPLY COMMENTS OF THE
UNITED STATES TELECOM ASSOCIATION**

The United States Telecom Association (“USTelecom”) respectfully submits the following comments in reply to comments submitted pursuant to the Commission’s data collection in WC Docket No. 05-25 and RM-10593. Our comments focus on issues related to product market definition, in particular the exclusion of cable modem services from the relevant product market.

I. Evidence Shows Cable Modem Is a Force in the Business Broadband Marketplace.

Available marketplace evidence supports the conclusion that cable is a meaningful competitor for most business customers, and cable networks are widely available to U.S. businesses. According to the cable industry Cable modem broadband service was available to 93 percent of the U.S. population.¹ Government data show cable modem was available to 89 percent of the U.S. population and DOCSIS 3.0 cable modem technology was available to more than 80 percent of the U.S. population at download speeds of 50 megabits per second or greater.²

¹ National Cable & Telecommunications Association, Industry Data, <https://www.ncta.com/industry-data>.

² National Broadband Map, *Broadband Statistics Report: Access to Broadband Technology by Speed* at 3 (Mar. 2015), <http://www.broadbandmap.gov/download/Technology%20by%20Speed.pdf>.

Cable operators' large network footprints allow them to serve most business locations without significant incremental investment.³ Independent analysts have estimated that cable broadband networks currently pass more than three-quarters of small and medium business customers in the U.S.⁴ A series of recent metropolitan area studies by a third party market researcher confirm this estimate is accurate and is, in fact, conservative.⁵

In addition, there is evidence that many customers have in fact been choosing cable modem service as an alternative to dedicated services such as T-1 service. First, cable business revenues have grown to an estimated \$14 billion from less than \$3 billion in 2007.⁶ Second, cable operators actively market their cable modem services alternatives to T-1s.⁷ Third, independent analysts confirm that the historical advantage of dedicated connectivity has eroded as cable modem capabilities have increased:

³ USTelecom White Paper, *The Competitive Business Broadband Marketplace* at 4 (February 2016) (“USTelecom Business Broadband Competition White Paper”) <https://www.ustelecom.org/sites/default/files/files/USTelecom-White-Paper-2.pdf>.

⁴ *Id.* (citing Alan Breznick, Heavy Reading, *Presentation to The Future of Cable Business Services 2014* (Dec. 2, 2014)).

⁵ See Ex Parte Letter from Patrick S. Brogan, USTelecom, to Marlene H. Dortch, FCC, WC Docket No. 05-25 and RM-10593, Attach., Arthur Menko, *Methodology for Identifying Local Competitive Commercial Infrastructure: Cable Modem High Capacity Services* at 1 (FCC filed Oct. 16, 2015) (estimating cable availability to nearly four-fifths of businesses in Atlanta); Ex Parte Letter from Maggie McCreedy, Verizon, to Marlene Dortch, FCC, WC Docket No. 05-25 & RM-10593 (FCC filed Jan. 14, 2016) (citing Declaration of Arthur Menko in WC Docket No. 05-25 & RM-10593 at 6 (Dec. 18, 2015) which estimated cable availability to more than three-quarters of businesses in Albany, Boston, Philadelphia, Virginia Beach and Washington, D.C.); and USTelecom Comments at 25-26 and Appendix, Arthur Menko, *Methodology for Identifying Local Competitive Commercial Infrastructure: Cable Modem High Capacity Services* at 2. (estimating cable availability to nearly 70 percent of businesses in Anchorage, Austin, Charleston (West Virginia), Cincinnati; Honolulu; Kansas City; Las Vegas; Omaha; Portland (Maine) Rochester; Spokane.) The results of these studies are all conservative since they are based on locations where cable is identified as a voice provider; there are locations where cable provides data or video services without voice.

⁶ USTelecom Business Broadband Competition White Paper at 6.

⁷ Comments of The United States Telecom Association, WC Docket 05-25 and RM-10593 at 21-23 (filed Jan. 28, 2016) (“USTelecom Comments”).

Historically, when consumer data service consisted of dial-up or few hundred kbps DSL, the relatively high speed, symmetric, dedicated capacity of a telco T1 or T3 business line provided distinctly superior connectivity in return for a price premium. As the capabilities of consumer-focused networks have increased, this distinction has eroded, allowing cable to meet the needs of a larger proportion of business customers with essentially-residential products. This trend will continue, e.g., with cable's rollout of DOCSIS3.1, which is specified to provide 10Gbps downstream by 1Gbps upstream service with little incremental network capex.⁸

Fourth, Commission data show the total number of so-called “best efforts” fixed broadband connections to businesses – such as cable modem, xDSL, fiber to the premises, fixed wireless, and satellite – rose from 6.6 to 8.4 million from 2009 to 2013 and the number of cable modem business connections grew from 1.6 million at the end of 2009 to 3.3 million out of 7.4 million total U.S. businesses in 2013.⁹ Recent market activity shows that cable operators continue to add business customers to their cable modem networks.¹⁰ Given that the number of U.S. businesses establishments was essentially flat from 2009 to 2013 period,¹¹ and given that 95% percent of

⁸ Paul de Sa et al., Bernstein, *U.S. Telecom: A Primer on the \$70B Enterprise Telecom Market (Cable's Opportunity = Telcos' Loss?)* at 7 (Jul. 16, 2015) (“Bernstein U.S. Telecom Enterprise Primer”) (explaining that cable’s increasing competitiveness for business customers is based, in part, on enhanced networks capabilities).

⁹ Federal Communications Commission, *Internet Access Services: Status as of December 31, 2013* at 23-24 (October 2014) (business connections are derived by subtracting residential connections from total connections).

¹⁰ See, e.g., USTelecom Business Broadband Competition White Paper at 5 (noting that Time Warner Cable had 58,000 lit buildings and 860,000 hybrid fiber-coax buildings on its network as of the third quarter of 2015, and added 50,000 buildings to its network in the first three quarters of 2015).

¹¹ United States Census, *Statistics of U.S. Businesses*, 2013 SUSB Annual Data and 2009 SUSB Annual Data, U.S. and state totals (“Statistics of U.S. Businesses”), http://www.census.gov/econ/susb/historical_data.html (from 2009 to 2013, establishments grew 0.7% from 7,433,465 to 7,488,353 while establishments with less than 20 employees declined 0.2% from 5,226,756 to 5,218,841).

small businesses had already adopted broadband Internet access by 2009,¹² businesses were clearly switching to these cable modem and other “best efforts” services from some other services. It is likely that, for some customers, these were legacy dedicated services. Customers have continued to switch to cable modem and other best efforts services, and there is no reason to believe they will not continue to do so in the future as technological capabilities of cable modem services continue to increase.

II. Overbroad Exclusion of Cable Modem Is Unjustified.

Cable operators market their business cable modem services as an alternative to traditional time division multiplexed (TDM) technologies, such as T-1 lines.¹³ The available evidence, discussed above, indicates that some customers have switched, and many continue to switch, from T1s to cable modem services. Yet, several CLEC commenters assert that, in assessing competition in the business broadband marketplace, the product market should be limited to certain “dedicated services.” Under this view, business broadband services provided via cable modem would be summarily excluded from the assessment.¹⁴

Ultimately, those claims rest on the notion that dedicated services offer quality features and dedicated bandwidth for which *selected* customers are willing to pay a premium. Advocates utilize the “best efforts” label pejoratively in order to generate a prima facie bias against their inclusion in any competitive analysis. Yet, existing DOCSIS 3.0 cable modem services, and

¹² Federal Communications Commission, *Broadband Service Capability Survey Business Survey-Final* at 5 (Feb. 2010) (among 37,779 businesses with 25 or fewer employees surveyed in October 2009, 37,034 were Internet adopters and 35,747 were broadband Internet adopters).

¹³ USTelecom Comments at 21-23.

¹⁴ See Declaration of Jonathan Baker on Market Power in the Provision of Dedicated (Special Access) Services, WC Docket No. 05-25 and RM-10593, at 15-18 (filed Jan. 27, 2016) (“Baker Declaration”); Comments of Windstream Services, LLC, WC Docket No. 05-25, RM-10593, GN Docket No. 13-5 at 10-30 (filed Jan. 27, 2016) (“Windstream Comments”); Comments of Birch, BT Americas, Earthlink, and Level 3, WC Docket No. 05-25 and RM-10593 at 15-18 (filed Jan. 22, 2016) (“Joint CLEC Comments”); Comments of Sprint.

soon-to-be-deployed DOCSIS 3.1 services, provide both upload and download speeds significantly greater than the 1.5 megabits per second upstream and downstream over a T-1 line.¹⁵ Neither the more limited preferences of a sub-segment of customers nor the rhetorical derision of such “best efforts” services justifies applying a narrow product market definition to the entire marketplace, nor do they justify the risk of overbroad regulation that such a limited definition entails.

A product market definition based on a blanket exclusion of cable modem is flawed in several respects. First, it is a highest common denominator construct: if *some customers* prefer the additional service quality and dedicated bandwidth features then, we are told, the Commission must regulate as if *all customers* are not willing to consider cable modem business service as a competitive alternative to dedicated services. Such an overbroad application of such a flawed analysis would lead to over-regulation of facilities-based services, even in the last mile, for a large portion of customers.

Second, a blanket exclusion of cable modem services from the product market definition rests on a false dichotomy driven by circular reasoning. If a business has chosen a best efforts service, we are told that choice was inevitable – that there are “camps” for best efforts and dedicated services and customers are willing to consider one service or the other, not both.¹⁶

¹⁵ See, e.g., USTelecom Comments at 21 (citing government data indicating that as of mid-2014, cable modem service using DOCSIS 3.0 technology was available to more than 80 percent of the population at 50 megabits per second or greater and 58 percent of households at 100 megabits per second or greater. See also USTelecom Comments at 18 (noting that cable companies are now on the verge of deploying next-generation DOCSIS 3.1 technology. This new technology permits speeds up to 10Gbps, and cable operators have already begun testing 1 Gbps service for commercial deployment.).

¹⁶ See Baker Declaration at ¶ 32 (“end users are typically in one camp or the other, preferring either dedicated services or best efforts broadband”).

This dichotomy is problematic at a minimum because it is based on static choices and ignores how business broadband technology and competition has been evolving – and continues to evolve – since local telecommunications markets have been opened to competition over the last couple of decades. As USTelecom stated in its comments in this proceeding, “[f]or decades, business customers’ high-capacity needs were met by DS1 and DS3 technology because that was the only option. Over the last ten years, however, customers have been rapidly shifting away from that decades-old technology towards a multitude of options with a range of capacities and features.”¹⁷

In reality, there was – and is – a base, albeit declining, of legacy customers who are now able to consider more diverse alternatives based on the quality and price tradeoffs reflected in the different technologies. The CLEC’s proposed product market definition gives no consideration to customer decision processes weighing and choosing among traditional and new technologies. Moreover, customers who have chosen one type of technology or the other at one point in time can be expected to consider alternatives going forward, as their own needs evolve and as technology evolves. The Commission must analyze competition holistically through the lens of a dynamic technology transition process rather than a static snapshot of a limited sub-segment’s choices at one particular point in time.

III. CLEC Share Calculations Misstate Competition.

Cable’s growth in revenues from less than \$3 billion in 2007 to \$14 billion in 2015 from providing services to businesses has changed market dynamics.¹⁸ CLECs generally admit that dedicated service buyers “differ in many ways that affect the value they place on dedicated services, the cost of providing those services, and the set of possible providers they can look

¹⁷ USTelecom Comments at 7.

¹⁸ *See supra* at 2 and fn. 6.

to.”¹⁹ In “many locations,” “best efforts (cable modem) broadband has often become the preferred option” as the price of that service “has declined and available bandwidth has increased.”²⁰ According to cable providers, the trend of increasing bandwidth will continue as the industry shifts to DOCSIS 3.1 and the ability to deliver upstream and downstream speeds that dwarf those offered over traditional dedicated services. Cable providers also stoutly defend the reliability and service quality of cable modem service for smaller and medium sized businesses as equal to or better than dedicated services,²¹ and the steady growth of their business customer base would seem to confirm this view.

CLECs single out “small retail customers and some mid-sized customers” as the source of growing demand for cable modem services.²² To put this growing demand in perspective, some analysts have estimated cable’s share of very small businesses to have reached 60% as of the end of 2015 and that cable has a 44% share of the next category up - small/lower complexity businesses.²³ These analysts project continued growth of cable share.²⁴

CLEC analysis defines the product market as “dedicated services” excluding cable modem service.²⁵ However, it would seem clear from the above that cable modem service is a viable alternative to dedicated services in, at least, the “many locations” where “small retail customers and some mid-sized customers” exist. When attempting to assess market rivalry by calculating market shares, the CLEC analysis excludes cable modem service as a competitor

¹⁹ Baker Declaration at ¶ 29 (citing differences in demand for “reliability and service quality.”).

²⁰ Baker Declaration at ¶ 32.

²¹ USTelecom Comments at 21-23.

²² Baker Declaration at ¶ 32.

²³ Bernstein U.S. Telecom Enterprise Primer at 6 (Exhibit 7).

²⁴ *Id.*, at 6-7.

²⁵ Baker Declaration at ¶ 3.

even in those locations where it is often “the preferred option,” while including small and mid-sized customer locations that had dedicated service according to the 2013 dataset.²⁶ This approach is flawed, as it effectively inflates the denominator of the share calculation by overstating the number of locations that require dedicated service-only connections and artificially reduces CLEC share while inflating ILEC share. “Small retail customer” locations should be excluded from these calculations because those locations are not part of a dedicated services-only product market. Similarly, and at a minimum, “mid-sized” business locations with “limited demands for service quality,”²⁷ should also be excluded from the denominator for the same reason. In the alternative, these locations could be included if cable modem service is counted as a competitor. Excluding these locations will have a substantial effect on the denominator of the market share calculation because the vast majority of business locations are small and mid-sized businesses locations. For example, Census data indicate that of 7.4 million business establishments in the United States, 5.2 million had fewer than 20 employees and 5.9 million had less than 100 employees.²⁸ Some telecom analysts estimate that well over half of business locations are small businesses and approximately 80% of business locations have communications needs that are largely met by cable modem service.²⁹

IV. Narrow product market definition distorts analysis of competitive entry.

Another example of the skewed impact of the CLECs’ narrow product market definition is significant underestimation of potential competition for dedicated services. By ignoring cable modem and other “best efforts” services, the CLECs’ competitive analysis utterly misses a

²⁶ Baker Declaration at ¶ 42.

²⁷ Baker Declaration at ¶ 32.

²⁸ Statistics of U.S. Businesses (2013).

²⁹ Bernstein U.S. Telecom Enterprise Primer at 4 (Exhibit 3).

significant source of competitive entry. For example, the CLECs focus on the impact of in-building and near-building competitors, as well as the prospect for market entry.³⁰ Cable modem (or cable voice or video) service may already be deployed in or near a building. A significant portion of the investment associated with bringing coax or fiber to the building would have already occurred. To provide dedicated services would entail deploying Ethernet electronics, or possibly a fiber upgrade to the lateral. But cable is excluded from the analysis merely because it is currently providing something other than dedicated services over the existing plant.

Meanwhile, evidence mounts that cable has been rapidly deploying dedicated Ethernet services which are not reflected in the 2013 data the FCC collected.³¹

V. Conclusion.

CLECs suggest that a competitive analysis of the business broadband marketplace should summarily exclude cable modem and other “best efforts” broadband services. Such an approach is overbroad because many customers consider such services to be a competitive alternative to dedicated services. In other words, CLECs seek to base policy for *all* business broadband customers on the more limited demands of a *subset* of customers. The practical impact of that approach is to substantially overstate ILEC market shares (and market power) by including customers that do not limit their demand to dedicated services in the denominator of their share calculation. It also means that the CLEC analysis misses a very large and growing source of potential entry for dedicated services.

³⁰ Baker Declaration at ¶¶ 39-40, 43, and 96-106.

³¹ See USTelecom Business Broadband Competition White Paper at 5 (noting that since late 2014, Comcast added new fiber and Ethernet services in a non-exhaustive list of at least 20 markets (Knoxville; Albuquerque; Santa Fe; Atlanta; Windsor County, Vermont; Sullivan County, New Hampshire; New London County, Connecticut; Denver; Portland, Oregon; Minneapolis-St. Paul; Scranton – Wilkes-Barre, Pennsylvania; Salt Lake City; Chico, East Bay, Napa, Modesto, Salinas, and San Ramon, California; Redmond, Washington; and Huntsville, Alabama). See also, USTelecom Comments at 27-29.

If the Commission were to expand regulation of special access generally based on the narrow CLEC product market definition, it would distort the market for millions of business customers who today have a competitive choice of facilities-based data service providers who compete with last mile networks. Instead, the Commission should focus on further encouraging continued investment and innovation in delivering broadband services to businesses.

Respectfully submitted,

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