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June 30, 2009

**EX PARTE**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

**RE: Special Access, WC Docket No. 05-25**

Dear Ms. Dortch:

The National Cable & Telecommunications Association (NCTA) submits this letter in response to two recent proposals – one by incumbent local exchange carriers (the “ILEC Proposal”)<sup>1</sup> and one by competitive local exchange carriers and wireless carriers (the “CLEC Proposal”)<sup>2</sup> – regarding potential collection of data regarding the state of competition for special access services.

Many cable operators provide high-capacity services that compete with special access services offered by incumbent local exchange carriers and consequently NCTA has a significant interest in any requirement obligating providers to submit data on the location of their facilities and customers. NCTA appreciates that the collection of additional data could be a useful factual predicate to establishing the appropriate regulatory regime for ILEC special access services. Should the Commission determine that there is a need for such additional data, NCTA’s members wish to be as helpful as possible in supplying any data deemed necessary.

As explained below, NCTA urges the Commission to tailor any data collection request to avoid overly burdensome requests for information regarding a company’s future construction of facilities. Given the numerous fact-specific variables that factor into such decisions, it is unlikely the Commission will be able to develop a “one size fits all” set of proxies to predict future investment and it should not collect data for that purpose. Instead, the Commission should focus on identifying locations actually served by competitors and it should use this information to test the accuracy of predictions previously made using its current triggers for granting pricing flexibility. Finally, because the data at issue could be used by ILECs to disadvantage

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<sup>1</sup> Letter from Glenn Reynolds, USTelecom, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25 (filed Apr. 27, 2009).

<sup>2</sup> Letter from Russell Merbeth, Integra Telecom, et al., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25 (filed June 3, 2009).

competitors and customers, the Commission should proceed with the utmost caution and take all possible steps to protect the confidentiality of any data it decides to collect.

Future Construction. It is generally agreed that potential competition to ILEC special access services may be a relevant factor to consider in deciding whether to grant (or revoke) pricing flexibility for special access services. Consequently, both the ILEC Proposal and the CLEC Proposal would require competitive providers to submit information regarding future construction of facilities. The “build/buy” section of the CLEC Proposal would require providers to submit a description of the analysis they employ in deciding whether to build new facilities, including the average cost of deploying transmission facilities and information on factors that would prevent deployment.<sup>3</sup> The ILEC Proposal, on the other hand, would require a competitive provider to submit detailed information regarding any location where it had expressed a willingness to provide service, e.g., by responding to a Request For Proposal (RFP).<sup>4</sup>

Under either the ILEC Proposal or the CLEC Proposal, NCTA is concerned that the data produced in response to these questions will not necessarily provide an accurate assessment of potential competition and that the benefit of collecting the data will not justify the significant burden placed on companies that must respond. As the FCC, DOJ, and GAO all have recognized, the economics of constructing last mile facilities to commercial buildings can be daunting.<sup>5</sup> These are capital-intensive, high-risk investments and decisions regarding where and when to make such investments are not simple. Consequently, as NCTA explained in a prior ex parte letter, providing data regarding where facilities might be deployed in the future is substantially more complicated than providing data regarding locations where facilities exist today.<sup>6</sup>

The ILEC Proposal would impose significant burdens with no likelihood that it will lead to accurate projections of where competition will develop. Many companies may not keep the kind of detailed records needed to identify potential customers as would be required under the ILEC Proposal. And even if that data could be produced, it would not provide an accurate picture of where competition is economically feasible. The fact that a company previously submitted a losing bid in response to an RFP does not demonstrate that it can efficiently serve that building in competition with the ILEC or that it would submit a bid to serve that location in the future. Indeed, the opposite conclusion is equally plausible, i.e., that serving that building is

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<sup>3</sup> CLEC Proposal at 7.

<sup>4</sup> ILEC Proposal at A-2.

<sup>5</sup> See *U.S. v. Verizon Communications, Inc. and MCI, Inc.*, C.A. No. 1:05CV02103, Complaint (filed Oct. 27, 2005) at 9, ¶ 27 (building entry “is a difficult, time-consuming, and expensive process.”); Report to the Chairman, Committee on Government Reform, House of Representatives, *FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, GAO-07-80 (Nov. 2006) at 26 (“Constructing a local telecommunications network can be extremely capital intensive.”); *Verizon Communications, Inc. and MCI, Inc. Applications for Transfer of Control*, WC Docket No. 05-75, Memorandum Opinion and Order, 20 FCC Rcd 18433, 18452, ¶ 39 (2005) (“[C]arriers face substantial fixed and sunk costs, as well as operational barriers” in extending service to new buildings).

<sup>6</sup> Letter from Steven F. Morris, NCTA, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25 (filed May 8, 2009).

not economically feasible for competitors and future competition is unlikely. Conversely, the fact that a competitor chose not to submit a bid for a particular location in the past has no bearing on whether it might decide to do so in the future. In short, the presence or absence of losing bids to serve customers in a particular area is not necessarily a reliable predictor of where competition might or might not be economically feasible.

The CLEC Proposal also raises concerns. The decision whether to build new facilities to a commercial location depends on a variety of factors and involves far more than just plugging numbers into a formula. The usual factors affecting a business case, such as cost of materials and labor and potential revenues from customers in the building, obviously are relevant. But as the CLEC Proposal suggests, there are a variety of factors that are more difficult to quantify (such as permitting and building access considerations, synergies with other construction in the area, internal budgeting constraints, and customer timing issues) that also affect the decision whether to extend service to a particular building at a particular time.

NCTA appreciates the Commission's desire to develop a set of proxies that can accurately determine where competition will constrain the special access rates of incumbent LECs and where it will not. Because of all the highly variable factors that affect construction decisions, however, it is highly unlikely that the Commission will be able to develop a "one size fits all" set of proxies capable of accurately predicting where competitors are likely to invest. Consequently, before the Commission imposes burdensome reporting requirements designed to predict where competitors might build in the future, it first should collect data regarding existing locations served by competitors and use that data to measure the validity of its existing pricing flexibility triggers, e.g., by determining whether there is any correlation between the number of collocating carriers (the key trigger under current rules) and the percentage of buildings served by competitors.

Where that analysis shows that a grant of pricing flexibility may have been premature, the Commission can then consider collecting additional market-specific data to determine whether potential competition is a sufficient constraint on the prices charged by the incumbent. A market-specific analysis, as the Commission has performed in some forbearance proceedings, would enable the Commission to fully consider the extent of existing competition in a particular geographic area and the likelihood and extent of additional competition. Cable operators have provided information to the Commission in such forbearance proceedings and would do the same in the context of a proceeding to consider a change in special access regulation for a particular geographic area.

Confidentiality. Any sort of Commission data request regarding special access facilities raises significant confidentiality issues. Information as to whether a particular provider does or does not serve a building, and the analysis it employs in deciding whether to extend facilities to new buildings, obviously is competitively sensitive. In addition, information regarding which locations a competitor does not plan to serve could be used by ILECs to disadvantage special access customers in those locations. Accordingly, NCTA fully supports the portion of the CLEC Proposal that specifically limits disclosure of competitors' special access data to Commission staff and consultants. The CLEC Proposal, as well as a subsequent letter filed by Sprint, fully set

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forth the legal and policy basis for precluding other parties from reviewing this data.<sup>7</sup> NCTA also agrees with the suggestion in the CLEC Proposal that the Commission publish any data it relies on in aggregate form only. There is no conceivable reason for the Commission to publish company-specific data regarding any competitive provider.

As noted above, NCTA is committed to working with the Commission to develop a meaningful process for collecting data regarding the special access marketplace. Please do not hesitate to contact us should you have any questions regarding this matter.

Respectfully submitted,

**/s/ Neal M. Goldberg**

Neal M. Goldberg

Steven F. Morris

cc: P. Aiyar  
S. Deutchman  
J. Schneider  
N. Alexander  
J. Veach  
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<sup>7</sup> Letter from Christopher Wright, Counsel for Sprint, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25 (June 22 2009).