



April 26, 2012

EX PARTE

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

Re: *NCTA Petition for Declaratory Ruling or Forbearance With Respect to Section 652 of the Communications Act Concerning Cable Acquisitions of Local Exchange Carriers*, WC Docket No. 11-118; *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25

Dear Ms. Dortch:

This *ex parte* letter responds to a recent filing in WC Docket No. 11-118 jointly made by the National Cable & Telecommunications Association (NCTA), American Cable Association (ACA), and COMPTTEL in support of NCTA's petition in that docket.¹ As explained in more detail in our attached Reply Comments filed in that proceeding, USTelecom does not oppose NCTA's request to eliminate certain processes set forth by Section 652 of the Act so long as it does so in a way that treats all service providers fairly and equally.² Indeed, USTelecom agrees with the basic assertion of NCTA's waiver petition that rules which artificially constrain facilities-based competition for the provision of broadband services are contrary to the public interest, particularly in light of the highly-competitive nature of the broadband market.

Nonetheless, USTelecom is compelled to file this letter in order to identify—and urge the Commission to seek clarification of—certain fundamental factual inconsistencies between arguments made in the *Joint ex parte letter* in support of NCTA's petition and statements that have been made by competitive local exchange companies ("CLECs")³ in connection with the Commission's review of special access pricing flexibility.

¹ *Ex parte* letter to Marlene Dortch, Secretary, FCC, from Rick Chessen, NCTA; Ross Lieberman, American Cable Association (ACA); and Mary Albert, COMPTTEL, WC Docket No. 11-118 (March 20, 2012) ("*Joint ex parte letter*").

² See Reply Comments of the United States Telecom Association, WC Docket No. 11-118 (September 12, 2011) ("USTelecom Reply Comments").

³ USTelecom uses the term CLEC in this letter to refer to non-cable service providers, although many cable companies are also certificated as competitive local exchange carriers.

In the *Joint ex parte letter*, the parties repeat one of their key points in support of NCTA's public interest argument—that combinations between cable companies and CLECs in the same geographic area will allow the combined company “to compete more effectively in the small and midsize business market.”⁴ As NCTA has argued in support of its petition, “[s]uch transactions will deliver particular benefits for small, medium-sized, and enterprise customers, as CLECs have focused on such customers and access to cable networks can reduce operational costs.”⁵ NCTA goes on to explain that these benefits arise because “[a]s the Commission recently noted, cable networks offer vital network facilities” that will allow CLEC-cable combinations to migrate CLEC services “to cable-owned facilities.”⁶ In other words, although combinations between a CLEC and cable company in the same geographic area will eliminate a competitor in that area, the supporters of NCTA's petition argue that there remains a public interest benefit because the merging CLEC will be able better to serve customers utilizing the cable company's network rather than having to deploy new facilities. COMPTTEL has expressly stated its agreement with NCTA's arguments.⁷

In the special access docket, by contrast, the CLEC industry has repeatedly asserted that cable networks are not actually competitive alternatives to incumbent local exchange carrier (“ILEC”) high-capacity service offerings to small and mid-sized business customers because they are technologically inadequate to serve such customers.⁸ For example, tw telecom has claimed (without substantiation) that cable networks “are not capable of providing the level of service (*e.g.*, reliability, service guarantees) demanded by most business customers and delivered by special access.”⁹ tw telecom goes on to assert that this is “in large part because of the inherent shortcomings” of cable networks “which make it difficult, *if not impossible*, to provide

⁴ *Joint ex parte letter* at 3.

⁵ *See, In the Matter of Conditional Forbearance from Section 652 of the Communications Act for Transactions Between Competitive Local Exchange Carriers and Cable Operators*, NCTA Conditional Petition for Forbearance, WC Docket No.11-118, at 8 (filed June 21, 2011) (“NCTA Forbearance Petition”); *see also* ACA Comments, WC Docket No. 11-118, at 3; COMPTTEL Comments, WC Docket No. 11-118, at 11.

⁶ NCTA Forbearance Petition at 9-10.

⁷ COMPTTEL Comments, WC Docket No. 11-118, at 11 (expressing support for NCTA's public interest analysis).

⁸ *See, e.g.*, Comments of tw telecom, WC Docket No. 05-25 (January 19, 2010) at p. 3 (“tw telecom Special Access Comments”).

⁹ tw telecom Special Access Comments, at 11. As AT&T has recently highlighted, tw telecom is the third largest provider of Ethernet services in the United States—selling significantly more Ethernet services to businesses than most of the companies that it is pressing to be regulated in the context of the special access proceeding. *See, Ex Parte Letter from David Lawson, Attorney for AT&T, to Marlene Dortch, Secretary, FCC (March 28, 2012)* at p. 5. (“AT&T March 28, 2012 *ex parte*”).

the level of service delivered” by ILEC special access services.¹⁰ And in a separate filing urging the Commission to ignore cable companies when defining the market for the provision of high-capacity services to businesses, a group of CLECs (all of which USTelecom believes to be members of COMPTTEL) has asserted that cable broadband service does not satisfy the needs of small and mid-sized business customers, simply stating that cable networks “*are simply not up to the task.*”¹¹ It is impossible to square these naked assertions with those being made by the CLEC industry in support of NCTA’s petition.

Of course, USTelecom and others have repeatedly repudiated the assertions from the CLEC industry that high capacity services provided by cable companies are somehow not substitutes for special access. As the record in the special access docket demonstrates, cable companies already have nearly ubiquitous high-capacity networks that reach more than three quarters of small and mid-sized businesses in the United States¹² and generated business revenues in excess of \$6 billion in 2011 with *projected growth to \$17 billion by 2014—even without CLEC mergers.*¹³

The cable industry itself has been consistent on this point, stating clearly in the special access proceeding that “many cable operators provide high-capacity services that compete with special access services offered by incumbent local exchange carriers...Cable operators offer these services to businesses and to telecommunications providers and in most cases own the facilities used to provide these services.”¹⁴ In fact, as USTelecom noted in its reply comments to NCTA’s petition, NCTA’s characterization of the cable industry’s success in competing for small and mid-sized business customers is much more modest than the reality—for example, one industry analyst estimates that cable companies already control 25%-30% of the U.S. Ethernet services business.¹⁵

¹⁰ *Id.* (emphasis added).

¹¹ Workshop Response of tw telecom, One Communications, Cbeyond and Integra, WC Docket No. 05-25, at 2-3 (September 15, 2009) (emphasis added).

¹² *See, e.g.*, Alan Breznick, Senior Analyst, Heavy Reading, Presentation at “The Future of Cable Business Services 2011” (December 1, 2011). *Also see*, Heavy Reading Insider, *Cable Operators & Ethernet: Serious Business*, Vol. 11, No. 5, July 2011 at 4-5 (“Cable’s plant already offers potentially deep fiber penetration of much of the U.S. commercial market. U.S. cable operators have large, concentrated fiber rings and networks extending across cities, counties and states...MSOs often cite their deep fiber penetration and claim greater ease and lower cost of additional build-out to customers as a competitive advantage.”).

¹³ *See* Tim McElgunn, Pike & Fisher, *Cable Commercial Services Strategies: Analysis of Revenue Forecasts*, 3rd Edition (September 2010) at 18.

¹⁴ *Ex parte* letter to Marlene Dortch, Secretary, FCC, from Steve Morris, NCTA, WC Docket No. 05-25 (May 8, 2009).

¹⁵ Heavy Reading Insider, *Cable Operators & Ethernet: Serious Business*, Vol. 11, No. 5 (July 2011) at 5.

Recent financial reports from the cable industry only serve to highlight the undeniable success these companies are having in the market for business services:

- Cox is already the fourth largest provider of Ethernet services to business customers in the country (behind CLEC tw telecom) and Cablevision/Optimum Lightpath follows closely behind them.¹⁶
- Time Warner Cable (also one of the largest providers of Ethernet services to businesses in the country) increased its overall revenues from business customers 32% in 2011, from \$1.1 Billion to \$1.47 Billion, and projects similar growth in 2012—which would put it at close to \$2 Billion.¹⁷ Indeed, Time Warner Cable’s Chairman and CEO recently emphasized that “business services continued to be our biggest success story,” and added that “we plan to continue our aggressive growth in business services by expanding product offerings, growing our sales force, improving productivity and increasing our serviceable footprint.”¹⁸ In support of growth strategy, Time Warner Cable dedicated nearly \$500 million in capital expenditures to the business market in 2011, a 40% increase since 2009 alone.¹⁹
- Comcast (a relatively recent entrant into the market) generated \$1.79 Billion in business services revenue in 2011—an increase of 41% from the previous year—and recently stated that it is “enthusiastic about the growth opportunities” from business services.²⁰ Comcast Business Class, the commercial services division of Comcast, *already reaches at least 80% of the businesses in its vast service territory.*²¹ Yet to support its projected

¹⁶ Vertical Systems, U.S. Retail Business Ethernet Port Share, Year-End 2011; Heavy Reading Insider, *Cable Operators & Ethernet: Serious Business*, Vol. 11, No. 5 (July 2011) at 6.

¹⁷ Time Warner Cable 4th Quarter 2011 Earnings, Trending Schedule and Transcript, Irene Esteves, Chief Financial Officer and Executive Vice President, Time Warner Cable, available at <http://ir.timewarnercable.com/phoenix.zhtml?c=207717&p=irol-IRHome> .

¹⁸ *Id.*, Transcript, Glenn Britt, Chairman and Chief Operating Officer, Time Warner Cable).

¹⁹ *Id.*, 4th Quarter Trending Schedule and Transcript, Irene Esteves, CFO and EVP.

²⁰ Comcast 4th Quarter 2011 Earnings, Trending Schedule and Transcript, Michael J. Angelakis, Chief Financial Officer and Vice Chairman, Comcast, available at <http://www.cmcsk.com/earningsdetails.cfm?QYear=2011&QQuarter=4> ; *see also*, Heavy Reading Insider, *Cable Operators & Ethernet: Serious Business*, Vol. 11, No. 5, July 2011 at 24 (“Comcast, by far the largest cable carrier, has radically revved up its Ethernet sales in its widespread franchise regions from a low level as recently as a year ago, virtually ensuring that the MSO share of the U.S. Ethernet market will rise substantially from close to 25 percent to approaching 30 percent (higher in-metro) in the next several years.”).

²¹ *See* Frost & Sullivan, *Cable MSO Ethernet Strategy: Moving Up-Market for New Opportunities*, Vol.6, No. 3 at p. 13 (March 2012).

continued growth in this market, Comcast dedicated more than \$600 million in capital expenditures on the business services market in 2011, up 22% from the previous year,²² and has hired more than 600 people since late 2010 just to support growth in the small and mid-sized business markets.²³

Indeed, *Communications Daily* recently reported that “engineering executives from three major U.S. cable companies [Comcast, Time Warner Cable and Bright House Networks] said they’ll keep pouring more resources into business services initiatives in 2012, after strong growth over the past several years.”²⁴ Industry analyst Heavy Reading nearly a year ago explained, “[t]he collective MSO share of the Ethernet market will continue growing at the expense of incumbents and other competitors.”²⁵ And recently, another leading industry analyst described the mid-sized business market as “rapidly becoming a *competitive jungle* for service providers,” but concluded that *cable companies* “will maintain an advantage over competitors [both ILECs and CLECs] moving into the mid-market due to their strong local presence and experience in the smaller business markets.”²⁶

But the advocacy of the CLEC industry in these two dockets remains patently inconsistent.²⁷ If cable networks are “simply not up to the task” of satisfying the needs of business customers, or do not go to the premises of small and mid-sized businesses, then how will “CLEC access to cable network’s facilities” create a stronger competitor to ILEC special access?

USTelecom and other commenters in the special access docket have demonstrated that the answer to these questions is simple: like the CLECs themselves, cable companies are already a formidable competitor to ILECs in the provision of business services and are continuing to invest in both network and personnel to grow their share of this market.

²² *Id.*

²³ Comcast 3rd Quarter 2011 Earnings Report, Transcript, Michael J. Angelakis, CFO and Vice Chairman, Comcast, available at <http://cmcsk.com/earningsdetails.cfm?QYear=2011&QQuarter=3>.

²⁴ *Communications Daily*, “Cable Operators See More Money in Business Services”, Vol. 32, No. 67 (April 6, 2012) at p. 6.

²⁵ Heavy Reading Insider, *Cable Operators & Ethernet: Serious Business*, Vol. 11, No. 5 (July 2011) at 24.

²⁶ Frost & Sullivan, *Cable MSO Ethernet Strategy: Moving Up-Market for New Opportunities*, Vol.6, No. 3 at pp. 16-18 (March 2012) (emphasis added).

²⁷ USTelecom also notes that COMPTTEL’s advocacy in support of the NCTA Forbearance Petition as reflected in its comments and the *Joint ex parte letter* are patently inconsistent with legal arguments it made just three weeks later in connection with a petition for forbearance filed by USTelecom. In that proceeding, COMPTTEL has asserted, among other things, that trade associations do not have “standing” to request forbearance on behalf of either their own members or non-member companies. See, *In the Matter of Petition of USTelecom for Forbearance Under 47 USC §160(c) From Enforcement of Certain Legacy Telecommunications Regulations*, WC Docket No. 12-61, COMPTTEL’s Opposition to USTelecom’s Petition for Forbearance, at pp. 1-6 (filed April 9, 2012).

But this is just one of many unsubstantiated arguments that have been made by those seeking additional regulation of ILEC special access, and before the Commission can impose expanded regulation on ILECs as these companies seek the Commission must require the CLEC industry to provide actual data supporting these claims—something which the CLEC industry has assiduously refused to do.²⁸ Indeed, as recently detailed by AT&T and further demonstrated by reports from both cable companies and CLECs such as the ones above, what limited data the Commission has collected concerning competition for business services already is hopelessly out of date, particularly in light of the rapid changes in this marketplace.²⁹

Accordingly, while the Commission would be completely justified in closing the special access proceeding simply on the basis of the record it has and the refusal of those companies that have been pushing for increased regulation to cooperate with the previous voluntary data requests, the Commission will need to fundamentally start over in the development of meaningful market data before it could be justified in moving forward.

As USTelecom has urged in the past, such an effort would require the issuance of *mandatory* directives to competitive providers of business services to provide the Commission with up-to-date market data, including network maps and other information that will allow for analysis of locations where competitors could potentially offer service.³⁰ As just one example, the Wall Street Journal recently reported that Level 3 Chief Executive Officer James Crowe told it that the company has “built a database of three million office buildings, data centers and cellphone towers, pinpointing areas where Level 3 can risk expanding its network without first selling the new capacity”—in other words, before it has signed up a single customer or guaranteed any revenue.³¹ Presumably other competitors have developed similar data.

In short, USTelecom’s member companies have fully cooperated with the Commission’s efforts to understand the highly competitive business services marketplace. Unfortunately, the

²⁸ See, e.g., *In re COMPTTEL, et al.*, Opposition of the Federal Communications Commission to Petition for Writ of Mandamus, USCA No. 11-1262 (D.C. Cir., Oct. 6, 2011), at 14 (“the vast majority of the service provider members of [COMPTTEL] did not provide any data in response to the agency’s October 2010 request”); also, TR Daily, “USF Contribution FNPRM Will Propose Fixes, Gillett Says,” at 2-3 (Apr. 17, 2012) (quoting the Chief, Wireline Competition Bureau, as telling a COMPTTEL conference that “[t]here is an incredible dearth of data” provided by the industry on special access).

²⁹ See, *AT&T March 28, 2012 ex parte*, pp. 1-11.

³⁰ See *Ex parte* Letter from Glenn Reynolds, USTelecom, to Marlene Dortch, Secretary, FCC, WC Docket No. 05-25 (December 1, 2010) (urging the Commission to request more recent data than it sought in its first voluntary request because that request sought data from 2009 “that will be more than a year old at the time of its filing [in January 2011], it will not be possible for the responses...to reflect the very dynamic changes currently happening in this marketplace”; to seek additional information about potential competition; and to make future requests mandatory because “many competitive providers may choose not to respond” to its voluntary request).

³¹ *Wall Street Journal*, “Optical Delusion? Fiber Booms Again Despite Bust,” April 3, 2012, available at <http://online.wsj.com/article/SB10001424052702303863404577285260615058538.html?KEYWORDS=optical+delusion>.

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CLECs pressing for increased regulation of incumbent carrier special access services have instead largely refused to provide such data and have urged the Commission to rely on unsupported and unsupportable claims about alternatives to special access—competition from cable networks being just one example.

Please include this notice in the dockets referenced above.

Sincerely,

A handwritten signature in black ink, appearing to read "Glenn T. Reynolds". The signature is fluid and cursive, with a prominent initial "G" and "R".

Glenn T. Reynolds

cc: Deena Shetler
Nick Alexander
Eric Ralph
Lisa Gelb
William Dever
Tim Stelzig
Travis Litman
Betsy McIntyre
Jamie Suskind
Daniel Shiman

Attachment

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

In the Matter of)	
)	
National Cable and Telecommunications Association Petitions for Declaratory Ruling or Forbearance With Respect to Section 652 of the Communications Act Concerning Cable Acquisitions of Local Exchange Carriers)	WC Docket No. 11-118
)	

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

The United States Telecom Association (USTelecom) submits these Reply Comments with respect to the petitions filed by the National Cable and Telecommunications Association (NCTA) requesting the Commission issue a declaratory ruling or, in the alternative, forbear from certain requirements of Section 652 of the Communications Act.

In short, NCTA argues that there is no pro-competitive purpose served by the additional procedural and substantive requirements set forth in Section 652 for transactions involving the acquisition by a cable company of a competitive local exchange carrier (CLEC) operating within its franchising area. NCTA seeks elimination of these requirements including the requirement of Section 652(d)(6)(B) that allows for the Commission to waive each of the cross-ownership restrictions of Section 652 only if the relevant Local Franchising Authority (LFA) approves of such a waiver.¹

¹ See 47 U.S.C. §652(d)(6)(B). In the event the Commission does not grant its requests to eliminate these requirements, NCTA requests that the Commission issue rules establishing procedural and substantive guidelines for LFA review of waiver requests. Given the competitiveness of broadband markets and the federal policy favoring deployment of broadband networks, USTelecom agrees with NCTA that LFAs should not have “unbounded discretion” in this area.

Because the marketplace for broadband services is highly competitive, USTelecom agrees with NCTA that artificial barriers to the efficient operation of the marketplace, such as those in Section 652 of the Act, are unnecessary and usually counterproductive. At the same time, because cable-CLEC combinations of the sort contemplated by the petitions will implicate other artificial regulatory entitlements, it is essential that the Commission address all such impediments to efficient competition in any order it might issue on NCTA's request. In particular, since the result of such combinations would be an even stronger competitor that has access to a cable company's ubiquitous network, the Commission must make clear that the combined company would no longer have any legal entitlement to unbundled network elements (UNEs) from incumbent local exchange carriers (ILECs) pursuant to Section 251(c) of the Act.

I. USTelecom Agrees That the Broadband Marketplace in which NCTA is Seeking Relief is Highly Competitive and That Unnecessary Regulations Can Discourage Investment in Broadband Networks.

USTelecom does not oppose the forbearance relief requested by NCTA.² ILECs, CLECs, wireless and cable companies are all competing vigorously in the provision of voice, video and data services to both household and business consumers. Or, to be more accurate, all of these companies and others are competing to offer consumers all of these services over broadband facilities.

² USTelecom notes that NCTA asserts that its request falls within the scope of the Commission's forbearance authority pursuant to § 10 of the Act because it is seeking relief on behalf of cable operators' CLEC divisions or affiliates that qualify as "telecommunications carriers," as required by the language of that section. NCTA Forbearance Petition at n. 3. Since the term "telecommunication carrier" is defined by the Act as "a provider of telecommunications services," 47 U.S.C. § 3(44), NCTA's forbearance petition appears to raise fact-specific questions that the Commission will need to address as to whether particular cable operators or their affiliates are offering telecommunications services.

To be clear, NCTA's petitions are about competition in the provision of broadband-based services, and cable companies continue to have the largest share of broadband customers in most geographic markets. But USTelecom agrees that there is sufficient competition among providers such that it no longer makes any sense for there to be artificial barriers to combinations between two broadband providers in a market other than those, such as the antitrust laws, that exist for all industries.³ Accordingly, USTelecom does not oppose NCTA's request that the Commission eliminate the processes established by Section 652, so long as it does so in a way that treats all service providers equally—that is, the Commission should eliminate artificial barriers to any combinations between cable companies, CLECs and/or ILECs that would not otherwise run afoul of the antitrust laws.⁴

II. Any Order Granting NCTA's Requested Relief Must Make Clear That a Combined Cable-CLEC Entity is Not Entitled to Purchase UNEs.

While USTelecom does not oppose the relief sought by NCTA in its forbearance petition,⁵ it is essential that any order granting the requested relief clearly establish that a combined cable-CLEC is presumptively not entitled to purchase UNE facilities within the

³ As NCTA points out, even if the obligations of Section 652 are eliminated, these transactions would continue to be subject to the Commission's review and approval pursuant to Section 214 of the Act. 47 U.S.C. §214.

⁴ Section 652(d)(6) applies the same waiver procedures and standards to both the cable-CLEC transactions of subsection (b) and the cable-ILEC transactions of subsection (a).

⁵ While USTelecom does not oppose NCTA's forbearance petition, it cannot support NCTA's petition for declaratory ruling as the legal argument asserted in that petition is facially flawed. In that petition, NCTA relies on assertions concerning legislative history and prior statements of the Commission's Cable Bureau as supportive of the idea that the intent of Section 652 was that its requirements only apply to combinations involving *incumbent* LECs, and not *competitive* LECs. Irrespective of the accuracy of those assertions, such considerations can only be relevant where there is ambiguity within the language of the statute itself. *See, Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). And the Commission simply cannot ignore that the essential term for which NCTA's declaratory ruling petition seeks clarification—"local exchange carrier"—is a defined term within the Communications Act that includes "any" provider of telephone exchange service. 47 USC §3(26). Nor can it ignore the fact that Congress clearly delineated those instances where it meant for certain obligations to apply only to ILECs, and not to CLECs. *See* 47 USC §251. NCTA's arguments for declaratory ruling would, in effect, require the Commission to discern Congress' intent as to the scope of requirements each time the term "local exchange carrier" is used in the Act, despite it being a defined term.

franchise area of the acquiring cable company—including UNEs previously being purchased by the stand-alone CLEC.

In support of the public interest benefits of such transactions, NCTA emphasizes that cable-CLEC cross-ownership arrangements would provide CLECs with “access to cable networks [that] can reduce operational costs.”⁶ The American Cable Association (ACA) elaborates on this point by explaining that a key benefit of combinations between cable companies and CLECs would be to give “CLEC access to a cable network’s facilities [that] can reduce the CLEC’s operational costs” and that as a result, such combinations should “lead to the migration of the CLEC’s services from leased to owned facilities and the expansion of cable services throughout business districts.”⁷

Cable companies today have virtually ubiquitous networks within their franchise areas—including in business districts—as well as easy access to rights-of-ways for deploying additional network facilities. As noted previously, cable companies typically have the majority of consumer broadband customers within their franchise areas and have the dominant share of the video marketplace.

Moreover, NCTA’s petitions fail to do justice to the tremendous success that cable companies have had in recent years in the small, medium and enterprise business markets. Last year, the three largest cable companies each had over \$1 billion in business revenues. And industry-wide, cable companies’ commercial services revenues—voice, data and video—are projected to grow from \$5 billion in 2010 to \$17 billion by 2014—even without CLEC

⁶ NCTA Forbearance Petition at 8. It should be noted that COMPTTEL expresses unqualified agreement with NCTA’s forbearance analysis which includes the assertion that an *acquired CLEC will be benefitted by having reduced costs from being able to provide service over the acquiring cable-company’s facilities*. COMPTTEL Comments at 11.

⁷ ACA Comments at 3.

acquisitions.⁸ And while cable companies have historically focused on the small and medium-sized business markets (those companies with up to 500 employees), they are rapidly expanding their focus on and share of the enterprise market.⁹ Indeed, according to one estimate, cable companies already control 25-30% of the U.S. Ethernet services business.¹⁰

For example, Cox Communications already has an estimated 25% of the small and medium-sized business market within its footprint¹¹ and has projected double-digit growth for each of the next several years.¹² Cablevision's dedicated business division, Optimum Lightpath, states that it has built the largest fiber network in the New York metropolitan area—a *network solely focused on serving business customers with more than 4,000 fiber-connected buildings*.¹³ In fact, Cablevision claims to already serve more than 70% of the hospitals in portions of its New York footprint.¹⁴ And Comcast has had year-over-year revenue growth rate of nearly 50% in *both* 2009 and 2010 for its commercial services and recently completed a roll-out of Ethernet

⁸ Tim McElgunn, Pike & Fisher, *Cable Commercial Services Strategies: Analysis of Revenue Forecasts*, 3rd Edition, September 2010 at 18 (“Pike & Fisher Analysis”).

⁹ Heavy Reading Insider, *Cable Operators & Ethernet: Serious Business*, Vol.11, No. 5, July 2011 at 5 (“many larger regional enterprises increasingly view MSOs as potentially viable alternatives to incumbent carriers, after years of experience and market success.”)

¹⁰ Heavy Reading Insider at 24.

¹¹ Craig Moffett, Bernstein Research, *U.S. Cable & U.S. Telecom: Getting Down to Business...The Battle for Commercial Services and Wireless Backhaul*, September 8, 2010, at 4 (“Bernstein Research Analysis”).

¹² Heavy Reading Insider at 16.

¹³ Heavy Reading Insider at 19-20. Cablevision serves the small business market through its cable MSO, while its Optimum Lightpath unit is dedicated to providing complex managed services for medium and large business customers.

¹⁴ *Id.*

services across its entire footprint for the purpose of delivering business-class services; while Time Warner Cable projects annual growth of more than 20% in the business services market.¹⁵

Moreover, while it is no doubt true as NCTA asserts that some CLEC business models have struggled in the past, a number of these companies are strong and increasing their shares of the business market. For example, tw telecom, a national CLEC, increased revenue 6.8% for the first six months of 2011 compared to the same period in 2010; in fact, tw telecom's overall revenue has grown for each of the last 27 quarters.¹⁶ Furthermore, in the first six months of 2011, tw telecom connected 1,081 new buildings directly to its network, bringing its total to 14,311 "on-net" buildings.¹⁷ Similarly, Cogent and AboveNet increased U.S. revenues by 17.6% and 17.2%, respectively, in the first six months of 2011 compared to the same period in 2010.¹⁸ And Integra Telecom, a western regional CLEC, initiated a \$52 million expansion of its fiber network earlier this year, increasing its on-net buildings by 20% to 1,600 in the first six months of 2011 compared to year-end 2010.¹⁹

Of course, the fact that the business broadband market is much more competitive than their petitions might reflect actually argues in favor of the relief that NTCA is seeking. In such a competitive marketplace, it is not only unnecessary but potentially harmful to maintain artificial barriers to the efficient operation of the economy. And this consideration weighs particularly

¹⁵ Bernstein Research Analysis at 1; Heavy Reading Insider at 14, 17.

¹⁶ Tw telecom Inc., U.S. Securities and Exchange Commission Form 10-Q, Second Quarter 2011, pp. 25-26.

¹⁷ *Id.*

¹⁸ Cogent Communications Group, Inc., U.S. Securities Exchange Commission Form 10-Q, Second Quarter 2011 at p. 12 and AboveNet, Inc., U.S. Securities Exchange Commission Form 10-Q, Second Quarter 2011 at p. 29.

¹⁹ Integra Press Release, "Integra Telecom Increases Number of Buildings on its Network by 20 Percent." July 25, 2011.

heavy when it comes to the broadband services market as such barriers skew competition and discourage investment in broadband network facilities—which are in turn a major driver of the U.S. economy as a whole.

In light of all this, as well as NCTA’s own explanation of the benefits of CLEC-cable company combination in creating a stronger competitor than they already present alone, there can be little doubt that such a combined entity cannot be found to be “impaired” without access to UNEs, as required by the Act.²⁰ Indeed, the continued reliance of the combined company on UNEs would totally undermine the essential arguments put forth by NCTA in support of the public interest benefits of such combinations: the promotion of facilities-based competition.

NCTA suggests, without any supporting evidence, that cable companies were slower to deploy facilities in downtown business districts than in other parts of their footprint. The statistics noted above demonstrate that this is certainly not the case today. In any event, however, the public interest benefits relied upon in the petitions would be fundamentally undermined if the combined cable-CLEC company could continue to rely on below-cost access to the ILEC’s network.

CONCLUSION

USTelecom agrees with the basic premise of NCTA’s petitions that rules and regulations that artificially constrain facilities-based competition for the provision of broadband services are clearly contrary to the public interest, particularly in light of the highly-competitive nature of the broadband market. For that reason, we do not oppose the elimination of *all* of the

²⁰ 47 U.S.C. §251(d)(2). *See also, In the Matter of Unbundled Access to Network Elements*, WC Docket No. 04-313, Order on Remand, FCC 04-290 (2005) (providing that impairment exists “when lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic.”).

cross-ownership provisions of Section 652 of the Act. But the same logic dictates that a cable company that acquires a CLEC within its franchise area not be allowed to continue to rely on UNEs—the classic case of synthetic competition—as to do so would in fact discourage the very facilities-based competition that NCTA cites as the public interest benefit of such transactions. Accordingly, it is important that the Commission clarify in any order addressing the merits of NCTA’s petitions that such a cable company-CLEC combination would no longer be “impaired” without access to UNEs.

Respectfully submitted,



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September 21, 2011