

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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

**APPLICATION FOR REVIEW OF CENTURYLINK**

Pursuant to section 1.115 of the Commission’s rules,<sup>1</sup> CenturyLink hereby seeks reversal of the Wireline Competition Bureau’s decision to collect data on potential competition from cable system operators only on a census-block, rather than building-by-building, basis.<sup>2</sup> If implemented, this decision will result in a failure to account fully for robust and growing cable-based competition, producing an “incomplete picture of competition in this market . . . [that is] likely to lead to inappropriate regulatory intervention.”<sup>3</sup> Indeed, the Commission foresaw that such limits would corrupt the data collection effort, and therefore delegated to the Bureau only “limited” authority to implement the *Data Collection Order*.<sup>4</sup> CenturyLink urges the Commission to correct this error.

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<sup>1</sup> 47 C.F.R. § 1.115.

<sup>2</sup> *In the Matter of 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 Rates*, WC Docket No. 05-25; RM-10593, Report and Order, 2013 FCC Lexis 3913 (Wireline Comp. Bur. Sept. 18, 2013) (*Bureau Order*).

<sup>3</sup> Statement of Commissioner Ajit Pai on Bureau Adoption of Special Access Data Collection at 2 (Sept. 18, 2013) (Pai Statement).

<sup>4</sup> *See In the Matter of Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange*

**Background.** In the *Data Collection Order*, the Commission constructed a comprehensive data collection to examine the full scope of actual and potential competition to the ILECs' DS1 and DS3 services. As noted by Commissioner Pai, however, the *Bureau Order* “exempt[ed] cable operators (but not other competitive providers) from reporting certain in-place but out-of-service facilities ‘capable of’ providing dedicated service,” in direct conflict with the *Data Collection Order*'s direction to “collect data about *all* communications pathways with the ‘capability to provide a dedicated service[.]’”<sup>5</sup>

The Commission was clear in its decision to collect data on all *Connections* “capable of” providing *Dedicated Services*.<sup>6</sup> The Commission found that “to understand the impact of competition in special access, it is important to grasp the effects of potential, as well as actual, competition.”<sup>7</sup> The Commission further stated its intention of using the data collected to “identify measures of actual and potential competition that are good predictors of competitive behavior”<sup>8</sup> and specifically *rejected* proposals to adopt sampling techniques or other means of reducing the potential burden resulting from a comprehensive, location-by-location data collection.<sup>9</sup> Most relevant here, the Commission decided to collect and examine “comprehensive data on the situs and facilities *capable of* providing special access”<sup>10</sup> and required all *Competitive*

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*Carrier Rates for Interstate Special Access Rates*, WC Docket No. 05-25; RM-10593, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 16318, 16340 ¶ 52 (2012) (*Data Collection Order*).

<sup>5</sup> Pai Statement at 1 (citing *Bureau Order* ¶¶ 26, 27, n.38).

<sup>6</sup> The capitalized and italicized terms in this document (e.g., *Connections*) refer to terms defined in Appendix B of the *Data Collection Order*.

<sup>7</sup> *Data Collection Order*, 27 FCC Rcd at 16338 ¶ 48.

<sup>8</sup> *Id.* at 16346 ¶ 67.

<sup>9</sup> *Id.* at 16328-30 ¶¶ 24-26.

<sup>10</sup> *Id.* at 16331-32 ¶ 31 (emphasis supplied).

*Providers*, including cable operators, to report detailed information on both their connections being used to provide a *Dedicated Service* and those having “the *capability* of being used to provide one or more ‘dedicated services.’”<sup>11</sup> For each such *Connection*, required information included the “situs of the location and whether the location is a building, other free-standing site, cell site on a building, or free-standing cell site.”<sup>12</sup>

***The Bureau Ignored the Commission’s Clear Direction.*** Despite the Commission’s clear direction, the *Bureau Order* exempted cable system operators from the requirement to provide location-by-location data for “facilities [within their franchise areas] that are *not* linked to a *Node* capable of providing Metro Ethernet (or its equivalent)” *and* that were not “used during the relevant reporting period to provide a *Dedicated Service* or a service that incorporates a *Dedicated Service* within the offering as part of a managed solution or bundle of services sold to the customer.”<sup>13</sup> Stated differently, pursuant to the revised data request, cable operators now must report only those in-franchise *Connections* that: (i) are linked to a head-end capable of providing Metro Ethernet and/or (ii) were used in the reporting period to provide a *Dedicated Service* or a service that incorporated a *Dedicated Service*. Thus, contrary to the terms of the *Data Collection Order*, the Bureau is omitting from the data collection a subset of the *Locations*

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<sup>11</sup> *Id.* at 16325 n.38 (emphasis supplied); *id.* at 16364-65 (Appendix A, Question II.A.4). The Commission repeatedly emphasized that the term *Connection* is not limited to in-service communication paths: “A communication path that is currently being used to provide a non-dedicated service to an end user, but has the capability to provide a dedicated service is considered a connection for purposes of this data collection.” *Id.* at 16325 n.38. The Commission further noted that “this definition does not depend on the medium used (*e.g.*, whether it is fiber, copper, or coaxial cable), but instead on the capability of the facility.” *Id.*

<sup>12</sup> *Data Collection Order*, 27 FCC Rcd at 16331 ¶ 31. The Commission’s data request also required limited data on a census-block basis from certain providers of *Best Efforts Business Broadband Internet Access Service* (hereinafter, *Best Efforts* data). *Data Collection Order*, 27 FCC Rcd at 16335-36 ¶ 44.

<sup>13</sup> *Bureau Order* ¶ 27.

to which a cable operator's plant is already connected, presumably via hybrid fiber coaxial (HFC) facilities.

***The Bureau Offers No Valid Justification.*** The Bureau attempts to justify this abrupt departure from the *Data Collection Order* with a host of unconvincing rationales. For example, it states that “these facilities . . . were most likely built to provide residential-type services;”<sup>14</sup> that their inclusion could “skew [the Bureau’s] assessment of demand for special access service;”<sup>15</sup> that the Bureau “can still account for the potential competition from these facilities by referencing data provided elsewhere in the collection;”<sup>16</sup> that this “clarification” will “aid the Commission by focusing the collection on *Locations* with *Connections* relevant to [the] inquiry;”<sup>17</sup> and that the exclusion of these data will “reduc[e] the reporting burden for cable system providers.”<sup>18</sup>

None of these reasons comes close to justifying the Bureau’s disregard of the Commission’s directive to collect comprehensive data on all *Connections* “capable of” providing *Dedicated Services*. Though cable system operators’ HFC plant initially may have been deployed to provide video and later voice services, cable operators can and do use it to provide *Dedicated Services* in direct competition with ILEC-provided DS1s and DS3s.<sup>19</sup> Hence the

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<sup>14</sup> *Bureau Order* ¶ 27.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* (noting that the Bureau “can refer to the fiber maps filed by cable system operators, the location of *Nodes* upgraded to provide Metro Ethernet (or its equivalent), and the information provided showing those census blocks within the FAs where the cable system operator reports making broadband service available with a bandwidth of at least 1.5 Mbps in both directions. (upstream/downstream).”).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> See Frost & Sullivan, *Cable MSO Ethernet Strategy: Moving Up-Market for New Opportunities*, at 7 (Mar. 2012) (“While most MSOs consider Ethernet over fiber access their

excluded facilities fit squarely within the scope of the potential competition data the Commission decided to collect in the *Data Collection Order*.<sup>20</sup>

Most importantly, the excluded location-by-location data are not duplicative of other data being collected. In particular, this granular information on potential competition will not be reflected in fiber maps or data showing the locations of *Nodes* upgraded to provide Metro Ethernet (or its equivalent). While these *Connections* may be included in the *Best Efforts* data, those data are being collected at the census-block level and therefore will not correspond to the other location-by-location facilities information in the data collection. As a result, the absence of these *Connections* in the collected data will cause the data collection to systematically underestimate the existence of potential competition for locations connected to (or nearby) cable system operators' legacy networks -- in direct conflict with the Commission's stated intention in the *Data Collection Order* -- and undermine the Commission's plan to conduct panel regressions "designed to determine how the intensity of competition (or lack thereof), whether actual *or potential*, affects prices, controlling for all other factors that affect prices."<sup>21</sup>

By disregarding cable operators' easily upgradable, in-place facilities in the collection of location-by-location data, the Bureau will also undermine the value and reliability of the

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preferred technology, . . . Ethernet over HFC is currently being used by some MSOs for asymmetrical and symmetrical network access based on DOCSIS2.0, migrating to DOCSIS3.0 to enable higher capacity and improved service level agreements (SLAs) and QoS.”).

<sup>20</sup> It is unclear how the inclusion of such data could “skew [the] assessment of demand for special access service,” *see Bureau Order* ¶ 27, as the facilities data in question falls in the “market structure” category, rather than the “demand (*i.e.*, observed sales and purchases)” data being collected. *Data Collection Order*, 27 FCC Rcd at 16331 ¶ 30.

<sup>21</sup> *Data Collection Order*, 27 FCC Rcd at 16346 ¶ 68 (emphasis supplied).

remaining collection of location-by-location data from other providers.<sup>22</sup> As CenturyLink has discussed, cable operators are “making deep inroads into wholesale and enterprise high-capacity services, ratcheting up capital expenditures and enjoying significant revenue growth in this segment,”<sup>23</sup> as they rapidly upgrade their cable plant to serve special access customers. Any inquiry that fails to fully account for the current and potential competition presented by cable operators will at best paint an “incomplete picture” of competition and impede the Commission’s objective of identifying simple triggers indicating that competitive deployment of facilities is *feasible* in a given market and therefore sufficient to discipline prices.<sup>24</sup>

***The Bureau Exceeded its Authority.*** Even if the Bureau’s decision were supported by a valid policy rationale -- and it is not -- it would still be incompatible with the authority delegated to it by the Commission, and thus unlawful. Pursuant to section 155(c) of the Act, the Commission may delegate authority to the Bureau “by published rule or by order.”<sup>25</sup> Here, the Commission directed the Bureau “to review and modify [the data] collection, consistent with the authority delegated in section III.D” of the *Data Collection Order*. That “limited” authority included the ability to “amend the data collection based on feedback received through the [paperwork reduction act] PRA process” and “make corrections to the data collection to ensure it

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<sup>22</sup> Thus, by seeking to “reduc[e] the reporting burden of cable system operators,” *Bureau Order* ¶ 27, the Bureau ironically will diminish the benefits arising from the reporting burdens from collecting location-by-location data from other providers.

<sup>23</sup> Comments of CenturyLink Inc., WC Docket No. 05-25, RM-10593, at 23 (filed Feb. 11, 2013) (noting that “while cable plant ‘passes three quarters of the businesses in the US, ... only one third of business broadband subscribers use [cable] services,” and “[f]or this reason, ‘MSOs have made significant capital and organizational commitments to growing their commercial services market....’” (quoting The Insight Research Corp., *Cable TV Enterprise Services: 2012-2017*, at 4, 105 (Sept. 2012))).

<sup>24</sup> See Pai Statement at 2; Reply Comments of CenturyLink, Inc., WC Docket No. 05-25, RM-10593, at 14-15 (filed Mar. 12, 2013).

<sup>25</sup> 47 U.S.C. § 155(c)(1).

reflects the Commission's needs as expressed in [the *Data Collection Order*.]"<sup>26</sup> However, "[a]ll such actions must be consistent with the terms of [that order]."<sup>27</sup> In particular, "even if the PRA process suggested that it would be less burdensome to collect special access facilities deployment at the census block level," the Commission emphasized that "it would not be consistent with [the *Data Collection Order*] for the Bureau to amend the data collection to require census block information rather than location-by-location information required by paragraph 31 about such facilities."<sup>28</sup>

Unfortunately that is exactly what the Bureau has done here. It has amended the data collection to require only census block information for cable facilities not connected to a *Node* that has been upgraded to provide Metro Ethernet (or its equivalent), rather than the location-by-location production of this information required in the *Data Collection Order*. Thus, the Bureau's action both exceeds the delegation of authority in the *Data Collection Order* and disregards the Commission's explicit directives.<sup>29</sup>

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<sup>26</sup> *Data Collection Order*, 27 FCC Rcd at 16340 ¶ 52.

<sup>27</sup> *Id.* at 16340 ¶ 52.

<sup>28</sup> *Id.* at 16340 ¶ 52 n.112.

<sup>29</sup> See, e.g., Responsible Accounting Officer Letter 20, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 11 FCC Rcd 2957, 2961 ¶ 25 (1996) (finding that Common Carrier Bureau exceeded its delegated authority by directing exclusions from, and additions to, the rate base not specifically provided for in Part 65 rules). The Commission has also reversed decisions made on delegated authority, based on findings that bureaus misapplied or misunderstood the law. See *Applications of Algreg Cellular Engineering*, *Memorandum Opinion and Order*, 12 FCC Rcd 8148, 8151 ¶ 1 (1997); *Applications of Mobicel, Inc.*, *Memorandum Opinion and Order*, 11 FCC Rcd 19098, 19106-110 ¶¶ 18-27 (1996).

**Conclusion.** The Commission should reverse the *Bureau Order* in the respects detailed above and should refrain from initiating the now incomplete data collection until taking action on this Application.<sup>30</sup>

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<sup>30</sup> See 47 C.F.R. § 1.115(b)(2)(i) (reversal warranted where “[t]he action taken pursuant to delegated authority is in conflict with . . . established Commission policy”).

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **APPLICATION FOR REVIEW OF CENTURYLINK** to be served via First Class United States mail, postage prepaid, on the parties listed on the attached service list.

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October 22, 2013

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