

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

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 Services )

WC Docket No. 05-25

RM-10593

**ACCEPTED/FILED**

NOV - 6 2013

Federal Communications Commission  
Office of the Secretary

**OPPOSITION OF  
CBEYOND, EARTHLINK, INTEGRA, LEVEL 3, AND TW TELECOM**

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Cbeyond Communications, LLC (“Cbeyond”), EarthLink, Inc. (“EarthLink”), Integra Telecom, Inc. (“Integra”), Level 3 Communications, LLC (“Level 3”), and tw telecom inc. (“tw telecom”) (collectively, the “Joint CLECs”), through their undersigned counsel, hereby submit this opposition to CenturyLink’s Application for Review (“Application”)<sup>1</sup> of the Wireline Competition Bureau’s (“Bureau’s”) September 18, 2013 Order (“*September 2013 Order*”) in the above-captioned proceeding.<sup>2</sup>

**I. INTRODUCTION AND SUMMARY**

CenturyLink’s Application is a transparent stall tactic that is meritless as matter of policy and law and designed to delay important data gathering in this long-pending proceeding. The Commission should summarily reject the Application and proceed with the Paperwork Reduction Act (“PRA”) review process for the mandatory special access data collection as soon as possible.

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<sup>1</sup> See generally Application for Review of CenturyLink, WC Dkt. No. 05-25, RM-10593 (filed Oct. 22, 2013) (“Application”).

<sup>2</sup> See generally *Special Access for Price Cap Local Exchange Carriers*, Report and Order, DA 13-1909 (WCB rel. Sept. 18, 2013) (“*September 2013 Order*”).

In its Application, CenturyLink asserts that, in the *September 2013 Order*, the Bureau exceeded the authority delegated to it by the Commission in the *December 2012 Order* in this proceeding<sup>3</sup> by excluding from the special access data collection *Locations* with cable company *Connections* that (1) are linked to a *Node* that has not been upgraded or built to provide Metro Ethernet service (or an equivalent service) and (2) were not used during the relevant reported period (*i.e.*, during 2010 and/or 2012) to provide a *Dedicated Service* or a service incorporating a *Dedicated Service*.<sup>4</sup> As discussed herein, the Bureau's approach in the *September 2013 Order* was entirely reasonable and will not impede the Commission's ability to accurately assess potential competition in the provision of special access. This is because, among other reasons, the number of excluded *Connections* that are currently capable of providing a *Dedicated Service* is likely to be very small. Moreover, the Bureau did not exceed its delegated authority by excluding the cable company *Connections* at issue. In fact, the Bureau acted entirely within the scope of its express delegated authority by modifying the data collection to respond to public feedback and to ensure the collection meets the Commission's needs as expressed in the *December 2012 Order*. Accordingly, CenturyLink's Application must be dismissed.

## **II. BACKGROUND**

### **A. The Commission's *December 2012 Order***

In the *December 2012 Order*, the Commission initiated a comprehensive special access data collection, described the nature of the data to be collected, and "include[d] in Appendix A

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<sup>3</sup> See generally *Special Access for Price Cap Local Exchange Carriers*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd. 16318 (rel. Dec. 18, 2012) ("*December 2012 Order*").

<sup>4</sup> See Application at 3-4. Italicized terms used in this Opposition have the same meaning as in the *September 2013 Order*.

an initial version of the data collection.”<sup>5</sup> The Commission stated that it “intend[ed] to examine comprehensive data on the situs and type of facilities capable of providing special access . . . and the proximity of such facilities to sources of demand.”<sup>6</sup> In describing the nature of this market structure data in paragraph 31 of the *December 2012 Order*, the Commission held that it would require *Providers* to submit information on *Connections* they own or lease under an IRU that are capable of being used to provide a *Dedicated Service*.<sup>7</sup> The Commission stated further in that paragraph that it would collect market structure data including but not limited to the following two categories of information: (1) *Locations* to which the *Provider* has sold a *Connection* to an *End User*; and (2) information on the nature of the *Location* and the nature of the *Connection* serving that *Location*.<sup>8</sup> Notably, the Commission did not state that it would collect information on every *Connection* owned or leased by a *Provider*.

Moreover, in the *December 2012 Order*, the Commission recognized “the complexities associated with ensuring that the specific questions asked [in the initial version of the data collection] meet the Commission’s needs as expressed in th[e] Report and Order” as well as the complexities associated with “navigating the Paperwork Reduction Act process.”<sup>9</sup> The Commission therefore delegated authority to the Bureau to, among other things, “(a) draft instructions to the data collection and modify the data collection based on public feedback; (b) amend the data collection based on feedback received through the PRA process; [and] (c) make

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<sup>5</sup> *December 2012 Order* ¶¶ 1, 30.

<sup>6</sup> *Id.* ¶ 31.

<sup>7</sup> *See id.*

<sup>8</sup> *See id.*

<sup>9</sup> *Id.* ¶ 52.

corrections to the data collection to ensure it reflects the Commission’s needs as expressed in this Report and Order.”<sup>10</sup> The Commission held that “[a]ll such actions must be consistent with the terms of this Report and Order.”<sup>11</sup> As an example, in footnote 112, the Commission explained that “even if the PRA process suggested that it would be less burdensome to collect special access facilities deployment at the census block level, it would not be consistent with this Report and 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>12</sup>

**B. The Bureau’s *September 2013 Order***

Subsequent to the release of the *December 2012 Order*, parties to this proceeding raised questions as to “the meaning of ‘capable’ within the definition of *Connection*” in the data collection.<sup>13</sup> Accordingly, pursuant to the authority delegated to it in the *December 2012 Order*, the Bureau provided guidance in the *September 2013 Order* as to the *Locations with Connections* that *Providers* must report.<sup>14</sup> The Bureau made these clarifications “to help the Commission identify,” consistent with the Commission’s needs as expressed in the *December 2012 Order*, “(1) facilities that can, or could, be used to provide a *Dedicated Service*; and (2) the demand for *Dedicated Service*.”<sup>15</sup>

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* n.112.

<sup>13</sup> *September 2013 Order* ¶ 22.

<sup>14</sup> *See id.* ¶ 22.

<sup>15</sup> *Id.* ¶ 20.

First, the Bureau clarified that non-cable *Competitive Providers* must report “all of their *Connections*,” regardless of whether those *Connections* are in service and regardless of the type of service provided.<sup>16</sup> The Bureau reasoned that, based on the record evidence, CLECs “are likely to only have built such *Connections* to a particular *Location* based on strong expectations of sufficient demand” for *Dedicated Services*, and thus, it is reasonable to assume that all such *Connections* are relevant to the Commission’s assessment of potential competition and demand for *Dedicated Service*.<sup>17</sup>

Second, the Bureau clarified that, outside their Franchise Areas (“FAs”), cable companies must also report all of their *Locations* with *Connections* because, like CLECs, cable companies operating outside their FAs likely only built *Connections* to particular *Locations* based on strong expectations of sufficient demand for *Dedicated Service*.<sup>18</sup>

Third, for cable companies operating inside their FAs, the Bureau clarified that *Locations* should be reported differently based on the type of *Connection*.<sup>19</sup> Specifically, cable companies must report all *Locations* with *Connections* linked to a *Node* that has been upgraded or built to provide Metro Ethernet service (or an equivalent service), regardless of whether those *Connections* are in-service and regardless of the type of service provided.<sup>20</sup> Again, the Bureau’s rationale was that “it is reasonable to assume that such upgrades were made based on strong

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<sup>16</sup> *Id.* ¶ 23.

<sup>17</sup> *Id.* ¶ 23 & n.64.

<sup>18</sup> *Id.* ¶ 25.

<sup>19</sup> *Id.* ¶ 26.

<sup>20</sup> *Id.*

expectations as to the likelihood of sufficient demand for *Dedicated Service* and are sources of potential competition.”<sup>21</sup>

The Bureau decided not to require cable companies to report all *Locations* in their FAs with *Connections* linked to a *Node* that has not been upgraded or built to provide Metro Ethernet service (or its equivalent). Rather, of those *Locations*, the Bureau held that cable companies must report only those *Locations* with “in-service *Connections* that were used during the relevant reporting period to provide a *Dedicated Service* or a service that incorporates a *Dedicated Service*. . . .”<sup>22</sup> Stated differently, the Bureau excluded from the data collection *Locations* with cable company *Connections* that (1) are linked to a *Node* that has not been upgraded or built to provide Metro Ethernet service (or its equivalent) and (2) were not used during 2010 and/or 2012 to provide a *Dedicated Service* or a service incorporating a *Dedicated Service*. The Bureau’s rationale was that, because of the way in which cable systems have historically been deployed, those *Connections* “were most likely built to provide [best efforts] residential-type services instead of [dedicated] high-capacity services to non-residential customers,” and “their inclusion could thus skew [the Commission’s] assessment of demand for special access service.”<sup>23</sup> And the Bureau found that it could “still account for the potential competition from these [*Connections*] by referencing data provided elsewhere in the collection,” including “the fiber maps filed by cable operators [and] the location of *Nodes* upgraded to provide Metro Ethernet (or its equivalent).”<sup>24</sup> The Bureau concluded that its clarification would “focus the collection on

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.* ¶ 27.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

*Locations* with *Connections* relevant to [the Commission’s] inquiry” and reduce the reporting burden on cable companies,<sup>25</sup> which had indicated during the PRA process that responding to the data collection would impose a “significant burden” on them.<sup>26</sup>

Finally, the Bureau clarified that incumbent LECs must not report *Locations* with *Connections* “used to provide services substantially similar to the services provided to residential customers . . . (even if the facility is technically capable of providing a *Dedicated Service*).”<sup>27</sup> The Bureau stated that “[t]his exclusion is again aimed at limiting the data reported to only *Locations* where the *End Users* are demanding services relevant to [the Commission’s] inquiry (*i.e.*, buying *Dedicated Services*).”<sup>28</sup>

### III. ARGUMENT

#### A. **The Bureau’s Approach In The *September 2013 Order* Was Reasonable And Will Not Hinder The FCC’s Ability To Accurately Assess Potential Competition In The Special Access Market.**

CenturyLink is incorrect that the approach taken by the Bureau “will cause the data collection to systematically underestimate the existence of potential competition” in the provision of special access services.<sup>29</sup> This is so for several reasons.

To begin with, the universe of cable company *Connections* that are currently capable of providing a *Dedicated Service* but (1) are linked to a *Node* that has not been upgraded to provide

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<sup>25</sup> *Id.*

<sup>26</sup> See Letter from Steven F. Morris, Vice President and Associate General Counsel, NCTA, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, at 1 (filed Apr. 17, 2013); see generally Comments of NCTA, WC Dkt. No. 05-25 (filed Apr. 15, 2013) (“NCTA PRA Comments”).

<sup>27</sup> *September 2013 Order* ¶ 31.

<sup>28</sup> *Id.*

<sup>29</sup> Application at 5.

Metro Ethernet (or an equivalent service) and (2) were not used to provide a *Dedicated Service* at any time during 2010 or 2012 is likely to be very small.<sup>30</sup> In other words, it is highly unlikely that there are a significant number of cable company *Connections* linked to non-upgraded *Nodes* that are currently capable of providing a *Dedicated Service* but were never used to do so during 2010 or 2012. First, cable companies are unlikely to modify individual *Connections* to provide *Dedicated Services* to businesses unless they have business customers to serve using those *Connections*. Like CLECs, cable companies generally do not build or modify individual last-mile facilities on an “if you build it, they will come” theory. Second, business customers generally sign contracts for *Dedicated Services* that are at least three years in length, and cable companies “have only recently upgraded systems in their FAs to provide *Dedicated Service*.”<sup>31</sup> Accordingly, if there are cable company *Connections* linked to non-upgraded *Nodes* that are currently capable of providing a *Dedicated Service*, those *Connections* were probably used to provide such services during 2010 or 2012 and will be captured in the data collection.

Moreover, to the extent that the excluded *Connections* are capable of providing a *Dedicated Service* in the future, the Bureau can rely on other data collected to account for this potential competition. In particular, the Bureau can use the maps of cable companies’ fiber networks and the locations of *Nodes* that have already been upgraded to provide Metro Ethernet (or its equivalent) to determine where cable companies are likely to upgrade their non-upgraded *Nodes* in the near future. Thus, the Bureau’s decision to exclude *Locations* with the *Connections*

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<sup>30</sup> As Cox explained in its PRA comments, Cox “provides best efforts business broadband Internet access services . . . to small and medium-sized businesses utilizing its hybrid fiber coaxial (‘HFC’) cable and Ethernet over HFC,” but Cox has “deployed a relatively small number of dedicated service connections using its HFC cable plant or Ethernet over HFC.” Declaration of Robert Hattori, Cox Communications, ¶ 7 (emphasis added) (attached as “Exhibit A” to NCTA PRA Comments).

<sup>31</sup> *September 2013 Order* ¶ 49.

at issue will not provide “an incomplete picture of competition” in the special access market, as CenturyLink asserts.<sup>32</sup>

On the contrary, the Bureau’s exclusion was necessary to ensure that the data collected is appropriately focused on (1) the facilities that can or could be used to provide a *Dedicated Service* to a business; and (2) the demand for such *Dedicated Services* (as opposed to residential-type services). The Bureau balanced the need to capture sources of potential competition (*i.e.*, in-place but out-of-service *Connections* currently capable of providing a *Dedicated Service*), as requested by AT&T and Verizon, without also capturing the numerous *Connections* that are irrelevant to the Commission’s inquiry (*i.e.*, those used to provide residential-type services). As the Bureau explained, “[i]ncluding facilities and services provided to residences will not help, and may distort, our analysis of the special access market.”<sup>33</sup> And for the reasons discussed above, it was entirely reasonable for the Bureau to assume that cable company *Connections* linked to non-upgraded *Nodes* that were not used in 2010 or 2012 to provide a *Dedicated Service* are being used to provide residential-type services.<sup>34</sup>

**B. The Bureau Acted Squarely Within The Scope Of Its Delegated Authority In The *September 2013 Order*.**

Nor is there any basis for CenturyLink’s claim that the Bureau exceeded its delegated authority in the *September 2013 Order*.<sup>35</sup> In fact, the Bureau’s action fell squarely within the scope of authority expressly delegated to it by the Commission in the *December 2012 Order*. There, the Commission directed the Bureau to “modify the data collection based on public

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<sup>32</sup> Application at 1 (internal citation omitted).

<sup>33</sup> *September 2013 Order* ¶ 21 (emphasis added).

<sup>34</sup> *See id.* ¶ 27.

<sup>35</sup> *See* Application at 6-7.

feedback,” “amend the data collection based on feedback received through the PRA process,” and “make corrections to the data collection to ensure it reflects the Commission’s needs as expressed in this Report and Order.”<sup>36</sup> That is precisely what the Bureau did in the *September 2013 Order*. In direct response to questions about the meaning of the term “capable” in the definition of “*Connection*,” the Bureau provided guidance on the *Locations with Connections* that different types of *Providers* must report. The Bureau did so while ensuring that its guidance reflected the Commission’s needs as expressed in the *December 2012 Order*—in particular, the need “to conduct a robust analysis of special access competition,” not competition for residential-type services.<sup>37</sup> Moreover, in making its clarifications, the Bureau eased the reporting burden on cable companies in response to feedback received from those companies in the PRA process.

CenturyLink nevertheless seizes upon footnote 112 of the *December 2012 Order* as evidence that the Bureau exceeded its delegated authority by excluding from the data collection those cable company *Connections* that (1) are linked to a non-upgraded *Node* and (2) were not used in 2010 or 2012 to provide a *Dedicated Service*.<sup>38</sup> In footnote 112, the Commission stated that “even if the PRA process suggested that it would be less burdensome to collect special access facilities deployment at the census block level, it would not be consistent with this Report and 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>39</sup> But the

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<sup>36</sup> *December 2012 Order* ¶ 52.

<sup>37</sup> *Id.* ¶ 30 (emphasis added).

<sup>38</sup> *See Application* at 7.

<sup>39</sup> *December 2012 Order* n.112.

Commission never held in paragraph 31 that it would collect location-by-location information for every single Connection capable of providing a *Dedicated Service*. That paragraph merely states the Commission’s “inten[tion] to examine comprehensive data on the situs and type of facilities capable of providing special access.”<sup>40</sup> And “comprehensive” facilities data does not necessarily mean data on every single facility. Rather, “comprehensive” means “including many, most, or all things.”<sup>41</sup> That is why the Commission held in paragraph 31 that it would collect facilities data “including but not limited to” the information specifically listed therein. Moreover, the only facilities information specifically listed in paragraph 31 is “Locations to which the provider has sold a connection to an end user.”<sup>42</sup> Thus, the Bureau did not run afoul of the requirements of paragraph 31 by not requiring location-by-location information for the small subset of cable company *Connections* that are currently capable of providing a *Dedicated Service* but (1) are linked to a non-upgraded *Node* and (2) were never used to provide a *Dedicated Service* during 2010 or 2012.

Furthermore, if such a minor change by the Bureau were impermissible, then the authority expressly delegated by the Commission to “modify the data collection based on public feedback,” “amend the data collection based on feedback received through the PRA process,” and “make corrections to the data collection to ensure it reflects the Commission’s needs” would be meaningless.

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<sup>40</sup> *Id.* ¶ 31 (emphasis added).

<sup>41</sup> Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/comprehensive> (last visited Nov. 4, 2013).

<sup>42</sup> *December 2012 Order* ¶ 31 (emphasis added).

Finally, it is worth noting that the case cited by CenturyLink in support of its delegated authority argument is inapposite.<sup>43</sup> In *RAO Letter 20*, the Common Carrier Bureau did exactly what it was expressly prohibited from doing.<sup>44</sup> There, the Commission found that the Common Carrier Bureau exceeded its delegated authority by instructing carriers to exclude and include certain items in the interstate rate base in violation of specific FCC rules that (1) “define[d] explicitly those items to be included in, or excluded from, the interstate rate base,” and (2) provided that RAO letters “must be limited to explanation, interpretation, and resolution of accounting matters.”<sup>45</sup> By contrast, here, the Bureau did exactly what it was explicitly authorized by the Commission to do—amend or modify the data collection based on public feedback and to ensure that the data collection reflects the Commission’s needs as expressed in the *December 2012 Order*.

#### IV. CONCLUSION

For the foregoing reasons, the Commission should reject CenturyLink’s Application and move forward with the special access data collection.

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<sup>43</sup> See Application n.29.

<sup>44</sup> See *Responsible Accounting Officer Letter 20, Uniform Accounting for Postretirement Benefits Other Than Pensions in Part 32*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 11 FCC Rcd. 2957, ¶ 25 (1996) (“*RAO Letter 20*”).

<sup>45</sup> *Id.*

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I, Nirali Patel, hereby certify that on this 6th day of November 2013, I caused to be served a true and correct copy of the foregoing Opposition of Cbeyond, EarthLink, Integra, Level 3, and tw telecom to be served via First Class U.S. Mail, postage prepaid, on the parties listed on the attached service list.



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