



## TABLE OF CONTENTS

INTRODUCTION AND SUMMARY .....	2
I. THE BUREAU FAILED TO EXERCISE ITS DELEGATED AUTHORITY TO ENSURE THAT THE COLLECTION COMPLIES WITH THE PRA.....	4
1. <i>Network Maps</i> .....	6
2. <i>Billing Data</i> .....	8
3. <i>Idle Facilities</i> . ....	8
4. <i>RFP Responses and Marketing Materials</i> .....	10
5. <i>Revenue Categories</i> .....	10
6. <i>Location Information</i> .....	11
II. THE BUREAU IGNORED CRITICAL CONCERNS REGARDING DATA SECURITY.....	13
CONCLUSION.....	15



## INTRODUCTION AND SUMMARY

As the *Special Access* proceeding approaches its eighth anniversary under its sixth chairman, the Commission is farther than ever from reaching any sort of meaningful conclusion. In 2012, the Commission both suspended its old pricing flexibility triggers and authorized a highly detailed, extremely onerous data collection that it views as a prerequisite to adopting new triggers.<sup>3</sup> However well-intentioned, this combination of decisions has left the Commission completely adrift, with no meaningful ability to regulate or deregulate in a critically important sector of the communications marketplace. If the principle that “a dynamic market deserves dynamic decision making”<sup>4</sup> is to have meaning, the Commission immediately should begin to chart a new course by scaling back the data collection in accordance with the PRA.

The data collection punishes the very companies that are investing private capital to finally bring widespread competition to the special access marketplace. Cable operators are making significant investments to provide commercial customers with services that are more robust and less expensive than the services offered by incumbent providers, a result that the Commission has long encouraged through its limited regulation of competitive providers. Yet these same companies, which have never been subject to any recordkeeping or reporting obligations with respect to their competitive special access services, are now expected to devote thousands of hours and tens of millions of dollars to gathering virtually every scrap of information about the commercial services they provide (or could provide), the networks they operate, and the customers they serve (including detailed CPNI regarding every business in

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<sup>3</sup> *Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, Report and Order, 27 FCC Rcd 10557 (2012) (*Suspension Order*) (suspending pricing flexibility triggers); *Data Collection Order*, 27 FCC Rcd at 16319, ¶ 1 (“[W]e initiate a comprehensive data collection and seek comment on a proposal to use the data to evaluate competition in the market for special access services.”).

<sup>4</sup> NET EFFECTS: THE PAST, PRESENT, AND FUTURE IMPACT OF OUR NETWORKS, Tom Wheeler (Nov. 2013), at 27.

America that purchases dedicated services). They then must submit that data for review by the Commission staff and by their competitors, without any assurance or explanation as to how the Commission intends to keep it secure.

Not only does the data collection penalize competitive providers and risk unnecessary disclosure of sensitive information, but it also will prove to be ineffective at helping the Commission establish new rules to govern the special access marketplace. As NCTA explained previously, “it is highly unlikely that the Commission will be able to perform a timely and meaningful analysis of data submitted by thousands of companies documenting every rate element and every facility going to every commercial customer in America. Both the data that the Commission will collect and the analysis it proposes to perform are exponentially more complicated than any the Commission has handled previously.”<sup>5</sup> The earliest the Commission possibly could complete any analysis is 2015 and any such analysis will be out of date immediately upon its release because the data the Commission is collecting is from 2010 and 2012.

The *Bureau Order* that is the subject of this Application for Review simply exacerbates this regulatory morass. The *Data Collection Order* adopted a template for the data collection without any consideration of whether that collection would pass muster under the PRA. Rather, the Commission specifically delegated to the Bureau responsibility for “amend[ing] the data collection based on feedback received through the PRA process.”<sup>6</sup> Notwithstanding that delegation, the Bureau failed to make changes proposed by NCTA and other parties that would

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<sup>5</sup> Reply Comments of the National Cable & Telecommunications Association, WC Docket No. 05-25 (filed March 12, 2013) at 1-2. *See also* AT&T Comments, WC Docket No. 05-25 (filed Feb. 11, 2013) at 2 (the Commission’s proposed approach “goes far beyond what is necessary in this proceeding, would raise a host of methodological and econometric difficulties that may prove insurmountable, is unlikely in the end to produce an administrable test for pricing flexibility, and would almost certainly mire the industry and the Commission in protracted and costly proceedings for years to come.”).

<sup>6</sup> *Data Collection Order*, 27 FCC Rcd at 16340, ¶ 52.

have substantially reduced the burden of the collection while continuing to provide the Commission with data necessary to analyze the special access marketplace.<sup>7</sup> To the contrary, it adopted a number of changes that are likely to increase the burden and complexity of the data collection, as well as changes that would require submission of detailed CPNI regarding every customer of dedicated services.

Because the Bureau failed to make the necessary changes, the Commission now must take responsibility for fixing the data collection in accordance with the PRA so that this proceeding can move forward in a reasonable and timely manner. The Commission also should review the Bureau's failure to address concerns raised by NCTA regarding the need for heightened data security measures with respect to network maps and other sensitive information.

**I. THE BUREAU FAILED TO EXERCISE ITS DELEGATED AUTHORITY TO ENSURE THAT THE COLLECTION COMPLIES WITH THE PRA**

The *Notice of Proposed Rulemaking* initiating this rulemaking in 2005 did not seek comment on the need for a mandatory collection of data from competitive providers. To the contrary, the *Notice of Proposed Rulemaking* focused almost entirely on how to monitor the behavior of incumbent LECs, particularly with respect to pricing matters. Confirming that a mandatory data collection was not being considered, the *Notice of Proposed Rulemaking* specifically stated: "This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13."<sup>8</sup>

In the subsequent years, the Bureau issued a variety of notices, as well as two voluntary data requests, but the Commission never specifically sought comment on whether a mandatory

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<sup>7</sup> See Comments of the National Cable & Telecommunications Association, WC Docket No. 05-25 (filed Apr. 15, 2013) (NCTA PRA Comments).

<sup>8</sup> *Notice of Proposed Rulemaking*, 20 FCC Rcd 1994, 2036, ¶ 133.

data collection was needed or the PRA implications such a collection might entail.<sup>9</sup> To the contrary, even in the *Suspension Order*, the Commission included the same boilerplate as it did in 2005 asserting that the item contained no information collection requirements under the PRA.<sup>10</sup>

Given the Commission's consistent decision not to solicit feedback on the PRA-related issues that might arise in this docket, its explicit delegation to the Bureau in the *Data Collection Order* to "amend the data collection based on feedback received through the PRA process" must be read as a mandate to make any and all changes necessary to bring the data collection into compliance with the PRA. As we explain below, the Bureau generally avoided carrying out this significant responsibility and the changes it did make to the data collection are woefully inadequate to address the serious PRA concerns raised by NCTA and other parties and in many ways exacerbate those concerns.

As a threshold matter, the Bureau did not take seriously the Commission's delegation of authority to address PRA issues. The Bureau did make some changes to the data collection, some of which reduced the burden on respondents.<sup>11</sup> But the Bureau made clear that PRA compliance was not a factor in making these changes. Specifically, it stated that "[a]llegations as to whether the collection complies with the PRA are not addressed here however. We will address those allegations as part of the PRA approval process."<sup>12</sup> Given that the *Bureau Order* is the order in which the data collection was finalized, and that the Bureau was specifically

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<sup>9</sup> The Bureau specifically stated that these voluntary data requests were not subject to the PRA. *See Competition Data Requested in Special Access NPRM*, WC Docket No. 05-25, 26 FCC Rcd 14000, 14001 n.8 (2011); *Data Requested in Special Access NPRM*, WC Docket No. 05-25, 25 FCC Rcd 15146, 15147, n.7 (2010).

<sup>10</sup> *Suspension Order*, 27 FCC Rcd at 10614, ¶ 105.

<sup>11</sup> *See, e.g.*, Opposition of the National Cable & Telecommunications Association, WC Docket No. 05-25 (filed Nov. 6, 2013) (NCTA Opposition) (supporting the Bureau's decision to narrow the information that cable operators must supply regarding inactive facilities).

<sup>12</sup> *Bureau Order*, 28 FCC Rcd at 13192, ¶ 7, n. 24.

delegated authority to address PRA concerns because such concerns had not been considered previously by the Commission, it was wholly inappropriate for the Bureau to defer consideration of the significant PRA concerns raised by NCTA and other parties.

Furthermore, the changes and clarifications made to the collection did not address the PRA concerns that were raised in a meaningful way. We identify several specific shortcomings below.

*1. Network Maps.* The *Data Collection Order* requires competitive providers to submit highly detailed maps identifying fiber routes and node locations, as well as information on the date each node was placed in service.<sup>13</sup> NCTA demonstrated through sworn affidavits that these requirements would cost tens of millions of dollars and we proposed alternative methods by which the Commission could identify a provider's network footprint without imposing such an incredible burden on providers.<sup>14</sup>

In the face of NCTA's undisputed evidence and alternative proposals, the Bureau's clarification with respect to the scale and format for reporting fiber routes is inadequate because it does not address the fact that many companies do not currently possess maps for all areas in the requested format and therefore will need to devote considerable resources to creating new maps solely for this data collection exercise. The Bureau acknowledges "the burdens of providing these comprehensive maps," but states that it is necessary to collect granular information because competition "appears to occur at a very granular level – perhaps as low as the building/tower."<sup>15</sup> There are two significant flaws in this justification. First, even if competition occurs at the building level, competitive providers will be providing information on

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<sup>13</sup> *Data Collection Order*, 27 FCC Rcd at 16332, ¶ 35.

<sup>14</sup> NCTA PRA Comments, Ex. A at 5; Ex. B at 3.

<sup>15</sup> *Bureau Order*, 28 FCC Rcd at 13204-05, ¶ 37.

every building they serve. The combination of a map of the network footprint, as NCTA proposed, and a list of buildings actually served, is more than sufficient for the Commission to determine where competition exists and where it is likely to develop. Second, it is implausible for the Commission to regulate at a building level, or even a street level. Such minutely granular rules would be impossible to implement and unworkable to apply. Since there is no meaningful possibility of establishing rules that vary by street or building, whether fiber runs down K Street or L Street or M Street ultimately will have no effect on any rules the Commission adopts and therefore that level of detail is simply unnecessary.

Similarly, the *Bureau Order* fails to seriously address NCTA's argument that the requested data regarding nodes used to interconnect with other networks is unnecessary to perform a competitive analysis. The Bureau suggests that granular data regarding node locations is needed to "understand whether the decision to deploy in an area is in response to demand for Dedicated Service."<sup>16</sup> But there is no need to undertake a burdensome collection to "understand" this point, as demonstrated by the Bureau's analysis just a few pages earlier in the order. In providing guidance on which connections to report, the Bureau specifically finds that non-cable providers "typically target their service offerings to businesses and other higher-capacity users where sufficient demand exists to justify the investment."<sup>17</sup> The Bureau makes a similar finding for deployment of Metro Ethernet facilities by cable operators "because it is reasonable to assume that such upgrades were made based on strong expectations as to the likelihood of sufficient demand for Dedicated Service and are sources of potential competition."<sup>18</sup> Given that the Bureau made multiple decisions that were premised on the unremarkable conclusion that

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<sup>16</sup> *Id.* at 13206, ¶ 42.

<sup>17</sup> *Id.* at 13199, ¶ 23.

<sup>18</sup> *Id.* at 13201, ¶ 26.

deployment and demand are related, its justification for the collection of detailed node data does not withstand scrutiny.<sup>19</sup>

**2. Billing Data.** NCTA demonstrated through sworn affidavits the extreme burden associated with the requirement in the *Data Collection Order* to provide billing data for every rate element billed to every dedicated services customer at every location across the country.<sup>20</sup> As with the mapping obligations described above, the extremely minor changes the Bureau made with respect to billing data do not ameliorate NCTA's PRA concerns in any meaningful way. While the clarification that companies may use their own billing codes, rather than the "ILEC-centric diagram of billed circuit elements" that the Commission adopted may be marginally helpful,<sup>21</sup> it does nothing to reduce the overwhelming quantity of data the Commission expects parties to provide (roughly 20 data points for every rate element provided to every customer, for each of 24 months)<sup>22</sup> or eliminate the need for manual review<sup>23</sup> of billing records (e.g., to identify adjustments, rebates, and true-ups). Moreover, not only did the Bureau fail to resolve the concerns that NCTA had raised, it added new reporting obligations that only serve to increase the burden on respondents.<sup>23</sup>

**3. Idle Facilities.** As part of its attempt to assess the level of potential competition for special access services in a particular area, the *Data Collection Order* defined the term "connection" to include not just facilities actually used to provide dedicated services, but also

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<sup>19</sup> The Bureau's clarification regarding the use of CLONES data may prove helpful in some cases, although it does nothing for companies that do not participate in the CLONES database, a privately-managed service that imposes significant fees to participate. The Bureau's clarification that information on nodes in-service prior to 1995 is not required is almost completely meaningless since the vast majority of cable facilities have been placed in service after that date.

<sup>20</sup> NCTA PRA Comments, Ex. A at 7-8; Ex. B at 3.

<sup>21</sup> *Bureau Order*, 28 FCC Rcd at 13207, ¶ 46.

<sup>22</sup> *Id.* at 13245-46, App. A (Instructions) at 23-24.

<sup>23</sup> *Id.* at 13212, Question II.A.12-14 (requiring reporting of customer names, unique IDs for each customer, and the per-unit charge for each element provided)

those facilities that are “capable” of providing a dedicated service.<sup>24</sup> The Bureau recognized that there were significant questions about the meaning of “capable” in this context and adopted a number of clarifications with respect to different types of providers. For cable operators, the Bureau clarified that there was no obligation to report non-fiber facilities that are connected to non-upgraded nodes and are not being used to provide dedicated services.<sup>25</sup>

While NCTA supports that clarification (for all the reasons explained in our Opposition to CenturyLink’s Application for Review of that decision),<sup>26</sup> the Bureau did not go far enough. In particular, identifying and reporting non-active, non-fiber facilities that are capable of being used for dedicated services in areas that have been upgraded for Metro Ethernet will be tremendously burdensome for most cable operators and will provide the Commission with no meaningful information. The Bureau’s revised collection effectively will require cable companies to identify every commercial building connected to a Metro Ethernet-capable headend in 2010 or 2012, regardless of the service that was provided to that location or whether any services were provided to that location at all. As explained in NCTA’s Opposition to CenturyLink’s AFR, non-active customers may not show up in company billing systems and therefore responding to this question may require significant manual intervention.<sup>27</sup> Moreover, given that the Commission will know the location of all fiber routes (or the network footprint under NCTA’s proposal) and the location of all commercial buildings that were served in the relevant time periods, there is no benefit to collecting detailed information on non-fiber facilities

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<sup>24</sup> *Data Collection Order*, 27 FCC Rcd at 16327, ¶ 20.

<sup>25</sup> *Bureau Order*, 28 FCC Rcd at 13201, ¶ 27.

<sup>26</sup> NCTA Opposition at 3-7.

<sup>27</sup> *Id.* at 4.

not actually being used to serve customers, particularly in light of the significant cost of gathering and submitting such data.

**4. RFP Responses and Marketing Materials.** The *Data Collection Order* required competitive providers to submit up to 15 winning responses to Requests for Proposal from commercial customers and up to 15 losing responses.<sup>28</sup> It also required competitive providers to submit past and future marketing materials through the end of 2014.<sup>29</sup> In both cases the requested data purportedly is necessary to assess the level of potential competition that may exist in a given geographic area.

In response, NCTA suggested that this broad request violated the PRA because a more narrow set of data would provide the Commission the same information. Specifically, NCTA explained that only the location of a losing response to an RFP was relevant and that winning responses were only relevant if they were not operational (and therefore not reflected in other responses).<sup>30</sup> Similarly, we explained that backward-looking marketing materials were irrelevant given the data that will be provided on actual customers and that forward-looking materials generally are too speculative to be meaningful.<sup>31</sup> We also explained that gathering both types of data would impose significant burdens on cable operators.<sup>32</sup> The *Bureau Order* did not address any of NCTA's concerns about RFP responses and marketing materials and consequently the Commission should address these arguments and make the proposed changes.

**5. Revenue Categories.** The *Data Collection Order* required providers and purchasers of special access services to provide detailed information on their revenues (for providers) or

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<sup>28</sup> *Data Collection Order*, 27 FCC Rcd at 16335, ¶ 41.

<sup>29</sup> *Id.* at ¶ 42.

<sup>30</sup> NCTA PRA Comments at 15.

<sup>31</sup> *Id.* at 14-15.

<sup>32</sup> *Id.* at 10-11.

costs (for purchasers), broken down based on various categories of bandwidth.<sup>33</sup> NCTA explained that many companies do not track sales or purchases based on the bandwidth categories proposed by the Commission and that answering these questions therefore might require extensive manual processing of sales or purchase records.<sup>34</sup> As an alternative to this incredibly burdensome process, NCTA proposed that the Commission clarify that these detailed breakdowns of sales or purchases only be required where a company tracks such information in the ordinary course of business. The *Bureau Order* completely fails to address NCTA's arguments and proposal on this point and consequently the Commission should address these arguments and make the proposed change.

**6. Location Information.** The *Bureau Order* modified the data collection so as to substantially increase the burden of providing information on "locations" served by dedicated connections. The *Data Collection Order* required providers to identify and provide information on locations at two discrete points in time, on December 31, 2010 and on December 31, 2012.<sup>35</sup> The *Bureau Order* substantially expanded this collection to require information on locations "during" 2010 and 2012, converting two snapshots of historical data into a comprehensive month-by-month assessment for those two years and substantially increasing the burden of responding to this request.<sup>36</sup> The stated reason for the change is to match location information with the required billing data collection, which requires information to be reported on month-by-month basis.<sup>37</sup> This rationale, however, is undermined by the guidance on "capable connections" elsewhere in the *Bureau Order*. As noted above, by including idle facilities connected to Metro

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<sup>33</sup> *Data Collection Order*, 27 FCC Rcd at 16333, ¶ 38.

<sup>34</sup> NCTA PRA Comments at 9.

<sup>35</sup> *Data Collection Order*, 27 FCC Rcd at 16364, Question II.A.3-4.

<sup>36</sup> *Bureau Order*, 28 FCC Rcd at 13212, ¶ 53.

<sup>37</sup> *Id.*

Ethernet-capable headends, the Bureau's guidance will require identification of locations that may not be identified in the provider's billing systems.

The *Bureau Order* also fails to remedy a data collection requirement that the Bureau acknowledges creates an unnecessary burden. Question II.A.3 of the *Data Collection Order* required respondents to provide separate totals for locations served by leased facilities and those served by owned facilities. The *Bureau Order* revised Question II.A.3 to eliminate a separate tally of leased versus owned locations in order to "address concerns of Cox and TW Telecom about differentiating by owned facilities and *Locations* connected by leased *IRU* facilities."<sup>38</sup>

Although the Bureau eliminates the requirement to provide a separate total of locations served by leased facilities in response to Question II.A.3, the *Bureau Order* retains in Question II.A.4 the underlying requirement to determine with respect to each location whether owned or leased facilities were used.<sup>39</sup> Moreover, the *Bureau Order* provides that, if respondents do not know the name of the *IRU* provider at a particular location, the respondent may instead provide a total number of locations served by leased facilities, effectively reinstating the tally that the Bureau eliminated from Question II.A.3.<sup>40</sup> In sum, the *Bureau Order* wholly fails to remedy the concern it identified.

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<sup>38</sup> *Id.*, n. 148.

<sup>39</sup> *Bureau Order*, 28 FCC Rcd at 13307, Question II.A.4.e. (asking whether the Connection to the location uses leased facilities).

<sup>40</sup> Although respondents need not provide the name of the *IRU* provider if not known, the *Bureau Order* requires in the alternative the "total number of *Connections* to *Locations* you obtain as an *IRU*," *Id.* at 13235, App. A, Instructions.

## II. THE BUREAU IGNORED CRITICAL CONCERNS REGARDING DATA SECURITY

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As numerous press reports over the last year have demonstrated, there are significant questions about the ability of the federal government to protect the security of data that it generates and collects. Unfortunately, the Commission has not been immune from these issues. In a report released earlier this year, GAO reached the following conclusion:

FCC did not effectively implement appropriate information security controls in the initial components of the ESN project. Although the commission deployed enhanced security controls and tools for monitoring and controlling security threats as of August 2012, it had not securely configured these tools and other network devices to sufficiently protect the confidentiality, integrity, and availability of its sensitive information. These weaknesses occurred, at least in part, because FCC did not fully perform key security risk management activities during the development and deployment of the ESN project. As a result, FCC limited the effectiveness of its security enhancements and its *sensitive information remained at unnecessary risk of inadvertent or deliberate misuse, improper disclosure, or destruction.*<sup>41</sup>

The concerns raised by GAO are troubling in the context of the overwhelming amount of special access data the Commission is proposing to collect from cable operators and other providers. In particular, NCTA raised concerns about the Commission's decision to collect highly detailed maps of every telecommunications network in the United States.<sup>42</sup> Individually such maps would have tremendous value to anyone trying to disrupt telecommunications and broadband services in this country and consequently extreme caution is warranted in the

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<sup>41</sup> United States Government Accountability Office, *INFORMATION SECURITY: Federal Communications Commission Needs to Strengthen Controls over Enhanced Secured Network Project*, GAO-13-155 at 9 (Jan. 2013) (emphasis added), at <http://gao.gov/assets/660/651559.pdf>.

<sup>42</sup> Letter from Steven F. Morris, NCTA, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25 (filed Feb. 28, 2013) (“NCTA also raised concerns about the security risks that would be created by requiring companies to create extremely detailed maps that they do not currently possess and then aggregating those maps at the Commission. The resulting product – a map of the entire U.S. telecommunications network, including every single location where two or more providers connect – obviously would be a target for hackers and others who might be intent on disrupting communications services in the United States.”).

treatment of such maps. The Commission's decision to aggregate such maps from every provider across the country raises the stakes considerably.

In the face of such significant concerns, NCTA believes the Bureau was obligated to spell out in some detail what steps it would take to protect the security of this data, including a discussion of any contractors that would be involved in developing the systems being used and whether those contractors have been appropriately vetted. The need for such an analysis and explanation is particularly acute given that other agencies, such as NTIA, have considered similar issues and ultimately decided not to collect the detailed information that is being sought here.<sup>43</sup> The Bureau, however, ignored NCTA's concerns completely and failed to provide any explanation as to how it plans to protect the security of mapping information submitted by cable operators and other providers.

Rather than address the concerns raised by NCTA, the Bureau's revisions heighten the security concerns considerably because the data collection now requires respondents to disclose detailed CPNI regarding every commercial customer to whom they sell dedicated services. Specifically, the *Bureau Order* amended the billing data collection to require disclosure of the customer's name along with detailed information on the type, configuration, location and quantity of service that the customer receives.<sup>44</sup> It is simply not reasonable for the Commission to expect thousands of companies to submit detailed network maps and sensitive customer

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<sup>43</sup> See Letter from Matt Polka, et al. to Larry Strickling, NTIA (August 6, 2009) ("Given the burdens and significant security risks of collecting such data and, more importantly, the network security risks associated with the aggregation of highly-detailed network infrastructure data, NTIA should revise the NoFA requirement that awardees obtain data concerning points of network traffic aggregation and interconnection."), at [http://www.ntia.doc.gov/legacy/broadbandgrants/correspondence/JointProviderLetter\\_090807.pdf](http://www.ntia.doc.gov/legacy/broadbandgrants/correspondence/JointProviderLetter_090807.pdf); NTIA Notice of Funds Availability Clarification (Aug. 7, 2009) ("3. Broadband Service Infrastructure in Provider's Service Area, (a) Last-Mile Connection Points -- Awardees are not required to report the data identified in this section."), at [http://www2.ntia.doc.gov/files/NTIA\\_MappingFAQ\\_NOFAClarity.pdf](http://www2.ntia.doc.gov/files/NTIA_MappingFAQ_NOFAClarity.pdf).

<sup>44</sup> See *Bureau Order*, 28 FCC Rcd at 13309, Question II.A.12.b (requiring name and unique numerical identifier for each customer); A.12.c (requiring the customer's location); A.12.e (requiring type of circuit and bandwidth); A.12.g (requiring number of units billed for each circuit element).

information without providing those companies an explanation of how the security of that data will be protected.

### **CONCLUSION**

For all the reasons explained in this Application for Review, the Commission should modify the mandatory special access data collection to reduce the burden on cable operators and other competitive providers in accordance with the PRA and take steps to protect the security of network maps and other critical data regarding the facilities and services provided by respondents, including detailed CPNI for every dedicated services customer in America.

Respectfully submitted,

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December 9, 2013

## CERTIFICATE OF SERVICE

I, Gretchen Lohmann, do hereby certify that on this 9<sup>th</sup> day of December 2013, I caused a copy of the foregoing Application for Review of the National Cable & Telecommunications Association to be served by postage pre-paid mail on the following:

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