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

In the Matter of	)	
	)	
Modernizing Unbundling and Resale Requirements in an Era of Next-Generation Networks and Services	)	WC Docket No. 19-308
	)	
	)	

COMMENTS OF USTELECOM – THE BROADBAND ASSOCIATION

Patrick R. Halley
Senior Vice President, Policy & Advocacy

Kristine Hackman
Vice President, Policy & Advocacy

USTelecom – The Broadband Association
601 New Jersey Avenue NW, Suite 600
Washington, D.C. 20001

February 5, 2020

TABLE OF CONTENTS

EXECUTIVE SUMMARY

USTelecom commends the Commission for launching this proceeding, which initiates a much-needed re-evaluation of obligations that have remained in place for far too long. American consumers are benefitting from virtually omnipresent competition in the provision of telecommunications, ranging from the lowest-capacity narrowband offerings to the most robust business-grade offerings. As the Commission has repeatedly recognized, this competition has reached into almost every corner of the nation, with even rural customers often enjoying high-speed wireless services, both fixed and mobile, in addition to cable-based telecommunications offerings and the services offered by traditional telecommunications providers. The core aim of the Telecommunications Act of 1996 – widespread facilities-based competition, fueled by a sustained cycle of investment and innovation – has arrived. Speeds have skyrocketed for residential and enterprise customers alike. In most markets, the "incumbent" provider is – *at best* – just one among a field of sparring competitors.

In such a marketplace, consumers are disserved by the market-distorting regulations of yesteryear. Today, unbundling mandates and broad avoided-cost resale requirements not only fail to advance consumer interests, but affirmatively undercut those interests. These obligations place ILECs at a significant competitive disadvantage *vis-à-vis* their similarly situated rivals and divert resources that could be put to better use in developing and deploying new services. In a market characterized by multiple providers relying on multiple platforms – including facilities-based providers as well as those relying on commercially available wholesale inputs – customers are best served by a level competitive playing field, which rewards those who can provide the best services at the lowest cost, rather than those that benefit from an outdated regulatory regime. Removal of the mandates at issue here will fuel additional competition, bringing consumers ever-better services. While specific individual providers may feel the impact of market interactions, competition *itself* will benefit – as will consumers. In this, the competitive telecommunications market is no different from any other competitive market.

Fortunately, Congress anticipated the advent of competition, and provided the Commission with multiple bases on which to lift outdated unbundling and avoided-cost resale mandates. The Commission should pursue each of the avenues available, lifting the relevant obligations nationwide. If the Commission is uncomfortable with nationwide relief, the NPRM's more conservative proposals will ensure that customers in the limited areas in which competitors might still rely on UNEs are protected, while all customers are able to benefit from open competition and deployment that will step from removal of these mandates in the vast majority of locations.

DS1/DS3 Loops. The Commission should find that competitors are not impaired without unbundled access to DS1 and DS3 loops nationwide, or at least in counties satisfying the BDS Order's Competitive Market Test. As the agency has recognized, the vast majority of census blocks, and some 99 percent of business establishments, enjoy competition in the provision of DS1 and DS3 service. Form 477 data demonstrates that competition is expanding, including explosive growth in 5G and fixed wireless offerings. Most competitors, moreover, do not rely on UNEs at all. The Commission should therefore find non-impairment nationwide – or at least in counties satisfying the CMT. The Commission should also forbear from DS1/DS3 loop unbundling, which is not necessary to ensure just and reasonable rates or practices or to protect

consumers, and whose elimination will fuel additional deployments and promote the transition to future networks. Finally, the Commission should recognize that unbundling is no longer permissible here because the markets served using unbundled DS1 and DS3 loops are competitive.

DS0 Loops. The Commission should find that competitors are not impaired without unbundled access to digital DS0 loops nationwide, or at least in urban census blocks. Cable providers compete ferociously with ILECs in the vast majority of local markets, offering service at 25/3 Mbps or better, without the use of UNEs. Cable providers' market shares have in fact exceeded ILEC market shares for many years. Moreover, ILECs currently sell many non-UNE wholesale loops and have every reason to continue doing so after unbundling obligations are lifted. These facts warrant a non-impairment finding. Forbearance is also warranted, given the role that competition plays in policing prices and practices, and the public interest benefits associated with forbearance, which will promote a level competitive playing field. Finally, unbundling obligations must be lifted here, too, because the retail markets served using DS0 loops are competitive.

Narrowband Voice-Grade Loops. The Commission likewise should find that competitors are not impaired without unbundled access to narrowband voice-grade loops nationwide. In addition to the robust competition detailed above, the voice market is dominated by mobile wireless providers, which have drastically reduced ILEC line counts. Indeed, ILECs now serve fewer than one-tenth of all voice lines. Individual competitors might still rely on UNEs, but competition itself does not. Competitors are not impaired without access to these loops. For the same reasons, the Commission should forbear from enforcing these unbundling obligations, particularly given the incentives for new broadband facility deployment that forbearance will unleash. Finally, here, too, the competitiveness of the retail market mandates a finding that unbundling is no longer required.

Subloops. The Commission should find that competitors are not impaired without unbundled access to either copper subloops or multiunit access subloops in any context in which they are not (or would not be) impaired without access to the underlying loop itself. Where competitors face no unique barriers with respect to the loop itself, they face no barriers with respect to the subloop, either. Competitors, moreover, can economically run their own high-capacity facilities to multiunit premises, and ILECs are prohibited from entering into exclusive service agreements. Forbearance is appropriate here too, because unbundling does not police the marketplace in areas where there is no underlying loop unbundling obligation. And, once again, competition in the retail markets served using subloops precludes mandatory unbundling.

Dark Fiber Transport. The Commission should find that competitors are not impaired without unbundled access to dark fiber transport nationwide, or at least to wire centers within half a mile of competitive fiber. Use of unbundled dark fiber is extraordinarily uncommon, and where it is available, there typically exist ample competitive alternatives. Many CLECs themselves offer dark fiber on a commercial basis. Under these circumstances, competitors cannot be said to be impaired without unbundled access. For the same reasons, the Commission also should forbear from unbundled dark fiber mandates, which impose market distortions that harm consumers and limit additional deployment of next-generation networks. Here too, moreover, the competitiveness of the marketplace renders mandatory unbundling unlawful.

NIDs and OSS. The Commission should find that competitors are not impaired without unbundled access to stand-alone NIDs and OSS nationwide. Competitors acknowledge that they do not purchase NIDs separate from loops, and OSS can only be used for that purpose. Moreover, the functionality provided by OSS is available on a commercial basis at competitive rates. Competition cannot be said to rely on unbundled stand-alone NIDs or OSS. Forbearance is also required here, given that unbundling imposes costs with no concomitant benefit. Finally, unbundling is prohibited because the markets served using these elements are competitive.

Avoided-Cost Resale for Non-Price Cap Carriers. The Commission should forbear from applying Section 251(c)(4)'s avoided-cost resale mandate to non-price cap carriers, as it already has forborne with regard to price cap carriers. Arguments raised by those challenging the Commission's decision with regard to price cap ILECs do not withstand scrutiny, and all the arguments that supported forbearance from these obligations for price cap ILECs apply as well to non-price cap carriers. The Commission has correctly determined that competition is best served by promoting facilities deployment, not by maintaining incentives for reliance on legacy networks. And just as in price cap territories, there is every reason to expect that non-price cap carriers will continue to offer their services on a wholesale basis at just and reasonable commercial rates. Forbearance does not mean customers will no longer have access to voice service. ILECs, and other alternative providers, will continue to compete to serve retail and enterprise end-user customers and will continue to provide commercially negotiated access to their networks. As is the case with unbundled access to loops, individual competitors might still rely on the avoided cost resale mandate, but competition itself does not.

Transition. The Commission should allow for a brief – but only brief – transition period. Following the effective date of its order, the Commission should expressly prohibit new orders. It should permit continued reliance on existing UNE arrangements for no longer than 18 months, but upon the order's effective date should allow ILECs to increase the rates for the relevant UNEs by up to 25 percent to facilitate migration toward commercial rates. In no event should the transition period extend beyond the period set in place by the *UNE Analog Loop and Avoided-Cost Resale Forbearance Order*.

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

In the Matter of Modernizing Unbundling and Resale Requirements in an Era of Next-Generation Networks and Services	))))))	WC Docket No. 19-308

COMMENTS OF USTELECOM – THE BROADBAND ASSOCIATION

USTelecom – the Broadband Association ("USTelecom") submits these Comments in response to the Federal Communications Commission's ("Commission's") *Notice of Proposed Rulemaking* ("*NPRM*") in the above-captioned docket.[1] In light of the rampant competition in the provision of all relevant communications offerings in all geographic markets, the Commission should eliminate unbundling obligations with respect to DS1 and DS3 loops, DS0 and narrowband voice-grade loops, subloops, dark fiber transport, network interface devices ("NIDs") and Operations Support Systems ("OSS") nationwide. This choice will benefit competition and consumers alike, driving additional infrastructure investment by all market participants and ensuring a future characterized by providers relying on a wide variety of platforms competing on a level playing field.

In the event the Commission is not ready to eliminate all remaining obligations nationwide, it should at the very least adopt the reasonable proposals set out in the *NPRM*. Specifically, the Commission can and must eliminate unbundling obligations for DS1 and DS3 loops in business data services ("BDS") Competitive Counties and Study Areas; for DS0 loops in

[1] *Modernizing Unbundling and Resale Requirements in an Era of Next-Generation Networks and Services*, Notice of Proposed Rulemaking, 34 FCC Rcd 11290 (2019) ("*NPRM*").

urban census blocks; for narrowband voice-grade loops nationwide; for subloops where there is no obligation to unbundle the associated loop; for dark fiber transport to wire centers within a half mile of alternative fiber; and for network interface devices ("NIDs") and operations support systems ("OSS") nationwide. There are various distinct routes toward eliminating these obligations; because they are independent of one another, the Commission should base its decision on multiple alternative grounds for each unbundling obligation. Finally, the Commission should forbear from applying Section 251(c)(4) avoided-cost resale mandates with respect to non-price cap incumbent local exchange carriers ("ILECs"), just as it did for price cap ILECs.

I. INTRODUCTION

The two core premises of the *NPRM* – and of these comments – are simple and undeniable. First, when communications markets no longer resemble the monopolies of the pre-1996 era, but instead are subject to vibrant competition from a multiplicity of providers vying for consumers' business, the most aggressive market-opening mechanisms established by the Telecommunications Act of 1996 ("1996 Act") must be lifted. Doing so will ensure that consumers can benefit from a level competitive playing field, in which all providers have incentives to improve service and reduce prices, and none are weighed down by unique regulatory burdens that do not apply and that never have applied to their competitors even when their market shares have grown to dwarf those of ILECs. Second, that time has come, nationwide, with respect to all remaining unbundling and avoided-cost resale mandates – and the case is even stronger in the specific geographic markets in which the Commission has proposed to remove requirements.

Whether through policy choices, technological innovation, or some combination of the two, the past 24 years have fulfilled the 1996 Act's stated objective, which was "to promote

competition and reduce regulation in order to secure lower prices and higher quality services for telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[2] As USTelecom has observed before, the advent of nearly ubiquitous competition requires the elimination of regulations meant to achieve the 1996 Act's goals. These regulations were never meant to remain in place forever – in fact, Congress adopted *multiple* specific mechanisms permitting their elimination over time. Meanwhile, the courts and Commission have repeatedly emphasized that the most aggressive of these market-opening mechanisms – specifically, Section 251(c)(3)'s unbundling mandates and Section 251(c)(4)'s avoided-cost resale requirements – would affirmatively harm consumers if left in place once a market became competitive. In an era in which the term "incumbent" signifies nothing except the market position a provider occupied a quarter of a century ago, retention of such requirements saps the incentives of *all* providers to invest in and deploy new facilities. Moreover, these obligations unfairly hobble ILECs, which must incur significant cost and administrative burdens to comply with requirements that do not apply to their cable and wireless competitors, notwithstanding these competitors' success.

Nor is there any doubt that robust competition – at the level warranting removal of unbundling and avoided-cost resale mandates – has arrived. The Commission has already found that the transport marketplace is competitive at the DS1, DS3, and OCn levels. Virtually all locations with demand for service at the DS1 and DS3 capacity levels have one or more competitive alternatives – very often competitive fiber-optic facilities (or a building served by such facilities within a half mile), as well as fixed wireless offerings, robust enterprise-grade

[2] Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, 56 (Preamble) ("1996 Act" and "1996 Act Preamble").

cable offerings, and more. At the residential level, the markets for voice and broadband alike are more competitive than the 1996 Act's authors ever envisioned, with consumers availing themselves of nearly ubiquitous cable broadband offerings at 25 Mbps/3 Mbps or higher speeds and extremely popular VoIP services,[3] as well as fixed and mobile wireless services offering voice and high-speed broadband, and CLECs offering their own competitive products either over their own facilities, facilities of other competitors, or ILEC facilities procured on a commercial (not unbundled) basis. In short, the kind of competition that necessitates elimination of unbundling and avoided-cost resale requirements nationwide has arrived.

Although the point can get lost in the maelstrom of proceedings raising these issues, a regime in which the Commission lifts unbundling and avoided-cost resale obligations in competitive markets is *not* meant to favor one set of competitors over another, but rather to promote the interests of *consumers*. Such a regime effectuates the basic economic insight that, in competitive markets, competition safeguards consumer interests far better than prescriptive regulation. When market outcomes are determined based on the merits of competing offerings rather than by regulatory fiat, providers must vie for customers on the basis of price and quality of service. And when one-time "incumbents" are freed from legacy mandates that serve no purpose (*other than to give an extra leg up to those who can compete without special treatment*),

[3] Those seeking to prolong UNE access notwithstanding ubiquitous competition will undoubtedly criticize the Commission's Form 477 data. While USTelecom agrees that more accurate data is needed in the universal service context, reliance on FCC Form 477 census block data is more than adequate for assessing the presence and feasibility of competition for last-mile facilities without reliance on UNEs. Indeed, as the Commission held in 2017, "Form 477 broadband service availability data necessarily imply the presence of broadband-capable cable network facilities, which makes it an ideal dataset to ensure the competitive market test accounts for competition from cable operators." *Business Data Services in an Internet Protocol Environment et al.*, Report and Order, 32 FCC Rcd 3459, 3507 para. 106 (2017) ("*BDS Order*"); *see also generally infra* note 29.

consumers benefit from the level playing field. Lifting the unbundling and avoided-cost resale mandates at issue in this proceeding will incentivize competitors to build more of their own facilities, a core goal of the 1996 Act, while simultaneously freeing up ILEC resources to be used to compete with the many providers to whom they are losing market share today (almost none of whom rely on access to UNEs). The question before the Commission here, then, is not whether its actions will help this or that provider, but whether it will advance the interests of *consumers*.

In light of the market conditions detailed below, there should be no doubt that removal of unbundling and avoided-cost resale will, indeed, promote consumers' interests. As the NPRM predicts, elimination of these mandates will promote new facilities deployment, which in turn will drive additional competition. These deployments will further transform the marketplace, contributing to America's 5G success as providers construct new fiber-optic facilities needed to accommodate exponential growth in mobile wireless traffic in the coming years. Contrary to the presumptions of critics, elimination of unbundling and avoided-cost resale discounts does not equate to the elimination of access to ILEC facilities; ILECs will retain every incentive to offer such access on a commercial basis going forward, lest they risk forfeiting all revenues associated with traffic that migrates off their networks.

The market evidence warrants nationwide relief from all remaining unbundling and avoided-cost resale obligations. Such relief will bring the benefits of competition and deployment to all Americans. If, however, the Commission remains concerned that certain classes of rural customers have yet to experience the robust competition that characterizes the vast majority of the marketplace, it should instead adopt its more conservative proposals, which limit certain categories of relief to urban areas and locations close to competitive fiber.

The *NPRM*'s proposals open the door to a future of unprecedented growth and innovation. If the Commission acts wisely, parties commenting to the agency in 2045 will be able to marvel at how much the world has changed since 2020. On the other side of the door lies the open marketplace envisioned by Congress, courts, and prior Commissions, in which consumer benefit arises from ferocious competition, robust investment, and dizzying innovation – not regulatory intervention. The time has come for the Commission to step through the door.

II. CONGRESS, THE COURTS, AND THE COMMISSION HAVE ALWAYS EXPECTED UNBUNDLING MANDATES TO SUNSET AS COMPETITION EVOLVED

As an initial matter, the 1996 Act's ILEC-specific unbundling mandates were always intended to sunset as competition arose. As Senator John Breaux, a leading backer of the 1996 Act, explained during debate, unbundling mandates are "extraordinary," given that they require "private industry" to take steps to "let the competitors come in and try to beat [their] economic brains out"; accordingly, such mandates were intended as "almost a jump-start" for competitors."[4] Describing Section 251(c)(3)'s unbundling requirement, Senator Breaux stated that "it is unlikely that competitors will have a fully redundant network in place when they initially offer local service . . . [and] some facilities capabilities (*e.g.*, central office switching) will likely need to be obtained from the incumbent local exchange carrier as network elements pursuant to new section 251."[5]

The Commission, too, has repeatedly recognized (on a bipartisan basis) that unbundling mandates should fall away as competition flourishes. In 1999, under Chairman Kennard, the

[4] 141 CONG. REC. 15572 (1995) (Remarks of Sen. Breaux (La.) on Pub. L. 104-104).

[5] S. CONF. REP. No. 104-230, at 148 (1996) (Conf. Rep.), *reprinted in* 142 Cong. Rec. H. 1078 (1996) (emphasis added).

agency recognized the drawbacks of indefinite unbundling, noting that "it is only through owning and operating their own facilities that competitors have control over the competitive and operational characteristics of their service, and have the incentive to invest and innovate in new technologies that will distinguish their services from those of the incumbent."[6] In 2003, under Chairman Powell, it explained that "excessive network unbundling requirements tend to undermine the incentives of both incumbent LECs and new entrants to invest in new facilities and deploy new technologies."[7] Accordingly, as the Commission has explained, unbundling is "designed to promote the *development* of competitive markets,"[8] and the justification for continued unbundling requirements evaporates as competition increases.[9] Hence, "[u]nbundling rules that encourage competitors to deploy their own facilities in the long run will provide

[6] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3701 para. 7 (1999) ("*UNE Remand Order*"), *rev'd, U.S. Telecomm. Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*").

[7] *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers et al.*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 16984 para. 3 (2003) ("*TRO*").

[8] *See, e.g.*, *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415, 19417 para. 3 (2005) (emphasis added) ("*Qwest Omaha Order*"); *see also UNE Remand Order*, 15 FCC Rcd at 3704 para. 14 ("unbundling rules that are based on a preference for development of facilities-based competition in the long run will provide incentives for both incumbents and competitors to invest and innovate, and should allow the Commission to reduce regulation once true facilities-based competition develops"); *id.* at 3701 para. 6 (acknowledging "Congress's expectation that new competitors would use unbundled elements from the incumbent LEC until it was practical and economically feasible to construct their own networks") (citation omitted).

The Commission subsequently observed that it had "come to recognize more clearly the difficulties and limitations inherent in competition based on the shared use of infrastructure through network unbundling." *TRO*, 18 FCC Rcd at 16984 para. 3.

[9] *Unbundled Access to Network Elements et al.*, Order on Remand, 20 FCC Rcd 2533, 2535 para. 3 (2005) ("*TRRO*").

incentives for both incumbents and competitors to invest and innovate, and will allow the Commission and the states to reduce regulation once effective facilities-based competition develops."[10] For this reason, the "unbundling rules [were] designed to remove unbundling obligations over time as carriers deploy their own networks and downstream local exchange markets exhibit the same robust competition that characterizes the long distance and wireless markets."[11]

Courts, too, have recognized the specific and transitional market-opening purpose of Section 251(c)(3).[12] The D.C. Circuit has observed that unbundling was meant to "enable *new* firms to *enter*" the fray.[13] And – in that court's words – these requirements were intended only to last so long as necessary and no longer, given widely recognized social and economic costs flowing from unbundling.[14]

The Commission, then, should not be swayed by special pleading from parties seeking eternal reliance on others' facilities at bargain-basement rates. The desire of this minority of providers to increase their profits is understandable, even if the vast majority of ILEC competitors have been able to successfully compete and build their own facilities without reliance on UNEs. But, as Congress, the Commission, and the Courts have recognized, it also is incompatible with the 1996 Act's purposes. Ultimately, as Chairman Pai has said, "government

[10] *UNE Remand Order*, 15 FCC Rcd at 3701 para. 7.

[11] *TRRO*, 20 FCC Rcd at 2536 para. 3.

[12] *See, e.g.*, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 428 (1999) (Breyer, J., concurring in part and dissenting in part) ("*Iowa Utils. Bd.*").

[13] *U.S. Telecom. Ass'n v. FCC*, 359 F.3d 554, 561 (2004) (emphasis added) ("*USTA II*").

[14] *USTA I*, 290 F.3d at 429.

can't manufacture competition through unbundling."[15] When competition rises, unbundling obligations are meant to dissipate. As described in the *NPRM* and below, the time to eliminate additional obligations has arrived.

III. DISCUSSION

A. The Commission Should Lift DS1 and DS3 Loop Unbundling Obligations

Unbundled DS1 and DS3 loops are fundamentally business services: they are functionally identical to DS1 and DS3 channel terminations, which the Commission classifies as business data services and which are sold exclusively for the provision of enterprise services. ILECs do not market DS1s or DS3s as consumer services, and USTelecom is unaware of significant residential UNE-based consumer offerings at these capacity levels. As the Commission found in the *BDS Order*: "Businesses, non-profits, and government institutions use business data services to enable secure and reliable transfer of data, for example, as a means of connecting to the Internet or the cloud, and to create private or virtual private networks."[16] Similarly, when sold as UNEs, DS1 and DS3 loops are designed and priced in a way that makes them attractive only to serve businesses and other customers needing the capabilities of a business data service.

The "extensive and increasing intermodal competition" ILECs face in the provision of DS1 and DS3 loops render unbundling obligations for those elements inappropriate, whether under the impairment inquiry set out by Section 251(d)(2) or the forbearance test under section 10 of the Act.[17] In addition, under long-standing precedent from the D.C. Circuit, unbundling

---

[15] *BDS Order*, 32 FCC Rcd at 3644 (Statement of Chairman Pai).

[16] *Id.* at 3463 para. 6.

[17] *NPRM* para. 29 (citing *BDS Order*, 32 FCC Rcd at 3479 para. 38).

mandates for these services are unlawful given the competitive nature of the markets they are used to serve.

The evidence shows that relief from these unnecessary and unlawful unbundling obligations should be granted on a nationwide basis. There is certainly no question that the Commission should, at a bare minimum, grant relief in the BDS Competitive Counties and Study Areas.[18]

1. Competitors Are Not Impaired Without Access to Unbundled DS1 and DS3 Loops

Elimination of the remaining DS1 and DS3 loop unbundling obligations will have no impact on the availability of DS1 and DS3 loops. As the *BDS Order* correctly recognized, UNE DS1 and DS3 loops, and DS1 and DS3 business data services, are "particularly close substitutes."[19] The *BDS Order* demonstrated conclusively that "there are no material operational or performance distinctions" between them,[20] and correctly found that "DS1 and DS3 services

[18] The BDS Competitive Counties and Study Areas are the "(1) counties served by price cap incumbent LECs found to be competitive pursuant to the *BDS Order*; and (2) the study areas deemed competitive as a result of our decision to allow certain rate-of-return incumbent LECs to elect incentive regulation for their business data services" supplemented by the counties and study areas deemed newly competitive by the Wireline Competition Bureau. *See NPRM* para. 27 (footnotes omitted); *Wireline Competition Bureau Releases Supplemental Lists of Counties Served by Price Cap Carriers and Rate-Of-Return Study Areas Newly Deemed Competitive Pursuant to Competitive Market Tests for Business Data Services*, Public Notice, WC Docket Nos. 17-144 *et al.*, DA 20-114 (rel. Jan. 31, 2020) ("*Newly Competitive Counties and Study Areas PN*").

[19] *See NPRM* para. 29 (citing *BDS Order*, 32 FCC Rcd at 3476, para. 32).

[20] *See id.*; *see also* Comments of CenturyLink, WC Docket No. 18-141 *et al.*, at 2 (filed May 9, 2019) ("CenturyLink May 2019 Comments"); Letter from Patrick R. Halley, Senior Vice President, Advocacy and Regulatory Affairs, USTelecom – The Broadband Association, WC Docket No. 18-141, at 4 (filed May 6, 2019) ("Unbundled DS1 and DS3 loops are functionally identical to DS1 and DS3 channel terminations, which the Commission classifies as business data services, and which are sold purely for the provision of enterprise services.") ("USTelecom May 6, 2019 *ex parte*").

will remain available for purchase on a commercial basis as business data services" if the unbundling obligations are eliminated.[21] In other words, competitive providers will have access to exactly the same DS1 and DS3 facilities the day after relief from the outdated unbundling obligations becomes effective (as, indeed, they have had all along).

Further, the competition in this product market is by no means limited to intramodal wireline providers. There is "some current or potential competition [for DS1 and DS3 channel terminations] in all counties served by price cap LECs,"[22] and the Commission found in the *BDS Order* that the presence of "even a single competitor exerts competitive pressure which results in just and reasonable rates."[23] As noted in the *NPRM*, "enterprise customers nationwide enjoy widespread competitive choice, with 95% of census blocks with business data services demand in price cap MSAs, representing 99% of business establishments, featuring at least one competitive provider."[24] The abundance of competition for these services is particularly obvious in the BDS Competitive Counties and Study Areas. The Commission's findings in the BDS proceeding – affirmed by the Eighth Circuit[25] – provide a conservative estimate of the level of competition for these services in the BDS Competitive Counties. Specifically, the Commission lifted *ex ante* rate regulation in each county "where the provision of price cap incumbent LECs'

[21] *NPRM* para. 29.

[22] *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks*, Memorandum Opinion and Order, 34 FCC Rcd 2590, 2609 para. 37 (2019).

[23] *BDS Order*, 32 FCC Rcd at 3468 para. 15.

[24] *NPRM* para. 21 (citing *BDS Order*, 32 FCC Rcd at 3481 para. 42).

[25] *See generally Citizens Telecomms. Co. of Minn., LLC v. FCC*, 901 F.3d 991 (8th Cir. 2018) ("*Citizens Telecomms.*").

business data services is deemed sufficiently competitive,"[26] with 91.9 percent of locations with special access demand found competitive pursuant to the BDS Competitive Market Test ("CMT").[27] The sixteen BDS Competitive Study Areas were likewise found competitive using a test based on the CMT's second prong.[28] And the number of BDS Competitive Counties and Study Areas is growing.[29]

USTelecom has demonstrated previously that the overall state of the market for business data services – including DS1 and DS3s as well as any number of full and partial substitutes offered by cable, fixed and mobile wireless, and other fiber-based wireline competitors – is

[26] *BDS Order*, 32 FCC Rcd at 3462 para. 4.

[27] *Id.* at 3521 para. 134; 3526 para. 142.

[28] *See* R*egulation of Business Data Services for Rate-of-Return Local Exchange Carriers et al.*, Report and Order, Second Further Notice of Proposed Rulemaking, and Further Notice of Proposed rulemaking, 33 FCC Rcd 10403, 10409-10 paras. 16-17 (2018); *id.* at 10432 paras. 78-79; *id.* at 10436 paras. 90-91.

[29] *See Newly Competitive Counties and Study Areas PN* at 3 (finding seven additional price cap counties and seven additional rate-of-return study areas meeting the criteria required to be deemed competitive). For the price cap counties update, a county was deemed competitive if 75 percent of the census blocks within the county were reported to have broadband connection availability by a cable operator in the most recent publicly available Form 477 data. For the rate-of-return study areas update, a study area was deemed competitive if 75 percent of the census blocks within the study area were served by a cable operator offering a minimum of 10/1 Mbps broadband service in the most recent publicly available Form 477 data. *Id.* at 2.

highly competitive.[30] Indeed, the Commission's most recent Form 477 data collection confirms that intermodal competition for DS1 and DS3 loops is increasing.[31]

The Commission's amendment of the number of counties deemed competitive under the updated CMT actually *understates* the extent of the increase in cable deployment, because it reflects cable availability only at 10/1 Mbps or greater speed.[32] The growth in cable offerings capable of providing BDS-grade service is especially striking when considering higher speed services, including those that provide speeds multiple times those available via DS1 and D3 UNEs. For example, the Commission's December 2016 Form 477 data indicate that cable was available in census blocks representing 88.1 percent of the U.S. population at 10/1 Mbps or greater, 87.5 percent at 25/3 Mbps or greater, 71.5 percent at 100/10 Mbps or greater, and 31.2

---

[30] USTelecom May 6, 2019 *ex parte* at 4-10; *see also id.*, Attach. at 2-3 (Declaration of Glenn Woroch and Robert Calzaretta In Support of USTelecom Petition for Forbearance) ("Woroch/Calzaretta Declaration").

[31] Reliance on FCC Form 477 census block data is more than adequate for assessing the presence of and feasibility of competition for last-mile facilities. The Commission expressly held as much in the *BDS Order*: "We find the Form 477 data well suited for supplementing the *2015 Collection* in the initial analysis of market conditions and a conservative proxy for competitive deployment going forward. Form 477 broadband service availability data necessarily imply the presence of broadband-capable cable network facilities, which makes it an ideal dataset to ensure the competitive market test accounts for competition from cable operators." *BDS Order*, 32 FCC Rcd at 3507 para. 106.

The Commission further held that "[t]he Form 477 data on broadband availability are well suited to identify increases in competitive broadband deployment, particularly by cable providers which are the most likely sources of competitive growth." *Id.* at 3528 para. 148. This is due in part to the small average size of a census block. The implied median diameter of a census block is less than 0.20 miles. *Id.* at 3520-21 para. 133. "The overall distribution of surface areas of census blocks is highly skewed. The mean size of all census blocks is 0.34 square miles, but 50 [percent] of them are smaller than 0.01 square miles (*i.e.*, the median size), and more than 85 percent are smaller than the average of 0.34 square miles. Census blocks that are served by cable are even smaller and more populated, with a mean size of 0.09 square miles and a median of 0.008 square miles (or about 5 acres)." *See* USTelecom May 6, 2019 *ex parte* at 3 n.8.

[32] *See supra* note 29.

percent at 250 Mbps or greater.[33] As of December 31, 2018, those figures had grown to 88.7 percent at 10/1 Mbps or greater, 88.4 percent at 25/3 Mbps or greater, and 86.7 percent at 100/10 Mbps or greater, and 82.5 percent at 250/25 Mbps or greater.[34] Moreover, cable broadband deployment at higher speed tiers, including cutting-edge near-gigabit speeds, is rapidly growing and service is now available to similar portions of U.S. households at these higher speeds. As of the end of 2018, CableLabs reported that cable broadband at gigabit speeds was available to 80 percent of U.S. households, up from just 4 percent at the end of 2016.[35] An independent analysis of the FCC's December 2018 Form 477 data indicates that cable service at 940 Mbps or greater was available to areas representing 73.3 percent of U.S. housing units.[36]

---

[33] FCC, *Fixed Broadband Deployment, Area Comparison*, https://broadbandmap.fcc.gov/#/area-comparison?version=dec2018&tech=acfow&speed=10_1&searchtype=county (last visited Feb. 3, 2020). To derive these figures, USTelecom filtered the data for cable technology as of December 2016 nationwide and at the county level.

[34] *Id.*

[35] CABLELABS, *Driving Gigabit Speeds: From Lab to Consumer* (2018), https://www-res.cablelabs.com/wp-content/uploads/2018/11/28092656/Driving-Gigabit-Speeds-From-Lab-to-Consumer-1.pdf.

[36] CENSUSNBM, *Report 217 - Broadband Deployment by Diverse Technologies at High Speeds: 25 Mbps, 50 Mbps, 100 Mbps and 1 Gbps(Maximum Advertised Download Speeds)*, http://censusnbm.com/doc/CensusNBM%20217%20Technology%20by%20Speeds%2025M%2050M%20100M%201G.pdf (last visited Feb. 4, 2020). USTelecom here cites 940 Mbps download, rather than the 1 Gbps/100 Mbps figures that are available on the Commission's own site. Due to the technical limitations of networks and customer equipment, as well as carrier reporting practices, 940 Mbps down more accurately reflects cutting-edge "gigabit" deployments than a literal 1 gigabit in the Commission's data. While the 940 Mbps data from CensusNBM do not have an upload constraint, it is not likely that adding one would significantly reduce the reported percentage availability. CensusNBM also reports percentages in terms of 2010 housing units rather than the population-based percentages that the Commission reports. In USTelecom's experience, housing unit percentages are typically – though not always – lower than population-based percentages, usually in the range a percentage point or so lower.

Growth in cable BDS services is unsurprising given cable providers' substantial capital expenditures in this area. Among the largest cable companies, Comcast reports that it has spent approximately $1.3 billion for each of the last three years, or $3.9 billion from 2017 through 2019 on business capital expenditures.[37] Charter Communications has likewise spent $1.3 billion for business (commercial) services in each of the last three years, for a total of $3.9 billion dollars.[38] Thus, the top two cable operators alone have invested $7.8 billion in capital over the last three years to expand services to businesses in competition with ILECs and CLECs using legacy DS1- and DS3-based offerings; and there is every reason to believe they will continue to deploy meaningful amounts of capital to expand services to business customers.

The explosive growth in 5G and other fixed wireless deployments portends even more robust competition in the provision of last-mile DS1- and DS3-equivalent offerings. These wireless options have become increasingly popular substitutes for DS1 and DS3s, even over the two short years that have passed since the release of the *BDS Order*. Contrary to one party's unsupported critique,[39] the Commission's predictive judgment with respect to the potential for

---

[37] COMCAST CORP., *Q4 2019 Earnings – Trending Schedule* at n.28, https://www.cmcsa.com/static-files/206eb2ec-1685-4571-acb4-505c93fa876d (last visited Feb. 3, 2020)

[38] CHARTER COMMC'NS, INC., *4Q19 Financial and Operating Results – Trending Schedule* at 3, https://ir.charter.com/static-files/8fd15f43-363a-4f2e-be36-66118fd6d9aa (last visited Feb. 3, 2020).

[39] Public Knowledge offers no facts or citations to support its bare assertion that "[t]he Commission's prior efforts to predict future competition and justify deregulation based on potential competition have been a failure." *See* Letter from Phillip Berenbroick, Policy Director, Public Knowledge, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 19-308, at 2 (filed Nov. 15, 2019). In any event, as the Eighth Circuit noted, "[r]egardless of whether its predictions based on uncertain data prove true, the FCC is not acting arbitrarily and capriciously when it makes such predictions in choosing how to regulate the market under its jurisdiction." *Citizens Telecomms.*, 901 F.3d at 1010.

5G fixed wireless networks to "represent a significant additional source of competition for the provision of business data services" is bearing out, even in the short term.[40] Even services targeted for residential use offer capabilities far in excess of those associated with DS1 and DS3 links. In March 2019, T-Mobile launched a "T-Mobile Home Internet" fixed wireless pilot in rural areas that delivers speeds of "around 50 Mbps" over LTE, with no data caps, for $50 per month.[41] Although the initial pilot is limited to 50,000 households, the company intends to transition the service to its 5G network, capable of speeds over 100Mbps, and serve 9.5 million customers by 2024.[42] Verizon has introduced 5G Home, a 5G fixed wireless service "with typical speeds around 300 Mbps and, depending on your location, maximum speeds up to 940 Mbps" in five cities,[43] and intends to make 5G fixed wireless available wherever it deploys mobile 5G facilities (34 cities to date).[44] AT&T already uses its Fixed Wireless Internet product

[40] *BDS Order*, 32 FCC Rcd at 3479 para. 38.

[41] T-MOBILE, *T-Mobile Begins Limited Home Internet Pilot, Laying a Foundation for Home Broadband Disruption in Advance of Merger with Sprint* (Mar. 21, 2019) https://www.t-mobile.com/news/home-internet-pilot.

[42] John Legere, *New T-Mobile: Creating a True Alternative to Fixed Broadband*, T-MOBILE (Mar. 7, 2019) https://www.t-mobile.com/news/new-t-mobile-fixed-broadband-alternative; *see also* letter from Nancy Victory, Counsel, T-Mobile US, Inc., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 18-197, Attach. at 7 (filed Mar. 6, 2019).

[43] VERIZON WIRELESS, *Verizon 5G Home Internet FAQs*, https://www.verizonwireless.com/support/5g-home-faqs/ (last visited Feb. 3, 2020).

[44] THOMSON REUTERS STREETEVENTS, *VZ – Verizon Communications Inc at Bank of America Merrill Lynch Media, Communications & Entertainment Conference* at 11 (Sept. 11, 2019) https://www.verizon.com/about/file/36923/download?token=Z2A5cLED (Ronan Dunne, Verizon Communications, Inc. EVP and Group CEO of Verizon Consumer: ". . . you should expect that every market that opens a 5G Mobility market will in due course be a 5G fixed wireless because it is one network."). Verizon has deployed mobile 5G in 34 cities to date, with more pending. *See* VERIZON WIRELESS, *Explore Verizon 5G Ultra Wideband Coverage* https://www.verizonwireless.com/5g/coverage-map/ (last visited Feb. 3, 2020).

to meet its Connect America Fund ("CAF") commitments in 18 states,[45] is starting to roll out fixed wireless service on CBRS spectrum, and intends to transition to 5G fixed wireless over time.[46] And mobile wireless provider C Spire has introduced C Spire 5G Internet, a 5G fixed wireless service that delivers speeds of up to 120Mbps with no data caps for $50 per month in Mississippi.[47]

Notably, the incredibly competitive BDS market described above is driven by players such as cable operators that have not relied on UNEs to deploy extensive Ethernet and best-efforts broadband services nationwide, but instead have invested in their own networks and, where necessary, obtained services from other carriers at market rates. These same companies are providing near-ubiquitous voice and broadband services to residential consumers nationwide, as evidenced by incumbent LEC subscriber losses[48] and the growing number of BDS Competitive Counties and Study Areas described above.[49] As the Commission noted in the *NPRM*, "if competitive providers have successfully entered using their own facilities in one

---

[45] Erin Scarborough, *Connecting Rural America: Delivering Fixed Wireless Internet Through New Technologies*, AT&T (Sept. 26, 2018), https://about.att.com/story/2018/fixed_wireless_rural_america.html.

[46] THOMSON REUTERS STREETEVENTS, *T – AT&T Inc at Morgan Stanley TMT Conference*, at 8 (Nov. 13, 2019), https://investors.att.com/~/media/Files/A/ATT-IR/events-and-presentations/Igal%20Elbaz%20at%20Morgan%20Stanley%20111319.pdf.

[47] C SPIRE, *There's a New Speed in Town*, https://cspire5ginternet.com/ (last visited Feb. 3, 2020).

[48] *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks*, Memorandum Opinion and Order, 34 FCC Rcd 6503, 6510 para. 13 (2019) ("*UNE Analog Loop and Avoided-Cost Resale Forbearance Order*"); Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks, WC Docket No. 18-141, at 7-11 (filed May 4, 2018) ("USTelecom 2018 Petition").

[49] *See generally Newly Competitive Counties and Study Areas PN*.

market, other providers could enter similar markets on a similar basis."[50] There is every reason to believe that this is the case with respect to the market for UNE DS1 and DS3 loops.

Given the expanse of competitive alternatives to UNE DS1 and DS3 loops, there is a clear basis for concluding that a reasonably efficient competitor would not be impaired without access to UNE DS1 and DS3 loops on a nationwide basis. Certainly, there is no question that the Commission should, as the *NPRM* proposes, reach a finding of no impairment with respect to UNE DS1 and DS3 loops in the BDS Competitive Counties and Study Areas.

Section 251(d)(2) requires that the Commission consider, "at a minimum," whether "the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[51] As the Commission explained in the *NPRM*:

> . . . the impairment inquiry considers whether a hypothetical "reasonably efficient competitor" would be impaired when lack of access to a particular network element creates a barrier to entry that renders entry uneconomic. The Commission presumes that the reasonably efficient competitor would use "reasonably efficient technologies and take advantage of existing alternative facilities deployment where possible." The inquiry makes reasonable inferences about competition, including that if competitive providers have successfully entered using their own facilities in one market, other providers could enter similar markets on a similar basis. The Commission's impairment determinations also account for the existence of intermodal competition, as "[t]he fact that an entrant has deployed its own facilities – regardless of the technology chosen – may provide evidence that any barriers to entry can be overcome."[52]

---

[50] *NPRM* para. 7.

[51] 47 U.S.C. § 251(d)(2).

[52] *NPRM* para. 7 (quoting *TRRO*, 20 FCC Rcd at 2547 para. 24, 2549 para. 28; *TRO*, 18 FCC Rcd at 17045 para. 97) (internal citations omitted).

Courts, and the Commission itself, have emphasized that the Commission must take into account both the benefits and costs of unbundling before it may require an ILEC to provide unbundled access to network elements pursuant to Section 251(c)(3).[53] Further, the courts and the Commission have interpreted the "at a minimum" language in Section 251(d)(2) to allow the Commission to consider other factors "rationally related to the goals of the Act,"[54] such as broadband deployment.[55]

In conducting its analysis, the Commission must not conflate the choices of an individual *competitor* with the inarguable existence of broad *competition*. The relevant inquiry is as to the impact on *reasonably efficient* competitors, not to "the individualized circumstances of the actual requesting carrier"[56] or a specific "carrier's impairment with reference to that carrier's particular

---

[53] *See, e.g., TRRO,* 20 FCC Rcd at 2552-53 para. 35; *USTA I,* 290 F.3d at 427-28 (directing the Commission to weigh the costs of unbundling as part of an "analysis of the competing values at stake in implementation of the Act"); *USTA I,* 290 F.3d at 428-29 (directing the Commission to consider intermodal competition as part of the "competitive context" of its unbundling decisions because "unbundling is not an unqualified good . . . . [and] nothing in the Act appears a license . . . to inflict on the economy the [costs of unbundling] under conditions where it had no reason to think doing so would bring on a significant enhancement of competition"); *USTA II,* 359 F.3d at 572 (noting that the Commission must "take into account not only the benefits but also the costs of unbundling (such as discouragement of investment in innovation)"); *USTA II,* 359 F.3d at 576 ("[T]he purpose of the Act is not to provide the widest possible unbundling, or to guarantee competitors access to network elements at the lowest price that government may lawfully mandate. Rather, its purpose is to stimulate competition – preferably genuine, facilities-based competition. Where competitors have access to necessary inputs at rates that allow competition not only to survive but to flourish, it is hard to see any need for the Commission to impose the costs of mandatory unbundling."); *USTA II*, 359 F.3d at 580 ("We therefore hold that the Commission reasonably interpreted § 251(c)(3) to allow it to withhold unbundling orders, even in the face of some impairment, where such unbundling would pose excessive impediments to infrastructure investment.").

[54] *USTA II,* 359 F.3d at 579-80; *TRO,* 18 FCC Rcd at 16984 para. 4; *see also Iowa Utils. Bd.,* 525 U.S. at 388; *UNE Remand Order,* 15 FCC Rcd at 3705.

[55] *TRO,* 18 FCC Rcd at 16984 para. 4.

[56] *TRRO,* 20 FCC Rcd at 2548 para. 26 (citation omitted).

business strategy," given that "such an approach could reward those carriers that are less efficient or whose business plans simply call for greater reliance on UNEs."[57]

Although nationwide relief is legally justified, if the Commission is not prepared to reach a nationwide finding of non-impairment, then USTelecom supports the Commission's proposal to conduct its impairment analysis at the county level.[58] As discussed above, DS1 and DS3 loops are identical whether sold as BDS or as UNEs, and, as the Commission found in the *BDS Order*, "counties are granular enough to capture reasonably similar competitive conditions yet large enough to be administratively feasible. . . ."[59] ILECs already have implemented systems to account for the use of counties in the *BDS Order*. The costs of requiring ILECs to implement any relief granted through an alternative geographic measure would certainly outweigh any benefits.

Given the inter- and intra-modal competition for DS1 and DS3 circuits identified above, no reasonably efficient competitor would be impaired absent access to DS1 and DS3 UNEs in the BDS Competitive Counties and Study Areas. The BDS proceeding established that cable and other fiber-based wireline competitors blanket these competitive areas. And reasonably efficient competitors are not using DS1s and DS3s, or even traditional wireline facilities, to compete at all. Instead, they are migrating to more efficient technologies like LTE and rapidly-expanding 5G fixed wireless solutions. For the same reasons, it is completely reasonable to infer that the less than 3 percent of enterprise locations in price cap ILEC competitive counties face the same

[57] *Id.* at 2547-48 para. 25 (internal quotations, citation omitted).

[58] *NPRM* para. 31.

[59] *BDS Order*, 32 FCC Rcd at 3508-09 para. 109.

non-impairment conditions.[60] The Commission in the *TRRO* noted that "the *USTA II* court directed the Commission to draw inferences between similar markets" and therefore "presume[d] that if 67% of all wire centers that are 'alike' in terms of business lines (and thus revenue opportunities) have a given number of fiber-based collocations, the remaining wire centers above this business line threshold could sustain that much competition as well."[61] Indeed, it would be appropriate to grant the requested relief even in the absence of such an inference, as there is no requirement that DS1s and DS3s be "literally ubiquitous."[62]

A finding of no impairment is buttressed by other factors "rationally related to the goals of the Act."[63] Such a finding will facilitate the policy set forth in the *Technology Transitions Order* of encouraging the transition away from legacy services to modern services provisioned over future networks by eliminating disincentives for competitors to invest in their own facilities-based networks and transition their customers to next-generation services.[64] Further, as

---

[60] *NPRM* para. 30.

[61] *TRRO*, 20 FCC Rcd at 2599 n.323; *see also id.* at 2645 para. 207 ("D.C. Circuit precedent instructs us to infer the absence of impairment [and therefore not unbundle] where the element in question – though not literally ubiquitous – is significantly deployed on a competitive basis.") (internal quotations, citation omitted).

[62] *See USTA II*, 359 F.3d at 574 ("In *USTA I* we expressed skepticism regarding whether there could be impairment in markets 'where the element in question – though not literally ubiquitous – is significantly deployed on a competitive basis.'" (citation omitted)).

[63] *Id.* at 579-80; *TRO*, 18 FCC Rcd at 16984 para. 4; *see also Iowa Utils. Bd.*, 525 U.S. at 388; *UNE Remand Order*, 15 FCC Rcd at 3705.

[64] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Report and Order, Declaratory Ruling, And Further Notice of Proposed Rulemaking, 32 FCC Rcd 11128, 11129-30 paras. 1-3 (2017) ("*Technology Transitions Order*"); *UNE Analog Loop and Avoided-Cost Resale Forbearance Order*, 34 FCC Rcd at 6510, para. 14; *id.* at 6518-19, paras. 29-30; *Business Data Services in an Internet Protocol Environment*, Report and Order on Remand and Memorandum Opinion and Order, 34 FCC Rcd 5767, 5796 para. 63 (2019) ("*UNE Transport Forbearance Order*").

described in the *NPRM*, the Commission previously has found that eliminating unbundling obligations will "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" by removing barriers to infrastructure investment.[65] A no impairment finding will reduce or eliminate other costs or harms as well, including: eliminating marketplace distortions created by imposing unnecessary costs on one class of competitors[66] and "disincentives to research and development by both incumbent LECs, competitive LECs and the tangled management inherent in shared use of a common resource."[67]

The record shows there is no need to exempt residential broadband in rural areas from the relief proposed in the *NPRM*. Even if competitors were using DS1 and DS3 UNEs to provision consumer-based offerings – which is rarely if ever the case – the recently released Form 477 data confirm that those UNEs are not needed to facilitate competition for consumer-based broadband services, even if unbundling were permitted for use in provisioning consumer broadband (which it is not). While commenters have expressed concerns that the unavailability of UNEs would impact the ability of some companies to provide broadband service, the Commission must not conflate the choices of individual competitors with the inarguable existence of broad competition.[68] Further, USTelecom notes that that Section 251(c)(3) on its face only allows unbundling for the provision of telecommunications services and not for the provision of

---

[65] *NPRM* at para. 87 (citing *TRO*, 18 FCC Rcd at 17087 para. 173).

[66] *See, e.g.*, *UNE Analog Loop and Avoided-Cost Resale Forbearance Order*, 34 FCC Rcd at 6511, para. 15; *id.* at 6518-19 paras. 29-30; *UNE Transport Forbearance Order*, 34 FCC Rcd at 5791-92, para. 54, 5796, para. 63.

[67] *UNE Transport Forbearance Order*, 34 FCC Rcd at 5791-92, para. 54 (quoting *USTA I*, 290 F.3d at 429 (citing *Iowa Utils. Bd.*, 525 U.S. at 428 (Breyer, J., concurring in part and dissenting in part)) (internal quotation marks and alterations omitted)).

[68] *See TRRO*, 20 FCC Rcd at 2547-48 paras. 25-26.

information services alone. As the statute requires, an ILEC "shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide *such telecommunications services*."[69] Broadband internet access service is an integrated information service. Thus, arguments that certain UNEs are necessary for the provision of broadband service alone must be rejected.

However, even if the Act permitted unbundling for the provision of broadband internet access, it would not be permissible in light of the market's competitiveness today.[70] As detailed above, as of December 2018, cable was available to the vast majority of the population at all speeds, and increasingly so at the highest speeds[71]and cable operators continue to make

[69] 47 U.S.C. § 251(c)(3) (emphasis added).

[70] *See* Reply Comments of USTelecom – the Broadband Association, WC Docket No. 18-141 at 31 (filed Sept. 5, 2018).

[71] *See supra* Section III.A.1.

significant investments that will only increase such availability across most or all of their residential and business footprints.[72]

[72] *See, e.g.*, THOMSON REUTERS STREETEVENTS, *CMCSA – Q2 2019 Comcast Corp Earnings Call*, at 7 (July 25, 2019) https://www.cmcsa.com/static-files/d604247d-05b6-4ae3-91eb-5ccef51236d1 (David N. Watson, Senior EVP & President, CEO, Comcast Cable: "We now have 100% of our network where we have 1 gig available."); SEEKING ALPHA, *Charter Communications, Inc. (CHTR) CEO Tom Rutledge on Q3 2019 Results – Earnings Call Transcript* (Oct. 25, 2019), https://seekingalpha.com/article/4299161-charter-communications-inc-chtr-ceo-tom-rutledge-on-q3-2019-results-earnings-call-transcript?part=single (Chris Winfrey, Chief Financial Officer, Charter Communications: "[W]e did the DOCSIS 3.1 rollout over two-year period which took our capability from a couple of 100 megabits per customer up to one gig per customer everywhere we operate."); Kevin Hart, *Voices: 10G Is the Future of the Cable Network*, DAILY ADVERTISER (Sept. 25, 2019), https://www.theadvertiser.com/story/opinion/2019/09/25/voices-10-g-future-cable-network/2440841001/ (the author, EVP and Chief Product and Technology Officer, Cox Communications: "98 percent of Cox customers have access to gigabit internet today . . . ."); SEEKING ALPHA, *Altice USA, Inc. (ATUS) CEO Dexter Goei on Q3 2019 Results – Earnings Call Transcript* (Nov. 6, 2019), https://seekingalpha.com/article/4303012-altice-usa-inc-atus-ceo-dexter-goei-on-q3-2019-results-earnings-call-transcript?part=single (Dexter Goei, CEO, Altice USA: "We continue to deliver the availability of higher 1 gig speeds in the Suddenlink footprint and we continue to upgrade nicely on the Optimum footprint."); SEEKING ALPHA, *Telephone and Data Systems, Inc. (TDS) CEO Ken Meyers on Q3 2019 Results – Earnings Call Transcript* (Nov. 3, 2019), https://seekingalpha.com/article/4301943-telephone-and-data-systems-inc-tds-ceo-ken-meyers-on-q3-2019-results-earnings-call-transcript?part=single (Vicki Villacrez, Senior VP of Finance and CFO, TDS Telecom: "We also enabled DOCSIS 3.1 in our band cable market which allows us to offer 1-gig broadband services."); SEEKING ALPHA, *Cable One, Inc. (CABO) CEO Julie Laulis on Q3 2019 Results – Earnings Call Transcript* (Nov. 9, 2019), https://seekingalpha.com/article/4304806-cable-one-inc-cabo-ceo-julie-laulis-on-q3-2019-results-earnings-call-transcript?part=single (Julie Laulis, President and CEO, Cable One Inc.: "On the SMB side we launched HFC gigabit service that provide greater connectivity and faster speed to meet the growing needs of those sized businesses."); BUSINESSWIRE, *Atlantic Broadband to Expand Gigabit Internet Deployment to More Than 90 Percent of Its Footprint* (Apr. 1, 2019), https://www.businesswire.com/news/home/20190401005122/en/Atlantic-Broadband-Expand-Gigabit-Internet-Deployment-90 ("Atlantic Broadband, the nation's ninth largest cable operator, announced today a major expansion of its Gigabit internet deployment for homes and businesses. . . . The planned expansion is expected to be completed by the end of summer, at which time Gigabit speed internet will be available to over 90 percent of Atlantic Broadband's footprint, extending across 11 states from Maine to Florida.").

2. Forbearance from DS1 and DS3 Loop Unbundling Obligations Is Also Warranted

Whether or not it finds nationwide non-impairment, the Commission should forbear from DS1 and DS3 loop unbundling mandates.[73] As an initial matter, there is nothing unconventional about the *NPRM*'s proposal to grant national forbearance. The Commission has taken a nationwide approach to forbearance repeatedly and on a bipartisan basis.[74] Such forbearance has

[73] *Compare* 47 U.S.C. § 251(d)(2) *with AT&T Corp. v. FCC*, 236 F.3d 729 (D.C. Cir. 2001) (holding that the Commission must grant forbearance where warranted notwithstanding availability of an alternative path to similar relief).

[74] *See, e.g.*, USTelecom 2018 Petition at 21-22 (citing *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) from Enforcement of Obsolete ILEC Legacy Regulations That Inhibit Deployment of Next-Generation Networks*, Memorandum Opinion and Order, 31 FCC Rcd 6157, 6164 para. 9 (2015) ("*2015 USTelecom Forbearance Order*"); *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, 5807-08 para. 439 & n.1306 (2015) ("*Title II Order*")); *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, Memorandum Opinion and Order, 23 FCC Rcd 12260, 12274 para. 24 n.93 (2008); *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, Memorandum Opinion and Order, 22 FCC Rcd 18705, 18716-21 paras. 20-25 (2007) (using a nationwide geographic market for evaluating competition for forbearance); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities et al.*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14901-02 paras. 91-93 (2005) (granting forbearance on a nationwide basis); *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c) et al.*, Memorandum Opinion and Order, 19 FCC Rcd 21496, 21496 para. 1, 21502 para. 12 (2004) (forbearing from enforcing the requirements of Section 271 "on a national basis") ("*Verizon Forbearance Order*").

The Commission also has made nationwide competition findings with deregulatory consequences outside the forbearance context. *See, e.g.*, *Amendment to the Commission's Rules Concerning Effective Competition et al.*, Report and Order, 30 FCC Rcd 6574, 6582-83 para. 11 (2015) (applying a "nationwide rebuttable presumption" that cable operators face effective competition, without conducting market-specific competition analyses).

been premised on national findings about competition,[75] precisely as the *NPRM* contemplates. The Commission has also granted national relief even in the absence of competitive findings, where forbearance was deemed appropriate based on other considerations that are "common nationwide."[76] As the Eighth Circuit recently underscored, the *Qwest Phoenix Order* does not require the Commission to evaluate competition in the same manner in all contexts – in particular, the Commission is "not bound to apply the traditional market power framework" in any particular matter.[77] Likewise, the D.C. Circuit has held that the Commission's analysis of forbearance is not bound by any specific analytical framework.[78]

As the D.C. Circuit has observed,[79] the costs and market distortions associated with mandatory unbundling requirements placed on a subset of competitors are not simply unnecessary in the presence of robust facilities-based competition, but are affirmatively

[75] *See, e.g., Verizon Forbearance Order*, 19 FCC Rcd at 21510-11 para. 30 ("[T]he BOCs have limited competitive advantages with regard to the broadband elements, given their position with respect to cable modem providers and others in the emerging broadband market. BOCs are not even the largest provider of broadband services to consumers – many more consumers receive broadband through cable modem services.") (citation omitted).

[76] *Title II Order*, 30 FCC Rcd at 5808 para. 439 n.1306 (rejecting the "suggestion that more geographically granular data or information or an otherwise more nuanced analysis are needed"); *see also 2015 USTelecom Forbearance Order*, 31 FCC Rcd at 6164 para. 9 & n.37 (citing numerous examples in which the Commission granted forbearance when other factors satisfied the Section 10(a) criteria).

[77] *Citizens Telecomms.*, 901 F.3d at 1008.

[78] *See Earthlink v. FCC*, 462 F.3d 1, 8 (D.C. Cir. 2006); *see also Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, 25 FCC Rcd 8622, 8633 para. 24 (2010) (recognizing that the Commission "has discretion in determining the analytical framework it will use in evaluating forbearance petitions") (citation omitted) ("*Qwest Phoenix Order*").

[79] *See generally* 47 U.S.C. § 251(d)(2).

harmful.[80] Indeed, once competition arises, there is "no reason to think [unbundling] would bring on a significant enhancement of competition," and "nothing in the Act appears a license to the Commission to inflict on the economy the sort of costs" associated with unbundling.[81] The same data set forth in section III.A.1 above, demonstrating that a reasonably efficient competitor is not impaired absent access to UNE DS1 and DS3 connections, also mandate a grant of forbearance for those services.[82]

Section 10 of the Act *requires* the Commission to forbear from applying any requirement of the Act or of its regulations to a telecommunications carrier or telecommunications service if the Commission determines that: (1) enforcement of the requirement "is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;" (2) enforcement of that requirement "is not necessary for the protection of consumers;" and (3) "forbearance from applying that requirement is consistent with the public interest."[83]

First, enforcement of DS1 and DS3 loop unbundling obligations is not necessary to ensure that rates and practices are just and reasonable, and not unjustly or unreasonably discriminatory. As discussed in detail in Section III.A.1, *supra*, the presence of overwhelming

---

[80] *See TRO*, 18 FCC Rcd at 17071 para. 41 (stating that unbundling requirements constitute "one of the most intrusive forms of economic regulation").

[81] *USTA I*, 290 F.3d at 429.

[82] While the data in Section III.A.1, *supra*, is relevant throughout, we do not reiterate in detail the figures demonstrating substantial communications marketplace competition in each Section of these comments.

[83] 47 U.S.C. § 160(a). In making the public interest determination, the Commission must also consider, pursuant to section 10(b) of the Act, "whether forbearance from enforcing the provision or regulation will promote competitive market conditions." *Id.* § 160(b).

inter- and intra-modal competition is more than sufficient to ensure that rates for DS1s and DS3s are just and reasonable, whether on a nationwide basis or in the BDS Competitive Counties and Study Areas. Further, the carefully calibrated set of *ex ante* price cap regulations imposed by the Commission in the *BDS Order* in counties not deemed competitive under the CMT were specifically designed to balance the need to facilitate wholesale entry against the harms to investment and innovation that accompany such regulation. Maintaining duplicate sets of pricing regulations (UNE and price cap) undermines this careful balance and harms competition and consumers, particularly given that application of tariff obligations and price caps under the revised (and more aggressive) productivity factor is designed to ensure that rates and practices are just and reasonable.[84]

Second, these same competitive conditions and regulatory safeguards render DS1 and DS3 loop unbundling obligations unnecessary for the protection of consumers. Consumers would, after forbearance, continue to have access to the same services provided by competitive providers over the exact same facilities. And those facilities can be procured by a competitive retail provider at market rates or at rates established under price cap regulation. If a competitive retail provider determines that it does not wish to pay market rates, it can deploy its own facilities or look to a competitive wholesaler to serve its end user customers.

Finally, forbearance from DS1 and DS3 loop unbundling obligations is consistent with the public interest. A grant of forbearance will facilitate the policy set forth in the *Technology*

[84] Indeed, the Commission's current productivity factor may force *excessive* annual rate reductions not supported by the evidence. *See* Joint Opening Brief of CenturyLink, Inc. and Citizens Telecommunications Company of Minnesota, LLC, *Citizens Telecom. Of Minn. v. FCC*, Nos. 17-2296 *et al.* (8th Cir. Sept. 27, 2017), *available at* https://prodnet.www.neca.org/publicationsdocs/wwpdf/927178th.pdf.

Transitions Order of encouraging the transition away from legacy services to services based on future networks by eliminating disincentives for competitors to invest in their own facilities-based networks and transition their customers to next-generation services.[85] Further, as described in the *NPRM*, the Commission previously has found that eliminating unbundling obligations will "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" by removing barriers to infrastructure investment.[86] Forbearance from these obligations will reduce or eliminate other costs or harms as well, including: eliminating marketplace distortions created by imposing unnecessary costs on one class of competitors[87] and "disincentives to research and development by both incumbent LECs, competitive LECs and the tangled management inherent in shared use of a common resource."[88]

3. Unbundling Mandates Are Prohibited Under Governing Law Because the Markets Competitors Serve Using DS1 and DS3 Unbundled Loops Are Sufficiently Competitive

Separate and apart from the impairment and forbearance analyses set forth above, it is simply unlawful under the precedent established by *USTA I* and the *TRRO* to require an ILEC to

[85] *Technology Transitions Order*, 32 FCC Rcd at 11129-30 paras. 1-3; *UNE Analog Loop and Avoided-Cost Resale Forbearance Order*, 34 FCC Rcd at 6510, para. 14, 6518-19, paras. 29-30; *UNE Transport Forbearance Order*, 34 FCC Rcd at 5796, para. 63.

[86] *NPRM* para. 87 (internal citation omitted).

[87] *See, e.g.*, *UNE Analog Loop and Avoided-Cost Resale Forbearance Order*, 34 FCC Rcd at 6511 para. 15, 6518-19 paras. 29-30; *UNE Transport Forbearance Order*, 34 FCC Rcd at 5791-92 para. 54; *id.* at 5796 para. 63.

[88] *UNE Transport Forbearance Order*, 34 FCC Rcd at 5791-92 para. 54 (quoting *USTA I*, 290 F.3d at 429 (citing *Iowa Utils. Bd.*, 525 U.S. at 428 (Breyer, J., concurring in part and dissenting in part)) (internal quotation marks and alterations omitted)).

make UNEs available to serve markets in which competition is flourishing.[89] The Commission stated in the *TRRO* that, consistent with *USTA II*, it was appropriate to "deny access to UNEs in cases where the requesting carrier seeks to provide service exclusively in a market that is sufficiently competitive without the use of unbundling,"[90] holding that "whatever incremental benefits could be achieved under the Act by requiring mandatory unbundling in these service markets would be outweighed by the costs of requiring such unbundling."[91] While the 2005 *TRRO* limited the relief granted in that order to markets where competition had evolved without access to UNEs, it explicitly stated that sufficient facilities-based competition could render UNE relief appropriate in markets where competition had evolved with the assistance of UNEs.[92] In

[89] *USTA I*, 290 F.3d at 422 (declaring it unlawful to mandate unbundling in "markets where there is no reasonable basis for thinking that competition is suffering"); *see also USTA II*, 359 F.3d at 574 ("In *USTA I* we expressed skepticism regarding whether there could be impairment in markets 'where the element in question – though not literally ubiquitous – is significantly deployed on a competitive basis.'" (citation omitted)); *id.* at 575 (noting that the Commission must determine whether "competition is possible" without unbundling).

[90] *See TRRO*, 20 FCC Rcd at 2551-52 para. 34 (citation omitted); *USTA II*, 359 F.3d at 576 ("Where competitors have access to necessary inputs at rates that allow competition not only to survive but to flourish, it is hard to see any need for the Commission to impose the costs of mandatory unbundling."); *id.* at 592 ("[C]ompetitors cannot generally be said to be impaired by having to purchase [tariffed] services from ILECs, rather than leasing the necessary facilities at UNE rates, where robust competition in the relevant markets belies any suggestion that the lack of unbundling makes entry uneconomic.").

[91] *TRRO*, 20 FCC Rcd at 2554-55, 2556 paras. 36, 38, and n.116 (discussing the possibility that sufficient competition in the telephone exchange and exchange access markets "might someday be appropriate, upon findings of sufficient facilities-based competition . . . .").

[92] *TRRO*, 20 FCC Rcd at 2551-52 para. 34; *see also Qwest Corp. v. FCC*, 482 F.3d 471, 480 (D.C. Cir. 2007) ("As the *TRRO* explicitly left open the possibility that 'sufficient facilities-based competition' might eventually make UNE relief appropriate in the local exchange market, either generally or in geographically specific markets, the [*Qwest Omaha Order*] seems simply to apply that concept: here the Commission found the combination of tariffed ILEC facilities and facilities-based competition adequate to assure competition even if it partially relaxed Qwest's obligations in the Omaha market.") (internal citations omitted).

the 15 years since the *TRRO*'s adoption, that possibility has become reality in the market for DS1 and DS3s.

As discussed above, when sold as UNEs, DS1 and DS3 loops are designed and priced in a way that makes them attractive only to serve businesses and other customers needing the capabilities of a business data service. And as illustrated in Section III.A.1, the record demonstrates that there are more than sufficient inter- and intra-modal competitive alternatives to UNE DS1 and DS3 loops – whether that assessment is made on a nationwide basis or only in the BDS Competitive Counties and Study Areas – to render the unbundling of DS1 and DS3s unnecessary.[93]

B. The Commission Should Lift Digital DS0 Loop Unbundling Obligations

The *NPRM* is also right in proposing to "find that competitive LECs are no longer impaired without access to UNE DS0 Loops in urban census blocks."[94] DS0 loops are used almost exclusively to serve the residential and SMB voice and broadband markets –markets in which ILECs have no market power (especially in dense urban environments).[95] While nationwide relief from these outdated obligations would be most appropriate in light of the rampant competition amongst providers detailed below, the Commission should at minimum eliminate digital DS0 loop unbundling obligations in urban census blocks.

---

[93] *BDS Order*, 32 FCC Rcd at 3521 para. 134; *id.* at 3526 para. 142; *see also* USTelecom May 6, 2019 *ex parte* at 4.

[94] *NPRM* para. 38.

[95] Although (as stated above) UNE DS0 loops are used almost exclusively for purposes of the voice market, the *NPRM* discusses UNE DS0 and narrowband voice-grade loop obligations separately. *Compare NPRM* para. 37 and n.133 (citing 47 C.F.R. § 51.319(a)(1)'s definition of DS0s) *with id.* para. 52 (defining the three classes of narrowband voice-grade loops). This section discusses DS0s; narrowband voice-grade loops are discussed *infra* in Section III.C.

1. Competitors Are Not Impaired Without Access to Unbundled DS0 Loops

As a preliminary matter, if the Commission elects not to provide relief on a nationwide basis, it is reasonable for the *NPRM* to choose census blocks as the relevant geographical unit for purposes of considering UNE DS0 obligations. As the Commission previously noted, it is proper to use the census block as the unit of measure. Reliance on FCC Form 477 census block data is more than adequate for assessing the presence of and feasibility of competition for last-mile facilities. The Commission expressly held as much in the *BDS Order*:

> We find the Form 477 data well suited for [assessing current] market conditions and a conservative proxy for competitive deployment going forward. Form 477 broadband service availability data necessarily imply the presence of broadband-capable cable network facilities, which makes it an ideal dataset to ensure the competitive market test accounts for competition from cable operators.[96]

This finding was correct. In the nearly 11 million census blocks in the United States, the mean area is 0.34 square miles, and 85 percent of blocks are smaller than the mean; the median is only 0.01 square miles.[97] The median is so much lower because the mean is skewed upward by a relatively small number of very large rural census blocks. And if "the median census block were a circle, it would be approximately 0.2 miles across – an area that can easily fit (and often does fit) a single building. Indeed, half of all census blocks are smaller than a tenth of a square mile (6.4 acres)."[98]

---

[96] *BDS Order*, 32 FCC Rcd at 3507 para. 106 (emphasis added).

[97] USTelecom May 6, 2019 *ex parte* at 6; *see also supra* note 29.

[98] *BDS Order*, 32 FCC Rcd at 3520-21 para. 133 (internal quotations, citations omitted). As in the BDS context, carriers are granted latitude in how they implement the census block analysis as those geographic areas comprise their wire center boundaries.

The areas served by cable cover approximately 50 percent of all census blocks, but approximately *90 percent* of the population. Thus, cable-served census blocks are significantly smaller and denser than average. The mean area of a cable-served census block is 0.9 square miles and the median is 0.008 square miles.[99] Accordingly, if a cable operator has deployed facilities in a census block, it is a highly reliable indicator that competitive facilities are generally available or deployable throughout the census block.

Within these census bocks, as the *NPRM* describes, urban ILECs face intense facilities-based competition. This competition is proven out by a range of data points. Cable providers "make available facilities-based 25/3 Mbps Internet access service . . . without the use of UNEs to 96.6 percent of consumers in urban census blocks. Some 75.3 percent of households in urban census blocks have at least two 25/3 Mbps providers. And 87.8 [percent] of households in urban census blocks have at least two 10/1 Mbps providers, all without the use of UNEs."[100] As these market realities demonstrate, intermodal facilities-based offerings provide robust competition in the provision of residential voice and broadband services.

[99] USTelecom May 6, 2019 *ex parte* at 6 (internal citations omitted).

[100] FCC, *Fixed Broadband Deployment, Area Comparison*, https://broadbandmap.fcc.gov/#/area-comparison?version=dec2018&tech=acfow&speed=10_1&searchtype=county (last visited Feb. 4, 2020). Even in the six months from June 2018 to December 2018, competition has grown. According to the *NPRM*, as of June 2018, "[c]able providers make available facilities-based 25/3 Mbps Internet access service . . . without the use of UNEs to 97 [percent] of households in urban census blocks." Some "74 [percent] of households in urban census blocks have at least two 25/3 Mbps providers. And "87 [percent] of households in urban census blocks have at least two 10/1 Mbps providers, generally the cable provider and the incumbent LEC, all without the use of UNEs." *NPRM* para. 39 (internal citations omitted).

ILECs' voice market shares have tumbled because of that competition. ILEC line counts plummeted from a high of 186 million in 2000 to a projected low of 36 million in 2018.[101] As of 2017 (per the latest Commission figures), ILEC landline services provided only about 12 percent of all business and residential voice subscriptions nationwide and ILEC legacy switched services accounted for only 9 percent.[102] Based on straight-line historical trends, USTelecom projects that by the end of 2020, these figures will have dropped to approximately 7 percent and 4 percent, respectively.[103] The data confirm an ongoing precipitous decline in the share of residential household subscription to traditional ILEC switched services, from 93 percent in 2003, to 46 percent in 2010, to a mere 14 percent in 2017 and a projected six percent in 2020.[104] Nor are such competitive trends limited to the voice market. In addition to ILEC-provided broadband service, as of December 2017, roughly 90 percent of the population (and 90 percent of households) were located in census blocks with access to cable broadband service, with nearly all available cable broadband offering download speeds of at least 25 Mbps.[105] According to the

[101] USTelecom, *Industry Metrics and Trends 2020*, at 5 (Feb. 2020), https://www.ustelecom.org/wp-content/uploads/2020/02/USTelecom-State-of-Industry-2020.pdf ("*USTelecom Industry Metrics and Trends Report*").

[102] *See* FCC, *Voice Telephone Services as of December 31, 2017, Tables: Nationwide and State-Level Data for 2008 – Present* (Aug. 28, 2019), https://www.fcc.gov/voice-telephone-services-report.

[103] *USTelecom Industry Metrics and Trends Report* at 10. Figures include all business and residential subscriptions.

[104] USTelecom 2018 Forbearance Petition at 8-9 and Chart 2; *see also USTelecom Industry Metrics and Trends Report* at 11. This analysis is conservative in that it only treats as "wireless" households that have cut the cord and are wireless-only. In reality, even households that retain landlines, including ILEC switched landline service, often have and use wireless service in addition to their wireless service.

[105] Woroch/Calzaretta Declaration at 2-4.

Commission's Internet access subscription data, cable and other non-wireline alternatives accounted for 64 percent of all fixed connections nationally in 2017, and that share appears to be rising.[106] And the above-described explosive growth in 5G and other fixed wireless deployments[107] not only creates competition for DS1- and DS3-equivalent offerings, but also gives rise to more relevant, popular, and improved substitutes for the lesser services made available via DS0 UNEs, too. In addition, nationwide satellite broadband offerings now provide up to 100 Mbps downstream and up to 20 Mbps upstream, with voice service a baseline feature of such networks.[108] It bears emphasizing that cable, fixed wireless, 5G, and satellite services are not contingent on UNE DS0s.

This robust intermodal competition is outcome-determinative when it comes to the question of non-impairment. And as the Commission explained in the *NPRM*, the impairment

---

[106] *USTelecom Industry Metrics and Trends Report* at 20 (summing 66 million cable connections and 3 million satellite and fixed wireless connections, and dividing by the total of 108 million for 2017. Based on trends, these technologies accounted for 73 million out of 112 million, or 65 percent, in 2018.).

[107] *See supra* notes 39-47.

[108] *See, e.g.*, VIASAT EXEDE, *Connect Your Business with High-Speed Internet*, VIAS https://www.exede.com/business/ (last visited Feb. 3, 2020) ("Viasat Business Internet: Plans starting at $50/mo[;] Nationwide broadband; up to 35 Mbps across most the US[;] Speeds up to 100 Mbps in select areas"); Comments of Hughes Network Systems, LLC, IB Docket No. 17-95, at 1 (filed Apr. 8, 2019) ("Hughes offers Commission-defined broadband speeds of over 25 Mbps down and 3 Mbps up for residential customers, and 55 Mbps down and 5 Mbps up for enterprise users, across the continental United States, southern Alaska and Puerto Rico."). USTelecom has argued in the Rural Digital Opportunity Fund Proceeding that the Commission should adopt a policy preference for terrestrial broadband service over satellite broadband service. Its argument is based primarily on the positive externalities associated with the infrastructure that will be built to serve last-mile locations with terrestrial networks and the fact that, in the case of satellite services, virtually no new infrastructure is deployed. Such arguments do not preclude an acknowledgment here that satellite services are nonetheless widely available, providing high-speed broadband and voice service.

inquiry "considers whether a hypothetical 'reasonably efficient competitor' would be impaired when lack of access to a particular network element creates a barrier to entry that renders entry uneconomic," and the agency "presumes that the reasonably efficient competitor would use reasonably efficient technologies and take advantage of existing alternative facilities deployment where possible."[109] The inquiry also "makes reasonable inferences about competition, including that if competitive providers have successfully entered using their own facilities in one market, other providers could enter similar markets on a similar basis," and "account[s] for the *existence of intermodal competition*," as "[t]he fact that an entrant has deployed its own facilities – regardless of the technology chosen – may provide evidence that any barriers to entry can be overcome."[110]

The extensive evidence of competitive market entry demonstrates that a reasonably efficient competitor is not impaired without access to DS0 UNEs. Given (1) the enormous number of households abandoning ILEC voice service typically switch to competitive alternatives that do not rely on UNEs or resale, and (2) the range of non-UNE-dependent facilities-based intermodal competitors, there is no reason to maintain unbundling obligations on DS0 loops that are themselves becoming increasingly competitively irrelevant.

2. Forbearance from DS0 Loop Unbundling Obligations Is Also Warranted

Separate and apart from the question of impairment, forbearance from UNE digital DS0 obligations under Section 10's three-part test is also warranted, for the factual reasons outlined

[109] *NPRM* para. 7 (quoting *TRRO*, 20 FCC Rcd at 2547 para. 24; *id.* at 2549 para. 28; *TRO*, 18 FCC Rcd at 17045 para. 97) (internal quotations, citations omitted).

[110] *NPRM* para. 7.

above. Just as the Commission was right to forbear from analog DS0 obligations last year, it is right to propose to forbear from digital DS0 obligations now.

First, enforcement of DS0 loop unbundling obligations is not necessary to ensure that rates and practices are just and reasonable, and not unjustly or unreasonably discriminatory.[111] The intense facilities-based competition acknowledged in the *NPRM* – which includes near-ubiquitous deployment of cable broadband at speeds equaling or exceeding 25/3 Mbps – provides significant competitive pressures on *all* providers' rates. This competition amplifies the need for the Commission to "look to the market, not to regulation"[112] as the optimal guarantor of reasonable rates.

Second, for these same reasons, competitive pressures in the market demonstrate that the "enforcement" of UNE DS0 unbundling in urban census blocks "is not necessary for the protection of consumers."[113] Competition is the ultimate guarantor of consumer protection – hence the 1996 Act's design to "promote competition and reduce regulation *in order to secure lower prices and higher quality services for American telecommunications consumers* and encourage the rapid deployment of new telecommunications technologies."[114] To quote again Chairman Pai's succinct formulation, "[t]he government can't manufacture competition through unbundling."[115] Where unbundling has become irrelevant, consumers' interests dictate it be set aside in order to not artificially constrain competition.

---

[111] *See generally* 47 U.S.C. § 160(a)(1).

[112] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 et al.*, First Report and Order, 11 FCC Rcd 15499, 15509 para. 12 (1996).

[113] 47 U.S.C § 160(a)(2).

[114] 1996 Act Preamble (emphasis added).

[115] *BDS Order*, 32 FCC Red at 3644 (Statement of Chairman Ajit Pai).

Third and finally, for all the interlocking rate- and consumer protection-related reasons detailed herein, forbearance from urban DS0 loop unbundling obligations is also consistent with the public interest.[116] Such regulations inherently impose "significant administrative and compliance costs . . . on [both] regulators and regulated companies,"[117] meaning that their elimination intrinsically serves "the public interest by reducing . . . undue regulatory burdens that can stand in the way of competition and innovation[.]"[118] As the Commission has previously recognized specifically in the forbearance context, "disparate treatment of carriers providing the same or similar services is not in the public interest as it creates distortions in the marketplace that may harm consumers."[119] Forbearance here does not mean customers will no longer have access to voice or broadband service. ILECs, and other alternative providers, will continue to compete to serve end-user customers and will continue to provide commercially negotiated access to their networks.

---

[116] 47 U.S.C. § 160(a)(3).

[117] *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Thirteenth Order on Reconsideration, 11 FCC Rcd 388, 390 para. 2 (1995).

[118] *Commission Launches Modernization of Media Regulation Initiative*, Public Notice, 32 FCC Rcd 4406, 4406 (2017.

[119] *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934 et al.*, Memorandum Opinion and Order, 22 FCC Rcd 16304, 16360 para. 129 (2007) (citation omitted); *see also Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685, 4696 para. 21 (2005) ("in a market where carriers are offering the same services and competing for the same customers, disparate treatment of different types of carriers or types of traffic has significant competitive implications" and could give one carrier "a competitive advantage over another type of carrier . . ."); *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901, 5920 para. 53 (2007) (the "disparate treatment" of competitors "would introduce competitive distortions into the marketplace").

3. Unbundling Mandates Are Prohibited Under Governing Law Because the Markets Competitors Serve Using DS0 Unbundled Loops Are Competitive

As noted above,[120] in "markets[] where competition has evolved without [UNE] access," the Commission has found that it cannot "justify imposing the costs of mandatory unbundling to promote competition."[121] The retail voice market – the very market UNE DS0s serve – has become competitive. This is true not only in urban census blocks, but on a nationwide basis. Accordingly, the Commission not only *should* eliminate these obligations, it *must* do so, under governing law.[122]

C. The Commission Should Lift Narrowband Voice-Grade Loop Unbundling Obligations Nationwide

The Commission's current rules also require ILECs to provide three varieties of voice-grade loops as UNEs: UNE Analog Loops in non-price cap areas, 64 kbps voice-grade channels over last-mile fiber loops (when an ILEC retires copper), and the TDM capabilities, features, and functionalities of hybrid loops.[123] As the *NPRM* suggests, the time has come to lift these obligations for on a nationwide basis.

1. Competitors Are Not Impaired Without Access to Unbundled Narrowband Voice-Grade Loops

The actual market conditions for voice services, as detailed throughout these Comments, demonstrate the propriety and necessity of such nationwide relief in the case of all three classes

---

[120] *See supra* Section III.A.3 (describing *TRRO* holdings that unbundling should not be required for the provision of service to already-competitive markets).

[121] *TRRO*, 20 FCC Rcd at 2552 para. 34 (citation omitted).

[122] *See, e.g., AT&T Corp. v. FCC*, 236 F.3d 729 (D.C. Cir. 2001) (holding that the Commission must grant forbearance where warranted notwithstanding availability of an alternative path to similar relief).

[123] 47 C.F.R. §§ 51.319(a)(1), (a)(3)(iii), & (a)(2)(iii); *see also NPRM* para. 20.

of narrowband voice-grade loops.[124] The fact that ILECs, per the latest Commission data, serve less than one-tenth of all voice subscriptions with traditional switched landline service as of 2017 (as part of a long-running downward trend) proves that competitors no longer need access to narrowband voice-grade copper loops.[125] Competitive alternatives no longer face significant hurdles to serving the voice market – indeed, they have come to dominate it, providing roughly 88 percent of all switched and VoIP lines in service as of December 2017, and rising to more than 90 percent today.[126] Given the vast array of intermodal voice alternatives available, maintaining narrow-band UNEs would perpetuate marked inefficiency, in contravention of the evolving transition to future networks.[127]

The Commission should not conflate the choices of an individual *competitor* with the inarguable existence of broad *competition* – especially in a marketplace where incumbents' market share has fallen off a cliff. The relevant inquiry is as to the impact on *reasonably efficient* competitors, not to a specific "carrier's impairment with reference to that carrier's particular business strategy," given that "such an approach could reward those carriers that are less efficient or whose business plans simply call for greater reliance on UNEs."[128] Given that the Commission does "not attach weight to the individualized circumstances of the actual

---

[124] *See supra* Section III.B.1 (detailing ILEC market-share loss).

[125] *See* FCC, *Voice Telephone Services as of December 31, 2017, Tables: Nationwide and State-Level Data for 2008 – Present* (Aug. 28, 2019), https://www.fcc.gov/voice-telephone-services-report.

[126] *Id.*; *see also Communications Marketplace Report et al.*, Report, 33 FCC Rcd 12558, 12663 para. 192 (2018); *id.* at 12668-69 paras. 203-207; *see also USTelecom Industry Metrics and Trends Report* at 10.

[127] *Cf. NPRM* para. 59.

[128] *TRRO*, 20 FCC Rcd at 2547-48 para. 25 (internal quotations, citation omitted).

requesting carrier,"[129] the above-described flourishing of intermodal competition more than carries the day.

Over the last seventeen years, the residential voice market has gone from roughly 93 percent ILEC-owned to more than 90 percent *not*-ILEC-owned.[130] Due to the advent of extensive competition in the last quarter century, ILECs are operating in an entirely different market environment than they were when Congress adopted the unbundling obligation. The market-opening envisioned by the 1996 Act has already occurred. Maintaining obligations reflective of a history long gone will extend baseless inequities in the treatment of similarly situated providers and inhibit the transition to the superior, more modern services and networks American consumers demand and deserve.

2. Forbearance from Narrowband Voice-Grade Loop Unbundling Obligations Is Also Warranted

As, once again, a distinct issue from the question of "impairment," the same factual realities that dictate the elimination of urban DS0 unbundling obligations also dictate the necessity of eliminating narrowband voice-grade loop UNE obligations nationwide.

First, voice-grade loops are irrelevant to the question of rates; there are no valid grounds to distinguish price-cap and rate-of-return areas in this regard, as both markets have been pried open by intermodal competition.[131] As the Commission observed last year in discussing UNE Analog Loop obligations for price-cap carriers in particular, "forbearance relief is warranted in light of overwhelming evidence demonstrating the increasing migration from legacy TDM voice

---

[129] *Id.* at 2548 para. 26 (citation omitted).

[130] USTelecom 2018 Petition at 8-9 & Chart 2; *see also USTelecom Industry Metrics and Trends Report* at 11.

[131] 47 U.S.C. § 160(a)(1).

service to IP-based and wireless voice communications capabilities provided by multiple intermodal providers" – that is, "it is no longer necessary to require . . . once-upon-a-time market-opening obligations that today amount to disparate regulatory burdens that frustrate the transition to advanced communications services offered over next-generation networks."[132] The regulatory burden imposed by the UNE regime on ILECs makes no more sense in the latter than in the former as a result.

Second, for these same reasons, enforcement of such regulations is unnecessary for the protection of consumers.[133] The explosion of competition detailed above amply protects consumers far better than narrow, technology-specific Commission dictates ever could.

Third, continued unbundling actually *contravenes* the public interest[134] by delaying ILECs' ability to focus on next-generation network deployment (especially when, to the best of USTelecom's knowledge, narrowband voice-grade loops are not even used by would-be competitors to provide *any* internet access, much less 25/3 Mbps service).[135] The elimination of unbundling mandates is designed in part to promote such deployment – achieving, as a result, lasting facilities-based competition. The Commission and the courts have rightly and repeatedly held that preservation of UNE mandates in the presence of competition contravenes the goals of the 1996 Act, by undermining such deployment incentives. Forbearance will promote

[132] *UNE Analog Loop and Avoided-Cost Resale Forbearance Order*, 34 FCC Rcd at 6507-508 para. 9 (internal citations omitted).

[133] 47 U.S.C. § 160(a)(2).

[134] *Id.* § 160(a)(3).

[135] As the D.C. Circuit has recognized, there "is a great deal of overlap in these three factors." *Verizon v. FCC*, 770 F.3d 961, 964 (D.C. Cir. 2014).

infrastructure deployment by competitors that otherwise would have relied on UNEs, who will be able to divert capital to deployment of new broadband infrastructure and services.

All three prongs of the forbearance test thus prescribe that unbundling mandates for narrowband voice-grade loops cannot stand.

3. Unbundling Mandates Are Prohibited Under Governing Law Because the Markets Competitors Serve Using Narrowband Voice-Grade Unbundled Loops Are Competitive

As detailed in the preceding sections,[136] extensive intermodal facilities-based competition in the voice market has led to a flourishing of competition – at ILECs' expense. The 87 percent loss in ILEC residential switched voice market share demonstrates conclusively that there is "no reasonable basis for thinking that competition is suffering."[137] Accordingly, unbundling mandates for narrowband voice-grade loops must be eliminated.[138]

D. The Commission Should Lift Subloop Unbundling Obligations Nationwide, or at Least Where the Underlying Loop Is Not Subject to an Unbundling Mandate

For many of the same reasons requiring the termination of unbundling requirements with respect to loops, the Commission also must bring an end to mandatory unbundling of both

[136] *See supra* Sections III.B.1 through III.C.2.

[137] *USTA I*, 290 F.3d at 422.

[138] *See supra* Section III.A.3.

copper subloops and multitenant unit subloops where the underlying loop is no longer available as a UNE.[139]

1. Competitors Are Not Impaired Without Access to Unbundled Subloops Where There Is No Loop Unbundling Mandate

The Commission can and should determine that competitors are not impaired without access to copper and multiunit access subloops where there is no underlying loop unbundling mandate.

The *NPRM* is correct in noting that there is simply no rationale for unbundling copper subloops when the associated loop would not itself be subject to unbundling. As the Commission articulates, a copper subloop is any portion of a copper loop or hybrid loop that (a) is comprised entirely of copper and (b) acts as a transmission facility between a point on the ILEC's outside loop plant and the end-user customer premises.[140] In the *TRO*, the Commission found that CLECs were impaired without access to copper subloops, but emphasized that this finding was merely an extension of its impairment finding with regard to copper loops themselves. In other words, copper subloops were subject to unbundling "because they [were] part and parcel of the local loop plant of incumbent LECs," meaning that "requesting carriers

[139] The Commission's pending Notice of Proposed Rulemaking addressing access to multiple tenant environments (the "MTE Docket") does not preclude action with respect to multitenant unit subloop unbundling. *See Improving Competitive Broadband Access to Multiple Tenant Environments et al.*, Notice of Proposed Rulemaking and Declaratory Ruling, 34 FCC Rcd 5702 (2019). The MTE docket is the appropriate context in which to address issues arising from the power of building owners to control which provider or providers can offer service to tenants in their buildings. Here, in contrast, the question is whether ILECs should be required to unbundle inside wiring subloops when the Commission already has determined that a competitor would not be impaired without access to a full loop. The Commission can and should easily answer this question ("no"), and doing so will not in any way prejudice the distinct set of questions regarding the effect on competition of restrictions imposed by a building owner.

[140] *NPRM* para. 65.

face *precisely the same barriers to entry* for a subloop as with a copper loop that extends from the incumbent LEC's central office to the customer's premises."[141] Under that logic, copper subloops should be available as UNEs only where copper loops themselves are available. And, as detailed above, unbundling obligations with respect to such loops should be lifted in all or nearly all cases.

The Commission also should find that requesting carriers are not impaired without unbundled access to multiunit premises UNE subloops. The Commission's prior impairment findings regarding such subloops were premised on a world in which ILECs were assumed to enjoy exclusive access to the vast majority of multiunit premises.[142] This world has long since passed into history. Given increasing bandwidth demands, multiunit premises are increasingly served by OCn-capacity links. The Commission has never found impairment with respect to such links. Rather, it has noted that competitors can economically provision them, and face no disadvantage *vis-à-vis* ILECs in doing so.[143]

To the extent multiunit buildings are served using DS3- or DS1-capacity links, the Commission correctly proposes to eliminate unbundling obligations for such loops in counties and study areas deemed competitive under the *BDS Order*'s CMT. Here, too, competitors are able to economically provision their own last-mile facilities or procure them on the market. In such cases, there is no basis for unbundling the inside wire within such premises: ILECs enjoy no particular advantage in deploying to premises in those areas and are barred from entering into

[141] *TRO*, 18 FCC Rcd at 17131 para. 253 (emphasis added).

[142] *See NPRM* para. 69.

[143] *See generally TRO*, 18 FCC Rcd 16978.

exclusive arrangements with landlords.[144] Retention of an unbundling obligation would be inimical to the Commission's deployment goals, because it would deter competitors from deploying their own facilities to reach the premises and ensuring durable competition for the business of its tenants.

Thus, the Commission should find that competitors are not impaired without unbundled access to either copper subloops or multiunit premises subloops.

2. Forbearance from Stand-Alone Subloop Unbundling Obligations Is Also Warranted Where There Is No Loop Unbundling Mandate

For the same reasons, the Commission should forbear from enforcing subloop unbundling obligations where there is no corresponding loop unbundling mandate. First, preservation of unbundling obligations in such circumstances is not needed to ensure just, reasonable, and nondiscriminatory rates and terms. The *NPRM*'s proposal would only eliminate subloop unbundling in areas where the agency has already found that unbundled access to the *entire loop* is unnecessary. A competitor capable of duplicating or competitively procuring an entire loop can similarly duplicate or competitively procure a portion of that loop – whether it runs to an individual end-user, or to a larger multiunit premise. In addition, ILECs at risk of losing revenue when traffic shifts from their facilities to competitive offerings will seek to preserve such revenues, in whole or in part, by offering commercial access to their facilities, providing yet another option to competitors and consumers.

Second, subloop unbundling where there is no corresponding loop unbundling mandate is not necessary to protect consumers. The wealth of alternative options that protects and will protect consumers upon elimination of certain underlying loop unbundling obligations will also

[144] 47 C.F.R. § 64.2500.

protect consumers upon the removal of UNE subloop requirements. Further, once again, elimination of unbundling mandates will incentivize new deployment by CLECs and broader commercial access to the ILECs' facilities.

Third, forbearance from these unbundling obligations is in the public interest. As noted above, because this request is limited to areas in which there is no associated loop unbundling requirement, competitors are by definition capable of economically procuring or self-provisioning their own loop facilities. Indeed, the elimination of unbundling mandates in these cases is designed in part to promote such deployment and to thereby achieve lasting facilities-based competition. As set out above, the Commission and the courts have repeatedly held that preservation of unbundling mandates in the presence of competition disserves the goals of the 1996 Act by undermining such deployment incentives. In contrast, forbearance will promote infrastructure deployment by competitors that otherwise would have relied on UNE copper subloops and unbundled access to multiunit premises' inside wiring.

3. Unbundling Mandates Are Prohibited Under Governing Law Because the Markets Competitors Serve Using Subloops Are Competitive Where There Is No Loop Unbundling Mandate

As detailed above, in the locales at issue here, the markets served using both copper subloops and multiunit premises subloops are competitive. Here, too, the policy against mandatory unbundling for service to competitive markets demand relief from unbundling mandates.[145]

[145] *See supra* Section III.A.3.

E. The Commission Should Lift Dark Fiber Transport Unbundling Obligations Nationwide, or at Least to Wire Centers Within a Half Mile of Alternative Fiber

Dark fiber UNEs, which have long represented a small proportion of dark fiber transport overall,[146] have been less and less relevant to the provision of competitive service as a multitude of competitive options have emerged. The record evidence, as recapped and refreshed below, shows that competitive providers can and do avail themselves of these alternatives, relegating dark fiber UNEs to the very margins of the marketplace. As a result, extending the reasoning of the *UNE Transport Forbearance Order* to dark fiber transport is a logical and easy next step.[147] Having already lifted obligations to unbundle lit transport (for price cap LECs) and having spared Tier 1 and Tier 2 dark fiber from unbundling from the outset, the time has come for the Commission to eliminate this remaining vestige of transport unbundling.

1. Competitors Are Not Impaired Without Access to Unbundled Dark Fiber Transport on a Nationwide Basis, or at Least to Wire Centers Within a Half Mile of Alternative Fiber

As an initial matter, under the *TRRO*, the Commission subjected dark fiber transport and DS3 transport identically with respect to unbundling, recognizing that, "[o]nce activated, dark fiber transport is used by carriers for the same purposes as lit dedicated transport."[148] The Commission determined in the *BDS Order* that the high-capacity transport marketplace is

[146] *TRRO*, 20 FCC Rcd at 2607 para. 133 (limiting unbundling obligations for dark fiber transport to transport involving at least one Tier 3 wire center endpoint); 47 C.F.R. § 51.319(d)(2)(iv); *see also UNE Transport Forbearance Order*, 34 FCC Rcd at 5768-69 para. 4 n.8 (referring to the "limited obligations to unbundle interoffice dark fiber").

[147] *NPRM* para. 73 and n.225.

[148] *TRRO*, 20 FCC Rcd at 2607 para. 133.

competitive,[149] and found nationwide non-impairment with respect to unbundled DS3 transport.[150] Given the Commission's recognition that dark fiber's characteristics mimic those of lit DS3 transport, these prior findings warrant a nationwide non-impairment finding with respect to dark fiber transport.

In any case, dark fiber transport warrants a nationwide non-impairment finding on its own merits. In generally finding that competitors are not impaired without access to dark fiber transport between Tier 1 and Tier 2 wire center end points, the Commission observed in the 2005 *TRRO* that "dark fiber transport (like all fiber transport) can, in some circumstances, be self-provisioned or obtained on a wholesale basis from carriers other than the incumbent LEC."[151] It further noted that "competing carriers that use UNE dark fiber transport actively seek out wholesale alternatives to the incumbent LEC's fiber facilities."[152] As a result, the Commission explained that its impairment test "results in no unbundling where the record reveals that a reasonably efficient competitor has, or could, duplicate the facilities of the incumbent LEC" and "forces competing carriers to find alternative facilities in the areas where competitors have deployed or could deploy such facilities."[153] Accordingly, the Commission required unbundling of dark fiber transport only where it also required unbundling of DS3-capacity transport – namely, on routes for which at least one end-point of the route is a wire center containing fewer than 24,000 business lines and fewer than three fiber-based collocators.[154] The trends that

[149] *BDS Order*, 32 FCC Rcd at 3499 para. 85.

[150] *See UNE Transport Forbearance Order*, 34 FCC Rcd at 5790-91 para. 52.

[151] *TRRO*, 20 FCC Rcd at 2607-608 para. 134.

[152] *Id.* (citation omitted).

[153] *Id.*

[154] *Id.* at 2607 para. 133.

resulted in limited unbundling of dark fiber transport in 2005 have continued, however, resulting in a vibrant, nationwide marketplace for dark fiber transport, as described below. Given the current marketplace, the Commission can and should readily conclude that a reasonably efficient competitor is not impaired without access to dark fiber transport on any route involving a wire center within a half-mile of competitive fiber facilities.

The record evidence shows that use of unbundled dark fiber in the marketplace today is extraordinarily uncommon. For instance, Verizon has stated that it "both uses and sells a de minimis amount of dark fiber UNEs."[155] Other ILECs report similar patterns.[156] As a result, in the aggregate, unbundled dark fiber from ILECs is at best a negligible portion of the overall marketplace. Indeed, data previously submitted by USTelecom on behalf of Verizon, AT&T, CenturyLink, and Frontier show that, as of 2018, other service providers were leasing a total of approximately 5,900 dark fiber circuits from these four ILECs, with the vast majority being used for transport between central offices.[157] This *de minimis* figure can only have decreased further since the initial submission of that data.

[155] Comments of Verizon, WC Docket No. 18-141, at 15-16 (filed May 9, 2019) ("Verizon May 2019 Comments").

[156] *See, e.g.*, CenturyLink May 2019 Comments at 8-9 ("Between 2015 and 2018 . . . CenturyLink's Ethernet purchases grew substantially, and its purchase of dark fiber transport increased dramatically, almost exclusively through arrangements with cable companies and CLECs."); Comments of AT&T, WC Docket No. 18-141 *et al.*, at 5 (filed May 9, 2019) ("AT&T May 2019 Comments") ("Both the recently released Form 477 data and the Commission's new April Data Tables strongly confirm that the statute requires forbearance from UNE requirements for all interoffice transport services, including dark fiber transport services, on a nationwide basis.").

[157] CMA Report at 13 & n.37 (further noting that dark fiber UNEs accounted for 0.28 percent of all UNEs then in use).

To put these numbers into a more concrete perspective, these ILEC dark fiber circuits accounted for an estimated 20,000 to 60,000 fiber miles[158] – a tiny fraction of the total fiber miles in the United States. By way of comparison, one competitive provider alone now reports *13 million* fiber miles (not subject to price regulation) – up from 11.8 million (or 10 percent) from 2018 when USTelecom last offered this comparison.[159] Another competitive provider reports 1.3 million fiber miles, a large portion of which it acquired from CenturyLink in a 2018 transaction.[160] These competitive fiber providers have flipped the unbundling assumptions on their head and achieved the unbundling regime's goal of enabling competitors to either self-provision or obtain *commercial* access from competitive providers.

Moreover, where unbundled dark fiber is available, there are typically ample alternatives available as well. About 78 percent of ILEC wire centers are within a half mile of competitive fiber and/or buildings with a competitive connection (presumably reflecting a combination of lit and dark fiber).[161] The two competitors mentioned above are by no means isolated examples – ten of the top fifteen facilities-based CLECs from Form 477 that serve the business market offered dark fiber as of 2018.[162] Thus, CLECs in the market for dark fiber may lease commercial

---

[158] CMA Report at 13.

[159] *See* ZAYO, *Dark Fiber*, https://www.zayo.com/services/dark-fiber/ (last visited Feb. 3, 2020); Letter from Jonathan Banks, Senior Vice President, Law & Policy, USTelecom, to Marlene Dortch, Secretary, FCC, WC Docket No. 18-141, at 1 (filed Sept. 4, 2018) (noting that Zayo reported 11.8 million miles as of August 2018).

[160] UNITI, *Uniti Fiber*, https://uniti.com/fiber/ (last visited Feb. 4, 2020); CENTURYLINK, *CenturyLink Completes Divestiture of Dark Fiber Strands to Uniti* (May 10, 2018), http://news.centurylink.com/2018-05-10-CenturyLink-completes-divestiture-of-dark-fiber-strands-to-Uniti.

[161] USTelecom May 6, 2019 *ex parte* at 2 (citing Woroch/Calzaretta Declaration at 2, 5).

[162] *See* CMA Report at 13 and n.41.

dark fiber or BDS transport (either TDM or IP-based) from various third parties, including ILECs as well as other CLECs; they may also bond DS1 BDS transport to attain greater bandwidth and convert aggregated IP-based traffic to TDM using widely available equipment that supports this technical functionality. As the Commission has found, this marketplace for dark fiber is thriving; many competitors – including mobile wireless service providers, CLECs, and other transport providers – obtain dark fiber transport pursuant to conventional commercial arrangements rather than as UNEs.[163] Additionally, USTelecom member data indicates that the vast majority of dark fiber is sold in counties deemed competitive under the competitive market test established in the *BDS Order*. In those locales, the market disciplines prices and practices far better than a forced unbundling regime could hope to manage.

This evidence is consistent with the Commission's broader findings about the transport marketplace generally. In the *BDS Order*, the Commission correctly found that the market for transport offerings – a class of services which includes interoffice dark fiber – is competitive nationwide, even without accounting for UNEs.[164] In the *UNE Transport Forbearance Order*, the Commission applied a more conservative analysis and found that the presence of alternative competitive fiber within half a mile of a price cap LEC wire center creates the same competitive marketplace dynamics for competitive LECs relying on UNE transport as it creates for BDS transport.[165] The market's nationwide competitiveness refutes claims that CLECs require access to unbundled dark fiber in any location

[163] *See, e.g.*, *BDS Order*, 32 FCC Rcd at 3477 para. 35 and nn.109-10 (citing evidence that CLECs provide dedicated services via local fiber transmission facilities that they own or acquired as dark fiber pursuant to long-term lease arrangements).

[164] *BDS Order*, 32 FCC Rcd at 3499 para. 85.

[165] *UNE Transport Forbearance Order*, 34 FCC Rcd at 5791-94 paras. 54-58.

Although CLECs have asserted a general "need" for unbundled dark fiber transport,[166] they simultaneously highlight the fact that they have largely, if not entirely, moved on from reliance on these UNEs.[167] Other CLECs improperly ask that the Commission protect not competition itself (which does not rely on UNEs) but rather their own specific business plans (which do).[168] For purposes of the Commission's impairment analysis, however, the critical inquiry is *not* whether CLECs have used or are still nominally using dark fiber UNEs. The impairment analysis very specifically does not concern itself with a specific "carrier's impairment with reference to that carrier's particular business strategy," given that "such an approach could reward those carriers that are less efficient or whose business plans simply call for greater reliance on UNEs."[169] Rather, as noted repeatedly above, the impairment analysis asks simply whether a reasonably efficient competitor has duplicated the ILECs' facilities, could do so, or could economically obtain the element on the market. Based on the overwhelming

[166] *See, e.g.*, INCOMPAS Section 706 Comments at 11-12 (asserting, without providing specific examples, that "many competitive providers" use dark fiber and other UNEs to enter and compete in the broadband marketplace); *see also* Reply Comments of Verizon, WC Docket No. 18-141, at 7 & n.20 (filed May 28, 2019) (showing that CLEC assertions about dark fiber being "critical" or "needed" are supported only by vague and/or limited anecdotal evidence).

[167] *See, e.g.*, Opposition of Sonic Telecom, LLC, WC Docket No. 18-141, at 4-5 (filed Aug. 6, 2018) (stating that Sonic "uses just two dark fiber interoffice transport UNEs to transport traffic to and from over 8,500 fiber customers"); Declaration of Fletcher Kittredge para. 13, attached as Attachment 10 to INCOMPAS *et al.* Oppostion (filed Aug. 6, 2018) ("Competitive Carriers Group Opp.") ("Eight years ago GWI was entirely dependent on dark fiber interoffice transport UNEs. In the intervening interval, GWI has replaced most dark fiber interoffice transport UNEs with dark fiber it has constructed itself or in partnership with others.").

[168] *See, e.g.*, Opening Comments of Raw Bandwidth Telecom Inc. et al., WC Docket No. 18-141, at 15 (filed Aug. 6, 2018) ("If dark fiber unbundled dedicated transport UNE availability were removed, we'd very likely have to exit every one of [our] COs as there are no cost-effective transport options.").

[169] *TRRO*, 20 FCC Rcd at 2547-48 para. 25 (internal quotations, citation omitted).

evidence, the answer to that central question is an unequivocal yes. And because the agency "presumes that the reasonably efficient competitor would use reasonably efficient technologies and take advantage of existing alternative facilities deployment where possible,"[170] any evidence about a particular CLEC's continued reliance on dark fiber UNEs is beside the point.

In short, dark fiber UNEs now play a negligible role in the marketplace, and those seeking access to this element have ample alternatives available. In fact, the record evidence regarding unbundled dark fiber transport is far less balanced than the *NPRM*'s brief overview might suggest.[171] The Commission should therefore conclude that, on a nationwide basis, providers are not impaired without access to dark fiber UNEs. While the evidence clearly supports that outcome, at a bare minimum, the Commission should adopt the *NPRM*'s proposal to find that a CLEC "within a half mile of alternative fiber would not be impaired without access to UNE Dark Fiber Transport because it should be able to obtain such transport … on a commercial basis at competitive rates, or by building its own transport network."[172]

2. Forbearance from Dark Fiber Transport Unbundling Obligations Is Also Warranted on a Nationwide Basis or at Least to Wire Centers Within a Half Mile of Alternative Fiber

This same evidence compels the independent conclusion that forbearance from dark fiber transport unbundling is appropriate on a nationwide basis, or at least for wire centers within a

[170] *NPRM* para. 7 (quoting *TRRO*, 20 FCC Rcd at 2547 para. 24; *id.* at 2549 para. 28; *TRO*, 18 FCC Rcd at 17045, para. 97) (internal quotations, citations omitted)).

[171] *Id.* paras. 78-79.

[172] *Id.* para. 73.

half mile of alternative fiber, for all of the reasons articulated in the *UNE Transport Forbearance Order*.[173]

First, enforcement of dark fiber transport unbundling obligations is not necessary to ensure that rates and practices are just and reasonable, and not unjustly or unreasonably discriminatory.[174] The Commission found in the *UNE Transport Forbearance Order* that, following forbearance, along routes where the UNE-triggering endpoint has nearby competitive fiber, market forces will ensure just and reasonable commercial interoffice transport prices in the absence of UNE DS1/DS3 transport availability.[175] It therefore concluded that competition will more effectively ensure just and reasonable prices for transport and the end-user services provided via transport than maintenance of these UNE obligations.[176] There is no reason to expect otherwise in the case of dark fiber UNEs, given the alternatives described above.

[173] In this respect, USTelecom highlights that the Commission did not decline in the *UNE Transport Forbearance Order* to forbear from enforcing dark fiber transport unbundling obligations on the merits. Rather, USTelecom withdrew its request. *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks*, Order, 34 FCC Rcd 5075, 5076 para. 3 (WCB 2019) (dismissing this portion of USTelecom's forbearance request without prejudice). When USTelecom proposed to limit any relief from transport unbundling to routes between wire centers that qualify as Tier 1 or Tier 2 (an offer that the Commission rejected, *see UNE Transport Forbearance Order*, 34 FCC Rcd at 5794 para. 59 n.193), USTelecom made absolutely no concessions as to the competitiveness of the marketplace for dark fiber transport, as INCOMPAS has oddly claimed. Reply Comments of INCOMPAS, WC Docket No. 18-141 *et al.*, at 16 (filed May 28, 2019).

[174] 47 U.S.C. § 160(a)(1).

[175] *UNE Transport Forbearance Order*, 34 FCC Rcd at 5794 para. 59 (noting the good faith commercial solutions that would arise from the framework developed in the *BDS Remand Order*).

[176] *Id.* at 5796 para. 62.

Second, and for the same reasons, enforcement of dark fiber transport unbundling obligation is not necessary for the protection of consumers.[177] Widespread and increasing competition in the provision of transport will drive down prices and provide competitive alternatives to those services, which in turn will benefit consumers.[178]

Finally, forbearance from dark fiber transport unbundling obligations is consistent with the public interest.[179] As the Commission found in the *UNE Transport Forbearance Order*, "[b]ecause disparate treatment of similarly situated competitors creates marketplace distortions that may harm consumers, removing unneeded UNE DS1/DS3 Transport obligations will eliminate such distortions and thereby foster competitive conditions, enhancing competition among providers of telecommunications services."[180] The same is true here.

In addition, forbearance for dark fiber UNEs will facilitate additional deployment of next-generation networks.[181] As noted above, CLECs that previously relied on dark fiber UNEs have shifted to reliance on CLEC-built fiber facilities. That fact corroborates the Commission's prediction in the *UNE Transport Forbearance Order* that "nearby fiber providers within a half mile of incumbent LEC wire centers where competitive LECs demand interoffice transport will deploy fiber and offer different transport routes over their fiber networks that meet the transport needs of competitive LECs that can no longer rely on UNE DS1/DS3 Transport."[182] And, as

[177] 47 U.S.C. § 160(a)(2).

[178] *UNE Transport Forbearance Order*, 34 FCC Rcd at 5795-96 paras. 61-62.

[179] 47 U.S.C. § 160(a)(3).

[180] *UNE Transport Forbearance Order*, 34 FCC Rcd at 5796 para. 63.

[181] *Id.*

[182] *Id.*

discussed above, the Commission has routinely considered the effect of its policies on deployment incentives in assessing whether forbearance will serve the public interest.[183] Moreover, particularly in the era of 5G wireless, the fact that some new deployment might occur in the middle mile rather than the last mile would be a positive, not negative, result of forbearance.

3. Unbundling Mandates Are Prohibited Under Governing Law Because the Markets Competitors Serve Using Unbundled Dark Fiber Transport Are Competitive

The extensive competition among providers of dark fiber transport means that continuing to require that it be unbundled would be not just unnecessary but unlawful. In light of the discussion above, "there is no reasonable basis for thinking that competition is suffering."[184] In fact, competition is so prevalent that dark fiber UNEs are not even a preferred option, to the point that they have become a negligible aspect of the marketplace. Under these circumstances, there is no basis for perpetuating the limited obligations for unbundling dark fiber transport.[185]

F. The Commission Should Lift NID and OSS Unbundling Obligations

NIDs (defined as any means of interconnecting an ILEC's distribution plant to wiring at a customer premises location)[186] and OSS (pre-ordering, ordering, provisioning, maintenance and repair, and billing functions supported by an ILEC's database and information)[187] are UNE services with no stand-alone value absent UNE access to other ILEC assets. In light of the exact

[183] *See, e.g., supra* notes 118-19, 134.

[184] *USTA I,* 290 F.3d at 422.

[185] *See supra* Section III.A.3 (describing *TRRO* holdings that unbundling should not be required for the provision of service to already-competitive markets).

[186] 47 C.F.R. § 51.319(c).

[187] *Id.* § 51.319(f).

market conditions that warrant lifting of DS1-, DS0-, narrowband voice-grade loop-, and dark fiber-UNE obligations, there is no reason to maintain NID and OSS UNE obligations.

1. Competitors Are Not Impaired Without Access to Unbundled NIDs and OSS

As the *NPRM* makes plain, the value of stand-alone NIDs to competition is an issue amenable to short resolution, for competitive carriers are *on record* as stating that "[a]s a practical matter, [they] do not purchase network interface device elements separate from unbundled loops."[188] Where competitors *acknowledge* they are not impaired sans access to stand-alone unbundled NIDs, there can be no argument that such access is necessary. For similar reasons, the elimination of stand-alone OSS UNEs – which are primarily used for the provision of *other* UNEs – would equally not inhibit competition.

While two specific entities have claimed they rely on UNE OSS to serve their non-UNE based customers,[189] it once again is not the Commission's job to protect individual competitors from their own choices, or from their own reliance on arbitrage opportunities that saddle consumers and ILECs with the costs of outdated regulations. As noted above, the relevant inquiry would look to the impact on reasonably efficient competitors – not to a specific "carrier's impairment with reference to that carrier's particular business strategy," given that "such an approach could reward those carriers that are less efficient or whose business plans simply call for greater reliance on UNEs."[190]

---

[188] *NPRM* para. 81 (quoting Competitive Carriers Group Opp. at 24); *see also id.* (noting that "AT&T is also on the record stating it sells no UNE NIDs").

[189] *NPRM* para. 85 & n.266.

[190] *TRRO*, 20 FCC Rcd at 2547-48 para. 25 (internal quotations, citation omitted).

Given the availability of OSS or analogous functions at competitive rates for both interconnection and number porting purposes, and given that the previous purpose of maintaining unbundled OSS is (*i.e.*, serving enterprise customers[191]) is obviated by the Commission's rightful determination of wide-spread competition in the BDS market – it can no longer be the case that lack of access to stand-alone unbundled OSS would impair competition.

2. Forbearance from NID and OSS Unbundling Obligations Is Also Warranted

For these reasons, the Commission should forbear from NID and OSS UNE obligations under Section 10. UNEs that competitors do not rely on are not necessary to ensure just and reasonable charges, practices, classifications, or regulations by, for, or in connection with telecommunications carriers or telecommunications service.[192] Nor is the enforcement of NID and OSS UNE obligations necessary for the protection of customers, given their lack of utility.[193] And elimination of regulatory burdens that serve no purpose plainly serves the public interest.[194]

3. Unbundling Mandates Are Prohibited Under Governing Law Because the Markets Competitors Serve Using Unbundled NIDs and OSS Are Competitive

As explained in the sections above, governing law dictates that where competitive markets exist, unbundling mandates are impermissible.[195] Accordingly, the Commission cannot continue to impose UNE obligations for NIDs and OSS.

---

[191] *TRO*, 18 FCC Rcd at 17334 para. 561.

[192] *See* 47 U.S.C. § 160(a)(1).

[193] *Id.* § 160(a)(2).

[194] *Id.* § 160(a)(3).

[195] *See supra* Section III.A.3 (describing *TRRO* holdings that unbundling should not be required for the provision of service to already-competitive markets).

G. The Commission Should Forbear from Enforcing Avoided-Cost Resale Mandates with Respect to Non-Price Cap ILECs

In the *UNE Analog Loop and Avoided-Cost Resale Forbearance Order*, the Commission forbore from enforcing Section 251(c)(4)'s avoided-cost resale mandate with respect to price cap ILECs.[196] As the *NPRM* indicates, the rationales on which the Commission relied there – including "the breadth of the voice service marketplace and the number of wholesale input alternatives to competitive LECs seeking to continue serving customers currently served by Avoided-Cost Resale"[197] – also apply in the case of non-price cap ILECs.

As an initial matter, nothing about the pending challenge to the Commission's *UNE Analog Loop and Avoided-Cost Resale Forbearance Order*[198] undermines the case for forbearance, whether regarding price cap or non-price cap ILECs. That Order, of course, remains in force. Moreover, the substantive arguments raised by petitioners INCOMPAS and the California Public Utilities Commission ("CPUC") in the pending litigation are without merit.[199] The CPUC and INCOMPAS complain that the Commission did not apply the test a

[196] *UNE Analog Loop and Avoided-Cost Resale Forbearance Order*, 34 FCC Rcd at 6523 para. 38.

[197] *See NPRM* para. 92 (quoting *UNE Analog Loop and Avoided-Cost Resale Forbearance Order*, 34 FCC Rcd at 6523 para. 38).

[198] *COMPTEL d/b/a INCOMPAS v. FCC*, Case Nos. 19-1164 *et al.* (D.C. Cir.).

[199] Petitioners' procedural arguments are also meritless. Here, however, USTelecom focuses on substantive claims. This is because, even assuming *arguendo* that the procedural complaints had merit, those arguments are specific to the *UNE Analog Loop and Avoided-Cost Resale Forbearance Order*, and the Commission could (and presumably would) avoid any similar infirmities in drafting an order resolving this docket.

previous Commission had applied in the *2010 Qwest Phoenix Order*.[200] They neglect to mention that the agency's *BDS Order rejected* the proposition that the *Qwest Phoenix Order*'s framework must be applied in all cases[201] – or that that finding was affirmed by the Eighth Circuit, which repudiated any suggestion that "the FCC is bound to apply the traditional market power framework" embraced by the *Qwest Phoenix Order*.[202]

INCOMPAS and the CPUC also argue that the Commission neglected to address the fact that certain customers require access to TDM facilities, and cannot rely on next-generation substitutes.[203] This claim, however, is flatly wrong: The Commission explicitly discussed the fact that, after avoided-cost resale mandates are lifted, competitors in need of ILEC facilities will continue to enjoy wholesale access to ILECs' TDM offerings on a *commercial* basis.[204] INCOMPAS suggests that the Commission was precluded from forbearing from avoided-cost resale because it never had done so before.[205] This, of course, is not so. By definition, every

---

[200] *See COMPTEL d/b/a INCOMPAS v. FCC*, Opening Brief of California Public Utility Commission, at 34 (filed Jan. 13, 2020; corrected Jan. 21, 2020) ("CPUC Brief"); *COMPTEL d/b/a INCOMPAS v. FCC*, Opening Brief of INCOMPAS, at 24-29 (filed Jan. 13, 2020) ("INCOMPAS Brief").

[201] *BDS Order*, 32 FCC Rcd at 3515 paras. 121-22.

[202] *See generally Citizens Telecomms.*

[203] *See* INCOMPAS Brief at 35-42; CPUC Brief at 34-38.

[204] *UNE Analog Loop and Avoided-Cost Resale Forbearance Order* at para. 19. INCOMPAS suggests that these offerings will be overpriced because IP alternatives are not true substitutes for those purchasers requiring TDM. INCOMPAS Brief at 43. This claim flouts basic economics. ILECs will price their wholesale offerings to compete for the business of *all* wholesale customers, not the small subset that purportedly requires TDM. Prices, therefore, will reflect the need to compete against CLEC, cable, fixed wireless, and other alternatives – any ILEC that prices above these levels is apt to see traffic migrate from its network to competing networks, resulting in a complete loss of the revenue associated with the service at issue.

[205] INCOMPAS Brief at 26-28.

grant of forbearance affects elements or markets in respect to which the Commission has not previously forborne. Indeed, as market conditions change, the Commission should be *expected* to expand the scope of forbearance.

Equally curious are INCOMPAS's claims that (1) the Commission was barred from considering deployment in its forbearance inquiry because the avoided-cost resale provision does not explicitly mention deployment[206] and (2) the Commission's approach to forbearance must somehow be "consistent with" the Sections 251(c)(4) and 252(d)(3).[207] Both of these contentions misunderstand the relationship between Section 10 and Section 251 – the criteria for forbearing are set out in Section 10, and need not be conformed to the particular provision from which the agency is considering forbearing.[208]

In short, there is every reason to believe that the *UNE Analog Loop and Avoided-Cost Resale Forbearance Order* both should and will be affirmed.

Virtually every point that order made in support of the Commission's decision as to price cap ILECs' resale obligations applies equally here. It remains the case that "Avoided-Cost Resale requirements . . . serve only to prolong dependence on legacy TDM voice services rather than pave the way for meaningful facilities-based competition over next-generation networks providing advanced communications capability."[209] It remains the case that the Commission's

---

[206] *Id*. at 33-34.

[207] *Id*. at 32.

[208] *See Verizon Tel. Cos. v. FCC*, 570 F.3d 294, 300-01 (D.C. Cir. 2009) (holding that analyses under Sections 10 and 251 are wholly distinct, and that the Commission need only assess whether forbearance is warranted under Section 10).

[209] *UNE Analog Loop and Avoided-Cost Resale Forbearance Order*, 34 FCC Rcd at 6523 para. 38.

"competition policy should no longer encourage business models that rely on supplying legacy TDM services by affirmatively protecting the provision of such services through regulated avoided-cost wholesale pricing."[210] And it remains the case that avoided-cost resale "increases the costs of" *all* ILECs, not simply price cap ILECs, and thereby "distorts competition by imposing 'a burdensome cost' on just one component of the industry, incumbent LECs."[211] Likewise, in non-price cap territories as well as price cap territories, avoided-cost resale "deters the deployment of new, next-generation networks by competitive LECs, thus decreasing facilities-based competition." In short, "Avoided-Cost Resale has outlived its intended purpose of opening monopoly local telephone service markets to competition."[212]

The plethora of voice service options that required forbearance in price cap areas is also evident in the territories of non-price cap ILECs, refuting any suggestion that Americans in the service areas of non-price cap ILECs are somehow less deserving of the benefits of forbearance than those in the territories served by price cap carriers. As noted above, as of December 2018, cable providers offered service to OVER 90 percent of the U.S. population and 90 percent of households had access to cable services with at least 25 Mbps download speeds.[213] In addition, per the latest Commission data as of 2017, 99.8 percent of all Americans had access to Mobile

[210] *Id.*

[211] *Id.* at 6523 para. 39

[212] *Id.* at 6523-24 para. 40.

[213] *See supra* at 32.

LTE service.[214] On top of this, CLECs would, post-forbearance, retain the ability to resell ILEC services under Section 251(b)(1). Thus, there is no less reason to forbear here than in the price cap territories at issue in the *UNE Analog Loop and Avoided-Cost Resale Forbearance Order*.

Unsurprisingly, then, the Section 10 forbearance factors warrant forbearance from enforcement of Section 251(c)(4) avoided-cost resale obligations against non-price cap ILECs. First, continued enforcement of these obligations is not necessary to ensure that rates or practices remain just, reasonable, and not unjustly or unreasonably discriminatory.[215] As the Commission held in the *UNE Analog Loop and Avoided-Cost Resale Forbearance Order*, alternative voice offerings works to prevent unjust, unreasonable, or unjust and unreasonable discrimination. Moreover, other core Title II provisions, including Sections 201, 202, and 208, will remain in force post-forbearance, providing ample protections against and allowing consumers to bring complaints to enforce their rights.[216] And, as the Commission has noted, "the role that TDM-based Avoided-Cost Resale plays in ensuring just and reasonable rates is questionable," given competition's strong role in policing the marketplace.[217]

---

[214] *Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 2019 Broadband Deployment Report, 34 FCC Rcd 3857, 3874 Fig. 2a (2019) ("Deployment (Millions) of Mobile LTE with a Minimum Advertised Speed of 5 Mbps/1 Mbps"). The figure remains exceedingly high—specifically, 89.0 percent – for "Deployment (Millions) of Mobile LTE with a Median Speed of 10 Mbps/3 Mbps." *Id.* at 3874 Fig. 2b. And these data points do not reflect the enormous growth the wireless industry itself has boasted of in 2018, 2019, and the beginning of 2020.

[215] *See* 47 U.S.C. § 160(a)(1).

[216] *See UNE Analog Loop and Avoided-Cost Resale Forbearance Order*, 34 FCC Rcd at 6525 para. 43.

[217] *Id.* at 6527 para. 48.

Second, continued enforcement of avoided-cost resale obligations against non-price cap ILECs is not necessary to protect consumers.[218] "Competitive LECs can continue to provide TDM voice service to end-user customers using section 251(b)(1) resale, commercial substitutes for resale, or other alternative arrangements. In addition, these customers will increasingly move to newer services offered over cable, wireless, competitive LEC, or incumbent LEC networks."[219] Further, Section 214's discontinuance provisions with respect to legacy voice service will remain in force, affording consumers additional protections.

Third, forbearance would advance the public interest.[220] "Eliminating outdated and unnecessary regulation serves the public interest by generally reducing carriers' costs and, in turn, benefit[ting] consumers through lower rates and/or more vibrant competitive offerings."[221] Prolonged reliance on avoided-cost resale, moreover, "could deter deployment of facilities-based competitive alternatives."[222]

For these reasons, the Commission should extend its prior forbearance with respect to avoided-cost resale to cover non-price cap ILECs.

H. The Commission Should Allow for a Brief (But Only Brief) Transition Period.

Finally, USTelecom urges the Commission to adopt a reasonable and brief transition period for carriers to move away from their embedded base of UNEs to other services and/or

---

[218] *See* 47 U.S.C. § 160(a)(2).

[219] *UNE Analog Loop and Avoided-Cost Resale Forbearance Order*, 34 FCC Rcd at 6527 para. 49.

[220] *See* 47 U.S.C. § 160(a)(3).

[221] *UNE Analog Loop and Avoided-Cost Resale Forbearance Order*, 34 FCC Rcd at 6527-28 para. 50 (internal quotation marks and citations omitted).

[222] *Id.* at 6528 para. 51.

arrangements. The Commission has taken such an approach in the past,[223] and should do so again here. Specifically, the Commission should impose an 18-month transition period, which would match or exceed periods it has adopted in the past. In no case should the transition period adopted extend beyond the period set in place by the *UNE Analog Loop and Avoided-Cost Resale Forbearance Order*.

USTelecom specifically proposes that UNEs ordered during the period after the Commission's vote on an eventual Order in this matter but prior to its effective date be provided subject to this transition. As of the Order's effective date, no new orders should be permitted. Instead, after that date, new orders for service should be addressed via commercial negotiations (or tariffed services, where available). Further, upon the Order's effective date, ILECs should be permitted to increase rates for their embedded base of UNEs by up to 25 percent. CLECs should be allowed to keep in place any of their embedded base of UNEs, along with collocation arrangements necessary for access to such UNEs, until 18 months from the effective date of the elimination of these obligations. Within the same window, CLECs should be required to disconnect (without penalty) or transition their embedded base of UNEs to alternative facilities or arrangements. Once the 18-month window closes, ILECs should be empowered to convert any UNEs that remain in place to alternative arrangements offering comparable functionality at the ILEC's then-existing market rates. Should parties' interconnection agreement require them to negotiate an amendment to effectuate the forbearance grant, the embedded UNE rates should be subject to true-up to the applicable ILEC rate increase (up to 25 percent) upon the amendment of the relevant interconnection agreements.

[223] *See, e.g., TRRO*, 20 FCC Rcd at 2536-37 para. 5.

Critically, the above-described transition would only reflect a *default* process. Carriers would remain free to negotiate alternative arrangements superseding the transition. Given the extreme proliferation of intermodal facilities-based competition, and the strong incentives ILECs will face to provide their offerings on a commercial basis at just and reasonable rates and terms, forward-thinking competitors will continue to enjoy numerous competitive options. For this reason, the competitive market conditions that warrant relief from UNE obligations also dictate the transition process not be overly delayed.

IV. CONCLUSION

USTelecom commends the Commission for launching this much-needed inquiry into updating its rules to reflect the modern communications marketplace. USTelecom strongly urges the agency to take the steps it has proposed. Doing so will help ensure a faster transition to next-generation networks and a better, more competitive future for American consumers.

Respectfully submitted,

USTELECOM –
THE BROADBAND ASSOCIATION

By: *Patrick R. Halley*
Patrick R. Halley
Senior Vice President, Policy & Advocacy

Kristine Hackman
Vice President, Policy & Advocacy

USTelecom – The Broadband Association
601 New Jersey Avenue NW, Suite 600
Washington, D.C. 20001

February 5, 2020