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May 28, 2019

## **VIA ECFS**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

**Re:   *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**

Dear Ms. Dortch:

Pursuant to the *Protective Order* in the above-captioned proceeding,<sup>1</sup> Granite Telecommunications, LLC, Manhattan Telecommunications Corporation d/b/a Metropolitan Telecommunications, and Access One, Inc. hereby submit for filing a redacted, public version of the enclosed Reply Comments. The Highly Confidential version of the Reply Comments has been filed by hand with the Office of the Secretary and will be made available for review pursuant to the terms of the *Protective Order*.

Please contact me if you have any questions regarding this submission.

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<sup>1</sup> *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks*, Order, 33 FCC Rcd. 5290 (2018) (“*Protective Order*”).

**REDACTED – FOR PUBLIC INSPECTION**

Marlene H. Dortch  
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Respectfully submitted,

/s/ Thomas Jones  
Thomas Jones

*Counsel for Granite Telecommunications, LLC  
Manhattan Telecommunications Corporation d/b/a  
Metropolitan Telecommunications, and Access One, Inc.*

Enclosure

cc: Terri Natoli  
Edward Krachmer  
Michele Berlove  
Pamela Megna

Before the  
Federal Communications Commission  
Washington, DC 20554

In the Matter of	)	
	)	
Petition of USTelecom for Forbearance	)	WC Docket No. 18-141
Pursuant to 47 U.S.C. § 160(c) to Accelerate	)	
Investment in Broadband and	)	
Next-Generation Networks	)	

**REPLY COMMENTS OF GRANITE, METTEL, AND ACCESS ONE**

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Before the  
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**REPLY COMMENTS OF GRANITE, METTEL, AND ACCESS ONE**

Granite Telecommunications, LLC (“Granite”), Manhattan Telecommunications Corporation d/b/a Metropolitan Telecommunications (“MetTel”), and Access One, Inc. (“Access One” and, together with Granite and MetTel, “the Joint Parties”), through their undersigned counsel, submit these reply comments in response to recent ex parte filings by USTelecom—The Broadband Association (“USTelecom”)<sup>1</sup> and comments of its member ILECs (together with USTelecom, “the ILECs”) in the above-captioned proceeding.<sup>2</sup>

**I. INTRODUCTION AND SUMMARY**

As the Joint Parties have shown, USTelecom has not met its burden of proof to demonstrate that the public in general and competition in particular will be advantaged by

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<sup>1</sup> Letter from Patrick R. Halley, Senior Vice President, Advocacy and Regulatory Affairs, USTelecom—The Broadband Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-141 (May 6, 2019) (“USTelecom May 6 Letter”); Letter from Patrick R. Halley, Senior Vice President, Advocacy and Regulatory Affairs, USTelecom—The Broadband Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-141 (May 10, 2019) (“USTelecom May 10 Letter”); Letter from Patrick R. Halley, Senior Vice President, Advocacy and Regulatory Affairs, USTelecom—The Broadband Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-141 (May 22, 2019) (“USTelecom May 22 Letter”).

<sup>2</sup> Comments of AT&T, WC Docket No. 18-141 (May 9, 2019) (“AT&T May 9 Comments”); Comments of Verizon, WC Docket No. 18-141 (May 9, 2019) (“Verizon May 9 Comments”).

forbearance from the avoided-cost resale requirement in Section 251(c)(4). It has now been over a year since the Petition<sup>3</sup> was filed, and the ILECs still have not attempted in any meaningful way to refute the evidence provided by the Joint Parties that (1) TDM-based telephone service provided via copper loops (“traditional TDM service”) constitutes a separate product market; (2) business and government customers – especially those with multiple locations – that rely on the unique characteristics of traditional TDM service continue to demand that service in large volumes; (3) ILECs have substantial and persisting market power in the provision of traditional TDM service; (4) avoided-cost resale under Section 251(c)(4) is essential to limiting ILECs’ ability to abuse that market power; and (5) the costs associated with maintaining avoided-cost resale regulation are minimal. Instead of addressing these basic facts, the ILECs continue to rely on misleading statistics regarding the sale of all types of voice services (consumer service, business service, TDM-based service, VoIP, etc.) in the aggregate.<sup>4</sup> In doing so, they fail to account for the relevant product market or the minimal costs associated with avoided-cost resale, rendering their analysis valueless.

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<sup>3</sup> 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 (filed May 4, 2018) (“Petition”).

<sup>4</sup> In its most recent substantive submission in the forbearance petition docket, USTelecom once again fails to offer any facts or analysis in support of its assertion that forbearance from Section 251(c)(4) is warranted. *See generally* USTelecom May 22 Letter. Moreover, USTelecom claims, incorrectly, that “no CLEC has identified any specific markets that they would be forced to exit following a grant of forbearance.” *Id.* at 2. In fact, as previously explained, **[BEGIN HCI]**

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Opposition of Granite to USTelecom’s Forbearance Petition, WC Docket No. 18-141, at 16-21 (Aug. 6, 2018) (“Granite Opp.”); Declaration of Larry Antonellis ¶ 42 (Aug. 6, 2018), attached as Attachment A to Granite Opp. (“Antonellis Decl.”).

Rather than revisit all of these issues, the Joint Parties submit these reply comments to supplement the record in three respects. First, the Joint Parties provide data demonstrating that the demand for traditional TDM service among federal and state government customers remains strong today and will almost certainly remain strong in the future. This shows that retaining Section 251(c)(4) avoided-cost resale is extremely important for those customers.

Second, the Joint Parties set the record straight on the data regarding CLECs' resale of traditional TDM service in the Commission's *November 2018 VTS Report*.<sup>5</sup> This report is the basis for the ILECs' assertion that resale of ILEC services is of no real significance in the market. However, when the statistics in that report for the relevant market, i.e., traditional TDM service provided to business and government customers, are examined, they confirm that competitors' resale of ILEC traditional TDM service remains an indispensable check against ILEC abuse of market power. In fact, the data in *VTS Reports*<sup>6</sup> from prior years show that the importance of resale of traditional TDM service has remained steady over time and, recently, has *increased*.

Third, the Joint Parties respond to the ILECs' most recent attempts to rely on Form 477 data to show the extent of broadband deployment. In the telephone service context, the 477

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<sup>5</sup> FCC, *Voice Telephone Services Status as of June 30, 2017*, at Table 1 (Nov. 2018), <https://docs.fcc.gov/public/attachments/DOC-355165A1.pdf> ("*November 2018 VTS Report*").

<sup>6</sup> *Id.* at Table 1; FCC, *Voice Telephone Services Status as of December 31, 2016*, at Table 1 (Feb. 2018), <https://docs.fcc.gov/public/attachments/DOC-349075A1.pdf>; FCC, *Voice Telephone Services Status as of June 30, 2016*, at Table 1 (Apr. 2017), <https://docs.fcc.gov/public/attachments/DOC-344500A1.pdf>; FCC, *Voice Telephone Services Status as of December 31, 2015*, at Table 1 (Nov. 2016), <https://docs.fcc.gov/public/attachments/DOC-342357A1.pdf>; FCC, *Voice Telephone Services Status as of June 30, 2015*, at Table 1 (Aug. 2016), <https://docs.fcc.gov/public/attachments/DOC-340665A1.pdf>; FCC, *Voice Telephone Services Status as of December 31, 2014*, at Table 1 (Mar. 2016), <https://docs.fcc.gov/public/attachments/DOC-338629A1.pdf> (collectively, "*VTS Reports*").

broadband deployment information pertains only to the availability of VoIP services, which are irrelevant to the market for traditional TDM service. But even if this were not the case, the Form 477 broadband deployment data cannot be used in this proceeding to show the availability of VoIP. This is because it is now widely recognized by USTelecom itself, Chairman Pai, Commissioners O’Rielly, Rosenworcel and Starks, the Secretary of Agriculture, and numerous members of Congress that Form 477 data overstates the extent to which broadband (and, by implication, VoIP) is available. It should therefore be clear by now that USTelecom and its ILEC members have failed to prove that forbearance should be granted with regard to the application of avoided-cost resale for traditional TDM service sold to business and government customers.

## II. DISCUSSION

### A. **The Joint Parties’ internal data show that government customers rely heavily on traditional TDM service.**

As the Joint Parties have explained at length, government customers demand traditional TDM service because of its unique characteristics, and that demand is likely to persist for the foreseeable future.<sup>7</sup> This continued demand can be seen in every aspect of the government

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<sup>7</sup> Letter from Thomas Jones, et al., Counsel for Granite Telecommunications, LLC, Manhattan Telecommunications Corporation d/b/a Metropolitan Telecommunications, and Access One, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-141, at 4-9 (Mar. 14, 2019) (“Joint Parties March 14 Letter”) (describing the regulatory and practical reasons why numerous federal agencies, including the Federal Aviation Administration, Federal Bureau of Investigation, and Department of Defense currently demand traditional TDM service and will do so for the foreseeable future); *see also, e.g.*, Declaration of William P. Zarakas ¶ 14 (Aug. 6, 2018), attached as Attachment B to Granite Opp. (observing that many business customers “are specifically seeking copper-based TDM service”); Granite Opp. at 16-21; Antonellis Decl. ¶¶ 9-27; Opposition of MetTel, WC Docket No. 18-141, at 4-6 (Aug. 6, 2018) (“MetTel Opp.”); Declaration of Sean J. Sullivan ¶¶ 11-21, attached to MetTel Opp.; Reply Comments of Granite in Support of Motion for Summary Denial and Opposition, WC Docket No. 18-41, at 9-10 (Sept. 5, 2018).



contracting process. For example, the General Services Administration (“GSA”) has sought to encourage federal agencies to transition from purchasing legacy telecommunications services, such as traditional TDM service, to IP-based services, such as VoIP. The centerpiece of that process is the Enterprise Infrastructure Solutions (“EIS”) program, which is a contractual framework for federal agencies to transition from legacy to IP services.<sup>8</sup> Federal agencies were scheduled to migrate to the EIS contract by 2020. However, in December 2018 – seven months *after* USTelecom asked the Commission to forbear from further enforcement of crucial regulatory protections for all customers everywhere – GSA announced that it had agreed to *extend by three extra years* legacy federal government telecommunications contracts expiring on or before May 2020, thereby delaying the transition to EIS to mid-2023.<sup>9</sup> A primary reason for

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<sup>8</sup> See Alan Thomas, *Extending Current Telecommunications Contracts To Allow For Successful EIS Transition*, GSABlog (Dec. 6, 2018), <https://www.gsa.gov/blog/2018/12/06/Extending-Current-Telecommunications-Contracts-To-Allow-For-Successful-EIS-Transition> (“In July 2017, GSA awarded the [EIS] contract, a game-changing [IT] contract that will improve how the federal government modernizes legacy IT and telecommunications infrastructure. The \$50 billion, 15-year, Best-in-Class acquisition vehicle is a one-stop shop for infrastructure modernization.”); *see also* GSA, EIS Fact Sheet, at 1 (Aug. 1, 2017), [https://www.gsa.gov/cdnstatic/EIS\\_Fact\\_Sheet.docx](https://www.gsa.gov/cdnstatic/EIS_Fact_Sheet.docx) (“EIS Key Objectives” are to “[s]implify the process of acquiring telecommunications and information technology products and services; [p]rovide cost savings through aggregated volume buying and price and spend visibility; [e]nable the procurement of integrated solutions; [p]romote participation by small businesses and foster competition;” and “[o]ffer a flexible and agile suite of services supporting a range of government purchasing patterns.”); *id.* at 1-2 (“EIS will deliver . . . [c]ost savings by increased supplier competition and price transparency via the GSA Pricer and Prices Paid in the GSA Acquisition Gateway, thus improving negotiation leverage of customers.”); *id.* at 3 (“EIS relaxed its geographical coverage requirement from contracts awarded in the past and reduced the number of mandatory services to promote competition.”).

<sup>9</sup> See Alan Thomas, *Extending Current Telecommunications Contracts To Allow For Successful EIS Transition*, GSABlog (Dec. 6, 2018), <https://www.gsa.gov/blog/2018/12/06/Extending-Current-Telecommunications-Contracts-To-Allow-For-Successful-EIS-Transition>.

this delay is that federal agencies – like many business entities – have been unable or unwilling to replace traditional TDM service with VoIP.<sup>10</sup>

To quantify the extent of federal government agencies’ reliance on traditional TDM service, Granite [BEGIN HCI]

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<sup>10</sup> See, e.g., Mark Rockwell, *Agencies Pivot as EIS Focuses on Modernization*, Federal Computer Week, Oct. 10, 2018, <https://fcw.com/articles/2018/10/10/eis-shifting-gears-rockwell.aspx> (explaining that “some agencies remain reluctant to release solicitations because of the complexity of modernizing their IT systems”); see also Joint Parties March 14 Letter at 4-9 (discussing “further evidence of the enduring importance of traditional TDM service to business and government customers”).

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MetTel **[BEGIN HCI]**

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In Access One’s experience, [BEGIN HCI]

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**B. An appropriate analysis of the Commission’s *VTs Reports* shows that resold ILEC lines are key to competition.**

The ILECs maintain that Form 477 data reported in the *November 2018 VTs Report*<sup>11</sup> support their request for forbearance from Section 251(c)(4) by demonstrating that non-ILEC retail telephone lines utilizing resold ILEC service represent (1) approximately five percent of

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<sup>11</sup> *November 2018 VTs Report* at Table 1. Rather than “CLEC,” the *VTs Reports* use the term “non-ILEC.” The Joint Parties use “CLEC” and “non-ILEC” interchangeably herein.

total retail telephone lines purchased in the U.S. and (2) ten percent of non-ILEC retail telephone lines.<sup>12</sup> USTelecom calculates these small percentages by comparing the number of TDM services provided by CLECs that resell ILEC services to (1) the total number of all types of telephone connections purchased in the U.S. (including VoIP, TDM, business, and residential) and (2) the total number of all types of telephone connections provided by competitive carriers in the U.S. (again, including VoIP, TDM, business, and residential).<sup>13</sup> But CLECs use resale of ILEC services almost exclusively to provide TDM service to business and government customers. By comparing the number of services provided by resale of ILEC service to totals that include categories of services that CLECs do not resell (most importantly, residential and VoIP), the USTelecom methodology produces artificially low percentages.

The correct approach is to compare the total number of lines served by CLECs reselling ILEC traditional TDM service to the total number of traditional TDM service (1) purchased by business and government customers in the U.S. and (2) provided by non-ILECs in the U.S. to business and government customers. These methodologies show that CLECs reselling ILEC services provide approximately one quarter of the traditional TDM service purchased by business customers in the U.S. and approximately two thirds of traditional TDM service provided by competitive carriers in the U.S. to business and government customers. These percentages attest to the important role that resale plays in the marketplace today. The correct calculations, and, in

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<sup>12</sup> See USTelecom May 6 Letter at 12-14; AT&T May 9 Comments at 15-17; Verizon May 9 Comments at 21-22. The ILECs' analysis does not include services competitors provide using UNEs. The analysis provided below by the Joint Parties also does not include services that competitors provide using UNEs.

<sup>13</sup> USTelecom May 6 Letter at 12-13; AT&T May 9 Comments at 15-16.

particular, the appropriate numerators and denominators for the calculations, are discussed in detail below.

***Appropriate Numerator.*** In performing their calculations, the ILECs use a numerator of 6.3 million non-ILEC retail lines that are provided via resale of ILEC services,<sup>14</sup> rounded from the total of 6,347,000 such lines set forth at Table 1, Reference Line 78 of the *November 2018 VTS Report*. The ILECs state that the 3.4 million ILEC wholesale lines provided to unaffiliated carriers, rounded from the total of 3,363,000 such lines reported at Reference Line 80, can be understood to represent a “lower bound” for the numerator in its calculations, and the 6.3 million non-ILEC retail lines relying on resold ILEC services represent an “upper bound” because “non-ILECs may channelize some portion of the wholesale lines they utilize to serve multiple subscribers over a single wholesale line reported by the ILEC.”<sup>15</sup> In the Joint Parties’ experience, it is almost always the case that wholesale lines are channelized to serve retail customers. Accordingly, 3.4 million lines, which likely represents the sale of a raw facility, is not a reasonable lower bound numerator for purposes of this calculation. However, a second viable numerator is as follows: 9,398,000 non-ILEC copper local loops, as shown on Reference Line 61, minus 1,772,000 non-ILEC UNE-L lines obtained from an unaffiliated entity, as shown on Reference Line 77, for a total of 7,626,000 lines. Accordingly, 7,626,000 is a reasonable upper bound numerator, and 6,347,000 is a reasonable lower bound numerator. Although the *November 2018 VTS Report* does not explicitly limit these data to services provided to business and government customers, the Joint Parties do not provide resold traditional TDM service to

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<sup>14</sup> USTelecom May 6 Letter at 13.

<sup>15</sup> *Id.* at 13 & n.58.

residential customers and believe that only a *de minimis* number of resold traditional TDM lines are provided by other CLECs to residential customers.<sup>16</sup>

***Appropriate Denominator.*** The ILECs use denominators of 119.2 million for *all* telephone lines nationwide and 63.4 million for *all* resold telephone lines.<sup>17</sup> Again, these totals include VoIP as well as circuit-switched lines and consumer as well as business lines. As mentioned, the use of these denominators is unreasonable even within the ILECs' flawed methodology because the numerators upon which the ILECs rely only include circuit-switched lines. In any event, the correct approach is to use a denominator that excludes VoIP and residential lines.

Table 1, Reference Line 19 of the *November 2018 VTS Report* reports 32,252,000 switched<sup>18</sup> access lines providing business and government grade telephone service, of which 10,939,000 are non-ILEC lines, as reported at Reference Line 21. To serve as appropriate denominators, these numbers should be reduced to exclude non-copper lines. Multiplying 32,252,000 by 87.5 percent (the percentage of total TDM access lines providing business and government grade telephone service over copper local loop lines – derived by using a numerator of 47,885,000 copper local loop lines (Reference Line 59) over a denominator of 54,748,000 switched access lines (Reference Line 13)),<sup>19</sup> yields a denominator of 28,220,500 copper-based

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<sup>16</sup> Competitors *do* rely on UNE-L service to serve residential customers, but UNE-L service is not included in this calculation.

<sup>17</sup> USTelecom May 6 Letter at 13.

<sup>18</sup> The Commission's reference to "switched" lines in the *November 2018 VTS Report* refers to lines that utilize TDM technology. To ensure consistency with the rest of the discussion in this pleading, we refer to the data for "switched" lines in the report as TDM.

<sup>19</sup> This calculation assumes that the share of copper-based services in the residential and business voice sectors is the same. However, this assumption likely yields a conservative denominator in



TDM access lines providing business and government grade telephone service. Multiplying 10,939,000 by the 87.5 percent factor yields a denominator of 9,571,625 non-ILEC copper-based TDM access lines providing business and government grade telephone service.<sup>20</sup>

**Results.** Using the numerators and denominators explained above, as of June 2017, non-ILEC resold TDM lines represent (1) between 22.5 percent (lower bound) and 27 percent (upper bound) of all copper-based TDM access lines providing business and government grade telephone service and (2) between 66.3 percent (lower bound) and 79.7 percent (upper bound) of non-ILEC copper-based TDM access lines providing business and government grade telephone service, as shown in Table 4.

**TABLE 4: ILEC TRADITIONAL TDM SERVICE RESOLD BY NON-ILECS, JUNE 2017<sup>21</sup>**

Resold Traditional TDM as a Percentage of All Bus./Gov. Copper-Based TDM (Lower Bound)	Non-ILEC Resold Traditional TDM as a Percentage of All Bus./Gov. Copper-Based TDM (Upper Bound)	Non-ILEC Resold Traditional TDM as a Percentage of All Non-ILEC Bus./Gov. Copper-Based TDM (Lower Bound)	Non-ILEC Resold Traditional TDM as a Percentage of All Non-ILEC Bus./Gov. Copper-Based TDM (Upper Bound)
22.5%	27.0%	66.3%	79.7%

What is more, as depicted in Figure 1, applying this methodology to data from the Commission’s *VTs Reports* from prior years reveals that non-ILEC traditional TDM lines have represented a significant portion of the relevant market over time, and, more recently, represent

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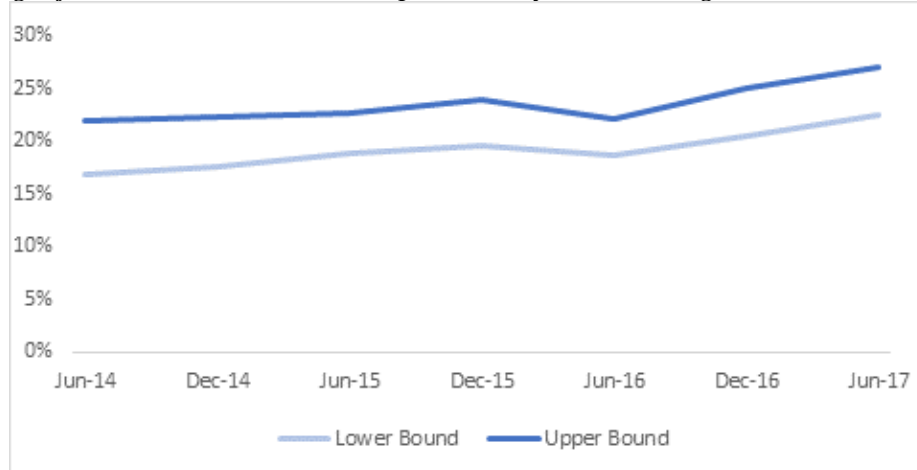
this instance, given the probability that more business voice services than residential voice services are provided via fiber.

<sup>20</sup> Another possible denominator would be the number of TDM access lines served via copper local loops by non-ILECs set forth in Table 1, Reference Line 61, namely 9,398,000. As explained, this total does not differentiate between residential and business lines, but it can be assumed to include business lines almost exclusively. If that denominator were used, the significance of non-ILEC resold TDM lines would be even greater than is described below.

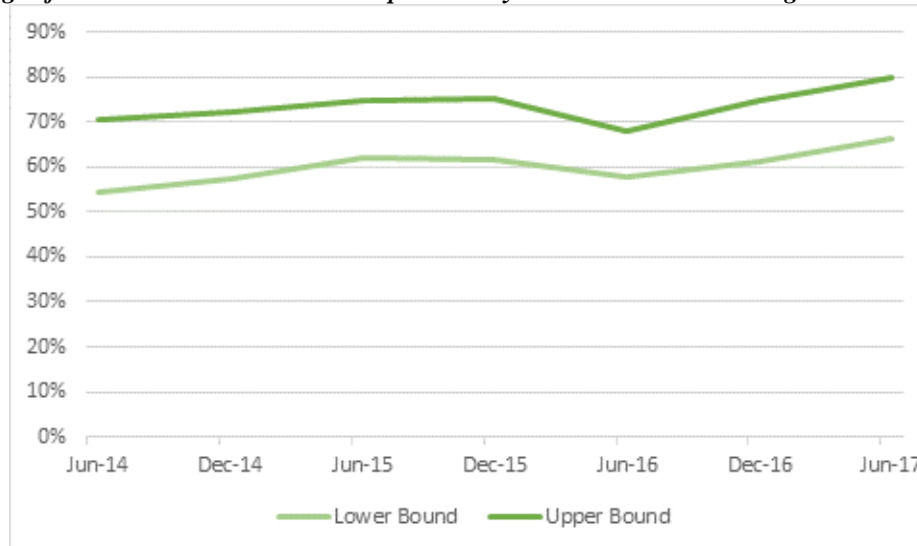
<sup>21</sup> *November 2018 VTs Report* at Table 1.

an *increasing* portion of the relevant market. As should be obvious, this analysis supports the conclusion that non-ILEC resold lines are key to ensuring that ILECs face competition.

**FIGURE 1. ILEC TRADITIONAL TDM SERVICE RESOLD BY CLECS, JUNE 2014- JUNE 2017<sup>22</sup>**  
*As a percentage of total traditional TDM service purchased by business and government customers in the U.S.*



*As a percentage of total traditional TDM service provided by CLECs to business and government customers in the U.S.*



<sup>22</sup> See note 6 *supra*. In some cases, the data reported in one *VTS Report* has been revised in a subsequent *VTS Report*. Wherever this has occurred, the Joint Parties have used the most recent figures reported for a given time period.

***Significant Demand for Resold Traditional TDM Service.*** An analysis of the *VTs Reports* from prior years also demonstrates that the demand for traditional TDM service provided by CLECs via resale to business and government customers has decreased far less over time than demand for such services provided by ILECs or than copper loops have been retired. Again, this reflects the high value that competitive carriers provide to customers when selling resold traditional TDM service. Moreover, to the extent that the volume of those services provided by competitive carriers has declined modestly over time, that is almost certainly due to the retirement of copper loops, not a decline in customer demand for the services offered by competitive carriers.

Reference Line 61 shows that copper loop services provided by non-ILECs was 12,076,000 in June 2014 and 9,398,000 in June 2017, a decline of approximately 22.2 percent. But subtracting customers served via UNE-L shows that the number actually decreased much less, from 8,431,000 in June 2014 to 7,626,000 in June 2017, or approximately 9.5 percent. In contrast, the copper-based TDM services provided by the *ILECs* are declining much more rapidly. Reference Line 60 shows that copper loop services provided by ILECs was 57,659,000 in June 2014 and 38,486,000 in June 2017, a decline of approximately 33.3 percent. These differences may to some degree reflect differences in provisioning and demand between residential services on the one hand and business services on the other hand. This is because ILECs provide copper-based services to both residential and business customers, whereas CLECs essentially only provide resold copper TDM services to business customers. In any event, these data show that demand for traditional TDM service is declining much more slowly when provided by CLECs via resale than is the case when provided via ILECs.

These trends can be observed even though the ILECs have increasingly been retiring copper loops. The percentage of copper loops retired, in the aggregate, can be shown by comparing the June 2014 and June 2017 totals for all copper loop-based services in Reference Line 59. Those totals show a decline from 69,735,000 in June 2014 to 47,885,000 in June 2017, or approximately 31.3 percent.

The results of this analysis are summarized in Table 5 below. As stated above, these results show that copper loops are being retired at a far faster rate than the decline in traditional TDM service provided by competitive carriers. The logical inference is that the modest decline in the volume of traditional TDM service provided by competitive carriers has been caused by the retirement of copper facilities rather than reduced demand from business and government customers.

**TABLE 5. DEMAND FOR TRADITIONAL TDM SERVICE, JUNE 2014- JUNE 2017<sup>23</sup>**

Percent <u>decline</u> of non-ILEC copper-based TDM service	9.5%
Percent <u>decline</u> of ILEC copper-based TDM service	33.3%
Percentage of copper loops retired	31.3%

**C. The ILECs’ assertion that Form 477 data are adequate to assess competition in the provision of voice services is meritless.**

It should be clear by now that VoIP services are irrelevant to the question of whether ILECs have market power in the provision of traditional TDM service. Nevertheless, even if this were not true, there is no basis for assessing the extent to which non-ILECs have deployed the broadband services needed to provide VoIP services. The only data that might be used to assess the availability of broadband (and therefore VoIP) are the broadband deployment data provided

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<sup>23</sup> See *id.*

in Form 477 reports. But as the Joint Parties have explained,<sup>24</sup> the Form 477 data significantly overstate the extent of broadband deployment, because, among other reasons, Form 477 data incorrectly assume that all end users within a census block have access to broadband where a provider reports that it can provide such service to a single location in that census block.

USTelecom tries to avoid these realities by arguing that, since the Commission relies on 477 data to determine the availability of USF subsidies, it must be sufficient for competition analysis.<sup>25</sup> But it is in the context of USF subsidy availability that USTelecom itself, the Commission, individual commissioners, the Secretary of Agriculture, and members of Congress have all recognized that Form 477 broadband deployment data are unreliable.

In sworn testimony before Congress and in recent filings with the Commission, USTelecom has not only acknowledged these flaws but also has explained exactly why the current Form 477 data collection methodology and similar census block-based approaches to broadband mapping are inaccurate. As the Joint Parties recently explained,<sup>26</sup> USTelecom CEO Jonathan Spalter observed last month before the Senate Commerce Committee that Form 477's “‘one-served-all-served’ reporting is simply not a reliable approach to understand broadband

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<sup>24</sup> See *generally* Joint Parties April 24 Letter; Joint Parties March 14 Letter at 11 & n.51.

<sup>25</sup> See USTelecom May 10 Letter at 2; USTelecom May 22 Letter at 2. Whatever the merits of USTelecom's recent assertions about the reliability of Form 477 data for assessing competition in the provision of last-mile services without reliance on DS1s and DS3s, none of those arguments make Form 477 data suitable for assessing the availability of broadband, and, by implication, VoIP.

<sup>26</sup> See Joint Parties April 24 Letter at 2.

availability,” particularly “in rural areas where census blocks are far larger than their urban and suburban counterparts and data sources are lacking.”<sup>27</sup>

USTelecom has further described the deficiencies of Form 477 data in recent letters to the Commission. In March, USTelecom wrote that census block-based data are “not granular enough to target areas that lack broadband.”<sup>28</sup> And an April letter from USTelecom and its broadband mapping consortium partners, ITTA and WISPA, candidly acknowledged that “the problems with census block reporting are well known.”<sup>29</sup> In doing so, USTelecom criticized a proposal to update Form 477 to collect enhanced census block-based data (“the current census data that would underlie this approach is nearly 10 years old and would not be updated until after the 2020 census data becomes available several years from now”), which would result in “‘estimate[s]’ based on inferences” that are “inaccurate” and “insufficient.”<sup>30</sup> USTelecom argued that the “growing use of competitive reverse auctions to distribute broadband funding puts *an even higher premium on having the best possible data* [about broadband deployment] *to*

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<sup>27</sup> Testimony of Jonathan Spalter President and CEO, USTelecom before the Senate Commerce Committee “Broadband Mapping: Challenges and Solutions,” at 2 (Apr. 10, 2019), [https://www.commerce.senate.gov/public/\\_cache/files/1c4bbcd1-e586-4c1d-94eb-3d2fe7ff9360/02973D243C78B859624D7E04EE8E7DD2.04-10-19spalter-testimony.pdf](https://www.commerce.senate.gov/public/_cache/files/1c4bbcd1-e586-4c1d-94eb-3d2fe7ff9360/02973D243C78B859624D7E04EE8E7DD2.04-10-19spalter-testimony.pdf).

<sup>28</sup> Letter from B. Lynn Follansbee, Vice President – Law & Policy, USTelecom, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 11-10, 10-90, at 1 (Mar. 21, 2019) (“USTelecom March 21 Letter”).

<sup>29</sup> Letter from B. Lynn Follansbee, Vice President – Law & Policy, USTelecom, et al., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 11-10, 10-90, at 2 (Apr. 12, 2019) (“USTelecom April 12 Letter”).

<sup>30</sup> *Id.* at 4.

*ensure a fair result*,”<sup>31</sup> and that a census block-based approach “based on ‘an estimate’” “would doom” the Commission’s efforts to fund broadband deployment.<sup>32</sup>

Criticism of the accuracy of Form 477 data is not new. Nearly two years ago, the Commission acknowledged the need to improve the accuracy of Form 477 data and adopted a notice of proposed rulemaking (“NPRM”) initiating a proceeding to that end.<sup>33</sup> In statements approving the NPRM, Chairman Pai acknowledged “concerns about the quality of the Form 477 data we’ve been collecting” and touted the future prospect of “more granular and standardized data” on broadband deployment,<sup>34</sup> and Commissioner O’Rielly explained that Form 477 data “is often criticized for not being sufficiently accurate or reliable.”<sup>35</sup> But that proceeding remains open, and problems with Form 477 data persist today, as Chairman Pai and Commissioners O’Rielly, Rosenworcel, and Starks acknowledged at the May 15, 2019 House Energy and Commerce Communications and Technology Subcommittee oversight hearing. There, Chairman Pai affirmed that it is necessary to have accurate and more granular broadband availability data and explained that the Commission is “currently in the process of revamping [the] Form 477 process, working with stakeholders from different sectors of the industry to figure out how to improve it and [address the] problem [identified by Rep. McEachin (D-VA-4)] about the census block being deemed covered if a single household in the block is getting service but nowhere

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<sup>31</sup> USTelecom March 21 Letter at 1 (emphasis added).

<sup>32</sup> USTelecom April 12 Letter at 4 (emphasis added).

<sup>33</sup> *See Modernizing the FCC Form 477 Data Program*, Further Notice of Proposed Rulemaking, 32 FCC Rcd. 6329, ¶¶ 5-7 (2017).

<sup>34</sup> *Id.* at 6370 (Statement of Chairman Ajit Pai).

<sup>35</sup> *Id.* at 6372 (Statement of Commissioner Michael O’Rielly).

else is.”<sup>36</sup> Likewise, Commissioner O’Rielly “wholeheartedly” agreed with Subcommittee Ranking Member Latta’s (R-OH-4) call for more accurate broadband data in order to properly allocate USF subsidies and explained to Rep. Gianforte (R-MT-At Large) that he has “pushed for” processes to solve “the problems with our current [broadband] maps.”<sup>37</sup> And Commissioner Starks detailed how, absent formal data validation procedures, the Commission had accepted Form 477 data that falsely indicated that a new entrant provided broadband to more than 20 percent of the country’s population.<sup>38</sup> Commissioner Rosenworcel echoed these statements and even quoted Secretary of Agriculture Sonny Perdue, who observed at another recent Congressional hearing that the degree to which Form 477 data overstates broadband availability renders the Commission’s Section 706 reports “fake news.”<sup>39</sup>

Members of Congress also have recognized that Form 477 data are unreliable. Last September, Sens. Klobuchar (D-MN) and Capito (R-WV) wrote to Chairman Pai explaining that “[t]he information currently collected by the FCC on broadband coverage is not detailed enough

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<sup>36</sup> House Energy and Commerce Committee Subcommittee on Communications & Technology Hearing “Accountability and Oversight of the Federal Communications Commission” (May 15, 2019), <https://energycommerce.house.gov/committee-activity/hearings/hearing-on-accountability-and-oversight-of-the-federal-communications> (“May 15 House E&C Oversight Hearing”) (beginning at 2:03:23).

<sup>37</sup> *Id.* (beginning at 2:29:50).

<sup>38</sup> *Id.* (beginning at 1:42:15); Statement of Geoffrey Starks, Commissioner, FCC, House Energy and Commerce Committee Subcommittee on Communications & Technology Hearing “Accountability and Oversight of the Federal Communications Commission,” at 3 (May 15, 2019), <https://docs.fcc.gov/public/attachments/DOC-357487A1.pdf>.

<sup>39</sup> Statement of Jessica Rosenworcel, Commissioner, FCC, House Energy and Commerce Committee Subcommittee on Communications & Technology Hearing “Accountability and Oversight of the Federal Communications Commission,” at 3 (May 15, 2019), <https://docs.fcc.gov/public/attachments/DOC-357480A1.pdf>; *see also* Ben Nuelle, *Senators Push FCC to Improve Broadband Data Maps*, Agri-Pulse, Mar. 20, 2019, <https://www.agri-pulse.com/articles/12010-senators-push-fcc-to-improve-broadband-data-maps>.



to provide an accurate picture of conditions at the local level, especially in rural areas. Without an improvement in data collection, maps will continue to inaccurately suggest service availability in unserved or underserved areas.”<sup>40</sup> Furthermore, within the past two months, no fewer than three bipartisan bills have been introduced that would direct the Commission to remedy the inaccuracies of broadband maps based on Form 477 data.<sup>41</sup> And at the May 15th hearing, a bipartisan pack of 13 House Energy and Commerce Committee members (seven Democrats and six Republicans) raised the aforementioned concerns with the Commission’s

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<sup>40</sup> Letter from Sens. Amy Klobuchar & Shelley Moore Capito to Ajit Pai, Chairman, FCC (Sept. 13, 2018), <https://www.capito.senate.gov/imo/media/doc/20180913%20Mobile%20Coverage%20Maps%20FCC.pdf>.

<sup>41</sup> See S. 1522, 116th Cong. (2019), <https://www.congress.gov/bill/116th-congress/senate-bill/1522/text> (“Broadband Data Improvement Act,” sponsored by Sens. Capito (R-WV), Schatz (D-HI), Moran (R-KS), and Tester (D-MT)); S. 842, 116th Cong. (2019), <https://www.congress.gov/bill/116th-congress/senate-bill/842/text> (“Improving Broadband Mapping Act of 2019,” sponsored by Sens. Klobuchar (D-MN), Capito (R-WV), Manchin (D-WV), and Hoeven (R-ND)); H.R. 2643, 116th Cong. (2019), <https://www.congress.gov/bill/116th-congress/house-bill/2643/text> (“Broadband MAPS Act,” sponsored by Reps. Latta (R-OH-5) and Welch (D-VT-At Large)); *see also* Press Release, Sen. Shelley Moore Capito, Capito, Manchin, Colleagues Introduce Bipartisan Legislation to Improve FCC Broadband Mapping (Mar. 14, 2019), [https://www.capito.senate.gov/news/press-releases/capito-manchin-colleagues-introduce-bipartisan-legislation-to-improve-fcc-broadband-mapping\\_](https://www.capito.senate.gov/news/press-releases/capito-manchin-colleagues-introduce-bipartisan-legislation-to-improve-fcc-broadband-mapping_); Press Release, Latta and Welch Introduce Bipartisan Broadband MAPS Act (May 9, 2019), <https://latta.house.gov/news/documentsingle.aspx?DocumentID=402112>. Last Congress, Sen. Wicker, now Chair of the Senate Commerce, Science, and Transportation Committee, introduced a similar bipartisan proposal. See S. 2955, 115th Cong. (2018), <https://www.congress.gov/bill/115th-congress/senate-bill/2955/text> (“MAP Broadband Act,” sponsored by Sens. Wicker (R-MS), Hassan (D-NH), Moran (R-KS), Blunt (R-MO), Klobuchar (D-MN), and Kennedy (R-LA)). In support of S. 1522, Commissioner O’Rielly stated, “I appreciate the great efforts by Senators Capito and Schatz to fix the *Commission’s broken broadband mapping process* and provide a credible and definable framework, including a challenge process. This bill would *lead to a more accurate and ultimately more helpful picture of broadband coverage, which would allow for more sound decisions and a real focus on those without service today.*” Sen. Capito, Press Release, Support for the Broadband Data Improvement Act (May 16, 2019), <https://www.capito.senate.gov/imo/media/doc/05-16-2019%20Broadband%20Data%20Improvement%20Act%20Support.pdf> (emphasis added).

collection of and reliance upon broadband data.<sup>42</sup> No statement captured more clearly the dire consequences that would result if the Commission were to base a forbearance decision on Form 477 data than that of Subcommittee Chairman Doyle, when he explained that

in the context of the USTelecom’s Forbearance Petition, I am very concerned that the Commission is using Form 477 data which industry and policy makers widely agree is flawed and overstates broadband availability. . . . This data [including BDS proceeding data] is years out-of-date and does not accurately reflect the current state of deployment or competition. If the FCC were to base its decision on such inaccurate data, the decision would likely be challenged in court<sup>43</sup>

and – critically – could “negatively affect government agencies that still rely on legacy infrastructure for national security and public safety services.”<sup>44</sup> Given the consensus that Form 477 data overstate broadband availability, it follows that such data overstate the presence of VoIP and are therefore an unreliable basis for assessing USTelecom’s request for nationwide forbearance from Section 251(c)(4)’s avoided-cost resale requirement.

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<sup>42</sup> See generally May 15 House E&C Oversight Hearing.

<sup>43</sup> *Id.* (beginning at 1:01:24).

<sup>44</sup> Opening Statement of Chairman Mike Doyle, House Energy and Commerce Committee Subcommittee on Communications & Technology Hearing “Accountability and Oversight of the Federal Communications Commission,” at 1 (May 15, 2019), <https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/2015%2005%2015%20FCC%20Oversight%20Opening%20Statement.pdf>; see also John Eggerton, *Dems Slam Pai in Oversight Hearing*, Broadcasting & Cable, May 15, 2019, <https://www.broadcastingcable.com/news/dems-slam-pai-in-oversight-hearing> (“[Doyle] also slammed the inaccurate and deeply flawed broadband deployment data, old and faulty business broadband data, and warned the FCC not to act on a USTelecom forbearance petition using such data”).

### III. CONCLUSION

For the foregoing reasons, and the reasons set forth in the Joint Parties' previous submissions in this proceeding, the Commission should promptly deny USTelecom's Petition.

Respectfully submitted,

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