

**Before the
Federal Communications Commission
Washington D.C. 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)	
)	
Regulation of Business Data Services for)	WC Docket No. 17-144
Rate-of-Return Local Exchange Carriers)	
)	
Business Data Services in an Internet)	WC Docket No. 16-143
Protocol Environment)	
)	
Special Access for Price Cap Local)	WC Docket No. 05-25
Exchange Carriers)	

REPLY COMMENTS OF AT&T

Pursuant to the Public Notice,¹ AT&T submits this reply to INCOMPAS’s arguments opposing forbearance from the Section 251(c) UNE requirements. INCOMPAS asserts that, at some locations, CLECs use UNEs to offer the only high speed broadband service available to consumers and small businesses and, if the Commission grants forbearance from the Section 251(c) UNE requirements, CLECs will stop offering those services, resulting in customers losing access to their only high speed broadband option. As explained below, this argument is refuted by the record. Further, even if INCOMPAS’s assertions were true, they could not support denial of the Petition.² The Commission has explained that its forbearance analysis focuses on

¹ Public Notice, *Wireline Competition Bureau Seeks Focused Additional Comment In Business Data Services And USTelecom Forbearance Petition Proceedings And Reopens Secure Data Enclave*, DA 19-281 (rel. April 15, 2019) (“Public Notice”).

² Petition for Forbearance of USTelecom – The Broadband Association, *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 (May 4, 2018) (“Petition”).

“marketplace conditions for these services broadly,” not “on individual customer locations.”³ The data show that facilities-based competition is now irreversible and almost ubiquitous. Thus, even if facilities-based competitors have not yet deployed service to every potential location, that is not a valid basis for denying the Petition.

1. *INCOMPAS’ assertions are unsupported and unverifiable.* INCOMPAS’ arguments are premised on the assertion that there are some locations where the *only* available provider of high-speed broadband service is a CLEC using UNEs. This factual premise is unsupported by any verifiable evidence. INCOMPAS has not identified any specific location where this is the case, and certainly no evidence that there is a large number of such locations. Nor does INCOMPAS provide any economic analysis demonstrating that CLECs could not continue offering broadband services using UNE substitutes if forbearance were granted. The Commission should reject INCOMPAS’ arguments on this basis alone.

2. *INCOMPAS’ assertions are refuted by the data.* The 2015 Data Collection required providers to submit locations served by UNEs.⁴ These data show that about 96 percent of buildings containing locations served by UNEs also have a cable company in the same census block or other facilities-based fiber competitor within a half mile.⁵ These data thus refute INCOMPAS’ assertion that a significant portion of locations have only a UNE-based supplier of high-speed broadband.

³ See, e.g., Memorandum Opinion and Order, *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; Petition of BellSouth Corporation for Forbearance under Section 47 U.S.C. § 160(C) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, 22 FCC Rcd. 18705, ¶ 20 & n.80 (2007) (“AT&T Ethernet Forbearance Order”).

⁴ See Mandatory Data Collection, at §§ II.A.4 & II.B.3, attached to Report and Order and Further Notice of Proposed Rulemaking, *Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25; RM-10593 (Dec. 18, 2012).

⁵ This figure was computed as follows: (1) identified buildings that contained one or more locations in the 2015 Data Collection served by CLECs using UNEs; (2) identified which of the buildings

It is unclear whether the UNE locations reported in the 2015 Data Collection include *all* UNE locations or only those used to serve businesses. AT&T therefore examined all of the UNEs it sells to further confirm that the figure above accurately represents the portion of UNE-only locations that have competitive alternatives. Specifically, AT&T identified the service locations for the UNEs it sells to unaffiliated customers,⁶ and found that about 95.9 percent of those UNE locations are in census blocks that are also served by cable companies or a facilities-based fiber competitor.⁷ These findings are consistent across DS0 (96.8%), DS1 (94.4%), and DS3 (98.3%) UNEs. Thus, INCOMPAS' threat that CLECs will cease offering the only available high speed broadband service could apply, even theoretically, to an exceedingly small number of customers.

These data focus on UNE service addresses. The record also confirms that competition for *transport* is nearly ubiquitous. In the BDS Order, the Commission found nearly ubiquitous competition for BDS transport services.⁸ The comments show that, "the Commission's analysis of transport in the BDS proceeding provides a template for the broader forbearance analysis the

in Step (1) had fiber deployed by a competitive provider in the same building or are within a half mile according to the 2015 Data Collection and/or had cable broadband facilities with download speeds of at least 25 Mbps in the same census block as the building (according to Form 477 data). The percentages are equal to the results from Step (2) divided by Step (1).

⁶ AT&T was able to identify the service locations for about 88 percent of the UNEs it sells. The figures above are based on these locations.

⁷ To determine whether a cable company had deployed service in the census block, AT&T relied on the most recent Form 477 data published by the Commission (AT&T counted only broadband services with download speeds of at least 25 Mbps). To determine whether a competitor had deployed fiber in the census block, AT&T used two alternative criteria: (1) whether a competitor has deployed fiber to any building in the census block of an AT&T-served location and (2) whether a competitor has deployed fiber anywhere in the census block. There was no material difference in the coverage metrics reported above when using these alternative approaches.

⁸ See Report and Order, *Business Data Services in an Internet Protocol Environment*, 32 FCC Rcd. 3459, ¶¶ 90-93 (2017) ("BDS Order").

Commission is undertaking here.”⁹ Applying that template here confirms that competition for transport overall is also ubiquitous. Cable companies have deployed competing transport networks covering more than 90 percent of the population and households, both overall and separately for Tier 1, Tier 2, and Tier 3 wire centers.¹⁰ In addition, CLECs have fiber facilities within 0.5 miles of nearly 80 percent of ILEC wire centers, confirming that CLECs can also replicate or bypass the vast majority ILEC interoffice transport routes.¹¹ And all of these metrics are conservatively low because they are based on 2017 or older data. No party disputes these facts. Instead, INCOMPAS asks the Commission to ignore these data on procedural grounds, and otherwise recycles the same baseless arguments—*e.g.*, that one competitor is insufficient, it is not economically feasible to deploy transport a half mile from fiber, cable companies are not effective competitors—that have already been rejected by the Commission in the BDS Order, which has been upheld by the Eighth Circuit.¹²

3. *The record shows that CLECs are highly unlikely to cease offering service at any location when forbearance is granted.* INCOMPAS also incorrectly assumes—offering no concrete examples or economic analysis—that if the Commission grants forbearance, CLECs will stop offering broadband service at locations currently served via UNEs. In fact, CLECs would

⁹ Comments of AT&T, *Wireline Competition Bureau Seeks Focused Additional Comment In Business Data Services And USTelecom Forbearance Petition Proceedings And Reopens Secure Data Enclave*, WC Docket Nos. 18-141, 170-144, 16-143, 05-25, at 5-9 (“AT&T 5/9 Comments”) (explaining that “there is no physical difference between the facilities used for BDS transport and UNE transport. Nor is there any difference in the economics for UNE and BDS transport. In both cases, interoffice transport facilities connect points of significant traffic aggregation, which makes such transport services susceptible to facilities-based entry.”).

¹⁰ AT&T 5/9 Comments at 5-9; Declaration of Glenn Woroch and Robert Calzaretta In Support of USTelecom Petition for Forbearance at 3-5 (“Woroch-Calzaretta Decl.”), attached to Letter from Patrick Halley, USTelecom to Marlene H. Dortch, FCC, *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 (May 6, 2019) (“USTelecom 5/6 Letter”).

¹¹ See AT&T 5/9 Comments at 5-9; Woroch-Calzaretta Decl. at 10.

¹² See, *e.g.*, AT&T 5/9 Comments, at 5-9; USTelecom 5/6 Letter at 3-14.

continue to have access to direct substitutes for UNEs, even in the exceedingly small number of locations where they may be the only available service provider. For example, ILECs will continue to offer DS1 and DS3 loop and transport services throughout their footprints at commercial rates (in counties where the Commission has found there to be sufficient competitive alternatives) or at regulated price cap rates (where the Commission has found competitive alternatives are not yet sufficiently available). ILECs will also continue to provide commercial UNE replacement services (a DS0 substitute) throughout their footprints, and ILECs have committed to offering standalone DS0 loops at commercial rates throughout their footprints.¹³ In addition, in many areas, other CLECs offer equivalent wholesale services. And, in many areas, CLECs can economically deploy their own facilities. No opponent of the Petition has identified any location where these alternatives are not available or are not an economically viable substitute for UNEs.

To be sure, these alternatives will likely be priced higher than UNEs. But that is because UNEs are currently priced at below-market TELRIC levels. No commenter has shown that CLECs cannot continue to profitably offer high-speed broadband services to customers using alternative inputs priced at marketplace levels. Nor could they: CLECs today overwhelmingly rely on these alternatives, rather than UNEs, to provide their successful marketplace offerings. CLECs might experience reduced profits when they can no longer rely upon UNEs priced below market levels, but the forbearance standard focuses on customers and the public interest, not provider profits.

The CLECs' own data are illustrative. For example, the record shows that Sonic, on average, pays \$11.67 for each DS0 UNE loop it purchases from AT&T, and then charges its end

¹³ See, e.g., Letter from Patrick Halley (USTelecom) to Marlene H. Dortch (Secretary, FCC), *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 1 (May 22, 2019).

users \$50 for the service it provides using that \$11.67 loop.¹⁴ That is a 400 percent mark-up. There is no reason to believe that Sonic could not continue to offer its customers that same service, at that same price, if it were to pay market-based prices for the DS0 UNE loop.

History also confirms that CLECs will simply carry on by relying on these alternatives. For example, when the Commission proposed to eliminate the UNE-Platform from the Section 251(c) requirements on a nationwide basis, CLECs and others made these same arguments that they would be forced to cease offering services if they had to pay marketplace rates for that input. The Commission rejected these arguments, removed UNE-P from Section 251(c), and what followed was continued facilities-based entry, increased competition, lower prices and more choices—and a successful marketplace for commercially negotiated UNE-P replacement services.¹⁵ Here too, there are a wide array of commercially viable alternatives to UNEs, and CLECs will seamlessly migrate to those alternatives during the transition process.

4. *Even assuming (contrary to fact) that LECs would cease offering service to some locations where they are the only provider, that cannot justify denial of the Petition.* Even if INCOMPAS's factual assertions and assumptions were valid, Section 10 would still require forbearance from the Section 251(c) UNE requirements. Under Section 10, the Commission "is required to forbear from any provision or regulation if it determines that (1) enforcement of the provision or regulation is not necessary to ensure the telecommunications carrier's charges,

¹⁴ See Declaration of William P. Zarakas, ¶ 22 & n.20, Attachment 2 to Opposition of INCOMPAS et al., *Petition for Forbearance Pursuant to 47 U.S. C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks*, WC Docket No. 18-141 (August 6, 2018).

¹⁵ See, e.g., Petition at 7-19; Comments of Verizon, *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 8-19 (Aug. 6, 2018) ("Verizon Comments"); Andres V. Lerner, *An Economic Analysis of the Impact of Forbearance from Section 251(c)(3) on Competition and Investments*, at 9-26 (Aug. 6, 2018) ("Economic Analysis of Forbearance"), attached to Verizon Comments.

practices, classifications, or regulations are just, reasonable, and not unjustly or unreasonably discriminatory; (2) enforcement of the provision or regulation is not necessary to protect consumers; and (3) forbearance is consistent with the public interest. In making this public interest determination, the Commission also must consider . . . whether forbearance from enforcing the provision or regulation will promote competitive market conditions.”¹⁶

These criteria would be easily satisfied here even if INCOMPAS’s assertions were true. The record demonstrates that UNEs are not remotely important, let alone “necessary,” to ensure just, reasonable and non-discriminatory rates and practices, or to otherwise protect consumers.¹⁷ The rates, terms, and conditions of the relevant services are driven by robust competition among multiple facilities-based providers, where cable companies have the majority market share.¹⁸

That is especially true when focusing on broadband services. According to the Commission’s most recent broadband report, there are about 212 million wireline broadband connections in the U.S. with download speeds of at least 10 Mbps.¹⁹ But there were fewer than

¹⁶ *AT&T Ethernet Forbearance Order* ¶ 16 (footnotes omitted).

¹⁷ See, e.g., *Petition* at 19-31; Comments of AT&T, *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, 6-10, 13-31 (filed September 5, 2018). Technically, the first prong of the statutory test does not apply to INCOMPAS’s argument. INCOMPAS is arguing that retention of these UNEs is necessary to facilitate CLECs’ broadband internet access offerings. The Commission has ruled that broadband internet access is not common carriage, and thus broadband internet access rates and terms are already exempt from the “just and reasonable” rate standard of Section 201 and the nondiscrimination standard of Section 202. Accordingly, retention of UNE requirements cannot be “necessary” to ensure that the “charges” or “practices” for broadband services continue to meet these standards.

¹⁸ See, e.g., Pete Bell, *Cable is Main Form of Broadband Access in North America*, TeleGeography (Nov. 8, 2018), <https://blog.telegeography.com/cable-is-main-form-of-broadband-access-in-north-america> (Cable has 62% market share).

¹⁹ The Commission has reported that 69.4% of the U.S. population had adopted a fixed broadband service with speeds of at least 10 Mbps as of December 2017. See Report, *Communications Marketplace Report*, GN Docket No. 18-231, ¶ 263, Fig. G-12 (rel. Dec. 26, 2018). The same report shows a U.S. population of about 305 million. See *id.* ¶ 248, Fig. G-1. Accordingly, the

2.1 million UNE connections at the end of 2016, most of which were voice, not broadband.²⁰ Thus, UNE-based broadband services comprise less than 1% of all wireline broadband connections. And, as noted, virtually all of these UNE locations—more than 96 percent—are in areas where other competitors (*e.g.*, cable) also offer broadband service.

On this record, undocumented threats by INCOMPAS that its members may cease offering service at some subset of the remaining locations if forbearance is granted, even if credible, would not justify denying forbearance. INCOMPAS seems to believe that if it can establish that there is a *risk* that some locations somewhere may lose access to high-speed broadband service, the Commission cannot grant forbearance. That is not the statutory test. As the D.C. Circuit has explained, Section 10 does not require a “painstaking analysis” of small geographic markets, and certainly not the isolated, location-specific situations that are the basis for INCOMPAS’s claims.²¹

Equally important, the statute reasonably contemplates a basic cost-benefit analysis: *i.e.*, the public interest requires the Commission to take a broader view and weigh whatever benefits of unbundling may remain against its manifest costs. Thus, for example, the D.C. Circuit held in *Earthlink* that the agency “only needed to show that the positive short-term impact of unbundling would be out-weighed by the longer-term positive impact that *not* unbundling would have on rates, consumers, and the public interest.”²² Indeed, even in 2006, the court affirmed the Commission’s

number of subscribers to fixed broadband services with download speeds of at least 10 Mbps was about 212 million at the end of 2017.

²⁰ Economic Analysis of Forbearance, at 11-12. *See also* 2018 Broadband Deployment Report, Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, GN Docket No. 17-199, Appendix D, Table D-2 (rel. Feb. 2, 2018).

²¹ *Earthlink, Inc. v. FCC*, 462 F.3d 1, 8 (D.C. Cir. 2006).

²² *Id.* at 11; *see also id.* at 8 (Commission may apply Section 10 “with an eye to the future” by accounting for the likely impact of forbearance on encouraging broadband investment).

judgment that the “benefits of unbundling were ‘modest,’” based in part on “evidence of intermodal competition indicating that cable modem service—not ILECs—is the nationwide broadband market leader with a solid majority.”²³ The court agreed that “it is reasonable to conclude that the BOCs’ secondary market position relative to cable internet providers tends to mitigate the impact of forbearance on the state of competition in the broadband market, especially where cable internet providers themselves are not required to unbundle.”²⁴ The same is even more true today with respect to the UNEs at issue here.

The Commission took the same approach when it granted forbearance from various requirements for Ethernet services. The Commission explained that it “consider[s] marketplace conditions . . . broadly”²⁵ and that it is not feasible to “focus on individual customer locations . . . for reasons of administrative practicality.”²⁶ Under this approach, the Commission granted ILECs forbearance from various common carriage requirements on the grounds that competition was entrenched and growing, notwithstanding that there were many locations at the time where competitors had not yet deployed competing facilities-based Ethernet services.²⁷

In short, the record overwhelmingly demonstrates that the marketplace for broadband services is highly competitive virtually everywhere, necessitating forbearance from the outdated UNE requirements designed to spur the very facilities-based competition that is now nearly universal. Even if INCOMPAS were right that CLECs might cease offering broadband service in

²³ *Id.* at 11.

²⁴ *Id.*

²⁵ *AT&T Ethernet Forbearance Order* ¶ 20.

²⁶ *Id.* ¶ 20 n.80.

²⁷ See generally, e.g., *AT&T Ethernet Forbearance Order*; Memorandum Opinion and Order, *Qwest Petition for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, 23 FCC Rcd. 12260 (2008).

a handful of locations—and, as discussed above, INCOMPAS has not remotely shown that to be the case—the statute would still require forbearance. Facilities-based competition is irreversible and now nearly ubiquitous, and under those circumstances the costs of retaining UNE requirements grossly outweighs any “positive short-term impact of unbundling.”²⁸

This conclusion is doubly true here, where the Commission and courts have repeatedly recognized that the Section 251(c) UNE requirements harm competition where facilities-based alternatives have taken hold. As the Commission has explained, “excessive network unbundling requirements tend to undermine the incentives of both incumbent LECs and new entrants to invest in new facilities and deploy new technology.”²⁹ And the D.C. Circuit has explained that 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.³⁰

²⁸ *Earthlink*, 462 F.3d at 11.

²⁹ Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review Of The Section 251 Unbundling Obligations Of Incumbent Local Exchange Carriers*, 18 FCC Rcd. 16978, ¶ 3 (2003).

³⁰ *USTA v. FCC*, 290 F.3d 415, 429 (D.C. Cir. 2002).

CONCLUSION

For the foregoing reasons, and for the reasons set forth in AT&T's prior submission and in USTelecom's Petition, the Commission should grant the Petition.

Respectfully submitted,

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