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June 12, 2019

By Electronic Filing

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 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 Nos. 18-141, 16-143, 05-25*

Dear Ms. Dortch:

AT&T submits this letter in response to Sonic's May 28, 2019 reply comments.¹ Sonic is under the misimpression that the Commission is required to protect Sonic's ability to purchase inputs to its services at regulated below-market TELRIC rates, as long as it can show that it puts those inputs to some good use. In fact, the statute requires the Commission to grant forbearance from requirements that are no longer necessary to protect consumers or competition, and where forbearance is in the public interest.² The Commission and courts have held that this standard is satisfied – including specifically for UNE requirements – where facilities-based competition for the end user services for which UNEs are used has developed or is developing.³ That standard is clearly satisfied here because facilities-based competition for UNE-based services is nearly ubiquitous, including in the areas served by Sonic. Indeed, as shown in Table 1, the census

¹ Reply of Sonic Telecom, LLC To Comments Addressing April 15, 2019 Public Notice Seeking Additional Comment, *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation*, WC Docket No. 18-141 (May 28, 2019) ("Sonic Reply").

² 47 U.S.C. § 160(c).

³ *Earthlink, Inc. v. FCC*, 462 F.3d 1, 8 (D.C. Cir. 2006) (upholding FCC decision to forbear from UNE requirements upon finding that competition had developed or was developing); *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 582 (D.C. Cir. 2004) (existence of "robust intermodal competition" renders wholesale access unnecessary, because "mass market consumers will still have the benefit of competition" even if all CLECs are driven from the market).

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blocks where Sonic offers service using UNEs are served by other facilities-based competitors, both overall and specifically in AT&T Tier 3 wire centers.⁴

Table 1. Facilities-based competition in census blocks where Sonic uses UNEs.

	% locations in census blocks where Sonic offers UNE Loop-based services with at least one facilities-based competitor	% population and households in census blocks where Sonic offers UNE Loop-based services that also have at least one other facility-based competitor
All AT&T Wire Centers	97% ⁵	99% ⁶
Tier 3 AT&T Wire Centers	96% ⁷	99% ⁸

On this record, there can be no serious dispute that facilities-based competition pervades Sonic's service area, and thus forbearance from the Section 251(c) UNE requirements is

⁴ The average size of these census blocks is small, about 0.2 miles in diameter. Accordingly, the existence of a competitor in the same census block generally means that the competitor can or already does offer service at the location that Sonic is serving using UNEs.

⁵ This metric was computed as follows. AT&T identified the service addresses where Sonic purchases DS0, DS1, and DS3 UNE loops from AT&T. AT&T was able to match about 87% of those addresses to a census block. For each matched address, AT&T determined whether (1) a cable company offered broadband service with download speeds of at least 25 Mbps in the same census block using December 2017 Form 477 data, (2) a competitive provider had deployed fiber in the same block based on the 2015 Data Collection and/or (3) a CLEC served a building using fiber in the same block based on the 2015 Data Collection.

⁶ The figures are about the same for population and households. This metric was computed as follows. The denominator is the total population (or households) located in census blocks where AT&T was able to match service addresses (as described in footnote 4, *supra*). The numerator is the population (or households) located within the subset of those census blocks containing at least one other competitor, as described in footnote 4, *supra*. The population and households of census blocks were obtained from the 2010 U.S. Census.

⁷ This metric was computed as described in n.4, *supra*, except for those census blocks served by AT&T Tier 3 wire centers.

⁸ The figures are about the same for population and households. This metric was computed as described in n. 5, *supra*, except for AT&T Tier 3 wire centers.

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justified. Sonic has no answer to these facts. Instead, Sonic relies on various unsubstantiated, incorrect, and ultimately irrelevant arguments that it should retain access to unbundled dark fiber transport, DS0 loops, and DS1 loops.

Dark Fiber Transport UNEs. Sonic makes three arguments in support of its desire to maintain access to dark fiber transport at below-market TELRIC rates. None has merit.

First, Sonic argues that the marketplace alternatives to dark fiber transport UNEs, such as lit transport, are more expensive than the below-market TELRIC prices it pays for dark fiber transport UNEs.⁹ But that dodges the issue. As explained above, the issue is whether facilities-based competition has developed or is developing within Sonic's service area, and the answer is clearly "yes." Indeed, even focusing only on the AT&T wire centers where Sonic purchases dark fiber transport UNEs from AT&T, the data show that approximately 99% of the population and households are in census blocks with at least one other competitor.¹⁰ It is understandable that Sonic would prefer to maintain access to inputs at regulated below-market TELRIC rates even where facilities-based competition has developed. But while that might be good for Sonic, it is not good for consumers or competition. 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."¹¹ 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 [provides] a license to the Commission to inflict on the economy the sort of costs" associated with unbundling.¹²

Second, Sonic argues that dark fiber transport UNEs provide more flexibility than other commercial offerings, such as "lit" fiber.¹³ Again, now that ubiquitous facilities-based competition has taken hold, dark fiber UNEs are not necessary at all; the particularities of Sonic's company-specific business model and preferences are not relevant. In any case, Sonic's argument is misleading, because it is based on comparison of dark fiber transport UNEs to off-

⁹ Sonic Reply at 4-5.

¹⁰ This metric was computed as described in footnote 5, *supra*, except focusing on census blocks where Sonic purchases dark fiber transport UNEs from AT&T.

¹¹ 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).

¹² *U.S. Telecom Ass'n v. FCC*, 290 F.3d 415, 429 (D.C. Cir. 2002).

¹³ Sonic Reply at 4-5.

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the-rack commercial lit fiber transport services. AT&T routinely offers lit fiber transport and other commercial services under terms that provide greater flexibility and other features that its customers require. Thus, to the extent Sonic has special requirements for fiber transport, it could seek to negotiate those terms under commercial arrangements for lit fiber with AT&T or other providers.

Third, Sonic argues that competition in Tier 3 wire centers is less developed than in Tier 1 and Tier 2 wire centers, and that Sonic uses dark fiber UNE transport to serve a number of “Tier 3” wire centers.¹⁴ It is true, according to AT&T’s records, that Sonic uses dark fiber UNEs to connect to a number of Tier 3 wire centers, but it is not true that facilities-based competition in those wire centers is underdeveloped. In the Tier 3 wire centers where Sonic uses AT&T dark fiber transport UNEs, the data show that approximately 95% of the census blocks have at least one other competitor.¹⁵ Thus, the data confirm that the Tier 3 AT&T wire centers where Sonic uses dark fiber have competitive providers in addition to Sonic and AT&T.

Importantly, the only reason many of these wire centers are still designated as Tier 3 is that the Commission’s rules do not account for cable facilities in making the Tier 1, Tier 2, and Tier 3 designations. Under the Commission’s rules, adopted in 2005, Tier 1 wire centers include those with at least four fiber-based collocators, Tier 2 wire centers include those with at least three fiber-based collocators, and Tier 3 wire centers are those that do not qualify for Tier 1 or Tier 2.¹⁶ The Commission acknowledged that this approach ignores cable companies, and thus likely “underestimate[s] competition in relevant markets as it fails to account for the presence of competitors that. . . have wholly bypassed incumbent LEC facilities.”¹⁷ At the time it adopted these rules, however, the Commission deemed cable to be a nascent competitor, and thus chose to omit such competition from its Tier definitions.¹⁸ Things are quite different today. Cable companies are among the leading providers of voice and broadband services, and the Commission has granular Form 477 data to identify where the cable companies operate. Indeed, the Commission relied on Form 477 data for the competitive market test adopted in the BDS

¹⁴ Sonic Reply, Attachment A, ¶ 2 (Declaration of Dane Jaspers).

¹⁵ This metric was computed using the approach described in footnote 4, *supra*, except focusing on service locations within Tier 3 wire centers where Sonic purchases dark fiber transport from AT&T.

¹⁶ 47 C.F.R. § 51.319.

¹⁷ Order on Remand, *Unbundled Access to Network Elements*, 20 F.C.C. Rcd. 2533, ¶ 95 (2005).

¹⁸ *Id.* ¶¶ 193-194.

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Order, for CAF funding eligibility, and in the reports it provides to Congress describing the state of broadband deployment.

Using Form 477 to account for cable competition in addition to fiber-based collocation confirms that about 91% of AT&T Tier 3 wire centers where Sonic currently purchases dark fiber transport UNEs from AT&T would be designated as Tier 2 wire centers, and thus would not even be eligible for dark fiber transport UNEs under the Commission's rules. The forbearance statute requires the Commission to take the present-day ubiquity of cable competition into account in applying the statutory criteria for forbearance. On this record, Sonic has not and cannot establish that the continued imposition of dark fiber transport UNE requirements on Tier 3 wire centers is necessary to protect consumers or competition.

UNE DS0 Loops. Sonic continues to argue that access to UNE DS0 loops is “necessary to ensure robust competition,” and that “in some cases, these are the only means of connectivity for consumers.”¹⁹ But Sonic has never provided any actual evidence to support these propositions. Nor could it. As explained above, the data show that about 97% of the census blocks containing locations where Sonic uses UNEs have competitive alternatives. Moreover, Sonic's implicit threat that, absent UNEs, it will cease offering service to customers or significantly raise prices is not credible. As AT&T has previously shown, the data submitted by Sonic and INCOMPAS show that Sonic's retail prices reflect more than 400% markups over its UNE costs.²⁰

In its reply, Sonic identifies one street where it offers service using DS0 UNEs purchased from AT&T and one street it serves using its own fiber facilities.²¹ Neither street supports its arguments that it offers service using UNEs in rural areas or that it is often the only supplier of high-speed broadband. These streets are located in densely populated areas of San Francisco, and Sonic admits that both are served by at least two other high-speed broadband providers (Comcast and AT&T), and for one of the streets, Sonic admits it uses its own fiber facilities, not UNEs.

Unable to press its original arguments, Sonic shifts to arguing that it uses UNEs to offer a

¹⁹ Sonic Reply at 8.

²⁰ Reply 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 5-6 (May 28, 2019).

²¹ Sonic Reply at 11 & Attachment C.

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service that is a better value than those of its competitors, based on a comparison of rates and terms for Internet/phone bundles at these streets.²² This additional argument is also meritless.

First, this argument is irrelevant. Even if (contrary to fact) it had established that its offerings are better than competitors, the fact remains that, as Sonic concedes, facilities-based competition exists in these areas and, for the reasons explained above, forbearance from the UNE requirements is mandated by Congress in such circumstances.

Second, Sonic has not remotely established that its offerings are better than its competitors. Its comparisons are apples-to-oranges. For example, Sonic's comparisons omit that AT&T's offer includes a Wi-Fi router,²³ whereas Sonic charges an additional \$6.50 per month for a non-Wi-Fi router, and at least an additional \$12 a month to add Wi-Fi to the router,²⁴ which brings Sonic's prices very close to those of AT&T for similar speed services. Moreover, AT&T includes access to AT&T's nationwide Wi-Fi hotspot network with its offering,²⁵ whereas Sonic does not appear to include any such service with its offering. Depending on the customer, that could make AT&T's offering a far better value than Sonic's offering.

Third, there is no evidence that Sonic would remove or significantly alter these or any other offerings when forbearance from the UNE requirements is granted. As AT&T has previously demonstrated, the data submitted by INCOMPAS and Sonic show that Sonic charges \$50/month (introductory price, then \$70/month) for a service that uses a UNE priced below market at a TELRIC level of only \$11.67/month. Although Sonic argues at length that it uses UNE loops as a "bridge" to fiber, Sonic's own evidence shows that it could maintain its same marketplace offers if it switched to market-priced, commercially-negotiated alternatives to UNE DS0 loops. As AT&T has noted, the forbearance test focuses on protection of consumers and competition—not Sonic's profit margins.

²² *Id.*

²³ See AT&T Website, <https://www.att.com/buy/bundles>, address 51 Ruth St. 94112 ("Wi-Fi gateway included with all plans.").

²⁴ To find these details, it is necessary to add one of the Internet Plans offered on Sonic's website (<https://www.sonic.com/availability>) for 51 Ruth St. 94112 to the shopping cart. The next screen states that the "modem rental" is an additional \$6.50/month, and that adding a Wi-Fi router costs an additional \$12-24/month.

²⁵ See AT&T Website, <https://www.att.com/internet/internet-services.html>.

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UNE DS1 Loops. Sonic also claims, in a footnote, that access to DS1 UNE loops remains “necessary for residential and enterprise customers beyond the reach of xDSL-capable loops.”²⁶ Sonic states that it will sell a business customer that is more than 14,500 feet from the central office a 12 Mbps service using UNE DS1 loops for \$1,119 per month.²⁷ Sonic also asserts that, if a residential customer is located more than 14,500 feet from the central office, its enterprise account team will sell that customer, on a custom basis, a 1.5 Mbps broadband service over a UNE DS1 loop for \$149 per month.²⁸

Sonic has not said how many residential customers it serves using DS1 UNE loops. It has to be a tiny number given the low speed (1.5 Mbps) and extremely high price (\$149), and the fact that the residential customer would have to negotiate the purchase of the service with Sonic’s enterprise team. AT&T’s records confirm that the number of such residential customers throughout Sonic’s service area is indeed extremely small. Although it is difficult to determine whether any particular location is a business or residential location (they can often be both), AT&T has been able to confirm that only a small number of the locations where it sells DS1 UNE loops to Sonic are even potentially residential addresses. Moreover, AT&T has confirmed that these potential residential locations are often in census blocks where cable companies offer 25 Mbps service (versus Sonic’s 1.5 Mbps, \$149/month service).

The reality is that virtually all DS1 services are used for BDS, not residential service. In the BDS proceeding, based on an extraordinarily extensive record, the Commission has already established a comprehensive regulatory regime for DS1s in the BDS marketplace. That regime is sufficient to regulate DS1 loops on a going forward basis. As AT&T has explained, retaining duplicative UNE requirements for DS1 loops would actually undermine the Commission’s objectives under the BDS regulatory regime.²⁹ To the extent there is a small number of residential customers served by DS1 UNEs, those rare occurrences are not a valid basis for establishing national policy by denying the request for forbearance from the Section 251(c) UNE requirements.

²⁶ Sonic Reply at 8 n.27 & Attachment A, ¶ 6 (Declaration of Dane Jasper).

²⁷ *Id.* at 8 n.27 & Attachment A, ¶ 6.

²⁸ *Id.* at 8 n.27.

²⁹ See, e.g., 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 10-12 (May 9, 2019).

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Best regards,

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