Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
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
	)	

COMMENTS OF CALL ONE INC.

Call One Inc. ("Call One") submits the following comments in the above-referenced proceeding. Call One submits its comments on petitioner's request for forbearance from the resale obligations of Incumbent Local Exchange Carriers ("ILECs")[1] under Section 251(c)(4) of the Telecommunications Act of 1996 ("TA96").[2] For the reasons stated below, Call One opposes petitioner's request for forbearance of the Section 251(c)(4) resale obligation.

BACKGROUND

Call One has been providing a competitive alternative for small and medium business and enterprise (SMB/SME) customers for more than 25 years. Unlike many other competitive local exchange carriers (CLECs), Call One began providing a competitive choice to the monopoly ILECs using resale.[3] Call One lacked the capital and other advantages inherent to those ILECs and other monopoly-based facility-providers, to create its own ubiquitous network and relied and (and continues to rely) on resale to provide SMB/SME customers a competitive alternative. Call One began with only a handful of employees and only a slightly greater number of customers, serving SMBs in the Chicagoland area. While still a fraction of the size of any ILEC, Call One is a successful company with customers in 47 states and 7 foreign countries. Call One's success is and has been based on providing these SMB and SME the comprehensive telecommunications services available to their larger competitors, with innovative and tailored solutions for their operations.

As telecommunications technologies have evolved, Call One has also evolved. In 2013, it deployed its first switch-based, Internet-Protocol ("IP") services. Since that time, its network has grown to include an additional switch, as well as five additional points of presence ("PoPs") spanning the U.S. Call One recognizes the need of telecommunications carriers to deploy their own facilities, enabling

[1] In short, ILECs are those monopoly, local exchange carriers that were providing local exchange services as of the enactment date of TA96, i.e., February 8, 1996, and those companies' successors. They include the former Bell Operating Companies ("BOCs") and their successors.
[2] Call One is not taking a position as to whether forbearance should or should not be granted as to those other categories and matters.
[3] Unlike many other CLECs shortly after the implementation of TA96, Call One did not rely on the Unbundled Network Element Platform ("UNE-P") to offer competitive local exchange services. Call One realized that the UNE-P paradigm was a short-lived subsidy that, while it created the opportunity for short-term profits, did not provide a sustainable long-term opportunity to provide local exchange service to SMB/SME customers.

them to create and offer innovative new services, and has been committed to making fiscally-responsible investments to do so. Recently, using its network facilities, Call One began offering its own unified communications solution, Call One UC, and its own version of Software Defined-Wide Area Network ("SD-WAN"), which it has branded as "Smart WAN."

Nonetheless, much of Call One's business still requires access to ILECs' resale facilities, especially in locations outside major urban areas, but even within those urban areas, to gain access to the incumbents' rate-payer funded, "last-mile" loop facilities. Although Call One's total revenues are shifting toward its own facilities-based services, as of June 2018, more than 75% of its revenues come from resold lines. Without access to these lines, under the requirements of Section 251(c)(4), Call One would not be able to serve the vast majority of its current customers, leaving them with no choice of providers other than the incumbent monopoly telephone and cable companies.

Call One's use of resale services under Section 251(c)(4), has not always been easy: Call One had to arbitrate agreements to obtain the services required by TA96 and state law, and it has had to closely monitor the ILECs' tariffs and retail offerings to ensure that Call One was and is obtaining non-discriminatory access to the incumbents' local exchange offerings. It has also had to devote significant efforts to reviewing and disputing incumbents' invoices for resale services. Call One has successfully resolved several million dollars in incumbents' overbilling for services.

To be clear, Section 251(c)(4) does <u>not</u> provide Call One any price or cost advantage over the incumbents. What Section 251(c)(4) provides Call One is the ability to compete against the incumbents on the merits, without unreasonable or discriminatory conditions, at a wholesale price that recognizes the costs that the incumbents avoid when they are not the retail telecommunications provider. Without the protections of Section 251(c)(4), Call One would be at a crippling product and cost disadvantage that would limit (or eliminate) its ability to provide SMB/SME customers a real competitive alternative to the ILEC and cable monopolists.

STATUTORY FRAMEWORK

Section 251 contains two "resale" obligations. The first resale obligation applies to all local exchange carriers, and is found at Section 251(b)(1):

> '(b) OBLIGATIONS OF ALL LOCAL EXCHANGE CARRIERS- Each local exchange carrier has the following duties:
>
> '(1) RESALE - The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

The second resale obligation applies only to ILECs. It is found in Section 251(c)(4):

> '(c) ADDITIONAL OBLIGATIONS OF INCUMBENT LOCAL EXCHANGE CARRIERS -
> In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties:
>
> '(4) RESALE - The duty--
>
> '(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

'(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

There are two significant differences between the Act's Section 251(b)(1) and Section 251(c)(4) resale obligations. ILECS, but not LECs, are required to:

- Resell telecommunications services at wholesale rates, and
- Offer for resale the same services offered to their retail customers.

As interpreted by the Commission and state public service commissions, these differences mean:

- ILECs must resell at retail rates, less the costs they avoid by not selling at retail (e.g., costs for customer service, customer billing, marketing, etc.); and
- ILECs must offer to resell all retail telecommunications services, including long-term promotional offerings.

As petitioner notes, there are three requirements for the Commission to forbear from enforcing a statutory obligation, such as the obligations imposed by Section 251(c)(4):

- The obligation is no longer necessary to ensure that the charges, practices, classifications or regulations . . . are just and reasonable and not unjustly or unreasonably discriminatory;
- Enforcement of the obligation is not necessary for the protection of consumers
- Forbearance is in the public interest.

As discussed below, petitioner has not—and cannot—satisfy any of the three forbearance requirements as they relate to eliminating the ILECs' Section 251(c)(4) resale obligation. Therefore, the Commission must deny the petition as it relates to the Section 251(c)(4) resale obligation.

CONTEXT OF THE PETITION

The ILECs have a well- and long-established record of challenging the market-opening provisions of TA96, litigating and relitigating any attempt to require them to open their monopoly, rate-payer funded telecommunications networks to meaningful competition. Having largely failed at those efforts, and in the light of new technological advancements, the ILECs have now migrated their strategy to abandoning their current networks, and have invested heavily in new, advanced telecommunications networks. The latter is in the public interest, the former is not.

To achieve this strategy, the ILECs have petitioned and received the right to abandon legacy networks on a wire center-by-wire center basis. They have stopped investing in the legacy network and devoted maintenance and capital to the new, advanced networks. Although service is declining to legacy network customers, they continue to raise retail prices, and given the methodology of wholesale pricing under the Act, resale pricing. And, they take the position that their new, advanced networks are untouchable by federal or state regulators, even though it is the monopoly profits that they have obtained—and in fact, continue to obtain—that they are using to fund these advanced networks.

But, to the ILECs, this is not enough. They have discovered that wire center-by-wire center abandonment only helps them with high cost customers, and that they cannot migrate existing network customers as quickly as they had hoped to their new networks. Instead, they see continuing losses of their customers to competitors, both resellers and providers of other networks. So, like any monopolist who cannot compete on the merits, they seek, as they do in this petition, to eliminate regulatory obligations that restrict their ability to disadvantage competitors. Thus, not only is their strategy to prevent competitors (and regulators) from touching their new, advanced networks, but to eliminate globally—not just on a wire center-by-wire center basis— any remaining regulatory obligations on their old legacy (monopoly) networks.

Even further, the ILECs attempt to use the evidence of any effective check on their monopoly power to propose its elimination. They tout that they have "only" 45% market share for some business segments of local exchange telecommunications.[4] But even if that is true, 45% of a market, while certainly less than a total monopoly, could still be a monopoly position, particularly when considered with other factors and actions, including those described in these comments[5].

Specifically, as to the resale obligation under Section 251(c)(4), the ILECs seek to eliminate or significantly hamper resale competition, by eliminating their duty to sell the services they sell to their retail customers at wholesale rates, or in some cases, even at the retail rates. Undoubtedly, they know the effects of doing so. By removing the obligation to offer wholesale rates, they can force their resale competitors to pay them additional monopoly profits, increasing those competitors' input costs and putting them at a substantial competitive price disadvantage. [6] And, by excluding promotional or

---

[4] See Petition at Page 10. Notably, this data does not separately address the SMB/SME market for local exchange access. Rather, it addresses only larger segments of the business market. Petitioner does not provide any data specific to the SMB/SME market, rather it generalizes without supporting evidence, that the competitive trends in the consumer market are the same for business customers. That generalization is misleading and false. SMB/SMEs, unlike residential customers, are not disconnecting their landline phone service en masse, nor are they similarly migrating services to wireless alternatives. Similarly, when Petitioner does address the business market separately from the residential market, it focuses on data services. (See Petition at Page 11.) While its argument relating to data services may be true for large SMEs or large enterprise customers, it is not true for the SMB/SME customers that Call One serves. These customers overwhelmingly need and use voice and data services, not just data services alone.

[5] For purposes of antitrust laws, a company with a market share of 45% could still possess monopoly power. See Hayden Publ'g Co., Inc. v. Cox Broad. Corp., 730 F.2d 64, 69 n.7 (2d Cir. 1984) ("[A] party may have monopoly power in a particular market, even though its market share is less than 50%."); Lenox MacLaren Surgical Corp. v. Medtronic, Inc., 762 F.3d 1114, 1123 (10th Cir. 2014) ("Though market-share percentages bear on the existence of monopoly power, they are not ordinarily conclusive."); Shoppin' Bag of Pueblo, Inc. v. Dillon Companies, Inc., 783 F.2d 159, 162 (10th Cir. 1986) ("It is generally agreed that while market share is indicative of market power, it is not the sole matter to be considered in assessing a defendant's market strength.")

[6] Assume that the retail cost of a telecommunications service is $100, and that the avoided costs of that service are $20. That results in a wholesale price of $80. If ILECs are no longer obligated to provide a wholesale price, they can then charge $100 to the reseller. The increased $20 is pure profit to the ILEC since it represents the costs that they avoided. At the same time, that $20 imposes an additional, unwarranted cost to the reseller, increasing its input price to the retail price: $100. The reseller cannot, in such a circumstance, remain competitive on price, since its input price equals the ILEC's retail price.

alternative pricing plans for telecommunications services from the 251(c)(4) resale obligation, they can ensure that resale competitors will only be able to purchase local exchange services at higher, standard "rack rates," giving the ILECs a virtually insurmountable price advantage.[7]

As Call One's experience has shown, ILECs have done exactly that: establish a rack rate for a service and then offer highly-discounted pricing plans for that same service. Part of Call One's success has been to carefully monitor the ILECs' pricing plans and order services under those plans to resell to Call One's customers. For example, SBC Illinois' standard business local access line has a tariff rate of over $140, while it offers that same business line with some usage bands included for less than $25.

That this is petitioner's intent cannot reasonably be disputed. Unlike other 251(c) obligations, resale at wholesale rate is the only obligation that has a parallel 251(b)(1) obligation. Petitioner is not seeking to forebear their 251(b)(1) resale obligation. The only differences between the 251(b)(1) and 251(c)(4) obligations are the additional 251(c)(4) duties to: (1) offer wholesale rates and (2) offer those rates on all of the ILECs' retail telecommunications offerings. Petitioner, therefore, is not seeking any substantive relief, e.g., to not offer a service or facility that it does not already provide to retail customers. Rather, it is seeking only to change the financial terms under which it resells the services it already offers to retail customers. Changing those financial terms will enable ILECs to extract additional monopoly revenues and by so doing, substantially hamper, if not eliminate, effective resale competition. Eliminating the 251(c)(4) resale obligation will enable ILECs to impose non-incurred costs (the costs they avoid selling at retail) on their competitors and require resellers to pay the highest-available, standard rack-rates for services they offer at retail at discounted promotional rates. Granting the petition will end effective resale telecommunications competition in the U.S.

DISCUSSION

I. The Section 251(c)(4) Resale Obligation Continues to Protect Against Unjust and Unreasonable Discrimination

As demonstrated above, the Section 251(c)(4) resale obligation protects resellers from unjust and unreasonable discrimination both as to the price resellers pay ILECs for resale services generally and eliminates the ILECs' ability to offer lower prices for retail services than they offer to resellers. As TA96 has been interpreted by the FCC, state commissions and the courts, these protections are unique to Section 251(c)(4): they do not exist under Section 251(b)(1) generally applicable resale obligation.

Although that statutory fact alone is enough to demonstrate that petitioner cannot satisfy this prong of the forbearance requirement, it is important to also recognize the impact of the potential discrimination that can and will occur if the Commission forbears from enforcing Section 251(c)(4).

As discussed above, at a minimum, the amount of the discrimination will be the avoided costs that have been established over two decades by state commissions, approximately 20% on average. Even more impactful, however, will be the elimination of the ILECs' obligation to offer for resale so-called "long term promotions" or discounted pricing plans. As demonstrated above, if these discounted

[7] For example, assume again that the standard retail price of an access line is $100. Assume that the ILEC offers a discounted retail price for that same access line of $80. If the FCC removes the ILEC's statutory obligation under 251(c)(4), a reseller would be forced to purchase the access line at the standard retail price of $100 and could not compete against the discounted retail price of $80.

pricing plans are no longer available to resellers, the ILECs can artificially set (and continue to inflate) a standard retail price for a service and force resellers to pay that higher input price, while the ILECs offer retail customers those same services at a substantially discounted price. It is tautological that a reseller cannot compete against a monopolist if the monopolist can force the reseller to pay a higher input price for the same service that it sells for a lower price at retail. It is exactly this type of price discrimination and monopoly manipulation that is at the heart of Section 251(c)(4).

II. Section 251(c)(4) Resale Obligation is necessary to protect consumers

Were the Commission to forbear from enforcing the Section 251(c)(4) resale obligation, the SMB/SME customers that Call One (and other resellers) serve would face significantly higher prices for local exchange services. These SMB/SME consumers would no longer have the ability to purchase resale services from a reseller at the same price and on the same terms as the ILECs' retail customers. One of the key reasons Call One's SMB/SME customers have chosen Call One as their telecommunications provider is because the ILECs did not provide them the service quality and personalized service that they expect and quite frankly deserve. Without the protections of Section 251(c)(4), these SMB/SME consumers will either be forced to pay substantially higher prices or will have no choice but to return to the ILEC monopolists (or the monopoly cable companies) and endure the poor quality service from which they thought that had escaped long ago. Protecting consumers, here SMB/SME customers, from monopolistic price increases and poor service quality levels, especially as a result of monopoly power, is the essence of the Commission's statutory duty to protect consumers.

Similarly, many SMB/SME customers, especially SMBs, as the ILECs well know, are not yet ready to migrate to new, IP-based technologies. An effective resale option of legacy local exchange service is required to provide these customers with a competitive choice from the ILEC and cable monopolists until these customers are ready to migrate to new technologies.

Thus, the Petitioner cannot and has not made the required showing under this prong of forbearance analysis.

III. Forbearing from 251(c)(4) Resale Obligation is not in the public interest

In addition to the reasons stated above, forbearing from enforcing the Act's 251(c)(4) resale obligation, will eliminate some of the most potent competition for local exchange service. For sure, the ILECs face competition from cable providers for these services, but a duopoly is not competition. As demonstrated above, if the Commission were to forbear from enforcing the Act's 251(c)(4) resale obligation, it would have the effect of substantially diminishing, if not eliminating, resale competition. For that reason, forbearance of 251(c)(4) is not, and cannot be, in the public interest.

Moreover, having robust resale competition is not antithetical to innovation. Although a local exchange access line is essential to their business, SMB/SME customers demand more than just an access line. Call One could not effectively compete for SMB/SME customers were it to offer only the ILECs' resold access lines and nothing more. As it has done, is doing, and will continue to do, Call One (and other resellers) offer many other services, either over the top of the access line ("OTT" services), or complementary services, to be able to meet SMB/SMEs needs for a full range of telecommunications services. Eliminating resellers' ability to obtain access lines to serve the SMB/SME market will eliminate this innovation. The Petitioner's argument echoes the ILECs' century-long argument that innovation only occurs from competing facilities-based networks. That long-rejected argument remains as old and tired now as it has ever been.

CONCLUSION

For all the reasons stated above, Call One respectfully requests that the Commission deny the Petition for Forbearance as it relates to the Section 251(c)(4) resale obligation.

H. Edward Wynn, Executive Chairman
Call One, Inc.
August 6, 2018

Chris Surdenik, Chief Executive Officer
Call One, Inc.
August 6, 2018