

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

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Petition of USTelecom for	)	WC Docket No. 18-141
Forbearance	)	
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**Comments of ICG CLEC Coalition**

**Executive Summary**

The USTelecom petition dramatically overshoots the mark, and would have devastating effects on competition. By removing all ILEC-specific requirements, ILECs would be able to take full advantage of the legacy facilities and market power that they acquired from years of de jure monopoly. Such blanket forbearance runs roughshod over the need to carefully evaluate when, where, and whether a specific obligation is still necessary. The purported loss of retail market share in the residential voice line market is only one aspect of ILEC market power, and the petition exaggerates the extent to which competitors are able to function without any of the protections granted by the Telecom Act for which forbearance is proposed.

ICG Coalition is a group of Competitive Local Exchange Carriers and the Interisle Consulting Group LLC. Members include Great Works Internet (Saco, ME), Terra Nova Telecom (Lakewood Ranch, FL), LCB Communications (Morgan Hill, CA), Business Automation Technology (Little Silver NJ), Quantum Internet Services (Manchester MD), and Tecinfo Communications (Leland, MS). These are relatively small facilities-based carriers, largely operating in rural or exurban areas, that nonetheless make some use of UNEs.

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## **The Petition is unduly broad**

USTelecom cannot be accused of subtlety. It simply asks that all obligations specific to Incumbent Local Exchange Carriers be forborne, on a blanket basis. These obligations include unbundled local loops, unbundled interoffice transport, total service resale, and nondiscrimination in fulfilling requests to competitors vs. its own affiliates. It justifies this by alleging competitive losses in narrow markets, notably home telephones. But the law is much more nuanced than that. Blanket forbearance is not justified on a nationwide scale when there is competition for only some of these items and only in some locations.

With respect to the remaining UNEs – mainly unbundled interoffice transport and loops – the Commission has a different mechanism at its disposal to evaluate whether a given element meets the “necessary and impair” test. In 2003, the Commission felt a great urgency to complete a Triennial Review of these obligations. This led to the Triennial Review Order and, after a court remand, the Triennial Review Remand Order in 2004. These substantially reduced the availability of UNEs, and led to the end of the regulated UNE Platform. Yet there have been no triennial reviews since then. No record has been established as to the need for specific remaining UNEs, or whether their deletion would impair competition. That would be the appropriate mechanism for studying this topic, not a blanket forbearance on all UNE obligations.

The Commission has already provided a mechanism for ILECs to retire copper facilities that are no longer necessary or profitable<sup>1</sup>. Under that process, CLECs have no recourse to prevent the eventual removal of facilities just as this Petition would provide CLECs with no recourse. That process would accomplish a purported goal of the Petition (to remove unprofitable legacy facilities), but would do so on a non-discriminatory basis. If the true goal of the petitioners were to retire legacy, unprofitable network elements from its network then it already has a mechanism to do that. This lays bare the true intent of the Petition, to provide yet another competitive advantage to ILECs by denying CLECs access to copper facilities which the ILEC and its affiliates would still enjoy. This would also have the practical effect of returning many areas to a monopoly or duopoly rule, which would harm competition and consumers by reducing consumer choice and raising prices where no choice exists.

### **Facilities-based competition means many things**

The Petition creates a straw man view of competition. It essentially defines all participants in the marketplace as falling into one of two categories. One is the reseller, who, whether using total service resale (ILEC retail rates minus avoided-cost discounts, essentially a commissioned sales agent relationship) or UNE-Platform substitutes, does not own any significant network facilities. A reseller does not differentiate its services based on technical capabilities, then, but on softer items such as customer service, billing, and pricing. The second category is “facilities-based”. In the Petition’s view, this is a network that makes no use whatsoever of ILEC facilities. It owns its own local loop facilities, or uses only wireless connectivity to its end users. The Petition considers this to be the only valid competition that is needed to protect consumers.

But there is a lot of room between these two extremes. The Petition gives short shrift to the use of unbundled loops *per se* in conjunction with the competitors’ own voice and/or data switching facilities. This so-called UNE-L mode of operation, known in most other countries as Local Loop Unbundling (LLU), allows competitors to offer differentiated services, and service combinations not offered by the ILEC, over the existing ILEC loop plant. This is not resale at all; it is simply making use of an essential facility from the ILEC to provide a competitive product.

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<sup>1</sup> 47 C.F.R. 325, 47 C.F.R. 333

UNE-L operation comes in many variations. One is to use a dry copper loop, which the Petition mischaracterizes as “DS0”<sup>2</sup>, to provide voice-grade analog telephone service. This is the most obvious application but no doubt in significant decline. Another is to use the loop to provide some form of DSL. Many ILECs no longer provide DSL to new customers, or in some areas even maintain it to existing customers. CLEC-provided DSL may be the only alternative. Such DSL may be used for BIAS, which is the most common mass-market application, in which case it is the only avenue by which competitive ISPs have access to fixed-line customers. But it may also be used for secure private data networks, and for innovative applications that are not suitable for running on the public Internet. Some of these applications use symmetric bandwidth, unlike the highly asymmetric nature of most consumer BIAS. And CLECs using UNE loops and subloops are able to provide high-speed services using newer DSL technologies than those being grandfathered by the ILECs, as well as pair bonding, to extract new life out of the copper loop plant. CLEC DSL at or above today’s 25/3 Mbps bogey is possible even though ILEC DSL is typically limited to much lower speeds.

Another type of UNE-L is the DS1 loop, which is useful for providing PBX trunk-type voice services, whether configured as Channelized, ISDN PRI, or VuIP<sup>3</sup>. This is widely used for business and government applications, to provide basic digital PSTN connectivity. Often this is combined with UNE interoffice transport, in which case it is an EEL. This allows competitors to provide business telephone service, often intermixed with limited-speed data access, around a LATA. The availability of EELs is already constrained by the Tier rules of the TRRO. Unbundled DS1 IOF is not available between two Tier 1 wire centers. Last year’s *BDS Order*<sup>4</sup> removed DS1 Special Access from the list of basic tariffed services offered by ILECs, so in many cases, especially *outside* of major cities, only the EEL makes competitive PBX trunks available to business.

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<sup>2</sup> A loop used for a UNE-Platform type service is specifically limited to DS0 (64 kbps), but a loop that is physically unbundled and provided to a CLEC at a collocation node has variable capabilities depending upon the loop make-up. Some “digital” loops are certified for DSL use, but are lumped with “DS0” in the Petition. Hence the Petition’s oxymoronic use of the phrase “DS0 digital loops, used for Ethernet-over-copper”, on page 4.

<sup>3</sup> VuIP, voice using IP, is when IP multiplexing is provided by the carrier, internal to its network, often with quality of service guarantees. It is often erroneously called VoIP, which however also includes Internet-based voice services, wherein the IP networking is under the control of a third-party ISP and does not provide QoS. Most so-called VoIP is really VuIP, including PacketCable, FiOS Digital Voice, and U-Verse telephone service.

<sup>4</sup> FCC 17-43

These are examples of the types of UNEs that still remain. The Petition states that the volume of customers using them has fallen in recent years. This is true, but in large part because their *availability* has decreased. In many cities, the ILEC has taken its copper loop plant out of service; it does not provide UNE loops out of its fiber plant. And some UNE-using CLECs have gone out of business. But that does not provide justification to put *all* UNE-using CLECs out of business. Those that remain active are typically offering their customers something they want.

### **Wireless substitution is only applicable to limited markets**

The Petition notes that “a projected 60 percent of telephone households will have replaced wireline service with wireless service by the end of this year”. This may be true, but it does not really impact the need for UNEs or for ILEC regulation. Wireless (mobile) substitution occurs primarily in the residential market. Businesses are far more likely to have some kind of wireline service. Wireline service is also usually needed for some legacy applications such as facsimile, home confinement devices, burglar and fire alarms. More importantly to the market, the two largest wireless service providers are also the two largest ILECs. They are not losing market share so much as they are moving their customers from one subsidiary to another. Voice quality is still almost always better on a properly-working wire line.

Wireless substitution has to a large extent resulted from Commission policies that favor mobile carriers over LECs. Wireless plans almost never include domestic toll charges. ILEC rates often do, and CLEC intercarrier compensation also retains a complex system of call classification that does not apply to mobile carriers. A wireless carrier pays a blended rate, derived from a periodic traffic study, based on bill and keep for intra-MTA calls and switched access for inter-MTA calls. Wireline carriers are expected to account for all calls and pay CABS switched access charges on calls that are not “local” in the ILEC retail tariffs. This distinction was a reasonable favor to the then-nascent wireless carriers in the 1990s, but today distorts the marketplace.

Wireline CLECs are also often liable for *originating* switched access charges<sup>5</sup> when they assign foreign exchange numbers, even within a local calling area, a legacy of turn-of-the-century efforts to stamp out ISP-modem CLECs who used virtual NXX to provide local numbers. Hence their customers cannot keep their number when they move across a rate center boundary, even

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<sup>5</sup> Terminating local switching rates for Price Cap Carriers have gone to zero under the terms of the *CAF Order* (FCC 11-161 in CC Docket 01-92), but *originating* local switching typically remains at pre-2010 rates .

within a city or local calling area. While the Commission is actively working on national number portability, wireless numbers effectively *are* already effectively portable between rate centers, as carriers rarely assess domestic roaming charges. UNE-based as well as fiber-based CLECs are both subject to these same disadvantages vis-à-vis mobile.

### **Regulation of the natural monopoly was never intended to be temporary**

A key principle behind the Petition is the notion that UNEs were only intended, in the Telecom Act, to be a temporary stage until facilities-based competition could occur. To the extent that UNE-Platform and Total Service Resale were included in the Act's model of competition, those particular items may have been seen as temporary. But to generalize this to UNE-L and all other UNEs is a gross overreach.

The key economic principle underlying the creation of UNEs is recognition of natural monopoly. This phrase was *incorrectly* used for many years to justify the *de jure* monopoly granted to the ILECs prior to 1996. A useful definition of the term is "A situation in which the barriers to entry for an industry or product are so high that it is not profitable for a second company to make an attempt." <sup>6</sup> The telecom industry as a whole is not a natural monopoly. But certain aspects sometimes are. As technology has advanced, that share of the total has decreased, so that, for example, it is easy to argue that *local switching* is no longer a natural monopoly. A telephone switch capable of providing "Class 5" capabilities cost hundreds of thousands of dollars, or more, in the 1980s, and it could only service a small radius (copper loop distances). Today a number of alternatives are available at far lower cost, and thus it is no longer a natural monopoly.

But the most expensive part of the PSTN is not the switching. It is the outside plant, and that is still, often, a natural monopoly. The *duopoly* of cable and ILEC exists because of a prescient FCC decision in the 1970s which prohibited ILEC-cable common ownership in non-rural areas. Thus two outside plants were required, and by the turn of the century their once-distinct capabilities had converged. But this duopoly, itself a regulatory creation, does not disprove the natural monopoly.

Likewise, the Petition cites findings in the *BDS Order* that there is ample competition in most, but not all, places. We do not agree with the conclusion of that Order, which assumed that

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<sup>6</sup> <https://financial-dictionary.thefreedictionary.com/natural+monopoly>

competition in one part of a county would be applicable miles away. But even that Order did not address the mass market for loop services. Most BDS is high-capacity high-dollar-value service, so there is some chance that a carrier will extend fiber for some distance in order to reach a BDS customer site. UNE-Loop, in contrast, is primarily used in the residential and SME sectors. Only the duopolists are realistically capable of providing them with wireline services.

There may be narrow markets where a third *overbuilder* may successfully pursue a fiber project. But they are narrow. They generally depend upon a high population density and a particularly weak incumbent. Even then, overbuilding is highly unusual. Only a small percentage of the population has an overbuilder option. Some of those are the results of bankruptcy assets, wherein the original overbuilder failed. Others are plant sold off by ILECs who abandoned cable projects. There is little chance that most homes will ever be in reach of an overbuilder.

There is also a public works dimension to this issue. Even when a CLEC is willing to overbuild the ILEC, local governments are understandably often reluctant to permit new entrants to dig up streets and sidewalks to build new facilities. In these cases, the limited capabilities of UNE-L may be the only viable competitive option.<sup>77</sup> Further, some CLECs have taken it a step further and deployed their own facilities in ILEC conduits and on ILEC poles in order to provide modern fiber optic facilities and the services that they enable. However, these facilities often terminate into an ILEC central office collocation, which may become harder with this Petition, as one of the only two avenues to qualifying for collocation is access to UNEs. The petition also reduces the Section 271 incentive for RBOCs to obey the requirement to allow access to poles and conduits. This is a clear example where Petitioners are seeking to tilt the table in favor of the ILEC, unfairly harming CLECs and CLEC customers without any justification.

The Petition wildly exaggerates access to competitive facilities. It cites a study that says, "in all price cap territories, 92.1 percent of buildings served were within a half mile of competitive fiber transport facilities." That may be true. But half a mile may as well be half a continent. In an urban area where underground construction must go under paved streets, fiber construction can cost upwards of \$700,000 per mile. Half a mile away may not be an insurmountable problem for

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<sup>77</sup> One Coalition member was initially denied permission to open a street for any purpose at all, and was thus unable to pull fiber into the ILEC wire center even though it was able to lease fiber to a pole adjacent to that building. To provide itself with entrance facilities into the ILEC wire center in order to access its collocation, then, it needed to use unbundled loops to a nearby building, essentially running DSL "backwards".

serving a 50-story office tower or a million-square-foot office park, but it is simply not useful for serving smaller sites such as schools, small offices, most government facilities, healthcare facilities, and any other modest-sized account. Even aerial fiber construction is costly, given the need for make-ready in most places, and typically takes longer than a year, given the approvals required. That is not a reasonable amount of time in which to fulfill an order.<sup>8</sup>

Wireless options are widely used in some areas. Some of us operate wireless networks. But these are complementary to, not entirely a substitute for, UNEs. Wireless ISPs primarily operate in rural and exurban locations, where the unlicensed spectrum is not overcrowded and there is less competition from cable and fiber operators. In urban areas, the 5 GHz band, which is the largest one available to WISPs below the millimeter range, is heavily congested by indoor and outdoor Wi-Fi, and is beginning to receive heavy interference from licensed mobile carriers using LAA (Licensed Assisted Access). LAA puts an LTE downlink signal on the 5 GHz band, typically at the full legal power limit, while the uplink and primary downlink is on an exclusively-licensed band, typically below 2200 MHz. Thus LAA is essentially immune to interference, while at the same time it is capable of causing catastrophic interference to WISPs. The CBRS band may also provide some access for competitive providers, but again the major carriers intend to use it in urban areas for small cell densification, and the Commission has a pending proceeding (WC Docket 17-258) that may dramatically reduce or remove the availability of its Priority Access Licenses to small operators. For these and other reasons, urban WISP operation is very limited, primarily to business locations, and largely on a point-to-point basis.

Nor is fixed use of mobile carrier networks a true substitute. Mobile networks carry high overhead needed for mobility, and because they allow users to join the network as they roam in to a cell's coverage area, their available capacity per user is extremely variable. The two largest mobile carriers are of course also the same companies as the two largest ILECs, so their incentive is not to compete with themselves, but to simply displace their own wireline plant with higher-priced mobile services. This not only leaves out room for competition from smaller CLECs, but does not provide consumers with the same range of options.

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<sup>8</sup> The Commission's *Connect America Fund* rules specify that a location is "served" by a CAF recipient if service can be provided at a location within two weeks of order.



The Petition states that there are relatively few remaining users of UNEs, relative to their historic high and relative to the total size of markets that it chooses to define. But this is irrelevant: To the CLECs that use UNEs, they are a vital tool for their very survival, and for their customers they are a vital means of receiving cost-effective services. The key markets for UNE-Loop services nowadays are DSL and business T1s and EELs. Conflating the market for these specific services with telecom in general is meaningless. Mobile phones, streetcars and letter post are all forms of communication, but a typical UNE-Loop operator can no more switch to mobile phones than to streetcars. Some limited substitution has occurred in the pure-voice arena. Fifteen years ago there was, for instance, a significant market for prepaid UNE-Platform and Resale lines provided by CLECs to credit-challenged customers. Nowadays the prepaid market is almost entirely based on mobile devices. What the Petition seeks to end, then, are not these already-historic markets, but the surviving ones that still offer useful services.

UNE subloops as well as full loops are useful for broadband applications, especially in rural areas. ILECs will be using Connect America Fund money to upgrade their DSL footprints, even as some other ILECs, such as Verizon, withdraw their DSL offerings. Upgrades can make use of bonded copper loops to offer higher speeds than single loop services. As the number of active loops carrying POTS decreases, spare copper makes pair bonding even more practical. CLEC access to these loops and subloops thus allows for improved broadband services this way in non-fiber areas.

Interoffice transport is another UNE that still has some applicability. The BDS Order removed the obligation for ILECs to even provide Special Access DS1s and DS3s. Yet there are applications, such as interconnection, that require TDM transport. Enhanced 911 typically requires TDM connectivity to the Selective Routers. CLECs cannot realistically build miles of fiber to deliver a few calls a day, even though they are critical. The Petition ignores these types of low-volume critical applications, though the Petitioners may well be aware of these unstated impacts of their requests. The TRRO rules put in place a tier structure to determine which types of IOF should be available where. ILECs have been able to up-tier wire centers in order to remove IOF availability. That process is adequate to protect their interests. The Petition in effect promotes even the smallest wire center to Tier 1, which is neither just nor reasonable.

The bottom line is that there are niche markets still well served by UNEs, that the “initial” need for UNEs has narrowed but has not ceased to exist, and a blanket removal of the ILEC obligation to provide them will result in harm to both competitors and customers, and even to ILEC customers, as the ILEC will no longer feel the same competitive pressure. A triennial review process, with its legally-accepted “impairment” analysis, would be more appropriate if the Commission agrees with the Petitioner that the current UNE list is too broad. We do not agree.

### **Line loss is exaggerated**

Another justification cited in the Petition is that there “has been a staggering decline in ILEC switched access voice line subscriptions”. This is meant to imply that competition must be adequate. However, the cited 16 percent market share of home lines only tells a very narrow part of the tale. Some subscribers have moved to *ILEC-affiliated* wireless, as from a Verizon ILEC to Verizon Wireless. Others have moved to other ILEC wireline services which are not counted. Do AT&T’s U-Verse and Verizon’s FiOS so-called VoIP lines count as ILEC service or as “landline other than ILEC switched”? We believe many are the latter. In past generations, when the ILEC upgraded its network or replaced one technology with another (i.e., manual with electromechanical dial, electromechanical dial with SPC (stored program control) dial, SPC dial with digital TDM), the lines remained in the same count. Now, however, ILECs seem to think that by using packetized transmission *within their own fixed networks*, somehow they are no longer providing a “switched landline” service. This is absurd. Verizon and AT&T hold numerous CLEC certificates, acquired over the years, but moving a telephone line from the ILEC to a CLEC subsidiary, or to the captive CMRS, does not constitute a competitive loss.

Of those lines that were actually lost, the predominant winner was the cable company, which of course can provide telephone service over its own facilities at relatively low incremental cost. Hence the non-ILEC-affiliated “winner” of these lines is again the duopoly. Cable telephony is now well established and functionally acts the same as modern POTS. That it has “IP in the middle” is irrelevant, although cable companies continue to claim regulatory benefits based on being “VoIP”.

The Commission has for over 20 years failed to rule on the status of VoIP. That may be in part because so-called VoIP is really more than one distinct thing. PacketCable, U-Verse, and other

IP-enabled PSTN voice services operated over a carrier's own facilities are more appropriately called "voice *using* IP" (VuIP). So-called over-the-top services, which use the Internet itself as part of the loop facility, are run *over* an unaffiliated IP network, and are true VoIP. The preponderance of what the Commission counts as VoIP is really VuIP. Because it is provided by one of the duopoly, it has only minor competitive benefit – a two-vendor market is still highly concentrated. Over-the-top VoIP is itself dependent upon the provision of broadband service by another party than the voice provider, and of course that service itself is almost always provided by the duopolists. CLEC-provided DSL using UNE loops or subloops is a true competitive alternative.

The other problem with counting home telephone lines is that it ignores the business-line market. The ILEC share of that market is not stated in the Petition, and were the petition to be granted, it would most likely rise very substantially, as CLECs would lose access to these critical customers.

Most larger PBXs are fed with either ISDN Primary Rate Interface (PRI) trunks or with SIP (Voice using IP) trunks. CLECs have a strong market here, but largely depend upon UNEs, especially DS1 EELs, to reach these mid-market customers. These customers, who include many mid-sized businesses and local governments, are too large to be served by cable, and too small to warrant fiber construction. They require reliable, high-quality telephone service. Over-the-top VoIP quality is often not adequate, because the Internet by design only provides "Best Efforts" (scare quotes required) quality of service, with relatively high jitter and packet loss. It is rarely useful as a business-trunk substitute. If the only generally-available transport mechanism to a business location is an Internet circuit, EELs having been discontinued as proposed in this Petition and Special Access DS1s removed in 2017's *BDS Order*, then there will literally be no means by which a competitive telephone carrier can provision high-quality voice circuits to a multi-line business customer, unless the customer is lucky enough to be in a location served by competitive fiber carriers, or has a line-of-sight microwave path to the competitive provider and appropriate rooftop access. These are customers that can still be served perfectly well over a copper loop. Even an entrance facility from a passing conduit bearing fiber might be hard to justify, given the cost of underground construction in many cities. Yet the BDS Order considers

fiber anywhere in a county to be a sign of competitive availability. That is simply absurd and cannot be the basis to remove access to loop UNEs.

### **Ethernet services can use copper**

The Petition repeatedly asserts that TDM-based services are obsolete, and conflates TDM services with UNEs in general. Yet UNE-Loop users nowadays often deliver packet-based services over copper. Ethernet over copper (EoC) is perfectly viable for the lower-speed services that many businesses and some residential users find very satisfactory. A 10 Mbps service can be provisioned over a loop length of approximately 7000 feet, whether it is over a full loop or a distribution subloop. That speed is deprecated as a consumer “broadband” rate for the primary reason that it does not support multiple simultaneous high-definition television streams. But many customers, especially businesses, do not use their broadband connections to watch television. A business may use EoC for its private network, for instance, with the underlying CLEC provisioning a Carrier Ethernet or MPLS path to the customer’s other sites across it. This may carry some mix of voice and data. Financial data in particular is extremely sensitive and is best kept isolated from the public Internet. A high-speed broadband “best efforts” Internet connection from a monopolist, then, is simply not a substitute for a properly-provisioned EoC from a CLEC offering a customized service.

The Petition instead assumes that ILEC Ethernet services, which are only provided on a voluntary, unregulated basis, are totally adequate for such customers. Cable is not a competitor: Its DOCSIS technology is designed almost exclusively for mass-market access services, and has far too little upstream capacity to support much business use, which is often more upstream than downstream. Cable companies provide BDS services where they have fiber, but that is generally in a higher price and capacity category than EoC. Certainly wireless services are rarely a substitute – private microwave remains an option in areas where line of sight is available, but both fixed and mobile wireless services are almost exclusively focused on single-line telephony and consumer Internet access. Thus CLEC EoC services in some locations are the only offering, or the only competition for an ILEC.

## **Small businesses are the most likely to be harmed**

The Petition tries to de-emphasize its impact by noting that “[o]nly a small fraction of competitive offerings rely on the regulations from which we seek forbearance”. But “competitive offerings” is a broad concept. Many of the small CLECs who often provide the only competitive telecommunications alternative in smaller markets would be put out of business. Large competitors in large markets, such as cable MSOs, would remain in business, and would benefit from the reduction in competition, but putting only small businesses out of business is hardly consistent with national policy to encourage small business. One difference between the Forbearance Petition process and the NPRM process is that the former is not required to provide a Regulatory Flexibility Analysis showing its impact on small business. Forbearance should not be allowed to become a loophole around the RFA.

## **ILECs continue to enjoy unique advantages**

The Petition claims that “ILECs and RBOCs no longer enjoy unique marketplace advantages.” This is a brazen falsehood. While the ILECs have ceded much of their consumer market share to the cable incumbent monopolists, those two entities, and especially the ILECs, still retain exceptional advantages over competitors.

The first is simply market power. Because they have had first-mover advantage, ILECs began with a customer base that a newcomer does not have. The business risk of entering a market is high; overbuilders have a long history of failure. ILECs began with a de jure monopoly and if they have lost too many customers, it is through their own fault, not regulatory disadvantages.

A newcomer must not only have enough customers to generate income, but absent access to ILEC facilities, it must have them in a concentrated area where it can focus its capital construction. This limits their ability to efficiently advertise, because media markets are often much larger than the targeted areas that a newcomer can plant facilities in.

The second and more critical advantage today is their unique access to outside plant facilities, notably poles and conduit. Aerial fiber construction for a newcomer typically costs about twice as much as it does for an incumbent, simply because of the higher cost of make-ready. An incumbent already has a place on the poles (a *gain*, typically allocated in one-foot increments),

so if it needs to upgrade its facilities or add new plant, it can do so within its existing attachment space. Many ILECs, of course, own their own poles; others have joint pole agreements with electric utilities that competitors do not have. A newcomer must create a new gain on all poles, whether by adding crossarms, relocating existing facilities, or even replacing the pole with a taller one. Underground facilities are likewise a major advantage for incumbents. They own legacy conduits, so they can deploy new facilities at will. Newcomers often have trouble finding enough room in ILEC conduits, if they are allowed to use them at all, and thus must often build new facilities at very high cost. This is a severe barrier to market entry and essentially a permanent advantage to incumbents.

### **The petition grossly mischaracterizes resale**

The Telecom Act requires ILECs to make their telecommunications services available for resale (total service resale, not to be confused with UNE-P) at a price based on their retail (tariff) rate, minus an avoided-cost discount. That is, the reseller's wholesale price is not based on actual cost, but is basically the ILEC's own retail price with a commission (based on estimated sales, billing and collection expenses) retained by the reseller. This is not a major strategy for CLECs any more, but may be a useful way to probe a market and gather a customer base before determining whether or not to construct facilities. It also allows a specialized CLEC to market to a particular customer segment that is not geographically focused. Hence it only impacts, per the petition, about 3% of total volume, which translates to less than one percent of revenues (all of which should be offset by the avoided costs).

Yet the Petitioners seek to do away with their commissioned resellers and only make their services available via their own retail processes, by calling for 251(c)(4)'s requirement to be forborne. Instead it cites 251(b)(5)'s requirement allowing resale of services. This is not in any way equivalent. The 251(b)(5) requirement is not part of the Telecom Act's opening of local markets. It dates back to the 1970s' *Sharing and Resale* Order. Prior to that, ILEC services were not only provided on a monopoly basis, but they could not be used by third parties to sell value-added services. The earliest packet-switched dial-up networks, such as Telenet and Tymnet, needed to become FCC-tariffed common carriers in order to acquire local dial tone lines under a special tariff, services for other service providers (Series 10000).

The *Sharing and Resale* Order itself was pivotal because it *permitted* the creation of value-added services<sup>9</sup>, which led to among other things today's Internet. It was controversial at the time because it *also* allowed sharing of WATS lines, and thus Full Time WATS lines, which some universities allowed students to use at night, were replaced by 240-hour Full Business Day lines. And it permitted the development of shared tenant PBX services, and the rental of office space with telephone service included as an amenity.

Resold services under 251(b)(5) are not discounted – they are full-priced services that, per that rule, a serving carrier may not *discontinue* simply because it has determined that its full-price subscriber is *allowing* others to use it, or that its subscriber is using it to provide a value-added service of some sort. The Petitioners ignore this and try to pull the wool over readers' eyes that this is simply a nearly-equivalent substitute provision, when it is not.

They also cite the mobile resale marketplace as if it were a substitute. This too is deceptive. Mobile services are not the same as wireline services. The cited MVNO, Tracfone, is very large, but it too is a special case. Owned by América Móvil, an affiliate of Carlos Slim's Teléfonos de México, it has long-standing arrangements with AT&T and Verizon. In the case of AT&T, which appears to be its primary supplier, it should be noted that Slim was once the largest single shareholder in, and a Director of, SBC Corp., which purchased the AT&T name later. Very few other MVNOs not affiliated with Telmex make use of AT&T's network. Likewise, MVNOs are rarely users of the Verizon Wireless network, except for the cable companies who sold their 700 MHz licenses (SpectrumCo) to Verizon several years ago. A number of apparent MVNOs are simply subsidiaries of the network operator too. For example, Virgin Mobile is owned by Sprint, and Cricket is owned by AT&T. Sprint has been the national provider most receptive to MVNO deals, but they do not have equivalent coverage to AT&T, and may not even be long for this world, given that a merger with T-Mobile is pending. In any case, MVNO is totally an option of the licensee, not mandated, and is thus not resale in the same sense. Further limiting the MVNO option is the Commission's recent decision to not allow MVNOs to collect Lifeline support, which is now limited to the primary carrier.

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<sup>9</sup> The now-historic term *value-added service* essentially evolved into Computer II's *Enhanced Service* category, predecessor of the current term *Information Service*.

It is also worthy of note that mobile phones do not meet the needs of many landline use cases. Fax machines, burglar alarms, fire alarms, elevator emergency lines, home confinement devices all require legacy POTS lines or a full functional equivalent.

### **UNE rates are not discounts but regulated cost-based prices**

The Petition mischaracterizes the way UNEs are priced. It claims that, “The Commission also has consistently recognized that forced sharing of facilities or services at mandated discounts reduces incentives for investment and innovation, to the detriment of consumers.” But CLEC wholesale pricing is not a *discount* per se. In the case of Total Service Resale, not UNEs, there is a discount based on avoided cost. But UNEs are elements, not services, and thus do not have an equivalent retail price. They are priced based on Total Element Long Run Incremental Cost (TELRIC), a forward-looking cost-based methodology developed by the Commission for the express purpose of UNE pricing. The Petition claims that the Commission has recognized its flawed reasoning, but fails to cite specifically where the Commission does so.

TELRIC exists because there is no true market for UNEs. If UNEs were a fully-competitive market commodity, like the grains described by Adam Smith in *The Wealth of Nations*, then their price would naturally gravitate towards cost, as new market entrants would establish cost-based prices. But UNEs are by definition the fruits of monopoly, facilities largely installed under de jure monopoly conditions, or installed with the advantages of that history. Thus TELRIC simulates what a true market price would be, were these services *not* subject to natural-monopoly conditions. That is a perfectly reasonable way to price a regulated monopoly, and it has been upheld through many court proceedings. The Petition, though, seeks to give the ILECs the best of both worlds, no price regulation because of putative competition, and minimal true competition because of their continuing control over essential facilities, without an obligation to make them available *at any price* to potential competitors.

### **Affiliate sales remain a major concern**

The Petition seeks forbearance from Section 271(e)(1), which requires Bell carriers to fulfill orders from competitors as fast as it fills orders to its own affiliates. Rather than forbear from Section 271 and 272 obligations, the Commission owes the public greater transparency here.



With the 18-year freeze on separations, which the Commission now seeks to extend<sup>10</sup>, ILECs are now claiming that their local services, including UNEs, are unprofitable, but that is only because the frozen share of total expenses allocated to the state jurisdiction is outrageously out of step with their proportionate usage of facilities. Wireless backhaul facilities, special access/BDS, broadband services, and essentially every growth market of the past two decades are jurisdictionally interstate, yet the separations freeze falsely makes the remaining amount of local service seem like a money-loser. Also conveniently omitted from the local service revenue calculations are revenues from ILEC affiliates who use those facilities. Often, the facilities are used to serve the same ILEC customers which have been imputed as “lost”, but who are really now served by an ILEC affiliate over the same facilities as before. This casts serious doubt upon the claim that ILEC local services are unprofitable.

Instead of doing away with all of Section 271 and 272 obligations, the Commission should undertake a study of the actual costs of each basket of service. It may well be appropriate to order that ILECs impute, to the state jurisdiction, a fee for each loop facility used by the ILEC or any affiliate equivalent to the UNE price paid by unaffiliated providers. Removing the UNE obligation, in contrast, removes one of the last vestiges of transparency in pricing.

Affiliate transactions also raise concern. Absent price regulation, carriers are now free (at least inasmuch as the FCC is concerned) to discriminate between customers, favor affiliates, and disfavor competitors in competitive industries who make use of ILEC facilities. Because there is a mix of state and interstate jurisdiction, mispriced transfers could also allow profits to be moved from a high-tax state to a low-tax state. Creative accounting should not be encouraged.

### **The proposed Transition is little more than a shut-down**

The Petition calls for a shut-down of embedded UNEs over an 18-month period. (A negotiated proposal with a specific party that makes modest use of UNEs suggests moving the end of the transition period to 2021; this does little to change the overall picture.) At that point the Petition says that CLECs must disconnect the facilities or else the ILEC will “convert any UNEs that remain in place... to alternative arrangements offering comparable functionality at the ILEC’s then-existing market rates.” This proposal has several glaring holes in it. First off, the single

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<sup>10</sup> FCC 18-99, in CC Docket 80-286

most critical UNE is the dry copper loop. There is no “market rate” for this, and ILECs have never offered this as a voluntary product. In fact when it was discovered in the 1990s that intraoffice alarm, voice-grade or audio-grade leased lines were often usable for DSL, ILECs shut down their tariffs or actively blocked their use for DSL using technical means. The Telecom Act then made UNE loops available and only then did DSL take off.

It is thus absurd to expect ILECs to transition these to something “comparable” that does not exist. In many cases ILECs have conflated UNE-L with UNE-Platform, a very different service, and offered POTS lines as a substitute. But while that is preposterously inappropriate, many ILECs are no longer even providing copper-based POTS lines in many areas. Nor have ILECs offered dry loops under commercial agreements. UNE-P substitutes did replace UNE switching, but many continued to use UNE loop pricing. And those agreements are by now largely in decline, though some orders are still being accepted from some CLECs. There is also no substitute for dark fiber, which is occasionally available as a UNE in spite of ILEC efforts to thwart the requirements.<sup>11</sup>

### **The Singer report contains many flaws**

USTelecom justifies its petition in part by including a report by Hal Singer. This report itself is deeply flawed, as it hand-waves around the problems caused by the proposal and claims benefits that are, at best, dubious.

Singer argues that customers would experience a “net savings of \$1.0 billion over 10 years, plus an additional consumer surplus of \$29 million due to receiving higher-quality services.” While that number may look impressive at first glance, it is a drop in the bucket (\$100M/year), practically a rounding error, compared to the total size of the telecommunications industry. The “additional consumer surplus” is even more absurd, besides its being a relatively miniscule number. It assumes that by depriving customers of choice, they will necessarily find, and select, a “higher quality” service from a reduced supply of providers, even though with less competition remaining service providers (i.e., those who own their own transmission facilities) will have less

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<sup>11</sup> For example, one major ILEC’s stated dark fiber ordering process begins with a required Access Service Request that queries a database which does not itself contain an inventory of dark fiber; it thus results in an immediate rejection. Manual intervention is then required to ascertain whether or not spare strands exist, and to continue the ordering process.

incentive to maintain quality. He admits that “some customers who remain on legacy services will pay higher prices for equivalent services...” but again presumes that being *forced* to migrate to “next-generation” services somehow makes up for it.

But what are these supposed next-generation substitutes? Singer’s lack of fundamental understanding of how telecommunications actually *works* is revealed when he states, “...the legacy TDM services offered via UNEs have suitable and often superior substitutes in the form of next-generation dedicated services {such as Ethernet and SIP trunks) and ‘best efforts’ services (such as broadband and VoIP).” While he commendably does include the required scare quotes around “best efforts” (a term of art that generally refers to the *worst* quality of service offered by a network), he is wrong to state that such services are a superior substitute for TDM services. TDM was designed to carry voice with strictly-defined quality, negligible switching delay, and negligible drop-outs. A “best efforts” voice service has much lower and much more variable quality. It always has greater latency, due to the need to queue and buffer voice packets, and it is subject to routine drop-outs. While “VoIP” is widely used, *very little* in practice is sent “best efforts” via “over the top” or “parasitic” services. PacketCable, VoLTE, and most ILEC IP-based voice services make use of *dedicated* or *prioritized* capacity, not the Internet. They are properly described as VuIP, not VoIP. CLECs can and do provide such services over UNEs (typically DS1 SIP trunks).

If competitive voice providers had to make use of “over the top” Internet-based services, then their quality would necessarily be inferior to the VuIP services offered by the wire owners and would be entirely subject to the quality of the underlying Internet service, which is often provided by the ILEC competitor. Singer hand-waves this away by saying, “Despite the lack of service guarantees, ‘best efforts’ broadband is frequently a sufficient substitute for a dedicated 1.5 Mbps DSL product.” But this reduced quality would dramatically impair competitors’ ability to do business, and would create a negative consumer surplus for their customers.

Singer similarly suggests that “Cable ‘Best Efforts’ Broadband (10 Mbps)” is a viable substitute for Ethernet over Copper (10 Mbps). Likewise, T1 and T3 are supposedly replaceable by cheap cable modems. Cable is far cheaper. But if it is cheaper already, why are users buying the more expensive service *unless* it has benefits that cable doesn’t? And of course it does. EoC is used to provide *private, secure* enterprise networks, while cable only provides *public Internet* access.

These are totally different. The cost of a data breach is *far higher* than the savings from going to a public Internet service. The number of points of exposure to the public Internet should be kept down, not increased, in the ever-riskier world of cyberspace. The national security implications of a forced migration of critical facilities to public Internet services demands further study that is not possible in the forbearance process.

Singer also notes that a substantial share of business data services are provided by non-ILECs. This is true, but it ignores the fact that ILEC facilities are often the only ones available to many buildings even in counties that the FCC has deemed subject to BDS competition. CLECs using UNEs thus sometimes provide the only alternative to ILEC services. Since ILECs have in some cases grandfathered DS1 Special Access circuits, UNEs remain the only way to acquire such circuits that are still vital to many applications, including public safety and first responder voice communications (i.e., repeater receiver backhaul).

Singer also uses rhetorical tricks to ignore the importance of the DS1 EEL (transport-loop combination), a key service for enterprise and government voice networks. Singer notes that these “UNEs are priced from 15% below the wholesale rate (for DS3s) to 69% below the wholesale rate (for DS1s). Asset-light service providers have captured the additional value accordingly.” But in fact, EELs are priced at a regulated rate based on cost, which is appropriate for a monopoly. The “wholesale” rate (Special Access) was never based on cost, but was price capped based on 1992 tariffs, which themselves were based in part on compensating for the lost ILEC switched access (toll call) revenues that leased-line circuits were assumed to avoid, at a time when switched access charges were typically five to ten cents *per minute per end*. They also were based on the transmission technology of the 1980s, not today’s fiber optic economics. Typical interoffice mileage of \$20/DS1/mile is hardly reasonable when transmission is now multi-gigabit fiber, not twisted pairs with repeaters every 6000 feet. These rates were never just and reasonable. And in last year’s *BDS Order*, those tariffs were *discontinued* in most places. Thus Singer makes it sound as if the CLECs were being unduly enriched when in fact EELs merely prevented the ILECs from being unduly enriched in those niche markets. And the substitutes that Singer proposes are not even generally available any more.

It is also worthy of note that ILECs already have a mechanism to address outdated UNE cost models. ILECs can ask a state Commission for a rate study at any time to adjust UNE rates if an

ILEC believes that UNE rates are outdated and/or unjust. To the best of our knowledge, no ILEC has made such a request in any of the states where Coalition members operate within the past ten years. It is thus disingenuous for Petitioner to imply that a complete forbearance is the remedy for unjust UNE rates when the available remedy for that issue has not been utilized.

The Petition fails in fact to meet any of the three Section 10 criteria which must all be met for a forbearance petition to be accepted. For these and other reasons, the Petition should be dismissed.