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REDACTED – FOR PUBLIC INSPECTION

August 6, 2018

VIA ECFS

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, S.W.
Washington, DC 20554

Re: WC Docket No. 18-141 - *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks Opposition of First Communications, LLC*

Dear Secretary Dortch:

On behalf of First Communications, LLC ("First Communications"), and in accordance with the procedures outlined in the Protective Order[1], enclosed for filing is the redacted version of the Opposition of First Communications, LLC and supporting Declaration of Margi Shaw, President of First Communications, for filing in this proceeding.

The CONFIDENTIAL version of the Opposition and supporting Declaration have been filed by hand delivery and copies sent to Pamela Megna of the Wireline Competition Bureau, Competition Policy Division.

[1] *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, DA-18-575, ¶¶ 5, 13, Protective Order (rel. June 1, 2018).

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Any questions relating to this filing should be directed to the undersigned.

Respectfully Submitted,

/s/ Russell M. Blau

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Counsel for First Communications, LLC

Attachment

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

OPPOSITION OF FIRST COMMUNICATIONS, LLC

First Communications, LLC ("First Communications"), by its undersigned counsel, opposes the petition filed by USTelecom for forbearance from legacy unbundled network element ("UNE") and Section 251(c)(4) resale obligations ("Petition").[1]

I. EXECUTIVE SUMMARY

The forbearance sought by USTelecom is a blatant attempt to let ILECs increase both wholesale and retail prices for competitors and their customers. If permitted, the requested forbearance would result in large numbers of small and medium-sized business customers either losing their existing broadband service, or paying a much higher price for it. The Commission must not permit the forbearance process to be used as an end-around for increasing prices.

Competition remains the most effective means of ensuring just and reasonable prices. Competitive providers consistently drive innovation and affordable pricing, and they provide high-

[1] *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks*, WC Docket No. 18-141 (filed May 4, 2018) ("*USTelecom Petition*"); *see also* Public Notice, *Pleading Cycle Established for Comments on USTelecom's Petition for Forbearance from Section 251(c) Unbundling and Resale Requirements and Related Obligations, and Certain Section 271 and 272 Requirements*, WC Docket No. 18-141, DA 18-475 (rel. May 8, 2018) ("*Public Notice*").

quality service to small and medium-sized businesses ignored by incumbents. Competitive high speed broadband offered over unbundled loops and transport gives small business a choice of providers where otherwise little if any competition exists. The Petition proposes no commercial replacement services. With no access to UNEs or reasonable replacements, competitive providers would be at a disadvantage in the market as of the day after the grant of forbearance.

Granting forbearance would either eliminate or substantially raise the cost of the dedicated broadband service that is being provided to customers over nearly one million UNEs. USTelecom's economic analysis suggests a 219% increase for loop rates.[2] It also admitted that UNE rates will rise following forbearance when it proposed a transition framework with an immediate 15 percent rate increase.[3] As shown herein, retail prices for small-business voice and broadband service would likely increase by 50% or more immediately upon the effective date of forbearance if providers like First Communications are required to transition to special access circuits. Special access rates have not decreased as bandwidth prices have gone down.

Customers would also suffer from lack of innovation and service if the Petition is granted because CLECs such as First Communications compete on more than price. Unbundled loops are a mission-critical bridge between today's copper-based networks and the mainly-fiber networks of the future. The Petition would permit ILECs to continue to offer service over legacy copper network elements but deny CLECs nondiscriminatory access to such inputs at reasonable prices, thwarting competition. A lack of competition will slow down broadband deployment and innova-

[2] Declaration of Margi Shaw ("Shaw Dec.") at para. 11, attached hereto as Exhibit A.

[3] USTelecom Petition at 44.

tion to small business customers particularly in underserved markets as no evidence or commitment has been provided in the Petition to increase broadband deployment to underserved small business markets.

II. INTRODUCTION

First Communications offers voice and broadband services to residential and business customers, including school districts, hospitals, dental offices, health clinics, libraries, village and township governments, and non-profit organizations, in Ohio, Michigan, and Illinois.[4] It serves approximately **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** of these customers over its own lit fiber or fixed wireless connections, or last mile facilities deployed by non-ILEC third parties.[5] However, where it is not economically feasible to deploy last-mile facilities, the company purchases DS1 unbundled loops and DS1 and DS3 unbundled transport from ILECs for access to customer premises.[6] First Communications currently uses approximately **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** DS1 UNEs and **[BEGIN CONFIDENTIAL]**[redacted] **[END CONFIDENTIAL]** DS1 special access circuits to serve its customers.[7] Most of the special access circuits were purchased after the Commission imposed limits on DS1 UNE availability in the *Triennial Review* proceeding.[8] However, the cost of a special access DS1 service at that time averaged $275 per month, versus an average of $50 per DS1 UNE.

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[4] Shaw Dec., paras. 2-3.

[5] Shaw Dec., para. 5.

[6] Shaw Dec., para. 7.

[7] Shaw Dec., para. 8.

[8] Shaw Dec., para. 17.

This increased cost was passed through to customers, causing First Communications to reduce its workforce through layoffs.[9]

First Communications has made substantial investments in its network to utilize UNEs and provide services to customers. Those investments include collocation cages, rent, equipment racks, aggregation equipment (MUXs, DACs), switching equipment, fiber transport, security, number portability, fraud protection, and managed services. Most recently, the company made a $3 million investment to update its switching infrastructure, of which $1 million supports its DS1 deployments.[10]

First Communications is a driver in its markets of competitive prices, higher bandwidth solutions, and innovative technology advancements. As described herein, First Communications provides customers with one-stop shopping and innovative custom solutions to meet their needs. Simply put, First Communications provides a high level of service to small and medium-sized businesses in a way the incumbents have refused to provide. Moreover, First Communications provides affordable, competitive services and most First Communications customers likely could not afford the monthly rate increase associated with the higher cost replacement service if First Communications were no longer able to obtain DS1 UNE loops and transport.

Most of First Communications' business customers currently are not served by ILEC fiber, and neither need nor want to pay the rates charged by the ILEC for fiber-based services. Recent price quotes from ILECs in First Communications' service area to extend fiber optic service to currently unserved customers ranged from $329 to $569 per month.[11] In the latter case, a jewelry

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[9] Shaw Dec., para. 17.

[10] Shaw Dec., para. 22.

[11] Shaw Dec., paras. 14-15.

store in a suburb of Chicago, First Communications was able to provide the customer with Internet, voice, and cloud services over a UNE DS1 loop for approximately $300 per month, less than half of what the retail price for fiber service would have been.[12]

Accordingly, loss of access to UNEs would have a devastating effect on First Communications' small and medium-sized business customers. Customers who are now paying an average of $400 per month for 1.5 mbps of bundled voice and data services would likely face price increases of 50% or more if First Communications were required to transition to special access circuits.[13] As noted above, these customers would face similar or larger price increases if they chose instead to obtain retail service from the ILEC. As a result, the forbearance sought by USTelecom would result in large numbers of small and medium-sized business customers either losing their existing broadband service, or paying a much higher price for it.

III. THE COMMISSION MUST APPLY THE QWEST PHOENIX FORBEARANCE STANDARD TO USTELECOM'S PETITION

A. The USTelecom Petition Does Not Demonstrate the Presence of Facilities-Based Competition.

Congress adopted Section 251(c) to foster competition without requiring competitors to duplicate the ILEC network in markets where such duplication was uneconomic.[14] "Congress wanted to enable entry by multiple competitors through the use of the [ILECs'] network" and evidence of "robust competition" is required to forbear from "Congress' imposition of unbundling

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[12] Shaw Dec., para. 14.

[13] Shaw Dec., para. 18.

[14] *BellSouth Telecomms., Inc. v. Southeast Tel., Inc. and Kentucky P.S.C.*, 462 F.3d 650, 652 (6th Cir. 2006).

obligations as a tool to open local telephone markets to competition."[15] USTelecom's proposed forbearance from Section 251 unbundling and resale obligations would *not* promote "competitive market conditions,"[16] but would instead inhibit competition and harm consumers.

USTelecom "bears the burden of proof – that is, of providing *convincing analysis and evidence* to support its petition for forbearance."[17] The Petition fails to meet this burden. The Commission may grant forbearance only when the Petitioner demonstrates that "(1) enforcement of such regulation… is not necessary to ensure that the charges… in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement… is not necessary for the protection of consumers; and (3) forbearance… is consistent with the public interest."[18] This analysis "consider[s] whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services."[19] The Petition would end the UNE-based competition the Commission relied on to justify relaxed regulation of numerous services, deprive consumers of the benefit of competition, and increase prices. The Petition fails the test and the Commission should deny it.

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[15] *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, Memorandum Opinion and Order, 25 FCC Rcd. 8622, 8638, ¶ 32 (2010) ("*Qwest Forbearance Order*"); *aff'd*, *Qwest Corp. v. FCC*, 689 F.3d 1214 (10th Cir. 2012).

[16] 47 U.S.C. § 160(b); *Qwest Forbearance Order* 25 FCC Rcd. at 8674, ¶ 104.

[17] *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act*, Report and Order, 24 FCC Rcd. 9543, 9554, ¶ 20 (2009) (emphasis added) ("*Forbearance Procedural Requirements Order*").

[18] 47 U.S.C. § 160(a).

[19] 47 U.S.C. § 160(b).

Competition remains the most effective means of ensuring that charges are just and reasonable and not unreasonably discriminatory.[20] Dissenting from the *2015 Open Internet Order*, then-Commissioner Pai stated that under the Act's forbearance standard the Commission "must identify something else [other than an economic regulation] that will constrain pricing, and that something else has always been—and can only be—competition."[21]

In the *Qwest Phoenix Forbearance Order,* the Commission evaluated Qwest's market power to gauge whether sufficient competition existed to ensure prices would remain just and reasonable if it granted forbearance.[22] Under the *Qwest Phoenix* standard, a petitioner could rely upon facilities-based competition either in the wholesale market or from "a number of significant, full facilities-based competitors providing the relevant retail services."[23] But the Commission made clear that forbearance would be denied where the ILEC "either individually or in conjunction with a small number of firms, could profitably sustain supracompetitive prices."[24]

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[20] *See Business Data Services in an Internet Protocol Environment*, Report and Order, 32 FCC Rcd. 3459, 3516, ¶ 124 (2017) ("*BDS Order*"); *see also Petition for Declaratory Ruling to Clarify 47 U.S.C. § 572 in the Context of Transactions Between Competitive Local Exchange Carriers and Cable Operators; Conditional Petition for Forbearance From Section 652 of the Communications Act for Transactions Between Competitive Local Exchange Carriers and Cable Operators*, Order, 27 FCC Rcd. 11532, 11544, ¶ 27 (2012) (quoting *Petition of U S WEST Communications Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance; Petition of U S WEST Communications, Inc., for Forbearance; The Use of N11 Codes and Other Abbreviated Dialing Arrangements,* Memorandum Opinion and Order, 14 FCC Rcd. 16252, 16270, ¶ 31 (1999)).

[21] *Protecting and Promoting the Open Internet*, WC Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601, 5978 (2015) (dissenting Statement of Comm'r Pai).

[22] *Qwest Forbearance Order*, 25 FCC Rcd. at 8645-47, ¶¶ 41-43.

[23] *Id.* at 8647, ¶ 43.

[24] *Id.*

The analysis of whether continued enforcement of a regulation is "not necessary for the protection of consumers" similarly depends on the presence of sufficient competition.[25] In the *2015 USTelecom Forbearance Order*, the Commission declined to forbear from Section 272 obligations because "[t]o the extent these obligations remain necessary to guard against unreasonable or unreasonably discriminatory rates or practices in the provision of access services to long distance competitors, they are also necessary to protect consumers of long distance services."[26]

Finally, in making the Section 10 public interest determination, the Commission must consider whether forbearance will promote competitive market conditions, including among providers of telecommunications services.[27] For example, in the recent *BDS Order*, after finding that the first two prongs of the forbearance analysis were met for certain services, the Commission said that "those same considerations, plus [the] desire to promote competition and broadband deployment, likewise persuade us that … forbearance is in the public interest."[28] The Commission's consideration of all three prongs of the Section 10 forbearance analysis seeks to "balanc[e] short-term competitive effects and future developments."[29]

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[25] *Qwest Forbearance Order*, 25 FCC Rcd. at 8671, ¶ 92; *See also Petition of NTCA—The Rural Broadband Association and the United States Telecom Association for Forbearance Pursuant to 47 U.S.C. § 160(c) from Application of Contribution Obligations on Broadband Internet Access Transmission Services*, Order, FCC 18-75, ¶ 9 (rel. June 8, 2018).

[26] *Petition of USTelecom for Forbearance Pursuant to 47 U.S. C.§ 160(c) from Enforcement of Obsolete ILEC Legacy Regulations That Inhibit Deployment of Next-Generation Networks*, Memorandum Opinion and Order, 31 FCC Rcd. 6157, 6181, ¶ 44 (2015) ("*2015 USTelecom Forbearance Order*").

[27] 47 U.S.C. § 160(b).

[28] *BDS Order*, 32 FCC Rcd. at 3531, ¶ 159.

[29] *EarthLink, Inc. v. FCC*, 462 F.3d 1, 6 (D.C. Cir. 2006).

Section 10 requires the Commission to engage in a rigorous analysis of competition "by defining the relevant product and geographic markets"[30] and "examining whether there are any carriers in those markets that, individually or jointly, possess significant market power."[31] USTelecom's request for forbearance from the remaining legacy unbundling obligations implicates both wholesale and retail markets. Yet it has not defined the relevant product markets, explained why it would be reasonable for the FCC to define the relevant geographic market as "national," or shown that ILECs lack significant power in every relevant market. This is not the "convincing analysis and evidence" demanded by the Commission's rules.[32] Because USTelecom has not met its burden, the Commission should deny the Petition.

B. The USTelecom Petition Improperly Seeks to Define a "National" Market for Legacy Local Services.

Commission precedent makes clear—and ILECs have previously agreed[33]—that forbearance from legacy unbundling obligations are subject to a market-by-market review. As the Commission stated, "[a] different [nationwide] analysis may apply when the Commission addresses advanced services, like broadband services, instead of a petition addressing legacy facilities."[34] Because USTelecom seeks forbearance from legacy UNE obligations, the nationwide analysis is not appropriate here.

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30 *Qwest Forbearance Order*, 15 FCC Rcd. at 8646, ¶ 42.

31 *Id.* at 8632, ¶ 21.

32 *Forbearance Procedural Requirements Order*, 24 FCC Rcd. at 9554, ¶ 42.

33 *See* Reply Comments of Verizon Comments, WC Docket 14-9, at 7 (filed July 14, 2014) (stating that Qwest Phoenix "concerned legacy TDM services and does not apply to broadband services"); Comments of AT&T Services, Inc., WC Docket 14-9, at 4 (filed July 7, 2014) (stating that "high-capacity broadband packet-switched and optical services" implicate the Commission's Section 706 broadband deployment goals compared to legacy TDM-based services).

34 *Qwest Forbearance Order*, 25 FCC Rcd. at 8644, ¶ 39.

USTelecom's reliance on forbearance orders that utilized a nationwide framework is misplaced.[35] Contrary to USTelecom's implication, the *BDS Order* evaluated competition on a geographic basis by examining competitive facilities within a half-mile radius of a location with BDS demand and categorizing county-sized markets as competitive or non-competitive. The *BDS Order* finds that a relevant geographic market is one within which consumers can turn for alternative sources and within which providers can reasonably compete.[36] Small business and residential customers do not look nationally to identify their service provider for voice or broadband service, instead they look to the carrier that can deliver it to the specific locations where they have the need for service.

The Commission's decisions adopting a nationwide market analysis were limited to *broadband* elements (as opposed to legacy network elements), relied on price-regulated alternatives to "backstop" forbearance, or relied on other nationwide regulatory reforms to constrain incumbents' ability to drive up prices. Indeed, these deregulatory decisions specifically relied on availability of price-regulated Section 251 UNEs to discipline the commercial offering of services, so forbearance from Section 251 unbundling and resale obligations would be inconsistent with those decisions.

For example, the *Section 271 Broadband Forbearance Order* only addressed Section 271 obligations for broadband elements that were no longer UNEs.[37] Similarly, the *Enterprise Broadband Order* limited forbearance to ILECs' specific non-TDM broadband services provided to retail enterprise customers with national, multi-location operations (*e.g.*, optical network services, wave-based services, frame relay services, ATM services, LAN services, Ethernet-based services, and

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[35] USTelecom Petition at 2, n.3.

[36] *BDS Order*, 32 FCC Rcd. at 3479, ¶ 39.

[37] *Section 271 Broadband Forbearance Order*, 19 FCC Rcd. 21496, 21502, ¶ 12.

video transmission services). The Commission's analysis focused on the impact of dominant carrier rules on the ILEC's ability to compete for enterprise customers with national, multi-location operations.[38] The Commission found that dominant carrier regulations inhibited AT&T from responding quickly to customers' demands for innovative service arrangements tailored to each customer's individualized needs.[39] The Commission recognized that the broadband services for which AT&T sought relief were purchased predominantly by enterprise customers (*i.e.*, they were retail services), not their competitors as wholesale inputs.[40] The Commission found that "competition for these enterprise broadband services tends to be based on either competitive deployment of facilities or use of special access inputs"[41] and limited forbearance to packet-switched services and non-TDM-based services.[42]

In contrast, UNEs are legacy network elements purchased by ILECs' competitors and used primarily for SMB customers in local markets or for serving locations with limited demand for telecommunications service. Although the Commission can "reasonably tailor its analysis to the situation at hand," CLECs use UNEs and resale to serve locations that are very different from the

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[38] *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 Corp. for Forbearance Under 47 U.S.C. § 160(c) From Title II and Computer Inquiry Rules With Respect to its Broadband Service*, 22 FCC Rcd. 18705, 18718, ¶ 21, n. 86 (2007) ("*Enterprise Broadband Order*").

[39] *Id.* at 18725, ¶ 33.

[40] *Id.* at 18718, ¶ 21, n. 90 (noting that granting forbearance "will not affect" the ability for competitors who purchase wholesale inputs to obtain traditional DS1 and DS3 special access services or UNEs as inputs or affect their ability to self-deploy OCN facilities and services or to obtain them from non-incumbents).

[41] *Id.* at 18716-17, ¶ 20.

[42] *Id.* at 18716-17, n.4 (noting that "all traditional, TDM-based DS1 and DS3 services and all services that do not provide a transmission capability of over 200 kilobits per second in each direction" were excluded from forbearance).

large, multi-location enterprises that were at issue in the *Enterprise Broadband Forbearance Orders*.

Nor does the *2015 USTelecom Forbearance Order* justify deviating from the market based analysis the Commission established in the *Qwest Phoenix Forbearance Order.* The 2015 Order relied on the retention of Section 251 requirements and other regulations[43] acting as "backstops" and the fact that the 271 obligations were superfluous in light of Section 251.[44] While this order also eliminated the Section 251 requirement to provide a 64 kbps channel for voice, there was nominal demand (nowhere near the 2 plus million UNE loops in service), and the ILECs were required to grandfather existing arrangements.[45] In contrast, there is a continued and substantial competitor demand for loop unbundling. Although nationwide UNE demand may have decreased,[46] to evaluate the impact on consumers under the statutory standard, the Commission must analyze the impact of resale UNE-based competition in each local market and USTelecom has provided no such market-by-market evidence.

The *2016 Switched Access Non-Dominance Order* is likewise inapplicable here since the Commission granted forbearance due to "changes to the regulatory structure of interstate switched access that are largely independent of [competitive] trends [and] is not dependent on the extent of

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[43] *2015 USTelecom Forbearance Order*, 31 FCC Rcd. at 6169, ¶ 8 (expecting that "the substantive section 251 obligations will continue to be enforced through interconnection agreements and complaints filed under section 203 of the Communications Act)

[44] *Id.* at 6172-73, ¶7 (stating that "there is … no evidence in the record that competitors are providing services through unbundled loops, transport, or databases and signaling specifically available under the independent checklist obligations").

[45] *Id.* at 6194, ¶ 66.

[46] USTelecom Petition at 16.

competition among geographic and product markets for retail voice services."[47] Unlike switched access regulation, no comprehensive regulatory overhaul is at issue and thus the *Switched Access Non-Dominance Order* cannot support departure from *Qwest Phoenix* market-based analytical framework.

IV. UNBUNDLING OF DS0 AND DS1 LOOPS AND DS1 AND DS3 TRANSPORT IS NECESSARY TO ENSURE JUST AND REASONABLE ILEC RATES

Competitive high speed broadband offered over unbundled loops and transport gives SMBs and CBOs a choice of providers where otherwise little if any competition exists. Having a choice of broadband providers gives customers "new broadband services, better service quality, greater selection, and lower prices."[48] The Commission has found that the availability of UNEs disciplines ILEC rate and non-rate terms.[49]

A. Forbearance Would Harm Both New and Existing Customers of Voice and Broadband Services

Ending First Communications' ability to order new or additional UNEs would harm customers and competition. In First Communications' experience, many broadband customers do not have fiber alternatives available, and even those that do often rely on copper-based services due to the price point and other reasons. There are many SMBs and anchor institutions for whom existing

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[47] *Technology Transitions, USTelecom Petition for Declaratory Ruling That Incumbent Local Exchange Carriers Are Non-Dominant in the Provision of Switched Access Services, Policies and Rules Governing Retirement of Copper Loops by Incumbent Local Exchange Carriers*, , Declaratory Ruling, Second Report and Order, and Order on Reconsideration, 31 FCC Rcd. 8283, 8293, ¶ 29 (2016) ("*Switched Access Non-Dominance Order*").

[48] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, 2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment, 30 FCC Rcd. 1375, 1459 ¶ 150 (2015).

[49] *TRRO*, 25 FCC Rcd. at 2575, ¶ 65.

copper-based solutions meet their business needs and limited budgets. Broadband services give new life to copper facilities and provide lower level bandwidth solutions for businesses and other customers who do not need or cannot afford to spend the extra money for fiber-based connectivity.

Ending competitors' ability to order new UNEs would harm customers and competition. The Petition proposes no commercial replacement services and the Commission has found that BDS are inadequate substitutes for UNE loops.[50] With no access to UNEs or reasonable replacements, competitive LECs would be at a disadvantage in the market as of the day after the grant of forbearance. USTelecom has not identified the geographic markets where customers can obtain facilities-based service from non-ILEC providers of broadband and TDM phone services. Absent UNE-based competition, ILECs would be free to raise rates with impunity. USTelecom has failed to demonstrate how ILEC rates will remain just and reasonable given the loss of competition.

USTelecom bears the burden of demonstrating why and how rates would remain just and reasonable after forbearance. It cannot "turn[] the first part of the forbearance test in Section 10 completely on its head by creating a presumption that rates will remain just and reasonable until an injured party demonstrates otherwise."[51] USTelecom admitted that UNE rates will rise following forbearance when it proposed a transition framework with an immediate 15 percent rate increase.[52] Although USTelecom has since reached a "compromise" with Windstream to prohibit price increases on existing UNEs before February 2021, the Commission can predict with certainty

[50] *Qwest Forbearance Order*, 25 FCC Rcd. at 8641, ¶ 35.

[51] Opposition of SBC Communications Inc., at 24, WC Docket No 03-266 (filed March 1, 2004).

[52] USTelecom Petition at 44.

that rates will increase by a similar amount, if not more, after February 2021. And, for new customers, First Communications has shown that retail prices for small-business voice and broadband service would likely increase by 50% or more immediately upon the effective date of forbearance.[53] USTelecom cannot offer any "convincing analysis or evidence" that rates will not increase because there are no reasonably priced competitive alternatives available for these services.

Even with the transition plan proposed by USTelecom and Windstream, existing customers would suffer immediate harm from forbearance as well. These customers might not be able to increase their bandwidth, add additional services, or rectify service problems caused by failures in the unbundled loops provisioned as of the order's effective date. In short, such restrictions will harm consumers by restricting their ability to run their businesses in a sensible way. This harms competition by putting companies like First Communications at a competitive disadvantage in continuing to serve existing customers. The transition away from legacy unbundling obligations would cause unnecessary rate increases through unconstrained increases in wholesale input prices, in particular for SMBs and CBOs that currently opt for existing copper services over fiber, are price-sensitive and do not want (or do not have the resources) to spend the extra money for fiber.

B. The Availability of UNEs Disciplines ILEC Rates

It would be arbitrary and capricious to end ILECs' few remaining Section 251 legacy loop unbundling obligations when the Commission has repeatedly relied on the availability of UNEs to justify prior forbearance and regulatory reforms.[54] Just last year, the Commission relied on the "medium term" availability of UNEs for "several years" to ensure that ILEC BDS rates would

[53] Shaw Dec., para. 18.

[54] *See infra*, Section III.B.

remain just and reasonable after regulation. As the Commission found, "the use of UNEs, where available, allow competitors to effectively compete in lower bandwidth services."[55] Without continued loop unbundling obligations, the BDS findings will no longer be valid.

The *BDS Order* is not the only time the Commission relied on UNEs to ensure just and reasonable rates. In its *Enterprise Broadband Order*, the Commission found that in addition to deploying their own OCn facilities or utilizing rate regulated TDM-based, DS1 and DS3 special access services (which after the *BDS Order* are largely unregulated), potential AT&T competitors had the option to use Section 251 UNEs as wholesale inputs for their enterprise broadband services.[56] Likewise, the *Section 271 Broadband Forbearance Order* relied in part on competitors' access to Section 251 UNEs to compete with the ILECs' broadband services.[57] Similarly, forbearance in the *2015 USTelecom Forbearance Order* relied to a large extent on the existence of regulatory "backstops" in the form of Section 251 and other regulations[58] as well as a lack of evidence

[55] *BDS Order*, 32 FCC Rcd. at 3476, ¶ 32.

[56] *Enterprise Broadband Order*, 22 FCC Rcd. at 18721-22, ¶ 25 (stating that even where competitors do not have the option of self-deploying facilities or purchasing inputs from carriers other than the incumbent LEC, potential providers may rely on special access services purchased from the incumbent LEC at rates subject to price regulation and excluded from forbearance).

[57] *Section 271 Broadband Forbearance Order*, 19 FCC Rcd. at 21507, n. 68 (finding forbearance warranted despite lower levels of competition in the enterprise customer market from cable providers "[b]ecause competitive LECs can still obtain access to network elements under section 251 to serve business customers"). *See also* 19 FCC Rcd. at 21509, ¶ 26 (noting that competitive LECs would still have access to other network elements after forbearance).

[58] *2015 USTelecom Forbearance Order*, 31 FCC Rcd. at 6169, ¶ 18 (expressing expectation that "the substantive section 251 obligations will continue to be enforced through interconnection agreements and complaints filed under section 203 of the Communications Act).

that competitors were relying on independent unbundling obligations in Section 271 in contrast to the unbundling requirements in Section 251.[59]

Because USTelecom has not shown by "convincing analysis and evidence" that facilities-based competition is sufficient to discipline ILECs' rates in the retail markets for low bandwidth services sold to SMB and CBO customers or the retail business POTs line market, the Commission must deny the Petition.

C. SMBs and other Customers Rely on UNE Loop Based Services in Geographic Markets Lacking Fiber Alternatives

In many cases, the locations where customers receive service with UNE loop inputs are in urban areas outside the central business district, suburban or rural areas where the only facilities-based provider is the ILEC. It is not economical for a facilities-based CLEC or the cable company to extend facilities to the location for such a small volume of business. For example, First Communications combines DS1 transport UNEs with UNE loops to provide Enhanced Extended Loops, or "EELs" which enables the Company to provide competitive service in less densely populated areas like southern Illinois and Ohio. In comparison to $1.88 per mile on an EEL, special access mileage costs could be as high as $37 per mile.[60] Without DS1 transport UNEs, the Company would either exit these underserved areas or lose customers because of rate increases, which would eventually result in the Company's market exit. For those businesses, absent the UNE obligations Congress adopted in the 1996 Act, reasonably priced ILEC wholesale replacement services are the only vehicle by which the customer can obtain the benefits of competition. The

[59] *Id.* at 6172-73, ¶27 (stating that "there is … no evidence in the record that competitors are providing services through unbundled loops, transport, or databases and signaling specifically available under the independent checklist obligations").

[60] Shaw Dec., para. 12.

Commission's forbearance analysis examines the evidence and "evaluate[s] whether potential entry could occur in a timely, likely, and sufficient manner to counteract the exercise of market power by" ILECs or ILECs operating in concert with a few competitors (*e.g*, duopoly).[61] There is typically insufficient demand at these customer locations to justify a capital investment by competitors to extend their own facilities to these locations. This economic reality is acute in many suburban markets served by First Communications, as well as in some urban areas on the fringes of the central business district.

Cable companies generally do not serve these rural and suburban commercial locations because they are not adjacent to their core residential service areas, nor are their services tailored for these customers. In any event, the Commission has found that an ILEC and cable company duopoly is insufficient to warrant forbearance from legacy unbundling obligations.[62] Nor is there "convincing analysis and evidence" of significant competition with the ILECs for the wholesale products that companies like First Communications use to serve their customers. As the Commission found, where the ILEC "was the sole provider of wholesale facilities and services, there is no reason to expect it to offer such services at 'competitive' rates."[63] As a result of these marketplace realities, Section 251(c) is necessary to ensure consumers have a competitive alternative to ILEC services and competitive rates in the relevant markets and thereby ensure that ILEC rates, charges, classifications, and regulations are just and reasonable and not unjustly or unreasonably discriminatory.

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[61] *Qwest Forbearance Order*, 25 FCC Rcd. at 8646, ¶ 42.

[62] *Id.* at 8637, ¶ 30.

[63] *Id.* at 8639-40, ¶ 34.

D. <u>Enforcement of the Section 251 Obligations Is Necessary to Protect Consumers</u>

Granting forbearance would either eliminate or substantially raise the cost of the dedicated broadband service that is being provided to customers over nearly one million UNEs. If the Commission grants the requested UNE forbearance, small and medium-sized business customers will either lose the broadband service they rely on today or be forced to pay significantly more.

1. Demand for UNE-based Services Remains Strong Even as Fiber-based Services Become More Prevalent

Contrary to USTelecom's implication, the ongoing transition to "Ethernet" services is not all fiber-based.[64] Unlike the 64 kbps UNE, demand for UNE loops is not "extremely modest," and First Communications and other competitors provide both voice and broadband service extensively over DS1 UNEs. USTelecom provides no data to justify its claims that "[o]nly a small fraction of competitive offerings rely on the regulations from which [its members] seek forbearance,"[65] and the fact that Commission data shows competitive LECs use 2.1 million UNE loops[66] to offer customers competitive service options proves otherwise.

UNE-based competition enables competitors to offer innovative services, tailored products, and dedicated customer service to SMB and CBO customers that might not be offered by the ILEC.[67] First Communications employs UNEs to deliver Software Defined Wide Area Network ("SD WAN") service, managed service, cloud service, and other flexible customized solutions, to

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[64] USTelecom Petition at 13.

[65] *Id.* at 19.

[66] *Id.* at 16.

[67] *Qwest Forbearance Order*, 25 FCC Rcd. at 8677, ¶ 108 (finding that UNE obligations have led some competitive carriers to invest in equipment and technologies to provide innovative broadband and video services over legacy copper loops).

customers such as jewelry stores, law and dental offices, metal shops, and others in Illinois, Michigan, and Ohio.[68] Without continued access to UNEs, customers like this, and similar customers in markets served by CLECs nationwide, may no longer be able to afford or enjoy these competitive services.

Without network element unbundling, most First Communications customers likely could not afford the cost of extending fiber to their premises and may lose their broadband service altogether. Even if fiber were available in the building, many small businesses cannot afford the monthly rate increase associated with the higher cost of fiber-based replacement service. If First Communications were no longer able to obtain DS1 UNE loops and transport, DS1 special access circuits would be approximately $200 more expensive. If that cost were passed on to a customer it would move the retail rate up to $600 (50% higher). Many new customers are buying service for $300, which means a $200 price increase would price First Communications out of the market and its small business, school and health care customers would lose a competitively viable service option.[69] Requiring existing services to transition from UNEs to special access or some other alternative (whether immediately or at some later date after a transition period) would impose additional costs and network disruption.[70] To the extent permitted by its contracts, First Communications would have to pass these additional costs along to customers as well.

Freed from regulation of their wholesale rates, and any obligation to offer unbundled loop and transport elements, it is inevitable that ILECs will deny CLECs access to bottleneck loop facilities or raise CLECs' costs, enhancing the ILECs' prospects of attracting CLEC customers to

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[68] Shaw Dec., paras. 11, 14-15.

[69] Shaw Dec., para. 18.

[70] Shaw Dec., para. 20.

ILEC services. Consistent with basic competition theory, the Commission "has long recognized that a vertically integrated firm with market power in one market--here upstream wholesale markets where, … [the incumbent LEC] remains dominant--may have the incentive and ability to discriminate against rivals in downstream retail markets or raise rivals' costs" with the goal of "foreclos[ing] competitors from the market altogether."[71] Absent the unbundling obligations that exist, these customers would have only one, or potentially two service providers.

As the Commission has observed, "there is little evidence… that the BOCs or incumbent LECs have voluntarily offered wholesale services at competitive prices once regulatory requirements governing wholesale prices were eliminated."[72] Absent continued Section 251 unbundling obligations, ILECs are unlikely to offer any competitively priced wholesale substitutes. If ILECs are permitted to eliminate their wholesale UNE loop offerings without providing comparably priced replacements (about which no details have been provided), the types of business and community customers served by First Communications will be forced to pay higher prices for the broadband services they currently use, settle for inferior service at the same rate, or lose service altogether. If CLECs are forced to raise prices, ILECs can either raise their prices, or use the price differential to lure customers away from CLECs. Once CLECs have left these markets because of their inability to offer competitively priced products, ILECs will have free rein to raise prices above competitive levels.[73] These supra-competitive prices will harm consumers.

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[71] USTelecom Petition, at 34.

[72] *Qwest Forbearance Order*, 25 FCC Rcd. at 8640, ¶ 34, n.105.

[73] *See id.* at 8637, ¶ 30.

E. <u>Complete Forbearance From Section 251(c)(3) Is Inconsistent with the Public Interest</u>

Competition is in the public interest. The harm to the public interest from granting USTelecom's request for forbearance warrants extreme attention due to the substantial harm that customers of both incumbents and competitors would suffer.

Customers would suffer from increased prices without UNE-based competition to check ILECs' rates. USTelecom's Petition makes clear that rates will go up substantially. Section 251(c) obligations continue to be a vital source of wholesale inputs for competitors like First Communications that serve business and community based organization customers in urban areas outside the central business district, suburban and Tier 2 and 3 markets.

Customers would suffer from lack of innovation and service because CLECs such as First Communications compete on more than price. Over the past year, First Communications has launched its own SD WAN service, managed services and upgraded cloud services all running on UNE network connections to customers. It offers customers tailored services and a higher level of personalized customer support, all of which would be lost if it could not serve these customers without reasonably priced wholesale inputs.[74] First Communications' ability to design custom solutions to meet the needs of a customer would be stilted, and these customers could lose the Company's innovative offerings and one-stop shopping if the Commission were to grant forbearance from legacy unbundling obligations.

Unbundled loops are a mission-critical bridge between today's copper-based networks and the mainly-fiber networks of the future. Copper, fiber and wireless technologies should be used to

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[74] Shaw Dec., paras. 10, 13. *See Qwest Forbearance Order*, 25 FCC Rcd.*id.* at 8675, ¶ 103 ("forbearing from DS0 UNEs in particular could foreclose important choices for certain groups of customers.").

their fullest by both competitive and ILECs to ensure that customers enjoy broadband service. USTelecom has agreed that "[c]opper loops are a fundamental building block in communications networks, including [] IP-based networks" and that "[t]echnology advances continue to extend the life and usefulness of copper facilities, providing greater speeds over existing copper plant."[75] The Petition, however, would permit ILECs to continue to offer service over legacy copper network elements but deny CLECs nondiscriminatory access to such inputs at reasonable prices. For those ILECs that continue to rely in part on copper loops or subloops to offer broadband and phone service, denying their competitors nondiscriminatory access to those unbundled loops would thwart competition and is thus contrary to the public interest.

The Commission cannot evaluate the impact of the loss of UNE-based competition on consumers without details about the inputs that will be available to CLECs post-forbearance. It would be arbitrary and capricious for the Commission to adopt USTelecom's wait-and-see approach to forbearance, and it fails to satisfy USTelecom's burden to provide "convincing evidence and analysis" that the unbundling and resale rules are no longer necessary to ensure just and reasonable rates.

This is an untenable proposition for CLECs and their customers who may be forced to make substantial new and uneconomical investments or discontinue service as a result of the loss of UNEs. The Commission has an opportunity to ensure that technology transitions continue to benefit end-user customers (whether residential or business customers located in rural, suburban, or urban areas) and the economy at large by preserving a critical Section 251 market-entry framework that Congress adopted and the Commission implemented. It is imperative that USTelecom

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[75] Reply Comments of United States Telecom Association, WC Docket No. 13-184, at 6-7 (filed July 6, 2015).

present their plans to regulators and competitors that rely on UNEs to compete before the Commission considers any forbearance from the obligations upon which competition in local markets has been able to grow for over two decades.

V. CONCLUSION

For the foregoing reasons, the Commission should find that USTelecom's petition for forbearance does not satisfy the requirements of Section 10 of the Act, and deny it in full.

Respectfully submitted,

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August 6, 2018

EXHIBIT A

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	)	

DECLARATION OF MARGI SHAW

1. My name is Margi Shaw. I serve as President at First Communications, LLC (the "Company"). I have been with the Company for 5 years. My responsibilities include setting strategy and direction for the Company, day to day operations and developing new products.

2. First Communications offers voice and broadband services to small business and medium-sized business customers in Ohio, Michigan and Illinois. We also offer voice and broadband service to residential customers. Many of our customers are in Tier 2 and Tier 3 cities or suburbs.

3. Our customer base includes school districts, hospitals, dental offices, health clinics, churches, libraries, villages/townships, and numerous non-profit organizations.

4. First Communications offers symmetrical broadband speeds of 1.5 Mbps to 1 Gig to our small business customers. We layer cloud, managed services, security and other data centric services over these broadband connections. Many of our new customers upgrade from DSL to First Communication's products.

5. Where and when possible, the Company relies on last mile facilities other than incumbent local exchange carriers ("ILECs") unbundled network elements ("UNEs")/special

access to serve customers. The Company serves approximately **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** customers over its lit fiber or fixed wireless connections or last mile facilities deployed by non-ILEC, third-parties. The Company's initial buildout was done based on the highest business density central offices. Once enough customers were acquired in a particular area, a cost study would be performed to evaluate the cost of new Company facilities versus the cost of serving that area over UNEs.

6. In downtown Chicago and Cleveland, our larger customers generally have fiber alternatives available. However, most of our customers in the suburbs do not, and they are not interested in paying the costs required to extend fiber to their location.

7. Where fiber is not available or too expensive, the Company uses UNEs from the ILECs to provide service. Specifically, the Company purchases DS1 loops and DS1 and DS3 interoffice transport, primarily from AT&T but also from Verizon in some cases.

8. First Communications uses UNEs as the last mile connection to customer premises and to transport voice and data traffic from suburban central offices to its centralized switches. DS1 transport UNEs, in addition to providing interoffice transport, also combine with UNE loops to provide Enhanced Extended Loops, or "EELs." In locations where DS1 UNEs are no longer offered, the Company sometimes uses special access service instead. The Company uses approximately **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** DS1 UNEs and **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** DS1 special access circuits to provide service to our customers.

9. The use of UNEs enables the Company to enter a new market to gain sufficient market share to be able to deploy our own fiber or fixed wireless facilities. It also allows us to

serve customers at remote locations where it is not feasible to deploy owned last mile facilities or purchase last mile facilities from a provider other than the ILEC.

10. The loss of access to UNEs would affect the Company's ability to continue to provide service. Customers would experience material price increases, certain geographic markets would be shut down, and the level of personalized service would be diminished. The Company also would need to cancel plans to introduce innovative solutions to its customers. Over the past year the Company has launched its own Software Defined Wide Area Network ("SD WAN") service, managed services and upgraded cloud services all running on UNE network connections to the customers.

11. For UNE DS1 loops, commercial offerings like special access services or other business data services may be available. However, they are substantially more expensive and include features the customer often does not want or need (*i.e.*, 36-month term commitment). The average price difference between a DS1 UNE in our market compared to month-to-month pricing for special access is 409%. US Telecom even references a 219%[1] price increase in its economic impact. Whether it is a 409% or 219% increase, this is not a viable alternative for the Company or its customers. The options available in certain locations to small business customers would be cost prohibitive or force them to buy a level of service that is not needed to meet their business objectives.

12. Similarly, special access DS1 and DS3 transport services may be available but at a substantially higher cost. The loss of UNE transport would eliminate the availability of EELs,

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[1] USTelecom's economist uses an average DS1 loop cost of $69 (Figure 7) and estimates the wholesale cost post-forbearance will be $220 for a DS1 (n.34). I calculated the percentage increase by subtracting $69 from $220, dividing the difference by the loop cost, and multiplying by 100.

which the Company uses to expand our reach to underserved areas. For example, the availability of EELs enabled the Company to provide service in less densely populated areas like southern Illinois and Ohio. In comparison to $1.88 per mile on an EEL, special access mileage costs could be as high as $37 per mile. Without DS1 transport UNEs, the Company would either exit these underserved areas or lose customers because of rate increases, which would eventually result in the Company's market exit.

13. The loss of UNEs also would have a serious negative impact on our customers. First Communications has an established network that provides customers flexible customized solutions with high levels of customer service. We have numerous schools, libraries, health care providers and government institutions that use our service and rely on the network we have built and connected with them. Eliminating access to UNEs would put them in an immediate bind and jeopardize the pricing and tailored solution developed for them, including the Company's new SD WAN and upgraded cloud offerings that give customers one-stop shopping solutions.

14. Examples of the costs to our customers of using fiber include the following example from July 2018. A jewelry store in a suburb of Chicago is located in a building that did not have lit fiber. It would have cost $569 a month to extend and light fiber to the customer's location. To deploy the Company's Internet, voice and cloud based services over that loop, the resulting retail cost would have been over $700. The customer needed Internet and voice services but could not afford that price. Using a UNE DS1 loop, we were able to offer them Internet, voice and cloud services for a retail price of approximately $300 a month.

15. Other quotes in July to a law office, dental office, and metal shop in Ohio and Illinois had similar results, with a minimum cost of $329 per month for a fiber loop circuit,

resulting in a roughly 58% higher cost to the customer as opposed to servicing the customer by UNEs.

16. First Communications expects that it would pass any cost increase on to its customers, as would its competitors. If the cost increase could not be passed on to customers, First Communications would exit the market, decommissioning its network in affected areas, and forcing customers to find an alternative provider, if any.

17. When the Commission imposed caps on the number of DS1 UNEs in the *Triennial Review Order (*"TRO"*)*, First Communications had to transition approximately **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** DS1 UNEs to special access circuits. The cost of these services increased from approximately $50 per DS1 UNE to $275 for a month-to-month special access DS1. Even if the Company were to buy a 36-month special access circuit for $122, which is difficult to match up with customer contracts, it would result in a substantial price increase which increases customer churn. This TRO transition from UNEs to special access resulted in the Company reducing our workforce through layoffs.

18. Our customers often want a voice and data service bundled with 1.5 Mbps of bandwidth. On average, our embedded small business customer base pays a retail rate of approximately $400. If First Communications were no longer able to obtain DS1 UNE loops, DS1 special access circuits would be approximately $200 more expensive. If that cost were passed on to a customer it would move the retail rate up to $600 (50% higher). Many of our new customers are buying service for $300, which means a $200 price increase would price First Communications out of the market and our small business, school and health care customers would lose a competitive service option.

19. Our customers choose First Communications not only based on price, but also for the tailored communications solutions, one-stop shopping, and customer service we offer. These customers often do not need, or cannot afford the cost of, the ILEC extending fiber to their business location. The cost to the Company of building fiber or fixed wireless loop to customer locations is likely to be even more expensive than the ILEC's cost. Unlike the ILECs, First Communications does not have a large, preexisting residential and business customer base over which to spread last mile deployment costs. The Company also does not have the advantages of incumbency, such as existing ubiquitous conduit or aerial attachments, right-of-way easements, and access to commercial buildings. If the Company's small business customers cannot afford the $329 or $569 monthly cost of extending ILEC fiber to their building, they are unlikely to be able to afford the even higher build cost that First Communications or another competitive provider would incur to connect their building.

20. Where alternatives to UNEs are available and affordable, migrating DS1 customers to alternatives would tie up the company's engineering resources for a long period of time, impacting our ability to manage our network and provide critical customer support. Moving customers from UNEs to special access circuits after the TRO took approximately ten months for **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** circuits. Moving customers from UNEs to third-party networks would take additional time. It would require coordinated hot cuts during which time we take down the customer's service and bring it back up (all off hours). Sometimes the customer needs different equipment (e.g., going from copper to fiber) and a transition would strand not only existing network investments of the Company but also of customers. The biggest issue is that logistics are very difficult for large batches of hot

cuts given the communications and cooperation needed between the Company, its customer, the ILEC, and the third-party provider.

21. Going to pure resale on other networks would limit the customized solutions First Communications currently offers its customers and strand to an extent the network investment in our markets. Using our owned facilities and leasing just the last mile of the network through UNEs allows us to provide greater levels of SLA's, provide managed services, SD WAN and unique pricing structures based on customers' actual bandwidth needs.

22. First Communications has made substantial investments in its network to utilize UNEs and provide services to customers. Those investments include collocation cages, rent, equipment racks, aggregation equipment (MUXs, DACs), switching equipment, fiber transport, security, number portability, fraud protection, and managed services. Most recently, the company made a \$3 million investment to update our switching infrastructure, of which \$1 million supports our DS1 deployments.

I declare the foregoing to be true and correct to the best of my knowledge, under penalty of perjury.

Margi Shaw

Margi Shaw

August 6, 2018

Date