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November 8, 2018

**VIA ECFS**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

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

Dear Ms. Dortch:

Pursuant to the *Protective Order* in the above-captioned proceeding,<sup>1</sup> Granite Telecommunications, LLC, Manhattan Telecommunications Corporation d/b/a Metropolitan Telecommunications, and Access One, Inc. hereby submit for filing a redacted, public version of the enclosed ex parte letter. The Highly Confidential version of the ex parte letter has been filed by hand with the Office of the Secretary and will be made available for review pursuant to the terms of the *Protective Order*.

Please contact me if you have any questions regarding this submission.

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<sup>1</sup> *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks*, Order, DA 18-575 (rel. June 1, 2018) (“*Protective Order*”).

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Respectfully submitted,

/s/ Thomas Jones  
Thomas Jones  
*Counsel for Granite Telecommunications, LLC,  
Manhattan Telecommunications Corporation  
d/b/a Metropolitan Telecommunications, and  
Access One, Inc.*

Enclosure

cc: Terri Natoli  
Michele Berlove  
Pamela Megna

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November 8, 2018

**VIA HAND DELIVERY AND ECFS**

***EX PARTE***

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW, Room TW-A325  
Washington, DC 20554

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

Dear Ms. Dortch:

Granite Telecommunications, LLC (“Granite”), Manhattan Telecommunications Corporation d/b/a Metropolitan Telecommunications (“MetTel”), and Access One, Inc. (“Access One” and, together with Granite and MetTel, “the Joint Parties”), through their undersigned counsel, submit this letter in response to the reply comments of USTelecom – The Broadband Association (“USTelecom”)<sup>1</sup> and its member ILECs<sup>2</sup> (together with USTelecom, “the ILECs”) in the above-referenced proceeding.

As explained herein, USTelecom has not met its burden of proof to demonstrate that the public in general and competition in particular will be advantaged by forbearance from the avoided-cost resale requirement in Section 251(c)(4). Specifically, USTelecom and its ILEC members fail to address the fact that TDM-based telephone service provided via copper loops (“traditional TDM service”) remains subject to continuing and durable demand by both business and government enterprise customers – especially those with multiple locations – who rely on its unique characteristics. The ILECs provide no justification for ignoring the competitive implications of the product and geographic market analyses submitted by Granite, MetTel, and other competitors, which demonstrate that business and government customers lack competitive alternatives to the ILEC when obtaining traditional TDM service. All they offer are inadequate ways to avoid these issues, for example, by

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<sup>1</sup> Reply Comments of USTelecom – The Broadband Association, WC Docket No. 18-141 (Sept. 5, 2018) (“USTelecom Reply Comments”).

<sup>2</sup> Comments of AT&T, WC Docket No. 18-141 (Sept. 5, 2018) (“AT&T Reply Comments”); Reply Comments of CenturyLink, WC Docket No. 18-141 (Sept. 5, 2018) (“CenturyLink Reply Comments”); Reply Comments of Frontier Communications Corporation, WC Docket No. 18-141 (Sept. 5, 2018) (“Frontier Reply Comments”); Reply Comments of Verizon, WC Docket No. 18-141 (Sept. 5, 2018) (“Verizon Reply Comments”).

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ignoring product and geographic markets entirely or by trying to persuade the Commission to rely on consumer buying patterns to assess the competitive choices available to business and government customers. The ILECs also fail to address, much less rebut, the evidence that competitive harm to customers will occur if forbearance from the Section 251(c)(4) avoided-cost resale requirement is granted, by misconstruing such arguments as mere complaints that competitors, and not competition, will be harmed. The absence of supporting evidence and analysis is fatal to USTelecom's request for forbearance from enforcement of Section 251(c)(4), as it would be fatal to any Commission order adopting petitioners' position on that provision.<sup>3</sup>

**I. Section 251(c)(4) Avoided-Cost Resale is Necessary and in the Public Interest.**

Granite, MetTel, and other opponents of granting forbearance from Section 251(c)(4) avoided-cost resale have conclusively demonstrated that retaining this requirement, at least as it applies to traditional TDM service, is both necessary to protect consumers and in the public interest.

To begin with, opponents of the Petition have shown that large numbers of business and government customers rely on traditional TDM service for its distinct characteristics. Multilocation business customers ("MLBs") and many single-location business customers do not perceive other voice services as viable alternatives to traditional TDM service. As Granite and MetTel have explained, this is because traditional TDM service provides benefits that managed VoIP (whether cable-provided or non-cable-provided) and fixed and mobile wireless service generally cannot.<sup>4</sup> For example, unlike most fiber networks, copper networks are self-powered and can continue to work in the event of an electrical outage without the need for failsafes like back-up generators or batteries.<sup>5</sup> Businesses therefore rely on traditional TDM service to ensure the operation of critical systems such as

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<sup>3</sup> See 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) ("Petition").

<sup>4</sup> See Declaration of William P. Zarakas ¶ 8 (Aug. 6, 2018) ("Zarakas Decl."), attached as Attachment B to Opposition of Granite to USTelecom's Forbearance Petition, WC Docket No. 18-141 (Aug. 6, 2018) ("Granite Opp."); Declaration of Larry Antonellis ¶¶ 9, 12-26 (Aug. 6, 2018) ("Antonellis Decl."), attached as Attachment A to Granite Opp.; Reply Comments of Granite in Support of Motion for Summary Denial and Opposition, at 9 (Sept. 5, 2018) ("Granite Reply Comments"); Opposition of MetTel, WC Docket No. 18-141, at 4-6 (Aug. 6, 2018) ("MetTel Opp."); Declaration of Sean J. Sullivan ¶¶ 9-19 ("Sullivan Decl."), attached as Attachment A to MetTel Opp; Declaration of John Hoehne ¶ 18 (Aug. 3, 2018) ("Hoehne Decl."), attached as Attachment 3 to Opposition of INCOMPAS, FISPA, Midwest Association of Competitive Communications, and the Northwest Telecommunications Association, WC Docket No. 18-141 (Aug. 6, 2018) ("INCOMPAS Opp.").

<sup>5</sup> See, e.g., Zarakas Decl. ¶ 8; Antonellis Decl. ¶¶ 9, 12, 15-19; Granite Reply Comments at 9.

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medical alerts, fire/sprinkler monitoring, gas pipeline monitoring, bank vault or burglar alarms, and elevators that require reliable back-up systems for unexpected failures, even where managed VoIP is available.<sup>6</sup> Some business customers rely on the ability of traditional TDM service to provide specific functionalities, like rollover lines, not provided by managed VoIP or mobile wireless.<sup>7</sup> And for many business customers that send large faxes frequently, even those that have access to fax-over-IP service, traditional TDM service is the gold standard for fax reliability. Finally, as Granite and MetTel have explained, many government customers also have needs that require the reliability, availability, and compatibility that only traditional TDM service can provide.<sup>8</sup> As summarized by the Michigan Internet and Telecommunications Alliance,

a decline in TDM usage does not mean that TDM-based services will cease to provide value to customers. Because electric power is supplied along with the telecommunications service, businesses continue to depend on POTS for essential services such as 911, alarm, and elevator services. If CLECs did not have access to the provision of such essential services, ILECs would hold a distinct competitive advantage over CLECs.<sup>9</sup>

Notwithstanding the value of traditional TDM service, ILECs have shown little interest in continuing to provide it. Competitors like the Joint Parties and others realized the substantial continued demand for the service and built their businesses around meeting this demand. They do so by combining traditional TDM service with innovative, value-added services such as one-stop shop integrated billing and maintenance platforms that save customers time and money.<sup>10</sup> A large segment

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<sup>6</sup> See Granite Opp. at 18; Antonellis Decl. ¶ 18; Granite Reply Comments at 9; *see also, e.g.*, Opposition of Access Point Inc., BullsEye Telecom, Inc., Matrix Telecom, LLC dba Impact Telecom, New Horizon Communications Corp., and Xchange Telecom LLC, WC Docket No. 18-141, at 16 (Aug. 6, 2018) (“Wholesale Voice Line Coalition Opp.”) (“Xchange provides POTS service to buildings in New York for use as an emergency line in elevators and the state prohibits such lines from using standard VOIP connections. . . . Nor is wireless service a reliable substitute for POTS used for fax, elevator, and/or alarm services because, unlike mobile services, copper lines do not require a separate power source.”); MetTel Opp. at 4-6; Opposition of U.S. TelePacific Corp., Mpower Communications Corp., and Arrival Communications, Inc., WC Docket No. 18-141, at 17-18 (Aug. 6, 2018) (“TPx Opp.”).

<sup>7</sup> See Granite Opp. at 17; Antonellis Decl. ¶ 13; Granite Reply Comments at 9-10.

<sup>8</sup> See Granite Opp. at 19-20; Antonellis Decl. ¶¶ 22-26; Granite Reply Comments at 10; MetTel Opp. at 6; Sullivan Decl. ¶ 19.

<sup>9</sup> Reply Comments of the Michigan Internet and Telecommunications Alliance, WC Docket No. 18-141, at 5 (Sept. 5, 2018).

<sup>10</sup> See, e.g., Sullivan Decl. ¶ 5. (“For example, MetTel provides award-winning customer support and

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of U.S. businesses rely on the innovative services competitors provide via traditional TDM service, including 80 of the Fortune 100 companies, hospitality companies, real estate companies, health care providers, banks and financial service companies, and public utilities, as well as non-profit organizations and many governmental agencies. Of special importance are MLBs and government customers operating in remote and rural areas.<sup>11</sup>

But competitors can only provide these highly-valued services if they are able to purchase traditional TDM service from ILECs on reasonable terms and conditions. This is because the ILECs have substantial and persisting market power in the provision of traditional TDM service to business and government customers.<sup>12</sup> The availability of avoided-cost resale provides a constraint on the ILECs' exercise of this market power, enabling competitors to purchase traditional TDM service via commercial wholesale agreements or interconnection agreements subject to state public utilities commissions' ("PUCs'") supervision.<sup>13</sup> If the Commission were to eliminate the avoided-cost resale requirement, ILECs would have the incentive and ability to increase the wholesale prices they charge for traditional TDM service. As a result, competitors would be forced to either scale back their service offerings or increase prices.<sup>14</sup> Either scenario would harm consumer welfare by forcing business and

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technical assistance as evidenced by its earning the Stevie Award for customer service the last four consecutive years. MetTel creates efficiencies for its customers in multiple ways. Notably, MetTel has differentiated itself from other retail voice providers by offering 24/7/365 support, consolidated billing, and access to its Bruin portal, enabling customers to see real-time status of the products they buy from MetTel. MetTel's 'customer first' approach means that MetTel manages all customers' relationships with vendors and network suppliers, allowing MetTel's customers to spend their time running their businesses. Through experienced employees, high levels of automation, and scalable, repeatable processes, MetTel is able to provide its MLB customers with a one-stop-shop experience."); *see also* Antonellis Decl. ¶ 5.

<sup>11</sup> Antonellis Decl. ¶ 4; *see also* Sullivan Decl. ¶ 4 (explaining MetTel's MLB customers "include retailers, restaurants, pharmaceutical companies, government agencies, financial service companies, and health and wellness facilities" and range from "six of the Dow 30 companies" to "neighborhood shops").

<sup>12</sup> *See, e.g.*, Granite Opp. at 22-24, 26-29; MetTel Opp. 6-7; Granite Reply Comments at 4, 12.

<sup>13</sup> *See* Granite Opp. at 6, 31, 36; Zarakas Decl. ¶¶ 21-29. For further detail regarding the harmful effects forbearance from Section 251(c)(4) would have on wholesale contracts, *see infra* at 19-24.

<sup>14</sup> *See* Zarakas Decl. ¶ 21 ("The prices for copper-based TDM service will increase if Section 251(c)(4) resale rate obligations are eliminated, which will lead to [BEGIN HCI]

[END HCI]."); *see also* Comments Submitted on Behalf of the Public Utilities Commission of Ohio, WC Docket No. 18-141, at 4-6 (Aug. 3, 2018) ("Ohio PUC Comments") ("[I]t would appear that the

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government customers to accept inferior service and/or pay higher prices.<sup>15</sup>

While the benefits to consumer welfare associated with retaining avoided-cost resale are substantial, the costs are *de minimis*. Section 251(c)(4) obligates ILECs to discount their prices for traditional TDM service by the amount they save when selling at wholesale. This allows ILECs to retain their expected profit margin for all aspects of the service that they are actually delivering. In fact, retaining the avoided-cost resale requirement has no effect whatsoever on ILECs' incentive to invest in new facilities and services.<sup>16</sup> As Granite and others have explained,<sup>17</sup> for all these reasons, retaining the avoided-cost discount is necessary and in the public interest.

## **II. The ILECs' Responses to the Arguments of Forbearance Opponents are Without Merit.**

***The ILECs have not met their burden to demonstrate that Section 251(c)(4) is not necessary.*** USTelecom bears the burden of demonstrating that enforcement of Section 251(c)(4) “is not necessary to ensure that charges, practices, classifications, or regulations” are just, reasonable, and not unjustly or unreasonably discriminatory; that the requirement is not necessary to protect consumers; *and* that forbearance is consistent with the public interest.<sup>18</sup> In assessing whether USTelecom has met this

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CLECs would have diminished bargaining power in commercial negotiations if the fallback options of the right to demand access to UNEs and wholesale services are eliminated. Thus, for example, it is hard to envision that wholesale rates and, correspondingly, retail rates based on wholesale rates would remain unchanged post-forbearance.”).

<sup>15</sup> See, e.g., Comments of the California Public Utilities Commission, WC Docket No. 18-141, at 28 (Aug. 6, 2018) (“[W]e specifically find that granting this petition risks harming the California market, as it likely would have one dominant provider in business voice, mobile backhaul, and other wholesale services in California.”). And as Granite’s Larry Antonellis states in his August 6 declaration, if the Commission forbears from the avoided-cost resale requirement, business customers will “bear the cost of losing the value and efficiency of Granite’s overall product, such as the benefits of a one-stop shop for national retail voice services, which MLBs prefer because of its superior product characteristics.” Antonellis Decl. ¶ 44. See also Reply Comments of the Massachusetts Department of Telecommunications and Cable, WC Docket No. 18-141, at 7 (Sept. 5, 2017) (“Because Granite serves many large business customers in Massachusetts, the MDTC opposes USTelecom’s request as something that could harm those businesses.”).

<sup>16</sup> See, e.g., Granite Opp. at 35; Granite Reply Comments at 4 & n.8.

<sup>17</sup> See, e.g., Granite Opp. at 16-21; Granite Reply Comments at 10; INCOMPAS Opp. at 71-74.

<sup>18</sup> 47 U.S.C. § 160(a); *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, 25 FCC Rcd. 8622, ¶ 14 (2010), *aff’d* by *Qwest Corp. v. FCC*, 689 F.3d 1214 (10th Cir. 2012) (“*Qwest Phoenix*

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burden, Section 10(b) instructs the Commission to “consider whether forbearance from enforcing [Section 251(c)(4)] will *promote* competitive market conditions, including the extent to which such forbearance will *enhance* competition among providers of telecommunications services.”<sup>19</sup> As discussed below, the ILECs repeatedly fail to address the evidence submitted by Granite, MetTel, and other competitors demonstrating that retaining the avoided-cost discount is necessary and in the public interest.

***The ILECs fail to justify their claim that a granular market power analysis is not required.***

The ILECs focus much of their attention on trying to persuade the Commission that it need not analyze the relevant markets for traditional TDM service. There is no merit to those arguments.

First, the ILECs incorrectly argue that Commission precedent does not support analyzing relevant product and geographic markets in its assessment of the USTelecom Petition.<sup>20</sup> In fact, the Commission has held, in multiple orders, that the traditional market power test is the appropriate analytical framework where the petitioner relies on the level of competition to justify forbearance from economic regulation applied to legacy services.<sup>21</sup> In asserting that competition renders Section 251(c)(4) avoided-cost resale unnecessary, that is exactly what USTelecom has done in the Petition.<sup>22</sup> The Commission therefore should analyze the Petition employing the framework set forth in the *Qwest Phoenix Forbearance Order*, the most recent application of the traditional market power analysis in the context of a request for forbearance from economic regulation of legacy services.<sup>23</sup>

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*Forbearance Order*”), *aff’d* by *Qwest Corp. v. FCC*, 689 F.3d 1214 (10th Cir. 2012).

<sup>19</sup> *Id.* § 160(b) (emphasis added).

<sup>20</sup> See AT&T Reply Comments at 10-12; CenturyLink Reply Comments at 6-14; USTelecom Reply Comments at 15-26; Verizon Reply Comments at 20-27.

<sup>21</sup> In the *Qwest Phoenix Forbearance Order*, the FCC “return[ed] to a traditional market power framework, which the Commission established in the *Competitive Carrier* proceedings and developed further in subsequent decisions to evaluate competition in telecommunications markets in forbearance proceedings.” *Qwest Phoenix Forbearance Order* ¶ 37. See also, e.g., *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd. 5662, ¶¶ 23-26 (2007); *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd. 18290, ¶¶ 20-23 (2005); *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd. 18433, ¶¶ 20-23 (2005); *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd. 3271, ¶¶ 38-73 (1995).

<sup>22</sup> Petition at 25-26, 29-30.

<sup>23</sup> See, e.g., Granite Opp. at 3-5, 11-14; INCOMPAS Motion for Summary Denial, WC Docket No. 18-



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The ILECs cite orders in which the Commission did not employ the traditional market power framework in support of their claim that the Commission need not employ that analysis here. But those orders did not involve requests for forbearance from economic regulation of legacy services. For example, most of the orders that the ILECs cite to support a nationwide forbearance analysis involve petitions for relief from regulations applicable to advanced services.<sup>24</sup> As Granite and MetTel have previously explained, the Commission explicitly established separate analytical frameworks for petitions involving “advanced services, like broadband services” and those “addressing legacy facilities.”<sup>25</sup> The instant Petition is distinguishable from broadband-related forbearance petitions because, in those cases, the Commission’s Section 10 analysis was informed by Section 706’s directive that the Commission seek to promote broadband deployment through forbearance.<sup>26</sup> As the Commission explained when distinguishing broadband-related forbearance analyses from the traditional market power analysis in the *Qwest Phoenix Forbearance Order*, “[f]or advanced services, not only must we take into consideration the direction of section 706, but we must take into consideration that this newer market continues to evolve and develop in the absence of Title II

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141, at 4 (Aug. 6, 2018) (“INCOMPAS Motion for Summary Denial”); TPx Opp. at 11; Wholesale Voice Line Coalition Opp. at 7-12; Opposition of Sonic Telecom, LLC to Petition for Forbearance of USTelecom, WC Docket No. 18-141, at 12-13 (Aug. 6, 2018); MetTel Opp. at 3; Opposition of First Communications, LLC, WC Docket No. 18-141, at 7-12 (Aug. 6, 2018).

<sup>24</sup> See, e.g., Verizon Reply at 21 (citing *Petition for Forbearance of the Verizon Telephone Companies Pursuant to § 160(c)*, Memorandum Opinion and Order, 19 FCC Rcd. 21496 (2004) (“*Section 271 Broadband Forbearance Order*”); *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*; *Petition of Bellsouth Corp. for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, Memorandum Opinion and Order, 22 FCC Rcd. 18705, ¶ 23 (2007) (“*AT&T Broadband Forbearance Order*”)); USTelecom Reply Comments at 16 (additionally citing *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 14853, ¶¶ 91-93 (2005) (“*Wireline Broadband Forbearance Order*”); *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, Memorandum Opinion and Order, 23 FCC Rcd. 12260, ¶ 24 & n.93 (2008) (“*Qwest Broadband Forbearance Order*”); *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling and Order, 30 FCC Rcd. 5601, ¶ 439 & n.1306 (2015) (“*Open Internet Order*”).

<sup>25</sup> Granite Opp. at 14 (quoting *Qwest Phoenix Forbearance Order* ¶ 39); MetTel Opp. at 3.

<sup>26</sup> See, e.g., *Section 271 Broadband Forbearance Order* ¶ 34; *Wireline Broadband Forbearance Order* ¶¶ 77-78; *AT&T Broadband Forbearance Order* ¶¶ 47-49; *Qwest Broadband Forbearance Order* ¶¶ 50-52; *Open Internet Order* ¶ 439.

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regulation.”<sup>27</sup> Since Section 706 does not apply to the instant Petition, which pertains to the core local competition requirements of the 1996 Act, the Commission’s Section 706-influenced forbearance precedent also does not apply. The ILECs conveniently ignore that they have conceded as much in previous forbearance proceedings.<sup>28</sup>

Verizon cites the *2013 USTelecom Forbearance Order*<sup>29</sup> and the *2015 USTelecom Forbearance Order*<sup>30</sup> as instances in which the Commission granted nationwide forbearance for legacy voice regulations,<sup>31</sup> but the forbearance granted in those orders concerned regulations far narrower in scope than the core local competition provisions that are the subject of the instant Petition.<sup>32</sup> As

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<sup>27</sup> *Qwest Phoenix Forbearance Order* ¶ 39.

<sup>28</sup> Comments of AT&T Services, Inc., WC Docket No. 14-9, at 4 (July 7, 2014) (explaining that petitions concerning “legacy TDM-based services” are different from petitions that “implicate the broadband deployment goals articulated in section 706 of the Act”); Verizon Reply Comments, WC Docket No. 14-9, at 6-7 (July 14, 2014) (advocating that the Commission treat forbearance petitions for “advanced services . . . differently from TDM services” and explaining that *Qwest Phoenix Forbearance Order* “concerned legacy TDM services and does not apply to broadband services”); CenturyLink’s Market Analysis Comments, WC Docket No. 14-9, at 8 (July 7, 2014) (internal quotation marks omitted) (distinguishing the application of the *Qwest Phoenix Forbearance Order* analysis to forbearance petitions concerning legacy TDM services from the standard used to analyze requests for forbearance from regulations applicable to broadband, which “must be reviewed pursuant to the direction of section 706”); CenturyLink’s Market Analysis Reply Comments, WC Docket No. 14-9, at 3, 7 (July 14, 2014) (contrasting the “[t]he more granular [*Qwest Phoenix Forbearance Order*] market power analysis used to evaluate legacy services” with the different standard for “advanced services, like broadband services”).

<sup>29</sup> *Petition of USTelecom for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Certain Legacy Telecommunications Regulations*, Memorandum Opinion and Order and Report and Order and Further Notice of Proposed Rulemaking and Second Further Notice of Proposed Rulemaking, 28 FCC Rcd. 7627 (2013).

<sup>30</sup> *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 (2015) (“*2015 USTelecom Forbearance Order*”).

<sup>31</sup> Verizon Reply Comments at 24-25.

<sup>32</sup> See, e.g., *2015 USTelecom Forbearance Order* ¶ 59 (“The relief from section 251(c)(3) unbundling we grant is far narrower in scope than that granted with respect to particular geographic markets in the earlier forbearance proceedings discussed in the *Qwest Phoenix Forbearance Order*.”);

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INCOMPAS and Granite have explained, the forbearance requested in those cases involved “a narrow pruning of a little-used unbundling requirement” rather than “broad-scale forbearance from unbundling,”<sup>33</sup> and the Commission “did not grant broad forbearance from any of the core local competition provisions of Section 251.”<sup>34</sup> As clarified by INCOMPAS, the *2015 USTelecom Forbearance Order*

simply explains the common sense view that if it is possible to evaluate whether a regulation is necessary without evaluating competition, then no evaluation of competition is necessary. In contrast, the driving purpose behind Section 251(c)(3) and (4) is to foster competitive markets — it is impossible to determine whether these provisions are still necessary, or whether they are “outmoded and harmful as a *general matter*,” without an examination of competition.<sup>35</sup>

Moreover, in the *2015 USTelecom Forbearance Order* the Commission specifically relied on the continued existence of Section 251(c)(4) as the primary statutory safeguard against ILEC abuse of market power in the provision of traditional TDM service, since it “effectively caps the prices that incumbents can charge for wholesale voice services” and – as USTelecom itself advocated – “preserves competitive LECs’ ability ‘to provide voice services to customers without building their own network facilities.’”<sup>36</sup>

Finally, the ILECs maintain that Commission and circuit court precedent provide the Commission with unfettered deference in choosing the appropriate analytical approach for a given forbearance petition.<sup>37</sup> But the Commission is still bound by precedent unless it can both articulate why departing from its past approach is “necessary” and “offer[] a sound basis for repudiating its prior decisions.”<sup>38</sup> The *Qwest Phoenix Forbearance Order* makes clear that where a petition that seeks

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<sup>33</sup> INCOMPAS Motion for Summary Denial at 15.

<sup>34</sup> Granite Opp. at 13.

<sup>35</sup> INCOMPAS Motion for Summary Denial at 14-15 (citing *2015 USTelecom Forbearance Order* ¶ 9).

<sup>36</sup> *2015 USTelecom Forbearance Order* ¶ 60 (citing 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, WC Docket No. 14-192, at 59 (filed Oct. 6, 2014)).

<sup>37</sup> See, e.g., Verizon Reply Comments at 21 & nn.73-74 (citing *U.S. Telecom Ass’n v. FCC*, 825 F.3d 674, 706 (D.C. Cir. 2016); *EarthLink, Inc. v. FCC*, 462 F.3d 1, 7-8 (D.C. Cir. 2006); *Qwest Corp. v. FCC*, 689 F.3d 1214, 1230 (10th Cir. 2012)); USTelecom Reply Comments at 15-17; AT&T Reply Comments at 11.

<sup>38</sup> *Qwest Corp. v. FCC*, 689 F.3d 1214, 1231 (10th Cir. 2012) (upholding the FCC’s application in the

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forbearance from the core local competition provisions of Section 251 is premised on the state of competition for legacy services, the Commission employs a traditional market power analysis. The Commission therefore must explain any departure from this precedent, and the ILECs have provided no basis upon which the Commission could do so.

*Second*, the ILECs' assertion that the Commission utilized a more granular analysis in the *Qwest Phoenix Forbearance Order* only because Qwest sought forbearance in a discrete geographic area also is unpersuasive.<sup>39</sup> In that order, the Commission actually analyzed geographic areas that were *smaller* than the discrete area for which Qwest sought forbearance.<sup>40</sup> What is more, it would not be reasonable to enable a petitioner to dictate the geographic scope of agency review. The Commission must utilize a reasonable method for analyzing the instant forbearance request, and that approach is the one set forth in the traditional market power test, which requires the use of granular and economically-sensible relevant product markets when considering forbearance from economic regulation. Any analytical framework that does not rely upon sufficiently granular relevant product markets would fail to account for the harm forbearance will cause to key segments of the economy, and a Commission order relying on such an approach would be arbitrary and capricious and vulnerable to reversal on appeal.<sup>41</sup>

*Third*, the ILECs argue that the Commission's past assessments of the voice and BDS markets obviate the need to assess ILEC market power in the provision of traditional TDM service, but this is

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*Qwest Phoenix Forbearance Order* of a traditional market power framework in analyzing Qwest's petition for forbearance from Section 251 requirements for legacy voice services). Despite Verizon and CenturyLink's suggestions otherwise, the Eighth Circuit's recent *Citizens Telecommunications* decision, addressing the business data services ("BDS") marketplace, does not alter the FCC's burden to explain why repudiating the *Qwest Phoenix Forbearance Order*'s traditional market power framework would be necessary to resolve the instant Petition. See Verizon Reply Comments at 26; CenturyLink Reply Comments at 4-5 (both citing *Citizens Telecommunications Company of Minnesota, LLC v. FCC*, 901 F.3d 991 (8th Cir. 2018)). That case did not concern application of the traditional market power framework to a forbearance petition.

<sup>39</sup> See, e.g., AT&T Reply Comments at 12; Verizon Reply Comments at 2.

<sup>40</sup> *Qwest Phoenix Forbearance Order* ¶¶ 64-65 (analyzing competition at "each customer location" within the Phoenix MSA).

<sup>41</sup> See, e.g., *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-44 (1983) (finding that an "agency rule would be arbitrary and capricious if the agency . . . entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency").

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not true. Contrary to CenturyLink's claim,<sup>42</sup> the Commission's ruling that ILECs are no longer dominant in the provision of interstate switched access service actually supports the need for *ex ante* regulation where the ILECs have market power. The Commission concluded that ILECs lack market power over interstate switched access because it had previously imposed *ex ante* rate regulation on that service in the form of bill and keep.<sup>43</sup>

The ILECs also contend that the Commission's analysis of the BDS marketplace in the 2017 *BDS Order*<sup>44</sup> supports their assertion that the ILECs lack market power in the provision of traditional TDM service.<sup>45</sup> But the *BDS Order* is irrelevant to the Commission's assessment of competition in the provision of traditional TDM service because that order did not address voice-grade DS0 services. The *BDS Order* also did not address competition in the many geographic locations where customers purchase traditional TDM service but do not purchase BDS. In any event, the *BDS Order* retained *ex ante* rate regulation for DS1 and DS3 channel terminations in areas it deemed non-competitive, consistent with the Joint Parties' contention that a lack of competition for traditional TDM service necessitates the continued enforcement of Section 251(c)(4).<sup>46</sup> Moreover, the Commission's statement in the *BDS Order* that, once TDM-based voice service is discontinued, the ILECs will continue to "make similar offerings available in IP"<sup>47</sup> provides no basis for granting the Petition. As Granite and its expert economist, Mr. William Zarakas, have explained at length, many business customers "are specifically seeking copper-based TDM service"<sup>48</sup> and do not regard managed VoIP as a substitute for traditional TDM-based voice service.<sup>49</sup> And in circumstances in which Granite's customers *would*

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<sup>42</sup> See CenturyLink Reply Comments at 7-8.

<sup>43</sup> *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, ¶ 16 (2016).

<sup>44</sup> *Business Data Services in an Internet Protocol Environment; Technology Transitions; Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Report and Order, 32 FCC Rcd. 3459 (2017) ("*BDS Order*").

<sup>45</sup> See, e.g., CenturyLink Reply Comments at 8-9, 29; Frontier Reply Comments at 2; USTelecom Reply Comments at 10; Verizon Reply Comments at 5-6.

<sup>46</sup> *BDS Order* ¶ 179.

<sup>47</sup> *Id.* ¶ 292.

<sup>48</sup> Zarakas Decl. ¶ 14; Granite Reply Comments at 9.

<sup>49</sup> See Granite Opp. at 16-21; Zarakas Decl. ¶ 14; Antonellis Decl. ¶ 12; Granite Reply Comments at 9-

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switch to an IP-based service offering, the ILECs have repeatedly rejected Granite's requests for access to replacement IP services, making the Commission's prediction of the continued availability of competitive options even less likely. As Granite's Director of Strategic Initiatives, Larry Antonellis, explains in his supplemental declaration submitted herewith, **[BEGIN HCI]**

**[END HCI]**

*Fourth*, the ILECs misapprehend the terms and purpose of Sections 251(b) and (c). In doing so, they argue incorrectly that the requirements of Section 251(c) were intended to be temporary measures designed to jump-start competition.<sup>52</sup> This argument inappropriately equates the UNE requirement with the avoided cost resale requirement. As Granite has explained, the terms and purpose of Section 251(c)(4) demonstrate that Congress intended that the avoided-cost resale requirement would remain in place over the long term.<sup>53</sup> In fact, it is logical to infer that Congress intended Section 251(c)(4) avoided-cost resale to remain in place even after UNEs are eliminated in a market.<sup>54</sup>

In addition, Verizon and AT&T assert that Section 251(c) requirements should not be applied in geographic areas where there is no prospect of competitive entry,<sup>55</sup> but this argument has no basis in the terms of Section 251(c)(4) or sound policy. Such geographic markets are especially well suited to the application of avoided-cost resale because the Section 251(c)(4) requirement enables competitors like the Joint Parties to provide customers with innovative services that would otherwise be unavailable in remote areas and to do so without imposing costs on the ILECs. This ILEC argument is also inconsistent with the *BDS Order* in which, as discussed above, the Commission retained *ex ante*

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10; *see also* MetTel Opp. at 4-6.

<sup>50</sup> Supplemental Declaration of Larry G. Antonellis ¶ 9 (Nov. 6, 2018) ("Antonellis Supp. Decl.") (Attachment I).

<sup>51</sup> *Id.*

<sup>52</sup> *See, e.g.*, USTelecom Reply Comments at 11-12; CenturyLink Reply Comments at 16; AT&T Reply Comments at 6; Verizon Reply Comments at 2, 7.

<sup>53</sup> *See* Granite Opp. at 10-11.

<sup>54</sup> *See id.*

<sup>55</sup> *See* Verizon Reply Comments at 7-8; AT&T Reply Comments at 19-20.

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regulation in areas deemed non-competitive.<sup>56</sup> Relegating these areas to stagnant monopolies is clearly not the best way to promote competition and, in reality, would contribute to eliminating competition in other areas. This is because MLB customers frequently demand that their service provider serve all of their locations; if a competitor is unable to serve locations where no competition exists, it may be unable to serve the customers' other locations as well. Thus, eliminating resale in noncompetitive locations would reduce competition everywhere.

***The ILECs offer no evidence that market conditions warrant forbearance.*** To the extent that the ILECs discuss market conditions, they offer no factual basis for granting forbearance from avoided-cost resale as it applies to traditional TDM service.

***Failure to define product and geographic markets.*** The ILECs fail to acknowledge the relevant product and geographic markets implicated by their request for forbearance from Section 251(c)(4), and, in so doing, inappropriately conflate distinct product markets and distinct geographic markets. With respect to product markets, the ILECs steadfastly refuse to analyze the level of competition in the provision of traditional TDM service available to enterprise and government customers. Instead, they cite competition from a range of services that Granite and MetTel have shown do not constitute viable alternatives to traditional TDM service, including fixed and mobile wireless and managed and best-efforts VoIP.<sup>57</sup> In addition, the ILECs cite competition for services provided to consumers, even though Granite, MetTel, and others have shown that the demands of business customers differ from those of consumers.<sup>58</sup> With no support whatsoever, CenturyLink contends that customers use traditional TDM service “out of inertia or concerns about change.”<sup>59</sup> There is no merit to this claim, which again ignores business customers' well-documented demand for traditional TDM because of its unique characteristics.<sup>60</sup> Finally, USTelecom asserts in passing that the relevant market consists of bundled voice and data,<sup>61</sup> but this is not the case for customers that demand traditional TDM service. Those customers routinely purchase traditional TDM service on a stand-alone basis.

CenturyLink asserts that the Commission's new “alternative options test” for assessing TDM

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<sup>56</sup> *BDS Order* ¶ 179.

<sup>57</sup> *See, e.g.*, USTelecom Reply Comments at 23-26; AT&T Reply Comments at 23; CenturyLink Reply Comments at 7-8.

<sup>58</sup> *See, e.g.*, CenturyLink Reply Comments at 4, 12; USTelecom Reply Comments at 25; Verizon Reply Comments at 9, 29-30.

<sup>59</sup> CenturyLink Reply Comments at 21.

<sup>60</sup> *See* Granite Opp. at 16-21; Antonellis Decl. ¶¶ 9-27; Granite Reply Comments at 9-10.

<sup>61</sup> *See, e.g.*, USTelecom Reply Comments at 25.

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discontinuance requests somehow supports the conclusion that VoIP is a substitute for traditional TDM service,<sup>62</sup> but that is incorrect. Under that test, if a carrier can show that “it provides a stand-alone interconnected VoIP service throughout the affected service area, and . . . at least one other stand-alone facilities-based voice service is available from another provider throughout the affected service area,” then streamlined discontinuance of the TDM service is appropriate.<sup>63</sup> In adopting this standard, the Commission barely acknowledged the needs of business customers, did not undertake a substitution analysis of any kind, and made no attempt to define a product market. Additionally, CenturyLink fails to recognize the substantial differences in the applicable standards for discontinuance under Section 214, from which the “alternative options test” stems, and the Section 10 forbearance standard.<sup>64</sup>

With respect to geographic markets, as Granite has explained, even if managed VoIP provided by cable companies were a viable alternative to traditional TDM service, in [BEGIN HCI]

[END HCI] of TDM customer locations, the ILEC is the only provider of wireline business telephone services, and there is little prospect that this will change in the foreseeable future.<sup>65</sup> The ILECs inappropriately conflate distinct geographic markets into a single national market because they have found pricing to be the same across regions. However, economic research has shown that commonality of prices across geographies cannot be used as a basis for concluding the existence of a

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<sup>62</sup> CenturyLink Reply Comments at 13.

<sup>63</sup> *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Second Report and Order, FCC 18-74, ¶ 30 (June 8, 2018) (“*2018 Wireline Broadband Order*”).

<sup>64</sup> *Id.* ¶ 13. For example, the Section 10 forbearance inquiry addresses whether the Commission should continue to enforce a particular *regulation* – not whether a carrier must continue to provide a particular type of telecommunications *service*, as is the case with Section 214. Moreover, the “alternative options test” presents an objectively lower bar and shorter inquiry for petitioning parties than does Section 10 forbearance. The “alternative options test” is designed “for streamlined treatment of applications” and merely requires a carrier to demonstrate the qualification of its substitute service and the existence of a facilities-based competitor. *See 2018 Wireline Broadband Order* ¶ 30 & n.93. Reflecting this streamlined inquiry, the discontinuance petition will be automatically granted on the 31st day after filing “unless the Commission notifies otherwise.” *Id.* ¶ 21. In contrast, Section 10 forbearance requires a detailed showing that all impacted carriers’ “charges, practices, [and] classifications” will remain just, reasonable, and not unjustly or unreasonably discriminatory; that enforcement is not necessary to protect consumers; *and* that forbearance is consistent with the public interest. *See* 47 U.S.C. § 160(a). Reflecting this complex inquiry and petitioners’ heavy burden of proof, the statute allows twelve to fifteen months for the Commission to conduct its analysis of a forbearance petition, far longer than the streamlined inquiry under Section 214. *See id.* § 160(c).

<sup>65</sup> *See* Zarakas Decl. ¶ 19.



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national geographic market.<sup>66</sup> Even more plainly, buyers of business telecom services in Atlanta cannot be substituted for service provided in Boston or Los Angeles, even if services in the latter geographic markets are offered at better (or the same) prices.<sup>67</sup>

Harms to competition posed by forbearance. The ILECs contend that competitors' arguments focus solely on harm to competitors, rather than harm to competition.<sup>68</sup> That is demonstrably untrue. Granite and Mr. Zarakas have described at length the consequences of forbearance from the avoided-cost resale requirement for the availability of competitive alternatives to customers, prices paid by customers, and the service quality of offerings available to customers.<sup>69</sup> As Mr. Zarakas explains, "The prices for copper-based TDM service will increase if Section 251(c)(4) resale rate obligations are eliminated, which will lead to [BEGIN HCI]

[END HCI]."<sup>70</sup> Further, Mr. Antonellis explains that,

but for the avoided-cost resale protections provided by Section 251(c)(4), ILECs would raise the prices they charge Granite for services made available in commercial wholesale agreements. In such an event, [BEGIN HCI]

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<sup>66</sup> Professor Jonathan Baker has explained that price comparisons, both in levels and in correlations, can mislead as to market definition. See Jonathan B. Baker, Market Definition: An Analytical overview, 75 Antitrust L.J. 129, 152-53 (2007).

<sup>67</sup> It may at times be expedient for analytical purposes to aggregate distinct geographic markets into a larger collection of geographies to the extent that customers exhibit relatively homogeneous demand characteristics across those geographies. However, unlike the pure exercise of market definition at the local level, where the focus is entirely on buyer-side substitution, when aggregating across geographies for expedience one must also consider whether competitive conditions vary across those geographies. Consider, for example, the situation in which business telecom buyers in Atlanta and Los Angeles were relatively homogeneous (and USTelecom has presented no evidence to support a claim that buyer-side substitution is nationally homogeneous). Also consider, for example, the situation in which the Atlanta market was dominated by a single facilities-based supplier while the Los Angeles market had three or more facilities-based suppliers. Scenarios such as these highlight the potential pitfalls of aggregating geographies when competitive conditions may be dissimilar.

<sup>68</sup> See AT&T Reply Comments at 6, 23; CenturyLink Reply Comments at 19; USTelecom Reply Comments at 5, 27-29; Verizon Reply Comments at 9, 13.

<sup>69</sup> See Granite Opp. at 25-29; Zarakas Decl. ¶¶ 21, 29.

<sup>70</sup> Zarakas Decl. ¶ 21.

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[END HCI] In both cases, this is direct harm to competition.<sup>71</sup>

The ILECs have not even attempted to refute these arguments; they have simply chosen to ignore them.

CenturyLink does at least try to address the fact that forbearance would deprive business customers of innovative products and services made available by competitors like the Joint Parties. It does so by incorrectly asserting that competitors that rely on avoided-cost resale “do not typically provide unique services unavailable from other providers.”<sup>72</sup> This assertion ignores the fact that, as Mr. Antonellis has explained, “Granite provides heightened customer support and technical assistance and creates efficiencies for its customers in multiple ways.”<sup>73</sup> Specifically, Granite makes available to its customers

teams of dedicated account managers, 24/7/365 operation and tech support, consolidated and customizable bill reporting, and online tracking tools. Granite’s personnel possess expertise catered to each customer’s unique communications infrastructure and preferences, which lets Granite focus on resolving operational issues and frees the customer so it may shift internal resources away from managing the dozens of underlying network suppliers to running its own business.<sup>74</sup>

MetTel, Access One, and members of the Wholesale Voice Line Coalition provide similar benefits to their customers.<sup>75</sup> Furthermore, as Mr. Antonellis explains, “[t]hese efficiencies are, in important part, a result of the ability of Granite to offer its MLB customers a one-stop shop.”<sup>76</sup> CenturyLink asserts that other providers, such as IXCs, and, to some degree, cable companies, also provide services on a nationwide basis.<sup>77</sup> But, as explained, the Joint Parties’ customers specifically require traditional TDM

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<sup>71</sup> Antonellis Decl. ¶ 42.

<sup>72</sup> CenturyLink Reply Comments at 19.

<sup>73</sup> Antonellis Decl. ¶ 5.

<sup>74</sup> *Id.*

<sup>75</sup> *See, e.g.*, Sullivan Decl. ¶ 5; Wholesale Voice Line Coalition Opp. at 1-3.

<sup>76</sup> Antonellis Decl. ¶ 5.

<sup>77</sup> *See* CenturyLink Reply Comments at 19-20.

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service, which can only be obtained from the ILEC within its service territory.<sup>78</sup> Granite’s MLB customers value the fact that “Granite provides substantial assistance in managing the relationships between its customers and the ILECs,” including “handl[ing] the processing and payment of dozens or hundreds of separate bills,” which may span dozens of individual ILEC footprints.<sup>79</sup> The Joint Parties are not aware of any ILEC offering traditional TDM service on a nationwide basis, nor do cable companies offer such service.

Additionally, AT&T’s contention that opponents of the Petition are asking the Commission to ignore the impact on consumers is simply wrong.<sup>80</sup> Granite, MetTel, and other competitors have demonstrated that harm to competition will harm consumers.<sup>81</sup> Indeed, the connection between competition and consumers is made explicit by the statute. Under Section 10(b), the Commission must “consider whether forbearance from enforcing [Section 251(c)(4)] will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services.”<sup>82</sup> The ILECs have not made such a showing; rather, as Granite, MetTel, and others have shown, forbearance would greatly diminish competition among ILECs, CLECs like the Joint Parties, and others.<sup>83</sup>

*Volume of demand for traditional TDM service and avoided-cost resale.* The ILECs also incorrectly and misleadingly assert that traditional TDM service is disappearing so quickly that the Commission need not worry about ILEC market power in the provision of that service.<sup>84</sup> But as Granite, MetTel, and other competitors as well as at least one government official have demonstrated, the demand for traditional TDM service remains strong among government customers, MLBs, and small business customers.<sup>85</sup> In pressing their argument, the ILECs cite data regarding patterns of TDM

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<sup>78</sup> See, e.g., Antonellis Decl. ¶ 29.

<sup>79</sup> Antonellis Decl. ¶ 7; see also Granite Opp. at 33; Sullivan Decl. ¶ 7.

<sup>80</sup> AT&T Reply Comments at 23.

<sup>81</sup> See, e.g., Granite Opp. at 31-37; Zarakas Decl. ¶¶ 21-29; MetTel Opp. at 4-10; INCOMPAS Opp. at 74; Wholesale Voice Line Coalition Opp. at 21-25, 28.

<sup>82</sup> 47 U.S.C. § 160(b).

<sup>83</sup> See, e.g., Granite Opp. at 36-37; MetTel Opp. at 6-8; Wholesale Voice Line Coalition Opp. at 28.

<sup>84</sup> See AT&T Reply Comments at 12; CenturyLink Reply Comments at 9-10, 12; Verizon Reply Comments at 11.

<sup>85</sup> See Granite Opp. at 16-21; Antonellis Decl. ¶¶ 9-27; Granite Reply Comments at 9-10; MetTel at 4-7, 9-10; INCOMPAS Opp. at 44-45; Letter from David J. Redl, Assistant Secretary for Communications and Information, NTIA, to Ajit Pai, Chairman, FCC, WC Docket No. 17-84, at 2

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usage among *all* customers.<sup>86</sup> These data reveal nothing about the patterns of demand among MLBs, government customers, or other relevant customer segments that rely on the distinct features of traditional TDM service.

Relatedly, the ILECs maintain that competitors barely rely on Section 251(c)(4) avoided-cost resale to purchase traditional TDM service.<sup>87</sup> There is no merit to this assertion. As Granite, MetTel and others have explained, competitors do in fact purchase a large number of lines under interconnection agreements governed by Section 251(c)(4).<sup>88</sup> Furthermore, the availability of avoided-cost resale enables competitors to negotiate reasonable prices in commercial wholesale agreements.<sup>89</sup> Thus, purchases made under those agreements must be understood to represent the “use” of Section 251(c)(4). In fact, as the Commission has frequently explained, Section 252 contemplates that competitors will enter into negotiated agreements with ILECs that depart from the terms of Sections 251 and 252.<sup>90</sup> Reliance on the availability of Section 251(c)(4) provisions to enter into commercial agreements therefore falls squarely within Congress’s and the Commission’s intended use of that statutory requirement.

USTelecom asserts that the Commission should reject this kind of backstop argument because it did so when it granted forbearance from the Section 271 UNE requirements in the *USTelecom 2015*

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(July 19, 2018) (“July 19 NTIA Letter”). CenturyLink mischaracterizes the July 19 NTIA Letter by stating that it is limited to “support[ing] the Commission’s efforts to accelerate the transition to IP and express[ing] faith in the Commission’s determination that carriers will consult with government agencies to avoid harmful impacts to customers and that extraordinary situations can be addressed on a case-by-case basis.” CenturyLink Reply Comments at 27. In fact, NTIA stated that it “remains concerned” that ILEC transitions from copper to IP networks may place the federal government – the “predominant buyer of communications services” – in the untenable position of losing access to critical national security and public safety communications functionality upon which it relies, particularly in areas lacking competition. July 19 NTIA Letter at 1-2.

<sup>86</sup> See, e.g., AT&T Reply Comments at 2; CenturyLink Reply Comments at 12; Verizon Reply Comments at 11.

<sup>87</sup> See, e.g., AT&T Reply Comments at 7-8; CenturyLink Reply Comments at 24-25; Verizon Reply Comments at 11.

<sup>88</sup> See, e.g., Granite Opp. at 25-26; Antonellis Decl. ¶¶ 10-11, 23-24, 40; MetTel Opp. at 5.

<sup>89</sup> See, e.g., Granite Opp. at 26; Zarakas Decl. ¶¶ 22-23 & nn.12-13; Antonellis Decl. ¶ 37.

<sup>90</sup> See generally 47 U.S.C. § 252.

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*Forbearance Order*,<sup>91</sup> but that order dealt with a very different situation. Section 271 UNEs were not subject to *ex ante* rate regulation,<sup>92</sup> so the effect of the requirement on negotiations for wholesale commercial agreements was far less significant than is the effect of the Section 251(c)(4) avoided-cost resale requirement on such negotiations. In addition, the Commission found in the *USTelecom 2015 Forbearance Order* that the protections of Sections 201 and 202 of the Act essentially served the same functions as the Section 271 UNE requirements at issue.<sup>93</sup> As Granite, MetTel and others have explained, that is not the case with avoided-cost resale: no other statutory requirement provides benefits and protections similar to those provided by Section 251(c)(4).<sup>94</sup>

*Avoided-cost resale as a constraint on ILEC market power.* The ILECs incorrectly argue that the availability of Section 251(c)(4) avoided-cost resale does not actually constrain the ILECs' ability to engage in anticompetitive conduct.<sup>95</sup> Granite and others have shown that the opposite is true. As an initial matter, AT&T's assertion that opponents of forbearance have provided "no economic or other studies" to support their arguments that avoided-cost resale constrains ILEC rates for commercially negotiated services ignores important elements of Granite's submissions in this proceeding.<sup>96</sup> In his declaration, Mr. Zarakas explains that the rates Granite negotiated for the purchase of traditional TDM service from [BEGIN HCI] [END HCI] at wholesale closely resemble [BEGIN HCI] [END HCI] avoided-cost resale rates. He states that "[t]his close correspondence between commercial wholesale prices and avoided cost resale rates follows directly from basic bargaining theory. It also follows that an increase in the rates available to Granite under Section 251(c)(4) would result in an increase in the prices that Granite would have to pay under commercial wholesale arrangements."<sup>97</sup> And Mr. Antonellis "explains that Granite's costs for lines procured under commercial wholesale agreements with ILECs would increase by as much as the entire resale discount (15.5% on average . . .) if Section 251(c)(4) obligations were eliminated."<sup>98</sup>

AT&T's further contention that [BEGIN HCI]

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<sup>91</sup> USTelecom Reply Comments at 34.

<sup>92</sup> See generally 47 U.S.C. § 271.

<sup>93</sup> See 2015 USTelecom Forbearance Order ¶¶ 31, 60.

<sup>94</sup> See, e.g., Granite Opp. 29-31; MetTel Opp. at 8-9.

<sup>95</sup> See, e.g., AT&T Reply Comments at 24; USTelecom Reply Comments at 33-34.

<sup>96</sup> AT&T Reply Comments at 24.

<sup>97</sup> Zarakas Decl. ¶ 26.

<sup>98</sup> *Id.* ¶ 27 (citing Antonellis Decl. ¶ 36).

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<sup>99</sup> [BEGIN HCI] [END HCI]

<sup>100</sup> [BEGIN HCI] [END HCI]

<sup>101</sup> [BEGIN HCI] [END HCI]

<sup>102</sup> [BEGIN HCI]

[END HCI]

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<sup>103</sup> Antonellis Supp. Decl. ¶ 7. After Granite revealed to AT&T that it was considering moving more than 61,000 lines from the LWC plan to The Big Easy, AT&T abruptly withdrew The Big Easy. *Id.*

<sup>104</sup> [BEGIN HCI] [END HCI]

<sup>105</sup> [BEGIN HCI] [END HCI]

<sup>106</sup> [BEGIN HCI] [END HCI]

<sup>107</sup> [BEGIN HCI]

HCI]

[END

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HCI]

The ILECs also assert that they would have the incentive to continue to offer traditional TDM service at reasonable prices and on reasonable terms and conditions were the Commission to grant

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<sup>108</sup> [BEGIN HCI]

[END HCI]

<sup>109</sup> [BEGIN HCI]

[END HCI]

<sup>110</sup> [BEGIN HCI]

[END HCI]

<sup>111</sup> [BEGIN HCI]

[END HCI]



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forbearance,<sup>112</sup> but opponents of forbearance have shown that this is untrue. Mr. Zarakas, Granite, MetTel, and others have described the ILECs' market power in the provision of traditional TDM service to enterprise and government customers,<sup>113</sup> the ILECs' incentive to increase prices if the avoided-cost resale requirement is eliminated,<sup>114</sup> and the ILECs' actual conduct that confirms this conclusion.<sup>115</sup> The ILECs respond to these arguments in only the most superficial and unpersuasive terms. For example, [BEGIN HCI]

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<sup>112</sup> See, e.g., USTelecom Reply Comments at 33; Verizon Reply Comments at 8.

<sup>113</sup> See, e.g., Granite Opp. at 22-24; Zarakas Decl. ¶ 14. MetTel Opp. 6-7; Granite Reply Comments at 4, 11-12.

<sup>114</sup> See Granite Opp. at 25 (explaining that ILECs act simultaneously as suppliers of wholesale voice services used as inputs by CLECs to provide retail services and as competitors to CLECs in the provision of retail voice services, and that ILECs therefore have a direct incentive to charge CLECs higher wholesale prices to disadvantage CLECs in competing for retail customers); Zarakas Decl. ¶ 21 ("The prices for copper-based TDM service will increase if Section 251(c)(4) resale rate obligations are eliminated, which will lead to [BEGIN HCI]

[END HCI]."); see also Ohio PUC Comments at 4-6 ("[I]t would appear that the CLECs would have diminished bargaining power in commercial negotiations if the fallback options of the right to demand access to UNEs and wholesale services are eliminated. Thus, for example, it is hard to envision that wholesale rates and, correspondingly, retail rates based on wholesale rates would remain unchanged post-forbearance.").

<sup>115</sup> See Granite Reply Comments at 11-12 (describing ILECs' consistent refusal "to provide services that Granite currently purchases under interconnection agreements pursuant to the Section 251(c)(4) avoided-cost resale discount under a legal framework that would remain in place even if the Commission were to forbear from enforcing Section 251(c)(4)[, such as] . . . resale under Section 251(b)(1) or a commercial agreement").

<sup>116</sup> [BEGIN HCI]

[END HCI]

<sup>117</sup> [BEGIN HCI]

[END HCI]

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[END HCI]

*ILEC assertions that competition policy should not apply to legacy services are without merit.*

The ILECs assert that there is no point in assessing ILEC market power over traditional TDM service because such service will eventually be replaced by newer technology.<sup>119</sup> But this ignores the facts that business and government customers today continue to demand traditional TDM service because of its unique characteristics that are not available through newer technologies,<sup>120</sup> and that customers with such demand continue to have few or no competitive alternatives to the ILEC. There are many instances in which the Commission has found that the lack of competition for a particular service warranted intervention in the market, even where such service would eventually become obsolete.<sup>121</sup>

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<sup>118</sup> [BEGIN HCI]

[END HCI]

<sup>119</sup> See, e.g., AT&T Reply Comments at 7-9; Verizon Reply Comments at 11.

<sup>120</sup> See Granite Opp. at 16-21; Antonellis Decl. ¶¶ 9-27; Granite Reply at 10; MetTel Opp. 4-6; Sullivan Decl. ¶¶ 9-19; INCOMPAS Opp. at 33, 44-45; Hoehne Decl. ¶ 18; Wholesale Voice Line Coalition Opp. at 16.

<sup>121</sup> See, e.g., *BDS Order* ¶ 96 (maintaining “ex ante pricing regulation of legacy, circuit-based DS1 and DS3 end user channel terminations . . . [for] areas where [it] predict[ed] there is a substantial likelihood that competition will fail to ensure just and reasonable rates,” notwithstanding the fact that DS1 and DS3 services will someday be replaced by Ethernet and other packet-based services); *2014 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*; *2010 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*; *Promoting Diversification of Ownership In the Broadcasting Services; Rules and Policies Concerning Attribution of Joint Sales Agreements in Local Television Markets; Rules and Policies to Promote New Entry and Ownership Diversity in the Broadcasting Services*, Order on Reconsideration and Notice of Proposed Rulemaking, 32 FCC Rcd. 9802, ¶¶ 71, 78 (2017) (“*Quadrennial Review Reconsideration Order*”) (finding that “the video marketplace has changed substantially since the current television ownership limits were adopted in 1999” and since the Commission’s last review of its local broadcast ownership rules in 2008, but concluding that “a rule focused on preserving competition among local broadcast television stations is still warranted” and retaining, with minor modifications, the prohibition on ownership of two of the

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***The ILECs offer no evidence that forbearance from Section 251(c)(4) will promote competition.*** As CenturyLink candidly admits, eliminating the avoided-cost resale requirement would likely cause higher prices for services, such as traditional TDM service, that are subject to the requirement.<sup>122</sup> That is competitive harm, and that should end the discussion.

Thus, it is not surprising that the ILECs fail to support their claim that forbearance from avoided-cost resale will promote investment and accelerate the transition to IP-based services.<sup>123</sup> As Granite has explained, the Petition provides no information or data upon which to conclude that this is the case with regard to avoided-cost resale.<sup>124</sup> The same is true of the ILECs' reply filings. At the same time, Congress designed Section 251(c)(4) such that the costs of retaining the avoided-cost resale requirement are *de minimis*.<sup>125</sup> As Mr. Zarakas observed, Section 251(c)(4)'s avoided cost methodology

ensures that, in addition to other costs, a return on invested capital is included in the resale price . . . . The ILECs therefore do not suffer a below market return on their investments when a business line is leased to a CLEC (via resale obligations) instead of sold directly to an end-user. There is, therefore, no adverse impact on their ability to gain profits or to invest in the construction of new networks or the provision of new services.<sup>126</sup>

The record of this proceeding demonstrates that forbearance from the Section 251(c)(4) avoided-cost resale obligation would harm competition while doing nothing to increase ILECs' incentives to invest in the construction of new networks or the provision of new services.

***Claims that avoided-cost resale imposes costs on ILECs are unsupported and meritless.*** Only AT&T even attempts to argue that avoided-cost resale imposes costs on ILECs, but its arguments are without support and have no merit.<sup>127</sup> First, AT&T asserts that ILECs must maintain systems and

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top-four television stations in a given local market).

<sup>122</sup> CenturyLink Reply Comments at 21.

<sup>123</sup> Rather, these ILEC arguments, when made with any specificity, concern Section 251(c)(3) unbundling. See, e.g., AT&T Reply Comments at 9, 19; Frontier Reply Comments at 1; USTelecom Reply Comments at 1-2, 12; Verizon Reply Comments at 19-20.

<sup>124</sup> See Granite Opp. at 35-37; Zarakas Decl. ¶ 20.

<sup>125</sup> See Granite Opp. at 35.

<sup>126</sup> Zarakas Decl. ¶ 20.

<sup>127</sup> AT&T Reply Comments at 24.

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dedicated employees for managing avoided-cost resale services,<sup>128</sup> but AT&T makes no attempt to substantiate this claim, estimate the actual costs at issue, or determine whether the systems and employees purportedly at issue would continue to be used in offering wholesale services in the event that the Commission were to grant forbearance. *Second*, AT&T asserts that state-supervised proceedings for determining avoided-cost resale prices are costly for regulators and carriers.<sup>129</sup> However, the Joint Parties are not aware of a single state in AT&T's ILEC territory that has conducted a proceeding to determine or review avoided-cost discounts in the past decade.<sup>130</sup> AT&T also fails to acknowledge that, absent such proceedings, ILECs and carriers would still need to negotiate prices for wholesale services, but without the efficiency benefits that the avoided-cost resale requirement affords. *Third*, AT&T asserts that avoided-cost resale prices are subject to error, but it offers no basis for concluding that this has in fact been the case.<sup>131</sup> If AT&T actually believes that the avoided-cost resale prices are in error, presumably it would have challenged those prices or asked states to reassess them. It is telling that AT&T appears not to have done so.<sup>132</sup> On the contrary, given AT&T's greater access to information and its ability to influence pricing decisions by state regulators, it is likely that any

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> For example, in 1996, near the beginning of its Local Competition Proceeding, the California Public Utilities Commission ("CPUC") established a 17 percent "wholesale discount" for resold ILEC services. *See* CPUC Decision No. 96-03-020 (Mar. 13, 1996). The CPUC closed its Local Competition proceeding in 2007. *See* CPUC Decision No. 07-05-011 (May 3, 2007). The Michigan Public Service Commission ("MPSC") established a wholesale discount rate of 16.62 percent in decisions in 2004 and 2005. *See* MPSC Case No. U-13531. Although the dates on which states in AT&T's ILEC territory established resale discounts span several years, the Joint Parties are not aware of an instance in over a decade in which any of these states has initiated a proceeding to establish or alter avoided-cost discounts.

<sup>131</sup> AT&T Reply Comments at 24.

<sup>132</sup> Rather, state-established discounts for AT&T's resold services have been in place for well over a decade (and, in some cases, over two decades). For example, the 17 percent wholesale discount established by the CPUC in 1996 remains in place today. *See, e.g.*, Resale Agreement under Sections 251 and 252 of the Telecommunications Act of 1996, Pricing Sheets at 11-14, attached as Exhibit A to Letter from Mark Ortlieb, AVP-Senior Legal Counsel Legal/State Regulatory, AT&T, to Kavita Kale, Executive Secretary, Michigan Public Service Commission, Case No. U-20149 (Apr. 5, 2018), <https://mi-psc.force.com/sfc/servlet.shepherd/version/download/068t00000022CDRAA2>. The 16.62 percent wholesale discount established by the MPSC over ten years ago also remains in place today. *See, e.g., id.* at 45-49.

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errors in avoided-cost resale prices established in state-supervised proceedings are in AT&T's favor.

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For the reasons explained herein and in the Joint Parties' previous submissions in this proceeding, the Commission should promptly deny the Petition.

Please contact the undersigned with questions or concerns about this submission.

Respectfully submitted,

/s/ Thomas Jones  
Thomas Jones  
Mia Guizzetti Hayes  
Samuel Eckland

*Counsel for Granite Telecommunications, LLC,  
Manhattan Telecommunications Corporation d/b/a  
Metropolitan Telecommunications, and Access One, Inc.*

Attachments

**REDACTED – FOR PUBLIC INSPECTION**

# **ATTACHMENT I**

**SUPPLEMENTAL DECLARATION OF LARRY G. ANTONELLIS**

I, Larry G. Antonellis, hereby declare:

1. I make this declaration based upon my personal knowledge, information and belief, and in support of the Opposition of Granite Telecommunications, LLC (“Granite”) to the Petition of USTelecom – The Broadband Association for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks.<sup>1</sup>

2. I am currently Director of Strategic Initiatives for Granite. I joined Granite in 2005 as Premier National Account Manager and have held positions of increasing responsibility in Granite’s national account management team. I earned a Bachelor’s degree in Mathematics from the University of Massachusetts and have acquired substantial knowledge about pricing and competition in the telecommunications industry. My responsibilities at Granite include working with Granite’s Premier Account Managers on client development and retention. I also oversee the implementation of pricing programs and projects that support Granite’s long-term vision. During my employment with Granite, I have repeatedly been involved in negotiations with incumbent local exchange carriers (“ILECs”) for the purchase of wholesale voice and data services and avoided-cost resale services, and I have developed an understanding of how ILECs price such services.

3. In this declaration, I will further explain how Granite’s recent negotiations with [BEGIN HCI] [END HCI] demonstrate the practical relationship between commercial wholesale pricing and the prices set through the avoided-cost discounts for resale under Section 251(c)(4) of the Communications Act. In addition, I will explain how [BEGIN

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<sup>1</sup> 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).

HCI]

[END HCI]

4. In my previous declaration, I explained that, absent the avoided-cost resale requirement, wholesale prices charged by an ILEC would effectively be increased to equal to the ILEC's retail prices. [BEGIN HCI]

5.

6.

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<sup>2</sup> Declaration of Larry Antonellis ¶ 37 (Aug. 6, 2018), attached as Attachment A to Opposition of Granite to USTelecom's Forbearance Petition, WC Docket No. 18-141 (Aug. 6, 2018).

<sup>3</sup> *See id.*



**[END HCI]**

7. Faced with the prospect that Granite could move a large number of lines to resale rate plans to avoid incurring a dramatic LWC price hike, AT&T initially responded by eliminating some of the retail offerings that would have been available to Granite at avoided-cost discounts. For example, on May 16, 2017, Granite sought to order from AT&T “The Big Easy,” a California retail plan that AT&T offered its own customers at rates significantly below Granite’s LWC rates. AT&T responded on May 19, 2017 that it had started to develop a corresponding avoided-cost resale offering. However, after Granite revealed to AT&T that it

was considering moving more than 61,000 lines from the LWC plan to The Big Easy, AT&T abruptly terminated The Big Easy on May 24, 2017.<sup>4</sup>

8. [BEGIN HCI]

9.

[END HCI]

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<sup>4</sup> See *California – Retail Guidebook Updates*, AT&T, <http://cpr.att.com/guidebook/ca/filings/cagbFiling.htm> (withdrawing package CA-17-0039, The Big Easy Plan).

I declare under penalty of perjury that, to the best of my knowledge and belief, the foregoing declaration is true and correct.

Executed on November 6, 2018.



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Larry G. Antonellis  
Director of Strategic Initiatives  
Granite Telecommunications, LLC

# **APPENDIX A**

**DOCUMENT REDACTED  
IN ITS ENTIRETY**

# **APPENDIX B**

**DOCUMENT REDACTED  
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# **ATTACHMENT II**



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IN ITS ENTIRETY**