

without the necessary support, in competition with the sole carrier in the area receiving support. “Universal service support mechanisms” should “neither unfairly advantage nor disadvantage one provider over another”²²³

Similarly, imposing these service obligations on only one category of carrier – ILECs – where no support is available for any carrier also violates competitive neutrality. Such asymmetric obligations also are not consistent with the Commission’s principle that “[u]niversal service support mechanisms” should “neither unfairly advantage nor disadvantage one provider over another”²²⁴

Indeed, the Commission already has recognized, on similar grounds, that forbearance is appropriate where a provider would otherwise be compelled to provide service in an area for which it receives no support. In the *Mobility Fund Forbearance Order*, in the case of a conditional ETC designation, it forbore from requiring that the designated service area conform to the service area of any rural telephone company serving the same area.²²⁵ Specifically, the Commission held:

Absent forbearance, we find that parties seeking support may be required to take on unsupported ETC obligations in portions of rural carriers’ study areas – *areas that may not be eligible for support* or for which they may not win support – and that this is likely to discourage participation in Mobility Fund Phase I. . . . Hence, we find that forbearing from the conformance requirement will encourage participation by assuring that *obligations of new*

²²³ *First USF Order*, 12 FCC Rcd at 8801 ¶ 47.

²²⁴ *Id.*

²²⁵ *Connect America Fund*, Second Report and Order, 27 FCC Rcd 7856 (2012) (“*Mobility Fund Forbearance Order*”). The rural service area conformance requirement is found in 47 U.S.C. § 214(e)(5) and 47 C.F.R. § 54.207(b).

*ETCs will not extend to portions of rural service areas for which a new ETC may not receive support.*²²⁶

This logic applies with equal force to “unsupported ETC obligations” imposed on price cap ILECs in “areas that may not be eligible for support.”²²⁷

3. Forbearance Also More Accurately Implements the Current High-Cost Regime.

The interpretation of Section 214(e)(1)(A) adopted in the *First USF Order* may have been consistent with the high-cost regime established in that order, which included fully portable support to all CETCs serving the same area as an ILEC receiving support.²²⁸ Because more than one ETC could receive high-cost support in a given service area, each ETC was in fact “eligible to receive universal service support in accordance with section 254,” and was required to offer “throughout the service area for which the designation is received . . . the services *that are supported* by Federal universal service support mechanisms under section 254(c).”²²⁹ The now abandoned portable high-cost regime established by the *First USF Order* thus was arguably congruent with the statutory language expressly tying ETC designations and obligations to high-cost support mechanisms.

Accordingly, leaving aside whether the Commission’s interpretation of Section 214(e) once made sense, now that the *Transformation Order* has severed the link between the high-cost support mechanisms and ETC designations and obligations, as discussed above, there is no

²²⁶ *Mobility Fund Forbearance Order*, 27 FCC Rcd at 7862 ¶ 15 (emphasis added).

²²⁷ *Id.*

²²⁸ *Id.* at 8786 ¶ 15, 8813 ¶ 67, 8932-33 ¶¶ 286-89, 8944-45 ¶¶ 311-13.

²²⁹ 47 U.S.C. § 214(e)(1) (emphasis added).

justification for treating carriers as designated ETCs where they no longer receive the associated high-cost support. Thus, where a carrier receives no support, forbearance from enforcement of the Section 214(e) ETC designation and service requirement satisfies all of the Section 10 forbearance criteria. The intense competition in the provision of voice telephone services ensures just and reasonable rates and protects consumers. Forbearance here would advance the Commission's deployment and universal service goals, helping assure competition where it can exist, and subsidizing service only where competition is infeasible.

VI. THE COMMISSION SHOULD FORBEAR FROM ENFORCING ALL REMAINING *COMPUTER INQUIRY* RULES

In order to eliminate barriers to infrastructure investment and competition, the Commission should forbear from continuing to impose the remaining legacy *Computer Inquiry* requirements on any LEC offering enhanced services. These requirements are the remnants of decades-old proceedings, which were premised on the idea that the Commission had to prevent telephone companies from using their monopoly over wireline voice networks to the disadvantage of emerging enhanced services providers ("ESPs") who were dependent on those networks. However, there is no LEC monopoly over wireline networks today, and the narrowband TDM-based network itself has entered its twilight years, as the industry transitions to IP-based broadband facilities offered by multiple competitors. The *Computer Inquiry* requirements therefore have outlived their utility, particularly insofar as the Commission may still consider them applicable to modern broadband services.

As discussed herein, the *Computer Inquiry* requirements – which apply primarily to a limited, aging, and declining set of narrowband services – no longer are necessary to ensure that consumers have access to enhanced services on just, reasonable, and competitively disciplined

terms. Instead, these legacy requirements selectively impede LECs from competing on even terms with cable companies and other vigorous competitors. It therefore is in the public interest to eliminate these unnecessary requirements.

A. Background of the *Computer Inquiry* Rules

The Commission first launched its *Computer Inquiry* in 1966, at a time when “communication common carriers” were first “grafting on to their conventional undertaking of providing communication channels and services to the public various types of data processing and information services.”²³⁰ At the time, the Commission worried that “common carriers, in offering these services, are, or in many instances will be, competitive with services sold by computer manufacturers and service bureau firms,” while “such firms will be dependent upon common carriers for reasonably priced communication facilities and services.”²³¹

The specifics of the restrictions the Commission imposed on carriers in response to these concerns morphed through the ensuing decades of Commission orders and judicial review. Ultimately, the Commission required all wireline carriers offering enhanced services to offer — and obtain — the transmission capabilities underlying such services by tariff.²³² The Regional Bell Operating Companies that wished to offer enhanced services were subjected to even tighter restrictions, and essentially had a choice of regimes. The RBOCs could choose to offer enhanced services through isolated affiliates in compliance with the *Computer II* structural-

²³⁰ *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, Notice of Inquiry, 7 FCC 2d 11, 15 ¶ 15 (1966) (“*Computer I NOF*”).

²³¹ *Id.*

²³² *Computer II Final Decision*, 77 FCC 2d at 474-75 ¶ 231.

REDACTED – FOR PUBLIC INSPECTION

separation requirements set out in Section 64.702 of the Commission's rules.²³³ In the alternative, RBOCs could forego the structural separation requirements and offer enhanced services directly – but only if the RBOCs complied with the non-structural safeguards set out in the *Computer III* proceedings, most notably the Comparably Efficient Interconnection (“CEI”) and Open Network Architecture (“ONA”) requirements.²³⁴

At a high level, the CEI regime – which was intended merely as a transition to ONA – requires RBOCs to comply with numerous specified “equal access” parameters and to file a plan before launching any new enhanced service detailing how the carrier would comply with CEI requirements. The ONA regime, intended to be the longer-lasting *Computer III* framework, initially required carriers to proactively divide their legacy networks into building blocks – basic service elements, basic service arrangements, and complementary network services – that would

²³³ 47 C.F.R. § 64.702; *see also Computer II*.

²³⁴ *See Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, Report and Order, 104 FCC Rcd 958 (1986) (“*Computer III Phase I Order*”), *recon.*, 2 FCC Rcd 3035 (1987) (“*Computer III Phase I Reconsideration Order*”), *further recon.*, 3 FCC Rcd 1135 (1988), *second further recon.*, 4 FCC Rcd 5927 (1989); *Computer III Phase I Order and Computer III Phase I Reconsideration Order vacated sub nom., California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) (“*California I*”); *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, Report and Order, 2 FCC Rcd 3072 (1987) (“*Computer III Phase II Order*”), *recon.*, 3 FCC Rcd 1150 (1988), *further recon.*, 4 FCC Rcd 5927 (1989) (“*Phase II Further Reconsideration Order*”); *Computer III Phase II Order vacated, California I*, 905 F.2d 1217; *Computer III Remand Proceeding*, Report and Order, 5 FCC Rcd 7719 (1990) (“*ONA Remand Order*”), *recon.*, 7 FCC Rcd 909 (1992), *pets. for review denied sub nom. California v. FCC*, 4 F.3d 1505 (9th Cir. 1993) (“*California II*”); *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, Report and Order, 6 FCC Rcd 7571 (1991), *vacated in part and remanded sub nom. California v. FCC*, 39 F.3d 919 (9th Cir. 1994), *cert. denied*, 514 U.S. 1050 (1995); *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, Notice of Proposed Rulemaking, 10 FCC Rcd 8360 (1995), *Further Notice of Proposed Rulemaking*, 13 FCC Rcd 6040 (1998), Report and Order, 14 FCC Rcd 4289 (1999), *recon.*, 14 FCC Rcd 21628 (1999) (collectively “*Computer III Proceedings*”). .

be described in carrier ONA Plans and be made available to competing ESPs. Pursuant to the Commission's ONA orders, carriers accomplished this task more than 20 years ago, after a lengthy and laborious process. The ONA plans cover virtually every element of a carrier's network. The ONA rules also imposed a variety of other obligations, including requirements that carriers establish procedures to ensure that they do not discriminate in their provision of ONA services, that they respond in a specified manner within 120 days to ESP requests for new network elements, and that they file nondiscrimination reports and annual affidavits demonstrating the nondiscriminatory service provided to unaffiliated ESPs and documenting other ONA-related activities.

Though the *Computer II* structural safeguards and the *Computer III* non-structural safeguards took different forms, their underlying purpose was the same: "to prevent the BOCs from using 'exclusionary market power' arising from their control over ubiquitous local telephone networks to impede competition in the enhanced services market."²³⁵ "Exclusionary" market power, in this context, means the ability of a carrier to "profitably to raise and sustain its price significantly above the competitive level by raising its rivals' costs and thereby causing the rivals to restrain their output."²³⁶

All of these restrictions thus rest on the assumption that independent ESPs are dependent on LEC facilities, allowing RBOCs or other LECs to exercise exclusionary market power in the absence of prophylactic regulations. In fact, however, changes in the market have rendered this

²³⁵ *Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, 23 FCC Rcd 11729, 11760, ¶ 44 (2008).

²³⁶ *Id.* at 11760 ¶ 44 n.157.

assumption obsolete. The *Computer Inquiry* restrictions therefore are no longer necessary to discipline carrier charges or practices, to protect consumers, or to advance the public interest.

B. Enforcement of the Remaining *Computer Inquiry* Rules is Not Necessary to Ensure Just, Reasonable and Nondiscriminatory Rates and Practices or to Protect Consumers

The remaining *Computer Inquiry* rules are no longer necessary because RBOCS and other LECs are no longer capable of exercising exclusionary market power against ESPs. The original regulatory rationale underpinning the *Computer Inquiry* rules – that competitive providers of enhanced services “will be dependent upon common carriers for reasonably priced communication facilities and services,”²³⁷ – no longer exists. As broadband and wireless have grown, the ILEC share of the fixed-line voice marketplace has eroded. From the end of 2000 to June 2013, ILEC switched and VoIP access lines fell from 178 million to only 78.5 million.²³⁸ As of June 2013, there were nearly as many interconnected VoIP residential lines as traditional switched access residential lines in the U.S.²³⁹ Since the end of 2000, the ILEC share of total fixed end user connections (including ILEC-provisioned VoIP services) has dropped dramatically, from 92 percent to 58 percent.²⁴⁰ As Dr. Caves observes in his attached Declaration, “[m]easured as a proportion of end-user switched access lines, interconnected VoIP subscriptions, and mobile wireless subscriptions, ILECs’ aggregate market share fell from 60.5

²³⁷ *Computer I NOI*, 7 FCC 2d at 15.

²³⁸ Compare 2009 Local Telephone Competition Report at 13, Table 1, with Mid-2013 Local Telephone Competition Report at 12, Table 1.

²³⁹ See Mid-2013 Local Telephone Competition Report at 5, Figure 4.

²⁴⁰ Compare 2009 Local Telephone Competition Report at 13, Table 1, with Mid-2013 Local Telephone Competition Report at 12, Table 1.

percent to 18.5 percent” from 2000 to 2012,²⁴¹ and ILEC fixed access lines accounted for *less than 18 percent* of the voice market as of mid-2013.²⁴²

In today’s marketplace, therefore, ESPs are clearly not dependent on common carrier facilities; to the contrary, non-common carriers such as cable companies are strong and growing competitors in both the wireline voice marketplace and the broadband marketplace. If approved, the pending Comcast-Time Warner Cable merger will further enhance cable providers’ competitive role. Even the types of enhanced services most closely associated with narrowband POTS lines – alarm services and voicemail – today can easily be obtained by consumers over competing platforms. Many alarm systems can and do use cable and other qualifying VoIP providers.²⁴³ Voicemail can be obtained through a variety of consumer- or business-grade online services that route to traditional lines, mobile phones, or exclusively through the Internet.²⁴⁴

LECs therefore cannot exercise exclusionary market power by charging ESPs supra-competitive rates. If LECs raised their rates above what the market will bear, ESPs could and

²⁴¹ Caves Decl. ¶ 12.

²⁴² This figure reflects the 78,537,000 ILEC access lines and VoIP connections listed in the *Mid-2013 Local Telephone Competition Report* at 12, Table 1, the 56,590,000 non-ILEC access lines listed in that report, and the 305,742,000 wireless accounts reported by FCC as of the mid-2013. See also Caves Declaration at ¶¶ 10, 12.

²⁴³ See CPI Security Systems, VoIP Requirements, <http://www.cpisecurity.com/customer-care-center/resources/voip-requirements/> (last visited Oct. 6, 2014); ADT, *Questions about VoIP*, <http://www.adt.com/customer-service/voip-faqs/> (last visited Oct. 6, 2014).

²⁴⁴ See Google, About Google Voice, https://support.google.com/voice/answer/115061?hl=en&ref_topic=1707989https://support.google.com/voice/answer/115061?hl=en&ref_topic=1707989 (last visited Oct. 6, 2014); eVoice, How eVoice® Works, <http://www.evoice.com/how-it-works> (last visited Oct. 6, 2014); YouMail, Visual Voicemail, <http://www.youmail.com/home/feature/visual-voicemail> (last visited Oct. 6, 2014).

REDACTED – FOR PUBLIC INSPECTION

would obtain necessary transmission services from competing providers. Accordingly, enforcement of the remaining *Computer Inquiry* rules is unnecessary to ensure just and reasonable rates for the products and services that ESPs purchase from RBOCs and other LECs, or to protect consumers.

Further, to the extent they even continue to apply, the *Computer Inquiry* obligations are largely anachronisms in the context of broadband services.²⁴⁵ As broadband service has grown over the last two decades, non-LEC competitors have gained leading positions in the marketplace for all types of broadband service. The Commission's most recent data indicate that there were 94 million fixed broadband connections as of mid-2103.²⁴⁶ Telecommunications company services accounted for slightly greater than 41 percent of fixed connections.²⁴⁷

For residential services and for higher speed tiers, non-ILECs' position in the marketplace is even stronger. For example, among residential connections, telecommunications companies served slightly less than 40 percent.²⁴⁸ Additionally, telecommunications companies provided just 32 percent of residential fixed connections offering at least 3 Mbps downstream and 768 Kbps upstream, and only about 25 percent of residential fixed connections offering at

²⁴⁵ See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) (“*2005 Wireline Broadband Order*”), *aff'd sub nom.*, *Time Warner v. FCC*, 507 F.3d 205 (3rd Cir. 2007).

²⁴⁶ *Mid-2013 Internet Access Report* at 23, Table 5.

²⁴⁷ *Id.* Services attributed to telecommunications companies include aDSL, sDSL, Other Wireline, and FTTP.

²⁴⁸ *Id.* at 24, Table 6.

REDACTED – FOR PUBLIC INSPECTION

least 6 Mbps downstream and 1.5 Mbps upstream.²⁴⁹ Cable modems accounted for 66 percent and 74 percent of such connections, respectively.²⁵⁰ Meanwhile, as noted above, mobile broadband now stands at more than 181 million connections²⁵¹ and mobile voice at 306 million connections,²⁵² surpassing fixed broadband and fixed voice connections, respectively. Consumer adoption of broadband alternatives provided by entities other than wireline telecommunications companies, including cable modem services and mobile broadband services, is evident not only at the national level but also across all of the states.²⁵³

In short, any ILEC monopoly over the transmission capabilities needed to provide enhanced services has been broken.²⁵⁴ As demonstrated above, it is now possible for ESPs to provide services without direct access to traditional phone lines, and therefore ESPs no longer are dependent upon LECs for access to consumers. In today's competitive marketplace, no LEC could exercise exclusionary market power to the detriment of ESPs. Accordingly, the animating rationale for the entire *Computer Inquiry* framework has been rendered obsolete. The remaining

²⁴⁹ *Id.* at 28, Chart 12.

²⁵⁰ *Id.*

²⁵¹ *Id.* at 5, Table 1.

²⁵² *Mid-2013 Local Telephone Competition Report* at 29, Table 18.

²⁵³ *Mid-2013 Internet Access Report* at 39-40, Table 17.

²⁵⁴ Previously, the Commission refused to forbear from the substantive *Computer Inquiry* requirements, based in part on its view that there was insufficient record evidence that alternative wholesale transmission services would be available to ESPs. *USTelecom Forbearance Order*, 28 FCC Rcd at 7643-44 ¶ 26. But the *Computer Inquiry* rules are not designed to protect ESP wholesale arrangements for their own sake. Rather, these rules are Commission creations designed to promote consumer interests. They are explicitly premised on the fear that LECs would privilege their own enhanced services over enhanced services provided by competitors who would be "dependent upon common carriers." *Computer I NOI*, 7 FCC 2d at 15.

Computer Inquiry rules are therefore not necessary to ensure just and reasonable rates and practices for facilities and services that LECS provide to ESPs, nor are these rules necessary to protect consumers. The robustly competitive marketplace now fulfills that role, making forbearance from enforcement of the remaining *Computer Inquiry* requirement appropriate.

C. Forbearance From Enforcement of the *Computer Inquiry* Rules Will Serve the Public Interest by Eliminating Costs and Excessive Burdens and Allowing RBOCs and Other LECs to More Efficiently Invest Their Resources in Modern Networks

The Commission already has acknowledged the *Computer Inquiry* obligations as inefficient anachronisms in the context of broadband services. The *2005 Wireline Broadband Order* eliminated all *Computer Inquiry* requirements for wireline broadband services, including when provided by RBOCs.²⁵⁵ The Commission correctly observed that the *Computer Inquiry* requirements “impede the development and deployment of innovative wireline broadband Internet access technologies and services” because “vendors do not create technologies with the *Computer Inquiry* requirements in mind.”²⁵⁶

The Commission also concluded that the *Computer Inquiry* requirements compelled wireline carriers when deploying advanced network equipment to either “decide not to use all the equipment’s capabilities” or “defer deployment” while the equipment was re-engineered “to facilitate compliance with the *Computer Inquiry* rules” – which, according to the Commission, were “less-than-optimal” outcomes, as they reduced “operational efficiency” and created

²⁵⁵ *2005 Wireline Broadband Order*, 20 FCC Rcd 14853.

²⁵⁶ *Id.* at 14887-88, ¶ 65.

“unnecessary costs and service delays.”²⁵⁷ The Commission reached similar conclusions in a series of decisions granting forbearance from the application of *Computer Inquiry* requirements to a wide range of enterprise broadband services.²⁵⁸

Despite the fact that the CEI and ONA rules no longer serve any meaningful purpose, RBOCs continue to incur significant costs in order to comply with them. All RBOCs continue to maintain unwieldy and arcane regulatory processes to comply with CEI and ONA. By way of example, carriers must maintain internal regulatory processes to ensure that employees remain familiar with the aging ONA and CEI requirements, that CEI/ONA-specific non-discrimination and equal access requirements are met, that new products receive CEI/ONA reviews, and that CEI/ONA-related documentation (*e.g.*, extensive descriptive material in carrier tariffs) is maintained. These processes increasingly result in confusion and operational churn as carriers strive to apply 30-year old regulatory frameworks in today’s fast-moving and dynamic telecommunications environment.

Collectively, these processes impose material costs in terms of employee time and

²⁵⁷ *Id.*

²⁵⁸ See, *e.g.*, *AT&T Forbearance Order*, 22 FCC Rcd at 18733-34 ¶¶ 54, 56 (because enterprise customers have “individualized needs” that AT&T must be able to meet through “innovative service arrangements that make full use of its networks’ telecommunications and information service capabilities,” continued application of the *Computer Inquiry* requirements to enterprise broadband services “constrains AT&T’s ability to respond to technological advances and customer needs in an efficient, effective, or timely manner”); *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to its Broadband Services*, Memorandum Opinion and Order, 23 FCC Rcd 12260, 12288-89 ¶ 55, 12289 ¶ 57 (2008) (“*Qwest Forbearance Order*”) (noting that eliminating the *Computer Inquiry* requirements “should benefit potential enterprise customers by giving them increased opportunities to obtain integrated service packages that meet their needs.”).

REDACTED – FOR PUBLIC INSPECTION

dollars invested to support them. CenturyLink, for example, estimates that, in the year ending July 31, 2013, it had between 55 and 60 employees who either maintained CEI/ONA specific processes or became engaged in some CEI/ONA-related compliance activities, large or small.²⁵⁹ Determining the costs of compliance is difficult, but the costs are real, even apart from the equally real, but more elusive, cost of the operational churn described above.

The CEI and ONA rules also impose other costs. Both the rules and the regulatory processes they have spawned fundamentally impede the ability of carriers to develop and deploy innovative products that respond to market demands in a timely fashion. Similarly, advance product notice aspects such as the CEI plan posting requirement give RBOC competitors an undue advantage and provide further disincentives to RBOC innovation in the information service area. These impacts ultimately reduce each carrier's incentive and ability to invest in and deploy network infrastructure.

These further "unnecessary costs and service delays" are all well documented in the Commission's own past orders, particularly in the 2005 *Wireline Broadband Order*, discussed above.²⁶⁰ Elimination of CEI and ONA will relieve carriers of these additional types of costs, which are distinct from those costs historically associated with meeting the ONA reporting requirements.²⁶¹ Notwithstanding the high costs the *Computer Inquiry* requirements impose and

²⁵⁹ Comments of CenturyLink at 11, CC Dkt. Nos. 95-20 & 98-10 (July 31, 2013).

²⁶⁰ 2005 *Wireline Broadband Order*, 20 FCC Rcd at 14887-88 ¶ 65.

²⁶¹ The Commission eliminated ONA reporting requirements via waiver in 2011. In the Notice of Proposed Rulemaking leading to that waiver, the Commission acknowledged that the CEI/ONA reporting rules impose significant costs on RBOCs without any corresponding benefit. *Review of Wireline Competition Bureau Data Practices*, Notice of Proposed Rulemaking, 26 FCC Rcd 1579 (2011).

REDACTED – FOR PUBLIC INSPECTION

the lack of any corresponding benefits to consumers, the Commission has continued to apply these requirements to narrowband services, and it appears to have left open the possibility of applying them even to enterprise broadband service offerings that have not specifically been granted forbearance.²⁶²

Given today's highly competitive voice and broadband markets, the Commission should eliminate that prospect once and for all. The *Computer Inquiry* requirements are particularly unjustifiable in the context of any broadband-based service, given that LECs have never enjoyed any dominant position in the broadband market. Moreover, even if the Commission were to conclude that there might be some remaining relevance to the *Computer Inquiry* rules in the context of legacy narrowband services, the Commission at a minimum should forbear from requiring carriers to unbundle any new narrowband elements. The Commission also should forbear from any requirements – beyond the standard Section 214 discontinuance process, if and when applicable – that impede carriers from retiring ONA elements. Granting this level of forbearance would fully protect the interests of any ESPs or consumers relying on existing narrowband elements, while ensuring that carriers will be allowed to innovate and compete effectively going forward and service providers will design applications based on the superior capabilities and functionality of advanced broadband networks.

²⁶² USTelecom believes that the *2005 Wireline Broadband Order* made clear that the *Computer Inquiry* rules no longer apply to *any* broadband services. To the extent any *Computer Inquiry* requirements arguably still apply to any sub-category of broadband services, however, the Commission should forbear from enforcing those requirements. Forbearance is appropriate here even if there is disagreement or uncertainty as to whether any *Computer Inquiry* requirements still apply to any broadband services. *AT&T v. FCC*, 452 F.3d 830, 836 (D.C. Cir. 2006) (“[A] forbearance petition’s conditional nature gives the Commission no discretion to escape ruling on its merits.”).

competitors have demonstrated that they are equally capable of constructing the entrance conduits at issue, no special restrictions on ILECs are warranted. Market forces will protect customers and ensure that the charges for such construction are just and reasonable.²⁶⁴ In addition, forbearance from the conduit-access requirements would serve the public interest by ensuring that all providers have appropriate incentives to invest in new facilities.

A. Background

Section 251(b)(4) of the Communications Act imposes on “[e]ach local exchange carrier” the duty “to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224.”²⁶⁵ Section 224, in turn, requires any “utility” – which includes local exchange carriers and other public utilities – to “provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.”²⁶⁶ However, for the purpose of Section 224, ILECs are explicitly excluded from the definition of “telecommunications carrier.”²⁶⁷ The Commission therefore concluded in the *First Local Competition Order* that “no incumbent LEC may seek access to the

²⁶⁴ USTelecom notes that the relief sought in this section of the Petition does not affect conduit access rights or obligations attaching to conduits that merely pass properties. Thus, even assuming *arguendo* that ILECs have more overall infrastructure, on an MSA-wide basis, than *some* competitors in *some* areas, the existence of that overall infrastructure is not determinative in considering whether conduit access obligations remain necessary as addressed by this forbearance request: new entrance conduits serving individual brownfield and greenfield properties.

²⁶⁵ 47 U.S.C. § 251(b)(4).

²⁶⁶ *Id.* § 224(f)(1).

²⁶⁷ *Id.* § 224(a)(5).

facilities or rights-of-way of a LEC or any utility under either section 224 or section 251(b)(4)” because “section 224 does not provide access rights to incumbent LECs” and “[w]e give deference to the specific denial of access under section 224 over the more general access provisions of section 251(b)(4).”²⁶⁸

The Ninth Circuit expressed “serious doubts about the FCC’s analysis” on this point, noting that in its view Sections 224 and 251(b)(4) could be better harmonized as imposing reciprocal access obligations on all LECs (under Section 251(b)(4)) but granting only CLECs a right to demand access to the facilities of non-LEC utilities (such as electric and gas companies).²⁶⁹ Nonetheless, the Ninth Circuit concluded that it was bound to defer to the Commission’s analysis.²⁷⁰ The Commission’s 2011 *Pole Attachment Order* reaffirmed the Commission’s interpretation that “incumbent LECs have no right of access to utilities’ poles pursuant to section 224(f)(1)” and that the Act “do[es] not grant incumbent LECs an access right under section 251(b)(4) that does not exist under section 224.”²⁷¹

²⁶⁸ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 16103-04, ¶ 1231 (1996) (“*First Local Competition Order*”) (subsequent history omitted).

²⁶⁹ *US West Communications, Inc. v. Hamilton*, 224 F.3d 1049, 1053-54 (9th Cir. 2000), *amended opinion*, 2000 U.S. App. LEXIS 26416 (9th Cir. Or. Sept. 13, 2000), *pet. for rehearing denied*, 2000 U.S. App. LEXIS 26417 (9th Cir. Or. Oct. 23, 2000).

²⁷⁰ *Id.* at 1054.

²⁷¹ *Implementation of Section 224 of the Act*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5327-28 ¶ 202, 5333 ¶ 212 n.643 (2011) (“*2011 Pole Attachment Order*”). The *2011 Pole Attachment Order* separately concluded that where ILECs already have such access, they are entitled to rates, terms, and conditions that are “just and reasonable” in accordance with Section 224(b)(1). *Id.* at 5327-28 ¶ 202. The relief sought in this Petition does not affect that finding, which would remain intact.

In sum, the Commission has held that ILECs must grant cable companies and other CLECs nondiscriminatory access to the ILECs' poles, ducts, conduits, and rights-of-way at regulated rates, but that ILECs have no reciprocal right to demand such access from CLECs.

B. Continued Enforcement of Conduit Access Obligations is Not Necessary to Ensure Just, Reasonable and Nondiscriminatory Rates and Practices or to Protect Consumers

When Congress enacted Section 224 in 1978, it did so to ensure that then-fledgling cable companies could gain reasonable access to poles, conduits, ducts, and rights-of-way controlled by utilities.²⁷² At the time, most local telephone companies were monopoly providers. The Commission noted in its *2011 Pole Attachment Order* that “historically incumbent LECs owned roughly as many poles as electric utilities.”²⁷³ Thus, when Congress expanded Section 224 in 1996 to provide “telecommunications carriers” with a guaranteed right of access to these facilities at regulated rates, it viewed ILECs as akin to “utilities” that were markedly distinct from other “telecommunications carriers” (which Congress generally assumed would need to rely, at least initially, on ILEC facilities).²⁷⁴ The Commission concluded that Congress intended to grant CLECs a right to access ILEC infrastructure while denying ILECs a reciprocal right to access fledgling CLEC facilities.

²⁷² See *id.* at 5245 ¶ 9; S. Rep. No. 104-230, at 205-06.

²⁷³ *2011 Pole Attachment Order*, 26 FCC Rcd at 5327 ¶ 199.

²⁷⁴ See 47 U.S.C. § 224(a)(5) (excluding ILECs from definition of “telecommunications carrier” for pole attachment purposes); *cf.* S. Rep. No. 104-230, at 148 (“This conference agreement recognizes that it is unlikely that competitors will have a fully redundant network in place when they initially offer local service, because the investment necessary is so significant.”).

REDACTED – FOR PUBLIC INSPECTION

Today, however, these distinctions are unjustified. Competitors no longer need access to ILEC conduit because they can and do construct their own conduit. Enforcement of the Section 224 and 251 obligations requiring ILECs to provide competitors access to ILEC conduit is no longer necessary to ensure reasonable rates and practices with regard to conduit or to protect consumers. The Commission itself has recognized that “current market realities” have evolved beyond the assumptions Congress made in 1996 regarding pole ownership, with “incumbent ILEC pole ownership [having] diminished relative to that of electric utilities” in the intervening years.²⁷⁵ Similarly, the overall imbalance between the conduit infrastructure deployed by ILECs and their major CLEC competitors has narrowed considerably. Competitive providers are no longer fledgling newcomers that must rely upon ILEC infrastructure to offer services. This is particularly the case where the “CLEC” is really a major cable company operating through a CLEC affiliate, which is a common occurrence.

Moreover, in the context of new entrance conduits in greenfield and brownfield situations, the relevant question is not how much conduit ILECs and CLECs have historically deployed overall, but rather whether CLECs today have as much ability to construct these entrance conduits as ILECs have without reliance on ILEC facilities. Experience shows that CLECs indeed have this capability – a capability further enhanced by the prevalence of “dig once” laws designed to facilitate the deployment of new conduits whenever work is underway on public rights of way.²⁷⁶

²⁷⁵ *2011 Pole Attachment Order*, 26 FCC Rcd at 5328-29 ¶ 206.

²⁷⁶ See Intergovernmental Advisory Committee, FCC, *Advisory Recommendation Number 2013-8 Regarding “Dig Once” Policies to Help Create a Robust, National Digital Infrastructure*, at 2-3 (July 31, 2013), available at <http://transition.fcc.gov/statelocal/recommendation2013-08.pdf>

In the context of new fiber deployments, the Commission has recognized that entry barriers “were largely the same for incumbent and competitive carriers,” both of which must obtain rights-of-way, bid for developments, obtain materials and implement construction programs.²⁷⁷ The same is true for new entrance-conduit construction. In that context, the assumptions underlying the imposition of asymmetrical conduit access obligations on ILECs no longer reflect current market realities.

C. Forbearance Would Serve the Public Interest by Ensuring that All ILECs Have Incentives to Invest in New Facilities

Even providers that are well-positioned to construct their own entrance conduits in new developments or to previously unserved buildings (such as the largest cable companies) frequently choose instead to obtain access rights from the ILEC at artificially low regulated rates. ILECs, in contrast, generally must construct their own entrance conduits in greenfield and brownfield situations. These asymmetric obligations reduce ILEC incentives to proactively deploy new infrastructure, given the considerable risk that competitors will be able to coopt much of the value of their capital investment. At the same time, the conduit-access regime depresses CLEC incentives to develop their own facilities.²⁷⁸ Eliminating the current asymmetric

(recommending that federal projects “notify parties that may be interested in placing fiber or conduit in the trench of the proposed work” in order to “accommodate and facilitate all future public and private fiber deployments”).

²⁷⁷ *FTTC Recon Order*, 19 FCC Rcd at 20298-99 ¶ 12.

²⁷⁸ Competitors also have little incentive to maintain the integrity of ILECs’ conduit and other outside plant. Indeed, the experience of one USTelecom member, CenturyLink, exemplifies the asymmetric incentives of ILECs and CLECs. Many CenturyLink underground vaults and pedestals have been damaged by competitors drilling or boring into those facilities without regard for engineering standards -- in a manner that minimized the competitor’s cost of providing service while increasing CenturyLink’s network maintenance expenses and threatening its

unbundling obligation by forbearing from requiring ILECs to provide access to conduit would serve the public interest by eliminating these distortions. This would create accurate and appropriate incentives for both ILECs and CLECs to construct conduit infrastructure going forward, further facilitating the deployment of advanced services to the benefit of consumers.

Whatever special advantage some believe ILECs once may have enjoyed over their competitors with respect to the deployment of entrance conduits in new developments or to other newly served buildings, that advantage has eroded and today no longer exists, particularly for brownfield and greenfield deployments. Indeed, today the ILEC conduit unbundling requirement harms the public interest rather than benefiting it. For instance, ILECs have faced challenges in serving customers stemming from the disparate conduit access obligations imposed on ILECs. [BEGIN CONFIDENTIAL] [REDACTED]

[END CONFIDENTIAL] This tilted playing field does not benefit consumers, and it often frustrates ILECs' ability to deliver the services that customers want.

As a practical matter, ILECs stand in the same position as their major CLEC competitors when it comes to competing for and providing the service at issue. Whether the winning bidder

network reliability and service quality. In even more instances, competitors have placed their facilities in CenturyLink's conduit without authorization, thus undermining CenturyLink's ability to manage its network. In certain cases, CenturyLink has resorted to legal action to address egregious instances of network damage or trespass, but such actions are costly and time-consuming. Until the Commission rectifies the current asymmetric rules for conduit access, it is likely that some CLECs will continue to view ILEC conduit as a public good that can be used (or misused) as the CLEC sees fit -- to the detriment of all users of that network plant.

REDACTED – FOR PUBLIC INSPECTION

is an ILEC or a CLEC, the company must undertake the cost of constructing a new entrance conduit. However, if an ILEC constructs this conduit, competitors such as Comcast or tw telecom are immediately entitled to demand access to the conduit at regulated – generally below-market – rates. Pursuant to Section 224(e) of the Communications Act, the Commission has issued regulations to “ensure that a utility charges just, reasonable, and nondiscriminatory rates” for conduit access and other pole attachments, with the maximum rate based on an apportionment of the conduit owner’s costs according to a Commission-mandated formula.²⁷⁹

For example, providers leasing conduit from CenturyLink on a regulated basis pay, on average, [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] per foot per year. For a 100-foot run, a competitor therefore would pay approximately [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] per year. Not surprisingly, it costs much more than that to build conduit. In greenfield situations CenturyLink spends an average of [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] per foot to place a four inch conduit, not including the cost of a handhole to access the conduit. Thus it would cost CenturyLink approximately [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] to install a typical 100-foot conduit to a new building in a central business district. Brownfield deployments in high-density urban areas are even more costly. In such situations, CenturyLink typically spends an additional [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] per foot to cut and restore concrete, resulting in a total cost of approximately [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] to install a 100-foot conduit. One can see why a provider might prefer to lease conduit from the local ILEC, rather than building its

²⁷⁹ 47 U.S.C. § 224(e)(1); 47 C.F.R. § 1.1409(e)(3).

own conduit, as it would take more than ten years to make it more economical to build its own conduit in a greenfield development and even longer for brownfield deployment.

In contrast, if Cox constructs the new conduit, the local ILEC has no corresponding access right. In practice, competitors generally refuse to allow ILEC facilities in their conduit under any terms, and, if they do allow such access, they charge many times the regulated rates applicable to the sharing of ILEC conduit. If the ILEC wishes to compete for customers in a building served by a Cox-owned entrance conduit, the ILEC must either pay market rates for conduit access or else undertake to construct its own entrance conduit.

Forbearance from applying ILEC conduit-access obligations to entrance conduits constructed in greenfield and brownfield developments would improve competition by eliminating this asymmetry and correcting the competitive distortions outlined above. In these situations, both ILECs and their competitors must undertake new construction to serve customers in a new development or a newly served building. These are not areas where ILECs typically already have deployed conduit and can repurpose it. They instead must build from scratch. In the context of new fiber deployments, the Commission recognized that requiring unbundling “created disincentives for competitive LECs to invest in their own facilities,”²⁸⁰ with “CLECs tempted to wait for ILECs to deploy FTTH and ILECs fearful that CLEC access would undermine the investments’ potential return.”²⁸¹ In contrast, the Commission found that

²⁸⁰ *FTTC Recon Order*, 19 FCC Rcd at 20300 ¶ 15.

²⁸¹ *Id.* at 20301 ¶ 16.

granting relief from this unbundling obligation would “provide[] incentives for carriers to invest in such facilities.”²⁸²

The same dynamic applies to requirements that ILECs grant competitors access to new entrance conduits at regulated rates. Forbearing from applying the conduit-access provisions in these situations would allow all providers to efficiently incorporate this construction cost into their bids and ultimate service prices. ILECs would have greater assurance of making a return on their capital investment, while other providers would have an incentive to build their own facilities when doing so would be more cost-effective than paying market rates for access to another provider’s conduit. This regime would create a level playing field that would better serve the public interest, while ensuring that providers’ prices would remain constrained by robust competition for conduit-construction services.

VIII. THE COMMISSION SHOULD FORBEAR FROM THE RULES PROHIBITING THE USE OF CONTRACT TARIFFS FOR BUSINESS DATA SERVICES IN ALL REGIONS

In order to eliminate barriers to infrastructure investment and competition, the Commission should forbear from applying the rules that prohibit price cap ILECs from using contract tariffs to offer “Business Data Services” in all regions.²⁸³ Doing so would effectively extend nationwide the Phase I pricing flexibility that today exists in only limited geographic areas.

²⁸² *Id.* at 20301 ¶ 15.

²⁸³ For purposes of this Petition, “Business Data Services” is defined as tariffed TDM special access (DS0 and above) services and tariffed enterprise broadband services.

REDACTED – FOR PUBLIC INSPECTION

The Commission's rules require ILECs to offer their Business Data Services on a generally available tariffed basis except in the limited geographic areas where they have been granted pricing flexibility. Outside of those limited areas, the pricing flexibility rules preclude ILECs – but not their competitors – from offering arrangements tailored to individual customers expeditiously, distorting the marketplace and reducing choices for consumers. These rules are unnecessary to protect consumers, because affected providers would still be required to offer these services at generally available regulated tariffed rates. To the contrary, forbearance also would benefit consumers by facilitating specialized arrangements involving lower prices and customized terms that customers demand, and meets each of the Section 10 forbearance criteria.

In the *Pricing Flexibility Order*,²⁸⁴ the Commission granted price cap LECs increased pricing flexibility in areas where specified competitive “triggers” were satisfied. Under “Phase I” pricing flexibility, price cap LECs that made a specific competitive showing for particular access services were permitted to offer those services under contract tariffs and volume and term discounts on one day's notice as long as they maintained their generally available price cap tariffed rates for those services.²⁸⁵ Because their generally available price cap rates continued to serve as a backstop, such relief permitted them, as a practical matter, to reduce their rates, but not raise rates for the same services, through contract tariffs or volume and term discounts.²⁸⁶ In the

²⁸⁴ *Access Charge Reform*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221 (1999) (“*Pricing Flexibility Order*”), *aff'd sub nom. WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001).

²⁸⁵ *Id.* at 14234-35 ¶ 24, 14288 ¶ 122.

²⁸⁶ *Special Access for Price Cap Local Exchange Carriers*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 16318, 16321 ¶ 5 (2012) (“*Special Access Data*