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

In the Matter of

Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) from ILEC Regulatory Obligations	WC Docket No. 14-192

COMMENTS OF THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES

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I. INTRODUCTION AND EXECUTIVE SUMMARY

On October 6, 2014, the United States Telecom Association ("USTelecom") filed a petition pursuant to section 10 of the Communications Act of 1934, as amended,[1] requesting that the Commission forbear from enforcing "various outdated regulatory requirements applicable to incumbent local exchange carriers,"[2] claiming that the relief requested will "promote the deployment of next-generation high-speed networks ... expanding infrastructure investment and increasing competition for services that have become central to Americans' daily lives."[3] The USTelecom petition ("Petition") seeks forbearance from application of statutory provisions and regulations that are characterized as falling into seven categories[4], as described more fully below.

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[1] 47 U.S.C. § 160.

[2] USTelecom Petition at 1.

[3] Id. at 2.

[4] Public Notice, DA 14-1585, at 1-2.

The Federal Communications Commission ("FCC" or "Commission") has requested comment on the USTelecom Petition.[5]

The National Association of State Utility Consumer Advocates ("NASUCA")[6] opposes all of the categories of the Petition, but particularly the Category 4 request for forbearance – for price cap incumbent local exchange carriers ("PC ILECs") – from the eligible telecommunications carrier ("ETC") requirements of 47 U.S.C. § 214(e), in areas where the PC ILEC does not receive Connect America Fund ("CAF") Phase II funding.[7] This request for forbearance does not meet any of the three section 10 standards for forbearance, and would establish a radical new federal exemption from some ILECs' carrier of last resort ("COLR") obligations. And none of the other requests for forbearance meet the statutory standard.

Indeed, none of the requests for forbearance will, as claimed by USTelecom, promote the deployment of next-generation high-speed networks or expand infrastructure investment, particularly the § 214(e) requests. None of the requests will increase competition for services that have become central to Americans' daily lives. The requests fundamentally conflict with the enduring values of telecommunication law.[8]

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[5] Id.

[6] NASUCA is a voluntary association of advocate offices in more than 40 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA's members are designated by laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. Members operate independently from state utility commissions as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (e.g., the state Attorney General's office). NASUCA's associate and affiliate members also serve utility consumers but are not created by state law or do not have statewide authority.

[7] Petition, Part V, at 60-73.

[8] FCC No. 14-5, ¶ 9.

II. THE USTELECOM REQUESTS FOR FORBEARANCE

As described in the Public Notice, USTelecom's forbearance requests fall into seven categories:

Category 1: Remaining section 271 and 272 obligations, equal access rules, and the nondiscrimination and imputation requirements set out in the Section 272 Sunset Order (47 U.S.C. §§ 271, 272, 251(g)).

Category 2: Structural separation requirements for independent incumbent LECs, including any conditions imposed by prior Commission Orders granting partial forbearance from 47 C.F.R. § 64.1903.

Category 3: Requirement to provide 64 kbps voice channel where copper loop has been retired (47 C.F.R. § 51.219(a)(3)(iii) (C)).

Category 4: All remaining 47 U.S.C. § 214(e) obligations where a price cap carrier does not receive High Cost Universal Service Support, including 47 C.F.R. §54.201(d). And, the Commission's determination that an Eligible Telecommunications Carrier is required to provide the "supported" services throughout its service area regardless of whether such services are actually "supported" with high-cost funding throughout that area (47 U.S.C. § 214(e); 47 C.F.R. § 54.201(d)).

Category 5: Remaining Computer Inquiry rules, obligations imposed by the Commission's Computer II Orders, and obligations, including Comparable Efficient Interconnection (CEI) and Open Network Architecture (ONA), and other requirements set forth in the Commission's Computer III orders (47 C.F.R. § 64.702).

Category 6: Requirement to provide access to newly deployed entrance conduit at regulated rates (47 U.S.C. §§ 224, 251(b)(4)).

Category 7: Rules prohibiting price cap incumbent LECs' use of contract tariffs for business data services in all regions. And, if necessary, the requirement that packet-switched or optical transmission services be subject to price cap regulation in order to be eligible for pricing flexibility (47 C.F.R. §§ 61.3(o), 61.55(a), 69.709(b), 69.711(b), 69.727(a), 69.705).[9]

These comments will first discuss the forbearance standard, and then the Category 4 request for forbearance from § 214(e). This will be followed by discussion of the other categories.

[9] Public Notice at 1-2.

III. THE FORBEARANCE STANDARD IS NOT MET HERE.

Subsequent to the filing of the Petition, the D.C. Circuit Court of Appeals decided AT&T and Verizon's appeals from the Commission's denial of forbearance from the Uniform System of Accounts, affirming the FCC's decision in all respects.[10] The decision solidifies the bounds of forbearance.

The forbearance standard says that the FCC

> shall forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, **if the Commission determines that—**
> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
> (3) forbearance from applying such provision or regulation is consistent with the public interest.[11]

The DC Circuit noted that the three conditions are conjunctive – that is, failure to meet any one of the standards requires denial of forbearance □ and noted the substantial overlap among the conditions.[12] Further, it is well-established – despite carping by carriers – that the burden of proof in a forbearance request is on the applicant.[13]

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[10] *Petition of USTelecom for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Certain Legacy Telecommunications Regulations* et al., WC Docket No. 12-61 et al., Memorandum Opinion and Order and Report and Order in WC Docket No. 10-132 and Further Notice of Proposed Rulemaking and Second Further Notice of Proposed Rulemaking, WC Docket No. 12-61 et al., 28 FCC Rcd 7627 (2013) ("*USTelecom Forbearance Order*"), aff'd, *Verizon and AT&T, v. FCC*, No. 13-1220 (D.C. Cir. October 31, 2014), ("Verizon and AT&T"). See also *Petition of Qwest Corporation for Forbearance Pursuant to 47 US. C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket 09-135, Memorandum Opinion and Order, 25 FCC Rcd 8622, 8636 (2010), (*Qwest Phoenix Forbearance Order*"), aff'd *Qwest v. FCC*, 689 F.3d 1214 (10th Cir., 2012).

[11] (Emphasis added.) See also 47 U.S.C. § 160(b),

[12] *Verizon and AT&T*, slip op. at 6.

[13] Id., slip op. at 11.

USTelecom has not provided a traditional market power analysis in support of its requests for forbearance now before the Commission. No such analysis is provided for any each of the carriers for which forbearance is sought. As a result, the Commission should reject the entire filing. There has been no showing that carriers no longer have market power in each area where forbearance is sought.

Since 2010, the FCC has applied a traditional market power framework, an analytical approach that examines evidence with respect to the (1) market share; (2) the supply elasticity – the ability of competitors to handle a greater portion of the overall market; and (3) the demand elasticity (the ability/willingness of customers to switch providers).[14] Market power is the ability to raises price by restricting output, or, stated differently, it is "[t]he ability of one or more firms profitably to maintain prices above a competitive level for a significant period of time."[15]

In economic terms, it is the ability to raise prices without a loss of demand that make the price increase unprofitable. While a truly competitive marketplace provides a powerful antidote to any effort to exploit consumers, the marketplace cannot provide this protection if a competitor has market power, since the pricing discipline of a competitive marketplace cannot be effective in the presence of market power.

To determine whether market power is present, one must first begin with the determination of the relevant market. The test for determining the relevant market was defined in *SCFC*, where the court noted that because "the ability of consumers to turn to other suppliers restrains a firm from raising prices above the competitive level, the definition of the 'relevant

[14] *Qwest Phoenix Forbearance Order* at ¶¶ 37, 42, 58-59.

[15] See *United States Department of Justice Merger Guidelines (1984)*, reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,103 at 20,556.

market' rests on a determination of available substitutes."[16] The *SCFC* court also stated that "[t]o define a market in product and geographic terms is to say that if prices were appreciably raised or volume appreciably curtailed for the product within a given area, while demand held constant, supply from other sources could not be expected to enter promptly enough and in large enough amounts to restore the old price and volume."[17]

Quantitatively measuring the extent to which two products or services are economic substitutes for one another requires examination of the "own price elasticity" of a product or service, and the "cross-price elasticity" of that product/service *vis-à-vis* another that is hypothesized to be a substitute.[18] The Court of Appeals reaffirmed that a determination of a relevant market rests on a determination of available substitutes. As the Third Circuit held, the "reasonable interchangeability" test is measured by, and is substantially synonymous with, cross-elasticity.[19]

A market is elastic if demand goes down as price goes up, and a market is cross-elastic if rising prices for product "A" cause consumers to switch to product "B."[20] When applying the relevant market test of "reasonable interchangeability," one must determine the elasticities of the product market. "Reasonably interchangeability" is predicated upon cross-elasticity being present and if cross-elasticity does not exist, then a product is not a substitute.[21] Accordingly, one

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[16] *SCFC ILC, Inc. v. Visa USA, Inc.* 36 F.3d 958, 966 (10 Cir. 1994) ("*SCFC*"). *citing Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d at 218 (DC Cir. 1986).

[17] *SCFC*, F6 F.3d at 966, quoting L. Sullivan, *Antitrust* § 12, at 41 (1977).

[18] *Telecor Communications, Inc. et. al., v. Southwestern Bell Telephone Company*, 305 F.3d 1124 (10th Cir. 2002) ("*Telecor*"), *accord Eichorn, et. al. v. AT&T Corp., et. al.*, 248 F.3d 131 (3rd Cir. 2001).

[19] *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430 (3rd Cir. 1997).

[20] See *Telecor*, 305 F.3d at 1131.

[21] See *Telecor*, 305 F.3d at *fn* 9, p. 1132.

must look at the "reasonable interchangeability," *i.e.*, available substitutes, from the perspective of purchasers, rather than the seller, when determining the relevant market.

US Telecom's filing is devoid of empirical evidence to show that carriers lack market power, and without such showings, the relief requested should be denied. US Telecom's reliance upon both wireless and VoIP as a substitute for wireline lacks empirical support.

In the 2007 FCC *ATT/BellSouth Merger Order* approving the merger of AT&T and BellSouth, the FCC confirmed its prior analysis that wireless service does not provide a price constraint on wireline services, except to the extent that the customer has chosen to rely exclusively on wireless service (i.e., cut the cord).[22] In 2010, the FCC concluded:

> Knowing the percentage of households that rely exclusively upon mobile wireless is insufficient to determine whether mobile wireless services have a price constraining effect on wireline access services ... For example, nationwide statistics published by the CDC suggest that the choice to rely exclusively upon mobile wireless services could be driven more by differences in consumers' age, household structure, and underlying preferences than by relative price differentials. ... Indeed, because the record reflects that the majority of residential customers continue to subscribe to both mobile wireless and wireline services, it appears that most mass market consumers use mobile wireless service to supplement their wireline service rather than as a substitute for their wireline service.[23]

The FCC also reaffirmed its position that wireless service does not effectively constrain ILEC market power for residential wireline services:

> Although the leading mobile providers have ubiquitous networks, as described above, we cannot conclude on the basis of this record that residential mobile voice services fall within the same relevant product markets as wireline services. Nor is there any evidence that mobile wireless carriers are likely to alter their pricing strategies dramatically to offer a closer substitute to Qwest's local service offerings in response to a small but significant and non-transitory increase in the

[22] *AT&T Inc. and BellSouth Corporation Application for Transfer of Control,* WC Docket No. 06-74, Memorandum Opinion and Order, WC Docket No. 06-74, Memorandum Opinion and Order, 22 FCC Rcd 5662 (2007) ("*AT&T/BellSouth Merger Order*"), at fn 27.

[23] *Qwest Phoenix Forbearance Order* at ¶ 59 (internal citation omitted).

> price of fixed mass market services, particularly given that the majority of consumers already purchase mobile wireless services at current price levels.[24] .

In the 2010 *Qwest Phoenix Forbearance Order* the FCC concluded:

> [N]either Qwest nor any other commenter has submitted evidence that would support a conclusion that mobile wireless service constrains the price of wireline service. For example, Qwest has produced no econometric analysis that estimate the cross-elasticity of demand between mobile wireless and wireline access services. Nor has it produced any evidence that it has reduced prices for its wireline services or otherwise adjusted its marketing for wireline service in response to changes in the price of mobile wireless service. Nor has it produced any marketing studies that show the extent to which consumers view wireless and wireline access services as close substitutes.[25]

In addition, the FCC concluded that Qwest had failed to show wireless is in the same product market as residential wireline voice services. The Commission noted that, although Qwest had provided evidence concerning the percentage of households in the Phoenix area that depend exclusively on mobile wireless services, that "cannot alone establish whether mobile wireless services should be included in the same relevant product market as residential wireline voice service."[26]

The Department of Justice also concluded that wireless and wireline services are in different product markets in its complaint regarding AT&T's proposed acquisition of T-Mobile, finding that "[b]ecause neither fixed wireless services nor wireline services are mobile, they are not regarded by consumers of mobile wireless telecommunications services as reasonable substitutes."[27]

As for VoIP, in the *AT&T/BellSouth Merger Order*, where the FCC excluded over-the-top VoIP services from the product market, stating:

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[24] *Qwest Phoenix Forbearance Order*, at ¶ 83.

[25] Id. at ¶ 55.

[26] Id., at ¶¶ 58-59.

[27] *United States of America v. AT&T, Inc. and T-Mobile USA, Inc., and Deutsche Telekom AG*, Complaint, Case No. 1:11-cv-01560, (filed Aug. 31, 2011), at ¶ 12.

> The varieties of over-the-top VoIP differ significantly in their service characteristics, including quality of service and price. The extent to which consumers view these services as substitutes for traditional wireline local service may vary based on these differences. In addition, the requirement that a consumer have broadband access to be able to use certain over-the-top VoIP services affects its substitutability. Specifically, for consumers who do not already have broadband access service, the subscription fee to obtain it must be added to the subscription fee for the over-the-top VoIP service when weighing it against the price of traditional wireline local service, which could make substitution uneconomic.[28]

Even for consumers who have broadband service, their willingness to subscribe to over-the-top VoIP service instead of wireline local service will vary with the attributes of the service and their willingness to trade service characteristics for lower prices.

In view of the foregoing, NASUCA submits that US Telecom has failed to provide empirical support to show that carriers who would be granted forbearance lack market power. As a result, the Petition should be denied.

IV. THE FCC SHOULD NOT FORBEAR FROM THE § 214(e) CARRIER OF LAST RESORT OBLIGATIONS.

USTelecom specifically seeks forbearance from 47 U.S.C. § 214(e), which provides that :

> A common carrier designated as an eligible telecommunications carrier under paragraph (2), (3), or (6) shall **be eligible** to receive universal service support in accordance with section 254 of this title **and shall**, throughout the service area for which the designation is received—
> (A) offer the services that are supported by Federal universal service support mechanisms under section 254(c) of this title, either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and
> (B) advertise the availability of such services and the charges therefor using media of general distribution.[29]

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[28] *AT&T/BellSouth Merger Order*, ¶ 94.Cite

[29] 47 U.S.C. § 214(e)(1)(A) (emphasis added).

An ETC is an ETC regardless of whether it receives USF support. As USTelecom states, "The Commission has interpreted Section 214(e)(1)(A) to require an ETC to provide the 'supported' services throughout its service area regardless of whether such services are actually 'supported' with high-cost funding throughout that area."[30] Despite this admission, USTelecom does not acknowledge that this interpretation of the statutory language has been twice upheld in the courts.[31] By law, then, ETC designation applies whether or not the ILEC requests or receives universal service fund ("USF") funding.

USTelecom seeks forbearance from this requirement, which is consistent with and parallel to the traditional COLR requirement, only for price cap ILECs and only in areas where the price cap ILECs do not receive CAF Phase II funding.[32] The distinction USTelecom seeks is fundamentally wrong, requesting forbearance from COLR responsibilities only for price cap ILECs, and then only for areas where the ILECs do not receive CAF II funding. Again, the obligation applies to all carriers designated as an ETC, whether or not they receive support. For a stark example, Verizon is and has been an ETC in the District of Columbia, where it has never received – and probably will never receive – USF high-cost funding. So CAF funding cannot be the trigger for the § 214(e) obligations. And the advent of CAF II – versus CAF I, and versus any one of the previous incarnations of the high-cost funds – was not a magical transformation that radically changed the ETC obligations into something that can or should be automatically dispensed with.[33]

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[30] Petition at 61,

[31] See *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095 (D.C. Cir 2009); *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999).

[32] Currently, the obligations apply throughout the ILEC's service areas. See 47 U.S.C. § 214(e)(5).

[33] See Petition at 61.

USTelecom's attempt to tie a lack of CAF II funding to a lack of need for the ETC obligations is a logical non sequitur regardless of the substance of USTelecom's allegations about competition or about the level of subscription for telephone service. But in fact, those allegations are themselves inadequate to meet the fundamental requirements for forbearance.

USTelecom cites to "the increasingly wide range of service options available," "the wealth of competitive alternatives," and the "**consequent** rapid decline in ILEC wireline market shares."[34] The petition says that "the obligation has become counterproductive, and **will** become anticompetitive in some circumstances…."[35] All of these claims are simply wrong.

The Petition for Category 4 fails the § 160(a)(3) public interest test, the § 160(a)(2) protection of consumers test and the § 160(a)(1) just and reasonable rates test. This request must be denied.

A. The need for a federal Carrier of Last Resort

The fundamental premise of USTelecom's argument is that

> [t]oday, consumers nationwide enjoy a wide array of voice service choices, provided over an expanding range of technologies and platforms. Thus, even apart from other considerations, the dynamic competition that characterizes the communications industry ensures that Sections 10(a)(1) and 10(a)(2) are satisfied.[36]

The point the argument misses is that what USTelecom describes elsewhere as "a multi-technology, **bundled**, all-distance competitive free-for-all…"[37] requires consumers to subscribe to bundles that go well beyond the services that are required by § 214(e).[38] Almost none of the "competitors" referenced by USTelecom – wireline or wireless □ offer the stand-alone basic

[34] Id. (emphasis added).

[35] Id. (emphasis added).

[36] Id. at 62.

[37] Id. at 21 (emphasis added).

[38] See 47 C.F.R. § 101(a).

service described in the C.F.R. Further, as discussed above, the *Qwest Phoenix Forbearance Order* found that Qwest had not supplied sufficient evidence to show that wireless service should be included in the same product market as wireline telephone service.[39]

USTelecom asserts that "[w]ith consumers 'increasingly shift[ing] from traditional telephone service' to alternatives, including VoIP and wireless, no competitive or consumer protection purpose is served by mandating the ILECs, and no one else, to continue providing 'supported services.'"[40] The consumer protection purpose for the ETC requirements is that there is **required to be** a carrier providing the supported services in a particular area – price cap or not.[41]

To paraphrase Robert Frost, COLR is the carrier that when you want to go to them, they have to let you in.[42] Without COLR, all the carriers in the area could deny service to a customer, and that would be legal. And, in fact, there wouldn't have to be any carriers at all in a specific area; that would also be legal. The ETC backstop continues to be necessary.[43] Forbearance cannot be granted from this obligation, especially not globally as requested by USTelecom.

Section 214(e)(4) includes a specific mechanism allowing a carrier to relinquish its ETC designation. The key provision of that section is that there has to be another ETC operating

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[39] *Qwest Phoenix Forbearance Order*, ¶¶ 55-61.

[40] Petition at 64 (footnote omitted).

[41] Allband sought and received ETC designation for previously unserved areas in the State of Michigan. See *Allband Communications Cooperative Petition for Waiver of Sections 69.2(hh) and 69.601 of the Commission's Rules*, WC Docket No. 05-174, Order (August 11, 2005).

[42] Robert Frost, "The Death of the Hired Man," accessible at http://www.poetryfoundation.org/poem/173525.

[43] The recent retreat of wireless ETCs shows the need to maintain the ILEC ETC requirement. See WC Dkt No. 09-197, Order, DA No. 14-1712 (11/25/2014) (AT&T in Virginia); id, Order. DA No. 14-1713)11/25/2014) (T-Mobile USA, Inc. in Alabama, Connecticut, Delaware, New Hampshire, New York, North Carolina, Tennessee, and the District of Columbia); .id., Order, DA No. 14-1715 (11/25/2014) (AT&T in New York, North Carolina, Tennessee, Virginia and the District of Columbia)

throughout the area where relinquishment is sought, before relinquishment can be granted.[44] Thus there must be a federally-specified COLR an ETC in all parts of the country.

There have been few requests for ILEC ETC relinquishment. This should correctly and properly be attributed to the law's requirement that there be a replacement COLR carrier for customers. Recently, the South Dakota Public Utilities Commission ("SDPUC") granted the simultaneous relinquishment and replacement of carriers in two study areas in that state.[45]

USTelecom's assertion that "[t]he Section 214(e) service obligations … have been rendered superfluous by the marketplace"[46] overlooks the fact that 214(e) was designed to protect consumers **against** the vagaries of the marketplace. Sec. 214(e) ensures that, pursuant to federal law, there will continue to be an ETC/COLR to serve customers.[47] The relinquishment process has not been shown to be unreasonable. Thus a wholesale elimination of the relinquishment process through forbearance is not in the public interest, and would violate the enduring values that the Commission has promised to defend.[48]

Similarly, USTelecom argues against the Lifeline obligation for price cap ETCs, stating,

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[44] 47 U.S.C. § 214(e). See http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db1125/DA-14-1712A1.pdf.

[45] See WC Docket No. 14-58, et al., SDPUC filing (October 30, 2014). In New Hampshire, the Dixville Notch Telephone Company has recently filed to discontinue its operations, but apparently intends to deal with § 214(e) later. See http://www.puc.state.nh.us/Regulatory/Docketbk/2014/14-240.html. NASUCA has made an amicus curiae filing in the New Hampshire Docket, raising the § 214(e) issue. See http://www.puc.state.nh.us/Regulatory/Docketbk/2014/14-240/LETTERS-MEMOS-TARIFFS/14-240%202014-11-14%20NASUCA%20REQUEST%20TO%20CONSIDER%20FEDERAL%20LAW%2047%20USC%20214E4.PDF. See also *Petition of Mid-Rivers Telephone Cooperative, Inc. for Order Declaring It to be an Incumbent Local Exchange Carrier in Terry, Montana Pursuant to Section 251(h)(2)*, CC Docket No. 02-78, Report and Order (October 11, 2006), ¶ 3.

[46] Petition at 64.

[47] Some states have eliminated or reduce the COLR obligations in state law. See NRRI's 2014 report, accessible at http://communities.nrri.org/research-papers/-/document_library_display/3stN/view/0/12601?_110_INSTANCE_3stN_redirect=http%3A%2F%2Fcommunities.nrri.org%2Fresearch-papers%3Fp_p_id%3D110_INSTANCE_3stN%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn-2%26p_p_col_count%3D1.

[48] FCC No. 14-144, ¶ 9.

> [i]n every single AT&T price cap wire center, there are at least three Lifeline providers, and the average number of Lifeline providers across all AT&T wire centers is over 12. Moreover, almost all Lifeline customers prefer wireless services.[49]

The "preference" of Lifeline customers for wireless services is likely an artifact of certain wireless ETCs' decision to offer "free" wireless Lifeline services, that is, services where there is no charge to the customer for a limited number of minutes,[50] and where the carrier (mostly resellers) can still profit from providing that limited number of minutes for the $9.25 Lifeline support amount. This is regulatory arbitrage, not the functioning of a free market in which ETC obligations are not required.

B. USTelecom's supposed benefits of forbearance are illusory.

USTelecom asserts that forbearance will advance national broadband goals,[51] will promote competitive neutrality,[52] and will more accurately implement the current high-cost regime.[53] All of these reasons are disingenuous.[54]

This part of USTelecom's petition would support advancing national broadband goals only if one assumes that the dollars represented by the actual costs to the ILECs of ETC status in price cap areas where no CAF II funding is received – costs that have neither been revealed nor explicated in the petition – will **all** be transferred to broadband deployment. That is almost

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[49] Petition at 66 (footnotes omitted).

[50] At least until the customer wants or needs to exceed the minutes in the "free" package."

[51] Petition at 68-69.

[52] Id. at 69-72.

[53] Id. at 72-73.

[54] Or mendacious. See http://en.wikiquote.org/wiki/Cat_on_a_Hot_Tin_Roof_%28film%29.

laughable, given the recent reaction of price cap carriers like AT&T to the possibility of consumer-protective Open Internet rules.[55]

Where competitive neutrality is concerned, USTelecom asserts, "[T]he current regime requires the unsubsidized price cap ETC to compete against a subsidized provider in an area where the Commission has determined that it is uneconomic to provide service without support."[56] First, the prior regime[57] required unsubsidized carriers – like cablecos – to compete against supported **price cap ETCs**. The price cap ETCs never complained about that support; indeed, ETCs often sought additional support.[58] More importantly, USTelecom's premise is simply wrong, because the price cap ETC is not required to compete against a subsidized provider **except** as a carrier of last resort. Again, the actual amount or level of the cost burden of this "competition" has not been revealed.

USTelecom's further citation to *Alenco*'s competitive neutrality statement[59] misrepresents *Alenco*'s reference to the requirements for universal service mechanisms, especially because the ETC/COLR obligation at issue here is not a "universal service mechanism." The obligation is the fundamental principle of universal service itself, not the support mechanism for universal service.[60] It should also be recalled that "competitive neutrality," as defended by USTelecom, is a Commission-adopted principle for universal service, not one directed by Congress.[61]

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[55] See https://www.techdirt.com/blog/netneutrality/articles/20141112/07323529118/att-pouts-freezes-mostly-bogus-fiber-to-press-release-deployments-net-neutrality-bluff.shtml.

[56] Petition at 69.

[57] Previous to the Transition Order.

[58] See *Qwest Comm'n Int'l, Inc. v. FCC*, 398 F.3d 1222, 1234 (10th Cir. 2005).

[59] Petition at 70, citing *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 616 (5th Cir. 2000) ("*Alenco*").

[60] See *Rural Cellular Ass'n v. FCC* and *Texas Office of Public Utility Counsel v. FCC*, supra footnote 31.

[61] See 47 U.S.C. § 254(b)(7).

Finally, USTelecom's argument that relieving price cap ETCs of the ETC obligation is congruent with the new high-cost regime adopted in the *Transition* clearly disregards the fact, as discussed, that the prior regime, and the law, did not make receipt of high-cost support a condition of ETC status.[62] As discussed, there was and is no requirement that ETCs actually receive high-cost support as part of their status.

The § 214(e) requirements are fundamental consumer protections that should not be forborne from, especially for the large price cap carriers. This aspect of USTelecom's petition must be denied.

V. OTHER USTELECOM FORBEARANCE REQUESTS

USTelecom Category 1: Remaining section 271 and 272 obligations, equal access rules, and the nondiscrimination and imputation requirements set out in the Section 272 Sunset Order (47 U.S.C. §§ 271, 272, 251(g)).

The Petition states,

> In order to eliminate barriers to infrastructure investment and competition, the Commission should forbear from applying Sections 271 and 272 and should send a strong signal that the [Performance Assurance Plans] are no longer needed. Similarly the Commission should forbear from applying the equal access requirements, which predated the 1996 Act but were preserved by Section 251(g). Equal access requirements are irrelevant to today's highly competitive, bundled, all-distance services.[63]

If the Commission forbears from §§ 271-272, there is a risk that the former regional Bell Operating Companies ("RBOCs") for whom the provisions were designed – now reduced in number but vastly greater in scope[64] □ will take advantage of the removal of those statutes. And withdrawal of the equal access requirements – a protection for the vestiges of competition in the

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[62] See *Rural Cellular Ass'n v. FCC* and *Texas Office of Public Utility Counsel v. FCC*, supra footnote 31.

[63] Petition at 16.

[64] See http://www.beatriceco.com/bti/porticus/bell/pdf/att_history.pdf.

"fringe" long distance market[65] -- will allow the largest carriers to extend their domination in this market, harming competition. Thus removing these requirements will not aid competition. This category fails the § 160(a)(3) and (b) tests. This request must be denied.

Category 2: Structural separation requirements for independent incumbent LECs, including any conditions imposed by prior Commission Orders granting partial forbearance from 47 C.F.R. § 64.1903.

The Petition states,

> In order to eliminate barriers to infrastructure investment and competition, the Commission should forbear from applying the structural separation requirements of Section 64.1903 of the Commission's rules to independent ILECs – RLECs and price cap ILECs alike –with no conditions. The structural separation requirements of Section 64.1903 are as irrelevant in the current all-distance marketplace as the remaining requirements of Section 272, and for many of the same reasons. The Commission previously concluded that such rules should not apply to price cap carriers that agreed to the same conditions that were applied to the RBOCs and their independent ILEC affiliates in the *Section 272 Sunset Order*,[66]

If the Commission grants the Category 1 forbearance just discussed, it should then also grant forbearance from the structural separations requirements, for the independents. This would allow independent ILECs to provide a little more competition for the dominant larger carriers.[67]

On its own, however, this category need not be granted. Structural separation remains an appropriate means for protecting consumers from the competitive vagaries of broader market.[68] Thus the USTelecom Petition fails the § 160(a)(2) test, and must be rejected.

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[65] See *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18342 ¶ 91 (2005) ("*SBC-AT&T Order*").

[66] Petition at 38 (footnotes omitted).

[67] It should be noted that if the RLECs choose to forgo structural separation, their costs of service – hence their CAF funding -- should recognize the economies of scope resulting from the combination.

[68] The lack of separation operates to the detriment of consumers. See the PULP/New Networks Report, "It's All Interconnected," accessible at http://utilityproject.org/2014/06/24/its-all-interconnected-oversight-and-action-is-required-to-protect-verizon-new-york-telephone-customers-and-expand-broadband-services/ (Verizon New York self-interested use of affiliates).

Category 3: Requirement to provide 64 kbps voice channel where copper loop has been retired (47 C.F.R. § 51.219(a)(3)(iii) (C)).

The Petition states,

> Regardless of whether [the] 64 kbps requirement made sense in 2003, its continued existence results in unnecessary burdens for one set of providers and undermines the broader shift to next-generation fiber facilities while providing no meaningful offsetting benefits to consumers.[69]

The issue of what happens to copper before and after it is retired is one of the fundamental questions addressed in the Commission's recent Notice of Proposed Rulemaking ("NPRM") (FCC 14-185), PS Docket No. 14-174, et al.[70] Yet the requirement for carriers having retired their copper to provide low-quality channels to competitors – like other issues discussed here – remains a necessary backstop. A better solution for consumers would be, of course, unbundling the more efficient fiber and the coax, as argued by NASUCA and others.[71] The current rule burdens all carriers that retire copper ("one set of providers"), which, no coincidence, just happen to be ILECs. Wireline networks generally should be unbundled. The decimation of residential competition after the abandonment of unbundling[72] was entirely unnecessary.

This request fails the § 160(a)(3) and (b) tests. It must be rejected.

Category 5: Remaining Computer Inquiry rules, obligations imposed by the Commission's Computer II Orders, and obligations, including Comparable Efficient Interconnection (CEI) and Open Network Architecture (ONA), and other requirements set forth in the Commission's Computer III orders (47 C.F.R. § 64.702).

Addressing the Petition's introduction on this request phrase by phrase:

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[69] Petition at 51.

[70] See FCC No. 14-185, ¶¶ 49-91.

[71] See NASUCA Resolution 14-3 (adopted November 18, 2104), accessible at

[72] See *Triennial Review of Unbundled Network Elements*, WC Docket No. 01-338, NASUCA ex parte (December 6, 2002); see also NASUCA UNE-P White Paper (2003), accessible at http://apps.fcc.gov/ecfs/document/view?id=6513405208.

- "In order to eliminate barriers to infrastructure investment and competition,"[73] As noted above, the incremental investment and competition from forbearance would be minimal.

- "...the Commission should forbear from continuing to impose the remaining legacy *Computer Inquiry* requirements on any LEC offering enhanced services."[74] USTelecom neither quantifies the burden nor identifies the "victims" of these regulations.

- "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..."[75] The issue was and is market power: Monopoly is simply the extreme example of market power or dominance. Duopoly is also extreme. The current issue is that certain carriers, including but certainly not limited to AT&T, Verizon, Comcast, and Time Warner Cable are dominant (or at best, duopolists) in many of their markets.

- " ...to the disadvantage of emerging enhanced services providers ('ESPs') who were dependent on those networks."[76] The Computer II requirements protect more than just the at-that-time "emerging" ESPs; the protections against dominance in those requirements should not be globally forborne from.

- "However, there is no LEC monopoly over wireline networks today,"[77] The monopoly has been "reduced" to a duopoly for lucky customers.

- "... and the narrowband TDM-based network itself has entered its twilight years, as the industry transitions to IP-based broadband facilities..."[78] The change to IP does not reduce the 1934 Communications Act's enduring values, or the consumer protections added by the 1996 Telecom Act.

- "...offered by multiple competitors."[79] Competition in the wired networks is controlled by the network owners, which are overwhelmingly duopolists.

- "The *Computer Inquiry* requirements therefore have outlived their utility, particularly insofar as the Commission may still consider them applicable to modern broadband services."[80] USTelecom's overbroad push that the *Computer*

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[73] Petition at 73.

[74] Id.

[75] Id.

[76] Id.

[77] Id.

[78] Id.

[79] Id.

[80] Id.

> *Inquiry* requirements do not apply to "modern broadband services" trivializes the remaining market. But it also ignores the need to protect the enduring values.

Nothing remains of USTelecom's claims. The request fails all three prongs of the forbearance test.

Category 6: Requirement to provide access to newly deployed entrance conduit at regulated rates (47 U.S.C. §§ 224, 251(b)(4)).

The Petition states, "As interpreted by the Commission, the conduit access provisions of Sections 224 and 251(b)(4) allow CLECs to demand access to ILEC-constructed conduits – at below-market rates – while denying ILECs reciprocal access to conduits their competitors construct."[81] Of course conduit rates are "below-market": They do not allow the conduit owner to – at least in this respect – exercise its market dominance. Certainly, ILEC conduit owners should remain subject to § 251(c)(2) and (3)'s requirements; it may be, however, that in the transformed world, the access requirements should also apply to all entrance conduits.

This request fails the § 160(a)(3) and (b) tests. It must be rejected.

Category 7: Rules prohibiting price cap incumbent LECs' use of contract tariffs for business data services in all regions. And, if necessary, the requirement that packet-switched or optical transmission services be subject to price cap regulation in order to be eligible for pricing flexibility (47 C.F.R. §§ 61.3(o), 61.55(a), 69.709(b), 69.711(b), 69.727(a), 69.705)

The Petition states,

> 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.[82]

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[81] Id. at 85.

[82] Id. at 95.

It is almost mind-boggling to hear USTelecom – ILEC bastion that it is – defend the use of tariffs. Filing of tariffs for customer services used to be anathema for carriers.[83] It was consistently argued that tariffs **prevented** "offering arrangements tailored to individual customers expeditiously..." [84] In this instance, the carriers want tariffs to make it easier to deal with the competition, and to use the filed rate doctrine, in their market dominance. This request fails the § 160(a)(3) and (b) tests.

VI. CONCLUSION

The Commission must preserve the enduring values of the 1934 and 1996 Communications Acts. This requires the Commission to deny USTelecom's request for forbearance in its entirety, because granting the Petition would violate all three conditions for forbearance in the Act. Clearly, USTelecom has failed to meet its burden of proof in this proceeding.

Respectfully submitted,

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[83] Also on the state level.

[84] See, e.g., http://transition.fcc.gov/Bureaus/Common_Carrier/News_Releases/2001/nrcc0130.html (description of detariffing).