

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Petition of USTelecom for Forbearance)	WC Docket No. 14-192
Under 47 USC §160(c) From Obsolete ILEC)	
Regulatory Obligations That Inhibit)	
Deployment of Next Generation Networks)	

COMPTEL’S OPPOSITION TO USTELECOM’S PETITION FOR FORBEARANCE

Mary C. Albert
Karen T. Reidy
COMPTEL
1200 G Street N.W., Suite 350
Washington, D.C. 20005
(202) 296-6650

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SUMMARY

For the second time in two years, USTelecom is back before the Commission seeking relief on behalf of the Regional Bell Operating Companies (“RBOCs”), price cap incumbent local exchange carriers (“ILECS”) and/or all ILECs from what it characterizes as “obsolete” statutory and regulatory requirements. While USTelecom bemoans the loss of retail access lines and retail market share that ILECs have sustained, many of the obligations from which it seeks forbearance are wholesale obligations. The wholesale inputs made available pursuant to Sections 271, 272, 224, 251(b)(4) and 251(g) of the Communications Act, 47 U.S.C. §§ 271, 272, 224, 251(b)(4), 251(g), the Computer Inquiry rules and the rule requiring ILECs to provide access to a 64 kbps voice grade loop where copper is replaced with fiber, 47 C.F.R. § 51.219(a)(3)(iii)(C), have enabled competitive carriers to offer innovative services and provide retail end users a choice in carriers. A healthy and vibrant wholesale market is critical to the creation and preservation of competition in the retail market. The statutory and regulatory provisions from which USTelecom seeks forbearance remain necessary to protect consumers and ensure that innovative services continue to be developed and offered in the retail market and that end users continue to have a choice in providers.

USTelecom has fallen far short of meeting its burden of proving that forbearance is warranted pursuant to Section 10 of the Act, 47 U.S.C. §160, for any of the statutory or regulatory obligations that the Commission has sorted into Categories 1, 3, 5, 6 and 7. The evidence cited by USTelecom relates generally to the voice telephony market, but it is non-carrier specific and sheds no light on the market share or market power held by any of the ILECs in any of the discrete geographic or product markets in which they operate. The national aggregated data on which USTelecom and its economists rely to argue that the existence of

competition is sufficient to warrant forbearance say nothing about the existence of competitive alternatives available in any of the specific product or geographic markets the ILECs on whose behalf it requests forbearance serve. Without such information, the Commission cannot possibly find that continued enforcement of the statutory provisions and regulations is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with any ILEC or ILEC service are just and reasonable and are not unjustly or unreasonably discriminatory; that enforcement of the provisions or regulations is not necessary for the protection of consumers; and that (3) forbearance from applying the provisions or regulations is consistent with the public interest and will promote competitive market conditions and enhance competition among providers. For these reasons, the Commission should deny USTelecom's Petition for Forbearance.

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COMPTEL’S OPPOSITION TO USTELECOM’S PETITION FOR FORBEARANCE

COMPTEL hereby submits its opposition to the United States Telecom Association’s (“USTelecom”) Petition For Forbearance from certain allegedly “outdated”¹ telecommunications regulations applicable to incumbent local exchange carriers (“ILECs”) that they claim inhibit deployment of next generation networks and “divert substantial resources away from such next generation networks.”² USTelecom seeks sweeping relief from a number of statutory and regulatory requirements for all Regional Bell Operating Companies (“RBOCs”), all ILECs, and/or all ILEC price cap carriers to which they apply.³ USTelecom has failed to demonstrate that all RBOCs, all ILECs or all price cap ILECs are entitled to forbearance relief from the regulatory requirements at issue and its Petition should be denied. At the very least, the Commission should deny any forbearance relief in **Category 1** – Remaining Section 271 and 272 obligations, and the equal access requirements; **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 5:**

¹ USTelecom Petition at 1.

² USTelecom Petition at 3.

³ See Appendix A to USTelecom’s Petition.

Open Network Architecture (“ONA”) and Comparably Efficient Interconnection (“CEI”) Requirements, All-Carrier *Computer Inquiry* Rules and the Structural Separation Rule; **Category 6** – Sections 224 and 251(b)(4) requirement to provide access to newly deployed entrance conduit at regulated rates; and **Category 7** – Regulations prohibiting price cap ILECs’ use of contract tariffs for business services in all regions and requirement that packet-switched or optical transmission services be subject to price cap regulation in order to be eligible for pricing flexibility.

I. The Statutory Standard

USTelecom bears a heavy burden in proving that it meets the statutory prerequisites to obtain forbearance.⁴ Section 10(a) of the Communications Act, 47 U.S.C. §160(a), provides that the Commission may not grant forbearance from any provision of the Act or any Commission regulation unless and until it determines that three conditions have been satisfied. The Commission must make affirmative determinations that (1) enforcement of the provision or regulation 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 the provision or regulation is not necessary for the protection of consumers; and (3) forbearance from applying the provision or regulation is consistent with the public interest.

In making the public interest determination, Section 10(b) requires the Commission to consider whether forbearance from enforcing the provision or regulation will promote

⁴ *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. §160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, Memorandum Opinion and Order, FCC 10-113 at ¶14 (rel. June 22, 2010) (*Qwest Phoenix Decision*).

competitive market conditions and enhance competition among telecommunications providers. If the Commission determines that forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a finding that forbearance is in the public interest. USTelecom has failed to make a *prima facie* showing that forbearance from enforcement of each of the statutory and regulatory provisions is warranted under each prong of this statutory standard as required by Section 1.54(b) of the Commission's rules. For this reason, USTelecom's Petition must be denied.

In support of its request, USTelecom has submitted declarations from two economists that discuss the competitive alternatives to ILEC wired voice telephony service generally.⁵ The analyses provided by the economists are non-carrier specific and provide no data on the market share or market power held by any of the ILECs in any of the discrete markets in which they operate.⁶ Nor does the national aggregated data on which USTelecom and its economists rely to argue that the existence of competition is sufficient to warrant forbearance say anything about the existence of competitive alternatives available in any of the specific markets the ILECs on whose behalf it requests forbearance serve. With no detail about individual ILEC market share in the appropriate product and local geographic markets, the only markets relevant to a determination of the existence of competitive alternatives, the Commission cannot justify granting forbearance relief from critical competitive statutory and regulatory provisions.⁷ While

⁵ See USTelecom Petition at 9-13 and Appendices B and C.

⁶ *Id.*

⁷ *Qwest Phoenix Decision* at ¶38. See also, *In the Matter of Petition of AT&T for Forbearance Under 47 U.S.C. §160(c) from Title II and Computer Inquiry Rules With Respect to Broadband Services*, WC Docket No. 06-125, Memorandum Opinion and Order, FCC 07-180 at ¶41 (rel. Oct. 12, 2007) (declining to extend forbearance relief to ILECs other than Petitioner because "record before us does not provide sufficient information regarding the nature and

USTelecom bemoans the ILECs' loss of access lines and market share generally,⁸ 56 percent of the total wireline local retail service connections are still provided by ILECs as are 77 percent of the total retail switched access lines.⁹

It is telling that USTelecom offers no examples of ILEC rates coming down to meet or better the rates charged by wireless, cable or VoIP providers, a scenario that a competitive market would likely produce. The facts demonstrate that the availability of competitive alternatives has not been sufficient to constrain the rates charged by USTelecom's largest members at the very least. For example, in California where local telephone service rates are largely deregulated, consumers have seen their rates for AT&T's measured service almost quadruple since 2008. The rates have risen from \$5.83 per month in 2008 to \$21.25 per month in 2014. The number of minutes available under the measured plan has also decreased by 33 percent while the rate for additional minutes has increased by 50 percent.¹⁰ In New York City, the price of Verizon's basic residential landline service has increased 84 percent since 2006.¹¹

competitive conditions associated with particular enterprise broadband services currently offered by other incumbent LECs").

⁸ USTelecom Petition at 9-12.

⁹ Industry Analysis and Technology Division, FCC, *Local Telephone Competition: Status as of December 31, 2013* at Figures 3, 7.

¹⁰ David Lazarus, "Since Deregulation, Landline Costs Skyrocket" (L.A. Times, Dec. 13, 2013), available at <http://articles.latimes.com/2013/dec/05/business/la-fi-lazarus-20131206>.

¹¹ Bruce Kushnick, "Verizon NY Charged 'Basic Rate' Phone Customers Multiple Rate Increases For the Deployment of the FiOS, Title II, FTTP Broadband Networks" (Huffington Post, May 31, 2014), available at http://www.huffingtonpost.com/bruce-kushnick/verizon-ny-charged-basic_b_5424893.html; see also, Elise Ackerman, "Why Your Phone Bill Keeps Increasing --- A Case Study Of Verizon New York's Relationship With State Regulators" (Forbes, Oct. 17, 2013), available at <http://www.forbes.com/sites/eliseackerman/2013/10/17/why-your-phone-bill-keeps-increasing-and-the-information-you-need-to-stop-the-bleeding/2>

Even if the Commission were to determine that certain of the statutory provisions and regulations from which USTelecom seeks relief have outlived their usefulness, which it should not do, it cannot possibly make that determination with respect to those requests the Commission has placed in Categories 1, 3 and 5 through 7. USTelecom has not come forward with reliable or verifiable evidence that would support a determination that forbearance from enforcement of these statutory provisions or regulatory requirements is warranted for all ILECs to which they apply. The Petition must be denied.

II. The Commission Should Deny Forbearance From Enforcement Of The Remaining Section 271 and 272 Requirements (Category 1)

Congress’s Section 271 “[c]ompetitive checklist” requires that Bell Operating Companies (“BOCs”) provide interconnection, unbundled loops, local loop transmission, transport, switching and other network elements to other telecommunications carriers upon request.¹² These requirements are independent of the Section 251(c) requirements.¹³ Thus, the Section 271 competitive checklist provisions safeguard requesting carriers’ rights to obtain interconnection as well as access to unbundled network elements (“UNEs”) even in circumstances where such elements are not available under Section 251(c)(3). The Section 271 provisions serve an important role in ensuring that competitive LECs are able to obtain the wholesale access needed to provide local and long-haul data services to business customers. Moreover, the accelerated complaint process under Section 271(d)(6)(B) establishes an efficient enforcement mechanism for all of the checklist requirements. And, Section 272(e)(1) and (3) remain key to preventing the BOCs from abusing their control of last-mile transmission facilities by ensuring that

¹² 47 U.S.C. § 271(c)(2)(B).

¹³ *Id.* § 251(c)(3).

competitors can obtain wholesale inputs at rates and levels of service quality equivalent to what the BOC provides itself.

As such, the checklist requirements fill significant gaps in the statutory and regulatory scheme that might otherwise leave competitors without the critical inputs needed to serve business customers and they provide an enforcement mechanism that is particularly needed as carriers transition from TDM to IP based services. USTelecom offers no rational basis that would warrant forbearing from these critical requirements.

A. The Requirements Imposed By The Competitive Checklist Enable Competitors to Bring Substantial Benefits To Business Customers.

Numerous competitive LECs rely on Section 271 checklist items, often in combination with UNEs provided pursuant to Section 251(c)(3), to bring competition to the business market where it would otherwise not exist. Today, competition for enterprise communications services is supplied by both ILECs and competitive carriers with the latter delivering services over their own networks as well as ILEC wholesale access facilities and services.¹⁴ Commission policies ensuring reasonably priced access to wholesale services and facilities and interconnection on reasonable and nondiscriminatory terms are necessary to advance the core goals of promoting competition and spurring broadband investment in the business market in particular. As the Commission has recognized, fostering competition in the business broadband market is essential to laying the foundation for a broadband future and wholesale policies have played a vital role in

¹⁴ *In the Matter of Ensuring Customer Premises Equipment Backup Power for Continuity of Communications*, PS Docket No. 14-174 *et al.*, Notice of Proposed Rulemaking and Declaratory Ruling, FCC 14-185 at ¶ 6 (rel. Nov. 25, 2014).

enabling competition and investment in the business broadband market, which is critical to the overall economy.¹⁵

More often than not, BOC connections continue to offer the only economically viable means of access to a business customer location. Sources put cable at 10 percent of annual US business wireline telecommunications spend, whereas non-cable competitors make up 26 percent of non-residential customer expenditures.¹⁶ Despite investing billions of dollars in their networks, non-cable competitors still rely extensively on BOC wholesale facilities and services to reach customers. COMPTEL members use the wholesale facilities and services they obtain to provide competitive, innovative retail products, primarily for customers in the business market.

Wholesale access is vital and is the lynchpin for achieving the enduring value of competition. With an effective wholesale market, retail competition will thrive, spurring economic growth, job creation and even greater innovation. While the Commission should not forbear from enforcing any of the remaining Section 271 obligations, COMPTEL focuses here

¹⁵ “Residential broadband competition—as important as it is—is not the only type of competition we must foster to lay the foundation for America’s broadband future. Ensuring robust competition not only for American households but also for American businesses requires particular attention to the role of wholesale markets, through which providers of broadband services secure critical inputs from one another.” Federal Communications Commission, Connection America: The National Broadband Plan at 47 (“National Broadband Plan”), *available at*: <http://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf>

¹⁶ *See* Letter of Jennie Chandra, Windstream, to Marlene H. Dortch filed Aug. 7, 2014 in GN Docket No. 13-5 (“Windstream Aug. 7, 2014 Ex Parte”), Attachment, *available at*: <http://apps.fcc.gov/ecfs/document/view?id=7521751925>, the source for which estimated monthly spending for wireline communications during 2nd Quarter of 2014, as compiled by the independent market research firm GeoResults; according to another source, cable “takes home *just 6%* of the annual US business telecom spend.” Light Reading, “Heavy Reading: Cable Biz Sales to Hit \$8.5B” (Dec. 4, 2013), *available at*: [http://www.lightreading.com/heavy-reading-cable-biz-sales-to-hit-\\$85b/d/d-id/706824?f_src=lightreading_editorspicks_rss_latest](http://www.lightreading.com/heavy-reading-cable-biz-sales-to-hit-$85b/d/d-id/706824?f_src=lightreading_editorspicks_rss_latest) (emphasis added).

on the key checklist items that become even more critical as carriers transition to next generation facilities and services.

1. Just, Reasonable and Non-Discriminatory Interconnection

As COMPTTEL has repeatedly maintained, ILECs are required to provide IP-to-IP interconnection for voice service where technically feasible pursuant to Sections 251 and 252 of the Act. Aside from an ILEC's obligation to provision IP interconnection in accordance with section 251(c), a BOC must provide interconnection that complies with the requirements of Section 251(c)(2) and 252(d)(1) pursuant to Section 271(c)(2)(B)(i). What this means is that, under Section 271, a BOC cannot simply cease to offer TDM interconnection without offering an alternative form of interconnection that complies with the statutory principles, such as that the interconnection be offered on just and reasonable and nondiscriminatory terms. While the technology neutral aspects of Section 251 cover IP interconnection, until the Commission confirms the obligations related to IP interconnection under Section 251, it cannot assess the impact of forbearance from Section 271 obligations on competition.

Interconnection of networks is key to a competitive market. Indeed, interconnection is equivalent to the First Amendment free speech rights for all networks. Without the requirement of interconnection, the ability of business and residential consumers to have a choice in providers will be hampered. When Congress passed the 1996 Act, the goal was to create a "network of networks" that would all be interconnected, allowing cable systems, long distance and local phone service providers and new entrants to compete in each other's markets, especially where competition had previously been prohibited. As a result, the U.S. economy experienced an increased amount of investment in the communications industry to the tune of an estimated \$1.3

trillion dollars.¹⁷ This continuation of such investment and innovation will not be possible if the BOCs – which still control the majority of switched access lines in-region -- are allowed to restrict competitive entry and either deny interconnection outright, or set conditions on interconnection that would make competing in a particular market economically impossible for smaller companies. Congress’ direction to include “rules of the road” to ensure non-discrimination and reasonable rates, terms, and conditions was, and continues to be, necessary for free, functioning, and competitive markets.

2. Unbundled Switching

A number of competitive LECs use a combined package of switching, DS0 loops, and shared transport (essentially, a UNE-P replacement product)¹⁸ obtained through commercial agreements with the BOCs to provide voice and data services to large businesses, including chains of retail stores, fast food restaurants, convenience stores and gas stations, that have numerous locations,¹⁹ most or all of which require a relatively small number of voice lines and relatively limited data bandwidth.²⁰ Continuing access to these network elements remains in the public interest and is necessary to protect consumers.

¹⁷ USTelecom Research Brief September 8, 2014, available at <http://www.ustelecom.org/sites/default/files/documents/090814%20Latest%20Data%20Show%20Broadband%20Investment%20Surged%20in%202013.pdf>

¹⁸ Local Wholesale Complete is AT&T’s UNE-P replacement product and Wholesale Advantage is Verizon’s.

¹⁹ *See, e.g.*, Letter from Eric J. Branfman, Counsel for Access Point Inc., Birch Communications Inc., BullsEye Telecom, Inc., Matrix Telecom, Inc., New Horizon Communications Corp., Sage Telecom Communications, LLC, Telscape Communications, Inc, and Xchange Telecom, to Marlene H. Dortch filed November 14, 2014 in WC Docket No. 14-192.

²⁰ Comments of Granite Telecommunications, LLC filed January 28, 2013 in GN Docket No. 12-353, Exhibit A, Declaration of Kevin Nichols in Support of Granite Telecommunications, LLC, at ¶ 4 (“Nichols Declaration”).

The ability of consumers at certain business locations to have a choice in provider is often dependent on this form of wholesale access. It is often uneconomical for non-cable competitive LECs to deploy fiber facilities to businesses located in suburban and rural areas, especially to provide the voice and data services demanded by these customers.²¹ Cable company networks often do not reach these customers' precise business locations and they do not generally offer service outside of their franchised cable territories.²² Nevertheless, business customers in these suburban and rural areas have a choice in their voice and data service provider because competitive LECs have been able to use a UNE-P replacement product to provide voice and data services to these businesses.²³

Competitors that rely on these inputs satisfy the unmet needs of large, multi-location business customers in several ways. *First*, they provide high quality and reliable voice service that includes advanced features (such as hunt lines) and that lacks the static, interference, or delay that can occur with alternatives such as mobile wireless or over-the-top VoIP services.²⁴ *Second*, the competitors enable these businesses—which have hundreds or thousands of locations dispersed across the country and are not ordinarily limited to the regional footprints of a single ILEC or cable company—to obtain all of their telecom needs from a single service provider.²⁵

²¹ See, e.g., Letter from Eric J. Branfman, Counsel for Granite Telecommunications, LLC, to Marlene H. Dortch filed November 6, 2014 in GN Docket Nos. 13-5 & 12-353, at 3.

²² Nichols Declaration at ¶ 14.

²³ See, e.g., Letter from Eric J. Branfman, Counsel for Access Point Inc., Birch Communications Inc., BullsEye Telecom, Inc., Matrix Telecom, Inc., New Horizon Communications Corp., Sage Telecom Communications, LLC, Telscape Communications, Inc, and Xchange Telecom, to Marlene H. Dortch, Secretary filed Nov. 14, 2014 in WC Docket No. 14-192.

²⁴ See Nichols Declaration at ¶ 7.

Third, the competitors meet the businesses' demand for highly responsive customer service by enabling them to speak directly with a live representative when service issues arise.²⁶ *Fourth*, the competitors offer the basic functionality that these customers need at the low prices they demand rather than offering, for example, a product that provides unneeded bandwidth capacity at often double or triple the price.²⁷

Using this approach to serve larger, multi-site businesses, competitive LECs such as Access Point, Birch, Granite, and MetTel have brought competition to hundreds of thousands of business customer locations across the country. For example, Granite currently serves more than 240,000 locations with over 1.35 million voice lines.²⁸ Its customers include the country's ten largest retailers and 86 of the *Fortune* 100 companies.²⁹

Without the continued availability of Section 271 unbundled switching, this form of competition will disappear. Section 271(c)(2)(B)(vi), the competitive checklist unbundled switching provision, is the only current legal requirement that incumbent LECs provide unbundled local switching to competitive carriers.³⁰ Moreover, BOCs are required to combine

²⁵ *Id.* at ¶ 8.

²⁶ *Id.* at ¶ 9.

²⁷ *Id.* at ¶ 10.

²⁸ *See id.* ¶ 4; Granite Telecommunications, LLC, About Granite, <http://www.granitenet.com/About> (last visited Dec. 5, 2014).

²⁹ Granite Telecommunications, LLC, About Granite, <http://www.granitenet.com/About> (last visited Dec. 5, 2014).

³⁰ *See Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd. 2533, ¶ 199 (2005) (“*TRRO*”) (holding that incumbent LECs will no longer be required to provide unbundled switching under Section 251(c)(3) of the Act).

Section 271 unbundled switching with Section 251 UNEs to enable competitors to establish a platform for providing end-to-end voice services to business customers.³¹ This requirement establishes a crucial regulatory backstop for negotiations between competitive carriers and BOCs. Those negotiations have yielded wholesale rates that enable competitors to compete, but it is unlikely that this would be the case in the absence of the competitive checklist unbundled switching requirement. This is because the BOCs do not appear to have any incentive to voluntarily offer access to local switching to their competitors on reasonable rates, terms, and conditions.

It follows that forbearance from the Section 271 competitive checklist unbundling requirements would harm competition and businesses. Forbearance would leave hundreds of thousands of business customer locations without any alternative to the ILEC, and it would also allow the incumbents to increase the rates charged to those locations for voice and data services. It should therefore be clear that the Section 271 unbundled switching obligation is necessary to protect consumers under Section 10(a)(2) of the Act³² and that forbearance would be contrary to the public interest under Section 10(a)(3).³³

3. Unbundled Loops and Transport and Local Loop Transmission

The competitive checklist requires BOCs to provide access to loops and transport (including DS0, DS1, and DS3 local transmission facilities) on an unbundled basis. Because

³¹ See, e.g., *BellSouth Telecommunications Co. v. Kentucky Public Service Commission*, 669 F. 3d 704, 712-714 (6th Cir. 2012).

³² 47 U.S.C. § 160(a)(2).

³³ 47 U.S.C § 160(a)(3).

these requirements operate independently of ILECs' unbundling obligation under Section 251(c)(3), BOCs must provide access to those network elements where Section 251(c)(3) does not apply.³⁴ For example, Section 271 requires BOCs to provide access to DS1 and DS3 loops and transport in wire centers where the Section 251 non-impairment "triggers" have been satisfied,³⁵ on routes where the Section 251 "caps" on these elements have been exceeded,³⁶ and where the competitive carrier seeks to utilize the facility to provide dedicated long-distance services.³⁷

The Commission has recognized the significance of this regulatory backstop. Indeed, it has declined to forbear from Section 271 unbundling requirements even in instances where it has forborne from Section 251(c)(3), and it has cited the availability of wholesale inputs under Section 271 as a basis for forbearing from Section 251(c)(3) in the first place.³⁸ Similarly, in the *Section 272 Forbearance Order*, the Commission relied on the continued application of the checklist as a basis for forbearing from dominant carrier regulation of the BOCs' in-region

³⁴ See *TRO* at ¶¶ 653-55 (finding that "section 271 places specific requirements on BOCs that were not listed in section 251," which "reflect Congress' concern, repeatedly recognized by the Commission and courts, with balancing the BOCs' entry into the long distance market with increased presence of competitors in the local market"); see also *United States Telecom Association v. FCC*, 359 F.3d 554, 588 (D.C. Cir. 2004) (explaining that "even in the absence of impairment, BOCs must unbundle local loops, local transport, local switching, and call-related databases . . .").

³⁵ See e.g., *TRRO* at ¶¶ 174, 178.

³⁶ See e.g., *id.* at ¶¶ 177, 181.

³⁷ See 47 C.F.R. §§ 51.319.

³⁸ See *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415, at ¶¶ 100-110 (2005); *id.* at ¶ 105 ("[I]f we would now forbear from sections 271(c)(2)(B)(iv) and (v), we could no longer fully rely on two of the three bases upon which we based our conclusion that forbearance from section 251(c)(3) obligations for loops and transport in certain wire centers is warranted.").

interLATA services, finding that the checklist requirements are an “important component of the regulatory framework” that help address the “competitive concerns” associated with the BOCs’ market power over local transmission facilities.³⁹

The importance of these provisions to promoting robust competition in the business market cannot be overstated. Competitors have been investing in their own networks and providing innovation and valued products to numerous industries, including healthcare facilities, government facilities and schools and libraries as well as small and medium-sized business. Where COMPTTEL members can serve customers on-net, they do so. But, in most instances, it is not economical for competitors to replicate last-mile facilities. As the Commission has recognized, competitive LECs use their own facilities in conjunction with the last-mile facilities/services obtained from the incumbent, such as DS1 and DS3s to serve retail customers, including to provide packet-based broadband services to hundreds of thousands of American businesses at competitive prices.⁴⁰

Additionally, as is the case for unbundled switching, this wholesale input enables consumers to receive the capacity they need at affordable pricing. Because business customers often have multiple locations, wholesale last-mile access requirements enable these customers to have an innovative, integrated service offered by one provider, by allowing carriers to

³⁹ See Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements; 2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission’s Rules; Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) with Regard to Certain Dominant Carrier Regulations for In-Region, Interexchange Services, Report and Order and Memorandum Opinion and Order, 22 FCC Rcd 16440, at ¶¶ 90-94 (2007) (“Section 272 Forbearance Order”).

⁴⁰ *Id.* at ¶ 106.

supplement the reach of their networks. The public interest would most definitely not be served by impairing or eliminating this valuable form of competition in the business market.

Contrary to the claims of USTelecom, certainty with regard to access to last-mile facilities at just and reasonable rates spurs investment by encouraging competitive LECs to invest in their own network facilities while allowing them to supplement their reach where they cannot build. This is particularly important given the prevalence of multi-location customers in the business market and the inability of one competitor to serve all locations – especially small and medium locations -- over its own facilities. Moreover, competitors’ ability to develop an economic case for building middle-mile and long haul facilities is dependent upon the ability to obtain last-mile access to the customer. Where access to unbundled last-mile facilities is not available and/or special access rates are unreasonable, investment opportunities, along with the opportunity for consumer choice in providers, may be lost.

Unbundled loops and local loop transmission, such as DS1s and DS3s, are still a key input for business broadband services and will remain a key input for the foreseeable future.⁴¹ The Commission cannot forbear from enforcing statutory provisions and long-standing rules requiring access to these facilities without any meaningful evidence that competition will not be thwarted without such access.

4. Enforcement

Section 271(d)(6)(B) establishes that if a BOC “cease[s] to meet any of the conditions required for” Section 271 approval, parties may file complaints on which the Commission must

⁴¹ See, e.g., *Special Access for Price Cap Local Exchange Carriers*, Report and Order, WC Docket No. 05-25, RM-10593, FCC 12-92, ¶ 2 (2012) (“Four of the largest incumbent LECs recently reported that their combined 2010 revenues from sales of DS1s and DS3s exceeded \$12 billion.”).

act within 90 days.⁴² This mechanism is available in the event that a BOC fails to satisfy any of its obligations under the checklist, including not only the Section 271 unbundling obligations discussed above but also the obligations to provide interconnection in accordance with Sections 251(c)(2) and 252(d)(1), access to UNEs in accordance with Sections 251(c)(3) and 252(d)(1), nondiscriminatory access to pole attachments, ducts, conduits and rights of way, access to loops, transport, and switching, reciprocal compensation arrangements, and others. The availability of this enforcement mechanism is a key constraint on BOC conduct, and if the FCC were to forbear from enforcing the competitive checklist, this constraint would be eliminated.

B. Sections 272(e)(1) and (3) Protections Remain Necessary

As the Commission has held on numerous occasions, BOCs have powerful incentives to abuse their market power over upstream inputs as a means of raising their rivals' costs.⁴³ A BOC can act on these incentives by, for example, slow-rolling the critical functionalities that it performs for wholesale customers, such as provisioning, maintenance, and repair, or by charging

⁴² See 47 U.S.C. § 271(d)(6)(B).

⁴³ See e.g., *In re Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, Memorandum Opinion and Order, 14 FCC Rcd 14712, ¶ 190 (1999) (“Incumbent LECs in general have both the incentive and ability to discriminate against competitors in incumbent LECs’ retail markets. This observation is the fundamental postulate underlying modern U.S. telecommunications law.”).

its competitors more than it charges itself for inputs.⁴⁴ The requirements of Section 272(e)(1) and (3) establish critical constraints on such conduct.⁴⁵

Section 272(e)(1) states that each BOC must “fulfill any requests from an unaffiliated entity for telephone exchange service and exchange access within a period no longer than the period in which it provides such telephone exchange service and exchange access to itself or to its affiliates.”⁴⁶ The Commission has interpreted this provision to mean that “an unaffiliated entity's request of a certain size, level of complexity, or in a specific geographic location must be fulfilled within a period of time that is no longer than the period of time in which a BOC responds to an equivalent request from itself or its affiliates.”⁴⁷ This provision thus prohibits BOCs from utilizing discriminatory service quality as a means of raising rivals’ costs for inputs such as special access services. In the *Section 272 Forbearance Order*, the Commission found that continued enforcement of Section 272(e)(1) would help alleviate the “competitive concerns” associated with the BOCs’ market power.⁴⁸ It also conditioned its grant of forbearance on the

⁴⁴ See *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, ¶ 65 (1996) (“*Non-Accounting Safeguards Order*”) (“[A] BOC could provide inferior service to, charge higher prices to, withhold cooperation from, or fail to share information with its rivals in competitive markets.”).

⁴⁵ Recognizing the importance of these provisions, Congress directed the Commission to continue enforcing these provisions even after other portions of Section 272 had sunset. See 47 U.S.C. § 272 (f)(1) (excluding subsection (e) from the sunset).

⁴⁶ 47 U.S.C. § 271(e)(1).

⁴⁷ *Non-Accounting Safeguards Order* ¶ 240.

⁴⁸ *Section 272 Forbearance Order* ¶ 91 (“The BOCs also will remain obligated, under section 272(e)(1), to “fulfill any requests” from their interLATA telecommunications services competitors “for telephone exchange service and exchange access” within periods no longer than the periods in which they provide such telephone exchange service and exchange access to themselves or their affiliates.”).

BOCs complying with specific reporting requirements that it found to be necessary to ensure compliance with Section 272(e)(1).⁴⁹

Section 272(e)(3) states that each BOC must charge its section 272 affiliate, or “impute to itself (if using the access for its provision of its services), an amount for access to its telephone exchange and exchange access services that is no less than the amount charged to any unaffiliated interexchange carrier for such service.”⁵⁰ This provision prohibits BOCs from charging discriminatory prices for inputs such as special access services as a means of raising rivals’ costs, thereby potentially creating a price squeeze. In the *Section 272 Forbearance Order*, the Commission conditioned its grant of forbearance on BOC compliance with robust imputation requirements.⁵¹ The Commission explained that such requirements would address “concerns regarding the incentives and ability of the BOCs and BOC independent incumbent LEC affiliates to use their pricing of access services, including special access services, to impede competition” while “not in any way hamper[ing] the BOCs’ and their independent incumbent LEC.”⁵² The Commission found that forbearance from dominant carrier regulation of in-region interLATA services was appropriate because “in comparison with dominant carrier regulation, imputation requirements provide a less costly but more effective method of assuring that the

⁴⁹ See *Section 272 Forbearance Order* at ¶¶ 97-98. The BOCs must report metrics regarding pre-ordering, provisioning, maintenance, and repair.

⁵⁰ 47 U.S.C. § 271(e)(3).

⁵¹ See *Section 272 Forbearance Order* ¶¶ 99-104 (requiring a BOC to, among other things, “impute to itself its highest tariffed rate for access, including access provided over joint-use facilities”).

⁵² *Id.* at ¶ 105.

BOCs and their independent ILEC affiliates will not discriminate between their own operations and their competitors in the pricing of special access services.”⁵³

C. **USTelecom Has Failed To Meet Its Burden of Proving That the Commission Should Forbear From the Remaining Section 271 And Section 272 Requirements.**

Notwithstanding the significant benefits of Section 271 competitive checklist and Section 272 requirements, USTelecom asserts that the Commission should forbear from these requirements. It offers three bases for its requested relief, none of which have any merit.

First, USTelecom argues that the Section 271 requirements are “redundant” and “duplicative” of other statutory provisions and should therefore be eliminated.⁵⁴ This is incorrect. The competitive checklist establishes several requirements found nowhere else in the Commission’s current regulatory regime. As mentioned, the BOCs’ obligation to provide unbundled switching exists only under Section 271(c)(2)(B)(iv) because the Commission eliminated the unbundled switching obligation under Section 251(c)(3) in 2005.⁵⁵ In addition, contrary to USTelecom’s suggestion, the BOCs’ obligations to provide unbundled DS0, DS1, and DS3 loops and transport under Section 271(c)(2)(B)(iv) and (v) are not superfluous because there are numerous circumstances in which those UNEs are not available under Section 251(c)(3), including the following: (1) in wire centers where the non-impairment triggers established in the *TRRO* are satisfied;⁵⁶ (2) in areas where the Commission has granted forbearance from Section 251 unbundling obligations;⁵⁷ (3) in buildings where the caps

⁵³ *Id.*

⁵⁴ USTelecom Petition at 17, 22-24, 26.

⁵⁵ *See TRRO* at ¶ 199.

⁵⁶ *See, e.g., id.* at ¶¶ 174, 178.

established in the *TRRO* have been exceeded;⁵⁸ and (4) where competitors seek to provide certain downstream retail services, such as standalone long distance services or mobile wireless services.⁵⁹

Second, USTelecom also incorrectly contends that the Section 271 requirements should be eliminated because they “were designed for a one-wire . . . world, in which ILECs were presumed to exercise exclusive control over bottleneck facilities,” that no longer exists today.⁶⁰ In fact, all of the available evidence demonstrates that incumbent LECs still retain the only last-mile connection to the vast majority of commercial buildings in the U.S.⁶¹

Faced with this reality, USTelecom’s Petition focuses almost exclusively on the increased competition in the residential voice market since 1996.⁶² But USTelecom bears the burden⁶³ of

⁵⁷ See, e.g., *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd. 19415 (2005).

⁵⁸ See, e.g., *TRRO* at ¶¶ 177, 181.

⁵⁹ See 47 C.F.R. § 51.309(b).

⁶⁰ USTelecom Petition at 8.

⁶¹ See, e.g., *Petition of Ad Hoc Telecommunications Users Committee, BT Americas, Cbeyond, Computer & Communications Industry Association, EarthLink, MegaPath, Sprint Nextel and tw telecom to Reverse Forbearance from Dominant Carrier Regulation of Incumbent LECs’ Non-TDM-Based Special Access Services*, WC Docket No. 05-25, at 42-46 & Attachment 2 (filed Nov. 2, 2012) (discussing findings made by the FCC, GAO, and DOJ between 2005 and 2010 as well as analysis of facilities data submitted in response to the Commission’s 2010 voluntary special access data request).

⁶² See, e.g., USTelecom Petition at 9-10, 12-13.

⁶³ See *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, Report and Order, 24 FCC Rcd. 9543, ¶ 20 (2009) (“We now state explicitly that the burden of proof is on forbearance petitioners at the outset and throughout the proceeding.”).

demonstrating that sufficient competition now exists in all of the relevant product and geographic markets to justify elimination of the Section 271 wholesale inputs at issue,⁶⁴ including DS0, DS1, and DS3 loops, switching, and transport that competitors rely on to provide voice and data services to America’s businesses. USTelecom has utterly failed to meet its burden. USTelecom asserts that “the rise of mobile communications,” the increase in Skype users, and the advent of “iMessage, Snapchat, Viber and WhatsApp”⁶⁵ justify forbearance, but it fails to show that mobile wireless voice services and over-the-top VoIP services are substitutes for the reliable, multi-line, feature-rich voice services demanded by multi-location businesses. The available evidence indicates that such services are not in fact substitutes for the voice services demanded by business customers.⁶⁶ Nor does the mere fact that “ILEC business line counts [have] declined”⁶⁷ demonstrate that there is sufficient competition in the relevant product and geographic markets in which the ILECs operate to warrant forbearance from the Section 271 unbundling requirements.

Third, USTelecom asserts, without any basis, that “forbearance will serve the public interest by eliminating costs and allowing RBOCs to more efficiently invest their resources in

⁶⁴ See, e.g., *Phoenix Order* at ¶¶ 37, 42.

⁶⁵ USTelecom Petition at 10-11.

⁶⁶ See Nichols Declaration at ¶ 7 (“Large, multisite businesses demand telecommunications services of the highest quality and reliability – that is, voice calls can be made and received 24 hours a day / 7 days per week / 365 days a year, without static, interference or delay. These businesses require advanced features, such as hunt lines which automatically route calls to specific locations and /or employees who are available to take the call. These cannot be exceptions, for example . . . during peak usage hours. If a telecommunications service cannot perform to these specifications, large, multisite businesses will not use them, even if alternative, newer products could be purchased at lower prices.”).

⁶⁷ USTelecom Petition at 13.

modern networks and services.”⁶⁸ USTelecom does not cite to a single piece of evidence regarding its members’ costs of complying with the Section 271 competitive checklist and Section 272 obligations. Simply stating that compliance with those unbundling requirements is costly is insufficient to grant forbearance. Nor does USTelecom explain how these requirements have served as a “barrier[] to infrastructure investment.”⁶⁹ USTelecom does not provide any specific examples of how these requirements have hindered the fiber deployment efforts of AT&T, CenturyLink, or Verizon. On the contrary, AT&T, for one, stated in its 2013 annual report that since announcing its “Project VIP,” it had “deployed fiber to more than 250,000 additional business customer locations,” and that it expects its fiber network to “reach a total of 1M additional business customer locations” by the end of 2015.⁷⁰ AT&T was able to deploy these facilities notwithstanding the purported investment chilling effects of the Section 271 and Section 272 requirements.

In sum, USTelecom has offered no basis for forbearing from the Section 271 and 272 requirements. In fact, all of the available evidence indicates that (1) those requirements are necessary to ensure that DS0, DS1, and DS3 loops, switching, and transport, as well as the downstream retail business services provided using those inputs, are offered at just, reasonable,

⁶⁸ *Id.* at 26.

⁶⁹ *Id.* at 16.

⁷⁰ See http://www.att.com/Investor/ATT_Annual/2013/project_velocity_ip.html (last visited November 29, 2014); see also Sean Buckley, “AT&T’s Stankey: The wireline portion of Project VIP is on track,” *Fierce Telecom*, Sept. 16, 2014, <http://www.fiercetelecom.com/story/atts-stankey-wireline-portion-project-vip-track/2014-09-16> (“‘We’re on pace with everything we said we wanted to do on the business side with fiber to the building,’ [AT&T’s John] Stankey said. ‘We’re on pace with everything we said we wanted to do in additional U-verse coverage as well as additional broadband coverage on the consumer side.’”).

and not unjustly or unreasonably discriminatory rates, terms, and conditions; (2) those requirements are necessary to protect business consumers from increased prices in the future; and (3) continued enforcement of those requirements is undoubtedly in the public interest.

D. USTelecom Has Failed To Demonstrate That Forbearance From Section 251(g)'s Equal Access Obligations Is Warranted

Finally, the Commission should reject USTelecom's request to forbear from the equal access obligations codified in Section 251(g) of the Act,⁷¹ which it contends are "irrelevant to today's highly competitive, bundled, all-distance services."⁷² Section 251(g) provides in relevant part:

On and after [February 8, 1996], each local exchange carrier, to the extent that it provides Wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding [February 8, 1996] under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after [February 8, 1996].

The equal access and nondiscrimination obligations embodied in Section 251(g) are extensive. As Congress was aware when it enacted Section 251(g), the obligations are found not only in Commission rules, but also in various court orders, consent decrees and Commission orders and policies. As an example, the Modified Final Judgment required the RBOCs to

⁷¹ USTelecom Petition at 33-37

⁷² USTelecom Petition at 16.

provide equal access to all interexchange carriers for 800 service.⁷³ The Commission has also referenced Section 251(g) obligations in a range of decisions.⁷⁴

Last year, the Commission granted USTelecom's request to forbear from enforcement of the Equal Access Scripting requirement.⁷⁵ Now USTelecom seeks forbearance from "all remaining legacy equal access obligations carried forward via 47 U.S.C. § 251(g)"⁷⁶ but does not specifically identify those obligations other than the toll dialing parity requirement.⁷⁷ Congress expressly codified the toll dialing parity requirement in Section 251(b)(3) of the Act.⁷⁸

⁷³ See *In the Matter of Provision of Access for 800 Service*, 3 FCC Rcd 721 at ¶ 10 (1988).

⁷⁴ See, e.g., *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 at ¶ 362 (1996) (the purpose of Section 251(g) is "to preserve the right of interexchange carriers to order and receive exchange access services if such carriers elect not to obtain exchange access through their own facilities or by means of unbundled elements purchased from an incumbent"); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 19392 at ¶29 (1996) ("Section 251(g) preserves the equal access obligations already imposed on the BOCs and GTE, but does not exempt them or other LECs from the toll dialing parity requirements [of Section 251(b)(3)]" *vacated in part sub nom. California v. FCC*, 124 F. 3d 934, 942 (8th Cir. 1977), *rev'd in part sub nom. AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999); *In the Matter of Application for Review and Petition for Reconsideration or Clarification of Declaratory Ruling Regarding U.S. West Petitions To Consolidate LATAs in Minnesota and Arizona*, 14 FCC Rcd 14392 (1999)(Section 251(g) authorizes the Commission to modify LATA boundaries); *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as Amended*, 11 FCC Rcd 21905 at ¶70 (continuing enforcement of the MFJ equal access requirements pursuant to Section 251(g) safeguards against BOC discrimination).

⁷⁵ *In the Matter of Petition of USTelecom for Forbearance Under 47 U.S.C. §160(c) from Enforcement of Certain Legacy Telecommunications Regulations*, WC Docket No. 12-61, Memorandum Opinion and Order and Report and Order and Further Notice of Proposed Rulemaking and Second Further Notice of Proposed Rulemaking, FCC 13-69 (rel. May 17, 2013) (*USTelecom Forbearance Order*).

⁷⁶ USTelecom Petition, Appendix A at 1.

⁷⁷ USTelecom Petition at 35.

⁷⁸ 47 U.S.C. §251(b)(3) states that all local exchange carriers shall have the duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service,

USTelecom does not seek forbearance from enforcement of Section 251(b)(3).⁷⁹ Even if the Commission were to grant USTelecom's Petition for forbearance from Section 251(g) (which it should not do), ILECs would not be relieved of the obligation to comply with the toll dialing parity requirement of Section 251(b)(3). As the Commission has recognized, "Section 251(g) preserves the equal access obligations already imposed on the BOCs and GTE [by their consent decrees], but does not exempt them or other ILECs from the toll dialing parity requirements of Section 251(b)(3)."⁸⁰

USTelecom's failure to identify any other equal access obligation from which it seeks forbearance precludes it from getting any relief. Section 1.54 of the Commission's rules requires forbearance petitioners to identify the specific relief requested, including "each statutory provision, rule or requirement from which forbearance is sought." The Commission cannot possibly determine that USTelecom has met its burden of proof with respect to each (or any) of the three criteria of Section 10 of the Communications Act so as to warrant forbearance from the unidentified "legacy equal access obligations." The Commission must deny USTelecom's request for forbearance from Section 251(g).

III. The Commission Should Deny Forbearance From Enforcement Of The Requirement That ILECs Provide Unbundled Access To A 64 Kbps Voice Channel Where They Replace Copper With FTTH (Category 3)

Under Section 51.319(a)(3)(iii)(C) of the Commission's rules, an ILEC that replaces a copper loop in a fiber-to-the-home ("FTTH") overbuild situation "shall provide

and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance and directory listing, with no unreasonable dialing delays.

⁷⁹ USTelecom Petition at 35.

⁸⁰ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 19392 at ¶29 (1996).

nondiscriminatory access to a 64 kilobits per second transmission path capable of voice grade service over the fiber-to-the-home loop on an unbundled basis.”⁸¹ USTelecom offers several reasons for forbearing this requirement, none of them has merit.

USTelecom asserts that the 64 kbps channel requirement should be eliminated because it provides “no meaningful . . . benefits to consumers.”⁸² This is simply not true. Competitive LECs rely on the 64 kbps channel requirement in their commercial negotiations with ILECs to ensure that the ILEC provides last-mile access in areas where copper loops have been replaced with FTTH. Without this regulatory backstop, the competitive LEC would be unable to obtain negotiated rates for voice-grade connections that enable it to serve, for example, the smaller locations of multi-location business customers in areas where copper has been replaced with FTTH (e.g., a convenience store located in a suburban apartment building).⁸³ And because large, multi-location business customers often demand that their service provider serve all of their locations, it is critical that a competitor have unbundled access to the last-mile connections serving these smaller locations. Otherwise, the competitive LEC will be unable to meet the customer’s service demands and the customer will be forced to rely on the ILEC alone to meet

⁸¹ 47 C.F.R. § 51.319(a)(3)(iii)(C); *see also* *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16978, ¶ 277 (2003) (“TRO”) (subsequent history omitted).

⁸² USTelecom Petition at 51; and at 52 (“[A]ny consumer benefits of this requirement are minimal at best.”).

⁸³ *See In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, CC Docket Nos. 01-338, *et al.*, Order on Reconsideration at ¶¶ 1, 4 (August 2004) (applying the FTTH rules to multi-dwelling units that are predominantly residential).

the voice and data needs at all of its locations. In the absence of an alternative to the ILEC, the large, multi-location business will likely pay more for voice and data services. The 64 kbps channel requirement that serves an important regulatory backstop and allows these types of customers to realize the benefits of competition. Therefore, contrary to USTelecom's claims,⁸⁴ this requirement is necessary to protect consumers and ensure just and reasonable rates under Sections 10(a)(1) and (2) of the Act.⁸⁵

USTelecom puts forth a number of claims that retaining the 64 kbps channel requirement is contrary to the public interest, but it fails to support those claims. For example, USTelecom complains that complying with the requirement is costly, but it fails to quantify that cost in any way.⁸⁶ In addition, USTelecom asserts that "this rule might foreclose ILECs from retiring the copper loop at all,"⁸⁷ but it does not explain how or why this "might" happen. Moreover, USTelecom repeatedly asserts that the 64 kbps channel requirement "deters fiber investment" and deployment, but it fails to cite any specific examples of such foregone investment and deployment.⁸⁸ In fact, Verizon deployed its FiOS network to *18 million* homes⁸⁹ despite having to comply with the 64 kbps channel requirement. Thus, there is no evidence that retaining this

⁸⁴ USTelecom Petition at 52-59.

⁸⁵ 47 U.S.C. § 160(a)(1)-(2).

⁸⁶ USTelecom Petition at 58-60.

⁸⁷ *Id.* at 53.

⁸⁸ *Id.* at 58-60.

⁸⁹ *See, e.g.*, Letter from Ian Dillner, Vice President, Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, filed August 1, 2013 in GN Docket No. 12-228, at 1.

requirement will harm the public interest or that forbearance from this requirement would further the public interest under Section 10(a)(3) of the Act,⁹⁰ as USTelecom claims.

USTelecom also contends that the 64 kbps channel requirement should be eliminated because “the marketplace now provides other options – including wholesale alternatives, resale, or over-the-top – for non-facilities-based providers to compete in the provision of voice services.”⁹¹ In particular, USTelecom points out that “ILECs offer wholesale voice alternatives, such as Verizon’s Wholesale Advantage product, for competitive providers.”⁹² This argument is disingenuous. To begin with, in the experience of competitive LECs, the requirement that BOCs provide 64 kbps channels is part of the regulatory backstop that brings them to the table to negotiate wholesale voice alternatives with competitive LECs. Moreover, as discussed above, USTelecom is seeking forbearance from the Section 271 unbundling requirements. If that request were granted, neither Verizon nor the other BOCs would have any regulatory compulsion or other incentive to continue offering unbundled switching as part of their UNE-P replacement products. Finally, USTelecom’s suggestion that “[c]ompetitive providers are also free to compete in the voice marketplace through over-the-top [VoIP] services” ignores the fact that even smaller locations of large multi-site businesses currently served using a 64 kbps channel are unlikely to view a Vonage-type service as a viable substitute for the high-quality, reliable voice service that businesses demand. This and USTelecom’s other arguments in favor of forbearance from the 64 kbps channel requirement must therefore be rejected.

⁹⁰ 47 U.S.C. § 160(a)(3).

⁹¹ USTelecom Petition at 52; *see also* at 58.

⁹² *Id.* at 59.

IV. Forbearance From the Open Network Architecture (“ONA”) and Comparably Efficient Interconnection (“CEI”) Requirements, the All-Carrier Computer Inquiry Rules and the Structural Separation Rule Must Be Denied (Category 5)

In 2012, USTelecom made a broad request for forbearance from the ONA, CEI, All-Carrier Computer Inquiry Rules and the Structural Separation Rule very similar to its request before the Commission now.⁹³ Just last year, the Commission denied USTelecom’s broad request⁹⁴ and it should do the same here.

A. Computer Inquiry Requirements

As it did two years ago, USTelecom argues that the market place has changed and the ONA, CEI, Computer Inquiry and Structural Separation have outlived their usefulness.⁹⁵ As was the case two years ago, however, USTelecom has failed to demonstrate that the flash cut elimination of the Computer Inquiry safeguards would not cause customers to lose access to reasonably priced service. Two years ago, the alarm industry demonstrated that its members are still heavily dependent on narrowband voice grade services to provide security and safety alarm services to large scale commercial and government customers as well as residential customers.⁹⁶ USTelecom has provided no evidence that circumstances have changed. Last year, the Commission denied USTelecom’s request for forbearance after finding that “[t]o the extent that there are cable and broadband entities that offer alternatives to allow competitive [enhanced service providers] to bypass the legacy narrowband networks, USTelecom has not demonstrated

⁹³ See *Petition of USTelecom for Forbearance Under 47 U.S.C. §160(c) from Enforcement of Certain Legacy Telecommunications Regulations*, filed in WC Docket No. 12-61.

⁹⁴ The Commission did eliminate the CEI/ONA narrowband reporting requirements. *USTelecom Forbearance Order* at ¶ 190.

⁹⁵ USTelecom Petition at 73-84.

⁹⁶ *USTelecom Forbearance Order* at ¶25.

where or on what terms such alternatives are available.”⁹⁷ USTelecom has not done so this time around either. It utterly failed to support its request with market specific information or carrier specific information.⁹⁸

The Commission has required carriers seeking forbearance from wholesale obligations to demonstrate there is sufficient competition to ensure that ILECs will be unable to raise prices, discriminate unreasonably or harm consumers if it provides the requested relief.⁹⁹ USTelecom has failed to make any such showing. The absence of reliable evidence that there are alternatives to the ILECs’ service available to enhanced service providers -- including evidence of where those alternatives are offered and on what terms and conditions they are offered -- precludes a finding that enforcement of the ONA, CEI, and Computer Inquiry requirements is no longer necessary to ensure that the ILECs’ rates, practices and regulations will remain just and reasonable and not unjustly or unreasonably discriminatory and to protect consumers. Nor can the Commission find that forbearance would be consistent with the public interest or promote or enhance competition.¹⁰⁰

B. The Structural Separations Requirements (47 C.F.R. § 64.1903)

In the *USTelecom Forbearance Order*, the Commission granted USTelecom’s request for forbearance from the structural separation requirements for price cap ILECs subject to two conditions: (1) that they file and obtain Commission approval of special access performance

⁹⁷ *Id.* at ¶ 26.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at ¶¶ 26-27.

metrics and (2) that they file and obtain Commission approval of an imputation plan.¹⁰¹ The Commission reasoned that these conditions would allow it to monitor whether price cap LECs are engaging in anticompetitive non-price discrimination in the provision of special access service to competitors or anticompetitive discrimination in the provision of access services and would protect against possible cost misallocation and price squeezes.¹⁰² The Commission denied relief from the structural separations requirements for rate of return carriers subject to cost regulation, because they “continue to have incentives and the potential ability to misallocate costs from their long distance operations to their access services, to increase rates for access services that are not capped or being phased down, and to engage in price squeezes.”¹⁰³

USTelecom now requests unconditional forbearance from the structural separations requirements for all ILECs.¹⁰⁴ Its request should be denied. Although USTelecom contends that the structural separation requirements present a barrier to the deployment of IP technologies by smaller carriers¹⁰⁵ and that the requirements are irrelevant in an “all-distance” world, it has not offered any support for those claims. Having failed to present any new or different evidence that was not before the Commission when it made its earlier structural separations forbearance determination, neither USTelecom nor its members are entitled to any additional relief.

¹⁰¹ *Id.* at ¶¶ 139, 142

¹⁰² *Id.* at ¶¶ 144, 146.

¹⁰³ *Id.* at ¶ 153.

¹⁰⁴ USTelecom Petition at 38-49.

¹⁰⁵ *Id.* at ¶40.

For these reasons, the Commission must deny USTelecom’s request for forbearance from the ONA, CEI, Computer Inquiry, and structural separations rules.¹⁰⁶

V. The Commission Should Not Forbear from Requiring ILECs to Provide Access to Newly Deployed Entrance Conduit Pursuant to Sections 224 and 251(b)(4) (Category 6)

USTelecom requests that the Commission forbear from requiring incumbent LECs to provide access to newly-deployed entrance conduit in new developments (“greenfields”) and to existing buildings previously unserved by fiber (“brownfields”).¹⁰⁷ Such forbearance would impede the deployment of competitive broadband infrastructure, and should be denied.

A. Access to ILEC Conduit Is Vital to the Competitive Deployment of Broadband Infrastructure.

Section 251(b)(4) of the Act imposes an obligation on all local exchange carriers “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.”¹⁰⁸ Section 224 requires any utility (including a local exchange carrier) 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” on rates, terms and conditions that are regulated by the Commission.¹⁰⁹ Sections 251(b)(4) and 224—which by statute apply to incumbent LECs in all geographic locations, whether greenfield, brownfield, or other—play a key role in promoting the deployment of broadband infrastructure.

¹⁰⁶ *Id.*

¹⁰⁷ USTelecom Petition at 85-94.

¹⁰⁸ 47 U.S.C. § 251(b)(4).

¹⁰⁹ 47 U.S.C. §§ 224(f)(1), 224(b)(1).

The Commission has astutely recognized that “[t]he cost of deploying a broadband network depends significantly on the costs that service providers incur to access conduits, ducts, poles and rights-of-way on public and private lands” and that the difficulty and time it takes to secure such access often discourages private investment.¹¹⁰ Unfortunately, “lack of reliable, timely, and affordable access” to these essential inputs “is often a significant barrier to deploying wireline and wireless services.”¹¹¹ In contrast, access to existing conduit helps carriers overcome “operational barriers to constructing their own facilities” that are often attributable to “problems in securing rights-of-ways from local authorities in order to dig up streets prior to laying fiber, including lengthy negotiations with local authorities over the ability to use the public rights-of-way and obtaining building and zoning permits.”¹¹² These barriers impact competitive LECs more so than ILECs because ILECs possess significant “first mover advantages” (even in greenfield and brownfield areas) such as preferential building access, pre-existing rights-of-way, and longstanding relationships with local franchising authorities.¹¹³ Given the Commission’s efforts to promote competition in the broadband marketplace and reduce barriers to entry, granting USTelecom’s request to forbear from enforcing the ILECs’ obligation to provide access to entrance conduit would be contrary to the public interest.

¹¹⁰ *Connecting America: The National Broadband Plan* at 109 (rel. Mar. 16, 2010).

¹¹¹ *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, ¶ 3 (2011) (“*Pole Attachments Order*”), *aff’d sub nom. Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183 (2013), *cert. denied*, 134 S.Ct 118 (2013).

¹¹² *TRRO* at ¶ 151.

¹¹³ *See TRO* at ¶ 89.

B. USTelecom Has Failed To Provide Evidence that Satisfies the Standard for Forbearance.

USTelecom has not met its burden of proving that the Commission should forbear from enforcing conduit access requirements in greenfield and brownfield areas. While it contends that the ILECs' duty to provide competitors with access to entrance conduit diminishes the incentive of both types of carriers to deploy new facilities,¹¹⁴ USTelecom offers virtually no data or other analysis in support of this assertion.

USTelecom cites sample costs that CenturyLink allegedly incurs when deploying new conduit and average regulated rates competitors pay to lease conduit from CenturyLink.¹¹⁵ This is apparently intended to show that there is a disparity between CenturyLink's investment and the amount that other providers pay for access. The ILEC's investment, however, is factored into the Commission's formula for determining conduit access rates.¹¹⁶ CenturyLink and USTelecom are free to take issue with the particulars of the Commission's formula (*e.g.*, by disputing the manner in which investment costs are calculated), but their dissatisfaction with the formula does not provide a basis for forbearance relief from Sections 224 and 251(b)(4). This is especially so because USTelecom has not shown that the current prices for access to ILEC conduit actually have a material adverse impact on either ILECs' or competitors' incentive and ability to deploy new fiber transmission facilities.

USTelecom also complains that "disparate conduit access obligations" applied to ILECs and competitors create a "tilted playing field" that purportedly skews efficient outcomes.¹¹⁷

¹¹⁴ See USTelecom Petition at 90.

¹¹⁵ *Id.* at 92.

¹¹⁶ 47 U.S.C. § 1.1409(e)(3).

¹¹⁷ USTelecom Petition at 91.

ILECs have been voicing variations on this complaint for years, but the Commission has consistently rejected it.¹¹⁸ USTelecom provides no evidence to support its claims that “experience shows” that competitors have the same ability as ILECs to deploy conduit and that the gap between the amount of conduit deployed by competitive LECs and ILECs has “narrowed considerably.”¹¹⁹

The essence of USTelecom’s argument is basically that the ILECs’ lack of a statutory right to *obtain* access at regulated rates to entrance conduit in greenfield and brownfield areas somehow warrants forbearance from their statutory obligation to *provide* such access. Differential treatment of ILECs based on their huge marketplace advantages – largely due to their prior monopoly status -- is a longstanding and entirely sensible public policy. ILECs are subject to numerous regulatory requirements for which there is no reciprocal obligation for competitive carriers. Simply claiming that differential treatment produces an unlevel playing field does not demonstrate that forbearance would be consistent with the public interest.

The Commission should disregard USTelecom’s allegations that certain unidentified “competitors” have damaged CenturyLink’s conduit and placed their facilities in CenturyLink’s conduit without authorization¹²⁰ in performing its forbearance analysis. USTelecom provides no

¹¹⁸ See *Applications Filed for the Transfer of Control of tw telecom inc. to Level 3 Communications, Inc.*, WC Docket No. 14-104, Memorandum Opinion and Order, DA 14-1543, ¶¶ 21-22 (2014) (declining CenturyLink’s request to impose a condition requiring Level 3 to grant “reciprocal” conduit access to incumbent LECs); *Pole Attachments Order* at n.643 (declining to “grant incumbent LECs an access right under Section 251(b)(4) that does not exist under Section 224”); *Local Competition Order* ¶ 1231 (“We cannot infer that section 251(b)(4) restores to an incumbent LEC access rights expressly withheld by section 224. We give deference to the specific denial of access under section 224 over the more general access provisions of section 251(b)(4).”)

¹¹⁹ USTelecom Petition at 89.

details or support for these accusations of misconduct. Even if it had, the allegations are irrelevant to the Commission's resolution of USTelecom's forbearance request and whether it has met its burden of showing that forbearance will meet each of the criteria of Section 10 of the Act.

VI. The Commission Should Not Forbear From The Rules Prohibiting The Use Of Contract Tariffs In The Absence Of Phase I Pricing Flexibility (Category 7)

USTelecom asks the Commission to forbear from applying the rules that prohibit price cap ILECs from using contract tariffs to offer tariffed TDM special access and tariffed enterprise broadband services in all service areas “in order to eliminate barriers to infrastructure investment and competition.”¹²¹ As USTelecom acknowledges, granting such forbearance “would effectively extend nationwide the Phase I pricing flexibility that today exists in only limited geographic areas.”¹²² And it would do so without any showing whatsoever by the ILECs that even the Phase I competitive triggers have been satisfied for any service or any geographic area.¹²³ As noted above, USTelecom has failed to provide any evidence of the extent of competition in any of the discrete geographic markets in which it seeks relief, much less competition sufficient to discourage exclusionary pricing behavior.

¹²⁰ See USTelecom Petition at n.278. CenturyLink is free to seek reimbursement and/or damages for any property damage caused by a telecommunications provider accessing its conduit.

¹²¹ USTelecom Petition at 94, 99. The specific rules from which USTelecom seeks forbearance are 47 C.F.R. §§ 61.3(o), 61.55(a), 69.705, 69.709(b), 69.711(b), 69.713(b) and 69.727(a). *Id.* Appendix A at 3-4.

¹²² *Id.* at 94.

¹²³ The Commission has acknowledged that the competitive triggers adopted in 1999 “have not worked as intended” and has suspended them pending the adoption of replacement rules. *In the Matter of Special Access For Price Cap Local Exchange Carriers*, WC Docket No. 05-25, Report and Order, FCC 12-92 (rel. Aug. 22, 2012) at ¶22 (“*Suspension Order*”).

A. ILECs Are Capable Of Using Contract Tariffs To Engage in Exclusionary Pricing and Thereby Discourage Entry

In the 1999 *Pricing Flexibility Order*, the Commission determined that price cap ILECs can thwart the development or emergence of facilities-based competition by using Phase I Pricing Flexibility relief to offer volume and term discounts through contract tariffs.¹²⁴ The Commission explained that ILECs can use these mechanisms to “lock[] up” the business of large customers whose traffic might otherwise justify the construction of competitive facilities, thereby “foreclo[sing] competition” both for these customers and “for the smaller customers as well”¹²⁵ who would benefit from the availability of an alternative service provider. To address these concerns, the Commission prohibited price cap ILECs from entering into contract tariffs or from offering certain volume and term discounts unless and until they could demonstrate that facilities-based competitive entry in a geographic market was sufficient to make exclusionary pricing behavior costly and unlikely to succeed.¹²⁶ It established a series of competitive “triggers” that permitted price cap LECs to obtain Phase I pricing flexibility (*i.e.*, ability to offer contract tariffs and certain volume and term discounts) if they could demonstrate “either that (1) competitors unaffiliated with the incumbent LEC ha[d] established operational collocation arrangements in a certain percentage of the incumbent LEC’s wire centers in an MSA, or (2) unaffiliated competitors ha[d] established operational collocation arrangements in wire centers

¹²⁴ *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers; Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA, Fifth Report and Order and Further Notice of Proposed Rulemaking*, 14 FCC Rcd 14221, ¶ 79 (1999) (“*Pricing Flexibility Order*”), *aff’d WorldCom v. FCC*, 238 F.3d 449 (D.C. Cir. 2001).

¹²⁵ *Id.*

¹²⁶ *Id.* at ¶ 80.

accounting for a certain percentage of the incumbent LEC's revenues from the services in question in that MSA.”¹²⁷

In the 2012 *Suspension Order*, the FCC concluded that the triggers established in the *Pricing Flexibility Order* were a poor proxy for the presence of competition sufficient to constrain ILEC anticompetitive practices, including exclusionary pricing designed to lock up large customers.¹²⁸ It therefore suspended application of the pricing flexibility rules pending the adoption of replacement rules after analysis of the data filed in the special access proceeding.¹²⁹ Granting ILECs blanket forbearance from the contract tariffing provisions and extending Phase I pricing flexibility nationwide where there has been no finding of competition in any particular market or for any particular service sufficient to constrain exclusionary behavior would completely nullify the *Suspension Order*.

Unfortunately, marketplace evidence demonstrates that ILECs already have engaged in anticompetitive pricing practices that the Commission sought to prevent in the *Pricing Flexibility Order* to a significant degree. ILECs impose a range of exclusionary terms and conditions in the sale of special access services through both contract tariffs and “off-the-shelf” tariff discount

¹²⁷ *Id.* at ¶ 77. In particular, to obtain Phase I relief for interstate special access services other than channel terminations between a LEC end office and an end user’s customer premises, a price cap ILEC was required to demonstrate that unaffiliated competitors had collocated in at least 15 percent of the ILEC’s wire centers within an MSA or collocated in wire centers accounting for 30 percent of the ILEC’s revenues from these services within the MSA. To obtain Phase I pricing flexibility for channel terminations between an ILEC end office and a customer premises, the ILEC was required to demonstrate that unaffiliated competitors had collocated in at least 50 percent of the ILEC’s wire centers within an MSA or collocated in wire centers accounting for 65 percent of the ILEC’s revenues from these services within the MSA. *See id.* at ¶¶ 93-99.

¹²⁸ *Suspension Order* at ¶ 5.

¹²⁹ *Id.*

plans.¹³⁰ These arrangements typically require customers to commit to maintaining an unreasonably high percentage of their historic special access purchase volume (e.g., 90 percent) with the ILEC for many years in order to obtain discounts or other benefits.¹³¹ By locking up customer demand, especially the demand of large customers, these so-called loyalty arrangements effectively diminish the addressable market for any carrier seeking to provide services in competition with the ILECs' special access offerings. As a result, such competitors are often unable to deploy fiber facilities to business customer locations and provide the businesses at those locations with the high-bandwidth, packet-based services that they increasingly demand.¹³² Phase I pricing flexibility has enabled ILECs to enter into onerous "overlay" contract tariffs in which buyers commit to even higher purchase levels than are required by the tariffed off-the-shelf volume and term discount offers. Granting forbearance from the contracting tariffing prohibitions would worsen these conditions by empowering ILECs to force customers into even more of these harmful arrangements in even more geographic areas regardless of the availability of competitive alternatives.

In order to obtain blanket forbearance for all price cap ILECs from the contract tariffing prohibitions for TDM special access and enterprise broadband services, USTelecom is required to show, among other things, that continued enforcement of the prohibitions is not necessary to ensure that the charges, practices or regulations by, for and in connection with every individual

¹³⁰ See Comments of BT Americas *et al.*, filed February 11, 2013 in WC Docket No. 05-25 at 20-47 ("Feb. 11, 2013 Comments of BT Americas *et al.*") (describing unreasonable terms and conditions imposed by ILEC loyalty arrangements).

¹³¹ *Id.* at 20-30 (providing examples of such provisions).

¹³² See Letter from Angie Kronenberg and Karen Reidy, COMPTTEL, to Marlene H. Dortch, filed September 10, 2014 in WC Docket No. 05-25 (citing record evidence of these harms).

price cap ILEC and every individual TDM based special access and enterprise broadband service that they offer are just and reasonable, and not unjustly or unreasonably discriminatory.

USTelecom has not come close to making such a showing.

USTelecom contends that forbearance would allow price cap ILECs to “offer reduced rates – but not increased rates -- in contract tariffs nationwide while continuing to offer [TDM-based special access and enterprise broadband services] at the generally applicable tariffed rates.”¹³³ With no showing of the extent of competition any price cap ILEC faces in any geographic market it serves or for any of the services for which USTelecom seeks forbearance, the Commission cannot possibly determine that the contract tariffing prohibitions are unnecessary to ensure that price cap ILEC rates, terms and conditions for TDM based special access and enterprise broadband services are just, reasonable and not unjustly or unreasonably discriminatory. The Commission found in the *Pricing Flexibility Order* that while price cap ILECs should be allowed to re-price services to respond to competitive pressure, they should not be allowed to do so “until multiple rivals have entered the market and cannot be driven out.”¹³⁴ In other words, sufficient competition, rather than just standard tariffed terms and conditions, is necessary to prevent the ILECs from using contract tariffs to engage in exclusionary pricing behavior.¹³⁵ The marketplace evidence that ILECs have in fact used contract tariffs in Phase I pricing flexibility areas to lock up demand demonstrates that in the absence of sufficient competition, which USTelecom has failed to show, price cap ILECs have the ability and the incentive to engage in exclusionary pricing behavior.

¹³³ USTelecom Petition at 99.

¹³⁴ *Pricing Flexibility Order* at ¶ 80.

¹³⁵ *Id.* at ¶ 79.

USTelecom also argues that blanket forbearance from the contract tariffing prohibitions will benefit consumers by enabling price cap ILECs to offer services “at reduced rates and/or on more flexible terms and conditions more favorable to the customer.”¹³⁶ While it is true that ILECs often offer discounts and other benefits through contract tariffs, USTelecom fails to mention that these discounts and benefits are typically conditioned on a customer agreeing to excessive term and volume commitments. As noted above, these commitments lock up demand in the business services market and by doing so, diminish or discourage the prospect of competitive entry and downward pricing pressure flowing from competition. In the absence of geographic and product market specific evidence of competition that would constrain excessive term and volume commitments, USTelecom has failed to demonstrate that forbearance from the contract tariffing prohibitions will promote competitive market conditions and competition among telecommunications providers, failings that are fatal to its request.¹³⁷

CONCLUSION

For the foregoing reasons, COMPTTEL respectfully requests that the Commission deny USTelecom’s Petition for Forbearance.

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Respectfully submitted,

Mary C. Albert
Karen T. Reidy
COMPTTEL
1200 G Street N.W., Suite 350
Washington, D.C. 20005
(202) 296-6650

¹³⁶ USTelecom Petition at 102.

¹³⁷ See 47 U.S.C. § 160(b) (“[T]he Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions . . .”).