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

In the Matter of	)	
	)	
Petition of USTelecom for Forbearance Under 47 U.S.C. §160(c) from Obsolete ILEC Regulatory Obligations that Inhibit Deployment of Next-Generation Networks	))))))	WC Docket No. 14-192

REPLY COMMENTS OF THE UNITED STATES TELECOM ASSOCIATION

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EXECUTIVE SUMMARY

USTelecom seeks to modernize rules and regulations to facilitate the transition to next-generation service and networks. The regulations at issue in the Petition pre-date many major technology and competitive transitions in the telecommunications marketplace and should be removed to free up resources that can be devoted to new broadband networks and services. It is precisely this forward looking innovation agenda that better serves consumers in the telecommunications marketplace.

USTelecom has provided ample evidence to support its petition. The national and state-level competition data that USTelecom has supplied shows business and residential competition and ILEC lines dropping precipitously across the country and no opponent provides credible evidence that there is a significant variation in the competitive dynamic across geographies and services. Given that the D.C. Circuit Court and the Commission have both recognized the need to balance precision as well as pragmatism and not bind the Commission to a particular analytical framework, the data USTelecom has provided is more than sufficient to make its case.

The Section 10 forbearance criteria are met for the section 271 and 272 and legacy equal access requirements. These rules are either moot or irrelevant to today's marketplace because these obligations were established to preserve competition in the traditional long distance market by ensuring that upstream local markets were irreversibly opened to competition. As the competition data provided by USTelecom shows, that purpose has been achieved and in fact has dissolved as developments in the marketplace since the passage of the Telecom Act of 1996 have rendered obsolete the core market structure assumptions underlying Section 271 as well as the Section 272 and equal access rules. Additionally, none of the comments filed in the initial round demonstrate an adequate need for retaining the Section 272(e) obligations and related conditions set forth in the 2007 Section 272 Sunset Order.

The Commission should grant forbearance on outdated structural separations requirements. With each passing year, as there continues to be a decline in the ILEC voice market and the continued growth in customer preference for new and better forms of voice such as wireless and VoIP, the rationale behind the structural separations requirements continues to erode and the rules prove themselves to be irrelevant while also unnecessarily requiring duplicative facilities and their associated additional expense with no additional benefit. Furthermore, there is no basis for fearing that costs can be improperly shifted, structural separation requirements to rate-of-return companies, therefore forbearance should be granted.

Competitors do not need unbundled access to a 64 kbps channel to provide voice service to end users because now they can and have invested in wireline and wireless facilities of their own, with no unbundling requirements. Additionally, there is no current regulatory obligation to offer UNE-P replacement products today because companies already offer them voluntarily on commercially reasonable market-based terms and conditions. If the 64 kbps unbundling requirement were eliminated, nothing would stop companies from continuing to offer commercial UNE-P replacement products, and the marketplace incentives to offer them would not change. This rules only serves to increase costs that applies only to one set of providers in a highly competitive marketplace, therefore, the Commission should forbear from applying it and forcing ILECs to incur wasteful costs.

The Commission should grant relief from Section 214(e) obligations in all areas. While USTelecom applauds the relief granted in its recent CAF II Order, USTelecom asks that the Commission also grant relief from the ETC obligations and designations in all remaining areas where a price cap carrier does not receive federal high-cost support as well as in unfunded areas as long as there is at least one other voice provider – wireline or wireless. USTelecom also seeks relief from Lifeline obligations in such areas where there is at least one other Lifeline provider.

Elimination of the Computer Inquiry Rules will not harm consumers because as the record makes clear that there is no ILEC monopoly over the transmission capabilities needed to provide enhanced services. In today's competitive marketplace, ESPs can provide services without direct access to traditional phone lines and are therefore no longer dependent upon LECs for access to consumers. There is thus no way for ILECs to exercise exclusionary market power to the detriment of ESPs, making the entire rationale for the *Computer Inquiry* framework obsolete.

The Commission should forbear from requiring ILECs to share newly deployed entrance conduit at regulated rates because these conduit access obligations are not necessary in this narrow context to ensure just, reasonable and nondiscriminatory rates and practices or to protect consumers. Competitors no longer need access to ILEC entrance conduit, particularly in greenfield and brownfield areas, because they can and do construct such conduit, as they steadily win business customers, therefore, making access to ILEC entrance conduit in these limited circumstances not necessary. Forbearance will serve the public interest by reducing an inequity in the Commission's current conduit-access rules that inhibit both ILEC and CLEC deployment incentives.

The Commission should permit price cap carriers to use contract tariffs to lower rates for business data services so as to eliminate the asymmetry in the current regulations that hamstring price cap ILECs by preventing them from offering customers nationwide reduced rates and more flexible terms than are otherwise available in tariffs. This relief will directly benefit consumers, who will be the ultimate beneficiaries of lower prices, and will advance the Commission's goals in promoting the increased availability of next generation high bandwidth data services.

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REPLY COMMENTS OF THE
UNITED STATES TELECOM ASSOCIATION

The United States Telecom Association (USTelecom)[1] is pleased to submit its reply comments in response to the comments filed in response to USTelecom's petition for forbearance from various outdated regulatory requirements applicable to incumbent local exchange carriers (ILECs) (Petition).[2]

I. INTRODUCTION

A. USTelecom's Petition Seeks to Modernize Rules and Regulations To Facilitate the Transition to Next-Generation Services and Networks.

The Petition seeks to modernize certain rules that single out one segment of the industry - ILECs – as a means of keeping up with the current state of technology in today's telephony world, which includes next-generation technologies that consumers want, delivered over robust competing broadband networks. The regulations at issue in the Petition pre-date major technology and competitive transitions in the telecommunications marketplace and

[1] USTelecom is the premier trade association representing service providers and suppliers for the telecom industry. Its diverse member base ranges from large publicly traded communications corporations to small companies and cooperatives – all providing advanced communications service to both urban and rural markets. USTelecom members provide a full array of services, including broadband, voice, data and video over wireline and wireless networks.

[2] *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. §160(c) from Obsolete Incumbent LEC Legacy Regulations that Inhibit Deployment of Next-Generation Networks,* WC 14-192 (filed Oct. 6, 2014) (*Petition).*

should be removed to free up resources that can be devoted to new broadband networks and services. This forward looking innovation agenda that better serves consumers in the telecommunications marketplace. Furthermore, unnecessary regulation creates unnecessary costs, and in this case those unnecessary costs force incumbent LECs to devote scarce resources to outmoded legacy networks and services.[3] Consumers are harmed and the marketplace is skewed by these rules. While cable, wireless, and competitive fiber providers are free to focus their expenditures on next-generation networks suited to delivering higher-speed services, ILECs must direct a substantial portion of their network budget to maintaining legacy facilities and fulfilling regulatory mandates whose costs far exceed any benefits.[4]

B. USTelecom Has Provided Ample Evidence To Support Its Petition

The D.C. Circuit Court has held that the Commission's analysis of forbearance from dominant carrier regulation is not bound by a particular analytical framework.[5] Section 10 requires that the provisions in question are no longer necessary to ensure that the charges, practices, classifications, or regulations by, for or in connection with telecommunications services are just and reasonable and are not unjustly or unreasonably discriminatory; enforcement of the requirements is not necessary for the protection of consumers; and, forbearance is consistent with the public interest.[6] Section 10 does not impose "a particular mode of market analysis or level of geographic rigor," but rather "allow[s] the forbearance analysis to vary depending on the circumstances."[7] Additionally, the Commission has recognized the need to balance the necessary precision obtained by analyzing competition at a

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[3] *See Id.* at 2.
[4] *See Petition* at 3.
[5] *See Id.* at 2, *citing*, *EarthLink v. FCC*, 462 F. 3d 1, 8 (D.C. Cir. 2006).
[6] 47 U.S.C. §160.
[7] *See CenturyLink PN* at *2* .

granular or disaggregated level with the pragmatic need to evaluate competition at an aggregated level and therefore analysis at a lower level is unnecessary.[8]

Several opponents to the Petition argue that it lacks sufficiently granular competition data for individual services and geographies across the country.[9] But the competition data that USTelecom supplied shows business and residential competition and ILEC lines dropping precipitously across the country[10] – and no opponent provides credible evidence that there is a significant variation in the competitive dynamic across geographies and services. The competitive LECs (CLECs) opposing the petition seem to be stuck in 1996 (when the Telecommunications Act was enacted) or 1999 (when a process for obtaining pricing flexibility for ILEC business services was created). But we are on the verge of 2015, and the marketplace has changed dramatically and irrevocably since those landmark days of yesteryear. Voice, broadband and data competition are irreversibly established across the country. Competitive investments, technology changes and consumers and businesses voting with their feet have created a very different environment. CLECs have continued to grow their market for share and have been building out to serve their chosen base of select business customers for decades. The Commission needs look no further than the National Broadband Map to understand that cable broadband networks are deployed across the country and, as thoroughly discussed in the Petition, these cable companies are now a major competitive force in the business market. CLEC and cable investments in network assets are here to stay, making competition irreversible.

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[8] *See Id.*
[9] *See e.g. Sprint Comments at* 2; *Opposition of Birch, BT Americas, Integra and Level 3* at 3 & 5-16. *(Joint CLECs Opposition).*
[10] *See Petition* at 8-15.

Attached to our Petition are two declarations from respected economists regarding the state of competition in the communications marketplace, including discussions of the authors' rigorous econometric analyses. One, the Declaration of Dr. Kevin W. Caves ("Caves Declaration") states, "As economists have recognized for some time, traditional ILEC voice offerings face widespread competition from a range of competitive alternatives," both wireline and wireless.[11] Dr. Cave notes that, in recent years, "evidence of robust and intensifying intermodal competition has continued to accumulate" and he goes on to conclude, "By any reasonable economic standard, traditional ILEC services are now just one of many communications offerings in a competitive industry with many players."[12]

In the business marketplace, Dr. Caves observes "the data show business customers are rapidly switching away from ILEC voice services toward competitive alternatives. In addition to more traditional voice offerings from cable companies or CLECs, a large proportion of businesses have access to high speed broadband, which in turn permits access to a variety of competitive VoIP offerings."[13] The Caves Declaration cites Commission data indicating that from 2008 to 2013 ILEC business lines declined by 12.5 million, or 27 percent, while non-ILEC business lines grew by 5.4 million. These data are as of mid-2013. New FCC data for year-end 2013 released since USTelecom filed the Petition indicate that ILEC business lines fell by an additional 1.1 million in the second half of 2013, or by a total of 30 percent since the end of 2008.[14] As of year-end 2013, the Commission's most recent data indicate that non-

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[11] *See Petition, Appendix B,* at 61. (*Caves Declaration*)
[12] *See Id.*
[13] *See Id.* at 12.
[14] Federal Communications Commission, *Local Telephone Competition: Status as of December 31, 2013* ("FCC Local Competition Report Year-End 2013") (October 2014) at Table 2.

ILEC share of business landlines was 45 percent nationwide.[15] Only two states had non-ILEC share less than 30 percent, while 18 had non-ILEC shares greater than 50 percent.[16]

Dr. Caves suggests the difference between ILEC business line losses and competitors gains indicates that businesses are switching to non-traditional alternatives not reflected in the FCC data. He notes that "[a]ll of the major cable multiple-system operators ('MSOs') have entered the business services market, offering voice in conjunction with various data-intensive products."[17] In addition to widespread deployment of VoIP-capable DOCSIS 3.0 cable broadband networks throughout most of the United States, Dr. Caves points out that "[t]here is also evidence that cable MSOs and other competitors are significantly expanding their capacity to serve commercial customers, with many providers attaining (or poised to attain) Carrier Ethernet 2.0 ('CE 2.0') certification."[18] This CE 2.0 standard supports an array of data-intensive commercial applications, such as VoIP, and allows cable and other competitors to expand their footprints through standardized interconnection.[19] As discussed below in Section VIII, the marketplace for Business Data Services is intensely competitive. Customers continue to shift from legacy time division multiplexing (TDM) services to Ethernet services. Non-ILECs, including CLECs and cable MSOs, often through deployment of their own last-mile facilities, have been instrumental in this transition, as evidenced by the highly fragmented Ethernet market shares.[20]

With respect to wireless services, Dr. Caves states, "the available evidence shows clearly and unambiguously that wireless voice service has evolved into a competitive

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[15] *See Id.* at Table 11.
[16] *See Id.*
[17] *See Caves Declaration* at 13.
[18] *See Id.*
[19] *See Id.* at 14.
[20] *See infra* at 34-35.

alternative to wireline service."[21] Similarly, the Declaration of Professor John Mayo ("Mayo Declaration") in Appendix C of the Petition states, "Both clear descriptive statistics and modern econometric evidence exists today which point clearly to the competitive role of wireless service."[22] Professor Mayo goes on to conclude that, "[t]he rapid evolution of consumer behavior now warrants the affirmative finding that wireless service presents a substantive, viable and economically constraining influence on the behavior of wireline telephone providers."[23] The most recent data from the Centers for Disease Control (CDC) on wireless competition indicate that the consumer migration to wireless-only voice service continues, and accelerated to 44 percent if households in the first half of 2013.[24]

Finally, with respect to geographic data, the Caves Declaration contains an extensive analysis of state data and includes a discussion of publicly available sub-state wireless competition data.[25] The Caves Declaration not only addresses state-level and sub-state-level data, but it also contains analyses of state-level data from the Centers for Disease Control (CDC) National Health Interview Survey (NHIS) for wireless-only households and state-level data from the Commission for wireline competition. Dr. Caves concludes at the outset of his declaration that voice competition is *widespread*, stating, "ILEC wireline voice offerings face widespread competition, with prices disciplined by a range of competitive alternatives, including wireless telephony, cable voice, over-the-top voice over internet protocol (VoIP),

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[21] *See Caves Declaration* at 60.
[22] *See Petition, Appendix* C at 4 *(Mayo Declaration).*
[23] *See Mayo Declaration* at 4.
[24] Stephen Blumberg and Julian Luke, National Center for Health Statistics, Centers for Disease Control & Prevention, *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, January to June 2014* (December 16, 2014).
[25] *See Caves Declaration* at 60.

and offerings from CLECs."[26] The Caves Declaration provides a detailed discussion of state and sub-state data in Section II B, "State and Regional Trends."[27]

Dr. Caves first analyzes CDC data describing state-level wireless-only household shares from 2007 through 2012, and concludes, "the data indicate that wireless-wireline competition is both widespread and increasing across the United States."[28] The analysis continues, "even the state at the 'low' end of the spectrum as of 2012 had roughly the same estimated wireless-only share as the state with the highest wireless-only share in 2007. In fact, NHIS point estimates have increased for literally every one of the states for which data are available over the sample period."[29] Dr. Caves also notes, "Finally, for many states, the NHIS also produces estimates for specific counties or groups of counties. These data, like the state-level estimates, reveal elevated and increasing wireless-only shares."[30]

In order to develop a more complete picture of competition, the Caves Declaration then goes on to analyze combined state landline competition data from the Commission with the state wireless competition data from the CDC for the period 2008 to 2012. Dr. Caves utilizes the data to estimate ILEC household voice shares at the state level.[31] He again concludes, "these state level estimates provided further confirmation of widespread competition across the United States. Among states for which complete 2012 data are available, the estimated share of households purchasing competitive alternatives to traditional ILEC voice service ranges from 51 percent to … 73 percent … with an average of 62 percent across all states (up from 38

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[26] *See Caves Declaration* at 60.
[27] *See Caves Declaration* at 22-26 and Figures V and VI.
[28] *See Caves Declaration* at 23 and Figure V.
[29] *See Id.*
[30] *See Id.*
[31] *See Caves Declaration* at 25.

percent in 2008)."[32] Moreover, when assessing this analysis, it is important to keep in mind that it is based on 2012 data and voice markets have only become increasingly competitive over time.

Tellingly, none of the commenters dispute the accuracy of any particular data in the Petition or present specific suggestions as to what additional data, and at what specific level of granularity would be necessary to meet the forbearance standard.

II. THE SECTION 10 FORBEARANCE CRITERIA ARE MET FOR THE SECTIONS 271 AND 272 AND LEGACY EQUAL ACCESS REQUIREMENTS

As the Petition demonstrates, any remaining obligations of Sections 271 and 272, and the Commission's legacy equal access rules, are either moot or irrelevant to today's marketplace. No commenter credibly rebuts this point or the evidence presented in the Petition demonstrating the remarkable transformation that has taken place in the marketplace since 1996. This transformation has dramatically reduced ILEC market shares overall and replaced the stand-alone local and long distance markets with an intensely competitive all-distance market. In this new competitive landscape, the Section 10 forbearance standard is met and forbearance from Sections 271 and 272 and the equal access rules is warranted.

Several commenting parties urge the Commission to retain Section 271 and related obligations.[33] But, their comments, which largely parrot the same arguments, fall well short of demonstrating a legitimate basis for denying the relief sought by the Petition.

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[32] *See Caves Declaration* at 25-26 and Figure VI.

[33] *See COMPTEL's Opposition to USTelecom's Petition for Forbearance* at 5-25, *("COMPTEL Opposition); Opposition of Granite Telecommunications, LLC ("Granite Opposition")* at 17-21, *Opposition of Birch, BT Americas, Integra, and Level 3* at 5-16 *("Joint CLECs Opposition"), Opposition of Full Service Network LP, et alto USTelecom's Petition for Forbearance* at 11-18 *(FSN Opposition); Comments of the Wholesale DS-0 Coalition* at 4-10 (*Wholesale Coalition Comments).*

To begin with, each of these parties ignores the driving point of the proposed forbearance relief: that these obligations were established to preserve competition in the traditional long distance market by ensuring that upstream local markets were irreversibly opened to competition. Yet, as the competition data shows, that purpose has been achieved and in fact has dissolved as developments in the marketplace since the passage of the Telecom Act of 1996 have rendered obsolete the core market structure assumptions underlying Section 271 [and section 272 and equal access rules][34] As discussed at length in the Petition, competition in local markets is irreversibly established. For example, only about 25% of the households in the country are connected to traditional phone lines. Cable company networks provide fully facilities-based competition for business and residential customers across the country and those networks are not likely under any circumstances to disappear from the market. Similarly, CLEC investments to serve business customers continue to increase, as does their share of business services. CLEC consolidation has created large national CLEC players that, like fiber assets, are unlikely to leave the market. As the Petition explains, ILECs today have only a small fraction of the total voice marketplace, and all-distance services dominate the marketplace.[35] There no longer is a federal need for these regulatory obligations.

In this context, the public interest would be served by granting the requested forbearance. Section 271 remains the underpinning of state-approved PAPs and the Section 271(c) checklist's outdated and often superfluous requirements. The Petition details the extensive costs imposed on AT&T, Verizon, and CenturyLink by these obligations.[36]

[34] *See Petition* at 15-22.
[35] COMPTEL suggests that the Commission cannot forbear from Section 271 until it addresses the applicability of Sections 251 and 271 to next generation IP networks. *COMPTEL Opposition* at 8. To begin with, Sections 251 and 271 plainly do not apply to all-IP networks. But, even if they could, it is the height of temerity to suggest that the Commission could lawfully retain legacy long distance regulation under the Section 10 standard for networks where the concept of long distance has never had, and never will have, any meaning.
[36] *See Petition* at 25.

Moreover, as the Petition also discusses, if the requested relief is granted various provisions of the Act outside of Section 271 still would remain in place to ensure just, reasonable and nondiscriminatory rates and practices and to protect consumers.[37] These include provisions in Sections 224, 251, and 252, as well as Commission rules governing number administration and portability. In addition, the former Bell Operating Companies (BOCs)[38] would remain subject to the continuing general obligation to provide service at just, reasonable, and not unreasonably discriminatory rates, terms, and conditions pursuant to Sections 201 and 202 of the Act.

In this context, the arguments presented in the initial comments as to why Sections 271 and 272 and related obligations should remain in place are easily disposed of.

First, COMPTEL and Granite argue that BOCs are required, by the Section 271 checklist, to provide combined unbundled switching and Section 252 UNEs to create a UNE-P replacement product.[39] They also argue that the commercial products that replaced UNE-P will disappear without Section 271.

These parties misstate the law. COMPTEL, for example, asserts that the BOCs must combine Section 271 unbundled switching with Section 251 UNEs.[40] But, those companies are not required to combine Section 271 unbundled switching with Section 271 shared transport, and therefore they are not required to offer those two elements in combination with one another and with Section 251 unbundled loops.

[37] *See Id.; 47 U.S.C.* § 160(a)(1), (2).
[38] The term BOC is a legal anachronism and does not reflect consumer options or competitive realities in today's markets.
[39] *See COMPTEL Opposition* at 11-12; *Granite Opposition* at 7.
[40] *See COMPTEL Opposition* at 11-12.

The Commission in 2004 found that CLECs are not impaired in deploying switches and held that incumbent LECs no longer were required under Section 251 to unbundle mass-market switching[41] or shared transport.[42] CLECs previously had used Section 251 unbundled switching "exclusively in combination with incumbent LEC loops and shared transport in an arrangement known as the unbundled network element platform (UNE-P)"[43] But the Commission held that UNE-P created "disincentives to investment" and imposed a "nationwide bar" on Section 251 unbundled switching and shared transport.[44] The Commission ordered a twelve-month transition to alternative service arrangements, but it did not specify what those arrangements should be. In particular, the Commission did not require incumbent LECs to recreate the UNE-P with a commercial offering. And it could not.

After the *Triennial Review Remand Order*, incumbent LECs' regulatory obligation to provide local switching and shared transport as network elements emanated exclusively from the Section 271(c)(2) competitive checklist, and that obligation applied only to the Bell Operating Companies. The Commission's rules permit commingling of Section 251 unbundled network elements – such as the local loop -- with Section 271 network elements. But the Commission has held that the former Bell Operating Companies are not required to combine Section 271 network elements – like local switching and shared transport -- with one another.[45] For these reasons, the Commission in a 2011 *amicus* brief told the Sixth Circuit that incumbent LECs are not obligated

[41] *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533, 2556-57 ¶ 39 (2005) ("*Triennial Review Remand Order*"), *aff'd sub nom. Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006) at ¶ 199-209.
[42] *See Triennial Review Remand Order* at ¶ 200 n.529.
[43] *See Triennial Review Remand Order* at ¶ 199 n.526.
[44] *See Triennial Review Remand Order* at ¶ 204.
[45] *See Triennial Review Order*, 18 FCC Rcd at 17386 (¶ 655, n.1990); *see also Nuvox Communications, Inc., Xspedius Communications, Inc. v. BellSouth Communications, Inc.*, 530 F.3d 1330, 1334 (11th Cir. 2008).

to recreate the UNE Platform.[46] This is consistent with prior Commission statements. In 2005, the Commission noted that in response to the delisting of Section 251 switching, "Qwest responded by introducing a commercial product designed to replace UNE-P -- and to keep customers on its network -- *even in the absence of a legal mandate to do so*."[47]

The Sixth Circuit case that COMPTEL cites does not change that holding, it reinforces it. In *BellSouth v. Kentucky Public Service Commission*, the Court held that the former Bell Operating Companies had to allow CLECs to combine elements of Section 251 and Section 271, but cited approvingly to the Commission's 2005 order in which it found there was no legal mandate on the ILECs to replace the Section 251 UNE Platform.[48] And it was in that proceeding that the Commission filed its brief reiterating and explaining that there is no such obligation.

COMPTEL and Granite also misstate the facts regarding UNE-P replacement products. Despite having no obligation to do so, the Bell Operating Companies – the operating affiliates of AT&T, CenturyLink, and Verizon – after the *Triennial Review Remand Order* voluntarily developed commercial products that offered the same functionality as the UNE-P. And, they continue to offer these products today not because they are required by regulation – they are not – but because they make commercial business sense. In this regard, because these UNE-P

[46] *See Brief for Amicus Curiae Federal Communications Commission in Support of Defendants-Appellants, Cross – Appellees and Partial Reversal of the District Court*, Case No. 10-5310/10-5311, *BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky v. Kentucky Public Service Commission* (filed Dec. 6, 2011) at 17. ("No BOC is under an obligation to re-create the UNE-Platform by application of the commingling rule, for two independent reasons. First, as explained above, the FCC has delisted unbundled local circuit switching and shared transport as UNEs that must be offered under section 251(c)(3); those elements are now offered strictly pursuant to the section 271 competitive checklist. And the FCC has determined that BOCs are not required to combine section 271 checklist items with one another. *Triennial Review Order*, 18 FCC Rcd at 17386 (¶ 655, n.1990); *see also Nuvox,* 530 F.3d at 1334. Thus, no BOC is obligated under the FCC's rules – and, as a consequence, no state commission may order a BOC – to combine the unbundled local circuit switching and shared transport pieces of what used to comprise the now-defunct UNE-Platform to satisfy its commingling duties.")

[47] *In the Matter of 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, 19455-19456 (F.C.C. 2005) at ¶ 82 (emphasis added) ("*Omaha Forbearance Order*"), *pets. for rev. dismissed and denied on the merits, Qwest v. FCC*, 482 F.3d 471 (D.C. Cir. 2007).

[48] *BellSouth Telecommunications, Inc. v. Ky. PSC,* 669 F.3d 704, 714 (6th Cir. 2012)

replacement products are commercial offerings not required by law, there is no "regulatory backstop," as COMPTEL asserts. But none is needed. The marketplace provides the Bell Operating Companies incentives to offer these replacement products on reasonable terms and conditions. Intermodal competition is thriving. In its recent *Technology Transitions NPRM*, the Commission noted that as of the end of 2013, approximately 41% of American households relied exclusively on wireless services, and that more than one-third of wireline retail local telephone service connections were interconnected VoIP.[49] More than half of the residential retail voice connections were interconnected VoIP as of the end of 2013.[50] Most of those interconnected VoIP connections are provided by non-incumbent LECs, including cable companies.[51] As discussed in Section I above, data indicates that competition continues to grow. Recently released wireless data indicates that, as of the first half of this year, 44 percent of households relied exclusively on wireless for voice telephony, an increase of three percentage points from the end of 2013.[52] The most recent Commission data shows that in the second half of 2013 incumbent LECs' switched and VoIP access lines fell by almost 3.5 million lines, from 78.5 million to 75.1 million, representing only 43 percent of the approximately 178 million access lines they served at the end of 2000.[53]

In this very competitive marketplace, incumbent LECs have incentives to offer UNE-P replacement products at appealing terms and conditions. If a customer chooses not to take retail

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[49] *In the Matter of Ensuring Customer Premises Equipment Backup Power for Continuity of Communications, Technology Transitions, Policies and Rules Governing Retirement of Copper Loops by Incumbent Local Exchange Carriers, Special Access for Price Cap Local Exchange Carriers, AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, PS Docket No. 14-174, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, RM-10593, Notice of Proposed Rulemaking and Declaratory Ruling ¶ 8, FCC 14-185 (rel. Nov. 25, 2014), Erratum (rel. Dec. 17, 2014).
[50] *See FCC Local Competition Report Year-End 2013* at Figure 4.
[51] *See Petition* at 10.
[52] *See infra* at 6.
[53] *See FCC Local Competition Report Year End 2013* at Table 1; *Petition* at 9.

service from one of them and instead chooses to take service from one of the many available intermodal options competitors offer, incumbent LECs make no money at all from that customer. . They make some money, however, if the customer chooses to take service from a company like Access Point or Granite, which purchase a wholesale UNE-P replacement product from the incumbents in order to provide retail service. The wholesale revenue from these customers is better than no revenue at all. That's why, even with no regulatory obligation to provide UNE-P replacement services, companies continue to offer them.

Similarly specious are arguments by certain parties that, without the 271 checklist, they cannot be assured that BOCs will continue to offer various other forms of wholesale access that currently exist. For example, COMPTEL argues that Section 271(c)(2)(B)(vi) is the only source of an obligation that incumbent LECs provide unbundled local switching.[54] Several parties argue that Section 271 requires BOCs to provide DS0, DS1, and DS3 transport services in areas where Section 251 impairment triggers have been met or where Section 251(c)(3) does not otherwise apply.[55] These arguments fail because there has long been sufficient competition in these markets, thereby making such a regulatory backstop unnecessary. Furthermore, carriers simply do not order unbundled switching except in combination with loop and transport, and commercial UNE-P replacement offerings aren't affected by this relief.

Certain parties also contend that Section 271(c)(2)(B)(i) is needed because it requires BOCs to provide interconnection *in accordance with* Section 251(c)(2) and 252(d)(1), access to UNEs *in accordance with* Sections 251(c)(3) and 252(d)(1), non-discriminatory access to pole attachments *in accordance with* Section 224, and reciprocal compensation arrangements *in accordance with* Section 252(d)(2). But if anything these contentions demonstrate the

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[54] *See COMPTEL Opposition* at 11.
[55] *See COMPTEL Opposition* at 13, 19-20; *Joint CLECs Opposition* at 6; *Granite Opposition* at 14-16.

redundancy of Section 271.[56] Each of the cited obligations has an independent source outside of Section 271. Thus, these arguments also fail to demonstrate a need for the duplicative Section 271 requirements.

COMPTEL and other CLEC commenters also point to the Section 271(d)(6)(B) 90-day deadline for resolution of certain Section 271- related complaints as another purportedly important Section 271 requirement that must be maintained. But this in fact is yet another example of a requirement whose purpose has long passed. The conditions that existed at the time when this 90-day enforcement track was enacted – the need to open local markets to competition – no longer exist. Not only is there is no longer a concern that BOCs could freeze competitors out of the marketplace, but various substantive Title II requirements outside the scope of Section 271 provide adequate substantive protection. For example, the Commission's Section 208 complaint procedures remain as a backstop of protection after forbearance.

Nor does the fact that the Commission cited the continued application of Section 271 in the Commission's 2007 Section 272 Sunset Order[57] present a hurdle to the Commission forbearing from Section 272 now.[58] No party was seeking forbearance from Section 271 at the time, and thus the Commission did not address whether there was a continuing need for Section 271. And, as the Petition discusses in great detail, competition has increased dramatically in the intervening years – with the relative share of the market held by BOCs dropping significantly.[59] Thus, the findings of the 2007 Sunset Order are wholly irrelevant to whether a current need exists for Section 271 obligations today. This point is driven home by the fact that the

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[56] *See COMPTEL Opposition* at 8; *Joint CLECs Opposition* at 6.

[57] *In the Matters of 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 (2007) ("*Section 272 Sunset Order*"), ¶ 90.

[58] *See COMPTEL Opposition*, p. 13; *Joint CLECs Opposition* at 7.

[59] *See Petition* at 9-16.

Commission has already forborne from other obligations cited as continuing in place at the time of the 2007 Sunset Order – for example, the Commission's cost assignment rules.[60]

None of the comments filed in the initial round demonstrate an adequate need for retaining the Section 272(e) obligations and related conditions set forth in the 2007 Section 272 Sunset Order. Indeed, only two commenting parties[61] presented specific arguments at all on this aspect of the Petition, and those comments do little more than recite the obligations themselves. Most importantly, as with the comments addressing the Section 271 forbearance relief, these comments also fail to address the overarching points addressed above that: (1) there can be no need for these regulatory obligations sufficient to allow the continuance of long distance regulation under the Section 10 forbearance standard given the irrelevance of the stand-alone long distance market; and (2) various provisions of the Act outside of Section 272 would, if the requested relief is granted, remain in place to ensure just, reasonable and nondiscriminatory rates and practices and to protect consumers.[62] When it comes to ensuring competitive time intervals for service requests or competitive pricing, the self-regulating forces of a competitive market or, where applicable and where needed, the lighter touch "just and reasonable" requirements applicable to all telecommunications providers under Section 201/202 will provide more than adequate protection.

The comments also fail to demonstrate an adequate need for retaining the Commission's legacy equal access obligations.[63] Only one party, COMPTEL, addresses this aspect of the Petition. COMPTEL presents no arguments as to why these obligations should remain. It

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[60] *Section 272 Sunset Order*, ¶ 90; *In the Matter of Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160 From Enforcement of Certain of the Commission's Cost Assignment Rules, et al.*, WC Docket Nos. 07-21 and 05-342, Memorandum Opinion and Order, 23 FCC Rcd 7302 (rel. Apr. 24, 2008);

[61] *See COMPTEL Opposition at 13; Joint CLECs Opposition at 7.*

[62] *See Id.;* 47 U.S.C. §160(a)(1), (2).

[63] USTelecom clarifies that it is not seeking forbearance from the equal access requirements as they apply to toll free traffic.

simply contends that the Petition fails to adequately identify the equal access obligations as to which forbearance is sought. COMPTEL is wrong. The Petition discusses in great detail the obligations as to which forbearance is sought. These are:

- The 1982 Modification of Final Judgment ("MFJ") in the federal antitrust case against AT&T to the extent it initially imposed equal access obligations upon BOCs.[64]
- A separate consent decree and FCC orders, respectively, to the extent they imposed similar equal access requirements on GTE companies[65] and (to a more limited extent) independent LECs.[66]
- Section 251(g) of the Act, added as part of the Telecommunications Act of 1996, to the extent it imported "the obligations of the [MFJ] . . . as well as Commission equal access requirements" "imposed on LECs prior to passage of the 1996 Act." [67]
- Section 251(b)(3)'s dialing-parity requirement, which was implemented in 47 C.F.R. §§ 51.205, 51.209, 51.213, 51.215, to the extent it codifies the equal-access obligations for interexchange service.[68]

As the Petition explains, the Commission has "look[ed] to federal court decisions and to its own orders," rather than to a codified set of regulations, "to determine what constitutes the

[64] *See Petition* at 22-23 (describing the "costly obligations to maintain network configuration and access offerings that permit other carriers to originate long distance calls from ILEC customers" and citing, among other things, Appendix B of the MFJ *(United States v. American Telephone & Telegraph, Co.*, 552 F. Supp. 131,195-196, Appendix B (D.C.C. 1982); *aff'd sub nom, Maryland v. United States*, 460 U.S. 1001 (1983), which describes the equal access obligations imposed on BOCs in greater detail).

[65] *See Petition* at 34 (citing discussion of GTE consent decree and independent LEC equal access obligations in *Allnet Communications Services, Inc.* Memorandum Opinion & Order on Reconsideration, 11 FCC Rcd 8519, 8526-27 ¶ 14 (1996)); *see also United States v. GTE Corp.*, 603 F. Supp. 730,743-46 (D.D.C. 1984) (discussing in greater detail the equal access obligations as imposed on GTE).

[66] *See Id.* at *34-35*.

[67] *See Id.* at 35.

[68] *See Id.; see also. Petition for Declaratory Ruling on Issues Contained in Thorpe*, 23 FCC Rcd 6371, 6378 (2008)(noting that "the MFJ and Commission orders required dialing parity in the interexchange market" until "Congress codified and extended this requirement in section 251(b)(3)").

provision of equal access."[69] Additionally, it is worth noting that the Petition stated clearly that, while it was not seeking forbearance from the Section 251(b)(3) dialing parity requirement for local calls, it was seeking forbearance as necessary from the 251(b)(3) dialing parity requirement as applied to interexchange or "toll" service.[70] Thus, these provisions, collectively, constitute the "statutory provision, rule, or requirement from which forbearance is sought"[71] in this context. And, given the somewhat unique history regarding these legacy equal access requirements, Appendix A to the Petition properly described the requested relief for purposes of Rule 1.54 as "All remaining legacy equal access obligations carried forward via 47 U.S.C. § 251(g)."[72] As the Commission has explained, a forbearance petition is "complete as filed" if it "explicitly states the scope of the relief requested, addresses each prong of the statute as it applies to the rules or provisions from which the petitioner seeks relief, identifies any other proceedings pending before the Commission where the petitioner speaks to the relevant issues and complies with format requirements."[73] The Petition's request for forbearance from the legacy equal access requirements meets this standard.

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[69] *See Id.*

[70] *See Id.* (stating that "[a]lthough "dialing parity" and "equal access" overlap to a large extent with respect to telephone toll service, Section 251(b)(3)'s dialing-parity requirement is a broader provision that also requires carriers to provide dialing parity for local calls. This Petition does not request any forbearance from the requirement that LECs provide dialing parity for local calls. However, forbearance from this requirement, as it is applied to interexchange service, would follow from the requested relief – *i.e.*, to the extent it codifies the equal-access obligations for interexchange service, forbearance from those obligations would also lift the dialing parity requirement.")

[71] 47 C.F.R. §1.54.

[72] *See Petition, Appendix A* at A-1.

[73] *See Petition of USTelecom for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Certain Legacy Telecommunications Regulations et al.*, Memorandum Opinion and Order and Report and Order and Further Notice of Proposed Rulemaking and Second Further Notice of Proposed Rulemaking, WC Docket No. 12-61, *et al.*, 28 FCC Rcd 7627, 7633 n.22 (rel. May 17, 2013) *(USTelecom Forbearance Order).*

III. THE COMMISSION SHOULD GRANT FORBEARANCE ON OUTDATED STRUCTURAL SEPARATIONS REQUIREMENTS

COMPTEL argues in its comments that USTelecom has failed to present any new or different evidence that was not before the FCC when they made its earlier structural separations forbearance determination.[74] But the evidence supporting an elimination of the separations requirements speaks for itself. With each passing year, industry, market, and technological developments have eroded the rationale for maintaining separations requirements than could have been imagined over a decade ago. The structural separation requirements of Section 64.1903 continue to prove themselves to be irrelevant simply by the continuing decline of the ILEC voice market and the continued growth in customer preference for new and better forms of voice such as wireless and VoIP. Meanwhile separations requirements require duplicative facilities and their associated additional expense with no additional benefit.

There is no basis for applying structural separation requirements to rate-of-return companies. When the Commission relieved price-cap independent ILECs of the Section 64.1903 structural separation requirement but declined to forbear for rural LECs (RLECs), the Commission cited "the continuing potential for cost misallocation" by rate-of-return carriers – specifically, incentives 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."[75] Because RLEC interstate switched access rates have been capped by intercarrier compensation reforms, the Commission's concerns focused on special access and common line rates.[76] In fact, rate-of-return carriers are not in a position to shift costs in order to

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[74] *See COMPTEL Opposition* at 31.
[75] *See USTelecom Forbearance Order*, 28 FCC Rcd at 7695 ¶ 153.
[76] *See Id.* at 7694 ¶ 151 (observing that recent intercarrier compensation reforms still allow increases in common line and special access rates). Because rule 64.1903 governs only "in-region, interstate" and "in-region, international" services, 47 C.F.R. § 64.1903(a), this request is limited to interstate and international services.

increase common line or special access rates (or universal service recovery associated with common line cost levels), or to effectuate a price squeeze in the rapidly disappearing long distance marketplace or any other market.

Both market conditions and the *Transformation Order* discourage rate-of-return companies from shifting costs to common line services. Increased common-line costs are reflected in subscriber rates for voice service through increased subscriber line charges, rather than being passed through to other carriers, making an RLEC's retail offering less competitive with other providers' services. As discussed above, RLECs are already losing an enormous amount of market share to CLECs, wireless and VoIP providers. Thus, passing misallocated costs on in the form of increased retail voice service rates would result in a net *loss* of revenue by the RLEC.

Moreover, there is no basis for fearing that costs improperly shifted to common line services will end up compensated through the universal service high-cost mechanisms currently available to rate-of-return companies. The High Cost Loop Support (HCLS) fund is subject to a cap, so any cost-shifting merely rearranges support among RLECs within the fund without increasing its overall size. Similarly, while Interstate Common Line Support (ICLS) is not capped, the overall amount of high-cost support for rate-of-return carriers is subject to a budget, and therefore, as in the case of HCLS, cost-shifting would merely rearrange support among rate-of-return carriers within that budget.[77]

Because RLECs have little incentive or ability to raise common line or special access rates through cost shifting, they will not be able to engage in the "price squeeze" behavior that

[77] Although some RLECs might attempt to gain an advantage over other RLECs in this regard, on balance, there would be little or no net shifting of RLEC costs to common line services.

concerned the Commission in the *USTelecom Forbearance Order*.[78] Thus, the commenter's concerns about a price squeeze ring hollow: An RLEC's special access rate increases would "squeeze" its own competitive rates as much as or more than any competitors' rates.

Price cap ILECs also should be relieved of the special access performance metrics and imputation requirements imposed on them as a condition of forbearance relief from Rule 64.1903 in the *USTelecom Forbearance Order*. All of the reasons set forth above for eliminating those additional requirements for the BOCs in the context of Section 272 and for granting the RLECs unconditional forbearance relief from Rule 64.1903 apply equally, if not even more strongly, to the price cap ILECs.[79] Costs, imputed or otherwise, are much less relevant to price cap ILECs than they are to RLECs. Because of the irrelevance of costs, combined with the irrelevance of requirements based on the assumption of separate local and long distance services and markets, elimination of these additional requirements for price cap ILECs easily meet the first two prongs of the Section 10 standard.[80] Moreover, because they provide little or no benefit and add unnecessary costs, elimination also would further the public interest.[81] Accordingly, for all of the same reasons that the Commission should forbear from continuing to apply the special access performance metrics and imputation conditions to the BOCs, and that forbearance relief from Rule 64.1903 for the RLECs should be unconditional, the Commission similarly should forbear from continuing to apply those conditions to price cap ILECs.

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[78] *See USTelecom Forbearance Order*, 28 FCC Rcd at 7694 ¶ 151.
[79] *See Id.* at 7691-93 ¶¶ 142-48 (citing *Section 272 Sunset Order*, 22 FCC Rcd at 16488-89 ¶¶ 97-98).
[80] *See Id.* at 7637 ¶ 16 (because structural separation rules and related conditions "only address[] . . . stand-alone long distance service, which has become a fringe market" they are "unlikely to ensure" just, reasonable and nondiscriminatory rates and practices or to protect consumers).
[81] *See Id.* at 7637-38 ¶ 17; 47 U.S.C. § 160(a)(3).

IV. COMPETITORS DO NOT NEED UNBUNDELED ACCESS TO A 64 KBPS CHANNEL TO PROVIDE VOICE SERVICE TO END USERS

Once the star of the telecommunications show for many decades, narrowband voice service has lost its shine. Today's consumer demands a package of high-capacity broadband services where voice plays an increasingly small supporting role to a broad and ever-widening cast of innovative products. To deliver those new products and services, companies have invested heavily in next generation broadband networks, including DOCSIS 3.0 cable networks and fiber-based networks.

When the Commission in 2003 decided not to require incumbent LECs to unbundle fiber-to-the-home loops, narrowband voice played a more prominent role. In that context, the Commission decided that when incumbent LECs retire existing copper loops and build all-fiber loops to replace them, the incumbent LEC must make available a 64 kbps voice grade channel over the new fiber-to-the-home loop so that competitors could use it to provide narrowband voice service. No other companies that have invested in and deployed broadband networks are subject to this requirement.

More than ten years down the road from that Commission decision, competitors do not in 2014 need unbundled access to a 64 kbps channel to provide voice service to end users. They can and have invested in wireline and wireless facilities of their own, with no unbundling requirements. And even if they choose to provide service over the new fiber facilities that others have deployed, competitors today are far more likely to do that by providing an over-the-top VoIP service, which does not use a narrowband 64 kbps channel.[82] As Alaska Communications Systems (ACS) said, "Few if any other competitive entrants that have a voice-only market

[82] *See Comments of Alaska Communications Services* at 6.

strategy would utilize that unbundled voice channel, and the Commission has since refocused its efforts on expanding the availability of affordable broadband service."[83]

Several commenters conflate the request for forbearance from the 64 kbps requirement with the request for forbearance from Section 271, and they mistakenly assert that without the two, incumbent LECs would have no regulatory obligation and as a result would not offer a competitively priced wholesale UNE-P replacement product.[84] As we explained above, there is no current regulatory obligation to offer UNE-P replacement products today. Companies that offer them do so voluntarily on commercially reasonable market-based terms and conditions. The 64 kbps unbundling requirement has nothing to do with Section 271. Furthermore, if the 64 kbps unbundling requirement were eliminated, nothing would stop companies from continuing to offer commercial UNE-P replacement products, and the marketplace incentives to offer them would not change.

Furthermore, competitors will still be able to provide service to multi-location business customers after the Commission forbears from the 64 kbps requirement, despite what commenters claim.[85] In reality, most enterprise providers do not serve multi-location customers through DS0s. Much more often they will serve smaller locations through DS1 or DS3 services, which generally will still be available over TDM-based fiber facilities even after the copper loop is retired. UNE-P replacement commercial products are also available, over which competitors can provide voice-grade service. None of those depend on the 64 kbps requirement.

COMPTEL also argues that Verizon invested in and deployed its all-fiber FiOS network despite having to comply with the 64 kbps requirement. But the 64 kbps requirement doesn't kick in when incumbent LECs like Verizon deploy fiber. Rather, it becomes an issue only when

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[83] *See Id.*
[84] *See Wholesale Coalition Comments* at 7-8.
[85] *See COMPTEL Opposition* at 26.

the incumbent LEC seeks to retire the existing copper loop in brownfield situations. As the Petition explains, building in the capabilities to offer a 64 kbps voice-grade channel over fiber is costly.[86] As the Petition explains, building in the capabilities to offer a 64 kbps voice-grade channel over fiber is costly.[87] COMPTEL complains that the Petition does not attempt to quantify the cost.[88] [[BEGIN HIGHLY CONFIDENTIAL]] X [[END HIGHLY CONFIDENTIAL]] providers submitted data to USTelecom indicating the average cost per wire center to implement a 64 kbps wholesale voice-grade channel over fiber. The data indicate that the average cost per wire center in which the capability to offer a 64 kbps voice-grade channel over fiber was made available fell in a range of [[BEGIN HIGHLY CONFIDENTIAL]] to [[END HIGHLY CONFIDENTIAL]]. Therefore the 64 kbps requirement forces the incumbent to waste resources to enable a capability that few, if indeed any, want.

As the record confirms, providers do not in 2014 still seek to provide narrowband voice services to the mass market over ILECs' legacy facilities as a meaningful and ongoing business model. As ITTA explained, the marketplace has changed fundamentally, "eliminat[ing] the utility of and need for the *Triennial Review Order's* requirement for ILECs to provide an unbundled 64 kbps voice channel when they retire copper loops and replace them with fiber, given competition from wireless providers, cable companies, and OTT VoIP providers."[89] The 64 kbps requirement stands today as a costly vestigial burden that applies only to one set of providers in a highly competitive marketplace. The Commission should forbear from applying it and forcing ILECs to incur wasteful costs.

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[86] *See Petition* at 57-58.
[87] *See Id.* at 58-59.
[88] *See COMPTEL Opposition* at 27.
[89] *See Comments of ITTA – The Voice of Mid-Size Communications Companies* at 8.

V. THE COMMISSION SHOULD GRANT RELIEF FROM SECTION 214(e) OBLIGATIONS IN ALL REMAINING AREAS WHERE A PRICE CAP DOES NOT RECEIVE FEDERAL HIGH-COST SUPPORT

On December 11, 2014, the Commission adopted an Order in its CAF II proceeding that granted a portion of the relief requested in the Petition.[90] Specifically, the Commission forbears from enforcing ETC voice obligations in areas where price cap carriers are not eligible to receive CAF II support (i.e. low-cost census blocks, census blocks where the carriers an unsubsidized competitor offers both voice and broadband at speeds of 10 Mbps downstream/1 Mbps upstream, and census blocks where another provider is awarded CAF II support).[91] While USTelecom applauds this relief, we ask that the Commission take a step further and grant relief from the ETC obligations and designations in all remaining areas where a price cap carrier does not receive federal high-cost support. Even with the CAF II Order's forbearance, USTelecom's members still will have unfunded ETC obligations in high- cost and extremely high-cost areas if they decline CAF II state-level commitment and no bidder is awarded CAF II support to serve those areas in the competitive bidding process. As AT&T detailed in its comments, it is extraordinarily costly to continue providing voice service in these areas[92] and requiring price cap carriers to continue to provide voice service as an ETC seems particularly unnecessary given the large number of competitive voice providers that exist even in extremely high-cost areas.

It is also important that the Commission forbear from price cap carriers' ETC designations in areas where they do not receive federal high-cost support. Doing so ensures that states could not use the ETC designation to impose state-specific unfunded obligations on price

[90] *In the Matter of Connect America Fund, ETC Annual Reports and Certifications, Petition of USTelecom for Forbearance Under 47 U.S.C. §160(c) from Obsolete ILEC Regulatory Obligations that Inhibit Deployment of Next-Generation Networks*, WC Docket Nos, 10-190, 14-58, 14-192, FCC 14-190, (adopted Dec. 11, 2014).
[91] *See Id.*
[92] *See Comments of AT&T In the Matter of Connect America Fund, Universal Service Reform Mobility Fund, ETC Annual Reports and Certifications, Establishing Just and Reasonable Rates for Local Exchange Carriers, Developing a Unified Intercarrier Compensation Regime*, WC Docket Nos, 10-190, 10-208, 14-58, 07-135, 01-92 (Aug. 8, 2014) at 13-15.

caps carriers. USTelecom asks that the Commission grant this relief from both the ETC obligations and designations in unfunded areas as long as there is at least one other voice provider – wireline or wireless. Finally, USTelecom also asserts that carriers should be relieved from Lifeline obligations in such areas where there is at least one other Lifeline provider versus having to go through the section 214(e)(4) relinquishment process, which has no deadline on state commission action of ETC relinquishment notices.

VI. ELIMINATION OF THE COMPUTER INQUIRY RULES WILL NOT HARM CONSUMERS

Although COMPTEL argues that USTelecom failed to show how eliminating the Computer Inquiry safeguards would not cause customers to lose access to reasonably priced service,[93] USTelecom in fact provided national and state by state data for all 50 states that shows a pattern of sustained loss for ILECs in the marketplace.[94] In today's marketplace, non-common carriers such as cable companies are strong and growing competitors in both the wireline voice marketplace and the broadband marketplace, and it is no longer the case that ESPs are "dependent upon common carriers for reasonably priced communication facilities and services."[95] Furthermore, a potential grant of the pending Comcast-Time Warner Cable merger would only serve to improve cable providers' competitive role. The data submitted shows that these legacy requirements selectively impede LECs from competing on even terms with cable companies and other vigorous competitors.[96] It therefore is in the public interest to eliminate these unnecessary requirements.

The Full Service Network (FSN) and Alarm Industry Communications Committee (AICC) argue that the Petition does not include sufficient evidence to forbear from the Open

[93] *See COMPTEL Opposition* at 29.
[94] *See Petition* at 9-15.
[95] *See Computer I NOI*, 7 FCC 2d at 15.
[96] *See Petition* at 9-15.

Network Architecture (ONA) and Comparably Efficient Interconnection (CEI) requirements.[97] But insofar as the alarm industry primarily is aimed at serving residential customers, the Petition contains substantial residential data at the state and national level that demonstrates the enormous competition in the residential markets.[98] Furthermore, as USTelecom showed in the Petition, many alarm systems can and do use cable and other qualifying VoIP providers.[99] Therefore, continuing to apply these outdated regulations only serves to impede ILECs' ability to compete with other providers of the same service.

The record makes clear that there is no ILEC monopoly over the transmission capabilities needed to provide enhanced services. Previously, the Commission refused to forbear from the substantive *Computer Inquiry* requirements, based in part on its view that there was insufficient record evidence that alternative wholesale transmission services would be available to ESPs.[100] But in the *Computer Inquiry* context the rules are designed to promote consumer interests based explicitly on the fear that LECs would privilege their own enhanced services over enhanced services provided by competitors, thereby making competitors, "dependent upon common carriers."[101] In today's competitive marketplace, ESPs can provide services without direct access to traditional phone lines and are therefore no longer dependent upon LECs for access to consumers. There is thus no way for ILECs to exercise exclusionary market power to the detriment of ESPs, making the entire rationale for the *Computer Inquiry* framework obsolete.

Furthermore, the CEI and ONA rules impose other costs that are well documented in the

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[97] *See FSN Opposition* at 1-2 & 5-9.
[98] *See Petition* at *Appendix B, Cave Declaration.*
[99] *See* "VoIP Requirements," http://www.cpisecurity.com/customer-care-center/resources/voip-requirements/ (last visited Jan. 29, 2014); "Questions about VoIP," http://www.adt.com/customer-service/voip-faqs/ (last viewed 12/17/2014).
[100] *See USTelecom Forbearance Order*, 28 FCC Rcd 7627, 7643-44 (2013).
[101] *See Computer I NOI*, 7 FCC 2d at 15.

Commission's own past orders.[102] As noted in the Petition, both the rules and the regulatory processes they have spawned fundamentally impede the ability of carriers to develop and deploy innovative products that respond to market demands in a timely fashion. This ultimately reduces each carrier's incentive and ability to invest in and deploy network infrastructure. Eliminating CEI and ONA will relieve carriers of these additional types of costs, which are distinct from those costs historically associated with meeting the ONA reporting requirements.[103] Granting forbearance would fully protect the interests of any ESPs and consumers, while ensuring that carriers will be allowed to innovate and compete effectively going forward and service providers can design applications based on the superior capabilities and functionality of advanced broadband networks.

VII. THE COMMISSION SHOULD FORBEAR FROM REQUIRING ILECS TO SHARE NEWLY DEPLOYED ENTRANCE CONDUIT AT REGULATED RATES.

In the Petition, USTelecom asks the Commission to take a small step toward modernizing its conduit access rules by forbearing from the obligation for ILECs to allow CLECs access to newly deployed entrance conduit (*i.e.*, conduit from the property line to a commercial building)

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[102] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Universal Service Obligations of Broadband Providers, Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services, Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements, Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises, Consumer Protection in the Broadband Era,* Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14887-88 ¶ 65 (2005), *aff'd sub nom., Time Warner v. FCC*, 507 F.3d 205 (3rd Cir. 2007).

[103] The Commission eliminated ONA reporting requirements via waiver in 2011. In the Notice of Proposed Rulemaking leading to that waiver, the Commission acknowledged that the CEI/ONA reporting rules impose significant costs on BOCs without any corresponding benefit. *Review of Wireline Competition Bureau Data Practices; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements,* Notice of Proposed Rulemaking, 26 FCC Rcd 1579 (2011).

at regulated rates.[104] Remarkably, the Commission's rules currently permit a CLEC to demand access to such newly constructed conduit, at below-market rates, while refusing to provide an ILEC access to that conduit when the CLEC constructs it.[105] While this asymmetric obligation dates back to a questionable statutory interpretation in 1996,[106] adopted in 47 C.F.R. § 1.1403(a), it has had an increasingly corrosive effect on competition in recent years as cable providers and other CLECs spread fiber to more and more commercial buildings.[107] As explained in the Petition, continued enforcement of these conduit access obligations is not necessary in this narrow context to ensure just, reasonable and nondiscriminatory rates and practices or to protect consumers.[108] The requested forbearance will also serve the public interest by ensuring that all LECs have incentives to invest in new infrastructure and facilities.[109]

In response, CLEC commenters raise a series of predictable objections: that USTelecom has failed to make a *prima facie* case;[110] that reducing CLEC access to below-market conduit will inhibit their facilities deployment;[111] that ILECs possess unique advantages, arising from their "prior monopoly status," justifying asymmetric conduit-access obligations – apparently indefinitely.[112] None of these arguments justify denial of the requested forbearance.

USTelecom has presented a prima facie case. Despite the fact that the Petition and its supporting declaration comprise nearly 300 pages, CLECs claim that USTelecom has failed to provide sufficient evidentiary support for the narrow relief it seeks from ILEC conduit-access

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[104] See Petition at 85-94.
[105] *See* I*d*. at 86-87.
[106] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 16103-04, ¶ 1231 (1996), (subsequent history omitted). *See* Petition at 86-87 (noting the Ninth Circuit's "'serious doubts about the FCC's analysis'" regarding the interplay between Sections 224 and 251(b)(4)).
[107] *See XO Comments* at 8 (describing XO's ongoing $500 million capital expansion project).
[108] *See Petition* at 88-90.
[109] *See Id.* at 90-94.
[110] *See Comments of the ACA* at 2-3.
[111] *See Joint CLECs Opposition* at 23-24.
[112] *See COMPTEL Opposition* at 35.

obligations. This is incorrect. Consistent with the Commission's procedural requirements for forbearance petitions,[113] USTelecom has specified in detail how the requested relief meets each of the three forbearance criteria, taking into account relevant Commission precedent. With respect to the first two prongs of the Section 10 criteria,[114] The Petition notes that competitors no longer need access to ILEC entrance conduit, particularly in greenfield and brownfield areas, because they can and do construct such conduit, as they steadily win business customers, large and small. Therefore, access to ILEC entrance conduit in these limited circumstances is not necessary to ensure just, reasonable and nondiscriminatory rates and practices or to protect consumers.[115] Regarding the third prong, the Petition shows that the requested forbearance will serve the public interest by reducing an inequity in the Commission's current conduit-access rules that inhibit both ILEC and CLEC deployment incentives.[116]

None of the data cited by the CLECs is necessary to grant the requested forbearance. For example, XO faults USTelecom for failing to provide evidence detailing how often XO and other CLECs build their own entrance conduit in greenfield and brownfield areas.[117] Not surprisingly, USTelecom does not possess such data. If the Commission believes that this information is important, USTelecom asks that the Commission request it from the CLECs.[118] USTelecom views information regarding CLECs' current conduit deployment as unnecessary and potentially

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[113] *See In the Matter of 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, 9553 ¶ 17 (2009) ("*Forbearance Procedures Order*").
[114] Section 10(a)(1) requires a showing that enforcement of the regulation or provision in question 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[.]" 47 U.S.C. § 160(a)(1). Section 10(a)(2) requires a showing that such enforcement "is not necessary for the protection of consumers[.]" *Id.;* 47 U.S.C. § 160(a)(2).
[115] *See Petition* at 88-90.
[116] *See Id.* at 90-94.
[117] *See XO Comments* at 5-6.
[118] *See Forbearance Procedures Order*, 24 FCC Rcd at 9552, 9553 ¶¶ 15, 17 (allowing petitioners to identify relevant data or information possessed by third parties and also to provide, on reply, counter-arguments and data responsive to arguments and data supplied in oppositions and comments).

misleading, however, as it most likely would understate CLECs' ability to deploy entrance conduit. As long as CLECs can obtain access to ILEC entrance conduit at next to nothing, one would expect they will opt to place their fiber in ILEC conduit rather than surrender this regulatory-conferred competitive advantage.

Much more relevant to the forbearance inquiry is the fact that CLECs can and do construct such conduit, which XO readily admits.[119] As the Commission found in the analogous context of unbundling fiber-to-the-home ("FTTH") and fiber-to-the-curb ("FTTC") loops in greenfield and brownfield areas, CLECs' deployment of such facilities demonstrates that CLECs' ability to compete will not be impaired without access to the ILEC infrastructure in question.[120] That a CLEC must have a sufficient business case to justify deploying new conduit is no different than for an ILEC. Each is on equal footing. Whoever wins the customer or customers in a commercial building anticipates sufficient revenues to justify the deployment, given the expected income from the services that can be provided over fiber.[121] And, as noted in the Petition, CLECs now routinely win such business, as demonstrated by the decline in ILEC business line counts by 30 percent from December 2008 through December 2013, as non-ILEC business counts grew by approximately 6.6 million.[122] While cable providers are experiencing

[119] *See XO Comments*, *Declaration of George Kuzmanovski* ¶ 4 ("*Kuzmanovski Declaration*").

[120] *In the Matter of 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, 18 FCC Rcd 16978, 17143 ¶ 275 (2003) ("*TRO*"), *subsequent history omitted*; *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Reconsideration, 19 FCC Rcd 20293, 20298-99 ¶ 12 (2004) ("*FTTC Recon Order*"), *subsequent history omitted*. *See also*, the claim of Joint CLECs. that the Commission "retained" the conduit access requirement in the *TRO* is misleading at best, as that requirement was not even under consideration in that proceeding; *Joint CLECs Opposition* at 24.

[121] *See TRO*, 18 FCC Rcd at 17144 ¶ 276; *FTTC Recon Order*, 19 FCC Rcd at 20299 ¶ 13. While the *TRO* and *FTTC Recon Order* focused on mass market deployments, the same logic applies to fiber deployed to commercial buildings, in that the higher-capacity services provided over fiber typically provide revenues sufficient to justify deployment. *See TRO*, 18 FCC Rcd at 17168 ¶ 315 (eliminating unbundling obligation for OCn loops based, in part, on the Commission's finding that CLECs can often overcome the barriers associated with loop deployment at the OCn level).

[122] *See FCC Local Competition Report Year-End 2013* at Table 2. *See also Petition* at 13-14 and *Caves Declaration*

year-over-year growth of approximately 20 percent in quarterly business service revenues,[123] CLEC success is hardly limited to cable. The third-largest provider of U.S. business Ethernet services is Level 3, with its acquisition of tw telecom.[124]

USTelecom seeks forbearance from ILEC conduit-access obligations in a very narrow context – for newly-deployed conduit from the property line to a commercial building (*i.e.*, entrance conduit). In this limited context, most of the CLECs' arguments about ILEC purported "first-mover advantages" are simply irrelevant. Just as with FTTH and FTTC deployments, "competitive LECs face similar barriers to deployment as incumbent LECs."[125] For example, the purported ubiquity of ILEC conduit does not give an ILEC any cost advantage in installing entrance conduit to a particular location.[126] Whether done by a CLEC or an ILEC, the construction process is the same: the company must trench and then lay new conduit to carry its fiber to the building.

Other first-mover advantages allegedly enjoyed by ILECs are similarly illusory, particularly in this context. For new construction, ILECs have no pre-existing facilities or relationship with the building owner they could leverage to their advantage. Even for brownfield deployments, ILECs face the same hurdles as CLECs in deploying new entrance conduit. They

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at ¶ 15. The data in the Petition and the Caves Declaration reflected results as of June 30, 2013, at which point ILEC business lines had fallen 27 percent from December 2008 and non-ILECs had grown by 5.4 million from the same point in time. The data cited above reflect more current data from the same FCC data set, which was released after the Petition was filed.

[123] *See Petition* at 14.

[124] Press Release, Vertical Systems Group, *Mid-Year 2014 U.S. Carrier Ethernet Leaderboard* (Aug. 20, 2014), available at http://www.verticalsystems.com/vsglb/mid-year-2014-u-s-carrier-ethernet-leaderboard/ (last viewed 12/17/2014).

[125] *See FTTC Recon Order*, 19 FCC Rcd at 20298-99 ¶ 12 (footnote omitted).

[126] *See Kuzmanovski Declaration* at ¶ 10 (claiming that ILECs' "nearly ubiquitous conduit and facilities" somehow make ILECs' "costs to lay facilities to any new building or development, or to overbuild to a building they already serve – bring fiber to that building in new conduit – are less, on average, than those of competitors which have existing conduit and facilities that are not as widely and densely distributed"). In fact, ILECs' fiber footprints are far from ubiquitous. According to Vertical Systems, more than 60 percent of U.S. commercial buildings with twenty or more employees had no access to fiber at the end of 2013. Press Release, Vertical Systems Group, *U.S. Business Fiber Gap Narrows in 2013; Fiber Penetration Reaches 39.3% of U.S. Commercial Buildings with 20+ Employees* (Apr. 3, 2014), available at http://www.verticalsystems.com/vsgpr/u-s-business-fiber-gap-narrows-in-2013/.

must negotiate with the building owner (who may be reluctant to have its building grounds torn up to place new conduit), they must engage in the same construction process as a CLEC, and they must restore the property when the conduit construction is complete. ILECs also incur the same potential delays in building new conduit as CLECs, and "time can be a significant factor in securing a customer" for them as well.[127] Finally, CLEC arguments about ILECs' access to preexisting rights-of-way and longstanding relationships with local franchising authorities are inapt with respect to entrance conduit.[128] Because entrance conduit is built on private, rather than public, property, franchise and right-of-way considerations do not apply.

Thus, without below-market access to ILEC conduit, a CLEC's decision to build new entrance will largely be driven by whether it has won, or anticipates winning, sufficient revenues through the provision of fiber-based services to justify the expense of installing the infrastructure and facilities necessary to provide those services – the same basic calculus as for an ILEC.[129]

As discussed in the Petition, the Commission's current asymmetric conduit-access obligations undermine both CLECs' and ILECs' incentives to deploy entrance conduit. CLECs have little incentive to incur the expense of deploying entrance conduit if they can use ILEC conduit to extend their fiber to a building at low regulated rates.[130] Indeed, that is exactly what seems to have occurred, as ILECs can get requests for access to an ILEC's conduit to a new building even before the ILEC has built or finalized the design of that conduit.

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[127] *See Kuzmanovski Declaration* at ¶ 15.
[128] *See COMPTEL Opposition* at 33; *Joint CLECs Opposition* at 24; *Kuzmanovski Declaration* at ¶¶ 16-17.
[129] According to XO, it typically undertakes a business case on a building-by-building basis before constructing its own conduit to a building, just like an ILEC would typically do. *See Kuzmanovski Declaration* at ¶ 7. And, again just as for an ILEC, "[t]he increased costs from deploying its own conduit to serve . . . one customer may not be justified." *See Kuzmanovski Declaration* at ¶ 14. Particularly since CLECs such as XO target commercial businesses across the country, ILECs do not have a material advantage in obtaining access to new buildings. *See* XO website, http://www.xo.com/why/the-right-network/reach/ (noting that "XO has the metro network coverage to go directly to where your business is.") (last viewed 12/16/ 2014).
[130] *See Petition* at 92 (noting disparity between the cost of deploying conduit and the rates paid by CLECs to lease that conduit); Joint CLEC Opposition at 23-24 (confirming such disparity).

ILECs similarly have diminished incentives to build entrance conduit under the current asymmetric conduit-access rules because they face the real prospect of being undercut by a competitor who has avoided the thousands of dollars of upfront expense necessary to build its own conduit.[131] Given falling prices for Ethernet and other fiber-based services,[132] the extra cost that an incumbent must recover in its rates may well make the difference between winning and losing a bid.[133]

Taking account of these incentives, the Commission should grant the limited forbearance from its conduit-access requirements sought by USTelecom. Reducing these incentives to investment will further the goals of Section 706, as well as the Commission's own objectives for increased deployment of next-generation facilities and services.

VIII. THE COMMISSION SHOULD PERMIT PRICE CAP CARRIERS TO USE CONTRACT TARIFFS TO LOWER RATES FOR BUSINESS DATA SERVICES

In requesting that the Commission forbear from its rules that currently restrict the ability of price cap ILECs to respond to competition for high speed business data services, USTelecom's petition seeks to extend one of the chief benefits of competition –specifically, lower rates – to even more customers. Specifically, the petition requests that that the Commission eliminate the asymmetry in the current regulations that hamstring price cap ILECs by preventing them from offering customers nationwide reduced rates and more flexible terms than are otherwise available in tariffs. This relief will directly benefit consumers, who will be the ultimate beneficiaries of lower prices, and will advance the Commission's goals in promoting

[131] The current rules also allow a CLEC to provide service more quickly than the ILEC in buildings in which they alone have entrance conduit, whereas ILECs do not enjoy a similar benefit when they deploy new entrance conduit. *See Kuzmanovski Declaration* at ¶ 15 (noting that XO can deploy service "much more rapidly by occupying [an ILEC's] existing conduit with its own fiber than by having to construct its own conduit facilities[.]").

[132] *See* Carrier Ethernet News, *TeleGeography Marks Accelerated Decline in Carrier Ethernet Pricing Worldwide* (Jun. 12, 2014), available at http://www.carrierethernetnews.com/articles/787410/telegeography-marks-accelerated-decline-in-carrier/. (last viewed 12/17/2014).

[133] More than 30 providers – most of them non-ILECs – offer enterprise broadband services nationally or to large parts of the country. *See Petition* at 14.

the increased availability of next generation high bandwidth data services. As ITTA succinctly described in their comments, "allowing price cap ILECs to use contract tariffs for Business Data Services in all geographic regions will allow customers to obtain these services at reduced rates and on more flexible terms and conditions, thus increasing customer choice and improving competitive conditions."[134]

Not surprisingly, especially in view of the artificial competitive advantages that the current regulatory regime provides them, a number of CLEC commenters, including major facilities-based providers XO Communications (XO) and Level 3, oppose the grant of any relief from those rules. Citing to the Commission's 1999 *Pricing Flexibility Order*,[135] these CLECs claim that preventing ILECs from offering customers (including presumably the CLEC commenters themselves) lower rates through contract tariffs outside of existing Phase I areas is necessary to prevent "exclusionary pricing behavior" that might impede the deployment of competitive facilities.[136] In other words, the same carriers that have long complained that ILEC rates for special access services are too high now paradoxically claim that lowering those rates would be anti-competitive.

Before detailing the lack of merit in these arguments, it is important to emphasize the limited nature of the relief that the Petition seeks. USTelecom seeks only to extend the existing Phase I contract tariff regime nationwide so as to allow price cap carriers to contract with customers at rates that are lower than, and on terms and conditions that are more flexible than, the rates and terms available in tariffs. It is just as important to note what the Petition does not

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[134] *See ITTA Comments* at 10.
[135] *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 US 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).
[136] *See Comments of XO Communications* at 10-16; *see Joint CLECs Opposition* at 16-22; *see COMPTEL Opposition* at 36-40.

do. In particular, USTelecom does not seek forbearance from the requirement to maintain those tariffs. The rates, terms and conditions in those existing tariffs, all of which are presumed lawful, just and reasonable, will still be available to customers. Thus, the relief sought in the Petition would only permit price cap carriers to lower rates, not to raise them. Moreover, as they do now, customers who believe carriers are abusing the limited pricing relief and engaging in unjust and unreasonable practices will have recourse to the Section 208 complaint process.

In addition to the fact that there is no monopoly provider, the fact that tariffed rates, terms and conditions will remain in place in and of itself eliminates the possibility of exclusionary pricing behavior. The economic theory underlying the concept of exclusionary pricing posits that a "monopolist," after eliminating competition through reduced rates, would then be in a position to recover the previously forgone profits by charging customers supra-competitive rates.[137] But the existence of just and reasonable tariffed rates as a backstop removes any prospect for subsequently offsetting contracted rate reductions with supra-competitive rates.

Moreover, given the irreversible evolution in the competitive marketplace for Business Data Services, the notion that the carriers who would receive the limited relief sought in the Petition could be considered "monopolists" in the provision of those services is silly. The theoretical concerns about the possibility of exclusionary conduct that the Commission voiced 15 years ago have been overcome by the reality of robust and widespread facilities-based competition from a variety of providers. As the Petition described, evidence abounds that competition has become even more intense in 2014. The shift from legacy TDM services to Ethernet continues to accelerate. Independent analysts have found that "the U.S. Ethernet

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[137] *See Pricing Flexibility Order* at ¶79 ("Economists have long noted the incentives that monopolists have to reduce prices in the short run and forgo current profits in order to prevent the entry of rivals or to drive them from the market. The monopolist then would be able to raise prices above competitive levels and earn higher profits than would have been possible if the exclusionary pricing behavior had not occurred and competitors had not exited or been deterred from entering the market.")

services market has entered a very healthy growth period," and "[d]uring the first half of 2014, more new Ethernet customer ports were installed than during any previous corresponding period." Competitive providers were instrumental in that growth, as the evidence shows that Ethernet market shares remain fragmented among many providers; AT&T, Verizon, tw telecom, CenturyLink, Time Warner Cable, Comcast, Cox, Level 3, and XO all have more than 4 percent of the retail ports, and seven other providers have between 1 and 4 percent.[138] The cable providers' business services operations continue to grow rapidly: Comcast just reported that its business services revenue increased 22 percent in the second quarter of 2014 to an annual run-rate of $4 billion,[139] and Cablevision similarly reported that its second quarter revenues increased 6.7 percent to $88 million.[140] Time Warner Cable Business Class recently announced significant enhancements to its Ethernet Services portfolio to target mid-market and enterprise customers with business locations spread across the US, including a 150,000-fiber-route-mile network infrastructure that currently serves 31 major metro markets nationwide with more than 80,000 fiber-lit buildings, 835,000 DOCSIS-equipped buildings and connectivity into 64 data centers across the nation.[141]

The CLECs have shared in those marketplace successes. Indeed, the extensive network deployment by the same CLEC commenters who raise the specter of "exclusionary pricing" in opposition to the limited pricing relief sought in the Petition underscores the hollowness of those

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[138] *See* Vertical Systems Group, "Mid-Year 2014 U.S. Carrier Ethernet LEADERBOARD," *available at* http://www.verticalsystems.com/vsglb/mid-year-2014-u-s-carrier-ethernet-leaderboard/. ("Customers shopping for Ethernet services have a broader choice of companies with substantial Ethernet assets, including the sixteen providers on the mid-2014 LEADERBOARD and Challenge Tier rosters.") (last viewed 12/18/2014).

[139] *See* "Comcast Reports Second Quarter 2014 Results," available at http://www.cmcsa.com/releasedetail.cfm?ReleaseID=861091 (last viewed 12/18/2014).

[140] "Cablevision Systems Corporation Reports Second Quarter 2014 Results," available at http://www.businesswire.com/news/home/20140805005727/en/Cablevision-Systems-Corporation-Reports-Quarter-2014-Results (last viewed 12/18/2014).

[141] *See* Press Release, "Time Warner Cable Business Class Announces Major Enhancements to Its Ethernet Services Portfolio",available at http://business.timewarnercable.com/content/twc/en/business-home/resource-center/news/twcbc-announces-major-enhancements-to-its-ethernet-services-portfolio.html (last viewed 12/18/2014).

claims. For example, in its comments XO touts the fact that it has deployed its own network "in more than three dozen large and mid-size metropolitan markets, which are connected by XO's nationwide fiber backhaul facilities, and connect more than 3,300 buildings."[142] XO also notes that it is in the midst of a $500 million capital expansion project that will permit it to "light many more buildings."[143] For its part Level 3, which already possessed an extensive fiber backbone, explained that its "financially compelling and very strategic" acquisition of tw telecom this year will provide its global customers with the benefit of "tw telecom's deep metropolitan footprint and buildings connected to the network, enabling a higher quality and more reliable on-net experience for customers doing business in North America."[144] And this competitive deployment is not restricted to Tier I cities. For example, the Zayo Group's extensive network – according to its website, it reaches thousands of buildings in 46 states and Washington, D.C. – not only connects the largest U.S. cities, but also "many Tier 2-5 U.S. markets.[145]

The CLECs' predictable carping about ILEC special access term and volume discount plans does not provide a basis for denying forbearance.[146] As the ILECs have demonstrated in the special access proceeding, the terms and conditions that the competitive carriers claim "lock them in" do not in fact foreclose them from obtaining service from alternative providers. For example, the AT&T tariff that the CLECs claim is a "loyalty" contract is a simple term plan under which customers can purchase individual circuits for one of six terms: month-to-month, 1-year, 2-year, 3-year, 5-year, and 7-year terms. AT&T (like other providers) offers lower rates in exchange for the benefits of longer terms, which include predictability of demand. A customer

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[142] *See XO Comments* at 8.
[143] *See Id.*
[144] *See* Press Release, "Level 3 to Acquire tw telecom," *available at* http://www.twtelecom.com/investor-guide/level3/ (last viewed 12/18/2014).
[145] *See* "About Zayo" available at http://www.zayo.com/company/company-overview. (last viewed 12/18/2014).
[146] *See Joint CLECs Opposition* at 18-19; *XO Comments* at 13-114; *COMPTEL Opposition* at 38-39.

can buy as much or little from AT&T as it wants and can chose the term length it wants. These term discounts naturally include liability for early termination – without such fees, customers could sign up for the 7-year discount but cancel after just 1 year, thus gaining the discount and denying the ILEC its benefit of the bargain. But the CLECs themselves use these same devices, and AT&T's fees, as an example, are in line with, and even more favorable than, those charged by some CLECs.[147]

Nor do the "portability" options included in the ILEC term plans unfairly "lock up" CLEC demand. For example, the portability option in AT&T's tariff allows a customer to move as many DS1 circuits from one location to another as it wants without incurring ETFs.[148] The volume commitment for the portability feature is set by reference only to the customer's historical DS1 channel termination volumes *with AT&T* – not with rivals.[149] Customers who make this commitment get a substantial benefit: a customer can disconnect up to 20 percent of its DS1 circuits (including disconnects made to move them to another carrier) over the three-year term of the portability plan without paying any ETFs.[150] Any customer that chooses the portability option thus retains substantial flexibility: the initial commitment under the term plan portability option does not apply to demand the customer has already placed with other access suppliers,[151] and the customer remains free to place any further increased demand during the term of the plan – as well as up to 20 percent of the existing circuits it has with AT&T – with any supplier of the customer's choosing without incurring an early termination fee.[152]

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[147] *See AT&T Reply Comments, Casto Reply Declaration*, ¶¶3-4 and n.2, Docket No. 05-25 (filed March 12, 2013) (*AT&T Casto Reply Declaration*). Notably, in many circumstances, AT&T's TPP tariff does not impose an ETF where the CLEC transfers one end of the circuit to another location in the same LATA as the existing customer. *Id*. at ¶ 13 & n.5.
[148] *See AT&T Casto Reply Declaration* at ¶ 5.
[149] *See Id.*
[150] *See Id*.
[151] *See Id*. at ¶ 5.
[152] *See Id.* In fact, several of the complaining carriers that have actually elected the TPP portability option are

The CLEC commenters provide no evidence for the contention that such terms harm competition. No party is required to purchase service on these terms. Special access customers – including many of the complaining carriers here – can and do purchase dedicated access from the ILECs via a number of alternative arrangements, including other individually negotiated pricing flexibility agreements, non-tariffed Ethernet services, and UNEs.[153] And AT&T's terms and conditions clearly are not foreclosing entry or preventing migration of DSn-level demand to other services. As AT&T showed last year, its sales of DS1s to both wireless and wireline customers were declining.[154] And those trends have continued: in the period from March 2011 to August 2014, the number of DS1 special access circuits AT&T provided to wireless providers in its incumbent territories dropped by more than 60 percent.[155]

In short, there is no basis in either economic theory or marketplace reality for the CLECs' alleged fears that giving price cap carriers the same abilities the CLECs have – that is, to respond to competition with lower rates – will impede competition. To the contrary, in taking this small step to help level the playing field the Commission will be enhancing competition to the benefit of the customers for these Business Data Services, and ultimately their end user customers as well.

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purchasing at levels well above the minimum TPP portability option commitment level – which means that they have the flexibility today to transfer those circuits to another provider without incurring any additional charge, and yet have chosen not to do so.

153 *See AT&T Reply Comments* at 23-24, 31-32.

154 *See AT&T Casto Reply Declaration* at ¶¶ 28-29 (from March 2011 to December 2012, the number of DS1 special access circuits AT&T provided to wireless providers had dropped by more than 30 percent, and AT&T's sales of DS1 circuits to wireline customers had likewise begun to decline).

155 Although in some instances AT&T was able to win the provider's Ethernet business, in many instances the wireless provider selected an alternative Ethernet provider for its backhaul needs.

IX. CONCLUSION

For the reasons discussed in the Petition and above, the Commission should grant forbearance from application of the requirements discussed herein. Such forbearance will remove barriers to infrastructure investment, promoting deployment and competition in an effort to keep up with a modernizing industry and provide truly high speed services for the benefit of consumers.

Respectfully submitted,

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