

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

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

**OPPOSITION OF PUBLIC KNOWLEDGE, THE BENTON FOUNDATION, NEXT
CENTURY CITIES, NEW AMERICA’S OPEN TECHNOLOGY INSTITUTE, AND THE
NATIONAL HISPANIC MEDIA COALITION**

August 6, 2018

SUMMARY

USTelecom requests that the Federal Communications Commission (the “Commission”) hollow out the remainder of its pro-consumer, pro-competition wireline network access rules. USTelecom requests the Commission forbear from requiring incumbent local exchange carriers to (1) provide access to poles, ducts, and conduits on a nondiscriminatory basis; (2) unbundle and resell of network elements; and (3) fulfilling competitor requests for telephone exchange service and nondiscriminatory prices.

USTelecom’s petition is not complete as filed, has not demonstrated grounds for nationwide forbearance, and has carried neither its burden of persuasion nor production to demonstrate why enforcement of the Commission’s rules is unnecessary. Indeed, USTelecom has failed to show that (1) forbearance is not necessary to avoid unjustly or unreasonably discriminatory charges or practices; (2) that forbearance would not harm consumers; and (3) that forbearance is otherwise in the public interest as to *any* of the provisions from which it seeks relief.

Supplying nationwide data to support the claim that local markets are competitive is wholly inadequate for demonstrating that the requirements of sections 251(c)(3) and (4), 271(c)(2)(B)(III), and 272(e)(1) of the Telecommunications Act of 1996 and section 64.1903 of the Commission’s rules are no longer necessary. These provisions and their associated obligations are some of the primary reasons why competition in the switched voice and business data services market exists in many locations across the United States. The Commission must reject USTelecom’s petition and continue to enforce these important laws and regulations for the benefit of competition and consumers alike.

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Public Knowledge, the Benton Foundation, Next Century Cities, New America’s Open Technology Institute, and the National Hispanic Media Coalition oppose the petition¹ of USTelecom—The Broadband Association (“USTelecom”) requesting that the Federal Communications Commission (“FCC” or the “Commission”) forbear from enforcing pro-competition statutory provisions and regulations concerning unbundling and resale of network elements adopted by Congress pursuant to section 10 of the Communications Act of 1934, as amended.² USTelecom’s Petition is not complete as filed, has not demonstrated grounds for nationwide forbearance, and has carried neither its burden of persuasion nor production to demonstrate why enforcement of the Commission’s rules is unnecessary. Contrary to the unfounded claims made in the USTelecom Petition, sections 251(c)(3)-(4), 271(c)(2)(B)(III), and 272(e)(1) of the Telecommunications Act of 1996 (the “Act”), and section 64.1903 of the FCC’s rules of the FCC’s are some of the primary reasons why competition in the switched voice and business data services market exists in many locations across the United States and, indeed,

¹ Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks, WC Docket No. 18-141 (May 4, 2018) (“USTelecom Petition”).

² 47 U.S.C. § 160.

continue to contribute to pro-consumer investment and innovation in new broadband facilities and services for the American public.

I. BACKGROUND.

A. Sections 251(c)(3)-(4), 271(c)(2)(B)(III), and 272(e)(1) and Associated Obligations, as Well as Section 64.1903 of the FCC's Rules, Are Intended to Create Competitive Markets that Would Not Otherwise Exist.

The Act includes a number of provisions designed to promote and develop competitive markets. The breakup of AT&T in 1984 generated competition in manufacturing, long distance, and information services, but kept in place a regime of regulated monopoly for local telephone service.³ In adopting the Act, Congress sought to bring the benefits of increased investment and innovation to consumers of local services by reversing decades of monopoly control and creating the conditions for competition at the local level. In order to do so, Congress adopted a series of structural and behavioral instruments.⁴ Structurally, the Act is intended to reduce the regulatory barriers to entry, which decades of monopoly service provision and regulation had entrenched by requiring the local monopolies to disaggregate their services and make them available to would-be competitors at reasonable rates. Behaviorally, the Act conditioned the local monopolists' entry into related markets on the emergence of competition in the local exchange market.

The Act required that incumbent Local Exchange Carriers ("LECs") provide unbundled network elements ("UNEs") to other telecommunications carriers.⁵ In particular, incumbent LECs must:

³ See, e.g., Jerry Hausman *et al.*, *The Effects of the Breakup of AT&T on Telephone Penetration in the United States*, *The Am. Econ. Rev.* 183:2 178-84 (May 1993).

⁴ See generally Nicholas Economides, *The Telecommunications Act of 1996 and Its Impact*, New York University, Center for Law and Business, Working Paper No. EC-98-08 (Apr. 28, 1998), <http://raven.stern.nyu.edu/networks/telco96.html>.

⁵ "Telecommunications carrier" is defined at 47 U.S.C. § 153(51).

provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.⁶

Incumbent LECs must also provide UNEs “in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.”⁷

Section 251 also established resale as a market-entry vehicle separate from UNE availability. Incumbent LECs are required “to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers.”⁸ Under section 252, UNEs offered pursuant to section 251(c)(3) must be made available at cost-based rates using the TELRIC methodology.⁹

Section 271(c)(2)(B) next established a “competitive checklist” for access, interconnection and other threshold requirements that a Bell operating company (“BOC”) must demonstrate before it may offer in-region, interLATA services.¹⁰ Once “a BOC obtains section 271 authority to offer in-region interLATA services, these threshold requirements become

⁶ 47 U.S.C. § 251(c)(3). A “network element” is “a facility or equipment used in the provision of a telecommunications service . . . includ[ing] features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provisions of a telecommunications service.” 47 U.S.C. § 153(35).

⁷ *Id.* “Telecommunications service” is defined at 47 U.S.C. § 153(53).

⁸ 47 U.S.C. § 251(c)(4)(A).

⁹ 47 U.S.C. § 252(d)(1).

¹⁰ 47 U.S.C. § 271(c)(2)(B). “Bell operating company” is defined at 47 U.S.C. § 153(5).

ongoing requirements.”¹¹

Section 271(c)(2)(B)(iii), the only remaining checklist item that the Commission has not forborne from,¹² requires a BOC to provide “nondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by the [BOC] at just and reasonable rates in accordance with the requirements of section 224.”¹³ The Commission observed that this obligation is “concurrent [with the] obligations in section 224” but found “that, because of the nature and continued importance of section 224, it is necessary to retain [this requirement] as an additional enforcement mechanism for the concurrent section 224 obligations.”¹⁴

A BOC authorized to offer in-region interLATA service under section 271 must do so in accordance with the requirements of section 272.¹⁵ Of this section, only the requirements set forth in subsection 272(e), which requires BOCs to fulfill unaffiliated providers’ telephone exchange service¹⁶ and exchange access¹⁷ requests, remain in effect. This provision requires BOCs to provide quarterly reports to the Commission on performance metrics concerning “order taking, provisioning, and maintenance and repair of the BOCs’ DS0, DS1, DS3, and OCn

¹¹ *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. Section 160(C) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415 ¶ 7 (2005).

¹² *See Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) from Enforcement of Obsolete ILEC Legacy Regulations That Inhibit Deployment of Next-Generation Networks, et al.*, Memorandum Opinion and Order, 31 FCC Rcd 6157 ¶¶ 16-18, 24-36 (2015) (granting USTelecom’s petition for forbearance of section 271 checklist items aside from checklist item 3) (“*2015 USTelecom Forbearance Petition Order*”).

¹³ 47 U.S.C. § 271(c)(2)(B)(iii).

¹⁴ *2015 USTelecom Forbearance Petition Order* ¶ 19.

¹⁵ 47 U.S.C. § 271(d)(3)(B).

¹⁶ 47 U.S.C. § 153(54).

¹⁷ 47 U.S.C. § 153(20).

services.”¹⁸

Finally, section 64.1903 of the Commission’s rules, which imposes structure separation requirements on incumbent LECs that provision long-distance services, prevent BOCs and independent incumbent LECs from acting upon anti-competitive incentives.¹⁹

B. The Commission Is Only Permitted to Forbear from Enforcing Sections 251(c) and 271 When Competitive Markets Exist..

The USTelecom Petition carries a heavy burden to prove the statutory prerequisites for obtaining forbearance. Section 10(a) of the Communications Act provides that forbearance is appropriate only where:

- (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
- (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
- (3) forbearance from applying such provision or regulation is consistent with the public interest.²⁰

In evaluating whether a rule is “necessary” under the first two prongs of the three-part forbearance test, the Commission considers whether there is a current need for a rule.²¹ For

¹⁸ 2015 USTelecom Forbearance Petition Order ¶ 38 (quoting Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements 2000 Biennial Regulatory Review Separate, Report and Order and Memorandum Opinion and Order, 22 FCC Rcd 16440 ¶ 96 (2007)).

¹⁹ 47 C.F.R. § 64.1903.

²⁰ 47 U.S.C. § 160(a). “In making the determination under subsection (a)(3) [whether forbearance is in the public interest,] the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.” *Id.* § 160(b). In addition, “[a] State commission may not continue to apply or enforce any provision” from which the Commission has granted forbearance under section 10. 47 U.S.C. § 160(e).

those portions of the forbearance analysis that require the Commission to assess whether a rule is necessary, the D.C. Circuit has explained that enforcement need not be “*absolutely required*.”²² Rather, “it is reasonable to construe ‘necessary’ as referring to the existence of a strong connection between what the agency has done by way of regulation and what the agency permissibly sought to achieve with the disputed regulation.”²³ In one particular case, the D.C. Circuit concluded that because the wireless number portability rules were “required to achieve the desired goal of consumer protection,” the Commission did not err in finding that the second prong was not met and forbearance was therefore not warranted.²⁴

In making the determination of whether forbearance is in the public interest under the third prong of the text, section 10(b) of the Act further requires the Commission to consider “whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services.”²⁵ If the Commission determines that “forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.”²⁶ Forbearance may only be granted where all three elements have been satisfied.

As the petitioner, USTelecom “bears the burden of proof—that is, of providing

²¹ See 2015 USTelecom Forbearance Petition Order ¶ 8.

²² *Cellular Telecomms. & Internet Ass’n v. FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003)

²³ *Id.* at 512.

²⁴ *Id.*

²⁵ *Id.* § 160(b).

²⁶ *Id.*

convincing analysis and evidence to support its petition for forbearance.”²⁷ This burden of proof “encompasses both the burden of production and the burden of persuasion.”²⁸ Thus, in addition to stating a *prima facie* case²⁹ in support of forbearance, “the petitioner’s evidence and analysis must withstand the evidence and analysis propounded by those opposing the petition for forbearance.”³⁰ The Commission applies the forbearance standard to the arguments and evidence in the petition and is under no obligation to consider other arguments that might support forbearance.³¹

In addressing USTelecom’s previous forbearance petition in 2015, the Commission determined that section 10 does not require a competitive analysis to be treated as “determinative” where “other considerations are more relevant to [the Commission’s] statutory analysis.”³² In that case, the Commission found that an analysis of competition was unnecessary because USTelecom argued that “the changing communications landscape throughout the country has rendered the [relevant requirements] outmoded and harmful *as a general matter*.”³³

USTelecom takes a different approach here, however. Like Qwest Corp. in the *Qwest Phoenix Order* proceeding, USTelecom argues that sufficient competition makes forbearance

²⁷ *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, Report and Order, 24 FCC Rcd 9543 ¶ 20 (2009) (“*Forbearance Procedures Order*”).

²⁸ *Id.* ¶ 21.

²⁹ 47 C.F.R. § 1.54(b).

³⁰ *Forbearance Procedures Order* ¶ 21.

³¹ *See 2015 USTelecom Forbearance Petition Order* ¶ 8.

³² *Id.* ¶ 10.

³³ *Id.* ¶ 9.

appropriate.³⁴ The Commission has previously found market power analysis to be appropriate when “analyzing claims that competition in the legacy services market is sufficient to satisfy the three-part section 10 forbearance criteria, not only with respect to dominant carrier regulation, but also with respect to the other regulatory obligations at issue here, such as section 251(c)(3) unbundling.”³⁵ As the Commission explained in the *Qwest Phoenix Order*, “the Commission’s market power analysis was designed to identify when competition is sufficient to constrain carriers from imposing unjust, unreasonable, or unjustly or unreasonably discriminatory rates, terms, and conditions, or from acting in an anticompetitive manner.”³⁶ Indeed, as the Commission noted there, “[t]his market power analysis is the precise inquiry specified in section 10(a)(1)” and informs the Commission’s “assessment of whether carriers would have the power to harm consumers by charging supracompetitive rates.”³⁷

Although *some* individual markets may be competitive as USTelecom contends (although USTelecom has failed to demonstrate it), many others—especially rural markets—are not. There is no single, nationwide market for switched access voice subscription services or business data services. And in certain areas of the U.S., where the need for reliable communications is most acute, sections 251, 271 and 272, along with their associated obligations and implementing

³⁴ See USTelecom Forbearance Petition at 22 (“Although the Commission has adopted asymmetric regulatory requirements in markets that are not competitive, it has long recognized that in competitive markets, such regulatory disparities undermine consumer welfare by distorting competition.”); see generally *Petition of Qwest Corp. for Forbearance, Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona MSA*, Memorandum Opinion and Order, 25 FCC Rcd 8622 (2010) (“*Qwest Phoenix Order*”).

³⁵ *Qwest Phoenix Order* ¶ 37; see also *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 ¶ 439 (2015) (“Unlike here, the Commission in the *Qwest Phoenix Order* was addressing a petition where the rationale for forbearance was premised on the state of competition.”) (“*2015 Open Internet Order*”).

³⁶ *Id.*

³⁷ *Id.*

regulations, are absolutely necessary to ensure that competition exists. Accordingly, before forbearing from the regulatory requirements set forth in these provisions, the Commission must conduct a granular, market-by-market analysis of the information set forth by USTelecom in its petition and conclude that effective competition exists. Conducting such an analysis will prevent inappropriate application of section 10 forbearance to markets that are not sufficiently competitive, and avert further widening of the digital divide, which would otherwise be contrary to the public interest.

As discussed in more detail below, USTelecom has failed to make a *prima facie* showing that forbearance from enforcement of sections 251(c)(3)-(4), 271271(c)(2)(B)(iii), and 272(e)(1) of the Act or section 64.1903 of the FCC's Rules is warranted under each prong of this statutory standard and the Commission's rules.³⁸ USTelecom has failed to demonstrate that the enforcement of these regulatory requirements is not necessary to ensure just and reasonable or nondiscriminatory charges and practices by ILECs. USTelecom has likewise failed to show that the enforcement of the requirements set forth in sections 251(c)(3)-(4), 271271(c)(2)(B)(iii), and 272(e)(1) of the Act or section 64.1903 of the FCC's Rules along with their associated requirements and implementing regulations, are not necessary to protect consumers. And nothing in USTelecom's petition shows that every market in the United States is competitive, that forbearance from enforcing these provisions will promote competitive market conditions, or that forbearance is otherwise consistent with the public interest.³⁹ The USTelecom Petition must

³⁸ 47 C.F.R. § 1.54(b).

³⁹ 47 U.S.C. § 160(a). "In making the determination under subsection (a)(3) [whether forbearance is in the public interest,] the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the

be denied.

II. FORBEARANCE FROM ENFORCEMENT OF SECTION 271(C)(2)(B)(III) WILL HARM CONSUMERS AND COMPETITION AND IS CONTRARY TO COMMISSION PRIORITIES CONCERNING STREAMLINING INFRASTRUCTURE DEPLOYMENT.

Gaining reasonable and timely access to rights-of-way is one of the biggest impediments to deploying broadband facilities. In other contexts, the BOCs have complained exhaustively about how “aggressive demands” from some infrastructure owners “erect significant barriers that can either prevent or substantially delay these deployments.”⁴⁰ But in its latest forbearance petition, USTelecom appears to contend that concerns about the investment-sapping potential of artificial barriers to entry by infrastructure owners somehow do not apply when USTelecom’s member companies control the relevant infrastructure resources and stand to benefit from postponing or preventing market entry. The argument is not sustainable and should be denied.

Section 271(c)(2)(B), checklist item 3, requires BOCs to provide “nondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned by the BOC at just and reasonable rates in accordance with the requirements of section 224.”⁴¹ USTelecom requests that the Commission forbear from this requirement on grounds that the provision is “wholly redundant of section 224 itself.”⁴² USTelecom has raised—and the Commission has rejected—this claim before. In denying USTelecom’s push for forbearance of this provision in 2015, the Commission observed some overlap between the checklist item 3 of section 271(c)(2)(B) and section 224.

But the Commission sustained the provision “because of the nature and continued importance of

basis for a Commission finding that forbearance is in the public interest.” *Id.* § 160(b). In addition, “[a] State commission may not continue to apply or enforce any provision” from which the Commission has granted forbearance under section 10. 47 U.S.C. § 160(e).

⁴⁰ Comments of Verizon, WT Docket No. 16-421, at 6 (Mar. 8, 2017) (“Verizon Comments”).

⁴¹ 47 U.S.C. § 271(c)(2)(B)(iii).

⁴² USTelecom Petition at 38.

section 224” retaining checklist item 3 “is necessary . . . as an additional enforcement mechanism for the concurrent section 224 obligations.”⁴³ The Commission stated that robust enforcement of these provisions was especially important because section 224 is “necessary for the viability of facilities-based competition . . . [and] provides access to LEC infrastructure for all providers, including wireline, wireless, and broadband providers, without a required finding of impairment.”⁴⁴ Nothing has occurred in the three years between 2015 and 2018 that has rendered the Commission’s conclusions regarding the independent importance of both section 224 and section 271(c)(2)(B) any less relevant or important. If anything, given that so few regulatory safeguards remain, enforcing the objectives of section 224 through every means available has become even more critical as a constraint on market power at the local level. Checklist item 3 provides an important consumer safeguard and competitive check as an “additional enforcement mechanism” to section 224.

Few have done a better job than the BOCs themselves of explaining just how important retaining the full suite of enforcement remedies when it comes to accessing poles, ducts, and rights of way. Verizon, for example, has been among the loudest voices complaining of a long list of hard and soft impediments to deployment resulting from an inability to readily access poles, ducts and rights of way.⁴⁵ The BOC’s litany of complaints include an “unwillingness to engage in productive and timely negotiations” over access to rights-of-way; negotiations that “drag on for years”;⁴⁶ a view that access to rights of way presents an opportunity “to raise revenues, rather than an opportunity to encourage investment and deployment to bring robust

⁴³ *2015 USTelecom Forbearance Petition Order* ¶ 19.

⁴⁴ *Id.* ¶ 20.

⁴⁵ Verizon Comments at 6.

⁴⁶ *Id.* at 7.

wireless broadband services to their communities”;⁴⁷ and a variety of unreasonable restrictions on equipment size and siting.⁴⁸ Of course, all of these concerns apply with even greater force when the BOCs control the essential access infrastructure because the BOCs have an even greater economic incentive to adopt these practices than local governments do. Not only do the BOCs stand to benefit from the collection of supra-competitive rates to access basic infrastructure, but they also stand to benefit from raising their rivals’ costs and delaying their competitors’ entry into local markets. Given the BOCs’ persistent complaints about how readily infrastructure access can be used to frustrate market entry and competition, they have little room to complain about a decision of Congress to provide multiple means of remedying abuse of this type of market power. Access to section 271(c)(2)(B) remedies under the Act remains as necessary today under sections 10(a)(1) and (2) as when the Commission last ratified it in 2015, and forbearance from enforcing it would frustrate the public interest.

Since the Commission’s 2015 decision in the previous USTelecom forbearance petition proceeding, the Commission has focused a considerable amount of effort amending the agency’s rules concerning infrastructure, deployment, and siting issues.⁴⁹ Forbearing from section 271(c)(2)(B) would strip the Commission of an important enforcement mechanism that is crucial to ensure timely deployment of vital wireline and wireless infrastructure. Preserving the Commission’s authority under section 271(c)(2)(B) to ensure reasonable access to rights-of-way

⁴⁷ *Id.* at 8.

⁴⁸ *Id.* at 10.

⁴⁹ *See, e.g., Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Draft Third Report and Order and Declaratory Ruling, WC Docket No. 17-84, WT Docket No. 17-79, FCC-CIRC1808-03 (rel. July 13, 2018); *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Second Report and Order, WT Docket No. 17-79, FCC 18-30 (rel. Mar. 30, 2018).

is one of the single most important steps the Commission can take to accelerate broadband deployment, increase broadband investment in the United States, and close the digital divide.⁵⁰ More generally, access to poles, conduits, and rights of way are critical for deploying advance wireless infrastructure, which is essential to broadband access and competitive markets for broadband services.⁵¹ Forbearance from section 271(c)(2)(B) would unnecessarily limit the tools that the Commission has available to achieve these important public interest objectives.

III. USTELECOM HAS NOT MET ITS BURDEN FOR FORBEARANCE FROM THE UNBUNDLED ACCESS AND RESALE PROVISIONS IN SECTION 251(C)(3) AND (4) AND ASSOCIATED REQUIREMENTS UNDER SECTIONS 251 AND 252.

Based largely on broad statements concerning the general state of competition across the United States and unsupported allegations of “affirmative[] harm[],”⁵² USTelecom asks the Commission to grant forbearance from the unbundled access and resale provisions in section 251(c)(3) and (4) and associated requirements under sections 251 and 252. USTelecom, however, fails to meet its burden under section 10 to provide “convincing analysis and evidence” satisfying all three prongs of the forbearance test.⁵³ Accordingly, USTelecom’s request must be denied.

⁵⁰ Press Release, FCC, Chairman Pai Proposes Over \$500 Million in Funding to Promote Rural Broadband Deployment (Jan. 16, 2018), <https://docs.fcc.gov/public/attachments/DOC-348723A1.pdf> (“We need more deployment in sparsely populated rural areas if we’re going to extend digital opportunity to all Americans.”).

⁵¹ See, e.g., *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 32 FCC Rcd 3266 ¶ 3 (“Pole attachments are a key input for many broadband deployment projects. Reforms which reduce pole attachment costs and speed access to utility poles would remove significant barriers to broadband infrastructure deployment and in turn increase broadband availability and competition in the provision of high-speed services.”).

⁵² USTelecom Petition at 25.

⁵³ *Forbearance Procedures Order* ¶ 20.

A. USTelecom Has Not Shown That the Enforcement of Sections 251(c)(3) and 251(c)(4) Is Not Necessary to Ensure That the Charges and Practices Are Just and Reasonable and Are Not Unjustly or Unreasonably Discriminatory, as Required by the First Prong of Section 10 Forbearance Test.

USTelecom claims that the enforcement of sections 251(c)(3) and 251(c)(4) 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,” as required by the first prong of the Commission’s forbearance test.⁵⁴ But the USTelecom Petition provides no sufficient basis—and there is none—for granting this relief at all, much less on a nationwide basis.

USTelecom’s argument for why the Commission should grant forbearance from the bundling and resale requirements can be boiled down to the existence of competition in the United States. According to USTelecom, the presence of “widespread intermodal competition renders section 251(c)’s unbundling and resale mandates unnecessary to ensure reasonable and nondiscriminatory charges and practices.”⁵⁵ USTelecom further claims that unbundling requirements “in the presence of robust facilities-based competition” are “affirmatively harmful.”⁵⁶ In addition, USTelecom also argues that the elimination of the resale and unbundling requirements set forth in sections 251 and 252 will remove competitive distortions in the marketplace.⁵⁷

As previously discussed, when “analyzing claims that competition in the legacy services market is sufficient to satisfy the three-part section 10 forbearance criteria, not only with respect

⁵⁴ 47 U.S.C. §160(a)(1).

⁵⁵ USTelecom Petition at 26.

⁵⁶ *Id.* at 25 (citing *United States Telecom Ass’n v. FCC*, 290 F.3d 415, 429 (D.C. Cir. 2002) (discussing unbundling in the context of the impairment test)).

⁵⁷ *Id.*

to dominant carrier regulation, but also with respect to the other regulatory obligations at issue here, such as section 251(c)(3) unbundling,”⁵⁸ the Commission has generally conducted a market power analysis.⁵⁹ Only through a clear-eyed examination of conditions in the relevant product and geographic markets, the Commission has held, can the agency accurately assess “whether carriers would have the power to harm consumers by charging supracompetitive rates.”⁶⁰

USTelecom’s claims regarding the competitive status of markets nationwide fail to recognize that telecommunications markets in the United States—regardless of how you define them—are not all created equal. New York City and rural Mississippi, for example, do not equally enjoy the benefits that come with robust, facilities-based, intermodal competition. In fact, as the Commission has recognized on multiple occasions, too many consumers across the United States still lack access to reliable communications—much less multiple alternatives for communications services. And not all UNEs are created equal; dark fiber, for example, may be readily accessible or more easily deployed than a loop in one market versus another. The Commission should consider whether even on a market-by-market basis, eliminating unbundling requirements as to all network elements is wise.

But even assuming that all UNEs were equally available and there were no stark differences between urban and rural markets—and among different urban and rural markets—USTelecom simply has not put forward enough evidence to support its request.

Nothing in the USTelecom Petition demonstrates “robust facilities-based competition” in every geographic market in the United States. The Supreme Court has defined a relevant

⁵⁸ *Qwest Phoenix Order* ¶ 37. See also *2015 Open Internet Order* ¶ 439 (“Unlike here, the Commission in the *Qwest Phoenix Order* was addressing a petition where the rationale for forbearance was premised on the state of competition.”).

⁵⁹ *Id.*

⁶⁰ *Id.*

geographic market as the “area of effective competition . . . in which the seller operates, and to which purchasers can practicably turn for supplies”⁶¹ and cautioned that the market must reflect “the commercial realities of the industry.”⁶² In economics, the relevant geographic market is defined as the region in which a hypothetical monopolist that is the only producer of the relevant product or service in the region could profitably impose at least a “small but significant and non-transitory” price increase for the relevant product.⁶³ Given the absence of any geographic market showings in its petition, USTelecom appears to assume the market for local exchange services is national in scope, but absolutely no basis exists for such a claim. As the very name of the service implies, local exchange services are characterized by a local geographic market. The availability of competitive alternatives for exchange products is typically measured in yards, not miles, and under no circumstances can these fixed, wireline products and services be assumed to be competitive across all or most of a country comprised of diverse terrain, population density, infrastructure development, and resource allocation. USTelecom makes no effort to take into consideration the diverse collection of geographic markets that define local competition in the United States.

USTelecom also fails to show “affirmative harm” as a direct result from either unbundling under section 251(c)(3) or resale under 251(c)(4). While competitive markets are preferable to command-and-control regulatory direction, the mere presence of administrative

⁶¹ *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961); accord *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321, 359 (1963).

⁶² *Brown Shoe Co. v. United States*, 370 U.S. 294, 336 (1961); S.Rep. No. 1775, 81st Cong., 2d Sess. 5-6.

⁶³ *United States v. Engelhard Corp.*, 126 F.3d 1302, 1304 (11th Cir. 1997) (citing U.S. Dep’t of Justice & Fed. Trade Comm’n, Horizontal Merger Guidelines §§ 1.0, 1.11 (1992)); see also Department of Justice, *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act*, at 26 (2009), <https://bit.ly/2mPcLzj>.

safeguards that allow avenues for competitive opportunity are not, in and of themselves, harmful. On the contrary, regulation that enables competitive entry, including market-entry through UNE-based competition, helps diminish the need for even greater regulatory intervention in the market for local exchange services now and in the future. In the vast majority of the United States, the market for exchange services continues to be served by a single service provider. Even if USTelecom had made a particularized, market-specific showing of “affirmative harm,” the Commission would have to weigh whatever benefits removing the unbundling and resale obligations might offer wireline providers against the harm to the public from removing these pro-competitive policies, as well as the potential for even greater harm and disruption to the wireline carriers that may occur if more extensive regulatory intervention is required to remedy monopolistic pricing and service in the future.

Likewise, USTelecom provides no persuasive evidence that “there is effectively no remaining UNE-based competition in that marketplace.”⁶⁴ While UNE-based competition is surely a less meaningful presence in the local markets today than it was prior to widespread adoption of wireless broadband technology, even USTelecom concedes that some measure of UNE- and resale-based competition persists. How is this competition distributed? Where does it occur geographically? And are there commonalities that can apply from one geographic or product market to the next? USTelecom does not say. The forbearance standard of the Act requires detailed, empirical showings demonstrably absent in USTelecom’s petition.

Contrary to USTelecom’s claims, CLECs are relying on UNEs and resale to compete. As the record of this proceeding shows, competitive service providers rely on UNEs and resale to serve their customers, particularly in underserved rural and remote areas, and facilitate fiber

⁶⁴ USTelecom Petition at 27.

deployment.⁶⁵ Some CLECs rely on UNEs to provide service in areas where they are the only broadband provider, or where the ILEC or any cable provider is not offering comparable speed or quality.⁶⁶ Some CLECs have been able to be the first to market with high bandwidth mass market broadband services thanks to UNE availability, which has then prompted competitors to improve their offerings.⁶⁷ Sometimes a CLEC that relies on UNEs to provide broadband service is the only competition an ILEC faces.⁶⁸ Yet other CLECs use “unbundled subloops interconnected at ILEC remote terminals to serve customers that are otherwise unreachable.”⁶⁹ Even companies that are primarily facilities-based, like Uniti Fiber, “use significant numbers of unbundled network elements to expand [its] reach, meet customer demands, and establish access to new markets.”⁷⁰ As Uniti explains, although the company “may be able to overbuild some of these routes, many are in locations and over geographic obstacles that would be extremely costly, if not impossible, for us to re-create. Without access to these network elements, Uniti Fiber would lose access to some customers.”⁷¹ Loss of these inputs would also necessarily change the way competitors like Uniti enter new markets, “and certainly in a way that would only serve to slow deployment of broadband, especially to remote and rural areas.”⁷² Consumers would be harmed if they effectively lost the only competitive alternative they have for reliable voice and

⁶⁵ See, e.g., Letter from John Nakahata, Counsel to INCOMPAS, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-141, at 1-2 (July 13, 2018) (“INCOMPAS Letter”).

⁶⁶ See *id.* at 2.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See Letter from Jeffrey R. Strenkowski, Vice President, Deputy General Counsel of Governmental Affairs, Uniti Fiber to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-141, at 1 (July 13, 2018).

⁷¹ *Id.* at 1-2.

⁷² *Id.* at 2.

data services. And even if there were no CLECs using UNEs or resale today, which USTelecom concedes is not the case, the simple availability of UNEs and resale serves as check on monopolistic practices at the local level. These regulatory measures operate constrain the ability of ILECs to lower output, increase prices and innovate less than would be the case in a competitive market. Thus, sections 251(c)(3) and (4) continue to benefit consumers and promote competition, and forbearance from the Act’s unbundled access and resale provisions would be contrary to the public interest.

USTelecom also points to the outcome of the BDS proceeding to support its arguments. Oddly, USTelecom argues that “the precision of [the] newly crafted scheme [applied in the BDS context] leaves no room for any continued unbundling requirements.”⁷³ But rather than supplying an answer to the USTelecom forbearance question, the BDS example underscores the need for a more comprehensive analysis by the Commission, one that is “tailored precisely to today’s competitive realities.”⁷⁴ In the BDS context, the Commission undertook the most comprehensive evaluation of both product and geographic markets in the agency’s history prior to making its findings.⁷⁵ The Commission should do the same here. At the very least, the Commission should consider the status of competition in each geographic market before entirely eliminating these requirements.

USTelecom makes similarly unfounded competition-based claims with respect to the section 251 resale mandates, including government-mandated wholesale discounts, the duty to

⁷³ USTelecom Petition at 28.

⁷⁴ *Id.* at 15.

⁷⁵ *See Business Data Services in an Internet Protocol Environment; Technology Transitions; Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of ILEC Rates for Interstate Special Access Services*, Report and Order, 32 FCC Rcd 3459 (2017).

negotiate and section 252 requirements.⁷⁶ USTelecom's arguments ignore that ILECs do not offer commercial wholesale voice platform agreements in all markets and, even where they do, ILECs still impose limitations on the customers or types of services and features that may be offered. Section 251(c)(4) ensures CLECs are able to continue offering POTS where they operate by serving as a constraint to ILEC pricing.⁷⁷

In short, nothing in the USTelecom Petition demonstrates that enforcement of sections 251(c)(3) and 251(c)(4) is not necessary to ensure charges and practices are just, reasonable, and not unjustly or unreasonably discriminatory across the entire United States. Even if USTelecom's theoretical arguments regarding the costs of unbundling and resale were true, USTelecom still failed show that those arguments are true with respect to any particular market in the United States—much less as to all of them. USTelecom's attempt to meet its burden under prong one of section 10(a) fails.

B. USTelecom Has Not Shown That the Enforcement of the Requirements of Section 251(c)(3)-(4) Is Not Necessary for the Protection of Consumers.

USTelecom argues that “for the same reasons that section 251(c)(3) and (4) and the associated requirements are not necessary to ensure just, reasonable, and nondiscriminatory charges and practices, they are not necessary to protect consumers.”⁷⁸ According to USTelecom, “consumer interests will be advanced by forbearance, because forbearance will heighten competition by promoting the deployment of fiber networks and next-generation services that customers increasingly demand.”⁷⁹ Once again, USTelecom's arguments are supported by no evidence whatsoever. USTelecom appears to rely solely on the unproven assumption that

⁷⁶ USTelecom Petition at 29.

⁷⁷ See INCOMPAS Letter at 4.

⁷⁸ USTelecom Petition at 31.

⁷⁹ *Id.*

deregulation, regardless of the context, will spur network deployment and competition. To the contrary, USTelecom fails to recognize that the enormous advantages that incumbency affords its member companies. Princeton University professor of economics Dr. Robert Willig aptly described those advantages more than a decade ago:

ILECs enjoy enormous advantages over new entrants as a result of their legacy as protected franchise monopolists that currently serve over 90% of existing demand. ILECs benefit from large economies of scale and scope and enjoy important first mover advantages relative to CLECs with respect to rights-of-way and placement of outside plant and its supporting structures.⁸⁰

Moreover, these advantages are more dramatic in rural and remote locations. As NTIA Administrator David Redl recently observed, incumbents operating in remote or less populated areas “do not face competitive pressures that the Commission sees in other parts of the country. . . . Oftentimes, carriers in these areas lack the incentives that exist in more populated areas”⁸¹ The Small Business Administration has also raised concerns that many CLECs had invested heavily in fiber using the revenue generated from UNEs and moving customers to their own facilities-based network over time. In addition, “[t]he presence of CLECs in the market appears to be providing competitive pressure for incumbents to likewise invest in new fiber deployment and network upgrades.”⁸² Lack of access to UNES would hinder this progress. The benefits of incumbency have not changed and, if anything, may have strengthened as CLECs have surrendered in the face of entrenched resistance by the ILECs to any form of market

⁸⁰ Robert D. Willig, *Investment Is Appropriately Stimulated by TELRIC*, at 3.3, <https://bit.ly/2LPQj7W>.

⁸¹ Letter from David J. Redl, Administrator, NTIA, to Ajit Pai, Chairman, FCC, WC Docket No. 17-84, at 2 (filed July 19, 2018).

⁸² Letter from Major L. Clark, Acting Chief Counsel, SBA, and Jamie Belcore Saloom, Assistant Chief Counsel, SBA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-141 *et al.*, at 3 (filed Aug. 1, 2018).

access.⁸³

Even if one were to concede that the enforcement of the requirements of section 252(c)(3)-(4) may not be necessary for the protection of *all* consumers in all geographic markets, the Commission must ensure that consumers nationwide, including those living in rural and remote areas, will have access to essential communications services and will not be otherwise harmed by the competitive carriers' inability to provide service or affordable service. Without that showing, which USTelecom has not made, the USTelecom Petition cannot be granted.

C. USTelecom Has Failed to Demonstrate That Forbearance from the Requirements of Sections 251(c)(3) and (4) Is Consistent with the Public Interest.

USTelecom also fails the third prong of the forbearance test. USTelecom argues that “[f]orbearance will promote competition by eliminating incentives to rely on synthetic competition at the expense of genuine, facilities-based competition, while reducing administrative compliance costs, and freeing capital for use in deploying broadband networks and advanced services to consumers.”⁸⁴ In support of its argument, USTelecom points to an analysis prepared by Economists Incorporated and CMA Strategy Consulting.⁸⁵ Among other deficiencies, this study again treats all markets across the United States as if they had equal levels of investment, market access, competition and deployment outcomes. The study then

⁸³ One of the few remaining competitive pressures is the availability of unbundled network elements, which seems likely to encourage incumbents to invest more than they otherwise would. A monopoly ILEC will only invest further units of capital so long as the rate of return exceeds the capital investment. Services produced by further capital investment may bid down the services produced by previously invested capital, thus reducing the rate of return on capital investment. Conversely, a competitive market forces firms to compete with higher-quality and lower-cost services. Capital investment thus becomes a “competitive weapon” for keeping and acquiring market share. *Id.* at 3.5.

⁸⁴ USTelecom Petition at 32.

⁸⁵ *Id.*, Appendix B (Hal Singer *et al.*, *Assessing the Impact of Forbearance from 251 (c)(3) on Consumers, Capital Investment, and Jobs* (May 2018)).

considers the public benefits at only the highest of levels, completely ignoring the detrimental effects forbearance would have on discrete areas and discrete consumer groups, including some of the populations most vulnerable to the exercise of market power in pursuit of discretionary monopoly pricing and the allocative inefficiency that results as a consequence. In rural areas, for example, the Commission runs the risk of rendering access to voice and internet services that might stimulate business development and support struggling communities either non-existent or even more unaffordable than it is today. In urban areas, the increased cost of innovation would result in poorer offerings for businesses and consumers by an industry less motivated to improve its offerings.⁸⁶ These outcomes are contrary to the public interest and do not support forbearance.

More fundamentally, the USTelecom-backed analysis simply assumes that the Commission's forbearance is all that stands in the way of competitive service providers building out their own networks. But if deregulation of ILEC monopoly power actually increased the incentive and ability of CLECs to enter the market, then the decade-long trend of deregulation of ILEC exercise of market power in the local exchange sector should have witnessed a decrease in ILEC market share across multiple product offerings. In reality, just the opposite has occurred. The unsupported presumption that eliminating access to UNEs and resale would somehow give competitors added incentive and capital to build out their own networks—particularly in high-cost, underserved rural areas—is simply farcical. Access to UNE loops allow CLECs to support more, not less, investment in network infrastructure and deployment.⁸⁷

USTelecom's Petition fails to satisfy any of the three prongs of the section 10 test. The

⁸⁶ See INCOMPAS Letter at 3-4.

⁸⁷ See, e.g., Blackfoot Communications Notice of *Ex Parte*, WC Docket No. 18-141, at 2 (filed Aug. 2, 2018).

Commission should deny USTelecom's request as to sections 251(c)(3) and (4) and associated requirements under sections 251 and 252.

IV. USTELECOM HAS NOT MET ITS BURDEN FOR FORBERANCE FROM SECTION 272(E)(1) OF THE ACT AND SECTION 64.1903 OF THE COMMISSION'S RULES.

A. USTelecom Has Not Shown That Enforcement of Section 272(E)(1) of the Act and Section 64.1903 of the Commission's Rules Is Not Necessary to Ensure That the Charges and Practices Are Just and Reasonable and Are Not Unjustly or Unreasonably Discriminatory as Required by the First Prong of Section 10 Forbearance Test.

The Commission has consistently held that BOCs have strong incentives to take advantage of upstream inputs as a tool for raising competitor costs by, for example, slow-rolling critical functions used by wholesale customers, including provisioning, maintenance, and charging excessive amounts.⁸⁸ Section 272(e)(1), which requires that each BOC "fulfill any requests from an unaffiliated entity for telephone exchange service and exchange access within a period no longer than the period in which it provides such telephone exchange service and exchange access to itself or to its affiliates,"⁸⁹ and section 64.1903 of the Commission's rules, which imposes structure separation requirements on incumbent LECs that provision long-distance services, prevent BOCs and independent incumbent LECs from acting upon those anti-competitive incentives.⁹⁰ Nothing in the USTelecom Petition shows that the protections afforded by section 272(e)(1) and section 64.1903 are not needed to guard against unjust or unreasonably

⁸⁸ See, e.g., *Ameritech Corp. and SBC Communications Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 14712 ¶ 190 (1999) ("Incumbent LECs in general have both the incentive and ability to discriminate against competitors in incumbent LECs' retail markets. This observation is the fundamental postulate underlying modern U.S. telecommunications law."); see also *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, Notice of Proposed Rulemaking, 11 FCC Rcd 18877 ¶ 65 (1996) ("[A] BOC could provide inferior service to, charge higher prices to, withhold cooperation from, or fail to share information with its rivals in competitive markets.").

⁸⁹ 47 U.S.C. § 272(e)(1).

⁹⁰ 47 C.F.R. § 64.1903.

discriminatory charges or practices.

This is not the first time USTelecom has tried—and failed—to show that the protections of section 272 are unnecessary. In 2015, the Commission denied USTelecom’s request, finding “insufficient basis in the record” to grant forbearance from this section, despite recognizing that the “marketplace is evolving.”⁹¹ Among other things, the Commission found the record lacking “data on the size or composition of long distance markets that serve business customers.”⁹² USTelecom now attempts to address that deficiency by arguing that incumbent LECs no longer presumptively hold market power in the provision of interstate switched access services and that this is “particularly the case” with respect to enterprise customers because these customers “typically purchase bundles that include local, long-distance, and often broadband or wireless services as well.”⁹³

First, USTelecom’s Petition once again pretends that there is a single, homogeneous market for local services across the United States. Nothing in the USTelecom Petition suggests that the protections of section 272(e)(1) are unnecessary in any given market—much less in all markets across the United States. Second, beyond the conclusory assertions about how enterprise customers “typically” and “almost invariably” purchase services,⁹⁴ USTelecom presents no evidence that shows that the section 272(e)(1) obligations are no longer necessary to guard against unjust or unreasonable charges or practices. If an incumbent LEC can delay in making critical functionalities available to competitors or charge competitors more than it charges itself for crucial inputs, consumers, both residential and enterprise, are sure to pay the

⁹¹ *2015 USTelecom Forbearance Order* ¶ 40.

⁹² *Id.* ¶ 42.

⁹³ *See* USTelecom Petition at 36.

⁹⁴ *See id.*

price.

USTelecom next points to BDS services, stating that the Commission has “recognized that competition is robust.”⁹⁵ According to USTelecom, “[w]ith multiple providers to choose from, enterprise customers no longer depend on RBOC or independent ILEC access to long-distance services.”⁹⁶ But USTelecom fails to mention that more than 77 percent of BDS customers had access to only one facilities-based competitive provider.⁹⁷ And, beyond BDS, USTelecom fails to put forward any data with respect to how many facilities-based providers typically offer interLATA service for both business and residential consumers. In many rural markets, there are likely few alternatives and only one facilities-based provider. And where there is only one facilities-based provider, any competitor is likely to depend on the incumbent LEC for the provisioning and maintenance of certain facilities, and to be at the mercy of the incumbent LEC’s pricing for these services. In this context, the protections from which USTelecom seeks forbearance are very much needed to prevent BOCs and independent incumbent LECs from benefiting themselves and their affiliates at the expense of their competitors, and harming consumers. Such a result would be contrary to the public interest.

Finally, USTelecom claims that section 202 can take the place of the section 272(e)(1) and section 64.1903 protections. According to USTelecom, “if there were lingering concerns about possible discrimination, section 202 continues to apply and will protect against the remote possibility of discrimination.”⁹⁸ As the Commission explained in 2015, however, “[w]hile other provisions of the Act certainly complement, and may partially overlap, with the remaining

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Business Data Services in an Internet Protocol Environment*, Tariff Investigation Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 4723, Appendix B, Table 7 (2016).

⁹⁸ USTelecom Petition at 37.

section 272 obligations . . . section 272 establishes protections that are not wholly replicated by any other Act provision or Commission requirement.”⁹⁹ This is still true today. Nothing in USTelecom’s petition shows that the continued application of section 202 presents a sufficient basis for forbearance from the obligations of section 272(e)(1) or section 64.1903 of the Commission’s rules. These requirements remain an important protection for competitive local exchange carriers. USTelecom’s request must be denied.

B. USTelecom Has Not Shown That the Enforcement of the Requirements of Section 272(E)(1) of the Act and Section 64.1903 of the Commission’s Rules Is Not Necessary for the Protection of Consumers.

USTelecom’s attempt to satisfy the requirements of section 10(a)(2) of the Act likewise fails. USTelecom claims that “the data” shows that the enforcement of section 272(e)(1) and the section 64.1903 rules are no longer needed to protect consumers.¹⁰⁰ According to USTelecom, “consumers and enterprise customers typically purchase packages of local and long-distance services. Thus, the very premise of these provisions—that competing long-distance providers must rely on RBOCs or independent ILECs for exchange access service—no longer applies.”¹⁰¹ USTelecom also claims that RBOCs and independent ILECs “no longer have the ability to discriminate in their provision of exchange access services in favor of their own long-distance operations.”¹⁰²

Despite its claims to the contrary, USTelecom once again fails to provide any evidence to prove its claims. How many facilities-based providers typically offer interLATA service? How many alternatives do consumers and enterprise customers have in each market? USTelecom has

⁹⁹ 2015 USTelecom Forbearance Petition Order ¶ 43.

¹⁰⁰ USTelecom Petition at 37.

¹⁰¹ *Id.*

¹⁰² *Id.*

not shown that residential and enterprise customers are able to access interLATA services through facilities-based competitive providers. In an environment where ILECs and BOCs can directly affect a competitor's service by delaying in provisioning facilities, raising its prices, or otherwise—all practices that result in higher prices for consumers—USTelecom's assertion that RBOCs and other incumbent LECs "no longer have the ability to discriminate in their provision of exchange access services in favor of their own long-distance operations" is insufficient to satisfy the second prong of the Commission's test.¹⁰³

C. USTelecom Has Failed to Demonstrate That Forbearance from the Requirements Section 272(E)(1) of the Act and Section 64.1903 of the Commission's Rules Is Consistent with the Public Interest.

USTelecom has failed to show that forbearance from section 272(e)(1) of the Act or section 64.1903 of the Commission's rules is in the public interest. According to USTelecom, "long distance service no longer exists as a separate marketplace, and customers have ample choices of local providers in all events; thus the risks of anticompetitive behavior these rules were intended to remedy have been eliminated."¹⁰⁴ As previously discussed, USTelecom has not shown that consumers have ample choices for service providers for either long distance or local service in any—much less every—market in the United States. USTelecom also has not shown that any competitive providers would not be vulnerable to practices that would ultimately result in higher prices for consumers, an outcome contrary to the public interest. And nothing in USTelecom's petition shows that the Commission can grant forbearance without first seeing a negative effect on competition. Accordingly, USTelecom's request has failed to meet the third prong of the Commission's forbearance test and should be denied.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 38.

V. CONCLUSION.

USTelecom's Petition is a bald attempt at hollowing out the remaining—and most important—legal protections available to ensuring that there are competitive markets for switched voice and business data services. Supplying nationwide data to support the claim that *local* markets are competitive is wholly inadequate for demonstrating that the protections of sections 251(c), 271(c)(2)(B)(III), 272(e)(1) of the Act and section 64.1903 of the Commission's rules are no longer necessary. Moreover, the data that USTelecom does provide does not even demonstrate what USTelecom purports it to conclusively show: (1) that forbearance is not necessary to avoid unjustly or unreasonably discriminatory charges or practices; (2) that forbearance would not harm consumers; and (3) that forbearance is otherwise in the public interest as to *any* of the provisions from which it seeks relief.

For all of the above reasons, the Commission must reject USTelecom's petition and continue enforcing these important laws and regulations for the benefit of competition and consumers alike.

Respectfully submitted,

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