

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

Modernizing Unbundling and Resale
Requirements in an Era of Next-Generation
Networks and Services

WC Docket No. 19-308

COMMENTS OF PUBLIC KNOWLEDGE

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February 5, 2020

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Public Knowledge submits these comments in response to the Commission’s *Notice of Proposed Rulemaking* (“NPRM”) relating to the remaining unbundled network element (“UNE”) and avoided-cost resale obligations.¹

I. INTRODUCTION AND SUMMARY

Public Knowledge opposes the Federal Communication Commission’s (“FCC” or “Commission”) proposal to forbear from all remaining unbundling and avoided-cost resale obligations as contrary to law and fact.² In 1996, Congress enacted Section 10 of the Communications Act of 1934, as amended, (the “Communications Act”), which mandates that the FCC meet three requirements before it can forebear from FCC regulations or Communications Act provisions.³ For each UNE and avoided cost-resale obligation in jeopardy in the NPRM, the FCC must show it satisfies all three Section 10 requirements.⁴ If the FCC fails to show it meets even one of the three Section 10 requirements for a UNE or avoided-cost resale obligation, the Communications Act does not allow the FCC to forbear from that obligation. For each element of the test, the agency must perform a detailed factual analysis to show how all three Section 10 requirements for each UNE or resale obligation at stake are satisfied. But the NPRM suggests the FCC plans to short-circuit its review by applying incorrect legal standards and relying on faulty and incomplete data.

Public Knowledge is a nonprofit policy and public interest organization that promotes competition and consumer protection on technology, telecommunications, and intellectual property matters. Public Knowledge’s members look to promote freedom of expression, an

¹ *Modernizing Unbundling and Resale Requirements in an Era of Next-Generation Networks and Services*, WC Docket No. 19-308, Notice of Proposed Rulemaking, FCC No. 19-119 (rel. Nov. 25, 2019) (“NPRM”).

² *See id.* at ¶ 3.

³ 47 U.S.C. 160(a)(1)-(3).

⁴ *See* NPRM at ¶ 11 (recognizing that the FCC can forbear from a Communications Act requirement or FCC regulation to a telecommunications carrier or telecommunications service “if and only if” it meets all three Section 10 requirements).

Open Internet, and access to affordable communications tools and creative works. When policy proposals threaten to dampen access to communication tools, Public Knowledge steps in to caution against this threat before flawed proposals turn into established policies. With the NPRM, the FCC runs the danger of stamping out the very benefit Congress intended to generate when it directed the FCC to create the UNEs and resale obligations: promoting market entry for telecommunication services where little to no competition exists. Indeed, it will also undermine, rather than promote, the goal of deployment of advanced broadband networks offering Gigabit services.

UNEs and avoided-cost resale obligations remain a critical component of how competitive local exchange carriers (“CLECs”) enter new markets to serve consumers and build networks that effectively compete with incumbent local exchange carriers (“ILECs”). Forbearing from all remaining UNEs and resale obligations would harm consumers who depend on the continued ability of CLECs to enter new markets with better service and lower prices than the incumbents have offered.

II. CLECS RELY ON UNEs AT ISSUE IN THE NPRM TO COMPETE AGAINST OTHER TELECOMMUNICATIONS SERVICE PROVIDERS.

Examining the role the UNEs at stake in the NPRM play in telecommunications services today provides insight into how forbearing from those UNEs would harm consumers and curtail competition. In the USTelecom petition for forbearance review, Dialog Telecom LLC observed:

In recent years, large carriers have made it more difficult and more expensive for customers to get these services [provided with UNEs], and it should not be assumed that there would be a path to migrate these services to a wholesale or special access arrangement, and if it is possible, it will very likely be cost prohibitive.⁵

⁵ Declaration of J. Bellina ¶ 9 (Aug. 3, 2018) (“Dialog Telecom Decl.”), attached as Attachment 5 to Opposition of INCOMPAS, FISPA, Midwest Association of Competitive Communications, and the Northwest Telecommunications Association, WC Docket No. 18-141 (Aug. 6, 2018) (“INCOMPAS et al. Opposition”).

The FCC's approach in the NPRM does exactly what Dialog Telecom warned against: the NPRM assumes CLECs will continue employing commercially alternative options to the UNEs at stake in the NPRM with little to no consequences for consumers when, in fact, the record evidence shows just the opposite. The FCC's proposed approach promises to short-circuit competition and harm consumers contrary to the will of Congress as reflected in the Communications Act.

A. Forbearance would hamper the deployment of next-generation fiber networks.

CLECs rely on UNEs to build out our nation's next-generation fiber networks. Due to the high cost of building fiber networks, CLECs must first establish a customer base in order to fund construction. For example, Ideatek in Kansas, Race in California, and Gorge Net in Oregon are all providers that used UNE access to build their own fiber networks in markets where they were the first provider to deploy fiber.⁶

Socket also was able to use UNE DS1 EELs to offer broadband and build its customer base in the small town of Fayette, Missouri. With that customer base, Socket was able to deploy a fiber network and serve additional customers as it built its broadband network. Through its fiber broadband network, Socket initially served business customers and public agencies, but later expanded to serve residential customers.⁷

In Oregon, Douglas Services, Inc. is instrumental in building out fiber networks to underserved areas in that state. UNEs assist Douglas's ability to build fiber networks by

⁶ INCOMPAS et al. Opposition, WC Docket No. 18-141, 47-50 (filed Aug. 6, 2018).

⁷ Socket Decl. ¶¶ 25-26.

allowing service to begin before the networks are fully built, thereby shortening the time to service and lowering the effective cost of fiber deployment.⁸

Allstream also has built out fiber networks with the help of UNEs in Oregon. Allstream was able to grow its customer base thanks to the ability to access UNEs. Allstream then built fiber to certain locations within that footprint and brought fiber back to its leased collocation space. Allstream then aggregated with other traffic to send to its backbone network.⁹

Sonic depends on xDSL-capable DS0s and dark fiber transport to provide competitive service while it deploys its own fiber network.¹⁰ Sonic and other CLECs use regulated access to UNE loops and dark fiber transport to develop the business case for entering and deploying fiber in a new market. According to analysis developed by the Brattle Group, “Sonic has been able to expand its fiber network *because* UNEs were available as a steppingstone.”¹¹ By May 2019, Sonic deployed gigabit fiber service to 19 new areas and doubled the number of census blocks it serves via its fiber network between December 2016 and December 2018.¹²

But, as with the ILECs, Sonic will need years to complete its planned fiber deployments and that type of long-range planning can only occur in a stable regulatory environment that preserves access to UNEs.¹³ According to Sonic, “This is why it is important to maintain the natural forbearance of existing rules for unbundling as well as for copper retirement: they incentivize both the ILEC and CLEC to race to deploy fiber.”¹⁴ Sonic reported that its fiber customers are more profitable than its UNE loop customers, which incentivizes Sonic to deploy

⁸ Declaration of D. Bubb ¶ 6 (Aug. 3, 2018) (“Douglas Decl.”), attached as Attachment 9 to INCOMPAS et al. Opposition, WC Docket No. 18-141 (Aug. 6, 2018).

⁹ Allstream Decl. ¶ 10.

¹⁰ Reply Comments of Sonic Telecom, LLC, WC Docket No. 18-141 (May 28, 2019), 12 (“Sonic Reply”).

¹¹ *Id.* at 14 (emphasis in original).

¹² *Id.* at 13.

¹³ *See id.*

¹⁴ *Id.*

fiber and transition customers off UNE loops as quickly as it can.¹⁵ Sonic’s experience shows that UNE obligations are still a “critical mid-step”¹⁶ for network infrastructure by bolstering (rather than harming) fiber network deployment.

As the NPRM notes, promoting broadband deployment is a relevant factor when the FCC decides whether to forbear from a UNE obligation.¹⁷ The NPRM incorrectly assumes that the remaining unbundling obligations discourage the deployment of next-generation network, when they facilitate the construction of new fiber networks. To reach this conclusion, the NPRM¹⁸ cites its finding about analog voice-only loops, not digital loops. The NPRM also overlooks the small, competitive providers, such as Sonic, that use UNEs as a bridge to fiber deployment and are building more fiber than incumbents in many markets.¹⁹

B. Forbearance would harm consumers.

DS0 loops are a critical building block for networks because they allow CLECs to use their own electronics and provide innovative solutions to serve customers. For example, Mammoth Networks uses DS0 loops to serve its customers in small communities in Colorado, Wyoming, and Montana. Mammoth deploys its own electronics on each end of the loop, bonding up to eight pairs of DS0s to produce synchronous services for small and medium-sized businesses while exerting control over the quality of service for voice and security.²⁰ This creative solution for broadband deployment allows small and medium-sized businesses to afford data at reasonable rates. If ILECs stopped offering the DS0 loop UNE to Mammoth, there would

¹⁵ *Id.*

¹⁶ *Id.* at 14.

¹⁷ *NPRM* ¶ 8.

¹⁸ *Id.* ¶ 23.

¹⁹ See Declaration of William P. Zarakas ¶¶ 5-9 and tbls. 1-2, (Aug. 3, 2018), attached as Attachment 2 to INCOMPAS et al. Opposition.

²⁰ Declaration of B. Worthen ¶ 8 (Aug. 4, 2018) (“Mammoth Decl.”), attached as Attachment 13 to INCOMPAS et al. Opposition.

be no alternative that would allow Mammoth to offer services of the same speed and quality.²¹

The same holds true for interoffice dark fiber—with Mammoth’s investment in electronics, it can use dark fiber UNEs to efficiently serve the needs of disparate customers.²²

For Mammoth and other CLECs, UNEs provide a steppingstone to deploy fiber networks, whether in urban, suburban or rural areas. Eliminating that steppingstone harms consumers. As described in the previous section, Sonic has documented how it is using UNEs to build a customer base that then supports a fiber build.²³ As of the end of 2018, Sonic had transitioned nearly a third of its customer base to its own fiber. At the same time, ILECs can eliminate most unbundling obligations by building fiber; therefore, forbearance from UNE obligations would not only eliminate the regulatory tool that fuels CLEC fiber deployments, but also eliminate the regulatory “carrot” that allows ILECs to avoid UNE obligations once they deploy fiber. This double whammy against extending fiber networks deeper into rural America does not promote the public interest and will harm consumers who would otherwise benefit from competition among fiber-based providers.

DS0 loops are also crucial for Virginia Global Communications Systems, Inc. (“VGCS”). Unlike commercial offerings, such as a special access service, DS0 loops provide flexibility for VGCS and other CLECs to deploy their own electronics on either end of the loop. VGCS uses a combination of DS0 loops and proprietary technology to provide DSL service to rural customers who would otherwise be outside the reach of any currently available high-speed broadband access. Like Mammoth, VSGC is not aware of any wholesale commercial offerings in their

²¹ Mammoth Decl. ¶ 8.

²² *Id.* ¶ 9.

²³ *See* Sonic Reply at 12-16.

service area that would provide them with the same functionality as the DS0 loop/subloop.²⁴ Similarly, Socket Telecom has made the case that there are either no or extremely limited commercially available options for DS0 copper loops offered by ILECs, especially in their operating region of Missouri. Socket provides services using DS0 loops to remote locations where the only UNE loops Socket can access are UNE DS0 copper loops—DS1 and DS3 UNEs are not even available options at these locations.²⁵

Rural, suburban, and urban communities also would suffer if CLECs did not have access to UNEs. Consumers would face service cuts and may either not be able to pay higher fees for ILECs or have no broadband service at all. Brian Worthen, the CEO of Mammoth Networks, attested that, “[t]he loss of access to UNEs would affect Mammoth’s ability to continue to provide service, limiting bandwidth to some rural markets and forcing Mammoth to purchase higher-cost transport and access services”²⁶ These types of consequences could occur not only in the western United States, but also on the east coast. Raul Alcaraz, the CEO of Race, also described how cutting off access to UNEs would mean cutting off Virginians’ access to broadband. Mr. Alcaraz explained that, because of the topology of the county that Virginia Global (VGCS) serves, there are a number of areas where the copper UNE based high speed data service VGCS provides is the only available option.²⁷ Even within urban areas, UNEs continue to help underserved communities gain access to telecommunications services. For example, Access One’s Chief Operating Officer John Hoehne detailed in a declaration that Access One customers in underserved urban areas would be “particularly hard hit” and “would have no

²⁴ Declaration of D. Janjic ¶ 8 (Aug. 4, 2018) (“VGCS Decl.”), attached as Attachment 16 to INCOMPAS et al. Opposition.

²⁵ Declaration of M. Kohly ¶ 46 (Aug. 3, 2018) (“Socket Decl.”), attached as Attachment 15 to INCOMPAS et al. Opposition.

²⁶ Mammoth Decl. ¶ 11.

²⁷ VGCS Decl. ¶ 2.

choice in communications were it not for CLEC/UNE competition.”²⁸ These Access One customers include Catholic Charities, Lutheran Child and Family Services, Mooseheart Child City (orphanage), Oak St. Health, Loretto Hospital, and CGH Hospital.²⁹

Removing UNE access would harm cornerstones of communities, such as hospitals, law enforcement offices, small businesses, and universities. For example, the loss of UNEs would have a serious negative impact on Mammoth’s customers, particularly those who need a reliable option for redundancy. For its part, Mammoth is the only route redundant option to three rural hospitals (in Wyoming and Colorado) and five counties’ Sherriff’s Offices.³⁰ Socket, meanwhile, relies on UNEs to serve satellite campuses of a community college. Socket provides telecommunications and dedicated data services to the main location using its own fiber and these same services with backup call routing at the remote locations. Socket states that the only way it could serve this multi-location community college and provide the college with a competitive choice for all of its locations is through the availability of DS1 enhanced extended loops.³¹

UNEs are also critical for customizing services for customers with specific service requirements. For example, Allstream Business US, LLC has customers who are healthcare providers, financial institutions, and governmental entities. Because of the oftentimes sensitive nature of their work, these institutions often require secure private networks of a type not offered by ILECs. Relying on UNEs, Allstream is able to customize services for healthcare providers to help meet the security requirements that are part of the Health Insurance Portability and

²⁸ Declaration of J. Hoehne ¶ 14 (Aug. 3, 2018) (“Access One Decl.”), attached as Attachment 3 to INCOMPAS et al. Opposition.

²⁹ *Id.*

³⁰ Mammoth Decl. ¶ 12.

³¹ Socket Decl. ¶ 38.

Accountability Act of 1996 (“HIPAA”).³² While ILECs may provide these services, they tend to focus on mass markets and standardized products, not on specialized services for small- to medium-sized entities, like Allstream does.³³ Additionally, cutting access to UNEs would also hinder emergency response services, which can be critical in non-urban environments. Without UNE access, for example, Race Telecommunications Inc. (“Race”), would be unable to provide service to a significant number of residents in Occidental, CA leaving them without vital emergency services.³⁴

C. Forbearance would depress competition among service providers.

If CLECs do not have access to UNEs, they would be less likely to enter new markets. For example, Race stated in its declaration that it would face increased costs as ILECs would be able to charge higher rates for access to their networks. With these increased deployment costs, Race would be less likely to enter new markets and would refrain from expansion in certain regions.³⁵ Raul Alcaraz stated, “The loss of access to UNEs would... force[] [Race] to discontinue service to the community and abandon plans for expansion in the region. It would lead to a significant loss of investments and would negatively impact the residents and their access to health and fire services.”³⁶ Socket would be constrained by similar cost barriers. For Socket, Special Access DS1s and DS3s are not a feasible option, especially because of cost. For example, with CenturyLink of Missouri, Special Access DS1 Loops can range from 140% to 189% higher than Socket’s average cost of UNE DS1 loops.³⁷ Socket’s customers cannot afford

³² Declaration of D. Denney ¶ 16 (Aug. 3, 2018) (“Allstream Decl.”), attached as Attachment 4 to INCOMPAS et al. Opposition.

³³ *Id.*

³⁴ Declaration of R. Alcaraz ¶ 7 (Aug. 5, 2018) (“Race Decl.”), attached as Attachment 14 to INCOMPAS et al. Opposition.

³⁵ Race Decl. ¶ 5.

³⁶ *Id.* ¶ 9.

³⁷ Socket Decl. ¶ 51.

these rates and new entrants could not absorb these costs.³⁸ And in one Colorado community that Mammoth serves, the dark fiber transport UNE costs \$1100. If Mammoth instead had to purchase business data services to connect customers to its network, the cost would be between \$4400-\$5200 per month.³⁹ This 300%+ monthly increase would likely force Mammoth to cease operations there.⁴⁰

Furthermore, removing CLECs' access to UNEs would be a significant waste of resources and past investment. For example, Socket has invested millions in establishing collocation arrangements in ILEC central offices, purchasing equipment to place in these collocation arrangements, and paying UNE non-recurring charges to obtain UNE loops and interoffice dark fiber. This investment would become stranded access to UNEs were cut off.⁴¹ Cutting off Socket's access to UNEs would also burden the CLEC with additional costs. For example, Socket enters into transport agreements with third-party carriers to connect collocation arrangements. These transport agreements have contractual obligations including early termination fees and waived non-recurring charges that Socket would have to repay if it cancelled the agreements.⁴² Socket would also need to pay ILEC collocation non-recurring charges to file applications and pay for decommissioning work in order to abandon existing collocation arrangements.⁴³

³⁸ *Id.*

³⁹ Mammoth Decl. ¶ 11.

⁴⁰ *Id.*

⁴¹ Socket Decl. ¶ 43.

⁴² *Id.*

⁴³ *Id.*

III. BEFORE IT CAN FORBEAR FROM A UNE OR AVOIDED-COST RESALE OBLIGATION, THE FCC MUST SHOW IT MEETS ALL THREE SECTION 10 REQUIREMENTS.

Section 10 of the Communications Act sets out three requirements the Federal Communications Commission must demonstrate before it forbears from applying an FCC regulation or Communications Act provision.⁴⁴ Those three requirements are:

- (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
- (3) forbearance from applying such provision or regulation is consistent with the public interest.⁴⁵

The FCC has the burden of showing it satisfies all three requirements.⁴⁶ Additionally, as part of the public interest requirement in the statute, the FCC must determine whether forbearance will promote competition.⁴⁷ In the face of evidence that forbearance will almost certainly limit

⁴⁴ Telecommunications Act of 1996, Pub. L. No. 104-104, § 401, Title IV, 110 Stat. 128 (codified at 47 U.S.C. § 160(a)) (“Communications Act”).

⁴⁵ 47 U.S.C. § 160(a)(1)-(3).

⁴⁶ *Cellular Telecomms. & Internet Ass’n v. FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003) (CTIA) (explaining that the three prongs of Section 10(a) are conjunctive and that the Commission could properly deny a petition for failure to meet any one prong); *Verizon v. F.C.C.*, 770 F.3d 961, 964 (D.C. Cir. 2014) (“The three conditions of § 10(a) are conjunctive and the Commission can ‘properly deny a petition for forbearance if it finds that any one of the three prongs is unsatisfied.’”) (citing *Cellular Telecomms. & Internet Ass’n v. FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003)); *Verizon Tel. Companies v. F.C.C.*, 570 F.3d 294, 300 (D.C. Cir. 2009) (“Section 10 does not ask the FCC to reconsider its decision in the TRRO that unbundling is still required in the local services market because CLECs’ abilities to compete are impaired. Rather, as applied to the dispute in this case, the language of the section contemplates that the FCC will evaluate [the three elements in Section 10]”); *In re Core Commc’ns, Inc.*, 455 F.3d 267, 277 (D.C. Cir. 2006) (“These three prongs of the forbearance test ‘are conjunctive,’ meaning that “[t]he Commission could properly deny a petition for forbearance if it finds that any one of the three prongs is unsatisfied.”) (citing *Cellular Telecomms. & Internet Ass’n v. FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003)); *EarthLink, Inc. v. F.C.C.*, 462 F.3d 1, 4 (D.C. Cir. 2006) (“[T]he FCC must forbear from applying a given provision of the Communications Act to a telecommunications carrier ‘in any or some of its ... geographic markets,’ if three conditions are met...”); *Qwest Corp. v. F.C.C.*, 689 F.3d 1214, 1226 (10th Cir. 2012) (“The Commission need only find that one of the prerequisites for forbearance is not met to justify denying the petition.”); *Fones4All Corp. v. F.C.C.*, 550 F.3d 811, 815 (9th Cir. 2008) (“The FCC is required to grant a petition for forbearance if the FCC determines that all three of the [requirements in Section 10] are met...”).

⁴⁷ See 47 U.S.C. § 160(b).

competition from CLECs, the FCC's burden of showing that forbearance is nevertheless in the public interest is extremely high, and has not been met in this proceeding.

When the FCC designates an unbundled network element ("UNE"), Section 251(c)(3) of the Communications Act requires ILECs make that network element available on an unbundled basis and at a cost-regulated price.⁴⁸ Section 251(d)(2) states that "at a minimum" the Commission must consider whether, "(A) access to such network elements as are proprietary in nature is necessary; and (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."⁴⁹ For non-proprietary network elements, the bulk of the FCC's analysis to evaluate whether it is necessary to unbundle a network element turns on the "impairment" inquiry defined in Section 251(d)(2)(B).⁵⁰

Both reviewing courts and the FCC have rejected cursory evaluations for when to forbear from a UNE obligation and have instead required a more fact-intensive analysis from the Commission.⁵¹ In 2007, when Verizon appealed an FCC order that denied forbearance,⁵² the D.C. Circuit agreed with Verizon that the FCC's exclusive reliance on existing market share to deny forbearance was arbitrary and capricious. The Court said that the "market share test" that

⁴⁸ Under Section 251(c)(3) of the Communications Act, incumbent local exchange carriers ("ILECs") must "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."

⁴⁹ 47 U.S.C. § 251(d)(2)(emphasis added).

⁵⁰ See generally *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

⁵¹ See John Meisel, *The Evolution of Federal Communications Commission Forbearance Orders: From Omaha to Phoenix*, 20 COMM.LAW CONSPECTUS 323, 343 (2012), <http://bit.ly/351dMNJ>. Congress defined the term "network element" as, "a facility or equipment used in the provision of a telecommunications service . . . which includes 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).

⁵² *Verizon Tel. Cos. v. FCC*, 570 F.3d 294, 302 (D.C. Cir. 2009).

the FCC applied in assessing the statutory prongs was an “unexplained departure from [the FCC’s] precedent.”⁵³

The position that the Section 10 requirements are a high bar to meet was also affirmed by the 10th Circuit, which provided a comprehensive and thoughtful examination of why a rigorous analysis is necessary for the FCC’s analysis to pass statutory muster. The court demonstrated this analysis in an order that denied Qwest Communications forbearance from requirements related to UNEs in Phoenix, Arizona. In that case, the FCC had employed a more nuanced and in-depth analysis than it had previously used in evaluating other petitions.⁵⁴ The FCC found that the FCC’s predictions for competition in the Omaha market, which it laid out in a previous order, did not occur following the agency’s previous grant of forbearance.⁵⁵ According to the FCC, the market-share test employed in evaluating previous petitions was inadequate.⁵⁶ The FCC instead adopted a market-power analysis approach⁵⁷ that “begins by delineating the relevant product and geographic markets and identifying market participants, then examines market-share data, and finally considers whether the potential for competitive market entry is sufficient to constrain an incumbent carrier’s ability to maintain prices above competitive levels.”⁵⁸ The 10th Circuit held that it was not arbitrary and capricious for the FCC’s decision to abandon the two-part test used in the Omaha order and adopt a market-power analytical approach.⁵⁹ In other words, the 10th

⁵³ *Id.* at 295

⁵⁴ *See e.g.*, In re 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 F.C.C.R. 19, 415 (2005)(“Omaha order”).

⁵⁵ Omaha order ¶ 34; *Qwest Corp. v. F.C.C.*, 689 F.3d 1214, 1233 (D.C. Cir. 2012).

⁵⁶ In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area, 25 FCC Rcd. 8622, Memorandum Opinion and Order (rel. June 22, 2010).

⁵⁷ This revised methodology was adopted in 2009 and created a higher bar for those seeking forbearance.

⁵⁸ Phoenix order ¶ 42.

⁵⁹ *Qwest Corp. v. F.C.C.*, 689 F.3d 1214, 1227 (10th Cir. 2012) (holding that the FCC’s decision to adopt a new approach was not arbitrary or capricious since its new approach had some basis in the FCC’s precedent and explained why it believed the change to be necessary.)

Circuit’s decision endorsed the FCC’s rejection of relying on a market-share test and speculative projections alone in favor of a more searching market-power analysis.

When the FCC conducts its competitive analysis for each unbundled network obligation, the FCC can consider whether “a hypothetical ‘reasonably efficient competitor’ would be impaired when lack of access to a particular network element creates a barrier to entry that renders entry uneconomic.”⁶⁰ The FCC factors into its reasonably efficient competitor analysis both operational and economic barriers that would make market entry uneconomic.⁶¹ The 2005 *Triennial Review Remand Order* states that, “[f]acilities-based competitive LECs have every incentive to deploy efficient technologies so as to maximize quality of service and minimize their costs.”⁶² The FCC’s impairment inquiry assumes that, where possible, CLECs will take advantage of reasonably efficient technologies and existing alternative facilities for deployment.⁶³

Here too, the FCC uses a fact-intensive inquiry to determine whether non-impairment supports forbearance from a specific UNE or avoided-cost resale obligation. This inquiry includes examining indicators of where competition and its benefits manifested already and whether reasonably efficient competitors are able to enter other similar markets.⁶⁴ For example, the FCC’s 2005 *Triennial Review Remand Order* identified fiber-based collocation as a key indicator of competitive fiber deployment.⁶⁵ But the *Triennial Review Remand Order* explained

⁶⁰ NPRM ¶ 7, citing *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Order on Remand*, 20 FCC Rcd 2535, ¶¶ 24, 28 (2005) (*Triennial Review Remand Order*), *aff’d*, *Covad Commc’ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

⁶¹ See *Triennial Review Remand Order* ¶ 28.

⁶² *Id.*

⁶³ *Id.* (“Specifically, to the extent competitors have deployed facilities sufficient to demonstrate that entry is economic in one geographic market, we presume that those facilities are reasonably efficient and that that carrier, or other carriers, could enter other, similar geographic markets on an economic basis using similar (or even more efficient) technologies.”).

⁶⁴ See *Triennial Review Remand Order* at ¶ 22.

⁶⁵ See *id.* ¶ 96.

that identifying one fiber-based collocator is not sufficient evidence to show competitors' non-impairment.⁶⁶ When discussing the merits of fiber-based collocation data, the FCC also acknowledged, "We are acutely aware of the need to base any test we adopt here on the most objective criteria possible . . . to avoid complex and lengthy proceedings that are administratively wasteful but add only marginal value to our unbundling analysis."⁶⁷ In short, the FCC's standard practice for evaluating non-impairment necessarily involves a rigorous and objective analysis of remaining barriers to entry that appears to be noticeably lacking from the FCC's proposed approach.

Should the FCC persist with its present proposal, the FCC would fail to demonstrate that forbearance from Section 251(c)(3)'s unbundling obligations at stake meets all three of the Section 10 requirements. While the NPRM asserts that the FCC enjoys "broad discretion" when applying the criteria of the forbearance test,⁶⁸ any discretion the FCC holds must find support in an evidentiary record tailored to the nature of the UNE and the specific markets involved. Courts require agencies to provide clear and well-supported explanations for an agency's policy choices.⁶⁹ Courts also rightly scrutinize agency decisions and demand fact-based support for decisions even when such decisions are based on ostensible expert understanding of the market.⁷⁰ Broad pronouncements about the state of market or the changing nature of technology are insufficient to withstand judicial scrutiny. Simply asserting the communications environment

⁶⁶ *Id.* ¶ 121.

⁶⁷ *Id.* ¶ 99.

⁶⁸ NPRM ¶ 12.

⁶⁹ See *Qwest Corp. v. Fed. Comm'n's Comm'n*, 689 F.3d 1214, 1225 (10th Cir. 2012) ("[W]e would require the Commission to offer a 'reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy.'").

⁷⁰ See *Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 167 (1962) ("Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion.'").

has “vastly changed” or the “legacy obligations appear to no longer make any sense”⁷¹ cannot satisfy the showing the FCC needs to make. Forbearance decisions can only survive judicial review based on well documented record evidence in support of each element of the statutory test the FCC must satisfy.

IV. Congress Mandated that the FCC Apply the Section 10 Requirement of the Communications Act When Determining Whether to Stop Enforcing a UNE or Avoided-Cost Resale Obligation.

A federal agency cannot make decisions that fall beyond the scope of legal authority Congress granted to that agency. Chairman Ajit Pai underscored this point in his capacity as Chairman of the FCC: “As a creature of Congress, the FCC must respect the law as set forth by the legislature.”⁷² When the D.C. Circuit in 2017 found the FCC operated beyond its legal authority, Chairman Pai expressed this same view, stating that, “[g]oing forward, the Commission will strive to follow the law and exercise only the authority that has been granted to us by Congress.”⁷³ These past statements recognize the FCC’s duty is to enforce the letter of the law.

When evaluating whether to forbear on any of the UNE obligations listed in the NPRM, the FCC has the duty to follow Congress’s mandate by applying the three Section 10 requirements. Under Section 10, Congress limited the power it delegated to the FCC to specific circumstances when the FCC can forbear from a Communications Act provision or FCC regulation. When a statute is silent or ambiguous there is a presumption that Congress intended

⁷¹ NPRM ¶ 23.

⁷² Fed. Commc’ns Comm’n, Ajit Pai FCC Chairman (last visited Jan. 22, 2020), <http://bit.ly/2G8BaJU>; *See also* Senate Appropriations Subcommittee Hearing June 20, 2017, 2 (“My commitment as Chairman is to do as I have promised without straying into activities that exceed our legal authority or go beyond the core competencies of our agency.”).

⁷³ *See also* Fed. Comm’n’s Comm’n, Statement of FCC Chairman Ajit Pai on the Latest D.C. Circuit Rebuke of FCC Overreach, 1 (March 31, 2017).

for a federal agency to fill in gaps because of the agency’s expertise.⁷⁴ On forbearance and UNE obligations, however, Congress spoke directly on the issue of which test applies. Therefore, the FCC must follow the Section 10 requirements Congress already established for that purpose.

If the FCC moves forward with removing a network element from the UNEs list without meeting the three requirements of Section 10, it is unlikely that decision would withstand judicial scrutiny. There are two steps under the *Chevron* deference framework to determine if a court should grant deference to an FCC order. The first step is to determine whether Congress spoke directly “to the precise question at issue.”⁷⁵ If the statute is silent or ambiguous about the specific issue, the second step is to determine whether the agency’s answer is “based on a permissible construction of the statute.”⁷⁶ Here, Congress already spoke directly to the question of exactly when the FCC can forbear from an FCC regulation or Communications Act provision. An agency interpretation that contradicts what Congress has said will be found unreasonable and reversed on appeal.⁷⁷

V. THE NPRM’S COMPETITIVE ANALYSIS RELIES ON FAULTY AND INCOMPLETE DATA.

The NPRM makes sweeping statements about UNE obligations and broadband competition across markets by relying on Form 477 data.⁷⁸ However, the FCC is in the midst of overhauling the Form 477 data collection because it is inaccurate and incomplete.⁷⁹ According

⁷⁴ See *Food and Drug Admin. v. Brown and Williamson Tobacco Corp.*, 120 S. Ct. 1291 (suggesting that administrative agencies receive less deference when interpreting their own jurisdiction).

⁷⁵ *Chevron U.S.A., Inc. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837, 842 (1984).

⁷⁶ *Id.* at 843.

⁷⁷ *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 n.4 (2009).

⁷⁸ For example, the NPRM proposes to eliminate unbundling for xDSL-capable DS0 loops in urban areas. This proposal relies entirely on admittedly-flawed Form 477 data. See NPRM ¶ 21 n.78 (relying on Form 477 data to assert that cable providers provide about 78% of 25/3 Mbps residential subscriptions); See also NPRM ¶ 39 nn.138-141 (relying on Form 477 data to assert that “the presence of nearly ubiquitous cable deployment in urban areas” means that CLECs are no longer impaired without access to UNE DS0 Loops and that cable providers provide 25/3 Mbps broadband service without UNEs to 97% of households in urban census blocks.).

⁷⁹ See generally Report and Order and Second Further Notice of Proposed Rulemaking, Establishing the Digital Opportunity Data Collection, WC Docket Nos. 19-195 and 11-10, Rel. Aug. 6, 2019.

to the FCC, “[I]t has become increasingly clear that the fixed and mobile broadband deployment data collected on the Form 477 are not sufficient to understanding where universal service support should be targeted and supporting the imperative of our broadband-deployment policy goals.”⁸⁰ Relying on Form 477 data that the FCC itself has found to be a woefully insufficient basis to guide government spending decisions provides no informed, non-arbitrary basis for FCC policy making. Using deeply flawed Form 477 data to reach conclusions as to whether sufficient competitive alternatives are available such that forbearing from any UNE obligations at stake in the NPRM would not only harm competition and consumers, but also be subject to reversal on appeal based on the FCC’s excruciatingly detailed analysis of the many different flaws that the Form 477 data-collection process and output exhibit. Even taking the most charitable view of the available Form 477 data, the information available simply does not offer sufficiently robust and reliable evidence of cable deployment and the broadband options customers have available in any given location to support a wholesale regulatory reversal by the FCC.⁸¹ A less charitable – and perhaps better informed view – would suggest that the Form 477 data is misleading and entirely inaccurate and would expose the FCC to a high likelihood of reversal on appeal to courts of relevant jurisdiction.⁸²

Evidence of just how poor the Form 477 data is abounds. As recently as December 5, 2019, Congressman Greg Walden asked all the FCC Commissioners in a subcommittee hearing

⁸⁰ DODC Report and Order ¶ 5.

⁸¹ See CostQuest Associates, *Broadband Mapping Initiative Proof of Concept Summary of Findings* at 16 (“*CostQuest Report*”), attached to Letter from Jonathan Spalter, President & CEO, USTelecom, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 19-195, 11-10, 10-90 & 19-126 (filed Aug. 20, 2019) (noting that current Form 477 data “could overstate broadband availability” and “[b]y design . . . doesn’t describe broadband availability for a specific location”).

⁸² See *Accountability and Oversight of the FCC: Hearing Before the Subcomm. on Comm’cns & Tech. of the H. Comm. on Energy and Commerce*, 116th Cong. at 55:45 (May 15, 2019) (testimony of Commissioner Starks) (“[T]he Commission admitted that its draft broadband deployment report relied in part on data from a new provider that had inflated its coverage by nearly 62 million persons.”) (“May 2019 House Hearing”), <https://bit.ly/2uY6Lf4>.

whether the NPRM would rely on “bad maps.”⁸³ All of the FCC Commissioners conceded that Form 477 data “significantly lacking and deeply flawed” during the December 5, 2019 subcommittee hearing.⁸⁴ Commissioner Rosenworcel told Congress during the same subcommittee hearing, “We have got to fix the situation we have where our data is so inaccurate we don’t know if we’re sending funds to the right place or not . . . [W]e need data before deployment.”⁸⁵ Or, as former FCC Commissioner Mignon Clyburn said, “A glitzy map with bad data is like the proverbial lipstick on a pig.”⁸⁶

Relying on Form 477 data would distort the results of the FCC’s competitive analyses and harm consumers, including the rural communities the NPRM seeks to protect with exemptions. The NPRM recognizes that, “unbundling requirements may have continued benefits in promoting broadband access to consumers where facilities-based competition is less likely to occur, we propose to maintain rules regarding mass market broadband-capable loops in rural areas.”⁸⁷ The current Form 477 data, however, cannot provide a complete picture of competition in rural areas. In congressional testimony, for example, USTelecom cautioned that the Form 477’s “‘one-served-all-served’ reporting is simply not a reliable tool to accurately understand broadband availability.”⁸⁸ USTelecom estimated that the Form 477 data could be mistakenly categorizing millions of locations in rural areas as already “served” by broadband.⁸⁹ AT&T also

⁸³ See *Accountability and Oversight of the FCC: Hearing Before the Subcomm. on Comm’cns & Tech. of the H. Comm. on Energy and Commerce*, 116th Cong. at 01:10 (Dec. 5, 2019) (“Dec. 2019 House Hearing”), <http://bit.ly/2GfzEWh>

⁸⁴ See generally Dec. 2019 House Hearing.

⁸⁵ See *id.* at hour 01:17.

⁸⁶ Kelcee Griffis, *FCC’s Broadband Maps Obscure Reality of National Coverage*, Law360 (March 7, 2018).

⁸⁷ NPRM ¶ 5.

⁸⁸ *Hearing on “Legislating to Connect America: Improving the Nation’s Broadband Maps” Before the Subcomm. on Comm’cns & Tech. of the H. Comm. on Energy & Commerce*, 116th Cong. (Sept. 11, 2019) (testimony of Jonathan Spalter, President & CEO of USTelecom Association, at 2).

⁸⁹ See Comments of USTelecom—The Broadband Association, WC Docket Nos. 19-126, 10-90 & 19-195 (filed Sept. 20, 2019) (“USTelecom RDOF Comments”) at 6 (“estimat[ing] that approximately five million broadband serviceable locations in rural areas nationwide could be currently errantly counted as served”); See also *CostQuest Report* at 7 (reporting that in the pilot mapping initiative, 48 percent of rural census block Fabric location counts do

noted that the Form 477 data overstates broadband penetration rates, but understates the number of communities without broadband access. According to AT&T, the Form 477 data does not report on these unserved areas.⁹⁰

Any FCC reliance on the current Form 477 data to forbear from a UNE obligation would call into question that forbearance decision as a whole. To the extent the FCC wants to rely on any part of the Form 477 data, it should do so once the updated Form 477 data collection is available.

VI. CONCLUSION

Forbearance from remaining UNE and resale obligations does not serve the public interest because it would harm consumers across the country and weaken competition. The UNEs and resale obligations at stake in the NPRM continue to fulfill their purpose of helping CLECs overcome barriers to entry and reach customers in new markets. Even when CLECs are not actively using UNEs and resale obligations, the availability of these tools to potential future competitors provides an important check on the incumbents' market power. Relying on faulty and incomplete data from the Form 477 data will fail to satisfy the rigorous standards court have applied when reviewing past FCC efforts to satisfy each prong of the three-part forbearance standard. If the FCC wants to review the use of the remaining UNE and resale obligations, it must assemble more robust data to determine whether forbearance from the UNEs and resale obligations is warranted under the standards Congress has established for competition in the communications sector of the nation's economy.

not match Form 477 data location-count estimates and 23 percent of rural pilot locations are not mapped to the correct census block).

⁹⁰ Letter from Ola Oyefusi, Director, Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 11-10, 10-90, at 1 (filed Oct. 12, 2018).

Respectfully submitted,

/s/ John Bergmayer

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PUBLIC KNOWLEDGE

February 5, 2020