

**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

**REPLY TO OPPOSITION OF PUBLIC KNOWLEDGE AND THE UTILITY REFORM
NETWORK (TURN)**

John Bergmayer
Legal Director
Public Knowledge
1818 N St. NW Suite 410
Washington, DC 20036

Regina Costa
Telecom Policy Director
TURN
785 Market St. Ste. 1400
San Francisco, CA 94103

October 14, 2022

TABLE OF CONTENTS

I. BECAUSE THE PUBLIC INTEREST FAVORS BROADBAND COMPETITION AND DEPLOYMENT, THE COMMISSION HAS NOT MET THE LEGAL STANDARD FOR FORBEARANCE	3
II. DSO AND DARK FIBER UNES ARE PARTICULARLY IMPORTANT FOR RESIDENTIAL BROADBAND	5
III. THE AVAILABILITY OF UNES JUMP-STARTS FACILITIES-BASED COMPETITION	8
IV. THE 1996 TELECOMMUNICATIONS ACT INTENDED TO ENCOURAGE NEW ENTRY IN THE FIXED RESIDENTIAL BROADBAND MARKET	11
CONCLUSION.....	13

**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

**REPLY TO OPPOSITION OF PUBLIC KNOWLEDGE AND THE UTILITY REFORM
NETWORK (TURN)¹**

The Commission should grant Sonic’s petition.²

Congress intended the Telecommunications Act of 1996 to promote exactly the kind of competition that Sonic and other competitors provide. Yet in the waning days of the Trump administration, the previous FCC eliminated (and began the process of sunseting) some of the Act’s primary pro-competition regulatory requirements: that incumbent local exchange carriers (ILECs) make available to competing providers (competitive local exchange carriers, or CLECS) unbundled network elements (UNEs).³ Much of the infrastructure built by ILECs was built in the

¹ Public Knowledge works at the intersection of copyright, telecommunications, and internet law, at a time when these fields are converging. Public Knowledge’s experience in all three areas puts it in an ideal position to advocate for policies that serve the public interest. Among other things, Public Knowledge works to ensure universal access to affordable broadband, open networks, and to uphold and protect consumer rights.

The Utility Reform Network (TURN) is an independent, non-profit organization representing the interests of utility consumers throughout the state of California, including telecommunications customers. TURN advocates on behalf of its 20,000 members and 40 million Californians before the California Public Utilities Commission (CPUC), the California Legislature, the FCC, and Congress. TURN is deeply involved in CPUC proceedings regarding issues such as universal broadband service, digital equity, telecommunications network reliability, service quality, consumer protections, universal service programs, incarcerated calling, and fair and reasonable rates, terms and conditions of service.

² Petition of Sonic Telecom for Reconsideration, WC Docket No. 19-308 (Feb. 8, 2021) (“Petition”).

³ Modernizing Unbundling and Resale Requirements in an Era of Next-Generation Networks and Services, Report and Order, 35 FCC Rcd 12425 (2020) (“2020 Report and Order” or “Order”).

ratepayer-subsidized, regulated monopoly era. UNEs allow that infrastructure to support new entrants into the broadband market, as well as incumbents.

USTelecom argues that the Commission should reject Sonic’s petition.⁴ This is not a surprise. Contrary to USTelecom’s arguments, facilities-based broadband competition is anemic at best. The FCC’s decision to phase out access to DS0 loops in urbanized areas and dark fiber transport will further impair the ability of competitors to serve residential broadband markets, including marginalized communities in urban areas. As Sonic demonstrated in its Petition, and further discussed here, the Commission’s decision was based on unreliable data, errors of fact and predictions that have not been borne out in practice.

Many aspects of the 1996 Act were successful. Unfortunately, however, local telecommunications competition is not more robust in 2022 (or 2020) than in 1996. Yet the Commission was so eager to declare victory and deregulate that it used bad data, bad assumptions, and bad reasoning as a basis to declare victory and relieve incumbents of UNE obligations. As Sonic has demonstrated, and as Public Knowledge has argued before in this docket, UNEs can be a key to not only unlocking broadband competition, but to bringing homes brand new fiber.

UNE critics have long claimed (with little support) that UNEs will somehow reduce incentives for the construction of new infrastructure. But faced with the evidence of actual broadband competition enabled by UNEs, the Pai FCC disregarded it in favor of its version of “the impairment inquiry,” which “considers whether a hypothetical reasonably efficient competitor” needs access to UNEs in order to enter a market.⁵ It seems indisputable that the

⁴ Opposition of USTelecom – the Broadband Association, WC Docket No. 19-308 (Oct. 4, 2022) (“Opposition”).

⁵ Order at ¶ 116.

experience of actual competitors should be given more weight than the hypothetical experience of hypothetical competitors. At the very least the assumptions of what a hypothetical competitor might do should be adjusted based on the experience of actual competitors, and on the failure of hypothetical new entrants to materialize. The sunseting of UNE requirements has not yet produced a flurry of new facilities-based broadband competition, just as the Commission's past elimination of similar requirements has only served to entrench incumbents. Hypothetical competitors remain hypothetical.

The decision to phase out access to the DS0 UNE in urbanized census blocks has a chilling effect on the ability of CLECs to build out broadband networks to serve communities with diverse populations and moderate incomes. Likewise, phasing out dark fiber transport will significantly impair the ability of alternative broadband providers to serve residential customers including in areas where incumbent telecommunications companies have poor track records or have failed to provide service at all. For these and other reasons the Commission should grant Sonic's petition.

I. BECAUSE THE PUBLIC INTEREST FAVORS BROADBAND COMPETITION AND DEPLOYMENT, THE COMMISSION HAS NOT MET THE LEGAL STANDARD FOR FORBEARANCE

The Commission cannot forbear from enforcing UNE rules unless it finds that:

- (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
- (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
- (3) forbearance from applying such provision or regulation is consistent with the public interest.⁶

⁶ 47 U.S.C. § 160(a)(1)-(3).

As explained below, the Commission’s order fails to meet even a single prong of this test. The immediate price hikes that have followed the Commission’s deregulation shows that UNEs are necessary to ensure that services are offered at just and reasonable rates. The Commission’s action will set back broadband competition, harming consumers by depriving them of choices and subjecting them to inferior service and higher prices. And hampering the emergence of new broadband competition is contrary to the public interest, especially as the COVID pandemic demonstrated that reliable home broadband is essential for the economy, for education, and for public health.

In addition, the FCC simply lacked reliable data on broadband competition. As Public Knowledge wrote in its comments, “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.”⁷

Microsoft noted in 2019 that the broadband data the Pai FCC was relying on meant that “millions of Americans already lacking access to broadband have been made invisible.”⁸ To help remedy this, Chairwoman Rosenworcel has led a comprehensive effort at the FCC to improve broadband data collection.⁹ The FCC’s reliance on incomplete, incorrect, and misleading data as a basis for sweeping deregulation not only provides enough reason for this FCC to reverse this mistake, but as well, enough reason for a court to do so.

⁷ Comments of Public Knowledge, WC Docket No. 19-308, 20 (Feb. 5, 2020).

⁸ John Kahan, It’s time for a new approach for mapping broadband data to better service Americans, Microsoft On the Issues (Apr. 8, 2019), <https://blogs.microsoft.com/on-the-issues/2019/04/08/its-time-for-a-new-approach-for-mapping-broadband-data-to-better-serve-americans/>.

⁹ See FCC, Broadband Data Collection Resources, <https://www.fcc.gov/BroadbandData/resources>.

II. DSO AND DARK FIBER UNES ARE PARTICULARLY IMPORTANT FOR RESIDENTIAL BROADBAND

While the availability of UNEs is important for competition in many telecommunications markets, DS0 and dark fiber UNEs are particularly important for residential competition.

Contrary to US Telecom's claims,¹⁰ CLECs desiring to serve residential broadband markets would be severely impaired if the FCC does not reverse course and mandate continued access to dark fiber within one-half mile of fiber.

The dark fiber UNE is crucial for competitors to extend broadband service to residential neighborhoods and for providing the broadband service itself. Without the ability to lease fiber for transport, CLECs face the specter of being unable to move broadband data between different network locations, resulting in an internet road to nowhere.¹¹ The mere presence of an available strand of fiber does not mitigate the impairment of CLECs who lose access to the dark fiber UNE. The FCC's impairment analysis did not consider whether the fiber that is present can actually be used. UNEs are subject to price controls and service quality requirements.

Eliminating the dark fiber UNE gives the ILECs, who have no love for CLEC competition, carte blanche to set prohibitive contractual terms, jack up prices and delay addressing problems.

Facing this situation, it is highly unlikely that a CLEC would risk expanding its network if the success of that venture depended upon the good faith of the ILECs who have a vested interest in quelling competitive options. Further, the existence of fiber built by a carrier to serve a large enterprise customer at a handful of locations does not mean the fiber is available as a dark fiber substitute; nor does it demonstrate the ability of a CLEC desiring to serve the residential market to build fiber for a different purpose.¹²

¹⁰ Opposition at 14.

¹¹ Petition at 12, fn 51.

¹² Petition at 13-14.

The FCC’s rationale for mandating dark fiber as a UNE was, in part, to encourage facilities-based competition. Noting that fiber was expensive and deployment costs were a barrier to entry, the Commission stated: “...carriers are capable of activating dark fiber when they have aggregated sufficient revenues to justify the high expense of expensive optronics, but even at such revenue levels, sometimes carriers have not achieved sufficient revenues to justify the high expense of fiber deployment.¹³ In its 2020 Report and Order, the FCC reiterated that “[c]onsistent with its preference for facilities-based competition, the [FCC] expected UNEs to provide competitors a means to enter the local marketplace in order to obtain a sufficient subscriber base and revenue to support the development of their own competitive facilities.”¹⁴ Dark fiber UNEs, by definition would otherwise lay fallow but for their usefulness to CLECs.¹⁵ Sonic, in particular, has put the dark fiber UNE to good use by doing exactly what Congress and the FCC intended, using this otherwise unused resource to rapidly move a large percentage of its customer base from UNEs to its own fiber network.¹⁶ Importantly, the access to the dark fiber UNE, combined with DS0 loops, allowed Sonic to develop business plans to provide fiber based service to over 900 urbanized census blocks with median household incomes of approximately \$50,000 per year.¹⁷

Access to DS0 loops is essential because last-mile broadband infrastructure is expensive and difficult to construct. Broadband is, at best, a tight oligopoly. There is a high fixed cost to construct a network, and a low marginal cost to connect an additional customer. ILECs and cable

¹³ Federal Communications Commission’s Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et. Al., CC Docket No. 01-338 (2004), Order on Remand at ¶135 (“Triennial Review Remand Order”).

¹⁴ Report and Order at ¶ 8.

¹⁵ Triennial Review Remand Order at ¶30.

¹⁶ Petition at 4.

¹⁷ Petition, Declaration of Nathan Patrick.

companies have a major advantage in that they have historically held franchises that, until the mid-1990s, granted exclusive rights to construct and operate local networks to offer telephone and cable services, respectively. Once a network is built, an ILEC has a cost advantage that in many areas (depending on population density, terrain, and other factors) can be insurmountable. Absent pro-competition public policy like UNEs, a new entrant must build an entire new network to serve just one customer. As the Commission observed shortly after Congress passed the Act, “[m]oreover, without access to unbundled loops, new entrants would be required to make a large initial sunk investment in loop facilities before they had a customer base large enough to justify such an expenditure.”¹⁸ An incumbent needs to merely extend or activate a line. As the Commission explained in 2003,

The costs of local loops serving the mass market are largely fixed and sunk. By fixed we mean that these costs are largely insensitive to the number of customers being served. Much of the cost applies whether a carrier serves a single residential customer or ten thousand residential customers: that carrier must secure rights-of-way, dig trenches or place poles, and run wire underground or along poles. Such deployment costs are also sunk. That is, local loop facilities are not fungible because they cannot be used for any other purpose if the investment fails. If a new entrant overbuilds to serve a mass market customer and loses that customer to another carrier, the new entrant cannot economically redeploy that loop to another location. Its investment might be lost unless it could find a purchaser for its redundant loops. This is true regardless of whether the new entrant was providing narrowband or broadband service, or both. A carrier will not deploy mass market loops unless it knows in advance that it will have customers that will generate sufficient revenues to allow it to recover its sunk loop investment. ... As new entrants, competitive LECs do not enjoy a large guaranteed subscriber base that would provide a predictable source of funding to offset their local loop deployment costs. For these reasons, we find that the costs of self-provisioning mass market loop facilities are demonstrably greater than those faced universally by new entrants in other industries.¹⁹

¹⁸ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report & Order, 11 FCC Rcd 15499, 15690 (1996).

¹⁹ Section 251 Unbundling Obligations of Incumbent Local Exch. Carriers, 18 FCC Rcd 16978, 17122-17123 (2003).

It is not surprising, therefore, that by far, the majority of broadband users subscribe to a service that already had networks constructed at the time of the 1996 Act,²⁰ and needed to merely upgrade them to provide broadband.

However, the fact that cable and telephone companies in some markets compete with each other does show that the economic characteristics of network construction are a barrier to the initial construction of competitive infrastructure, but not to broadband competition itself, if an alternative provider can use UNEs as a stepping stone to construct a network. Open access competition on shared infrastructure is itself valuable, and can drive better service, faster speeds, and lower prices. But the model of relying on DS0 loops to build a customer base, and then upgrading those customers to new fiber, shows that DS0 loops can provide both valuable retail competition, and a path to fiber and new facilities-based competition—a longtime Commission goal, as discussed below.

III. THE AVAILABILITY OF UNES JUMP-STARTS FACILITIES-BASED COMPETITION

In the Order, the Commission wrote that it “has long envisioned the use of UNEs by competitors as a stepping stone to deployment of their own facilities.”²¹ This is half true: Congress and the Commission have envisioned competition enabled by UNEs, facilities based competition, and models in between. As an earlier Commission observed, “[a]lthough Congress did not express explicitly a preference for one particular competitive arrangement, it recognized implicitly that the purchase of unbundled network elements would, at least in some situations,

²⁰ Prior to broadband, cable and telecommunications companies did not compete with each other. Therefore the existence of a telephone natural monopoly no more posed an obstacle to cable television than the existence of an electric natural monopoly would.

²¹ Order ¶ 116.

serve as a transitional arrangement until fledgling competitors could develop a customer base and complete the construction of their own networks.”²²

Only a few years after the passage of the 1996 Act, the Commission predicted that “that over time competitors will prefer to deploy their own facilities in markets where it is economically feasible to do so.”²³ In 1999, the Commission was careful to qualify that the construction of new networks would only occur when it was “practical and economically feasible.”²⁴ By contrast, in 2020, the Commission subscribed to a theory holding that implementing Congress’s directive that incumbent telecommunications providers should make their infrastructure available would have the opposite effect and deter both competition and network upgrades. Apart from being in tension with the directives of Congress, another difficulty with this latter theory is that it is empirically false. ILECs subject to UNE obligations have invested in fiber, and may be spurred to do so from the expansion of competitors like Sonic. Moreover, the Commission’s deregulation of incumbents has been met with less, not more competition. When the Commission cut back on its UNE obligations, major CLECs left the market entirely. “The narrowing of unbundling rights has had enormous consequences within the industry. Among other things, it helped convince national CLECs such as AT&T and MCI to give up the ghost and merge with legacy wireline companies SBC and Verizon.”²⁵ The Commission’s approach to Business Data Services is instructive: It has led to incumbents

²² Implementation of the Local Competition Provisions, Report & Order, 15 FCC Rcd 3696, ¶ 6 (1999)

²³ Implementation of the Local Competition Provisions, 15 FCC Rcd. 3696 at ¶ 7.

²⁴ Implementation of the Local Competition Provisions, 15 FCC Rcd. 3696 at ¶ 6.

²⁵ John Blevins, A Fragile Foundation – The Role of “Intermodal” and “Facilities-Based” Competition in Communications Policy, 60 Ala. L. Rev. 241, 253 (2009).

charging more for data transport, not the construction of new capacity. As INCOMPAS²⁶ explained in recent comments,

In 2017, the FCC prematurely deregulated BDS pricing based on what have been so far unproven predictions of the potential of a single alternative facilities-based provider entering a market.⁵² In response, the incumbent telcos have raised prices.⁵³ For example, since the BDS Order, CenturyLink has increased the rates for special access DS1 channel terminations across the board in its price-cap and price-flexibility wire centers, whether urban or rural. INCOMPAS' prior comments noted the significant price increases since the BDS Order, and these price increases have not abated. For example, prior to the BDS Order, CenturyLink's rate for DS1 channel terminations was \$139.35/mo. However, these rates have now increased to \$510.59/mo, which is 3.7x the rate pre-BDS Order. This marks a 266% increase in price since before the BDS Order whereas in 2020 the highest price increase had been 150%. Furthermore, prior to the BDS Order, CenturyLink's rates for 8 miles of DS1 transport pre-BDS order was \$198.40/mo. However, these rates have now increased to \$501.02/mo, which is 2.5x the rate pre-BDS order. This marks a 153% increase in price since before the BDS Order whereas in 2020 the highest price increase had been 54%.²⁷

INCOMPAS further observed that “These BDS price increases demonstrate the lack of competition in the marketplace and are a basis for the Commission to conclude that its prediction that competition would increase in the BDS market was inaccurate and accordingly should be revisited.”²⁸ The same reasoning applies here.

One way that the availability of UNEs jump-starts competition is by allowing new entry, which can then be leveraged into the scale necessary to construct a new network. And the Commission has long viewed one goal of its unbundling rules as part of promoting facilities-based competition, observing that “[u]nbundling rules that encourage competitors to deploy their

²⁶ The agreement between INCOMPAS and USTelecom, see Order at ¶ 20, should be seen as an agreement between those parties, which they negotiated considering their various business models, the political environment, and appetite for litigation. To the extent the Commission puts a private agreement into place, it still must *independently* demonstrate that serves the broader public interest, and take into account the needs of broadband users as well as the perspective of ISPs who were not party to that agreement. Here, the Commission's reasoning does not support its conclusions or give proper weight to the entire record.

²⁷ Comments of INCOMPAS, GN Docket No. 22-203, 22-23 (July 1, 2002).

²⁸ Comments of INCOMPAS at 23-24.

own facilities in the long run will provide incentives for both incumbents and competitors to invest and innovate, and will allow the Commission and the states to reduce regulation once effective facilities-based competition develops. Accordingly, the unbundling rules we adopt in this proceeding seek to promote the development of facilities-based competition.”²⁹ Sonic provides exactly the kind of competition the Commission once sought to foster, and in 2020, took steps to eliminate. But while Sonic has been the most vocal advocate for the importance of UNEs, it is not alone in leveraging them to bring needed competition to communities that are otherwise underserved by incumbents. As Public Knowledge explained in its comments in 2020, providers such as Ideatek in Kansas, Race in California, Gorge Net in Oregon, Socket in Missouri, and Allstream and Douglas Services in Oregon all have relied on UNEs to provide service.³⁰

IV. THE 1996 TELECOMMUNICATIONS ACT WAS INTENDED TO ENCOURAGE NEW ENTRY IN THE FIXED RESIDENTIAL BROADBAND MARKET

The 1996 Telecommunications Act was intended to promote competition in the U.S. telecommunications industry by requiring that incumbent local telecommunications share their monopoly networks with new entrants, in exchange for the incumbents being able to compete in new markets. The Act was successful in that telephone companies entered the video and long distance markets, and cable companies began offering broadband and telephone service. However, while the Commission was right in 2020 to declare that the “communications marketplace has dramatically transformed since Congress pass the 1996 Act,” when it comes to residential broadband, the market has not become more competitive. President Biden’s Executive Order, “Promoting Competition in the American Economy,” found that “[i]n the

²⁹ Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 15 FCC Rcd 3696, ¶ 14 (1999)

³⁰ Comments of Public Knowledge, 2-4.

telecommunications sector, Americans likewise pay too much for broadband, cable television, and other communications services, in part because of a lack of adequate competition.”³¹ In accompanying materials, the White House noted that “[m]ore than 200 million U.S. residents live in an area with only one or two reliable high-speed internet providers, leading to prices as much as five times higher in these markets than in markets with more options.”³² And, by far, most Americans get their broadband from cable or telecommunications companies (or their corporate successors) who were incumbents in 1996. According to recent numbers from Leichtman Research, the largest cable and wireline providers make up 96% of the market.³³

In 1996, Congress was aware that cable companies intended to enter residential telecommunications markets.³⁴ But cable companies did not need UNEs: they already had their own wireline networks. While cable entering the telecommunications marketplace was beneficial, UNEs were intended to provide an even greater level of competition by adopting a line-sharing model that is particularly well-suited to the architecture of telephone networks, which (unlike cable) provide a physically separate local loop from a switching office to a customer’s residence.

Thus the Commission previously found that “[w]ere that level [cable vs. telco] of competition sufficient to fulfill Congress’ goals for telephone services, the 1996 Act only would have needed to require interconnection. Instead, Congress established means for additional

³¹ Promoting Competition in the American Economy, EO 14036, 86 FR 36,987, 36,988 (July 9 2021).

³² Fact Sheet: Executive Order on Promoting Competition in the American Economy (July 9, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy>.

³³ Leichtman Research Group, About 1,065,000 Added Broadband in 1Q 2022; Fixed Wireless Services Accounted for Half of the Net Adds in the Quarter (May 18, 2022), <https://www.leichtmanresearch.com/about-1065000-added-broadband-in-1q-2022/>.

³⁴ S. Conf. Rep. No. 104-230, at 148 (1996).

competitors to enter without fully duplicating the incumbent's local network. It is clear Congress wanted to enable entry by multiple competitors through use of the incumbent LEC's network."³⁵ Congress would not have created the UNE system if its only goal was to trade a monopoly for, at best, a duopoly. It intended to encourage entry from new competitors by relieving them of the (usually economically impossible) task of duplicating an incumbent's network before it could provide service. It intended, in other words, for companies like Sonic to enter new markets and provide broadband to consumers, which would drive down costs, encourage network upgrades, and make users less subject to the whims of broadband gatekeepers.

Mobile providers do not use UNEs either, but there are other reasons why they cannot be used as a justification to eliminate DS0 and dark fiber UNEs. First, mobile service is often offered by the local incumbent telephone company. It is meaningless to say that AT&T competes against AT&T Mobility. Second, mobile and fixed broadband are separate product markets. They are not substitutes. They have different characteristics and pricing models, and most users who can afford both fixed and mobile broadband subscribe to both.³⁶ The Commission should pursue policies that promote robust fixed broadband competition, and mobile competition. Treating them as the same undermines both goals, and paints a false picture of the state of competition in both markets.

CONCLUSION

The Commission should not have forborne from enforcing UNE obligations on telecommunications incumbents, because those obligations have been shown to promote competition and benefit consumers. In so doing, the Commission in 2020 relied on bad data,

³⁵ Petition of Qwest for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area, 25 FCC Rcd 8622, ¶ 32 (2010).

³⁶ Comments of INCOMPAS at 8.

faulty reasoning, and unwarranted assumptions. The Commission can begin to fix this error in 2022 by granting Sonic's petition, and making DS0 and dark fiber UNEs available to companies that want to provide broadband to underserved users.

Respectfully submitted,

/s/ John Bergmayer

Legal Director
Public Knowledge
1818 N St. NW, Suite 410
Washington, DC 20036

October 14, 2022