ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case No. 19-1164
(consolidated with Case No. 19-1202)

COMPTEL d/b/a INCOMPAS

Petitioner,

- *v.* -

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,

Respondents.

On Petition for Review of an Order of the
Federal Communications Commission

BRIEF OF PETITIONER COMPTEL D/B/A INCOMPAS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and *Amici Curiae*

Petitioner is COMPTEL, d/b/a INCOMPAS ("INCOMPAS"). INCOMPAS, the Internet and competitive networks association, is a non-profit corporation that advocates for laws and policies that promote competition, innovation, and economic development. INCOMPAS represents a wide array of competitive organizations in the telecommunications and Internet ecosystem, including among others, Granite Telecommunications, LLC ("Granite"), Metropolitan Telecommunications Corporation d/b/a Metropolitan Telecommunications ("MetTel"), and Access One, Inc. ("Access One"), each of which, along with INCOMPAS, were active participants in the proceeding (WC Docket No. 18-141) that resulted in the Ruling Under Review ("Proceeding").

Respondents in this case are the Federal Communications Commission and the United States of America.

On September 10, 2019, USTelecom – The Broadband Association submitted a motion to intervene in support of Respondents.

There currently are no *amici curiae*.

Dozens of entities, including companies, organizations, Members of Congress, government bodies, and thousands of individuals participated in the Proceeding. The FCC did not include in the Ruling Under Review a listing of the

participants before the agency. Below is an indicative (but not comprehensive) list of companies, organizations, Members of Congress, and government bodies that participated in the proceeding, according to the FCC's Electronic Comment Filing System ("ECFS")[1]:

Access One, Inc.;
Access Point Inc.;
Alaska Communications Systems Group, Inc.;
Allstream Business US, LLC;
AMA Communications L.L.C. d/b/a AMA TechTel Communications;
AT&T Services, Inc.;
Benton Foundation;
Biddeford Internet Corporation d/b/a GWI;
Blackfoot Communications, Inc.;
BullsEye Telecom, Inc.;
California ISP Association;
California Public Utilities Commission;
Call One, Inc.;
California Association of Competitive Telecommunications Companies;
Center for Democracy & Technology;
CenturyLink, Inc.;
Cloudflare, Inc.;
Cox Communications, Inc.;
Dialog Telecommunications Inc.;
Digital West Networks, Inc.;
Electronic Frontier Foundation;
First Communications, LLC;
FISPA;
Frontier Communications Corporation;
Full Service Network LP;
GCI Communication Corp.;

[1] A comprehensive list of participants in the Proceeding is available from ECFS at the following website: https://www.fcc.gov/ecfs/search/filings?proceedings_name=18-141&sort=date_disseminated,DESC.

GeoLinks, LLC;
Granite Telecommunications, LLC;
ICG CLEC Coalition;
IdeaTek;
Institute for Local Self-Reliance;
Internet Innovation Alliance;
Irregulators;
Liberty Cablevision of Puerto Rico, LLC;
Mammoth Networks;
Massachusetts Department of Telecommunications and Cable;
Matrix Telecom, LLC d/b/a Impact Telecom and Xchange Telecom LLC;
Medina County Fiber Network;
MetTel;
Michigan Internet Telecommunications Alliance;
Michigan Public Service Commission;
Midwest Association of Competitive Communications;
National Association of State Utility Consumer Advocates;
National Association of Telecommunications Officers and Advisors;
National Hispanic Media Coalition;
National League of Cities;
New America's Open Technology Institute;
New Horizon Communications Corp.;
New Networks Institute;
Next Century Cities;
Northwest Telecommunications Association;
Open Internet LLC;
Oregon Public Utility Commission;
Pennsylvania Public Utility Commission;
Public Knowledge;
Public Utilities Commission of Ohio;
Puerto Rico Telephone Company, Inc.;
Raw Bandwidth Communications, Inc.;
Raw Bandwidth Telecom, Inc.;
U.S. Representative Jared Huffman;
U.S. Representative Jennifer Gonzalez-Colon;
SnowCrest Telephone, Inc.;
Socket Telecom, LLC;
Sonic Telecom, LLC;
Telecommunications Regulatory Board of Puerto Rico;
TEXALTEL;

U.S. TelePacific Corp., Mpower Communications Corp., and Arrival Communications, Inc., all d/b/a TPx Communications;
U.S. Small Business Administration;
Uniti Fiber;
USTelecom – The Broadband Association;
Verizon;
Windstream Services, LLC; and
WorldNet Telecommunications, Inc.

B. Ruling Under Review

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, FCC 19-72 (rel. Aug. 2, 2019) (the "*Forbearance Order*").

C. Related Cases

California Public Utilities Commission v. FCC, No. 19-1202, likewise seeks review of the *Forbearance Order* and has been consolidated with this case. Counsel for Petitioner is not aware of any other related petitions for review of the *Forbearance Order* pending before this Court or of any other related cases pending before any other court.

CORPORATE DISCLOSURE STATEMENT

INCOMPAS is the leading national trade association representing Internet, streaming, fiber, and competitive communications service providers large and small and their supplier partners. INCOMPAS is a not-for-profit corporation, has not issued shares or debt securities to the public, and does not have any parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public.

STATEMENT REGARDING JOINT APPENDIX

The parties intend to utilize the deferred joint appendix option as described in Federal Rule of Appellate Procedure 30(c).

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CONGRESSIONAL MATERIAL

*** -** Authorities upon which we chiefly rely are marked with asterisks.

GLOSSARY

1996 Act	Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56
2015 Order	*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; Lifeline and Link Up Reform and Modernization; Connect America Fund*, Memorandum Opinion and Order, 31 FCC Rcd. 6157 (2015)
Anchorage Order	*Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Section 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, Memorandum Opinion and Order, 22 FCC Rcd. 1958 (2007)
Antonellis Decl.	Declaration of Larry G. Antonellis (Aug. 6, 2018), attached as Attachment A to Opposition of Granite to USTelecom's Forbearance Petition, WC Docket No. 18-141 (Aug. 6, 2018)
Antonellis Supp. Decl.	Supplemental Declaration of Larry G. Antonellis (Nov. 6, 2018), attached as Attachment I to Letter from Thomas Jones, et al., Counsel for Granite Telecommunications, LLC, Manhattan Telecommunications Corporation d/b/a Metropolitan Telecommunications, and Access One, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-141 (Nov. 8, 2018)
AT&T Dec. 28, 2018 Letter	Letter from James P. Young, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-141 (Dec. 28, 2018)
AT&T Reply Comments	Reply Comments of AT&T, WC Docket No. 18-141 (Sept. 5, 2018)

CLEC	Competitive Local Exchange Carrier
Communications Act	Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq*.
Forbearance Order	*Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks*, Memorandum Opinion and Order, 34 FCC Rcd. 6503 (2019)
Frontier June 28, 2019 Letter	Letter from AJ Burton, Frontier Communications, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-141 (June 28, 2019)
Granite Opp.	Opposition of Granite to USTelecom's Forbearance Petition, WC Docket No. 18-141 (Aug. 6, 2018)
Granite Sept. 5, 2018 Reply Comments	Reply Comments of Granite in Support of Motion for Summary Denial and Opposition, WC Docket No. 18-141 (Sept. 5, 2018)
ILEC	Incumbent Local Exchange Carrier
INCOMPAS Opp.	Opposition of INCOMPAS, FISPA, Midwest Association of Competitive Communications, and The Northwest Telecommunications Association, WC Docket No. 18-141 (Aug. 6, 2018)
Joint Parties' Nov. 8, 2018 Letter	Letter from Thomas Jones, et al., Counsel for Granite Telecommunications, LLC, Manhattan Telecommunications Corporation d/b/a Metropolitan Telecommunications, and Access One, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-141 (Nov. 8, 2018)
Joint Parties' Nov. 19, 2018 Letter	Letter from Thomas Jones, et al., Counsel for Granite Telecommunications, LLC, Manhattan Telecommunications Corporation d/b/a Metropolitan Telecommunications, and Access One, Inc., to

	Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-141 (Nov. 19, 2018)
Joint Parties' Mar. 14, 2019 Letter	Letter from Thomas Jones, et al., Counsel for Granite Telecommunications, LLC, Manhattan Telecommunications Corporation d/b/a Metropolitan Telecommunications, and Access One, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-141 (Mar. 14, 2019)
Joint Parties' Apr. 24, 2019 Letter	Letter from Thomas Jones, et al., Counsel for Granite Telecommunications, LLC, Manhattan Telecommunications Corporation d/b/a Metropolitan Telecommunications, and Access One, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-141 (Apr. 24, 2019)
Joint Parties' May 28, 2019 Reply Comments	Reply Comments of Granite, MetTel, and Access One, WC Docket No. 18-141 (May 28, 2019)
Joint Parties' June 14, 2019 Letter	Letter from Thomas Jones, et al., Counsel for Granite Telecommunications, LLC, Manhattan Telecommunications Corporation d/b/a Metropolitan Telecommunications, and Access One, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-141 (June 14, 2019)
Joint Parties' June 26, 2019 Letter	Letter from Thomas Jones, et al., Counsel for Granite Telecommunications, LLC, Manhattan Telecommunications Corporation d/b/a Metropolitan Telecommunications, and Access One, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-141 (June 26, 2019)
Joint Parties' July 15, 2019 Letter	Letter from Thomas Jones, et al., Counsel for Granite Telecommunications, LLC, Manhattan Telecommunications Corporation d/b/a Metropolitan Telecommunications, and Access One, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-141 (July 15, 2019)

LEC	Local Exchange Carrier
Local Competition Order	*Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd. 15499 (1996)
MetTel Opp.	Opposition of MetTel, WC Docket No. 18-141 (Aug. 6, 2018)
Omaha Order	*Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd. 19415 (2005)
PUCO Comments	Comments Submitted on Behalf of the Public Utilities Commission of Ohio, WC Docket No. 18-141 (Aug. 3, 2018)
Singer Decl.	Hal Singer et al., *Assessing the Impact of Forbearance from 251(c)(3) on Consumers, Capital Investment, and Jobs* (May 2018), attached as Appendix B, to USTelecom Petition
Sullivan Decl.	Declaration of Sean J. Sullivan, attached to Opposition of MetTel, WC Docket No. 18-141 (Aug. 6, 2018)
TDM service	Time-division multiplexing-based business telephone services provided via powered copper loops (alternatively referred to in *Forbearance Proceeding* pleadings as "traditional TDM service")
Terry Order	*Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Resale, Unbundling and Other Incumbent Local Exchange Requirements Contained in Sections 251 and 271 of the Telecommunications Act of 1996 in the Terry, Montana Exchange*, Memorandum Opinion and Order, 23 FCC Rcd. 7257 (2008)
UNE	Unbundled Network Element

USTelecom Petition	Petition for Forbearance of USTelecom – The Broadband Association, WC Docket No. 18-141 (May 4, 2018)
Verizon Reply Comments	Reply Comments of Verizon, WC Docket No. 18-141 (Sept. 5, 2018)
Verizon-MCI Order	*Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd. 18433 (2005)
VTS Reports	FCC Voice Telephone Services Reports, released semi-annually
Zarakas Decl.	Declaration of William P. Zarakas (Aug. 6, 2018), attached as Attachment B to Opposition of Granite to USTelecom's Forbearance Petition, WC Docket No. 18-141 (Aug. 6, 2018)

STATUTUES AND REGULATIONS

The pertinent statutes and regulations are set forth in the Addendum to this Brief.

STATEMENT OF JURISDICTION

This Court has jurisdiction over the petition pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1). On August 2, 2019, the Commission released the *Forbearance Order*, which became effective upon publication. Petitioner timely filed its petition for review on August 12, 2019. *See* 28 U.S.C. § 2344.

STATEMENT OF THE ISSUES

1. Whether the Commission violated the statutory criteria in 47 U.S.C. § 160 when it granted forbearance from the Section 251(c)(4) Avoided-Cost Resale requirement for TDM service sold to government and business customers.

2. Whether the Commission's failure to explain why it abandoned its established standard for determining whether to forbear from the Section 251(c)(4) Avoided-Cost Resale requirement and its failure to justify its new standard was arbitrary and capricious in violation of the Administrative Procedure Act ("APA").

3. Whether the Commission's nationwide grant of forbearance from the Section 251(c)(4) Avoided-Cost Resale requirement, without regard for the significant class of customers that continues to rely on TDM service for mission-critical functions, was arbitrary and capricious in violation of the APA.

STANDING

Petitioner has standing to bring this petition. INCOMPAS is an industry association whose mission is to advocate for laws and policies that promote

competition, innovation, and economic development. INCOMPAS represents an array of competitive organizations in the telecommunications and Internet ecosystem, including, among others, Granite, MetTel, and Access One, each of which, along with INCOMPAS, was an active participant in the Proceeding.

An association has standing to act on behalf of its members "if (1) at least one of its members would have standing to sue in his own right, (2) the interests the association seeks to protect are germane to its purpose, and (3) neither the claim asserted nor the relief requested requires that an individual member of the association participate in the lawsuit." *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002). A member has standing if (1) it has "suffered an injury in fact . . . which is (a) concrete and particularized . . . and (b) actual or imminent"; (2) there is a "causal connection between the injury and the conduct complained of"; and (3) it is "likely . . . that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal quotations omitted); *see also U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 739 (D.C. Cir. 2016).

Petitioner satisfies each of these requirements. Its members, including Granite, MetTel, and Access One, have standing to seek review in their own right because, as is evident from the administrative record, they participated in the Proceeding, and the *Forbearance Order* has caused them injury-in-fact, which would be redressed by its *vacatur*. Because Petitioner and its members are the

"object of [the *Forbearance Order*]," there is "little question that the action or inaction has caused [them] injury, and that a judgment preventing or requiring the action will redress it." *Lujan*, 504 U.S. at 561-62; *see also U.S. Telecom Ass'n*, 825 F.3d at 739. Accordingly, Petitioner's standing is "self-evident" and "no evidence outside the administrative record is necessary . . . ." *Sierra Club*, 292 F.3d at 899-900.

STANDARD OF REVIEW

Section 10 of the Communications Act establishes a three-prong test to determine whether competition in the provision of telecommunications services renders statutory requirements and/or regulations unnecessary. To obtain forbearance, a requesting party must demonstrate that (1) enforcement of the relevant provisions and regulations is "not necessary to ensure that charges, practices, classifications, or regulations" are just, reasonable, and not unjustly or unreasonably discriminatory; (2) enforcement of the provisions and regulations is not necessary to protect consumers; and (3) forbearance from applying the provisions and regulations is consistent with the public interest. *See* 47 U.S.C. § 160(a). Under the first prong, the term "necessary" refers "to the existence of a strong connection between what the [Commission] has done by way of regulation and what the [Commission] permissibly sought to achieve with the disputed regulation." *CTIA v. FCC*, 330 F.3d 502, 509, 512 (D.C. Cir. 2003); *see also id*. at

510 ("[A] measure may be 'necessary' even though acceptable alternatives have not been exhausted."). Under the third prong, the Commission must "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." 47 U.S.C. § 160(b). Finally, the requesting party bears the burden of proof "at the outset and throughout the proceeding." *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).

In considering these forbearance criteria, the Commission "[must] 'examine the relevant data and articulate a satisfactory explanation for its action.'" *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). While the Commission is authorized to change existing policies, it must "provide a reasoned explanation for the change." *Nat'l Lifeline Ass'n v. FCC*, 921 F.3d 1102, 1110-11 (D.C. Cir. 2019) (citing *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016)). "[A]n agency changing its course must . . . indicat[e] that prior policies and standards are being deliberately changed, not casually ignored." *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970). A "reasoned explanation" further requires that the agency "explain why such a change was

appropriate" and "how the new test reasonably interprets" the governing statute or rule. *ABM Onsite Servs.—W., Inc. v. NLRB*, 849 F.3d 1137, 1147 (D.C. Cir. 2017).

Agency action is arbitrary and capricious where the agency "failed even to mention or discuss, let alone distinguish . . . orders" that are of "obvious relevance." *Lone Mountain Processing, Inc. v. Sec'y of Labor*, 709 F.3d 1161, 1163-64 (D.C. Cir. 2013). "An agency's failure to respond meaningfully to objections raised by a party [likewise] renders its decision arbitrary and capricious." *Ameren Servs. Co. v. FERC*, 893 F.3d 786, 794 (D.C. Cir. 2018) (internal quotations omitted). Although an agency "is not required to discuss every item of fact or opinion included in the submissions it receives in response to a [notice], it must respond to those comments which, if true, would require a change in the proposed rule," *Genuine Parts Co. v. EPA*, 890 F.3d 304, 313 (D.C. Cir. 2018) (internal quotations omitted), as well as to comments "that can be thought to challenge a fundamental premise underlying the proposed agency decision," *Carlson v. Postal Regulatory Comm'n*, 938 F.3d 337, 344 (D.C. Cir. 2019) (quoting *MCI WorldCom, Inc. v. FCC*, 209 F.3d 760, 765 (D.C. Cir. 2000)); *see also Butte Cty. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010) (finding that an agency "cannot ignore evidence contradicting its position"). "An agency's response to public comments . . . must be sufficient to enable the courts 'to see what major issues of policy were ventilated . . . and why the agency reacted to

them as it did.'" *Carlson*, 938 F.3d at 344 (internal quotations omitted). As such, an agency will not receive deference when its "responses . . . amounted to conclusory statements that dismissed Petitioners' concerns without providing reasoned analysis." *New Eng. Power Generators Ass'n, Inc. v. FERC*, 881 F.3d 202, 210-11 (D.C. Cir. 2018).

Similarly, "[a]n agency action is arbitrary and capricious where the agency has entirely failed to consider an important aspect of the problem," *United Keetoowah Band of Cherokee Indians in Okla. v. FCC*, 933 F.3d 728, 738 (D.C. Cir. 2019) (internal quotations omitted), particularly where that aspect "is factually substantiated in the record," *Humane Soc'y of United States v. Zinke*, 865 F.3d 585, 606 (D.C. Cir. 2017); *see also Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 430 (D.C. Cir. 2018) ("An agency's failure to consider an important aspect of the problem is one of the hallmarks of arbitrary and capricious reasoning.").

In reviewing challenged Commission action under these standards, this Court's role is to ensure "'that the [agency] engaged in reasoned decisionmaking' after a 'searching and careful inquiry' of the record," and that its "substantive decision [is] supported by 'substantial evidence' in the administrative record." *Nat'l Lifeline Ass'n*, 921 F.3d at 1111 (first bracket in original, second bracket added) (citations omitted).

STATEMENT OF CASE

I. The Avoided-Cost Resale and UNE Requirements of the 1996 Telecommunications Act

In the 1996 Telecommunications Act ("1996 Act"), Congress sought to promote competition for local telecommunications services by enacting new market-opening mechanisms. The 1996 Act's provisions include requirements that incumbent local exchange carriers ("ILECs") (1) offer retail services to competitors (i.e., competitive local exchange carriers or "CLECs") at rates that exclude the costs ILECs avoid by selling the services at wholesale rather than at retail ("Avoided-Cost Resale"), *see* 47 U.S.C. §§ 251(c)(4), 252(d)(3), and (2) unbundle elements of their networks ("UNEs") and make them available to CLECs at cost-based rates, *see id.* §§ 251(c)(3), 252(d)(1).

The Avoided-Cost Resale provisions require ILECs "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." *Id.* § 251(c)(4). Section 252(d)(3) establishes a "top down" approach for wholesale rates that excludes "costs that are *actually* avoided, not those that could be or might be avoided," and thus ensures that ILECs earn the same profits that they earn when they sell telecommunications services at retail. *Iowa Utils. Bd. v. FCC*, 219 F.3d 744, 754-56 (8th Cir. 2000) (emphasis added). The Commission has established guidelines for implementing this requirement, and states apply those guidelines to set specific

wholesale rates that ILECs may charge competitors. The Avoided-Cost Resale requirement applies to "any" telecommunications services ILECs offer to retail customers, without any duration or other qualification and without regard to the level of competition in the relevant market. *See* 47 U.S.C § 251(c)(4).

In contrast, under the UNE provisions, the Commission must determine whether a competitor's ability to provide service would be impaired in the absence of a particular UNE. *See id*. § 251(d)(2). If not, an ILEC need not offer the UNE in that geographic area. Rate setting for UNEs is also fundamentally different. Under the rules adopted by the Commission, UNE prices are set based on a forward-looking economic cost methodology, called Total Element Long Run Incremental Cost, or "TELRIC," which utilizes estimates rather than actual costs. *See* 47 C.F.R. § 51.505(a). TELRIC costs must be based on "the use of the most efficient telecommunications technology currently available and the lowest cost network configuration, given the existing location of the [ILEC's] wire centers." *Id*. § 51.505(b)(1). For these reasons, TELRIC frequently results in UNE rates that are significantly lower than Avoided-Cost Resale rates.[2]

[2] According to the economic analysis accompanying the USTelecom Petition, "regulated UNE rates are on average 59% less than commercial wholesale rates for equivalent legacy services." Singer Decl. at 4 (JA____). Given that commercial wholesale rates closely resemble Avoided-Cost Resale rates, *see* Antonellis Decl. ¶¶ 33-42 (JA____-____); Zarakas Decl. ¶¶ 21-27 (JA____-____), UNE rates can

II. The Commission's Forbearance Proceeding

On May 4, 2018, USTelecom filed a petition requesting nationwide forbearance from several statutory provisions and regulations, including the Avoided-Cost Resale requirement and the UNE requirement for analog loops.[3] On August 2, 2019, after taking various actions in the Proceeding not relevant here, the Commission granted these requests in the *Forbearance Order* by a vote of 3-2.[4] The Commission established a two-part transition period consisting of (1) a six-month period during which new Avoided-Cost Resale services and analog loop UNEs can be ordered and (2) a three-year grandfathering period for Avoided-Cost Resale services and analog loop UNEs purchased as of the effective date of the order as well as those purchased during the six-month transition period. *Forbearance Order* ¶¶ 45-46 (JA____).

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be considered to be on average roughly 59 percent less than Avoided-Cost Resale rates.

[3] *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 (filed May 4, 2018) ("USTelecom Petition").

[4] *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks*, Memorandum Opinion and Order, 34 FCC Rcd. 6503 (2019) (JA____-____) ("*Forbearance Order*"). Commissioners Rosenworcel and Starks dissented.

III. Traditional TDM-based Telephone Services

Among the ILEC telecommunications services affected by the *Forbearance Order* are traditional TDM-based telephone services provided over powered copper lines with relatively low bandwidth ("TDM service").[5] The administrative record showed that many government and business customers value the reliability offered by traditional line-powered service, which does not require fail-safes like back-up generators or batteries at the customer's location to operate during electrical outages. Newer communications services do not provide the same level of reliability as TDM service, frequently do not offer the same functionalities as TDM service, and are not available at many customer locations where TDM service is available. Antonellis Decl. ¶¶ 12-23 (JA___-___); Sullivan Decl. ¶ 16 (JA____).

IV. Business and Government Customers Increasingly Rely on the TDM Services Provided by Petitioners for Critical Functions.

Petitioner's members (collectively, "Petitioners") purchase TDM service from ILECs at wholesale and then resell them to government and business customers to meet their critical telecommunications needs. Most of these customers have multiple locations in different regions of the country that are

[5] In the Proceeding, Petitioner and its members generally referred to this service as "traditional TDM service." For economy, "TDM service" is used here.

served by different ILECs. Antonellis Decl. ¶¶ 4-7, 20-22 (JA____-____, ____-____); Sullivan Decl. ¶¶ 6, 18 (JA____, ____).

Petitioners' government customers rely on TDM service because of its reliability and availability in locations not served by VoIP or wireless service. In some cases, federal agency regulations require the use of TDM service. For instance, TDM service enables the Federal Aviation Administration's National Airspace System applications to establish uniform clock synchronization around the country and to avoid harmful latency. Antonellis Decl. ¶ 26 (JA____-____). And, the FAA requires that ground components of non-Federal Microwave Landing System facilities operate on a channel using TDM service. *See* Joint Parties' Mar. 14, 2019 Letter at 7 (Mar. 14, 2019) (JA____) (citing 14 C.F.R. § 171.311).

Petitioners' business customers rely on TDM service for similar reasons. Among them, property management companies require continuous functionality of fire/sprinkler, burglar, and elevator alarms across the buildings they manage. Banks and other financial institutions likewise require continuous service in order to ensure the security of vaults and the operation of clearinghouses, ATMs, and electronic transfer capabilities, among other services. Other business customers rely on TDM service to ensure uninterrupted gas pipeline monitoring. Antonellis Decl. ¶¶ 15-19 (JA____-____).

In addition to providing service reliability for critical functions to multi-location customers, Petitioners specialize in providing "one-stop shop" service offerings that include integrated billing, customer support, and technical assistance for all of their customers' locations across the country. The one-stop shop model relieves end-user customers of the burden of purchasing TDM service from numerous ILECs. CLECs' customers instead receive a single, consolidated bill. Without CLECs' one-stop shop service offerings, customers would have to coordinate and negotiate with many different ILECs, substantially increasing transaction costs and resulting in an effective net increase in the prices they pay for TDM service. *Id*. ¶¶ 5-7 (JA____-____).

Through these efforts, Petitioners and other CLECs have gained a substantial share of the competitive marketplace for TDM service. Available FCC data show that roughly one out of every four government and business customers in the United States purchases TDM service from Petitioners and other CLEC-resellers. Joint Parties' May 28, 2019 Reply Comments at 9-14 (JA____-____). Petitioners' market share likely skews even higher for multi-location government and business customers. For example, Granite, which serves more than 80 of the Fortune 100 companies, has calculated that its customer locations receiving TDM-based telephone services has increased or remained steady every year since 2004, while the total number of TDM-based telephone lines it provides to customers has

generally increased or remained steady. Antonellis Decl. ¶¶ 4, 14 (JA____, ____-____).[6]

Moreover, the continued availability of TDM service is of growing—not declining—importance to these government and business customers. As the nation's primary climate research program has observed, "[r]ecent extreme events demonstrate the vulnerabilities of interconnected economic sectors to increasing risks from climate change." U.S. Global Change Research Program, *Fourth National Climate Assessment*, at 47 (Nov. 2018), https://nca2018.globalchange.gov/downloads/NCA4_2018_FullReport.pdf (JA____). These vulnerabilities will only increase as "extreme weather and climate-related events are expected to become more frequent and more intense in a warmer world," *id.*, making TDM service even more important to Petitioners' customers.

V. The Lack of Available Substitutes for TDM Service

There are no available substitutes for TDM service. The administrative record showed that government and business customers do not consider fixed and mobile wireless services as viable alternatives to TDM service. Because of their

[6] Downward pressure on resold TDM services has resulted from the retirement of copper loops by ILECs, and not a decline in customer demand. *See* Joint Parties' May 28, 2019 Reply Comments at 15-16 (JA____-____).

limited deployment, fixed wireless services are unavailable at most customer locations. Where deployed, fixed wireless services are impeded by line-of-sight restrictions and limited range. Mobile wireless service lacks functionalities, such as faxing and "rollover" lines, that many business and government customers require. Most critically, both fixed and mobile wireless services are susceptible to coverage gaps, network overload (especially during large-scale natural disasters and emergencies), and outages from loss of power. *See, e.g.*, Antonellis Decl. ¶ 13 (JA____).

Internet-based telephone services, commonly known as voice-over-IP or "VoIP," are not considered a substitute for TDM service, either. VoIP may be managed by an Internet service provider ("managed VoIP") or offered as an application-based service provided via an IP network ("over-the-top VoIP"). Like fixed and mobile wireless services, VoIP does not work during power outages. When offered over the public Internet, it is also less secure than TDM service. Provisioning more secure VoIP requires dedicated access lines and battery power at the customer's location. Even then, current battery technologies have proven incapable of supporting the service during extended outages. *See id*. ¶¶ 12, 15-17 (JA____-____, ____-____). Due to these limitations, it is common for government and business customers that purchase VoIP to purchase redundant TDM service,

even at the same locations and at greater cost, for their more critical communications needs. Joint Parties' July 15, 2019 Letter at 2-3 (JA____-____).

Further, like fixed and mobile wireless services, VoIP suffers from significant network gaps and limitations. This is because both managed and over-the-top VoIP require a broadband connection to function. The FCC measures the availability of broadband based on data that broadband providers submit via the FCC's Form 477. But, FCC commissioners, members of Congress, and the ILECs themselves have acknowledged that Form 477 data significantly overstates the availability of broadband. *See* Joint Parties' May 28, 2019 Reply Comments at 16-22 (JA____-____). Among other flaws, Form 477 data incorrectly assume that all end users within a census block have access to broadband where a provider reports that it could provide that service to one location in the census block. *See* Joint Parties' Apr. 24, 2019 Letter at 2 (JA____). A 2015 Granite-commissioned study of the availability of cable-provided broadband service indicated that cable company networks did not serve 85 percent of Granite's customer locations, and that deployment of cable facilities to serve those locations would be cost prohibitive in 51 percent of unserved locations. Slide Deck at 5-6, attached as Attachment to Letter from Thomas Jones, Counsel for Granite Telecommunications, LLC, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 13-5, 12-353; WC Docket Nos. 14-192, 04-36 (June 3, 2015) (JA____-____).

A 2016 Granite survey similarly showed that non-ILEC competitors, including cable companies, either had deployed or could deploy service to fewer than **[BEGIN HCI]** [redacted] **[END HCI]**[7] locations. Antonellis Decl. ¶ 31 (JA____).

Recent data, placed on the record, further show that broadband, and therefore VoIP, is unavailable in many locations. For example, a Microsoft study measuring broadband adoption indicates that only approximately 49 percent of Americans use the Internet "at broadband speeds." *See* Joint Parties' Apr. 24, 2019 Letter at 2-3 (citing John Kahan, Chief Data Analytics Officer, "Broadband mapping meeting with Preston Wise - FCC," at 3-4 (Mar. 27, 2019) filed as an attachment to Letter from Paula Boyd, Senior Director U.S. Government and Regulatory Affairs, Microsoft Corporation and David A. LaFuria, Lukas, LaFuria, Counsel for Microsoft Corporation, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-238 & WC Docket No. 11-10 (Mar. 29, 2019)) (JA____-____).

VI. Avoided-Cost Resale as a Check on ILEC Market Power

ILECs are the only entities that own legacy copper loop connections to these government and business customers. While TDM service remains essential for such customers, it typically does not generate sufficient revenue to make it

[7] Pursuant to D.C. Cir. Rule 47(1)(a), Petitioner submits under seal information designated as "Highly Confidential" ("HCI") and submitted under seal in the record of the underlying Proceeding.

economically feasible for competitors to deploy redundant copper loops or to build other necessary network facilities for the service. That is true for the multi-location customers served by Petitioners. For example, Granite's customers purchase, on average, only three or four lines per location, providing insufficient revenue to support facilities-based competition in each customer location. Zarakas Decl. ¶ 16 (JA____-____). Petitioners can only offer TDM service by purchasing it at wholesale from an ILEC and then reselling it. ILECs compete with Petitioners by offering TDM service directly in the same retail customer marketplace. *See* Antonellis Decl. ¶ 32 (JA____-____).

It is thus not surprising that the record showed ILECs have the ability and incentive to charge extremely high wholesale prices for TDM service. Petitioners and other CLECs rely on the Avoided-Cost Resale requirement to compete for business and government customers, either by purchasing traditional TDM service from ILECs at the prescribed wholesale rate or by using the regulatory requirement as a bargaining tool to obtain prices that closely resemble the Avoided-Cost Resale discount in commercially-negotiated wholesale agreements. *See id*. ¶¶ 33-42 (JA____-____); Zarakas Decl. ¶¶ 21-27 (JA____-____).

Granite's most recent renewal of its commercial agreement with **[BEGIN HCI]** [redacted] **[END HCI]** demonstrates how Avoided-Cost Resale disciplines the wholesale prices that ILECs charge for TDM service. When Granite attempted to

renegotiate its multi-state wholesale voice services agreement with **[BEGIN HCI]**

[redacted]

[END HCI]. Antonellis Supp. Decl. ¶¶ 5-8 (JA____-____).

Additional record evidence demonstrated the "close correspondence between commercial wholesale prices and avoided cost resale rates" for TDM service obtained from ILECs subject to Avoided-Cost Resale. Zarakas Decl. ¶ 26 (JA____). Just as basic bargaining theory dictates that the availability of the Avoided-Cost Resale discount keeps commercial wholesale prices in check, elimination of the regulatory requirement would cause prices for TDM service to increase, harming competition and government and business customers. *Id*. In one case, for example, "Granite's costs for lines procured under commercial wholesale agreements with ILECs would increase by as much as the entire resale discount (15.5% on average . . .) if [Avoided-Cost Resale] were eliminated." *Id*. ¶ 27 (JA____). Such increased line procurement costs would have two expected effects:

[BEGIN HCI] [redacted]

[redacted] **[END HCI]**. *Id.* ¶ 29 (JA____).

In contrast, the record showed that ILECs long ago recovered their costs in deploying copper facilities used for TDM service. Because Avoided-Cost Resale ensures that ILECs earn the same profits that they earn for TDM service sold at retail, continuation of the requirement imposes virtually no costs on ILECs and would have "no adverse impact on their ability to gain profits or to invest in the construction of new networks or the provision of new services." *Id.* ¶ 20 (JA____).

Granite's experience reselling the TDM service of rural ILECs that are statutorily exempt from the Avoided-Cost Resale requirement, *see* 47 U.S.C. § 251(f) ("Rural ILECs"), further demonstrates how the Avoided-Cost Resale requirement serves as a check on wholesale prices. Where Granite has sought to resell Rural ILECs' TDM service, **[BEGIN HCI]** [redacted] **[END HCI]**. Antonellis Decl. ¶ 38 (JA____). Rural ILECs engage in this anticompetitive conduct even though they remain subject to other

requirements, including Section 251(b)(1) of the Act, which requires them to provide retail services to competitors at wholesale (although not subject to the Avoided-Cost requirement), and Sections 201 and 202 of the Act, which require them to do so on just and reasonable and not unjustly or unreasonably discriminatory terms and conditions. *See* 47 U.S.C. §§ 201, 202, 251(b)(1).

SUMMARY OF ARGUMENT

The *Forbearance Order* reflects a results-driven, deregulate-at-all-costs decision that violates the statutory criteria for forbearance and has all of the hallmarks of arbitrary and capricious agency action. The Commission granted nationwide forbearance from Avoided-Cost Resale for all telecommunications services, including TDM service that government and business customers rely upon to ensure communications capabilities for mission-critical functions during power outages, periods of wireless and broadband network congestion, and at all times in large parts of the country where these other services are unavailable. These mission-critical functions include landing airplanes safely every day, maintaining first-responder communications during power outages caused by wildfires, and ensuring essential security services in times of natural disaster.

The *Forbearance Order* marks a sea change from prior Commission precedent. Unlike the requirement to lease UNEs at cost-based rates, Avoided-Cost Resale ensures that ILECs receive the same profit margin from TDM service

resale as they do from selling TDM service directly at retail. This leads to the logical conclusion, supported by economic analysis, that Avoided-Cost Resale should have no effect on the facilities-based incentives for ILECs. In prior forbearance orders, the Commission has found that Avoided-Cost Resale imposes far fewer costs on ILECs compared to UNE requirements and has consistently retained Avoided-Cost Resale as a regulatory safeguard when forbearing from UNE requirements to promote facilities-based competition. In doing so, the Commission determined that Avoided-Cost Resale was necessary to ensure just and reasonable rates in the absence of UNEs and that other statutory requirements were insufficient to ensure this outcome. The *Forbearance Order* ignores this precedent and wrongly conflates the statutory frameworks for UNEs and Avoided-Cost Resale. Specifically, the Commission attempted to justify forbearance from Avoided-Cost Resale on the new-found theory that it has "outlived" its purpose in supporting facilities-based competition, but the Commission nowhere acknowledged this change in policy, much less explained how it is consistent with the statutory text or structure of the 1996 Act.

The Commission's decision to forbear from Avoided-Cost Resale for TDM service also relies on an assessment of the market that is not based on facts in the record and that ignores voluminous record evidence that contradicts the Commission's assessment. Despite evidence of the continued demand for the

reliability and ubiquity of TDM service from these customers, the Commission dismissed this demand as simply "a matter of *preference*," disclaiming any duty to "'protect' every preference some customers might have, especially in the face of alternative options for obtaining voice services." *Forbearance Order* ¶ 31 (JA____) (emphasis added). But the evidence demonstrated that government and business customers do not view these other alternatives as viable substitutes for TDM service. None of these alternatives provide the reliability of line-powered TDM, and they do not even exist in many areas in which government and business customers must have telephone service. Nor will these deficiencies be overcome within the limited transition periods set by the Commission.

The Commission's belief that commercially negotiated agreements under the 1996 Act's general resale requirement in Section 251(b)(1) should produce just and reasonable prices for TDM service without Avoided-Cost Resale was likewise unsupported and contradicted by the record. The evidence showed that ILECs have only agreed to prices resembling the Avoided-Cost Resale discount due to the continued availability of this regulatory option. ILECs that are statutorily exempt from Avoided-Cost Resale have refused to provision TDM service or charged "wholesale" rates equivalent to their retail rates. Other regulatory "alternatives" identified by the Commission would be even less effective in disciplining pricing or are simply inapplicable.

Finally, while the Commission theorized that its undifferentiated deregulatory approach to Avoided-Cost Resale would promote broadband deployment, and thus provide public benefits, this conclusion was unsupported by the record and the Commission's analysis again ignored key aspects of the problem. The Commission nowhere explained how relieving ILECs of the purported "costs" of Avoided-Cost Resale would produce such benefits when ILECs will continue to incur these same "costs" under the 1996 Act's general resale provision, which the Commission elsewhere touted as an important remaining regulatory backstop. Other reasons cited for this purported public benefit were equally flimsy. If anything, the record showed that the absence of Avoided-Cost Discount will allow ILECs to charge supracompetitive rates for TDM service, incenting them to retain rather than replace traditional line-powered facilities. The Commission ignored this fact. Nor did the Commission explain how consumers would benefit when government and business customers are forced to pay higher prices for TDM service to ensure mission-critical functions, including public safety.

ARGUMENT

I. The Commission's Adoption Of A New Framework To Address Forbearance From Section 251(c)(4) Avoided-Cost Resale Was Arbitrary And Capricious.

In prior forbearance proceedings, the FCC has consistently retained the Avoided-Cost Resale requirement in Section 251(c)(4) because (a) it is necessary to ensure just and reasonable rates and to protect consumers even where, indeed especially where, circumstances justified forbearance from Section 251(c)(3) UNE requirements, and (b) other statutory provisions are insufficient for this purpose. The Commission has never previously considered whether Avoided-Cost Resale promotes facilities investment. The *Forbearance Order* departed without explanation from that prior policy. The Commission adopted a new standard under which it assessed forbearance based on whether Avoided-Cost Resale will promote investment in facilities. In so doing, the FCC conflated the framework of Avoided-Cost Resale with UNE unbundling. The Commission failed to explain why this new approach is reasonable or consistent with the terms of the statute.

In its original implementation of the UNE and Avoided-Cost Resale frameworks, the Commission properly determined that Congress did not express "any policy preference for facilities-based competition" when adopting the Avoided-Cost Resale requirement. *See Local Competition Order* ¶ 923. Avoided-Cost Resale was intended as a separate pro-competitive measure to promote just

and reasonable rates for local telecommunications services offered by ILECs that has little or no effect on ILEC or CLEC facilities-based investment incentives. Unlike the "bottom up" cost-based approach to setting prices for UNEs under Section 252(d)(1), the avoided-cost methodology required by Section 252(d)(3) is a "top down" approach that ensures ILECs earn the same profit levels as they do when they sell services at retail. As Senator Inouye explained during the legislative debate regarding the Avoided-Cost Resale requirement in the 1996 Act, Congress sought to "balance[] the interests . . . in permitting the [ILECs] to recover their costs and *indeed to make a reasonable profit* . . . ." 141 Cong. Rec. S8369 (daily ed. June 14, 1995) (Amendment No. 1303) (emphasis added). Congress was "not asking [ILECs] to subsidize their competitors." *Id.* For that reason, "resale prices must reflect the very substantial savings" that ILECs realize because they are "relieved of the obligation to provide a wide variety of services to the retail customer, such as billing and maintenance, that add to the cost of service" as well as "the costs associated with marketing, advertising, and collecting on receivables[.]" *Id.* By design, then, Avoided-Cost Resale was intended to have little or no impact on an ILEC's incentive to deploy next-generation facilities, much less to incent CLECs to deploy redundant competitive facilities where it is economically infeasible.

Understanding this regulatory framework, the Commission has consistently retained the Section 251(c)(4) Avoided-Cost Resale requirement as a separate competitive safeguard even as the Commission became "increasingly interested in supporting facilities-based competition" by granting forbearance from UNE requirements under Section 251(c)(3). *Forbearance Order* ¶ 40 (JA____). In its *Omaha Order*, for example, the Commission granted forbearance from UNE requirements based on the presence of intermodal facilities-based competition from a cable provider, but denied forbearance from Avoided-Cost Resale. The Commission did so "*[p]articularly because* [it had] . . . determined to forbear from section 251(c)(3)" requirements to promote facilities-based competition, concluding that Avoided-Cost Resale remained a necessary regulatory backstop to "ensure reasonable and nondiscriminatory pricing, and ensure consumers' interests and the public interest are protected. . . . [B]ecause the incumbent LEC continues to receive a high percentage of the revenue from resale pursuant to section 251(c)(4), we find that resale does not impose costs similar to those that accompany unbundling pursuant to section 251(c)(3)." *Omaha Order* ¶¶ 88-89 (emphasis added). The Commission likewise rejected the ILEC's argument that Section 251(b)(1) resale was an adequate alternative to Avoided-Cost Resale under Section 251(c)(4). Since "section 251(b)(1) has no wholesale pricing requirement . . . a competitive LEC is unable to distinguish its resale service on the basis of

price"; thus, "the value of a resale option to the creation of competitive markets is diminished." *Id.* ¶ 89.

The Commission affirmed this same statutory interpretation when forbearing from application of certain UNE requirements in the *Anchorage Order*. The Commission predicated its grant of forbearance there on the ILEC's "[continued] obligations to provide its services for resale under section 251(c)(4)," which enabled "sufficient wholesale inputs to preserve and foster a vibrant competitive retail market" even while fostering facilities-based competition through the elimination of UNE requirements under Section 251(c)(3). *Anchorage Order* ¶ 44.

In 2015, the Commission again granted forbearance from UNE requirements but retained Avoided-Cost Resale as a "statutory and regulatory safeguard[] in place to guard against any unreasonable or unreasonably discriminatory charges or practices that could potentially arise in the absence of the [forborne] requirement." *2015 Order* ¶ 60. Particularly relevant here, the Commission emphasized in this most recent order that Section 251(c)(4) "preserves competitive LECs' ability 'to provide voice services to customers *without building their own network facilities*.'" *Id.* (emphasis added) (internal quotations omitted).

And, in the only market in which the Commission has granted forbearance from Section 251(c)(4), it did so without any change in its prior view of the Avoided-Cost Resale requirement. Forbearance was instead appropriate in an

anomalous situation where *two* ILECs, Qwest and Mid-Rivers, had constructed near-ubiquitous last-mile access networks in the same discrete local geographic region. *See generally Terry Order*. The presence of duplicative ILEC networks provided a sufficient safeguard against unreasonable or unreasonably discriminatory charges or practices to justify forbearance from both the UNE and Avoided-Cost Resale requirements. *Id*. The Commission made no attempt to assess whether Avoided-Cost Resale promotes facilities-based competition.

The *Forbearance Order* marks a wholesale departure from this prior precedent. In granting nationwide forbearance, the Commission theorized that "Avoided-Cost Resale requirements, like UNE Analog Loop requirements, serve only to prolong dependence on legacy TDM voice services, rather than pave the way for meaningful facilities-based competition over next-generation networks providing advanced communications capability," and determined that "[t]he same marketplace and technological changes that warrant forbearance from UNE Analog Loop requirements justify forbearance from Avoided-Cost Resale." *Forbearance Order* ¶ 38 (JA____). The Commission's new—and improper—conflation of these separate statutory frameworks reaches its zenith where its only passing reference to back-up generator and battery power necessary to maintain telecommunications services during power outages appears *in the UNE analysis*—and is utterly ignored for Avoided-Cost Resale, where continuing demand for

reliable TDM service exists for precisely such circumstances. *See id.* ¶ 32 (JA____).

In making this sea change, the Commission did not acknowledge that it was abandoning its established framework for assessing forbearance from Section 251(c)(4). Nor did the Commission attempt to explain why its new approach is reasonable and preferable to its past approach. And, as detailed below, the Commission disregarded extensive contrary record evidence and arguments in pursuing its deregulate-at-all-costs agenda.

a. The Commission Failed To Acknowledge Its Departure From The Framework Set Forth In The *Omaha Order* Or Explain Why It Should Not Apply.

In conflating its analysis of UNEs and Avoided-Cost Resale, the Commission failed to acknowledge or distinguish its treatment of the Avoided-Cost Resale requirement in prior proceedings such as the *Omaha Order*. This failure alone renders the *Forbearance Order* arbitrary and capricious. *Lone Mountain Processing*, 709 F.3d at 1164 (vacating order where agency failed to "discuss, let alone distinguish" precedent that was "obviously relevan[t]").

Although the *Forbearance Order* twice references the *Omaha Order*, the Commission failed to acknowledge its finding there that Avoided-Cost Resale is a necessary regulatory safeguard, especially where forbearance from UNEs has been granted, and that "the incumbent LEC continues to receive a high percentage of the

revenue from resale pursuant to section 251(c)(4)." *Omaha Order* ¶ 89; *see also* INCOMPAS Opp. at 74 (JA____); Granite Opp. at 9-11, 35-36 (JA____-____, ____-____). Instead, the Commission's analysis of the costs imposed by Avoided-Cost Resale under Section 251(c)(4) is modeled after its discussion of the UNE requirement in Section 251(c)(3). *Forbearance Order* ¶¶ 9, 15-16, 39 (JA____-____, ____, ____). But, as shown, the latter focuses on the asymmetrical burden on ILECs under the "bottom up" cost-based approach to UNEs and the purported disincentives toward investment in next generation technologies. The former utilizes a materially different, "top down" approach that avoids such disincentives. The *Forbearance Order* fails to "discuss, let alone distinguish," *Lone Mountain Processing*, 709 F.3d at 1164, its prior—and correct—"find[ing] that [Avoided-Cost Resale] does not impose costs similar to those that accompany unbundling pursuant to section 251(c)(3)," *Omaha Order* ¶ 89.

The Commission also cited to Section 251(b)(1) resale as a further ground for forbearance from 251(c)(4) without distinguishing its contrary finding in the *Omaha Order* that 251(b)(1) is an *inadequate* substitute for Avoided-Cost Resale, even in the presence of intermodal facilities-based competition. *See Forbearance Order* ¶¶ 43 & n.150, 49, 51, 54 (JA____, ____, ____, ____). Although the Commission observed that the *nondiscrimination* portions of 251(b)(1) are identical to those of 251(c)(4), that is beside the point. In the *Omaha Order*, the

Commission found that the *pricing* portions of the two provisions are the relevant consideration: Because "section 251(b)(1) has *no wholesale pricing* requirement," it is not a substitute for "the value of a resale option to the creation of competitive markets" that Congress established in Section 251(c)(4). *Omaha Order* ¶ 89 (emphasis added); *see also* INCOMPAS Opp. at 73-74 (JA____-____); Granite Opp. at 29-31 (JA____-____); MetTel Opp. at 8-9 (JA____-____); PUCO Comments at 5-6 (JA____-____).

The Commission likewise failed to explain its decision to forbear from both Section 251(c)(3) UNE and Section 251(c)(4) Avoided-Cost Resale requirements in the *Forbearance Order*—and, in doing so, to apply the same framework for determining whether to forbear from the two separate requirements—when it has expressly retained Avoided-Cost Resale as a competitive safeguard in prior orders granting UNE forbearance. The Commission simply "gloss[ed] over" the *Omaha Order* (and similar *Anchorage* and *2015 Order* precedent), *see Forbearance Order* ¶ 58 nn.191, 194 (JA____), and made no effort to "grapple with" its prior findings that the continued availability of Avoided-Cost Resale is essential to ensure just and reasonable rates, to protect consumers, and to promote the public interest in markets where UNE forbearance is granted. *See NLRB v. CNN Am., Inc.*, 865 F.3d 740, 750 (D.C. Cir. 2017) (finding arbitrary and capricious action where, as here, an agency failed to "grapple with" prior contrary agency precedent); *Ramaprakash*

v. FAA, 346 F.3d 1121, 1125 (D.C. Cir. 2003) (holding that an agency's "failure to come to grips with" its own conflicting precedent "constitutes an inexcusable departure from the essential requirement of reasoned decision making") (internal citations omitted).

b. The Commission Failed To Explain Why Its Newfound View Of Section 251(c)(4) Comports With The Terms Of The Statute.

The Commission likewise failed to explain "how [its] new test reasonably interprets" the governing statute or rule. *ABM Onsite Servs.—W., Inc.*, 849 F.3d at 1147. The *Forbearance Order* makes no attempt to explain how the Commission's new approach for assessing forbearance from Avoided-Cost Resale is consistent with the text of Sections 251(c)(4) or 252(d)(3) or the broader objectives and structure of Sections 251 and 252. Nor could it. The Avoided-Cost Resale requirement is a separate market-opening mechanism distinct from the UNE requirement, says nothing about facilities deployment, and utilizes a rate methodology that has no little or no effect on ILEC or CLEC investment incentives. The *Forbearance Order* essentially rewrites the relevant statutory provisions and framework without any justification.

The only statutory language that the Commission considered is the provision in Section 10 (codified as 47 U.S.C. § 160) that the agency may not forbear from Section 251(c) requirements until they are "fully implemented." *See Forbearance Order* ¶ 41 (JA____). But that provision concerns only whether the Commission

had the *authority* to forbear from Sections 251(c)(4) and 252(d)(3). It says nothing about the meaning or purpose of Sections 251(c)(4) or 252(d)(3). The Commission's failure to explain how its new, conflated analytical framework for Avoided-Cost Resale reasonably interprets these statutory provisions is another hallmark of arbitrary and capricious agency action.

c. The Commission Failed To Explain How Its Change In Framework For Analyzing Avoided-Cost Resale Is Appropriate Or Justified By The Record Evidence.

Apart from ignoring its prior precedent and the terms of the relevant statutes, the Commission also failed to address arguments made by Petitioners that (1) forbearance from Avoided-Cost Resale and UNEs should remain subject to different tests and (2) and unlike UNEs, forbearance from Avoided-Cost Resale should be denied except where facilities-based competition is extremely robust. An agency's "reasoned explanation" for a change in policy must "respond to the substantial arguments" put forward by commenters. *New Eng. Power Generators Ass'n, Inc.*, 881 F.3d at 211. The *Forbearance Order* fails this standard as well.

The most the Commission allowed is that it had previously "noted that the use of Avoided-Cost Resale, unlike UNEs, might be an important long-term strategy." *Forbearance Order* ¶ 40 (JA____) (citing *Local Competition Order* ¶ 907). But the *Forbearance Order* then simply pivoted to the Commission's interest in facilities deployment as justification for eliminating Avoided-Cost

Resale. *Id.* ¶ 40 & n.142 (JA____) (citing other orders discussing this same interest). The Commission ignored arguments from Petitioners that Section 251(c)(4) applies, without qualification, to "*any*" telecommunications services ILECs offer to retail customers, and without regard to the level of competition in the relevant market. This language differs materially from the UNE requirement under Section 251(d)(2), which directs the Commission to consider, "at a minimum," whether Section 251(c)(3) access to an ILEC's network elements is "necessary" and whether failure to provide a nonproprietary element on an unbundled basis would "impair" a requesting carrier's ability to provide service. The Commission has given proper effect to these different statutory constructs in prior forbearance proceedings, keeping Avoided-Cost Resale in place even where ILECs have been relieved of UNE obligations. One will search the *Forbearance Order* in vain for any substantive response to these arguments.

II. The Commission's Grant Of Nationwide Forbearance From Avoided-Cost Resale For TDM Service Was Arbitrary And Capricious.

In forbearing from Avoided-Cost Resale for all telecommunications services, the Commission theorized that just and reasonable prices will remain because of "[t]he growing number of end users turning to VoIP and wireless offerings." *Id.* ¶ 47 (JA____). Without citing any record support, the Commission asserted that "competition from [VoIP and wireless] options plays a far more important role in constraining [ILEC] rates than the continued availability of

Avoided-Cost Resale." *Id.* ¶ 48 (JA____). This broad assumption failed to account for record evidence showing that VoIP and wireless prices do *not* discipline rates for TDM service because government and business customers do not view these other services as viable substitutes. The Commission's related speculation that the general resale provisions of Section 251(b)(1) and other regulatory alternatives would discipline TDM prices was equally unsupported and refuted by contrary record evidence. *Id.* ¶¶ 39, 43, 47-49, 51-52 (JA____, ____, ____-____, ____-____).

a. The Commission Ignored Record Evidence That Avoided-Cost Resale Is Necessary To Protect Customers Of TDM Service From Unjust And Unreasonable Rates.

The record demonstrated that a significant market segment, including federal and state governments and 80 of the Fortune 100 companies, continue to purchase TDM service for its reliability and ubiquity. *See* Antonellis Decl. ¶¶ 4, 9-27 (JA____, ____-____). Because it is line-powered, TDM service functions during power outages when VoIP and wireless services fail. These other services are also susceptible to network congestion that disrupts their availability. TDM is not.

In addition, TDM service is available in rural and other locations where VoIP and wireless services do not exist or have limited functionality. The Commission simply assumed the nationwide presence of broadband providers and therefore VoIP. *See Forbearance Order* ¶¶ 48, 62 (JA____, ____). But the record

showed that broadband has not been deployed in large portions of the country, and that the Commission's deployment data, derived from Form 477, are unreliable and overstate the extent of availability. *See, e.g.*, Joint Parties' Apr. 24, 2019 Letter at 1-3 (JA____-____). FCC commissioners, members of Congress, and Intervenor USTelecom's president have reached this exact same conclusion. *Id.* at 2 (JA____); Joint Parties' May 28, 2019 Reply Comments 16-22 (JA____-____). Moreover, a 2019 study found that the level of broadband adoption among Americans is approximately 49 percent. Joint Parties' Apr. 24, 2019 Letter at 2-3 (JA____-____). Thus, even if customers viewed VoIP as a viable substitute (and they do not), the Commission failed to explain how the existence of VoIP in some parts of the country could serve to constrain prices for TDM service in areas where VoIP does not exist.[8]

For these reasons, government and business customers continue to purchase large volumes of TDM service, and some federal and state regulations specifically

[8] In its discussion of UNEs (not Avoided-Cost Resale), the Commission stated that "we see no basis to conclude that price cap LECs could price discriminate based on the relative magnitude of competition present in narrow geographic areas." *Forbearance Order* ¶ 25 (JA____). This unexplained view runs counter to decades of Commission precedent. *See, e.g.*, *Verizon-MCI Order* ¶ 37 (finding the likelihood of "anticompetitive effects in buildings where MCI is the only competitive LEC with a direct wireline connection and where entry appears unlikely" absent remedial measures). An agency receives no deference for "conclusory statements that dismissed Petitioners' concerns without providing reasoned analysis." *New Eng. Power Generators Ass'n*, 881 F.3d at 210-11.

require such services. *See* Antonellis Decl. ¶¶ 9-27 (JA____-____); Sullivan Decl. ¶¶ 16, 19-20 (JA____, ____-____); Joint Parties' Mar. 14, 2019 Letter at 6-10 & n.46 (JA____-____). The *Forbearance Order* fails to explain how VoIP and wireless services will constrain TDM prices in the absence of Avoided-Cost Resale when government and business customers do *not* view them as viable substitutes, and they are not even available in many locations.

The Commission's prediction that government and business customers will transition from TDM service to VoIP without Avoided-Cost Resale is likewise contradicted by the evidence. *See Forbearance Order* ¶ 31 (JA____). While many government and business customers purchase VoIP and wireless telephone services for some purposes, they rely on TDM service for critical functions where reliability is of paramount importance. Granite Opp. 17-18 (JA____-____); Antonellis Decl. ¶¶ 9-27 (JA____-____); Sullivan Decl. ¶¶ 4-20 (JA____-____). To meet this demand, Petitioners' customers commonly purchase TDM service at locations where VoIP is also available, including where prices for TDM service are significantly higher than those for VoIP. *See*, *e.g.*, Joint Parties' Nov. 19, 2018 Letter at 1-2 (JA____-____) (explaining that "[m]ore than 50 percent of MetTel's VoIP customers purchase traditional TDM service from MetTel at the same location at which they purchase VoIP service from MetTel" and that demand for TDM remains robust even though MetTel's TDM prices are on average more than

double, and Access One's are more than two-and-a-half times, their prices for VoIP).[9]

The Commission similarly ignored evidence that the demand for TDM service among government and business customers is large and stable. *See* Granite Opp. at 17-21 (JA____-____); Antonellis Decl. ¶¶ 9-27 (JA____-____); Zarakas Decl. ¶¶ 6-12 (JA____-____); Sullivan Decl. ¶ 13 (JA____); *see* Joint Parties' May 28, 2019 Reply Comments at 4-9 (JA____-____). For example, Granite resells TDM service to 80 of the Fortune 100 corporations in addition to numerous federal and state agencies. Antonellis Decl. ¶ 4 (JA____). The Commission glossed over these facts, citing instead to its annual Voice Telephone Services ("VTS") Reports showing that overall demand for TDM service has decreased, while demand for VoIP and wireless has increased. *See Forbearance Order* ¶ 47 (JA____); *see also id.* ¶ 62 (JA____) (citing the "Voice Telephone Services" discussion of the *2018 Communications Marketplace Report*, which is likewise predicated on VTS Report data). But that generalized trend ignores the significant percentage of government and business customers that continue to rely on TDM service and will be harmed

[9] Thus, while the Commission stated that alternative services such as facilities-based VoIP need not be "perfect substitutes" in order to have a competitive effect on TDM service, the record showed that such services did not constitute even an imperfect substitute for TDM service. *Forbearance Order* ¶ 62. And, as explained *infra*, facilities-based VoIP is not even available in large portions of the country.

by the elimination of Avoided-Cost Resale. The *same* VTS Reports show that demand for resold TDM service from these customers has remained steady and recently has *increased*. *See* Joint Parties' May 28, 2019 Reply Comments at 3, 13-16 (JA____, ____-____).[10]

The Commission nowhere acknowledged, let alone considered, the effect of its *Forbearance Order* on this major segment of TDM customers. Worse, the Commission ignored evidence that demand for TDM lines may even *accelerate* as more frequent and longer climate disasters cause greater, widespread power outages like California is currently experiencing. Joint Parties' Mar. 14, 2019 Letter at 5-7 (JA____-____).

The Commission's disregard for this important market segment is further evident from its summary dismissal of the "distinctive line power feature of TDM voice service." *Forbearance Order* ¶ 32 (JA____). The Commission only discussed this feature in the section of the *Forbearance Order* addressing *UNEs*,

[10] In its discussion of UNEs (not Avoided-Cost Resale), the Commission dismissed this analysis in a footnote, asserting that "[t]he underlying data that formed the basis for Granite's switched access line numbers was not included in the record; thus, we cannot verify their accuracy." *Forbearance Order* ¶ 11 n.36 (JA____-____). This response is another hallmark of the Commission's lack of meaningful consideration of contrary evidence: as detailed on the record, the "underlying data" came from the very same *Commission-published* reports that the Commission relied upon elsewhere in the *Forbearance Order*. *See* Joint Parties' May 28, 2019 Reply Comments at 9-16 (JA____-____).

and ignored the issue entirely in its discussion of Avoided-Cost Resale, where TDM reliability is of paramount importance.

Even then, the Commission's short-shrift treatment of line-powered TDM was contradicted by the record. While acknowledging that its rules mandating backup power for VoIP apply only to residential subscribers, the Commission asserted that "business and government customers meet the need for backup power by maintaining generators or uninterrupted power supplies to ensure ongoing business operations for all equipment needing uninterrupted power supply during power outages." *See id.* ¶ 32 n.114 (JA____). The Commission's only basis for this claim was two cherry-picked *ex parte* filings suggesting that it is *theoretically possible* for business customers to deploy their own back-up power for VoIP services. But the *Forbearance Order* nowhere considers the extent to which business customers *actually* deploy their own backup power for business VoIP or even view that as a viable solution for mission-critical service.

The Commission's failure was not for lack of evidence. The record showed that Petitioners' government and business "customers who need reliable and secure access to critical infrastructure use traditional TDM, not VoIP." Antonellis Decl. ¶ 12 (JA____); Joint Parties' July 15, 2019 Letter at 2-3 (JA____-____) (explaining that "commercially-available battery backups provide only a short-term power source, usually several hours," whereas "TDM lines are powered by

the ILECs' central offices, which are equipped with battery backup powered by generators that have the ability to run indefinitely, thus ensuring continuity of service"). This included real-world incidents, such as during Superstorm Sandy, where VoIP quickly became unavailable while TDM service continued to work. "It is for reasons like this that business and government customers continue to purchase traditional TDM service." Joint Parties' July 15, 2019 Letter at 3 (JA____). The FCC simply ignored this evidence.[11]

Further, the record showed that government and business customers with multi-location footprints rely on Petitioners to provide one-stop-shop offerings for their critical TDM services. *See* Antonellis Decl. ¶¶ 4-7, 41-44 (JA____-____, ____-____); Zarakas Decl. ¶¶ 6-13, 29 (JA____-____, ____); Sullivan Decl. ¶¶ 4-7, 33 (JA____-____, ____); Joint Parties' Nov. 8, 2018 Letter at 4, 16-17 (JA____, ____- ____). Avoided-Cost Resale enables Petitioners to serve this demand and aggregate billing across different ILEC networks and locations. In one case, for example, "Granite's largest customers (in terms of their number of lines) would need to deal with 10 or so different telephone companies in order to procure service . . . . This could [also] turn into processing hundreds of bills each month,

[11] The Commission's discussion of eventual copper retirement is also misplaced. *Forbearance Order* ¶ 33 (JA____). Until that point, a significant class of customers will rely on Avoided-Cost Resale to ensure that rates for traditional TDM service remain just and reasonable.

given that individual state and/or regional ILECs may bill separately for each product or service." Zarakas Decl. ¶ 11 (JA____). The FCC never addressed this evidence, either.

Rather than grappling with the significant market demand for reliable TDM service, the Commission simply dismissed it, stating that "[i]nsofar as particular end users steadfastly remain reliant on TDM as a matter of *preference*, we likewise are not persuaded that the Commission must 'protect' every preference some customers might have, especially in the face of alternative options for obtaining voice services." *Forbearance Order* ¶ 31 (JA____) (emphasis added). Ensuring continued telecommunications during power outages for emergency response, to synchronize nationwide air traffic control, to safeguard vaults, and for other critical functions is not a "preference." It is a *necessity*, which the Commission was wrong to ignore.

b. The Commission Ignored Record Evidence That Commercial Wholesale Agreements Will Not Produce Just And Reasonable Rates For TDM Service Absent Avoided-Cost Resale.

Having disregarded the record evidence of continuing customer demand for TDM service, the Commission reached a results-driven deregulatory conclusion "that Avoided-Cost Resale does *not* serve to constrain retail rates," especially "[g]iven the number of available alternatives for competitors to provide competition to [ILECs] and [ILECs'] demonstrated willingness to offer

commercial wholesale services." *Id.* ¶ 48 (JA____). That assumption is contradicted by additional record evidence that the Commission likewise ignored.

Because Petitioners' government and business customers do not view alternative service offerings as substitutes, they continue to demand large volumes of TDM service. Petitioners are dependent on ILECs to obtain TDM service to meet that demand. In the absence of Avoided-Cost Resale, ILECs will have the ability and incentive to increase the prices they charge competitors and, in turn, the prices customers must pay. *See, e.g.*, Granite Opp. at 26-29 (JA____-____). While the Commission pointed to the continued availability of commercial arrangements for resale services, *see Forbearance Order* ¶ 42 (JA____-____), it simply ignored the fact that current wholesale agreements have been disciplined by the availability of Avoided-Cost Resale as a regulatory backstop, resulting in negotiated rates that resemble the Avoided-Cost discount, *see* Antonellis Decl. ¶¶ 34-38 (JA____-____); Sullivan Decl. ¶¶ 22-26 (JA____-____).

Again, the Commission's failure was not for lack of evidence. The record was replete with Petitioners' real-world experiences in seeking commercial wholesale agreements with ILECs. *See* Antonellis Decl. ¶¶ 34-44 (JA____-____); Zarakas Decl. ¶¶ 20-29 (JA____-____); Sullivan Decl. ¶¶ 31-32 (JA____); Granite Sept. 5, 2018 Reply Comments at 6-7 (JA____-____). Those experiences and accompanying economic analyses showed that the availability of Avoided-Cost

Resale has resulted in commercial wholesale rates that are very similar to the rates otherwise available pursuant to 251(c)(4). ILECs would not have agreed to these rates without the prospect of Avoided-Cost Resale as a backstop; and ILECs that are statutorily exempt from Avoided-Cost Resale have demanded rates equivalent to their retail rates for TDM service. *See* Antonellis Decl. ¶¶ 36-38, 41-42 (JA____-____, ____-____); Zarakas Decl. ¶¶ 24-29 (JA____-____); Antonellis Supp. Decl. ¶¶ 3-8 (JA____-____); Joint Parties' Nov. 8, 2018 Letter at 22 (JA____).

In other words, the Commission's speculative belief that it "do[es] not expect" ILECs to increase prices for commercial agreements in the absence of Avoided-Cost Resale was not only unsubstantiated, but contradicted by the evidence. *See Forbearance Order* ¶ 52 (JA____-____). The record showed that there is every reason to expect that ILECs will increase prices if Avoided-Cost Resale is eliminated. *See* Antonellis Decl. ¶¶ 36-38, 41-42 (JA____-____, ____-____); Antonellis Suppl. Decl. ¶¶ 3-8 (JA____-____); Granite Sept. 5, 2018 Reply Comments at 12 (JA____); Joint Parties' Nov. 8, 2018 Letter at 23-24 (JA____-____). The Commission just ignored this evidence, too. "An agency action is arbitrary and capricious where the agency has entirely failed to consider an important aspect of the problem, or offered an explanation for its decision that runs

counter to the evidence before the agency." *United Keetoowah Band of Cherokee Indians in Okla.*, 933 F.3d at 738 (internal quotations omitted).

Nor will the limited transition periods adopted in the *Forbearance Order* serve to protect customers, as the Commission wrongly theorized. *Forbearance Order* ¶¶ 44-46, 49 (JA____-____, ____). Nothing in the record suggested that wireless service or VoIP will be able to offer the same reliability and ubiquity as TDM service within the transition periods. Further, as a practical matter, allowing six months for new orders and grandfathering those orders and prior orders for three years will have almost no real-world effect. Since the six-month transition for new orders expires on February 2, 2020, CLECs will not have Avoided-Cost Resale available as a backstop when negotiating commercial wholesale agreement renewals after that date. And ILECs have no incentive to engage in renewal negotiations until the transition period expires.

c. Other Regulatory Alternatives Identified By The Commission Are Inadequate Or Inapplicable.

The Commission further asserted that, in the absence of Avoided-Cost Resale, other statutory provisions, including Section 251(b)(1) and Sections 201, 202, 208, and 214, would protect consumers of TDM service against unjust, unreasonable and unjustly or unreasonably discriminatory charges or practices. *See id.* ¶ 43 (JA____). But, true to form, the Commission failed to even

acknowledge substantial arguments on the record that none of these other provisions will constrain ILEC prices.

Section 251(b)(1) merely requires that all LECs offer their telecommunication services at resale; it does not establish any constraint on prices. *See* 47 U.S.C. § 251(b)(1). Sections 201 and 202 together require that ILEC prices are just, reasonable, and not unjustly or unreasonably discriminatory, and Section 208 establishes a complaint process for carriers to enforce Sections 201 and 202. *See* 47 U.S.C. §§ 201, 202, 208. But, unlike the *ex ante* Avoided-Cost Resale requirement, Sections 201, 202, and 208 are *ex post* enforcement safeguards, and they include no specific standard for setting wholesale rates. *See id.* The costs, uncertainties, and delays involved with such proceedings make them highly ineffective means of resolving price disputes. Post hoc enforcement also distorts competition, hampering competitors' ability to respond to customer requests for TDM service in a timely fashion. *See* Granite Opp. at 29-31 (JA____-____); MetTel Opp. at 8-9 (JA____-____). And Section 214's discontinuance requirements only apply to the extent that an ILEC seeks to discontinue, reduce, or impair a service. *See* 47 U.S.C. § 214. As long as an ILEC continues to offer in-demand TDM service, Section 214 is inapplicable.[12]

[12] Nor will "special access services" provide competitive protections in the absence of Avoided-Cost Resale. *See Forbearance Order* ¶ 42 (JA____-____). As explained on the record, TDM service is not generally available as a special access

The inadequacies of these regulatory alternatives were fully established in the record. For instance, Granite described how it is frequently **[BEGIN HCI]** [redacted] **[END HCI]** when serving customers located where Rural ILECs are exempt from the Avoided-Cost Resale requirement pursuant to Section 251(f). *See* Granite Opp. at 27 (JA____); Antonellis Decl. ¶ 38 (JA____). And this occurs even though ILECs in those areas are still subject to Sections 251(b)(1), 201, 202, 208, and 214. Those ILECs generally charge competitors "wholesale" prices equal to their own retail prices. Joint Parties' June 14, 2019 Letter at 2-3 (JA____-____). The Commission nowhere addressed this evidence.

More generally, the Commission asserted that, "to the extent that Avoided-Cost Resale's primary value is as a regulatory backstop, it offers even fewer benefits than the Commission and Congress initially envisioned and thus the public interest is even better served by its sunset." *Forbearance Order* ¶ 51 n.170 (JA____). But the Commission failed to explain what it—or Congress—"initially envisioned" for Avoided-Cost Resale, much less acknowledged that the Commission has consistently (a) relied on Avoided-Cost Resale as a regulatory backstop to ensure just, reasonable, and not unjustly or unreasonably

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service. *See, e.g.*, Joint Parties' Nov. 8, 2018 Letter at 11-12 (JA____); Joint Parties' June 26, 2019 Letter at 3 (JA____). Moreover, none of filings the Commission cited for this proposition even mention special access service as an alternative. *See Forbearance Order* ¶ 42 & n.146 (JA____).

discriminatory rates (e.g., the *Omaha*, *Anchorage*, and *2015 Orders*); and (b) found that Congress intended for this regulatory backstop to level the bargaining power in resale negotiations between ILECs and CLECs. Joint Parties' Nov. 8, 2018 Letter at 18 (JA____); Joint Parties' June 26, 2019 Letter at 5 & n.22 (JA____). Avoided-Cost Resale continues to provide exactly the benefits that Congress and the Commission initially envisioned. The Commission simply ignored this evidence without adequately explaining or supporting its fundamental change in position.

Finally, the Commission failed to give meaningful consideration to granting forbearance to all telecommunications services except TDM services sold to government and business customers, as Petitioners proposed. In dismissing this option, the Commission stated that "the record neither provides a basis to affirmatively identify" all end users that prefer TDM service or to "administratively structure forbearance to exclude all such end users." *Forbearance Order* ¶ 31 (JA____). Yet, elsewhere in the *Forbearance Order*, the Commission noted Avoided-Cost Resale is used "*solely*" or "*almost exclusively*" to sell TDM service to government and business customers. *Id.* ¶ 40 (JA____-____) ("solely"); *id.* ¶ 49 n.162 (JA____) ("almost exclusively") (emphases added). Having itself affirmatively identified the customers harmed by forbearance, the Commission could and should have retained Avoided-Cost Resale for TDM

service resold to this significant market segment. In plowing ahead with its deregulate-at-all-costs approach, the Commission failed "to consider responsible alternatives" or "to give a reasoned explanation for its rejection of [them]." *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 242 (D.C. Cir. 2008) (finding such agency action arbitrary and capricious).

Because Avoided-Cost Resale remains necessary to ensure just and reasonable rates for TDM service, the Commission's grant of forbearance was improper, *see* 47 U.S.C. § 160(a)(1), (2) (requiring a valid determination that continued enforcement of the relevant regulation "is not necessary to protect customers" and "to ensure . . . just and reasonable" rates), and arbitrary and capricious.

d. The Commission's Conclusion That Forbearance From Avoided-Cost Resale Would Have Public Interest Benefits Was Also Unsupported And Arbitrary And Capricious.

In addressing the remaining public interest criterion, the Commission theorized that retaining Avoided-Cost Resale creates disincentives for broadband deployment. *Forbearance Order* ¶ 39 & n.139 (JA____). Like other aspects of the order, there was no factual support for this proposition, and the Commission simply ignored contrary record evidence.

For example, the Commission cited conclusory assertions about broadband deployment by AT&T that lack any factual basis. *Id.* ¶ 39 (JA____) (citing AT&T

Dec. 28, 2018 Letter at 2 (JA____)). The Commission also cited an economic analysis submitted by Verizon, but—just like the economic analysis that accompanied the USTelecom Petition—the investment-related conclusions there only analyzed forbearance from *UNEs*—not Avoided-Cost Resale. *Id.* (JA____) (citing Verizon Reply Comments at 14-15 (JA____-____)); *see also* Granite Opp. at 36-37 (JA____-____); *see generally* Singer Decl. (JA____-____) (analyzing only the impacts of forbearance from the Section 251(c)(3) UNE requirement).

The Commission similarly cited another AT&T filing suggesting that Avoided-Cost Resale requires that ILECs maintain systems and employees for managing the regulated services. *Forbearance Order* ¶ 39 & n.135 (JA____) (citing AT&T Reply Comments at 24 (JA____)). But neither AT&T nor the Commission made any attempt to quantify those costs, let alone explain how such costs would be avoided when ILECs provision TDM service for resale under Section 251(b)—which the Commission elsewhere touted as a viable "regulatory alternative" to Avoided-Cost Resale. *See id.* ¶¶ 42-43 (JA____-____).

The Commission also pointed to AT&T's assertion that Avoided-Cost Resale rates are set too low, which purportedly undermines investment in facilities. *See id.* ¶ 39 & n.135 (JA____) (citing AT&T Reply Comments at 24 (JA____)). But there was no evidence for that proposition, either. If AT&T actually believed Avoided-Cost Resale rates were set too low, it could and would have challenged

them. In fact, AT&T has not challenged Avoided-Cost Resale rates over the past decade, if ever. *See* Joint Parties' Nov. 8, 2018 Letter at 25-27 (JA____-____). AT&T did not dispute this point; the Commission just ignored it.

The Commission similarly accepted Frontier's claim that Avoided-Cost Resale artificially forces Frontier to maintain high prices. *Forbearance Order* ¶ 39 & nn.137, 138 (JA____) (citing Frontier June 28, 2019 Letter at 2-3 (JA____-____)). Yet, neither Frontier nor the Commission explained (or can explain) how this could be true. The Avoided-Cost Resale discount merely prevents Frontier from charging competitors for the marketing, billing, customer service, and other costs that Frontier avoids when it sells TDM service at wholesale. 47 U.S.C. § 252(d)(3). It should have no effect on Frontier's retail pricing for the service.

Equally flimsy, the Commission accepted AT&T's assertion that ILECs, CLECs, and the states "must expend resources determining the avoided-cost rates." *Forbearance Order* ¶ 39 (JA____). As noted in the record, however, there is no evidence that state commissions have reviewed, let alone changed, the discounts they set for Avoided-Cost Resale in the past 10 years. Joint Parties' Nov. 8, 2018 Letter at 26 & n.130 (JA____). AT&T did not dispute this fact; the Commission again ignored it.

While accepting at face value these demonstrably inaccurate assertions, the Commission disregarded evidence showing that Avoided-Cost Resale for TDM

service does not undermine ILEC investment in broadband or other next-generation networks. Because the Avoided-Cost Resale methodology "ensures that, in addition to other costs, a return on invested capital is included in the resale price," ILECs "do not suffer a below market return on their investments when a business line is leased to a CLEC (via resale obligations) instead of sold directly to an end-user. [Thus,] there is [] no adverse impact on their ability to gain profits or to invest in the construction of new networks or the provision of new services." Zarakas Decl. ¶ 20 (JA____); *see also Omaha Order* ¶ 89 ("[B]ecause the [ILEC] continues to receive a high percentage of the revenue from resale pursuant to section 251(c)(4), we find that resale does not impose costs similar to those that accompany unbundling pursuant to section 251(c)(3)").

Moreover, the Commission failed to contend with Petitioners' arguments that forbearance from Avoided-Cost Resale would *reduce* ILECs' incentive to replace copper with fiber. Because forbearance eliminates the ability of non-ILECs to offer competitive TDM service to government and business customers, restoring ILECs' monopoly in the provision of this service reduces their incentives to retire more-profitable TDM lines and replace them with next-generation fiber facilities. *See* Joint Parties' July 15, 2019 Letter at 1-2 (JA____-____).

And the Commission's prediction that higher prices for TDM service after forbearance could cause competitive carriers to deploy new facilities to provide

telephone services is fanciful and contradicted by the evidence. *See Forbearance Order* ¶¶ 39, 51-52 (JA____, ____-____). As the record showed (and logic dictates), it is economically infeasible for Petitioners to deploy redundant copper loop facilities needed to provide TDM service. Granite Opp. at 23-24 (JA____-____); Antonellis Decl. ¶¶ 29-31 (JA____-____); Zarakas Decl. ¶¶ 15-17 (JA____-____); Sullivan Decl. ¶ 22 (JA____). Just as in *National Lifeline*, "[t]he Commission's conclusion" that a change in policy "will incentivize [broadband] deployment" was entirely "speculative" and contradicted by record evidence that the Commission simply chose to ignore. 921 F.3d at 1115 (internal quotations omitted). In fact, the only conclusion supported by the record regarding expected higher prices for TDM service post-forbearance is that government and business customers will be affirmatively harmed – paying higher rates, without the benefits of innovative one-stop shopping, for mission-critical service inputs. *See, e.g.*, Granite Opp. at 6 (JA____).

For these additional reasons, the Commission's grant of forbearance was improper, *see* 47 U.S.C. § 160(a)(3) (requiring a valid determination that forbearance from a regulation is consistent with the public interest), and constitutes arbitrary and capricious agency action.

CONCLUSION

The Court should vacate the *Forbearance Order* to the extent that it unlawfully granted forbearance from the application of Avoided-Cost Resale under Section 251(c)(4) to TDM service demanded by Petitioners' government and business customers.

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), undersigned counsel certifies that this brief:

(i) complies with the type-volume limitation of Rules 29(a)(5) and 32(a)(7)(B) because it contains 11,731 words, excluding the parts of the brief exempted by Rule 32(f) and Circuit Rule 32(e)(1); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2013 and is set in Times New Roman font in a size equivalent to 14 points or larger.

Dated: January 13, 2020 */s/ David P. Murray*

ADDENDUM

ADDENDUM OF PERTINENT STATUTES

47 U.S.C. § 160 - Competition in provision of telecommunications service

(a) Regulatory flexibility

Notwithstanding section 332(c)(1)(A) of this title, the Commission shall forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines 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.

(b) Competitive effect to be weighed

In making the determination under subsection (a)(3), 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.

(c) Petition for forbearance

Any telecommunications carrier, or class of telecommunications carriers, may submit a petition to the Commission requesting that the Commission exercise the authority granted under this section with respect to that carrier or those carriers, or any service offered by that carrier or carriers. Any such petition shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance under subsection (a) within one year after the Commission receives it, unless the one-year period is extended by the Commission. The Commission may extend the initial one-year period by an additional 90 days if

the Commission finds that an extension is necessary to meet the requirements of subsection (a). The Commission may grant or deny a petition in whole or in part and shall explain its decision in writing.

(d) Limitation

Except as provided in section 251(f) of this title, the Commission may not forbear from applying the requirements of section 251(c) or 271 of this title under subsection (a) of this section until it determines that those requirements have been fully implemented.

(e) State enforcement after commission forbearance

A State commission may not continue to apply or enforce any provision of this chapter that the Commission has determined to forbear from applying under subsection (a).

47 U.S.C. § 201 - Service and charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided*, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further*, That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: *Provided further*, That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

47 U.S.C. § 202 - Discriminations and preferences

(a) Charges, services, etc.

It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

(b) Charges or services included

Charges or services, whenever referred to in this chapter, include charges for, or services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind.

(c) Penalty

Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of $6,000 for each such offense and $300 for each and every day of the continuance of such offense.

47 U.S.C. § 208 - Complaints to Commission; investigations; duration of investigation; appeal of order concluding investigation

(a) Any person, any body politic, or municipal organization, or State commission, complaining of anything done or omitted to be done by any common carrier subject to this chapter, in contravention of the provisions thereof, may apply to said Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been caused, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

(b)(1) Except as provided in paragraph (2), the Commission shall, with respect to any investigation under this section of the lawfulness of a charge, classification, regulation, or practice, issue an order concluding such investigation within 5 months after the date on which the complaint was filed.

(2) The Commission shall, with respect to any such investigation initiated prior to November 3, 1988, issue an order concluding the investigation not later than 12 months after November 3, 1988.

(3) Any order concluding an investigation under paragraph (1) or (2) shall be a final order and may be appealed under section 402(a) of this title.

47 U.S.C. § 214 – Extension of lines or discontinuance of service; certificate of public convenience and necessity

(a) Exceptions; temporary or emergency service or discontinuance of service; changes in plant, operation or equipment

No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line: *Provided*, That no such certificate shall be required under this section for the construction, acquisition, or operation of (1) a line within a single State unless such line constitutes part of an interstate line, (2) local, branch, or terminal lines not exceeding ten miles in length, or (3) any line acquired under section 221 of this title: *Provided further*, That the Commission may, upon appropriate request being made, authorize temporary or emergency service, or the supplementing of existing facilities, without regard to the provisions of this section. No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby; except that the Commission may, upon appropriate request being made, authorize temporary or emergency discontinuance, reduction, or impairment of service, or partial discontinuance, reduction, or impairment of service, without regard to the provisions of this section. As used in this section the term "line" means any channel of communication established by the use of appropriate equipment, other than a channel of communication established by the interconnection of two or more existing channels: *Provided, however*, That nothing in this section shall be construed to require a certificate or other authorization from the Commission for any installation, replacement, or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided.

(b) Notification of Secretary of Defense, Secretary of State, and State Governor

Upon receipt of an application for any such certificate, the Commission shall cause notice thereof to be given to, and shall cause a copy of such application to be filed with, the Secretary of Defense, the Secretary of State (with respect to such applications involving service to foreign points), and the Governor of each State in

which such line is proposed to be constructed, extended, acquired, or operated, or in which such discontinuance, reduction, or impairment of service is proposed, with the right to those notified to be heard; and the Commission may require such published notice as it shall determine.

(c) Approval or disapproval; injunction

The Commission shall have power to issue such certificate as applied for, or to refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof, or discontinuance, reduction, or impairment of service, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. After issuance of such certificate, and not before, the carrier may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, extension, acquisition, operation, or discontinuance, reduction, or impairment of service covered thereby. Any construction, extension, acquisition, operation, discontinuance, reduction, or impairment of service contrary to the provisions of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, the State commission, any State affected, or any party in interest.

(d) Order of Commission; hearing; penalty

The Commission may, after full opportunity for hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier, party to such proceeding, to provide itself with adequate facilities for the expeditious and efficient performance of its service as a common carrier and to extend its line or to establish a public office; but no such authorization or order shall be made unless the Commission finds, as to such provision of facilities, as to such establishment of public offices, or as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier which refuses or neglects to comply with any order of the Commission made in pursuance of this subsection shall forfeit to the United States $1,200 for each day during which such refusal or neglect continues.

(e) Provision of universal service

(1) Eligible telecommunications carriers

A common carrier designated as an eligible telecommunications carrier under paragraph (2), (3), or (6) shall be eligible to receive universal service support in accordance with section 254 of this title and shall, throughout the service area for which the designation is received--

(A) offer the services that are supported by Federal universal service support mechanisms under section 254(c) of this title, either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and

(B) advertise the availability of such services and the charges therefor using media of general distribution.

(2) Designation of eligible telecommunications carriers

A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the State commission. Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.

(3) Designation of eligible telecommunications carriers for unserved areas

If no common carrier will provide the services that are supported by Federal universal service support mechanisms under section 254(c) of this title to an unserved community or any portion thereof that requests such service, the Commission, with respect to interstate services or an area served by a common carrier to which paragraph (6) applies, or a State commission, with respect to intrastate services, shall determine which common carrier or carriers are best able to provide such service to the requesting unserved community or portion thereof and shall order such carrier or carriers to provide such service for that unserved

community or portion thereof. Any carrier or carriers ordered to provide such service under this paragraph shall meet the requirements of paragraph (1) and shall be designated as an eligible telecommunications carrier for that community or portion thereof.

(4) Relinquishment of universal service

A State commission (or the Commission in the case of a common carrier designated under paragraph (6)) shall permit an eligible telecommunications carrier to relinquish its designation as such a carrier in any area served by more than one eligible telecommunications carrier. An eligible telecommunications carrier that seeks to relinquish its eligible telecommunications carrier designation for an area served by more than one eligible telecommunications carrier shall give advance notice to the State commission (or the Commission in the case of a common carrier designated under paragraph (6)) of such relinquishment. Prior to permitting a telecommunications carrier designated as an eligible telecommunications carrier to cease providing universal service in an area served by more than one eligible telecommunications carrier, the State commission (or the Commission in the case of a common carrier designated under paragraph (6)) shall require the remaining eligible telecommunications carrier or carriers to ensure that all customers served by the relinquishing carrier will continue to be served, and shall require sufficient notice to permit the purchase or construction of adequate facilities by any remaining eligible telecommunications carrier. The State commission (or the Commission in the case of a common carrier designated under paragraph (6)) shall establish a time, not to exceed one year after the State commission (or the Commission in the case of a common carrier designated under paragraph (6)) approves such relinquishment under this paragraph, within which such purchase or construction shall be completed.

(5) "Service area" defined

The term "service area" means a geographic area established by a State commission (or the Commission under paragraph (6)) for the purpose of determining universal service obligations and support mechanisms. In the case of an area served by a rural telephone company, "service area" means such company's "study area" unless and until the Commission and the States, after taking into account recommendations of a Federal-State Joint Board instituted under section 410(c) of this title, establish a different definition of service area for such company.

(6) Common carriers not subject to State commission jurisdiction

In the case of a common carrier providing telephone exchange service and exchange access that is not subject to the jurisdiction of a State commission, the Commission shall upon request designate such a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the Commission consistent with applicable Federal and State law. Upon request and consistent with the public interest, convenience and necessity, the Commission may, with respect to an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated under this paragraph, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the Commission shall find that the designation is in the public interest

47 U.S.C. § 251 – Interconnection

(b) Obligations of all local exchange carriers

Each local exchange carrier has the following duties:

(1) Resale

The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(c) Additional obligations of incumbent local exchange carriers

In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties:

(3) Unbundled access

The duty to 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. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale

The duty--

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

47 U.S.C. § 252 - Procedures for negotiation, arbitration, and approval of agreements

(d) Pricing standards

(3) Wholesale prices for telecommunications services

For the purposes of section 251(c)(4) of this title, a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

CERTIFICATE OF SERVICE

I hereby certify that all participants in this appeal are registered CM/ECF users and that service will be accomplished electronically through the Court's CM/ECF system today, January 13, 2020.

I further certify that on January 13, 2020, two copies of the public version and the sealed version of the Brief of Petitioner COMPTEL d/b/a INCOMPAS were served on parties as indicated below.

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