

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

In the Matter of)
)
Modernizing Unbundling and Resale) WC Docket No. 19-308
Requirements in an Era of)
Next-Generation Networks and Services)
)

**REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF STATE UTILITY
CONSUMER ADVOCATES**

I. INTRODUCTION

On November 25, 2019, the Federal Communications Commission (FCC or Commission) issued a Notice of Proposed Rulemaking (NPRM)¹ that proposed significant changes to access requirements for Unbundled Network Elements (UNEs). The National Association of State Utility Consumer Advocates (NASUCA)² hereby files these Reply Comments.

II. DISCUSSION

In the NPRM, the Commission seeks comment on proposals to forbear from all remaining unbundling and avoided cost resale obligations.³ The Commission proposes to

¹ In the Matter of Modernizing Unbundling and Resale Requirements in an Era of Next-Generation Networks and Services, WC Docket No. 19-308, Adopted November 22, 2019, Released November 25, 2019.

² NASUCA is a voluntary association of 58 consumer advocates. NASUCA members represent the interests of utility consumers in 43 states, the District of Columbia, Puerto Rico, Barbados and Jamaica. NASUCA is incorporated in Florida as a non-profit corporation. NASUCA's full members are designated by the laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. Members operate independently from state utility commissions. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (e.g., the state Attorney General's office). NASUCA's associate and affiliate members also represent the interests of utility consumers but are not created by state law or do not have statewide authority. Some NASUCA member offices advocate in states whose respective state commissions do not have jurisdiction over certain telecommunications issues.

³ NPRM at ¶ 3.

eliminate access requirements for the following UNEs based on the belief that Competitive Local Exchange Carriers (CLECS) now have alternatives:

- DSI and DS3 loops in counties and study areas deemed competitive in the Business Data Services Report and Order.⁴
- xDSL-capable DS0 loops in urban census blocks.⁵
- Dark fiber transport in any wire center that is located within one-half mile of alternative (non-ILEC) fiber.⁶
- Subloops, Operations Support Services (OSS), Network Interface Devices (NIDs) and narrowband voice grade loops.

As the NPRM states, the Commission may forbear from regulations set forth in Section 10 of the 1996 Communications Act only if it demonstrates that forbearance meets each of the following three requirements: (1) enforcement of such regulation or provision is not necessary to ensure that charges and practices 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.⁷ As part of the public interest inquiry, the Commission must also consider "whether forbearance from enforcing the provision or regulation will promote competitive market conditions[.]"⁸ Section 251 (c)(3) of the Communications Act requires Incumbent Local Exchange Carriers (ILECS) make UNEs available on an unbundled basis and at a cost-regulated price. Section 251(d)(2) states that "at a minimum" the Commission must

⁴ In the Matter of Business Data Services in an Internet Protocol Environment et al, WC Docket Nos. 16-143 et al., Report and Order, 32 FCC Rcd 3459 (2017) (BDS Order). NPRM ¶30.

⁵ NPRM ¶39

⁶ NPRM ¶73.

⁷ 47 U.S. Code § 160(a).

⁸ 47 U.S. Code § 160(b).

consider whether, "(A) access to such network elements as are proprietary in nature is necessary; and (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."⁹

The ILECS, AT&T, Verizon, and CenturyLink, and their trade association--US Telecom--support the Commission's proposals, claiming that the unbundling rules have outlived their usefulness and eliminating the remaining UNEs would not impair the ability of CLECs to provide services.¹⁰

The record contains significant evidence to the contrary. Thirteen Competitive Local Exchange Carriers (CLECs) that serve customers in 35 states submitted comments in response to this NPRM and previously submitted to the Commission declarations in related dockets addressing how their companies rely on each of the UNEs that the Commission proposes to eliminate, and how they will be impaired should the Commission proceed as suggested.¹¹

A. DS1 and DS3 Loops

With respect to DS1 and DS3 loops in counties and study areas deemed "competitive," in and of itself the mere presence of competitive fiber does not mean that barriers to entry are not significant. As INCOMPAS points out, the BDS test is of areas where CLEC's said they "might," hypothetically deploy fiber.¹² An indication that CLECs would hypothetically consider deploying fiber is not the same thing as the actual deployment of the fiber and is not evidence that actual deployment has occurred and competitive alternatives exist. Further, counties can cover a wide swath of territory with different competitive conditions and different entry barriers

⁹ 47 U.S. Code § 251(d)(2)

¹⁰ See, e.g. US Telecom at 1-2, AT&T at 2-4, Verizon at 1-5.

¹¹ See, e.g., INCOMPAS and the Northwest Telecommunications Association (INCOMPAS) at 20-38.

¹² INCOMPAS at 22.

in different areas of each county. The presence of fiber in one area of a county neither means it is available in all areas of a county, nor that such presence would reasonably provide competitive alternatives in the entire county. Eliminating CLEC access to the DS1 and DS3 loops would impair the ability of CLECs to serve all customers in an area, and cause customers to lose important competitive options.

The Commission does provide a rural exemption for UNE DS1 and DS3 loops for rural residential use,¹³ recognizing that UNE DS1 loops are an important means of providing broadband to rural residential customers. This should be expanded to include business customers. In sparsely populated rural areas, business enterprises are often far flung and overlap with residential customers. For example, farms, bed and breakfasts, and small local stores and post offices are often part and parcel of rural residential areas and are primary employers and economic anchors of the community. By limiting the rural exemption to residential customers, the proposal would make it less economically viable for small, independent providers to serve customers and would undermine the economic health of rural areas.

B. xDSL-Capable DS0 Loops

There is substantial evidence that xDSL capable DS0 loops continue to be essential for CLECs to provide innovative voice and data services to customers in rural areas, and to use as a stepping stone for further building out fiber networks. Virginia Global Communications Systems uses DS0 loops to serve rural customers who would otherwise not receive broadband service from any provider.¹⁴ Mammoth Networks uses DS0 loops to provide service to customers in Colorado, Wyoming and Montana. Mammoth installs its electronics on both ends of the DS0

¹³ NPRM at ¶32, 34.

¹⁴ Public Knowledge at 6-7.

UNE loop to create bonded pairs capable of delivering broadband to rural small and medium sized businesses with data service at reasonable rates.¹⁵ Sonic Communications uses DS0 UNE loops as a bridge to build out its own fiber network.¹⁶ Sonic has been able to expand its fiber network to 19 new areas and double the number of census blocks it serves using fiber between December 2016 and December 2018 because "UNE's were available as a stepping stone."¹⁷ Socket Telecom serves remote locations in Missouri using DS0 loops to remote locations, where DS0 loops are the only loops Socket can access, because there are no DS1 or DS3 loops serving these areas.¹⁸

There are no other wholesale commercial offerings that would provide the same functionality needed to provide broadband service in these rural areas as DS0 loops.¹⁹ Eliminating access to DS0 loops would severely limit the ability of CLECs to continue to serve customers. There are also substantial barriers to entry for timely deployment of fiber related to permitting processes and access to public rights of way.²⁰ The record shows that CLECs have no commercial alternatives to DS0 loops.²¹ ILECS have no legal obligation to negotiate with CLECs to provide alternatives for DS0 Loops, and have no incentive to negotiate the provision of alternatives to carriers who are using DS0 loops to expand their own competing fiber networks.²² If the DS0 loop UNE is eliminated then the ability of CLECs to offer service would be impaired and the public interest would be undermined.

¹⁵ Id. at 5.

¹⁶ Id. at 4.

¹⁷ Id. at 4.

¹⁸ Id., at 7.

¹⁹ See, e.g., Id. at 7.

²⁰ INCOMPAS at 26.

²¹ Id. at 26.

²² Id. at 27.

C. Dark Fiber Transport

The NPRM proposes a finding that CLECs are not impaired without access to dark fiber transport in any wire center located within one-half mile of non-ILEC fiber.²³ The NPRM assumes that a competitor within a half mile of alternative fiber would not be impaired because it should be able to obtain transport on a commercial basis at competitive rates. The NPRM bases its finding on its analysis in the review of Business Data Services (BDS).²⁴ This assumption is incorrect. As INCOMPAS points out, the data the Commission relies on did not differentiate between commercially owned dark fiber and dark fiber funded and controlled by government entities, who do not typically make fiber commercially available.²⁵ Further, in the experience of CLECs the fiber network builders are rarely willing to lease dark fiber on their networks.²⁶ For example, IdeaTek notes that there is no substitute dark fiber provider in several of the communities it serves and that "[w]ithout dark fiber interoffice transport UNEs, IdeaTek would have to decide on a community-by-community basis whether to raise prices or exit certain markets that have no feasible alternative for dark fiber transport."²⁷ Lit transport is not an adequate substitute for dark fiber because CLECs have already integrated dark fiber into their networks and cannot reasonably replace it without incurring costs that are prohibitive. For example, Sonic estimated that building a replacement for its dark fiber UNEs would "cost over \$580 million," a 100 fold or greater increase on its current monthly transport costs when amortized over 20 years.²⁸ Eliminating the dark fiber UNE would significantly impair CLECs from providing service.

²³ NPRM at ¶ 73.

²⁴ Id.

²⁵ INCOMPAS at 27-28.

²⁶ Id. at 28.

²⁷ Declaration of Daniel Friesen at ¶10, Attachment 11 to INCOMPAS.

²⁸ INCOMPAS at 30.

D. Operations Support Services (OSS)

The Commission should retain the OSS UNE. As both INCOMPAS and NCTA - The Internet & Television Association (NCTA) argue, stand-alone OSS is critical for CLECs.²⁹ OSS is used by CLECs to place orders with ILECs for non-UNE services and functions such as interconnection trunks, changes to directory listings and to request porting of telephone numbers.³⁰ Eliminating the OSS UNE would impair the ability of competitors to offer service and in doing so would harm customers who would suffer from incomplete and delayed directory information, delays and difficulty porting numbers and changing providers, and less reliable service if competitors' ability to interconnect with other networks was affected. Eliminating the OSS UNE would significantly impair CLECs' ability to provide service.

E. Public Safety

As the California Public Utilities Commission (CPUC) argues, the Commission has a legal obligation to consider the impact on public safety for each UNE that it eliminates.³¹ In its review of the Restoring Internet Freedom Order, the D.C. Circuit Court of Appeals found that the Commission "is 'required to consider public safety by . . . its enabling act.'"³² NASUCA agrees with the CPUC and the D.C. Circuit that the Commission should consider the impact on public safety for each UNE it proposes to eliminate. For example, where CLECs offer TDM based services using DS0 loops, would the elimination of this UNE deprive customers of a

²⁹ Id. at 31, NCTA at 1 - 3.

³⁰ NCTA at 1.

³¹ Id. at 4-5.

³² *Mozilla Corp. v. FCC*, 940 F.3d 1, 59 (D.C. Cir. 2019), citing *Nuvio Corp. v. FCC*, 473 F.3d 302, 307 (D.C. Cir. 2006).

reliable means of dialing 9-1-1 and receiving emergency alerts? Would the lack of access to DS1 or DS3 loops affect the provision of 9-1-1?

The CPUC and INCOMPAS correctly argue that eliminating the OSS UNE would jeopardize public safety. INCOMPAS points out that CLECs rely on UNE OSS "to access 911 databases and connect through selective routers to PSAPs [Public Safety Answering Points] for 911 services."³³ The CPUC quotes the NPRM describing OSS as consisting of "pre-ordering, ordering, provisioning, maintenance and repair, and billing functions supported by an incumbent LEC's databases and information."³⁴ ILECs must provide maintenance and repair to facilities leased by CLEC providers. Without this requirement and the ability of CLECs to rely on the OSS UNE, CLECs may struggle to resolve maintenance and repair issues, and this could adversely affect an end-user's ability to receive emergency alerts or contact first responders. The CPUC also cites a complaint filed by a California CLEC that interconnects with AT&T California for network services including E-911 routing and unbundled interoffice transport and loops. The complaint alleges that there has been a noticeable deterioration in the quality of AT&T's legacy network that has led to extended outages affecting customer's ability to complete ordinary calls and the ability to complete 911 calls.³⁵ This complaint underscores the importance of OSS UNE access.

III. CONCLUSION

NASUCA appreciates the opportunity to comment on the Commission's proposed revisions to UNE access. The evidence is clear that if the Commission proceeds with the proposals described in the NPRM, the ability of CLECs serving customers throughout the

³³ INCOMPAS at 31.

³⁴ CPUC at 5; NPRM at ¶ 83.

³⁵ CPUC at 5-6.

country will would be impaired. Prior to eliminating these UNES the Commission must also consider the impact on public safety.

Respectfully submitted,

David Springe, Executive Director
NASUCA
8380 Colesville Road, Suite 101
Silver Spring, MD 20910
Phone (301) 589-6313
Fax (301) 589-6380

Regina Costa
Telecommunications Policy Director
The Utility Reform Network (TURN)
785 Market St., Suite 1400
San Francisco, CA 94103
Phone (415) 929-8876, Ext. 312
rcosta@turn.org

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