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

NOS. 19-1164, 19-1202

COMPTEL D/B/A INCOMPAS, ET AL.,

PETITIONERS,

V.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

RESPONDENTS.

ON PETITIONS FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties.

Petitioners are Comptel, d/b/a INCOMPAS (INCOMPAS) and the California Public Utilities Commission (CPUC). Respondents are the Federal Communications Commission (FCC or Commission) and the United States of America. USTelecom is an intervenor in support of respondents.

2. Rulings under review.

The ruling at issue is *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks*, 34 FCC Rcd 6503,[1] 2019 WL 3605125 (2019) (*Order*).

3. Related cases.

INCOMPAS and CPUC filed petitions for review of the *Order*, and the Court consolidated both cases (Nos. 19-1164, 19-1202) on its own motion. Respondents are not aware of any other related cases pending in this Court or any other court.

[1] 34 FCC Rcd 6503 is the correct citation for the *Order*, but when typed into Westlaw it takes the reader to the wrong Commission order. Therefore, respondents have also included the parallel Westlaw citation.

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GLOSSARY

1996 Act	The Telecommunications Act of 1996
Act	The Communications Act of 1934, as amended
CPUC	California Public Utilities Commission
FCC	Federal Communications Commission
LEC	Local exchange carrier
Legacy TDM service	Basic telephone service, also known as plain old telephone service or POTS
Order	*Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks*, 34 FCC Rcd 6503, 2019 WL 3605125 (2019)
TDM	Time-Division Multiplexing
UNE	Unbundled Network Element
VoIP	Voice over Internet Protocol

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BRIEF FOR RESPONDENTS

INTRODUCTION

Twenty-four years ago, Congress adopted sweeping legislation to introduce competition into local telephone markets. The Telecommunications Act of 1996 required incumbent local exchange carriers (LECs)—which had historically dominated the provision of local telephone service—to open their networks to allow new competitors to enter local markets. Two of these network-opening requirements were that incumbent LECs (1) offer individual elements of their networks to new entrants on an unbundled basis at regulated prices, and (2) sell

retail services to new entrants at wholesale rates so that they could resell those services to their customers.

These requirements were not intended to exist in perpetuity. Rather, Congress envisioned that they would help "jump-start" competition by allowing new entrants to gain a foothold in the market. Once these competitors acquired enough customers, it was expected that they would build their own facilities to serve their customers without relying on regulated access to the network elements and services of their incumbent rivals.

The 1996 Act included two other provisions that are central to this case. First, Congress directed the Commission to encourage the deployment of advanced telecommunications capability to all Americans. 47 U.S.C. § 1302. Second, Congress authorized the agency to forbear from enforcing the Act's market-opening obligations. In so doing, Congress signaled its expectation that the Commission would analyze the continued necessity of these requirements as the telecommunications sector evolved, and refrain from enforcing obligations that had outlived their purpose.

That time has now arrived. The Commission found that competition in the voice services market is flourishing, and consumers have increasingly switched from traditional legacy voice service to next-generation services like broadband and mobile voice offerings. To help foster this transition, the Commission has

adopted a number of decisions over the last decade limiting many of these 1996-era requirements and making it easier for carriers to replace their legacy copper facilities with fiber networks and other modern infrastructure. Taken together, the mandates Congress enacted nearly a quarter century ago to help competitive LECs provide legacy voice service are no longer necessary and cease to make economic sense. The petitions for review should be denied.

JURISDICTION

The *Order* (JA) was released on August 2, 2019. INCOMPAS timely filed its petition for review of the *Order* on August 12, 2019, and CPUC timely filed its petition for review of the *Order* on October 1, 2019. This Court's jurisdiction rests on 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

QUESTIONS PRESENTED

1. Whether the Commission reasonably declined to apply a market power analysis when deciding whether to forbear from enforcing Analog Loop unbundling and Avoided-Cost Resale requirements for price cap LECs.

2. Whether the Commission reasonably granted forbearance from the Analog Loop unbundling requirement.

3. Whether the Commission reasonably granted forbearance from the Avoided-Cost Resale requirement.

STATUTES AND REGULATIONS

The relevant statutes and rules are set forth in an addendum to this brief.

COUNTERSTATEMENT

A. The Telecommunications Act of 1996

For much of the twentieth century, local telephone companies (or incumbent LECs) controlled 99.7% of local telephone service in the United States, enabling them to provide "virtually ubiquitous service" through their networks, and to serve new customers "at a much lower incremental cost than could a new entrant." *First Local Competition Notice*, 11 FCC Rcd 14171, 14174-75 ¶6 (1996) (JA).

In 1996, Congress comprehensively amended the Communications Act of 1934 to end this monopoly. The 1996 Act was designed to "promote competition and to reduce regulation []" for local telephone service and "encourage the rapid deployment of new telecommunications technologies." *EarthLink, Inc. v. FCC*, 462 F.3d 1, 3 (D.C. Cir. 2006) (quoting Preamble of Act, Pub.L. No. 104–104, 110 Stat. 56). To this end, the 1996 Act imposed certain obligations on incumbent LECs to open local markets to competition, two of which are central to this appeal.

1. Network Element Unbundling Under Section 251(c)(3)

First, the 1996 Act required incumbent LECs to share specified elements of their networks on an unbundled basis—at cost-based rates—with new entrants into local telephone markets, also known as competitive LECs. 47 U.S.C. § 251(c)(3). Previously, new entrants found it prohibitively expensive to build the extensive infrastructure required to provide local telephone service, and therefore could not compete with incumbent LECs. The Act sought to remove this barrier to entry by,

among other things, requiring incumbent LECs to unbundle elements of their networks. This mandate was considered extraordinary at the time. As a leading backer of the 1996 Act explained, the statute required incumbent LECs to "let the competitors come in and try to beat [their] economic brains out." Remarks of Sen. Breaux (La.) on Pub. L. 104-104 (1995), 141 Cong. Rec. 15572 (1995).

As directed by Congress, the Commission specified in its regulations the "unbundled network elements (UNEs)[] that competitive LECs can lease from incumbent LECs to provide their own retail services." 47 C.F.R. § 51.319. One of the elements at issue in this litigation is unbundled Analog Loops, a copper loop[1] that can provide only legacy TDM service,[2] also known as plain old telephone service. *Id*. § 51.319(a)(1).

Importantly, the unbundling requirement was conceived as a transitional mechanism to "jump-start" competition. *Order* ¶1 (JA). The Commission envisioned that competitive LECs would use unbundled network elements only until "it was practical and economically feasible to construct their own networks." *Third Report and Order*, 15 FCC Rcd 3696, 3701 (1999) (JA). Neither Congress

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[1] Loops connect end user subscribers to the LECs' switches; they generally provide "the last mile of a carrier's network that enables the end-user to originate and receive communications." *Triennial Review Remand Order*, 20 FCC Rcd 2533, 2614-15 ¶147 (2005) (JA).

[2] Time-division multiplexing (TDM) is a legacy method of combining multiple transmissions on a single signal path, such as a circuit.

nor the Commission intended to "impose the associated regulatory burdens on incumbent LECs indefinitely." *Wireline Infrastructure First Report and Order*, 32 FCC Rcd 11128, 11142 ¶32 (2017) (JA).

2. Avoided-Cost Resale of Services Under Section 251(c)(4)

The 1996 Act also imposed the Avoided-Cost Resale obligation on incumbent LECs, which requires them to "offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." 47 U.S.C. § 251(c)(4); *Order* ¶2 (JA). Wholesale rates are the retail rate for the service minus "avoided costs," which are primarily those costs associated with marketing, billing, and collection. 47 U.S.C. § 252(d)(3); *Order* ¶5 (JA). These rates are almost "exclusively, if not entirely" used by competitive LECs to provide legacy TDM voice service to business customers. *Order* ¶5 (JA).[3]

3. Regulatory Forbearance Under Section 10

To "further the deregulatory aims" underlying the 1996 Act, Congress vested the Commission with the "unusual authority to forbear from enforcing provisions of the Act as well as its own regulations." *Verizon v. FCC*, 770 F.3d

[3] Avoided-Cost Resale does not apply to Internet Protocol (IP)-based voice services. *Id*. n.166 (JA). The most common example of an IP-based service is VoIP (Voice over Internet Protocol), which enables people to make calls over a facilities-based broadband connection provided by the VoIP provider or over the Internet through applications like Vonage, Google Phone, and Skype.

961, 964 (D.C. Cir. 2014). This power is codified at 47 U.S.C. § 160, commonly referred to as section 10. Under section 10, the FCC "shall forbear" from applying a provision of the Act to a telecommunications carrier if three conditions are satisfied: (1) enforcement is not necessary to ensure "just," "reasonable," and nondiscriminatory terms of service, (2) enforcement is not "necessary for the protection of consumers," and (3) forbearance is "consistent with the public interest." 47 U.S.C. § 160(a); *EarthLink*, 462 F.3d at 4.

The forbearance mandate is reiterated in what is commonly referred to as section 706. That provision states that "the [FCC] … shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans … by utilizing … regulatory forbearance … or other regulating methods that remove barriers to infrastructure investment." 47 U.S.C. § 1302(a); *EarthLink*, 462 F.3d at 4-5. The Commission's section 10 forbearance analysis is "'informed' by section 706's mandate to encourage deployment of broadband services." *EarthLink*, 462 F.3d at 6.

B. The Commission's Application of Unbundling and Resale Provisions Over the Years Amidst Historic Technology Transitions

The Commission has limited its unbundling regulations several times since the passage of the 1996 Act, in response to the rise of competition in local markets and the "historic technology transitions that are transforming our nation's voice

communications services." *Technology Transitions Order*, 29 FCC Rcd 1433, 1435 ¶1 (2014) (JA). Consumers have "increasingly mov[ed] away from traditional telephone services provided over copper wires and towards next-generation technologies using a variety of transmission means, including copper, fiber, and wireless spectrum-based services," *Wireline Infrastructure First Report and Order*, 32 FCC Rcd at 11129 ¶1 (JA). Driving these decisions is the Commission's "over-arching purpose … to speed technological advances," while also protecting consumers. *Technology Transitions Order*, 29 FCC Rcd at 1441 ¶23 (JA).

As early as 2003, the Commission began limiting unbundling obligations to promote facilities-based deployment and remove barriers to investment. At the time, incumbent and competitive LECs were in the early stages of deploying new fiber-based local loops. In the *Triennial Review Order*, the agency drastically limited the unbundling of these next-generation fiber loops, recognizing that unbundling could reduce incentives for both incumbent and competitive LECs to deploy advanced facilities. 18 FCC Rcd 16978, 16984 ¶3 (2003) (JA). The Commission also reasoned that "unbundling appeared likely to undermine important goals of the 1996 Act," specifically section 706's "overarching" directive, *EarthLink*, 462 F.3d at 4, that the Commission encourage the deployment of advanced telecommunications facilities. *Triennial Review Order*, 18 FCC Rcd

at 17087 ¶173 (JA). Two years later, the Commission imposed unbundling obligations only in instances where doing so would not "frustrate sustainable, facilities-based competition." *Triennial Review Remand Order*, 20 FCC Rcd at 2535 ¶2 (JA).

Beginning in 2005, the Commission further refined its unbundling obligations. The agency exercised its section 10 authority to forbear from enforcing loop and transport network element unbundling obligations for incumbent LECs in specific geographic service areas to account for increased deployment and competition by cable providers. *See, e.g.*, *Qwest Terry Order*, 23 FCC Rcd 7257, 7263-71 ¶¶12-27 (2008) (JA); *Anchorage Order*, 22 FCC Rcd 1958, 1962-63 ¶¶7-8 (2007) (JA). In one of these forbearance decisions, the Commission found it in the public interest to place intermodal competitors "on an equal regulatory footing by ending unequal regulation of services provided over different technological platforms."[4] *Qwest Omaha Order*, 20 FCC Rcd 19415, 19455 ¶78 (2005) (JA).

In 2015, the Commission eliminated one of the last network element unbundling requirements applicable to next-generation networks by granting

[4] Intermodal competition refers to the provision of the same service by different technologies (*e.g.*, a cable television company competing with a telephone company in the provision of video services).

forbearance to all incumbent LECs from an obligation to make available new voice-grade channels over overbuilt fiber loops. *2015 USTelecom Forbearance Order*, 31 FCC Rcd 6157 (2015) (JA). The Commission explained that even this limited unbundling obligation on fiber loop deployment could "impede the retirement of copper loops and the overall transition from copper to fiber." *Id*. at 6190 ¶57 (JA).

In recent years, the Commission has also made it easier for carriers to retire copper loops in favor of increasingly popular fiber networks. In 2017, the agency streamlined the process for incumbent LECs to replace their legacy copper networks with fiber or other advanced technologies, thereby enabling carriers to more rapidly "shift resources away from maintaining outdated legacy infrastructure and services." *Wireline Infrastructure First Report and Order*, 32 FCC Rcd at 11129 ¶3 (JA); *Order* ¶21 (JA). And a year later, the Commission permitted carriers to discontinue legacy TDM voice service altogether, provided that they offer stand-alone, facilities-based interconnected VoIP service and there is at least one other carrier offering voice service in the area. *Wireline Infrastructure Second Report and Order*, 33 FCC Rcd 5660, 5672-79 ¶¶29-40 (2018) (JA); *Order* ¶21 (JA).

The Commission's changes to its unbundling regulations over the last seventeen years have thus been driven by policies to promote facilities-based

deployment, consistent with a dramatic shift in the market toward next-generation services and away from legacy TDM service.

C. USTelecom Forbearance Petition

In 2018, USTelecom, a national trade association representing incumbent LECs, asked the Commission to forbear from enforcing Analog Loop unbundling and Avoided-Cost Resale obligations under 47 U.S.C §§ 251(c)(3) and 251(c)(4). *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks*, Dkt. 18-141 (filed May 4, 2018) (*Petition*) (JA). USTelecom stated that the "expansive set of network-sharing obligations" that Congress adopted decades ago to foster competition were no longer necessary, given the wide range of providers—including cable companies, competitive LECs, and wireless providers—that now dominated the voice services market. *Petition* at iii (JA). These next-generation IP providers had in fact "supplant[ed] ILEC offerings." *Id*. Therefore, USTelecom asserted, it was time for the Commission to forbear from "enforcing these ILEC-specific requirements."[5] *Id*.

The Commission solicited and received public comments on USTelecom's petition. 33 FCC Rcd 4614 (May 8, 2018) (JA).

[5] USTelecom originally sought much broader relief, but later limited its request to forbearance from the Analog Loop unbundling and Avoided-Cost Resale mandates. *Order* n.24 (JA).

D. *Order* on Review

In the *Order* on review, the Commission granted forbearance from both the Analog Loop unbundling and Avoided-Cost Resale requirements for price cap LECs.[6] In light of the "overwhelming evidence" of users switching from legacy TDM voice service to IP-based and wireless networks and of significant competition from multiple intermodal providers, the Commission found that it was no longer necessary to require incumbent LECs to "bear these once-upon-a-time market-opening obligations that today amount to disparate regulatory burdens[]." *Order* ¶9 (JA). The Commission explained that promoting competition free from unnecessary regulation benefits both consumers and businesses by "putt[ing] downward pressure on rates, improv[ing] access to high-speed broadband, and mak[ing] available to consumers the benefits of new, innovative protective technologies such as voice call authentication that are only available over IP-based networks." *Id*.

1. Forbearance from the Analog Loop Unbundling Requirement

First, the Commission forbore from enforcing Analog Loop unbundling obligations for price cap LECs. The agency explained that TDM voice service, particularly that provided over copper loops, was "rapidly becoming obsolete," *id*.

[6] Price cap LECs are "incumbent LECs … that are subject to price cap regulation pursuant to [the Commission's] rules," *Order* n.6 (JA), under which carriers may set rates that do not exceed an upper limit prescribed by regulation.

¶10 (JA), because competitors had largely "moved on from relying on UNE Analog Loops to compete." *Id.* ¶13 (JA). However, the Commission emphasized that the *Order* would not end TDM voice service for customers. Whether through commercial wholesale agreements or the resale obligation in section 251(b)(1) of the Act that applies to all LECs (not just incumbents), "TDM voice services ... will remain for customers desiring such service so long as copper networks or TDM services exist at those customer locations."[7] *Id.* ¶31 (JA).

The Commission also concluded that forbearance from the Analog Loop unbundling obligation was required because of its associated harms. For one, it forced incumbent LECs to "maintain outdated TDM equipment even when they no longer desire to offer those services to their customers." *Id.* ¶14 (JA). By having to operate both TDM-based and IP-based networks, incumbent LECs would be deterred from investing in next-generation IP infrastructure. *Id.* Moreover, the unbundling mandate "distorts competition" in the voice market by imposing substantial costs only on incumbent LECs, while competitive LECs use the incumbents' networks to provide voice services yet were not subject to similar regulation. *Id.* ¶15 (JA). And because CLECs could obtain unbundled Analog

[7] Section 251(b)(1) prohibits all LECs from imposing unreasonable or discriminatory limitations on the resale of their telecommunications services. 47 U.S.C. § 251(b)(1). Unlike the Avoided-Cost Resale obligation for incumbent LECs under section 251(c)(4), it "does not include a wholesale discount rate mandate." *Order* ¶5 (JA).

Loops at closely regulated rates, they have an incentive to continue to rely on the incumbent's unbundled network elements, rather than invest in the capital needed to provide facilities-based next-generation IP services. *Id*.

The Commission further determined that forbearance satisfied the three-part test of section 10. First, Analog Loop unbundling was not necessary to ensure that voice service rates were just and reasonable because the myriad of alternative voice service options would "put pressure" on price cap LECs to keep their rates competitive. *Id*. ¶25 (JA). Second, those same alternatives would protect consumers from unreasonable rates or loss of service. *Id*. ¶27 (JA). And third, forbearance served the public interest by reducing reliance on outdated technology and promoting "competition based on next-generation networks and broadband services." *Id*. ¶29 (JA).

The Commission established a two-part transition in which competitive LECs could order unbundled Analog Loops for an additional six months from the *Order*'s effective date, and adopted a three-year transition period for price cap competitive LECs and their customers to "transition to alternative TDM or new IP-based voice service arrangements." *Id*. ¶23 (JA).

2. Forbearance from the Avoided-Cost Resale Requirement

The Commission also forbore from enforcing the Avoided-Cost Resale provision, which requires incumbent LECs to offer telecommunications services to

their competitors at regulated wholesale rates. *Id.* ¶¶3, 38 (JA). The Commission explained that Avoided-Cost Resale was no longer necessary given the "breadth of the voice service marketplace." *Id.* ¶38 (JA). In addition, it served "only to prolong dependence on legacy TDM voice services rather than pave the way" for advanced communications networks. *Id.* And Congress had not intended Avoided-Cost Resale to remain in effect indefinitely. *Order* ¶41 (JA).

In addition, the agency agreed with incumbent LECs that maintaining the requirement was "affirmatively harmful." *Id.* ¶39 (JA). Avoided-Cost Resale drove up costs for incumbent LECs—who were required to maintain systems and dedicate staff to manage these legacy regulated services—as well as for competitive LECs and state commissions, who "must expend resources determining the avoided-cost rates, which typically requires months (or longer) of state proceedings[]." *Id.* And as with the Analog Loop unbundling mandate, Avoided-Cost Resale distorted competition by imposing a "burdensome cost" on only one set of competitors. *Id.*

Finally, the Commission determined that forbearance satisfied section 10. Enforcement was not necessary to ensure just and reasonable rates because the array of alternative voice services available and other statutory protections would serve as "sufficient backstops." *Id.* ¶47 (JA). Consumers would not be harmed because competitive LECs "can continue to provide TDM voice service to end-

user customers using section 251(b)(1) resale" and commercial agreements, and these customers would increasingly move to next-generation IP-based services. *Id.* ¶49 (JA). Finally, forbearance was consistent with the public interest. *Id.* ¶50 (JA). By eliminating "outdated and unnecessary regulation," carriers' costs would go down and in turn, consumers would benefit through "lower rates and/or more vibrant competitive offerings." *Id.*

The Commission established a similar three-year transition period, during which Avoided-Cost Resale services would continue to be made available to competitive LECs at "regulated rates." *Id.* ¶46 (JA).

SUMMARY OF ARGUMENT

1. The Commission applied the appropriate analytical framework in granting forbearance from the Analog Loop unbundling and Avoided Cost Resale requirements for price cap LECs. The agency properly considered whether forbearance will promote investments in next-generation networks, consistent with the directive in Section 706 of the 1996 Act to "encourage the deployment ... of advanced telecommunications capability to all Americans[]." 47 U.S.C. § 1302. This Court has recognized that the Commission's forbearance analysis is "informed by section 706's mandate to encourage deployment of broadband services" and has made clear that the agency can consider how regulatory

mandates deter investment in next-generation facilities in making forbearance determinations. *See Earthlink*, 462 F.3d at 5-6.

CPUC insists that the Commission should have applied a market-based analysis, as it did a decade earlier when it denied a forbearance petition in its *Qwest Phoenix* order. But section 10 "imposes no particular mode of market analysis or level of geographic rigor," and "allow[s] the forbearance analysis to vary depending on the circumstances." *Earthlink*, 462 F.3d at 8. In addition, the Commission has never been wedded to a market power analysis. Over the years, it has applied a variety of frameworks when determining regulatory relief, "tailor[ing] its analysis to the situation at hand." *Id*. at 9.

2. The Commission reasonably forbore from the Analog Loop unbundling requirement for price cap LECs. CPUC contends that government and business customers rely on legacy TDM service for their line-powered capabilities, but its concerns are misplaced. As a preliminary matter, nothing in the *Order* ends access to legacy TDM voice service. As the record demonstrates, competitive carriers continue to have options available to provide TDM voice service to customers who prefer it over next-generation services. In addition, only TDM service over copper loops is line powered—TDM service over fiber is not. *Order* ¶32 (JA). TDM service over copper is available to the extent that a carrier has not retired its copper loops, a business decision that is made by the carrier and not the

Commission. Therefore, copper-based TDM service may eventually become unavailable for reasons that are entirely unrelated to the *Order*.

The agency reasonably concluded that many legacy TDM customers will transition to VoIP and wireless offerings, as customers across the country have increasingly done. Petitioners contend that government and business customers do not consider these next-generation services as substitutes for TDM, but this contention is belied by the data. Business VoIP subscriptions increased by over 1,000% over a nine-year period, while legacy analog loops account for less than two percent of all fixed lines and less than *one-half percent of all connections.*

Nor will forbearance from the Analog Loop unbundling requirement adversely impact public safety. The business and government customers who depend on legacy copper-based TDM service for its line-powered functionality will continue to have it so long as the incumbent LEC has not retired its copper facilities. And while CPUC contends that California's 9-1-1 emergency system relies on legacy networks, the California Office of Emergency Services—the state agency responsible for coordinating emergency preparedness—has explained that California is migrating to an IP-based 9-1-1 system because doing so will *enhance* public safety.

3. Finally, the Commission reasonably forbore from the Avoided-Cost Resale requirement for price cap LECs. The agency explained that the mandate prolonged

the dependence on legacy networks rather than encouraged the transition to advanced communication networks. Thus, forbearance served the Act's objective of "encourag[ing] the rapid deployment of new telecommunications technologies." S.Rep. No. 230, 104th Cong., 2d Sess. 1 (1996); *EarthLink*, 462 F.3d at 1, 3.

INCOMPAS points out that the Commission denied forbearance from Avoided-Cost Resale in a decision from 15 years ago. But nothing prevents the Commission from revisiting such determinations in light of changed circumstances. The *Order* explained that the market has changed dramatically since then, and consumers do not rely on legacy voice services to the extent they did in 2005. More broadly, the Commission reasonably found that Avoided-Cost Resale had long since outlived its intended purpose of opening up the local telephone market to competition.

Furthermore, forbearance satisfied the three-prong test under section 10. Enforcement was not necessary to keep rates just and reasonable because robust competition would naturally keep rates competitive, and other important statutory protections will remain in effect. In addition, enforcement was not necessary to protect consumers because TDM service will continue to be available for those who prefer it, and customers by and large have already made the transition to VoIP and wireless services. Finally, the Commission concluded that forbearance served the public interest: the voice services market is already competitive, and the agency

reasonably predicted that providers would deploy next-generation facilities to meet rising consumer demand for these services. This prediction, which is well within the agency's area of expertise, is entitled to "particularly deferential review." *Earthlink*, 462 F.3d at 12.

STANDARD OF REVIEW

The Court reviews the FCC's interpretation of section 10 of the Act under the familiar framework set forth in *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *See EarthLink*, 462 F.3d at 1. Under *Chevron*, unless the statute "unambiguously forecloses the agency's interpretation," a reviewing court must "defer to that interpretation so long as it is reasonable." *Nat'l Cable & Tel. Ass'n v. FCC*, 567 F.3d 659, 663 (D.C. Cir. 2009).

Review in this case more generally is governed by the "arbitrary and capricious" standard of the Administrative Procedure Act. *See* 5 U.S.C. § 706(2)(A). In cases like this one, involving "competing policy choices" and "predictive market judgments," that standard "is particularly deferential." *Ad Hoc Telecom. Users Comm. v. FCC*, 572 F.3d 903, 908 (D.C. Cir. 2009); *see FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 814 (1978).

ARGUMENT

I. THE COMMISSION REASONABLY APPLIED SECTION 10 IN GRANTING FORBEARANCE FROM THE ANALOG LOOP UNBUNDLING AND AVOIDED-COST RESALE REQUIREMENTS FOR PRICE CAP LECS

Petitioners contend that the Commission applied a "new framework" (CPUC Br. at 24, INCOMPAS Br. at 24) in which it analyzed forbearance based on whether the Analog Loop Unbundling and Avoided-Cost Resale obligations will "promote investment in facilities," (INCOMPAS Br. at 24) but that it failed to explain how this approach was consistent with the forbearance statute or Commission precedent. Petitioners are mistaken. The agency's focus on promoting infrastructure deployment and next-generation IP services was neither new nor unusual. On the contrary, it was consistent with the Act, Court precedent, and the Commission's policies and decisions over the last seventeen years.

A. The *Order*'s Analytical Framework is Consistent with the Act

At the outset, the Commission's focus on promoting next-generation services is grounded in the statutory text. Section 706 of the 1996 Act directs the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans … by utilizing … regulatory forbearance … or other regulating methods that remove barriers to infrastructure investment." 47 U.S.C. § 1302; *EarthLink*, 462 F.3d at 4-5. In the context of affirming a prior grant of regulatory forbearance under section 10, this

Court observed that section 706 grants the Commission "significant, albeit not unfettered, authority and discretion to settle on the best regulatory or deregulatory approach to broadband." *Ad Hoc Telecomms. Users Comm.*, 572 F.3d at 906-07. Consistent with section 706, the Commission has taken numerous actions over the last seventeen years limiting unbundling obligations by trimming the list of network elements that incumbents must unbundle or by forbearing from the unbundling requirement as to specific network elements. *See* Counterstatement pp. 8-11. The Commission also has taken steps to make it easier for incumbent LECs to replace legacy copper networks or discontinue TDM-based legacy voice service altogether, *see id.* p. 10, to keep pace with the "sweeping changes in the communications marketplace" toward IP-based and wireless networks. *Order* ¶3 (JA).

CPUC contends that "encouraging investments in advanced services" does not comport with the forbearance statute. Br. at 20. That claim is foreclosed by this Court's decision in *EarthLink*. *See* 462 F.3d at 6-7 (affirming the Commission's application of section 10 viewed through the "prism" of "section 706's mandate to encourage deployment" of advanced services); *id.* at 9 (FCC appropriately applied the forbearance criteria "[g]uided by section 706"); *see also USTelecom Ass'n v. FCC*, 359 F.3d 554, 579-80 (D.C. Cir. 2004) (*USTA II*) (holding that the Commission appropriately considered section 706's goals of

removing barriers to infrastructure investment in limiting the section 251 network element unbundling requirement).

B. The *Order*'s Analytical Framework is Consistent with Court Precedent

Rather than focus on facilities deployment, CPUC argues that the Commission should have applied a market test framework in analyzing USTelecom's forbearance petition, as it did a decade earlier in the *Qwest Phoenix* order. Br. at 19; *see* 25 FCC Rcd 8622 (2010), *aff'd*, *Qwest Corp. v. FCC*, 689 F.3d 1214 (10th Cir. 2012). But this Court and others have rejected that argument, and have consistently found that the Commission is not tethered to a single analytical framework. As even CPUC acknowledges (Br. at 13-14), section 10 of the Act "imposes no particular mode of market analysis or level of geographic rigor." *EarthLink*, 462 F.3d at 8. Rather, it "allow[s] the forbearance analysis to vary depending on the circumstances." *Id*. And because the statute does not mandate a particular method of analysis, courts have deferred to the Commission's analytical approach in determining regulatory relief.

In *EarthLink v. FCC*, for example, the petitioner argued that competition could only be analyzed by conducting a market analysis. *Id*. The Court acknowledged that the Commission's prior forbearance decisions had been "informed by the [FCC]'s traditional market power analysis," but agreed with the agency that the framework did not "bind [the FCC's § 160] forbearance analysis."

Id. at 10. Therefore, the Court reasoned, "we cannot say the FCC was unreasonable in taking another tack here, tailoring the forbearance inquiry to the situation at hand." *Id*. at 9.

Similarly, in *USTelecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016), this Court affirmed its earlier holding in *EarthLink* that the Commission was not bound to a particular type of analysis. There, a service provider argued that the Commission's public interest determination under section 10 of the Act "must be made for each regulation, provision and market … using the definition and context of that provision in the Act." *Id*. at 728. The petitioner argued that because section 251 "applies to 'local exchange carriers, … the geographic market, as the name implies and the definition in the [Communications] Act confirms, is local and not national.'" *Id*. The Court disagreed, explaining that the petitioner "cannot rope section 251's [local, market-by-market] requirements into the Commission's section 10 analysis." *Id*.

In addition, the U.S. Court of Appeals for the Eighth Circuit recently held that the Commission was not required to apply a particular framework when granting regulatory relief. *Citizens Telecomms. Co. of Minn., LLC v. FCC*, 901 F.3d 991 (8th Cir. 2018). There, the competitive LEC petitioners claimed that the Commission erred by failing to analyze the incumbent LEC's market power before changing its regulations. *Id*. at 1007. The court disagreed, explaining that such an

argument "presumes the FCC is bound to apply the traditional market power framework." *Id*. While recognizing that the Commission had applied the market power framework in prior orders, the court concluded that "nothing indicates the FCC was bound to extend that framework to the [business data services] context." *Id*. In their briefs, petitioners do not distinguish or even address any of these cases, which support the *Order*'s forbearance analysis.[8]

C. The *Order*'s Analytical Framework is Consistent with Commission Precedent

The Commission has "employed a large variety of competitive analyses" when determining regulatory relief, consistent with the substantial discretion courts have afforded the agency to choose the appropriate framework when examining the market-opening obligations on incumbent LECs. *Order* ¶58 (JA); *Accord*, *Earthlink*, 462 F.3d at 10. In prior orders, the Commission considered different factors such as the local presence of a facilities-based competitor, potential or actual competition, the market-power standard, or simply whether removing outdated regulatory obligations will promote competitive market conditions.

[8] CPUC acknowledges the holding in *EarthLink* that the forbearance statute imposes "no particular mode of market analysis or level of geographic rigor" on the Commission, but argues that the agency should be "guided" by precedent. Br. at 13-14. But CPUC's argument cannot be reconciled with the Court's ruling that the agency can "tailor[] the forbearance inquiry to the situation at hand" and that its analysis will "vary depending on the circumstances." *EarthLink*, 462 F.3d at 8, 9.

Order ¶58; n.191 (citing cases) (JA). Therefore, the Commission did not need to provide the parties "notice that it was considering a turn from its practice in applying a market power framework," as CPUC contends (Br. at 24), because precedent demonstrates that the agency has applied a number of different tests, "tailor[ing] its analysis to the situation at hand." *EarthLink*, 462 F.3d at 10; *see also id*. (recognizing "the FCC's capacity and propensity to adapt forbearance decisions to the circumstances").

CPUC insists that the Commission should have applied the market power framework in the *Order* because the agency a decade earlier characterized it as the "precise inquiry" for forbearance determinations. Br. at 15; *see Qwest Phoenix Order*, 25 FCC Rcd. at 8643 ¶37. But in the *Order*, the Commission fully explained its choice of an analytical standard. It pointed out that in *Qwest Phoenix*, the agency was "careful to cabin its findings to the particular situation at issue, and any broader reading of the order would contradict its own holding" that it has the "discretion in determining the analytical approach it will use in evaluating forbearance petitions." *Order* ¶¶59, 61 (JA). In addition, the Commission reasoned that its analysis in *Qwest Phoenix* "left the door open" for other analytical approaches when it explained in that decision that "[c]arriers are, of course, free to seek forbearance based on other factors … so long as the section 10 criteria are satisfied." *Id*. ¶60 (JA).

In fact, five years ago the Commission rejected arguments that the *Qwest Phoenix* framework had to be applied uniformly to every forbearance determination. *2015 USTelecom Forbearance Order*, 31 FCC Rcd at 6164 (JA). In that decision, the agency explained that the "analysis used in the *Qwest Phoenix* context is not the appropriate analysis for use in considering USTelecom's request" because USTelecom attacked the necessity of the underlying regulation as a general matter, as it did in the forbearance petition leading to this litigation. In contrast, the petitioner in *Qwest Phoenix* argued that the regulation should not apply to a specific market, thereby prompting a market power analysis. Indeed, the Commission's approach in *Qwest Phoenix* was itself a departure from earlier orders in which the agency granted forbearance. *See Qwest Corp.*, 689 F.3d at 1227 (recognizing that Commission changed its framework from the analysis in *Qwest Phoenix* but nevertheless denying the petition for review).[9]

CPUC next contends that the basis of the agency's new forbearance analysis contradicted a specific finding in *Qwest Phoenix* that maintaining "unbundling of

[9] CPUC relies on the Tenth Circuit's decision in *Qwest Corp.* to argue that the Commission must explain why it "diverged from its precedent in adopting a market power analysis for forbearance determinations." Br. at 17; *Qwest Corp.*, 689 F.3d at 1230. But the Commission did explain in the *Order* that it has applied a variety of analytical frameworks depending on the circumstances, *Order* ¶58 (JA), and therefore was not required to apply a market power analysis here. *Id.* ¶61 (JA). In addition, the Commission has explicitly rejected the view that the market power analysis must always be applied in forbearance determinations. *See 2015 USTelecom Forbearance Order*, 31 FCC Rcd at 6164 (JA).

legacy facilities, such as copper loops, may increase the incentives of incumbent LECs to upgrade their facilities to fiber." *Qwest Phoenix Order*, 25 FCC Rcd. at 8644-45 ¶39; CPUC Br. at 23. This tentative prediction, however, was not borne out in the market. Rather, the Commission found that these regulatory obligations have forced incumbent LECs to maintain outdated technologies at the "cost of a slower transition to next-generation networks and services." *Order* ¶3 (JA).

Petitioners also claim that the Commission should have analyzed "the retail enterprise/business market" separately (CPUC Br. at 33), and considered granting forbearance to all telecommunications services "except TDM services sold to government and business customers." INCOMPAS Br. at 48. But the Commission explained why it declined to adopt that approach. The "record does not support a finding that such a narrow market segment constitutes its own market" (*Order* n.116 (JA)) because the evidence demonstrated that businesses were moving to next-generation services, *id.* ¶¶11-12 (JA), and that "the vast majority of competition in the market does not in fact rely on UNE Analog Loops … but instead on facilities-based competition and privately negotiated and unregulated resale agreements." *Id.* n.116 (JA).

CPUC points to a Commission decision denying USTelecom forbearance from a different statutory provision than at issue here, 47 U.S.C. § 272, in which the agency agreed with commenters that USTelecom should have "differentiate[d]

[business] markets from the markets for residential services." *2015 USTelecom Forbearance Order*, 31 FCC Rcd at 6180 ¶42 (JA); CPUC Br. at 33. That decision is distinguishable. There, the Commission agreed that the business market should be considered separately because "section 272 obligations continue to play an important role in protecting competition in *enterprise* long distance markets." 31 FCC Rcd at 6178 ¶37 (JA). Here, in contrast, the Commission found the opposite: all customers, whether business, residential, or government, were increasingly migrating from legacy TDM voice service to IP-based and wireless services, therefore rendering unnecessary regulations to promote legacy TDM voice service. *Order* ¶¶3, 9 (JA).

Moreover, the Commission has never held that certain markets must always be analyzed separately when evaluating the network element unbundling obligation for incumbent LECs. To the contrary, in the *Triennial Review Order*, the Commission found that the "unbundling obligations and limitations for such loops do not vary based on the customer to be served," thus obviating the need to analyze the business market separately. 18 FCC Rcd at 17110 ¶210 (JA). And in the *Anchorage Order*, the Commission in granting forbearance noted that "a distinction in relief depending on the nature of the customers remains administratively impracticable and would encourage disputes over whether a

particular customer is a residential or business customer." 22 FCC Rcd at 1967 ¶13 (JA).

Taken together, neither *Qwest Phoenix* nor any other Commission decision established that the agency must apply a market power analysis for every forbearance determination. The Commission agrees with petitioners that it should be "guided by its precedent." CPUC Br. at 14. The precedent demonstrates that the Commission has appropriately employed a variety of analytical frameworks.

II. THE COMMISSION REASONABLY FORBORE FROM ENFORCING THE ANALOG LOOP UNBUNDLING REQUIREMENT FOR PRICE CAP LECS

After reviewing the extensive record compiled in response to USTelecom's petition and applying the three-part section 10 analysis, the Commission determined that the statutory requirements for forbearance were satisfied. The Commission therefore granted the petition and forbore from enforcing the Analog Loop unbundling and Avoided-Cost Resale requirements for price cap LECs. That decision was reasonable and reasonably explained.

CPUC argues that the Commission's grant of forbearance from the Analog Loop unbundling requirement was arbitrary and capricious because: (1) it will harm government and business customers, who rely on TDM service; and (2) it

will have an adverse impact on public safety, particularly California's 911/E911 system.[10] Both arguments should be rejected.

A. The Commission Reasonably Determined That Government and Business Customers Will Continue to Have TDM Service

CPUC contends that the *Order* did not adequately address the needs of business and government customers for reliable TDM service. Br. at 34. CPUC asserts that these customers prefer legacy services because of specific product characteristics such as the line-powered feature of copper-based TDM service, and increased reliability and functionality during power outages. *Id*.

Nothing in the *Order*, however, ends access to TDM voice service. As the Commission explained, "the record confirms that TDM voice service from incumbent LECs and competitive LECs (through commercial wholesale agreements and section 251(b)(1) resale) will remain for customers desiring such service so long as copper networks or TDM services exist at those customer locations." *Order* ¶31 (JA). Moreover, "[n]othing we do here requires any customer to transition from one technology to another on any particular timeline." *Id*. ¶35 (JA). Competitive LECs are free to enter into "long-term contracts for TDM services to those same customers at market rates." *Id*. In addition, the Commission explained that "[w]e expect those carriers serving government

[10] INCOMPAS does not challenge the Commission's forbearance from the Analog Loop unbundling mandate. *See* INCOMPAS Br. at 1.

customers directly to make sufficient arrangements to continue service for such customers as needed[].” *Id*. n.124 (JA). Therefore, carriers can continue to offer TDM-based service to those business and government customers that desire it. *Id*.

The Commission’s finding that TDM service will continue to be available to customers is substantially supported by the record. AT&T explained that “ILECs will continue to offer DS0, DS1, and DS3 [unbundled loop] services on a commercial basis, as they do today, and these services will continue to be subject to the just, reasonable, and non-discriminatory provisions of section 201 and 202 of the Communications Act … The only change will be that ILECs will no longer be subject to additional unnecessary pricing regulations that are not applicable to their competitors.” AT&T *Ex Parte* Letter at 1 (June 26, 2019) (JA). Similarly, Frontier Communications explained that it “has a shared incentive with its wholesale customers, like Granite, to ensure that each wholesale end user remains a happy customer … Especially with legacy technologies like TDM, and especially with such extensive competition, forcing a customer to make new decisions, such as by ending their service or migrating to a new carrier, … creates the opportunity for competitors to win the customers. In other words, Frontier … has the shared incentive with resellers to ensure end-user customers purchasing TDM continue to get their TDM service.” Frontier Communications *Ex Parte* Letter at 1 (June 28, 2019) (JA).

Likewise, Verizon stated that "commenters incorrectly assume that without UNEs, they will be unable to serve these identified markets. If the Commission were to grant forbearance, however, ILECs would have strong business incentives to continue providing wholesale services, and they would be required to provide this access on just and reasonable terms." Reply Comments of Verizon at 8 (Sept. 5, 2018) (JA). And CenturyLink noted that forbearance from analog loop bundling will have "no impact" on the TDM services. CenturyLink *Ex Parte* Letter at 3 (July 1, 2019) (JA). This is because many end user customers "routinely purchase CenturyLink's TDM voice services through indirect sales channels, such as system aggregators and IT consultants," and such customers can also buy those services "directly from the ILEC at rates, terms, and conditions very similar to those obtained from the CLEC." *Id.* (JA); *see also* Reply Comments of CenturyLink at 23 (Sept. 5, 2018) (JA).

Taken together, the record amply supports the Commission's finding that TDM service "will remain for customers desiring such service[]." *Order* ¶31 (JA); *see also id.* ¶19 (JA). Forbearance does not mean the end of unbundled access to loops. Rather, it ends *regulated pricing* for those loops. But it also ends the harms associated with that regulatory requirement.

It is true that some carriers have retired their copper loops and others may be in the process of doing so, as demand for next-generation technologies continues to

increase nationwide. *Order* n.52, n.116 (JA); 47 C.F.R. § 51.333 (outlining procedures for incumbent LECs to retire copper facilities in favor of fiber facilities). Under such circumstances, customers may continue to receive TDM-based service over fiber, or may choose to switch to alternative voice services such as IP-based services, and incumbent LECs would no longer be subject to the Analog Loop unbundling obligation, thereby rendering petitioners' arguments moot.[11]

In other words, copper-based TDM service may become unavailable for reasons that *are entirely unrelated to the Order*. This is because copper loop retirement is a business decision that rests with the carriers, not the Commission. As the agency explained, "[n]othing about the rules at issue in this order require carriers to maintain line-powered copper loops—whether those loops may be retired is a subject of our copper retirement rules, *see* 47 C.F.R. § 51.333 and beyond the scope of this proceeding." *See Order* n.116. Notably, INCOMPAS admitted in the underlying proceeding that as more incumbent LECs retire copper loops, dependence on copper-based TDM service will no longer be a sustainable business practice for competitive LECs. *Id*. n.52; Declaration of William P.

[11] Analog Loops are a type of copper loop. *Order* ¶4 (JA). In the event that incumbent LECs retire their copper loops, they would no longer be in a position to offer unbundled Analog Loops to competitive LECs and would therefore cease to be subject to the unbundling requirement under section 251(c)(3). *Id*. n.52 (JA).

Zarakas ¶18, Attachment 2 to INCOMPAS et. al Opposition (Aug. 6, 2018) ("reliance on UNE-based services is not a viable long-term option for CLECs [because] [u]nder existing rules, ILECs will eventually upgrade their networks to fiber and retire their copper-based networks … which will mean that bare copper UNEs will not be available for CLECs to lease indefinitely") (JA).

Business and government customers—like customers generally—have moved away from traditional TDM service provided over copper lines toward more modern IP-based services provided over fiber, cable, and wireless networks. *Order* ¶¶11-12 (JA); Petition at 8-10 (JA). Over a nine-year period, business reliance on traditional voice services fell by 49%, while business VoIP subscriptions increased by more than 1000%. *Order* ¶11 (JA). To the extent that some of these customers purchase TDM service, they do so for redundancy purposes. *Id*. n.166 (JA).

CPUC insists that "the use of [UNEs] has not been subject to a steady decline over the years." Br. at 28. While CPUC is correct that "usage increased between 2014 and 2016" nationwide (Br. at 27), those numbers sharply dropped a year later and have continued to fall. Between June 2014 and December 2018, voice subscriptions relying on unbundled loops dropped by over *60%* nationwide, from 3.6 million to only 1.4 million. *See* FCC, Voice Telephone Services: Status as of December 31, 2015 at 9 (Table 1, line 77) (Mar. 2016),

https://docs.fcc.gov/public/attachments/DOC-342357A1.pdf; FCC, Voice Telephone Services: Status as of December 31, 2018 at 9 (Table 1, line 77) (Mar. 2020), https://docs.fcc.gov/public/attachments/DOC-362882A1.pdf; *see also Order* ¶13 (noting decrease over one year period) (JA). Indeed, unbundled Analog Loops nationwide account for less than two percent of all fixed lines and *less than one-half of one percent of all connections.* Petition at 17-18 (JA); *see also Order* n.125 (explaining that "competitive carriers serving government customers only rarely rely on the [unbundled] Analog Loops … at issue in today's ruling.") (JA). CPUC claims that "nation-wide numbers … cannot provide an accurate view of the competitive pressure on ILECs." Br. at 26. But it was reasonable for the Commission to consider national data over the long-term as well as the market today, rather than a snapshot from several years ago.[12]

B. The Commission Reasonably Considered VoIP and Wireless Offerings As Appropriate Substitutes

CPUC insists that government and business customers do not consider VoIP as an adequate substitute primarily because of the "line powered feature" of TDM service. CPUC Br. at n.4. This functionality allows service to remain "when [commercial] power is unavailable," thereby "mitigat[ing] the impact of power

[12] CPUC's examples of customers that rely on TDM service (Br. at 34-36) certainly cannot be extrapolated to business and government customers as a whole. In any event, nothing in the *Order* ends TDM service. *See supra* pp. 31-33.

shutoffs on vulnerable populations." *Id*. at 42-43. CPUC also contends that the "superior reliability of [TDM] service is critically needed during natural disasters and other emergencies." *Id*. at 43.[13]

As a point of clarification, only TDM service over copper loops is line powered—TDM service over fiber is not. *Order* ¶32 (JA). TDM service over copper is available to the extent that a carrier has not retired its copper loops, a business decision that is made by the carrier. *See supra* pp. 33-35.

More importantly, nothing in this *Order* ends TDM service. Customers who prefer legacy TDM voice service will continue to receive it, and the record confirms that carriers are committed to offering TDM service to their customers even in the absence of regulation. *See supra* pp. 32-33. Therefore, CPUC's discussion of government and business customers that rely on TDM service does not call into question the reasonableness of the Commission's forbearance decision.

In any event, the significant numbers of businesses moving away from TDM service toward IP-based services strongly supports the Commission's finding that customers view these next-generation services as substitutes, notwithstanding the lack of line power. *Order* ¶11 (JA). This is because IP and wireless services over

[13] Although INCOMPAS does not challenge the Commission's Analog Loop forbearance decision, it nonetheless raises many of these same arguments in its brief. *See* Br. at 35-36.

next-generation networks provide significant advantages over outdated legacy networks such as lower rates, improved access to high speed broadband, and "protective technologies such as voice call authentication that are only available over IP-based networks," among other benefits.[14] *Id.* ¶9 (JA).

In addition, the Commission reasonably declined to weigh heavily the "distinctive line power feature of [copper] TDM voice service," *id.* ¶32 (JA), because it found that VoIP and other IP-based services will remain operational during a power outage so long as they are configured with backup power. As one commenter explained, "[b]usiness and government customers commonly meet this need via uninterruptable power supplies, which provide near instantaneous protection for power interruptions by storing energy in batteries or other means. [These power supplies] are used for backup power not only for their communications systems, but also for computer networks, point of sale terminals, and other business critical functions. Obviously, all such equipment needs backup

[14] Several commenters pointed out the significant advantages of VoIP and other IP-based services. For example, CenturyLink explained that unlike TDM, "IP-based services enable a multi-location business customer, such as a retail chain, to create a virtual private voice network connecting their various locations, utilize credit card processing machines without having to pay for additional access lines, and perform other productivity-enhancing functions, such as remotely checking inventory." CenturyLink *Ex Parte* Letter at 5 (July 1, 2019) (JA). AT&T explained that "IP-based services are just as suitable as legacy TDM-based services for faxing, medical alerts, fire/sprinkler monitoring, gas pipeline monitoring, bank vault or burglar alarms, and elevators, including when purchased by government entities." AT&T *Ex Parte* Letter at 2 (June 26, 2019) (JA).

power during an outage." CenturyLink *Ex Parte* Letter at 5 (July 1, 2019) (JA); *see also Order* n.114 (JA).[15]

Consistent with the rising numbers of customers that are switching from legacy TDM to VoIP or other IP-based voice services, the Commission has previously recognized the substitutability of certain of these voice services. For example, in the *Wireline Infrastructure Second Report and Order*, the Commission permitted carriers to discontinue legacy voice services—including traditional business telephone services—provided that the carrier offers standalone, facilities-based interconnected VoIP service and there is at least one other facilities-based voice service in the affected area. 33 FCC Rcd at 5673 ¶30 (JA); *Order* ¶21 (JA). That decision demonstrates that the Commission has already determined that certain IP-based services are appropriate substitutes for TDM service.

Next, CPUC contends that VoIP is not an adequate substitute for TDM in rural areas because VoIP requires a broadband connection to function, and many

[15] INCOMPAS asserts that the Commission's reasoning is based on "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." Br. at 40. But the Commission found nothing in the record showing that businesses that depend on continuously-powered telecommunications were unable or unwilling to make the necessary investments to protect such service. Therefore, the Commission reasonably relied on record comments that businesses purchase backup power in the event of a power outage, to ensure that operations are not adversely impacted.

rural areas lack broadband. Br. at 30-31.[16] But the Commission made clear that it forbore from the Analog Loop unbundling and Avoided-Cost Resale obligations for "*price cap* incumbent LECs throughout their local service areas." *Order* ¶9 (emphasis added) (JA). A large portion of rural areas in the United States is served by non-price cap LECs, *id.* ¶22 (JA), which are not subject to the Commission's forbearance determination. Therefore, rural customers of non-price cap LECs that currently use TDM-voice services will continue to have access to these services, to the extent that they use them. Indeed, the record illustrates that usage of unbundled network elements in price cap LECs' rural areas is negligible. *See, e.g.*, Assessing the Impact of Forbearance from 251(c)(3) on Consumers, Capital Investment, and Jobs Report at 7, Attached to Reply Comments of USTelecom (nearly 92% of unbundled network elements provisioned by two of the four largest incumbent LECs went to urban and suburban areas, while only 7% were in rural areas) (JA __);[17] AT&T *Ex Parte* Letter at 21-22 (Sept. 5, 2018) ("fewer than **[BEGIN CONFIDENTIAL]** ■ **[END CONFIDENTIAL]** of the digital DSO UNE Loops sold by AT&T are in rural UNE zones." (JA).

[16] *See also* INCOMPAS Br. at 35-36.

[17] Each of the four largest incumbent LECs used for this statistic is a price cap LEC. *See Business Data Services in an Internet Protocol Environment*, 31 FCC Rcd 4723, 4745-46 ¶51 (2016) (JA).

Although it is true that not all Americans subscribe to broadband,[18] TDM service will continue to be made available for those who prefer it or who do not have VoIP offerings or other adequate voice alternatives in their area. In addition, as competitors continue to enter the market and deploy next-generation facilities, *see infra* pp. 60-64, more customers will have access to VoIP or other types of voice services.

In essence, CPUC wants the Commission to preserve indefinitely an incumbent LEC-specific regulatory requirement so that competitive LECs can continue to sell copper-based TDM services to business and government customers. But the Analog Loop unbundling obligation was enacted to "jump-start" competition, not to subsidize competitive LEC entry into local markets and entrench a legacy technology in perpetuity. As this Court explained, "[w]here competitors have access to necessary inputs at rates that allow competition not

[18] As of 2017, 69.7% of Americans overall and 63.4% of Americans in "non-urban" areas subscribed to broadband with speeds of 10 Mbps/1 Mbps. *See 2019 Broadband Deployment Report*, 2019 WL 2336551*22, Figure 12 (2019) (JA). Access to wireless service, on the other hand, is nearly universal in the United States. *See id*. at *13, Figure 2a (as of 2017, 99.8% of Americans and 99.1% of those in rural areas had access to wireless service) (JA); *Order* n.36 (noting that there were "336 million mobile subscriptions in the United States as of June 2017") (JA). CPUC acknowledges the dominance of the wireless market today. *See* CPUC Comments at 11 (Aug. 6, 2018) ("[T]he market has evolved, and wireless telecommunications subscriptions, specifically mobile subscriptions, … now dominate the market.") (JA); *But see Order* n. 45 ("We have insufficient information to determine business' reliance on mobile voice services.") (JA).

only to survive but to flourish, it is hard to see any need for the Commission to impose the costs of mandatory unbundling." *USTA II*, 359 F.3d at 576; *Order* ¶17 (JA). Therefore, the Commission reasonably found that it was not required indefinitely to "protect every preference" customers may have, particularly given the number of available alternative and superior options for voice services. *Order* ¶31 (JA).

Here, it was reasonable for the Commission to balance "the future benefits [of forbearance from a statutory requirement] against [the] short term impact." *EarthLink*, 462 F.3d at 9. To the extent that some existing TDM users may be unable to migrate to next-generation voice services—which the agency found unlikely, *Order* ¶31 (JA)—the Commission concluded that was nevertheless outweighed by the significant benefits customers would obtain not only from "the technologies themselves but also from the vibrant competition associated with next-generation voice services." *Id.* ¶28 (JA); *see also id.* ¶26 (the Commission is allowed to "balanc[e] competing policy considerations") (citing cases) (JA). The three-year transition period also helps ensure that business and government customers "are given sufficient time to accommodate the transition to [next-generation services] such that key functionalities are not lost during this period of change." *Id.* ¶33 (JA).

C. The Commission Reasonably Found That Forbearance Will Not Adversely Impact Public Safety

CPUC argues that the Commission did not adequately consider the impact of forbearance from the Analog Loop unbundling obligation on public safety. Br. at 44. Specifically, CPUC claims that the *Order* did not address how forbearance "could detrimentally impact the 911 system, which relies on copper facilities and [TDM] technology."[19] *Id*. at 39, 44. This argument is unpersuasive.

The Commission saw no need to engage in a detailed discussion about public safety because nothing in the *Order* will end TDM service. As the Commission explained (*Order* ¶¶19, 31 (JA)) and the record confirms, *see supra* pp. 32-33, carriers will continue to provide TDM service for those customers who prefer to remain on legacy networks. It is possible that prices may "differ somewhat" for some customers, *Order* ¶25 (JA), but CPUC does not argue that a potential increase in pricing implicates public safety concerns.[20]

In addition, CPUC's contention that the California 9-1-1 system relies on legacy networks is belied by the state's current efforts to migrate its legacy 9-1-1

[19] CPUC also argues that business and government customers depend on TDM service and will be adversely impacted if forced to switch to VoIP, an argument addressed in Section II.A and B.

[20] Petitioners do not challenge the rates as they relate to the Commission's grant of forbearance from the Analog Loop unbundling requirement in any respect, and are thus barred from raising this argument for the first time on reply. *See, e.g. Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1001 (D.C. Cir. 2008).

system to next-generation services. The California Office of Emergency Services (CA OES), the state agency responsible for coordinating emergency preparedness and response, has been charged with transitioning all of California's 9-1-1 call centers to Next Generation 9-1-1, a nationwide, IP-based emergency communications system. Next Generation 9-1-1 Now, About NG911, http://www.ng911now.org/about-ng911. According to CA OES, the reason for this migration is because "[t]he current 9-1-1 system is unable to efficiently integrate with today's new technologies and lacks the reliability and monitoring capabilities needed to support today's increased disaster environment. Due to the aging technology of today's 9-1-1 system, the number of outages continues to increase and the existing 9-1-1 system is becoming less and less reliable." CA OES, Next Generation 9-1-1 in California, https://www.caloes.ca.gov/governments-tribal/public-safety/ca-9-1-1-emergency-communications-branch/ca-9-1-1-technology. Thus, contrary to CPUC's assertions that TDM networks are "critical" to public safety, (Br. at 34), the *state agency tasked with overseeing emergency services* has made clear that "[t]here is an urgent need to transform California's legacy 9-1-1 system into a Next Generation 9-1-1 system." CA OES at 1.

CPUC has not shown that the migration to next-generation networks—which has been ongoing for more than a decade—has undermined 9-1-1 service in any city in California or elsewhere. On the contrary, the Commission found that

"facilities-based interconnected VoIP service embodies the same managed service quality and underlying network infrastructure … and 911 access requirements found in legacy TDM voice service." *Order* ¶21 (JA); *see also* Reply Comments of AT&T at n.62 (Sept. 5, 2018) ("the relief granted by this [forbearance] petition would not result in any change to how the AT&T ILECs price or supply 911 database management services to CLECs") (JA).

Nor is California alone in its efforts to migrate the state's 9-1-1 system to next-generation services. As of 2019, 31 states reported adopting strategic plans for Next Generation 9-1-1, and 22 states have begun installing and testing Next Generation 9-1-1 components at the state level. *National 911 Progress Report* at 8, https://www.911.gov/pdf/National-911-Program-Profile-Database-Progress-Report-2019.pdf (Nov. 2019). While some of these states are in the preliminary stages of implementation, the trend is clear. States are transitioning their legacy 9-1-1 systems in favor of Next Generation 9-1-1 in order to *enhance*, not undermine, public safety. CPUC's public safety claims should be rejected.[21]

[21] CPUC asks that the Commission "clarify that it will continue to require that incumbent [LECs] provide access to 911/E911 databases, pursuant to 47 C.F.R. § 51.319(f)[]." Br. at 47. Incumbent LECs will continue to be subject to the requirements in § 51.319(f). *See Order* n.24 (explaining that because USTelecom "withdrew its forbearance from section 251(c)(3) unbundling obligations related to 911 and E91 databases," there was nothing for the Commission to act on and the issue was "moot") (JA).

III. THE COMMISSION REASONABLY FORBORE FROM ENFORCING THE AVOIDED-COST RESALE REQUIREMENT FOR PRICE CAP LECS

Unlike CPUC, INCOMPAS does not challenge the Commission's grant of forbearance from the Analog Loop unbundling requirement, as it had in the underlying proceeding. Reply Comments of INCOMPAS at 19-21 (May 28, 2019) (JA). Instead, it challenges on three grounds the agency's forbearance from Avoided-Cost Resale for price cap LECs. INCOMPAS argues that: (1) the Commission conflated the framework of both requirements in the *Order*, and gave short shrift to its analysis of Avoided-Cost Resale (Br. at 24-32); (2) the *Order*'s focus on promoting investment in facilities cannot be reconciled with the text of the Act or Commission precedent (*id*. at 29-33); and (3) the Commission's grant of forbearance is arbitrary and capricious because it does not satisfy the three-prong test under section 10 of the Act (*id*. at 34-49). INCOMPAS is mistaken.

A. The Commission Did Not Conflate the Framework of the Avoided-Cost Resale Requirement with the Analog Loop Unbundling Requirement

INCOMPAS claims that the Commission "conflated the framework of Avoided-Cost Resale with UNE unbundling" (Br. at 24) when it explained that "[t]he same marketplace and technological changes that warrant forbearance from UNE Analog Loop requirements justify forbearance from Avoided-Cost Resale." *Order* ¶38 (JA). This argument is baseless. The Commission's rationale

underlying forbearance from the Analog Loop unbundling requirement necessarily had some overlap with its analysis of Avoided-Cost Resale because both requirements share a common history, common goals, and a common set of problems that warranted forbearance. *Id.* ¶¶1, 3-5, 9, 38 (JA). Both obligations were enacted at the same time to facilitate entry into the local telephone market by new competitors. *Id.* ¶¶1, 4-5 (JA). Nearly a quarter of a century later, however, the Commission concluded that these obligations, which are used to provide TDM voice service, were no longer necessary considering "overwhelming evidence" that consumers were migrating away from TDM toward IP-based, wireless, and other advanced communications services. *Id.* ¶9 (JA). INCOMPAS has not pointed to any authority suggesting that the Commission cannot apply similar or even the same reasoning to two or more requirements when making forbearance determinations.

In any event, the Commission explained in the *Order* why its thinking had evolved on Avoided-Cost Resale. The agency acknowledged that "unlike UNEs," it had once envisioned that Avoided-Cost Resale "might be an important long-term strategy." *Id.* ¶40 (JA). However, "over these two-plus decades, [it] has grown increasingly interested in supporting facilities-based competition, particularly through the deployment of next-generation facilities," and Avoided-Cost Resale

interferes with these "current objectives by allowing prolonged dependence on the TDM network." *Id*; *see also* Counterstatement pp. 7-11.

Importantly, competitive LEC resellers like INCOMPAS' members can still offer voice services to their customers by relying on "section 251(b)(1) resale or special access services in order to meet their multi-location business customers' preference." *Id.* ¶42 (JA). Moreover, "commercial wholesale platform services will remain available to competitive LEC resellers—as they have for more than 15 years." *Id*.

The record showed that competitive LECs in any event do not substantially rely on Avoided-Cost Resale. *See Order* n.125 (competitive carriers serving government customers "rely on privately negotiated resale arrangements in the vast majority of circumstances.") (JA); *id.* ¶42 (JA) (wholesale platform services "constitute a far more significant percentage of resellers' business than Avoided-Cost Resale."); ICG CLEC Coalition Comments at 14 (Aug. 7, 2018) (admitting that reliance on Avoided-Cost Resale "is not a major strategy for CLECs anymore") (JA). The Commission therefore determined that forbearance from the Avoided-Cost Resale requirement appropriately balanced the agency's goals of curbing prolonged dependence on TDM networks, *see infra* pp. 61-62, while still preserving a path for resellers to offer voice services to their customers.

B. Forbearance is Consistent with the Act

INCOMPAS next contends that the Commission did not explain how promoting investment in next-generation facilities comports with "the text of Section 251(c)(4) or 252(d)(3) or the broader objectives and structure of Sections 251 and 252." Br. at 32. It is true that these provisions on their own do not pertain to promoting next-generation networks. The Commission's focus on encouraging investment in next-generation networks, however, is entirely consistent with the broader objectives of the 1996 Act. The goal of the 1996 Act is to ensure "a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector development of advanced telecommunications[]." S.Rep. No. 230, 104th Cong., 2d Sess. 1 (1996); *see also* 47 U.S.C. § 157 (encouraging "the provision of new technologies and services to the public."). To further this objective, Congress included in the 1996 Act an "overarching" directive, *EarthLink*, 462 F.3d at 4, that the Commission "utiliz[e]" "regulatory forbearance" to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans." 47 U.S.C. § 1302; *see also id.* § 160(a). Indeed, in vesting the Commission with the "unusual authority" of forbearance, *Verizon*, 770 F.3d at 964, Congress signaled its expectation that the Commission would analyze the continued necessity of sections 251, 252, and other requirements as the telecommunications sector evolved. *See also Order* n.145

("[t]he Commission has previously found that section 251(c)'s requirements have been fully implemented," thereby mandating forbearance) (JA).

Here, the Commission forbore from enforcing the Avoided-Cost Resale obligation because, among other things, it found that the requirement served "only to prolong dependence on legacy TDM voice services rather than pave the way" for advanced communications networks, in contravention of the 1996 Act. *Id.* ¶38 (JA). This Court has made clear that the Commission, as part of its network element unbundling analysis, may consider how regulatory mandates deter investment in next-generation facilities and act to relieve those burdens as appropriate. *See USTA II*, 359 F.3d at 579-80; *EarthLink*, 462 F.3d at 5-6; *see supra* pp. 22-23. That principle applies with equal force to forbearance from the Avoided-Cost Resale requirement. Congress adopted the Avoided-Cost Resale requirement (like the Analog Loop unbundling requirement) as a transitional method to "jump-start" competition. Had Congress intended for Avoided-Cost Resale to remain in effect indefinitely, it would have carved out a section 251(c)(4) exception from the scope of the Commission's forbearance authority. *Order* ¶41 (JA). It did not.

C. Forbearance is Consistent with Commission Precedent

INCOMPAS further argues that the Commission did not adequately explain its departure from *Qwest Omaha*, where the Commission forbore from the Analog

Loop unbundling obligation but denied forbearance from the Avoided-Cost Resale requirement. 20 FCC Rcd at 19459-60 ¶88-89 (JA). The Commission did not discuss *Qwest Omaha* at great length in the *Order* because it had previously explained that its decision there was based on the specific facts of that case, and should not be applied broadly. *See id*. at 19424 ¶14 ("We emphasize, however, that in undertaking this analysis, we do not … otherwise make any general determinations of the sort we would properly make in a rulemaking proceeding on a fuller record.") (JA). In addition, this Court has previously rejected arguments that *Qwest Omaha* is binding on the agency. *See EarthLink*, 462 F.3d at 10 (explaining that the petitioners' "reliance on *Qwest Omaha* … is particularly inapt as that case highlights the FCC's capacity and propensity to adapt forbearance decisions to the circumstances"). The fact that the agency denied forbearance from Avoided-Cost Resale in a decision 15 years ago, when TDM voice services played a much larger role than they do now, is of little import. In the *Order*, the Commission reasonably determined that Avoided-Cost Resale has long since "outlived its intended purpose of opening monopoly local telephone service markets to competition." *Order* ¶40 (JA).

INCOMPAS next argues that the Commission, while relying on Section 251(b)(1) resale, did not distinguish its *Omaha Order* ruling that Section 251(b)(1) is an inadequate substitute for Avoided-Cost Resale because it lacks a wholesale

pricing requirement. Br. at 30. But the Commission has consistently explained that "each case must be judged on its own merits," *Anchorage Order*, 22 FCC Rcd. at 1959 ¶1 (JA), and that a conclusion in one forbearance determination does not establish "rules of general applicability." *Id*. Indeed, in an agency decision upon which INCOMPAS relies (Br. at 28), the Commission forbore from Avoided-Cost Resale obligations precisely *because*, among other reasons, the carrier "remains obligated under resale requirements in section 251(b)(1)," thereby ensuring that rates would remain just and reasonable. *Qwest Terry Order*, 23 FCC Rcd. at 7267 ¶19 (JA). The *Qwest Terry Order*, which post-dates the *Qwest Omaha Order* by three years, demonstrates that the Commission has never adopted a one-size-fits-all approach.

D. The Commission Reasonably Found that the Requirement Is Not Necessary to Ensure Just and Reasonable Rates

INCOMPAS asserts that "there is every reason to expect that ILECs will increase prices if Avoided-Cost Resale is eliminated." Br. at 44. The Commission reasonably disagreed.

The "growing number of end users turning to VoIP and wireless offerings evidences the breadth and competitiveness of the marketplace," and will help ensure that rates remain just and reasonable. *Order* ¶47 (JA). Customers today can choose among a number of voice services providers including cable operators

and other facilities-based providers, over-the-top providers,[22] competitive LECs, wireless providers, and incumbent LEC VoIP and TDM offerings.[23] *Id*. The abundance of choices in the market "necessarily limit[s] incumbent LECs' ability to raise prices for voice services," irrespective of whether Avoided-Cost Resale remains in effect. *Id*. ¶48 (JA). Voice service providers want to keep their customers, and are well aware that a customer complaining of higher prices can simply switch to any number of competitors. This market pressure will help keep prices competitive. To the extent that prices rise for select customers (*id*. ¶52 (JA)), this would still not be a reason to refrain from forbearance. As this Court has recognized, "[e]ven if the FCC's judgment 'entails increasing consumer costs today in order to stimulate technological innovations ... there is nothing in the Act barring such trade-offs.'" *EarthLink*, 462 F.3d at 6 (quoting *USTA II*, 359 F.3d at 581).

Furthermore, the Commission pointed out that the 1996 Act already includes several important regulatory backstops that are not impacted by the *Order*, to help ensure just and reasonable rates. First, all LECs (including incumbents) are

[22] Consumers access over-the-top service through the broadband network of an Internet service provider, rather than through a facilities-based provider, such as a cable operator.

[23] INCOMPAS argues that VoIP and wireless offerings are not adequate substitutes for TDM service, which is addressed in Section II.B.

prohibited by section 251(b)(1) from "impos[ing] unreasonable or discriminatory conditions or limitations on ... resale." 47 U.S.C. § 251(b)(1); *Order* ¶43 (JA). INCOMPAS claims that this provision does not "establish any constraint on prices" (Br. at 46), but the Commission has previously found that it does. *See Qwest Terry Order*, 23 FCC Rcd. at 7267 ¶19 (JA) (Avoided-Cost Resale obligations were not necessary to ensure just and reasonable rates because Qwest was still required to comply with section 251(b)(1), thereby ensuring consumers would not be placed "in jeopardy" by excessive rates); *Order* ¶43 ("the Commission has specifically interpreted section 251(b)(1) of the Act as prohibiting discriminatory provisioning of any telecommunications services for resale.") (citing cases) (JA).

In addition, longstanding provisions of the Communications Act protect consumer interests. Sections 201 and 202 of the Act prohibit unjust, unreasonable, and unreasonably discriminatory charges. 47 U.S.C. §§ 201, 202. Furthermore, section 208 of the Act allows competitive LECs to challenge the reasonableness of the rates they pay incumbent LECs. *Id*. § 208. While this process is "*ex post*," (INCOMPAS Br. at 46), it is subject to a limited time frame: challenges to a tariffed rate must be resolved within five months, 47 U.S.C. § 208(b)(1), and to other rates within 270 days. 47 C.F.R. § 1.740. Moreover, the agency offers a mediation process that provides for "rapid resolution of complaints between

carriers (including incumbent LECs and their competitor customers)." *Order* ¶43 (JA); *see* 47 C.F.R. § 1.737.

INCOMPAS further contends that the Avoided-Cost Resale obligation has helped discipline rates in current negotiated wholesale contracts. It argues that the Commission "ignored" evidence that incumbent LECs will "increase prices for commercial agreements in the absence of Avoided-Cost Resale," (Br. at 44), referencing as an example Granite's contract negotiations with **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL].** The Commission, however, did not ignore this evidence. *See Order* n.170 (JA).[24] The agency in any event found that incumbent LECs have an incentive "to develop reasonable commercial wholesale arrangements" with competitive LECs because such arrangements enable them to "continue earning revenues from their networks rather than lose any revenue opportunity altogether if the competitive LEC's customer migrates to a different intermodal provider," an expectation that had been "borne out" in the past. *Id.* ¶¶19, 31, n.116 (JA). In addition, to the extent that the predominant value of Avoided-Cost Resale is as a bargaining chip in negotiating commercial agreements, the Commission concluded that it "offers even fewer

[24] **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**. *See* AT&T *Ex Parte* Letter at 24-25 (Sept. 5, 2018) (JA).

Material Under Seal Deleted

benefits than the Commission and Congress initially envisioned[].”[25] *Id*. n.170 (JA). The Commission also explained that the *Order* will not impact existing contractual agreements during the three-year transition period, “which should quell concerns regarding near-term price increases following forbearance from Avoided-Cost Resale obligations.”[26] *Id*. n.155 (JA).

Next, INCOMPAS points out that Granite, one of its members, asserted in comments to the agency that it was frequently **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** when serving customers in the service territories of rural incumbent LECs that are exempt from the Avoided-Cost Resale requirement

[25] INCOMPAS argues that the Commission failed to explain what it or Congress “initially envisioned” for Avoided-Cost Resale. Br. at 47. Not true. *See Order* ¶¶5, 40 (the mandate was created “as a means of market entry for competitors,” and as potentially an “important long-term strategy” for some new entrants) (JA).

[26] INCOMPAS’ characterization of the three-year transition period as “limited” is not persuasive. Br. at 22. The Commission determined that the 18-month transition period proposed by USTelecom was “insufficient,” *Order* ¶34 (JA), and extended the time frame significantly to allow competitive LECs and their customers to “transition to alternative TDM or new IP-based voice service arrangements” if they so choose. *Id*. ¶23 (JA). The three-year period is also “consistent with transition timeframes the Commission has previously adopted in light of changes in the regulatory environment.” *Id*. Finally, the Commission explained that parties “remain free to deviate [from the transition period] pursuant to mutual agreement.” *Id*. n.156 (JA).

pursuant to section 251(f).[27] Br. at 47; *see also* Granite Opposition at 34 (Aug. 6, 2018) ("[w]ithout the avoided-cost discount, it would no longer be profitable for Granite to service many of [its] small customers.") (JA). But the forbearance statute focuses on consumers and the public interest, *see* 47 U.S.C. § 160(a)(2) and (3), not on competitors' profits. *Order* n.170 (JA). Therefore, the Commission reasonably declined to "maintain inefficient network use" simply so that the "profits of a competitive LEC operating an outmoded business model" would not be disturbed. *Id.* ¶26 (JA).

E. The Commission Reasonably Found That the Requirement Is Not Necessary to Protect Consumers

INCOMPAS asserts that there is a "large and stable" demand for TDM service among government and business customers. Br. at 38. INCOMPAS points out that Granite, one of its members, resells TDM service to "80 of the Fortune 100 corporations in addition to numerous federal and state agencies." *Id.* Notably, INCOMPAS fails to mention *how much* TDM service is actually purchased by any of these entities. *See also* Br. at 43 (claiming that such customers "demand large volumes of TDM service" but providing no actual data). INCOMPAS does not present *any evidence* to support the proposition that most business and government

[27] Section 251(f) provides that "[s]ubsection (c) of this section," which includes the Analog Loop unbundling and Avoided-Cost Resale requirements, "shall not apply to a rural telephone company" except under limited circumstances. 47 U.S.C. § 251(f).

customers purchase a significant amount of TDM service. The reality is that business and government customers—like all customers—are increasingly migrating away from traditional TDM service provided over copper lines for more modern IP-based services provided over fiber, cable and wireless networks. *See supra* pp. 35-36.

Nor does INCOMPAS dispute the accuracy of the data. The TDM share of all wireline voice telephone connections fell from 82% to 37% over a nine-year period. *Order* ¶11 (JA). In addition, resold incumbent LEC lines comprised less than *3% of total fixed end-user retail connections* as of 2016. Comments of Verizon at 19 (Aug. 6, 2018) (analyzing data from Petition at 17) (JA). Moreover, INCOMPAS' own members admit that they do not rely on Avoided-Cost Resale to any significant degree. Avoided-Cost Resale accounted for **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**.

INCOMPAS also contends that the Commission ignored its claim that forbearance would harm competitive LECs' ability to provide government and multi-location business customers "one-stop-shop offerings for their critical TDM services." Br. at 41. The agency did not ignore this evidence. Rather, it addressed it and reasonably determined that such harm was unlikely because of how little these competitive LECs rely on Avoided-Cost Resale. *Order* n.125, ¶42 (JA). Granite, for example, conceded that most of its leasing arrangements with incumbent LECs were through commercial wholesale agreements, not Avoided-Cost Resale. *Id*. n.125 (JA); *see also supra* p. 58. Therefore, the "one-stop shopping" that allegedly distinguishes Granite's service offerings does not depend on the continuing availability of section 251(c)(4) Avoided-Cost Resale.

F. The Commission Reasonably Found That Forbearance Serves the Public Interest

"[T]he Commission's judgments on the public interest are 'entitled to substantial judicial deference.'" *M2Z Networks, Inc. v. FCC*, 558 F.3d 554, 558 (D.C. Cir. 2009). In analyzing the public interest prong under section 10 of the Act, the Commission must "consider whether forbearance ... will promote competitive market conditions." 47 U.S.C. § 160(b). INCOMPAS does not dispute that the voice services market is very competitive, nor could it. *See Order* ¶48 (JA) (listing array of voice services competitors in market today). Rather,

INCOMPAS argues that forbearance from the Avoided-Cost Resale requirement does not benefit the public interest. None of its arguments are persuasive.

First, INCOMPAS contends that it was "fanciful" for the Commission to predict that potentially higher prices for TDM service after forbearance would encourage carriers to deploy new facilities. Br. at 53. But surely it was reasonable for the Commission to have predicted that competitors want to expand their customer base and will take measures to make that happen, including investments in facilities. As the agency explained, potential new competitors would deploy facilities to "meet the demands of consumers losing access to legacy TDM services provided via Avoided-Cost Resale 'subsidies' to certain competitive LECs." *See Order* ¶51 (JA). As this Court has recognized, the "FCC's predictions about the development of new broadband technologies and about the incentives for increased deployment (and, in turn, increased competition)" stemming from deregulatory measures are "well within" the agency's realm of expertise. *EarthLink*, 462 F.3d at 12.

INCOMPAS counters that "it is economically infeasible for Petitioners to deploy redundant copper loop facilities needed to provide TDM service." Br. at 53. This assertion is not convincing for several reasons. As a preliminary matter, TDM service can be provided over a fiber network, and does not require copper facilities. *Order* ¶32 (JA). More importantly, as more customers continue to

leave legacy copper services, *id.* ¶11 (JA), *see supra* pp. 35-36, the cost of maintaining the network will likely exceed the revenue it generates. At that point, it would be more financially prudent for providers to transition their remaining customers to the fiber network and retire their copper facilities altogether, as INCOMPAS itself acknowledged before the agency. *Id.* n.52 (JA); Declaration of William Zarakas ¶18, Attachment 2 to INCOMPAS et. al Opposition ("reliance on UNE-based services is not a viable long-term option for CLECs" because ILECs will eventually retire their copper-based networks in favor of fiber) (JA). This would result in reduced availability of access to line-powered TDM service for resale, a consequence made no more likely by the Commission's *Order* on review.

Next, INCOMPAS asserts that the Commission lacked factual support for finding that Avoided-Cost Resale "creates disincentives for broadband deployment," and disregarded evidence to the contrary. Br. at 49. INCOMPAS focuses its criticism almost entirely on paragraph 39 of the *Order*. *Id.* at 49-51. But the Commission's public interest analysis was explained in paragraphs 50-55, and does not rely on anything from paragraph 39.

INCOMPAS claims that the agency accepted statements from incumbent LECs AT&T and Frontier about the significant costs they incurred from complying with Avoided-Cost Resale, without making an "attempt to quantify those costs."

Id. at 50. But the Commission reasonably accepted record statements from incumbent LECs—the regulated parties—regarding the harms they faced in complying with this obligation. Although INCOMPAS disagrees with the FCC's assessment of the evidence, the Commission may "exercise its judgment in moving from the facts and probabilities on the record to a policy conclusion." *USTelecom*, 825 F.3d at 694-95. "[T]he FCC may rationally choose which evidence to believe among conflicting evidence in its proceedings," especially where, as here, it is predicting "what will happen in the markets under its jurisdiction." *Citizens Telecomms.*, 901 F.3d at 1011. INCOMPAS offers no basis to disturb the Commission's reasonable determination that imposing regulations on a single class of competitors would likely reduce the resources that they could otherwise use toward facilities deployment. *Order* ¶7 (Avoided-Cost Resale "distorts competition by favoring competitors that are not investing in their own facilities over those that are.") (JA).

INCOMPAS' assertion that "forbearance from avoided-cost resale would *reduce* ILEC's incentive to replace copper with fiber" is also meritless. Br. at 52. Over the last several years, incumbent LECs have been retiring their copper loops in favor of fiber networks in response to rising consumer demand for next-generation services. *Order* nn.52, 90, 116, 172 (JA). In addition, given how little competitive LECs rely on Avoided-Cost Resale, *see supra* pp. 48, 58, it is not

credible that they are basing business decisions on the existence of this requirement.

To the extent that copper deployment is financially infeasible for competitive LECs (Br. at 53), the forbearance statute requires the Commission to consider whether forbearance "will promote competitive market conditions" overall, not its impact "on just a subset of competitors." *Order* n.170 (JA). As the Commission found, there is no dearth of competitors in the market, many of whom the agency reasonably concluded will have the incentive to deploy facilities to meet growing consumer demand. *See EarthLink*, 462 F.3d at 5, 11 (even "if all CLECs were driven from the … market," the existence of "robust intermodal competition" from other providers warrants upholding the Commission's decision) (quoting *USTA II*, 359 F.3d at 582).

Finally, INCOMPAS contends that the Commission's prediction that forbearance will encourage deployment is similar to an agency prediction that the Court rejected in *National Lifeline Ass'n v. FCC*, 921 F.3d 1102 (D.C. Cir. 2019). That case, however, is distinguishable. There, the Court held that the agency's expectation that facilities-based providers would deploy in Tribal areas was contradicted by record evidence that many such providers were not interested in offering service to Tribal Lifeline customers, and that some were no longer Lifeline providers. 921 F.3d at 1112; *see also Order* n.175 (JA). Here, in

contrast, there has been a substantial shift toward IP-based and wireless services over the last decade, and an array of competitors that show no signs of leaving the voice services market. *Order* ¶¶9, 11, 48 (JA). In view of the number of consumers switching to next-generation voice services, it was certainly reasonable for the Commission to anticipate that some providers would be encouraged to deploy facilities to meet this growing demand. *Id.* ¶¶51-52 (JA). This conclusion, which is grounded in logic, market trends, and lies squarely within the "agency's field of discretion and expertise," is entitled to "particularly deferential review." *EarthLink*, 462 F.3d at 12.

CONCLUSION

The Court should deny the petitions for review.

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CERTIFICATE OF FILING AND SERVICE

I, Thaila K. Sundaresan, hereby certify that on March 25, 2020, I filed the foregoing Under Seal Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by hand delivery. Copies of this brief will be sent by electronic mail to the case participants.

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STATUTORY ADDENDUM

5 U.S.C. § 706

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--
(1) compel agency action unlawfully withheld or unreasonably delayed; and
(2) hold unlawful and set aside agency action, findings, and conclusions found to be--
(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(D) without observance of procedure required by law;
(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

47 U.S.C. § 160

§ 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.

47 U.S.C. § 251

§ 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

§ 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.

47 U.S.C. § 1302

§ 1302. Advanced telecommunications incentives

(a) In general
The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

47 C.F.R. § 51.319

§ 51.319 Specific unbundling requirements.

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(f) Operations support systems. An incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to operations support systems on an unbundled basis, in accordance with section 251(c)(3) of the Act and this part. Operations support system functions consist of pre-ordering, ordering, provisioning, maintenance and repair, and billing functions supported by an incumbent LEC's databases and information. An incumbent LEC, as part of its duty to provide access to the pre-ordering function, shall provide the requesting telecommunications carrier with nondiscriminatory access to the same detailed information about the loop that is available to the incumbent LEC.

47 C.F.R. § 51.333

§ 51.333 Notice of network changes: Short term notice, objections thereto and objections to copper retirement notices.

(a) Certificate of service. If an incumbent LEC wishes to provide less than six months' notice of planned network changes, or provide notice of a planned copper retirement, the public notice or certification that it files with the Commission must include a certificate of service in addition to the information required by § 51.327(a) or § 51.329(a)(2), as applicable. The certificate of service shall include:
(1) A statement that, at least five business days in advance of its filing with the Commission, the incumbent LEC served a copy of its public notice upon each telephone exchange service provider that directly interconnects with the incumbent LEC's network, provided that, with respect to copper retirement notices, such service may be made by postings on the incumbent LEC's website if the directly interconnecting telephone exchange service provider has agreed to receive notice by website postings; and
(2) The name and address of each such telephone exchange service provider upon which the notice was served.
(b) Implementation date. The Commission will release a public notice of filings of such short term notices or copper retirement notices. The effective date of the network changes referenced in those filings shall be subject to the following requirements:
(1) Short term notice. Short term notices shall be deemed final on the tenth business day after the release of the Commission's public notice, unless an objection is filed pursuant to paragraph (c) of this section.
(2) Copper retirement notice. Notices of copper retirement, as defined in § 51.325(a)(3), shall be deemed final on the 90th day after the release of the Commission's public notice of the filing, unless an objection is filed pursuant to paragraph (c) of this section, except that notices of copper retirement involving copper facilities not being used to provision services to any customers shall be deemed final on the 15th day after the release of the Commission's public notice of the filing. Incumbent LEC copper retirement notices shall be subject to the short-term notice provisions of this section, but under no circumstances may an incumbent LEC provide less than 90 days' notice of such a change except where the copper facilities are not being used to provision services to any customers.
(c) Objection procedures for short term notice and copper retirement notices. An objection to an incumbent LEC's short term notice or to its copper retirement notice may be filed by an information service provider or telecommunications service provider that directly interconnects with the incumbent LEC's network.

Such objections must be filed with the Commission, and served on the incumbent LEC, no later than the ninth business day following the release of the Commission's public notice. All objections filed under this section must:
(1) State specific reasons why the objector cannot accommodate the incumbent LEC's changes by the date stated in the incumbent LEC's public notice and must indicate any specific technical information or other assistance required that would enable the objector to accommodate those changes;
(2) List steps the objector is taking to accommodate the incumbent LEC's changes on an expedited basis;
(3) State the earliest possible date (not to exceed six months from the date the incumbent LEC gave its original public notice under this section) by which the objector anticipates that it can accommodate the incumbent LEC's changes, assuming it receives the technical information or other assistance requested under paragraph (c)(1) of this section;
(4) Provide any other information relevant to the objection; and
(5) Provide the following affidavit, executed by the objector's president, chief executive officer, or other corporate officer or official, who has appropriate authority to bind the corporation, and knowledge of the details of the objector's inability to adjust its network on a timely basis:
"I, (name and title), under oath and subject to penalty for perjury, certify that I have read this objection, that the statements contained in it are true, that there is good ground to support the objection, and that it is not interposed for purposes of delay. I have appropriate authority to make this certification on behalf of (objector) and I agree to provide any information the Commission may request to allow the Commission to evaluate the truthfulness and validity of the statements contained in this objection."
(d) Response to objections. If an objection is filed, an incumbent LEC shall have until no later than the fourteenth business day following the release of the Commission's public notice to file with the Commission a response to the objection and to serve the response on all parties that filed objections. An incumbent LEC's response must:
(1) Provide information responsive to the allegations and concerns identified by the objectors;
(2) State whether the implementation date(s) proposed by the objector(s) are acceptable;
(3) Indicate any specific technical assistance that the incumbent LEC is willing to give to the objectors; and
(4) Provide any other relevant information.
(e) Resolution. If an objection is filed pursuant to paragraph (c) of this section, then the Chief, Wireline Competition Bureau, will issue an order determining a

reasonable public notice period, provided however, that if an incumbent LEC does not file a response within the time period allotted, or if the incumbent LEC's response accepts the latest implementation date stated by an objector, then the incumbent LEC's public notice shall be deemed amended to specify the implementation date requested by the objector, without further Commission action. An incumbent LEC must amend its public notice to reflect any change in the applicable implementation date pursuant to § 51.329(b).

(f) Resolution of objections to copper retirement notices. An objection to a notice that an incumbent LEC intends to retire copper, as defined in § 51.325(a)(3) shall be deemed denied 90 days after the date on which the Commission releases public notice of the incumbent LEC filing, unless the Commission rules otherwise within that time. Until the Commission has either ruled on an objection or the 90–day period for the Commission's consideration has expired, an incumbent LEC may not retire those copper facilities at issue.

(g) Limited exemption from advance notice and timing requirements for copper retirements—

(1) Force majeure events.

(i) Notwithstanding the requirements of this section, if in response to a force majeure event, an incumbent LEC invokes its disaster recovery plan, the incumbent LEC will be exempted during the period when the plan is invoked (up to a maximum 180 days) from all advanced notice and waiting period requirements under this section associated with network changes that result from or are necessitated as a direct result of the force majeure event.

(ii) As soon as practicable, during the exemption period, the incumbent LEC must continue to comply with § 51.325(a), include in its public notice the date on which the carrier invoked its disaster recovery plan, and must communicate with other directly interconnected telephone exchange service providers to ensure that such carriers are aware of any changes being made to their networks that may impact those carriers' operations.

(iii) If an incumbent LEC requires relief from the notice requirements under this section longer than 180 days after it invokes the disaster recovery plan, the incumbent LEC must request such authority from the Commission. Any such request must be accompanied by a status report describing the incumbent LEC's progress and providing an estimate of when the incumbent LEC expects to be able to resume compliance with the notice requirements under this section.

(iv) For purposes of this section, “force majeure” means a highly disruptive event beyond the control of the incumbent LEC, such as a natural disaster or a terrorist attack.

(v) For purposes of this section, “disaster recovery plan” means a disaster response plan developed by the incumbent LEC for the purpose of responding to a force majeure event.
(2) Other events outside an incumbent LEC's control.
(i) Notwithstanding the requirements of this section, if in response to circumstances outside of its control other than a force majeure event addressed in paragraph (g)(1) of this section, an incumbent LEC cannot comply with the timing requirement set forth in paragraphs (b)(1) or (2) of this section, hereinafter referred to as the waiting period, the incumbent LEC must give notice of the network change as soon as practicable and will be entitled to a reduced waiting period commensurate with the circumstances at issue.
(ii) A short term network change or copper retirement notice subject to paragraph (g)(2) of this section must include a brief explanation of the circumstances necessitating the reduced waiting period and how the incumbent LEC intends to minimize the impact of the reduced waiting period on directly interconnected telephone exchange service providers.
(iii) For purposes of this section, circumstances outside of the incumbent LEC's control include federal, state, or local municipal mandates and unintentional damage to the incumbent LEC's network facilities not caused by the incumbent LEC.