

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

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

PETITION FOR RECONSIDERATION OF SONIC TELECOM, LLC

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EXECUTIVE SUMMARY

Future proof networks across all parts of the country are critical to ensuring truly advanced broadband—not just best-efforts 25/3 Mbps—is available to all Americans. Preventing a monopoly on those networks, and the broadband services provided over them, is necessary to ensuring broadband services that are affordable and enjoyed by all Americans. The Commission should reverse actions taken by the previous administration that hinder, rather than promote, the *most aggressive* fiber to the home (“FTTH”) builders—those using unbundled network elements (“UNEs”) as a stepping-stone for fiber buildout. The remote learning during the pandemic has dispelled the myth that the Commission need only promote broadband and fiber build out to rural and less densely populated areas. Commission policies need to spur deployment to underserved and unserved communities in urbanized areas, too. The record overwhelmingly demonstrates two UNEs – unbundled DS0 Loops and unbundled dark fiber – are key to FTTH buildout by those using them (competitors) and those responding to the competition with their own buildout (incumbent local exchange carriers (“ILECs”)). Cutting off access to these elements, even at a future date, disrupts today’s plans for future fiber buildout, as well as investment in new, innovative technology delivered over these network elements.

This sets the country on a trajectory of an ILEC monopoly in FTTH build in urbanized areas, assuming the ILEC chooses to build. The harm from such an outcome not only is no consumer choice in service provider, and all that comes with a lack of robust competition, it is the foreseeable continuation of a red line of have and have nots of advanced broadband services running through our cities. A Communications Workers of America and the National Digital Inclusion Alliance study, and the attached Sonic declaration, find ILEC fiber build favors high-income communities.

It is important for competitors to have access to UNEs in these communities that lack ILEC FTTH build since the record shows that competitors have provided faster broadband speeds over the ILEC's copper network than the ILECs. Access to these UNEs also make possible build plans like Sonic's 2020-2021 build plans that include planned fiber deployments to over 900 urbanized census blocks with median household incomes of approximately \$50,000. Both the impairment and forbearance standard require the Commission to consider the impact of its actions on the deployment of advanced services. The Biden Administration further calls for a look at whether ". . . regulatory initiatives appropriately benefit and do not inappropriately burden disadvantaged, vulnerable, or marginalized communities."¹ Curtailing the availability of UNE building blocks initially relied on by aggressive competitive fiber builders in urbanized areas counter these policy objectives. Rather than basing its findings on facts, the Commission's actions curtailing access to these UNEs were based on data it *knew* is untrustworthy and unsubstantiated theories and predictions. The compromise proposal adopted by the Commission did not include *any* FTTH builder predominantly serving urbanized areas, whose customers constitute a segment of the market materially impacted by the Order. Transitions do not cure the deficiencies in Commission findings and conclusions. They at best delay the impact.

This Petition identifies material errors in fact and law, omissions, unsupported findings, and new evidence that justify Commission reconsideration and reversal of its finding of no impairment, and grant of forbearance, for the unbundled DS0 Loop in urbanized areas and unbundled dark fiber within a half of mile of fiber.

¹ President Joseph R. Biden, Memorandum for the Heads of Executive Departments and Agencies, Modernizing Regulatory Review, Jan. 20, 2021.

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PETITION FOR RECONSIDERATION OF SONIC TELECOM, LLC

Sonic Telecom, LLC, pursuant to Section 1.429 of the Commission’s rules, 47 C.F.R. § 1.429, submits this Petition for Reconsideration of the Federal Communications Commission’s (“Commission”) Report and Order.²

Reconsideration is appropriate where the petitioner shows either a material error or omission in the Commission’s original order or raises additional facts not known or not existing until after the petitioner’s last opportunity to respond.³ Although the Commission may reject arguments that were previously considered and rejected, even if a petition is repetitious, the Commission has discretion to consider it.⁴ The Commission also can reconsider an order that “failed to fully consider important arguments and lacked a reasoned basis for its conclusion...”⁵

² *Modernizing Unbundling and Resale Requirements in an Era of Next-Generation Networks and Services*, Report and Order, 35 FCC Rcd 12425 (2020) (“Order”).

³ See 47 C.F.R. §§ 1.106(c), 1.429(b)(1)-(3); *EZ Sacramento, Inc., Memorandum Opinion and Order*, 15 FCC Rcd 18257, para. 2 (Enf. Bur. 2000) (citing *WWIZ, Inc., Memorandum Opinion and Order*, 37 FCC Rcd 685, 686 (1964), aff’d sub. nom. *Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), cert. denied, 383 U.S. 967 (1966)); see also *Ely Radio, LLC, Memorandum Opinion and Order*, 27 FCC Rcd 7608, 7610, para. 6 (Enf. Bur. 2012) (articulating the standard of review for Petitions for Reconsideration).

⁴ *Amendment of Section 73.3555(e) of the Commission’s Rules, National Television Multiple Ownership Rule*, Order on Reconsideration, 32 FCC Rcd 3390, 3397, para. 16 (2017) (“UHF Discount Order on Reconsideration”) (“Neither the Communications Act nor Commission rules preclude the Commission from granting petitions for reconsideration that fail to rely on new arguments.”).

⁵ *Id.*, 32 FCC Rcd at 3396-97, paras. 16-17.

A petition for reconsideration that relies on facts or arguments which have not previously been presented to the Commission may be granted if: (1) the facts or arguments relied on relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters to the Commission; (2) the facts or arguments relied on were unknown to petitioner until after its last opportunity to present them to the Commission, and it could not through the exercise of ordinary diligence have learned of the facts or arguments in question prior to such opportunity; or (3) the Commission determines that consideration of the facts or arguments relied on is required. This Petition identifies material errors in fact and law, omissions, unsupported findings, and new evidence that justify Commission reconsideration and reversal of its finding of no impairment, and grant of forbearance, for the unbundled DS0 Loop in urbanized areas and unbundled dark fiber within a half of mile of fiber.

I. THE ORDER HARMS CONSUMERS AND HINDERS COMMISSION DEPLOYMENT GOALS

The widespread shelter-in-place orders across the country have shown many families in urbanized communities are harmed by the lack of access to any broadband, let alone affordable, reliable broadband. The New York Times reported “it [is] three times more likely that households without internet service can be found in urban, rather than rural, environments”⁶ and the Dallas Morning News recounts that a large percentage of households in large cities lack broadband access.⁷ The Census Bureau’s American Community Survey (“ACS”) estimates nearly 14 million metropolitan households are without an in-home or wireless broadband

⁶ Opinion, “Doing Schoolwork in the Parking Lot Is Not a Solution,” N.Y. Times, The Editorial Board, Jul. 18, 2020, <https://www.nytimes.com/2020/07/18/opinion/sunday/broadband-internet-access-civil-rights.html>.

⁷ Corbett Smith, “A third of Dallas families are without home internet, making online learning all the more difficult,” The Dallas Morning News, May 8, 2020, <https://www.dallasnews.com/news/public-health/2020/05/08/a-third-of-dallas-families-are-without-home-internet-making-online-learning-all-the-more-difficult/>.

subscription.⁸ Demonstrating the gravity, the Electronic Frontier Foundation (“EFF”) drew the Commission’s attention to two young girls in a California city doing homework in a Taco Bell parking lot due to lack of home broadband.⁹ These real-world experiences should have given the Commission pause in using data known to be untrustworthy to find “robust competition” and take action that will impede competitive carriers’ ability to serve consumers and ultimately deploy and expand fiber networks across urbanized communities. But it did not. Instead, the Commission committed a material error by relying on faulty data and chipped away at statutory means for those providing faster, more innovative broadband over legacy facilities, building new networks, and providing competitive broadband services where there otherwise is none, especially in urbanized areas.¹⁰

Moreover, as demand for broadband—especially for household broadband—has been rapidly escalating, the Commission and industry have been calling for future proof networks “and fiber is the undisputed winner. Fiber-to-the-home deployments are a better option for consumers today, and they are the only option that will allow expansive, efficient upgrades to America’s networks for a generation.”¹¹ Consumer demand for all-fiber broadband has

⁸ Lara Fishban and Adie Tomer, “Neighborhood broadband data makes it clear: We need an agenda to fight digital poverty,” Brookings Series-Metropolitan Infrastructure Initiative, Feb. 6, 2020, <https://www.brookings.edu/blog/the-avenue/2020/02/05/neighborhood-broadband-data-makes-it-clear-we-need-an-agenda-to-fight-digital-poverty/>. Some estimates suggest that the majority of people who do not have internet live in cities and suburbs, not in rural areas. Olga Khazan, “America’s Terrible Internet Is Making Quarantine Worse,” The Atlantic, Aug. 17, 2020, <https://www.theatlantic.com/technology/archive/2020/08/virtual-learning-when-you-dont-have-internet/615322/>.

⁹ Letter from Ernesto Falcon, Electronic Frontier Foundation to Marlene H. Dortch, Secretary, FCC, at 3, (filed Oct. 20, 2020) (“EFF Oct. *Ex Parte* Notice”).

¹⁰ As the Small Business Administration, Office of Advocacy points out, these carriers are sometimes the only broadband competitor in “dense urban areas.” *See* Reply Comments and Initial Regulatory Flexibility Comments U.S. Small Business Administration, Office of Advocacy at 4 (filed Mar. 20, 2020) (emphasis added) (“SBA Reply”).

¹¹ Bennett Cyphers, “The Case for Fiber to the Home, Today: Why Fiber is a Superior Medium for 21st Century Broadband,” Electronic Frontier Foundation, Oct. 16, 2019,

skyrocketed and is expected to continue rising.¹² This is not just a passing trend. For years experts have been pointing to FTTH connections as “the only technology with enough bandwidth to handle projected consumer demands during the next decade reliably and cost effectively . . . [and] spark the creation of products not yet dreamed of . . .”¹³ Current technologies do not come close.¹⁴ These facts should have caused the Commission to maintain policies to promote and enable fiber build, particularly FTTH deployment, using all possible means. But it did not. Instead, the Commission made contradictory suppositions and unsubstantiated predictions to find the *most aggressive* FTTH builders, those that deploy more fiber in the areas they operate than the ILEC,¹⁵ to be inefficient competitors. And it relied on cable competitors, who serve 100% of their residential customer base on cable technology rather than fiber,¹⁶ as evidence of “robust competition” that makes continued access to DS0 Loops unnecessary.

At the time of the proceeding, Sonic had moved 41% of its subscriber base from UNEs to fiber and had been named the fastest ISP in the United States,¹⁷ compared to AT&T’s 29% on fiber as of December 31, 2019.¹⁸ The Commission nonetheless, incredibly, found that “continued unbundling at regulated rates could artificially slow the transition away from legacy services and reduce incentives to invest in more advanced technologies, such as fixed wireless

<https://www.eff.org/wp/case-fiber-home-today-why-fiber-superior-medium-21st-centurybroadband>.

¹² See Letter from Lisa R. Youngers, Pres. & CEO, Fiber Broadband Ass’n, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 19-126 and 10-90, at 2 (filed Jan. 21, 2020).

¹³ Tim Crosby, “How Fiber-to-the-home Broadband Works,” HowStuffWorks.com, Mar. 28, 2008, <https://computer.howstuffworks.com/fiber-to-the-home1.htm>.

¹⁴ *Id.*

¹⁵ Declaration of William P. Zarakas, attached to Joint Opposition of INCOMPAS, FISPA, Midwestern Association of Competitive Communications, and the Northwest Telecommunications Association, WC Docket No. 18-141, paras. 5-9 (filed Aug. 6, 2018) (“Joint Opposition”) (“The Brattle Group Study”).

¹⁶ *Communications Marketplace Report*, GN Docket No. 20-60, 2020 Communications Marketplace Report, Fig. II.B.6 (rel. Dec. 31, 2020) (“2020 Marketplace Report”).

¹⁷ See Comments of Sonic Telecom, LLC at 2 (filed Feb. 5, 2020) (“Sonic Comments”).

¹⁸ 2020 Marketplace Report, Fig. II.B.6.

and fiber-based networks.”¹⁹ Multiple declarations and economic studies in the record, as well as the findings of a fellow federal governmental agency, contradict the Commission’s finding and instead demonstrate that unbundling spurs deployment of new networks and promotes “the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.”²⁰ The record overwhelmingly demonstrates (1) significant investment in fiber network deployment by UNE-based competitors in both urban and rural areas;²¹ (2) competition ILECs face from UNE-based competitors stimulates ILEC network investment;²² and (3) competitors use of UNE copper loops and UNE dark fiber fosters innovation and the transition to more advanced technologies.²³ As the U.S. Small Business Office of Advocacy (“SBA”) concluded, the “record shows that small CLECs are investing significantly into building their

¹⁹ Order, 35 FCC Rcd 12458, para. 62; *see also id.* at 2452, para. 54.

²⁰ 47 U.S.C. § 1302.

²¹ *See e.g.*, Sonic Comments at 26; The Brattle Group Study, para. 17 (UNEs lower barriers to facilities-based competition and advanced FCC’s objectives of enhancing broadband networks investment); Letter of R. Matthew Kohly, Socket Telecom, LLC to Marlene H. Dortch, FCC, attaching Declaration, at para. 3 (filed Feb. 5, 2020) (“Kohly Decl.”) (Socket’s capex as a percentage of revenue from 2013 to 2017 was twice that of AT&T); Telnet at para. 7 (Telnet has invested \$50 million and has plans to continue investing in underserved urban and rural areas); Letter from Hai Jiang, Counsel for Clear Rate Communications, Inc. attaching Declaration of Thane Namy, at 3 (filed Feb. 5, 2020) (“Namy Decl.”) (Clear Rate delivers service to end-users using its own fiber network that it is continually investing in and expanding); Comments of Uniti Fiber at i (filed Feb. 5, 2020) (“Uniti Fiber self deploys fiber facilities wherever practical, but continues to use UNEs to expand network reach, meet customer demand, and access new markets.”) (“Uniti Fiber Comments”); Buckingham Decl., para. 4 (Digital West has invested approximately \$13 million in its own network facilities); Letter from Daniel Friesen, IdeaTek, to Marlene H. Dortch, Secretary, FCC, attaching Declaration, para. 13 (filed Feb. 5, 2020) (“IdeaTek Decl.”) (IdeaTek has invested tens of millions of dollars in sustainable rural fiber optic infrastructure and has plans to continue investing at least \$2-3 million per year on new fiber optic infrastructure).

²² Sonic Comments at 27-28; Declaration of David E. M. Sappington, attached to Joint Opposition at 16 (long-term increase in competitor investment facilitated by access to UNEs, in turn, stimulates ILEC broadband investment is supported by empirical research and well documented) (“Sappington Decl.”).

²³ Sonic Comments at 28-31; The Brattle Group Study at pp. 9 -11 (“CLECs are providing faster broadband speeds over the ILEC’s copper network than the ILECs are themselves. In the absence of UNEs, customers either might not have access to or would have to pay much more for comparable products.”).

own networks and deploying next generation facilities under the existing regulatory scheme, which has also encouraged incumbents to move their own networks forward.”²⁴

The Commission also ignored evidence that its finding of no impairment would result in fiber builders curtailing deployment or exiting the market because of this Order,²⁵ including evidence that such exiting has already occurred because of similar action by the Commission.²⁶ The Commission downplayed or disregarded evidence that ending access to UNE transport exposes substantial investments—including fiber investment—to being stranded.²⁷ The Commission claims it addresses these harms with a transition. But the Commission’s previous actions included a multi-year transition and expansion plans still were scrapped. This Order compounds this dilemma by impacting access to *both* loops and transport. Expecting these small carriers to rebuild the entire ILEC network in a few years when the much larger ILECs have not been able to do so even with the foundation of their legacy networks is not only foolhardy, in contravenes the intent of the Act.

This sets the country on a trajectory of an ILEC monopoly in FTTH build in urbanized areas, assuming the ILEC chooses to build.²⁸ The harm from such an outcome not only is no

²⁴ SBA Reply at 4.

²⁵ See e.g., Reply Comments of Sonic Telecom, LLC at 10 (filed March 20, 2020) (discussing possible exit from one-half existing footprint) (“Sonic Reply”); see also, Declaration of Dane Jasper, Attachment to Sonic Reply, para. 12 (“Jasper Decl.”); Declaration of Jeff Buckingham, President of Digital West, para. 8 (“Buckingham Decl.”); IdeaTek Decl., para. 13 (stating that “this NPRM has already caused IdeaTek to alter deployment plans in some very underserved markets in Kansas and simply abandon others.”).

²⁶ See e.g., Buckingham Decl., para. 6 (discussing Digital West’s exiting of a market impacted by the Commission’s DS1/DS3 Transport Forbearance Order, stating that it is resulting in consumers losing their only broadband provider); See also, Kohly Decl., para 17-22, (explaining that the Transport Forbearance Decision was extremely detrimental to Socket’s fiber deployment and customers).

²⁷ See *infra* n. 51; See also, Letter from Karen Reidy, Counsel to Sonic Telecom, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 19-308, at 2, (filed Feb. 27, 2020); Jasper Decl., para. 10.

²⁸ Sonic Reply at 1 and 5, n. 12.

consumer choice in service provider, and all that comes with a lack of robust competition, it is the foreseeable continuation of a red line of have and have nots of advanced broadband services running through our cities. A Communications Workers of America and the National Digital Inclusion Alliance study, cited by EFF, finds ILEC fiber build favors high-income communities.²⁹

The attached study on fiber build supports this ILEC fiber-build disparity by household income. Sonic analyzed the correlation between household income and the availability of ILEC fiber-based broadband services in urbanized areas. Sonic's analysis *overstates* ILEC FTTH deployment in urbanized areas because it identifies census blocks as served where there may only be one FTTH connection—meaning this data cannot be used to demonstrate sufficient deployment anywhere. Mr. Patrick's declaration demonstrates that in urbanized census blocks with median household income of \$50,000 or less, fewer than 30% of blocks have at least one ILEC fiber-based broadband connection.³⁰ In contrast, the percent of blocks with at least one ILEC fiber-based broadband connection exceeds 50% once median household income hits approximately \$115,000.

It is important for competitors to have access to UNEs in these communities that lack ILEC FTTH build since the record shows that competitors have provided "faster broadband speeds over the ILEC's copper network than the ILECs..."³¹ Sonic's 2020-2021 build plans include planned fiber deployments to over 900 urbanized census blocks with median household incomes of approximately \$50,000. Mr. Patrick explains that "[i]t is only through the extensive

²⁹ See EFF Oct. *Ex Parte*, at 2, n. 10, citing "AT&T's Digital Redlining Leaving Communities Behind for Profit," at 1, Oct. 2020, [NDIA-CWA AT&T Redlining Report.pdf \(fcc.gov\)](#) ("AT&T prioritizes network upgrades to wealthier areas, leaving lower income communities with outdated technologies").

³⁰ Declaration of Nathan Patrick, para. 8 (Attached as Exhibit 1).

³¹ The Brattle Group Study at p. 9.

market testing that Sonic has done with [UNEs] that we have the confidence in these markets, and believe that a fiber investment is warranted. An inability to prove-out future low-income areas with UNEs would make that approach impossible.”³² The Commission should maintain an all-hands on deck approach to bringing FTTH to urbanized areas as it did for rural and urban clusters. Both the impairment and forbearance standard require the Commission to consider the impact of its actions on the deployment of advanced services. The Biden Administration further calls for a look at whether “. . . regulatory initiatives appropriately benefit and do not inappropriately burden disadvantaged, vulnerable, or marginalized communities.”³³ Curtailing the availability of UNE building blocks initially relied on by aggressive competitive fiber builders in urbanized areas counter these policy objectives.

II. ACCESS TO UNBUNDLED DS0 LOOPS AND UNBUNDLED DARK FIBER IS NEEDED FOR THE PROVISION OF COMPETITIVE SERVICES AND DEPLOYMENT OF COMPETITIVE FIBER NETWORKS

The record overwhelmingly demonstrates the need for access to UNEs to provision broadband services to residential communities and small businesses and to build new broadband networks. Unbundled DS0 Loops and unbundled dark fiber are particularly needed to provision innovative, high speed, and sometimes symmetrical competitive broadband services.³⁴ These UNEs are also key to broadband providers’ continued fiber network investment and expansion into new markets. These UNEs are necessary for fiber builders to enter new markets, connect

³² Patrick Decl., para. 12.

³³ President Joseph R. Biden, Memorandum for the Heads of Executive Departments and Agencies, Modernizing Regulatory Review, Jan. 20, 2021.

³⁴ Due to the ability of the competitor to use its own electronics over the unbundled DS0 Loop and unbundled dark fiber, these UNEs allow a competitor to provide more innovation, quality and security in the services it offers. The distinction in type and quality of service enables competitors to establish a loyal customer base and start the transition of the customer’s mindset, and demand, for the services that will be available on the competitor’s network. *See* Sonic Comments at 11 and Sonic Reply at 16. *See also*, Sonic Comments at 28-31 (discussing competitors’ use of DS0 Loops and dark fiber to foster innovation and to transition customers to more advanced technology).

markets, and acquire a customer base, establishing market share to finance and justify last-mile fiber construction.³⁵ As stated by Professor Sappington, “[t]his process is well-documented, both in principle and in fact.”³⁶ The Brattle Group Study found that “few if any competitive operators – including ILECs with respect to markets outside of their footprint – can afford to build-out networks on a fully speculative basis.”³⁷ As SBA concluded, without UNEs competitors will be prevented “from continuing to serve consumers with competitive services, and deploying next generation networks themselves.”³⁸ In contrast, the record lacks evidence of a provider deploying FTTH without the foundation of an existing network.³⁹ The Commission’s determination that competitors would have greater incentive to build fiber without access to UNEs therefore lacked a reasoned basis and should be reversed.

A. UNE DS0 Loops Are Needed for Provisioning Broadband Services and Building Networks

The Commission correctly preserved access to DS0 Loops in rural areas and urban clusters. However, the Commission erred in finding no impairment and in granting forbearance for this critical unbundled network element in urbanized areas, with no rational basis or discernable distinction.⁴⁰ The Order not only lacks reasoned support for this conclusion, but it is also rife with contradictions.

³⁵ *Infra* at n. 41 and 51.

³⁶ Sonic Reply at 12, n. 41, *citing* Sappington Declaration at 15.

³⁷ *Id.*, *citing* the Brattle Group Study at para. 16.

³⁸ SBA Reply at 4. SBA also found that these competitors “face immediate harms,” despite a transition. *Id.*

³⁹ *See* Sonic Reply at 12; *See also*, The Brattle Group Study at para. 16 (“few if any competitive operators – including ILECs with respect to markets outside of their footprint – can afford to build-out networks on a fully speculative basis.”); *See also*, CenturyLink at i and 18 (acknowledges the fact that cable companies “leverage” their existing networks to buildout fiber).

⁴⁰ Order, 35 FCC Rcd at 12451-52, para. 52.

Competitors like Sonic attested to the *need* for unbundled DS0 Loops to enter a market, establish a customer-base, and build out a FTTH network.⁴¹ The cost of deploying local loops is fixed and sunk. A carrier will not deploy loops unless it knows that it will have customers that will generate sufficient revenues to recover its sunk loop investment, which is particularly challenging in residential communities.⁴² The Order, nonetheless, states in a footnote, with no explanation or support, that it no longer finds this ‘compelling’ in urbanized areas.⁴³ Elsewhere, the Commission contradicts itself, acknowledging that “competitors rely on UNE DS0 loops to connect their customers to their own fiber networks and are swapping out these loops for their own last mile facilities as they build out their fiber network to their end-users’ premises.”⁴⁴ The Commission cites Sonic—a fiber builder in *urbanized* areas—as support.⁴⁵ The Commission provides no basis for finding FTTH builders in urbanized areas are less impaired without UNEs than in other areas. In basing its conclusion on its unsubstantiated and internally conflicting opinion instead of facts, the Commission ignores important aspects of the problem of FTTH

⁴¹ GWI at para. 9 (explaining that larger business customers served via fiber generate greater revenue per customer but small business and residential customers require initial use of UNEs to build a customer base and financially justify building fiber infrastructure); Namy Decl. at 1 (credits access to copper loops as key to its fiber expansion by providing a way to enter a market and gain customers); Kohly Decl., paras. 5 and 8 (UNEs create a means to enter new markets and enable fiber build); Buckingham Decl., para. 10 (Digital West uses DS0 Loops to provision residential voice and broadband services, enabling it to “quickly and reliably serve customers in a marketplace while building the financial sustainability to justify expanding [its] own last-mile fiber network.”).

⁴² In contrast with the enterprise marketplace, where a single customer might purchase a sufficient amount/capacity of custom services to justify construction to their location, in the residential marketplace no one customer or even small group of customers has adequate monthly spending to justify building the network. Access to UNEs allows competitors to overcome this impairment, by enabling competitive broadband providers to obtain a sufficient customer-base to support deployment. *See* Jasper Decl., para. 6.

⁴³ Order, 35 FCC Rcd at 12458, para. 61, n. 264.

⁴⁴ *Id.* at 12511, para. 169.

⁴⁵ *Id.* at n. 722.

build in urbanized areas such as inability to build on speculation and the lack of subsidies to build in urban areas that are available to service providers in rural areas.⁴⁶

The Commission also fails to provide a reasoned basis for its belief that “a reasonably efficient carrier” would not use copper loops and instead would use fixed wireless and other technology to enter a market.⁴⁷ As an initial matter, the Order contradicts itself in the very footnote that is supposed to support this claim. As the Commission notes, and has previously stated, an efficient carrier today would design an “all Internet protocol (IP) fiber network”⁴⁸ – the very network competitive broadband providers deploy by starting with unbundled network elements and transitioning customers to fiber. There is industry-wide and Commission recognition of the benefits and efficiency of this future proof network.⁴⁹ Additionally, the record declarations from broadband providers using fixed wireless to provision services came from those providing service predominantly, if not exclusively, to rural communities or urban clusters.⁵⁰ The Commission’s claims of fixed wireless deployment in urbanized areas focused primarily on the potential 5G deployment by the wireless affiliates of two major ILECs – which hardly constitutes competition and is not fixed wireless.

B. UNE Dark Fiber is Needed for Provisioning Broadband Services and Building Networks

Unbundled dark fiber is important for expansion of broadband networks and support for networks already deployed. Numerous broadband providers attested to the high probability of exiting markets, and halting expansion of fiber builds into new markets, caused by the loss of

⁴⁶ Sonic Reply at 12-13; The Brattle Group Study at para. 16.

⁴⁷ Order, 35 FCC Rcd at 12457-58, para. 61.

⁴⁸ *Id.* at n. 261.

⁴⁹ *Supra* at pp. 3-4.

⁵⁰ *See e.g.*, Letter from Brian R. Worthen, CEO, Mammoth Networks to Marlene Dortch, Secretary, FCC, attaching Declaration, para. 1 (filed Feb. 5, 2020) (deploys broadband in the “most rural areas” of Colorado, Montana, New Mexico, and Wyoming with “deployment strategy of our own fiber and fixed wireless infrastructure.”) (“Mammoth Decl.”).

unbundled dark fiber.⁵¹ The Commission, nonetheless, concluded that competitors are no longer impaired without access to UNE dark fiber transport provisioned from wire centers within a half a mile of competitive fiber, claiming the “impairment inquiry asks only whether a ‘reasonably efficient competitor within a half mile of alternative fiber’ could either obtain such transport at competitive rates or by building its own network.”⁵² The analysis in the Order, however, proves neither the existence of competitive rates or the ability to build one’s own network due to nearby fiber.

As the record shows, alternative nearby fiber is not always commercially available or suitable for the service being provided.⁵³ The Commission acknowledges this fact, but states that

⁵¹ See Jasper Decl., paras. 10 and 12 (Sonic’s investment in CO facilities and UNE loop servicing equipment “would become stranded and worthless with the loss of UNE interoffice dark fiber and xDSL-capable loops.” Instead of expanding Sonic’s fiber network to transition existing UNE-based customers, Sonic anticipates it “would exit most of those markets because the transport and loop costs would be infeasible.”); Mammoth Decl., para. 10 (stating that “the loss of access to dark fiber interoffice transport UNEs would increase our costs of serving rural markets by eight to nine times. This will impact how much last-mile connectivity [it] will be able to deploy”); Buckingham Decl., para. 13 (stating the “loss UNE of dark fiber will be significant and harm [Digital West’s] fiber deployment”); Uniti Fiber Comments at 2-3 (Uniti Fiber echoes that the loss of dark fiber “would disrupt the market” by forcing competitors to expend capital fruitlessly overbuilding unused ILEC fiber facilities rather than using their capital to push new fiber deployments to more end users and locations and raises the possibility that loss of this element will “sever customers” from its network. In particular, the loss of dark fiber could result in its existing network infrastructure becoming “separate, disconnected ‘islands’ with no links to move traffic to and from Uniti Fiber’s core network” and “may compel Uniti Fiber to abandon existing central offices where it has deployed network facilities.”); Comments of Windstream Services, LLC at 3 (filed Feb. 5, 2020) (expresses the concern that losing access to unbundled dark fiber “means that significant investments made by Windstream would be stranded.”) (“Windstream Comments”).

⁵² Order, 35 FCC Rcd at 12484, para. 115.

⁵³ Jasper Decl., paras 17-18. See also Windstream Comments at 2-3 (Noting providers cannot simply swap out affected dark fiber strands for lit capacity. “In contrast to lit ILEC transport service purchased on a commercial wholesale basis, UNEs give competitive providers the ability to control how the facility is used in combination with their own network infrastructure. . . competitive providers have been able to upgrade their network electronics and switches to deliver faster and better services over the same underlying network element.”); Kohly Decl., paras. 67, 75 (BTOP recipient and cable providers with nearby fiber do not, as a general matter, make it commercially available to competitive carriers seeking to provide competitive broadband).

“whether or not such fiber is commercially available has no bearing on the analysis.”⁵⁴ The Commission, without showing commercial availability from a competitive provider, has no basis for saying an efficient competitor within a half mile of alternative fiber could obtain such transport at competitive rates. It likewise means there is no assurance of “market pressure to keep rates down” as the Commission alleged to meet two necessary prongs of the forbearance test, in addition to no impairment.⁵⁵

The possibility of “commercial alternatives” provided by the ILECs does not change this outcome.⁵⁶ If the alternative fiber provides no viable commercial alternative to ILEC dark fiber, there is nothing to control the pricing of the ILEC commercial offering. The Order provides no price analysis of transport rates within a half a mile of alternative fiber, or a comparison to other transport rates, to prove otherwise. As parties addressed in the proceeding, it “would be unreasonable to conclude that Congress created a structure to incent entry into the local exchange market, only to have that structure undermined, and possibly supplanted in its entirety, by services priced by, and largely within the control of, incumbent LECs.”⁵⁷

The Commission’s other basis for finding no impairment and granting forbearance—that a reasonably efficient competitor within a half mile of alternative fiber could build its own network—likewise lacks a reasoned basis. Courts demand a nuanced approach to the Commission’s impairment analysis. The Commission’s analysis, however, goes no further than to show the existence of nearby fiber, *i.e.*, some entity, somehow, was able to deploy fiber for some reason. The Order fails to address how the existence of fiber built by the city, through

⁵⁴ Order, 35 FCC Rcd at 12488, para. 121, n. 523. *See also, id.* at para. 122.

⁵⁵ *Id.* at 12489-90, paras. 125-126.

⁵⁶ *Id.* at 12459, para. 64.

⁵⁷ Sonic Reply at 26, n. 85; *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2535, para. 48 (2005), *aff’d Covad Commc’ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006) (“TRRO”).

Federal funding,⁵⁸ to serve a large enterprise customer⁵⁹ or for wireless backhaul⁶⁰ demonstrates that a carrier can economically justify building a \$580 million transport network to serve even a flourishing residential customer base.⁶¹ Indeed, the Commission recognizes the need for a sufficient customer base and revenue stream to build a fiber transport network.⁶² Yet, the standard the Commission adopted – existing fiber within a half a mile – has no relationship to a service provider’s ability to amass a sufficient customer base or revenue to self-deploy fiber transport.

In short, the analysis the statute requires is whether lack of access to unbundled dark fiber creates an *economic* barrier to a competitor’s ability to “provide the services it seeks to offer.”⁶³ Yet the Commission provides no analysis at all, let alone on a market basis, of whether deployment costs or rates of commercial transport create impairment to the service the competitor is seeking to provide. In particular, the Order contains no analysis of potential revenues to deploy, or purchase commercial, transport to serve residential customers.⁶⁴ Because this conclusion lacked a reasoned basis, the Commission should reverse its finding.

⁵⁸ See Kohly Decl., para. 68 (Socket’s investigation into the nearby fiber in its region found that it was likely part of construction done as a result of loans and grants totaling \$7.2 billion through the Broadband Technology Opportunity Program (BTOP) and Broadband Initiative Program (BIP) that were part of the American Recovery and Reinvestment Act—something a reasonably efficient carrier could not replicate with private funding, particularly small fiber builders).

⁵⁹ See Windstream Comments at 4 (Competitive providers tend to deploy a transport link only where there is a high likelihood of securing high-revenue anchor customers, such as data centers and larger enterprise users).

⁶⁰ Sonic Reply at 24.

⁶¹ See Jasper Decl., para. 12.

⁶² Order, 35 FCC Rcd at 12487, para. 121 (“unbundled access to interoffice dark fiber and other UNEs to obtain a sufficient customer base within an incumbent LEC’s local market, thus generating enough revenue to eventually build a competing fiber network.”).

⁶³ 47 U.S.C. 251(d)(2)(B).

⁶⁴ The Commission’s theory that nearby fiber means sufficient demand defies logic. One could assume nearby fiber would detract demand from a third network. Moreover, demand for wireless backhaul provides no indication of demand for residential fixed broadband services. Level of demand for Dark Fiber UNE is not relevant to the impairment analysis.

III. THE ORDER KNOWINGLY OVERSTATES BROADBAND COMPETITION AND FAILS TO ASSESS COMPETITION IN CERTAIN CRITICAL BROADBAND MARKETS

The Commission’s assessment of no impairment, and a grant of forbearance, for unbundled DS0 Loops in urbanized areas and unbundled dark fiber lacked a reasoned basis. The conclusions reached were based, primarily for DS0 Loops and in part for dark fiber,⁶⁵ on a market analysis with material errors and omissions, resulting in an overstatement of competition. Any one of the following reasons, alone, invalidates the outcome: 1) reliance on flawed data uncondusive to good decision-making; 2) omission from its analysis of important segments of the broadband marketplace – higher speed broadband (greater than 25/3 Mbps) and symmetrical services; and 3) use of a faulty standard for robust competition. The Commission also made a material omission in not submitting the FCC staff analysis of the deployment data in the record for parties to critique. The Commission’s use of this flawed data as the primary basis for finding a lack of impairment and grant of forbearance for DS0 Loops in urbanized areas compels those decisions to be reversed. The use of this data, even in part, to support the Commission’s finding of a lack of impairment and grant of forbearance for UNE dark fiber necessitates the reversal of those decisions.⁶⁶

A. Bad Data Means Bad Decisions

The Commission, in assessing the state of competition, used flawed data, uncondusive to sound decision-making.⁶⁷ It is arbitrary and capricious for the Commission to rely on flawed data that resulted from data collection methodologies the Commission acknowledges are in need

⁶⁵ Order, 35 FCC Rcd at 12489, para. 123 (“ . . .when coupled with the Commission’s findings regarding the competitiveness of the market without reliance on UNEs, persuades us that unbundling should be eliminated . . .”).

⁶⁶ See *supra* pp. 1-2.

⁶⁷ Order, 35 FCC Rcd at 12459, para. 63, n. 271 (“Staff analysis of FCC Form 477 deployment data as of December 31, 2019.”).

of material change to preserve the integrity of its policymaking process.⁶⁸ All five Commissioners agreed, when asked at a Congressional Oversight Hearing, that the Commission’s existing broadband deployment data is “significantly lacking and deeply flawed” and that when the FCC has bad data, it “can’t make good decisions.”⁶⁹ It was this “deeply flawed data” that the Commission used to upend core market-opening provisions of the landmark, bipartisan Telecommunications Act of 1996 (“the Act”).⁷⁰

The record shows industry-wide repudiation of the data;⁷¹ the Commission has recognized the need of substantial change in its data collection process to preserve the integrity of its policymaking process;⁷² and, in the midst of this proceeding, a bipartisan Congress enacted legislation – the Broadband Data Act – to change the data collection methodology due to the lack of credibility of the existing Form 477 data relied on in this proceeding.⁷³ Both Congress (via the Broadband Data Act) and the FCC Chairman at the time (in the data collection proceeding)

⁶⁸ See *Uniti Fiber* at 13-14; *Sonic Comments* at 14-15; *Sonic Reply* at 19-20. See also, *Establishing the Digital Opportunity Data Collection; Modernizing the FCC Form 477 Data Program*, Report and Order and Second Further Notice of Proposed Rulemaking, 34 FCC Rcd 7505, 7507, para. 5 (2019) (“*Data Collection Order and FNPRM*”) (Stating that “it has become increasingly clear that the fixed and mobile broadband deployment data collected on the Form 477 are not sufficient to ... supporting the imperative of our broadband-deployment policy goals.”).

⁶⁹ See *Sonic Comments* at 14, n. 50 (“All Commissioners agreed by raising their hands that the data is flawed and flawed data prevents good decision-making.”); *INCOMPAS Comments* at 8, *citing* *Accountability and Oversight of the FCC: Hearing Before the Subcomm. on Comm’cns & Tech. of the H. Comm. on Energy & Commerce, 116th Cong. (Dec. 5, 2019) (“Dec. 2019 House Hearing”)* (noting that before the House Subcommittee on Communications and Technology “[a]ll five Commissioners agreed that the existing broadband deployment data are “significantly lacking and deeply flawed” and when the FCC has bad data, “[it] can’t make good decisions.”).

⁷⁰ The Commission’s conclusion on cable competition is based on FCC staff analysis of flawed FCC Form 477 deployment data as of December 31, 2019. See *Order*, 35 FCC Rcd at 12457, para. 60, n. 256. See also *id.* at 12459, para. 63, n. 271.

⁷¹ See *Sonic Comments* at 14, n. 50 (citing to statements or findings by industry participants repudiating the data); *Comments of INCOMPAS and Northwest Telecommunications Association* at 6-9.

⁷² *Data Collection Order and FNPRM*, 34 FCC Rcd at 3507, para. 5.

⁷³ *Broadband Deployment Accuracy and Technological Availability Act, PUBLIC LAW 116-130, 47 USC 641, Mar. 23, 2020 (“Broadband Data Collection Act”)*.

rejected the relevancy of data that counts “everyone in a census block as served if just one person is served,”⁷⁴ as it undeniably leads to an overstatement of competition. Yet that is exactly what the Commission knowingly did in this Order. Moreover, the Order did not reconcile the inconsistency of the Commission’s use of the Form 477 data to make a finding of “robust intermodal competition” with its disclaimer regarding the data that “a list of providers deployed in a census block does not necessarily reflect the number of choices available to any particular household or business location in that block, and the number of such providers in the census block *does not purport to measure competition.*”⁷⁵

The Commission cannot justify its use of this data by stating “such data is the best, most granular data currently available.”⁷⁶ The Commission is not just choosing “which evidence to believe among conflicting evidence” in this proceeding.⁷⁷ It is relying exclusively on data the Commission found to be untrustworthy—the antithesis of good decision-making. Moreover, since the Commission had begun a process to cure its data collection process and Congress had passed legislation mandating that broadband data collection include the collection of broadband availability data on a location basis⁷⁸ and at various speeds,⁷⁹ the Commission knew more accurate data would be generated and available for analysis. The Commission was under no imminent time pressure to conclude the proceeding. It could have waited for credible data to perform its analysis.

⁷⁴ Broadband Data Act, Title VIII Sec. 802(b)(1)(A)(i); Statement of Chairman Ajit Pai, Data Collection Order and FNPRM (The Commission “will no longer count everyone in a census block as served if just one person is served.”).

⁷⁵ See Sonic Comments at 15, *citing* Explanation of Broadband Deployment Data, Block-Level Deployment and Competition, FCC, <https://www.fcc.gov/general/explanation-broadbanddeployment-data> (last visited Feb. 1, 2020) (emphasis added).

⁷⁶ Order, 35 FCC Rcd at 12515, para. 178.

⁷⁷ See *Id.*, n. 763, *citing* *Citizens Telecom. v. FCC*, 901 F.3d at 1011.

⁷⁸ Title VIII Sec. 802(b)(1)(A)(i).

⁷⁹ Title VIII Sec. 802(b)(2)(A)(ii).

The concerns with the data are not just “limitations on precision” that are negated by allegedly small census blocks in urbanized areas, as suggested in the Commission’s Order.⁸⁰ Concerns raised by commenters, the Commission, and Members of Congress had to do with the methodology of collecting the data and the accuracy of the reporting. In addition to the fatal flaw of counting an entire census block served based on one location capable of being served, the following are examples of unaddressed concerns related to Form 477 data collection methodologies that lead to an overstatement of competition: i) broadband providers are asked to identify locations where (by their own judgments) they could provide broadband—not just those actually served;⁸¹ ii) broadband providers supply advertised speeds, not the speeds they actually deliver;⁸² and iii) the data collection lacks an adequate method to discover and address, and even included, inaccurate reporting.⁸³ As Commissioner Starks states regarding one discovered inaccuracy: “The fact that such a huge error was not flagged but instead was baked into the FCC’s data underlying this report – the same data underlying much of the FCC’s frequently criticized broadband mapping efforts – demonstrates the fundamental problems with the FCC’s data analysis capabilities.”⁸⁴

⁸⁰ The Order alleges urbanized census blocks are small, but is inconsistent in noting extent. Order, 35 FCC Rcd at 12457, para. 60 (“urbanized area census blocks are *relatively* small.”) (emphasis added); para. 71 (“The census blocks in those areas are generally *extremely* small.”) (emphasis added).

⁸¹ See TPx at 12 (Form 477 data identifies where a provider “could” provide service within a designated timeframe, not where the provider is serving customers.); INCOMPAS at 7 (Stating data collection is misleading because providers “indicate where they ‘could’ provide service in their Form 477 submissions—not where they actually provide service.”).

⁸² See Sonic Comments at 21, n. 67 (noting that the National Association of Counties discovered major discrepancies between the maximum advertised speeds required by the FCC’s Form 477 process and the actual levels of Internet service experienced by users, including in counties with populations of over 500 thousand).

⁸³ Sonic Comments at 14 (noting a primary concern with existing data is inaccurate reporting by the provider).

⁸⁴ Statement of Commissioner Geoffrey Starks, *Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 2019 Broadband Deployment Report, GN Docket No. 18-238,

The size of the census block provides no cure for these deficiencies. In addition, the claims that the census blocks are small are based on decade old data⁸⁵ and the Order ignores evidence that the size (in terms of actual distance) is not within a cable company's typical criteria for the extension of its network. Specifically, a group of competitors demonstrated that it is unrealistic to assume a cable provider serving a single location in a census block can or will serve all locations in the block, when in fact cable typically will not deploy more than 200 feet to a new customer location without special construction charges.⁸⁶ The group showed that the mean and median length of cable served urban census blocks is four and more than two times, respectively, the typical 200 foot distance a cable company will build to without special construction charges.⁸⁷ The Order does not even acknowledge, let alone address, the critical issues raised by this filing.

Evidence in the record, and continuing to emerge, confirms that the Order's analysis overstates the presence of competition. USTelecom's expert acknowledged that some urban census blocks counted as "served" only have 50 percent coverage.⁸⁸ Broadband Now says unserved is double that represented by the Form 477 count.⁸⁹ A report by Communications Workers of America and the National Digital Inclusion Alliance found that nearly a third of households within AT&T's service areas receive internet at speeds that do not meet the FCC's

<https://docs.fcc.gov/public/attachments/FCC-19-44A1.pdf>. *See also* Statement of Commissioner Brendan Carr, Data Collection Order and FNPRM ("And our new approach empowers the public and the FCC alike to verify the data carriers submit. We're not just going to take carriers at their word."). *See also* Data Collection Order and FNPRM, 34 FCC Rcd at 3507, para. 3 ("[W]e adopt a process to begin collecting public input, sometimes known as "crowdsourcing," on the accuracy of service providers' broadband deployment data."). *See* Sonic Comments at 15.

⁸⁵ Order, 35 FCC Rcd 12457, para. 60, n. 259 ("Staff calculation based on 2010 census blocks").

⁸⁶ Letter of Uniti Fiber, Sonic, Allstream, U.S. TelePacific Corp. to Marlene H. Dortch, FCC, (filed Jun. 12, 2020) ("Competitors Joint Ex Parte").

⁸⁷ *Id.*

⁸⁸ USTelecom Reply Comments at 25, Appendix A, at 10; *See* Competitors Joint Ex Parte at 1-2.

⁸⁹ *See* Sonic Comments at 21, n. 67.

threshold to be considered broadband.⁹⁰ The Commission ignored all this evidence and, instead, relied on flawed data.

In short, the Commission fails to provide a rational basis to rely on a data collection that Congress has statutorily mandated be changed, the Commission is in the process of changing due to flaws, and all five Commissioners recognized as “deeply flawed” and not conducive to “good decisions” to make such a critical policy decision. The Commission’s expert staff has since warned that use of flawed data prevents good decision-making.⁹¹ Therefore, the Commission’s decision, finding no impairment and in favor of forbearance for access to unbundled DS0 Loops in urbanized areas and unbundled dark fiber, should be reversed.⁹²

B. The Commission’s failure to evaluate competition in the marketplace for higher speed and symmetrical broadband services constitutes a material omission

The Commission’s failure to evaluate impairment and the state of competition beyond 25/3 Mbps best-efforts broadband service constitutes a material omission since it ignores a critical aspect of the issue — increasing demand for higher speeds and symmetrical home broadband service. Evaluating competition at more advanced and symmetrical speeds is not just about the availability of service any individual customer wants. There is industry-wide recognition of consumers’ need for more advanced broadband services that has been accelerated by the shelter-in-place orders. Prior to the pandemic, the Commission found that speeds greater

⁹⁰ See EFF Oct. *Ex Parte* Notice at 2 and n. 10, citing “AT&T’s Digital Redlining Leaving Communities Behind for Profit,” Communications Workers of America and the National Digital Inclusion Alliance, at 1 (Oct. 2020).

⁹¹ Office of General Counsel and Office of Economics and Analytics, *Memorandum on the Legal Framework and Considerations for Regulatory Impact Analysis*, p. 12 (Nov. 19, 2020).

⁹² Sonic Comments at 19-20 (It would be arbitrary and capricious for the Commission to rely in this proceeding on data that is the result of data collection methodologies the Commission recognizes is in need of substantial change in order to preserve the integrity of its policymaking process, since ending incumbent LECs’ unbundling obligations constitutes a critical policy decision.). See also Uniti Fiber Comments at 13-14.

than 25 Mbps are needed to have more than one “high demand application” (streaming HD video, multiparty video conferencing, online gaming, telecommuting) running at the same time.⁹³ Today, home broadband needs to be capable of supporting parent’s work, children’s schooling, family medical needs, shopping and socializing with family and friends all being conducted virtually from home, often simultaneously. This trend is likely to continue, as more and more businesses indicate a future with increased work from home being the norm.⁹⁴ An “increase in remote working could become the most influential legacy of COVID-19”⁹⁵ and telehealth is predicted to have a sevenfold growth by 2025.⁹⁶ Higher performance symmetric broadband service with greater downstream and upstream bandwidth also is needed to support new technologies such as 8K video, virtual reality (“VR”) and augmented reality (“AR”). These technologies hold the promise of “greatly improved” experiences in virtual education, telemedicine, teleworking and entertainment, as well as advanced security for home and small businesses broadband service.⁹⁷

An impairment analysis under Section 251 needs to evaluate the “ability of the telecommunication carrier seeking access to provide the services that it seeks to offer.”⁹⁸ Sonic, along with a multitude of carriers, attested to the impairment competitors would face without

⁹³ Household Broadband Guide, Federal Communications Commission (last updated Feb. 5, 2020), <https://www.fcc.gov/research-reports/guides/household-broadband-guide>.

⁹⁴ The Conference Board, From Immediate Responses to Planning for the Reimagined Workplace, 8 (2020), <https://conference-board.org/pdfdownload.cfm?masterProductID=20874>. See also, Doug Dawson, “How Will Cable Companies Cope with COVID-19?” POTs and PANs, June 26, 2020, <https://potsandpansbyccg.com/2020/06/26/how-will-cable-companies-cope-with-covid-19/> (“Practically every prognosticator in the country is predicting that we’re not going to return to pre-COVID behavior.”).

⁹⁵ *Id.*

⁹⁶ Staff News Writer, Telehealth Up 53%, Growing Faster than any Other Place of Care, American Medical Association (May 29, 2019), <https://www.ama-assn.org/practicemanagement/digital/telehealth-53-growing-faster-any-other-place-care>.

⁹⁷ Comments of the Fiber Broadband Association, GN Docket No. 20-269, at 12, (filed Sept. 18, 2020).

⁹⁸ 47 U.S.C. Section 251(d)(2)(B); See Sonic Comments at 10.

access to unbundled DS0 Loops and unbundled dark fiber in providing broadband services in general, and in deploying a new fiber network in particular.⁹⁹ Significantly, the services these competitors are capable of offering over these unbundled network elements are broadband services with speeds substantially higher than 25/3 Mbps, as well as symmetrical services.¹⁰⁰ Competitors are also providing symmetrical gigabit service over the fiber networks that are made possible through access to these UNEs.¹⁰¹ The Commission performs no analysis on the availability of broadband service at these higher speeds or for symmetrical services.¹⁰² This omission not only fails to adhere to the statutory standard, it conflicts with the Commission's calls for future proof networks and recognition of the importance of fiber buildout, and the increased innovation and security features that come with it.

The Commission's focus on the FCC's bare minimum standard to meet the definition of broadband also conflicts with Congressional calls for a higher speed analysis. The Broadband Data Act requires the collection of broadband availability data at "various speeds."¹⁰³ In doing

⁹⁹ See *infra* at n. 41 and 51.

¹⁰⁰ See Sonic Comments at 29-30 (Sonic uses "innovative technology, namely VDSL2 and pair bonding, to provide to residential customers up to 50/15 Mbps over single UNE DS0 Loop and up to 100/3 Mbps over a bonded pair of UNE DS0 Loops . . . For business customers, Sonic uses e.SHDSL technology over four to twenty-four bonded copper pairs to deliver a symmetric service from 5 Mbps/5 Mbps to 100 Mbps/100 Mbps . . . GWI offers Ethernet Dedicated Internet Access, Ethernet Wire Service, Ethernet Virtual Private Line, Ethernet Virtual LAN and Hosted PBX services over DS0 Loops . . . Socket's residential services include voice and DSL-based internet services with speeds up to 50 Mbps when provided over DS0 Loops . . . Gorge Networks offers broadband speeds to business and residential customers of up to 100 Mbps download and 20 Mbps upload. Using DS0 UNEs, Digital West offers voice and broadband speeds to residential customers of up to 30 Mbps download and 10 Mbps upload, and speeds to enterprise customers of up to 300 Mbps download and 300 Mbps upload depending on loop length.").

¹⁰¹ Sonic Comments at 10, 16.

¹⁰² See, e.g., Letter from Tamar E. Finn and Patricia Cave, Morgan, Lewis & Bockius LLP, Counsel for U.S. TelePacific Corp. et al., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-141, at 2 (filed June 13, 2019) (stating that "the presence of a cable provider in a census block does not mean the cable plant is capable of delivering the symmetric 10-15 Mbps EoC provides.").

¹⁰³ Title VIII Sec. 802(b)(2)(A)(ii).

so, Congress makes clear broadband is not limited to 25/3 asymmetrical services and has changed the way the Commission should be analyzing availability of home broadband service away from the manner it used in this Order.

C. The Commission’s Standard of One Competitor and Predictive Judgement Does Not Equal “Robust” Competition

Even assuming *arguendo* the data were credible, the Commission’s reliance on one competitor to find no impairment and grant forbearance is a material error. A non-impairment standard that could be satisfied by the presence of a single competitor would frustrate Section 251’s purpose to create robust competition in telecommunications. The Commission has recognized that “Congress rejected implicitly the argument that the presence of a single competitor, alone, should be dispositive of whether a competitive LEC would be ‘impaired’ within the meaning of section 251(d)(2).”¹⁰⁴

In contrast, here the Commission finds “cable competition alone is enough to establish the existence of sufficient competition even in the absence of UNEs.”¹⁰⁵ But as the Commission previously found, “in considering the 1996 Act, Congress recognized that cable operators were likely to emerge as facilities-based competitors for local telephone services. Were that level of competition sufficient to fulfill Congress’ goals for telephone services, the 1996 Act only would

¹⁰⁴ *Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3727, para. 55 (1999) (The Commission further states that a “standard that would be satisfied by the existence of a single competitive LEC using a non-incumbent LEC element to serve a specific market, without reference to whether competitive LECs are ‘impaired’ under section 251(d)(2), would be inconsistent with the Act’s goal of creating robust competition in telecommunications.”). See also, *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, 25 FCC Rcd 8622, 8638, para. 32 (2010) (“Qwest Phoenix Forbearance Order”) (“[F]orbearing from unbundling obligations on the basis of duopoly, without additional evidence of robust competition, appears inconsistent with Congress’ imposition of unbundling obligations as a tool to open local telephone markets to competition in the 1996 Act.”).

¹⁰⁵ Order, 35 FCC Rcd at 12457, para. 60.

have needed to require interconnection.”¹⁰⁶ Unsubstantiated assertions of the presence of additional competition does not rectify this deficiency.

CONCLUSION

For the foregoing reasons, the Commission should reconsider and reverse its finding of no impairment, and grant of forbearance, for the unbundled DS0 Loop in urbanized areas and unbundled dark fiber within a half of mile of fiber.

Respectfully submitted,

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¹⁰⁶ Qwest Phoenix Forbearance Order, 25 FCC Rcd at 8638, para. 32.