CENTER FOR DEMOCRACY & TECHNOLOGY

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Federal Communications Commission
445 12th St. S.W.
Washington, DC 20554

RE: WC Docket No. 19-308

At the Center for Democracy & Technology, we believe in the power of the internet. Whether it's facilitating entrepreneurial endeavors, providing access to new markets and opportunities, or creating a platform for free speech, the internet empowers, emboldens and equalizes people around the world.

Many of us take advantage of the remarkable opportunities that the internet affords us. But only those who can afford it enjoy those opportunities. As many have noted, there is a general lack of significant competition for wireline internet access in the United States. That lack of competition leads to high prices, pricing opacity, and lower quality than would likely exist in a more competitive environment.

It is against that backdrop that we write to raise our concerns that taking regulatory action to further diminish competition in internet access is contrary to the public interest. We also note that there are regulatory asymmetries in the current unbundled network elements access requirements, and those differences may further distort this concentrated market by treating traditional phone companies differently from cable companies. Finally, and perhaps most significantly, the FCC has an opportunity to lead a national conversation about access to valuable, hard-to-replicate assets in telecommunications and how competition policy can address those thorny questions. We encourage the FCC to take on that challenge.

1. Taking regulatory action that may reduce competition among internet access providers is likely to harm American consumers and small businesses.

Economists (and FCC commissioners) agree: consumers benefit from robust competition. Those benefits come in the form of lower prices, higher quality, and faster innovation. And when it comes to internet access, Americans remain disappointed by their choices. As the American Consumer Satisfaction Index (ACSI) found, Americans ranked internet service providers last among telecom services providers. As ACSI found, "service is largely considered to be slow and unreliable, and competition is limited in many areas. Most ISPs are still falling short of providing good service at an

affordable price."[1] A recent Pew research study showed that half of Americans cite cost as a reason not to have high-speed broadband at home, and 22 percent said that the service is not available or the speed is not acceptable.[2]

As a nation, we have made strides towards broadband availability since the 1996 Telecom Act, and the FCC deserves significant credit for those advances. But there is more work to do to make sure that all Americans have access to the internet at a reasonable cost. The current rules, which require incumbent telecom providers to offer access to unbundled network elements, power competitive offerings in some parts of the country and give some Americans more choices for broadband service. That increased choice benefits consumers in the form of better quality-adjusted prices for broadband access.

For that reason, we believe that regulatory roll-backs of unbundled network element access requirements ("UNE rules") is premature. It is certainly true that the telecom landscape has changed terrifically since those rules were initially implemented. And as consumer demand for higher speed internet increases, the market popularity of UNE-based options may well decline based on natural market forces. But lack of access and lack of competition still persist in this important industry. Many consumers and small businesses can only get broadband service from one or two local providers. For those Americans who choose to get internet access through competitive local exchange carriers, regulatory changes that would make it harder for their providers to offer service would be harmful. It may also leave them with only an incumbent monopolist as a provider of wireline internet access.[3]

In addition, the existence of the current UNE rules serves, itself, as a competitive check on incumbent providers. Those incumbent telecom companies know that a failure to provide good service at reasonable prices could attract entry from competitors that could avail themselves of the unbundled network elements rules to provide service. That competitive pressure likely benefits even consumers of those incumbent providers.

Thus, absent a compelling showing that rolling back these UNE rules will spark new infrastructure investment and competition, we oppose the notice of proposed rulemaking at a time when internet access is increasingly important and the number of competitors in any given local market is distressingly low.

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[1] https://www.theacsi.org/news-and-resources/customer-satisfaction-reports/reports-2019/acsi-telecommunications-report-2018-2019/acsi-telecommunications-report-2018-2019-download

[2] https://www.pewresearch.org/internet/2019/06/13/mobile-technology-and-home-broadband-2019/

[3] As Chairman Pai has noted, accurate data on the number of choices Americans have for internet access is not readily available, given the data limitations of the FCC's broadband maps based on self-reported industry data. *See*, e.g., https://docs.fcc.gov/public/attachments/FCC-19-79A1.pdf

2. The current regulatory landscape treats traditional telecom providers differently from cable companies in ways that make little sense.

Taking a step back, we also note that the rules for access to unbundled network elements apply only to incumbent local exchange carriers ("phone companies"), not to cable companies. This is true even though the two types of companies compete to offer internet access to consumers and small businesses. Indeed, their pricing structures often match almost perfectly: for example, both Verizon (a phone company) and Comcast (a cable company) offer internet access for $39.99 per month (plus hefty additional fees).[4]

There is a potentially market distortionary effect when rules mandating access for rivals and potential rivals apply to one competitor but not to another competitor.[5] By putting those requirements on one type of competitor but not the other, the UNE rules may distort competitive dynamics.

We recognize that the FCC itself is limited in its ability to correct this problem. The distortion would be best addressed by legislation that would recognize the competitive role of cable companies and place the same requirements on both phone and cable companies. Despite the uneven application of the UNE rules to similarly situated competitors (phone and cable companies), our concerns about the limited number of competitors consumers have to choose from in internet access service still leads us to oppose the repeal of rules that help bring new competitors to the marketplace.

3. As markets become increasingly concentrated, we need to explore broader competition policy questions about when and how dominant incumbents should share assets with rivals.

Huge sections of the American economy, including throughout much of the telecom sector, are highly concentrated. We are concerned that a generalized lack of competition is harming consumers by keeping prices too high and suppressing both quality and innovation. Firms with market power and control of key infrastructure assets raise particular competitive concerns if they have the ability and opportunity to block competitors from offering services to consumers.

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[4] We note that many phone and cable companies tack on additional fees that can be hard for consumers to find. Router/modem fees and set-up/installation fees are common. It is also common for internet service providers to increase prices after a 12-month introductory rate and to require consumers to use auto-pay services that may make it less likely that consumers look carefully at their bills on a regular basis. Pricing opacity itself is an indicator of a lack of competition in the market for internet access services.

[5] The economic incentives and theories are complex. In addition to the distortion that can occur when regulatory asymmetries persist, economic theory suggests that requirements to share access with rivals has the potential to depress incentives to invest in infrastructure. In addition, the tendency toward natural monopoly for many networks can make investment in secondary networks less appealing. These are all worthy areas for additional factual analysis.

These are not new antitrust issues, and courts have grappled with them for decades. Jurisprudence on when dominant firms have a legal duty to grant access to rivals continues to evolve, with recent cases in the Third Circuit about branded pharmaceutical products[6] and in the FTC's case against Qualcomm[7] in the Northern District of California.

The issue of access to unbundled network elements raises similar competition policy questions. The statutory roots of this particular rule-making proceeding are, of course, distinct from those in other economic sectors. But from a policy perspective, we encourage the FCC to help advance discussion about when dominant firms should be required to grant access to rivals. These policy issues are complex, and the solutions are not simple. For example, requiring incumbents to grant access to rivals can increase the competitive options for consumers. But it can also reduce incentives to invest in must-have infrastructure. There are also important questions about what the price for access should be, and how that price should be set. Government entities often face significant challenges in determining prices, but allowing incumbents to set prices unilaterally can defeat the goals of mandated access. It would be valuable to explore other pricing options, such as various types of auctions. The FCC has particular expertise that could help inform national discussion on these issues.

In short, with the continuing trend toward consolidation in the telecommunications sector, and high levels of industry concentration throughout the American economy, the FCC can play a central role in answering those challenging questions about when firms with market power should be required to grant access to key infrastructure to rivals, and on what terms. We urge you to consider taking on that challenge directly.

Sincerely,

Avery Gardiner
Senior Fellow for Competition, Data, and Power

[6] *See*, *e.g.*, Complaint, *Lannett Co. v. Celgene Corp.*, No. 2:08-cv-03920 (E.D. Pa. Aug. 15, 2008).
[7] Decision available at https://www.ftc.gov/system/files/documents/cases/qualcomm_findings_of_fact_and_conclusions_of_law.pdf