

ALERT

FCC Initiates Rulemaking to Update Unbundling and Resale Requirements

December 2, 2019

On November 25, 2019, the Federal Communications Commission released a Notice of Proposed Rulemaking (NPRM) that seeks to update the unbundling and resale obligations of incumbent local exchange carriers. The FCC proposes to remove the following unbundling requirements:

1. DS1 and DS3 loops in counties and study areas previously deemed competitive by the FCC, with an exemption for DS1 loops used to provide residential broadband service and telecommunications service in rural areas;
2. DS0 loops in urban census blocks;
3. Narrowband voice-grade loops;
4. Subloops in the particular instances or geographic areas where the Commission proposes to eliminate the unbundling of the underlying loop; and
5. Dark fiber transport in wire centers within a half-mile of alternative fiber.

The NPRM also proposes to forbear from unbundling requirements for network interface devices (NID) and operations support systems (OSS) and to remove avoided cost resale requirements in non-price cap incumbent service areas.

FCC Chairman Ajit Pai and Commissioners Michael O’Rielly, and Brendan Carr voted in favor of the NPRM, while Commissioners Jessica Rosenworcel and Geoffrey Starks dissented. Comments and reply comments are due 30 and 60 days, respectively, from the date of publication in the Federal Register.

Authors

Bennett L. Ross
Partner
202.719.7524
bross@wiley.law
Kevin G. Rupy
Partner
202.719.4510
krupy@wiley.law

Practice Areas

Telecom, Media & Technology

The following is a summary of the NPRM:

Modernizing Unbundling and Resale Requirements in an Era of Next-Generation Networks and Services

WC Docket No. 19-308

I. Introduction

In 2019, the Federal Communications Commission granted incumbent local exchange carriers (LECs) relief from certain unbundling and resale requirements that the FCC found no longer served the public interest and were unnecessary to protect consumers.^[1] On November 25, 2019, the FCC released a Notice of Proposed Rulemaking (NPRM) seeking comment on proposals to update incumbent LECs' remaining unbundling and resale obligations. These proposals are intended to remove unnecessary regulatory burdens that can inhibit the deployment of, and transition to, next-generation networks and services, while maintaining unbundling requirements that may have continued benefits in promoting broadband access to consumers where facilities-based competition is less likely to occur. *NPRM*, ¶ 3.

II. Modernizing Unbundling Obligations

A. DS1 and DS3 Loops

The Commission's current rules require incumbent LECs to unbundle DS1 and DS3 loops in certain wire center based upon the number of business lines served by and number of fiber-based collocators in the wire center, subject to a cap on the availability of unbundled DS1 and DS3 loops in a single building. The NPRM proposes to eliminate unbundling obligations for DS1 and DS3 loops in: (1) counties served by price cap incumbent LECs that were found to be competitive in the *BDS Order*,^[2] and (2) the study areas deemed competitive as a result of the *Rate-of-Return BDS Order* allowing certain rate-of-return incumbent LECs to elect incentive regulation for their business data services, subject to a narrow residential carve-out.^[3] *NPRM*, ¶¶ 26-27.

According to the Commission, the findings in the *BDS Order* eliminating ex ante pricing regulation of DS1 and DS3 business data services are applicable in the unbundling context based on the FCC's understanding that "no material operational or performance distinctions" exist between unbundled DS1 and DS3 loops and DS1 and DS3 business data services. The NPRM seeks comment on this issue. It also seeks comment on whether DS1 and DS3 loops constitute reasonably efficient technology such that a reasonably efficient competitor would rely on them to compete for business data service customers. *NPRM*, ¶ 29.

In light of evidence in the record that some competitive LECs use unbundled DS1 loops to provide broadband to residential customers for whom no other broadband service is available and the distance is too great to provision such service using DS0s, the FCC proposes to exempt DS1 loops from any unbundling relief in rural census blocks. The Commission seeks comment on the administrability of this proposed exemption, as well as whether a similar exemption is necessary for UNE DS3 Loops. *NPRM*, ¶¶ 32-34.

B. DS0 Loops

The Commission's current rules require incumbent LECs to make available unbundled DS0 loops nationwide. The NPRM proposes to eliminate DS0 loop unbundling obligations in urban census blocks. However, the NPRM proposes to still require unbundling of DS0 loops in rural areas, where there may be greater barriers to facilities-based deployment. *NPRM*, ¶ 38.

The NPRM also seeks comment on the rationale for the Commission's proposals, namely that: (1) a reasonably efficient competitor is no longer impaired without access to unbundled DS0 loops in urban census blocks because of ubiquitous cable deployment in urban areas, as well as increasing wireless broadband deployment and entry in urban areas; and (2) eliminating DS0 loop unbundling in urban

areas would facilitate broadband deployment. It also seeks comment on the administrability of basing a finding of non-impairment at the urban census block level and on the making of no distinction between residential and enterprise services in extending DS0 loop unbundling. *NPRM*, ¶¶ 40-43.

The NPRM notes objections by competitive LECs to the elimination of DS0 unbundling obligations. The NPRM seeks comment on these objections. *NPRM*, ¶¶ 44-48.

As an alternative to finding no impairment for DS0 loops in urban census blocks, the Commission seeks comment on whether it should forbear from DS0 loop unbundling requirements in urban census blocks with a minimum of 25/3 Mbps fixed service provided by at least two facilities-based, terrestrial providers without the use of unbundled network elements. The NPRM seeks comment on this alternative. *NPRM*, ¶¶ 49-51.

C. Legacy Narrowband Voice-Grade Loops

Currently, incumbent LECs must provide three specific types of narrowband voice-grade loops, which are used to provide voice but not broadband service: unbundled Analog Loops, 64 kbps voice-grade channels over last-mile fiber loops when an incumbent LEC retires copper, and the TDM capabilities of hybrid loops. In light of the migration by consumers and businesses away from legacy voice services in favor of IP- and wireless-based voice services provided by multiple intermodal providers, the Commission proposes to remove unbundling obligations for narrowband voice-grade loops nationwide. *NPRM*, ¶ 53.

The NPRM seeks comment on the specific proposals for each of the three types of narrowband voice-grade copper loops. The Commission proposes to extend the forbearance for UNE Analog Loops to all remaining service areas where the unbundling obligation still applies. It also proposes to eliminate the requirement that competitive LECs continue to receive unbundled access to the previously grandfathered 64 kbps voice channels over fiber loops. Furthermore, the Commission proposes to grant nationwide forbearance from UNE Hybrid Loop requirements. The NPRM seeks comment on these proposals. *NPRM*, ¶¶ 55-64.

D. Subloops

The FCC's rules currently impose unbundling obligations for two types of subloops—copper and multiunit premises subloops. Incumbent LECs must provide competitive LECs unbundled access to copper unbundled subloops for the provision of narrowband and broadband services. Incumbent LECs also must provide unbundled access to multiunit premises subloops necessary to access wiring at or near a multiunit customer premises. *NPRM*, ¶¶ 65-66.

The Commission proposes to forbear or find no impairment with respect to subloop unbundling in the particular instances or geographic areas where the Commission proposes to eliminate the underlying loop to the customer's premises. The Commission reasons that the ability of competitive LECs to serve their current customer base with their own facilities-based network would be unaffected if copper subloop unbundling obligations are eliminated. The *NPRM* seeks comment on whether multiunit premises subloops should be differently from the copper unbundled subloops given that unbundling requirements for multiunit premises unbundled subloops were intended to address issues related to facilities-based competitors accessing the customer's location where access to the premises was controlled or managed by someone other than the customer. *NPRM*, ¶¶ 67-69.

E. Dark Fiber Transport

Under the Commission's unbundling rules, an incumbent LEC is required to unbundle its interoffice dark fiber and make it available to a requesting carrier. Where so obligated, the incumbent LEC must lease its unlit fiber, subject to availability, enabling the competitive LEC to use such dark fiber as if it were part of its own fiber network. Consistent with the DS1 and DS3 transport unbundling relief granted previously, the Commission proposes to eliminate dark fiber transport unbundling obligations where competitive fiber exists within one-half mile of a wire center. *NPRM*, ¶ 73.

The Commission's proposal is based on the conclusion that a reasonably efficient competitor within a half mile of alternative fiber would not be impaired without access to unbundled dark fiber transport because it should be able to obtain such transport, if available, on a commercial basis at competitive rates, or by building its own transport network. While the FCC has previously differentiated lit from dark fiber, the *NPRM* concludes that such distinctions have no bearing on the fact that the existence of a nearby fiber network suggests the ability of a reasonably efficient competitor to self-provision its own fiber network in competition with the incumbent LEC. *NPRM*, ¶¶ 73-74.

The FCC also seeks comment on whether it should supplement the list of incumbent LEC wire centers for which it proposes to find non-impairment for unbundled dark fiber transport by adding any Tier 3 wire centers that are within a half mile—or potentially some longer distance—of Tier 1 or Tier 2 wire centers. It asks whether it can infer no impairment as to these wire centers, due to the proximity of either fiber-based competitors or business line density at the nearby Tier 1 and Tier 2 wire centers. *NPRM*, ¶ 74.

F. Network Interface Devices and Operations Support Systems

In addition to its obligation to provide the NID functionality as part of an unbundled loop or subloop, an incumbent LEC also must offer nondiscriminatory access to the NID on an unbundled, stand-alone basis to requesting carriers for the purpose of connecting the competitor's own loop facilities. The Commission proposes to forbear from NID unbundling obligations on the basis that stand-alone NIDs are not necessary for competitive LECs to access potential customers. *NPRM*, ¶ 81.

Under the FCC's rules, incumbent LECs must offer nondiscriminatory access to their OSS for qualifying services on an unbundled basis. The Commission proposes to forbear from the OSS unbundling obligation on the basis that it is not necessary to ensure either just or reasonable rates or to protect consumers. The NPRM seeks comment on whether access to such unbundled network elements remains necessary to facilitate deployment of competitive carrier networks, and whether alternative OSS providers on which competitive LECs could rely are present in the marketplace. *NPRM*, ¶¶ 84-85.

G. Other Considerations

For each network element or requirement discussed in the NPRM, the Commission seeks comment on whether: (1) requesting carriers are no longer impaired without access to the element or requirement under section 251 (d)(2), or (2) the forbearance criteria are met under section 10. The NPRM seeks comment on whether the Commission should consider additional considerations beyond impairment or forbearance. Furthermore, the Commission seeks comment on alternative approaches for relief with respect to each network element or requirement, and more generally on the impact of the Commission's policy changes, including the recently concluded USTelecom forbearance proceeding, on the voice and broadband marketplace. *NPRM*, ¶¶ 86-89.

III. Avoided-Cost Resale

Incumbent LECs are required to make available at regulated wholesale rates telecommunications services that they make available to their own non-carrier retail customers. In the *UNE Analog Loop and Avoided-Cost Resale Forbearance Order*, the FCC granted price cap incumbent LECs relief from the avoided-cost resale requirement. The Commission proposes to extend to non-price cap incumbent LEC service areas the forbearance previously granted with respect to avoided-cost resale in price cap incumbent LEC service areas. Among other things, the NPRM seeks comment on any reasons why non-price-cap areas may differ from price cap areas with respect to the avoided-cost resale requirement that is only used to provision voice-grade service, and why continued application of the requirement are or are not necessary. It also seeks comment on the respective costs and benefits of the proposal versus retaining the status quo, as well as whether special considerations apply to small businesses. *NPRM*, ¶¶ 92-93.

IV. Transition Plan

The Commission proposes a three-year transition period for all unbundling and avoided-cost resale relief in order to give existing customers served via these unbundling and resale obligations time to transition to alternative arrangements without service disruption. The NPRM seeks comment on what conditions, if any, should apply to the transition period, and whether any special circumstances exist that would require longer or shorter transition periods for particular unbundled network elements. The NPRM also seeks comment on a

transition period that is shorter than three years for existing customers. *NPRM*, ¶¶ 97-101.

For further information on these issues, please contact any of the following authors listed on this alert.

Kamila M. Benzina, a Law Clerk in Wiley Rein's Telecom, Media & Technology practice, contributed to this alert.

[1] See *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks*, Report and Order on Remand and Memorandum Opinion and Order, 34 FCC Rcd 5767 (2019) ("*BDS Remand Order/ UNE Transport Forbearance Order*"); *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks*, Memorandum Opinion and Order, 34 FCC Rcd 6503 (2019) ("*UNE Analog Loop and Avoided-Cost Resale Forbearance Order*").

[2] *Business Data Services in an Internet Protocol Environment et al.*, Report and Order, 32 FCC Rcd 3459 ("*BDS Order*").

[3] *Regulation of Business Data Services for Rate-of-Return Local Exchange Carriers, Business Data Services in an Internet Protocol Environment, Special Access for Price Cap Local Exchange Carriers*, Report and Order, Second Further Notice of Proposed Rulemaking, and Further Notice of Proposed Rulemaking, 33 FCC Rcd 10403 (2018) ("*Rate-of-Return BDS Order*").