

March 13, 2019

**Ex Parte via ECFS**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

*Re: Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. §160(c) to Accelerate Investment in Broadband and Next-Generation Networks (WC Docket No. 18-141)*

Dear Ms. Dortch,

On behalf of INCOMPAS, we write in response to recent *ex parte* letters from USTelecom and AT&T in the above-referenced proceeding. These two *ex parte* notices<sup>1</sup> further demonstrate that USTelecom's original Petition fails to meet the basic procedural requirement that forbearance petitions must be complete as-filed. Accordingly, the Commission should grant the Motion for Summary Denial filed by INCOMPAS and others.<sup>2</sup>

As INCOMPAS and others have explained, the Petition fails to meet the Commission's forbearance procedural requirement to "state a complete *prima facie* case in the petition,"<sup>3</sup> which includes all "facts, information, data, and arguments on which [it] intends to rely to make [its] *prima facie* case."<sup>4</sup> The Petition did not consider even basic product and geographic market definitions, much less conduct the analysis required under the Commission's precedent to establish that competition is sufficient to satisfy the statutory forbearance requirements.<sup>5</sup> Instead, the Petition relied on generalized descriptions of the market for retail voice services on a nationwide basis to support forbearance from unbundling requirements for a wide range of

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<sup>1</sup> See Letter from Patrick Halley, Senior Vice President, Advocacy and Regulatory Affairs, USTelecom, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-141 (filed Feb. 27, 2019) ("2/27/19 Joint Ex Parte"); Letter from James P. Young, Counsel to AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-141 (filed Feb. 21, 2019) ("2/21/19 AT&T Ex Parte").

<sup>2</sup> Motion for Summary Denial of INCOMPAS et al., WC Docket No. 18-141 (filed Aug. 6, 2018) ("Motion for Summary Denial"); Reply Comments of INCOMPAS et al., WC Docket No. 18-141 (filed Sept. 5, 2018); *see also* Motion for Partial Summary Denial and Comments of Cox Communications, Inc., WC Docket No. 18-141 (filed Aug. 6, 2018).

<sup>3</sup> *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, Report and Order, 24 FCC Rcd. 9543 ¶ 21 (2009) ("*Forbearance Procedures Order*").

<sup>4</sup> *Id.* ¶ 17.

<sup>5</sup> See Motion for Summary Denial at 12-24.

elements. The Commission has held that “generalized claims about competition,” like those asserted in the Petition, are not a substitute for defining distinct product and geographic markets and analyzing the impact of forbearance on those markets.<sup>6</sup>

The recent filings underscore the relevance of these distinctions to understanding competitive realities and place a spotlight on their absence in the Petition. First, AT&T’s February 21, 2019, letter presents an “offer” to continue providing DS0 loops on a commercial basis “according to the same geographic wire center designations that currently exist.”<sup>7</sup> In addition, the letter explained that “the rates for *new* DS0 loops provisioned in rural wire centers will not change during the transition,” but that AT&T intends to increase the prices on new DS0 loops in the urban and suburban wire centers.<sup>8</sup>

AT&T does not give the rationale for this pricing difference in the letter. But this approach will likely have different impacts on consumers in different types of markets. As Sonic explained, raising prices on unbundled loops in urban and suburban markets would make it more difficult, if not impossible, for competitive providers that rely on the loops to serve customers and to act as a bridge to building their fiber-to-the-home plant.<sup>9</sup> The effect in urban and suburban areas would likely raise prices for consumers and stall the deployment of fiber. Likewise, forbearance would have different impacts on communities and consumers across different urban/suburban and rural markets in the United States. The Petition neglects to address these differences, and it seeks nationwide relief based on the assumption that facilities-based competition is as robust and available to businesses in Manhattan as it is to schools, hospitals, and farmers in remote areas like rural Kansas.

Second, the recent filings reveal the factual hollowness in the Petition as-filed. In its February 21, 2019 letter, AT&T provided maps purporting to “depict the number of fixed broadband providers” in the areas served by Sonic.<sup>10</sup> Notwithstanding its significant deficiencies,<sup>11</sup> AT&T’s letter at the very least paid lip service to the type of market-specific analysis that is required under the Commission’s forbearance standard. The Commission’s rules require petitioners to “address an issue at a sufficiently granular level to permit meaningful

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<sup>6</sup> See *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 ¶ 28 (2010) (“*Qwest Phoenix Forbearance Order*”).

<sup>7</sup> 2/21/19 AT&T Ex Parte at 1.

<sup>8</sup> *Id.* at 2.

<sup>9</sup> See *Opposition of Sonic Telecom, LLC to Petition for Forbearance of USTelecom* at 18-22 WC Docket No. 18-141 (filed Aug. 6, 2018).

<sup>10</sup> See 2/21/19 AT&T Ex Parte at 1.

<sup>11</sup> For example, the mere “presence” of a provider as captured in the Commission’s Form 477 database does not mean that the provider offers any given service, much less the range of services offered by competitive providers using unbundled loops. See, e.g., *Opposition of INCOMPAS et al.* at 12-13, WC Docket No. 18-141 (filed Aug. 6, 2018).

analysis of whether or not the statutory criteria are met.”<sup>12</sup> Subjecting this type of data in the public record to scrutiny during the public comment period is central to the Commission’s decisionmaking process under its forbearance procedures. The complete-as-filed rules were expressly designed to elicit this information early in the process to prevent an impoverished record based on which the Commission must make decisions with nationwide implications, and do so against a firm statutory deadline.

Yet more than ten months after the Petition was filed,<sup>13</sup> USTelecom and AT&T are *still* refusing to commit to providing the full factual support for the Petition, even now “discuss[ing] the possibility of submitting additional information in the record.”<sup>14</sup> As the Commission correctly predicted, “less than complete petitions present interested parties with a moving target, which frustrates their efforts to respond fully and early in the process.”<sup>15</sup> Moreover, waiting until more than six months after the comment cycle closed to provide market-level analysis “unreasonably burdens the resources of stakeholders” and “is especially onerous for smaller companies, which may be affected severely by grants of forbearance to large companies.”<sup>16</sup> Many of INCOMPAS’s members, as well as members of the other organizations that moved for summary denial, are smaller providers that do not have the resources to “[k]eep[] up with a petitioner’s unfolding arguments and evidence,” especially this late into the proceeding.<sup>17</sup> Enforcing existing complete-as-filed rules would help discourage this kind of gamesmanship and restore procedural fairness to the Commission’s forbearance proceedings.

USTelecom and AT&T cast this attempt to cure the defects in the Petition as “response[s]” to requests from Commission staff and to “questions raised in the record.”<sup>18</sup> The Commission’s rules rightfully do allow petitioners to submit new data and to respond to arguments raised by staff or in the comments, and note that Commission “may be expected to require *updated* data from a petitioner.”<sup>19</sup> But these submissions must in all cases be “supplementing the petition with additional data,”<sup>20</sup> and not substituting for a petition that was incomplete when filed.

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<sup>12</sup> *Forbearance Procedures Order* ¶ 30.

<sup>13</sup> *See* Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks, WC Docket No. 18-141 (filed May 4, 2018) (“Petition”).

<sup>14</sup> 2/27/19 Joint Ex Parte at 2.

<sup>15</sup> *See Forbearance Procedures Order* ¶ 12.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> 2/27/19 Joint Ex Parte at 1.

<sup>19</sup> *Forbearance Procedures Order* ¶ 15 (emphasis added).

<sup>20</sup> *Id.*

That is plainly not the case here. The “questions raised in the record” to which the new information purportedly responds were examples of the competitive realities in discrete and local, as opposed to general and national, relevant markets.<sup>21</sup> Various stakeholders submitted this information to partially fill the yawning gaps in the Petition’s vague story of competition. The complete-as-filed rule would be toothless if a petitioner could sidestep the consequences of its violation of that rule simply by “responding” to instances in the record pointing out that very same violation. In any case, a vague promise to temporarily not raise prices with respect to one network element in one type of market, made months after the end of the comment period, cannot reasonably be characterized as a response to anything—much less an adequate submission to cure the defects in the as-filed Petition.

The Commission should not endorse USTelecom and AT&T’s attempt to shed or shift its burden of production under the forbearance rules and should accordingly deny the Petition.

On March 12, 2019, Karen Reidy, Vice President, Regulatory Affairs of INCOMPAS spoke by telephone with Terri Natoli of the Wireline Competition Bureau about the above-referenced proceeding and the topics discussed in this letter.

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Please let me know if you have any questions.

Sincerely,



John Nakahata  
Henry Shi  
*Counsel to INCOMPAS*

cc: Terri Natoli

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<sup>21</sup> See Reply Comments of INCOMPAS et al. at 4-5 & nn.9-12, WC Docket No. 18-141 (filed Sept. 5, 2018) (citing comments filed by consumer groups, state utilities regulators, competitive carriers from across the country, and others).