

April 22, 2019

**VIA ECFS**

Ms. 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:

WorldNet Telecommunications, Inc. (“WorldNet”) respectfully submits this letter as a follow-up to its ex parte discussions, on March 12, 2019 and March 13, 2019, with Chairman Pai, Commissioners Stark and O’Rielly, and Commission staff members. Specifically, one of the issues discussed in those meetings was the authority and need for the Commission, as urged by WorldNet and several other commenters in this proceeding, to deny or defer the forbearance requested in this proceeding with regard to Puerto Rico, notwithstanding the Commission’s actions with regard to the nation at large.

**1. The Commission can deny or defer forbearance for Puerto Rico, regardless of the Commission’s actions with regard to other United States jurisdictions.**

The Commission has clear statutory authority to give individualized consideration to Puerto Rico in this proceeding. Indeed, this authority is found on the face of the forbearance standard governing this proceeding. Specifically, 47 U.S.C. § 160(a) provides, in relevant part, that the Commission may “forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets . . .”<sup>1</sup> Looking at this language, the D.C. Circuit has confirmed that “the statute imposes no particular mode of market analysis or level of geographic rigor . . . In context, the language simply contemplates that the FCC might sometimes forbear in a subset of . . . markets . . . allowing the forbearance analysis to vary depending on the circumstances.”<sup>2</sup> In short, the Commission has clear statutory authority to give individualized consideration to Puerto Rico. And, notably, no party in this proceeding has claimed (or credibly could claim) otherwise.

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<sup>1</sup> See 47 U.S.C. § 160(a) (emphasis added).

<sup>2</sup> See Earthlink, Inc. v. Federal Communications Commission, 462 F.3d 1, 8 (D.C. Cir. 2006) (“Earthlink”).

**2. The Commission should deny or defer forbearance for Puerto Rico, regardless of the Commission’s actions with regard to other United States jurisdictions.**

With clear authority to give Puerto Rico individualized consideration and relief in this proceeding, the question turns to whether the Commission should do so. WorldNet submits (including for the reasons put forth in prior written submittals and ex parte meetings) that the only reasoned answer to that question is yes.

Several commenters in this proceeding have urged the Commission to undertake (or to allow for state regulators to undertake) market-by-market and/or product-by-product analyses to determine where and the extent to which forbearance from unbundling and resale obligations satisfies the statutory conditions for forbearance. In WorldNet’s view, it is hard to avoid the need for such an approach in order to conduct a reasoned and statutorily credible forbearance analysis. It is the approach that the Commission itself has found necessary and appropriate in determining forbearance from UNE obligations.<sup>3</sup> Indeed, the Commission has used this approach in cases that were far less complex than the case at hand (i.e., far more limited in geographic scope and/or in the number and variety of services/facilities involved).<sup>4</sup> This case involves inherent and wide-sweeping variations in markets, as well as the complexities inherent in the large scope of the different services and facilities (and consequential disruption and impact) swept into the forbearance request. These variations and complexities are, in WorldNet’s view, simply not addressed by the generalized, nationwide assumptions and patchwork of cherry-picked, circumstantial data that USTelecom (“UST”) and others in specific markets have submitted in purported support of the forbearance request.

That said, WorldNet’s point here is not simply to echo the calls for the Commission to undertake (or to establish a process to undertake) a state-by-state, market-by-market, or product-by-product analysis. WorldNet’s point here is that, regardless of what the Commission undertakes for the rest of the country, the Commission can and should give special, individualized consideration and relief to Puerto Rico. It is the only way to take action consistent with the Commission’s otherwise strong pledge to support Puerto Rico as it faces unique problems from the hurricanes and fiscal crisis. As set forth in WorldNet’s other submissions in this proceeding and further herein, Puerto Rico is a market that is indisputably and materially different than every other United States jurisdiction, based both on a catastrophic hurricane, the level and nature of competition, and its unparalleled economic condition. These differences beg for a fundamentally different forbearance analysis than for the rest of the

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<sup>3</sup> See, e.g., 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 (2010) (“Qwest Phoenix Forbearance Order”) (“Qwest Phoenix Forbearance Order”) (denying UNE forbearance within the Phoenix MSA by evaluating the different products/services); Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area, WC Docket No. 04-223, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005) (“Qwest Omaha Forbearance Order”), aff’d, Qwest Corp. v. FCC, 482 F.3d 471 (D.C. Cir. 2007) (granting UNE forbearance for some wire centers within the Omaha MSA, but denying UNE forbearance for other wire centers within the Omaha MSA); see also Business Data Services in an Internet Protocol Environment, Report and Order, 32 FCC Rcd. 3459 (2017) (using market-by-market analysis to determine continuing obligations with regard to business data services).

<sup>4</sup> See, e.g., Qwest Phoenix Forbearance Order; Qwest Omaha Forbearance Order.

country. Compelling information dictates that now is not the time for forbearance in Puerto Rico, that future market conditions (including hurricane and economic recovery) are grossly uncertain, and that it would be therefore irresponsible to try and pick a transition date now. Instead, US Telecom (to the extent they have standing and jurisdiction in Puerto Rico) or any other party can always come back to the Commission at a future date, and, make their arguments with updated real data and information as to why those future conditions should compel forbearance.

As the Commission is well aware, the forbearance standard requires the following three findings: (1) that enforcement of a regulation is not necessary to ensure just, reasonable, and nondiscriminatory charges and practices; (2) that enforcement of a regulation is not necessary to protect consumers; and (3) that forbearance is consistent with the public interest.<sup>5</sup> The unparalleled circumstances in Puerto Rico clearly call for a finding that neither US Telecom nor any other party can meet their burden to show that any of these conditions are met in Puerto Rico.

### **1. Just, Reasonable, and Nondiscriminatory Charges and Practices**

In past UNE forbearance analyses, the Commission has looked primarily to the existence of competition in a market as the determinant of whether the first condition of the statutory forbearance test is met (i.e., that enforcement of a regulation is not necessary to ensure just, reasonable, and nondiscriminatory charges and practices).<sup>6</sup> As already documented by WorldNet in its other filings, Puerto Rico is set apart from other jurisdictions by its lack of competition.

In evaluating competition in connection with UNE forbearance requests, the Commission has looked to things like market share and the availability of retail and wholesale service options. As already noted for the Commission, PRTC's wireline market share in Puerto Rico is, based on the FCC's own data, 62% -- a number that is 14 percentage points higher than the national ILEC average. In short, unlike virtually anywhere else in the US, the ILEC still controls nearly two-thirds of its wireline market. That is not a competitive market by any logical measure. It is a market still dominated by the historical monopoly. That makes sense to those who have witnessed or lived through the anti-competitive tactics of the incumbent LEC to squash competition.<sup>7</sup> To conceivably remove and/or diminish competitors through UNE forbearance simply adds to this unparalleled market power. Accordingly, lack of competition to discipline the market with regard to price, service, and innovation inarguably poses a significant threat to

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<sup>5</sup> See 47 U.S.C. § 160(a).

<sup>6</sup> See Qwest Phoenix Forbearance Order at ¶¶92-109.

<sup>7</sup> See, e.g., See In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Waiver Petition of the Telecommunications Regulatory Board of Puerto Rico for Enterprise Market Switching Impairment in Defined Puerto Rico Markets, CC Docket No. 01-338, p. 3 (filed Dec. 30, 2003) ("The record evidence reflects that CLECs in Puerto Rico are not "competing successfully" in providing switched services via collocation and backhaul transport (i.e., UNE-L). In fact, they are not competing at all. Not one CLEC in Puerto Rico is providing switched services using UNE-L. Indeed, the only CLEC to deploy its own local switches in Puerto Rico has been asking PRTC to provide the collocation necessary for a UNE-L based service platform for more than three years without success.").

just, reasonable, and nondiscriminatory charges and practices, consumer protections, and the public interest.

Moreover, a large part of the remaining one-third of the wireline market in Puerto Rico is controlled by one cable company – Liberty Cablevision. In past UNE forbearance analyses, the Commission has determined that “forbearing 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.”<sup>8</sup> As the Commission itself expressed, “[e]conomists, courts, and the Commission have long recognized that duopolies may present significant risks of collusion and supracompetitive pricing, which can lead to significant decreases in consumer welfare. Notably, even Liberty opposes forbearance in Puerto Rico.”<sup>9</sup> As the D.C. Circuit has stated, “[t]he combination of a concentrated market and barriers to entry is a recipe for price coordination.”<sup>10</sup> Simply put, Puerto Rico now sits near the bottom of US jurisdictions with regard to its level of competition and its number of retail and wholesale service options. In past UNE forbearance cases that ostensibly presented more robust levels of competition than Puerto Rico presents today, the Commission has found that the forbearance petitioner had failed to meet any of the three forbearance requirements. The same result is imminently justified for Puerto Rico.

Indeed, looking beyond just the numbers to the real world on the ground in Puerto Rico, for the past two decades, UNE-based competitors have been the primary agents in Puerto Rico fighting against the unjust, unreasonable, and discriminatory practices of PRTC. For its part, WorldNet has also been an industry leader in Puerto Rico to improve telecommunications service quality, if not the industry leader. Historically, Puerto Rico has struggled with service quality issues, with Puerto Rico consumers never really enjoying near the same level of service made available to consumers in the US mainland. In 2004, WorldNet took action (which the Telecommunications Regulatory Board approved) to change this by proposing for its interconnection agreement with PRTC a detailed list of improved performance standards for PRTC, along with associated liquidated damages. PRTC vigorously opposed these changes, which were intended to impose standards of performance and mechanisms to meaningfully enforce them, challenging WorldNet’s proposals all the way to the United States Court of Appeals for the First Circuit. Undaunted, WorldNet ultimately prevailed, establishing new, much higher benchmarks for service in Puerto Rico.<sup>11</sup> In short, WorldNet, and potentially other UNE and resale providers in Puerto Rico, have been the leading agents for much needed service quality improvements and the transition to and deployment of next-generation services. Unlike anywhere else, they have been a critical and necessary part of the Puerto Rico market in ensuring that ILEC practices have been just and reasonable, in protecting Puerto Rico consumers from an incumbent that has its origins as a state-owned monopoly. Although there is still much work to

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<sup>8</sup> See Qwest Phoenix Forbearance Order at ¶32.

<sup>9</sup> See, e.g., In the Matter of 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, Comment of Liberty Cablevision of Puerto Rico LLC (filed Aug. 6, 2018).

<sup>10</sup> See Qwest Phoenix Forbearance Order at ¶29.

<sup>11</sup> See WorldNet Telecommunications, Inc. v. Puerto Rico Telephone Company, Inc., 497 F.3d 1 (1<sup>st</sup> Cir. 2007) (affirming as lawful the Board’s approval of WorldNet proposals for stricter service performance standards for PRTC that required a superior level of service than that provided by PRTC to its own end user customers and for liquidated damages associated with such standards).

do, Puerto Rico's telecommunications markets simply would not be anywhere near as advanced as they are today without UNE and resale requirements. This unique situation, just like the low levels of competition, undercuts the first element of the forbearance standard as applied to Puerto Rico.

## **2. Consumer Protection & Public Interest**

In looking at Puerto Rico, the role of UNE-based competitors in advancing better service standards and lower pricing also shows that the second and third elements of the forbearance standard are not met in Puerto Rico (i.e., that enforcement of a regulation is not necessary to protect consumers and is inconsistent with the public interest). Beyond this, however, the market circumstances in Puerto Rico today mirror most of the other criteria previously used by the Commission to deny UNE forbearance in other markets because UNEs were still needed to protect consumers and to serve the public interest. For example, as documented by WorldNet in its previous filings, WorldNet is using UNEs in conjunction with its own state-of-the-art electronics to create innovative service solutions for Puerto Rico consumers. The Commission has cited this practice as a basis for finding that UNEs were still necessary for consumer protection.<sup>12</sup> As also already documented, WorldNet is using UNEs to small to medium-sized businesses and targeted industries with right-sized, tailored service solutions. The Commission has also cited this practices as another basis for finding that UNEs were still necessary for consumer protection.<sup>13</sup> Similarly, WorldNet is using UNEs to provide bundles of voice and data services. The Commission has cited this practice as a basis for finding that forbearance from UNEs would not serve the public interest.<sup>14</sup>

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<sup>12</sup> See Qwest Phoenix Forbearance Order at ¶102 ("First, there is evidence that consumers can benefit from innovative offerings provided by competitors relying on UNEs. Several providers have explained that by attaching their own equipment to legacy copper loops leased as UNEs, they have been able to differentiate their service offerings and provide additional choices to residential or business customers in markets entered by relying on UNEs. In this manner, for example, Cavalier is able to offer telephone, television, and broadband Internet services, thus promoting competition for voice, video, and broadband services. Although Cavalier to date has not entered the Phoenix market, it contends that the only realistic potential for Cavalier and other similarly situated entities to enter the Phoenix MSA is through the continued availability of UNEs.").

<sup>13</sup> See Qwest Phoenix Forbearance Order at ¶103 ("Second, evidence in the record also suggests that competitors rely on UNEs to target particular niche markets or customer segments. For example, multiple carriers provide advanced services over copper loops to enterprise customers, including hospitals, fire departments, and schools, as well as government clients. Competitive LECs already rely heavily on UNE loops to provide services to businesses in Phoenix. Similarly, Cavalier reports that in other markets, it has been able to deploy advanced services to mass market consumers in inner-city neighborhoods where fiber technologies have not been deployed.<sup>300</sup> Cavalier asserts that, although it owns many of its own facilities, its 'only realistic access to the vast majority of customers' over the last-mile is over unbundled DS0 UNE loops, and that it 'likely will have to cease operations' if access to UNEs is foreclosed.<sup>301</sup> Therefore, forbearing from DS0 UNEs in particular could foreclose important choices for certain groups of customers.").

<sup>14</sup> See Qwest Phoenix Forbearance Order at ¶106 ("In addition, we find other potential competitive concerns here. For example, the Commission's rules allow a carrier that obtains access to a UNE for the provision of a telecommunications service also to use that UNE to provide other services. Thus, a carrier could combine Qwest's UNE loops with its own electronics to provide bundled broadband, voice, and video services to mass market customers or a suite of voice and data products to enterprise customers in Phoenix. The loss of UNEs thus could have competitive implications not only for traditional voice and data services, but for broadband Internet and video services as well. In addition, there is empirical econometric evidence from other contexts that wireline UNEs encourage the provision of broadband service.").

Simply put, Puerto Rico presents a compelling case unlike any other jurisdiction to warrant special, individualized consideration in this proceeding based on the unique nature of its telecommunications markets alone. There is one additional reason, however, that the Commission should give Puerto Rico special consideration and relief, and that reason does not involve any measure of debate about how much Puerto Rico's telecommunications markets are different from everywhere else. As the Commission already well knows, Puerto Rico's entire economy is in crisis. Where virtually all of the other US jurisdictions are currently experiencing economic growth, low unemployment, and relative prosperity, Puerto Rico is now burdened with economic contraction, the highest unemployment levels in the nation by far, a historic fiscal crisis, mass population exodus, and the continuing effects of historic recent hurricanes. As applied to Puerto Rico, the basic economic assumptions and projections used in the UST Petition are, unlike anywhere else in the nation, a square peg in a round hole.

As documented in WorldNet's comments in this proceeding, forbearance comes at a much higher price for Puerto Rico than anywhere else in the nation – a price that Puerto Rico cannot fairly be forced to pay right now. The UST Petition itself acknowledges that forbearance from UNE and resale requirements would not be without some measure of immediate impact to communications markets, including, most notably, price increases for communications services.<sup>15</sup> In part, the reason asserted to justify such price increases is to introduce higher cost advanced services.<sup>16</sup> Yet, the Commission has heard that Puerto Rican consumers neither want, nor can afford, such services while they are still digging out from their challenges. Although ignored in the UST Petition, forbearance from UNE and resale requirements could also lead to other significant market disruptions, including, for example, the loss by potentially thousands of Puerto Rico residents and business of their chosen communications services and/or service providers. By definition, since the market has shown that competitors were the customers' first choice, including over and above the ILEC, for very good reasons, then impeding, eliminating, or raising the cost of competition hurts telecommunications customers in Puerto Rico. Indeed, the loss of UNE and resale obligations may even lead to the complete loss of providers that depend on these obligations to reach customers, with the attendant immediate impact of, among other things, significant job losses and potentially millions of dollars in stranded investment. Puerto Rico's economy is, even more than a year after the 2017 hurricanes, running on fumes right now. Unlike any other US jurisdiction, Puerto Rico is simply not in a position, even if just in the short term, to absorb price increases on critical communications services, the cost and burden of a forced transition to new services and/or new providers, job losses, or stranded investment. To impose these burdens on Puerto Rico in its current economic state is not consistent with the public interest element of the forbearance standard.

In recent months, the Commission has given Puerto Rico special consideration and relief due to the unique challenges that it now faces.<sup>17</sup> The Commission can and should do so again

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<sup>15</sup> See In the Matter of 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, Petition for Forbearance of USTelecom – The Broadband Association, Appendix B at 30 (filed May 4, 2018).

<sup>16</sup> See id.

<sup>17</sup> See, e.g., In the Matter of the Uniendo a Puerto Rico Fund and the Connect USVI Fund, WC Docket No 18-143, Order and Notice of Proposed Rulemaking, FCC 18-57 (rel'd May 29, 2018) (providing advances and special grants of universal service funding to Puerto Rico and creating a \$750 million dollar special fund dedicated specifically to the rebuilding and strengthening of Puerto Rico's telecommunications industry); In the Matter of

here. Quite plainly, the Commission knows that Puerto Rico is in a completely different economic place than the rest of the country. It knows that Puerto Rico's telecommunications markets face different challenges and investment paradigms than anywhere else. And, that the national assumptions, data, and projections presented in purported support of the UST Petition take no account of these circumstances. If ever there were a case for the Commission to provide special exception for a jurisdiction in a forbearance analysis, Puerto Rico is it.

Respectfully submitted,

/s/ Richard Davis

Richard Davis

Outside Counsel

WorldNet Telecommunications, Inc.

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Schools and Libraries Universal Service Support Mechanisms, CC Docket No. 02-6, Order, FCC 17-139 (rel'd Oct. 30, 2017) (adopting temporary rules to provide relief to Puerto Rico schools and libraries). A list of many other special relief orders by the Commission for Puerto Rico, providing things like deferrals of filing deadlines and temporary waivers of regulatory requirements, can be found at <https://www.fcc.gov/maria>.