

April 24, 2019

**VIA ECFS**

***EX PARTE***

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW, Room TW-A325  
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:

In filings in the above-referenced docket, competitive carriers that rely on avoided-cost resale under Section 251(c)(4) to provide telephone service to business and government customers have demonstrated that traditional TDM-based telephone services provided via copper loops (“traditional TDM service”) constitutes a separate product market when purchased by business and government customers and that incumbent LECs have substantial and persisting market power in the provision of those services.<sup>1</sup> The incumbent LECs have tried to side-step any analysis of the traditional TDM service market by citing to the purportedly widespread availability of, and migration to, VoIP services.<sup>2</sup> The resale competitors have explained that business and government customers frequently do not perceive VoIP services as a substitute for traditional TDM service.<sup>3</sup> They have also explained that, even in circumstances where business and government customers might perceive managed VoIP services to be substitutes for traditional TDM service, the broadband facilities needed to support VoIP, including best efforts broadband, are frequently unavailable.<sup>4</sup>

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<sup>1</sup> See, e.g., Opposition of Granite to USTelecom’s Forbearance Petition, WC Docket No. 18-141, at 16-21, 22-24 (Aug. 6, 2018) (“Granite Opposition”); Opposition of MetTel, WC Docket No. 18-141, at 4-7 (Aug. 6, 2018) (“MetTel Opposition”).

<sup>2</sup> See, e.g., 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 at 10 (filed May 4, 2018).

<sup>3</sup> See, e.g., Granite Opposition at 16-17; MetTel Opposition at 4-5.

<sup>4</sup> See, e.g., Granite Opposition at 24; MetTel Opposition at 5-6.

Recent analyses of the Commission's own broadband data support this conclusion. It has become increasingly clear that the Form 477 data, the only purportedly comprehensive data set the Commission has to measure the extent of broadband deployment, significantly overstates the extent of broadband deployment. This is because, among other reasons, the Form 477 data incorrectly assumes that all end users within a census block have access to broadband where a provider reports that it can provide such service to a single location in the census block.

USTelecom has candidly acknowledged that the Form 477 data is unreliable and overstates the extent to which broadband (and by implication VoIP) is available. Jonathan Spalter, President and CEO of USTelecom, recently described the problem with the data in written testimony before the Senate Commerce Committee:

[I]f a provider is able to serve a single location in a census block, then the FCC considers every location in that block "served." Therein lies the challenge. In some cases, only a fraction of locations in the block can access broadband services. This issue is particularly acute in rural areas where census blocks are far larger than their urban and suburban counterparts and data sources are lacking. The "one-served-all-served" reporting is simply not a reliable approach to accurately understand broadband availability . . . .<sup>5</sup>

Mr. Spalter went on to explain that USTelecom has launched its so-called Broadband Mapping Initiative, an effort to "create a consistent national dataset identifying broadband serviceable locations using a single methodology to provide a harmonized reference point for broadband reporting."<sup>6</sup>

In an *ex parte* recently filed at the Commission, Microsoft sought to provide a measure of just how inaccurate the Form 477 data is. Microsoft explains that, while the most recent Form 477 data indicates that approximately 92 percent of Americans have access to broadband and 24.7 million Americans lack access to broadband, Microsoft's data indicates that only approximately 49 percent of Americans have "access [to] internet at broadband speeds" and that approximately 162.8 million Americans do not use the internet at broadband speeds.<sup>7</sup> The discrepancy is especially great in some

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<sup>5</sup> Testimony of Jonathan Spalter President and CEO, USTelecom before the Senate Commerce Committee "Broadband Mapping: Challenges and Solutions," at 2 (Apr. 10, 2019), <https://www.commerce.senate.gov/public/cache/files/1c4bbcd1-e586-4c1d-94eb-3d2fe7ff9360/02973D243C78B859624D7E04EE8E7DD2.04-10-19spalter-testimony.pdf>.

<sup>6</sup> *See id.* at 2.

<sup>7</sup> *See* John Kahan, Chief Data Analytics Officer, "Broadband mapping meeting with Preston Wise - FCC," at 3-4 (Mar. 27, 2019) filed as an attachment to Letter from Paula Boyd, Senior Director U.S. Government and Regulatory Affairs, Microsoft Corporation and David A. LaFuria, Lukas, LaFuria, Gutierrez & Sachs, LLP, Counsel for Microsoft Corporation, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-238 & WC Docket No. 11-10 (Mar. 29, 2019). It is worth observing that Microsoft's business incentives appear to align with the goal of ensuring that the Commission's

rural counties, such as Ferry County, Washington, in which the Form 477 data indicates access to 100 percent of county residents whereas the Microsoft data indicates broadband usage among only 2.2 percent of county residents.<sup>8</sup>

Taken together, USTelecom's admission that the Commission's existing methodology for determining the availability of broadband (and by implication VoIP) is "simply not a reliable approach" and Microsoft's independent assessment that the FCC's deployment data overstates broadband usage by almost 120 million people mean that the Commission cannot rely on its Form 477 broadband deployment data as the basis for concluding that managed VoIP is ubiquitously available to business and government customers. It follows that, even if it were true that VoIP and traditional TDM service purchased by business and government customers belong in the same product market (and it is not), there is no available basis for granting nationwide forbearance from the application of the Section 251(c)(4) avoided-cost resale requirement to traditional TDM service based on the availability of VoIP services. Moreover, the absence of reliable broadband deployment data in relevant geographic areas within the U.S. forecloses any attempt to grant forbearance in the subset of geographic areas within the U.S. in which non-ILECs provide VoIP.

Finally, in analyzing the voice services marketplace, the Commission also may not rely on its competition analyses in prior orders to the extent those prior orders were based on Form 477 data or inferences from similar data. For example, in assessing the extent to which incumbent LECs face competition in the provision of business data services ("BDS"), the Commission relied on the predictive judgement that competitors will deploy new BDS facilities from existing cable facilities as reported in Form 477 data or from competitors' fiber facilities.<sup>9</sup> There is now no basis for concluding that competitive providers would build new last-mile facilities from such existing facilities for the purpose of providing best efforts services that do not qualify as BDS but do qualify as broadband under the Form 477 reporting rules (and that can be used to provide VoIP) to new customers in the same area.

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broadband deployment assessments are accurate. There is therefore no reason to think that Microsoft would seek to overstate or understate the extent of broadband deployment.

<sup>8</sup> See *id.* at 5.

<sup>9</sup> See *Business Data Services in an Internet Protocol Environment*, Report and Order, 32 FCC Rcd. 3459, ¶¶ 97-152 (2017) (explaining basis for test used to determine whether incumbent LECs face competition in the provision of BDS channel terminations and certain other business data services in a county).

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Please contact the undersigned with questions or concerns about this submission.

Respectfully submitted,

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