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EX PARTE

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), WC Docket No. 18-141

Dear Ms. Dortch:

Access Point Inc.; BullsEye Telecom, Inc.; Manhattan Telecommunications Corporation d/b/a Metropolitan Telecommunications; New Horizon Communications Corp.; and Xchange Telecom LLC (collectively the "Wholesale Voice Line Coalition"), file this letter in support of INCOMPAS' Motion to Dismiss¹ and Motion for Extension of Time² filed in the above-captioned proceeding.³ As INCOMPAS explained in its motions and as discussed below, the Commission's rules and the Administrative Procedure Act ("APA") require that the Commission grant one of INCOMPAS' motions.

¹ Motion to Dismiss of INCOMPAS, WC Docket No. 18-141 (filed May 11, 2018) ("Motion to Dismiss").

² Motion for Extension of Time of INCOMPAS, WC Docket No. 18-141 (filed May 11, 2018) ("Motion for Extension of Time").

³ *Pleading Cycle Established for Comments on USTelecom's Petition for Forbearance from Section 251(c) Unbundling and Resale Requirements and Related Obligations, and Certain Section 271 and 272 Requirements*, Public Notice, WC Docket No. 18-141, DA 18-475 (rel. May 8, 2018).

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INCOMPAS Motion to Dismiss

As INCOMPAS and supporting parties⁴ have explained, USTelecom's Petition⁵ "relies on confidential data and purported interviews not attached to the Petition as part of its *prima facie* case"⁶ and "data compilations and analysis ... not ... included with the Petition"⁷ and should be dismissed for failure to comply with the Commission's "complete-as-filed" rule.⁸ Even if the Commission were to conclude that the Petition does not violate the "complete-as filed rule", USTelecom's failure to submit relevant information and data cited in its Petition into the record is flatly inconsistent with the APA. The Commission should dismiss the Petition.

Commission proceedings reviewing petitions for forbearance are considered rulemaking proceedings.⁹ Under the APA the Commission is obligated to give "interested persons an opportunity to participate in [a] rule making through submission of written data, views, or arguments."¹⁰ More importantly, the APA requires that the Commission disclose in "detail the thinking that has animated the form of a proposed rule and the data upon which that rule is based."¹¹ This facilitates the "exchange of views, information, and criticism between interested persons and the agency" that the APA requires.¹²

The D.C. Circuit has found that agencies cannot shield from public comment the data on which its conclusions rest, explaining that allowing "an agency to play hunt the peanut with technical information, hiding or disguising the information that it employs, is to condone a practice in which the agency treats what should be a genuine interchange as mere bureaucratic sport."¹³

"Fail[ing] to reveal [to the public] portions of the technical basis for a proposed rule in time to allow for meaningful commentary" is a "serious procedural error"¹⁴ that could result in dismissal of any resulting agency decision.

⁴ Letter from Thomas Jones, Counsel for Granite Telecommunications, LLC to Marlene H, Dortch, FCC (May 15, 2018) ("Granite Letter"); Revised Motion for Extension of Time and for Protective Order of the California Association of Competitive Telecommunications Companies, WC Docket No. 18-141 (filed May 15, 2018); Letter from Paula Foley, Midwest Association of Competitive Communications, to Marlene H. Dortch, FCC (May 14, 2018).

⁵ 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").

⁶ INCOMPAS Motion to Dismiss at 1.

⁷ *Id.* at 1-2.

⁸ 47 C.F.R. § 1.54.

⁹ See *Verizon v. FCC*, 770 F.3d 961, 966-67 (D.C. Cir. 2014).

¹⁰ 5 U.S.C. § 553(c).

¹¹ *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977) ("*HBO*") quoting *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 392-394 (1973), *cert. denied*, 417 U.S. 921 (1974).

¹² *HBO* at 567 F.2d 9, 35.

¹³ *Conn. Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 530-31 (D.C. Cir. 1982).

¹⁴ *Id.* at 530.

INCOMPAS Motion for Extension of Time

The Wholesale Voice Line Coalition agrees with INCOMPAS, Granite and others that should the Commission decline to dismiss the Petition, it must (1) require Petitioner USTelecom to submit the necessary information and data and (2) reset the comment period to ensure that parties have sufficient time to analyze and comment on the information and data. This will alleviate the serious procedural issues resulting from USTelecom's withholding of key data from the public record.

It would be unreasonable to classify USTelecom's petition as anything but "complex" pursuant to the *Forbearance Procedures Order*.¹⁵ A "complex" Petition warrants a pleading cycle longer than the brief 45 day cycle established in the Commission's Public Notice.¹⁶ INCOMPAS' proposed pleading cycle – 90 days for comments and 30 days for replies – should allow interested persons to analyze the relevant information and data, including the additional material that USTelecom failed to file with its Petition.¹⁷ This longer pleading cycle is consistent with extended pleading cycles in other complex proceedings before the Commission that involved analysis of significant volumes of information,¹⁸ including the Commission's BDS proceeding where the Commission granted repeated extensions – of much greater length – at the request of USTelecom and the ILECs.¹⁹ The complex issues presented in the Petition warrant the same careful consideration by interested persons, their experts, and the Commission.

Respectfully submitted,

/s/ Joshua M. Bobeck

Joshua M. Bobeck

Counsel for Access Point Inc.; BullsEye Telecom, Inc.; Manhattan Telecommunications Corporation d/b/a Metropolitan Telecommunications, New Horizon Communications Corp.; and Xchange Telecom LLC

¹⁵ Motion for Extension of Time at 2 *citing 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, 9553 ¶ 17 (2009) ("*Forbearance Procedures Order*").

¹⁶ *See Forbearance Procedures Order*, 24 FCC Rcd. at 9559 ¶ 29.

¹⁷ Motion for Extension of Time at 1.

¹⁸ Granite Letter at 3, n.15.

¹⁹ *Id.* at 4 n.16.