

May 21, 2018

Ex Parte

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 May 17, 2018, the undersigned counsel for INCOMPAS and Windstream Services, LLC (“Windstream”); Karen Reidy, Vice President, Regulatory Affairs of INCOMPAS; and Mengyu Huang, counsel for INCOMPAS and Windstream, met with Madeleine Findley, Terri Natoli, Michele Berlove, Megan Capasso, Pamela Megna, Daniel Kahn, and Tracy Waldon of the Wireline Competition Bureau. In addition, Carol Keith, Deputy General Counsel of Windstream, and Paula Foley, Regulatory Counsel of Granite Telecommunications, LLC, joined the meeting by phone.

We discussed INCOMPAS’s motion to dismiss¹ and motion for extension of time² with respect to USTelecom’s recent forbearance petition.³ We reiterated concerns that USTelecom’s Petition violated the Commission’s “complete-as-filed” rule by failing to include the confidential data and interviews, as well as any other data compilations and analysis, on which the Petition and the accompanying economic report relied.⁴ The *Forbearance Procedures Order* requires a that “[a] petition for forbearance must include in the petition the facts, information, data, and arguments on which the petitioner intends to rely to make the *prima facie* case for forbearance.”⁵ Petitioners failed to do so.

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”).

³ 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”).

⁴ Motion to Dismiss at 1-2 (citing 47 C.F.R. § 1.54(b) and *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, ¶ 17 (2009) (“*Forbearance Procedures Order*”).

⁵ *Forbearance Procedures Order* ¶ 17.

Failure to provide the underlying information and data deprives INCOMPAS and other interested parties of a meaningful opportunity to comment and prejudices their ability to participate fully in the proceeding.⁶ Even with respect to any public data sources incorporated into US Telecom's charts, commenters should not have to guess at the values of the actual data in the charts, nor should they have to guess at how to recreate US Telecom's compilations in order to respond. The Commission should dismiss the Petition without prejudice for its noncompliance with baseline procedural requirements. At minimum, the Commission should (1) direct USTelecom to file all the underlying data, including confidential data, (2) adopt a protective order, and (3) reset the comment dates to permit an adequate, 90-day comment period once the Petition is actually complete as filed and the ordinary process for clearing counsel and experts to access confidential materials has been completed.⁷

INCOMPAS also reiterated that the Petition is a "complex" petition that warrants an extended comment cycle. Unlike the previous two USTelecom forbearance petitions,⁸ the current Petition carries broader impact. It seeks to eliminate all unbundling and resale mandates – provisions at the core of the Telecommunications Act of 1996 – for all incumbent local exchange carriers and for all geographic markets nationwide. If granted, the forbearance sought would exert significant effect on not only business but also residential services markets. We expressed concern that the Petition asserted sweeping assumptions about the market and state of competition without providing the underlying data for its assumptions. Given the varying degrees of competition and available service alternatives for consumers in local markets, interested parties, including states, need additional time to collect data and provide the Commission with full analyses of how forbearance would affect the range of services, providers, and end-users across different geographic markets.

Moreover, we noted that interested parties had extra time to prepare responses to the previous two USTelecom forbearance petitions. In both cases, the initial comment period was set at 30 days but the timing of the Public Notice release granted parties 20 to 30 additional days

⁶ See *Forbearance Procedures Order*, ¶ 12 (“[L]ess than complete petitions present interested parties with a moving target, which frustrates their efforts to respond fully and early in the process.”).

⁷ Motion to Dismiss at 3; Motion for Extension at 1.

⁸ See *Pleading Cycle Established for Comments on United States Telecom Ass’n Petition for Forbearance from Certain Incumbent LEC Regulatory Obligations*, Public Notice, DA 14-1585, 29 FCC Rcd. 13,535 (2014); *Pleading Cycle Established for Comments of United States Telecom Ass’n Petition for Forbearance from Certain Telecommunications Regulations*, Public Notice, DA 12-352, 27 FCC Rcd. 2326 (2012).

to prepare comments.⁹ In contrast, the Public Notice for the current Petition was released only four days after the petition was filed.¹⁰

With respect to the Petition's forbearance request for Section 272(e)(1) and related obligations, we noted that Section 272(e)(1) is tied to the nondiscriminatory and prompt provisioning of UNEs and resale. Congress recognized the need to establish this protection for competitive carriers separate from and in addition to Sections 201 and 202's protections against discriminatory and unreasonable practices.

This petition will affect local telecommunications markets across the country, across a broad range of product markets. To the extent that it may be necessary to present those effects to the Commission, INCOMPAS members and other stakeholders, including the States, need a reasonable amount of time to be able to do so.¹¹

Sincerely,



John Nakahata
Counsel to INCOMPAS and Windstream

cc: Madeleine Findley
Terri Natoli
Michele Berlove
Megan Capasso
Pamela Megna
Daniel Kahn
Tracy Waldon

⁹ *Id.* USTelecom filed its 2014 forbearance petition on October 6, 2014 and the Bureau issued the Public Notice seeking comments on November 5, 2014. USTelecom filed its 2012 forbearance petition on February 16, 2012 and the Bureau issued the Public Notice seeking comment on March 8, 2012.

¹⁰ *See* Motion for Extension at n.5 (noting that parties have 11 fewer days to analyze the Petition than would be the case if the Commission followed the default Forbearance Timeline of 15 days for Public Notice release).

¹¹ Motion of the National Association of Regulatory Utility Commissioners for Extension of Time at 7, WC Docket No. 18-141 (filed May 16, 2018) (“[T]he time between the notice and the comment deadline simply does not give any interested party adequate time to prepare a proper response, much less allow NARUC members to generate an adequate response and get it through State required clearance procedures.”).