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June 13, 2019

Via ECFS

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

Re: WC Docket Nos. 18-141; 17-144; 16-143; & 05-25
Notice of Ex Parte

Dear Ms. Dortch:

On June 11, 2019, representatives on behalf of U.S. TelePacific Corp., Mpower Communications Corp., and Arrival Communications, Inc., all d/b/a TPx Communications ("TPx") met with staff from the Wireline Competition Bureau and Office of Economics and Analytics. Attendees of the meeting are identified in **Attachment 1**.

TPx reiterated its opposition to the nationwide forbearance USTelecom seeks in its Petition for Forbearance (the "Petition").[1] As the petitioner, USTelecom bears a statutory burden to provide "convincing evidence and analysis" that forbearance is in the public interest. Unable to do that, USTelecom now argues that competitive carriers bear the burden to prove forbearance will have an adverse impact on customers receiving competitive voice and broadband service over unbundled network elements ("UNEs").

TPx explained the adverse impact forbearance from Section 251(c) obligations would have on its customers. In many cases, TPx's use of UNEs allows its customers to enjoy more innovative services at lower price points than are available from the incumbent LECs. TPx uses UNEs to serve small and mid-sized businesses, schools, libraries and other community anchor institutions in urban and suburban areas primarily in California, Nevada and Texas. TPx serves single-location customers as well as multi-location customers. For multi-location customers, TPx uses a variety of last-mile access solutions of which UNEs are an important part. For example, TPx uses fiber and fixed wireless including a mix of licensed and unlicensed spectrum to serve customers. However, TPx

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1 *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).

finds that fixed wireless is most often accepted by customers as a back-up to wired services. UNEs are critical components of the services provided to TPx's customers.

As described in **Attachment 3**, TPx uses approximately 122,000 analog DS0 loops to support Ethernet-over-Copper ("EoC") and approximately 148,000 analog DS0 loops to provide Plain Old Telephone Service ("POTS"), which its customers use for telephone service, fax machines, key systems, and alarm services. TPx explained that when it orders analog DS0 loops from the incumbent LECs, TPx orders on average nine (9) dry copper pairs to provide EoC. TPx does not use "line sharing" for providing POTS and EoC due to the unique nature of the customers' equipment that generally requires a separate line to ensure proper performance.

In response to staff's questions regarding the ordering of DS0 loops, TPx investigated and determined that TPx orders 2-wire xDSL loops to provide EoC. However, TPx has not verified that the xDSL loops can be used to provide POTS and understands that the ability to provide POTS via xDSL loops – to the extent it could be done as a technical matter – may require additional or replacement equipment. If the Commission were to forbear from requiring that incumbent LECs offer analog DS0 loops, it should prohibit incumbent LECs from imposing fees to convert an analog DS0 to an xDSL Loop.

In addition to loops for POTS, TPx uses approximately 12,000 resold POTS lines. TPx's local government customers, among others, continue to rely on POTS (through UNEs or resale) for reliability and alarm systems, and VoIP or other over-the-top solutions are insufficient to meet their need for a self-powered and reliable line. TPx also uses bonded and single DS1 UNEs to provide voice and data services.

Similar to the wide variety of last-mile access solutions, TPx uses a combination of fiber, leased backhaul, UNEs and special access for transport. TPx has EoC aggregation points in the wire centers in which it is collocated and TPx-managed fiber transport is available in approximately 30 percent of these wire centers.

TPx explained that it generally has not seen an impact to its customers as a result of the incumbent LECs' copper retirements to date, in particular in California where TPx's use of UNEs is highest. If copper retirements have occurred, they have not taken place where TPx's customers are located. Despite USTelecom's claims, the reality of accessible, "in-the-ground" networks reveals a stark lack of competitive alternatives to UNEs. In areas where TPx serves, only approximately 25 percent of TPx's existing EoC customers have fiber available in the building and another 50 percent of its customers have fiber within 500 feet of the customer premises. Even in central business districts and suburban areas, the non-recurring charges ("NRCs") for deploying fiber the last 500 feet have been prohibitive, ranging from approximately \$20,000 to over \$200,000.[2] Small business

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[2] *See* Opposition of U.S. TelePacific Corp., Mpower Communications Corp., and Arrival Communications, Inc., WC Docket No. 18-141, at 20-23 (filed Aug. 6, 2018) ("TPx Opposition").

customers are often unwilling to pay these costs. TPx's average customer requires only a 10-15 Mbps service and some well-known fiber providers are not willing to provision fiber for the low bandwidth services that TPx's customers require. And even if a cable provider offers service in a census block, that does not mean the cable plant is capable of delivering the symmetric 10-15 Mbps EoC provides or that the cable company will extend its plant to the office parks and other locations where TPx small and medium business customers are located.

There is nothing in the record beyond unenforceable "commitments" upon which the Commission could make a reasoned decision about competition and economics in a post-forbearance market. Competitive LECs like TPx lack negotiating power to avoid succumbing to the incumbent LECs' price increases. As a result, the impact of forbearance on its customers will be immediate rate increases imposed by the incumbent LEC for continued access to their current services over the same copper facilities used to serve them today. Alternatively, if TPx cannot find an economical alternative last mile solution (which may not be available absent a new build), TPx's customers may lose service from TPx – often the only competitive alternative to the incumbent LEC – at their location.

The incumbent LECs' argument that UNE rates are artificially low and have not changed since adoption of the Telecommunications Act are wrong. Rather than litigating a UNE cost case, AT&T and Frontier entered into voluntary settlements with CALTEL freezing or limiting increases on UNE rates in California through 2020.[3]

TPx opposes forbearance. However, if the Commission determines that forbearance is warranted (on a nationwide or more limited basis), TPx presented a number of principles to guide a post forbearance world:

1. The Commission must provide a reasonable transition period – TPx recommends seven years[4] to ensure that customers of competitive LECs are able to maintain their existing services and provider(s) (*See* **Attachment 2**).
2. For UNEs ordered or in service in a carrier's embedded base prior to the effective date of any grant of forbearance, the rates will remain at the UNE rate during the transition period. During the transition, carriers would be able to order maintenance and replacement loops for the embedded base at UNE rates.

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[3] *See* Reply Comments of CALTEL, WC Docket No. 18-141, at 21-25 (filed Sept. 5, 2018).

[4] A seven-year transition is consistent with the transition adopted by the Commission for reducing intercarrier compensation in incumbent LEC price cap territories. *See Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform – Mobility Fund*; WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17934, ¶ 801 (2011); *aff'd sub nom., In re: FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014).

3. For loops ordered after the grant of forbearance, incumbent LECs will be allowed to negotiate nominal, incremental increases for UNEs with the rate determined based on the year the loops were ordered and remain frozen throughout the transition period (*i.e.*, rates for UNEs ordered in Year Two should apply to those loops throughout completion of the transition in Year Seven. The rates for UNEs ordered in Year Three would remain the same through Year Seven.).
4. At the expiration of the transition, incumbent and competitive LECs should be required to use mutual best efforts to negotiate commercial terms to successor arrangements.
5. The incumbent LECs must be prohibited from imposing or increasing fees they charge in the provisioning, record-keeping or maintenance related activities with respect to a carrier's embedded base of UNEs.

These principles will ensure that existing customers are not harmed (through rate increases or loss of services or competition) during the transition and provide sufficient time for competitive LECs to determine whether alternative last-mile access solutions are available.

Because USTelecom has not met its burden, the Commission should deny the Petition. Even if the Commission finds that limited forbearance is appropriate, it should provide a transition period long enough to avoid the substantial disruption and cost to customers that forbearance would cause.

Sincerely,

/s/ Tamar E. Finn

Tamar E. Finn
Patricia Cave

Counsel to U.S. TelePacific Corp., Mpower Communications Corp., and Arrival Communications, Inc., all d/b/a TPx Communications

cc: (Via E-Mail)
Kris Monteith
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Edward Krachmer
Michele Berlove
Justin Faulb
Pam Megna
Eric Ralph
Megan Capasso

Attachments:

Attachment 1 – Fact Sheet: TPx Communications' Use of Section 251(c) UNEs and Resold Lines

Attachment 2 – TPx Communications' Forbearance Principles

<u>ATTACHMENT 1</u>

June 11, 2019 Meeting Attendees

In-Person:

William P. Hunt III, TPx, General Counsel, Senior Vice President & Secretary
Tamar Finn, Morgan, Lewis & Bockius LLP, Counsel to TPx
Patricia Cave, Morgan, Lewis & Bockius LLP, Counsel to TPx
Kris Monteith, Wireline Competition Bureau
Terri Natoli, Wireline Competition Bureau
Edward Krachmer, Wireline Competition Bureau
Michele Berlove, Wireline Competition Bureau
Justin Faulb, Wireline Competition Bureau
Pam Megna, Office of Economics and Analysis
Eric Ralph, Office of Economics and Analysis

Via teleconference:

Craig Maloof, TPx, Vice President of Network Planning
Russell Shipley, TPx, Executive Vice President Wholesale, Engineering and Operations
Megan Capasso, Wireline Competition Bureau

Attachment 2

Fact Sheet: TPx Communications' Use of Section 251(c) UNEs and Resold Lines

<u>Fact Sheet:</u>
<u>TPx Communications' Use of Section 251(c) UNEs and Resold Lines</u>

- TPx's customers appreciate the innovative voice and data services TPx puts in place leveraging fiber, Ethernet over Copper and DS1s to maximize bandwidth and provide flexibility to adapt to their needs.

- TPx uses unbundled network elements ("UNEs") to serve tens of thousands of customers primarily in California, Nevada, and Texas.

  - Approximately 122,000 analog DS0 loops to support Ethernet-over-Copper ("EoC") services.
  - Approximately 148,000 analog DS0 loops to support business Plain Old Telephone Service ("POTS").
  - Approximately 22,000 UNE DS1s to support business voice and data services (using bonded and single DS1s).
  - Approximately 12,000 resale lines to support business POTS (including to support fax machines, alarm services, and key telephone systems).
  - TPx uses Operations Support Systems and 911 UNEs to provide service, including to its non-UNE based customers (*e.g.*, customers served via Ethernet or special access circuits).
  - TPx incurs substantial monthly collocation costs to serve its customer base using UNEs.

- No commercial alternatives for **<u>bare copper analog DS0 loops</u>** exist today.

- TPx often moves customers to fiber or its fixed wireless solution where available.

  - Only 25 percent of TPx's customers have fiber at their location.
  - In TPx's experience, fiber providers are not likely to build to customers with low-bandwidth demands (e.g., a typical TPx customer requires only 10-20 Mbps).
  - Not all customers can afford move to fiber-based Ethernet service at triple the monthly recurring cost for EoC and after special construction and applicable non-recurring provisioning costs.

- "[F]or California at least, any complaints about 'artificially low' UNE rates should be disregarded, because both ***AT&T and Frontier have repeatedly and voluntarily entered into settlement agreements with CALTEL that either froze CPUC-adopted rates or adjusted them annually*** based on a negotiated price cap formula indexed to the rate of inflation." (Reply Comments of CALTEL, WC Docket No. 18-141, at 25 (filed Sept. 5, 2018) (emphasis added).)

<u>ATTACHMENT 3</u>

TPx Communications' Forbearance Principles

<u>TPx Communications' Forbearance Position</u>

- USTelecom and the incumbent LECs have not met their burden to provide "convincing evidence and analysis" that nationwide forbearance from UNE obligations is in the public interest.
    - The *BDS Order* did not analyze the voice or combined voice and broadband markets.
        - Reliance on flawed Form 477 data to make determinations about the status of facilities-based competition would not be reasoned decision making.
        - Incumbent LECs have a 75 percent market share for Plain Old Telephone Service ("POTS").
    - The ILECs have failed to provide any evidence that market conditions will constrain their ability to impose whatever price increase they seek post forbearance. Granting forbearance will lead to immediate increases in pricing for consumers and competitive providers.
        - ILECs will use their copper facilities to provide the same services at higher prices to consumer and business customers.
        - ILECs will abandon the cost plus reasonable profit model mandated by Congress.
    - Absent enforceable commitments regarding the incumbent LECs' commercial alternatives, forbearance would be arbitrary and capricious and conflict with the *BDS Order's* reliance on the continued availability of UNEs to constrain BDS prices.
    - Unbundling does not deter fiber investment because incumbent LECs have the right to retire copper to end their unbundling obligations when they build fiber.
- If the Commission grants forbearance (on a nationwide or partial basis), it should provide a reasonable transition period for customers of competitive LECs to maintain voice and broadband service as their preferred provider transitions away from UNEs.
- If the Commission grants any forbearance relief, TPx proposes that the Commission adopt the following principles:
    - A minimum seven (7) year transition period for customers and competitive providers to move off of UNEs. A short transition period would be highly disruptive and costly to everyone but the incumbent LECs.
    - Rates charged for UNEs *in service or ordered* prior to the effective date of any forbearance order ("embedded UNEs") should be frozen at the UNE rate throughout the transition period.

- Rates for UNEs ordered following forbearance should be determined by the year in which the UNE is ordered.

    - For example, UNEs ordered in Year One post-forbearance could increase by a small amount from the embedded base rates. Year Two rates could increase by a small amount from Year One, etc.

    - Rates charged for network facilities ordered following forbearance should be frozen for the remainder of the transition period. For example, Year Two rates should apply to all UNEs ordered in Year Two throughout the transition.

- During the transition period, incumbent LECs should be prohibited from increasing the rates for any fees associated with the ordering, provisioning or installation of any network element or facility that is the subject of a grant of forbearance.

- Incumbent LECs and competitive LECs should be required to use mutual best efforts to negotiate commercial terms and transition UNEs to successor arrangements.