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June 14, 2019

VIA ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
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:

Pursuant to the *Protective Order* in the above-captioned proceeding,[1] Granite Telecommunications, LLC, Manhattan Telecommunications Corporation d/b/a Metropolitan Telecommunications, and Access One, Inc. hereby submit for filing a redacted, public version of the enclosed ex parte. The Highly Confidential version of the ex parte has been filed by hand with the Office of the Secretary and will be made available for review pursuant to the terms of the *Protective Order*.

Please contact me if you have any questions regarding this submission.

[1] *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks,* Order, 33 FCC Rcd. 5290 (2018) ("*Protective Order*").

Respectfully submitted,

/s/ Thomas Jones
Thomas Jones

Counsel for Granite Telecommunications, LLC
Manhattan Telecommunications Corporation d/b/a
Metropolitan Telecommunications, and Access One, Inc.

Enclosure

cc: Terri Natoli
Michele Berlove
Edward Krachmer
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VIA HAND DELIVERY AND ECFS ***EX PARTE NOTICE***

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:

On Wednesday June 12, 2019, the undersigned and Mia Guizzetti Hayes of Willkie Farr and Gallagher LLP, counsel for Granite Telecommunications, LLC ("Granite"), Manhattan Telecommunications Corporation d/b/a Metropolitan Telecommunications ("MetTel"), and Access One, Inc. ("Access One") (together, the "Joint Parties"), spoke by phone with Terri Natoli and Michele Berlove of the Wireline Competition Bureau regarding (1) the manner in which competitive carriers rely on avoided-cost resale under Section 251(c)(4) to provide traditional TDM-based telephone services via copper loops ("traditional TDM service") to business and government customers, and (2) the appropriate transition for avoided-cost resale if forbearance were granted.

1. Competitors' Use of Avoided-Cost Resale

During the call, we explained that many business and government customers rely on traditional TDM service because of its unique characteristics, and they do not regard wireless or IP-based voice service as a substitute.[1] Demand for traditional TDM service therefore remains significant. For example, traditional TDM service is purchased by **[BEGIN HCI]** **[END HCI]** of Granite's business and government customers, and **[BEGIN HCI]** **[END HCI]** of Granite's lines are provided to business and government customers that require traditional TDM service at ten or

[1] *See* Declaration of William P. Zarakas ("Zarakas Decl.") ¶ 14 (Aug. 6, 2018), attached as Attachment B to Opposition of Granite to US Telecom's Forbearance Petition, WC Docket No. 18-141 (Aug. 6, 2018) ("Granite Opp.") (observing that many business customers "are specifically seeking copper-based TDM service"); Granite Opp. at 16-21; Declaration of Larry Antonellis ¶¶ 9-27 (Aug. 6, 2018), attached as Attachment A to Granite Opp. ("Antonellis Decl."); Opposition of MetTel, WC Docket No. 18-141, at 4-6 (Aug. 6, 2018) ("MetTel Opp."); Declaration of Sean J. Sullivan ¶¶ 11-21, attached to MetTel Opp.; Reply Comments of Granite in Support of Motion for Summary Denial and Opposition, WC Docket No. 18-41, at 9-10 (Sept. 5, 2018).

more locations.[2] We also stated that customers frequently purchase both IP-based and traditional TDM service at a single location, which is further evidence that those services belong in separate product markets.[3]

We explained that approximately **[BEGIN HCI]** **[END HCI]** of traditional TDM voice lines provided by Granite are obtained pursuant to interconnection agreements with ILECs.[4] Competitors typically purchase traditional TDM service under interconnection agreements directly governed by Section 251(c)(4) when ILECs refuse to offer traditional TDM in commercial wholesale agreements or when the pricing or features provided via avoided-cost resale are advantageous.[5] Competitors also rely on the Section 251(c)(4) avoided-cost resale requirement as a protection against ILEC abuse of market power when negotiating the prices for traditional TDM service in commercially negotiated agreements with the ILECs.[6] In both contexts, the avoided-cost resale requirement serves as a check on ILEC monopoly power by providing competitors with a regulatory backstop when ILECs demand supra-competitive prices.

In contrast, where avoided-cost resale is *not* available, competitors have no choice but to accede to ILECs' demands for supra-competitive prices. For example, as Granite has explained, when it has attempted to resell traditional TDM service to customers located in the service territories of ILECs that are not subject to Section 251(c)(4) as a result of the Section 251(f) rural ILEC exemption, **[BEGIN HCI]**

[END HCI]

Importantly, ILECs that are exempt from the application of Section 251(c)(4) are nevertheless subject to the duty under Section 251(b)(1) not to prohibit or impose unreasonable or discriminatory conditions or limits on the resale of telecommunications services.[9] But Section 251(b)(1) does not require that ILECs reduce their prices by the costs they avoid by selling services at wholesale, places

[2] *See* Granite Opp. at 20.

[3] *See id*. at 17; Antonellis Decl. ¶¶ 16-17, 19.

[4] *See* Granite Opp. at 25; Antonellis Decl. ¶ 40.

[5] *See* Granite Opp. at 25; Antonellis Decl. ¶ 40; Zarakas Decl. ¶¶ 21-29.

[6] *See* Granite Opp. at 26; Antonellis Decl. ¶¶ 32-44; Zarakas Decl. ¶¶ 21-29.

[7] *See* Granite Opp. at 27; Antonellis Decl. ¶ 38.

[8] *See* Granite Opp. at 27; Antonellis Decl. ¶ 38.

[9] *See* 47 U.S.C. § 251(b)(1).

the burden of demonstrating harm on the competitor, and provides only a *post hoc* enforcement mechanism, among other deficiencies. Granite's experience operating in territories served by ILECs that are subject to Section 251(b)(1) but not Section 251(c)(4) demonstrates that the former is not an effective safeguard against ILECs' abuse of market power.[10]

We also reiterated that the continued availability of UNE voice grade DS0 copper loops is extremely important to the Joint Parties' ability to serve business and government customers in CenturyLink's ILEC region. Granite's and MetTel's commercial wholesale agreements with CenturyLink provide an overall wholesale discount for traditional TDM service that is similar to the avoided-cost resale discount.[11] The agreements achieve this outcome by setting the price for the loop component of traditional TDM service to be equal to the price that CenturyLink charges for the DS0 voice grade copper loop purchased as a UNE, and setting the price for the other components of the service (e.g., switching) at a commercially-negotiated level.[12] We explained that elimination of UNE rate regulation for DS0 voice grade copper loops would increase the price the competitors pay for TDM lines they buy in CenturyLink's ILEC region.[13] In fact, in discussions with Granite, CenturyLink has expressly reserved the right to increase the prices that it charges Granite for traditional TDM service if the Commission grants forbearance. CenturyLink would likely take the same approach with MetTel. As a result, the competitors' business and government customers in CenturyLink's ILEC region would face increased retail prices, and, because resale competitors are the only alternative to the ILEC in the provision of traditional TDM service, the benefits of competition would be diminished.[14]

Finally, we explained that, absent the regulatory backstop provided by the Section 251(c)(4) avoided-cost resale requirement, ILECs would raise the prices they charge for traditional TDM service made available in commercial wholesale agreements. Granite has explained that, were this to occur, **[BEGIN HCI]**

[END HCI] The record of this proceeding provides ample evidence to

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[10] *See* Granite Opp. at 29-31.

[11] *See* Letter from John Nakahata, Counsel for INCOMPAS, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-141, at 5 (June 3, 2019).

[12] *See id*.

[13] *See id*.

[14] *See id*. at 5-6.

[15] *See* Antonellis Decl. ¶ 42.

conclude that if forbearance from Section 251(c)(4) were granted, other resale competitors, including MetTel and Access One, as well as their business and government customers, would suffer the same harms, to the ultimate detriment of competition and consumers.

2. Transition

During the call, we reiterated that the ILECs have provided no basis in the record for granting forbearance from the application of Section 251(c)(4) avoided-cost resale to traditional TDM service purchased by government and business customers. In fact, it is striking that, while the ILECs have made some (albeit unmeritorious) attempts to support forbearance for unbundled network elements, they have offered virtually no arguments regarding resale: their economist reports do not discuss resale; they have provided no analysis of the relevant market; they have provided no information regarding the geographic areas in which competitive alternatives are available (other than to rely on Form 477 broadband deployment data that is irrelevant and unreliable); and the information and arguments regarding the extent to which competitive carriers rely on resale have been thoroughly refuted. Given the absence of any record evidence to support forbearance, it would be arbitrary and capricious for the agency to grant forbearance for avoided-cost resale as it applies to traditional TDM service sold to business and government customers.

Nevertheless, in the event that the Commission were to grant such forbearance, the Joint Parties request that, in doing so, it account for the terms and pending negotiations of downstream retail contracts. First, a large number of the Joint Parties' service contracts with business customers are three years in duration, and, in the case of some contracts for large volumes of service, give the customer the right to extend the term by one or two 12-month time periods ("option years"). The prices for traditional TDM service cannot be increased during the term of the contracts, including during the option years. In addition, the Joint Parties have been actively marketing such traditional TDM service. In some cases such marketing consists of offering the three-year contract term with fixed prices to new customers. In other cases such marketing consists of efforts to renew contracts with existing customers on the same terms and conditions. These discussions are often extremely complex and slow, frequently lasting many months or even more than a year. This is especially true with very large customers that have thousands of locations in dozens of ILEC territories. Customers expect that their service provider will remain true to its offer of service in the future. If the service provider has promised to provide service to a new or existing customer under a future contract of three years in duration at fixed prices, it will suffer substantial reputational harm if it fails to meet that commitment.

However, forbearance would make it highly unprofitable for a competitive provider to meet its obligations under existing contracts and promises of future service arrangements. As explained, the Joint Parties provide traditional TDM service by purchasing that service at wholesale from ILECs under interconnection agreements directly governed by Section 251(c)(4) and under commercial wholesale agreements whose prices are strongly influenced by the availability of Section 251(c)(4). Virtually all interconnection agreements contain change of law provisions that would allow ILECs to reduce the resale discount or eliminate it entirely if forbearance were granted. While the prices in

commercial wholesale agreements do not contain similar provisions, a number of the Joint Parties' commercial wholesale agreements will expire within the next calendar year. In the absence of the disciplining effect of avoided-cost resale, the ILECs are likely to substantially increase the prices for traditional TDM service included in commercial wholesale agreements upon renewal. Both forms of price increases threaten to force the Joint Parties to serve business customers under existing and promised retail contracts at a significant loss. In order to address this concern, it would be appropriate to postpone the effective date of forbearance from Section 251(c)(4) avoided-cost resale for traditional TDM service sold to business customers by five years from the grant of forbearance. This delay would give the competitors the time to adjust their marketing and standard contract terms to the post-forbearance environment, assuming offers of service are even viable in such an environment.

If, as seems entirely possible, resale competitors are forced to withdraw from some or all parts of the traditional TDM business service market, a transition period would give business customers the time necessary to adjust to the new environment. A key value provided by resale competitors is that they enable business customers with locations in many ILEC territories to purchase traditional TDM service from a single service provider. If resale competitors are unable to perform this function, business customers would need to enter into contracts directly with the ILECs. For many large business customers, this could mean that they must do so for more than **[BEGIN HCI]** **[END HCI]** ILECs.[16] This is likely to be an extremely time-consuming process. Even if some resale competitors remain in the market while others exit, this would require that many business customers negotiate large and complex service contracts with new resale service providers, also a long and difficult process. All of these factors demonstrate that, from the business end user perspective, five years is an appropriate transition period.

Second, federal government customers present an even more difficult situation. The Enterprise Infrastructure Services ("EIS") contract terms govern most of the services, including traditional TDM service, that firms like Granite and MetTel sell to federal government customers. Federal government agencies continue to purchase a large volume of traditional TDM service for critical infrastructure and functionalities, and many federal agencies are unlikely to transition from traditional TDM service to VoIP in the near future.[17] The EIS contract consists of an initial five-year term, and it gives the

[16] *See* Antonellis Decl. ¶ 7 (explaining that **[BEGIN HCI]** **[END HCI]** of Granite's customers have service locations in the territories of **[BEGIN HCI]** **[END HCI]** ILECs).

[17] *See, e.g.*, Letter from Thomas Jones, et al., Counsel for Granite Telecommunications, LLC, Manhattan Telecommunications Corporation d/b/a Metropolitan Telecommunications, and Access One, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-141, at 4-9 (Mar. 14, 2019) (describing the regulatory and practical reasons why numerous federal agencies, including the Federal Aviation Administration, Federal Bureau of Investigation, and Department of Defense currently demand traditional TDM service and will do so for the foreseeable future); Letter from David J. Redl, Assistant Secretary for Communications and Information, NTIA, to Ajit Pai, Chairman, FCC, WC Docket No. 17-84, at 2 (July 19, 2018) (describing the challenges the federal government faces in the

government customer (which is the General Services Administration or "GSA," acting on behalf of government customers) the right to extend the contract by two successive five-year terms. Rates that service providers must charge government customers are essentially locked during the initial five-year term.[18] While there may be opportunity for a service provider to seek to increase prices during the extension terms of the contract, GSA has the sole discretion as to whether to allow price increases, the increases are capped at 10 percent per five-year extension.[19] Thus, in the case of government customers, increases in ILEC wholesale prices made possible by forbearance could force the Joint Parties to operate at a loss for up to fifteen years. This extended commitment, by itself, justifies denial of forbearance for government customers. However, if the Commission nevertheless grants forbearance even for government customers, it should give service providers enough time to phase in price increases that could perhaps be acceptable to the government during the initial five-year extension. In order to achieve this, it would be appropriate to postpone the effective date of forbearance from Section 251(c)(4) avoided-cost resale for traditional TDM service sold to federal and state government customers by <u>seven years</u> from the grant of forbearance.

Please contact me with questions or concerns about the foregoing.

Respectfully submitted,

<u>/s/ Thomas Jones</u>
Thomas Jones

Counsel for Granite Telecommunications, LLC, Manhattan Telecommunications Corporation d/b/a Metropolitan Telecommunications, and Access One, Inc.

cc: Terri Natoli
Michele Berlove

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transition to IP-based services, particularly in areas where service providers lack competitive pressure); Reply Comments of Granite, MetTel, and AccessOne, WC Docket No. 18-41, at 4-9 (May 28, 2019) (quantifying federal government agencies' current and future demand for traditional TDM service).

[18] *See* General Services Administration, *Enterprise Infrastructure Solutions (EIS) Request for Proposals, Section H Special Contract Requirements,* § H.19 (July 2017), http://www.granitenet.com/GetRedactedFile/EIS_Section_H_REDACTED.pdf.

[19] *See id.*