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June 26, 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
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VIA HAND DELIVERY AND 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:

This letter responds to the discussion of Section 251(c)(4) avoided-cost resale in letters filed on June 14, 2019 and June 20, 2019 in the above-referenced docket by USTelecom—The Broadband Association ("USTelecom").[1] As with all of its advocacy regarding avoided-cost resale, USTelecom's letters reduce to a series of conclusory statements that are unsupported by facts or law. The letters make clear again that USTelecom would very much like to get rid of avoided-cost resale. This is unsurprising since forbearance would enable ILECs to impose a price squeeze on resale competitors. But it is not enough that USTelecom wants this relief. It must ground its arguments in relevant facts and a sound reading of the statute.[2] It has done neither.

[1] *See* Letter from Patrick R. Halley, Senior Vice President, Policy & Advocacy, USTelecom—The Broadband Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-141 (June 20, 2019) ("USTelecom June 20 Letter"); Letter from Patrick R. Halley, Senior Vice President, Policy & Advocacy, USTelecom—The Broadband Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-141 (June 14, 2019) ("USTelecom June 14 Letter"). This letter is written on behalf of Granite Telecommunications, LLC ("Granite"), Manhattan Telecommunications Corporation d/b/a Metropolitan Telecommunications ("MetTel"), and Access One, Inc. (together, "the Joint Parties").

[2] *See Business Data Services in an Internet Protocol Environment, et al.*, Report and Order on Remand (WC Docket Nos. 05-25, 16-143; GN Docket No. 13-5) and Memorandum Opinion and Order (WC Docket No. 18-141), FCCCIRC 1907-05, ¶¶ 55-58, 64-65 (June 19, 2019) (rejecting ILEC arguments that the Commission should forbear from UNE transport requirements on a nationwide basis, and instead tailoring forbearance to transport routes where the record shows that ILECs face competition). As the Commission explained, "we can agree with USTelecom only to the extent that the record

USTelecom's arguments boil down to four basic assertions. *First*, USTelecom states that it "strongly opposes [the Joint Parties'] claim that there is a separate end-user product market for" traditional TDM service.[3] To review, the Joint Parties have filed declarations by experts in the purchasing decisions of business and government customers.[4] Those experts described the distinct features of TDM-based telephone service provided via copper loops ("traditional TDM service") that a large number of business and government customers highly value, and explained that business and government customers do not perceive other telephone services, including VoIP, as substitutes for traditional TDM service.[5] In addition, Granite filed a declaration by an economics expert, William Zarakas, in which Mr. Zarakas analyzed the market for traditional TDM service and concluded that, because of business customers' demand for the distinct characteristics of traditional TDM service and ILECs' market power over that service, elimination of avoided-cost resale would **[BEGIN HCI]** **[END HCI]**.[6] This is precisely the kind of testimony and analysis that the Commission has frequently relied on in defining relevant product markets.[7] The Joint Parties also filed data showing business and government customers'

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demonstrates that [non-ILEC] networks are in fact ubiquitous, and elsewhere we must follow the record, not USTelecom's assertions to the contrary." *Id.* ¶ 65.

[3] USTelecom June 14 Letter at 4.

[4] *See* Declaration of William P. Zarakas ("Zarakas Decl.") (Aug. 6, 2018), attached as Attachment B to Opposition of Granite to USTelecom's Forbearance Petition, WC Docket No. 18-141 (Aug. 6, 2018) ("Granite Opp."); Declaration of Larry Antonellis (Aug. 6, 2018), attached as Attachment A to Granite Opp. ("Antonellis Decl."); Supplemental Declaration of Larry Antonellis (Nov. 6, 2018), attached as Attachment I to Letter from Thomas Jones, Willkie Farr & Gallagher LLP, Counsel for Granite Telecommunications, LLC, et al., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-141 (Nov. 8, 2018) ("Joint Parties' Nov. 8 Letter"); Declaration of Sean J. Sullivan ("Sullivan Decl."), attached to Opposition of MetTel, WC Docket No. 18-141 (Aug. 6, 2018) ("MetTel Opp."); Declaration of John Hoehne (Aug. 3, 2018) ("Hoehne Decl."), attached as Attachment 3 to Opposition of INCOMPAS, FISPA, Midwest Association of Competitive Communications, and the Northwest Telecommunications Association, WC Docket No. 18-141 (Aug. 6, 2018).

[5] *See, e.g.*, Zarakas Decl. ¶ 14 (observing that many business customers "are specifically seeking copper-based TDM service"); Antonellis Decl. ¶¶ 9-27; Sullivan Decl. ¶¶ 11-21; Hoehne Decl. ¶ 18.

[6] Zarakas Decl. ¶¶ 21-29.

[7] *See, e.g.*, *Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, 25 FCC Rcd. 8622, ¶¶ 55-61 (2010) (relying on expert declarations to find that mobile wireless and residential wireline voice service are not in the same relevant product market); *Verizon Communications, Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd.

substantial and persisting demand for TDM-based telephone services,[8] explained that many customers purchase traditional TDM service and VoIP at the same location,[9] and explained that business customers pay significantly higher prices for traditional TDM service than they do for VoIP.[10]

USTelecom has offered *nothing* relevant in response to this evidence: no testimony by an industry expert, no testimony by an economic expert, no assessment of customers' continued demand for traditional TDM services, no assessment of whether such customers demand traditional TDM service and VoIP at the same location, and no assessment of prices. In its recent letters, USTelecom relies exclusively on the Commission's conclusion that packet-based business data services ("BDS") are substitutes for TDM-based BDS.[11] But that conclusion is irrelevant. The telephone service marketplace is completely different from the BDS marketplace. Among other things, customers highly value the line-powered feature of traditional TDM service, but that feature is irrelevant to customers seeking BDS. The record evidence therefore overwhelmingly demonstrates that traditional TDM service should be treated as a distinct product market.

18433, ¶¶ 25-27 (2005) (relying on expert declarations to determine "that many purchasers of wholesale special access services view Type I services as substantially superior to Type II services due to differences in performance, reliability, security, and price," and that those services therefore are in separate relevant product markets).

[8] Granite Opp. at 16-21 (quantifying business customers' demand for TDM telephone services); MetTel Opp. at 4-6 (same); Reply Comments of Granite, MetTel, and Access One, WC Docket No. 18-41, at 4-9 (May 28, 2019) ("Joint Parties' May 28 Reply") (describing government customers' current and future demand for traditional TDM service).

[9] *See* Letter from Thomas Jones, Counsel for Granite Telecommunications, LLC, et al., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-141, at 2 (Nov. 19, 2018) ("Joint Parties' Nov. 19 Letter") (observing that "more than 50 percent of MetTel's VoIP customers purchase traditional TDM service from MetTel at the same location at which they purchase VoIP . . . even though the prices that MetTel must charge for traditional TDM service are on average more than double the prices [MetTel] charges for VoIP," thereby indicating that traditional TDM service provided to business and government customers is a separate relevant product market); *see also* Granite Opp. at 7, 17; Antonellis Decl. ¶¶ 16-17, 19.

[10] *See* Joint Parties' Nov. 19 Letter at 2 (explaining that the Joint Parties often must charge customers specifically seeking the security and reliability of traditional TDM service up to two and a half times the price of VoIP service, further distinguishing traditional TDM service provided to business and government customers as a separate relevant product market).

[11] USTelecom June 14 Letter at 5-6.

USTelecom argues that the Commission's Voice Telephone Service Reports show that resale of TDM telephone service is an insignificant part of the overall demand for voice services,[12] but that argument rests on its flawed product market analysis. Specifically, USTelecom asserts that, in determining the portion of the market that is served by competitors providing resold ILEC traditional TDM service, it was justified in using a denominator that included non-TDM-based services. It also asserts that growth in non-switched telephone services shows that resold traditional TDM service is declining in significance.[13] Both of these arguments rely on USTelecom's unsupported and incorrect assertion that VoIP should be included in the same product market as traditional TDM service. Both must therefore be rejected. The only meaningful analysis of the Commission's data is the one submitted by the Joint Parties, which shows that resale of traditional TDM service is a significant and growing part of the relevant market.[14]

Second, USTelecom repeats its view that avoided-cost resale is not relevant to the forbearance analysis where competitors use it to obtain reasonable prices in commercial wholesale agreements ("CWAs") rather than interconnection agreements ("IAs") that expressly incorporate Section 251(c)(4).[15] USTelecom does not attempt to show how this conclusion is consistent with the terms of Section 10, Commission precedent, or sound public policy. This is not surprising, since no such showing is possible. Section 10 states that the Commission must determine whether continued enforcement of a requirement remains necessary to ensure that prices are just and reasonable and not unjustly or unjustly discriminatory, whether it remains necessary to protect consumers, and whether retaining the requirement is in the public interest.[16] It states further that, in assessing whether retaining the requirement is in the public interest, the Commission "shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions."[17] Nowhere in the terms of Section 10 is there in any indication that the scope of this inquiry should be limited to

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[12] *See* Letter from Patrick R. Halley, Senior Vice President, Advocacy and Regulatory Affairs, USTelecom—The Broadband Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-141, at 13 (May 6, 2019); Letter from Patrick R. Halley, Senior Vice President, Advocacy and Regulatory Affairs, USTelecom—The Broadband Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-141, at 2 (May 10, 2019).

[13] USTelecom June 14 Letter at 9.

[14] Joint Parties' May 28 Reply at 9-16.

[15] USTelecom June 20 Letter at 2-3; USTelecom June 14 Letter at 3-4.

[16] *See* 47 U.S.C. § 160(a).

[17] *See id.* § 160(b).

circumstances where the requirement for which forbearance is sought directly applies. Moreover, the Commission has in the past rejected arguments very similar to the one USTelecom makes here.[18]

USTelecom states that "the statutory purpose of Section 251(c)(4) is not to provide negotiating leverage, but to serve as a competitive market entry option in its own right."[19] But USTelecom offers no support for this assertion, and it is flatly wrong. As the Joint Parties have explained, the terms and structure of Section 252 and the Commission's interpretation of those provisions show that the purpose of the Section 251(c) requirements is to balance out the bargaining power between ILECs and competitors so that the parties can reach an agreement, regardless of whether that agreement incorporates or departs from the terms of Section 251(c).[20] For example, Section 252(a)(1) expressly contemplates that parties will enter into agreements "without regard to the standards set forth in subsections (b) and (c) of section 251 of this title."[21] This provision reflects Congress' expectation that the requirements of Section 251(c) would be used as leverage by competitors to negotiate agreements with ILECs that might not include the specific standards set forth in Section 251(c)(4). Yet under USTelecom's narrow reading of the forbearance standard, services purchased by competitors pursuant to such negotiated agreements would be irrelevant to the forbearance inquiry.[22]

Nor would it make any sense as a policy matter to prohibit consideration of CWAs. As Mr. Zarakas explained, the only reason that ILECs offer reasonable prices in CWAs is the threat that

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[18] In the *Triennial Review Remand Order*, the Commission rejected the argument that competitors' reliance on special access services justified eliminating UNEs because the Commission found that the availability of UNEs was necessary to ensure that special access prices were reasonable. *See Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd. 2533, ¶¶ 64-65 (2005) ("*Triennial Review Remand Order*").

[19] USTelecom June 14 Letter at 3.

[20] *See* Joint Parties' Nov. 8 Letter at 18; Letter from Thomas Jones, Willkie Farr & Gallagher LLP, Counsel for Granite Telecommunications, LLC, et al., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-141, at 13-14 (Mar. 14, 2019); *see also* Granite Opp. at 8-11.

[21] *See* 47 U.S.C. § 252(a)(1).

[22] Nor should there be a distinction made here between negotiated agreements that are filed with the states for review under Section 252(a)(1) and CWAs, which generally are not. Competitors have little choice but to agree to terms in CWAs stating that the agreements are not governed by Section 252 because ILECs have the market power to withhold key benefits from competitors unless they agree to such provisions. For example, ILECs make it easier to obtain in CWAs such benefits as fixed or predictable pricing over a term (which in turn allow for predictable pricing for customers), as well as uniform ordering and billing mechanisms.

competitors will invoke Section 251(c)(4).[23] Eliminating avoided-cost resale would have the same effect on downstream business and government customers of traditional TDM service regardless of whether competitors use the availability of Section 251(c)(4) to obtain reasonable wholesale prices in CWAs or IAs. In both cases, retail prices would increase, innovation would slow, and competitive choices would shrink. It would therefore harm consumer welfare to conclude that customers served by service inputs obtained under CWAs are somehow irrelevant to the Section 10 analysis.[24]

Third, USTelecom again asserts that the Commission should rely on the supposed "near-ubiquity of cable services at speeds of 25 Mbps/3 Mbps" to conclude that ILECs somehow face sufficient competition in the provision of traditional TDM service.[25] This information is of course irrelevant because cable companies do not provide traditional TDM service. But even if cable companies did provide that service, it is now abundantly clear that the data provided in Form 477 filings are unreliable because they vastly overstate the extent of cable network deployment. USTelecom's own president, FCC commissioners, members of Congress, and industry analysts all agree on this point.[26] Moreover, that conclusion comports with Granite's own analysis of the availability of cable network facilities.[27]

Fourth, USTelecom repeats its empty refrain that ILECs will have the incentive to sell traditional TDM service to wholesale customers on reasonable prices, terms, and conditions even if

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[23] *See* Zarakas Decl. ¶¶ 22-29.

[24] Given ILECs' ability to make it easier for competitors to purchase resold services under CWAs than under avoided-cost resale, it is obviously incorrect to assert, as USTelecom does, that competitors' increasing reliance on CWAs necessarily proves the declining importance of avoided-cost resale. *See* USTelecom June 20 Letter at 3. Given ILECs' monopoly over traditional TDM service, this trend likely reflects ILECs' growing exploitation of their market power to push competitors to utilize CWAs. ILECs' argument that competitors' reliance on CWAs justifies forbearance shows that ILECs have had an incentive to exploit their market power in this way (i.e., to establish a (flawed) pretext for seeking forbearance).

[25] *See* USTelecom June 20 Letter at 2-3; USTelecom June 14 Letter at 2.

[26] *See* Joint Parties' May 28 Reply at 17-22.

[27] *See* Antonellis Decl. ¶ 31 (describing survey of a large customer's locations showing that **[BEGIN HCI] [END HCI]**); Slide Deck at 5-6, attached as Attachment to Letter from Thomas Jones, Counsel for Granite Telecommunications, LLC, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 13-5, 12-353; WC Docket Nos. 14-192, 04-36 (June 3, 2015) (explaining that cable company networks did not serve 85 percent of Granite's customer locations, and cable company network deployment would be cost-prohibitive (i.e., would cost more than $3,500) in 51 percent of the unserved locations).

forbearance from avoided-cost resale were granted.[28] The Joint Parties have already explained why there is no basis for this assertion.[29] The ILECs' own recent conduct offers further proof of this since they **[BEGIN HCI]**

[END HCI] The obvious implication is that the ILECs are waiting to see if they can exploit the absence of avoided-cost resale to increase prices in CWAs.

In addition to the flaws in what the USTelecom letters assert, it is significant that USTelecom's letters are silent as to the *de minimis* costs associated with complying with the avoided-cost resale requirement. As Mr. Zarakas explained, because the avoided-cost resale discount only reflects the costs that ILECs avoid when selling at wholesale, "[t]here is . . . no adverse impact on [ILECs'] ability to gain profits or to invest in the construction of new networks or the provision of new services."[31] The *de minimis* costs associated with retaining avoided-cost resale are a crucial consideration in the forbearance analysis since they show that the considerable benefits associated with maintaining the regulation are not remotely outweighed by any purported costs associated with doing so.

All of this shows that there is no basis for granting USTelecom's request for forbearance from the Section 251(c)(4) avoided-cost resale requirement. Any such grant would be arbitrary and capricious.

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[28] *See* USTelecom June 20 Letter at 3; USTelecom June 14 Letter at 2.

[29] *See* Zarakas Decl. ¶¶ 21-29 (explaining that ILECs would increase wholesale prices if avoided-cost resale were eliminated); Granite Opp. at 27 (explaining that, when operating in areas served by ILECs exempt from Section 251(c)(4) because they qualify for the Section 251(f) rural exemption, **[BEGIN HCI]**

[END HCI]). Moreover, the Commission's 1996 decision to eliminate the wireless resale rule is irrelevant here. The Commission eliminated the wireless resale rule following a five-year sunset period with the understanding that facilities-based competition was already significant and was increasing. *See generally Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, First Report and Order, 11 FCC Rcd. 18455 (1996); *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, et al.*, Memorandum Opinion and Order on Reconsideration, 14 FCC Rcd. 16340 (1999). These circumstances are markedly different from the present market for traditional TDM service in which ILECs retain monopoly power.

[30] *See, e.g.*, Joint Parties' Nov. 8 Letter at 23-24; **[BEGIN HCI]**

[END HCI].

[31] Zarakas Decl. ¶ 20.

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

Respectfully submitted,

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