

July 3, 2019

**Ex Parte via ECFS**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

*Re: Regulation of Business Data Services for Rate-of-Return Local Exchange Carriers; Business Data Services in an Internet Protocol Environment; Special Access for Price Cap Local Exchange Carriers, WC Docket No. 17-144; Business Data Services in an Internet Protocol Environment, WC Docket No. 16-143; Special Access for Price Cap Local Exchange Carriers, WC Docket No. 05-25; 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,

INCOMPAS files this ex parte in response to the July 1, 2019 Ex Parte submitted by USTelecom, discussing the *Eliminating Unnecessary Regulation of Price Cap Carriers' Transport Services and Facilities*, Report and Order on Remand and Memorandum Opinion and Order (“*Draft Transport Order*”) that the Commission will consider at its July 10 Open Meeting.<sup>1</sup>

**1. The Commission Should Not Reduce the Transition Periods Set in the Draft Transport Order, Which are Already too Short.**

Contrary to USTelecom’s assertions, the Commission has no reason to reduce the six-month “freeze” of current market conditions nor the three-year transition period implemented in the *Draft Transport Order*.<sup>2</sup> The Commission has broad discretion in establishing transitions, especially with respect to rates.<sup>3</sup> The Commission’s draft is correct to weigh the reasonableness of its transition period based on the specific findings and circumstances on the record. As the

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<sup>1</sup> Letter from Patrick R. Halley, Counsel, Senior Vice President, Policy & Advocacy, USTelecom – The Broadband Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-144 et al. (filed July 1, 2019) (“USTelecom July 1 Ex Parte”).

<sup>2</sup> *Eliminating Unnecessary Regulation of Price Cap Carriers' Transport Services and Facilities*, WC Docket Nos. 16-143 et al., 18-141, Report and Order on Remand, Memorandum Opinion and Order (Draft Rel. June 19, 2019), ¶ 61 (“*Draft Transport Order*”), <https://docs.fcc.gov/public/attachments/DOC-358069A1.pdf>.

<sup>3</sup> See *Sorenson Commc'ns, Inc. v. FCC*, 765 F.3d 37, 41, 51-52 (D.C. Cir. 2014) (deferring to discretion and judgment of FCC about how best to achieve a smooth transition away from rate regulation).

*Draft Transport Order* recognizes, a six-month “freeze” “will enable competitive LECs to execute short term business plans and fulfill contractual obligations” to existing or new customers, while the three-year transition takes into consideration the longer period needed by smaller competitive LECs to secure alternative deployments.<sup>4</sup> If anything, a three-year transition period is too short for the small competitive LECs (“CLECs”) serving remote non-urban areas with slower evolution of actual and potential transport competition.<sup>5</sup> As INCOMPAS proposed, the Commission should provide an additional 3 year transition period in those areas.

Notably, USTelecom concedes that three years is a reasonable transition period.<sup>6</sup> Its claim that CLECs already received “nearly three years” to transition rests on the fallacious premise that this three-year timeframe should start running from the date of the Petition.<sup>7</sup> Under USTelecom’s faulty logic, CLECs should have started acting from the day USTelecom filed its Petition as if the Petition would be granted in its entirety. In arguing for eliminating the six-month “freeze,” USTelecom adopts the same reasoning.<sup>8</sup> Yet at the filing of the Petition, CLECs had no way of knowing which parts of the Petition would be granted and which parts would be denied. Indeed, the Petition has undergone several amendments since its initial filing.<sup>9</sup> Without knowing the outcome of the Petition, the reasonable path for CLECs to proceed on is to continue to operate their businesses and enter into new contracts with customers under the existing rules. The Commission reasonably took this reality into account, providing—what is the absolute minimal reasonable amount of time—a six-month new ordering period as a safety valve for CLECs to fulfill the bids and contracts that they committed to before knowing what changes the Commission would implement under its Transport Order.

Moreover, the transition timeframe still imposes significant restrictions on CLECs. First, the period within which new orders can be made is limited to six months. USTelecom

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<sup>4</sup> *Draft Transport Order* ¶¶ 60-61, 71.

<sup>5</sup> Letter from John T. Nakahata, Counsel, INCOMPAS, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-141 et al. at 2 (filed June 28, 2019).

<sup>6</sup> See USTelecom July 1 Ex Parte at 3 (“This 18-month transition period, coupled with the 15 months that the Petition will have been pending, provides competitive LECs with nearly three years to prepare for the transition.”).

<sup>7</sup> *Id.*; Petition for Forbearance of USTelecom – The Broadband Association, WC Docket No. 18-141, (filed May 4, 2018) (“Petition”).

<sup>8</sup> USTelecom July 1 Ex Parte at 2 (“Competitive local exchange carriers (“CLECs”) have been on notice for 15 months that the Commission could forbear from UNE DS1/DS3 transport.”).

<sup>9</sup> See, e.g., Letter from Jonathan Banks et al., Senior Vice President, Law & Policy, USTelecom – The Broadband Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-141 (filed June 21, 2018); Letter from Patrick R. Halley, Sr. V.P., Policy & Advocacy, USTelecom – The Broadband Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-141 (filed June 17, 2019); Letter from Patrick R. Halley, Sr. V.P., Policy & Advocacy, USTelecom – The Broadband Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-141 (filed July 1, 2019).

hyperbolically claims, without any evidence, that there will be an “ordering frenzy.”<sup>10</sup> But the only orders that could feasibly be placed in the next six months are those that are already in the sales process or shortly will be. This is not enough time to launch and complete a new sales campaign. Second, even where CLECs are able to make new orders of unbundled network element (“UNE”) DS1/DS3 transport services under the six-month “freeze,” the *Draft Transport Order* limits the time period that those services may be obtained under the regulated UNE rates to the three-year transition period from the date of the Transport Order.<sup>11</sup> This three-year cutoff in certain cases may be significantly less than the time period under which the CLEC is bound under the terms and rates of its contract with customers.

Expecting parties to operate as if a forbearance petition is already granted upon filing would defeat the entire process of the forbearance proceeding. The *Draft Transport Order* correctly rejects USTelecom’s approach. Starting the six-month “freeze” and three-year transition from the date of the final Transport Order provides all parties with notice of and a reasonable timeframe to adjust to the rule changes.

In contrast to the Commission’s reasoned approach, USTelecom misapplies Commission precedent, making inapposite comparisons to transition timeframes granted under different circumstances, different services, or considerably narrower geographic markets. First, the *Triennial Review Remand Order* is inapplicable because the affected UNEs were ones for which the Commission concluded there was *no impairment*.<sup>12</sup> Without impairment, CLECs were not entitled to Section 251(c)’s unbundling requirements.<sup>13</sup> The areas with no impairment under the *TRRO* consist of the most competitive areas, while the forbearance contemplated by the Petition and *Draft Transport Order* extends a wider scope, capturing a wide variety of geographic markets with different competitive conditions, including areas in which potential competition is expected to discipline prices over time. Thus, a longer period is warranted under the *Draft Transport Order* to allow sufficient transition periods for CLECs serving less competitive areas and to prevent service disruption to customers.

Similarly, the Commission’s decisions in the *Qwest Omaha*<sup>14</sup> and *ACS*<sup>15</sup> forbearance orders to impose shorter transition periods and not allow new UNE orders were based on specific

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<sup>10</sup> See USTelecom July 1 Ex Parte at 2.

<sup>11</sup> *Draft Transport Order* ¶ 61.

<sup>12</sup> *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd. 2533, ¶¶ 5, 1442 (2005) (“*Triennial Review Remand Order*” or “*TRRO*”).

<sup>13</sup> See *TRRO* ¶ 1442.

<sup>14</sup> *Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metro. Statistical Area*, 20 FCC Rcd. 19415 (2005) (“*Qwest Omaha*”).

<sup>15</sup> *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S. C. § 160(c)), for Forbearance from Sections 251(c)(3) and*

findings and circumstances inapplicable here. In *Qwest Omaha*, the Commission based its forbearance decision on the presence of actual competition that Qwest faced from Cox and other carriers.<sup>16</sup> The *Draft Transport Order*, however, recognizes that its forbearance decision is based on both “current *and* potential competition.”<sup>17</sup> Potential competition requires a longer timeframe in order to develop. The *BDS Order* considered buildout within a half mile as a measure of competitive choice “over the medium term,” not immediately.<sup>18</sup> The Commission thus reasonably decided on a three-year transition period to “to fully ensure that current *and* potential competition plays its expected role in working to ensure just and reasonable incumbent LEC rates for commercial BDS transport” for CLECs and customers.<sup>19</sup>

Like *Qwest Omaha*, the *ACS* forbearance decision was based on the actual facilities-based competition presented by General Communication Inc. (“GCI”).<sup>20</sup> The Commission found that GCI was already “providing services over its own last-mile facilities to many customers” and “self-provisions all of its own transport.”<sup>21</sup> Moreover, the Commission further reduced the need for a longer transition period by “requir[ing] ACS to make loops and certain subloops available” to GCI “by no later than the end of the transition period, at the same rates, terms and conditions as those negotiated between GCI and ACS in Fairbanks, Alaska until commercially negotiated rates are reached.”<sup>22</sup> Unlike GCI, many CLECs affected by the *Draft Transport Order* do not self-provision their own transport nor enjoy the security of a price cap from a previous commercially negotiated agreement. Lastly, both *Qwest Omaha* and *ACS* set transition timeframes for highly narrow and specific geographic markets—the Omaha MSA and Anchorage study area, respectively—based on detailed local market data.<sup>23</sup> As discussed above, the *Draft Transport Order* affects markets across the country where competitive conditions are not uniform. The six-month “freeze” and longer transition period are reasonable under these circumstances.

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252(d)(1) in the Anchorage Study Area, Memorandum Opinion and Order, 22 FCC Rcd. 1958 (2007) (“ACS”).

<sup>16</sup> *Qwest Omaha* ¶ 73.

<sup>17</sup> *Draft Transport Order* ¶ 61.

<sup>18</sup> See *Business Data Services in an Internet Protocol Environment et al.*, Report and Order, 32 FCC Rcd. 3459, ¶¶ 43, 50 (2017) (“*BDS Order*”).

<sup>19</sup> *Draft Transport Order* ¶ 61.

<sup>20</sup> *ACS* ¶¶ 2, 20.

<sup>21</sup> *Id.* ¶¶ 20.

<sup>22</sup> *Id.* ¶ 2.

<sup>23</sup> *Qwest Omaha* ¶ 23, *ACS* ¶¶ 28-30.

Nor does the *BDS Order*<sup>24</sup> support USTelecom's position. First, the *Draft Transport Order* recognizes that UNE transport affects a broader market than BDS transport.<sup>25</sup> Given the greater number of customers and geographic areas affected, the transition process for UNE transport would be more complicated than if it were limited to BDS transport. The *Draft Transport Order* takes into account the Commission's interest in ensuring that rates are just and reasonable and avoiding service disruption for non-BDS customers.<sup>26</sup> As explained in our previous filings, many CLECs rely on UNE transport to reach the remote locations of multilocation customers and to provide important enhanced broadband internet access services, including service in areas where the ILEC has not upgraded its broadband network to offer the same level of service.<sup>27</sup> The transition period must be reasonably long to avoid disruption to these CLEC services, where the CLEC may be the customer's only option in the foreseeable term.

Second, USTelecom claims that a shorter transition period than the *BDS Order*'s 36-month transition period is warranted because in the *BDS Order*, "incumbent LECs could choose to "voluntarily withdr[a]w their tariffs during the six-month freeze period" and immediately raise rates.<sup>28</sup> This is a mischaracterization. USTelecom neglects to mention that ILECs could not immediately withdraw their contract tariffs; those contract tariff rates continued to apply for the remaining term of the contract.<sup>29</sup> Contracts tariffs, which were commonly used for BDS purchases, helped provide a safety valve for many CLECs affected by the *BDS Order* during and after the transition period. In contrast, the UNE market does not have contract tariffs or equivalent terms to ensure a smoother transition. In light of all the above factors, reducing the *Draft Transport Order*'s six-month "freeze" or three-year transition period is inconsistent with the Commission's interest in providing a reasonable transition that avoids service disruption and harm to consumers while facilitating the development of competition.

Finally, USTelecom's proposed 18-month transition period does not refute the *Draft Transport Order*'s reasonable conclusion that a longer transition is warranted. USTelecom claims that its 18-month period was the result of a negotiation between UNE purchasers and UNE sellers, but all of its members sell UNEs and none are exclusively UNE purchasers. This skews the balance of interests in USTelecom's internal negotiations such that they are not a reasonable proxy for the interests of the public as a whole.

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<sup>24</sup> *BDS Order*.

<sup>25</sup> See *Draft Transport Order* ¶¶ 55, 64.

<sup>26</sup> See *id.* ¶ 71.

<sup>27</sup> See Comments of INCOMPAS at 19-20, WC Docket No. 18-141 et al. (filed May 9, 2019); see Opposition of INCOMPAS, FISPA, Midwest Association of Competitive Communications, and the Northwest Telecommunications Association at 40, WC Docket No. 18-141 (filed Aug. 6, 2018).

<sup>28</sup> USTelecom July 1 Ex Parte at 4.

<sup>29</sup> *BDS Order* ¶ 170.

**2. The Commission Should Not Change the *Draft Transport Order's* Finding that USTelecom's May 6, 2019 Filing was Late, But It Should Grant USTelecom's Proposed Withdrawal of Its Request for UNE Transport Forbearance for Tier 3 Wirecenters.**

USTelecom asks the Commission not to characterize its May 6, 2019 ex parte as late-filed proposed changes to its forbearance petition. USTelecom ignores the fact that it chose the scope of its forbearance request, and the paucity of supporting data that it submitted. Indeed, as INCOMPAS previously set forth, the Commission could have (and should have) dismissed USTelecom's Petition in its entirety by granting INCOMPAS' motion for summary dismissal.<sup>30</sup> The changes USTelecom proposed properly require Commission approval.

The Commission, however, should nonetheless grant USTelecom's request to modify its forbearance request with respect to UNE Transport, proposed in the May 6 letter, to limit that request to Tier 1 and Tier 2 wirecenters, and thus to withdraw its request for forbearance as to Tier 3 wirecenters. Just as it has been reasonable to accept USTelecom's request to withdraw other aspects of its forbearance request, it is also reasonable to accept this request.<sup>31</sup> The record contains no opposition to their request on narrowing the scope of the petition in this manner.

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Please let me know if you have any questions.

Sincerely,



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<sup>30</sup> Motion for Summary Denial of INCOMPAS et al., WC Docket No. 18-141 (filed Aug. 6, 2018).

<sup>31</sup> *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks*, Order, DA No.19-622, WC Docket No. 18-141(rel. July 2, 2019); *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks*, Order, DA No. 19-573, WC Docket No. 18-141, Order (rel. June 18, 2019);