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July 15, 2019

VIA ECFS ***NOTICE OF EX PARTE***

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:

On July 11, 2019, Sana Sheikh, Senior Corporate Counsel of Granite Telecommunications, LLC ("Granite"), Joseph Farano, General Counsel, and Sean Sullivan, Vice President, Product Management and Regulatory Affairs, of Manhattan Telecommunications Corporation d/b/a Metropolitan Telecommunications ("MetTel"), Joel Miller, General Counsel of Access One, Inc. (together with Granite and MetTel, the "Joint Parties"), and Karen Reidy, Vice President of Regulatory Affairs of INCOMPAS, as well as Mia Guizzetti Hayes and the undersigned of Willkie Farr & Gallagher LLP, participated in separate meetings with Jamie Susskind, Chief of Staff and Wireline Advisor to Commissioner Carr, and Andrew Magloughlin, intern in Commissioner Carr's office; Arielle Roth, Wireline Advisor to Commissioner O'Rielly; Travis Litman, Chief of Staff and Wireline Advisor to Commissioner Rosenworcel; and Randy Clarke, Wireline Advisor to Commissioner Starks. During the meetings, the Joint Parties' representatives explained that the Commission should deny forbearance for avoided-cost resale of TDM-based telephone services provided via copper loops ("traditional TDM service") and voice-grade copper loop unbundled network elements ("VGCL UNEs"). We further explained that if the Commission grants forbearance for resale and VGCL UNEs, the order should not take effect for five years and three years for existing lines serving government and business customers, respectively, and the order should not take effect for four years and 18 months for newly-ordered lines serving government and business customers, respectively. Following is a description of the arguments we made in support of these assertions.

First, we explained that retaining avoided-cost resale would not slow the transition to IP voice services or the deployment of fiber loop facilities. The avoided-cost discount merely requires that the

wholesale discount equals the amount the ILECs save when selling to wholesale customers rather than retail customers.[1] If the costs associated with maintaining copper loop plant increase, the ILECs remain free to increase their retail prices for traditional TDM service, and the avoided-cost discount would simply apply to those higher underlying retail prices. The ILECs are also free to retire their copper loops at any time, as long as they comply with the relevant Commission rules, and the avoided-cost discount in no way affects this right. Such retirement operates as a form of unilateral forbearance because the elimination of copper eliminates traditional TDM service. The ILECs are also free to seek to discontinue traditional TDM service at any time, thereby effectively eliminating avoided-cost resale entirely since that requirement does not apply to VoIP. Again, application of the avoided-cost discount does not affect this right. If anything, the presence of competitors selling traditional TDM service would seem to accelerate the transition to VoIP and fiber since the ILECs have an extra incentive to eliminate competition made possible by avoided-cost resale. All of this supports the conclusion reached by the Joint Parties' economic expert in this proceeding that "[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."[2]

Second, Mr. Sullivan and Mr. Miller explained why business and government customers demand traditional TDM service and do not view other telephone services, including IP-based services, as substitutes. To begin with, and contrary to CenturyLink's and AT&T's assertions,[3] IP-based services are not as reliable as TDM-based services. This is so because IP-based services are not line-powered and have more points of potential failure than traditional TDM service. For example, an IP-based service fails when there is a power outage unless the customer has a battery backup. Moreover, in the Joint Parties' experience, commercially-available battery backups provide only a short-term power source, usually several hours.[4] In contrast, traditional TDM lines are powered by the

[1] *See* 47 U.S.C. § 251(c)(4); 47 C.F.R. § 51.609.

[2] *See* Declaration of William P. Zarakas ¶¶ 22-23 & nn.12-13 (Aug. 6, 2018) ("Zarakas Decl."), attached as Attachment B to Opposition of Granite to USTelecom's Forbearance Petition, WC Docket No. 18-141 (Aug. 6, 2018) ("Granite Opp.").

[3] *See* Letter from Craig J. Brown, Assistant General Counsel, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-141, at 4-6 (July 1, 2019); Letter from Christopher T. Shenk, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-141, at 2-3 (June 26, 2019).

[4] AT&T's reliance on the *2017 Technology Transitions Order* is misplaced. That order found that the Commission's 911 backup power requirements were sufficient to protect *residential* customers, not business or government customers, in the event of a power outage. *See Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Report and Order, Declaratory Ruling, And Further Notice of Proposed Rulemaking, 32 FCC Rcd. 11128, ¶ 46 (2017) ("*2017 Technology Transitions Order*"). In its 911 backup power order, the Commission required providers of non-line-powered residential voice service to make available "at the subscriber's option and expense, a backup power solution that provides 911 access for 8 hours in the event of commercial power loss[, and] [w]ithin three years, . . . a 24-hour backup power solution." *See Ensuring Continuity*

ILECs' central offices, which are equipped with battery backup powered by generators that have the ability to run indefinitely, thus ensuring continuity of service. As a result, VoIP quickly becomes unavailable in the event of an extended power outage, as was the case during Superstorm Sandy, whereas traditional TDM service continues to work. It is for reasons like this that business and government customers continue to purchase traditional TDM service. Notably, more than half of MetTel's customers that purchase VoIP service also purchase traditional TDM service, even at the same location, and they do so even though traditional TDM service is twice as expensive as VoIP service.

Mr. Sullivan also explained that competitors like the Joint Parties deliver value to government and business customers through their "one stop shop" business model. Business and government customers, many of which have thousands of locations throughout the country, rely on the Joint Parties for all of their telecom needs. Those customers, which include more than 80 of the Fortune 100 companies, value the fact that the Joint Parties serve as a single point of contact for ordering, provisioning, installation, maintenance, and billing. In the absence of the price-disciplining effects of the avoided-cost resale discount and VGCL UNEs, the Joint Parties could lose the ability to provide these services.[5] The risk of such harm to the Joint Parties and their end-user customers is especially acute because many of the Joint Parties' commercial wholesale agreements will expire within the next calendar year, and the ILECs have provided no assurances that they will maintain rates that resemble current rates.

Third, Ms. Sheikh explained that, should the Commission grant forbearance for avoided-cost resale and VGCL UNEs, establishing transition periods of adequate duration before forbearance takes effect will be key to protecting the interests of government customers, American taxpayers, and business customers. Ms. Sheikh stated that five years is the minimum adequate transition period for federal government customers, with an overlapping four-year period during which new services can be ordered subject to the wholesale regulations at issue. And while the three-year transition period that

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of 911 Communications, Report and Order, 30 FCC Rcd. 8677, ¶ 9 (2015). In any event, power outages caused by severe storms or natural disasters frequently exceed eight or 24 hours. Business and government customers are well aware of this fact and therefore purchase traditional TDM service where possible.

[5] As the Joint Parties have explained, the continued availability of VGCL UNEs is extremely important to their ability to serve business and government customers in CenturyLink's ILEC region. This is because 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, and they do so by setting the price for the loop component of traditional TDM service to be equal to the price that CenturyLink charges for a VGCL UNE, and setting the price for the other components of the service (e.g., switching) at a commercially-negotiated level. *See* Letter from Thomas Jones, 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 3 (June 14, 2019) ("Joint Parties' June 14 Letter").

the Chairman has reportedly proposed[6] is arguably the minimum adequate transition period for business customers, the concurrent period during which new services may be added should be 18 months.

Federal government customers. A significant transition period is crucial for federal government customers. For the past several years, the General Services Administration ("GSA") has sought to promote competition and provide cost savings to government customers by awarding the Enterprise Infrastructures Solutions contract ("EIS") to nine approved carriers, including Granite and MetTel.[7] In contrast, EIS's predecessor contract, Networx, was awarded to only three approved carriers, all of them ILECs: AT&T, Verizon, and CenturyLink. The smaller number of competitive options under Networx has resulted in higher prices for government customers than is likely to be the case under EIS. Given that avoided cost resale and VGCL UNEs are crucial to ensuring Granite's and MetTel's viability as competitors, forbearance from these requirements would undermine their ability to compete absent a sufficient transition.

EIS was originally scheduled to take effect in May 2017, but GSA has postponed the mandatory transition date for government agencies until May 2023.[8] As a result, most federal government customers have not begun to purchase services under EIS. In the two years since the award of EIS, of the expected 150 requests for proposals ("RFPs") from federal agencies, fewer than 30 have been issued, and fewer than five have been awarded. Given the slow pace of the transition and government agencies' general reluctance to begin to purchase services under EIS, it seems likely that many government agencies will not begin to order services under EIS until near the deadline in May 2023.

If avoided-cost resale and VGCL UNE requirements have been eliminated before then, ILECs will almost certainly have significantly increased the prices they charge Granite and MetTel for wholesale TDM telephone services. This will undermine the competitors' ability to function as viable competitive options for government agency customers. Granite and MetTel will be forced either to respond to government agency RFPs with prices that are near or below their operating costs in the hopes that GSA will agree to price increases in the future or to forgo responding to government RFPs. Either way, government agencies will be harmed because Granite and MetTel will be weakened or eliminated as the only viable alternatives to the ILECs for TDM telephone services.

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[6] *See Pai Circulates Draft Voice Forbearance Order After USTelecom Narrows Request*, Communications Daily, at 12-13 (July 3, 2019).

[7] *See* GSA, EIS Fact Sheet, at 1 (Aug. 1, 2017), https://www.gsa.gov/cdnstatic/EIS_Fact_Sheet.docx.

[8] *See* Alan Thomas, *Extending Current Telecommunications Contracts To Allow For Successful EIS Transition*, GSABlog (Dec. 6, 2018), https://www.gsa.gov/blog/2018/12/06/Extending-Current-Telecommunications-Contracts-To-Allow-For-Successful-EIS-Transition.

In the end, taxpayers will incur the loss, and it is likely to be significant. According to GSA, EIS offers a 21 percent savings for the same services purchased under the current Networx contract.[9] These savings are in significant part due to the larger number of competitive options available under EIS. But if Granite and MetTel are no longer viable competitors in the provision of TDM telephone services, the number of providers of TDM telephone services would be the same as under Networx, and it is likely that federal government customers would not receive the potential cost savings that result from a competitive bidding process. This is because the elimination of Granite and MetTel will decrease the number of competitors that have the ability to provide traditional TDM service, thereby allowing ILECs to charge their ceiling prices rather than encouraging the pool of competitors to offer rates below their ceiling prices. This is especially the case in instances where federal government agencies issue regional RFPs, and the ILECs are the only competitors in those regions. Because Granite and MetTel offer traditional TDM service on a nationwide basis, they offer competitive options in the ILECs' regions, hence driving down the prices available to federal government customers.

Furthermore, as the Joint Parties have explained, 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, even under EIS.[10] As also explained, federal government customers disproportionately purchase lines directly governed by the avoided-cost resale discount (i.e., lines purchased under interconnection agreements) as compared to other enterprise customers, largely as a result of those federal government customers' remote and rural locations.[11] And even where the avoided-cost resale

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[9] *See* Crystal Philcox, *Achieving Modernization Through EIS* (May 22, 2018), https://gsablogs.gsa.gov/technology/2018/05/22/achieving-it-modernization-through-eis/ ("Because of the consolidated buying power we have under GSA contracts, we realized a savings with EIS prices that average 21 percent lower than our current contract, Networx. That's real money that agencies can put back into application modernization or cloud migration.").

[10] *See, e.g.,* Letter from Thomas Jones, 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 transition to IP-based services, particularly in areas where service providers lack competitive pressure); Reply Comments of Granite, MetTel, and Access One, WC Docket No. 18-41, at 4-9 (May 28, 2019) (quantifying federal government agencies' current and future demand for traditional TDM service).

[11] *See, e.g.,* Declaration of Larry Antonellis ¶ 24 (Aug. 6, 2018) ("Antonellis Decl."), attached as Attachment A to Granite Opp.; Declaration of Sean J. Sullivan ¶ 20, attached to Opposition of MetTel to USTelecom's Forbearance Petition, WC Docket No. 18-141 (Aug. 6, 2018).

discount does not apply directly, the regulatory backstop provided by Section 251(c)(4) disciplines the prices that ILECs charge the Joint Parties in commercial wholesale agreements, which in turn enables the Joint Parties to offer competitive prices to their end-user customers, including federal government customers.[12] Thus, the higher quality adjusted prices that the ILECs will undoubtedly offer as a result of forbearance from the avoided-cost resale discount are likely to result in very large losses to taxpayers.

Ms. Sheikh explained that, in order to address these concerns, it would be appropriate for forbearance from the Section 251(c)(4) avoided-cost resale and VGCL UNE requirements, as they apply to federal government end-users, to take effect a minimum of five years from the effective date of the Commission's order granting forbearance. In addition, federal government customers should be given, at a minimum, four years to add new services, which would coincide with the May 2023 deadline for the transition from Networx to the EIS contract. While far from ideal, these transitions would at least enable Granite and MetTel to sustain the prices they submitted in 2016 during the early stages of their service relationships governed by EIS. For example, for a government customer that begins purchasing services under EIS around the time of the mandatory transition date in May 2023, the four-year transition for new orders would enable the competitors to order new lines for that customer with the protection of avoided-cost resale and VGCL UNEs, and the five-year transition for grandfathered orders would enable the competitors to maintain those prices for the first year of the customer relationship. The competitors would need to request approval for rate changes during this period in the hope that they can continue viable operations during the remainder of the EIS contract.

Business customers. Ms. Sheikh also explained that business customers typically purchase traditional TDM service under three-year contract terms, with the right to unilaterally extend the contract for up to an additional two years.[13] Service providers generally have no ability to increase prices during either the initial three-year term or during the extension periods. The Joint Parties set the prices in their customer contracts based on the wholesale prices they have paid ILECs while avoided-cost resale and VGCL UNE requirements have been in place. As such, the Joint Parties believe that a three-year transition period for business customers is the minimum necessary for competitors to honor the terms and rates they have already committed to provide to their business customers.

As Ms. Sheikh explained, a concurrent period of 18 months during which customers may add new services subject to avoided-cost resale and VGCL UNE requirements is appropriate for business customers. Many business customers order large numbers of new service lines during the terms of their contracts as they open new locations, and as their service requirements increase at existing locations. The Joint Parties would likely need to offer newly-ordered services at a loss if, as seems highly likely, the wholesale prices they pay ILECs increase after forbearance takes effect. An 18-month transition for new service orders is the minimum necessary to enable the Joint Parties to keep the harmful effects of the resulting price squeezes at manageable levels under existing contracts.

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[12] *See, e.g.*, Granite Opp. at 26; Zarakas Decl. ¶¶ 22-23 & nn.12-13; Antonellis Decl. ¶ 37.

[13] *See* Joint Parties' June 14 Letter at 4.

Finally, the longer the Joint Parties are able to sustain viable service arrangements for business customers, the more time those customers will have to adjust to the new environment. When ILECs increase wholesale prices, the Joint Parties may lose the ability to serve many locations. This will require that business customers purchase traditional TDM service directly from the ILECs in such newly-unserved areas. Absent a sufficient transition, business customers would be forced to rush through the process of procurement and negotiation with ILECs, a process that can take more than a year under normal circumstances. This is a daunting prospect given that many business customers purchase traditional TDM service in dozens of ILEC territories. Again, the longer the transition, the longer the Joint Parties will be able to serve business customers, and the longer such customers will have to transition to purchasing traditional TDM service directly from ILECs. A period of 18 months to add new services would allow competitors to honor existing contracts and to remain reliable and predictable resources for the additional services that business customers require as they design and execute transition plans necessitated by forbearance.

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

Respectfully submitted,

/s/ Thomas Jones
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