

**Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of	:	
	:	WC Docket No. 18-141
Petition of USTelecom for Forbearance	:	
Pursuant to 47 U.S.C. § 160(c) to	:	
Accelerate Investment in Broadband and	:	
Next-Generation Networks	:	

**COMMENTS
SUBMITTED ON BEHALF OF
THE PUBLIC UTILITIES COMMISSION OF OHIO**

INTRODUCTION

On May 4, 2018, USTelecom – The Broadband Association (USTelecom) filed a petition for forbearance of multiple sections of the Telecommunications Act of 1996 (the Act) pursuant to 47 U.S.C. § 160(c).¹ Among other sections, USTelecom is seeking forbearance of section 251(c)(3) and (4) and related requirements under other sections of the Act. On May 8, the Federal Communications Commission (FCC) issued a public notice in this docket seeking comment on the USTelecom petition. The Public Utilities Commission of Ohio (Ohio Commission) and other interested parties sought and obtained a 60-day extension in which to file comments now due by August 6, 2018, and reply comments on September 5, 2018.

USTelecom filed an ex parte letter with the FCC on June 21, 2018, in which it

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). (Petition)

proposed a modified transition to the relief being sought in its forbearance petition.²

While the Ohio Commission recognizes that the evolving telecommunications industry has undergone significant changes since the passage of the Act in 1996, it nonetheless believes that even following USTelecom's proposed modification to its forbearance request, the provisions contained in sections 251 and 252 will likely continue to play an important role in promoting a competitive telecommunications market beyond the time period contemplated in the proposal. Accordingly, the Ohio Commission appreciates this opportunity to provide its comments on the USTelecom petition for the FCC's studied consideration.

DISCUSSION

One of the primary policy objectives of the Act is the promotion and development of competitive telecommunications markets.³ To further this objective, section 251 (c)(3) and (4) imposes unbundling and resale obligations on incumbent local exchange carriers (ILECs). The requirement to provide unbundled access imposes a duty on ILECs to "provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are

² *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, ex parte letter (filed June 21, 2018). (Letter)

³ Telecommunications Act of 1996, Pub. Law 104-104, 110 Stat. 56, Feb. 8, 1996 (Westlaw).

just, reasonable, and nondiscriminatory...”.⁴ The resale requirement imposes a duty to offer for resale any telecommunications services that an ILEC provides at retail at a wholesale rate and not prohibit nor impose any unreasonable or discriminatory conditions or limitations on the resale of such services.⁵ These requirements are intended to remove barriers to market entry and to facilitate competition by providing telecommunications carriers, which lack their own networks, with access to network elements and services needed to serve their customers. The telecommunications industry and marketplace have changed significantly since the passage of the Act in 1996, perhaps lessening the need for access to network elements and services that these provisions of the Act provide. While the Ohio Commission understands that there will likely be a time when section 251(c)(3) and (4) are, in fact, obsolete, that time has not arrived yet. Many competitive local exchange carriers (CLECs) in Ohio must still rely on the availability of unbundled network elements (UNEs) and resale services to serve their customers. Consequently, the Ohio Commission believes that the relevancy of section 251(c)(3) and (4) and the associated obligations of section 251 and 252 must be carefully scrutinized before any grant of forbearance is given.

Ohio, like many other states, still has a significant number of CLECs serving customers within the state. Generally, these companies serve business customers, with a variety of services tailored to meet the customers’ needs. Lacking networks of their own, CLECs must purchase UNEs or complete services for resale to serve their customers.

⁴ 47 U.S.C. § 251(c)(3) (2018).

⁵ 47 U.S.C. § 251(c)(4) (2018).

While other services have emerged in recent years that compete with or replace traditional TDM-based (time-division multiplex telecommunications services, the TDM-based UNEs or services purchased from the ILECs by the CLECs remain necessary, in whole or in part, for CLECs to adequately meet the needs of their customers. By ensuring that CLECs have access to the UNEs and services critical to their ability to adequately serve their customers, section 251(c)(3) and (4) of the Act continues to promote competition, and, most important, choices in the telecommunications market.

While USTelecom points out that, following forbearance, ILECs will continue to provide their service offerings for resale on a commercial basis pursuant to Section 251(b)(1), the economic analysis provided with the petition notes that “asset-light” service providers will pay on average much higher commercial wholesale rates for UNE equivalents and presumably resale equivalents. The authors of that analysis assume historical wholesale rates would remain unchanged post-forbearance.⁶ The FCC needs to carefully scrutinize this assumption. At first blush, it would appear that the CLECs would have diminished bargaining power in commercial negotiations if the fallback options of the right to demand access to UNEs and wholesale services are eliminated. Thus, for example, it is hard to envision that wholesale rates and, correspondingly, retail rates based on wholesale rates would remain unchanged post-forbearance. This is, in fact, contrary to the position expressed by USTelecom that enforcement of these provisions is no longer necessary to ensure that charges and practices are just and

⁶ Petition, Appendix B at 17.

reasonable. Moreover, assuming the accuracy of the statistics cited by USTelecom, resale and UNE loops must still be utilized to provision approximately seven percent of end-user switched access and VoIP lines.⁷ This is not an insignificant number of lines served.

Section 251(c)(3) and (4), and the associated obligations imposed under the Act, provide a baseline or safety net to ensure that all carriers have reasonable market access and operate on a level playing field. This benefits both CLECs and end users. Should the FCC grant the USTelecom petition, CLECs would be forced to negotiate commercial wholesale agreements under section 251(b)(1) without any recourse to state commissions and the associated mediation and arbitration processes. Such a proposition presumes that CLECs have equal bargaining power with ILECs in negotiating these agreements. The Ohio Commission is not convinced that this is currently the case or, given the extended transition period set forth in the modified transition proposal, will be the case by February 4, 2021.⁸ Accordingly, the Ohio Commission strongly encourages the FCC to fully investigate and determine whether CLECs truly are at bargaining parity with ILECs before granting any forbearance of section 251(c)(3) and (4) and the associated obligations under sections 251 and 252 under either the original petition or USTelecom's modified proposal. This will continue the important safety net that many CLECs must still rely upon. A forbearance of the unbundling and resale requirements of 251(c) will likely increase wholesale rates for UNE and 251(c) resale equivalents, affecting not only

⁷ Petition, Summary at iii.

⁸ See Letter.

CLECs but end users and competition generally. This result is contrary to the intent of the Act, to open telecommunications markets and foster competition within those markets.

The ability to negotiate fairly is essential to competition. Obtaining network elements and services at just and reasonable rates is crucial to ensuring that CLECs may offer services to end users at rates that are also just and reasonable. If they cannot do this, CLECs will not be able to effectively compete. Nonetheless, negotiating parity alone should not be taken as dispositive of whether there is market competition or not. The Ohio Commission urges the FCC to apply a market-by-market approach, rather than a blanket nationwide approach in determining whether there is adequate competition to justify forbearance.

In its petition, USTelecom broadly states that ILECs no longer enjoy unique marketplace advantages due to the development of competition.⁹ Asymmetrical regulatory requirements, in USTelecom's view, distort competition to the detriment of consumers.¹⁰ The petition further avers that, as a consequence, the perpetuation of regulatory disparities intended to jumpstart competition cannot be justified any longer.¹¹ The Ohio Commission takes no position on this assertion here, but, rather, encourages the Commission to address the more basic question of whether or not a market is, in fact, a competitive one prior to addressing USTelecom's claims regarding regulation within that

⁹ Petition at 22.

¹⁰ *Id.*

¹¹ *Id.*

market. The Ohio Commission submits that, a simple checklist approach will likely not be sufficient in determining whether a market is competitive. Questions abound. For example, can the presence of only two service providers be sufficient for true competition in one market yet insufficient in another? How should this determination be made? Further, does the presence of ILEC affiliates, especially in markets with few providers, affect competition positively or negatively? Does a decline in the number of CLEC switched lines, provided through UNEs or resold services, indicate a growth in competition as CLECs develop their own networks or a decline in competition as the ILEC tightens control within the market? These questions illustrate the need for the Commission to carefully evaluate *each* market before considering forbearing from the requirements of section 251(c)(3) and (4) and the associated obligations of sections 251 and 252. Such an evaluation is crucial, even in light of the extended transition period set forth in the modified transition proposal. Only then can we avoid a fatal assumption that sufficient competition may exist in a marketplace, where, upon closer examination, such is actually not the case.

CONCLUSION

The Ohio Commission recognizes that the telecommunications industry has changed significantly since the passage of the Act in 1996. Nonetheless, the Ohio Commission strongly urges the FCC to apply its studied judgment given the nature of the relief sought by USTelecom. Forbearance, while appropriate under the right market circumstances, can wreak market havoc if too lightly granted. The Ohio Commission

encourages the FCC to take a measured approach in considering USTelecom's request, with its proposed modifications, that carefully considers negotiating position parity between ILECs and CLECs, and a thorough and studied analysis of the real state of competition in each individual market rather than implementing a national, blanket approach. Section 251(c)(3) and (4) as well as the associated obligations of sections 251 and 252 have been crucial to the development of competitive telecommunications markets. In the Ohio Commission's view, it is imperative, then, that a proper and complete analysis be undertaken before abandoning these important provisions of the Act. To do otherwise imperils the continuing growth of competition and development of new services for customers in the telecommunications marketplace.

The Ohio Commission appreciates the opportunity to provide these comments for the Commission's studied consideration.

Respectfully submitted,

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