

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

MOTION FOR SUMMARY DENIAL

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I. INTRODUCTION AND SUMMARY

INCOMPAS, the internet and competitive networks association;¹ FISPA;² the Midwestern Association of Competitive Communications (“MACC”);³ and the Northwest Telecommunications Association⁴ (collectively, the “Competitive Carriers Group”), on behalf of themselves and their respective members, file this Motion pursuant to Section 1.56 of the Commission’s rules, and respectfully move the Commission to deny summarily the Petition of

¹ INCOMPAS is the preeminent national industry association for providers of internet and competitive communications networks, including both wireline and wireless providers in the broadband marketplace.

² FISPA is a national consortium of small to mid-range CLECs and service providers whose mission is to unite and advanced our priorities of broadband choice, quality, and speed through member collaboration, advocacy, and education.

³ MACC is a leading Midwest trade association of competitive carriers formed to support an environment that fosters competition in the communications marketplace. MACC members supporting this filing include Birch Communications, First Communications, Granite Telecommunications, TDS Metrocom and Allstream.

⁴ The Northwest Telecommunications Association (NWTa) is an association of Service Providers and small Competitive Carriers that offers broadband and voice service in all of Oregon, Washington, and Idaho. All providers serve some rural markets, many providing only to rural markets.

USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) with respect to the unbundling and resale mandates in Section 251(c)(3) and (4) and associated obligations under Sections 251 and 252 (“Category 1”), and to the time interval requirements for nondiscriminatory treatment of affiliates and non-affiliates under Section 272(e)(1) (“Category 2”).⁵

First, as a threshold matter, USTelecom has failed its burden of production. In seeking forbearance, USTelecom must “state a complete *prima facie* case in the petition,”⁶ which includes all “facts, information, data, and arguments on which [it] intends to rely to make [its] *prima facie* case.”⁷ Only with “sufficient evidence and persuasive arguments” can the Commission “make an informed and reasoned determination that the statutory criteria are met.”⁸

Because the Petition does not provide any supporting data with respect to the product and geographic markets in which competitive local exchange carriers (“CLECs”) utilize unbundled network elements (“UNEs”) or avoided-cost resale to offer telecommunications and other services in competition with the incumbent local exchange carriers (“ILECs”), USTelecom wholly fails to provide the data required for the Commission to make a determination on whether the Category 1 and Category 2 requirements are necessary to ensure that charges and practices

⁵ 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”). Concurrently with the motion, the Competitive Carriers Group is filing an opposition explaining how, even if the Commission were to consider the Petition notwithstanding the procedural defects, the Category 1 and Category 2 forbearance requested should nonetheless be denied. *See* Opposition of INCOMPAS, FISPA, Midwest Association of Competitive Communications, and the Northwest Telecommunications Association, WC Docket No. 18-141 (filed Aug. 6, 2018) (“Opposition”).

⁶ *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, Report and Order, 24 FCC Rcd. 9543, 9556, ¶ 21 (2009) (“*Forbearance Procedures Order*”).

⁷ *Id.* ¶ 17.

⁸ *Id.* ¶ 21.

will be reasonable and not unreasonably discriminatory, or are necessary to protect consumers. Indeed, USTelecom fails to even discuss many of the unbundled elements at stake, let alone provide analysis of the impact of forbearance for those UNEs. Its unsupported assertion that “there is effectively no remaining UNE-based competition in [the residential] marketplace” is manifestly untrue, as evidenced by declarations filed by CLECs with their comments.⁹ And it makes only scant discussion of avoided-cost resale. The nature and extent of telecommunications competition varies widely across the United States, yet USTelecom seeks a “one-size-fits-all” forbearance.

Similarly, the Petition presents insufficient evidence and analysis that its requested forbearance serves “the public interest.” USTelecom’s public interest claims rely on analysis in its economist report, which fails entirely to address services resold pursuant to Section 251(c)(4),

⁹ Petition at 27-28. *See contra* Comments Submitted on Behalf of the Public Utilities Commission of Ohio, WC Docket No. 18-141, at 5 (filed Aug. 3, 2018) (“[A]ssuming the accuracy of the statements cited by USTelecom, resale and UNE loops must still be utilized to provision approximately seven percent of end-user switched access and VoIP lines.”) (“Ohio PUC Comments”); Declaration of John Hoehne ¶ 2, attached as Attachment 3 to Opposition (“Access One Decl.”); Declaration of Douglas Denney ¶¶ 2, 14, attached as Attachment 4 to Opposition (“Allstream Decl.”); Declaration of James Bellina ¶ 3, attached as Attachment 5 to Opposition (“Dialog Decl.”); Declaration of Jeff Buckingham ¶ 2, attached as Attachment 6 to Opposition (“Digital West Decl.”); Declaration of Todd Way ¶ 2, attached as Attachment 7 to Opposition (“DFN Decl.”); Declaration of Gregory J. Darnell ¶ 2, attached as Attachment 8 to Opposition (“Fusion Decl.”); Declaration of Dan Bubbs ¶ 2, attached as Attachment 9 to Opposition (“Gorge Decl.”); Declaration of Fletcher Kittredge ¶ 2, attached as Attachment 10 to Opposition (“GWI Decl.”); Declaration of Daniel Friesen ¶ 2, attached as Attachment 11 to Opposition (“IdeaTek Decl.”); Declaration of Jeff Rhoden ¶ 2, attached as Attachment 12 to Opposition (“InfoStructure Decl.”); Declaration of Brian Worthen ¶¶ 2, 9, attached as Attachment 13 to Opposition (“Mammoth Decl.”); Declaration of Raul Alcaraz ¶ 2, attached as Attachment 14 to Opposition (“Race Decl.”); Declaration of R. Matthew Kohly ¶¶ 3, 8, 46, attached as Attachment 15 to Opposition (“Socket Decl.”); Declaration of Dusan Janjic ¶ 2, 11, attached as Attachment 16 to Opposition (“Virginia Global Decl.”); Declaration of Margi Shaw ¶ 2, attached to Opposition of First Communications, LLC, WC Docket No. 18-141 (filed Aug. 6, 2018) (“First Communications Decl.”).

and provides no underlying data necessary for the Commission to evaluate the claimed benefits.¹⁰ Failure to attach such data to the Petition renders it not “complete-as-filed” and prevents the Commission from making an informed and reasoned determination that the statutory criteria for forbearance are met.

Second, the Petition is, on its face, so overbroad and so lacking in analytical support that it cannot meet the statutory standard for forbearance. By assuming uniformity of competition and entry barriers, the Petition treats the central business district in San Francisco or New York City the same as a rural county in Kansas. Because the Petition seeks forbearance based on the alleged presence of sufficient local competition, it falls under the analytical framework established by the *Qwest Phoenix Forbearance Order*, the last decision in which the Commission considered a petition for forbearance from the Act’s core local competition provisions.¹¹ The *Qwest Phoenix Forbearance Order* requires a separate examination of product markets and geographic markets with differing competitive conditions to determine whether the ILEC-specific local competition requirements remain necessary and in the public interest.¹² The Petition does not even acknowledge the existence of separate geographic markets, or of separate retail and wholesale markets for the services at issue, much less provide any evidence or analysis about the existence and extent of competition in the relevant markets. Failure to assess competition in the relevant product and geographic markets risks harm from premature

¹⁰ See Hal Singer et al., “Assessing the Impact of Forbearance from 251(c)(3) on Consumers, Capital Investment, and Jobs” at 14 (May 2018), appended as Appendix B to Petition (“Singer”).

¹¹ See *Petition of Qwest Corporation 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 (2010) (“*Qwest Phoenix Forbearance Order*”).

¹² *Id.* ¶ 28 n.82.

forbearance to a wide range of customers, including the federal government.¹³ USTelecom similarly neglects any assessment of the barriers to entry and the likelihood of near-term wholesale competitive alternatives to UNEs or avoided-cost resale in these different markets. The failure to provide this information precludes any conclusion that forbearance will not adversely affect competition, and thus consumers.¹⁴ For these reasons, the Petition presents an incomplete *prima facie* case and fails to “address [the] issue at a sufficiently granular level to permit meaningful analysis of whether or not the statutory criteria are met.”¹⁵

Moreover, because USTelecom has not filed particularized data to support its forbearance request with respect to discrete product and geographic markets in which UNEs and services for resale are currently available under Section 251(c)(3) and (4), it cannot save its Category 1 requests by narrowing the requested scope of forbearance. What support USTelecom does provide is insufficient to establish the case for forbearance with respect to any subset of UNEs or resold services, and to any subset of geographic or product markets. Accordingly, the Petition should be denied summarily in all respects.

Finally, in addition to being procedurally deficient, the Petition is also substantively unsound. Concurrently with this summary denial motion, the Competitive Carriers Group has separately filed an Opposition to the Petition. The Commission should deny the Petition, if not

¹³ See D. Sappington, “Premature, Ubiquitous Forbearance Will Harm Consumers,” Attachment 2 to Opposition, at 10-11 (“Sappington Report”). See also Letter from David J. Redl, Assistant Secretary for Communications and Information, U.S. Dept. of Commerce, to Ajit Pai, Chairman, FCC, at 3, WC Docket No. 17-84 (filed Jul. 19, 2018).

¹⁴ See Sappington Report at 3-7.

¹⁵ *Forbearance Procedures Order* ¶ 30.

through summary denial as summarized below, then on substantive grounds as asserted in the Opposition.

II. STANDARD

Summary denial is appropriate where “the petition for forbearance, viewed in the light most favorable to the petitioner, cannot meet the statutory criteria for forbearance.”¹⁶ The Commission will deny summarily any “petition that on its face is incomplete or defective.”¹⁷ Under the “complete-as-filed” rule in 47 C.F.R. § 1.54(b), the petitioner must include with its petition all “facts, information, data, and arguments on which the petitioner intends to rely to make the *prima facie* case for forbearance.”¹⁸ “[T]he Commission requires petitioners to produce sufficient evidence and analysis to warrant the grant of a forbearance petition.”¹⁹ Failure to provide those facts, information, and data is grounds for summary denial.

Similarly, summary denial may be granted if “a petition does not address an issue at a sufficiently granular level to permit meaningful analysis of whether or not the statutory criteria are met.”²⁰ The level of granularity necessary depends on the “scope of the relief sought,” and the Commission determines on a case-by-case basis whether the petitioner has met its burden of providing sufficient supporting data for a complete petition.²¹ As the Commission explained in the *Forbearance Procedures Order*, a complete-as-filed petition needs to include enough detail and clarity that interested parties are not presented with “unfolding arguments and evidence,”

¹⁶ 47 C.F.R. § 1.56(a).

¹⁷ *Forbearance Procedures Order* ¶ 27.

¹⁸ *Id.* ¶ 17.

¹⁹ *Id.* ¶ 20.

²⁰ *Id.* ¶ 30.

²¹ *Id.*

which would “unreasonably burden[] the resources of stakeholders.”²² As discussed further below, USTelecom’s Petition fails entirely to meet this standard, and cannot be granted without further “unfolding arguments and evidence.”²³

III. The Petition Must Be Denied Because USTelecom Failed to Provide Any of the Facts or Analysis Required by the *Qwest Phoenix Forbearance Order* for Forbearance from Section 251(c)(3) or (4).

Even when viewed in the most favorable light, USTelecom has failed to meet its burden of satisfying the statutory criteria for forbearance. USTelecom has violated the “complete-as-filed” rule by failing to file with its Petition all the information, facts, and data that it intends to rely on, from purported interviews to the underlying data that form the bedrock of the Petition’s competition and public interest claims. And although USTelecom has subsequently filed some underlying information, not only does that continue to violate the “complete-as-filed” rule, but it has still not filed all underlying information, including the interviews conducted by its economist, on which it relies. As such, there is insufficient evidence in the Petition to establish a *prima facie* case.

Moreover, USTelecom has failed to present the analysis required by the *Qwest Phoenix Forbearance Order* to support forbearance from Section 251(c)’s market-opening provisions. The Petition fails to define specific product or geographic markets. Nor does it assess the differing competitive conditions in these markets, including barriers to entry and the likelihood of near-term wholesale competitive alternatives to UNEs or avoided-cost resale. These failures render USTelecom’s discussion insufficiently granular “to permit meaningful analysis of

²² *Id.* ¶ 12.

²³ *Id.*

whether or not the statutory criteria are met.”²⁴ The Petition should be denied summarily in all respects.

A. The Petition Fails to Meet the Threshold Burden of Production.

USTelecom’s Petition fails to meet its burden of production by not including evidence for its *prima facie* case. The Petition does not present any evidence that the Category 1 unbundling and avoided-cost resale requirements or Category 2 nondiscrimination requirements are not necessary to ensure reasonable prices and terms or to protect consumers. Although it seeks forbearance from a series of distinct unbundling obligations, the Petition simply provides a blanket assertion that there is no longer a need for any unbundling obligation. The Petition offers even less information in support of its request for forbearance of avoided-cost resale.

Instead of offering specific evidence, the Petition reiterates the ILECs’ long-held philosophical disagreements with the very concept of the market-opening Category 1 provisions, arguing that these provisions are “distortions” of the market that are “affirmatively harmful.”²⁵ Similarly, USTelecom erroneously attempts to shift onto the Commission an ongoing burden to justify the unbundling and resale obligations.²⁶ Neither the Commission nor the opponents to the Petition carry the burden to affirmatively provide evidence justifying the continued application of these regulations.²⁷ As the Commission’s *Forbearance Procedures Order* makes clear, in

²⁴ *Id.* ¶ 30.

²⁵ *See* Petition at 25-26.

²⁶ *See* Petition at 4-7 (arguing that “the justification for continued unbundling requirements diminishes as competition increases”).

²⁷ *See Forbearance Procedures Order* ¶ 22 (“We disagree with parties who maintain that the Commission has ‘an ongoing burden to justify regulation’ and we find no burden of proof placed on the Commission ‘clearly’ written into the statute . . . it is for the petitioner to convince the Commission to make those determinations in the petitioner’s favor.”).

forbearance petitions filed pursuant to Section 10(c) of the Communications Act, “the petitioner bears the burden of proof—that is, of providing convincing analysis and evidence to support its petition for forbearance.”²⁸ USTelecom has failed to provide the requisite evidence and analysis to avoid summary denial. It cannot shirk its burden by passing it onto another party.

USTelecom also asserts that for “the residential marketplace . . . there is effectively no remaining UNE-based competition.”²⁹ As evidenced by declarations filed by CLECs with their comments, this assertion is not only unsupported, it is manifestly untrue.³⁰ CLECs continue to rely on UNEs to provide voice and data services to residential customers, including many in underserved markets.³¹ USTelecom’s assertion that competition in the marketplace “does not rely on unbundling”³² is also facially inconsistent with its own economist report, which states that there are still over 2 million DS0, DS1, and DS3 UNEs in use.³³ The Petition offers no reason for the Commission to conclude that these millions of UNEs do not currently provide a competitive constraint on ILEC prices.³⁴ As Dr. Sappington observes, competitive entry from even a small number of UNEs, and the lower barriers to entry that UNEs provide, can discipline pricing and incent further investments in service quality and delivery by the ILEC, and where it is present, the cable incumbent.³⁵ With respect to business data services (“BDS”), the Petition

²⁸ *Id.* ¶ 20; *see also Qwest Phoenix Forbearance Order* ¶ 14.

²⁹ *See* Petition at 27-28.

³⁰ *See* Opposition at 18-20, Section III.B.

³¹ *See* n.9, *supra*.

³² Petition at 27.

³³ Singer at 11-12.

³⁴ Indeed, the Petition appears to acknowledge in a footnote that UNEs *are* being used as inputs by providers to compete with ILEC offerings. *See* Petition at 28 n.83.

³⁵ Sappington Report at 6-7; 10-12; 15-16 (noting and providing examples for the fact that as “CLECs expand their fiber networks to serve customers . . . ILECS often will feel pressured

argues that the Commission's *BDS Order* "leaves no room for any continued unbundling requirements."³⁶ But the *BDS Order* made no such finding; it instead acknowledged that UNEs "play competitive roles in business data services markets."³⁷ Moreover, the Commission in the *BDS Order* concluded that there was not nationwide competition for DS1s and DS3s;³⁸ a nationwide grant of forbearance for these UNEs thus would conflict with the *BDS Order*'s competition findings, and also with the *BDS Order*'s approach to market analysis, which examined competition on a county-by-county basis.³⁹

The Petition has also failed to meet the burden of production in showing that the forbearance sought would be in the public interest. Its public interest claims rely on the analysis and conclusions of an economist report bereft of any of the underlying data, including purported interviews with ILECs, necessary for commenters and for the Commission to evaluate the claimed benefits.⁴⁰ The Petition and its economist report assume that CLECs that purchase UNEs are not investing in deploying fiber networks when in fact many CLECs rely on UNEs as stepping stones to build out their fiber networks, and exert competitive pressure on ILECs to increase their own investment, especially in rural regions.⁴¹ Given this reality, forbearance

to follow suit." This fact "has been identified in empirical research," and "is well documented in the present proceeding.").

³⁶ See Petition at 28.

³⁷ *Business Data Services in an Internet Protocol Environment*, Report and Order, 32 FCC Rcd. 3459 ¶ 21 (2017) ("*BDS Order*").

³⁸ *Id.* ¶¶ 16, 86.

³⁹ *Id.* ¶ 97 (noting that setting the "competitive market test on the geographic unit of a county or county-equivalent . . . significantly reduces the over- and under-inclusivity issue posed by [metropolitan statistical areas]").

⁴⁰ See Singer at 14.

⁴¹ See Sappington Report at 14-16; Declaration of William P. Zarakas, attached as Attachment 2 to Opposition at ¶¶ 5, 8, 11-16 ("Brattle UNE Decl."); Opposition at 45-48.

would reduce, not increase, network investment in many geographic regions. USTelecom fails to provide the necessary data to support its sweeping assertion that forbearance will benefit consumers and the U.S. economy at large by increasing network investment.⁴² Moreover, its economist report does not even mention avoided-cost resale and makes no attempt to show that forbearance from that requirement would serve the public interest. The same failings that render the Petition not “complete as filed,” and thus subject to dismissal,⁴³ also prevent the Commission from making an informed and reasoned determination that the statutory criteria for forbearance are met.

B. USTelecom Does Not Provide the Necessary Competition Analysis of *Any* Relevant Market to Support Its Sweeping Forbearance Petition.

The Petition relies on the existence of sufficient market competition to ensure reasonable prices and consumer protection such that the Category 1 and Category 2 requirements are not necessary. Accordingly, in order to carry its burden of production, it must provide the analyses and evidence of competition in all of the relevant markets in which forbearance is sought. It utterly fails to do so: USTelecom provides no analysis and evidence for *any* relevant product and geographic market, and thus the Petition is fatally incomplete and must be summarily denied.

⁴² See Petition at 32-33 and Singer at 18-20.

⁴³ See Motion to Dismiss of INCOMPAS, WC Docket No.18-141 (filed May 11, 2018).

1. The *Qwest Phoenix Forbearance Order* Establishes the Proper Framework for Consideration of a Petition Seeking Forbearance from Section 251(c).

Section 10 of the Communications Act authorizes the Commission to forbear from applying a regulation or provision of the Act *only* if the Commission determines that:

- (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
- (2) enforcement of such regulation or provision is not necessary for the protection of consumers; *and*
- (3) forbearance from applying such provision or regulation is consistent with the public interest.⁴⁴

In determining whether forbearance is in the public interest, Section 10 further instructs, “the Commission shall consider whether forbearance from enforcing the provision or regulation will *promote* competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services.”⁴⁵

The Petition seeks forbearance from Section 251(c)’s unbundling and resale mandates — core provisions of the Telecommunications Act of 1996 designed to open local markets to competition — based on an assertion that competition has rendered these requirements no longer necessary.⁴⁶ Consequently, the *Qwest Phoenix Forbearance Order*, the last decision in which the Commission considered a petition for forbearance from these provisions in the 1996 Act

⁴⁴ 47 C.F.R. § 160(a) (emphasis added); *see also* *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(C) from Enforcement of Obsolete ILEC Legacy Regulations That Inhibit Deployment of Next-Generation Networks*, Memorandum Opinion and Order, 31 FCC Rcd. 6157, 6162, ¶ 7 (2015) (“*USTelecom 2015*”).

⁴⁵ 47 U.S.C. § 160(b) (emphasis added).

⁴⁶ *See Qwest Phoenix Forbearance Order* ¶ 10.

based on an assertion of sufficient competition, provides the analytical framework for the Commission to adopt when assessing whether USTelecom has met the statutory criteria for forbearance. The *Qwest Phoenix Forbearance Order* established a detailed framework, based on the Department of Justice and the Federal Trade Commission’s joint Horizontal Merger Guidelines, for analyzing whether these core unbundling and resale requirements are necessary and in the public interest.⁴⁷ Rejecting “generalized claims about competition,” the Commission held that it will define the affected specific product and geographic markets, and will analyze the impact of forbearance in those specific markets.⁴⁸

In adopting this framework, the Commission specifically rejected its prior “nearly exclusive emphasis on [the ILEC’s] share of the mass market retail voice marketplace.”⁴⁹ The Commission instead undertakes a product and geographic market-specific inquiry.⁵⁰ The Petition does not even attempt to distinguish between relevant geographic markets, and provides only the crudest product market definitions by occasionally distinguishing between residential and business end users. Indeed, it bases its argument for non-BDS services on the presence of retail voice competition, but then acknowledges that voice service may not be a distinct product market (an assertion that is clearly incorrect in the case of copper-based TDM business telephone services, as discussed below) and then fails to analyze that market.⁵¹ The *Qwest Phoenix Forbearance Order* also recognized wholesale markets for loops and dedicated transport as

⁴⁷ *Id.* ¶ 28 n.82. It is important to understand that the Commission freely adopted the analytical structure established in the 2010 Horizontal Merger Guidelines. Having done so, it must now follow its own precedential analytical framework.

⁴⁸ *Id.* ¶ 28.

⁴⁹ *Id.*

⁵⁰ *See id.* ¶¶ 26 n.77, 28.

⁵¹ Petition at 19.

separate from retail product markets.⁵² Thus, a proper competition analysis to determine whether to grant forbearance for the wholesale market must rely on data and test results from the wholesale market, not a retail product market. The Petition contains no such analysis, whether with respect to wholesale markets for loops, transport services, or dark fiber, let alone elements such as NIDs, subloops, 911/E911 databases or the operations support systems needed to access all UNEs. To the extent that the Petition provided any data, it was generalized data at the national level about retail users.⁵³ By itself this requires summary denial.

In the *Qwest Phoenix Forbearance Order*, the Commission also rejected its prior premise that “duopoly always constitutes effective competition and is necessarily sufficient to ensure just, reasonable, and nondiscriminatory rates and practices, and to protect consumers.”⁵⁴ In other words, the Petition must offer more than evidence of duopoly in the relevant product and geographic markets; the Commission demands “additional evidence of robust competition” before it will grant forbearance of Section 251(c)’s competition fostering provisions.⁵⁵ Thus, even assuming that the Petition provides sufficient evidence of a duopoly in all relevant markets (and it does not), that would be insufficient to enable the Commission to make a determination about the sufficiency of competition.

The *USTelecom 2015 Forbearance Order* does not establish anything to the contrary. Notably, none of the forbearance requests granted by the Commission in that order affected, in broad sweep, the core local competition provisions of Section 251(c).⁵⁶ *USTelecom 2015* simply

⁵² *Qwest Phoenix Forbearance Order* ¶ 28.

⁵³ *See, e.g.*, Petition at 8-10, 13-14.

⁵⁴ *Qwest Phoenix Forbearance Order* ¶ 29.

⁵⁵ *See id.* ¶ 32.

⁵⁶ *See USTelecom 2015* ¶¶ 11-12.

explains the common sense view that if it is possible to evaluate whether a regulation is necessary without evaluating competition, then no evaluation of competition is necessary.⁵⁷ In contrast, the driving purpose behind Section 251(c)(3) and (4) is to foster competitive markets — it is impossible to determine whether these provisions are still necessary, or whether they are “outmoded and harmful *as a general matter*,”⁵⁸ without an examination of competition.

USTelecom 2015’s limited scope similarly distinguishes it from the present Petition and renders its analytical framework ill-suited to petitions seeking forbearance from *all* unbundling requirements under Section 251(c)(3). The Commission’s reasoning in *USTelecom 2015* suggests as much. When granting forbearance from the *Triennial Review Order*’s requirement to provide a 64 kbps channel over a fiber loop when an incumbent local exchange carrier overbuilds a copper loop with fiber, the Commission recognized the difference between a narrow pruning of a little-used unbundling requirement and broad-scale forbearance from unbundling. The Commission noted: “The relief from section 251(c)(3) unbundling we grant [in *USTelecom 2015*] is far narrower in scope than that granted with respect to particular geographic markets in the earlier forbearance proceedings discussed in the *Qwest Phoenix Forbearance Order*.”⁵⁹ The Commission also explained that it was “leaving intact the much broader local competition

⁵⁷ *Id.* ¶ 9. Similarly, in the *Open Internet Order*, the Commission recognized the analysis of competition is critical when forbearance is premised on competition, stating “the Commission in the *Qwest Phoenix Order* was addressing a petition where the rationale for forbearance was premised on the state of competition.” *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601, ¶ 439 (2015) (“*Open Internet Order*”). Accordingly, that Order also does not alter the analysis required for forbearance from Sections 251(c)(3) and (4) of the Communications Act.

⁵⁸ *See USTelecom 2015* ¶ 9.

⁵⁹ *Id.* ¶ 59.

safeguards of Section 251 and its implementing rules.”⁶⁰ *Qwest Phoenix Forbearance Order*, not *USTelecom 2015*, establishes the appropriate analytical framework to assess the full impact of forbearance from Section 251(c)’s local competition safeguards.⁶¹

2. The Petition Fails to Provide Any of the Granular Information or Analysis Required by the *Qwest Phoenix Forbearance Order* to Assess the Effect on Competition and Consumers, and Thus Must Be Summarily Denied.

The *Qwest Phoenix Forbearance Order* requires a separate examination of product markets and geographic markets with differing competitive conditions, when analyzing whether Section 251(c)’s core local competition provisions remain necessary and in the public interest. Yet the Petition ignores addressing the reality that CLECs use UNEs or avoided-cost resale in a wide variety of product and geographic markets — markets with uneven levels of competition, and even with specialized niches within those markets.⁶² Because the Petition fails even to discuss the *Qwest Phoenix Forbearance Order*, let alone apply it, the Petition has not established its *prima facie* case, and must therefore be summarily denied.

First, USTelecom fails specifically to define any product markets. The Petition spends pages discussing “voice service” as if that were a product market, but then asserts that “voice service” is likely not a relevant product market, as consumers, especially residential consumers,

⁶⁰ *Id.*

⁶¹ As the Ohio Public Utilities Commission explained, a market-by-market examination is necessary because forbearance would drastically alter competitive providers’ negotiating position vis-à-vis ILECs, and the resulting effects on wholesale and retail prices will vary depending on local conditions. *See* Ohio PUC Comments at 3-6,. It would therefore be inappropriate to “assume [that] historical wholesale rates would remain unchanged post-forbearance.” *Id.* at 4.

⁶² For a detailed discussion of how competitive carriers use UNEs or resale in different product and geographic markets, see Opposition at 45-48. *See also* Sappington Report at IV and V.

typically purchase voice and data services together.⁶³ Although USTelecom makes passing reference to BDS, it does not engage in any serious market definition of BDS, especially with respect to the critical range of BDS below 50 Mbps.⁶⁴

To the extent that some voice service does qualify as a separate product market, the Petition fails to address it. Specifically, TDM-based business telephone service provided over copper loops is a distinct product market. Businesses demand this service for a number of reasons, the most important of which is that the service is line-powered and is therefore more reliably available than other voice services, such as most managed VoIP services offered by cable companies, that are not self-powered. In light of this characteristic, business customers rely on TDM-based business telephone service provided over a copper loop for medical alerts, fire/sprinkler monitoring, gas pipeline monitoring, bank vault, burglar alarms, elevators and even back-up data connections.⁶⁵ These business customers do not view other voice services, including managed VoIP services or wireless voice services, as substitutes for TDM-based telephone services. Yet USTelecom fails to address this distinct market in its Petition.

Second, USTelecom fails to acknowledge the existence of separate geographic markets. Local competition conditions are not uniform across the country, whether for combined residential voice and broadband service (a market suggested by USTelecom) or for BDS.

Dr. Sappington confirms that under well-recognized economic analysis, geographic markets for

⁶³ Petition at 19 (“Indeed, voice service itself may no longer constitute a distinct market, as providers typically offer service packages that combine voice with data, and often video service, as well as (in the case of mobile service) messaging offerings.”).

⁶⁴ *See id.* at 11-12.

⁶⁵ *See* Declaration of Larry Antonellis ¶ 18, Attachment A to Opposition of Granite Telecommunications, LLC, WC Docket No. 18-141 (filed Aug. 6, 2018).

telecommunications services are defined by choices available at specific locations – with aggregation only of locations with similar competitive characteristics.⁶⁶ Full facilities-based competitive choices available to customers on Manhattan in New York City, has nothing to do with the competitive choices available to schools, hospitals, and farmers in remote areas like rural Kansas – or even suburban New Jersey. There are areas of the country in which UNE-based CLECs provide the only combined voice and fixed broadband competitive alternative to the ILEC,⁶⁷ and where CLECs that are relying on avoided-cost resale provide the only TDM-based business telephone service alternative to the ILEC.⁶⁸ USTelecom provides no information as to whether UNEs and resale are concentrated in specific geographic markets, such that they would have a significant competitive impact in those markets. UNEs in particular are not available in all geographic markets under the current rules.⁶⁹

Failure to assess competition in the relevant markets risks harm from premature forbearance to a wide range of customers, including the federal government. As NTIA

⁶⁶ Sappington Report at 14; *see also* Ohio PUC Comments at 7 (noting that questions about competitive conditions “illustrate the need for the Commission to carefully evaluate *each* market before considering forbearing from the requirements” at issue in the Petition).

⁶⁷ Opposition at 3-4, 53-54. The Commission has not found mobile and fixed broadband to be in the same product markets. *See Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in A Reasonable & Timely Fashion*, 2018 Broadband Deployment Report, FCC 18-10, ¶ 18 (rel. Feb. 2, 2018) (“[W]e disagree with those that argue that mobile services are currently full substitutes for fixed service.”).

⁶⁸ Opposition at 44 (providing examples of the “importance for those businesses that rely on TDM to ensure the operation of critical systems such as medical alerts alerts, fire/sprinkler monitoring, gas pipeline monitoring, bank vault or burglar alarms, and elevators that require reliable back-up systems for unexpected failures, even where VoIP services provided over managed networks (i.e., not over the public internet) are available.”)

⁶⁹ *See* 47 C.F.R. § 51.319; Opposition at 52-53 (summarizing the current limitations UNEs and resale are subject to and how they vary by geography based on the ILEC’s technology deployment).

Administrator David Redl recently explained, “a broad range of critical national security and public safety functions of the [f]ederal government rely on reliable telecommunications services, and it is in the national interest to ensure that those functions can be maintained as our country’s communications providers make the welcome transition to modern technology.”⁷⁰ Unless the Commission establishes the appropriate protections, federal government agencies may be placed “in the untenable position of losing access” to those services.⁷¹ State and local governments that are served by competitive providers similarly may lose access to essential services.⁷²

Third, the Petition claims that “[c]ompetition is not dependent on UNEs or resale” when the number of UNE loops in use has fallen to more than two million.⁷³ This argument is misleading. USTelecom ignores the fact that the more than two million UNE loops cited in its Petition are in areas outside the most competitive areas, where UNEs are already excluded as a result of the *TRO* and *TRRO Orders*.⁷⁴ If anything, these remaining UNE loops play a greater role in facilitating competition in otherwise ILEC-dominant areas, as the expert reports of both

⁷⁰ Letter from David J. Redl, Assistant Secretary for Communications and Information, U.S. Dept. of Commerce, to Ajit Pai, Chairman, FCC, at 3, WC Docket No. 17-84 (filed Jul. 19, 2018).

⁷¹ *Id.* at 1.

⁷² See Socket Decl. ¶ 56.

⁷³ Petition at 15-16. *But see* Ohio PUC Comments at 5 (“[A]ssuming 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. This is not an insignificant number of lines served.”).

⁷⁴ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exch. Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16,978, 17,083-85, 17,102-336, ¶ 164-68, 197-566 (2003) (“*TRO Order*”) (explaining and applying impairment standard); *Unbundled Access to Network Elements*, Order on Remand, 20 FCC Rcd. 2533, 2536-37, ¶¶ 3, 5 (2005) (“*TRRO Order*”) (excluding high-capacity loops and interoffice dedicated transport UNEs from the most competitive areas and excluding UNEs from “sufficiently competitive” long distance and wireless markets).

Dr. Sappington and Mr. Zarakas make clear.⁷⁵ For both loops and transport, USTelecom's data do not distinguish between areas in which UNEs are available and those in which they are not.⁷⁶ Accordingly, USTelecom's data are insufficient to analyze the state of competition in the geographic areas in which loop and transport UNEs are available today.

Moreover, despite seeking forbearance from all unbundling obligations, USTelecom fails to provide any discussion at all of subloops, network interface devices, 911 and E911 databases, and operations support systems,⁷⁷ and fails to even mention dark fiber transport. Subloops are used by some CLECs to access loops otherwise unavailable because of fiber feeder.⁷⁸ 911/E911 databases have a clear competitive and public safety impact.⁷⁹ NIDs are the terminal endpoint for loops, and OSS is necessary to provision all elements.⁸⁰ Dark fiber transport is often critical in the deployment of fiber loops. One dark fiber transport UNE can be responsible for the competition provided by a multitude of fiber lines.⁸¹ USTelecom's failure to present any

⁷⁵ Sappington Report at 10-16; Brattle UNE Decl. at 5, Table 3 and 6, Table 4.

⁷⁶ See Petition at 15-18.

⁷⁷ See *id.* at 27.

⁷⁸ See, e.g., Gorge Decl. ¶ 4; First Communications Decl. ¶ 12; Digital West Decl. ¶¶ 5, 9, 11.

⁷⁹ See Socket Decl. ¶ 12.

⁸⁰ Generally, the NID is included in the unbundled loop charge as part of the loop, and is not charged or ordered separately.

⁸¹ See, e.g., See IdeaTek Decl. ¶ 4 (“We use dark fiber UNE’s to connect from a more urban central office where we can obtain critical wholesale products to more rural unserved central offices.”); see also, e.g., Digital West Decl. ¶ 10 (“There are no competitive dark fiber or lit services between central offices so the only services available are the much more expensive ILEC lit services that would increase costs by a factor of 40 and eliminate the flexibility of easily increasing the speed of the dark fiber loops.”); GWI Decl. ¶ 13 (explaining that GWI uses UNE dark fiber to serve 1100 customers in 9 communities where “[t]here is no substitute dark fiber provider”).

information with respect to these elements prevents any meaningful analysis of competition and the impact of forbearance on the product and geographic markets that rely on these UNEs.

USTelecom also offers virtually no factual support for its assertion that competition in at least some relevant markets is not dependent on the continued availability of Section 251(c)(4) avoided-cost resale. The small amounts of data offered by USTelecom in support of its request for forbearance from Section 251(c)(4) are highly aggregated. For example, USTelecom relies on the total number of resold ILEC lines as a percentage of total end-user fixed connections nationwide,⁸² the number of telephone lines (TDM and VoIP) served by ILECs and non-ILECs nationwide,⁸³ and the total number of access lines serviced by ILECs nationwide.⁸⁴ But such aggregated data say nothing about the level of competition in any particular product or geographic market, and it therefore is not a basis for granting forbearance in such relevant markets. USTelecom's petition also says nothing about the harm that would befall customers that continue to utilize avoided-cost resale of TDM-based business telephone services if the Commission were to grant forbearance from Section 251(c)(4). This is a particularly egregious omission given that avoided-cost resale is statutorily defined to ensure that ILECs suffer no reduction in profits or any other discernable harm. Moreover, USTelecom asserts that ILECs have the incentive to offer telecommunications services at wholesale on reasonable rates, terms, and conditions,⁸⁵ but it offers no evidence that there is sufficient competition in the relevant product and geographic markets to create such an incentive.

⁸² See Petition at 18 and n.48.

⁸³ See Petition at 10 and n.21.

⁸⁴ See Petition at 7-8.

⁸⁵ See Petition at 29.

Fourth, USTelecom fails to provide any assessment of barriers to entry and the likelihood of near-term wholesale competitive alternatives to UNEs or avoided-cost resale, particularly in less than the five-year period considered in the *BDS Order*.⁸⁶ The Petition erroneously relies on the *BDS Order* to justify its sweeping claim that competition no longer depends on UNEs or resale, without addressing the different competitive conditions that exist in separate areas of the country. The *BDS Order* recognized that some counties are not competitive, and not likely to become competitive, even at a time horizon of five years.⁸⁷ Moreover, data in the BDS proceeding showed that 84 percent of BDS locations with aggregate demand of less than 100 Mbps were served only by the ILEC.⁸⁸ In the remainder, less than one percent were served by more than one other alternative provider.⁸⁹ The *BDS Order* did not establish that there were current competitive alternatives to ILEC BDS in *most* areas of the country, let alone *all* areas as presupposed by USTelecom. In addition, the Petition fails to acknowledge that barriers to entry in the provision of TDM-based business telephone service are especially high given the low revenues that providers earn from the sale of such services as compared to higher-bandwidth services.

Fifth, USTelecom asserts that there is no need for the *ex ante* rate regulation requirements in Section 251(c)(3) and (4) because other statutory provisions, which do not include *ex ante* rate

⁸⁶ See *BDS Order* ¶ 13 (establishing the time horizon); see also *id.* at 3483, ¶ 49 (“Market analysis is incomplete without an evaluation of entry barriers”).

⁸⁷ *Id.* at 3528, ¶ 152; *id.* ¶ 179 (concluding that continued price cap regulation “in non-competitive counties to ensure the rates, terms and conditions for such services are just and reasonable”).

⁸⁸ Letter from John T. Nakahata, Counsel to Windstream, to Marlene H. Dortch, Secretary, FCC, at 3, WC Docket Nos. 16-143 et al. (filed Oct. 21, 2016).

⁸⁹ *Id.* at 3, 5.

regulation, would be sufficient to protect competition and consumers. But, as explained, USTelecom has offered no competition analysis to justify this assertion. Nor has USTelecom offered any other justification for concluding that reliance on Sections 251(b)(1), 201, 202, or 208 would provide sufficient protection from competitive harm. Notably, USTelecom fails to acknowledge that the Commission has relied on the continued availability of “cost-based rates available under Section 251 and through resale under Section 251(b)(4)” – the very Category 1 requirements from which USTelecom seeks forbearance in the Petition – to justify forbearance from Section 271 checklist items.⁹⁰ USTelecom also fails to acknowledge that state regulation of resale pursuant to Section 251(b) would not entail the *ex ante* protections afforded by the Section 251(c)(4) avoided-cost resale regime. Furthermore, the instant request for forbearance differs dramatically from other situations in which the Commission has relied on residual statutory requirements like Sections 201 and 202 of the Act as a justification for eliminating *ex ante* rate regulation. For instance, the *Enterprise Broadband Forbearance Orders*⁹¹ did not concern the core local competition provisions of the 1996 Act, a fact that renders those orders irrelevant to the USTelecom Petition. In any event, the Commission did analyze the marketplace for the

⁹⁰ USTelecom 2015 ¶ 32.

⁹¹ *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*; *Petition of BellSouth Corporation for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, Memorandum Opinion and Order, 22 FCC Rcd. 18705 (2007) (“AT&T Forbearance Order”); *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements, et al.*, Memorandum Opinion and Order, 22 FCC Rcd. 19478 (2007); *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, Memorandum Opinion and Order, 23 FCC Rcd. 12,260 (2008) (collectively, the “Enterprise Broadband Forbearance Orders”).

relevant enterprise broadband services in those orders. It found that the competitive conditions in combination with the Commission's enforcement authority under Sections 201, 202, and 208 of the Act would provide a sufficient counterweight to ILECs' market power.⁹² USTelecom has not even attempted to undertake such an analysis here.

Failure to provide any of the above information — as to specifically affected product and geographic markets, the presence or absence of wholesale competitive alternatives, barriers to near-term entry, and the impact on retail residential, small business, enterprise and government customers — renders the Petition fatally incomplete and deprives the Commission of the ability to assess the full impact of USTelecom's requested forbearance in local markets.

⁹² See, e.g., *AT&T Forbearance Order* ¶¶ 35-36.

IV. CONCLUSION

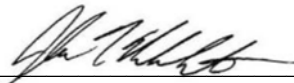
USTelecom has failed to provide arguments and evidence sufficient to establish its *prima facie* case for forbearance. Critically, USTelecom neglects any granular analysis of how forbearance will impact product and geographic markets with differing levels of competition. The Petition lacks specific facts and arguments to show that Section 251(c)(3) unbundling, Section 251(c)(4) resale, and associated statutory obligations, including the Section 272(e)(1) provisioning requirements, are unnecessary due to sufficient competition in the relevant product and geographic markets. Accordingly, USTelecom's Petition must be denied summarily.

Respectfully submitted,

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