

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

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

**U.S. TELEPACIFIC CORP., MPOWER COMMUNICATIONS CORP., AND ARRIVAL  
COMMUNICATIONS, INC. SUPPORT FOR  
MOTION FOR SUMMARY DENIAL**

U.S. TelePacific Corp., Mpower Communications Corp., and Arrival Communications, Inc., all doing business as TPx Communications (collectively “TPx”), support the Motion for Summary Denial filed by INCOMPAS, FISPA, the Midwest Association of Competitive Communications, and the Northwest Telecommunications Association (collectively, the “Competitive Carriers Group”).<sup>1</sup> As shown by the Competitive Carriers Group, the petition does not meet the legal standard established for forbearance relief. The Commission should deny the USTelecom Petition for Forbearance (“Petition”).<sup>2</sup>

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<sup>1</sup> INCOMPAS et. al. Motion for Summary Denial, WC Docket No. 18-141 (filed Aug. 6, 2018) (“*Competitive Carriers Group Motion*”).

<sup>2</sup> *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) (“*USTelecom Petition*”); see also Public Notice, *Pleading Cycle Established for Comments on USTelecom’s Petition for Forbearance from Section 251(c) Unbundling and Resale Requirements and Related Obligations, and Certain Section 271 and 272 Requirements*, WC Docket No. 18-141, DA 18-475 (rel. May 8, 2018) (“*Public Notice*”).

The Competitive Carrier Group’s Motion shows “that the petition for forbearance, viewed in the light most favorable to the petitioner, cannot meet the statutory criteria for forbearance.”<sup>3</sup> The Commission has established that it will deny “a petition [that] does not address an issue at a sufficiently granular level to permit meaningful analysis of whether or not the statutory criteria are met,” or that otherwise fails to state a *prima facie* case.<sup>4</sup> To win forbearance, a Petition must include all “facts, information, data, and arguments on which [it] intends to rely to make [its] *prima facie* case.”<sup>5</sup> Section 10 of the Communications Act, as amended, requires the Commission to engage in a rigorous analysis of competition “by defining the relevant product and geographic markets”<sup>6</sup> and “examining whether there are any carriers in those markets that, individually or jointly, possess significant market power.”<sup>7</sup> Without the necessary factual details, the Commission cannot conduct its required analysis.

The Petition does not address the relevant issues “at a sufficiently granular level” or provide the “convincing analysis and evidence” demanded by the Commission’s forbearance standard.<sup>8</sup> The Petition does not even attempt to: (1) define the relevant product markets, (2) explain

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<sup>3</sup> 47 C.F.R. § 1.56(a).

<sup>4</sup> *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, 9559, ¶ 30 (2009) (“*Forbearance Procedural Requirements Order*”).

<sup>5</sup> *Id.*, 24 FCC Rcd. at 9553, ¶ 17.

<sup>6</sup> *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, Memorandum Opinion and Order, 25 FCC Rcd. 8622, 8646, ¶ 42 (2010) (“*Qwest Phoenix Forbearance Order*”); *aff’d*, *Qwest Corp. v. FCC*, 689 F.3d 1214 (10th Cir. 2012).

<sup>7</sup> *Id.* at 8632, ¶ 21.

<sup>8</sup> *Forbearance Procedural Requirements Order*, 24 FCC Rcd. at 9559, ¶ 30.

why it would be reasonable for the Commission to define the relevant geographic market as “national,” or (3) show that incumbent local exchange carriers (“ILECs”) lack significant power in every – or even some – relevant market. Nor does the Petition “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.”<sup>9</sup> It also does not provide evidence of the availability of competitive alternatives at the customer location, define or analyze the product markets, or demonstrate why and how rates would remain just and reasonable after forbearance.

In the *Qwest Phoenix Forbearance Order*, the Commission evaluated Qwest’s market power to gauge whether sufficient competition existed if it granted forbearance to ensure prices would remain just and reasonable.<sup>10</sup> Under the *Qwest Phoenix* standard, a petitioner could rely upon facilities-based competition either in the wholesale market or from “a number of significant, full facilities-based competitors providing the relevant retail services.”<sup>11</sup> The analysis of whether enforcement of a regulation is “not necessary for the protection of consumers” rests on the presence of sufficient competition.<sup>12</sup> In making the Section 10 public interest determination, the Commission must consider whether forbearance will promote competitive market conditions, including among providers of telecommunications services.<sup>13</sup>

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<sup>9</sup> Competitive Carriers Group’s Motion at 2.

<sup>10</sup> *Qwest Phoenix Forbearance Order*, 25 FCC Rcd. at 8645-47, ¶¶ 41-43.

<sup>11</sup> *Id.* at 8647, ¶ 43.

<sup>12</sup> *Id.* at 8671, ¶ 92; *See also Petition of NTCA—The Rural Broadband Association and the United States Telecom Association for Forbearance Pursuant to 47 U.S.C. § 160(c) from Application of Contribution Obligations on Broadband Internet Access Transmission Services*, Order, FCC 18-75, ¶ 9 (rel. June 8, 2018).

<sup>13</sup> 47 U.S.C. § 160(b).

USTelecom alone bears the burden of including sufficient granular data to show why and how there is sufficient competition to ensure that wholesale and retail rates would remain just and reasonable after forbearance. USTelecom admitted – in its Petition – that UNE rates will rise following forbearance when it proposed a transition framework with an immediate 15 percent rate increase.<sup>14</sup> Although USTelecom has since reached a “compromise” with Windstream to prohibit price increases on existing UNEs before February 2021, the Commission can predict with certainty that wholesale rates will increase by a similar amount, if not more, after February 2021. The Petition offers no “convincing analysis and evidence” to the contrary and does not show any “significant alternative sources of wholesale inputs” to UNEs.<sup>15</sup>

Nor does USTelecom offer sufficient granular data to show that retail rates will not increase. USTelecom asserts that nationwide UNE demand had decreased<sup>16</sup> but provides no data to justify its claims that “[o]nly a small fraction of competitive offerings rely on the regulations from which [its members] seek forbearance.”<sup>17</sup> Yet CalTel and TPx contend that the use of UNEs have increased in the state of California.<sup>18</sup> In light of this evidence, USTelecom’s assertion that Commission data shows competitive LECs use approximately one million UNEs to provide broadband access<sup>19</sup> proves otherwise. Similar to *Qwest Phoenix Forbearance Order*, the Petition fails to include any data that would show that “any new entry would be timely; likely; or sufficient in its

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<sup>14</sup> USTelecom Petition at 44. *See* TPx Opposition at 27.

<sup>15</sup> *Qwest Phoenix Forbearance Order*, 25 FCC Rcd. at 8659, ¶ 70.

<sup>16</sup> USTelecom Petition at 16.

<sup>17</sup> *Id.* at 19.

<sup>18</sup> *See* CalTel Comments at 18-24 (describing increased use of UNEs in California); TPx Comments at 15.

<sup>19</sup> USTelecom Petition, App. B. at 3.

magnitude, character, and scope to operate as a competitive counterbalance to any attempted price increase by a hypothetical monopolist.”<sup>20</sup> The Petition does not present evidence that a fiber network is within one-half mile of each UNE customer’s location to show the customer can obtain facilities-based service as an alternative to the competitor’s UNE-based service.<sup>21</sup> If the Petition is granted and its Draconian provisions go into effect, competitive providers relying on UNEs today will have no bargaining power and will be forced to accept whatever new pricing and conditions the incumbent LEC imposes under the threat of their customers losing service. Competitive providers like TPx would then have to pass any increase in its input costs on to its customers to remain profitable and continue providing services.<sup>22</sup> The Petition is silent on how this increase leads to “just and reasonable” rates.

Nor does the Petition include any data on the post-forgiveness prices consumers will pay for broadband they now receive using EoC. In denying Qwest’s Phoenix forgiveness request, the Commission stated that “[i]n the absence of any record evidence that a *de novo* entrant is likely to construct a network in this market in the near future, [the Commission does] not find the theoretical possibility of such occurrence sufficient to support a finding that [the ILEC, or the ILEC in conjunction with the cable company] would not have the ability to exercise significant market power.”<sup>23</sup> The Petition therefore fails to make a *prima facie* case that retail rates will not increase and remain just and reasonable.

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<sup>20</sup> *Qwest Phoenix Forgiveness Order*, 25 FCC Rcd. at 8667, ¶ 85.

<sup>21</sup> *Id.* at 8667, ¶ 85 (finding there is “no record evidence that any ... over-builder is considering expanding its network into Phoenix.”).

<sup>22</sup> Shipley Decl., ¶ 24.

<sup>23</sup> *Qwest Phoenix Forgiveness Order*, 25 FCC Rcd. at 8667, ¶ 85.

The Petition is also bereft of any explanation of what services USTelecom's members will offer to replace the millions of voice and broadband connections competitive LECs supply using UNEs and resold services – services that will be offered over the same copper loops that CLECs use today. The Petition's failure to specify the “significant alternative sources of wholesale inputs” to UNEs<sup>24</sup> that incumbent LECs will make available post-forbearance does not provide sufficient granular detail necessary for the Commission to apply its “robust competition” standard required to forbear from an incumbent LEC's obligation to offer unbundled DS0 loops that enable TPx and other competitors to offer 50 Mbps and below broadband service or line-powered POTS service. There are no reasonably comparable competitive alternatives available for UNEs and resold plain old telephone service (“POTS”).<sup>25</sup> The Petition provides no guarantee that DS0 loops or a commercial replacement product will be offered following forbearance. If USTelecom wants unbundling relief for its incumbent LEC members, it should have identified in its Petition the commercial services and prices that its members plan to make available if forbearance is granted. The Commission cannot conduct its competition or public interest analysis without understanding the commercial services and prices USTelecom's members will make available following forbearance. Without it, the Commission is left to make an uninformed judgment as to whether wholesale and retail rates will remain just and reasonable.

Because USTelecom has not provided sufficient granular evidence to prove that existing facilities-based competition is sufficient to discipline ILECs' rates in the retail markets for low

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<sup>24</sup> *Id.* at 8659, ¶ 70.

<sup>25</sup> *See* TPx Opposition at 27 (stating that no reasonably comparable competitive alternatives are available for DS0 loops and resold voice services); Shipley Decl., ¶ 33 (stating that no substantive details about commercial alternatives to UNEs have been made available by the ILECs).

bandwidth services (*i.e.*, at or below 50 Mbps) sold to small and medium business and community based organization customers or the retail business POTS (*i.e.*, line-powered) line market in each geographic market, the Commission should grant the Competition Carriers Group's Motion and deny the Petition.

Respectfully submitted,

*/s/ Andrew D. Lipman*

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September 5, 2018