

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Petition of USTelecom for Forbearance
Pursuant to 47 U.S.C. § 160(c) to Accelerate
Investment in Broadband and Next-
Generation Networks

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WC Docket No. 18-141

**REPLY COMMENTS OF THE
PUBLIC UTILITY COMMISSION OF OREGON**

The Public Utility Commission of Oregon (the “Oregon Commission”) respectfully submits these reply comments concerning the petition for forbearance filed by USTelecom – The Broadband Association (“USTelecom”) on May 4, 2018.¹ The Oregon Commission encourages the Federal Communications Commission (“FCC”) to take a principled approach to competitive analysis in this proceeding, which would involve carefully accounting for market-specific data and considering the potential impacts of forbearance on states and competitive providers. The Oregon Commission also requests the FCC clearly explain whether and how state authority would change as a result of this proceeding, as well as provide opportunity to comment on any such alteration.

INTRODUCTION AND SUMMARY

The Petition seeks broad forbearance on a nationwide basis to relieve every incumbent local exchange carrier (“ILEC”) from an array of statutory obligations. These obligations were designed to foster a competitive telecommunications marketplace. Among the requirements at issue here are the core local telecommunications competition requirements to provide unbundled

¹ *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c)*, WC Docket 18-141 (filed May 4, 2018) (“Petition”).

network elements (“UNEs”) and avoided-cost resale under Sections 251(c)(3) and 251(c)(4) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the Act) and related provisions that apply under Sections 251(d)(3) and 252 of the Act. The Oregon Commission is the state commission in Oregon that exercises the authority delegated to states under Sections 251 and 252 of the Act and would therefore be affected by a grant of forbearance in this proceeding.

The Oregon Commission encourages the FCC to apply a principled approach to competitive analysis. The forbearance standard requires the FCC to assess, among other things, whether forbearance “will promote competitive market conditions” and “the extent to which such forbearance will enhance competition among providers of telecommunications services.”² While USTelecom makes broad nationwide assertions about competition in support of its argument that forbearance is now in the public interest, in undertaking a competitive analysis, the FCC should nevertheless more granularly assess “relevant product and geographic markets” to determine “whether there are any carriers in those markets that, individually or jointly, possess significant market power.”³ The Oregon Commission sees no reason to depart from this economically sound approach or to otherwise ignore variation in local competitive conditions, particularly as such an approach is supported by the statutory impairment standard that otherwise applies to UNEs.

The FCC must fully consider any data in the record that suggests forbearance may negatively affect competition among providers. Oregon market data suggest that UNEs and resale still play a role in multiple local markets. And, under the FCC’s own impairment standard, the

² 47 U.S.C. § 160(a)-(b).

³ *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, FCC 10-113, 25 FCC Rcd. 8622 ¶¶ 21, 37-44 (2010) (“*Qwest Phoenix Forbearance Order*”), *aff’d* by *Qwest Corp. v. FCC*, 689 F.3d 1214 (10th Cir. 2012).

competitive classification of Oregon wire centers suggests that significant variation in competitive potential exists across the state. The FCC should carefully analyze all data in the record that parties argue support the conclusion that forbearance will harm competition rather than enhance it.

Finally, any changes to state authority resulting from this proceeding should be sufficiently described to enable informed comment. For example, if forbearance is granted, state commissions need to understand their role during any transition period. Or, after transition, state commissions need to understand what of their role remains with respect to interconnection agreements. The FCC should affirmatively explain any effect on states and provide the opportunity to comment.

DISCUSSION

I. The FCC Should Not Forbear From Enforcement of the Unbundling and Resale Provisions of the Act Without Undertaking a Competitive Analysis on a Market-By-Market Basis.

USTelecom bases its request for forbearance on broad, nationwide conclusions about the state of competition for communications services.⁴ The Oregon Commission is concerned that such broad conclusions are not well tailored to the standard that is most appropriate here. The proper standard requires market-specific assessment of the potential impact of forbearance on market conditions and, ideally, the use of a traditional market power analysis.⁵ Such an analysis requires granular consideration of specific product and geographic markets. The FCC should therefore take care to undertake a principled competitive analysis before it determines that the record here supports forbearance from the UNE and avoided-cost resale provisions of the Act.⁶

⁴ Petition at 25 (asserting that “the evidence would compel a finding of nationwide non-impairment”); *id.* at 7-18 (detailing USTelecom’s assertions about competition).

⁵ See 47 U.S.C. § 160; *Qwest Phoenix Forbearance Order*, 25 FCC Rcd. ¶ 43.

⁶ The Oregon Commission offers comment here on the request for forbearance from certain subsections of Sections 251 and 252; it takes no position on the Section 271 request at this time.

The Act authorizes the FCC to forbear from applying a provision of the Act if a petitioner meets its burden to establish three things: “(1) enforcement of such . . . provision is not necessary to ensure that the charges [and] practices . . . in connection with that . . . telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement . . . is not necessary for the protection of consumers; and (3) forbearance . . . is consistent with the public interest.”⁷ The public interest criterion requires the FCC to “consider whether forbearance from enforcing the provision . . . will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services.”⁸ A petitioner’s burden is to “provid[e] convincing analysis and evidence” that “withstand[s] the evidence and analysis propounded by” the petitioner’s opponents.⁹

As competition is the justification underlying USTelecom’s Petition, it is critical that the FCC apply a principled approach to competitive analysis here. Consistent with its own precedent, the FCC should “define[] the relevant product and geographic markets and examine[] whether there are any carriers in those markets that, individually or jointly, possess significant market power.”¹⁰ Wholesale and retail markets should be analyzed separately.¹¹ Each customer location is potentially a separate geographic market, “given that a customer is unlikely to move in response

⁷ 47 U.S.C. § 160(a).

⁸ 47 U.S.C. § 160(b).

⁹ *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act, as Amended*, Report and Order, FCC 09-56, 24 FCC Rcd. 9543 ¶¶ 20-21 (2009) (“*Forbearance Procedures Order*”) (explaining the petitioner’s burden).

¹⁰ *Qwest Phoenix Forbearance Order*, 25 FCC Rcd. ¶ 21; see also *id.* ¶¶ 37-44 (discussing the traditional market power framework).

¹¹ *Id.* ¶ 43.

to a small, but significant and nontransitory increase in the price of the service,” though the FCC “traditionally has aggregated customers facing similar competitive choices.”¹²

Opponents of the Petition offer a variety of arguments why it does not meet these standards. For instance, one state commission argues that USTelecom seeks overly broad relief by not citing a particular unbundled element, group of elements, or distinct geographic areas.¹³ Another asserts that the results of its own data collection suggest that a potential result of forbearance could be that state will have just “one dominant provider in business voice, mobile backhaul, and other wholesale services.”¹⁴ Others commenters raise important questions about the effect on the markets for 911 and emergency services.¹⁵ The Oregon Commission takes no position on the validity of the assertions offered by other parties, but it believes that in light of the evidence and analysis that has been offered into the record, it is crucial that the FCC apply its standards carefully and on a market-by-market basis for each market covered by the Petition.¹⁶

The nature of the impairment standard—under which the FCC would ordinarily determine that UNE obligations under Section 251 of the Act are no longer warranted—reinforces the need for a market-by-market approach here.¹⁷ The purpose of the statutory impairment standard is to

¹² *Id.* ¶ 64.

¹³ See Comments of the Michigan Public Service Commission at 2 (filed Aug. 6, 2018).

¹⁴ Comments of the California Public Utilities Commission at 18 (filed Aug. 6, 2018) (“California Comments”).

¹⁵ See Motion for Summary Denial and Comments of Cox Communications, Inc. at 3-7 (filed Aug. 6, 2018) (arguing that the petition fails to address 911/E911 and other product markets in meaningful detail); California Comments at 3-4 (arguing that the question of how forbearance would affect 911 and emergency-services networks is unanswered by the Petition).

¹⁶ See also Comments of Public Utilities Commission of Ohio at 6-7 (filed Aug. 6, 2018) (“Ohio Comments”) (listing questions that “illustrate the need for the Commission to carefully evaluate each market”).

¹⁷ See *Unbundled Access to Network Elements, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, FCC 04-290, 20 FCC Rcd. 2533 (2005) (“Triennial Review Remand Order”), *aff’d*, *Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

ask whether “the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.”¹⁸ As interpreted by the FCC and the D.C. Circuit, the impairment standard requires a “granular” analysis of local markets, including different market segments and geographic areas.¹⁹ In rejecting a nationwide presumption of impairment, the D.C. Circuit remarked that the FCC “may not ‘loftily abstract[] away from all specific markets.’”²⁰ The Oregon Commission encourages the FCC to avoid an analogous mistake here by not reaching more broadly than is justified.

II. The FCC Must Carefully Consider The Potential Negative Impacts of Forbearance on Competition.

The Act requires the FCC to consider the competitive effects of forbearance, including the extent to which it will enhance competition.²¹ While the Oregon Commission makes no claim here about the current level of competition in Oregon for any particular service, available information suggests that UNEs and resale play more than a *de minimis* role in the state and that competitive conditions vary meaningfully across the state. In light of this and other assertions in the record, the FCC must carefully consider whether forbearance might harm competition rather than enhance it.

UNEs and avoided-cost resale still appear to play an important role for many competitive providers in Oregon. Two ILECs—the largest incumbents in the state—are the major providers of UNEs and resale in Oregon. In 2016, 66 competitive local exchange carriers (“CLECs”) surveyed

¹⁸ 47 U.S.C. § 251(d)(2)(B).

¹⁹ *Triennial Review Remand Order*, 20 FCC Rcd. ¶¶ 8-10; *U.S. Telecom Ass’n v. FCC*, 359 F.3d 554, 569-71 (D.C. Cir. 2004) (“*USTA I*”).

²⁰ *USTA II*, 359 F.3d at 569 (quoting *U.S. Telecom Ass’n v. FCC*, 290 F.3d 415, 423 (D.C. Cir. 2002) (“*USTA I*”)) (alteration in original).

²¹ 47 U.S.C. § 160(b).

by the Oregon Commission reported providing local service in Oregon. Of those, 40 reported reselling ILEC services and 29 reported utilizing UNEs to provide service.²²

Oregon competitive providers are actively using a substantial number of UNEs and a significant quantity of resale. ILECs reported leasing 78,200 UNEs to CLECs in 2016.²³ While this reflects a slight decline from the same reported metric for 2015, the trend for this figure has been, overall, relatively flat since approximately 2011.²⁴ Additional UNEs not reflected in these figures are likely used to provide broadband Internet access service.²⁵ Data reported by the FCC shows Oregon CLECs provided switched local exchange service using 46,000 lines provisioned by resale of other companies' facilities.²⁶ Again, this figure does not include non-local exchange services such as broadband.

Competitive conditions vary in different areas of Oregon when assessed against the FCC's own impairment standard. Under this standard, wire centers in Oregon are not all located in equally competitive areas. One major Oregon ILEC has 81 central offices, 69 of which are classified as Tier 3 for dedicated interoffice transport, which indicates that there is not sufficient competitive potential on routes connecting to those offices to permit the ILEC to cease offering interoffice transport services on an unbundled basis. In the 58 central offices of another major Oregon ILEC, 56 offices are still classified as Tier 3 and are therefore similarly impaired. Another measure of impairment—that for UNE loops—demonstrates additional variation in competitive

²² See Public Utility Commission of Oregon, *Local Telecommunications Competition Survey 2017 Annual Report* 21-22 (Jan. 2, 2018), <https://www.puc.state.or.us/telecom/2017-Telecommunications-Competition-Survey.pdf>.

²³ *Id.* at 11.

²⁴ See *id.* at 11, 23.

²⁵ See Comments of Blackfoot Communications, Inc. at 3-5 (filed Aug. 6, 2018) (explaining that UNEs are used to provide advanced services, not just switched landline voice service).

²⁶ Federal Communications Commission, Wireline Competition Bureau, *Voice Telephone Services: Status as of December 31, 2016* (rel. Feb. 2018) (supplemental state subscription table).

circumstances across the state. In one Oregon ILEC's operating area, only 1 central office (Portland) meets the non-impairment test for DS1 loops, and only 3 central offices (Portland, Eugene, and Salem) meet the non-impairment test for DS3 loops. In the other major Oregon ILEC's operating area, no offices meet the non-impaired tests for either DS1 or DS3 loops. ILECs update these classifications when new thresholds are met.²⁷ This distribution of wire center classifications suggests significant variation in competition or competitive potential in different markets across Oregon. Against this backdrop, it is difficult to see how the evidence necessarily "compel[s] a finding of nationwide non-impairment," as USTelecom asserts.²⁸

The record contains numerous other assertions from Oregon competitive providers about the importance of UNEs and resale to competition and the potential negative impact of forbearance in Oregon. They raise serious questions about whether forbearance would negatively impact certain geographic areas,²⁹ customer segments,³⁰ or services such as rural broadband.³¹ While the

²⁷ See, e.g., Order No. 18-238, Docket No. UM 1891, 2018 WL 3818024 (Public Utility Commission of Oregon June 27, 2018) (resolving partially contested petition to update non-impaired wire center list).

²⁸ Petition at 25. See also Comments of the Pennsylvania Public Utility Commission at 3-9 (filed Aug. 6, 2018) ("Pennsylvania Comments") (arguing that the FCC should require the impairment standard be met before granting forbearance and that USTelecom has not offered granular enough data to satisfy that standard).

²⁹ For example, Gorge Networks asserts that UNE loops are, in some remote Oregon locations, the only economically viable way to provide broadband service. See Declaration of Dan Bubb, Gorge Networks, ¶ 8 (filed Aug. 6, 2018) (Attachment 9 to Opposition of Incompas, FISPA, the MACC, and the NTA ("Competitive Carriers Opposition")). InfoStructure asserts that it provides faster and more reliable service than the incumbent, but may not be able to continue to do so if UNEs were no longer available. See Declaration of Jeff Rhoden, Origin Networks, LLC dba InfoStructure, ¶¶ 7-9 (filed Aug. 6, 2018) (Attachment 12 to Competitive Carriers Opposition).

³⁰ Allstream asserts that two-pair copper UNE loops are key to Allstream being able to offer specialized services that meet the unique needs of certain health care, governmental, or banking customers. See Declaration of Douglas Denney, Allstream Business US, ¶¶ 14, 16 (filed Aug. 6, 2018) (Attachment 4 to Competitive Carriers Opposition).

³¹ Douglas Fast Net ("DFN") asserts that it uses UNE subloops to service approximately 2,850 broadband customers. Declaration of Todd Way, Douglas Services d/b/a Douglas FastNet, ¶ 5 (filed Aug. 6, 2018) (Attachment 7 to Competitive Carriers Opposition). According to DFN,

Oregon Commission takes no position on the merits of others' assertions, it notes that they raise important questions about whether forbearance is advisable here. The FCC should carefully evaluate these and any other parts of the record that suggest forbearance could harm competitive market conditions, rather than enhancing them as the forbearance standard properly anticipates.

III. Changes to the Role of State Commissions Must Be Fully Considered and Explained.

State commissions play a unique role under the Act. Section 252 authorizes state commissions to, among other things, review and approve negotiated interconnection agreements, and to mediate or arbitrate differences arising in the course of negotiations.³² The Petition seeks to eliminate ILEC-specific unbundling and resale mandates in Section 251(c)(3) and (4) and “associated Section 251 and 252 obligations.” Presumably, this would eliminate some state responsibilities under the Act. If it grants forbearance, the FCC should be as explicit as possible regarding what remains of the state role during any transition period and, beyond that, going forward relative to interconnection or other agreements and dispute resolution.

State commissions' review and approval of interconnection agreements acts a check on negotiations to avoid the introduction of terms that would be inconsistent with the Act, discriminatory against a carrier not party to the agreement, or harmful to the public interest.³³ Under this authority, the Oregon Commission has reviewed and approved (in either original or revised form) 67 agreements (covering interconnection, resale, UNEs, colocation, and combinations of these) and 25 amendments to agreements since January 2016. Many more that were approved prior to that period are still in effect. By working with parties to these agreements and exercising the role given to it under the Act, the Oregon Commission and its staff have

some of its customers may only have broadband Internet access through satellite or slower legacy technology if DFN were to exit the market. *Id.* ¶ 2.

³² See 47 U.S.C. § 252.

³³ 47 U.S.C. § 252(e)(2).

prevented numerous problematic provisions from remaining in agreements. Examples of these provisions include incorrect rate sheets, missing language, erroneous language inserted inadvertently, and provisions that conflict with state policy.

It is unclear how granting the petition will impact the content of, and need for, agreements in the future. Should the FCC grant forbearance, any impacts on existing or future interconnection agreements (such as current terms, termination dates, rates, services, or conditions) as well as state commission review and approval authority, must be identified and explained.³⁴ If the services are to be transitioned to commercial agreements, will state oversight be needed or permitted? Will reasonable price increases or ceilings be imposed? What is to stop ILECs from increasing prices sufficiently high enough to make the services uneconomical for use by CLECs? Given these questions and the traditional role of state commissions under the Act to help equalize bargaining power,³⁵ the Oregon Commission believe that states should likely retain their authority to review and approve agreements that replace those now negotiated under Section 251, and should also likely retain authority to help resolve disputes that arise pertaining to such agreements. If the Commission disagrees, and forbears from unbundling obligations and related state commission roles, the FCC should give states the opportunity to comment on the specific scheme it adopts.

CONCLUSION

The sweeping relief requested by USTelecom in the Petition warrants careful scrutiny by the FCC under the proper standards. For the reasons explained above, the FCC should undertake a principled competitive analysis on a market-by-market basis before forbearing from enforcement of the UNE and resale provisions of the Act. Additionally, the FCC should carefully consider all information in the record that suggests, contrary to the purpose of forbearance, that forbearance

³⁴ See Pennsylvania Comments at 12-13 (raising a question about change of law provisions).

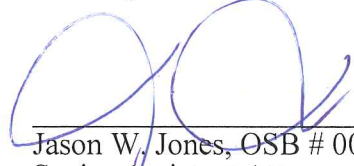
³⁵ See Ohio Comments at 5-6 (noting the effect that recourse to state commissions has played in equalizing bargaining power).

from these provisions may harm rather than enhance competition. And finally, the FCC should be explicit about whether and how the authority of states will change as a result of this proceeding.

DATED this 5th day of September, 2018.

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