

**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)	

**REPLY COMMENTS OF GRANITE
IN SUPPORT OF MOTION FOR SUMMARY DENIAL AND OPPOSITION**

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Granite Telecommunications, LLC (“Granite”), through its undersigned counsel, hereby submits reply comments in support of the Motion for Summary Denial of USTelecom’s Petition for Forbearance¹ filed by INCOMPAS, FISPA, the Midwest Association of Competitive Communications, and the Northwest Telecommunications Association² and, in the alternative, Granite’s Opposition to USTelecom’s Petition.³

I. INTRODUCTION AND SUMMARY

As shown in the Joint Motion for Summary Denial, USTelecom has utterly failed to prove that forbearance from the Category 1 avoided-cost resale obligations meets the statutory

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”).

² Motion for Summary Denial of INCOMPAS, FISPA, Midwest Association of Competitive Communications, and the Northwest Telecommunications Association, WC Docket No. 18-141 (Aug. 6, 2018) (“Joint Motion for Summary Denial”).

³ Opposition of Granite to US Telecom’s Forbearance Petition, WC Docket No. 18-141 (Aug. 6, 2018) (“Granite Opp.”).

criteria set forth in Section 10 of the Communications Act of 1934, as amended.⁴ Accordingly, the Commission should grant the Joint Motion for Summary Denial. If the Commission declines to do so, it must employ the traditional market power framework to analyze the level of competition in the relevant markets. Such an analysis will yield the conclusion that ILECs continue to have substantial and persisting market power in the provision of TDM-based telephone services provided via copper loops (“traditional TDM service”), and forbearance is therefore inappropriate.

Numerous parties, including the public utilities commissions of California, Michigan, Ohio, and Pennsylvania, filed comments opposing forbearance and describing the substantial harm to consumers and competition that would result if the Commission were to grant USTelecom’s Petition. The opposition of state regulators highlights the critical, statutorily-created role that states play in ensuring that avoided-cost resale rates are just and reasonable and not unjustly or unreasonably discriminatory, and that the ILECs fulfill their duty to deal in good faith. As Granite’s recent experiences in Michigan and New York illustrate, state supervision of avoided-cost resale is a highly effective means of ensuring that ILECs cannot charge their wholesale customers above-cost rates for traditional TDM service.

Only Verizon and the Internet Innovation Alliance filed comments supporting USTelecom’s request for forbearance from the avoided-cost resale requirement. Their arguments fall flat. In an expert economist report submitted on behalf of Granite, William Zarakas demonstrates that it is necessary to assess competition using appropriate relevant product markets, such as the market for traditional TDM service. Yet Verizon fails to do that, relying instead on a meaningless assessment of all relevant voice markets aggregated together.

⁴ 47 U.S.C. § 160(a).

And, as Granite has shown, the Internet Innovation Alliance’s contention that required investment in lower-speed services harms deployment of high-speed services also is without merit.

The Petition should be denied.

II. DISCUSSION

As explained in Granite’s Opposition, as well as oppositions filed by numerous other parties, USTelecom has not come close to carrying its burden of proving that forbearance from the Section 251(c)(4) avoided-cost resale requirements and the related provisions of Section 252 meets the statutory criteria set forth in Section 10.⁵ The Petition is so facially insufficient that the Commission should grant the Joint Motion for Summary Denial.⁶ Summary denial would spare private parties from needlessly incurring further expenses associated with opposing the facially meritless Petition. Summary denial would also conserve Commission resources, making them available for more productive purposes than the time-consuming review of a petition it will ultimately deny. Nor would summary denial prejudice USTelecom since it would be free to file a forbearance petition in the future addressing the same regulations for which it seeks forbearance here.

⁵ See 47 U.S.C. §§ 160(a), 251(c)(4), 252; *see generally* Granite Opp.; *see also, e.g.*, Opposition of MetTel, WC Docket No. 18-141, at 2 (Aug. 6, 2018) (“MetTel Opp.”) (“USTelecom’s utter failure to support its assertion that competition renders avoided-cost resale unnecessary is fatal to the Petition insofar as it seeks forbearance from Section 251(c)(4) and the related provisions. This is especially true to the extent that those requirements apply to TDM-based telephone service provided via copper networks to business customers[.]”); Comments of CALTEL, WC Docket No. 18-141, at 18 (Aug. 6, 2018); Comments of the Pennsylvania Public Utility Commission, WC Docket No. 18-141, at 8 (Aug. 6, 2018) (“Pennsylvania PUC Comments”) (“USTelecom has not provided sufficiently granular data to meet its burden of proof that the unbundling and resale obligations are no longer necessary . . . for competing carriers and their end-user customers.”).

⁶ See Granite Opp. at 3, 15; *see generally* Joint Motion for Summary Denial.

However, if the Commission declines to summarily deny the Petition, it must conduct its review by utilizing the appropriate analytical framework. Where, as here, a party relies on the presence of competition as the basis for its request for forbearance from applying economic regulation to legacy services, the Commission must assess that request by conducting a thorough market power analysis utilizing its traditional market power framework.⁷ Application of that framework shows that the ILECs continue to have substantial and persisting market power in the provision of traditional TDM service, and the statutory forbearance standard therefore cannot be met with respect to Section 251(c)(4) avoided-cost resale as applied to that service. What is more, because the avoided-cost discount includes only the costs that ILECs avoid by selling their services at wholesale, there are effectively no costs to the ILECs associated with retaining Section 251(c)(4).⁸

⁷ 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, ¶¶ 37-45 (2010), *aff'd by Qwest Corp. v. FCC*, 689 F.3d 1214 (10th Cir. 2012); see also Granite Opp. at 3-5, 11-14; Opposition of U.S. TelePacific Corp., Mpower Communications Corp., and Arrival Communications, Inc., WC Docket No. 18-141, at 11 (Aug. 6, 2018) (“TPx Opp.”); Opposition of Access Point Inc., BullsEye Telecom, Inc., Matrix Telecom, LLC dba Impact Telecom, New Horizon Communications Corp., and Xchange Telecom LLC, WC Docket No. 18-141, at 7-12 (Aug. 6, 2018) (“Wholesale Voice Coalition Opp.”); Opposition of Sonic Telecom, LLC to Petition for Forbearance of USTelecom, WC Docket No. 18-141, at 12-13 (Aug. 6, 2018); MetTel Opp. at 3; Opposition of First Communications, LLC, WC Docket No. 18-141, at 7-12 (Aug. 6, 2018).

⁸ See Granite Opp. at 35. Cf. Comments of Verizon, WC Docket No. 18-141, at 21 (Aug. 6, 2018) (“Verizon Comments”) (asserting that “in industries characterized by rapid technological advancement—like the telecommunications sector— . . . distortions can undermine consumer welfare by imposing costs that outweigh any minimal benefit,” but failing to explain how this could be the case in the context of the avoided-cost resale requirement) (citing Andres V. Lerner, *An Economic Analysis of the Impact of Forbearance from 251(c)(3) on Competition and Investments*, ¶ 14 (Aug. 6, 2018), attached as Exhibit A to Verizon Comments (“Lerner Decl.”)).

A. The Commission should heed the concerns of state regulators.

Notable among the numerous parties that filed oppositions to the Petition in the initial round of comments are the public utilities commissions of California, Michigan, Ohio, and Pennsylvania. The significant concerns they have raised include the points that USTelecom has not provided sufficiently granular data to show that forbearance is justified,⁹ that relief should be considered on a market-by-market basis and not a nationwide basis,¹⁰ that neither VoIP nor mobile wireless service is a substitute for traditional TDM service,¹¹ and that elimination of the avoided-cost resale requirement will harm consumers.¹² In addition, the California Public Utilities Commission has described the continuing importance of traditional TDM service to public safety entities such as California PSAPs, which require copper facilities for their

⁹ See, e.g., Comments of the California Public Utilities Commission, WC Docket No. 18-141, at 7-10 (Aug. 6, 2018) (“CPUC Comments”); Comments of the Michigan Public Service Commission, WC Docket No. 18-141, at 2 (Aug. 6, 2018) (“Michigan PSC Comments”); Pennsylvania PUC Comments at 8-10.

¹⁰ See, e.g., CPUC Comments at 7-10; Pennsylvania PUC Comments at 8-10; Comments of the Public Utilities Commission of Ohio, WC Docket No. 18-141, at 6-7 (Aug. 3, 2018) (“Ohio PUC Comments”); Michigan PSC Comments at 2.

¹¹ See, e.g., Michigan PSC Comments at 3-4 (explaining that traditional TDM service may be the only reliable voice service available in certain areas within the state and stating that the PSC “does not support VoIP being considered equal to traditional wireline service for technical and regulatory reasons”); CPUC Comments at 3-4, 17-18.

¹² See, e.g., Pennsylvania PUC Comments at 11-12 (“The ability of ILECs to impose resale restrictions and conditions would allow ILECs to protect their market position by withdrawing services unilaterally and unconditionally.”); Ohio PUC Comments at 4-6 (“[I]t 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.”); CPUC Comments at 28 (“[W]e specifically find that granting this petition risks harming the California market, as it likely would have one dominant provider in business voice, mobile backhaul, and other wholesale services in California.”).

Centralized Automated Message Accounting trunks used for 911 connections.¹³ The Commission should accord significant weight to the views of these state regulators given their special expertise in local competition matters and given that they are impartial third-parties.

The states' involvement in this proceeding also draws focus to a further issue that requires additional attention, namely the importance of preserving the state commissions' key role in enforcing the requirements of Section 251(c). As Granite explained in its Opposition, the statutory scheme for avoided-cost resale creates a critical role for states in ensuring that rates for traditional TDM service sold pursuant to Section 251(c)(4) are just and reasonable and not unjustly or unreasonably discriminatory.¹⁴ If forbearance from enforcing that provision were granted, states would be precluded from playing their important role in oversight of wholesale rates.

Two of Granite's recent experiences illustrate how competition and consumers would be harmed if states were no longer able to enforce Section 251(c)(4) and the related statutory provisions. *First*, in 2017, Granite sought to resell to its end-user customers at the avoided-cost discount traditional TDM service that Frontier made available to its retail customers. Frontier denied Granite's request to do so, and then ceased responding to Granite's inquiries about the matter, all in clear violation of Section 251(c)(4) and the terms of the state-approved interconnection agreement between the parties. Granite therefore was left with no choice but to invoke the New York Public Service Commission's ("PSC") expedited dispute resolution process, which it did in December 2017. Given the involvement of the New York PSC, Frontier

¹³ See CPUC Comments at 3-4.

¹⁴ See Granite Opp. at 30-31.

and Granite were able to agree on an arrangement for the sale of Frontier's services subject to the avoided-cost discount.

Second, also in 2017, as part of a broader rate dispute that spanned numerous AT&T ILEC service territories, Granite filed a complaint against Michigan Bell Telephone Company d/b/a AT&T Michigan. In the complaint, Granite explained that, in violation of Section 251(c)(4), the Michigan Telecommunications Act, and the state-approved interconnection agreement between the parties, AT&T Michigan had failed to make available to Granite, on just, reasonable, and nondiscriminatory terms, traditional TDM service that AT&T provides to its retail customers. The Michigan PSC conducted a full mediation of this dispute. The detailed provisioning plan that resulted from the Michigan mediation formed the basis of a comprehensive agreement between Granite, AT&T Michigan, and other AT&T ILEC operating companies regarding availability of these services for resale under Section 251(c)(4).

There is no question that, in both instances, state supervision of the interconnection agreements between the parties, as established by Section 252 of the Act and conducted by regulators with expertise in analyzing the local market conditions and available services present in their respective states, helped to level the playing field between Granite and the ILECs. As a result, both ILECs ultimately sold Granite the traditional TDM service at issue at just and reasonable avoided-cost rates, consistent with Section 251(c)(4). In the absence of state supervised avoided-cost resale, ILECs would be free to charge their wholesale customers above-cost rates for traditional TDM service, to the detriment of consumers and competition.

B. Support for USTelecom’s request for forbearance from the avoided-cost resale requirement is scant and without merit.

Only two parties, Verizon and the Internet Innovation Alliance, support granting USTelecom’s petition. Those parties’ filings only serve to underscore the absence of any basis for forbearing from enforcement of Section 251(c)(4) and the related provisions.

Like USTelecom, Verizon makes only a halfhearted attempt to argue that competition renders application of the Section 251(c)(4) avoided-cost resale requirement unnecessary. And, like USTelecom, Verizon offers no information or data that would enable the Commission to reach that conclusion. For example, Verizon contends erroneously that (1) competition in the marketplace for voice services is intense and does not rely to a meaningful extent on avoided-cost resale¹⁵ and (2) wireline voice services have “collapsed into” a larger communications services marketplace that includes a variety of technologies and providers.¹⁶ The expert economist report submitted by Mr. Zarakas shows that these generalized assertions that fail to utilize appropriate relevant markets do not reflect the true economic preferences of important customers, such as companies that operate many locations across multiple states, are without merit, and, indeed, are affirmatively dangerous. As Mr. Zarakas explains, “broad and sweeping market analysis hides important product distinctions and geographic unevenness, and can give rise to inappropriate policy conclusions that risk substantial harm to . . . these locations.”¹⁷

¹⁵ See Verizon Comments at 19.

¹⁶ See *id.* at 8.

¹⁷ Declaration of William P. Zarakas ¶ 14 (Aug. 6, 2018), attached as Attachment B to Opposition of Granite to USTelecom’s Forbearance Petition, WC Docket No. 18-141 (Aug. 6, 2018) (“Zarakas Decl.”); see also Opposition of Public Knowledge, the Benton Foundation, Next Century Cities, New America’s Open Technology Institute, and the National Hispanic Media Coalition, WC Docket No. 18-141, at 16 (Aug. 6, 2018) (“[U]nder no circumstances can these fixed, wireline products and services be assumed to be competitive across all or most of a

To begin with, Verizon’s reliance on the status of “the consumer marketplace” as the basis for generalized conclusions applicable to all customers nationwide ignores key differences between residential and business customers, to say nothing of differences among different types of business customers or differences in the available competitive options in different areas of the country. As Mr. Zarakas explained, many business customers, including Granite’s multi-location business customers (“MLBs”), “are specifically seeking copper-based TDM service.”¹⁸ This is because traditional TDM service provides benefits that managed VoIP (whether cable-provided or non-cable-provided) and fixed and mobile wireless service generally cannot.¹⁹ In addition, unlike most fiber networks, copper networks are self-powered and can continue to work in the event of an electrical outage without the need for failsafes like back-up generators or batteries.²⁰ Businesses therefore rely on traditional TDM service to ensure the operation of critical systems such as medical 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 managed VoIP is available.²¹ And some business customers rely on the

country comprised of diverse terrain, population density, infrastructure development, and resource allocation.”).

¹⁸ Zarakas Decl. ¶ 14.

¹⁹ See *id.* ¶ 8; Declaration of Larry Antonellis ¶¶ 9, 12-26 (Aug. 6, 2018), attached as Attachment A to Opposition of Granite to USTelecom’s Forbearance Petition, WC Docket No. 18-141 (Aug. 6, 2018) (“Antonellis Decl.”).

²⁰ See Zarakas Decl. ¶ 8; Antonellis Decl. ¶¶ 9, 12, 15-19.

²¹ See Granite Opp. at 18; Antonellis Decl. ¶ 18; see also, e.g., Wholesale Voice Coalition Opp. at 16 (“Xchange provides POTS service to buildings in New York for use as an emergency line in elevators and the state prohibits such lines from using standard VOIP connections. . . . Nor is wireless service a reliable substitute for POTS used for fax, elevator, and/or alarm services because, unlike mobile services, copper lines do not require a separate power source.”); MetTel Opp. at 4-6; TPx Opp. at 17-18.

ability of traditional TDM service to provide specific functionalities, like rollover lines, not provided by managed VoIP or mobile wireless.²² Finally, as Granite has explained, many government customers also have needs that require the reliability, availability, and compatibility that only traditional TDM service can provide.²³ For all of these reasons, traditional TDM service should be treated as a separate relevant market, and Verizon’s discussion of market conditions for other services is irrelevant to that market.

Nor can there be any question that ILECs have market power in the provision of traditional TDM service. As Mr. Zarakas explained, “facilities-based provision of copper-based TDM services is only available from the ILECs” given the ubiquity of their incumbent infrastructure and because it is uneconomic for competitors to construct copper-based facilities to service individual customer locations.²⁴ Moreover, even if non-copper-based services, such as VoIP, could be considered a reasonable substitute for traditional TDM service “for some subset of MLB lines, for a significant fraction of MLB locations no such alternatives exist.”²⁵

Verizon’s expert, Dr. Lerner, has supplied data purportedly showing that business use of traditional voice service will decrease significantly “in the future.”²⁶ But this assertion suffers from the same flaws as the USTelecom Petition: it inappropriately focuses on *all* business voice services and fails to acknowledge that traditional TDM-based voice service constitutes a separate relevant product market. The highly aggregated data that Dr. Lerner cites does not separately

²² See Granite Opp. at 17; Antonellis Decl. ¶ 13.

²³ See Granite Opp. at 19-20; Antonellis Decl. ¶¶ 22-26.

²⁴ Zarakas Decl. ¶ 14.

²⁵ *Id.*

²⁶ Lerner Decl. ¶ 36 & Fig. 7.

project the use of traditional TDM-based voice service by the subset of business customers that, like Granite’s MLB customers, specifically seek traditional TDM service today. It would be just as inappropriate to analyze a “market” for data services that combines both best-efforts broadband and Ethernet.²⁷ Accordingly, the Commission cannot rely upon this data to support a finding that forbearance from Section 251(c)(4) is warranted.

Verizon asserts that “[t]he ILEC-specific resale mandate is . . . unnecessary to protect consumers” because, even if forbearance is granted, ILECs would still be subject to the requirements of Section 251(b)(1)²⁸ and would have the incentive to offer wholesale services at reasonable rates.²⁹ USTelecom made a similar argument in the Petition.³⁰ As explained at length in Granite’s Opposition, there is no basis for these assertions.³¹

Granite’s recent experience in attempting to negotiate commercial agreements with ILECs supports this conclusion. As proposed by USTelecom in its Petition, Granite has asked

²⁷ See *Business Data Services in an Internet Protocol Environment; Technology Transitions; Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Report and Order, 32 FCC Rcd. 3459, ¶ 31 (2017) (“[W]e do not observe broad substitution or substantial performance similarities with fiber-based business data services sufficient to determine that best-efforts service and its underlying facilities are in the same product market.”).

²⁸ 47 U.S.C. § 251(b)(1).

²⁹ Verizon Comments at 29. Verizon also asserts that it intends to continue purchasing “regulated and commercial wholesale offerings” from other ILECs because it relies on those offerings – including “business data services from major cable companies for its CLEC operations as well as its mobile backhaul” – to operate its businesses. *Id.* at 28-30. Verizon further asserts that “because of these competitive choices . . . Verizon and other ILECs will have every incentive going forward to continue to provide wholesale access to their networks.” *Id.* at 30. But this incentive does not appear to extend to the traditional TDM service that Granite provides.

³⁰ See Petition at 20, 31.

³¹ See Granite Opp. at 29-31.

several ILECs to provide services that Granite currently purchases under interconnection agreements pursuant to the Section 251(c)(4) avoided-cost resale discount under a legal framework that would remain in place even if the Commission were to forbear from enforcing Section 251(c)(4). Such a framework could take several forms, including resale under Section 251(b)(1) or a commercial agreement. However, citing a variety of meritless excuses, these ILECs have consistently refused to establish such arrangements. For example, one ILEC has refused to even enter into discussions until after the Petition is granted, and another ILEC indicated that it would not offer resale under Section 251(b)(1) at prices resembling those offered under Section 251(c)(4). At the same time, this ILEC argued that it is not permitted by law to offer services currently subject to Section 251(c)(4) in a commercial agreement that is not filed with state commissions under Section 252. This is a makeweight argument because the ILEC could expand the range of services it offers Granite under the parties' existing commercial wholesale agreement to encompass services equivalent to those Granite currently purchases under Section 251(c)(4). It could do this by changing the terms on which the services are offered so as to be more suitable to a wholesale customer, thereby making those services different from those offered to retail customers and rendering Section 251(b)(1) inapplicable. These ILECs' flat refusal to work with Granite to find a commercial solution is more evidence of ILECs' substantial and persisting market power in the provision of traditional TDM service.

Finally, the Internet Innovation Alliance contends that forbearance from the provisions that are the subject of the Petition, including Section 251(c)(4), is appropriate because required investment in lower-speed services harms deployment of high-speed services.³² This assertion

³² See Comments of Internet Innovation Alliance, WC Docket No. 18-141, at 6-8 (Aug. 6, 2018). The Internet Innovation Alliance also asserts that "there should be no undue preference for older technologies that customers do not want and that will not meet the needs of large, medium, and

misses the mark entirely. *First*, because high-speed services do not, as a practical matter, employ TDM technology, there is no logical relation between the incentive to build a non-TDM network to a business location and the incentive to build out a TDM network to the same location. As Granite has established, for the relevant business customers, traditional TDM service and non-TDM services are not substitutable. *Second*, there are many geographic areas in which construction of the facilities required to provide high-speed services is not feasible.³³ *Third*, the availability of traditional TDM service promotes investment in innovative products and services. Avoided-cost resale allows competitors like Granite to combine traditional TDM service purchased from ILECs with value-added services such as customized technical support and streamlined billing to create highly-sought-after downstream services sold at retail to MLBs,³⁴ as well as to small and medium-sized businesses.³⁵ As Granite’s Larry Antonellis states in his declaration, if the Commission forbears from the avoided-cost resale requirement, business customers will “bear the cost of losing the value and efficiency of Granite’s overall product, such

small enterprises that use BDS.” *Id.* at 9. This repeats Dr. Singer’s untested and incorrect assumption that customers no longer demand traditional TDM service. *See* Hal Singer et al., *Assessing the Impact of Forbearance from 251(c)(3) on Consumers, Capital Investment, and Jobs*, at 17 (May 2018), attached as Appendix B to Petition for Forbearance of USTelecom – The Broadband Association, WC Docket No. 18-141 (May 4, 2018).

³³ *See* Zarakas Decl. ¶¶ 15, 19; (explaining that in the absence of scale economies or customers with high monthly telecom spending, providers are unlikely to construct new facilities); Antonellis Decl. ¶ 31 (explaining that “[t]o date, . . . fiber build-outs have been limited”); *see also* Michigan PSC Comments at 8 (“UNEs and resale are still relied on heavily by competitive providers—because they are the only economical methods of entry in some areas.”).

³⁴ *See* Antonellis Decl. ¶¶ 4-8.

³⁵ *See, e.g.*, Call One Comments at 6 (“Without the protections of Section 251(c)(4), [small and medium-sized business] consumers will either be forced to pay substantially higher prices or will have no choice but to return to the ILEC monopolists . . . and endure the poor quality service from which they thought [they] had escaped long ago.”).

as the benefits of a one-stop shop for national retail voice services, which MLBs prefer because of its superior product characteristics.”³⁶

III. CONCLUSION

For the foregoing reasons, and the reasons set forth in the Joint Motion for Summary Denial and in Granite’s Opposition, the Commission should promptly deny USTelecom’s Petition.

Respectfully submitted,

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³⁶ Antonellis Decl. ¶ 44.