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September 20, 2018

Via ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: WC Docket Nos. 18-141 & 17-287
Notice of Ex Parte Communication

Dear Ms. Dortch:

On September 18, 2018, Craig Maloof, Vice President-Network Planning and William P. Hunt III, General Counsel, Senior Vice President & Secretary, on behalf of U.S. TelePacific Corp., Mpower Communications Corp., and Arrival Communications, Inc., all d/b/a TPx Communications ("TPx"), the undersigned and Patricia Cave of Morgan, Lewis & Bockius LLP ("Morgan Lewis"), met with Arielle Roth, Legal Advisor to Commissioner O'Rielly.

TPx reiterated points made in its filings[1] opposing the USTelecom Petition for Forbearance (the "Petition").[2] TPx explained the continued importance of unbundled network elements ("UNEs") and resale to competitive markets and the adverse impact forbearance from Section 251(c) obligations would have on its customers. TPx urged the Commission to deny the Petition.

TPx described its use of UNEs to serve primarily small and mid-sized businesses, schools, libraries and other community anchor institutions in urban and suburban areas.

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[1] Opposition of U.S. TelePacific Corp., Mpower Communications Corp., and Arrival Communications, Inc. (collectively "TPx") ("TPx Opposition") (filed Aug. 6, 2018); Reply Comments of U.S. TelePacific Corp., Mpower Communications Corp., and Arrival Communications, Inc. (collectively "TPx") ("TPx Reply Comments") (filed Sept. 5, 2018); U.S. TelePacific Corp., Mpower Communications Corp., and Arrival Communications, Inc. Support for Motion for Summary Denial ("TPx Summary Denial Support") (filed Sept. 5, 2018).

[2] *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks*, WC Docket No. 18-141 (filed May 4, 2018) ("USTelecom Petition").

TPx has made substantial investments in collocations and equipment to provide broadband, voice, plain old telephone service ("POTS") and bundled services to its customers using UNEs obtained from incumbent local exchange carriers ("incumbent LECs"). TPx's average customer requires only a 10-15 Mbps service and some well-known fiber providers are not willing to provision fiber for the low bandwidth services that TPx's customers want. As a result, TPx turns to an ecosystem of approximately 30 vendors, including cable, fiber providers, and incumbent LECs, to obtain last mile access to its customers.

Although TPx relies on Ethernet over Fiber ("EoF") for its last mile access to thousands of customers, it still uses incumbent LEC DS0 loops to provide Ethernet over Copper ("EoC") service to approximately 14,000 locations in California, Nevada and Texas. Approximately 25 percent of TPx's existing customers have fiber available in the building and another 50 percent of its customers have fiber within 500 feet of the customer premises. Where fiber is in the building, the cost to use EoF as the last mile is three times the cost of the copper loops used to provide EoC. If UNEs were no longer available in fiber-connected buildings, the cost to provide services its customers demand would triple and TPx would pass the cost through to its customers by increasing retail rates. TPx's customers have voted with their checkbooks to continue using TPx's EoC-based services, and forbearance would require customers to purchase fiber or higher bandwidth service they don't want or need.

TPx provided examples of customers without a fiber option in their building asking for a quote for fiber-based services. Even in central business districts and suburban areas, the non-recurring charges ("NRCs") for deploying fiber have been prohibitive, ranging from approximately $20,000 to $200,000. In addition to NRCs, the customer would incur installation costs for labor (truck roll) and new equipment. TPx customers have been unwilling to pay these costs. TPx also explained that – as a general matter – it has found cable facilities (if in the building or nearby) to be inferior substitutes for providing EoC or EoF due to the length of time it takes cable providers to initiate services and the unpredictability regarding the quality of the cable plant.

TPx uses approximately 150,000 UNE loops to provide POTS, which its customers use for telephone service, fax machines, key systems, and alarm services. TPx's local government customers, among others, continue to rely on POTS for reliability and alarm systems, and VoIP or other over-the-top solutions are insufficient to meet their needs. TPx expects its replacement costs to provide POTS service to these customers to triple if forbearance were granted. TPx would pass the increased costs through to its customers.

TPx obtains approximately 22,000 DS1 UNEs to provide service to customers with low bandwidth demands (*i.e.*, averaging 3 Mbps) that cannot obtain EoC service due to loop length or low quality copper. Transitioning these customers to special access services would double TPx's costs, which would be passed to its customers through increased retail rates.

TPx uses approximately 12,000 resold lines to serve customers. Without commercial alternatives, TPx does not know what the impact will be but expects the cost to provide replacement services to increase.

Having voted with their checkbooks to choose TPx as their service provider, the record does not show that TPx's small and medium sized business and community anchor institution customers have cost-effective alternatives in the retail market to obtain the lower bandwidth (3-25 Mbps) and POTS services they desire. The impact of forbearance on these customers likely would be immediate rate increases, whether for continued access to their current services or being forced to pay for a higher bandwidth or fiber service the customer has rejected.

Nothing in the Communications Act, as amended, or the Commission's rules restrict incumbent LECs from offering network elements on a commercial basis today. TPx has requested information from the incumbent LECs about their plans for commercial arrangements but the incumbent LECs have not provided details. If the wholesale market were truly competitive, as USTelecom and others allege, then imposing an immediate 15 percent increase in the rates incumbent LECs charge to wholesale customers – as originally proposed by USTelecom – would not be possible. These price increases will be borne directly by customers, and could result in increased pressure on the Universal Service Fund's budget for E-rate and other programs in which TPx's customers participate.

Moreover, the fact that some incumbent LECs continue to use legacy copper facilities to provide high speed Internet access to their wholesale customers (including TPx) shows the value of copper plant in offering advanced services. Rather than adopting a complex transition regime that gives the incumbent LECs carte blanche to increase loop rates and determine post-UNE commercial offerings, the Commission should retain the existing regulatory framework that permits incumbent LECs to offer commercial arrangements and escape UNE obligations by deploying fiber and retiring copper.

Although the U.S. Court of Appeals agreed that the FCC did not have to extend the *Qwest Phoenix* market test to its evaluation of competition in the business data service ("BDS") market, that test binds the Commission in this forbearance proceeding.[3] As TPx explained in its initial opposition, other forbearance orders diverging from *Qwest Phoenix* are distinguishable.[4] USTelecom and the incumbent LECs did not rebut TPx's and others' analysis regarding prior nationwide forbearance orders other than to say that the Commission has discretion to change its standard. But the Commission cannot ignore an important aspect of the problem or its precedent. One important aspect is that USTelecom and its members have not defined specific product markets or submitted with USTelecom's petition record evidence that shows the existence of competition sufficient to

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[3] *See Citizens Telecomm. Co. of Minn., LLC v. FCC*, No. 17-2296 (8th Cir. Aug., 28, 2018).

[4] TPx Opposition, at 11-16.

discipline prices in each defined product market.[5] Prior nationwide forbearance orders focused on (a) advanced services (*i.e.*, broadband elements) and new network investment, (b) the market for enterprise services provided to customers with nationwide presence, or (c) lack of evidence that competitive providers were *actually relying* on the regulations at issue. Those orders also relied on Section 251 UNEs as a regulatory "backstop" to the potential negative consequences of granting nationwide forbearance. In the case of the 64 kbps loop, the Commission conditioned forbearance on the continued availability of UNEs already in use. Because the record in this proceeding shows continued reliance on UNEs for competition and due to the differences between the USTelecom Petition and the Commission's prior grants of nationwide forbearance, it would be arbitrary and capricious for the Commission to abandon *Qwest Phoenix.*

USTelecom has the burden of providing "convincing evidence and analysis" that supports granting forbearance. Because USTelecom has not borne this burden, the Commission should deny the Petition.

In response to a question from Ms. Roth concerning the Commission's Notice of Proposed Rulemaking regarding the Lifeline program,[6] TPx opposed limiting the availability of Lifeline support to facilities-based providers. Any such limitation would increase the rates for TPx's Lifeline customers (and its wholesale customers' Lifeline customers) or limit the Lifeline customer's choice of service provider to the incumbent LEC.

Sincerely,

/s/ Tamar E. Finn

Tamar E. Finn
Patricia Cave

Counsel to U.S. TelePacific Corp., Mpower Communications Corp., and Arrival Communications, Inc., all d/b/a TPx Communications

cc: Arielle Roth (Via E-Mail)

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[5] *See* Reply Comments of USTelecom-The Broadband Association, WC Docket No. 18-141, at pp. 10-11, 21 (filed Sept. 5, 2018) (arguing that incumbent LECs are non-dominant in "every key market, including markets for business and residential voice, residential broadband, business data services across the vast majority of the country, TDM transport, Ethernet, and high-capacity loops" but later arguing that bundled services are the relevant market) (citations omitted); Comments of AT&T, WC Docket No. 18-141, at 13 (filed Sept. 5, 2018) (proposing to define the relevant product markets as (1) DS1 and DS3 loop and transport, (2) DS0 loop and resale, and (3) dark fiber transport).

[6] *See Bridging the Digital Divide for Low-Income Consumers, Lifeline and Link Up Reform and Modernization, Telecommunications Carriers Eligible for Universal Service Support*, Fourth Report and Order, Order on Reconsideration, Memorandum Opinion and Order, Notice of Proposed Rulemaking, and Notice of Inquiry, 32 FCC Rcd. 10475 (2017).