

**Before the  
Federal Communications Commission  
Washington, DC 20554**

In the Matter of

United States Telecom Association Petition  
For Forbearance From Certain Incumbent LEC  
Regulatory Obligations

WC Docket No. 14-192

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**COMMENTS OF THE AMERICAN CABLE ASSOCIATION**

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The American Cable Association (“ACA”) submits comments on the United States Telecom Association (“USTelecom”) petition (“Petition”) seeking forbearance from a series of incumbent local exchange carrier (“LEC”) regulatory obligations.<sup>1</sup>

**I. INTRODUCTION AND SUMMARY**

Among ACA’s members are entities providing voice and broadband services to business customers in competition with incumbent LECs. It is from that perspective that ACA comments on the Petition. ACA opposes USTelecom’s requests that the Commission forbear from requiring that incumbent LECs share newly deployed entrance conduit at regulated rates and from prohibiting incumbent LECs from using contract tariffs for business data services in all regions. Both requests ignore the continued existence of incumbent LEC market power in the

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<sup>1</sup> 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, WC Docket No. 14-192 (filed Oct. 6, 2014) (herein the “Petition”).

business market and would damage competition in the market for data (broadband) services for these customers.

**II. USTELECOM HAS FAILED TO MEET ITS BURDEN OF PROVIDING SUFFICIENT EVIDENCE TO MAKE A PRIMA FACIE CASE REGARDING THE REQUESTS FOR FORBEARANCE FROM THE PROVISION OF NEWLY SUPPLIED ENTRANCE CONDUIT AND FROM THE PROHIBITION ON SUPPLYING CONTRACT TARIFFS IN ALL REGIONS**

At the beginning of the Petition, USTelecom discusses at length its claim that the incumbent LECs face extensive competition, especially from cable operators.<sup>2</sup> Virtually this entire discussion involves the voice and broadband residential markets; USTelecom spends a mere two paragraphs on the business markets.<sup>3</sup> Moreover, in its discussion of the business market, it makes no attempt to discuss specific geographic and product markets, and the data it supplies is, at best, limited. For instance, it submits no evidence of the market shares of competitors in any geographic and product market for business data services.<sup>4</sup> Accordingly, USTelecom provides no basis in the introductory section to contend that the market power of incumbent LECs has waned sufficiently in the business markets.

Nor does USTelecom supply sufficient evidence in the later sections of the Petition to demonstrate it meets the forbearance requirements regarding access to entrance facilities or supply of contract tariffs. In the entrance facilities section (Section VII of the Petition), USTelecom supplies no data whatsoever. All it does is make conclusory statements or

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<sup>2</sup> See Petition at 8-16.

<sup>3</sup> See *id.* at 13-14. USTelecom's experts Msrs. Caves and Mayo do not address the business market in their submissions in the Appendices.

<sup>4</sup> For example, USTelecom's discussion of the increase in revenues from business services provided large cable operators has almost no meaning, since there is no baseline, no discussion of the product markets, and no discussion of the geographic markets.

theoretical arguments with no facts, *e.g.*, “ILECs have no special advantages,” “all providers are equally capable,” “market forces will protect customers,” and “the overall imbalance between conduit infrastructure deployed by ILECs and their major CLEC competitors has narrowed considerably.”<sup>5</sup> Even for the key issue of whether competitors are as capable as incumbent LECs in deploying new conduit, USTelecom’s argument is best summed up by its general allegation, “Experience shows that CLECs indeed have this capability.”<sup>6</sup>

USTelecom also comes up short in presenting evidence to support forbearance from contract tariff prohibitions in all regions (Section VIII of the Petition). The data it submits allegedly describes competition in the business market – but only at the national level, which is not the relevant geographic market according to the Commission’s prior analysis of the special access market.<sup>7</sup> Moreover, it does not provide specific data on the separate product markets (*e.g.*, TDM transport or TDM channel terminations) that are relevant to either wholesale or retail users. USTelecom thus provides no factual basis upon which the Commission can consider its request. As the Commission stated in the *Pricing Flexibility Suspension Order*, “Categorical assertions about competitiveness are not an adequate basis upon which we can base grants of pricing flexibility.”<sup>8</sup>

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<sup>5</sup> See Petition at 85-89.

<sup>6</sup> See *id.* at 89.

<sup>7</sup> See *e.g.* *Special Access for Price Cap Local Exchange Carriers*, Report and Order, 27 FCC Rcd 10557, 10569 ¶¶ 26, 37 (2012) (“*Pricing Flexibility Suspension Order*”). (“The Commission chose to grant pricing flexibility relief on an MSA basis, finding that, among the proposed alternatives ‘MSAs best reflect the scope of competitive entry, and therefore are a logical basis for measuring the extent of competition.’” However, even an MSA may be too large for the relevant product market. The Commission later states in this decision that its data “suggests that competitive conditions within an MSA are also likely to vary significantly.”)

<sup>8</sup> See Petition at 81.

In sum, ACA submits that, for the two forbearance requests discussed above, USTelecom has failed to meet the regulatory requirement set forth in 47 C.F.R § 1.54(b) that a petition “must contain facts and arguments which, if true and persuasive, are sufficient to meet each of the statutory criteria for forbearance.” Consequently, the Commission should summarily reject these requests.

**III. USTELECOM HAS FAILED TO MEET THE REQUIREMENTS OF SECTION 10(C) IN SEEKING FORBEARANCE FROM REQUIRING INCUMBENT LECs TO SHARE NEW DEPLOYED ENTRANCE CONDUIT SUBJECT TO REGULATION**

In the Petition, USTelecom requests that the Commission forbear from requiring incumbent LECs to share newly deployed entrance conduit at regulated rates.<sup>9</sup> It contends that forbearance “would increase competition by creating a level playing field,” that market forces are sufficient “to ensure that the charges for such construction are just and reasonable,” and it would serve the public interest by providing “appropriate incentives to invest in new facilities.”<sup>10</sup> At its heart, USTelecom’s request is premised on its argument that competitors are no longer “fledgling newcomers” and “have as much ability to construct these entrance conduits as ILECs have without reliance on ILEC facilities.”<sup>11</sup> As discussed above, USTelecom provides no data for this conclusion, and from experiences of ACA members competing with incumbent LECs, USTelecom’s premise is incorrect. The development of robust competition will be greatly inhibited if competitive providers do not have access to incumbent LECs newly deployed entrance conduit.

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<sup>9</sup> See Petition at 85-94.

<sup>10</sup> See *id.* at 85-86.

<sup>11</sup> See *id.* at 89.

Sections 224 and 251(b)(4) of the Communications Act, as amended,<sup>12</sup> which enable access to incumbent LEC entrance conduit at reasonable rates, are vital for the construction of networks and provision of services to consumers and for the development of competition as a whole.<sup>13</sup> This stems from the fact that it is not a trivial undertaking for a competitive provider to build entrance conduit, and, as such, access to incumbent entrance conduit makes a meaningful difference in whether a competitive provider can serve a business customer, which in turn would facilitate the development of facilities-based competition. The Commission has long recognized this fact. For instance, in the *Triennial Review Remand Order*, the Commission detailed its understanding of the economics of deploying facilities to a building, including that entrance conduit is a major cost factor –

- “The economics of deploying loops are determined by the costs associated with such deployment and the potential revenues that can be recouped from a particular customer location.”
- “Competitive LECs face large fixed and sunk costs in deploying competitive fiber.”
- “The costs of loop construction are fixed, meaning that they are largely independent of the particular capacity of service that a customer obtains at a particular location.”
- “The most significant portion of the costs incurred in building a fiber loop results from deploying the physical fiber infrastructure into underground conduit to a particular location.”
- “The construction of local loops generally takes between six and nine months absent unforeseen delay...Often these delays are attributable to problems in securing rights-of-way from local authorities...[and] many local jurisdictions impose construction moratoriums which prevent the grant of a franchise agreement to construct new facilities.”

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<sup>12</sup> 47 U.S.C. § § 224, 251(b)(4).

<sup>13</sup> See *Connecting America: The National Broadband Plan*, Chapter 6, Infrastructure at 107-118 (2010).

- “A carrier’s ability to recover the cost of that loop is generally wholly tied to the carrier’s ability to maintain service to a specific customer, and thus, most of the costs associated with constructing loops are sunk costs.”<sup>14</sup>

Based on these findings, the Commission concluded that “the barriers to entry impeding competitive deployment of loops are substantial” and “the high cost of constructing ‘lateral’ fiber connecting a building to a fiber ring’s splice point” is a critical factor.<sup>15</sup>

What is important to understand for purposes of the Petition is that competitive providers continue to face these challenges and barriers in deploying new loops and that access to incumbent entrance conduit, including newly deployed entrance conduit, by significantly reducing the cost of building a lateral from a competitor’s own transport facilities, can make the difference in deciding whether to serve a business customer. To elaborate, as a rule in markets (MSAs) today, incumbents have a ubiquitous presence in commercial buildings, serve most, if not all, customers in a building, usually have a long standing relationship with the building owner, and may even have access to the building at no charge. This presence and scale and these relationships are all material advantages when an incumbent wants to build new entrance conduit.

In contrast, competitive providers, at best, have fewer advantages, and in most instances, they have none since they are new entrants. For example, a building owner may decide to open a trench on its property for the construction of new conduit so that fiber can be brought to the building, but that opportunity is meaningless if the competitor has yet to deploy transport

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<sup>14</sup> *Unbundled Access to Network Elements et al.*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, FCC 04-290, ¶¶150,151 (rel Feb. 4, 2005) (“*Triennial Review Remand Order*”).

<sup>15</sup> *See id.* at ¶¶ 153,154.

facilities in that area<sup>16</sup> or if the competitor has no or an insufficient number of customers (demand) in the building. And that problem becomes exacerbated if the building owner decides to charge the competitor an unreasonable fee for entry.<sup>17</sup>

Accordingly, USTelecom's premise is incorrect: when it comes to building new entrance facilities, incumbents have a substantial advantage over competitive providers. As a result, in deciding whether to deploy fiber for the first time to a building to serve a customer, unless it has the economic benefit of being able to access incumbent entrance conduit regardless of whether it is old or newly deployed, a competitive provider may have no choice but to forego the project and not serve the customer. Such an outcome is inconsistent with the requirements for forbearance and the development of competition.

USTelecom seeks to buttress its case by submitting that the current regulatory regime has a host of problems, including that competitors do not provide their conduit to incumbents at regulated rates<sup>18</sup> and do not "maintain the integrity of ILECs' conduit and other outside plant;"<sup>19</sup> However, because incumbents have presence throughout virtually an entire market, it is rare they do not have their own entrance conduit and need access to a competitor's entrance facilities. In any event, they have sufficient ability to obtain those facilities in commercial negotiations. As for maintaining incumbent facilities, it would be expected that incumbents impose a contractual obligation on competitive providers to properly maintain leased conduit and related facilities.

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<sup>16</sup> This could be because of a number of factors, including that a competitive provider has not yet achieved scale in the market or because the local government has imposed barriers to obtaining access to right-of-way.

<sup>17</sup> Any fee in excess of what the incumbent pays should be viewed as unreasonable.

<sup>18</sup> See Petition at 93.

<sup>19</sup> See *id.* at n. 278.

In sum, access to entrance conduit is a fundamental requirement for facilities-based competition, and, despite the growth of competition, the vast majority of buildings are not served by facilities-based competitors of business data services. The Commission has recognized this reality and required incumbents to share entrance facilities to spur competitive deployments. Given that incumbents continue to have advantages in accessing buildings, it should maintain – and not forbear from enforcing -- those requirements for newly deployed entrance facilities by incumbent providers.

**IV. USTELECOM HAS FAILED TO MEET THE REQUIREMENTS OF SECTION 10(C) IN SEEKING FORBEARANCE FROM RULES PROHIBITING THE USE OF CONTRACT TARIFFS FOR BUSINESS DATA SERVICES IN ALL REGIONS**

USTelecom requests that the Commission “forbear from applying the rules that prohibit price cap ILECs from using contract tariffs to offer ‘Business Data Services’ in all regions.”<sup>20</sup> The effect of such forbearance would be to extend Phase I pricing flexibility, which was in effect from 1999 to its suspension in mid-2012, to all areas of the country. USTelecom contends that because “the explosive growth of competition has radically altered the whole transmission marketplace,” the restrictions on contract tariffs inhibit price cap LECs from responding to the needs of consumers, distorting the market.<sup>21</sup>

The Commission’s *Pricing Flexibility Order* was premised on the advent of facilities-based competition in business data service markets, and the rules adopted in this decision enable a price cap LEC to obtain pricing flexibility as competition develops, as indicated by “competitor

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<sup>20</sup> See *id.* at 94.

<sup>21</sup> See *id.* at 95-96.

collocation” triggers.<sup>22</sup> For Phase I pricing flexibility, the Commission sought to adopt triggers for relief that indicated that “competitors have made irreversible, sunk investments in the facilities needed to provide the services at issue.”<sup>23</sup> The Commission was concerned that if regulatory relief was granted “prematurely,” price cap LECs could “exclude new entrants from the market” or “increase rates to unreasonable levels.”<sup>24</sup> For Phase I relief, the Commission was particularly concerned that granting it prematurely would enable price cap LECs to pursue “exclusionary practices.”<sup>25</sup> That is the issue posed by the Petition and the key question in the forbearance analysis: is there sufficient facilities-based competition for the provision of business data services in the relevant markets that the Commission is justified in enabling price cap LECs to use contract tariffs in all regions? ACA submits the answer is “no.”

As a threshold matter, USTelecom is seeking forbearance for services for which the Commission had established a deregulatory regime that has since been suspended and where the Commission is undertaking a comprehensive data collection to examine competitive conditions in those markets.<sup>26</sup> Data submitted in the Petition (even assuming it were more elaborate and precise) cannot equal the data the Commission is collecting to fully understand at a granular level competitive conditions. For that reason alone – seeking to use inadequate data to presume

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<sup>22</sup> See *Access Charge Reform*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, 14225 ¶¶ 67-157 (1999) (“*Pricing Flexibility Order*”), *aff’d sub nom. WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001).

<sup>23</sup> See *id.*, ¶ 24

<sup>24</sup> See *id.*, ¶ 68.

<sup>25</sup> See *id.*, ¶ 69.

<sup>26</sup> See *Special Access for Price Cap Local Exchange Carriers*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 16318 (2012) (“*Pricing Flexibility Suspension Order FNPRM*”).

Commission findings -- the Petition should be deemed insufficient to justify the forbearance request.<sup>27</sup>

In addition, USTelecom is most likely seeking forbearance in regions where the price cap LECs could not meet the now-suspended Phase I competition triggers.<sup>28</sup> In other words, despite not being able to satisfy the faulty triggers – which the Commission has determined to be “not working as predicted” and failing “to accurately reflect competition”<sup>29</sup> – USTelecom seeks forbearance. This should be a sufficient indication of lack of competition for the Commission to reject USTelecom’s request. In any event, ACA submits that even if a price cap LEC met the triggers, these triggers were particularly inapt for determining competition in an MSA for the supply of channel terminations and resulted in deregulation where it was not warranted.

Aside from these problems, even accepting the data filed in the Petition, USTelecom has not presented evidence to demonstrate that sufficient facilities-based competition (“irreversible, sunk investments”) has developed in the MSAs where price cap LECs are seeking relief, particularly for TDM channel terminations.<sup>30</sup> USTelecom appears to believe that higher-level,

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<sup>27</sup> The Commission makes a similar point about the importance of its special access data collection in determining the state of competition in the recently adopted *Technology Transitions* Notice of Proposed Rulemaking. See *Technology Transitions et al.*, Notice of Proposed Rulemaking and Declaratory Ruling, ¶ 6, GN Docket No. 13-5 (rel. Nov. 25, 2014) (“Based on the data that we collect, we intend to conduct a comprehensive evaluation of access to last-mile services, which will enable us to address critical long-term questions about the state of competition and the role of regulation in facilitating competitive markets.”).

<sup>28</sup> It is possible that USTelecom is seeking forbearance in an area where competition has evolved sufficiently since the rules were suspended to meet the triggers, but it supplies no information about any MSA to indicate whether this is the case.

<sup>29</sup> See *Pricing Flexibility Suspension Order*, ¶ 1.

<sup>30</sup> See *Technology Transitions* Notice of Proposed Rulemaking, ¶ 6 (“competitive carriers face the prospect of having no access to critical inputs, at last not on reasonable terms and conditions—preventing them from continuing to provide competitive alternatives to

national data is enough, but that data is not relevant to competition in individual MSAs, which is the relevant geographic market determined by the Commission. As such, its request for forbearance should be rejected.

Respectfully submitted,



<p>Matthew M. Polka President and Chief Executive Officer American Cable Association One Parkway Center Suite 212 Pittsburgh, Pennsylvania 15220 (412) 922-8300</p> <p>Ross J. Lieberman Senior Vice President of Government Affairs American Cable Association 2415 39th Place, NW Washington, DC 20007 (202) 494-5661</p> <p>December 5, 2014</p>	<p>Thomas Cohen Kelley Drye &amp; Warren LLP 3050 K Street, NW Suite 400 Washington, DC 20007 Tel. (202) 342-8518 Fax (202) 342-8451 tcohen@kelleydrye.com Counsel to the American Cable Association</p>
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small- and medium-sized businesses and other institutions like schools, libraries, and health care facilities.”).