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) From Obsolete ILEC Regulatory Obligations that Inhibit Deployment of Next-Generation Networks	WC Docket No. 14-192

REPLY COMMENTS OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

The Pennsylvania Public Utility Commission (PaPUC) files these Reply Comments in accordance with the Public Notice (PN) in WC Docket No. 14-192, DA 14-1585 issued by the Federal Communications Commission (FCC or Commission) on November 5, 2014, soliciting comments or opposition to the United States Telecom Association (USTelecom) Forbearance Petition ("USTelecom Petition" or "Petition"). Comments were due on or before December 5, 2014, and Reply Comments are due on or before December 22, 2014.

Introduction and Summary

The USTelecom Petition seeks forbearance from application of statutory provisions or regulations that USTelecom characterizes as falling into one of seven categories.[1] The PaPUC's

[1] **Category 1:** Remaining section 271 and 272 obligations, equal access rules, and the nondiscrimination and imputation requirements set out in the *Section 272 Sunset Order* (47 U.S.C. §§ 271, 272, 251(g)).
Category 2: Structural separation requirements for independent incumbent LECs, including any conditions imposed by prior Commission Orders granting partial forbearance from 47 C.F.R. § 64.1903.
Category 3: Requirement to provide 64 kbps voice channel where copper loop has been retired (47 C.F.R. § 51.219(a)(3)(iii)(C)).
Category 4: All remaining 47 U.S.C. § 214(e) obligations where a price cap carrier does not receive High Cost Universal Service Support, including 47 C.F.R. §54.201(d). And, the Commission's determination that an Eligible Telecommunications Carrier (ETC) is required to provide the "supported" services throughout its service area regardless of whether such services are actually "supported" with high-cost funding throughout that area (47 U.S.C. § 214(e); 47 C.F.R. § 54.201(d)).
Category 5: Remaining *Computer Inquiry* rules, obligations imposed by the Commission's

Reply Comments generally opposes the granting of forbearance for all of the Categories set forth in the Petition, but also, specifically opposes forbearance for Category 3, which involves the requirement to provide a 64 kilobits per second (kbps) voice channel on an unbundled basis where copper loops have been retired (47 C.F.R. § 51.219(a)(3)(iii)(C)) and Category 4, which involves the requirement that the designated eligible telecommunications carrier (ETC) offer the services that are supported by the Federal universal service fund (USF) support mechanism under section 254(c) throughout its service area. Accordingly, the PaPUC's Reply Comments adopt many of the positions of the opposing commentators.

As an initial matter, these Reply Comments should not be construed as binding on the PaPUC in any matter before the PaPUC. Moreover, the PaPUC's position set forth in these Reply Comments could change in response to later events, including Ex Parte filings, legal proceedings or other regulatory developments at the state or federal level. Also, the PaPUC's participation in this proceeding is without prejudice to any subsequent appellate litigation involving the FCC's *USF/ICC Transformation Order*.[2] Lastly, the instant Reply Comments build upon and reiterate prior filings of the PaPUC on several issues concerning forbearance.

A. The Section 10(a) Forbearance Standard Has Not been Satisfied

The PaPUC supports the Comments generally opposing the USTelecom Petition for its failure to satisfy the statutory standard to obtain forbearance from the FCC. In particular, the PaPUC agrees with the positions of COMPTEL, XO Communications, LLC (XO), American Cable Association (ACA) and the National Association of State Utility Consumer Advocates

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Computer II Orders, and obligations, including Comparable Efficient Interconnection (CEI) and Open Network Architecture (ONA), and other requirements set forth in the Commission's *Computer III* orders (47 C.F.R. § 64.702).
Category 6: Requirement to provide access to newly deployed entrance conduit at regulated rates (47 U.S.C. §§ 224, 251(b)(4)).
Category 7: Rules prohibiting price cap incumbent LECs' use of contract tariffs for business data services in all regions. And, if necessary, the requirement that packet-switched or optical transmission services be subject to price cap regulation in order to be eligible for pricing flexibility (47 C.F.R. §§ 61.3(o), 61.55(a), 69.709(b), 69.711(b), 69.727(a), 69.705).

[2] *In re Connect America Fund et al.*, WC Docket No. 10-90 *et al.*, (FCC, Rel. Nov. 18, 2011), Report and Order and Further Notice of Proposed Rulemaking, *slip op.* FCC 11-161, 26 FCC Rcd 17663 (2011), and subsequent Reconsideration and Clarification rulings (collectively *USF/ICC Transformation Order*), *aff'd In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014), U.S. App. LEXIS 9637, 9633, *reh'g petitions denied, cert. petitions pending, US Cellular Corp. v. FCC*, http://www.fcclaw.com/wp-content/uploads/2014/11/2014-1125-Cert-Petition-AS-FILED.pdf.

(NASUCA) that the USTelecom Petition has not met the statutory standard for the granting of forbearance pursuant to Section 10 of the Communications Act of 1934, as amended (Communications Act), 47 U.S.C. § 160, for any of the statutory or regulatory obligations in the Categories listed in the FCC's November 5th PN.[3] See COMPTEL Comments at iv, 2-5; XO Comments at 2; ACA Comments at 1-4; NASUCA Comments at 2.

To obtain forbearance from the FCC, the PaPUC agrees with opposing commenters that an applicant has the burden of proof and must meet all three conditions[4] of the statutory forbearance standard set forth in Section 10(a) of the Communications Act, 47 U.S.C. § 160(a). The PaPUC agrees with the assertion of the opposing commentators that USTelecom has not presented a prima facie case for the FCC to grant forbearance because the Petition lacks a traditional market power analysis and has not demonstrated the emergence of sufficient competition in any specific geographic or relevant product markets. *See* ACA Comments at 2; XO Comments at 2; NASUCA Comments at 5-9; COMPTEL Comments at 3-5. Additionally, the PaPUC agrees with the opposing commentators' overall position that the USTelecom Petition lacks sufficient empirical evidence and support to satisfy the statutory criteria to obtain forbearance from the FCC for any of the seven categories.

Furthermore, in order to grant forbearance, the Commission must address the merits and the arguments of the USTelecom Petition as they apply to USTelecom's *individual* ILEC members. *See* COMPTEL Comments at 5. XO Comments at 4-7, 14-15; ACA Comments at 3, 10. The USTelecom Petition makes generalized arguments as to why forbearance relief should apply to its member ILECs on a collective basis. Both the requirements of the statute and the Commission's past sound practice, however, dictate that the FCC must carefully scrutinize the merits of the relevant facts and arguments with the appropriate geographic and hence, per-

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[3] *See* fn. 1.

[4] The Commission must make affirmative determinations that: (1) enforcement of the provision or regulation is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of the provision or regulation is not necessary for the protection of consumers; and (3) forbearance from applying the provision or regulation is consistent with the public interest.

company focus. No such geographic, company-specific analysis has been provided here to support the Petition.

B. Carrier of Last Resort Obligations Under Section 214 Cannot Be Summarily Eliminated Through Requests For Forbearance Relief. [Category 4]

The PaPUC agrees with Comments opposing USTelecom's request for forbearance from the Section 214(e) obligations, 47 U.S.C. § 214(e), as granting forbearance would unlawfully preempt and undermine regulatory obligations that exist under independent state law, including carrier of last resort (COLR) requirements. Accordingly, the PaPUC supports the initial comments opposing USTelecom's request for forbearance from COLR obligations requirements under Section 214(e), 47 U.S.C. § 214(e). *See* NASUCA Comments at 9-16. Furthermore, potential FCC forbearance of Section 214(e) obligations does not affect COLR obligations for USTelecom's incumbent local exchange carrier (ILEC) members, where such obligations are prescribed under independently existing State statutory law. To the extent that the Commission contemplates granting such forbearance, "the FCC should clarify in any forbearance action, that it is not preempting any State COLRs."[5] With its recent December 18, 2014, Order addressing further Connect America Reforms and the pending USTelecom Petition, the Commission has strongly reaffirmed this approach.[6]

To begin, USTelecom's forbearance request related to Section 214(e) obligations seemingly conflicts with independent state law obligations. Forbearance seemingly conflicts with the authority of State commissions to designate ETCs and to enforce the COLR obligations of incumbent local exchange carriers (ILECs) that are *jointly* administered by the FCC and State public utility commissions under independent state law. Thus, federal forbearance from Section 214(e) obligations, if approved, would unlawfully preempt the COLR obligations of the 'price cap' ILEC members of USTelecom, which is under the operation of independent State laws and regulations.

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[5] National Association of Regulatory Utility Commissioners, Notice of Oral Ex Parte, WC Docket No. 14-192 *et al.*, filed December 11, 2014, Paragraphs [i] & [ii], at 1.
[6] *See* discussion *infra*.

In addition, forbearance of COLR obligations seemingly conflicts with the Commission's pronouncements in the *USF/ICC Transformation Orde*r soundly reaffirming the necessity for State regulated and enforced COLR obligations that involve basic retail wireline voice telecommunications services. The *USF/ICC Transformation Orde*r unambiguously states the following:

> Therefore, we do not seek to modify the existing authority of the states to establish and monitor carrier of last resort (COLR) obligations. We will continue to rely upon states to help us determine whether universal service support is being used for its intended purposes including by monitoring compliance with the new public interest obligations described in this Order.
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> Importantly, these reforms do not displace existing state requirements for voice service, including state COLR obligations. We will continue to work in partnership with the states on the future of such requirements as we consider the future of the PSTN.
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> We decline to preempt state obligations regarding voice service, including COLR obligations, at this time. Proponents of such preemption have failed to support their assertion that state service obligations are inconsistent with federal rules and burden the federal universal service mechanisms, nor have they identified any specific legacy service obligations that represent an unfunded mandate that make it infeasible for carriers to deploy broadband in high-cost areas. Carriers must therefore continue to satisfy state voice service requirements.

Connect America Fund et al., 26 FCC Rcd 17663, ¶¶ 15, 75 and 82 (2011) (*USF/ICC Transformation Order*).

The PaPUC asserts that the USTelecom Petition attempts to re-litigate the issues that have already been addressed in the *USF/ICC Transformation Order*, which is an effort that is both legally and technically unsustainable and should be rejected. Furthermore, if USTelecom and its ILEC members continue to have issues with the State COLR obligations set forth in the *USF/ICC Transformation Order*, they can address such issues in the appropriate judicial and/or

administrative forums. However, such issues should not be addressed through the vehicle of a petition for federal forbearance that appears to be a collateral attack on the *USF/ICC Transformation Order* and its ongoing rulemakings.

The Commission conclusively resolved the interplay between ETC designations, Section 214(e) obligations, and State COLR obligations through its recently issued December 18, 2014, Order that addressed the continuous Connect America Fund reforms as well as the outstanding USTelecom Petition. The Commission stated in relevant part:

> Our decision to grant limited forbearance does not redefine price cap carriers' service areas or revoke price cap carriers' ETC designations in these areas, and we emphasize that *it does not preempt price cap carriers' obligation to continue to comply with any state requirements, including carrier of last resort obligations to the extent applicable*. We also note that we do not relieve ETCs of their other "incumbent-specific obligations" like interconnection and negotiating unbundled network elements pursuant to sections 251 and 252 of the Act. The continued existence of these obligations supports our finding that the forbearance we do grant today is consistent with the public interest.

In re Connect America Fund; ETC Annual Reports and Certifications; Petition of US Telecom for Forbearance Pursuant to 47 U.S.C. § 160(c) from Obsolete ILEC Regulatory Obligations that Inhibit Deployment of Next-Generation Networks, WC Docket No. 10-90, WC Docket No. 14-58, WC Docket No. 14-192, (FCC, Rel. Dec. 18, 2014), Report and Order, FCC 14-190, ¶ 67, at 27 (footnote omitted, emphasis added).

The PaPUC also opposes the USTelecom Petition because requests for forbearance, and similar pleadings like petitions for a declaratory ruling, are inappropriate vehicles to examine complicated matters governed by federal rules. Rather, a rulemaking proceeding with appropriate notice and comment is the lawful and far superior approach. This position is entirely consistent with USTelecom's prior view that important and complex changes to federal rules can be implemented only through a rulemaking as opposed to a discrete proceeding, like a declaratory ruling. The instant Petition appears to involve the *Connect America Fund* proceeding at WC Docket No. 10-90 *et al.* and could have long-term impacts better examined there as opposed to here.

The PaPUC notes that the FCC has recently initiated at least one additional rulemaking proceeding where a number of the issues raised in the USTelecom Petition can be examined in the context of a better and more comprehensively developed record.[7] Accordingly, the FCC should proceed cautiously in considering the Petition.

C. The Commission Should Deny Forbearance from Enforcement of the Requirement that ILECs Provide Unbundled Access to a 64 Kbps Voice Channel Where they Replace Copper with FTTH [Category 3]

The PaPUC agrees with the commentators opposing forbearance from the 64 kbps channel requirement set forth in Section 51.319(a)(3)(iii)(C) of the Commission's rules. 47 C.F.R. § 51.319(a)(3)(iii)(C). As noted in multiple comments, it appears that competitive local exchange carriers (CLECs) continue to rely on the 64 kbps channel requirement to provide service to end-users, including smaller locations of multi-location business customers, in areas where ILEC copper has been or is being replaced with fiber to the home or to the premises (FTTH/FTTP) physical network facilities. Consistent with the comments, the PaPUC is concerned about the adverse impact that forbearance could have on these carriers and their customers. The PaPUC also notes the comments of COMPTEL regarding the lack of evidence provided to support that retaining the 64 kbps channel requirement is costly, forecloses ILECs from retiring copper loops, or deters fiber optic network investment. Moreover, the PaPUC is concerned about the incongruity of claiming, on the one hand, that the market for voice services at 64 kbps is competitive while, on the other hand, failing to note that under current FCC rules the deployment of fiber or advanced services precludes competitor access to those facilities but for the very 64 kbps voice service for which the Petition seeks forbearance. Thus, the PaPUC agrees with COMPTEL that the Petition fails to support its claim that the 64 kbps channel requirement provides no benefit to customers or that retaining the 64 kbps channel requirement is contrary to the public interest. COMPTEL Comments at 26-28.

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[7] *In re Ensuring Customer Premises Equipment Backup Power for Continuity of Communications; Technology Transitions; Policies and Rules Governing Retirement Of Copper Loops by Incumbent Local Exchange Carriers, et al.* PS Docket No. 14-174, GN Docket No. 13-5, RM-11358, *et al.*, (FCC, Rel. Nov. 25, 2014), Notice of Proposed Rulemaking and Declaratory Ruling, FCC 14-185.

The USTelcom Petition request for forbearance relief from the retention of the 64 kbps channel requirement over the FTTH loop on an unbundled basis also has the potential of adversely impacting wholesale access service obligations and competitive providers. The PaPUC agrees with COMPTEL's assessment that competitive LECs rely on the 64kbps channel requirement in their commercial negotiations with ILECs to ensure that the ILECs provide last-mile access in areas where copper loops have been replaced. COMPTEL Comments at 26. COMPTEL points out that USTelcom's forbearance request for the 64 kbps channel requirement, when coupled with its dual request for forbearance from the Section 271 unbundling requirements in this same Petition, would *possibly* result in the BOCs unilaterally ceasing to negotiate wholesale alternatives with competitive carriers as the BOCs "would not have any regulatory compulsion or other incentive to continue offering unbundled switching as part of their UNE-P replacement products." *Id*. at 28. Accordingly, the PaPUC believes retention of this requirement is necessary to protect competitive carriers and, ultimately, their end-user consumers.

Furthermore, as noted by NASUCA, the issue of what happens to copper before and after it is retired is one of the fundamental questions addressed in the Commission's recent Notice of Proposed Rulemaking at PS Docket No. 14-174 *et al* (FCC 14-185). NASUCA Comments at 18. As we stated above, forbearance petitions and similar pleadings like petitions for a declaratory ruling are inappropriate vehicles to examine and resolve complicated matters governed by federal rules. Rather, a rulemaking proceeding with appropriate notice and comment from a broader spectrum is the lawful and far superior approach. Therefore, the Commission should deny USTelecom's Petition in regards to Category 3 and address the issue in its recent NPRM. (FCC 14-185).

The Pa. PUC appreciates this opportunity to file Reply Comments in this proceeding.

Respectfully submitted,

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