Public Knowledge

December 9, 2015

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

Re: *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. 14-192.

Dear Ms. Dortch:

On December 9, 2015 I spoke with Claude Aiken, OGC, with regard to the above captioned matter.

As a general matter, Public Knowledge (PK) does not support the proposed forbearance. USTA has not met the burden of showing that these rules are unnecessary or that they in any way inhibit the deployment of next generation networks. To the contrary, as the Commission has found in the context of the *Open Internet Order*, company plans on deployment are generally not impacted by changes in the regulatory environment, and the Commission should not assume that these regulations inhibit deployment of broadband services based on vague generalities about the cost of regulation and discredited platitudes that carriers will not expand facilities subject to pro-competitive rules.

In particular, Public Knowledge opposes forbearance from conduit access – whether "green field" or "brown field." As demonstrated by the strong bipartisan consensus around the "dig once" infrastructure bills proposed in Congress, access to conduits is a critical means of promoting competitive broadband deployment and reducing cost. In light of the lack of specific evidence that conduit sharing impedes deployment, the Commission should not forbear from pro-competitive obligations that serve both the market-opening purposes of Section 271, as well as the general policy of promoting broadband competition and deployment pursuant to Section 706.[1]

Additionally, PK raised concerns as to how the forbearance of Section 271 obligations would potentially impact the "performance assurance plans" (PAPs) filed in many states to ensure compliance with Section 271. In particular, PK raised concerns that (a) ILECs would argue to

[1] The Commission may decline to forbear from a regulatory requirement that serves a legitimate purpose, even if that purpose is not related to the statutory provision under which it is promulgated. *See Verizon v. FCC*, 770 F.3rd 961, 967-68 (D.C. Cir. 2014). *See also Ad Hoc Telecommunications Users Council v. FCC*, 572 F.3d 903 (D.C. Cir. 2009) (consideration of goals of Sec. 706 an important consideration in determining whether and how to grant forbearance).

state authorities that Section 10(e)[2] would require states to repeal existing PAPs; and, (b) ILECs filing future discontinuances under Section 214(a) will argue that the Commission is prohibited from reviewing PAPs (whether still on file in the states or recently repealed) as evidence of whether the new service provided by the ILEC offers wholesale services on a "reasonably comparable basis" to the service previously offered by the ILEC.[3]

If the Commission grants the requested forbearance, it is important that the Commission clarify that forbearance from Section 271 obligations does not require states to repeal PAPs. In particular, states should be aware that PAPs may be used as evidence in future 214(a) discontinuance proceedings, and that keeping PAPs in place to ensure that competitors will enjoy reasonably comparable access to successor networks is a valid purpose and not preempted by Section 10(e).

Additionally, the Commission should make it clear that it's forbearance here from certain obligations does not prevent the Commission from evaluating contracts entered into subject to PAPs, even if PAPs are repealed by a state. Nor is the FCC barred from looking at repealed PAPs, but will instead treat them as evidence similar to any other evidence of what is considered "reasonably comparable."

For example, assume, following grant by the Commission of the pending forbearance petition, a state repeals the requirement to file and maintain a PAP with the state PSC. The ILEC withdraws its PAP, and immediately files a 214(a) discontinuance. A CLEC files an objection that the ILEC has not offered reasonably comparable access, and cites to the repealed PAP as evidence of the service that was available prior to discontinuance. The ILEC objects to the admissibility of the evidence on the grounds that, because the Commission has forborn from the 271 obligations that triggered the PAP, and because the state has repealed the PAP, the Commission is barred from even considering the PAP as evidence.

The Commission should therefore clarify that under Rule 63.71(c) it will continue to consider all relevant information – including PAPs, whether or not the PAP has been repealed. Obviously, the weight of the evidence will depend on the length of time and developments in the market. If a PAP is repealed and several years pass before the ILEC files a 214(a), the probative weight of a repealed PAP as to what was available in the market prior to filing a 214(a) is different than the probative weight of a PAP repealed a mere day before the filing of a 214(a). But nothing in the pending forbearance order, or any subsequent state action triggered by the pending forbearance order, impacts what evidence the Commission may consider when evaluating a 214(a) discontinuance request.

Failure to make this clarification will introduce significant confusion into the 214(a) process, and may deprive carriers and consumers of what little publicly available evidence exists as to what wholesale access is offered by the ILEC when it files its 214(a). Without access to all relevant

[2] 47 U.S.C. 160(e).
[3] *Technology Transitions*, GN Docket No. 13-5, Report & Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, 30 FCC Rcd 9372 (2015) adopting Rule 63.71(c).

evidence, the Commission cannot make an adequate determination. Worse, it invites ILECs to game the timing of requests so as to minimize the evidence available to the Commission for evaluation.

In accordance with Section 1.1206(b) of the Commission's rules, an electronic copy of this letter is being filed in the above-referenced docket. Please contact me with any questions regarding this filing.

Respectfully submitted,

/s/ Harold Feld
Senior Vice President
PUBLIC KNOWLEDGE

CC: Claude Aiken