

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Petition of USTelecom for Forbearance)	WC Docket No. 12-61
Under 47 USC §160(c) From Enforcement)	
Of Certain Legacy Telecommunications)	
Regulations)	
)	

**COMMENTS OF
THE AD HOC TELECOMMUNICATIONS USERS COMMITTEE AND REQUEST FOR
SUMMARY DISMISSAL**

The Ad Hoc Telecommunications Users Committee (“Ad Hoc”) hereby responds to the Commission’s Public Notice in the docket captioned above seeking comment on the petition for forbearance filed by USTelecom (“USTA”).¹

Ad Hoc opposes the petition in its entirety and for a reason that applies to all of the categories of relief USTA seeks: USTA has failed to make a *prima facie* evidentiary showing that would justify granting the forbearance it seeks. Indeed, as to nearly all of the services USTA’s members provide to enterprise customers, USTA has failed to proffer any evidence at all. The Commission should therefore dismiss or deny this petition.

¹ *Pleading Cycle Established for Comments on United States Telecom Association Petition for Forbearance from Certain Telecommunications Regulations*, WC Docket No. 12-61, DA 12-352, (rel. March 8, 2011).

DISCUSSION

As USTA itself acknowledges, the Commission is already re-examining many of its legacy rules in a number of dockets.² If USTA's objective is to contribute to the Commission's analysis of its rules to identify and eliminate those that are obsolete, then USTA could have been a thoughtful participant in any or all of the proceedings conducting that analysis. Alternatively, if USTA believes the scope of those proceedings is too narrow, it could have filed a petition seeking additional relief not already at issue in those proceedings. USTA chose instead to file a petition under Section 10 of the Act,³ triggering an onerous statutory deadline that hijacks the Commission's policy agenda – by forcing it to allocate resources away from other matters – and disrupts progress across all of its existing proceedings. USTA also imposes an unnecessary burden on other parties who must expend resources responding to its petition.

But the filing of a Section 10 forbearance petition also triggers requirements that apply to the petitioner. Section 10(a) requires the Commission to forbear from applying any statutory provision or regulation if it determines that: (1) enforcement of the provision or regulation is not necessary to ensure that the telecommunications carrier's charges, practices, classifications, or regulations are just, reasonable, and not unjustly or unreasonably discriminatory; (2) enforcement of the provision or regulation is not necessary to protect consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest.⁴ In determining whether forbearance is consistent with the public interest, Section 10(b) requires the Commission to consider

² Petition at pp. 3-8, notes 6, 12, and 19.

³ 47 U.S.C. § 160.

⁴ 47 U.S.C. § 160(a).

“whether forbearance from enforcing the provision or regulation will promote competitive market conditions.”⁵

As to each of the three prongs above, the petitioner bears the burden of proof.⁶ The petition itself must be “complete as filed,” meaning that the petitioner must include as part of the petition “the facts, information, data, and arguments on which the petitioner intends to rely to make the *prima facie* case for forbearance.”⁷ Specifically, the *prima facie* case “must show in detail how each of the statutory criteria are met with regard to each statutory provision or rule from which forbearance is sought.”⁸ Moreover, as the U.S. Court of Appeals for the District of Columbia Circuit and this Commission have observed, the three prongs of Section 10(a) are conjunctive and the Commission can properly deny a petition for failure to meet any one prong.⁹

USTA claims in its petition that the regulations it targets fall within the first and second prongs of the forbearance standard, that is, they are not necessary to ensure that (1) charges, practices, classifications, or regulations are just and reasonable and are not unjustly or unreasonably discriminatory or (2) consumers are protected. According to USTA, the reason the regulations are unnecessary is “the explosion of competition from a variety of service providers utilizing different technologies and platforms.”¹⁰ As evidence of that explosion, USTA appends a “Competitive Analysis” to its petition which purports to justify the forbearance it seeks with data regarding

⁵ 47 U.S.C. § 160(b).

⁶ See *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, WC Docket No. 07-267, Report and Order, 24 FCC Rcd 9543, 9554-55, para. 20 (2009) (“*Forbearance Procedural Order*”)

⁷ *Id.* at para. 17.

⁸ *Id.*

⁹ *Cellular Communications & Internet Ass'n v. FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003).

¹⁰ Petition at 12.

increased demand for wireless service and reductions in the number of “switched access lines” or “telephone” lines.¹¹

Therefore, under the statutory standards for forbearance, USTA’s petition has two fatal flaws. First, the petition seeks forbearance from regulations that apply equally to both enterprise customer services and residential services. But USTA’s “Competitive Analysis” does not address competition in the enterprise customer market at all. Nor does it provide any data regarding such competition or competitive alternatives to the business services of USTA’s members. The data and discussion USTA does provide – regarding residential customers and their “switched access” and “telephone” lines – is simply irrelevant for purposes of determining whether USTA members possess market power in the enterprise services market. As the Commission observed when it rejected an earlier analysis that took the same approach as USTA’s petition,

[t]he focus...on Qwest's market share for retail mass market telephone service was not, by itself, sufficient to determine whether Qwest possessed the power to control price (in other words, individual market power) in the markets for retail mass market services or retail enterprise services, or in any wholesale market. Nor did the generalized claims about competition for enterprise customers allow for such an evaluation.... Accordingly, the Commission's nearly exclusive emphasis on Qwest's share of the mass market retail voice marketplace--without meaningful consideration of Qwest's market shares in other relevant retail and wholesale markets, as well as other factors pertinent to whether Qwest, individually or jointly, possessed market power in those markets--is not supported by current economic theory.

Petition of Qwest Corporation For Forbearance Pursuant to 47 USC §160(c) in the Phoenix, Arizona Metropolitan Statistical Area, WC Docket No. 09-135, Memorandum Opinion and Order, 25 FCC Rcd 8622, 8635 ¶ 28 (2010), pet. for review pending,

¹¹ Petition at Appendix B.

Qwest Corp. v. FCC, No. 10-9543 (10th Cir. filed July 30, 2010) (“*Qwest Phoenix II Forbearance Order*”).

In this case, because USTA simply fails to provide any evidence regarding the market for business service, its petition fails to make a *prima facie* case for the broad forbearance it seeks.

The second flaw in USTA’s petition concerns the competitive evidence that it does supply, which is limited to its “Competitive Analysis” at Appendix B. That analysis provides no specific data regarding the nature and competitive conditions associated with the particular services, carriers, and locations it would have the Commission deregulate, no identification of product or geographic markets, no analysis of entry barriers or potential competition or any of the other factors previously identified by this Commission as determinative of a market power analysis. Once again, USTA’s petition is inconsistent with the Commission’s clear, unequivocal guidance regarding the type of data and analysis required to justify forbearance like that requested by USTA:

It is well established that the assessment of a carrier's individual market power requires a thorough analysis, which traditionally begins with a delineation of the relevant product and geographic markets, and then considers market characteristics, including market shares, the potential for the exercise of market power, and whether potential entry would be timely, likely, and sufficient to counteract the exercise of market power.

Id. The breezy “Competitive Analysis” appended to USTA’s petition fails to provide that “thorough analysis.”

CONCLUSION

Accordingly, and in light of the severe evidentiary deficiencies identified above, the Commission should summarily dismiss or deny USTA's petition for failing to make a *prima facie* showing that forbearance is justified.

Respectfully submitted,

AD HOC TELECOMMUNICATIONS USERS COMMITTEE

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