

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	WC Docket No. 18-141
Petition of USTelecom for Forbearance	)	
Pursuant to 47 U.S.C. § 160(c) to Accelerate	)	
Investment in Broadband and	)	
Next-Generation Networks	)	

**COMMENTS OF THE CENTER FOR DEMOCRACY & TECHNOLOGY**

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August 6, 2018

## **I. Legal Standard for Forbearance**

In its application for forbearance, USTelecom (USTA) must provide “convincing analysis and evidence” to prove that three distinct statutory requirements are met under the Communications Act.<sup>1</sup> The FCC must find that (1) enforcement of the 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 regulation is not necessary to protect consumers; and (3) forbearance from the application of the provision or regulation is consistent with the public interest.<sup>2</sup> Additionally, in its assessment of whether forbearance is consistent with the public interest, the FCC must consider whether granting forbearance will promote competitive market conditions.

All three statutory prerequisites must be satisfied for forbearance to be granted.<sup>3</sup> Based on the plain meaning of the statute and agency precedent, USTA has failed to make a *prima facie* showing for the three requirements in its petition. Consequently, the petition for forbearance should be denied in accordance with 47 C.F.R. § 1.54 of the Commission’s rules.

## **II. USTA has not met the standard for forbearance from ILEC-specific unbundling and resale mandates under Section 251(c)(3) and (4) and associated Section 251 and 252 obligations.**

Under Section 251(c)(3) of the Communications Act, incumbent local exchange carriers (ILECs) have a duty to provide “nondiscriminatory access to network elements on an unbundled basis” at just, reasonable, and nondiscriminatory rates, and Section 251(c)(4) requires ILECs to offer telecommunications services at wholesale rates for resale. Consistent with the requirements of

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<sup>1</sup> *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act, as Amended*, WC Docket No. 07-267, Report and Order, 24 FCC Rcd 9543, para. 20.

<sup>2</sup> 47 U.S.C. § 160(a).

<sup>3</sup> 47 C.F.R. § 1.54(b)(1). *See also* Cellular Telecomms. & Internet Ass’n v. FCC, 330 F.3d 502, 509 (D.C. Cir. 2003) (“The three prongs of § 10(a) are conjunctive. The Commission could properly deny a petition for forbearance if it finds that any one of the three prongs is unsatisfied.”).

the Communications Act, USTA must meet the aforementioned three prerequisites under Section 10 to qualify for forbearance from Section 251(c).

In petitions for forbearance from Section 251(c), the FCC evaluates whether the claims of petitioners satisfy the statutory criteria through a market power analysis.<sup>4</sup> For example, the FCC denied a petition for forbearance from Section 251(c) in the Phoenix Forbearance Order of 2010. Based on the analysis of the record, the Commission found that the petitioner had failed to demonstrate that there was sufficient competition to justify forbearance and ensure that it could not raise prices, discriminate unreasonably, or harm consumers.<sup>5</sup> The FCC found that “reasonably efficient competitors face barriers to entry that are likely to make entry into these markets uneconomic without access to...UNEs (unbundled network elements),” justifying the continued enforcement of the pertinent statutory provisions.<sup>6</sup>

Within the specific context presented by the USTA petition, the Commission has acknowledged that barriers to market entry similarly remain high for competitive local exchange carriers (CLECs), and access to UNEs help facilitate competition, infrastructure investment, and the expansion of broadband access among these smaller carriers.<sup>7</sup> This reality is reflected in the statutory analysis of the USTA petition, which fails to meet the burden of proof necessary to justify forbearance from the duties of Sections 251(c)(3) and (4).

**A. USTA has not shown that Sections 251(c)(3) and (4) are not necessary to enforce just and reasonable practices.**

In its petition, USTA has failed to affirmatively demonstrate that enforcement of Section 251(c)(3) and (4) unbundling and resale requirements are not necessary to enforce just and

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<sup>4</sup> See John Meisel, *The Evolution of Federal Communications Commission Forbearance Orders: From Omaha to Phoenix*, 20 CommLaw Conspectus 323, 324 (2012).

<sup>5</sup> *In re Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, 25 FCC Rcd 8622 (2010), para 2 (*Phoenix Forbearance Order*).

<sup>6</sup> *Id.* at para 93.

<sup>7</sup> See *In the Matter of Petition of USTelecom for Forbearance Under 47 USC § 160(c) From Obsolete ILEC Regulatory Obligations That Inhibit Deployment of Next Generation Networks*, WC Docket No. 14-192 (2014); COMPTTEL’s Opposition to USTelecom’s Petition for Forbearance, at 33 (Dec. 5, 2014) (“COMPTTEL Opposition”).

reasonable practices. USTA argues for forbearance based on the premise that the “marketplace is irrevocably open to competition,” and that “[c]ompetition does not rely on unbundling or resale mandates.” The petition claims that there is sufficient competition in the markets for residential, resale, and business data services (BDS), but the arguments put forth by USTA are not supported by relevant data, current law, or sound public policy considerations.

First, USTA contends that there is “effectively no remaining UNE-based competition in the residential marketplace.”<sup>8</sup> Rather, USTA argues that CLECs use ILEC facilities to serve residential customers exclusively through commercial platforms, and that eliminating unbundling requirements will increase competition and facilities-based investment.<sup>9</sup> However, USTA does not provide evidence to substantiate these claims. The petition does not illustrate how many CLECs use commercial platforms, or explain how exactly commercial platforms influence UNE-based competition. It does not provide any evidence regarding how forbearance will stimulate significant new deployment of competitive facilities by non-incumbent providers.<sup>10</sup> And while the petitioner argues for the complete displacement of UNE-based competition by facilities-based competition, it does not explain how this competition will arise or detail how this new competitive market will develop.<sup>11</sup> Without the necessary evidence to answer these questions and meet the burden of proof, the Commission should deny the petition for forbearance from Section 251(c).<sup>12</sup>

The petition also claims that forbearance is justified in the resale market, arguing that the marketplace is “highly competitive.”<sup>13</sup> USTA cites to the elimination of wireless resale rule as a potential model, arguing that ILECs will negotiate “reasonably” with wholesale customers because “[r]evenue from a resold line is better than no revenue at all.”<sup>14</sup> However, this claim fails

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<sup>8</sup> 2018 USTelecom Forbearance Petition at 27–28.

<sup>9</sup> *Id.* at 28.

<sup>10</sup> See *Phoenix Forbearance Order* at para. 36.

<sup>11</sup> 2018 USTelecom Forbearance Petition at n. 83.

<sup>12</sup> *Phoenix Forbearance Order* at para. 92 (“[W]hen seeking forbearance, ‘the petitioner bears the burden of proof—that is, of convincing analysis and evidence to support its petition for forbearance.’”).

<sup>13</sup> 2018 USTelecom Forbearance Petition at 29.

<sup>14</sup> *Id.*

to account for more recent and more relevant precedent that suggests that forbearance is unlikely to preserve these conditions for CLECs and consumers.

In the Omaha Forbearance Order, the Commission granted forbearance from wholesale and retail regulations for network elements, predicting that the petitioner would continue to make wholesale facilities available to competitors at competitive rates and terms.<sup>15</sup> But in an assessment of its decision, the FCC found that “there is little evidence...that the BOCs (Bell Operating Companies) or incumbent ILECs have voluntarily offered wholesale services at competitive prices once regulatory requirements governing wholesale prices were eliminated.”<sup>16</sup> Despite these issues, USTA fails to distinguish its case from the Omaha Forbearance Order, neglecting the concerns raised by the Commission’s analysis.

Finally, USTA argues that the Business Data Services Order (BDS Order) creates a new regime of regulation and “leaves no room for any continued unbundling requirements.”<sup>17</sup> However, the Commission endorsed the continued use of UNEs in the BDS Order, noting that they allow “competitive providers to effectively compete...and are particularly close substitutes for DS1s and DS3s.”<sup>18</sup> In fact, the FCC explicitly chose not to intervene in the marketplace for wholesale BDS in the Order, noting that “[t]he Communications Act and Commission precedent provide ample guidance regarding the pricing of wholesale [BDS].”<sup>19</sup> By doing so, the FCC explicitly allowed for the continued practice of unbundling.

Additionally, while CDT has concerns about the test adopted in the BDS Order to measure competition, its use is not consistent with the nationwide forbearance requested by petitioners. The BDS Order uses a county-by-county approach to examine geographic conditions, as they “provide a convenient, natural administrative unit for capturing competitive effects.”<sup>20</sup> This

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<sup>15</sup> *Phoenix Forbearance Order* at para 33.

<sup>16</sup> *Phoenix Forbearance Order* at paras. 33-34.

<sup>17</sup> 2018 USTelecom Forbearance Petition at 28.

<sup>18</sup> *Business Data Services in an Internet Protocol Environment*, Report and Order, 32 FCC Rcd 3459, para. 32 (2017).

<sup>19</sup> *Id.* at paras. 260-261.

<sup>20</sup> *Id.* at para 111.

reflects the vast distinctions between access to BDS across geographic areas and the need for a more carefully tailored approach in this particular context.

**B. USTA has not shown that Sections 251(c)(3) and (4) are not necessary for the protection of consumers.**

USTA has also failed to prove that enforcement is not necessary for the protection of consumers. As the Commission noted in the Phoenix Forbearance Order, the necessary analysis under this prong is closely linked to the “just and unreasonable” analysis required under Section 10(a)(1).<sup>21</sup> Consistent with that analysis, USTA has not shown that continued enforcement of Sections 251(c)(3) and (4) is not necessary for the protection of consumers.<sup>22</sup>

**C. USTA has not shown that forbearance from Sections 251(c)(3) and (4) is consistent with the public interest.**

Moreover, USTA has not shown that forbearance is consistent with the public interest in this context. In its petition, USTA reiterates the earlier competition arguments and cites to a study that claims that consumer savings and investment will result from forbearance.<sup>23</sup> But the aforementioned study is founded upon flawed assumptions, resulting in findings that dramatically overestimate the benefits of forbearance. More specifically, the study paradoxically posits that consumers will save money by moving to next-generation services even as prices for services rise.<sup>24</sup> Among other issues, this theory is based upon a narrow conception of next-generation services and fails to account for the inability of consumers to upgrade to these technologies.

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<sup>21</sup> *Phoenix Forbearance Order* at para. 101 (“The analysis...underlying our conclusion that section 251(c)(3) UNEs remain necessary to ensure just and reasonable and not unjustly and unreasonably discriminatory rates, terms, and conditions, likewise leads to the conclusion that these requirements remain necessary for the protection of consumers.”).

<sup>22</sup> *See id.* Additionally, the Commission has acknowledged that consumers have benefitted from innovative offerings provided by competitors relying on UNEs.

<sup>23</sup> 2018 USTelecom Forbearance Petition at 33.

<sup>24</sup> 2018 USTelecom Forbearance Petition at App. B, B-20.

First, the study uses a limited definition of “next-generation” services that is limited to products like Ethernet and cable “best efforts” broadband. Some of the Ethernet and broadband products listed within this narrow definition only provide speeds of 10 Mbps, falling far short of the FCC benchmark of 25 Mbps for high-speed broadband. Under the theory outlined by the study, consumers would shift from services provided by UNEs to incumbent services that plausibly fit this definition. As a result, consumers would be stripped of competitive alternatives in the present, and efforts by CLECs to build out fiber networks would be hindered.

Without access to UNEs, CLECs will face greater difficulties in maintaining a user base and raising the necessary capital for infrastructure buildout. For instance, Sonic is a CLEC that provides broadband access to consumers in California through UNEs in areas where ILECs have used the same infrastructure exclusively for telephone service.<sup>25</sup> It has been able to invest the revenue into their own fiber network, providing high-speed BIAS to a customer base that may not otherwise have access to such services.<sup>26</sup> Access to UNEs has help facilitate this growth, and forbearance from the requirements of Section 251(c) would restrict potential competition for high-speed BIAS and limit efforts to close the digital divide.

Second, the study fails to account for the unavailability of next-generation services across different local markets. Because the study has a broad national focus, it fails to account for gaps in access to next-generation services in local markets in a manner consistent with the Phoenix Forbearance Order.<sup>27</sup> In fact, while USTA is asking for nationwide forbearance, the study only takes into account data from 14 states and the District of Columbia. Furthermore, 11 of those states are relatively more densely populated and located on the East and West Coast, seemingly neglecting more rural states that may have less extensive broadband infrastructure.<sup>28</sup> Many of

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<sup>25</sup> Michael Hiltzik, *Sonic is a small ISP that competes brilliantly with the big guys — so they're trying to throttle its business*, L.A. Times, Jul. 5, 2018, available at <http://www.latimes.com/business/hiltzik/la-fi-hiltzik-sonic-isp-20180706-story.html>.

<sup>26</sup> *Id.*

<sup>27</sup> According to the Commission, 97.9 percent of Americans in urban areas have access to fixed high-speed broadband, compared to only 69.3 percent of Americans in rural areas. *In the Matter of Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, GN Docket No. 17-199, 2018 Broadband Deployment Report, 33 FCC Rcd 1660, para. 50 (2018).

<sup>28</sup> *Id.*

these areas within the digital divide benefit from the service provided by CLECs, and could either lose access or face increasingly high subscription fees as a result of forbearance.<sup>29</sup>

**III. USTA has not met the standard for forbearance from RBOC-specific time interval requirements for nondiscriminatory treatment of affiliates and non-affiliates regarding requests for service, and the long-distance separate affiliate requirement for independent ILECs.**

Section 272(e)(1) requires BOCs and independent ILECs to fulfill requests from unaffiliated entities for telephone exchange service and exchange access in the same period of time it provides such services to itself or to affiliates. The purpose of this provision is to prevent BOCs and ILECs from harming unaffiliated competitors through discriminatory provision of services. The BOCs' and ILECs' ability to do this stems from their control of local exchanges; where Section 251 mandates sale of unbundled network elements at reasonable rates, section 272 addresses non-monetary avenues for discrimination against competitors. Viewed through this lens, it becomes clear that Section 272(e)(1) will remain necessary to guard against discriminatory treatment as long as competitors depend on BOCs and ILECs for exchange service or exchange access. Therefore, absent a showing that no BOC or ILEC receives such requests, forbearance relief from Section 272(e)(1) should not be granted.

**A. USTA has not shown that Section 272(e)(1) is unnecessary to enforce just and reasonable practices.**

In 2014, USTA petitioned the Commission for forbearance from all remaining obligations under section 272, as well as a host of other provisions.<sup>30</sup> In that proceeding, the Commission denied forbearance from 272(e)(1) because, despite USTA's assertions that sufficient competition

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<sup>29</sup> See David S. Evans, *Economic Findings Concerning the State of Competition for Wired Broadband Provision to U.S. Households and Edge Providers*, at 35-37 (2017) (finding that competitive markets for broadband resulted in comparatively lower prices for consumers).

<sup>30</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*, Memorandum Opinion and Order, 31 FCC Rcd 6157 (2015) ("2015 USTelecom Forbearance Order").



would prevent harms to consumers in an ever-dwindling market for stand-alone long-distance calling, the petition did not address Section 272's role in preventing BOCs' incentives and ability to discriminate against competitors.<sup>31</sup>

In the three years since, nothing has changed. BOCs still have incentives and ability to harm competitors by "slow-rolling the critical functionalities that [they perform] for wholesale customers, such as provisioning, maintenance, and repair."<sup>32</sup> And USTA's petition still fails to address these potential harms, which will continue to exist as long as competitive LECs depend on wholesale inputs from incumbents, regardless of the offerings available to residential or enterprise customers. Instead, USTA relies on the Commission's own findings that ILECs "no longer presumptively assert market power" in the long-distance voice market in an attempt to justify its forbearance request.<sup>33</sup> However, the Commission's finding in the Technology Transitions Declaratory Ruling derives from an analysis of market power with respect to other providers in the market for interstate switched-access services.<sup>34</sup> This analysis has nothing to do with BOC's control over access to local exchanges or other inputs competitors might use.

In its denial of the previous petition, the Commission noted that commenters argued against such general competition claims on the grounds that removal of "these safeguards would compromise their access to wholesale inputs, including special access services, that they rely on to compete with incumbents in the provision of "downstream long-haul services" to business customers."<sup>35</sup> USTA's current petition again fails to address this concern, providing no evidence as to how often BOCs receive requests from unaffiliated providers nor any evidence showing that CLECs have multiple options for wholesale inputs.

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<sup>31</sup> 2015 USTelecom Forbearance Order, 31 FCC Rcd at 6180-81, para 42.

<sup>32</sup> COMPTTEL Opposition at 16.

<sup>33</sup> Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks at 36, WC Docket No. 18-141 (May 4, 2018) ("2018 USTelecom Petition for Forbearance").

<sup>34</sup> Technology Transitions; USTelecom Petition for Declaratory Ruling that Incumbent Local Exchange Carriers are Non-Dominant in the Provision of Switched Access Services, Declaratory Ruling, Second Report and Order, and Order on Reconsideration, 31 FCC Red 8283, 8286-87, para. 10 (2016) ("Technology Transitions Declaratory Ruling").

<sup>35</sup> 2015 USTelecom Forbearance Order, 31 FCC Rcd at 6180-81, para 42.

Nor has USTA submitted any of the metrics formerly required by the Commission as part of the Qwest Section 272 Sunset Forbearance Order to monitor compliance with Section 272(e)(1).<sup>36</sup> Essentially, the evidence in USTA's petition addresses the wrong aspect of competition to answer the first question relevant to forbearance: whether Section 272(e)(1) is necessary for the enforcement of just and reasonable practices. So long as BOCs control the market for wholesale inputs, section 272(e)(1) will remain necessary. Therefore, forbearance relief must be denied.

**B. USTA has failed to demonstrate that section 272(e)(1) is unnecessary to protect consumers.**

For many of the same reasons above, USTA fails meet the second prong of the forbearance analysis by showing that Section 272(e)(1) is unnecessary to protect consumers. First, as long as competing providers depend on wholesale inputs from BOCs, the customers of those providers can be harmed by unjust, unreasonable, or discriminatory practices by the BOC against competitors. As discussed above, USTA's petition relies solely on the same kinds of arguments that failed to convince the Commission in 2015. It offers nothing beyond statements showing a general trend away from long-distance voice calls and the Commission's finding that ILECs are non-dominant for the purposes of some other regulatory regimes.<sup>37</sup> But nowhere in the Technology Transitions Declaratory Ruling did the Commission mention Section 272. That the Commission did not find a sufficient relationship between ILECs' status as dominant or non-dominant and the continued application of Section 272 to even mention the statute should speak to the relevance of that document to this proceeding. In short, USTA offers nothing to distinguish this petition for forbearance from its earlier, failed petition.

Second, despite USTA's claims to the contrary, Section 202 is not an acceptable substitute for the protections of 272(e)(1). As the Commission noted in the previous petition for forbearance, "Section 272 establishes protections that are not wholly replicated by any other Act provision or

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<sup>36</sup> *Petition of Qwest Communications International Inc. for Forbearance from Enforcement of the Commission's Dominant Carrier Rules As They Apply After Section 272 Sunsets*, WC Docket No. 05-333, Memorandum Opinion and Order, 22 FCC Rcd 5207, 5240-41, paras. 64-66 (2007).

<sup>37</sup> 2018 USTelecom Petition for Forbearance at 37-38; Technology Transitions Declaratory Ruling, 31 FCC Rcd at 8290-97, paras. 19-42.

Commission requirement.”<sup>38</sup> As noted above, Section 272’s protections will remain relevant as long as competitors rely on wholesale inputs provided by BOCs and ILECs. Because USTA has not shown the absence of such reliance or otherwise proved that Section 272(e)(1) is unnecessary to protect consumers, the Commission must not forbear from Section 272(e)(1).

**C. USTA has failed to prove that forbearance from 272(e)(1) is in the public interest.**

Finally, USTA offers no evidence whatsoever that forbearance from Section 272(e)(1) would be consistent with the public interest. Although the petition alludes vaguely to some disparate impact compliance with 272 has on BOCs and independent ILECs, it includes no evidence to back this claim. Nor does it even try to explain how relief from the obligations created by Section 272 would be consistent with the public interest. One is left to surmise that the “time and resources” associated with not discriminating against competitors are so significant as to put USTA’s members at risk of economic downfall. Yet this implied claim goes unsupported. Therefore, USTelecom has not met the burden of proof, nor the burden of production required for forbearance relief. The Commission must deny the petition.

**Conclusion**

As discussed above, USTA’s petition for forbearance lacks evidence to satisfy any of the prongs of the analysis prescribed by Section 160, let alone all three. According to the Commission’s forbearance procedure, then, USTA has not met the requisite burden for forbearance relief. Therefore, the petition must be denied.

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<sup>38</sup> 2015 USTelecom Forbearance Order, 31 FCC Red at 6181, para 43.