

State of California

Public Utilities Commission
San Francisco

MEMORANDUM

Date : May 24, 2018

To : The Commission
(Meeting of May 31, 2018)

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Subject: Filing of Comments at the FCC: Petition of USTelecom for
Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment
in Broadband and Next-Generation Networks

RECOMMENDATION: The Commission should file comments in response to USTelecom’s Petition for Forbearance, filed May 4, 2018.¹

FACTS: On May 4, USTelecom—a lobbying group that speaks for many telecommunications companies—filed a Petition for Forbearance with the FCC. The Petition asks the FCC not to enforce several laws and regulations that USTelecom calls “outdated.” By themselves, such petitions are not objectionable: in the name of “regulatory flexibility,” 47 U.S.C. § 160 requires the FCC to stop enforcing provisions that are no longer necessary to promote service at just and reasonable rates, and to protect consumers. The issue here is with the scope of the petition: USTelecom asks the FCC to forbear from enforcing a swath of pro-competitive provisions against every Incumbent

¹ Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks, WC Docket No. 18-141 (May 4, 2018).

Local Exchange Carrier (ILEC) in the country.² This includes giants like Verizon and AT&T and, contrary to what USTelecom argues, the effect might be to freeze the smaller Competitive Local Exchange Carriers (CLECs) out of a number of markets.

In particular, USTelecom asks the FCC to stop enforcing the following provisions:

- Section 251(c)(3), which requires all ILECs to provide, on a non-discriminatory basis and at just and reasonable rates, access to unbundled network elements, or UNEs (access to UNEs allows non-facilities-based carriers to provide service without building facilities of their own);
- Section 251(c)(4), which requires all ILECs to resell, at wholesale rates and on a non-discriminatory basis, any telecommunications service that the ILEC offers at retail;
- Section 251(d)(3), to the extent that section would allow States to re-impose the parts of Section 251 listed above;
- Section 271(c)(2)(B)(iii), which is part of a so-called “competitive checklist” that the FCC looks at when an RBOC wants to provide long-distance (AKA InterLATA) service. This part of the competitive checklist examines whether the RBOC provides non-discriminatory access to its poles, ducts, conduits, and rights-of-way.³
- Section 272(e)(1), which requires RBOCs to fulfil Section 251 requests from non-affiliated carriers on the same timeline that the RBOC fulfills such requests from its own affiliates.

USTelecom also asks the FCC to forbear from enforcing a number of other sections of Title 47 of the U.S. Code and the Code of Federal Regulations, and several FCC orders, all of which implement the provisions listed above.

DISCUSSION: Under California law, when the FCC receives a petition requesting that it

forbear from enforcing [a] carrier’s duty to provide to any requesting telecommunications carrier, nondiscriminatory access to network elements on an unbundled basis at any

² Strictly speaking, some of the rules from which USTelecom seeks forbearance apply not to all ILECs, but to Regional Bell Operating Companies, or RBOCs. RBOCs are simply that subset of ILECs that were part of the Bell System.

³ USTelecom notes that this provision basically duplicates 47 U.S.C. § 224, which also requires carriers to provide non-discriminatory access to their facilities. Here, they may have a point—though in that case, why ask the FCC to forbear from enforcing it? What does USTelecom gain?

technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory (47 U.S.C. Sec. 251(c)(3) and Sec. 271 (c)(2)(B)(ii)), within any metropolitan statistical area located in the state, the commission *shall participate* in that forbearance proceeding by filing comments on the petition, providing data on competition in the metropolitan statistical area that is the subject of the petition, and taking any other action that advances the state's policies promoting competition in telecommunications markets.⁴

In other words, we have a statutory mandate to file comments in this proceeding.

Staff proposes to send data requests to every ILEC and CLEC in every metropolitan statistical area in the state, to gather the information we need to participate meaningfully. Staff may also be able to use information collected for the Competition OII, I.15-11-007—though that information is now several years old. Staff will analyze these data to determine whether USTelecom's forbearance petition will advance or hinder competition in California.⁵

This requires a lot of work. And as of today, we do not have enough time to do it: on May 8, the FCC set the pleading cycle, making opening comments due on June 7, with reply comments due on June 22.⁶ On May 18, therefore, we asked the FCC to extend the pleading cycle, so that opening comments would be due on September 5, with reply comments due on October 22. A number of other commenters, including CLECs, other state commissions, and the U.S. Small Business Administration, have also asked the FCC to extend the comment deadline. Staff expects that the FCC will grant some extension, though probably for less time than we have requested.

CONCLUSION: Section 716(a) of the Public Utilities Code obliges the Commission to file comments in this FCC proceeding. The data that staff gathers will decide the thrust of those comments.

⁴ Cal. Pub. Util. Code § 716(a) (emphasis added).

⁵ At least some CLECs still rely on Section 251(c)'s UNE-and-resale provisions, which would seem to point to the latter.

⁶ *Pleading Cycle Established for Comments on USTelecom's Petition for Forbearance from Section 251(c) Unbundling and Resale Requirements and Related Obligations, and Certain Section 271 and 272 Requirements*, Public Notice, WC Docket No. 18-141 (May 8, 2018).