

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

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

**COMMENTS OF THE  
MICHIGAN PUBLIC SERVICE COMMISSION**

***Introduction***

On May 7, 2018 USTelecom – The Broadband Association (USTelecom) filed a petition with the Federal Communications Commission (FCC or Commission) for forbearance from the requirement to provide unbundled network elements (UNEs) and resale under sections 251(c)(3) and 251(c)(4)<sup>1</sup> and the associated obligations under Sections 251 and 252<sup>2</sup> as well as other obligations under Section 272(e)(1) and 271(c)(2)(B)(iii)<sup>3</sup>. The FCC issued a notice requesting comment on May 8, 2018. In response to motions for extension filed by the Michigan Public Service Commission (MPSC) and other parties the comment deadlines were extended by 60 days. The MPSC is the state commission in Michigan that exercises the authority

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<sup>1</sup> 47 USC § 251(c)(3), (c)(4) (“Section 251”).  
<sup>2</sup> 47 USC § 252 (“Section 252”).  
<sup>3</sup> 47 USC § 272(e)(1); 47 USC § 271(c)(2)(B)(iii).

delegated to states under Sections 251 and 252 of the 1996 Act and as such will be affected by any forbearance granted in this proceeding. The MPSC offers the following comments and urges the Commission to carefully consider the effects of granting forbearance on the states and on competitive providers.

***Request for Forbearance from 251(c) Unbundling and Resale Requirements***

***The Forbearance Request is Overly Broad***

In the past the Commission has decided which elements would not be subject to unbundling through a finding of non-impairment under the standard defined under Section 251(d)(2) on a per element basis. In this proceeding, USTelecom is not asking for relief from providing any particular element or group of elements but is instead asking that UNEs and resale be eliminated entirely, for the entire United States. While there may be areas of the country where competition will still thrive without access to UNEs or resale the MPSC does not believe that this applies to the entire country. The MPSC urges the Commission to consider all areas of the country when evaluating this petition. Section 10 of the Communications Act <sup>4</sup> allows the Commission to grant forbearance for distinct geographic areas if the requirements are met for those areas, and USTelecom is free to file a petition for those service areas that have robust competition. But granting forbearance nationwide will negatively impact those geographic areas where robust competition currently is not present.

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<sup>4</sup> 47 USC § 160 (“Section 10”)

### ***Petitioner's Reliance on VoIP to Support Claims of Competition***

In its petition, USTelecom relies heavily on the availability of VoIP service to support its claim that competition does not depend on UNEs or resale. However, the MPSC does not believe that VoIP is properly included as a non-ILEC competitor to traditional wireline service. VoIP requires a broadband connection to function and while universal broadband may one day be achieved, today there are still large areas of the country that are unserved by broadband providers. This concern was expressed by the Commission in the Triennial Review Remand Order when it declined to consider VoIP as a reason to deny access to UNEs stating that “Customers seeking to use VoIP as a substitute for circuit-switched telephone service must first subscribe to a broadband service...While broadband penetration rates are increasing, broadband service today is far from ubiquitous.”<sup>5</sup> The MPSC believes this reasoning is still valid today. While broadband penetration has increased since 2005, it is still “far from ubiquitous.” In Michigan specifically, there are many places in the Upper Peninsula and northern Lower Peninsula of the state that lack broadband, as can be seen in the state broadband map compiled by Connect Michigan.<sup>6</sup> As a result, VoIP is not available in these areas of the state and wireless service can also be unreliable in many of these areas due to geography. This means that traditional wireline service may be the only reliable voice service

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<sup>5</sup> *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533, 2575, note 118, (2005). (“*Triennial Review Remand Order*”)

<sup>6</sup> <http://map.connectmi.org/>

available in these areas. With the UNE and resale obligations of Section 251 in place these areas are still open to competition and the benefits it brings. But if these offerings are not available to competitors at cost-based rates it is likely that these areas would have no competition at all due to the high barrier to entry.

The MPSC also does not support VoIP being considered equal to traditional wireline service for technical and regulatory reasons. VoIP will not work during a power outage<sup>7</sup>, but a traditional landline receives its power from the central office and will continue to function. This can be an especially relevant difference in the case of natural disasters like hurricanes and tornadoes when a landline may be the only way to contact emergency services. In addition, 911 service on a VoIP line requires the customer to make sure their location is correct and updated so that first responders will know where they are if they are unable to convey that information themselves. On a landline, locational information is managed by the provider. Traditional wireline is also subject to important state and federal regulations, including quality of service and customer protections, due to its classification as a Title 2 telecommunications service. VoIP is currently classified as neither an information service or a telecommunications service. And, while the Commission has applied certain telecommunications regulations to VoIP, the

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<sup>7</sup> Some VoIP providers do include a backup battery for their customers which will allow VoIP to continue to function during short term power outages. However, this is not equal to the central office power of a traditional landline. It is up to the customer to make sure the battery is connected properly and charged and in a long outage, such as those common during natural disasters, the backup battery will fail long before the central office power supplied to a traditional wireline phone.

uncertain classification of VoIP for regulatory purposes militates against considering VoIP a true competitor to landline service—especially in the context of a nationwide forbearance petition.

If VoIP is not considered in evaluating the number of competitive lines, then it becomes clearer that UNEs and resale are still widely used by competitive providers. In Michigan, as of June 2016 (the most recent data that the MPSC has access to), non-ILEC lines represent approximately 24% of switched lines with just over 38% of them being provided via UNEs and approximately 28% via resale.<sup>8</sup> This is far higher than the “small and declining portion of competitive lines” USTelecom claims to support forbearance.<sup>9</sup> This demonstrates that without VoIP being considered UNEs and resale are still an important method of entry into the market for competitors. And despite USTelecom’s claims to the contrary, ILECs still maintain market power and control of the vital last mile for providing service to end-users.

Even if the Commission decides that VoIP should be considered in evaluating whether forbearance would be in the public interest, the petition should not be granted. As previously stated, in the MPSC’s view the forbearance from Section 251(c) unbundling and resale obligations sought by USTelecom is overly broad and would be detrimental to wireline competition. There are still large areas of the country lacking affordable access to broadband and therefore lack access to VoIP.

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<sup>8</sup> See FCC State Form 477 Data for Michigan as of June 2016

<sup>9</sup> USTelecom Petition p. 18

For these areas UNEs and resale represent a viable method of competitive entry into the market. For these areas forbearance should not be granted and since USTelecom has requested forbearance for the country as a whole the petition should be denied. As stated by the Commission in the Triennial Review Remand Order when discussing competition from cable companies, “incumbent LECs remain free to seek forbearance from our unbundling rules in specific geographic markets where they believe the aims of section 251(c)(3) have been ‘fully implemented’ and other requirements for forbearance have been met.”<sup>10</sup> The MPSC urges the Commission to continue to apply this reasoning and not grant forbearance nationwide when only specific geographic markets are truly competitive and others still greatly benefit from the availability of UNEs and resale.

***Forbearance from Unbundling and Resale Obligations is not in the Public Interest.***

The MPSC does not believe that USTelecom has met their burden of proof under Section 10. There are still areas of the country that lack access to VoIP and UNEs and resale still provide an important method of entry into the market for competitors in these areas. Section 10(b) requires that the Commission consider the competitive effects of forbearance, “including the extent to which such forbearance will enhance competition among providers of telecommunications services.”<sup>11</sup>

Rather than enhancing competition, eliminating UNEs and resale requirements

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<sup>10</sup> *Triennial Review Remand Order*, ¶ 39.

<sup>11</sup> 47 USC 160 § 10(b).

would harm it, removing possibly the only method of market entry in areas that currently lack access to VoIP. Because forbearance nationwide is not in the public interest and does not meet the requirement under Section 10(a)(3), the petition should be denied.

***Section 271(c)(2)(B)(iii) is Still Necessary and Forbearance Should be Denied.***

USTelecom seeks forbearance from the requirement under Section 271(c)(2)(B)(iii) that RBOCs provide nondiscriminatory access to poles, ducts, conduits, and rights of way claiming that it is duplicative and unnecessary.<sup>12</sup> USTelecom previously sought forbearance from this requirement in 2015 and the Commission denied this request, stating that “because of the nature and continued importance of section 224, it is necessary to retain checklist item 3 as an additional enforcement mechanism for the concurrent section 224 obligations.”<sup>13</sup> USTelecom claims that due to decreasing pole ownership this provision is not needed.<sup>14</sup> However, as noted by the FCC in its 2015 order, the “access obligation in checklist item 3 is not dependent on whether or not there is completion.”<sup>15</sup> The Commission found that, due to the importance of access to poles, forbearance was not warranted as it would be inconsistent with the public interest. While USTelecom argues that

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<sup>12</sup> USTelecom Petition p. 43.

<sup>13</sup> *In the Matter of Petition of USTelecom for Forbearance Pursuant to 47 USC 160(c) From Enforcement of Obsolete ILEC Legacy Regulations That Inhibit Deployment of Next-Generation Networks*, Memorandum Opinion and Order, 31 FCC Rcd 6157, 6170 ¶ 19 (2015) (“*2015 USTelecom Forbearance Order*”).

<sup>14</sup> USTelecom Petition p. 41.

<sup>15</sup> *2015 USTelecom Forbearance Order* ¶ 22.

this requirement has long outlived its usefulness, the Commission clearly disagreed in 2015 and USTelecom has not presented convincing new evidence that meets its burden of proof to change this determination. The MPSC asks the Commission to deny forbearance from this requirement.

### ***Conclusion***

The MPSC appreciates the opportunity to comment on this petition. Forbearance from the unbundling and resale obligation of Section 251 will have far reaching effects on the telecommunications marketplace. While USTelecom argues that these methods of entry are only used by a small fraction of competitors it relies on VoIP numbers to support its argument, which distorts the true competitive picture because VoIP is only available where there is access to reliable broadband and there are still large areas which lack this service. Eliminating VoIP when evaluating USTelecom's petition makes it clear that UNEs and resale are still relied on heavily by competitive providers—because they are the only economical methods of entry in some areas. Even if the Commission chooses to consider VoIP it should still deny forbearance because removing these requirements nationwide would be overly broad and have negative consequences in areas currently lacking reliable broadband or wireless service. The MPSC urges the Commission to take this into consideration when evaluating whether forbearance would be in the public interest. To the extent that certain geographic areas may be highly competitive, providers like USTelecom are free to petition for forbearance in those areas. But at this time a



grant of nationwide forbearance would be overly broad, harmful to competition and therefore not in the public interest.

The MPSC also urges the Commission to deny forbearance from the Section 271(c)(2)(B)(iii) requirement for nondiscriminatory access. This forbearance request was previously denied in 2015 and the reasons for denying forbearance stated by the Commission in 2015 still apply today. USTelecom has failed to establish that there has been a significant enough of a change in the industry since 2015 to demonstrate that forbearance is in the public interest. Consequently, USTelecom's request should be denied.

The MPSC takes no position on USTelecom's request for forbearance from Section 271(E)(1) at this time but may address it in Reply Comments.

Respectfully submitted,

**MICHIGAN PUBLIC SERVICE COMMISSION**

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