

FCC Considering Partial Grant of Regulatory Forbearance for Incumbent Carriers

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Among the items being considered at the upcoming April 12, 2019 Federal Communications Commission ("FCC" or "Commission") open meeting is possible regulatory forbearance of certain legacy regulatory and structural requirements applicable to Bell Operating Companies ("BOCs"), price cap local exchange carriers ("LECs"), and independent rate-of-return carriers ("RoR carriers"). Acting on a nearly year-old USTelecom petition, the FCC's [draft Memorandum Opinion and Order](#) ("Order") proposes to forbear from enforcement of three regulatory requirements: (i) that independent RoR carriers offer in-region long distance service through a separate affiliate ("structural separations"); (ii) that BOCs and price cap LECs do not discriminate in service provisioning intervals and that they file special access provisioning reports; and (iii) that BOCs provide nondiscriminatory access to poles, ducts, conduits, and rights-of-way (collectively, "pole attachments"). However, the draft Order declines to decide on USTelecom's request for forbearance from certain network unbundling and resale requirements. The Commission's deferral on the unbundled network elements ("UNE")/resale issue is not surprising in light of the significant industry and consumer opposition to this aspect of USTelecom's petition. With the exception of the few comments supporting USTelecom's petition, the vast majority of comments were relatively silent regarding the other forbearance requests. If adopted, the draft Order will be effective upon release.

The Telecommunications Act of 1996 (the "Act") introduced numerous regulatory provisions designed to prevent BOCs from leveraging their monopoly status to disadvantage competitor long distance providers and some requirements subsequently were applied to independent incumbent local exchange carriers. Certain provisions have automatically sunset and, over time, the FCC eliminated or forbore from enforcing many, but not all, of the requirements. USTelecom has sought forbearance from BOC obligations on several occasions including, prior to the current request, in a 2014 request that all BOCs receive forbearance from all remaining Section 272 obligations in all regions. If adopted in its current form, the draft Order would forbear from enforcing three requirements, including effectively eliminating the remaining Section 272 obligations.

First, independent RoR carriers currently are subject to structural separations requirements for their in-region long distance services. The FCC rule Section 64.1903 separate long distance affiliate requirement was designed to prevent independent RoR carriers from misallocating local and long-distance operational costs, a practice that could result in overearnings or increased rates for competitors relying on critical service inputs from the independent RoR carriers. Describing the structural separations requirement as burdensome and ineffective at preventing cost misallocation, the draft Order instead cites to regulatory and marketplace changes, and Commission enforcement mechanisms as sufficient to address cost misallocation concerns. The Commission notes the existence of "numerous accounting, cost allocation and separations requirements" that act to require separate accounting, prevent cross-subsidization of services, and prescribe cost allocation

procedures. The draft Order asserts that, should these methods fail, the RoR carriers are subject to investigation and enforcement pursuant to several provisions of the Act. Finally, the draft asserts that Commission rule changes and increasing RoR carrier conversion to price cap regulation has reduced the incentive, and made it easier to identify, cost misallocation. Unlike prior Commission forbearance grants of the structural separations requirement, the draft Order does not propose special access charge imputation filing or performance metric reporting requirements on independent RoR carriers. Consistent with the Commission's prior forbearance of the imputation condition for price cap LECs and because, as discussed below, the performance metric reporting requirements are proposed to be forborne for BOCs and price cap LECs, the Commission proposes to forbear them for RoR carriers also.

Second, the draft Order proposes to grant forbearance from the Section 272(e)(1) provisioning interval requirement and related special access performance metric reporting requirement. Although not requested by USTelecom, the Commission takes the opportunity to propose forbearance of similar provisions and reporting requirements applied to price cap LECs. Section 272(e)(1) of the Act prohibits BOCs from discriminating in the speed at which the BOC provisions telephone exchange service and exchange access to unaffiliated carriers as compared to fulfilling requests for the BOC or its own affiliates. The special access performance metric reporting was intended to assist in enforcing Section 272(e)(1)'s nondiscrimination requirement. USTelecom had sought similar forbearance in 2014 and the proposed grant marks a departure from the Commission's 2015 order denying USTelecom's 2014 request for forbearance from all remaining Section 272 BOC obligations ("2015 USTelecom Forbearance Order").

Similar to the justification for the structural separations forbearance for RoR carriers, the draft Order relies on the presence of existing regulations, enforcement mechanisms, and marketplace changes as supporting the proposed forbearance. The FCC explains that Sections 201 and 202 of the Act prohibit unreasonably discriminatory behavior and Section 251(b)(1) has been interpreted as prohibiting discriminatory provisioning of services for resale. The 2015 USTelecom Forbearance Order previously asserted that Sections 201 and 202 were insufficient to protect competition. Responding to opposition references to the 2015 decision on this point, the draft Order characterizes the prior statements regarding Sections 201 and 202 as "outdated," particularly in light of later Commission orders including the 2017 Business Data Services Order. The Commission's Section 208 complaint process and Market Disputes Resolution process are mentioned as additional methods of preventing discriminatory provisioning. The draft Order also notes that facilities-based competition, including in the business data services market, supports elimination of the BOC and price cap LEC provisioning safeguards and renders unpersuasive commenter concerns regarding possible BOC and price cap LEC motives to discriminate. USTelecom did not seek forbearance from Sections 272(e)(2) and (4), the last remaining Section 272 provisions applicable to a BOC's Section 272 separate affiliate. However, the draft Order suggests those provisions essentially will become irrelevant because, upon forbearance of the special access performance metric reporting requirement, there will be no reason for a BOC to continue operating a Section 272 long distance affiliate.

The draft Order's third proposed forbearance grant would relieve BOCs of the Section 271(c)(2)(B)(iii) requirement to provide nondiscriminatory access to pole attachments in accordance with Section 224 of the Act. Like the structural separations issue, this request received little attention in proceeding comments. The FCC explains that Section 271(c)(2)(B)(iii) is typically applied as a condition for BOCs seeking to provide in-region long-distance service. Because the draft Order finds the provision to be redundant of Section 224, which remains in effect, the FCC proposes to forbear from enforcement of Section 271(c)(2)(B)(iii). The draft Order highlights that the only distinction

between Section 271(c)(2)(B)(iii) and Section 224 is the former statute's 90-day complaint period, which the Commission notes has never been used for a Section 271 pole attachment complaint. The FCC asserts there is no need to single out BOCs for "duplicative pole access regulation" in light of pole ownership competition from electric service providers and the nondiscrimination safeguards in Section 224. Commenter observations that BOCs have been using enforcement remedies to obtain pole access were considered insufficient to support retaining Section 271's duplicative enforcement remedy.

Finally, the Commission expressly declined to rule on USTelecom's forbearance request regarding Section 251(c) obligations applicable to UNEs and resale. This issue has garnered the most attention, including staff briefing requests from the House Commerce Committee and House Communications Subcommittee, opposition filings from many industry members, and potentially more than 8,000 letters, many individualized, from consumers. Industry members opposing UNE and resale forbearance have asserted a variety of concerns, including that the petition was procedurally deficient because it was not "complete-as-filed", the lack of "economically viable alternatives" for certain UNEs, and USTelecom's failure to provide granular, localized data to support assertions of market competition.

The few comments supporting USTelecom's petition asserted the presence of facilities-based competitors and the decline in use of UNEs, particularly as consumers seek higher-speed services, and argued the Commission is not required to "undertake any particular geographic or product market analysis" when reviewing a forbearance request. In light of the significant and ardent positions on potential UNE/resale forbearance – including sustained *ex parte* communications, as recently as yesterday, with the Commission – it's not surprising that the Commission has chosen to delay deciding on this issue. Rather, addressing the issue in a footnote, the FCC notes that the UNE/resale request remains pending, subject to an August 2, 2019 statutory deadline, and that the draft Order should not be "construed as prejudging" the issue. The Commission does appear to be moving on the request, however, as just last week it released a [Public Notice](#) stating that the Commission intends to incorporate into the USTelecom forbearance proceeding confidential and highly confidential information submitted in the BDS proceeding. The Public Notice notes that USTelecom "relies on the Commission's analysis of the data submitted in the BDS proceedings for the factual basis of its forbearance request" and the Commission expects that the BDS data "will significantly enhance the Commission's ability to analyze competitive facilities deployment." Consequently, we expect the Commission will take up this request in a future order.

The draft Order is subject to change before being released, so be sure to check back for any updates on the final Order.