

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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

**MOTION TO DISMISS**

INCOMPAS, on behalf of itself and its members, files this motion to dismiss USTelecom’s above-captioned petition<sup>1</sup> for violation of the “complete-as-filed” rule in 47 C.F.R. § 1.54(b). The Commission’s *Forbearance Procedures Order* makes clear that a “petition for forbearance must include in the petition the acts, information, data, and arguments on which the petitioner intends to rely.”<sup>2</sup> USTelecom has not done so. As is evident from pages 14 through 16 of Appendix B to the Petition, the Petition relies on confidential data and purported interviews not attached to the Petition as part of its *prima facie* case.<sup>3</sup> In addition, the Petition relies on data compilations and analysis that, although potentially based on publicly

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<sup>1</sup> 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 (filed May 4, 2018) (“Petition”).

<sup>2</sup> *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, Report and Order, 24 FCC Rcd. 9543, ¶ 17 (2009) (“*Forbearance Procedures Order*”).

<sup>3</sup> See Hal Singer and Kevin Caves, “Assessing the Impact of Forbearance from 251(c)(3) on Consumers, Capital Investment, and Jobs” at 14-16 (May 2018), appended as Appendix B to *Petition* (“Singer & Craves”). The reliance on interviews is reflected on page 15. All interview notes on which Singer and Caves rely also need to be produced to meet the complete as filed requirement. Interested parties cannot meaningfully review the basis for Singer and Caves analysis simply based on their *ex post* summarization of the results.

available data, are not themselves self-evident or included with the Petition.<sup>4</sup> Accordingly, USTelecom deprives interested parties, or their counsel and experts, of their ability to examine all of this underlying data and analysis on which the Petition relies.

When the Commission adopted the “complete-as-filed” rule, it did so “for three reasons: to make the process fairer for commenters, more manageable for the Commission, and more predictable for petitioners.”<sup>5</sup> As the Commission explained, “complete petitions permit interested parties to file complete and thorough comments on a fully-articulated proposal. By contrast, less than complete petitions present interested parties with a moving target, which frustrates their efforts to respond fully and early in the process. Keeping up with a petitioner’s unfolding arguments *and evidence* also unreasonably burdens the resources of stakeholders. This burden is especially onerous for smaller companies, which may be affected severely by grants of forbearance to larger companies.”<sup>6</sup> The Commission’s rationale for adopting the rule is exactly on point here. USTelecom’s failure to abide by the “complete-as-filed” rule prejudices INCOMPAS’ members’ ability to evaluate USTelecom’s Petition and to participate fully in this proceeding.

Moreover, depriving interested parties of a meaningful opportunity to examine and comment upon the information and data that USTelecom relies upon would violate the Administrative Procedure Act and basic principles of procedural due process. As the D.C. Circuit has explained, the “opportunity for comment must be a meaningful opportunity.”<sup>7</sup>

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<sup>4</sup> See, e.g., Petition, Charts 1-5 (all referencing “USTelecom analysis” as a source). In addition, presenting charts is not the same as providing the underlying data compilations.

<sup>5</sup> *Forbearance Procedures Order*, ¶ 41.

<sup>6</sup> *Id.* ¶ 12 (emphasis added).

<sup>7</sup> *Gerber v. Norton*, 294 F.3d 173, 179 (D.C. Cir. 2002) (citations omitted).

Failing to make information and data available to interested parties results in “serious procedural error,” which is the basis for reversal on appeal.<sup>8</sup>

The proper remedy under the Commission’s rules is for the Commission, or the Bureau on delegated authority, to dismiss USTelecom’s Petition for failure to comply fully with the “complete-as-filed” rule. In the event that it does not do so, the Commission, or the Bureau on delegated authority, must at a minimum direct USTelecom to file all the underlying data, including confidential data, and it should reset the comment dates to permit an adequate comment period once the Petition is actually complete as filed. As discussed in INCOMPAS’ Motion for Extension of Time filed simultaneously with this motion, this Petition is clearly a “complex” petition warranting a comment and reply comment periods longer than the “typical” 30 and 15 days, respectively.<sup>9</sup>

In the event the Commission does not dismiss the Petition, but allows USTelecom to cure its violation, it should also adopt a protective order. A protective order would aid the Commission and interested parties in this proceeding by facilitating the filing and review of confidential and proprietary information essential to a full consideration of the petition for forbearance, while enabling USTelecom to submit the understandably confidential and propriety data of its members used in its economic analysis.

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<sup>8</sup> *Conn. Light & Power Co. v. Nuclear Regulatory Comm’n*, 673 F.2d 525, 530 (D.C. Cir. 1982).

<sup>9</sup> *See Forbearance Procedures Order* ¶ 29. *See also* Motion for Extension of Time of INCOMPAS at 2, WC Docket No. 18-141 (filed May 11, 2018).

Accordingly, the Commission, or the Bureau on delegated authority, should dismiss the Petition for failure to comply with the “complete-as-filed” rule, without prejudice to refile in a complete form.

Respectfully submitted,



Karen Reidy  
Vice President, Regulatory Affairs  
INCOMPAS  
1200 G Street, N.W., Suite 350  
Washington, DC 20005

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John T. Nakahata  
Henry Shi  
Harris, Wiltshire & Grannis, LLP  
1919 M Street NW  
Washington, DC 20036  
[jnakahata@hwglaw.com](mailto:jnakahata@hwglaw.com)  
202-730-1300

*Counsel for INCOMPAS*

May 11, 2018

**CERTIFICATE OF SERVICE**

I hereby certify that on May 11, 2018, I electronically filed the foregoing document with the Federal Communications Commission via the ECFS filing system. I also certify that the foregoing document is being served this day on all parties identified in the attached Service List via e-mail.

\_\_\_\_\_/s/ Alexandra Green  
Alexandra Green  
*Legal Assistant, Harris, Wiltshire &  
Grannis LLP*

**SERVICE LIST**

Jonathan B. Banks  
USTelecom  
601 New Jersey Avenue, NW  
Suite 600  
Washington, D.C. 20001  
Telephone: (202) 326-7272  
jbanks@ustelecom.org

Diane Griffin Holland  
USTelecom  
601 New Jersey Avenue, NW  
Suite 600  
Washington, D.C. 20001  
Telephone: (202) 326-7251  
dholland@ustelecom.org