



April 15, 2019

**Ex Parte via ECFS**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

*Re: 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); Regulation of Business Data Services for Rate-of-Return Local Exchange Carriers (WC Docket No. 17-144); Regulation of Business Data Services in an Internet Protocol Environment (WC Docket No. 16-143); Special Access for Price Cap Local Exchange Carriers (WC Docket No. 05-25); AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services (RM-10593)*

Dear Ms. Dortch,

INCOMPAS, on behalf of itself and its members, hereby files this letter in response to the Wireline Competition Bureau's Public Notice dated April 4, 2019,<sup>1</sup> announcing the Bureau's intent to incorporate confidential and highly confidential information and data filed in response to the Commission's business data services (BDS) data collection ("Highly Confidential and Confidential BDS Collection"),<sup>2</sup> and data filed in the *Second FNPRM* in the BDS proceedings.<sup>3</sup> INCOMPAS objects to the use of the Highly Confidential and Confidential BDS Collection as a

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<sup>1</sup> *Wireline Competition Bureau to Incorporate Business Data Services Data and Second Further Notice and Further Notice Record into USTelecom Forbearance Proceeding*, WC Docket Nos. 18-141, 17-144, 16-143, 05-25, RM-10593, Public Notice (Apr. 3, 2019).

<sup>2</sup> *Special Access for Price Cap Local Exchange Carriers et al.*, WC Docket No. 05-25, Order on Reconsideration, 29 FCC Rcd. 10899 (WCB 2014); *Special Access for Price Cap Local Exchange Carriers et al.*, WC Docket No. 05-25, RM-10593, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd. 16318, 16340, ¶ 51 (2012); see FCC, Instructions for Data Collection for Special Access Proceeding, WC Docket No. 05-25, RM-10593, OMB Control No. 3060-1197 (Dec. 5, 2014), <https://docs.fcc.gov/public/attachments/DOC-330865A2.pdf>.

<sup>3</sup> *Regulation of Business Data Services for Rate-of-Return Local Exchange Carriers; Business Data Services in an Internet Protocol Environment; Special Access for Price Cap Local Exchange Carriers*, WC Docket Nos. 17-144, 16-143, 05-25, Report and Order, Second Further Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 33 FCC Rcd. 10403, 10453-58, ¶¶ 147-62 (2018) ("*Second FNPRM*").

basis of support for USTelecom’s Forbearance Petition.<sup>4</sup> Doing so would be inconsistent with and undermine the Commission’s forbearance rules, and would violate basic principles of procedural fairness. Specifically, allowing this additional data to be used in support of the Petition would violate the “complete-as-filed” rule in 47 C.F.R. § 1.54(b). USTelecom could have proposed a modification of the BDS Protective Order at the time it filed its petition, but did not do so, even though it bore the burden of production. Incorporation of this data at this point in the proceeding unreasonably burdens the resources of interested parties, including many small carriers that were not a part of the original BDS proceedings, with a massive volume of eleventh-hour data to analyze. Moreover, given the mass of data and the need to hire experts to analyze it—which parties in the BDS proceeding did initially over approximately three months and which continued for many months thereafter—incorporation of this data at this point in the proceeding deprives interested parties of a meaningful opportunity to comment and inform the Commission’s decision.

INCOMPAS reiterates the points from its previous filings, which urge the Commission to summarily deny the Petition for violating the complete-as-filed rule.<sup>5</sup> The forbearance rules make clear “that the burden of proof is on forbearance petitioners *at the outset and throughout the proceeding.*”<sup>6</sup> It is the petitioner’s responsibility to state a prima facie case in its petition and “provid[e] convincing analysis and evidence to support” forbearance.<sup>7</sup> At the outset, USTelecom failed to meet its burden of production and its burden of proof. It could have sought a modification of the protective orders and the inclusion of this data into record at the beginning of this proceeding. Having failed to do so, introducing that data now in effect shifts the burden; USTelecom should not be able to rely on that data now. The Commission cannot ignore the principles enunciated in its own rules. Incorporating the BDS data into the record cannot cure USTelecom’s defective Petition.

Additionally, allowing the “massive” volume of BDS data<sup>8</sup> to be used this late in the proceeding as support for the Petition would violate another cardinal tenet of the complete-as-

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<sup>4</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>5</sup> Letter from John Nakahata, Counsel to INCOMPAS, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-141 (filed Mar. 13, 2019); Motion for Summary Denial of INCOMPAS et al., WC Docket No. 18-141 (filed Aug. 6, 2018) (“Motion for Summary Denial”); Reply Comments of INCOMPAS et al., WC Docket No. 18-141 (filed Sept. 5, 2018).

<sup>6</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, 9555 ¶ 20 (2009) (emphasis added) (“*Forbearance Procedures Order*”).

<sup>7</sup> *Id.*

<sup>8</sup> *Business Data Services in an Internet Protocol Environment et al.*, Report and Order, FCC 17-43, 32 FCC Rcd. 3459, 3460 ¶ 1 (2017) (“BDS Order”).

filed rule: to “permit interested parties to file complete and thorough comments on a fully-articulated proposal” without unreasonably burdening their resources.<sup>9</sup> The Highly Confidential and Confidential BDS Collection is a massive data collection consisting of information from 604 filers,<sup>10</sup> 658,485 census blocks, and 1,216,977 buildings with last-mile access demand.<sup>11</sup> The Commission allowed BDS stakeholders access to the data collection early on, and throughout the multiyear BDS proceeding, to “continue[] to provide updated analysis to [the Commission] in an effort to inform [its] judgment.”<sup>12</sup> Accordingly, parties in the BDS proceeding had *years* from the opening of the data enclave to the issuance of the BDS Order to digest and analyze the data and to file comments. In contrast, interested parties in the USTelecom forbearance proceeding would have three months or less from a yet-to-be issued public notice defining the issues for comment until the “quiet period” required under Commission rules<sup>13</sup> to analyze this massive volume of BDS data from 2016, and the additional data filed this year in response to the *Second FNPRM*.

Any use of this BDS data to support the Petition would be especially unfair for the smaller carriers that did not participate in the BDS proceedings, including the many INCOMPAS members that have filed comments and declarations in opposition to the Petition. Unlike the larger incumbent local exchange carriers, these smaller carriers lacked any prior opportunity to analyze the BDS data collection. Nor are they likely to have the resources to hire outside experts—required for the Highly Confidential data—to complete their analysis in the few months remaining. Given the data volume, cost, and time constraints, many stakeholders, particularly smaller carriers, would be unable to provide full and meaningful comments on the newly submitted data. The Commission designed the complete-as-filed rule to avoid precisely this type of inequitable outcome.

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<sup>9</sup> *Forbearance Procedures Order* ¶ 12.

<sup>10</sup> *Business Data Services in an Internet Protocol Environment*, Tariff Investigation Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd. 4723, 4742 ¶ 42 (2016).

<sup>11</sup> *BDS Order* ¶ 115.

<sup>12</sup> *Id.* ¶ 10 n.36.

<sup>13</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, DA 19-175, Order (Feb. 14, 2019) (extending statutory deadline by 90 days to August 2, 2019).

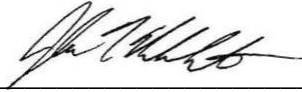
Ms. Marlene H. Dortch  
April 15, 2019  
Page 4 of 4

Accordingly, the Petition should be summarily denied for violating the complete-as-filed rule.<sup>14</sup> At minimum, the Commission, or the Bureau on delegated authority, must prohibit the Highly Confidential and Confidential BDS Collection from being used in support of USTelecom's Petition.

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Please let me know if you have any questions.

Sincerely,



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<sup>14</sup> Motion for Summary Denial; Reply Comments of INCOMPAS et al.; *see also* Motion for Partial Summary Denial and Comments of Cox Communications, Inc., WC Docket No. 18-141 (filed Aug. 6, 2018).