

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
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PETITION OF USTELECOM FOR DECLARATORY RULING THAT INCUMBENT LOCAL EXCHANGE CARRIERS ARE NON-DOMINANT IN THE PROVISION OF SWITCHED ACCESS SERVICES)	WC Docket No. 13-3
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**COMMENTS OF THE INDEPENDENT TELEPHONE & TELECOMMUNICATIONS
ALLIANCE IN SUPPORT OF USTELECOM PETITION FOR DECLARATORY
RULING**

The Independent Telephone & Telecommunications Alliance (“ITTA”) hereby submits its comments in support of the Petition for Declaratory Ruling filed by the United States Telecom Association (“USTelecom”) on December 19, 2012 in the above-captioned proceeding.¹

BACKGROUND AND SUMMARY

USTelecom seeks a declaratory ruling from the Commission that incumbent local exchange carriers (“ILECs”) are no longer presumptively dominant when providing interstate mass market and enterprise switched access services.² In light of the current state of the domestic telecommunications marketplace and Commission policies favoring modernization of outdated regulations to pave the way for consumers to benefit from newer technologies and services, ITTA agrees that “the public interest would be well-served by a clear declaration from the Commission stating what it has implicitly acknowledged in other contexts – that ILECs are no longer in any way ‘dominant’ when providing voice services over their traditional switched access networks.”³

¹ Petition for Declaratory Ruling of the United States Telecom Association, WC Docket No. 13-3 (filed Dec. 19, 2012) (“Petition”).

² *Id.* at 9.

³ *Id.* at 4.

As USTelecom demonstrates, ILECs are no longer the market leaders in the provision of residential or business switched access services. The communications marketplace is undergoing a fundamental technological transformation as more and more consumers shift from plain old telephone service (“POTS”) offered over the legacy public switched telephone network (“PSTN”) to IP-based voice services offered over fixed and mobile broadband networks. Government statistics show that more consumers have “cut the cord” and subscribe exclusively to mobile wireless services than there are switched access lines provided by ILECs.⁴ The data also indicates that the number of households served by interconnected VoIP service providers will surpass the number of households served by ILEC switched access services by the end of this year.⁵ These marketplace developments lead inexorably to the conclusion that regulations that were adopted when ILECs wielded monopoly power in the provision of voice services are no longer justified.

The FCC should eliminate its dominant carrier regulations to provide regulatory parity among all classes of voice service providers.⁶ Under the Commission’s rules, dominant carriers are subject to price cap or rate-of-return regulation and must file tariffs with applicable cost support for services on a minimum notice of seven days or more,⁷ while non-dominant carriers are not subject to rate regulation and may file tariffs on one day’s notice and without cost support;⁸ (2) dominant carriers are subject to a 60-day waiting period for applications to discontinue, reduce, or impair

⁴ *See id.* at 30.

⁵ *See id.* at 28-29.

⁶ As USTelecom notes in its Petition, granting such relief would have no impact on public policy obligations applicable to all carriers such as 911, customer privacy, and disabilities access, nor would it impact obligations for ILECs to provide unbundled network elements pursuant to Section 251(c)(3) of the Communications Act. *Id.* at n. 2. The Petition also is limited to switched services and thus does not include dedicated services such as special access. *Id.*

⁷ 47 U.S.C. §§ 203(b), 204(a)(3); 47 C.F.R. §§ 61.38, 61.41, 61.58; *Implementation of Section 402(v)(1)(A) of the Telecommunications Act of 1996*, Report and Order, 12 FCC Rcd 2170 (1997).

⁸ 47 C.F.R. §§ 1.773(a)(ii), 61.23(c); *Tariff Filing Requirements for Non-Dominant Carriers*, Order, 10 FCC Rcd 4074 (1995).

services to be granted, as compared to a 30-day period for non-dominant carriers;⁹ and (3) dominant carriers are eligible for presumptive streamlined treatment for fewer types of transfers of control under section 214 than non-dominant carriers.¹⁰

By lifting these outdated regulatory requirements from ILECs' provision of switched access services, the Commission would recognize as it has in other contexts that such regulations are "ill-equipped" to address current needs because they are "based on decades-old assumptions that fail to reflect today's networks, the evolving nature of communications services, or the current competitive landscape."¹¹ Moreover, should the Commission continue to hold on to antiquated rules that have no relevance in today's marketplace, it will discourage investment in next generation networks and services, a core aspect of its policy agenda.

In sum, because ILEC-provided switched-based services are just one of many competing alternatives consumers have for voice service, it no longer makes sense to treat ILECs as dominant in the provision of switched access voice services. To further the public interest and promote regulatory parity among voice providers, the Commission should declare that ILECs are no longer subject to dominant carrier rules in their provision of residential and business switched access services, thus promoting investment in new technologies and services in furtherance of the Commission's broadband deployment and other policy goals.

DISCUSSION

I. ILECs Are No Longer Dominant in the Provision of Switched Access Services

The paradigm shift away from reliance on the PSTN to IP-enabled platforms and applications for the delivery of voice services is well-documented. Since its peak around the turn of the century,

⁹ 47 C.F.R. § 63.71(c).

¹⁰ 47 C.F.R. § 63.03(b).

¹¹ *In the Matter of Connect America Fund, et al.*, WC Docket Nos. 10-90, *et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, ¶ 6 (rel. Nov. 18, 2011) ("*USF/ICC Transformation Order*").

the number of ILEC switched access lines has fallen by more than 50% and continues to decline.¹² Similarly, ILEC switched access minutes of use have dropped by more than 70% despite an increase in population as switched access connections are displaced by wireless and VoIP subscriptions.¹³ Today, only about one-third of American households purchase an ILEC switched access service.¹⁴ In contrast, approximately 40% of U.S. households have “cut the cord” and rely entirely on mobile wireless for their voice service.¹⁵

The rapid decline of switched access connections in the face of vibrant growth in subscribership to interconnected VoIP and mobile wireless services was confirmed in the Commission’s Local Telephone Competition Report released just last month.¹⁶ Out of 442 million total retail local telephone service connections as of December 2011, there were roughly 298 million mobile telephony subscriptions, 37 million interconnected VoIP subscriptions, and 85 million ILEC end user switched access lines in service.¹⁷ Over a three-year period from December 2008 to December 2011, interconnected VoIP subscriptions increased at a compound annual growth rate of 19% and mobile telephony subscriptions increased at a compound annual growth rate of 4.5%, while ILEC retail switched access lines declined at a rate of more than 10% per year.¹⁸ Of the 37 million interconnected VoIP subscriptions, nearly all were provided by non-ILEC providers, and the vast

¹² See Petition at 7.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ “Local Telephone Competition: Status as of December 31, 2011,” Industry Analysis and Technology Division, Wireline Competition Bureau, January 2013, *available at*: www.fcc.gov/wcb/stats.

¹⁷ See *id.* at 2, Figure 1 and 5, Figure 4.

¹⁸ See *id.* at 2, Figure 1 and 16, Table 5.

majority of those (24 million) were provided by cable operators offering digital voice service as part of a broadband bundle.¹⁹

These statistics underscore the Commission’s recognition in the *USF/ICC Transformation Order* that the regulatory system “established long before competition emerged among telephone companies, cable companies, and wireless providers” is now “eroding rapidly as consumers increasingly shift from traditional telephone service to substitutes including [VoIP], wireless, texting, and email...”²⁰ The combined effect of the increasing market share for VoIP service providers, the robust growth in mobile wireless subscribership, and the overall shrinking of the wireline voice services market has had a dramatic impact on ILECs that the Commission cannot ignore.²¹

Indeed, Frontier Communications announced on its most recent earnings call that it will no longer be tracking access lines as a metric. Dan McCarthy, Frontier’s President and Chief Operating Officer stated that “access lines [are] no longer a relevant metric for our business as we continue to sell significantly increased volumes of both residential and business products that are not counted as access lines. As a result, we are no longer reporting access line metrics.”²² Given that ILEC switched access services are but one of a multitude of voice and other communications options available to today’s consumers, it makes no sense to treat ILECs as dominant providers in a

¹⁹ See *id.* at 7, Figure 5 and 8, Figure 6.

²⁰ *USF/ICC Transformation Order* at ¶ 9.

²¹ The Commission also cannot ignore the availability and popularity of over-the-top voice applications in considering the current competitive landscape for voice services. As USTelecom points out, millions of American consumers utilize OTT to make phone calls. According to the most recently available data, Google Voice had 1.4 million registered users, nearly a quarter of a billion consumers use Skype each month, and countless consumers can utilize Apple’s popular Face Time service through the iPhone, iPad, and iPod Touch. Petition at 36-38. In addition, the Commission itself has acknowledged that consumers also are adopting alternative forms of communications in place of traditional voice calls, such as text messaging, email, and social networking. See *USF/ICC Transformation Order* at ¶ 9.

²² “Q4 2012 Earnings Call Transcript,” Frontier Communications Corporation, Feb. 21, 2013, available at: <http://www.morningstar.com/earnings/earnings-call-transcript.aspx?t=FTR®ion=USA&culture=en-us>, 4 (last visited Feb. 25, 2013).

marketplace where the consumer can choose a myriad of options from many providers for their communications needs.

II. The Continued Application of Outdated Legacy Rules Undermines Competition, Consumer Welfare, and Broadband Investment

Prolonging legacy dominant carrier regulation places ILECs at a competitive disadvantage vis-à-vis their cable and wireless competitors and could have a deleterious impact on consumer welfare. As the number of subscribers to traditional voice services continues to decline, the costs of complying with outdated Commission regulations are spread across fewer and fewer consumers, forcing them to bear a disproportionate regulatory burden. According to the Commission, “as customers leave the PSTN, the typical cost per line for [POTS] increases, given the high fixed costs of providing such service.”²³ Indeed, “[b]etween 2003 and 2009, the average cost per line increased almost 20 percent.”²⁴ No other service providers face the same regulatory hurdles that constrain the ILEC industry.

Furthermore, prolonging this regulatory imbalance impedes deployment of new technologies and services. As the Commission recognized in the National Broadband Plan, legacy regulations that require ILECs to maintain POTS are “not sustainable” because they reduce incentives for ILECs to deploy next generation facilities, “siphon[] investments away from new networks and services,” and result in significant “stranded” investment in outdated facilities and technologies.²⁵ In establishing broadband deployment and adoption as the Commission’s top policy priority, the National Broadband Plan cautioned the Commission to ensure “that legacy regulations and services did not become a drag on the transition to a more modern and efficient use of resources... or make it difficult

²³ “Connecting America: The National Broadband Plan,” 59 (2010), *available at*: <http://www.broadband.gov/> (“National Broadband Plan”).

²⁴ *Id.*

²⁵ *Id.*

to achieve certain public policy goals.”²⁶ Given the importance of the goal of universal broadband access, no policy basis exists to deny the relief requested by USTelecom when it would help achieve the Commission’s broadband deployment and adoption objectives.

III. Elimination of Unnecessary Dominant Carrier Regulations Would Be Consistent With Commission Precedent, State Regulatory Developments, and Relevant Policy Priorities

Relaxing dominant carrier regulation to provide regulatory parity among voice services providers would be consistent with Commission precedent, regulatory developments at the state level, and policy priorities advanced by the Obama Administration and the FCC that favor modernization or elimination of outdated regulations to reflect current marketplace realities.

The Commission recently eliminated a presumption of dominance on a nationwide basis with respect to vertically-affiliated multichannel video programming distributors (“MVPDs”) when it allowed the exclusive contract prohibition of the program access rules to expire.²⁷ In that proceeding, the Commission found that case-by-case consideration of specific conduct rather than a preemptive ban on exclusive arrangements would “adequately address competitively harmful conduct,” despite the fact that cable operators retain a 57.4% market share nationwide, and a market share as high as 80% in some regions.²⁸ Similarly, the Commission concluded that AT&T was no longer dominant in the provision of long distance services based on the fact that: (1) the company faced competition from at least three nationwide facilities-based providers, (2) its market share had fallen by one-third in the previous ten years to about 55% of revenues and 59% of minutes, (3) a significant percentage of its customers were switching to competitors as a service substitute, and (4) such competitors had sufficient capacity to constrain unilateral price increases by AT&T.²⁹

²⁶ *Id.*

²⁷ *See Revision of the Commission’s Program Access Rules*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 12605 (rel. Oct. 5, 2012).

²⁸ *Id.* at ¶¶ 17-18, 21.

²⁹ *See Motion of AT&T Corp. to Be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, ¶¶ 38-73 (1995).

As indicated above, “[a]nalogous but more dramatic competitive shifts have already transpired in the context of ILEC switched access services” as traditional voice customers switch to more technologically advanced alternatives.³⁰ Today, ILECs have a much smaller market share compared to cable companies, which the Commission recently ruled are no longer dominant in the provision of MVPD services. In addition, the competitive landscape provides a much more compelling case for deregulation than the circumstances that justified the Commission’s finding that AT&T is no longer dominant with respect to the provision of long distance voice service. Applying a consistent analytical approach based on the current marketplace for voice services would support a similar conclusion that ILECs are non-dominant in the provision of residential and enterprise switched access services.

Numerous states have begun to eliminate unnecessary regulations in recognition of the availability of competitive alternatives offered by wireless and interconnected VoIP providers. According to a recent survey, at least 20 states have adopted legislation in the past few years to deregulate traditional voice services to level the playing field between ILECs and their rivals. These and other state actions represent an appropriate and forward-looking approach to communications policy. As USTelecom points out, the FCC “should be leading by example in unraveling outdated dominant carrier regulation in light of this new competitive landscape.”³¹

Further, granting the relief requested by USTelecom would be consistent with the Commission and Administration policies to eliminate or modernize outdated regulations to reduce regulatory burdens and facilitate investment in new networks and services. Consistent with directives issued by the White House,³² the FCC has announced plans to “streamline and modernize

³⁰ Petition at 15.

³¹ *Id.* at 20.

³² *See, e.g.*, Executive Order 13536, “Improving Regulation and Regulatory Review” (Jan. 18, 2011), available at: <http://www.whitehouse.gov/the-press-office/2011/01/18/improving-regulationand-regulatory-review-executive-order>; Executive Order 13579, “Regulation and Independent Regulatory Agencies” (July 11, 2011), available at: <http://www.whitehouse.gov/the-press->

the Commission's rules and reduce burdens on the private sector"³³ by identifying rules that have not kept pace with marketplace and technological changes³⁴ and eliminating regulations that create competitive distortions in the marketplace.³⁵

The Commission's failure to reform outdated rules stands in the way of achieving its most important policy objectives. A central focus of the Commission's regulatory agenda is to facilitate universal broadband access and adoption for all Americans, particularly for consumers in rural areas such as those where ITTA members predominantly offer service.³⁶ As the Commission has recognized, "[a]ccess to robust broadband service is "crucial to our nation's economic growth, global competitiveness, and civic life. Businesses need broadband to attract customers and employees, job-seekers need broadband to find jobs and training, and children need broadband to get a world-class education."³⁷ Indeed, the job opportunities broadband access makes available "are critical to our nation's economic recovery and long term economic health, particularly in small towns... [and] rural and insular areas."³⁸

As long as the Commission persists in maintaining legacy obligations that apply to ILECs and not other providers, it will continue to exacerbate marketplace distortions, create disincentives

[office/2011/07/11/executive-orderregulation-and-independent-regulatory-agencies](http://www.whitehouse.gov/sites/default/files/privacy-final.pdf); "Consumer Data Privacy in a Networked World: A Framework for Protecting Privacy and Promoting Innovation in the Global Digital Economy," The White House, at 39 (Feb. 2012), *available at*: <http://www.whitehouse.gov/sites/default/files/privacy-final.pdf>.

³³ See *Reporting Requirements for U.S. Providers of International Telecommunications Services; Amendments of Part 43 of the Commission's Rules*, 26 FCC Rcd 7274 (2011) (Statement of Chairman Julius Genachowski); "Statement from FCC Chairman Julius Genachowski on the Executive Order on Regulatory Reform and Independent Agencies," News Release (rel. July 11, 2011), *available at*: http://hraunfoss.fcc.gov/edoc_public/attachmatch/DOC-308340A1.pdf.

³⁴ See *Final Plan for Retrospective Analysis of Existing Rules*, at p. 7 (rel. May 18, 2012), *available at*: http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-314166A1.pdf.

³⁵ *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901, ¶ 53 (2007).

³⁶ See *USF/ICC Transformation Order* at ¶ 5.

³⁷ *Id.* at ¶ 3 (internal citations omitted).

³⁸ *Id.*

for broader investment in next-generation networks and services, promote inefficient allocation of scarce investment dollars, and delay the transition to all-IP networks. As CenturyLink recently stated in a different proceeding before the Commission, “[i]t is not mere hyperbole to say that, given the current competitive state of the current telecommunications landscape, every employee hour and dollar spent on data gathering and reporting is time and money that won’t be spent building-out the network capabilities needed to bring consumers and businesses the communications services they seek.”³⁹ The Commission must continue on its path to “accelerate the transition from circuit-switched to IP networks, with voice ultimately one of many applications running over fixed and mobile broadband networks.”⁴⁰

CONCLUSION

For all of the foregoing reasons, the Commission should expeditiously grant the relief requested in the USTelecom Petition and declare that ILECs are presumptively non-dominant in the provision of residential and business switched access services.

Respectfully submitted,

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³⁹ Comments of CenturyLink, WC Docket No. 10-90, *et. al.*, 3 (filed Feb. 4, 2013).

⁴⁰ *USF/ICC Transformation Order* at ¶ 11.