

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Technology Transitions)	GN Docket No. 13-5
)	
Policies and Rules Governing Retirement Of Copper Loops by Incumbent Local Exchange Carriers)	RM-11358
)	
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
)	

**REPLY COMMENTS OF ACCESS POINT INC., BIRCH COMMUNICATIONS INC.,
MANHATTAN TELECOMMUNICATIONS CORPORATION D/B/A METROPOLITAN
TELECOMMUNICATIONS, NEW HORIZON COMMUNICATIONS CORP., AND
XCHANGE TELECOM LLC—THE WHOLESALE VOICE LINE COALITION**

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Access Point Inc., Birch Communications Inc., Manhattan Telecommunications Corporation d/b/a Metropolitan Telecommunications, New Horizon Communications Corp. and Xchange Telecom LLC, collectively the “Wholesale Voice Line Coalition” or “Coalition,” provide these reply comments in response to the Federal Communications Commission’s (“Commission” or “FCC”) Further Notice of Proposed Rulemaking (“FNPRM”) in the recent *Technology Transitions Order*.¹

¹ *Technology Transitions et al.*, GN Docket No. 13-5 et al., Report and Order, Order on Reconsideration and Further Notice of Proposed Rulemaking, 30 FCC Rcd 9372 (2015) (“*Technology Transitions Order and FNPRM*”).

I. Introduction and Summary

The Coalition responds briefly to the comments of AT&T, CenturyLink, US Telecom, and ITTA (collectively, the “ILECs”) regarding the duration of the Commission’s requirement that after transition from TDM to IP, ILECs continue to offer wholesale voice platform services to CLECs that are “reasonably comparable” to those they offer now. As shown below, none of the ILECs’ arguments is persuasive because: (1) the Commission has legal authority to impose this requirement; (2) policy considerations support such a requirement; and (3) there is no basis to sunset this requirement upon the effectiveness of an order in the special access proceeding.

II. The Commission has legal authority to impose the requirement that ILECs provide “reasonably comparable” access to a wholesale voice platform

The Commission should reject the arguments of AT&T and CenturyLink that it lacks authority to impose the requirement that ILECs offer “reasonably comparable” access to a wholesale voice platform. AT&T contends that the Commission lacks authority to require continuation of wholesale voice platform services on a long-term basis because the services are “private carriage,” and “are neither Title II offerings nor interstate services.”² AT&T does not explain why this is so and fails to provide any citation for its remarkable claims, which are in fact contrary to well-established law. Clearly, the wholesale voice platform is simply a wholesale version of a service that AT&T and other ILECs provide at retail. As the Commission has held, wholesale services are common carriage.³ Moreover, platform services include

² Comments of AT&T at pp. 18-19.

³ *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, 22 FCC Rcd 3513, 3517, ¶ 11 (2007) (“the definition of ‘telecommunications services’ is not limited to retail services, but also includes wholesale services when offered on a common carrier basis”); *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the*

exchange access,⁴ which is an interstate service that is inseparable from “local” service. In addition, platform service is made of elements required to be provided under Sections 251 and/or 271. The Commission was expressly invested with jurisdiction over these elements in the 1996 Act. Finally, the Commission has ancillary authority over the wholesale voice platform.⁵

CenturyLink argues that the “reasonably comparable” wholesale platform requirement is outside the Commission’s authority because it conflicts with Section 252,⁶ and like AT&T, neither explains this argument nor offers any citations supporting it. Section 252 requires that ILECs provide certain unbundled network elements at cost-based rates, which the Commission has interpreted to mean TELRIC pricing. While switching and certain other elements are no longer required to be provided at TELRIC rates, the “reasonably comparable” requirement does not require them to be provided at TELRIC rates either. Quite to the contrary, CenturyLink and other ILECs provide wholesale voice platform services at rates that are much higher than TELRIC. Requiring that the “reasonably comparable” platform continue to be provided at these

Communications Act of 1934, as Amended, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 22033 ¶ 263 (1996) (“definition of ‘telecommunications services’ is intended to clarify that telecommunications services are common carrier services, which include wholesale services to other carriers.”)

⁴ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd 15499, 15679 ¶ 356 (1996).

⁵ The FCC’s ancillary authority, as set forth in Section 4(i) of the Act provides that the FCC “may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.” Under this provision, the FCC may act when its regulation plainly covers interstate “communication by wire or radio” and its regulations are “reasonably ancillary” to its substantive responsibilities under the Act. *See Am. Library Ass’n*, 406 F.3d 689, 703 (D.C. Cir. 2005) (citing *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) (*Midwest Video I*), and *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) (*Midwest Video II*)). Here the Commission’s regulation regarding the wholesale platform service would be reasonably ancillary to its substantive duties under sections 201(b), 202(a), 214, 251, and 271 among others.

⁶ Comments of CenturyLink at p. 36 (“CenturyLink Comments”).

above-TELRIC rates does not in any way interfere with the Commission’s determination that ILECs are no longer required to provide such elements at TELRIC rates.

CenturyLink also mistakenly argues that “the rule essentially precludes an ILEC from exiting the market.”⁷ This argument is unfounded because to “exit the market” for a particular service, the ILEC must exit both the retail and the wholesale market for that service. The FCC’s reasonably comparable rule applies only if the ILEC obtains authority to discontinue a TDM service “and offers an Internet Protocol Service in the same geographic market(s) as the TDM service.” Thus, it requires the ILEC to offer a wholesale IP service only if the ILEC in fact offers such IP service on a retail basis. But if the ILEC chooses to offer a retail IP service, it cannot be “exiting the market” for that service, regardless of what the FCC’s Rules provide.

III. Policy Considerations Support the Wholesale Voice Platform Requirement

The *Technology Transitions Order* explains in some detail why requiring a “reasonably comparable” wholesale voice platform was in the public interest.⁸ The Coalition explained why this requirement was needed in its opening Comments.⁹ The Commission should reject the ILECs’ efforts to reverse the *Technology Transitions Order*.

First, the Commission should reject USTelecom’s assertion that the platform requirement is unnecessary because “multiple alternatives are available.”¹⁰ USTelecom does not identify any of the “multiple alternatives” that it references, and none of the other ILECs identify alternatives,

⁷ *Id.*

⁸ *Technology Transitions Order and FNPRM*, 30 FCC Rcd at 9453-56 ¶¶ 146-50.

⁹ Comments of Access Point Inc., Birch Communications Inc., Matrix Telecom, Inc., Manhattan Telecommunications Corporation d/b/a Metropolitan Telecommunications, New Horizon Communications Corp. and Xchange Telecom LLC at pp. 5-15 (“Coalition Comments”).

¹⁰ Comments of the United States Telecom Association at p. 18 (“USTelecom Comments”).

apart from CenturyLink's reference to VoIP.¹¹ The obvious problem with VoIP as an alternative to the wholesale voice platform is that VoIP is not a stand-alone service; it is predicated on a last-mile broadband connection. This means that regardless of the technology used to transmit voice communications using VoIP, the customer needs a separate broadband connection. Given that most businesses that are served today over the wholesale voice platform do not have access to cable without substantial construction charges,¹² this means that to offer VoIP to small businesses, a carrier must obtain a broadband connection from the ILEC. Since broadband pricing is not subject to regulation, the ILEC can readily limit competition to its voice service by increasing the price of its broadband service.

Second, the Commission should reject the ILECs' argument that the platform is offered "voluntarily" today and therefore should be expected to be offered voluntarily after the transition. Platform services are *not* being offered voluntarily today. They are being offered because they are required by Section 271¹³ and/or because of RBOC concerns that they may be required under § 271.¹⁴

¹¹ CenturyLink Comments at p. 36.

¹² See *ex parte* letter of Thomas Jones, Counsel for Granite Telecommunications, LLC, to Marlene H. Dortch, GN Docket Nos. 13-5, 12-353; WC Docket Nos. 14-192, 04-36, (June 3, 2015), Attachment at p. 6; *ex parte* letter from Richard Brown, CEO, and Chairman, Access Point, Inc., to Marlene H. Dortch, WC Docket Nos. 14-192, 15-114; GN Docket Nos. 13-5, 12-353 (Oct. 6, 2015), at p. 2.

¹³ See *ex parte* letter from Eric J. Branfman, Counsel for the Wholesale Voice Line Coalition, to Marlene H. Dortch, WC Docket Nos. 14-192, 15-114 (June 11, 2015) at pp. 5-7; Comments of the Wholesale DS-0 Coalition, WC Docket No. 14-192 (Dec. 5, 2014) at pp. 9-10; Petition of Granite Telecommunications, LLC for Declaratory Ruling Regarding the Separation, Combination and Commingling of Section 271 Unbundled Network Elements, WC Docket No. 15-114 (May 4, 2015), at pp. 6-16; Reply Comments of Granite Telecommunications, LLC In Support of Petition for Declaratory Ruling, WC Docket No. 15-114 (June 30, 2015) at pp. 6-20.

¹⁴ See *ex parte* letter from Eric J. Branfman, Counsel for Granite Telecommunications, LLC, to Marlene H. Dortch, WC Docket Nos. 14-192, 15-114; GN Docket Nos. 13-5, 12-353 (Sept. 22, 2015), at pp. 2-4 and n. 4; *ex parte* letter from Richard Brown, CEO, and Chairman,

Moreover, the publicly available wholesale platform agreements show that even if the agreements are voluntary, the ILECs are *not* voluntarily offering platform agreements over IP and fiber; the agreements expressly exclude locations served by IP.¹⁵ The ILECs have offered no reason why they are likely to remove such exclusions absent regulatory compulsion. The Commission has repeatedly found that ILECs possess monopoly power at the locations of most customers served by the wholesale voice platform,¹⁶ and the business locations that are least susceptible to being served by CLECs building their own facilities are those where the demand is just for a few voice lines, the very locations where the wholesale voice platform is typically

Access Point, Inc., to Marlene H. Dortch, WC Docket Nos. 14-192, 15-114; GN Docket Nos. 13-5, 12-353 (Oct. 6, 2015), at pp. 1-2.

¹⁵ While these agreements are subject to nondisclosure agreements, AT&T routinely files its agreements with the Commission pursuant to Section 211. Other agreements are publicly available on the websites of certain state commissions.

¹⁶ See e.g. *In the Matter of Special Access for Price Cap Local Exchange Carriers, , AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, , Report and Order, 27 FCC Rcd 10557, 10583, ¶ 49 (2012)* (finding that in Atlanta approximately 60 percent of the zip codes lacked any competitive fiber deployment and it did not expect other markets would show broader competitive deployment); *Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas, 22 FCC Rcd 21293, 21317 ¶ 41 (2007)* (finding that competitors have their own facilities at only 0.25% of the commercial buildings in the six covered MSAs combined); *Petitions of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis, St. Paul, Phoenix and Seattle Metropolitan Statistical Areas, Memorandum Opinion and Order, 23 FCC Rcd 11729, 11758 ¶ 40 (2008)* (finding that competitors served approximately 0.17 to 0.26 percent of all business locations in the four MSAs combined); Government Accountability Office, Report to the Chairman, Committee on Government Reform, House of Representatives, *FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services, GAO-07-08, at 20 (Nov. 2006)* (finding competitive fiber deployment across 16 markets limited to 6% of buildings with demand for DS1s; 15% with DS3 demand, and 25% with demand for 2 or more DS-3s); *United States v. SBC Communications, Inc., Complaint, No. 1:05-cv-02102, ¶ 15 (D.D.C. Oct. 27, 2005)*; *United States v. Verizon Communications Inc. and MCI, Inc., Complaint, No. 1:05-cv-02103, ¶ 15 (D.D.C. Oct. 27, 2005)* (finding that for “the vast majority of commercial buildings in their territories, the ILEC is likely the only carrier that owns a last-mile connection to the building.”)

used.¹⁷

As the Commission observed in denying Qwest's forbearance petition: "there is little evidence, either in the record or of which we are aware, that the BOCs or incumbent LECs have voluntarily offered wholesale services at competitive prices once regulatory requirements governing wholesale prices were eliminated."¹⁸ Nothing that has occurred since this Commission observation suggests that that BOCs or incumbent LECs have suddenly reversed their course. There is no reason for the Commission to conclude that ILECs will undermine their own monopoly pricing power by offering a wholesale voice platform on terms that will enable the CLEC to force the ILEC to reduce the retail price the ILEC can charge in the absence of competition.

Third, the Commission should reject USTelecom's contention that the availability of a reasonably comparable wholesale voice platform would "discourage facilities-based deployment."¹⁹ Xchange, one of the members of the Coalition, has submitted a study that it performed, which demonstrate that it is not economically feasible for it to build facilities to its customers, given the relatively modest demand at each customer location.²⁰ The ILECs have not shown why eliminating the reasonably comparable wholesale voice platform requirement will make such construction feasible.

¹⁷ See Comments of the Wholesale DS-0 Coalition, WC Docket No. 14-192 (Dec. 5, 2014) at 2; *ex parte* letter from Eric J. Branfman, Counsel for Granite Telecommunications, LLC, to Marlene H. Dortch, WC Docket Nos. 14-192, 15-114; GN Docket Nos. 13-5, 12-353 (Sept. 22, 2015), at p. 2; Opposition of Granite Telecommunications, LLC, WC Docket No. 14-192 (Dec. 5, 2014) at pp.7-8.

¹⁸ *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, 25 FCC Rcd 8622, 8640 ¶ 34, n.105 (2010).

¹⁹ USTelecom Comments at p. 18.

²⁰ *Ex parte* letter from Mordy Gross, Xchange Telecom LLC, to Marlene H. Dortch, GN Docket Nos. 13-5 and 12-353; WC Docket No. 14-192 (Oct. 23, 2015).

Fourth, USTelecom's contention that the wholesale voice platform should not be required absent a showing of impairment²¹ should not be credited. Impairment is the statutory standard for requiring unbundling of network elements at TELRIC rates, which is not sought by the Coalition. Rather, the "reasonably comparable" requirement involves provision of elements at a price that substantially exceeds TELRIC. Furthermore, as discussed above, the record in this docket shows that CLECs are unable to serve the customers they currently serve with the wholesale voice platform in any other economically viable way.

IV. The Issuance of an Order in the Special Access Docket is not a Logical Point in Time to Sunset the Reasonably Comparable Wholesale Voice Platform Requirement

The Coalition demonstrated in its opening Comments that there is no basis to tie the sunset of the reasonably comparable wholesale voice platform to the issuance of an effective order in the special access docket.²² This proposition is so indisputably correct that only ITTA attempts to contravene it, arguing that the special access docket "will entail a comprehensive evaluation of competition."²³ The problem with ITTA's argument is that, as the Commission has recognized, the special access docket is simply not evaluating competition *in the voice market*, which is the only market relevant to the wholesale voice platform.²⁴

The Commission also should not credit ITTA's conjecture that "the special access proceeding will likely demonstrate that the Commission's interim condition relating to its reasonably comparable wholesale access are unnecessary."²⁵ ITTA offers no support for this

²¹ USTelecom Comments at p. 18.

²² Coalition Comments at pp. 15-17.

²³ Comments of ITTA - The Voice of the Mid-Size Communications Companies at p. 17. ("ITTA Comments")

²⁴ *Technology Transitions Order and FNPRM*, 30 FCC Rcd at 9496 ¶ 242.

²⁵ ITTA Comments at p. 18.

speculation. More importantly, if the Commission were somehow to conclude through the special access proceeding that, even though the proceeding does not examine competition in voice, its record showed that the voice platform was unnecessary, the Commission certainly possesses the authority to end the voice platform requirement at that time.

V. Conclusion

For the reasons set forth above and in the Coalition's opening Comments, the Commission should revise its finding in the *Technology Transitions Order* and conclude that specifying an end date for the reasonably comparable requirement applicable to Commercial Wholesale Platform service is not needed at this time.

Respectfully submitted,

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