WC 08-225

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

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| In the Matter of: | ) | |
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| Petition of the United States Telecom Association for Waiver From Application of the Equal Access Scripting Requirement | ) | DOCKET FILE COPY ORIGINAL |
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Federal Communications Commission
Office of the Secretary

**PETITION OF THE UNITED STATES TELECOM ASSOCIATION FOR WAIVER FROM APPLICATION OF THE EQUAL ACCESS SCRIPTING REQUIREMENT**


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## PETITION OF THE UNITED STATES TELECOM ASSOCIATION FOR WAIVER FROM APPLICATION OF THE EQUAL ACCESS SCRIPTING REQUIREMENT

Pursuant to section 1.3 of the Commission's Rules, 47 C.F.R. § 1. 3, the United States Telecom Association (USTelecom),[1] on behalf of its small and mid-sized carrier member companies,[2] hereby petitions the Federal Communications Commission to waive application to them of the Equal Access Scripting Requirement (EA Scripting Requirement).[3] The EA Scripting Requirement was created pursuant to the Modified Final Judgment (MFJ) applicable to Bell companies, expanded to remaining carriers in 1985, and preserved under the 1996

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[1] USTelecom is the premier trade association representing service providers and suppliers for the telecommunications industry. USTelecom members provide a full array of services, including broadband, voice, data, and video over wireline and wireless networks.

[2] AT&T, Verizon, and Qwest and their ILEC affiliates were previously granted relief from the EA Scripting Requirement. *See Section 272(f)(1) Sunset of BOC Separate Affiliate and Related Requirements; 2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules; Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160 (c) with Regard to Certain Dominant Carrier Regulations for In-Region, Interexchange Services*, Report and Order and Memorandum Opinion and Order, 22 FCC Rcd 16440, 16442, 16498-16502, ¶¶ 3, 117-127 (2007) (*Equal Access Scripting Memorandum Opinion and Order*). Therefore, this Petition is filed only on behalf of USTelecom's small and mid-sized independent ILEC members. The names of these companies are provided in Appendix A.

[3] We note that this Petition for Waiver is narrowly focused. In particular, the requirement for dialing parity contained in section 251(b)(3) of the Communications Act is separate from and unaffected by this Petition. *See* 47 U.S.C. § 251(b)(3)(ensuring that competing providers of telephone exchange service and telephone toll service "have non-discriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays").

Telecommunications Act, at section 251(g).[4] Under the EA Scripting Requirement, small and mid-sized wireline incumbent local exchange carriers (ILECs) must inform customers seeking new telephone exchange service that they have a choice of long distance provider and read to them a randomized list of available providers of stand-alone wireline long distance service, upon request. No other providers of voice services — not wireless, not cable, not VoIP — are subject to this regulatory burden.

## EXECUTIVE SUMMARY

The Commission's rules may be waived for good cause shown.[5] The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.[6] In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy.[7] Waiver of the Commission's rules is therefore appropriate if circumstances warrant a deviation from the general rule, and such a deviation will serve the public interest.[8]

Last year, the Commission granted forbearance from the EA Scripting Requirement to AT&T, Verizon, and Qwest and waived the requirement for their ILEC affiliates in recognition that the EA Scripting Requirement was no longer necessary to protect consumers and forbearance and waiver served the public interest. In its Order concluding that these rules should no longer apply to those companies, the Commission found that "competition for stand-alone

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[4] 47 U.S.C. § 251(g).
[5] Rule 1.3, 47 C.F.R. § 1.3.
[6] Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*) citing WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969) (*Wait Radio*).
[7] *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.
[8] *Northeast Cellular*, 897 F.2d at 1166; *WAIT Radio*, 418 F.2d at 1159.

*long distance services would function* better absent the market-place distorting effects of the current EA Scripting Requirement."[9] The Commission explained that the EA Scripting Requirement "was designed to foster fair competition in the provision of stand-alone long distance service at a time when competition in the provision of stand-alone long distances services was nascent and there was little, if any, competition in the provision of local exchange service."[10]

Indeed, the EA Scripting Requirement was crafted for a particular moment in history, one that is long past. That wireline past was prologue to the development of a vibrant, intermodal market for "all-distance" communications services in which cable and wireless compete head-on with ILECs for the consumer's dollar in every region of the country. This modern intermodal marketplace would have been inconceivable when the EA Scripting Requirement was created. It is equally inconceivable that the EA Scripting Requirement still burdens small and mid-sized ILECs and their customers. The Commission is forcing small and mid-sized ILECs to live in the "dark backward and abysm of time," as Shakespeare put it.[11]

Consumers' knowledge of their long distance service choices is undeniably far more sophisticated than it was at the inception of a competitive stand-alone long distance market in 1983 when the EA Scripting Requirement was created. Customers have long since become familiar with their ability to choose among long distance providers. The EA Scripting Requirement is doubly or triply anachronistic today given that consumers now have long distance service choices that go far beyond those contemplated at the time of these rules and, in fact, also have a broad degree of choice among providers of voice services that include local

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[9] *Equal Access Scripting Memorandum Opinion and Order* at 16500 ¶ 122.
[10] *Id.* at 16499 ¶ 120.
[11] *The Tempest,* Act I. Scene 2. Line 59.

calling capabilities. In today's world, where consumers are evaluating the best "all distance" and feature set package from mobile, wireline, cable, and (Voice over Internet providers (VoIP), the EA Scripting Requirement no longer serves any useful purpose.

The EA Scripting Requirement adds costs to the provision of service to just one subset of ILEC customers without a countervailing benefit to them. These additional costs tilt the playing field towards other providers of voice services that do not carry the burden of the EA Scripting Requirement. The Commission's goal of regulatory parity will also be served by granting waiver from the EA Scripting Requirement. Enabling full and fair competition among all wireline, wireless, and cable providers of voice services would better serve consumer interests than requiring one small segment of ILEC customers to listen to a list of wireline long distance service providers when they change their wireline voice service, as the EA Scripting Requirement mandates today.

The case for providing relief to small and mid-sized ILECs is particularly compelling. These carriers typically provide their own long distance services by purchasing capacity on a wholesale basis from other long distance competitors, including affiliates of AT&T, Verizon, and Qwest that already received this relief. Moreover, the small and mid-sized ILECs generally do not have facilities-based long distance or wireless affiliates.

Thus, the Commission's 2007 conclusion that the EA Scripting Requirement likely harmed, rather than helped competition, was unnecessary to protect consumers, and no longer served the public interest, applies with equal force to small and mid-sized ILECs.

The Commission should act now to waive the EA Scripting Requirement.

# I. BACKGROUND

## A. History of the EA Scripting Requirement

### 1. Creation of the EA Scripting Requirement

The EA Scripting Requirement is a legacy of the MFJ and the regulations which followed on its heels. It was born of the effort to create a competitive long distance market and provide all long distance providers with access to consumers. In the early 1980s, the Bell companies voluntarily undertook to read names of interexchange carriers (IXCs) in case customers, when asked to choose a long distance provider, did not yet know the names of any other IXCs.

The practice became mandatory in 1983, with the MFJ court's requirement that the companies provide a list of long distance providers to customers as a condition for allowing them to continue the practice of routing calls to AT&T by default in situations where customers failed to select an IXC.[12] The Commission recognized this practice in its later balloting requirements.[13] In 1985, in its order extending equal access requirements to other ILECs, the Commission began requiring service representatives to inform their customers of their presubscription options and to read to them lists of carriers.[14] The EA Scripting Requirement was then preserved by section 251(g) of the Telecommunications Act of 1996,[15] which requires carriers to continue to comply

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[12] *United States v. Western Elec. Co.*, 578 F. Supp. 668, 676-77 (D.D.C. 1983).
[13] *Investigation of Access and Divestiture Related Tariffs*, 101 F.C.C. 2nd 911 App. B ¶ 22 (1985) ("New customers are to be handled by the Business Office according to the LEC's new customer presubscription procedures. These procedures should provide new customers with an opportunity to obtain a ballot and make an interexchange carrier selection."). *See also Investigation of Access and Divestiture Related Tariffs*, 101 F.C.C. 2nd 935 ¶ 40 (1985) (clarifying that mailing a ballot was not required and that orders could be taken over the telephone as long as "LEC personnel taking the verbal order ... provide new customers with the names and, if requested, the telephone numbers of the IXCs and ... devise procedures to ensure that the names of IXCs are provided in random order").
[14] *MTS and WATS Market Structure, Phase III*, Report and Order, 100 F.C.C. 2nd 860 (1985).
[15] 47 U.S.C. § 251(g).

with equal access and nondiscrimination requirements established prior to its enactment until those requirements are superseded by subsequent Commission action.

2. The Equal Access NOI

The Commission issued a Notice of Inquiry (NOI) in 2002 to determine among other things, whether there was still a need for the EA Scripting Requirement in the "all-distance," intermodal services marketplace.[16] In the NOI, the Commission set forth four goals: 1) to create a deregulatory, pro-competitive environment in light of the fact that "carriers that are freed from unnecessary regulation are more likely to compete and innovate more aggressively;" 2) to create a "modern" equal access regime that will "benefit consumers;" 3) to balance the costs and benefits of equal access regulation; and 4) "to harmonize the requirements of similarly situated carriers as much as possible."[17]

3. 272 Sunset and AT&T Forbearance Order

In 2002, the Commission opened a proceeding to consider the appropriate regulatory framework for Bell-company provided long distance services after the sunset of certain section 272 obligations. In 2006, AT&T petitioned for forbearance from, among other things, the EA Scripting Requirement.[18] In an Order granting relief from the separate affiliate requirements, the Commission granted forbearance to AT&T, Verizon, and Qwest from enforcement of the EA

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[16] *Notice of Inquiry Concerning a Review of the Equal Access and Non-Dissemination Obligation Applicable to Local Exchange Carriers*, Notice of Inquiry, 17 FCC Rcd 4015, 4016 ¶ 2 (2002)(*Equal Access NOI*).
[17] *Id.*
[18] *Petition of AT&T Inc. for Forbearance under 47 U.S.C. § 160c with Regard to Certain Dominant Carrier Regulations for In-Region, Interexchange Services*, WC Docket No. 06-120, at 1, 37-38 (filed June 2, 2006) (AT&T Petition).

Scripting Requirement and waived the requirement for the ILEC affiliates of those companies.[19] The Commission reasoned that the EA Scripting Requirement was "no longer justified as applied to AT&T, Qwest, and Verizon, given the marketplace changes that have occurred since the requirement's adoption and the requirement's relative costs and benefits."[20]

With respect to the first prong of the forbearance statute, the Commission found that the EA Scripting Requirement was no longer "necessary to ensure that the charges, practices, and classifications, or regulations by, for, or in connection with [the provision of long distance telecommunications services by AT&T, Verizon, and Qwest] are just and reasonable and are not unjustly or unreasonably discriminatory."[21] The Commission reached this conclusion after examining conditions surrounding consumers who buy long distance service in a bundle, and those who buy long distance service as a stand-alone element.

The Commission found that the market for bundled voice services is vibrant and competitive.[22] It recognized that the market for stand-alone long distance services "is becoming a fringe market" because the majority of consumers now obtain long distance as part of a "bundle" of communications services, from either wireless, wireline, or cable.[23] In light of the Commission's determination that this market for bundled services is highly competitive, it concluded that consumers who bundled voice services do not need the EA Scripting Requirement to ensure that ILECs do not discriminate in favor of preferred providers.

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[19] See *Equal Access Scripting Memorandum Opinion and Order* at 16442, 16449-55 ¶¶ 3, 117-26).
[20] *Id.*
[21] 47 U.S.C. § 160(a)(1).
[22] *Equal Access Scripting Memorandum Opinion and Order* at 16499-500 ¶ 121.
[23] *Id.*

The Commission also found there was no need to continue enforcing the EA Scripting Requirement when customers purchase stand-along long distance. It observed that there is keen competition for a consumer's long distance business.[24] As acknowledged by the Commission, many competitive long distance options are now available to consumers who continue to subscribe to long distance service as a stand-alone service. For example, the Commission noted that prepaid card and dial-around service are available nationally. In addition, with an increasing portion of consumers are engaged in "usage substitution."[25] More consumers are using their wireless phones to make long distance calls because the "bucket of minutes" that subscribers purchase does not differentiate between local and long distance. Therefore consumers can make long distance calls at zero marginal cost.[26] In addition, many consumers are opting to use facilities-based or over-the-top VoIP services for their local and long distance calls. Thus, there is keen competition for the consumer's long distance business.[27]

In light of the above analysis, the Commission determined that "instead of increasing consumer awareness of competitive alternatives, the artificially narrow focus of the EA Scripting Requirement may, in fact, confuse or mislead consumers and cause them not to investigate alternative means of making long distance calls."[28] The Commission concluded that "competition for stand-alone long distance services would function better absent the potential marketplace-distorting effects of the current EA Scripting Requirement.[29]

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[24] *Id.* at 16500 ¶ 122.
[25] *Id.* at 16501 ¶ 123.
[26] *Id.*
[27] *Id.* at 16499-501 ¶¶ 120-23.
[28] *Id.* at 16500 ¶ 122.
[29] *Id.*

With respect to the second prong of the forbearance test, the Commission concluded that the EA Scripting Requirement is no longer "necessary for the protection of consumers."[30] To the contrary, "consumers have significant competitive alternatives available to them in the stand-alone long distance market, as well as numerous options for bundled service offerings by, among others, LECs, cable operators and interconnected VoIP providers."[31] Given the fact that the EA Scripting Requirement focuses solely on wireline carriers, there is a real potential that the EA Scripting Requirement could mislead consumers about the availability of non-wireline sources of long distance services.[32]

With respect to the third prong of the forbearance test, the Commission concluded that forbearance from the EA Scripting Requirement is "consistent with the public interest."[33] The EA Scripting Requirement could "distort competition and harm consumers" and was imposing "unnecessary costs" on the Bells, the Commission concluded.[34] Moreover, the Commission concluded that customers "can obtain long distance service from another carrier or select a stand-alone long distance service, [because] the BOCs remain subject to nondiscrimination obligations and must allow customers to exercise their rights under the remaining equal access obligations."[35]

Accordingly, upon consideration of all three prongs of the forbearance test, the Commission concluded that relief from the EA Scripting Requirement should be granted to AT&T, Verizon, and Quest. Further, the Commission also waived the EA Scripting

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[30] 47 U.S.C. § 160(a)(2).
[31] *Equal Access Scripting Requirement* at 16500-01 ¶¶ 122, 123.
[32] *Id.*
[33] 47 U.S.C. § 160(a)(3).
[34] *Id.* at 16502 ¶ 124.
[35] *Id.* at 16501 ¶ 124.

Requirement with respect to the independent incumbent LEC affiliates of AT&T, Verizon, and Qwest, reasoning that it would be "more sensible for the BOC incumbent LECs and their independent incumbent LEC affiliates to operate pursuant to a uniform regulatory framework."[36]

The Commission, however, declined to extend forbearance relief to all ILECs. In the section 272 context applicable only to the Bell companies, the Commission reasoned that there was insufficient evidence in the record to support that request.[37] It also noted that the Commission was considering the request for wider relief in a separate proceeding, and independent ILECs "otherwise remain free to seek relief from the EA Scripting Requirement."[38] Commissioner McDowell, in his concurrence to the *Equal Access Scripting Memorandum Opinion and Order*, added that "the independent incumbent local exchange carriers continue to be subjected to regulation that may be ripe for a lighter regulatory touch."[39] Accordingly, the Commission issued a notice asking parties to refresh the record in the *Equal Access NOI*.[40]

**B. Market Developments**

1. Overview

The EA Scripting Requirement survived unchanged until 2007, despite the radical reshaping of the market for long distance services in the intervening twenty-plus years. The

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[36] *Id.* at 16502 ¶ 125.
[37] *Id.* at 16502 ¶ 126.
[38] *Id. See Equal Access NOI*, 17 FCC Rcd 4015.
[39] *Equal Access Scripting Memorandum Opinion and Order*, 22 FCC Rcd at 16555.
[40] *See Parties Asked to Refresh Record Regarding Review of Equal Access and Nondiscrimination Obligations Applicable to Local Exchange Carriers*, Public Notice, 22 FCC Rcd 4553 (2007).

*intervening years tell* a story of *declining* prices and increasing competition.[41] For example, during this period, the now-pervasive concept of "all-distance" was born with the introduction in 1998 of AT&T's "Digital One Rate Plan," the first nationwide wireless calling plan, which other wireless carriers rapidly followed with "all-distance" plans of their own. These developments produced downward pressure on all long distance prices – pressure that continues today.

Robust competition developed, including the advent of intermodal competition from ubiquitous wireless service, and from the rapid growth of cable voice services, over-the-top VoIP, as well as calling card and dial-around services. The long distance market was largely subsumed in the "all-distance" market and other competitive alternatives. Consumers began to be bombarded with advertisements for an array of competitive and feature-rich choices of telecommunications services, often bundled with broadband and video services.

Today, long distance has largely become but one feature of a bundle of services offered across platforms. Stand-alone long distance is becoming merely "a fringe market."[42]

The wireline past in which the EA Scripting Requirement made sense was prologue to the development of a highly competitive long distance market. Now competition to provide long distance service is fierce. There are hundreds of stand-alone long distance providers, in addition to cable, CLEC, over-the top VoIP, and wireless providers of which continues to exist along side a newer, vibrant, intermodal market for "all-distance" communications services. These voice providers compete head-on with ILECs for the consumer's dollar in every region of the country. As discussed in more detail below, competition increasingly comes from facilities-based

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[41] *See*, e.g., *History: Long Distance*, Cybertelecom, at http://www.cybertelecom.org/notes/long_distance.htm (last visited on October 27, 2008)(long distance rates fell 40 percent from 1984 to 1990).

[42] *Equal Access Scripting Memorandum Opinion and Order,* 22 FCC Rcd at 16452 ¶ 23.

providers offering bundles of local and long distance, or "all-distance" voice service. In addition, competitors in this sector are spending large and growing sums of money on advertising to ensure that consumers across the country are aware of their options for voice services, including long distance services.

The following sections discuss various provider segments in the market for stand-alone and bundled voice services – including cable, wireless, over-the-top VoIP, CLECs, calling cards and dial-around services – and advertising expenditures that incorporate long distance service products.

2. Competition from Cable Companies

- According to the National Cable & Telecommunications Association (NCTA) cable passes over 123 million homes.[43]
- Cable companies were providing telephone service to 15.1 million customers at the end of 2007, up from 9.5 million, 5.9 million, and 3.8 million at the end of 2006, 2005, and 2004, respectively. As of the end of first quarter of 2008, cable had 16.5 million residential voice customers.[44] See Figure 1. These data represent an astounding annual growth rate in the 55-60 percent range for the three consecutive years.
- Cable's 16.5 million residential voice customers at the end of 2007 represent approximately 14.3 percent of approximately 115 million U.S. households.[45]

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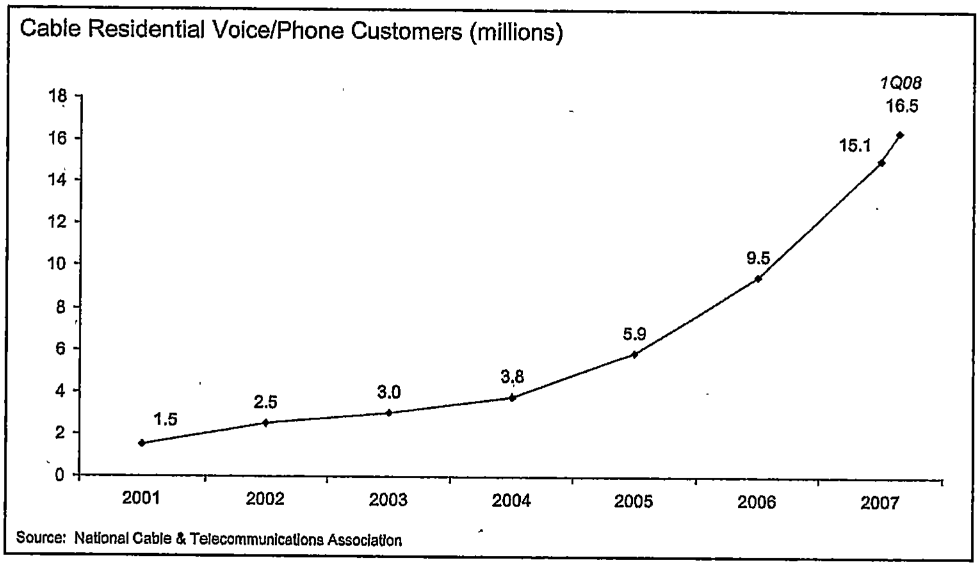
[43] National Cable and Telecommunications Association at http://www.ncta.com/Statistic/Statistic/Statistics.aspx, (last accessed October 28, 2008).
[44] *Id.*
[45] *See, e.g.*, U.S. Census Bureau, Current Population Survey, Table HH-1 at http://www.census.gov/population/www/socdemo/hh-fam.html#ht (last accessed October 28, 2008), which indicates there were 114.3 million households at the end of 2006 and growing.

- According to NCTA, as of the end of 2007, 92 percent of U.S. households could receive cable broadband.[46]
- The top publicly traded cable MSOs for which data are available (Comcast, Time Warner, Cablevision, Charter, Mediacom, and Insight) offer broadband to over 98 percent of the households in their footprints and offer phone service to 89 percent of households in their footprints.[47]

Figure 1: Growing Cable Voice Competition

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[46] National Cable & Telecommunications Association, 2008 Industry Overview at http://i.ncta.com/ncta_com/PDFs/NCTA_Annual_Report_05.16.08.pdf (last accessed October 28, 2008).

[47] Yankee Group, U.S. Consumer Service Provider Monitor and Forecast, April 2008. Note Cox Communications is not included as it has not reported availability data since going private several years ago. At that time, (third quarter 2005), Cox offered broadband to 99 percent of households in its footprint. Cox also offered telephony to 66 percent of households, at a time when the rest of the publicly reporting industry offered telephony to 27 percent of their households. These figures suggest that Cox is likely on par or more heavily penetrated than the rest of the industry.

- Cable MSOs that serve more rural populations, such as Mediacom and Insight, offered telephone service to 90 percent and 81 percent of households in their footprints, respectively, at the end of 2007.[48]

3. Competition from Wireless Companies

- Wireless substitution for wireline phone service is well-established. By the end of 2007, U.S. wireless only households had grown from near 3 percent at the beginning of 2003 to 15.8 percent.[49] This trend continues and according to the most recent survey by Nielson Mobile, by the end of June 2008, 17.1 of U.S. households had cut the cord. [50] Moreover, Nielson Mobile expects that figure to rise to 20 percent by year's end.[51] See Figure 2.
- Furthermore, the most recent survey of the Centers for Disease Control concludes that an *additional* portion of U.S. households—13.1 percent at the end of 2007—while retaining a wireline phone, predominantly or exclusively use their cell phones.[52]
- There are now more households that are wireless only than are wireline only.[53]

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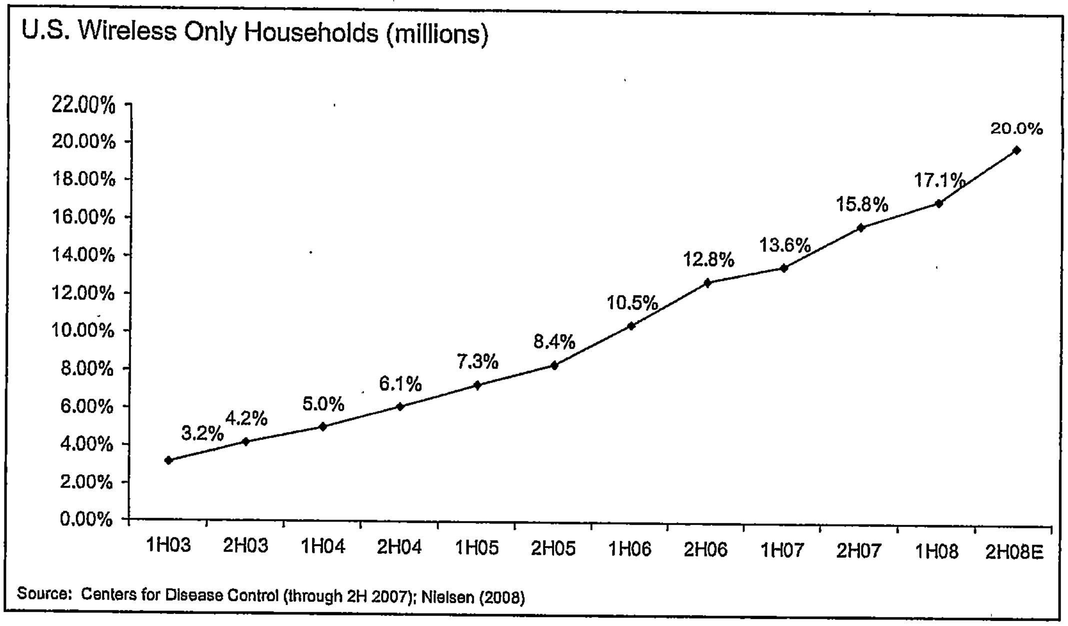
[48] *Id.* Note, Insight Communications data are only available for third quarter 2007, not fourth quarter.
[49] National Center for Health Statistics, at http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless200805.htm (last visited October 27, 2008).
[50] See Nielson Mobile Survey, September 2008, at http://www.nielsenmobile.com/documents/WirelessSubstitution.pdf (last visited October 27), 2008.
[51] See Nielson Mobile Survey, September 2008, at http://www.nielsenmobile.com/documents/WirelessSubstitution.pdf (last visited October 27, 2008).
[52] National Center for Health Statistics, at http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless200805.htm (last visited October 27, 2008) at 3.
[53] *See* http://www.fiercetelecom.com/story/wireless-only-homes-surpass-wireline-only/2007-08-27 (last visited October 27, 2008).

Figure 2: Growing Wireless Competition




- Wireless service is nearly ubiquitous in the United States. The FCC has found that 99.8 percent of the U.S. population, as measured by census blocks, is covered by one or more wireless provider and 95.5 percent is covered by at least three wireless providers.[54]
- Even in rural areas, the FCC has found that the average rural county has an average of 3.6 wireless providers and that 99.3 percent of the population in rural counties is covered by at least one wireless competitor.[55]
- As of the end of 2007, approximately 85 percent of the population had a wireless phone.[56]

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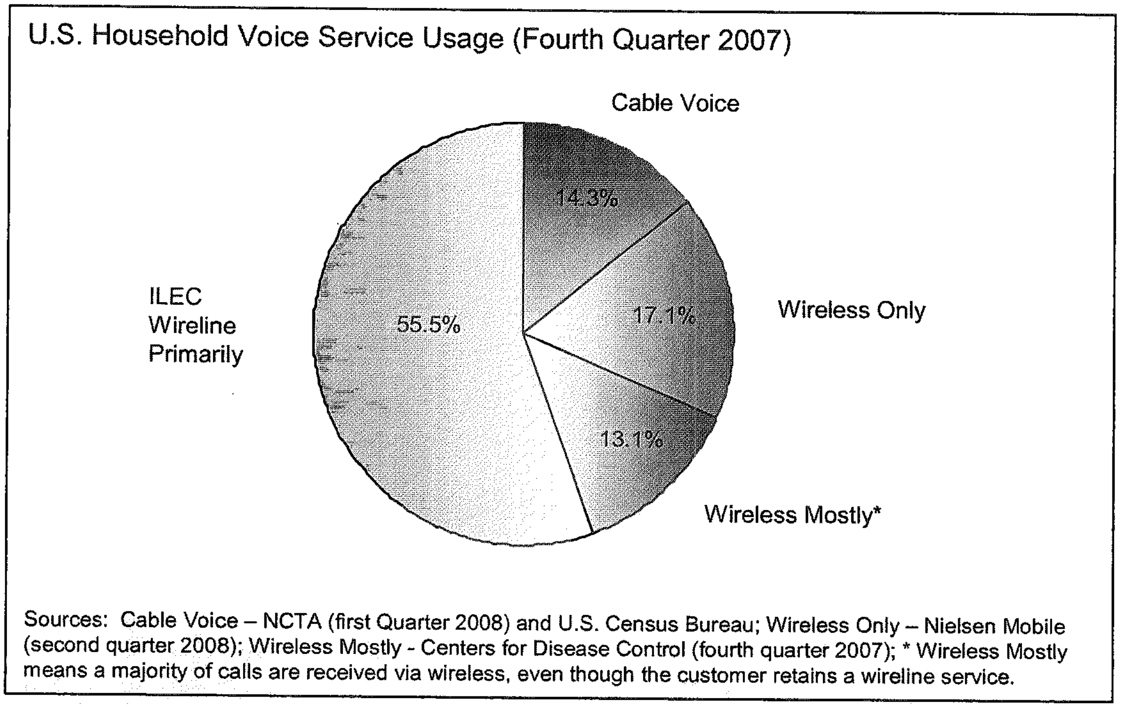
[54] FCC, *Twelfth Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, FCC 09-28, released Feb. 4, 2008, at 5 ¶ 2.
[55] *Id.* at 53 ¶ 106.
[56] See CTIA Semiannual Wireless Survey Topline Results at http://www.ctia.org/advocacy/research/index.cfm/AID/10316 (last visited October 27, 2008) and U.S. Census Bureau, 2007 Population Estimates (July 2007), DP-1 General Demographic Characteristics, at http://factfinder.census.gov/servlet/DatasetMainPageServlet?_program=PEP&_submenuId=data

- Wireless customers routinely use their mobile phones to make what are essentially free long distance calls from their homes. As a result, wireline long distance calling volumes and access minutes have dropped precipitously over the last several years.
- In sum, U.S. consumers either exclusively or primarily use alternatives to ILEC wireline voice approximately 44.5 percent of the time.[57] See Figure 3. In the large majority of cases, these alternatives to wireline voice make no distinction between local and long distance service.

Figure 3: Percentage of Households Using Alternatives to Wireline Voice

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sets_3&_lang=en (last visited October 28, 2008), showing population of 301.6 million, 261.5 million over 9 years old, as of July 2007.

[57] *See supra* at notes 33, 38, and 40. Based on the 2007 and 2008 figures, cable had 16.5 million lines (1st quarter 2008) comprising 14.3 percent of U.S. households, as discussed in section I. B. 2. Wireless only households comprised 17.1 percent of U.S. households (2nd quarter 2008), and wireless mostly households comprised 13.1 percent of U.S. households (4th quarter 2007), as discussed in section 1. B. 3.

4. Competition from Broadband and Over-the-Top VoIP Companies

- Cable and wireline (and to some extent, wireless) broadband provide ready platforms for over-the-top VoIP service.
- Vonage had 2.6 million subscribers at the end of the second quarter of 2008.[58]
- As of second quarter 2008, Skype had 340 million users worldwide that routinely substitute Skype for national and international long distance calling.[59]
- Jupiter media expects the broadband telephony market to double by 2013.[60] VoIP is competing for the traditional wireline customer and cross-platform competition has intensified as new services enter the market.
  - For example, T-Mobile is offering an all-distance VoIP service in a bundle with its wireless services, which it calls T-Mobile@Home. [61]

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[58] Vonage Financial Statements at http://ir.vonage.com/results.cfm (last visited October 29, 2008).

[59] EBay Financial Statements at http://investor.ebay.com/results.cfm (last visited October 29, 2008). We note that eBay's Skype VoIP services business posted a 51 percent revenue growth rate on a year-over-year basis for the second quarter of 2008, to $136 million, as the service provider added nearly 29 million registered users during the quarter, for a period-ending tally of 338.2 million. *See* TRDaily (July 16, 2007).

[60] See Jupiter Research Press Release, *Jupiter Research Forecasts Broadband Telephony Market Will Nearly Double Between 2007 and 2013*, July 7, 2008, at http://www.jupiterresearch.com/bin/item.pl/press:press_release/2008/id=08.07.07-broadcast-telephony-market.html/ (last visited October 29, 2008) (assessment addressing both over-the-top and facilities-based VoIP.

[61] *See* http://www.t-mobile.com/shop/plans/#Individual+T-Mobile+%40Home ("T-Mobile @Home® provides you unlimited nationwide calling from home. Just plug in your home phone line to a T-Mobile @Home® Wireless Router with Home Phone Connection ... and you're good to go.") (last visited October 27, 2008).

## 5. Advertising

- Competitive providers are spending large sums of money to ensure consumers across the country are aware of their offerings, including long distance service. Measures vary depending on methodology, but the total amount is large regardless of the measure selected. Given this large spend, it is highly likely that most consumers are aware of the many competitive offerings that provide substitutes for long distance calling.
  - According to Nielsen, wireless phone providers spent over $4.1 billion on advertising in 2007, up 12 percent from 2006 and up 67 percent from 2003. [62] Advertising Age indicates that wireless providers spent $5.9 billion in 2007 on *measured media alone*.[63] In addition, carriers spend significant amounts in *unmeasured spending*.[64] The top 100 advertisers in the country include AT&T, Verizon, Sprint-Nextel, Deutsch Telekom/T-Mobile, and Alltel.[65]
  - According to Advertising Age, wireless advertising in 2007 is significant not only for large carriers, but regional carriers that serve smaller markets. *Measured media alone* for such carriers includes the following: Alltel ($191 million), U.S.

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[62] Nielson Mobile, Wireless Mobile and Multifunction Phones, May 21, 2008, at http://www.nielsenmobile.com/html/press%20releases/Monitor-Plus.html (last visited on October 28, 2008).

[63] "100 Leading Advertisers" in *Advertising Age/TNS Media Intelligence* (June 23, 2008) at http://adage.com/datacenter/article?article_id=127791 (last visited on October 28, 2008). Measured media spending reviews 19 media outlets, including television, radio, periodicals, Internet display, and billboards.

[64] *Id.* "Methodology" at http://adage.com/datacenter/article?article_id=127857 (last visited October 28, 2008). Unmeasured spending includes, for example, direct marketing, promotions, Internet search ads, and product placement. Unmeasured spending can be as large as measured media. *See, e.g., id.*, "Marketer Trees 2008" at http://adage.com/marketertrees08/ (last visited on October 28, 2008) (reporting that Alltel spent $192 million in measured media and $172 million in unmeasured spending, for a total $364 million, in 2007).

[65] *Id*, "100 Leading National Advertisers" at http://adage.com/datacenter/article?article_id=127791 (last visited on October 28, 2008).

Cellular ($83 million), Metro PCS ($42 million), Leap Wireless International ($39 million), Centennial Communications Corp ($3.5 million), and Rural Cellular ($2 million).[66]

- Cable companies also spend significantly to advertise their bundled services. Comcast and Time Warner are among the top 100 advertisers in the United States. According to Advertising Age, in 2007, Comcast spent $412 million on its cable brand, compared with $360 million in 2006, a growth rate of 14.5 percent.[67] Time Warner Cable reported marketing expenses, including advertising costs, of $499 million in 2007, $414 million in 2006, $306 million in 2005 and $272 million in 2004.[68]

### 6. Growth of Bundled Services

The growth of wireless, cable, and VoIP service providers has created a very competitive market for bundled services, including long distance.[69] The portion of U.S. households that turns to a cable or wireless provider for primary phone usage is at least 31.4 percent (17.1 percent cord-cutters plus 14.3 percent cable telephony users) but likely closer to 44.5 percent, if a

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[66] *Id.* "US Market Share Leaders," at http://adage.com/datacenter/article?article_id=127791 (last visited October 29, 2008). Rural Cellular has been acquired and Alltel is being acquired by Verizon Wireless. Advertising by Dobson, which was acquired by AT&T, is included in the data for AT&T.

[67] See *id.*, "Marketer Trees 2008" at http://adage.com/marketertrees08/#222), (last visited October 30, 2008).

[68] *Id.*, "Marketer Trees 2008" at http://adage.com/marketertrees08/#115 (last visited October 29, 2008).

[69] The Commission's "product market analysis does not require that all mass market consumers would be willing or able to substitute" one bundle of services for another to include a particular service in the relevant market. Instead, the Commission's product market definition analysis "only requires evidence of sufficient demand substitutability in those geographic markets where [the competing] service is available." *SBC Communications, Inc. and AT&T Corp Applications for Approval of Transfer and Control*, Memorandum Opinion and Order (2005), 20 FCC Rcd 18290, 18338-39 ¶ 87.

majority of the additional 13.1 percent of wired voice subscribers who primarily or exclusively use their wireless phone are ILEC voice customers. Given these statistics, it is not surprising that the Commission has found that the price of long distance is highly elastic. An ILEC cannot raise rates for long distance without finding that its customers can switch to an alternative service provider with a bundled long distance service and a readily available presence in the home or the neighborhood.

7. Stand-Alone Long Distance

Although bundled service is the primary way that consumers purchase competitive long distance service, there are still some customers who purchase stand-alone long distance. While this market is shrinking, there is still stiff competition for the consumer's long distance business. There were 1,373 telecommunications companies in 2005 that were offering some form of toll service to customers, of which only 174 also offered local service.[70] This pool of wireline providers suggests that the stand-alone wireline long distance market is providing an alternative for customers. In addition, the latest FCC data indicate that there are 691 telecommunications providers offering operator and prepaid calling-card services.[71] Dial-around services also remain an option for many consumers, with as high as a $3 billion market.[72]

### C. Effect of Competition in Areas Served by Small and Mid-Sized ILECs

The competitive picture described above has affected mid-sized and small ILECs in the same ways as their larger counterparts that have been granted relief from the EA Scripting Requirement. According to FCC ARMIS data, mid-sized ILECs' billable access lines fell 5.3

[70] FCC, *Telecommunications Provider Locator* at 5.
[71] FCC, *Telecommunications Provider Locator* (September 2007) at 5.
[72] http://www.dialaroundworld.com/ last accessed July 9, 2008.

percent in 2007, from 12.0 million to 11.4 million. *Residential* lines fell 7.0 percent in 2007, from 8.6 million to 8.1 million.[73] See Figure 4. The National Exchange Carrier Association (NECA) whose members serve 3.5 percent of U.S. access lines in the most rural areas of the country, reports that NECA members lost 2.3 percent of access lines from 2006 to 2007 as a result of competition.[74] NECA has recently filed even more dramatic numbers illustrating the accelerating decline in access minutes by non-Tier 1 (small and mid-sized carriers) over the last year. According to data filed by NECA with the Commission on September 16, 2008 for the third and fourth quarters of 2007 and the first and second quarters of 2008, the access minutes of these carriers declined by 8.2 percent during that period.[75]

We further note that small and mid-sized carriers have a lower proportion of long distance subscribers than did AT&T, Verizon, and Qwest when they received relief. As of June 30, 2007, 66 percent of AT&T, Verizon, and Qwest's residential customers received both local and long distance service from those companies, while only 61 percent of smaller and mid-sized ILECs' residential customers receive both local and long distance service from the ILEC.[76]

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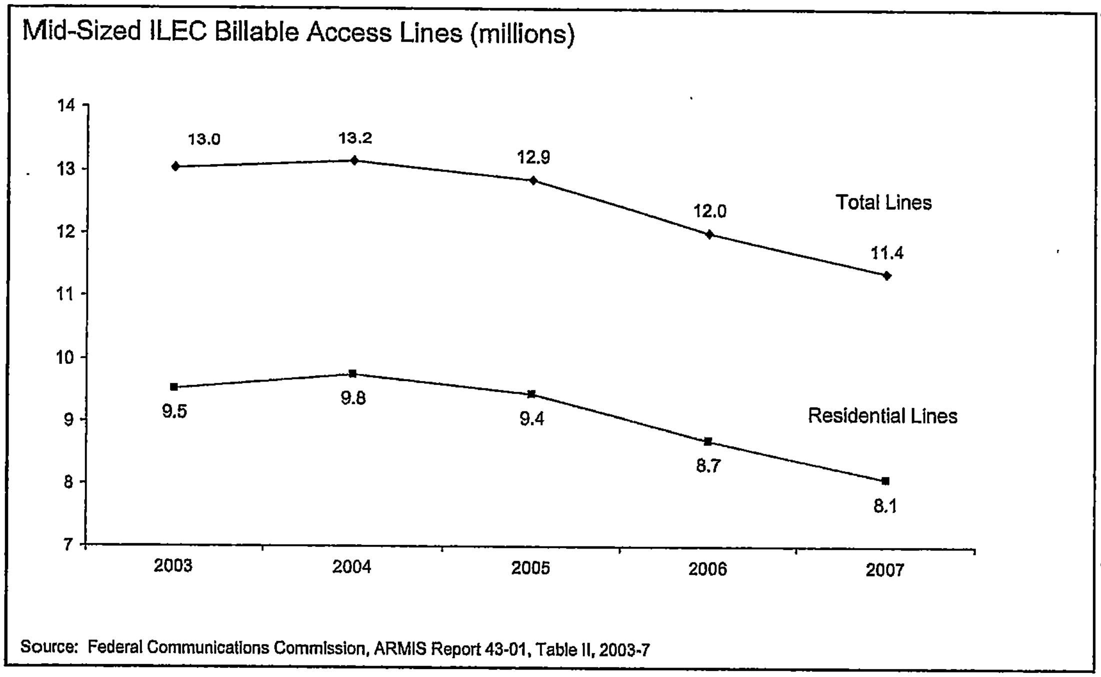
[73] FCC ARMIS Report 43-01, Table II, 2003-2007.

[74] National Exchange Carrier Association, *Trends 2007: Building Tomorrow's Network* at p. 5 at http://www.neca.org/media/Trends2007_final_web.pdf (last visited October 28, 2008).

[75] *See* Letter of September 16, 2008, from Patricia A. Chirico, Executive Director, Tariffs, Rates, Costs & Average Schedules, NECA, to Marlene H. Dortch, Secretary, Federal Communications Commission (transmitting minutes of use data to the FCC).

[76] Federal Communications Commission, Local Telephone Competition Status as of June 30, 2007, March 2008, Table 6.

Figure 4: Access Line Loss Not Limited to Large Companies




### D. Local Competitive Conditions

The national competitive picture is mirrored in local markets across the country in which independent ILECs compete against cable and wireless and other long distance providers. For example, Iowa Telecommunications Services, Inc. (Iowa Telecom), a USTelecom member, competes against a host of wireline and cable CLECs, multiple wireless carriers, and a number of facilities-based and over-the-top VoIP providers, all vying for consumers' local and long distance business.[77]

- The majority of all Iowa consumers choose to bundle their long distance with local telephone service and video.[78] This account is consistent with the Commission's findings

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[77] *See generally*, Timothy Tardiff and Harold Ware, *Statement of Position of Iowa Telecom in Possible Extension of Board Jurisdiction over Single Line Flat-Rated Residential and Business Rates for Local Exchange Carriers, Before the State of Iowa Department of Commerce Utilities Board*, Dkt. No. INU-08-1 (March 17, 2008) (*Iowa Telecom Statement*).
[78] *Id.* at 5, 8.

in the *Equal Access Memorandum Opinion and Order* that the majority of consumers in AT&T, Verizon, and Qwest markets do not subscribe to stand-alone long distance services, but instead subscribe to bundled services. Thus, stand-alone long distance service is becoming a "fringe market," in Iowa, just as it is nationally.

- Cross-platform competition is strong. For example, there are at least two competitive alternatives to Iowa Telecom in every exchange in Iowa Telecom's service area and almost 100 percent of households are in Census Tracts with two or more wireless carriers.[79]
- Cable providers are claiming a larger and larger share of the voice market, in addition to their share of the video market. Equally important, with the roll-out of broadband services in Iowa markets, both cable VoIP and over-the-top VoIP providers such as Vonage are providing competitive alternatives to Iowa Telecom service.[80]
- The prices of wireless and cable services are competitive with the price of wireline, limiting the ability of Iowa Telecom to raise prices.[81]

## II. ARGUMENT

The Commission's rules may be waived for good cause shown.[82] Waiver of the Commission's rules is appropriate if circumstances warrant a deviation from the general rule, and such a deviation will serve the public interest.[83] In addition, the Commission may exercise

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[79] *Id.* at 26.
[80] *Id.* at 31-47.
[81] *Id.* at 31-47 (making the point that the roll-out of broadband services in Iowa is enabling over-the-top VoIP providers to compete, as well).
[82] Rule 1.3, 47 C.F.R. § 1.3.
[83] *Northeast Cellular*, 897 F.2d at 1166; *WAIT Radio*, 418 F.2d at 1159.

its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.[84] The Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy.[85] By all these measures, the Commission should exercise its authority to waive the application of the EA Scripting Requirement to USTelecom's small and mid-sized ILEC member companies.

### A. Waiver Will Serve the Public Interest by Establishing Regulatory Parity and Fostering Competition

When the Commission granted AT&T, Verizon, Qwest and their ILEC affiliates relief from the EA Scripting Requirement, the Commission found that "competition for stand-alone long distance services would function better absent the market-place distorting effects of the current EA Scripting Requirement."[86] That conclusion applies with equal – if not greater – force to small and mid-sized carriers. With respect to the EA Scripting Requirement, as demonstrated above, these carriers face significant competitive pressures from a wide range of long distance providers. Their situation parallels the situation of AT&T, Verizon, and Quest, and they too should be afforded relief from the EA Scripting Requirement.

The Commission has consistently recognized that all similarly situated service providers should be subject to the same regulatory regime. As the Commission repeatedly has explained,

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[84] *Northeast Cellular* 897 F.2d at 1166 citing *WAIT Radio*, 418 F.2d at 1159.
[85] *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.
[86] *Equal Access Scripting Memorandum Opinion and Order* at 16500 ¶ 122. In his concurrence, Commissioner McDowell hailed the order for establishing "regulatory parity among providers of long distance services, be they wireline, cable, wireless, or over-the-top VoIP, but noted that the order did not reach independent incumbent local exchange carriers who "continue to be subjected to regulation that may be ripe for a lighter regulatory touch." *Id.* at 16555.

regulatory parity between all service providers is in the public interest.[87] Regulatory parity prevents distortions in the competitive marketplace and consequent consumer harm.[88] Continued application of the EA Scripting Requirement to small and mid-sized ILECs flies in the face of the Commission's consistent efforts to establish regulatory parity.[89] Now only traditional ILECs are forced to design and market their services inefficiently to meet this outmoded regulatory requirement. In view of the robust competition that small and mid-sized ILECs face from wireless, cable, and over-the-top VoIP service providers, as described above, this lack of regulatory parity is particularly troubling. Selective application of the EA Scripting Requirement

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[87] *See, e.g., Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Report & Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 14853, 14865, ¶ 17 (2005) (consistent regulatory treatment of similarly situated competitors "best facilitates the goals of the Act"), *aff'd Time Warner v. FCC,* 507 F.3d 205 (3d Cir. 2007); *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules With Respect to its Broadband Services*, Memorandum Opinion and Order, 22 FCC Rcd 18705 ¶ 46 (2007) (granting forbearance from dominant carrier regulation for certain AT&T broadband services because doing so would "serve the public interest by eliminating the market distortions that asymmetrical regulation of these services causes"); *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended,* Memorandum Opinion and Order, 22 FCC Rcd 16304 ¶ 129 (2007) ("Disparate treatment of carriers providing the same or similar services is not in the public interest as it creates distortions in the marketplace that may harm consumers.").

[88] *See, e.g., Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901, 5920, ¶ 53 (2007) (noting that the "disparate treatment" of competitors "would introduce competitive distortions into the marketplace").

[89] *See, e.g., Telephone Number Requirements for IP-Enabled Services Providers*, Report and Order, 22 FCC Rcd 19531-32 ¶ 1 (2007) ("We believe that these steps we take to ensure regulatory parity among providers of similar services will minimize marketplace distortions arising from regulatory advantage."); *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(C) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements; Petition of the Frontier And Citizens ILECs for Forbearance Under Section 47 U.S.C. § 160(C) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, Memorandum Opinion and Order, 22 FCC Rcd 19478 (2007) ("Forbearing from application of dominant carrier regulation will increase competition by freeing the petitioners from unnecessary regulation and will serve the public interest by promoting regulatory parity among providers of these services.").