

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

In the Matter of)
)
Petition of USTelecom for)
Declaratory Ruling that Incumbent Local)
Exchange Carriers Are Non-Dominant in)
the Provision of Switched Access Services)
)

WC Docket No. 12-__

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Federal Communications Commission
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PETITION FOR DECLARATORY RULING
OF THE
UNITED STATES TELECOM ASSOCIATION

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EXECUTIVE SUMMARY

Pursuant to Section 1.2 of the Commission's rules, the United States Telecom Association (USTelecom) respectfully files this petition requesting that the Commission issue a declaratory ruling that incumbent local exchange carriers (ILECS) are no longer subject to dominant-carrier regulation under the Commission's rules.

The Commission in the *Universal Service Reform Order* emphasized the importance of reforming "outdated" regulatory mechanisms "established long before competition emerged among telephone companies, cable companies, and wireless providers..." The Commission went on to conclude that "the system is eroding rapidly as consumers increasingly shift from traditional telephone service to substitutes including Voice over Internet Protocol (VoIP), wireless, texting, and email..."

Today, there are likely more households that have chosen to "cut-the-cord" and subscribe only to wireless service than there are households that subscribe to a switched-access service provided by an ILEC. And within the next year, the number of households being served by an interconnected VoIP service will surpass the number of households subscribed to an ILEC switched access service.

These statistics are merely the most obvious manifestations of a profound and accelerating technological and societal shift away from "plain old telephone service" (POTS) offered over the legacy public switched telephone network (PSTN) to IP-based services offered over fixed and mobile broadband networks.

In recognition of these facts, the Commission has focused significant resources recently on preparing for the demise of the PSTN – a notion that is fundamentally at odds with the

continued treatment of ILECs as “dominant” when offering switched access voice services. Indeed, the Commission has established a policy goal of modernizing its rules in order to “accelerate the transition from circuit-switched to IP networks, with voice ultimately one of many applications running over fixed and mobile broadband networks.”

While the Commission has recognized this transition in several contexts, many of its regulatory paradigms continue to be based upon the idea that the PSTN still constitutes a monopoly platform for the delivery of voice services. But the evidence is clearly to the contrary. Indeed, since its peak around the turn of the century, the number of ILEC switched access lines has fallen at least 50%, and continues to decline; and ILEC switched access minutes of use have dropped by more than 70%, all despite an increased population. These connections have not just disappeared. Rather, they have been displaced by wireless and VoIP connections. Indeed, today only about one-third of American households purchase an ILEC switched access service. In contrast, approximately 40% of U.S. households have “cut the cord” and rely entirely on wireless for their voice service. In short, the share of consumers continuing to subscribe to ILEC switched-access services is considerably less than that which led to the finding of AT&T non-dominance in the long-distance market, as well as the Commission’s recent order finding that cable companies are no longer dominant on a nationwide basis in the MVPD market.

Not only can such an imbalanced regulatory scheme no longer be justified, its continued enforcement by the Commission has significant negative public policy consequences. As the number of consumers choosing to retain ILEC PSTN connectivity continues to decline – by more than ten per cent a year, according to the Commission – the costs of complying with these anachronistic regulations are spread across fewer and fewer consumers, proportionately

increasing the burden on those consumers that remain on the legacy network. As the Commission itself has recognized, this situation is not “sustainable.”

And more importantly, the continued failure to adjust outdated regulatory models to reflect the rapidly changing communications landscape is inhibiting the transition to all-IP networks by reinforcing incorrect market signals and forcing limited investment capital to be directed to last century’s communications infrastructure at the expense of new technologies. At the same time, this backwards-looking approach undermines the Commission’s ability to tailor its public interest obligations in a manner that takes full advantage of these new technologies.

In short, POTS provided by the ILECs is only one of many options available to meet consumers’ demands for communications services, and an option being chosen by a rapidly declining minority of consumers at that. In this context, it simply no longer makes sense as a matter of economics or public policy to continue to treat ILECs as dominant in the provision of switched voice telecommunications services, and thus the switched access services component of those voice services. Accordingly, 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. This petition is not requesting the deregulation of switched access, but rather is requesting regulatory parity in this area between LECs.

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**PETITION FOR DECLARATORY RULING
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I. INTRODUCTION

Pursuant to Section 1.2 of the Commission's rules,¹ the United States Telecom Association (USTelecom) respectfully files this petition requesting that the Commission issue a declaratory ruling that incumbent local exchange carriers (ILECS) are no longer subject to dominant-carrier regulation under the Commission's rules.²

¹ 47 C.F.R. §1.2; 5 U.S.C. §554(e).

² The specifics of the requested relief are discussed in section II.A. below and include modified obligations with respect to tariffing, discontinuance of services, and transfers of control. Granting this relief would have no impact on public policy obligations applicable to all carriers such as 911, customer privacy, and disabilities access. This petition is also limited to switched services and therefore does not encompass dedicated services such as special access. Nor does this Petition seek relief related to the provisions of unbundled network elements, which are subject to the standard set forth in Section 251(c)(3) of the Act.

The Commission in the *Universal Service Reform Order* emphasized the importance of reforming “outdated” regulatory mechanisms “established long before competition emerged among telephone companies, cable companies, and wireless providers...”³ The Commission went on to conclude:

*“And the system is eroding rapidly as consumers increasingly shift from traditional telephone service to substitutes including Voice over Internet Protocol (VoIP), wireless, texting, and email...”*⁴

Indeed, the shift identified by the Commission is well past the tipping point and inexorably moving towards the retirement of the PSTN. Consider that:

Today, there are likely more households that have chosen to “cut-the-cord” and subscribe only to wireless service than there are households that subscribe to a switched-access service provided by an ILEC.

And within the next year, the number of households being served by an interconnected Voice over Internet Protocol (VoIP) service will surpass the number of households subscribed to an ILEC switched access service.

These statistics are merely the most obvious manifestations of a profound and accelerating technological and societal shift away from “plain old telephone service” (POTS) offered over the legacy public switched telephone network (PSTN) to IP-based services offered over fixed and mobile broadband networks. Yet, despite this reality, ILEC voice services offered over these legacy networks continue to be subject to decades-old monopoly regulations not applied to any other service provider. Not only can such an imbalanced regulatory scheme no

³ Report and Order and Further Notice of Proposed Rulemaking, *Connect America Fund*, 26 FCC Rcd 17663, FCC 11-161, ¶ 9 (rel. Nov. 18, 2011) (*Universal Service Reform Order*).

⁴ *Id.*

longer be justified, its continued enforcement by the Commission has significant negative public policy consequences.

As the number of consumers choosing to retain ILEC PSTN connectivity continues to decline – by more than ten per cent a year, according to the Commission – the costs of complying with these anachronistic regulations are spread across fewer and fewer consumers, proportionately increasing the burden on those consumers that remain on the legacy network. As the Commission itself has recognized, this situation is not “sustainable.”

And more importantly, the continued failure to adjust outdated regulatory models to reflect the rapidly changing communications landscape is inhibiting the transition to all-IP networks by reinforcing incorrect market signals and forcing limited investment capital to be directed to last century’s communications infrastructure at the expense of new technologies. At the same time, this backwards-looking approach undermines the Commission’s ability to tailor its public interest obligations in a manner that takes full advantage of these new technologies.

In short, POTS provided by the ILECs is only one of many options available to meet consumers’ demands for communications services, and an option being chosen by a rapidly declining minority of consumers at that. In this context, it simply no longer makes sense as a matter of economics or public policy to continue to treat ILECs as dominant in the provision of switched voice telecommunications services, and thus the switched access services component of those voice services. Accordingly, 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. USTelecom urges the Commission to evaluate and grant this relief on a nationwide basis, applying the same analytical framework as it used recently in the virtually identical situation where it found that cable companies are no longer dominant nationwide in the MVPD market.

II. DISCUSSION

As the Commission is fully cognizant, the communications industry, and indeed the very ways in which people communicate, is well into an era of fundamental change. At the technological level, the industry is in the midst of transitioning from the Public Switched Telephone Network -- rooted in century-old, fixed-location, voice-centric technology -- to mobile and Internet-Protocol (IP) based networks which deliver voice as merely one of many applications. And at a societal level, we have moved from a time where consumers considered "voice" as the sole means of real-time, person-to-person communications, to today where "voice minutes" are rapidly being displaced by other forms of communications such as "over-the-top" video-chat, e-mail, text, SMS, social networks, and others. These newer forms of communication are characterized by increased mobility, time-shifting, multi-party capability, video and applications integration.

The Commission is well-aware of these paradigm shifts and has acknowledged the need to evaluate and modify its legacy rules to reflect these changes in the communications marketplace.⁵ Indeed, the Commission recently established a Task Force to examine and provide recommendations on how to modernize the Commission's policies to encourage this

⁵ See, e.g., FCC Press Release, *FCC Chairman Julius Genachowski Announces Formation of 'Technology Transitions Task Force,'* December 10, 2012. .

technological transition.⁶ The Commission explained the need for this effort by stating that the “nation’s broadband transition means that communications networks are increasingly migrating from special purpose to general purpose, from circuit-switched to packet-switched, and from copper to fiber and wireless-based networks.”⁷ The Commission has already begun the essential task of modernizing the legacy universal service and inter-carrier compensation systems, acknowledging that the previous regimes were “ill-equipped” to address the challenges of broadband services 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.”⁸ Or as Chairman Genachowski succinctly stated,

“[w]e are living in a world imagined by Steve Jobs, Bill Gates, Marc Andreessen and other visionaries, but in too many ways the FCC rules...were built for the world of Alexander Graham Bell.”⁹

One need look no farther for validation of the Chairman’s statement than the decades-old regulatory scheme built on the presumption that ILECs retain monopoly power when

⁶ *Id.*

⁷ *Id.* Over the past several months, a number of filings have been made asking the Commission to begin considering how its regulatory mechanisms must change to reflect the transition from switched to IP-based networks. See, AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition, at 1 (filed Nov. 7, 2012); see also, Petition of the National Telecommunications Cooperative Association for a Rulemaking to Promote and Sustain the Ongoing TDM-to-IP Evolution, at 1 (filed Nov. 19, 2012); see also, Public Notice, *Pleading Cycle Established On AT&T And NTCA Petitions*, DA 12-1999 (released December 14, 2012). While this Petition for Declaratory Ruling is driven by the same technology transition as those, USTelecom here focuses on remaining legacy rules that impede this transition.

⁸ *Universal Service Reform Order*, ¶16.

⁹ Remarks of FCC Chairman Julius Genachowski, Georgetown Center for Business and Public Policy, Georgetown University, Washington, D.C., at 1-2 (Nov. 7, 2011) (emphasis added) (available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-310876A1.pdf) (visited December 17, 2012).

providing traditional voice services over their legacy switched networks – that is, networks whose basic technology goes back to the work of Alexander Graham Bell himself. The origins of the legacy ILEC dominant carrier rules go back more than 30 years – before broadband networks, VoIP, or widespread wireless usage – to an era that presumed the existence of a single, monopoly platform from which consumers could obtain voice service.

But this is no longer a POTS world. The communications marketplace is very quickly evolving to mobile and IP-based broadband networks where traditional voice service offered over the wireline PSTN is being replaced by multiple alternative access methods and an unlimited variety of applications that are untethered from ownership of the network itself. In this new marketplace, consumers have multiple ways of interacting with each other, and have control over what services they use and how they use them. In fact, not only do consumers now have such control, they demand it.

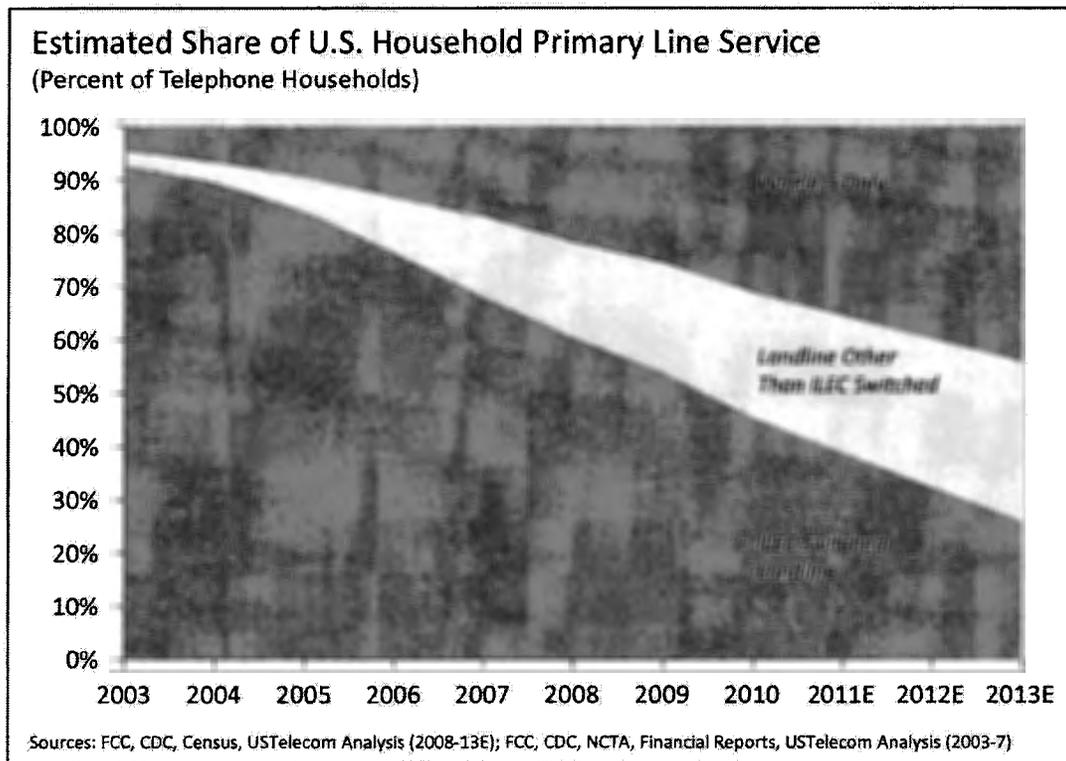
Wireless technology has enabled the most significant and obvious change in the way we communicate: mobility. Mobility makes personal communications vastly more convenient and efficient for both voice services and for the many applications-based services that are being replaced for voice by consumers. And, indeed, the proliferation of smartphones and other mobile devices with screens (laptops, e-readers, notebook computers, gaming devices, tablet computers, etc.) that allow integration of voice with text, images and video have accelerated consumer adoption of many different formats for communicating. Consumers now expect – and, in fact, demand – the flexibility to control the time, location and manner of communications that best suits their needs in a particular circumstance. And this demand is not one which the fixed-location, voice-centric PSTN was designed to meet.

Of course, this is not news to the Commission. To the contrary, the Commission has focused significant resources recently on preparing for the demise of the PSTN – a notion that is fundamentally at odds with the continued treatment of ILECs as “dominant” when offering switched access voice services. Indeed, the Commission has established a policy goal of modernizing its rules in order to *“accelerate the transition from circuit-switched to IP networks, with voice ultimately one of many applications running over fixed and mobile broadband networks.”*¹⁰

While the Commission has recognized this transition in several contexts, many of its regulatory paradigms continue to be based upon the idea that the PSTN still constitutes a monopoly platform for the delivery of voice services. But the evidence is clearly to the contrary. Indeed, since its peak around the turn of the century, the number of ILEC switched access lines has fallen by more than 50%, and continues to decline; and ILEC switched access minutes of use have dropped by more than 70%, despite an increased population.¹¹ These connections have not just disappeared. Rather, they have been displaced by wireless and VoIP connections. *Indeed, today only about one-third of American households purchase an ILEC switched access service.* In contrast, approximately 40% of U.S. households have “cut the cord” and rely entirely on wireless for their voice service.

¹⁰ *Universal Service Reform Order*, at ¶ 11 (emphasis added).

¹¹ Richard N. Clarke, *Journal of Information Policy*, *The case for reforming regulation of PSTN voice services*, Volume 2, p. 287 (2012) (*Clarke Paper*).



In sum, whatever public policy goals may once have been achieved by treating ILECs as “dominant” in the provision of switched access services, those goals are no longer served by applying unique regulatory burdens to networks that constitute one among many communications platforms – and, indeed, one that is now utilized by a small and quickly shrinking percentage of consumers. To the contrary, maintaining regulatory mandates on ILECs based upon an outdated notion of “dominance” will undoubtedly serve to inhibit and delay the transition to all-IP networks by inducing inaccurate price signals, discouraging incentives for consumers and businesses to adapt to these new technologies, and misdirecting limited capital spending away from investment in new networks. As the *National Broadband Plan* explained, continuing to regulate PSTN services as the presumptive ‘network of record,’ leads to stranded

investment in outdated technology at the expense of investment in new IP technologies – itself an explicit and critical goal of the Commission.¹²

A. Relief Requested.

In this *Petition*, USTelecom requests that the Commission declare that ILECs are no longer presumptively dominant when providing interstate mass market and enterprise switched access services.¹³ Previous Commission orders have identified the specific obligations that flow directly from dominant carrier regulation as encompassing the following:¹⁴ (i) 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,¹⁵ while non-dominant carriers are not subject to rate regulation and may file tariffs on one days' notice and without cost support;¹⁶ (ii) dominant carriers are subject to a 60-day waiting period for

¹² *Connecting America: The National Broadband Plan*, p. 59 (released March 16, 2010) (*National Broadband Plan*).

¹³ See, Memorandum Opinion and Order, *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, 20 FCC Rcd 19415, ¶ 22 (2005) (*Qwest Omaha Forbearance Order*). Although substantial evidence confirms that ILECs no longer are dominant in the provision of dedicated services, such as special access, this petition does not encompass such services.

¹⁴ See e.g., *Qwest Omaha Forbearance Order*, ¶ 11.

¹⁵ See 47 U.S.C. §§ 203(b), 204(a)(3); 47 C.F.R. §§ 61.38, 61.41, 61.58; Report and Order, *Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, CC Docket No. 960187, 12 FCC Rcd 2170 (1997).

¹⁶ 47 C.F.R. §§ 1.773(a)(ii), 61.23(c); Order, *Tariff Filing Requirements for Non-dominant Carriers*, 10 FCC Rcd. 4074 (1995). It is worth noting here that the question of whether local exchange carriers possess market power (*i.e.*, a terminating or originating, in the case of 800 traffic, access monopoly) with respect to their own end users is not at issue in this *Petition*. So long as the Commission requires interexchange carriers to interconnect with LECs, and such carriers are permitted to file tariffs dictating the rates, terms and conditions on which interexchange carriers must exchange traffic with them, LECs will continue to have power with respect to their own end users. Thus, USTelecom is not asking the Commission to deregulate

applications to discontinue, reduce, or impair services to be granted, as compared to a 30-day period for non-dominant carriers;¹⁷ and (iii) dominant carriers are eligible for presumptive streamlined treatment for fewer types of transfers of control under section 214 than non-dominant carriers.¹⁸

Because the changes in the communications marketplace that form the basis of this request are so pervasive and ubiquitous, USTelecom requests that the Commission eliminate the presumption of dominance on a nationwide basis. This is precisely the approach taken by the Commission in its recent Order eliminating the presumption against exclusive arrangements for vertically-owned cable programming.¹⁹ In that Order, the Commission determined that it was appropriate to eliminate the regulatory presumption based on a finding that the cable

ILEC switched access services and charges; rather, it is requesting that ILEC switched access services be regulated on the same non-dominant basis as competitors. See, *Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, *Seventh Report and Order and Further Notice of Proposed Rulemaking*, FCC 01-146 (Apr. 27, 2001). Moreover, we emphasize that non-dominant tariffing treatment would not – and is not intended to – in any way alter the substantive requirements established by the Commission in the *Universal Service Reform Order*. As such, all LECs' access charges would remain subject to the transition established in that order for intercarrier compensation. If that order is reversed on appeal, the Commission would, of course, have to consider what, if any, rules should apply to LEC access charges. But, given the changes in the marketplace, any such rules should apply to all LECs on a competitively neutral basis.

¹⁷ 47 C.F.R. § 63.71(c).

¹⁸ 47 C.F.R. § 63.03(b). The provision of switched access services are essentially identical, regardless of the regulatory construct of the wireline company. A CLEC and an ILEC provide the same service to reach an end user customer. See, *Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, *Seventh Report and Order and Further Notice of Proposed Rulemaking*, FCC 01-146 (Apr. 27, 2001).

¹⁹ Report and Order and Further Notice of Proposed Rulemaking, *Revision of the Commission's Program Access Rules*, MB Docket No. 12-68, 27 FCC Rcd. 12605 (rel. October 5, 2012) (*Program Access Order*).

industry's market share had fallen to 57.4 percent, from 67 percent five years earlier.²⁰ The Commission noted that cable companies retained market shares as high as 80 percent in some regions but determined that the regulatory presumption should still be eliminated on a nationwide basis, with specific conduct evaluated on a case-by-case basis.²¹ The Commission concluded that such a case-by-case approach, rather than a "preemptive ban", would "adequately address competitively harmful conduct in a more targeted, less burdensome manner."²² USTelecom seeks a consistent analytical approach with respect to this request, in which ILEC market shares, by any conceivable measure, are significantly lower than those of the cable industry in the MVPD market. Moreover, as the Commission's own data and maps demonstrate, these competitive alternatives are available virtually everywhere in the country and are being accepted by consumers nationwide.

B. Dominant Carrier Regulation.

Beginning in the late 1970's, the Commission issued a series of orders in the *Competitive Carrier Proceeding* for purposes of distinguishing between dominant and non-dominant carriers.²³ Importantly, this extended Commission effort was expressly and fundamentally in

²⁰ *Program Access Order*, ¶ 17.

²¹ *Id.*, ¶ 18, n. 67.

²² *Id.*, ¶ 21.

²³ Notice of Inquiry and Proposed Rulemaking, *Policy and Rules Concerning Rates for Competitive Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, 77 FCC 2nd 308 (1979); First Report and Order, *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 85 FCC 2d 1 (1980) (*Competitive Carrier First Report and Order*); Second Further Notice of Proposed Rulemaking, CC Docket No. 79-252, 47 Fed. Reg. 17308 (1982); Second Report and Order, 91 FCC 2nd 59 (1982); Order on Reconsideration, 93 FCC 2d 54 (1983); Third Further Notice of Proposed Rulemaking, 48 Fed. Reg. 28292 (1983); Third Report and Order, 48 Fed. Reg. 46791 (1983); Fourth Report and Order, *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities*

recognition of the fact that regulations impose costs – both directly upon the regulated entities from the administrative obligations of compliance, as well as the “[m]ore significant costs...inflicted on society by the loss of dynamism which can result from regulation.”²⁴

Consistent with this fact, the Commission even then recognized the public policy benefits of eliminating regulations where “a rough cost/benefit analysis suggests that the costs of continuing to regulate the service offerings of any carrier or class of carriers by means of the prevailing tariff, entry, and exit rules exceed the benefits...”²⁵

In the *Competitive Carrier Proceeding*, the Commission determined that application of certain regulatory obligations “to non-dominant carriers imposes unnecessary and counterproductive regulatory constraints upon a marketplace that can satisfy consumer demand efficiently and without government intervention,” and therefore streamlined the regulations for such carriers.²⁶ Specifically, the Commission relieved non-dominant carriers from *ex ante* rate regulation, reduced their tariff obligations, and accorded them presumptive streamlined entry and exit treatment under section 214 of the Act.

Authorizations Therefor, 95 FCC 2d 554 (1983), *vacated AT&T v. FCC*, 978 F.2d 727 (D.C.Cir. 1992), *cert. denied*, *MCI v. AT&T*, 509 U.S. 913 (1993) (*Competitive Carrier Fourth Report and Order*); Fifth Report and Order, 98 FCC 2d 1191 (1984); Sixth Report and Order, 99 FCC 2d 1020 (1985), *vacated MCI v. FCC*, 765 F.2d 1186 (D.C.Cir. 1985), *aff'd*, *MCI v. AT&T*, 512 U.S. 218 (1994) (collectively, the “*Competitive Carrier Proceeding*”).

²⁴ *Competitive Carrier First Report and Order*, ¶ 11. See also, Order, *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, 11 FCC Rcd 3271, ¶ 27 (1995) (“The cost of dominant carrier regulation of AT&T in this context includes inhibiting AT&T from quickly introducing new services and from quickly responding to new offerings by its rivals”) (*AT&T Non-Dominance Order*); *Qwest Omaha Forbearance Order*, at ¶ 47 (“applying these dominant carrier regulations to Qwest limits its ability to respond to competitive forces and, therefore, its ability quickly to offer consumers new pricing plans and service packages”).

²⁵ *Competitive Carrier First Report and Order*, ¶ 4.

²⁶ *Id.*, ¶ 53.

On the other hand, the Commission determined to continue more traditional common carriage regulation on "dominant carriers," which it defined as one that "possesses market power," that is the power to control prices without regard to market forces.²⁷ In determining whether a firm possessed market power, the Commission focused on certain "clearly identifiable market features," including "the number and size distribution of competing firms, the nature of barriers to entry, and the availability of reasonably substitutable services," and whether the firm controlled "bottleneck facilities."²⁸ In a subsequent order in that proceeding, the Commission elaborated that market power is demonstrated by "the ability to raise prices by restricting output" or "the ability to raise and maintain prices above competitive levels without driving away so many customers as to make the increase unprofitable."²⁹

The Commission's determination that AT&T possessed market power rested on an evaluation of several market conditions, but largely focused on its market share and control of bottleneck facilities. With respect to the first point, the Commission found that AT&T was "virtually the only supplier of all interexchange services," with a market share of approximately 90% of overall long-distance industry revenues and minutes.³⁰ And with respect to the second issue, the Commission explained that AT&T controlled (through its ownership of the Bell Operating Companies) bottleneck local access facilities for over 80% of the nation's

²⁷ *Id.*, ¶¶ 54 - 57.

²⁸ *Id.*, ¶¶ 57 - 58. *See also*, *AT&T Non-Dominance Order* at 3274.

²⁹ *Competitive Carrier Fourth Report and Order*, ¶¶ 7 - 8.

³⁰ *Competitive Carrier First Report and Order*, 85 FCC 2d at 23; *AT&T Non-Dominance Order*, ¶ 69.

telephones.³¹ In other words, because there were no alternatives to the AT&T-owned local access facilities by which long-distance voice services could reach consumers, AT&T possessed control over access to customers whereby competitors “must either be allowed to share the bottleneck facility or fail.”³²

The Commission has also recognized that, over time, developments in the marketplace may result in a previously dominant carrier becoming non-dominant. In particular, nearly 15 years after its dominance finding in the *Competitive Carrier Proceeding*, the Commission in the *AT&T Non-Dominance Order* concluded that AT&T no longer maintained market power in the interstate, interexchange markets and accordingly reclassified AT&T as non-dominant in the provision of these services.³³ The key factors the Commission cited in support of its finding were:³⁴

- (i) AT&T faced competition from at least three nationwide facilities-based providers and many non-facilities-based competitors;
- (ii) AT&T’s market share had fallen by one-third in the previous ten years to approximately 55.2% of revenues and 58.6% of minutes;
- (iii) That a significant percentage of AT&T’s customers had switched, and were continuing to switch, to services offered by these competitors in order to obtain price reductions or desired features, demonstrating “that these customers find

³¹ *AT&T Non-Dominance Order*, ¶ 69.

³² *Competitive Carrier First Report and Order*, ¶ 59.

³³ *AT&T Non-Dominance Order*.

³⁴ *Id.*, ¶¶ 38 - 73.

the services provided by AT&T and its competitors to be very close substitutes”;

and,

- (iv) “AT&T’s competitors have enough readily available excess capacity to constrain AT&T’s pricing behavior – *i.e.*, that they have or could quickly acquire the capacity to take away enough business from AT&T to make unilateral price increases by AT&T unprofitable”.

Analogous but more dramatic competitive shifts have already transpired in the context of ILEC switched access services. As-discussed in detail below, ILECs have lost well-over 50% of their access lines (and are continuing to lose more than 10% each year) to multiple wired and wireline voice alternatives. Moreover, these changes are merely a reflection of a more profound paradigm shift in the communications marketplace as the network that today continues to be regulated as “dominant” is not only rapidly losing market share, but indeed is quite literally being replaced by other, more technologically advanced alternatives.

C. The Public Interest Requires Adapting Regulations in Light of Changes in the Communications Marketplace.

1. The Commission and Administration Have Recognized the Importance of Eliminating Outdated Regulations.

Both Chairman Genachowski and the Obama Administration have correctly recognized that continued enforcement of unnecessary and asymmetrical regulations is, in and of itself, contrary to the public interest.³⁵

³⁵ Indeed, this is the fundamental policy underlying Congress’ inclusion of section 10 into the Communications Act, in order to provide a vehicle by which the Commission must justify the continued existence of regulations. See 47 U.S.C. §160(a)-(c).

The Commission and the Administration have repeatedly voiced support for eliminating unnecessary regulation. In January 2011, President Obama released an Executive Order that called on all executive agencies to reexamine their significant rules, and to streamline, reduce, improve or eliminate them based on that examination.³⁶ In pressing this policy, President Obama emphasized that regulation and its accompanying paperwork mandates “saddle business with huge administrative costs.”³⁷ As further explained by the President’s Administrator for the Office of Information and Regulatory Affairs, “paperwork and reporting requirements impose significant burdens on the American people, including those who run businesses, both large and small.”³⁸

In July 2011, the President released a second Executive Order extending these efforts and policies to independent agencies, an announcement that was welcomed with full and open support by Chairman Genachowski.³⁹ Pursuant to this directive, the Chairman committed to establishing a process with the objective to “streamline and modernize the Commission’s rules

³⁶ Executive Order 13563, *Improving Regulation and Regulatory Review* (Jan. 18, 2011) (available at <http://www.whitehouse.gov/the-press-office/2011/01/18/improving-regulation-and-regulatory-review-executive-order>) (visited December 17, 2012).

³⁷ Remarks by President Obama to the Chamber of Commerce, U.S. Chamber of Commerce Headquarters, Washington, D.C., February 7, 2011 (available at <http://www.whitehouse.gov/the-press-office/2011/02/07/remarks-president-chamber-commerce>) (visited December 17, 2012).

³⁸ Cass R. Sunstein, Administrator, Office of Information and Regulatory Affairs, “Memorandum for Chief Information Officers: Minimizing Paperwork and Reporting Burdens; Data Call for the 2011 Information Collection Budget,” at 1 (Feb. 23, 2011) (available at http://whitehouse.gov/sites/default/files/omb/infoereg/icb/2011_ICB_Data_Call.pdf) (visited December 17, 2012).

³⁹ Executive Order 13579, *Regulation and Independent Regulatory Agencies* (July 11, 2011) (available at <http://www.whitehouse.gov/the-press-office/2011/07/11/executive-order-regulation-and-independent-regulatory-agencies>) (visited December 17, 2012).

and reduce burdens on the private sector,” and the Commission staff recently released a plan to identify “outmoded or counterproductive rules.”⁴⁰ In particular, the Chairman’s recently issued *Final Plan for Retroactive Analysis of Existing Rules* identifies as “ripe” for reconsideration those regulations that have “been affected by changes in technology...or changes in market structure.”⁴¹

The Administration has also recognized that applying different regulatory obligations to competitors in the market is contrary to the public interest in the absence of a compelling need. In its recently released White Paper on Consumer Data Privacy, the Administration proposes the elimination of the current regulatory model where “existing Federal laws treat similar technologies within the communications sector differently,” to be replaced by a framework that applies equally to all competitors.⁴² Indeed, the Commission has consistently emphasized

⁴⁰ See, First Report and Order, and Further Notice of Proposed Rulemaking, *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); News Release, *Statement from FCC Chairman Julius Genachowski on the Executive Order on Regulatory Reform and Independent Agencies*, July 11, 2011 (available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-308340A1.pdf) (visited November 12, 2012). See Also, Preliminary Plan for Retrospective Analysis of Existing Rules, Federal Communications Commission, at 2 (rel. Nov. 7, 2011) (*Retrospective Analysis Plan*) (available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-310874A1.pdf) (visited December 17, 2012).

⁴¹ Report, *Final Plan for Retrospective Analysis of Existing Rules*, at p. 7 (released May 18, 2012) (available at: http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-314166A1.pdf) (visited December 17, 2012).

⁴² The White House, *Consumer Data Privacy in a Networked World: A Framework for Protecting Privacy and Promoting Innovation in the Global Digital Economy*, at 39 (February 2012) (available at: <http://www.whitehouse.gov/sites/default/files/privacy-final.pdf>) (visited December 17, 2012). *Communications Daily* recently reported that the Assistant Secretary for Communications and Information explained the reasoning behind this approach as being because “[p]hone companies are competing with a broader group of rivals now who aren’t

the importance of a level regulatory playing-field among competitors, explaining that “disparate treatment” of similar services “would introduce competitive distortions into the marketplace.”⁴³

2. Numerous States Have Already Reduced Regulatory Burdens In Recognition of Wireless and VoIP Competition.

A large number of states have already recognized the public interest in eliminating unnecessary regulations on ILECs in response to the availability of competitive alternatives offered by wireless and VoIP providers. A recent survey found that at least 20 states have adopted legislation in the past few years that significantly deregulate traditional ILEC voice services based upon the availability of competitive alternatives,⁴⁴ and many additional state regulatory commissions have implemented alternative regulatory mechanisms for ILECs in their states.⁴⁵

subject to” the same regulatory obligations. See, Communications Daily, “*Strickling Suggests ‘U.N. Model’ for Defining Consensus in Privacy Discussions,*” p. 5 (April 12, 2012).

⁴³ Declaratory Ruling, *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd 5901, 5920, ¶153 (2007). See, e.g., Further Notice of Proposed Rulemaking, *Developing a Unified Intercarrier Compensation Regime*, 20 FCC Rcd 4685, 4696, ¶121 (2005) (explaining that “in a market where carriers are offering the same services and competing for the same customers, disparate treatment of different types of carriers or types of traffic has significant competitive implications.”).

⁴⁴ Advanced Communications Law & Policy Institute at New York Law School, “*Primer on State Efforts to Deregulate Telecommunications,*” pp. 2-3, February 2012 (ACLP Survey) (available at: http://www.nyls.edu/centers/projects/advanced_communications_law_and_policy_institute/resource_library/) (visited December 17, 2012); see also, Sherry Lichtenberg, National Regulatory Research Institute Report, *The Year in Review; The Status of Telecommunications Deregulation in 2012*, p. 1 (June 2012) (NRRRI Study) (available at: <https://prodnet.www.neca.org/publicationsdocs/wwpdf/61912nrri.pdf>) (visited December 17, 2012).

⁴⁵ See, Ball State University Digital Policy Institute, *Telecommunications Deregulation: A Policy Progress Report*, (March 2010) (available at:

As NRRRI – the research arm of the association of state utility regulators – recently explained, these states have supported deregulation as an appropriate step to “level the playing field between incumbent wireline carriers and their competitors,” and have particularly focused upon removing “regulatory requirements that apply only to [incumbent] wireline carriers, bringing them in line with non-traditional carriers like CLECs and the cable companies.”⁴⁶ And a separate independent survey of state efforts to reduce legacy telecommunications regulations summarizes that, “these efforts have focused on removing legacy rules and regulations from the books in an effort to foster competition among voice service providers.”⁴⁷

Texas’ deregulation legislation, for example, states that its purpose is to reduce the regulation of incumbent carriers because of increased competition from providers “not subject to state regulation, such as wireless communications providers and Voice over Internet Protocol (VoIP) providers.”⁴⁸

Similarly, a recent report by the Florida Public Service Commission on the impacts of that state’s efforts to reduce regulation of the telecommunications industry emphasizes that “wireless and VoIP services compete with traditional wireline service and represent a significant portion of today’s communications market in Florida.”⁴⁹ Based on its study, the Florida PSC

<http://cms.bsu.edu/Academics/CentersandInstitutes/~media/DepartmentalContent/DPI/PDFs/TelecommDeregulation.ashx> (visited December 17, 2012).

⁴⁶ *NRRRI Study*, p. 9.

⁴⁷ *ACLIP Survey*, p. 3.

⁴⁸ *See, NRRRI Study*, pp. 9-10.

⁴⁹ *Report on the Status of Competition in the Telecommunications Industry as of December 31, 2011*, Florida Public Service Commission, Office of Telecommunications (July 2012) (available at:

concluded that “competitive providers are able to offer functionally equivalent services to both business and residential customers”; that “customers are finding reasonable pricing packages and functionality with CLECs, cable providers, and wireless providers”; and that the “*number and variety of competitive choices among all types of service providers and recent high customer satisfaction rates for interconnected VoIP providers suggests that competition is having a positive impact on the telecommunications market in Florida.*”⁵⁰

NRRI sums up this trend at the state level by stating:

“As telecommunications competition has increased, commissions, companies, and state legislators have begun to reassess the need for and the type of regulation necessary when consumers have multiple options for communications services, including wireline, cable-voice, and wireless options.”⁵¹

These state actions represent appropriate fact-based and forward-looking public policy and should be applauded. Consistent with Chairman Genachowski’s emphasis on the importance of eliminating unnecessary regulation, however, the Commission should be leading by example in unraveling outdated dominant carrier regulation in light of this new competitive landscape.

D. The Continued Application of Outdated Legacy Rules Impedes Deployment of New Technologies and Services.

<http://www.floridapsc.com/publications/pdf/telecomm/20120730MasterComp.pdf> (visited December 17, 2012).

⁵⁰ *Id.* Similarly, the Senate Floor Analysis for California’s recently passed legislation eliminating regulation of VoIP services explained, “[t]oday’s consumers are increasingly abandoning landline service and opting for wireless service and fixed or mobile broadband service that offers a platform for integrated voice, video and data services and Internet access.” See, California Legislative Information, SB-1161, Senate Floor Analysis, p. 4 (available at http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120120SB1161&search_keywords) (visited December 17, 2012).

⁵¹ *NRRI Study*, p. 1.

“As recognized by the National Broadband Plan, the Commission has set an express goal of facilitating industry progression to all-IP networks...”

-- Universal Service Reform Order, ¶ 1335.

“Our population is quickly migrating to voice services that are not part of the traditional PSTN, thus negating the assumption that the current system of PSTN regulation and subsidy can continue to support our social and economic needs as a nation. Examples include: 3G and 4G cellular; VoIP, over the top services such as Skype; and many others.”⁵²

-- FCC Technology Advisory Council (9/27/2011)

As the Commission recognized in the *Universal Service Reform Order*, a failure to reform outdated rules to recognize technological and societal changes ultimately leads to poor Commission policy to the detriment of the public interest. In particular, the continued enforcement of anachronistic, PSTN-centric obligations both impedes the ability ILECs to invest in new IP-based networks and undermines incentives of network users to adopt these new technologies.

The *National Broadband Plan* specifically expressed concern about outdated, PSTN-centric regulatory obligations that require irrational investment in old technologies that is likely to become stranded.⁵³ This statement acknowledges a critical truth that governs the speed and extent of deployment of new IP-based networks – that such deployment will require tremendous private investment and that such investment dollars are finite. As the National

⁵² See, Technological Advisory Council Report, *Sun-setting the PSTN*, p. 3, September 27, 2011 (available at: [http://transition.fcc.gov/oet/tac/tacdocs/meeting92711/Sun-Setting the PSTN Paper V03.docx](http://transition.fcc.gov/oet/tac/tacdocs/meeting92711/Sun-Setting%20the%20PSTN%20Paper%20V03.docx)) (visited December 17, 2012) (*TAC Report*).

⁵³ *National Broadband Plan*, p. 59.

Broadband Plan emphasized, outdated regulations focused on the PSTN therefore have the unintended consequence of “siphoning investments away from new networks and services.”⁵⁴

The Commission has repeatedly recognized that these new IP-based networks ultimately offer consumers much greater capabilities and functionalities than the PSTN. As the Commission’s TAC has explained, “with the availability of new and more capable modes of communication and information services (e.g., VoIP, text messaging, IPTV, social networks and wireless) there are now alternative ways to achieve many of these national goals...and to go beyond the current benefits of the PSTN.”⁵⁵ As just one example, the Commission has recently emphasized the important benefits to public safety to be achieved by transitioning to IP-based networks. As the Commission summarized in the *NG 911 NPRM*:

“Sending text messages, photos, and video clips has become commonplace for users of mobile devices on 21st century broadband networks, yet our legacy circuit-switched 911 system does not support these forms of communication. While continuing to ensure reliable voice-based 911 service will always be essential as we migrate to NG911, adding these non-voice-based capabilities to our 911 system will significantly improve emergency response, save lives, and reduce property damage.”⁵⁶

The Commission added that these features made possible by IP-based networks are particularly important for people with disabilities, including those with hearing, speech or other impairment that make traditional telephone communications difficult or impossible.⁵⁷

⁵⁴ *Id.*

⁵⁵ *See, TAC Report*, p. 3.

⁵⁶ Notice of Proposed Rulemaking, *Facilitating the Deployment of Text-to-911 and Other Next Generation 911 Applications*, PS Docket No. 11-153, 26 FCC Rcd 13615, ¶1 (Sept. 22, 2011) (*NG911 NPRM*).

⁵⁷ *Id.*

The impact of the legacy regulatory burdens is real and can mean the difference between whether or not new services are deployed. This was demonstrated recently in connection with Google's deployment of its new fiber-based network in Kansas City. Google has acknowledged that it considered offering VoIP as part of its service package but "took a pass once it started doing some digging into federal and state regulations," according to a report of comments from a senior Google executive.⁵⁸ "We looked at doing that," the executive stated to a conference of Mayors, "[h]owever, in the United States, there are all of these special rules that apply."⁵⁹

Moreover, as the number of consumers relying upon the PSTN shrinks, the share of regulatory compliance costs borne by those continuing to rely on ILEC switched services increases. As the National Broadband Plan explained:

"Consumers benefit from the options that broadband provides, such as Voice over internet Protocol. But as customers leave the PSTN, the typical cost per line for Plain Old Telephone Service (POTS) increases, given the high fixed costs of providing such service. Between 2003 and 2009, the average cost per line increased almost 20 percent."⁶⁰

Importantly, the impact of such unnecessary regulatory burdens accelerates as more consumers leave the PSTN, leaving those consumers that remain to bear an ever increasing

⁵⁸ Alyson Raletz, Kansas City Business Journal, *Google considers but drops plans to include phone service, too*, December 4, 2012 (available at: <http://www.bizjournals.com/kansascity/blog/2012/12/google-considers-drops-phone-service.html>) (visited December 17, 2012).

⁵⁹ *Id.*

⁶⁰ *National Broadband Plan* at p. 59.

share of these costs – a situation the National Broadband Plan recognized is ultimately “not sustainable.”⁶¹

E. The PSTN is Rapidly Being Displaced By Mobile and IP-Based Networks for Voice Services.

As compared to the developments that led to the finding of AT&T’s non-dominance in the long-distance market, the paradigm shift enabled by the technological, competitive and societal changes that characterize today’s communications marketplace are significantly more profound, disruptive and irreversible.

The rapid erosion of the PSTN has coincided with the explosive growth of numerous alternative voice platforms. In particular, both wireless and IP-based wireline services have grown to the point where each has surpassed (in the case of “cut-the-cord wireless) or soon will surpass (in the case of interconnected VoIP) the number of American homes subscribed to ILEC switched access services. And while not as easily quantified (and therefore not relied upon in the market share analysis below), traditional switched access voice minutes have also been displaced by a broad array of over-the-top voice and non-voice services that are nearly universally available.

1. ILEC Switched Access Lines Are In Inexorable Decline.

“The PSTN no longer functions as a universal communications infrastructure...”
-- *FCC Technology Advisory Council (9/27/2011)*

The Commission has already recognized that the PSTN is rapidly being displaced by other services utilizing multiple IP-based networks as the predominant platforms for communications, including voice. As it explained in the *Universal Service Reform Order*, the

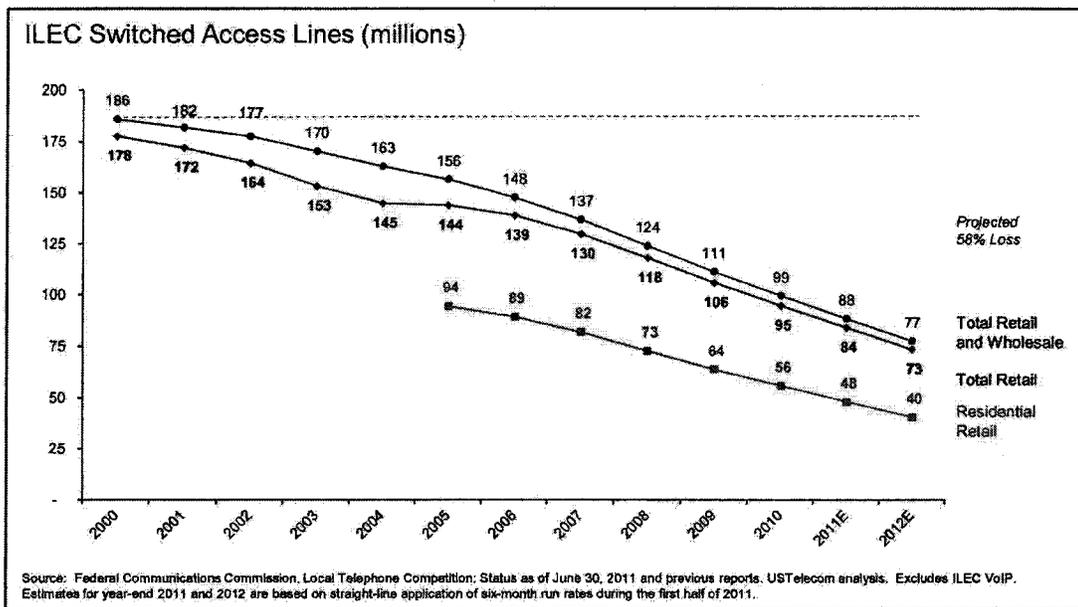
⁶¹ *Id.*

need to reform and fundamentally redefine “universal service” was driven by the displacement of the PSTN by other networks and services and was intended “to make affordable broadband available to all Americans and accelerate the transition from circuit-switched to IP networks, with voice ultimately one of many applications running over fixed and mobile broadband networks.”⁶²

The displacement of the PSTN by alternative technologies has been much more dramatic than the erosion of AT&T’s long distance market share that led to the Commission’s finding of non-dominance. The Commission’s own most recent data shows that by the end of 2011, the number of ILEC switched access lines had declined by more than 50 percent since early 2000 – and was continuing to decline by more than 10% each year.⁶³

⁶² *Universal Service Reform Order*, ¶ 6.

⁶³ The number of retail ILEC PSTN lines in service peaked a little over a decade ago, at approximately 178 million lines. Federal Communications Commission Report, *Local Telephone Competition: Status as of December 31, 2002*, at 5, Table 1 (June 2003) (*FCC Local Competition Status Year-End 2002*). According to the Commission, by the middle of 2011 that number had dropped to 89 million. Federal Communications Commission Report, *Local Telephone Competition: Status as of June 30, 2011*, at 5, Figure 4 (June 2012) (*FCC Local Competition Status Mid-Year 2011*). Our data include retail and wholesale lines, and straight-line estimates for year end. In fact, the actual rate of decline is somewhat greater than the FCC data indicate since the number of reporting ILECs was greater in 2011 compared to 2000 because prior to 2005 only carriers with 10,000 lines or more were required to submit line count data.



A decade ago, 93% of American households subscribed to an ILEC-provided switched access service. Today, that figure is down to *less than one-third* of American households and is projected to decline to a mere *one-quarter* of households by the end of 2013.⁶⁴ Moreover, this comparison significantly understates the degree to which Americans have replaced their reliance upon the PSTN – indeed, as previously noted, the minutes of use over ILEC PSTN subscriber lines has fallen more than 70% despite a growth in population.⁶⁵ In fact, only counting PSTN, inter-connected VoIP and wireless, ILEC switched access minutes were less than one-third of voice minutes *by the end of 2011*.⁶⁶ Given the continued decline in ILEC switched access lines, that share is certainly considerably less today.

2. Interconnected VoIP Service.

“VoIP subscribers will surpass PSTN in 2013. PSTN is expected to decline at 9% annually while VoIP grows at 27%.”

⁶⁴ See chart at p. 8, *supra*.

⁶⁵ *Clarke Paper*, p. 287.

⁶⁶ *Id.*, p. 294, Table 1.

In prior orders, the Commission has acknowledged that interconnected VoIP services are considered by consumers to be substitutes for PSTN voice service.⁶⁷ The Commission reinforced the manifest fact that interconnected VoIP services are alternatives to PSTN voice service in the *Universal Service Reform Order*. As the Commission explained, “[i]ncreasingly, however, consumers are obtaining voice services not through traditional means but instead through interconnected VoIP providers offering services over broadband networks Interconnected VoIP services, among other things, allow customers to make real-time voice

⁶⁷ See, e.g., Memorandum Opinion and Order, *Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. Section 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas*, 22 FCC Rcd 21293, n. 72 (2007) (recognizing “competition from entities such as cable operators that utilize VoIP technology to provide voice services to their customers over their own network facilities.”); see also, Memorandum Opinion and Order, *Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, 23 FCC Rcd. 11729, n. 63 (2008) (*Qwest Phoenix Order*) (including in its analysis “competition from entities that utilize VoIP technology to provide voice services to their customers over their own network facilities – that is, providers of “fixed” VoIP service, including cable operators.”). In other instances, the Commission has also acknowledged other forms of residential voice competition from cable providers. See e.g., Memorandum Opinion and Order, *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, 20 FCC Rcd 19415, ¶ 59 (2005) (finding that the “substantial intermodal competition for telecommunications services provided over Cox’s own extensive facilities is sufficient to grant Qwest forbearance.”); Memorandum Opinion and Order, *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, 22 FCC Rcd. 1958, ¶ 32 (2007) (finding that the local cable operator covered a sufficient portion of the service area to “provide within a commercially reasonable time services that ‘offer the full range of services that are substitutes for the incumbent LEC’s local service offerings.’”).

calls to, and receive calls from, the PSTN, and increasingly appear to be viewed by consumers as substitutes for traditional voice telephone services.”⁶⁸

The Commission’s own data demonstrates the extent to which consumers are increasingly migrating to interconnected VoIP services. In its recent *Local Telephone Competition Report*, the Commission found that as of June 2011, about 33.6 million out of a total of about 146 million U.S. fixed voice lines (23%) were already interconnected VoIP.⁶⁹ Additionally, that same report indicates that one-quarter of households are subscribed to a residential interconnected VoIP service.⁷⁰ The vast majority of these customers are receiving such service from a cable company. In fact, the National Cable & Telecommunications Association (NCTA) reports that more than 20% of all U.S. households subscribed to cable voice services by late 2012.⁷¹

Based on the available data, USTelecom estimates that by the end of 2012, approximately 45% of households subscribed to a *wireline* service will be served by interconnected VoIP, mostly from a cable provider. And by the end of 2013, more than 52% of *wireline* households will be interconnected VoIP – while only 46% of *wireline* households will be

⁶⁸ *Universal Service Reform Order*, ¶163.

⁶⁹ FCC Report, *Local Telephone Competition: Status as of June 30, 2011*, Industry Analysis and Technology Division, Wireline Competition Bureau, Figure 1, p. 2, June 2012 (*2012 Local Competition Report*).

⁷⁰ *2012 Local Competition Report*, Figure 2, p. 3.

⁷¹ See, NCTA website, *Operating Metrics* (available at: <http://www.ncta.com/StatsGroup/OperatingMetric.aspx>) (visited December 17, 2012) (The NCTA data shows that there were 26.4 million cable phone customers as of September 2012).

served by ILEC POTS.⁷² These figures are consistent with the predictions of the Commission's own Technology Advisory Council (TAC) that "VoIP subscribers will surpass PSTN in 2013."⁷³

As detailed below, these shares drop significantly when wireless subscribers are added to the equation – as they most certainly should be.

It is also beyond dispute that interconnected VoIP service is widely available – in many cases from multiple providers. The Commission's own data has found that cable broadband networks reach 85% of American households,⁷⁴ and cable providers are today offering voice service wherever they have facilities. These cable broadband networks have sufficient capacity to absorb the increasing volumes of voice traffic moving from the PSTN to non-ILEC interconnected VoIP services. By some estimates, the amount of voice traffic that travels over the PSTN amounts to only slightly more than 1% of Cisco's figure for total U.S. IP traffic. As a result, the degree to which data networks would need to be incremented in order to carry all remaining PSTN voice traffic is minimal.⁷⁵

3. **Wireless Services.**

"Fixed lines continue to decline; mobile is the preferred choice for voice communications."

-- FCC Technology Advisory Council (6/29/2011)

⁷² See, Table, U.S. Household Primary Line Service Penetration Estimates, p. 41, *infra*.

⁷³ See, Meeting of the Technological Advisory Council Presentation, p. 33, March 30, 2011 (available at: <http://transition.fcc.gov/oet/tac/TACMarch2011mtgfullpresentation.pdf>) (visited December 17, 2012).

⁷⁴ Eighth Broadband Progress Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended*, 27 FCC Rcd. 10342, FCC 12-90, ¶60 (August 21, 2012) (*Section 706 Report*).

⁷⁵ *Clarke Paper*, p. 295.

“Wire-line users are migrating to Wireless as a replacement...Much of the population regard wireless as a replacement and viable alternative to the PSTN with greater service options.”

-- FCC Technology Advisory Council (9/27/2011)

“We know, based on government statistics (and what we observe around us), that Americans are shifting rapidly from reliance on landline phones to mobile devices...there are more households with cell phones than landlines today in the U.S., or conversely, more households without landlines than without cell phones.”

-- Frank Newport, Editor-in-Chief, Gallup (10/10/2012)

When it last considered the question, the Commission concluded that it was not prepared to find based upon the record in that proceeding that mobile wireless services should be considered within the same product market as wireline service.⁷⁶ Whatever the merits of the finding at that time, today such a conclusion would simply contravene reality. Indeed, the Commission has implicitly recognized as much in recent decisions, including its recent decisions to provide support for wireless voice services pursuant to Section 254 of the Act.⁷⁷ Similarly, in its most recent *Broadband Progress Report*, the Commission emphasized that “consumers are choosing mobile broadband at a much faster rate than any other technology,”⁷⁸ adding that “Americans increasingly are using their smartphones and other mobile devices everywhere they go” including at home.⁷⁹

⁷⁶ See, Memorandum Opinion and Order, *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, FCC 10-113, ¶ 55 (2010) (*Qwest Phoenix Forbearance Order*).

⁷⁷ See, *Universal Service Reform Order* at ¶¶ 295-300.

⁷⁸ See, *Section 706 Report*, ¶ 33.

⁷⁹ *Id.*

The most irrefutable evidence of this change in consumer behavior is the continued expansion of households that no longer subscribe to any wireline voice service. For the second half of 2011, the Centers for Disease Control and Prevention reported that the percentage of households that had completely “cut-the-cord” and subscribed only to wireless had grown to more than 34%.⁸⁰ As the CDC itself noted, the growth in cut-the-cord households reflected in its semi-annual reports has been extremely consistent over the prior four years.⁸¹ *Therefore, it is reasonable to project that by the end of 2012 approximately 40% of households will no longer subscribe to a wireline service.* This compares with only 24.5% of households during the second half of 2009, the data relied upon by the Commission during its last consideration of the issue.⁸²

The fact that consumers are subscribing to wireless service in lieu of wireline is underscored by the recent accelerating decline in the percentage of households that subscribe to both a wireless and wireline service. That figure dropped more than 10% between the second-half of 2008 and the second-half of 2011.⁸³ These data are consistent with the analysis

⁸⁰ CDC Report, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July–December 2011*, June, 2012 (available at: <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201206.pdf>) (visited December 17, 2012) (*CDC Wireless Substitution Report*). Because the CDC surveys take place throughout the six-month report window, the reported results more accurately represent the mid-point of the survey period, e.g., approximately September 30 for July-December reports. Given the consistent trend line in the CDC reports, it is reasonable to project that this figure had grown to 36% by year-end 2011.

⁸¹ *Id.* at p. 2 (“The 2.4-percentage-point increase from the first 6 months of 2011 through the second 6 months of 2011 is the average size of increases observed for previous 6-month periods dating back to January 2008.”).

⁸² *Qwest Phoenix Order*, ¶¶ 19 - 22.

⁸³ *CDC Wireless Substitution Report*, p. 6, Table 1 (showing a reduction in the percentage of households taking both landline and wireless to 53.4% for July-December 2011 compared with 59.6% for July-December 2008). In the Commission’s decision subsequent to the *Qwest Phoenix Forbearance Order*, it expressed concern that the number of households subscribing to

from a recent economics paper by researchers with Georgetown University and UC-Berkeley which concludes that “wireline and wireless services have become important substitutes vis-à-vis complements.”⁸⁴

Even among those households where wireline phones are still present, the CDC found that nearly one of every six American homes (16.0%) received all or almost all calls on wireless telephones despite also having a landline telephone.⁸⁵ In other words, today more than 50% of American homes rely predominantly – and in most instances *exclusively* – on wireless telephones for their voice services. Not surprisingly then, by the end of 2011 wireless voice minutes equaled the total voice minutes over the PSTN and inter-connected VoIP networks *combined*.⁸⁶

The Commission is well aware of the historic speed with which wireless services have been adopted by American consumers due to the tremendous freedom allowed by mobility. Approximately 90% of American adults now have a wireless phone.⁸⁷ CTIA reports that in 2011, wireless subscriber connections grew to 331.6 million – a 7% increase from the previous year. And the Commission’s most recent wireless competition report found approximately 97.2% of

both a wireline and wireless service had remained steady at approximately 59% for the past three years. Memorandum Opinion and Order, *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, ¶ 55, n. 164 (2010).

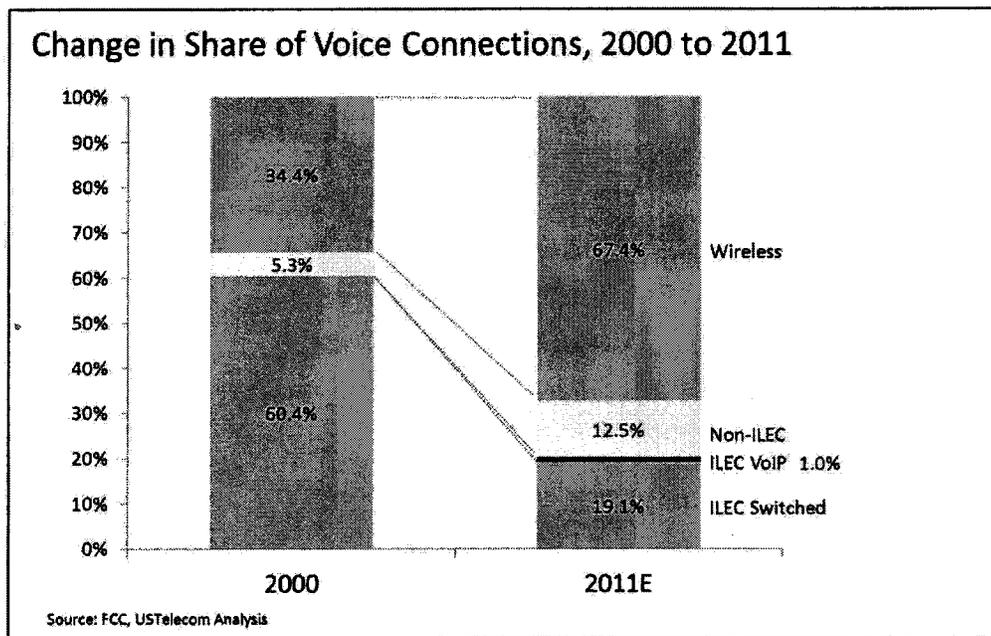
⁸⁴ Jeffrey T. Macher, John W. Mayo, Olga Ukhaneva, Glenn Woroch, *Demand in a Portfolio-Choice Environment: The Evolution of Telecommunications*, p. 19, September 6, 2011 (available at: <http://www.bus.umich.edu/academics/departments/be/pdf/J%20Mayo%20-%20Demand%20in%20a%20Portfolio%20Environment%20September%206.pdf>) (visited December 17, 2012).

⁸⁵ *CDC Wireless Substitution Report*, p. 1.

⁸⁶ *Clarke Paper*, p. 294-295.

⁸⁷ *CDC Wireless Substitution Report*, p. 6, Table 1.

the population are covered by at least three mobile voice providers,⁸⁸ and 94.7 percent of the U.S. population are covered by four or more competitors.⁸⁹ Accordingly, nearly all Americans have multiple wireless options for their voice service.



And as noted previously, wireless networks already carry more voice minutes than the PSTN -- approximately 195 billion wireless voice minutes per month, compared to the approximately 130 billion minutes per month carried by ILECs on the PSTN.⁹⁰ And with the deployment of more advanced wireless networks, wireless capacity has been increasing by an

⁸⁸ Fifteenth Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, 26 FCC Rcd. 9664, FCC 11-103, ¶44 (June 27, 2011) (*Fifteenth Wireless Competition Report*).

⁸⁹ *Fifteenth Wireless Competition Report*, ¶45.

⁹⁰ *Clarke Paper*, p. 294.

estimated 60 billion minutes each month.⁹¹ Accordingly, these networks clearly have sufficient capacity to accommodate significant further transitioning from wireline usage.

The CDC data discussed above has repeatedly been relied upon by the Commission. Of course, the primary reason the CDC surveys this question as part of National Health Interview Statistics is because of the impact of cut-the-cord consumers on the ability of its survey to reach a representative sample of households.⁹² Similarly, the Gallup polling organization has increased the percentage of wireless respondents that it includes in surveys to 50% from zero percent prior to 2008, explaining that this change in statistical methodology was necessary “to take into account the growing number of people who don’t even talk on landlines.”⁹³ And this trend to rely solely on wireless for voice service will only accelerate as today’s younger generations become a larger percentage of the population. As one commentary succinctly describes this effect, college students graduating in 2012 grew up in “an era where computers and rapid communication are the norm,” and will “hardly recognize the availability of

⁹¹ *Id.*, p. 297.

⁹² *CDC Wireless Substitution Report*, p. 3 (stating that “the potential for bias due to undercoverage remains a real and growing threat to surveys conducted only on landline telephones.”).

⁹³ *Communications Daily*, October 23, 2012, p. 11 (quoting Frank Newport, Editor in Chief, Gallup); *see also*, Gallup website, Polling Matters, *Survey Methods, Complex and Ever Evolving*, (available at: <http://pollingmatters.gallup.com/2012/10/survey-methods-complex-and-ever-evolving.html>) (visited December 17, 2012) (explaining that Gallup has consistently adjusted its methodology over time because “we know, based on government statistics (and what we observe around us), that Americans are shifting rapidly from reliance on landline phones to mobile devices...there are more households with cell phones than landlines today in the U.S., or conversely, more households without landlines than without cell phones.”).

telephones in their rooms since they have seldom utilized landlines during their adolescence. They will continue to live on their cell phones and communicate via texting.”⁹⁴

4. Over-the-Top VoIP Services.

The Commission also cannot ignore the significant impact that over the top VoIP services have with respect to providing a viable alternative to traditional PSTN offerings. While subscriber counts for domestic over-the-top VoIP providers are generally not publicly available, the Commission cannot reasonably deny the presence, availability and increasing use of such services by consumers.

The Commission’s recent Broadband Report concluded that “VoIP services, which can be used with a data rate as low as 100 Kbps but require relatively low latency, were adequately supported by all of the broadband service tiers.”⁹⁵ The Commission’s Broadband Report shows that 94% of American consumers have access to fixed broadband services, meaning 297 million of the nation’s 316 million consumers have access to a wide selection of over-the-top VoIP services through fixed broadband connections.⁹⁶ Regarding wireless broadband access, the Commission found that 98.4% of the population has access to mobile broadband services with download/upload rates of at least 768k/200k.⁹⁷ Given the Commission’s own findings, consumers clearly have access to sufficient wireless and fixed broadband in order to support over-the-top VoIP applications.

⁹⁴ Beloit College, Mindset List, 2012 List (available at: <http://www.beloit.edu/mindset/2012/>) (visited December 17, 2012).

⁹⁵ *Section 706 Report*, ¶¶ 127 – 129.

⁹⁶ *Id.*, Table 1, p. 29.

⁹⁷ *Id.*, ¶¶ 86 – 88; Table 14, p. 42.

In fact, since the Commission's Broadband Report utilizes a speed benchmark of 4 Mbps download and 1 Mbps upload for fixed broadband services; and since most over the top VoIP services advertise services that can utilize much lower thresholds, it is likely that the percentage of consumers with access to competitive over the top VoIP offerings is even greater. Skype, for example, advertises that the minimum download and upload speeds necessary for its standard calling service is a mere 30kbps download and upload.⁹⁸

The over-the-top VoIP services that are available to American consumers are offered by some of the country's most prominent companies, including Google (Google Voice and Google Talk), Microsoft (Skype) and Apple (FaceTime). Not only does each company play a significant role in the offering of over-the-top VoIP services, but they also manufacture and sell extremely popular consumer software and hardware products supporting communications services.

Apple, for example, offers consumers some of the best-known hardware products, including the iPhone, iPad and iPod Touch, each of which is capable of utilizing the company's popular FaceTime service. Similarly, Google is one of the leading developers of the Android operating system, which became the world's leading smartphone platform at the end of 2010.⁹⁹

⁹⁸ See, Skype website, *How much bandwidth does Skype need?* (available at: <https://support.skype.com/en/faq/FA1417/how-much-bandwidth-does-skype-need>) (visited December 17, 2012).

⁹⁹ See, Canalys website, *Google's Android becomes the world's leading smart phone platform*, January 31, 2011 (available at: <http://www.canalys.com/newsroom/google%E2%80%99s-android-becomes-world%E2%80%99s-leading-smart-phone-platform>) (visited December 17, 2012).

On May 22, 2012, Google completed its acquisition of Motorola Mobility, the company that created the first cell phone.¹⁰⁰

In addition to providing the Android software that powers smartphone platforms and consumer electronics devices, Google also began offering consumers its Google Voice service in March 2009. By October 2009, when the service was an "invitation only" offering, Google Voice registered 1.4 million users, 570,000 of whom used the service seven days a week.¹⁰¹ Although Google has not released updated subscriber numbers since 2009, it noted that in 2011 that its over-the-top VoIP had "evolve[d] significantly," since 2009.¹⁰² During 2011, Google Voice went out of invite-only mode and became available to all US users, and the company launched Google Voice applications for the iPhone, iPod Touch and iPad. In addition, Google made it possible to "get the full set of Google Voice features on your existing mobile number by porting it to Google Voice."¹⁰³ And in December 2011, Google announced that it had extended free domestic calls within the US and Canada for 2012.¹⁰⁴

¹⁰⁰ See, Google Official Blog, *We've acquired Motorola Mobility*, May 22, 2012 (available at: <http://googleblog.blogspot.com/2012/05/weve-acquired-motorola-mobility.html>) (visited December 17, 2012).

¹⁰¹ See, Sam Diaz, Business Week, *1.4 million Google Voice users, global push in the works*, ZDNet, October 30, 2009 (available at: <http://www.zdnet.com/blog/bt/business-week-1-4-million-google-voice-users-global-push-in-the-works/26813>) (visited December 17, 2012).

¹⁰² See, Vincent Paquet, Google Voice Product Manager, Google Voice Blog, *Google Voice turns 2!*, March 11, 2011 (available at: <http://googlevoiceblog.blogspot.com/2011/03/google-voice-turns-2.html>) (visited December 17, 2012) (*Google Voice Blog*).

¹⁰³ *Google Voice Blog*.

¹⁰⁴ See, Vincent Paquet, Google Voice Product Manager, Google Voice Blog, *Free calling within the US and Canada through 2012*, December 13, 2011 (available at: <http://googlevoiceblog.blogspot.com/2011/12/free-calling-within-us-and-canada.html>) (visited December 17, 2012).

Finally, Microsoft's over-the-top VoIP service remains one of the most popular offerings available. Even prior to its acquisition by Microsoft, Skype disclosed to the Securities and Exchange Commission in August, 2010, that the company had 20 million connected users in the United States, 1.9 million of which were paying customers.¹⁰⁵ Although Microsoft has not released subscribership data for Skype since its acquisition of the company in May, 2011, the New York Times reported in May, 2012, that in seven months, "the number of people using the service each month has jumped 26 percent to nearly a quarter of a billion."¹⁰⁶

In July of this year, Microsoft announced that during the first quarter of 2012, registered users had logged 115 billion minutes of calls on Skype, an increase of 50% from the prior quarter.¹⁰⁷ Microsoft also announced that it will be integrating Skype into its office productivity suite, powering the "presence" feature in Outlook and becoming a default piece of every version of Office shipped.¹⁰⁸ Furthermore, Skype is reportedly continuing its strategy to enable

¹⁰⁵ See, Skype Form S-1, Registration Statement, August 9, 2010, p. 138 (available at: <http://www.sec.gov/Archives/edgar/data/1498209/000119312510182561/ds1.htm>) (visited December 17, 2012).

¹⁰⁶ Nick Wingfield, New York Times, *\$8.5 Billion Deal for Calling Service Presents a Puzzle*, May 28, 2012 (available at: http://www.nytimes.com/2012/05/29/technology/microsoft-at-work-on-meshing-its-products-with-skype.html?_r=1&pagewanted=all) (visited December 17, 2012) (*New York Times Article*).

¹⁰⁷ See, Microsoft Investor Relations website, *Earnings Call Transcript*, July 19, 2012, p. 7 (available at: http://www.microsoft.com/global/investor/RenderingAssets/Downloads/FY12/Q4/Microsoft_Q4_2012_PreparedRemarks.docx) (visited December 17, 2012).

¹⁰⁸ Rip Empson, TechCrunch, *How's Skype Doing At MSFT? Usage Jumps 50%, Users Logged 115B Minutes Of Calls Last Quarter*, July 19, 2012 (available at: <http://techcrunch.com/2012/07/19/skype-at-microsoft/>) (visited December 17, 2012).

consumers to make calls from any device connected to the Internet, not just ones powered by Microsoft software.¹⁰⁹

In this regard, Skype has developed versions of its calling software for use on Google Android smartphones and tablets, a Sony portable game console, Comcast set-top boxes and Apple mobile devices.¹¹⁰ Skype CEO Tony Bates noted that while most of the current Skype user activity is on personal computers, "iPhone is our top platform for downloads, and Android is our fastest-growing platform."¹¹¹ In fact, Skype is the fourth most-downloaded free app of all time for both the iPhone and iPad.¹¹² In September 2011, Skype revealed that its iPhone app had been downloaded nearly 60 million times to date and that it had been downloaded more than one million times in the first 36 hours following its debut in March 2009.¹¹³ That number has since increased to 120 million downloads.¹¹⁴

And recent surveys suggest that American consumers are increasingly looking towards over-the-top VoIP services as an alternative to traditional PSTN voice offerings. A study last

¹⁰⁹ *New York Times Article.*

¹¹⁰ *New York Times Article; see also, Skype website, The Big Blog, Derek Snyder, Say Hello to Skype for Android Tablets, November 20, 2012 (available at: <http://blogs.skype.com/en/2012/11/say-hello-to-skype-for-android-tablets.html>) (visited December 17, 2012).*

¹¹¹ *V2M Article.*

¹¹² *New York Times Article.*

¹¹³ *Skype website, The Big Blog, Heather LeRoy, Skype for iPhone & Skype for iPad Updates Deliver Anti-Shake Technology & Bluetooth Connectivity, September 26, 2011 (available at: <http://blogs.skype.com/en/2011/09/skype-for-iphone-skype-for-ipa.html>) (visited December 17, 2012).*

¹¹⁴ *Skype website, The Big Blog, Jonathan Watson, Skype for iPhone and iPad Hits over 120 Million Downloads and Releases New Versions, November 28, 2012 (available at: <http://blogs.skype.com/en/2012/11/skype-for-iphone-and-ipad-hits.html>) (visited December 17, 2012).*

year from the Pew Research Center's Internet & American Life Project (Pew), specifically referred to Skype, when it asked consumers if they "ever use the internet to make a phone call online, using a service such as Skype or Vonage?"¹¹⁵ The Pew study found that a quarter of American adult internet users (25%), and 19% of all American adults, have placed phone calls using over-the-top VoIP services.¹¹⁶ It noted that both of these figures represented "marked increases from previous readings" in previous Pew surveys.

Moreover, the Pew study stated that there is "little doubt that the popularity of online phone calling has picked up over time for several reasons."¹¹⁷ Among the reasons cited by Pew for this increase is that such services are "free or cheaper than other types of phone calling; it is enabled on many handheld devices like smartphones and tablet computers . . . and more families and friends are building online calls into their communications streams."¹¹⁸

5. Consumers Are Adopting New Communications Technologies to Replace Significant Amounts of Traditional "Voice" Services.

"In addition to the availability of alternative mechanisms for voice communication, there are now services, a number of which have high levels of acceptance and use within U.S. households and businesses, that could provide equivalent or even vastly superior means of achieving some of the social and economic goals previously attained via the PSTN. Among others, these new services include: messaging services such as IM/SMS; mature applications like email; social networking services such as Facebook, Twitter, and many others; web and cellular based

¹¹⁵ Lee Rainie, Director, Pew Research Center's Internet & American Life Project, *24% of internet users have made phone calls online*, May 30, 2011 (available at: http://www.pewinternet.org/~media/Files/Reports/2011/PIP_Internet%20phone%20calls.pdf) (visited December 17, 2012) (*Pew VoIP Study*).

¹¹⁶ *Pew VoIP Study*, p. 2

¹¹⁷ *Id.*, p. 3.

¹¹⁸ *Id.*

Geographic Information Systems such as Google Maps, Mapquest, TomTom, Garmin and NavTeq; and many widely accepted applications on smart phones.”

-- FCC Technology Advisory Council (9/27/2011)

“Consumers increasingly rely on – and many of them prefer – texting as a primary source of communications. Texting will become increasingly important as we harness the new tools of technology to the requirements of a safe and secure nation...We have to get beyond thinking about critical communications as just traditional voice and realize that consumers don’t make a lot of these distinctions among services and technologies that so often seem to fixate us and stymie us here in Washington...Indeed today’s consumers might rightly wonder: what’s so “next generation” about texting?”

-- Commissioner Michael J. Copps (10/22/2011)¹¹⁹

A major implication of the widespread deployment of wired and wireless IP-based networks is the fact that consumers are today exchanging significant amounts of traditional voice communications with alternative forms of communications. That is, where consumers once would have “made a phone call,” they are increasingly choosing to text, e-mail, social network, video-chat or utilize some other form of communication service.

The Pew Internet & American Life Project (Pew) has released several reports confirming the widespread of adoption and use of alternative communication platforms by consumers. A Pew analysis in December 2010, showed the percentage of Internet users across multiple

¹¹⁹ See, Notice of Proposed Rulemaking, *Facilitating the Deployment of Text-to-911 and Other Next Generation 911 Applications*, 26 FCC Rcd. 13615, Statement of Commissioner Michael J. Copps, p. 1 (Sept. 22, 2011).

generations (*e.g.*, Gen X'ers, Older Boomers, etc.) engaging in various forms of online activity that were once limited to phone calls.¹²⁰

Activities that were once carried out by making a phone call are now conducted by a majority of consumers online. These include making travel reservations, obtaining information from Government websites, banking online and researching health information. Earlier generations, such as "Younger Boomers" (ages 46 – 55) and "Older Boomers" (ages 56 – 64), were even more expansive in their Internet use, with a majority utilizing the Internet for purchasing products, instant messaging, viewing video and social networking activities.

Even older generations have widely embraced the availability of alternative communication platforms and services. As of February 2012, Pew reported that more than one third (34%) of internet users age 65 and older use social networking sites such as Facebook, and 18% do so on a typical day. By comparison, email use continues to be the bedrock of online communications for seniors, with 86% of Internet users age 65 and older using email, and 48% doing so on a typical day.¹²¹

The case supporting USTelecom's relief here is overwhelming even without consideration of these voice alternatives. And since, admittedly, quantifying the degree to which such replacement is taking place is a complex undertaking, USTelecom does not rely on this profound societal shift in its market share analysis below. Still, it is irrefutable that a

¹²⁰ Pew website, *Generations Online 2010: Summary of Findings*, December 16, 2010 (available at: <http://pewinternet.org/Infographics/2010/Generations-2010-Summary.aspx>) (visited December 17, 2012).

¹²¹ Kathryn Zickuhr, Mary Madden, Pew Report, *Older adults and internet use*, June 6, 2012, p. 9 (available at: <http://pewinternet.org/Reports/2012/Older-adults-and-internet-use.aspx>) (visited December 17, 2012).

significant and rapidly growing amount of traditional voice traffic is being displaced by these new forms of communications. Indeed, the Commission emphasized this shift in support of the need to reform the traditional inter-carrier compensation regime.¹²²

F. The Continued Treatment of ILECs as “Dominant” in the Provision of Switched Access Services— Alone Among Voice Service Providers – is Economically Irrational and Discourages the Deployment of New Broadband Networks.

As conclusively demonstrated in the foregoing, there has been a profound and accelerating technological and societal shift away from services offered over the legacy PSTN to IP-based services offered over fixed and mobile broadband networks. These shifts raise significant questions concerning the manner in which the Commission and others have traditionally evaluated competition for the provision of voice services – or even whether voice should continue to be considered a discrete product market.

But even under a more traditional market power approach, it simply can no longer be seriously argued that ILEC POTS, and thus the underlying switched access voice services, remain “dominant”. The Commission itself has recognized that “courts virtually never find monopoly power when market share is less than about 50 percent.”¹²³ Indeed, as noted previously, the Commission has recently found that preemptive regulation is no longer necessary to protect

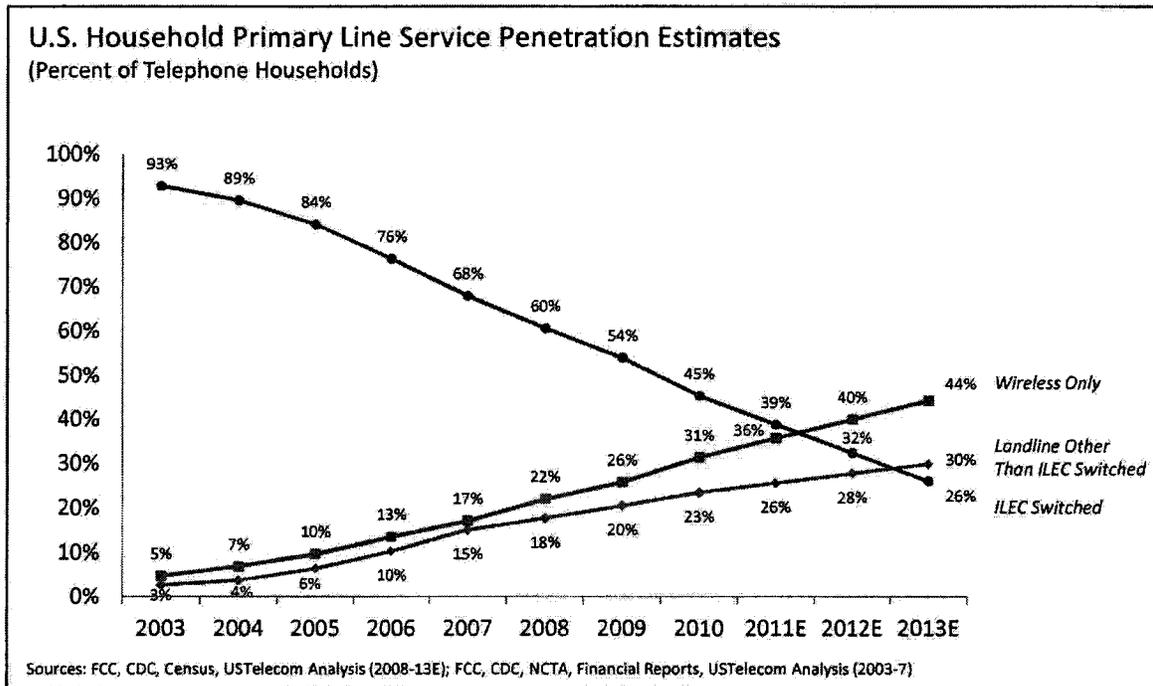
¹²² See, e.g., *Universal Service Reform Order* at 7, ¶19 (explaining that consumers are increasingly shifting “from traditional telephone service to substitutes including...texting and email.”)

¹²³ Report and Order on Reconsideration, *Rules and Policies on Foreign Participation*, 12 FCC Rcd 23891, ¶ 161, n. 314 (1997) (citing A.B.A. Section of Antitrust Law, *Antitrust Law Developments* at 235-236 (4th ed.) (1997) (supporting the establishment of a presumption that foreign carriers with less than 50 percent market share lack market power).

competition in the MVPD market based on a finding that cable companies' national market share had been reduced to 57.4 percent.¹²⁴

But today, less than one in three households subscribes to an ILEC switched access service – far below any defensible measurement of market power. Indeed, based upon the Commission's own data and analysis, this figure is likely to be closer to one-in-four households by the end of 2012; and the Commission's TAC projects that it will be down to 6% within 5 years.¹²⁵

As the charts below demonstrate, these households aren't somehow going "off the grid" – they are instead rapidly migrating to new technologies that include both VoIP and wireless.



¹²⁴ *Program Access Order*, ¶¶ 17, 31.

¹²⁵ See, Technology Advisory Council Presentation, *Status of Recommendations*, June 29, 2011, p. 12 (available at: <http://transition.fcc.gov/oet/tac/TACJune2011mtgfullpresentation.pdf>) (visited December 17, 2012).

U.S. Household Voice Telephony Choices 2008-2011

	Households 2008	Share of Phone Households	Households 2009	Share of Phone Households	Households 2010	Share of Phone Households	Households 2011 Estimated	Share of Phone Households	Households 2012 Estimated	Share of Phone Households	Households 2013 Estimated	Share of Phone Households
Total Households	117.1	n/a	117.4	n/a	118.4	n/a	119.3	n/a	120.0	n/a	120.8	n/a
Total Phone Households	114.9	100%	115.1	100%	116.0	100%	116.8	100%	117.5	100%	118.3	100%
ILEC Switched (Retail and Wholesale)	69.5	60%	62.0	54%	52.5	45%	45.2	39%	37.9	32%	30.6	26%
Non-ILEC Switched (Excl. ILEC Wholesale)	2.5	2%	2.3	2%	1.9	2%	1.6	1%	1.2	1%	0.8	1%
VoIP	17.7	15%	21.2	18%	25.2	22%	28.4	24%	31.5	27%	34.6	29%
ILEC VoIP	0.2	0%	0.9	1%	2.3	2%	3.6	3%	4.9	4%	6.2	5%
Non-ILEC VoIP	17.5	15%	20.3	18%	23.0	20%	24.8	21%	26.6	23%	28.4	24%
Cord Cutters	25.2	22%	29.6	26%	36.3	31%	41.7	36%	47.0	40%	52.3	44%
No-Phone Households	2.2	n/a	2.3	n/a	2.4	n/a	2.5	n/a	2.5	n/a	2.5	n/a

Sources: CDC, FCC, Census, USTelecom Analysis. Estimates for 2011-13 based on straightline run rates for actual data from year-end 2010 to mid 2011.

As detailed above, 40% of households have gone wireless-only – the most conservative measurement of wireless replacement.¹²⁶ And more than one-quarter of households have switched to a VoIP service, the vast majority of which are being provided by cable companies. This loss of customers from ILEC switched access services far exceeds (both in line and minutes) the losses that led to AT&T being found non-dominant in long distance. This would even be true if one illogically counts only wireline connections.

Indeed, any way one looks at it, the marketplace shift away from ILEC switched access services greatly exceeds that which formed the basis for the Commission's grant of non-dominance for AT&T's long distance services:

- ILECs face competition from a greater number of facilities-based competitors than did AT&T long-distance at the time it was found non-dominant, as well as a very large number (indeed, virtually unlimited) of non-facilities-based competitors. The Commission's own reports

¹²⁶ These projections are based upon a straight-line application of CDC and FCC data comparing first-half and second-half 2011 data. To be conservative, ILECS wholesale lines that are resold by third parties are attributed to the ILEC share.

show that 82% of the population lives in areas served by at least 3 wireless 3G or 4G network providers¹²⁷ and at least 85% of the population is served by a cable company;¹²⁸

- ILEC switched access market share has fallen by considerably more than the one-third reduction experienced by AT&T long distance at the time it was found non-dominant;
- ILEC switched access market share is significantly lower in both customers and minutes of use than that of AT&T long distance at the time it was found non-dominant (and this would be true even if the Commission somehow excluded wireless);
- These former ILEC switched access customers have switched to inter-connected VoIP, wireless and over-the-top VoIP competitors in tremendous numbers and these competitors clearly have sufficient “readily available excess capacity” to take on significant additional market share from the ILECs.¹²⁹

Nor is it necessary for the Commission to analyze these trends at a more granular level than nation-wide, as the Commission has repeatedly recognized that this transition is happening virtually everywhere in the country. Rather, the Commission should apply the same level of scrutiny it recently used in the analagous proceeding involving cable industry dominance of the MVPD market.

In orders over the past decade, the Commission had previously found that cable operators were dominant in the provision of MVPD services, with market shares between 67

¹²⁷ *Fifteenth Wireless Competition Report*, ¶ 46.

¹²⁸ *Section 706 Report*, ¶ 60.

¹²⁹ *See, AT&T Non-Dominance Order*, 11 FCC Rcd at 3303-3309.

percent and 63.5 percent of subscribers.¹³⁰ But in its recent *Order* eliminating the presumption against exclusive arrangements for vertically-owned programming, the Commission found that cable companies were no longer likely to be able to engage in anti-competitive conduct because the companies combined *national market share* had fallen to 57.4 percent, from 67 percent five years earlier.¹³¹ The Commission noted that cable companies retained market shares *as high as 80 percent in some regions* but determined that the regulatory presumption should still be eliminated *on a nationwide basis*, with specific conduct evaluated on a case-by-case basis.¹³² The Commission concluded that such a case-by-case approach, rather than a “preemptive ban”, would “adequately address competitively harmful conduct in a more targeted, less burdensome manner.”¹³³ USTelecom seeks a consistent analytical approach with respect to this request, in which ILEC market shares, by any conceivable measure, are significantly lower than those of the cable industry in the MVPD market.

The Commission’s own broadband maps – as well as those developed by NTIA – demonstrate that multiple facilities-based alternative voice services are available to nearly all Americans; these alternative have already been widely adopted by consumers at a rate that

¹³⁰ Report and Order and Notice of Proposed Rulemaking, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 22 FCC Rcd. 17791, ¶ 65 (2007); see also, First Report and Order, *Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, 25 FCC Rcd. 746, ¶¶ 27, 42 (2010) (the Commission noted that cable’s market share was approximately 63.5%, *id.*, ¶27, and therefore concluded that “cable operators still have a dominant share of MVPD subscribers.” *Id.*, ¶ 42).

¹³¹ *Program Access Order* at ¶ 17.

¹³² *Id.* at ¶ 18 and note 67.

¹³³ *Id.* at ¶ 21.

exceeds virtually any consumer technology in history; and these alternative networks have many times the capacity necessary to support the continuation of this voice transition.¹³⁴

Yet, despite this reality, ILEC voice services offered over these legacy networks continue to be subject to decades-old monopoly regulations not applied to any other service provider. Not only can such an imbalanced regulatory scheme no longer be justified, its continued enforcement by the Commission has significant negative public policy consequences. Most critically, and as emphasized by the *National Broadband Plan*, such un-necessary regulation is “siphoning investments away from new networks and services.”¹³⁵

III. CONCLUSION.

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

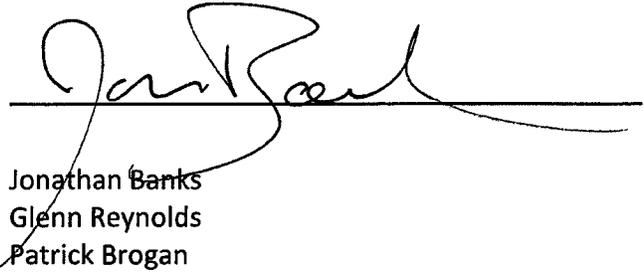
¹³⁴ Cf. *AT&T Non-Dominance Order*, 11 FCC Rcd at 3303-3309.

¹³⁵ *National Broadband Plan*, p. 59.

Respectfully submitted,

UNITED STATES TELECOM ASSOCIATION

By:

A handwritten signature in black ink, appearing to read "Jonathan Banks", is written over a horizontal line. The signature is fluid and cursive.

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