

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

In the Matter of)
)
AT&T and NTCA Petitions on Transition) GN Docket No. 12-353
from Legacy Transmission Platforms to)
Services Based on Internet Protocol)

COMMENTS OF
THE FREE STATE FOUNDATION¹

I. Introduction and Summary

These comments are submitted in response to the Commission's request for comments on petitions urging the Commission to alter policies in response to the ongoing technological transition of voice networks. In these comments we offer our views concerning the principles and priorities that should guide the Commission's policies toward completing the IP transition on a timely basis and the anticipated retirement of the public switched telephone network (PSTN).

In recent years, the market for voice services has undergone dynamic change. This includes the emergence of cross-platform competition in local and long distance services as well as the employment of IP- and broadband-enabled technologies. Trends over the last several years reveal an ongoing migration of providers and consumers from legacy TDM networks to all-IP networks. For consumers, and for the nation as a whole, to realize the full benefit of these innovative and competitive breakthroughs, the Commission must replace its legacy monopoly approach to ensuring access to voice services with a much less regulatory approach. Otherwise,

¹ These comments express the views of Randolph J. May, President of the Free State Foundation, and Seth L. Cooper, Research Fellow of the Free State Foundation. The views expressed do not necessarily represent the views of others associated with the Free State Foundation. The Free State Foundation is a nonpartisan, non-profit free market-oriented think tank.

the service providers necessarily will have fewer funds available to invest in new broadband facilities as they continue to sink scarce capital into legacy facilities utilized by a dwindling number of customers.

Consumers stand to benefit from the advanced capabilities of new all-IP networks in providing voice services as against older and increasingly outdated copper-based TDM legacy switched circuit systems. Permitting carriers to focus on investing in and upgrading next-generation network technologies ultimately will improve consumer experience through technically superior services as well as prospectively reduced prices. Absent concerted action to facilitate the PSTN's retirement from its decades-old regulatory grip, consumers will continue to encounter the legacy system's drag on next-generation network investment through delayed deployment of new broadband technologies. This drag likely will delay price reductions that would otherwise result from all-IP network economic efficiencies.

A simpler and less prescriptive regulatory framework is needed to ensure that all-IP networks will thrive in an environment free from outdated and cumbersome legacy restrictions. This means adopting a more market-driven approach to ensuring universal service through an interconnected voice network with basic consumer protections. By exercising its forbearance authority, in particular, the Commission can adopt a simplified regulatory framework for ensuring access to voice services by all Americans while, at the same time, ensuring that voice providers using competing platforms have the freedom and flexibility to best serve consumers. Indeed, the Commission's forbearance authority, which thus far has been too little used, would seem to be an especially appropriate tool for the FCC to employ in facilitating the IP-transition. Likewise, the Commission can use its waiver authority to remove regulatory impediments to ensuring access to reliable voice service via all-IP networks.

The Commission should not hesitate to issue waivers and declaratory rulings clarifying the status of IP-enabled services, such as VoIP, in order to ensure the operation of a nationwide free marketplace for such services. This includes declarations that preempt state regulations where technological and other marketplace developments demonstrate the inherently interstate nature of new types of services.

An agency process for facilitating this transition to all-IP voice services should be established and earnestly pursued to ensure the timely end of the PSTN. The Commission should freely employ a series of trials, geographically targeted and consisting of varying deregulatory and consumer choice components, to assess the efficiency and effectiveness of reforms. The Commission should invoke its forbearance and waiver authorities as necessary to permit such trials to proceed on a timely basis. For instance, forbearance relief or waivers could be granted to clear away potential obstacles to all-IP network transitions posed by service discontinuance requirements, notice-of-network change regulations, carrier-of-last-resort obligations, or other unnecessary mandates. Trials can provide the Commission with valuable, real-world data that can inform broader PSTN retirement efforts as well as the composition of a new deregulatory framework for all-IP voice services.

Finally, the FCC should set a deadline for retirement of the legacy PSTN regulatory system. A PSTN sunset date should coincide with the final implementation of a new, deregulatory, market-driven framework for voice services in an all-IP world. A specific deadline will focus the efforts of the Commission and legacy voice providers and will better ensure, for the benefit of the nation's consumers, that the IP-transition and PSTN retirement process takes place in a timely manner.

II. Dynamic Change Resulting from Cross-Platform Competition and IP-Enabled Technologies Requires Replacement of the Legacy Monopoly System with a Market-Driven Framework

When a market undergoes rapid and dramatic change – as the voice services and advanced telecommunications market surely has – the basic regulatory approach to that market should reflect such change. Otherwise, consumer welfare is likely to suffer on account of regulation that restricts new services from being made available or results in higher prices being charged by complying providers. When markets move from a monopolistic to a competitive environment – as is certainly the case when it comes to voice services in the last decade or more – regulatory policy should no longer be premised on outdated monopolistic assumptions. This is especially important where markets undergo disruptive changes brought about by innovative technologies and business models.

Dynamic markets should be accompanied by a less onerous regulatory approach that provides incentives for continued innovation and investment. Free market competition should set the backdrop for innovative and competitive markets. The market should serve as the primary means for incentivizing and disciplining providers to ensure availability of superior service and price options to consumers.

Under a deregulatory, market-driven approach, government intervention should be limited. Ideally, any needed regulatory requirements should be narrowly-targeted and provide the least intrusive means available to serve statutory objectives. Any such regulations should provide clarity and minimize administrative burdens for compliance. The benefits of any necessary regulations should outweigh the costs.

Up through the early 1990s, the vast majority of consumers were reliant on a single local exchange provider operating highly centralized circuit-switched networks. In that monopoly-era

context, the FCC's array of PSTN regulatory requirements had stronger plausibility claims. But the communications landscape has changed dramatically over the last couple of decades, with competition growing in local and long distance services and innovative IP-enabled technologies on course to overtake older, copper-based switched circuit technologies. Today's broadband-centric market for digital communications provided by competing wireline, cable, and wireless platforms should be matched by a deregulatory, market-driven policy that encourages further innovation, investment, and competition through Internet-connected and IP-enabled services. Once free from outdated, unnecessary, and burdensome regulatory restraints – and the ongoing costs incurred in complying with these restraints – providers will be in the best position to further deploy and upgrade all-IP networks for delivering voice services.

But as will be discussed below, failure to bring about a change in policy risks serious harm to consumer welfare, as existing regulation will preclude full realization of the technological and economic benefits of next-generation networks.

III. The Commission Must Establish a New Policy Framework for Ensuring Access to Voice Services in an All-IP World

The Commission has previously recognized that "broadband technologies...are fast becoming substitutes for communications services provided by older, legacy communications technologies."² It has also acknowledged that retirement of the PSTN is a critical goal for the agency.³ With the advent of IP-based technologies, copper-based TDM networks are becoming increasingly anachronistic. IP-enabled services offer superior technological capabilities as well as economic efficiencies.

² Public Notice: "FCC Workshops on the Public Switched Telephone Network in Transition" at ¶ 2 (2011), available at: http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db1110/DA-11-1882A1.pdf.

³ See *Connecting America: The National Broadband Plan*, at 49, available at: www.broadband.gov. See also, e.g., *In re: Connect America Fund*, et al., 26 FCC Red 17663, at 17926 ¶ 783, 18123 ¶ 1335 (2011) ("*USF Reform Order*").

Maintaining legacy networks is increasingly expensive and burdensome. The costs of maintaining such networks continue to rise while the number of switched access lines continues to drop. As the Commission's *Local Telephone Competition Report* reveals, the number of ILEC end-user switched access lines dropped precipitously from over 142 million in June 2006 to under 90 million in December 2011.⁴ Meanwhile, the number of cable and other non-ILEC interconnected VoIP subscribers have risen significantly, from just over 21 million in December 2008 to just under 32 million in December 2011.⁵ And the number of wireless connections has skyrocketed from approximately 38 million in 1996 to nearly 322 million in June 2012.⁶ An estimated 34% of households already are relying exclusively on wireless for voice services.⁷

Costs are also rising due to the increasingly expensive replacement parts needed to maintain legacy network operations. The Commission has previously highlighted the unnecessary duplication costs that result when carriers are required to maintain two separate networks to perform the same end-user services.⁸ Responding to legacy regulatory requirements, carriers must pour financial resources into outdated networks in order to satisfy regulatory requirements rather than consumer demand. By stranding investments in legacy networks, investment in next-generation services is thereby deterred.

IP-enabled services have thrived in a largely unregulated environment – certain regrettable exceptions aside – on account of rapid technological change and free market

⁴ *Local Telephone Competition Report: Status as of December 31, 2011* (January 2012), at 16 (Table 5), available at: http://transition.fcc.gov/Daily_Releases/Daily_Business/2013/db0114/DOC-318397A1.pdf.

⁵ *Id.* at 15 (Table 4).

⁶ CTIA, "Semi-Annual Mid-Year 2012 Top-Line Survey Results" (2012), at 3, available at: http://files.ctia.org/pdf/CTIA_Survey_MY_2012_Graphics-final.pdf.

⁷ Stephen J. Blumberg, Ph.D., and Julian V. Luke, "Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July-December 2011," Division of Health Interview Statistics, National Center for Health Statistics, Centers for Disease Control and Prevention (2012), available at: <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201206.pdf>.

⁸ *Connecting America: The National Broadband Plan*, at 49, 59.

competition. A post-PSTN regulatory framework – and the transition process that must precede its full implementation – should reflect these new technological and market realities. The monopoly-era assumptions behind legacy regulations, on the other hand, are no longer justified in light of today's dynamic conditions. A reformed, less onerous regulatory approach is needed to promote innovation and investment in interconnected IP networks delivering universal service.

IV. The New Framework Should Include Only Those Obligations or Regulations Necessary to Satisfy Basic Statutory Requirements for Ensuring Universal Service

A new framework for all-IP voice services and the PSTN retirement process must be limited to ensuring that basic voice services are available to all Americans. The Commission possesses discretion in carrying out statutory duties, including its duty to promote access to voice services. But its exercise of that authority should not be harnessed to further extraneous ends that ultimately detract from overall consumer welfare.

Debates over financial incentives through subsidies and rate recovery should, for instance, be addressed through the Commission's USF/ICC reform proceedings and not derail the establishment of a new framework. And the Commission's exercise of its authority for ensuring access to voice services should not be turned into a vehicle for imposing new rates or other mandates for non-voice services or IP-enabled services generally. A proper focus on ensuring provision of voice services via all-IP networks should result in minimal, targeted regulation while ensuring providers maintain marketplace freedom in offering consumers other IP-enabled services.

The Commission should also consider issuing declaratory rulings that clarify the status of IP-enabled services, such as VoIP. In prior orders the Commission has recognized the benefits that result from ensuring that a truly national market exists for such services, free from layers of

burdensome regulations.⁹ Here, the Commission should be ready to issue declarations that preempt state regulations where technological and market developments demonstrate the inherently interstate nature of new types of IP-based services, as well as the impediments posed by state or local regulations. Unlike the old analog networks, it is costly and impractical, if not impossible, to track the jurisdictional status of IP calls for regulatory purposes.

V. The Commission Should Authorize a Series of Special Trials to Assess Deregulatory Reforms to Facilitate Nationwide Retirement of the PSTN

The Commission has ample opportunity to proceed in a deliberate but nonetheless swift manner in replacing the legacy PSTN regulatory apparatus. The Commission should invite a series of test cases or trials in different geographic areas, allowing interested voice service providers to engage voice consumers in early migration from legacy TDM networks to all-IP networks. In addition to being conducted in different areas, trials can be conducted with different components, such as time periods or consumer switching options. This will provide the Commission windows into what works best when it comes to transitioning to all-IP networks and retiring legacy systems.

A series of trials can provide the Commission with valuable, real-world data to guide its broader PSTN retirement efforts. Such data can also inform the final composition of a new de-

⁹ *See, e.g., In re: Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798 (2002) (classifying cable modem service as "information services" and thereby exempt from potential common-carrier regulation under Title II of the Communications Act), *affirmed, NCTA v. Brand X*, 545 U.S. 967 (2005); *In re: Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853 (2005) (classifying wireline broadband services as "information services" exempt from regulation under Title II), *affirmed, Time Warner Telecom v. FCC*, 507 F.3d 205 (3d Cir. 2007); *In re: Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd 5901 (2007) (classifying wireless broadband services as "information services" exempt from regulation under Title II). *See also, e.g., In re: Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC 22404 (2004) (preempting state regulation of Vonage's DigitalVoice VoIP service), *aff'd Minnesota Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007).

regulatory framework for all-IP voice services. An expedited comment cycle should be established for permitting and overseeing such trials.

VI. The Commission has Authority to Adopt a New Framework for Voice Services on All-IP Networks and to Conduct Trials as Part of the Transition Process

The Telecommunications Act of 1996 included provisions unmistakably intended to be tools for the Commission to use to reduce regulation as more competition and more consumer choice continued to develop. One of those deregulatory provisions is Section 10. It mandates that the Commission "*shall forbear*" from applying any regulation or statutory provision if the agency determines enforcement of such requirement "is not necessary" to ensure that telecommunications carriers' charges and practices are reasonable and "not necessary for the protection of consumers," and that forbearance is consistent with the public interest.¹⁰

The Commission's forbearance authority, which heretofore has been underutilized, is especially relevant to establishing a new framework for all-IP services. Through its policy of forbearing from regulating wireless services under the full panoply of Title II requirements, the Commission has set an example worth drawing upon when it comes to setting a deregulatory, market-driven policy toward voice services provided through all-IP networks. In its *Mobile Services Order* (1994), the Commission established a light-touch regulatory approach to wireless services that has provided an environment hospitable to the tremendous innovation and growth witnessed in the market.¹¹ The Commission's forbearance authority is a mechanism particularly well-suited to facilitating the IP-transition – if the agency employs the tool in a proper deregulatory way.

In addition to its forbearance authority, the Commission can use its waiver authority for

¹⁰ 42 U.S.C. § 161.

¹¹ *See* Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services, *Second Report and Order*, 9 FCC Red 1411 (2004) ("*Mobile Services Order*").

purposes of conducting transition trials in preparation of the PSTN's retirement.¹² For instance, the Commission could use its forbearance or waiver authorities to clear delays or other obstacles to IP network upgrades that could result from service discontinuance requirements,¹³ notice-of-network change regulations,¹⁴ or state carrier-of-last-resort obligations that are unnecessary or would hinder transition to IP-based services. Depending upon the statutory or regulatory provisions at issue, issuance of waivers from requirements that would subvert statutory goals in particular circumstances, based on case-by-case evaluation, might offer a more expeditious route for setting up trials.

Moreover, the Commission has the power, through declaratory rulings to preempt state regulations that conflict with Commission policies regarding interstate voice services. Both a future framework for voice services and the conduct of trials in preparation for the PSTN retirement implicate interstate commercial concerns. To ensure that IP-enabled services can successfully operate through the channels of interstate commerce, the Commission should exercise its preemptive authority where needed to ensure statutory goals are achieved.

VII. FCC Should Set a Deadline for the Retirement of the Legacy PSTN Regulatory System

As the Technology Advisory Council has recommended, "[t]he FCC should take steps to expedite the transition, with a target date of 2018."¹⁵ The Commission should incorporate this recommendation into its IP transition and PSTN retirement process. A sunset date will convey a seriousness of purpose about the transition process and emphasize the reality of the PSTN's

¹² See 47 C.F.R. § 1.3.

¹³ See 47 U.S.C. § 214(a).

¹⁴ See 47 C.F.R. §§ 51.325(a), 51.333.

¹⁵ FCC Technological Advisory Council, *Status of Recommendations*, at 11, 16 (2011), available at: <http://transition.fcc.gov/oet/tac/TACJune2011mtgfullpresentation.pdf>.

impending retirement. Whether sunset occurs in 2018 or a set date thereafter, having a precise date will help ensure that the process moves with deliberation and without unnecessary delay.

Once the PSTN retirement deadline approaches, if the Commission concludes that discrete geographical areas are not adequately positioned to accommodate the transition to all-IP services, the agency should only consider time-restricted, geographically targeted remedial actions. But any such actions cannot become excuses for delaying the nationwide retirement of the PSTN. Once the Commission establishes its deadline, it should stick to it.

VIII. Conclusion

For the foregoing reasons, the Commission should act in accordance with the views expressed herein.

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