TECH FREEDOM

# TOWARD MODERN, MODEST REGULATION FOR THE IP TRANSITION

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In the Matter of the Technological Transition
of the Nation's Communications Infrastructure

GN Docket No. 12-353

January 28, 2013

# TOWARD MODERN, MODEST REGULATION FOR THE IP TRANSITION

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## Introduction

AT&T and NTCA have asked the Commission to open a proceeding to facilitate the telephone industry's ongoing transition from legacy, time-division multiplexed ("TDM") networks to next-generation Internet Protocol ("IP") networks. The AT&T and NTCA petitions are measured and cautious, but the technological and competitive changes that have precipitated their request are truly momentous, and they will shape the future of telecommunications and its regulation. We applaud the Commission for seeking comments on the petitions, as well as for creating the Technology Transitions Policy Task Force.

The extent of the consumer benefits that will arise from the IP Transition depends in substantial part upon the Commission itself, and its willingness to acknowledge that regulations that were put in place to facilitate competition on Ma Bell's legacy copper phone lines are neither legally nor sensibly applied to the industry's modern fiber networks. The oft-cited goal of "technological neutrality" is no excuse for maintaining these outdated regulations.

AT&T's Petition asks the FCC to open a proceeding to conduct trial runs of a deregulated IP network, freed of the outdated Title II regulations that apply to copper networks.[2] Of particular importance, AT&T seeks to operate its trial IP network (and, presumably, its eventual nationwide IP network) freed of regulatory restraints under Section 214 and state rules that might preclude it from discontinuing its copper network alongside its fiber network.[3] Elsewhere the company has been more concrete in its request, asking the Commission to deregulate interconnection by declaring that IP-based services are information services, not subject to the monopoly-era interconnection requirements under Title II.[4] The company seeks reform of wholesale obligations under Section 251 to eliminate unbundling, resale, collocation and other requirements, as well as ETC reform to permit broadband providers to accept universal service support without onerous and uneconomical requirements.[5] Absent this regulatory relief, the IP Transition will be impaired, its costs will be higher, and these costs will be improperly borne by the transitioning ILECs — that is, by their customers. Delay, in other words, is a hidden tax on future of the Internet.

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[1] TechFreedom is a non-profit, non-partisan technology policy think tank. Starr, Manne & Szoka have written and commented extensively on these issues. They can be reached at contact@techfreedom.org.

[2] AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition at 1 (filed Nov. 7, 2012), *available at* http://www.att.com/Common/about_us/files/pdf/fcc_filing.pdf ("AT&T Petition").

[3] AT&T Petition at 11-18.

[4] *See* Letter from Robert W. Quinn, Senior Vice President Federal Regulatory and Chief Privacy Officer, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 at 3, (filed Aug. 30, 2012) *available at* http://www.telecomlawmonitor.com/uploads/file/ATT%20ex%20parte%20083012.pdf.

[5] *Id.* at 4.

We urge the Commission to authorize AT&T's proposed trial runs in the IP Transition, and to resist the impulse mechanically to apply outdated regulations to new infrastructure for which it is not suited and to which it is not legally applicable. At the same time, we urge the Commission carefully to assess the legal basis for extending necessary public safety requirements on all-IP networks and, if necessary, request that Congress pass narrow legislation to give the FCC clear, rational statutory authority to create and fund an appropriate system for ensuring public safety on IP networks.

## The Technological and Market Forces Driving the IP Transition

America's largest ILECs are preparing to do what entrenched monopolies never do: tear up their lower-quality, protected products (in this case, outdated copper wire networks) to replace them, at enormous expense, with something more useful (webs of fiber that that would carry Internet Protocol traffic). Why? Because of fierce competition. As Harold Feld notes:

> AT&T has no choice. Competition is forcing AT&T to invest in its networks or risk obsolescence**.** Cable providers have already taken AT&T's residential wireline business, and are eating into AT&T's commercial enterprise customers**.** Verizon Wireless has a superior wireless network, and both T-Mobile and Sprint are pouring billions into network improvements and upgrades**.** AT&T either upgrades or goes under. This is why AT&T's filing makes it clear that AT&T is going ahead with this investment whether or not the FCC grants it any kind of regulatory relief**.**[6]

The FCC's own data show that the former Baby Bells are far from dominant in the provision of local voice service. As of a year ago, almost 50% of zip codes and 90% of households were served by fully ten or more CLECs or non-ILEC Voice over Internet Protocol (VoIP) providers, and in only 8% and 0.4% of zip codes and households, respectively, were ILECs actual monopoly providers of wireline telephone service.[7] The numbers can only have decreased since. Competition is increasingly not just among resellers who rely on the FCC's unbundling mandates, but also among competing physical networks — true, market-based competition. Roughly a third of residential consumers now rely on VoIP instead of legacy, copper-based, switched access service for voice telecommunication,[8] and more than another third have cut the cord completely and rely solely on wireless for voice services.[9]

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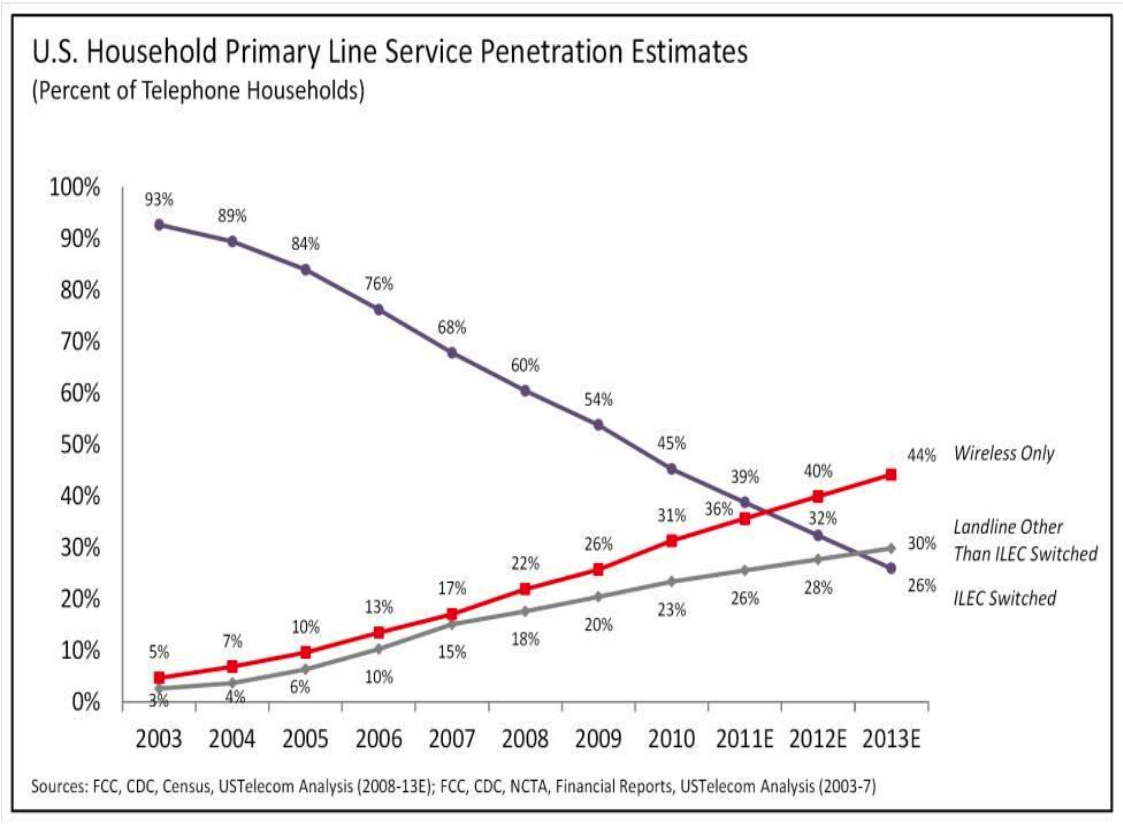
[6] Harold Feld, *Shutting Down The Phone System Gets Real: The Implications of AT&T Upgrading To An All IP Network,* Public Knowledge, Nov. 13, 2012, http://publicknowledge.org/blog/shutting-down-phone-system-gets-real-implicat.

[7] FCC Wireline Competition Bureau, *Local Telephone Competition: Status as of December 31, 2011*, Tables 19 & 20, Jan. 2013*, available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2013/db0114/DOC-318397A1.pdf.

[8] USTelecom Petition for Ruling that Incumbent Local Exchange Carriers Are Non-Dominant in Switched Voice Services (filed Dec. 19, 2012), *available at* http://www.ustelecom.org/news/filings/ustelecom-petition-ruling-ilecs-are-non-dominant-switched-voice-services ("USTelecom Petition").

[9] Centers for Disease Control, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey,*




This transition to an all-IP network is inevitable and, as the data shows, for most Americans, it is already well under way. But the questions remain: how fast will it proceed, at what cost, and under what regulatory regime? The answers to these questions, in turn, depend largely on the outcome of this and other proceedings at the FCC (and state PUCs) that will determine the regulations under which the transition and the resulting IP network will labor. In this, two issues are paramount: Whether, and with what specific regulatory requirements, ILECs will be required to maintain their legacy copper networks alongside fiber; and whether, and to what extent, fiber networks will be regulated under Title II of the Communications Act.

The IP Transition is being driven by technological and market forces. It does not require government action; it simply requires that government get out of the way. In particular, as the National Broadband Plan put it, understatedly, "requiring an incumbent to maintain two networks — one copper and one fiber — would be costly, possibly inefficient and reduce the incentive for incumbents to deploy fiber facilities."[10]

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*January-June 2012,* Dec. 2012, *available at* http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201212.pdf.

[10] FCC, Connecting America: The National Broadband Plan 49 (2010), *available at* http://www.broadband.gov/plan/ ("National Broadband Plan").

Even more than providing a better, cheaper telephone service that can compete with wireless and cable VoIP, telecommunications companies want to offer faster broadband service than is possible using DSL technologies over copper networks. Given the priority placed on extending broadband service, and the competitiveness of the market (as well as all the hand wringing over the need for a competitive alternative to cable),[11] accelerating and facilitating the IP Transition should be the FCC's top priority. Key to this is ensuring that outdated regulation and rent-seeking by other carriers does not force ILECs to bear the substantial cost of maintaining wasteful and redundant networks or of maintaining price- and term-controlled access to their networks in today's competitive market. There is no good reason to require ILECs to maintain outdated copper networks alongside fiber, nor to saddle IP-based telecommunications services with the burdens of Title II regulation, which aimed at market conditions wildly less competitive than today's.

## The IP Transition's Potential Regulatory Hurdles

The IP Transition faces opposition on essentially two fronts. First, some commenters have expressed concern over the maintenance of public safety/emergency response functions on an all-IP network. Second, others have expressed concern over the deregulation of telecommunications services entailed by the designation of IP services as information services.

There are, to be sure, legitimate questions to be answered about how to address public safety needs (for example, by ensuring a certain level of network resiliency during emergencies). Such concerns (along with other aspects of universal service) can and should be dealt with in a manner appropriate to the new technology, funded through a rational system of subsidies (instead of ad hoc mandates that pass costs on to other users). We address these public safety issues in more detail at the end of this filing.

But the real opposition, it is already clear, arises from the narrow economic self-interest of companies that are threatened by the IP Transition — not from a selfless concern for the public interest. These companies (telecommunications carriers that profit from the interconnection, unbundling and other obligations under which ILECs operate) talk about competition, but what they really mean is keeping alive regulations that no longer make any economic sense — and that no longer have any basis in law.

This opposition comes primarily from CLECs, which have been granted a legal right of regulated and price-controlled access to resell their own service over the traditional copper networks of the ILECs that actually own those networks. But, as Fred Campbell points out,

[11] *See, e.g.*, Susan Crawford, *How to Get America Online,* New York Times, Jan. 23, 2013, http://www.nytimes.com/2013/01/24/opinion/how-to-get-high-speed-internet-to-all-americans.html?ref=opinion&_r=1&.

> The temporary taking of telephone infrastructure owned by other providers was justified by the fact that the legacy infrastructure CLECs were authorized to lease was built during a monopoly era when the profits of telephone companies were still guaranteed by government. The government hasn't guaranteed regional telephone companies a monopoly rate of return for over 20 years.
>
> CLECs have no better claim to the new, all-IP infrastructure built by telephone companies since the market was opened to competition than they do to similar infrastructure built by cable operators, mobile providers, wireless Internet service providers and others that have invested billions in new networks over the last two decades.[12]

In 2003, the FCC declared that broadband facilities were not subject to the same unbundling requirements as copper networks.[13] To preserve a role for the CLECs, the Commission required that ILECs offer a 64 kbps channel on their fiber networks in the event that they had retired their copper network.[14] The CLECs, however, have since been content to sit on their old business model of providing service over copper networks to non-residential customers at below-market rates imposed by government. They have made little or no effort to upgrade their networks to compete in an all-IP world despite the obvious direction the industry was moving. In particular, they have not invested in the technical infrastructure necessary to interface with IP networks.[15] Now, as technological change is disrupting their business model, it seems they would rather hinder the IP-transition than make an effort to remain competitive. Now that real competition is driving the construction of new fiber networks to compete with cable and wireless services, the CLECs are more clearly than ever Potemkin competition.

## The Impropriety of Outdated Regulation

What the CLECs want — the maintenance of broadband unbundling and interconnection requirements that would put the burden of technological compatibility and infrastructure maintenance on the ILECs rather than the recalcitrant CLECs[16] — is not only bad for consumers, it is

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[12] Fred Campbell, *Don't Let CLECs Throw Consumers Under the Internet Bus,* Technology Liberation Front, Dec. 7, 2012, http://techliberation.com/2012/12/07/dont-let-clecs-throw-consumers-under-the-internet-bus/.

[13] *In re* Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 01-338, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 F.C.C.R. 16978, ¶ 7 (Aug. 21, 2003).

[14] *Id.* ¶ 277.

[15] As the National Broadband Plan explains, "When a copper facility is retired, to continue providing service a competitor needs to redesign its network or purchase special access circuits from the incumbent LEC. These special access connections are typically more expensive, may have different service characteristics, and may limit the competitor's ability to differentiate its service." National Broadband Plan at 66, fn. 88.

[16] Among other things, the CLECs want the FCC to require ILECs to provide (on price regulated terms) technology-neutral interconnection (supporting both TDM-based and IP-based interconnection) under Section 251(c)(2). *See* Letter from

also illegal; the FCC has no authority to maintain these regulations. Even the current 64 kbps channel requirement stands on shaky legal ground at best. The FCC issued this rule when broadband services provided by ILECs were still regulated as telecommunications services under Title II of the Communications Act. But in 2005 the FCC subsequently reclassified wireline broadband as an information service, subjecting ILECs to far less oppressive regulations under Title I.[17] If access requirements for IP networks were challenged, a court would almost certainly rule the FCC no longer has any direct statutory authority to continue this invasion of property rights.

Not only are forced interconnection and unbundled access on IP networks not legally permissible, they are not economically defensible. Forced access reduces incentives to invest in network construction and maintenance. This could perhaps be justified if competitive conditions warranted, but competition between IP network providers is remarkably robust.

And, as AT&T points out in its ex parte filing in this proceeding responding to Cbeyond and other CLECs, interconnection, even of voice services, on IP networks is already occurring without any regulatory mandate:

> [H]undreds of thousands of IP networks have interconnected directly or indirectly since the dawn of the commercial Internet, all in the absence of any interconnection mandate from the United States or any other governmental or regulatory entity in the world.... When two Skype subscribers connect to the Internet via separate ISPs, their calls to each other go through — not because their ISPs have any regulatory obligation to interconnect (they do not), but because it is in their mutual self-interest to arrange for such interconnection. This is not to say that coordination between interconnecting VoiP providers will be straightforward or that the Commission will have no role in supervising it.[18]

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Thomas Jones, Counsel for Cbeyond, Inc., EarthLink, Inc., Integra Telecom, Inc., Level 3 Communications, LLC, and TW Telecom Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket No. 12-353, (filed Jan. 22, 2013) (*CLEC Ex Parte* Letter), *available at* http://apps.fcc.gov/ecfs/document/view?id=7022109891.

[17] *In re* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises; Consumer Protection in the Broadband Era, CC Docket No. 02-33, Report and Order and Notice of Proposed Rulemaking, 20 F.C.C.R. 14853, ¶¶ 1-4 (Aug. 5, 2005) ("Wireline Order").

[18] *See* Letter from Frank S. Simone, Assistant Vice President Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 12-353 at 5, (filed Jan. 15, 2013) (AT&T *Ex Parte* Letter), *available at* http://apps.fcc.gov/ecfs/document/view?id=7022105086.

Today, robust competition for telephony services exists without access mandates — coming not primarily from the CLECs but rather from cable and wireless companies (including the ILECs themselves, now in competition with each other) that have built their own networks.

In fact, one of the most significant results of the transition to an all-IP infrastructure is that it will promote further competition in the wireline broadband market. Susan Crawford, among others, has repeatedly declared that the battle for wireline supremacy is over and that cable has won, leaving its ILEC opponents in the dust.[19] But AT&T would beg to differ. By December, 2015, AT&T plans to have invested $14 billion to upgrade its entire wireline footprint to an all-IP network, including high speed DSL, either in the form of its U-Verse service or by replacing its current DSLAMs with IP DSLAMs in 75% of its footprint (57 million customers).[20] These services provide comparable connection speeds to the so-called "cable monopolies" Crawford claims have arisen, and the competition they provide will benefit both customers and the industry as a whole. AT&T's investment is just the tip of the iceberg, however. For the IP Transition to benefit the country as a whole, smaller ILECs must also upgrade their networks. Giving all owners of copper networks the incentive to embrace the IP Transition requires removing outdated and costly regulations obligating them to maintain their TDM networks and resolving uncertainty about the future regulatory landscape for IP networks.

There is, quite simply, no economic basis for extending a regulatory system intended to open markets to competition through regulated access mandates to copper networks that were built by the Ma Bell monopoly to cover infrastructure investments by ILECs in *new* fiber networks made long after the AT&T breakup. Expropriation by forced access deters investment, and is not needed to maintain competition in today's telecommunications market.[21] Even if the particular degree of expropriation imposed on ILECs seems relatively small (a 64kbps channel but not more, for example), so long as the *principles* of unbundling and forced access remain enshrined in law, network owners will not be able to reap the full fruits of their investment. Instead, investment will be curtailed as risk-adjusted expected returns will always be diminished by the possibility of future, more significant expansions of the scope and extent of regulation. In the end it is consumers who will suffer for these reduced investment incentives.

It is difficult to see what could possibly justify further delay in recognizing that unbundled access and interconnection mandates for IP networks lack economic and legal justification. The FCC would do well to recognize that today's wireline providers are no longer the "dominant" heirs to

[19] *See, e.g.*, Susan Crawford, *How to Get America Online,* New York Times, Jan. 23, 2013, http://www.nytimes.com/2013/01/24/opinion/how-to-get-high-speed-internet-to-all-americans.html?ref=opinion&_r=1&.
[20] *See* AT&T Petition at 8-9.
[21] As even the Supreme Court has recognized: *See Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) ("[enforced sharing] may lessen the incentive for the monopolist, the rival, or both to invest in…economically beneficial facilities.").

Ma Bell they once were — and thus end such mandates once and for all. As Commissioner Pai noted in his Statement on the formation of the Technology Transitions Policy Task Force:

> [O]ur rules continue to presume static domination by monopoly providers. We need a forward-looking regulatory framework that will expedite the Internet Protocol (IP) transition and accommodate — indeed, encourage — the most important technological revolution of our time….[T]he Task Force should resist the urge to simply import the rules of the old world into the new.[22]

Although this might mean the death of some CLECs that are unable to compete with superior, all-IP service, it would be competition — not its absence — doing the killing. Companies that live by regulatory fiat may die by regulatory fiat; when the justification for intervention disappears, so, too, should the regulation. The consumer benefits that subsidized CLECs once arguably provided are simply no longer present given robust competition from cable and wireless.

### The Right Policy Approach to Protecting Public Safety

The current copper network has proven highly reliable for several reasons. First, a copper network is, unlike, a fiber network, a second electrical grid, powering phones even when the power grid goes down during emergencies. Second, the copper network was built over a century by a monopoly provider with an incentive (and, in fact, a legal mandate) to "gold-plate" the network so that it could pass along the costs to, and earn excess profits from, consumers. At the same time, over the copper network's many years of existence, first responders have developed a robust emergency system consisting of public safety answering points (911 emergency call centers) that readily permit voice communication with, and geolocation by, emergency responders.

But it is a mistake to think that tomorrow's emergency telecom services must look exactly like today's, and to elevate the particular safety aspects of the copper network over those enabled by an IP network. Thus, most importantly, an IP network permits emergency call centers and other emergency responders to receive text messages, videos, photographs, geolocation, and other kinds of data we cannot even yet imagine — none of which is as readily or efficiently transmitted over the TDM network and all of which can, in quite obvious ways, facilitate better and more effective emergency response. And while an all-IP network may make geolocation more difficult in some respects, and may increase the risk of power-outage-induced downtime, the benefits of richer data transmission, easy simultaneous connection to multiple response points, and more robust forms of geolocation, such as GPS data, could easily outweigh the loss of these attributes of the copper-based network.

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[22] Ajit Pai, *Statement of Commissioner Ajit Pai On the Formation of a Technology Transitions Policy Task Force* (Dec. 10, 2012), *available at* http://www.fcc.gov/document/pai-statement-formation-technology-transitions-policy-task-force.

Public safety concerns must be taken seriously; they involve, quite literally, matters of life and death. But that does not mean we should stop thinking carefully about the practical tradeoffs at stake. For example, while a second electrical grid for telephony may be useful for public safety, the relevant question is *how* useful, relative to the alternative? Importantly, the answer to this question depends in large part on the on the extent of consumers' reliance on devices connected to the copper network that don't require their own power sources. As Americans switch away from simple, POTS landline phones to other means of communication (including wireless and VoIP, most notably), and as even those who retain landlines use devices that require their own power source (e.g., cordless phones and caller ID phones), the benefits of the copper network's independent power supply decrease commensurately. Today only a third of homes have landlines,[23] and surely a much smaller fraction of residential customers have phones that draw their electrical power from the copper network; for businesses the number must be vanishingly small.

More fundamentally, we must decide how much network reliability we — collectively, as a society — are willing to pay for and who will pay for it. In the era of a true monopoly telecom network the government simply mandated that Ma Bell build its network to a certain level of resiliency, and the costs were borne by all users in the form of higher rates. In an era of competition, that approach is no longer tenable: Shackle telecom providers with the costs of maintaining the copper network, and consumers will simply flee to cheaper providers, leaving an ever-shrinking customer base to bear an increasing share of the legacy network's costs. Simply put, mandatory cross-subsidies are not sustainable in a competitive market.

The rational way to promote public safety in an era of increasing facilities-based competition is (a) to decide what level of resiliency is appropriate for public safety and (b) to tailor a targeted system of subsidies available to any company willing to provide that service. Rather than setting a specific subsidy amount, a quasi-market mechanism would, ideally, allocate a subsidy at the lowest price at which certain public safety goals can be achieved through the provision of innovative public safety offerings that can be achieved — but that may not yet even have been conceived. For example, cable and telecommunications companies could compete to offer greater degrees of network reliability by installing additional backup generators or other mechanisms inside the facilities where traffic is routed along their networks.

## Overcoming Regulatory Impediments: Toward Modern, Modest Regulation for Modern Networks

While questions about public safety, reliability, and the proper regulatory framework for an all-IP infrastructure are complex and must eventually be addressed, there are simpler solutions to simpler questions that can be addressed right now. There are currently a myriad of regulations,

[23] *See* USTelecom Petition ("today only about one-third of American households purchase an ILEC switched access service").

both on the federal and state levels, that require ILECs to maintain their TDM networks even after suitable IP-based replacement networks have been put in place. The considerable expense of maintaining these legacy networks will only slow ILECs' investment in the deployment of essential next-generation networks. The FCC can remove this burden on the ILECs and accelerate the IP Transition and broadband deployment by eliminating existing regulations that may require the maintenance of duplicative networks.

AT&T's petition proposing deregulated trial runs for the transition to an all-IP infrastructure offers an excellent way to start the ball rolling toward a nationwide transition. Several of the issues addressed in the petition are already the subject of open proceedings at the FCC, but AT&T's proposed trials would allow a number of these issues to be addressed in one proceeding and in the same time-frame. Resolving these related issues one at a time and separately from one another is cumbersome and time-consuming. The proposed trials would allow customers and the FCC alike to see what life in a deregulated, all-IP world would look like. Seeing how an all-IP network actually works could help provide answers to the countless speculative questions that today hold little basis in reality, especially about public safety, and help ILECs, customers and the FCC focus on the real problems that need to be addressed.

When the 1996 Telecommunications Act was passed, landline telephones connected by copper wires (plain old telephone service or POTS) were still the primary medium for voice communication. The option of telephone, broadband data and cable service all being provided by one provider on one network was unavailable. But today the ILECs, who once dominated the voice market, are in direct competition with both cable and wireless providers offering identical (or superior) services.

The regulatory environment, however, treats ILECs exactly as it did 17 years ago, when they had a monopoly on voice services. These regulations, written for a dramatically different market, now hinder the ILECs' ability to compete with cable and wireless, which (rightly) face no such regulatory burdens. To promote the IP Transition, the FCC must acknowledge that wireline voice is no longer a dominant service and stop regulating it as such.[24] The first steps toward this goal (besides ending unbundled access) should be to eliminate the regulations that require ILECs to maintain their TDM networks once IP networks have been put in place.

Section 10 of the Communications Act requires the FCC to forbear from "any regulation or any provision" affecting telecommunications carriers if the Commission determines that

1. enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that

[24] *See* USTelecom Petition.

telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
2. enforcement of such regulation or provision is not necessary for the protection of consumers; and
3. forbearance from applying such provision or regulation is consistent with the public interest.[25]

This public interest determination depends on "whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services."[26] Based on these criteria the FCC must forbear from applying the provisions of the Act that require ILECs with IP-based service to continue to operate their TDM networks if an ILEC files a petition for forbearance. Doing so would certainly promote competitive market conditions, as it would allow ILECs to invest more money in building IP-based networks that will compete directly with cable and wireless broadband.

While application of numerous provisions of the Communications Act would hinder or slow the retirement of TDM networks (and thus delay the IP Transition), the greatest impediment may arise from state public utility commissions. Several PUCs impose obligations under the Communications Act that require ILECs to maintain their TDM networks alongside their IP networks. However, because the FCC's decision to forebear from application of a requirement of the Communications Act would also apply to state commissions,[27] forbearance by the FCC would also solve the problem of misguided state regulation. But FCC forbearance doesn't prevent states from enforcing separate state laws. To clear out the most burdensome obligations of state law, the FCC must go one step further and exercise its preemption authority.

The FCC possesses broad conflict preemption authority, and it can preempt state regulations in situations beyond what is specifically laid out in the Communications Act. Courts have laid out several specific situations in which the FCC may preempt state regulations through this authority. In *Minnesota Public Utilities Com'n. v. F.C.C.*, the Eighth Circuit upheld the FCC's preemption of state VoIP regulations, noting that "[c]ompetition and deregulation are valid federal interests the FCC may protect through preemption of state regulation."[28] As long as it does so within the powers delegated to them by Congress, the FCC could justify preempting state regulation in the IP Transition by declaring that promoting competition and doing away with unnecessary regulation

[25] 47 U.S.C. § 160.
[26] *Id.*
[27] 47 U.S.C. § 160(e).
[28] *Minnesota Public Utilities Com'n. v. F.C.C.*, 483 F.3d 570, 580 (8th Cir. 2007).

are two of the agency's primary objectives — both of which are benefited by facilitating, and expediting, the IP Transition.

Likewise, the FCC stated in a 2010 Order, citing numerous D.C. Circuit cases, that, "[w]here state regulation conflicts with a federal regulatory objective, and that conflict impinges upon the Commission's exercise of its own lawful authority, the Commission may preempt."[29] Thus, if the FCC used its Congressionally-delegated powers to lay out a regulatory objective of easing the IP Transition, the Commission could justifiably preempt state provisions that conflict with that objective. Using either justification, the Commission should — and lawfully can — preempt state regulations that require ILECs to maintain duplicative TDM and IP networks.

The issue of how these new networks will be regulated is perhaps the biggest question of the IP Transition. Under the current regulatory structure, some services over IP networks are treated as information services (broadband Internet),[30] while other services have not been given any classification (VoIP).[31] Title I affords the FCC very little authority to impose regulations on IP services (just how little will be decided this summer in the D.C. Circuit's *Verizon v. FCC* Net Neutrality case). Under the current regulatory structure the Commission will lose the ability to impose the countless Title II regulations used to regulate services over TDM networks once those TDM networks are gone.

The Commission has used its ancillary authority under Title I to impose regulations such as E911 on VoIP through its general authority to promote public safety,[32] but the D.C. Circuit's 2010 *Comcast v. FCC* decision has put that authority in doubt.[33] To impose public safety obligations on IP networks, the FCC would have to rely on Section 1 of the Communications Act, which says that one of the purposes of creating the FCC was to promote "safety of life and property through the use of wire and radio communications."[34] But the D.C. Circuit called Section 1 a "statement of policy" that delegates the FCC no regulatory authority.[35] The ruling likely forbids the FCC from using its ancillary authority to pass any public safety regulations on IP services beyond what is specifically outlined in the Communications Act (such as the E911 requirements imposed on VoIP providers,

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[29] *In re* National Association of Regulatory Utility Commissioners Petition for Clarification or Declaratory Ruling that No FCC Order or Rule Limits State Authority to Collect Broadband Data, WC Docket No. 09-193, Memorandum Opinion and Order, 25 F.C.C.R. 5051, ¶ 6 (April 26, 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-70A1.pdf.

[30] *See* Wireline Order.

[31] *In re* IP-Enabled Services, E911 Requirements for IP-Enabled Service Providers, WC Docket Nos. 04-36 & 05-196, First Report and Order and Notice of Proposed Rulemaking, 20 F.C.C.R. 10245, ¶ 24 (June 3, 2005), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-116A1.pdf ("VoIP E911 Order").

[32] *Id.* ¶ 22.

[33] *Comcast Corp v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

[34] 47 U.S.C. § 151.

[35] *Comcast Corp v. FCC* at 654-55.

which could be supported by Sec. 251(e)(3) of the Act[36]). So under the current regulatory regime, the FCC may find itself without a way to impose some important public safety obligations on IP providers. While regulatory fiat may not be necessary to ensure optimal public safety functions on competitive networks, the question of the FCC's regulatory authority for public safety goals on an all-IP network will need to be fleshed out and may require separate Congressional action.

But we are concerned that the Commission may attempt to reclassify IP services as telecommunications services in order to retain its authority to impose Title II restrictions on the carriers. Title II, however, was written to regulate monopoly telephone service, and thus contains a number of provisions meant to govern service providers that were not governed by that best of all regulators: competition. It makes no sense to impose Title II regulations on a competitive industry, and it's difficult to argue that the telephony market isn't competitive, especially once the ILECs transition their networks to IP. Even an abridged version of Title II similar to the one the FCC proposed in 2010 in its "Third Way" proceeding[37] — forbearance from all but six of the provisions of Title II — would be too restrictive. Such a regulatory scheme would inevitably still impose Sections 201 and 202 of the Communications Act on carriers, providing for rate regulation, which is, in a competitive market, completely unnecessary and counter-productive.

Furthermore, the courts could very likely overturn a decision to reclassify IP services for two reasons. First, they could (and likely would) find that services delivered over IP networks no longer fit the statutory definition of "telecommunications services." The Communications Act defines "telecommunications services" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used,"[38] where "telecommunications" is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[39] The FCC further clarified these definitions in its 1998 Report to Congress:

> An entity offering a simple, transparent transmission path, without the capability of providing enhanced functionality, offers 'telecommunications.' By contrast, when an entity offers transmission incorporating the 'capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information,' it does not offer telecommunications."[40]

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[36] 47 U.S.C. § 251(e)(3) (Which applies the requirement that 9-1-1 is the "universal emergency telephone number within the United States for reporting an emergency" to "both wireline and wireless telephone service.").
[37] Austin Schlick, *A Third-Way Legal Framework for Addressing the* Comcast *Dilemma*, FCC, (May 6, 2010), *available at* http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-297945A1.pdf.
[38] 47 U.S.C. § 153(53).
[39] 47 U.S.C. § 153(50).
[40] *In re* Federal-State Joint Board on Universal Service, C.C. Docket No. 96-45, Report to Congress, 13 F.C.C.R. 11830, ¶ 39

Following the FCC's guidance, it's difficult to see how a court could find that services delivered over IP networks would meet the definition of "telecommunications." Instead, IP services fit much better within the category of "information services," which the FCC used to classify broadband Internet services over cable, wireline and wireless in a series of Orders from 2002 to 2007.[41]

The FCC's classification of broadband as an information service for the last decade leads to the second reason courts could overturn reclassification of services over IP networks: it would be arbitrary and capricious under the Administrative Procedure Act (APA). When an agency makes a decision, the APA requires it to "examine the relevant data and articulate a satisfactory explanation for its action."[42] Because the FCC spent years defending wireline broadband as an information service — an issue that went all the way to the Supreme Court in the *Brand X* case[43] — and has, since 2005, found that VoIP is neither a telecommunications service nor an information service,[44] the Commission would have a difficult time now defending a decision to reclassify both services as telecommunications services.

Because Title II is not an appropriate set of regulations for IP services, and because reclassification is unlikely to survive judicial scrutiny, the FCC must forbear from bootstrapping its outdated Title II authority. Rather, for the modest public-safety-directed regulations that may be required, it is Congress that must make clear that the FCC has the necessary legal authority over IP networks to impose a rational system for requiring and, where appropriate, subsidizing public safety features.

## Conclusion

Even better than a narrow fix would be for Congress to seize the opportunity to enact a new regulatory scheme that more adequately suits the realities of today's market. A truly technology- and provider-neutral approach that applies broad principles of competition and consumer protection law to the communications marketplace, similar to the approach advocated in the 2005 Digital Age Communications Act (DACA),[45] is an ideal solution to regulate such a rapidly evolving

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(April 10, 1998).

[41] *See* Wireline Order. *See also In re* Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband

[41] Access to the Internet Over Cable Facilities,Docket No. 00-185 & CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 F.C.C.R. 4798 (March 15, 2002), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-02-77A1.pdf*; FCC Classifies Wireless Broadband Internet Access Service as an Information Service*, WT Docket No. 07-53 (March 22, 2007), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-271695A1.doc.

[42] *FCC v. Fox Television Stations*, 556 U.S. 502 (2009).

[43] *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005).

[44] *See* VoIP E911 Order at ¶ 22.

[45] Raymond L. Gifford, *The Continuing Case for Serious Competition Law Reform*, Mercatus Center Working Paper No. 11-44, Nov. 2011, *available at* http://mercatus.org/sites/default/files/publication/Gifford_Communications_Law_Reform.pdf.

industry. The DACA model would address market power and interconnection through the best conceptual framework available: antitrust law, grounded in the analytical discipline of law and economics. The FCC's siloed approach to regulation makes no sense in an all-IP world and should be replaced with a consumer welfare standard that can be applied to all technologies equally. AT&T's proposed trials and the deregulated environment they contemplate provide an excellent first step toward completing the IP transition for all Americans.