

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

In the Matter of)
)
AT&T Petition to Launch a Proceeding)
Concerning the TDM-to-IP Transition)
_____)

GN Docket No. 12-353

In the Matter of)
)
Petition of the National Telecommunications)
Cooperative Association for a Rulemaking)
to Promote and Sustain the Ongoing TDM-to-IP)
Evolution)
_____)

COMMENTS OF GRANITE TELECOMMUNICATIONS, LLC

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January 28, 2013

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COMMENTS OF GRANITE TELECOMMUNICATIONS, LLC

I. Introduction and Summary

Granite Telecommunications, LLC (“Granite”) appreciates the opportunity to provide input to the Commission’s Technology Transitions Policy Task Force. Granite recognizes that the Commission has before it a significant challenge in preserving and advancing competition, increasing broadband deployment and advancing universal service during the course of the evolution of the Public Switched Telephone Network from one comprised of circuit-switched TDM networks to one comprised of packet-switched IP networks. Granite agrees with Chairman Genachowski that the Commission’s overriding goal is and should be to “continue to drive a virtuous cycle of innovation and investment, promote competition, and protect consumers.”¹ In light of these goals and the challenges before the Commission and the Task Force, Granite is

¹ See FCC Chairman Julius Genachowski Announces Formation of Technology Transitions Policy Task Force, (Dec. 10, 2012).

pleased to provide these Comments on the Petitions filed by the National Telecommunications Cooperative Association (“NTCA”) and AT&T.²

Granite is a nationwide competitive provider of telecommunications services to business subscribers. Granite is the country’s premier provider of nationwide local business telecommunications service, serving over 1,250,000 phone lines predominantly used by multi-location business customers.³ Granite provides telecommunications service to all of the nation’s 10 largest retail companies, 66 of the nation’s Fortune 100 companies, the United States Postal Service and many other governmental entities.⁴ Granite serves over 13,500 business customers at over 240,000 locations.⁵ Many of its customers are national in scope and have locations throughout the country. Despite the fact that Granite does not require its customers to sign term commitments, Granite’s customer churn rate is less than one-fifth of the industry average, demonstrating the high level of customer satisfaction Granite achieves.⁶ With scalable solutions and dedication to “live” personalized service, Granite is able to meet the ever changing needs and demands of its multi-location customers.⁷

Granite serves customers all across the United States. Its customers typically require a small number of voice lines at a given location (3 to 15 lines) and in certain instances a modest DSL or other broadband connection. These customers are, for the most part, national firms,

² *AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition*, (filed Nov. 7, 2012) (“AT&T Petition”); *Petition of the National Telecommunications Cooperative Association for a Rulemaking to Promote and Sustain the Ongoing TDM-to-IP Evolution*, (filed Nov. 19, 2012) (“NTCA Petition”).

³ Exhibit A, Declaration of Kevin Nichols in Support of Comments of Granite Communications, LLC, (“Nichols Decl.”), ¶ 2.

⁴ *Id.* ¶ 4.

⁵ *Id.*

⁶ *Id.* ¶ 12.

⁷ *See id.* ¶¶ 9, 11.

having a footprint that does not align with the geographic footprints of any RBOC or cable company. None of the RBOCs or cable companies provides the service that Granite provides outside of their own network footprints in the way that Granite does. In other words, if a Granite customer wanted to obtain service across its national footprint from incumbent LECs and/or cable companies, it would have to employ a large staff of its own dedicated to cobbling together service from myriad carriers, each of which serves only a limited portion of the customer's footprint. Granite provides these national companies with the ability to obtain basic voice service at its retail locations nationwide from a single supplier. Granite's customers find this to be a major benefit.⁸ By and large, the locations where Granite serves its customers are locations where the customer lacks the choice of a last mile supplier other than the ILEC.⁹

To satisfy its customer's demand for nationwide services, Granite has negotiated commercial agreements with the RBOCs. An AT&T commercial agreement with Granite, for example, recited that the agreement "is intended to be governed by the provisions of section 271."¹⁰ Under these commercial agreements, such as AT&T's Local Wholesale Complete ("LWC") Agreement, the ILECs provide Granite with an unbundled DS0 loop, packaged together with local switching and shared transport. While the RBOCs must provide DS0 loops pursuant to the Commission's current unbundling rules under section 251, they are required to provide local switching and shared transport by section 271.¹¹ The prices Granite pays for this

⁸ *Id.* ¶ 8.

⁹ *Id.* ¶ 13. Competition at these locations comes from other CLECs who likewise utilize ILEC loops.

¹⁰ See Exhibit B, Letter from Terri Hoskins, General Attorney, AT&T Services, Inc. to Marlene H. Dortch, (Jan. 29, 2010) at Attachment, p. 2 § 1.2.

¹¹ The RBOCs are also required to commingle section 251 and section 271 elements, as they do in the commercial agreements. *BellSouth Telecomms. v. Kentucky PSC*, 669 F.3d 704 (6th Cir. 2012).

package of elements are not set by regulators but are negotiated with the RBOCs.

Granite has on occasion sought similar commercial agreements with ILECs for elements or services where those ILECs are not subject to section 271 and has faced significant resistance to the offering of such elements or services. In such cases, it typically enters into resale agreements under section 251(c)(4); however, the discounts available pursuant to section 251(c)(4) are not sufficient for a CLEC to cover its costs and earn an adequate profit to remain viable. Granite enters into such agreements mostly to be able to serve its multi-location customers at their locations. This experience in negotiating for commercial agreements in the absence of section 271 rights informs Granite's view that the Commission should not eliminate the pro-competitive framework currently in place under sections 251 and 271, as suggested by AT&T, even where ILECs are replacing copper-based TDM service with fiber or hybrid copper-fiber based IP service.¹² As the Commission updates its existing competition rules to reflect the ongoing evolution of the PSTN from a circuit-switched TDM network to a packet-switched IP network, competitive access to the local loop, particularly, under sections 271 and 251, must be maintained in order to preserve the competition that the Commission has achieved in implementing the 1996 Act. As discussed below,¹³ AT&T's standard LWC "commercial" agreement denies CLECs access to fiber loops. Granite is concerned that if no regulatory

¹² AT&T references both its existing U-Verse technology, which is a hybrid fiber-copper network, and what it calls "Mobile Premises Services," which it describes as allowing customers "to make calls using ordinary wireline handsets connected to wireless base stations." AT&T Petition at 9. In a November 7, 2012 analyst conference describing AT&T's proposal, Ralph de la Vega, President and CEO, AT&T Mobility, described the latter as "a new wireless product that offers customers low-cost alternatives for their home phone service." Exhibit C, Edited Transcript, AT&T Inc. 2012 Analyst Conference, November 7, 2012 at 14. AT&T's Mobile Premises product is clearly limited to home (residential) use, does not appear to have the multi-line hunting and other features that small businesses need, and thus does not provide a new option for the types of business customers that Granite serves.

¹³ See n. 93 *infra*.

obligations are applied to AT&T's fiber loops, and it removes copper loops, Granite and other CLECs will have no access to loops at all, even under "commercial" agreements, ending competition from CLECs except in the relatively few locations where it is economical for a CLEC to construct its own last mile connections.

To preserve competition, the Commission must also update its existing competition rules, particularly in the business market, to reflect the ongoing evolution of the PSTN from a circuit-switched TDM network to packet-switched IP network. Such an update should, among other things, examine whether the Commission's predictive judgment that competition did not require that RBOCs make access available to fiber loops under either section 251 or 271, has been borne out by experience, particularly in light of AT&T's proposal that copper loops be removed.¹⁴

Granite recognizes the twin challenges facing the Commission with regard to this network evolution. The Commission must clarify the application of its rules to the IP-based networks of the present and future while removing any regulatory impediments that may prevent the IP evolution from occurring in rural areas without access to broadband. At the same time, however, the Commission must not permit the ILECs, particularly the RBOCs, to backslide on their commitment to opening their networks to competition simply because the networks are transitioning from one technology (circuit switched TDM) to another (packet switched IP). The Commission has made it plain that the Act's pro-competitive provisions are technology neutral

¹⁴ See AT&T Petition at p. 19 (urging the Commission to eliminate its current requirements regarding "legacy copper loop[s]") and p. 21 (suggesting that AT&T's proposed "trial" should "preclude carriers (including carrier customers) from demanding service or interconnection in TDM format,") but failing to mention that the Commission's current rules under §§ 251 and 271 limit AT&T's obligation to provide access to service over fiber loops or the "packetized" (i.e. IP) capability in a hybrid fiber-copper loop facility. *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, 19 FCC Rcd 21496, 21499-500 ¶ 6 at 21504 ¶ 19 (2004) ("Section 271 Forbearance Order").

and that commitment must not waver.¹⁵

The Commission has been presented with two starkly different visions of how to achieve these twin objectives. The NTCA presents a reasoned proposal, asking the Commission to take measured steps to update and clarify its regulations so their application to the evolving IP-based network are clear for all market participants.¹⁶ In contrast, AT&T presents a Petition that does not even pay lip service to the importance of preserving competition and implicitly asks the Commission to assume that the evolution of the PSTN to an IP-based network magically eliminates the vast market power it and other RBOCs continue to assert in their incumbent markets. AT&T's Petition should be denied in all respects.

While IP may in certain cases reduce some barriers, it does nothing to eliminate the principal impediment to fully competitive markets — the exclusive control by the ILEC of the last mile local loop. In most markets, the ILEC continues to be the only provider with connections to virtually all of the business locations in the market. Even in residential markets, where cable companies compete, most consumers are confined to a duopoly, having to choose between the ILEC and the cable company. The evolution from circuit switching to IP does nothing to mitigate the ILEC control over bottleneck last mile facilities, and therefore does not warrant AT&T's suggestion that the Commission abandon the pro-competitive policies that the Commission and Congress have adopted to ensure that consumers enjoy the benefits of competition. These pro-competitive measures include, among others, unbundling of access to last mile facilities, mandatory interconnection to complete calls and dialing parity. Abandoning these policies will amount to an end to competition for most business customers and a substantial

¹⁵ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24011, 24017 ¶ 11 (1998).

¹⁶ NTCA Petition at ii.

reduction in competition for residential customers. No aspect of the technical evolution from TDM to IP described by AT&T warrants abandonment of such benefits, including better prices and services, innovation and investment. Experience shows that AT&T's claims that investment will be enhanced by eliminating the steps towards competition that the Commission has taken are inconsistent with past experience as shown below.

The Commission should also reject as premature AT&T's proposed "trial," in which AT&T and other ILECs would be free to remove all copper from their networks in locations they select, deny CLECs access to last mile facilities, and refuse interconnection. Such a trial would wreak havoc on the business relationships between CLECs and their customers and would involve network changes that are irreversible. Of equal importance, AT&T has provided no explanation whatever what the trial would measure, why it is needed, and under what circumstances the trial would be deemed a "success." If the Commission nevertheless decides to hold a trial, Granite offers some suggestions below on improving the trial from that which has been proposed by AT&T.

In contrast, NTCA's "smart" regulatory approach, in which all stakeholders consider what existing regulations are rendered obsolete, which existing regulations must be maintained, and what new regulations are needed to protect consumers, promote competition and ensure universal service would enable the Commission to address issues associated with the technology transition in a logical way that does no harm to existing methods of operation and relationships. Granite generally supports the NTCA approach, although it disagrees with NTCA's premise that a new proceeding devoted to these issues is necessary, given that virtually all of them are the subject of proceedings that are already underway.

II. Granite Generally Supports NTCA's Petition for Smart Regulation

NTCA correctly highlights a number of important aspects concerning the "ongoing

evolution” of the PSTN from a TDM circuit switched network to an IP-based network.¹⁷ NTCA sensibly recognizes that the transition from TDM to IP is ongoing and represents “a technology shift within a network” rather than a replacement of a network.¹⁸ This is consistent with independent analysis suggesting that “an instantaneous cutover is impractical if not impossible” and that as a result “both the old and new networks [will be] operating simultaneously for a significant period of time.”¹⁹ Because the IP based network of the future is so intertwined with the current PSTN it make little sense, as NTCA observes, to simply assume away all the old regulation and start from the premise of no regulation.²⁰ Granite agrees with NTCA that starting from scratch “would create a regulatory vacuum, confuse consumers and even put some at risk, and generate massive waves of uncertainty that undermine ...investment in the IP evolution.”²¹ Instead, beginning from the existing regulatory framework, and modifying it where necessary, using principles that have “stood the test of time” is a smarter approach.²² Granite supports NTCA’s “smart” regulatory approach, in which all stakeholders consider what existing regulations are rendered obsolete, which existing regulations must be maintained, and what new regulations are needed to protect consumers, promote competition and ensure universal service.

Granite recognizes the unique challenges the broadband evolution poses for rural communications companies. Granite shares NTCA’s concern that the Commission’s USF policy must enable rural communications companies to invest in bringing broadband to the most remote

¹⁷ See NTCA Petition at p. 1.

¹⁸ NTCA Petition, at p. 2.

¹⁹ NRRI, *The Transition from the Legacy Public Switched Telephone Network to Modern Technologies*, Professor David Gabel, Steven Burns, Report No. 12-122 (Oct. 2012) available at <http://www.nrri.org/documents/317330/90b7e015-cf8e-4a16-829f-88643d84b2e1>.

²⁰ See NTCA Petition at p. 6-7.

²¹ *Id.* at p. 12.

²² *Id.*

and hard to reach corners of their markets so that all American have access to broadband. At the same time, Granite has significant concerns that the Commission's current framework for analyzing and promoting competition is inherently flawed. As the Broadband Plan identified, the Commission currently lacks a coherent framework in which it can sensibly analyze competition.²³ While Granite believes strongly in the continued vitality of the regimes under sections 251 and 271, there are aspects of the Commission's rules and decisions that must be modified in order to continue to provide American consumers with the benefits of the competition unleashed under the 1996 Act. Any smart regulatory approach must begin by harmonizing the Commission's competitive framework, particularly in the business market, in a technology neutral manner so that competitors have access to bottleneck facilities based on the economics of obtaining alternative facilities rather than on the particular network protocol used or the form of the transmission medium. As AT&T's Chairman Randall Stephenson recently explained, the Commission must "make sure that our regulations aren't tied to specific technologies but more to services."²⁴

Unlike the NTCA, however, Granite is not certain that an additional rulemaking proceeding is necessary to address proposals for modifying the regulatory framework to properly guide the evolution of the PSTN from TDM to IP. As explained in further detail in section III.F below, the Commission already has before it a number of open proceedings in which it is addressing issues pertaining to IP evolution. And in those instances in which it does not have such a proceeding, the IP-enabled services proceeding, WC Docket No. 04-36, remains a suitable proceeding in which the Commission and interested parties can address proposals to modernize

²³ Connecting America: The National Broadband Plan for Our Future, ("National Broadband Plan") Recommendation 4.7 at pp. 47-48 (2010).

²⁴ Exhibit C, Edited Transcript, AT&T Nov. 7, 2012 Analyst Conference Call at p. 23.

the current regulatory scheme.

III. AT&T's Petition Should be Denied

In contrast to NTCA's sensible smart regulation approach, AT&T's Petition asks the Commission to flash cut to virtually no regulations. In so doing, AT&T is apparently asking the Commission to assume that competition exists in IP services today, will continue to exist absent any regulations, and that neither AT&T nor any other ILEC controls bottleneck last mile transmission facilities. The FCC cannot rationally adopt such an approach. Such an approach is fundamentally at odds with the Commission's history of promoting competition from multiple providers, which must remain a core policy objective as the PSTN evolves into a broadband IP-based platform for communications services. Because promoting competition, both intermodal and intramodal, is the best means for continuing "to drive a virtuous cycle of innovation and investment... and protect[ing] consumers,"²⁵ the Commission should deny AT&T's Petition.

A. As a Matter of Policy, the FCC Should Continue to Promote Competition within the Telecommunications Industry

The FCC's National Broadband Plan ("National Broadband Plan") recognized that in order to "lay the foundation for America's broadband future," the FCC must "ensur[e] robust competition...for American businesses...through...well functioning wholesale markets."²⁶ The National Broadband Plan recognized that the FCC's current rules regarding wholesale competition "were developed without the benefit of a consistent, rigorous analytic framework."²⁷ The National Broadband Plan observed that the FCC's current wholesale market policy is not technology neutral because "[s]imilar network functionalities are regulated differently, based on

²⁵ See n. 1 *supra*.

²⁶ See n. 10 *supra*.

²⁷ *Id.*

the technology used.”²⁸ For example, under the FCC’s wholesale access policies, a competitor’s ability to obtain access to “loops and other point-to-point data circuits...[that] serve as critical inputs to retail broadband service...vary based on...whether the facility or service operates using a circuit-or packet switched-based mode or is constructed from copper or fiber—regardless of the economic viability of replicating the physical facility.”²⁹ The National Broadband Plan found that these policies, which frequently impede competitors’ access to the inputs necessary to provide competitive broadband services. “undermine[] longstanding competition policy objectives.”³⁰

In response to the problems identified, the National Broadband Plan recommended that the FCC conduct a rigorous and analytic evaluation of wholesale competition and establish rules “to ensure widespread availability of inputs for broadband services.”³¹ That analytic evaluation has not yet taken place, although a data gathering exercise is about to begin with respect to special access service in WC Docket No. 05-25.³² Granite urges the Commission to act upon that National Broadband Plan recommendation, using the market based analysis adopted in the *Qwest Phoenix Forbearance Order*³³ to determine the specific geographic and product markets where the ILECs retain market power as the result of their control of bottleneck facilities. The data

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at Recommendation 4.7 p. 48.

³² *In the Matter of Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25; *AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593, Report and Order and Further Notice of Proposed Rulemaking, FCC 12-153 (rel. Dec. 18. 2012).

³³ *See 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, 8645-47 ¶¶ 41-45 (2010) (“*Qwest Phoenix Forbearance Order*”) *aff’d Qwest Corp. v. FCC*, 689 F.3d 1214 (10th Cir. 2012).

gathered in WC Docket 05-25 should be helpful in performing such a market based analysis. As explained below, allowing the ILECs to assume away competition simply by virtue of a predicted transition to IP networks would not only “undermine longstanding competition policy objectives” but would turn those policy objectives upside down.³⁴

AT&T’s Petition implicitly urges the Commission to assume that the mere evolution of communications networks from TDM to IP will usher in a competitive world that renders all regulation counterproductive.³⁵ To eliminate all regulations on the basis of such an assumption would be contrary to the Commission’s core mission under the Telecommunications Act of 1996 of fostering and ensuring competition in all telecommunications markets.

The Commission recognized the benefits of competitive entry in all telecommunications markets long ago.³⁶ In beginning to open up markets that had once been the domain of legalized monopolies, the Commission “repeatedly found that competitive markets with reduced barriers to entry are in the public interest.”³⁷ Similarly, the Commission established that “the benefits of competition in securing innovative service, low prices, and responsiveness to consumer choice should be the same regardless” of the type of service at issue.³⁸ It is generally the Commission’s expectation that competition “will ultimately result in the provision of telecommunications service at the lowest possible cost; in the reduction or elimination of waste; in making carriers more responsive to the needs and desires of consumers; and, in making carriers respond more

³⁴ National Broadband Plan, at p. 47.

³⁵ See e.g., AT&T Petition at p. 20, 22.

³⁶ *In the Matter of MTS and WATS Market Structure*, Report and Third Supplemental Notice of Inquiry and Proposed Rulemaking, 81 FCC 2d 177 ¶ 109 (1980).

³⁷ *Id.*

³⁸ *Id.* at ¶ 110 (opening competition previously limited to specialized common carrier services to MTS and WATS services.).

rapidly and efficiently to technological change and innovation.”³⁹

Similarly, the settlement of the government’s antitrust litigation against AT&T in 1982 produced a consent decree that separated AT&T’s long-distance arm from the local exchange companies, and limited those local exchange companies to the provision of local services.⁴⁰ The consent decree, “did nothing, however, to increase competition in the persistently monopolistic local markets, which were thought to be the root of natural monopoly in the telecommunications industry.”⁴¹

The 1996 Act filled that void by seeking to “eliminate the monopolies enjoyed by the inheritors of AT&T’s local franchises.”⁴² It did so, building on the Commission’s policy of competition for interstate telecommunications services by explicitly “opening the local exchange and exchange access markets to competitive entry” including the removal of regulatory...economic and operational impediments” to competition.⁴³ The Commission construed the competition mandated under the 1996 Act as a means towards “eliminat[ing] the ability of an [ILEC] to use its control of bottleneck local facilities to impede free market competition.”⁴⁴ To inject competition in the local markets that were formerly the exclusive province of state sanctioned monopolies, the 1996 Act imposed specific duties on the ILECs. As

³⁹ *Id.* at ¶ 105.

⁴⁰ *See United States v. AT&T Co.*, 552 F. Supp. 131 (D.D.C.1982), *aff’d. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

⁴¹ *Verizon v. FCC*, 535 U.S. 467, 475-76 (2002) *citing* S. Benjamin, D. Lichtman, & H. Shelanski, *Telecommunications Law and Policy* 682 (2001) (hereinafter Benjamin et al.); P. Huber, M. Kellogg, & J. Thorne, *Federal Telecommunications Law* § 2.1.1, pp. 84-85 (2d ed.1999) (hereinafter Huber et al.); W. Baumol & J. Sidak, *Toward Competition in Local Telephony* 7-10 (1994); S. Breyer, *Regulation and Its Reform* 291-292, 314 (1982).

⁴² *Verizon*, 535 U.S. at 476.

⁴³ *Local Competition Order*, 11 FCC Rcd 15499, 15505 ¶ 3 (1996) *subseq. history omitted*.

⁴⁴ *Id.* at 15506 ¶ 4.

the United States Supreme Court observed, “foremost among these duties is the [I]LEC’s obligation under 47 U.S.C. § 251(c)...to share its network with competitors.”⁴⁵ The Act’s mandates that ILECs provide unbundled access to network elements, compulsory interconnection and resale of retail services are central to this sharing requirement. The rates for sharing, particularly for UNEs and interconnection, must be just, reasonable and based on cost, as such “ratesetting [was] designed to give aspiring competitors every possible incentive to enter local retail telephone markets, short of confiscating the incumbents’ property.”⁴⁶

It is important that the 1996 Act did not dictate the precise forms competitive entry could take, nor did it require a competitor to have deployed its own facilities prior to obtaining use of the ILEC network, either through interconnection, UNEs or resale.⁴⁷ Congress, for example, did not limit entry to competitors, such as cable companies, that had constructed their own networks to support the provision of competitive services. Instead, as the Commission recently recognized in the *Qwest Phoenix Forbearance Order*, “Congress established means for additional competitors to enter without fully duplicating the incumbent’s local network.”⁴⁸ Thus, “it is clear Congress wanted to enable entry by multiple competitors through the use of the [I]LEC’s network.”⁴⁹ Further “Congress did not intend section 251(c)(3) to be read to contain any requirement that carriers must own or control some of their own local exchange facilities before they can purchase and use unbundled elements to provide a telecommunications service.”⁵⁰

⁴⁵ *AT&T Corp. v. Iowa Utils Bd.*, 525 U.S. 366, 371 (1999).

⁴⁶ *Verizon*, 535 U.S. at 489.

⁴⁷ *Verizon*, 535 U.S. at 491-92.

⁴⁸ *Qwest Phoenix Forbearance Order*, 25 FCC Rcd at 8639 ¶ 32.

⁴⁹ *Id.*

⁵⁰ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15664 ¶ 323 (1996).

1. The Commission's Competition Policy Should Continue to Promote Entry from Multiple Competitors

Consistent with the pro-competitive vision of the 1996 Act, the Commission has consistently favored competition from multiple providers, finding that in markets with choices among multiple providers, consumers have access to better and more innovative services and lower prices. The Commission recognizes that “firms operating in a market with two or fewer firms... are likely to recognize their mutual interdependence and...in many cases may engage in strategic behavior, resulting in prices above competitive levels.”⁵¹ As former Chairman Powell explained, a duopoly ... decrease[s] incentives to reduce prices, increase[s] the risk of collusion, and inevitably result[s] in less innovation and fewer benefits to consumers. That is the antithesis of what the public interest demands.”⁵² Examples from previous Commission experience, including the mobile wireless industry,⁵³ the multichannel video market,⁵⁴ and the then nascent instant messaging industry,⁵⁵ support this analysis.

The Commission has consistently sought to advance and protect competition provided by multiple firms because such competition maximizes innovation. It would be contrary to the

⁵¹ *Qwest Phoenix Forbearance Order*, 25 FCC Rcd at 8637 ¶ 30.

⁵² *Application of Echostar Communications Corp.*, 17 FCC Rcd 20559, 20684, Separate Statement of Chairman Michael K. Powell (2002).

⁵³ *Id.* at 8637-38 ¶ 31 (citing reduction in prices for mobile wireless service after additional competitors were introduced to duopoly cellular market and similar effects in other markets).

⁵⁴ *See Echostar*, 17 FCC Rcd at 20604, ¶ 99 and 20605, ¶ 102 (finding that merger resulting in duopoly carries a “strong presumption of significant anticompetitive effects.”); Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment, 21 FCC Rcd 15087, 15093, Table 1 (2006) (showing that video markets with only two competitors saw higher prices than those with more than two competitors).

⁵⁵ *Applications of Time Warner Inc. and America Online, Inc.*, 16 FCC Rcd 6547, 6617 ¶ 163 (2001) (emphasis added) (imposing conditions on AOL’s instant messenger service because a competitor’s rival service “would be merely a duopoly, not the healthy competition that exists today in electronic mail.”).

public interest to use the innovative developments regarding the evolution of IP networks, typically led by rivals to the incumbent carriers, as the genesis for *decreasing* competition through premature deregulation.

In the telecommunications industry, history suggests that, contrary to AT&T's suggestion that eliminating requirements that support competition will induce more investment and innovation, "innovations have been more rapidly deployed in telecommunications networks" where there are more competitors, not fewer.⁵⁶ Innovation thrives and advances more rapidly in less concentrated markets.⁵⁷ Facing less competition through innovation, a company with market power "might be able to slow its own innovative efforts ... thereby entrenching its monopoly power in the future."⁵⁸

Because the Commission has recognized that innovation — the "provision of new technologies and services to the public" — best serves the public interest, a reduction in the level of innovation in a market is contrary to the public interest.⁵⁹ The Commission has acknowledged that innovation can come in many forms. Innovation has certainly come in the delivery to the market of technology that was not previously available commercially. But this innovation rarely comes from the RBOCs. For instance, it is well documented that although the RBOCs had xDSL technology available they chose not to bring xDSL to market, prior to its being offered by

⁵⁶ Howard Shelanski, *Competition and Deployment of New Technology in U.S. Telecommunications*, 2000 U. Chi. Legal F. 85 (2000).

⁵⁷ Brett M. Frischmann and Mark A. Lemley, *Spillovers*, 107 Colum L Rev 257, 281 (2007) ("[i]nnovation ... is generally spurred by decentralized competition.").

⁵⁸ Steven C. Salop, R. Craig Romaine, *Preserving Monopoly: Economic Analysis, Legal Standards, And Microsoft*, 7 Geo. Mason L. Rev. 617, 623 (1999).

⁵⁹ *Time Warner Entertainment Co and US West Communications, Inc.*, 8 FCC Rcd 7106, 7107-8 (1993).

competitive providers, for fear of cannibalizing their existing products.⁶⁰ Indeed, it was competition from providers using unbundled copper loops, not from the cable companies, that spurred the ILEC investment in DSL and broadband.⁶¹ As the President’s Council of Economic Advisers explained,

Although DSL technology has been available since the 1980s, only recently did [the ILECs] begin to offer DSL service to businesses and consumers seeking low-cost options for high-speed telecommunications. The incumbents’ decision finally to offer DSL service followed closely the emergence of competitive pressure from ... the entry of new direct competitors attempting to use the local-competition provisions of the Telecommunications Act of 1996 to provide DSL over the incumbents’ facilities.⁶²

Similarly, the Commission has recently found that the availability of UNEs, particularly UNE loops, has “led some competitive carriers to invest in facilities and operational support services to bring innovative new services to customers.”⁶³ In particular, the Commission observed that competitive carriers continue to innovate by extracting more bandwidth from the copper loop to provide services such as Ethernet over Copper.⁶⁴ Innovation can also come from “the ability to package and market services in ways that differ from the incumbent’s existing service offerings [which] increases the [competing] carrier’s ability to compete against the

⁶⁰ See “How Phone Firms Lost to Cable in Consumer Broadband Battle,” Wall Street Journal, p. 1, Mar. 13, 2003.

⁶¹ In 2003, the Commission’s Chief Economist concluded that broadband provided through unbundled access to copper loops was one of the few unambiguous successes of the 1996 Act because it brought “dramatic price reductions and dramatic jumps in DSL deployment” and “for every DSL line shared, the ILECs deployed four DSL lines of their own.” Communications Daily, Oct. 20, 2003, at 10 (quoting FCC Chief Economist Simon Wilkie).

⁶² Council of Economic Advisers, Economic Report of the President, February 1999, at pp. 187-188, www.gpo.gov/fdsys/pkg/ERP-1999/pdf/ERP-1999.pdf.

⁶³ *Qwest Phoenix Forbearance Order*, 25 FCC Rcd at 8677 ¶ 108.

⁶⁴ *Id.* at 8674-75 ¶¶ 102-03. See also *Ex parte* Letter from E. Branfman, Counsel for U.S. TelePacific Corp. et al, to Marlene H. Dortch, WC Docket Nos. 10-188; GN Docket Nos. 09-51, 12-353, 13-5, RM 11358 (filed Jan. 25, 2013).

incumbent and is likely to benefit consumers.”⁶⁵ Granite has brought this type of innovation to the market, as is discussed below.

2. Granite’s Customers Benefit from Telecommunications Competition

Granite innovates in service provision, among other ways, by providing its national customers with a single source to satisfy their voice and DSL telecommunications needs throughout the U.S. For nationwide merchants such as a national drugstore chain, a national auto-parts retailer, and a national gas station chain, Granite is the interface for billing, service provisioning and troubleshooting most or all of their telecommunications service, throughout the country. This is important as these and many other businesses have locations widely dispersed across the country, requiring the integration of service among multiple providers of basic telephone service. Granite provides its customers with a single uniform national interface for its service, which Granite’s business customers find to be a very desirable feature of Granite’s service offering.⁶⁶ This is something the ILECs do not offer, for they generally refuse to compete for these DS0 services outside of their legacy ILEC territories. Similarly, the cable companies do not provide these services as they typically are not built out to where Granite’s business customers are located and also do not typically offer voice services outside of their franchised cable territories.

Granite obtains its underlying services through DS0 agreements with ILECs— in other words, agreements for UNE-P replacement services that include an unbundled loop. In some locations where the ILEC refuses to provide Granite with DS0 UNE-P replacement services,

⁶⁵ *Local Competition Order*, 11 FCC Rcd at 15668 ¶ 333.

⁶⁶ Nichols Decl., ¶ 8. *See id.* at ¶¶ 7, 9, 11 (Granite also offers customers other benefits, such as higher level of support than RBOCs, 24/7 live help desk support, and prompt trouble resolution).

Granite may obtain resold ILEC services pursuant to section 251(c)(4). Absent the regulatory requirements that AT&T proposes be eliminated, Granite fears it would lose the alternative of sections 251 and 271 services, would have dramatically less negotiating ability with the ILECs and therefore would be unable to provide the integrated services its customers demand.

Granite's customers will, of course, continue to desire and benefit from integrated nationwide service during and after the transition to IP networks. But under AT&T's view of the post IP transition market, Granite's customers should be denied this benefit until a single company invests hundreds of billions of dollars to deploy competitive transmission facilities to every corner of the nation despite the overwhelming evidence that such deployment of duplicative networks is not economically efficient. This outcome would be plainly inconsistent with the pro-competitive charter of the 1996 Act.

B. The Ongoing Evolution To IP Based Networks Does Not Alter ILEC Market Power

AT&T's Petition suggests that the ongoing evolution from circuit switched TDM networks to packet switched IP networks means that AT&T and other ILECs no longer have market power to raise prices above supra-competitive levels, stifle innovation and otherwise harm consumer welfare. These claims do not comport with the facts and facts are stubborn things. For most Americans, as New York's attorney general has observed, there is a duopoly at best.⁶⁷ But it remains a fact that at most business locations in the country the ILEC's last mile facilities remain the only source of wireline communications service.⁶⁸

⁶⁷ See Letter from K. Gordon, New York Assistant Attorney General to J. Brillling, N.Y.P.S.C., Case 10-C-0202, Petition of Attorney General Eric T. Schneiderman to Modify the Verizon Service Quality Improvement Plan. (July 30, 2012).

⁶⁸ See e.g. *Special Access for Price Cap Local Exchange Carriers*, WC Docket 05-25, AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, RM-10593, Report and Order, 27 F.C.C.

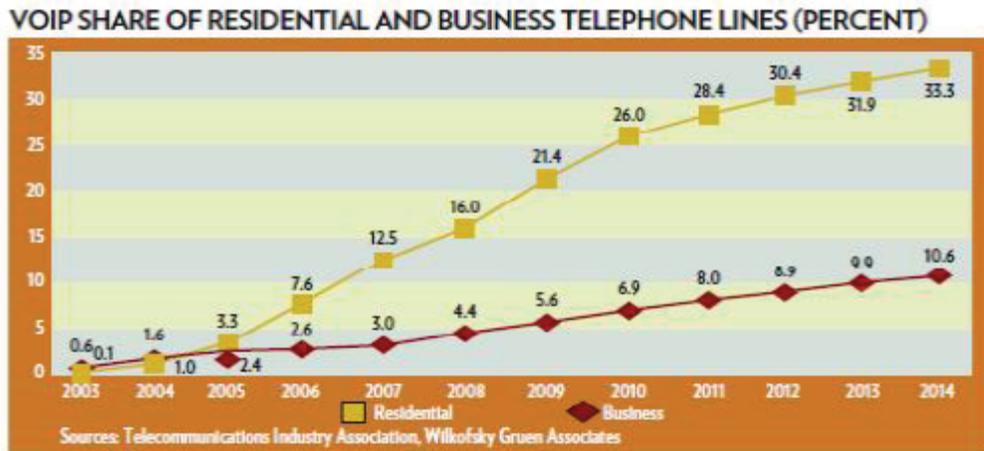
1. The Evolution to IP Networks is Gradual and Builds Upon the Existing TDM Network

From AT&T's rhetoric, it appears that AT&T expects the Commission to believe that AT&T's IP networks are simply deployed by forklift, immediately rendering the existing "legacy" TDM-based network obsolete. Instead, the reality is that the evolution to IP networks is a gradual evolution, whereby network operators slowly integrate IP into their "legacy" networks. AT&T overstates the pace at which conversion to IP is taking place, particularly for business customers.⁶⁹ As reflected by a chart placed into the record of this Docket by the Telecommunications Industry Association, by 2012, VoIP served only 8.9% of business lines, while serving 30.4% of residential lines.⁷⁰

Rcd. 10557, 10582, FCC 12-92 ¶ 49 (rel. Aug. 22, 2012) ("*Special Access Order*") (finding that in Atlanta approximately 60 percent of the zip codes lacked any competitive fiber deployment and it did not expect other markets would show broader competitive deployment); *Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas*, 22 FCC Rcd 21293, ¶ 41 (2007) (finding that competitors have their own facilities at only 0.25% of the commercial buildings in the six covered MSAs combined); *Petitions of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis, St. Paul, Phoenix and Seattle Metropolitan Statistical Areas*, 23 FCC Rcd 11729 ¶ 40 (2008) (finding that competitors served approximately 0.17 to 0.26 percent of all business locations in the four MSAs combined); Government Accountability Office, Report to the Chairman, Committee on Government Reform, House of Representatives, FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services, GAO-07-08, at 20 (Nov. 2006) (finding competitive fiber deployment across 16 markets limited to 6% of buildings with demand for DS1s; 15% with DS3 demand, and 25% with demand for 2 or more DS-3s); *United States v. SBC Communications, Inc.*, Complaint, No. 1:05-cv-02102, ¶ 15 (D.D.C. Oct. 27, 2005); *United States v. Verizon Communications Inc. and MCI, Inc.*, Complaint, No. 1:05-cv-02103, ¶ 15 (D.D.C. Oct. 27, 2005) (finding that for "the vast majority of commercial buildings in their territories, the ILEC is likely the only carrier that owns a last-mile connection to the building.")

⁶⁹ See *Ex Parte* letter from Brian Scarpelli, Manager, Government Affairs, Telecommunications Industry Association, to Marlene H. Dortch, GN Docket No. 12-353 (Jan. 11, 2013), Attachment, "Public Switched Telephone Network in Transition" at p. 3 ("*TIA Ex Parte*"); see also "Local Telephone Competition: Status as of December 31, 2011", Industry Analysis and Technology Division, Wireline Competition Bureau, January 2013 at p. 3, figure 2.

⁷⁰ *TIA Ex Parte* at p. 3.



By 2014, business VoIP will account for 10.9 percent of all business lines, while residential VoIP will grow to a 35.7 percent share.

This chart also illustrates the important fact that business customers are switching to VoIP more slowly than residential users, and at the current rate of conversion it will take decades for even a majority of business users to make this transition.

In any event, the IP network is plainly built on the back of the existing legacy network at every level. At the physical layer, the ILECs' IP network relies on the exact same physical infrastructure that the ILEC has maintained for over a century — most of which was deployed and paid for by captive ratepayers when the ILECs were government sanctioned monopolies protected from competition by state and federal regulators. The fiber facilities used to carry TDM DS0, DS1 and DS3 service can easily be harnessed to provide IP service and because most fiber deployment contain at least 24 fiber strands in a fiber cable, a carrier can have some strands in a single cable connected to TDM-based electronics, while other strands within the cable can be connected to IP-based optronics such as Ethernet gear.

Not that the copper plant on which the ILECs continue to rely is useless. At the same time that AT&T claims that it should be free to abandon legacy copper loops, relied on by its competitors, free from any rules or reasonable notice requirements, it admits that its “broadband” network is a hybrid copper-fiber network that uses AT&T's existing last mile copper plant to

reach its customers.⁷¹

Even where the ILEC is deploying new fiber to support its transition to IP-based service carried over broadband facilities, the ILEC is installing its fiber in conduit or on telephone poles that it has had in place for decades. And where an ILEC is deploying IP-based services to existing customers, it maintains its advantage of continuing to fund new investment backed by revenues from a massive entrenched base of paying customers, many of which date from the time when competition for local telephone service was unlawful. In short, the considerable ILEC advantages of economies of scale and scope, fostered by a century of state-sanctioned monopoly, cannot be so easily undone by a shift from circuit to packet switching.

2. The ILECs Control Bottleneck Transmission Facilities to The Vast Majority of Business Locations

Despite their claims that the IP evolution somehow levels the playing field, the ILECs continue to serve a very high percentage of business customers nationwide. For example, the Commission recently found that competitive deployment of last mile access facilities has generally not occurred except in areas with significant concentration of business demand.⁷² Thus, in markets such as Atlanta, 60 percent of the zip codes lacked any competitively provided wireline service,⁷³ and the Commission predicted that it would be unlikely to identify conflicting

⁷¹ See Transcript, AT&T at Credit Suisse Media & Telecom Week, Statement of Rick Lindner, Chief Financial Officer, AT&T at p. 9 (Dec. 5, 2006), attached as Exhibit D (“we’re not going to have to go fiber to the home. We are pleased with the bandwidth that we’re seeing over copper.”).

⁷² See *Special Access for Price Cap Local Exchange Carriers*, WC Docket 05-25, AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, RM-10593, Report and Order, 27 F.C.C. Rcd. 10557, 10582, FCC 12-92 ¶ 49 (rel. Aug. 22, 2012) (“*Special Access Order*”).

⁷³ *Id.*

trends in different markets.⁷⁴ Although the Commission found that business demand for service is highest and most concentrated in certain geographic areas, the Commission also found that “demand exists for ... services outside of these areas.”⁷⁵ Similarly, the Commission concluded that this demand — in areas where the demand is less concentrated — cannot easily be served by extending competitive wireline networks from those areas where demand is concentrated.⁷⁶ In other words, there are significant swaths of the business market that for the foreseeable future, will not have a choice between competing facilities-based networks.

Nor, given the economic factors entailed in deploying competitive telecommunications networks, should this be a surprise. Self-provisioning last mile facilities to small and medium size businesses and residential consumers is not an economic option. The Commission has long recognized the significant time, expense and disruption associated with fiber deployment.⁷⁷ As explained above, such deployment is rarely economic in areas outside of the most densely

⁷⁴ *Id.* ¶ 50.

⁷⁵ *Id.* ¶ 53. The fact that demand by businesses for telecommunications services exists in small towns in rural areas comes as no surprise to Granite, which serves business customers in rural towns such as Carney, Michigan; Enderlin, North Dakota and Williamsville, Virginia. (Nichols Decl. ¶ 4).

⁷⁶ *Id.* at ¶¶ 34, 60, 55.

⁷⁷ See *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an Unified Intercarrier Compensation Regime; Federal-State Joint Board, Report and Order and Further Notice of Proposed Rulemaking*, 26 FCC Rcd 17663, 17668, 17669 ¶¶ 4-5, 7 (2011); *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 Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, ¶ 7 (2003) (“*TRO*”), corrected by *Errata*, 18 FCC Rcd 19020 (2003), vacated and remanded in part, *aff’d in part, United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir 2004) (*USTA II*), cert. denied, 543 U.S. 925 (2004), on remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533 (2005) (“*TRRO*”), *aff’d, Covad Commc’ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006), ¶¶ 85-91.

populated business centers.⁷⁸ The Commission has consistently found that all competitive carriers, including cable companies, “face extensive economic barriers” to the deployment of competitive facilities where they lack existing facilities needed to serve the customer.⁷⁹ These barriers include significant sunk costs along with substantial economies of scale and scope.⁸⁰ These barriers continue to make deployment of competitive last mile access facilities “costly and difficult.”⁸¹

Further, it is unlikely that even the ILEC will have deployed fiber facilities to most small and medium sized business customers. For example, in AT&T’s 22 state footprint, AT&T has announced that it intends to deploy fiber to reach approximately 50 percent of the multi-tenant office buildings in its 22 state footprint.⁸² This leaves the remaining half of the multi-tenant business locations in AT&T’s territory wholly reliant on copper infrastructure for reliable wireline services.⁸³ Even Verizon, which is the only RBOC to have invested in fiber to the home, is limiting its fiber investment. Verizon has written off deploying fiber to the forty percent of its territory where the service has yet to be deployed.⁸⁴ Verizon has clearly informed investors that it will not expand FiOS because “every copper customer doesn’t make financial sense to convert to FiOS.”⁸⁵ Thus Verizon has stated that it only intends to deploy fiber to the number of homes to

⁷⁸ *Supra* n. 72.

⁷⁹ *Qwest Phoenix Forbearance Order*, 25 FCC Rcd at 8670 ¶ 90 (citing *TRO* ¶¶ 85-91).

⁸⁰ *TRO* ¶ 86.

⁸¹ *Qwest Phoenix Forbearance Order*, 25 FCC Rcd at 8661 ¶ 73.

⁸² *See* Laying a Foundation for Future Growth, AT&T Analyst Conference, Nov. 7, 2012 at p. 11. Available at <http://www.att.com/gen/general?pid=23393>.

⁸³ *Id.*

⁸⁴ *See* Verizon 2011 Annual Report at p. 3 (claiming that FiOS has passed homes in 60% of its wireline territory).

⁸⁵ Exhibit E, Transcript, Fran Shammo, Executive Vice President and Chief Financial

which it committed in its original local franchise agreements and “at this point [Verizon] won’t build beyond that.”⁸⁶ Even if the ILEC deployed fiber in a wire center, its competitors would likely need access to copper in that wire center, both to continue serving existing customers and to compete for ILEC customers who may prefer a lower cost alternative because their budget may not be able to absorb the cost of upgrading to the higher bandwidth of fiber-based services, especially if the customer lacks a pressing need for that bandwidth.⁸⁷

Nor are the cable companies viable competitors for the customers Granite serves. Like the ILECs, each cable provider offers service only within its geographically limited franchise area. Even within that limited territory, in many instances, the cable companies do not have facilities that pass Granite customer locations, as cable networks predominantly serve residential areas. Granite’s business customers typically have locations in retail areas that are not passed by a cable network, and it is cost-prohibitive to extend that network to serve a business that needs only a few lines. In addition, even where the business location is passed by the cable company, the cable company’s voice service is not a viable substitute for most business customers. Cable providers also do not have the sophisticated back office functionality necessary to provide the type of customer service that national multi-location business customers expect from Granite. It

Officer, Verizon, Goldman Sachs Communacopia Conference, at p. 9 (Sep. 20, 2012) (“Shammo Transcript”).

⁸⁶ *Id.* at p. 13.

⁸⁷ *See* Nichols Decl. ¶ 10 (“most businesses will reject products that offer more functionality than required – but at higher prices. For example, if a gas station needs to complete credit card transactions at a point of sale in a retail store location that is sufficiently served by a copper DSL line and does not require other high bandwidth capacity at that particular location, that business is unlikely to opt for a product that offers the unneeded bandwidth at double or triples the price, such as a data T1 or fiber-based data product. The business in this example will keep the lower-priced DSL line, even though higher capacity products are available.”). *See also* *Shammo Transcript* at p. 10 (Verizon benefits when it replaces copper with FiOS because Verizon expects customers to buy more and higher priced services.)

is therefore no surprise that NRRI has found that “cable telephony substitution” has not occurred in the business market to the same extent it has occurred in the residential market.⁸⁸ For similar reasons, wireless services are not a substitute for the reliable wireline services that business customers seek. Business customers generally require a more reliable service, even for simple voice calls.

Consistent with the data presented above, showing that VoIP has achieved only minimal penetration in the business market, VoIP — either over the top or facilities-based — is also not a competitive alternative for most of Granite’s business customers. To use VoIP service, a customer must have a broadband connection. If that connection comes from the ILEC, it is priced at the discretion of the ILEC and therefore provides no competition at all to the ILEC. As discussed above, cable providers cannot provide service economically to a very large percentage of Granite’s customer locations, particularly because of the geographically dispersed small business locations that Granite serves. In any event, an over the top VoIP provider would have to ensure that every location where its customer wanted service had a broadband connection. The customer would then have to procure the voice service and the underlying broadband connection. And any provider of facilities-based VoIP would have to overcome the economic barriers associated with deploying a broadband connection to a relatively small customer. It is unlikely that a provider would view such a deployment — to a single customer location using 5 or fewer voice lines — as an economically rational decision.

AT&T downplays the limits to competitive entry by suggesting that it has incurred significant line losses as a result of competitive forces.⁸⁹ This statement is misleading because

⁸⁸ NRRI Transition Report at p. 5.

⁸⁹ AT&T Petition at pp. 4-5, 10.

ILEC line loss is much lower in the business market than the residential market.⁹⁰ There are several explanations for this distinction. First, as discussed above, cable substitution is more likely to occur in the residential market where cable networks are located and residential customers are more willing to tolerate the reliability issues associated with cable-provided broadband and voice services. Second, residential users require the mobility that wireless service provides much more than business users, particularly retail businesses. Residential users are also less concerned about wireless reliability issues, leading to a higher rate of wireless substitution among residential customers. Of course, given AT&T's and Verizon's position as far and away the two largest wireless carriers in the country, many of AT&T's and Verizon's purported line losses are really intra company line transfers - from ILEC wireline voice lines to ILEC wireless voice lines. AT&T's line losses have no impact on the competitive reality that most business locations lack alternatives to the ILEC provided wireline service because no alternative transmission facility has been deployed to their business location and no competitor is likely to deploy new transmission facilities to these locations for the foreseeable future. If these businesses are to enjoy the benefits of competition, the Commission must continue to enforce the pro-competitive policies of the 1996 Act.

C. The Relief Sought by AT&T is Prohibited By Well-Established, Long-Standing Law

The premature deregulation proposed by AT&T, even if limited to a handful of wire centers self-selected by the ILECs, would run roughshod over the pro-competition principles established in the Act and the Commission's rules. And AT&T does not hide its contempt for these rules, even suggesting that dialing parity — a core tenet of telephone competition —

⁹⁰ NRRI Transition Report at p. 6 (ILEC business line losses between 2005-2010 were more than 50% lower than residential line losses).

should be discarded.⁹¹ AT&T's proposal to deregulate competition prematurely is profoundly at odds with the measures in sections 251 and 271 that Congress enacted to protect competition and consumers.

1. AT&T's Proposal is Inconsistent with Section 251

For Granite, and its customers, this end run around the pro-competitive provisions of the 1996 Act would undermine the competitive gains in the local services market made since 1996. AT&T's proposal to run roughshod over the 1996 Act is a naked attempt to preclude competitors from obtaining access to unbundled loops. AT&T seeks the ability to retire its copper infrastructure without notice to the Commission or competitors, knowing that that the Commission has severely limited the ability of CLECs to access fiber loops.⁹² Moreover, standard language in AT&T's commercial Local Wholesale Complete ("LWC") agreements under section 271 flatly prohibits the CLEC from accessing customers served by fiber loops, regardless of the reason that AT&T installed the fiber loops: "nothing herein shall obligate AT&T-22STATE to provide LWC or LWCALs using or otherwise provided over (i) any fiber-to-the-premise, fiber-to-the-home or fiber-to-the-curb facilities (as defined and used in 47 C.F.R. section 51.319(a)(3) and FCC orders relating thereto)."⁹³

AT&T further believes that it can evade its unbundling and interconnection obligations by having IP-based services classified as information services and argues that it should not have to "maintain access to the otherwise unused copper infrastructure in the feeder or to provide a

⁹¹ AT&T Petition at p. 19.

⁹² See e.g. *TRRO*, 20 FCC Rcd at 2633-34 ¶ 182; *Section 271 Broadband Forbearance Order*, 19 FCC Rcd at 21498 ¶ 4.

⁹³ See letter of William Roughton, General Attorney, AT&T, to Marlene H. Dortch, January 6, 2012, attached as Exhibit F, extending term through Dec. 31, 2014, June 2, 2009 Agreement between AT&T and EveryCall Communications, Inc. and amendment, at § 1.7.

non-packetized transmission path between the central office and the customer's premise."⁹⁴ Verizon has argued before the D.C. Circuit in litigation regarding the Commission's Network Neutrality rules that the FCC lacks jurisdiction over information services.⁹⁵ It is therefore apparent that it is the RBOCs' plan to cabin off all of their services — voice, video and data — from Commission jurisdiction — simply by providing them through the use of IP and classifying them as an information service.

While this scheme is admirable for its simplicity, it would make for poor policy. For example, "impairment" remains the "touchstone" for determining which elements of the ILEC network must be "unbundled."⁹⁶ Any proposal to eliminate UNEs through side door measures such as AT&T has proposed cannot be squared with the core tenet of the Act's unbundling regime.

But the problem with AT&T's proposal runs deeper than just access to UNEs. AT&T's radical proposal threatens the very core of the 1996 Act's requirement that consumers be able to choose their service provider of choice, while maintaining the ability to call anyone, regardless of the identity of the called party's service provider. AT&T's proposal — even on a limited trial basis — to "keep IP services free of legacy regulation"⁹⁷ conflicts with the core interconnection provisions of Section 251.⁹⁸ Those provisions require an ILEC to "interconnect directly or

⁹⁴ AT&T Petition at p. 18-19.

⁹⁵ *Cellco Partnership v. FCC*, No. 11-1135, Joint Brief for Verizon and MetroPCS at p. 14 (filed July 2, 2012) (D.C. Cir.)

⁹⁶ *See USTA v. FCC*, 290 F.3d 415, 427 (D.C. Cir. 2002).

⁹⁷ AT&T Petition at p. 22.

⁹⁸ Granite understands the ILECs' argument that § 251(c)(2) does not apply to IP traffic and therefore they are under no legal obligation to complete calls sent to them in IP, but the FCC has the necessary legal authority to mandate SIP interconnection. It would be poor policy to abandon mandatory interconnection because of the technical evolution from TDM to IP. As discussed below, allowing parties to have unfettered bottleneck access to large numbers of

indirectly with the facilities and equipment of other telecommunications carriers.”⁹⁹ There is nothing in this section that limits the obligation of interconnection to TDM-based services. But AT&T seeks instead to use the quoted term “telecommunications carrier” to limit this requirement to entities other than itself by having all of its IP-based services classified as an information service, thereby exempting it from all of the pro-competitive provisions of the Act that apply to “telecommunications carriers.” AT&T’s attempt to eliminate all of the existing legal framework governing interconnection would generate serious adverse consequences for competition. The mandatory interconnection provisions of the Act were adopted to deny the ILECs the ability to exclude a competitor from the market by refusing interconnection. Without mandatory interconnection a competitor — even one with its own facilities-based network, would be unable to secure for its customers the ability to make calls to customers of the ILEC, except at the whim of that ILEC.¹⁰⁰ And as the Commission recently asserted, “the 1996 Act recognized, without the ability to exchange traffic with the local incumbent carrier, no competitive provider would be able to compete effectively.”¹⁰¹

In an *ex parte* letter in support of its Petition, AT&T contends that there is no need for the Commission to regulate IP-to-IP interconnection for the delivery of traffic to the local customers of AT&T or other local service providers.¹⁰² In support of this contention, AT&T claims that

customers invites anti-competitive behavior.

⁹⁹ 47 U.S.C. § 251(a).

¹⁰⁰ AT&T Communications of Illinois *Petition for a Total Local Exchange Wholesale Service Tariff from Illinois Bell Telephone Company*, Docket No. 95-0458 and LDDS Communications *Petition for a Total Local Exchange Wholesale Service Tariff from Illinois Bell Telephone Company*, Docket No. 95-0531 (1996 Ill. PUC Lexis 320).

¹⁰¹ Declaratory Ruling, *Petition of CRC Communications of Maine, Inc. and Time Warner Cable Inc. for Preemption Pursuant to Section 253 of the Communications Act, as Amended, et al*, 26 F.C.C. Rcd. 8259, 8266 ¶ 12 (2011) (“*CRC Declaratory Ruling*”).

¹⁰² *Ex Parte* letter from Robert Quinn, Senior Vice President, Federal Regulatory and

“hundreds of thousands of IP networks have connected directly or indirectly since the days of the commercial Internet, all in the absence of any interconnection mandate . . .”¹⁰³ AT&T cites Comcast as “appropriately warn[ing] that interconnection regulation for any VoIP traffic ‘could suddenly catapult the Commission into regulation of the Internet backbone. . .’”¹⁰⁴

This is a red herring. Packet switched VoIP traffic does not flow over the public Internet. Moreover, AT&T’s analogy to the commercial Internet backbone, where there are numerous routes and providers able to transmit traffic from Point A to Point B, is completely inapposite when applied to the bottleneck situation that results when a single carrier controls access to its end user customer.¹⁰⁵ The Commission has long recognized that even a small carrier has market power over access to its end user customer:

Sprint and AT&T persuasively characterize both the terminating and the originating access markets as consisting of a series of bottleneck monopolies over access to each individual end user. Thus, once an end user decides to take service from a particular LEC, that LEC controls an essential component of the system that provides interexchange calls, and it becomes the bottleneck for IXCs wishing to complete calls to, or carry calls from, that end user.¹⁰⁶

Just last year, the Commission reaffirmed this finding, observing that CLECs have the

Chief Policy Officer, AT&T, to Ms. Marlene H. Dortch, WC Docket No. 05-25, at pp. 5-7.

¹⁰³ *Id.* at p. 5.

¹⁰⁴ *Id.* at p. 6.

¹⁰⁵ See *Ex Parte* letter from Samuel L. Feder, Counsel for Charter Communications, Inc. to Marlene H. Dortch, WC Docket 10-90 at p. 2 (Dec. 17, 2012) (explaining that the availability of alternative providers and alternative routes to reach customers distinguishes Internet peering from IP interconnection for voice traffic); see also *Ex Parte* letter from Richard Shockey, Shockey Consulting to Marlene H. Dortch, GN Docket 13-5, WC Docket No. 09-51 (Jan. 16, 2013) at p. 2 (“Interconnected SIP is NOT the Internet”) and at Attachment, “Technical Aspects of SIP/VoIP Interconnection,” at p. 4 (“VoIP/SIP traffic is different [from IP Peering for Internet traffic] and the agreements will have to be different as well.”)

¹⁰⁶ *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923, 9935 ¶ 30 (2001) (footnote omitted).

ability to impose “excessive access charges on IXCs” and that “this anticompetitive practice was possible because the market for these services did not allow competition to discipline rates and CLECs thus enjoyed a monopoly over access charges: in order to originate and terminate long distance traffic, the IXC has no choice but to use the local network of the LEC serving the end-user customer.”¹⁰⁷ Changing the protocol in which the traffic is carried from TDM to IP does absolutely nothing to reduce a LEC’s bottleneck control over access to its end-users.

Similar issues have played out before the Commission with respect to Internet traffic. For example, in a dispute over Comcast’s imposition of charges for last-mile delivery of traffic to the customers that Comcast serves as an ISP, Level 3 rejected the claim that the dispute was over “backbone peering,” and pointed out that short of taking away Comcast’s end user customer, there was no way to avoid sending traffic to the customer through Comcast.¹⁰⁸ It is this control over access to its end user that dictates that the Commission not allow IP-to-IP interconnection to be governed purely by the bargaining strength of the connecting parties.

AT&T also asks the Commission to eliminate its dialing parity obligation. While AT&T

¹⁰⁷ Brief for Amicus Curiae Federal Communications Commission In the United States Court of Appeals for the Third Circuit, Nos. 11-26 (consolidated with No. 11-2568) & 11-1204 (consolidated with No. 11-2569), *PAETEC Communications, Inc. v. MCI Comm’s Services, Inc. d/b/a Verizon Business Services; Verizon Global Networks Inc.*, Case No. 11-2268, filed March 14, 2012, at p. 6.

¹⁰⁸ *Ex Parte* letter from John M. Ryan, Executive Vice President and Chief Legal Officer, Level 3 Communications, to Marlene H. Dortch, GN Docket No. 09-191, January 14, 2011, at pp.2- 3. *See* Attachment to *ex parte* letter from John M. Ryan, Assistant Chief Legal Officer, Level 3 Communications, to Marlene H. Dortch, GN Docket No. 09-191, December 3, 2010, at pp. 2-3:

Unlike “peering” in the Internet backbone, where competition abounds and prices have been declining steadily, Internet carriers that have content requested by Comcast subscribers have no choice but to exchange traffic with Comcast. Comcast is using this dominant position to demand payment for traffic delivered at its customers’ requests. You simply cannot “route around” Comcast to provide requested content to Comcast’s subscribers.

suggests dialing parity is antiquated,¹⁰⁹ it too rests as a core provision of the Act, guaranteeing that a customer of one phone company has the ability to call a neighbor who is the customer of a competing company without having to enter into any special codes. Thus, if dialing between ILEC customers requires dialing a seven digit number, the ILEC cannot require that a competitor's customer access the local network through a more cumbersome or restrictive dialing pattern, such as by dialing an additional five digit access code.¹¹⁰ Eliminating the pro-competitive protections of the Act, such as interconnection and dialing parity, would constitute major steps on the road to rolling back the competition that has developed since 1996 and deterring future competitive entry. The Commission must reject AT&T's suggestion that it take such steps.

2. AT&T's Proposal is Inconsistent with Section 271

As explained earlier, Granite's ability to negotiate agreements with the RBOCs for DS0 service is not unrelated to RBOC's compliance with their obligations under section 271 of the Act, which governs RBOC entry into the long-distance service market. Under section 271, in order for an RBOC to provide in-region interLATA long-distance service, it must demonstrate compliance with certain obligations to provide access and interconnection to requesting CLECs.¹¹¹ And its obligations to demonstrate compliance remain ongoing, even after the RBOC receives the Commission's approval to provide in-region interLATA long-distance service.¹¹²

The obligations under section 271 remain wholly independent of the RBOCs' separate

¹⁰⁹ While the dialing parity rules were plainly drafted in light of the PSTN's dialing system and the NANP, the principle applies equally where the "dialing" is an artifice to connect a real-time voice transmission from one IP address to another IP address.

¹¹⁰ 47 U.S.C. §§ 153(15), 251(b)(3).

¹¹¹ See 47 U.S.C. § 271(c)(1)(A) and § 271(c)(2)(A) .

¹¹² 47 U.S.C. § 271(d)(6).

duties as ILECs under section 251. For instance, section 271 of the Act requires RBOCs to provide “Local loop transmission from the central office to the customer’s premises, unbundled from local switching or other services.”¹¹³ It also requires that RBOCs provide “Local switching unbundled from transport, local loop transmission, or other services.”¹¹⁴ Unlike UNEs, which must be priced based on cost, RBOCs must offer these section 271 elements at rates that are just, reasonable and nondiscriminatory.¹¹⁵ The FCC has enforced these obligations primarily through proceedings evaluating BOC applications on a state-by-state basis for authority under Section 271 to provide in-region interLATA long distance service. In these cases, the FCC has addressed the terms on which a BOC may obtain such authority.

The Commission has emphasized that the RBOCs’ obligation to provide nondiscriminatory access to section 271 elements at just and reasonable rates is independent of its obligation to provide section 251(c)(3) UNEs at cost-based rates, because the plain language and structure of the section 271 checklist establish an independent and ongoing access obligation to provide section 271 elements.¹¹⁶ As the D.C. Circuit recognized, “even in the absence of impairment, RBOCs must unbundle local loops, local transport, local switching, and call-related databases in order to enter the interLATA market.”¹¹⁷ Thus, while section 251(c)(3) UNEs are only available where requesting carriers are “impaired,”¹¹⁸ § 271 imposes on the RBOCs a permanent duty to provide access to the items enumerated on the competitive checklist, which

¹¹³ 47 U.S.C. § 271(c)(2)(B)(iv).

¹¹⁴ 47 U.S.C. § 271(c)(2)(B)(vi).

¹¹⁵ *USTA II*, 359 F.3d at 588 (citing 47 U.S.C. §§ 201-202).

¹¹⁶ *See TRO*, ¶ 654.

¹¹⁷ *USTA II*, 359 F.3d at 588 (emphasis added); *see also Verizon N.E., Inc. v. Maine PUC*, 509 F.3d 1, 5 (1st Cir. 2007) (explaining that in contrast to § 251, § 271 mandates that “statutorily specified network elements be made available.”).

¹¹⁸ *See* 47 U.S.C. § 251(d)(2)(B).

includes section 271 elements.

This permanent duty to provide specified network elements under section 271 is not tied to any technology. The text of the section 271 obligation to provide local loops refers simply to “local loop transmission”; it is not limited to TDM based transmission and does not exclude IP-based transmission.

Granite acknowledges that the Commission granted the RBOCs forbearance from their obligation to provide access to fiber loops and packet switching under section 271.¹¹⁹ The Commission’s decision was, however, largely based on a) evidence pertaining to the residential market b) speculation regarding cable company competition in the business market and c) speculation regarding “promising access technologies on the horizon.”¹²⁰ Furthermore, the Commission’s decision to forbear from the RBOC obligation to provide access to fiber loops under section 271 was expressly predicated on continued access to UNEs under section 251(c)(3). The Commission explained that forbearance was warranted “[b]ecause [C]LECs can still obtain access to network elements under section 251 to serve business customers.”¹²¹

After more than eight years, however, it is plainly obvious that the Commission’s predictive judgment in this regard was flawed. The anticipated competition from cable companies in the business market has not materialized and the ILECs continue to dominate this market and retain significant market power.¹²² Furthermore, the “promising access technologies” have failed to make any inroads. Neither fixed wireless, satellite nor any of the other

¹¹⁹ *Section 271 Forbearance Order*, ¶ 1.

¹²⁰ *Id.* at ¶ 22.

¹²¹ *Id.* at, ¶ 22. n.68.

¹²² Even if cable competition for business customers were to grow, as discussed above, the locations served by cable companies would still be limited to those on the cable network. There will therefore always be business locations in which the ILEC’s monopoly will remain free from cable competition.

technologies on which the forbearance was premised have demonstrated any chance of breaking the RBOC stranglehold on the business market.

Furthermore, as AT&T's Petition lays bare, the RBOCs have no intention of allowing CLECs to compete using loops unbundled pursuant to section 251. Instead they have asserted a proposal where in the name of an IP transition they intend to move all of their services to fiber and IP, aggressively retire their copper plant, and then claim that section 251 no longer applies. If this gambit is permitted, and the premature forbearance granted in 2004 allowed to remain intact, the RBOCs will have successfully rolled back the Commission's competitive achievements in implementing the 1996 Act.

D. The Commission Should Modify its Competitive Framework to Accommodate Evolution of the PSTN to IP

1. The Current Legal and Regulatory Framework is Technology Neutral

AT&T's Petition at least implicitly suggests that the shift from circuit switched TDM communications to packet switched IP communications requires a different regulatory framework because the existing framework did not anticipate the evolution to IP. This is simply a preposterous fallacy that AT&T and the RBOCs have perpetuated to convince state and federal policymakers that they should be free to undermine competition free of any sensible restraints. The Commission has long held that "the pro-competitive provisions of the 1996 Act apply equally to advanced services and to circuit-switched voice services. Congress made clear that that the 1996 Act is technologically neutral and is designed to ensure competition in all telecommunications markets."¹²³ The technology underlying the network is irrelevant as is the

¹²³ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24011, 24017 ¶ 11 (1998).

mode of transmission. To allow carriers to avoid their statutory competitive and interconnection obligations by electing to use one type of technology as opposed to another would defy logic.

The Commission typically seeks to promulgate rules that are “technology neutral” because it believes that it “is in the public interest for competing telecommunications technologies to succeed or fail in the marketplace on the basis of their merits and other market factors, and not primarily because of government regulation.”¹²⁴ Moreover, the plain language of the Act requires such a technology-neutral approach. Section 706, upon which the Commission has partially rested its expansive authority to enact broadband, USF and intercarrier compensation reforms,¹²⁵ defines advanced telecommunications capability “without regard to any transmission media or technology” and as a capability that allows users to “originate and receive...voice, data, graphics and video... using any technology.”¹²⁶ The Commission has established that the “intent of section 706 [is] that our broadband policy be technology-neutral.”¹²⁷

2. The Commission Should Update Its Competition Policy in the Business Market To Make Competitive Access To Last Mile Transmission Facilities Technology Neutral

There are multiple steps that the Commission should take in order to harmonize its

¹²⁴ *In The Matter Of Biennial Regulatory Review -- Amendment Of Parts 1, 22, 24, 27 And 90 To Streamline And Harmonize Various Rules Affecting Wireless Radio Services*, 23 FCC Rcd. 5319 ¶ 13 (2008).

¹²⁵ *Connect America Fund Order*, 26 FCC Rcd 17663 at ¶¶ 66-73.

¹²⁶ § 706, Pub. L. 104-104, Title VII, February 8, 1996, 110 Stat. 153, reproduced in the notes under 47 U.S.C. § 157. Section 706 is not part of the Communications Act of 1934. Congress enacted Section 706 as part of the Telecommunications Act of 1996 and more recently codified the provision in Chapter 12 of Title 47, at 47 U.S.C. § 1302.

¹²⁷ *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*, 14 FCC Rcd 2398, 2437 ¶ 74 (1999).

competitive framework with the Act's mandate of technological neutrality. First, the Commission should, consistent with the recommendation of the National Broadband Plan,¹²⁸ develop a coherent and effective framework for analyzing competition in the business market, regardless of network protocol and regardless of transmission medium, so that American consumers and business are not denied access to competition simply because the incumbent provider elects to provide service using an IP-capable network rather than its legacy network. Instead, the Commission's competitive analysis, particularly in the separate business market, should focus on whether deployment of alternative competing facilities is economic, and where such competition is not economic, the Commission should establish a coherent set of conditions under which the ILECs must provide reasonably priced access to bottleneck transmission facilities.

Second, the Commission should modify its copper retirement rules to deny ILECs the ability to retire copper loops unless they provide CLECs with an opportunity for continued access to loops serving those locations at TELRIC rates. Under the Commission's current rules, ILECs can retire copper loops as long as they provide the Commission with notice of such retirement. This fails to protect customers currently receiving competitive services provided over UNE copper loops and certainly does not protect consumers who may in the future find their competitive choices limited because the Commission's rules are not technology neutral. The Commission should act on the currently pending petitions for rulemaking regarding copper loops¹²⁹ so that customers continue to have competitive choices for their communications

¹²⁸ See *National Broadband Plan Recommendation 4.7* at p. 48.

¹²⁹ *In the Matter of Petitions for Rulemaking and Clarification Regarding the Commission's Rules Applicable to Retirement of Copper Loops and Copper Subloops*, RM-11358; *Bridgecom International, Inc. et al. Petition for Rulemaking and Clarification* and *XO Communications, LLC, et al Petition for Rulemaking*, RM-11358 (filed Jan. 18, 2007).

services regardless of the transmission media used in the last mile facilities serving their location. Competition will benefit if the Commission puts in place mechanisms to ensure that competitive replacement products remain available to CLECs at rates that do not exceed what CLECs are currently paying. The fact that some business customers are willing to pay a substantial premium for high speed dedicated services, such as special access or even integrated T-1s, should not be allowed to obscure the fact that many other business customers are more than satisfied with the POTS service they currently receive and will, at many business locations, not need more that level of service at any time in the foreseeable future.

Third, the Commission should also take steps to facilitate the transition to fiber-based broadband IP network by requiring ILECs that eliminate copper from their network to make available fiber-based replacement products to competitors where third party alternatives are not available for serving the business market. This requires the Commission to conduct a data driven overhaul of its competition analysis so that the Commission evaluates competition based on whether the customer at a business location has a reasonable choice among competing providers of service at reasonable prices. Where such competition is not available, consistent with the requirement of sections 251 and 271, the Commission should update and modify its existing framework to require ILECs to provide access to their last mile facilities to competitors regardless of the technology used in the transmission media and regardless of the network protocol. The Commission should use the data driven market analysis it conducted in the *Qwest Phoenix Forbearance Order* as its model for such an analysis.

Fourth, the Commission should partially reverse the forbearance granted in the *Section 271 Forbearance Order* and modify the relief to require the RBOCs, in the business market, to provide access to fiber loops, packetized hybrid loops and packet switching at just and

reasonable rates pursuant to Section 271. As discussed above, much of the basis for granting the RBOCs forbearance from their 271 obligations rested on assumptions and predictions regarding competition in the business market that have failed to come true. The Commission now has an obligation to revisit those predictions and recalibrate its policies to the facts. While the *271 Forbearance Order* suggested that CLECs were equally capable of deploying broadband networks.¹³⁰ But, as will likely be shown by the data collection effort contemplated by WC Docket 05-25, CLECs have been unable to deploy competing broadband networks to all but a fraction of the available buildings in the business market. Even the cable companies that, like the RBOCs, had an existing network, largely insulated from competition, and the revenues from a broad customer base on which to use a source of funding, have been able to deploy broadband networks to a small fraction of business customers and fewer residential customers than ILECs. Moreover, competitive fiber to the home deployment in the residential market is virtually nonexistent. Both the ILECs and the cable companies had significant first mover advantages, in terms of access to capital, building access agreements, access to rights of way, use of their existing networks and infrastructure such as poles and conduit. CLECs were essentially replicating this from scratch, and with no hope of ever achieving the scale economies of the ILECs and the cable companies.

And despite this significant first mover advantage, the RBOC record of fiber deployment since the *TRO* and the *Section 271 Forbearance Order* is unimpressive. Other than Verizon, none of the RBOCs have constructed fiber to the home networks. And even Verizon's FiOS network is limited as Verizon, freed from its supposedly restrictive fiber unbundling obligation,

¹³⁰ *Section 271 Forbearance Order*, 19 FCC Rcd at 21510 ¶ 29.

has no intention of deploying fiber to nearly 40 percent of its footprint.¹³¹ If Verizon is not expected to extend fiber to the home to a large fraction of its customers, on what basis can the Commission predict that any competitors would be able to do the same?¹³²

The record for AT&T is even worse. AT&T has firmly stated it has no plans to build fiber to the home.¹³³ Its model has always been a fiber to the node, continuing to make significant use of its embedded legacy copper infrastructure — the same legacy copper infrastructure to which it seeks to deny CLECs access.¹³⁴ And even in the business market, AT&T only intends to deploy fiber to fifty percent of the multi-tenant business locations (and only those with six or more tenants) in its territory.¹³⁵ Despite the overblown rhetoric in its petition, AT&T intends to continue to serve the remaining customers with copper based networks.

The Commission certainly has the authority to revise its policies and decisions as it “reasonably see[s] fit based on changes in market conditions, technical capabilities, or policy

¹³¹ See Verizon 2011 Annual Report at p. 23 (Verizon currently serves nearly 60 percent of its footprint with FiOS); Transcript, Fran Shammo, Executive Vice President and Chief Financial Officer, Verizon, Goldman Sachs Communacopia Conference, at p. 9.

¹³² While the RBOCs may point to Google Fiber, that is an experiment in one city and it is not yet clear whether the results of that trial demonstrate that such a business model is economic or can be replicated anywhere else. See Neal Lachman, “Challenges And Opportunities For Google’s Fiber Project: A Reality And Sanity Check “ August 3, 2012, (postulating that there are “severe shortcomings in Google’s business model, which can be disastrous for the profitability of its project”) available at <http://seekingalpha.com/article/778871-challenges-and-opportunities-for-google-s-fiber-project-a-reality-and-sanity-check>.

¹³³ *Supra* n. 71.

¹³⁴ *Id.*

¹³⁵ See Laying a Foundation for Future Growth, AT&T Analyst Conference, Nov. 7, 2012 at p. 40. Available at <http://www.att.com/gen/general?pid=23393>. (noting that AT&T considers a multi-tenant building

approaches to regulation.”¹³⁶ When the Commission bases its decisions on predictive judgments such as those at the heart of the *Section 271 Forbearance Order*, the Commission has a special duty to revisit such policies when the predictions are inaccurate. The Commission’s “latitude to make policy based on predictive judgments deriving from its general expertise...implies a correlative duty to evaluate its policies over time to ascertain whether...they actually produced the benefits the Commission originally predicted they would.”¹³⁷

The RBOCs continue to perpetuate the myth that the only way the Commission can encourage the RBOCs to invest in fiber and IP-based networks is by eliminating their statutory unbundling obligations. Verizon, in its latest audacious bid to roll back competition, has suggested that the Commission eliminate the rule that requires ILECs to provide unbundled access to a 64Kb voice channel in order to promote additional investment in IP and broadband.¹³⁸ This is patently absurd. As demonstrated above, Verizon has already declared its intent to cease bringing FiOS to additional area of its territory because the approximately \$700 per home it costs to deploy FiOS is not economic. It simply defies logic that eliminating an obligation to provide a voice channel under certain limited circumstances will drastically alter Verizon’s investment formula so that it will have a business case for deploying fiber to 100 percent of its territory. Similarly, Granite’s comments, provided in detail below, as well as the analysis by others, demonstrate the lack of new investment proposed by AT&T.

As demonstrated in the past with respect to DSL, the RBOCs respond with new investment in response to both intramodal and intermodal competition. But the Commission’s

¹³⁶ *Ad Hoc Telecomms Users Comm. v. FCC*, 572 F.3d 903, 911 (D.C. Cir. 2009).

¹³⁷ *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992).

¹³⁸ *Ex parte* letter from Maggie McCready, Verizon, to Marlene H. Dortch, GN Docket 12-353, GN Docket No. 13-5 at p. 3 (filed Jan. 15, 2013).

focus on intermodal competition has left the nation with a duopoly at best as the promising technologies the *TRO* envisioned have simply failed to offer American the robust alternatives to duopoly and monopoly communications service.¹³⁹ The Commission can no longer blindly accept RBOC promises of new investment in return for killing competition because it simply does not work.

3. The Commission Must Mandate IP Interconnection

Lastly, for the reasons discussed above, Granite agrees with the NTCA that the Commission should confirm that the Act's mandates regarding compulsory interconnection applies to all interconnection — including IP interconnection — for the exchange of traffic subject to sections 251 and 252 (as well as under section 271), regardless of the technology used for such interconnection.¹⁴⁰ The transition of voice service to IP networks does not eliminate the need for mandatory interconnection of networks, particularly in light of the RBOC claims that the Act somehow, despite the clear preference for technology neutral rules, exempts IP-based services. Further, mandatory IP interconnection is central to the expansion of affordable broadband. The Commission has explicitly linked mandatory interconnection for IP-based voice traffic to fulfillment of its statutory goal of increasing deployment of broadband.¹⁴¹ Absent

¹³⁹ See *TRO*, ¶ 246 n.737 citing *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*, Third Report, 17 FCC Rcd 2844, 2877-80 ¶¶ 79-88 (touting coming intermodal competition from “3G Wireless,” (¶ 80) satellite (¶ 85), “Helios, an unmanned, solar-powered aircraft” that flies “in the stratosphere for a six-month period of time” (¶ 86) “Free Space optics” (¶ 87), “I-burst wireless” (¶ 88).). In terms of predictive judgments, the failure of the predictive judgments in the *TRO* and the *Section 271 Forbearance Order* regarding intermodal competition are simply stunning.

¹⁴⁰ See NTCA Petition at p. 14.

¹⁴¹ *CRC Declaratory Ruling*, 26 F.C.C. Rcd. at 8274 ¶ 27 (by reaffirming interconnection rights of wholesale carriers to use statutory interconnection rights to serve VoIP providers FCC “promote[d] facilities-based voice competition” as well as the deployment

compulsory IP interconnection, carriers will be forced to convert IP originated traffic to TDM and deploy additional TDM network facilities and pass on these inefficiencies to consumers in the form of higher costs and less innovation.

E. AT&T Grossly Overstates the Relationship Between Approval of its Petition and Additional Investment

AT&T suggests that its recent announcement of \$14 billion in investment is in some way tied to the grant of its Petition and the elimination of requirements to which AT&T objects.¹⁴² The Commission should not be lured into taking actions that will deprive purchasers of telecommunications services of the benefits of competition simply because AT&T cites a large dollar figure.

First, any inference that the \$14 billion investment cited by AT&T is significantly additive to its prior level of capital investment would be unwarranted. AT&T's Annual Reports reflect annual capital investment exceeding \$20 billion in 2008, 2010, and 2011.¹⁴³ While similar data is not yet publically available for 2012, in early 2012, AT&T informed the investment community that "We expect to invest about \$20 billion again in 2012."¹⁴⁴ AT&T now projects capital investment of \$22 billion a year for 2013-15, an increase of only 8% over the \$20.3 billion that it averaged for 2010-11, the last two years for which data is publically available.¹⁴⁵ This is plainly not a massive increase in capital investment. Moreover, the majority of the announced \$14 billion investment is in wireless, while the changes in regulatory policy that

"additional broadband facilities and upgrad[es to] existing broadband networks in rural areas.").

¹⁴² See AT&T Petition at 8-12.

¹⁴³ AT&T 2011 Annual Report at p. 30.

¹⁴⁴ See Exhibit G, "Investment Drives Service Improvements" .

¹⁴⁵ AT&T News Release "AT&T to Invest \$14 Billion to Significantly Expand Wireless and Wireline Broadband Networks, Support Future IP data Growth and New Services" (Nov. 7, 2012); n. 143 *supra*.

AT&T proposes all relate to wireline service, further demonstrating the lack of relationship between AT&T's capital investment and the changes in FCC policy that AT&T seeks.

Second, the \$14 billion figure cited by AT&T is barely more than 1% of the nearly \$1.2 trillion investment in private sector broadband investment cited in footnote 11 of NTCA's Petition. The Commission should not allow itself to be stampeded into eliminating protections for competition and consumers of telecommunications service by AT&T's promise to invest an amount that is a minuscule part of the industry's recent investment in broadband. As well-known telecommunications industry analyst Craig Moffet recently observed, after analyzing the data that AT&T released with its announcement that accompanied its Petition, AT&T's expansion of its wireline IP broadband service "is not much of an expansion at all. Cable and satellite investors should breathe a sigh of relief."¹⁴⁶

Third, the record of AT&T and its predecessor companies on follow through on commitments for investment is dismal, at best. AT&T is seeking to get credit in 2013 for broadband upgrades that it has promised over the past 20 years, but failed to deliver. For example, in 1993 Pacific Bell

announced a capital investment plan totaling \$16 billion over the next seven years to upgrade core network infrastructure and to begin building California's "Communications superhighway". This will be an integrated telecommunications, information and entertainment network providing advanced voice, data and video services. Using a combination of fiber optics and coaxial cable, Pacific Bell expects to provide broadband services to more than 1.5 million homes by the end of 1996, 5 million homes by the end of the decade.¹⁴⁷

Promptly after acquiring Pacific Bell, SBC "halted construction on the Advanced

¹⁴⁶ Todd Spangler, "AT&T Better Hope 100 Meg Does Not Become De Facto Anytime Soon," Multichannel News, November 9, 2012 available at <http://www.multichannel.com/blogs/bit-rate/att-better-hope-100-meg-does-not-become-de-facto-anytime-soon>.

¹⁴⁷ Pacific Telesis 1993 Annual Report at p. 10.

Communications Network (ACN) in California,” shutting down this \$16 billion project.¹⁴⁸

Similarly, in 1994, SNET

announced its intention to invest \$4.5 billion over the next 15 years to build a statewide information superhighway (“I-SNET”). I-SNET will be an interactive multimedia network capable of delivering voice, video and a full range of information and interactive services. The Telephone Company expects I-SNET will reach approximately 500,000 residences and businesses through 1997.¹⁴⁹

Promptly after acquiring SNET, SBC requested and received permission from the Connecticut Department of Public Utility Control to close SNET’s Connecticut cable television business.¹⁵⁰

Likewise, in 1994, Ameritech petitioned the FCC “for authority to construct, operate, own, and maintain advanced fiber optic facilities and equipment to provide video dialtone service within geographically defined areas in Illinois, Indiana, Michigan, Ohio, and Wisconsin.”¹⁵¹ Ameritech stated that this video network “will extend to six million customers within six years.”¹⁵² Seven years later, shortly after SBC acquired Ameritech, this network served only 300,000 customers, and was sold to WideOpenWest.¹⁵³

¹⁴⁸ SBC 1999 Annual Report: Notes to Consolidated Financial Statements, *Post Merger Initiatives* at ¶ 10.

¹⁴⁹ SNET 1993 Annual Report at p. 9.

¹⁵⁰ SBC 2001 Annual Report: State Regulation, *Wireline* at ¶ 6.

¹⁵¹ Ameritech Operating Companies for Authority Pursuant to Section 214 of the Communications Act of 1934, as amended, to construct, operate, own, and maintain advanced fiber optic facilities and equipment to provide video dialtone service within geographically defined areas in Illinois, Indiana, Michigan, Ohio, and Wisconsin, Order and Authorization, W-P-C-6926, W-P-C-6927, W-P-C-6928, W-P-C-6929, W-P-C-6930, Adopted: December 23, 1994 Released: January 4, 1995.

¹⁵² Ameritech Investor Fact Book, March, 1994.

¹⁵³ Telephony, June 4, 2001; see SBC 2000 Annual Report: Business Operations, Other -

After shutting down the video expansion plans of Pacific Bell, SNET and Ameritech, all of which had been announced in the 1993-94 time frame, in 1999 SBC “announced plans to upgrade our network to make broadband services available to approximately 80% of our U.S. wireline customers over the four years through 2003 (Project Pronto).”¹⁵⁴ SBC explained, however, in its 2003 Annual Report that it “had limited build-out” of this project.¹⁵⁵

As remarkable as its history of broken promise of network upgrade is, the story of the broken promise of SBC to engage in a “National-Local Strategy” in consideration of the Commission’s approval of its merger with Ameritech is even more remarkable. This promise to the FCC was made in an attempt to obtain relief that SBC wanted: approval of its merger with Ameritech. The Commission approved the merger, but SBC fell laughably short of implementing its promised strategy.

The first exhibit to SBC’s application for the Ameritech merger was the Affidavit of James S. Kahan, SBC’s Senior Vice President for Corporate Development. To induce the FCC to approve the merger, Mr. Kahan represented that the merging parties would undertake, “on a massive scale,” “rapidly entering into 30 of the largest” MSA’s “outside of SBC’s combined territory,” offering local, long distance, high-speed data and other telecommunications services, as well as “expansion into numerous foreign markets.”¹⁵⁶ Mr. Kahan asserted that:

The National-Local Strategy contemplates the rapid entry by the combined SBC/Ameritech companies into 30 of the largest MSAs in the United

Cable Television Services at ¶ 1. (service provided to “approximately 304,000 customers”).

¹⁵⁴ SBC Annual 2003 Report: Business, *Broadband Initiative* at ¶ 1.

¹⁵⁵ *Id.*

¹⁵⁶ Affidavit of James S. Kahan, Attachment to Application of Ameritech Corporation and SBC Communications Inc., for Authority, Pursuant to Section 214 of the Communications Act of 1934, as Amended, to Transfer Control of Ameritech Corporation, a Company Controlling International Section 214 Authorizations, CC Docket 98-141, filed July 24, 1998 (Kahan Aff.), at ¶¶ 11, 27.

States outside of our existing local exchange regions. SBC will install switches in each of these markets within three years after the closing of our merger with Ameritech. This local exchange entry will be the broadest and deepest such entry undertaken by any telecommunications company in the United States to date.¹⁵⁷

Mr. Kahan's 1998 statement that the planned "entry will be the broadest and deepest such entry undertaken by any telecommunications company in the United States to date" is a dramatic representation, given that by that time, entry by recent entrants MFS Communications and TCG had been so substantial that each had been purchased for more than \$10 billion, one by Worldcom and one by AT&T.¹⁵⁸

Mr. Kahan further represented that "in entering these markets, SBC from the outset will serve not only large corporate customers, but also medium and small business customers and residential customers on an extensive basis,"¹⁵⁹ that SBC would install over 140 switches and more than 2900 fiber miles in these 30 markets to serve such customers,¹⁶⁰ entailing more than \$2 billion in capital expenditures¹⁶¹ and more than \$23.5 billion in operating expenses over the next ten years,¹⁶² and that SBC expected \$2 billion in revenue in the 30 markets by 2003 and more than \$7 billion in revenue by 2008, based on SBC's expectation that it would "capture between 5-10% of the addressable business and residential customers" in those markets.¹⁶³

Seven years later, Mr. Kahan filed a declaration in support of yet another SBC merger,

¹⁵⁷ *Id.* at ¶ 34.

¹⁵⁸ New York Times, August 27, 1996 <http://www.nytimes.com/1996/08/27/business/worldcom-to-buy-mfs-for-12-billion-creating-a-phone-giant.html>; Los Angeles Times, January 9, 1998 <http://articles.latimes.com/1998/jan/09/business/fi-6420>.

¹⁵⁹ Kahan Aff. at ¶ 36.

¹⁶⁰ *Id.* at ¶¶ 37-38.

¹⁶¹ *Id.* at ¶ 57.

¹⁶² *Id.* at ¶ 58.

¹⁶³ *Id.* at ¶ 43.

this one with AT&T. In contrast with his 1998 representations that SBC would spend an average of more than \$2.5 billion *per year* on capital expenditures and operating expenses, in 2005 Mr. Kahan only cited a total of \$1 billion of expenditures for “facilities, start-up sales and marketing costs, and introduction of SBC’s products” in support of the National-Local strategy.¹⁶⁴ While data is not publically available regarding SBC’s other promises, it is clear that SBC never made a bona fide effort to install the switches and fiber that it promised, or to serve more than a handful of residential or small business customers in the 30 out-of-region SMAs. Indeed, a declaration filed in 2006 in support of AT&T’s merger with BellSouth stated that “AT&T does not compete in the circuit-switched local market in BellSouth’s territory and has no intention of entering that market.”¹⁶⁵

Finally, contrary to AT&T’s suggestion, the Commission’s desired goal of encouraging investment in broadband would not be best achieved by adopting AT&T’s approach of reducing competition. To the contrary, as shown above, experience has demonstrated that actions that foster competition *stimulate* investment in new technology, rather than inhibit it.¹⁶⁶ Adopting the measures proposed by AT&T would reduce competition, and thereby reduce investment in broadband.

F. It is Not Necessary to Establish a Separate Docket for the IP Evolution Issues Identified by AT&T

The Commission should deny AT&T’s request that a separate docket should be

¹⁶⁴ Declaration of James S. Kahan, Senior Executive Vice President for Corporate Development, SBC Communications Inc., Attachment to SBC Communications Inc. and AT&T Corp. Applications for Transfer of Control, filed 2/22/05, WC Docket No. 05-65, at ¶ 24.

¹⁶⁵ Declaration of Barry L. Boniface, Chief Strategy & Development Officer, BellSouth Corporation, Attachment to AT&T Inc. and BellSouth Corporation Application for Transfer of Control, WC Docket No. 06-74, filed March 31, 2006, at ¶ 35.

¹⁶⁶ See notes 60-62 *supra*.

established for the collection of issues that it has identified. Most of these issues are already in fact the subject of other dockets, such as WC Docket No. 12-61, *Petition of USTelecom For Forbearance Under 47 U.S. C. § 160(c) From Enforcement of Certain Legacy Telecommunications Regulations* (“USTelecom Forbearance”). Addressing them in this docket would be duplicative, disruptive to the existing proceedings, or both, and would be an inefficient use of the resources of the Commission and the affected parties. AT&T could file a forbearance petition to address the relatively few issues that are not the subject of pending proceedings. The Table below shows the duplicative nature of AT&T’s requests and pending dockets already addressing the same issues.

Issue raised by AT&T	Page(s) in AT&T Petition	Existing Proceeding Addressing Issue
Section 214 discontinuance requirements	13	US Telecom Forbearance Petition at 59-62
Notice of Network Change Rules	15	US Telecom Forbearance Petition at 56-59
Federal and state service obligations	15-18	<i>ICC and USF Transformation Order and FNRPM</i> , ¶¶ 1099-1101
Regulatory Status of IP-enabled services	18	<i>IP-Enabled Services</i> , Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004).
Equal Access Obligations	18	<i>In the Matter Notice of Inquiry Concerning a Review of the Equal Access and Nondiscrimination Obligations Applicable to Local Exchange Carriers</i> , Notice of Inquiry, 17 FCC Rcd 4015 (2002); Public Notice, Parties Asked to Refresh Record Regarding Review of Equal Access and Nondiscrimination Obligations Applicable to Local Exchange Carriers, 22 FCC Rcd 4553 (2007)
Legacy Copper Loop Requirements	19	US Telecom Forbearance Petition at pp. and Petitions for Rulemaking and Clarification Regarding the Commission’s Rules Applicable to Retirement of Copper Loops and Copper Subloops, RM-11358
ONA/CEI	20	US Telecom Forbearance Petition at 24-31
Record keeping	20	US Telecom Forbearance Petition at 47-48
Accounting	20	US Telecom Forbearance Petition at 31-43
Data collection	20	US Telecom Forbearance Petition at 51-56

AT&T has simply failed to make a case for the Commission pulling issues that are the subject of open dockets into a new docket devoted to a set of issues that AT&T would like it to address.

G. The Commission Should Deny AT&T’s Proposal for a “Trial”

1. AT&T’s Proposed “Trial” Would be Highly Disruptive

AT&T’s proposed trial would allow ILECs to “propose individual wire centers” for “an experiment” in which the FCC would eliminate what AT&T refers to as “outdated ‘telephone company’s regulations,” “preclude carriers (including carrier customers) from demanding service or interconnection in TDM format,” and allow carriers to refuse to provide “legacy services.”¹⁶⁷ AT&T correctly recognizes that the Commission may be “concerned that non-migrating customers will be cut off (even temporarily) from service,”¹⁶⁸ but its proposed solution is wholly inadequate. AT&T would have the Commission address this problem by “allow[ing] those customers’ existing service providers to switch them to another service.”¹⁶⁹ AT&T offers no suggestion as to what other service would be available to the TDM customers of Granite and other CLECs, given that carriers would not be permitted to demand interconnection in TDM and the ILEC would be “free of legacy regulation” for its fiber-based and IP services.¹⁷⁰

In other words, AT&T proposes that CLECs that currently serve customers in these wire centers using TDM facilities, whether owned by the CLEC, owned by AT&T, or a mixture of both, would have to incur the expense of converting to IP, and would have no right to buy or lease any part of these IP facilities from AT&T or another ILEC. Moreover, not only CLECs, but also IXC and

¹⁶⁷ AT&T Petition at 6, 21-22. AT&T also proposes that the Commission “keep IP services free of legacy regulation” and preempt contrary state regulations. *Id.* at 22-23.

¹⁶⁸ *Id.* at 22.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 21-22.

end users, that have been purchasing TDM facilities (such as DS1 and DS3 special access) from AT&T pursuant to tariffed rates, terms, and conditions, would be denied the benefits of such tariffs, and would have to pay whatever prices and accept whatever terms and conditions as demanded by AT&T, unless competitors sprung up to offer such facilities. In most cases, this would be unlikely. As the Commission has found, competitors do not find it economical to build facilities to reach customers without a commitment of a volume of business that justifies the expense of construction.¹⁷¹

As a practical matter, this means that CLECs such as Granite that serve customers through TDM facilities would suddenly be unable to serve the locations of such customers that are in the “trial” wire centers. As discussed above, the competition that Granite provides is in large part predicated on Granite’s ability to serve *all* of a customer’s locations. In many cases, such customers have hundreds or even thousands of locations. Granite would suddenly have to change its marketing plan, offering only to serve “most,” “many” or “some” of a customer’s locations. This is a much less attractive marketing message, and would strengthen AT&T’s ability to wrest the customer away from Granite, not only in the trial wire centers, but throughout AT&T’s region. Both the customer and Granite would be losers. The customer would lose the benefits that made it prefer Granite to AT&T in the first place, while Granite would lose the revenues provided by the customer.

Nor would this damage to the customer relationships of Granite and other CLECs be limited to the duration of the trial. Once the carrier-customer relationship is broken, it is likely to stay broken. Moreover, while AT&T asserts that “the Commission need not prejudge” the issue,¹⁷² since the trial involves the physical removal of copper, if the trial is not deemed a success, carriers such as Granite that had been serving customers over such copper would be unable to resume serving them

¹⁷¹ See III.B.2, *supra*.

¹⁷² AT&T Petition at p. 6.

for lack of physical facilities.¹⁷³

In addition to being highly disruptive to the existing business operations of competitors and customers, the trial proposed by AT&T is unnecessary. No trial is needed to see that the competitive harms detailed above will result from a trial, and AT&T has not offered a persuasive reason why a trial is needed. Rather, AT&T seems to assume, without support, that it will be necessary to move all customers of circuit switched services to packet switched services, and has designed a trial that will accomplish such goal.

Perhaps most importantly, a trial is not useful because it is not likely to model the real world that will exist if the Commission grants AT&T the relief that it seeks. The present construct was established by the Commission and Congress out of a concern that those with market power, such as AT&T, would use that power to disadvantage competition and customers. There is no way to design a trial that tests whether those with market power will misuse that power once the trial is over. The fact that a schoolyard bully is on good behavior when the teacher is present provides no insight as to whether the bully will misbehave once the teacher exits the scene. Likewise, AT&T and others with market power may behave quite reasonably until the Commission declares the trial a success, and only then, after the Commission removes the protections to competition that are currently in place, begin to misuse their market power.

In a January 14, 2013 *ex parte* that, peculiarly, is not filed in this docket, AT&T defends the trials that it proposed in its Petition in this docket, on the grounds that the trials “would be rigorously empirical.”¹⁷⁴ AT&T also characterizes CLECs that have opposed its proposed trials

¹⁷³ AT&T does not suggest that it would be willing to reinstall the copper at its own expense if the trial is not deemed a success.

¹⁷⁴ *Ex Parte* letter from Robert Quinn, Senior Vice President, Federal Regulatory and Chief Policy Officer, AT&T, to Marlene H. Dortch, WC Docket No. 05-25, at p. 7 (filed on Jan. 14, 2013).

as showing “contempt for data-driven decision-making.” Nowhere in either AT&T’s Petition or its *ex parte* letter, however, does AT&T explain what data would be collected in its supposedly “rigorously empirical” trial, or how such data would be used. Such a trial would plainly be costly, and, as shown above, disruptive to competitors and customers alike. If the trial’s proponent cannot, in two substantial filings, offer a single example of what data it proposes be collected, why such data is needed, or how such data would be used, the Commission should not impose such a trial on the industry.

2. If A Trial Is Conducted, Precautions Must Be Taken To Ensure A Fair Trial And Avoid Public Harm

For the reasons stated above, a trial is both unnecessary and harmful. Should the Commission nevertheless determine to hold a trial, precautions must be taken to ensure a fair trial and to minimize the harm to the public that will inevitably result. First, a trial would not be legitimate if, as AT&T advocates, the ILECs select the wire centers. This would give the ILECs an opportunity to select wire centers most likely to generate an outcome most favorable to their position. Wire centers should instead be selected by the Commission after it affords a full opportunity to all interested parties to provide input.

Second, the ground rules under which the trial is conducted should be established after the Commission also affords a full opportunity to all interested parties to provide input, and the ground rules should be designed to reduce damage to competition. For example, if ILECs remove copper, then CLECs should be permitted to share the ILEC’s fiber. The ground rules for trial should also ensure a representative customer mix of residential, small and large business, urban and rural wire centers, and both end user and carrier customers.

Third, AT&T says nothing about what would constitute a successful trial. The Commission should spell out in advance the parameters that a trial must meet to constitute a

success. Among other things, the trial should demonstrate that the approach it takes do not have an adverse effect on competition. Fourth, a trial should not assume success. Thus, the Commission must provide for a return to pre-existing competitive conditions should it determine that the trial was not a success. For this reason, the Commission should provide that if copper is not used during the trial, it is also not removed, and not allowed to deteriorate, thus permitting a return to use of copper if necessary.

Fifth, and perhaps most importantly, the Commission must ensure that the trial is indicative of the positions that parties will take if it declares the trial a success. The Commission must address the concern that parties with market power, such as AT&T, may have a tendency to be on their best behavior during a trial but, once allowed to impose what AT&T describes as “market” prices, terms and conditions, take full advantage of their market power to the detriment of competitors, the competitive process, and end users. As discussed above, Granite does not believe addressing those concerns through a trial is possible, and for that reason, the trial should not be conducted, but if the Commission nevertheless adopts AT&T’s proposed trial, it must make every effort to address such concerns.

IV. Conclusion

For the aforementioned reasons, AT&T's Petition should be denied and the Commission should, consistent with NTCA's Petition, and in the numerous proceedings already before the Commission, examine how to recalibrate the existing legal and regulatory framework to modernize it in accordance with the ongoing evolution to IP-based broadband networks.

Respectfully submitted,

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January 28, 2013

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