

**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)
)

REPLY COMMENTS OF BULLSEYE TELECOM, INC.

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I.	INTRODUCTION.....	1
II.	SUMMARY OF POSITION	3
III.	THE COMMISSION MUST UPDATE — AND NOT ABANDON — ITS PRO- COMPETITIVE POLICIES OF THE 1996 ACT TO REFLECT THE ONGOING TRANSITION TO IP NETWORKS.....	5
	A. THE EVOLUTION OF TECHNOLOGY FROM TDM TO IP DOES NOT ALTER ILEC CONTROL OVER BOTTLENECK LAST MILE FACILITIES	5
	B. BULLSEYE SUPPORTS NTCA’S SMART REGULATION APPROACH TO RECALIBRATION OF THE PRO-COMPETITIVE REGULATORY FRAMEWORK	9
	1. Competitors Should Have Access to Reasonably Priced Last Mile Facilities Regardless of the Network Technology.....	12
	2. The Commission Should Preserve Competitive Access to Copper Loops.....	13
	3. The Commission Should Mandate IP Interconnection for Voice Traffic.....	14
IV.	THE COMMISSION SHOULD REJECT AT&T’S PETITION.....	15
	A. THE COMMISSION SHOULD REJECT AT&T’S PROPOSED TRIAL.....	16
	B. WHILE THE COMMISSION SHOULD REJECT AT&T’S PROPOSED TRIAL, IF A TRIAL IS HELD, CARRIER RELATIONSHIPS WITH CUSTOMERS SHOULD BE PRESERVED, AND THE TRIAL PROCESS SHOULD BE CLARIFIED	17
V.	CONCLUSION	18

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I. Introduction

BullsEye Telecom, Inc. (“BullsEye”) is a competitive provider of business telecommunications services. BullsEye operates nationwide and serves primarily national multi-location business customers in the healthcare, retail, financial service, restaurant, utility, transportation as well as many other industries. BullsEye sells Voice, Data, Wireless and IP services to allow customers to elect the solution that best fits their needs today while providing them an evolution path as their requirements change in the future.

Because BullsEye’s typical customer needs communications service at all of their locations, its customers do not fit neatly within the geographic footprint of the ILECs or the cable MSOs. No RBOC or cable company provides the services that BullsEye provides outside of their own network footprints in the manner that BullsEye does. Further, typically the locations where

BullsEye provides service are locations where the customer lacks the ability to choose a last mile supplier other than the ILEC.

BullsEye does not own its own telecommunications network or facilities because duplicating the RBOC network at every location where its customers require service would be prohibitively expensive and burdensome. Instead, BullsEye procures wholesale service from other carriers, and predominantly from the RBOCs and other ILECs. In particular BullsEye relies on “Commercial Agreements” it has obtained from the RBOCs for continued provision of UNE-P replacement service. Under these commercial agreements, such as AT&T’s Local Wholesale Complete (“LWC”) Agreement, the RBOCs provide BullsEye 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 251,¹ they are required to provide local switching and shared transport under section 271.² The prices BullsEye pays for this package of elements are set by the ILECs and in most cases are nonnegotiable. BullsEye is totally dependent upon the ILECs, and AT&T in particular, for access to customers. For AT&T to now petition to remove this access not only violates the current legislation but also is an obvious attempt to regain its monopoly position. When BullsEye has requested similar arrangements from non RBOC ILECs, the only available option has been resale agreements. In certain cases, and in order to avoid having service gaps, BullsEye may obtain resale agreements pursuant to section 251(c)(4) of the Act. The discounts available in section 251(c)(4) agreements, however, do not cover BullsEye’s costs. Indeed, BullsEye enters into such agreements mostly to be able to serve its multi-location customers at their locations where commercial agreements pursuant to Section 271 are not available. Absent the regulatory requirements that AT&T

¹ See 47 C.F.R § 51.319(a)(1).

proposes be eliminated, BullsEye fears it would lose the alternative of sections 251 and 271 services, and would have no negotiating ability with ILECs, which would have no requirement to provide services. BullsEye would therefore be unable to provide the integrated services its customers require.

Through these commercial and resale agreements, BullsEye is able to provide its customers with service in just about any location across the country. This national footprint allows BullsEye to provide its customers with a single source service at their widely dispersed business locations. In addition, BullsEye provides these customers with a unified interface for advanced billing, provisioning, troubleshooting and reporting solutions for most or all of their telecommunications services, throughout the country.

BullsEye's customers will, of course, continue to require and benefit from integrated nationwide service during and after the evolution to IP networks. In its petition, AT&T appears to suggest that simply because these customers may someday be served over an IP network that some company will make the extraordinary investment of 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 cost prohibitive and inefficient. Such a result is at odds with the pro-competitive policies established under the 1996 Act which are technology-neutral.

II. Summary of Position

As described in more detail below, BullsEye supports the Commission's review of the IP transition. That transition must not, however, serve as a pretext for eliminating the key pro-competitive measures implemented pursuant to the 1996 Act, and must not undermine the competitive gains made since the advent of competition. Accordingly the Commission should reject AT&T's Petition.

- The transition to IP networks is a gradual evolution of technology like others that have occurred before in the telecommunications network.
- The ILECs continue to make substantial use of copper and TDM in their networks and will continue to do for the foreseeable future.
- The evolution of networks that use TDM to networks primarily based on IP does not eliminate the need for reasonably priced wholesale last mile access in order to preserve the benefits of competition, particularly for business customers.
- The Commission should adopt, in part, NTCA’s “smart regulation” approach and reject AT&T’s “Wild West” approach of no regulation.

In order to hasten the IP transition, the Commission must follow through on the recommendations of the National Broadband Plan to update its competition policies for the age of the IP network. This is consistent with the Commission’s long established view that competition policy, and the 1996 Act in particular, are technology neutral.

- To preserve the Commission’s core value of providing consumers the benefits of competition, the Commission must preserve reasonably priced wholesale access to last mile facilities capable of providing voice and broadband, regardless of the underlying technology selected by the ILEC.
- The Commission should revise its copper loop retirement rules to foster deployment of broadband.
- The Commission should mandate IP Interconnection.

Finally, with respect to AT&T’s proposed “trials,” BullsEye suggests that:

- The Commission should deny AT&T’s Petition asking for trials because there is little basis for believing the trials will be an accurate measure of how AT&T and

other ILECs would behave should they be afforded significant deregulation and such trials would cause immediate harm to customers that have exercised their choice to select competitive providers.

- If, however, the Commission is inclined to conduct such trials, it must provide for competitive wholesale pricing and access, including over fiber, and for access to packetized loops where needed.

III. The Commission Must Update — and Not Abandon — its Pro-Competitive Policies of the 1996 Act to Reflect the Ongoing Transition to IP Networks

A. The Evolution of Technology from TDM to IP Does Not Alter ILEC Control over Bottleneck Last Mile Facilities

Currently, over 90% of BullsEye's services are provided using TDM-based solutions. Of course BullsEye recognizes the benefits of the ongoing evolution to IP networks. In fact there are many customer locations where BullsEye serves its customers using a Voice over IP solution. But even where BullsEye offers Voice over IP services, customers often require the use of TDM services and technology in concert with Voice over IP to support fax, alarm, modem, back-up and broadband services. In addition, BullsEye or its customer must have access to a last mile broadband connection and customers often prefer to purchase broadband and Voice over IP services from the same provider for quality of service and convenience reasons, which further substantiates the need for BullsEye and other CLECs to have access to a last mile broadband connection. Contrary to AT&T's assumption that the mere evolution to IP eliminates its bottleneck control of last mile access, AT&T's proposal would result in a world where customers lack access to competitive choices. This is especially troubling in areas of the country where there is little or no deployment of alternative last mile facilities and little likelihood that deployment will become economical in the foreseeable future.

The distinction that AT&T seeks to draw between TDM-based networks and IP networks is artificial and simply designed to impede competition. BullsEye agrees with NARUC that it is a fallacy that the IP transition involves development of a “new” network.² Instead, the Commission must view the transition to IP as the next step in the evolution of the public telecommunications network.³ This “ongoing evolution” of the PSTN to an IP-based network is not, contrary to AT&T’s disinformation,⁴ a network replacement but is instead “a technology shift within a network.”⁵ Parties commenting in this proceeding recognize that “both the old and new networks [will be] operating simultaneously for a significant period of time”⁶ and that existing last mile infrastructure will continue to be used to connect to customers.

AT&T has led the Commission down this path before in the early stages of interstate telecommunications competition. In the *Execunet* cases,⁷ MCI began providing customers with Execunet, a switched service that the Commission concluded competed with AT&T’s monopoly MTS and WATS services.⁸ AT&T asserted, and the Commission found, that MCI lacked the authority to provide Execunet, construing MCI’s Section 214 authorization⁹ as limited to non-

² NARUC Comments at p. 4.

³ NARUC Comments at p.4-5.

⁴ *See Ex parte* letter of Robert W. Quinn, Jr., AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, at p. 2 (filed Jan. 14, 2013).

⁵ NTCA Petition at p. 2.

⁶ Granite Telecommunications, LLC Comments at p. 8, n.19 citing NRRI, *The Transition from the Legacy Public Switched Telephone Network to Modern Technologies*, Professor David Gabel, Steven Burns, Report No. 12-122 (Oct. 2012).

⁷ *MCI Telecommunications Corp.*, 60 FCC 2d 25 (1976), *reversed on other grounds*, *MCI Telecommunications Corp. v. FCC (“Execunet I”)*, 561 F. 2d 265 (D.C. Cir. 1977), cert. denied, 434 U.S. 1040 (1978).

⁸ *Id.*

⁹ These authorizations included those issued by the Commission in *Specialized*

switched private line services and thus not authorizing the provision of switched services that competed with MTS or WATS service.¹⁰ The U.S. Court of Appeals for the D.C. Circuit, however struck down these arbitrary distinctions and found that the Commission's decision granting MCI and other specialized common carrier authorizations did not limit such authorizations to non-switched private line services and thus there was no sound basis for the Commission's rejection of MCI's Execunet tariff.¹¹ The Court's decision did not, however, deter the Commission or AT&T from attempting to stifle competition. Under the Commission's decisions regarding Specialized Common Carriers, the Bell Companies were obligated to provide MCI and other authorized carriers with nondiscriminatory access to the local exchange.¹² But AT&T and the Commission attempted to block the use of such local interconnections for Execunet services — again arguing that there was no obligation to provide the mandatory interconnection because Execunet was, like MTS and WATS service, a switched service, and not a nonswitched private line service.¹³ Again, the Commission's unfortunate effort on behalf of AT&T to blunt the introduction of competition to AT&T's MTS and WATS services was rejected by the D.C. Circuit.¹⁴ The Court again denied “the effort by AT&T, with the approval of

Common Carrier Services, 29 FCC 2d 870 (1971), *affirmed sub nom. Washington Utilities and Transportation Comm'n v. FCC*, 513 F. 2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975).

¹⁰ *See id.*

¹¹ *See MCI Telecommunications Corp. v. FCC*, 561 F. 2d 265 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978).

¹² *See Bell System Tariff Offerings*, 46 FCC 2d 413 (1974), *affirmed sub nom. Bell Tel. Co. of Pennsylvania v. FCC*, 503 F.2d 1250 (3rd Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975) *reh. denied*, 423 U.S. 886 (1975).

¹³ *See Petition of AT&T Company for a Declaratory Ruling and Expedited Relief*, FCC 78-142, 67 FCC 2d 1455, *rev'd MCI Telecommunications Corp. v. F. C. C.*, 580 F.2d 590 (D.C. Cir. 1978).

¹⁴ *See MCI Telecommunications Corp. v. F. C. C.*, 580 F.2d 590 (D.C. Cir. 1978).

the Commission, to arrest the development of Execunet service.”¹⁵ The Court held that the Commission’s categorization of Execunet as a switched service like MTS rather than a private line service did not provide a basis for allowing AT&T to deny MCI the local physical interconnections that were necessary for MCI to provide Execunet.¹⁶

Just like with monopoly AT&T’s efforts to “arrest the development” of competition based on superficial distinctions between switched and private line services, there is no basis for the regulatory distinction AT&T attempts to draw between the network protocols underlying IP and TDM based services.¹⁷ The RBOCs all continue to make considerable use of TDM in their network,¹⁸ continue to provide TDM-based services¹⁹ and rely on so called “legacy” copper facilities to provide service — including broadband service.²⁰ The fact that carriers are transitioning their TDM services to IP does not magically cause competitive last mile facilities to sprout from the ground nor does it alleviate significant economic barriers to entry that prevent competitors from deploying their own facilities to most customer locations, including the locations where BullsEye serves most of its customers. Thus, despite AT&T’s claims to the

¹⁵ *Id.* at 592.

¹⁶ *Id.* at 596-97.

¹⁷ See NARUC Comments at p. 16 (“significant network upgrades and transitions have occurred every time since phone service was invented. None of these shifts in technology changed the fact that providers were still providing voice and data telecommunications services.”).

¹⁸ See New Networks Comments at p. 2, 5; Transcript, Fran Shammo, Executive Vice President and Chief Financial Officer, Verizon, Goldman Sachs Communacopia Conference, at p. 9 (Sep. 20, 2012) (attached as Exhibit E to Granite Comments) (“every copper customer doesn’t make financial sense to convert to FiOS...[r]eally what we are attacking is the ones that are chronic and that means that they had two truck rolls every six months to their house.”).

¹⁹ See AT&T Nov. 7 Investor Presentation (explaining that AT&T only intends on deploying fiber to 50% of multi-tenant business locations in its 22 state ILEC footprint.).

²⁰ New Networks Institute Comments at p. 5.

contrary, the IP evolution still requires the faithful enforcement of the 1996 Act's competition enhancing provisions in order to protect competition and consumers from the exercise and abuse of ILEC market power.

B. BullsEye Supports NTCA's Smart Regulation Approach to Recalibration of the Pro-Competitive Regulatory Framework

BullsEye partially supports the "Smart Regulation" approach NTCA proposed for promoting and sustaining the ongoing IP evolution instead of AT&T's proposed blank slate of no regulation.²¹ BullsEye agrees with NTCA that AT&T's "Wild West"²² approach would increase the level of uncertainty in the industry and would likely undermine the Commission's goal of fostering a stable evolution to and investment in IP networks.²³ It is therefore sensible for the Commission to modify, where necessary, the existing framework based on sound principles that have "stood the test of time." It is BullsEye's view that these sound principles include the competitive framework established in sections 251, 252 and 271 of the Act. Other commenters agree that these provisions of the Act need to be maintained and enforced.²⁴ Further, BullsEye agrees with those parties that have urged the Commission to modify its competition-enhancing measures so that they may be applied unequivocally in a technology neutral manner.²⁵ Applying these principles on a technology neutral basis will allow competitors to access ILEC last mile facilities based on whether it is economic to self-deploy alternative facilities or obtain them from

²¹ See NTCA Petition at pp. 9-10.

²² *Id.* at p. 8.

²³ *Id.*

²⁴ T-Mobile Comments at pp. 14-15; State Members of the Joint Board on USF at pp. 9-10.

²⁵ Cbeyond *et al* Comments at pp. 14-15.

a third party,²⁶ rather than on the particular network protocol used or the form of the transmission medium. As AT&T's Chairman Randall Stephenson observed, the Commission must "make sure that regulations aren't tied to specific technologies but more to services."²⁷

The comments filed in this proceeding underscore BullsEye's view that the Act — and the 1996 Act in particular — is technology neutral.²⁸ The overriding legal principles established in sections 251, 252 and 271 are not altered simply because the ILEC elects to use different network technologies and communication protocols.²⁹ Nevertheless, AT&T's Petition seeks to undermine that neutrality by asking the Commission to gut the core competition enhancing provisions of the 1996 Act in sections 251 and 271.³⁰ AT&T's Petition asserts that those competition enhancing measures should no longer be applied to TDM-based networks in order to hasten the IP transition.³¹ As parties filing comments observe, however, carriers are already conducting such a transition for their own networks.³² In addition, AT&T's petition seeks to take advantage of misguided Commission policies that undermine the transition the Commission's unbundling and forbearance decisions that denied competitors reasonably priced access to fiber

²⁶ See e.g. 47 C.F.R. § 51.317(b).

²⁷ Granite Comments at p. 9 citing Exhibit C, Edited Transcript, AT&T Nov. 7, 2012 Analyst Conference Call at p. 23.

²⁸ See MetroPCS Comments at p. 5; NECA and OPASTCO Comments at p. 7.

²⁹ State Members of the Joint Board Comments at pp. 9-10.

³⁰ See Granite Comments at pp. 28-35.

³¹ See e.g. AT&T Petition at pp. 18 (urging the Commission to declare all IP services as unregulated "interstate information services") and at p. 21 (urging the Commission to eliminate any obligation for AT&T to provide TDM based interconnection or TDM service upon reasonable request.).

³² Nebraska Rural Independent Comments at p. 21.

and or packetized hybrid loops even where impairment was obvious.³³

BullsEye thus urges the Commission to deny AT&T's petition and instead update its competition policy to be consistent with the technology agnostic underpinnings of the 1996 Act. First, as a fundamental principle, the Commission's policies for last mile access and interconnection must be technology neutral. Consistent with this underlying principle, the Commission should modify its existing policies that allow ILECs to retire copper loops, including the feeder portion of copper loops where the ILECs are continuing to make use of copper facilities in their network.³⁴ Second, the Commission should modify its loop unbundling rules to allow CLECs access to fiber loops and hybrid loops and their packetized functionality where, consistent with the Commission's loop unbundling analysis, duplication of such facilities by reasonably efficient competitors is not economic.³⁵ Third, the Commission should reverse the forbearance prematurely granted to the RBOCs in 2004 that excused the RBOCs from an obligation to provide access to fiber loops and packetized hybrid loops pursuant to section 271.³⁶ Lastly, the Commission must mandate SIP-based interconnection.³⁷

³³ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, 17142-45, ¶¶ 273-77 (fiber to the home loops need not be unbundled), 17149-53, ¶¶ 288-95 (no unbundled access to packetized capability of hybrid loops for mass market broadband service) and 17321-23, ¶¶ 537-41 (denying unbundled access to packet switching) (2003) (“TRO”), *aff’d in part, vacated and remanded in part, sub nom 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*, 20 FCC Rcd 2533 (2005) (“TRRO”), *aff’d, Covad Commc’ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

³⁴ U.S. TelePacific Comments at pp. 9-13.

³⁵ *See, e.g.,* Cbeyond *et al.* comments at pp. 14-15.

³⁶ *See, e.g.,* Granite Comments at pp. 39-40.

³⁷ *See, e.g.,* T-Mobile Comments at p. 5.

1. Competitors Should Have Access to Reasonably Priced Last Mile Facilities Regardless of the Network Technology

BullsEye, in accord with other commenters like Cbeyond *et al.*, Granite and COMPTEL, believes that the Commission must follow through on the recommendations set forth in the National Broadband Plan that the Commission take action to hasten the deployment of broadband and IP-based networks.³⁸ The Plan was clear that unleashing the forces of competition is a vital step in fostering such deployment. The Commission is further aware that in order to achieve such deployment, competitive carriers must have reasonably priced access to last mile facilities to reach customers where they are unable to economically deploy their own facilities or obtain facilities from an alternative supplier.³⁹ As the record demonstrates, in many markets, including the business market, the ILECs are the sole communications provider with last mile access to the customer.⁴⁰ In other markets, most customers face no choice other than the ILEC/cable duopoly.⁴¹ As the Commission has established, a duopoly does not enhance competition.⁴²

It is therefore imperative that the Commission modify and update its competition policies to afford CLECs access to the fiber and packetized hybrid loops in markets where sufficient

³⁸ See Cbeyond *et al.* Comments at pp. 6-7.

³⁹ See Cbeyond *et al.* Comments at p. 8 (noting that due to significant barriers to entry, “competitors could not simply replace [the ILECs] last-mile inputs by building networks that duplicate the ILECs’ ubiquitous networks.”).

⁴⁰ See Interisle Consulting Comments at p. 4; Granite Comments at pp. 22-27.

⁴¹ See Interisle Consulting Comments at p. 4; Ad Hoc Telecommunications Users Committee Comments at p. 10.

⁴² 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, 8637 ¶ 30 (2010) (“*Qwest Phoenix Forbearance Order*”) *aff’d* *Qwest Corp. v. FCC*, 689 F.3d 1214 (10th Cir. 2012).

competitive alternatives are lacking. In particular, BullsEye endorses the Cbeyond *et al.* proposed timetable of Commission proceedings recommended in the NBP.⁴³

2. The Commission Should Preserve Competitive Access to Copper Loops

Furthermore, during the IP evolution, while networks still contain copper transmission facilities or employ TDM technology, the Commission must protect the use of copper loops by competitors. As a number of commenters have demonstrated, copper remains a viable transmission medium for delivering broadband capability to many Americans who otherwise might not be able to obtain broadband.⁴⁴ The Commission's copper loop retirement policies are, however, not balanced and, consistent with the NBP, the Commission should restore that balance by preserving CLEC access to copper loops.⁴⁵ There should be little concern that the ILECs will be forced to maintain two networks, as they claim.⁴⁶ As Sprint points out "carriers have always been forced to address both future customers and services while maintaining service to existing subscribers."⁴⁷ Of the major ILECs, only Verizon has indicated a commitment to fiber to the home, and even that commitment is limited since Verizon has made it clear it has no intention of deploying fiber to the home throughout its service territory.⁴⁸ Further, Verizon's statements to

⁴³ See Cbeyond *et al.* Comments at p. 2.

⁴⁴ E.g., U.S. TelePacific Comments at pp. 2, 9-13; TEXALTEL Comments at p. 6; Community Competitors Coalition at p. 5.

⁴⁵ See Massachusetts Department of Telecommunications and Cable Comments at p. 12.

⁴⁶ See, e.g., ITTA Comments at p. 9.

⁴⁷ Sprint Comments at p. 16.

⁴⁸ See Granite Comments at p. 41, n. 131 citing 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 (Verizon statement that it is curtailing further deployment of FiOS beyond current franchise areas).

investors discussing copper retirement indicate that its replacement of copper with FiOS is limited and perhaps equally important is targeted to the home as opposed to business locations, which comprise 100% of BullsEye's customers; Verizon has clearly stated its retirement efforts are aimed at those portions of their copper plant that have become difficult to maintain.⁴⁹ Thus as long as Verizon and other ILECs retain copper in their networks, they should not be allowed to retire the copper plant needed by CLECs when those facilities continue to provide a source of bringing last mile connectivity, including broadband connectivity,⁵⁰ to customers who, absent such connectivity, would be denied the benefits of competition.

3. The Commission Should Mandate IP Interconnection for Voice Traffic

Because the market opening measures enacted in the 1996 Act are technology neutral, the Commission should end its delay in mandating SIP interconnection. The record is replete with compelling evidence that the ILECs retain market power with respect to voice termination and the use of IP does not eliminate that market power.⁵¹ In fact, if the Commission continues to delay mandating IP-based interconnection such as SIP interconnection it will only delay the transition to IP networks and enhance ILEC market power with respect to voice termination. The record includes comments from a broad array of parties urging the Commission to act now on IP interconnection. This includes wireless carriers,⁵² rural ILECs,⁵³ state commissions,⁵⁴ cable

⁴⁹ *Supra.* n. 18.

⁵⁰ U.S. TelePacific Comments at 9-13.

⁵¹ *See* notes 52-57, *infra.*

⁵² Sprint Comments at pp. 27-28 MetroPCS Comments at p. 5; T-Mobile Comments at p. 5.

⁵³ Nebraska Rural Independent Comments at p. iii, 8; NECA and OPASTCO Comments at p. 7.

companies,⁵⁵ consumer groups;⁵⁶ and CLECs.⁵⁷

IV. The Commission Should Reject AT&T's Petition

BullsEye agrees with the many commenters that urge the Commission to reject AT&T's Petition unequivocally. In contrast to NTCA's smart regulation approach, which, as reflected above, BullsEye largely supports, AT&T's Petition asks the Commission to eliminate virtually all of the pro-competitive regulations that the Commission has previously adopted. This approach could only be justified if the Commission were to find that competition in IP services will exist absent any such pro-competitive requirements, and that neither AT&T nor any other ILEC controls bottleneck last mile transmission facilities. The approach that AT&T proposes is in fundamental conflict with the Commission's history and practice of promoting competition from multiple providers, which must remain a central policy objective of the Commission during and after the transition of the PSTN into a broadband IP-based platform for communications services. Because promoting competition (both intermodal and intramodal) is and should be the Commission's overriding goal and the best means for continuing "to drive a virtuous cycle of innovation and investment... and protect[ing] consumers,"⁵⁸ the Commission should deny AT&T's Petition.

⁵⁴ California PUC Comments at p. 14.

⁵⁵ Cox Communications Comments at pp. 9-10; Cablevision Comments at pp. 4-6.

⁵⁶ NASUCA Comments at p. 10; Public Knowledge Comments at p. 19.

⁵⁷ Community Competitors' Coalition Comments at pp. 5-6; TEXALTEL Comments at p. 4.

⁵⁸ See FCC Chairman Julius Genachowski Announces Formation of Technology Transitions Policy Task Force, (Dec. 10, 2012).

A. The Commission Should Reject AT&T's Proposed Trial

AT&T proposes that a trial in which ILECs would “propose individual wire centers” for “an experiment” in which the Commission would eliminate what AT&T characterizes as “outdated ‘telephone company’ regulations.”⁵⁹ AT&T does not explain, however, either in its Petition or in its Comments, what such a trial would measure or how it would be determined whether the trial is a success. This tactic is a transparent effort to divert attention from AT&T’s goal of eliminating all competition and re-establishing its monopoly position. Thus, there is little basis for the Commission to conclude that the trial will serve any useful purpose. This is particularly the case because during a trial in which the FCC closely monitors the behavior of AT&T and others with market power will, as Public Knowledge has commented, not “provide much evidence of anything other than that AT&T can behave for two years when it knows regulators are scrutinizing its behavior”⁶⁰

More importantly, the trial that AT&T proposes would do affirmative harm to the competitive marketplace that the Commission’s efforts have helped foster. As Granite has shown, existing commercial agreements under Section 271 do not provide CLECs the ability to access ILEC fiber, while FCC Rules do not permit CLECs to access ILEC fiber or packet-switched service under Sections 251 and 252.⁶¹ In addition, AT&T’s Petition states that in its

⁵⁹ AT&T Petition at pp. 6, 21.

⁶⁰ Public Knowledge Comments at p. 9; *see* T-Mobile Comments at p. 17 (“ILECs hoping to encourage the Commission to adopt deregulatory policies will have an incentive to refrain from abusing market power, but this incentive will disappear once the Commission eliminates pro-competitive regulations”); Cablevision Comments at p. 6 (“there is no reason to trust that the trial runs proposed by AT&T would yield anything resembling the actual results of the ‘market-based, regulation-free’ interconnection regime that AT&T ultimately desires.”)

⁶¹ Granite Comments at pp. 4, 28, 35.

proposed trial, ILECs would be “free of legacy regulation” for their fiber-based and IP services.⁶²

As a result, BullsEye and other CLECs would have no way to access the customers they have been serving through purchase of last mile access from the ILEC pursuant to Sections 252 and 271, short of building their own connections to those customers, which would be prohibitively expensive, except to reach customers with very large needs at a single location. As noted above, cable providers only infrequently serve business customers, so most business customers would have no alternative to the ILEC, while in the minority of areas where cable may be available to business customers, there would only be a duopoly which, as stated earlier, does not provide adequate competition. Business customers would thus be deprived of the benefits of competition. Even if at the end of the trial, the FCC were to declare AT&T’s “experiment” a failure, CLECs’ relations with their customers will have been severed, and the Commission would not be able to restore the damage to the competitive marketplace caused by the experiment.⁶³

B. While the Commission Should Reject AT&T’s Proposed Trial, If a Trial Is Held, Carrier Relationships with Customers Should Be Preserved, and the Trial Process Should Be Clarified

Should the Commission nevertheless determine to hold a trial, numerous precautions must be taken. First, BullsEye agrees with TelePacific that contrary to AT&T’s suggestion, the Commission, not the ILECs, should select the wire centers for the trial, after receiving input from

⁶² AT&T Petition at pp. 21-22.

⁶³ While BullsEye agrees with HyperCube that “the affected offices should be able, and generally required, to be returned to their pre-trial status following the completion of the trial period,” BullsEye does not believe that the damage to customer relationships can be so easily repaired. HyperCube Comments at pp. 18-19.

all affected parties.⁶⁴ Second, The Commission must establish rules for the trial that will support and preserve competition. BullsEye agrees with Cbeyond *et al.* that the Commission should “apply appropriately tailored regulations mandating the availability on reasonable rates, terms, and conditions of: (1) dark fiber and conditioned copper loops in selected geographic areas, and (2) packet-mode loops in other selected geographic areas”⁶⁵ and the trial

should be fairly long in duration (e.g., one year) to give retail and wholesale competitors the chance to adjust their business plans to the test environment. They would need to encompass a large enough geographic area, likely far larger than individual wire centers, to enable competitors to achieve the economies of scale needed to design and market business broadband services on rates, terms and conditions that are likely to be quite different than what is currently possible. Moreover, participants in the tests would need to be able to enter into wholesale and retail service agreements of customary duration (e.g., three years) in the test area, even if that means that the term of the service agreements would extend past the termination of the test period. This is necessary to enable service providers to design offerings in a manner that enables them to recover the customer-specific sunk costs of providing the service at a particular location in an affordable and efficient manner.⁶⁶

V. Conclusion

For the aforementioned reasons, AT&T’s Petition should be denied. To enable consumers to obtain the benefits of competition, the Commission should, consistent with NTCA’s Petition, and in the numerous proceedings already before the Commission, modify the existing legal and regulatory framework under the 1996 Act to accommodate the ongoing transition to IP-based broadband networks, while providing for competitive access to monopoly last-mile facilities regardless of the underlying transmission media or network protocol.

⁶⁴ U.S. TelePacific Comments at p. 15.

⁶⁵ Cbeyond *et al.* Comments at p. 24.

⁶⁶ Cbeyond *et al.* Comments at p. 26.

Respectfully submitted,

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