

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

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In the Matter of )  
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Petition for Declaratory Ruling of the )  
United States Telecom Association )  
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WC Docket No. 13-03

**COMMENTS OF GRANITE TELECOMMUNICATIONS, LLC**

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Granite Telecommunications, LLC (“Granite”) appreciates this opportunity to comment on the United States Telecom Association’s (“USTA’s”) Petition for Declaratory Ruling regarding the status of incumbent local exchange carriers (“ILECs”) as dominant carriers in the market for switched access services.<sup>1</sup> Granite opposes USTA’s Petition and respectfully requests that the Commission deny it.

**I. INTRODUCTION AND SUMMARY**

Granite is a nationwide competitive provider of telecommunications services to business customers. Granite serves over 1,250,000 phone lines predominantly used by multi-location businesses.<sup>2</sup> 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

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<sup>1</sup> *In the Matter of Petition of USTelecom for Declaratory Ruling that Incumbent Local Exchange Carriers Are Non-Dominant in the Provision of Switched Access Services*, WC Docket No. 13-21 (filed Dec. 19, 2012) (“USTA Petition”).

<sup>2</sup> *In the Matter of AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition, Petition of the National Telecommunications Cooperative Association for a Rulemaking to Promote and Sustain the Ongoing TDM-to-IP Evolution*, GN Docket No. 12-353, Comments of Granite Communications, LLC, at Exhibit A, Declaration of Kevin Nichols, ¶ 2 (Jan. 28, 2013) (“Nichols Decl.”).

other governmental entities.<sup>3</sup> Granite’s business 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. Granite provides these national companies with the ability to obtain basic voice service and other services at their retail locations nationwide from a single supplier. By and large, the locations where Granite serves its customers are locations where the only facilities-based last mile access supplier is the ILEC.<sup>4</sup>

USTA’s Petition seeks a ruling that ILECs are no longer dominant in the market for providing switched access services. USTA’s Petition focuses on end user switched access charges and contains minimal discussion of switched access charges imposed on IXCs. Yet, USTA appears to seek relief from requirements applicable to both types of switched access charges. The burden is on the Petitioners to be clear as to which aspects of switched access charges they are seeking relief from dominant carrier regulation for (e.g. all inter-carrier switched access charges, SLCs, the Access Recovery Charge). The Commission should decline

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<sup>3</sup> Nichols Decl., at ¶ 4.

<sup>4</sup> 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. Rcd. 10557, 10582, FCC 12-92 ¶ 49 (rel. Aug. 22, 2012) (“*Special Access Order*”); *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); GAO, *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); *U.S. v. SBC Comm., Inc.*, Complaint, No. 1:05-cv-02102, ¶ 15 (D.D.C. Oct. 27, 2005); *U.S. v. Verizon Comm. 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.”).

to take action on the Petition until Petitioners more clearly state what is requested and other parties have the opportunity to comment on a clear request. Once the types of charges implicated by the Petition are clear, the Commission should analyze market power appropriately for each separate market (e.g., an analysis of market power for tandem switching likely differs from originating access charges). The Petition does not provide data appropriate to reach a finding for each possible switched access market.

The Petition is ambiguous on this point; however, in any event USTA apparently *concedes* that LECs continue to have market power in the market for switched access services provided to IXC, admitting that “with respect to their own end users” local exchange carriers possess market power for such switched access services.<sup>5</sup> USTA thereby concedes the existence of ILEC market power in connection with provision of switched access services to IXC to connect with the ILECs’ end users. USTA’s concession precludes a finding that all ILECs lack market power and are non-dominant in the provision of switched access services to IXC.

USTA’s concession is consistent with the Commission’s observation less than three years ago, in the Qwest Phoenix Forbearance Order, that “for switched access services, only end-user customers have the possibility of competitive alternatives in the market in which they purchase access service. IXC, which also must pay switched access charges, face a bottleneck monopoly from the LECs . . . that provide access to their end users.”<sup>6</sup> On this basis, the Commission concluded that “Qwest, like other LECs, possesses market power over originating and

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<sup>5</sup> USTA Petition, at 9, n.16.

<sup>6</sup> *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, No. 10-113, Memorandum Opinion and Order, 25 FCC Rcd. 8622, 8664, at ¶ 79, n.237-38 (rel. June 22, 2010), *aff’d sub nom, Qwest Corporation v. FCC*, 689 F. 3d 1214 (10<sup>th</sup> Cir. 2012) (“Qwest Phoenix Forbearance Order”); *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Seventh Order and FNPRM, 16 FCC Rcd. 9923, 9938, at ¶ 38 (2001).

terminating switched access” and may not be granted forbearance from regulation of switched access services, including many of the same switched access regulations that are implicated by the present Petition.<sup>7</sup> The Commission denied Qwest relief from many of the same regulations now sought by USTA in its present Petition in the Qwest Phoenix Forbearance Order less than three years ago, even though forbearance was requested for only a single market (Phoenix) for one ILEC (Qwest). Now, USTA requests broad relief from these regulations in all markets *nationwide and for all ILECs*. USTA has not explained what has changed with respect to the “bottleneck monopoly” found by the Commission that would merit a different outcome today and would be sufficient to justify nationwide relief for all ILECs.

USTA instead largely relies on competition from cable companies, mobile service providers and over-the-top VoIP providers for *local services* and an alleged concomitant loss of ILEC market power for these local services. USTA thus in effect ignores the fact that the Commission has held that “providers of switched access services serve two distinct customer groups: (1) IXC’s, which purchase originating and terminating switched access services as an input for the long distance services that they provide to their end user customers; and (2) end users who benefit from the ability, provided by access service, to place and receive long distance calls.”<sup>8</sup> USTA fails to acknowledge and separately address these two distinct types of switched access services or the existence of ILEC market power for any specific individual ILEC, let alone all ILECs on a nationwide basis. Further, USTA ignores the fact that switched access services are comprised of components such as Subscriber Line Charges (“SLCs”), local switching and tandem switching.<sup>9</sup> A proper granular analysis of market power may reach a

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<sup>7</sup> Qwest Forbearance Order, at ¶ 79.

<sup>8</sup> Qwest Phoenix Forbearance Order, at ¶ 111 (2010).

<sup>9</sup> *See, e.g.*, Qwest Phoenix Forbearance Order, at ¶ 111, n.329.

different outcome for different components of the relevant type of switched access service. On these grounds alone, USTA's market analysis is fundamentally flawed and its Petition should be rejected. Thus, the Commission should deny USTA's Petition without even reaching the question of whether ILECs are no longer dominant in the provision of retail services, as suggested by the Petition.

Nonetheless, in response to the arguments USTA raises, Granite demonstrates below that contrary to USTA's contentions, the ILECs have continued dominance in retail local business services because ILECs are near-monopoly providers of facilities-based last mile access,<sup>10</sup> and associated switched access services, and therefore there is no basis for the Commission to declare them non-dominant. Following the Qwest Phoenix Forbearance Order, Granite distinguishes between residential and business local services (and related switched access services) because while retail residential wireline services are characterized to a significant extent by an ILEC-cable company duopoly, there is far less facilities-based competition in the market for business services.

Instead of showing what has changed since the Commission denied the requested relief in the Qwest Phoenix Forbearance Order, USTA has attempted to obfuscate the issue by relying on wholly inapposite market share analysis in the Commission's *Program Access Order* for the MVPD market<sup>11</sup> and the dated market share analysis from the 18 year old AT&T Non-Dominance Order in a different market, the domestic long distance market,<sup>12</sup> as well as aggregate market share data for retail local services. Among other defects, USTA's reliance on the

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<sup>10</sup> See n. 4, *supra*.

<sup>11</sup> USTA Petition, at 43-44; *Revision of the Commission's Program Access Rules*, MB Docket No. 12-68, 27 FCC Rcd. 12605, Report and Order and FNPRM, at ¶¶ 17, 31 ("*Program Access Order*").

<sup>12</sup> USTA Petition, at 14-15.

*Program Access Order* is somewhat misleading because the Commission's actions were based on many factors and considerations in addition to an aggregate decline in the cable industry's share of MVPD subscribers, including, for example, the fact that the Commission, in approving transfer of licenses, imposed a program access condition on Comcast/NBCU to continue to make the networks it controls available to competitors, and there was a decline in the amount of satellite-delivered, cable-affiliated programming among the most popular cable networks to which the subject rules applied.<sup>13</sup>

USTA's Petition thus lacks evidentiary support because rather than focusing on the appropriate segments of the switched access market, it merely cites *nationwide trends* in access line losses, cable competition, consumer decisions to "cut the cord," and other information relating to the local services market. The aggregate trends USTA relies upon obscure the reality that market power varies significantly among geographic regions and undermines its request for a nationwide declaration of non-dominance.

USTA's arguments relating to aggregate market share for retail local services, if relevant, also ignore important distinctions between the markets for small, medium and large business services and for residential services. By doing so, USTA overstates the pace at which conversion to VoIP, cable and mobile services in the switched access and local services markets is taking place for business customers. Moreover, USTA ignores that most business customers do not view mobile services as a substitute for wireline services. The state of competition in the market for business services is substantially different from the market for residential services.<sup>14</sup>

Further, USTA provides no data concerning the individual line losses, and market share losses

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<sup>13</sup> See, e.g., *Program Access Order*, at ¶¶ 4, 22-31.

<sup>14</sup> Qwest Phoenix Forbearance Order, at ¶ 91 ("we are unwilling to predict that Cox's competitive success in the retail mass market currently subjects, or will in the future subject, Qwest to effective competition in the enterprise market.").

for specific ILECs. The Commission cannot make a determination that each and every ILEC lacks market power based on general nationwide assumptions regarding overall ILEC market share in retail local services.

The Commission should utilize a more granular market definition than the unified, nationwide market analysis suggested by USTA, require data needed to evaluate the market power of each subject ILEC, and at a minimum analyze the residential and small, medium and large business markets as separate markets. In addition, because mobile service providers and over-the-top VoIP providers are not providers of switched access services, consistent with its prior findings in other proceedings,<sup>15</sup> the Commission should not consider competition from them when analyzing market power for business switched access services, as urged by USTA.

## **II. USTA’S PETITION SHOULD BE DENIED BECAUSE PETITIONER CONCEDES THAT ILECS HAVE MARKET POWER IN THE MARKET FOR WHICH IT SEEKS A FINDING OF NON--DOMINANCE**

Although USTA requests non-dominant treatment for all ILECs in the market for providing switched access to IXCs, its Petition focuses solely on loss of access lines and market share to cable, wireless and VoIP providers in the retail local market.<sup>16</sup> Interexchange carriers utilize LEC originating and terminating access services that are not retail services; as USTA admits, terminating access services are monopoly services for which LECs possess market power.<sup>17</sup> In the Qwest Phoenix Forbearance Order, the Commission rejected the argument that USTA makes here: that ILECs should be granted forbearance from dominant carrier regulation of carrier’s carrier switched access charges based on the assumption that the retail market for end

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<sup>15</sup> Qwest Phoenix Forbearance Order, at ¶¶ 54-55 (2010).

<sup>16</sup> USTA Petition, at 14-40.

<sup>17</sup> USTA Petition, at 9, n.16.

user services is competitive.<sup>18</sup> The Commission has thus concluded that the existence of supposed competition in the retail market cannot serve as grounds to find that ILECs lack market power in the provision of switched access to IXCs. In the absence of even an attempt by USTA to demonstrate why the Commission should reverse itself on that issue, the Commission should deny the Petition without reaching the question of whether ILECs possess market power in the local retail market.

### **III. ALTERNATIVELY, USTA’S PETITION SHOULD BE DENIED BECAUSE ILECS CONTINUE TO POSSESS MARKET POWER AND CONTROL BOTTLENECK FACILITIES IN THE LOCAL MARKET FOR BUSINESS CUSTOMERS**

The Commission has long distinguished between two kinds of carriers—those with “market power” (*i.e.*, dominant carriers) in the relevant market segments and those without market power (non-dominant carriers).<sup>19</sup> In determining whether a firm possesses market power, the Commission has focused on certain “clearly identifiable market features,” including “the number and size distribution of competing firms, *the nature of barriers to entry*, and the availability of reasonably substitutable services,” and *whether the firm controls “bottleneck facilities.”*<sup>20</sup>

In 1995, the Commission reclassified AT&T as non-dominant in the provision of domestic interstate, long-distance services, after considering a number of factors, none of which

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<sup>18</sup> Qwest Phoenix Forbearance Order, at ¶¶ 9, 50, 79, 112 (at ¶ 79, “Thus, we conclude that Qwest, like other LECs, possesses market power over originating and terminating switched access.”).

<sup>19</sup> *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, First Report and Order, 85 FCC2d 1, at 20-23 (1980) (“*First Report and Order*”); See, also, 47 C.F.R. § 61.3(q) (“Dominant Carrier. A carrier found by the Commission to have market power (*i.e.*, power to control prices).”).

<sup>20</sup> *First Report and Order*, at 20-21 (emphasis added); USTA Petition, at 13.

was necessarily sufficient standing alone, including: (1) the steep decline in AT&T's market share, *lost to facilities-based providers*; (2) AT&T faced *at least three nationwide facilities-based providers* and hundreds of smaller such competitors; (3) AT&T's competitors possessed the ability to accommodate a substantial number of new customers *on their networks* with “little or no investment immediately;” and (4) *AT&T had not controlled local bottleneck facilities for over ten years.*<sup>21</sup>

As demonstrated below, these conditions are clearly not met with respect to the market for service to business customers. Importantly, the ILECs continue to control bottleneck DS0 loop facilities for business customers that are the foundation of competition, and at most business customer locations (especially small and medium business customer locations) do not face *facilities-based* competitors for switched access services to business customers. Thus, these two conditions and others which led to the reclassification of AT&T in the domestic long distance market are clearly not met in the distinct business markets for switched access services.

**A. The Business Market Must Be Analyzed Separately from the Residential Market**

In the recent Qwest Phoenix Forbearance proceeding, in which Qwest requested a ruling that it was non-dominant in the provision of switched access, the Commission was required to analyze Qwest's market power. It determined to “separately evaluate competition for distinct services, for example differentiating among the various retail services purchased by residential and small, medium, and large business customers, and the various wholesale services purchased

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<sup>21</sup> *In the Matter of Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, FCC No. 95-427, Order, 11 FCC Rcd. 3271, 3303-08, at ¶¶ 59, 67, 70-71 (1995) (“AT&T Domestic Non-Dominance Order”); *Qwest Phoenix Forbearance Order*, 25 FCC Rcd. 8622, 8625-26, at ¶¶ 7-8 (2010); USTA Petition, at 14-15.

by other carriers.”<sup>22</sup> The Commission concluded that an analysis that fails to evaluate market power in business markets separately from the residential market “is not supported by current economic theory.”<sup>23</sup>

The USTA Petition focuses on residential line loss, thus ignoring these important distinctions between the retail market for business access services and that for residential access services. For example, USTA repeatedly emphasizes that “today only about one-third of American *households* purchase an ILEC switched access service,” and that “approximately “40% of *households* have ‘cut the cord’ and rely entirely on wireless for their voice services.”<sup>24</sup> USTA also relies on competition from cable companies in the residential market, which is characterized by a duopoly consisting of the ILECs and cable companies. For example, USTA notes that “more than 20% of all U.S. *households* subscribed to cable voice services by 2012.”<sup>25</sup>

USTA’s statistics regarding households and residential customers are simply irrelevant to an assessment of an ILEC’s continued dominance and market power in the distinct market *for business* switched access services. Perhaps sensing its case for further deregulation is weakest in the distinct business market for switched access services, USTA requests that the Commission “evaluate and grant” the relief it seeks “on a nationwide basis” for all ILECs and all switched access services, thereby obscuring the distinctions between the residential and business markets

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<sup>22</sup> Qwest Phoenix Forbearance Order, at ¶¶ 1, 80-91 (treating the retail mass market for wireline services separately from the enterprise market).

<sup>23</sup> Qwest Phoenix Forbearance Order, at ¶ 28.

<sup>24</sup> USTA Petition, at ii-iii, 7, graph on 8, 24, 26 (emphasis added) (at p. 26, “A decade ago, 93% of American households subscribed to an ILEC-provided switched access service. Today, that figure is down to *less than one-third* of American households and is projected to decline to a mere *one-quarter* of households by 2013.”).

<sup>25</sup> USTA Petition, at 28 (emphasis added) (at p. 9, USTA “requests that the Commission declare that ILECs are no longer presumptively dominant when providing interstate mass market and enterprise switched access services.”).

for switched access services, as well as the significant variance among individual ILECs and specific geographic markets.<sup>26</sup>

The Commission should reject USTA's proposed definition of the relevant market and its analytical framework.<sup>27</sup> If the Commission does not dismiss the Petition outright because USTA admits that ILECs possess market power in the provision of switched access to IXCs, it should utilize a more granular market definition than the unified, nationwide market analysis suggested by USTA, and at a minimum analyze the residential and business markets as separate switched access markets, and also analyze the markets served by individual ILECs. The business market for switched access services should be further disaggregated between the small and mid-sized business locations served by Granite and large businesses, because, among other reasons, competitive providers are far less likely to construct facilities to small and mid-sized businesses with 3 to 15 lines than to large business locations.<sup>28</sup>

#### **B. ILECs Continue to Possess Market Power in the Business Market**

There are several reasons why the Commission should not find that USTA has met its burden of showing the ILECs no longer possess market power in the business market. First, USTA has provided minimal data regarding market share in the small, medium and large business markets. Second, even if USTA had provided the relevant data, it would make no sense for the Commission to make a ruling about the absence of market power of any given ILEC on the basis of national average data, most of which is outside the region of any given ILEC. This is reminiscent of the old saying that one can drown in a lake that has an average of six inches of

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<sup>26</sup> USTA Petition, at 4.

<sup>27</sup> Qwest Phoenix Forbearance Order, at ¶ 91 (“we are unwilling to predict that Cox’s competitive success in the retail mass market currently subjects, or will in the future subject, Qwest to effective competition in the enterprise market.”).

<sup>28</sup> Nichols Decl., at ¶¶ 13-14; n. 4 *supra*.

water, because the water may be much deeper than that at any given point. Third, as shown in Section III.B.1, below, there is substantial evidence that ILEC loss of market share to cable and wireless telephony (which constitute the chief reasons for line loss relied upon by USTA) in the small and mid-size business market is not nearly as significant as ILEC loss of market share to cable and wireless in the residential market. Fourth, ILECs still possess control over bottleneck facilities serving the vast majority of business locations. Granite elaborates on the last two reasons below.

**1. ILECs continue to possess large market shares in the business market**

The conversion to VoIP services and mobile services as a substitute for ILEC switched access and other services for businesses is much more gradual than that for residential services.<sup>29</sup> As demonstrated in a chart developed by the Telecommunications Industry Association, as of 2012, VoIP served only 8.9% of business lines, while serving 30.4% of residential lines.<sup>30</sup> 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.<sup>31</sup>

There are multiple reasons for this distinction. First, VoIP is heavily provided by cable providers, and cable substitution is more likely to occur in the residential market, where cable networks are located. In many instances, the cable companies do not have facilities that pass

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<sup>29</sup> 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.

<sup>30</sup> See *TIA ex parte*, at 3; Granite IP Interconnection Comments, GN Docket No. 12-353, at 20; 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.

<sup>31</sup> See Granite IP Interconnection Comments, GN Docket No. 12-353, at 21.

business customer locations, as cable networks predominantly serve residential areas.<sup>32</sup> Even where cable facilities are located in the general area of a business customer, it is cost-prohibitive to extend the cable network to serve a business that needs only a few lines.

Second, residential users require the mobility that wireless service provides much more than business users that have been using wireline service. In addition, for reliability and security reasons, wireless services are not a substitute for the wireline services that business customers seek, even for basic voice calls. Likewise, they cannot provide the connectivity among locations that many businesses require. As demonstrated by a declaration of a Granite executive, because of reliability, quality, responsive customer service, and other concerns regarding mobile services, Granite's business customers do not perceive mobile services as a substitute for their wireline switched access services.<sup>33</sup> This leads to a higher rate of wireless substitution among residential customers.<sup>34</sup>

In the Qwest Phoenix Forbearance proceeding, when the Commission last considered the same market power issues, it concluded that there was insufficient evidence to determine which

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<sup>32</sup> Qwest Phoenix Forbearance Order, at ¶¶ 74 (“we find credible assertions that Cox’s last-mile network, although extensive in residential areas, could not readily serve most of the enterprise businesses in these markets at this time.”), 91 (“we are unwilling to predict that Cox’s competitive success in the retail mass market currently subjects, or will in the future subject, Qwest to effective competition in the enterprise market.”).

<sup>33</sup> Nichols Decl., at ¶¶ 7-8.

<sup>34</sup> See Qwest Phoenix Forbearance Order, at ¶ 59 (some wireline customers appear unlikely to drop wireline services for wireless services “in response to a significant price increase, including those who: (a) *value the reliability* and safety of wireline service; (b) value a single point of contact for multiple household members; (c) live in a household with poor wireless coverage; (d) *operate a business out of their home* and believe that wireline service offers better reliability and sound quality; or (e) desire a service that is more economically purchased when bundled with a local service (e.g., wireline broadband Internet service, or a video service.”) (emphasis added); Nichols Decl., at 7-8, 11.

over-the-top VoIP services and mobile services should be included in the relevant market.<sup>35</sup> As noted in the Qwest Phoenix Forbearance Order, the “Commission, the Department of Justice, and foreign regulators have previously found that mobile wireless service does not constrain the price of wireline service.”<sup>36</sup> As the Commission observed, the growth in the number of wireless-only residential customers who have cut the cord does not establish an increasing cross-elasticity of demand between mobile and wireline customers in the residential market, let alone the business and IXC markets for switched access services.<sup>37</sup> Thus, consistent with its prior findings, the Commission should not consider competition from over-the-top VoIP services and mobile services when analyzing market power for business switched access services, as urged by USTA.<sup>38</sup>

Furthermore, to use VoIP service, a customer must have a broadband connection. A large portion of business broadband connections come from the ILEC. Those connections are priced at the discretion of the ILEC and therefore provide no competition at all to the ILEC. As demonstrated below,<sup>39</sup> a provider of facilities-based VoIP services would have to overcome substantial barriers to entry associated with deploying a broadband connection to a relatively small customer in order to reach the type of business customers served by Granite. It is unlikely that a facilities-based provider would view such a deployment (to a single customer with 5 or fewer voice lines) as an economically rational decision.

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<sup>35</sup> Qwest Phoenix Forbearance Order, at ¶¶ 54-55.

<sup>36</sup> Qwest Phoenix Forbearance Order, at ¶¶ 57-58, n 169-176.

<sup>37</sup> Qwest Phoenix Forbearance Order, at ¶ 59 (“nationwide statistics published by the CDC suggest that the choice to rely exclusively upon mobile services could be driven more by differences in consumers’ age, household structure, and underlying preferences than by relevant price differentials.”).

<sup>38</sup> Qwest Phoenix Forbearance Order, at ¶¶ 54-55.

<sup>39</sup> See p. 18, *infra*.

USTA states that the “displacement of the PSTN by alternative technologies has been much more dramatic than the erosion of AT&T’s long distance share that led to the Commission’s finding of non-dominance” in the domestic long distance market some 18 years ago.<sup>40</sup> USTA’s analogy to this 18 year old proceeding belies the fact that there are critical differences between long distance competition against AT&T in the 1980s and 1990s than the more limited facilities-based competition that exists in the switched access market for business customers today. First, in the domestic long distance market of the 1990s, AT&T faced nationwide competition from at least three facilities based providers,<sup>41</sup> and it did not control access to bottleneck facilities used to provision these competing long distance services (rather, the ILECs controlled and still control bottleneck loop facilities). By contrast, most competitors to the ILECs in the business switched access market today rely extensively on ILEC last mile bottleneck facilities, as does Granite.<sup>42</sup> Moreover, given AT&T’s and Verizon’s position as far and away the two largest wireless carriers in the country with about 80% of wireless market’s revenues, 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.<sup>43</sup>

USTA has not carried its burden of showing that ILECs in general, or any ILEC in particular, lacks significant market power in the business switched access market. If it reaches this issue, the Commission should not depart from its ruling in the *Phoenix Forbearance Order*,

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<sup>40</sup> USTA Petition, at iii, 15, 25.

<sup>41</sup> Qwest Phoenix Forbearance Order, at ¶ 7; AT&T Non-Dominance Order, at ¶¶ 70-71.

<sup>42</sup> *Supra*, n.4; Nichols Decl., at ¶ 13.

<sup>43</sup> *In the Matter of AT&T and NTCA Petitions*, GN Docket No. 12-353, Comments of The Ad Hoc Telecommunications Users Committee, at 12 (Jan. 28, 2012) (“Specifically, ‘AT&T and Verizon Wireless together control two-thirds of the marketplace and generate 80 percent of its revenues.’”) (“Ad Hoc Comments”); Susan P. Crawford, *Captive Audience: The Telecom Industry and Monopoly Power in the New Gilded Age*, at 157-58 (Yale University Press, 2013).

and should deny the Petition.

## **2. ILECs control bottleneck transmission facilities to the vast majority of business locations**

In discussing the market characteristics that it considers in determining whether a carrier possesses market power, the Commission has emphasized that, “[a]n important structural characteristic of the marketplace that confers market power upon a firm is the control of bottleneck facilities’ because it provides the ability ‘to impede access of its competitors to those facilities,’ and thus *is treated ‘as prima facie evidence of market power* requiring detailed regulatory scrutiny.’”<sup>44</sup>

In most markets, the ILEC continues to be the only provider with connections to virtually all of the business locations in the market.<sup>45</sup> Even where there are competitors, their mere presence does not demonstrate that the ILECs lack market power, as “[g]enerally accepted economic theory has long recognized that it is possible for providers to have market power even in the presence of competitors.”<sup>46</sup> Further, as the Commission recently observed in a forbearance proceeding, “competitors offering business services largely must rely on purchases from [the ILEC] to provide service.”<sup>47</sup> Despite USTA’s claims that the gradual transition to IP networks

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<sup>44</sup> Qwest Phoenix Forbearance Order, 25 FCC Rcd. 8625, at ¶ 5, *quoting, In the Matter of Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, First Report and Order, FCC 80-269, 85 FCC 2d 1, 14, at ¶ 58 (1980) (emphasis added).

<sup>45</sup> *Supra*, n.41; Qwest Forbearance Order, at ¶ 87 (“we find competitors offering retail enterprise services in the Phoenix MSA primarily rely upon Qwest’s wholesale services, and that Qwest has not demonstrated that there exists significant actual or potential competition for enterprise services by customers that rely on their own last-mile connections to serve customers.”).

<sup>46</sup> Ad Hoc Comments, GN Docket No. 12-353, at 7 (citing N. Gregory Mankiw, *Principles of Microeconomics*, 6th Edition, at 11 (South-Western College Pub: 2011)).

<sup>47</sup> *See, e.g.*, Qwest Phoenix Forbearance Order, 25 FCC Rcd. 8623, at ¶ 2.

and VoIP somehow spells the end of ILEC market power, the ILECs continue to serve a very high percentage of business customers nationwide and, importantly, continue to control bottleneck local loop facilities upon which competitive services are based.

The Commission also recently found that competitive deployment of last mile access facilities has generally not occurred except in areas with significant concentration of business demand.<sup>48</sup> Thus, in markets such as Atlanta, 60 percent of the zip codes lacked any competitively provided wireline service,<sup>49</sup> and the Commission predicted that it would be unlikely to identify conflicting trends in different markets.<sup>50</sup> The Commission concluded that demand in areas where the demand is less concentrated cannot easily be served by extending competitive wireline networks, even from those areas where demand is relatively highly concentrated.<sup>51</sup> 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 is not a viable option. The Commission has long recognized the significant time, cost and disruption associated with fiber deployment<sup>52</sup> and has concluded that barriers to entry

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<sup>48</sup> *Special Access Order*, 27 F.C.C. Rcd. 10557, 10582, FCC 12-92 ¶ 49.

<sup>49</sup> *Id.*

<sup>50</sup> *Special Access Order*, at ¶ 50.

<sup>51</sup> *Special Access Order*, at ¶¶ 35-38, 55, 60 (“even if competitors could easily deploy fiber to serve customer demand within 1,000 feet of incumbents’ facilities [as alleged by SBC], many parts of an MSA would still not be served by competitive fiber.”).

<sup>52</sup> *See Connect America Fund, A National Broadband Plan for our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 10-90, 07-135 *et al.*, FCC 11-61, Report and Order and FNPRM, 26 FCC Rcd. 17663, 17668, 17669 ¶¶ 4-5, 7 (rel. Nov. 18, 2011) (“ICC Reform Order”); *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*

continue to make deployment of competitive last mile access facilities “costly and difficult.”<sup>53</sup>

Such deployment is rarely economic in areas outside of the most densely populated business centers. 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.<sup>54</sup> These barriers include significant sunk costs such as the costs of obtaining easements, “construction costs, the costs of fiber and electronics, backhaul costs, transactions costs involved in negotiating with suppliers, and other recurring costs such as rent, utilities, and maintenance [that] are typically too large to justify provisioning a building with relatively low levels of demand.”<sup>55</sup> The Commission has recognized other barriers to entry as well “including the delays in or impossibility of securing municipal franchise agreements, rights-of-way agreements, building access agreements, and building and zoning permits.”<sup>56</sup> These barriers continue to make deployment of competitive last mile access facilities “costly and difficult.”<sup>57</sup>

USTA argues that virtually any regulation of ILECs somehow impedes future investment and forestalls competition.<sup>58</sup> USTA provides scant support for its “investment chilling”

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*Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and FNPRM, 18 FCC Rcd 16978, ¶ 7 (2003) (“TRO”), *vacated and remanded in part, aff’d in part*, *United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), *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), *aff’d*, *Covad Commc’ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006), ¶¶ 85-91.

<sup>53</sup> *Qwest Phoenix Forbearance Order*, at ¶ 73.

<sup>54</sup> *Qwest Phoenix Forbearance Order*, at ¶ 90 (citing TRO ¶¶ 85-91).

<sup>55</sup> *Special Access Order*, at ¶ 54; TRO, ¶ 86.

<sup>56</sup> *Special Access Order*, at ¶ 54.

<sup>57</sup> *Qwest Phoenix Forbearance Order*, 25 FCC Rcd at 8661 ¶ 73.

<sup>58</sup> USTA Petition, at 23, 48.

argument. To the contrary, the Commission has recognized that “maintaining competition policies actually gives both ILECs and competitors the incentive to invest and innovate in order to remain competitive.”<sup>59</sup> As others have explained, “none of the FCC’s decisions to deregulate ILEC last-mile facilities has actually resulted in substantially increased investment or materially greater competition.”<sup>60</sup> Thus, in light of the ILECs’ entrenched market power in the market for business switched access services and services provisioned to IXCs the Commission should continue to treat ILECs as dominant carriers and enforce its existing dominant carrier rules.

#### **IV. IF THE COMMISSION DOES NOT DENY USTA’S PETITION, IT SHOULD DEFER RULING ON IT**

The Commission’s Intercarrier Compensation Reform proceeding has requested comment on the role of “regulated end user charges” and the magnitude and role of subscriber line charges (“SLC”), a key component of switched access charges.<sup>61</sup> The non-dominant cost study and tariffing relief sought by USTA would have one of its most significant effects on tariffing of the SLC charged to end users. If the Commission eliminates the SLC, then there appears to be no substantial reason to address USTA’s request that ILECs be declared non-dominant in the tariffing of end user switched access charges. Given that the ICC Reform Order establishes a glide-path mandating declining terminating switched access charges imposed on IXCs that is implemented through ILEC tariffs and is currently addressing originating access charges as well,<sup>62</sup> it would not be a good use of administrative resources to focus on carrier’s carrier switched access charges in this proceeding as well. Thus, if the Commission does not deny

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<sup>59</sup> *In the Matter of AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition*, GN Docket No. 12-353, Comments of CBeyond et al., at 27 (Jan. 28, 2013) (“CBeyond Comments”); Qwest Phoenix Forbearance Order, at n.313.

<sup>60</sup> CBeyond Comments, at 28.

<sup>61</sup> ICC Reform Order, at ¶¶ 1330-1334 (rel. Nov. 18, 2011).

<sup>62</sup> ICC Reform Order, at ¶¶ 35, 739 (rel. Nov. 18, 2011).

USTA's Petition for the reasons set forth above, it should defer any action on USTA's Petition until it has addressed these issues in the Intercarrier Compensation Reform proceeding.

#### **IV. CONCLUSION**

For the aforementioned reasons, USTA's Petition should be denied and the Commission should continue to treat ILECs as dominant carriers in the switched access market for business customers and residential customers. Alternatively, the Commission should defer ruling on USTA's Petition.

Respectfully submitted,

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