

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Petition of US Telecom Association for	)	WC Docket No. 13-3
Declaratory Ruling that Incumbent Local Exchange	)	
Carriers Are Non-Dominant in	)	
The Provision of Switched Access Services	)	
	)	
In the Matter of	)	
	)	
Petition of XO Communications, LLC,	)	RM-11358
Covad Communications Group, Inc., NuVox	)	
Communications and Eschelon Telecom, Inc. for	)	DA 07-209
A Rulemaking to Amend Part 51 Rules	)	WC Docket No. 10-188
Applicable to Incumbent LEC Retirement of	)	
Copper Loops and Copper Subloops	)	GN Docket No. 09-51
	)	WC Docket No. 13-5
In the Matters of	)	
	)	
AT&T Petition to Launch a Proceeding	)	GN Docket No. 12-353
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	)	

**REPLY COMMENTS OF THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

The Pennsylvania Public Utility Commission (Pa. PUC) files these Reply Comments addressing the Public Notice in WC Docket No. 13-3 at DA 1321 issued by the Federal Communications Commission (FCC or Commission) on January 9, 2013 and the other dockets.

The Notice solicits Comments or Oppositions to the US Telecom Association (USTA) Petition For A Declaratory Ruling that Incumbent Local Exchange Carriers (ILECs) Are Non-Dominant in the Provision of Switched Access Services (USTA Petition). Comments or Oppositions are due on or before February 25, 2013, and Reply Comments on or before March 12, 2013. The Pa. PUC also submits these into the record to refresh the record in the pending Copper Rulemaking case as well.

The USTA “requests that the Commission declare that ILECs [incumbent local exchange carriers] are no longer presumptively dominant when providing interstate mass market and enterprise switched access services.”<sup>1</sup> The USTA Petition seeks expansive relief from several current FCC rules. First, the Petition seeks relief from the existing FCC rules requiring dominant ILEC carriers to file cost support for services subject to tariff changes on a minimum notice of 7 days compared to the absence of that regulation for non-dominant carriers. In addition, the USTA Petition seeks abandonment of the current 60-day waiting period for applications to discontinue switched access service for dominant ILECs compared to a 30-day period for non-dominant carriers.

The USTA Petition seeks presumptive streamlined treatment for Section 214 transfers of control similar to non-dominant carriers. The USTA Petition relies particularly on the FCC’s recent ruling in its *Program Access Rules* at Docket No. 12-68 (October 12, 2012) in which the FCC eliminated the presumption against exclusive arrangements for vertically-owned cable programming on a national basis. The FCC noted that, while the incumbent cable companies’ market share dropped from 67% to

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<sup>1</sup> USTA Petition, p. 1

57% in a period of five years, there was a need for “case by case” evaluations for those markets that were still 80% controlled by the incumbent cable companies.<sup>2</sup>

The Pa. PUC appreciates an opportunity to file Reply Comments. As an initial matter, these Pa. PUC Reply Comments should not be construed as binding on the Pa. PUC in any matter before the Pa. PUC. Moreover, the Pa. PUC Reply Comments could change in response to later events, including Ex Parte filings or the review of other filed Comments and legal or regulatory developments at the state or federal level, including subsequent ex parte filings made at the FCC after expiration of the Comment and Reply Comment periods. The Pa. PUC Reply Comments build upon and reiterate prior filings of the Pa. PUC on several issues.

The Pa. PUC opposes this petition on two grounds. First, the Pa. PUC opposition is based on independent state law and Section 214 of the federal Communications Act of 1934, as amended (Act). Second, the Pa. PUC opposition is based on the FCC’s 2013 Local Competition Report (FCC Local Competition Report or FCC Report) which demonstrates that the requested relief in the USTA Petition is premature.

**1. The Section 214 Relief Should Not Undermine State Law or Section 214.**

Current Pennsylvania law requires the Pa. PUC to maintain universal service and ensure that rates for protected services inclusive of intrastate switched carrier access are reasonable and do not subsidize competition. 66 Pa. C.S. § 3011. That same law also requires the Commission to provide diversity in the supply of telecommunications services, to encourage the efficient use of technological advances, and to promote and to

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<sup>2</sup> USTA Petition, pp. 9-12.

encourage the provision of competitive services by a variety of service providers on equal terms throughout all geographic areas of Pennsylvania without jeopardizing the provision of universal telecommunications at affordable rates. 66 Pa.C.S. §§ 3011(1), (5), (6), (8).

Section 214 of the Act requires the FCC to consider the impact of discontinuance on preventing loss or impairment of service offered to a community or part of a community without adequate public interest safeguards. *Total Telecommunications Service v. AT&T*, 919 F.Supp. 472, aff'd 99 F.3d 448 (D.C. 1996). This requirement is consistent with Pennsylvania law.

The Pa. PUC opposes any grant of national relief that would effectively undermine Pennsylvania law and the Pa. PUC's role in Section 214. 47 U.S.C. § 214. The USTA Petition fails to address how relief will prevent the loss of service to a community or parts of a community if a grant is construed as authorizing the abandonment or discontinuance of wireline telecommunications services on a statewide basis or to specific locales within a state.

Currently, under applicable federal law the Pa. PUC has 30 days to address petitions by non-dominant carriers to abandon service and a 60-day period to address petitions to abandon service by federally classified dominant carriers, an important consideration when Pennsylvania's law on universal service may be at stake.

A new 30-day time period that replaces the 60-day time period for review and response would leave less time for input from the Pa. PUC, notwithstanding any impact to universal service under independent state law, and relevant state-specific proceedings addressing the abandonment of services and/or network facilities by a state regulated

ILEC. It is one thing to have a 30-day review period and streamlined process for competitors who do not have carrier of last resort or universal service obligations. It is quite another thing to impose the same 30-day review period and streamlined process for incumbents and carriers of last resort.

The existing time periods make sense. They accurately reflect the different obligations of competitors compared to incumbents – including the federal and state universal service fund (USF) support often provided to those ILECs in recognition of their different obligation to universally provide retail and wholesale wireline switched access interconnection services and facilities, i.e., the carrier of last resort (COLR) obligations.<sup>3</sup> While universal service and COLR obligations may be under considerable pressure, the Pa. PUC does not think that pressure alone warrants relief that obviates universal service or COLR requirements. Those important legal mandates require time needed by the states, in this case 60 days, to determine if a petition by an ILEC to the FCC will have a negative impact to universal service and the COLR requirements in a state. While most petitions today rarely rise to that level, the impending changes in universal service suggest that these obligations, and support for that obligation, must be reinforced, not abandoned, by the FCC.

Cost support for wholesale switched access services tariff filings and a 60-day period for review of Section 214 applications or petitions are neither onerous nor

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<sup>3</sup> The ILEC provision of basic intrastate wireline retail voice telecommunications services also involves a number of attendant and critical functionalities such as access to 911/E911 emergency services, “1+” equal access dialing for interexchange calls, access to telecommunications relay services (TRS), etc. These ILEC COLR obligations are traditionally and lawfully established by independent state law and regulations and state utility commissions exercise the appropriate regulatory oversight and enforcement.

burdensome given the potentially negative impact on universal service and COLR obligations. This 60-day period is not that much longer compared to the 30-day period for competitors who do not have these universal service and COLR obligations. A relatively minor time differential of 30 days is not that significant given the FCC's evidence on the facts about local competition today.

USTA and its member ILECs are simply engaging in repetitive arguments and requests for relief that are currently pending in other proceedings before the Commission. The Pa. PUC reiterates its previous opposition to such requests for relief on the basis that Section 214 requests for abandonment of services or facilities that affect ILEC intrastate jurisdictional operations are also subject to independent state law. Furthermore, if the FCC were to inadvisably grant any relief from Section 214 obligations regarding services and/or network facilities abandonment, such relief cannot lawfully preempt the COLR obligations of USTA's members on the state level. The Commission's *USF/ICC Transformation Order*<sup>4</sup> unambiguously reaffirmed the necessity for state regulated and enforced COLR obligations that involve basic retail wireline voice telecommunications services. The FCC *USF/ICC Transformation Order* stated the following:

Therefore, we do not seek to modify the existing authority of the states to establish and monitor carrier of last resort (COLR) obligations. We will continue to rely upon states to help us determine whether universal service support is being used for its intended purposes including by monitoring compliance with the new public interest obligations described in this Order.

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<sup>4</sup> *In re Connect America Fund, et al.*, WC Docket No. 10-90 *et al.*, (FCC, Rel. Nov. 18, 2011), Report and Order and Further Notice of Proposed Rulemaking, *slip op.* FCC 11-161, 26 FCC Rcd 17663 (2011), and subsequent Reconsideration and Clarification rulings (collectively *USF/ICC Transformation Order*), *appeals pending*.

\* \* \*

Importantly, these reforms do not displace existing state requirements for voice service, including state COLR obligations. We will continue to work in partnership with the states on the future of such requirements as we consider the future of the PSTN.

\* \* \*

We decline to preempt state obligations regarding voice service, including COLR obligations, at this time. Proponents of such preemption have failed to support their assertion that state service obligations are inconsistent with federal rules and burden the federal universal service mechanisms, nor have they identified any specific legacy service obligations that represent an unfunded mandate that make it infeasible for carriers to deploy broadband in high-cost areas. Carriers must therefore continue to satisfy state voice service requirements.

*USF/ICC Transformation Order*, ¶ 15 at 10, ¶ 75 at 29, ¶ 82 at 31 (citing ABC Plan Attach. 1 at 13 and Attach. 5 at 8). *See also In re Petition of USTelecom for Forbearance Under 47 U.S.C. § 160(c) From Enforcement Of Certain Legacy Telecommunications Regulations*, WC Docket No. 12-61, Reply Comments of the Pennsylvania Public Utility Commission, April 24, 2012, at 5-6.

## **2. Other Comments Support Denying the USTA Petition.**

Several parties that submitted initial Comments support the denial of the USTA Petition. Of the Comments filed, the Pa. PUC particularly notes the Comments of COMPTTEL, Granite Telecommunications, LLC (Granite), the Massachusetts Department of Telecommunications and Cable (MDTC), and Cox Communications (Cox) given their concerns with Section 214 and the lack of evidence supporting the USTA Petition's claims.

Granite correctly points out that the USTA Petition fails to properly distinguish between carrier-to-carrier wholesale switched access and retail end-user switched access

services.<sup>5</sup> Granite argues, as the Pa. PUC has in the past, that competition appears to be largely a duopoly in the wireline residential retail market between telephone and cable networks. In comparison, ILECs have continued dominance in retail local business services, as ILECs are near-monopoly providers of facilities-based last-mile access and associated wholesale switched carrier access services.<sup>6</sup> The Pa. PUC agrees with Granite that the residential access lines and market share that the ILECs have relinquished to affiliated and non-affiliated wireless service providers and cable companies are not relevant to the market position that the ILECs hold in the business customer market segments.

ILEC affiliates dominate the wireless market, where approximately 80% of the revenues from wireless markets accrue to two major providers i.e., Verizon and AT&T. USTA's nationwide approach ignores this ILEC-related dominance in the wireless market as well as the need to disaggregate the markets into residential and business components that, in turn, should be broken down into small, medium, and large businesses. These are important considerations because cable facilities-based competition is not as widely available to business customers and is expensive to deploy, particularly outside the most densely populated business areas.<sup>7</sup> Granite also indicates that "for reliability and security reasons, wireless services are not a substitute for the wireline services that business customers seek, even for basic voice calls." Nor can

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<sup>5</sup> Granite Telecommunications, LLC, Comments, WC Docket No. 13-3 (February 25, 2013), pp. 2-3 (Granite Comments).

<sup>6</sup> Granite Comments, p. 5.

<sup>7</sup> Granite Comments, WC Docket No. 13-03 (February 25, 2013), p. 10 and pp. 5, 12-15, 10-11, and 18.

wireless services “provide the connectivity among locations that many businesses require.”<sup>8</sup>

COMPTEL’s Comments make similar arguments in support of denial of the petition. COMPTEL credibly notes that switched access markets consist of interexchange carrier payments, often priced on a minute-of-use basis, whereas end-users of retail switched access pay rates that include federal subscriber line charges (SLCs). The Pa. PUC agrees with COMPTEL that USTA’s request for the non-dominant treatment of its member ILECs for purposes of discontinuance, reduction, or impairment of services and transfer of control regulations is without support and that the relief would leave ILECs free to unilaterally increase their SLCs on one day’s notice and above Commission-set caps – further evidence of market power and consistent with the FCC’s own precedent and federal dominant classification for ILECs.<sup>9</sup>

The Pa. PUC shares the MDTC’s concern that, at a minimum, the petitioner should be required to provide far more information than the conclusory statements made in the USTA Petition. The Pa. PUC also agrees with the MDTC position that the FCC’s market analysis should not be nationwide, but rather, should be more granular.

A more granular analysis is needed, given that for “many consumers, the ILEC is” the only “local voice service” alternative, and that there “are areas in Massachusetts, for example, where consumers simply are not able to purchase switched access service from

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<sup>8</sup> Granite Comments, , WC Docket No. 13-03 (February 25, 2013), pp. 12-13.

<sup>9</sup> COMPTEL Comments (February 25, 2013), WC Docket No. 13-3, pp. 2-5, citing *In re Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, at ¶ 114 (2010) (*Phoenix Forbearance Decision*), *aff’d sub nom. Qwest Corp. v. FCC*, 689 F.3d 1214 (10<sup>th</sup> Cir. 2012).

a seller located at a second location,” i.e., where the switched access service seller is not located in the same geographic area as the buyer. The Pa. PUC further agrees with the MDTC that any FCC decision should not preempt the states’ ability to protect consumers under the states’ respective independent state law.<sup>10</sup>

The Pa. PUC agrees with Cox that state authority over interconnection remains critical to competition and that denial of the USTA Petition is particularly appropriate given USTA’s failure to explain how evidence of retail competition has any impact on carrier-to-carrier wholesale switched access services. USTA’s claim is contradicted by FCC precedent holding that a decline in retail market share cannot be the basis for relief from carrier-to-carrier services<sup>11</sup> – in this case the retail market for switched access and the wholesale market for carrier-to-carrier switched access services.

Finally, the Pa. PUC observes that the Commission’s dominant carrier regulation of USTA’s member ILECs comports with the various regulatory relief and support mechanisms that are in place while the *USF/ICC Transformation Order* is being implemented. Such support mechanisms are not generally available to competitive carriers. Sprint-Nextel and the National Cable and Telecommunications Association (NTCA) correctly note the disparate treatment by the FCC when it comes to compensating carriers for lost switched access revenues in the *USF/ICC Transformation Order* at Docket No. 10-90.

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<sup>10</sup> MDTC Comments, WC Docket No. 13-3 (February 25, 2013), pp. 2 and 5-7.

<sup>11</sup> Cox Communications Comments, WC Docket No. 13-3, (February 25, 2013), pp. 2-3.

They note that despite an access monopoly for call completion to its end-user subscribers and the fact that AT&T and Verizon are the two largest holding companies of ILECs and the two largest wireless service providers, various ILECs still received \$2.9 billion in legacy high-cost support in 2012. ILECs alone have the exclusive right to continue receiving support for their access revenue reductions, and federal price cap ILECs are able to exercise the right of first refusal in receiving support from the CAF Phase II fund.<sup>12</sup> Competitors, on the other hand, must get their compensation for lost access revenue from their respective end-users.<sup>13</sup>

The Pa. PUC agrees with NCTA that it is not credible for an incumbent to seek preferential treatment for universal service and intercarrier compensation regimes, on the one hand, while continuing to seek relief from certain regulatory obligations on the other hand. However, the Pa. PUC agrees with the FCC that disparate regulatory treatment with certain CAF support mechanisms is appropriate, given the incumbents' network build-out commitments and COLR obligations and the CLECs lack of market power<sup>14</sup> -- a circumstance evident in the FCC's latest *Local Competition Report*.<sup>15</sup>

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<sup>12</sup> Sprint-Nextel Comments, WC Docket No. 13-3, (February 25, 2013), pp. 2-3; National Cable & Telecommunications Comments, WC Docket No. 13-3, February 25, 2013), p. 4.

<sup>13</sup> *USF/ICC Transformation Order*, paragraphs 863-866, 26 FCC Rcd 17965-17967 (noting the lack of COLR obligations for competitive LECs).

<sup>14</sup> *USF/ICC Transformation Order*, paragraphs 862 and 864, 26 FCC Rcd 17965-17966.

<sup>15</sup> *Local Telephone Competition as of December 31, 2011 (January 2013)*, FCC Industry and Technology Division (hereinafter FCC Report).

### **3. The Local Competition Report Supports Denying the USTA Petition.**

The USTA Petition claims that relief is warranted because households served by an interconnected Voice over Internet Protocol (VoIP) provider will surpass the number of households getting ILEC switched access service.<sup>16</sup> The FCC's 2013 Report on Local Competition, however, indicates that ILEC provision of retail switched access service remains a dominant service. The Pa. PUC notes the following from the FCC Report demonstrating that, for residential and business customers, switched access remains dominant when compared to Interconnected VoIP:

- Figure 4 of the FCC Report shows that the total number of switched access lines and interconnected VoIP in the country total 143.525 million. Of this 143.525 million wireline retail local telephone service connections, 106.866 million or 74.46% continued to be connected via switched access lines. This is contrary to the USTA claim that interconnected VoIP is advancing into all markets using new technology platforms that are bringing an end to the switched access/copper loop technology platform so rapidly that incumbents should not be subject to Dominant Carrier regulatory treatment under the FCC's rules.
- Figure 4 shows that 48.364 million or 93% of the 52.095 million switched access lines that serve *residential customers* are controlled by the ILECs.
- Figure 4 shows that ILEC switched access lines provide 36.382 million or 60.11% of the overall 60.525 million wireline retail local telephone service connections to *business customers*.
- Figure 4 shows that when it comes to retail switched access lines alone, ILECs still occupied 79.30% of the relevant marketplace i.e., 84.745 million out of 106.866 million.
- Figure 8 on Page 10 of the FCC Report notes that wholesale competitors rely on ILEC-provided UNEs and resold services to compete. The FCC Report notes that CLECs reported providing 38% of lines by reselling ILEC wholesale or retail services. They also reported providing 31% of lines over ILEC facilities leased at regulated, cost-based rates (that is, unbundled network elements or, UNEs). And

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<sup>16</sup> USTA Petition, p. 2.

they provided the remaining 31% of lines over local loops that they owned. Essentially, competitors rely on ILECs (e.g., UNEs and resold services) for about 69% of the switched services that they offer in competition with the ILECs.

Given this data, the USTA claim is premature that competitors and the proliferation of technology platforms support abandoning the Commission's Dominant Carrier rules and classification that applies to the retail and wholesale switched access services of the ILECs.

Moreover, Figure 7 of the FCC Report demonstrates the continuing importance of the local copper loops in providing voice and potentially other services to customers.

Specifically,

- Figure 7 shows that local copper loops were 97.268 million or 91.02% of the connections used to provide service to Americans when they are served by switched access.
- Figure 7 also shows that 79.066 million or 93.30% of the 84.745 million retail switched access line connections supplied by the ILECs relies on the copper local loop.
- Figure 7 further shows that competitors equally rely on the copper local loop to provide 18.202 million or 82.28% of the 22.121 million retail switched access line connections that they supply to their customers. This must be seen against the FCC observation on Page 10 of its Report that, of these connections, approximately 69% continue to rely on ILEC-provided UNEs or resale to even compete in the switched access market in the first place.

Thus, Figure 7 shows that ILECs and CLECs continue to rely heavily on the copper local loop to supply 91% of the switched access connections throughout the nation. Given the absence of UNEs or resale for fiber to the premises (FTTP) or coaxial cable and the nation's apparent continuing reliance on the copper local loop and switched access, the FCC's consideration of the role of copper loop in this proceeding and its

ancillary rulemaking is of critical importance to competition.

The Pennsylvania experience from the FCC Report regarding the provision of switched access services is similar to the national experience. Specifically,

- Table 9 of the FCC Report shows that Pennsylvania has a total of 6.841 million switched access and interconnected VoIP connections. Of that, 5.245 million or 76.67% of the 6.841 million connections continues to use switched access. The remaining 1.596 million or 23.33% are VoIP subscriptions.
- In Pennsylvania's residential market, switched access continues to be the dominant service platform of choice compared to interconnected VoIP. Table 10 shows that of Pennsylvania's 3.998 million residential connections, 2.528 million or 63.23% rely on switched access and 1.471 million or 36.79% rely on interconnected VoIP. This suggests that the national continuing reliance on switched access is also reflected in Pennsylvania.
- In Pennsylvania's business market, there is a marked reliance on switched access compared to interconnected VoIP. Table 11 shows a total of 2.843 million connections. They consist of 2.718 million switched access lines (95.60%) and 125,000 connections (4.40%) for interconnected VoIP for business customers. Of the 2.843 million business connections, 2.718 million or 95.60% are switched access in which the ILECs supply 1.413 million (52%) and CLECs supply 1.305 million (48%).

### **Conclusion**

The Pa. PUC asks the FCC to deny the USTA Petition. The Pa. PUC opposition is based on independent state law and Section 214 of the federal Communications Act of 1934, as amended (Act). The Pa. PUC also opposes relief based on the FCC's latest Local Competition Report, which evidence demonstrates that the relief sought in the USTA Petition is premature.

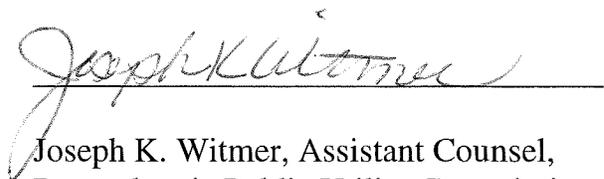
The claims of multiple platforms and the preeminence of interconnected VoIP compared to switched access is inconsistent with the FCC Report on Local Competition

for either the nation or Pennsylvania. The claims about retail switched access services being less important to the voice or other services compared to interconnected VoIP is not borne out by the FCC Report.

Finally, the Pa. PUC is very concerned that the competitive environment in Pennsylvania and our universal service mandate under independent state law may be harmed if the USTA Petition were granted. Competition might disappear and universal service would be threatened. These kinds of negative results can be avoided by simply refusing to adopt petitions based on claims not supported by the evidence.

The Pa. PUC appreciates this opportunity to file Reply Comments in this proceeding.

Respectfully Submitted,

A handwritten signature in cursive script, reading "Joseph K. Witmer", is written over a horizontal line.

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