

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
)
Petition of USTelecom For Declaratory Ruling) WC Docket No. 13-3
that Incumbent Local Exchange Carriers Are)
Non-Dominant in the Provision of Switched)
Access Services)

**REPLY COMMENTS OF THE
UNITED STATES TELECOM ASSOCIATION**

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TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY 1

II. DISCUSSION 4

 A. USTelecom’s Petition is Procedurally Proper. 4

 B. USTelecom’s Petition Seeks Regulatory Parity, Not “Deregulation.” 5

 C. There Is Ample Record Evidence Upon Which The Commission Should Determine
 That ILECs Are Non-Dominant In The Provision Of Switched Access Services..... 7

 D. Claims That ILECs Have “Market Power” In Providing Switched Access Services
 Ring Hollow..... 14

 E. Commenters’ Claims About The Alleged Benefits Enjoyed By ILECs Cannot Justify
 The Continued Imposition Of Dominant Carrier Regulation. 18

III. CONCLUSION..... 19

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I. INTRODUCTION AND SUMMARY

The United States Telecom Association (“USTelecom”) respectfully submits the following reply comments in support of its Petition requesting a declaration that incumbent local exchange carriers (“ILECs”) are no longer subject to dominant carrier regulation with respect to switched access services. USTelecom’s Petition is predicated on the marketplace reality that ILEC switched access services are increasingly being displaced by competitive alternatives and that, as a result, ILECs do not have market power that warrants continued dominant carrier regulation.

Commenters acknowledge the numerous competitive options consumers enjoy today.¹

Commenters also acknowledge that consumers enthusiastically have embraced these competitive

¹ See, e.g., Comments of Verizon and Verizon Wireless, WC Docket No. 13-3, at 1 (filed Feb. 25, 2013) (“Verizon Comments”) (noting that “cable providers, wireless providers, competitive LECs, and other new IP-enabled services provide a range of options from which to obtain switched access or a substitute); Comments of AT&T Inc., WC Docket No. 13-3, at 2 (filed Feb. 25, 2013) (“AT&T Comments”) (“consumers can choose from a broad and increasing array of technologies, products, services, and providers to meet their communications needs, and their communications are more likely to take place over a wireless device or over an IP-network than over a traditional voice telephone network ...”); see also Comments of the National Cable &

options, as underscored by the precipitous decline in ILEC switched access lines in the past several years.²

No commenter disputes these indisputable competitive truths. Nonetheless, several commenters – most of which are competing local exchange carriers (“CLECs”) or their trade groups – oppose USTelecom’s Petition. Such opposition is not surprising, given that CLECs have a vested interest in preserving an unlevel competitive playing field that subjects ILECs to the unnecessary burdens and increased costs resulting from dominant carrier regulation. Beyond being self-serving, however, this opposition is misguided and misinformed.

First, notwithstanding claims to the contrary, USTelecom’s Petition is procedurally proper. The relief that USTelecom seeks – a declaration that ILECs are not dominant in the provision of switched access services – is appropriately the subject of a petition for declaratory judgment, and there is no legal or procedural impediment to the Commission’s granting the requested relief.

Second, although several commenters overstate the scope of USTelecom’s Petition, the relief that USTelecom seeks is relatively narrow. That is, USTelecom is seeking regulatory

(footnote cont’d.)

Telecommunications Association, WC Docket No. 13-3, at 2 (filed Feb. 25, 2013) (“NCTA Comments”) (conceding that ILECs “often ‘constitute one among many communications platforms’ available to customers and that they serve a smaller share of that marketplace than they did in the past”) (citation omitted); Comments of the Independent Telephone & Telecommunications Alliance, WC Docket No. 13-3, at 3-5 (filed Feb. 25, 2013) (“ITTA Comments”).

² AT&T Comments at 8-9 (noting that “[s]ince 1999, the number of residential switched ILEC access lines in AT&T’s ILEC states has fallen by more than [70%], even as the number of the total housing units that ILECs must stand ready to serve has continued to increase”); Verizon Comments at 9 (noting that “[i]n the last three years, Verizon’s switched access lines declined by an average of 14% per year,” with Verizon losing approximately 2 million switched access lines in 2012 alone); Comments of the Digital Policy Institute and Kleinhenz and Associates, WC Docket No. 13-3, at 5 (filed Feb. 25, 2013) (“Today, approximately 75 percent of ILEC customers have completely transitioned away from traditional networks”).

parity in the manner by which the switched access services of ILECs and CLECs are regulated by the Commission. This modest relief is consistent with the Commission's efforts to ensure a level competitive playing field and is a far cry from "deregulation," as some commenters falsely claim USTelecom is seeking.

Third, there is ample record evidence upon which the Commission should determine that ILECs are non-dominant in the provision of switched access services. ILEC switched access lines are increasingly becoming marginalized in the market today, and current and projected ILEC access line penetration rates do not remotely approach the level that would warrant dominant carrier regulation. Although some commenters criticize USTelecom's projections and the market analysis utilized by USTelecom to demonstrate ILEC non-dominance, these criticisms cannot withstand scrutiny and do not warrant denial of the requested relief.

Fourth, the Commission should reject commenters' claims regarding the alleged "market power" possessed by ILECs in providing switched access services. In addition to being vague and unsubstantiated, such claims are premised upon a distorted view of "market power." If the Commission were to accept this view, it would result in an ILEC being deemed dominant even if it provides only a single switched access line to a single customer in its entire service territory. Furthermore, taken to its illogical extremes, the view of "market power" espoused by some commenters would result in every local exchange carrier being subjected to dominant carrier regulation – an outcome that would make no sense in today's marketplace where no carrier has the power to control prices.

Finally, although some commenters suggest that ILECs enjoy certain benefits – principally with respect to universal service – such benefits (even if not illusory) cannot justify continued application of dominant carrier regulation.

Accordingly, the Commission should grant USTelecom's Petition and declare that ILECs are not dominant in the provision of switched access services.

II. DISCUSSION

A. USTelecom's Petition is Procedurally Proper.

There is no merit to the argument that USTelecom's request for relief should be denied because its petition for declaratory ruling is "the wrong procedural vehicle."³ First, the Commission has broad discretion to issue a declaratory ruling.⁴ Second, USTelecom is seeking a determination regarding the regulatory treatment of ILEC switched access services under the Commission's rules, which is properly within the ambit of a declaratory ruling request.⁵

Furthermore, the premise that forbearance is the only procedural means by which the Commission can classify ILECs as non-dominant is false.⁶ In establishing the dominant versus non-dominant dichotomy more than 30 years ago – long before Congress enacted section 10 of the Telecommunications Act of 1996 vesting the Commission with forbearance authority – the Commission recognized the importance of "adjusting our regulation to the realities of this

³ Comments of Cbeyond, Earthlink, Integra, Level 3, and TW Telecom, WC Docket No. 13-3, at 3-4 (filed Feb. 25, 2013) ("Coalition Comments").

⁴ See *Yale Broadcasting Co. v. FCC*, 478 F.2d 594, 602, (D.C. Cir. 1973); see also *In the Matter of Lorillard Tobacco Company*, Order, 22 FCC Rcd 4917, 4920 (MB 2007).

⁵ See, e.g., *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, Memorandum Opinion and Order, 21 FCC Rcd 13281 (2006) (granting petition for declaratory ruling to classify Broadband over Power Line-enabled Internet access service as an information service); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, Declaratory Ruling, 14 FCC Rcd 3689 (1999) (issuing declaratory ruling to classify the jurisdiction and regulatory treatment of ISP-bound traffic).

⁶ Coalition Comments at 4.

industry and the marketplace.”⁷ Indeed, the Commission expressed its commitment to “a continuing assessment of the costs and benefits of imposing the dominant-carrier regulatory requirements” and stressed its receptivity “to the presentation of evidence that circumstances have evolved in a manner which permits the easing of the regulatory requirements to which any carrier or class of carriers is subject.”⁸ There is simply no legal or procedural reason why the Commission cannot accomplish these objectives – which underlie USTelecom’s Petition – by means of a declaratory ruling proceeding.⁹

B. USTelecom’s Petition Seeks Regulatory Parity, Not “Deregulation.”

Despite claims that USTelecom’s Petition seeks the “wholesale elimination of Commission regulation”¹⁰ and “significant deregulation of every type of [ILEC] service,”¹¹ the relief requested by USTelecom is actually quite narrow. USTelecom’s Petition seeks a declaration that ILECs are non-dominant in the provision of switched access services. Granting this relief would place ILECs on equal footing with their competitors by: (i) allowing all carriers to file tariffs on one day’s notice and without cost support; (ii) subjecting all carriers to a 30-day waiting period for applications to discontinue, reduce, or impair services to be granted; and (iii)

⁷ *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, First Report and Order, 85 FCC 2d 1, ¶ 39 (1980) (“*Competitive Carrier First Report and Order*”).

⁸ *Id.* ¶ 26; *see also id.* (acknowledging that carriers initially classified as dominant “could qualify for our streamlined procedures since they may become subject to sufficient potential competition to assure good performance without detailed government intervention”).

⁹ The argument that the Commission can only grant USTelecom’s request for relief by means of forbearance also is belied by the fact that, in finding AT&T non-dominant in the interstate, domestic, interexchange market, the Commission issued a “declaration” to that effect in response to a motion by AT&T. *See Motion of AT&T Corp. to be Classified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, ¶ 12 (1995).

¹⁰ Coalition Comments at 1

¹¹ NCTA Comments at 3.

making all carriers eligible for presumptive streamlined treatment for more types of transfers of control under section 214. This regulatory parity represents modest relief that would be entirely consistent with the Commission’s desire to ensure a level competitive playing field.¹²

As made clear in its Petition, USTelecom is not seeking regulatory relief with respect to special access services. Nor is USTelecom asking the Commission to forbear from any requirements under section 251 or section 271. Because granting USTelecom’s Petition would have no effect on existing ILEC wholesale obligations, commenter concerns about the continued ability of competitors to rely “on ILEC last mile” facilities and the “impact on carrier-to-carrier services” are not only overwrought but totally unfounded.¹³

¹² See, e.g., *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to its Broadband Services*, Memorandum Opinion and Order, 22 FCC Rcd 18705, ¶ 49 (2007) (eliminating dominant carrier regulation of broadband services “will increase competition by freeing [the ILECs] from unnecessary regulation” and “will serve the public interest by promoting regulatory parity among providers”); *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, 22 FCC Rcd 20235, ¶ 21 (2007) (noting that the effect of maintaining disparities between the regulation of competing services would “reduce competition in the provision of triple play services and result in inefficient use of communications facilities”); *Promotion of Competitive Networks in Local Telecommunications Markets*, Report and Order, 23 FCC Rcd 5385 (2008) (Commission prohibited telecommunications carriers from entering into exclusive access contracts with residential multiple tenant environment owners “to create parity for the provision of telecommunications services to customers,” reasoning that “the importance of regulatory parity is particularly compelling” in “an environment of increasingly competitive bundled service offerings”).

¹³ See, e.g., Comments of Granite Telecommunications, LLC, WC Docket No. 13-3, at 15 (filed Feb. 25, 2013) (“Granite Comments”); Comments of Cox Communications, Inc., WC Docket No. 13-3, at 2 (filed Feb. 25, 2013) (“Cox Comments”). The rhetoric of some commenters only underscores the makeweight nature of their opposition. For example, Cox’s claim that treating ILECs as non-dominant in the provision of switched access services “could greatly damage voice service competition in the U.S.” is absurd. Cox Comments at 3. As nearly all commenters agree, voice services are rapidly being displaced by newer technologies, and consumers increasingly rely upon devices other than a landline telephone to meet their voice communications needs. See, e.g., AT&T Comments at 9-10; ITTA Comments at 3-5. Granting the limited relief requested in USTelecom’s Petition would not suddenly reverse these market trends.

Equally unfounded are claims that granting USTelecom's Petition could harm competition and consumers. The only specific example offered by commenters is the possibility that "proposed transfers of control involving incumbent LECs could be subject to less stringent review procedures."¹⁴ However, this example is unavailing. Even under streamlined processing, the Commission has broad discretion to remove an application from or not subject an application to streamlined processing, including when it determines that an application requires "further analysis" under the Commission's public interest standard.¹⁵

C. There Is Ample Record Evidence Upon Which The Commission Should Determine That ILECs Are Non-Dominant In The Provision Of Switched Access Services.

USTelecom's Petition contains extensive data regarding the changes in the communications marketplace, including the displacement of traditional telephone service by wireless and IP-based services. As noted in USTelecom's Petition, less than half of U.S. households subscribed to an ILEC-provided switched access line as of 2010, and minutes of use over ILEC switched access lines have fallen more than 70 percent, comprising less than one-third of all voice traffic as of 2011.¹⁶ No commenter disputes these critical facts.

USTelecom also has projected that ILEC switched access lines will continue to decline precipitously. According to USTelecom's analysis, by the end of 2013, only 26 percent of U.S. households will subscribe to an ILEC switched access line, while 30 percent will subscribe to a landline service other than ILEC switched access and 44 percent of households will only have a

¹⁴ Coalition Comments at 10.

¹⁵ 47 C.F.R. § 63.03(c)(1)(v).

¹⁶ USTelecom Petition at 24-28.

wireless phone.¹⁷ Such low penetration levels eviscerate any notion that ILECs are “dominant” in the provision of switched access services.

Cox criticizes USTelecom’s analysis, claiming that it appears to treat all wireless lines as replacements for landline service, does not account for households that retain landline service, and gives excessive weight to households with multiple wireless lines.¹⁸ Cox’s criticisms are without merit.¹⁹

First, Cox is simply wrong with respect to how USTelecom counts wireless-only and landline households. The core of USTelecom’s household analysis is reflected in the chart on page 44 and the table on page 45 of the Petition. In its analysis, USTelecom seeks to answer two simple questions: does a household have any landline service or not; and, if so, is that landline an ILEC switched landline or another service. USTelecom has taken pains to normalize the data at the household level and eliminate double counting. Thus, USTelecom’s analysis starts with

¹⁷ *Id.* at 44-45.

¹⁸ Cox Comments at 4. For example, according to Cox, if a household drops landline service, but there are two wireless lines in the house, USTelecom’s analysis would fail to recognize that “a very high percentage” of wireless customers subscribe to the service provided by the same companies that provide ILEC switched services, so these companies are “not losing customers at all.” *Id.*

¹⁹ USTelecom has published similar analyses, including detailed methodologies, which address many of the issues raised by Cox. *See* Patrick Brogan, “Competitive Market for Voice Services: No More Need for Regulation,” USTelecom Research Brief (Jan. 5, 2012) (“USTelecom: Competitive Voice Services”) available at <http://www.ustelecom.org/sites/default/files/documents/010512-ResearchBrief-Competition-Research-Brief-Final.pdf>; *see also* Patrick Brogan, “The Transformation of Personal Communications and the Erosion of Traditional Voice Provider Dominance,” USTelecom Research Brief (Jan. 4, 2013), summary available at http://www.ustelecom.org/sites/default/files/documents/130104_TPRC_Exec_Summary_Final.pdf, and full report (presented at the Telecommunications Research Policy Conference September 22, 2012 and Revised November 15, 2012) (“Transformation of Personal Communications Full Report”) available at <http://www.ustelecom.org/sites/default/files/documents/Voice%20Competition%20TPRC%202012-11-15.pdf>.

CDC data for the percentage of telephone households that have wireless-only telephone service. In the CDC data, it does not matter if a household has one or a dozen mobile wireless telephones, as either would count as only a single wireless household. This is true of wireless-only households as well as households that have both landline and wireless phones.

Similarly, USTelecom counts any household that has a landline—regardless of whether it has zero, one, or a dozen wireless phones—as a single landline household. USTelecom’s analysis disregards the fact that most of these households also have wireless service; only households that have completely “cut the cord” are counted as non-landline.²⁰ Then, the Commission’s data is used to estimate the portion of those remaining landline households that are ILEC switched, Non-ILEC switched, ILEC VoIP, and Non-ILEC VoIP households.²¹

Second, Cox erroneously claims that USTelecom’s treatment of ILEC VoIP services, such as FiOS and U-verse, “significantly distorts” the picture of the voice services market by making it appear that ILECs are losing more lines than they actually are. As made clear by the table on page 45 of the Petition, USTelecom’s calculation of household shares of ILEC switched access service does not include ILEC VoIP services, nor should it. The purpose of the analysis is

²⁰ Indeed, to be conservative, USTelecom’s analysis treats as “wireline” the roughly 16 percent of households that CDC specifically identifies as “wireless all or mostly” -- in other words households that have a landline phone but use wireless for most or all calls.

²¹ USTelecom’s analysis does not look only at ILEC “retail” shares. The USTelecom analysis assumes non-ILEC switched lines provided by a competitor other than a cable company are resold ILEC lines and thus are included in the ILEC totals. Furthermore, much like USTelecom eliminated multiple wireless devices in a wireless-only household, its analysis eliminates non-primary lines in a landline household. Using Census household data, USTelecom backs out wireless-only and no-telephone households, and makes an estimate of second lines so that total wireless-only, landline, and no-telephone households equals the total number of households based on Census data. Thus, every household falls into a mutually exclusive category, there is no double-counting, and wireless is given the minimum possible weighting.

to estimate the number of households served by ILECs with switched access services, which necessarily would not include non-switched services, like VoIP.

Since USTelecom initially filed its Petition, the Commission has released its semi-annual Local Telephone Competition report containing actual year-end 2011 data.²² USTelecom's preliminary assessment indicates that both ILEC and non-ILEC VoIP households grew slightly faster in the second half of 2011 than its straight-line projections based on previous Commission reports would suggest. At the same time, switched households appear to have fallen faster than previously projected.

However, Ad Hoc's claim that USTelecom's forecasts evidence a "pattern of inaccuracies" is frivolous.²³ First, Ad Hoc's claim is based on figures for residential "switched access lines" (58.2 million in 2010 and 52.5 million in 2011) that include ILEC VoIP lines, which are not "switched" and which USTelecom's data explicitly excludes, for the reasons explained above. Second, Ad Hoc erroneously equates residential lines with households; because some households purchase multiple lines, residential lines reported by the Commission include non-primary lines. USTelecom's analysis adjusts the data by backing out non-primary lines, which is appropriate and which makes direct comparisons with the Commission's data inapt.

Equally frivolous are claims that the Commission's data reflect that ILECs had more than 60 percent of the residential and business local telephone service connections in the United

²² Industry Analysis and Technology Division, Wireline Competition Bureau, "Local Telephone Competition: Status as of December 31, 2011" (Jan. 2013).

²³ Comments of Ad Hoc Telecommunications Users Committee, WC Docket No. 13-3, at 5 (filed Feb. 25, 2013) ("Ad Hoc Comments").

States as of December 31, 2011.²⁴ This assertion is based on conveniently ignoring the tens of millions of households and businesses that have cut the cord and no longer have any a wired voice connection.

Several commenters object to any consideration of wireless services in a market analysis given the Commission’s historic reluctance to resolve whether such services are “viable substitute[s] for traditional telephone services.”²⁵ However, when, according to the Commission’s own data, there were more than twice as many wireless subscribers (298 million) as wireline access lines (143.5 million) as of December 2011 and with more than 321 million wireless subscriber connections in the United States as of June 2012, the substitutability of wireless service for traditional telephone service should be obvious.²⁶

Although some commenters also object to any consideration of over-the-top VoIP services in assessing ILEC market power, it should be emphasized that USTelecom did not include such services in its market analysis.²⁷ Rather, USTelecom only included “interconnected VoIP” services, as that term has been defined by the Commission, which would include VoIP services offered by cable operators, LECs, and certain VoIP providers, such as Vonage. Nonetheless, the Commission cannot turn a blind eye to competing voice services offered by such ubiquitous competitors as Microsoft, Google, and Facebook, which, according to published reports, attract hundreds of millions of users – users who do not use traditional telephone service

²⁴ Coalition Comments at 8.

²⁵ *See, e.g.*, Coalition Comments at 6.

²⁶ *See, e.g.*, Verizon Comments at 5-6; USTelecom Petition at 29-35.

²⁷ *See* Coalition Comments at 6 (noting that “the Commission has never found that non-interconnected, over-the-top VoIP services, such as those used by the majority of Skype, are a viable substitute for traditional telephone services”); Granite Comments at 4.

to communicate.²⁸ This proceeding allows the Commission to recognize once and for all what every consumer already knows – that ample alternatives to switched access services are available in the market today.

Despite these nationwide market realities, several commenters fault USTelecom for not submitting granular geographic and product market data, which they argue is necessary before the Commission can find that ILECs lack market power in providing switched access services.²⁹ For example, according to Granite, the residential and business markets should be analyzed separately because “cable substitution is more likely to occur in the residential market,” given that cable operators purportedly “do not have facilities that pass business customer locations” and it is “cost-prohibitive” for cable operators to serve small business customers.³⁰

However, this argument ignores that cable facilities are already deployed to more than 90 percent of residences and at least 75 percent of small and mid-size businesses throughout the country.³¹ The fact is that cable companies have long been very successful in selling services to

²⁸ See, e.g., Verizon Comments at 6-7; USTelecom Petition at 35-40.

²⁹ See, COMPTEL’s Opposition to USTelecom’s Petition for Declaratory Ruling, WC Docket No. 13-3, at 4 (filed Feb. 25, 2013) (arguing that no individual ILEC should “be relieved of dominant carrier regulation” without evidence or analysis of the market power that the ILEC “enjoys in its local exchange area or of the availability of competitive voice alternatives” in that area”) (“COMPTEL Opposition”); Granite Comments at 5-6; Coalition Comments at 5-8.

³⁰ Granite Comments at 12-13. While insisting that ILECs have market power in the provision of switched access services and should continue to be saddled with dominant carrier regulation, Granite has no hesitation in trumpeting the fact that it “serves over 1,250,000 phone lines” and counts “all of the nation’s 10 largest retail companies, 66 of the nation’s Fortune 100 companies, the United States Postal Service and many other governmental entities” among its customers. *Id.* at 1-2. It is hard to reconcile such competitive successes with Granite’s distorted view of an “ILEC-dominated” marketplace.

³¹ See, e.g., National Cable and Telecommunications Association, <http://www.ncta.com/StatsGroup/Availability.aspx>, (stating the cable company provided high-speed Internet services are available to 93% of American households); “Cable’s Cut of the Biz Services Pie to Eclipse \$7B,” Jeff Baumgartner, *Light Reading Cable News Analysis* (Nov. 29,

cost/benefit analysis suggests that the costs of continuing to regulate the service offerings of any carrier or class of carriers by means of [dominant carrier regulation] exceed the benefits”³⁶

Here, under any principled analysis, the costs of continued dominant carrier regulation of ILEC switched access services outweigh any corresponding benefits, and no granular market analysis is required for the Commission to make this determination.³⁷

D. Claims That ILECs Have “Market Power” In Providing Switched Access Services Ring Hollow.

In order to justify the continued disparate regulation of ILEC switched access services, several commenters blithely insist that ILECs have “market power,” without bothering to explain how or why that is so. The essence of “market power” is the “power to control price.”³⁸ As the Commission has explained, a firm with market power has the ability to set prices “above competitive costs in order to earn supranormal profits” or set prices “below costs to forestall entry by new competitors or to eliminate existing competitors.”³⁹ It is difficult to conceive how ILECs have the power to control the price of switched access services when the number of switched access lines they serve is in a free fall and has been for years. USTelecom is unaware of any market in which a competitor with a continuously declining market share – a share that

³⁶ *Id.* ¶ 4.

³⁷ *See, e.g., Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket Nos. 96-149, 96-61, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, 12 FCC Rcd 15756, ¶ 88 (1997) (“*LEC Classification Order*”), *recon. denied*, Second Order on Reconsideration and Memorandum Opinion and Order, 14 FCC Rcd 10771 (1999) (“The Commission has long recognized that the regulations associated with dominant carrier regulation can dampen competition”).

³⁸ *Competitive Carrier First Report and Order* ¶ 54.

³⁹ *Id.* ¶ 56.

for the ILECs is below 50 percent by any conceivable measure – has been found to possess the power to control price.

Cox argues that the “decline in retail market share cannot form the basis for relief” from dominant carriers regulation of switched access services because, according to Cox, ILECs “still act as bottlenecks, controlling facilities that remain essential for all carrier-to-carrier interactions.”⁴⁰ Cox does not bother identifying the “bottleneck” facilities to which it is referring, except to mention, almost in passing, “key tandem and transiting functions” that are allegedly essential to competition.⁴¹ However, the Commission has never found an ILEC’s tandem switch to be a “bottleneck” facility, and numerous competitors offer competing tandem switching and transiting services.⁴² For example, Neutral Tandem, which is the leading non-ILEC provider of tandem services in the United States, currently provides competitive tandem services in 189 of the 192 LATAs in the continental United States and Puerto Rico.⁴³

⁴⁰ Cox Comments at 2-3; *see also* COMPTTEL Opposition at 7 (“The existence of alleged competition in the retail market cannot serve as a basis for finding that ILECs do not have market power in the switched access market”).

⁴¹ *Id.* at 3; *see also* NCTA Comments at 6.

⁴² *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd 4554, ¶ 683 (2011) (noting that “the record in this proceeding indicates that a competitive market for transit services exists”).

⁴³ Reply Comments of Neutral Tandem, *Connect America Fund*, WC Docket No. 10-90, at 1. n.1 (filed March 30, 2012) (“local tandem transit service is widely available and the market for this service is competitive”); *see also* Neutral Tandem Inc., Form 10Q, filed November 9, 2011 for the period ending September 30, 2011, p. 14 (“Following the introduction of our tandem interconnection services, we began to face competition from other non-ILEC carriers, including Level 3, Hypercube and Peerless Network. Over the past several years, this competition has intensified causing us to lose some traffic as well as significantly reduce certain rates we charge our customers in various markets, including with respect to our major customers”) (available at:

Some commenters insist that ILECs have market power by virtue of their last mile facilities, which commenters claim constitute “bottleneck facilities,” relying upon the Commission’s *Qwest Phoenix Forbearance Order*.⁴⁴ Under this theory, continued dominant carrier regulation of ILEC switched access services is warranted because, when terminating a call, the ILEC “has an access monopoly for the competition of calls to its end user subscribers”⁴⁵

Even assuming this theory held water, it proves too much. First, it would mean that an ILEC that loses 99 percent of its access lines would nonetheless continue to enjoy “market power” by virtue of its having at least some access lines, no matter how modest the number. Second, by illogical extension, this theory would render every local exchange carrier – including cable operators and other competitive local exchange carriers (“CLECs”) – subject to dominant carrier regulation because they would have “market power” as a result of their operating a last mile “access monopoly.” It is surprising that Cox relies on the *Qwest Phoenix Forbearance Order* in its comments given that by the flawed analysis of that order, Cox and other cable

(footnote cont’d.)

<http://files.shareholder.com/downloads/TNDM/1707536840x0xS1193125-11-304064/1292653/filing.pdf>).

⁴⁴ *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, 25 FCC Rcd. 8622 (2010), *aff’d Qwest Corporation v. FCC*, 689 F. 3d 1214 (10th Cir. 2012) (“*Qwest Phoenix Forbearance Order*”); see Granite Comments at 15; COMPTTEL Opposition at 6.

⁴⁵ Comments of Sprint Nextel Corporation, WC Docket No. 13-3, at 2 (filed Feb. 25, 2013) (“Sprint Comments”); COMPTTEL Opposition at 6 (“IXCs face a bottleneck monopoly from the ILECs that provide access to their end users because, unlike the end users, the IXCs do not have the ability to choose competitive alternatives in the market in which they purchase service”).

providers are explicitly and by logical extension equally “dominant” the ILECs.⁴⁶ It also could have significant regulatory implications in the broadband arena where cable operators have a significantly higher share of the broadband market than ILECs and thus could be considered “dominant” with respect to every location they serve. Of course, such an approach would be illogical as well as contrary to Commission precedent.⁴⁷

Notwithstanding claims otherwise, USTelecom has not “conceded” that ILECs continue to possess market power in the provision of switched access services.⁴⁸ The footnote in USTelecom’s Petition to which commenters point (n.16) merely underscores that it is unnecessary for the Commission to resolve whether a local exchange carrier possesses “market power” with respect to its own end users, since USTelecom is not asking the Commission to deregulate ILEC switched access services and charges. Rather, USTelecom’s Petition merely requests that ILEC switched access services and charges be regulated in the same non-dominant manner as competitors.⁴⁹

⁴⁶ See, e.g., *Qwest Phoenix Forbearance Order* at p. 43. (concluding that the Phoenix retail mass market had “two dominant providers, Qwest and Cox” (emphasis added)).

⁴⁷ In the *CLEC Access Charge Reform Order*, the Commission noted that IXCs, which historically paid switched access charges, faced a bottleneck monopoly from the LECs—whether an ILEC or CLEC—that provide access to their end users. *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923, ¶ 38 (2001) (“*CLEC Access Charge Reform Order*”). However, the Commission’s solution was not to subject all LECs to dominant carrier regulation, but rather to establish benchmarks against which to assess whether a CLEC’s switched access rates were just and reasonable.

⁴⁸ See, e.g., Granite Comments at 3.

⁴⁹ The Commission’s historic concerns about the “market power” possessed by LECs over terminating switched access have largely been rendered moot with the transition to bill-and-keep for terminating access charges. *Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) (“*USF/ICC Transformation Order*”), *pets. for review pending sub nom. In re: FCC 11-161*, No. 11-9900 (10th Cir. filed Dec. 8, 2011). Once bill-and-keep is fully implemented, there will be no “price” for terminating switched access

E. Commenters' Claims About The Alleged Benefits Enjoyed By ILECs Cannot Justify The Continued Imposition Of Dominant Carrier Regulation.

Several commenters point to benefits allegedly enjoyed by ILECs as a purported justification to perpetuate dominant carrier regulation of ILEC switched access services.⁵⁰ For example, Sprint asserts that regulating ILEC and CLEC switched access services in the same manner would disproportionately benefit ILECs by virtue of the universal service support ILECs are eligible to receive.⁵¹

This assertion is false. First, the universal service support ILECs receive carries its own regulatory obligations, which have nothing to do with the regulatory treatment of switched access services.⁵² Second, the Phase I incremental support under the Connect America Fund (“CAF”) that the Commission has allocated to price cap ILECs has a specific purpose – to “spur immediate broadband buildout” and “accelerate broadband deployment in unserved areas across America.”⁵³ CAF I Incremental Support was envisioned by the Commission as a means to get funding to those carriers best positioned to deploy broadband infrastructure expeditiously, because, as the Commission correctly recognized, price cap carriers are in a “unique position to

(footnote cont'd.)

services for a LEC to “control.” In the meantime, terminating switched access rates are being lowered consistent with the Commission’s transition plan, and nothing in USTelecom’s Petition would or is intended to alter that transition. USTelecom Petition at 9-10, n.16.

⁵⁰ See, e.g., NCTA Comments at 4 (claiming that it is not “credible” for ILECs “to demand the same regulatory obligations as competitors ... while continuing to argue for exclusive or preferred rights to universal service support and intercarrier compensation”).

⁵¹ Sprint Comments at 3.

⁵² See, e.g., 47 C.F.R. §§ 54.312(b)(4), § 54.313, 54.314 & 54.320.

⁵³ *USF/ICC Transformation Order*, ¶¶ 22, 132 & 137.

deploy broadband networks rapidly and efficiently” in their service areas.⁵⁴ Thus, whatever “benefits” that ILECs may enjoy under the universal service system are far removed from any conceivable justification for dominant carrier regulation and do not warrant continuation of the current regulatory regime.

III. CONCLUSION

For the foregoing reasons, the Commission should grant USTelecom’s Petition and declare that ILECs are non-dominant in the provision of switched access services.

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⁵⁴ *USF/ICC Transformation Order* ¶ 177; *see also id.* ¶ 137; *id.* ¶ 145 (with CAF I Incremental Support, “we distribute funding to those carriers that provide service in the highest-cost areas because these are the areas where we can be most confident, based on available information, that USF support will be necessary in order to realize timely deployment. Thus, we can be confident we are allocating support to carriers that will need it to deploy broadband in some portion of their service territory. At the same time, to promote the most rapid expansion of broadband to as many households as possible, we wish to encourage carriers to use the support in lower cost areas where there is no private sector business case for deployment of broadband, to the extent carriers also serve such areas.”).