

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

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

REPLY COMMENTS OF XO COMMUNICATIONS, LLC

XO Communications, LLC (“XO”), by its attorneys, hereby files reply comments in response to the Public Notice in the above-referenced docket seeking comment on the petition for declaratory ruling filed by USTelecom.¹ For the procedural and substantive reasons discussed herein, XO submits that the Commission should reject USTelecom’s request that it issue an order declaring all incumbent local exchange carriers (“LECs”) are no longer subject to dominant carrier regulation for purposes of providing switched access services.²

I. A PETITION FOR DECLARATION RULING IS NOT THE PROPER PROCEDURAL VEHICLE FOR THE RELIEF REQUESTED BY USTELECOM

The Commission should reject USTelecom’s petition because it seeks relief using the wrong procedural vehicle, namely, a petition for declaratory ruling. Instead, USTelecom should have filed a petition for forbearance from dominant carrier regulation pursuant to Section 10(c)

¹ *Wireline Competition Bureau Seeks Comment on United States Telecom Association Petition for Declaratory Ruling that Incumbent Local Exchange Carriers are Non-Dominant in the Provision of Switched Access Services*, WC Docket No. 13-3, Public Notice, DA 13-21 (rel. Jan. 9, 2013); *Petition of USTelecom for Declaratory Ruling that Incumbent Local Exchange Carriers are Non-Dominant in the Provision of Switched Access Services*, WC Docket No. 13-3 (filed Dec. 19, 2012) (“USTelecom Petition”).

² See USTelecom Petition at ii.

of the Communications Act of 1934, as amended (the “Act”) or a petition for rulemaking pursuant to Section 1.401(a) of the Commission’s rules.³ As Cbeyond *et al.* correctly note in their comments,⁴ because USTelecom seeks neither to terminate a controversy nor to remove any uncertainty surrounding existing rules or policies, the issues it presents “are not suitable for a declaratory ruling” pursuant to Section 1.2 of the Commission’s rules.⁵ This argument also was made by the National Cable & Telecommunications Association (“NCTA”): “The classification of incumbent LECs as dominant carriers is well-established and there appears to be no ‘controversy’ or ‘uncertainty’ as to this classification or its regulatory consequences.”⁶

In its filing, USTelecom contends that, because there is extensive competition from a variety of retail service providers, all incumbent LECs should be declared non-dominant in the provision of switched access services.⁷ That is the very type of factual inquiry that a petition for forbearance is intended to address. In fact, over the past six years, incumbent LECs have recognized that deregulatory questions should be examined through a petition for forbearance, which provides both a specific standard for determining whether a provider has market power and requires the type of specific evidence needed to determine whether the standard for relief is met.⁸ By seeking to exploit an alternate and inadequate procedural vehicle, USTelecom seeks to

³ See 47 U.S.C. § 160(c); 47 C.F.R. § 1.401(a).

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

⁵ See 47 C.F.R. § 1.2.

⁶ See Comments of the National Cable & Telecommunications Association, WC Docket No. 13-3, n. 2 (Feb. 25, 2013) (“NCTA Comments”).

⁷ See, e.g., USTelecom Petition at 6-7.

⁸ See, e.g., *Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas*, Memorandum Opinion and Order, 22 FCC Rcd 21293 (2007).

evade this rigorous review. For this reason alone, the Commission should reject the petition as procedurally defective.

II. USTELECOM HAS NOT PROVIDED SUFFICIENT EVIDENCE THAT INCUMBENT LECS ARE NON-DOMINANT IN THE PROVISION OF SWITCHED ACCESS SERVICES

Even if the Commission were to consider the relief USTelecom seeks despite its clear procedural misstep, the Commission should not grant USTelecom the relief sought in light of the inadequate support it offers. USTelecom supports its request for nationwide relief from the application of dominant carrier regulations to incumbent LECs in their provision of switched access services with the following arguments:

(1) A grant of the petition will further the Commission’s overall objective of seeking to reform outdated regulatory requirements;⁹

(2) Because of substantial competition for retail voice service, including that “the number of ILEC switched access lines has fallen at least 50%, and continues to decline, ... it no longer makes sense as a matter of economics and public policy to continue to treat ILECs as dominant in the provision of switched voice telecommunications services;”¹⁰

(3) The Commission has previously granted nationwide relief in similar circumstances,¹¹ and

(4) Continued application of the dominant carrier rules “has negative public policy consequences ... increasing the burden on those consumers that remain on the legacy network.”¹²

XO responds below to each of these arguments.

First, XO supports Commission efforts to reform outdated regulations¹³ but only where

⁹ See USTelecom Petition at 15-18.

¹⁰ See *id.* at iv, 7.

¹¹ See *id.* at 10-11.

¹² See *id.* at iii-iv.

¹³ XO, for instance, supported many of the reforms to the switched access regulatory regime adopted by the Commission in the *Connect America Fund Order*. See *Connect America*

(footnote continued)

evidence indicates that reform is warranted. As discussed below, USTelecom has not placed sufficient evidence in the record to support the relief it requests. Much to the contrary, it has avoided discussing the relevant product market – carrier-to-carrier services – and has failed to provide evidence about the relevant – local – geographic markets.

USTelecom’s intent is highlighted by the partial relief it requests. It seeks to eliminate only select regulations dealing with the provision of switched access services (dominant carrier regulation for incumbent LECs). But, if the evidence were sufficient for that purpose, the Commission should also consider whether it supports elimination of switched access regulations that, for instance, benefit incumbent LECs.¹⁴ As NCTA noted in its comments, even after the switched access reforms in the *Connect America Fund Order*, incumbent LECs continue to have regulatory benefits unavailable to competitive LECs.¹⁵ If USTelecom were sincere, it would have requested removal of all regulations as supported by the evidence, not just removals in cases benefitting incumbent LECs.

Second, USTelecom bases its request on evidence of declining shares for retail voice services offered by incumbent LECs. However, that is the incorrect metric to use to analyze the relevant product market. As Cox Communications discussed in its comments, “[t]he Commission has stated specifically that decline in retail market share cannot form the basis for

(footnote continued from previous page)

Fund, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) (“*Connect America Fund Order*”).

¹⁴ The incumbent LECs and not competitive LECs, for instance, are eligible to offset reductions in switched access charge revenues through application of an Access Recovery Charge. *See id.*, ¶¶ 862-865.

¹⁵ *See* NCTA Comments at 4. *See also* Comments of Sprint Nextel Corporation, WC Docket No. 13-3, at 3-4 (“Sprint Comments”) (“USTelecom’s petition ignores the many regulatory advantages enjoyed by incumbent LECs.”).

relief from regulation of carrier-to-carrier services.”¹⁶ An examination of carrier access to incumbent LEC switched access facilities will demonstrate that, even with increased competition, incumbent LECs continue to control key switched access facilities, including tandem switches and transit facilities.¹⁷ If USTelecom wants to obtain the relief it has requested, it will need to submit evidence for this particular service offering.¹⁸

Third, USTelecom’s request for nationwide relief is misplaced. It seeks to rely on the *AT&T Non-Dominance Order*, wherein the Commission granted AT&T nationwide relief from regulations governing its provision of long distance service. However, that conclusion was based on a finding that because carriers offered service on a national basis, a single nationwide

¹⁶ Comments of Cox Communications, Inc., WC Docket No. 13-3, at 2 (Feb. 25, 2013) (“Cox Comments”). Cox Communications cites to the Commission’s Order on Qwest Corporation’s forbearance petition for the Phoenix MSA where the Commission found that “competitive findings regarding retail end-user services...do not pose a competitive constraint on a LEC’s carrier’s carrier switched access services.” *See 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, 8679 (2011). *See also* Sprint Comments at 2 (“USTelecom’s petition emphasizes that incumbent LECs have lost end user customers...This is not the same as being non-dominant in the provision of switched access services. The terminating LEC has an access monopoly for the completion of calls to its end user subscribers, and the largest incumbent LECs are certainly dominant in the provision of access transport (which is not provided over the incumbent LEC’s local loop) to competitive carriers.”).

¹⁷ In its petition, USTelecom argues that all LECs are on a similar footing and that it is not seeking to deregulate the incumbent LEC’s provision of these services. *See* USTelecom Petition at n. 17. However, as Comptel noted in its comments, “The Commission has recognized that switched access charges have two separate rate components – the per minute carrier’s carrier charges imposed on interexchange carriers and the flat rated subscriber line charge imposed on end users. USTelecom does not separately address the two types of switched access services or the market power that ILECs exercise in the provision of either.” *See* Comptel’s Opposition to USTelecom’s Petition for Declaratory Ruling, WC Docket No. 13-3 at 2 (Feb. 25, 2013).

¹⁸ In any event, USTelecom’s retail market evidence is suspect, since as Cbeyond *et al.* note, “USTelecom has not actually provided any market share data in its petition.” Cbeyond Comments at 8. According to Commission data, incumbent LECs continue to have more than 60 percent of the residential and business local telephone connections. *See* “Local Telephone Competition Report: Status as of December 31, 2011,” Industry Analysis and Technology Division, Wireline Competition Bureau, at Fig. 4 (rel. Jan., 2013.)

market existed.¹⁹ Here, incumbent LECs offer switched access service on a local or MSA-wide basis, and the simple aggregation of local markets – or simple contention that all incumbent LECs are similarly situated *vis-à-vis* their competitive situation – is not equivalent to a single nationwide market. Rather, the relevant markets are still local. This point was emphasized by Cox Communications in its comments: “USTelecom mistakenly treats the entire country as a single geographic and product market. As the Commission has recognized repeatedly, this simply is not correct ... Instead, any request for non-dominant treatment should be tied to a granular, geographic, company-specific showing.”²⁰ Individual incumbent LECs too have recognized this fact and have accordingly filed for relief (via forbearance petitions) on a Metropolitan Statistical Area (“MSA”) basis.²¹

USTelecom also seeks to avoid the rigor of MSA-specific analysis by arguing that the Commission should follow the approach it took in granting nationwide relief in the recent *Program Access Order*,²² which eliminated the presumption against exclusive arrangements for vertically-integrated cable operators.²³ However, the Commission did not find in the *Program*

¹⁹ See *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, ¶ 22 (1995) (“*AT&T Non-Dominance Order*”).

²⁰ Cox Comments at 4. See also NCTA Comments at 6-7 (“Absent some demonstration that the competitive situation suggested by these national figures applies to all individual carriers, or at least to all classes of carriers, and this competitive situation is sufficient to address the concerns that triggered the regulation, the Commission should be hesitant to rely on them as the sole basis for a finding that incumbent LECs no longer are dominant. As just one obvious example, rural rate-of-return LECs may not be similarly situated to urban price cap LECs with respect to the level of competition they face.”)

²¹ See, e.g., *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 (Mar. 24, 2009).

²² See *Revision of the Commission’s Program Access Rules*, MB Docket No. 12-68, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 12605 (rel. Oct. 5, 2012) (“*Program Access Order*”).

²³ See USTelecom Petition at 10.

Access Order that vertically-integrated cable operators were not dominant on a nationwide basis. Instead, as Cbeyond *et al.* noted in their comments, after examining the product market on a regional and national basis, the Commission “found that a case-by-case approach to applying its program access regulations was still necessary to prevent anticompetitive conduct because ‘the current market presents a mixed picture (with the cable industry now less dominant at the national level ... but prevailing concerns about cable dominance and concentration in various individual markets.)’”²⁴

Finally, USTelecom provides insufficient evidence that dominant carrier regulation of switched access services is inhibiting investment, including in IP networks, or otherwise harming incumbent LECs.²⁵ As discussed above, USTelecom erroneously believes evidence about competition in the retail voice market is apt for the switched access relief it is seeking. XO agrees with the comments of Cbeyond *et al.* that “there is nothing inherent in dominant carrier pricing and tariffing regulation that is ‘forcing limited investment capital to be directed at last century’s communications infrastructure at the expense of new technologies.’”²⁶ In addition, as

²⁴ Cbeyond Comments at 6. *See also* NCTA Comments at 7-8 (“USTelecom has mischaracterized the approach taken by the Commission in the *Program Access Order*. A nationwide market share analysis was used in one portion of the Commission’s program access analysis based on the Commission’s finding that withholding programming from competitors becomes less profitable as a cable operator loses market share, thereby making less regulation necessary. In contrast, USTelecom has not demonstrated how the retail market share data it has submitted related to the specific regulatory relief it is seeking. In addition, other sections of the *Program Access Order* included detailed analysis of particular channels and cable operators, which is precisely the type of company-specific analysis that is lacking from the USTelecom Petition ... Furthermore, even if USTelecom had accurately characterized the *Program Access Order*, there is no compelling reason why the Commission must apply the same type of analysis in this case as it did in that order. The USTelecom Petition presents an entirely different factual scenario under an entirely different statutory regime than was addressed in the *Program Access Order*.”).

²⁵ *See, e.g.*, USTelecom Petition at iv.

²⁶ Cbeyond Comments at 9.

Cox Communications states, there is no evidence in the petition indicating that the decline in the incumbent LECs' lost share in the switched access market is due to the dominant carrier regulation.²⁷ Cox Communications' statement is supported by the fact that, in the *Connect America Fund Order*, the Commission has placed all LECs on a glide path to bill and keep (although, as discussed earlier, it has eased the transition for the incumbent and not competitive LECs). In contrast to the incumbent LECs not suffering harm, because these LECs continue to have market power in the provision of local transmission facilities, carriers requiring access to these facilities would be harmed if the relief proposed by USTelecom were granted.

III. CONCLUSION

For the foregoing reasons, the Commission should not grant the relief requested by USTelecom. At the very least, given that the Commission continues to work on switched access issues as part of the *Connect America Fund Order*, it should delay consideration of the request so that it can first complete its work. This will provide greater certainty about the future regulatory regime for switched access services and enable a more reasoned decision on whether and to what extent the relief sought by USTelecom should be granted.

²⁷ See Cox Comments at 5.

Respectfully submitted,

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