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

Technology Transitions Policy Task Force	)	
Seeks Comment on Potential Trials	)	GN Docket No. 13-5

INITIAL COMMENTS OF THE NEW JERSEY DIVISION OF RATE COUNSEL

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SUMMARY

The New Jersey Division of Rate Counsel ("Rate Counsel") welcomes the opportunity to contribute to the efforts of the Federal Communications Commission ("FCC" or "Commission") to design, implement, and evaluate trials of technology, particularly if these efforts are informed by (and assessed based on) policy goals of universal service, competitive choice, network reliability, and, where effective competition does not yet exist – consumer protection. Further, Rate Counsel recommends that the FCC coordinate closely with state regulators and consumer advocates to ensure that the FCC's selection and assessment of various trials benefit from states' and consumers' unique and "on the ground" perspectives. Rate Counsel fully supports the collection of data, and urges the FCC, to the greatest extent possible, to ensure that data and reports from the trials are public.

Rate Counsel also urges the Commission to reject any implication that new technology is inherently "better" than old technology. Rate Counsel, of course, welcomes innovation, but when migration to new technology raises consumers' costs or jeopardizes consumers' public safety, carriers should not be permitted to force consumers to prematurely abandon existing technology. Also, Rate Counsel urges the Commission to reject any attempt by industry to equate new technology with the presence of competition: the issues of an evolving technological platform and the structure of relevant product and geographic markets are distinct matters. Indeed, as consumers migrate to wireless and broadband services, they are migrating to highly concentrated product markets that lack effective competition and lack adequate federal and state regulatory oversight.

Service "trials," of course, are already underway, such as the "Fire Island" trial, where Verizon is deploying its Voice Link service on a limited basis, and the impacted consumers have

no choice but to participate in Verizon's major shift in service. Rate Counsel also assumes that industry is "trialing" various kinds of interconnection agreements throughout the country as well as NG911 capabilities. The breadth of the IP-transition issues that the Commission will be considering in this proceeding makes these Verizon-type "trials" – conducted, apparently almost entirely at the carrier's volition – problematic and deserving of regulatory scrutiny.

Rate Counsel submits that the trials that the FCC envisions for this proceeding will lead to a better understanding not only of technical matters, but also of the impact of the nation's migration to new technologies on the prices that consumers pay for services, the reliability of consumers' link to public safety entities, the spectrum of choice that consumers face, and the ability of all consumers (whether residing in urban or rural areas, young or old, of limited income) to avail themselves of affordable voice and data services.

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I. INTRODUCTION

The New Jersey Division of Rate Counsel ("Rate Counsel") welcomes the opportunity to contribute to the endeavors of the Federal Communications Commission ("FCC" or "Commission") to (1) select and oversee trials that relate to the telecommunications industry's transition to new technological platforms, (2) establish criteria for evaluating those trials, (3) collect and report relevant data, and (4) throughout the process, ensure that all stakeholders – for example, consumer advocates, incumbent carriers, competitive carriers, and state regulators – have adequate opportunity to participate meaningfully in the design, implementation, and evaluation of those trials.[1] The challenges that the FCC describes through the numerous questions that it poses in its May 10th Public Notice are formidable, including, among others, the matter of the trials' timing. Rate Counsel urges the FCC to create a framework for the trials and

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[1] / FCC Public Notice, "Technology Transitions Policy Task Force Seeks Comment on Potential Trials," GN Docket No. 13-5, DA 13-1016, rel. May 10, 2013 ("Public Notice"). Reply comments are due August 7, 2013. *Federal Register*, Vol. 78, No. 101, May 24, 2013, 31542.

to select trials in a sufficiently timely manner so as to inform and guide policy issues that relate to technical issues rather than to have industry dictate unilaterally the terms of the nation's transition to new platforms.[2] Here, the FCC's Technology Transitions Policy Task Force ("Task Force") is proposing trials to "gather a factual record to help determine what policies are appropriate to promote investment and innovation while protecting consumers, promoting competition, and ensuring that emerging all-Internet Protocol ('IP') networks remain resilient."[3] However, real life is overtaking the FCC's proceeding. In response to its notice inviting comment,[4] the New York Public Service Commission ("NYPSC") recently received numerous comments on the proposed "Voice Link" tariff submitted by Verizon New York.[5] In these comments, Rate Counsel highlights some of the key issues that are surfacing during the NYPSC's investigation of Verizon New York's proposed Voice Link tariff that may be germane to this proceeding. Although some of the issues in the state proceeding relate solely to the "Fire Island" situation, most of them pertain directly to the questions and issues that the FCC raises in its Public Notice. The issue of utmost concern to Rate Counsel is that industry is embarking on "trials" without awaiting regulatory approval, and is making decisions unilaterally (such as

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[2]/ "Verizon: Fiber up or die," Lois Weiss, *New York Post*, June 28, 2013, http://www.nypost.com/p/news/business/verizon_fiber_up_or_die_MqyAEJlo32gWEsLHKNGKrN; "Fight With Verizon Over Ending Landline Service Has New Front: Catskills," by Patrick McGeehan, *New York Times*, June 26, 2013, http://www.nytimes.com/2013/06/27/nyregion/fight-with-verizon-over-ending-landline-service-has-new-front-catskills.html?_r=0

[3]/ Public Notice, at 1.

[4]/ Case 13-C-0197 – Tariff filing by Verizon New York Inc. to introduce language under which Verizon could discontinue its current wireline service offerings in a specified area and instead offer a wireless service as its sole service offering in the area, Notice Inviting Comments, issued May 21, 2013 ("NYPSC Voice Link Notice"). The NYPSC has extended the deadline for submitting comments twice, most recently on June 28, 2013 until September 13, 2013.

[5]/ Voice Link is a fixed wireless service that uses regular home telephone handsets and existing wiring and jacks in customers' homes and businesses. The Voice Link device, which Verizon provides to customers, uses wireless technology rather than wireline facilities to transmit and receive calls between customers' homes or businesses and Verizon's network. Customers may use their same telephone number.

whether to replace damaging copper plant) and then presenting regulators with little choice but to approve a new service on an emergency basis.

The FCC describes and poses questions about, among other things, three general types of trials of technology:

1. VoIP interconnection issues;
2. Public Safety and Next Generation 911 ("NG911"); and
3. Wireline to Wireless.

The FCC also poses various questions about other types of and aspects about trials, including, among other things, trials to "facilitate better access for persons with disabilities,"[6] and the appropriate geographic scope for trials.[7] Rate Counsel responds to many but no means all of the various questions about which the FCC seeks comment, and, for those topics left unaddressed in these initial comments, Rate Counsel may respond in reply comments.

II. VOIP INTERCONNECTION TRIAL

A. Background

The FCC states:

> [A]s we move from TDM to all-IP networks, providers are migrating to voice over Internet Protocol (VoIP) interconnection. VoIP interconnection should be more efficient and has the potential to unleash new, innovative services and features. We seek comment on a VoIP interconnection trial that would gather data to determine whether there are technical issues that need to be addressed and gather information relevant to the appropriate policy framework.[8]

6/ Public Notice, at 3. The FCC asks: "Are there other trials that the Commission might conduct to investigate methods of improving access for individuals who are deaf, hard of hearing, deaf-blind, or who have a speech disability?" *Id.*, at 11.

7/ *Id.*, at 2-3.

8/ *Id.*, at 2.

Regarding these issues, the FCC also observes that in comments on the FRNPRM accompanying the USF/ICC Transformation Order, there was no consensus on the policy framework to be used for VoIP interconnection, as well as whether there was a need for technical and/or industry standards.[9] Yet the FCC's Technology Advisory Council found that IP interconnection in the United States has been "delayed."[10] The FCC notes that it is also seeking comments about VoIP interconnection in its NPRM regarding VoIP provider direct access to numbering resources.[11]

The FCC also seeks comment on how to structure its trial to determine whether industry standards are required: areas of concern include "signaling, media formats (codecs), non-voice media such as text and video, fault location, and fail-over and quality-of-service measurements."[12] The FCC describes logistical issues relating to VoIP interconnection as follows:

> In moving from TDM to VoIP interconnection, issues such as the number and physical points of interconnection, pricing, transit, numbering and number portability, service level agreements, quality of service, and other terms and conditions will need to be resolved. For example, the TAC identified several issues that need to be resolved to reach VoIP interconnection agreements, including routing, addressing, security, signaling, media, quality, accounting/charging, and testing. A trial may shed light on which issues are more difficult to resolve and which issues parties are able to negotiate more easily. In addition, parties will need to resolve application of any legacy rules to the VoIP interconnection agreement. We seek comment on how best to structure any trial to

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9/ *Id.*, at 4.

10/ *Id.*, citing FEDERAL COMMUNICATIONS COMMISSION TECHNOLOGICAL ADVISORY COUNCIL, TAC MEMO – VOIP INTERCONNECTION 2 (2012), available at http://transition.fcc.gov/bureaus/oet/tac/tacdocs/meeting92412/VoIP-Interconnection-TAC-Memo-9-24-12.pdf TAC VOIP INTERCONNECTION WHITE PAPER).)

11/ Public Notice, at 5, citing *VoIP Direct Access NPRM*, FCC 13-51, para. 53.

12/ Public Notice, at 5.

> provide the Commission with data to evaluate which policies may be appropriate.[13]

VoIP providers should possess relevant experience and expertise regarding these various issues, and Rate Counsel intends to review and possibly respond to their comments.

Among other things, industry's increasingly reliance on VoIP should not jeopardize the integrity of the public network. As Figures 1 and 2 in the following section show, many consumers now use VoIP services for their voice service, and the trend is toward increasing VoIP adoption. As Rate Counsel explained in its reply comments in the FCC's rural call completion proceeding:

> Consumers have an expectation that they can reach emergency services, family and friends can reach them, they can conduct business, etc., *no matter the underlying technology*. As the traditional PSTN moves towards the "IP transition" consumers should not lose the old 99.999% quality standard.[14]

Rate Counsel urges the FCC to establish as a goal for any IP interconnection trial that the *reliability* of consumers' calls, regardless of whether they are destined for urban or rural areas, does not suffer.

Regarding interconnection among providers, presumably there is a wealth of experience acquired thus far. Based on experience elsewhere in the industry, Rate Counsel is concerned, however, that the FCC's seeming faith in the ability of competitors to effectively "negotiate" with incumbent carriers does not appear justified. The incumbents continue to have significant market power. But the FCC proposes to conduct the current trial outside the Section 251/252

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[13]/ *Id.*, with footnote stating: "For example, parties would need to resolve whether and how intercarrier compensation occurs with VoIP interconnection, or whether parties will exchange traffic under a bill-and-keep methodology."

[14]/ *In the Matter of Rural Call Completion*, WC Docket 13-39, Rate Counsel Reply Comments, June 11, 2013, at 18, footnote omitted, emphasis in original.

interconnection framework, asking providers to instead "negotiate in good faith without a backstop of regulations or specific parameters" and then report back to the FCC on technical issues as well as larger negotiation disputes.[15] The FCC also proposes to conduct another trial in which the parties agree to abide by the 251/252 framework.[16] The FCC notes at footnote 23 of the Public Notice:

> Given the positions in the record it is unclear whether any incumbent LECs would voluntarily agree to a trial using the section 251/252 framework. AT&T not only opposes NTCA's proposal to regulate VoIP interconnection under sections 251 and 252 as "needless and harmful," but also argues that the Commission lacks Title II authority to regulate interconnection between IP-based service providers. *See* AT&T Jan. 28, 2013 Comments, GN Docket No. 12-353, at 11; *see also* AT&T Feb. 25, 2013 Reply Comments, GN Docket No. 12-353, at 32–33 (reiterating that the Commission lacks Title II authority to regulate IP-to-IP interconnection, arguing that IP-based services are properly classified as "information services").

It is not clear how this trial will ever get up and running considering the FCC's reasonable concerns:

> Should we allow providers to negotiate and, if they cannot resolve disputes, then no agreement is reached? Or, should there be a process for arbitrating or mediating disputes? If so, should the state be responsible for arbitrating the agreements, or should the Commission or an independent entity arbitrate or mediate any disputes? Should any VoIP interconnection agreements reached during the trial be the basis for future agreements or could doing so impact the negotiations during the trial? If we undertake a trial under the section 251/252 framework, should the existing rules be applied or should they be modified?[17]

Rate Counsel does not grasp how companies will proceed, because they may not want to agree to terms and conditions that could be viewed as creating a precedent.

15/ Public Notice, at 5.

16/ *Id.*

17/ *Id.*, at 6.

In part as a result of these concerns, the FCC should subject the current industry-driven "trials" to close scrutiny, including gathering data. As described further in these comments, consumers are being harmed or are being put at risk from these service changes. This is what may happen when industry drives the bus, rather than the overall public interest being the driver.

Simply because VoIP is a new technology does not alter the uneven "negotiating" power of carriers. In order to facilitate diverse supply and multiple competitors, the FCC should apply the Section 251/252 requirements to VoIP interconnection. Further, the FCC could vastly simplify regulatory uncertainty by finally classifying VoIP as the telecommunications service that it clearly is.

Certainly, the FCC should collect data or this exercise cannot be described as a trial. The FCC is seeking comment on the scope and frequency of reporting.[18] The FCC's own discussion suggests this trial will be long. And, unless there are controls on industry action, the "transition" will have already occurred before the FCC's efforts are complete.

> *Data.* We propose that providers participating in a VoIP interconnection trial submit data regarding the length of time it took to reach an agreement, the issues in dispute, a copy of any agreements that are reached, as well as reports on the implementation of such agreements, such as call quality and reliability metrics, and a description of any technical problems that were encountered. We seek comment on the scope and frequency of these reporting requirements.[19]

These data are relevant and necessary for the FCC's resolution of these issues. Industry complaints on burdensomeness must not give way to a data-driven, public-interest-driven Commission ruling.

18/ *Id.*

19/ *Id.*

B. Consumers have a strong stake in the transition to an IP world.

Rate Counsel supports the FCC's proposed analysis of VoIP matters. Households increasingly use VoIP as their landline connection to the public switched telephone network: As Figures 1 and 2 below show, there has been enormous growth in the number of consumers using VoIP service as an alternative to ILECs' "traditional" voice service. As noted in the FCC's Local Competition Report, the FCC adopted a Report and Order in June 2008 that revised the Form 477 reporting requirements (that yield the data provided in the Local Competition Report).[20] Through the *Form 477 Order*, the Commission required providers of interconnected VoIP service to furnish subscribership data (both end-user and resale),[21] and to determine the percentage of subscribers that are residential customers. The new reporting requirements took effect with the March 2009 filing of year-end data as of December 31, 2008.[22] The most recent data available is as of June 30, 2012. Since December 31, 2008, the number of VoIP subscriptions in the United States grew 80% from 21.7 million to almost 39.2 million in June 2012.[23] The VoIP share of total residential end-user switched access lines and VoIP

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[20]/ *In the Matter of Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscribership*, WC Docket No. 07-38, Report And Order And Further Notice Of Proposed Rulemaking, released: June 12, 2008 ("*Form 477 Order*").

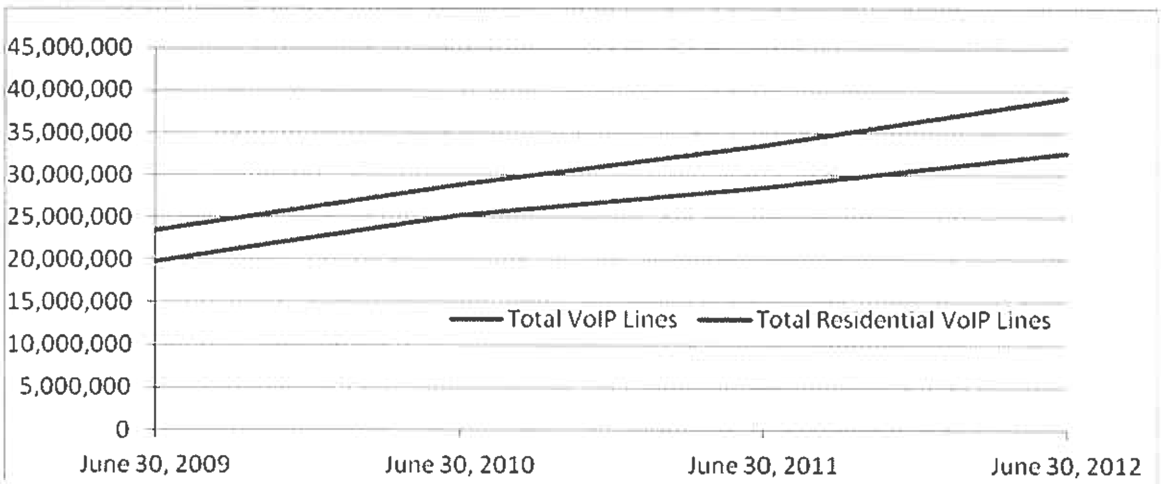
[21]/ The FCC's rules define "interconnected VoIP service" as "a service that: (1) enables real-time, two-way voice communications; (2) requires a broadband connection from the user's location; (3) requires Internet protocol-compatible customer premises equipment (CPE); and (4) permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network." 47 C.F.R. § 9.3. The FCC explains further: "We note that the current interpretation of element (4) of the definition excludes the VoIP service that Skype offers in the United States, and subscribers to those services are not reported on Form 477." Federal Communications Commission, *Local Telephone Competition: Status as of December 31, 2011* ("FCC Local Competition Report"), rel. January 2013, at footnote 2.

[22]/ *Form 477 Order*, at fn 47.

[23]/ Federal Communications Commission, *Local Telephone Competition: Status as of June 30, 2012*, rel. June 2013 ("FCC Local Competition Report"), at Table 3.

subscriptions grew from 20% in December 2008 to over 40% in June 2012.[24] The vast majority of these lines are provided by cable companies and some are provided by incumbent local exchange carriers.

Figure 1
Growth in Interconnected VoIP Subscriptions in the United States
June 30, 2009 – June 30, 2012[25]

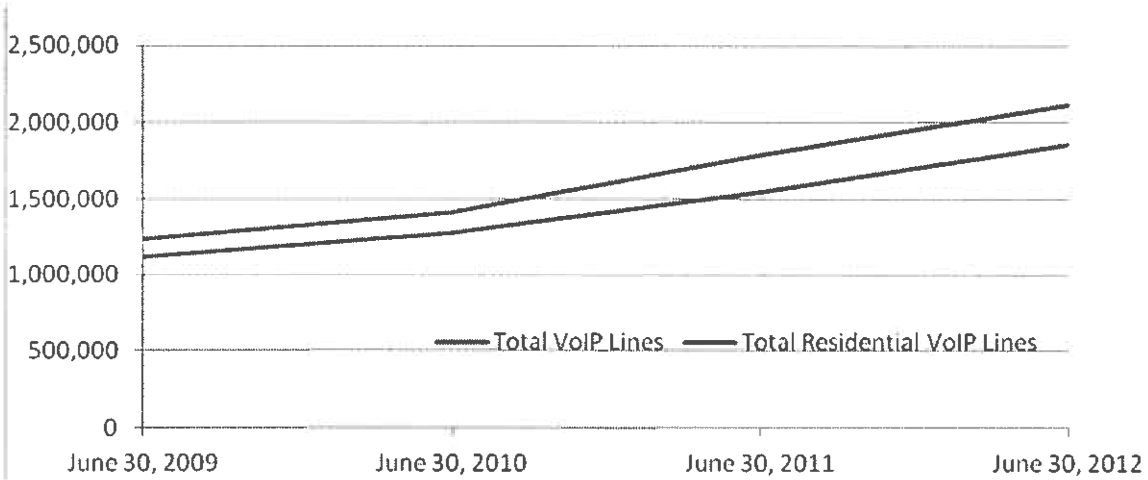


In New Jersey, as Figure 2 below shows, total VoIP subscriptions grew 72% from 1.2 million in June 2009 to 2.1 million in June 2012. Total residential VoIP subscriptions grew 66% from 1.1million in June 2009 to almost 1.9 million in June 2012.

24/ *Id.*, at Chart 3.

25/ Source: FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, Local Telephone Competition: Status as of June 30, 2012, rel. June 2013; Status as of June 30, 2011, rel. June 2012; Status as of June 30, 2010, rel. March 2011; Status as of June 30, 2009, rel. September 2010. Total VoIP Lines from Table 9 (2011 and 2012 data); Table 8 (2009 and 2010 data). Total Residential VoIP Lines From Table 10 (2011 and 2012 data); Table 9 (2009 and 2010 data).

Figure 2
Growth in Interconnected VoIP Subscriptions in New Jersey
June 30, 2009 – June 30, 2012[26]



Accordingly, Rate Counsel certainly welcomes the "VoIP" element of proposed trials. Further, Rate Counsel welcomes new, innovative services and features, but the FCC should not permit the movement from TDM to an all-IP network to excuse an erosion of consumer protection or interconnection obligations. Further the movement to new technology is an issue entirely distinct from the presence or absence of competition in relevant markets.

Rate Counsel urges analysis beyond simply the technical aspects. Among other things, the FCC should assess the relationship of VoIP deployment to the FCC's and state PUCs' ability to achieve larger policy goals – consumer protection, affordable service, etc. Rate Counsel is concerned that the trials seem to be occurring while the FCC fails to decide key issues: The FCC should unambiguously declare that VoIP is a telecommunications service subject to regulatory

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26/ Source: FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, Local Telephone Competition: Status as of June 30, 2012, rel. June 2013; Status as of June 30, 2011, rel. June 2012; Status as of June 30, 2010, rel. March 2011; Status as of June 30, 2009, rel. September 2010. Total VoIP Lines from Table 9 (2011 and 2012 data); Table 8 (2009 and 2010 data). Total Residential VoIP Lines From Table 10 (2011 and 2012 data); Table 9 (2009 and 2010 data).

oversight. The FCC also should revisit its 2005 decision and find broadband service to be the telecommunications service that it truly is, or at least to contain an indelible telecommunications element.[27]

The FCC has not made the core determination of whether VoIP services are telecommunications services or information services – that issue has been pending for many years in the *IP-Enabled Services* proceeding.[28] In the 2004 *IP-Enabled Services NPRM*, the FCC also sought comment regarding whether switched access charges should apply to VoIP or other IP-enabled services.[29] This matter also remains pending. The FCC has many open proceedings on these issues and has not moved to resolve them.[30] The FCC stated in its *AT&T IP Telephony Order*: "The Commission has recognized the potential difficulty in determining the jurisdictional nature of IP telephony. We intend to address this issue in our comprehensive *IP-Enabled Services* rulemaking proceeding and do not address it here."[31]

27/ See, e.g., *National Cable & Telecommunications Ass'n. v. Brand X Internet Services*, 545 U.S. 967, 1007 (2005) (Scalia, J., dissenting).

28/ *In the Matter of IP-Enabled Services*, FCC WC Docket No. 04-36, Notice of Proposed Rulemaking, Rel. March 10, 2004 ("*IP-Enabled Services NPRM*"), at para. 43.

29/ *Id.*, at paras. 61-62.

30/ See, e.g., *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, FCC WC Docket No. 02-361, Order, Rel. April 21, 2004 ("*AT&T IP Telephony Order*").

31/ *Id.*, at para. 20. Indeed, the United States District Court for the Western District of New York referred a dispute between Frontier Telephone of Rochester, Inc. and USA Datanet Corp. regarding the applicability of access charges case to the jurisdiction of the Commission for clarification and consideration in the context of other ongoing telecommunications proceedings in 2005. Specifically, the District Court stayed the case until the Commission issued rules "that ought to resolve the central issue in this case." *Frontier Telephone of Rochester, Inc., v. USA Datanet Corp.*, Decision and Order, 05-CV-6056 CJS, (W.D.N.Y. August 4, 2005), at 2. The District Court referred to the Notice of Proposed Rulemaking, in WC Docket No. 04-36 and to the VarTec petition. *Id.*, at 4-5. The Court reasoned that the potential cost from delay was minimal because "the FCC has been actively considering the issue for more than a year, and it appears that a decision [in the IP-Enabled Services proceeding] will be forthcoming in a matter of months, as opposed to years." *Id.*, at 13. Yet the issues at the heart of that dispute remain unresolved.

Consumers require protection from market imperfections, regardless of the technology that carriers deploy. Consumers should not need to suffer harm before such regulatory intervention occurs. Instead, the FCC should intervene when there is risk of consumer harm.[32] If, theoretically, industry does not intend to slam, cram, or otherwise harm consumers, then the existence of adequate protection for consumers will have been at worst superfluous, but certainly cannot be construed to have harmed the industry. By contrast, if adequate regulatory oversight detects and prevents consumer harm, the benefit can be significant. Waiting for harm to occur first can unnecessarily impose substantial costs on consumers.[33]

The FCC has adopted numerous regulatory obligations and consumer protections for all interconnected VoIP services (nomadic and fixed). These include application of FCC requirements related to the Communications Assistance for Law Enforcement Act (CALEA); disability access and Telephone Relay Service (TRS); E911 services; protection of Customer Proprietary Network Information (CPNI); and contributions to the Federal Universal Service Fund.

32/ *See, e.g.,* In the Matter of Verizon Complaint Regarding Unauthorized Change of Subscriber's Telecommunications Carrier, IC No. 11-S3251566, *Order*, DA 13-1294, released May 31, 2013. The FCC explains its inaction as follows: "The carrier switch to Verizon pertains to Verizon's FIOS Digital Voice service, which is a VoIP (voice over Internet Protocol) service. The Commission's carrier change rules have not been extended to VoIP service. We find that Verizon did not violate our carrier change rules." Id., at para. 4, footnotes omitted. Among other things, the FCC includes the following footnote: "See generally 47 C.F.R. §§ 64.1100(b)(d). We note that the Commission has sought comment on whether it is necessary to extend slamming regulations to VoIP or other IP-enabled service providers. See Enabled Services, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, 4910-11 paras. 71-72 (2004)." Id., at footnote 13.

33/ Consumer harm continued many years as a result of cramming before regulators began to establish consumer protection measures. *See, e.g.,* In the Matter of Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges ("Cramming"), CG Docket No. 11-116, Consumer Information and Disclosure, CG Docket No. 09-158, Truth-in-Billing and Billing Format, CC Docket No. 98-170, *Order*, November 4, 2011. A Senate Report concluded that "[o]ver the past decade, telephone customers appear to have been scammed out of billions of dollars through third-party billing on landline telephones." "Unauthorized Charges on Telephone Bills," United States Senate Committee on Commerce, Science, and Transportation, Office of Oversight and Investigations Majority Staff, Staff Report for Chairman Rockefeller, July 12, 2011, at i.

Interconnected VoIP Service Providers are also subject to other traditional telecommunications regulations placed on local carriers, such as number portability and interconnection duties. On May 13, 2009, the FCC adopted a Report and Order in WC Docket No. 04-36, concerning requirements on interconnected VoIP providers when discontinuing service. The order holds interconnected VoIP service providers to the same rules and requirements with respect to discontinuance obligations, including providing the same notice to consumers that applies to nondominant wireline telecommunications carriers. After filing notice with the FCC, VoIP service providers would be allowed to discontinue service after 30 days absent further FCC action. The FCC concluded that:

> Consumers increasingly use interconnected VoIP service as a replacement for traditional voice service, and as interconnected VoIP service improves and proliferates, consumers' expectations for this type of service trend toward their expectations for other telephone services. Thus, in this Report and Order (Order), we take steps to protect consumers of interconnected VoIP service from the abrupt discontinuance, reduction, or impairment of their service without notice.[34]

The FCC also stated:

> Most relevant here, the Commission has extended a number of consumer protection and public safety requirements to interconnected VoIP service. For example, in 2005, the Commission asserted its ancillary jurisdiction under Title I of the Act, and its authority under section 251(e), to require interconnected VoIP providers to supply 911 emergency calling capabilities to their customers. In 2006, in the *2006 Interim Contribution Methodology Order*, the Commission established universal service contribution obligations for interconnected VoIP providers based on the permissive authority of section 254(d) and its ancillary jurisdiction under Title I of the Act. In 2007, the Commission extended the customer privacy requirements of section 222 to interconnected VoIP providers using Title I authority. Also in 2007, the Commission used its Title I authority to extend the section 255 disability access obligations to providers of interconnected VoIP services and to manufacturers of specially designed equipment used to provide these services. The Commission also extended the Telecommunications Relay Services (TRS) requirements to providers of interconnected VoIP services,

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34/ *In the Matter of IP-Enabled Services*, WC Docket No. 04-36, *Report and Order*, rel. May 13, 2009, at para. 2.

> pursuant to section 225(b)(1) of the Act and its Title I jurisdiction, thus requiring interconnected VoIP providers to contribute to the Interstate TRS Fund under the Commission's existing contribution rules, and to offer 711 abbreviated dialing for access to relay services. Additionally in 2007, the Commission extended local number portability (LNP) obligations and numbering administration support obligations to interconnected VoIP providers and their numbering partners pursuant to sections 251(e) and 251(b)(2) of the Act and Title I authority.[35]

Most recently, on February 21, 2012, the FCC released a Report and Order that extends network outage reporting requirements to providers of interconnected VoIP service.[36] The FCC stated: "In short, given the long-term upward trend in VoIP subscription and use, the growing dependence on VoIP for 9-1-1 communications, our prior experience with voluntary reporting, and the statutory mandate that VoIP providers provide 9-1-1, we adopt mandatory outage reporting of interconnected VoIP service, as detailed below."[37] The FCC's decision regarding mandatory outage reporting contrasts sharply with the FCC's refusal to address complaints regarding VoIP slamming.[38]

The FCC, through its various regulatory decisions, is treating VoIP *almost* like a telecommunications service. Rate Counsel urges the FCC to simply classify VoIP as the telecommunications service that it truly is, and then industry can seek forbearance if and where appropriate. The burden should not be on consumers to first demonstrate harm, but rather should be on industry to demonstrate which elements of regulatory oversight are not essential, which is the essence of forbearance. In any event, technological changes should not become an excuse to back off of data-driven analyses of whether markets are sufficiently competitive to protect

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35/ *Id.*, at para. 5 (cites omitted).

36/ *In the Matter of The Proposed Extension of Part 4 of the Commission's Rules Regarding Outage Reporting To Interconnected Voice Over Internet Protocol Service Providers and Broadband Internet Service Providers*, PS Docket No. 11-82, Report and Order, rel. February 21, 2012.

37/ *Id.*, at para. 46.

38/ *See* footnote 32, above.

consumers from unfair terms, conditions, and rates, and to protect competitors from discriminatory or monopolistic behavior. Of course, some consumer protections (e.g., service quality, customer safety, and full and accurate disclosure) should exist even in an effectively competitive market, given the (statutory) public interest in telecommunications.

III. PUBLIC SAFETY NG-911 TRIAL

A. Background

The FCC also proposes to conduct a trial that relates to the nation's transition to Next Generation 9-1-1 ("NG911").[39] The FCC states:

> [A]s we transition away from TDM, the nation's emergency calling (911) system must also migrate to Next Generation 9-1-1 (NG911). Although there is broad consensus regarding the benefits and potential of NG911, when these new capabilities will be introduced is less certain. We seek comment on a trial that will assist the Commission, state, local and Tribal governments, and Public Safety Answering Points (PSAPs) in a few geographic areas to answer important technical and policy questions to accelerate the transition. *Beyond NG911, we also seek comment on how a trial could elicit data on the impact of network resiliency and public safety more broadly as consumers migrate to wireless and IP-based services that are dependent on commercial power.*[40]

Rate Counsel addresses this element of the Commission's Public Notice at a general level. Clearly, public safety is of utmost importance to consumers and to society. The most state-of-the-art 911 facilities available may be widely deployed, but if the last link to the

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39/ In footnote 5 of its Public Notice, the FCC describes NG911 as follows: NG911 refers to an initiative aimed at enabling the public to obtain emergency assistance by means of advanced communications technologies beyond traditional voice-centric devices. The NG911 proceeding examines how to update the 911 system to improve public emergency communications services and allow them to take advantage of the enhanced capabilities of IP-based devices and networks by enabling 911 PSAPs to receive texts, photos, videos, and data. See Framework for Next Generation 911 Deployment, PS Docket No. 10-255, Notice of Inquiry, 25 FCC Rcd 17869, 17870, para. 1, 17872, para. 7 (2010)." The FCC also cites, in footnote 6, to: Federal Communications Commission, *Legal and Regulatory Framework for Next Generation 911 Services*, Report to Congress and Recommendations (Feb. 22, 2013), *available at* http://www.fcc.gov/document/legal-and-regulatory-framework-ng911-services-report-congress.

40/ Public Notice, at 8, emphasis added.

consumer is weak, the NG911 is useless in the face of an emergency. Rate Counsel urges the Commission to require data on the impact of network resiliency and public safety in all of the trials that this proceeding encompasses. For example, VoIP lacks the ability to function during prolonged power outages. Moreover, as is discussed in the next section of these comments, Voice Link is hampered by multiple matters that place consumers' safety in jeopardy. Movement toward new technologies should not lead to movement away from public safety. Thus the Commission must ensure that the public does not lose protection during the trials.

IV. WIRELINE TO WIRELESS CONVERSION TRIAL

A. Background

The Public Notice also addresses the possibility of a technology transition from wireline to wireless for both voice and broadband services, observing that Verizon has already gone ahead with a "trial" of its wireless Voice Link service on a part of Fire Island that sustained significant storm damage and that AT&T has announced plans "to seek authority to serve millions of current wireline customers, mostly in rural areas, with a wireless-only product."[41]

The Public Notice proposes that the Commission would "compare wireline and wireless offerings across a number of dimensions, including: quality and terms of service, price, product functionalities, E-911 performance, accessibility options, reliability, and potential carrier cost savings in the delivery of voice and data services to higher cost areas." The Public Notice clearly contemplates that customers retain the option to switch back to wireline service, should

[41]/ Public Notice, at fn 31: "See AT&T Wire Center Trials Petition at 9 (explaining that AT&T will offer wireless communications alternatives to customers living in particularly high-cost areas, including its Mobile Premises Services, which allows customers to make calls using ordinary wireline handsets connected to wireless base stations)."

they be dissatisfied with the trial wireless service and that there be full disclosure of any differences between the wireless service and the wireline service that customers are accustomed to receiving: "These differences may include price, data usage allowances, terms of service, 911 capabilities (including location accuracy), accessibility, calling features, incompatibilities with fax machines or other customer premises equipment, or any other differences."[42] Rate Counsel submits that incumbent carriers will not want to disclose differences.

B. A test of wireless as a substitute for "traditional" local exchange service raises numerous concerns.

The Commission is right to acknowledge that the issues raised by a trial of wireless service for local exchange service and exchange access involve more than simply a test-drive of the technology. There are certainly significant concerns about the reliability of the wireless service for home and business access to the PSTN, but the implications of such a change are much broader.

Some immediate insight into the problems associated with wireless service can be gleaned from the comments received by the NYPSC in its investigation of a tariff recently filed by Verizon and the trial of wireless service that is presently under way on the western portion of Fire Island (where wires were damaged in a major storm in October 2012). However, the "trial" of Voice Link service on the western portion of Fire Island clearly falls short of the controlled conditions that the FCC envisions (and that should, in fact, be adopted). In New York, Verizon filed its tariff on short notice, and less than a month later was installing its voice-only wireless service. Customers were given no choice – their wireline service, which had been damaged, was simply not repaired. There is no wireline service for them to go back to, unless Verizon fixes its

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[42] *Id.*, at 9.

outside plant. Customers had little to no advance notice of the many limitations of the Voice Link service, which cannot handle data communications functions, including monitoring systems (health or alarm), faxes, credit card point-of-sale devices, and DVRs. Customers who previously had the option to subscribe to digital subscriber line ("DSL") service have lost a wireline broadband option. Customers who choose to replace these broadband functionalities with a separate, wireless service will pay much more than previously for an equivalent level of service.

The New York Public Service Commission has received hundreds of comments already from consumers on Fire Island who were pushed into taking Verizon's wireless voice-only service. These customers have concerns with the reliability of the service, its technical limitations, and the cost of obtaining broadband (or even narrowband data) services through a separate wireless service. The FCC should also carefully investigate these trials.[43]

On a related note, in assessing how to protect consumers if wireless is substituted by ILECs for some of their exchange access lines, the Commission should not assume that "wireless" equals "deregulated." Some observers have made reference to the "fact" that wireless service is not regulated by the states. This observation seems to relate to the provisions of the 1993 Omnibus Reconciliation Act (OBRA), which preempted state rate and entry/exit regulation of CMRS, but left states jurisdiction over service "terms and conditions."[44] Rate Counsel questions whether the provisions in OBRA with respect to "commercial *mobile* radio services" were ever intended to apply to the use of wireless to replace the ILEC's fixed local exchange

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[43]/ FCC Public Notice DA 13-1475, "Comments Invited on Application of Verizon New Jersey Inc. and Verizon New York Inc. to Discontinue Telecommunications Services," WC Docket No. 13-150, Comp. Pol. File No. 1115, Section 214 application, released June 28, 2013. Comments are due July 29, 2013. Inexplicably, the FCC did not include an opportunity for reply comments. Verizon submitted its Section 214 application on June 7, 2013. In the Matter of Section 63.71 Application of Verizon New York Inc. and Verizon New Jersey Inc. For Authority Pursuant to Section 214 of the Communications Act of 1934, As Amended to Discontinue the Provision of Service, filed June 7, 2013.

[44]/ *Nat'l Ass'n of State Util. Consumer Advocates v. F.C.C.*, 457 F.3d 1238 (11th Cir. 2006).

access lines. This is all the more a concern since wireless access is being promoted for fixed locations where there are no (or very limited) competitive options.[45]

There have also been recent instances where customers have been involuntarily pushed into fixed wireless broadband service, when they had an expectation of getting wired broadband. In a recent case before the Pennsylvania Public Utility Commission, Complainant David K. Ebersole, Jr. waited two years for the DSL service that Verizon was supposed to provide pursuant to a statutory statewide broadband initiative. At the eleventh hour, Verizon informed Mr. Ebersole and his neighbors that they would have to obtain their fixed broadband service from Verizon Wireless. In his affidavit, Mr. Ebersole, who had subscribed to DSL at a previous residence, compared the wireless service very unfavorably to the wired DSL. This paragraph from his affidavit says it all:

> DSL offers unlimited data usage. 4G LTE is "pay as you go" which equates to roughly $10/GB, depending on the plan you select. This drives up the cost significantly. In my first month of service, I used 5 GB within 8 days of the billing cycle. The plan I selected is a 5 GB plan, so I will now be charges $10/GB for each additional GB. As of this writing, I have used 6.1 GB, making my total bill at least $70. It is important to note that my Internet usage is only for casual web browsing, email, and some music and application downloads. I do not stream video or music. I've had to turn off my Internet periodically until next billing cycle to minimize the chance for additional charges. 4G LTE is not practical for home use because it is cost-prohibitive.[46]

Consumers must be protected from such forced transitions.

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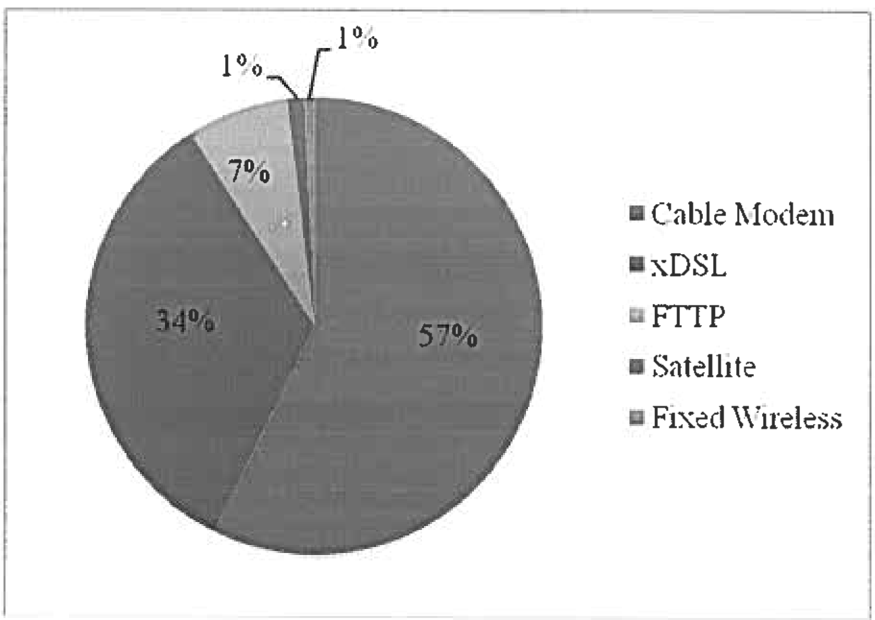
45 / Moreover, states may petition the Commission for authority to regulate CMRS rates and "the Commission shall grant such petition if such State demonstrates that—(i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or (ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State." 47 U.S.C. 332(c)(3).

46/ *Petition of David K. Ebersole, Jr. and the Office of Consumer Advocate for a Declaratory Order*, Pennsylvania PUC P-2012-2323362, Ebersole Affidavit, at para. 25.c. The Pennsylvania PUC issued an order in February 2013. *Final Order*, February 28, 2013; *See also Dissenting Statement of Commissioner James H. Cawley*, February 28, 2013.

C. The technical limitations of fixed wireless thwart the FCC's broadband goals.

Voice Link does not support broadband service. By replacing the copper-based link to the public switched network with a fixed wireless service, Verizon eliminates consumers' option to subscribe to DSL. Accordingly, Voice Link leads to the loss of broadband participants in a market that is already vastly concentrated. Nationwide, a substantial number of households rely on DSL as their mode of broadband access to the Internet. As of June 30, 2012, as Figure 3 below shows, there were 27.7 million residential xDSL lines in service in the United States, representing 34% of all fixed connections to the Internet.[47]

Figure 3
DSL Represents A Significant Portion Of Fixed Broadband Connections In The United States[48]



47/ Federal Communications Commission, Wireline Competition Bureau, Industry analysis and Technology Division, *Internet Access Services: Status as of June 30, 2012*, rel. May 2013, at Table 6.

48/ *Federal Communications Commission, Wireline Competition Bureau, Industry analysis and Technology Division, Internet Access Services: Status as of June 30, 2012, rel. May 2013, at Table 6.* There were 31.3 million xDSL lines in service (i.e. both residential and business lines). *Id.*, at Table 5.

ILECs' economic incentives collide with those of the consumer – AT&T and Verizon make substantial profits on their wireless service (due to higher revenues and presumably lower costs), and therefore, a shift *away* from DSL or fiber and *toward* wireless enhances their revenue streams at the expense of the consumer. Further, Verizon's cross-marketing agreements with cable companies, whereby Verizon markets cable companies' broadband services, and they market Verizon's wireless services, further serve to diminish Verizon's interest in maintaining and promoting its DSL service.[49] Rate Counsel urges the Commission, in its evaluation of trials, to assess the impact of the new technology on the diversity and affordability of broadband access to the Internet for all wireline services whether copper or fiber.

D. The technical limitations of fixed wireless thwart public safety goals.

Rate Counsel urges the Commission to assess comprehensively the impact of any new technology on consumers' ability to reliably connect to emergency services. The most

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49/ In the Matter of Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC and Cox TMI, LLC For Consent To Assign AWS-1 Licenses, WT Docket No. 12-4; Applications of Verizon Wireless and Leap for Consent To Exchange Lower 700 MHz, AWS-1, and PCS Licenses, ULS File Nos. 0004942973, 0004942992, 0004952444, 0004949596, and 0004949598; Applications of T-Mobile License LLC and Cellco Partnership d/b/a Verizon Wireless for Consent to Assign Licenses, WT Docket 12-175, Memorandum Opinion and Declaratory order, released August 23, 2012. The FCC recognized the potential for anticompetitive behavior. The FCC stated: "As described above, several of the concerns parties have raised about the impact of the Commercial Agreements are speculative at this point. We believe that the modifications adopted pursuant to the proposed Consent Decree adequately restrict the parties' ability to engage in anticompetitive conduct at this time and with respect to current service offerings. As explained above, however, we cannot know for certain how relevant products and services will develop in the future; nor do we know how the Commercial Agreements will affect such competitive developments. Both the agreements and many of the products and services at issue are nascent, including in particular integrated wireline and wireless broadband services. Nevertheless, we take potential risks to the public interest very seriously and will monitor marketplace developments closely. Further, as stated above, we are opening a separate docket to allow the public to file complaints or petitions if they believe the parties are acting in violation of the conditions imposed by this order or engaging in anticompetitive conduct relating to this transaction that implicates the public interest or otherwise violates the Act or Commission rules. We intend to exercise Commission jurisdiction fully and take corrective action whenever necessary in the public interest." Id., at para. 169, footnote omitted, emphasis added. WC Docket No. 12-234 has been established for that purpose. FCC Public Notice, "Docket Established for Monitoring the Recent Verizon Wireless Transactions," WC Docket No. 12-234, DA 12-1389, August 23, 2012.

sophisticated E-911 or NG911 system in the world is useless if the last link to the consumer is unreliable. Further, as the NYPSC's Public Notice acknowledges, Voice Link does not support medical alert systems,[50] which jeopardizes medically vulnerable citizens. Alternatives, if available, create new costs for customers. Moreover, Voice Link does not support home security monitoring systems.[51] Consumers' security then is at risk, and again, if alternatives exist, consumers bear the cost. The NYPSC describes Voice Link as remaining "stationary at one location in the customer's premises."[52] If, however, a consumer brings her Voice Link equipment to a new residence, the device will still be "pegged" to the original residence. In the event of an emergency, the outdated address will appear on an E-9-1-1 call, posing yet another threat to public safety.

Further, Voice Link is not as reliable as is Verizon's conventional copper-based telephone service. Typically, Verizon's "traditional" local exchange service continues to operate during power outages. The NYPSC states that the Voice Link "device is equipped with a battery back-up, in case of commercial power loss," and that "[a]ccording to Verizon, available devices are equipped with rechargeable battery packs, while newer units are expected to operate on standard AA batteries."[53] Of course consumers cannot recharge batteries during power outages.

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[50]/ Case 13-C-0197 – Tariff filing by Verizon New York Inc. to introduce language under which Verizon could discontinue its current wireline service offerings in a specified area and instead offer a wireless service as its sole service offering in the area, Notice Inviting Comments, issued May 21, 2013 ("NYPSC Voice Link Notice"), at 2.

[51]/ *Id.*

[52]/ *Id.*

[53]/ *Id.* See also New York Public Service Commission Case 13-C-0197, Tariff filing by Verizon New York Inc. to introduce use of wireless technology as an alternative to repairing damaged facilities, Order Conditionally Approving Tariff Amendments in Part, Revising in Part, and Directing Further Comments, issued and effective May 16, 2013 ("NYPSC Voice Link Order"), at 4, which states: "In case of commercial power failures, the units are equipped with a rechargeable backup battery that provides up to two hours of talk time and 36 hours of standby time."

Rate Counsel acknowledges that Verizon, in the future, may be able to solve some of Voice Link's significant public safety flaws, but urges the Commission, in its evaluation of trials, to analyze the impact of the technology *as trialed* on public safety.

Rate Counsel also urges the Commission to assess the impact of new technology on carriers' willingness to maintain existing technology. If carriers do not maintain and repair their existing outside plant, residents' dial tones may not function, which further jeopardizes public safety, particularly for those who live in remote areas, far from emergency services, and with spotty wireless coverage. Rate Counsel recommends that the Commission heed the concerns expressed in AARP's recent comments submitted to the NYPSC:

> If approved, Verizon's proposed tariff would provide the company with seemingly unfettered latitude to decide to deploy Voice Link rather than to maintain and repair its copper plant. AARP is concerned about the redlining that could occur, creating yet deeper divisions between the telecommunications "haves" and "have nots." Left to its own financial analyses, Verizon can selectively neglect its outside plant. Once the plant has reached "a point of no return" Verizon could then determine that it is "impractical" to repair the plant and then offer Voice Link to the affected customers. During these years of technological transition, the Commission should monitor carefully Verizon's investment in maintaining its copper outside plant so that Verizon, through neglect of its existing infrastructure, does not implicitly force consumers to "choose" Voice Link. AARP does not oppose migrations to new, high-quality technological platforms, but the transition should be managed in such a way as to prevent unnecessary threats to public safety.[54]

In assessing the "success" of a trial, the FCC should consider whether the "trialed" new technology (1) shifts new costs and inconveniences to those consumers seeking to maintain the same level of medical and security protection; and (2) creates incentives (or "rewards") carriers for allowing their conventional plant to deteriorate.

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[54]/ Case 13-C-0197 – Tariff filing by Verizon New York Inc. to introduce language under which Verizon could discontinue its current wireline service offerings in a specified area and instead offer a wireless service as its sole service offering in the area, AARP Comments, July 2, 2013, at 10.

E. The technical limitations of fixed wireless undermine the goal of affordable telecommunications and broadband services.

In its evaluation of new technology, the FCC should examine the impact of the trialed technology on the affordability of telecommunications and broadband services.[55] When new technology causes residential and business consumers to pay more for some approximation of the status quo – that is to obtain broadband access to the Internet, to ensure that their Life Alert and security systems work, and to be able to do credit card and fax transactions – then this significant consequence should be taken into account by the FCC.

F. Any transition that is not carefully managed will expose customers to poor service and other disruptions.

Rate Counsel is concerned that the FCC's enthusiasm for new technology will be interpreted by industry as justification to allow its copper plant to deteriorate, and that such deterioration will more likely occur in precisely those areas that depend on a reliable network connection. There are already signs that this is occurring. In recent comments to the NYPSC in the Voice Link proceeding (as well as in a recent proceeding on Verizon's quality of service), the Communications Workers of America report that Verizon has simply stopped maintaining its copper wires.[56]

The FCC unfortunately eliminated precisely the type of informational tools that would enable it to examine network reliability, e.g., timeliness of dial tone repair and number of

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55/ In Rate Counsel's view, broadband is a telecommunications service.

56/ New York Public Service Commission Case 13-C-0197, Comments of the Communications Workers of America, July 2, 2013, at 15-16. Rather than fixing outside plant that has failed over the winter in the Catskills, Verizon – after having been explicitly told to hold off on any expansion of its wireless Voice Link service beyond Fire Island – made plans to restore service to customers in this area using Voice Link. See, Case 13-C-0197, Emergency Petition of New York Attorney General Eric T. Schneiderman for an Order Preventing Verizon from Illegally Installing Voice Link Service in Violation of its Tariff and the Commission's May 16, 2013 Order, filed June 26, 2013.

troubles reported on dial tone lines, previously provided by carriers through the Automated Reporting Management Information System ("ARMIS") reports.

Industry often refers to the declining trend in demand for ILECs' traditional lines. (This does not include ILEC DSL lines.) Despite that decrease, a "critical mass" of copper-based dial tone lines continues to link consumers to the public switched network,[57] and the FCC should not, with these trials, tacitly approve of industry neglecting the infrastructure that supports these lines. Rate Counsel certainly welcomes innovation and technological progress, but the FCC's firm hand is needed to guide the transition so that the nation's most vulnerable citizens are not harmed during the transition.

Rural customers are particularly vulnerable to the consequences of fraying outside plant because wireless coverage may be spotty, neighbors far away, and emergency services remote. Economic incentives to cause carriers to maintain their plant may be lacking.[58]

Elderly customers are also particularly vulnerable to the adverse consequences of industry's premature neglect of their copper infrastructure because they disproportionately rely on wireline connections. The proportion of households who rely on landline connections

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57/ Further, with U-Verse, AT&T continues to require copper plant for the link from the node to the customer premises.

58/ *See, e.g.*, In the Matter of the Board's Review of Verizon New Jersey, Inc.'s Service Quality Issues, New Jersey Board of Public Utilities Docket No. TO12020156, Order, April 29, 2013. The New Jersey Board of Public Utilities directed Verizon "to upgrade and replace, as necessary, the infrastructure that is used to provide service to Stow Creek and Greenwich Township, Cumberland County, in order to provide a level of service that meets the Company's statutory obligation of safe, adequate and proper service." *Id.*, at 3. In Massachusetts, responding to municipal officials' and consumers' concerns regarding Verizon's quality of service in Western Massachusetts, the Massachusetts Department of Telecommunications and Cable conducted a comprehensive investigation, and pursuant to the regulatory approval of a settlement, Verizon Massachusetts has surveyed and repaired outside plant in rural communities in Western Massachusetts. See, Massachusetts D.T.C. 09-1, Investigation by the Department of Telecommunications and Cable on its own motion, pursuant to General Law Chapter 159, Section 16, of the telephone service quality of Verizon New England Inc., d/b/a Verizon Massachusetts, in Berkshire, Hampden, Hampshire, and Franklin Counties, Order on Joint Motion for Approval of Settlement, February 10, 2011. See also, Settlement Agreement by and among the Office of the Attorney General of Massachusetts, Verizon New England Inc., d/b/a Verizon Massachusetts, Local 2324, International Brotherhood of Electrical Workers, AFL-CIO and the Towns of Hancock, Egremont and Leverett, November 30, 2010.

increases with age. The most recent CDC survey on wireless substitution indicates that less than 12% of adults 65 and over are cord-cutters – that is, they live in households that rely solely on wireless telephones (by comparison, 43.5% of adults aged 35-44 years are cord-cutters).[59]

The Pew Internet & American Life Project ("Pew"), which has produced numerous studies on Internet use, released a study last year identifying demographic characteristics of people who do not use the Internet, including: senior citizens, adults with less than a high school education, the poor, and consumers with disabilities.[60] Pew also provides results of a survey conducted in April and May 2013 demonstrating that just 56% of adults ages 65 and over used the Internet (much less subscribed to broadband in the home).[61] An older study, based on a survey from January and February 2012 showed 53% of adults aged 65 and over used the Internet and 39% of that age group had broadband in the home.[62] For these consumers, any analysis of substitutability would need to include not only the "incremental" price of the VoIP service, but also the price for the broadband platform that is necessary to support the VoIP. For the same reasons that these consumers do not currently subscribe to the Internet, they may not find "over the top" VoIP a suitable alternative. As stated above, the Pew Study shows that only

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59/ Stephen J. Blumberg, Ph.D., and Julian V. Luke, Division of Health Interview Statistics, National Center for Health Statistics, Centers for Disease Control and Prevention, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey,* July – December 2012, rel. June 18, 2013, at 2. The wireless only rate declines with age: 62.1% for adults aged 25-29; 53.2% for adults aged 30-34; 43.5% for adults aged 35-44; 28.4% for adults aged 45-64; and 11.6% for adults aged 65 and over. *Id.*

60/ Kathryn Zickuhr and Aaron Smith, *Digital differences: While increased internet adoption and the rise of mobile connectivity have reduced many gaps in technology access over the last decade, for some groups digital disparities remain*, Pew Research Center's Internet & American Life Project, April 13, 2012 ("Pew 2012 Digital Differences Report"), at 2. The report is available at: http://pewinternet.org/Reports/2012/Digital-differences.aspx.

61/ Pew Research Center's Internet & American Life Project Spring Tracking Survey, April 17-May 19, 2013, available at: http://www.pewinternet.org/Trend-Data-(Adults)/Whos-Online.aspx (accessed June 27, 2013).

62/ Pew Research Center's Internet & American Life Project January 20-February 19, 2012 results presented in Kathryn Sickuhr, Mary Madden, "Older adults and internet use," June 6, 2012. Available at: http://pewinternet.org/Reports/2012/Older-adults-and-internet-use/Main-Report/Internet-adoption.aspx (accessed June 27, 2013).

56% of adults aged 65 and over use the Internet (and presumably have broadband) and since in 89% of consumer purchases, VoIP is purchased as part of double-play or triple-play,[63] seniors' relatively low "take" rate for broadband is consistent with an assumption that elderly disproportionately depend on ILECs' traditional lines.

Further, across all age groups, there remains a large residential demand for "traditional" service as is evidenced by the 48.4 million residential lines in service in the United States. While total end-user switched access lines have seen a reduction since December 2008, there were still almost 102 million end-user switched access lines in service in the United States as of June 30, 2012.[64] Total residential end-user switched access lines in the United States fell from 78.2 million in December 2008 to 48.4 million in June 2012,[65] yet the approximate 50 million households that continue to rely on ILEC lines can hardly be considered to be negligible. In New Jersey, there are 3.1 million switched access lines, including 1.1 million residential switched access lines in service as of June 30, 2012.[66] Accordingly, during this "transition" to new technology, it is essential that the outcome of the trials not become an excuse for the FCC or the industry to ignore the needs of the critical mass of customers who continue to rely on "conventional" technology.

63/ Approximately 89% of residential VoIP subscriptions were part of a bundle with Internet, according to the FCC. FCC Local Competition Report, at Table 9.

64/ FCC Local Competition Report, at Table 3. There were 141 million end-user switched access lines in service in December 2008. *Id.*

65/ *Id.*

66/ FCC Local Competition Report, at Tables 8 and 9.

V. RECOMMENDED "RULES OF THE ROAD" FOR THE TRIALS

. Rate Counsel recommends that the Commission consider carefully the way in which the FCC conducts the trials (or, in the alternative, the way in which the FCC guides the industry's conducting of trials). In this section Rate Counsel offers some suggestions for the Commission's analysis of any trials that this proceeding encompasses.

A. The FCC should examine technical issues separately from market structure issues.

As previously stated, the transition to new technologies does not equate with more competition – technical matters may merit further analysis, but they should be considered separately from an assessment of the structure of relevant geographic and product markets. Of course new services can change the structure of relevant markets, and the FCC should consider that impact – for example, Voice Link eliminates a wireline broadband provider and so diminishes the already limited competitive options for "unmetered" broadband service for consumers. Technological changes underscore the need for an ongoing assessment of the status of competition in relevant markets, and the corresponding need for adequate data on rates, terms, conditions, and availability of services to enable stakeholders and regulators to detect market imperfections. This need persists regardless of whether services are offered over wireless, IP, or conventional copper networks. In any event, changes in technology cannot obscure the need to ensure that services are affordable, available, and comparably priced in urban and rural areas.[67]

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[67]/ Many but not all state legislatures have explicitly eliminated state regulators' authority to regulated VoIP. Connecticut and New York are examples of states that have not yet relinquished their authority over VoIP service. Recently, the Connecticut Legislature did not pass Bill No. 6401 (An Act Concerning Video and Cable Providers).

B. Participation by consumers should be voluntary.

Whether before, during, or after the trials are conducted, regulatory oversight is essential to ensure that consumers are not pressured by carriers' misleading or aggressive marketing to migrate to new technologies before consumers want to. Carriers' and consumers' interests may diverge, especially if carriers prefer that consumers purchase more expensive, and often metered wireless services. For this reason, consumer protection measures are essential to prevent slamming, cramming, and aggressive sales practices. Further, if there comes a time that it is in the overall public interest for customers to migrate away from copper-based technology, that determination should be made by regulators, not by industry.

This is particularly important if – contrary to the FCC's apparent intention – customers are not able to move back to their prior service at the conclusion of the trial. And it highlights the unfairness of Verizon's Voice Link efforts.

C. States should have a clear say in the selection of the trials.

States (regulators and consumer advocates) should have a role in all trials that this proceeding encompasses. They should be kept fully informed throughout, and the FCC should create opportunities for consumers and stakeholders (e..g, CLECs) to speak up about the implications of the trials.

Rate Counsel recommends that VoIP trials occur in states that have not yet eliminated their commission's jurisdiction over VoIP so that those commissions will be better able to oversee and participate in the trials.

D. Interconnection obligations should continue regardless of technology

Rate Counsel opposes the idea of leaving it up to the industry to settle on fair interconnection agreements. The negotiating power between ILECs and CLECs typically is imbalanced, and the movement to IP should not become an acceptable strategy for abandoning interconnection obligations. By contrast, a regulatory "hands-off" approach harms competition and consumers. The FCC expresses concern that ILECs might not voluntarily agree to a trial if there is a section 251/252 regulatory backstop.[68] Rate Counsel urges the Commission to ignore any such attempt at regulatory blackmail. Further, any interconnection agreements that are negotiated voluntarily during a trial environment should be viewed somewhat skeptically as they may represent incumbent carriers' "best behavior."

Finally, the trials announced should have a specified end-date. Unless the FCC affirmatively finds the continuation of the trials after that date to be in the public interest, consumers and competitors should be able to revert to the state of service before the trial.[69]

VI. CRITERIA FOR EVALUATING THE TRIALS

Rate Counsel urges the Commission to establish the criteria by which it intends to evaluate trials. Further, Rate Counsel recommends that the Commission consider its own role in guiding the transition to new technologies in such a way as to promote the public interest. If consumers are to migrate to wireless and IP platforms, and if these markets lack effective competition, does the FCC intend to intervene?

Rate Counsel certainly welcomes the opportunity to contribute to the FCC's efforts to design, implement, and evaluate trials of technology, particularly if these efforts are informed by

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68/ Public Notice, at 5-6.

69/ This requirement would distinguish the IP trials in this proceeding from the FCC's numbers trial, which, despite being ostensibly time-limited, allow VoIP providers to retain after the trial the numbers obtained during the trial. In the Matter of Numbering Policies for Modern Communications, WC Docket No. 13-97 (and other dockets), FCC 13-51, Notice of Proposed Rulemaking, Order, and Notice of Inquiry, April 18, 2013, at paras. 87-114. The FCC refers to the possibility of requiring VoIP providers to return numbers to a local exchange carrier partner "if problems arise." *Id.*, at para. 88.

(and assessed based on) overarching policy goals of universal service, network reliability, consumer protection and competitive choice. Further, Rate Counsel recommends that the FCC coordinate closely with state regulators and consumer advocates to ensure that the FCC's selection and assessment of various trials benefit from states' and consumers' unique and "on the ground" perspectives. Rate Counsel fully supports the collection of data, and urges the FCC, to the greatest extent possible, to ensure that the data and reports from the trials are public. Rate Counsel also urges the Commission to reject any implication that new technology is inherently "better" than old technology. Rate Counsel, of course, welcomes innovation, but when migration to new technology raises consumers' costs or jeopardizes consumers' public safety, it likely is premature to force consumers to abandon existing technology. Also, Rate Counsel urges the Commission to reject any attempt to equate new technology with the presence of competition – the issues are distinct, and, indeed, as consumers migrate to wireless and to broadband services, they are migrating to highly concentrated product markets that lack effective competition and lack adequate regulatory oversight

Trials, of course, are already underway, such as the "Fire Island" trial, where Verizon is deploying its Voice Link service on a limited basis. Rate Counsel assumes that industry is "trialing" various kinds of interconnection agreements. Rate Counsel anticipates that the trials that the FCC envisions for this proceeding will lead to a better understanding not only of technical matters, but also of the impact of the nation's migration to new technologies on the prices that consumers pay for services, the reliability of consumers' link to public safety entities, the spectrum of choice that consumers face, and the ability of all consumers (whether residing in urban or rural areas, young or old, of limited income) to avail themselves of affordable voice and data services.

Rate Counsel suggests the following for criteria for the trials:

- *Scalability:* Can the trials be "scaled up"?

- *Impact on consumer protection:* Do the trials erode consumer protection (e.g., measures to detect and to prevent slamming, cramming, etc.)? Rate Counsel appreciates that the FCC is "mindful of the fact that, while participation in any trial would be voluntary for providers, all consumers in trial regions would likely be affected, either directly or indirectly," and that the FCC states: "As consumer protection is a core principle guiding the work of the Task Force, comments in support of any trial proposal should address how best to ensure a successful trial while also avoiding potential harmful impacts to consumers."[70]
- *Impact on public safety:* The FCC appropriately seeks "comment on the impact of consumer migration to wireless and IP-based services that are dependent on commercial power and network resiliency and public safety services generally" and raises the important question of how "the need to establish adequate back up power solutions" should "be integrated into the Commission's technology trials and other data gathering efforts?"[71]
- *Impact on network reliability*: regardless of whether consumers confront emergencies, consumers value a reliable connection to the network.
- *Economic development:* how do technologies improve/harm businesses' ability to conduct business without incurring new costs and inconveniences?
- *Affordability:* How do new technologies affect the affordability of voice and Internet access?
- *Impact on consumers:* Are consumers better off? Worse off? How will the FCC find out?
- *Impact on goal of reasonable comparability and of universal service:* In evaluating trials, the FCC should notice and collect information about whether the result is disparate levels of service for different groups of consumers.
- *Impact on carriers' willingness to repair and to maintain existing technology.*
- *Impact on competitive choice:* Are consumers' options enhanced or diminished?
- *Opportunities to learn something new:* are the trials teaching us something we do not already know?
- *Incentive for best behavior:* How does the FCC filter out the effect of carriers being on their best behavior during a trial?

VII. DATA COLLECTION AND REPORTING

70/ Public Notice, at 3.

71/ *Id.*, at 8.

Rate Counsel urges the Commission to issue data and information requests, as necessary, to the trial participants. The data and information that the FCC collects should, to the greatest extent practical, be public. If the FCC decides that the consumers' perspective should be tracked, surveys should be conducted by independent third-party entities. Attributes of network resiliency are of paramount importance for tracking and analyzing.

The FCC and states should collect and report information about consumers' experiences and that information should be broadly disseminated. The default assumption should be that information is public, with carriers bearing the burden to demonstrate otherwise.

VIII. CONCLUSION

Rate Counsel welcomes efforts by the FCC to gain perspective on the way in which the nation's transition to new technologies affects network reliability, broadband deployment and affordability, and consumers. Rate Counsel welcomes the collection and analysis of data and information gleaned from the trials and is hopeful that the trials will promote (1) consumer protection; (2) universal service; (3) network reliability; (4) consumers' ability to choose to retain existing technology if the new technology would erode consumers' public safety; and (5) interconnection of carriers' networks at reasonable rates, terms and conditions.

Respectfully submitted,

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