

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

In the Matter of)	
)	
Technology Transitions Policy Task Force)	GN Docket No. 13-5
Public Notice Regarding Potential Trials)	

REPLY COMMENTS OF FREE PRESS

Free Press respectfully submits this reply to initial comments on the “IP transition” trials described in the *Public Notice* in the above-captioned docket.¹ The record highlights the manner in which unregulated trials could obliterate longstanding—and still vital—public interest obligations, consumer protections, and competitive safeguards. AT&T is the chief culprit proposing such a radical move,² falsely suggesting that such rules are a telephone-era relic in a world of IP-based networks. Nothing could be further from the truth. This is not a proceeding about a “phone network” transition or the general principles that should govern it, but about broadband connectivity and the Commission’s authority to preserve those crucial principles for modern networks.

Before it proceeds down AT&T’s preferred path of destructive deregulation, the Commission must answer questions—ones largely, and unfortunately, of the Commission’s own making—concerning its own authority over next-generation networks. Indeed, as the initial round of comments demonstrated, the questions and issues that arise in the context of IP transition trials are inextricably intertwined with the underlying regulatory framework.

¹ Technology Transitions Policy Task Force Seeks Comment on Potential Trials, *Public Notice*, GN Docket No. 13-5, DA 13-1016 (rel. May 10, 2013) (“*Public Notice*”).

² *Id.* at 1-2, nn.4 & 7. The *Public Notice* curiously refers to “stakeholders” and “parties,” plural, that have proposed such trials, yet in each of these footnotes cites only AT&T’s requests.

Yet the Commission need not look beyond the Communications Act, as amended by the Telecommunications Act of 1996, to determine the proper classification of Internet Protocol (“IP”) based networks and IP-based transmission services. Whether Title II and common carrier principles apply to such networks and services is a determination that should be clear in light of the statute’s plain language, notwithstanding the Commission’s previous missteps in making such determinations. Information gleaned from trials may be useful to a point, depending on the validity of such experiments and the good (or bad) faith with which they are conducted. But no trial could or should override the appropriate classification of IP-based networks and telecommunications services, nor the Commission’s authority to promote and preserve public interest principles in the broadband telecommunications era.

AT&T has cloaked its proposals as innocuous experiments to test the appropriateness and relevance of any regulations. But a closer look reveals that AT&T’s trials are just another step in its quest to completely dismantle the public packet-switched telecommunications network and eliminate any vestiges of a broadband telecommunications services marketplace. Free Press welcomes a dialogue regarding the already ongoing transition to the 21st century network, and the appropriate regulatory regime for it; but the Commission must not allow any single company to control the conversation or to devise skewed trials benefitting its own corporate interest rather than the public interest.

AT&T has set out to orchestrate the final removal of Title II and common carriage principles from our communications networks. Designing and conducting its own trials is a way for AT&T to further that goal. Accordingly, Free Press urges the Commission to clarify, before moving forward with any trials, that IP-based networks and IP-enabled telecommunications services are governed by Title II.

I. Before the Commission Proceeds With Trials, the Commission Must First Resolve the Regulatory and Legal Framework That Will Govern IP-Based Networks.

Many of the questions raised in the Public Notice and the initial round of comments can be answered by the Commission’s simply clarifying the appropriate regulatory framework and classification for so-called IP-based networks and the services offered over them, including Voice over Internet Protocol (“VoIP”) services.³ It is thus no surprise that there is near unanimous agreement that the proposed trials are *not* the appropriate forum for resolving the regulatory and legal framework that will govern the transition from Time Duplex Multiplexing (“TDM”) to IP multiplexing transmission technologies.⁴

The Commission’s regulatory authority over IP-based networks and IP-enabled services is controlled by statute and cannot be resolved by reference to any proposed trials. The “question here is whether [IP-based transmission providers] ‘offe[r] . . . telecommunications for a fee directly to the public.’ If so, they are subject to Title II regulation as common carriers.”⁵ In other words, no trials or experimentation will inform the Commission’s *legal* determination as to

³ *E.g.*, Comments of California Public Utilities Commission and the People of the State of California (“CPUC”) at 11 (“At the root of many of the questions described in these Comments—the Commission’s authority to regulate VoIP interconnection, numbering, the role of the states, copper retirement—is the question of the regulatory classification of VoIP and other IP-enabled services.”).

⁴ *See, e.g.*, Comments of the American Cable Association at 5 (Applicability of interconnection provisions of the 1996 Act is a “legal matter” that “do[es] not lend [itself to trials]”); Comments of CPUC at 2 (“Like many commenters, however, the CPUC believes that the FCC must address an array of legal/regulatory questions, some immediate and some long-standing, before forging ahead with any trials or ‘regulatory experiments,’ as AT&T proposes.”). AT&T and other incumbent local exchange carriers arrive at the wrong conclusion on the law, but start from the same premise that this is a legal question, not a factual experiment. *See* Comments of AT&T at 24 (“[C]onducting a trial of IP interconnection under the Commission’s auspices—including a trial in which the parties ‘negotiate pursuant to the existing section 251/252 framework’—presumes legal authority that simply does not exist.”); Comments of CenturyLink at 20 (“As a legal matter, t[he 251/252] framework, and particularly its ILEC specific obligations, does not apply to VoIP interconnection.”).

⁵ *Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. 967, 1006 (2005) (Scalia, J., dissenting).

whether IP-based networks and services constitute telecommunications services. This is a determination that needs to be made in the first instance by the Commission.⁶ Were it to allow trials and experiments to define the scope of the Commission’s authority over IP-based services, the Commission would be shirking its obligation to enforce the principles and mandates of the 1996 Act. Congress designed that law to promote advanced and competitive public communications networks—regardless of the technologies employed—governed by principles of non-discrimination, interconnection, universal service, and consumer protection.⁷ This is a regulatory regime that applies notwithstanding any information that can potentially be gleaned from AT&T’s self-serving experiments.⁸

Without resolving the fundamental question of the Commission’s authority over IP-based networks, there is no clarity as to how this transition should proceed. In fact, as affirmed by numerous parties, there are no technological or logistical obstacles to ensuring an efficient

⁶ See, e.g., Comments of COMPTTEL at 6 (“As an initial matter, whether a statute applies cannot be determined by whether select parties ‘have a good experience’ in a test environment. A statute applies (or does not) because of its terms and the intent of Congress.”); Comments of Cox Communications, Inc. at 2 (“What trials cannot do is modify the underlying regulatory framework that applies to specific services and interconnection, because those issues are subject to existing, specific legal requirements and other policy considerations.”).

⁷ See generally Comments of Free Press, GN Docket No. 12-353, at 18-23 (filed Jan. 28, 2013).

⁸ As Free Press explained in our earlier comments, trials are not an appropriate forum for determining the regulatory framework that governs IP-enabled services, and there are also a number of ongoing Commission proceedings specifically addressing the continuing relevance of regulations during the IP transition. See *id.* 6-7 & n.4 (documenting the number of pending proceedings before the Commission implicated by the relief sought in AT&T’s petition); see also Comments of American Cable Association at 4 (“Confirming that interconnection rights exist when exchanging VoIP traffic is the critical issue the Commission should address. . . . It is the issue that the Commission has before it in the *USF/ICC Transformation Order*, a proceeding in which substantial comments have already been filed.”); Comments of Cox Communications, Inc. at 6 (“Legal and policy considerations should be addressed through the Commission’s existing docketed proceedings and the implementation of existing law.”).

transition. It is this regulatory uncertainty that is impeding the progress of the transition⁹—but in exactly the opposite manner from the ways in which AT&T imagines. Lack of clarity in this case harms competitors, innovators, and end-users, not incumbents that portray themselves as bound by regulations they have fought tooth and nail to remove from their packet-switched networks and services. Thus, before permitting any trials, the Commission needs to address lingering questions concerning its authority over next-generation networks. It should affirm *not* that its rules are no longer necessary, but to the contrary that this framework remains essential with today’s market and evolving technologies.

II. AT&T’s Proposed Trials Are Simply Another Step in Its Push to Achieve a State of Total Deregulation.

AT&T’s comments in response to the *Public Notice* reveal that, at its core, AT&T is not seeking permission for experimentation in transitioning to an IP-based network. Rather, AT&T views the trials simply as a stepping stone on its path to removing all remaining vestiges of the Commission’s authority over the company’s infrastructure. Permitting any trials without first establishing the appropriate regulatory framework for such facilities plays straight into AT&T’s master plan to eliminate common carriage principles and Title II protections from our nation’s communications network.

⁹ *E.g.*, Comments of Cablevision Systems Corporation at 2 (“While Cablevision has been successful in negotiating IP interconnection agreements with competitive providers and interexchange carriers (‘IXCs’), Cablevision’s inability to obtain IP interconnection from incumbent local exchange carriers (‘ILECs’) has led it to the conclusion that the Commission must take specific steps to facilitate IP interconnection more generally, including by clarifying the legal regime that governs it.”); Comments of COMPTTEL at 4 (noting that the “Commission’s delay [in] confirming the policy framework for IP-to-IP interconnection” is holding up progress of the IP transition); Comments of Sprint Nextel Corporation at 13 (“Failure to implement . . . the basic competitive principles of the Act is imposing unnecessary costs and impediments to network improvements that ultimately increase costs to the industry and its consumers, undermine competition, and hinder the Commission’s goals of advancing broadband IP networks and services.”).

The word “trial” implies a preliminary or temporary experiment used to gain information.¹⁰ However, AT&T has made clear in its comments that it views these trials as irreversible and permanent. According to AT&T, “after the Commission approves a trial plan, the carrier in question would be free to discontinue service in accordance with the terms of the plan without further Commission action.”¹¹ Problematically, if AT&T’s “terms of the plan” include elimination of common carrier obligations and consumer protections, this “trial” deregulation will be permanent *unless* the Commission takes further action. That AT&T’s purported trials could potentially result in permanent changes shows that AT&T is not, in fact, seeking a “trial.” The purpose of a trial is to gather data to inform decision-making, not to initiate a potentially disastrous and permanent set of changes.

Even with regard to the design of the proposed trials, which AT&T originally framed as a means of determining the appropriate measure of regulatory oversight, AT&T opposes any meaningful oversight and reporting requirements. Instead of addressing the specific issues and questions set out in the *Public Notice*, AT&T insists on more generalized trials and suggests that the details will be fleshed out in that context.¹² For example, rather than addressing any of the specific concerns regarding disability access that were raised in the *Public Notice*, AT&T simply responds that it “is committed to working with the disability community” and that it will “devise solutions . . . to any issues that may arise during the transition to all-IP services.”¹³ This type of

¹⁰ Comments of CPUC at 2 (clarifying the need to ensure that any trials “will be just that, trials, which assumes that the *status quo ante* could be restored at the end of the trial”).

¹¹ Comments of AT&T at 12; *see also id.* at 7, 17-18 (specifying that, with regard to the transition from wireline to wireless services, AT&T envisions these trials as “mandatory and permanent” with no option of switching back).

¹² *Id.* at 16, 42 (rejecting the issue-specific trials contemplated by the *Public Notice* in favor of its own more generalized trials).

¹³ *Id.* at 9; *see also id.* at 14-15 (AT&T will decide by itself the types of information that need to be disclosed that “implicate[] important public interest considerations”).

generalized assurance is particularly dangerous where, as here, AT&T envisions the “trial” as permanent. And with regard to the categories of information that AT&T plans to collect and disclose, AT&T sets a very low bar, indicating that it will collect the number of customer responses to carrier notification, the number of customers transferred to alternative services, and the number of customers still needing to be transitioned.¹⁴ Without meaningful and comprehensive data, however, the trials will not generate any useful information.¹⁵

Although Free Press welcomes a discussion to identify which regulations need to be modernized and updated to better reflect today’s technology, AT&T would instead wipe the entire slate clean by essentially eliminating all common carrier regulations and regulatory oversight during its purported “trials.”¹⁶ After establishing that these obligations are no longer necessary in its contrived and unrealistic trials (in which AT&T would be on its best behavior), AT&T would shift the burden to the Commission to readopt longstanding principles that have always governed our communications networks, regardless of the technologies employed.

As Free Press has predicted, allowing AT&T to carry out its proposed trials will result in complete deregulation and the voiding of all common carriage requirements, meaning no interconnection obligations, no universal service, no consumer safeguards in the event of natural disasters, no privacy safeguards, and no restraint on price gouging in a broadband

¹⁴ *See id.* at 15.

¹⁵ *E.g.*, Comments of Minnesota Public Utilities Commission and Minnesota Department of Commerce at 2 (noting that without comprehensive monitoring and data transparency, the trials will merely reflect providers “on their best behavior, delivering services in best-case scenarios, to generate marketable results”).

¹⁶ Comments of AT&T at 15 (“[I]t is important for the detailed plans [of trials] submitted by carriers to identify [legacy regulatory obligations that impede the transition], and for the Commission to eliminate them prior to the start of the trial.”); AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition, GN Docket No. 12-353 (filed Nov. 7, 2012) at 6-7 (“To the extent any regulation is necessary at all, the experiment will enable the Commission to consider, from the ground up and on a comparatively neutral basis, what, if any, legal ILEC regulation remains appropriate after the IP transition.”).

communications world. The Commission must not cede its oversight of our communications network to the very carriers that would seek to dismantle all of these protections, even under the guise of purported trials or experimentation.

III. Any Information Collected From Trials Will Have Limited Import.

If the Commission elects to move forward with the proposed trials, it is unlikely that the results or data gathered will produce any useful information in guiding policy decisions (as distinct from technical and logistical decisions). Whether carriers or the Commission designs the trials, any resulting information will likely be skewed as parties attempt to alter their behaviors to achieve the desired set of regulatory outcomes.¹⁷ Thus, trials of any sort should be conducted only when the important legal and policy questions have been resolved.

In any event, to the extent that the Commission requires additional information or evidence to inform its decision-making, the IP transition is not as new as AT&T would suppose, and has in fact been occurring for more than a decade. The Commission has at its disposal sufficient real-world experience without having to resort to distorted results gathered from carrier-designed trials.¹⁸

¹⁷ *E.g.*, Comments of CenturyLink at 21 (“[S]uch trials are by their nature artificial and static,” as the “Commission’s oversight of the trials will alter participants’ behavior and the results of the trials.”); Comments of COMPTTEL at 6-7 (“[A] trial of negotiations *supervised* by the Commission by its nature provides no evidence as to behavior without regulation.”); Comments of Cox Communications, Inc. at 5 (“Parties with significant negotiating power would choose not to exercise that power during the trial process so as to convince regulators that there is no need to limit their ability to impose favorable terms and conditions during later negotiations.”).

¹⁸ *E.g.*, Comments of Verizon and Verizon Wireless at 2 (“The transition to new broadband and IP-based services is already occurring, without any regulatory ‘trials.’”); Comments of T-Mobile USA, Inc. at 9 (documenting list of problems encountered during negotiations for interconnection).

