

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

COMMENTS OF

THE FREE STATE FOUNDATION¹

I. Introduction and Summary

These comments are submitted in response to the Commission's request for comments on USTelecom's petition asking the Commission to declare that incumbent local exchange carriers (ILECs) are no longer presumptively dominant when providing interstate mass market and enterprise switched access voice services. We urge the Commission to act promptly in this proceeding. Reclassification of ILEC switched access services to non-dominant status is well overdue, and consumers will benefit from such reclassification.

Long gone are the days when consumers had only one choice for interstate voice services. Publicly available data amply demonstrates the dynamic change that has taken place in the voice services market in the 30-plus years since the dominant carrier regime was established. In the last decade, technological breakthroughs have only accelerated the ever-increasing level of marketplace competition. Cross-platform competition from wireless and cable providers has

¹ These comments express the views of Randolph J. May, President of the Free State Foundation, and Seth L. Cooper, Research Fellow of the Free State Foundation. The views expressed do not necessarily represent the views of others associated with the Free State Foundation. The Free State Foundation is a nonpartisan, non-profit free market-oriented think tank.

coincided with increasing adoption of IP-enabled technologies and the transition away from copper-based switched access networks.

While static indicators cannot adequately capture the dynamism of today's market, even viewed through static lens, voice services are demonstrably competitive. For example, the percentage of households subscribing to ILEC switched access services has dropped from 93% of all households in 2003 down to less than 33% today. Future decreases in ILEC market share are anticipated. VoIP service is expected to exceed 52% of all wireline households. And even by conservative estimates, 34% of all households already rely *exclusively* on wireless for voice services, a figure that keeps climbing.

There is no evidence of market power problems warranting continued enforcement of dominant carrier regulations. The old assumptions of a monopolistic environment upon which dominant carrier regulation of ILEC switched access services was based have surely disintegrated. This erosion compels a declaration that ILECs should no longer be presumed dominant when providing interstate mass market and enterprise switched access voice services.

Adherence to rule of law principles demand that where evidence overwhelmingly indicates that regulations have outlived the factual assumptions on which they were based, those regulations should be speedily removed. Dominant carrier regulation of ILEC switched access services is no longer justified. It is therefore inequitable and arbitrary to enforce those mandates. Extending enforcement through *ad hoc* rationales likewise involves an abuse of agency authority.

Agency precedent also favors reclassifying ILEC switched access services as non-dominant since conditions are even more competitive than when the Commission previously has

granted similar relief. Concerns over regulatory parity are also relevant, since ILECs' market competitors are subject only to non-dominant carrier regulation.

As importantly as anything else, unnecessary legacy regulations impose compliance costs and result in economic dislocations that, ultimately, harm consumers. Absent demonstrated market power or consumer harm, free market competition should prevail as the means for delivering goods and services to consumers in the most efficient, least costly manner. Dominant carrier regulation increases carriers' compliance costs, and this, in turn, makes the ILECs' services more costly. The dominant carrier regulatory requirements at issue here, including the stringent tariff filing requirements, impede the swift development and implementation of new service offerings. Moreover, relieving ILEC switched access services from the compliance and opportunity costs attending to dominant carrier regulations can free up investment for next-generation networks and accelerate the ongoing transition to all-IP networks.

Finally, we wish to emphasize, as we have so often previously, that there are many other desirable deregulatory actions – cutting across the various service categories – which the Commission should undertake as well as this one. Whether by issuance of a declaratory ruling, as in this instance, or by grant of forbearance petitions or waivers, the Commission should continue removing outdated regulatory barriers without delay.

II. The Commission Should Rule Promptly to Reclassify ILEC Switched Access Services

This petition for a declaratory ruling that ILEC switched access services are no longer presumptively dominant merits the Commission's prompt action. The Commission should proceed in a concerted manner and render its decision as soon as is reasonably possible.

Promptness is particularly important because relief from dominant carrier regulation of ILEC switched access services is long past due. The Commission's rules give it authority to issue

declaratory rulings on its own initiative.² Given voice services market developments over the last number of years, a *sua sponte* declaratory ruling that those services are no longer presumptively dominant would certainly have been warranted. At the very least, there is no reason for the Commission to run the clock on this petition.

Finally, relieving ILECs from dominant carrier regulations would reduce costly regulatory barriers to the successful transition of voice services from last-generation copper-based networks to next-generation broadband networks. Relieving ILECS of the drag imposed by dominant carrier regulations would further the ongoing transition to IP-based networks that the Commission has pledged to facilitate.

III. Technological and Competitive Changes in the Marketplace Have Dramatically Transformed the Voice Services Market

Dynamic changes have undermined the factual assumptions upon which dominant carrier regulations were staked. The Commission has conceded the reality of such changes, and its own report data reveals their sweep. In recent years the number of switched access lines has decreased dramatically while the number of VoIP and wireless subscribers has skyrocketed.

According to the Commission's *Local Telephone Competition Report*, the number of ILEC end-user switched access lines dropped dramatically, from over 142 million in June 2006 down to under 90 million in December 2011.³ Meanwhile, the number of cable and other non-ILEC interconnected VoIP subscribers has risen significantly, from just over 21 million in December 2008 up to nearly 32 million in December 2011.⁴ Wireless connections have also

² See 47 CFR 1.2(a).

³ *Local Telephone Competition Report: Status as of December 31, 2011* (January 2012), at 16 (Table 5), available at: http://transition.fcc.gov/Daily_Releases/Daily_Business/2013/db0114/DOC-318397A1.pdf.

⁴ *Id.* at 15 (Table 4).

skyrocketed, surging from approximately 38 million in 1996 up to nearly 322 million in June 2012.⁵ An estimated 34% of households rely exclusively on wireless for voice services.⁶

In terms of market share, the decline for ILEC switched access services is also considerable. Whereas some 93% of households subscribed to ILEC switched access services in 2003, today less than 33% of all households subscribe.⁷ It is projected that, by the end of this calendar year, less than 25% of all households will have ILEC switched access subscriptions.⁸ The FCC's Technical Advisory Committee predicted VoIP will overtake the PSTN by this year.⁹

Snapshot pictures of market share, by themselves, cannot adequately capture the forces of innovation that characterize consumer welfare-enhancing, dynamic markets. Nonetheless, even by these static market indicators, the market for voice services is demonstrably competitive.

IV. Dominant Carrier Regulation of ILEC Switched Access Services Lacks Analytical Justification

Adequate justification is required to impose onerous requirements on voice providers. In the matter of ILEC switched access services, dominant carrier regulations were premised on monopolistic or market power assumptions. Whatever the necessity of such regulations 30 years ago or even 10 years ago, the voice services market is now competitive and innovative. The data is inconsistent with claims of ILEC possession of market power. The monopolistic assumptions behind dominant carrier regulation of ILEC switched access services have disintegrated.

⁵ CTIA, "Semi-Annual Mid-Year 2012 Top-Line Survey Results" (2012), at 3, available at: http://files.ctia.org/pdf/CTIA_Survey_MY_2012_Graphics_final.pdf.

⁶ Stephen J. Blumberg, Ph.D., and Julian V. Luke, "Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July-December 2011," Division of Health Interview Statistics, National Center for Health Statistics, Centers for Disease Control and Prevention (2012), available at: <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201206.pdf>.

⁷ See Petition of USTelecom for Declaratory Ruling that Incumbent Local Exchange Carriers Are Non-Dominant in the Provision of Switched Access Services ("Petition"), WC Docket No. 13-3, at 26 (December 19, 2012).

⁸ *Id.*

⁹ Meeting presentation, Meeting of the Technological Advisory Council, at 33 (March 30, 2011), available at: <http://transition.fcc.gov/oet/tac/TACMarch2011mtgfullpresentation.pdf>.

As indicated above, today's market is characterized by cross-platform competition from wireless, cable VoIP, and other alternatives as well as the ongoing migration of consumers from legacy TDM networks to IP-based networks. These conditions in the voice services market undermine any basis for continued enforcement of dominant carrier regulation of ILEC switched access services. When the basis for such regulations goes away, so should the regulations.

V. Continuing to Impose Dominant Carrier Regulation on ILEC Switched Access Services Would Be Contrary to Rule of Law Principles

Where evidence overwhelmingly indicates that regulations have outlived the factual assumptions on which they were based, those regulations should be speedily removed. From a rule of law standpoint, enforcement of mandates that are outdated and lack justification is inequitable and arbitrary. Imposing regulations in the absence of a legitimate basis for doing so involves an abuse of agency authority and belies the limited role of administrative agencies in our constitutional system. Similarly, conjuring up thin *ad hoc* rationales to prolong the life of regulations that have outlived their reason for being epitomizes administrative arbitrariness. Moving the goal posts to preserve regulatory controls runs contrary to the rule of law.

Thus, continued imposition of dominant carrier regulations on ILEC switched access services would run contrary to the rule of law. As indicated above, market data and trends have undercut the monopolistic assumptions of the three-decades-old dominant carrier regime. Faced with eroding market share and cross-platform competition, ILECs are not dominant in providing interstate mass market and enterprise switched access voice services. Prolonged subjection of ILEC switched access services to dominant carrier regulation would amount to nothing more than a raw exercise of arbitrary administrative power.

Significantly, the *AT&T Non-Dominance Order* (1995) is an analogous agency precedent that, if consistently applied, decisively dictates a non-dominant finding regarding ILEC switched access services. In that order, the Commission recognized the existence of market competition and issued non-dominance findings where static indicators were less favorable than in this case.

In reclassifying AT&T as non-dominant in providing interstate interexchange services, the Commission took stock of AT&T's competitors, the extent to which they eroded AT&T's market share and induced subscribers to switch, and their the potential competitive ability to constrain AT&T's pricing.¹⁰ The *Order* cited AT&T's decade-long decline in market share to 55.2% of revenue and 58.6% of minutes in support of its non-dominance finding.¹¹

But the voice services market is even more competitive than it was in the mid-1990s. Compared to AT&T's cited market share, for instance, the precipitous drop in ILEC switched access market share is greater still. As indicated earlier, ILEC market share has dropped to less than 33% of subscribers. In terms of voice minutes, ILEC switched access market share fell below 33% in 2011.¹² Moreover, ILECs on the PSTN average around 130 billion voice minutes per month compared to some 195 billion wireless minutes.¹³ Failing to find ILEC switched access services are non-dominant would be an unreasonable departure from precedent.

Continued enforcement of dominant carrier regulation would also pose lack of parity problems. ILEC switched access lines are in steep and steady decline, while VoIP and wireless subscriptions continue to rise. Yet VoIP services offered by competitive local exchange carriers (CLECs) and cable providers are not subject to dominant carrier regulations. Likewise, through

¹⁰ See *In re Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, Order*, 11 FCC Rcd 3271, 3293-3309 (1995).

¹¹ See *id.* at 3307 ¶ 67.

¹² Petition, *infra*.

¹³ See *id.* at 33 (citing Richard N. Clarke, "The case for reforming regulation of PSTN voice services," 2, *Journal of Information Policy*, 287, 294 (2012)).

its *Mobile Services Order* (1994), the Commission accorded wireless voice services non-dominant carrier treatment by forbearing from several onerous common carrier regulations.¹⁴

VI. Continuing to Impose Costly Dominant Carrier Regulation on ILEC Switched Access Services Harms Consumers

Responding to legacy regulatory requirements, ILECs must pour financial resources into outdated networks in order to satisfy regulatory requirements rather than consumer demand. The steep decline in ILEC switched access lines has critical bearing in this regard. Relative costs of complying with dominant carrier regulations increases as the ILEC switched access subscriber base decreases. Regulatory compliance is a component of those increasing costs.

Costs also result from the competitive disadvantage such regulatory provisions create for ILECs *vis-à-vis* voice service providers unsaddled by such regulations. ILECs seeking to attract or retain subscribers or making other critical business decisions face extra regulatory hurdles, including stringent tariff filing requirements, that can slow their responsiveness and result in lost economic opportunities. As the Commission has previously described the differential treatment:

Dominant carriers are subject to price cap or rate-of-return regulation, and must file tariffs for some services – on a minimum of seven days' notice and often more – and usually with cost support data. Non-dominant carriers, on the other hand, are not subject to rate regulation and may file tariffs, on one day's notice and without cost support that are presumed lawful. In addition, non-dominant carriers are required to wait only 30 days for their applications to discontinue, reduce, or impair service to be granted, as opposed to a 60-day grant period for dominant carriers. Finally, dominant carriers are eligible for presumptive streamlined treatment for fewer types of transfer of control under section 214 than non-dominant carriers.¹⁵

¹⁴ See Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services, *Second Report and Order*, 9 FCC Rcd 1411 (2004) ("*Mobile Services Order*").

¹⁵ Petition of Qwest Corporation for Forbearance in the Omaha Metropolitan Statistical Area, *Memorandum and Order* ("*Qwest Omaha MSA Order*"), 20 FCC Rcd 19415, 19422 ¶11 (2005) (internal cites omitted).

VII. Continuing to Impose Dominant Carrier Regulation on ILEC Switched Access Services Would Impede the Ongoing IP Transition

Dominant carrier compliance costs drain financial resources from investment in more technologically advanced services. As the Commission previously has acknowledged, legacy regulations strand investments in older and less productive networks.¹⁶ This deters investment and innovative resources from the IP transition that the Commission now promotes.

Relief from dominant carrier regulation would therefore assist the transition to IP-based networks and the retirement of the public switched telephone network (PSTN). Reduced costs would free up resources that can then be directed to building and operating next-generation network services offering superior service and reliability.

Dominant carrier regulation will become superfluous once the legacy PSTN is retired. As consumers turn exclusively to IP-based services, prolonging the life of such regulation now makes no sense.

VIII. The Commission Should Consider Deregulatory Presumptions

The dynamism of today's advanced telecommunications services market calls for a less regulatory policy approach. Adoption of deregulatory evidentiary presumptions should be an important tool for the Commission to remove unnecessary and harmful regulatory burdens while it prevents consumer harm where actual evidence supports targeted agency action.

Nationwide market conditions call for a nationwide ruling on the classification of ILEC switched access services. And any competitive concerns regarding a particular geographic area can be addressed with targeted remedies, subject to a deregulatory presumption that can be rebutted on a case-by-case basis.

The Commission made a nationwide finding in the *AT&T Non-Dominance Order*. More to

¹⁶ See *Connecting America: The National Broadband Plan*, at 49, 59.

the point, in its *Program Access Order* (2012), the Commission replaced the ban on exclusive contracts by vertically-integrated cable programmers with a rebuttable presumption of market competitiveness, albeit with extra qualifications attached.¹⁷ This petition offers the Commission a timely opportunity to build on the approach taken in the *Program Access Order* by employing a more straightforward deregulatory presumption to apply once ILEC switched access services are reclassified as non-dominant.

VIII. Conclusion

For the foregoing reasons, the Commission should act in accordance with the views expressed herein.

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February 25, 2013

¹⁷ *In re Revision of the Commission's Program Access Rules, Report and Order and Further Notice of Proposed Rulemaking ("Program Access Order")*, 27 FCC Rcd. 12619-37 (2010).