BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matters of:	)	
	)	
Appropriate Framework for Broadband Access to the Internet over Wireline Facilities	)	CC Docket No. 02-33
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Universal Service Obligations of Broadband Providers	)	
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Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review -- Review of Computer III and ONA Safeguards and Requirements	)	CC Docket Nos. 95-20, 98-10
	)	
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OPPOSITION TO PETITION FOR RECONSIDERATION

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OPPOSITION TO PETITION FOR RECONSIDERATION

Time Warner Telecom Inc. ("TWTC"), by its attorneys, and in accordance with the public notice in the above-referenced proceedings,[1] hereby files this Opposition to the Petition for Reconsideration filed by Verizon.[2]

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[1] *See Petition for Reconsideration of Action in Rulemaking Proceeding*, 70 Fed. Reg. 74016 (Dec. 14, 2005).

[2] *See* Verizon, *Petition For Limited Reconsideration of Title I Broadband Order*, CC Dkt. Nos. 02-33 *et al.*, (filed Nov. 16, 2005) ("*Verizon Petition*").

I. Introduction And Summary

In the *Broadband Classification Order*[3] that is the subject of Verizon's petition, the Commission demonstrated a stunning disregard for the facts and a dismissive approach to basic competition policy. In that order, the Commission eliminated bedrock common carrier requirements, adopted in the *Computer Inquiry* proceedings, applicable to transmission used to provide broadband internet access to business customers. It did so without considering the level of competition in the relevant business markets, indeed without even *mentioning* the business markets. Apparently aware that this result threatens the viability of competition for business customers, the Commission preserved common carrier regulation for stand-alone broadband transmission used by business customers. Retaining such regulation is, by itself, insufficient to protect competition, because the elimination of *Computer Inquiry* regulation offers the incumbents clear opportunities to discriminate against competitive providers of broadband internet access. But Verizon would like more such opportunities.

Accordingly, Verizon has now asked the Commission to eliminate common carrier regulation from stand-alone packetized broadband transmission used primarily to serve business customers. Such a request could only be justified by the most blatantly unfounded assertions regarding the level of competition in the business market, and so it is with Verizon's petition. Specifically, Verizon asks for removal of "broadband transmission services" from common carrier regulation because "…no local telephone company has market power over broadband transmission services." *Verizon Petition* at 13. Indeed, Verizon argues that, "…local telephone companies have *never* had market power with respect to these services." *Id.* (emphasis added).

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[3] *See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities et al.*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) ("*Broadband Classification Order*").

Verizon claims that incumbent LECs lack market power over broadband transmission facilities because (1) wireline competitors have allegedly deployed substantial broadband transmission facilities; (2) Verizon (along with other incumbent LECs) controls a relatively small share of the *retail* ATM and frame relay market; and (3) intermodal competitors such as cable and fixed wireless purportedly provide robust competition to traditional wireline broadband transmission services.

No one, probably not even Verizon, is persuaded by these claims. They do not withstand even the most cursory scrutiny. It is certainly true that a finding of market power can be the basis for the establishment of a regulatory compulsion to offer service on a common carrier basis. *See id.* at 8. But contrary to Verizon's claims, incumbent LECs retain overwhelming market power over broadband transmission facilities used to serve all but the largest business customers.[4] The Commission has long held that the incumbent LECs remain dominant in the provision of such broadband transmission facilities and, as a result, the FCC retains substantial (though inadequate) regulation to limit the harmful consequences to consumer welfare of the incumbent LECs' market power. The Commission's recent findings in the *Triennial Review Remand Order* and *Bell/IXC Merger Orders* only reinforce the conclusion that incumbent LECs retain substantial market power over broadband transmission facilities used to serve business customers. This market power is derived primarily from the fact that, as the Justice Department explained in its review of Verizon's purchase of MCI, incumbents like Verizon still own the only loop facilities capable of providing broadband business class service to the "vast majority" of commercial buildings in the country.

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[4] As discussed *infra*, competitive carries can only construct broadband transmission facilities to businesses where the revenue opportunity is very high.

Without significant facilities-based competition, the removal of common carrier regulation from stand-alone broadband offerings as Verizon requests will obviously leave competitive carriers open to even greater price-and non-price discrimination than is already the case after the *Broadband Classification Order*. The fact that Verizon has restricted its petition to relief for packetized services is of little comfort to competitive carriers. Because of the inherent advantages offered by packet-based services over TDM-based services, carriers without access to packetized transmission facilities at just and reasonable rates will be increasingly unable to compete.

In sum, Verizon's petition asks the Commission once again to ignore market realities and to grant incumbents relief based on nothing more than baseless, conclusory statements and the incumbents' heartfelt desire to eliminate constraints on their ability to capture the full value of monopoly rents. The awkward truth is that the incumbents continue to possess enduring market power over the broadband transmission facilities needed to serve business customers, and granting Verizon's petition would result in serious harm to consumer welfare. The trend of unfounded deregulation must stop here and now. The Commission must reject Verizon's petition and retain common carrier regulation over the incumbent LECs' broadband transmission services, whether packetized or not.

II. The Incumbent LECs Retain Market Power Over Broadband Transmission Facilities Serving Business Customers

The Commission has repeatedly found that the incumbent LECs dominate the market for broadband transmission facilities used to serve business customers. Just 10 months ago, the Commission concluded that competitors generally cannot deploy transmission facilities for the purpose of providing DS1 or DS3 service because the revenue opportunities associated with such services are too small to cover the costs of loop deployment.[5] Only two months ago, in conditionally approving Verizon's purchase of MCI, the Commission again concluded that, in the vast majority of commercial buildings in the country, the incumbent LECs control the only loop transmission facility suitable for business class broadband services.[6] The DOJ came to the identical conclusion with respect to the commercial buildings in Verizon's region, holding that "[f]or the vast majority of commercial buildings in its territory, Verizon is the only carrier that owns a last-mile connection to the building. Thus, in order to provide voice or data telecommunications services to customers in those Verizon-only buildings, competing carriers typically must lease the connection from Verizon as Local Private Line service."[7]

Market conditions since the passage of the 1996 Act demonstrate that there is little chance that this situation will change in the foreseeable future. As the DOJ recently confirmed, market entry and construction of broadband transmission facilities is "a difficult, time consuming and expensive process." *Id.* ¶ 27. Even Verizon admits that in the 9 years since the 1996 Act, there has only been a 25 percent increase in the still miniscule number of buildings served by

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[5] *See, e.g., Unbundled Access to Network Elements, et al.,* Order on Remand, 20 FCC Rcd 2533, ¶ 149 (2005) ("*Triennial Review Remand Order*"); *see also Review of the Section 251 Unbundling Obligations of Local Exchange Carriers, et al*., Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, ¶ 298 (2003), (*"Triennial Review Order"*) *vacated in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) *cert. denied*, 125 S. Ct. 313 (2004).

[6] *See Verizon Commc'ns Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, FCC 05-184, ¶ 39 (rel. Nov. 17, 2005) ("The record also indicates that, for many buildings, there is little potential for competitive entry, at least in the short term. As the Commission has previously recognized, carriers face substantial fixed and sunk costs, as well as operational barriers, when deploying loops, particularly where the capacity demanded is relatively limited.").

[7] *In re United States v. Verizon Commc'ns Inc*., Civil Action No. 1:05CV02103, Compl. ¶ 13 (D.D.C. Oct. 27, 2005) ("*Compl.*").

competitive fiber (from 24,000 to approximately 32,000).[8] In addition, the limited increase in CLEC loop deployment over the years has more than been reversed by the recent purchases of AT&T by SBC and MCI by Verizon.[9] Assuming that there are between 739,000 and 3 million commercial buildings in this country (*see Triennial Review Remand Order* ¶ 157), competitive carriers have constructed wireline loop facilities to, at the very most, 4.3 percent of commercial buildings nationwide.[10] This means that the incumbent LECs possess the only loops serving a staggering 95 percent of these commercial buildings. Given that it has apparently taken the entire competitive carrier industry 9 years to add only 9,000 high capacity broadband loops in the business markets, the incumbent LECs' market share shows no sign of diminishing any time soon.

The fundamental obstacle to loop deployment is the cost of connecting new fiber connections to end user locations. Both packetized and TDM-based services are transmitted over the same copper and fiber loops that the incumbents control today. Simply because packetized services rely on more advanced electronics does not magically make the construction of the

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[8] In the Special Access Pricing Proceeding initiated this year, Verizon alleged that CLECs have deployed loops serving "31,467+" buildings. *See* Verizon Comments, WC Dkt. No. 05-25 Attachment D, Decl. of Quintin Lew, at Attachment B (filed June 13, 2005). Verizon indicates that, in 1996, there were only 24,000 buildings "served directly by CLEC fiber." *Id.* at Attachment C, Decl. of William Taylor, Table 10, at 5.

[9] For example, in its Final Annual Report before its merger with SBC, AT&T Reported that it served 6,776 buildings over its own facilities. *See* AT&T Corp. SEC Form 10-K Annual Report for Fiscal Year Ended Dec. 31, 2004, at 8 (filed Mar. 9, 2005). The DOJ provided limited divestitures of only several hundred of the already miniscule number of loops deployed by both Verizon and MCI. *See In re United States v. Verizon Commc'ns Inc*., Civil Action No. 1:05CV02103, *(Proposed Amended) Final Judgment* at App. A (D.D.C. Nov. 28, 2005); *United States v. SBC Commc'ns Inc.*, Civil Action No. 1:05CV02102, *(Proposed Amended) Final Judgment* at App. A (D.D.C. Nov. 28, 2005).

[10] 32,000 loops divided by 739,000 builds equals .0433 or 4.3 percent of buildings served by CLEC loops.

underlying copper or fiber any less costly. In light of the similarity in construction costs for loops regardless of the type or capacity, the Commission has held that the key variable for determining whether a competitor can efficiently deploy loop facilities is the revenue opportunity *(i.e.*, the price level) associated with a service. *See Triennial Review Remand Order* ¶ 149; *Triennial Review Order* ¶ 100.

The prices charged for packetized services demonstrate that loop deployment is still not efficient where carriers seek to offer the packetized successors to TDM-based DS1 and DS3 services. For example, the incumbents charge similar prices for DS3 service and Ethernet service, demonstrating that the revenue opportunities are the same. BellSouth's month-to-month rate for their LightGate 2 DS3 service is $3,780,[11] while its month-to-month rate for 1 Gbps Metro Ethernet service is $2,850.[12] Similarly, SWBT's (at&t's) month-to-month rate for 2 DS3s is $3,900 in Texas[13] while the monthly rate for its Gigabit Ethernet Metropolitan Area Network product on a 12 month term is $3,300.[14] It is generally inefficient (notwithstanding the conclusion reached in the *Triennial Review Remand Order*) for carriers to incur the sunk costs of loop construction solely for purposes of providing 2 DS3s (or less) of capacity.[15] It follows that

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[11] *See* BellSouth, Tariff FCC No. 1, § 7.5.9(A)(3)(b).

[12] *See id.* § 23.5.2.23(A)(1)(c).

[13] *See* Southwestern Bell Tel. Co., Tariff FCC No. 73, § 20.5.2(M).

[14] *See id.* § 7.3.12(M)(1)(a). It does not appear from the tariff that SWBT offers month-to-month Ethernet rates, but rather a month-to-month "extension" rate off of an existing term contract. *See id.*

[15] *See ex parte* presentation of MiCRA *et al.*, WC Dkt. Nos. 04-313 *et al.*, at 5 (filed Oct. 18, 2004) (citing CLEC filings for the proposition that "KMC will not build laterals unless a customer purchases at least 3 DS3s…XO will not construct laterals unless combined customer demand in a building reaches at least 3 DS3s…Xpedius requires a bare minimum of 3 DS3s in customer demand before constructing laterals…For buildings over 500 feet from its fiber ring,

carriers would be unable to deploy loops for the purpose of providing Ethernet services for which the revenue opportunities are actually slightly lower.

In light of the barriers to deployment of both packetized and TDM-based broadband transmission facilities and the incumbent LECs' overwhelming dominance in that market, Verizon and the incumbent LECs' alleged market share of the *retail* ATM and frame relay markets is irrelevant to a market power analysis. Because of their dominance, the incumbent LECs can control the price and supply of services that rely on their bottleneck loop facilities. Indeed, in its scrutiny of the Verizon/MCI merger, the DOJ concluded that CLECs reselling the Verizon's own broadband transmission facilities would not be a competitive constraint on the incumbent LECs' market power "because Verizon would control the price of the resold circuits." *Compl.* ¶ 25. The Commission came to a similar conclusion in the *Triennial Review Remand Order*, holding that the availability to CLECs of solely resold "services priced by, and largely within the control of the incumbent LEC," (*Triennial Review Remand Order* ¶ 48) would encourage the incumbent LECs to abuse their market power over broadband transmission facilities.

Evidently recognizing its continued dominance of the wireline broadband transmission market, Verizon restates the incumbents' tired argument, repeatedly rejected by the Commission, that cable companies' hybrid fiber coaxial ("HFC") networks and fixed wireless services serve as effective intermodal competitors to traditional wireline broadband transmission facilities. The Commission should reject this argument once more.

ATI requires that a customer order OC-3 service before building…Echelon and SNiPLink report that it is never economic to self deploy loops to their bases of DS1 service customers.") (internal citations omitted).

In the *Triennial Review Order*, the Commission determined that HFC networks generally do not serve businesses and that "[t]he cable companies have remained focused on mass market, largely residential service consistent with their historic residential network footprints." *Triennial Review Order* ¶ 52. The Commission concluded that, to the limited extent that cable companies were serving customers in the enterprise market, they were not selling HFC-based cable modem service but rather traditional wireline broadband transmission services. As the FCC has held, a cable company's use of its fiber infrastructure to provide enterprise class wireline broadband transmission services cannot be considered "intermodal" competition[16] any more than electric utility Pepco's investment and grant of fiber-backbone rights to cable modem provider Starpower can be considered "intermodal" competition in the consumer broadband market.[17]

The Commission reiterated and reinforced these findings in the *Triennial Review Remand Order*. There, the Commission again concluded that most businesses served by cable companies were "not large enterprise customers, but mass market small businesses that would never generate enough traffic to require a high-capacity loop." *Triennial Review Remand Order* ¶ 193. Cable companies focus on selling cable modem services to "home offices or very small stand-alone businesses, neither of which typically requires high-capacity loop facilities." *Id.* Most

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[16] For example, the Commission rejected Qwest's assertion that it had lost customers to "intermodal competition" from cable companies because "those losses are to the circuit-switched telephony service offered by Cox's competitive LEC affiliate, rather than to its cable operation." *Triennial Review Remand Order* ¶ 193, n.514.

[17] Starpower was started as a joint venture between Pepco, the electrical utility in the D.C./Baltimore area, and RCN. RCN's business plan was made possible by utilizing Pepco's fiber backbone network that it had initially used for the administration of its power services. In late 2004, RCN bought Pepco out of the joint venture. However, "Starpower continues to lease certain portions of Pepco's fiber system and Pepco provides construction and construction management services to Starpower." RCN Corp. SEC Form 10-Q Quarterly Report for Quarterly Period Ended Sept. 30, 2005, at 7 (filed Nov. 9, 2005).

businesses have thus far apparently viewed cable modem service as insufficient for their needs, because “bandwidth, security, and other technical limitations of cable modem service render it an imperfect substitute for service provided over DS1 loops.” *Id.* Finally, the absence of cross elasticity of demand between cable modem service and wireline broadband transmission facilities indicates that they are not substitutes.[18]

The Commission has similarly concluded that wireless service is not a substitute for wireline broadband transmission services. In the *Triennial Review Remand Order*, the Commission found that “[t]he record does not indicate that other intermodal options, such as fixed wireless and satellite, offer significant competition in the enterprise loop market.” *Triennial Review Remand Order* ¶ 193, n.508. In its most recent report regarding competition in the high-speed internet access market, the Commission found that satellite and fixed wireless broadband represent less than two percent of the total high-speed lines in service.[19] Furthermore, the fact that fixed wireless products are often orders of magnitude less expensive than the incumbent LECs’ wireline broadband transmission offerings, yet have been unable to capture more than a tiny foothold in the marketplace, demonstrates that fixed wireless and wireline broadband transmission services are not in the same product market. For example, First Avenue Networks (as of late 2004) had been unable to sell more than 25 leases for its ExpressLink product, despite the fact that its wireless footprint covers the entire nation and its OC-3 level

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[18] *See Triennial Review Remand Order* ¶ 194 (“Commenters also note that businesses that do require DS1 loops are willing to pay significantly more for them than the cost of a cable modem connection, which also indicates that the two are not interchangeable. Finally, at least two competitors maintain that, based on their internal data, they rarely lose enterprise customers to cable providers.”).

[19] *See* Industry Analysis and Technology Division, Wireline Competition Bureau, *High-Speed Services for Internet Access: Status as of December 31, 2003*, Table 1, Chart 2 (June 2004).

product is priced at less than seven percent of the tariffed rate of an ILEC DS-1 circuit ($500 per year).[20]

Verizon does not even attempt to explain why past Commission holdings regarding intermodal competition are wrong (nor could it). Rather, it trots out the *very same* studies from In-Stat/MDR regarding cable modem usage submitted by BellSouth (if not others) in the *Triennial Review Remand Order* record.[21] Cbeyond responded to BellSouth's reliance on the In-Stat study.[22] In the *Triennial Review Remand Order*, the FCC relied on Cbeyond's *ex parte* (*see Triennial Review Remand Order* ¶ 193, nn. 511, 512) in its determination that cable modem service is not a substitute for wireline broadband transmission services offered to business. The Commission thus rejected the In-Stat study then[23] and it should reject it now.[24]

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[20] *See* Comments of First Avenue Networks, Inc, ET Dkt. Nos. 95-183 *et al.*, Declaration of Simon Wilkie, ¶ 8 (filed Dec. 2, 2004).

[21] *Compare* Letter of Jonathan Banks, VP, Executive and Federal Affairs, to Marlene H. Dortch, Secretary, FCC, WC Dkt. Nos. 04-313 *et al.*, at 4 (filed Nov. 8, 2005) ("A recent study by In-Stat/MDR found that 41 percent of 'enterprises,' 32 percent of 'middle market businesses,' and 44 percent of small businesses were using cable modem service in their main offices for some high-capacity services.") (*citing* In-stat/MDR Study) *with Verizon Petition* at 14-15 ("[A] study by In-Stat/MDR found that 41 percent of 'enterprises'…were using cable modem service...With respect to the 'middle market' In-Stat/MDR reported that 32 percent were using cable modem…") (*citing* In-Stat/MDR study).

[22] *See* Letter from Thomas Jones, Counsel, Cbeyond, to Marlene H. Dortch, Secretary, FCC, WC Dkt. Nos. 04-313 *et al.* (filed Nov. 19, 2004).

[23] Indeed, in the *Triennial Review Remand Order*, the Commission cited with approval McLeod's Reply Comments stating as follows, "Assuming *arguendo* that 'some' estimated number of businesses are using 'some' cable modem services, there is not record evidence that these services are used for anything more than Internet access service or video. Nor is there record evidence that businesses are substituting cable modem service for DS1 and high-capacity telecommunications services that small, medium and large businesses require." *Triennial Review Remand Order* ¶ 193, n.511.

[24] By analogy, for Verizon's argument to hold water, it would have to be true that because some large enterprises use DS1 loops (which they undoubtedly do), DS1 and OCn loops serve as

III. Existing And Future Regulations Designed To Mitigate The Incumbent LECs' Market Power Over Broadband Transmission Facilities Serving Businesses Would Be Eliminated If Verizon's Petition Were Granted

Common carrier regulation is the only effective way to limit the incumbent LECs' opportunities to leverage their market power over broadband transmission facilities into the retail broadband transmission markets through price and non-price discrimination.[25] To be sure, the

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substitutes for one another in all situations and for all applications. This absurd argument must be rejected.

[25] *See Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Section 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules,* Memorandum Opinion and Order, 14 FCC Rcd 14712 ¶ 107 (1999), *vacated*, *Ass'n of Comm. Enters. v. FCC*, 235 F.3d 662 (D.C. Cir. 2001) ("In addition, incumbent LECs, which are both competitors and suppliers to new entrants, have strong economic incentive, to preserve their traditional monopolies over local telephone service and to resist the introduction of competition that is required by the 1996 Act. More specifically, an incumbent LEC has an incentive to: (1) delay interconnection negotiations and resolution of interconnection disputes; (2) limit both the methods and points of interconnection and the facilities and services to which entrants are provided access; (3) raise entrants' costs by charging high prices for interconnection, network elements and services, and by delaying the provisioning of, and degrading the quality of, the interconnection, services, and elements it provides. An incumbent LEC has similar, and probably greater, incentive to deny special accommodations required by competitive LECs seeking to offer innovative advanced services that the incumbent may not even offer. As noted at the outset, this view of the incumbent LECs' incentives and abilities is the fundamental postulate of the basic cornerstones of modern telecommunications law -- the MFJ and the 1996 Act."); *Application of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, Memorandum Opinion and Order, 15 FCC Rcd 14032, ¶ 188 (2000) ("Specifically, given their monopoly control over exchange access services, each Applicant currently has the ability to discriminate against rivals providing interexchange services, in favor of its own interexchange operations, by denying, degrading, or delaying access on the originating and terminating ends. We focus our discussion on discrimination with respect to the potential for terminating access, because we find that the merged entity's incentive to engage in this type of discrimination will increase significantly as a result of the merger."); *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area; Policy and Rules Concerning the Interstate, Interexchange Marketplace,* Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, 12 FCC Rcd 15756, ¶ 111 (1997) ("We noted that there are various ways in which a BOC could attempt to discriminate against unaffiliated interLATA carriers, such as through poorer quality

Commission must strengthen the existing common carrier regulatory regime to protect competition in the business market. But even in the dangerously unregulated environment that exists today, the Commission has relied on its Title II authority to regulate the incumbents' business broadband service to protect, to some degree, competition.

For example, in order to prevent incumbent LECs from leveraging their market power in transmission facilities to advantage their newly formed interstate affiliates (which can now provide interstate ATM and Frame Relay services), the Commission has long prohibited the incumbent LECs from offering "growth discounts"[26] for wholesale broadband transmission facilities. These discounts "create an artificial advantage for BOC long distance affiliates with no subscribers, relative to existing IXCs and other new entrants." *Id.* Only last year, the Commission struck down a BellSouth special access volume pricing plan because it is "akin to [a] growth discount[]."[27] Of course, if Verizon's petition were granted, the FCC could no longer invalidate plans like that of BellSouth.

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interconnection arrangements or unnecessary delays in satisfying its competitors' requests to connect to the BOC's network.") (footnote omitted).

[26] *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers; Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, ¶ 134 (1999) ("*Pricing Flexibility Order*") ("Growth discounts refer to pricing plans under which incumbent LECs offer reduced per-unit access service prices to customers that commit to purchase a certain percentage above their past usage, or plans that offer reduced prices based on growth in traffic placed over an incumbent LEC's network.").

[27] *AT&T Corp. v. BellSouth*, Memorandum Opinion and Order, 19 FCC Rcd 23898, ¶ 38, n.105 (2004).

Furthermore, the incumbent LECs have been subject to price caps since 1990 when the FCC moved away from subjecting dominant carriers to rate-of-return regulation.[28] As the Commission recently reiterated, price caps are used to approximate prices that a "a competitive firm *would* charge."[29] In other words, price caps are necessary in a market that is not fully competitive, such as broadband transmission services. Even where incumbents have been relieved of price cap regulation pursuant to the Commission pricing flexibility rules for special access, incumbents are still subject to "dominant" carrier regulation.[30]

More importantly, in light of the incumbent LECs' continuing exploitation of their market power over broadband transmission services, the Commission, pursuant to its power to regulate *common carriers*, released an NPRM investigating possible changes to the current pricing flexibility regime. *See generally Special Access NPRM*. In that proceeding, the Commission recognized the incumbents' enduring market power over special access facilities by tentatively concluding, among other things, that incumbent LECs should remain under price caps

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[28] *See generally Policy and Rules Concerning Rates for Dominant Carriers*, Second Report and Order, 5 FCC Rcd 6786 (1990).

[29] *Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Service*, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994, ¶ 61 (2005) ("*Special Access NPRM*") (emphasis added).

[30] *See Pricing Flexibility Order* ¶ 151 ("We conclude that the Phase II regulatory relief we grant below is warranted when competitors have established a significant market presence in an MSA, and we need not require a showing of non-dominance. Upon a Phase II showing, we will not grant incumbent LECs all the regulatory relief we afford to non-dominant carriers. Specifically, incumbent LECs in Phase II are still required to file generally available tariffs, while non-dominant LECs and CAPs are permitted, but not required, to file tariffs. Furthermore, our relief is limited to certain services and certain areas, and will be granted only upon satisfaction of the triggers we adopt here. *Thus, Phase II relief is not tantamount to non-dominant treatment.*") (emphasis added).

with a revised x-factor to account for new productivity growth.[31] Crucially, the Commission did not contemplate removing dominant carrier status from the incumbent LECs in their offering of broadband transmission services.

The Commission is also appropriately considering whether to implement special access performance metrics pursuant to its common carrier authority under Sections 272(e) and 202(a) to prevent incumbent LECs from exercising non-price discrimination over critical broadband transmission inputs. Such discrimination could (and does) include slow rolling of orders to competitive carriers or simply advantaging an incumbent LEC's own subsidiaries or internal divisions over competitive carriers when provisioning wireline broadband transmission facilities. Even the incumbent LECs themselves recognize that their poor special access performance calls out for regulation. Several months ago they jointly filed a proposal (although far short of what is necessary) for special access performance metrics.[32] Of course, the incumbent LECs only proposed these rules because they were bargaining in the shadow of the law; in the absence of common carrier regulation, the FCC would have no authority to promulgate rules regarding

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[31] *See id.* ¶ 24 ("We tentatively conclude that we should continue to regulate special access rates under a price cap regime and that the price cap regime should continue to include pricing flexibility rules that apply where competitive market forces constrain special access rates. This approach will allow the market to determine rates where competitive market forces exist, while protecting special access consumers from unreasonable rates where competition is lacking.").

[32] *See* Service Quality Measurement Plan; Joint BOC Section 272(e)(1) Performance Metrics Proposal, attached to Letter of Mary L. Henze, VP, BellSouth *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Dkt. Nos. 01-321 *et al.* (filed Dec. 20, 2004) ("*Joint BOC Proposal*"). This identical plan was adopted as a condition of the Verizon/MCI and SBC/AT&T mergers. *Compare Joint BOC Proposal with* Attachment A, attached to ex parte letter of Susanne Guyer, Verizon, to Kevin Martin, Chairman, FCC, WC Dkt. No. 05-75 (filed Oct 31, 2005) *and* Attachment A, attached to ex parte letter of Thomas Hughes, SBC, to Kevin Martin, Chairman, FCC, WC Dkt. No. 05-65 (filed Oct. 31, 2005). However, the performance metrics are only of a limited duration, after which the incumbent LECs will still retain market power.

special access performance metrics and the incumbent LECs would have little incentive to come to the negotiating table.

IV. Even If The Business Broadband Transmission Markets Were Competitive, Commission Precedent Requires The Retention Of Common Carrier Regulation

Finally, the core provisions of Title II, Sections 201, 202 and 208, do not apply only to dominant carriers. These sections have long been applied to all providers in both competitive and non-competitive markets.[33] Accordingly, even if the broadband transmission market were competitive (which it is not), the Commission must continue to apply these sections to the incumbent LECs' offering of broadband transmission service. Only this year, the Commission reiterated that "[e]ven in *substantially competitive markets*, there remains a risk of unjust or discriminatory treatment of consumers, and sections 201 and 202 therefore continue to afford important consumer protections."[34] This is because even in substantially competitive markets

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[33] *See Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance For Broadband Personal Communications Services; Biennial Regulatory Review - Elimination or Streamlining of Unnecessary and Obsolete CMRS Regulations; Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers; Further Forbearance from Title II Regulation for Certain Types of Commercial Mobile Radio Service Providers; GTE Petition for Reconsideration or Waiver of a Declaratory Ruling,* Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 16857, ¶ 15 (1998) ("*PCIA Forbearance Order*") ("Sections 201 and 202, codifying the bedrock consumer protection obligations of a common carrier, have represented the core concepts of federal common carrier regulation dating back over a hundred years. Although these provisions were enacted in a context in which virtually all telecommunications services were provided by monopolists, they have remained in the law over two decades during which numerous common carriers have provided service on a competitive basis.").

[34] *Petition of SBC Commc'ns Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services*, Memorandum Opinion and Order, 20 FCC Rcd 9361, ¶ 17 (2005) ("*SBC Forbearance Order*") (emphasis added).

such as CMRS[35] "carriers may still be able to treat some customers in an unjust, unreasonable, or discriminatory manner." *PCIA Forbearance Order* ¶ 23. For this reason, the Commission has "*never* granted a petition for forbearance from [these sections]." *SBC Forbearance Order* ¶ 17 (emphasis added). Even when the Commission has determined a carrier to be non-dominant, the Commission has continued to apply Sections 201 and 202 as well as the complaint procedures of Section 208. *See PCIA Forbearance Order* ¶ 17. Likewise, because the broadband transmission marketplace is not even "substantially competitive," the Commission should not eliminate these most basic protections against discriminatory behavior.

Nor do the Commission's decisions in the past to allow certain types of service providers to choose between common to non-common carrier status support similar treatment for incumbent LEC broadband transmission service. Contrary to Verizon's claim, (*see Verizon Petition* 9-12) the Commission did not rely on the mere presence of competition in those cases as the basis for giving service providers the choice of classification. Rather, in nearly every case where the Commission or courts have granted a carrier the choice to act as a private or common

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[35] The FCC's 1998 CMRS Report demonstrated that the CMRS market was highly competitive with multiple non-dominant providers competing in the same market: "There are at least three mobile telephone providers in each of the 50 largest Basic Trading Areas ('BTAs') and 97 of the 100 largest BTAs. Currently, three or more mobile telephone operators are providing service in BTAs containing approximately 219 million people." *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Third Report, 13 FCC Rcd 19744 at 19751 [paragraph number unavailable] (1998); "To date, approximately 273 BTAs, containing over 219 million POPs, have three or more mobile telephone operators offering service. This represents 87 percent of the nation's total POPs. While over one half of these BTAs have only three mobile telephone operators, 71 BTAs have four providers, 51 BTAs have five providers, and 13 have six providers. These 135 BTAs contain over 68 percent of the nation's POPs." *Id.* at 19768.

carrier, it has done so because of the availability of other *common carrier* offerings, not merely other *competitive* offerings.[36]

For example, in *Wold*, the court found it reasonable for carriers to offer satellite transponder service on a private carrier basis because "the Commission saw no danger that transponder sales would 'drastically curtail the availability of transponders left for common carrier use.'"[37] When the Commission revised its transponder sales rules over a decade later in *DISCO I*, the Commission again relied upon the continued availability of common carrier transponders to justify its rule permitting satellite operators to elect to operate transponders on a common carrier or non-common carrier basis.[38] The same analysis has been applied to the

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[36] Verizon also misconstrues the holding of *Southwestern Bell*. Contrary to Verizon's assertion, that case did not analyze Southwestern Bell's market power over dark fiber services, but rather considered whether Southwestern Bell's filing of dark fiber ICB contracts with the FCC transforms individual case basis (ICB) dark fiber offerings into a "common carrier" service. The court held that the mere filing of contracts did not make the ICB offerings common carriage. The court remanded to the Commission to determine whether Southwestern Bell "held themselves out to all potential users of dark fiber." *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1483 (D.C. Cir. 1994) ("*Southwestern Bell*"). If such a "holding out" occurred, then the ICB offerings would be considered a common carrier offering regardless of Southwestern Bell's market power over dark fiber. *See National Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 608-09 (D.C. Cir. 1976).

[37] *Wold Commc'ns, Inc. v. FCC*, 735 F.2d 1465, 1478 (D.C. Cir. 1984) ("*Wold*") (*citing In the Matter of Domestic Fixed-Satellite Transponder Sales. In the Matter of the Applications of Hughes Communications, Inc. Southern Pacific Communications Company RCA American Communications, Inc. Western Union Telegraph Company; For Modification of Domestic Fixed Satellite Space Station Authorizations to Permit Non Common Carrier Transponder Sales,* Memorandum Opinion, Order and Authorization, 90 F.C.C.2d 1238, ¶ 37 (1982)).

[38] *See Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems and DBSC Petition for Declaratory Rulemaking Regarding the Use of Transponders to provide International DBS Service*, Report and Order, 11 FCC Rcd 2429, ¶ 49 (1996) ("*DISCO I*") ("…several operators have chosen to continue to offer space segment capacity on a common carrier basis. This suggests that market forces are sufficient to provide enough common carrier capacity.").

offering of undersea cable facilities.[39] Indeed, in past orders approving non-common carriage of undersea cables and satellite transponders, the Commission has repeatedly "found that if sufficient alternative facilities, including common carrier facilities, are available an applicant would be unable to charge monopoly rents and hence would not have market power."[40]

V. Without The Availability Of Packetized Broadband Transmission Facilities At Just And Reasonable Rates, Competitive Carriers Will Be Forced From The Broadband Transmission Services Market.

Based on the foregoing, it is clear that granting Verizon the relief it seeks would lead to dire consequences in the market for packetized loop facilities needed to serve business customers. Moreover, the fact that Verizon limits its relief to only packetized broadband transmission services while conceding the need for continued regulation of TDM-based service is meaningless. This is because, as the years pass, the demand for broadband transmission services will shift further and further away from TDM-based services and towards packetized services. Such a migration will occur because packetized services such as Ethernet offer certain inherent advantages over TDM-based services. Among other things, Ethernet customers need not purchase or pay for electronics normally associated with TDM and a direct connection can be established between the carrier's loop facility and the customer's internal LAN.[41] Service and

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[39] *See AT&T Submarine Systems Inc.; Application for a License to Land and Operate a Digital Submarine Cable System Between St. Thomas and St. Croix in the U.S. Virgin Islands*, Memorandum Opinion and Order, 13 FCC Rcd 21585, ¶ 11 (1998) (holding that the availability of other undersea cables on a common carrier basis on the same route supports the petitioner's request to offer its own undersea cable on a non-common carrier basis).

[40] *Id.* ¶ 9 (*citing* at nn.23-24 ("*Norlight*, 2 FCC Rcd 132, 134 (1987); *Transponder Sales*, 90 F.C.C. 2d at 1252-3; *Optel* 8 FCC Rcd 2267, 2269 (1993); *Pacific Telecom Cable*, 2 FCC Rcd 2686, 2687 (1987); *Transnational Telecom*, 5 FCC Rcd 598, 599 (1990).")).

[41] CISCO SYSTEMS, *Metro Ethernet Services Business Overview for Service Providers*, at 4, *available at*

provisioning costs are also lower for Ethernet[42] in part because customers can purchase the exact amount of bandwidth they need. *See Cisco Presentation* at 5.

If incumbent LECs are only obligated to offer less efficient TDM-based services on reasonable terms and conditions subject to the Commission's rules and regulations, while more desirable packetized services such as Ethernet are subject to neither Commission regulation nor market discipline, the result is predictable. The incumbent LECs will simply starve their TDM-based services of investment and offer more in-demand packet-switched transmission services to CLECs at monopoly rents. CLECs will be price squeezed out of selling packet-switched services at retail, and will be forced to compete for customers against the incumbent LECs' own packet-switched services with out-of-date and inefficient TDM-based services. Under these circumstances, it is likely that CLECs will win little retail business and CLECs will be forced to withdraw from those markets where they rely upon the incumbent LECs' facilities for broadband transmission inputs. In other words, CLECs will only be able to serve customers in the few situations where it is economically rational construct their own facilities. However, serving only the largest customers' largest business locations does not provide a tenable business plan. As the Commission found in the *Triennial Review Order,* competitors cannot serve the locations to which they have built facilities if they cannot obtain access to incumbent loops to serve the other locations of the same customer where telecommunications demand is too small to justify loop construction. *See Triennial Review Order* ¶ 302, n.880.

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http://www.cisco.com/en/US/netsol/ns341/ns396/ns223/networking_solutions_white_paper09186a0080215adc.shtml ("*Cisco Presentation*").

[42] For example, Cisco notes that "Ethernet per-port costs and provisioning costs are lower than other service alternatives such as ATM, Frame Relay and SONET. Rather than provisioning additional circuits, the service provider simply opens a new port on an existing switch, reducing operational expense." *Cisco Presentation* at 4.

VI. Conclusion

For the reasons stated above, we respectfully request that the Commission deny Verizon's Petition for Reconsideration.

Respectfully submitted,

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ATTORNEYS FOR TIME WARNER TELECOM

December 29, 2005

CERTIFICATE OF SERVICE

I, Jonathan Lechter, do hereby certify that on this 29th day of December, 2005, I caused to be served a true and correct copy of the foregoing "Opposition to Petition for Reconsideration" by delivering a copy thereof via overnight mail to the following:

Verizon Telephone Companies Michael E. Glover Edward Shakin William H. Johnson 1515 North Courthouse Road Suite 500 Arlington, VA 22201 Tel: 703-351-3060

/s/

Jonathan Lechter