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

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| Petition of AT&T Inc. for Forbearance<br>Under 47 U.S.C. § 160(c) with Regard<br>To Certain Dominant Carrier Regulations<br>For In-Region, Interexchange Services | )<br>)<br>)<br>) | WC Docket No. 06-120 |

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**Reply Comments of AT&T Inc.**

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## I. INTRODUCTION AND SUMMARY.

AT&T Inc. ("AT&T"), on behalf of its telephone companies, respectfully submits the following reply comments in support of its petition for forbearance from certain dominant carrier regulations for its in-region, interstate and international interexchange services.[1] In this Petition, AT&T also sought relief from certain regulations that apply to its provision of interstate interexchange services in the territories of its affiliates that are not Bell Operating Companies ("BOCs") and from outdated "script" obligations that require BOCs to read a list of names of long distance providers to new customers.[2]

For the reasons detailed in its Petition, the Commission should grant the relief requested by AT&T. Dominant carrier regulation is appropriate only when necessary to prevent the exercise of market power, and the Commission has recognized time and again over the past fifteen years that *no* carrier has the ability to exercise market power in the provision of interexchange services.

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[1] *Petition of AT&T Inc. for Forbearance under 47 U.S.C § 160(c) with Regard to Certain Dominant Carrier Regulations for In-Region, Interexchange Services*, WC Docket No. 06-120 (filed June 2, 2006) ("Petition").

[2] *See* Petition at 36-37.

AT&T's competitors, nonetheless predictably trot out their tired claim that AT&T possesses market power in the local market, which it purportedly can leverage to undermine competition in the long distance market. This claim is specious, both because its premise is incorrect and because, even if it were not, AT&T would have no ability to quickly acquire market power in interexchange interLATA services by leveraging market power in other services. Indeed, while the telecommunications world continues to undergo revolutionary change, the recycled arguments of our opponents assume a world that has long ceased to exist and made no sense even in that world. Their claims of continued market power in local service cannot be squared with the reality that AT&T has lost millions of local access lines and is today losing hundreds of thousands of such lines each month, most of which have shifted to intermodal and intramodal competitors that do not rely on AT&T's network.[3]

And their robotic regurgitation of decades-old claims about the potential to acquire market power through discrimination and cross-subsidization in the provision of access services have been repeatedly rejected by the Commission – *even before the current explosion of intermodal competition.* As the Commission has explained, "[d]ominant carrier regulation" is *not* intended "to prevent [certain] harmful types of anticompetitive activity, such as cost misallocation, access discrimination, and attempts to engage in a price squeeze, that a BOC can engage in by virtue of its control of bottleneck facilities."[4] Indeed, it is "at best a clumsy tool" to address such concerns and is instead designed to address the relationship between a provider and

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[3] *See Total Switched Access Lines*, ARMIS Operating Data Report (ARMIS 43-08, Table 2, Column CJ, Line 910).

[4] *Regulatory Treatment of LEC Provision of Interexchange Services*, 14 FCC Rcd 10771, 10777-78 ¶ 8 (1999) (*LEC IXC Order*).

its *retail* customers.[5] In any event, the Commission has stated repeatedly that concerns about an incumbent local exchange carrier's ("ILEC") ability to discriminate against competitors using special access inputs is more appropriately addressed in the Commission's pending special access rulemakings.[6] The Commission therefore should disregard any of the wholesale access service assertions made by the commenters in this proceeding.

Subjecting AT&T to dominant carrier regulation is not only unnecessary but, as the Commission has long recognized, harmful to the public interest. The Commission has repeatedly acknowledged that "competition is the most effective means of ensuring that the charges, practices, classifications, and regulations with respect to [a telecommunications service] are just and reasonable, and not unjustly or unreasonably discriminatory."[7] The Commission also has recognized that consumers are denied the full benefits of competition when regulators "tip the scales" through asymmetric regulation of a service or industry. For this reason, the Commission will impose unique regulations on one carrier or set of carriers only in the rare circumstances where there is a market failure and the benefits of such regulations outweigh the costs. There is no failure in the interexchange market. To the contrary, the market is intensely competitive and that competition manifests itself through unprecedented choices and record-low prices that are available to consumers. Even our opponents do not dispute the fact that the long distance services market is dramatically more competitive today than it was over ten years ago.

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[5] *LEC Classification Order* ¶ 91; *see also id.* ¶ 85 (finding that "dominant carrier regulations are generally designed to prevent a carrier from raising prices by restricting its output rather than to prevent a carrier from raising its prices by raising its rivals' costs").

[6] *See, e.g., SBC-AT&T Merger Order* at ¶ 55.

[7] *Petition of US West Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance*, 14 FCC Rcd 16252, ¶ 31 (1999).

Thus, imposing dominant carrier regulation on AT&T and the other BOCs but not on their competitors is indefensible and contrary to the public interest.[8]

Applying dominant carrier regulation to AT&T's provision of in-region long distance services post sunset of section 272's separate affiliate requirements also would be counter to the pro-competition, deregulatory statutory scheme created by Congress in the Telecommunications Act of 1996 ("1996 Act" or "Act"). Congress determined that, after three years of full implementation of the market opening provisions of the Act, the long distance services market would be irreversibly open to competition and section 272's structural safeguards would no longer be necessary. In establishing section 272's sunset mechanism, Congress recognized, as has the Commission, that structural separation imposes significant costs and inefficiencies on carriers with little corresponding benefit.[9] Absent forbearance relief, AT&T and the other BOCs would be presented with the Hobson's choice of retaining their separate affiliate structure, which Congress deemed unnecessary after a finite period of time, or being subjected to dominant carrier regulation, the costs of which the Commission has recognized and deemed unnecessary for more than ten years. Such a result would be particularly anomalous given the deregulatory thrust of the 1996 Act and the fact that the Commission's dominant carrier regulatory regime was devised long before the advent of competition.

The commenters opposing AT&T's request for relief from the decades old script requirement likewise ignore the dramatic changes that have occurred in the long distance market since those rules were adopted more than twenty years ago. As AT&T previously indicated,

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[8] Verizon Comments at 1. As discussed below, AT&T is not seeking forbearance from its obligations under sections 201 and 202 of the Act.

[9] *See, e.g., Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, et al.*, CC Docket Nos. 02-33 *et al.*, 20 FCC Rcd 14853, ¶26 (Commission finding that the cost of decreased efficiency and innovation imposed by structural safeguards outweighed their benefits) (further citation omitted).

given the billions of dollars that have been spent on advertising long distance services during the past 22 years and the high churn rates in the long-distance market, it is inconceivable that consumers are unaware that they have a choice of long-distance companies. To the extent those script requirements were ever necessary, they surely no longer are, and it is long past time for the Commission to quit micro-managing marketing scripts in this hyper-competitive market.

The dominant carrier relief sought by AT&T in its Petition is identical to that previously sought by every other BOC.[10] AT&T strongly encourages the Commission to consider its petition together with those filed by the other BOCs.[11] To rule on these identical requests on an

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[10] BellSouth Corporation's Petition for Waiver, WC Docket No. 05-277 (filed Sept. 19, 2005); Petition of Qwest Communications International Inc. for Forbearance from Enforcement of the Commission's Dominant Carrier Rules as They Apply after Section 272 Sunset Pursuant to 47 U.S.C. § 160, WC Docket No. 05-333 (filed Nov. 22, 2005); Petition of the Verizon Local and Long Distance Companies for Forbearance under 47 U.S.C. § 160(c) with regard to Certain Dominant Carrier Regulations for In-Region, Interexchange Services, WC Docket No. 06-56 (filed Feb. 28, 2006). In its petition, Verizon requests that the Commission refrain from imposing certain *Computer Inquiry* obligations to its long distance services. Verizon Petition at 3. While AT&T thinks that such relief is unnecessary because the Commission's Comparably Efficient Interconnection ("CEI") and Open Network Architecture ("ONA") requirements would not apply to the BOCs' direct provision of interLATA services post section 272 sunset, to the extent that there may be any lingering uncertainty about this matter, forbearance would be appropriate and consistent with prior Commission precedent and congressional intent. Since passage of the 1996 Act, the Commission has made clear that CEI and ONA obligations only apply to intraLATA services. *See, e.g., Non-Accounting Safeguards Order* ¶ 132 (explaining that the Commission was retaining CEI and ONA requirements for intraLATA services to fill the gap left by section 272, which only applies to interLATA services); *Computer III Remand Further NPRM* ¶ 48 (tentatively concluding that the Commission would continue to apply CEI and ONA requirements only to intraLATA services); *Computer III Remand Order* ¶ 12. As noted above, Congress determined that it was appropriate to sunset the separate affiliate requirements in section 272 because, after three years, there can be no legitimate concern that separation is necessary to address any residual market power. Thus, having scaled back its CEI and ONA regulations to allow Congress's comprehensive scheme to work its course, it would be particularly arbitrary now to interpret this series of orders as springing these antiquated requirements back to life upon the sunset of section 272 (especially given that section 272 preserves its own subsection (e) nondiscrimination requirements).

[11] *See* Sprint-Nextel Comments at 2-3 (noting that AT&T has previously supported considering these BOC petitions in the pending Commission rulemaking). AT&T would support the Commission considering its Petition together with Qwest's petition or in the pending *LEC Non-Dominant Proceeding*, which ever would occur earlier. By statute, the Commission must act on Qwest's petition by November 22, 2006 (unless the Commission extends its review until February 20, 2007). Additionally, AT&T has no objection to the Commission extending the relief AT&T requests to all independent LECs. *See* ACS Comments.

iterative, rather than comprehensive, basis could potentially place AT&T at a competitive disadvantage vis-à-vis the other BOCs, distorting competition in the marketplace with no discernible public interest benefit.[12]

## II. INTEREXCHANGE MARKETS ARE COMPETITIVE AND AT&T HAS NO ABILITY TO EXERCISE MARKET POWER.

As explained in the Petition, dominant carrier regulation is appropriate only when a carrier has the "ability profitably to raise and sustain prices . . . significantly above competitive levels by restricting its own output."[13] In order to determine whether a carrier has market power and can thereby raise and sustain prices by restricting output, the Commission must focus on the availability of competitive supply, barriers to entry, and demand elasticities.[14] When the Commission recently reviewed the relevant markets in the *SBC-AT&T Merger Proceeding*, it concluded that the merger is not likely to result in anticompetitive effects in the retail long distance markets. Specifically, in the enterprise market, the Commission determined that there are a large number of competitors already participating and there is a high level of sophistication in this market.[15] In the long distance mass market, the Commission similarly concluded that competition from intermodal competitors is growing quickly, and will become increasingly significant in the years to come.[16] Contrary to the position of some commenters, AT&T's in-

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[12] *See, e.g., Verizon Telephone Companies' Petition for Forbearance from Title II and* Computer Inquiry *Rules with Respect to Broadband Services Is Granted by Operation of Law*, FCC Press Release (March 20, 2006).

[13] Petition at 6 (quoting *LEC Classification Order* ¶ 6).

[14] *Id.* at 8.

[15] *SBC-AT&T Merger Order*, ¶65.

[16] *See SBC-AT&T Merger Order* ¶ 101.

region long distance market share is not dispositive of market power.[17] Indeed, the Commission has long recognized that "[e]ven a firm with a very large market cannot automatically be presumed to have market power."[18] AT&T clearly does not have market power for the reasons detailed in its Petition.

### A. COMPETITION IS ROBUST IN THE RETAIL LONG DISTANCE MARKET.

In an effort to chip away at the edges of the case presented in the Petition, several commenters make vague assertions that intermodal long distance competitors using certain technologies do not pose a significant competitive threat in the long distance market, citing dated information and older Commission orders. These comments are simply not in touch with the competitive reality.

*Wireless.* Sprint-Nextel contends that, in its *SBC-AT&T Merger Order*, the Commission found that wireless service does not have a price constraining effect on all consumers' demand for primary line wireline services.[19] What Sprint/Nextel ignores is that the Commission also said that "increasing numbers of mass market customers are subscribing to mobile wireless services, thus providing an additional access option for making local telephone calls"[20] and that "SBC considers this growing substitution in developing its marketing, research and development, and corporate strategies for its local service offerings."[21] Indeed, citing representations by

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[17] *See* Comptel Comments at 8; Sprint-Nextel Comments at 13-14.

[18] *Review of Prime Time Access* Rule, 11 FCC Rcd 546, ¶ 24 n.44 (1995). Indeed, AT&T's market share was 60% when the Commission declared it non-dominant over a decade ago. *See AT&T Non-Dominance Order* ¶ 68 (finding that "market share alone is not necessarily a reliable measure of competition, particularly in markets with high supply and demand elasticities").

[19] Sprint-Nextel Comments at 7-8 (citing *SBC-AT&T Merger Order*, ¶ 90 & n.277).

[20] *SBC-AT&T Merger Order,* ¶ 89.

[21] *Id.* ¶ 90.

Sprint/Nextel in their own merger proceeding, the Commission stated its "expectation" that "intermodal competition between mobile wireless and wireline service will likely increase in the near term."[22] More significantly, the finding cited by Sprint/Nextel specifically referred to substitution of wireless service for *local* wireline service, not *long-distance* services. Indeed, the Commission expressly determined that wireless services are in the same product market as mass market wireline long distance services based on usage substitution between wireless and wireline long distance service, and it found that "we expect a consumer who subscribes to both a mobile wireless service and a wireline long distance service will allocate minutes between these services in an optimal manner, *i.e.*, the consumer will seek the lowest possible charge, consider service quality, and consider the time the call is placed" – the hallmarks of competition at work. [23] And as with local service, the Commission found that consumers are increasingly using their mobile wireless service for long distance calls, and that SBC and AT&T consider minute substitution in their business strategies.[24] These conclusions are unassailable. As AT&T explained in both the *SBC-AT&T Merger Proceeding* and its Petition, studies show that wireless service has displaced 60 percent of long distance calls from landlines.[25]

Both Sprint-Nextel and McLeod nonetheless argue that, to the extent AT&T loses long distance customers to wireless services, it is "to a large extent" losing those customers to its own

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[22] *Id.*

[23] *SBC-AT&T Merger Order*, ¶ 92-93.

[24] *SBC-AT&T Merger Order* ¶¶ 92-93 (explaining that it would expect consumers subscribing to both services to allocate minutes between these services in an optimal manner).

[25] Petition at 12; *SBC-Merger Order*, n.288; *see also* Verizon Comments at 3 (noting that there were more wireless than wireline lines at the end of 2004).

wireless affiliates.[26] This assertion, which is completely unsupported, proves nothing. Even if AT&T is losing some wireline subscribers to its wireless affiliates, the fact remains that the provision of wireless services is vigorously competitive. Cingular is engaged in head-to-head competition with multiple wireless providers, some of which are or, like Sprint/Nextel, recently were affiliated with incumbent LECs, and some of which are not. Indeed, the success of Verizon, Cingular, and Sprint Nextel outside the footprints served by their ILEC "parents" as well as the success of T-Mobile, Nextel (since acquired by Sprint), and AT&T Wireless (since acquired by Cingular) belies the claim of Sprint-Nextel and McLeod that AT&T customers who "cut the chord" are, to a large extent, migrating to Cingular.

*Cable Providers.* Sprint-Nextel and McLeod assert that cable telephony is in its early stages, faces barriers to entry, and has no significant presence in the enterprise market.[27] These assertions border on the absurd. Cable companies have near ubiquitous network facilities and established mass market customer relationships. Many major cable companies have been providing switched telephone services for years and have an existing base of approximately three million circuit switched telephony providers."[28]

The development of VoIP technologies has allowed cable incumbents to upgrade their networks at very low incremental cost to support VoIP services in addition to the broadband Internet and video programming services they already offer. Cable companies throughout AT&T's territory are offering promotional local and long-distance VoIP bundles, which provide consumers with the same capabilities as traditional wireline services, along with novel enhanced features, at steep discounts. Moreover, these offerings are ubiquitous. As Verizon points out in

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[26] Sprint-Nextel Comments at 8; McLeod Comments at 8-9.

[27] Sprint-Nextel Comments at 9; McLeod Comments at 5-6.

[28] *VOip Gathering Momentum* at 9.

its comments supporting AT&T's petition, cable companies expect to offer telephony services to 95 percent of U.S. households by the end of 2007.[29] They also happen to be quite successful. As AT&T notes in its Petition, cable VoIP providers added 1.7 million new subscribers in 2005, an increase of 300 percent over 2004. Moreover, these increases are expected to grow even *faster* in 2006.[30] By 2010, it is estimated that cable will have approximately 22 million VoIP subscribers.[31]

Cable competition will further intensify as a result of the recently announced joint venture involving Sprint Nextel, Time Warner Cable, Cox and Advance Newhouse that aims to provide access "to the most advanced integrated entertainment, communications, and wireless products available anywhere in the United States." The joint venture will be able to offer the "quadruple play" of video, wireless voice and data, high speed Internet and wireline voice service to the 75 million homes passed by the cable companies.[32]

There thus can be no credible argument that cable providers are not a competitive factor in the interexchange marketplace. To the contrary, they are a source of significant and growing competition. Consistent with this status, the Commission has found "documentary evidence" that AT&T views cable-based VoIP as its "*primary* competitive threat in the mass market."[33]

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[29] Verizon Comments at 4.

[30] Petition at 14 (stating that cable companies will end 2006 with 5.9 million VoIP subscribers that will be in addition to their existing base of 3 million customers).

[31] Petition at 15.

[32] Press Release, Sprint Nextel, Comcast, Time Warner Cable, Cox Communications and Adcance/Newhouse Communications to Form Landmark Cable and Wireless Joint Venture (Nov. 2, 2005), *available at* http:// www.2.sprint.com/mr/news_dtl.do?id=8961.

[33] *SBC-AT&T Merger Order* ¶ 87 (emphasis added).

Nor is it the case, as McLeod and Sprint-Nextel maintain, that cable competition is confined to mass market customers. Cable providers continue to utilize their extensive fiber networks to provide new services, such as VoIP and traditional data and Internet transport to retail business customers.[34] Indeed, the Yankee Group estimates that cable providers sold $1.2 billion in phone, data, and video services to companies in 2004, and expected revenue to reach $2 billion in 2005.[35] More significantly, McLeod and Sprint-Nextel ignore the fact that competition for business customers comes from an even broader group of suppliers than it does in the mass market.[36] As noted in the Petition, there is robust competition in the enterprise market from traditional interexchange carriers, data/IP providers, competitive LECs, VoIP providers, systems integrators, international carriers, equipment vendors, and value-added resellers, as well as from cable providers.[37] The Commission confirmed as much in its *SBC-AT&T Merger Order*, finding that "for all groups of business customers, there are multiple services and multiple providers that can meet demand."[38] Even Sprint-Nextel concedes, as it

[34] AT&T and BellSouth documented this competition in their merger application. *See matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from BellSouth Corporation to AT&T Inc,* Description of Transaction, Public Interest Showing and Related Demonstration, App. B. pp. B-35 to B-42.

[35] Ken Belson, *Not Just TV: Cable Companies Compete for the Office Domain,* NY Times, Aug. 3, 2005, at C1, *available at* 2005 WLNR 12179832 (citing Yankee Group report).

[36] In the Commission's special access proceeding, AT&T provided evidence that cable is indeed becoming an important source of competition in the enterprise market. *See, e.g.*, AT&T Comments at 17, WC Docket No. 05-25 (filed June 13, 2005) (explaining that, using their existing facilities, cable providers today have access to an estimated market of over 20 million business lines and they are actively expanding their fiber-to-the-curb infrastructure to include business customers).

[37] Petition at 18-24.

[38] *SBC-AT&T Merger Order* ¶ 77.

must, that "long distance continues to be a multi-billion dollar industry, *with hundreds of non-BOC competitors.*"[39]

*VoIP*. Just as it incorrectly characterized the significance of cable competition, Sprint-Nextel improperly dismisses the significance of competitive potential of VoIP generally, including from "over the top" VoIP providers, such as Vonage. . According to Sprint-Nextel, "VoIP technology remains in its early stages, its market share, while growing, remains small, and the Commission has found [in the *Triennial Review Remand* Order] that it is not yet a substitute for traditional carrier services, either for mass market or enterprise services."[40]

These statements are either incorrect or irrelevant. While by some measures VoIP technology is still new, the fact is that this that prior quality concerns about VoIP service have been largely resolved and VoIP has become a genuine competitive threat to traditional wireline services. Indeed, Vonage alone has more than 1.6 million subscribers nationwide and that number is growing rapidly. Other VoIP providers, including TouchTone, Broadfone, Broadvox Direct, Covad, EarthLink, MyPhoneCompany.com, Net2Phone, Opex, Packet 8, VoicePulse, and others all compete actively for VoIP customers, and analysts expect over-the-top VoIP providers to gain at least 4 million customers by 2008.[41] And that was before Microsoft announced plans to integrate VoIP into its desktop services.[42] Moreover, as Verizon notes, broadband – and hence

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[39] Sprint-Nextel Comments at 16 (citing a Commission report finding that the long distance industry includes more than 1,000 toll carriers) (emphasis added).

[40] Sprint-Nextel Comments at 8-9.

[41] Petition at 17.

[42] *See, e.g.,* http://www.microsoft.com/presspass/press/2006/jun06/06-25UCGRoadmapPR.mspx.

VoIP service -- is available to more than 90 percent of U.S. households from a provider other than the ILEC.[43]

While it is true, as Sprint-Nextel note, that the Commission found in the *Triennial Review Remand Order* that VoIP does not obviate the need for unbundled network elements, Sprint-Nextel misrepresent Commission precedent when they claim that the Commission does not view VoIP as a substitute for traditional services. In the *SBC-AT&T Merger Order,* the Commission specifically found that "facilities based VoIP services clearly fall within the relevant service market for local services" and that "while it is likely that some proportion of mass market consumers may view certain over-the-top VoIP services as substitutes for wireline local service, there is insufficient information in the record to determine which types of over-the-top VoIP service should be include in the product market."[44] The Commission ultimately concluded, with respect to over-the-top VoIP, that it did not need to include such services in its merger analysis because there was so much additional competition and because AT&T's own over-the-top VoIP offering was so insignificant. That fact remains, though, that over-the-top VoIP represents a growing competitive threat, albeit one of many faced by traditional wireline long-distance providers. The competitive pressure exerted on the long distance market by VoIP providers – both facilities-based and non-facilities-based, prevents AT&T from obtaining market power and, as discussed below, provides a significant disincentive for AT&T to discriminate against intramodal retail competitors. To do so would only result in a loss of traffic on AT&T's network and, obviously, a loss of access revenue.

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[43] Verizon Comments at 5; *see also* Qwest *Ex Parte* (stating that it is competing against over 100 VoIP providers).

[44] *SBC-AT&T Merger Order* ¶ 87-88.

### B. AT&T HAS NO ABILITY TO MISALLOCATE COSTS OR TO DISCRIMINATE.

Sprint-Nextel baldly asserts that dominant carrier regulation of AT&T and the other BOCs is necessary to prevent them from leveraging their purported dominance in local markets to undermine long distance competition, and, in particular, to prevent the BOCs from misallocating costs and discriminating against unaffiliated long distance providers.[45] Apart from being wholly unsupported, these claims are based on view of the market that is rooted in the past and completely at odds with the competitive pressures confronting AT&T and the other BOCs.

As discussed above, in the decade since local markets were opened to competition, AT&T and the other BOCs have lost millions of local access lines, and continue to lose hundreds of thousands of additional lines every month. That trend has accelerated in recent years as intermodal and intramodal competitors have stepped up their penetration of the local market, and, if anything, will assuredly intensify as the competition continues to move increasingly to alternative platforms that completely by-pass traditional wireline networks. Likewise, competition in the long distance market has exploded, with hundreds of competitors offering competing long distance services over a variety of intramodal and intermodal platforms, many of which (like cable VoIP services) also completely by-pass ILEC networks. In light of these developments, the notion that AT&T has the ability – through cross-subsidization or otherwise – to set retail long distance prices at predatory levels, drive out its long distance competitors, and then raise and sustain long distance prices significantly above competitive levels is simply absurd. The hyper-competitive nature of the market simply would not tolerate such a pricing

[45] Sprint/Nextel Comments at 16-17. *See also* Comptel Comments at 5-6.

strategy, and AT&T would never be able to recoup the revenues lost from setting its retail prices at predatory levels.[46]

Additionally, AT&T is subject to pure price cap regulation of its access services in all of its in-region states. As the Commission has long recognized, under this form of incentive regulation, carriers lack any incentive or ability to engage in cross-subsidization.[47] Hence claims that AT&T could engage in such rampant cross-subsidization as to acquire market power in the long distance market is ludicrous.

Claims that BOCs could effectively leverage market power through discrimination are equally unavailing. BOCs have provided a variety of services that rely on their access services – including enhanced, intraLATA toll and wireless services – for years, and the opponents of AT&T's petition have offered no evidence that BOCs have discriminated against unaffiliated providers of such services, much less acquired market power through such discrimination. Indeed, the success of Cingular's competitors in AT&T's ILEC territory belies the notion that vertical integration necessarily carries a risk of undetected discrimination. In the final analysis, these parties' claims amount to nothing more than empty, recycled rhetoric. As the Justice Department has recognized, "discrimination is unlikely to be effective unless it is apparent to customers. But, if it is apparent to customers, it is likely also to be apparent to regulators or to competitors that could bring it to the attention of regulators."[48]

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[46] *See LEC Classification Order* ¶ 107.

[47] Petition at 26; *LEC Classification Order* ¶ 106. As noted above, the focus of McLeod comments, including assertions about cross-subsidization, is special access service, which is outside the scope of this Petition and should be addressed by the Commission in its pending rulemakings. *See* McLeod Comments at 8.

[48] Petition at 27 n.95.

In its Petition, AT&T noted that, even if it could degrade the quality of a competitor's access, which it cannot without great difficulty and expense,[49] it would not because it would lose access revenue when the mass market customer "cut the cord" and obtained service from an intermodal competitor.[50] McLeod does not dispute this, responding only that there are no intermodal competitors for *enterprise* customers.[51] But, as the Commission determined in its *SBC-AT&T Merger Order*, McLeod's assertion is simply incorrect. In the order, the Commission found that for enterprise customers, "myriad providers are prepared to make competitive offers" and that "available market share data does not reflect the rise in data services, cable and VoIP competition, and the dramatic increase in wireless usage. Foreign-based companies, competitive LECs, cable companies, systems integrators, and equipment vendors and value-added resellers are also providing services in this market."[52] The Commission concluded that "sufficient enterprise competition remains within SBC's region to ensure that the merger is not likely to result in anticompetitive effects for medium and large in-region enterprise customers."[53] The Commission thus already has rejected McLeod's claims, and should do so again here.

Finally, and in all events, even if AT&T had the ability to discriminate and cross-subsidize, which it does not, that would not be a basis for continuing dominant carrier regulation.

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[49] Petition at 28.

[50] Petition at 27 (explaining that, because of significant intermodal competition from cable, wireless, and VoIP providers, AT&T does not control bottleneck access facilities).

[51] McLeod Comments at 8.

[52] *SBC-AT&T Merger Order* ¶ 73.

[53] *SBC-AT&T Merger Order* ¶ 74. For these reasons, there also is no merit to Comptel's claim that AT&T's retail service will be unaffected by its discriminatory behavior because such behavior is likely to prompt the customer to switch to AT&T. Comptel Comments at 9.

The Commission has been quite clear that *dominant carrier regulation* "does not sufficiently help to prevent [certain] types of harmful anticompetitive activity such as cost misallocation, access discrimination, and attempts to engage in a price squeeze . . . ."[54]

## III. DOMINANT CARRIER REGULATION IS BURDENSOME AND EXISTING SAFEGUARDS PROVIDE AMPLE PROTECTION AGAINST ANTICOMPETITIVE BEHAVIOR.

### A. DOMINANT CARRIER REGULATION IS BURDENSOME.

Sprint-Nextel and McLeod contend that separate affiliate and dominant carrier regulation are not burdensome to AT&T and, as proof, point to AT&T's success in the long distance market.[55] As an initial matter, legacy SBC was *not* entirely successful in the long-distance market. Indeed, one of the reasons SBC acquired AT&T was because SBC had so much difficulty penetrating the enterprise market, and that difficulty was due, in no small measure, to structural separation requirements that forced SBC to operate inefficiently and in denied it the ability fully to meet customers' needs and expectations. In any event, whether or not AT&T has been able to capture long distance customers despite its separate affiliate obligations is irrelevant to the issue of whether such regulation is necessary to prevent AT&T from exercising market power in the long distance market, and whether the costs of dominant carrier regulation outweigh the benefits. The Commission has long recognized that structural separation requirements impose substantial costs due to the duplication of facilities and personnel, deprivation of economies of scope, and increased transaction and production costs.[56] Moreover, Congress clearly believed that section 272's structural separation requirements impose significant costs that, after three years, become more harmful than beneficial and should therefore be eliminated.

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[54] *LEC IXC Order*, ¶ 8.
[55] Sprint-Nextel Comments at 13-14; McLeod Comments at 10-11.

[56] Petition at 29 & n.99.

McLeod's assertion that dominant carrier regulation is appropriate because BOCs are "very comfortable operating in a regulated environment" begs the question.[57] For reasons detailed in the Petition, AT&T is most certainly not "comfortable" with the prospect of having to comply with out-dated regulations that no other long distance carrier has had to operate under in more than fifteen years. Regardless, comfort with regulation is not the standard that the Commission applies in determining whether dominant carrier regulation is appropriate. Under the correct standard, the Commission should not apply this regulation unless it finds that a carrier has market power and can thus raise and sustain prices by restricting its output.

*Tariffs.* Comptel argues that tariffing is necessary to detect and prevent predatory pricing and points to language in the *LEC Classification Order* to support its position.[58] Comptel neglects to mention that in the same paragraph of this order, the Commission determined that, while tariffing and other forms of dominant carrier regulation may help deter a BOC from engaging in certain types of anticompetitive conduct, these are not, by themselves, sufficient bases for imposing these regulations on the BOC.[59] Moreover, in the nine years since the *LEC Classificiation Order,* intermodal comopetition has exploded, making predatory pricing even more unlikely. In any event, the Commission has recognized for the last twenty years that tariffing requirements are affirmatively harmful by "(1) removing incentives for competitive price discounting; (2) reducing or taking away carriers' ability to make rapid, efficient responses to changes in demand and cost; (3) imposing costs on carriers that attempt to make new offerings; and (4) preventing consumers from seeking out or obtaining service arrangements

[57] McLeod Comments at 10-11.
[58] Comptel Comments at 7-8 (citing *LEC Classification Order* ¶ 87 & n.338).

[59] *LEC Classification Order* ¶ 87. *See also id.* n.338 ("Although the advance tariff filing requirement might help detect certain types of price discrimination, *the marginal benefit of such regulation would be outweighed by the burdens such regulation would impose*, as discussed above") (emphasis added).

specifically tailored to their needs."[60] In this regard, McLeod's claims that tariffing and price cap regulation are not burdensome are frivolous at best..

*Section 214 Applications and Discontinuances.* McLeod was the only commenter to discuss this issue and, as with tariffs and price caps, it did so only in a superficial fashion.[61] McLeod contends that entry and exit regulation are a "non-issue" for AT&T because "it is not likely that AT&T will be either entering or exiting any interexchange markets in a way that would trigger this regulation."[62] Apart from being nothing more than unsupported speculation, McLeod's claim is entirely beside the point. The issue here is not whether AT&T's business plans would trigger the section 214 requirements, but whether there is any basis to continue applying those requirements to AT&T in light of current market conditions. And McLeod fails to offer any analysis to rebut AT&T's explanation as to why the Commission's streamlined procedures should apply.[63] Moreover, in a competitive marketplace, it is critical that providers be able to dynamically respond to customer demand in the market by being able to offer new services and discontinue services without any excessive regulatory delay, especially when competitors face no similar delays. As noted in the Petition, in its *Qwest Omaha Forbearance Order*, the Commission determined that non-streamlined procedures were unnecessary to ensure just and reasonable rates, to protect consumers, or to further the public interest due to competition in the relevant market.[64] Those findings are even more appropriate here as the Commission has repeatedly determined that the long distance market is robustly competitive.

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[60] Petition at 31 (quoting *IXC Detariffing Order* ¶ 53).
[61] McLeod Comments at 10-11.

[62] McLeod Comments at 10-11.

[63] Petition at 36-36.

[64] Petition at 35-36.

### B. THE *LEC CLASSIFICATION ORDER* IS NOT INCONSISTENT WITH AT&T'S PETITION.

Comptel argues that AT&T is seeking forbearance from the very same safeguards that formed the basis for the Commission's decision to declare BOCs non-dominant in the *LEC Classification Order*.[65] That is incorrect and irrelevant. In the *LEC Classification Order,* the Commission found that, in light of section 272 separation requirements, the BOCs would not have market power – or the ability quickly to acquire market power – in long-distance services. The Commission did not conclude that BOCs would be dominant absent application of the full panoply of section 272 because the Commisison had no need to address that question. And the Commission certainly did not conclude that post-sunset, BOCs would be dominant unless they complied fully with section 272 separation requirements. In any event, the issue here is not what level of separation was necessary for nondominant status nine years ago. The issue is what, if any, level of separation is required today. As we have shown, the long-distance market is intensely and growingly competitive and structural separation requirements of any kind are unnecessary and counterproductive.

## IV. THE COMMISSION SHOULD FORBEAR FROM ITS INDEPENDENT LEC STRUCTURAL SEPARATION REQUIREMENT.

Only Sprint-Nextel and Comptel mention this aspect of AT&T's petition but neither commenter provides any legitimate reason why the Commission should not grant AT&T's request.[66]

Sprint-Nextel is incorrect in asserting that, if the Commission forbears from independent LEC separation requirements that AT&T, alone, would not have to pay tariffed rates for AT&T's

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[65] Comptel Comments at 6 (asserting that AT&T is "seeking to abandon" its section 272 separate affiliate safeguards).

[66] Comptel Comments at 6-7; Sprint-Nextel Comments at 12.

access services. This argument is nothing more than a stalking horse for Sprint's bogus claims of cost-misallocation, which we previously addressed. In any case, in the unlikely event that AT&T's independent LEC affiliates – SNET and the Woodbury Telephone Company – attempted to engage in anticompetitive behavior, they would be subject to the Commission's enforcement and complaint processes, as well as the nation's antitrust laws.

In its comments opposing this aspect of the Petition, Comptel simply summarizes Commission findings made more than 20 years ago to support its assertion that "in the absence of separation safeguards, forbearance from dominant carrier regulations is indefensible."[67] Comptel would have the Commission rely on precedent that pre-dates the MFJ.[68] It is an understatement to say that the state of long distance competition is dramatically different today than it was in 1984, and AT&T would suggest that the Commission review relevant precedent, such as its *SBC-AT&T Merger Order*, to determine whether AT&T's independent LECs have market power. They clearly do not and forbearance from the Commission's separate affiliate rules and from dominant carrier regulation is in the public interest.

## V. THE COMMISSION SHOULD FORBEAR FROM ITS EQUAL ACCESS SCRIPT REQUIREMENT.

NASUCA and Comptel oppose AT&T's request that the Commission forbear from enforcing its equal access script requirements. As explained in the Petition, these requirements require BOCs and independent LECs to read to new local customers a list of long distance providers that could provide them with long distance services separate from the local services

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[67] Comptel Comments at 7 (citing *Competitive Carrier Fifth Report and Order*, 98 FCC 2d 1191 (1984)).

[68] The Commission began its *Competitive Carrier Proceeding* in 1979 and issued its first order a year later. *See Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, First Report and Order, 85 FCC 2d 1 (1980).

they have chosen to buy from the ILEC.[69] NASUCA argues that, because AT&T remains dominant in the local market, it should not be permitted to leverage its bottleneck access to local telephone customers to its advantage by dispensing with providing new customers with the information that they can choose from among providers.[70] This argument is totally unavailing. The millions of lines AT&T has lost and continues to lose to competitors belies NASUCA's claim that AT&T maintains market power in local services. But, in all events, the issue is not whether AT&T has market power in local services; market power does not justify any and all regulation. The issue is whether the equal access script requirements serve any useful purpose. As AT&T showed in its petition, and as should be obvious to any casual observer, consumers have been bombarded for more than twenty years with advertisements from long-distance providers, and, more recently, wireless and VoIP providers. It is simply inconceivable that consumers today are unaware that they have a choice of long-distance providers. It is thus long past time that the Commission eliminated its equal access script requirements.

Those requirements are, moreover, increasingly at odds with the way carriers of all kinds market and package their services. In response to overwhelming consumer demand, carriers of all stripes offer consumers bundled packages of services and those packages are quickly displacing stand-alone long-distance service in the marketplace. As the Commission has observed, "long distance service purchased on a standalone basis is becoming a fringe market."[71] When the service packages that customers seek require them to purchase local and long-distance service together, it is counter-productive and confusing to them to force AT&T and other BOCs to read an equal access script. Moreover, there are significant costs associated with

[69] Petition at 37.
[70] NASUCA Comments at 5-6.

[71] *SBC-AT&T Merger Order* ¶ 91.

this MFJ-era script requirement. As Verizon explains in its comments, simply maintaining the list of providers is complex and costly because, for example, the lists need to be continually updated, which requires monitoring of additions, deletions, name and other changes for a large number of long distance carriers.[72] AT&T and Verizon must maintain and update these listings for every state in which they operate. Moreover, these listings require resequencing to ensure that the lists are read in random order.[73] The costs are significant and, as explained in the Petition, are unnecessary to ensure just and reasonable rates, protect consumers, or to further the public interest.[74]

## VI. CONCLUSION

For the foregoing reasons, the Commission should grant AT&T's forbearance petition.

Respectfully Submitted,

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[72] Verizon Comments at 8.
[73] Verizon Comments at 8.
[74] *See also* ACS Comments at 2-5 (supporting AT&T's request).