

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

<b>In the matter of</b>	)	
	)	
<b>Petition of AT&amp;T for Forbearance Under</b>	)	
<b>47 U.S.C. § 160 from Title II and <i>Computer</i></b>	)	<b>WC Docket No. 06-125</b>
<b><i>Inquiry</i> Rules with Respect to its Broadband</b>	)	
<b>Services</b>	)	
	)	
<b>Qwest Petition for Forbearance Under</b>	)	
<b>47 U.S.C. § 160 from Title II and <i>Computer</i></b>	)	
<b><i>Inquiry</i> Rules with Respect to Broadband</b>	)	
<b>Services</b>	)	
	)	
<b>BellSouth Petition for Forbearance Under</b>	)	
<b>47 U.S.C. § 160 from Title II and <i>Computer</i></b>	)	
<b><i>Inquiry</i> Rules with Respect To Broadband</b>	)	
<b>Services</b>	)	

**OPPOSITION OF COMPTTEL**

August 17, 2006

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**OPPOSITION OF COMPTTEL**

COMPTTEL, through counsel, hereby opposes the Petitions filed by AT&T, Qwest and BellSouth (collectively, the “BOCs”) for forbearance from Title II and the *Computer Inquiry* rules with respect to their broadband services. The Commission must deny each of the Petitions because none of the Petitioners has met its burden of showing that all of the statutory prerequisites for forbearance have been satisfied and that it is entitled to the relief requested. Surely, a finding that the largest local exchange carriers and the largest providers of broadband services to enterprise customers in the nation<sup>1</sup> are not required to

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<sup>1</sup> AT&T, which is awaiting Commission approval to acquire BellSouth (WC Docket 06-74), describes itself as follows: “AT&T Inc. is one of the world’s largest

be regulated as dominant carriers, are not required to offer or price their broadband services on a nondiscriminatory basis, are not subject to the Commission's complaint authority, are not required to negotiate in good faith, are not required to interconnect their broadband services with other providers, are not required to maintain the confidentiality of their customers' network information and other data, are not required to make their broadband services accessible for the disabled, are not required to make their broadband services available for resale, and are not required to refrain from slamming or cramming, must be based on more than the generic, conclusory allegations contained in the Petitions.

## **I. Introduction and Summary**

AT&T,<sup>2</sup> Qwest<sup>3</sup> and BellSouth<sup>4</sup> each request the same relief from Title II and the *Computer Inquiry* rules that Verizon, the sole remaining Bell Company, enjoys as a result of the Commission's failure to act on Verizon's December 20, 2004 Petition for Forbearance.<sup>5</sup> The Verizon Petition was deemed granted by operation of law effective March 19, 2006 because the Commission, which had only four members at the time, was

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telecommunications holding companies and is the largest in the United States. Operating globally under the AT&T brand, AT&T companies are recognized as the leading worldwide providers of IP-based communications services to business and as leading U.S. providers of high-speed DSL services." Available at <http://att.sbc.com/gen/press-room?pid=5097&cdvn=news&newsarticleid=22358>.

<sup>2</sup> See AT&T Petition For Forbearance at 1.

<sup>3</sup> Qwest Petition For Forbearance at 1.

<sup>4</sup> BellSouth Petition For Forbearance at 2.

<sup>5</sup> Petition of the Verizon Telephone Companies For Forbearance Under 47 U.S.C. §160(c) from Title II and Computer Inquiry Rules With Respect To Their Broadband Services, WC Docket 04-440, filed December 20, 2004 ("Verizon Petition").

deadlocked on its disposition.<sup>6</sup> The Commission issued no decision explaining the action, nor even a Public Notice.<sup>7</sup> Instead, the public was informed that forbearance was deemed granted by operation of law through a News Release, “an unofficial announcement of Commission action,”<sup>8</sup> issued by the Office of Media Relations.

One of the many difficulties arising from the Commission’s failure to issue a decision or even a Public Notice on the Verizon Petition is the inability to determine with any certainty the extent of the relief Verizon was granted by operation of law. Verizon’s original Petition requested forbearance for any broadband services that Verizon does or

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<sup>6</sup> See, *Verizon Telephone Companies’ Petition for Forbearance from Title II and Computer Inquiry Rules With Respect to their Broadband Services Is Granted By Operation of Law*, FCC News Release dated March 20, 2006 (“News Release”); Joint Statement of Chairman Kevin J. Martin and Commissioner Deborah Taylor Tate in Docket No. 04-440 at 2. Section 10(c) of the Telecommunications Act of 1996, 47 U.S.C. §160(c) provides that a forbearance petition shall be deemed granted if the Commission does not deny the petition within one year unless the one year period is extended by the Commission for up to an additional 90 days. The Commission granted a 90 day extension for the Verizon Petition. *Petition of the Verizon Telephone Companies’ Petition for Forbearance under 47 U.S.C. §160(c) from Title II and Computer Inquiry Rules With Respect to their Broadband Services*, WC Docket No. 04-440, Order, DA05-3217 (released December 19, 2005).

<sup>7</sup> AT&T’s reliance on *Radio-Television News Directors Association v. Federal Communications Commission*, 184 F. 3d 872 (D.C. Cir. 1999) (“*RTNDA*”) to convert the Joint Statement of Chairman Martin and Commissioner Tate into the “opinion of the agency” is misplaced. (AT&T Petition at 2, n. 4) The *RTNDA* case involved a deadlocked vote in a rulemaking proceeding, the effect of which was to leave the existing rules in place. The Court held that the Commission’s Public Notice announcing the deadlocked vote constituted final agency action for purposes of judicial review and directed the two Commissioners who had voted to retain the rules to submit a statement explaining their reasoning to facilitate judicial review. The Commission conceded to the Court that the joint statement was not binding precedent in future Commission cases. *Id.*, 184 F. 3d at 21. In any event, the Joint Statement by Chairman Martin and Commissioner Tate gives no details as to their reasoning for voting in favor of repealing Title II of the Communications Act as it applies to Verizon’s broadband services and thus cannot be deemed the opinion of the agency for purposes of Section 10(c).

<sup>8</sup> See News Release at 1.

may in the future offer.<sup>9</sup> In response to a request for clarification from Commission staff, Verizon, by letter dated February 7, 2006, stated that at a minimum it was seeking forbearance for packet-switched services capable of 200 Kbps in each direction,<sup>10</sup> including Frame Relay, ATM, IP-VPN and Ethernet, and non-TDM based optical networking, optical hubbing and optical transmission services. Verizon excluded from its clarified request special access services at DS1 or DS3 speeds, and stated it was not seeking forbearance from the application of universal service obligations to its broadband services.<sup>11</sup> Chairman Martin and Commissioner Tate appear to believe that the relief granted was that described in Verizon's February 7, 2006 *ex parte*,<sup>12</sup> as opposed to Verizon's original petition. Commissioner Copps, on the other hand, seems to believe that Verizon obtained forbearance from Title II and the *Computer Inquiry* rules for all services, including DS1 and DS3 services, the traditional special access services that "are the backbone of business communications in this country" and for its universal service obligations.<sup>13</sup>

Not surprisingly, the Commissioners' confusion carries over to the Petitions for Forbearance that are the subject of this docket. While AT&T and BellSouth limit their

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<sup>9</sup> Verizon Petition at 1.

<sup>10</sup> The BOCs' broad definition of broadband as all services capable of 200 Kbps in each direction encompasses virtually all telecommunications services other than single line, circuit-switched voice service.

<sup>11</sup> Letter from Edward Shakin, Verizon, to Marlene H. Dortch filed February 7, 2006 in WC Docket 04-440, at 2-3 ("Verizon 2/7/06 Ex Parte).

<sup>12</sup> Joint Statement of Chairman Kevin J. Martin and Commissioner Deborah Taylor Tate in Docket No. 04-440 at 1-2.

<sup>13</sup> Statement of Commissioner Michael J. Copps In Response To Commission Inaction On Verizon's Forbearance Petition, WC Docket No. 04-440 at 2.

requests for forbearance to Frame Relay, ATM, VPN, Remote Network Access Service with speeds up to 6 Mbps, Ethernet Based Service, Video Transmission Service, Optical Transport Service, Optical Networking Service and Wave-based Transport Service,<sup>14</sup> Qwest's wish list also includes Metro Private Line Service, which its website describes as "point-to-point intraLATA private lines at speeds ranging from DS-1 to OC-48 for on-net to on-net connectivity and DS-1 to OC-12 for on-net to off-net locations."<sup>15</sup> Thus, Qwest's Petition expressly seeks forbearance from Title II regulation for the traditional special access DS1 and DS3 services that Chairman Martin and Commissioner Tate believed were excluded from Verizon's request.<sup>16</sup> Chairman Martin and Commissioner Tate stated that "[i]t arguably would have been preferable to have reached consensus on a proposal clearly setting forth the relief granted today."<sup>17</sup> Not only would it have been

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<sup>14</sup> AT&T Petition at 8-10 and Appendix A; BellSouth Petition at 7-8 and Attachment A.

<sup>15</sup> Qwest Petition at Attachment A;  
[http://www.qwest.com/pcat/large\\_business/product/1,1016,1145\\_4\\_2,00.html](http://www.qwest.com/pcat/large_business/product/1,1016,1145_4_2,00.html).

<sup>16</sup> It is not at all clear that Verizon will not try to argue that the relief it was granted goes beyond the services described in the February 7, 2006 letter to the Commission. The Buckingham Research Group reported on July 6, 2006 that "One of the more interesting comments came from a Verizon executive who suggested that while the company was somewhat hamstrung in raising special access rates due to FCC conditions imposed as part of the VZ-MCI merger, it was looking at other ways to extract higher prices for its services, including the recent FCC forbearance petition that could lead to better pricing on SONET and other inter-central office transport services." The Buckingham Research Group, Equity Research Report on Communications Services issued July 6, 2006 at 2. In their Reply Comments in WC Docket No. 06-120, Verizon referenced a subsequent Buckingham Research Group Report which it claims "corrected" the July 6 story. The "correction" merely states that Verizon clarified the company's position on "rate relief." The Buckingham Research Group, Equity Research Report on Communications Services issued July 19, 2006 at 2.

<sup>17</sup> Joint Statement of Chairman Kevin J. Martin and Commissioner Deborah Taylor Tate in Docket No. 04-440 at 2.

preferable, the statute requires no less. Section 10(c) unambiguously provides that “[t]he Commission may grant or deny a petition in whole or in part and *shall explain its decision in writing.*” 47 U.S.C. §160(c) (emphasis added). There is no exception to the written explanation requirement for forbearance petitions deemed granted by the Commission’s failure to act in a timely fashion. On the contrary, the language requiring a written decision immediately follows the language stating that if the Commission fails to act within the statutory timeframe, “such petition shall be deemed granted.”

The lack of a decision explaining any reasoning for the grant of forbearance has prompted AT&T, BellSouth and Qwest to presume that the representations in the Verizon Petition relating to the state of competition for broadband services are not only true, but also entitle them, *a priori*, to the same relief. In the absence of any indication as to the factual basis for the forbearance deemed granted, there is no foundation for the BOCs’ presumptions.

## **II. The Statutory Criteria For Forbearance Have Not Been Met**

The BOCs bear a heavy burden in proving that they meet the requirements to obtain forbearance from *Computer Inquiry* and Title II regulation of their broadband services. Section 10(a) of the Act, 47 U.S.C. §160, provides that the Commission may not grant forbearance from any provision of the Act or any Commission regulation unless and until it determines that three conditions have been satisfied. The Commission must make affirmative determinations that (1) enforcement of the provision or regulation is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of

such provision or regulation is not necessary for the protection of consumers; *and* (3) forbearance from applying such provision or regulation is consistent with the public interest. In making the public interest determination, Section 10(b) requires the Commission to consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions and enhance competition.

The BOCs have not come close to meeting their burden of proving that grant of their Petitions to forbear from applying the *Computer Inquiry* and Title II regulations to their broadband services would satisfy each prong of Section 10(a) and would promote competitive market conditions and enhance competition as required by Section 10(b). Instead, emboldened as they are by the deemed granted status of the Verizon Petition, the BOCs maintain that the Commission *must* grant their Petitions because it would be unlawful for the Commission to regulate their broadband services when Verizon has been freed from such regulation.<sup>18</sup> Qwest goes so far as to contend that the grant of its Petition is a mere “ministerial act” that the Commission is compelled to perform and that the Commission need not undertake a detailed forbearance analysis.<sup>19</sup> Neither of these arguments has merit.

Sections 10(a) and (b) set out explicit standards that bind the Commission’s consideration and disposition of forbearance petitions. There are no exceptions. The Commission cannot grant forbearance unless it affirmatively determines that the statutory criteria are satisfied. Nowhere does Section 10 authorize the Commission to grant forbearance to eliminate allegedly disparate treatment. Moreover, by failing to act on Verizon’s Petition, the Commission has effectively repealed without explanation Title II

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<sup>18</sup> AT&T Petition at 1-3; Qwest Petition at 6-10.

<sup>19</sup> *Id.* at 7-9.

of the Act insofar as it applies to Verizon. A grant of the BOCs' Petitions would result in the repeal of Title II of the Act as it applies to the nation's remaining largest telecommunications carriers. Contrary to Qwest's assertion, the administrative repeal of a federal statute is not a ministerial act.<sup>20</sup> Accordingly, the Commission must reject the BOCs' suggestions that the deemed granted status of the Verizon Forbearance Petition constitutes a grant of forbearance of their obligations to meet the Section 10 standards.

**A. The BOCs Have Not Appropriately Defined Relevant Product and Geographic Markets For Their Broadband Services**

The Commission has previously determined that forbearance from dominant carrier and other Title II regulation is warranted only where there is sufficient facilities-based competition to ensure that the interests of consumers and the goals of the Act are protected.<sup>21</sup> In evaluating whether sufficient competition exists to justify forbearance, the Commission has reviewed the level of competition in both the retail and wholesale markets.<sup>22</sup> The Commission has properly recognized that application of the Section 10(a) criteria "is no simple task and a decision to forbear must be based upon a record

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<sup>20</sup> See *Clinton v. City of New York*, 524 U.S. 417 (1998) (repeal of statutes must conform with Article I of the Constitution; there is no provision of the Constitution that authorizes the President to repeal statutes); *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 954, 958 ("[a]mendment and repeal of statutes, no less than enactment, must conform with Art. I [of the Constitution]"; "[t]he explicit prescription for legislative action contained in Art. I cannot be amended by legislation.") (1983).

<sup>21</sup> *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, FCC 05-170 (released December 2, 2005), *appeal pending sub nom. Qwest Corporation v. Federal Communications Commission*, Case No. 05-1450 (D.C. Cir.) ("*Qwest Forbearance Order*").

<sup>22</sup> *Id.* at ¶65.

that contains more than broad, unsupported allegations of why those criteria are met.”<sup>23</sup>

The BOCs’ Petitions are devoid of substance and contain nothing more than broad, unsupported allegations relating to the extent and level of competition for their broadband services. Based on those broad, unsupported allegations, the BOCs ask the Commission to conclude that *Computer Inquiry* and Title II regulation is not necessary to ensure just and reasonable rates, prevent discrimination, protect consumers or protect the public interest. The Commission cannot draw such a conclusion based on the BOCs’ submissions, and for this reason, their Petitions must be denied.

In order to perform the required competitive analysis, the Commission must examine the relevant product and geographic markets and identify firms that are current or potential suppliers in those markets. *Qwest Forbearance Order* at ¶18. The Commission defines relevant product markets by identifying and aggregating consumers with similar demand patterns and treats as relevant geographic markets areas in which all customers will face the same competitive alternatives for a product. *Id.* The Commission has also found it appropriate to define separate relevant product markets based on the class of customer. Residential consumers fall into one product market, small enterprise customers fall into a separate product market and mid-sized to large

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<sup>23</sup> *In the Matters of Bell Operating Companies Petitions For Forbearance From The Application of Section 272 of the Communications Act of 1934 To Certain Activities*, CC Docket 96-149, Memorandum Opinion and Order, DA98-220 at ¶16 (released February 6, 1998).

retail enterprise customers fall into a third.<sup>24</sup> The BOCs' failure to submit any usable data on the relevant product or geographic markets precludes a grant of their Petitions.<sup>25</sup>

The BOCs characterize the customers for the broadband services for which they seek forbearance as "sophisticated" or mid-sized to large enterprise customers.<sup>26</sup> This characterization, however, is clearly underinclusive. For example, the BOCs seek forbearance for their Frame Relay services, which the Commission has recently described as a "cost effective service option for smaller businesses that do not generate enough traffic to support a full T-1." *SBC/AT&T Merger Order* at ¶ 57, n.164. The BOCs also seek forbearance for their video transmission services. AT&T has recently announced its intention "to make its Project Lightspeed video services available . . . to more than 5.5 million low-income households."<sup>27</sup> Qwest's "Qwest Choice TV" is offered to residential customers and its website states that the television service is available for "non-commercial use" only.<sup>28</sup> Under no circumstances can the small business customers for the BOCs' Frame Relay services and the residential customers for their video services, including the low-income residential customers, be said to occupy the one-size-fits-all

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<sup>24</sup> *In the Matter of SBC Communications Inc. and AT&T Corp. Applications for Transfer of Control*, WC Docket No. 05-65, Memorandum Opinion and Order, FCC 05-183 (released November 17, 2005 ("*SBC/AT&T Merger Order*") at ¶¶ 60, 81.

<sup>25</sup> See *Qwest Forbearance Order* at ¶ 50 (denial of request for forbearance for enterprise services due to a lack of relevant market data).

<sup>26</sup> BellSouth Petition at 4, 9; AT&T Petition at 5, 9, 15.

<sup>27</sup> <http://att.sbc.com/gen/press-room?pid=7777>. See also, "AT&T U-Verse Timeline" at 2, available at [http://att.sbc.com/common/files/pdf/att\\_u-verse\\_time\\_v10.pdf](http://att.sbc.com/common/files/pdf/att_u-verse_time_v10.pdf).

<sup>28</sup> See "Qwest Offers Innovative TV Service Solutions," available at <http://www.qwest.com/residential/products/tv>.

sophisticated, mid-sized and large customer class described by the BOCs in their Petitions.

The BOCs' showing with respect to the relevant geographic market(s) is similarly deficient. They contend simply that the market for their broadband services is national,<sup>29</sup> and submit no evidence with respect to the state or level of competition for broadband services in their serving territories. The BOCs' contention that the market for broadband services is national – *i.e.*, that all broadband customers across the nation face the same competitive choices -- is directly at odds with the Commission's geographic market analysis undertaken in the *SBC/AT&T Merger Order*. There, the Commission determined that the relevant geographic market for small enterprise customers with a single location in SBC's region was that customer's location and that the relevant geographic market for large, multi-location enterprise customers was all geographic locations within SBC's region where they had a presence. Only for large enterprise customers with locations throughout the United States did the Commission define the relevant geographic market as national.<sup>30</sup> Because none of the BOCs limit their forbearance requests to broadband services sold only to large enterprise customers with locations throughout the United States, the Commission cannot possibly find that the appropriate geographic market for purposes of analyzing whether there is sufficient actual or potential competition to justify forbearance from *Computer Inquiry* and Title II regulation for all broadband services is the entire nation. As the Commission has recognized, "the economic barriers to self-providing facilities can be substantial and 'can

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<sup>29</sup> BellSouth Petition at 12; AT&T Petition at 2, 5.

<sup>30</sup> *SBC/AT&T Merger Order* at ¶¶ 62-63.

differ from city to city, within the same city or between a city and its suburbs because of differences in municipal right-of-way and permitting policies as well as conduit availability' among other factors." *Qwest Forbearance Order* at ¶ 104. Such variations mandate that forbearance analyses be conducted on a market by market basis. *Id.* at ¶14, n. 46. To conclude otherwise would be a gross disservice to broadband customers located in AT&T's, BellSouth's and Qwest's service areas, especially those whose competitive options are non-existent or limited. That such customers exist was recently confirmed by the Chairman of AT&T who admitted that there are "many customers who have had limited access to broadband."<sup>31</sup>

**B. The BOCs Have Failed To Identify Broadband Competitors Operating In Their Service Territories**

In addition to flunking the product market/geographic market test, the BOCs have presented no credible evidence that sufficient competition exists in either their retail or wholesale broadband markets such that Title II and the *Computer Inquiry* regulations are not necessary to ensure just, reasonable and nondiscriminatory rates, terms and conditions for the broadband services at issue here. Instead of identifying actual or even potential competitors that provide broadband services in their local service areas, the BOCs simply make conclusory, unsupported allegations that all broadband users have numerous suppliers from which to choose, citing an ex parte filed in the Verizon forbearance proceeding as definitive proof that competition for broadband services is

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<sup>31</sup> "AT&T Initiatives Expand Availability of Advanced Communications Technologies," Detroit, Michigan, May 8, 2006, available at <http://att.sbc.com/gen/press-room?pid=5097&cdvn=news&newsarticleid=22272>.

abundant.<sup>32</sup> Verizon's ex parte, however, at least identified competing providers of broadband services *in its serving area* and singled out AT&T as the largest provider of broadband services to enterprise customers.<sup>33</sup> It also identified Qwest as a large provider.<sup>34</sup> In contrast, AT&T, BellSouth and Qwest identified no retail or wholesale<sup>35</sup> competitors that provide broadband services in their serving territories. Nor did they provide their actual market shares or analyze the demand elasticity or supply elasticity for broadband services in their serving areas. Without such information, the Commission cannot possibly conclude that the BOCs merit forbearance in the retail<sup>36</sup> or wholesale market<sup>37</sup> for broadband services either in their service territories or nationwide.

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<sup>32</sup> Qwest Petition at 12, 14-17; AT&T Petition at 12 and BellSouth Petition at 11, 13 citing Verizon 2/7/06 ex parte.

<sup>33</sup> *Id.* at 7-9. Verizon's characterization of AT&T is consistent with AT&T's own description of itself. See n. 1, *supra*.

<sup>34</sup> *Id.*

<sup>35</sup> AT&T itself acknowledged that certain unidentified broadband competitors rely on wholesale inputs to serve their customers. See AT&T Petition at 12: "Current competitors include not only the facilities-based carriers that Verizon identified, but also system integrators and other non-facilities based competitors that are able to purchase wholesale frame relay and ATM services at highly competitive rates."

<sup>36</sup> See *Qwest Forbearance Order* at ¶ 50 (forbearance from dominant carrier regulation for retail enterprise services denied where Qwest failed to provide sufficient data to evaluate competitiveness of market). Qwest has provided no evidence that would warrant a reconsideration of the Commission's findings for Omaha, Nebraska, much less the nation as a whole.

<sup>37</sup> See *Id.* at ¶ 60 (forbearance from 251(c) obligations denied where Qwest failed to demonstrate that it was subject to significant competition from competitors that do not rely on its wholesale services). Again, Qwest has provided no evidence that would warrant a reconsideration of the Commission's findings for Omaha, Nebraska, much less the nation as a whole.

To bolster its argument that competition for broadband services is robust, AT&T makes the following argument:

In orders stretching back for many years, including most recently the *Wireline Broadband Order*, the *SBC-AT&T Merger Order*, and the *Verizon-MCI Merger Order*, the Commission has consistently and emphatically determined that large, sophisticated customers can purchase broadband services from a large number of suppliers. With respect to broadband transmission services in particular, the records developed in those and other recent Commission proceedings leave no doubt that many suppliers compete intensely to provide broadband ATM, Frame Relay, Gigabit Ethernet, IP-enabled broadband transmission services, and OCn-level transmission services.<sup>38</sup>

AT&T's characterization of the Commission's orders is misleading at best. In the *Wireline Broadband Order*, the Commission made no findings with respect to competition for broadband transmission services and in fact affirmed that stand-alone ATM service, frame relay, gigabit Ethernet service and other high capacity special access services that carriers and end users traditionally use for basic transmission purposes remain subject to Title II requirements.<sup>39</sup> The BOCs have provided no evidence of a change in circumstances within the last year that would compel a reversal of the Commission's determination that broadband transmission services should remain subject to Title II.

In the Merger Orders, the Commission found a "high level of concentration" for high-capacity data services for mid-sized and large enterprise customers with significant

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<sup>38</sup> AT&T Petition at 4-5.

<sup>39</sup> *In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, Report and Order and Notice of Proposed Rulemaking, FCC 05-150 (released September 23, 2005) at ¶19, *appeal pending sub. nom. Time Warner Telecom Inc. v. Federal Communications Commission*, Nos. 05-4769, *et al* (3<sup>rd</sup> Circuit).

operations in SBC's (now AT&T's) and Verizon's regions after the mergers.<sup>40</sup> There will undoubtedly be a similarly high level of concentration for high-capacity data services for mid-sized and large enterprise customers with significant operations in BellSouth's region if and when the Commission approves the AT&T/BellSouth merger. The highly concentrated nature of the broadband market in AT&T's territory may explain why neither AT&T nor BellSouth offered any evidence of competitive alternatives available to their broadband customers.

Although Qwest submitted data purporting to show "market share" for itself, Verizon and MCI for several broadband services,<sup>41</sup> the data is unreliable and entitled to no consideration for at least four reasons. First, the service categories for which revenue data is provided are for the most part undefined (e.g., "U.S. CPE-Based IP VPN Services" and "U.S. Business IP Revenue") and uncorrelated to the services for which Qwest seeks forbearance. Second, even if it were possible to fit the services into a relevant product market, the market share percentages Qwest shows for wholesale IP and business IP revenue are based on data that is almost four years old and the market share percentages for ATM and Frame Relay are based on data that is almost three years old. Qwest offers no explanation as to why a Petition for Forbearance filed in mid-2006 should be evaluated based on market data dating back to 2002 and 2003. Third, the data is apparently national in scope and provides no insight into Qwest's competitive position

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<sup>40</sup> *SBC/AT&T Merger Order* at ¶ 70; *Verizon/MCI Merger Order* at ¶ 70-71.

<sup>41</sup> Qwest Petition, Attachment B.

in its ILEC serving areas.<sup>42</sup> Finally, the numbers presented are analysts' projections, not actual market shares. At most Qwest's "market share" information demonstrates that analysts predicted that Verizon and MCI would realize larger revenues on some services than would Qwest. It does not show that Qwest competes with Verizon/MCI (or any other vendor) for those revenues and therefore is irrelevant for determining the extent or level of competition for broadband services in Qwest's territory.

The BOCs' failure to submit any reliable data on relevant product and geographic markets, as well as their failure to identify with specificity any facilities-based or non-facilities-based entities with which they actually or potentially compete in providing retail or wholesale broadband services in their serving areas, precludes a meaningful forbearance analysis. For this reason alone, the Commission must deny the Petitions. *Qwest Forbearance Order* at ¶¶ 59-67 (forbearance denied where Qwest failed to demonstrate existence of actual or potential competition).

### **C. *Computer Inquiry* and Title II Regulation Remain Necessary To Protect Consumers and Prevent Discrimination**

The removal of *Computer Inquiry* and Title II regulation for all broadband services will allow the BOCs to freely engage with impunity in price and service quality discrimination, to raise the prices for wholesale inputs used by facilities-based and non-facilities based providers to unjust and unreasonable levels, to refuse to sell wholesale inputs to any actual or potential competitors in their markets, and to refuse to interconnect with other carriers seeking to exchange traffic with the BOCs' broadband

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<sup>42</sup> See *In the Matter of Verizon Communications Inc. and MCI, Inc. Applications for Transfer of Control*, 20 FCC Rcd 18433 at ¶49, n.135 (2005) (rejecting analyst projections of national market share as unreliable and likely masking variations in market share among narrower geographic regions).

facilities. Other than their broad, conclusory allegations about the allegedly robust competition in the broadband market, the BOCs did not discuss why enforcement of Title II is not necessary to ensure that their charges, practices, classifications or regulations for broadband services are just, reasonable and not unjustly or unreasonably discriminatory. The BOCs did not even mention, much less discuss, why the Section 251 requirements that they (1) negotiate the terms and conditions for access to their broadband networks and facilities in good faith, (2) provide other carriers with interconnection to their broadband networks, (3) offer their retail broadband services for resale at avoided cost wholesale discounts and (4) provide reasonable notice of changes in their broadband networks that would affect interoperability are not necessary to ensure that their wholesale charges, practices, classifications and regulations for broadband services are just, reasonable and not unjustly or unreasonably discriminatory. As the Commission has acknowledged, these requirements facilitate existing and potential competition and are necessary to ensure just, reasonable and nondiscriminatory prices and practices and to protect consumers where, as here, all competitors rely on access to the ILEC network to exchange traffic and competing providers use resale to reach their customers. *See Qwest Forbearance Order* at ¶¶ 84, 87.

The BOCs have not demonstrated that they are subject to competition from competitors that do not rely on their wholesale broadband services. Although there is clearly wholesale demand for broadband transmission services, the BOCs have not provided any evidence that significant alternative sources of wholesale inputs exist for competitors in the BOC serving areas. As AT&T itself conceded, the unnamed systems integrators and other non-facilities-based competitors which it claims provide robust

competition for broadband services rely on wholesale inputs to reach their end users. (AT&T Petition at 12) Moreover, in the ordinary course of business, AT&T segregates its retail and wholesale enterprise customers (defined as other carriers and systems integrators) into different categories. *SBC/AT&T Merger Order* at ¶ 61, n. 176. In the absence of any evidence of alternative wholesale broadband transmission suppliers operating in their service territories, relieving the BOCs of their obligations to make wholesale inputs available to facilities-based and non-facilities-based competitors pursuant to Sections 201, 202 or 251 would significantly undermine, or even eliminate, whatever competition does exist. See *Qwest Forbearance Order* at ¶¶ 60, 84-87. Forbearance would give the BOCs a license to eliminate their competitors by refusing them wholesale inputs altogether or pricing those inputs at uneconomic rates to protect and increase their own market shares. What's more, forbearance from enforcing Sections 204 and 208 would deprive competitors and end users of their only avenue to challenge the lawfulness of broadband rates, terms and conditions. Under these circumstances, the Commission cannot possibly find that forbearance will promote competitive market conditions or enhance competition.

The BOCs also did not mention, much less discuss, how relieving them of their obligations under Section 222 to safeguard their customers' CPNI, their obligations under Section 214 to provide their customers reasonable notice of the discontinuance or withdrawal of a service, their obligations under Section 228 to refrain from slamming and cramming, or their obligations under Section 255 to ensure access to their broadband services for the disabled will protect consumers. Nor could they. These Title II obligations are paramount for the protection of all telecommunications customers, from

the “sophisticated” mid-sized and large enterprise customers who subscribe to the BOCs’ broadband services, to the smaller business customers who subscribe to their Frame Relay services and the residential customers who subscribe to their video transmission services.

The requirements of Section 10 (a) are conjunctive. The Commission must deny a petition for forbearance if it finds that any one of the three prongs is unsatisfied.<sup>43</sup> The BOCs’ failure to show that retail and wholesale competition throughout their franchise areas is vibrant enough to protect consumers and ensure that the rates, terms and conditions for broadband services are just, reasonable and nondiscriminatory in the absence of *Computer Inquiry* and Title II regulation mandates denial of the Petitions.

**D. Forbearance Will Not Serve The Public Interest**

In order to meet the public interest criterion of Section 10(a), the Commission has ruled that a petitioner must explain how the benefits of a regulation can be attained in the event of forbearance.<sup>44</sup> The BOCs have not even attempted to show that in the absence of enforcement of *Computer Inquiry* and Title II regulation, facilities-based and non-facilities based participants in the broadband market will remain viable, that customer CPNI will not be used for improper marketing or other purposes, that customers will have a right to challenge the lawfulness of the BOCs’ broadband rates, terms and conditions or that competition and consumers will be protected.

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<sup>43</sup> *Core Communications v. Federal Communications Commission*, 2006 U.S. App. LEXIS 16850 (D.C. Cir. 2006).

<sup>44</sup> *In the Matter of Petition of Ameritech Corporation for Forbearance from Enforcement of Section 275(a) of the Communications Act of 1934, as Amended*, CC Docket No. 98-65, Memorandum Opinion and Order, FCC 99-215 at ¶ 7 (released August 31, 1999).

Even if the Commission were to find that the BOCs are subject to sufficient retail competition to justify forbearance, which it should not do because of the BOCs' failure to identify any entities with which they compete, such a finding cannot be made for the wholesale market. Not even the BOCs themselves allege that there is any competition in the wholesale market for broadband transmission or other services. The Commission has made clear that forbearance will not serve the public interest or promote competitive market conditions where, as here, it is likely to lead to an increase in prices for wholesale inputs that competitors need to serve their customers. In the 1998 Biennial Review, the Commission found as follows:

[F]orbearance would be likely to raise prices for interconnection and UNEs (particularly those that may constitute bottleneck facilities), inputs competitors must purchase from incumbent LECs in order to provide competitive local exchange service. Because we find that the result of forbearance would be higher costs for competitive LECs which could impair their ability to enter and compete in local markets, we cannot find that forbearance would promote competitive market conditions.<sup>45</sup>

This precedent compels the Commission to conclude that forbearance from the *Computer Inquiry* and Title II requirements will not promote competitive market conditions because the result of forbearance will be higher costs for facilities-based and non-facilities-based competitors who rely on the BOCs' wholesale inputs. Higher costs will adversely impact the ability of these competitors to enter, compete and remain competitive in the BOC service territories. Moreover, because the BOCs are the only carriers with ubiquitous access to all residential and business customers in their serving territories, the total deregulation of their broadband services will allow them to effectively eliminate all

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<sup>45</sup> See *In the Matter of the 1998 Biennial Regulatory Review – Review of Depreciation Requirements for Incumbent Local Exchange Carriers*, CC Docket 98-137, Report and Order in CC Docket No. 98-137, Memorandum Opinion and Order in ASD 98-91, FCC 99-397 at ¶63 (released December 30, 1999).

facilities- based and non-facilities-based competitors by simply refusing to sell them the necessary wholesale inputs. Such a result will not serve the public interest.

The BOCs' complaints that *Computer Inquiry* and Title II regulation harm the public interest by raising their costs, delaying the introduction of new services, imposing undue administrative burdens and restricting their ability to respond to customer demand<sup>46</sup> are not credible. As demonstrated below, the BOCs are powerful forces in the broadband market and publicly brag about their innovativeness, their rapid and aggressive roll-out of new services and their customer responsiveness despite being subject to *Computer Inquiry* and Title II regulation.

### **III. Section 706 Does Not Compel Forbearance**

The BOCs contend that that the *Computer Inquiry* and Title II common carrier regulations deter broadband investment and innovation, delay the introduction of new services, limit their flexibility to customize service offerings, and limit their ability to respond to competition.<sup>47</sup> For these reasons, they argue that Section 706, which directs the Commission to use its forbearance authority to remove barriers to infrastructure investment and encourage the deployment of advanced services, mandates the grant of their Petitions.<sup>48</sup>

The BOCs' representations to the Commission directly contradict the representations they are making to the public and investors about their broadband initiatives, flexibility and competitiveness. For example, in the letter to shareholders

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<sup>46</sup> AT&T Petition at 11, 24-26; Qwest Petition at 13-14, 18-19; BellSouth Petition at 13-14.

<sup>47</sup> AT&T Petition at 6, 27; BellSouth Petition at 14; Qwest Petition at 12-13.

<sup>48</sup> *Id.*

accompanying AT&T's 2005 Annual Report, Chairman and CEO Edward E. Whitacre made the following statements:

Today AT&T is:

- No. 1 in wireless customers
- No.1 in large-business customers
- No.1 in DSL broadband lines
- No. 1 in local access and long distance lines
- No.1 in data revenues

\* \* \*

[W]e will continue to develop the most advanced and reliable networks, applications and services available anywhere in the world. That is what we do best.

Today, our global IP backbone is widely regarded as the best in the world with the most efficient cost structure.

We are investing in growth initiatives for businesses and consumers that leverage the power of these merging technologies in new ways, including:

- Super high speed Internet access.
- Sophisticated managed services that provide security and quality for transmitting information over our world-class IP backbone network.
- Voice over IP for large businesses.
- Next-generation IP-based television services.
- Advanced wireless voice and data services through Cingular Wireless.
- Innovative solutions that will integrate wireless and wireline communications.

We are continuing to enhance and evolve our global IP backbone and our local and wireless networks . . . . We intend to make all of these IP networks – wireline and wireless – work together seamlessly on the three critical screens: the PC, the TV and the wireless handset.

As demand for bandwidth and secure, high-quality IP networks increases with continuing growth and varied use of the Internet, your company stands to benefit.<sup>49</sup>

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<sup>49</sup> AT&T 2005 Annual Report, Chairman's Letter, available at [http://www.sbc.com/Investor/ATT\\_Annual/chairletter.html](http://www.sbc.com/Investor/ATT_Annual/chairletter.html).

More recently, a May 8, 2006 AT&T press release described a keynote address

Mr. Whitacre made to the Detroit Economic Club as follows:

**AT&T Initiatives Expand Availability of Advanced Communications Technologies**

*Company Enhances Broadband Reach Through Innovative Technologies: Satellite, Fixed Wireless and Wimax*

*Details the Availability of Project Lightspeed to Low-Income Households*

AT&T, Inc. (NYSE:T) today announced a series of moves that underscore the company's commitment to widely delivering the benefits of broadband Internet access and IP-based services to businesses and consumers throughout its traditional 13-state local service territory.

The initiatives, announced by AT&T Chairman and CEO Edward E. Whitacre during a keynote address to the Detroit Economic Club, include three components:

- Offering a satellite-based broadband service later this month in select rural markets in AT&T's residential service territory, most of which are not served by landline broadband service today.
- Affirming the company's intent to make its Project Lightspeed video services available – within three years – to more than 5.5 million low-income households as part of its initial build in 41 target markets, making them among the first in the nation to receive these new IP-enabled video services.
- Expanding the scope of the company's market efforts related to WiMAX and other fixed wireless technologies. New deployments will begin later this year in Texas and Nevada, joining existing AT&T fixed wireless service offers in Alaska, Georgia and New Jersey.

These efforts expand AT&T's industry-leading drive to make broadband Internet access, and the services it enables, more widely available to business and residential customers. AT&T is already the nation's largest provider of DSL broadband, with 7.4 million DSL lines in service and DSL service options available to nearly four out of five customer locations within the company's 13-state local service area.

\* \* \*

“Innovation and a meaningful commitment to bring those advances to all of our customers were at the foundation of our efforts to create the new AT&T,” Whitacre said. “With our resources, scope and expertise, AT&T is well positioned to deliver the benefits of new innovations to customers of all sizes – from the largest global enterprises to small businesses to consumers.

“By rapidly deploying these new broadband technologies and aggressively rolling out new services, we’re meeting that goal by making broadband and competitive video programming services accessible to many customers who have had limited access to broadband . . . until now,” he said.<sup>50</sup>

With respect to flexibility to meet customer demands for customized services, AT&T’s Global, National, Mid-Size, Regional Business and Government Solutions web page states that, “[t]he new AT&T provides business customers with access to one of the world’s most advanced IP networks and a single source for sophisticated national and global communications systems – local, national, global and wireless – *customized and managed to their specifications.*”<sup>51</sup> In AT&T’s 2005 Annual Report, Mr. Whitacre stated that “[w]e have an opportunity to *customize* advanced products built by AT&T for larger customers and make them available to our 3 million medium and small business customers.”<sup>52</sup>

Similarly, BellSouth Chairman and CEO Duane Ackerman heralded BellSouth’s investment in its broadband network and technologies in its 2005 Annual Report:

In our wireline business, we have put our core business on a clear path to a broadband future.

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<sup>50</sup> “AT&T Initiatives Expand Availability of Advanced Communications Technologies,” Detroit, Michigan, May 8, 2006, <http://att.sbc.com/gen/press-room?pid=5097&cdvn=news&newsarticleid=22272>

<sup>51</sup> <http://att.sbc.com/gen/general?pid=7490>. (Emphasis added.)

<sup>52</sup> AT&T 2005 Annual Report, Chairman’s Letter.

Network – We are increasing the speed of our wireline network by building on the investments we have made over the past two decades. Our goal is to deliver more bandwidth, better security and quality of service to our consumer and business customers. . . . [W]e are upgrading the network so that 50 percent of our households will have access to speeds of 12 to 24 megabits by the end of 2007. . . . Greater speeds open up possibilities for BellSouth to offer new higher bandwidth applications over our network such as voice over Internet protocol (VoIP), integrated wireless and wireline products, and video entertainment services.<sup>53</sup>

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BellSouth also made the following representations in its Annual Report:

But our story is not just about speed, it's also about our communications network. BellSouth is channeling more capital and assets toward expanding our broadband IP (Internet protocol) network – one with the capability, bandwidth and speed needed to compete against cable.

\* \* \*

In addition to expanding our fiber network, BellSouth is developing broadband products and services that meet customers' network needs. More than just providing high-speed Internet, we offer convenient solutions like wireless networking and Internet security for the home; voice, e-mail and web hosting packages for small businesses; and data networking and voice over Internet protocol (VoIP) solutions for large businesses.<sup>54</sup>

And in its 2005 Annual Report, Qwest Chairman and CEO Dick Notebaert touted the contracts Qwest had won with enterprise customers and the broadband initiatives it was offering:

The Spirit of Service was also at work in 2005 on behalf of enterprise customers. Qwest won contracts for a broad variety of services with prestigious organizations including Sunkist, the State of Colorado, and the U.S. Department of Defense. We promoted One-Flex™, a Voice over Internet Protocol (VoIP) service, to businesses in some 250 cities in some 250 cities, and made customer-benefiting

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<sup>53</sup> BellSouth 2005 Annual Report, Letter to Shareholders, available [http://www.bellsouth.com/investor/2005annualrpt/letter\\_to\\_shareholders.htm](http://www.bellsouth.com/investor/2005annualrpt/letter_to_shareholders.htm).

<sup>54</sup> BellSouth 2005 Annual Report at 3.

improvements in our Qwest iQ Networking™ wide area network (WAN) solution, a service named “Best Value” by *Network Computing* magazine.<sup>55</sup>

The words of the BOC Chairmen and the representations the BOCs have made in SEC filings regarding their investments in broadband, product innovation and competitiveness belie the fictional complaints contained in their Petitions that the *Computer Inquiry* and Title II regulations dampen their incentives to invest and impede their ability to compete. The BOCs cannot have it both ways. The BOCs’ assertions that *Computer Inquiry* rules and Title II stifle broadband development, innovation and their ability to innovate and compete are contrary to the reality painted by their corporate leaders and should be accorded no weight by the Commission.

#### **IV. Conclusion**

For the foregoing reasons, COMPTEL respectfully requests that the Commission deny the AT&T, BellSouth and Qwest Petitions for Forbearance from *Computer Inquiry* and Title II regulation.

August 17, 2006

Respectfully submitted,

/s/

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<sup>55</sup> Qwest 2005 Annual Report at 3.