

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

In the Matter of	)	
	)	
Qwest Petition for Forbearance Under	)	
47 U.S.C. § 160(c) from Title II and	)	
Computer Inquiry Rules with Respect to	)	
Broadband Services	)	
	)	
Petition of AT&T Inc. for Forbearance	)	
under 47 U.S.C. § 160(c) from Title II	)	WC Dkt. No. 06-125
and Computer Inquiry Rules with	)	
Respect to its Broadband Services	)	
	)	
	)	
Petition of BellSouth Corporation for	)	
Forbearance Under Section 47 U.S.C.	)	
§ 160(c) from Title II and Computer	)	
Inquiry Rules with Respect to its	)	
Broadband Services	)	
	)	
Embarq Petition of the Embarq Local Operating	)	
Companies for Forbearance Under	)	
47 U.S.C. § 160(c) from Application of the	)	WC Dkt. No. 06-147
Computer Inquiry and Certain Title II	)	
Common Carriage Requirements	)	

**OPPOSITION OF TIME WARNER TELECOM, INC., CBeyond  
COMMUNICATIONS, LLC, AND ONE COMMUNICATIONS CORP.**

August 17, 2006

**Willkie Farr & Gallagher LLP**  
1875 K Street, N.W.  
Washington, D.C. 20006-1238  
(202) 303-1000

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COMMUNICATIONS, LLC AND ONE COMMUNICATIONS CORP.**

Time Warner Telecom, Inc. (“TWTC”) Cbeyond Communications LLC, (“Cbeyond”),  
and One Communications Corp., by their attorneys, hereby submit this opposition to the petitions

for forbearance filed by AT&T,<sup>1</sup> BellSouth,<sup>2</sup> Qwest,<sup>3</sup> (collectively, “the RBOCs”) and Embarq<sup>4</sup> in the above-captioned proceedings.

## **I. Introduction and Summary**

The RBOCs and Embarq have taken the opportunity in the wake of the confusion resulting from the FCC’s grant, without any justification or explanation, of Verizon’s broadband forbearance petition<sup>5</sup>, to seek similar relief for themselves. The petitioners seek the elimination of Title II regulation that applies to dominant carriers (such as price regulation) as well as regulation that applies to all telecommunications carriers for their non-TDM services such as Ethernet and non-TDM based OCn services.<sup>6</sup> There is no basis for granting any of this relief, but the petitions are most blatantly baseless with regard to dominant carrier regulation (the focus of

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<sup>1</sup> See Petition of AT&T Inc. for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services, WC Dkt. No. 06-125 (filed July 13, 2006) (“*AT&T Petition*”).

<sup>2</sup> See Petition of BellSouth Corporation for Forbearance Under Section 47 U.S.C. § 160(c) From Title II and Computer Inquiry Rules With Respect to Its Broadband Services, WC Dkt. No. 06-125 (filed July 20, 2006) (“*BellSouth Petition*”).

<sup>3</sup> See Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services, WC Dkt. No. 06-125 (filed June 13, 2006) (“*Qwest Petition*”).

<sup>4</sup> See Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of the Computer Inquiry and Certain Title II Common Carriage Requirements, WC Dkt. No. 06-147 (filed June 13, 2006) (“*Embarq Petition*”).

<sup>5</sup> See 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 No. 04-440 (filed Dec. 20, 2004) (“*Verizon Petition*”).

<sup>6</sup> Embarq’s petition is slightly narrower in terms of the scope of the relief sought, although it is still unclear exactly what regulations it is seeking relief from. See *Embarq Petition* at 2. (“Specifically, Embarq seeks relief from the mandatory application of Title II requirements regarding tariffs, prices, cost support, price caps and price flex....Embarq is not seeking relief from its Title II obligations related to CALEA...or USF.”).

this opposition) currently applicable to Ethernet and other packetized services and non-TDM based OCn services.

To begin with, the petitions all erroneously rely on the purported existence of retail competition (without regard to whether it is facilities-based) as the basis for their request for relief from dominant carrier regulation, or for that matter any duty to deal required of common carriers. As the FCC has repeatedly held, any analysis of dominance must turn on whether an ILEC controls the facilities needed to provide the retail services at issue, not the ILECs' retail market share for such services. The available evidence indicates that the petitioners remain dominant in the provision of broadband transmission facilities necessary to provide packetized and even OCn broadband services to businesses. The Commission's recent findings in the *Triennial Review Order* and Bell/IXC merger orders only reinforce the conclusion that the petitioners retain substantial market power over both TDM and packetized broadband transmission facilities used to serve business customers. This market power is derived primarily from the fact that, as the Justice Department explained in its review of legacy AT&T's merger with SBC, incumbent LECs such as the petitioners still own the only loop facilities capable of providing broadband business class service to the "vast majority" of commercial buildings in the country.

Without significant facilities-based competition, the removal of dominant carrier regulation from packetized broadband offerings as the petitioners request will obviously leave competitive carriers open to even greater price and non-price discrimination than is already the case after the elimination of *Computer Inquiry* requirements in the *Broadband Classification Order*. The fact that the ILECs have restricted their petitions to seeking relief only for packetized services and non-TDM based OCn services hardly cabins in the harm to consumer

welfare. Most importantly, because of the inherent advantages offered by packetized services and CLECs' inability in the long term to rely on ILEC supplied TDM facilities (either UNEs or special access) to provide packetized services, carriers without access to packetized transmission facilities at just and reasonable rates will be increasingly unable to compete.

Moreover, the ILECs' request for relief from Title II regulations applicable to non-dominant carriers like CLECs is simply absurd. The ILECs offer no justification for this relief, and there is none. Given their obvious market power, the ILECs must continue to be subject to the basic duty to deal imposed on all telecommunications carriers. Furthermore, it is difficult to see how the social policy regulations in Title II could possibly be eliminated for packetized or non-TDM based OCn services. For example, how is it that the CPNI of an AT&T Ethernet customer is any less entitled to protection than the CPNI of a TWTC Ethernet customer? Why is it that access by the disabled is any less important for advanced packetized services than for TDM services? Obviously, there is no basis for these distinctions. But the ILECs' petitions for relief from *all* Title II regulation for these services would lead to exactly this sort of discrimination.

In sum, the petitions ask the Commission to once again ignore the market realities and grant the incumbents' relief based on nothing more than baseless, conclusory statements and the incumbents' burning desire to eliminate constraints on their ability to capture the full value of monopoly rents. The truth is that the incumbents continue to possess enduring market power over the broadband transmission facilities needed to serve business customers, and granting the ILECs' petitions would result in serious harm to consumer welfare. The FCC must reject the ILECs' petition and retain all existing Title II regulation applicable to the ILECs' broadband transmission services, whether packetized, non-TDM based OCn or TDM.

## II. The Grant of Verizon's Petition Does not Provide a Basis for Approving the Petitioners' Requests

As a preliminary matter, the petitioners wrongly assert that the grant of Verizon's petition<sup>7</sup> provides a basis, in and of itself, for granting the instant pending petitions. *See, e.g., BellSouth Petition* at n.5; *Qwest Petition* at 2; *AT&T Petition* at 2. In support of this argument, AT&T asserts that the D.C. Circuit has in the past considered an FCC "press release" stemming from a 2-2 FCC vote to be an "opinion of the Agency" which carries precedential value for future action.<sup>8</sup> However, that case only demonstrates how deficient the Verizon "decision" actually was.

Most fundamentally, the cursory explanation in the *Joint Statement* and news release in which the Commission announced its grant of the Verizon petition offers little clue as to why the Commission may have thought it was justified in granting Verizon's petition. Absent such an explanation, there is no basis for determining whether the instant petitions resemble Verizon's and whether the Verizon decision could somehow support granting the instant petitions. In any event, the court in *Radio-Television* (the case AT&T relies upon) rejected the agency's cursory reasoning for its decision because the news release in that case was, like the *Joint Statement* and news release with respect to the *Verizon Petition*, vague, unsupported, conclusory and

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<sup>7</sup> *See* FCC Press Release, *Verizon Telephone Companies' Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to Broadband Services is Granted by Operation of Law*, WC Dkt. No. 04-440 (rel. March 20, 2006). *See id.*, Joint Statement of Chairman Kevin J. Martin and Commissioner Deborah Taylor Tate, WC Dkt. No. 04-440 (rel. March 20, 2006) ("*Joint Statement*").

<sup>8</sup> *See AT&T Petition* at n.4 (citing *Radio-Television News Directors Ass'n v. FCC*, 184 F.3d 872 (D.C. Cir. 1999) ("*Radio-Television*").

constituted an unjustified change in prior policy.<sup>9</sup> For the same reasons, the grant of Verizon’s petition holds no precedential value for the petitions at bar.

### **III. In Assessing The Petitions, the FCC Must Focus on the Extent To Which the Petitioners Continue to Possess Market Power Over the Facilities Necessary to Provide These Services**

The petitioners’ arguments that market circumstances support their petition fare no better. The petitioners argue that the purpose of Title II dominant carrier regulation (such as special access price regulation) is to ensure that carriers with market power cannot exercise that power to disadvantage rivals.<sup>10</sup> This is certainly true. However, the petitioners seem to believe that the presence of robust *retail* competition in the market for packetized broadband services to enterprises somehow eliminates the petitioners’ market power over these services.<sup>11</sup> This belief is inconsistent with decades of FCC precedent linking dominance and market power to the control of the underlying bottleneck facilities.

Section 10 of the Communications Act requires that the Commission forbear from applying a statutory provision or regulation only if it determines that (1) the requirement is not “necessary” to ensure just, reasonable and “not unjustly or unreasonably discriminatory” charges and practices; (2) the requirement is “not necessary for the protection of consumers”; and (3)

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<sup>9</sup> See *Radio-Television* at 881 (“Yet, to the extent the FCC employed some sort of ‘calculus,’ its analysis in the Joint Statement is opaque, relying on broad policy statements to justify much narrower rules despite having recently rejected similar policies in a related context....In short, the FCC’s analysis in the Joint Statement bears little relation to the FCC’s present and past actions.”). See also *id.* at 881-883.

<sup>10</sup> See *Qwest Petition* at 14 (“Given that Qwest has no market power in the broadband market, there is no justification to apply the Title II common carriage requirements.”).

<sup>11</sup> See, e.g., *BellSouth Petition* at 11 (“[N]early half the large and medium-sized business customers that purchase ATM and Frame Relay services had switched providers and...there is no significant difference in the level of competition for these services in different parts of the country.”).

forbearance is in the public interest. 47 U.S.C. § 160(a). These requirements are conjunctive, so the failure to meet any of the three requires denial of a petition for forbearance.<sup>12</sup> In the context of Section 10, “necessary” does not mean “absolutely required” or “indispensable.” *CTIA v. FCC*, 330 F.3d at 511. A requirement is “necessary” to ensure just, reasonable and nondiscriminatory rates, terms and conditions if there is merely a “strong connection” between a requirement and “what the agency permissibly sought to achieve with the disputed regulation.” *Id.* at 512. Moreover, in making a determination as to whether granting a petition is in the public interest, the Commission “shall” consider the extent to which granting forbearance will “promote competitive market conditions.” 47 U.S.C. § 160(b).

When determining whether to grant forbearance under Section 10 from dominant carrier regulation, the D.C. Circuit has held that the Commission must apply its traditional standard for determining dominance established pursuant to statutory provisions other than Section 10 (mainly Sections 201 and 202) unless the Commission explains why a departure from that test is appropriate.<sup>13</sup> Accordingly, in determining whether to grant the petitioners’ request for forbearance from dominant carrier regulation, the Commission must apply its traditional non-dominance test.

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<sup>12</sup> See *Cellular Telecomms. & Internet Ass’n v. FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003) (*CTIA v. FCC*).

<sup>13</sup> See *AT&T Corp. v. FCC*, 236 F.3d 729, 736 (2001) (“The FCC departed from its traditional non-dominance analysis without explanation. The FCC’s new policy that market share data [alone] is essential to evaluate a carrier’s market power may well be reasonable, but until the Commission has adequately explained the basis for this conclusion, it has not discharged its statutory obligation under the Administrative Procedure Act. Where, as here, an agency has failed ... to explain the path that it has taken, we have no choice but to remand for a reasoned explanation.”) (internal cites omitted).

The FCC's rules and past precedents define a dominant carrier as a carrier that possesses market power.<sup>14</sup> As the Commission recently reiterated in the *Qwest Omaha Order*<sup>15</sup>, the FCC has applied the same dominance analysis since the *Competitive Carrier* proceedings and the dawn of competition in the late 1970s. Through the *Competitive Carrier Proceeding*, the Commission established a regulatory framework to distinguish between dominant carriers, which have market power, and carriers classified as non-dominant, which lack market power. Under the framework set forth in the *LEC Classification Order*, the Commission determines whether a carrier is dominant by: (1) delineating the relevant product and geographic markets for examination of market power; (2) identifying firms that are current or potential suppliers in that market; and (3) determining whether the carrier under evaluation possesses individual market power in that market. See *Qwest Omaha Order* ¶ 18.

As the FCC has repeatedly found, dominance is tied to control over bottleneck facilities, not retail market share. The dominance/non-dominance analysis in this case must accordingly focus on the extent to which the ILECs control the facilities necessary to provide packetized broadband services to enterprises. In the 2001 *Broadband Dom/Non-Dom NPRM*,<sup>16</sup> for example, the Commission recognized the need to investigate each particular broadband product and geographic market to determine if a “carrier may be able to raise prices by increasing its rivals’ costs or by restricting its rivals’ output through the *carrier's control of an essential input, such as*

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<sup>14</sup> See 47 C.F.R § 61.3(q); see also, e.g., *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, ¶ 5 (1995) (“*AT&T Non-Dominance Order*”).

<sup>15</sup> See *Petition of Qwest for Forbearance Pursuant to Section 47 U.S.C. 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005) (“*Qwest Omaha Order*”).

<sup>16</sup> See *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, 16 FCC Rcd 22745, ¶ 17 (2001) (“*Broadband Dom/Non-Dom NPRM*”).

*access to bottleneck facilities*, that its rivals need to offer their [broadband] services.” *Id.* ¶ 28 (emphasis added). The Commission acknowledged that “[h]igh initial investment, economies of scale, access to customers, and the monopoly legacy of the telecommunications networks all contribute to incumbent LEC market power in the local exchange and exchange access market.” *Id.* ¶ 29. To the extent that competitors must rely on loop facilities as inputs, the FCC recognized that the dominance/non-dominance inquiry must focus on “the extent to which current statutory and regulatory requirements, including any competitive safeguards” limit the incumbents’ ability to raise rivals’ costs. *Id.* ¶ 32. Moreover, when the FCC declared AT&T to be non-dominant, it did so in large part because it no longer controlled local bottleneck facilities.<sup>17</sup>

Accordingly, the petitioners’ attempts to rely on retail competition as the basis for relief must be rejected. For example, AT&T argues that “the Commission concluded, just months ago that competition for ‘high-capacity transmission services,’ including Frame Relay, ATM and Gigabit Ethernet is ‘robust’ and that the merged SBC-AT&T would have no ability to ‘raise and maintain prices above competitive levels.’”<sup>18</sup> The petitioners’ reliance on this and similar passages from the RBOC/IXC merger orders is misplaced. In nearly every instance where the petitioners cite to the RBOC/IXC merger orders, they cite to the FCC’s discussion of *retail*

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<sup>17</sup> See *AT&T Non-Dominance Order* ¶ 32 (“At the time we issued the First Report and Order, AT&T controlled bottleneck facilities and was virtually the only supplier of interexchange services. Thus, under 1981 market conditions, AT&T’s market power in one segment of the market could have dramatically affected the performance of all market segments. As explained below, however, the interexchange market enjoys substantial competition today. Even though AT&T may be able to control the price of a small number of services, as we discuss below, the vast majority of interexchange services and transactions are subject to substantial competition. Moreover, as a result of divestiture, AT&T no longer owns bottleneck local access facilities.”).

<sup>18</sup> See *AT&T Petition* at 19 (citing *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion & Order, 20 FCC Rcd 18290, ¶¶ 57, 73 n.223 (2005) (“*SBC/AT&T Merger Order*”)).

special access competition. The FCC merely concluded in its RBOC/IXC merger orders that the loss of legacy AT&T in the *retail* special access market in SBC's region would be ameliorated by the presence of other *retail* competitors.<sup>19</sup> Moreover, it is of course true that the *retail* market for packetized and TDM-based special access services is competitive. But this fact is irrelevant to any dominance analysis in this case. The existence of retail competition depends almost completely on the availability of inputs provided by the ILECs at just and reasonable terms and rates. In the absence of price and non-price regulation made possible by Title II, these inputs would no longer be available and retail competition would suffer.

Indeed, the parts of the RBOC/IXC orders *not* cited by the ILECs make clear the ILECs' control over special access facilities. For example, while "SBC can access all or virtually all of the buildings and transport routes in its territory" (*SBC/AT&T Merger Order* ¶ 30) over its own facilities, legacy AT&T, one of the largest CLECs in SBC's territory, had deployed facilities to less than 1 percent of the 240,000 buildings in SBC's region. *See id.* n.98. Even though legacy AT&T controlled a miniscule percentage of the market for special access facilities, the FCC believed that the elimination of AT&T as a facilities-based competitor in SBC's region would lead to substantial harms that could only be cured through DOJ-ordered divestitures of many of these facilities. *See id.* ¶ 37. The DOJ came to a similar conclusion regarding SBC's dominance

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<sup>19</sup> *See SBC/AT&T Merger Order* ¶ 65 ("We conclude that, although there is evidence that horizontal concentration will increase as a result of the merger, this increase is not likely to result in anticompetitive effects, given the large number of competitors already participating in this market and the high level of customer sophistication for mid-sized and large enterprise customers.").

of the special access facilities market, finding that SBC controlled the only last-mile access to the “vast majority of commercial buildings”<sup>20</sup> in its region.

#### **IV. The Petitioners Continue to Control Bottleneck Facilities Necessary to Provide Packetized Broadband Services to Enterprise Customers**

None of the petitioners has proffered any information as to their market share of the broadband transmission *facilities market*. This is of course because all the available data shows that the petitioners continue to control the vast majority of facilities necessary to provide both packetized and TDM-based broadband services to enterprises. Less than two years ago, the ILECs stated in their “UNE Fact Report” that competitors served 31,669 buildings<sup>21</sup> with their own fiber loops as compared to the hundreds of thousands or millions of buildings served by ILEC fiber.<sup>22</sup> CLECs therefore only possess a 1.1 to 4.6 percent share of the high capacity transmission loop facilities needed to provide TDM and packetized services to enterprises. In any market characterized by high entry barriers and in which one company controls 95 percent of that market, that company is able to exercise its market power and must be considered dominant.

Indeed, TWTC, like other CLECs, remains heavily reliant on ILEC loop facilities. This is so even though it likely deploys loop facilities at a faster pace than any other competitor serving the business market. While TWTC serves 6,185 buildings on-net, it provides service to

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<sup>20</sup> *United States v. SBC Communications, Inc. and AT&T Corp.*, Case No. 1:05CV02102, Complaint ¶ 15 (D.D.C. filed Oct. 27, 2005).

<sup>21</sup> *See UNE Fact Report 2004*, Prepared for and Submitted by BellSouth, SBC, Qwest, and Verizon, Dkt. Nos. 04-313 *et al.*, at III-4 (Oct. 4, 2004).

<sup>22</sup> *See Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533, ¶ 157 (2005) (“*TRRO*”) (stating that the record indicates that there are between 700,000 and 3 million commercial buildings in the nation).

another 16,865 buildings via leased (usually ILEC) special access loops.<sup>23</sup> Therefore, TWTC serves only 26.8 percent of its customer locations using its own facilities, while it must rely on other carriers (almost exclusively the ILEC) 73.2 percent of the time. TWTC is not alone in its reliance on ILEC facilities. Other companies that provide packetized broadband services to business customers such as XO,<sup>24</sup> Xspedius,<sup>25</sup> TDS,<sup>26</sup> McLeod,<sup>27</sup> and Cavalier,<sup>28</sup> have previously stated that they cannot serve the vast majority of their customers using their own loop facilities and must rely on the ILEC instead in most cases. Still other carriers, such as Cbeyond, which provides only DS-1 level service, deploy *no* loop facilities because it is generally not economic for Cbeyond<sup>29</sup> or any other CLEC (*see TRRO* ¶ 166) to deploy DS-1 level facilities because the revenue opportunities are so low.

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<sup>23</sup> See Time Warner Telecom, Inc., SEC Form 10-Q Quarterly Report for the Period Ended Mar. 31, 2006, at 24 (filed May 10, 2006). Nearly all of these facilities are leased from the RBOCs.

<sup>24</sup> See DS1 Loop Emergency Petition of XO Communications, Inc., Ex. 2, Declaration of Wil Tirado, WC Dkt. Nos. 04-313, ¶ 7 (filed Sept. 29, 2004) (XO has only built loops to 1% of the buildings in those cities where it has a fiber ring).

<sup>25</sup> See Declaration of James C. Falvey ¶ 20, attached to Joint Comments of the Loop and Transport CLEC Coalition, WC Dkt. No. 04-313 (filed Oct. 4, 2004) (almost none of Xspedius' transmission facilities serve individual customers).

<sup>26</sup> See Declaration of Mark A. Jenn, ¶ 12, attached to ATX *et al.*, Comments, Attach. A, WC Dkt. No. 04-313 (filed Oct. 4, 2004) (stating that TDS only deploys loops to 2.4% of the buildings that it serves).

<sup>27</sup> See McLeod Comments, WC Dkt. No. 04-313, at 9-10 (asserting that even in those markets where McLeod has deployed the most facilities, it has only deployed to 1% of the buildings in those exchanges).

<sup>28</sup> See ALTS *et al.* Comments, App. I, Declaration of Brad A. Evans, WC Dkt. No. 04-313, ¶ 13 (filed Oct. 4, 2004) (stating that Cavalier only deploys loops to 1-2% of the buildings that it serves).

<sup>29</sup> Cbeyond explains that all of its customers are served by DS1 loops provided by ILECs because it is never economically rational for Cbeyond to deploy DS1 facilities. See Declaration

The petitioners' market power over packetized and TDM-based special access facilities is unlikely to diminish any time soon. This is because, as the FCC has repeatedly found, facilities based entry is difficult and slow. In the two most recent unbundling orders, the FCC found that substantial barriers exist to high capacity loop construction, making rapid entry extremely difficult.<sup>30</sup> In its recent RBOC/IXC merger orders, the FCC reiterated that the barriers to construction of special access facilities are high.<sup>31</sup>

The petitioners argue that because the FCC determined that carriers are "unimpaired" without access to facilities at higher than DS3 capacity, there are no barriers to entry for CLEC construction of such facilities. *See AT&T Petition* at 14-15. The FCC dismissed this argument in its *SBC/AT&T Merger Order*:

"We are not persuaded by the Applicants' argument that Commission findings that network elements need not be unbundled pursuant to the 'impairment standard' ...demonstrate that the special access market has sufficiently low entry barriers to permit...facilities-based entry to defeat any attempted post-merger price increase...As the Commission explained in the Triennial Review Order '[t]he purposes of a market power analysis are not the purposes of section 251(d)(2). . . the Act requires only that network elements be unbundled if competing carriers are impaired without them, regardless of whether the incumbent LEC is exercising market

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of Richard Baatelan on behalf of Cbeyond, attached to Comments of ALTS, WC Dkt. Nos. 04-313 *et al.*, App. C ¶ 5 (Oct. 4, 2004).

<sup>30</sup> *See TRRO* ¶ 153; *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order, 18 FCC Rcd 16978, ¶ 150 (2003), *subsequent history omitted* ("TRO").

<sup>31</sup> *See SBC/AT&T Merger Order* ¶ 32 ("As discussed below, we find that the elimination of AT&T as a provider of wholesale special access services is likely to result in anticompetitive effects in the provision of Type I special access services to particular buildings where AT&T is currently the sole carrier, besides SBC, with a direct wireline connection to the building, *and where barriers to entry make it unlikely that other carriers will build their own facilities*. Absent appropriate remedies, these building-specific effects may also lead to increases in SBC's MSA-wide special access prices.") (emphasis added).

power or the unbundling would eliminate this market power.”

*SBC/AT&T Merger Order* n.105 (internal cites omitted). Furthermore, in eliminating CLECs’ right to unbundled OCn loops, the FCC relied on the availability of dark fiber loops, which are no longer available. *See Triennial Review Order* ¶ 202. Therefore, regardless of the FCC’s findings with respect to impairment, ILECs still exercise market power over all special access facilities used to provide packetized and TDM-based services.

Although the petitioners focus on retail competition for packetized broadband services to enterprises, they also imply that, unlike TDM facilities, there are few barriers to entry to construction of packetized broadband facilities. *See BellSouth Petition at 10*. This implied assertion is belied by the ILECs’ statements in other contexts. As AT&T has indicated, the only difference between TDM-based transmission facilities and Ethernet-based transmission facilities are the electronics placed on the ends of the fiber or copper loop:

“To offer Ethernet Services, a provider deploys Ethernet switches and Ethernet equipment at the customers’ premises that connects to the customers’ LANs. Ethernet providers then use dedicated transmission facilities to connect customers’ LANs to Ethernet routers and switches. However, they do not need special facilities, such as ‘Ethernet loops.’ In fact, there is no such thing as an ‘Ethernet loop.’ *Rather, Ethernet providers use ordinary dedicated transmission facilities that are also used for other types of services.*”<sup>32</sup>

The barriers to loop construction largely stem from the costs and administrative difficulties of laying the fiber itself, not the cost of the electronics used to light the fiber. *See TRRO* n. 493; *TRO* ¶ 381. Therefore, the barriers to facilities-based entry are essentially the same for loops that carry TDM or Ethernet traffic. As the FCC held in the *TRRO*, CLECs cannot deploy DS1 or DS3 facilities in most locations because the revenue opportunity does not

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<sup>32</sup> *See* Reply Declaration of Parley C. Casto ¶ 21, attached to Joint Opposition of AT&T Inc. and BellSouth Corp. to Petitions to Deny and Reply to Comments, WC Dkt. No. 06-74 (filed June 20, 2006).

compensate for the cost of deploying the fiber. *See TRRO* ¶ 166. Similarly, it is not economic for CLECs to deploy Ethernet capable loops at lower capacities and at longer distances where the cost of construction cannot be recouped. For that reason, CLECs are just as dependant upon ILECs' packetized transmission facilities to provide finished Ethernet services as they are to provide TDM-based services. Indeed, assuming the same revenue potential, it is no more likely that a CLEC would be able to deploy packetized loops than TDM-based loops. The absence of the availability of packetized UNEs<sup>33</sup> makes the impact of the petitioners' proposed relief far more damaging to competition than would be the case if they had asked for relief for solely TDM-based services.<sup>34</sup>

**V. TDM Based UNEs and Special Access Facilities Cannot be Used as Inputs to Provide Packetized Broadband Services to Enterprises In Many Instances**

AT&T argues that Title II regulation of packetized broadband services is unnecessary because TDM-based UNEs and special access facilities can serve as a replacement for the ILECs' packetized broadband facilities in those instances where competitors cannot construct their own facilities. As TWTC has demonstrated, however, TDM facilities cannot in many cases serve as an adequate substitute for packetized special access services provided on reasonable

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<sup>33</sup> In eliminating unbundling for the packetized capabilities of hybrid loops in the *Triennial Review Order*, the Commission did not rely on the absence of barriers to entry for these services. Rather, the Commission did so to encourage CLEC and ILEC investment in new, advanced facilities and because the Commission retained unbundling for the TDM features of these loops. *See TRO* ¶¶ 289-290. The Commission believed that the continued availability the TDM-based functionality of packetized loops would provide CLECs a viable alternative to packetized loop UNEs. As TWTC has shown, however, the Commission's prediction regarding the ability of carriers to employ TDM loops for Ethernet services is increasingly unfounded. Because of the added costs and inefficiencies of TDM loops, CLECs cannot utilize TDM loops to provide Ethernet services to many customer locations. *See Reply Declaration of Graham Taylor*, attached to Letter of Thomas Jones, Counsel, Time Warner Telecom, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 06-74, ¶¶ 17-25 (filed Aug. 8, 2006) ("*Taylor Reply Decl.*").

<sup>34</sup> However, TDM-based UNEs have substantial limitations as discussed below.

terms and conditions. The high price of the TDM facilities themselves, the need to purchase two sets of electronics (TDM and Ethernet), the inefficiencies of converting signals from TDM to Ethernet and the cost of maintenance and repair all conspire to substantially limit the circumstances in which competitors can rely on TDM transmission inputs to provide Ethernet service. *See generally, Taylor Reply Decl.* Accordingly, CLECs are increasingly reliant on “finished” packetized transmission facilities (those facilities that are subject to the instant petitions) to compete in the retail market for advanced services.

When a CLEC purchases a special access or UNE TDM loop, that circuit is provisioned with TDM electronics. Although CLECs do not pay a separate charge for these TDM electronics, the fixed cost of these electronics is incorporated into the monthly recurring charge for the circuit. *See id.* ¶ 18. Carriers must then place Ethernet customer premises electronics on top of the existing TDM electronics to enable the CLEC to offer Ethernet service. *See Taylor Reply Decl.* ¶ 18. These added electronics can add thousands of dollars in cost per circuit depending upon the configuration and capacity of the circuit. *See id.* CLECs therefore pay “twice” for the electronics to provide Ethernet over TDM: once for the TDM electronics and once for the equipment to convert the TDM signal to Ethernet. *See id.*

Furthermore, Graham Taylor, TWTC’s Senior Vice President for Marketing, has recently explained that “Ethernet-over-TDM also increases [CLECs’] costs because [CLECs] must purchase much more TDM capacity than [needed] to provide Ethernet service. If a customer demands a 50 Mbps Ethernet loop, the CLEC must purchase two DS3s from the ILEC. *See id.* Because of bandwidth loss that occurs when TDM is converted into Ethernet, the customer does not receive 90 Mbps of bandwidth when it utilizes two DS3s. *See id.* Indeed, “[r]ather, assuming a 512 kbps frame (essentially a packet) size, two DS3s only provide 66.5 Mbps of

Ethernet bandwidth.” *Id.* In fact, when CLECs provide Ethernet over TDM, they lose between 4 to 30 percent of the bandwidth in the TDM circuit. *Id.* Accordingly, CLECs relying on TDM as an input to Ethernet service must over-purchase bandwidth, thus artificially increasing their costs.

Moreover, as Mr. Taylor has also explained, “[r]eliance on TDM loops to provide packetized services also introduces additional points of potential failure into the circuit.” *Id.* ¶ 24. “[I]dentifying the source of service problems is slower, more complex and likely more costly if [CLECs] must rely on two sets of equipment rather than one.” *Id.* “If there is a problem with service quality and a circuit provisioned with both TDM and Ethernet electronics goes down, [a CLEC] must send its technicians to the site and the ILEC must also send its technicians to the site to determine whether the failure was caused by the [CLEC’s] equipment, the ILEC’s equipment, the ILEC’s circuit, or some combination of these.” *Id.* Because such equipment and the circuit are often located far from the areas where the CLEC has built a substantial portion of its network facilities, maintenance calls can take several hours. *See id.* “In addition, where [CLECs] self-deploy [] [their] own Ethernet loops, service repair and maintenance truck-rolls are generally much less costly in terms of labor and time because [CLECs] can only deploy loop facilities close to [their] existing network, decreasing the distance that must be traveled by the techs and increasing their utilization.” *Id.*

In addition, the high fixed and variable mileage rates ILECs (especially AT&T) charge for TDM special access facilities also make it uneconomical for carriers to rely on TDM special access facilities to provide Ethernet in many cases. The mileage charges imposed on a circuit of just 5 miles can add hundreds of dollars in cost to a circuit that can only be sold for less than \$1000 dollars at retail in many cases. *See Taylor Reply Decl.* ¶¶ 19-23. Rather, AT&T’s

mileage charges demonstrate that AT&T, and other similarly situated ILECs continue to exercise their monopoly power over the facilities necessary to provide packetized and TDM-based facilities to their enterprise customers. If the ILECs did not have market power over these facilities, they simply could not charge such absurdly high rates for TDM mileage. Indeed, unlike the high rates that RBOCs are able to charge for mileage in the market for local special access services, rates for competitive long-haul transmission circuits are extremely low and declining. As former FCC Chief Economist Simon Wilkie explains, prices in this market have fallen more than 90 percent since 1999.<sup>35</sup> The fact that RBOCs can levy exorbitant mileage charges for their local circuits while the prices for competitive long-haul services have dropped indicates that RBOCs are exercising their market power with impunity.

The “lower” prices offered by ILECs for TDM UNEs do not ameliorate the inherent problems presented by using TDM facilities to provide packetized services. Although TDM-based UNEs are generally priced lower than TDM-based special access circuits in most cases, the prices for these UNEs do not actually reflect their true costs. For example, relying on claims of no “facilities available,” the “incumbent LECs sometimes do not permit competitors to obtain new circuits as UNEs, and only permit the competitive LEC to convert facilities obtained as special access to UNEs after a ‘holding period’ of one to several months.” *TRRO* ¶ 64.

Moreover, “Verizon sometimes imposes large, nonrecurring charges on UNEs that are not imposed on special access.” *Id.* n.183 (internal citations omitted). BellSouth and AT&T (SBC)

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<sup>35</sup> See Declaration of Simon Wilkie, ¶ 10, attached to Opposition of Global Crossing, WC Dkt. No. 05-65 (filed Apr. 25, 2005) (“Consider the market for DS3 level transport from New York to Los Angeles, a distance of approximately 2,500 miles. In June 1999, such a circuit would be leased for \$55,000 per month. In February 2004, the price was \$3,500 per month. This represents a decline of over 90 percent.”).

have engaged in similar tactics.<sup>36</sup> For these reasons, the Commission determined that many carriers purchase special access because ILECs refused to offer UNEs in a non-discriminatory fashion. Indeed, these additional “hidden” costs are why many carriers, including TWTC and Paetec, rely almost exclusively on special access facilities, not UNEs, to provide service.

In any event, UNEs are often not available in areas where it is uneconomic to construct local transmission facilities. For example, TWTC’s experience is that there are many buildings in those areas where the FCC has determined that CLECs are not “impaired” without access to unbundled loops to which it is not economic to deploy laterals. This is true even in wire centers in which TWTC has deployed transport and collocated equipment in an ILEC central office. For these reasons, neither TDM-based special access services, nor TDM-based UNEs can serve as a replacement packetized transmission facilities offered on just and reasonable rates.

#### **VI. Large and Sophisticated Customers Cannot Negotiate Lower Prices in Markets Controlled by One Supplier, Such as the Market for Wholesale Special Access Facilities Used to Provide Packetized Broadband Services**

The petitioners argue that they cannot effectively exercise market power because “large and sophisticated customers” purchase packetized transmission facilities and therefore can negotiate for the lowest price. *See, e.g., BellSouth Petition* at 4; *AT&T Petition* at 15. In support of this argument, petitioners again mischaracterize the recent RBOC/IXC merger orders. In those orders, the FCC discussed the benefits of large and sophisticated customers negotiating for lower special access rates with respect to two issues related to the mergers: (1) coordinated

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<sup>36</sup> *See, e.g., Declaration of James C. Falvey on Behalf of Xspedius Communications* ¶ 38, attached to Comments of Loop and Transport CLEC Coalition, WC Dkt. No. 04-313 (filed Oct. 4, 2004) (“Xspedius has recently experienced a significant increase in the number of UNE orders rejected by SBC Texas because there were ‘no facilities’ available, and it would ostensibly require more than ‘routine network modifications.’ Yet, when ordered as Special Access, the same circuits are provisioned with alacrity.”); *id.* ¶ 39 (noting that, when Xspedius attempted to convert a special access circuit to a UNE circuit, BellSouth charged Xspedius an \$800 per circuit non-recurring charge).

effects in the wholesale special access market and (2) the impact on competition in the retail special access market. Crucially, the FCC did not hold in these or any other orders (nor could it) that even the most sophisticated customer could “bargain down” a monopolist who has little incentive to negotiate.<sup>37</sup>

As to the first issue, the FCC merely held that sophisticated customers, through a competitive bidding or RFP process, can prevent collusion between *at least two wholesale providers* in those few cases where at least two carriers can offer wholesale special access services.<sup>38</sup> Whatever the merits of this proposition, it has no relevance to situations in which only a single carrier’s facilities serve a particular location. As to the second issue, the FCC held that the effects of the elimination of legacy AT&T’s and MCI’s retail offerings in SBC’s and Verizon’s respective regions would be ameliorated by the ability of “sophisticated customers” to negotiate contracts among the multiple remaining carriers serving the retail enterprise market.<sup>39</sup>

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<sup>37</sup> In the case relied upon by AT&T to show that “sophistication of customers is likely to ensure competition even in highly concentrated markets” (*AT&T Petition* at n.43), the court still assumed the existence of two national providers of the particular product in question, not a monopoly. *See United States v. Baker Hughes Inc.*, 908 F.2d 981, 986 (D.C. Cir. 1990). Moreover, the market in that case, unlike the market for broadband transmission facilities, exhibited low barriers to entry, largely precluding anticompetitive behavior on behalf of the two firms already in the market. *See id.* at 989. *Baker Hughes* therefore has no bearing on the instant petitions.

<sup>38</sup> *See SBC/AT&T Merger Order* ¶ 52 (“*Coordinated Effects*. We also do not believe that the merger increases the likelihood of coordinated interaction. It is generally recognized that the likelihood of coordinated effects depends on a number of factors, including the ease with which firms can reach tacit agreement, the incentive of firms to cheat, and the ability of the remaining firms to detect and punish such cheating. Carriers that purchase wholesale special access services, whether Type I or Type II, are sophisticated customers that often rely on a competitive bid process or negotiate individual contracts, and that enter into long-term contracts.”)(citations omitted).

<sup>39</sup> *See id.* ¶ 56 (“We conclude, however, that the merger is not likely to result in anticompetitive effects for enterprise customers. We find that competition for medium and large enterprise customers should remain strong after the merger because medium and large enterprise customers are sophisticated, high-volume purchasers of communications services that demand high

Again, this conclusion is irrelevant to situations where petitioners control the sole transmission facility serving a commercial building.

Not surprisingly, in its merger orders, the FCC did not rely on the ability of sophisticated customers to negotiate lower rates for those services for which there was only one Type I wholesale supplier, *i.e.*, a monopoly.<sup>40</sup> This, of course, is logical since even the most sophisticated carrier cannot negotiate between two carriers in those situations where there are not two carriers. As explained above, because ILECs provide the only loop facilities serving the vast majority of commercial office buildings in the country, petitioners are the only wholesale suppliers in most situations and the “sophistication” of the buyer will do little to ameliorate the ILECs’ market power.

Indeed, as TWTC’s experience in seeking an agreement for finished Ethernet and IP VPN interconnection services with AT&T demonstrates, even the most sophisticated purchaser of special access services imaginable (a major CLEC) has been unable to obtain packetized services and facilities on reasonable terms and conditions. TWTC’s experience and sophistication has provided little help in extracting reasonable terms from AT&T. This is because AT&T is, in most cases, the only carrier offering Type I wholesale special access facilities in AT&T’s region

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capacity communications services, and because there will remain a significant number of carriers competing in the market.”).

<sup>40</sup> *See id.* ¶ 36 (“*Unilateral Effects*. Several commenters claim that, as a result of the merger, wholesale special access prices are likely to rise at specific buildings where AT&T is currently offering either Type I or Type II special access services. As discussed in greater detail below, we believe these claims are correct in part. The record suggests that the merger will result in a reduction in the number of competitors offering Type I services in buildings where AT&T is currently connected via its own facilities, and that, absent remedial measures, this is likely to lead to an increase in the price of special access service to buildings where only SBC and AT&T own or control a direct wireline connection, and where conditions make additional facilities-based entry unlikely.”) (citations omitted).

and the interconnection services necessary to provide IP VPN services. In these situations, AT&T has no incentive to provide competitive terms to TWTC. As explained in depth by Graham Taylor, under the current regulatory regime, AT&T has already acted upon its incentives to deny and degrade access to the bottleneck facilities necessary to provide packetized services such as IP VPN and Ethernet. *See generally, Graham Taylor Reply Decl.* AT&T's ability to act on its incentives will skyrocket if its services are completely removed from Title II regulation.

**VII. The Removal of Dominant Carrier Regulation from the Petitioners' Packetized Broadband Facilities Will Force CLECs to Scale Back or Eliminate Their Packetized Broadband Service Offerings**

Based on the forgoing, it is clear that granting the ILEC petitioners the relief that they seek would have dire consequences in the market for packetized loop facilities needed to serve business customers. That the petitioners limit their relief only to packetized transmission services is meaningless. *First*, as explained above, TDM services cannot be effectively used as inputs for packetized services. *Second*, carriers cannot over the long term compete with the ILECs' packetized services if they can only provide TDM-based services to the majority of customer locations that they cannot reach with their own facilities. This is because the demand for broadband transmission services is shifting further and further away from TDM-based services and towards packetized services. The inherent advantages and flexibility of packetized services virtually guarantee that this pattern will continue. For example, Ethernet customers can establish a direct connection between a carrier's loop facility and the customers' internal LAN, eliminating the need for complex protocol conversions the exist with TDM services.<sup>41</sup> Service and provisioning costs are also lower for Ethernet than for TDM services. *See Hubbard* at 9. Most importantly, Ethernet can be delivered in flexible capacity increments (not simple

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<sup>41</sup> *See* Stan Hubbard, Carrier Ethernet Services: Who's Doing What, 2 Heavy Reading at 9 (No. 24 Nov. 24, 2004) ("*Hubbard*").

multiples of DS1 and DS3), saving customers the expense for overpaying for capacity that they do not need, as is the case with TDM service. *See id.*

If ILECs are obligated to offer only the less efficient TDM-based services on reasonable terms and conditions subject to the Commission's rules and regulations, while more desirable packetized services such as Ethernet are subject to neither Commission regulation nor market discipline, the result is predictable. The ILECs will simply starve their TDM-based services of investment and will either offer the more desirable packet switched transmission services to CLECs at monopoly rates or not at all. Going forward, CLECs' ability to compete without access to these facilities will be severely hampered.

The ultimate extension of this trend is that CLECs will win less and less retail business and will be forced to withdraw from those markets where they rely on the ILECs' facilities for broadband transmission inputs. In other words, CLECs will only be able to serve customers in those few situations where it is economical to deploy their own facilities.

Serving only the largest customers' largest business locations does not constitute a viable business plan. Indeed, with respect to packetized facilities, it is becoming increasingly necessary to serve all of a customer's locations (not just the largest) so that the customer can be served over one integrated data/voice network.<sup>42</sup> If CLECs are forced to only serve customers via on-net loops, many of these multi-location customers will chose the ILEC because of their ubiquitous facilities.

The ILECs' refusal to provide packetized facilities to CLECs at just and reasonable rates in the absence of regulatory compulsion is not idle speculation. Indeed, the manner in which AT&T offers its *intrastate* Ethernet services demonstrates that ILECs will exercise their market

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<sup>42</sup> *See* Petition to Deny of Time Warner Telecom, Inc., WC Dkt. No. 06-74, at 5 (filed June 5, 2005).

power by denying access to necessary inputs to provide packetized services whenever they get the chance. TWTC has anecdotal evidence that AT&T is able to undersell TWTC in the retail Ethernet market by selling Ethernet services to its end-user customers under its state contract tariffs. *See Taylor Reply Decl.* ¶ 34. In many states, these state “tariffs” do not perform the functions normally associated with an effective tariffing regime, and indeed they are not subject to meaningful regulation. For example, in Ohio, the terms of the contracts for intrastate services AT&T offers to its retail customers must be made available to all “similarly situated customers.” OAC § 4901:1-6-19(A). However, AT&T argues that TWTC is not “similarly situated” to AT&T’s own retail end users (because TWTC is a wholesale customer) and therefore, TWTC cannot take advantage of these contract prices. Other states, such as Illinois, have similar statutory provisions which preclude CLECs from taking advantage of intrastate contract rates in most cases.<sup>43</sup> Because AT&T is under no compulsion to sell to competitors at the prices in these state contract tariffs, AT&T does not do so. Nor does wholesale competition provide a spur to AT&T to offer intrastate services to other carriers at even close to these rates. AT&T simply refuses to offer Ethernet services at these rates. The elimination of AT&T’s obligation to file tariffs for its packetized services at the Federal level (and the right of CLECs to opt-into such tariffs) would lead to the exact same sort of discrimination with respect to interstate packetized broadband services.

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<sup>43</sup> Under Illinois law, a telecommunications carrier can negotiate to provide competitive telecommunications services, including intrastate special access, without regard to any tariffs it may have on file with respect to such services. *See* 220 ILCS § 5/13-509. Carriers must file a notice of the negotiated contract (*see id.*), but CLECs have no way of knowing what the prices in the contract are as the contracts themselves are generally accorded confidential treatment. *See id.* More importantly, carriers would obviously have no right to opt-into these rates.

### **VIII. The ILECs Provide No Basis For the Removal of Those Title II Regulations that Apply to Both Dominant and Non-Dominant Carriers**

If the petitioners were granted the relief requested, their packetized broadband services would no longer be subject to dominant carrier *or any other* Title II regulation. If the removal of dominant carrier regulation is not justified because of the ILECs' continuing market power over high capacity transmission facilities, there is even less reason to eliminate those Title II regulations meant to apply to carriers both with and without market power. For instance, the core provisions of Title II, Sections 201, 202 and 208, do not apply only to dominant carriers. These sections have long been applied to all providers in both competitive and non-competitive markets.<sup>44</sup> Accordingly, even if the broadband transmission market were competitive (which it is not), the Commission must continue to apply these sections to the ILECs' offering of broadband transmission service. Only last year, the Commission reiterated that “[e]ven in *substantially competitive markets*, there remains a risk of unjust or discriminatory treatment of consumers, and sections 201 and 202 therefore continue to afford important consumer

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<sup>44</sup> See *Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance For Broadband Personal Communications Services; Biennial Regulatory Review - Elimination or Streamlining of Unnecessary and Obsolete CMRS Regulations; Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers; Further Forbearance from Title II Regulation for Certain Types of Commercial Mobile Radio Service Providers; GTE Petition for Reconsideration or Waiver of a Declaratory Ruling*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 16857, ¶ 15 (1998) (“*PCIA Forbearance Order*”) (“Sections 201 and 202, codifying the bedrock consumer protection obligations of a common carrier, have represented the core concepts of federal common carrier regulation dating back over a hundred years. Although these provisions were enacted in a context in which virtually all telecommunications services were provided by monopolists, they have remained in the law over two decades during which numerous common carriers have provided service on a competitive basis.”).

protections.”<sup>45</sup> This is because even in substantially competitive markets such as CMRS<sup>46</sup> “carriers may still be able to treat some customers in an unjust, unreasonable, or discriminatory manner.” *PCIA Forbearance Order* ¶ 23. For this reason, the Commission, with the exception of its mistaken and unjustified grant of the Verizon’s petition has “*never* granted a petition for forbearance from [these sections].” *SBC Forbearance Order* ¶ 17 (emphasis added). Even when the Commission has determined a carrier to be non-dominant, the Commission has continued to apply Sections 201 and 202 as well as the complaint procedures of Section 208. *See PCIA Forbearance Order* ¶ 17.

Nor have petitioners offered any reason why the Commission should eliminate the social policy requirements applicable to all telecommunications carriers under Title II. Indeed, the FCC has also recently expressed concern that carriers have not adequately safeguarded their customers’ CPNI. If the petitions were granted, the FCC will have no ability to ensure that ILECs’ packetized broadband services customers’ CPNI is properly protected. Nor will the

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<sup>45</sup> *Petition of SBC Commc’ns Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services*, Memorandum Opinion and Order, 20 FCC Rcd 9361, ¶ 17 (2005) (“*SBC Forbearance Order*”) (emphasis added).

<sup>46</sup> The FCC’s 1998 CMRS Report demonstrated that the CMRS market was highly competitive with multiple non-dominant providers competing in the same market: “There are at least three mobile telephone providers in each of the 50 largest Basic Trading Areas (‘BTAs’) and 97 of the 100 largest BTAs. Currently, three or more mobile telephone operators are providing service in BTAs containing approximately 219 million people.” *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Third Report, 13 FCC Rcd 19746 at 19751 [paragraph number unavailable] (1998); “To date, approximately 273 BTAs, containing over 219 million POPs, have three or more mobile telephone operators offering service. This represents 87 percent of the nation’s total POPs. While over one half of these BTAs have only three mobile telephone operators, 71 BTAs have four providers, 51 BTAs have five providers, and 13 have six providers. These 135 BTAs contain over 68 percent of the nation’s POPs.” *Id.* at 19768.

Commission be able to ensure disabled access to packetized service or the fulfillment of any other social policy requirements applicable only to telecommunications carriers.

If the ILECs' petitions are granted, the absurd result would be that CLECs would continue to be subject to the provisions and rules of Title II, while ILECs, with respect to their packetized services, would not be. There is no justification for such a state of affairs. Moreover, such an outcome which would place CLECs at a substantial, and unjustified competitive disadvantage because they would incur substantial costs for compliance with these rules, while its competitors would not. Competition and the interests of consumers will suffer as a result.

**IX. Conclusion**

For the reasons stated above, the ILECs' petitions should be denied.

Respectfully submitted,

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/s/

Thomas Jones  
Jonathan Lechter

Willkie Farr & Gallagher LLP  
1875 K Street, N.W.  
Washington, D.C. 20006  
(202) 303-1000

ATTORNEYS FOR TIME WARNER TELECOM,  
INC, CBeyond COMMUNICATIONS, LLC  
AND ONE COMMUNICATIONS CORP.

August 17, 2006

**CERTIFICATE OF SERVICE**

I, Jonathan Lechter, do hereby certify that on this 17th day of August, 2006, I caused to be served true and correct copies of the foregoing opposition by delivering copies thereof via U.S. mail and e-mail to the following:

<p><u>Embarq Local Operating Companies*</u> Craig T. Smith 5454 West 110<sup>th</sup> Street Overland Park, KS 66211 Tel: (913) 245-6691</p> <p><u>Qwest Corporation*</u> Craig J. Brown Robert B. McKenna Daphne E. Butler Suite 950 607 14<sup>th</sup> Street, N.W. Washington, D.C. 20005 Tel: 303-383-6653</p> <p><u>BellSouth Corporation*</u> Richard M. Sbaratta Suite 4300 675 West Peachtree Street, N.E. Atlanta, GA 30375-00001 Tel: 404-335-0738</p> <p>Bennett L. Ross Suite 900 1133 21<sup>st</sup> Street, N.W. Washington, D.C. 20036 Tel: 202-463-4113</p>	<p><u>AT&amp;T Inc.*</u> Jack S. Zinman Gary L. Phillips Paul K. Mancini AT&amp;T Inc. 1120 20<sup>th</sup> Street, N.W. Suite 1000 Washington, D.C. 20006 Tel: 202-457-3053</p> <p>David L. Lawson Sidley Austin LLP 1501 K Street, N.W. Washington, D.C. 20005 Tel: 202-736-8000</p> <p><u>FCC**</u> Janice M. Miles Federal Communications Commission Wireline Competition Bureau Competition Policy Division 445 12<sup>th</sup> Street S.W. Suite 5-C327 Washington, D.C. 20554 Janice.Myles@fcc.gov</p> <p>Best Copy and Printing, Inc. Portals II 445 12<sup>th</sup> Street, S.W. Suite CY-B402 Washington, D.C. 20554 fcc@bcpiweb.com</p>
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\* via U.S. mail

\*\* via e-mail

\_\_\_\_\_/s/  
Jonathan Lechter