

**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 and)
Computer Inquiry Rules with Respect)
To Broadband Services)
)
Petition of BellSouth Corporation for)
Forbearance Under 47 U.S.C. § 160(c))
from Title II and *Computer Inquiry* Rules)
With Respect To Broadband Services)
)
Petition of the Embarq Local Operating)
Companies for Forbearance Under)
47 U.S.C. § 160(c) from Application of)
Computer Inquiry and Certain Title II)
Common-Carriage Requirements)
)
Frontier and Citizens Communications)
Incumbent Local Exchange Carriers)
Petition for Forbearance Under)
47 U.S.C. § 160(c) from Title II and)
Computer Inquiry Rules with Respect)
To Broadband Services)

WC Docket No. 06-125

WC Docket No. 06-147

REPLY COMMENTS OF BELLSOUTH CORPORATION

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REPLY COMMENTS OF BELLSOUTH CORPORATION

BellSouth Corporation (“BellSouth”), on behalf of its wholly owned affiliates, hereby submits its Reply Comments in the above-referenced proceedings.

I. INTRODUCTION AND SUMMARY

The forbearance petitions filed by BellSouth and other incumbent local exchange carriers (“ILECs”) present the Commission with an important opportunity to eliminate arcane, unnecessary, and burdensome regulation of ILEC broadband services – an opportunity this Commission should not let pass. For more than three years, the Commission has worked diligently to promote broadband deployment and innovation by “clearing out the underbrush of regulation” applicable to broadband services. Specifically, the Commission: (1) eliminated most unbundling requirements for broadband;¹ (2) extended unbundling relief to both Fiber-to-the-Curb and Fiber-to-the-Home (“FTTH”) loops;² (3) granted forbearance from the application of section 271’s unbundling obligations to broadband elements relieved from unbundling under section 251;³ (4) preempted state commission orders regulating the provision of Digital Subscriber Line (“DSL”) service;⁴ (5) established a “minimal regulatory environment” for wireline broadband Internet access services;⁵ and (6) most recently eliminated Title II and *Computer Inquiry* regulation of certain broadband services offered by Verizon.⁶

¹ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) (“*Triennial Review Order*”), vacated in part and remanded, *United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir.) (“*USTA II*”), cert. denied 125 S. Ct. 313 (2004).

² *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Reconsideration, 19 FCC Rcd 20293 (2004).

³ *Petition for Forbearance of the Verizon Telephone Companies pursuant to 47 U.S.C. § 160(c)*, 19 FCC Rcd 21,496 (2004), aff’d, *EarthLink, Inc. v. FCC*, 2006 U.S. App. LEXIS 20819 (Aug. 15, 2006).

⁴ *BellSouth Telecommunications, Inc. Request for Declaratory Ruling That State Commissions May Not Regulate Broadband Internet Access Services By Requiring BellSouth To Provide Wholesale or Retail Broadband Services To Competitive LEC UNE Voice Customers*, Memorandum Opinion and Order and Notice of Inquiry, 20 FCC Rcd 6830 (2005).

⁵ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) (“*Wireline*

To date, the Commission's efforts have met with unparalleled success. According to industry estimates, the number of Americans with broadband service at home grew from 60 million in March 2005 to 84 million in March 2006, an increase of 40 percent.⁷ During the same time, the number of FTTH homes passed increased fourfold, from approximately one million homes passed to more than four million.⁸ Although cable modem service has been and remains the broadband market leader, DSL subscriber growth from telephone companies recently has begun to outpace new subscribers to cable modem service.⁹ These trends flow directly from the Commission's application of "a lighter regulatory touch" uniformly across various broadband platforms, and such trends are only certain to continue if the Commission grants the forbearance petitions filed by BellSouth and the other ILECs.

Not surprisingly, various ILEC competitors oppose forbearance, arguing that rules established decades ago when the analog telephone network was the only way to reach customers should continue to apply to ILEC broadband services, even though such rules do not apply in

Broadband Internet Access Order"), appeal pending *Time Warner Telecom v. FCC*, Case No. 05-4769 and consolidated cases (D.C. Cir.).

⁶ *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 (March 20, 2006).

⁷ *Home Broadband Adoption 2006*, John B. Horigan, Associate Director of Research, Pew Internet & American Life Project, May 28, 2006, at i. Broadband adoption among lower income households also has increased dramatically, as households with incomes between \$40,000 and \$50,000 with broadband service grew 68 percent between March 2005 and March 2006. *Id.* at 40-43.

⁸ See Ex Parte Letter from Thomas Cohen, Counsel to Fiber-to-the-Home Council, to Marlene Dortch, Secretary, FCC, MB Docket 05-311 (May 23, 2006) (citing Render Vanderslice & Associates study).

⁹ See, e.g., Steve Donohue, "DSL Rates Outpaces Cable," *Multichannel News* (August 17, 2006) (noting report from Leichtman Research Group, which found that top DSL providers added 1.16 million subscribers during second quarter 2006, compared to 918,427 from cable distributors).

large measure to these competitors and serve no useful purpose in a competitive market.¹⁰ Many rehash the same arguments and offer the same dire predictions about the end of broadband competition that they have been making for more than four years in resisting the Commission's efforts to eliminate unnecessary regulation of broadband services.¹¹ The Commission has rejected such arguments and disregarded such predictions in the past and should do so again.

In framing the relief that BellSouth is seeking, it is important for the Commission to understand what this case is not about. Despite commenters' claims to the contrary, this case is not about the availability of, pricing for, or the regulatory regime applicable to special access. Consistent with Verizon's forbearance petition that was granted by operation of law, the services for which BellSouth is seeking forbearance do not include TDM-based special access, such as DS1 and DS3 services.

¹⁰ Comments of EarthLink and New Edge Networks, Inc. in Opposition to Petitions (hereinafter referred to as "*EarthLink Comments*"); Opposition of Time Warner Telecom, Inc., Cbeyond Communications, LLC, and One Communications Corp (hereinafter referred to as "*Time Warner Telecom Comments*"); Opposition of Alpheus Communications, LP, Deletacom, Inc., Integra Telecom, Inc., McLeodusa Telecommunications Services, Inc., MPower Communications Corp., Norlight Telecommunications, Inc., Pac-West Telecom, Inc., TDS Metrocom, LLC, Telepacific Corp. D/B/A Telepacific Communications (hereinafter referred to as "*Alpheus Group Comments*"); Sprint Nextel Corporation's Opposition to Petitions for Forbearance hereinafter referred to as "*Sprint Nextel Comments*"); Comments in Opposition of Broadview Networks, Covad Communications, CTC Communications, Inc., Eschelon Telecom, Inc., Nuvox Communications, XO Communications, and Xspedius Management Company LLC (hereinafter referred to as "*Broadview Group Comments*").

¹¹ See, e.g., Comments of Covad Corporation, CC Docket Nos. 01-338, 96-98 & 98-147, at 9 (filed April 5, 2002) ("any Commission decision to ignore the clear mandate of Congress and scale back unbundling of the ILECs' loop and transport facilities would effectively eliminate broadband choice for consumers and small/medium sized businesses"); Reply Comments of ITC^DeltaCom, CC Docket Nos. 01-338, 96-98 & 98-147, at 21 (filed July 17, 2002) (expressing concern "that the movement of BellSouth's network to advanced services and data, even for the most basic customers, will exclude the CLECs' access to this customer"); Comments of Sprint Corporation, WC Docket No. 04-440, at 2 (filed Feb. 11, 2005) ("... competition in all telecommunications markets ... would be impaired if the Commission were to do away with *Computer Inquiry* safeguards").

This case also is not about wholesale competition. Although the broadband services that are the subject of BellSouth's forbearance petition are offered to carriers on a wholesale basis as well as enterprise customers on a retail basis, carriers rarely purchase these services at wholesale (with some limited exceptions discussed below). To the extent a carrier seeks to offer competing broadband services to enterprise customers, it can readily do so either by: (1) constructing the facilities necessary to serve the customer's locations; (2) leasing the necessary facilities from third parties; or (3) leasing from BellSouth TDM-based special access facilities (or high-capacity unbundled network elements where available) to which they would connect their own packet-switching equipment. All of these serving options are available today and would remain available after BellSouth's petition for forbearance is granted. Granting the petition also would allow BellSouth to enter into mutually beneficial commercial arrangements with wholesale customers on a private carriage basis.

In opposing the grant of forbearance, various commenters misconstrue both the status and the significance of Verizon's forbearance petition being granted by operation of law. Claims that Verizon's petition "remains pending" before the Commission or only resulted in "a provisional form of relief" are specious.¹² Furthermore, whether or not the granting of Verizon's petition by operation of law has "precedential value" as a legal matter, it cannot be seriously disputed that Verizon has been relieved of Title II and *Computer Inquiry* requirements with respect to specific broadband services. For the reasons outlined in its Petition, BellSouth is entitled to the same relief. There is no legal or public policy rationale for continuing to apply archaic regulatory requirements to the same broadband services offered by BellSouth, particularly when such requirements do not apply in large measure to BellSouth's competitors.

¹² *Earthlink Comments* at 4; *Broadview Group Comments* at 13.

Commenters also distort the significance of the Commission's *Wireline Broadband Internet Access Order*, which eliminated Title II and *Computer Inquiry* requirements for ILEC broadband Internet access services. The Commission's reasoning applies with equal force to the elimination of Title II and *Computer Inquiry* requirements with respect to the other broadband services that are the subject of BellSouth's petition, and attempts by commenters to distinguish the *Wireline Broadband Internet Access Order* are unpersuasive.

Various commenters complain about the sufficiency of BellSouth's forbearance showing, arguing that BellSouth has not adequately defined the relevant product and geographic markets and failed to show that it lacks market power in the relevant markets. Such complaints ring hollow, particularly when the D.C. Circuit in *Earthlink v. FCC* recently rejected the argument that the Commission's section 10 forbearance analysis must employ a specific type of market definition or level of geographic rigor – a case that most parties, including EarthLink, fail to even mention in their comments. Furthermore, competition for the broadband services that are the subject of BellSouth's petition is flourishing across all geographic and product markets, as the Commission has previously found and as commenters conveniently ignore.

Notwithstanding commenters' claims to the contrary, BellSouth has satisfied the requirements for forbearance. Title II and *Computer Inquiry* regulations are not necessary to ensure just, reasonable, and nondiscriminatory prices or protect consumers of the broadband services that are the subject of BellSouth's petition. As the Commission has noted, the broadband market is "an emerging and rapidly changing marketplace that is markedly different from the narrowband marketplace" that Title II and the *Computer Inquiry* rules were designed to regulate.¹³ This is particularly true within the enterprise segment for broadband services – a

¹³ *Wireline Broadband Internet Access Order* ¶ 37.

segment served by myriad providers offering services in competition to those that are the subject of BellSouth's petition. Under such circumstances, competition, and not regulation, will ensure that rates are just, reasonable, and nondiscriminatory and that customers are protected.

Granting forbearance also is in the public interest. Doing so will be consistent with the Commission's "goal of developing a consistent regulatory framework" across broadband platforms by ensuring that like services are regulated in the same manner.¹⁴ Applying outdated regulation to only a subset of providers is contrary to the public interest and ultimately harms customers of broadband services who are denied additional choices in products and services. Furthermore, applying rules that are the byproduct of the old narrowband world to broadband services is unnecessary, and to the extent new rules for broadband services become warranted, the Commission can promulgate such rules consistent with its Title I authority.

Because BellSouth has satisfied the requirements for forbearance, the Commission must grant BellSouth's petition.

II. CONCERNS ABOUT SPECIAL ACCESS AND WHOLESALE COMPETITION ARE MISPLACED.

Commenters devote considerable time and effort to special access services and wholesale competition, neither of which is an issue in this proceeding. With respect to special access, consistent with Verizon's forbearance petition that was deemed granted by operation of law, the services for which BellSouth is seeking forbearance do not include TDM-based special access, such as DS1 and DS3 services. Thus, Sprint Nextel's concern about BellSouth's alleged dominance in "the provision of critical network facilities in the special access market" is

¹⁴ *Id.* ¶ 1.

misguided.¹⁵ To the extent there are any competitive concerns about special access services, those concerns are properly addressed in the Commission's ongoing special access docket.

Similarly, wholesale competition is not an issue in this proceeding. Although the broadband services that are the subject of BellSouth's forbearance petition are offered to carriers on a wholesale basis as well as to enterprise customers on a retail basis, with a few exceptions, carriers rarely purchase these services at wholesale. For each of the broadband services that are the subject of BellSouth's petition, BellSouth analyzed the extent to which the commenters opposing forbearance purchased such services at wholesale from BellSouth from January through July 2006. The results of this analysis, which are attached as Exhibit 1, reflect that none of the commenters purchased any Virtual Private Network ("VPN"), Remote Network Access, Video Transmission, or Wave-Based Transport services from BellSouth in 2006, and they purchased minimal quantities of Ethernet and ATM services from BellSouth. While BellSouth sold greater quantities of Frame Relay and Optical Transport and Network services to certain commenters, these are among the most competitive services for which there are numerous competitive options, as discussed in greater detail below. In short, eliminating Title II and

¹⁵ *Sprint Nextel Comments* at 3. Equally misguided are Sprint Nextel's claims that BellSouth has "special access market power" by virtue of: (1) BellSouth's alleged 98.37% rate of return on special access services; and (2) the special access rates that BellSouth has charged to Sprint Nextel "have either increased or remained flat over time." *Id.* at 6-10. First, as BellSouth, economists, and other carriers have repeatedly explained, and the Commission has acknowledged, segment-specific ARMIS data are not accurate reflections of BellSouth's actual returns but rather are artifacts of the ARMIS rules for allocating network investment among services and the "frozen" separations rules. *See* Joint Opposition of AT&T, Inc. and BellSouth Corporation to Petitions to Deny and Reply Comments, WC Docket No. 06-74, at 33. Second, with respect to the special access prices, BellSouth has examined its special access revenues from DS1 and DS3 services purchased by Sprint Nextel (and its wireless predecessors). From December 2001 through December 2005, BellSouth's revenue per DS1 circuit purchased by Sprint Nextel decreased by approximately 25% and the revenue per DS3 circuit decreased by approximately 20%.

Computer Inquiry regulation of the broadband services at issue in this proceeding will have no impact on “wholesale competition,” despite commenters’ claims to the contrary.

Furthermore, all options available today to a carrier seeking to offer a competing broadband service to an enterprise customer would remain available if the Commission were to grant BellSouth’s petition for forbearance. These options include: (1) constructing the facilities necessary to serve those customers; (2) leasing the necessary facilities from third parties; or (3) leasing from BellSouth TDM-based special access facilities (or high-capacity unbundled network elements where available) to which they would connect their own packet-switching equipment. In addition, granting BellSouth’s petition also would allow BellSouth to enter into mutually beneficial commercial arrangements with wholesale customers on a private carriage basis.¹⁶

Time Warner Telecom argues that it cannot offer a competing Ethernet service to enterprise customers using TDM-based unbundled network elements and special access services -- an argument that is completely contrary to its public statements elsewhere.¹⁷ The reality is that Time Warner Telecom has numerous options for last-mile connectivity to support its Ethernet services, including (i) the use of its own robust and growing local networks, (ii) the purchase of wholesale Ethernet services from many other competing providers, and (iii) continued reliance upon ordinary TDM loops. The latter approach, for example, is one that Time Warner Telecom

¹⁶ The fact that wholesale options will remain available even if forbearance is granted – including the availability of special access facilities and unbundled network elements where the impairment standard has been met – readily distinguishes this case from the *Qwest Omaha Forbearance Order*, upon which several commenters rely. See *Sprint Nextel Comments* at 11 (citing *Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005) (“*Qwest Omaha Forbearance Order*”); *COMPTEL Comments* at 8-9; *Broadview Group Comments* at 21-23. In contrast to Qwest’s request for regulatory relief in Omaha, BellSouth’s petition does not seek forbearance from obligations to provide unbundled network elements or offer TDM-based special access services.

¹⁷ *Time Warner Telecom Comments* at 16-20.

has elsewhere stated “enables us to *cost-effectively* deliver our industry-leading Ethernet portfolio to customers *anywhere*.”¹⁸

While criticizing the use of the TDM loops for last-mile connectivity, Time Warner Telecom recently announced that it can use TDM loops and Ethernet electronics provided by its third party vendor Overture to “cost-effectively deliver [its] industry-leading Ethernet portfolio to customers *anywhere*” – even where “it may be uneconomical to directly connect” to Time Warner Telecom’s network.¹⁹ Indeed, Time Warner Telecom apparently provisions services to nearly *three quarters* of its Ethernet customer locations today over TDM connections supplied by others.²⁰ Faced with these facts, Time Warner Telecom cannot seriously contend that TDM loop-connectivity is not a cost-effective Ethernet solution today, when its conduct and statements confirm that it is.

Time Warner Telecom’s claim that “mileage” charges will render Ethernet over TDM unviable in the near future is also meritless.²¹ Special access service mileage charges reasonably reflect the increased costs of providing longer connections and do not prevent Time Warner Telecom or other Ethernet providers from making effective use of Ethernet over TDM arrangements. Moreover, to the extent that Time Warner Telecom is dissatisfied with the levels of mileage charges, it can readily minimize those charges by deploying more points of

¹⁸ Time Warner Telecom, June 6, 2006 Press Release, at 1 (emphasis added), *available at* <http://www.twtelecom.com/Documents/Announcements/News/2006/Overture.pdf>.

¹⁹ *Id.* at 1 (describing an arrangement with Ethernet provider Overture Networks that gives Time Warner Telecom a “branch office” solution [that] enables us to cost-effectively deliver our industry-leading Ethernet portfolio to customers anywhere”).

²⁰ Response of Time Warner Telecom, Inc. to AT&T, Inc. and BellSouth Corporation Joint Opposition to Petitions to Deny and Reply to Comments, WC Docket No. 06-74 (“*Time Warner Telecom Response*”), Reply Declaration of Graham Taylor ¶ 4 (“*Graham Reply Declaration*”).

²¹ *Time Warner Telecom Comments* at 18.

interconnection (“POIs”) with BellSouth. And where Time Warner Telecom chooses to save money by deploying fewer and more dispersed POIs, it can and should expect to pay more in mileage charges.

III. COMMENTERS MISCONSTRUE THE STATUS AND SIGNIFICANCE OF THE VERIZON FORBEARANCE PETITION BEING GRANTED BY OPERATION OF LAW.

Most commenters do not dispute that Verizon has been granted relief from Title II and *Computer Inquiry* requirements for its broadband services by virtue of its forbearance petition being granted by operation of law. However, two groups of commenters argue otherwise, insisting that Verizon’s petition remains “pending” before the Commission and that Verizon’s petition was not actually granted by operation of law.²² According to this fanciful reading of section 10, the Commission is required to conclude and explain in writing that Verizon’s petition satisfied the criteria in section 10, and until it does so the “deemed granted” status of any petition is a provisional form of relief that can be revisited at any time.

These arguments fundamentally misread the language in section 10, which could not be more clear. Section 10(c) expressly provides that a forbearance petition “shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance” within one year after the forbearance petition has been filed or within 450 days if the Commission extends this initial one-year period for an additional 90 days.²³ The plain intent of section 10(c) was to require the Commission to act on forbearance petitions in a timely manner; if the Commission fails to do so the forbearance petition is “deemed granted” by operation of law.

²² See *EarthLink Comments* at 4; *Broadview Group Comments* at 9.

²³ 47 U.S.C. § 160(c).

According to the Broadview Group, the Commission can grant or deny a forbearance petition at any time, even if it does so two, three, or even ten years after the petition has been filed.²⁴ Under this interpretation, the Commission's statutory deadline for resolving forbearance petitions would effectively be read out of section 10, which violates every basic principle of statutory construction.²⁵

Under EarthLink's theory, the only type of forbearance petition that can be "deemed granted" is one for which the deadline has not been extended beyond the one-year period; because the Commission extended the initial one-year period in considering Verizon's forbearance petition, EarthLink insists that it was not "deemed granted" by operation of law, even though the Commission did not deny the petition within the statutory period. EarthLink's misreading of section 10 would essentially mean that the Commission has no deadline to act on forbearance petitions and that its failure to deny a petition after any period of time would have no consequence, despite plain congressional intent otherwise.

Furthermore, EarthLink's theory that a forbearance petition can only be granted by operation of law when "the Commission *does not extend* the one-year period" defies common sense.²⁶ Under this interpretation, if the Commission does not extend the one-year review period but does not deny a forbearance petition at the end of that one-year period, the petition is "deemed granted" by operation of law. However, according to Earthlink, the Commission could defeat Congress's intent to impose strict deadlines for Commission action on forbearance

²⁴ *Broadview Group Comments* at 13.

²⁵ *See, e.g., Sandoz v. Leavitt*, 427 F. Supp. 2d 29 (D.D.C.) (agency's failure to act on plaintiff's drug application within 180 days of submission violated 21 U.S.C. § 335(c), which provides that the agency "shall either ... approve the application" or "give the applicant notice of an opportunity for a hearing" within 180 days after filing).

²⁶ *EarthLink Comments* at 4 (emphasis in original).

petitions simply by granting itself an extension of 90 days and then failing to act after this 90-day extension has passed. Congress clearly could not have intended such an absurd result.

Putting aside the legal “precedential” value of the Verizon forbearance petition having been granted by operation of law, by virtue of the Commission’s failure to deny Verizon’s forbearance petition by the statutory deadline, Verizon has been granted regulatory freedom in offering its broadband services to enterprise customers -- freedom that other ILECs do not currently enjoy. Such a result is inconsistent with the Commission’s goal of “developing a consistent regulatory framework across platforms by regulating like services in a similar functional manner”²⁷ The Commission can remedy this situation and achieve its regulatory goals by granting the forbearance petitions filed by BellSouth and the other ILECs.

IV. COMMENTERS DISTORT THE SIGNIFICANCE OF THE COMMISSION’S WIRELINE BROADBAND INTERNET ACCESS ORDER.

Several commenters insist that the Commission’s *Wireline Broadband Internet Access Order* “does not provide any guidance in evaluating” the forbearance petitions filed by BellSouth and the other ILECs because “substantial” differences exist between the broadband services at issue in that case and the broadband services at issue here.²⁸ For example, the Broadview Group argues that while competitive providers use alternative means of delivering broadband Internet access services to wireline consumers – namely cable companies – “there is no evidence” that cable companies or other competitors are providing, or are capable of providing, to enterprise customers the types of broadband services described in the forbearance petitions.²⁹ This argument is frivolous.

²⁷ *Wireline Broadband Internet Access Order* ¶ 1.

²⁸ *Alpheus Group Comments* at 10; *Broadview Group Comments* at 24.

²⁹ *Broadview Group Comments* at 24.

As discussed in greater detail below and as some of these very same parties have repeatedly made clear *outside* of these proceedings, the enterprise market is highly competitive with numerous providers, including, ILECs, CLECs, VoIP-based carriers, cable companies, systems integrators, equipment vendors, and wireless carriers vying for customers. Thus, in public filings at the Securities and Exchange Commission, some of the same parties filing comments in this proceeding have stated as follows:

- Time Warner Telecom: We also face *competition from electric utilities, long distance carriers, wireless telephone system operators, and private networks* built by large end users using dark fiber providers all of which currently and may in the future, offer services similar to those we offer. In addition, *cable television companies are increasingly competing with us and other traditional telecommunications providers, primarily with respect to smaller business customers, but are beginning to market dedicated services to larger customers as well.*³⁰
- XO Communications: While we believe that business customers will generally continue to require wireline services, *businesses have increasingly adopted wireless solutions for their routine communications requirements. According to a published report, in 2006, aggregate spending by business customers on wireless communications services are anticipated to exceed business customers spending on wireline communications services for the first time.*³¹
- Cbeyond Communications: *We compete, and expect to continue to compete, with many types of communications providers, including traditional local telephone companies. In the future, we may also face increased competition from cable television companies, new VoIP-based service providers or other managed service providers with similar business models to our own.*³²

³⁰ Time Warner Telecom Inc., Form 10-K, at 15 (SEC filed Mar. 16, 2006) (“Time Warner Telecom 10-K”) (emphases added).

³¹ XO Holdings, Inc., Form 10-K, at 5 (SEC filed Mar. 16, 2006) (emphasis added).

³² Cbeyond Form 10-K, at 23 (emphasis added).

These uniform statements accord with the Commission's explicit conclusion that the "sophisticated" customers in the enterprise market have a "*multitude of choices available to them.*"³³

Nor is the extensive competition for enterprise customers the only thing that commenters have conceded elsewhere. Outside of these proceedings, certain CLECs also have forthrightly explained that the enterprise market is so competitive that there is substantial pressure on prices, a phenomenon they expect to continue into the future. As Time Warner Telecom recently stated, it is experiencing "intense price competition" for many of its products, and, "[w]ith several facilities-based carriers providing the same service in a given market, price competition is likely to continue."³⁴ Cbeyond similarly anticipates that "aggressive price competition will continue."³⁵ XO likewise reports that "competition places downward pressure on prices for local and long distance telephone service and data services."³⁶ These statements strongly confirm that the business market is "robustly" competitive, as the Commission concluded just last year.³⁷

In addition, Time Warner Telecom recently told analysts that its proposed merger with Xspedius, a transaction in which Time Warner Telecom will invest more than \$500 million of its shareholders' money, would allow it "to capture *growing* enterprise market opportunities" and "to *further* accelerate [Time Warner Telecom's] growth."³⁸ Such statements confirm that

³³ *SBC/AT&T Merger Order* ¶ 75 (emphasis added).

³⁴ Time Warner Telecom 10-K, at 14.

³⁵ Cbeyond 10-K, at 29.

³⁶ XO Holdings, Inc., Form 10-Q, at 38 (SEC filed May 10, 2006).

³⁷ *SBC/AT&T Merger Order* ¶ 73 n.223.

³⁸ Press Release, Time Warner Telecom to Acquire Xspedius Communications for \$531.5 million, July 27, 2006 at 6 (emphases added), available at http://www.twtelecom.com/Documents/Announcements/News/2006/TWTC_acquisition_of_Xspedius_Press_Release.pdf; see also John Curran, *Time Warner Telecom Buying Xspedius for*

competitors other than the ILECs are fully capable of providing broadband service to enterprise customers and belie suggestions that the enterprise market lacks significant competitive choices.

Furthermore, commenters that seek to read the *Wireline Broadband Internet Access Order* narrowly ignore that, in granting regulatory relief to wireline broadband Internet access services and the underlying broadband transmission services, the Commission held that certain characteristics of those services “inform[ed] [its] decision-making.”³⁹ Those characteristics – “the growth and development of entirely new broadband platforms; the flexibility to respond more rapidly and effectively to new consumer demands; and [the Commission’s] expectation of the availability of alternative competitive broadband transmission to the currently required wireline broadband common carrier offerings” -- apply equally to the broadband services subject to BellSouth’s petition.⁴⁰

First, the technology used to provide the broadband services at issue here “are fundamentally changing” in ways that are “rapidly breaking down the formerly rigid barriers that separate one network from another.”⁴¹ With respect to enterprise services generally, the Commission has noted that “the use of emerging technologies are likely to make this market more competitive, and that this trend is likely to continue in the future.”⁴² Commenters acknowledge these technological changes, noting that broadband services such as Gigabit

\$531M, TR Daily (July 28, 2006) (“This acquisition significantly broadens the already extensive nature of our local assets and national capabilities The marketplace continues to validate our long-held view of the value of last mile connectivity to enterprise customers.”) (quoting Larissa Herda, Time Warner Telecom’s CEO).

³⁹ *Wireline Broadband Internet Access Order* ¶ 32.

⁴⁰ *Id.* ¶ 79.

⁴¹ *Id.* ¶ 32.

⁴² Memorandum Opinion and Order, *Verizon Communications Inc. and MCI Inc., Applications for Approval of Transfer of Control*, 20 FCC Rcd 18433, ¶ 75 (2005) (“*Verizon/MCI Order*”).

Ethernet are replacing older technologies such as Frame Relay and ATM.⁴³ These technologies are “multi-purpose in nature and more application-based, rather than existing for a single, unitary, technologically specific purpose.”⁴⁴ As a result, the emergence of these technologies “will lead to greater capacity for innovation to offer new platforms ...,” and, as providers “continue to emerge to complement existing market offerings and participants[,] ... these offerings will grow over time as consumers demand even more advanced services, with the result that technological growth and development continue on an upward spiral.”⁴⁵

The accuracy of the Commission’s prediction about the growth and development of entirely new broadband platforms was confirmed by XO’s recent announcement that it has deployed fixed broadband wireless service in nine major markets.⁴⁶ The service utilizes LMDS fixed broadband wireless as a last mile access method to deliver Dedicated Internet Access and Metropolitan and Inter-city Ethernet solutions directly to businesses at speeds of 10 Mbps and 100 Mbps. XO maintains that the utilization of fixed broadband wireless services “will help fill a critical gap for businesses that require higher speed broadband access but are constrained by the

⁴³ See *Alpheus Group Comments* at 10-11; *Verizon/MCI Order* ¶ 59. The Alpheus Group argues that forbearance is not appropriate because Frame Relay, ATM, and Gigabit Ethernet services “are not new, innovative broadband services of the type that the Commission has sought to encourage through ‘a lighter regulatory treatment ...’” *Alpheus Group Comments* at 10. However, wireline broadband Internet access service was not “new” either, yet the Commission concluded that eliminating unnecessary regulation of this service would “enable consumers to reap the benefits of advanced wireline broadband Internet access services that incorporate the latest technologically advanced integrated equipment, on a more widely available and more timely basis than if we maintained the existing regime.” *Wireline Broadband Internet Access Order* ¶ 80. The same reasoning applies here.

⁴⁴ *Wireline Broadband Internet Access Order* ¶ 40.

⁴⁵ *Id.*

⁴⁶ See Press Release, XO Communications Deploys Fixed Broadband Wireless in Nine Cities to Expand Metro Coverage and Reduce Network Access Costs, August 28, 2006, available at <http://www.xo.com/news/316.html>.

bandwidth limitations of copper or lack direct access to fiber,” which, according to XO, is not available in approximately 20 percent of buildings in the United States.⁴⁷

Second, changes in the marketplace for the broadband services at issue here, as evidenced by the XO announcement, require that providers have “the flexibility to respond more rapidly and effectively to new consumer demands.”⁴⁸ Because enterprise customers seek “individually-negotiated” and “customized” broadband offerings,⁴⁹ providers must have flexibility in their service offerings to compete effectively. Private contractual arrangements give “service providers more flexibility in developing a new technology and more incentives to do so.”⁵⁰

By contrast, Title II and *Computer Inquiry* regulations do not afford flexibility but rather impose “costs, inefficiencies, and delays [that] are significant and substantially impede network development.”⁵¹ The Commission has recognized that common-carriage requirements “slow innovation” with respect to wireline broadband Internet access services, “because vendors do not create new technologies with [these] requirements in mind.”⁵² Service providers either “must decide not to use all the equipment’s capabilities, thereby reducing their *operational efficiency*, or they must defer deployment while the manufacturer re-engineers it to facilitate compliance with the *Computer Inquiry* rules, thereby creating unnecessary costs and service delays.”⁵³ These same considerations apply to the broadband services at issue here.

⁴⁷ *Id.*

⁴⁸ *Wireline Broadband Internet Access Order* ¶ 79.

⁴⁹ *Verizon/MCI Order* ¶ 79.

⁵⁰ *Id.* ¶ 72.

⁵¹ *Wireline Broadband Internet Access Order* ¶ 71.

⁵² *Id.* ¶ 65.

⁵³ *Id.*

Finally, by granting the relief that BellSouth seeks, the Commission can reasonably expect that alternative competitive broadband transmission services will become available to the currently required wireline broadband common carrier offerings. This is precisely what happened after the *Wireline Broadband Internet Access Order*, as a result of which BellSouth negotiated commercial agreements with approximately 200 providers, including entering into customized Regional Broadband Aggregation Network (“RBAN”) service agreements with several providers. As the Commission observed previously, facilities-based wireline carriers “have a business interest in maximizing the traffic on their networks, as this enables them to spread fixed costs over a greater number of revenue-generating customers.”⁵⁴ This observation applies to broadband Internet access service as well as the broadband services at issue here.

EarthLink falsely claims that BellSouth failed to live up to its promises about how it “would treat competitors and ISPs” after the *Wireline Broadband Internet Access Order*, insisting that BellSouth demanded allegedly anticompetitive restrictions as a condition for renewal of Earthlink’s RBAN agreement.⁵⁵ EarthLink conveniently omits crucial details of those negotiations. EarthLink was not only seeking an extension, but also lower RBAN rates, in consideration for which, BellSouth asked for, and EarthLink agreed to, a resale restriction and a class of service provision under which RBAN is to be provisioned on residential voice lines.⁵⁶

⁵⁴ *Wireline Broadband Internet Access Order* ¶ 64; see also *Qwest Omaha Forbearance Order* ¶ 81 (noting that “Qwest will prefer that a customer be served by a wireline competitor using Qwest’s facilities at wholesale rates above that customer’s use of [a facilities-based competitor’s] network, which offers Qwest no revenue whatsoever but only a miniscule reduction in its costs”).

⁵⁵ *Earthlink Comments* at 16-17.

⁵⁶ The resale restriction ensures that EarthLink does not create a secondary market for the lower-priced RBAN, while the residential line requirement was in direct response to EarthLink’s representations that lower RBAN rates were necessary to serve the residential market, which EarthLink claimed was its primary market.

Similarly, EarthLink's claims that BellSouth conditioned an RBAN agreement with New Edge, an EarthLink subsidiary, on the alleged "removal of all collocated facilities" and an "agreement not to offer VOIP services in the BellSouth region"⁵⁷ are untrue. During the negotiations, BellSouth expressed concern about and sought a "better understanding of" New Edge's plans potentially to offer VoIP over the RBAN platform, but BellSouth made clear that it was not asking "New Edge to restrict their customer's use of third party VoIP service."⁵⁸ So too, although the parties discussed the "opportunity for New Edge to redeploy its existing collocation arrangements" in BellSouth's central offices to areas outside the BellSouth region, this discussion was in the context of BellSouth's desire for "New Edge to maximize the number of subs on the RBAN platform," which New Edge was willing to consider in exchange for a "very long-term commitment from [BellSouth] to have continued access to [BellSouth] network."⁵⁹

With respect to Earthlink's allegations that BellSouth is refusing to provide certain wholesale DSL services, BellSouth is in the process of eliminating a specific form of DSL, known as Permanent Virtual Circuit or PVC-based DSL, for both its retail operations and for third-party customers of wholesale DSL, because it conflicts with the new, upgraded DSLAM cards that are being deployed in the BellSouth network.⁶⁰ EarthLink's subsidiary New Edge is, therefore, not uniquely affected by this technology-based decision. Moreover, consistent with the Commission's *Wireline Broadband Internet Access Order*, BellSouth is not required to

⁵⁷ *EarthLink Comments* at 17-18.

⁵⁸ E-mail from Kent Dallas, BellSouth, to Rob McMillin, New Edge (Feb. 28, 2006).

⁵⁹ *Id.*

⁶⁰ BellSouth is deploying these new, upgraded DSLAM cards as part of BellSouth's efforts to build out and enhance its transport network to meet the growing broadband demands of its customers. By contesting the elimination of PVC-based DSL, EarthLink is effectively seeking to thwart BellSouth's network upgrades and infrastructure improvements, which are necessary to better serve BellSouth's broadband customers.

separate out and offer as a common carrier service the underlying DSL transport component of its wireline broadband Internet access services and is not required to offer existing services to new customers or to existing customers at new locations.⁶¹ As contemplated by the *Wireline Broadband Internet Access Order*, effective May 17, 2006, BellSouth stopped accepting orders for PVC-based circuits at new customer locations. On November 16, 2006 (one year from the effective date of the *Wireline Broadband Internet Access Order*), BellSouth will begin disconnecting any remaining PVC-based subscribers. There is nothing “unreasonable” or “anticompetitive” about BellSouth’s actions, notwithstanding Earthlink’s claims otherwise.

In sum, the same considerations that led the Commission to exempt wireline broadband Internet access services from Title II and *Computer Inquiry* regulations apply equally to the broadband services that are the subject of BellSouth’s forbearance petition.

V. THE COMMISSION IS NOT REQUIRED TO ADOPT ANY SPECIFIC MARKET APPROACH IN RESOLVING BELL SOUTH’S FORBEARANCE PETITION.

Several commenters argue that the Commission must conduct a “sufficiently granular” market power analysis, insisting that “the Commission must apply its traditional non-dominance test” before granting forbearance.⁶² This argument is plainly inconsistent with *Earthlink v. FCC* – a case most parties fail to even mention – in which the D.C. Circuit held that section 10 “imposes no particular mode of market analysis or level of geographic rigor.” Although Earthlink argued that section 10 “permits the FCC to grant forbearance only after a ‘painstaking analysis of market conditions’ in ‘particular geographic markets and for specific telecommunications services,’” the Court of Appeals rejected this argument, finding that the

⁶¹ *Wireline Broadband Internet Access Order* ¶ 86.

⁶² *Alpheus Group Comments* at 4-5; *Time Warner Telecom Comments* at 7-8.

Commission has the flexibility to vary its forbearance analysis “depending on the circumstances.”⁶³

Several commenters cite *AT&T Corp. v. FCC*, 236 F.3d 729 (D.C. Cir. 2001), which is inapposite.⁶⁴ In that case, Qwest filed a petition seeking forbearance from “dominant carrier” regulation in the provision of special and switched access services in the Phoenix and Seattle Metropolitan Statistical Areas. In denying the petition, the Commission relied solely on the fact that, in its view, Qwest had failed to offer any reliable data on its share of the relevant markets. In granting Qwest’s petition for review and remanding the case to the Commission, the D.C. Circuit found that the Commission had “departed from its traditional non-dominance analysis without explanation” because the Commission previously had considered a number of factors in classifying carriers as dominant or nondominant, and in one case had “gone so far as to view market share as irrelevant where there was other evidence that a carrier lacked market power.”⁶⁵ The issue of the proper market analysis required by section 10 was not before the Court in *AT&T Corp. v. FCC*, and the case does not hold that “the Commission must conduct a full market power analysis” before granting BellSouth’s forbearance petition, as the Alpheus Group claims.

⁶³ *Earthlink v. FCC*, 2006 U.S. App. LEXIS 20819, at 16-17. The Alpheus Group attempts to distinguish *Earthlink*, claiming that the case involved forbearance from application of section 271 unbundling to broadband network elements, and not “whether the broadband market is sufficiently competitive to permit dispensing with common carrier regulation.” *Alpheus Group Comments* at 6. However, this is a distinction without a difference, and nothing in the Court’s opinion can reasonably be read to suggest that the D.C. Circuit’s interpretation of section 10 was premised upon the nature of the regulatory obligation from which forbearance was being sought. In addition, the D.C. Circuit upheld the Commission’s flexibility in making forbearance decisions “with an eye to the future” by taking into account the goals of broadband deployment and assessing likely developments in the broadband market embodied in section 706. 2006 U.S. App. LEXIS. at 21-22. That the Court expressly endorsed the Commission’s flexibility in tailoring its forbearance analysis in the broadband context is fatal to the Alpheus Group’s view that the Commission has no such flexibility here.

⁶⁴ *Alpheus Group Comments* at 6; *Time Warner Telecom Comments* at 8.

⁶⁵ *AT&T Corp. v. FCC*, 236 F.3d at 736-737.

Furthermore, notwithstanding commenters' arguments to the contrary,⁶⁶ BellSouth has properly defined the relevant geographic and product markets for purposes of the Commission's forbearance analysis. Specifically, the geographic market is national, and the relevant product market consists of the broadband services specified in BellSouth's petition that are developed for and sold primarily to enterprise customers.⁶⁷

COMPTEL's argument that a national broadband market is at odds with the geographic market analysis undertaken by the Commission in the *SBC/AT&T Merger Order* is flawed.⁶⁸ First, the analysis required in reviewing a proposed merger differs significantly from the standard for forbearance under section 10. While both inquiries involve a public interest assessment, the standard of review and the public interest framework that guides the Commission's merger determinations is a considerably more intensive inquiry that considers factors wholly irrelevant to forbearance, including "ensuring a diversity of license holdings," "assessing whether the merger will affect the quality of communication services," as well as evaluating "the nature, complexity, and speed of change of, as well as trends within, the communications industry."⁶⁹ Second, in *EarthLink v FCC*, the D.C. Circuit expressly affirmed the Commission's view of the broadband market on a national level, finding that the Commission had "reasonably eschewed a more elaborate snapshot of the current market"⁷⁰

⁶⁶ *Broadview Group Comments* at 20-22 ("None of the ILEC Petitions provide sufficient evidence for the Commission to reach a conclusion regarding the proper product or geographic markets"); *COMPTEL Comments* at 8-9.

⁶⁷ BellSouth's Petition for Forbearance at 7-8 & 12.

⁶⁸ *COMPTEL Comments* at 11 (citing *In re: SBC Communications, Inc. and AT&T Corp. Applications for Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18290 ¶¶ 62-63 (2005) ("*SBC/AT&T Merger Order*").

⁶⁹ *SBC/AT&T Merger Order* ¶ 17.

⁷⁰ *EarthLink v FCC*, 2006 U.S. App. LEXIS at 21.

Equally flawed are claims that small business and residential customers buy the broadband services that are the subject of BellSouth's forbearance petition.⁷¹ The suggestion that a small business or residential customer would purchase Optical (or "OCn") Transport and Networking services or Wave-Based Transport service is laughable given the cost and speeds of such services.⁷² Indeed, the Commission has recognized that OCn services are deployed to "large enterprise customers."⁷³ The video transmission services that are the subject of BellSouth's petition are not available to residential customers and are typically purchased by television networks or carriers serving television networks, which hardly constitute "small business customers." BellSouth's Remote Network Access service and VPN services are offerings designed to provide connectivity or remote access between multiple locations, which make them ill-suited for most small business customers. Finally, with respect to Frame Relay, ATM, and Ethernet-based services, these offerings are sold predominately by BellSouth's large business segment to enterprise customers, which generate approximately 95 to 100 percent of BellSouth's revenues for these products.⁷⁴ In short, the broadband services for which BellSouth is seeking forbearance are services designed for and sold primarily to large enterprise customers.

⁷¹ *COMPTEL Comments* at 10; *Broadview Group Comments* at 23 (arguing that "[s]ome might be unsuitable for small businesses with only one or few locations, where as others might only appeal to large, multi-location corporations").

⁷² See Ex Parte Letter from Bennett L. Ross, General Counsel – D.C., BellSouth, to Marlene H. Dortch, Secretary, FCC, Attachment A (August 4, 2006) (noting that the customer interface for Optical Transport and Networking services operate at subset speeds up to 2.5 Gbps (OC48) with transport at speeds from 155 Mbps (OC3) to 10 Gbps (OC192), which is the same transmission rates for BellSouth's Wave-Based Transport service).

⁷³ *Triennial Review Order* ¶ 315.

⁷⁴ Customer sales and marketing are handled primarily by two groups at BellSouth -- Business Markets, which handles large business ("LBS") customers (as well as wholesale customers), and Retail Markets, which handles small business ("SBS") and residential customers. Customers are designated as LBS or SBS according to the revenue the customer generates with BellSouth. Customers spending above approximately \$65,000 annually are

VI. TITLE II AND *COMPUTER INQUIRY* REGULATION OF BROADBAND SERVICES IS NOT NECESSARY TO ENSURE JUST, REASONABLE, AND NONDISCRIMINATORY RATES, TERMS, AND CONDITIONS BECAUSE THE ENTERPRISE MARKET FOR BROADBAND SERVICES IS FIERCELY COMPETITIVE.

Forbearance is appropriate because, as the Commission has previously recognized, competition for enterprise customers is “strong” and will remain so given that “enterprise customers are sophisticated, high-volume purchasers of communications services that demand high-capacity communications services, and because there [are] a significant number of carriers competing in the market.”⁷⁵ Enterprise customers often purchase broadband services through a competitive bidding process and frequently employ “either communications consultants or ... in-house communications experts” to help them through this process.⁷⁶ Consequently, as the Commission has noted, enterprise customers “are likely to make informed choices based on expert advice about service offerings and prices” and are likely to “seek out the best-priced alternatives.”⁷⁷

Numerous competitors are serving enterprise customers, “includ[ing] interexchange carriers, competitive LECs, cable companies, other incumbent LECs, systems integrators, and equipment vendors.”⁷⁸ The Commission concluded that these “myriad providers are prepared to make competitive offers,” which will “ensure that there is sufficient competition.”⁷⁹ Thus,

generally assigned to LBS, while lower spending customers are generally assigned to SBS. *See* Response of BellSouth Corporation to Information and Document Request dated June 23, 2006, *In re: AT&T Inc. and BellSouth Corporation Applications for Approval of Transfer of Control*, WC Docket No. 06-74, Specification No. 1, at 3.

⁷⁵ *SBC/AT&T Order* ¶ 56.

⁷⁶ *Id.* ¶ 75.

⁷⁷ *Id.*

⁷⁸ *Verizon/MCI Order* ¶¶ 64 & 74.

⁷⁹ *Id.* ¶ 74.

competition, and not antiquated regulation, will ensure that enterprise customers pay just, reasonable, and nondiscriminatory rates, which satisfies the first prong of the section 10 forbearance analysis.

The Broadview Group's argument that the Commission's findings of extensive competition in the enterprise market in approving the SBC/AT&T and Verizon/MCI mergers are irrelevant for forbearance purposes is puzzling.⁸⁰ The Broadview Group does not deny that numerous competitive alternatives exist for enterprise customers, and the fact that enterprise customers have numerous competitive options does not change with the context of the regulatory proceeding in which such alternatives are examined.

COMPTEL attempts to sweep aside the Commission's findings about extensive competition in the enterprise market by faulting BellSouth for not identifying any competitors providing broadband service to enterprise customers in its serving territory.⁸¹ However, the competitors that were previously identified by Verizon in connection with its forbearance petition are national in scope and serve enterprise customers in BellSouth's region as well.⁸² Furthermore, the information that COMPTEL faults BellSouth for not including in its forbearance petition has already been furnished to the Commission in connection with the AT&T merger, and little purpose would be served in providing the same information twice.⁸³

⁸⁰ *Broadview Group Comments* at 29.

⁸¹ *COMPTEL Comments* at 13; *see also Sprint Nextel Comments* at 14 (accusing petitioners of speaking "in broad, national generalities").

⁸² *See Ex Parte Letter from Edward Shakin, Vice President and Associate General Counsel – Verizon, to Marlene Dortch, Secretary, FCC, Docket No. 04-440 (Feb. 7, 2006).*

⁸³ *See Description of Transaction, Public Interest Showing, and Related Demonstration, WC Docket No. 06-74, at 68-82 (identifying the national and regional CLECs, national interexchange carriers, data and IP network providers, international carriers, systems integrators, equipment vendors and value-added resellers, and cable providers serving the business market in BellSouth's region). There is no merit to the Broadview Group's claim that BellSouth's*

Just as the enterprise market for broadband services is competitive overall, the same is true of the specific services that are the subject of BellSouth's petition. For example, extensive competition exists for the optical transmission services at issue here. As the Commission has recognized, there is "substantial deployment of competitive fiber loops at OCn capacity and competitive carriers confirm they are often able to economically deploy these facilities to the large enterprise customers that use them."⁸⁴ Competing carriers can economically deploy new OCn-level facilities because these types of facilities "produce revenue levels which can justify the high-cost cost of loop construction, providing the opportunity for competitive LECs to offset the fixed and sunk costs associated with the loop construction."⁸⁵ Moreover, the "[l]arge enterprise customers purchasing services over OCn loops enter into long-term contracts committing to revenue streams and associated early termination charges that provided the ability for carriers to recover their substantial non-recurring 'set-up' or construction costs."⁸⁶

statements in the context of the merger with AT&T are at odds with BellSouth's representation in its forbearance petition that it competes against AT&T "in a nationwide marketplace for the same services." *Broadview Group Comments* at 27. First, BellSouth's forbearance petition makes no mention of the extent to which BellSouth competes against AT&T for enterprise customers either within or outside of the BellSouth region. Second, the merger application does not state that AT&T and BellSouth serve "a *different* market," as the Broadview Group claims. *Id.* (emphasis in original). Rather, the merger application makes clear that AT&T and BellSouth serve *different segments* of the business market, with AT&T focusing on the requirements of the customers with the most geographically dispersed, complicated needs, whereas BellSouth focuses on the customers with locations predominantly in its region or customers with operations in its region. See Description of Transaction, Public Interest Showing, and Related Demonstration, WC Docket No. 06-74, at 67-68.

⁸⁴ *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order and Remand, 20 FCC Rcd 2533, ¶ 183 (2005) ("*Triennial Review Remand Order*") *aff'd*, *Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006); see also *Triennial Review Order* ¶ 315.

⁸⁵ *Triennial Review Remand Order* ¶ 182.

⁸⁶ *Triennial Review Order* ¶ 316.

Consequently, competing carriers are deploying optical facilities themselves or obtaining them from third parties.⁸⁷

In fact, competitors have been so successful in deploying optical facilities that, according to one study, alternative access vendors or “AAVs” (which refer to any competitor that provides service without using BellSouth facilities) dominate the market for OCn level circuits in BellSouth’s region. This study estimated that AAVs have a 79% share of OCn level circuits, compared to BellSouth’s 21% share.⁸⁸

Competition is equally intense in the market for such services as VPN and Ethernet. Time Warner Telecom has conceded as much elsewhere, noting that it expects already robust Ethernet competition to “continue[] to intensify over time”⁸⁹ and predicting that the many other retail providers will “offer even lower retail Ethernet prices.”⁹⁰ Time Warner Telecom has publicly proclaimed itself as an “industry leader” in this robustly competitive marketplace with a “comprehensive portfolio of Ethernet Services”⁹¹ and also recently announced “1 Gbps availability and nationwide reach for its IP VPN service to business customers.”⁹² And just one

⁸⁷ *Id.* ¶ 315; *see also* Comments of Cincinnati Bell Telephone Company LLC, at 6.

⁸⁸ *See* Comments of BellSouth Corporation, *In re: Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, at 27-28 (citing RHK study).

⁸⁹ *Time Warner Telecom Response* at 18; *Taylor Reply Declaration* ¶ 11 n.7.

⁹⁰ *Time Warner Telecom Response* at 17-18 (“TWTC operates in a competitive retail market”); *see also Taylor Reply Declaration* ¶¶ 11 n.7 & 13.

⁹¹ *See* Press Release Time Warner Telecom Introduces Affordable Ethernet Connectivity for Multi-Location Businesses, June 6, 2006, at 1 (emphasis added), available at <http://www.twtelecom.com/Documents/Announcements/News/2006/Overture.pdf>.

⁹² *See* Press Release, Time Warner Telecom Expands IP VPN Capabilities Nationwide, June 6, 2006, available at http://www.twtelecom.com/Documents/Announcements/News/2006/IPVPN_CoS.pdf.

month ago, Time Warner Telecom reported “strong” second quarter 2006 results “due to success with Ethernet and IP-based product sales.”⁹³

The competitiveness of VPN and Ethernet services is underscored by XO’s recent announcement that it has deployed fixed broadband wireless service in nine cities, including Atlanta and Miami.⁹⁴ The service, which utilizes LMDS fixed broadband wireless as a last mile access method, will allow XO to deliver Dedicated Internet Access and Metropolitan and Inter-city Ethernet solutions directly to businesses at speeds of 10 Mbps and 100 Mbps.⁹⁵

With respect to ATM and Frame Relay services, there are multiple competitive providers in BellSouth’s region. The same competitive providers identified by Verizon as offering ATM and Frame Relay services in its region offer services in BellSouth’s region.⁹⁶ Furthermore, as the Commission has noted, Frame Relay services are provided to “larger businesses [that] contract for more sophisticated services,” and these businesses have numerous competitive options.⁹⁷

⁹³ See Press Release, Time Warner Telecom Reports Strong Second quarter 2006 Results, July 31, 2006, available at http://www.twtelecom.com/Documents/Announcements/News/2006/TWTC_Q2_2006_Earnings_Release.pdf.

⁹⁴ See Press Release, XO Communications Deploys Fixed Broadband Wireless in Nine Cities to Expand Metro Coverage and Reduce Network Access Costs, August 28, 2006, available at <http://www.xo.com/news/316.html>.

⁹⁵ *Id.*

⁹⁶ See Ex Parte Letter from Edward Shakin, Vice President and Associate General Counsel – Verizon, to Marlene Dortch, Secretary, FCC, Docket No. 04-440, at 7-8 (Feb. 7, 2006).

⁹⁷ *SBC/AT&T Order* ¶ 60; see also *Alpheus Group Comments* at 18 (acknowledging that Frame Relay and ATM services are “generally provided to larger business customers”) (quoting Letter to Marlene H. Dortch from Ruth Milkman, Counsel to MCI, Inc., CC Docket No. 01-337, filed May 8, 2003).

At bottom, considerable competition exists in the enterprise market for the broadband services for which BellSouth is seeking forbearance.⁹⁸ Consequently, Title II and *Computer Inquiry* regulation is not necessary to ensure that enterprise customers pay just, reasonable, and nondiscriminatory rates.

VII. TITLE II AND *COMPUTER INQUIRY* REGULATION OF BROADBAND SERVICES IS NOT NECESSARY TO PROTECT CONSUMERS.

Title II and *Computer Inquiry* regulation of the broadband services that are the subject of BellSouth's petition is not necessary to protect retail consumers, and commenters do not seriously argue otherwise. Instead, several commenters focus on the purported protection of carriers, which is not the focus of the second prong of section 10 and is a misguided concern in any event.⁹⁹

For example, there is no merit to the Broadview Group's insistence that without Title II and *Computer Inquiry* requirements the ILECs "will be able to foreclose all alternative providers from access to facilities needed to reach their customers."¹⁰⁰ Hyperbole aside, alternative providers will continue to have numerous options to access necessary facilities, including special access, unbundled network elements (where available), as well as leasing such facilities from third parties or entering into private carriage agreements with ILECs. Although the Broadview Group claims that ILECs "will have unrestrained incentives" to try to increase rates "so as to

⁹⁸ *Time Warner Telecom Comments* at 11 (admitting that "it is of course true that the retail market for packetized and TDM-based special access services is competitive").

⁹⁹ The term "consumer," although undefined in the context of section 10, generally is understood to refer to the ultimate end user. *See, e.g., Association of Communications Enterprises v. FCC*, 253 F.3d 29, 31-32 (D.C. Cir. 2001) (affirming the Commission's construction of the phrase "at retail" as "involving direct sales of a product or service to the ultimate consumer for her own personal use or consumption").

¹⁰⁰ *Broadview Group Comments* at 32.

squeeze the competition out of their respective markets,”¹⁰¹ this argument ignores that competitors can readily self-provision the facilities necessary to offer broadband service to enterprise customers, as they have done in the past and continue to do so today. The ability of competitors to readily self-deploy broadband facilities or purchase such facilities from third parties places an obvious constraint on ILEC pricing.¹⁰²

The Broadview Groups insists that forbearance is not necessary in order for the ILECs to compete in the broadband services arena because there is no “current market data suggesting that regulation has prevented them from obtaining and maintaining a dominant share of customers for their broadband services, particularly within their operating territories.”¹⁰³ However, the market share data that BellSouth filed with the Commission in Docket No. 05-25 establishes otherwise, reflecting that BellSouth’s share of OCn level circuits in its region is 21 percent and that competing providers have the “dominant” share of the OCn market.

Sprint Nextel insists that, other than with respect to Verizon’s forbearance petition, “the Commission has *never* exempted any carrier from its section 201 and 202 obligations.”¹⁰⁴ However, that is precisely the result the Commission reached in eliminating Title II regulation of the wireline broadband Internet access services and the underlying transmission components.

¹⁰¹ *Id.* at 32-33.

¹⁰² The Broadview Group’s suggestion that carriers “no longer will have any recourse against anticompetitive behavior” ignores that the Commission’s granting of BellSouth’s forbearance petition would have no impact on the federal antitrust laws. *Broadview Group Comments* at 33. Furthermore, the Alpheus Group’s claim that Bell Operating Companies (“BOCs”) “have strong incentives to thwart provision of CLEC VoIP by denying or degrading access [to] competing VoIP services” is both untrue and irrelevant to the Commission’s forbearance analysis. *Alpheus Group Comments* at 24-25. First, there is no evidence that any BOC has denied or degraded access to a competing VoIP service. Second, if a BOC were to engage in such conduct, the Commission could take appropriate action consistent with its Title I authority.

¹⁰³ *Broadview Group Comments* at 33.

¹⁰⁴ *Sprint Nextel Comments* at 16.

The Commission's reasoning applies to the broadband services at issue here, for the reasons previously explained.

That sections 201 and 202 may "represent the central tenant of federal common carrier regulation" does not foreclose the granting of BellSouth's forbearance petition.¹⁰⁵ Common carrier regulation under Title II is simply unnecessary and inappropriate in the context of the broadband services that are the subject of BellSouth's petition. Although the Commission has made clear that any petitioner seeking forbearance from sections 201 and 202 is "obligated to explain in detail why the Commission should forbear from those sections . . .,"¹⁰⁶ BellSouth has done so. Sprint Nextel's "logic" that common carrier regulation should continue to apply to broadband services because "that's the way things have always been done" is unavailing.

VIII. FORBEARANCE FROM APPLYING TITLE II AND *COMPUTER INQUIRY* REGULATION OF BROADBAND SERVICES IS IN THE PUBLIC INTEREST.

Relying upon the Commission's *1998 Biennial Regulatory Review Order*, the Broadview Group argues that forbearance is not in the public interest because it will result in "increased end user rates and decreased competitive alternatives in the retail market."¹⁰⁷ However, the *1998 Biennial Regulatory Review Order*, in which the Commission denied forbearance from the prescription of ILEC depreciation lives and salvage factors, is readily distinguishable. In denying forbearance in that case, the Commission found that forbearance could adversely affect

¹⁰⁵ *Sprint Nextel Comments* at 16.

¹⁰⁶ *Petition of SBC Communications, 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).

¹⁰⁷ *Broadview Group Comments* at 34-35 (citing *1998 Biennial Regulatory Review – Review of Depreciation Requirements for Incumbent Local Exchange Carriers*, CC Docket 98-137, Report and Order and Memorandum Opinion and Order (1999) ("*1998 Biennial Regulatory Review Order*"); see also *COMPTEL Comments* at 19-20.

competition by increasing the rates for unbundled network elements and interconnection services, since numerous states had used “FCC-prescribed projection lives and salvage factors” in setting such rates.¹⁰⁸ Here, there is no basis to make a similar finding and no reason to believe that ILECs will have the ability “to raise arbitrarily the rates for essential inputs that competitors must purchase,”¹⁰⁹ particularly when ILEC special access and unbundled network element rates remain subject to federal and state regulation, and competition will constrain ILEC prices of other services that may be offered on a private carriage basis.

Sprint Nextel insists that granting forbearance would not be in the public interest because doing so would exempt the ILECs from “a host of other statutory requirements,” including the protection of consumer privacy, access to communications by the disabled, and other provisions of Title II.¹¹⁰ However admirable the social goals of the various provisions of Title II about which Sprint Nextel expresses concern, such provisions are the byproduct of the old narrowband world in which the consumer was limited to a single provider of telephone services. In this bygone era, a consumer who wanted, or needed, to continue receiving a narrowband service generally had no other competitive choices in the event of misbehavior by the monopoly carrier, and rules were established to protect these consumers or to protect a segment of the market against unfair competition.¹¹¹

¹⁰⁸ *Biennial Regulatory Review Order* ¶ 69.

¹⁰⁹ *Id.*

¹¹⁰ *Sprint Nextel Comments* at 17; *see also COMPTEL Comments* at 17-18.

¹¹¹ For example, consumer proprietary network information (“CPNI”) rules grew out of the *Computer Inquiry* line of Commission orders and were implemented “to protect independent enhanced services providers and CPE suppliers by prohibiting AT&T, the BOCs, and GTE from using CPNI obtained from their provision of regulated services to gain a competitive advantage in the unregulated CPE and enhanced services markets.” Peter W. Huber, Michael K. Kellogg & John Thorne, *Federal Telecommunications Law* § 14.5.2 (2d ed. 1999).

However, as the Commission found in the *Wireline Broadband Internet Access Order*, “[t]he broadband marketplace before us today is an emerging and rapidly changing marketplace that is markedly different from the narrowband marketplace”¹¹² Gone is the day “when only a single platform capable of delivering such services was contemplated and only a single facilities-based provider of that platform was available to deliver them to any particular end user.”¹¹³ This dynamic transformation of the market has resulted in the integration of broadband technology into the existing wireline platform, the growth and development of entirely new broadband platforms, and the availability of numerous competitive broadband alternatives.¹¹⁴

Considering the dramatic competitive change that has occurred in the broadband market, the answer to Sprint Nextel’s concerns is not simply to overlay old regulations that were developed for a narrowband world on this new market of broadband services. Rather, the Commission should consider whether regulations are necessary in a competitive market and whether existing statutory and common law remedies are sufficient to protect all consumers. If the Commission decides to promulgate rules applicable to broadband services, it should do so consistent with its Title I authority and ensure that such rules apply to all competitors in the broadband market, regardless of the underlying technology. The Commission is in the midst of this process in WC Docket No. 05-271, and the outcome of that proceeding should resolve Sprint Nextel’s public interest concerns.

Finally, Sprint Nextel argues that the section 706 mandate to the Commission to promote broadband deployment and investment “cannot be read to overrule the analysis mandated by

¹¹² *Wireline Broadband Internet Access Order* ¶ 47.

¹¹³ *Id.*

¹¹⁴ *Id.* at ¶ 79.

section 10.”¹¹⁵ BellSouth does not contend otherwise. However, as the Commission found, and as D.C. Circuit agreed, section 706 can “inform” the Commission’s forbearance analysis, and nothing in section 10 prohibits the Commission from weighing “section 706’s goals and assessing likely market developments ... in assessing the impact of forbearance on rates, consumers, and the public interest.”¹¹⁶ Section 706’s goals would be met and are completely consistent with the granting of BellSouth’s forbearance petition.

IX. CONCLUSION

For the foregoing reasons, the standards for forbearance under section 10 have been satisfied, and the Commission must grant BellSouth’s petition.

Respectfully submitted,

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¹¹⁵ *Sprint Nextel Comments* at 20.

¹¹⁶ *Earthlink v. FCC*, 2006 U.S. App. LEXIS at 20-22.

EXHIBIT 1

**UNITS OF BROADBAND SERVICES SUBJECT TO BELLSOUTH'S
FORBEARANCE PETITION PURCHASED BY COMMENTERS
(January – July 2006)**

Service	Jan 2006	Feb 2006	March 2006	April 2006	May 2006	June 2006	July 2006	Total Units
Virtual Private Network Service	0	0	0	0	0	0	0	0
Remote Network Access Service	0	0	0	0	0	0	0	0
Video Transmission Service	0	0	0	0	0	0	0	0
Wave-Based Transport Service	0	0	0	0	0	0	0	0
Ethernet-Based Service	0	0	0	0	1	3	0	4
ATM Service	2	2	0	11	20	4	3	42
Frame Relay Service	13	20	25	13	15	15	8	109
Optical Networking Service	37	27	45	32	45	35	26	247
Optical Transport Service	40	21	43	46	35	35	61	281