

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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

**REPLY COMMENTS OF AT&T INC.**

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## I. INTRODUCTION AND SUMMARY

AT&T Inc. and its affiliates (collectively, AT&T) respectfully submit the following reply comments in support of its Petition for forbearance from Title II common carrier regulations and *Computer Inquiry* requirements regarding its packet-switched and optical transmission broadband services.<sup>1</sup> In its Petition, AT&T described how these services are subject to robust, national competition from a variety of competitors. AT&T then demonstrated how it met each of the statutory criteria for forbearance and requested that the Commission remove the outmoded and unnecessary Title II and *Computer Inquiry* regulations that inhibit AT&T and other Bell Operating Companies (BOCs) from delivering innovative, customized solutions to meet their subscribers' needs.<sup>2</sup>

Despite the competitive realities of today's broadband marketplace and the inefficiencies caused by the continued application of archaic rules to modern broadband networks and services, some commenters stubbornly insist that legacy common carrier regulation must be carried forward lock, stock and barrel into the broadband future. These commenters rely on the same tired, monopoly-era rhetoric found (sometimes verbatim) in their pleadings from other broadband-related dockets. They also employ familiar yet dubious tactics to dissuade the Commission from granting AT&T's Petition: they mischaracterize the scope of services and regulations covered by our Petition; they misstate the statutory criteria for forbearance under section 10; and they offer hyperbole-laden responses to the substantive showings in our Petition.

As discussed below, AT&T's Petition covers the same types of broadband services and common carrier regulations that were the subject of Verizon's recently granted forbearance

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

<sup>2</sup> While AT&T's Petition urged the Commission to grant forbearance for AT&T and the other BOCs, AT&T also supports granting forbearance for non-BOCs, such as Embarq, who satisfy the statutory criteria for such relief.

petition,<sup>3</sup> and specifically *excludes* the traditional DS-1 and DS-3 special access services that some commenters use as inputs for their own broadband offerings. AT&T's Petition also fully satisfies each of the applicable statutory criteria for forbearance under section 10. The widespread broadband competition described in our petition conclusively demonstrates that legacy regulation is not necessary to ensure just and reasonable rates, to protect consumers, or to serve the public interest. Indeed, both the Commission and the courts have repeatedly recognized that such robust competition provides a legitimate basis for granting relief from common-carrier-style regulation that has long outlived its usefulness. And the commenters themselves have unwittingly supplied perhaps the best evidence of national, facilities-based broadband competition through a multitude press releases and product announcements touting their extensive investment in, and deployment of, new broadband networks and services -- all of which severely contradict the self-serving, downbeat competitive assessments contained in their regulatory filings with this Commission.

Given this intense, national competition, granting AT&T's Petition and eliminating unwarranted regulatory disparities will undoubtedly "promote [the] competitive market conditions" that Congress sought to foster through section 10.<sup>4</sup> By allowing AT&T to focus its resources on developing creative, customized solutions rather than churning out cookie-cutter common carrier offerings, forbearance will enable AT&T to better meet the needs of its customers, who themselves increasingly demand innovative communications products and services to stay competitive in the global business marketplace. Accordingly, the Commission should reject the arguments of opposing commenters and expeditiously grant AT&T's Petition.

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<sup>3</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 (Dec. 20, 2004). See also *Verizon Telephone Companies' Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to Broadband Services Is Granted by Operation of Law*, FCC Press Release (March 20, 2006).

<sup>4</sup> See 47 U.S.C. § 160(b).

## II. DISCUSSION

### A. Commenters Have Mischaracterized the Scope of AT&T's Broadband Forbearance Petition.

In its Petition, AT&T clearly identified the types of services and regulations covered by its forbearance request.<sup>5</sup> As AT&T explained, it is seeking relief for the same two categories of broadband services identified by Verizon in its forbearance petition: (i) “packet-switched services capable of transmitting 200 kbps or greater in each direction,” which “include Frame Relay services, ATM services, IP-VPN services and Ethernet services;” and (ii) “non-TDM-based optical networking, optical hubbing, and optical transmission services,” which “are provided over optical facilities at OCn speeds” relying on “SONET-based, Wave Division Multiplexing (‘WDM’) or Dense Wave Division Multiplexing (‘DWDM’) networks.”<sup>6</sup> For both categories of services, AT&T stated that it is requesting forbearance from the same “Title II common carrier regulations and *Computer Inquiry* requirements” for which Verizon received relief.<sup>7</sup> Just like Verizon, however, AT&T clarified that it is not seeking relief from “any universal service obligations that may otherwise apply” to the covered broadband services.<sup>8</sup>

Despite the unmistakable clarity of AT&T's Petition, a few commenters have significantly mischaracterized that Petition, either by exaggerating the scope of the Petition to dissuade the Commission from granting forbearance at all, or by attempting to narrow the scope of the Petition to limit any forbearance the Commission does ultimately grant. For example, Sprint urges the Commission not to grant forbearance with respect to traditional DS-1 and DS-3

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<sup>5</sup> AT&T Petition at 7-10.

<sup>6</sup> AT&T Petition at 8-9. *See also* AT&T Petition at Appendix A (attaching a list of relevant services offered by AT&T that fit within these two categories).

<sup>7</sup> AT&T Petition at 10.

<sup>8</sup> AT&T Petition at 10.

special access services because such services are “a critical input to the services provided by ILEC competitors for broadband and non-broadband services.”<sup>9</sup> But as AT&T made clear in its Petition, it is *not* seeking forbearance relief for traditional DS-1 or DS-3 special access services.<sup>10</sup> Instead, AT&T explained that it was seeking relief for the same types of services for which Verizon was afforded relief, and as Chairman Martin and Commissioner Tate have expressly acknowledged, Verizon’s forbearance request “excludes traditional special access services (DS1 and DS3 services).”<sup>11</sup> Thus, notwithstanding Sprint’s attempt to overstate the scope of AT&T’s Petition, traditional DS-1 and DS-3 special access services are simply not at issue in this proceeding.

Broadview, on the other hand, attempts to limit the scope of AT&T’s Petition by asserting that the Petition “seeks relief only with respect to large and medium-sized enterprise customers.”<sup>12</sup> Like Verizon, however, AT&T did not limit its forbearance request to services offered to a particular customer class (business or residential) or size (large, medium or small). Rather, AT&T plainly stated that, while the broadband services at issue are “typically” offered to large and medium-sized business customers and to other carriers, it is seeking relief for the

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<sup>9</sup> Sprint Comments at 5-11.

<sup>10</sup> AT&T Petition at 9.

<sup>11</sup> *Verizon Telephone Companies’ Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to Broadband Services Is Granted By Operation of Law*, Joint Statement of Chairman Kevin J. Martin and Commissioner Deborah Taylor Tate at 1 (March 20, 2006) (Martin-Tate Joint Statement).

<sup>12</sup> Broadview Comments at 23 n.49. *See also* Alpheus Comments at 3 (asking the Commission to clarify that the petitions do not seek forbearance with respect to any mass market services). When referring to parties filing joint comments on AT&T’s Petition, AT&T uses the name of the lead commenter to collectively identify all of the parties joining those comments.

covered services “regardless of the type of customer seeking to buy or use them.”<sup>13</sup> Broadview’s claim to the contrary is erroneous.

In a similar vein, some parties assert that AT&T either has not identified the regulations from which it seeks relief or has sought relief from only a subset of Title II common-carrier regulations. For example, Sprint alleges that AT&T did not identify the “specific rules or regulations” from which it seeks forbearance.<sup>14</sup> Alpheus claims that AT&T seeks forbearance only with respect to “Part I” of Title II, which is captioned “Common Carrier Regulation” and includes sections 201-231, rather than all of the regulations related to common carriers found in Title II, which is captioned “Common Carriers.”<sup>15</sup> OPATSCO apparently believes there is some ambiguity as to whether AT&T is seeking relief from universal service contribution requirements for the covered services and asks the Commission to clarify that such requirements will still apply after forbearance is granted.<sup>16</sup>

Despite these assertions, AT&T’s was quite clear about the regulations for which it seeks relief. AT&T stated that it is seeking forbearance from all of the same Title II common-carrier regulation and *Computer Inquiry* requirements for which Verizon obtained relief.<sup>17</sup> As AT&T and Verizon both explained, these are the same regulations and requirements that the Commission eliminated for broadband transmission services used to provide Internet access

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<sup>13</sup> AT&T Petition at 9. *See also* Letter from Ed Shakin, Verizon, to Marlene Dortch, FCC, WC Docket No. 04-440, at 3 (*Verizon 2/7/06 Ex Parte*) (“Verizon is seeking relief for the services at issue regardless of the nature of the customer to whom the service is offered.”).

<sup>14</sup> Sprint Comments at 17.

<sup>15</sup> Alpheus Comments at 3.

<sup>16</sup> OPATSCO Comments at 4.

<sup>17</sup> AT&T Petition at 9-10.

service in the recent *Wireline Broadband Order*.<sup>18</sup> Indeed, Verizon’s request for relief from “Title II common-carriage regulation” was specific enough for the Commission to award Verizon the full forbearance relief it sought.<sup>19</sup>

To eliminate any possible doubt, however, AT&T’s Petition clarified that it seeks relief from “*all* common carrier provisions of Title II of the Communications Act of 1934, as amended (except the permissive authority contained in section 254(d) that authorizes the Commission to require universal service contributions from providers of interstate telecommunications); *all* Commission regulations implementing the common carrier provisions of Title II (except section 54.706 insofar as it requires private carriers to contribute to universal service); and *all* regulations and requirements derived from the Commission’s *Computer Inquiry* decisions.”<sup>20</sup> Given these unambiguous statements, which do not limit AT&T’s Petition to particular Parts of Title II, it is simply not credible for any party to profess uncertainty as to the scope of relief requested by AT&T.<sup>21</sup>

**B. Commenters’ Have Misrepresented the Requirements for Forbearance Under Section 10 of the Communications Act.**

Under section 10 of the Communications Act, the Commission is required to forbear from applying a regulation or provision of the Act if it determines that:

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<sup>18</sup> AT&T Petition at 10; Verizon 2/7/06 *Ex Parte* at 3.

<sup>19</sup> See Verizon 2/7/06 *Ex Parte* at 3.

<sup>20</sup> AT&T Petition at 10 n.28 (emphasis added).

<sup>21</sup> See *AT&T v. FCC*, 452 F.3d 830 (D.C. Cir. 2006) (remanding the Commission’s denial of AT&T’s petition for forbearance from Title II common carrier regulation of IP platform services because the Commission has, in fact, previously granted requests for relief from “common carrier” regulation). See also *Brotherhood of Railroad Trainmen v. Baltimore & Ohio Railroad Co., et al*, 331 U.S. 519, 528 (1947) (“[H]eadings and titles are not meant to take the place of the detailed provisions of the text. Nor are they necessarily designed to be a reference guide or a synopsis. Where the text is complicated and prolific, headings and titles can do no more than indicate the provisions in a most general manner.”). Notwithstanding the clarity of AT&T’s Petition, AT&T recognizes the important role that the federal universal service fund plays in keeping telephone rates affordable and we have no objection to the Commission issuing the universal service clarification requested by OPATSCO. See OPATSCO Comments at 4.

(1) enforcement of such regulation or provision is not necessary to ensure that . . . charges, practices, classifications, or regulations . . . are just and reasonable and are not unjustly or unreasonably discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest.<sup>22</sup>

In making the “public interest” determination under subsection (a)(3), the Commission “shall consider” whether forbearance “will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services.”<sup>23</sup> Forbearance under section 10 is not discretionary. Rather, section 10 provides that the Commission “shall forbear” when the statutory criteria are satisfied.<sup>24</sup>

Despite the plain language of section 10 and the numerous Commission orders and judicial decisions reciting the familiar three-pronged test for forbearance, some commenters attempt to graft new standards and requirements onto the statutorily-defined forbearance analysis. Time Warner Telecom, for example, alleges that before granting AT&T’s forbearance petition, “the Commission must apply its traditional non-dominance test.”<sup>25</sup> Alpheus makes similar arguments about the need to conduct a “traditional market power analysis for the services in question.”<sup>26</sup>

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<sup>22</sup> 47 U.S.C. § 160(a).

<sup>23</sup> 47 U.S.C. § 160(b).

<sup>24</sup> 47 U.S.C. § 160(a).

<sup>25</sup> Time Warner Telecom Comments at 8. *See also id.* at 9 (discussing traditional non-dominance analyses developed beginning in the 1970s in the Commission’s *Competitive Carrier* proceedings).

<sup>26</sup> Alpheus Comments at 5. *See also* Comptel Comments at 8-9; Sprint Comments at 14-15. In a traditional non-dominance or market power analysis, the Commission typically examines a variety of information related to a

None of the commenters raising these arguments, however, can point to any such requirement in section 10. That omission is telling, as Congress was well aware of the Commission’s “traditional” 1970s-era market power analysis when it added section 10 to the Act in 1996, but chose not to mandate such a test as a prerequisite for forbearance.<sup>27</sup> Thus, any suggestion that section 10 requires the Commission to perform a traditional non-dominance test or market power analysis before granting AT&T’s Petition is entirely baseless.<sup>28</sup>

Unable to find a statutory basis for their arguments, some commenters allege that the Commission’s *Qwest Omaha Order* stands for the proposition that a traditional market power analysis *must* be applied before forbearance may be granted under section 10.<sup>29</sup> But in the *Qwest Omaha Order*, the Commission specifically rejected just such a requirement. The Commission explained that, although its section 10 forbearance analysis may be “informed” by a traditional market power examination, any such examination “does not bind our section 10 *forbearance* analysis.”<sup>30</sup> The Commission further observed that its framework for section 10 forbearance petitions concerning *legacy* telecommunications services would necessarily be different from the

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provider and its services, including, among other things, a complex analysis of supply and demand elasticity. *See Motion of AT&T Corp. to Be Reclassified as a Non-Dominant Carrier*, CC Docket No. 95-427, Order, 11 FCC Rcd. 3271 (1995).

<sup>27</sup> Citing a House Conference Report, Sprint claims that section 10 requires a “showing that the petitioner has no market power.” Sprint Comments at 15 (citing H.R. Conf. Rep. No. 104-458 at 185 (1996)). AT&T can find nothing in this Conference Report stating that a market power analysis is a requirement for forbearance. Instead, the Conference Report simply describes the three-pronged statutory test set forth in section 10.

<sup>28</sup> As explained below, even if the Commission believed a traditional market power analysis was warranted for the services at issue in this case, it thoroughly evaluated AT&T’s position in the market for these services just 9 months ago in the *SBC-AT&T Merger Order* and found that the market was competitive and would remain so following the merger. *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, Memorandum Opinion and Order, FCC 05-183 (released Nov. 17, 2005) (*SBC-AT&T Merger Order*). *See infra* section II.C.1.

<sup>29</sup> *See* Sprint Comments at 14; Time Warner Telecom Comments at 8. *See also* *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, FCC 05-170 (released Dec. 2, 2005) (*Qwest Omaha Order*).

<sup>30</sup> *Qwest Omaha Order* ¶ 17 n.52 (emphasis in original).

approach it applies to petitions regarding *broadband* services because broadband services are offered in a competitive marketplace “where the preconditions for monopoly are not present.”<sup>31</sup>

Indeed, the Commission followed just such a broadband-oriented approach in the *271 Broadband Forbearance Order*, when it granted BOC petitions for forbearance from unbundling obligations under section 271 that continued to apply to broadband facilities (fiber-to-the-home loops, fiber-to-the-curb loops, the packetized functionality of hybrid loops, and packet switching) after the Commission had previously eliminated unbundling obligations for those same facilities under section 251.<sup>32</sup> In granting forbearance, the Commission declined to apply a traditional non-dominance analysis because “neither the language of section [10] nor relevant precedent supports [the] assertion that the Commission was required to conduct detailed market power studies.”<sup>33</sup> Instead, the Commission conducted the three-pronged analysis required by section 10 and concluded that forbearance was warranted, particularly given the existence of significant competition already present in the still emerging broadband market.<sup>34</sup>

In response to Earthlink’s appeal of the *271 Broadband Forbearance Order*, the D.C. Circuit flatly rejected the arguments that section 10 or the *Qwest Omaha Order* require a

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<sup>31</sup> *Qwest Omaha Order* ¶¶ 106, 107 (citations omitted). See also *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, WC Docket Nos. 02-33, Report and Order and Notice of Proposed Rulemaking, FCC 05-150 ¶ 85 (released Sept. 23, 2005) (*Wireline Broadband Order*) (“Applying a traditional market dominance analysis to a situation where the facilities-based wireline carriers have been required to provide service on specified terms and conditions while the market was still relatively undefined (and remains dynamic and evolving even today) would lead to a result that would be misleading and could be self-fulfilling. Therefore, we believe that a conclusive finding about dominance or non-dominance of these carriers in this context is ill-suited and inappropriate.”).

<sup>32</sup> *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), et al*, WC Docket No. 01-338, Memorandum Opinion and Order, FCC 04-254 (released Oct. 27, 2004) (*271 Broadband Forbearance Order*).

<sup>33</sup> See Brief for Respondents Federal Communications Commission and United States of America, *Earthlink v. FCC*, No. 05-1087, at 25 (D.C. Cir. Feb. 6, 2006).

<sup>34</sup> *271 Broadband Forbearance Order* ¶¶ 21-22.

traditional market power analysis.<sup>35</sup> Describing EarthLink’s claims as “particularly inapt,” the Court explained that “[w]hile such an analysis is no doubt appropriate in some circumstances, we cannot say the FCC was unreasonable in taking another tack here, tailoring the forbearance inquiry to the situation at hand.”<sup>36</sup> The Court concluded that “[g]iven the FCC’s view of the broadband market as still emerging and developing, it reasonably eschewed a more elaborate snapshot of the current market in deciding whether to forbear with respect to the fiber network elements at issue here.”<sup>37</sup> Having found nothing improper in the Commission’s decision to dispense with a traditional market power analysis, the Court concluded that the Commission “appropriately stepped through the three-part forbearance inquiry, at each step explaining its view that forbearance would only have a ‘modest’ impact that was outweighed by forward-looking benefits (increased competition and fiber deployment).”<sup>38</sup>

Although the Court issued its decision affirming the *271 Broadband Order* two days *before* the comment deadline in this proceeding, most commenters chose to ignore the Court’s ruling in their comments. And while Alpheus attempts to distinguish the Court’s holdings from the instant matter, its feeble, one-paragraph effort misses the mark. According to Alpheus, the Court’s decision is irrelevant here because the *271 Broadband Forbearance Order* dealt with forbearance from unbundling obligations not “whether the broadband market is sufficiently competitive to permit dispensing with common carrier regulation.”<sup>39</sup> Thus, according to Alpheus, the Commission cannot decide whether competition is “sufficient to assure reasonable

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<sup>35</sup> *Earthlink v. FCC*, No. 05-1087, Slip Op. (D.C. Cir., Aug 15, 2006).

<sup>36</sup> *Earthlink v. FCC*, Slip Op. at 14-15.

<sup>37</sup> *Earthlink v. FCC*, Slip Op. at 14.

<sup>38</sup> *Earthlink v. FCC*, Slip Op. at 15.

<sup>39</sup> Alpheus Comments at 6. *See also* Broadview Comments at 22 n.45.

pricing and other terms and conditions of stand-alone broadband transmission services without assessing whether BOCs possess market power in provision of those services.”<sup>40</sup>

Contrary to Alpheus’s assertion, however, competition in the broadband market was directly at issue in the *271 Broadband Forbearance Order*. As discussed above, the Commission found, and the Court agreed, that a traditional market power analysis was unnecessary precisely because the broadband market is “emerging and developing.”<sup>41</sup> Rather than mandating such an analysis, section 10 permits the Commission to “tailor[] the forbearance inquiry to the situation at hand.”<sup>42</sup> Consistent with the Court’s decision in *Earthlink v. FCC*, the Commission is not obligated to conduct the traditional market power analysis suggested by some commenters and, instead, may properly focus its efforts on the three-pronged statutory forbearance criteria as Congress intended.

Having failed in their efforts to graft a traditional market power test onto section 10, some commenters claim that section 10 nonetheless requires the Commission to apply the three-pronged forbearance criteria on a local or regional level through a “painstaking” and “granular” geographic analysis for each of the broadband services at issue.<sup>43</sup> Thus, under this interpretation of section 10, they argue the BOCs’ assertions of national broadband competition are insufficient to support granting forbearance. Unfortunately for these commenters, EarthLink raised this very same argument before the D.C. Circuit in its appeal of the *271 Broadband Forbearance Order* and failed miserably. As the Court explained:

According to EarthLink, the statute permits the FCC to grant forbearance only

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<sup>40</sup> Alpheus Comments at 6.

<sup>41</sup> See *Earthlink v. FCC*, Slip Op. at 14.

<sup>42</sup> *Earthlink v. FCC*, Slip Op. at 14.

<sup>43</sup> See Sprint Comments at 18; Alpheus Comments at 4. See also Earthlink Comments at 21-23; Comptel Comments at 8-12; Broadview Comments at 20-22.

after a “painstaking analysis of market conditions” in “particular geographic markets and for specific telecommunications services.” We disagree. On its face, the statute imposes no particular mode of market analysis or level of geographic rigor. *See* 47 U.S.C. § 160(a) . . . . Seizing on the phrase “geographic markets” in § 160(a), EarthLink contends the decision to forbear on a nationwide basis -- without considering more localized regions individually -- is *per se* improper. This argument is tenuous, at best. In context, the language simply contemplates that the FCC might sometimes forbear in a subset of a carrier's markets; it is silent about how to determine when such partial relief is appropriate. Similarly, the statute does not require consideration of specific services. *See id.* (permitting forbearance as to a “*class* of telecommunications carriers or telecommunications services” (emphasis added)). Instead, we are persuaded the agency reasonably interpreted the statute to allow the forbearance analysis to vary depending on the circumstances.<sup>44</sup>

No commenter bothers to acknowledge the Court’s holding on this particular point, let alone proffers a compelling response.

Undaunted by their failed attempts to graft new requirements onto section 10, a few commenters imply that the Commission can simply sidestep section 10 altogether and reject AT&T’s forbearance request on other grounds. Earthlink, for example, argues that AT&T is misusing section 10 “to short-circuit the FCC’s rulemaking process” in the *Broadband Non-Dominance NPRM* and other pending proceedings.<sup>45</sup> But the D.C. Circuit has squarely held that “an alternative route for seeking [relief] does not diminish the Commission’s responsibility to fully consider petitions under § 10.”<sup>46</sup> As the Court explained: “Congress has established § 10 as a viable and independent means of seeking forbearance” and the Commission “has no authority to sweep it away by mere reference to another, very different, regulatory mechanism.”<sup>47</sup>

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<sup>44</sup> *Earthlink v. FCC*, Slip Op. at 11-12.

<sup>45</sup> Earthlink Comments at 2.

<sup>46</sup> *AT&T v. FCC*, 236 F.3d 729, 738 (D.C. Cir. 2001).

<sup>47</sup> *AT&T v. FCC*, 236 F.3d at 738.

Taking a different tack, Alpheus argues that Title II common carrier regulation is not really so bad after all and the BOCs already have plenty of relief that enables them to offer innovative services on a customized basis (*e.g.*, the pricing flexibility rules and, in AT&T's case, tariff forbearance for its advanced services affiliate).<sup>48</sup> Thus, Alpheus claims "there is simply no need to forbear from all common carrier regulation under Title II . . . ."<sup>49</sup> Putting aside Alpheus's fatuous assertion that common carrier regulation is not "burdensome," which the Commission has flatly rejected on numerous occasions,<sup>50</sup> Alpheus's argument fundamentally misconstrues the statutory requirements for forbearance. A party seeking forbearance under section 10 is *not* required to demonstrate that a regulation is burdensome (though that is certainly true here).<sup>51</sup> Nor is the Commission permitted to decline forbearance from a rule merely by deeming compliance with that rule "not too hard." Rather, section 10 mandates that the Commission "shall" forbear from regulations that are no longer necessary to ensure just and reasonable rates, safeguard consumers, and protect the public interest.<sup>52</sup> If the regulation is no longer necessary to serve these purposes, then the Commission *must* forbear, regardless of how little or how great a burden the regulation imposes on carriers.<sup>53</sup> Alpheus's unsupported claim to the contrary is meritless.

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<sup>48</sup> Alpheus Comments at 12-13.

<sup>49</sup> Alpheus Comments at 13.

<sup>50</sup> *See* AT&T Petition at 24-25 (citing Commission decisions discussing the burdens imposed by common carrier regulation).

<sup>51</sup> *See* AT&T Petition at 24-25.

<sup>52</sup> 47 U.S.C. § 160(a).

<sup>53</sup> Taken to its logical conclusion, Alpheus's argument would permit the Commission to deny forbearance from the application of "unnecessary" rules so long as the Commission found that compliance with those rules is not burdensome. Such an argument is in direct conflict with the plain language of section 10.

In perhaps the most desperate attempt by a commenter to forestall the Commission from conducting the forbearance analysis dictated by section 10, the New Jersey Division of Rate Counsel alleges that section 10 is Constitutionally invalid on its face and “*any* exercise of forbearance authority contained in Section 10 of the Act violates separation of powers, equal protection, [the] 10<sup>th</sup> Amendment, and [the] 11<sup>th</sup> Amendment . . . .”<sup>54</sup> Despite Rate Counsel’s sweeping accusation of unconstitutionality, fundamental principles of statutory interpretation hold that a legislative act is presumed Constitutional and the party challenging it bears a significant burden to prove otherwise.<sup>55</sup> The only support Rate Counsel offers for its argument is a citation to an *ex parte* letter that it filed in the *271 Broadband Forbearance* docket.<sup>56</sup> In the *ex parte*, Rate Counsel espouses a theory that certain provisions in the Constitution place inherent limits on the Commission’s ability to forbear from section 271.<sup>57</sup> Rate Counsel, however, makes no effort to explain how its nearly two-year-old *ex parte* is relevant to the present proceeding or how granting AT&T’s current forbearance request would implicate any of the Constitutional provisions it references. Accordingly, Rate Counsel has completely failed to meet its burden of proving that section 10 is unconstitutional and the Commission should summarily dismiss its claim.

Not content with simply attacking section 10 or distorting the statutory forbearance criteria contained therein, some commenters next turn their attention to mischaracterizing the

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<sup>54</sup> NJ Rate Counsel Comments at 5 (emphasis added).

<sup>55</sup> See *Moon v. Freeman*, 379 F.2d 382, 391 (9<sup>th</sup> Cir. 1967).

<sup>56</sup> Letter from Christopher White, NJ Division of Ratepayer Advocate, to Marlene Dortch, FCC, CC Docket No. 01-338 (Dec. 7, 2004).

<sup>57</sup> Rate Counsel filed its *ex parte* on December 7, 2004, nearly six weeks *after* the Commission issued the *271 Broadband Forbearance Order*. Rate Counsel did not appeal that *Order*, which, as discussed above, has now been affirmed by the D.C. Circuit.

effect of section 10(c)'s "deemed granted" provision on Verizon's broadband forbearance petition. These commenters argue that, without a written order to explain its decision, the Verizon "deemed grant" holds "no precedential value" for the current BOC forbearance petitions.<sup>58</sup> Thus, the commenters claim, Verizon's "deemed grant" cannot serve as the basis for providing the same relief to AT&T and the other BOCs.<sup>59</sup>

The commenters arguments about the procedural effect of Verizon's "deemed grant" are a red herring designed to draw attention away from the substantive impact of the grant of Verizon's petition. As AT&T explained in its Petition, by allowing Verizon's forbearance petition to become deemed granted, the Commission has given Verizon the ability to offer its broadband services on a private carriage basis.<sup>60</sup> As such, Verizon has a significant competitive advantage over AT&T and the other BOCs when offering its services to prospective customers. In light of the competitive distortions caused by this regulatory disparity, it would be arbitrary and capricious for the Commission to deny AT&T the same forbearance relief that Verizon has already received, regardless of whether Verizon's relief was awarded in the form of a "deemed grant." As AT&T pointed out in its Petition, the D.C. Circuit's well-known *Melody Music* decision holds that the Commission cannot treat two similarly-situated parties differently unless it satisfactorily explains the reasons for such disparate treatment. The explanation "must do more than enumerate factual differences . . . it must explain the relevance of those difference to the purposes of the Federal Communications Act."<sup>61</sup> Indeed, even Earthlink admits that *Melody Music* and its progeny do not permit an agency to "vacillate[] without reason in its application of

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<sup>58</sup> See Time Warner Telecom Comments at 7; Alpheus Comments at 7; Broadview Comments at 10.

<sup>59</sup> See Earthlink Comments at 6-7.

<sup>60</sup> AT&T Petition at 2-3.

<sup>61</sup> *Melody Music*, 345 F.2d at 733.

a statute.”<sup>62</sup> Permitting Verizon to offer broadband services on a private carriage basis while denying that same relief to AT&T would be just such an unreasonable vacillation, thus running afoul of the principles articulated in *Melody Music*.

In a final act of desperation, Broadview and Earthlink go so far as to assert that the Verizon “deemed grant” never actually happened. According to Broadview, “Verizon’s Petition is still pending” and will remain so until the Commission grants or denies the petition on its merits and issues a written decision indicating its reasons for doing so.<sup>63</sup> To hear Broadview tell it, the “deemed granted” status described in section 10(c) of the Act “is merely meant to be a provisional form of relief.”<sup>64</sup> Of course, Broadview fails to cite anything in section 10 or its legislative history for the novel theory that the “deemed granted” language in the statute is merely “provisional” or that once a petition is deemed granted it nonetheless remains “pending.” Absent any authority for these arguments, the Commission hardly needs to dignify them with a response.

Earthlink ups the ante with an even more far-fetched interpretation of section 10. It claims that the “deemed granted” provision of section 10(c) is actually far more limited than anyone recognizes. According to Earthlink, section 10(c)’s deemed granted provision does not apply to a petition if the Commission has extended the twelve-month statutory deadline by 90

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<sup>62</sup> Earthlink Comments at 7 (citation omitted). Earthlink’s reliance on *New Orleans Channel 20, Inc. v. FCC*, 830 F.2d 361 (D.C. Cir. 1987), to limit *Melody Music* is flawed. The Court in *New Orleans Channel 20* pointed out that unlike the appellant in *Melody Music*, the appellants before it were not similarly situated with other parties who had obtained relief from the Commission. *New Orleans Channel 20*, 830 F.2d at 365 (“Appellants next argue that they have been denied the same treatment accorded to three similarly situated parties who have successfully sought an extension. We reject this argument. The FCC distinguishes these cases on their facts . . .”).

<sup>63</sup> Broadview Comments at 12.

<sup>64</sup> Broadview Comments at 13.

days.<sup>65</sup> In Earthlink’s view, the act of extending the statutory deadline prevents a forbearance petition from ever being “deemed granted.” To support this argument, Earthlink points to two sentences in section 10(c), which state:

Any such petition shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance under subsection (a) within one year after the Commission receives it, unless the one-year period is extended by the Commission. The Commission may extend the initial one-year period by an additional 90 days if the Commission finds that an extension is necessary to meet the requirements of subsection (a).<sup>66</sup>

According to Earthlink, the “deemed granted” provision in the first sentence only applies insofar as the Commission does not exercise its extension authority referenced in the last clause of that sentence: “unless the one-year period is extended by the Commission.”<sup>67</sup> Earthlink further alleges that the second sentence quoted above, which authorizes the Commission to extend the deadline by 90 days, contains no “deemed granted” provision, thus conclusively proving the correctness of Earthlink’s interpretation.<sup>68</sup>

Earthlink’s argument is nonsense. Properly read in context, the clause “unless the one-year period is extended by the Commission” refers to *when* a forbearance petition will be deemed granted, not *whether* the petition will be deemed granted. The phrase immediately preceding the “unless” clause states that the deemed grant will occur “within one year,” if the Commission does not act on the petition. Thus, read in context, the “unless” clause simply means that, when the Commission extends the deadline for deciding a forbearance petition, the petition will not be deemed granted “within one year.” Rather, the petition will be deemed

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<sup>65</sup> Earthlink Comments at 4-6.

<sup>66</sup> 47 U.S.C. § 160(c).

<sup>67</sup> Earthlink Comments at 4.

<sup>68</sup> Earthlink Comments at 5.

granted at the expiration of the Commission's extension, which, as the second sentence makes clear, is limited to 90 days.

Aside from being textually tenuous, Earthlink's interpretation of section 10(c) would render the "deemed granted" provision completely meaningless. If the Commission could prevent a petition from being deemed granted merely through the ministerial act of issuing a public notice to extend the statutory deadline, the Commission would have no incentive to ever decide a forbearance petition within the maximum fifteen months allotted by Congress and there would be no consequences stemming from the Commission's failure to do so. Congress clearly did not intend for section 10 to be construed to produce the absurd results suggested by Earthlink and any argument to the contrary is simply not credible.<sup>69</sup> Indeed, even Earthlink's own trade association, Comptel, is not willing to support such a dubious interpretation of section 10. Instead, it forthrightly acknowledges that "[t]he Verizon Petition was deemed granted by operation of law effective March 19, 2006 because the Commission, which had only four members at the time, was deadlocked on its disposition."<sup>70</sup>

In all events, as discussed below, regardless of the merits (or lack thereof) of any commenter's arguments about the precedential value of the Verizon "deemed grant," AT&T's Petition fully satisfies each of the statutory criteria for forbearance under section 10. Indeed, the forbearance relief accorded to Verizon makes it all the more necessary for the Commission to extend the same relief to other broadband providers who compete with Verizon. Thus, consistent with Congress's mandate that such petitions "shall" be granted, the Commission should expeditiously grant AT&T's Petition and allow AT&T to offer its broadband services on a

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<sup>69</sup> See *In re Kaiser Aluminum Corp.*, 2006 WL 2061337 (3<sup>rd</sup> Cir. July 26, 2006) ("A basic tenet of statutory construction is that courts should interpret a law to avoid absurd or bizarre results.").

<sup>70</sup> Comptel Comment at 2-3.

private carriage basis, free from outmoded and unnecessary Title II common carrier regulations and *Computer Inquiry* requirements.

**C. AT&T's Petition Fully Satisfies Each of the Substantive Forbearance Criteria in Section 10 of the Act.**

**1. Just and Reasonable Charges.**

In its Petition, AT&T described at length how its packet-based and optical transport broadband services are subject to intense and robust competition, which ensures that rates, terms and conditions for these services will remain just and reasonable and not unjustly or unreasonably discriminatory.<sup>71</sup> Despite this detailed showing, as well as similar showings from other petitioners,<sup>72</sup> some commenters assert that the marketplace is not sufficiently competitive to warrant relief and AT&T has not provided enough evidence of competition to support its Petition.<sup>73</sup> They further allege that purchasers of the broadband services at issue here have only a limited number of suppliers to choose from and that Title II regulation is absolutely necessary to guarantee that rates remain reasonable. Contrary to these sweeping assertions, the record in this proceeding is replete with extensive data conclusively showing pervasive, national competition for packet-based and optical transport broadband services. As discussed below, the commenters' stubborn refusal to acknowledge this competition is simply not tenable given the mounds of market data in the record, the Commission's conclusions in a variety of broadband proceedings, the rulings of the D.C. Circuit, and the commenters' very own behavior in the marketplace.

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<sup>71</sup> AT&T Petition at 11-21.

<sup>72</sup> See Petition of Bellsouth Corporation for Forbearance under 47 U.S.C. § 160(c) from Title II and *Computer Inquiry* Rules with Respect to Its Broadband Services, WC Docket No. 06-125, at 9-12 (July 20, 2006); Qwest 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, at 15-18 (June 13, 2006).

<sup>73</sup> See Earthlink Comments at 10-18; Sprint Comments at 11; Comptel Comments at 12-15; Time Warner Telecom Comments at 12-16; Broadview Comments at 22-25; Alpheus Comments at 14-21.

*Broadband Competition.* In its Petition, AT&T provided market data from a variety of analysts showing that purchasers of broadband services have numerous options to meet their needs.<sup>74</sup> AT&T also incorporated by reference the comprehensive data that Verizon put on the record to support its broadband forbearance petition, which similarly shows the multitude of providers competing for customers' broadband dollars.<sup>75</sup> Indeed, the Commission itself has already recognized that AT&T faces "robust" competition for enterprise services, including the high-capacity services covered by this Petition.<sup>76</sup>

In addition to the numerous suppliers competing to offer broadband packet-based and optical transport services, the purchasers of these services also foster intense competition through the methods they use to evaluate service offerings and select vendors. As AT&T explained in its Petition, the purchasers of these services are typically sophisticated business entities that solicit bids through requests for proposals (RFPs).<sup>77</sup> This bid process maximizes competition among suppliers and helps to drive down prices while ensuring high-quality service. Purchasers of these broadband services also often employ knowledgeable and experienced telecommunications consultants to obtain the best possible terms for the services they procure.<sup>78</sup> Even smaller purchasers that may not use RFPs will often conduct informal competitions among suppliers, asking various service providers to present customized proposals.<sup>79</sup> Given the increasing sophistication of broadband purchasers, it is not surprising that Yankee Group reports that 47

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<sup>74</sup> AT&T Petition at 11-17 (citing analyst reports from Yankee Group, Goldman Sachs Global Investment Research, In-Stat, and IDC).

<sup>75</sup> AT&T Petition at 12.

<sup>76</sup> *SBC-AT&T Merger Order* ¶¶ 57, 73 n.223.

<sup>77</sup> AT&T Petition at 15-16.

<sup>78</sup> See *SBC-AT&T Merger Order* ¶ 75.

<sup>79</sup> See SBC-AT&T Public Interest Statement, WC Docket No. 05-65, at 92-93 (Feb. 21, 2005).

percent of large and medium-sized business customers switched service providers in 2004, which is a 9 percent jump from 2003.<sup>80</sup>

The intense competition for broadband services is heightened further by the rapidly evolving technology in this market. As AT&T detailed in its Petition, “legacy” ATM and Frame Relay are being supplanted by newer IP and MPLS-based broadband transmission services.<sup>81</sup> According to IDC, “ATM, frame, and private line services are all under pressure from IP VPNs and transparent LAN (Ethernet) services.”<sup>82</sup> IDC predicts that “ATM services will begin to decline in 2005, and that decline will accelerate through 2009 [because] ATM is a legacy technology that will face fierce competition from cheaper and more flexible rivals.”<sup>83</sup> In-Stat is equally blunt in its analysis of the wireline data market: “It is beyond cliché to note the continued decline of legacy revenues; the move to IP is apparent and accelerating. . . . [A]ll of the major service providers continue to report flat or declining wireline data revenues, announcing (as in the case of AT&T) falling volumes and price erosion abated only by improved IP revenues.”<sup>84</sup> Even Alpheus candidly admits that ATM and frame relay “may have less commercial importance in the future” because they are being “supplanted by IP-enabled services.”<sup>85</sup>

Rather than addressing these marketplace realities directly, some commenters disingenuously attempt to deny that AT&T has made any competitive showings at all. Comptel,

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<sup>80</sup> Yankee Group, “Network Service Providers Alter Their Business Models to Capture a Greater Share of Increasing Enterprise Budgets,” at 7 (Jan. 2005).

<sup>81</sup> AT&T Petition at 13-15.

<sup>82</sup> IDC Market Analysis, U.S. ATM Services 2005-2009 Forecast, at 2 (May 2005).

<sup>83</sup> IDC Market Analysis, U.S. ATM Services 2005-2009 Forecast, at 10 (May 2005).

<sup>84</sup> In-Stat, Share of Wallet: Telecom Trends and Expenditures in the U.S. Business Market, at 8 (Dec. 2005).

<sup>85</sup> Alpheus Comments at 11.

for instance, argues that AT&T has not offered “*any evidence* of competitive alternatives available to their broadband customers.”<sup>86</sup> Broadview similarly alleges that “the ILEC Petitioners utterly fail to provide meaningful data on the competitiveness of the market(s)” that would justify the relief they seek.<sup>87</sup> But these head-in-the-sand responses are simply not credible in light of the extensive evidence of competition in the record.

Moreover, they fly in the face of this Commission’s own findings about robust competition in the broadband marketplace. In fact, just nine months ago in the *SBC-AT&T Merger Order*, the Commission comprehensively reviewed AT&T’s standing as a provider of broadband services. The Commission found that “there are numerous categories of competitors providing services to enterprise customers,” including “interexchange carriers, competitive LECs, cable companies, other incumbent LECs, systems integrators, and equipment vendors.”<sup>88</sup> The Commission also found that “mid-sized and large enterprise customers tend to be sophisticated purchasers of communications services,” who “tend to make their decisions about communications services by using either communications consultants or employing in-house communications experts,” which “demonstrates that these users are aware of the multitude of choices available to them” and that they “are likely to make informed choices based on expert advice about service offerings and prices.”<sup>89</sup> The Commission further recognized that the number of customers subscribing to legacy services, like Frame Relay, was “declining” while the

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<sup>86</sup> Comptel Comments at 15 (emphasis added).

<sup>87</sup> Broadview Comments at 30. *See also* Earthlink Comments at 11.

<sup>88</sup> *SBC-AT&T Merger Order* ¶ 64.

<sup>89</sup> *SBC-AT&T Merger Order* ¶ 75. *See also id.* ¶ 76 (observing that the SBC-AT&T merger would not have anticompetitive effects on small enterprise customers).

number purchasing newer, IP-based transmission services was “increasing.”<sup>90</sup> Given all of these competitive factors, the Commission concluded that “a large number of carriers compete in this market (even though the market shares of some may be small), and that these multiple competitors ensure that there is sufficient competition.”<sup>91</sup> Each of these findings is fully consistent with AT&T’s Petition and the market evidence cited therein. Accordingly, AT&T has provided more than ample support for its argument that competition is sufficient to ensure that rates, terms and conditions for its broadband services will remain just and reasonable without the need for burdensome common carrier regulation.

Indeed, to see the tangible benefits of unshackling broadband services from common carrier-style regulation, the Commission need look no further than its own experience with broadband Internet access service. In the *Wireline Broadband Order*, the Commission definitively classified wireline broadband Internet access as an information service and gave ILECs permission to offer the underlying transmission component of that service on a private carriage basis.<sup>92</sup> The net effect of that *Order* was to remove wireline broadband Internet access from the ambit of Title II common carrier regulations and *Computer Inquiry* requirements. The wisdom of the Commission’s *Order* has been borne out in the marketplace. Former FCC Chief Economist Thomas Hazlett recently explained in the *Wall Street Journal* that, despite much hand-wringing last August about deregulating wireline broadband Internet access, the marketplace response has been tremendous: “DSL packages are cheaper, performance speeds are faster, and the number of subscribers is growing more quickly than under [common carrier]

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<sup>90</sup> *SBC-AT&T Merger Order* ¶59.

<sup>91</sup> *SBC-AT&T Merger Order* ¶ 73.

<sup>92</sup> *Wireline Broadband Order* ¶¶ 12-17, 87-88.

rules.”<sup>93</sup> According to Hazlett, the “bottom line” is that “[s]ince DSL began to shed its [common carrier] obligations, users have flocked to the service.”<sup>94</sup> The Commission can and should encourage the same pro-competitive marketplace results for packet-switched and OCn-level broadband transmission services by granting AT&T’s Petition.

But if there was any lingering doubt about the competitive choices available to the purchasers of the broadband services at issue in AT&T’s Petition, the commenters own behavior conclusively demonstrates that broadband competition is vibrant. While the commenters’ filings with this Commission bemoan a supposed lack of competition, their public statements in the marketplace paint a very different picture. For example, Broadview and co-commenters XO and Covad claim that AT&T has “failed to demonstrate that there is ample competition” to warrant forbearance.<sup>95</sup> Covad, however, has been proudly touting its selection by Gartner as “one of eight business-class DSL market leaders in the U.S.,”<sup>96</sup> and has said that later this year it will complete “the nation’s largest ADSL 2+ network, enabling high-speed data and next-generation voice services to millions of businesses and residences,” including “metro Ethernet and bonded T1” services.<sup>97</sup> XO has similarly extolled the virtues of recent upgrades to its “nationwide long haul fiber network and extensive metro fiber networks,” which include “more than 1 million fiber miles of XO metro fiber in 37 cities,” enabling XO to provide “door-to-door delivery of

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<sup>93</sup> Broadbandits, Thomas Hazlett, Wall Street Journal (Aug. 12, 2006). *See also* Verizon, Cablevision skirmish as war nears, USA Today (Aug. 24, 2006) (describing intense competition between cable and telephone companies).

<sup>94</sup> Broadbandits, Thomas Hazlett, Wall Street Journal (Aug. 12, 2006). Sprint appears to implicitly agree with Hazlett’s findings. *See* Sprint Comments at 19 (observing the growth of DSL-based broadband Internet access services).

<sup>95</sup> Broadview Comments at 29.

<sup>96</sup> Covad Positioned to Gain from Expansion of Business DSL, Covad Press Release (Aug. 2, 2006).

<sup>97</sup> Covad Continues Build-Out of Next-Generation Network in Eight Markets, Covad Press Release (July 20, 2006).

customer traffic.”<sup>98</sup> In addition, XO recently announced that it was “significantly expanding the reach of [its] network to serve even more businesses” by using wireless technology that will enable XO “to deliver business-class broadband solutions directly to businesses and help the company reduce local network costs.”<sup>99</sup> According to XO, its broadband wireless solution gives it “a more cost-effective and scalable replacement to leased network elements that connect local switches to our own fiber network,” which will allow XO to deliver solutions “directly to businesses” at speeds up to 100 Mbps.<sup>100</sup> Broadview, for its part, just recently announced the expansion of its “Total Solutions” voice, data, Internet and phone systems package to multiple East Coast cities following six years of “success” in New York.<sup>101</sup>

Similarly, Alpheus and co-commenter Pac-West decry the lack of “alternative” providers in the broadband marketplace.<sup>102</sup> But just a few months ago Alpheus confidently trumpeted the expansion of what it claims is already “the most extensive competitive deep metro fiber footprint in Texas,” over which it “can provide DS-1 through OC-192 connectivity, Gigabit Ethernet and Managed Waves.”<sup>103</sup> In like fashion, California-based Pac-West reported last month that it had

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<sup>98</sup> XO Communications Deploys Major Segments of Next Generation Nationwide Inter-City Fiber Optic Network, XO Press Release (Aug. 2, 2006). *See also* XO Communications Celebrates 10 Years of Innovation and Leadership, XO Press Release (July 10, 2006) (“Today, XO leverages more than \$8 billion in facilities-based networks ([www.xo.com/about/network](http://www.xo.com/about/network)) it has deployed nationwide and in the local markets it serves. XO operates an 18,000 route mile nationwide network that connects 75 metropolitan markets and operates 9,100 route miles of local fiber in 37 metropolitan markets. Within this nationwide network footprint, XO can reach more than four million businesses.”).

<sup>99</sup> XO Communications Deploys Fixed Broadband Wireless in Nine Cities to Expand Metro Coverage and Reduce Network Access Costs, XO Press Release (Aug. 28, 2006).

<sup>100</sup> XO Communications Deploys Fixed Broadband Wireless in Nine Cities to Expand Metro Coverage and Reduce Network Access Costs, XO Press Release (Aug. 28, 2006).

<sup>101</sup> Broadview Networks Expands Markets for Total Solutions™, Bundled Voice, Data, Internet and Hardware Product, Broadview Press Release (July 10, 2006).

<sup>102</sup> Alpheus Comments at ii-iii.

<sup>103</sup> Alpheus Expands Fiber Network to Corpus Christi, Alpheus Press Release (April 21, 2006).

added New York, Alabama, North Carolina, South Carolina and New Jersey to its existing operations in California, Nevada, Washington, Arizona, Utah, Oregon, Idaho, Colorado, Washington, DC, Pennsylvania, Florida and Maryland.<sup>104</sup> Pac-West also confidently boasted about passing the mid-way point of its “national build to access over 150 million end-users.”<sup>105</sup> According to Pac-West, this “national infrastructure” will serve VoIP providers, wireless broadband providers, ISPs, carriers and other next-generation providers.<sup>106</sup>

Like other commenters, Comptel criticizes the alleged lack of “competitive alternatives” available for broadband customers.<sup>107</sup> However, one of Comptel’s leading members, Level 3, recently announced that it is expanding its “Level 3 Metro Services business unit,” which delivers “a full set of services to customers who make bandwidth decisions on a local or regional basis, such as state and municipal governments, universities, enterprise customers and regional wholesale accounts . . . .”<sup>108</sup> Level 3 also explained that its “extensive metro infrastructure in 36 markets, connecting approximately 900 traffic aggregation points,” has been a “source of considerable competitive advantage,” which it is currently expanding through acquisitions to approximately 5,000 traffic aggregation points in the U.S.<sup>109</sup>

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<sup>104</sup> Pac-West Passes Mid-Way Point of National Build to Access Over 150 Million End-Users, Pac-West Press Release (July 20, 2006).

<sup>105</sup> Pac-West Passes Mid-Way Point of National Build to Access Over 150 Million End-Users, Pac-West Press Release (July 20, 2006).

<sup>106</sup> Pac-West Passes Mid-Way Point of National Build to Access Over 150 Million End-Users, Pac-West Press Release (July 20, 2006).

<sup>107</sup> Comptel Comments at 15.

<sup>108</sup> Level 3 to Enhance Focus on Growing Metropolitan and Content Business Segments, Level 3 Press Release (May 26, 2006).

<sup>109</sup> Level 3 to Enhance Focus on Growing Metropolitan and Content Business Segments, Level 3 Press Release (May 26, 2006).

Not to be outdone, Earthlink rails against AT&T's petition for an alleged lack of "hard evidence" of competition and claims that competitors often have "no choice" but to rely on the BOCs for the facilities and services "to provide the high capacity services most businesses demand."<sup>110</sup> Perhaps Earthlink should have consulted more closely with co-commenter New Edge Networks, which it acquired earlier this year, before making these allegations -- New Edge prominently boasts on its website that it owns "one of the largest, most robust ATM/Frame Relay networks *on the planet*."<sup>111</sup> According to New Edge, with "more than 800 ATM switches deployed, we offer the greatest ATM switch density of any carrier in the North American continent . . . our network enables us to deliver Frame Relay, ATM, IP and DSL services."<sup>112</sup> New Edge also brags that its "wholesale access solutions" enable ISPs to "deliver broadband services to over 11,000 central offices (CO) nationwide."<sup>113</sup> New Edge "can deliver Metro DS3 Internet access in speeds from 3 Mbps to 45 Mbps" and for businesses requiring "more than 45 Mbps, New Edge Networks offers a wide array of scalable, fully managed, Internet access methods including OC-3, OC-12, Ethernet, Fast Ethernet, and Gig Ethernet services."<sup>114</sup>

Given the multitude of competitive investments in new nationwide broadband networks and service offerings by so many commenters, these same commenters cannot be taken seriously when they tell the Commission that the broadband market is not competitive.

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<sup>110</sup> Earthlink Comments at 13, 22.

<sup>111</sup> Frame Relay brochure, New Edge Networks, available at: [http://www.newedgenetworks.com/products/frame\\_relay/frame\\_relay.pdf](http://www.newedgenetworks.com/products/frame_relay/frame_relay.pdf) (emphasis added).

<sup>112</sup> ATM Services brochure, New Edge Networks, available at: [http://www.newedgenetworks.com/products/atm\\_network/atm\\_services.pdf](http://www.newedgenetworks.com/products/atm_network/atm_services.pdf).

<sup>113</sup> Wholesale DSL and T1, New Edge Networks, available at: [http://www.newedgenetworks.com/products/wholesale\\_dsl/](http://www.newedgenetworks.com/products/wholesale_dsl/)

<sup>114</sup> DS3 & Higher, New Edge Networks, available at: <http://www.newedgenetworks.com/products/ds3/>

*Wholesale Broadband Market.* Perhaps recognizing the conflict evident between their regulatory positions and marketplace announcements, a few commenters attempt to narrow the scope of their arguments to focus on the wholesale market for broadband transmission services. For example, Time Warner Telecom concedes that “it is of course true that the *retail market for packetized and TDM-based special access services is competitive,*” but urges the Commission to retain Title II regulation for the wholesale transmission services it uses as inputs into retail broadband services.<sup>115</sup> Sprint argues that AT&T and other petitioners have “ignored the fact that other competitors must rely on ILEC facilities in the wholesale market in order to provide their own retail services.”<sup>116</sup> Broadview claims that it would be a “mistake” for the Commission to grant forbearance because of the potential negative consequences for the wholesale market.<sup>117</sup>

The only “mistake” here is the commenters’ flawed arguments about the wholesale market. The flurry of competitive broadband investments, acquisitions and partnerships over the last eighteen months shows that there are indeed alternatives to BOC wholesale services. As discussed above, many of the commenters have been aggressively deploying their own broadband transmission facilities to obviate the need for reliance on BOC wholesale services, while others have begun offering wholesale services of their own. New Edge, for example, touts the availability of its “wholesale access solutions” for ISPs,<sup>118</sup> and Comptel member Level 3’s

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<sup>115</sup> Time Warner Telecom Comments at 10-11 (emphasis added).

<sup>116</sup> Sprint Comments at 15.

<sup>117</sup> Broadview Comments at 26.

<sup>118</sup> Wholesale DSL and T1, New Edge Networks, available at: [http://www.newedgenetworks.com/products/wholesale\\_dsl/](http://www.newedgenetworks.com/products/wholesale_dsl/)

Metro Services business unit is expanding the services it offers to “wholesale accounts.”<sup>119</sup>

Thus, the commenters’ arguments are belied by their own actions.

Indeed, the same arguments raised by commenters here were also raised by competitors in the *271 Broadband Forbearance Order* and the Commission soundly rebuffed them. As the Commission explained, “[f]orbearance need not await the development of a fully competitive market when the section 10 criteria are otherwise satisfied.”<sup>120</sup> It specifically “reject[ed] the arguments of competitive LECs that a fully competitive wholesale market is a mandatory precursor to a finding that section 10(a)(1) is satisfied, regardless of the state of intermodal competition in the retail market and the effects on incumbent LEC investments.”<sup>121</sup> Relying on its predictive judgment, the Commission concluded that even in the absence of broadband regulation under section 271, CLECs “would still be able to access other network elements to compete in the broadband market or take advantage of the opportunities presented by the developing market situation to *build their own facilities or obtain access to facilities from other suppliers.*”<sup>122</sup> When Earthlink challenged this point on appeal, the Court found that Earthlink’s argument “warrant[ed] little discussion” because CLECs “have alternate ways to compete.”<sup>123</sup>

Nonetheless, some commenters quibble that intermodal competition from cable companies, which, in part, buttressed the Commission’s holdings in the *271 Broadband Forbearance Order* and the *Wireline Broadband Order*, is allegedly not present to the same

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<sup>119</sup> Level 3 to Enhance Focus on Growing Metropolitan and Content Business Segments, Level 3 Press Release (May 26, 2006). See also *SBC-AT&T Merger Order* ¶¶ 31-35 (observing that the merger “will not increase the merged entity’s ability to increase prices for or decrease quality of wholesale special access services”).

<sup>120</sup> *271 Broadband Forbearance Order* ¶ 28.

<sup>121</sup> *271 Broadband Forbearance Order* ¶ 28.

<sup>122</sup> *271 Broadband Forbearance Order* ¶ 26 (emphasis added).

<sup>123</sup> *Earthlink v. FCC*, Slip Op. at 17 n.8.

degree for the packet-based and optical transport services at issue here.<sup>124</sup> While cable companies may not compete as heavily in the market for these services *today*, they, along with other intermodal competitors, are increasingly competing for business customers. In fact, just last week Reuters reported that major cable companies, including Time Warner, Cox, Cablevision and Comcast, are beginning to aggressively challenge telephone companies in the business market.<sup>125</sup> Time Warner Inc.'s cable business unit has seen revenue growing at about 50 percent annually and the company expects to take a "good chunk" of the \$13 billion to \$15 billion business services opportunity in its market, while Cox expects revenue from its business services to top \$500 million this year.<sup>126</sup> Given these ongoing marketplace developments, the Commission has rightly "refused to take the static view suggested by some competitors of this dynamic broadband market [,because] broadband technologies are developing and we expect intermodal competition to become increasingly robust . . . ."<sup>127</sup>

Moreover, the commenters' myopic focus on cable competitors completely ignores the commenters own plethora of competitive *nationwide, facilities-based* wireline broadband networks and services, which are described in detail above. Indeed, it is precisely because the Commission had the fortitude to begin weaning the commenters from their dependence on BOC broadband facilities that they have begun to develop innovative new arrangements for investment in, and deployment of, their own broadband facilities and services. According to the D.C. Circuit, this "forward-looking interpretation and application of the statute," which is "guided by section 706" and the Commission's "predictions about the development of new broadband

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<sup>124</sup> See, e.g., Earthlink Comments at 12; Broadview Comments at 26 n.60.

<sup>125</sup> *Cable sets its sights on business services*, Reuters (Aug. 25, 2006)

<sup>126</sup> *Cable sets its sights on business services*, Reuters (Aug. 25, 2006).

<sup>127</sup> 271 *Broadband Forbearance Order* ¶ 29.

technologies and about the incentives for increased deployment (and, in turn, increased competition)” is “well within the agency’s expertise” and entirely “reasonabl[e].”<sup>128</sup>

Nonetheless, to the extent there is any residual concern about wholesale access to the broadband facilities that some competitors may use as inputs to provide retail broadband services, AT&T (like Verizon) has explicitly *excluded* traditional DS-1 and DS-3 special access services from the scope of its forbearance petition. AT&T’s Petition also does not affect the ability of qualified competitors to continue purchasing DS-1 and DS-3 loops as UNEs. Thus, contrary to the “sky-is-falling” rhetoric of some commenters, granting AT&T’s forbearance will have no impact on their ability to obtain the traditional DS-1 and DS-3 services and facilities they use as inputs for retail broadband services.<sup>129</sup>

*Rural Internet Connectivity.* NTCA and OPATSCO raise concerns that granting AT&T’s forbearance petition could affect the ability of rural ILECs to obtain connectivity to the Internet backbone. According to NTCA, many rural ILECs rely on BOC facilities for these connections and the Commission should make certain that forbearance relief does not result in higher connection prices, which could lead to higher rates for broadband Internet access customers in rural areas. NTCA acknowledges, however, that “many rural ILECs connect to the Internet today over [TDM] circuits.”<sup>130</sup> As discussed above, TDM-based DS-1 and DS-3 special access services are specifically excluded from the scope of AT&T’s forbearance petition. Thus,

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<sup>128</sup> *Earthlink v. FCC*, Slip Op. at 13-14, 20-21.

<sup>129</sup> A few commenters take issue with the rates that AT&T and other BOCS charge for their special access services. Broadview Comments at 30-31; Sprint Comments at 6-7. As AT&T explained in its comments, however, the Commission has already concluded that the *Special Access NPRM* is the appropriate proceeding to address arguments concerning special access competition and rates. AT&T Petition at 24. *See also* Joint Opposition of AT&T Inc. and BellSouth Corporation to Petitions to Deny and Reply to Comments, WC Docket No. 06-74, at 30-34 (June 20, 2006) (addressing claims about special access pricing).

<sup>130</sup> NTCA Comments at 2.

granting forbearance will not affect the ability of rural LECs to connect to the Internet backbone.<sup>131</sup>

*Ethernet over TDM.* Even though AT&T excluded TDM-based DS-1 and DS-3 special access services and UNE loops from the scope of its forbearance request, Time Warner Telecom claims that it still cannot compete effectively because these TDM-based services and UNEs “cannot be used as inputs to provide packetized broadband services to enterprises in many instances.”<sup>132</sup> Specifically, Time Warner Telecom alleges that when it procures a TDM loop and the associated TDM electronics, it must incur additional costs to place Ethernet electronics “on top of the existing TDM electronics to enable the CLEC to offer Ethernet service.”<sup>133</sup> The added costs of this arrangement, says Time Warner Telecom, render the use of BOC TDM facilities uneconomical for the provision of Ethernet services to retail customers.

Given the grave concerns expressed by Time Warner Telecom’s regulatory counsel about the purportedly unworkable economics of Ethernet over BOC TDM facilities, it is quite remarkable that Time Warner Telecom’s business units are proudly telling customers and investors that Time Warner Telecom can “*cost-effectively* deliver our industry-leading Ethernet portfolio to customers *anywhere*,” even “where it may be uneconomical to directly connect to our 21,000-route mile fiber network.”<sup>134</sup> Time Warner Telecom also brags that increasing its “Ethernet and IP VPN capabilities” has helped it achieve “strong organic growth and expanding

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<sup>131</sup> To the extent NTCA has concerns about the development of packet-based methods for obtaining Internet backbone connectivity in rural areas in the future (e.g., Ethernet), NTCA Comments at 2-3, its members can still use DS-1 and DS-3 TDM-based circuits as the transmission building blocks for packet-based connectivity. *See infra* pp. 32-33.

<sup>132</sup> Time Warner Telecom Comments at 16.

<sup>133</sup> Time Warner Telecom Comments at 17.

<sup>134</sup> Time Warner Telecom and Overture Networks Provide Ethernet Anywhere, Time Warner Press Release (June 6, 2006).

margins.”<sup>135</sup> Based on this “strong performance,” Time Warner Telecom is “continuing to invest in the business to achieve further growth . . . .”<sup>136</sup> In fact, Time Warner Telecom has been so successful with its Ethernet strategy, that it received the 2005 Frost & Sullivan Award for Product Line Strategy Leadership “for the company’s wide range of products in the metro Ethernet market, aimed at both wholesale and large enterprise customers.”<sup>137</sup> Time Warner Telecom was honored with this prestigious award because it has “optimized” its Ethernet product line by “leveraging products with the various price, performance, and feature points required by the market.”<sup>138</sup>

In light of the glaring inconsistency between Time Warner Telecom’s regulatory rhetoric and its real-world business experience, Time Warner Telecom’s arguments about the allegedly ruinous economics of providing Ethernet services over TDM facilities cannot be taken seriously – no matter how many times Time Warner Telecom repeats them. Indeed, in the AT&T-BellSouth merger docket, Time Warner Telecom proffered the same dubious allegations about the economics of these services and AT&T responded with a detailed point-by-point refutation of each allegation.<sup>139</sup> Rather than reiterating those responses here, AT&T respectfully refers the Commission to our submission in the merger docket and urges the Commission to forcefully reject Time Warner Telecom’s arguments in their entirety.

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<sup>135</sup> Time Warner Telecom Reports Strong Second Quarter 2006 Results, Time Warner Telecom Press Release at 4 (July 31, 2006).

<sup>136</sup> Time Warner Telecom Reports Strong Second Quarter 2006 Results, Time Warner Telecom Press Release at 4 (July 31, 2006).

<sup>137</sup> Frost & Sullivan Recognizes Time Warner Telecom for Product Line Strategy Leadership in Metro Ethernet Solutions, Frost & Sullivan Press Release (Sept. 26, 2005).

<sup>138</sup> Frost & Sullivan Recognizes Time Warner Telecom for Product Line Strategy Leadership in Metro Ethernet Solutions, Frost & Sullivan Press Release (Sept. 26, 2005).

<sup>139</sup> See Letter from Gary Phillips, AT&T, and Bennett Ross, BellSouth, to Marlene Dortch, FCC, WC Docket No. 06-74 (Aug. 21, 2006).

*Earthlink Negotiations.* Earthlink expresses doubt that private carriage arrangements for broadband services will lead to just and reasonable rates, terms and conditions because AT&T has allegedly “stalled negotiations and/or refused to negotiate any broadband transmission arrangements” with Earthlink, and AT&T “simply refuses” to even discuss such arrangements with New Edge Networks.<sup>140</sup> Although Earthlink admits that AT&T “has discussed several ideas for a long-term broadband transmission arrangement,” Earthlink is disappointed that AT&T has not yet supplied it with a written proposal.<sup>141</sup>

Earthlink’s arguments, however, are nothing more than a verbatim re-hash of claims that it raised -- and AT&T fully addressed -- in the AT&T-BellSouth merger proceeding. As we explained in that proceeding, when the Commission adopted the *Wireline Broadband Order*, it provided for a one-year transition period, which runs until November 16 of this year, to give the ILECs and other affected entities “sufficient time to adjust to [the Commission’s] new [regulatory] framework.”<sup>142</sup> During that one-year transition period, the status quo is effectively frozen. Consistent with the process the Commission envisioned, AT&T has been using this transition period to review its wireline broadband product portfolio, during which time Earthlink continues to receive transmission services under existing contractual arrangements. As for New Edge Networks, AT&T was unwilling to hold talks with New Edge due to legitimate, confidential business reasons that AT&T disclosed to the Commission in the merger

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<sup>140</sup> Earthlink Comments at 18.

<sup>141</sup> Earthlink Comments at 18.

<sup>142</sup> Joint Opposition of AT&T Inc. and BellSouth Corporation to Petitions to Deny and Reply to Comments, WC Docket No. 06-74, at Appendix A, pp. A3-A4 (June 20, 2006).

docket.<sup>143</sup> These business reasons are well known to both Earthlink and New Edge, respectively, and were only recently addressed by Earthlink. Nevertheless, AT&T is involved in ongoing discussions with Earthlink, with whom we are eager to maintain a commercial relationship.

## 2. Protection of Consumers.

In its Petition, AT&T explained that the sophisticated customers who purchase packet-switched and OCn-level broadband services are rarely satisfied with “off-the-rack” services and instead typically require flexible, customized solutions to meet the particularized operational needs of their businesses at specific locations scattered across a city, a region, the nation or the entire world.<sup>144</sup> Thus, these customers would be well-served by the elimination of Title II common carrier and *Computer Inquiry* regulations because those regulations inhibit providers’ flexibility to develop tailored, private contractual agreements that meet customers’ requirements.

Some commenters allege, however, that forbearance from Title II common carrier regulation could lead to consumer harm. Sprint and Comptel, for example, question whether removing regulations concerning slamming (section 228), disability access (section 255), customer proprietary network information (section 222), and discontinuance notices (section 214) is in consumers’ best interests.<sup>145</sup> Aside from

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<sup>143</sup> Joint Opposition of AT&T Inc. and BellSouth Corporation to Petitions to Deny and Reply to Comments, WC Docket No. 06-74, Reply Declaration of Parley C. Casto ¶¶ 46-51 (filed June 20, 2006).

<sup>144</sup> AT&T Petition at 21-24.

<sup>145</sup> Sprint Comments at 17, Comptel Comments at 18-19. See also Time Warner Telecom Comments at 27-28. In a related argument, Sprint argues that, other than Verizon, the Commission has “never exempted” any carrier from its 201 and 202 obligations. Sprint Comments at 16. See also Time Warner Telecom Comments at 27. Contrary to Sprint’s claim, however, the Commission removed all Title II obligations from wireline broadband Internet access service (including sections 201 and 202) in the *Wireline Broadband Order*, and the pro-consumer results of that decision speak for themselves. See *supra* at 23-24.

merely pointing out the existence of these statutory provisions, Sprint and Comptel make little effort to explain how these provisions are actually “necessary” within the meaning of section 10(a)(2) to protect the sophisticated business purchasers of packet-switched and OCn-level broadband services.<sup>146</sup>

As the Commission has explained, a regulation is “necessary” for the protection of consumers under section 10(a)(2) only “if there is a strong connection between the requirement and the goal of consumer protection.”<sup>147</sup> Here, no such connection exists. The slamming provisions of section 258, for example, are designed to prevent unauthorized changes in a subscriber’s “telephone exchange service” or “telephone toll service.”<sup>148</sup> The packet-switched and OCn-level broadband transmission services at issue here, however, are not traditional telephone exchange services or telephone toll services and, therefore, section 258 on its face does not even apply. Moreover, neither Sprint nor Comptel has identified a single instance of a subscriber of ATM, Frame Relay, Ethernet, OCn-level optical transport or any similar service ever being “slammed” by another carrier, or, for that matter, whether such a practice is even technologically possible. Accordingly, section 258 is not even relevant, let alone necessary for the protection of consumers.

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<sup>146</sup> Sprint and Comptel also raise concerns about forbearance from section 251(a) (general duty to interconnect). Sprint Comments at 17; Comptel Comments at 17. Neither Sprint nor Comptel explains, however, why section 251(a), which addresses carrier-to-carrier interconnection, should be considered a “consumer protection” provision. In any event, even in the absence of section 251(a), AT&T will have strong incentives to interconnect with other broadband service providers because our customers will expect to be able to communicate with the subscribers of other providers and we would risk losing them to competitors if we did not meet that expectation.

<sup>147</sup> *Petition for Forbearance from E911 Accuracy Standards Imposed on Tier III Carriers for Locating Wireless Subscriber*, 18 FCC Rcd. 24648, ¶ 14 (2003).

<sup>148</sup> *See* 47 U.S.C. § 258.

Sprint and Comptel similarly fail to draw any connection between the disability access provisions of section 255 and the broadband services at issue here. Indeed, the hearing and speech impaired consumers that Congress sought to protect in section 255 (or any other end-user consumers) do not usually interface directly with the packet-based and OCn-level transmission services that are the subject of this Petition. Rather, end-user consumers typically communicate using other services or applications that ride on top of these broadband transmission services. Thus, the broadband transmission services at issue here simply do not implicate the public policy issues that Congress sought to address in section 255 and Sprint and Comptel have not even attempted to show otherwise.

Sprint and Comptel also fail to explain why the CPNI provisions in section 222 are “necessary” for the protection of the sophisticated business customers that purchase the broadband transmission services at issue here. As discussed above and in AT&T’s Petition, these purchasers often rely on RFPs and/or consultants to obtain the highest quality services at the most favorable terms. To the extent these purchasers have specific needs for the protection of their confidential or other network information, they are more than capable of ensuring that such needs are addressed by their providers, and such provisions are routinely included in contracts with these business customers. Given these marketplace realities, prescriptive regulations for the protection of customers’ proprietary information are not necessary in the competitive market for the broadband transmission services at issue here and neither Sprint nor Comptel have offered any evidence to the contrary.

These two commenters also make no effort to explain why the section 214 discontinuance provisions are “necessary” to protect the savvy business customers who purchase packet-based and OCn-level broadband transmission services. Contrary to the unsupported claims of Sprint and Comptel, fellow commenter Alpheus actually concedes that “entry and exit regulation is essentially a non-issue” because “it is not likely that BOCs will be either entering or exiting any markets in a way that would trigger this regulation at the federal level.”<sup>149</sup> In all events, as discussed above, sophisticated business purchasers are fully capable of using competitive procurement techniques to ensure that any concerns about the process for discontinuing broadband packetized and optical transmission services are appropriately addressed by their providers.

In short, Sprint and Comptel offer nothing more than perfunctory allegations without any attempt to explain how the consumer-related Title II regulations they cite are relevant to the broadband services at issue – let alone “necessary” to protect consumers within the meaning of section 10(a)(2). Accordingly, the Commission should reject their arguments out of hand.

### **3. The Public Interest.**

In its Petition, AT&T demonstrated that granting forbearance is in the “public interest” and will “promote competitive market conditions” because it will give AT&T the flexibility to respond to customer demand more quickly and with greater innovation and customization than is permitted today under Title II common carrier regulation.<sup>150</sup> As AT&T explained, the Commission has long recognized that Title II common carrier regulation “impedes [carriers] from quickly introducing new services in response to customer demands and opportunities

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<sup>149</sup> Alpheus Comments at 13.

<sup>150</sup> AT&T Petition at 24-26.

created by technological developments,” “reduces” the ability of carriers “to respond quickly to [their] competitors’ advanced services offerings and tailor [their] own offerings to meet customers’ individualized needs,” and “diminishes” carriers’ “ability to reduce prices and improve service in response to competitive pressures.”<sup>151</sup> Thus, removing these regulations from AT&T in a competitive market where a major competitor (Verizon) has already been granted such relief would most certainly “enhance competition” among providers of broadband services.<sup>152</sup>

Despite the well known competitive impediments inherent in Title II common carrier regulation, some commenters allege that forbearance would not serve the public interest here because it would hinder rather than further competitive market conditions. These arguments are little more than a re-hash of the same claims commenters raised about the alleged lack of competition in the wholesale market for broadband transmission services. Broadview, for example, claims “there are not adequate alternatives to the ILEC broadband transmission services to prevent rate increases and promote competition [and] there is no evidence that forbearance will encourage competitors to deploy additional broadband transmission facilities.”<sup>153</sup> AT&T, however, has already shown that Broadview and other commenters are aggressively deploying their own nationwide, facilities-based broadband services to compete

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<sup>151</sup> AT&T Petition at 25 (citing *Review of Regulatory Requirements of Incumbent LEC Broadband Telecommunications Services*, Memorandum Opinion and Order, 17 FCC Rcd. 27000 ¶ 26 (2002)). See also *AT&T Non-Dominance Order*, 11 FCC Rcd. 3271 ¶ 27 (1995) (Title II regulation can “inhibit[] [a carrier] from quickly introducing new services and from quickly responding to new offerings by its rivals” and “imposes compliance costs on [regulated carriers] and administrative costs on the Commission”).

<sup>152</sup> 47 U.S.C. § 160(b).

<sup>153</sup> Broadview Comments at 34.

head-to-head with AT&T and the other BOCs.<sup>154</sup> Thus, Broadview’s “public interest” arguments fail for the same reasons as its meritless arguments about the need for continued rate regulation.

Comptel challenges AT&T’s claim that less Title II common carrier regulation will further the public interest by facilitating a greater array of innovative, customized broadband service offerings.<sup>155</sup> Specifically, Comptel alleges that according to public statements from AT&T’s annual reports and news releases, AT&T appears to have all of the flexibility it needs to offer innovative services to its customers without the forbearance relief it now seeks. Comptel neglects to mention that many of the public statements to which it cites are related to *residential* broadband services, for which the Commission has already granted substantial relief, as well as to wireless and IP-based services, which the Commission has never subjected to the full panoply of Title II common carrier regulations in the first place.<sup>156</sup> Moreover, to the extent AT&T is currently able to offer some customized solutions for business subscribers today by taking advantage of the limited relief the FCC has afforded through pricing flexibility or the conditional detariffing of our advanced services affiliate, it is clearly in the public interest for the Commission to foster greater innovation and customization by granting forbearance from outmoded and unnecessary Title II common carrier regulations that “impose significant costs on carriers and their customers.”<sup>157</sup>

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<sup>154</sup> See *supra* section II.C.1.

<sup>155</sup> Comptel 21-24.

<sup>156</sup> See Comptel at 22-23 (quoting AT&T’s 2005 Annual Report, and an AT&T press release regarding “advanced communications technologies” such as satellite broadband, IP-enabled video, WiMax and DSL). See also *id.* at 24 (quoting two brief statements regarding business services).

<sup>157</sup> See *Competitive Carrier Order*, 85 FCC.2d 1, ¶ 14 (1980), *rev’d on other grounds*, *MCI v. FCC*, 765 F.2d 1186, 1195-96 (D.C. Cir. 1985).

### III. CONCLUSION

For all of the foregoing reasons, the Commission should reject the arguments of the opposing commenters and should expeditiously grant AT&T's Forbearance Petition.

Respectfully Submitted,

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