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 its Broadband Services	)	WC Docket No. 06-125
	)	
Petition of BellSouth Corporation for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and *Computer Inquiry* Rules with Respect to Its Broadband Services	)	
	)	
Petition of the Embarq Local Exchange Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements	)	WC Docket No. 06-125

REPLY COMMENTS OF
ADHOC TELECOMMUNICATIONS USERS COMMITTEE

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SUMMARY

The members of AdHoc are among the nation's largest and most sophisticated corporate buyers of telecommunications services. Committee members come from a broad range of economic sectors and maintain thousands of corporate premises in every region of the country.

AdHoc admits no carriers as members and accepts no carrier funding. AdHoc members therefore have no commercial self-interest in imposing unnecessary regulatory constraints on incumbent service providers. They are uniquely qualified to provide a credible, unbiased, and informed perspective on the state of competition in telecommunications markets and have consistently supported forbearance when a market becomes competitive.

But broadband access markets are not yet competitive. Under current competitive conditions in those markets, the Commission cannot de-regulate the BOCs' broadband access services and must deny these petitions.

Despite marketplace realities, or perhaps because of them, the carriers once again rely on breezy rhetoric instead of hard evidence to justify sweeping de-regulation. They urge the FCC to wield a meat cleaver and indiscriminately lop off Title II in its entirety and all of the *Computer II* requirements based on vague and unsupported claims about their services and the state of the telecommunications marketplace.

By relying on unsubstantiated claims of marketplace competition, in lieu of any evidentiary showing, the petitioners fail to justify the forbearance they seek. In addition, they fail to address at all, much less justify forbearance for, the many

Title II provisions that serve public policy goals unrelated to marketplace competition, such as the privacy, disability access, slamming, interconnection, telemarketing, and junk faxes.

As Ad Hoc has repeatedly demonstrated, the current market for broadband access is not competitive. As a result, the carriers rates and profits are at astronomically high levels. Yet the Commission has repeatedly predicted that competition in this market was imminent. And, since the evidence shows that these markets are not competitive, the Commission is forced to rely on its predictions as the rationale for eliminating regulatory protections for enterprise customers. Given its abysmal track record for accurately predicting the emergence of competition in broadband access markets, the Commission cannot continue its blithe reliance on similar rosy predictions and grant the instant petitions.

To the extent that the petitioners are seeking forbearance for their *interstate interexchange* services, they failed to support their request. They do not acknowledge, much less address, the Commission's previous forbearance orders for interstate interexchange services.

As for broadband *access* services, the petitioners rely primarily on last summer's merger orders and the *Broadband Wireline Internet Access Order*. But neither of those orders found these broadband access services to be competitive.

The petitioners try to blur the distinction between resellers of broadband access and facility-based providers and claim that their access customers create

the very competition that justifies de-regulating the monopoly services on which those customers depend. But as “old” AT&T pointed out, before the merger silenced it, broadband access is a classic “bottleneck” that must be regulated to control the monopoly power it confers.

The petitioners claim that they must receive the same deregulation as the “default” deregulation Verizon received in order to preserve “regulatory parity” and protect them from a competitive disadvantage That claim is a classic red herring. Verizon’s default deregulation in March of this year created no competitive disadvantage for the petitioners because their services do not compete with Verizon’s. In fact, the only competitive impact of Verizon’s default de-regulation is that it allows Verizon to exploit its market power over the in-region access services that the petitioners must buy from Verizon in order to deliver their interstate voice and data services. The cure for that competitive disadvantage is not to grant the instant petitions but to withdraw the forbearance Verizon already received, a solution the petitioners apparently do not endorse.

The petitioners open-ended and non-specific request for forbearance as to all of Title II includes a broad range of statutory provisions and regulatory requirements that have nothing to do with marketplace competition or rate regulation, such as privacy protections, access for individuals with disabilities, interconnection requirements, slamming prohibitions, and the rules governing telemarketing and junk faxes. But the petitions are silent as to a rationale for forbearance as to those requirements. Because the petitions request forbearance without proffering a showing under the statutory standard in Section

10, the Commission should summarily dismiss them on procedural grounds.

Finally, the petitioners misrepresent the services that would be affected by granting the petition. They claim that their petitions do not include "DS1 or DS3" speeds." In fact, DS1 and DS3 speeds are tariffed components of the services for which they explicitly seek forbearance.

They also maintain that that the Commission can exclude "TDM-based services" from the definition of broadband and thereby "address any concerns that granting the requested relief would undermine the availability of traditional TDM-based special access services used to serve business customers."[1] This proposal is nonsensical because business customers do not buy, nor do AT&T, BellSouth or Qwest offer in their tariffs, any class of service called "TDM service." Time division multiplexing ("TDM") is simply a technology that enables a carrier to transmit multiple signals simultaneously over a single transmission path. It is used, for example, to convert 24 voice grade analog channels into one digital T1, which any of the petitioners may choose to do for one customer to meet that customer's needs, or for multiple customers as a means of optimizing the carrier's network performance. Whether or not a carrier uses TDM for a particular traffic stream can be entirely transparent to the customer.

The suggestion that the FCC could carve out TDM from special access services is specious not only as an engineering matter but also as a matter of competitive analysis. Technology differences should not be confused with competitive differences. Whether the transmission protocol for a facility is TDM

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[1] *Verizon Feb. 7 Letter* at 2.

or IP or DWDM provides no basis for determining when a service is available on a competitive bases, and therefore may be a candidate for forbearance. It is the loop that either is or is not subject to competition – the kind of electronics associated with the loop is not the determining factor.

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REPLY COMMENTS OF THE ADHOC TELECOMMUNICATIONS USERS COMMITTEE

The AdHoc Telecommunications Users Committee (the "AdHoc Committee") submits these Reply Comments pursuant to the Commission's July 28, 2006 Public Notice[2] and Order[3] in the dockets captioned above.

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[2] Pleading Cycle Established for Comments on Embarq Local Operating Companies'

INTRODUCTION

The members of AdHoc are among the nation's largest and most sophisticated corporate buyers of telecommunications services. Committee members come from a broad range of economic sectors (manufacturing, financial services, insurance, retail, package delivery, and information technology) and maintain thousands of corporate premises in every region of the country. Their combined annual spend on communications products is between two and three billion dollars per year. As substantial, geographically-diverse end users of telecommunications service nation-wide, AdHoc members are uniquely qualified to provide a credible, unbiased, and informed perspective on the state of competition in telecommunications markets.

AdHoc admits no carriers as members and accepts no carrier funding. AdHoc members therefore have no commercial self-interest in imposing unnecessary regulatory constraints on incumbent service providers. Indeed, as high-volume purchasers of telecommunications services, AdHoc members have historically been among the first beneficiaries of the FCC's de-regulatory efforts. As a consequence, AdHoc has consistently supported forbearance for telecommunications services as soon as a service market becomes competitive.

But local exchange and interstate access markets are not yet sufficiently competitive for market forces to discipline the ILECs' prices and practices, as Ad

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Petition for Forbearance under 47 U.S.C. 160(C) from Application of Computer Inquiry and Certain Title II Common Carriage Requirements, WC Docket No. 06-147, Public Notice, DA No. 06-1545 (rel. July 28, 2006).

[3] *Qwest et al. Petitions for Forbearance*, Order, WC Docket No. 06-125, DA 06-1544 (rel. July 28, 2006).

Hoc has regularly reported to the Commission in earlier pleadings.[4] Consequently, the ILECs retain the ability to leverage their market power in the local exchange and exchange access markets at (literally) customers' expense and gain uneconomic advantages in other markets (such as long distance, equipment, or information services) that disrupt the development (and

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[4] *See, e.g.,* Comments of AdHoc Telecommunications Users Committee (Jan. 22, 2002) at 2-3, *filed in Performance Measurements and Standards for Interstate Special Access Services*, CC Docket Nos. 01-321, 00-51, 98-147, 96-98, 98-141, 96-149, 00-229, Notice of Proposed Rulemaking, 16 FCC Rcd 20896 (2001) ("*Performance Standards rulemaking*"); Comments of AdHoc Telecommunications Users Committee (Mar. 1, 2002) at 14-17, *filed in Review of Regulatory Requirements for Incumbent LEC Broadband Services; SBC Petition for Expedited Ruling That It Is Non-Dominant in its Provision of Advanced Services and for Forbearance From Dominant Carrier Regulation of These Services,* CC Docket No. 01-337, Notice of Proposed Rulemaking, 16 FCC Rcd 22745 (2001) ("*Broadband Regulation Rulemaking")*; Reply Comments of AdHoc Telecommunications Users Committee (Jul. 1, 2002) at i, *filed in Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, CC Docket Nos. 02-33, 95-20, and 98-10, Notice of Proposed Rulemaking, 17 FCC Rcd 3019 (2002) ("*Wireline Broadband Internet Access Rulemaking*"); Comments of AdHoc Telecommunications Users Committee (Dec. 2, 2002) at 5, *filed in AT&T Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM No. 10593 ("*AT&T Special Access Rulemaking Petition*"); Comments of AdHoc Telecommunications Users Committee (Jun. 30, 2003) at 6, *filed in Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, WC Docket No. 02-112, and *2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules*, CC Docket No. 00-175, Further Notice of Proposed Rulemaking, 18 FCC Rcd 10914 (2003) ("*ILEC Separate Affiliate Dominant/Non-Dominant Rulemaking* "); Reply Comments of AdHoc Telecommunications Users Committee (September 23, 2004) at 3-14, *filed in 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 (rel. Dec. 2, 2005) ("*Qwest Omaha Forbearance Petition* "); Reply Comments of Ad Hoc Telecommunications Users Committee (May 10, 2005), *filed in SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control,* WC Docket No. 05-65, Memorandum Order and Opinion, 20 FCC Rcd 18290 (2005) *("SBC/AT&T Merger Order");* Reply Comments of AdHoc Telecommunications Users Committee (May 24, 2005) at 8-23, *filed in Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75, Memorandum Order and Opinion, 20 FCC Rcd 18433 (2005) ("*Verizon/MCI Merger Order*"); Comments and Reply Comments of AdHoc Telecommunications Users Committee (June 13, 2005 and July 29, 2005), *filed in Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994 (2005) ("*Special Access Rulemaking*"); Comments of AdHoc Telecommunications Users Committee (February 22, 2006), *filed in Petition of Qwest Communications International Inc. for Forbearance from Enforcement of the Commission's Dominant Carrier Rules as They Apply After Section 272 Sunset Pursuant To 47 U.S.C. § 160*, WC Docket No. 05-333 ("*Qwest § 272 Forbearance Petition*"), Letter from Colleen Boothby, Counsel for Ad Hoc Telecommunications Users Committee, to Marlene Dortch, Secretary, FCC, WC Docket No. 04-440 (filed Mar. 16, 2006).

continuation) of competition in all of those markets. The FCC cannot therefore abandon the rules and policies which ensure that both enterprise customers and mass market consumers are protected from the supracompetitive prices, impediments to innovative applications and equipment, sluggish provisioning, and other practices associated with the ILECs' lop-sided market power in local exchange and access markets. Under current competitive conditions in those markets, the regulatory forbearance sought by the petitioners is simply premature.

Despite these marketplace realities, or perhaps because of them, the carriers once again rely on breezy rhetoric instead of rigorous analysis and factual evidence to justify the sweeping deregulation they seek. The petitions do not distinguish between different product and geographic markets, do not proffer factual evidence to support a finding that the forbearance they seek meets the statutory standard, do not identify the particular services for which they seek forbearance, and do not even specify the particular statutory sections and regulations from which they seek relief.[5] In short, the petitioners urge the FCC to wield a meat cleaver and indiscriminately lop off Title II in its entirety and all of the *Computer II* requirements based on vague and unsupported claims about their services and the state of the telecommunications marketplace.

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[5] Embarq is an exception but even its petition is unclear. Embarq requests forbearance from "Title II common carriage requirements" but also claims to seeks relief from "Title II requirements regarding tariffs, prices, cost support, price caps and price flex" but not "Title II obligations related to CALEA…or USF." 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, WC Docket No. 06-147 (filed June 13, 2006) ("*Embarq Petition*") at 2, 10. Embarq does not specify the particular statutory provisions and regulations it has in mind nor does it address the many Title II common carriage requirements that have nothing to do with the general topics it identifies.

By relying exclusively on conclusory and unsubstantiated assertions of marketplace competition, in lieu of any evidentiary showing, the petitioners fail to justify their request that the Commission eliminate regulatory requirements that protect consumers in the absence of competition. In addition, the petitioners simply fail to address, much less justify forbearance for, the myriad provisions of Title II that serve public policy goals unrelated to the presence or absence of the marketplace competition upon which they rely.

Marketplace competition is especially critical to the Commission's regulation of the broadband access services at issue in these petitions since that regulation is not, contrary to Qwest's and Verizon's characterization, accidental – some unintended consequence of "regulatory creep"[6] – nor is it (or was it) unnecessary. The regulatory *status quo* is both deliberate, as a matter of historical fact, and necessary, given the lack of competition in the access marketplace and the petitioners' 20-year track record for exploiting their market power over these very services to establish excessive and discriminatory rates.

As a matter of historical fact, the Commission established the special access category in 1984 for broadband access services in the original interstate access charge regime "to eliminate the unreasonable discrimination inherent in the then prevailing system…[,]replace it with a single, uniform and nondiscriminatory rate structure" and "grant customers flexibility to assemble the kind and amount of service they wanted without being forced to pay for

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[6] Qwest Petition for Forbearance Under 47 U.S.C.§ 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services, WC Dkt. No. 06-125 (filed June 13, 2006) ("*Qwest Petition*") at 13.

unneeded services or facilities."[7]

The BOCs' attempts to overcharge for special access began almost immediately, with the filing of their first access tariffs in 1984, prompting a tariff investigation that resulted in a multi-million dollar refund to customers.[8] This pattern was repeated when the BOCs first began offering DS3 service and sought to avoid cost-supported, generally available rates by filing "individual case basis" ("ICB") rates. After investigation, the Commission rejected the BOCs' ICB rates as unlawful and ordered them to file lawful, generally available DS3 rates.[9]

As corporate data networks have continued to grow in size and economic importance, and with the rise of the Internet, broadband access services have become even more important to enterprise customers, BOC competitors, and interexchange carriers, generating nearly half of the BOCs' access revenues. Yet, as Ad Hoc has repeatedly demonstrated,[10] the current market for broadband access is not competitive, producing excessive rates and desultory service. More importantly, the multi-year surge in demand for broadband access services and five years of supra-competitive profit levels for the BOCs have failed to attract significant competitive entry for the services used most by enterprise customers. Yet the Commission has repeatedly predicted that competition in this

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[7] *Investigation of Special Access Tariffs of Local Exchange Carriers*, CC Docket No. 85-166, Phase I, FCC 86-52, rel. Jan. 24, 1986 at para. 5.

[8] *See Investigation of Special Access Tariffs of Local Exchange Carriers*, CC Docket No. 85-166, Phase I, Memorandum Opinion and Order, 3 FCC Rcd 2638 (1988).

[9] *See generally Local Exchange Carriers' Individual Case Basis DS3 Service Offerings*, CC Docket No. 88-136, 4 FCC Rcd 8634 (1989), *on recon.*, 5 FCC Rcd 4842 (1990).

[10] *See* note 3, *supra.*

market was imminent and relied on those predictions to eliminate significant regulatory protections for broadband access customers. Given its abysmal track record for accurately predicting the emergence of competition in broadband access markets, the Commission cannot continue its blithe reliance on similar rosy predictions and grant the instant petitions.

I. PETITIONERS FAIL TO PROVIDE EVIDENTIARY SUPPORT FOR THE FORBEARANCE THEY SEEK

Consistent with their general lack of specificity or analytical rigor, the petitions do not make clear which services would be forborne if the petitions were granted. They do not specify whether they are requesting forbearance for the petitioners' broadband *interstate access* services alone or their broadband *interstate interexchange* services as well. The petitioners claim, however, to be seeking the same scope of forbearance that Verizon received by default in March of this year.[11] In an *ex parte* clarifying the scope of relief it sought in its petition, Verizon stated that it was including the services provided to enterprise and government customers pre-merger by the former MCI and, post-merger, by "Verizon Business operating units," which includes interstate interexchange services.[12] Moreover, all of the petitions seek forbearance for ATM and frame relay services, which are offered by the carriers as both interstate interexchange and interstate access services. Indeed, Qwest describes the frame relay service

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

[12] Letter from Edward Shakin, Verizon, to Marlene Dortch, Secretary, FCC, WC 04-440 (filed February 7, 2006) ("*Verizon Feb. 7 Letter*") at fn. 2.

("FRS") for which it seeks forbearance as including "interLATA interstate FRS."[13]

If the petitioners are seeking forbearance for their interstate interexchange services, then they have failed to support their request. The Commission has previously conducted forbearance analyses of the interstate interexchange market [14] and on that basis has forborne from enforcing a number of statutory and regulatory requirements with respect to those services. As Time Warner Telecom points out in its Opposition to the petitions, however, the Commission has never concluded that competitive conditions in interstate interexchange markets warrant forbearance from Title II in its entirety.[15] The petitioners do not acknowledge[16] and address the Commission's prior findings regarding that market, much less support (or even offer) any justification for revising the forbearance parameters already in place and the findings on which they are based. Accordingly, the Commission must deny the petitions with respect to any interstate interexchange services for which the petitioners seek additional forbearance beyond that already granted by the Commission.

Moreover, the Commission's prior forbearance for interstate interexchange services only applies to the structurally separate affiliates of the petitioners which

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[13] *Qwest Petition* at Attachment A.

[14] *See generally Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934,* CC Docket No. 96-61, Second Order on Reconsideration and Erratum, 14 FCC Rcd 6004 (1999). *See also* Opposition of Time Warner Telecom, *et al.*, filed August 17, 2006 ("*Time Warner Opposition*") at 26-28.

[15] *Time Warner Opposition, id.*

[16] Embarq appears to recognize the scope of Verizon's petition, as supplemented by the *Verizon Feb. 7 Letter,* and the Commission's prior forbearance decision regarding interexchange carriers, *Embarq Petition* at 12, but proffers only a single scant paragraph of text to support including its interexchange services in the scope of the much broader de-regulation it seeks in its petition.

have been classified as non-dominant carriers. The Commission has already initiated a rulemaking – and the carriers have forbearance petitions pending – regarding the appropriate regulatory treatment of the carriers' interstate interexchange services should the carriers eliminate their separate affiliates.[17] For all of the reasons AdHoc identified in its opposition to those petitions,[18] the Commission should resolve in the pending rulemaking any questions regarding that issue.

As to the broadband access services that fall within the scope of the petitions, the petitioners rely primarily on this Commission's findings in last summer's merger orders[19] and in the *Broadband Wireline Internet Access Order* ("*BWIA Order*").[20] But that reliance is also misplaced.

The merger orders were engaged in an entirely different analysis from that required to support the instant petitions, namely, whether the mergers would have an adverse impact on competition. The orders did not make a determination as to whether the broadband access market is *per se* competitive. The merger orders' determination that the mergers made a non-competitive market no worse is, of course, entirely different from an affirmative determination

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[17] *See ILEC Separate Affiliate Dominant/Non-Dominant Rulemaking,* note 3, *supra. See, e.g., Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(C) With Regard to Certain Dominant Carrier Regulations for In-Region, Interexchange Services,* WC Docket No. 06-120 (filed Jun. 2, 2006).

[18] Reply Comments of AdHoc (Feb. 22, 2006), *filed in Petition of Qwest Communications International Inc. for Forbearance from Enforcement of the Commission's Dominant Carrier Rules as They Apply After Section 272 Sunset Pursuant to 47 U.S.C. § 160*, WC Docket No. 05-333.

[19] *SBC/AT&T Merger Order* and *Verizon/MCI Merger Order, supra,* note 3.

[20] *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, CC Docket Nos. 02-33, 95-20, and 98-10, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) ("*BWIA Order*")

that the market was competitive to begin with, which the petitioners now claim.

The merger orders also analyzed different markets, services, and providers from those at issue in this case. The petitioners' selective citation of support from the merger orders relies on determinations regarding the "retail enterprise customer market," which is not the same as the broadband access market at issue in the petitions. The merger order defined the "retail enterprise customer market" to include local voice, interLATA voice, and data, including "high-cap data," sold to end users[21] not the broadband access services sold to end users and carriers that are the subject of the instant petitions. The relevant geographic market in the merger orders was nation-wide for large enterprise customers,[22] not the exchange areas in which the petitioners provide broadband access services. Not surprisingly, the Commission found in the merger orders that a market defined to include interexchange carriers, CLECs, cable companies, ILECs, systems integrators and equipment vendors would not experience competitive harm as a result of the mergers, a finding of no relevance to a market that consists of broadband access service providers, which is the relevant market for the instant petitions.

The merger orders also considered "wholesale special access," the service that includes the broadband access services at issue in the petitions. But, as discussed by the commenters, the petitioners' failure to rely on that section of the merger orders is understandable since it challenges their

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21 *See, e.g., SBC/AT&T Merger Order* at paras. 57-58.

22 *Id.* at para. 63.

characterization of the broadband access market as competitive. As to the wholesale special access market, the Commission concluded that

- The elimination of the merged IXC as a provider of Type I special access "is likely to result in anticompetitive effects" that may lead to "increases in … MSA-wide special access prices.[23]

- The elimination of the merged IXC as a provider of Type II special access won't result in price increases because the merged IXC provided "such a relatively small amount" of service to begin with.[24]

- The pre-merger ILEC's incentives or abilities to raise special access prices or discriminate in provisioning "are better addressed in pending general rulemaking proceedings."[25]

The petitioners' reliance on the *BWIA Order* is similarly misplaced. The focus of that order was residential Internet access provided over the DSL facilities of the incumbent local exchange carriers ("ILECs"). As part of its justification for de-regulating those services, the Commission relied on competition from cable modem service. But cable modem service serves residential neighborhoods; there is little or no cable competition for business customers in business districts, as Ad Hoc has pointed out repeatedly.[26] For those customers, the ILECs' broadband access facilities are almost always the only option. That is why the *BWIA Order* itself made a point of distinguishing between the services de-regulated pursuant to the competitive analysis in the *Order* and

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23 *See, e.g., id.* at para. 32.

24 *See, e.g., Verizon/MCI Merger Order* at para. 33.

25 *See, e.g., id.* at para. 35.

26 *See generally* pleadings cited in note 3, *supra.*

> other wireline broadband services, such as stand-alone ATM service, frame relay, gigabit Ethernet service, and other high-capacity special access services, that carriers and end users have traditionally used for basic transmission purposes. That is, these services lack the key characteristics of wireline broadband Internet access service – they do not inextricably intertwine transmission with information-processing capabilities. Because carriers and end users typically use these services for basic transmission purposes, these services are telecommunications services under the statutory definitions. These broadband telecommunications services remain subject to current Title II requirements.

BWIA Order, note 20, *supra*, at para. 9. The *Order* simply does not provide a relevant precedent for the forbearance requested in the instant petitions.

Finally, the petitioners' attempt to rely on the size and sophistication of enterprise customers as a substitute for competitive alternatives[27] is disingenuous. As vendors who are intimately familiar with the prices, terms, and conditions applicable to the full range of customers taking their services, the petitioners know only too well that some of their largest customers may pay some of their highest prices and some of their smallest customers may pay some of their lowest prices. Competitive terms and prices are not a function of customer size and sophistication. Large, sophisticated customers need competitive alternatives in order to have the kind of negotiating leverage and stimulate the kind of competitive bidding cited in the petitions and the merger orders. The universal experience of AdHoc members confirms that enterprise customers are no better off than CLECs when it comes to the negotiating dynamics described in

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[27] *See, e.g., Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to its Broadband Services*, WC Docket No. 06-125 (filed July 13, 2006) ("*AT&T Petition*") at 15; *Petition of BellSouth Corporation for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, WC Docket No. 06-125 (filed July 20, 2006) ("*BellSouth Petition*") at 4.

Time Warner's Opposition[28]: without competitive alternatives, size doesn't matter. Size doesn't push prices down; competition pushes prices down.

II. RETAIL COMPETITION FROM RESOLD BROADBAND ACCESS CAN NOT JUSTIFY DEREGULATION OF BROADBAND ACCESS

As noted above, "broadband" services include services in multiple distinct markets, each with decidedly different competitive characteristics.

- IntraLATA "access" type services v. interLATA transport services.
- Residential consumer asymmetric DSL (ADSL) Internet access v. symmetric DS-n and OC-n facilities provided to enterprise customers.
- In-region "last mile" and associated interoffice transport where AT&T/SBC has broadband distribution facilities in place v. out-of-region geographic markets in which AT&T and rival (non-ILEC) carriers must resell facilities-based services obtained from the ILEC or other facilities-based service provider.
- Relatively low-bandwidth *(i.e.*, DS-1, DS-3) services furnished to individual enterprise customer locations v. high-bandwidth pipes (*e.g.,* OC-12 through OC-192) furnished to interexchange carriers and certain telecommunications-intensive businesses.
- Retail services furnished to end users v. wholesale services furnished to other carriers for resale as part of end-user services they provide to their retail customers.

To be sure, *some* of these markets are relatively competitive (although perhaps less so than they had been several years ago, prior to last year's mergers and the withdrawal of several firms from the market). However, by obscuring these critical distinctions, the petitioners create the impression of pervasive competition across the entirety of broadband services when, in reality, the ILECs dominate, if not monopolize, key markets within their legacy operating

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[28] *Time Warner Opposition* at 20-23.

regions.

By way of illustration, the Commission has observed that before the "new" AT&T absorbed the "old" AT&T's local fiber optic rings and distribution facilities within the current 13-state SBC region, the "old" AT&T owned last-mile facilities to only 1,691 (or 0.7%) of the 240,000 commercial buildings with demand for line equivalents of at least 10- DS-0's.[29] While the SBC/AT&T Merger does not reveal the total number of buildings within these 19 MSAs to which other CLECs connect with their "own" last mile facilities, there is no evidence that the number of buildings served by other CLECs combined is anywhere near as high as the number served by the single largest competitor – the "old" AT&T. Put differently, the "new" AT&T now has an absolute monopoly at about 99% of the buildings, a monopoly disciplined solely by the threat of *potential* entry by one or more competitors at those locations. And despite at least seven years of excessive profits at historically unprecedented levels, thanks to the Commission's special access regulatory flexibility rules, no *potential* entry has actually materialized to constrain AT&T's pricing.

The "old" AT&T of course, recognized exactly how unlikely such entry was – describing special access as "a classic 'bottleneck' input" in a mandamus petition filed with the D.C. Circuit less than three years ago, as the following passage from that petition demonstrates:[30]

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[29] *SBC/AT&T Merger Order* at paras. 36-37.

[30] *AT&T Corp., AT&T Wireless, The Comptel/Ascent Alliance, eCommerce and Telecommunications Users Group, and the Information Technology Association of America*, Petition for Writ of Mandamus, U.S. Court of Appeals for the District of Columbia Circuit, Docket No. 03-1397 (Nov. 5, 2003) at pp 6-7 (footnotes omitted).

> All of the transmission facilities used to provide special access services have strong natural monopoly characteristics, and that is most starkly the case with the local loops used to provide channel terminations to end user customers, which is the "most costly and difficult" part of the incumbents' network for new entrants to replicate. As the FCC has recently found, loop and transport facilities exhibit economies of scale that give incumbents dramatically lower unit costs over virtually all levels of demand (because, for example, trenching and other "structure" costs are not capacity sensitive), and virtually all the necessary investment must be "sunk" with little or no salvage value. Further, even on routes where deploying alternative facilities could be economically rational, competitive carriers often cannot secure the necessary rights-of-way and building access (or face exorbitant demands from municipalities and building owners to obtain that access that only heighten the incumbent's cost advantage). The FCC has found that deployment of alternative facilities is thus generally limited to entrance facilities, to transport facilities on very high density routes, and to very high capacity "OC-n" loops that are the equivalent of thousands of individual telephone lines.
>
> Special access is thus a classic "bottleneck" input. No matter how extensive or sophisticated a carrier's network, it cannot deliver its services without the "last mile" connection to the customer's building. And no matter how large the business or government agency, it cannot obtain communications services unless it or its communications services supplier first obtains special access. In the absence of rate regulation or price-constraining competition between multiple facilities-based special access providers, control of special access facilities conveys monopoly power.

The lack of competitive alternatives in wholesale broadband access markets requires continuing regulation of those services to protect competitor and enterprise customer access to necessary inputs that are only available from BOCs.

The distinction between noncompetitive wholesale special access and retail end user services that rely upon wholesale special access has been submerged by the petitioners into a "soup" that requires careful analysis by the Commission before it is eaten. In particular, the Commission must recognize that

the presence of resale-based competition – *i.e.,* competition that utilizes broadband access and other wholesale services obtained on a noncompetitive basis from the BOCs – in retail markets does not provide a basis for deregulating the wholesale service inputs upon which that competition depends.

By citing competitor and enterprise customer behavior in the interstate, interLATA market, the petitioners are ignoring what the Commission recognized in its merger orders: competition in that market is provided by companies who depend upon noncompetitive services, such as broadband access, that they can obtain only from the BOCs. The petitioners are arguing that competition in one market (interstate interLATA) justifies deregulation of a different market (broadband special access) which is not competitive and which is the source of inputs that competitors in the first market must have to provide competitive services. But there can be no rationale for such a leap. Deregulating a noncompetitive service is never a good idea. Deregulating a noncompetitive service that is an essential input for competitors in an adjacent competitive market is an even worse idea, because it can lead to the elimination of competition in that adjacent market.

III. THE PETITIONER'S "REGULATORY PARITY" CLAIMS ARE A RED HERRING

Two of the petitioners argue that the Commission has no choice but to grant their petitions in order to ensure "regulatory parity" with Verizon and remove "an arbitrary and unwarranted competitive advantage" that Verizon would

otherwise enjoy.[31] These arguments once again gloss over the different service markets affected by Verizon's default forbearance. Considered individually, the differences between those markets exposes the flaws in the petitioners' arguments.

Deregulation of Verizon's interstate interLATA services does not change the competitive status quo because the Commission had already exercised its forbearance authority with respect to *both* Verizon's interstate interLATA services and those of the petitioners. As described above, the Commission had classified those as non-dominant before Verizon even filed its petition.

Nor does default deregulation of Verizon's broadband access services give Verizon a competitive advantage over petitioners. Default deregulation of Verizon's in-region broadband access services has no competitive impact on the petitioners' in-region broadband access services because those services are in different geographic markets and do not compete. The default deregulation of Verizon's out-of-region access services, to the extremely limited extent that the former MCI and Verizon offered such services, had no competitive impact because those services were already de-regulated when FCC forbore from regulating CLECs. Default deregulation of Verizon's access services has no competitive impact on the petitioners' interstate interexchange services because those services do not compete with each other.

In fact, the only competitive impact of Verizon's default deregulation is that it allows Verizon to exploit its market power over the in-region access services

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[31] *AT&T Petition* at 3. *See also Qwest Petition* at 7-10.

petitioners must buy from Verizon in order to deliver their interstate interexchange services. The cure for that competitive disadvantage is not to grant the instant petitions but to withdraw the forbearance Verizon already received, a solution the petitioners apparently do not endorse.

IV. THE PETITIONS SHOULD BE DISMISSED FOR MAKING NO PRIMA FACIE SHOWING AS TO MOST OF THE STATUTORY PROVISIONS FOR WHICH PETITIONERS SEEK FORBEARANCE

The petitioners seek forbearance from enforcement of Title II in its entirety. The only rationale they offer is a series of (unsubstantiated) claims regarding the state of competition for broadband services. But their open-ended and non-specific request for forbearance as to all of Title II encompasses a broad range of statutory provisions and regulatory requirements that have nothing to do with marketplace competition or rate regulation. As Commissioner Copps pointed out in his separate statement on Verizon's default deregulation,[32] Title II includes many non-economic requirements such as privacy protections, access for individuals with disabilities, interconnection requirements, and enforcement jurisdiction, to which can be added slamming prohibitions and the rules governing telemarketing and junk faxes.

Yet the petitions are silent as to a rationale for forbearing from enforcement of these requirements. Because the petitions request forbearance without proffering a justification for the forbearance or any showing under the statutory standard in Section 10, the petitioners have failed to make a prima face case to support their request. The Commission should therefore summarily

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[32] Statement Of Commissioner Michael J. Copps In Response To Commission Inaction On Verizon's Forbearance Petition, rel. Mar. 20, 2006.

dismiss the petitions on procedural grounds.

V. THE PETITIONERS MISREPRESENT THE SERVICES FOR WHICH THEY SEEK FORBEARANCE

The petitions purport to exclude two services from their forbearance requests – DS1/DS3 services and TDM-based special access – in order to protect the interests of enterprise customers. Contrary to their representations, these services would not be protected if their petitions are granted.

A. Contrary to Petitioners' Claims, the Petitions Include DS1/DS3 Services Within the Scope of Forbearance

BellSouth[33] and Embarq[34] claim that their forbearance requests do not include point to point services at "DS1 or DS3" speeds," *i.e.,* the special access services that the Commission recognizes as the least competitive. AT&T[35] and Qwest[36] are somewhat less clear as to the scope of their requests – while both claim to seek competitive parity with Verizon following the default grant of Verizon's *Petition* (which would mean exclusion of DS1 and DS3 services), neither explicitly excludes DS1 or DS3 special access services in their filings.

In fact, for the services of every petitioner, special access local channels at DS1 and DS3 speeds are tariffed components of the services for which they explicitly seek forbearance.

The list of services found as attachments to the carriers' petitions purport

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33 *BellSouth Petition* at 6-7.

34 *Embarq Petition* at 2.

35 *AT&T Petition* at 8.

36 *Qwest Petition* at 7.

to identify the services for which they each seek forbearance. The lists include frame relay service, ATM, Ethernet services, IP-VPN services and LAN Services among others. As was true for Verizon, those services include DS1/DS3 services. Attached for illustrative purposes are pages from Qwest's interstate access tariff for Frame Relay and ATM services. As Attachment A demonstrates, the "User to Network Interface" and "Network to Network Interface" both contain a "frame relay" or "ATM" access link – and this access link is nothing other than plain vanilla special access. Qwest's "User to Network Interface" includes the DS1 or DS3 loop (or a loop at other speeds) between the customer's premises and Qwest's wire center or service hubs. Petition's filings mislead relative to their intention to exclude all DS1 and DS3 special access services.

B. "TDM Services" is a Meaningless Category

Verizon (in the *Verizon Feb. 7 Letter*), AT&T, BellSouth and Qwest (in the instant petitions) maintain that that the Commission can exclude "TDM-based services" from the definition of broadband and thereby "address any concerns that granting the requested relief would undermine the availability of traditional TDM-based special access services used to serve business customers."[37] This proposal is nonsensical because the distinction is meaningless to business customers. Business customers do not buy, nor do AT&T, BellSouth or Qwest offer in their tariffs, any class of service called "TDM service." Some services that business users purchase utilize TDM-based channelization. Other services may utilize non-channelized circuits or circuits established with some other form

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[37] *Verizon Feb. 7 Letter* at 2.

of multiplexing.

Time division multiplexing ("TDM") is simply a technology that enables a carrier to transmit multiple signals simultaneously over a single transmission path. It is used, for example, to convert 24 voice grade analog channels into one digital T1, which any of the petitioners may choose to do for one customer to meet that customer's needs, or for multiple customers as a means of optimizing the carrier's network performance. Whether or not a carrier uses TDM for a particular traffic stream can be entirely transparent to the customer.

Petitioners imply that "traditional TDM-based special access" is different from packet services like frame relay or IP-VPNs. But customers can (and do) buy a single T1 connection under the petitioners' special access tariffs to transmit both traditional voice services, which may use TDM, and Internet access traffic, formatted as IP. In fact, the frame relay and ATM "access links" in Qwest's tariff and included as Attachment A, might well be provisioned using TDM technology – even though the data they would be transmitting might be in a packetized format. Surely Petitioners are not proposing that the same circuit should be both regulated and unregulated simultaneously.

As Time Warner points out in its Opposition,[38] TDM-based circuits (both special access and UNEs) are always not an adequate substitute for non-TDM services because it is the underlying facility – not the electronics on the circuit – that competitors need in many cases in order to provide services to end-users. Time Warner's concern with the continued availability of non-TDM circuits

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[38] *Time Warner Opposition* at 16-20.

to competing providers underscores just how ludicrous the Petitioner's proposal is. If their petitions are granted, a dedicated loop (channel termination) between an end user premises and a LEC serving wire would continue to be subject to the *Computer II* rules and Title II of the Act (and also subject to the requirement that other carriers be able to interconnect with the loop) if time division multiplexing equipment is connected to it. But the very same physical loop would not be subject to those protections if the circuit is unchannellized, or if it is provisioned utilizing packet-based multiplexing electronics. If the FCC forbears from regulation of all loops that do not have associated TDM electronics, it will in essence be allowing the Petitioners to preclude other carriers from connecting to loops unless they are more expensive TDM-based service – even if the TDM-electronics are either not necessary to, or interfere with, the service the competitor is attempting to provide to its customer.

The suggestion that the FCC could carve out TDM from special access services is specious not only as an engineering matter but also as a matter of competitive analysis. Technology differences should not be confused with competitive differences. Whether the transmission protocol for a facility is TDM or IP or DWDM provides no basis for determining when a service is available on a competitive bases, and therefore may be a candidate for forbearance. It is the loop that either is or is not subject to competition – the kind of electronics associated with the loop is not the determining factor.

CONCLUSION

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

Respectfully submitted,

ADHOC TELECOMMUNICATIONS
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Certificate of Service

I, Dorothy Nederman, hereby certify that true and correct copies of the preceding Reply Comments of AdHoc Telecommunications Users Committee were filed this 31st day of August, 2005 via the FCC's ECFS system and by email to:

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