

Dee May  
Vice President  
Federal Regulatory



1300 I Street, NW, Suite 400 West  
Washington, DC 20005

Phone 202 515-2529  
Fax 202 336-7922  
dolores.a.may@verizon.com

October 11, 2007

**Ex Parte**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

**Re: Special Access Rates for Price Cap Local Exchange Carriers, WCB Docket No. 05-25 & RM-10593; Petitions of AT&T Inc., BellSouth Corporation, the Embarq Local Operating Companies, and Qwest Under 47 U.S.C. § 160(c) for Forbearance from Title II and Computer Inquiry Rules with Respect to Broadband Services, WC Docket Nos. 06-125 & 06-147; 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**

Dear Ms. Dortch:

Verizon is filing to respond to various *ex partes* recently filed in these dockets that recycle old arguments and provide no basis for the Commission to deny any portion of the requested relief in the pending forbearance petitions. Furthermore, as the Commission has found previously and as Verizon and others have explained repeatedly in these dockets, the robust competition for the advanced services at issue in these proceedings, as well as the sophisticated nature of the customers who buy them, require the Commission to grant the full requested relief to the petitioners as well as to all other competitors. As Verizon's experience over the last 18 months has shown, the market works, and all competitors should be given flexibility to offer customized services to meet their customers' needs and to compete more effectively.

Each of the arguments asserted by the CLECs has already been fully addressed (generally, multiple times) in the various dockets listed above, and Verizon attaches its previous filings for inclusion in each of the dockets listed above to assist the Commission as it considers the recurring issues in these dockets.

### National Market Analysis

First, some commenters continue to urge the Commission to deviate from its consistent practice of addressing broadband issues from a national perspective.<sup>1</sup> Although these parties may prefer a different approach, the Commission has repeatedly employed a national market analysis for broadband.<sup>2</sup> And the Supreme Court and D.C. Circuit have repeatedly upheld those determinations.<sup>3</sup> Consistent with that precedent, AT&T, Qwest and the other petitioners in these dockets have supported their requests for relief by submitting evidence showing the extensive competition nationwide to provide broadband transmission services to enterprise customers. Indeed, even competitors that oppose the relief requested in these petitions tout industry analysts' assessment of broadband competition nationwide as "provid[ing] in-depth, accurate, defensible statistics and analysis," such as a recent such report showing that Time Warner Telecom has the third largest "U.S. Port Share" of "Retail Business Ethernet Services" and that companies other than AT&T, Qwest, and Verizon currently have won 56 percent of that enterprise business nationally.<sup>4</sup> In the attached documents, Verizon explains in detail why a national market analysis is appropriate for enterprise broadband services. *See, e.g.*, Attachments A at 3-4, C, E, and I at 9-19.<sup>5</sup> The Commission should reject the calls for local market-by-local market analysis for these highly competitive services.

### Enterprise Broadband Services vs. Traditional TDM-Based Special Access

Next, parties continue to argue that the high-end, sophisticated services at issue in the pending broadband forbearance petitions – packetized and non-TDM –based optical services – should be lumped in with traditional special access services, such as DS1s and DS3s, and addressed in the pending special access proceeding.<sup>6</sup> Here too, however, these parties disregard

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<sup>1</sup> *See, e.g.*, Letter from Gil Strobel on behalf of Sprint Nextel to Marlene Dortch, WC Docket Nos. 05-25, 06-125, and 06-147 (filed Oct. 5, 2007); Letter from Patrick Donovan to Marlene Dortch, WC Docket Nos. 06-125, 05-25 (filed Oct. 5, 2007 ("Cavalier Letter").

<sup>2</sup> Letter from Dee May, Vice President, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 06-125 & 06-147 (Sept. 5, 2007) ("Verizon Sept. 5 Ex Parte") (citing Commission orders).

<sup>3</sup> *See Brand X*, 545 U.S. at 1002; *United States Telecom. Ass'n v. FCC*, 359 F.3d 554, 578-85 (D.C. Cir. 2004); *EarthLink*, 462 F.3d at 8-9.

<sup>4</sup> Time Warner Telecom Grows Ethernet Market Share, [http://www.twtelecom.com/Documents/Announcements/News/2007/VSG\\_TWTC\\_Mid\\_year07Ethernet.pdf](http://www.twtelecom.com/Documents/Announcements/News/2007/VSG_TWTC_Mid_year07Ethernet.pdf); *see also* Carol Wilson, "Carrier Ethernet Cable Style," *Telephony's Guide to carrierethernet* at 14-18 (Sept. 2007) (providing "U.S. port share" statistics and noting that, among cable companies, "Cox is the undisputed leader in Ethernet port sales, but it is far from alone in its success").

<sup>5</sup> *See* Attachment A, Verizon Comments, Qwest Petition for Forbearance, WC Docket No. 06-125 (filed Sept. 20, 2007); Attachment C, Verizon Ex Parte, Petitions of AT&T, BellSouth Corporation and Qwest for Forbearance from Title II and Computer Inquiry Rules, WC Docket Nos. 06-125, 06-147 (filed Sept. 5, 2007); Attachment E, Verizon Ex Parte, Petitions of AT&T Bellsouth Corporation, Embarq and Qwest for Forbearance from Title II and Computer Inquiry Rules, WC docket Nos. 06-12, 06-147 Ifled Sept. 5, 2007); Attachment I Verizon Reply Comments, Petitions of AT&T, BllSouth Corporation and Embarg Local Operating Companies and Qwest for Forbearance from Title II and Computer inquiry Rules with Respect to Broadband Sevices (field Aug. 31, 2007)

<sup>6</sup> *See, e.g.*, Letter from Thomas Jones on behalf of Time Warner Telecom to Marlene Dortch, WC Docket Nos. 05-25, 06-125 (Oct. 9, 2007) ("Time Warner Letter"); Letter from Aryeh Friedman on behalf of BT Americas, Inc. to Marlene Dortch, WC Docket Nos. 05-25, 06-125, and 06-147 (filed Oct. 5, 2007) ("Oct. 5 BT Letter").

the Commission's own previous recognition that these packetized and optical services are distinct from traditional special access and warrant a lighter regulatory touch. *See* Attachments A at 3, C, and E. This dividing line that the Commission has drawn in the past is consistent with Congress's own policy preference for promoting the deployment and development of advanced broadband facilities and services.<sup>7</sup> Moreover, the Commission has already found that other providers can and do offer their own packetized and optical services by self-provisioning these services over their own facilities or third-party facilities.<sup>8</sup> The Commission has also found that other providers can offer such services combining incumbents' TDM-based special access with their own packet switches.<sup>9</sup> The Commission applied this distinction most recently in granting forbearance to ACS of Anchorage, Inc., noting that the relief granted "excludes TDM-based, DS-1 and DS-3 special access services," and should follow this consistent approach as it considers the pending petitions.<sup>10</sup>

Time Warner Telecom seeks to muddy the waters on this distinction by pointing out that the enterprise broadband services are included in special access tariffs when sold on a common carriage basis, thus suggesting that they must be special access services.<sup>11</sup> This fact proves nothing, however. Time Warner Telecom ignores that services sold out of tariff are placed in one of only two buckets – either "switched access" or "special access." Just like DSL Internet access services before being granted regulatory relief, enterprise broadband services were placed into the not-switched-access category and therefore were located in the special access tariffs. That fact does not detract from the significant differences that the Commission has recognized between these advanced services and traditional special access.

### Evidence of Competition

Notwithstanding all indications to the contrary, some commenters also continue to maintain that there is a lack of evidence of competition for enterprise broadband services.<sup>12</sup> Of course, the Commission has previously found, and the petitioners and numerous others have documented, that the opposite is true and have documented that enterprise broadband services are characterized by falling prices and increasing innovation and investment. *See, e.g.,*

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<sup>7</sup> *See* 47 U.S.C. § 157 note (codifying Telecommunications Act of 1996, § 706); *id.* § 230.

<sup>8</sup> *See, e.g.,* TRO ¶¶ 288, 538.

<sup>9</sup> *See, e.g.,* Memorandum Opinion and Order, *Petition for Waiver of Pricing Flexibility Rules for Fast Packet Services*, 20 FCC Rcd 16840, ¶¶ 10-11 (2005); TRO ¶ 294; *see also* Order on Reconsideration, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 19 FCC Rcd 20293, ¶¶ 20-21 (2004); Memorandum Opinion and Order, *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, 19 FCC Rcd 21496 (2004), *aff'd*, *EarthLink, Inc. v. FCC*, 462 F.3d 1 (D.C. Cir. 2006).

<sup>10</sup> Memorandum Opinion and Order, *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S.C. § 160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area*, WC Docket No. 06-109, FCC 07-149, ¶ 96 (rel. Aug. 20, 2007) ("ACS Broadband Forbearance Order").

<sup>11</sup> *Time Warner Letter* at 3-4.

<sup>12</sup> *See, e.g., Cavalier Letter* at 2; *Time Warner Letter* at 4.

Attachments A at 4-6, B, C, D, F, H, and I at 9-17.<sup>13</sup> Thus, the evidence already in the record demonstrates that stand-alone enterprise broadband services at issue in the pending petitions are subject to extensive competition.

Moreover, the services themselves are among the most sophisticated services on the market, and the enterprise customers that demand these services are among the most sophisticated purchasers. As the Commission has recognized, these “highly sophisticated” purchasers can and do “negotiate for significant discounts.”<sup>14</sup> Their sophistication is “significant not only because it demonstrates that these users are aware of the multitude of choices available to them, but also because they show that these users are likely to make informed choices based on expert advice” to “seek out best-price alternatives.”<sup>15</sup> Indeed, the Commission recently reaffirmed that the “sophistication of the enterprise customers that tend to purchase” stand-alone broadband transmission at issue here, along with the “large revenues these customers generate,” confirms that competition can and will discipline prices for such services, in the absence of regulation.<sup>16</sup>

Verizon’s experience over the last year-and-a-half since its forbearance petition was granted has confirmed that the market for these services is extremely competitive and works well in the absence of outdated regulation. In that time, Verizon has entered into private carriage arrangements with approximately 200 wholesale and retail customers with a value of well over \$1 billion in total. Verizon has also rolled out new and innovative services, such as a bandwidth-on-demand service. Forbearance has also enabled Verizon to design and offer new, integrated optical IP services without the need to engage in complex regulatory determinations of how to treat the broadband transmission components of those services, or the need to design those integrated services to satisfy regulatory requirements rather than the needs of its customers.

### Ethernet Services

In addition to their general arguments concerning competition for broadband services, some commenters continue to focus attention on Ethernet services.<sup>17</sup> This is interesting given

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<sup>13</sup> See note 5 and Attachment B, Verizon Ex Parte, Petitions of AT&T, BellSouth corporation and Qwest for Forbearance from Title II and Computer Inquiry Rules, WC docket Nos. 06-125, 06-147 (filed Sept. 5, 2007); Attachment D, Verizon Ex Parte, Petitions of AT&T, BellSouth Corporation, Embarq and Qwest for Forbearance from Title II and Computer Inquiry Rules, WC Docket Nos. 06-125, 06-147 (filed Sept. 5, 2007); Attachment F, Verizon Ex parte, Petition for Forbearance from Title II and Computer Inquiries Requirements for Enterprise Broadband Services, WC Docket Nos. 06-125, 06-147 and Special Access Rates for Price Cap Local Exchange Carriers, WC Docket Nos. 06-125, 06-147 and Special Access Rates for Price Cap Local Exchange Carriers, WC Docket No. 05-25, RM 10593 (filed Aug. 31, 2007).; Attachment H, Verizon Ex Parte, Petition for Forbearance from Title II and Computer Inquires Requirements for Enterprise Broadband Services, WC docket No. 06-125, 06-147 (filed Aug. 29, 2007)

<sup>14</sup> Memorandum Opinion and Order, *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18433, ¶ 75 (2005).

<sup>15</sup> *Id.* ¶ 76.

<sup>16</sup> *ACS Broadband Forbearance Order* ¶ 99.

<sup>17</sup> See *Time Warner Letter* at 5-6; *Cavalier Letter* at 2; *Oct. 5 BT Letter* at 1-2; Letter from Aryeh Friedman to Marlene Dortch, WC Docket Nos. 06-125, 06-147, 04-440, 05-25 (Oct. 9, 2007).

that Ethernet services are among the most advanced and competitive services on the market, with scores of significant providers competing to offer these services. *See, e.g.*, Attachment G. In fact, Time Warner Telecom was recently ranked as the third largest provider of these services – much larger than some of the parties to the pending petitions. *Id.* Verizon rebutted these claims concerning the lack of competition for Ethernet services in detail in a recent *ex parte* specifically addressing Ethernet services, and incorporates those arguments in response to the recent filings.<sup>18</sup>

### Need for Relief

Finally, one group of CLECs now argue that there is no need to grant the pending forbearance petitions because existing regulations permitting pricing flexibility and contract tariffs are sufficient to allow incumbent providers to offer customized solutions.<sup>19</sup> As Verizon has previously explained,<sup>20</sup> however, while it is certainly true that under pricing flexibility, ILECs are permitted some degree of flexibility in dealing with other market participants, that relief does not go nearly far enough. This is so for several reasons.

First, the flexibility that pricing flexibility permits is geographically limited and is only available in particular areas in which certain triggers are satisfied. So, for example, the ability to enter into contracts with customers is limited to particular geographic areas. This limitation shows the inadequacy of existing regulatory relief – particularly given the national and international nature of enterprise broadband services and the fact that customers want contracts to purchase these services across broad areas. For example, this limitation would prevent negotiating nationwide arrangements with customers who operate on a national basis. Second, the pricing flexibility rules do not themselves remove services from the common carrier rubric. This limitation undermines ILECs' ability to negotiate truly individualized arrangements with customers even in those areas where they are permitted to enter into contracts. The ability to negotiate in an unencumbered fashion is essential to enable providers to minimize their risks given uncertain demand for innovative broadband services and products. If a provider is required to offer the same exact terms to any other requesting party, it may elect to forgo certain opportunities that could have been beneficial to its customers.

Finally, the “contract tariff” route permitted under price flexibility is no panacea because *any* tariffing requirement is harmful to a competitive market. As the Commission has previously recognized, a tariffing regime, when imposed in a competitive market, “may facilitate, rather than deter, price coordination, because under a tariffing regime, all rate and service information is collected in one, central location,” thereby rendering it easier for competitors to adjust prices in response to rate changes by each other. *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as Amended*, 11 FCC Rcd 20730, ¶ 23 (1996). Forcing *any* participant in a competitive

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<sup>18</sup> *See* Letter from William Johnson on behalf of Verizon to Marlene Dortch, WC Docket Nos. 06-125, 06-147, and 04-440 (Oct. 9, 2007).

<sup>19</sup> *Cavalier Letter* at 2.

<sup>20</sup> *See* Verizon Reply Comments, WC Docket No. 04-440, at 29-30 (March 10, 2004).

Marlene H. Dortch

October 11, 2007

Page 6

market to disclose cost information, pricing information, and network architecture plans harms, rather than promotes, competition. This concern is equally valid in the context of contract tariffs.

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The Commission should grant the full requested relief in the pending enterprise broadband forbearance petitions and should allow all competitors the flexibility to customize offerings to better serve their customers and to compete more effectively.

Sincerely,

A handwritten signature in black ink that reads "Dee May". The signature is written in a cursive, flowing style.

cc: Dana Shaffer  
Marcus Maher  
Nick Alexander  
Bill Dever  
Heather Hendrickson  
Melissa Kirkel

## INDEX OF ATTACHMENTS

Attachment	Description
A	Verizon Comments, Qwest Petition for Forbearance, WC Docket No. 06-125 (filed Sept. 20, 2007)
B	Verizon Ex Parte, Petitions of AT&T, BellSouth Corporation and Qwest, for Forbearance from Title II and Computer Inquiry Rules, WC Docket Nos. 06-125, 06-147 (filed Sept. 17, 2007)
C	Verizon Ex Parte, Petitions of AT&T, BellSouth Corporation, Embarq and Qwest for Forbearance from Title II and Computer Inquiry Rules, WC Docket Nos. 06-125, 06-147 (filed Sept. 5, 2007)
D	Verizon Ex Parte, Petitions of AT&T, BellSouth Corporation, Embarq and Qwest for Forbearance from Title II and Computer Inquiry Rules, WC Docket Nos. 06-125, 06-147 (filed Sept. 5, 2007)
E	Verizon Ex Parte, Petitions of AT&T, BellSouth Corporation, Embarq and Qwest for Forbearance from Title II and Computer Inquiry Rules, WC Docket Nos. 06-125, 06-147 (filed Sept. 5, 2007)
F	Verizon Ex Parte, Petitions for Forbearance from Title II and Computer Inquiries Requirements for Enterprise Broadband Services, WC Docket Nos. 06-125, 06-147 and Special Access Rates for Price Cap Local Exchange Carriers, WC Docket No. 05-25, RM 10593 (filed Aug. 31, 2007)
G	Verizon Ex Parte, Petitions for Forbearance from Title II and Computer Inquires Requirements for Enterprise Broadband Services, WC Docket Nos. 06-125, 06-147 (filed Aug. 30, 2007)
H	Verizon Ex Parte, Petitions for Forbearance form Title II and Computer Inquires Requirements for Enterprise Broadband Services, WC Docket Nos. 06-125, 06-147 (filed Aug. 29, 2007)
I	Verizon Reply Comments, Petitions of AT&T, BellSouth Corporation and Embarq Local Operating Companies and Qwest for Forbearance from Title II and Computer Inquiry Rules with Respect to Broadband Services (filed August 31, 2007)

# **ATTACHMENT A**

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20544**

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

WC Docket No. 06-125

**COMMENTS OF VERIZON<sup>1</sup>**

The Commission should grant Qwest and all other competing providers the full relief that it requests with respect to enterprise broadband services. Qwest again seeks for its stand-alone broadband transmission services — including high-speed packetized services and non-TDM based optical services — the same flexibility to meet customer demands that Verizon received in March 2006 when Verizon’s petition for forbearance was deemed granted by operation of law. Because Verizon has already filed comments and a number of ex partes in this docket with regard to Qwest’s prior petition, as well as the still-pending petitions of AT&T and BellSouth,<sup>2</sup> Verizon limits its comments to the following points, all of which confirm that the Commission should grant the full relief requested in the pending forbearance petitions.

1. The Commission historically has pursued a largely bipartisan deregulatory policy toward the advanced broadband services at issue in this docket. That policy began when the Commission, under then-Chairman Kennard, allowed telephone companies to provide enterprise

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<sup>1</sup> The Verizon companies participating in this filing (“Verizon”) are the regulated, wholly owned subsidiaries of Verizon Communications Inc.

<sup>2</sup> See, e.g., Letter from Dee May, Vice President, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 06-125 & 06-147 (Sept. 5, 2007) (“*Verizon Sept. 5 Ex Parte*”); Letter from Dee May, Vice President, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 04-440, 06-125, 06-147 (Sept. 4, 2007); Letter from Dee May, Vice President, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 06-125 & 06-147 (Aug. 29, 2007); Reply Comments of Verizon, WC Docket Nos. 06-125 & 06-147 (Aug. 31, 2006).

and other broadband services on a largely deregulated basis through data affiliates,<sup>3</sup> and allowed cable companies to roll out their broadband services on a deregulated basis.<sup>4</sup> The Commission's consistent policy — continued through the Commission's most recent orders unanimously extending its treatment of cable modem and wireline Internet access service to broadband over power line and wireless broadband<sup>5</sup> — has been part of a successful effort to encourage companies to develop and deploy these advanced services.<sup>6</sup>

2. It is critical that the Commission maintain this successful, deregulatory broadband policy, which has encouraged providers of broadband services over various platforms — wireline, cable, wireless, fixed wireless, satellite, and broadband over power line, among others — to invest in these new technologies and to deploy new and innovative services. Given these demonstrated past successes, the Commission should not — indeed, could not — reasonably depart from that policy. As the D.C. Circuit and Commission have repeatedly found, regulation has the very real potential to stifle investment and innovation in advanced broadband services and facilities.<sup>7</sup>

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<sup>3</sup> See Memorandum Opinion and Order and Notice of Proposed Rulemaking, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24012, ¶¶ 85-103 (1998).

<sup>4</sup> See, e.g., Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798, ¶ 2 (2002) (citing orders “dat[ing] back to at least 1998”), *aff’d*, *National Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

<sup>5</sup> See Memorandum Opinion and Order, *United Power Line Council’s Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, 21 FCC Rcd 13281 (2006); Declaratory Ruling, *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd 5901 (2007).

<sup>6</sup> See Letter from Joseph Jackson, Associate Director, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 06-125 & 06-147, Attach. (Sept. 17, 2007) (chart demonstrating increased investment resulting from Commission’s deregulatory broadband policies).

<sup>7</sup> See, e.g., Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, ¶ 3 (2003) (“*TRO*”) (subsequent history omitted) (“[W]e are very aware that excessive network unbundling requirements tend to undermine the incentives of both incumbent LECs and new entrants to invest in new facilities and deploy new technology” and this effect “is particularly critical in the area of broadband deployment.”); see *United States Telecom Ass’n v. FCC*, 290 F.3d 415, 427 (D.C. Cir. 2002) (“Each unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities.”).

3. The Commission also should maintain the dividing line that it has drawn in the past between enterprise broadband services — both packetized and non-TDM optical services — and traditional, TDM-based special access, which is consistent with Congress’s own policy preference for promoting the deployment and development of advanced broadband facilities and services.<sup>8</sup> The Commission has already found that other providers can and do offer their own packetized and optical services by self-provisioning these services over their own facilities or third-party facilities.<sup>9</sup> The Commission has also found that other providers can offer such services combining incumbents’ TDM-based special access with their own packet switches.<sup>10</sup> The Commission applied this distinction most recently in granting forbearance to ACS of Anchorage, Inc., noting that the relief granted “excludes TDM-based, DS-1 and DS-3 special access services.”<sup>11</sup>

4. In ruling on the pending petitions of Qwest and others, the Commission should follow its repeated decisions to employ a national market analysis for broadband.<sup>12</sup> The Supreme Court and D.C. Circuit, moreover, have repeatedly upheld those determinations.<sup>13</sup> Consistent with that precedent, Qwest and the other petitioners in this docket have supported

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<sup>8</sup> See 47 U.S.C. § 157 note (codifying Telecommunications Act of 1996, § 706); *id.* § 230.

<sup>9</sup> See, e.g., *TRO* ¶¶ 288, 538.

<sup>10</sup> See, e.g., Memorandum Opinion and Order, *Petition for Waiver of Pricing Flexibility Rules for Fast Packet Services*, 20 FCC Rcd 16840, ¶¶ 10-11 (2005); *TRO* ¶ 294; see also Order on Reconsideration, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 19 FCC Rcd 20293, ¶¶ 20-21 (2004); Memorandum Opinion and Order, *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, 19 FCC Rcd 21496 (2004), *aff’d*, *EarthLink, Inc. v. FCC*, 462 F.3d 1 (D.C. Cir. 2006).

<sup>11</sup> Memorandum Opinion and Order, *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S.C. § 160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area*, WC Docket No. 06-109, FCC 07-149, ¶ 96 (rel. Aug. 20, 2007) (“*ACS Broadband Forbearance Order*”).

<sup>12</sup> See *Verizon Sept. 5 Ex Parte Attach.* at 1-2 (citing Commission orders).

<sup>13</sup> See *Brand X*, 545 U.S. at 1002; *United States Telecom. Ass’n v. FCC*, 359 F.3d 554, 578-85 (D.C. Cir. 2004); *EarthLink*, 462 F.3d at 8-9.

their requests for relief by submitting evidence showing the extensive competition nationwide to provide broadband transmission services to enterprise customers. Indeed, even competitors that oppose the relief requested in these petitions tout industry analysts' assessment of broadband competition nationwide as "provid[ing] in-depth, accurate, defensible statistics and analysis," such as a recent such report showing that Time Warner Telecom has the third largest "U.S. Port Share" of "Retail Business Ethernet Services" and that companies other than AT&T, Qwest, and Verizon currently have won 56 percent of that enterprise business nationally.<sup>14</sup>

5. The evidence already in the record demonstrates that stand-alone enterprise broadband services at issue in the pending petitions are subject to extensive competition. Moreover, the services themselves are among the most sophisticated services on the market, and the enterprise customers that demand these services are among the most sophisticated purchasers. As the Commission has recognized, these "highly sophisticated" purchasers can and do "negotiate for significant discounts."<sup>15</sup> Their sophistication is "significant not only because it demonstrates that these users are aware of the multitude of choices available to them, but also because they show that these users are likely to make informed choices based on expert advice" to "seek out best-price alternatives."<sup>16</sup> Indeed, the Commission recently reaffirmed that the "sophistication of the enterprise customers that tend to purchase" stand-alone broadband

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<sup>14</sup> Time Warner Telecom Grows Ethernet Market Share, [http://www.twtelecom.com/Documents/Announcements/News/2007/VSG\\_TWTC\\_Mid\\_year07Ethernet.pdf](http://www.twtelecom.com/Documents/Announcements/News/2007/VSG_TWTC_Mid_year07Ethernet.pdf); see also Carol Wilson, "Carrier Ethernet Cable Style," *Telephony's Guide to carrierethernet* at 14-18 (Sept. 2007) (providing "U.S. port share" statistics and noting that "Cox is the undisputed cable leader in Ethernet port sales, but it is far from alone in its success").

<sup>15</sup> Memorandum Opinion and Order, *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18433, ¶ 75 (2005).

<sup>16</sup> *Id.* ¶ 76.

transmission at issue here, along with the “large revenues these customers generate,” confirms that competition can and will discipline prices for such services, in the absence of regulation.<sup>17</sup>

6. In the nearly 18 months since Verizon’s petition for forbearance was granted by operation of law, Verizon has embraced that deregulatory relief and has actively engaged with its customers on the transition of these broadband services to private carriage arrangements. Not surprisingly, given the intense competition for broadband services, the market is working. Verizon employed a transition process following the grant of its petition by operation of law, during which it left its existing tariffs in place for a period of time while it negotiated agreements.<sup>18</sup> Now, Verizon has detariffed or grandfathered the bulk of the broadband transmission services for which Verizon obtained regulatory relief through the deemed grant of its petition. And Verizon has entered into private carriage arrangements with approximately 200 wholesale and retail customers with a value of more than \$1 billion in total. Verizon has also rolled out new and innovative services, such as a bandwidth-on-demand service. Forbearance has also enabled Verizon to design and offer new, integrated optical IP services without the need to engage in complex regulatory determinations of how to treat the broadband transmission components of those services, or the need to design those integrated services to satisfy regulatory requirements rather than the needs of its customers.

7. Verizon’s and its customers’ successes in moving to private carriage arrangements for broadband services — and the absence of any evidence of harms resulting from the grant of its petition — confirm that the regulations and statutory provisions from which Verizon sought forbearance remain unnecessary to protect consumers or to ensure just and

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<sup>17</sup> *ACS Broadband Forbearance Order* ¶ 99.

<sup>18</sup> See Verizon’s Petition for Waiver of the Price Cap Rules, *Petition for Waiver of the Commission’s Price Cap Rules For Services Transferred from VADI to the Verizon Telephone Companies*, WC Docket No. 07-31, at 6-8 (FCC filed Feb. 9, 2007) (describing the transition process).

reasonable rates and that enforcement of those rules and provisions is not in the public interest. That concrete experience further confirms that Verizon's competitors should be extended this same relief, so that they too will have the flexibility to provide customized, broadband offerings to meet the particularized needs of their customers.<sup>19</sup>

### CONCLUSION

The Commission should grant Qwest's petition and the other pending petitions in this docket.

Respectfully submitted,

Of Counsel:

Michael E. Glover

/s/ Scott H. Angstreich  
Scott H. Angstreich  
KELLOGG, HUBER, HANSEN, TODD,  
EVANS & FIGEL, P.L.L.C.  
1615 M Street, N.W. – Suite 400  
Washington, D.C. 20036  
(202) 326-7900

Edward Shakin  
William H. Johnson  
VERIZON  
1515 North Courthouse Road – Suite 500  
Arlington, VA 22201-2909  
(703) 351-3060

*Counsel for Verizon*

September 20, 2007

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<sup>19</sup> See, e.g., *BellSouth Telecomms., Inc. v. FCC*, 469 F.3d 1052, 1060 (D.C. Cir. 2006) (holding that agencies have “no license to ignore the past when the past relates directly to the question at issue” and provides “data against which to test the [relevant] proposition[s]” on which the agency’s decision is based).

# **ATTACHMENT B**

Joseph Jackson  
Associate Director  
Federal Regulatory



1300 I Street, NW, Suite 400 West  
Washington, DC 20005

Phone 202 515-2467  
Fax 202 336-7922  
joseph.r.jackson@verizon.com

September 17, 2007

**Ex Parte**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

**Re: Petitions of AT&T Inc., BellSouth Corporation, the Embarq Local Operating Companies, and Qwest Under 47 U.S.C. § 160(c) for Forbearance from Title II and Computer Inquiry Rules with Respect to Broadband Services, WC Docket Nos. 06-125 & 06-147.**

Dear Ms. Dortch:

Ms. Dee May provided the attached chart and associated website address prepared by Criterion Economics. ([http://www.criterioneconomics.com/docs/pdf/2007/0914/charts/DeregulationIncreaseInvestment\\_091407.pdf](http://www.criterioneconomics.com/docs/pdf/2007/0914/charts/DeregulationIncreaseInvestment_091407.pdf)). This chart demonstrates that the Commission's deregulatory broadband policies have resulted in a substantial increase in investment in communications equipment, including broadband facilities.

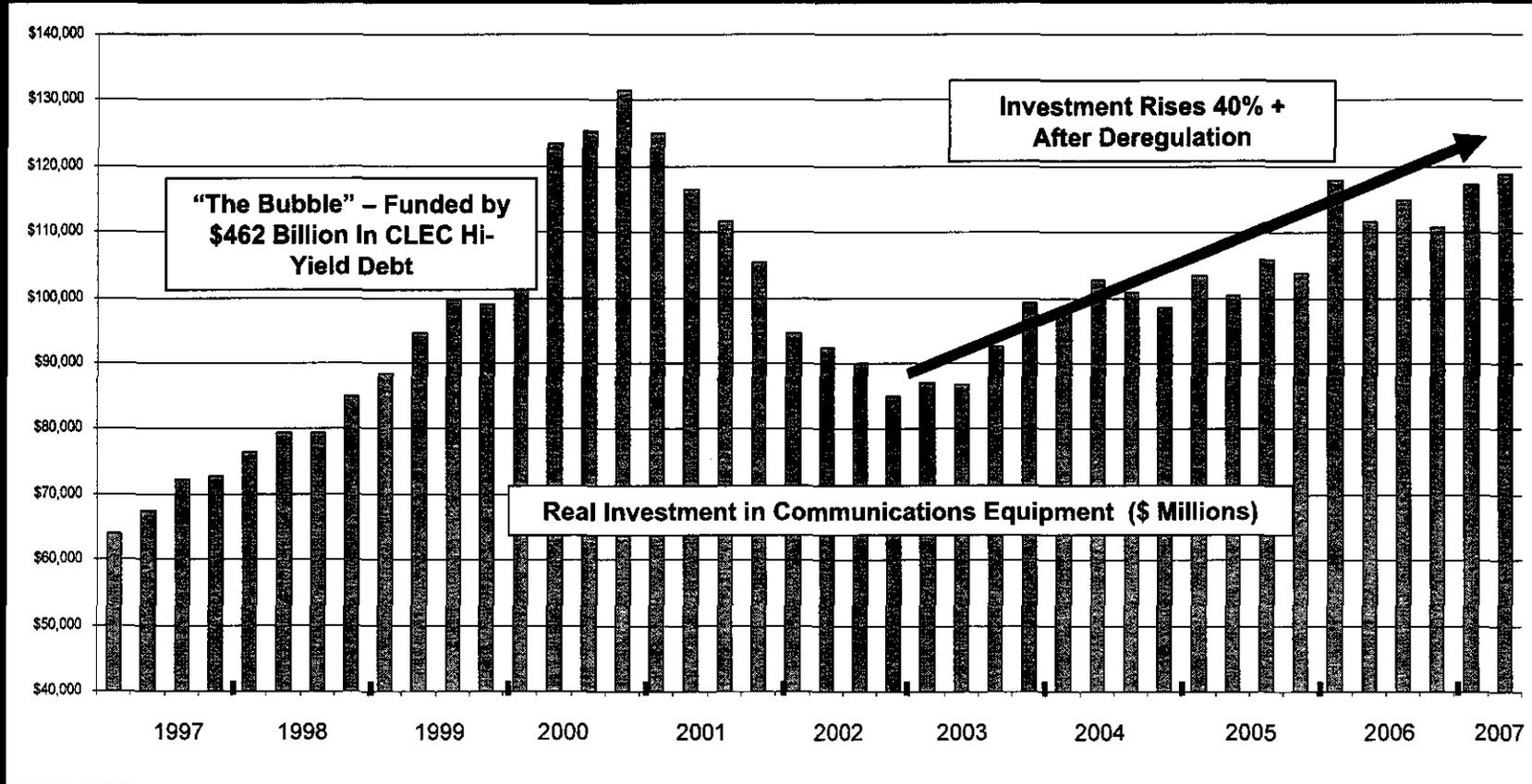
Please let me know if you have any additional questions.

Sincerely,

A handwritten signature in cursive script that reads "Joseph Jackson".

cc: C. Moore  
D. Shaffer  
M. Maher  
C. Shewman

# Deregulation Increased Investment



February 1996  
Telecom Act Passed

August 1996  
FCC Issues UNE  
Regs

1997-2003  
FCC and State PUCs  
Aggressively Implement  
UNE Regs

29 CLECs Declare  
Bankruptcy  
US Telecom Sector  
Loses 318,000 Jobs

March 2002: FCC Cable  
Modem Decision

August 2003: FCC  
Exempts Broadband  
FTTP) and Eliminates  
Line Sharing

November 2003:  
Verizon Announces  
FTTP Rollout

March 2004: Court  
Affirms FCC Decision  
Removing Unbundling  
Modem Decision

Sept. 2005: FCC  
Removes Common  
Carrier Regulation of  
Wireline Broadband

# **ATTACHMENT C**

Dee May  
Vice President  
Federal Regulatory



1300 I Street, NW, Suite 400 West  
Washington, DC 20005

Phone 202 515-2529  
Fax 202 336-7922  
dolores.a.may@verizon.com

September 5, 2007

**Ex Parte**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

**Re: Petitions of AT&T Inc., BellSouth Corporation, the Embarq Local Operating Companies, and Qwest Under 47 U.S.C. § 160(c) for Forbearance from Title II and Computer Inquiry Rules with Respect to Broadband Services, WC Docket Nos. 06-125 & 06-147.**

Dear Ms. Dortch:

Today, Dee May and Will Johnson of Verizon spoke with Scott Deutchman, Commissioner Copp's Legal Advisor, to discuss the above proceedings. The positions set forth are consistent with those placed on the record. Verizon provided the attached documents as part of the discussion.

Sincerely,

A handwritten signature in cursive script that reads "Dee May".

**Attachments**

cc: S. Deutchman  
T. Navin  
D. Stockdale  
M. Maher  
W. Kehoe  
W. Dever  
C. Shewman

- In the *Cable Modem Declaratory Ruling* the Commission “consider[ed] the broad issue of the appropriate *national* framework for the regulation of cable modem service” and adopted rules for cable modem service on a nationwide basis, without considering individual geographic areas. Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798, ¶ 56 (2002).
  - The Supreme Court upheld that decision in full, including the Commission’s consideration of national “market conditions.” *National Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2711 (2005).
- In the *Triennial Review Order*, the Commission likewise concluded — on a nationwide basis — that incumbent LECs did not have to unbundle certain broadband elements, irrespective of the type of customer served using those elements. Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, ¶¶ 210, 241-246, 255-263, 272-280, 285-295 (2003).
  - The D.C. Circuit upheld the Commission’s decision not to require unbundling of these elements on a nationwide basis. *United States Telecom. Ass’n v. FCC*, 359 F.3d 554, 578-85 (D.C. Cir. 2004).
  - The Commission itself later noted that “the D.C. Circuit upheld the Commission’s findings in the *Triennial Review Order* that it was appropriate to relieve the BOCs from unbundling obligations on a national basis for the broadband elements at issue.” Report and Order, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853, ¶ 23 (2005) (“*271 Broadband Forbearance Order*”).
- In the *271 Broadband Forbearance Order*, the Commission then granted forbearance, “on a national basis,” from § 271 insofar as it applied to the “broadband elements” as to which the Commission refused to require unbundling in the *Triennial Review Order*. *271 Broadband Forbearance Order* ¶ 12.
  - The D.C. Circuit upheld this decision in full as well. *EarthLink, Inc. v. FCC*, 462 F.3d 1 (D.C. Cir. 2006).
    - That court held that § 160 permits the Commission to “forbear on a nationwide basis — without considering more localized regions individually” and rejected the argument that § 160 requires the Commission to consider “market conditions in particular geographic markets,” holding further that the forbearance statute “imposes no particular mode of market analysis or geographic rigor.” *Id.* at 8 (internal quotation marks omitted).
    - The D.C. Circuit similarly found that the Commission “reasonably eschewed a more elaborate snapshot of the current market in deciding whether to forbear” based on its “view of the broadband market as still emerging and developing” and rejected claims that “competition can only . . . be assessed by focusing on . . . specific . . . geographic markets.” *Id.* at 9.

- In reaching these rulings, the D.C. Circuit accepted the Commission's arguments on appeal.
  - In particular, the Commission argued to the D.C. Circuit that it was appropriate to "evaluate[] the broadband marketplace . . . on a nationwide basis to determine whether the statutory criteria for forbearance were satisfied." Brief for Respondents at 21-22, *EarthLink, Inc. v. FCC*, No. 05-1087 (D.C. Cir. Feb. 6, 2006).
  - The Commission, in defending its review of a nationwide broadband market also pointed to the fact that the record in the *271 Broadband Forbearance* proceeding "contained ample evidence that, although the broadband market was still emerging, facilities-based broadband competition existed widely across the nation." *Id.* at 23.
- In the *Wireline Broadband Order*, the Commission again considered a nationwide broadband marketplace and rejected arguments that it is required to consider narrower geographic areas, because those arguments are "premised on data that are both limited and static," which is inappropriate in light of the "[c]ontinuous change and development [that] are likely to be the hallmark of the marketplace for broadband Internet access at both the retail and wholesale levels over the next several years." Report and Order, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853, ¶¶ 50, 56 (2005).
- The Commission is currently defending those conclusions before the Third Circuit, where it has argued that the decision not to "distinguish[] between specific geographic and product markets" in the context of broadband services was appropriate, because "static marketplace dominance analysis" is not useful in the context of "an emerging market that will likely experience rapid technological and competitive changes before it reaches maturity." Brief for Respondents at 50-58, *Time Warner Telecom v. FCC*, Nos. 05-4769 *et al.* (3d Cir. oral arg. Mar. 16, 2007) (internal quotation marks omitted).
- In two subsequent orders extending the Commission's treatment of cable modem and wireline Internet access service to other broadband platforms — namely, broadband over power line and wireless broadband — the Commission again ruled on a nationwide basis, without considering narrower geographic regions. See Memorandum Opinion and Order, *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, 21 FCC Rcd 13281 (2006); Declaratory Ruling, *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd 5901 (2007).

# Opportunity Knocks at Cable's Door

**As wireless carriers look for more backhaul capabilities at less cost, Multiple Service Operators (MSO) arrive with plenty of options.**

By M.J. Richter

The mobile communications industry, one of the technology world's biggest success stories of all time, is discovering new meaning behind the old saying that "success has a price." For most of the past 25 years, the price in question has been that of building wireless networks to keep up with explosive customer growth. Today, wireless operators are focused on increasing their network efficiencies, particularly in wireless backhaul, to minimize Operating Expenses (OpEx) costs — both those incurred by their current networks and those that will be required to support new wireless applications and services.

On average, transport costs account for nearly 25% of wireless operators' OpEx costs, and 60%-75% of those transport costs are attributed to backhaul. Those numbers translate into a U.S. backhaul market valued at slightly more than \$2 billion in 2006 and could reach \$16 billion by 2009, according to the Cellular Telecommunications & Internet Association. GeoResults, a research firm, estimates that between 2005 and 2009, wireless operators around the world will spend \$31 billion on backhaul.

Since the wireless industry's inception, wireless carriers typically have leased T-1 lines from local exchange carriers to backhaul their cell-site TDM traffic. As their customer base has grown, so too have their backhaul needs. In 2005, wireless operators needed an average of three T-1s per cell site, according to GeoResults. By 2009, the average number of T-1s required to handle backhaul will be at least nine per cell site, a 200% increase. The number of voice Minutes of Use (MoU) continues to grow at a rapid pace (see Figure 1).

In addition to the growth of voice traffic, new, high-bandwidth Third-Generation (3G) data and multimedia services, such as mobile video, music downloads, news and mobile gaming, will continue to push mobile carriers' bandwidth requirements even higher. As a result, carriers are migrating their infrastructures towards IP-based networks, both to support new high-bandwidth data services and scale bandwidth as customers require. Growth of these new services is causing mobile carriers to look at alternate technologies, such as Ethernet, for transport and cell-site backhaul.

### Backhaul: "Up For Grabs"

For wireless carriers, a dual challenge is to accommodate growth in the number of customers, MoU and bandwidth while finding out how to reduce OpEx. Keeping OpEx in check is critical — it better positions wireless carriers to price services at a competitive point while still turning a profit.

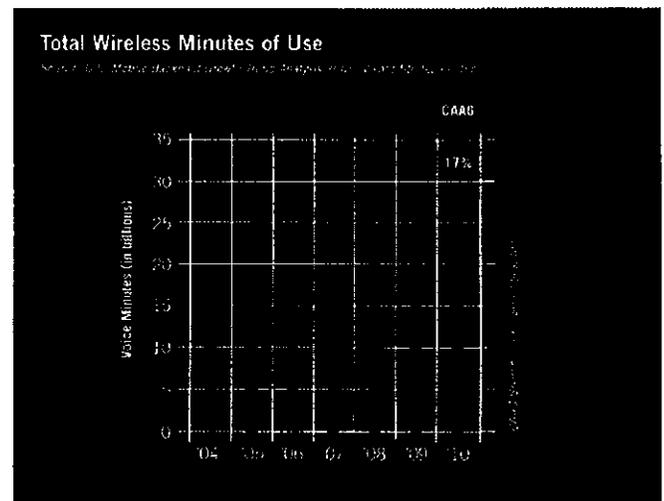
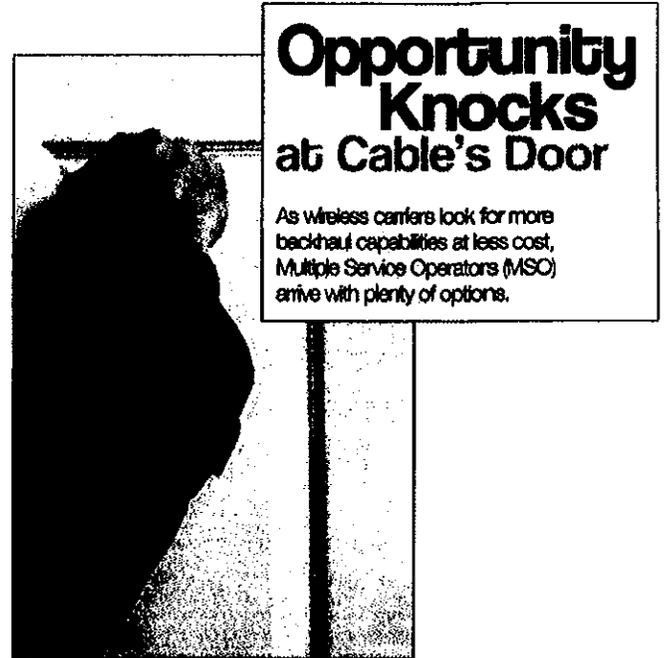


Figure 1. Total wireless minutes of use

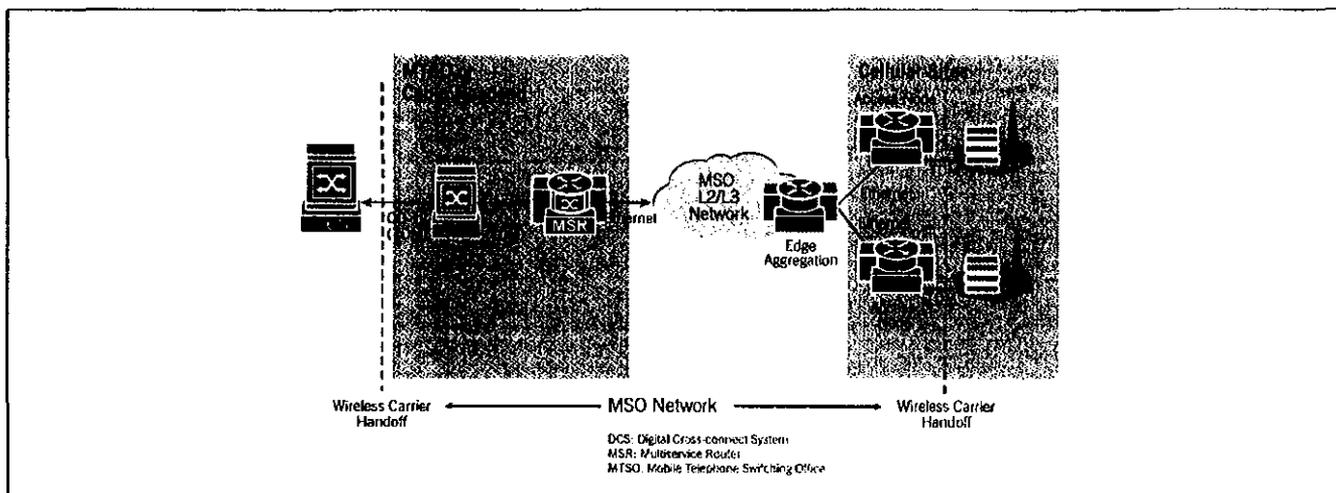


Figure 2. Ethernet backhaul network

"There is no question that wireless carriers are looking to grow revenue-generating service offerings while curbing OpEx, thereby increasing profitability," said Iyad Tarazi, vice president of network development at Sprint Nextel. "The amount of bandwidth required will, in many cases, require an alternative to traditional T-1 leased lines in order for this to make sense."

Most wireless carriers have identified backhaul as an important area in which to reduce expenses, by considering alternatives to leased T-1 backhaul lines, such as native Ethernet service. The wireless backhaul network currently is "up for grabs," says Peter Jarich, principal analyst for wireless infrastructure with Current Analysis, a research firm. Jarich believes MSOs are capable of capturing a significant share of the wireless backhaul market.

To do that, MSOs must have the facilities in place and be able to match the service-assurance capabilities and reliability that wireless operators currently get from the telcos, Jarich says. "They're in a pretty good competitive spot. It's something they're going to have to show they can do, but if they can, then clearly it's a nice market opportunity [for them]."

That opportunity coincides with a major strategic objective on the part of many MSOs: They have invested heavily in their fiber or Hybrid Fiber-Coax (HFC) infrastructures over the past several years to provide broadband and voice services to residential customers. Now, with these networks upgraded and enhanced, they are looking to leverage this base and utilize it to offer Ethernet services to enterprise customers, carriers and wireless providers.

The majority of wireless operators today seek more affordable T-1 services for their backhaul, while others prefer to buy native Ethernet services to handle backhaul. MSOs can readily position themselves to satisfy both requirements with fiber and/or coax facilities in place

near many cell sites. Oftentimes, MSOs only need to build short spurs to certain towers and deploy Ethernet access interfaces to create a unified data network to provide scalable backhaul service. In fact, many of the largest MSOs already are making forays into the market.

An example is Cox Business Services, a subsidiary of Cox Communications, the third-largest U.S. cable operator. Cox Business Services has been providing fiber-based wireless backhaul for more than a decade to most major wireless carriers. Additionally, Comcast, Time Warner Cable and other major MSOs offer Ethernet-based services today and are tailoring them to meet the demand of wireless carriers.

### Putting it All Together

An MSO can provide T-1-over-Ethernet services by deploying a multiservice edge device that offers both TDM and Ethernet interfaces at the cell site (see Figure 2). Using circuit emulation, this TDM traffic can be transported over an MSO's Layer 2/Layer 3 network. Additionally, an MSO can offer native Ethernet backhaul from the same device as Ethernet interfaces become more prevalent at the cell site. By pairing this multiservice edge device with a carrier-class multiservice router, MSOs can also offer guaranteed Quality of Service (QoS) for any type of access traffic over a Multiprotocol Label Switching (MPLS) network, along with verifiable Service Level Agreements (SLA). These factors help deliver the availability, reliability and scalability that wireless operators require.

Because wireless operators want to protect their embedded investments, they will continue to require an OC-3/12 handoff from the cell site. The MSO can address that need by deploying a Digital Cross-connect System (DCS) to function as an efficient, centralized headend. The DCS offers a central location to manage and troubleshoot T-1 circuits and collect statistics for SLA reporting.

"As long as we can get carrier-class Ethernet, using an Ethernet-based backhaul is a great solution," said Tarazi. "This goes a long way toward solving both the backhaul cost issue and migrating toward a more IP-based network, and companies that can offer that Ethernet pipe will be well-positioned."

Depending on its infrastructure, an MSO can pursue the wireless backhaul market right away by using its SONET-based network, or it can leverage its embedded Ethernet investments with incremental upgrades to edge devices that support T-1-over-Ethernet service. Either way, by implementing solutions that support guaranteed Ethernet and/or MPLS, MSOs have a significant opportunity to capture a share of the booming wireless backhaul market and generate significant new revenue streams. By leveraging the flexible solutions that Tellabs offers, MSOs can tap into these revenue streams with the efficiency and carrier-class reliability that wireless providers have come to expect.

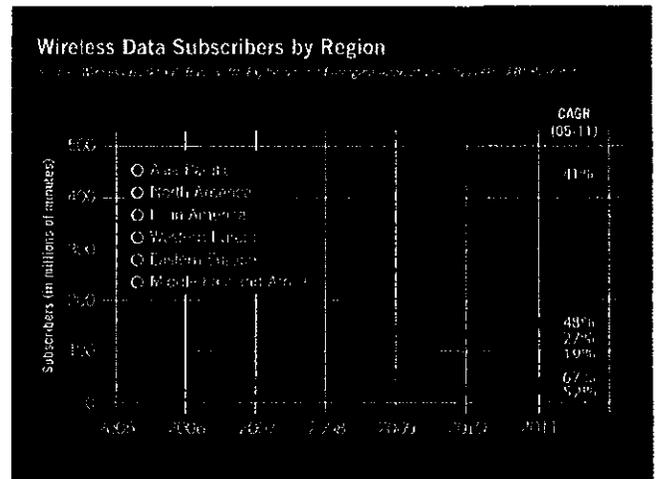


Figure 3. Wireless data subscribers by region

#### North America

Tellabs  
One Tellabs Center  
1415 West Diehl Road  
Naperville, IL 60563  
U.S.A.  
+1 630 798 8800  
Fax: +1 630 798 2000

#### Asia Pacific

Tellabs  
3 Anson Road  
#14-01 Springleaf Tower  
Singapore 079909  
Republic of Singapore  
+65 6215 6411  
Fax: +65 6215 6422

#### Europe, Middle East & Africa

Tellabs  
Abbey Place  
24-28 Easton Street  
High Wycombe, Bucks  
United Kingdom  
HP11 1NT  
+44 870 238 4700  
Fax: +44 870 238 4851

#### Latin America & Caribbean

Tellabs  
1401 N.W. 136th Avenue  
Suite 202  
Sunrise, FL 33323  
U.S.A.  
+1 954 839 2800  
Fax: +1 954 839 2828

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74.1713E Rev. A 10/06

## Enterprise Broadband Services vs. Special Access Services

### Enterprise Broadband Services

1. Packetized services capable of 200 Kbps or more in each direction, such as:
  - IP-Based Services
  - Ethernet Services
  - ATM/Frame Relay
2. Optical-Level Services, such as:
  - WDM and DWDM-based services, like IOTS
  - SONET

These services do not include traditional TDM-based special access services.

### Basis for Commission Analysis

- Nationwide

### Traditional Special Access Services

All TDM-based high capacity services, including DS1s and DS3s.

### Basis for Commission Analysis

- MSA for Pricing Flexibility

### In the TRO and TRRO, the Commission's Orders Established These Two Categories of Enterprise Broadband Services.

For packetized services, the Commission recognized that "the record shows that a wide range of competitors are actively deploying their own packet switches, including routers and DSLAMs to serve both the enterprise and mass markets." The Commission noted that allowing unbundled access to packetized facilities and services would "blunt the deployment of advanced telecommunications infrastructure by incumbent LECs and the incentive for competitive LECs to invest in their own facilities, in direct opposition to the express statutory goals authorized by section 706."

Likewise, with respect to optical services and facilities, the Commission found that there is "substantial deployment of competitive fiber loops at OCn capacity and competitive carriers confirm they are often able to economically deploy these facilities to the large enterprise customers that use them." Competing carriers are able to deploy new OCn-level facilities without significant difficulty because these types of facilities "produce revenue levels which can justify the high cost of loop construction, providing the opportunity for competitive LECs to offset the fixed and sunk costs of loop construction."

**The Commission Lacks Legal Authority to Issue an Order on Verizon's Broadband Forbearance Petition That Was Deemed Granted by Operation of Law.**

The Commission Cannot Issue an Initial Order Now on Verizon's Petition

When the March 19, 2006 statutory deadline for ruling on Verizon's petition for forbearance passed without Commission action, that petition was "deemed granted" by operation of law, thus terminating the proceedings on Verizon's petition. 47 U.S.C. § 160(c).

The Commission has held, in the analogous context of the "deemed lawful" provision in § 204(a)(3) that "[a]ppellate cases . . . have consistently found that the term 'deemed,' in this context, is not ambiguous" and "must be read" to mean "conclusive." *Streamlined Tariff Order*, 12 FCC Rcd 2170, ¶ 19 (1997).

The D.C. Circuit expressly upheld that determination. *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 406, 412 (D.C. Cir. 2002).

The Commission later found that, "[g]iven the Court's conclusion," the Commission "cannot adopt [a] reading" of "deemed lawful" as "ambiguous" and as creating merely a "presumption" of lawfulness that "may be rebutted." *Streamlined Tariff Reconsideration Order*, 17 FCC Rcd 17040, ¶¶ 4-5 (2002).

Therefore, for the Commission to act after a tariff has been "deemed lawful" or a petition has been "deemed granted," the Commission must conduct a new, separate "proceeding based on a preponderance of the evidence presented in [the new] proceeding." *Streamlined Tariff Order* ¶ 23.

This interpretation, as the Commission recognized in the § 204(a)(3) context, is required in order to give effect to the language of the statute." *Id.* ¶ 19.

If the Commission could, instead, adopt and release an order at any time after a petition has been deemed granted, it would "gut section 10" by treating "the statutory deadline [as] inconvenient," which the D.C. Circuit made clear "cannot be correct." *AT&T Inc. v. FCC*, 452 F.3d 830, 836 (D.C. Cir. 2006).

Petitioners that obtained the benefit of a deemed grant would rightly be reluctant to take advantage of that regulatory relief, in conflict with Congress's intention that forbearance would result in the "eliminat[ion] [of] outdated regulations . . . in a *timely* manner." 141 Cong. Rec. S7898 (June 7, 1995) (remarks of Sen. Dole) (emphasis added).

Precedent in the context of the Bank Holding Company Act, which similarly provides that certain applications "shall be deemed to have been granted" when the agency "fail[ed] . . . to act on" them within a specified time period, is to the same effect. *See Tri-State Bancorporation, Inc. v. Board of Governors of the Federal Reserve System*, 524 F.2d 562, 564, 566-68 (7th Cir. 1975) (vacating agency order purporting to deny an application that had previously been deemed granted by operation of law pursuant to 12

U.S.C. § 1842(b)); *North Lawndale Econ. Dev. Corp. v. Board of Governors of the Fed. Reserve Sys.*, 553 F.2d 23, 27 (7th Cir. 1977) (same).

The Commission, in its brief in *Core Communications*, suggested that it might be “open to the agency” to conclude that “deemed granted” is “ambiguous” and that the Commission could rule on a petition that already was granted by operation of law, though it conceded that the Commission had “not addressed th[at] issue.” Brief for Respondents at 31, *In re Core Commc’ns, Inc.*, Nos. 04-1368 *et al.* (D.C. Cir. July 25, 2005).

But a ruling that “deemed” is ambiguous, if reached by the Commission, would run squarely into the Commission’s own precedent holding that “deemed” is unambiguous and that it “cannot adopt [a] reading” of “deemed” as “ambiguous.” *Streamlined Tariff Order* ¶ 19; *Streamlined Tariff Reconsideration Order* ¶¶ 4-5.

It would also run afoul of the appellate decisions, including the D.C. Circuit’s decision in *ACS Anchorage*, that “have consistently found that the term ‘deemed,’ in this context, is not ambiguous” and “must be read” to mean “conclusive.” *Streamlined Tariff Order* ¶ 19.

In any event, in defending the tentative view expressed in its brief in *Core Communications*, the Commission expressly pointed to § 204(a)(3) and the Commission’s authority to conduct “further investigation” of a tariff that has been deemed lawful, and to “impos[e] . . . prospective remedies.” FCC *Core* Brief at 33-34. The Commission’s own precedent makes clear that such further investigation must occur in a new proceeding and on a new record, which the Commission has not done here.

#### The Commission Cannot Issue an Order on “Reconsideration” of the Deemed Grant

As the Commission has explained to the D.C. Circuit, when Verizon’s petition was deemed granted by operation of law, the Commission did not adopt or issue “a reviewable FCC order,” nor did it take “any reviewable agency ‘action.’” Brief for the FCC at 16, 21, *Sprint Nextel Corp. v. FCC*, No. 06-1111 *et al.* (D.C. Cir. oral arg. Oct. 15, 2007).

Reconsideration can occur only following “an order, decision, report, or action” by the Commission or by a designated entity within the Commission. 47 U.S.C. § 405(a); *see* 47 C.F.R. §§ 1.106(a), 1.429(a) (providing for reconsideration of “final” agency action only). Because the deemed grant of Verizon’s petition did not involve any agency action — as the Commission has told the D.C. Circuit — there is nothing to reconsider.

In any event, Congress set a strict 30-day time limit on the filing of petitions for reconsideration, and that time has long since passed, even assuming the deemed grant of Verizon’s petition could be treated as an action subject to reconsideration, which it cannot. *See* 47 U.S.C. § 405(a).

Similarly, the Commission’s rules establish a 30-day period in which the Commission can grant reconsideration on its own motion. *See* 47 C.F.R. § 1.108. Again, any such period has long since passed.

# **ATTACHMENT D**

Dee May  
Vice President  
Federal Regulatory



1300 I Street, NW, Suite 400 West  
Washington, DC 20005

Phone 202 515-2529  
Fax 202 336-7922  
dolores.a.may@verizon.com

September 5, 2007

**Ex Parte**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

**Re: Petitions of AT&T Inc., BellSouth Corporation, the Embarq Local Operating Companies, and Qwest Under 47 U.S.C. § 160(c) for Forbearance from Title II and Computer Inquiry Rules with Respect to Broadband Services, WC Docket Nos. 06-125 & 06-147;**

**In the Matter of Special Access Rates for Price Cap Local Exchange Carriers, WC Docket No. 05-25.**

Dear Ms. Dortch:

Yesterday, Susanne Guyer and Ed Shakin of Verizon spoke with John Hunter, Commissioner McDowell's Chief of Staff and Senior Legal Advisor, to discuss the above proceedings. The positions set forth are consistent with those placed on the record. Verizon provided the attached documents as part of the discussion.

Sincerely,

A handwritten signature in cursive script that reads "Dee May".

Attachments

cc: J. Hunter            M. Maher            C. Shewman  
    T. Navin            W. Kehoe  
    D. Stockdale        W. Dever

**ATTACHMENT D**

**DECLARATION OF CYNTHIA WELLS**

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

In the Matter of

Special Access Rates for Price Cap  
Local Exchange Carriers

WC Docket No. 05-25 & RM-10593

**DECLARATION OF CYNTHIA WELLS**

1. My name is Cynthia Wells. I am employed by Verizon Wireless as Director, Transport and Interconnection. In this role, I am responsible for obtaining, negotiating, and overseeing Verizon Wireless' contracts with third-party providers of transport and interconnection facilities. My business address is 2785 Mitchell Drive, Walnut Creek, California 94598.

2. The purpose of my declaration is to describe the competitive alternatives Verizon Wireless sees in the marketplace with respect to "backhaul" services that are used to connect individual wireless cell sites to other parts of Verizon Wireless' network. These "backhaul" facilities typically consist of DS1 special access channel terminations but in some cases may include DS3 or higher-capacity channel terminations. Because Verizon Wireless frequently must obtain backhaul facilities from ILEC as well as from competitive access providers, Verizon Wireless has considerable experience regarding the availability of competitive alternatives for wireless backhaul facilities.

3. In general, it has been Verizon Wireless' experience that, in the past few years, the competitive options for wireless backhaul facilities have increased considerably. This has occurred in large part because of the rapid growth in demand for wireless services generally, and in particular for wireless broadband services (such as

Verizon Wireless's EvDO), which have increased the bandwidth requirements for wireless backhaul at individual cell sites. Many competitive carriers have started vying to fulfill this rising demand. In particular, in recent years we have seen an increase in offers from cable operators and fixed wireless providers.

4. On June 20, 2007, for example, Verizon Wireless held a symposium in Charlotte, North Carolina with competitive providers of access and transport services to discuss our needs and requirements as we plan to augment and extend our network to meet the rising demand for wireless broadband services. More than a dozen competitive providers responded to the invitation, with the apparent intention of marketing themselves to Verizon Wireless. These providers included traditional carriers and fiber suppliers such as Level 3 and Time Warner Telecom, cable operators such as Comcast, Cox, and Time Warner Cable, and fixed wireless providers such as Tower Cloud.

5. The response that Verizon Wireless received at the symposium is consistent with its general experience in identifying competitive suppliers; in addition to the carriers that responded to the symposium invitation, Verizon Wireless is aware that Cablevision, Fibertech, Pennsylvania Power & Light (PPL), TTMI, Hudson Valley Datanet, and Oxford network all offer facilities that could be used for wireless backhaul services and FiberTower offers a fixed wireless alternative for wireless backhaul facilities. As a result of rising competition in the provision of wireless backhaul, Verizon Wireless has seen a steady decrease in prices for the DS1 and DS3 services traditionally used for wireless backhaul. Accordingly, Verizon Wireless supports the Commission's deregulatory policies, which has allowed this competition to develop.

6. In addition to purchasing backhaul services from third parties, Verizon Wireless also self-supplies its own backhaul in many cases. In some cases, Verizon Wireless uses microwave to provide backhaul services. Verizon Wireless has a number of licenses for two-way microwave throughout the country that it uses for this purpose. In Virginia, for example, approximately one-third of Verizon Wireless's total DS-1 equivalents used for wireless backhaul are supplied by Verizon Wireless itself using its own microwave facilities.

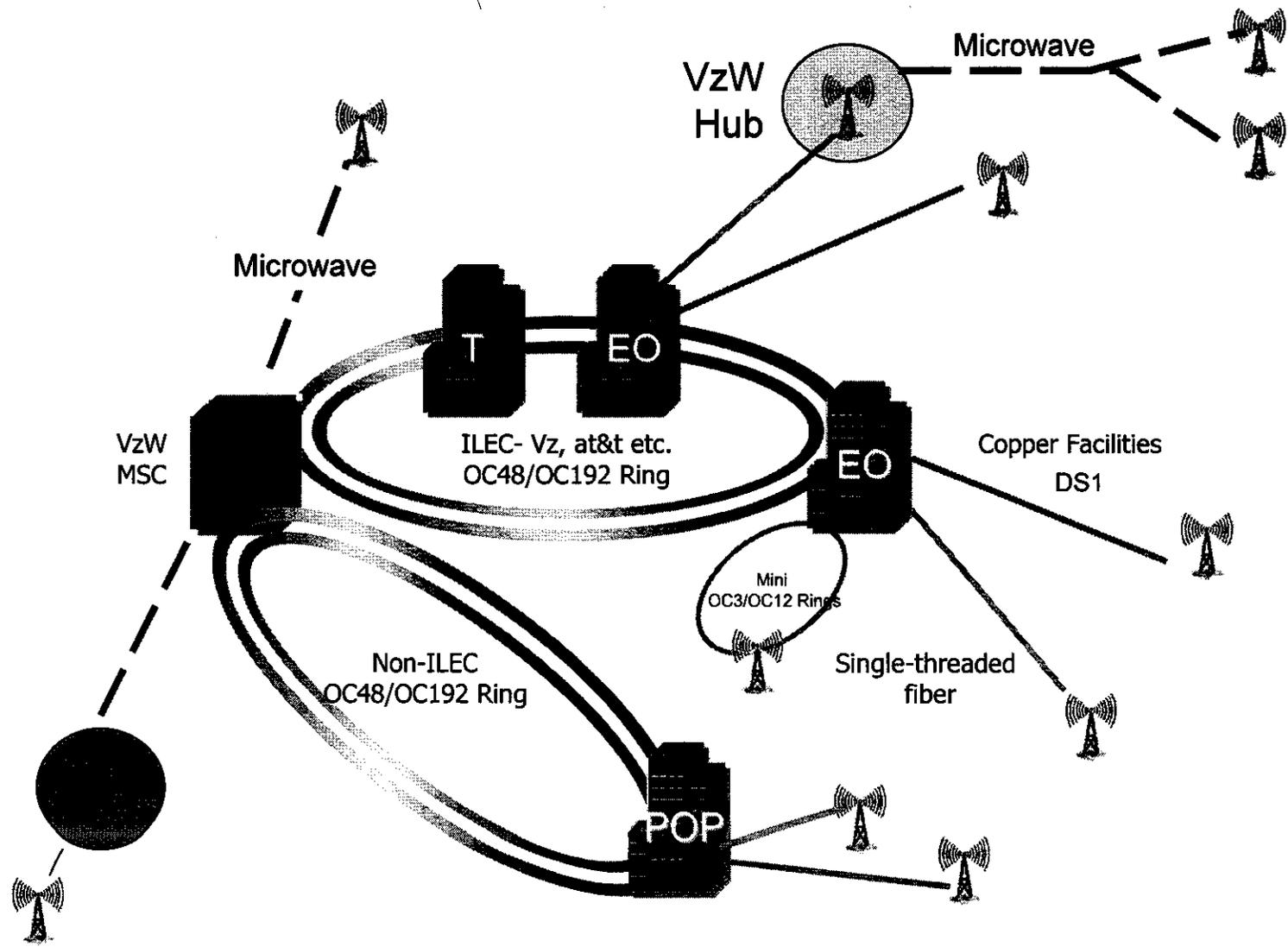
7. In Verizon Wireless's experience, it is particularly attractive from an economic perspective to deploy alternative technologies such as fixed wireless and microwave in more sparsely populated or remote areas. In metropolitan areas where there tend to be more competitive options, it is often more practical to lease a traditional high-capacity circuit.

8. This concludes my declaration.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on August 8, 2007

  
Cynthia Wells



# Opportunity Knocks at Cable's Door

**As wireless carriers look for more backhaul capabilities at less cost, Multiple Service Operators (MSO) arrive with plenty of options.**

By M.J. Richter

The mobile communications industry, one of the technology world's biggest success stories of all time, is discovering new meaning behind the old saying that "success has a price." For most of the past 25 years, the price in question has been that of building wireless networks to keep up with explosive customer growth. Today, wireless operators are focused on increasing their network efficiencies, particularly in wireless backhaul, to minimize Operating Expenses (OpEx) costs — both those incurred by their current networks and those that will be required to support new wireless applications and services.

On average, transport costs account for nearly 25% of wireless operators' OpEx costs, and 60%-75% of those transport costs are attributed to backhaul. Those numbers translate into a U.S. backhaul market valued at slightly more than \$2 billion in 2006 and could reach \$16 billion by 2009, according to the Cellular Telecommunications & Internet Association. GeoResults, a research firm, estimates that between 2005 and 2009, wireless operators around the world will spend \$31 billion on backhaul.

Since the wireless industry's inception, wireless carriers typically have leased T-1 lines from local exchange carriers to backhaul their cell-site TDM traffic. As their customer base has grown, so too have their backhaul needs. In 2005, wireless operators needed an average of three T-1s per cell site, according to GeoResults. By 2009, the average number of T-1s required to handle backhaul will be at least nine per cell site, a 200% increase. The number of voice Minutes of Use (MoU) continues to grow at a rapid pace (see Figure 1).

In addition to the growth of voice traffic, new, high-bandwidth Third-Generation (3G) data and multimedia services, such as mobile video, music downloads, news and mobile gaming, will continue to push mobile carriers' bandwidth requirements even higher. As a result, carriers are migrating their infrastructures towards IP-based networks, both to support new high-bandwidth data services and scale bandwidth as customers require. Growth of these new services is causing mobile carriers to look at alternate technologies, such as Ethernet, for transport and cell-site backhaul.

### Backhaul: "Up For Grabs"

For wireless carriers, a dual challenge is to accommodate growth in the number of customers, MoU and bandwidth while finding out how to reduce OpEx. Keeping OpEx in check is critical — it better positions wireless carriers to price services at a competitive point while still turning a profit.

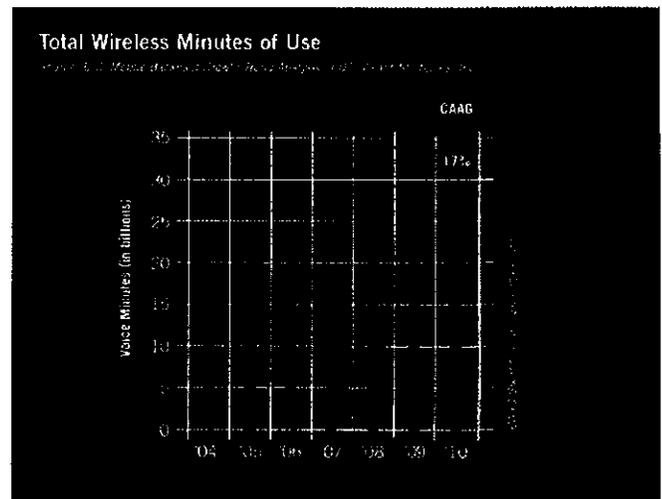
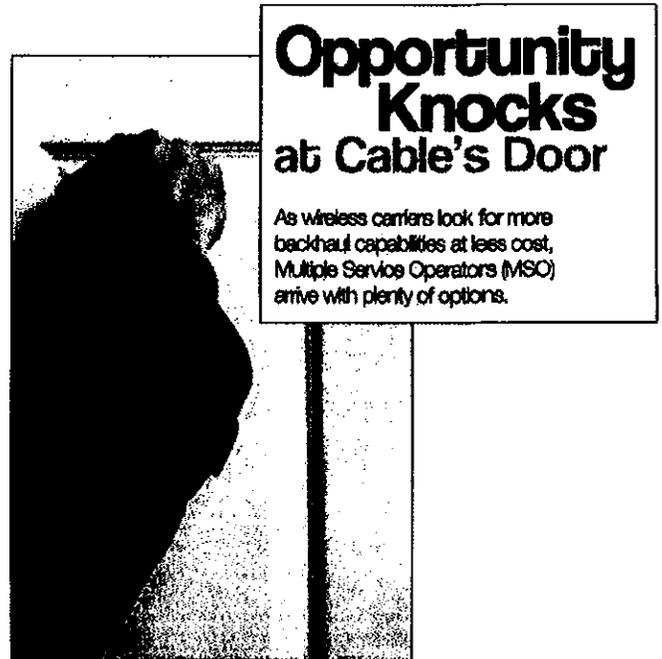


Figure 1. Total wireless minutes of use

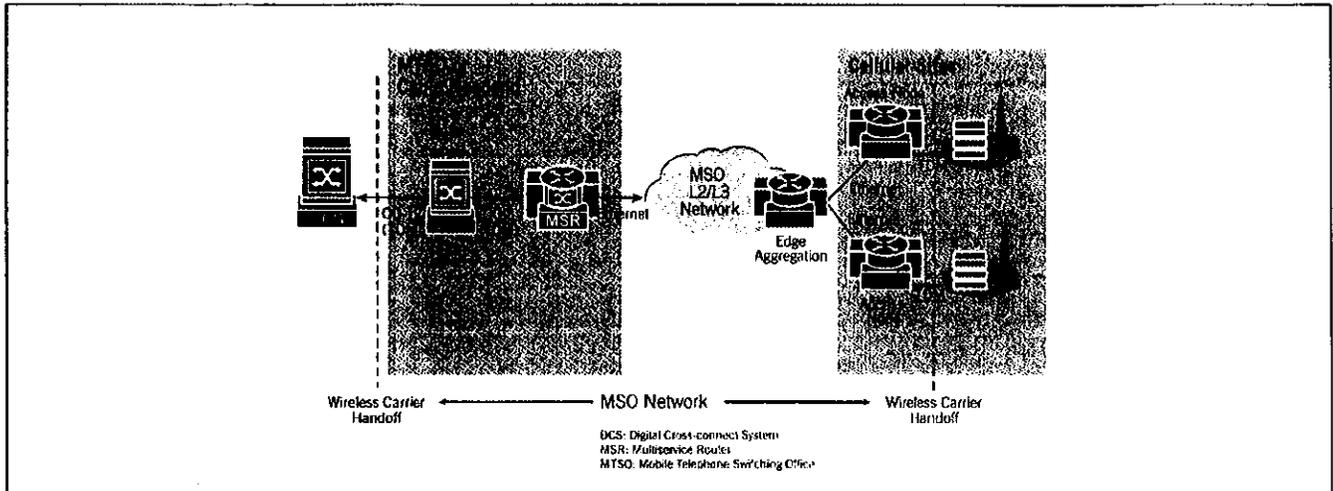


Figure 2. Ethernet backhaul network

"There is no question that wireless carriers are looking to grow revenue-generating service offerings while curbing OpEx, thereby increasing profitability," said Iyad Tarazi, vice president of network development at Sprint Nextel. "The amount of bandwidth required will, in many cases, require an alternative to traditional T-1 leased lines in order for this to make sense."

Most wireless carriers have identified backhaul as an important area in which to reduce expenses, by considering alternatives to leased T-1 backhaul lines, such as native Ethernet service. The wireless backhaul network currently is "up for grabs," says Peter Jarich, principal analyst for wireless infrastructure with Current Analysis, a research firm. Jarich believes MSOs are capable of capturing a significant share of the wireless backhaul market.

To do that, MSOs must have the facilities in place and be able to match the service-assurance capabilities and reliability that wireless operators currently get from the telcos, Jarich says. "They're in a pretty good competitive spot. It's something they're going to have to show they can do, but if they can, then clearly it's a nice market opportunity [for them]."

That opportunity coincides with a major strategic objective on the part of many MSOs: They have invested heavily in their fiber or Hybrid Fiber-Coax (HFC) infrastructures over the past several years to provide broadband and voice services to residential customers. Now, with these networks upgraded and enhanced, they are looking to leverage this base and utilize it to offer Ethernet services to enterprise customers, carriers and wireless providers.

The majority of wireless operators today seek more affordable T-1 services for their backhaul, while others prefer to buy native Ethernet services to handle backhaul. MSOs can readily position themselves to satisfy both requirements with fiber and/or coax facilities in place

near many cell sites. Oftentimes, MSOs only need to build short spurs to certain towers and deploy Ethernet access interfaces to create a unified data network to provide scalable backhaul service. In fact, many of the largest MSOs already are making forays into the market.

An example is Cox Business Services, a subsidiary of Cox Communications, the third-largest U.S. cable operator. Cox Business Services has been providing fiber-based wireless backhaul for more than a decade to most major wireless carriers. Additionally, Comcast, Time Warner Cable and other major MSOs offer Ethernet-based services today and are tailoring them to meet the demand of wireless carriers.

### Putting it All Together

An MSO can provide T-1-over-Ethernet services by deploying a multiservice edge device that offers both TDM and Ethernet interfaces at the cell site (see Figure 2). Using circuit emulation, this TDM traffic can be transported over an MSO's Layer 2/Layer 3 network. Additionally, an MSO can offer native Ethernet backhaul from the same device as Ethernet interfaces become more prevalent at the cell site. By pairing this multiservice edge device with a carrier-class multiservice router, MSOs can also offer guaranteed Quality of Service (QoS) for any type of access traffic over a Multiprotocol Label Switching (MPLS) network, along with verifiable Service Level Agreements (SLA). These factors help deliver the availability, reliability and scalability that wireless operators require.

Because wireless operators want to protect their embedded investments, they will continue to require an OC-3/12 handoff from the cell site. The MSO can address that need by deploying a Digital Cross-connect System (DCS) to function as an efficient, centralized headend. The DCS offers a central location to manage and troubleshoot T-1 circuits and collect statistics for SLA reporting.

"As long as we can get carrier-class Ethernet, using an Ethernet-based backhaul is a great solution," said Tarazi. "This goes a long way toward solving both the backhaul cost issue and migrating toward a more IP-based network, and companies that can offer that Ethernet pipe will be well-positioned."

Depending on its infrastructure, an MSO can pursue the wireless backhaul market right away by using its SONET-based network, or it can leverage its embedded Ethernet investments with incremental upgrades to edge devices that support T-1-over-Ethernet service. Either way, by implementing solutions that support guaranteed Ethernet and/or MPLS, MSOs have a significant opportunity to capture a share of the booming wireless backhaul market and generate significant new revenue streams. By leveraging the flexible solutions that Tellabs offers, MSOs can tap into these revenue streams with the efficiency and carrier-class reliability that wireless providers have come to expect.

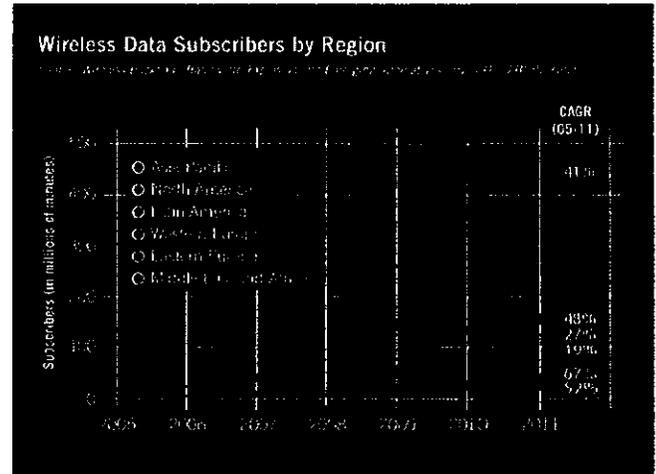


Figure 3. Wireless data subscribers by region

**North America**

Tellabs  
One Tellabs Center  
1415 West Diehl Road  
Naperville, IL 60563  
U.S.A.  
+1 630 798 8800  
Fax: +1 630 798 2000

**Asia Pacific**

Tellabs  
3 Anson Road  
#14-01 Springleaf Tower  
Singapore 079909  
Republic of Singapore  
+65 6215 6411  
Fax: +65 6215 6422

**Europe, Middle East & Africa**

Tellabs  
Abbey Place  
24-28 Easton Street  
High Wycombe, Bucks  
United Kingdom  
HP11 1NT  
+44 870 238 4700  
Fax: +44 870 238 4851

**Latin America & Caribbean**

Tellabs  
1401 N.W. 136th Avenue  
Suite 202  
Sunrise, FL 33323  
U.S.A.  
+1 954 839 2800  
Fax: +1 954 839 2828

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74.1713E Rev. A 10/06

# **ATTACHMENT E**

Dee May  
Vice President  
Federal Regulatory



1300 I Street, NW, Suite 400 West  
Washington, DC 20005

Phone 202 515-2529  
Fax 202 336-7922  
dolores.a.may@verizon.com

September 5, 2007

**Ex Parte**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

**Re: Petitions of AT&T Inc., BellSouth Corporation, the Embarq Local Operating Companies, and Qwest Under 47 U.S.C. § 160(c) for Forbearance from Title II and Computer Inquiry Rules with Respect to Broadband Services, WC Docket Nos. 06-125 & 06-147.**

Dear Ms. Dortch:

Yesterday, Susanne Guyer and Ed Shakin of Verizon spoke with Chris Moore, Commissioner Tate's legal advisor, to discuss the above proceedings. The positions set forth are consistent with those placed on the record. Verizon provided the attached documents as part of the discussion.

Sincerely,

A handwritten signature in cursive script that reads "Dee May".

Attachments

cc: C. Moore  
T. Navin  
D. Stockdale  
M. Maher  
W. Kehoe  
W. Dever  
C. Shewman

**The Commission Lacks Legal Authority to Issue an Order on Verizon's Broadband  
Forbearance Petition That Was Deemed Granted by Operation of Law.**

The Commission Cannot Issue an Initial Order Now on Verizon's Petition

When the March 19, 2006 statutory deadline for ruling on Verizon's petition for forbearance passed without Commission action, that petition was "deemed granted" by operation of law, thus terminating the proceedings on Verizon's petition. 47 U.S.C. § 160(c).

The Commission has held, in the analogous context of the "deemed lawful" provision in § 204(a)(3) that "[a]ppellate cases . . . have consistently found that the term 'deemed,' in this context, is not ambiguous" and "must be read" to mean "conclusive." *Streamlined Tariff Order*, 12 FCC Rcd 2170, ¶ 19 (1997).

The D.C. Circuit expressly upheld that determination. *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 406, 412 (D.C. Cir. 2002).

The Commission later found that, "[g]iven the Court's conclusion," the Commission "cannot adopt [a] reading" of "deemed lawful" as "ambiguous" and as creating merely a "presumption" of lawfulness that "may be rebutted." *Streamlined Tariff Reconsideration Order*, 17 FCC Rcd 17040, ¶¶ 4-5 (2002).

Therefore, for the Commission to act after a tariff has been "deemed lawful" or a petition has been "deemed granted," the Commission must conduct a new, separate "proceeding based on a preponderance of the evidence presented in [the new] proceeding." *Streamlined Tariff Order* ¶ 23.

This interpretation, as the Commission recognized in the § 204(a)(3) context, is required in order to give effect to the language of the statute." *Id.* ¶ 19.

If the Commission could, instead, adopt and release an order at any time after a petition has been deemed granted, it would "gut section 10" by treating "the statutory deadline [as] inconvenient," which the D.C. Circuit made clear "cannot be correct." *AT&T Inc. v. FCC*, 452 F.3d 830, 836 (D.C. Cir. 2006).

Petitioners that obtained the benefit of a deemed grant would rightly be reluctant to take advantage of that regulatory relief, in conflict with Congress's intention that forbearance would result in the "eliminat[ion] [of] outdated regulations . . . in a *timely* manner." 141 Cong. Rec. S7898 (June 7, 1995) (remarks of Sen. Dole) (emphasis added).

Precedent in the context of the Bank Holding Company Act, which similarly provides that certain applications "shall be deemed to have been granted" when the agency "fail[ed] . . . to act on" them within a specified time period, is to the same effect. *See Tri-State Bancorporation, Inc. v. Board of Governors of the Federal Reserve System*, 524 F.2d 562, 564, 566-68 (7th Cir. 1975) (vacating agency order purporting to deny an application that had previously been deemed granted by operation of law pursuant to 12

U.S.C. § 1842(b)); *North Lawndale Econ. Dev. Corp. v. Board of Governors of the Fed. Reserve Sys.*, 553 F.2d 23, 27 (7th Cir. 1977) (same).

The Commission, in its brief in *Core Communications*, suggested that it might be “open to the agency” to conclude that “deemed granted” is “ambiguous” and that the Commission could rule on a petition that already was granted by operation of law, though it conceded that the Commission had “not addressed th[at] issue.” Brief for Respondents at 31, *In re Core Commc’ns, Inc.*, Nos. 04-1368 *et al.* (D.C. Cir. July 25, 2005).

But a ruling that “deemed” is ambiguous, if reached by the Commission, would run squarely into the Commission’s own precedent holding that “deemed” is unambiguous and that it “cannot adopt [a] reading” of “deemed” as “ambiguous.” *Streamlined Tariff Order* ¶ 19; *Streamlined Tariff Reconsideration Order* ¶¶ 4-5.

It would also run afoul of the appellate decisions, including the D.C. Circuit’s decision in *ACS Anchorage*, that “have consistently found that the term ‘deemed,’ in this context, is not ambiguous” and “must be read” to mean “conclusive.” *Streamlined Tariff Order* ¶ 19.

In any event, in defending the tentative view expressed in its brief in *Core Communications*, the Commission expressly pointed to § 204(a)(3) and the Commission’s authority to conduct “further investigation” of a tariff that has been deemed lawful, and to “impos[e] . . . prospective remedies.” FCC *Core* Brief at 33-34. The Commission’s own precedent makes clear that such further investigation must occur in a new proceeding and on a new record, which the Commission has not done here.

#### The Commission Cannot Issue an Order on “Reconsideration” of the Deemed Grant

As the Commission has explained to the D.C. Circuit, when Verizon’s petition was deemed granted by operation of law, the Commission did not adopt or issue “a reviewable FCC order,” nor did it take “any reviewable agency ‘action.’” Brief for the FCC at 16, 21, *Sprint Nextel Corp. v. FCC*, No. 06-1111 *et al.* (D.C. Cir. oral arg. Oct. 15, 2007).

Reconsideration can occur only following “an order, decision, report, or action” by the Commission or by a designated entity within the Commission. 47 U.S.C. § 405(a); *see* 47 C.F.R. §§ 1.106(a), 1.429(a) (providing for reconsideration of “final” agency action only). Because the deemed grant of Verizon’s petition did not involve any agency action — as the Commission has told the D.C. Circuit — there is nothing to reconsider.

In any event, Congress set a strict 30-day time limit on the filing of petitions for reconsideration, and that time has long since passed, even assuming the deemed grant of Verizon’s petition could be treated as an action subject to reconsideration, which it cannot. *See* 47 U.S.C. § 405(a).

Similarly, the Commission’s rules establish a 30-day period in which the Commission can grant reconsideration on its own motion. *See* 47 C.F.R. § 1.108. Again, any such period has long since passed.

## Enterprise Broadband Services vs. Special Access Services

### Enterprise Broadband Services

1. Packetized services capable of 200 Kbps or more in each direction, such as:
  - IP-Based Services
  - Ethernet Services
  - ATM/Frame Relay
2. Optical-Level Services, such as:
  - WDM and DWDM-based services, like IOTS
  - SONET

These services do not include traditional TDM-based special access services.

#### Basis for Commission Analysis

- Nationwide

### Traditional Special Access Services

All TDM-based high capacity services, including DS1s and DS3s.

#### Basis for Commission Analysis

- MSA for Pricing Flexibility

#### In the TRO and TRRO, the Commission's Orders Established These Two Categories of Enterprise Broadband Services.

For packetized services, the Commission recognized that "the record shows that a wide range of competitors are actively deploying their own packet switches, including routers and DSLAMs to serve both the enterprise and mass markets." The Commission noted that allowing unbundled access to packetized facilities and services would "blunt the deployment of advanced telecommunications infrastructure by incumbent LECs and the incentive for competitive LECs to invest in their own facilities, in direct opposition to the express statutory goals authorized by section 706."

Likewise, with respect to optical services and facilities, the Commission found that there is "substantial deployment of competitive fiber loops at OCn capacity and competitive carriers confirm they are often able to economically deploy these facilities to the large enterprise customers that use them." Competing carriers are able to deploy new OCn-level facilities without significant difficulty because these types of facilities "produce revenue levels which can justify the high cost of loop construction, providing the opportunity for competitive LECs to offset the fixed and sunk costs of loop construction."

# **ATTACHMENT F**

Dee May  
Vice President  
Federal Regulatory

EX PARTE OR LATE FILED



August 31, 2007

EX PARTE COPY ORIGINAL  
ORIGINAL

1300 I Street, NW, Suite 400 West  
Washington, DC 20005

Phone 202 515-2529  
Fax 202 336-7922  
dokores.a.may@verizon.com

Ex Parte

FILED/ACCEPTED

AUG 31 2007

Federal Communications Commission  
Office of the Secretary

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

Re: Petitions for Forbearance from Title II and Computer Inquiries Requirements for Enterprise Broadband Services, WC Docket Nos. 06-125 and 06-147 and Special Access Rates for Price Cap Local Exchange Carriers, WC Docket No. 05-25 and RM-10593

Dear Ms. Dortch:

Yesterday, Ms. Sherry Ingram and I met with Mr. Chris Moore of Commissioner Tate's office. We reviewed Verizon's position as set forth in the above proceedings. No new data or positions were discussed. Mr. Moore requested additional information as follows:

1. What are the term commitments for our new Fiberconnect offering to Wireless carriers? The customer can sign up for 1, 3 or 5 year terms.
2. The Denver Post article on Time Warner Telecom's business success and having 900,000 buildings within just a mile of their fiber footprint. (Attachment 1)
3. A chart displaying which MSAs have what type of regulation – Price cap, Phase I or Phase II for both channel terminations and transport. (Attachment 2)

Please let me know if you have any additional questions.

Sincerely,

Attachments

cc: C. Moore  
T. Navin  
M. Maher  
C. Shewman  
D. Stockdale

No. of Copies rec'd. 0  
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# **ATTACHMENT 1**

Tech meltdown survivor secures its niche; Time Warner Telecom's conservative strategy allowed it to triumph as other companies failed.

By Andy Vuong

1054 words

Sat Aug 25, 12:00 AM ET

Denver Post

During the tech boom a decade ago, Time Warner Telecom took the conservative business approach of securing customer contracts before deploying fiber-optic lines to provide businesses with high-speed Internet connections. The strategy allowed it to emerge as one of the rare success stories from the ensuing telecom meltdown that swallowed a number of its free-spending competitors.

"A lot of the companies that got into the local fiber area - they were good at construction, not so good at putting customers on the network and customer service," said Donna Jaegers, a telecom analyst with Janco Partners.

After the wave of industry consolidation in recent years, Douglas County-based Time Warner Telecom is one of the few remaining stand-alone metro fiber companies that have much-coveted "last mile" connections into cities and individual buildings.

Among the 75 metro areas it operates in are Denver, Miami, San Francisco, Los Angeles, New York and Dallas.

Viewed by analysts as a strategic fit for long-haul network operators such as Denver-based Qwest and Broomfield-based Level 3, Time Warner Telecom has seen its stock price grow fivefold since 2005.

Earlier this month, Time Warner Telecom shares shot up 23 percent to about \$20 a share after it announced second-quarter financial results.

The company is on the verge of profitability, a milestone that may be reached in the fourth quarter or early next year, according to analysts.

"We secure the customer first, make sure we've got the right solution for their needs and their applications, and then we spend the capital to go out to build to them," said Mike Rouleau, senior vice president of business development and strategy for Time Warner Telecom, which employs 2,800 nationwide, including about 1,100 in Colorado.

Product of joint venture

The company's annual capital expenditures peaked in 2001 at \$425 million. It expects to spend \$240 million this year.

Time Warner Telecom's roots stem from a joint venture formed in 1993 by Qwest's

predecessor, US West, and New York-based Time Warner Inc.

US West poured \$2.5 billion into the Time Warner Entertainment venture. It included programming and entertainment assets such as HBO and Warner Bros. movies and music, as well as Time Warner Telecom, known then as Time Warner Communications.

The communications arm was initially assigned to develop and sell residential and business cable phone services using a hybrid optical-fiber and coaxial-cable technology.

In 1998, US West spun off its cable arm MediaOne (later acquired by AT&T, then Comcast), which included the investment in the joint venture.

Also that year, Time Warner Telecom separated from Time Warner Entertainment, kept the Time Warner name under a licensing agreement and shifted its focus to selling Internet, networking and voice services solely to business customers. The company went public in 1999 with an initial offering of \$14 a share. The stock surged to \$85 in 2000.

Time Warner Telecom initially generated 60 percent of its revenue from carriers such as WorldCom and AT&T.

In recent years, the company has transformed from being a "carrier's carrier" to one that serves more enterprise customers - large businesses such as HealthOne. Today, more than 60 percent of its revenue comes from the more lucrative enterprise customers and only about a third comes from wholesale agreements with other carriers.

Company escaped bankruptcy

Time Warner Telecom has yet to reach sustained profitability, only posting a small profit in 2000 largely because of a one-time boost in revenue. Like others in the industry, the company also struggled during the downturn as its stock price dropped to less than a dollar.

But armed with about \$1 billion in cash in 2001, the company avoided bankruptcy. Its shares have steadily rebounded amid industry consolidation.

Time Warner Telecom acquired Xspedius, also a metro fiber operator, last year for about \$580 million in cash and stock. The acquisition and successful integration added 31 markets to Time Warner's service territory, taking the number to 75.

"We have 900,000 buildings within just a mile of our fiber footprint," Rouleau said.

Time Warner Telecom trails only AT&T and Verizon in the number of Ethernet ports in service - which provide businesses with access to high-speed Internet and other services.

Consolidation has left Time Warner Telecom as one of the few remaining independent

local and regional fiber operators, said analyst Jaegers.

"During the telecom boom, it was easy for Qwest or Level 3 to get railroad rights of way and build long-haul fiber," said Jaegers, whose firm does business with Time Warner Telecom. "What was harder, and thus is a lot more scarce, was building local fiber."

Time Warner Telecom launched a rebranding effort last year after Time Warner Inc. began selling off its large stake in the company. The licensing agreement with Time Warner Inc., which no longer holds a stake in Time Warner Telecom, called for the company to change its name once the stake dropped to less than 30 percent.

Shortly before it was to announce a new name this summer, the company postponed the change until next June, spurring speculation that it would be acquired.

"They spent lots and lots of money on a rebranding effort," said Eric Paulak, a Boulder-based telecom analyst with market research firm Gartner. "Why do you spend all of that money only to quit what you were doing?"

"Our belief is why go through a rebranding effort twice - your new name and the name of the company that's going to acquire you. ... We fully think that Qwest is likely to buy Time Warner Telecom," Paulak said.

#### Takeover speculation

Qwest spokeswoman Diane Reberger said the company doesn't comment on speculation.

Rouleau said the one-year extension helps the company because it still has a couple of names going through the patent process.

"The name is only one part of the whole branding process," he said.

Jaegers said she doesn't believe Time Warner Telecom chief executive Larissa Herda's endgame is to be acquired.

"They have the same potential that MCI had in the early days as far as gaining some major market share in the enterprise space," Jaegers said.

Jaegers added a wrinkle to the takeover speculation, suggesting that cable company Comcast - a fierce Qwest competitor - could have interest in Time Warner Telecom.

"Comcast is talking a lot about getting into the business enterprise space," Jaegers said.

Comcast spokeswoman Tracy Baumgartner declined to comment.

**ATTACHMENT 2**

**Verizon MSAs****Summary**

<b>Number of MSAs by Pflex Phase</b>		
	<b>End User Chan Term</b>	<b>Transport (All Other)</b>
Phase II	24	58
Phase I	26	11
Price Cap	150	131
Grand Total	200	200

Verizon MSAs

2006 MSA	Verizon Pflex Status End User Chan Term
Akron, OH	Phase II
Binghamton, NY	Phase II
Bloomington-Normal, IL	Phase II
Bridgeport-Stamford-Norwalk, CT	Phase II
Charleston, WV	Phase II
Dallas-Fort Worth-Arlington, TX	Phase II
Erie, PA	Phase II
Fort Wayne, IN	Phase II
Hagerstown-Martinsburg, MD-WV	Phase II
Harrisburg-Carlisle, PA	Phase II
Huntington-Ashland, WV-KY-OH	Phase II
Lancaster, PA	Phase II
No MSA DE	Phase II
Parkersburg-Marietta-Vienna, WV-OH	Phase II
Pittsburgh, PA	Phase II
Reading, PA	Phase II
Richmond, VA	Phase II
Roanoke, VA	Phase II
San Francisco-Oakland-Fremont, CA	Phase II
Scranton-Wilkes-Barre, PA	Phase II
State College, PA	Phase II
Vineland-Milville-Bridgeton, NJ	Phase II
Virginia Beach-Norfolk-Newport News, VA-NC	Phase II
Williamsport, PA	Phase II
Albany-Schenectady-Troy, NY	Phase I
Allentown-Bethlehem-Easton, PA-NJ	Phase I
Altoona, PA	Phase I
Baltimore-Towson, MD	Phase I
Bangor, ME	Phase I
Boston-Cambridge-Quincy, MA-NH	Phase I
Buffalo-Niagara Falls, NY	Phase I
Durham, NC	Phase I
Elkhart-Goshen, IN	Phase I
Lakeland, FL	Phase I
Lynchburg, VA	Phase I
Manchester-Nashua, NH	Phase I
New York-Northern New Jersey-Long Island, NY-NJ-PA	Phase I
No MSA ID	Phase I
No MSA WV	Phase I
Philadelphia-Camden-Wilmington, PA-NJ-DE-MD	Phase I
Portland-South Portland-Biddeford, ME	Phase I
Portland-Vancouver-Beaverton, OR-WA	Phase I
Providence-New Bedford-Fall River, RI-MA	Phase I
Sarasota-Bradenton-Venice, FL	Phase I
Seattle-Tacoma-Bellevue, WA	Phase I
Springfield, MA	Phase I
Syracuse, NY	Phase I
Tampa-St. Petersburg-Clearwater, FL	Phase I

2006 MSA	Verizon Pflex Status
	End User Chan Term
Washington-Arlington-Alexandria, DC-VA-MD-WV	Phase I
Worcester, MA	Phase I
Burlington-South Burlington, VT	Price Cap
Elmira, NY	Price Cap
Johnstown, PA	Price Cap
Los Angeles-Long Beach-Santa Ana, CA	Price Cap
No MSA VT	Price Cap
Poughkeepsie-Newburgh-Middletown, NY	Price Cap
Riverside-San Bernardino-Ontario, CA	Price Cap
Santa Barbara-Santa Maria-Goleta, CA	Price Cap
Atlantic City, NJ	Price Cap
Flint, MI	Price Cap
Houston-Sugar Land-Baytown, TX	Price Cap
No MSA MD	Price Cap
No MSA VA	Price Cap
No MSA WA	Price Cap
No MSA WI	Price Cap
Oxnard-Thousand Oaks-Ventura, CA	Price Cap
Utica-Rome, NY	Price Cap
Wheeling, WV-OH	Price Cap
York-Hanover, PA	Price Cap
Anderson, IN	Price Cap
Ann Arbor, MI	Price Cap
Appleton, WI	Price Cap
Asheville, NC	Price Cap
Augusta-Richmond County, GA-SC	Price Cap
Austin-Round Rock, TX	Price Cap
Bakersfield, CA	Price Cap
Barnstable Town, MA	Price Cap
Battle Creek, MI	Price Cap
Beaumont-Port Arthur, TX	Price Cap
Bellingham, WA	Price Cap
Blacksburg-Christiansburg-Radford, VA	Price Cap
Bloomington, IN	Price Cap
Brownsville-Harlingen, TX	Price Cap
Canton-Massillon, OH	Price Cap
Champaign-Urbana, IL	Price Cap
Charleston-North Charleston, SC	Price Cap
Charlotte-Gastonia-Concord, NC-SC	Price Cap
Charlottesville, VA	Price Cap
Chicago-Naperville-Joliet, IL-IN-WI	Price Cap
Cincinnati-Middletown, OH-KY-IN	Price Cap
Cleveland-Elyria-Mentor, OH	Price Cap
Coeur d'Alene, ID	Price Cap
College Station-Bryan, TX	Price Cap
Columbia, SC	Price Cap
Columbus, OH	Price Cap
Corpus Christi, TX	Price Cap
Cumberland, MD-WV	Price Cap
Danville, IL	Price Cap
Danville, VA	Price Cap

2006 MSA	Verizon Pflx Status End User Chan Term
Davenport-Moline-Rock Island, IA-IL	Price Cap
Dayton, OH	Price Cap
Decatur, IL	Price Cap
<i>Detroit-Warren-Livonia, MI</i>	<i>Price Cap</i>
Dover, DE	Price Cap
El Centro, CA	Price Cap
Evansville, IN-KY	Price Cap
Florence, SC	Price Cap
Fond du Lac, WI	Price Cap
Fresno, CA	Price Cap
Glens Falls, NY	Price Cap
Grand Rapids-Wyoming, MI	Price Cap
Greenville-Mauldin-Easley, SC	Price Cap
Hanford-Corcoran, CA	Price Cap
Harrisonburg, VA	Price Cap
Holland-Grand Haven, MI	Price Cap
Indianapolis-Carmel, IN	Price Cap
Ithaca, NY	Price Cap
Jackson, MI	Price Cap
Janesville, WI	Price Cap
Kalamazoo-Portage, MI	Price Cap
Kankakee-Bradley, IL	Price Cap
Kennewick-Richland-Pasco, WA	Price Cap
Kingston, NY	Price Cap
Kokomo, IN	Price Cap
Lafayette, IN	Price Cap
Lansing-East Lansing, MI	Price Cap
Lebanon, PA	Price Cap
Lewiston-Auburn, ME	Price Cap
Lima, OH	Price Cap
Longview, TX	Price Cap
Longview, WA	Price Cap
Louisville/Jefferson County, KY-IN	Price Cap
Madison, WI	Price Cap
Mansfield, OH	Price Cap
McAllen-Edinburg-Mission, TX	Price Cap
Merced, CA	Price Cap
Michigan City-La Porte, IN	Price Cap
Milwaukee-Waukesha-West Allis, WI	Price Cap
Monroe, MI	Price Cap
Morgantown, WV	Price Cap
Mount Vernon-Anacortes, WA	Price Cap
Muskegon-Norton Shores, MI	Price Cap
Myrtle Beach-Conway-North Myrtle Beach, SC	Price Cap
Niles-Benton Harbor, MI	Price Cap
No MSA AZ	Price Cap
No MSA CA	Price Cap
No MSA IL	Price Cap
No MSA IN	Price Cap
No MSA MA	Price Cap
No MSA ME	Price Cap

2006 MSA	Verizon Pflex Status End User Chan Term
No MSA MI	Price Cap
No MSA MO	Price Cap
No MSA NC	Price Cap
No MSA NH	Price Cap
No MSA NV	Price Cap
No MSA NY	Price Cap
No MSA OH	Price Cap
No MSA OR	Price Cap
No MSA PA	Price Cap
No MSA SC	Price Cap
No MSA TX	Price Cap
Ocean City, NJ	Price Cap
Peoria, IL	Price Cap
Pittsfield, MA	Price Cap
Rochester, NY	Price Cap
Rockford, IL	Price Cap
Sacramento--Arden-Arcade--Roseville, CA	Price Cap
Saginaw-Saginaw Township North, MI	Price Cap
Salem, OR	Price Cap
Salinas, CA	Price Cap
Salisbury, MD	Price Cap
San Angelo, TX	Price Cap
San Antonio, TX	Price Cap
San Jose-Sunnyvale-Santa Clara, CA	Price Cap
San Luis Obispo-Paso Robles, CA	Price Cap
Sandusky, OH	Price Cap
Santa Rosa-Petaluma, CA	Price Cap
Sheboygan, WI	Price Cap
Sherman-Denison, TX	Price Cap
South Bend-Mishawaka, IN-MI	Price Cap
Spartanburg, SC	Price Cap
Spokane, WA	Price Cap
Springfield, IL	Price Cap
Springfield, OH	Price Cap
St. Louis, MO-IL	Price Cap
Stockton, CA	Price Cap
Sumter, SC	Price Cap
Terre Haute, IN	Price Cap
Toledo, OH	Price Cap
Trenton-Ewing, NJ	Price Cap
Tyler, TX	Price Cap
Victoria, TX	Price Cap
Visalia-Porterville, CA	Price Cap
Wausau, WI	Price Cap
Weirton-Steubenville, WV-OH	Price Cap
Wenatchee, WA	Price Cap
Winchester, VA-WV	Price Cap
Yakima, WA	Price Cap
Youngstown-Warren-Boardman, OH-PA	Price Cap
Yuba City, CA	Price Cap

## Verizon MSAs

2006 MSA	Verizon Pflex Status Transport (All Other)
Akron, OH	Phase II
Binghamton, NY	Phase II
Bloomington-Normal, IL	Phase II
Bridgeport-Stamford-Norwalk, CT	Phase II
Charleston, WV	Phase II
Dallas-Fort Worth-Arlington, TX	Phase II
Erie, PA	Phase II
Fort Wayne, IN	Phase II
Hagerstown-Martinsburg, MD-WV	Phase II
Harrisburg-Carlisle, PA	Phase II
Huntington-Ashland, WV-KY-OH	Phase II
Lancaster, PA	Phase II
No MSA DE	Phase II
Parkersburg-Marietta-Vienna, WV-OH	Phase II
Pittsburgh, PA	Phase II
Reading, PA	Phase II
Richmond, VA	Phase II
Roanoke, VA	Phase II
San Francisco-Oakland-Fremont, CA	Phase II
Scranton--Wilkes-Barre, PA	Phase II
State College, PA	Phase II
Vineland-Millville-Bridgeton, NJ	Phase II
Virginia Beach-Norfolk-Newport News, VA-NC	Phase II
Williamsport, PA	Phase II
Albany-Schenectady-Troy, NY	Phase II
Allentown-Bethlehem-Easton, PA-NJ	Phase II
Altoona, PA	Phase II
Baltimore-Towson, MD	Phase II
Bangor, ME	Phase II
Boston-Cambridge-Quincy, MA-NH	Phase II
Buffalo-Niagara Falls, NY	Phase II
Durham, NC	Phase II
Elkhart-Goshen, IN	Phase II
Lakeland, FL	Phase II
Lynchburg, VA	Phase II
Manchester-Nashua, NH	Phase II
New York-Northern New Jersey-Long Island, NY-NJ-PA	Phase II
No MSA ID	Phase II
No MSA WV	Phase II
Philadelphia-Camden-Wilmington, PA-NJ-DE-MD	Phase II
Portland-South Portland-Biddeford, ME	Phase II
Portland-Vancouver-Beaverton, OR-WA	Phase II
Providence-New Bedford-Fall River, RI-MA	Phase II
Sarasota-Bradenton-Venice, FL	Phase II
Seattle-Tacoma-Bellevue, WA	Phase II
Springfield, MA	Phase II
Syracuse, NY	Phase II
Tampa-St. Petersburg-Clearwater, FL	Phase II
Washington-Arlington-Alexandria, DC-VA-MD-WV	Phase II
Worcester, MA	Phase II
Burlington-South Burlington, VT	Phase II
Elmira, NY	Phase II
Johnstown, PA	Phase II
Los Angeles-Long Beach-Santa Ana, CA	Phase II

2006 MSA	Verizon Pflax Status Transport (All Other)
No MSA VT	Phase II
Poughkeepsie-Newburgh-Middletown, NY	Phase II
Riverside-San Bernardino-Ontario, CA	Phase II
Santa Barbara-Santa Maria-Goleta, CA	Phase II
<i>Atlantic City, NJ</i>	Phase I
Flint, MI	Phase I
Houston-Sugar Land-Baytown, TX	Phase I
No MSA MD	Phase I
No MSA VA	Phase I
No MSA WA	Phase I
No MSA WI	Phase I
Oxnard-Thousand Oaks-Ventura, CA	Phase I
Utica-Rome, NY	Phase I
Wheeling, WV-OH	Phase I
York-Hanover, PA	Phase I
Anderson, IN	Price Cap
Ann Arbor, MI	Price Cap
Appleton, WI	Price Cap
Asheville, NC	Price Cap
Augusta-Richmond County, GA-SC	Price Cap
Austin-Round Rock, TX	Price Cap
Bakersfield, CA	Price Cap
Barnstable Town, MA	Price Cap
Battle Creek, MI	Price Cap
Beaumont-Port Arthur, TX	Price Cap
Bellingham, WA	Price Cap
Blacksburg-Christiansburg-Radford, VA	Price Cap
Bloomington, IN	Price Cap
Brownsville-Harlingen, TX	Price Cap
Canton-Massillon, OH	Price Cap
Champaign-Urbana, IL	Price Cap
Charleston-North Charleston, SC	Price Cap
Charlotte-Gastonia-Concord, NC-SC	Price Cap
Charlottesville, VA	Price Cap
Chicago-Naperville-Joliet, IL-IN-WI	Price Cap
Cincinnati-Middletown, OH-KY-IN	Price Cap
Cleveland-Elyria-Mentor, OH	Price Cap
Coeur d'Alene, ID	Price Cap
College Station-Bryan, TX	Price Cap
Columbia, SC	Price Cap
Columbus, OH	Price Cap
Corpus Christi, TX	Price Cap
Cumberland, MD-WV	Price Cap
Danville, IL	Price Cap
Danville, VA	Price Cap
Davenport-Moline-Rock Island, IA-IL	Price Cap
Dayton, OH	Price Cap
Decatur, IL	Price Cap
Detroit-Warren-Livonia, MI	Price Cap
Dover, DE	Price Cap
El Centro, CA	Price Cap
Evansville, IN-KY	Price Cap
Florence, SC	Price Cap
Fond du Lac, WI	Price Cap
Fresno, CA	Price Cap
Glens Falls, NY	Price Cap
Grand Rapids-Wyoming, MI	Price Cap

2006 MSA	Verizon Pflex Status Transport (All Other)
Greenville-Mauldin-Easley, SC	Price Cap
Hanford-Corcoran, CA	Price Cap
Harrisonburg, VA	Price Cap
Holland-Grand Haven, MI	Price Cap
Indianapolis-Carmel, IN	Price Cap
Ithaca, NY	Price Cap
Jackson, MI	Price Cap
Janesville, WI	Price Cap
Kalamazoo-Portage, MI	Price Cap
Kankakee-Bradley, IL	Price Cap
Kennewick-Richland-Pasco, WA	Price Cap
Kingston, NY	Price Cap
Kokomo, IN	Price Cap
Lafayette, IN	Price Cap
Lansing-East Lansing, MI	Price Cap
Lebanon, PA	Price Cap
Lewiston-Auburn, ME	Price Cap
Lima, OH	Price Cap
Longview, TX	Price Cap
Longview, WA	Price Cap
Louisville/Jefferson County, KY-IN	Price Cap
Madison, WI	Price Cap
Mansfield, OH	Price Cap
McAllen-Edinburg-Mission, TX	Price Cap
Merced, CA	Price Cap
Michigan City-La Porte, IN	Price Cap
Milwaukee-Waukesha-West Allis, WI	Price Cap
Monroe, MI	Price Cap
Morgantown, WV	Price Cap
Mount Vernon-Anacortes, WA	Price Cap
Muskegon-Norton Shores, MI	Price Cap
Myrtle Beach-Conway-North Myrtle Beach, SC	Price Cap
Niles-Benton Harbor, MI	Price Cap
No MSA AZ	Price Cap
No MSA CA	Price Cap
No MSA IL	Price Cap
No MSA IN	Price Cap
No MSA MA	Price Cap
No MSA ME	Price Cap
No MSA MI	Price Cap
No MSA MO	Price Cap
No MSA NC	Price Cap
No MSA NH	Price Cap
No MSA NV	Price Cap
No MSA NY	Price Cap
No MSA OH	Price Cap
No MSA OR	Price Cap
No MSA PA	Price Cap
No MSA SC	Price Cap
No MSA TX	Price Cap
Ocean City, NJ	Price Cap
Peoria, IL	Price Cap
Pittsfield, MA	Price Cap
Rochester, NY	Price Cap
Rockford, IL	Price Cap
Sacramento-Arden-Arcade-Roseville, CA	Price Cap
Saginaw-Saginaw Township North, MI	Price Cap

2006 MSA

Verizon Pflx Status  
Transport (All Other)

Salem, OR	Price Cap
Salinas, CA	Price Cap
Salisbury, MD	Price Cap
San Angelo, TX	Price Cap
San Antonio, TX	Price Cap
San Jose-Sunnyvale-Santa Clara, CA	Price Cap
San Luis Obispo-Paso Robles, CA	Price Cap
Sandusky, OH	Price Cap
Santa Rosa-Petaluma, CA	Price Cap
Sheboygan, WI	Price Cap
Sherman-Denison, TX	Price Cap
South Bend-Mishawaka, IN-MI	Price Cap
Spartanburg, SC	Price Cap
Spokane, WA	Price Cap
Springfield, IL	Price Cap
Springfield, OH	Price Cap
St. Louis, MO-IL	Price Cap
Stockton, CA	Price Cap
Sumter, SC	Price Cap
Terre Haute, IN	Price Cap
Toledo, OH	Price Cap
Trenton-Ewing, NJ	Price Cap
Tyler, TX	Price Cap
Victoria, TX	Price Cap
Visalia-Porterville, CA	Price Cap
Wausau, WI	Price Cap
Weirton-Steubenville, WV-OH	Price Cap
Wenatchee, WA	Price Cap
Winchester, VA-WV	Price Cap
Yakima, WA	Price Cap
Youngstown-Warren-Boardman, OH-PA	Price Cap
Yuba City, CA	Price Cap

# **ATTACHMENT G**

**Dee May**  
Vice President  
Federal Regulatory



August 30, 2007

1300 I Street, NW, Suite 400 West  
Washington, DC 20005

**Ex Parte**

Phone 202 515-2529  
Fax 202 336-7922  
dolores.a.may@verizon.com

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

**Re: Petitions for Forbearance from Title II and Computer Inquiries Requirements for Enterprise Broadband Services, WC Docket Nos. 06-125 and 06-147**

Dear Ms. Dortch:

Yesterday, Verizon provided Mr. John Hunter of Commissioner McDowell's office the attached analyses and request that they be filed in the above proceedings.

Please let me know if you have any additional questions.

Sincerely,

A handwritten signature in cursive script that reads "Dee May".

Attachments

cc: J. Hunter  
T. Navin  
M. Maher  
C. Shewman  
D. Stockdale

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PRNewswire  
LIVE BROADCASTWelcome [\[Sign In\]](#)To track stocks & more, [Register](#)**Financial News**Enter symbol(s)    **Press Release**

Source: Time Warner Telecom Inc.

**Time Warner Telecom Grows Ethernet Market Share**

Tuesday August 21, 1:17 pm ET

- **Company increases share of Ethernet ports by 3 market share points**
- **Vertical Systems Group Ranks Time Warner Telecom One of Top 3 Providers**
- **Company continues to see high demand for Ethernet services**

LITTLETON, Colo., Aug. 21 /PRNewswire-FirstCall/ – According to a recent Ethernet market share analysis from Vertical Systems Group, Time Warner Telecom (Nasdaq: [TWTC](#) - [News](#)), a leading provider of voice, Internet and data solutions to businesses across the country, has increased its share of Ethernet ports in service by 3 market share points, or 28 percent, over the last six months. Vertical Systems Group provides in-depth, accurate, defensible statistics and analysis on networking markets with a focus on Ethernet services, IP VPNs, Frame Relay, Private Lines, ATM, DSL, MPLS, VPLS, and Internet Access.

"As customers realize the important benefits of Ethernet, our percentage of market share increases significantly," said Mike Rouleau, Senior Vice President, Strategy and Business Development for Time Warner Telecom.

"Businesses are benefiting from our innovation in delivering services based on this very easy to use, scalable, reliable and secure technology. Our Ethernet services easily connect their businesses from doorstep to doorstep, and city to city across the country. This report continues to prove that our decision to offer metro Ethernet four years ago to all our customers was the right one."

"Time Warner Telecom continues to be a leader in delivering Ethernet to businesses across the country, as evidenced by impressive gains from our year- end 2006 port share results," said Erin Dunne, Director of Research Services for Vertical Systems Group. "The company's strategy to focus on delivering Ethernet to business customers has established them as one of the top 3 providers of retail Business Ethernet services in the U.S."

Time Warner Telecom grew by 3 market share points, while AT&T, which this year also included ports it acquired from Bell South, actually shrunk by nearly 3 market share points. This halved the gap between Time Warner Telecom and AT&T and firmly establishes the company as one of the top 3 Ethernet service providers in the industry. The mid-year 2007 U.S. Ethernet port share totals are calculated using the installed base of actual U.S. Business Ethernet installations as of June 30, 2007. The report also underscores the fact that business customers are abandoning older Frame Relay and ATM technologies for the speed, flexibility and affordability of Ethernet.

Time Warner Telecom's metro Ethernet services are available in speeds from 1 Mbps to 10 Gbps, with national connectivity at speeds up to 1 Gbps. The company sells its Ethernet-based offerings to medium and large enterprise customers that require sophisticated and versatile high-bandwidth connections. Enterprise businesses that benefit from Ethernet connectivity are medical providers, financial institutions, military, government and education. Time Warner Telecom offers its Ethernet-based solutions to customers in 75 metropolitan markets across the U.S. and the District of Columbia as well as extending that coverage between markets with its more than 25,000 route mile fiber network and IP backbone.

**About Time Warner Telecom**

Time Warner Telecom Inc., headquartered in Littleton, Colo., provides managed network services, specializing in Ethernet and transport data networking, Internet access, local and long distance voice, VoIP and security, to enterprise organizations and communications services companies throughout the U.S. As a leading provider of

integrated and converged network solutions, Time Warner Telecom delivers customers overall economic value, quality, service, and improved business productivity. Please visit <http://www.twtelecom.com> for more information.

#### About Vertical Systems Group

Vertical Systems Group (<http://www.verticalsystems.com>) is recognized worldwide as a leading market research and strategic consulting firm specializing in defensible quantification of the networking industry. ENS is the industry's authoritative resource for "real world" analysis on broadband services, including Ethernet, IP VPNs, MPLS / VPLS, Frame Relay, ATM, Private Lines, Access, Fiber and more. To speak with an analyst at Vertical Systems Group, call Elizabeth Swanson at +1.781.329.0900 ext. 213 or [eswanson@verticalsystems.com](mailto:eswanson@verticalsystems.com).

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Source: Time Warner Telecom Inc.

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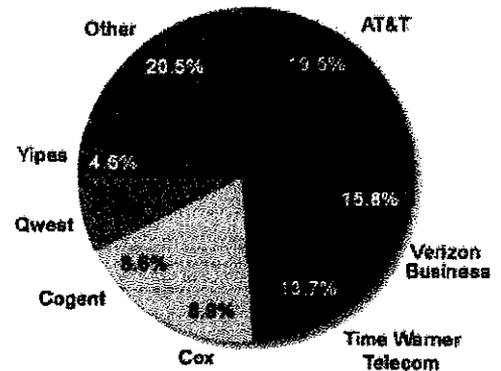
[Vertical in the News](#)

**Vertical Systems Group: Mid-Year 2007 Market Share Results for U.S. Business Ethernet Services**

WESTWOOD, MA, FOR IMMEDIATE RELEASE...Two of the top three providers of retail Business Ethernet Services in the U.S. gained port share for mid-year 2007 as compared to year-end 2006 results, according to Vertical Systems Group's latest market analysis. In addition, an MSO entered into the top tier for the first time, while several other major providers had share declines.

"As anticipated, competition in the Business Ethernet Services market heated up during the first half of 2007, resulting in considerable port share fluctuation," said Rick Malone, Principal at Vertical Systems Group. "The dense availability of low cost metro services boosted share for many regional U.S. Ethernet providers, including MSOs. Additionally, the aggressive deployment of new fiber infrastructure for residential applications enabled broader accessibility of native Ethernet services for adjacent business sites."

**Retail Business Ethernet Services Mid-Year 2007 U.S. Port Share**



Copyright Vertical Systems Group - ENS

AT&T, Verizon Business and Time Warner Telecom are the top three U.S. retail Business Ethernet Services providers. AT&T, including BellSouth (acquired in December 2006) holds the leading position with a 19.5% share of mid-2007 ports. AT&T's share declined as compared to the combined year-end 2006 shares for AT&T (13.6% port share) plus BellSouth (8.5%). Verizon Business is second overall with a 15.8% port share, up from 12.2% at year-end 2006. In third position is Time Warner Telecom with 13.7% of ports, a jump from 10.7% in 2006.

Cox Business, holding a port share of 8.9%, makes a debut in fourth position as the first MSO in the top tier of U.S. Business Ethernet providers. Cogent is fifth with an 8.6% share of the market, an increase from 8.2% at year-end 2006. Qwest (including OnFiber) is sixth at 8.4%, down from a 9.9% port share. Yipes is seventh with a share of 4.6%, a decline from 5.4% at year-end. Yipes recently announced its acquisition by Reliance Communications and will operate as a business unit within the company's FLAG Telecom operations.

Other Business Ethernet Services providers comprise an aggregate 20.5% of the market, including AboveNet, American Fiber Systems, Alpheus Communications, American Telesis, Arialink, Balticore, Bright House Networks, Charter Business, CIFNet, Cincinnati Bell, Comcast Business, CT Communications, Electric Lightwave, Embarq, Expedient, Exponential-e, Fibernet Telecom Group, FiberTower, Global Crossing, Globix, IP Networks, Level 3 (including Broadwing), LS Networks, Masergy, Met-Net, Neopolitan Networks, NTELOS, NTT/Verio, Optimum Lightpath, Orange Business, RCN, Savvis, Spirit Telecom, Sprint, SuddenLink, Surewest, Time Warner Cable, US LEC, US Signal, Verocity, Virtela, Windstream, XO, and others.

### **About Emerging Networks Service (ENS) Research Programs**

Detailed statistics for the Business Ethernet Services market are available exclusively through Vertical Systems Group's **ENS Research Programs**, which feature analyst support time plus unlimited web-based access to hundreds of research topics. Research content for the Ethernet Services market covers segmentation by application, target opportunity analysis, migration analysis for 10+ Mbps and Sub-10 Mbps services, revenue and port projections by speed (1+ Gbps, 100 Mbps, 10 Mbps, Sub-10 fiber, Sub-10 copper), fiber statistics, service pricing by segment and speed, market shares, a directory of service offerings worldwide, plus directories of service providers and equipment vendors. All research data is organized in an easy-to-use, interactive format using color graphics and key stats, with data tables designed for direct export to Excel. **ENS (Emerging Networks Service)** is a comprehensive "real world" resource that delivers in-depth coverage of network services markets coupled with extensive analysis of legacy to emerging services data that is more defensible than forecasts from a discrete "survey" or single market report. [Contact us now](#) for more information on a program that fits your organization's needs.

### **About Vertical Systems Group**

Vertical Systems Group (<http://www.verticalsystems.com>) is recognized worldwide as a leading market research and strategic consulting firm specializing in defensible quantification of the networking industry. **ENS** is the industry's authoritative resource for "real world" analysis on broadband services, including *Ethernet, IP VPNs, MPLS / VPLS, Frame Relay, ATM, Private Lines, Access, Fiber* and more. To speak with an analyst at Vertical Systems Group, call Elizabeth Swanson at +1.781.329.0900 ext. 213 or [eswanson@verticalsystems.com](mailto:eswanson@verticalsystems.com).

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### **Vertical Systems Group**

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# **ATTACHMENT H**

Dee May  
Vice President  
Federal Regulatory



August 29, 2007

1300 I Street, NW, Suite 400 West  
Washington, DC 20005

**Ex Parte**

Phone 202 515-2529  
Fax 202 336-7922  
dolores.a.may@verizon.com

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

**Re: Petitions for Forbearance from Title II and Computer Inquiries Requirements for Enterprise Broadband Services, WC Docket Nos. 06-125 and 06-147**

Dear Ms. Dortch:

Yesterday, Verizon met with Commissioner McDowell and Mr. John Hunter of his office regarding the above proceedings and responded to follow up questions they had today. Representing Verizon were Ms. Susanne Guyer, Mr. David Small and Mr. Mike Glover, and in the follow-up discussion Ms. Guyer and Mr. Edward Shakin. Verizon reviewed the positions and data presented in its Ex Parte filed in WC Docket No. 04-440 on February 7, 2006 and in the attached report by CIBC. Verizon emphasized the importance when conducting a Broadband analysis of doing so on a national basis, rather than on a local basis, due to the nature of the broadband marketplace. A national analysis for broadband services is also consistent with extensive Commission precedent.

Please let me know if you have any additional questions.

Sincerely,

A handwritten signature in black ink that reads "Dee May".

Attachment

cc: Commissioner McDowell  
J. Hunter  
T. Navin  
M. Maher  
C. Shewman  
D. Stockdale

July 30, 2007

Telecommunications Services

Sector Weighting:

**Market Weight**

## Enterprise Outlook Update: Pricing and Volume Continue to Improve CLECs Most Positively Leveraged

- We believe the enterprise market is set to reach a 5% revenue growth rate by YE08, from -5% at YE05, driven by stable spot pricing and the repricing of most legacy contracts. This outlook is supported by our industry growth models here, plus updated CLEC financial metrics.
- CLECs should expand their current 20% market share at a 1-2% rate, growing 10%-12%, or double the market rate. CLEC margins, now 20%, should widen by approximately 1% per year on economies of scale, price stability, more efficient technology, and consolidation.
- More difficult long-haul pricing would be a positive for most CLECs. The regulatory environment is improving for CLECs, as are prospects for consolidation (as evidenced by more than 20 mergers in the past two years). We spotlight five private CLECs here.
- Ultimately, we expect to see the emergence of a handful of major CLECs with a national footprint and revenues of \$2-3 billion each. Our top CLEC picks are PAET and TWTC, both of which can generate double-digit organic growth in revenue and EBITDA.

*All figures in US dollars, unless otherwise stated.*

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Investors should consider this report as only a single factor in making their investment decision.

**See "Important Disclosures" section at the end of this report for important required disclosures, including potential conflicts of interest.**

**See "Price Target Calculation" and "Key Risks to Price Target" sections at the end of this report, or at the end of each section hereof, where applicable.**

**Timothy Horan, CFA**  
1 (212) 667-8137  
Tim.Horan@us.cibc.com

**Ned Baramov**  
(212) 667-6102  
Ned.Baramov@us.cibc.com

**Srinivas Anantha, CFA**  
1 (212) 667-8189  
Srinivas.Anantha@us.cibc.com

**Suneer Maheshwary**  
(212) 667-6427  
suneer.maheshwary@us.cibc.com

## Table of Contents

CLEC Investment Thesis .....	3
CLEC Market Overview .....	6
Industry Outlook .....	8
Investment Positives .....	11
Well-Positioned CLECs Show Solid Operating Leverage .....	11
Improving Regulatory Environment .....	12
Competitive Advantages vs. Telcos.....	15
Quality of Service/Customer Care Drives Market Share .....	15
Low, Success-Based Costs.....	15
Investment Concerns .....	16
Change in Regulation.....	16
Cable MSOs Represent a Longer Term Risk .....	16
New Entrants/Increased Competition.....	17
Unforeseen Disruptive Technologies .....	17
NC Computing Drives Growth.....	18
Appendix 1. Expect More CLEC Consolidation / IPOs .....	20
Consolidation on the CLEC Front .....	20
Five Private Regional Consolidators .....	21
NuVox .....	21
One Communications.....	21
TelePacific.....	22
Integra/Eschelon.....	23
Broadview Networks.....	24
Appendix 2. M&A Transactions in the CLEC Sector .....	26
Appendix 3. CLEC vs. ILEC Line Metrics .....	27
Appendix 4. Coverage and Business Size Matrix .....	28

## Table of Exhibits

Exhibit 1.	AT&T/Verizon Quarterly Enterprise Revenue Growth (YoY) .....	3
Exhibit 2.	Competitive Service Providers' Public Market Multiples.....	5
Exhibit 3.	SMB Market Size and Estimated CLEC Share (2005-2009E).....	6
Exhibit 4.	Smart-Build vs. Facilities-Based Model.....	7
Exhibit 5.	Estimated U.S. Business Voice and Data Market, 2004-2009E.....	8
Exhibit 6.	Average Local Revenue per Business Line, 1989-2008E .....	9
Exhibit 7.	CLEC Summary Financial Metrics, 2002-2007E .....	10
Exhibit 8.	Revenues 2006-2007E .....	11
Exhibit 9.	EBITDA 2006-2007E.....	11
Exhibit 10.	Capital Expenditures, 2006-2007E .....	12
Exhibit 11.	Unlevered FCF, 2006-2007E .....	12
Exhibit 12.	Communications Intensity .....	18
Exhibit 13.	Total Business Market Size 2004-2009E.....	19
Exhibit 14.	Five Private CLECs to Keep an Eye on.....	20
Exhibit 15.	NuVox Serves Customers From 48 Locations in 16 States .....	21
Exhibit 16.	One Comm. Serves Above 160,000 Businesses in 16 States .....	22
Exhibit 17.	TelePacific Serves 75,000 Accounts in 2 States.....	23
Exhibit 18.	Integra/Eschelon - 11 Western and Midwestern States .....	24
Exhibit 19.	Broadview Serves 20 Markets in 10 Northeastern States.....	25
Exhibit 20.	Recent Acquisitions in the CLEC Sector .....	26
Exhibit 21.	Reported End-User Switched Access Lines.....	27
Exhibit 22.	% of Switched Access Lines that Serve Business Customers.....	27
Exhibit 23.	CLECs' Business Size vs. Geographic Coverage .....	28

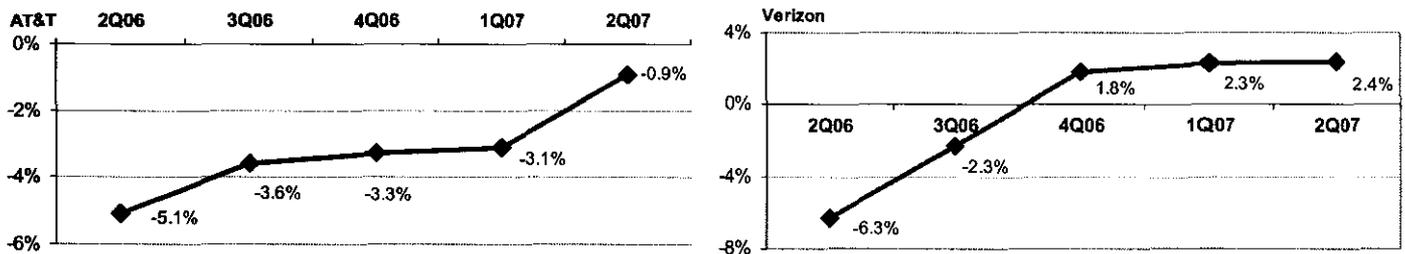
# CLEC Investment Thesis

We believe that enterprise will be the most attractive segment of the communications market over the next five years. Emerging carriers (or CLECs, competitive local exchange carriers) are most positively leveraged to these trends, in our view. The combination of improving pricing trends in the business segment, increased network capacity, and the introduction of differentiated IP communications/ computing services should enable CLECs revenues to grow by 10-12% per year for the next 3-4 years. This would reflect 5% industry growth plus gains of about 1-2% per year in market share.

Pricing improvements come from the consolidation among the large telcos and the long-distance industry and the absorption of the initial impact of IP-driven deflation (this absorption has yet to occur in the consumer market). These trends have enabled fairly stable voice/data spot pricing in the last 18 months. Voice pricing for large enterprises (voice is about half the industry's revenues) is now stable in the 2-3 cent range for long-distance, in our opinion. The improvement in revenue growth can be seen in AT&T/Verizon's results (see Exhibit 1). It is seeing growth not only in small business voice/data revenues, but also in access lines. Data revenue, which continues to grow as a percentage of total business revenue, is now probably close to half, as enterprises "webify."

The incumbents, particularly AT&T, needed to reprice a majority of their enterprise contracts (which usually run for three years), which were on average about 30% above spot prices. Now, this repricing is mostly over and likely to be finalized within the next 12 months. The migration to all IP voice and data services also put pressure on revenue growth, as customers spend about 20% less on telecom services. However, within 12-18 months business customers are back to spending the same amount on communication services. Much of the rebound comes from higher bandwidth and more high-level managed services. As the trend toward Network Centric computing accelerates, these drivers should continue for the next year.

**Exhibit 1. AT&T/Verizon Quarterly Enterprise Revenue Growth (YoY)**



Source: Company reports and CIBC World Markets Corp.

A majority of business customers are now at spot pricing and probably a quarter of business revenues have made the transition to IP. Another, more subtle, drag on revenues has been the grooming of wholesale incumbent traffic. This initiative has hurt both the industry's access revenues as well as wholesale revenues, but we expect it to be completed by year-end.

The current pricing umbrella provided by incumbents is key to the financial health of the CLEC industry. The main CLEC selling point remains differentiated/high quality services/customer care at slightly lower prices. We

estimate that CLECs' market share of volume is around 20%, with a revenue market share of 15%. This equates to approximately \$13 billion in revenues from the total \$90 billion business market opportunity. We believe CLECs could increase their market share to closer to 30%, which would provide almost 10 years of visible growth.

We expect future CLEC revenues to carry high incremental EBITDA margins (i.e., around 50%) for many companies, up from approximately 20% currently for emerging carriers and 35% for the incumbents. Because of this leverage, we expect 10%-12% revenue growth to drive EBITDA growth of 15%. Much of the positive leverage comes from the fact that CLECs have made significant investments in their underutilized networks and operating systems in the past decade. In fact, the industry in total is still trading at less than half investment value. This advantage can be seen in the strong financial results of most CLECs over the past two years. Free cash flow has even more leverage on this 15% EBITDA growth, and should be in the 25% range. Most CLECs are either already FCF positive or are less than a year away from turning cash flow positive.

We believe consolidation in this sector is inevitable, given the economies of scale and scope that it would drive. At present, there are approximately 400 CLECs serving about 21 million business lines (including VoIP). Most of the consolidation to date has taken place through private restructurings. In Appendix 1, we briefly review five private CLECs that have so far assumed the roles of consolidators in their geographic areas. Integra, One Communications, Broadview Networks, NuVox, and TelePacific are all privately owned operators that have managed to expand their footprint through selective acquisitions.

One of the keys to the recent success of the CLEC business model has been the ability to efficiently utilize incumbents' local loops with disruptive technologies. Using IP, VoIP and Ethernet, CLECs can provision lower-cost differentiated services. In addition, the CLECs have provided more targeted marketing, customer care and operating systems, partially as a result of having a focus on discrete segments of the business market (usually either small business, medium-size or, rarely, large business). For the most successful CLECs, this positive combination has come together only in the last few years.

Longer term, we believe successful CLECs will be those that bridge the gap between communications and computing. These carriers will have a dominant horizontal niche (a focus on one customer segment and avoidance of channel conflict), in our opinion.

Long-distance pricing has improved somewhat, in our view, but we still see a few suppliers with substantial amounts of overcapacity, which will likely pressure prices. In this regard, XO Communications announced yesterday that it was increasing its average bandwidth capacity from 400 Gbps to 1,200 Gbps. This is an enormous amount of new capacity, probably equal to all the capacity in Cogent's existing network. This is positive for our top two CLEC picks, for two reasons. First, PAET and TWTC lease long-haul transport in the spot market. Second, we believe that Level 3 will seek to minimize this risk by becoming more vertically integrated and investing in the metro and enterprise markets, probably through consolidation.

We see some near-term risk for the largest CLEC (and one of our top picks), Time Warner Telecom. Some of its short-term risks are the integration of Xspedius and lower than expected carrier/wholesale revenues. Wholesale, which makes up roughly 30% of the company's total top line, declined last quarter due to grooming initiatives by AT&T and Verizon. We expect the two telcos to continue moving traffic aggressively onto their own networks, until the process is completed, or by year-end.

Yet we remain very positive on TWTC's long-term potential as the only independent CLEC with a focus on mid- to large-sized enterprises. In addition, we believe that TWTC could in theory ultimately be acquired. PAETEC, another top pick, is not facing the same risks and is seeing strong fundamental results. PAET will report second quarter results on August 9th.

We reiterate our Sector Outperformer rating on Time Warner Telecom and PAETEC. TWTC is set to leverage its \$2 billion-plus network and business model investment. We look for 10% organic revenue growth in 2007, and we believe the company can potentially accelerate this rate in 2009-10 as the overall industry grows. The potential return of wholesale revenue growth could drive EBITDA increases of about 12%. PAET remains one of the few CLECs focused on mid-sized businesses. We expect the company to generate an organic double-digit revenue growth rate and expanding EBITDA margins (going to 22% from 18%) in the next 3-4 years.

## Exhibit 2. Competitive Service Providers' Public Market Multiples

		Closing Price	Market Cap.	Firm Value	2008E Revs	'08 Rev. Mult.	2007E Revs	Firm Value to 2008E EBITDA Consolidated		'08 Capex as a % of Revs	2008E Levered FCF Yield	2008E Net Debt/EBITDA
	Rating	7/30	(Mil.)	(Mil.)	(Mil.)		(Mil.)	EBITDA	Multiple			
Cogent (COI)	SP-S	\$29	1,409	1,459	236	6.2x	188	78	18.7x	12.0%	3.0%	0.6x
Eschelon Telecom (ESCH)	NR	\$29	552	672	371	1.8x	338	97	7.0x	16.5%	3.7%	1.2x
PAETEC (PAET)	SO	\$12	1,329	2,076	1,251	1.7x	1,052	244	8.5x	8.0%	5.4%	3.1x
Time Warner Tel. (TWTC)	SO	\$19	2,903	3,976	1,217	3.3x	1,096	426	9.3x	22.0%	2.7%	2.5x
Cbeyond Comm (CBEY)	NR	\$36	1,024	990	360	2.7x	278	61	16.3x	17.4%	(0.2%)	NM
Covad Comm. (DVW)	NR	\$1	258	362	547	0.7x	496	50	7.2x	4.7%	9.4%	2.1x

Source: Company reports and CIBC World Markets Corp.

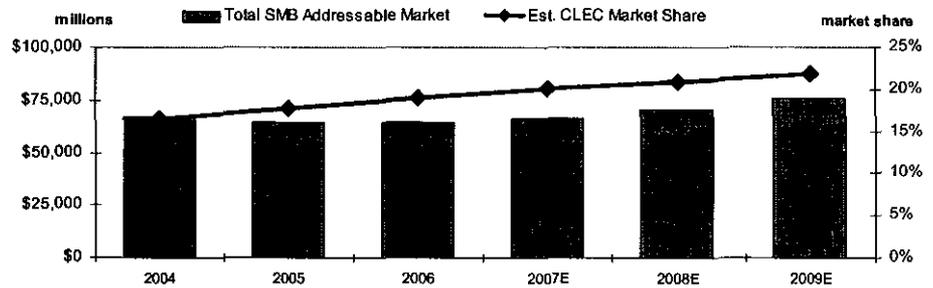
## CLEC Market Overview

We think the horizontally focused companies are best positioned to take advantage of the secular shift to NC computing. These companies either provide critical basic infrastructure (local access, long-haul fiber transport, wireless towers, data centers) or resell the last mile at a profit and provide superior NC applications (e.g., smart-build CLECs, ASPs).

The well-run, well-funded CLECs are in a strong position to gain share in the communications space. Most of these companies exemplify our horizontal segmentation thesis, as they are focused on a specific niche and provide high-quality/innovative services and superior customer support at a lower cost.

Most independent CLECs today, other than Time Warner Telecom, are targeting the \$66 billion small- and medium-sized business communication services market (roughly two-thirds of the total business communication services market). CLECs usually provide lower-cost services than incumbents, a better match for the needs of the SMB segment. The large incumbent telcos often have a service/cost advantage in the larger enterprise market, so it makes sense for the competitive carriers to focus on the SMB segment.

**Exhibit 3. SMB Market Size and Estimated CLEC Share (2005-2009E)**



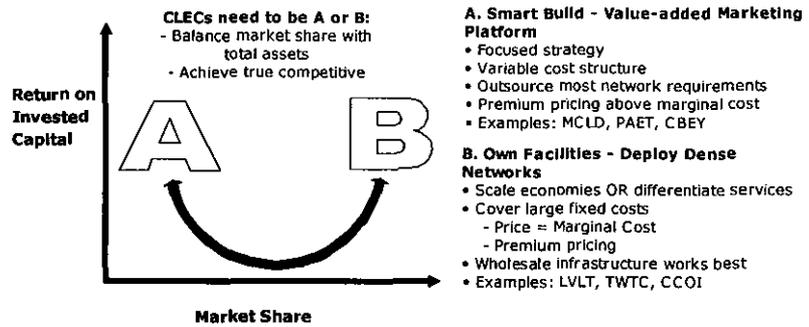
Source: Company reports and CIBC World Markets Corp.

CLECs currently serve about 25% of total business lines, or about 21 million lines. This report focuses on business lines, as the business segment (specifically SMB) remains the primary growth opportunity for CLECs. We estimate that the former AT&T and MCI represented roughly 10% of the 80 million business lines in the U.S. today.

Growing demand for data communications by small- and medium-sized businesses has created an opportunity for service providers and equipment vendors. Even the larger enterprises are relying more on their service provider for value-added applications (e.g., hosted or fully managed offerings, VPNs). This gradual shift toward network-based solutions and reliance on service providers for more than just a land line is creating a new market. CLECs have traditionally focused on value-added services and a more consultative approach to customers, which has allowed the CLECs to gain a respectable share in the newly shaped, services-driven market.

We see two CLEC strategies: 1) offer differentiated applications and competitive prices ("smart-build") and utilize the incumbents' last mile to cost-efficiently connect to the customer or 2) own the last-mile facilities (see Exhibit 4).

**Exhibit 4. Smart-Build vs. Facilities-Based Model**



Source: Company reports and CIBC World Markets Corp.

Time Warner Telecom, Level 3, and Cogent are examples of the second approach, facilities-based. These three companies operate unique assets that are difficult (probably impossible) to replicate. However, facilities-based CLECs need high market share to earn their cost of capital, a risky proposition in our view. We see few new CLECs owning last-mile facilities from inception (“build it and they will come” approach) due to the prohibitively high upfront investment needed for a complete network buildout (Level 3 and Cogent are still trading below their overall investment value). Facilities-based companies that have survived and thrived to this point should experience very high incremental returns on invested capital.

The first strategy, smart-build, is more widespread among competitive carriers. Using this strategy, CLECs can meet ROIC hurdles with relatively low market share. PAETEC, Eschelon and Cbeyond have focused on the service component of the business, rather than the delivery infrastructure. CLECs in this group prefer to invest in critical elements of the network (switches) and lease the last mile from the incumbents. The main focus remains on differentiated applications and competitive pricing.

For new start-ups, we prefer a smart-build approach, because it has higher ROIC, lower risk, and more easily takes advantage of new IP-based applications. Under this model, the CLEC captures its customers first and then fills in the needed assets in a cost-effective way. This model was not profitable in the 1990s as there was no efficient way to resell the telcos’ last-mile assets. CLECs today are utilizing the incumbents’ last-mile infrastructure cost effectively.

## Industry Outlook

We estimate the size of the total business and enterprise market for voice and data services to be above \$90 billion in 2007. We believe it is poised to grow 3-5% per year for the next three to four years. We estimate the small- to medium-sized business segment at roughly \$66 billion in 2007 and believe it is set to grow approximately 4-6% per year, primarily driven by data.

**Exhibit 5. Estimated U.S. Business Voice and Data Market, 2004-2009E**

	2004	2005	2006	2007E	2008E	2009E	YoY Growth					'04-'09 CAGR
							2005	2006	2007E	2008E	2009E	
<b>Total Business Lines</b>												
Circuit Switched	68.1	67.9	67.2	67.2	67.9	68.6	-0.3%	-1.0%	0.0%	1.0%	1.0%	0.1%
VoIP	6.5	9.5	13.3	17.0	20.0	23.0	46%	40.0%	28.0%	17.6%	15.0%	28.8%
<b>Normalized Access Lines</b>	<b>74.6</b>	<b>77.4</b>	<b>80.5</b>	<b>84.2</b>	<b>87.9</b>	<b>91.6</b>	3.7%	4.0%	4.6%	4.4%	4.2%	4.2%
<b>Lines Served by CLECs</b>												
Circuit Switched	17.3	17.5	17.6	17.8	17.9	17.9	1.1%	1.0%	0.8%	0.5%	0.4%	0.8%
VoIP	1.3	1.9	2.9	4.4	6.4	8.7	45.0%	52.0%	55.0%	45.0%	35.0%	46.2%
<b>Total</b>	<b>18.6</b>	<b>19.3</b>	<b>20.5</b>	<b>22.2</b>	<b>24.3</b>	<b>26.6</b>	4.2%	6.0%	8.4%	9.4%	9.6%	7.5%
<b>Revenue</b>												
Voice	\$58,900	\$54,407	\$51,541	\$48,946	\$47,587	\$47,415	-7.6%	-5.3%	-5.0%	-2.8%	-0.4%	-4.2%
Data	\$36,100	\$36,271	\$37,323	\$41,695	\$47,587	\$53,468	0.5%	2.9%	11.7%	14.1%	12.4%	8.2%
<b>Total Business Comm. Market</b>	<b>\$95,000</b>	<b>\$90,678</b>	<b>\$88,864</b>	<b>\$90,641</b>	<b>\$95,173</b>	<b>\$100,884</b>	-4.55%	-2.00%	2.00%	5.00%	6.00%	1.2%
<i>Est. CLEC Market Share</i>	11.6%	12.6%	13.7%	14.7%	15.5%	16.4%						
<b>Small- to Medium-Sized Business Market</b>	<b>\$66,500</b>	<b>\$64,381</b>	<b>\$63,542</b>	<b>\$66,188</b>	<b>\$70,428</b>	<b>\$75,663</b>	-3.2%	-0.6%	3.4%	6.4%	7.4%	2.6%
<i>Est. CLEC Market Share</i>	16.6%	17.8%	19.0%	20.1%	21.0%	21.9%						
<b>Total Addressable EBITDA</b>	<b>\$8,645</b>	<b>\$10,301</b>	<b>\$10,877</b>	<b>\$12,903</b>	<b>\$15,142</b>	<b>\$17,402</b>	19.2%	5.6%	18.6%	17.4%	14.9%	15.0%
<i>Average EBITDA Margin:</i>	13.0%	16.0%	17.0%	19.5%	21.5%	23.0%						
<b>Unlevered Free Cash Flow (\$ millions)</b>	<b>\$97</b>	<b>\$573</b>	<b>\$561</b>	<b>\$771</b>	<b>\$894</b>	<b>\$1,043</b>	493%	-2.1%	37.4%	16.0%	16.6%	60.9%
<i>Unlevered FCF (% of revenues)</i>	0.9%	5.0%	4.6%	5.8%	6.1%	6.3%						
<b>CLEC Service Revenue (\$ millions)</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>	<b>2007E</b>	<b>2008E</b>	<b>2009E</b>	<b>2005</b>	<b>2006</b>	<b>2007E</b>	<b>2008E</b>	<b>2009E</b>	<b>'04-'09 CAGR</b>
Local (incl. value added)	\$5,125	\$5,259	\$5,489	\$5,860	\$6,346	\$6,919	2.6%	4.4%	6.8%	8.3%	9.0%	6.2%
Long Distance	\$2,785	\$2,858	\$2,983	\$3,217	\$3,509	\$3,844	2.6%	4.4%	7.8%	9.1%	9.6%	6.7%
Internet/Data	\$2,451	\$2,604	\$2,843	\$3,250	\$3,787	\$4,440	6.3%	9.1%	14.3%	16.5%	17.2%	12.6%
Other (web hosting, VPN, etc.)	\$668	\$731	\$821	\$957	\$1,131	\$1,344	9.4%	12.3%	16.5%	18.1%	18.9%	15.0%
<b>Total Estimated CLEC Revenue</b>	<b>\$11,030</b>	<b>\$11,453</b>	<b>\$12,137</b>	<b>\$13,284</b>	<b>\$14,772</b>	<b>\$16,547</b>	3.8%	6.0%	9.5%	11.2%	12.0%	8.4%

Source: Company reports and CIBC World Markets Corp.

We guesstimate that total business lines at the end of 2007 will reach 84 million, growing at a normalized rate of roughly 4% per year. We include circuit-switched and VoIP lines in our estimated total count. We expect circuit-switched lines to grow modestly at around 1% per year in the next three years, while VoIP lines should grow at a healthy rate of 28% in 2007.

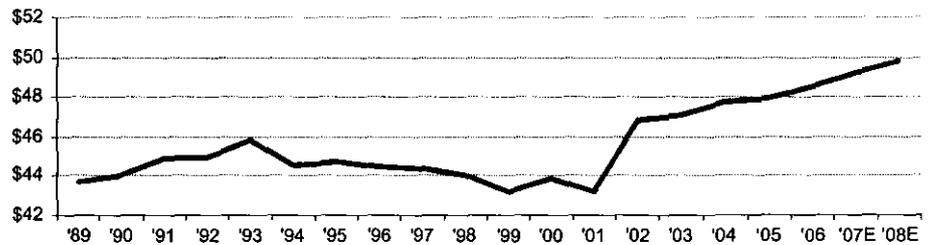
We believe that about 20% of business lines are now VoIP based. These lines can save customers 20% off circuit-switched prices. Large enterprises have been adopting VoIP primarily due to its unique features/functionality.

Most CLECs are focused on small- and medium-sized businesses, which make up roughly 70% of the overall business market. SMBs are the natural addressable market for competitive carriers. We model 4-6% annual growth, which does not include potential NC computing revenues. We think that medium-sized businesses in particular would be more willing to outsource a large portion of their IT needs if they could get good service at a reasonable price.

Average EBITDA margins for seven major CLECs are currently around 17%. While there is substantial deviation, the ones with proven business models are in the 25-30% range (see Exhibit 7). Given strong volume growth and stability in pricing, CLECs should be able to drive their margins by at least 1.5% per year.

If we are correct in our revenue forecast, we should see the CLECs report incremental EBITDA margins in the 40-70% range, depending on the level of imbedded capital investment. Many independent CLECs have difficult-to-replicate, underutilized assets, stable back-office systems and processing capabilities. Importantly, increased demand comes at a time when the number of competitors is at its lowest point in a decade and individual companies have ample excess capacity. Mergers and acquisitions are also driving operating efficiencies and higher margins.

**Exhibit 6. Average Local Revenue per Business Line, 1989-2008E**



Note: Beginning in 2002, additional monthly charges for touch-tone service are included in the monthly charge  
Source: FCC and CIBC World Markets Corp.

## Exhibit 7. CLEC Summary Financial Metrics, 2002-2007E

Revenue	2002	2003	2004	2005	2006	2007E	% YoY Growth					CAGR '02-07
							2003	2004	2005	2006	2007E	
XO Communication	\$ 1,260	\$ 1,110	\$ 1,300	\$ 1,434	\$ 1,412	\$ 1,394	(11.9%)	17.1%	10.2%	(1.5%)	(1.2%)	2.0%
Time Warner Telecom	696	655	651	706	812	1,096	(5.8%)	(0.7%)	8.6%	15.0%	34.9%	9.5%
PAETEC (pro forma)	540	674	770	897	1,125	1,251	25.0%	14.1%	16.5%	25.4%	11.2%	18.3%
Integra	97	121	138	155	345	383	24.3%	13.8%	12.3%	123.3%	11.0%	31.5%
Eschelon	122	141	158	228	275	337	15.6%	12.1%	44.3%	20.4%	22.9%	22.6%
Cbeyond	21	66	113	159	214	274	212.6%	73.0%	40.4%	34.4%	28.0%	67.2%
ITC*DeltaCom	418	462	584	520	488	487	10.3%	26.4%	(10.8%)	(6.3%)	(0.1%)	3.1%
Cogent	52	59	91	135	149	188	14.5%	53.6%	48.1%	10.2%	26.1%	29.3%
<b>Revenue</b>	<b>3,206</b>	<b>3,289</b>	<b>3,805</b>	<b>4,234</b>	<b>4,819</b>	<b>5,410</b>	<b>2.6%</b>	<b>15.7%</b>	<b>11.3%</b>	<b>13.8%</b>	<b>12.3%</b>	<b>11.0%</b>
<b>Gross Margin</b>	<b>2002</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>	<b>2007E</b>	<b>Gross Profit YoY Growth</b>					
XO Communication	58.5%	62.0%	57.5%	59.0%	57.7%	39.1%	(6.6%)	8.6%	13.1%	(3.7%)	(33.1%)	(5.9%)
Time Warner Telecom	59.8%	59.7%	59.9%	61.4%	61.9%	56.6%	(6.1%)	(0.4%)	11.4%	15.9%	23.4%	8.3%
PAETEC (pro forma)	54.8%	56.7%	55.9%	52.7%	45.9%	48.0%	29.4%	12.5%	9.8%	9.3%	16.3%	15.2%
Integra	62.7%	65.1%	66.6%	67.2%	69.0%	69.5%	29.0%	16.5%	13.2%	129.3%	11.8%	34.3%
Eschelon	54.4%	56.9%	60.0%	57.2%	57.3%	59.0%	21.0%	18.0%	37.6%	20.7%	26.5%	24.6%
Cbeyond	44.8%	66.7%	72.0%	70.4%	69.9%	69.9%	365.0%	86.7%	37.2%	33.6%	27.8%	82.7%
ITC*DeltaCom	53.4%	50.0%	49.8%	51.5%	49.9%	52.3%	3.3%	26.0%	(7.8%)	(9.2%)	4.7%	2.7%
Cogent	5.4%	20.9%	30.5%	36.5%	46.3%	55.1%	339.6%	124.3%	77.6%	39.6%	50.0%	106%
<b>Average Gross Margin</b>	<b>56.5%</b>	<b>58.0%</b>	<b>56.6%</b>	<b>57.1%</b>	<b>55.8%</b>	<b>51.4%</b>	<b>5.3%</b>	<b>12.9%</b>	<b>12.1%</b>	<b>11.4%</b>	<b>3.3%</b>	<b>8.9%</b>
<b>Adj. EBITDA margin</b>	<b>2002</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>	<b>2007E</b>	<b>Adj. EBITDA YoY Growth</b>					
XO Communication	0.0%	0.8%	1.5%	7.6%	6.6%	10.7%	NM	120.8%	441.3%	(14.5%)	60.7%	721%
Time Warner Telecom	27.2%	31.0%	32.4%	34.1%	35.5%	30.7%	7.2%	3.9%	14.3%	19.5%	16.8%	12.2%
PAETEC (pro forma)	7.7%	15.0%	15.5%	14.5%	13.7%	16.2%	143%	17.7%	8.8%	19.3%	30.8%	37.2%
Integra	8.2%	22.7%	26.0%	29.6%	31.2%	31.5%	244%	30.2%	27.9%	135%	11.9%	72.1%
Eschelon	(2.1%)	10.0%	16.2%	18.0%	20.2%	23.7%	NM	81.1%	60.9%	35.3%	43.9%	NM
Cbeyond	(157%)	(6.7%)	14.5%	16.0%	16.4%	16.1%	NM	(474.4%)	55.1%	37.7%	25.8%	NM
ITC*DeltaCom	27.3%	12.3%	11.8%	14.0%	12.4%	13.7%	(50.2%)	21.3%	5.3%	(16.7%)	10.6%	(10.1%)
Cogent	(59.1%)	(23.8%)	(13.8%)	6.0%	15.0%	25.6%	NM	(11.3%)	(164%)	177%	115%	NM
<b>Average</b>	<b>9.0%</b>	<b>12.0%</b>	<b>12.7%</b>	<b>15.9%</b>	<b>16.9%</b>	<b>19.4%</b>	<b>37.0%</b>	<b>23.2%</b>	<b>38.8%</b>	<b>21.5%</b>	<b>28.3%</b>	<b>29.6%</b>
<b>Capital Intensity</b>	<b>2002</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>	<b>2007E</b>	<b>Cap-ex YoY Growth</b>					
XO Communication	16.6%	7.4%	8.2%	6.0%	8.4%	11.8%	(60.5%)	28.8%	(18.6%)	37.8%	38.3%	(4.7%)
Time Warner Telecom	15.1%	19.8%	26.4%	23.0%	23.3%	22.8%	23.8%	32.3%	(5.5%)	16.4%	31.9%	18.9%
PAETEC (pro forma)	4.8%	4.3%	4.3%	8.1%	7.0%	6.8%	11.5%	13.8%	121.2%	8.1%	8.2%	26.8%
Integra	21.6%	14.7%	18.5%	17.5%	11.9%	11.8%	(15.2%)	42.7%	6.7%	51.3%	10.2%	16.6%
Eschelon	18.9%	18.4%	19.6%	15.8%	19.9%	15.9%	13.0%	19.2%	16.1%	51.8%	(2.0%)	18.4%
Cbeyond	136%	40.0%	21.0%	18.7%	20.1%	19.3%	(7.9%)	(9.4%)	25.4%	44.1%	23.2%	13.2%
ITC*DeltaCom	8.3%	9.8%	8.5%	5.4%	9.6%	11.2%	30.1%	9.6%	(42.8%)	65.5%	16.6%	9.5%
Cogent	145%	40.4%	11.1%	12.8%	14.4%	14.9%	(68.1%)	(57.8%)	71.1%	23.9%	30.1%	(18.0%)
<b>Average</b>	<b>16.3%</b>	<b>11.6%</b>	<b>11.8%</b>	<b>10.9%</b>	<b>12.3%</b>	<b>13.6%</b>	<b>(27.1%)</b>	<b>18.5%</b>	<b>2.1%</b>	<b>29.0%</b>	<b>23.5%</b>	<b>7.0%</b>
<b>Un-levered FCF (% rev)</b>	<b>2002</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>	<b>2007E</b>	<b>Unlevered FCF YoY Growth</b>					
XO Communication	(16.6%)	(6.6%)	(6.6%)	1.5%	(1.9%)	(1.1%)	(65%)	17%	(126%)	(219%)	NM	NM
Time Warner Telecom	12.1%	11.1%	6.0%	11.1%	12.2%	7.9%	(13%)	(47%)	102%	26%	(12%)	0.6%
PAETEC (pro forma)	2.9%	10.7%	11.2%	6.3%	6.7%	9.4%	360%	19%	(34%)	34%	54%	49.4%
Integra	(13.4%)	8.0%	7.6%	12.1%	19.4%	19.7%	(175%)	7%	80%	257%	13%	NM
Eschelon	(21.0%)	(8.4%)	(3.5%)	2.2%	0.3%	7.8%	(53%)	(54%)	(193%)	(82%)	2,869%	NM
Cbeyond	(292%)	(46.7%)	(6.5%)	(2.7%)	(3.6%)	(3.2%)	(50%)	(76%)	(41%)	82%	11%	NM
ITC*DeltaCom	19.0%	2.5%	3.3%	8.5%	2.8%	2.5%	(85%)	66%	127%	(69%)	(10%)	(31.2%)
Cogent	(204%)	(64.3%)	(24.9%)	(6.9%)	0.6%	10.7%	(64%)	(41%)	(59%)	(110%)	2,160%	NM
<b>Average</b>	<b>(7.3%)</b>	<b>0.4%</b>	<b>0.9%</b>	<b>5.0%</b>	<b>4.6%</b>	<b>5.8%</b>	<b>(105%)</b>	<b>165%</b>	<b>536%</b>	<b>5%</b>	<b>41%</b>	<b>NM</b>

## Notes:

Estimates for companies not covered by CIBC are from First Call or based on annualized 1Q07 results. Integra 2006 estimates include ELI acquisition. Eschelon results presented separately.

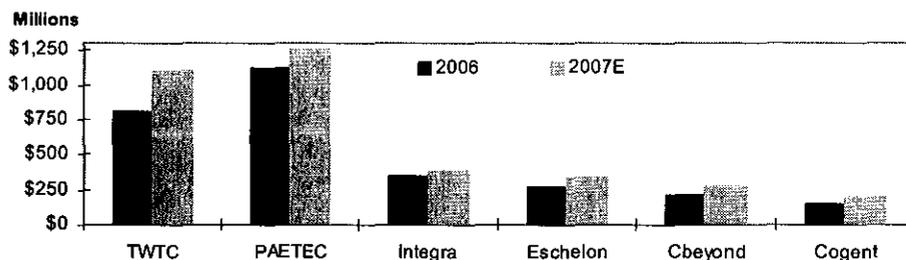
Source: Company reports and CIBC World Markets Corp.

## Investment Positives

### Well-Positioned CLECs Show Solid Operating Leverage

Even with double-digit revenue growth over the past five years, the CLECs we consider to be best positioned have expanded margins and kept cap-ex in check. We estimate emerging carriers, including TWTC, PAETEC, Integra/Eschelon, Cbeyond and Cogent, have grown revenues, both organically and through acquisitions, at a compounded annual rate (CAGR) of 18% over the past five years (vs. the average of 11% for most CLECs).

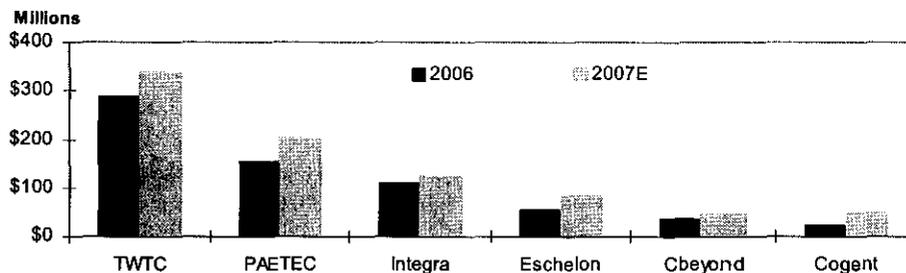
**Exhibit 8. Revenues 2006-2007E**



Source: Company reports, First Call, and CIBC World Markets Corp.

Well-positioned CLECs have grown EBITDA at an estimated CAGR of 40% over the past five years (vs. 30% for the average CLEC), while improving EBITDA margins to 23% of revenues in 2006 from 11% in 2002.

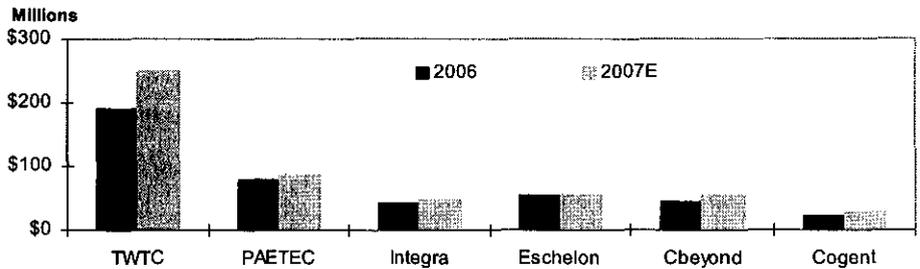
**Exhibit 9. EBITDA 2006-2007E**



Source: Company reports, First Call, and CIBC World Markets Corp.

Cap-ex over the same period has increased at a CAGR of 11%, while cap-ex as a percentage of revenues has declined nearly 360 bps to 15%. While capital intensity is likely to slowly trend down, we expect it will be mostly success driven, based on high incremental returns on capital.

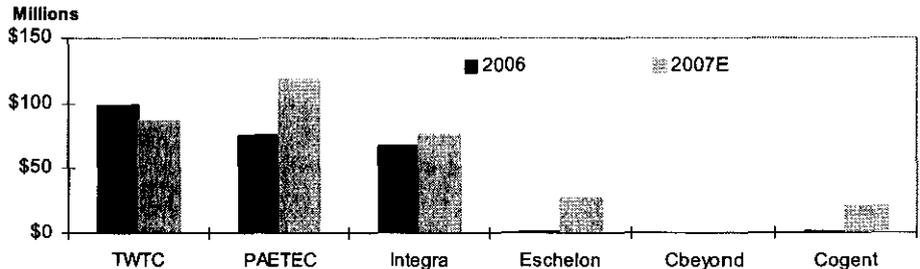
**Exhibit 10. Capital Expenditures, 2006-2007E**



Source: Company reports, First Call, and CIBC World Markets Corp.

Declining cap-ex (as a percentage of revenue) and solid growth in EBITDA have driven unlevered free cash flows (FCF) from a negative \$100 million in 2002 to a positive \$235 million in 2006. We estimate that from 2003 to 2006, unlevered FCF as a percentage of revenues has expanded from 4% to 8%.

**Exhibit 11. Unlevered FCF, 2006-2007E**



Source: Company reports, First Call, and CIBC World Markets Corp.

**Improving Regulatory Environment**

We review regulatory positives and concerns below. We believe the overall regulatory environment gradually shifts to favoring emerging carriers. Our central regulatory thesis in the last decade has been that competition, driven by new technologies, has driven and will continue to drive deregulation. However, over the last four years, under a dominant Republican administration, the incumbent carriers have had unprecedented regulatory wins.

Much of these regulatory wins have been to the detriment of CLECs (UNE-P, non dominant classification, etc.). Given the weak industry fundamentals, this did make some sense, but the administration clearly had laissez faire policies. Now, with the Democrats firmly in control of Congress and potentially the oval office, we think the regulatory environment will become much more difficult. The outcome of this shift is hard to predict, but we expect major telco consolidations to be very difficult and see a shift in regulatory sentiment back to favoring emerging competitors, a clear positive for the CLECs.

**Transition to IP Renders Current Rules Irrelevant:** We also note that there is still a mass of regulation that makes sense only in a circuit-switched context (e.g., access charges, tariffs, billing standards). The ongoing transition to an

all-IP world will shortly render most of these rules irrelevant, particularly with VoIP having hit mainstream.

The one piece of regulation that is still critical in an IP world is competitor access to the incumbents' last-mile infrastructure. We believe that at some point the CLECs will have enough market share either to build out some plant themselves or to use wireless technologies, which should force the incumbent telcos to start treating them as valuable customers.

**Last Mile Access Rules Expected to Remain Unchanged:** There is some industry concern that regulators will give the incumbents non-dominant status, and they would then raise rates for UNE-Ls (the first mile copper loops that CLECs resell). Our conversations with industry participants and regulatory representatives lead us to believe that unbundled loops in all their different forms are sacrosanct to regulators and pretty well accepted by incumbents. Our contacts do not point to any overturning of the FCC's decision to keep unbundled loops in place. Further, we expect pricing of wholesale special access UNE T-1s and EELs to remain reasonable and for carriers to continue to look for lower costs through master purchase agreements and network grooming. Despite our optimism, there is still a risk that the incumbents won't need to provision UNE-Ls at some point in the future.

**Forbearance Petitions Threaten Last Mile Access in Competitive Markets:** While we believe that UNE loops availability and pricing are unlikely to change, the major threat is market-by-market forbearance petitions from ILECs. For example Qwest's forbearances for elimination of UNE pricing requirements in Omaha drove average costs per T-1 from \$76 to \$200. Intense competition from Cox Communications relieved Qwest from providing transmission facilities to competitors. Qwest still provides UNE loops but at "just and reasonable" prices. The company has also petitioned the FCC for similar forbearances in the Denver, Minneapolis, Seattle and Phoenix metropolitan areas.

Verizon is also seeking forbearance from FCC rules on providing some selected network elements, such as last-mile facilities, in six northeast metropolitan service areas.

While the FCC requires that incumbent local exchange carriers continue providing T-1 UNE loops in most situations, this does not cover high-density central offices. If Verizon petition is granted, the price some CLECs pay to obtain access to T-1 loops in the 6 northeast markets will likely increase. We expect such higher costs to be passed on to the end users or pressure margins.

**Telco Copper Plant Retirement:** FCC rules currently permit telcos to retire last mile copper loop facilities without any regulatory oversight. As telcos deploy more fiber infrastructure, which the FCC has declared as not subject to unbundling requirements, telcos may eliminate last mile copper access to customers. To date, Verizon has filed more than 80 notifications of copper plant retirement affecting a few of its exchanges. Several CLECs petitioned the FCC in January 2007 to change copper plant retirement rules. The FCC's consideration of this petition could have longstanding effects on the CLECs' ability to have access to last-mile facilities throughout the country, as "me too" petitions in other markets are likely to follow. The FCC has solicited public comments on this petition but has not yet made any decision. The deadline for FCC to address the Verizon petition is September 2, 2007.

**Wireless Spectrum Auction:** The FCC recently issued its draft rules for the upcoming 700Mhz spectrum auction, which would potentially enable the entry of a wireless wholesale provider. The draft rules are very much in tune with our network-centric computing and horizontal segmentation thesis, but could be detrimental to incumbents and increase competition among CLECs. The

valuable, high quality 700Mhz spectrum would likely facilitate the entry of a new national operator.

**TELRIC (Total Element Long-run Incremental Cost) Proceeding:** In 2003, the FCC initiated a proceeding to address the methodology used to price UNEs and to determine whether the current methodology, TELRIC, should be modified. Specifically, the FCC is evaluating whether adjustments should be made to allow incumbent local exchange carriers to recover their actual embedded costs and whether to change the time horizon used to project the forward-looking costs. There has been no progress on the TELRIC rulemaking, and we don't expect significant changes in 2007. Potential ruling could negatively impact CLEC margins.

**Special Access Proceeding:** In January 2005, the FCC released a Notice of Proposed Rulemaking (NPR) in which it considers the adoption of new special access pricing regulations that could potentially result in lower special access prices charged by ILECs or limits to the degree of pricing flexibility ILECs will have. Costs are currently determined by incumbents' special access pricing, which are subject to price-cap rules as well as pricing flexibility rules that permit ILECs to offer volume and term discounts and contract tariffs and remove special access service in a defined geographic area from price-cap regulation based on the competitive landscape.

**Intercarrier Compensation:** An industry task force produced a proposal, the Missoula plan, which was filed with the FCC on July 24, 2006. The Missoula Plan would impose a uniform compensation rate applicable to all types of traffic that a carrier terminates, change the rules of interconnection and transiting, and partially preempt state authority over intrastate access rates. The plan also proposes to establish three tiers of payments whereby large, non-rural wireline and wireless carriers would charge less.

The growing scale and scope of CLECs, in addition to their focus on more dense metropolitan areas, makes them vulnerable to plans aiming to aid the smaller, more rural service providers. The Missoula plan, if adopted as proposed, would result in meaningful reductions in access revenues and increased costs of interconnection for CLECs. Some of the cost increases could potentially be made up by passing them over to customers. Positively, the adoption of any reform would require a long transition period (of at least 3-5 years in our view).

**Changes in USF funding mechanism:** A revised USF may affect the contributions CLECs are required to make to the program (the current contribution is determined as 10.9% of interstate and international revenue). As with the potential increase of last-mile costs, higher USF contributions will either be passed on to end users or compress margins (most likely a combination of both).

**Protections as Part of the Large Telco Merger Conditions:** The transactions between T/SBC, VZ/MCI, and T/BLS have led to favorable for the CLECs merger conditions. Among the key benefits are: extended periods of price caps on special access lines, fixed UNE and private line service rates, commitments not to seek forbearance from the UNE-L and transport obligations, extension of effective interconnection agreements, among others.

**Beneficial Pricing Rules:** CLECs are also obtaining progressively greater pricing flexibility. The number of states no longer reviewing CLEC rates reached 25 this year, versus 21 states where CLEC rates are still subject to flexible regulation (or where price deregulation is dependent on competitive intensity). Another 5 states apply some form of regulation to specific services (e.g. review rates for basic exchange service or require CLECs to set rates at or below those of incumbents).

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## **Competitive Advantages vs. Telcos**

### **Quality of Service/Customer Care Drives Market Share**

The very nature of SMBs calls for a more personalized service. Evolving businesses frequently change their communication needs and require more tailored solutions. The incumbents have traditionally had only a direct sales force for larger businesses, as their employee costs are relatively high. The CLECs pay lower success-based commissions and can profit from sales people adding about \$3,000 per month in incremental revenues (or roughly \$200,000 per year in recurring revenues). In reality, the incumbents never needed to expand their sales force in this segment of the market (primarily relying on call center sales) because they were a virtual monopoly.

Flexibility to pick and choose the best end-user segments to focus on and the best customers within those segments. For example, the business market usually subsidizes the residential business.

Ability to deploy differentiated bundles and price them without having to worry about cannibalizing existing services.

The incumbents still have 75% market share, so there is plenty of room to grow organically.

CLECs can be more nimble in providing new value-added or IT services.

### **Low, Success-Based Costs**

No legacy issues, such as regulatory pricing, operating systems, facilities, retiree healthcare and pension costs, carrier of last resort, etc.

Unionized employees are not typical for CLECs.

Smart-build CLECs can capture the customers, then backfill with facilities with very high incremental returns on capital.

## Investment Concerns

The most popular concern among investors remains the prior boom-bust cycle of CLECs and the relatively short period since competitive carriers have become free cash flow positive. We note that CLECs are now using differentiated technologies to sell differentiated communication services with a high degree of customer care (something that appears to be declining at the large telcos). In addition, CLECs are now benefiting from improved pricing environment, changed focus to serving SMBs, and economies of scale.

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## Change in Regulation

There are always ongoing proceedings and initiatives that address last-mile resale access and costs. We are more focused on the regulatory issues, as we don't expect new legislation to pass at the federal level in the next few years. The biggest concern here would be either a limitation on interconnection (unlikely), or increased prices for UNE-Ls and special access. We believe the Democratic Congress is protecting new entrants, and if the Democrats win the White House, this will shift to outright assistance, in our view.

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## Cable MSOs Represent a Longer Term Risk

The first business services by cable operators are primarily focused on data (e.g., private line services, basic VPNs and high-speed Internet access), with some MSOs planning to commit more resources to the provisioning of voice services later in the year.

Comcast has launched a \$3 billion, 5-year plan to enter the SMB market and management expects to capture 20% market share by the end of 2011. The company plans to spend \$250 million in 2007. We believe Comcast, which covers 40% of the U.S., poses a threat to CLECs. The company unveiled a new 200-worker business support center in March, specifically dedicated to handling requests of business customers, regardless of their location.

Cox (which serves more than 13,000 businesses in California) and Cablevision are also gaining momentum in the SMB market. Time Warner Cable plans to launch a business voice offering by January 2008.

However, we note that serving the business community demands an increasingly complex set of provisioning and support capabilities. MSOs have historically deployed services in residential markets, and new network buildouts are necessary to meaningfully penetrate the SMB market. MSOs' current business offerings primarily target home offices.

In addition, cable companies need to improve their history of multi-day repair times, as business-critical systems/applications must be repaired in a matter of hours, not days.

Lastly, the small- and medium-sized business customer is typically constrained by a limited budget and IT expertise. SMBs increasingly rely on service providers for hosted or on-demand solutions, avoiding the upfront investment in hardware, and management/maintenance of software. The demand for hosted and managed solutions would require MSOs to include new capabilities in their offerings.

On the whole, we believe the cable companies pose a risk to the CLECs. The MSOs have a clear incentive to service the business market, as this is a highly profitable way to leverage their existing hybrid fiber coaxial networks. However, we expect this will take time to play out, and any meaningful impact is likely a few years away, allowing sufficient time for the CLECs to gain substantial market share and offer a differentiated NC computing service.

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## **New Entrants/Increased Competition**

While we believe barriers to entry are relatively high, a potential drop in the cost of capital could also enable multiple new providers to enter the market, increasing the overall competitive environment.

This is largely what happened with the last CLEC boom/bust cycle. However, given how fresh that bubble is in investors' minds, we do not expect this market to make another irrational turn.

Larger carriers, such as Level 3, XO Communications and Qwest, could increase their investment and focus on providing local services to small- and medium-sized business customers, intensifying the overall competitive environment for the CLECs.

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## **Unforeseen Disruptive Technologies**

Innovation remains the largest risk, potentially introducing more competition. Wireless access technology (e.g. Wi-Fi, WiMAX), in particular, could make many existing business models obsolete. The recent roaming/buildout agreement announced by Sprint and Clearwire is expected to result in a vast footprint, covered with wireless broadband, providing a third high-speed Internet pipe to businesses and consumers.

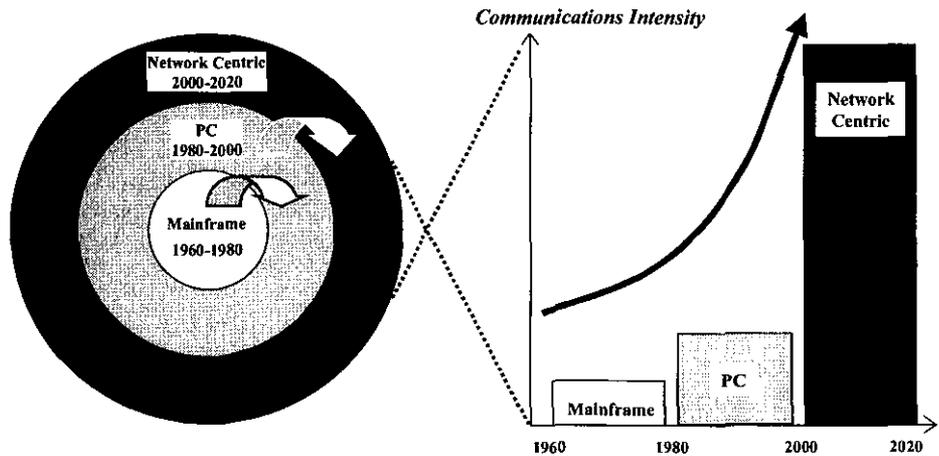
While difficult to predict, wireless or truly differentiated VoIP technologies could substantially lower the cost structure. Low-cost IP transport and voice over IP are largely what drove prices down so much in the last six years.

## NC Computing Drives Growth

We believe the growth of the enterprise communications market will be driven by continued adoption of the network-centric computing model (enabled by ongoing advances in access and transport technologies), horizontal segmentation, pricing power and introduction of new services.

We foresee an economy-wide shift to NC computing, driven by disruptive technologies. Technologies such as IP/Ethernet, soft switches, optronics and wireless broadband are driving traffic onto one multi-purpose IP network that enables new applications (e.g., IT to small businesses) to be purchased separately from network access (e.g., voice and video over IP). These technologies have also increased broadband speeds and reduced latency. In addition, improvements in computing power (Moore's Law), network security (authentication, intrusion detection, encryption, etc.), compression and higher layer protocols are setting the stage for the broad adoption of NC computing.

**Exhibit 12. Communications Intensity**



Source: Company reports and CIBC World Markets Corp.

Importantly, the disruptive technologies are enabling, for the first time, the separation of the applications from the underlying physical network. In addition, bottlenecks associated with last-mile broadband and network security are being worked out, mainly due to CLEC competition. On the wireline side, the broadband bottleneck is slowly being resolved by new transport technologies, such as Ethernet, and we believe the small- and medium business market will greatly benefit from this. In wireless, the advent of broadband wireless technologies should be a major driver of NC computing in the next 3-5 years (e.g., 4G, Wi-Fi, WiMAX, etc.). This new access medium should create unpredictable new applications and integration with enterprise data. We expect to see close to a billion wireless devices deployed (in the next few years) that have reasonable broadband capability.

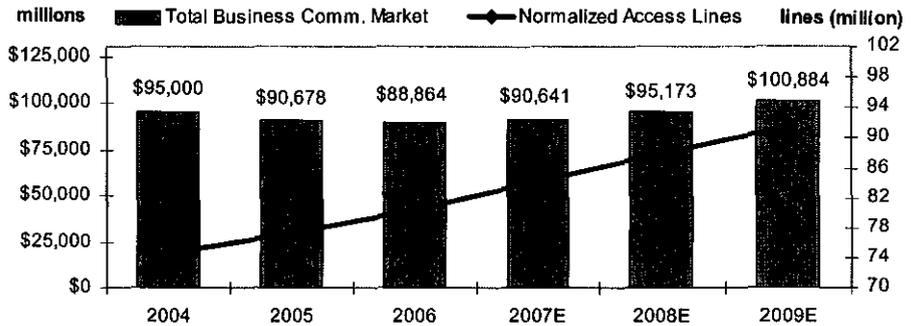
During the 1980s-90s, the U.S. communications market grew revenues at around 6% and earnings closer to 10% per year. Following the burst of the Internet bubble in 2000, revenue growth declined rapidly to negative 3%-4% per year, driven largely by the collapse in pricing power. Pricing declines were caused by abundant excess capacity and a large number of competitors. This oversupply was exacerbated by a deflationary IP technology, numerous

bankruptcies, poor customer service and massive enterprise inventories of communications services in the late 1990s.

Following significant restructuring and consolidation during the past few years, we believe pricing power has returned to the industry. This change in trends can be seen in the quarterly performance of AT&T's enterprise revenues (see Exhibit 1 above). We now expect the enterprise communications sector to report 2% revenue growth in 2007 and 5-6% in 2008-09 (see Exhibit 4).

We estimate the total business market has declined from \$100 billion to \$90 billion in the last five years. We are now looking for the market to grow back to over \$100 billion by 2009, or in the 5% range. However, we expect the CLECs' addressable market to grow at a much faster rate, with the CLECs capturing about 1-2% market share per year in the next three to five years. If their market share gains were to accelerate to 4% in the next 2 years, which we consider possible, the incumbents would likely become more aggressive on pricing and/or deployment of new technologies. As a result, the CLECs have a window of opportunity to profitably capture share and offer difficult-to-replicate NC services. While the CLECs will continue to discount prices of legacy services, the focus will be on new solutions and growing the overall market. We believe demand for application service provider (ASP) services will grow dramatically as smaller businesses develop a broader IT infrastructure (supported by cheaper access).

**Exhibit 13. Total Business Market Size 2004-2009E**



Source: Company reports and CIBC World Markets Corp.

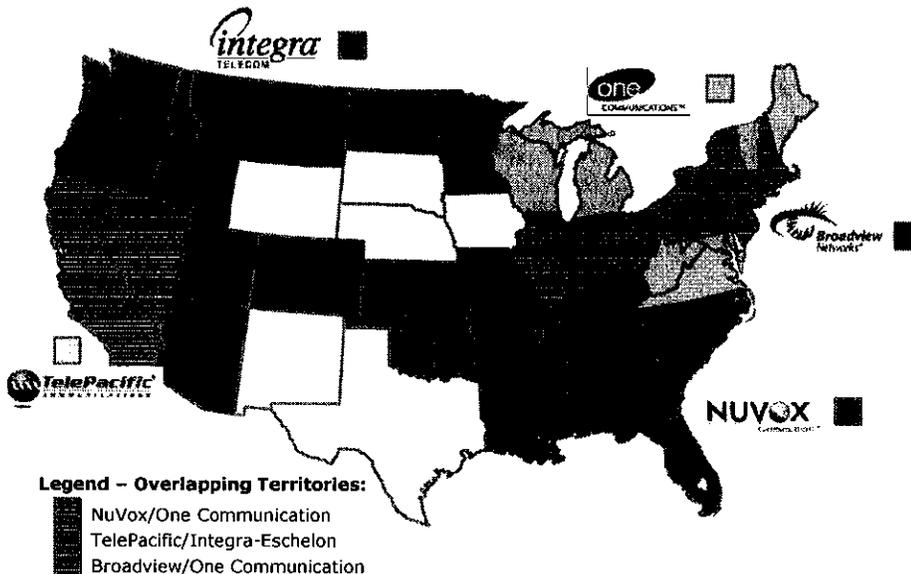
# Appendix 1. Expect More CLEC Consolidation / IPOs

## Consolidation on the CLEC Front

We briefly review five private competitive local exchange carriers (CLECs), which have so far assumed the roles of consolidators in their respective geographic areas. We expect consolidation to continue in the next year or two, and we believe many of these companies will consider becoming public. Ultimately consolidation amongst this group makes strategic/financial sense. Integra, One Communications, Broadview Networks, NuVox, and TelePacific are all privately-owned operators that have managed to expand their footprints through selective acquisitions. The appendix aims to familiarize investors with the operations of the regional consolidators.

At present, there are approximately 400 CLECs serving about 21 million business lines (including VoIP) and 13 million residential switched access lines in the U.S. We believe consolidation in this sector is inevitable, given the economies of scale and scope that it will drive. Technology will also be a key driver of this process, as companies that are leaders in IP services, may seek to acquire customer bases or fiber assets to leverage this skill set. Regulatory pressures may also contribute to consolidation as the telcos win UNE forbearances, which will lead to negotiated prices where scale will be important. Ultimately, we expect to see a few major competitive carriers (i.e. revenues of above \$2-3 billion per year) with national footprints.

### Exhibit 14. Five Private CLECs to Keep an Eye on



Source: Company reports and CIBC World Markets Corp.

Increasing scale of CLEC operations implies better negotiating leverage for last mile access pricing, and growing self sufficiency for local services. Positively, merger conditions in the deals between AT&T and SBC, Verizon and MCI, and more recently AT&T and BellSouth provide short-term protection from ILEC price increases.

Fewer industry players will likely lead to price stability, similar to the dynamics achieved after years of M&A among telcos. Margin expansion is also expected from synergies, as CLECs cross sell each other's services; centralize billing, customer service, and other corporate operations; and move traffic onto their own networks.

Successful CLECs will seek to focus on targeted niche customer segments, selling highly differentiated services. That's why CLECs have focused primarily on the small- and medium-sized business (SMB) segment, which has historically remained underserved by telcos. The lucrative fundamentals of this \$70 billion market have attracted the interest of cable operators and even incumbent telcos. We expect relatively dynamic environment in this space, as CLECs leverage their consultative sales approach to combat increased interest by cable and telco.

CLECs already went down the consolidating path once, with the majority of them going bankrupt. Following the 1996 Act, many competitive carriers went out to expand via M&A, borrowing significant balances to finance such transactions, without adequate earnings to stomach the substantial interest costs. We are now seeing a second wave of consolidation activity, with over 20 significant transactions in the last 1-2 years. The consolidation efforts this time around are more focused on scale and meaningful synergies, with seasoned managements identifying accretive targets and providing disciplined execution.

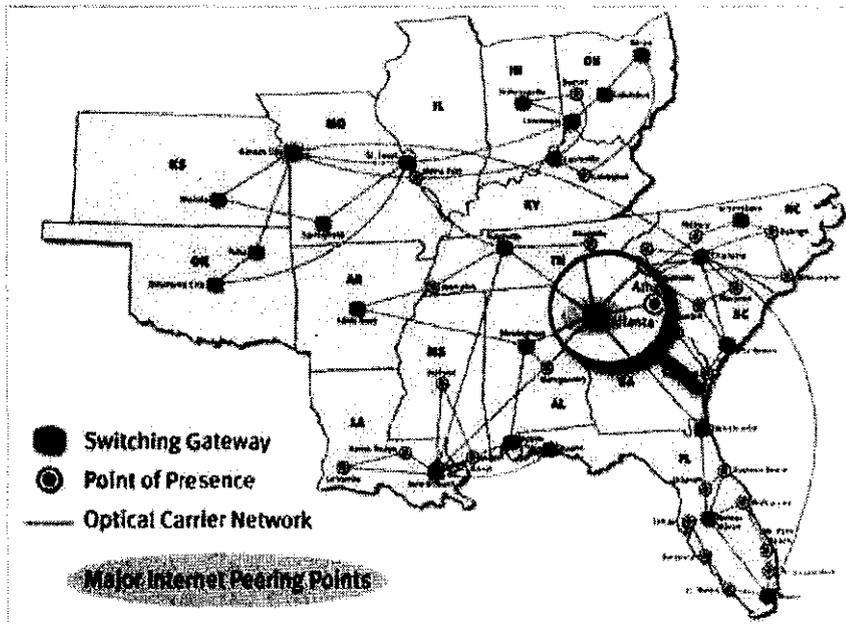
## Five Private Regional Consolidators

### NuVox

NuVox' operations are concentrated in the South East (and Midwest) part of the country. Most recently (3/21), NuVox acquired Florida Digital, becoming one of the largest competitive carrier in the region.

The combined company provides IP-based communications solutions including voice, data connectivity and storage, private networking, web hosting, and security services exclusively to business customers in 16 states. NuVox serves more than 90,000 customers and has approximately 1 million voice and data lines, and annual revenues of above \$500 million.

Exhibit 15. NuVox Serves Customers From 48 Locations in 16 States



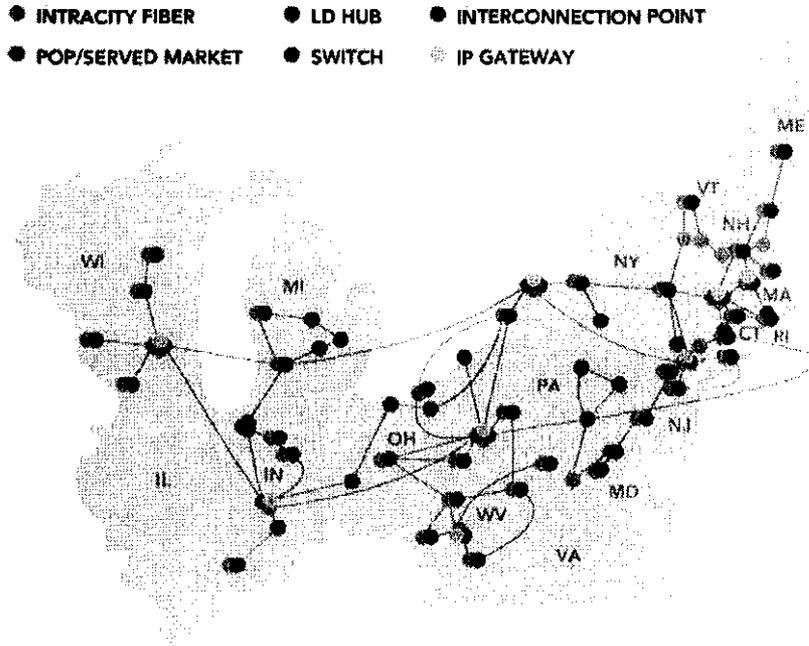
Source: Company reports and CIBC World Markets Corp.

### One Communications

The company significantly increased its scale in one quick stroke – acquiring Conversent Communications and at the same time merging with CTC Communications. The combined entity is a key consolidator in the North East (Mid-Atlantic and Upper Midwest) and probably the largest private competitive carrier in the county.

One Communications serves more than 160,000 businesses in 16 states and employs more than 2,000 people. Annual revenues are approximately \$800 million. In addition, the company has valuable infrastructure assets: its IP core uses nearly 10,000 route miles of fiber to interconnect more than 700 collocation sites.

**Exhibit 16. One Comm. Serves Above 160,000 Businesses in 16 States**



Source: Company reports and CIBC World Markets Corp.

**TelePacific**

This South-West consolidator most recently completed the acquisitions of Arrival (Feb. 2007) and Mpower (Aug. 2006). The company, established in 1998, serves customers throughout California and Las Vegas, Nevada. TelePacific offers local and long distance voice, dedicated Internet access, private networking and data transport services as well as bundled voice and Internet solutions, to more than 75,000 customers (or 980,000 access lines), primarily SMBs.

TelePacific focuses on maintaining a strong local presence and providing superior customer service – it has more than 1,200 employees across 18 regional offices and three call centers located in CA/NV. The company provides services through a combination of its own switches and network infrastructure, including fiber assets.

In March, TelePacific signed a five-year contract with AT&T for wholesale long distance voice services and special access services for DS1 and DS3 transport. The company has maintained a close working relationship with T since 2003.

Management is headed by CEO Dick Jalkut, who has over 35 years of experience in the telecom industry, including the top executive position at NYNEX, which later merged to create Verizon.

**Exhibit 17. TelePacific Serves 75,000 Accounts in 2 States**



Source: Company reports and CIBC World Markets Corp.

**Integra/Eschelon**

Most recently, Integra announced the acquisitions of Eschelon (March 2007), which is expected to close on August 31, 2007. Upon completion of the transaction, Integra will serve an average of 20% of the businesses in the metropolitan areas in which it operates. Integra focuses on serving the small business market segment with some of the highest quality customer care in the industry. The combined operations will become the largest CLEC in the Western U.S.

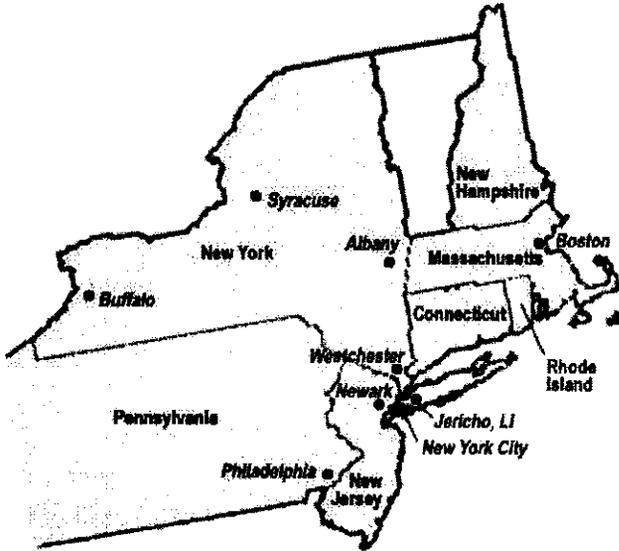
The integration of Eschelon is expected to generate substantial operating and network cost savings, as nearly 80% of each company's revenues is derived from overlapping geographic markets. Much of Eschelon's traffic, which was previously routed over leased facilities from other carriers, will now be routed over Integra's extensive metropolitan area and intercity fiber networks. Total combined revenues are expected to be more than \$700 million annually, with more than \$200 million in pro-forma 2007 EBITDA.

M&A makes up the bulk of the company's growth since its establishment in 1996. Another of Integra's significant acquisitions was Electric Lightwave (acquired from Citizens Communications in 2006 for \$234 million), which added valuable fiber assets (2,200 route mile metro network, and 4,700-mile long haul network) with direct access to over 580 commercial buildings, effectively reducing the need to lease from incumbents.

Integra's CEO and co-founder, Dudley Slater, has extensive M&A experience, having served as Principal of Rural Link Communications, a company focused on investing in, and managing ILECs, and as VP of Business Development at Pacific Telecom.



**Exhibit 19. Broadview Serves 20 Markets in 10 Northeastern States**



Source: Company reports and CIBC World Markets Corp.

## Appendix 2. M&A Transactions in the CLEC Sector

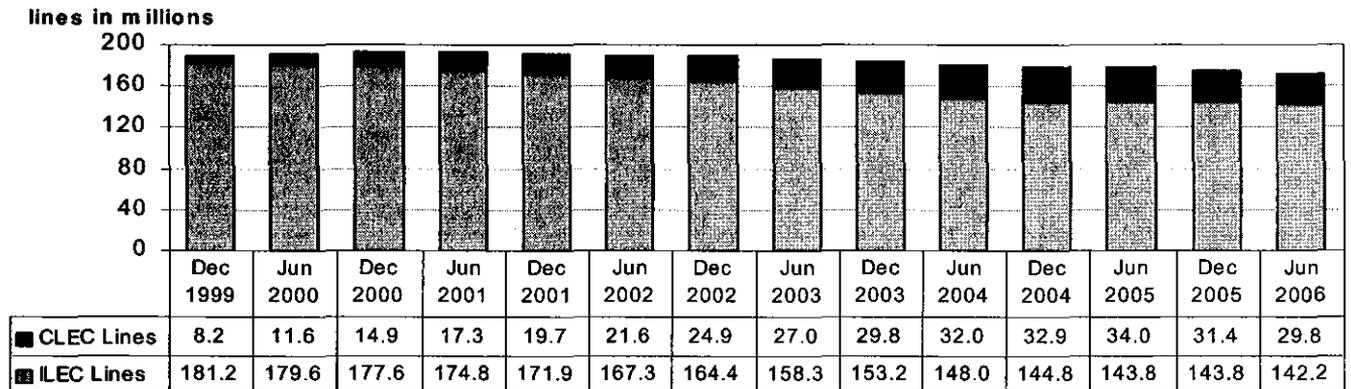
### Exhibit 20. Recent Acquisitions in the CLEC Sector

Transaction History at a Glance ( <i>\$ millions</i> )					
Date	Target	Acquirer	Acquisition Value	LTM Revenue	Revenue Multiple
7/16/2007	Yipes Communication	Reliance Comm.	\$300	\$70 <sup>†</sup>	4.3
7/2/2007	MobilePro Corp.	United Systems Access	\$30	\$63	0.5
3/20/2007	Eschelon	Integra Telecom	\$710	\$275	2.6
2/19/2007	UNICOM	Eschelon	\$14	\$19	0.7
10/17/2006	Broadwing	Level 3	\$1,400	\$76	1.6
9/22/2006	Talk America	Cavalier	\$251	\$115	2.2
8/14/2006	PAETEC	US LEC	\$1,300	\$1,000	1.3
8/9/2006	OneEighty Communications	Eschelon	\$10	\$7	1.3
7/30/2006	Xspedius Communications	Time Warner Telecom	\$532	\$240	2.2
6/29/2006	Mountain Telecommunications	Eschelon	\$40	\$19	2.1
6/6/2006	Looking Glass	Level 3	\$165	\$77 <sup>†</sup>	2.1
5/15/2006	OnFiber Communications	Qwest	\$107	\$60	1.8
5/5/2006	Mpower Communications	TelePacific Comm	\$204	\$193	1.1
5/2/2006	TelCove Inc.	Level 3	\$1,238	\$390	3.2
4/14/2006	ICG Communications	Level 3	\$163	\$77 <sup>†</sup>	2.1
2/7/2006	Electric Lightwave	Integra Telecom	\$247 <sup>†</sup>	\$159	1.6
1/27/2006	Oregon Telecom	Eschelon	\$20	\$24	0.8
1/26/2006	Progress Telecom	Level 3	\$140	\$70	2.0
12/30/2005	Eventis Telecom	Hickory Tech	\$36	\$43	0.8
12/23/2005	WilTel Communications	Level 3	\$724	\$1,550	0.5
12/13/2005	New Edge Networks	EarthLink	\$144	\$120	1.2
12/6/2005	ConEdison Communications	RCN	\$32	\$42	0.8
10/5/2005	NextWeb	Covad	\$25	\$8	3.1
1/4/2005	American Long Lines	PAETEC	\$4	\$25	0.2
10/22/2004	ICG Communications assets	Mpower Comm	\$14 <sup>†</sup>	\$30	0.5
10/19/2004	Advanced TelCom	Eschelon	\$46	\$80	0.6
3/8/2004	Focal Communications	Corvis	\$210	\$280	0.8
3/3/2004	GoBeam	Covad	\$48	NA	NA
2/13/2004	Allegiance Telecom	XO Communications	\$660	\$770 <sup>†</sup>	0.9
				<b>Average</b>	<b>1.47</b>

Source: Company reports and CIBC World Markets Corp.

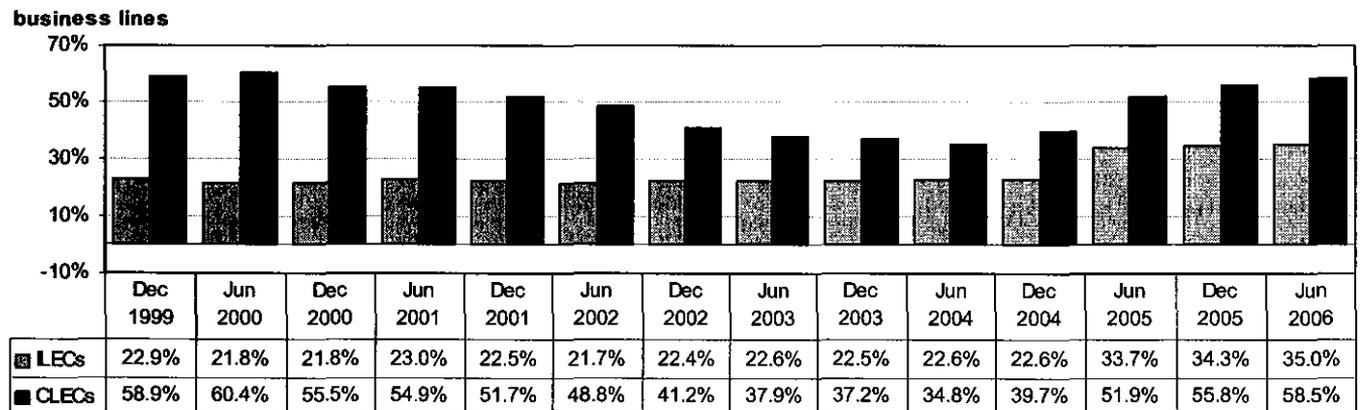
# Appendix 3. CLEC vs. ILEC Line Metrics

**Exhibit 21. Reported End-User Switched Access Lines**



Source: Federal Communications Commission reports and CIBC World Markets Corp.

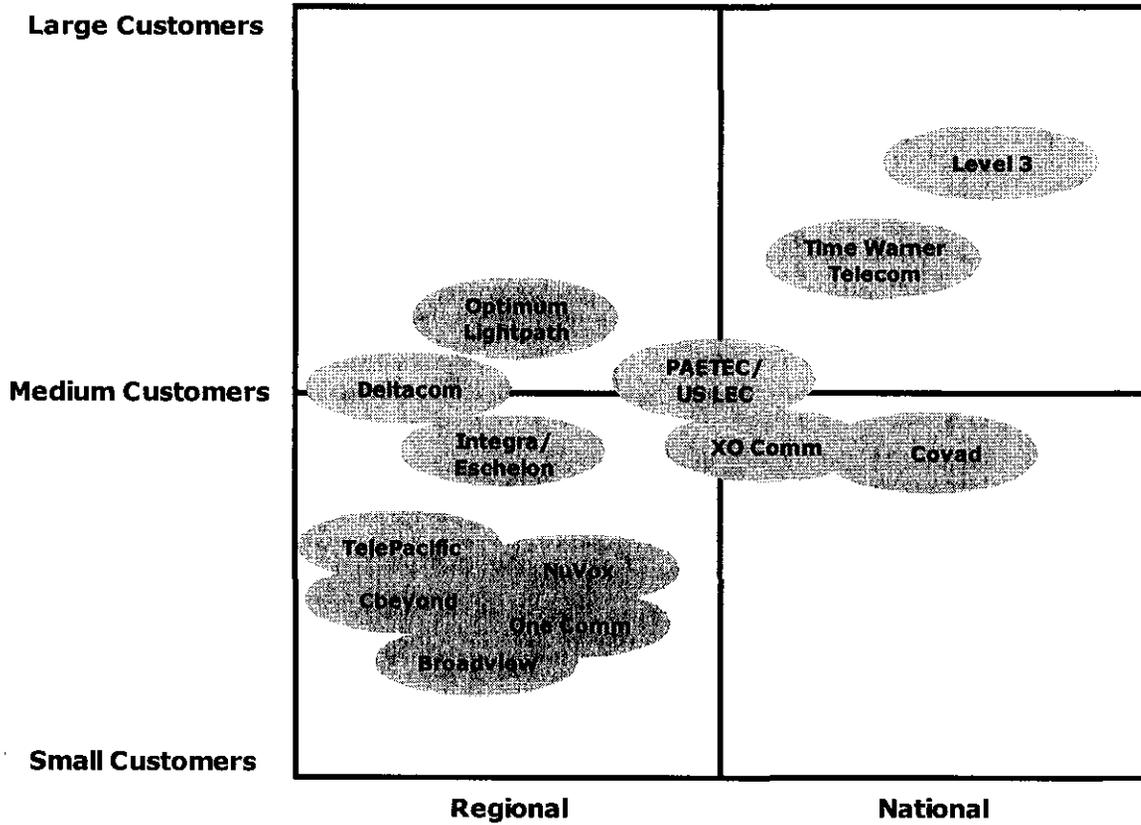
**Exhibit 22. % of Switched Access Lines that Serve Business Customers**



Source: Federal Communications Commission and CIBC World Markets Corp.

# Appendix 4. Coverage and Business Size Matrix

Exhibit 23. CLECs' Business Size vs. Geographic Coverage



Source: Company reports and CIBC World Markets Corp.

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EarthLink, Inc. (1, 2f, 3a, 3b) (ELNK-OTC, US\$7.02, Sector Underperformer)  
Eschelon Telecom Inc. (1, C49) (ESCH-NASDAQ, US\$29.29, Not Rated)  
Level 3 (1, 2a, 2d) (LVLT-OTC, US\$5.22, Sector Performer - Speculative)  
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Qwest Communications (5a) (Q-NYSE, US\$8.64, Sector Performer)  
Sprint Nextel (S-NYSE, US\$20.93, Sector Performer)  
Time Warner Telecom (1) (TWTC-OTC, US\$19.23, Sector Outperformer)  
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Clearwire (CLWR-OTC, US\$30.02, Not Rated)  
Covad Communications (DVW-AMEX, US\$0.88, Not Rated)  
Hickory Tech (HTCO-OB, US\$8.88, Not Rated)  
ITC DeltaCom Inc (ITCD-OTC, US\$1.16, Not Rated)  
PPL Corporation (PPL-NYSE, US\$46.92, Not Rated)  
RCN Corp. (RCNI-OTC, US\$17.69, Not Rated)  
Telephone Data Systems (TDS-NYSE, US\$68.40, Not Rated)  
Time Warner Cable (TWCAV-NYSE, US\$38.00, Not Rated)  
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- 12 The equity securities of this company are subordinate voting shares.
- 13 The equity securities of this company are non-voting shares.
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- C49 CIBC World Markets Corp. will be providing debt financing to Integra Telecom, Inc. in its announced acquisition of Eschelon Telecom, Inc. (ESCH).

## CIBC World Markets Price Chart

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Restricted	0	0.0%	Restricted	0	0.0%

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# **ATTACHMENT I**

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20544**

In the Matter of

Petitions of AT&T Inc., BellSouth Corporation, the Embarq Local Operating Companies, and Qwest Under 47 U.S.C. § 160(c) for Forbearance from Title II and *Computer Inquiry* Rules with Respect to Broadband Services

WC Docket Nos. 06-125 & 06-147

**REPLY COMMENTS OF VERIZON**

Of Counsel:

Michael E. Glover

Scott H. Angstreich  
KELLOGG, HUBER, HANSEN, TODD,  
EVANS & FIGEL, P.L.L.C.  
1615 M Street, N.W.  
Suite 400  
Washington, D.C. 20036  
(202) 326-7900

Edward Shakin  
William H. Johnson  
VERIZON  
1515 North Courthouse Road  
Suite 500  
Arlington, VA 22201-2909  
(703) 351-3060

*Counsel for Verizon*

August 31, 2006



**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20544**

In the Matter of

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WC Docket Nos. 06-125 & 06-147

**REPLY COMMENTS OF VERIZON<sup>1</sup>**

**INTRODUCTION AND SUMMARY**

On December 20, 2004, Verizon filed a petition for forbearance from the application of Title II and the *Computer Inquiry* rules to Verizon's broadband services, to the extent those requirements might be construed to apply to those services. When the statutory deadline for ruling on that petition passed without Commission action, the petition for forbearance was "deemed granted" by operation of law, thus terminating the proceedings on Verizon's petition.

Other incumbent local exchange carriers ("LECs") have now filed their own, separate petitions for forbearance, seeking for themselves and other incumbent LECs the same relief that was granted to Verizon by operation of law. Predictably, those opposing these new petitions make the same arguments here that have been repeatedly rejected by the Commission and by the courts — namely, that there supposedly is insufficient competition in the broadband market and that a grant of forbearance would harm end-user customers and intramodal competitors. But these are the same claims that these same commenters raised before the Commission held in the

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<sup>1</sup> The Verizon companies participating in this filing ("Verizon") are the regulated, wholly owned subsidiaries of Verizon Communications Inc.

*Triennial Review Order*<sup>2</sup> that incumbent LECs should not have to offer their packetized, broadband facilities as § 251(c)(3) unbundled network elements. And these same claims were repeated before the Commission held in the *271 Broadband Forbearance Order*<sup>3</sup> that it would forbear from enforcing § 271 insofar as it requires Bell Operating Companies (“BOCs”) to provide other carriers unbundled access to their broadband facilities. The same claims were raised yet again before the Commission held in the *Title I Broadband Order*<sup>4</sup> that wireline facilities-based providers may sell broadband transmission services under Title I, either on a private carriage basis as a wholesale input to a wireline broadband Internet access service, or as an information service when part of that provider’s own integrated wireline broadband Internet access service. And the Commission rejected similar claims in refusing to impose *Computer Inquiry* and Title II requirements on cable modem providers.<sup>5</sup>

In each of the orders, the Commission rejected these claims, and the courts, in the decisions reached to date, have affirmed the Commission in all respects. The most recent of

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<sup>2</sup> Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) (“*Triennial Review Order*”), *aff’d in pertinent part, vacated in part and remanded, United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir.), *cert. denied*, 543 U.S. 925 (2004).

<sup>3</sup> Memorandum Opinion and Order, *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, 19 FCC Rcd 21496, ¶ 22 (2004) (“*271 Broadband Forbearance Order*”), *aff’d, EarthLink, Inc. v. FCC*, No. 05-1087, – F.3d –, 2006 WL 2346459 (D.C. Cir. Aug. 15, 2006).

<sup>4</sup> Report and Order and Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853 (2005) (“*Title I Broadband Order*”), *petitions for review pending, Time Warner Telecom, Inc. v. FCC*, Nos. 05-4769 *et al.* (3d Cir. filed Oct. 26, 2005).

<sup>5</sup> See Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 17 FCC Rcd 4798 (2002) (“*Cable Modem Declaratory Ruling*”), *aff’d, National Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

these decisions — *EarthLink* — could not have been stronger in upholding the Commission’s determinations that “the broadband market [i]s still emerging and developing,” and that the “preconditions for monopoly are not present” in that market, which is characterized by robust competition, with cable modem as the market leader — a conclusion that the D.C. Circuit had “upheld in resounding terms.” 2006 WL 2346459, at \*6, \*8-\*9 (internal quotation marks omitted). The court also specifically upheld the Commission’s findings that “CLECs have alternat[iv]e ways to compete and the BOCs will be inclined to offer reasonable wholesale rates because they face intense intermodal competition,” and its “predictions about the development of new broadband technologies . . . [and, in turn, increased competition[] flowing from an absence of] regulation requiring BOCs to provide wholesale inputs to other carriers’ services. *Id.* at \*8 n.8, \*9 (internal quotation marks omitted). And the court held that, in light of § 706 and Congress’s policy of promoting broadband, the Commission properly “make[s] the forbearance decision with an eye to the future,” placing greater weight on “longer-term positive impact that *not* [regulating] would have on rates, consumers, and the public interest.” *Id.* at \*5, \*8.

The Commission’s deregulatory efforts, moreover, have resulted in increased competition, and the Commission’s actions have resulted in lower prices, higher-speed services, and a wider variety of offerings.<sup>6</sup> In addition, all forms of broadband service — not only cable modem and DSL, but also third-generation wireless, fiber-to-the-premises, and broadband-over-powerline, among others — have increased subscribership and availability, as companies continue to invest heavily in these intermodal alternatives. This includes the “most rapid growth

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<sup>6</sup> See, e.g., News Release, Verizon, *Verizon Pumps Up Speed, Not Price, of FiOS Internet Service for New York, New Jersey and Connecticut* (May 1, 2006), available at <http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=93410>; David W. Barden *et al.*, Bank of America, *Battle for the Bundle: Consumer Wireline Services Pricing* at 11 (Jan. 23, 2006).

of FTTH deployment to date,<sup>7</sup> 3G wireless networks being rolled out across the country,<sup>8</sup> and massive investment in satellite broadband,<sup>9</sup> among other investment and expansion.

In sum, the Commission's deregulatory decisions have been right — both as a matter of law and regulatory policy — and the proponents of continued regulation have been wrong. Their arguments are no better this time around and provide no basis for the Commission to deviate from its steady path of deregulating incumbent LECs' broadband facilities and establishing regulatory parity with other market participants, including the market leading cable modem providers.

## DISCUSSION

### I. VERIZON'S PETITION FOR FORBEARANCE WAS GRANTED BY OPERATION OF LAW, AND IS NO LONGER BEFORE THE COMMISSION

As an initial matter, claims by a few parties that the Commission should use this proceeding to reconsider or modify the relief that Verizon previously received are unavailing. Verizon's petition was deemed granted by operation of law, and is no longer pending before the Commission. The Commission therefore has no authority to alter that relief in the current dockets and any claims to the contrary are specious.

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<sup>7</sup> Press Release, Fiber to the Home Council, *Fiber-to-the-Home Subscribers Increase 70% in the Last Third of 2005*, at 1 (Feb. 22, 2006), available at <http://www.ftthcouncil.org/documents/653395.doc>.

<sup>8</sup> See, e.g., News Release, Helio LLC, *Helio is Here: Innovative 3G Services, Exclusive Devices and Personalized Service & Support* (May 2, 2006), available at [http://www.helio.com/page?p=press\\_release\\_detail&contentid=1146535515494](http://www.helio.com/page?p=press_release_detail&contentid=1146535515494); Galen Gruman, *Taking IT to the Streets: 3G Arrives*, InfoWorld (Mar. 4, 2005), available at [http://www.infoworld.com/article/05/03/04/10FEmobile\\_1.html?s=feature](http://www.infoworld.com/article/05/03/04/10FEmobile_1.html?s=feature); Cingular HSDPA Release, *Cingular Launches 3G Network* (Dec. 6, 2005), available at <http://cingular.mediaroom.com/index.php?s=pageB&item=3>.

<sup>9</sup> See, e.g., Sandy Brown, *DirectTV, EchoStar Bundle Up*, TheStreet.com (Jan. 30, 2006), available at <http://www.thestreet.com/tech/internet/10265051.html>; Bloomberg News, *DirectTV May Spend \$1 Billion for Web Foray* (Jan. 10, 2006).

First, EarthLink — alone among commenters — asserts that Verizon’s petition was not, in fact, deemed granted. See EarthLink at 3-6. The Commission, of course, issued a news release on March 20, 2006 correctly announcing that “the relief requested in Verizon’s petition was deemed granted by operation of law, effective March 19, 2006.”<sup>10</sup> And more than a dozen parties — virtually all of which are also commenters here — have petitioned for review of the news release, because they, too, recognize that Verizon’s petition was deemed granted.<sup>11</sup>

EarthLink’s argument to the contrary is based on a tortured reading of § 160(c), under which the deemed granted provision applies only if the Commission does *not* extend the one-year period for ruling on a forbearance petition. See EarthLink at 4. EarthLink claims that the “unless” clause in § 160(c) states an exception to the deemed granted provision:

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.<sup>12</sup>

Contrary to EarthLink’s claim, the “unless” clause does not modify “deemed granted,” which appears nearly 30 words earlier in the sentence, but the immediately preceding “within one year” clause. Thus, the plain meaning of this sentence is that a petition for forbearance is deemed granted if the Commission does not deny the petition within either one year or one year and 90 days, if the Commission extends the one-year period.

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<sup>10</sup> News Release, FCC, *Verizon Telephone Companies’ Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to Their Broadband Services Is Granted by Operation of Law* (Mar. 20, 2006), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-264436A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-264436A1.pdf).

<sup>11</sup> Verizon notes that those petitions for review are jurisdictionally defective because, as the D.C. Circuit has held, courts of appeals do not have jurisdiction to review an announcement of an event that occurred by operation of law. See *AT&T Corp. v. FCC*, 369 F.3d 554 (D.C. Cir. 2004).

<sup>12</sup> 47 U.S.C. § 160(c).

Nor is it relevant, as EarthLink claims (at 5), that the deemed granted language is not repeated in the following sentence, which defines the Commission's limited authority to extend the one-year period. The sentence that permits the Commission to extend the one-year period only by "an additional 90 days" — and only "if the Commission finds that an extension is necessary to meet the requirements of subsection (a)" — gives content to the "unless" clause in the preceding sentence. When the two sentences are read together, it is plain that the Commission's extension authority is not an exception to the "deemed granted" provision. Indeed, EarthLink's interpretation would nullify Congress's decision to limit the Commission to a single, 90-day extension of the one-year period. That limit would have been unnecessary if, as EarthLink claims, the Commission could take as long as it wished to rule on a forbearance petition after extending the deadline, without ever triggering the deemed granted provision.

*Second*, Broadview *et al.* assert that Verizon's petition — despite being deemed granted — "remains pending before the Commission" and that the Commission still "must issue an order on the Verizon Petition," which they claim the Commission should do in these dockets, when it rules on the pending AT&T, BellSouth, Embarq, and Qwest petitions. Broadview *et al.* at 7, 9, 11. This argument, too, is based on a misreading of § 160(c). Contrary to their claims, nothing in § 160 permits — much less compels — the Commission to rule on a petition for forbearance after the statutory deadline passes.<sup>13</sup>

Broadview *et al.* appear (at 13) to rely on the final sentence of § 160(c), which states that the "Commission may grant or deny a petition in whole or in part and shall explain its decision in

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<sup>13</sup> Contrary to Broadview *et al.*'s claim (at 13-15), Verizon does not argue — as Core Communications, Inc. did — that the granting of a petition for forbearance by operation of law is legally equivalent to Congress passing a statute repealing the relevant provisions and regulations.

writing.”<sup>14</sup> The statute thus uses permissive language to describe certain actions the Commission “may” take — affirmatively granting or denying a petition, in whole in part — in which case (but only in which case) it “shall” explain its decision in writing. Or the Commission “may” not take one of those actions, as when a petition is deemed granted, in which case there is no decision to explain. This provision, therefore, is irrelevant when a petition for forbearance is granted “by operation of law, not by Commission action.” *AT&T Corp.*, 369 F.3d at 556 (internal quotation marks omitted). When a petition is deemed granted, there is no Commission decision for the Commission to explain in writing. Instead, “Congress made the decision” to grant the petition “by operation of law,” and “[a]ny decision by the FCC” reference in § 160(c) “is a matter entirely separate from Congress’s decision” as reflected in the deemed granted provision. *Id.* at 560.

Not only does the Commission have no statutory obligation to issue a written order on Verizon’s deemed granted petition, but also it is precluded from doing so because that petition is not “pending” before the Commission. On the contrary, as the Commission and D.C. Circuit have held in the context of § 204(a)(3), a “deemed” grant of a petition is a “conclusive” grant.<sup>15</sup> The Commission cannot belatedly issue an order under § 160 on Verizon’s petition, just as it cannot issue an order under § 204 with regard to a tariff that has been deemed lawful. *See Virgin Islands Tel. Corp. v. FCC*, 444 F.3d 666, 672-73 (D.C. Cir. 2006). Similarly, in *Tri-State Bancorporation, Inc. v. Board of Governors of the Federal Reserve System*, 524 F.2d 562 (7th Cir. 1975), the Seventh Circuit vacated an agency order purporting to deny an application for

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<sup>14</sup> CompTel (at 6) makes the same argument, though it does not claim that Verizon’s petition is still pending before the Commission.

<sup>15</sup> Memorandum Opinion and Order, *Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, 12 FCC Rcd 2170, ¶¶ 18-19, 21 (1997); *see ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 412, 415 (D.C. Cir. 2002).

approval of formation of a bank holding company because that order was adopted and released after the application was “deemed granted” by operation of law. *See id.* at 564, 566-68. Like § 160(c), the “time limitation in the [Bank Holding Company] Act is mandatory in the sense that the statute prescribes the effect of the Fed’s failure to act, *i.e.*, the application is deemed approved.” *Id.* at 565-66. And the court recognized “Congress’s declaration[,], implicit in” adopting the “deemed granted” provision, that it should eliminate the “risk [of] allowing a meritorious application to be delayed by [the] federal bureaucracy for more than” a specified time, even though the result is to preclude the agency from belatedly determining that the application was not meritorious. *Id.* at 567-68; *see North Lawndale Econ. Dev. Corp. v. Board of Governors of the Fed. Reserve Sys.*, 553 F.2d 23, 27 (7th Cir. 1977) (vacating another order purporting to deny an application when the order was adopted and released after the application was deemed granted).

*Third*, for similar reasons, the Commission must reject other commenters’ proposals that the Commission rescind the deemed grant of forbearance or reduce (whether through clarification or modification) the relief that Verizon obtained when it rules on the AT&T, BellSouth, Embarq, and Qwest petitions pending in this docket. *See Alpheus et al.* at 2-3, 8-9; OPASTCO at 3-7. Because Verizon’s petition was deemed granted, the Commission no longer has jurisdiction over that petition. *See, e.g., Tri-State*, 524 F.2d at 565-68. Therefore, whatever the scope of the relief the Commission grants to the current petitioners, it cannot simply issue an order that reduces the relief that Verizon obtained by operation of law.<sup>16</sup> In any event, Verizon

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<sup>16</sup> Matters are different, however, if the Commission grants relief beyond that already received by Verizon, because some of the petitions request relief applicable to *all* BOCs or *all* incumbent LECs. In that case, Verizon (as a BOC and an incumbent LEC) would obtain any additional benefits that might accrue as a result of the Commission’s order in these dockets.

notes that OPASTCO identifies no basis for its purported confusion about which broadband services were the subject of Verizon's petition and whether Verizon was relieved of any obligations to make universal service contributions for those services. In fact, Verizon explicitly listed the services that were the subject of its petition,<sup>17</sup> and affirmatively stated that it did not seek forbearance from federal universal service obligations applicable to those services.<sup>18</sup> There can be no *bona fide* confusion on either point.<sup>19</sup>

## **II. THE PETITIONS SHOULD BE GRANTED BECAUSE THE NATIONWIDE BROADBAND MARKET IS ROBUSTLY COMPETITIVE**

### **A. Robust Competition in the Nationwide Broadband Market Demonstrates that the Criteria for Forbearance Are Satisfied**

Congress required the Commission to grant a petition for forbearance when continued enforcement of the statutory provisions and regulations at issue is neither "necessary to ensure" "just and reasonable" rates nor "necessary for the protection of consumers," and forbearance from enforcing that requirement "is consistent with the public interest," including the interest in "promot[ing] competitive market conditions." 47 U.S.C. § 160(a)-(b). The Commission has long recognized that "competition is the most effective means of ensuring that . . . charges,

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<sup>17</sup> Letter from Edward Shakin, Verizon, to Marlene Dortch, Secretary, FCC, WC Docket No. 04-440, Att. 1 (FCC filed Feb. 7, 2006).

<sup>18</sup> Letter from Suzanne A. Guyer, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-440, at 1 (FCC filed Feb. 17, 2006).

<sup>19</sup> CompTel (at 5 n.16) asserts that it is unclear whether Verizon claims that the relief granted by operation of law applies to services other than those listed in the February 7, 2006 *ex parte*, *see supra* note 17, but it relies on an analyst's mischaracterization of a statement by a Verizon executive, which was immediately corrected in a subsequent report. In any event, contrary to CompTel's implication, the initial report of the executive's statement did not mention any services in the context of "the recent FCC forbearance petition" that were not clearly listed in the February 7, 2006 *ex parte*, Qaisar Hasan & May Tang, Buckingham Research Group, *Telecom Carriers Upbeat on Non-Consumer Trends* at 2 (July 6, 2006), and the correction made clear that Verizon intended to "cut prices . . . (as opposed to raising them)," as initially (and erroneously) reported, Qaisar Hasan & May Tang, Buckingham Research Group, *Industry Consultants Reinforce Bullish Thesis on Metro, Long Haul* at 2 (July 19, 2006).

practices, classifications, and regulations [for telecommunications services] are just and reasonable, and not unjustly or unreasonably discriminatory.”<sup>20</sup> Competition is also relevant to — if not dispositive of — the other two forbearance criteria. That is because § 160 reflects the basic antitrust principle that government regulation of the marketplace is “for the protection of competition, not competitors.” *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (internal quotation marks omitted). Thus, § 160(a)(3) and (b) require the consideration of the public interest, defined in terms of the promotion of competition, and § 160(a)(2) requires the Commission to consider the protection of “consumers” — that is, end-user customers — rather than the parochial interests of carriers that are both customers and competitors in serving consumers. For these reasons, as the Commission has recognized, any effect that forbearance might have on wholesale terms to other carriers is relevant to the analysis under § 160 only to the extent that it affects retail competition and consumers.<sup>21</sup>

In addition, the Commission’s analysis of the pending petitions must be guided by Congress’s direction to the Commission to “utiliz[e] . . . regulatory forbearance” to “promote competition,” “remove barriers to infrastructure investment,” and otherwise promote the growth and development of “advanced telecommunications capability.” Telecommunications Act of 1996, § 706(a) (codified at 47 U.S.C. § 157 note). The Commission has accordingly held that “broadband deployment is a critical policy objective that is necessary to ensure that consumers

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<sup>20</sup> Memorandum Opinion and Order, *Petition of U S West Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance*, 14 FCC Rcd 16252, ¶ 31 (1999); *accord* 271 *Broadband Forbearance Order* ¶ 24.

<sup>21</sup> See Report and Order in CC Docket No. 98-137 Memorandum Opinion and Order in ASD 98-91, *1998 Biennial Regulatory Review – Review of Depreciation Requirements for Incumbent Local Exchange Carriers*, 15 FCC Rcd 242, ¶ 63 (1999); Memorandum Opinion and Order, *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, 13 FCC Rcd 18025, ¶¶ 67-69 (1998).

are able to fully reap the benefits of the information age”<sup>22</sup> and that “widespread deployment of broadband infrastructure has become the central communications policy objective of the day.”<sup>23</sup>

The Commission properly recognized that § 706 must influence its forbearance analysis in granting forbearance from enforcing § 271 insofar as it requires BOCs to provide other carriers unbundled access to their broadband facilities.<sup>24</sup> The D.C. Circuit expressly upheld the Commission’s decision, holding that the “language of section 706 suggests a forward-looking approach” and that the Commission “permissibly construed the statutory scheme to permit weighing [§ 706] considerations” in its forbearance analysis. *EarthLink*, 2006 WL 2346459, at \*5-\*6.

As Verizon has demonstrated,<sup>25</sup> stand-alone broadband transmission services, such as those at issue in the pending petitions, are sold primarily to enterprise customers and are subject to intense competition.<sup>26</sup> Incumbent LECs, moreover, have never had market power with respect to these services. The Commission, in its orders approving the combinations of Verizon and

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<sup>22</sup> *Triennial Review Order* ¶ 241.

<sup>23</sup> Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 FCC Rcd 3019, ¶ 1 (2002) (footnote omitted).

<sup>24</sup> See *271 Broadband Forbearance Order* ¶¶ 20, 34.

<sup>25</sup> Prior to the deemed grant of Verizon’s forbearance petition, Verizon had filed for reconsideration of the Commission’s failure in the *Title I Broadband Order* to extend the relief granted in that order to broadband transmission service that will not be used as part of an Internet access service. Verizon attaches those filings, which set forth the record evidence in support of that reconsideration request, to this pleading. See *Petition for Limited Reconsideration of Title I Broadband Order*, CC Docket Nos. 02-33 *et al.* (FCC filed Nov. 16, 2005) (Attach. 1); *Reply Comments in Support of Verizon’s Petition for Limited Reconsideration of the Title I Broadband Order*, CC Docket Nos. 02-33 *et al.* (FCC filed Jan. 9, 2006) (Attach. 2).

<sup>26</sup> See Memorandum Opinion and Order, *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18433, ¶ 57 (2005) (“*Verizon-MCI Order*”); *id.* ¶ 60 (“larger businesses often contract for more sophisticated services, including Frame Relay [and] virtual private networks”); *Triennial Review Order* ¶¶ 46, 129.

MCI, and SBC and AT&T, has expressly recognized this. Indeed, the Commission found, rejecting commenters' "contrary . . . assertions," that "competition in the enterprise market is robust." *SBC-AT&T Order*<sup>27</sup> ¶ 73 n.223 (emphasis added). The Commission held further that "myriad providers are prepared to make competitive offers" to enterprise customers and that "these multiple competitors ensure that there is sufficient competition." *Verizon-MCI Order* ¶ 74; accord *SBC-AT&T Order* ¶ 73. In reaching this conclusion, the Commission made specific reference to Frame Relay services, one of the wireline broadband transmission services at issue in these petitions. See *Verizon-MCI Order* ¶ 74. The Commission recognized further that "new competitors" — including "systems integrators and managed network providers" and those offering "IP-VPNs and other converged services" — "are putting *significant competitive pressure* on traditional service providers" with respect to enterprise customers. See *id.* ¶ 75 n.229 (emphasis added).

Competing providers of broadband services to enterprise customers include "interexchange carriers, competitive LECs, cable companies, other incumbent LECs, systems integrators, and equipment vendors." *Id.* ¶¶ 64, 74. Verizon is most aware of competitive conditions in its own region, where AT&T is the leading provider for many (if not all) of the services at issue here,<sup>28</sup> but is only one of many competitive providers of these services, which

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<sup>27</sup> Memorandum Opinion and Order, *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18290 (2005) ("*SBC-AT&T Order*").

<sup>28</sup> See, e.g., David W. Barden *et al.*, Banc of America Securities, *Merger Monitor XI*, at 3 (Oct. 3, 2005); see also AT&T, *IP and IP VPN*, available at [http://www.business.att.com/service\\_portfolio.jsp?repopid=ProductCategory&repoitem=eb\\_vpn&serv\\_port=eb\\_vpn&segment=ent\\_biz](http://www.business.att.com/service_portfolio.jsp?repopid=ProductCategory&repoitem=eb_vpn&serv_port=eb_vpn&segment=ent_biz) ("AT&T VPN gives you choices in your network design of sophisticated VPN technologies, access, security, voice and WiFi offers, with the flexibility to add on options such as Voice over IP, Video, remote access and hosting.").

also include petitioner Qwest<sup>29</sup> and Sprint,<sup>30</sup> the former parent of petitioner Embarq. Other competitive providers include, but are not limited to, BT Infonet,<sup>31</sup> Cavalier,<sup>32</sup> Cogent,<sup>33</sup> Conversent,<sup>34</sup> Equant,<sup>35</sup> Global Crossing,<sup>36</sup> ICG,<sup>37</sup> Level 3,<sup>38</sup> Looking Glass,<sup>39</sup> McLeodUSA,<sup>40</sup>

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<sup>29</sup> See Qwest, *ATM Service*, available at [http://www.qwest.com/pcat/large\\_business/product/1,1016,767\\_4\\_2,00.html](http://www.qwest.com/pcat/large_business/product/1,1016,767_4_2,00.html) (“Qwest ATM provides high speed, reliability and security for data, video, voice and Internet communications to keep you positioned in the global marketplace.”).

<sup>30</sup> See Sprint, *Data Networking Services: ATM*, available at <http://www.sprintbiz.com/products/atm/index.html> (“Sprint ATM works for sophisticated service providers and enterprises needing high speed transport (higher than DS3) to consolidate intracompany voice, data, and video traffic, while maintaining the highest level of network performance.”); Sprint, *IP VPN*, available at [http://www.sprint.com/business/products/products/hardwareBasedIP-VPN\\_tabA.html](http://www.sprint.com/business/products/products/hardwareBasedIP-VPN_tabA.html) (“Sprint IP Virtual Private Network(SM) (VPN) services deliver a best-of-both-worlds approach to connectivity, delivering the flexibility and global reach of the public Internet and the security and performance of a private networking solution.”).

<sup>31</sup> See BT Infonet, *IP VPN*, available at [http://www.bt.infonet.com/services/internet/ip\\_vpn.asp](http://www.bt.infonet.com/services/internet/ip_vpn.asp) (BT Infonet’s “IP VPNs are run over our global IP network for fully meshed, any-to-any connectivity between multiple locations for a lower cost of ownership than a private network.”).

<sup>32</sup> See Cavalier Telephone, *Data Solutions from Cavalier Business Communications*, available at [http://www.cavtel.com/business/data\\_solutions.shtml](http://www.cavtel.com/business/data_solutions.shtml) (Cavalier offers frame relay with “Secure site-to-site connectivity with ‘best effort’ performance for delay tolerant traffic.”).

<sup>33</sup> See Cogent Communications, *Ethernet Point-to-Point Services*, available at <http://www.cogentco.com/htdocs/ethernet.php> (“Cogent’s point-to-point GigE connections are popular solutions for NetCentric customers who need room to grow. Implement a redundant or backup network or access remote storage locations – Cogent’s network has the capacity you need.”).

<sup>34</sup> See Conversent, *Conversent Secure Private Networks (ATM)*, available at <http://www.conversent.com/website/products/index.asp?prodId=24&pId=14&type=data> (Conversent’s “Secure Private Network Solutions leverages proven ATM technology to provide a perfect solution for businesses looking to transmit mission critical information between remote offices and a host location without fear of interception, loss, or corruption of data.”).

<sup>35</sup> See Equant, *Equant IP VPN*, available at [http://www.equant.com/content/xml/prod\\_serv\\_ipvpn.xml](http://www.equant.com/content/xml/prod_serv_ipvpn.xml) (“Equant IP VPN is a fully managed, business-class service designed to provide a flexible, reliable and cost-effective network infrastructure. It’s backed by the highest levels of performance, quality, data integrity and security – all of which are essential to your e-business.”).

<sup>36</sup> See Global Crossing, *IP VPN Service*, available at [http://www.globalcrossing.com/xml/services/serv\\_data\\_ipvpn\\_over.xml](http://www.globalcrossing.com/xml/services/serv_data_ipvpn_over.xml) (“Global Crossing provides one of the most powerful

OnFiber,<sup>41</sup> SAVVIS,<sup>42</sup> TelCove,<sup>43</sup> Time Warner Telecom,<sup>44</sup> XO,<sup>45</sup> and Xspedius.<sup>46</sup> In short, the sophisticated business customers who purchase these types of services have many competitive options.

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and versatile fully managed IP VPN solutions available today.”); Global Crossing, *Frame Relay Service*, available at [http://www.globalcrossing.com/xml/services/serv\\_data\\_frame\\_rel\\_over.xml](http://www.globalcrossing.com/xml/services/serv_data_frame_rel_over.xml) (Global Crossing offers “one of the world’s most extensive FR/ATM networks [which] allows you to link sites around the globe free from interoperability concerns.”).

<sup>37</sup> See ICG Communications, *Metro Ethernet*, available at <http://www.icgcomm.com/products/corporate/metroe.asp> (“ICG’s Metro Ethernet is a flexible transport service that provides connectivity across the local metropolitan geography using Ethernet as the core protocol” and is offered at up to “1Gbps (1000Mbps) – Gig-E.”).

<sup>38</sup> See Level (3) Communications, *Level 3 IP VPN*, available at <http://www.level3.com/3248.html> (Level 3’s “IP VPN service gives . . . the flexible connectivity and scalability of IP-based services combined with the security, privacy and quality of ATM and frame relay”); Level (3) Communications, *Level 3 Ethernet VPN Service*, available at <http://www.level3.com/1505.html> (Level 3’s “Ethernet VPN service is an MPLS-based, nationally available solution available in increments as small as 1 Mbps” and in “speeds [up to] 1 Gbps”).

<sup>39</sup> See Looking Glass Networks, *EtherGLASS – Ethernet Services*, available at <http://www.lglass.net/products/etherglass.jsp> (“Gigabit Ethernet services are available on either 1000Base-SX (multimode fiber), or 1000Base-LX (single mode fiber) interfaces, at transmission speeds that are configurable from 10 Mbps to 1000 Mbps, depending on your requirements.”).

<sup>40</sup> See McLeodUSA, *Preferred Advantage Metro Frame Relay*, available at [http://www.mcleodusa.com/ProductDetail.do?com.mcleodusa.req.PRODUCT\\_ID=340910](http://www.mcleodusa.com/ProductDetail.do?com.mcleodusa.req.PRODUCT_ID=340910) (“McLeodUSA Preferred Advantage[] Metro Frame Relay links multiple office locations through an advanced, secure frame relay network, which works within either public or shared wide area networks.”).

<sup>41</sup> See OnFiber Communications, *Ethernet*, available at <http://www.onfiber.com/content/index.cfm?fuseaction=showContent&contentID=22&navID=22> (“OnFiber Ethernet service provides the ease of Ethernet local area network technology extended across the metro or across the country. It offers a simple, cost-effective, and non-oversubscribed solution for interconnecting locations. With standard LAN interfaces, this service provide customers a highly affordable way to link sites together at speeds ranging from 1 Mbps to 1 Gbps.”).

<sup>42</sup> See SAVVIS, *Network Services*, available at <http://www.savvis.net/corp/Products+Services/Network/> (“SAVVIS operates an integrated global IP and transport network that delivers IP VPN . . . solutions for enterprises and carriers alike.”).

<sup>43</sup> See TelCove, *ATM*, available at <http://www.telcove.com/products/atm.asp> (TelCove’s “ATM and Frame Relay services are able to inter-work to create a hybrid (Frame-ATM) network that best meets a customer’s network application requirements.”); TelCove, *IP VPN*, available at <http://www.telcove.com/products/ip-vpn.asp> (“With TelCove’s IP-VPN offerings, critical voice

Indeed, in granting Verizon a waiver to enable Verizon to obtain pricing flexibility for its advanced services, the Commission recognized that “competitors do not have to rely on Verizon’s packet switching to provide their own advanced services to customers.”<sup>47</sup> That is because carriers can provide (and are providing) wireline broadband transmission services by deploying their own facilities, or using third-party facilities, to serve the highly lucrative enterprise customers. In addition, carriers can — and already are — creating and selling their own broadband transmission services by combining “special access facilities” with *their own* “packet switch[es].”<sup>48</sup> Those TDM-based special access facilities, moreover, are beyond the scope of the pending petitions and, therefore, will remain available through federal tariffs, subject to common carrier regulation, even after the Commission grants the relief sought here.<sup>49</sup>

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and IT services can be converged using one of the industry’s most scaleable, reliable, and efficient private communications networks.”); TelCove, *Metro Ethernet and Intercity Ethernet Service*, available at <http://www.telcove.com/products/ethernet.asp> (TelCove offers Ethernet services with “[b]andwidth from 10 Mbps to 10 Gbps for Metro Ethernet.”).

<sup>44</sup> See Time Warner Telecom, *Ethernet Internet Service*, available at [http://www.twtelecom.com/cust\\_solutions/services/ethernet\\_internet.html](http://www.twtelecom.com/cust_solutions/services/ethernet_internet.html) (Time Warner Telecom offers Gigabit Ethernet, including “[f]ractional, full, or burstable solutions from 20 Mbps – 1000 Mbps (1 Gbps).”).

<sup>45</sup> See XO Communications, *XO VPN*, available at <http://www.xo.com/products/smallgrowing/data/vpn/index.html> (“XO[] VPN (Virtual Private Network) is a secure encrypted network solution that secures data traffic via encryption between your remote employees and your corporate network or among your various office locations. XO VPN is a cost-efficient solution for companies without a heavy investment in infrastructure or personnel.”).

<sup>46</sup> See Xspedius Communications, *Customer Solutions: Frame ConneX*, available at [http://www.xspedius.com/customersolutions/data\\_connex.aspx](http://www.xspedius.com/customersolutions/data_connex.aspx) (“Xspedius Communications, Inc. provides managed and unmanaged Frame Relay transport services in over 30 U.S. markets, utilizing its own MPLS backbone with ATM and Frame at the edge.”).

<sup>47</sup> Memorandum Opinion and Order, *Petition for Waiver of Pricing Flexibility Rules for Fast Packet Services*, 20 FCC Rcd 16840, ¶ 11 (2005).

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

<sup>49</sup> Those TDM-based facilities also remain available as UNEs, to the extent the Commission has found impairment with respect to those facilities.

And there can be no serious claim that other carriers are unable to deploy their own packet switches or connect those switches to special access facilities, given the Commission's long-standing determination that carriers are not impaired without access to incumbents' packet switches and the fact that carriers have already deployed many thousands of such switches.<sup>50</sup>

Similarly, with respect to non-TDM optical transmission services, there can be no serious dispute that other carriers are capable of deploying their own facilities. As the Commission has recognized, there is "substantial deployment of competitive fiber loops at OCn capacity and competitive carriers confirm they are often able to economically deploy these facilities to the large enterprise customers that use them."<sup>51</sup> Competing carriers are able to deploy new OCn-level facilities without significant difficulty, because these types of facilities "produce revenue levels which can justify the high cost of loop construction, providing the opportunity for competitive LECs to offset the fixed and sunk costs associated with the loop construction." *Triennial Review Order* ¶ 316.<sup>52</sup> Moreover, the "[l]arge enterprise customers purchasing services over OCn loops enter into long-term contracts committing to revenue streams and associated early termination charges that provide the ability for carriers to recover their substantial non-recurring 'set-up' or construction costs." *Triennial Review Order* ¶ 316 (footnote omitted). Consistent with these findings, "there does not appear to be any evidence of

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<sup>50</sup> See, e.g., Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533, ¶¶ 205-209 (2005) ("*Triennial Review Remand Order*"), petitions for review denied, *Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006); *271 Broadband Forbearance Order* ¶¶ 12, 19, 37 (forbearing from enforcing any requirement of BOCs to provide access to packet switches under § 271).

<sup>51</sup> *Triennial Review Remand Order* ¶ 183; see also *Triennial Review Order* ¶ 315.

<sup>52</sup> See also *Triennial Review Remand Order* ¶ 182 n.493 ("Despite these costs, the revenue possibilities of dark fiber are great enough to make self-deployment economic.").

demand for incumbent LEC OCN level unbundled loops,” which further shows that competing carriers are deploying these high-speed optical facilities themselves or obtaining them from third parties. *Id.* ¶ 315.

In addition, the enterprise customers that purchase these wireline broadband transmission services, as the Commission has recognized, are “highly sophisticated” and can “negotiate for significant discounts.” *Verizon-MCI Order* ¶ 75. This level of sophistication is “significant not only because it demonstrates that these users are aware of the multitude of choices available to them, but also because they show that these users are likely to make informed choices based on expert advice” to “seek out best-price alternatives.” *Id.* ¶ 76. This “process of competitive bidding and contract renegotiation is often sufficient . . . [to] compel[] the supplier to offer lower prices and improved service to retain the [enterprise] customer.” *SBC-AT&T Order* ¶ 74 n.226 (internal quotation marks omitted). Indeed, as the Commission has recognized, contracts with enterprise customers “are typically the result of RFPs,” “are individually-negotiated,” and “are generally for customized service packages”<sup>53</sup> — the antithesis of common carrier offerings.

**B. The Oppositions to the Petition Repeat Arguments that the Commission and Courts Have Repeatedly Rejected**

In opposing the AT&T, BellSouth, Embarq, and Qwest petitions for forbearance, commenters rely on the same hoary arguments that the Commission and the courts have rejected time and again. The Commission should reject those arguments yet again in granting the petitions.

For example, *Broadview et al.* (at 18-28) contend that the Commission’s forbearance analysis must consider discrete geographic areas and discrete products, rather than the national

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<sup>53</sup> *Verizon-MCI Order* ¶ 79.

broadband market that the Commission has considered in the *Cable Modem Declaratory Ruling*, the *Triennial Review Order*, the *271 Broadband Forbearance Order*, and the *Title I Broadband Order*. As this list makes clear, the Commission has already considered and rejected claims that it is precluded from recognizing that there is a national broadband market, and that the various high-speed, packetized services offered to customers in that market need not be considered on a service-by-service basis in the Commission's deregulatory efforts. The D.C. Circuit also "disagree[d]" with the argument that § 160 "permits the [Commission] to grant forbearance only after . . . [consideration of] particular geographic markets and . . . specific telecommunications services." *EarthLink*, 2006 WL 2346459, at \*5 (internal quotation marks omitted). The court found that § 160 permits the Commission "to forbear on a nationwide basis — without considering more localized regions individually —" and "does not require consideration of specific services." *Id.*

Similarly, *Alpheus et al.* (at 5-6) argue that the Commission must utilize "traditional market power analys[is]" in reviewing the pending forbearance petitions. But the Commission has already rejected that claim, and the D.C. Circuit expressly upheld the Commission's decision that its "traditional market power analysis . . . does not bind [the FCC's § 160] forbearance analysis." *EarthLink*, 2006 WL 2346459, at \*7 (internal quotation marks omitted; alteration in original). The court found further that the Commission had acted appropriately in "eschew[ing] a more elaborate snapshot of the current market" conditions and in "tailoring the forbearance inquiry to the situation at hand," namely the "emerging and developing" broadband market. *Id.* at \*6. The court also rejected claims that the Commission's analysis was inconsistent with precedent, finding that other instances in which the Commission had used its traditional market power analysis were "not directly applicable to the present circumstances." *Id.* at \*7. *Alpheus et*

*al.* (at 6) attempt to distinguish *EarthLink* because that case pertained only to § 271 requirements, but in arguing that a different analysis is required here they rely on the same case that the D.C. Circuit expressly found is not “directly applicable” because it spoke to “dominance classifications,” which the pending petitions do not address. *EarthLink*, 2006 WL 2346459, at \*7.

The New Jersey Division of Rate Counsel (“NJDRRC”) (at 6-7) repeats what the D.C. Circuit derided as the “frantic claim” that granting the pending petitions would mean that the Commission had found “that duopoly now equates to rigorous competition.” *EarthLink*, 2006 WL 2346459, at \*8 (internal quotation marks omitted). As the court explained, this claim “misses the mark” because the question is not whether “cable’s majority market share alone is dispositive,” but instead whether — as the Commission found in the *271 Broadband Forbearance Order* and the *Title I Broadband Order* — that cable modem’s “market lead[.]” “lends support” to a decision not to impose on “secondary market” players (incumbent LECs) obligations that do not apply to the “cable internet providers.” *Id.* NJDRRC’s claim is even further off base here, where the Commission has repeatedly, and correctly, found that enterprise customers have myriad providers from which to choose.

NJDRRC (at 8) also asserts that, if the Commission grants the pending petitions, it should extend to BOCs the structural separation requirements in 47 C.F.R. § 64.1903 that apply to independent incumbent LECs when they provide in-region, interstate, interexchange services. As NJDRRC implicitly recognizes, the statutory separation requirements applicable to BOCs will sunset in full by the end of this year, and have already sunset in full for Verizon and BellSouth.<sup>54</sup>

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<sup>54</sup> See Home Page, FCC Common Carrier Bureau, *RBOC Applications to Provide In-Region, InterLATA Services Under § 271*, available at [http://www.fcc.gov/Bureaus/Common\\_Carrier/in-region\\_applications/](http://www.fcc.gov/Bureaus/Common_Carrier/in-region_applications/).

There is no basis for the Commission to re-impose such regulation, particularly because the technology used to provide the broadband services at issue here, as the Commission has recognized, is “fundamentally changing” in ways that are “ero[ding] . . . barriers between various networks” that underlay the differential regulation of intra- and interexchange services and that have no applicability to the any-distance broadband market.

Finally, a number of commenters repeat the claim — also rejected by the Commission in the *271 Broadband Forbearance Order* and the *Title I Broadband Order* and upheld by the D.C. Circuit in *EarthLink* — that the Commission must consider wholesalers interests separate from those of end-user customers. *See, e.g.*, *EarthLink* at 11-15; *CompTel* at 18, 20; *Sprint Nextel* at 13-14; *Time Warner Telecom et al.* at 7-16. In rejecting this claim in the past, the Commission has correctly started from the principle that it is *consumers*, not wholesalers, who are the ultimate beneficiaries of the Communications Act, and thus that *retail* competition in the broadband market — not the ability of particular companies to have guaranteed wholesale suppliers — is the central aim of regulatory policy. *See, e.g.*, *Title I Broadband Order* ¶ 62. And, in *EarthLink*, the court rejected claims that the Commission “failed to properly consider the wholesale market,” finding that the Commission had properly found that wholesale purchasers “have alternat[iv]e ways to compete” and that incumbents “will be inclined to offer reasonable wholesale rates” as a sensible business response to the intense competition in the market and the desire to “keep traffic on-net.” *EarthLink*, 2006 WL 2346459, at \*8 n.8 (internal quotation marks omitted).<sup>55</sup>

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<sup>55</sup> It is telling that, in their efforts to support their claims that incumbents will discriminate against wholesale purchasers, commenters are forced to dredge up stale allegations from 2002. *See Alpheus et al.* at 26 & n.72.

**CONCLUSION**

For the foregoing reasons, the Commission should grant the relief requested in the petitions.

Respectfully submitted,

Of Counsel:

Michael E. Glover

/s/ Scott H. Angstreich  
Scott H. Angstreich  
KELLOGG, HUBER, HANSEN, TODD,  
EVANS & FIGEL, P.L.L.C.  
1615 M Street, N.W.  
Suite 400  
Washington, D.C. 20036  
(202) 326-7900

Edward Shakin  
William H. Johnson  
VERIZON  
1515 North Courthouse Road  
Suite 500  
Arlington, VA 22201-2909  
(703) 351-3060

*Counsel for Verizon*

August 31, 2006

# **ATTACHMENT 1**

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

<b>In the Matters of:</b>	)	
	)	
<b>Appropriate Framework for Broadband Access to the Internet over Wireline Facilities</b>	)	CC Docket No. 02-33
	)	
<b>Universal Service Obligations of Broadband Providers</b>	)	
	)	
<b>Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements</b>	)	CC Docket Nos. 95-20, 98-10
	)	
	)	

**PETITION FOR LIMITED RECONSIDERATION OF  
TITLE I BROADBAND ORDER**

**Michael E. Glover**  
*Of Counsel*

**Edward Shakin**  
**William H. Johnson**

1515 North Courthouse Road  
Suite 500  
Arlington, VA 22201  
(703) 351-3060  
will.h.johnson@verizon.com

**November 16, 2005**

**Attorneys for the  
Verizon telephone companies**

## CONTENTS

<b>I. Introduction and Summary .....</b>	<b>1</b>
<b>II. Background.....</b>	<b>3</b>
<b>III. The Commission Should Encourage Deployment of All Innovative and Competitive Broadband Services, Including ATM and Frame Relay, by Allowing Them to Be Offered on a Private Carriage Basis Under Title I, Even When Those Services Are Not Used for Internet Access .....</b>	<b>7</b>
<b>A. Broadband Transmission Services Are Not the Type of Services     Warranting Common Carrier Treatment.....</b>	<b>7</b>
<b>B. The Robust Competition for Broadband Transmission Services     Demonstrates the Lack of Any Need for Common Carrier Regulation.....</b>	<b>13</b>
<b>Conclusion.....</b>	<b>16</b>

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**PETITION FOR LIMITED RECONSIDERATION OF  
TITLE I BROADBAND ORDER**

**I. Introduction and Summary.**

In its recent *Title I Broadband Order*,<sup>1</sup> the Commission took an important pro-competitive and pro-consumer step by recognizing that wireline facilities-based providers may sell broadband Internet access services as information services under Title I of the Communications Act, and that the underlying broadband transmission services, when offered by local telephone companies, are no longer subject to the common carrier strictures of Title II or to the *Computer Inquiry* rules unless the provider so chooses. Accordingly, telephone companies are now able to provide stand-alone broadband transmission services that are used as inputs to Internet access services through commercially negotiated private carriage agreements under Title I of the Act. As the Commission stated, “the appropriate framework for wireline Internet access

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<sup>1</sup> *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853 ( 2005) (“*Title I Broadband Order*”).

service, *including its transmission component*, is one that is eligible for a lighter regulatory touch.” *Title I Broadband Order* ¶ 3. Verizon<sup>2</sup> fully supports this outcome that will allow it to compete more effectively with other broadband Internet access providers, like the cable companies, who have long operated outside of Title II.

At the same time, Verizon urges the Commission to reconsider one important aspect of its recent order – its decision not to extend Title I private carriage treatment to stand-alone broadband transmission services, such as the ATM and Frame Relay services that Verizon sells primarily to large enterprise customers, to the extent that those services are not used for Internet access.<sup>3</sup> The question is whether the lighter regulatory treatment extended by the order to broadband transmission services when used for Internet access should also apply when those same services are not offered as part of an Internet access service.

Verizon documented in this proceeding that these broadband transmission services, whether or not offered together with Internet access, are sold in a competitive environment, thus eliminating any need for common carrier regulation of any providers. Verizon also showed that it and other local telephone companies remain subject to intrusive common carrier regulation when they sell these competitive broadband transmission services, even while all other

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<sup>2</sup> The Verizon companies (“Verizon”) are the affiliated local telephone companies of Verizon Communications Inc. These companies are listed in Attachment A.

<sup>3</sup> In addition to any broadband transmission services used to access the Internet, the broadband transmission services entitled to Title I treatment should include all transmission services that use a packet-switched or successor technology. Examples include Digital Subscriber Line (DSL) services (while most DSL services are offered as part of an Internet access service, that is not always the case), Frame Relay services, Asynchronous Transfer Mode (ATM) services, gigabit Ethernet services, and optical services. This definition does not include TDM-based special access services, although, as the Commission has recognized, packetized transmission services should not be denied relief simply because of any “TDM handoff” required in order for these services to be compatible with legacy customer premises equipment. *See Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 19 FCC Rcd 20293, ¶ 21 (2004).

competitors have been immune from such regulation. For example, when other carriers provide these broadband transmission services to enterprise customers for purposes other than Internet access, they have been allowed to operate largely free from regulation even if they are nominally subject to Title II. By regulating local telephone companies as common carriers, but leaving their competitors essentially unregulated, the current regulatory scheme has made it more difficult for these providers to compete successfully and efficiently and has created disincentives to new investment that hinder deployment of new facilities and services.

Consistent with the record in this proceeding and with the Commission's precedent recognizing that Title I treatment is appropriate for services such as those at issue here over which the providers lack market power, the Commission should reconsider its order in this one regard and hold that all broadband transmission services, including specifically stand-alone broadband transmission services, are subject only to minimal regulation under Title I rather than the unnecessary strictures of Title II common carrier regulation, even when those services are not used for Internet access. Doing so would allow providers like Verizon additional flexibility to craft broadband services that better meet customers' needs, thus spurring additional investment in and competition for these already competitive services.

## **II. Background.**

The Commission initiated this proceeding in February 2002, seeking to determine the appropriate regulatory classification for wireline broadband services.<sup>4</sup> In doing so, the Commission appropriately recognized that "[t]he widespread deployment of broadband infrastructure has become the central communications policy objective of the day," and that

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<sup>4</sup> *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 FCC Rcd 3019 (2002) ("NPRM").

“broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market.” *NPRM* ¶¶ 1, 5. The Commission then tentatively concluded that “the provision of wireline broadband Internet access service is an information service,” and that “the transmission component of retail wireline broadband Internet access services provided over an entity’s own facilities is ‘telecommunications’ and not a ‘telecommunications service.’” *Id.* ¶ 17. In addition, the Commission sought comment on the appropriate regulatory classification when any “entity provides only broadband transmission on a stand-alone basis, without a broadband Internet access service.” *Id.* ¶ 26. The Commission asked commenters to “address what the appropriate statutory classification of broadband transmission should be when it is not coupled with the Internet access component. . . . [and] the circumstances under which owners of transmission facilities offer broadband transmission on a private carriage basis.” *Id.*

In response to the *NPRM*, Verizon supported the Commission’s conclusion that wireline Internet access services constitute information services that should be subject to a minimal regulatory regime under Title I, similar to the Commission’s previous determination with respect to cable modem service – the dominant broadband service sold to mass market consumers.<sup>5</sup> Verizon – again with the support of other parties<sup>6</sup> – further argued that the Commission’s

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<sup>5</sup> See, e.g., Comments of Verizon, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33 (filed May 3, 2002) (“*Verizon Comments*”).

<sup>6</sup> See, e.g., Letter from Cronan O’Connell, Qwest, to Marlene H. Dortch, FCC, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, at 7 (filed Aug. 8, 2003) (arguing that Qwest and other local telephone companies lack market power over ATM and Frame Relay, and should not be subject to common carrier regulation); Letter from Cronan O’Connell, Qwest, to Marlene H. Dortch, FCC, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, at 13-18 (filed May 23, 2003); Letter from Whit Jordan, BellSouth, to Marlene H. Dortch, FCC, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, at 7 & 16 (filed Oct. 16, 2002); Letter from Jonathan J. Boynton, SBC, to Marlene H. Dortch,

broadband policy objectives, the mandate of Section 706 to encourage broadband deployment, and relevant Commission precedent all warranted the same private carriage treatment for other broadband transmission services even when not used for Internet access services, including packetized broadband transmission services like ATM and Frame Relay.<sup>7</sup> Throughout the course of this proceeding, Verizon repeatedly explained both the propriety and necessity for treating these broadband transmission services as private carriage offerings under Title I, and provided the factual record to support such a determination.<sup>8</sup> Among other things, Verizon demonstrated that these services are innovative services being offered in a highly competitive market to sophisticated customers – precisely the type of services that the Commission previously has recognized should be subject to only minimal regulation under Title I, rather than misplaced, inefficient and unnecessary common carrier regulation. Moreover, Verizon explained that common carrier regulation is particularly troubling with respect to broadband transmission services sold to enterprise customers because these customers – who frequently have regional, national or international communications needs – demand integrated services and customized

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FCC, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, at 9-11 (filed Sept. 26, 2002).

<sup>7</sup> *Verizon Comments* at 9-23.

<sup>8</sup> See, e.g., *Verizon Comments*, at 9-23; Reply Comments of Verizon, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, at 11-44 (filed July 1, 2002); Broadband Fact Report, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, at 26-31 (filed May 3, 2002) (Attachment A to *Verizon Comments*) (“2002 Broadband Fact Report”); Letter from Ann D. Berkowitz, Verizon, to Marlene H. Dortch, FCC, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33 (filed June 25, 2003) (“Enterprise Market Presentation”); Letter from Dee May, Verizon, to Marlene H. Dortch, FCC, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, at 17-19 (filed Nov. 13, 2003); Broadband Fact Report, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, at 24-26 (filed March 26, 2004) (“March 2004 Broadband Fact Report”).

solutions that are difficult to satisfy under common carrier regulation, particularly when the regulations of multiple jurisdictions apply.<sup>9</sup>

Despite the robust record in this proceeding demonstrating that broadband transmission services like ATM and Frame Relay should be subject to Title I regardless of whether they are used for Internet access, the Commission's *Title I Broadband Order* declined to so hold. Instead, the Commission concluded that "other wireline broadband services, such as stand-alone ATM service, frame relay, gigabit Ethernet service, and other high-capacity special access services" lack the "information-processing capabilities" of broadband Internet access services. *Title I Broadband Order* ¶ 9. While that may mean that these stand-alone transmission services are not being used as an input to Internet access or another information service, the order says nothing about whether these stand-alone services can or should be treated as private carriage offerings under Title I. Instead, the order skips past this critical issue and simply assumes these stand-alone services would be offered as "telecommunications services . . . subject to current Title II requirements." *Id.* The Commission did acknowledge, however, that these exact same broadband transmission services should not be subjected to common carriage regulation when they are provided either as a "wholesale input to ISPs," or are offered as part of an Internet access service. *See id.* ¶¶ 103-104. The Commission acknowledged that "the current record does not support a finding of compulsion that the transmission component of [f] wireline broadband Internet access service is a telecommunications service as to the end user." *Id.* ¶ 106. As we demonstrated previously, and address again below, the same is true when these services are offered on a stand-alone basis and not as part of an Internet access service.

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<sup>9</sup> *Enterprise Market Presentation* at 7 & 11.

**III. The Commission Should Encourage Deployment of All Innovative and Competitive Broadband Services, Including ATM and Frame Relay, by Allowing Them to Be Offered on a Private Carriage Basis under Title I, Even When Those Services Are Not Used for Internet Access.**

The record in this proceeding clearly demonstrates that all wireline broadband services – and not merely broadband Internet access services – are subject to intense competition and that providers should be permitted to offer these services on a private carriage basis under Title I. And this is certainly true for broadband transmission services like ATM and Frame Relay that are sold to sophisticated enterprise customers, primarily by providers who have long been exempt from Title II's most onerous requirements. Moreover, the Commission's recent order already recognizes that these same services may be offered on a private carriage basis when used as an input to an integrated Internet access service. Accordingly, Verizon respectfully urges the Commission to reconsider its order in this limited regard and to hold that stand-alone broadband transmission services may be offered on a private carriage basis under Title I, regardless of whether they are sold as part of an Internet access service.

**A. Broadband Transmission Services Are Not the Type of Services Warranting Common Carrier Treatment.**

The competitive nature of broadband transmission services compels the conclusion that these services may be sold on a private carriage basis under Title I. The Act defines a "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public."<sup>10</sup> The Commission previously has found that the definition of telecommunications services "is intended to encompass only telecommunications provided on a common carrier basis" – that is,

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<sup>10</sup> 47 U.S.C. § 153(46).

telecommunications offered not simply to the public, but “indifferently [to] all potential users.”<sup>11</sup> However, unless a provider chooses to offer services in that manner, then precedent also recognizes that common carriage treatment cannot be imposed absent the presence of market power with respect to such services – something local telephone companies and other providers alike lack with respect to stand-alone broadband transmission services.

Consistent with this two-step approach, the Commission has made it clear that compelled Title II treatment is justified only to prevent an abuse of market power. Where competition restrains market power, the Commission can and must let market forces, rather than Title II regulations, guide the development of the marketplace.<sup>12</sup> In fact, where such competition is present, the Commission has often either mandated that services or facilities be taken outside of Title II completely, or allowed telecommunications providers to choose whether to offer service on a common- or non-common-carrier basis, particularly when those services are innovative or involve emerging technologies.<sup>13</sup>

The Commission’s *Title I Broadband Order* reaffirms the two-step approach to determining whether common carrier regulation applies, correctly recognizing that broadband

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<sup>11</sup> *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 9177-78, ¶ 785 (1997).

<sup>12</sup> See *AT&T Submarine Systems, Inc.*, 13 FCC Rcd 21585, ¶ 9 (1998) *aff’d*, *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999); see also, e.g., *Cox Cable Communications, Inc., Commline, Inc. and Cox DTS, Inc.*, 1 FCC Rcd 561, ¶ 5 (1986) (finding no “compelling reason” to impose common carrier regulation on a carrier that had “little or no market power”); see generally Michael Kende, Office of Plans and Policy, FCC, *The Digital Handshake: Connecting Internet Backbones* at 12 (OPP Working Paper No. 32, Sept. 2000) (common carrier regulation “serve[s] to protect against anti-competitive behavior by telecommunications providers with market power. In markets where competition can act in place of regulation as the means to protect consumers from the exercise of market power, the Commission has long chosen to abstain from imposing regulation.”).

<sup>13</sup> See, e.g., *Computer & Communications Indus. Assoc. v. FCC*, 693 F.2d 198, 208-09 (D.C. Cir. 1982) (“*CCIA*”) (affirming the reasonableness of the Commission’s determination that enhanced services and customer premises equipment were outside the scope of Title II); see also *Philadelphia Television Broad. Co. v. FCC*, 359 F.2d 282 (D.C. Cir. 1966).

transmission services that are used as inputs to an Internet access service fall under Title I. In this context, the Commission noted that “the transmission component of wireline broadband Internet access service is a telecommunications service only if one of two conditions is met: the entity that provides the transmission voluntarily undertakes to provide it as a telecommunications service; or the Commission mandates, in the exercise of our ancillary jurisdiction under Title I, that it be offered as a telecommunications service.” *Title I Broadband Order* ¶ 103. The D.C. Circuit has followed the same approach, holding that common carrier regulation may only apply where a provider’s market power justifies the imposition of such intrusive requirements, unless the provider itself chooses to operate as a common carrier.<sup>14</sup>

Other, well-established judicial precedent further confirms the Commission’s authority to permit private carriage treatment where a provider lacks market power. As the D.C. Circuit confirmed when it upheld the Commission’s landmark decision to classify information services and CPE under Title I, “the latitude accorded the Commission by Congress in dealing with new communications technology includes the discretion to forbear from Title II regulation” by classifying services as non-common carriage under Title I.<sup>15</sup> In that decision, the court approved the FCC’s use of private carriage in place of common carriage and held that “the public interest touchstone of the Communications Act, beyond question, permits the FCC to allow the marketplace to substitute for direct Commission regulation in appropriate circumstances.”<sup>16</sup>

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<sup>14</sup> *National Ass’n of Regulatory Util. Comm’rs v. FCC*, 525 F.2d 630, 642 (D.C. Cir. 1976) (“The key factor is that the operator offer indiscriminate service to whatever public its service may legally and practically be of use. In making this determination, we must inquire, first, whether there will be any legal compulsion thus to serve indifferently, and if not, second, whether there are reasons implicit in the nature of [the service’s] operations to expect an indifferent holding out to the eligible user public.”).

<sup>15</sup> *CCIA*, 693 F.2d at 212.

<sup>16</sup> *Wold Communications, Inc. v. FCC*, 735 F.2d 1465, 1475 (D.C. Cir. 1984) (citation omitted).

Subsequently, the Commission has used this discretion to allow non-common-carrier provision of many types of innovative services as they have developed, including satellite services,<sup>17</sup> submarine cables,<sup>18</sup> for-profit microwave systems,<sup>19</sup> dark fiber,<sup>20</sup> and various mobile services,<sup>21</sup> to name just a few.<sup>22</sup>

The same private carriage approach is appropriate with respect to stand-alone broadband transmission services, as confirmed by the Commission's decision in the *Cable Modem Declaratory Ruling* and the *Title I Broadband Order*, as well as by the Supreme Court's decision in *Brand X*. In the *Cable Modem Declaratory Ruling*,<sup>23</sup> the Commission decided that any "stand-alone transmission service" offered by cable companies to ISPs would be a "private

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<sup>17</sup> *Licensing Under Title III of the Communications Act of 1934, as amended*, 8 FCC Rcd 1387 (1993) (allowing certain satellite services on a private carriage basis, including mobile voice, data, facsimile, and position location for both domestic and international subscribers); *Application of Loral/Qualcomm Partnership, L.P.*, 10 FCC Rcd 2333 (1995) (allowing use of the Globalstar system for mobile voice, data, facsimile, and other services as a non-common carrier).

<sup>18</sup> *AT&T Submarine Systems, Inc.; FLAG Pacific Limited*, 15 FCC Rcd 22064 (2000).

<sup>19</sup> *See, e.g., General Telephone Company of the Southwest*, 3 FCC Rcd 6778 (1988) (providing that for-profit microwave systems may be offered as private carriage, even if interconnected with the public switched telephone network).

<sup>20</sup> *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475 (D.C. Cir. 1994).

<sup>21</sup> *Amendment of the Commission's Rules to Establish New Personal Communications Services*, 6 FCC Rcd 6601 (1991); *Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems*, 89 F.C.C.2d 58 (1982) (dispatch services may be offered either on a common or non-common carrier basis); *Petition for Reconsideration of Amendment of Parts 2 and 73 of the Commission's Rules Concerning Use of Subsidiary Communications Authorization*, 98 F.C.C.2d 792 (1984) (private carrier paging system may be offered either on a common or non-common carrier basis).

<sup>22</sup> A listing of further examples was included as Exhibit C to *Verizon Comments*.

<sup>23</sup> *Inquiry Concerning High-Speed Access to Internet over Cable and Other Facilities*, 17 FCC Rcd 4798 (2002) ("*Cable Modem Declaratory Ruling*").

carrier service and not a common carrier service.”<sup>24</sup> *Id.* ¶ 54. The Commission recognized that Title I treatment is appropriate where a provider deals with selected customers “on an individualized basis” rather than offering services “indiscriminately.” *Id.* ¶ 55. The Supreme Court’s decision in *Brand X* subsequently affirmed the Commission’s application of Title I to cable operators’ broadband services. *NCTA v. Brand X Internet Servs.*, 125 S. Ct. 2688 (2005). And, directly to the point here, the Court also recognized that “[t]he Commission has long held that ‘all those who provide some form of transmission services are not necessarily common carriers.’” *Id.* at 2706 (citation omitted).

Likewise, as discussed above, the Commission again concluded in the *Title I Broadband Order* that broadband transmission services – identical to those at issue here – may be offered on a private carriage basis when used as part of an Internet access service. *Title I Broadband Order* ¶ 103. As was true in the context of cable providers, the Commission noted that it expected “a collection of individualized arrangements” by providers who sell these broadband transmission services for use in Internet access services, and concluded that private carriage treatment was appropriate. *Id.*

The Commission’s analysis in this regard is no less applicable when these same services are sold to sophisticated enterprise customers for uses other than Internet access. No provider has market power with respect to any broadband transmission services, whether or not those services are used to access the Internet. And the absence of any such market power precludes compulsory common carrier treatment of these services. Moreover, the sophisticated customers who purchase these broadband transmission services demand individualized solutions and

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<sup>24</sup> In fact, even before the Commission’s *Cable Modem Declaratory Ruling*, cable companies (and satellite and wireless companies) were free to offer broadband transmission on a non-common-carrier basis – or, indeed, not to offer transmission on a stand-alone basis at all.

arrangements that are best handled through “individualized arrangements.” Thus, as Verizon demonstrated throughout this proceeding, the strong and increasing competition for broadband services compels the Commission to classify *all* broadband transmission under Title I, whether or not those transmission services happen to be used to access the Internet.

Nor does the current Title II treatment of broadband services support a contrary conclusion. The Commission’s treatment of local telephone company broadband services under Title II until now has not been the product of a considered decision on the part of the Commission. Instead, Title II has been applied to wireline broadband reflexively, through “regulatory creep.” That is, because the telephone companies provided voice services subject to Title II, the Commission reflexively subjected them to Title II regulation in their provision of broadband as well. But the mere fact that local telephone companies are regulated under Title II when they provide narrowband voice transmission provides no impediment to regulating their broadband transmission under Title I. Indeed, it is well established that telephone companies can act as non-common carriers when they offer transmission services or facilities, just as they can when they offer other types of services.<sup>25</sup> As the D.C. Circuit has noted, “[w]hether an entity in a given case is to be considered a common carrier” turns not on its typical status but “on the particular practice under surveillance.”<sup>26</sup>

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<sup>25</sup> See, e.g., *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999) (upholding regulation of undersea fiber optic telecommunications cable on non-common carrier basis); *Southwestern Bell Tel. Co.* (recognizing provision of dark fiber on non-common carrier basis); *FLAG Pacific Limited*, 15 FCC Rcd 22064 (2000) (involving undersea telecommunications cable on a non-common carrier basis); *FLAG Atlantic Limited*, 15 FCC Rcd 21359 (1999) (same).

<sup>26</sup> *Southwestern Bell Tel. Co.*, 19 F.3d at 1481; see also *NARUC v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976) (finding it “logical to conclude that one can be a common carrier with regard to some activities but not others”).

By eliminating in this context the counterproductive and expensive Title II regulation of broadband transmission services sold by local telephone companies, the Commission would allow local telephone companies – just like all other competitors – to negotiate flexible, mutually beneficial terms and conditions with their customers. Scrapping Title II’s stringent tariffing system in the context of these competitive and innovative services also would create a regulatory environment conducive to the very substantial further investment needed to bring about widespread broadband deployment and would prevent this unnecessary regulation from further distorting a vibrantly competitive market. *See Title I Broadband Order* ¶ 3.

**B. The Robust Competition for Broadband Transmission Services Demonstrates the Lack of Any Need for Common Carrier Regulation.**

The competitive nature of broadband transmission services confirms this conclusion. Stand-alone broadband transmission services sold to enterprise customers are subject to intense competition, and local telephone companies have never had market power with respect to these services. In brief terms, no providers – and certainly no local telephone company – has market power over broadband transmission services. The larger business segment is typified by vigorous, well-funded competitors; massive recent investments sunk into fiber and packet switches; and large, sophisticated customers with long-term contracts. All of these factors prevent any exercise of market power by local telephone companies or any other providers.<sup>27</sup>

Even after Verizon completes its merger with MCI, the combined entity will be a minority player in the competition for broadband transmission services. As Verizon has

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<sup>27</sup> Verizon Broadband Non-Dominance Comments, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, at 19-22 (filed Mar. 1, 2002); Verizon Broadband Non-Dominance Reply Comments, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket NO. 01-337, at 26-30 (filed Apr. 22, 2002).

previously explained, customers of these services have many alternatives from whom they can purchase broadband services such as ATM and Frame Relay.<sup>28</sup> In 2004, Verizon accounted for only about a 5.1 percent market share of ATM revenues, and approximately a 4.9 percent share of ATM revenues nationally.<sup>29</sup> Although the combined entity will be an important provider of these services, it certainly will not be in any position to exercise market power. Instead the vast majority of these services (to the tune of 75 percent or more) still will be provided by other players, and Verizon will still face stiff competition from SBC/AT&T, Sprint Nextel, Qwest, Level 3, XO and a host of other providers.<sup>30</sup> Any attempt by local telephone companies to raise the price or reduce their output of ATM, Frame Relay, gigabit Ethernet or other broadband services would lead customers to defect to the many other suppliers of the same services who are ready and willing to supply these services.

Moreover, a number of competing last-mile technologies – including satellite, fixed wireless, third-generation (“3G”) wireless, broadband over power lines (“BPL”), and Wi-Fi – eliminate any “bottleneck” concerns and provide still further competition today, with the promise of even greater competition to come.<sup>31</sup> For example, a study by In-Stat/MDR found that 41 percent of “enterprises” (which is defined as businesses with 5,000 or more employees) were using cable modem service, 40 percent were using fixed wireless, and 21 percent were using

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<sup>28</sup> See, e.g., *2002 Broadband Fact Report*, at 26-31; *Enterprise Market Presentation*; *March 2004 Broadband Fact Report*, at 24-26.

<sup>29</sup> M. Bowen, *et al.*, Schwab Soundview Capital Markets, *AT&T Corp.* at 3 (Jan. 21, 2004).

<sup>30</sup> See, e.g., *See, e.g., 2002 Broadband Fact Report*, at 26-31; *Enterprise Market Presentation*; *March 2004 Broadband Fact Report*, at 24-26; see also Letter from Dee May to Marlene H. Dortch, *Verizon Communications Inc. and MCI, Inc., Applications for Approval of Transfer of Control*, WC Docket No. 05-75, Attachment 1 (filed Sep. 14, 2005).

<sup>31</sup> See, e.g., *Fourth Report to Congress on Availability of Advanced Telecommunications Capability in the United States*, 19 FCC Rcd 20540, 20553-20562 (2004).

satellite, in place of or in addition to other alternatives such as high-speed ILEC lines.<sup>32</sup> With respect to the “middle market” (which is defined as businesses with between 500 and 5,000 employees), In-Stat/MDR reported that 32 percent were using cable modem, 29 percent fixed wireless, and 9 percent were using satellite.<sup>33</sup> In addition, the study found that 40 percent of enterprise businesses and 38 percent of middle-market businesses plan to use cable modem in the next 12 months, and that 54 percent and 44 percent, respectively, plan to use fixed wireless within that time.<sup>34</sup> Under these circumstances, imposing Title II common carrier regulations and the *Computer Inquiry* rules on one (and only one) class of service providers is affirmatively counterproductive, and continuing this lopsided treatment will jeopardize the continued development of these innovative broadband services on a competitive basis.

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<sup>32</sup> K. Burney & C. Nelson, In-Stat/MDR, *Cash Cows say “Bye-Bye”: Future of Private Line Services in US Businesses (5+ Employees)*, at 19, Table 9 (Dec. 2003). (“*In-Stat/MDR December 2003 Study*”); *March 2004 Broadband Fact Report* at 25.

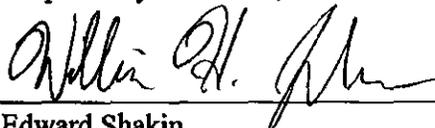
<sup>33</sup> *In-Stat/MDR December 2003 Study*.

<sup>34</sup> *Id.* at 19, Table 10.

**CONCLUSION**

**The evidence adduced in this record showing the state of competition and local telephone companies' lack of market power for *all* broadband services, including specifically stand-alone broadband transmission services like ATM and Frame Relay, strongly supports the conclusion that Title II is the wrong regulatory pigeonhole for any wireline broadband services.**

Respectfully submitted,



Edward Shakin  
William H. Johnson

**Michael E. Glover**  
*Of Counsel*

1515 North Courthouse Road  
Suite 500  
Arlington, VA 22201  
(703) 351-3060  
will.h.johnson@verizon.com

**November 16, 2005**

Attorneys for the  
Verizon telephone companies

THE VERIZON TELEPHONE COMPANIES

The Verizon telephone companies are the local exchange carriers affiliated with Verizon Communications Inc. These are:

Contel of the South, Inc. d/b/a Verizon Mid-States  
GTE Southwest Incorporated d/b/a Verizon Southwest  
Verizon California Inc.  
Verizon Delaware Inc.  
Verizon Florida Inc.  
Verizon Maryland Inc.  
Verizon New England Inc.  
Verizon New Jersey Inc.  
Verizon New York Inc.  
Verizon North Inc.  
Verizon Northwest Inc.  
Verizon Pennsylvania Inc.  
Verizon South Inc.  
Verizon Virginia Inc.  
Verizon Washington, DC Inc.  
Verizon West Coast Inc.  
Verizon West Virginia Inc.

# **ATTACHMENT 2**

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

In the Matter of

Appropriate Framework for Broadband Access  
to the Internet over Wireline Facilities

CC Docket No. 02-33

Universal Service Obligations of Broadband  
Providers

Computer III Further Remand Proceedings:  
Bell Operating Company Provision of  
Enhanced Services; 1998 Biennial Regulatory  
Review — Review of Computer III and ONA  
Safeguards and Requirements

CC Docket Nos. 95-20, 98-10

**REPLY COMMENTS IN SUPPORT OF VERIZON'S PETITION FOR LIMITED  
RECONSIDERATION OF THE TITLE I BROADBAND ORDER**

**I. INTRODUCTION AND SUMMARY**

The *Title I Broadband Order*<sup>1</sup> took an important step to benefit both consumers and competition by recognizing that wireline facilities-based providers may sell broadband transmission services under Title I of the Communications Act, either on a private carriage basis as a wholesale input to an affiliated or unaffiliated ISP's wireline broadband Internet access service, or as an information service when part of the facilities-based provider's own integrated wireline broadband Internet access service. As Verizon has explained, it fully supports that decision, which will enable Verizon and other wireline facilities-based providers to compete more effectively with other broadband Internet access providers, which have long been outside of Title II regulation.

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<sup>1</sup> Report and Order and Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853 (2005) ("*Title I Broadband Order*").

The Commission, however, stopped short on one of the issues raised in the NPRM<sup>2</sup> and addressed extensively in the comments of parties on both sides of the issue — whether mandatory common carrier regulation should apply when wireline facilities-based providers sell broadband transmission service that will not be used as part of an Internet access service. Wireline facilities-based providers sell stand-alone packetized broadband transmission services, such as ATM and Frame Relay services, primarily to large enterprise customers. As the record here demonstrates — and as the Commission recently reconfirmed in approving the combinations of Verizon and MCI and SBC and AT&T — competition to provide these services is already robust. Moreover, the customers that purchase these services are highly sophisticated and utilize competitive bidding processes that further prevent any single provider from exercising market power. For these reasons, under long-standing court and Commission precedent, there is no justification for compelling wireline facilities-based providers to offer *any* broadband transmission services on a common carrier basis. Instead, all such services should be permitted to be offered on a private carriage basis under Title I.

The comments in opposition to Verizon’s petition lack merit. *First*, Verizon’s petition for limited reconsideration is procedurally proper: the NPRM expressly raised the question whether common carrier regulation applies to broadband transmission service offered separate from Internet access, yet the Commission did not substantively address that issue despite the fact that parties on both sides of the issue commented extensively on it.

*Second*, the commenters are wrong about the applicable legal standard: the lack of market power is a sufficient ground for not mandating that wireline facilities-based carriers offer

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<sup>2</sup> Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 FCC Rcd 3019 (2002) (“NPRM”).

broadband transmission service on a common carrier basis, and the fact that carriers do so today as a matter of regulatory compulsion is irrelevant to the common carrier inquiry.

*Third*, the commenters' claims that incumbent LECs have market power for broadband transmission services is directly contrary to the record here and the Commission's determinations in the *Verizon-MCI Order*<sup>3</sup> and *SBC-AT&T Order*<sup>4</sup> that there is already robust competition to provide broadband transmission services. Moreover, those claims are based on a fundamental confusion about the wires that physically carry the transmission and the electronics that perform the broadband and packet functions. Even after Verizon's petition is granted, Verizon and other incumbent LECs will continue to offer access to existing TDM-based transport, either on a common carrier basis or as UNEs (to the extent the statutory impairment standard is satisfied). Other carriers can continue to provide their own broadband services by attaching their own packet switches to any such facilities obtained from incumbents, and the commenters make no claim — nor could they — that there is any impediment to the self-provision of such switches.

*Fourth*, the conditions adopted as part of the Commission's approval of the combination of Verizon and MCI pose no bar to a ruling granting Verizon's petition. Although Verizon intends to comply fully with the terms of those conditions, the existence of the conditions has no bearing on the appropriate regulatory classification of the wireline broadband transmission services at issue. Those conditions say nothing about the appropriate regulatory classification of any service Verizon sells.

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<sup>3</sup> Memorandum Opinion and Order, *Verizon Communications Inc. and MCI Inc., Applications for Approval of Transfer of Control*, 20 FCC Rcd 18433 (2005) ("*Verizon-MCI Order*").

<sup>4</sup> Memorandum Opinion and Order, *SBC Communications Inc. and AT&T Corp., Applications for Approval of Transfer of Control*, 20 FCC Rcd 18290 (2005) ("*SBC-AT&T Order*").

## **II. VERIZON’S REQUEST FOR RECONSIDERATION IS WITHIN THE SCOPE OF THIS PROCEEDING**

In the NPRM, the Commission expressly directed commenters to “address what the appropriate statutory classification of broadband transmission should be when it is *not coupled with the Internet access component.*” NPRM ¶ 26 (emphasis added). The Commission, moreover, instructed commenters to “discuss how judicial and Commission definitions of common carriage might apply” to such broadband transmission, including “the standards for private and common carriage that they deem appropriate for broadband transmission, whether using xDSL or other wireline technologies.” *Id.* ¶ 26 & n.64 (emphasis added). Verizon, therefore, submitted comments demonstrating that all wireline broadband transmission services, including packetized broadband transmission services like ATM and Frame Relay, should be classified under Title I, even when provided separate from Internet access service.<sup>5</sup> The Commission, however, did not address that showing in the *Title I Broadband Order*, concluding only that stand-alone wireline broadband transmission is not an information service. Because that ruling is not dispositive of the question whether such transmission *must* be offered on a common carrier basis, Verizon filed this petition for limited reconsideration.

Some commenters, however, claim that Verizon’s request for reconsideration is procedurally invalid. For example, Earthlink (at 1-2) complains that Verizon’s petition repeats arguments found in its comments and cites prior Commission decisions rejecting petitions for reconsideration that merely repeat claims that the Commission had considered and rejected. But there can be no dispute that the Commission did not substantively consider or reject Verizon’s arguments, making them appropriate for inclusion in a petition for reconsideration.

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<sup>5</sup> See Verizon Comments at 9-23; Verizon Pet. at 4-5.

Nor is there any merit to claims by XO (at 4) and Broadwing (at 1-3) that the ruling Verizon sought in its comments and in its petition for reconsideration can be granted only in other proceedings pending before the Commission. The NPRM plainly sought comment on the “appropriate statutory classification of broadband transmission . . . when it is not coupled with [an] Internet access component” and, moreover, made express reference to the question of “how judicial and Commission definitions of common carriage might apply” to such transmission. NPRM ¶ 26. Verizon and others<sup>6</sup> provided comments demonstrating that all broadband transmission services should be classified under Title I, regardless of whether they are provided in combination with or as an input to a broadband Internet access services. Others filed comments in opposition to these showings.<sup>7</sup> In these circumstances, a ruling granting Verizon’s petition for limited reconsideration would easily satisfy the notice-and-comment requirements of the Administrative Procedure Act. *See New York v. EPA*, 413 F.3d 3, 32 (D.C. Cir. 2005) (“Central to notice-and-comment rulemaking is the ability of an agency to craft a final rule based on the comments of interested parties.”); *see also Crawford v. FCC*, 417 F.3d 1289, 1295-96 (D.C. Cir. 2005) (explaining that the notice-and-comment requirement standard is satisfied where “affected part[ies] should have anticipated the agency’s final course in light of the initial notice,” particularly where the agency “was merely doing that which [it] announced it would do”) (internal quotation marks omitted).<sup>8</sup> Moreover, the Commission has an obligation in notice-and-comment proceedings to address explicitly arguments raised by commenters that, as here,

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<sup>6</sup> *See* Verizon Pet. at 4 n.6.

<sup>7</sup> *See, e.g.*, AOL Time Warner Reply Comments at 16-17; AT&T Reply Comments at 43-46.

<sup>8</sup> In any event, it is settled that “actual notice will render” an alleged deficiency in the notice “harmless.” *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983).

are within the scope of the proceeding. *See, e.g., Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 468 (D.C. Cir. 1998) (“An agency must . . . demonstrate the rationality of its decision-making process by responding to those comments that are relevant and significant.”).

**III. THE COMMISSION SHOULD GRANT THE PETITION AND PERMIT WIRELINE BROADBAND SERVICE PROVIDERS THE OPTION OF OFFERING ALL BROADBAND TRANSMISSION SERVICES ON A PRIVATE CARRIAGE BASIS UNDER TITLE I**

**A. Under the Applicable Legal Standard, the Fundamental Question Is Whether Wireline Facilities-Based Providers Have Market Power with Respect to Wireline Broadband Services Not Used for Internet Access**

In the 1996 Act, Congress adopted a definition of “telecommunications carrier” that provides that such carriers “shall be treated as a common carrier under th[e] [Communications Act] only to the extent that it is engaged in providing telecommunications services.” 47 U.S.C. § 153(44). “Telecommunications service,” in turn, is defined as the “offering of telecommunications for a fee” that is “effectively available directly to the public.” *Id.* § 153(46). As the Commission has held — and the D.C. Circuit has affirmed — these 1996 Act definitions effectively codify the two-part test established in *NARUC I* and its progeny.<sup>9</sup> The Commission, therefore, was required to “consider whether, under the first part of the *NARUC I* test, the public interest requires common carrier” regulation of those wireline broadband transmission services. *Virgin Islands*, 198 F.3d at 925 (internal quotation marks omitted). As we have demonstrated, and discuss further below, there is no basis for compelling common carrier treatment of wireline broadband services — whether offered with or separate from a broadband Internet access

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<sup>9</sup> *See Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 925-27 (D.C. Cir. 1999); *National Ass’n of Regulatory Util. Comm’rs v. FCC*, 525 F.2d 630, 641-43 (D.C. Cir. 1976) (“*NARUC I*”).

component — because incumbent LECs have “little or no market power” with respect to those services.<sup>10</sup>

The second part of the *NARUC I* test — whether the carrier has a *voluntary* “practice of . . . indifferent service that confers common carrier status”<sup>11</sup> — is relevant only in the *absence* of such regulatory compulsion, because it cannot be satisfied in the presence of such regulation. That is because a “binding requirement of . . . indifferent service” precludes the need for consideration of carriers’ voluntary practices, because courts and the agency “know what those [practices] will be if the FCC regulations are followed.” *NARUC II*, 533 F.2d at 609. As Verizon’s petition and the supporting comments make clear, but for the existing legal compulsion to offer wireline broadband services on a common carrier basis, Verizon and other incumbents LECs would make individualized decisions in the provision of their wireline broadband services to the enterprise customers that purchase this service — because that is what those customers demand. *See, e.g., Verizon Pet.* at 5-6, 11-12.

Indeed, in the *Title I Broadband Order* itself, the wireline broadband services that the Commission classified under Title I had previously been offered on a common carrier basis as a matter of regulatory compulsion. *See, e.g., Title I Broadband Order* ¶ 106. This determination, as the Commission recognized, is fully consistent with both the *Cable Modem Declaratory Ruling*<sup>12</sup> and the Supreme Court’s decision in *Brand X*. The Supreme Court’s decision confirms

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<sup>10</sup> *Cox Cable Communications, Inc., Compline, Inc. and Cox DTS, Inc.*, 102 F.C.C.2d 110, ¶ 27 (1985), *vacated as moot*, 1 FCC Rcd 561, ¶ 5 (1986); *see, e.g., Verizon Pet.* at 7-12.

<sup>11</sup> *National Ass’n of Regulatory Util. Comm’rs v. FCC*, 533 F.2d 601, 608-09 (D.C. Cir. 1976) (“*NARUC IP*”).

<sup>12</sup> *Declaratory Ruling and Notice of Proposed Rulemaking, Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798 (2002) (“*Cable Modem Declaratory Ruling*”), *aff’d*, *National Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 125 S. Ct. 2688 (2005) (“*Brand X*”).

that the Commission acts properly when it relies on “contemporaneous market conditions” — rather than past regulatory requirements — in determining whether to classify a service under Title I. 125 S. Ct. at 2711.

Some commenters contend that a different legal standard applies, but there is no merit to those claims. CompTel (at 9-13) and XO (at 5), for example, assert that the fact that Verizon and other incumbent LECs currently offer wireline broadband services on a common carrier basis is dispositive, and that it is irrelevant that these carriers are doing so because the Commission has required them to do so. But neither cites any authority in support of these claims and, as shown above, D.C. Circuit precedent establishes precisely the opposite rule. Indeed, in allowing existing DSL transport services to be offered on a private carriage basis, the Commission has rejected this same argument. *See Title I Broadband Order* ¶ 106 (“The previous orders . . . assumed . . . that the offering of DSL transmission on a common carrier basis was a telecommunications service. These decisions, however, did not address the important public interest issue we address in this Order — whether this broadband transmission component must continue to be offered . . . on a common carrier basis.”). Moreover, that same decision and other court precedent make clear that the Commission has authority to hold that services that were “initially treated as common carrier offerings” no longer need to be provided as such, if after “further inspection they [are] determined not to be common carriage communications offerings within the meaning of the Act.”<sup>13</sup>

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<sup>13</sup> *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1483 (D.C. Cir. 1994); *see Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 210 (D.C. Cir. 1982) (upholding the Commission’s conclusion that a service “originally regulated under Title II” “is not a common carrier service” based on the Commission’s finding of the existence of “healthy competition” in a “competitive market” by non-common carriers).

XO (at 4-5) similarly argues that the existence of competition is irrelevant to the question whether wireline broadband services must be offered on a common carrier basis when sold apart from an Internet access component. But its argument reduces to the claim — rejected by the Commission in a decision upheld by the D.C. Circuit — that 1996 Act’s definition of “telecommunications service” eliminated, rather than codified, the two-part *NARUC I* test. *See Virgin Islands*, 198 F.3d at 925-27. CompTel (at 8 n.20) offers a more subtle, but equally erroneous claim: that the existence of a competitive market is relevant only with respect to services that have not yet been deployed.<sup>14</sup> CompTel contends further that, for services that have already been deployed, the only question is whether the carrier offers them indifferently to the eligible public. Again, however, CompTel presumes that it makes no difference whether a service is offered indifferently to the public as a result of *regulatory compulsion* or a carrier’s voluntary choice. As shown above, the Commission precedent here and case law draw exactly that distinction.<sup>15</sup>

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<sup>14</sup> Presumably, Broadwing (at 3-4) is making a similar (and equally erroneous) point when it notes that ATM and Frame Relay are “legacy” services. Nothing in the *NARUC I* two-part test turns on whether a service is new or whether it has existed for some time. And as discussed above, the Commission is free to reconsider a previous decision that a particular service must be sold on a common carriage basis. *See Southwestern Bell*, 19 F.3d at 1483.

<sup>15</sup> CompTel (at 14-19) goes to great length in an attempt to dispute our showing (at 10-11 & n.24) that granting Verizon’s petition is consistent with the *Cable Modem Declaratory Ruling* and the Supreme Court’s *Brand X* decision. But try as it might, CompTel cannot dispute that granting Verizon’s petition would remove burdens from wireline facilities-based carriers that have never applied to, or were long ago eliminated for, other providers of broadband transmission services. For example, more than a decade ago, the Commission gave providers of satellite transmission services the option of offering transmission services on a private carrier basis under Title I. *See Declaratory Ruling, Licensing Under Title III of the Communications Act of 1934, as amended*, 8 FCC Rcd 1387 (1993); Order and Authorization, *Application of Loral/Qualcomm Partnership, L.P.*, 10 FCC Rcd 2333 (Int’l Bur. 1995). Likewise, the Commission permitted the same Title I treatment for, among other things, transmission services provided over submarine cables. *See Memorandum Opinion and Order, AT&T Submarine Systems, Inc.*, 13 FCC Rcd 21585 (1998), *aff’d*, *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999). Even the traditional long distance companies and CLECs, which have

Finally, Time Warner Telecom (at 16-19) asserts that “in nearly every case” where the Commission has determined not to mandate the provision of a service under Title II, it did so “because of the availability of other *common carrier* offerings, not merely other *competitive* offerings.” Time Warner Telecom hardly substantiates its claim, pointing to only a handful of examples from among the many that Verizon identified where the Commission has not required the provision of service on a common carrier basis. *See* Verizon Pet. at 9-10 & n.22. In numerous instances, the Commission has held that it would not require provision of service on a common carrier basis without even mentioning, let alone considering, whether other carriers were providing the service on a common carrier basis.<sup>16</sup> In addition, the Commission’s *Title I Broadband Order* itself came to the opposite conclusion.

Moreover, in the cases on which Time Warner Telecom relies, the Commission did not hold that the voluntary offering by some carriers of service on a common carrier basis was *necessary* before other carriers could be given the option of offering service on a private carriage basis. Instead, the Commission simply noted the existence of such carriers as part of its determination in those specific cases, under the first step of the *NARUC I* test, that the public interest did not require common carrier provision of those services.<sup>17</sup> Importantly, Time Warner

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remained nominally under Title II, have been permitted to sell broadband transmission services without the burdensome economic regulation and tariffing requirements imposed on Verizon and other ILECs.

<sup>16</sup> *See, e.g.,* Memorandum Opinion and Order, *NorLight*, 2 FCC Rcd 5167 (1987); Order and Authorization, *Application of Loral/Qualcomm Partnership, L.P.*, 10 FCC Rcd 2333 (1995); Report and Order, *Amendment of Subpart C Part 90 of the Commission’s Rules to Permit Enterprises to be Licensed Directly in the Special Emergency Radio Service*, 3 FCC Rcd 3677 (1988); Memorandum Opinion and Order, *Amendment of Subpart C of Part 90 of the Commission’s Rules to Permit Commercial Enterprises to be Licensed Directly in the Special Emergency Radio Service*, 5 FCC Rcd 3471 (1990).

<sup>17</sup> *See, e.g., Wold Communications, Inc. v. FCC*, 735 F.2d 1465, 1474-75 (D.C. Cir. 1984).

Telecom cannot show, and does not even claim, that the public interest *in this case* requires the existence of some carriers offering broadband transmission on a common carrier basis. As shown below, the robust, existing competition to provide broadband transmission services to enterprise customers demonstrates that there is no public interest basis for requiring, as a condition for granting Verizon’s petition, that *some* companies in this competitive market segment voluntarily offer broadband transmission on a common carrier basis.

**B. The Robust Competition for Broadband Transmission Services Demonstrates the Lack of Market Power and Therefore the Lack of Any Need for Mandatory Common Carrier Regulation**

As Verizon has demonstrated, the record here shows that stand-alone broadband transmission services sold to enterprise customers are subject to intense competition, and incumbent LECs have never had market power with respect to these services. *See Verizon Pet.* at 13-15. The Commission, in its recent orders approving the combinations of Verizon and MCI and SBC and AT&T, has expressly recognized this. Indeed, the Commission found, rejecting commenters’ “contrary . . . assertions,” that “competition in the enterprise market is *robust*.” *SBC-AT&T Order* ¶ 73 n.223 (emphasis added). The Commission recognized that “myriad providers are prepared to make competitive offers” to enterprise customers and that “these multiple competitors ensure that there is sufficient competition.” *Verizon-MCI Order* ¶ 74; *accord SBC-AT&T Order* ¶ 73. In reaching this conclusion, the Commission made specific reference to Frame Relay services, one of the wireline broadband transmission services at issue here. *See Verizon-MCI Order* ¶ 74. The Commission recognized further that “new competitors” — including “systems integrators and managed network providers” and those offering “IP-VPNs and other converged services” — “are putting *significant competitive pressure* on traditional service providers” with respect to enterprise customers. *See id.* ¶ 75 n.229 (emphasis added).

In addition, the Commission recognized that the enterprise customers that purchase these wireline broadband transmission services are “highly sophisticated” and can “negotiate for significant discounts.” *Id.* ¶ 75. As the Commission explained, this level of sophistication is “significant not only because it demonstrates that these users are aware of the multitude of choices available to them, but also because they show that these users are likely to make informed choices based on expert advice” to “seek out best-price alternatives.” *Id.* ¶ 76. This “process of competitive bidding and contract renegotiation is often sufficient . . . [to] compel[] the supplier to offer lower prices and improved service to retain the [enterprise] customer.” *SBC-AT&T Order* ¶ 74 n.226.

For all of these reasons, there is no public interest reason to compel wireline facilities-based providers to provide broadband transmission services on a common carrier basis. That is especially true because, as the Commission has recognized, contracts with enterprise customers “are typically the result of RFPs,” “are individually-negotiated,” and “are generally for customized service packages”<sup>18</sup> — the antithesis of common carrier offerings.

Some of the commenters dispute the extent of competition to provide broadband transmission services to enterprise customers, *see, e.g.*, *Broadwing* at 4-7; *Earthlink* at 3-4; *Time Warner Telecom* at 8-11, but they ignore the Commission’s conclusions in the *Verizon-MCI Order* and the *SBC-AT&T Order*, as well as the record evidence here.<sup>19</sup>

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<sup>18</sup> *Verizon-MCI Order* ¶ 79.

<sup>19</sup> Earthlink contends that a different result should apply when it and other dial-up Internet service providers seek to purchase wireline *broadband* transmission services for use with their provision of *narrowband* service to their customers. *See Earthlink* at 3. Contrary to Earthlink’s claim, the *Title I Broadband Order* does not “confirm[] that [*Computer II* and *Computer III*] obligations . . . continue in effect.” *Id.* On the contrary, the Commission held only that the *Title I Broadband Order* did not change “the current rules or regulatory framework for the provision of access to *narrowband* transmission associated with dial-up Internet access services.” *Title I Broadband Order* ¶ 9 n.15 (emphasis added). To the extent dial-up ISPs seek

Other commenters claim that Verizon continues to have market power in the provision of broadband transmission services because of alleged impediments that carriers face in deploying the loops and/or transport over which those broadband services are carried. *See, e.g.*, Broadwing at 7-10; Time Warner Telecom at 4-7, 12-16, 19-20; CompTel at 2-4. But the Commission rejected similar claims in granting Verizon a waiver to enable Verizon to obtain pricing flexibility for its advanced services.<sup>20</sup> That is because, as the Commission has recognized, such claims are based on a fundamental confusion about wireline broadband transmission services. Wireline broadband transmission services “are generally made up of packet switching equipment and facilities, such as Frame Relay or ATM switches,” and “a special access line connection” that reaches the end-user customer. *Verizon Pricing Flexibility Waiver Order* ¶ 10.

But, as the Commission has further recognized, “competitors do not have to rely on Verizon’s packet switching to provide their own advanced services to customers.” *Id.* ¶ 11. As an initial matter, carriers are provided wireline broadband transmission services without using either Verizon’s facilities or packet switching, by deploying their own facilities, or using third-party facilities, to serve these highly lucrative customers. In addition, carriers can — and already are — creating and selling their own broadband transmission services by combining “Verizon’s special access facilities” with *their own* “[p]acket switch[es].” *Id.* Those TDM-based special access facilities are beyond the scope of this petition and will remain available through federal

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to purchase *broadband* transmission services, they are *already* covered by the Title I rulings in the present order. Thus, Earthlink is wrong (at 5-6) in claiming that the “provision of ATM and Frame Relay to ISPs” as part of a *broadband* Internet access service was not deregulated in the *Title I Broadband Order*. *See Title I Broadband Order* ¶ 9 n.15 (holding that the use of “ATM or frame relay transport” in “the[] network[]” does not “limit[] the scope of relief” the Commission provided for all wireline broadband transmission sold as a wholesale input for wireline broadband Internet access service).

<sup>20</sup> Memorandum Opinion and Order, *Petition for Waiver of Pricing Flexibility Rules for Fast Packet Services*, 20 FCC Rcd 16840 (2005) (“*Verizon Pricing Flexibility Waiver Order*”).

tariffs, subject to common carrier regulation, even after the Commission grants the relief sought here.<sup>21</sup> And there can be no serious claim that other carriers are unable to deploy their own packet switches or connect those switches to special access facilities, given the Commission’s long-standing determination that carriers are not impaired without access to incumbents’ packet switches and the fact that carriers have already deployed many thousands of such switches.<sup>22</sup>

Broadwing (at 11) asserts that granting Verizon’s petition creates the possibility of a price squeeze. But the Commission rejected virtually identical, and equally unsubstantiated,<sup>23</sup> claims in the *Verizon Pricing Flexibility Waiver Order*. As the Commission explained there, claims such as Time Warner Telecom’s “essentially restate allegations that special access rates are anticompetitive,” which the Commission “is addressing through the *Special Access NPRM*.” *Verizon Pricing Flexibility Waiver Order* ¶ 13. Verizon has also extensively rebutted the claims made in that proceeding and repeated in other proceedings. Because the Commission “is establishing a comprehensive record” in that proceeding, which it has explained will “enable it to asses any ‘price squeeze’ issues,” that is the “appropriate proceeding to address [these] arguments concerning special access . . . rates.” *Id.*

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<sup>21</sup> Those services will also remain subject — to the extent they are today — to the § 251(a) and (c) obligations that CompTel (at 3) erroneously asserts will be eliminated.

<sup>22</sup> See, e.g., Order on Remand, *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533 ¶¶ 205-209 (2005); Memorandum Opinion and Order, *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), et al.*, 19 FCC Rcd 21496 (2004) (forbearing from enforcing any requirement of BOCs to provide access to packet switches under § 271), *petition for review filed, Earthlink, Inc. v. FCC*, No. 05-1087 (D.C. Cir.)

<sup>23</sup> The only “support” Broadwing offers is a citation to a three-year old pleading in another docket. See Broadwing at 11 n.38. See *Verizon Pricing Flexibility Waiver Order* ¶ 13 (finding that “AT&T ha[d] not presented sufficient evidence in th[at] proceeding to establish a price squeeze”).

**C. The Conditions on the Commission’s Approval of the Combination of Verizon and MCI Pose No Impediment to the Relief Verizon Seeks Here**

Earthlink (at 4-5) asserts that Verizon’s petition is incompatible with four of the time-limited conditions adopted as part of this Commission’s approval of the combination the two companies. In fact, none of the conditions poses any impediment to the granting of Verizon’s petition. As an initial matter, Verizon plainly intends to comply fully with all of the conditions. But the existence of those conditions has no bearing on the question presented by the Commission’s NPRM and addressed by commenters on both sides — whether wireline broadband transmission service sold by wireline facilities-based providers that will not be used in as part of an Internet access service should be classified under Title I. That is because the conditions, by their plain terms, do not compel common carrier classification for any service, let alone the wireline broadband transmission services at issue here.

Indeed, the only condition specifically applicable to special access prices — which requires Verizon’s incumbent LEC entities not to “increase the rates in their interstate tariffs, including contract tariffs” for a period of “30 months from the Merger Closing Date” — expressly applies *only* to “DS1, DS3 and OCn special access services.” *Verizon/MCI Order* App. G, Spec. Acc. Cond. 5. The condition says nothing about whether the services that it does mention should be classified going forward as either common or private carriage services. Moreover, that condition expressly “does not apply” to the rates for “Advanced Services that would have been provided by [Verizon’s] separate Advanced Services affiliate under the terms of the *Bell Atlantic/GTE [Merger] Order*,” *id.* n.577, which encompasses all packet-switched

services including ATM, Frame Relay, and the other wireline broadband transmission services at issue here.<sup>24</sup> Therefore, there is no inconsistency between this condition and Verizon's petition.

Similarly, the other conditions that Earthlink cites also do not address the regulatory classification of any service. Instead, those conditions state only that Verizon will provide reports of its performance under defined measurements for DS0, DS1, and DS3 and above facilities, and will not limit the availability of special access offerings to Verizon's affiliates. *See id.* App. G, Spec. Acc. Conds. 1, 3, 4 & Attach. A.

For these reasons, none of the conditions to which Earthlink points prescribes a particular regulatory classification even for the services to which they apply and, therefore, none is an impediment to the ruling sought by Verizon's petition.

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<sup>24</sup> *See* Memorandum Opinion and Order, *Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee*, 15 FCC Rcd 14032, App. D, ¶ 2 (2000) (“*Bell Atlantic/GTE Merger Order*”) (definition of “Advanced Services”).

**CONCLUSION**

For the foregoing reasons, and those set forth in Verizon's petition, the Commission should grant the petition for limited reconsideration.

Respectfully submitted,

Of Counsel:  
Michael E. Glover

  
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Scott H. Aronstreich  
KELLOGG, HUBER, HANSEN, TODD,  
EVANS & FIGEL, P.L.L.C.  
1615 M Street, N.W.  
Suite 400  
Washington, D.C. 20036  
(202) 326-7900

Edward Shakin  
William H. Johnson  
VERIZON  
1515 North Courthouse Road  
Suite 500  
Arlington, VA 22201-2909  
(703) 351-3060

*Counsel for the Verizon telephone companies*

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## CERTIFICATE OF SERVICE

I hereby certify that, on the 9th day of January 2006, I caused a copy of the foregoing Reply Comments in Support of Verizon's Petition for Limited Reconsideration of the *Title I Broadband Order* to be served upon the parties on the service list below by first-class mail, postage prepaid.

Andrew D. Lipman  
Russell M. Blau  
Patrick J. Donovan  
Swindler Berlin LLP  
3000 K Street, NW  
Suite 300  
Washington, DC 20007

Jason Oxman  
Senior Vice President,  
Legal and International Affairs,  
CompTel  
1900 M Street, NW  
Suite 800  
Washington, DC 20036

David N. Baker  
Earthlink, Inc.  
1375 Peachtree Street, Level A  
Atlanta, GA 30309

Mark J. O'Connor  
Jennifer L. Phurrough  
Lampert & O'Connor, P.C.  
1750 K Street, NW  
Suite 600  
Washington, DC 20006

Thomas Jones  
Jonathan Lechter  
Willkie Farr & Gallagher LLP  
1875 K Street, NW  
Washington, DC 20006

Brad E. Mutschelknaus  
Thomas Cohen  
Heather T. Hendrickson  
Kelley Drye & Warren LLP  
1200 19<sup>th</sup> Street, NW  
Suite 500  
Washington, DC 20036

  
Suzanne Donnelly