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

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AUG - 7 2008

FCC

WC Docket No. 06-125

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)

MEMORANDUM OPINION AND ORDER

Adopted: July 22, 2008

Released: August 5, 2008

By the Commission: Chairman Martin and Commissioner McDowell issuing separate statements;
Commissioners Copps and Adelstein dissenting and issuing a joint statement.

TABLE OF CONTENTS

	Para.
I. INTRODUCTION	1
II. BACKGROUND	3
A. Regulatory Requirements	3
1. Title II Requirements	3
2. <i>Computer Inquiry</i> Requirements	6
B. Prior Broadband Relief	8
III. DISCUSSION	13
A. Introduction	13
B. Scope of Petition	14
C. Effect of the Verizon "Deemed Grant"	16
D. Application of the Statutory Forbearance Criteria	19
1. Dominant Carrier Regulation	20
a. Charges, Practices, Classifications, and Regulations	20
b. Protection of Consumers	46
c. Public Interest	48
2. <i>Computer Inquiry</i> Requirements	54
3. General Title II Economic Regulation	61
a. Regulation Applied to Common Carriers or LECs	62
b. Regulation Applied to Incumbent LECs or BOCs	66
4. Public Policy Regulation	68
IV. ORDERING CLAUSES	73
APPENDIX	

I. INTRODUCTION

1. In this Order, we address a petition filed by Qwest requesting that the Commission forbear, pursuant to section 10 of the Communications Act of 1934, as amended (Communications Act or Act),¹

¹ 47 U.S.C. § 160. Congress enacted section 10 as part of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 47 U.S.C.) (1996 Act).

from applying Title II of the Act and the *Computer Inquiry* rules to certain broadband services.² Verizon's forbearance petition was "deemed granted" on March 19, 2006; Qwest seeks relief comparable to the relief granted Verizon through that deemed grant.³ Consistent with our *AT&T Title II and Computer Inquiry Forbearance Order*,⁴ we grant substantial forbearance relief to Qwest with regard to its existing packet-switched broadband telecommunications services and its existing optical transmission services.⁵ We also grant Qwest forbearance from its obligations under the *Computer Inquiry* rules in connection with these services, conditioned on its compliance with the *Computer Inquiry* obligations that apply to all non-incumbent local exchange carrier (LEC) facilities-based wireline carriers.⁶

2. In all other respects, Qwest's request for forbearance is denied. In particular, we deny forbearance from any statutory or regulatory requirement that applies to common carriers or LECs generally regardless of whether they are incumbents or competing carriers. We also deny forbearance, except as stated above with regard to the *Computer Inquiry* rules, from any statutory or regulatory requirements that apply to Qwest in its capacity as an incumbent LEC or Bell Operating Company (BOC). In addition, Qwest must meet its public policy obligations under Title II and the Commission's implementing rules with respect to the services at issue.⁷ This preserves important public policies related

² 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 (filed Sept. 12, 2007) (Qwest Petition). The Wireline Competition Bureau (Bureau) invited comment on the petition. See *Pleading Cycle Established for Comments on 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, Public Notice, 22 FCC Rcd 16858 (WCB 2007). We note that the instant Qwest petition is virtually identical to a prior Qwest forbearance petition upon which comment was sought, and that Qwest ultimately withdrew on September 11, 2007. See Letter from Melissa E. Newman, Vice President-Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-125 (filed Sept. 11, 2007). All comments, replies, and *ex parte* letters cited in this Order were filed in WC Docket No. 06-125 in response to Qwest's original petition unless otherwise stated, and we incorporate the record of that proceeding into this one.

³ See 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, WC Docket No. 04-440, News Release (rel. Mar. 20, 2006) (*March 20 News Release*), review denied, *Sprint Nextel Corp. v. FCC*, 508 F.3d 1129 (D.C. Cir. 2007) (*Sprint Nextel v. FCC*); Petition of the Verizon Telephone Companies For Forbearance, WC Docket No. 04-440 (filed Dec. 20, 2004) (Verizon Petition).

⁴ *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, *Petition of BellSouth Corporation for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, WC Docket No. 06-125, Memorandum Opinion and Order, 22 FCC Rcd 18705 (2007) (*AT&T Title II and Computer Inquiry Forbearance Order*), *pets. for review pending*, No. 07-1426 (and consolidated cases) (D.C. Cir. filed Oct. 22, 2007); see Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and *Computer Inquiry* Rules with Respect to Its Broadband Services, WC Docket 06-125 (filed July 13, 2006) (AT&T Petition); Petition of BellSouth Corporation for Forbearance Under 47 U.S.C. § 160(c) from Title II and *Computer Inquiry* Rules with Respect to Its Broadband Services, WC Docket 06-125 (filed July 20, 2006) (Legacy BellSouth Petition).

⁵ For ease of exposition, we refer to the services for which we grant relief as the "petitioner-specified services." We describe these services more fully in part III.D.1.a, below. They exclude all traditional TDM-based DS1 and DS3 services, and all services that do not provide a transmission capability of over 200 kilobits per second (kbps) in each direction. See, e.g., Qwest Petition at 1.

⁶ Specifically, we grant, with regard to Qwest's existing packet-switched broadband services and its existing optical transmission services, forbearance from the requirements contained in section 203 of the Act, 47 U.S.C. § 203, section 214 of the Act, 47 U.S.C. § 214 (as it relates to dominant carriers), and the following sections of the Commission's rules: 47 C.F.R. §§ 61.31-.59 (general rules for dominant carriers), 47 C.F.R. § 63.71 (to the extent it provides discontinuance rules for domestic dominant carriers), 47 C.F.R. Part 69 (access charge and pricing flexibility rules), as well as *Computer Inquiry* requirements.

⁷ See, e.g., 47 U.S.C. §§ 222, 225, 229, 251(a)(2), 254, 255.

to 911, emergency preparedness, customer privacy, and universal service in connection with the broadband services for which we grant relief.

II. BACKGROUND

A. Regulatory Requirements

1. Title II Requirements

3. Title II of the Act and the Commission's implementing rules impose both economic and non-economic regulation on common carriers. Generally speaking, the most extensive regulations are imposed on dominant carriers (*i.e.*, those with individual market power). These carriers are subject to price cap or rate-of-return regulation, and must file tariffs for many of their interstate telecommunications services – on either seven or fifteen days' notice – and usually with supporting data.⁸ In contrast, nondominant carriers are generally not subject to direct rate regulation and may file tariffs, on one day's notice and without cost support, which are presumed lawful.⁹ In addition, applications to discontinue, reduce, or impair service are subject to a 60-day waiting period for dominant carriers, as opposed to a 31-day period for nondominant carriers.¹⁰ Finally, dominant carriers must follow more stringent procedures under section 214 of the Act for certain types of transfers of control for which nondominant carriers are accorded presumptive streamlined treatment.¹¹

4. The Act and our rules impose additional obligations on the BOCs, independent incumbent LECs, or incumbent LECs generally. Under section 271 of the Act, BOCs were required to demonstrate compliance with certain market-opening requirements, including, *inter alia*, interconnection and nondiscriminatory access to network elements, directory assistance, databases and signaling before providing in-region, interLATA long distance service.¹² The BOCs must continue to comply with such market-opening requirements.¹³ Independent incumbent LECs, moreover, are subject to certain structural separation requirements if they wish to provide in-region, interstate, interexchange telecommunications services other than through resale.¹⁴ Incumbent LECs must meet additional obligations, including the interconnection, collocation, and other obligations set forth in section 251(c) of the Act and the Commission's implementing rules.¹⁵

5. In addition to the economic regulation described above, Title II and the Commission's rules subject all common carriers to a variety of non-economic regulations designed to further important public

⁸ See 47 U.S.C. §§ 203(b), 204(a)(3); 47 C.F.R. §§ 61.38, 61.41, 61.58; *Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, CC Docket No. 96-187, Report and Order, 12 FCC Rcd 2170, 2182, 2188, 2191-92, 2202-03, paras. 19, 31, 40, 67 (1997) (*Tariff Streamlining Order*); see also *Access Charge Reform*, CC Docket Nos. 96-262, 94-1, 98-157, CCB/CPD File No. 98-63, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, 14241, para. 40 (1999) (*Pricing Flexibility Order*) (allowing price cap LECs to file tariffs for new services on one day's notice), *aff'd*, *WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001).

⁹ 47 C.F.R. §§ 1.773(a)(ii), 61.23(c); *Tariff Filing Requirements for Nondominant Carriers*, CC Docket No. 93-36, Order, 10 FCC Rcd 13653, 13653-54, paras. 3-4 (1995).

¹⁰ 47 C.F.R. § 63.71(c).

¹¹ 47 C.F.R. § 63.03(b).

¹² See 47 U.S.C. § 271.

¹³ See 47 U.S.C. § 271(d)(6).

¹⁴ See 47 C.F.R. § 64.1903.

¹⁵ 47 U.S.C. § 251(c).

policy goals and protect consumers.¹⁶ These include requirements that carriers contribute to federal universal service support mechanisms on an equitable and nondiscriminatory basis,¹⁷ ensure access to telecommunications services by people with disabilities,¹⁸ meet standards regarding the privacy of their customers' information,¹⁹ and facilitate the delivery of emergency services.²⁰ All common carriers, moreover, are subject to a formal complaint process under which any person may complain to the Commission about anything the carrier may do that is contrary to the provisions of the Act.²¹

2. Computer Inquiry Requirements

6. Facilities-based wireline carriers are also subject to *Computer Inquiry* requirements. In the *Computer II Orders*,²² the Commission, in response to the convergence and increasing interdependence of computer and telecommunications technologies, established a new regulatory framework that distinguishes between "basic services" and "enhanced services."²³ The Commission determined that enhanced services were not within the scope of its Title II jurisdiction but rather were within its ancillary jurisdiction under Title I of the Communications Act.²⁴ To protect against anti-competitive behavior, the Commission, pursuant to this ancillary jurisdiction, imposed structural separation requirements on AT&T.²⁵ The Commission required other facilities-based common carriers to provide the basic transmission services underlying their enhanced services on a nondiscriminatory basis pursuant to tariffs governed by Title II of the Act.²⁶ These carriers thus must offer the underlying basic service at the same

¹⁶ See *infra* part III.D.4.

¹⁷ 47 U.S.C. § 254(d).

¹⁸ 47 U.S.C. § 225.

¹⁹ 47 U.S.C. § 222(a)-(c), (f).

²⁰ 47 U.S.C. § 222(d)(4), (g).

²¹ 47 U.S.C. § 208.

²² *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 FCC 2d 384 (1980) (*Computer II Final Decision*), *recon.*, 84 FCC 2d 50 (1980) (*Computer II Reconsideration Order*), *further recon.*, 88 FCC 2d 512 (1981) (*Computer II Further Reconsideration Order*), *aff'd sub nom. Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982) (*CCIA v. FCC*), *cert. denied*, 461 U.S. 938 (1983) (collectively referred to as *Computer II Orders*).

²³ The Commission defined basic services as the offering of "a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information." *Computer II Final Decision*, 77 FCC 2d at 415-16, para. 83, 420, para. 96. Enhanced services, in turn, were defined as services that "combine[] basic service with computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information, or provide the subscriber additional, different, or restructured information, or involve subscriber interaction with stored information." *Id.* at 387, para. 5. In other words, an "enhanced service is any offering over the telecommunications network which is more than a basic transmission service." *Id.* at 420, para. 97. Although the Commission used the term "enhanced service" in its *Computer Inquiry* decisions and the Act uses the term "information service," the Commission has determined that "Congress intended the categories of 'telecommunications service' and 'information service' to parallel the definitions of 'basic service' and 'enhanced service' developed in [the] *Computer II* proceeding . . ." *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 992-94 (2005) (*NCTA v. Brand X*); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11511, para. 21 (1998) (*Report to Congress*).

²⁴ See, e.g., *Computer II Final Decision*, 77 FCC 2d at 435, para. 132.

²⁵ *Id.* at 467-68, para. 216.

²⁶ *Id.* at 475, para. 231; see *id.* at 435, para. 132 (discussing jurisdictional basis for the Commission's *Computer II* actions); see also *CCIA v. FCC*, 693 F.3d at 211-14 (affirming the Commission's reliance on its ancillary (continued....))

prices, terms, and conditions, to all enhanced service providers, including their own enhanced services operations.²⁷

7. In the *Computer III* proceedings,²⁸ the Commission replaced this mandatory structural separation regime with a regime that gives a BOC the option of providing enhanced services pursuant to nonstructural safeguards. In developing this regime, the Commission determined that the cost of decreased efficiency and innovation imposed by the structural safeguards of *Computer II* outweighed their benefits.²⁹ The *Computer III* framework maintained the existing basic and enhanced services categories.³⁰ It adopted comparably efficient interconnection (CEI), open network architecture (ONA), and other nonstructural requirements as alternatives to the *Computer II* structural separation requirements for the BOCs.³¹ Under *Computer III*, a BOC may provide enhanced services either directly or through an affiliate that is not a *Computer II* affiliate pursuant to an ONA or, alternatively, a CEI plan.

(Continued from previous page)

jurisdiction in imposing structural safeguards on AT&T's provision of enhanced services); *NCTA v. Brand X*, 545 U.S. at 996 (describing *Computer II* and stating that the Commission "remains free to impose special regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction").

²⁷ See *CCIA v. FCC*, 693 F.2d at 205; see also *Computer II Final Decision*, 77 FCC 2d at 474-75, para. 231. We note that the *Computer II* "unbundling" of basic services requirement is separate and distinct from the obligation, in section 251(c)(3) of the Communications Act, that incumbent LECs provide access to unbundled network elements (UNEs). 47 U.S.C. § 251(c)(3).

²⁸ *Amendment of Section 64.702 of the Commission's Rules and Regulations*, CC Docket No. 85-229, Phase I, 104 FCC 2d 958 (1986) (*Computer III Phase I Order*), recon., 2 FCC Rcd 3035 (1987) (*Computer III Phase I Reconsideration Order*), further recon., 3 FCC Rcd 1135 (1988) (*Computer III Phase I Further Reconsideration Order*), second further recon., 4 FCC Rcd 5927 (1989) (*Computer III Phase I Second Further Reconsideration Order*); *Phase I Order and Phase I Recon. Order vacated sub nom. California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) (*California I*); CC Docket No. 85-229, Phase II, 2 FCC Rcd 3072 (1987) (*Computer III Phase II Order*), recon., 3 FCC Rcd 1150 (1988) (*Computer III Phase II Reconsideration Order*), further recon., 4 FCC Rcd 5927 (1989) (*Phase II Further Reconsideration Order*); *Phase II Order vacated, California I*, 905 F.2d 1217 (9th Cir. 1990); *Computer III Remand Proceeding*, CC Docket No. 90-368, 5 FCC Rcd 7719 (1990) (*ONA Remand Order*), recon., 7 FCC Rcd 909 (1992), *pets. for review denied sub nom. California v. FCC*, 4 F.3d 1505 (9th Cir. 1993) (*California II*); *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards*, CC Docket No. 90-623, 6 FCC Rcd 7571 (1991) (*BOC Safeguards Order*), *BOC Safeguards Order vacated in part and remanded sub nom. California v. FCC*, 39 F.3d 919 (9th Cir. 1994) (*California III*), cert. denied, 514 U.S. 1050 (1995); *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, CC Docket No. 95-20, Notice of Proposed Rulemaking, 10 FCC Rcd 8360 (1995) (*Computer III Further Remand Notice*), Further Notice of Proposed Rulemaking, 13 FCC Rcd 6040 (1998) (*Computer III Further Remand Further Notice*); Report and Order, 14 FCC Rcd 4289 (1999) (*Computer III Further Remand Order*), recon., 14 FCC Rcd 21628 (1999) (*Computer III Further Remand Reconsideration Order*); see also *Further Comment Requested to Update and Refresh Record on Computer III Requirements*, CC Docket Nos. 95-20, 98-10, Public Notice, 16 FCC Rcd 5363 (CCB 2001) (asking whether, under the ONA framework, information service providers can obtain the telecommunications inputs, including digital subscriber line (DSL) service, they require) (collectively referred to as *Computer III*).

²⁹ See *Computer III Phase I Order*, 104 FCC 2d at 964, para. 3.

³⁰ *Id.* at 964, para. 4.

³¹ *Id.* An ONA plan includes a description of how a BOC unbundles its network to enable its competitors to provide enhanced services generally. *Id.* at 1019-20, para. 113, 1064-67, paras. 214-19. A CEI plan includes a description of how a BOC unbundles its network to enable its competitors to provide a particular enhanced service or set of enhanced services that the BOC intends to provide. *Id.* at 1055-56, paras. 190-91.

B. Prior Broadband Relief

8. In previous orders, the Commission has taken a number of important steps aimed at easing the regulatory requirements for broadband facilities and services. Specifically, in the *Triennial Review Order*, the Commission determined, on a national basis, that incumbent LECs do not have to unbundle certain broadband elements, including fiber-to-the-home (FTTH) loops in greenfield situations, broadband capabilities of FTTH loops in overbuild situations, the packet-switched capabilities of hybrid loops, and packet switching.³² In making its determination, the Commission considered, among other things, the directive of section 706 of the 1996 Act that it encourage the deployment of advanced services, and it concluded that these facilities should not be unbundled.³³ In subsequent reconsideration orders, the Commission extended the same unbundling relief to encompass fiber loops serving predominantly residential multiple dwelling units (MDUs) and fiber-to-the-curb (FTTC) loops.³⁴ Moreover, in the *Section 271 Broadband Forbearance Order*, the Commission granted the BOCs forbearance relief from the requirements of section 271 specifically for the broadband elements for which it had granted

³² *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17141-53, paras. 272-95, 17323, para. 541 (2003) (*Triennial Review Order*), corrected by *Triennial Review Order Errata*, 18 FCC Rcd at 19022, para. 26, *aff'd in part, remanded in part, vacated in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554, 564-93 (D.C. Cir. 2004) (*USTA II*), *cert. denied*, 543 U.S. 925 (2004), *on remand, Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, 20 FCC Rcd 2533, 2541, para. 12 (2004) (*Triennial Review Remand Order*), *aff'd, Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

³³ *Triennial Review Order*, 18 FCC Rcd at 17125-27, paras. 242-44. Section 706 states, in pertinent part:

The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

“Advanced telecommunications capability” is defined

without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.

47 U.S.C. § 157 nt.

³⁴ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Order on Reconsideration, 19 FCC Rcd 20293, 20297-20303, paras. 9-19 (2004) (*Triennial Review FTTC Reconsideration Order*).

unbundling relief under section 251.³⁵ The Commission applied its section 10 forbearance analysis in light of the Act's overall goals of promoting local competition and encouraging broadband deployment.³⁶

9. In the *Wireline Broadband Internet Access Services Order*,³⁷ the Commission, among other things, generally eliminated the Title II and *Computer Inquiry* requirements applicable to wireline broadband Internet access services offered by facilities-based providers.³⁸ The Commission granted this relief for wireline broadband Internet access service and its underlying broadband transmission component, whether that component is provided over all copper loops, hybrid copper-fiber loops, an FTTC or fiber-to-the-premises (FTTP) network, or any other type of wireline facilities.³⁹ The Commission's actions did not encompass other wireline broadband services, such as stand-alone Asynchronous Transfer Mode service (ATM), Frame Relay service, Gigabit Ethernet service, and other high-capacity special access services.⁴⁰ The Commission stated that carriers and end users traditionally have used these services for basic transmission purposes and that these services, unlike broadband Internet access services, are telecommunications services under the statutory definitions and thus subject to Title II.⁴¹

10. In the *Verizon Advanced Services Waiver Order*,⁴² the Commission granted a waiver of specific regulatory requirements to allow Verizon to exercise pricing flexibility for certain advanced

³⁵ *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*; *SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c)*; *Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*; *BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket Nos. 01-338, 03-235, 03-260, 04-48, Memorandum Opinion and Order, 19 FCC Rcd 21496 (2004) (*Section 271 Broadband Forbearance Order*), *aff'd*, *EarthLink, Inc. v. FCC*, 462 F.3d 1 (D.C. Cir. 2006) (*EarthLink v. FCC*).

³⁶ 47 U.S.C. § 157 nt.

³⁷ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) (*Wireline Broadband Internet Access Services Order*), *aff'd*, *Time Warner Telecom Inc. v. FCC*, 507 F.3d 205 (3rd Cir. 2007) (*Time Warner Telecom v. FCC*).

³⁸ *Id.* at 14872-915, paras. 32-111. The Commission found these services to be information services. *See id.* at 14909, para 102.

³⁹ *See id.*

⁴⁰ *See id.*

⁴¹ *See id.* 47 U.S.C. § 153(43), (46). We note that issues relating to this framework are pending before the Commission in a number of proceedings. *See, e.g., Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994 (2005) (*Special Access Rates for Price Cap Local Exchange Carriers Notice*) (examining the regulatory framework to apply to price cap LECs' interstate special access services, including whether to maintain or modify the Commission's pricing flexibility rules); *Parties Asked to Refresh Record in the Special Access Notice of Proposed Rulemaking*, WC Docket No. 05-25, RM-10593, Public Notice, 22 FCC Rcd 13352 (2007); *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, Notice of Proposed Rulemaking, 16 FCC Rcd 22745 (2001) (*Incumbent LEC Broadband NPRM*) (examining what regulatory safeguards under Title II of the Act, if any, should apply when a carrier that is dominant in the provision of traditional local exchange and exchange access services provides broadband services); *Computer III Further Remand Further Notice*, 13 FCC Rcd at 6046, para. 6 (inviting comment on whether the Commission should eliminate the ONA, CEI, and other *Computer III* requirements).

⁴² *Petition for Waiver of Pricing Flexibility Rules for Fast Packet Services, Petition for Forbearance Under 47 U.S.C. Section 160(c) from Pricing Flexibility Rules for Fast Packet Services*, WC Docket No. 04-246, Memorandum Opinion and Order, 20 FCC Rcd 16840 (2005) (*Verizon Advanced Services Waiver Order*).

services that rely on packet technology.⁴³ Pricing flexibility relief allows a carrier the ability to provide tariffed services at volume and term discounts and under contract tariffs, whereby service offerings may be negotiated and tailored to meet customers' individual needs.⁴⁴ The Commission subsequently granted AT&T and Qwest similar relief for packet-based advanced services.⁴⁵

11. On December 20, 2004, Verizon filed a petition requesting that the Commission forbear from applying Title II of the Act and the *Computer Inquiry* rules to its broadband services.⁴⁶ On December 19, 2005, the Commission, pursuant to section 10(c) of the Act, extended by 90 days (until March 19, 2006) the date by which Verizon's petition would be deemed granted in the absence of a Commission decision denying the petition for failure to meet the standards for forbearance under section 10(a) of the Act.⁴⁷ By their recorded vote, two Commissioners voted for and two Commissioners voted against a Memorandum Opinion and Order granting Verizon's petition in part. Section 10(c) provides that a forbearance petition "shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance under subsection (a) within one year after the Commission receives it, unless the one-year period is extended by the Commission."⁴⁸ On March 20, 2006, the Commission issued a News Release announcing that the petition had been granted by operation of law.⁴⁹ At that same time, the Chairman and other Commissioners issued statements expressing their views on the deemed grant of Verizon's forbearance petition.⁵⁰ On December 7, 2007, the D.C. Circuit denied petitions for review that attempted to challenge the deemed grant.⁵¹

⁴³ Generally, price cap LECs may obtain pricing flexibility in two separate phases on a metropolitan statistical area (MSA) basis to respond to competition in markets that are sufficiently competitive to warrant this relief. See *Pricing Flexibility Order*, 14 FCC Rcd at 14234, 14257, paras. 24, 68. Specifically, the *Verizon Advanced Services Waiver Order* grants Verizon phase I pricing flexibility for the advanced services at issue in MSAs where Verizon previously had qualified for phase I or II pricing flexibility for other special access services. *Verizon Advanced Services Waiver Order*, 20 FCC Rcd at 16840, para. 1.

⁴⁴ *Pricing Flexibility Order*, 14 FCC Rcd at 14287, 14291, paras. 122, 128. Under phase I relief, a price cap carrier may offer volume and term discounts and contract tariffs for certain interstate access services; however, to protect those customers that may lack competitive alternatives, the price cap LEC must continue to offer its generally available, price cap constrained (*i.e.*, subject to part 61 and part 69) tariff rates for these services. 47 C.F.R. § 69.727(a); *Special Access Rates for Price Cap Local Exchange Carriers Notice*, 20 FCC Rcd at 2001, para. 17. Under phase II relief, part 69 rate structure requirements and price cap regulation are eliminated, and tariffs may be filed on one day's notice. 47 C.F.R. § 69.727(b).

⁴⁵ *SBC Communications Inc. Petition for Waiver of Section 61.42 of the Commission's Rules*, WC Docket No. 03-250, Order, 22 FCC Rcd 7224 (WCB 2007) (*SBC Waiver Order*); *Qwest Petition for Waiver of Pricing Flexibility Rules for Advanced Communications Networks Services*, WC Docket No. 06-187, Order, 22 FCC Rcd 7482 (WCB 2007) (*Qwest Pricing Flexibility Waiver Order*).

⁴⁶ See Verizon Petition at 24.

⁴⁷ 47 U.S.C. § 160(c); *Petition for Forbearance Filed by the Verizon Telephone Companies with Respect to Their Broadband Services*, WC Docket No. 04-440, Order, 20 FCC Rcd 20037 (WCB 2005).

⁴⁸ 47 U.S.C. § 160(c).

⁴⁹ *March 20 News Release*.

⁵⁰ Joint Statement of Chairman Kevin J. Martin and Commissioner Deborah Taylor Tate, *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 (rel. Mar. 20, 2006); Statement of Commissioner Michael J. Copps in Response to Commission Inaction on Verizon's Forbearance Petition, *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 (rel. Mar. 20, 2006); Statement of Commissioner Jonathan S. Adelstein in Response to Commission Inaction on Verizon's Forbearance Petition, *Petition of the* (continued....)

12. In the *AT&T Title II and Computer Inquiry Forbearance Order*, the Commission granted in part AT&T's requests for forbearance seeking relief comparable to the relief granted Verizon when its similar petition for forbearance was deemed granted by operation of law.⁵² The Commission determined that the statutory criteria were met and granted forbearance from dominant carrier regulation of AT&T's existing packet-switched broadband telecommunications services and its existing optical transmission services.⁵³ The Commission also granted AT&T relief from its obligations under the *Computer Inquiry* rules in connection with these services, conditioned on its compliance with the *Computer Inquiry* obligations that apply to all non-incumbent LEC, facilities-based wireline carriers.⁵⁴ In all other respects AT&T's requests for forbearance were denied.⁵⁵

III. DISCUSSION

A. Introduction

13. Based on our analysis of marketplace conditions for the services at issue here, we grant Qwest forbearance from the application of our dominant carrier tariff filing, cost support, discontinuance, and domestic transfer of control rules, and certain *Computer Inquiry* requirements, with regard to (1) its existing non-TDM-based, packet-switched services capable of transmitting 200 kilobits per second (kbps) or greater in each direction; and (2) its existing non-TDM-based, optical transmission services. These services include Frame Relay services, ATM services, Virtual Private Network (VPN) services, Local

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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 (rel. Mar. 20, 2006).

⁵¹ *Sprint Nextel v. FCC*, 508 F.3d at 1133.

⁵² *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18705; see *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry Rules and Certain Title II Common-Carriage Requirements, Petition of the Frontier and Citizens ILECs 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. 06-147, Memorandum Opinion and Order, 22 FCC Rcd 19478 (2007) (*Embarq and Frontier/Citizens Title II and Computer Inquiry Forbearance Order*) (granting in part Embarq's and Frontier/Citizen's requests for forbearance relief comparable to the relief granted Verizon through operation of law), *pet. for review pending*, No. 07-1452 (D.C. Cir. filed Nov. 5, 2007). We note that AT&T had withdrawn its request for forbearance from Title II dominant carrier regulation with respect to broadband services provided on an interstate interexchange basis that are subject to the relief the Commission granted in the *Section 272 Sunset Order. AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18714, para. 15; see also *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements et al.*, CC Docket No. 00-175, WC Docket Nos. 02-112, 06-120, Report and Order and Memorandum Opinion and Order, 22 FCC Rcd 16440 (2007) (*Section 272 Sunset Order*) (allowing the BOCs to provide in-region, interstate, long distance services directly or through affiliates that are neither section 272 separate affiliates nor rule 64.1903 separate affiliates, subject to nondominant carrier regulation, as long as they comply with certain targeted safeguards as well as with other continuing statutory and regulatory obligations). To the extent that Qwest's forbearance petition seeks relief comparable to what was granted in the *Section 272 Sunset Order*, we find that request to be moot, consistent with our conclusions in the *AT&T Section 272 Forbearance Denial Order. Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) with Regard to Certain Dominant Carrier Regulations for In-Region, Interexchange Services*, WC Docket No. 06-120, Memorandum Opinion and Order, 22 FCC Rcd 16556 (2007) (*AT&T Section 272 Forbearance Denial Order*). Similarly, for the same reasons stated in that order, to the extent that Qwest seeks relief from dominant carrier regulation of broadband services provided on an interstate interexchange basis that is different from, or in addition to, that granted in the *Section 272 Sunset Order*, we find that such additional relief would be inconsistent with the statutory forbearance criteria. *Id.* at 16559, para. 7. We therefore deny such relief.

⁵³ *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18716-21, paras. 20-25.

⁵⁴ *Id.* at paras. 54-62.

⁵⁵ *Id.* at paras. 64-75.

Area Network (LAN) services, Ethernet-Based services, Video Transmission services, Optical Network services, and Wave-Based services. This grant is restricted to services that Qwest currently offers and lists in its petition, and excludes all TDM-based DS1 and DS3 services.

B. Scope of Petition

14. We begin our analysis by identifying the specific relief Qwest requests in its petition, including the services, statutory provisions and Commission regulations that Qwest identifies in its petition.⁵⁶ As stated above, Qwest seeks relief comparable to that granted Verizon when its similar petition for forbearance was deemed granted.⁵⁷ Specifically, Qwest requests relief from Title II and *Computer Inquiry* requirements for the broadband services specified in its petition as well as for any additional interstate broadband services it may choose to offer in the future.⁵⁸ The requested relief from Title II includes the ability to offer any of its specified services on a private carriage basis and free from the Commission's dominant carrier requirements.⁵⁹ Qwest also seeks relief from the *Computer Inquiry* rules, including the requirement that it separate out and offer any underlying transmission components of its specified services on a common carrier basis.⁶⁰ Qwest does not seek relief from the Commission's universal service requirements.⁶¹

15. The services for which Qwest seeks relief fall within two categories of telecommunications services capable of transmitting at speeds of 200 kbps in both directions: (1) packet-switched services, which route or forward packets, frames, cells, or other data units based on the identification, address, or other routing information contained in the packets, frames, cells, or other data units; and (2) non-TDM-based optical networking, optical hubbing, and optical transmission services.⁶² Qwest lists certain specific interstate broadband telecommunications services that it currently offers and for which it seeks forbearance.⁶³ Qwest also seeks relief from Title II and *Computer Inquiry* regulation for any additional services it chooses to offer in the future that fit within either of these two categories of services.⁶⁴

⁵⁶ See, e.g., *Petition of Qwest Communications International Inc. for Forbearance from Enforcement of the Commission's Dominant Carrier Rules As They Apply After Section 272 Sunsets*, WC Docket No. 05-333, Memorandum Opinion and Order, 22 FCC Rcd 5207, 5214-15, para. 11 (2007) (*Qwest Section 272 Sunset Forbearance Order*); *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, Memorandum Opinion and Order, 17 FCC Rcd 27000, 27010, para. 18 (2002) (*SBC Advanced Services Forbearance Order*).

⁵⁷ Qwest Petition at 1; see *supra* para. 11 (describing the "deemed grant" of Verizon's Title II and *Computer Inquiry* Forbearance Petition).

⁵⁸ See Qwest Petition at 1.

⁵⁹ *Id.* at 3 (requesting relief from Title II requirements and treatment as a dominant carrier).

⁶⁰ See, e.g., *id.* at 19-21.

⁶¹ *Id.* at 1 n.3.

⁶² See *id.* at 1-2.

⁶³ Qwest lists the following services: Frame Relay, ATM service, Metro Optical Ethernet, LAN Switching service, Synchronous Service Transport, Ethernet Ports over SONET on Synchronous Service Transport & Self-Healing Network service, GeoMax, Broadcast Digital Transport Video service, HDTV Net, Self Healing Network service, QWave, Private Line OC3, OC12 and OC48, and Metro Private Line. See Qwest Petition at Attachment A. We refer to these services as the petitioner-specified services.

⁶⁴ See Qwest Petition at 1 (seeking forbearance for "any broadband services Qwest does or may offer to the extent those services are not offered as part of an Internet access service").

C. Effect of the Verizon "Deemed Grant"

16. As indicated above, Verizon's petition for forbearance from application of Title II of the Act and the *Computer Inquiry* rules to its broadband services was "deemed granted" on March 19, 2006.⁶⁵ Qwest claims in its petition that, by virtue of the Verizon deemed grant, the Commission must grant the Qwest petition, which seeks the relief granted to Verizon by operation of law, "as a ministerial act."⁶⁶

17. We reject this argument as inconsistent with section 10 of the Act, which specifies that "the Commission shall forbear . . . if the Commission determines" that the statutory forbearance criteria are met.⁶⁷ Neither this provision nor any other statutory provision permits us to forbear absent a determination based on the relevant statutory criteria.⁶⁸ Consequently, we must evaluate whether forbearance is consistent with the criteria of section 10 based on the record evidence here.⁶⁹ For similar reasons, we reject Qwest's argument that we must grant Qwest precisely the same forbearance relief as was granted Verizon by operation of law because we cannot treat similarly situated entities differently without a reasoned explanation.⁷⁰ We set forth below the rationale for our decisions in this Order based on the facts and evidence relevant to Qwest and its identified broadband services. We thus conclude that this Order satisfies our obligation to set forth a sufficient analysis and justification of the forbearance we do, and do not, grant.

18. We also decline in the context of this forbearance petition to explain, clarify, or otherwise address the forbearance that Verizon was deemed granted by operation of law, as several parties urge.⁷¹ We find that requests seeking clarification or other determinations regarding forbearance with respect to Verizon's broadband services are more appropriately addressed distinctly, based on evidence relevant to Verizon.⁷² In this proceeding, we limit our decision-making to the specific petition under consideration – that filed by Qwest.

⁶⁵ See *supra* para. 11; see also *March 20 News Release*.

⁶⁶ Qwest Petition at 7-10.

⁶⁷ 47 U.S.C. § 160(a).

⁶⁸ See Broadview Comments at i.

⁶⁹ We reject the argument that the "deemed granted" status of the Verizon Title II and *Computer Inquiry* Forbearance Petition has precedential value, or binds or otherwise limits our responsibility to evaluate Qwest's forbearance petition and the other petitions that are before us on their merits. Compare, e.g., Qwest Petition at 7-10; Letter from Melissa Newman, Vice President, Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-125, at 2-4 (filed Sept. 4, 2007) (Qwest Sept. 4, 2007 *Ex Parte* Letter) with, e.g., Alpheus Comments at 7; Broadview Comments at 7-10. That argument presupposes that the deemed grant of Verizon's petition was the result of Commission action. See, e.g., Qwest Sept. 4, 2007 *Ex Parte* Letter at 2-3 (stating that the deemed grant "establishes a specific Commission action . . . with direct legal consequence"). The Commission, however, took no action addressing whether grant of Verizon's petition is consistent with the statutory forbearance criteria. In any event, as the Commission has held, it has the option of revisiting a forbearance ruling in light of new facts. See, e.g., *Qwest Section 272 Sunset Forbearance Order*, 22 FCC Rcd at 5235, para. 55. Therefore, even if we were to treat the "deemed grant" of Verizon's forbearance petition as a Commission decision, given the extensive record developed in response to the petitioner's forbearance petitions, we would find it appropriate to revisit that determination with respect to Qwest based on the evidence before us.

⁷⁰ Qwest Petition at 6-7; Qwest Sept. 4, 2007 *Ex Parte* Letter at 3.

⁷¹ See, e.g., Legacy BellSouth Petition at 3-4 (asking the Commission to resolve the uncertainty as to the scope of the Verizon deemed grant); Frontier Petition at 3-4 (same); Embarq Petition at 5 (claiming there uncertainty regarding the Verizon petition); Covad Motion, WC Docket No. 04-440.

⁷² We note that several competitive carriers have filed a motion asking the Commission to issue a written order addressing Verizon's petition for forbearance with respect to enterprise broadband services. See Covad Motion; *Wireline Competition Bureau Seeks Comment on the Motion of Covad Communications, Group, NuVox* (continued...)

D. Application of the Statutory Forbearance Criteria

19. An integral part of the “pro-competitive, de-regulatory national policy framework”⁷³ established in the 1996 Act is the requirement, set forth in section 10 of the Communications Act, that the Commission forbear from applying any provision of the Act, or any of the Commission’s regulations, if the Commission makes certain findings with respect to such provisions or regulations.⁷⁴ Specifically, the Commission is required to forbear from any such provision or regulation if it determines that (1) enforcement of the provision or regulation is not necessary to ensure the telecommunications carrier’s charges, practices, classifications, or regulations are just, reasonable, and not unjustly or unreasonably discriminatory; (2) enforcement of the provision or regulation is not necessary to protect consumers; and (3) forbearance is consistent with the public interest.⁷⁵ In making this public interest determination, the Commission also must consider, pursuant to section 10(b), “whether forbearance from enforcing the provision or regulation will promote competitive market conditions.”⁷⁶

1. Dominant Carrier Regulation

a. Charges, Practices, Classifications, and Regulations

20. Section 10(a)(1) of the Act requires that we analyze whether the application of dominant carrier regulation to each of the services specified by Qwest is necessary to ensure that the “charges, practices, classifications, or regulations . . . for[] or in connection with that . . . telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory.”⁷⁷ Our section 10(a)(1) analysis takes into account the effect of dominant carrier regulation on Qwest’s rates and practices by considering the overall marketplace for the services for which relief is sought and the customers that use them.⁷⁸ We conclude that, in light of the overall competitive alternatives available for

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Communications, Inc., and XO Communications, LLC for Expedited Order on Verizon Petition for Forbearance, WC Docket No. 04-440, Public Notice, 22 FCC Rcd 13899 (2007); *see also, e.g.,* Alpheus Comments at 8 (stating that the Commission should use this proceeding to examine the forbearance granted to Verizon and, if it is not rescinded, clarify its scope); Broadview Comments at 16.

⁷³ Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 113 (1996).

⁷⁴ 47 U.S.C. § 160(a).

⁷⁵ *Id.*

⁷⁶ 47 U.S.C. § 160(b). In its comments, the New Jersey Rate Counsel argues that exercise of the Commission’s forbearance authority pursuant to section 10 of the Act violates the Separation of Powers Provision and the Equal Protection Clause as well as the Tenth and Eleventh Amendments of the Constitution. *See* New Jersey Rate Counsel Comments at 5-6. As we held in the *Qwest Section 272 Sunset Forbearance Order* in response to the same argument, the New Jersey Rate Counsel makes no attempt to develop this argument, and we find the assertion insufficient to call into question section 10’s constitutionality. *See Qwest Section 272 Sunset Forbearance Order*, 22 FCC Rcd at 5232, para. 49 n.139 (citing *Sprint Corp. v. FCC*, 331 F.3d 952, 960 (D.C. Cir. 2003) (Administrative Procedure Act does not require the Commission to respond to conclusory comments); *MCI WorldCom v. FCC*, 209 F.3d 70, 765 (D.C. Cir. 2000) (holding that a party did not raise an argument with sufficient force to obligate the Commission to respond); *Application by Verizon Maryland Inc., Verizon Washington, D.C. Inc., Verizon West Virginia Inc., Bell Atlantic Communications Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in Maryland, Washington, D.C., and West Virginia*, WC Docket No. 02-384, Memorandum Opinion and Order, 18 FCC Rcd 5212, 5282 n.469 (2003) (Regulatory agencies are not required to address arguments not stated with sufficient force or clarity.)).

⁷⁷ 47 U.S.C. § 160(a)(1).

⁷⁸ *Section 271 Broadband Forbearance Order*, 19 FCC Rcd at 21505, para. 21.

the petitioner-specified services, as well as the way in which they are typically offered to enterprise customers, it is appropriate to forbear from dominant carrier regulation as it applies to these services. In particular, mandating that Qwest, but not its nondominant competitors, comply with requirements that directly limit the ability of customers to secure the most flexible service arrangements is unnecessary to prevent unjust, unreasonable, or unjustly or unreasonably discriminatory rates, terms, and conditions for these services.

21. We begin our analysis by looking at the broadband services identified by Qwest and the customers that use them. These types of services are high-speed, high-volume services that enterprise customers, including some wholesale customers, use primarily to transmit large amounts of data among multiple locations. For example, Frame Relay service allows local area networks to be connected across a public network to carry customized data applications.⁷⁹ ATM service, which was developed more recently than Frame Relay, has greater availability in urban areas, is currently a widely-used carrier backbone technology, and can guarantee different service quality levels to meet various customer needs.⁸⁰ This service offers high capacity and reliability by combining some circuit-switched functionality with packet-switching and is used to deliver data that requires a very low rate of transmission delays.⁸¹ Ethernet-based services provide high-speed, dedicated pathways for large applications, including engineering, medical imaging, and streaming video applications, and are often used as part of local area networks (LANs).⁸²

22. Qwest's non-TDM-based, optical services are very high speed, fiber-based transmission services that, collectively, reflect many of the telecommunications transmission capabilities that technological advances have made possible. For example, Qwest's GeoMax service provides a high-speed, multi-protocol, fiber optic data transport service that enables signals of different wavelengths to be transmitted in the same direction over one strand of fiber.⁸³ Qwest's Synchronous Service Transport service provides customers with synchronous, optical fiber based transport at speeds as high as 9.953 gigabits per second.⁸⁴ Other services in this category also offer enterprise customers highly advanced transmission arrangements. We find insufficient information to precisely define market boundaries for such services, and we thus focus our analysis on the services Qwest identifies in the record generally.

23. We also find it appropriate, contrary to several parties' arguments,⁸⁵ to consider marketplace conditions for these services broadly.⁸⁶ In this regard, as we find below, competition for these enterprise

⁷⁹ *Verizon Communications Inc. and MCI, Inc. Application for Approval of Transfer of Control*, WC Docket No. 05-75, Memorandum Opinion and Order, 20 FCC Rcd 18433, 18463-64, para. 57 n.160 (2005) (*Verizon/MCI Order*); see also Qwest Petition at Attach. A.

⁸⁰ See *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, Memorandum Opinion and Order, 20 FCC Rcd 27000, 27003, para. 6 n.22 (2002) (*SBC Advanced Services Order*).

⁸¹ *Verizon/MCI Order*, 20 FCC Rcd at 18464, para. 57 n.161; see also Qwest Petition at Attach. A.

⁸² *Verizon/MCI Order*, 20 FCC Rcd at 18464, para. 57 n.163; see also Qwest Petition at Attach. A.

⁸³ Qwest Petition at Attach. A.

⁸⁴ *Id.*

⁸⁵ See, e.g., Broadview Comments at 28 (claiming that the petitioner does not provide evidence for the Commission to determine the relevant geographic market and simply claim that there is a national market for broadband products); COMPTel Comments at 11.

⁸⁶ See AT&T Petition at 5 (stating that Verizon's Petition demonstrated that "broadband competition is national in scope and is not limited to Verizon's territory or the territory of any specific BOC"); Qwest Reply at 6; Verizon Reply at 17-18 (claiming that the Commission may consider a national broadband market based on its analysis in the *Wireline Broadband Internet Access Services Order*, the *Triennial Review Order*, the *Section 271 Broadband* (continued....))

broadband services tends to be based on either competitive deployment of facilities or use of special access inputs. We note that the relief we grant Qwest excludes TDM-based DS-1 and DS-3 special access services,⁸⁷ and that such special access services for other incumbent LECs likewise remain rate regulated, regardless of the specific geographic market.⁸⁸ We also continue to believe, as the Commission determined in the *Wireline Broadband Internet Access Services Order*, that it is appropriate to view a broadband marketplace that is emerging and changing, such as we find true here, from the perspective of the larger trends that are shaping the marketplace.⁸⁹ Thus, in the *Wireline Broadband Internet Access Services Order*, the Commission analyzed competitive conditions for broadband Internet access services without regard to specific, identified geographic markets, finding that relying on specific geographic markets would force the Commission to premise findings on limited and static data that failed to account for all of the forces that influence the future market development.⁹⁰ Similarly, the Commission relied on such an approach in the *Section 271 Broadband Forbearance Order* when – after evaluating both mass market and enterprise broadband competitive conditions generally – it granted the BOCs forbearance from access obligations for broadband loops and packet switching.⁹¹ The similarities we find between the characteristics of the present marketplace as emerging and changing, and the markets at issue in those prior orders, suggest that it is appropriate for us to look more broadly at competitive trends without regard to specific geographic markets.⁹²

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Forbearance Order, and the *Cable Modem Declaratory Ruling*); Erratum, Letter from Dee May, Vice President, Federal Regulatory, Verizon, to Marlene H. Dortch, FCC, WC Docket Nos. 06-125, 06-147, 04-440, at 5-8 (filed Sept. 4, 2007) (Verizon Sept. 4, 2007 *Ex Parte* Erratum). We note that the Commission's forbearance analysis is informed by its traditional market power framework, where the Commission has noted that competitive analyses generally should focus on individual customer locations, but for reasons of administrative practicality may be aggregated and evaluated on a broader geographic basis. See, e.g., *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5700, para. 68 (2007) (*AT&T/BellSouth Order*) (subsequent history omitted). Moreover, we note that, although the Commission's analysis of forbearance from dominant carrier regulation is informed by its traditional market power analysis, it is not bound by that framework. As the Commission stated in the *Qwest Omaha Order*, while it "look[s] to the Commission's previous caselaw on dominance for guidance," the traditional market power inquiry does not "bind [the Commission's] section 10 forbearance analysis." *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, 20 FCC Rcd 19415, 19423-25, paras. 14, 17, n.52 (2005) (emphasis in original) (*Qwest Omaha Order*), *aff'd*, *Qwest Corp. v. FCC*, 482 F.3d 471 (D.C. Cir. 2007).

⁸⁷ See Qwest Petition at 1.

⁸⁸ Moreover, as discussed below, concerns regarding existing regulation of TDM special access inputs are better addressed in the pending rulemaking context. See *infra* para. 37.

⁸⁹ *AT&T/BellSouth Order*, 22 FCC Rcd at 5698-99, para. 65 & n.183 (discussing the marketplace evolution for these types of services); Verizon Sept. 4, 2007 *Ex Parte* Erratum, attaching Verizon Feb. 7, 2006 *Ex Parte* Letter, WC Docket No. 04-440, at 4-6 (describing how "the technology used to provide the broadband services at issue here '[is] fundamentally changing' in ways that are 'breaking down the formerly rigid barriers that separate one network from another'") (citations omitted); *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14880-81, para. 50; *id.* at 14901-03, paras. 91-94.

⁹⁰ *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14880-81, para. 50; *id.* at 14901-03, paras. 91-94.

⁹¹ See *Section 271 Broadband Forbearance Order*, 19 FCC Rcd at 21496, para. 1 (granting forbearance relief for FTTH loops, FTTC loops, the packetized functionality of hybrid loops, and packet switching); see also *EarthLink v. FCC*, 562 F.3d at 8 (upholding the Commission's decision in the *Section 271 Broadband Forbearance Order* as a reasonable interpretation of the forbearance statute).

⁹² Certain commenters seek to distinguish the manner in which the Commission conducted its analysis in the *Wireline Broadband Internet Access Services Order* on the basis of the evidence of the intermodal competition cited (continued....)

24. Moreover, in the *ACS Dominance Forbearance Order*, the Commission found that many enterprise customers that purchase these types of services have national, multi-location operations and thus seek the best-priced alternatives from multiple potential providers having national market presences.⁹³ Viewing the regulatory obligations from a broad perspective is consistent with the needs of the large and mid-sized enterprise customers that use Qwest's broadband services to connect geographically-dispersed locations.⁹⁴ Many of these customers, moreover, have national, multi-location operations and thus seek the best-priced alternatives from multiple potential providers having national market presences.⁹⁵ Other enterprise customers have more regional or localized operations, but even these customers are able to solicit telecommunications services from a range of potential providers. Indeed, providers of these services often are able to self-deploy or obtain from competitive LECs the telecommunications services and facilities needed to meet potential customers' telecommunications requirements. Where self-deployment and purchasing from competitive LECs are not options, potential providers may obtain UNEs from the incumbent LEC to meet these customers' needs.⁹⁶

25. Viewed on this basis, and consistent with the Commission's findings in several recent orders, we find that a number of entities currently provide broadband services in competition with Qwest's services.⁹⁷ There are a myriad of providers prepared to make competitive offers to enterprise customers

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in that proceeding. *See, e.g.*, Broadview Comments at 25. To the extent that competition in the emerging market for enterprise broadband services addressed here relies in part on third parties' wholesale inputs, rather than competitors' own facilities, we do not find that to be a distinguishing factor in terms of the Commission's approach of viewing emerging and changing broadband markets from the perspective of the larger trends that are shaping the marketplace, although we do account for those factors in the relief ultimately granted and denied. The Commission relied on the presence of intermodal competitors in the emerging wireline broadband Internet access services market in granting relief from the compulsion to offer as telecommunications services the telecommunications inputs necessary for wireline broadband Internet access service. *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14895, para. 79. Here, however, in addition to the potential for competitors to deploy their own facilities for the provision of the relevant enterprise broadband services, we observe that the relief we grant excludes TDM-based DS-1 and DS-3 special access services. Thus, those services, in addition to section 251 UNEs, remain available for use as wholesale inputs for these enterprise broadband services.

⁹³ *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, Memorandum Opinion and Order, 22 FCC Rcd 16304, 16349, para. 101 (2007) (*ACS Dominance Forbearance Order*), *recons. pending*. Thus, based on our discretion to tailor our forbearance analysis, we find that an analysis of the petitioner-specified services on a national basis is the proper approach, and we reject arguments raised regarding the geographic market definition. *See EarthLink v. FCC*, 462 F.3d at 9.

⁹⁴ *See AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18718, para. 21; *see also Time Warner Telecom v. FCC*, 507 F.3d at 221-22 (concluding that Commission's "broad market analysis" of the broadband Internet access services market "was both reasonable and consistent with the approach upheld by the Supreme Court in *Brand X*").

⁹⁵ Verizon Sept. 4, 2007 *Ex Parte* Erratum at 3.

⁹⁶ The broadband services for which Qwest is seeking relief are purchased predominantly by enterprise customers, not by their competitors as wholesale inputs. *See AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18718, para. 21 n.90. Granting the requested relief, however, will not affect these competitors' ability to obtain traditional DS1 and DS3 special access services or UNEs as inputs. Nor will it affect the competitors' ability to self-deploy their own OCN facilities and services or to obtain them from non-incumbents. *Id.*

⁹⁷ *See AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18718-19, para. 22; *see also Verizon/MCI Order* 20 FCC Rcd at 18474-75, para. 76; *Qwest Section 272 Sunset Forbearance Order*, 20 FCC Rcd (continued....)

demanding packet-switched data services located both within and outside any given incumbent LEC's service territory.⁹⁸ These competitors include the many competitive LECs, cable companies, systems integrators, equipment vendors, and value-added resellers providing services that compete against Qwest.⁹⁹

26. As acknowledged in the *AT&T Title II and Computer Inquiry Forbearance Order*, we recognize that the record in this proceeding does not include detailed market share information for particular enterprise broadband services.¹⁰⁰ However, we note that other available data suggest that there are a number of competing providers for these types of services nationwide and the marketplace generally appears highly competitive.¹⁰¹ In particular, the record shows there are many significant providers of Frame Relay services, ATM services, and Ethernet-based services.¹⁰² Moreover, as we discuss below, we find that competitors either are providing, or readily could enter the market to provide, these services. In light of these factors and the emerging and evolving nature of this market, and consistent with traditional

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at 5244, para. 30; Verizon Sept. 4 2007 *Ex Parte* Erratum, attaching Verizon Feb. 7, 2006 *Ex Parte* Letter, WC Docket No. 04-440, at 7-9.

⁹⁸ See *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18718-19, para. 22; see also *Verizon/MCI Order*, 20 FCC Rcd at 18473-74, para. 74; Verizon Reply at 17-18 (stating that much of the success of Verizon's competitors is due to their ability to serve the national and international needs of large business customers, and that there are "national patterns" with respect to broadband availability and competition throughout Verizon's service areas).

⁹⁹ Competitors are rapidly deploying new Internet Protocol (IP)-based networks and services along with other technologies to satisfy customer demand. See Telecommunications Industry Association, TIA's 2005 Telecommunication Market Review and Forecast, at 121 (2005) (stating that IP-VPNs have emerged as a lower-cost alternative to Frame Relay service). Frame Relay growth has come to a near standstill as lower cost alternatives have emerged, and unified messaging, voice over IP (VoIP), multi-cast video and IP-based network security services, not suitable for Frame Relay applications, are increasingly in demand. *Id.* at 120. As discussed in prior Commission orders, there are numerous types of business models supporting competition for enterprise customers. Some competitive LECs market integrated voice and data services to enterprise customers, primarily through leasing high-capacity loops from the incumbent LECs as UNEs and then using the leased loops to provide a bundled offering including voice, data, and Internet access. See, e.g., *Triennial Review Order*, 18 FCC Rcd at 17014, para. 48 n.159 (observing that companies such as ITC^Deltacom, NewSouth, and Cbeyond have focused on providing integrated services to the business market).

¹⁰⁰ See *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18719-20, para. 23.

¹⁰¹ See, e.g., Verizon Sept. 4, 2007 *Ex Parte* Erratum, attaching Verizon Feb. 7, 2006 *Ex Parte* Letter, WC Docket No. 04-440, at 7 n.13 (citing a June 2005 analyst's estimated market shares for "primary" providers of enterprise data services: AT&T 35%, MCI 28%, Sprint 12%, incumbent LEC 7%, Other 19%); *id.* at 7 n.14 (citing a June 2005 analyst's estimated market shares for "secondary" providers of enterprise data services: Sprint 31%, AT&T 16%, incumbent LEC 16%, MCI 6%, Qwest 6%, Other 25%); see generally *id.* at Attach. 2 (citing a November 2003 analyst report estimating market shares of top providers of services to large enterprise customers: AT&T 26%, MCI 14%, Sprint 8%; and forecasting anticipated market shares for subsequent years). While these data are not ideal, for example because they predate the BOC/interexchange carrier mergers, and the underlying information and methodologies are not available, as noted above, we do not give significant weight to such static market share information in any event.

¹⁰² See *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18718-19, para. 22; see also Broadview Comments at 11 (stating "it is of course true that the retail market for packetized and TDM-based special access services is competitive") (emphasis in original); Time Warner Telecom, Cbeyond *et al.* Comments at 10 (arguing that Qwest is trying to rely on the retail competition for these services as a basis for forbearance relief); Sprint Nextel Comments at 13-15 (same); see also *Section 271 Broadband Forbearance Order*, 20 FCC Rcd at 21505-06, para. 22 (citing competition from competitive LECs, cable companies, systems integrators, equipment vendors, and value-added resellers).

market power analysis, we do not find it essential to have such detailed information and would not give significant weight to static market share information in any event.¹⁰³ However, our findings here concerning the granularity of competition in specific geographic markets and the level of competition for enterprise broadband services do not prejudice the issue of the appropriate level of market analysis for services subject to the open *Special Access Rulemaking* proceeding, WC Docket No. 05-25.¹⁰⁴

27. We also observe the sophistication of the enterprise customers that tend to purchase broadband telecommunications services. The Commission consistently has recognized that customers that use specialized services, similar to the petitioner-specified services, demand the most flexible service offerings possible, and that service providers treat them differently from other types of customers, both in the way they market their products and in the prices they charge.¹⁰⁵ These users tend to make their decisions about communications services by using either communications consultants or employing in-house communications experts.¹⁰⁶ This shows that customers are likely to make informed choices based on expert advice about service offerings and prices, and thus suggests that these users also are likely to be aware of the choices available to them.¹⁰⁷ The Commission has further found that the large revenues these customers generate, and their need for reliable service and dedicated equipment, provide a significant incentive to suppliers to build their own facilities where possible, and to carry the traffic of these customers over the suppliers' own networks.¹⁰⁸ These services equate to substantial telecommunications expenditures for large enterprise customers, which supports the notion that these customers will continue to deal at the most sophisticated level with the providers of these services.¹⁰⁹

¹⁰³ See, e.g., *Application of WorldCom, Inc. and MCI Communications Corporation For Transfer of Control of MCI Communications Corporation To WorldCom, Inc.*, CC Docket No. 97-211, Memorandum Opinion and Order, 13 FCC Rcd 18025, 18036-37, paras. 17-18 (1998); see also DOJ/FTC Horizontal Merger Guidelines, § 1.521 ("Market concentration and market share data of necessity are based on historical evidence. However, recent or ongoing changes in the market may indicate that the current market share of a particular firm either understates or overstates the firm's future competitive significance."). We thus reject commenters' calls to base our analysis on such information. See, e.g., AdHoc Reply at 13-14.

¹⁰⁴ *Special Access Rates for Price Cap Local Exchange Carriers Notice*, 20 FCC Rcd at n.43.

¹⁰⁵ See, e.g., *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18720, para. 24; *AT&T/BellSouth Order*, 22 FCC Rcd at 5699, para. 66; *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18323, para. 60 (2005) (*SBC/AT&T Order*); *Verizon/MCI Order*, 20 FCC Rcd at 18465, para. 60; *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as Amended; 1998 Biennial Regulatory Review – Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets*, CC Docket Nos. 96-61, 98-183, Report and Order, 16 FCC Rcd 7418, 7426, para. 17 (2001) (*CPE Bundling Order*); *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, 3306, para. 65 (1995) (*AT&T Reclassification Order*) (citing *Competition in the Interstate, Interexchange Marketplace*, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, 5887, para. 39 (1991)).

¹⁰⁶ See *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18718-19, para. 22; *AT&T/BellSouth Order*, 22 FCC Rcd at 5708-09, paras. 81-82; *SBC/AT&T Order*, 20 FCC Rcd at 18332-33, paras. 74-75; see also *Verizon/MCI Order*, 20 FCC Rcd at 18474-75, para. 76.

¹⁰⁷ See *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18718-19, para. 22; *AT&T/BellSouth Order*, 22 FCC Rcd at 5708-09, para. 82; *SBC/AT&T Order*, 20 FCC Rcd at 18332-33, para. 75; see also *Verizon/MCI Order*, 20 FCC Rcd at 18474-75, para. 76.

¹⁰⁸ *Triennial Review Order*, 18 FCC Rcd at 17063, para. 129.

¹⁰⁹ See Verizon Sept. 4, 2007 *Ex Parte* Erratum at 3; see also Legacy BellSouth Comments, WC Docket No. 04-440 at 27 (stating that customers of these broadband transmission services "typically exert control over their buying practices through a variety of mechanisms to ensure quality and price" such as request for proposals and competitive bids).

Smaller enterprise customers, whose telecommunications requirements do not warrant the deployment of new facilities, tend to purchase less sophisticated services.

28. We further find that competitors can readily respond should Qwest seek to impose unjust, unreasonable, or unjustly or unreasonably discriminatory rates, terms, or conditions for its enterprise broadband services. Even in situations where competitors do not have the option of self-deploying their own facilities or purchasing inputs from carriers other than the incumbent LEC, potential providers may rely on special access services purchased from the incumbent LEC at rates subject to price regulation.¹¹⁰ In this regard, we note that the relief we grant in this Order excludes TDM-based DS-1 and DS-3 special access services.¹¹¹ Moreover, as we discuss in more detail below, competing carriers are able economically to deploy OCn-level facilities to the extent that there is demand for such services in Qwest's incumbent LEC service area. These conclusions are consistent with our analysis of retail enterprise services in other recent orders, where the Commission found that "so long as competitive choices remain" for retail enterprise services, large enterprise "customers should seek out best-priced alternatives," limiting the ability of a provider "to raise and maintain prices above competitive levels."¹¹²

29. We reject Time Warner Telecom's assertion that TDM-based loops cannot in many instances be used to provide packetized broadband services to enterprise customers.¹¹³ We find that assertion to be inconsistent with Time Warner Telecom's public statements that Time Warner Telecom can "cost-effectively deliver . . . Ethernet [services] to customers anywhere," even "where it may be uneconomical" to build facilities connecting Time Warner Telecom's network to the customers' premises.¹¹⁴ Indeed, we observe that Time Warner Telecom has been able to compete in the provision of Ethernet services by relying on special access TDM loops (in addition to its own facilities).¹¹⁵ We also are unpersuaded by

¹¹⁰ See, e.g., Sprint Nextel Comments at 6 (stating that special access inputs are "critical" inputs to the broadband services provided by incumbent LEC competitors); Time Warner Telecom, *Cbeyond et al.* Comments at 12-16 (arguing that many competitors rely on special access facilities to serve broadband services to enterprise customers); Broadview Comments at 25-26 (arguing that competitors are dependent on the incumbent LECs' special access services); Mobile Satellite Ventures Subsidiary Reply at 2 (stating that it relied on special access inputs from the incumbent LECs to provide mobile satellite services). While we note that Qwest has phase II pricing flexibility in certain markets where the Commission has determined the competitive triggers have been met, this does not alter our ultimate conclusions for the reasons described above. See *infra* para. 44.

¹¹¹ Qwest excludes traditional TDM-based DS1 and DS3 services from its broadband requests. See *supra* n.5.

¹¹² See *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18720-21, para. 25; *AT&T/BellSouth Order*, 22 FCC Rcd at 5608-09, para. 82; *SBC/AT&T Order*, 20 FCC Rcd at 18332-33, para. 75; *Verizon/MCI Order*, 20 FCC Rcd at 18474-75, para. 76; *Qwest Section 272 Sunset Forbearance Order*, 22 FCC Rcd at 5231, para. 46.

¹¹³ Time Warner Telecom, *Cbeyond et al.* Comments at 16-20.

¹¹⁴ *Time Warner Telecom and Overture Networks Provide Ethernet Anywhere*, Time Warner Telecom Press Release (June 6, 2006), available at: <http://www.twtelecom.com/Documents/Announcements/News/2006/Overture.pdf>.

¹¹⁵ Specifically, Time Warner Telecom cites two declarations filed in the AT&T/BellSouth merger proceedings. See Time Warner Telecom, *Cbeyond et al.* Comments at 15-20 (citing Letter from Thomas Jones, Counsel for Time Warner Telecom, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-74, Attach. Reply Decl. of Graham Taylor (Taylor WC Docket No. 06-74 Reply Decl.); Joint Opposition of AT&T Inc. and BellSouth Corp. to Petitions to Deny and Reply to Comments, WC Docket No. 06-74, Attach. Reply Decl. of Parley C. Casto (Casto WC Docket No. 06-74 Reply Decl.)). These declarations indicate that Time Warner Telecom, among others, can use TDM special access services to offer retail Ethernet services. See Taylor WC Docket No. 06-74 Reply Decl. at para. 9 ("To the extent that TWTC has been able to deploy Ethernet services at retail in AT&T's region, it has done so using 1) its on-net facilities; 2) TDM loops purchased from AT&T; and 3) an extremely limited number of competitive facilities.") cited in Time Warner Telecom, *Cbeyond et al.* Comments; Casto WC Docket No. 06-74 Reply Decl. at para. 10 ("Numerous Ethernet providers, including TWTC, AT&T, and others, offer retail Ethernet services" by using "basic DS1 or DS3 special access circuits.").

Time Warner Telecom's concern that reliance on TDM special access inputs gives rise to service or performance problems that hinder competition.¹¹⁶ We agree that this argument is undercut by the fact that providers have been successfully competing for Ethernet services customers by relying on TDM inputs.¹¹⁷ We also reject Time Warner Telecom's argument that the fixed and variable mileage rates charged by the BOCs make it uneconomical for competing carriers to rely on TDM inputs, and that forbearance should be denied because the BOCs therefore have monopoly power over such inputs.¹¹⁸ Rather, consistent with the *AT&T Title II and Computer Inquiry Forbearance Order*, we believe that the increased mileage costs for providing longer connections has not prevented Time Warner Telecom from using Ethernet over TDM arrangements; and further, that Time Warner Telecom could minimize those charges by interconnecting at additional points.¹¹⁹ In addition, we observe that all ways of obtaining transmission capacity have trade-offs, including purchasing transmission services at wholesale and self-provisioning network transmission facilities, and we anticipate that competitors will explore various options in seeking to provide enterprise broadband services. For example, obtaining wholesale TDM special access circuits and providing the Ethernet electronics can enable providers to exercise greater control over the traffic carried on those circuits.¹²⁰ Further, any transmission services typically are offered in fixed capacity increments, which may not be the precise capacities particular customers prefer.¹²¹

30. In addition, to the extent that commenters argue for changes in the existing regulation of special access services other than those for which we grant relief, as in prior proceedings, we find that such concerns are more appropriately addressed on an industry-wide basis in pending rulemaking proceedings.¹²² As the Commission has held, "[t]o the extent that certain incumbent LECs have the incentive and ability under our existing rules to discriminate against competitors" using special access inputs, "such a concern is more appropriately addressed in our existing rulemaking proceedings on special access performance metrics and special access pricing."¹²³ By addressing such issues in the context of a

¹¹⁶ See, e.g., Time Warner Telecom, *Cbeyond et al.* Comments at 18.

¹¹⁷ See, e.g., Casto WC Docket No. 06-74 Reply Decl. at para. 22.

¹¹⁸ Time Warner Telecom, *Cbeyond et al.* Comments at 18-19.

¹¹⁹ See *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18721-22, para. 26.

¹²⁰ See Casto WC Docket No. 06-74 Reply Decl. at para. 22.

¹²¹ For example, Time Warner Telecom notes that it would need to obtain two DS3s to provide a 50 Mbps Ethernet loop because DS3s provide approximately 45 Mbps of bandwidth. Time Warner Telecom, *Cbeyond et al.* Comments at 17. However, Ethernet supports data transfer rates in specific increments of 10 Mbps, 100 Mbps, and 1 Gbps. See NEWTON'S TELECOM DICTIONARY at 363-64. Thus, depending upon the capacity of service desired by a particular customer, it could well be necessary to purchase excess capacity of a wholesale Ethernet service, as well.

¹²² We note that our finding is consistent with *AT&T Corp. v. FCC*, 236 F.3d 729 (D.C. Cir. 2001). In that decision, the court found that the Commission could not deny a petitioner's forbearance request simply because of the availability of a separate, inferior avenue of regulatory relief. *Id.* at 737-38. By contrast, here we grant in part Qwest's forbearance request with regard to certain specific services and we do not defer consideration of requested forbearance relief to any other proceeding. Deferring to other pending proceedings proposals by commenters for increased regulation of other services does not in any way undermine the grant of requested relief.

¹²³ *AT&T/BellSouth Order*, 22 FCC Rcd at 5695-96, para. 60; *SBC/AT&T Order*, 20 FCC Rcd at 18320, para. 55; *Verizon/MCI Order*, 20 FCC Rcd at 18462, para. 55; *Application of AT&T Wireless Services, Inc. and Cingular Wireless Corporation For Consent to Transfer Control of Licenses and Authorizations*, File Nos. 0001656065, *et al.*, WT Docket No. 04-70; *Applications of Subsidiaries of T-Mobile USA, Inc. and Subsidiaries of Cingular Wireless Corporation for Consent to Assignment and Long-Term De Facto Lease of Licenses*, File Nos. 0001771442, *et al.*, WT Docket No. 04-254; *Applications of Triton PCS License Company, LLC, AT&T Wireless PCS, LLC, and Lafayette Communications Company, LLC For Consent to Assignment of Licenses*, File Nos. 0001808915, *et al.*, Memorandum Opinion and Order, 19 FCC Rcd 21522, 21592, para. 193 (2004).

rulemaking, we will be able to develop a comprehensive approach based on a full record that applies to all similarly situated incumbent LECs. For the same reasons, to the extent that commenters desire expanded access to section 251 UNEs under the Commission's generally applicable unbundling rules, we find it more appropriate to consider such concerns in the context of an industry-wide proceeding applicable to all similarly situated carriers, rather than in the context of a forbearance proceeding.¹²⁴

31. Because our grant of forbearance excludes traditional TDM-based DS1 and DS3 special access services, we reject certain commenters' concerns regarding the potential impact of forbearance on rural access to the Internet backbone.¹²⁵ The record makes clear that rural carriers are largely using TDM-based DS1 and DS3 special access services to access the Internet backbone today,¹²⁶ and the forbearance relief granted in this Order does not affect those services. Accordingly, rural incumbent LECs will continue to have access to the Internet backbone using those regulated special access services. While the rural carriers' concerns regarding access to the Internet backbone using packetized services appear largely speculative based on the record here, as in the *AT&T/BellSouth Order*, we commit to monitor the competitive concerns of rural carriers with respect to access to the Internet backbone.¹²⁷ We find on this record, however, that the limited forbearance relief we grant in this order will not adversely affect rural incumbent LECs' ability to access the Internet backbone.

32. We are convinced that customers would benefit from the ability of all competitors to respond to competing market-based price offerings that take the form of promotions and multi-tiered service packages. As we held in the *AT&T Title II and Computer Inquiry Forbearance Order*, we find tariffing and cost support requirements limit Qwest's ability to negotiate service arrangements tailored to specific customer needs and to respond to new service offers from unregulated competitors because it must currently provide advance notice of any tariff price changes.¹²⁸ We also find that the ability to negotiate in an unencumbered fashion is not only essential to enable competition in the broadband market but to encourage investment in, and development of, new broadband services and that these requirements impose significant unnecessary transactions costs on Qwest's broadband business.¹²⁹

33. In light of these findings, we conclude that dominant carrier tariffing and pricing regulation of Frame Relay services, ATM Services, LAN services, Ethernet-Based services, Video Transmission services, Optical Network services, and Wave-Based services, as offered by Qwest today, is not necessary to ensure that Qwest's rates and practices for those services are just, reasonable, and not unjustly or unreasonably discriminatory. The competitive conditions persuade us that the contribution of tariffing requirements, and the accompanying cost support and other requirements, to ensuring just, reasonable, and nondiscriminatory charges and practices for these services is negligible. The Commission has recognized that tariffs originally were required to protect consumers from unjust, unreasonable, and

¹²⁴ See, e.g., Broadview Reply at 7-8; see also 47 C.F.R. §§ 1.401-1.407 (providing for petitions for rulemaking).

¹²⁵ See NTCA Comments at 2 (arguing that forbearance will saddle rural areas with obsolete TDM connections for Internet backbone); OPASTCO Comments at 3, 6 (claiming that rural incumbent LECs need access to the Internet backbone based on reasonable and nondiscriminatory rates and terms in order to provide their customers with high-quality, affordable advanced services); NTCA Reply at 3 (arguing that if forbearance is granted, the BOCs could refuse to provide their transport services to the Internet backbone to rural incumbent LECs, unless these incumbent LECs agree to purchase both this transport and Internet backbone capacity from the BOC).

¹²⁶ NTCA Comments at 2 (stating many rural incumbent LECs connect to the Internet using TDM circuits).

¹²⁷ *Id.* We note that the Commission has the option of revisiting this forbearance ruling should circumstances warrant. See, e.g., *Qwest Section 272 Sunset Forbearance Order*, 22 FCC Rcd at 5235, para. 55.

¹²⁸ See *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18723, para. 29.

¹²⁹ See *id.*

discriminatory rates in a virtually monopolistic market, and that they become unnecessary in a marketplace where the provider faces significant competitive pressure.¹³⁰

34. For the same reasons, we find that continuing to subject Qwest to dominant carrier regulation in regard to its existing non-TDM-based packet-switched broadband services therefore is no longer appropriate in light of the market conditions. Such regulation is not necessary to ensure that Qwest's charges, practices, or regulations in connection with these services are just, reasonable, and not unjustly or unreasonably discriminatory, so long as Qwest is subject to the same treatment as the nondominant competitors that provide these services.¹³¹

35. We also find that Qwest faces sufficient competition in its provision of the specified optical transmission services because competing carriers are able to economically deploy OCn-level facilities to compete with Qwest's offerings. Specifically, we find, consistent with the Commission's findings in the *Triennial Review* and the *Triennial Review Remand Orders*, that there is substantial deployment of competitive fiber loops at OCn capacity and that competitive carriers are often able to economically deploy these facilities to large enterprise customers.¹³² We further find, consistent with this precedent, that OCn-level facilities produce revenue levels that can justify the high cost of loop construction.¹³³ Our precedent also makes clear that large enterprise customers purchasing services over such facilities typically enter into long-term contracts that enable competing providers to recover their construction costs over lengthy periods.¹³⁴ Evidence in the record here likewise is consistent with those conclusions.¹³⁵ Thus, we find it no longer appropriate to subject Qwest to dominant carrier regulation for these non-TDM-based, optical services.¹³⁶

36. Given the costs associated with dominant carrier regulation, we find that customers would benefit by our granting Qwest relief from that regulation as it applies to the packet-switched and optical transmission services for which it seeks forbearance. In particular, the Commission has long recognized that tariff regulation may create market inefficiencies, inhibit carriers from responding quickly to rivals'

¹³⁰ See *ACS Dominance Forbearance Order*, 22 FCC Rcd at 16350, para. 103; see also *Policies and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61, Second Report and Order, 11 FCC Rcd 20730, 20738-68, paras. 14-66 (1996) (*Interexchange Forbearance Order*).

¹³¹ See *Qwest Omaha Order*, 20 FCC Rcd at 19434-35, paras. 39, 42. As discussed in part III.D.3 & III.D.4, below, we agree with the argument of Time Warner Telecom, *Cbeyond et al.* that Qwest should remain subject to nondominant carrier regulation in its provision of these services. See *Time Warner Telecom, Cbeyond et al.* Comments at 26-28.

¹³² *Triennial Review Order*, 18 FCC Rcd at 17169, 17221, paras. 315, 389 (finding that requesting carriers are not impaired without OCn or SONET interface transport); *Triennial Review Remand Order*, 20 FCC Rcd at 2634, para. 183; *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18724-25, para. 32; *EarthLink Comments* at 20 (arguing that the BOCs control almost all the essential inputs in their regions). We note that our reliance on the *Triennial Review Order* and the *Triennial Review Remand Order* is for purposes of the findings of fact made therein and not on the impairment analysis *per se*. See *Sprint Comments* at 18 (arguing that any reliance in this proceeding on the *Triennial Review Order* would be misplaced as the analysis conducted in that order was driven by section 251(c), as opposed to the section 10 forbearance analysis of the current proceeding); see also *Broadview Reply* at 10 n.30.

¹³³ *Triennial Review Order*, 18 FCC Rcd at 17169, para. 316.

¹³⁴ *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18724-25, para. 32; *Triennial Review Order*, 18 FCC Rcd at 17169, para. 316.

¹³⁵ See *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18724-25, para. 32.

¹³⁶ Qwest has not asked for, nor are we granting, forbearance for the traditional TDM-based DS1 and DS3 special access services that the Commission has previously found that competitors rely on to serve enterprise customers. See *Qwest Petition* at 1-2.

new offerings, and impose other unnecessary costs.¹³⁷ We find that applying dominant carrier regulation to the petitioner-specified broadband services would have each of these effects. Specifically, tariffing these services reduces Qwest's ability to respond in a timely manner to its customers' demands for innovative service arrangements tailored to each customer's individualized needs.¹³⁸ In addition, by mandating that Qwest provide advance notice of changes in its prices, terms, and conditions of service for these services, tariffing allows its competitors to counter innovative product and service offerings even before they are made available to the public. In contrast, detariffing of these services will facilitate innovative integrated service offerings designed to meet changing market conditions and will increase customers' ability to obtain service arrangements that are specifically tailored to their individualized needs.¹³⁹ Moreover, relief from advance notice requirements and cost-based pricing requirements will enable Qwest to respond quickly and creatively to competing service offers.¹⁴⁰ We find that tariff regulation simply is not necessary to ensure that the rates, terms, and conditions for the petitioner-specified broadband services are just and reasonable and not unjustly or unreasonably discriminatory. The better policy for consumers is to allow Qwest to respond to technological and market developments without the Commission reviewing in advance the rates, and terms, and conditions under which it offers these services.¹⁴¹

37. We disagree with the parties that argue Qwest already has sufficient relief, through our pricing flexibility regime, to meet its customers' needs and compete effectively.¹⁴² Although Qwest has obtained pricing flexibility relief for certain interstate access services,¹⁴³ that relief is both limited in scope and limited to certain geographic areas.¹⁴⁴ As the Commission has stated before in reducing regulatory requirements where competition is present, there comes a point at which constraints become counter-productive, especially in terms of carriers' ability to respond to customer needs.¹⁴⁵ This is particularly true for the broadband services for which Qwest seeks relief because, unlike many of its competitors, Qwest is limited in its ability to negotiate arrangements with customers that operate on a nationwide basis. Even when price cap carriers are permitted to tailor services to their customers through individually negotiated contracts under the *Pricing Flexibility Order*, our rules still require these contract-based tariffs to be filed with specified information that is available publicly to any party, including competitors.¹⁴⁶

¹³⁷ See, e.g., *AT&T Reclassification Order*, 11 FCC Rcd at 3288, para. 27.

¹³⁸ *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18725, para. 33; Qwest Petition at 13; see also *Interexchange Forbearance Order*, 11 FCC Rcd at 20760-61, para. 53.

¹³⁹ *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18725, para. 33.

¹⁴⁰ *Id.*; Qwest Petition at 13.

¹⁴¹ See *SBC Advanced Services Forbearance Order*, 17 FCC Rcd at 27012-13, para. 22.

¹⁴² Alpheus Comments at 12-13; Broadview Reply at 12.

¹⁴³ Most carriers did not include packet-switched services in price caps, and thus these services could not qualify for pricing flexibility. The Commission subsequently found that these procedural circumstances should not act to preclude Qwest from obtaining pricing flexibility for these services. See *Qwest Pricing Flexibility Waiver Order*, 22 FCC Rcd at 7485, para. 6 n.22.

¹⁴⁴ See generally *Pricing Flexibility Order*, 14 FCC Rcd 14221. Pricing flexibility permits the LEC to enter into more individualized relationships with its customers. Price cap LECs may obtain pricing flexibility in two separate phases, each on an MSA basis.

¹⁴⁵ See, e.g., *id.* at 14232-33, para. 17.

¹⁴⁶ 47 C.F.R. § 61.55 (requirements for contract-based tariffs).

38. We find that eliminating these requirements would make Qwest a more effective competitor for these services, which in turn we anticipate will increase even further the amount of competition in the marketplace,¹⁴⁷ thus helping ensure that the rates and practices for these services overall are just, reasonable, and not unjustly discriminatory. Forbearing from dominant carrier regulation of the petitioner-specified services will permit customers to take advantage of a more market-based environment for these highly specialized services and allow Qwest the flexibility necessary to respond to dynamic price and service changes often associated with the competitive bidding process. In such a deregulated environment, the Commission's enforcement authority, along with market forces, will serve to safeguard the rights of consumers. Qwest will continue to be subject to sections 201 and 202 of the Act in its provision of its specified broadband services, which, among other things, mandate that Qwest provide interstate telecommunications services upon reasonable request and prohibit Qwest from acting in an unjust or unreasonable manner or otherwise favoring particular entities in the provision of "like" services provided to other entities.¹⁴⁸

39. By virtue of the relief granted, Qwest may detariff the specified broadband services, but the section 201 and 202 standards and the formal complaint process in section 208 of the Act and sections 1.720 through 1.735 of the Commission's rules will continue to apply to those service offerings. We expect that any complaint pertaining to services covered by this Order will be resolved within five months, as prescribed by section 208(b)(1) of the Act.¹⁴⁹

40. We also find that continued application of our dominant carrier discontinuance rules to the petitioner-specified broadband services is not necessary to ensure that the charges, practices, or regulations in connection with these services are just, reasonable, and not unjustly or unreasonably discriminatory, so long as Qwest is subject to the same treatment as nondominant carriers in relation to these services.¹⁵⁰ We conclude that subjecting Qwest to a 60-day automatic grant period for discontinuance of the existing specified broadband services, and a 30-day comment period for notice to affected customers, is not necessary under section 10(a)(1), where nondominant carriers providing those same services are subject to a 31-day automatic grant period and a 15-day comment period. However, to maintain sufficient customer protection and ensure the justness and reasonableness of Qwest's practices in connection with these services, we predicate this finding upon Qwest's compliance with the discontinuance rules that apply to nondominant carriers in the event it seeks to discontinue, reduce, or impair any of the non-TDM-based, packet-switched broadband services and non-TDM-based, optical transmission services for which we grant relief.¹⁵¹ Similarly, we forbear from applying our domestic streamlined transfer of control rules to Qwest as a dominant carrier of these services, conditioned upon treatment of Qwest as a nondominant carrier for these services.¹⁵²

41. Consistent with our recent *AT&T Title II and Computer Inquiry Forbearance Order*,¹⁵³ we reject the New Jersey Rate Counsel's argument that the Commission should impose the requirements of section 64.1903 of the Commission's rules on Qwest in the event we grant Qwest forbearance relief in

¹⁴⁷ See *supra* paras. 32-36.

¹⁴⁸ 47 U.S.C. §§ 201-02.

¹⁴⁹ Section 208(b)(1) states: "Except as provided in paragraph (2), the Commission shall, with respect to any investigation under this section of the lawfulness of a charge, classification, regulation, or practice, issue an order concluding such investigation within 5 months after the date on which the complaint was filed." 47 U.S.C. § 208(b)(1).

¹⁵⁰ 47 C.F.R. §§ 63.03(b)(2), 63.71(a)(5), (b)(4), (c).

¹⁵¹ 47 C.F.R. § 63.71; see *Qwest Omaha Order*, 20 FCC Rcd at 19435-36, para. 43.

¹⁵² 47 C.F.R. § 63.03; see *Qwest Omaha Order*, 20 FCC Rcd at 19435-36, para. 43.

¹⁵³ *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18727, para. 38.

this proceeding.¹⁵⁴ That rule imposes structural separation requirements on independent incumbent LECs in their provision of interstate, interexchange services.¹⁵⁵ In the *Section 272 Sunset Order*, we rejected a similar argument from the New Jersey Rate Counsel in connection with our determination that the BOCs should not be subject to the section 64.1903 requirements in their provision of in-region, long distance services.¹⁵⁶ We found that, as applied to those services, the section 64.1903 requirement would impose costs that would make the BOCs less effective marketplace competitors, and instead we adopted targeted safeguards to address potential competitive concerns.¹⁵⁷ Consistent with that order, we find here that, as applied to Qwest's existing specified-broadband services, the section 64.1903 requirements would impose significant costs. Indeed, they would require Qwest to restructure its in-region, broadband telecommunications operations at great expense and in a less efficient manner.¹⁵⁸ We find that these costs far exceed any potential benefits and therefore decline to impose the section 63.1903 requirements on Qwest in its provision of its existing specified broadband services.

42. Further, while we do grant forbearance from dominant carrier regulation for the petitioner-specified services, we do not grant forbearance from Title II as a whole, but instead ensure that Qwest is subject to the same regulatory obligations applicable to nondominant carriers.¹⁵⁹ As the Commission concluded in the *Qwest Section 272 Sunset Forbearance* and the *ACS Dominance Forbearance Orders*, "dominant carrier regulation is not the most effective and cost-efficient way to address exclusionary market power concerns resulting from [an incumbent LEC's] control of any bottleneck access facilities that [the incumbent LEC's] competitors must access in order to provide competing services."¹⁶⁰ We find that, to the extent dominant carrier regulation of the petitioner-specified broadband services addresses any exclusionary market power Qwest may have in relation to those services, the burdens imposed by that regulation exceed its benefits.¹⁶¹

¹⁵⁴ New Jersey Rate Counsel Comments at 8 (arguing that application of these requirements is necessary to deter the BOCs and independent incumbent LECs from engaging in discriminatory behavior).

¹⁵⁵ Under section 64.1903 of our rules, an independent incumbent LEC that provides in-region, interstate, interexchange telecommunications services or in-region, international services is required to provide such services through a separate affiliate and such affiliate must maintain separate books of account from the independent incumbent LEC and purchase services from the independent incumbent LEC pursuant to the incumbent LEC's tariffs. 47 C.F.R. § 64.1903(a). Section 64.1903 of the Commission's rules also forbids incumbent LECs' affiliates from jointly owning transmission or switching facilities with the independent incumbent LEC. 47 C.F.R. § 64.1903(a).

¹⁵⁶ *Section 272 Sunset Order*, 22 FCC Rcd at 16482, para. 85.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 16482-83, paras. 85-86 (discussing the costs and burdens of section 63.1903 structural separation requirements).

¹⁵⁹ See *infra* parts III.D.3 & III.D.4. This should address commenters' concern regarding general Title II regulations including, for example, universal service, interconnection, customer proprietary network information (CPNI), and disability access. See Sprint Nextel Comments at 17; COMPTTEL Comments at 18; Broadview Comments at 5, 26-28; Letter from Daniel L. Brenner, National Cable & Telecommunications Association, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 04-440, 06-109, 06-125, 06-147 (filed Aug. 6, 2007); Letter from Mary C. Albert, COMPTTEL, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 04-440, 06-109, 06-125, 06-147 (filed Aug. 13, 2007); Letter from William H. Weber, Vice President and Corporate Counsel, Cbeyond, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 04-440, 06-109, 06-125, 06-147 (filed Aug. 13, 2007).

¹⁶⁰ *ACS Dominance Forbearance Order*, 22 FCC Rcd at 16354, para. 111; *Qwest Section 272 Sunset Forbearance Order*, 22 FCC Rcd at 5233, para. 52.

¹⁶¹ *ACS Dominance Forbearance Order*, 22 FCC Rcd at 16354, para. 111; *Qwest Section 272 Sunset Forbearance Order*, 22 FCC Rcd at 5233, para. 52.

43. Our forbearance grant is restricted to broadband services that Qwest currently offers and lists in its petition. We believe that limiting our forbearance grant to the identified services that are currently offered is consistent with our analysis under the forbearance framework. We do not know the precise nature of future services, including how, and to what customers, they would be offered, information that we would need to evaluate whether they are sufficiently similar to the services for which we grant forbearance here.¹⁶² Similarly, we do not know the competitive conditions associated with such potential services. We thus are unable to conclude on the record here that the section 10 criteria are met for such services. We therefore cannot find that dominant carrier regulation will not be necessary to ensure that the charges, practices, classifications, and regulations in connection with those as yet unoffered services will be just, reasonable, and not unreasonably discriminatory within the meaning of section 10(a)(1).¹⁶³

44. Similarly, we decline to extend the forbearance relief granted in this order to carriers other than Qwest.¹⁶⁴ For similar reasons to those noted above, we find it appropriate to limit forbearance to Qwest. Just as we do not know the precise nature of, and competitive conditions associated with, other possible services that Qwest might some day offer, the record before us does not provide sufficient information regarding the nature of, and competitive conditions associated with, particular enterprise broadband services currently offered by other incumbent LECs. We find that the better course is to limit this forbearance grant to Qwest, without prejudice to the ability of other carriers to file their own forbearance petitions showing that granting them relief from dominant carrier regulation for specific broadband telecommunications services would meet the statutory forbearance criteria, or to seek such relief in the rulemaking context or through petitions to be declared nondominant.¹⁶⁵ We also agree with NTCA that certain carriers may not want to offer their broadband telecommunications free of dominant carrier regulation and therefore should not be forced to relinquish any obligations and benefits of such regulation by a broad forbearance grant by the Commission.¹⁶⁶ Accordingly, the forbearance relief granted in this Order is limited to Qwest and the services it specified.

45. To ensure that customers will have the benefit of a single regime for Qwest's packet-switched and optical transmission broadband offerings, we condition the forbearance relief granted to Qwest on its not filing or maintaining any interstate tariffs for its specified broadband services. Thus, to the extent Qwest wishes to take advantage of the relief granted in this Order for any particular service specified in its petition, it must follow our rules for nondominant interexchange carriers in connection with that service. Consistent with the Commission's analysis in the *Interexchange Forbearance Order*, we find that precluding Qwest from tariffing its packet-switched broadband services and its optical transmission services while taking advantage of that relief is necessary to protect consumers and the public interest because, in such circumstances, it will limit Qwest's ability to invoke the filed rate doctrine in contractual disputes with its customers.¹⁶⁷ Precluding such tariffs also will restrict Qwest's ability to assert "deemed

¹⁶² Cf. 47 U.S.C. § 160(a) (directing the Commission to forbear with respect to a particular service or class of services).

¹⁶³ *Qwest Omaha Order*, 20 FCC Rcd at 19438, para. 50 (denying Qwest's petition with respect to the enterprise market because Qwest had failed to provide sufficient data for its service territory for the entire MSA to allow the Commission to make a forbearance determination).

¹⁶⁴ See Cincinnati Bell Comments at 2 (supporting forbearance relief for all incumbent LECs); Hawaiian Telcom Reply at 1-2 (same).

¹⁶⁵ We note that GCI argues that the Commission lacks the authority to grant forbearance relief to any carriers other than those that file petitions for forbearance. GCI Reply at 3. Because we decline to extend our forbearance grant to carriers other than Qwest, we need not address this argument.

¹⁶⁶ NTCA Reply at 5.

¹⁶⁷ See *Interexchange Forbearance Order*, 11 FCC Rcd at 20760, para. 52 (finding that "not permitting nondominant interexchange carriers to file tariffs with respect to interstate, domestic, interexchange services will enhance competition among providers of such services, promote competitive market conditions, and achieve other (continued....)

lawful” status for tariff filings that are not accompanied by cost support.¹⁶⁸ We distinguish this from the broadband relief granted to ACS in the *ACS Dominance Forbearance Order*, in which the Commission conditioned its forbearance relief on, among other things, ACS’s continuing to file tariffs for switched access, special access, and end-user services.¹⁶⁹ In that instance, the Commission found that filing of tariffs was appropriate for the Commission to monitor ACS’s compliance with the other conditions the Commission adopted in that order, including conditions arising from ACS’s status as a rate-of-return carrier.¹⁷⁰ In addition, there was consensus in the record that continued tariffing was appropriate given the unique circumstances in the Anchorage study area. Here, we are addressing Qwest, which, unlike ACS, is not subject to rate-of-return regulation in the provision of any interstate access services, nor is it subject to many of the conditions adopted in the *ACS Dominance Forbearance Order*. Further, both commenters and Qwest here suggest that a mandatory detariffing regime would be more appropriate.¹⁷¹ Accordingly, we find that these consumer protection and public interest benefits provide independent reasons for conditioning Qwest’s ability to take advantage of the relief granted here on mandatory detariffing of the broadband transmission services for which we grant relief.

b. Protection of Consumers

46. Section 10(a)(2) of the Act requires us to determine whether dominant carrier regulation of Qwest’s-specified services is necessary to protect consumers.¹⁷² For reasons similar to those that persuade us that these regulations are not necessary within the meaning of section 10(a)(1), we also determine that their application to Qwest’s existing specified services is not necessary for the protection of consumers. As we found above, Qwest faces sufficient pressure from actual and potential competition to protect consumers, which gives Qwest incentive to offer innovative services. In light of these conclusions, we find that the combination of dominant carrier tariffing requirements and the accompanying cost support can hinder, instead of protect, consumers’ ability to secure better service offerings. Finally, as we explain below,¹⁷³ we are not forbearing from any public policy obligations applicable to these services, including those related to 911, emergency preparedness, customer privacy, or universal service, and consumers therefore do not lose protections in these important areas.

(Continued from previous page)

objectives that are in the public interest, including eliminating the possible invocation of the filed rate doctrine by nondominant interexchange carriers, and establishing market conditions that more closely resemble an unregulated environment”). We note that certain exceptions to the Commission’s mandatory detariffing rules exist. Pursuant to the “filed-rate” doctrine, where a filed tariff rate, term, or condition differs from a rate, term, or condition set in a non-tariffed carrier-customer contract, the carrier is required to assess the tariff rate, term, or condition. *See Armour Packing Co. v. United States*, 209 U.S. 56 (1908); *American Broadcasting Cos., Inc. v. FCC*, 643 F.2d 818 (D.C. Cir. 1980); *see also Aero Trucking, Inc. v. Regal Tube Co.*, 594 F.2d 619 (7th Cir. 1979); *Farley Terminal Co., Inc. v. Atchison, T. & S.F. Ry.*, 522 F.2d 1095 (9th Cir. 1975), *cert. denied*, 423 U.S. 996 (1975). Consequently, if a carrier unilaterally changes a rate by filing a tariff revision, the newly filed rate becomes the applicable rate unless the revised rate is found to be unjust, unreasonable, or unlawful under the Act. *See* 47 U.S.C. § 201(b); *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990).

¹⁶⁸ *See* 47 U.S.C. § 204(a)(3).

¹⁶⁹ *ACS Dominance Forbearance Order*, 22 FCC Rcd at 16332, para. 61, 16344-45, para. 89.

¹⁷⁰ *Id.* at 16307, para. 4, 16344-45, para. 89.

¹⁷¹ *See* Alpheus Comments at 22 (arguing that permissive detariffing would allow the BOCs to tariff “purported private carriage services so they may invoke the filed rate doctrine against their retail and CLEC wholesale broadband customers”); *see also* Qwest Petition at 5-6 (citing *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended*, CC Docket No. 96-61, Second Report and Order, 11 FCC Rcd 20730, 20732-33, para. 3 (1996) (*Detariffing Order*)).

¹⁷² 47 U.S.C. § 160(a)(2).

¹⁷³ *See infra* part III.D.4.

47. Conversely, we find that restricting our forbearance grant to Qwest's existing services as specified in its petition, and subsequent filings, is necessary to protect customers under section 10(a)(2). Qwest has not provided sufficient information regarding any broadband services, other than those specifically identified in its petition, to allow us to reach a forbearance determination under section 10(a).¹⁷⁴ We cannot make a finding on the record before us that Qwest will face sufficient competitive pressure with regard to services it does not currently offer,¹⁷⁵ or that dominant carrier regulation of these as yet unoffered services otherwise will not be necessary to protect consumers. In addition, as explained above,¹⁷⁶ carriers that have not filed similar forbearance petitions are free to do so, as well as to seek relief from regulatory obligations through rulemaking proceedings or petitions to be declared nondominant.

c. Public Interest

48. Section 10(a)(3) of the Act requires us to determine whether forbearance from dominant carrier regulation for Qwest's non-TDM-based, packet-switched broadband services and its non-TDM-based, optical transmission services is consistent with the public interest.¹⁷⁷ In making this determination, section 10(b) of the Act directs us to consider whether forbearance from enforcing the provisions at issue will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services. If we determine that forbearance will promote competition among providers of telecommunications services, that determination may be a basis for finding that forbearance is in the public interest.¹⁷⁸

49. We agree with Qwest that a deregulatory approach for its provision of non-TDM-based, packet-switched broadband services and non-TDM-based, optical transmission services will serve the public interest by eliminating the market distortions that asymmetrical regulation of these services causes.¹⁷⁹ In particular, the record in this proceeding shows that dominant carrier regulation impedes Qwest's efforts to compete effectively with nondominant providers of these services.¹⁸⁰ The record also makes clear that such regulation keeps Qwest from responding efficiently and in a timely manner to market-based pricing promotions, including volume and term discounts, or special arrangements offered by competitors.¹⁸¹ In particular, Qwest has shown that dominant carrier regulation of its specified services makes it unnecessarily difficult to negotiate nationwide arrangements tailored to the needs of

¹⁷⁴ *Qwest Omaha Order*, 20 FCC Rcd at 19438, para. 50 (denying Qwest's petition with respect to the enterprise market because Qwest had failed to provide sufficient data for its service territory for the entire MSA to allow the Commission to make a forbearance determination).

¹⁷⁵ *See supra* para. 42.

¹⁷⁶ *See supra* para. 43.

¹⁷⁷ 47 U.S.C. § 160(a)(3).

¹⁷⁸ 47 U.S.C. § 160(b).

¹⁷⁹ *See AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18730-31, para. 46; *see also, e.g.*, Qwest Petition at 18-19.

¹⁸⁰ *See* Qwest Petition at 13. In addition, as the Commission observed in the *AT&T Title II and Computer Inquiry Forbearance Order*, "[w]e seek to avoid persistent regulatory disparities between similarly situated competitors, and seek to minimize the time in which they are treated differently." *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18732, para. 50.

¹⁸¹ *See, e.g.*, Qwest Petition at 13-14. While we note that Qwest has phase II pricing flexibility in certain markets where the Commission has determined the competitive triggers have been met, this does not alter our ultimate conclusions for the reasons described above. *See supra* para. 36.

large enterprise customers with geographically dispersed locations, because its tariff filings necessarily provide competitors with notice of its pricing strategies and competitive innovations.¹⁸²

50. Forbearance from the application of dominant carrier regulation to Qwest's non-TDM-based, packet-switched broadband services and non-TDM-based, optical transmission services also will promote the public interest by furthering the deployment of advanced services.¹⁸³ Indeed, forbearance in this case is entirely consistent with section 706 of the 1996 Act and Congress's express goals of "promot[ing] competition and reduc[ing] regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."¹⁸⁴ Forbearance also is consistent with section 7(a) of the Act, which establishes a national policy of "encourag[ing] the provision of new technologies and services to the public."¹⁸⁵ In addition, for the reasons described above, we conclude that granting Qwest this relief will help promote competitive market conditions and enhance competition among providers of telecommunications services as contemplated by section 10(b). By allowing Qwest to compete more effectively in the provision of the broadband transmission services that it currently offers, forbearance from dominant carrier regulation of these services will enhance competition among providers in a manner consistent with the public interest.¹⁸⁶

51. Our finding that public interest benefits will accrue from allowing Qwest to provide non-TDM-based, packet-switched broadband services and non-TDM-based, optical transmission services subject to the same regulations as its nondominant competitors also is consistent with the Commission's Fourth Report to Congress on the availability of advanced telecommunications capability under section 706 of the 1996 Act. In that report, the Commission determined that a diverse range of broadband technologies and facilities-based platforms that promote both price and quality-of-service competition will be available to consumers, and that the prospects of such competition "lend credence to calls for restrained regulation of advanced telecommunications technologies and advanced telecommunications providers."¹⁸⁷

¹⁸² See *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18730-31, para. 46; see also, e.g., Qwest Reply at 16-17.

¹⁸³ 47 U.S.C. § 157 nt; see Qwest Petition at 10. The Commission has concluded that section 706 is not an independent grant of forbearance authority. *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24012, 24044-48, paras. 69-77 (1998), *recon. denied*, 15 FCC Rcd 17044 (2000); see also *ACS Dominance Forbearance Order*, 22 FCC Rcd at 16356, para. 118 n.318.

¹⁸⁴ 1996 Act Preamble, 110 Stat. at 56; 47 U.S.C. § 157 nt. In section 706 of the 1996 Act, Congress directed the Commission to encourage, without regard to transmission media or technology, the deployment of advanced telecommunications capability to all Americans on a reasonable and timely basis through, among other things, removing barriers to infrastructure investment. 47 U.S.C. § 157 nt.

¹⁸⁵ 47 U.S.C. § 157(a).

¹⁸⁶ We recognize, of course, that theoretically forbearance from dominant carrier regulation for broadband telecommunications services other than those Qwest currently offers or for incumbent LECs other than Qwest also may advance purposes behind sections 7(a) and 706. In the event that Qwest or other carriers request additional relief from dominant carrier regulation, we will evaluate on the record developed with regard to those requests whether grant of those requests would advance these purposes. However, for the reasons set forth in this Order, we cannot conclude on the record before us that additional forbearance here would meet the statutory forbearance criteria.

¹⁸⁷ *Availability of Advanced Telecommunications Capability in the United States*, GN Docket No. 04-54, Fourth Report to Congress, 19 FCC Rcd 20540 (2004).

52. We disagree with the commenters that urge that forbearing from the application of dominant carrier regulation to Qwest's existing, non-TDM-based, packet-switched broadband services and existing, non-TDM-based, optical transmission services would be inconsistent with the public interest.¹⁸⁸ Forbearing from application of dominant carrier regulation will increase competition by freeing Qwest from unnecessary regulation and will serve the public interest by promoting regulatory parity among providers of these services. In addition, the directives of section 706 of the 1996 Act require that we ensure that our broadband policies promote infrastructure investment, consistent with our other statutory obligations under the Act. As we found in the *Wireline Broadband Internet Access Services Order*, regulation that constrains incentives to invest in and deploy the infrastructure needed to deliver broadband services is not in the public interest.¹⁸⁹ By regulating Qwest on the same terms as its nondominant competitors, we will encourage all potential investors in broadband network platforms, and not just a particular group of investors, to be able to make market-based, rather than regulatory-driven, investment and deployment decisions. This is particularly true for new technologies and services that provide voice, video, Internet access, and other broadband applications.

53. Consistent with our determinations under sections 10(a)(1) and 10(a)(2),¹⁹⁰ we find that extending our forbearance from dominant carrier regulation to services that Qwest does not currently offer would be contrary to the public interest. Specifically, because the record before us is insufficient to support a finding that Qwest will lack market power with regard to these as yet unoffered services, we cannot conclude that forbearance in this instance would be consistent with the public interest. We also believe that the public interest would be better served by our allowing carriers that are not before us to file their own forbearance petitions seeking relief from dominant carrier regulation for specific broadband telecommunications services or seek regulatory relief through rulemaking proceedings or petitions to be declared nondominant, rather than extending our forbearance action to such carriers.

2. Computer Inquiry Requirements

54. As part of its request, Qwest seeks forbearance from application of the *Computer Inquiry* requirements to its specified broadband services.¹⁹¹ Consistent with the treatment of wireline broadband Internet access service in the *Wireline Broadband Internet Access Services Order*, we forbear from application of our BOC-specific *Computer Inquiry* rules to the extent that Qwest offers information services in conjunction with its existing non-TDM-based, packet-switched broadband services or its existing non-TDM-based, optical transmission services.¹⁹²

55. The reasons that persuaded the Commission in the *Wireline Broadband Internet Access Services Order* to eliminate the *Computer Inquiry* rules as they applied to wireline broadband Internet access service also persuade us to forbear from application of the BOC-specific *Computer Inquiry* rules to any information services Qwest may offer in conjunction with one or more of its existing specified broadband services. Specifically, the enterprise customers that seek to obtain such information services demand the most flexible service offerings possible.¹⁹³ To compete effectively in providing these

¹⁸⁸ See, e.g., Broadview Comments at 34-35; EarthLink Comments at 20-21, COMPTTEL Comments at 19-21; Sprint Nextel Comments at 16-19.

¹⁸⁹ *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14878, para. 45.

¹⁹⁰ See *supra* parts III.D.1.a & III.D.1.b.

¹⁹¹ As discussed below, we grant forbearance from certain *Computer Inquiry* requirements that would apply to the enterprise broadband service solely by virtue of their use as the transmission component of an information service.

¹⁹² See *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14863-64, para. 14 (citing *NCTA v. Brand X*, 545 U.S. at 1000).

¹⁹³ See Qwest Petition at 12 (arguing that Title II requirements limit its ability to respond to competition in a market where "a customer is seriously considering a number of different providers").

customized service packages, Qwest necessarily will need to adapt how it integrates each of its specified services into service packages that meet potential customers' individualized needs. Like its enterprise services competitors, Qwest also will have to offer its customers innovative service arrangements that make full use of its networks' telecommunications and information services capabilities.¹⁹⁴

56. We conclude that requiring Qwest to unbundle and offer separately the non-TDM-based, packet-switched broadband services and non-TDM-based, optical transmission services underlying these information services – or otherwise comply with the BOC-specific *Computer Inquiry* requirements by virtue of the use of these telecommunications services – is unnecessary to ensure that the charges or practices associated with them are just, reasonable, and not unreasonably discriminatory. On the contrary, as discussed in part III.D.1, above, competitive constraints on the Qwest's non-TDM-based, packet-switched broadband services and non-TDM-based, optical transmission services will check Qwest's ability to impose such charges and practices on potential customers. Indeed, like other enterprise services providers, Qwest will have every business incentive to offer the transmission component of these services under just, reasonable, and nondiscriminatory rates, terms, and conditions in order to spread network costs over as much traffic and as many customers as possible.¹⁹⁵

57. This need to attract as many enterprise and carrier customers as possible also makes clear that application of the *Computer Inquiry* rules to Qwest's information services, to the extent that Qwest includes one or more of its existing specified services, is not necessary to protect consumers. Rather, Qwest's need to respond to changing customer demands with innovative offerings should ensure adequate consumer protection. In particular, we find that application of the *Computer Inquiry* rules to these information services constrains Qwest's ability to respond to technological advances and customer needs in an efficient, effective, or timely manner.¹⁹⁶ Eliminating this constraint should benefit potential enterprise customers by giving them increased opportunities to obtain integrated service packages that meet their needs.

58. We conclude that forbearance from applying many of the BOC-specific *Computer Inquiry* rules to Qwest's information services, to the extent that it includes one or more of the specified non-TDM-based, packet-switched broadband services and non-TDM-based, optical transmission services, will serve the public interest. Specifically, application of the *Computer II* structural separation or, alternatively, the *Computer III* CEI and ONA requirements unnecessarily constrains how Qwest may offer its broadband transmission services to its enterprise customers. Removing these unnecessary constraints will promote competitive market conditions by increasing the competitive pressure on all enterprise services providers. Forbearance in these circumstances also will increase Qwest's incentives to invest in advanced network technologies that will enable it to provide enterprise customers with increasingly innovative services.

59. This forbearance determination does not extend, however, to the BOC-specific *Computer Inquiry* requirements to the extent they impose the same transmission access or nondiscrimination requirements that apply to all non-BOC, facilities-based wireline carriers in their provision of enhanced services.¹⁹⁷ We find that relief from these requirements would be contrary to the public interest as it would confer a regulatory advantage on Qwest, vis-a-vis its facilities-based, wireline competitors offering information services. We therefore condition our forbearance from the BOC-specific *Computer Inquiry* requirements on compliance by Qwest with the non-BOC transmission access and nondiscrimination

¹⁹⁴ See Qwest Petition at 18.

¹⁹⁵ See *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14892-93, paras 75-76, 14902, para. 92.

¹⁹⁶ *Id.* at 14887-92, paras. 65-73, 14902, para. 92.

¹⁹⁷ *Computer II Final Decision*, 77 FCC 2d at 474-75, para. 231; see *infra* paras. 69-72.

requirements in connection with its provision of information services in conjunction with its existing specified broadband services.

60. Our forbearance from the *Computer Inquiry* requirements also does not extend to Qwest's information services to the extent it incorporates telecommunications components other than its existing specified broadband services. As with our analysis of dominant carrier regulation of its broadband services,¹⁹⁸ we find that restricting our forbearance from *Computer Inquiry* obligations to services that incorporate these existing broadband telecommunications services is appropriate because we cannot conclude, on the record before us, that Qwest will lack market power with regard to any as yet unoffered broadband telecommunications services. We also cannot find, on this record, that additional forbearance from the *Computer Inquiry* rules would meet the statutory forbearance criteria.

3. General Title II Economic Regulation

61. As part of its request, Qwest seeks forbearance from any economic regulation that would apply to it, under Title II and the Commission's implementing rules, in connection with its existing and future broadband services.¹⁹⁹ We first address this regulation as it applies to common carriers or LECs. We then turn to this regulation as it applies to incumbent LECs or BOCs.

a. Regulation Applied to Common Carriers or LECs

62. Title II and the Commission's implementing rules impose economic regulation on common carriers or LECs generally regardless of whether they are incumbents or competing carriers. This regulation, though much less burdensome than the regulation imposed on dominant carriers, has been thought to provide important protections against unjust, unreasonable, and unjustly or unreasonably discriminatory treatment of consumers.²⁰⁰ For example, section 201 of the Act mandates that all carriers engaged in the provision of interstate or foreign communications service provide such service upon reasonable request, and that all charges, practices, classifications, and regulations for such service be just and reasonable.²⁰¹ Section 202 of the Act makes it unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services, or to make or give any undue or unreasonable preference or advantage to any person or class of persons.²⁰² All telecommunications carriers are obligated under section 251(a)(1) of the Act to "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers."²⁰³ Section 251(b), moreover, imposes a number of duties on LECs, including the duty not to impose unreasonable or

¹⁹⁸ See *id.*

¹⁹⁹ See, e.g., Qwest Petition at 3 (requesting relief from Title II requirements and treatment as a dominant carrier). In this part and in part III.D.4, *infra*, we use the terms "economic regulation" and "public policy regulation" as convenient shorthands to ensure that we address the full breadth of Qwest's forbearance request. In using these terms, we recognize that they have no well-established, specific meanings. Cf. *AT&T Inc. v. FCC*, 452 F.3d 830 (D.C. Cir. 2006) (*AT&T v. FCC*) (directing that the Commission reconcile its holding that a request for forbearance from "only 'common carrier' and 'economic' regulation under Title II" was insufficiently specific to identify the regulations from which forbearance was sought with the Commission's use of these terms in other proceedings). Our use of these terms here does not in any way prejudice our actions on remand of *AT&T v. FCC*.

²⁰⁰ See *Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services*, WT Docket No. 98-100, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 16857, 16865-72, paras. 15-31 (1998) (*PCIA Forbearance Order*) (denying PCIA's request for forbearance from sections 201 and 202 of the Act and noting that these provisions "codify[] the bedrock consumer protection obligations of a common carrier. . ."); *Time Warner Telecom, Cbeyond et al. Comments* at 26.

²⁰¹ 47 U.S.C. § 201.

²⁰² 47 U.S.C. § 202.

²⁰³ 47 U.S.C. § 251(a)(1).

discriminatory conditions or limitations on resale of their telecommunications services,²⁰⁴ the duty to implement number portability,²⁰⁵ and the duty to provide competing telecommunications service providers with access to the LECs' poles, ducts, and conduits under just and reasonable rates, terms, and conditions.²⁰⁶

63. With respect to nondominant carriers, the Commission has relaxed tariffing, transfer of control, and discontinuance regulation for carriers that lack market power, although, as discussed above, these carriers are still subject to limited regulation in these areas.²⁰⁷ In particular, section 214 of the Act requires common carriers to obtain Commission authorization before constructing, acquiring, operating or engaging in transmission over lines of communication, or discontinuing, reducing or impairing telecommunications service to a community.²⁰⁸ The Commission's discontinuance rules for nondominant carriers require such carriers to file applications with the Commission and provide notice to the affected customers.²⁰⁹ These applications are automatically granted on the 31st day unless the Commission notifies the applicant otherwise.²¹⁰ Moreover, to the extent they are permitted to file interstate tariffs, nondominant carriers must comply with the streamlined tariffing and notice requirements of part 61, subpart C of the Commission's rules.²¹¹

64. We conclude that the record does not demonstrate that forbearance from these, and other, economic regulations that apply generally to nondominant telecommunications carriers and to LECs would meet the statutory forbearance criteria. Indeed, Qwest asks us to go beyond the relief the Commission has granted any competitive LEC or nondominant interexchange carrier and allow it to offer certain broadband telecommunications services free of Title II regulation, thus creating a disparity in regulatory treatment between Qwest and its competitors.²¹² We find, based on the record before us, that granting Qwest such preferential treatment would be inconsistent with the market-opening policies and consumer protection goals that led Congress and the Commission to impose these economic regulations

²⁰⁴ *E.g.*, 47 U.S.C. § 251(b)(1).

²⁰⁵ 47 U.S.C. § 251(b)(2).

²⁰⁶ *E.g.*, 47 U.S.C. §§ 224, 251(b)(4).

²⁰⁷ *See supra* para. 3.

²⁰⁸ 47 U.S.C. § 214; *see, e.g., Verizon Telephone Companies Section 63.71 Application to Discontinue Expanded Interconnection Service Through Physical Collocation*, WC Docket No. 02-237, Order, 18 FCC Rcd 22737, 22742, para. 8 (2003) (applying five factors to determine whether "reasonable substitutes are available" to consumers). In 1999, the Commission granted all carriers blanket authority under section 214 to provide domestic interstate services and to construct, acquire, or operate any domestic transmission line. *See Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996, Petition for Forbearance of the Independent Telephone & Telecommunications Alliance*, Report and Order in CC Docket No. 97-11, Second Memorandum Opinion and Order in AAD File No. 98-43, 14 FCC Rcd 11364, 11372, para. 12 (1999); 47 C.F.R. § 63.01(a). We also note that, in certain instances, the Commission has granted conditional blanket discontinuance authority to carriers under section 214. *See Wireline Broadband Access Services Order*, 20 FCC Rcd at 14907-08, paras. 100-01.

²⁰⁹ 47 C.F.R. § 63.71(c).

²¹⁰ *Id.*

²¹¹ *See* 47 C.F.R. §§ 61.18 *et seq.*

²¹² We note that this request appears inconsistent with Qwest's request for regulatory parity among broadband competitors. Qwest Petition at 14 (suggesting that the Commission should subject Qwest and its competitors to the same Title II regulatory requirements); *see also Applications for License and Authority to Operate in the 2155-2175 MHz Band*, WT Docket No. 07-16; *Petitions for Forbearance under 47 U.S.C. § 160*, WT Docket No. 07-30, Order, 22 FCC Rcd 16563, 16568, para. 9 (2007) (denying a forbearance request because the petitioners failed to demonstrate that a forbearance action was in the public interest).

on carriers that lack individual market power.²¹³ For example, the protections provided by sections 201 and 202(a), coupled with our ability to enforce those provisions in a complaint proceeding pursuant to section 208, provide essential safeguards that ensure that relieving Qwest of tariffing obligations in relation to its specified broadband services will not result in unjust, unreasonable, or unreasonably discriminatory rates, terms, and conditions in connection with those services.²¹⁴ Accordingly, we cannot find that enforcement of these statutory and regulatory requirements is not necessary to ensure that the “charges, practices, classifications, or regulations . . . for[] or in connection with [Qwest’s specified broadband services] are just and reasonable and are not unjustly or unreasonably discriminatory” within the meaning of section 10(a)(1).²¹⁵

65. Qwest also has not shown how enforcement of these economic regulation requirements in connection with its specified broadband services is not necessary for the protection of consumers within the meaning of section 10(a)(2) or how forbearance is consistent with the public interest within the meaning of section 10(a)(3).²¹⁶ On the contrary, disparate treatment of carriers providing the same or similar services is not in the public interest as it creates distortions in the marketplace that may harm consumers.²¹⁷ Moreover, nondominant carrier regulation provides significant consumer benefits without the costs of dominant carrier regulation. In particular, many of the obligations that Title II imposes on carriers or LECs generally, including interconnection obligations under section 251(a)(1) and pole attachment obligations under sections 224 and 251(b)(4), foster the open and interconnected nature of our communications system, and thus promote competitive market conditions within the meaning of section 10(b). Allowing Qwest, but not its competitors, to avoid these obligations would undermine, rather than promote, competition among telecommunications services providers within the meaning of that provision. Moreover, in originally subjecting nondominant carriers to streamlined discontinuance, transfer of control, and tariffing requirements, the Commission necessarily determined that these requirements were needed to protect the public interest and competitive markets in situations where a carrier lacks market power.²¹⁸ Granting Qwest, but not its competitors, forbearance from these and the other obligations that apply generally to common carriers, LECs, or nondominant carriers would result in disparate regulatory treatment for the same or similar services, create market distortions, and fail to protect consumers within the meaning of section 10(a)(2).²¹⁹ Accordingly, we deny Qwest’s forbearance request to the extent it seeks forbearance from Title II economic obligations, including those discussed above, that apply generally to telecommunications carriers or LECs.

b. Regulation Applied to Incumbent LECs or BOCs

66. Title II and the Commission’s implementing rules also impose regulation specifically on incumbent LECs, or BOCs, and independent incumbent LECs. For example, section 251(c) of the Act

²¹³ Cf. *Time Warner Telecom, Cbeyond et al.* Comments at 26 (contending that Qwest has provided no basis for relief from Title II regulation that applies to both dominant and nondominant carriers).

²¹⁴ See, e.g., *SBC Advanced Services Forbearance Order*, 17 FCC Rcd at 27010, 27012, paras. 18, 21 (citing 47 U.S.C. §§ 201-02, 208); *PCIA Forbearance Order*, 13 FCC Rcd at 16865-72, paras. 15-31; see also COMPTTEL Comments at 18 (arguing that forbearance from sections 201 and 202 would significantly undermine competition); Sprint Nextel Reply at 8 (maintaining that forbearance from sections 201 and 202 would effectively gut the core of the Communications Act); *Time Warner Telecom, Cbeyond et al.* Comments at 26-27.

²¹⁵ 47 U.S.C. § 160(a)(1).

²¹⁶ 47 U.S.C. § 160(a)(2), (a)(3).

²¹⁷ *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14865, para. 17 (creating a regulatory and analytical framework that is consistent across different platforms that supports competing services).

²¹⁸ See, e.g., *Detariffing Order*, 11 FCC Rcd at 20776-77, paras. 84-85.

²¹⁹ 47 U.S.C. § 160(a)(2).

imposes interconnection, unbundling, and resale obligations on Qwest as an incumbent LEC.²²⁰ In addition, the BOCs, under section 271 of the Act, were required to demonstrate compliance with certain market-opening requirements before providing in-region, interLATA long distance service and must continue to comply with such market-opening requirements.²²¹

67. We conclude that the record before us does not show that forbearance from these and other economic regulations that apply generally to incumbent LECs or BOCs would meet the statutory forbearance criteria. Indeed the record contains no specific information regarding whether application of these regulatory requirements is not necessary to ensure that the “charges, practices, classifications, or regulations . . . for[] or in connection with [Qwest’s specified broadband services] are just and reasonable and are not unjustly or unreasonably discriminatory” within the meaning of section 10(a)(1).²²² Nor does the record suggest how continued enforcement of these requirements in connection with Qwest’s specified broadband services is not necessary for the protection of consumers or inconsistent with the public interest. We therefore deny Qwest’s forbearance request to the extent it seeks forbearance from Title II economic obligations, including those discussed above, that apply generally to incumbent LECs or BOCs.

4. Public Policy Regulation

68. As part of its request, Qwest seeks forbearance from any public policy regulation that would apply to it, under Title II and the Commission’s implementing rules, in connection with its existing and future broadband services offerings.²²³ We now turn to these requests.

69. Title II and the Commission’s implementing rules set forth numerous public policy requirements that apply generally to all carriers, regardless of whether they are incumbents or competing carriers. These requirements advance critically important national objectives, such as ensuring the sufficiency of universal service support mechanisms, promoting access to telecommunications services by individuals with disabilities, protecting customer privacy, and increasing the effectiveness of emergency services, among other objectives. For example, section 254(b) of the Act states that “[t]here should be specific, predictable, and sufficient Federal and State mechanisms to preserve and advance universal service.”²²⁴ Section 254(d) of the Act states that “[e]very telecommunications carrier that provides interstate telecommunications services shall contribute” to universal service.²²⁵ These universal service provisions ensure that all Americans, including consumers living in high-cost areas, low-income consumers, eligible schools and libraries, and rural health care providers, have access to affordable telecommunications services.²²⁶

²²⁰ See COMPTTEL Comments, Attach. at 17 (arguing that the section 251 requirements are necessary to ensure that “wholesale charges, practices, classifications and regulations for broadband services are just reasonable and not unjustly or unreasonably discriminatory”); Sprint Nextel Reply at 10 (arguing that “forbearance also could lift the symmetrical interconnection obligations of sections 251 and 252”).

²²¹ See 47 U.S.C. § 271.

²²² 47 U.S.C. § 160(a)(1).

²²³ Qwest Reply at 2-3 (stating that “it is seeking forbearance from all of Title II regulation, except [u]niversal [s]ervice requirements”).

²²⁴ 47 U.S.C. § 254(b)(5). The Commission has emphasized that maintaining the long-term viability of universal service programs is a fundamental goal that must continue to be met in an evolving telecommunications marketplace in which customers are migrating to broadband service platforms. *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 24952, 24954-56, paras. 1-5 (2002) (*Universal Service Contribution Methodology NPRM*).

²²⁵ 47 U.S.C. § 254(d).

²²⁶ See generally 47 U.S.C. § 254.

70. Similarly, Congress enacted section 225 of the Act to require each common carrier offering voice telephone service to also provide telecommunications relay service (TRS) so that individuals with disabilities will have equal access to the carrier's telecommunications network.²²⁷ Moreover, section 255 sets forth disability access network requirements, and 251(a)(2) prohibits telecommunications carriers from installing any "network features, functions, or capabilities" that do not comply with the disability access requirements in section 255.²²⁸ With regard to customer privacy, certain provisions in section 222 of the Act restrict telecommunications carriers' use and disclosure of CPNI.²²⁹ In these provisions, Congress recognized that telecommunications carriers are in a unique position to collect sensitive personal information and that consumers maintain an important privacy interest in protecting this information from disclosure and dissemination.²³⁰ Other section 222 provisions increase the effectiveness of emergency services by facilitating the provision of vital caller location and subscriber identification information to emergency service providers.²³¹ We note that Qwest's obligations under the Communications Assistance for Law Enforcement Act (CALEA) are governed by the CALEA statute,²³² and Qwest remains obligated to comply with those statutory requirements.

71. We find that Qwest has not shown that forbearance from these and the other public policy requirements in Title II and the Commission's implementing rules meets the statutory forbearance criteria.²³³ Indeed, with regard to universal service, Qwest disavows any intent to seek relief from universal service contribution obligations.²³⁴ We believe that by excluding this relief from its forbearance request, Qwest recognized that the public interest requires it to maintain its universal service support obligations. Nevertheless, we include those obligations in our forbearance analysis to ensure that there is no ambiguity with regard to Qwest's continuing duty to include revenues from each of its specified broadband services in its federal universal service support calculations.

72. In particular, we conclude on the record before us that forbearing from the public policy requirements in Title II and the Commission's implementing rules would be inconsistent with the critical national goals that led to the adoption of these requirements. We therefore cannot find that enforcement of those requirements is unnecessary to ensure that the "charges, practices, classifications, or

²²⁷ 47 U.S.C. § 225. TRS enables an individual with a hearing or speech disability to communicate by telephone or other device with a hearing individual. This is accomplished through TRS facilities that are staffed by specially trained communications assistants (CAs) using special technology. The CA relays conversations between persons using various types of assistive communication devices and persons who do not require such assistive devices. *See generally Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 5140, 5141, para. 2 (2000) (*Improved TRS Order & FNPRM*).

²²⁸ 47 U.S.C. §§ 251(a)(2), 255.

²²⁹ 47 U.S.C. § 222(a)-(c), (f). CPNI is defined to include "(A) information that relates to the quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and (B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier." 47 U.S.C. § 222(h)(1).

²³⁰ *See generally* 47 U.S.C. § 222.

²³¹ 47 U.S.C. § 222(d)(4), (g).

²³² 47 U.S.C. § 229; *see also* Communications Assistance for Law Enforcement Act, Pub. L. No. 103-414, 108 Stat. 4279 (1994) (codified as amended in sections of 18 U.S.C. and 47 U.S.C.).

²³³ *See, e.g.*, AdHoc Reply at i-ii (pointing out that Qwest fails to address or justify forbearance from Title II provisions that serve public policy goals, such as privacy and disability access, that are unrelated to marketplace competition).

²³⁴ Qwest Petition at 1 n.3. *See generally* 47 U.S.C. § 254.

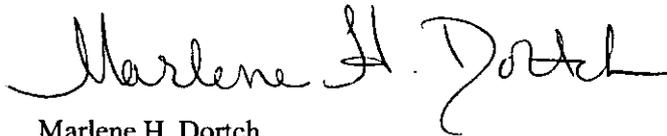
regulations . . . for[] or in connection with [Qwest's specified services] are just and reasonable and are not unjustly or unreasonably discriminatory" within the meaning of section 10(a)(1) of the Act,²³⁵ or is not necessary for the protection of consumers within the meaning of section 10(a)(2) of the Act.²³⁶ On the contrary, we believe that consumers will continue to receive essential protections from the application of these requirements in connection with Qwest's specified services.

IV. ORDERING CLAUSES

73. Accordingly, IT IS ORDERED that, pursuant to section 10 of the Communications Act of 1934, as amended, 47 U.S.C. § 160, the Petition for Forbearance filed by Qwest Corporation and Qwest Communications Corporation IS GRANTED to the extent described herein and otherwise IS DENIED.

74. IT IS FURTHER ORDERED that, pursuant to section 10 of the Communications Act of 1934, as amended, 47 U.S.C. § 160, and section 1.103(a) of the Commission's rules, 47 C.F.R. § 1.103(a), this Order SHALL BE EFFECTIVE on July 22, 2008. Pursuant to section 1.4 and 1.13 of the Commission's rules, 47 C.F.R. §§ 1.4, 1.13, the time for appeal of the Commission's actions with regard to these carriers shall run from the release date of this Order.

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch
Secretary

²³⁵ 47 U.S.C. § 160(a)(1).

²³⁶ 47 U.S.C. § 160(a)(2).

APPENDIX

Qwest Petition for Forbearance Filed June 13, 2006
WC Docket No. 06-125

Petition	Abbreviation
Qwest Corporation and Qwest Communications Corporation	Qwest

COMMENTERS
WC Docket No. 06-125

Comments	Abbreviation
Alpheus Communications, LP, DeltaCom, Inc., Integra Telecom, Inc., McLeodUSA Telecommunications Services, Inc., Mpower Communications Corp., Norlight Telecommunications, Inc., Pac-West Telecomm, Inc., TDS Metrocom, LLC, and Telepacific Corp d/b/a Telepacific Communications	Alpheus
ACS Anchorage, Inc.	ACS
Broadview Networks, Covad Communications, CTC Communications, Inc., Eschelon Telecom, Inc., NuVox Communications, XO Communications, Xspedius Management Company	Broadview
Cincinnati Bell Telephone Company LLC	Cincinnati Bell
COMPTEL	COMPTEL
EarthLink, Inc., New Edge Networks, Inc.	EarthLink
Embarq Local Operating Companies	Embarq
Iowa Telecommunications Services, Inc.	Iowa Telecom
National Telecommunications Cooperative Association	NTCA
New Jersey Division of the Rate Counsel	New Jersey Rate Counsel
Organization for the Promotion and Advancement of Small Telecommunications Companies	OPASTCO
Sprint Nextel Corporation	Sprint Nextel
Time Warner Telecom, Inc., Cbeyond Communications, LLC, One Communications Corp.	Time Warner Telecom, Cbeyond <i>et al.</i>

REPLY COMMENTERS
WC Docket No. 06-125

Reply Comments	Abbreviation
AdHoc Telecommunications Users Committee	AdHoc
AT&T Inc.	AT&T
BellSouth Corporation	Legacy BellSouth
Broadview Networks, Covad Communications, CTC Communications, Inc., Eschelon Telecom, Inc., NuVox Communications, XO Communications, Xspedius Management Company	Broadview
COMPTEL	COMPTEL
Embarq Local Operating Companies	Embarq
General Communications, Inc.	GCI
Hawaiian Telcom, Inc.	Hawaiian Telcom
Mobile Satellite Ventures Subsidiary LLC	Mobile Satellite Venture
MontanaSky.Net	MontanaSky.Net

National Telecommunications Cooperative Association	NTCA
Qwest Corporation, Qwest Communications Corporation	Qwest
Sprint Nextel Corporation	Sprint Nextel
T-Mobile USA, Inc.	T-Mobile
The Verizon Companies	Verizon

**Qwest Petition for Forbearance Filed September 12, 2007
WC Docket No. 06-125**

Petition	Abbreviation
Qwest Corporation and Qwest Communications Corporation	Qwest

**COMMENTERS
WC Docket No. 06-125**

Comments	Abbreviation
AdHoc Telecommunications Users Committee	AdHoc
Alpheus Communications, LP, Cavalier Telephone, LLC, DeltaCom, Inc., Integra Telecom, Inc., McLeodUSA Telecommunications Services, Inc., Mpower Communications Corp., Pactec Communications, Inc., TDS Metrocom, LLC, and Telepacific Corp d/b/a Telepacific Communications	Alpheus, Cavalier <i>et al.</i>
COMPTEL	COMPTEL
Covad Communications Group, NuVox Communications and XO Communications, LLC	Covad <i>et al.</i>
Embarq Local Operating Companies	Embarq
Frontier Communications	Frontier
Sprint Nextel Corporation	Sprint Nextel
Time Warner Telecom, Inc.	Time Warner Telecom
T-Mobile USA, Inc.	T-Mobile
The Verizon Companies	Verizon

**STATEMENT OF
CHAIRMAN KEVIN J. MARTIN**

Re: 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

Broadband access is essential to an expanding Internet-based information economy. Promoting broadband deployment is one of the highest priorities of the FCC. To accomplish this goal, the Commission seeks to establish a policy environment that facilitates and encourages broadband investment, allowing market forces to deliver the benefits of broadband to consumers. Today, we take another step in establishing a regulatory environment that encourages such investments and innovation by granting Qwest's petition for regulatory relief of its broadband infrastructure and fiber capabilities. This relief will enable Qwest to have the flexibility to further deploy its broadband services and fiber facilities without overly burdensome regulations.

The relief afforded to Qwest is consistent with and similar to the relief provided in Commission decisions regarding broadband services, packet switching, and fiber facilities. In those decisions, the Commission determined to relax regulations where competition was significant and where regulations acted as a disincentive to deploy new broadband technologies. Accordingly, based on the specific market facts that have been placed before us, we are compelled under the "pro-competitive, deregulatory" framework established by Congress, as well as under section 10's forbearance criteria, to grant Qwest relief from the continued application of legacy regulations.

**STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL**

Re: 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

I am pleased to support this order to streamline regulation of the enterprise broadband market and bring parity to those providers of broadband services.

With this grant of Qwest's petition for forbearance from regulating its existing enterprise service offerings, we are bringing Qwest into regulatory parity with other similarly situated price cap carriers. This action extends the de-regulatory framework for Qwest's business broadband services. It also ensures that the consumer protection and competition promotion measures that we adopted for AT&T, Embarq, Frontier and Citizens remain in place.

While the Order grants relief to Qwest, it does not forbear from existing regulation of the TDM-based, DS-1 and DS-3 special access services most heavily relied upon by many enterprise users, wireless carriers and competitive local exchange carriers. As competition in the broadband market continues to grow, especially through the deployment of new wireless technologies, less regulation should be required.

I note, however, that the Commission still has inadequate information to determine whether allegations that competition is scarce in certain segments of the special access market have merit. I will continue to work to ensure that these questions are fully explored in the Special Access proceeding after a more granular record has been established through detailed mapping of business broadband facilities.

**JOINT STATEMENT OF
COMMISSIONER MICHAEL J. COPPS AND COMMISSIONER JONATHAN S. ADELSTEIN,
DISSENTING**

Re: *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, Memorandum Opinion and Order, FCC 08-168

The Commission continues down its ill-considered road of granting far-reaching forbearance to petitioners seeking relief from Title II and *Computer Inquiry* obligations associated with certain broadband enterprise services. As was the case in last year's *AT&T Title II and Computer Inquiry Forbearance Order* addressing largely the same issues raised by Qwest here, there is insufficient evidence to support forbearance in this case.

The concerns we originally raised in our Joint Statement in the *AT&T Title II and Computer Inquiry Forbearance Order* are equally applicable today, so we need only briefly repeat our concerns here. First, the Order reaffirms the notion of a special class of "broadband enterprise services" deserving of forbearance. Yet, the Commission has previously treated these services as special access services. The Commission's pending rulemaking on this very topic is of course long overdue. Clearly, we should not be granting forbearance for rules covering special access services without first completing an industry-wide analysis of competition for these services. The Order also lacks any rigorous analysis of the impact on small and medium size business customers as well communications providers who use these services to provide both residential and enterprise services. Moreover, the Commission again relies on a nationwide market analysis. We have repeatedly argued that rampant deregulation and a blind eye towards a competitive analysis are no substitutes for a national strategy for deploying broadband services. Today's Order is a missed opportunity for the Commission to critically review whether a national framework for the market specific services before us is appropriate.

The Order retains key interconnection, universal service, privacy, disabilities access, and other Congressionally-mandated provisions -- forbearance from which would have been devastating for consumers and competition. While we appreciate the decision to retain these essential responsibilities, we cannot support this Order's decision to forbear from rules that provide critical pricing protection.

It remains abundantly clear that the Commission is bent on continuing its headlong rush to eliminate large swaths of its rules under the guise of forbearance and absent the kind of industry-wide reviews that would enable us to assess the marketplace as a whole. We believe this is an egregious mistake. The lack of data concerning the specific product and geographic markets at issue and this Order's lack of analysis cause us great concern about both the substance and the process by which the Commission grants forbearance from our rules. Moreover, as a result of this approach, the Commission finds itself inundated with company-specific requests for "me-too" relief that divert attention from the many other critical priorities before us.

For these reasons, we dissent from today's Order.