

BEFORE THE  
Federal Communications Commission  
WASHINGTON, D.C.

In the Matter of )  
 )  
Framework for Broadband Internet Service ) GN Dkt. No. 10-127  
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**REPLY COMMENTS OF TW TELECOM**

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ATTORNEYS FOR TW TELECOM INC.

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tw telecom inc. (“TWTC”), by its attorneys, hereby files these reply comments in response to the Notice of Inquiry in the above-referenced proceeding.<sup>1</sup>

**I. INTRODUCTION AND SUMMARY**

TWTC applauds the Commission’s efforts in this proceeding to establish a legal framework for broadband Internet access so that the Internet remains an open platform for innovation and civic engagement. In the *Reclassification NOI*, the Commission discusses, among other proposals, classifying “Internet connectivity service” as a telecommunications service and forbearing from most of the requirements that would otherwise apply under Title II to the service once reclassified. TWTC is concerned, however, that this so-called Third Way proposal, if adopted, could cause several unintended negative consequences for the Commission’s broader regulatory framework for telecommunications services. In these comments, TWTC describes these possible

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<sup>1</sup> See *Framework for Broadband Internet Service*, Notice of Inquiry, 25 FCC Rcd 7866 (2010) (“*Reclassification NOP*”). Unless otherwise indicated, citations to comments in this pleading are to initial comments filed in response to the *Reclassification NOI*.

consequences and proposes means of avoiding them in the event that the Commission adopts the Third Way approach.

## **II. DISCUSSION**

As PAETEC observed in its comments, the Commission must keep in mind that the Internet connectivity services that are the subject of this proceeding are provided via facilities that serve many other purposes and that are subject to economic regulation that is a critical constraint on incumbent LEC market power, especially in the business market. *See* PAETEC Comments at 4. The incumbent LEC local loop and transport facilities that transmit broadband Internet access to business end users as well as the servers and other network equipment of Internet application, content and service providers are (at least in most cases) subject to regulations applicable to special access, Section 251(c)(3) unbundling, Section 271(c) unbundling, and Section 251(c)(2) interconnection requirements. Competitors like TWTC rely on inputs subject to these regulations, in combination with their own network assets, to provide competitive offerings of broadband Internet access as well as other important transmission services offered to business customers.

Encouraging such competition should be a central component of the Commission's plan for preserving an open Internet. As BT has explained, the competition made possible by effective regulation of incumbent LEC loop and transport wholesale services addresses many of the concerns that have prompted the Commission to initiate this proceeding. *See* BT Comments, WC Docket No. 09-191 (Jan. 14, 2010). For example, the presence of multiple providers of Internet connectivity service to business customers would diminish the concern that any provider would engage in unreasonable discrimination because in a competitive market customers would respond to

unreasonable discrimination by changing service providers. It is therefore important that the Commission's decisions in this docket not jeopardize effective regulation of incumbent LEC wholesale inputs. In this regard, the Commission should focus on three areas of concern.

**A. The Commission Must Establish A Sound Basis For Forbearance Decisions Reached In This Proceeding.**

In assessing whether to forbear from Title II regulations that would otherwise apply if "Internet connectivity service" were classified as a telecommunications service, the Commission must be careful to provide a sound basis for forbearance decisions. The Commission correctly observes in the *Reclassification NOI* that Section 10 does not mandate the use of any particular analytical framework for assessing forbearance petitions. *See Reclassification NOI* ¶ 73. But the Commission is nevertheless required to justify the analytical framework it uses in each forbearance decision.<sup>2</sup> As part of its justification, the Commission must explain differences in its approach to forbearance from regulation of Internet connectivity service and its approach to forbearance in other contexts. For example, in its recent decision denying Qwest's request for forbearance from unbundling requirements in the Phoenix MSA, the Commission appropriately held that, in considering whether to retain unbundling requirements, it is appropriate to apply a rigorous market power standard, consistent with the DOJ/FTC Horizontal Merger Guidelines.<sup>3</sup> As the Commission held, application of this standard in the context of a

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<sup>2</sup> *See AT&T Corp. v. FCC*, 236 F.3d 729, 736-37 (D.C. Cir. 2001) (reversing FCC denial of forbearance because FCC failed to explain why it was departing from its traditional market power standard in analyzing competition).

<sup>3</sup> *See Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, 2010 FCC LEXIS 3841, ¶¶ 24, 28, 37 (2010) ("*Phoenix Forbearance Order*").

UNE forbearance petition requires that the Commission define appropriate geographic and product markets and then determine whether elimination of unbundling will result in supra-competitive prices in any of the relevant markets. *See Phoenix Forbearance Order* ¶ 28. If the Commission decides not to use a rigorous market power analysis as the basis for forbearance decisions applicable to Internet connectivity service, it must be careful to distinguish the *Phoenix Forbearance Order* from the forbearance decisions in this proceeding.

Moreover, the Commission must also ensure that its forbearance decisions with regard to Internet connectivity service are consistent with its proposal to apply new regulation (e.g., Sections 201 and 202) to that service. The Commission suggests that it could determine whether to forbear from economic regulation of Internet connectivity service on a nationwide basis, without utilizing granular geographic and product markets. *See Reclassification NOI* ¶ 73. The Commission suggests that a nationwide approach could be justified because, unlike situations in which a carrier seeks forbearance from an existing regulation, forbearance “here would be designed to maintain a deregulatory *status quo* for wired broadband Internet service that applies across the nation.” *See id.* But if the deregulatory *status quo* is sufficient, the Commission must explain why it is reclassifying broadband connectivity services and subjecting all such services in all relevant product and geographic markets to economic regulation under Sections 201 and 202. Moreover, if the Commission relies on an economic analysis in order to apply Sections 201 and 202, it will need to explain why it is not relying on economic analysis as the basis for forbearing from other Title II requirements.

**B. Forbearance From Application Of Title II Requirements To Internet Connectivity Services Should Have No Bearing On Special Access, Unbundling And Interconnection Regulations Applicable To Incumbent LECs.**

In forbearing from regulations that would otherwise apply if Internet connectivity service were classified as a telecommunications service, the Commission must clarify that such forbearance does not affect legal requirements applicable to incumbent LEC transmission and interconnection services that are used as inputs for Internet connectivity service. Special access, unbundling and interconnection requirements must remain unchanged.

To begin with, it is critical that the Commission clarify that Internet connectivity service and special access services are distinct services subject to entirely different regulatory regimes. The Commission suggests in the *Reclassification NOI* that Internet connectivity service could be defined as it was in the *Cable Modem Order*, namely as a service that establishes “a physical connection to the Internet and interconnecting with the Internet backbone, and sometimes including protocol conversion, Internet Protocol (IP) address number assignment, domain name resolution through a domain name system (DNS), network security caching, network monitoring, capacity engineering and management, fault management and troubleshooting.” *Reclassification NOI* ¶ 16. The Commission has defined special access more broadly, to mean a service provided by a local exchange carrier that employs “dedicated facilities that run directly between the end user and [an interexchange carrier’s] point of presence...or between two discrete end user locations.”<sup>4</sup> Given the sweeping scope of the definition of special access service, there

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<sup>4</sup> *Special Access Rates for Price Cap Local Exchange Carriers et al.*, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994, ¶ 7 (2005) (“*Special Access NPRM*”).

could be some confusion as to whether at least some Internet connectivity services qualify as special access services. This might be the case, for example, if one were to conclude that “interconnecting with the Internet backbone” is equivalent to transmission of traffic to an interexchange carrier’s “point of presence.” The Commission has no apparent intention of subjecting Internet connectivity services provided by incumbent LECs to the regulatory regime applicable to special access services. But in clarifying this distinction, it is critical that the Commission foreclose incumbent LECs from arguing that forbearance from regulation of Internet connectivity services somehow results in forbearance from regulation of special access. Retaining (and enhancing) special access regulation while forgoing regulation of Internet connectivity service would be consistent with Commission precedent and sound policy.

The Commission has consistently distinguished the regulatory regime applicable to broadband Internet access and special access. Most importantly, in the *Wireline Broadband Order*, the Commission clarified that its classification of broadband Internet access services provided by traditional wireline local exchange carriers as information services and its elimination of the *Computer Inquiry* regulations applicable to such information services did not change the regulation of special access services provided over the same facilities. As the Commission explained, services “such as stand-alone ATM service, frame relay, gigabit Ethernet service, and other high-capacity special access services, that carriers and end users have traditionally used for basic transmission purposes . . . lack the key characteristics of wireline broadband Internet access service.”<sup>5</sup>

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<sup>5</sup> See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities et al.*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14863, ¶ 9 (2005) (“*Wireline Broadband Order*”).

The Commission therefore clarified that the *Wireline Broadband Order* had no effect on the regulatory regime applicable to special access services. *See Wireline Broadband Order* ¶ 9. Indeed, the Commission expressly recognized that it was considering whether to increase the level of regulation applicable to incumbent LEC special access service even though it was decreasing the regulatory oversight of broadband Internet access services provided by incumbent LECs. *See id.* n.24.

In addition, to the extent that incumbent LECs possess market power over local transmission facilities needed to provide Internet connectivity services (as is the case in the business market), it is sound policy to target dominant carrier regulation to those transmission facilities rather than to downstream retail services such as Internet connectivity services for which local transmission facilities are inputs.<sup>6</sup> Effective regulation of upstream special access inputs enables firms that need access to such inputs to compete against incumbent LECs, thereby enhancing consumer welfare and, as mentioned, reducing the need for regulation of Internet connectivity service in the first place.

As to incumbent LECs' unbundling or interconnection obligations, the law is clear that these duties are unaffected by a change in the regulatory treatment of incumbent LEC services. As the Commission held in the *Wireline Broadband Order*, an incumbent LEC must provide unbundled access to a facility that the Commission has

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<sup>6</sup> *See Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC Local Exchange Area et al.*, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, 12 FCC Rcd 15756, ¶¶ 81-192 (1997) (concluding that dominant carrier regulation along with accounting and non-accounting safeguards applicable to the local transmission facilities were more appropriate means of addressing incumbent LEC market power than dominant carrier regulation of downstream long distance services for which local transmission services are inputs).

classified as a UNE to any requesting carrier that seeks to use the facility to provide a telecommunications service. *Wireline Broadband Order* ¶ 127, n.398. Thus, a change in the regulatory status of a service that the *incumbent LEC* offers via the network facility in question “is not dispositive” of whether unbundling requirements apply. *See id.*

Similarly, the Commission has held that a change in the regulatory treatment of incumbent LEC services has “no effect whatsoever on the section 251 interconnection obligations of incumbent LECs or on competitive LECs’ right to obtain such interconnection.” *See id.* n.400.

The same is true of BOC unbundling obligations under Section 271(c). In order to meet its ongoing obligations under Section 271(c)(2)(B), a BOC must provide or offer to “other telecommunications carriers,” among other things, unbundled loop and transport facilities. *See* 47 U.S.C. § 271(c)(2)(B)(iv), (v). As long as the requesting carrier is a “telecommunications carrier,” the BOC must continue to offer unbundled loops and transport facilities under Section 271(c). A change in the regulatory treatment of a service that the BOC provides via such loops and transport facilities has no effect whatsoever on a BOC’s duty to provide the networks elements or a requesting telecommunications carrier’s right to obtain the network elements under Section 271(c).<sup>7</sup>

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<sup>7</sup> It is also worth noting that, when the FCC granted AT&T forbearance from all dominant carrier regulations applicable to packet-switched and optical special access services, this change did not alter AT&T’s duty to provide UNEs under Sections 251(c)(3) and 271(c) or its duty to provide interconnection under Section 251(c)(2). *See Petition of AT&T for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services et al.*, Memorandum Opinion and Order, 22 FCC Rcd 18705, ¶¶ 69-70 (2007) (“*AT&T Forbearance Order*”). Forbearance from those requirements cannot be granted unless the FCC determines that the Section 10 standard is met for each of those requirements, and the FCC concluded that this was not the case with regard to the facilities at issue in the *AT&T Forbearance Order*. *See id.*

Finally, no decision adopted in this proceeding should give incumbent LECs the right to discriminate against traffic originating from other carriers' networks that traverses leased special access or UNE facilities or that traverses interconnection arrangements. The incumbent LEC must be required to transmit traffic, including Internet connectivity traffic, across special access and UNE facilities in exactly the manner in which it transmits traffic originating from its own end user customers. This should be true regardless of the nature of the leased transmission facility (e.g., Ethernet, DS1, or DS3). Similarly, incumbent LECs must be required to treat traffic, including Internet connectivity traffic, exchanged with competitors in exactly the manner in which it treats traffic originating from its own end user customers.

**C. The FCC Should Not Delay Or Forgo Reversing Forbearance Inappropriately Granted By The Commission In The Past.**

While there is understandable concern that a future Commission might reverse forbearance decisions reached in this proceeding, this concern does not justify retaining forbearance that was incorrectly granted in other, unrelated contexts in the past. Indeed, as the Commission recognized in the National Broadband Plan, it is critical that the agency reassess forbearance decisions where it evident that such decisions were inappropriate.<sup>8</sup> The Commission should assess each forbearance decision, and each review of previous forbearance decision, based on the relevant facts and policies relevant to the case at hand. In that way, the Commission can reverse forbearance that should not have been granted in the past while retaining forbearance granted in this proceeding.

There are several situations in which the Commission previously granted forbearance without a sound basis for doing so, and it is now assessing how best to

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<sup>8</sup> See Connecting America: National Broadband Plan at 47 (Mar. 16, 2010).

correct those mistakes. For example, the Commission is currently considering the extent to which it is appropriate to reverse forbearance from regulations applicable to special access services that utilize packet-switched technology. This has, unfortunately, been an extremely slow and uneven process. In its 2005 *Special Access NPRM*, the Commission sought comment on “the proper regulatory treatment” of “packet-switched” special access services. *Special Access NPRM* ¶ 52. In 2006, however, the FCC failed to act by the statutory deadline on a Verizon petition for forbearance from regulation of packet-switched and optical services. As a result, the petition was “deemed granted,” and virtually every Title II requirement applicable to Verizon’s packet-switched and optical services, including special access services using those technologies, was eliminated.<sup>9</sup> This occurred without the Commission providing a stitch of analysis as to whether or why forbearance was justified.

Soon after the “Verizon deemed grant,” AT&T as well as other incumbent LECs filed petitions for forbearance seeking the same treatment of their packet-switched and optical special access services. On October 12, 2007, the Commission released an Order denying AT&T forbearance from regulations applicable to non-dominant carriers but granting AT&T forbearance from dominant carrier regulation. The Commission clarified, however, that its *AT&T Forbearance Order* did not “prejudge” the broader special access rulemaking proceeding. *See AT&T Forbearance Order* ¶ 23. In addition,

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<sup>9</sup> *See* FCC News Release, “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 (rel. Mar. 20, 2006). The FCC states in the *Reclassification NOI* that it has “never exercised its authority under section 10 to forbear” from Sections 201, 202, and 208. *Reclassification NOI* ¶ 75. Perhaps the Commission would take the view that the “deemed grant” did not constitute the exercise of authority under section 10, but the real world consequence of the FCC’s failure to act on the Verizon petition was in fact forbearance from Sections 201, 202 and 208.

the Commission was concerned that the denial of forbearance from non-dominant carrier regulation caused AT&T to be treated differently from Verizon when providing Ethernet and optical services. *See id.* ¶ 50. The FCC therefore stated that it would release an order “within 30 days” reversing the “deemed granted” forbearance to the extent that it exceeded the relief granted to AT&T. *See id.* Unfortunately, almost three years later, the Commission still has not reversed the Verizon deemed grant forbearance.

A number of parties, including TWTC, appealed the *AT&T Forbearance Order*. On appeal, the D.C. Circuit observed that, unlike residential customers, “who typically have at least two wires into their homes over which they can obtain Internet service (namely, their traditional telephone and cable lines),” business customers usually have “only one” such connection.<sup>10</sup> Nevertheless, the court afforded the Commission’s decision to forbear from dominant carrier regulation substantial deference and upheld the order. In doing so, the court relied in part on the Commission’s ongoing review of the special access market initiated by the *Special Access NPRM*. As the court explained, “the FCC emphasized that its ongoing Special Access Rulemaking proceeding will address, on an industry-wide basis, general concerns about discriminatory practices by ILECs with respect to their special access lines. In that docket, the Commission is looking broadly and deeply at the market to make sure ILECs are not engaging in unjust and unreasonable practices.” *Id.* at 911. Accordingly, the “FCC’s forbearance decision in this particular matter (or in the related Verizon and Qwest special access matters) is not chiseled in marble” and “the FCC will be able to reassess” the decision as part of the Special Access rulemaking. *Id.* The court therefore fully expected that the Commission would and

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<sup>10</sup> *Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903, 904 (D.C. Cir. 2009).

should promptly complete its review of the special access forbearance decisions and reverse them as appropriate in the rulemaking. The Commission is now moving forward with that review.

In addition, the Commission is also reassessing forbearance previously granted from unbundling requirements. In the *Phoenix Forbearance Order*, the Commission explained that it had eliminated Qwest's unbundling obligation in the Omaha market based on predictive judgments that "have not been borne out by subsequent developments, were inconsistent with prior Commission findings, and are not otherwise supported by economic theory." *Phoenix Forbearance Order* ¶ 34. The Commission did not rule on a pending Petition for Modification filed by McLeodUSA, in which McLeodUSA sought reversal of the forbearance granted in the *Omaha Forbearance Order*. *See id.* n.112 (stating the Commission did not mean to "prejudge the outcome of McLeod's pending petition"). But it is highly likely that such reversal is warranted in light of the Commission's analysis in the *Phoenix Forbearance Order*. Delaying such reversal only harms business customers in Omaha who have been deprived of competition since the elimination of UNEs in that market.<sup>11</sup>

In sum, it is critical that the Commission's decisions in the instant proceeding not undermine the Commission's progress in reassessing forbearance granted to Verizon by default, to AT&T and others based on the understanding that the decisions would be revisited in the special access rulemaking and to Qwest in Omaha based on reasoning the

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<sup>11</sup> In addition to the forbearance decisions discussed herein, the Commission also inappropriately granted forbearance from Section 271 unbundling obligations with regard to packet-switched and other broadband services. *See Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c) et al.*, Memorandum Opinion and Order, 19 FCC Rcd 21496 (2004). That decision should also be reassessed by the Commission.

Commission has itself now deemed unreliable. Regardless of whether the Commission determines that Internet connectivity service, if classified as a telecommunications service, should be subject to broad forbearance and that such forbearance should not be reversed in the future, those conclusions have no relevance to whether it is appropriate to reverse premature grants of forbearance from regulation of special access service and UNEs.<sup>12</sup>

### **III. CONCLUSION**

The Commission's treatment of Internet connectivity service should account for the factors described herein.

Respectfully submitted,

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<sup>12</sup> Even AT&T has stated that the Commission would likely need to reverse the deemed grant of forbearance from enforcement of non-dominant carrier regulation of Verizon's packet-switched and optical special access service if the Commission reclassifies Internet connectivity service as a telecommunications service. *See* AT&T Comments at 117.