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

In the Matter of)
)
Petition of tw telecom inc. et al. to Establish)
Regulatory Parity in the Provision of)
Non-TDM-Based Broadband Transmission)
Services)

WC Docket No. _____

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Federal Communications Commission
Office of the Secretary

PETITION OF TW TELECOM INC. ET AL.

October 4, 2011

TABLE OF CONTENTS

| | <u>Page</u> |
|--|-------------|
| I. INTRODUCTION AND SUMMARY..... | 1 |
| II. BACKGROUND..... | 4 |
| A. The “Deemed Grant” Of Verizon’s Forbearance Petition..... | 4 |
| B. The Partial Grant Of AT&T, Embarq, Frontier, And Legacy Qwest’s Forbearance Petitions..... | 8 |
| III. THE COMMISSION SHOULD REVERSE THE DEEMED GRANT OF FORBEARANCE FROM GENERAL TITLE II ECONOMIC REGULATION, TITLE II PUBLIC POLICY REGULATION, AND CERTAIN <i>COMPUTER INQUIRY</i> REQUIREMENTS FOR VERIZON’S NON-TDM-BASED BROADBAND TRANSMISSION SERVICES..... | 15 |
| A. The Commission Has Already Found That Forbearance From Such Regulation Does Not Meet The Statutory Forbearance Standard..... | 15 |
| 1. General Title II Economic Regulation..... | 16 |
| 2. Title II Public Policy Regulation..... | 19 |
| 3. <i>Computer Inquiry</i> Transmission Access And Nondiscrimination Requirements..... | 21 |
| B. The Commission Has The Authority To Reverse The Deemed Grant Of Forbearance From Such Regulation..... | 21 |
| IV. CONCLUSION..... | 24 |

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PETITION OF TW TELECOM INC. ET AL.

Pursuant to Section 1.41 of the Commission's rules¹ and Section 4(i) of the Communications Act,² tw telecom inc., BT Americas Inc., the Ad Hoc Telecommunications Users Committee, Computer & Communications Industry Association, EarthLink, Inc., and Sprint Nextel Corporation (collectively, "tw telecom inc. et al.") hereby submit this petition to reverse the deemed grant of forbearance from general Title II economic regulation, Title II public policy regulation, and certain *Computer Inquiry* requirements for the Verizon Telephone Companies' ("Verizon's") non-TDM-based broadband transmission services.

I. INTRODUCTION AND SUMMARY.

This petition seeks a Commission order that would create regulatory parity between Verizon and its competitors in the provision of non-TDM-based packetized and optical transmission services that are critical to businesses and broadband service providers in the United States. This change is necessary to ensure that the Commission is able to carry out its responsibility to implement the economic and public policy requirements of Title II of the

¹ 47 C.F.R. § 1.41.

² 47 U.S.C. § 154(i). The Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.* (the "Communications Act" or "Act"), was amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

Communications Act and to level the playing field in the marketplace for services such as Ethernet, ATM and SONET that comprise the core of the nation's communications infrastructure.

Verizon's petition for forbearance from all Title II regulation of its non-TDM-based packetized and optical transmission services was deemed granted by operation of law when the Commission failed to act on the petition by the statutory deadline of March 19, 2006. AT&T, Embarq, Frontier, and legacy Qwest subsequently filed petitions for forbearance seeking the same level of deregulation that Verizon received. In the timely orders addressing those petitions, however, the Commission denied forbearance with respect to the regulations applicable to non-dominant telecommunications carriers as well as certain other regulations. In so doing, the Commission reiterated its longstanding policy of requiring that all providers of transmission services, even those without market power, comply with the bedrock economic and public policy requirements of Title II. Those requirements therefore apply to all of Verizon's competitors, no matter how small, in the provision of non-TDM-based packetized and optical transmission services. But they do not apply to Verizon.

As the Commission stated in the order addressing AT&T's petition for forbearance, it is critical for the agency "to avoid persistent regulatory disparities between similarly-situated competitors."³ Accordingly, the Commission stated that it "will issue an order addressing Verizon's forbearance petition . . . within 30 days" of the release of the *AT&T Forbearance Order*.⁴ More than three-and-a-half years later, the Commission still has not addressed the

³ *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*, Memorandum Opinion and Order, 22 FCC Rcd. 18705, ¶ 50 (2007) ("*AT&T Forbearance Order*").

⁴ *Id.*

“regulatory disparities between similarly-situated competitors”⁵ that exist in the market for packetized and optical transmission services. The Commission must do so as soon as possible.

The merits of applying to Verizon the regulations currently applicable to other non-dominant providers of non-TDM-based packetized and optical transmission services are not in dispute. Section 10 of the Act requires that the Commission forbear from enforcing regulations where (1) such regulations are not necessary to ensure just and reasonable and not unjustly or unreasonably discriminatory rates, terms and conditions, (2) such regulations are not necessary to protect consumers and (3) forbearance is in the public interest. The Commission has the authority to reverse forbearance where any of these requirements is not met. This is the case here.

The Commission has already held in the *AT&T Forbearance Order* that application of basic economic regulation under Title II, such as the duties established in Section 201(b) and Section 202(a) and the complaint procedures in Section 208, are “essential safeguards” for the protection of consumers of non-TDM-based packetized and optical transmission services.⁶ There, the Commission also held that application of public policy requirements under Title II, such as those concerning universal service, privacy and disability access, “advance critically important national objectives.”⁷ In addition, the Commission held that enforcement of certain *Computer Inquiry* requirements is necessary and in the public interest. As a result, the Commission held that the Section 10 criteria for forbearance from these categories of regulation are not met with regard to non-TDM-based packetized and optical transmission services.

⁵ *Id.*

⁶ *Id.* ¶ 67.

⁷ *Id.* ¶ 72.

These conclusions apply to Verizon just as much as to other carriers, and the Commission's failure to apply these regulations to Verizon has created a significant competitive advantage for the carrier. The Commission must therefore reverse the deemed grant of forbearance to the extent necessary to apply to Verizon the same regulations applicable to AT&T, Embarq, Frontier, legacy Qwest and its other competitors in the provision of non-TDM-based packetized and optical transmission services.

II. BACKGROUND.

A. The "Deemed Grant" Of Verizon's Forbearance Petition.

Section 10 of the Act⁸ directs the FCC to "forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service" if the following three-part test is met:

- (1) enforcement of the identified provision(s) or regulation(s) is not necessary to ensure that the telecommunications carrier's charges, practices, classifications or regulations are just, reasonable, and not unjustly or unreasonably discriminatory;
- (2) enforcement of the identified provision(s) or regulation(s) is not necessary to protect consumers; and
- (3) non-enforcement of the identified provision(s) or regulation(s) is consistent with the public interest.⁹

Under Section 10(b), when determining whether forbearance is in the public interest under Section 10(a)(3), "the Commission shall consider whether forbearance . . . will promote competitive market conditions."¹⁰

On December 20, 2004, Verizon filed a petition for forbearance¹¹ pursuant to Section 10.

⁸ 47 U.S.C. § 160.

⁹ 47 U.S.C. §§ 160(a)(1)-(3).

¹⁰ *Id.* § 160(b).

Verizon requested forbearance from application of “Title II common carriage requirements and *Computer Inquiry* rules”¹² to “any broadband services offered by Verizon”¹³ at the time or in the future.¹⁴ Verizon argued that forbearance was warranted because (1) there was “intense intermodal competition” in the “broadband mass market”¹⁵ from cable providers, who were subject to a “hands off” regulatory approach;¹⁶ (2) there was “intense” “broadband competition for large business customers” from “the major long-distance carriers” (i.e., AT&T, MCI, and Sprint),¹⁷ who were “largely unregulated”;¹⁸ (3) “in light of the Commission’s statutory duty under Section 706, . . . it would be unlawful for the Commission to apply any of the Title II common carriage requirements to the broadband services offered by ILECs”;¹⁹ and (4) “[g]iven that ILECs have no market power in the broadband market, there would be no justification to apply the Title II common carriage requirements” to Verizon’s broadband services.²⁰

¹¹ See generally 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 Dkt. No. 04-440 (filed Dec. 20, 2004) (“Verizon Petition”).

¹² *Id.* at 2.

¹³ *Id.* at 1.

¹⁴ Verizon requested the same relief as that requested in BellSouth’s October 2004 forbearance petition to the extent that it was not covered by Verizon’s previously filed requests for regulatory relief. See *id.* at 2. BellSouth, in turn, had requested forbearance from traditional common carriage requirements for “all broadband services that [it] does or may offer.” *Id.*

¹⁵ *Id.* at 3-4.

¹⁶ *Id.* at 9.

¹⁷ *Id.* at 7.

¹⁸ *Id.* at 11.

¹⁹ *Id.* at 14.

²⁰ *Id.* at 15.

On December 19, 2005, pursuant to Section 10(c) of the Act, the Commission extended the deadline for acting on Verizon's petition by 90 days, to March 19, 2006.²¹ On February 7, 2006, in response to a request for clarification by Commission staff, Verizon submitted an *ex parte* letter stating that it sought forbearance for two categories of "broadband transmission services" that it offers "both to enterprise customers on a retail basis, and to other carriers on a wholesale basis."²² These categories were (1) non-TDM-based "packet-switched services capable of 200 kbps in each direction" (including "Frame Relay services, ATM services, IP-VPN services, and Ethernet services")²³ and (2) "non-TDM based optical networking, optical hubbing, and optical transmission services."²⁴ At the same time, Verizon submitted a "List of Broadband Services for Which Verizon Is Seeking Forbearance" which contained 10 Verizon services that fell within these two categories.²⁵

In the *February 7, 2006 Letter*, Verizon did not clarify the specific statutory provisions and/or implementing regulations from which it sought forbearance. Nor did it explain how forbearance from each provision and/or regulation satisfied the criteria of Section 10.²⁶ Instead,

²¹ See generally *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*, Order, 20 FCC Rcd. 20037 (2005).

²² See Letter from Edward Shakin, Vice President and Associate General Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 04-440, at 2-3 (filed Feb. 7, 2006) ("*February 7, 2006 Letter*").

²³ See *id.* at 2.

²⁴ See *id.* at 3. The services for which Verizon obtained forbearance are referred to hereinafter as "non-TDM-based broadband transmission services."

²⁵ See *id.*, Attachment 1.

²⁶ See, e.g., Letter from Jason Oxman, COMPTTEL, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 04-440, at 3 (filed Feb. 17, 2006) ("Verizon does not explain, as to a single specific provision of Title II, how its forbearance petition meets the section 10 test."); Letter from Russell

Verizon reiterated that it was “seeking forbearance from the mandatory application of Title II common-carriage regulation”²⁷ and did not discuss the Section 10 criteria in the *February 7, 2006 Letter*.

The Commission failed to issue a written decision addressing the merits of Verizon’s petition by the March 19, 2006 statutory deadline. As the Commission later explained, “[b]y their recorded vote, two Commissioners voted for and two Commissioners voted against a Memorandum Opinion and Order granting Verizon’s petition in part.”²⁸ Under Section 10(c) of the Act, a forbearance petition “shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance” set forth in Section 10(a) before the statutory deadline.²⁹ Accordingly, on March 20, 2006, the Commission issued a news release “inform[ing] the public that, pursuant to section 10(c), the relief requested in Verizon’s petition was deemed granted by operation of law, effective March 19, 2006.”³⁰

M. Blau, Counsel for McLeod USA, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 04-440, at 4 (filed Mar. 14, 2006) (“In order for the Commission to evaluate this request[,] Verizon must submit a showing as to why each of the provisions for which it seeks forbearance is unnecessary under the statutory forbearance standards with respect to each service.”).

²⁷ *February 7, 2006 Letter* at 3.

²⁸ *AT&T Forbearance Order* ¶ 11.

²⁹ 47 U.S.C. § 160(c).

³⁰ 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* (rel. Mar. 20, 2006). The Commission also released statements from individual commissioners. In a joint statement, Chairman Martin and Commissioner Tate expressed support for granting Verizon’s petition as amended by the *February 7, 2006 Letter*, and in separate statements, Commissioners Copps and Adelstein expressed their opposition to Verizon’s petition even as amended by the *February 7, 2006 Letter*. See Joint Statement of Chairman Kevin J. Martin and Commissioner Deborah Taylor Tate, WC Dkt. No. 04-440 (rel. Mar. 20, 2006); Statement of Commissioner Michael J. Copps in Response to Commission Inaction on Verizon’s Forbearance Petition, WC Dkt. No. 04-440 (rel. Mar. 20, 2006); Statement

On appeal, Sprint Nextel and other competitors argued that (1) the deadlocked vote on the draft order addressing Verizon's petition constituted an agency decision to deny the petition and (2) in the alternative, the deemed grant constituted final agency action that should be vacated as arbitrary and capricious.³¹ The D.C. Circuit rejected these arguments. It held that "Congress, not the Commission, 'granted' Verizon's forbearance petition."³² The court explained that "Congress made the decision in [Section 10(c)] to 'grant' forbearance whenever the Commission 'does not deny' a carrier's petition" and "[w]hen the Commission failed to deny Verizon's forbearance petition within the statutory period, Congress's decision – not the agency's – took effect."³³

**B. The Partial Grant Of AT&T, Embarq, Frontier, And Legacy Qwest's
Forbearance Petitions.**

Following the deemed grant of Verizon's petition, AT&T, Embarq, Frontier, and legacy Qwest each filed petitions seeking "relief comparable to the relief granted [to] Verizon through that deemed grant."³⁴ The Commission granted only partial forbearance from Title II requirements and the *Computer Inquiry* rules for each petitioner's existing non-TDM-based

of Commissioner Jonathan S. Adelstein in Response to Commission Inaction on Verizon's Forbearance Petition, WC Dkt. No. 04-440 (rel. Mar. 20, 2006).

³¹ See *Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1131 (D.C. Cir. 2007).

³² *Id.* at 1132.

³³ *Id.*

³⁴ See *AT&T Forbearance Order* ¶ 1; *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements et al.*, Memorandum Opinion and Order, 22 FCC Rcd. 19478, ¶ 1 (2007) ("*Embarq & Frontier Forbearance Order*"); *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, 23 FCC Rcd. 12260, ¶ 1 (2008) ("*Qwest Forbearance Order*").

“packet-switched broadband telecommunications services” and existing non-TDM-based “optical transmission services” (hereinafter, “non-TDM-based special access services”).³⁵ In particular, the Commission granted each of the petitioners forbearance from dominant carrier regulation³⁶ and from certain *Computer Inquiry* requirements.³⁷ Importantly, the Commission denied each of the petitioners forbearance from a wide range of regulations.

³⁵ The Commission defined the categories of services for which it was granting partial forbearance as follows: “(1) [the petitioner’s] existing non-TDM-based, packet-switched services capable of transmitting 200 kbps or greater in each direction; and (2) [the petitioner’s] existing non-TDM-based, optical transmission services.” *AT&T Forbearance Order* ¶ 12; *Embarq & Frontier Forbearance Order* ¶ 12; see also *Qwest Forbearance Order* ¶ 12. Each grant of partial forbearance excluded all TDM-based DS1 and DS3 special access services. See *AT&T Forbearance Order* ¶ 12; *Embarq & Frontier Forbearance Order* ¶ 12; *Qwest Forbearance Order* ¶ 13. In addition, each grant of partial forbearance was limited to the services that the petitioner offered at the time and listed in its petition. See *AT&T Forbearance Order* ¶ 12; *Embarq & Frontier Forbearance Order* ¶ 12; *Qwest Forbearance Order* ¶ 13. By contrast, although Verizon listed 10 services in its “List of Broadband Services for Which Verizon Is Seeking Forbearance,” it has taken the position that it sought and obtained forbearance for “all services that fit within the[] [two] categories [of non-TDM-based packetized and non-TDM-based optical transmission services] that Verizon *does or may offer*.” Letter from William H. Johnson, Assistant General Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 04-440, n.22 (filed Nov. 7, 2007) (emphasis added). The Commission should eliminate any doubt as to the scope of the deemed grant by reimposing general Title II economic regulation, Title II public policy regulation, and certain *Computer Inquiry* requirements on *all of Verizon’s existing and future* non-TDM-based broadband transmission services. The grant of partial forbearance to AT&T also excluded its broadband transmission services provided on an interstate interexchange basis. See *AT&T Forbearance Order* ¶ 15; see also *id.* n.168. This raises the question of whether the deemed grant of Verizon’s petition included forbearance for Verizon’s interstate interexchange broadband transmission services. To eliminate any doubt, the Commission should clarify that the deemed grant did not affect regulation of such services. Indeed, non-dominant carrier regulation applies to incumbent LECs’ in-region interstate interLATA services offered through a separate subsidiary as well as their out-of-region interexchange services. See generally *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC’s Local Exchange Area*, Second Report and Order in CC Docket No. 06-149 and Third Report and Order in CC Docket No. 96-61, 12 FCC Rcd. 15756 (1997).

³⁶ Specifically, the Commission granted 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), [and] 47 C.F.R. Part 69 (access charge and pricing flexibility rules).” *AT&T Forbearance Order* n.5; *Embarq & Frontier Forbearance Order* n.6;

First, the Commission denied forbearance from “general Title II economic regulation” applicable to common carriers or LECs, including non-dominant carriers (hereinafter, “general Title II economic regulation”).³⁸ According to the Commission, such regulation includes, but is not limited, to the following:³⁹

- Sections 201 and 202 of the Act, which require, among other things, that common carriers’ rates and practices are just and reasonable and not unjustly or unreasonably discriminatory;
- Section 251(b) of the Act, which imposes a number of duties on LECs, including the duty not to impose unreasonable or discriminatory conditions or limitations on resale of their telecommunication services, the duty to implement number portability, and the duty to provide competitive telecommunications service providers with access to the LECs’ poles, ducts, and conduits under just and reasonable rates, terms, and conditions;
- Section 214 of the Act, which requires common carriers to obtain Commission authorization before constructing, acquiring, operating or engaging in transmission over lines of communications, or discontinuing, reducing or impairing telecommunications service;

Qwest Forbearance Order n.6. tw telecom inc. et al. will seek reversal of the grant of forbearance from dominant carrier regulation to Verizon, AT&T, Embarq, Frontier, and legacy Qwest in a separate petition.

³⁷ The Commission granted AT&T and legacy Qwest forbearance from *Computer Inquiry* requirements applicable to Bell Operating Companies (“BOCs”) (i.e., the so-called *Computer II* structural separation requirements and *Computer III* comparably efficient interconnection and open network architecture requirements) to the extent that AT&T and Qwest offer information services in conjunction with their existing non-TDM-based special access services. See *AT&T Forbearance Order* ¶¶ 53-57; *Qwest Forbearance Order* ¶¶ 54-58. The Commission granted Embarq and Frontier forbearance from “the *Computer Inquiry* tariffing requirement” applicable to incumbent LECs (i.e., the requirement to offer the basic transmission services underlying their information services as telecommunications services pursuant to tariff) to the extent that Embarq and Frontier provide information services in conjunction with their existing non-TDM-based special access services. See *Embarq & Frontier Forbearance Order* ¶¶ 51-54; see also *id.* n.180.

³⁸ See *AT&T Forbearance Order* ¶¶ 65-68; *Embarq & Frontier Forbearance Order* ¶¶ 57-60; *Qwest Forbearance Order* ¶¶ 62-65.

³⁹ See *AT&T Forbearance Order* ¶¶ 3, 65-68; *Embarq & Frontier Forbearance Order* ¶¶ 3, 57-60; *Qwest Forbearance Order* ¶¶ 3, 62-65.

- Section 63.71(c) of the Commission’s rules, which sets forth streamlined discontinuance rules for non-dominant carriers;
- Part 61, subpart C of the Commission’s rules, which sets forth streamlined tariffing and notice requirements for non-dominant carriers; and
- Section 63.03(b) of the Commission’s rules, which sets forth streamlined transfer of control requirements for non-dominant carriers.

The Commission held that forbearance from these and other regulations applicable to non-dominant carriers and to LECs would not satisfy the criteria of Section 10(a) because, among other things, such forbearance would “go beyond the relief the Commission has granted any competitive LEC or nondominant interexchange carrier and allow [the petitioner] to offer certain broadband telecommunications services free of Title II regulation, thus creating a disparity in regulatory treatment between [the petitioner] and its competitors.”⁴⁰ Furthermore, such relief “would be inconsistent with the market-opening policies and consumer protection goals that led Congress and the Commission to impose these economic regulations on carriers that lack individual market power.”⁴¹

Second, the Commission denied each of the petitioners forbearance from Title II “public policy regulation” that applies generally to all carriers (hereinafter, “Title II public policy regulation”).⁴² The Commission explained that such regulation includes, but is not limited to, the following statutory provisions and the rules that implement them:⁴³

⁴⁰ See *AT&T Forbearance Order* ¶¶ 67-68; *Qwest Forbearance Order* ¶¶ 64-65; see also *Embarq & Frontier Forbearance Order* ¶¶ 59-60.

⁴¹ See *AT&T Forbearance Order* ¶ 67; *Qwest Forbearance Order* ¶ 64; see also *Embarq & Frontier Forbearance Order* ¶ 59.

⁴² See *AT&T Forbearance Order* ¶¶ 71-75; *Embarq & Frontier Forbearance Order* ¶¶ 63-67; *Qwest Forbearance Order* ¶¶ 68-72.

⁴³ See *AT&T Forbearance Order* ¶¶ 72-73; *Embarq & Frontier Forbearance Order* ¶¶ 64-65; *Qwest Forbearance Order* ¶¶ 69-70.

- Section 254(d) of the Act, which requires every telecommunications carrier to contribute to the universal service fund;
- Sections 225, 255, and 251(a)(2) of the Act, which impose requirements that promote access to telecommunications services by individuals with disabilities;
- Section 222 of the Act, which restricts telecommunications carriers' use and disclosure of customer proprietary network information ("CPNI") and which also facilitates the provision of caller location and subscriber identification information to emergency service providers; and
- Section 229 of the Act, which requires compliance with the Communications Assistance for Law Enforcement Act.

The Commission held that the petitioners had "not shown that forbearance from these and other public policy requirements in Title II and the Commission's implementing rules meets the statutory forbearance criteria."⁴⁴ The Commission found that forbearance would not satisfy the Section 10(a) criteria because, among other things, (1) the petitioners' exclusion of universal service contribution obligations from their forbearance requests was a tacit recognition of the fact that forbearance from such obligations was not in the public interest;⁴⁵ and (2) "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."⁴⁶

Third, the Commission denied Embarq and Frontier forbearance from the *Computer Inquiry* transmission access and nondiscrimination requirements (i.e., the requirements to offer as telecommunications services the basic transmission services underlying the enhanced services, and to offer those telecommunications services on a nondiscriminatory basis to all enhanced

⁴⁴ *AT&T Forbearance Order* ¶ 74; *Embarq & Frontier Forbearance Order* ¶ 66; *Qwest Forbearance Order* ¶ 71.

⁴⁵ *AT&T Forbearance Order* ¶ 74; *Embarq & Frontier Forbearance Order* ¶ 66; *Qwest Forbearance Order* ¶ 71.

⁴⁶ *AT&T Forbearance Order* ¶ 75; *Embarq & Frontier Forbearance Order* ¶ 67; *Qwest Forbearance Order* ¶ 72.

service providers, including its own enhanced services operations) that apply to all non-BOC facilities-based wireline carriers in their provision of enhanced services.⁴⁷ The Commission also denied AT&T and legacy Qwest forbearance from the BOC-specific *Computer Inquiry* requirements to the extent that they impose the same transmission access and nondiscrimination requirements that apply to all non-BOC, facilities-based wireline carriers in their provision of enhanced services.⁴⁸ In each case, the Commission found that relief from the *Computer Inquiry* transmission access and nondiscrimination requirements when providing information services in conjunction with the petitioner's existing non-TDM-based special access services was not in the public interest because "it would confer a regulatory advantage on [the petitioner], vis-a-vis its facilities-based wireline competitors offering information services."⁴⁹

The denial of forbearance from these categories of regulation means that AT&T, legacy Qwest, Embarq, and Frontier (as well as other providers of non-TDM-based broadband transmission services) are subject to regulations that do not apply to Verizon's non-TDM-based broadband transmission services. Based on the discussion of the statutory provisions and implementing rules in the *AT&T Forbearance Order*, it appears that Verizon received forbearance for its non-TDM-based broadband transmission services from not only dominant carrier regulation and certain BOC-specific *Computer Inquiry* requirements but also (1) general Title II economic regulation; (2) Title II public policy regulation; and (3) the BOC-specific *Computer Inquiry* requirements to the extent that they impose the same transmission access and nondiscrimination requirements that apply to all non-BOC, facilities-based wireline carriers in

⁴⁷ See *Embarq & Frontier Forbearance Order* ¶ 53.

⁴⁸ See *AT&T Forbearance Order* ¶ 58; *Qwest Forbearance Order* ¶ 59.

⁴⁹ *AT&T Forbearance Order* ¶ 58; *Embarq & Frontier Forbearance Order* ¶ 53; *Qwest Forbearance Order* ¶ 59.

their provision of enhanced services. In the *AT&T Forbearance Order*, the Commission recognized “the need to ensure regulatory parity” between Verizon and other non-dominant carriers.⁵⁰ The Commission stated that it would reverse the deemed grant of forbearance to Verizon to the extent necessary to eliminate the disparity:

As noted above, Verizon’s petition for forbearance for [non-TDM-based broadband transmission services] was deemed granted by operation of law on March 19, 2006. We seek to avoid persistent regulatory disparities between similarly-situated competitors, and seek to minimize the time in which they are treated differently. *Thus, we will issue an order addressing Verizon’s forbearance petition . . . within 30 days.*⁵¹

The Commission has never issued such an order.

In the appeal of the *AT&T Forbearance Order* (as well as the *Embarq & Frontier Forbearance Order*), the D.C. Circuit held that the Commission’s decision to grant forbearance from dominant carrier regulation and certain *Computer Inquiry* requirements⁵² was not arbitrary and capricious in part because “the Commission maintained common-carrier regulation on the ILECs’ special access lines.”⁵³ The court explained its reasoning as follows:

To be sure, petitioners’ submission might pack more force had the FCC lifted all common-carrier regulation on the ILECs’ special access lines, thereby potentially allowing ILECs to leverage their control over special access lines into undue control of the broadband business services market (and to presumably squeeze out competitive broadband business service providers). But the FCC did no such thing. Rather, the Commission expressly recognized that ILECs’ control of bottleneck special access lines in certain local areas creates the potential for improper exercise of market power. The FCC therefore refused the ILECs’

⁵⁰ *AT&T Forbearance Order* ¶ 50.

⁵¹ *Id.* (emphasis added).

⁵² *Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903, n.2 (D.C. Cir. 2009).

⁵³ *Id.* at 911.

forbearance petitions in part and retained basic Title II common-carrier regulation [including Sections 201 and 202 of the Act] on the ILECs' special access lines.⁵⁴

The court also pointed out that, in response “to the concern that ILECs might be able to skirt their basic Title II common-carrier obligations,” the Commission retained application of the Section 208 complaint process—“a formal fast-track process for business end-users and competitive broadband providers to challenge the reasonableness of rates charges by ILECs, among other things”—to AT&T, Embarq and Frontier.⁵⁵

Finally, the court made clear that the Commission could reverse the forbearance decisions in the orders on appeal as well as in the Verizon deemed grant: “[f]or present purposes, the relevant point is that 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 may be reversed in whole or in part “based on changes in market conditions, technical capabilities, or policy approaches to regulation in this area.”⁵⁶

III. THE COMMISSION SHOULD REVERSE THE DEEMED GRANT OF FORBEARANCE FROM GENERAL TITLE II ECONOMIC REGULATION, TITLE II PUBLIC POLICY REGULATION, AND CERTAIN *COMPUTER INQUIRY* REQUIREMENTS FOR VERIZON’S NON-TDM-BASED BROADBAND TRANSMISSION SERVICES.

A. The Commission Has Already Found That Forbearance From Such Regulation Does Not Meet The Statutory Forbearance Standard.

Under Section 10 of the Act, if all three criteria of subsection (a) are satisfied, forbearance from the identified provision(s) or regulation(s) must be granted.⁵⁷ It follows that

⁵⁴ *Id.* at 908-09.

⁵⁵ *Id.* at 909.

⁵⁶ *Id.* at 911.

⁵⁷ 47 U.S.C. § 160(a).

the Commission may reverse forbearance if at least one of those criteria is no longer met. The Commission should reverse the deemed grant of forbearance from general Title II economic regulation, Title II public policy regulation, and certain *Computer Inquiry* requirements for Verizon's non-TDM-based broadband transmission services because the Commission has already found that forbearance from such regulation does not meet the Section 10 criteria.

1. General Title II Economic Regulation.

In the *AT&T Forbearance Order*, the Commission found that the record failed to demonstrate that forbearance from general Title II economic regulation for AT&T's existing non-TDM-based special access services would meet the Section 10 criteria.⁵⁸ First and most importantly, the Commission held that forbearance from Sections 201, 202, or 208 of the Act would not satisfy the first prong of Section 10(a).⁵⁹ Specifically, the Commission held that "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 AT&T of [dominant carrier] tariffing obligations in relation to its specified [non-TDM-based special access services] will not result in unjust, unreasonable, or unreasonably discriminatory rates, terms, and conditions in connection with those services."⁶⁰

This holding was consistent with previous decisions in which the Commission relieved carriers of dominant carrier regulation but continued to require compliance with Sections 201

⁵⁸ *AT&T Forbearance Order* ¶ 67; see also *Embarq & Frontier Forbearance Order* ¶ 59; *Qwest Forbearance Order* ¶ 64.

⁵⁹ See *AT&T Forbearance Order* ¶ 67; see also *Embarq & Frontier Forbearance Order* ¶ 59; *Qwest Forbearance Order* ¶ 64.

⁶⁰ *AT&T Forbearance Order* ¶ 67; see also *Embarq & Frontier Forbearance Order* ¶ 59; *Qwest Forbearance Order* ¶ 64.

and 202—the core consumer protection provisions⁶¹—of the Act.⁶² Indeed, as discussed above, the D.C. Circuit upheld the Commission’s decision to grant AT&T, Embarq, and Frontier forbearance from dominant carrier regulation for their existing non-TDM-based special access services in part because the Commission continued to require compliance with “basic Title II common-carrier regulation,” including Sections 201, 202, and 208 of the Act.⁶³ As the court explained, the Commission retained such regulation because it expressly recognized that the incumbent LECs’ bottleneck control of special access facilities in certain markets could result in an improper exercise of market power.⁶⁴

Second, the Commission found that forbearance from “interconnection obligations under section 251(a)(1) and pole attachment obligations under sections 224 and 251(b)(4)” was not warranted because they “foster the open and interconnected nature of our communications system and thus promote competitive market conditions within the meaning of section 10(b).”⁶⁵

⁶¹ See *Personal Communications Industry Association’s Broadband Personal Communications Services Alliance’s Petition for Forbearance For Broadband Personal Communications Services*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd. 16857, ¶ 15 (1998) (“*PCIA Forbearance Order*”).

⁶² See, e.g., *Motion of AT&T to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd. 3271, ¶ 130 (1995); *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, Report and Order and Memorandum Opinion and Order, 22 FCC Rcd. 16440, ¶ 90 (2007); see also *PCIA Forbearance Order* ¶ 17 (“Consistent with the centrality of sections 201 and 202 to consumer protection, the Commission has never previously refrained from enforcing sections 201 and 202 against common carriers even when competition exists in a market.”).

⁶³ See *supra* Part II.B.

⁶⁴ See *id.*

⁶⁵ *AT&T Forbearance Order* ¶ 68; see also *Embarq & Frontier Forbearance Order* ¶ 60; *Qwest Forbearance Order* ¶ 65.

Third, the Commission held that forbearance from non-dominant streamlined discontinuance, transfer of control, and tariffing requirements would not satisfy the third prong of Section 10(a) because “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.”⁶⁶

Finally, the Commission found that, as a general matter, AT&T failed to demonstrate how forbearance from these and other general Title II economic regulation requirements was not necessary for the protection of consumers, as required by Section 10(a)(2), or how forbearance is consistent with the public interest, as required by Section 10(a)(3).⁶⁷ The Commission held that, in fact, such forbearance would not satisfy Sections 10(a)(2) and (3) because it “would result in disparate regulatory treatment for the same or similar services, create market distortions, and fail to protect consumers.”⁶⁸

For these same reasons, the Commission should reverse the deemed grant of forbearance from general Title II economic regulation for Verizon’s non-TDM-based broadband transmission services.⁶⁹ The rationale for denying AT&T (as well as Embarq, Frontier, and Qwest) forbearance from the aforementioned statutory provisions and regulations applies equally to

⁶⁶ *AT&T Forbearance Order* ¶ 68; *see also Embarq & Frontier Forbearance Order* ¶ 60; *Qwest Forbearance Order* ¶ 65.

⁶⁷ *AT&T Forbearance Order* ¶ 68; *see also Embarq & Frontier Forbearance Order* ¶ 60; *Qwest Forbearance Order* ¶ 65.

⁶⁸ *AT&T Forbearance Order* ¶ 68; *see also Embarq & Frontier Forbearance Order* ¶ 60; *Qwest Forbearance Order* ¶ 65.

⁶⁹ The Commission should also clarify that the application of “economic regulations that apply generally to incumbent LEC[s] or BOCs,” including but not limited to Sections 251(c) and 271 of the Act, to Verizon’s non-TDM-based broadband transmission services was unaffected by the deemed grant. *AT&T Forbearance Order* ¶ 70; *Embarq & Frontier Forbearance Order* ¶ 62; *Qwest Forbearance Order* ¶ 67.

Verizon. Verizon has no better basis for claiming that it satisfied the criteria of Section 10(a) than did AT&T (or Embarq, Frontier, or Qwest).⁷⁰ Furthermore, the deemed grant of forbearance from general Title II economic regulation for Verizon's non-TDM-based broadband transmission services, but not those of its competitors, has resulted in the disparate treatment of similarly-situated competitors that the Commission sought to avoid in the *AT&T Forbearance Order* and the subsequent forbearance orders. Indeed, as explained, the Commission stated that it would "issue an order addressing Verizon's forbearance petition" within 30 days of the release of the *AT&T Forbearance Order* for this exact reason.⁷¹

2. Title II Public Policy Regulation.

In the *AT&T Forbearance Order*, the Commission found that AT&T failed to demonstrate that forbearance from Title II public policy regulation satisfied the Section 10 criteria. The Commission relied in part on comments in the record "pointing out that AT&T failed 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."⁷² The Commission also recognized that these public policy requirements "advance critically important national objectives, such as ensuring the sufficiency of universal service support mechanisms,

⁷⁰ In its petition, Verizon argued broadly that "the regulations imposed by Title II . . . are not needed to ensure competitive prices," Verizon Petition at 16, and that "Title II regulations are unnecessary to protect consumers in light of intermodal competition and Verizon's secondary status in the market." *Id.* at 19. However, Verizon failed to identify the particular Title II economic regulation requirements from which it sought forbearance. Nor did it analyze the effect that forbearance from each regulation would have with respect to its non-TDM-based broadband transmission services.

⁷¹ See *AT&T Forbearance Order* ¶ 50.

⁷² *Id.* n.238 (citing Ad Hoc Telecommunications Users Committee Reply Comments, WC Dkt. No. 06-125, at i-ii (filed Aug. 31, 2006); see also *Embarq & Frontier Forbearance Order* n.218; *Qwest Forbearance Order* n.233).

promoting access to telecommunications services by individuals with disabilities, protecting consumer privacy, and increasing the effectiveness of emergency services, among other objectives,” and that continued application of these requirements was therefore necessary to protect consumers and was in the public interest.⁷³

For these same reasons, the Commission should reverse the deemed grant of forbearance from Title II public policy regulation for Verizon’s non-TDM-based broadband transmission services. Like AT&T, Verizon failed to discuss or justify forbearance from Title II public policy requirements.⁷⁴ Moreover, the Commission’s reasoning that granting AT&T (as well as Embarq, Frontier, and legacy Qwest) forbearance from Title II public policy regulation for their existing non-TDM-based special access services would be inconsistent with critical national policy goals applies equally to Verizon. There is nothing unique about Verizon or its non-TDM-based broadband transmission services that justifies forbearance from such regulation, which applies generally to all carriers.

⁷³ *AT&T Forbearance Order* ¶ 72; see also *Embarq & Frontier Forbearance Order* ¶ 64; *Qwest Forbearance Order* ¶ 69.

⁷⁴ Verizon merely asserted in its reply comments that “if the Commission agrees that particular [Title II] provisions are needed to promote national security, emergency preparedness, or other such public policy concerns, implementing such provisions under Title I for all broadband platforms” would be preferable to “imposing them through Title II regulation only on the local telephone companies who are minority players.” Reply Comments of Verizon in Support of its Petition for Forbearance, WC Dkt. No. 04-440, at 32 (filed Mar. 10, 2005). The Commission’s ancillary jurisdiction is severely limited. See generally *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010) (holding that the Commission lacks ancillary jurisdiction to regulate an Internet service provider’s network management practices); *Am. Library Ass’n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005) (holding that the Commission lacks ancillary jurisdiction to promulgate so-called “broadcast flag” rules).

3. Computer Inquiry Transmission Access And Nondiscrimination Requirements.

In the *AT&T Forbearance Order*, the Commission denied AT&T forbearance from the BOC-specific *Computer Inquiry* requirements to the extent that they impose the same transmission access and nondiscrimination requirements that apply to all non-BOC, facilities-based wireline carriers in their provision of enhanced services.⁷⁵ The Commission's rationale was that relieving AT&T of these requirements would give it a regulatory advantage over its competitors when providing information services in conjunction with its existing non-TDM-based special access services.⁷⁶ The same rationale compels reversal of the deemed grant of forbearance to Verizon from the BOC-specific *Computer Inquiry* requirements to the extent that they impose the same transmission access and nondiscrimination requirements that apply to all non-BOC, facilities-based wireline carriers in their provision of enhanced services. As with the deemed grant of forbearance from general Title II economic regulation, relieving Verizon of the *Computer Inquiry* transmission access and nondiscrimination requirements applicable to its facilities-based wireline competitors has resulted in the differential regulatory treatment that the Commission sought to prevent in the *AT&T Forbearance Order*.

B. The Commission Has The Authority To Reverse The Deemed Grant Of Forbearance From Such Regulation.

There is no question that the Commission has the authority to reverse the deemed grant of forbearance from general Title II economic regulation, Title II public policy regulation, and the *Computer Inquiry* transmission access and nondiscrimination requirements for Verizon's non-TDM-based broadband transmission services. The Commission has noted that it has the option

⁷⁵ See *AT&T Forbearance Order* ¶ 58; see also *Qwest Forbearance Order* ¶ 59.

⁷⁶ See *AT&T Forbearance Order* ¶ 58; see also *Qwest Forbearance Order* ¶ 59.

of revisiting forbearance decisions,⁷⁷ and it promised to do so in the case of Verizon's deemed grant.⁷⁸ Moreover, the fact that forbearance was deemed granted to Verizon by operation of law does not mean that the Commission lacks the authority to reimpose the regulation at issue on Verizon's non-TDM-based broadband transmission services. In fact, in *Ad Hoc Telecommunications Users Committee v. FCC*, the D.C. Circuit held that the deemed grant in the "related Verizon . . . special access matter[] . . . is not chiseled in marble" and that the Commission could reassess that forbearance decision and other forbearance decisions as it reasonably sees fit.⁷⁹

Verizon will likely argue that the Commission cannot reverse the deemed grant of forbearance from the regulation at issue because Verizon has relied on the unregulated status of its non-TDM-based broadband transmission services to make business decisions about those services.⁸⁰ But Verizon has been on notice since October 2007 that the Commission intended to revisit the deemed grant.⁸¹ Thus, Verizon could not reasonably rely on the notion that its unregulated status with respect to non-TDM-based broadband transmission services would remain unchanged.

⁷⁷ See *AT&T Forbearance Order* n.120; *Embarq & Frontier Forbearance Order* n.113; *Qwest Forbearance Order* n.127.

⁷⁸ See *AT&T Forbearance Order* ¶ 50.

⁷⁹ See *Ad Hoc Telecomms. Users Comm.*, 572 F.3d at 911.

⁸⁰ See, e.g., Letter from William H. Johnson, Assistant General Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 04-440, at 2 (filed Nov. 7, 2007) (explaining that, since the deemed grant, Verizon has negotiated numerous private carriage agreements for enterprise broadband services).

⁸¹ See *AT&T Forbearance Order* ¶ 50.

Moreover, even if Verizon's reliance interests were at stake, the Commission could readily reverse the deemed grant of forbearance. In the normal course, an agency that seeks to change an existing policy "which has engendered serious reliance interests" must "provide a more detailed justification than what would suffice for a new policy created on a blank slate."⁸² In this case, however, the Commission did not create the existing policy (i.e., forbearance from general Title II economic regulation, Title II public policy regulation, and certain *Computer Inquiry* requirements). As the D.C. Circuit held in *Sprint Nextel Corp. v. FCC*, it was Congress, not the FCC, that granted Verizon's petition.⁸³ Accordingly, the Commission need not provide an explanation of why reimposing the regulation at issue on Verizon's non-TDM-based broadband transmission services is a better policy than the status quo.

Alternatively, even if such an explanation were required, the Commission could provide one quite easily. As explained above, the Commission has affirmatively found that the public interest is served by retaining general Title II economic regulation, Title II public policy regulation, and the *Computer Inquiry* transmission access and nondiscrimination requirements.⁸⁴ Also as explained above, the Commission has held that differential treatment of similarly-situated carriers distorts competition and harms consumers.⁸⁵ Reimposing the regulation at issue on Verizon's non-TDM-based broadband transmission services would redress these substantial harms.

⁸² *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009).

⁸³ *Sprint Nextel Corp.*, 508 F.3d at 1132.

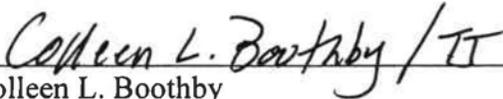
⁸⁴ *See supra* Part III.A.

⁸⁵ *See supra* Parts II.B & III.A.

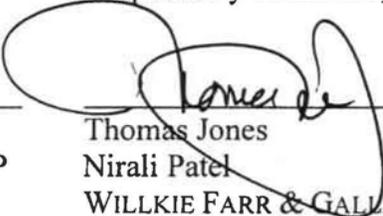
IV. CONCLUSION.

For the foregoing reasons, the Commission should reverse the deemed grant of forbearance from general Title II economic regulation, Title II public policy regulation and certain *Computer Inquiry* requirements for Verizon's non-TDM-based broadband transmission services.

Respectfully submitted,



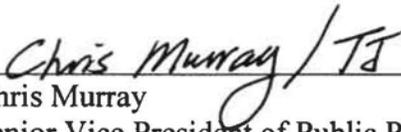
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