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

In the Matter of Petition of tw telecom inc. et al. Seeking Reverse of Forbearance Granted to Verizon Telephone Companies by Operation of Law	WC Docket No. 11-188

COMMENTS OF VERIZON

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COMMENTS OF VERIZON[1]

The enterprise broadband marketplace has become even more competitive in the years since Verizon's petition for forbearance from regulation of its enterprise broadband services was granted by operation of law in 2006. Numerous providers — including Petitioners[2] here — are thriving in this innovative and rapidly growing marketplace. For example, lead Petitioner tw telecom is ranked third in the United States in the provision of business Ethernet service, which has recently overtaken legacy services in total bandwidth sold. Petitioner Sprint recently announced an award of contracts to dozens of companies for building fiber-based backhaul capable of delivering Ethernet at 15,000 of its cell sites after a highly competitive bidding process; Sprint expects to announce another set of contracts for fiber backhaul at 15,000 more sites in mid-2012.[3]

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[1] The Verizon companies participating in this filing ("Verizon") are the wholly owned subsidiaries of Verizon Communications Inc. that filed the petition for forbearance in WC Docket No. 04-440.

[2] Petition of tw telecom inc. et al. to Establish Regulatory Parity in the Provision of Non-TDM-Based Broadband Transmission Services, WC Dkt. No. 11-188 (filed Oct. 4, 2011) ("Petition").

[3] *See* Carol Wilson, Light Reading, *Sprint To Reveal Backhaul Contract Winners Friday* (Oct. 5, 2011), http://www.lightreading.com/document.asp?doc_id=213050.

Although petitioners urge the Commission to re-regulate Verizon's enterprise broadband services, they do not identify a single marketplace failure that could warrant re-regulation of those services. Nor do they address Verizon's own enterprise broadband services, despite the fact that many of the petitioners have entered into private carriage contracts with Verizon for such services. More broadly, Verizon has entered into approximately 3,000 private carriage contracts for enterprise broadband services with end user customers and unaffiliated carrier customers, valued at a total of more than $3 billion.

Petitioners, therefore, have not met their burden here. To re-regulate Verizon's enterprise broadband services, the Commission would have to make findings — on a complete record that considers the current marketplace facts and the events of the past five-and-a-half years — that re-regulation is warranted, according to the same standards that apply when the Commission decides to adopt regulations in the first place: namely, that there is a marketplace failure that warrants regulation. Because Petitioners do not even *attempt* to make such a showing, the Petition necessarily fails. Nor, as discussed below, could Petitioners succeed in meeting their burden: there is no marketplace failure with respect to enterprise broadband services that could warrant re-regulation of Verizon's services.

Rather than try to satisfy the standard that applies here, Petitioners repeat well-worn claims of alleged flaws in the forbearance petition Verizon filed in 2004. Even aside from the fact that those recycled claims are still incorrect, the Commission cannot act today on a petition that was deemed granted in 2006. Nor can the Commission rely on findings it made in 2007 and 2008 in denying, in part, forbearance petitions by other providers with respect to their enterprise broadband services. The Commission must consider the marketplace as it exists today, with particular attention paid to the results of the natural experiment that the deemed grant of

Verizon's petition provides. Finally, the Petitioners urge regulation in the name of parity. But the past five-and-a-half years show that the right way to achieve parity would be to *extend* the forbearance granted to Verizon to other providers, not to re-impose regulations that Petitioners cannot show are necessary to correct any marketplace failure.

BACKGROUND

Section 10 of the Communications Act, 47 U.S.C. § 160, provides that any telecommunications carrier may file with the Commission a petition requesting that it forbear from applying any Communications Act provisions or FCC rules to specific services, including, as relevant to this proceeding, enterprise broadband services. The forbearance section was contemplated by Congress as a mechanism to "encourage the deployment" of broadband "on a reasonable and timely basis,"[4] as part of its broader strategy to "promote competition and reduce regulation."[5] Under Section 10, the Commission must grant forbearance "if enforcement is unnecessary to ensure that rates and practices are just, reasonable, and not unreasonably discriminatory; enforcement is unnecessary to protect consumers; and forbearance is consistent with the public interest, in that it 'will promote competitive market conditions' and 'enhance competition among providers of telecommunications services.'" *Ad Hoc Telecomm. Users Comm. v. FCC*, 572 F.3d 903, 907 (D.C. Cir. 2009) (quoting 47 U.S.C. § 160).

On December 20, 2004, Verizon filed a petition for forbearance from the application of Title II and the *Computer Inquiry* rules to Verizon's broadband services, to the extent those requirements might be construed to apply to those services. In February 2006, following the

[4] 47 U.S.C. § 1302.

[5] Pub. L. No. 104-104, 110 Stat. 56, 56 (1996).

release of the *Wireline Broadband Order*,[6] Verizon clarified that its petition sought for its enterprise broadband services the same relief the Commission provided in its order for broadband transmission services that are used for, or as an input to, broadband Internet access services.[7]

When the statutory deadline passed without Commission action, Verizon's petition for forbearance, as clarified, was deemed granted by operation of law, thus terminating the proceedings on the petition.[8] The D.C. Circuit rejected Sprint's challenge to the relief granted to Verizon, explaining that "Congress, not the Commission, 'granted' Verizon's forbearance petition." *Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1132 (D.C. Cir. 2007).

Since its forbearance petition was granted, Verizon has actively engaged with its customers on transitioning its existing broadband services to negotiated, private carriage arrangements. Verizon has detariffed or grandfathered all of its previously tariffed enterprise broadband services. Verizon has entered into approximately 3,000 private carriage contracts for enterprise broadband services with a wide variety of end user customers and unaffiliated carrier

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[6] Report and Order and Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853 (2005) ("*Wireline Broadband Order*"), *aff'd*, *Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007).

[7] *See* Letter from Edward Shakin, Vice President and Associate General Counsel, Verizon, to Marlene Dortch, Secretary, FCC, WC Dkt. No. 04-440 (filed Feb. 7, 2006).

[8] As Verizon has explained, its enterprise broadband services remain subject to universal service obligations, as well as the Communications Assistance for Law Enforcement Act (CALEA). Universal service obligations were not subject to Verizon's petition for forbearance. *See* Letter from Suzanne A. Guyer, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 04-440 (filed Feb. 17, 2006). CALEA obligations still apply because that statute's definition of "telecommunications carrier" is broader than that used in the Communications Act, and encompass Verizon's enterprise broadband services. *See* 47 U.S.C. § 1001(8)(B)(ii); *see* Reply Comments of Verizon in Support of Its Petition for Forbearance, *In re 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 (Mar. 10, 2005).

customers. These contracts cover services including Ethernet and OCN. In total, the contracts are valued at more than $3 billion.

ARGUMENT

I. THE COMMISSION CANNOT RE-REGULATE VERIZON'S ENTERPRISE BROADBAND SERVICES, EXCEPT THROUGH A RULEMAKING PROCEEDING

A. Once Verizon's petition for forbearance was granted by operation of law, the statutes and regulations that were the subject of that petition ceased to apply to Verizon's enterprise broadband services. *See* 47 U.S.C. § 160(a), (c). Therefore, today — as has been the case for the past five-and-a-half years — Verizon offers its enterprise broadband services free from those statutory and regulatory obligations. Although a grant of forbearance is "not chiseled in marble," *Ad Hoc*, 572 F.3d at 911, as the Commission's General Counsel recently noted, "overturn[ing] a grant of forbearance" is "difficult[]," and something the Commission "has never" done.[9]

To re-impose statutory or regulatory obligations eliminated through forbearance, the Commission must act through the normal means it uses to determine that regulation is warranted — its rulemaking authority. Indeed, although the Communications Act specifies procedures for granting forbearance, it does not grant the Commission any authority, or establish any unique process that differs from the normal processes under the Administrative Procedures Act, for re-imposing statutory or regulatory obligations after forbearance is granted. It follows that the Commission's authority to re-impose regulation is found in Section 201(b), which is the source of its authority to promulgate regulations implementing the Communications Act.

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[9] Austin Schlick, General Counsel, FCC, *A Third Way Legal Framework for Addressing the Comcast Dilemma* at 8-9 (May 6, 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-297945A1.pdf.

To invoke that authority, the Commission must identify some marketplace failure justifying regulation. The Commission has acknowledged that it "should not intervene in the market except where there is evidence of a market failure and a regulatory solution is available that is likely to improve the net welfare of the consuming public, *i.e.*, does not impose greater costs than the evil it is intended to remedy."[10] In the absence of a marketplace failure, the Commission generally will "rel[y] on market forces, rather than regulation."[11] The D.C. Circuit similarly has recognized that the Commission may adopt regulations only "upon finding that they advance a legitimate regulatory objective." *Cellco P'ship v. FCC*, 357 F.3d 88, 96 (D.C. Cir. 2004).

These rulemaking requirements apply regardless of how forbearance was granted — whether through a Commission vote or by operation of law. In both cases, the result of forbearance remains the same: the statutory and regulatory obligations no longer apply to the carrier or service for which forbearance was granted. Although it was "Congress [that] made the decision . . . to 'grant' forbearance," rather than the Commission, when forbearance is granted by operation of law, *Sprint Nextel*, 508 F.3d at 1132, that difference does not allow the Commission to re-impose regulatory requirements without using the rulemaking process. On the contrary, respect for Congress's determination that Commission inaction should result in forbearance — thereby putting a thumb on the scale in favor of deregulation — requires that the standards for

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[10] Tentative Decision and Request for Further Comments, *Amendment of 47 CFR § 73.658(j)(1)(i) and (ii), the Syndication and Financial Interest Rules*, 94 FCC 2d 1019, ¶ 107 (1983).

[11] Memorandum Opinion and Order, *Orloff v. Vodafone Airtouch Licenses LLC, d/b/a Verizon Wireless*, 17 FCC Rcd 8987, ¶ 22 n.69 (2002) (citing this language with approval), *aff'd*, *Orloff v. FCC*, 352 F.3d 415, 420 (D.C. Cir. 2003); *see also* Second Report and Order, *Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, ¶ 173(1994) ("[I]n a competitive market, market forces are generally sufficient to ensure the lawfulness of . . . terms and conditions of service by carriers who lack market power.").

re-imposing regulations following a grant of forbearance be at least the same when that grant occurs by operation of law.

As in any proceeding adopting new rules, the Commission must compile a record and find substantial evidence warranting regulation — in particular, evidence that "the circumstances . . . previously identified as supporting forbearance h[ave] changed,"[12] such as being "based on changes in market conditions, technical capabilities, or policy approaches to regulation." *Ad Hoc*, 572 F.3d at 911; *see also, e.g.*, *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). That record must be based on evidence of *current* marketplace conditions, especially in a marketplace like the one for enterprise broadband services, which is experiencing "rapid technological changes."[13] Nor can the Commission ignore the fact that the last five-and-a-half years have provided a natural experiment from which to gauge whether the statutory provisions and regulations that previously applied to Verizon's enterprise broadband services are necessary to remedy a marketplace failure. As the D.C. Circuit has held, agencies have "no license to ignore the past when the past relates directly to the question at issue," particularly when there is available "data against which to test the [relevant] proposition[s]" on which the agency's decision is based. *BellSouth Telecomms., Inc. v. FCC*, 469 F.3d 1052, 1060 (D.C. Cir. 2006).

B. In urging the Commission to re-regulate Verizon's enterprise broadband services, Petitioners bear the burden of producing substantial record evidence of a marketplace failure or

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[12] Schlick, *A Third Way Legal Framework for Addressing the Comcast Dilemma* at 8-9.

[13] Notice of Inquiry, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, 22 FCC Rcd 7816, ¶ 12 (2007); *cf. Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009) (invalidating a Commission rule as arbitrary and capricious upon "[c]onsidering the marketplace as it is today").

some other problem in need of a regulatory solution.[14] Instead of attempting to meet that burden, Petitioners complain about Verizon's 2004 forbearance petition and rely on findings the Commission made in 2007 and 2008 in denying, in part, other carriers' petitions for forbearance with respect to their enterprise broadband services. But those complaints and prior rulings are irrelevant here.

First, the Commission cannot act now on complaints about alleged deficiencies in Verizon's 2004 petition for forbearance, which was deemed granted by operation of law in March 2006. No action the Commission takes now would constitute a "den[ial] of the petition . . . within" the statutory deadline. 47 U.S.C. § 160(c). Therefore, the Commission cannot prevent Verizon's petition from having been "deemed granted," and any attempt by the Commission to deny the petition after the period expires would violate that statutory mandate. *See Sprint Nextel Corp.*, 508 F.3d at 1132 ("When the Commission failed to deny Verizon's forbearance petition within the statutory period, Congress's decision — not the agency's — took effect.").

Belatedly acting on Verizon's petition after the deemed grant would also be inconsistent with the Commission's own interpretations of similarly worded provisions of the Communications Act, as well as judicial interpretations of those provisions. For example, Section 204(a)(3) of the Act provides that certain tariffs filed by local exchange carriers shall be "deemed lawful" unless the Commission takes action within a specified seven- or fifteen-day period. The Commission has stated, and the D.C. Circuit has agreed, that once a tariff is

[14] *See* 5 U.S.C. § 556(d) ("Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."); Report and Order, *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, As Amended*, 24 FCC Rcd 9543, ¶ 20 (2009) ("The burden of proof is on the proponent in both formal rulemaking and formal adjudication . . . .").

"deemed lawful" under Section 204(a)(3), the Commission may revisit the tariff's lawfulness prospectively, in a subsequent complaint filed under Section 208, but may not award retrospective damages if it then finds the tariff unlawful. *See ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 411 (D.C. Cir. 2002). Likewise, while the Commission can open a new rulemaking proceeding to impose new regulations on a carrier, it cannot go back and undo the effect of a deemed grant of forbearance.

Second, the Commission's 2007 and 2008 decisions to deny, in part, petitions for forbearance that other carriers filed with respect to their enterprise broadband services were based on the specific records compiled in those proceedings.[15] Even aside from the fact that the records in those cases were developed with respect to other carriers and their particular services, the Commission cannot rely on records from three or four years ago — particularly in a fast moving segment of the marketplace, such as the one for enterprise broadband services — to justify imposing regulatory requirements today. Moreover, the Commission in those other orders did not address evidence of the actual marketplace experience following the grant of Verizon's forbearance petition, in which Verizon has operated unencumbered by the regulatory obligations that Petitioners seek to re-impose. Those five-and-a-half years of marketplace facts provide the Commission with data against which to test the claimed need for regulation, which the Commission cannot ignore. *See BellSouth Telecomms., Inc.*, 469 F.3d at 1060 (agencies have "no license to ignore the past" when there is "data against which to test the [relevant] proposition[s]").

Finally, Petitioners note the current disparity in the regulation of Verizon's enterprise broadband services, as compared with those of other providers. But the goal of parity does not

[15] *See, e.g.*, Memorandum Opinion and Order, *Petition of AT&T for Forbearance Under 47 U.S.C. § 160(c)*, 22 FCC Rcd 18705, ¶¶ 40-41 (2007).

provide a basis for regulating one participant in a marketplace. *See National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1000-02 (2005). Absent a showing of marketplace failure — and Petitioners have thoroughly failed to meet their burden to make such a showing — parity should be achieved by eliminating regulations on other providers, not re-imposing regulations where there has been no demonstration of a need for them.

II. THE PROVISION OF ENTERPRISE BROADBAND SERVICES IS ROBUSTLY COMPETITIVE

As shown above, it is Petitioners' burden to identify a marketplace failure warranting the regulations they seek, which Petitioners have manifestly failed to meet. The omission from the Petition of any claim — let alone evidence — of marketplace failure is particularly telling, because Petitioners are all participants in that marketplace, as providers, purchasers, or both. Indeed, individual petitioners and members of Petitioner Computer & Communications Industry Association purchase enterprise broadband services from Verizon pursuant to private carriage contracts.[16] Furthermore, all broadband providers, including Verizon and Petitioners themselves, must roll out these new services from scratch — there are no "incumbents" in the enterprise broadband marketplace. In all events, as discussed below, the enterprise broadband marketplace is even more competitive today than it was in 2006, when Verizon's petition was granted. Therefore, any attempt by Petitioners to carry their burden and demonstrate a marketplace failure warranting the regulation of Verizon's enterprise broadband services would not succeed.

[16] Although the Ad Hoc Telecommunications Users Committee does not reveal its membership, at least some of its members likely are among the hundreds of end user customers purchasing enterprise broadband services from Verizon under private carriage arrangements.

A. The Marketplace for Enterprise Broadband Services Is Even More Competitive Today Than in Mid-2006

Since March 2006, the marketplace for enterprise broadband services has witnessed innovation and substantial competition resulting in the introduction of new services. No true incumbents exist in this segment of the marketplace, because every provider is deploying new services and facilities that do not piggy-back off of prior TDM-based technologies. Moreover, the Commission has long recognized that "competition in the enterprise market is robust"[17] and that "myriad providers are prepared to make competitive offers" to enterprise customers such that no provider exerts market power.[18] In addition, the customer base for these services is "highly sophisticated" and capable of "negotiat[ing] for significant discounts."[19] This is particularly true in two areas of ever-increasing importance to providers and consumers alike: business Ethernet and mobile backhaul.

1. Business Ethernet Services

Most prominently, business Ethernet services have rapidly developed, and the marketplace for the provision of these services is fiercely competitive. These services are "being offered by numerous non-incumbents, including MSOs, CLECs and formerly IP/MPLS virtual network operators (VNOs)."[20] Among the top providers of business Ethernet services are

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[17] Memorandum Opinion and Order, *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18290, ¶ 73 n.223 (2005).

[18] Memorandum Opinion and Order, *Verizon Communications Inc. and MCI, Inc., Applications for Approval of Transfer of Control*, 20 FCC Rcd 18433, ¶ 74 (2005).

[19] *Id.* ¶ 75; *see also id.* ¶ 76 (noting that this level of sophistication is "significant not only because it demonstrates that these users are aware of the multitude of choices available to them, but also because they show that these users are likely to make informed choices based on expert advice" to "seek out best-price alternatives").

[20] Charles Carr, Yankee Group, *Forecast: Carrier Ethernet Is Finally Unleashed* at 4 (Apr. 2011). Cable companies represent a growing segment of the Ethernet marketplace. As one analyst notes, "[f]or larger businesses, metro Ethernet and value-added services are being offered

tw telecom (#3), Cox (#5), Time Warner Cable (#6), XO (#7), Cogent (#8), and Level 3 (#9), with very little distance between the number four (CenturyLink/Qwest) and number nine (Level 3) providers.[21] At least 21 other companies are providing business Ethernet services: AboveNet, Charter Business, Comcast Business, Covad, Expedient, FiberLight, Frontier, Global Crossing, Lightower, Masergy, NTT, Optimum Lightpath, Orange, Paetec, Reliance Globalcom, Savvis, Sidera Networks, Sprint, SuddenLink, Windstream, and Zayo Group.[22]

Business Ethernet service "is a scalable, reliable and cost-efficient transport service," which provides "an attractive service option for customers migrating from ATM, Frame Relay, SONET and Private Line services."[23] Providers "are increasingly focusing on enhancing the depth of their offerings," and "there are more flavors of Ethernet available today in the market as compared to three years ago, which provides business customers with more choices."[24] Enterprise customers "are increasingly utilizing Ethernet services for domestic and international WAN networking as migration from packet services and private line services accelerates, and for metro-area connectivity."[25] Due to this influx of "multiple suppliers," "[p]ricing pressure on the

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by the cable companies." Philip Cusick et al., JP Morgan, *Cable & Satellite, Initiating on Cable & Satellite; Positive Outlook Driven by Continued Growth and Capital Return Potential* at 49 (Sept. 28, 2011).

[21] Vertical Systems Group: *Mid-2011 U.S. Business Ethernet LEADERBOARD, Competition Heads Up as Demand for Ethernet Services Remains Strong in the First Half of the Year*, Aug. 16, 2011, http://verticalsystems.com/prarticles/stat-flash-08-2011-Mid-Year-2011_Leaderboard_prnews.html. Rick Malone, principal at Vertical Systems Group, explained that " '[c]ompetition heated up in the U.S. market during the first half of 2011, with very strong enterprise demand that is tracking the 30+% port growth we quantified in 2010.' " *Id.*

[22] *See id.*

[23] Roopashree Honnachari, Frost & Sullivan, *Demystifying Carrier Ethernet Services: No One Size Fits All*, BCS 5-02, at 1 (Apr. 6, 2011).

[24] *Id.*

[25] Nav Chandler, IDC, *U.S. Carrier Ethernet Services 2011-2015 Forecast*, IDC #231257, at 1 (Nov. 2011).

carrier Ethernet services market continues to accelerate" because "Ethernet users expect a lower price per bit."[26]

As a result of " 'a 10x surge in the past five years,' " business Ethernet bandwidth has recently overtaken legacy bandwidth.[27] Ethernet is replacing "legacy services such as SONET, Frame Relay and ATM because it provides more flexible bandwidth options and is highly scalable, which in turn makes it highly cost efficient."[28] There is also fierce competition in helping customers migrate from legacy ATM, frame relay, and private line services to business Ethernet services.[29] Industry analysts predict that based on this "growth in demand . . . Ethernet revenue for the industry will generate a [compound annual growth rate] of over 20% for the foreseeable future."[30]

2. Mobile Backhaul Services

The marketplace for mobile backhaul services is also highly competitive, as the "large scale 'mass migration' of wireless backhaul from TDM to Ethernet," requiring new fiber deployment, has been a "specific factor contributing to particularly rapid growth" of Ethernet

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[26] Ron Kline, Ovum, *Market Segment Profile: Carrier Ethernet* at 2 (Oct. 2011).

[27] Vertical Systems Group, *U.S. Ethernet Bandwidth Surpasses Legacy Bandwidth* (July 26, 2011), http://verticalsystems.com/prarticles/stat-flash-2011-July.html.

[28] Colby Synesael & Jonathan Charbonneau, Cowen and Company, *Telecom and Data Services, Industry Overview, Fiber: A Sector Evolves* at 14 (Oct. 29, 2010).

[29] Nav Chandler & Courtney Munroe, IDC, *U.S. Frame Relay and ATM Services 2011-2015 Forecast and Analysis*, IDC #230578, at 4, 8 Table 7 (Sept. 2011); Nav Chandler, IDC, *U.S. Private Line 2011-2015 Forecast and Analysis*, IDC #228077, at 2 (May 2011); Honnachari, *Demystifying Carrier Ethernet Services: No One Size Fits All* at 1.

[30] *Q2 2011 tw telecom Inc. Earnings Conference Call – Final*, FD (Fair Disclosure) Wire, Transcript 080911a4167350.750 (Aug. 9, 2011) (statement by tw telecom EVP and CFO Mark Peters).

service.[31] As a result, the marketplace is "rife with a large array of operators, including incumbent local exchange carriers (ILECs), competitive local exchange carriers (CLECs), cable multiple system operators (MSOs), fiber-based providers, microwave operators, and resellers."[32] Competitive wholesalers "are being particularly aggressive in targeting new wireless backhaul opportunities," while cable operators "such as Charter Communications, Comcast Business, Cox Carrier Services and Time Warner Cable Business Class have become a credible threat in the wireless backhaul race."[33] Selling "wholesale [backhaul] services to mobile, long-distance and other competitive carriers is becoming an increasingly significant element of [MSOs'] revenue plan."[34] For example, Cox "expects backhaul to account for over half its wholesale revenue in 2011, or more than $500 million," and Comcast "anticipates the addressable backhaul market within its footprint is roughly $1 billion."[35] Analysts have found that this "[g]reater competition among vendors, as well as competing backhaul platforms, is creating downward pricing pressures for backhaul service providers; which, in turn, is impacting their revenues and profitability."[36]

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[31] Insight Research Corporation, *Carrier and Ethernet Services: Public Ethernet in Metro and Wide Area Networks 2011-2016*, at 7 (Aug. 2011).

[32] Frost & Sullivan, *U.S. Mobile Backhaul Services Market: Wireless Service Provider Spending Trends*, BCS508, at 6 (Oct. 2011); *see also* Jennifer Pigg, Yankee Group, *4G Trends, Wholesale Mobile Backhaul: There's Gold in Them There Hauls* at 4 (June 29, 2011), http://www.4gtrends.com/articles/40130/wholesale-mobile-backhaul-theres-gold-in-them-ther/; Synesael & Chambonneau, *Fiber: A Sector Evolves* at 17-18.

[33] Sean Buckley, FierceTelecom, *Telco BackHaul Strategies, Wireline Wholesale Carriers Feed Off the Wireless Backhaul Bonanza* at 2 (Nov. 2011), ebook *available at* http://www.fiercetelecom.com/offer/telco_backhaul.

[34] Pigg, *Wholesale Mobile Backhaul: There's Gold in Them There Hauls* at 4.

[35] *Id.*

[36] Frost & Sullivan, *U.S. Mobile Backhaul Services Market: Wireless Service Provider Spending Trends* at 6.

This competition for mobile backhaul services is fueled by dramatic increases in wireless data traffic,[37] further boosting demand for backhaul service and making it necessary to upgrade to higher-capacity facilities in all areas. The average backhaul requirements for a cell cite "more than tripled to 35 Mbps in 2011," from "10 Mbps in 2008," and are projected to nearly triple again "by 2015," when wireless providers "will demand 100 Mbps."[38] The global demand for mobile backhaul equipment is projected to reach $10.4 billion in 2014 (compared to $7.2 billion in 2009).[39] Another report projects that the microwave equipment segment of the marketplace will exceed $12 billion alone by 2016, due largely to "the need for operators to deploy new base stations to provide good quality of experience over LTE networks."[40]

Sprint — one of the Petitioners — has been a major beneficiary of this intense competition. Sprint recently announced that it had awarded a new set of mobile backhaul contracts to a wide variety of providers. Sprint stated that it "will end up with '*25 to 30 significant backhaul providers*' that will likely be a mix of incumbent LECs, cable MSOs and

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[37] Commission staff reported a year ago that "mobile data demand is expected to grow between 25 and 50 times current levels within 5 years." FCC Staff Technical Paper, *Mobile Broadband: The Benefits of Additional Spectrum* at 5 (Oct. 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-302324A1.pdf.

[38] Pigg, *Wholesale Mobile Backhaul: There's Gold in Them There Hauls* at 4; *see also* Press Release, Visant Strategies, *Backhaul Capacity of United States Mobile Wireless Networks Will Continue to Increase Substantially, New Visant Strategies Report Finds* (Dec. 2011), http://www.visantstrategies.com/forecast/US_wireless_backhaul_4G.html ("[B]ase stations with more than 24 Mbps of backhaul capacity will grow by more than a factor of twenty from 2009 to 2015 while in 2015 the number of base stations with less than 12 Mbps of backhaul capacity will be half of that today."); Andy Fuertes & Larry Swasey, *Mobile Backhaul – The Backhaul Heat Is On*, CED, Sept. 30, 2011, http://www.cedmagazine.com/articles/2011/09/mobile-backhaul-the-backhaul-heat-is-on ("Mobile carriers in the United States are seeking an average of 100 Mbps to 300 Mbps per tower on 3.5G and 4G cell sites for backhaul.").

[39] *See* Press Release, Infonetics Research, *Shift Seen In Operator Strategy for Mobile Backhaul; Equipment Spending Up 21%* (Apr. 21, 2010), http://www.infonetics.com/pr/2010/Mobile-Backhaul-and-Microwave-Market-Highlights.asp.

[40] Ian Mansfield, *Microwave Backhaul Equipment Market To Surpass US$ 12 Billion by 2016*, Cellular-News, May 25, 2011, http://www.cellular-news.com/story/49312.php.

alternative carriers, all of whom will be expected to deliver Ethernet predominantly over fiber for Sprint's new multi-mode network."[41] The company has credited this growth in alternatives and "back haul flexibility" with reducing significantly its backhaul costs, telling investors that, while it previously was "basically a T1 organization," "[n]ow we've got the opportunity to use fiber or microwave and we choose site by site, and it's an economic decision and at times has to be a technology decision."[42] This flexibility has given Sprint "a very much improved cost structure."[43]

B. The Petitioners, No Different From Numerous Other Providers, Are Thriving in the Marketplace for Enterprise Broadband Services

As analysts and providers themselves acknowledge, numerous providers are thriving in this highly innovative and rapidly growing marketplace. That is true of the petitioners in particular.

1. tw telecom

Ranked as the third largest provider of business Ethernet services in the United States, tw telecom has experienced substantial growth. Frost & Sullivan awarded tw telecom its 2011 Growth Leadership Award for Retail Carrier Ethernet Services.[44]

In its Q3 earnings statement, tw telecom announced that the company "[g]rew enterprise revenue 3.0% sequentially and 10.0% year over year," "[g]rew data and Internet revenue 4.1% sequentially and 18.6% year over year, driven primarily by a 27.5% increase year over year in

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[41] *See* Wilson, *Sprint to Reveal Backhaul Contract Winners Friday* (emphasis added).

[42] *Sprint 4G Strategy/Network Update – Final*, FD (Fair Disclosure) Wire, Transcript 100711a4207432.732 (Oct. 7, 2011).

[43] *Id.*

[44] *See* Press Release, tw telecom, *tw telecom Receives Prestigious Frost & Sullivan Growth Leadership Award for Retail Carrier Ethernet Services* (Sept. 15, 2011), http://newsroom.twtlecom.com/index.php?s=24615&item=61498.

strategic Ethernet and VPN-based products," and saw an "18.6% increase for data and Internet services, primarily due to continued success with Ethernet and IP-based products."[45]

tw telecom's Chairman, CEO, and President Larissa Herda recently explained that tw telecom is "selling Ethernet services to telecommunications carriers in general," which is "a relatively new phenomenon," and that for some wireless carriers, it is "a preferred provider for these Ethernet networks."[46] As "enterprise bandwidth needs continue to grow, increasing the demands on customers' networks," tw telecom has seen "30% year-to-date growth in the strategic product revenue" driven by "demand for [tw telecom's] IP VPN and Ethernet services."[47] In the first half of 2011, tw telecom added "nearly 60% more . . . buildings connected to [its] fiber network" than it did in the first half of 2010.[48] tw telecom's new products driving new contract growth include "converged services and fractional 10-gig Ethernet."[49]

2. EarthLink

EarthLink has also thrived in the growing marketplace for enterprise broadband services. The company announced earlier this year that it has evolved into " 'a leading IP solutions provider with well over half of [its] revenue . . . generated from our EarthLink Business

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[45] Release, *tw telecom Reports Third Quarter 2011 Results* at 1, 3 (Nov. 7, 2011), http://www.twtelecom.com/investor-guide/financial reporting/ (link to 3rd Quarter, 2011-Earnings Release - TWTC_Q32011EarningsReleaseFINAL.pdf).

[46] *Q1 2011 TW Telecom Inc Earnings Conference Call – Final*, FD (Fair Disclosure) Wire, Transcript 051111a3993007.707 (May 11, 2011) (statement by tw telecom Chairman, CEO and President Larissa Herda); *see also id.* ("[W]e will expect to see continued progress with those types of services.").

[47] *Q2 2011 tw telecom Inc. Earnings Conference Call – Final*, FD (Fair Disclosure) Wire, Transcript 080911a4167350.750 (Aug. 9, 2011) (statement by tw telecom Chairman, CEO and President Larissa Herda).

[48] *Id.*

[49] *Id.*

segment,' " and that growth is expected to "increase."[50] In the third quarter of 2011, for example, EarthLink's revenue of $357.3 million represented a "146% increase from the third quarter of 2010, reflecting the acquisitions of ITC^Deltacom and One Communications."[51] EarthLink's business services "represented 74% of [its] total revenue in the third quarter of 2011, as compared to 23% of revenue in the third quarter of 2010."[52]

EarthLink has a "'dense fiber network across the eastern half of the United States and a ubiquitous IP footprint that makes [them] unique in terms of the value proposition [they] can offer multi-location enterprise customers.'"[53] EarthLink has similarly touted the fact that it has "one of the largest fiber networks in the country" and "the capability to provide hosted voice services on the IP network on a national basis."[54]

In mid-December 2011, EarthLink launched the "Complete suite of voice, data and Internet for mid-market businesses and large enterprises" that blend technologies including "[l]ocal, long-distance, toll-free and integrated Internet and data services, including line side,

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[50] Press Release, EarthLink, *EarthLink Announces First Quarter 2011 Results* (Apr. 28, 2011), http://www.earthlink.net/about/press/pressrelease.faces?id=843.

[51] Press Release, EarthLink, *EarthLink Announces Third Quarter 2011 Results* (Oct. 27, 2011), http://www.earthlink.net/about/press/pressrelease.faces?id=875.

[52] *Id.*

[53] Press Release, EarthLink, *EarthLink Announces Fourth Quarter and Full Year 2010 Results* (Feb. 8, 2011), http://www.earthlink.net/about/press/pressrelease.faces?id=833; *see also Q1 2011 EarthLink Inc. Earnings Conference Call – Final*, FD (Fair Disclosure) Wire, Transcript 042811a3955982.782 (Apr. 28, 2011) (statement by EarthLink Chairman and CEO Rolla Huff) ("The first quarter was an important one for our Company, as it represented the first full quarter following the close of our acquisition of DeltaCom. In addition, during the quarter we closed on our acquisition of STS Telecom and one day after the end of the first quarter, we closed on our acquisition of One Communications. Through it all, the people of EarthLink maintained their focus, producing $52 million of free cash flow.").

[54] *Q2 2011 EarthLink Inc. Earnings Conference Call – Final*, FD (Fair Disclosure) Wire, Transcript 072811a4153884.784 (July 28, 2011) (Comments by EarthLink Chairman and CEO Rolla Huff).

hosted, PRI, and SIP, and access types, from T1 and DSL to Ethernet and wireless."[55] EarthLink made these services available "as a result of multiple acquisitions . . . over the past year."[56] EarthLink has recently expanded its network to include "major transport network builds, new OC-192 10 Gigabit Ethernet fiber rings, additional high-speed access points for private Voice over IP network traffic, nationwide IP MPLS and EVDO wireless network expansions, and . . . high-capacity fiber rings" for "Earthlink's enterprise class data centers."[57]

3. Sprint

Sprint currently offers Ethernet access "in 40 markets nationwide and 37 markets globally."[58] Sprint plans to "build[] upon existing availability of Ethernet access . . . [to] extend [its] service to 65 markets by the end of 2011,"[59] and it has "actively invested in EoC to Ethernet-enable more customer locations."[60] After seeing "the advantages of IP" before many other providers, Sprint "built an IP network on top of [its] ATM infrastructure" that it can readily utilize to serve its Ethernet based customers.[61] Sprint recently received a PilotHouse Award

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[55] Press Release, EarthLink, *EarthLink Gives Partners 'Complete' Package to Sell Nationwide*, Dec. 12, 2011, http://www.channelpartnersonline.com/news/2011/12/earthlink-gives-partners-complete-package-to-sell.aspx.

[56] *Id.*

[57] EarthLink Press Release, *EarthLink Announces Network Expansion and Enhancements for Scalability and Growth* (Oct. 17, 2011), http://www.earthlink.net/about/press/pressrelease.faces?id=873.

[58] News Release, Sprint, *Sprint Continues Nationwide Ethernet Access Expansion for Businesses* (Sept. 7, 2011), http://newsroom.sprint.com/article_display.cfm?article_id=2026.

[59] *Id.*

[60] Frost & Sullivan, *Retail Carrier Ethernet Services Market Update, 2011, Revenue Growth Continues even as Competition Heats Up!*, N99A-63, at 29 (Aug. 2011).

[61] Insight Research Corporation, *Carriers and Ethernet Services: Public Ethernet in Metro & Wide Area Networks* at 31.

from Nemertes Research for its managed router services after receiving the highest score in either the "leaders" or "challengers" category for this category of services.[62]

Moreover, as noted above, Sprint recently announced a new round of awards for backhaul expansion for 15,000 sites, and it expects an *additional* round of backhaul contract awards in mid-2012 for another 15,000 sites.[63] As a result, Sprint "will end up with '*25 to 30 significant backhaul providers*'" from this round of contract bids, "all of whom will be expected to deliver Ethernet predominantly over fiber for Sprint's new multi-mode network."[64] Sprint has attested that this expansion will provide it substantial "flexibility" in reducing its backhaul costs, telling investors that, while it previously was "basically a T1 organization," it now has the "opportunity to use fiber or microwave and we choose site by site, and it's an economic decision and at times has to be a technology decision."[65] According to Sprint, this flexibility will enable Sprint's networks to better "reach universities, hospitals, military bases and other sites with high-bandwidth needs, helping to amortize the cost of fiber."[66]

4. BT Americas

BT Americas, a subsidiary of BT Group, is rapidly expanding its enterprise broadband service offerings in the United States and globally. The company is now offering to its customers across 28 countries (including the United States) "a new E-LAN service, dramatically

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[62] *Sprint Named Top Provider – Managed Router Services, Market Challengers*, http://convergence.sprint.com/pdf_view.aspx?title=Sprint Named Top Provider – Managed Router Services, Market Challengers&pdf=/downloads/Nemertes PilotHouse Award Summary_2011.pdf (last visited Dec. 15, 2011).

[63] *See* Wilson, *Sprint to Reveal Backhaul Contract Winners Friday*.

[64] *Id.* (emphasis added).

[65] *Sprint 4G Strategy/Network Update – Final*, FD (Fair Disclosure) Wire, Transcript 100711a4207432.732 (Oct. 7, 2011).

[66] Wilson, *Sprint To Reveal Backhaul Contract Winners Friday*.

increasing flexibility for organizations with ambitions to use Ethernet 'any to any' connectivity between sites."[67] The service "is used typically to connect sites and applications that have complex and rapidly changing network traffic patterns."[68] According to a principal analyst at Current Analysis, " '[w]ith this extension into new countries and the launch of its E-LAN service BT is clearly improving its position in the global Ethernet market.' "[69]

In 2008, BT's Global Services unit was selected for the "leaders" quadrant in the Gartner Magic Quadrant for Managed and Professional Network Service Providers, Worldwide.[70] BT was selected for the "leaders" quadrant after "Gartner evaluated 18 vendors for IT services for business communications systems" in North America.[71] The president of BT Americas applauded this selection as " 'a testimony to how our strong and growing presence in the Americas positions us to better serve the global needs of U.S. and Canada-based multinationals.' "[72]

Most recently, BT and Orange Business Services entered into a collaborative agreement "for a global commercial service to allow each other's video exchange customers to participate

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[67] PR Newswire, *BT Connect – New Ethernet Connect Services Improving Freedom To Innovate* (Nov. 17, 2011), http://online.wsj.com/article/PR-CO-20111117.html.

[68] *Id.*

[69] *Id.*; *see also id.* ("Neil Sutton, VP Global Portfolio, BT Global Services, said: 'BT Connect, our portfolio of network services, is now an even richer set of services that meet the different needs of our global customers, covering IP, Ethernet, Internet and application performance management. Our customers are looking for choice and flexibility to meet evolving needs. For those of our customers requiring specific services for specific needs or for those that require exclusive control of their IP architecture, Ethernet Connect is now a great global service. By extending the availability of that service to 28 countries and adding capabilities such as E-LAN, we are now offering a highly compelling solution in the market.' ").

[70] Webwire, *BT Places in Leaders Quadrant in Key Industry Analyst Firm's Worldwide Report* (Sept. 10, 2008), http://www.webwire.com/ViewPressRel.asp?aId=74393.

[71] *Id.*

[72] *Id.*

in telepresence meetings with one another," which will facilitate "real-time, virtual meetings around the world" through "a directory [that] helps customers see which organizations are registered and what locations are available through the inter-provider connection."[73]

CONCLUSION

For the foregoing reasons, the Commission should deny Petitioners' request to re-regulate Verizon's enterprise broadband services, and, to the extent the Commission desires parity among providers, it should forbear from applying the regulations to these services in order to further fuel the rapid growth in this highly competitive marketplace.

[73] PRNewswire, *BT and Orange Business Services Collaborate To Extend Telepresence Connectivity* (Dec. 8, 2011), http://www.sacbee.com/2011/12/08/4108688/bt-and-orange-business-services.html

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