

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

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| In the Matter of |) | |
| |) | |
| Petition of tw telecom inc. et al. to Establish |) | |
| Regulatory Parity in the Provision of |) | WC Docket No. 11-188 |
| Non-TDM-Based Broadband Transmission |) | |
| Services |) | |

**REPLY COMMENTS OF
TW TELECOM, BT AMERICAS, CBeyond AND EARTHLINK**

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Pursuant to the Commission’s *Public Notice* in the above-captioned proceeding,¹ tw telecom inc., BT Americas Inc., Cbeyond, Inc., and EarthLink, Inc. hereby submit these reply comments in support of the Petition in the above-captioned proceeding.²

I. INTRODUCTION AND SUMMARY.

The instant Petition seeks to establish a level playing field in the provision of non-TDM-based broadband transmission services by applying to Verizon the same regulations that apply to all other providers of such services.³ As Verizon acknowledges, the nation’s business customers have been increasingly demanding Ethernet services and other non-TDM-based broadband transmission services.⁴ Not surprisingly, Verizon and the incumbent LECs that have acquired Verizon assets (collectively, “the incumbent LECs”) seek to retain their competitive advantage in

¹ See *Comment Sought on Petition Seeking Reverse of Forbearance Grant to Verizon Telephone Companies by Operation of Law*, Public Notice, 26 FCC Rcd. 15683 (2011) (“*Public Notice*”).

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 generally *Petition*.

⁴ See Verizon Comments at 12. All references to “Comments” are to those filed in WC Dkt. No. 11-188, unless otherwise indicated.

the non-TDM-based broadband transmission services market and to that end, they raise several arguments in opposition to the Petition. None of these arguments has merit.

First, the incumbent LECs claim that the Commission cannot reverse the deemed grant of forbearance to Verizon because the marketplace for non-TDM-based broadband transmission services today is, in their view, very competitive and lacking in any problems that require a regulatory solution. But the Commission has consistently applied Sections 201, 202, and 208 of the Act (as well as the other statutory provisions and regulations from which Verizon was granted forbearance) in competitive markets and in the absence of any market failure. Moreover, even if the current marketplace for non-TDM-based broadband transmission services were competitive, the current market conditions would be virtually indistinguishable from those in 2007 and 2008 when the Commission retained application of the regulatory requirements at issue to AT&T, Embarq, Frontier, and Qwest.

In fact, in order to reverse the deemed grant of forbearance under Section 10 of the Act, the Commission need only find that the regulations at issue are required to achieve the desired goal of consumer protection or the desired goal of just and reasonable and not unjustly or unreasonably discriminatory rates, terms, and conditions. In addition, the Commission need not rely on an extensive factual record in order to reverse the deemed grant of forbearance. Instead, the Commission can rely on its understanding of market conditions today and reasonably make the same predictive judgment that it made in the *AT&T Forbearance Order*, the *Embarq/Frontier Forbearance Order*, and the *Qwest Forbearance Order* (i.e., that the application of general Title II economic regulation, Title II public policy regulation, and certain *Computer Inquiry* requirements is “necessary” and/or in the public interest under Section 10). The Commission can and should do so now.

Second, the incumbent LECs argue that the Commission cannot reverse the deemed grant of forbearance unless it initiates a rulemaking proceeding. This is not true. In order to reapply existing statutory obligations and Commission regulations to Verizon, the Commission can exercise its broad discretion to proceed using an informal adjudication. In fact, a proceeding to reverse a deemed grant of forbearance closely resembles proceedings, such as waiver rescission and declaratory ruling proceedings, which the Commission has treated as informal adjudications. In keeping with its existing informal adjudication procedure, the Commission need only do what it has already done—provide public notice of the Petition and an opportunity for comment. And, if reversal of the deemed grant of forbearance is treated as a “rule” rather than an informal adjudication, it would be an interpretative rule that is exempt from the APA’s rulemaking requirements.

II. THE COMMISSION CAN REASONABLY DECIDE TO REVERSE THE DEEMED GRANT OF FORBEARANCE BASED ON ITS UNDERSTANDING OF MARKET CONDITIONS AS THEY EXIST TODAY.

The incumbent LECs assert that the Commission cannot reverse the deemed grant of forbearance to Verizon because “the marketplace [for non-TDM-based broadband transmission services] as it exists today” is “robustly competitive”⁵ and “there is no marketplace failure . . . that could warrant re-regulation of Verizon’s services.”⁶ These arguments are meritless.⁷

⁵ Verizon Comments at 2, 10; *see also* FairPoint and Frontier Comments at 8 (“The Market for Non-TDM-Based Broadband Services Is Competitive and Therefore Re-Regulation Is Not Necessary”).

⁶ Verizon Comments at 2; *see also* FairPoint and Frontier Comments at 7 (arguing that Petitioners must show that “consumers are being harmed by the Verizon Forbearance”); Hawaiian Telcom Comments at 4 (asserting that the Petition must be denied because Petitioners “do not identify any anticompetitive issues in today’s market”).

⁷ The incumbent LECs’ arguments that the Commission cannot reverse the deemed grant of forbearance because Verizon has relied on that grant to enter into numerous contracts for non-TDM-based broadband transmission services (*see, e.g.*, CenturyLink Comments at 5-6; Hawaiian

Under Section 10 of the Act,⁸ the Commission is required to forbear from a regulation or statutory provision if the following three-part standard is met: (1) enforcement of the regulation or provision is not necessary to ensure that rates, practices, classifications, or regulations of the telecommunications carrier or telecommunications service are just and unreasonable and not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance is consistent with the public interest.⁹ It follows that, if any one of these three parts of the standard is not met, the Commission must reverse a prior grant of forbearance.¹⁰

Telcom Comments at 7-8) are also without merit. As the Petitioners have already explained, Verizon has been on notice since October 2007 that the Commission intended to revisit the deemed grant, and therefore, Verizon could not have reasonably relied on the belief that the unregulated status of its non-TDM-based broadband transmission services would remain unchanged. *See* Petition at 22. Moreover, application of the regulatory requirements at issue would not prevent Verizon from either entering into contracts to provide non-TDM-based broadband transmission services or continuing to offer such services pursuant to contract. Indeed, CenturyLink fails to provide any concrete examples of how reversal of the deemed grant would “deprive Verizon customers of their contracts.” CenturyLink Comments n.22. Nor does Hawaiian Telcom offer any support for its claim that application of general Title II economic regulation, Title II public policy regulation, and the relevant *Computer Inquiry* requirements to Verizon could “lead[] to price increases” or otherwise harm customers of Verizon’s non-TDM-based broadband transmission services. *See* Hawaiian Telcom Comments at 7.

⁸ 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).

⁹ 47 U.S.C. § 160(a)(1)-(3).

¹⁰ *Cellular Telecomms. & Internet Ass’n v. FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003) (“The three prongs of § 10(a) are conjunctive. The Commission could properly deny a petition for forbearance if it finds that any one of the three prongs is unsatisfied.”). Nothing in the Act precludes the Commission from reversing a prior grant of forbearance. Nor is there any provision in the Act that precludes the Commission from reversing a deemed grant of forbearance by Congress. Furthermore, given that the primary intent of the deemed grant provision in Section 10(c) was to compel the Commission to act on forbearance requests in a timely manner (*see* Cong. Rec. S7897 (June 7, 1995)), it would be absurd if the Commission were prohibited from modifying or reversing a deemed grant of forbearance once the agency ultimately decided to act.

In determining whether a provision is “necessary” to protect consumers or to prevent unjust or unreasonable or unjustly or unreasonably discriminatory rates, terms and conditions, the Commission need not find that the regulations or provisions at issue are “absolutely required” or “essential” to achieve these outcomes. The D.C. Circuit has held that in deciding to retain regulations as “necessary” under Section 10(a)(2) of the Act, it is sufficient for the Commission to find that such regulations (e.g., wireless number portability requirements) “are required to achieve the desired goal of consumer protection.”¹¹ That is, “[i]n the forbearance context, . . . it is reasonable to construe ‘necessary’ as referring to the existence of a strong connection between what the agency has done by way of regulation and what the agency permissibly sought to achieve with the disputed regulation.”¹² Under this rationale, it is also sufficient for the Commission to find that regulations are “necessary” under Section 10(a)(1) of the Act if there is a strong connection between enforcing the regulation and achieving the desired goal of just and reasonable and not unjustly or unreasonably discriminatory rates, terms, and conditions. Otherwise, under a more restrictive interpretation of “necessary” under either Section 10(a)(2) or 10(a)(1), forbearance would *always* be granted “because it is difficult to imagine a regulation whose enforcement is *absolutely required* or *indispensable* to protect consumers”¹³ or absolutely required or indispensable to ensure that rates, terms, and conditions are just and reasonable and not unjustly or unreasonably discriminatory.¹⁴

¹¹ See *Cellular Telecomms. & Internet Ass’n*, 330 F.3d at 512.

¹² *Id.*

¹³ See *id.* at 511 (emphasis in original).

¹⁴ Similarly, the D.C. Circuit has upheld the Commission’s less restrictive interpretation of “necessary in the public interest” under Section 11 of the Act. See *Cellco P’ship v. FCC*, 357 F.3d 88, 93-101 (D.C. Cir. 2004). Section 11 requires the Commission to determine whether any of its regulations “is no longer necessary in the public interest as a result of meaningful economic

Nor is it necessary for the Commission to rely on an extensive factual record in order to apply the regulations at issue to Verizon in its provision of non-TDM-based broadband transmission services. Under D.C. Circuit precedent, when deciding to retain a regulation as “necessary in the public interest” under Section 11 of the Act, the Commission is not required to meet a “special evidentiary burden”¹⁵ (beyond a reasonable explanation for its decision). In *Cellco Partnership v. FCC*, Verizon Wireless argued that in order to retain an annual reporting requirement for CMRS carriers providing international service, “the Commission may not rely on its initial justification for adoption of a rule, but instead must provide [specific record] evidence to demonstrate that its regulation remains essential in light of present market conditions.”¹⁶ Verizon Wireless further argued that the Commission ignored “its prior findings that the CMRS and international markets are highly competitive,” “failed to link the monitoring function to any possible regulatory problem,” and failed to explain its rationale for eliminating quarterly reports but retaining annual reports.¹⁷ The court rejected all of these arguments. It found instead that the Commission can “rely on its predictive judgment or properly supported

competition between providers of such service.” 47 U.S.C. § 161(a)(2). The court held that “the Commission reasonably interpreted § 11 to require it to ‘reevaluate regulations in light of current competitive market conditions to see that the conclusion [it] reached in adopting the rule — that [the rule] was needed to further the public interest — remains valid.’” *Cellco P’ship*, 357 F.3d at 98 (alterations in original). The Commission’s interpretation was reasonable in part because it “avoid[ed] absurd results where a rule is ‘necessary’ when adopted but not when it is subjected shortly thereafter to biennial review under § 11.” *Id.*

¹⁵ *Id.* at 90.

¹⁶ *Id.* at 95.

¹⁷ *Id.* at 101.

inferences in determining to retain a regulation” under Section 11.¹⁸ “While the Commission’s explanation was not lengthy,” the court deferred to the Commission’s predictive judgment that “as the use of cell[ular] telephones increases, CMRS carriers will cease to hold a *de minimis* share of the international telecommunications market,” and the Commission thus had an “ongoing need for data by which to monitor industry trends.”¹⁹ While *Cellco Partnership* involved Section 11, there is no reason that the Commission cannot rely on predictive judgments in determining to retain regulations under Section 10.

Applying these principles to the instant Petition to reverse the deemed grant of forbearance, it is clear that there is ample basis for the Commission to reapply to Verizon the same bedrock Title II regulations that apply to all other providers of non-TDM-based broadband transmission services. *First*, the incumbent LECs’ claim that the purportedly competitive nature of the market for non-TDM-based broadband transmission services justifies forbearance is flatly inconsistent with Commission precedent. The Commission has consistently retained the regulatory requirements at issue—including those within the category of “general Title II economic regulation”²⁰—in competitive markets and in the absence of a demonstrated market failure. For example, in the *PCIA Forbearance Order*, the Commission expressly declined broadband PCS providers’ request to forbear from Sections 201 and 202 of the Act notwithstanding the fact that such providers were “operating in an increasingly competitive

¹⁸ *Id.* at 98; *see also id.* at 102 (holding that the Commission can “exercis[e] its predictive judgment in assessing regulatory necessity in light of current competitive market conditions” under Section 11).

¹⁹ *Id.* at 102.

²⁰ *See* Petition at 10 & n.39.

environment” characterized by falling prices and increasingly diverse service offerings.²¹ The Commission continued to apply these “bedrock” provisions of the Act in large part because “[S]ections 201 and 202 and the [S]ection 208 complaint process [serve] as important safeguards to protect consumers *in the event of a market failure*” in the future.²² In particular, “[c]ompetitive markets increase the number of service options available to consumers, but they do not necessarily protect all consumers from all unfair practices” and they “may fail to deter providers from . . . discriminating against[] customers whom they view as less desirable.”²³

Likewise, in the *Orloff Order* cited by Verizon, the Commission emphasized that it was “not forbearing from applying [S]ection 202(a)” of the Act because “Section 202 continues to act as a powerful protection for CMRS consumers, even if it was not violated in this case.”²⁴ Specifically, “[i]f a CMRS market were inadequately competitive, or if some other market failure limited consumers’ abilities to use market forces to protect themselves, Section 202 could be implicated.”²⁵ The Commission further noted that it would continue to apply Section 202 because “competition alone” would not necessarily prevent unreasonable discrimination.²⁶

²¹ 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, ¶ 21 (1998) (“*PCIA Forbearance Order*”).

²² *Id.* ¶ 16 (emphasis added).

²³ *Id.* ¶ 23.

²⁴ *Orloff v. Vodafone AirTouch Licenses, LLC, d/b/a Verizon Wireless*, Memorandum Opinion and Order, 17 FCC Rcd. 8987, ¶ 22 (2002) (“*Orloff Order*”).

²⁵ *Id.*

²⁶ *Id.*

Second, even if the marketplace for non-TDM-based broadband transmission services today were competitive, the current market conditions would be virtually indistinguishable from those in 2007 and 2008 when the Commission retained application of the regulatory requirements at issue to AT&T, Embarq, Frontier, and Qwest. During that period, the Commission found that the non-TDM-based broadband transmission services market was characterized by “a myriad of providers prepared to make competitive offers to enterprise customers.”²⁷ The Commission also found, among other things, that “there [we]re many significant providers of . . . Ethernet-based services.”²⁸ It nevertheless continued to apply general Title II economic regulation (as well as “Title II public policy regulation” and certain *Computer Inquiry* requirements) to AT&T, Embarq, Frontier, and Qwest.²⁹ The Commission made a predictive judgment that these backstop regulations were necessary and in the public interest notwithstanding the existence of competition. For example, the Commission found that while there was sufficient competition to warrant relief from dominant carrier tariffing

²⁷ See *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, Memorandum Opinion and Order, 22 FCC Rcd. 18705, ¶ 22 (2007) (“*AT&T Forbearance Order*”); *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*, Memorandum Opinion and Order, 22 FCC Rcd. 19478, ¶ 21 (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, ¶ 25 (2008) (“*Qwest Forbearance Order*”).

²⁸ See *AT&T Forbearance Order* ¶ 23; *Embarq & Frontier Forbearance Order* ¶ 22; *Qwest Forbearance Order* ¶ 26.

²⁹ See *AT&T Forbearance Order* ¶¶ 65-68 (general Title II economic regulation); *id.* ¶¶ 72-75 (Title II public policy regulation); *id.* ¶ 58 (*Computer Inquiry* requirements); *Embarq & Frontier Forbearance Order* ¶¶ 57-60 (general Title II economic regulation); *id.* ¶¶ 64-67 (Title II public policy regulation); *id.* ¶ 51 (*Computer Inquiry* requirements); *Qwest Forbearance Order* ¶¶ 62-65 (general Title II economic regulation); *id.* ¶¶ 69-72 (Title II public policy regulation); *id.* ¶ 59 (*Computer Inquiry* requirements).

requirements, Sections 201, 202, and 208 of the Act were necessary “safeguards” to ensure that such relief “will not result in unjust, unreasonable, or unreasonably discriminatory rates, terms, and conditions in connection with [non-TDM-based broadband transmission] services.”³⁰

Similarly, the Commission continued to apply nondominant carrier streamlined discontinuance, streamlined transfer of control, and streamlined tariffing requirements because it had already “necessarily determined that these requirements were needed to protect the public interest” even in “competitive markets.”³¹ Thus, even if the current marketplace for non-TDM-based broadband transmission services were “highly competitive”³² and filled with “multiple suppliers” of Ethernet services,³³ the Commission would be fully justified in concluding that there is a “strong connection” between applying the Title II regulations at issue to Verizon’s non-TDM-based broadband transmission services and ensuring just, reasonable and not unjustly or unreasonably discriminatory prices as well as, more generally, protecting the retail and wholesale customers that purchase those services.

In sum, the Commission, relying on its understanding of conditions in the non-TDM-based broadband transmission services market today, can reasonably make the same predictive judgment regarding the regulations at issue that it made in the *AT&T Forbearance Order* (as well as the *Embarq/Frontier Forbearance Order* and the *Qwest Forbearance Order*). That is, the Commission can find that application of general Title II economic regulation, Title II public

³⁰ See *AT&T Forbearance Order* ¶ 67; *Embarq & Frontier Forbearance Order* ¶ 59; *Qwest Forbearance Order* ¶ 64.

³¹ See *AT&T Forbearance Order* ¶ 68; *Embarq & Frontier Forbearance Order* ¶ 60; *Qwest Forbearance Order* ¶ 65.

³² FairPoint and Frontier Comments at 8.

³³ Verizon Comments at 12 (internal citation omitted).

policy regulation, and certain *Computer Inquiry* requirements to Verizon in its provision of non-TDM-based broadband transmission services is “necessary” and/or in the public interest under Section 10.

In fact, there is every reason to make this predictive judgment now. There is a serious concern that there could be a market failure in the non-TDM-based broadband transmission services market. This is precisely why the Commission has been seeking data on the rates charged for and revenues generated from non-TDM-based broadband transmission services.³⁴ And, the D.C. Circuit has already recognized that if the FCC had “lifted all common-carrier regulation” of AT&T, Embarq, and Frontier’s non-TDM-based broadband transmission services—which is exactly what happened in the case of Verizon’s services—the Commission could “potentially allow[] ILECs to leverage their control over special access lines into undue control of the broadband business services market.”³⁵

III. THE COMMISSION CAN REVERSE THE DEEMED GRANT OF FORBEARANCE WITHOUT ANY ADDITIONAL PROCEDURES BEYOND THE CURRENT NOTICE-AND-COMMENT PROCESS.

Contrary to the claims made by the incumbent LECs,³⁶ the FCC can reverse the deemed grant of forbearance without following the formalities of a rulemaking proceeding. The incumbent LECs cite no authority to support their claims that a rulemaking is mandatory³⁷

³⁴ See generally *Competition Data Requested in Special Access NPRM*, Public Notice, 26 FCC Rcd. 14000 (2011).

³⁵ *Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903, 908 (D.C. Cir. 2009).

³⁶ Verizon Comments at 5-7; CenturyLink Comments at 4-5; Hawaiian Telecom Comments at 8-9.

³⁷ See Verizon Comments at 5-7; see also CenturyLink Comments at 4-5; Hawaiian Telecom Comments at 8-9. Verizon’s assertion (at 6) that “rulemaking requirements apply regardless of how forbearance was granted—whether through a Commission vote or by operation of law” is

because no such authority exists. On the contrary, the notice-and-comment procedures adopted by the Commission in this proceeding comport with fundamental principles of administrative law and FCC prior practice. This is because no *new* rules are proposed in the Petition. The Petition merely seeks the application to Verizon of existing statutory obligations and Commission regulations that the Commission has already declared essential safeguards for consumers of non-TDM-based broadband transmission services. To reapply these existing duties to Verizon, the Commission may proceed by way of informal adjudication. Indeed, the reversal of a deemed grant of forbearance resembles proceedings such as the waiver rescissions and declaratory rulings that the Commission has treated as informal adjudications. But even if reversal of the deemed grant were to be classified as the adoption of a “rule,” it would be merely an interpretative rule exempt from the rulemaking requirements outlined in the Administrative Procedure Act (“APA”).³⁸

A. The Petition To Reverse The Deemed Grant Of Forbearance May Be Treated As An Informal Adjudication.

The Commission has the discretion to reverse the deemed grant of forbearance in an informal adjudication. In fact, this proceeding closely resembles informal adjudicatory determinations by the Commission to rescind waivers and to issue declaratory rulings.

First, the Commission has wide discretion to proceed by way of informal adjudication, and this discretion has been upheld consistently by the courts.³⁹ A proceeding may be

misleading because, as discussed below, agencies have discretion to proceed by adjudication rather than rulemaking. *See infra* note 39.

³⁸ *See* 5 U.S.C. § 553 (setting forth rulemaking requirements and the exemption for interpretative rules).

³⁹ *See SEC v. Chenery Corp.*, 332 U.S. 194, 202-03 (1947) (“There is thus a very definite place for the case-by-case evolution of statutory standards. And the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed

considered an informal adjudication absent a statutory requirement that the Commission enact regulations or review a matter “on the record after full opportunity for a hearing” as outlined in Section 554 of the APA.⁴⁰ Here, nothing within the Act restricts the Commission’s discretion to resolve this matter as an informal adjudication. As Verizon concedes, the Communications Act, including Section 10, is silent as to the procedure for reversing a deemed grant of forbearance.⁴¹ Thus, consistent with its existing informal adjudication procedure, the Commission need only do what it has already done—provide notice of the Petition and an opportunity for comment—to grant Petitioners’ request.⁴² The Commission has already complied with the notice-and-

discretion of the administrative agency.”); *see also* *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 293 (1974) (The choice between rulemaking and adjudication “lies primarily in the informed discretion of the administrative agency.”); *Time Warner Entm’t Co. v. FCC*, 240 F.3d 1126, 1141 (D.C. Cir. 2001) (Agencies have “very broad discretion whether to proceed by way of adjudication or rulemaking.”).

⁴⁰ *See Hong Kong Telecommunications (Pacific) Limited; Application for authority pursuant to Section 214 of the Communications Act of 1934, as amended to resell international private lines for the provision of non-telephonic services between the U.S. and Hong Kong*, Order and Authorization, 13 FCC Rcd. 20050, n.22 (1998) (defining informal adjudications by the FCC); *see also Ass’n of Nat’l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1161 n.17 (D.C. Cir. 1979) (“[I]nformal adjudication occurs when an agency determines the rights or liabilities of a party in a proceeding to which [Section] 554 [of the APA] does not apply.”).

⁴¹ *See* Verizon Comments at 5. Nor does Section 10 compel the agency to exercise its rulemaking authority when granting or denying a petition for forbearance, or require a full hearing on the record as outlined in Section 554 of the APA. *See* 47 U.S.C. § 160.

⁴² *See Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling*, Memorandum Opinion and Order, 12 FCC Rcd. 15639, ¶¶ 34-36 (1997) (“*Silver Star*”) (“The [notice-and-comment] procedures we followed in this proceeding are consistent with those that the Commission has used for years with respect to informal adjudications.”). The notice-and-comment procedure for informal adjudications is not required by the APA, but is a procedural safeguard adopted by the Commission in some cases. *See Petitions for Waiver of Section 64.702 of the Commission’s Rules (Computer II)*, Memorandum Opinion and Order, 100 F.C.C.2d 1057, ¶¶ 34-35 (1985) (“*Computer II Waiver Petitions*”) (“The [APA] does not prescribe a specific procedural format for informal adjudicatory procedures It is the responsibility of the agency to employ procedures which ensure creation of an adequate record to support the results it reaches[.]”).

comment procedures that it generally follows in informal adjudications. It issued a public notice on November 10, 2011 describing petitioners' request to restore regulatory parity between Verizon and its competitors in the provision of non-TDM-based broadband transmission services and provided an opportunity to Verizon and any other interested parties to submit comments.⁴³ A supplemental rulemaking proceeding is therefore not required.

Second, the instant proceeding is very similar to other Commission proceedings which have been treated as adjudications.⁴⁴ For example, Section 1.3 of the Commission's rules states that "any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown."⁴⁵ In a waiver proceeding, a party submits a petition, the Commission may provide for public notice and comment to the petition, and then the Commission determines whether granting the waiver is appropriate under the relevant rules. The Commission routinely follows these procedures—rather than the procedures required for a rulemaking—when considering waiver petitions.⁴⁶

⁴³ *See generally Public Notice.*

⁴⁴ The Commission previously declined to classify forbearance proceedings as either adjudications or rulemakings. *See Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, Report and Order, 24 FCC Rcd. 9543, ¶ 20 (2009). Nevertheless, the similarities between this proceeding and other informal adjudicatory proceedings weigh in favor of treating this proceeding as an informal adjudication.

⁴⁵ 47 C.F.R. § 1.3.

⁴⁶ *See, e.g., Spanish Broadcasting System, Inc. (MegaTV), Petition for Waiver of Section 73.658(i) of the Commission's Rules*, Order, DA 11-2041, ¶ 1 & n.1 (2011) (granting waiver of the "network representation" rule after the Media Bureau issued public notice of the petition for waiver and requested public comment); *DexCom, Inc., Request for Waiver of the Frequency Monitoring Requirements for Medical Implant Communications Service Rules*, Order, 21 FCC Rcd. 875, ¶ 1 (2006) (granting waiver to permit petitioner to operate in the Medical Implant Communications Service band after issuance of public notice and receipt of public comment); *Computer II Waiver Petitions* ¶¶ 34-35 (describing the notice-and-comment procedures adopted

As with forbearance, neither the Communications Act nor the Commission's rules, except in limited circumstances,⁴⁷ provides guidelines for the procedures to follow when determining whether to reverse (i.e., to rescind) a grant of waiver. The Commission has treated such determinations as informal adjudications and has rescinded waivers absent a rulemaking proceeding. For example, in *Guderian Broadcasting*, the Commission terminated a waiver of certain broadcast ownership rules because the special circumstances that supported the waiver no longer existed.⁴⁸ In so doing, the Commission sought comment on the petition to reverse the waiver, but it did not follow the procedures for a rulemaking. Similarly, the Commission rescinded a waiver granted to the Bell Operating Companies that permitted revenues and expenses associated with the toll-free dialing database to be recorded solely on the books of the subsidiary of an affiliated company.⁴⁹ The Commission took this action without a notice-and-

for informal adjudications such as the waiver of certain *Computer II* structural separation requirements and noting that these procedures ensure creation of an adequate agency record).

⁴⁷ Section 1.113 of the Commission's rules, 47 C.F.R. § 1.113, allows the Commission to reverse a grant of waiver on its own motion within 30 days of public notice of the grant. *See, e.g., Stratos Mobile Networks (USA) LLC and Marine Satellite Services, Inc., Petition for Waiver of Section 20.15(d) of the Commission's Rules*, Order, 15 FCC Rcd. 8825, ¶¶ 2-3 (2000) (reversing grant of petition pursuant to Rule 1.113 within 30 days of public notice).

⁴⁸ *Guderian Broadcasting, Inc., KEGK(FM), Motion to Show Cause and Petition for Revocation of Waiver*, 23 FCC Rcd. 5316, ¶¶ 4-5 (2008) ("*Guderian Broadcasting*"). The Commission initially granted a waiver of a broadcast ownership cap rule for radio stations in a particular market. When the waiver was granted, the Commission noted that the waiver would maintain the competitive balance in the geographic market between the petitioner and its dominant competitor, Clear Channel Communications. The Commission later terminated the waiver after notice and comment because Clear Channel sold its stations in this market and "the special circumstances that supported the [grant of waiver] no longer exist[ed]." *Id.* ¶ 5.

⁴⁹ *See BOC Petition for Waiver to Allow DSMI to Account for Toll Free Database Services*, Order, 13 FCC Rcd. 24125, ¶ 2 (1998).

comment process because the sale of the affiliated company constituted a “material change in the circumstances underlying the waiver.”⁵⁰

The similarity between rescission of waivers and reversal of the deemed grant of forbearance is striking. In both situations, a prior informal adjudication yielded an order relieving one or more entities from the obligation to comply with a requirement, and the Commission subsequently determines whether to reverse that prior outcome. Thus, if it is appropriate for the Commission to treat waiver rescissions as informal adjudications, it is appropriate for the Commission to treat reversal of the deemed grant of forbearance as an informal adjudication.

The Commission’s treatment of declaratory rulings further supports this conclusion. When the Commission considers a petition for declaratory ruling filed pursuant to Section 1.2 of its rules⁵¹ and in accordance with Section 554(e) of the APA,⁵² it generally releases a notice of the petition for declaratory ruling, requests public comment, and issues an order to resolve uncertainty based on its interpretation of the Act or agency rules.⁵³ The Commission does not utilize the procedures required for a legislative rulemaking. The D.C. Circuit has upheld the Commission’s notice-and-comment procedure for declaratory rulings as a proper exercise of the Commission’s adjudicative powers even when a declaratory ruling creates a new regulation applicable to a defined set of companies.⁵⁴ Thus, the fact that a proceeding reimposes regulatory

⁵⁰ *Id.* ¶ 4.

⁵¹ 47 C.F.R. § 1.2.

⁵² 5 U.S.C. § 554(e).

⁵³ *See, e.g., Silver Star* ¶¶ 34-36 (issuing a declaratory ruling after notice and comment).

⁵⁴ In *Qwest Services Corp. v. FCC*, 509 F.3d 531, 536-37 (D.C. Cir. 2007), the court upheld the FCC’s declaratory ruling that classified IP-transport and menu-driven calling cards as

obligations, as would be the case if the Commission were to reverse the Verizon deemed grant of forbearance, does not disqualify it for informal adjudication procedures.⁵⁵

In sum, there is ample basis for the Commission to treat this proceeding as an informal adjudication. Both the agency's broad discretion to rely on an informal adjudication rather than a rulemaking and the treatment of waiver rescission proceedings and declaratory ruling proceedings support this conclusion.

B. If Reversal Of The Deemed Grant Of Forbearance Is Treated As A “Rule,” It Would Be An Interpretative Rule Exempt From APA Rulemaking Requirements.

To the extent that reversal of a deemed grant of forbearance is characterized as a “rule” rather than a proper assertion of the Commission's adjudicative powers, the Commission may still proceed without following the formalities of a rulemaking. This is because the reversal would be merely an interpretative rule which is explicitly exempt from the rulemaking

telecommunications services and thereby required calling card providers to pay access charges on calls made with such cards. The court stated that “there is no question that a declaratory ruling can be a form of adjudication” and rejected the argument that the FCC could only issue such a broadly applicable classification with retroactive application in a rulemaking. *See id.* at 536 (“Most norms that emerge from a rulemaking are equally capable of emerging (legitimately) from an adjudication[.]”) (*citing NLRB*, 416 U.S. at 294-95).

⁵⁵ The D.C. Circuit's determination in *Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1132 (D.C. Cir. 2007), that congressional action, not agency action, resulted in the deemed grant of forbearance to Verizon does not change the analysis. In *Am. Mining Cong. v. EPA*, 907 F.2d 1179 (D.C. Cir. 1990), and *Am. Fed'n of Gov't Emps. v. OPM*, 821 F.2d 761 (D.C. Cir. 1987), after congressional action caused the agency to withdraw certain regulations, the court upheld the agencies' reinstatement of those regulations without any additional rulemaking procedures. In both cases, the regulations were reimposed even though they had been “suspended” for several years. *See Am. Mining Cong.*, 907 F.2d at 1182; *Am. Fed'n of Gov't Emps.*, 821 F.2d at 764. Similarly in this case, although a grant of forbearance by operation of law may be deemed congressional action, that classification alone does not necessitate an additional rulemaking to reimpose the regulations at issue.

requirements in Section 553 of the APA.⁵⁶ The authority to adopt interpretative rules is central to role of administrative agencies. As the D.C. Circuit has explained, if agencies were required “to promulgate every regulatory or statutory interpretation arrived at in the course of adjudicating *specific cases*, agencies would be condemned to inactivity, since interpretation of the statutory and regulatory framework under which an agency must act is the *sine qua non* of reasoned agency action.”⁵⁷

To determine whether an agency rule is an interpretative rule exempt from the APA’s rulemaking requirements or a legislative rule subject to those requirements, courts consider the following factors:

- (1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties;
- (2) whether the prior legislative rule the agency is claiming to interpret is too vague or open-ended to support the interpretative rule;
- (3) whether the agency has explicitly invoked its general legislative [(i.e., rulemaking)] authority; and
- (4) whether the rule effectively amends a prior legislative rule.⁵⁸

If the answer to all of these questions is in the negative, then the agency rule is an interpretative rule.

⁵⁶ See 5 U.S.C. § 553(b)(A) (“[T]his subsection does not apply to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice[.]”). Thus, the issuance of an interpretative rule need not be accompanied by a notice of proposed rulemaking as is generally required for rulemakings under Section 553 of the APA. *Id.*

⁵⁷ *Caraballo v. Reich*, 11 F.3d 186, 195 (D.C. Cir. 1993) (emphasis added).

⁵⁸ See RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 454 (2010) (citing *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993); *Gonzales v. Oregon*, 546 U.S. 243 (2006)).

In this case, reversal of the deemed grant of forbearance is an interpretative rule. *First*, under the first factor of the four-factor test, courts examine whether the rule at issue “creat[es] a duty [that] is a necessary predicate to any enforcement action,”⁵⁹ or in other words, whether the rule creates an independent basis for agency action. If so, the rule is a legislative rule. Here, reversal of the deemed grant of forbearance would not create an independent basis for agency action. Congress already created the obligations set forth in Title II of the Act, and the Commission has already adopted regulations implementing those provisions and applied them to nondominant providers of non-TDM-based broadband transmission services. Reversal of the deemed grant of forbearance would merely apply those existing requirements to Verizon. Thus, under the first factor, reversal of the deemed grant of forbearance would be an interpretative, not legislative, rule.

Second, under the second factor, if a rule interprets an existing regulation that is so broad as to be “susceptible to an extraordinarily wide range of interpretations,” then it constitutes a legislative rule that is subject to the APA’s rulemaking requirements.⁶⁰ This is not the case here. The economic and public policy requirements in Title II of the Act and the Commission’s implementing regulations are well defined, having been clarified in decades of Commission precedent, and the Section 10 standard is also well understood. Interpretation of these provisions

⁵⁹ *See Am. Mining Cong.*, 995 F.2d at 1109; *see id.* at 1112 (finding that the rule at issue was an interpretative rule in part because it merely clarified existing reporting obligations and “there was no legislative gap that required [the rule] as a predicate to enforcement action”).

⁶⁰ *PIERCE*, *supra* note 58, at 452; *see also Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 97-100 (1995) (holding that the Department of Health and Human Services’ Medicare reimbursement guidelines were merely an interpretation of the existing “comprehensive regulations” and, thus, were interpretative rules exempt from rulemaking requirements); *United States v. Picciotto*, 875 F.2d 345, 346-48 (1989) (finding that an agency’s interpretation of the open-ended term “additional reasonable conditions” in an existing regulation was a legislative rule requiring notice and comment, not an interpretative rule).

for the sole purpose of ensuring that they apply to Verizon’s conduct in the provision of non-TDM-based broadband transmission services would not be an interpretation of overly “vague” or “open-ended” legislative rules.⁶¹ Reversal of forbearance therefore would be an interpretative rule under the second factor.

Third, the Commission has not “explicitly invok[ed] its general legislative [(i.e., rulemaking)] authority”⁶² in this proceeding. In fact, the Commission has already expressly declined to invoke its rulemaking authority in forbearance proceedings.⁶³ Therefore, under the third factor, reversal of the deemed grant of forbearance would be an interpretative rule.

Finally, in reversing forbearance, the Commission would not be amending its own previously enacted legislative rules. Rather, the Commission would be interpreting provisions of the Act and “indicat[ing its] reading of [that] statute”⁶⁴ as well as applicable Commission regulations. Thus, under the fourth factor, reversal of the deemed grant of forbearance would be an interpretative rule.

Nor is it relevant that this interpretative rule reimposes obligations on Verizon or could arguably have a substantial impact on the company. These effects alone do not recast the decision to reverse the deemed grant of forbearance as a legislative rule. Even a rule that alters primary conduct may be properly classified as an interpretative rule.⁶⁵ As the D.C. Circuit has

⁶¹ PIERCE, *supra* note 58, at 454; *see also Am. Mining Cong.*, 995 F.2d at 1110.

⁶² PIERCE, *supra* note 58, at 454.

⁶³ *See Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, Report and Order, 24 FCC Rcd. 9543, n.72 (2009).

⁶⁴ *Caraballo*, 11 F.3d at 195.

⁶⁵ *Cent. Tex. Tel. Coop., Inc., v. FCC*, 402 F.3d 205, 214 (D.C. Cir. 2005) (*citing Am. Mining Cong.*, 995 F.2d at 1107-08).

explained, interpretative rules “may have the *effect* of creating new duties. . . . [T]he mere fact that [an interpretative] rule may have a substantial impact does not transform it into a legislative rule.”⁶⁶ Therefore, even if the reversal of a deemed grant of forbearance is a “rule,” it would be an interpretative rule, and a notice-and-comment rulemaking proceeding is not necessary.

IV. CONCLUSION.

For the foregoing reasons, the Commission should grant the instant Petition.

Respectfully submitted,

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⁶⁶ *Id.* (internal quotations omitted) (emphasis in original).