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REDACTED – FOR PUBLIC INSPECTION

November 2, 2012

FILED/ACCEPTED

NOV - 2 2012

Federal Communications Commission
Office of the Secretary

VIA COURIER AND ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, Room TW-A325
Washington, DC 20554

Re: ***Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services,*** **WC Docket No. 05-25, RM-10593**

Dear Ms. Dortch:

On behalf of Ad Hoc Telecommunications Users Committee, BT Americas Inc., Cbeyond, Inc., Computer & Communications Industry Association, EarthLink, Inc., MegaPath Corporation, Sprint Nextel Corporation, and tw telecom inc., please find enclosed two copies of the redacted version of a petition to reverse forbearance from dominant carrier regulation of incumbent LECs' non-TDM-based special access services (the "*Petition*"). The *Petition* contains information that the Wireline Competition Bureau has deemed highly confidential under the *Second Protective Order*[1] in the above-referenced proceeding.

Specifically, the *Petition* and Attachment 2 thereto contain statistics derived from the data that parties submitted in response to the Commission's first special access data request.[2] This data includes

[1] *In the Matter of Special Access for Price Cap Local Exchange Carriers,* Second Protective Order, 25 FCC Rcd. 17725 (2010) ("*Second Protective Order*"); *see also Special Access for Price Cap Local Exchange Carriers*, Letter from Sharon E. Gillett, Chief, Wireline Competition Bureau to Paul Margie, Wiltshire & Grannis LLP, 26 FCC Rcd. 6571 (2011) (supplementing the *Second Protective Order*); *Special Access for Price Cap Local Exchange Carriers*, Letter from Sharon E. Gillett, Chief, Wireline Competition Bureau to Donna Epps, Vice President, Federal Regulatory Affairs, Verizon, 27 FCC Rcd. 1545 (2012) ("*Letter to Donna Epps*") (further supplementing the *Second Protective Order*).

[2] *Data Requested in Special Access NPRM*, Public Notice, 25 FCC Rcd. 15146 (2010) ("*First Special Access Data Request*").

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the number of locations to which incumbent LECs and non-incumbent LECs own connections in each of the markets for which the Commission requested data.[3] In addition, the *Petition* contains highly detailed information regarding a commercial agreement under which one petitioner purchases specified special access services from an incumbent LEC and the number of Ethernet circuits that this petitioner purchases from non-incumbent LECs.[4] The petitioner keeps this information in the strictest confidence, and it is not available from public sources. If released to the petitioner's competitors, this information would allow those competitors to gain a significant advantage in the marketplace. Accordingly, this information is eligible for highly confidential treatment under the *Second Protective Order*.

Pursuant to the procedures outlined in the *Modified Protective Order*,[5] as modified by the instructions in the first data request in this proceeding,[6] one original of the highly confidential version of the *Petition* is being filed with the Secretary's Office under separate cover, and two copies of the highly confidential version of the *Petition* will be delivered to Andrew Mulitz of the Pricing Policy Division of the Wireline Competition Bureau. In addition, pursuant to a request from Wireline Competition Bureau staff, one copy of the highly confidential version of the *Petition* will be delivered to Derian Jones of the Pricing Policy Division of the Wireline Competition Bureau. Finally, one machine-readable copy of the redacted version of the *Petition* will be filed electronically via ECFS.

Please do not hesitate to contact me at (202) 303-1111 if you have any questions or concerns about this submission.

Respectfully submitted,

/s/ Thomas Jones

Counsel for BT Americas Inc., Cbeyond, Inc., EarthLink, Inc., MegaPath Corporation, and tw telecom inc.

Enclosures

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[3] *See Second Protective Order*, ¶ 6 (deeming responses to Questions III.B and III.E of the *First Special Access Data Request* to be eligible for highly confidential treatment).

[4] *See id.* (deeming "[t]he extent to which companies rely on [incumbent LEC] and [non-incumbent LEC] last-mile facilities and local transport facilities to provide special access-like services and the nature of those inputs (*e.g.*, the names of suppliers and whether the inputs are conditioned copper loops, DS1 loops, DS3 loops, Ethernet loops)" to be eligible for highly confidential treatment).

[5] *See In the Matter of Special Access for Price Cap Local Exchange Carriers*, Modified Protective Order, 25 FCC Rcd. 15168, ¶ 5 (2010).

[6] *See First Special Access Data Request* at 21.

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Washington, D.C. 20554

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Special Access Rates for Price Cap Local Exchange Carriers	)	WC Docket No. 05-25
	)	
AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services	)	RM-10593

PETITION OF AD HOC TELECOMMUNICATIONS USERS COMMITTEE, BT AMERICAS, CBEYOND, COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION, EARTHLINK, MEGAPATH, SPRINT NEXTEL, AND TW TELECOM TO REVERSE FORBEARANCE FROM DOMINANT CARRIER REGULATION OF INCUMBENT LECS' NON-TDM-BASED SPECIAL ACCESS SERVICES

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Pursuant to Section 1.41 of the Commission's rules[1] and Sections 4(i) and 10 of the Communications Act,[2] Ad Hoc Telecommunications Users Committee, BT Americas Inc., Cbeyond, Inc., Computer & Communications Industry Association, EarthLink, Inc., MegaPath Corporation, Sprint Nextel Corporation, and tw telecom inc. (collectively, the "Petitioners") hereby submit this petition to reverse the forbearance from dominant carrier regulation and certain *Computer Inquiry* requirements granted to the Verizon Telephone Companies ("Verizon"), AT&T Inc. ("AT&T"), the legacy Embarq Local Operating Companies ("legacy Embarq"), the Frontier and Citizens ILECs ("Frontier"), and legacy Qwest Corporation ("legacy Qwest") in their provision of non-TDM-based special access services.

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[1] 47 C.F.R. § 1.41.

[2] 47 U.S.C. § 154(i); *id.* § 160. The Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.* ("Communications Act" or "Act"), was amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act").

I. INTRODUCTION AND SUMMARY.

Through the so-called "deemed grant" of a forbearance petition filed by Verizon in 2006 and in subsequent partial grants of forbearance petitions filed by AT&T, legacy Embarq, Frontier, and legacy Qwest, the FCC has eliminated all dominant carrier regulation of the largest incumbent LECs' packet-switched and optical special access services ("non-TDM-based special access services"). In the orders addressing the AT&T, legacy Embarq, Frontier and legacy Qwest forbearance petitions (the "*Forbearance Orders*"), the Commission declined to examine the incumbent LECs' market power in the relevant product and geographic markets. It instead granted forbearance from dominant carrier regulation based primarily on predictions that competition would develop in the future, on the continued availability of DS1 and DS3 special access services, and on the continued application of certain statutory provisions (*e.g.*, the complaint provisions of Section 208 of the Act). In what may have been an implicit acknowledgement of the weaknesses of its analysis, the Commission noted that it could apply appropriate regulations to incumbent LEC non-TDM-based special access services in the future.

Today, as a result of the Commission's decisions in the *Forbearance Orders*, the incumbent LECs are essentially free to offer non-TDM-based special access services at any price and on any terms and conditions they choose. The dangers associated with the Commission's deregulation of non-TDM-based special access services without properly analyzing the market for those services have grown significantly over time. Traditional DS1 and DS3 special access services comprise the vast majority of the special access services used to serve business customers across the United States, and will continue to be critical and widely-used for the

foreseeable future,[3] but non-TDM-based special access services, such as Ethernet, are replacing DSn services. Ethernet and other non-TDM-based special access services will eventually be the central means by which businesses in this country transmit information. When and where that is the case, unreasonably high prices and anticompetitive conduct by dominant incumbent LECs will harm American businesses by increasing their costs and reducing the extent to which they benefit from innovation yielded by competitive markets.

The Commission has an obligation under Sections 201(b) and 202(a) of the Act to ensure that incumbent LECs provide non-TDM-based special access services at rates, and on terms and conditions, that are just and reasonable and not unjustly or unreasonably discriminatory. In order to meet these obligations, the Commission must undertake a thorough market power analysis of incumbent LEC non-TDM-based special access services. This is especially so because the Commission concluded in the 2010 *Phoenix Order* that a traditional market power analysis is the appropriate means of determining whether forbearance from regulation of incumbent LEC local transmission facilities is appropriate. In light of this conclusion, the Commission's decisions to forbear from regulating incumbent LEC non-TDM-based special access services and the "deemed grant" to Verizon must be reexamined.

Accordingly, the Commission should conduct a market power analysis of the incumbent LECs' non-TDM-based special access service offerings in which it follows the methodology utilized in the *Phoenix Order* and in which it considers the information submitted in the Commission's special access rulemaking docket. That analysis will almost certainly yield the conclusion that the incumbent LECs' enduring control over the only last-mile connection serving

[3] While traditional DS1 and DS3 special access services are not the focus of this Petition, the Petitioners believe that reform of regulations governing DS1 and DS3 special access services also must be adopted.

the vast majority of business customers in the country gives incumbent LECs market power in the provision of non-TDM-based special access services. In conducting the analysis, the Commission should consider the following.

First, the Commission should define the relevant product markets. In so doing, the Commission should follow the test set forth in the *DOJ-FTC Horizontal Merger Guidelines*, under which a relevant product market consists of a product or group of products such "that a hypothetical profit-maximizing firm . . . that was the only present and future seller of those products ('hypothetical monopolist') likely would impose at least a 'small but significant and nontransitory' increase in price." If the Commission lacks the information necessary to conduct this analysis, it can instead rely on evidence such as the extent to which there are differences between services in terms of prices and technical characteristics, and the extent to which customers switch between the services. In addition, the Commission should follow its past practices of (1) treating services provided solely over a service provider's own facilities as belonging to different product markets than services provided over other service providers' facilities (and, as discussed below, the Commission should focus its analysis exclusively on services provided via facilities owned by the service provider); (2) treating wholesale and retail services as belonging to different product markets; and (3) relying on capacity levels as a basis for defining relevant product markets.

Second, the Commission should define the relevant geographic markets. While each individual customer location is technically a separate geographic market for last-mile services, for administrative purposes, it will be necessary for the Commission to aggregate customer locations subject to similar levels of competition. In so doing, the Commission should identify low capacity non-TDM-based special access services (*e.g.*, at or below 10 Mbps) that do not, by

themselves, yield sufficient revenue to justify competitive deployment of last-mile facilities in any geographic area. The Commission could deem such services to be subject to incumbent LEC market power on a nationwide basis. For higher capacity non-TDM-based special access services, the Commission could aggregate individual customer locations into larger categories, such as wire centers. Wire centers subject to similar levels of competition could in turn be aggregated into broader categories. Once the Commission has established such aggregated categories, it could undertake a granular market power analysis in a representative subset from each aggregated category. The results of the analysis in representative wire centers would apply to all wire centers in the category.

Third, in conducting a granular market power analysis for relevant product markets in representative wire centers, the Commission should identify the market participants. Consistent with the *Phoenix Order*, the Commission should count only those service providers that deliver special access services via facilities that they own. Moreover, the Commission should only count entities to the extent that their facilities actually support provision of viable substitutes for incumbent LEC non-TDM-based special access services. For example, cable companies should only be considered competitors in locations served by their fiber facilities (as opposed to locations served by their coaxial cable facilities) because the cable companies appear to provide substitutes for incumbent LEC non-TDM-based special access services only via such fiber facilities.

Fourth, after identifying the market participants, the Commission should assess the extent to which incumbent LECs face actual competition from market participants in the wire centers at issue. To make this assessment, the Commission should determine the extent to which market participants have actually deployed facilities to customer locations that can be used to provide

non-TDM-based special access services. Every past examination of the market for local transmission services, including those conducted by the GAO, the DOJ, and the Commission itself, has yielded the conclusion that incumbent LECs own the only facilities serving the vast majority of business customers in the United States. The data submitted in the Commission's special access rulemaking docket confirm that this remains the case. Thus, there is little doubt that the Commission will conclude that incumbent LECs face little or no actual competition in most or all of the relevant markets for non-TDM-based special access services.

Fifth, the Commission should assess the extent to which incumbent LECs face potential competition. Specifically, the Commission should assess whether potential entry into the relevant product and geographic markets is likely to occur in a timely and sufficient manner to counteract the exercise of market power by an incumbent LEC. It is highly unlikely that potential entrants meet this test in the relevant special access market(s). This is because, as the Commission has repeatedly held, the barriers to deploying local transmission facilities are extremely high. Competitive carriers will deploy local transmission facilities only to locations where the revenue opportunities are sufficiently large to overcome the extremely high sunk costs of deployment. Such locations constitute a small minority of commercial buildings in the U.S. This is true even in markets that incumbent LECs have identified as subject to the highest level of facilities-based competition. For example, the Commission recently concluded that even in Phoenix, which legacy Qwest apparently viewed as the most competitive urban area in its territory, the high barriers to facilities deployment rendered both construction of new facilities by existing competitors and entry by an entirely new competitor "unlikely" for the provision of DS1 and DS3 services. That conclusion almost certainly applies to most or all non-TDM-based special access services throughout the country too.

Sixth, the Commission should assess the extent to which customers are willing and able to switch from the incumbent LECs' non-TDM-based special access services to a non-incumbent LEC's non-TDM-based special access services (*i.e.*, elasticity of demand). The paucity of facilities-based competitors to the incumbent LECs obviously limits customers' ability to switch to alternative facilities-based competitors. But even where non-incumbent LEC providers have deployed their own facilities, customers are often unwilling to switch to the non-incumbent LEC. This is because the special access tariffs and commercial agreements under which wholesale and retail customers purchase special access from incumbent LECs often include provisions that limit customers' ability to switch from an incumbent LEC to another provider.

Seventh, the Commission should assess the extent to which incumbent LECs' advantages in cost structure, size and resources as compared to their competitors are strong enough to preclude effective competition. Here again, the analysis weighs heavily in favor of concluding that incumbent LECs have market power in the provision of non-TDM-based special access services. Incumbent LECs benefit from significant first-mover advantages such as preexisting and preferential access to commercial buildings and rights-of-way and the receipt of billions of dollars in universal service funds over several decades. Incumbent LECs also benefit from far greater economies of scale and scope than their competitors—a result of, among other things, their ubiquitous networks and, in the case of AT&T and Verizon, their ownership of the two largest mobile wireless carriers. At the same time, competitors' reliance on incumbents' last-mile facilities enables incumbent LECs to raise their rivals' costs, thereby increasing the cost differential between incumbents and non-incumbents even further.

Applying these factors in the market power analysis yields the conclusion that incumbent LECs must be treated as dominant in the provision of non-TDM-based special access services.

Again, that dominance results primarily from the incumbent LECs' control over the only last-mile facilities that serve a large number of business customers in the U.S. Moreover, the incumbent LECs have already begun to exploit this market power in harmful ways, such as by (1) setting prices for non-TDM-based special access services well above the available measures of costs; (2) maintaining wholesale prices that are high relative to retail prices so as to squeeze non-incumbent LECs' margins and limit the size of their addressable markets; and (3) utilizing restrictive provisions in special access volume and term plans to limit the extent to which competitors are able to upgrade existing purchases of DS1 and DS3 special access circuits to more efficient Ethernet special access circuits.

Therefore, the Commission should establish regulations that limit the incumbent LECs' ability to act on their incentives to harm consumers and competition in the provision of non-TDM-based special access services. In particular, the Commission should reverse the "deemed grant" to Verizon and the *Forbearance Orders* to the extent necessary to classify incumbent LECs as dominant in the provision of non-TDM-based special access services. The Commission should then establish pricing regulations (to be implemented via tariffs) and service quality regulations for incumbent LEC non-TDM-based special access services.

These regulations will ensure that incumbent LECs offer non-TDM-based special access services at rates, and on terms and conditions that are just and reasonable and not unjustly or unreasonably discriminatory in accordance with Sections 201(b) and 202(a) of the Act. These regulations will also advance the goals of Section 706 of the 1996 Act by enabling competitors to expand the size of their addressable markets to include locations that they cannot serve today due to high incumbent LEC wholesale prices for non-TDM-based special access services. This, in turn, will allow non-incumbent LECs to serve more multi-location customers and to deploy fiber

to such customers' multiple locations, including their high-demand locations. The ultimate beneficiaries will of course be businesses, anchor institutions, and the U.S. economy as a whole.

II. BACKGROUND.

A. The "Deemed Grant" Of Forbearance From Dominant Carrier Regulation Of Verizon's Non-TDM-Based Special Access Services.

Section 10 of the Act[4] directs the Commission 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.[5]

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."[6]

On December 20, 2004, Verizon filed a petition for forbearance[7] pursuant to Section 10. Verizon requested forbearance from application of "Title II common carriage requirements"[8]—

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[4] 47 U.S.C. § 160.

[5] *See id.* §§ 160(a)(1)-(3).

[6] *Id.* § 160(b).

[7] *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").

[8] *Id.* at 2.

including dominant carrier "tariff filing, cost support, and pricing requirements"[9]—and "*Computer Inquiry* rules"[10] to "any broadband services offered by Verizon"[11] at the time or in the future.[12] Verizon offered virtually no factual support for its petition. 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.[13] 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."[14] 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")[15] and (2) "non-TDM based optical networking, optical hubbing, and optical

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[9] *Id.* at 8.

[10] *Id.* at 2.

[11] *Id.* at 1.

[12] 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.*

[13] *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).

[14] *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*").

[15] *See id.* at 2.

transmission services."[16] In the *February 7, 2006 Letter*, Verizon reiterated that it was "seeking forbearance from the mandatory application of Title II common-carriage regulation"[17]—which includes dominant carrier regulation—but it did not discuss how its request satisfied the Section 10 criteria.[18]

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."[19] 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.[20] Accordingly, on March 20, 2006, the Commission issued a news release

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[16] *See id.* at 3. At the same time, Verizon submitted a "List of Broadband Services for Which Verizon Is Seeking Forbearance" that contained 10 Verizon services that fell within these two categories. *See id.*, Attachment 1.

[17] *Id.* at 3.

[18] *See, e.g.*, Letter from Jason Oxman, COMPTEL, 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 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.").

[19] *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services; Petition of BellSouth Corporation for Forbearance Under Section 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, ¶ 11 (2007) ("*AT&T Forbearance Order*").

[20] 47 U.S.C. § 160(c).

"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."[21]

B. The Grant Of Forbearance From Dominant Carrier Regulation Of AT&T, Legacy Embarq, Frontier, And Legacy Qwest's Non-TDM-Based Special Access Services.

Following the deemed grant of Verizon's petition, AT&T, legacy Embarq, Frontier, and legacy Qwest each filed petitions seeking "relief comparable to the relief granted [to] Verizon through that deemed grant."[22] Like Verizon, these incumbent LECs offered virtually no factual support for their forbearance requests. Nevertheless, the Commission granted forbearance from dominant carrier regulation of each petitioner's existing "non-TDM-based, packet-switched services capable of transmitting 200 kbps or greater in each direction" and "non-TDM-based,

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[21] *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 of Commissioner Jonathan S. Adelstein in Response to Commission Inaction on Verizon's Forbearance Petition, WC Dkt. No. 04-440 (rel. Mar. 20, 2006). On appeal, the D.C. Circuit Court of Appeals held that the deemed grant was not an appealable agency action because "Congress, not the Commission, 'granted' Verizon's forbearance petition." *Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1132 (D.C. Cir. 2007).

[22] *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*") (collectively, the "*Forbearance Orders*").

optical transmission services."[23] In particular, the Commission granted forbearance from the tariff filing, cost support, and pricing requirements for dominant carriers contained in Sections 61.31 to 61.59 of its rules, as well as other requirements applicable to dominant carriers.[24] The Commission also granted forbearance from certain *Computer Inquiry* rules.[25] The relief granted

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[23] *AT&T Forbearance Order* ¶ 12; *Embarq & Frontier Forbearance Order* ¶ 12; *see also Qwest Forbearance Order* ¶ 13. 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). For this reason, the Commission should eliminate any doubt as to the scope of the deemed grant by reapplying dominant carrier regulation to *all of Verizon's existing and future* non-TDM-based broadband transmission services. In addition, there is some confusion regarding whether the deemed grant affected Verizon's interstate interexchange broadband transmission services. The grant of partial forbearance to AT&T excluded its broadband transmission services provided on an interstate interexchange basis (*see AT&T Forbearance Order* ¶ 15; *see also id.* n.168) and the forbearance relief granted to legacy Embarq, Frontier, and legacy Qwest was "consistent with" the relief granted in the *AT&T Forbearance Order*. *See Embarq & Frontier Forbearance Order* ¶ 1; *Qwest Forbearance Order* ¶ 1. 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 also clarify that the deemed grant did not affect regulation of such services. For ease of reference, the non-TDM-based packet-switched broadband services and the non-TDM-based optical transmission services for which Verizon as well as AT&T, legacy Embarq, Frontier, and legacy Qwest were granted forbearance from dominant carrier regulation are referred to herein as "non-TDM-based special access services."

[24] More 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; *Qwest Forbearance Order* n.6.

[25] 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*

expressly excluded all TDM-based DS1 and DS3 special access services.[26]

In the *Forbearance Orders*, the Commission acknowledged that its "analysis of forbearance from dominant carrier regulation is informed by its traditional market power analysis."[27] Despite this statement, however, the Commission did not perform a traditional market power analysis in the *Forbearance Orders*. Historically, under its traditional market power framework, the Commission determined whether there is sufficient competition in a market to constrain a carrier from exercising market power (*i.e.*, the power to control price),[28] and thus relieve the carrier of dominant carrier regulation.[29] In particular, "after defining the

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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 legacy 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.

[26] *See AT&T Forbearance Order* ¶ 12; *Embarq & Frontier Forbearance Order* ¶ 12; *Qwest Forbearance Order* ¶ 13.

[27] *AT&T Forbearance Order* n.80; *Embarq & Frontier Forbearance Order* n.72; *Qwest Forbearance Order* n.86.

[28] *See Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, First Report and Order, 85 FCC 2d 1, ¶¶ 54, 56 (1980) ("*Competitive Carrier First Report and Order*").

[29] *See Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, 25 FCC Rcd. 8622, ¶ 37 (2010), *aff'd, Qwest Corp. v. FCC*, No. 10-9543 (10th Cir. Aug. 6, 2012) ("*Phoenix Order*") (explaining the purpose of the traditional market power analysis); *see also Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd. 3271 (1995) ("*AT&T Nondominance Order*") (undertaking a market power analysis to determine whether AT&T remained a dominant carrier requiring continued regulation in the interstate interexchange market).

relevant [geographic and product] markets and identifying participating firms, [the Commission] would then evaluate available evidence regarding market shares . . . and other factors, including supply substitutability, elasticity of demand, [and] the cost structure, size, and resources of the carrier."[30] In deciding the *Forbearance Orders,* the Commission departed from this traditional market power framework in several critical respects.

First, the Commission did not assess competition in the relevant geographic market. Instead, the Commission found it "appropriate . . . to look more broadly at competitive trends without regard to specific geographic markets."[31] *Second*, the Commission did not assess competition in the relevant product markets. The Commission examined competition in the downstream retail market for all non-TDM-based broadband services—not just non-TDM-based broadband special access services[32]—and it did not examine the level of competition for wholesale non-TDM-based special access services. *Third*, in evaluating the level of actual competition in the retail market, the Commission did not rely on "detailed market share information"[33] and took into account competition from providers—such as "systems integrators, equipment vendors, and value-added resellers"—that do not rely on their own facilities to

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[30] *See Phoenix Order* n.144 (citing *AT&T Nondominance Order* ¶¶ 38, 139).

[31] *AT&T Forbearance Order* ¶ 20; *Embarq & Frontier Forbearance Order* ¶ 19; *Qwest Forbearance Order* ¶ 23.

[32] *See, e.g.*, Brief of Private Petitioners, *Ad Hoc Telecomms. Users Comm. v. FCC*, No. 07-1426, at 6 (D.C. Cir. July 15, 2008) (explaining that the record contained data "purporting to show the existence of competition for downstream, interexchange, packetized services," not the special access services at issue); *id.* at 12 (explaining that the "FCC granted forbearance with respect to special access products that are necessarily provided in local geographic markets, yet the FCC considered only competitive data relating to the national market for end-to-end products").

[33] *AT&T Forbearance Order* ¶ 23; *Embarq & Frontier Forbearance Order* ¶ 22; *Qwest Forbearance Order* ¶ 26.

provide non-TDM-based special access services.[34] *Fourth*, the Commission found that there is "the potential for competitors to deploy their own facilities for the provision of the relevant [non-TDM-based special access services],"[35] but it did not cite to any record evidence of supply substitutability or any other evidence to support this finding of potential competition. *Fifth*, the Commission failed to examine elasticity of demand or the cost structure, size, and resources of the carriers seeking forbearance.

Rather than consider these time-tested components of the market power framework, the Commission considered factors that have little or no bearing on the level of competition for non-TDM-based special access services. For example, the Commission observed that enterprise customers are "sophisticat[ed]" enough "to make informed choices based on expert advice about service offerings and prices" and "also are likely to be aware of the choices available to them."[36] In addition, the Commission held that "market forces" as well as "the Section 201 and 202 standards and the formal complaint process in Section 208 of the Act" and the Commission's implementing rules would "safeguard the rights of consumers."[37] Furthermore, the Commission predicted that forbearance from dominant carrier tariff filing, cost support, and pricing regulation

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[34] *AT&T Forbearance Order* ¶ 22; *Embarq & Frontier Forbearance Order* ¶ 21; *Qwest Forbearance Order* ¶ 25.

[35] *AT&T Forbearance Order* n.86; *Embarq & Frontier Forbearance Order* n.78; *Qwest Forbearance Order* n.92.

[36] *AT&T Forbearance Order* ¶ 24; *Embarq & Frontier Forbearance Order* ¶ 23; *Qwest Forbearance Order* ¶ 27.

[37] *AT&T Forbearance Order* ¶¶ 35-36; *Embarq & Frontier Forbearance Order* ¶¶ 34-35; *Qwest Forbearance Order* ¶¶ 38-39.

"would make [each petitioner] a more effective competitor" for the services at issue[38] by "enabl[ing] [each petitioner] to respond quickly and creatively to competing service offers."[39] The Commission "anticipat[ed]" that this in turn would "increase even further the amount of competition in the marketplace" for non-TDM-based special access services.[40] The Commission also noted that "[it] has the option of revisiting this forbearance ruling should circumstances warrant."[41]

In the appeal of the *AT&T Forbearance Order* (as well as the *Embarq & Frontier Forbearance Order*), the D.C. Circuit Court of Appeals—applying a "particularly deferential" standard of review—upheld the Commission's decision to forbear from dominant carrier regulation.[42] The court deferred to the Commission's judgment that dominant carrier regulation was unnecessary because (1) the Commission retained other common carrier regulation, including Sections 201, 202, and 208 of the Act; (2) the Commission "determined that competitive broadband service providers could use heavily regulated TDM-based services to compete"; (3) the Commission "recognized the fact and feasibility of competitive self-deployment of special access lines"; and (4) "the FCC is continuing to study the overall market

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[38] *AT&T Forbearance Order* ¶ 35; *Qwest Forbearance Order* ¶ 38; *see also Embarq & Frontier Forbearance Order* ¶ 34.

[39] *AT&T Forbearance Order* ¶ 33; *Embarq & Frontier Forbearance Order* ¶ 32; *Qwest Forbearance Order* ¶ 36.

[40] *AT&T Forbearance Order* ¶ 35; *Embarq & Frontier Forbearance Order* ¶ 34; *Qwest Forbearance Order* ¶ 38.

[41] *AT&T Forbearance Order* n.120; *Embarq & Frontier Forbearance Order* n.113; *see also Qwest Forbearance Order* n.69 ("[A]s the Commission has held, it has the option of revisiting a forbearance ruling in light of new facts.").

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

developments in special access on an industry-wide basis."[43] The court stated, however, 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 that "the FCC will be able to reassess as they reasonably see fit based on changes in market conditions, technical capabilities, or policy approaches to regulation in this area."[44]

C. The Use Of The Traditional Market Power Standard In The *Phoenix Order*.

In 2009, Qwest filed a petition for forbearance from dominant carrier regulation applicable to its switched access services and Section 251 unbundling requirements[45] in the Phoenix, Arizona Metropolitan Statistical Area ("MSA").[46] In the order addressing Qwest's petition, "the Commission comprehensively reviewed its approach to forbearance and explained in detail its decision to return to the more rigorous market power framework that underpinned its earliest forbearance decisions."[47] The Commission explained that "[t]he traditional market power framework enables [it] to respond to a petition for forbearance by evaluating the record evidence of actual and potential competition, and considering whether there is evidence of sufficient competition to conclude that forbearance is warranted."[48] The Commission further

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[43] *Id.* at 911; *see also id.* ("Finally, in reaching its decision, the FCC emphasized that its ongoing Special Access Rulemaking proceeding will address, on an industry-wide basis, general concerns about discriminatory practices by ILECs with respect to their special access lines.").

[44] *Id.*

[45] *See* 47 U.S.C. § 251(c)(3).

[46] *See generally* Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area, WC Dkt. No. 09-135 (filed Mar. 24, 2009).

[47] Brief for Respondents, *Qwest Corp. v. FCC*, No. 10-9543, at 16-17 (10th Cir. Jan. 10, 2011) ("FCC *Phoenix Order* Appeal Brief").

[48] *Phoenix Order* ¶ 42.

explained that the traditional market power analysis requires it to, among other things, (1) define the relevant product and geographic markets; (2) identify the market participants and evaluate the level of actual competition in the relevant markets (*e.g.*, by examining evidence regarding market shares and market concentration); and (3) "evaluate whether potential entry could occur in a timely, likely, and sufficient manner to counteract the exercise of market power by [the petitioner] or by [the petitioner] in concert with a few competitors."[49]

In the *Phoenix Order*, the Commission defined the relevant product markets—including separate retail and wholesale markets[50]—by using the "economically sound standards" of the *DOJ-FTC Horizontal Merger Guidelines.*[51] The Commission also relied on the *Merger Guidelines* and Commission precedent to "properly[ ]" define the relevant geographic market.[52] In assessing the level of actual competition in the relevant markets, the Commission limited its analysis to competition from service providers that use their own facilities (*e.g.*, loop and transport facilities) to deliver service to their customers.[53] And in evaluating the level of potential competition in the relevant markets, the Commission examined both "the potential for

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[49] *Id.*

[50] *See id.*

[51] *See id.* n.169; *see also* U.S. Department of Justice and the Federal Trade Commission, Horizontal Merger Guidelines, § 4.1.1 (rel. Aug. 19, 2010) ("*DOJ-FTC Horizontal Merger Guidelines*" or "*Merger Guidelines*") (defining a product market as the smallest group of products for which a hypothetical monopoly provider" would be able to profitably impose a "small but significant and non-transitory" increase in price).

[52] *See Phoenix Order* ¶¶ 64-65.

[53] *See, e.g., id.* ¶ 71 (counting as competitors in the wholesale loop market only those service providers that "have constructed their own last-mile connections to enterprise customers, and . . . offer these services to competitors as wholesale inputs").

entry via supply-side substitution"[54] and "the possibility of *de novo* entry" and took into account the relevant barriers to entry.[55]

Applying the traditional market power framework to the record evidence, the Commission found "insufficient actual and potential competition" in the relevant markets[56] to warrant forbearance from dominant carrier regulation or unbundling obligations in the Phoenix MSA. In particular, the Commission found "no 'significant alternative sources of wholesale inputs' in the Phoenix MSA."[57] The Commission also found that "potential competition from either supply-side substitution or from *de novo* entry to be unlikely [in the wholesale loop market] in the Phoenix MSA."[58] And, based on "insufficient evidence of competition [in the retail enterprise and mass markets] to ensure that Qwest's switched access rates are just, reasonable, and not unjustly or unreasonably discriminatory," the Commission "conclude[d] that the dominant carrier pricing and tariffing regulations remain necessary" under the Section 10 forbearance standard.[59]

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[54] *See id.* ¶ 83; *see also id.* ¶¶ 72-73, 89.

[55] *See id.* ¶ 84 & n.252 (citing *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16978, ¶¶ 85-91 (2003) ("*TRO*") (subsequent history omitted)) (discussing types of barriers to entry, including scale economies, sunk costs, and first-mover advantages); *Phoenix Order* ¶ 89 & n.268; *see also Phoenix Order* ¶ 38 (explaining that "barriers to entry . . . are key components of a traditional market power analysis").

[56] *See Phoenix Order* ¶ 91 (retail enterprise market); *see also id.* ¶¶ 70-73 (wholesale loop market).

[57] *Id.* ¶ 70.

[58] *Id.* ¶ 73.

[59] *Id.* ¶ 114.