

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

In the Matter of Special Access 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

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**COMMENTS OF  
THE NEW JERSEY DIVISION OF RATE COUNSEL**

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## SUMMARY

Rate Counsel fully supports the petition filed on November 2, 2012 with the Federal Communications Commission (“FCC” or “Commission”) by the Ad Hoc Telecommunications Users Committee, BT Americas Inc., Cbeyond, Inc., Computer and Communications Industry Association, EarthLink, Inc., MegaPath Corporation, Sprint Nextel Corporation and tw telecom inc. to reverse the forbearance granted to Verizon, AT&T, legacy Embarq, Frontier and legacy Qwest with respect to dominant carrier regulation and certain *Computer Inquiry* requirements with respect to their provision of packet switched and optical special access services.

Consumers benefit from well-functioning special access services markets. In granting petitions for forbearance relating to non-TDM-based special access services, the FCC failed to apply the rigorous market analysis that is required to assess properly the level of competition that exists in relevant markets. The FCC erred in granting forbearance and should reverse those decisions, so as to permit effective and efficient competition to occur as carriers migrate to IP platforms. Consistent with the data-driven, analytically sound examination of the structure of relevant geographic and product markets for special access services that the FCC conducted in the Qwest’s Phoenix forbearance proceeding, the FCC should apply a similar analysis of the non-TDM special access services based on data and information about relevant geographic and product markets. The FCC should reverse its premature granting of forbearance and apply dominant carrier regulation to non-TDM-based special access services to prevent incumbent local exchange carriers from exercising market power. Furthermore, the Commission should instruct carriers to submit complete applications for forbearance in order to prevent unnecessary administrative burden.

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**I. INTRODUCTION**

The New Jersey Division of Rate Counsel (“Rate Counsel”), an agency representing New Jersey consumers,<sup>1</sup> files comments in support of the petition<sup>2</sup> filed on November 2, 2012 with the Federal Communications Commission (“FCC” or “Commission”), by the Ad Hoc Telecommunications Users Committee, BT Americas Inc., Cbeyond, Inc., Computer and Communications Industry Association, EarthLink, Inc., MegaPath Corporation, Sprint Nextel

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<sup>1</sup>/ Rate Counsel is an independent New Jersey State agency that represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities.

<sup>2</sup>/ In the Matter of 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 User Committee, BT Americas, Cbeyond, Computer and 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, November 2, 2012 (“Petition”).

Corporation and tw telecom inc. (the “Petitioners” or “Ad Hoc, et al”) to reverse the forbearance granted to Verizon, AT&T, legacy Embarq, Frontier and legacy Qwest with respect to dominant carrier regulation and certain *Computer Inquiry* requirements with respect to their provision of packet switched and optical (“non-TDM-based”) special access services.<sup>3</sup>

As a general matter, consumers benefit from well-functioning special access services markets. In granting petitions for forbearance relating to non-TDM-based special access services, the FCC failed to apply the rigorous market analysis that is required to assess properly the level of competition that exists in relevant markets. The FCC erred in granting forbearance and should reverse those decisions, so as to permit effective and efficient competition to occur as carriers migrate to Internet Protocol (“IP”) platforms. Consistent with the data-driven, analytically sound examination of the structure of relevant geographic and product markets for special access services that the FCC conducted in the Qwest’s Phoenix forbearance proceeding, the FCC should apply a similar analysis of the non-TDM special access services based on data and information about relevant geographic and product markets.

## **II. SUMMARY OF PETITION**

The Petitioners are petitioning the FCC to “reverse” the forbearance from dominant carrier regulation and certain Computer Inquiry requirements that it previously granted to Verizon, legacy Embarq, Frontier and Citizens ILECs (“Frontier”), and legacy Qwest as

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<sup>3</sup> / On November 2, 2012, in its Public Notice responding to the Petition, the Wireline Competition Bureau waived the standard ten-day comment cycle associated with petitions and stated that it would establish a pleading cycle in a forthcoming Public Notice (FCC Public Notice, DA 12-1819, released November 9, 2012.) On February 15, 2013, the FCC released a Public Notice in WC Docket No. 05-25 (DA 13-232) seeking comments on Ad Hoc, et al’s petition. Reply Comments are due May 31, 2013. Rate Counsel’s comments are based on its review of the redacted version of the Petition.

implicated in their provision of non-TDM-based special access service<sup>4</sup> as well as to impose appropriate regulations to prevent carriers from exerting dominance.<sup>5</sup>

The Petition encompasses, among others, Verizon’s forbearance petition that, by virtue of not having been acted upon, was “deemed granted” in 2006.<sup>6</sup> After the deemed granted approval of Verizon’s petition, AT&T, legacy Embarq, Frontier and legacy Qwest all successfully petitioned the FCC for the same grant of forbearance (collectively, the “Forbearance Orders”):

- 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 (2007);
- 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 (2007);
- 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 (2008).

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<sup>4</sup> / Petition, at 1.

<sup>5</sup> / *Id.*, at 25.

<sup>6</sup> / 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”). See, also, 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).

Ad Hoc, et al. argue that the FCC has the authority to reverse its earlier decisions,<sup>7</sup> and that the Commission need only acknowledge that it is making a change, and clearly articulate its reasons for so doing.<sup>8</sup> The Petitioners explain that in denying the appeal of the *AT&T Forbearance Order*:

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.”<sup>9</sup>

Furthermore, Petitioners recommend that the Commission adopt new dominant carrier regulation of non-TDM-based special access services “to prevent incumbent LECs from improperly exploiting their market power.”<sup>10</sup>

The Petitioners urge the Commission to utilize its *Qwest Phoenix Forbearance Order*<sup>11</sup> framework for assessing packet switching and optical special access services markets,<sup>12</sup> and enumerate the following purported errors made in the Commission’s earlier grants of forbearance (copied verbatim, from pages 26-27, cites omitted):

- Ignored the wholesale market for non-TDM-based special access services and improperly analyzed the retail market for all non-TDM-based broadband services rather than the specific subset of services for which the incumbent LECs sought forbearance: non-TDM-based broadband special access services;
- Considered broad national “competitive trends without regard to specific geographic markets”;

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<sup>7</sup> / Petition, at 21.

<sup>8</sup> / *Id.*, at 22.

<sup>9</sup> / *Id.*, at 18 citing: *Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903 (D.C. Cir. 2009), at 911.

<sup>10</sup> / Petition, at 25.

<sup>11</sup> / See, e.g., *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket 09-135, Memorandum Opinion and Order, 25 FCC Rcd 8622 (2010) (“*FCC Qwest Phoenix Forbearance Order*”).

<sup>12</sup> / Petition, at 25.

- Relied on vague and unsupported predictive judgments about the development of competition in the provision of retail non-TDM-based special access services in the future—including the possibility that competitors would deploy their own broadband facilities—even though the Commission had repeatedly found that the barriers to the deployment of last-mile facilities are impossible to overcome in most situations;
- Depended on the sophistication of enterprise customers to counteract the incumbent LECs’ exercise of market power, despite the fact that, in the absence of a viable alternative, there is nothing that even the most sophisticated customer can do to offset the incumbent LECs’ market power; and
- Relied on the fact that incumbent LECs would remain subject to Sections 201 and 202 of the Act and the Section 208 complaint process, even though the Commission has never deemed these requirements to be sufficient, standing alone, to protect consumers and competition against the exercise of incumbent LEC market power and there was no record evidence to support such a finding.

According to Petitioners, the use of the Phoenix framework will leave no doubt that the incumbent local exchange carriers (“ILEC”) continue to be dominant in the provision of non-TDM-based special access services.<sup>13</sup> Petitioners also contend that dominant carrier regulation is necessary to ensure that incumbent services are offered on just and reasonable terms and conditions (in accordance with Section 201(b) of the Act) and that incumbents do not unjustly or unreasonably discriminate (in accordance with Section 202(1)).<sup>14</sup> As described in the Petition:

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

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<sup>13</sup> / See Petition, at 30-56.

<sup>14</sup> / *Id.*, at 59.

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, 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.<sup>15</sup>

### III. DISCUSSION

**The Commission should grant the Petition, reverse forbearance and adopt dominant carrier regulation of carriers' non-TDM-based special access services.**

Rate Counsel fully supports the Petition and urges the Commission to reverse its premature granting of forbearance. The fact that the original request for forbearance, submitted by Verizon, was granted through inaction (and was opposed by two of the then Commissioners) as opposed to being granted based on a reasoned, well-articulated, fact-based assessment of the merits of Verizon's petition underscores the tenuous foundation upon which the subsequent similar requests for forbearance were granted by the FCC.<sup>16</sup>

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<sup>15</sup> / *Id.*, at 3-4, cite omitted.

<sup>16</sup>/ See *id.*, at footnote 21 stating: "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

Instead, the FCC should apply the methodology that it used in the *Qwest Phoenix Forbearance Order* to an in-depth analysis of non-TDM special access services offered in relevant geographic markets.<sup>17</sup> There is a clear history of predictive judgment mis-gauging the extent of competition that would actually occur in special access markets.<sup>18</sup> The FCC should be mindful of its own conclusions in the *FCC Qwest Phoenix Forbearance Order*. For example, the FCC concluded that its predictions about competition were unfounded: “Upon further consideration, we find that these predictions have not been borne out by subsequent developments, were inconsistent with prior Commission findings, and are not otherwise supported by economic theory.”<sup>19</sup>

The Commission should adopt the traditional market power analysis that it used in the *Qwest Phoenix Forbearance Order*,<sup>20</sup> and should only consider potential entry that is “timely, likely and sufficient in its magnitude, character and scope to deter or counteract the competitive

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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).”

<sup>17</sup>/ Petition, at 3.

<sup>18</sup>/ *FCC Qwest Phoenix Forbearance Order*, at paras. 34-35.

<sup>19</sup>/ *Id.*, at para. 35.

<sup>20</sup>/ Rate Counsel discussed the specifics of such a market analysis in its recent comments and reply comments and does not repeat that discussion here. See, *In the Matter of Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25; RM-10593, Comments of the New Jersey Division of Rate Counsel, February 11, 2013; *In the Matter of Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25; RM-10593, Reply Comments of the National Association of State Utility Consumer Advocates and New Jersey Division of Rate Counsel, March 12, 2013.

effects of concern.”<sup>21</sup> If in doubt, the Commission should reject speculations about potential entry – the Commission’s past predictions have not proven out.

Rate Counsel supports the FCC’s proposed structural market analysis such as that conducted in the *Qwest Phoenix Forbearance Order*.<sup>22</sup> In comments filed in response to the FCC’s Further Notice of Proposed Rulemaking<sup>23</sup> in the special access proceeding, Rate Counsel supported such an approach, also noting:

Price increases in a declining cost industry suggest a lack of market discipline. Price increases in areas for which ILECs have acquired pricing flexibility undermine the findings of competition that justified the regulatory relief that the FCC prematurely granted. An outcome with rates in markets that have been granted pricing flexibility being higher than those rates in markets without pricing flexibility suggests that the industry’s and the FCC’s predictions about competition were misplaced.<sup>24</sup>

As the Petitioners observe, the Court upheld the FCC’s *Qwest Phoenix Forbearance Order*. The Petition explains:

On appeal, the Tenth Circuit Court of Appeals rejected Qwest’s argument that “the Commission’s assessment of competitive conditions in the Phoenix market was unreasonable.” The court found that Qwest was on notice that the Commission was considering moving to the traditional market power framework to analyze Qwest’s petition and that such a framework “necessitated the production of qualitatively different evidence to warrant regulatory forbearance.” The court further found that “the Commission offered an extensive discussion of its reasons for . . . adopting the market-power approach—an approach with some

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<sup>21</sup> / U.S. Department of Justice and the Federal Trade Commission, Horizontal Merger Guidelines, Issued August 19, 2010 (“DOJ/FTC 2010 Merger Guidelines”), at § 9.

<sup>22</sup> / *Qwest Phoenix Forbearance Order*, FCC Rcd at 8622.

<sup>23</sup> / *In the Matter of Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25; RM-10593, *Report and Order and Further Notice of Proposed Rulemaking*, rel. December 18, 2012 (“Order/FNPRM”).

<sup>24</sup> / *In the Matter of Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25; RM-10593, Comments of the New Jersey Division of Rate Counsel, February 11, 2013, at 9.

basis in the Commission's precedent and, in the Commission's view, better in keeping with the underlying purposes of section 10."<sup>25</sup>

In light of the importance of non-TDM special access services to CLECs' ability to compete, the FCC should apply the same level of rigor to its analysis of the ILECs requests for forbearance.

**Migration to non-TDM-based special access services underscores the importance of preventing ILECs from exerting market power in the rates, terms, and conditions of these services.**

A last mile loop provided using a TDM transport protocol is, at least in many cases, required to be offered on a wholesale basis, and the legacy carriers are required to provide service (even if at special construction prices) when service is requested. However, as users move to packetized service (i.e., Ethernet), these critically important wholesale requirements disappear. The change in technology should not alter ILECs' requirement to enable CLECs to obtain access to the last-mile loop. Instead any decisions regarding forbearance should be based on an analytically sound economic analysis. The Commission should reject ILECs' frequent attempts to confuse changes in *technology* with changes in *market structure*. CLECs' ability to obtain access at reasonable rates, terms, and conditions to ILECs' loops, whether Ethernet or TDM, is essential to the development of competitive options, which in turn affects consumers.

Because enterprise customers' demand for packetized services is increasing, the FCC's failure to rein in ILECs' market power in these important and growing markets will thwart competition, and, thereby harm consumers. Rate Counsel urges the Commission to remedy the flawed forbearance decisions expeditiously. Rate Counsel also cautions the Commission that ILECs are likely to claim that rescinding forbearance will deter carriers' investment. This scare

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<sup>25</sup> / Petition, at 21, citing, *Qwest Corp. v. FCC*, No. 10-9543, slip op. (10th Cir. Aug. 6, 2012), at 28, 35, 36.

tactic has been rebutted in the context of the larger special access FNPRM now pending before the Commission. In reply comments, Rate Counsel and the National Association of State Utility Consumer Advocates (“NASUCA”) stated:

The ILECs are unabashedly seeking to scare the FCC into a belief that new special access service rules could “imperil the migration to high-capacity IP networks.” Particularly galling, in the context of the ILECs’ vocal lobbying for hastening the nation’s transition to an IP network, is the fact that the ILECs’ special access terms and conditions actually thwart rather than spur the nation toward the IP network.<sup>26</sup>

**The Commission should signal industry that the Commission will not tolerate incomplete applications for forbearance that lead to a squandering of administrative resources.**

Rate Counsel is heartened by the Commission’s apparent interest in obtaining and analyzing relevant data regarding forbearance requests, but dismayed that carriers fail to submit adequately supported applications in the first place.<sup>27</sup> Rate Counsel urges the Commission to require carriers to submit comprehensive data and information in support of their requests for forbearance with their *original* filings, rather than being permitted to withdraw flawed applications at a later date.<sup>28</sup> When carriers submit incomplete applications as “trial balloons,”

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<sup>26</sup> / *In the Matter of Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25; RM-10593, Reply Comments of the National Association of State Utility Consumer Advocates and New Jersey Division of Rate Counsel, March 12, 2013, at 9.

<sup>27</sup> / *In the Matter of Petition of CenturyLink for Forbearance Pursuant to 47 U.S.C. § 160(c) from Dominant Carrier and Certain Computer Inquiry Requirements on Enterprise Broadband Services*, WC Docket No. 12-60, Order, March 20, 2013.

<sup>28</sup> / On February 23, 2012, CenturyLink filed a petition for forbearance requesting that the Commission forbear from dominant carrier regulation and the *Computer Inquiry* tariffing requirement with respect to its packet-switched and optical transmission services for those services subject to the regulations. On February 22, 2013, the Commission extended by 90 days the date by which CenturyLink’s petition would be deemed granted in the absence of a Commission decision. On March 5, 2013, the Commission requested that CenturyLink provide additional information to support its request for forbearance, and also issued a Public Notice inviting voluntary submissions of competition data to assist the Commission in evaluating CenturyLink’s forbearance petition. On March 20, 2013, CenturyLink submitted a request to withdraw its petition for forbearance and requested that the Commission dismiss its petition without prejudice, which the Commission granted (as well as withdrawing its voluntary data request). *Id.*, paras. 1-2.

they create administrative burden. Therefore the Commission should signal the industry unambiguously that the Commission will not tolerate frivolous applications.

#### **IV. CONCLUSION**

Rate Counsel urges the FCC to grant the Petition, reverse its earlier granting of forbearance, and apply dominant carrier regulation to non-TDM-based special access services to prevent incumbent local exchange carriers from exercising market power. Furthermore, carriers should be instructed to submit complete applications for forbearance with comprehensive supporting documentation so as not to create unnecessary administrative burden for the Commission.

Respectfully submitted,

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