Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

COMMENTS OF COMPTEL

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COMPTEL respectfully summits these comments in support of the petition filed jointly by 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. ("the Petitioners") to reverse forbearance from dominant carrier regulation and certain *Computer Inquiry* requirements granted to Verizon, AT&T, legacy Embarq, Frontier, and legacy Qwest in their provision of non-TDM-based special access services.[1]

[1] 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, WC Docket No. 05-25, RM-10593 (filed Nov. 2, 2012) ("Petition").

Introduction and Summary

Enterprise broadband service is a multi-billion dollar business, impacting a significant number of businesses.[2] The regulatory policies for wholesale access affect competition in the downstream markets for retail broadband services provided to small businesses, mobile customers and enterprise customers.[3] Communications costs are a substantial portion of businesses' expenses and impact their ability to invest, grow their business, and create jobs. Consequently, failure to ensure just and reasonable rates for these services will have a significant negative impact on the economy as a whole. According to a recent report, the FCC's failure to adopt pro-competitive policies in the wireline telecommunications section will result in a loss of as many as 300,000 existing jobs and a reduction in investment by as much as $30 billion per year.[4] With regard to the enterprise broadband services in particular, the economy is being impacted by a regulatory landscape that resulted from inaction in one case,[5] and decisions that

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[2] These services "comprise a rich set of services provided to business customers over dedicated last-mile telecommunications facilities that allow customers to connect from the served location to any other premises or service (point to any point). Such services differ significantly from the "best efforts" types of broadband (DSL, cable modem or FiOS-like services) used for Internet access (point to Internet). 'Best efforts' Internet access broadband is not a substitute for customers that need dedicated Business Broadband Services." S. M. Gately Consulting LLC, "The Benefits of a Competitive Business Broadband Market, at i-ii, (April 2013)("Benefits of Competitive Business Broadband Market"), available at: http://thebroadbandcoalition.com/storage/benefits-of-broadband-competition.pdf.

[3] *See* Federal Communications Commission, Connection America: The National Broadband Plan at 47, available at: http://www.broadband.gov/download-plan/ ("National Broadband Plan").

[4] *Benefits of a Competitive Business Broadband Market* at iv.

[5] Under Section 10(c) of the Communications Act, as amended ("the Act") a forbearance petition is deemed granted if the Commission does not deny the petition before the statutory deadline. 47 U.S.C § 160(c). The Commission failed to issue a decision in response to Verizon's petition for forbearance with respect to its enterprise broadband services. Consequently, Verizon's petition, as modified by subsequent *ex partes*, was deemed granted. FCC News Release, "Verizon

lacked traditional market analysis in the other instances.[6] It is time for the Commission to correct this situation.

The Commission has a duty to ensure that the rates for these enterprise broadband services are just and reasonable. The analysis in Attachment A – which shows BOC prices dramatically higher than comparable services from rural carriers - indicates that the BOC rates for these services far exceed the Commission's just and reasonable standard. The Commission needs to revisit the grants of forbearance for these services and conduct a market analysis consistent with the precedent established in the *Qwest Phoenix Forbearance Order*.[7]

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 Petitioners also filed a petition to reverse the deemed grant of forbearance from Title II economic and public policy regulation of Verizon's enterprise broadband services, and the Commission has failed to address that petition. *See* 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).

[6] *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, WC Docket No. 06-125, FCC 07-180, 22 FCC Red. 18705 (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, et al.,* Memorandum Opinion and Order, WC Docket No. 06-147, FCC 07-184, 22 FCC Red. 19478 (2007) *("Embarq & Frontier Forbearance Order"); Qwest Petition for Forbearance Under 47 U.S. C. § 160(c) from Title 11 and Computer inquiry Rules with Respect to Broadband Services,* Memorandum Opinion and Order, WC Docket No. 06-125, FCC 08-168, 23 FCC Rcd. 12260 (2008) *("Qwest Forbearance Order")* (collectively, the *"Broadband Forbearance Orders").*

[7] *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, WC Docket No. 09-135, FCC 10-113 (2010)("Qwest Phoenix Forbearance Order").

The Commission has a Duty to Act

The Commission has a duty to ensure rates for the enterprise broadband services at issue in the petition are just and reasonable and non-discriminatory.[8] When confronted with possible – let alone evident – market failure, the Commission is obligated to take action to determine and remedy the existence of that market failure. This market, in particular, is too critical for the Commission to ignore the need for a rigorous market analysis to determine if preserving the grants of forbearance from dominant carrier regulations is appropriate. There is no question that Ethernet, in particular, is becoming the dominant technology that will form the PSTN of the future.[9] Indeed, in order to ensure a competitive structure for all market segments, it is time for the Commission to revisit its premature forbearance decisions in the harsh light of today's market facts.

The prior grants of forbearance do not preclude Commission action. The Commission has the authority to reverse the grants of forbearance from dominant carrier regulation of AT&T, legacy Embarq, Frontier, and legacy Qwest and the deemed granted forbearance of Verizon. The Commission recognized this in its Broadband Forbearance Orders[10] and the D.C. Circuit explicitly affirmed this fact, stating that "the FCC's forbearance decision [with regard to the grant

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[8] 47 U.S.C §§201 and 202.

[9] This does not mean, however, that DS1 and DS3 special access services are irrelevant. DS1s and DS3s are still a key input for business broadband services and will remain a key input for some time. *See, e.g.*, *Special Access for Price Cap Local Exchange Carriers*, Report and Order, WC Docket No. 05-25, RM-10593, FCC 12-92, ¶ 2 (2012) ("Four of the largest incumbent LECs recently reported that their combined 2010 revenues from sales of DS1s and DS3s exceeded $12 billion.").

[10] *AT&T Forbearance Order* at n. 120; *Embarq and Frontier Forbearance Order* at n. 113; *Qwest Forbearance Order* at n. 127. The Commission also recognized its ability to revisit the Verizon deemed granted forbearance. *AT&T Forbearance Order* at ¶ 50.

of forbearance to AT&T] (or in the related Verizon and Qwest special access matters) is not chiseled in marble…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."[11]

The Commission's Approach in the Broadband Forbearance Orders is Inconsistent with Current Precedent for Determining Forbearance

In granting AT&T forbearance the Commission acknowledged that "the record in this proceeding does not include detailed market share information for particular enterprise broadband services."[12] The Commission chose to look more broadly at competitive trends, without regard to specific geographic markets.[13] At one point the Commission suggested it was analyzing the market on a nationwide basis, stating that "available data suggest that there are a number of competing providers for these types of services nationwide and the marketplace generally appears highly competitive."[14] The Commission quickly dismissed this data too, however, finding it "not ideal" (because it predated the BOC/interexchange carrier mergers and the underlying information and methodologies were not available) and not relevant, stating it did "not give significant weight to such static market share information in any event."[15] With no data to support a market analysis it is unclear how the Commission determined there was "significant competitive pressure" to make tariffs unnecessary to protect consumers from unjust,

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[11] *Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903, 911 (2009).

[12] *AT&T Forbearance Order* at ¶ 23.

[13] *Id*. at ¶20.

[14] *Id*. at ¶23

[15] *Id*, n. 94.

unreasonable, and discriminatory rates.[16] The Commission, nevertheless, granted forbearance, with a cryptic intent to accommodate "forces that influence the future market development."[17]

In the subsequent *Qwest Phoenix Forbearance Order*, however, the Commission adopted a traditional market power framework to evaluate competition in telecommunications markets for purposes of forbearance proceedings. In doing so, the Commission found this approach better suited the three-part section 10 forbearance criteria with respect to dominant carrier regulation, as well as unbundling requirements.[18] The Commission and other US agencies (such as the DOJ and FTC), as well as regulators in other counties (such as those in the European Union), have a long history in using this approach to determine the extent of competition in a market.[19]

Significantly, as the Commission explained, the Commission's market power analysis adopted in the *Qwest Phoenix Forbearance Order* – and proposed by the Petitioners of this proceeding - is designed to identify when competition is sufficient to constrain carriers from imposing unjust, unreasonable, or unjustly or unreasonably discriminatory rates, terms, and conditions, or from acting in an anticompetitive manner.[20] The Commission concluded that this "market power analysis is the precise inquiry specified in section 10(a)(1), and informs our assessment of whether carriers would have the power to harm consumers by charging

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[16] *Id* at ¶30.

[17] *Id*. at ¶20.

[18] *Qwest Phoenix Forbearance Order* at ¶ 37.

[19] *Id*.

[20] *Id*.

supracompetitive rates."[21]

Claiming Broadband is an Emerging Market Does Not Justify Ignoring Evident Market Failure

The Commission needs to re-evaluate the existing forbearance grants from dominant carrier regulation where it failed to use the traditional market power framework for evaluating competition adopted in the *Qwest Phoenix Forbearance Order*, or explain why it is appropriate to use fundamentally different analytical methodologies to evaluate competition for the services at issue.[22] As discussed below, the reasons provided in the broadband forbearance decisions at issue here are no longer valid.

The Commission's broadband forbearance decisions seems to draw a distinction between "legacy services" and what it described as "emerging services," in terms of whether to conduct a market analysis.[23] First, it is not appropriate to draw such distinction, particularly when a firm with market power can preserve its market power over a newer service that relies to a great extent on the same existing facilities from which it derives its market power over a legacy service. Second, the enterprise broadband market (and its dominant Layer 2 offering, Ethernet) is a maturing market and, even to the extent one found these services could be consider "emerging services" at one time, that is no longer the case. Rather, Ethernet is the fundamental building block of the IP-based technologies being deployed in the PSTN today.

As Commissioner Pai identified, a core principle when transitioning to new emerging technologies is that "the FCC must be able to combat discrete market failures and

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[21] *Id*.

[22] *Qwest Phoenix Forbearance Order* at ¶25.

[23] *AT&T Forbearance Order* at ¶¶ 20, 23.

anticompetitive harms."[24] Market power concerns do not disappear merely because a market is evolving,[25] particularly in a case such as here where the BOC can leverage its market power in "legacy" services into the "emerging" services. In a proceeding before the California Public Utilities Commission, a declaration on behalf of CALTEL discusses how AT&T enjoys the same market power for Ethernet that is has traditionally enjoyed for DS1 services, partly as a result of its contracting strategy (that ties purchases for Ethernet to DS1 commitments) and the indisputable advantages of its legacy network footprint.[26] Moreover, as the Petitioners address, the same facilities that can be used to provide legacy TDM-based unbundled network elements are used to provide the non-TDM-based special access services at issue in the Verizon deemed granted and Broadband Forbearance Orders.[27]

The standard for determining market power also does not change. In the *National Broadband Plan*, developed subsequent to the forbearance grants at issue here, the Commission recognized the flaws of its current regulatory approach to wholesale access and pricing

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[24] Opening Remarks of Commission Ajit Pai at first Technology Transition Policy Task Force Workshop, March 18, 2013, available at http://www.fcc.gov/document/technology-transitions-policy-task-force-workshop-opening-statement

[25] Nor does the Commission's duty to promote competition and protect consumers disappear simply because a market is changing. *See* Prepared Remarks of FCC Chairman Julius Genachowski, Technology Transitions Policy Task Force Workshop, at 2 March 18, 2013, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-319574A1.pdf ("While technological advances can change markets, they don't change the FCC's mission.").

[26] *See* Declaration of Joseph Gillan on behalf of CALTEL- Public Version, attached to Additional Comments and Analysis of the California Association of Competitive Telecommunications Companies Regarding Backhaul and Merger Conditions, *Acquisition by AT&T Inc. of T-Mobile USA, Inc., and its Effect on California Ratepayers and the California Economy*, California PUC Investigation 11-06-009 (filed Aug. 22, 2011).

[27] Petition at 29, 50.

mechanisms that regulate network functionalities differently, based on the technology used, and developed without the benefit of a consistent, rigorous analytic framework.[28] With regard to the Commission's decision of forbearance granted to AT&T in particular, it notes that the "[l]ack of appropriate wholesale access to packet-based facilities in particular serves as a constraint on competition in broadband services, which can typically be provided more efficiently using packet-based inputs."[29] In other words, even if it was appropriate to consider a market an "emerging" market, that would still not justify the Commission allowing unjust, unreasonable, discriminatory rates or otherwise anti-competitive behavior.

As noted, however, the Ethernet market cannot be considered a nascent, emerging, market. In 2007 (when AT&T was granted forbearance), roughly 1/3rd of its wireline revenues were attributable to data services;[30] in 2012, however, data was responsible for the *majority* (53%) of its wireline revenues.[31] Perhaps even more telling are the trends affecting AT&T's business-related data revenues in 2012, with:

* Strategic business services (which include Ethernet) increasing by 13.5%; while

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[28] *National Broadband Plan* at 47, emphasis added ["Unfortunately, the FCC's current regulatory approach is a hodgepodge of wholesale access rights and pricing mechanisms that were developed *without the benefit of a consistent, rigorous analytic framework*. Similar network functionalities are regulated differently, based on the technology used. Therefore, while networks generally have been converging to integrated, packet-mode, largely-IP networks, regulatory policy regarding wholesale access has followed the opposite trajectory. This situation undermines longstanding competition policy objectives."]

[29] *Id*. at 65, n. 70.

[30] Wireline Segment Results, AT&T 2007 Annual Report at 32, available at: http://www.att.com/Investor/ATT_Annual/downloads/07_ATTar_FullFinalAR.pdf

[31] Wireline Segment Results, AT&T 2012 Annual Report at 37, available at: http://www.att.com/Investor/ATT_Annual/2012/downloads/ar2012_annual_report.pdf

* Traditional data revenues (which exclude Ethernet) decreased by 5%.[32]

Although Verizon does not report segment results organized in the same manner as AT&T (with its separation of voice and data), it experienced a similar trend, informing investors that its global enterprise revenues decreased "primarily due to lower local services and traditional circuit-based revenues … as our customer base continued to migrate to next generation IP services."[33]

BOC Ethernet Prices are Evidence of Market Failure

As stated above, the Commission must ensure the rates for enterprise broadband services are just and reasonable. Additionally, unjust and unreasonable rates indicate market failure. As evidence of unjust and unreasonable rates and market failure for a core enterprise broadband service (Ethernet), COMPTEL commissioned an analysis that compared the Ethernet prices of AT&T and CenturyLink to a comparable service constructed using the wholesale Ethernet offering of rural ILECs in NECA #5.[34] Both AT&T and CenturyLink are far larger and operate in more dense areas than the carriers concurring in NECA #5 and, accordingly, should enjoy significantly greater economies of scale and scope. Consequently, AT&T and CenturyLink's costs should be *less* than the NECA #5 carriers, which would necessarily imply that their prices should be less as well. Instead, as the attached analysis demonstrates, the BOC prices are often greater by an order of magnitude. For example, AT&T's Ethernet channel termination prices are between 6 (2Mbps) and 11 times (1Gbps) more expensive than the rates in NECA #5, even with

[32] *Id*. at 38.

[33] Verizon 2012 Annual Report at 33, available at: http://www22.verizon.com/investor/app_resources/interactiveannual/2012/downloads/12_vz_ar.pdf

[34] As noted in Attachment A at 3, Verizon does not publically file its Ethernet prices and, as such, no comparison was possible.

a 3 year contract; while CenturyLink's rates are between 2 (2Mbps) and 11 times (1Gbps) higher.[35]

The Commission has been clear that cost is an important determinant of just and reasonable rates.[36] AT&T and CenturyLink's Ethernet access and transport services cannot *plausibly* bear any reasonable relationship to cost. If the rural ILECs can offer, at the rates embodied in NECA #5, a wholesale broadband transmission platform that can easily (and effectively) become a finished retail service comparable to the AT&T and CenturyLink services at a *fraction* of the price of AT&T and CenturyLink,[37] then the only logical conclusion is that the AT&T and CenturyLink prices are unreasonably and unjustly inflated.

Conclusion

The Commission must conduct a reasonable market analysis for these critical services so that it can assure that its regulatory oversight is appropriate to actual competitive conditions, and take remedial actions necessary to address price levels.

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[35] Attachment A, Table 2.

[36] *Investigation of Special Access Tariffs of Local Exchange Carriers*, Memorandum Opinion and Order , 4 FCC Rcd 12, at ¶ 32 (1988) (emphasis supplied)["The Communications Act requires that rates be just and reasonable and not create unreasonable discrimination or undue preference. Sections 201(b) and 202(a), 47 U.S.C. §§ 201(b), 202(a). *Costs are traditionally and naturally a benchmark for evaluating the reasonableness of rates,* because cost-based rates both deliver price signals which contribute to efficient use of the networks and generally distribute network costs to the customer who causes those costs."].

[37] COMPTEL previously compared NECA #5 to AT&T and CenturyLink's Ethernet services from the perspective of a carrier seeking a wholesale access link. *See* An Analysis of Ethernet Access Options Under NECA 5, Attachment A to the Comments of COMPTEL In the Matter of: Petition of AT&T to Launch a Proceeding Concerning the TDM-to-IP Transition and Petition of NTCA for Rulemaking to Promote and Sustain the Ongoing TDM-to-IP Evolution, GN Docket 12-353, filed January 28, 2013 ("*NECA #5 Wholesale ETS Analysis*"). This analysis is similar, but not identical, to the analysis attached here, which is focused on judging the reasonableness of the prices charged for the finished Ethernet services. *See* Attachment A, n. 4.

Respectfully submitted,

/s/

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