

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

In the Matter of	)	
	)	
Special Access Rates for Price Cap Local Exchange Carriers	)	WC Docket No. 05-25
	)	
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	)	RM-10593

**COMMENTS OF HAWAIIAN TELCOM, INC.**

Hawaiian Telcom, Inc. (“Hawaiian Telcom”) hereby submits comments on the Petition filed in the above-captioned proceeding.<sup>1</sup> Petitioners ask the Commission to reverse the forbearance from regulation of non-TDM-based special access services previously granted to Verizon, AT&T, Embarq, Frontier, and Qwest.<sup>2</sup> Like other special access petitions that have been filed previously,<sup>3</sup> the Commission should refuse to grant the instant Petition. Special access services, particularly advanced broadband services

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<sup>1</sup> Public Notice, *Wireline Competition Bureau Seeks Comment on Petition To Reverse Forbearance From Dominant Carrier Regulations of Incumbent LECs’ Non-TDM-Based Special Access Services*, WC Docket No. 05-125, RM-10593, DA 13-232 (rel. Feb. 15, 2013) (“Public Notice”).

<sup>2</sup> 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. 05-125, RM-10593 (filed Nov. 2, 2012) (“Petition”).

<sup>3</sup> See, e.g., Petition of tw telecom inc., etc., to Establish Regulatory Parity in the Provision of Non-TDM-Based Broadband Transmission Services, Docket No. WC 11-188, at 1 (dated Oct. 4, 2011) (“tw telecom Petition”).

that include non-TDM-based special access services, are provided in a marketplace that is vibrantly competitive and in no need of regulation. Therefore, there is no basis in fact to grant the Petition. In addition, the Petition cannot lawfully serve as the basis for reversing previously granted forbearance.

## I. INTRODUCTION

Over eight years ago, Verizon filed a petition on behalf of all of its operating telephone companies, seeking forbearance from the FCC's Title II<sup>4</sup> and *Computer Inquiry* rules<sup>5</sup> applicable to most business broadband services.<sup>6</sup> Verizon's request was based on facts which demonstrated a nationwide competitive business broadband marketplace. Verizon's petition was granted by operation of law pursuant to Section 10(c) of the Communications Act.<sup>7</sup> The court denied an appeal of this forbearance grant in 2007 because the grant was made by Congress pursuant to statute, and hence was an unreviewable agency action that was not appealable pursuant to 47 U.S.C. § 402(a) or 28

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<sup>4</sup> 47 U.S.C. §§ 201, *et seq.*

<sup>5</sup> *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 FCC 2d 384 (1980) *recon.*, 84 FCC 2d 50 (1980), *further recon.*, 88 FCC 2d 512 (1981), *aff'd sub nom. Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983) (collectively referred to as *Computer II Orders*). *Amendment of Section 64.702 of the Commission's Rules and Regulations*, CC Docket No. 85-229, Phase I, 104 FCC 2d 958 (1986) ("Third Computer Inquiry").

<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 Docket No. 04-1440 (dated Dec. 20, 2004) ("Verizon Petition"). Verizon indicated that its forbearance grant did not apply to DS-1 and DS-3 services provided in time division multiplexing ("TDM") format and did not seek to avoid payment of universal service contributions based on revenues derived from the forborne services. Letter from Edward Shakin, Verizon, to Marlene Dortch, FCC, WC Docket No. 04-1440 (dated Feb. 7, 2006); Letter from Susanne A. Guyer, Verizon, to Marlene Dortch, FCC, WC Docket No. 04-1440 (dated Feb. 17, 2006).

<sup>7</sup> 47 U.S.C. § 160(c); Public Notice, *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*, WC Docket No. 04-440 (rel. Mar. 20, 2006).

U.S.C. § 2342(1).<sup>8</sup> “Congress made the decision in § 160(c) to ‘grant’ forbearance whenever the Commission ‘does not deny’ a carrier’s petition. When the Commission failed to deny Verizon’s forbearance petition within the statutory period, Congress’s decision – not the agency’s – took effect.”<sup>9</sup>

At later dates, the Commission issued orders granting in part the forbearance petitions filed by AT&T, Qwest, Embarq, and Frontier that were similar, although not identical, to Verizon’s.<sup>10</sup> Using its predictive judgment, the Commission concluded that Section 10’s factors were met with respect to the forborne services,<sup>11</sup> based on facts showing a nationwide competitive advance broadband services marketplace.<sup>12</sup> These grants eliminated dominant carrier regulation under Title II of the Communications Act<sup>13</sup> and the *Computer Inquiry* rules applicable specifically to Bell Operating Companies.<sup>14</sup>

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<sup>8</sup> *Sprint Nextel Corp. v. FCC*, 508 F.3d 1129 (D.C. Cir. 2007).

<sup>9</sup> *Id.* at 1132.

<sup>10</sup> *Petition for AT&T Inc for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Service*, Memorandum Opinion and Order, WC Docket No. 06-125, 22 FCC Rcd 18705 (2007) (“*AT&T 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*, WC Docket No. 06-125, 23 FCC Rcd 12260 (2008) (“*Qwest Forbearance Order*”); *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements*, Memorandum, Opinion and Order, WC Docket No. 06-147, 22 FCC Rcd 19478 (2007) (“*Embarq-Frontier Forbearance Order*”).

<sup>11</sup> *Embarq-Frontier Forbearance Order*, ¶¶ 16-49; *Qwest Forbearance Order*, ¶¶ 20-53; *AT&T Forbearance Order*, ¶¶ 16-51.

<sup>12</sup> *See, e.g., AT&T Forbearance Order*, ¶¶ 20-21.

<sup>13</sup> *See, e.g., id.*, ¶¶ 36-37.

<sup>14</sup> *Id.*, ¶¶ 53, 59.

**II. BECAUSE THE MARKETPLACE FOR BUSINESS BROADBAND SERVICES IS EVEN MORE COMPETITIVE TODAY THAN IN 2006, IT WOULD BE BAD PUBLIC POLICY TO GRANT THE PETITION.**

Given the highly competitive marketplace for business broadband services, the re-regulation of business broadband services would interfere with ILEC operating companies' legitimate investment incentives to deploy broadband. In the current economic environment, re-regulating business broadband services for these companies would create uncertainty that would make economic expansion more difficult. The Petitioners' request therefore would be an exceedingly erroneous economic decision. The Commission in the past has been cautious about interfering with private contracts when doing so could undermine investment-backed expectations of the carrier and customers alike.<sup>15</sup> No showing has been made in the Petition that invalidating existing contracts would not have such investment-squelching impact in the instant case.

More importantly, the forbearance grants permitted ILECs to enter into contracts with customers to provide forborne services on an unregulated basis. Customers of these forborne services now have an expectation that these contracts are legal, subject only to the general contract law. It would be markedly anti-consumer to now open these contracts to new and different challenges, possibly leading to price increases and other changes in negotiated terms and conditions, particularly when the market is competitive. Such a possibility smacks of retroactive rulemaking that is disfavored in the law.<sup>16</sup>

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<sup>15</sup> See, e.g., *Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, et. al, 15 FCC Rcd 22983, ¶ 36 (2000).

<sup>16</sup> *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 216-25 (1988) (Justice Scalia concurring).

Although Petitioners allege that the market for non-TDM-based special access services is not competitive, they do not present comprehensive market facts that contradict the facts that the Commission relied on to grant the forbearance requests in the first place. In fact, the market today for business broadband services is no less competitive than it was when non-TDM special access forbearance was originally granted. If anything, the marketplace for advanced broadband services has become even more competitive. The digital revolution has been progressing rapidly on a nationwide basis both technologically and from multiple large players. These marketplace facts have been cited in numerous submissions to the Commission.<sup>17</sup>

There have been no legal or policy changes that have occurred since the original forbearance grants that would justify revisiting any of the non-TDM special access service grants at this time. Congress has not made changes to either the forbearance statute or any of the relevant portions of the Communications Act. Furthermore, the Commission has adopted no substantive rule changes that would impact any of the forbearance grants.<sup>18</sup> Although the Commission has made a number of pronouncements about the broadband market for residential and small business customers,<sup>19</sup> it has engaged

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<sup>17</sup> See, e.g., Comments of CenturyLink, Inc., WC Docket No. 05-25, 10-36 (filed Feb. 11, 2013); Letter from Robert W. Quinn, Jr., AT&T, to Marlene H. Dortch, FCC, WC Docket No. 05-25, Attachment 1 (filed Jun. 7, 2012); Comments of Verizon, WC Docket No. 11-188, 10-22 (filed Dec. 20, 2011).

<sup>18</sup> The FCC's forbearance rulemaking was entirely procedural in nature and did not change the substantive rules applicable to forbearance requests. *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, WC Docket No. 07-267, Report and Order, 24 FCC Rcd 9543 (2009) ("*Forbearance Procedures Order*").

<sup>19</sup> See, e.g., Federal Communications Commission, Connecting America: The National Broadband Plan, GN Docket No. 09-51, at 9 (rel. Mar. 16, 2010).

in no such analysis of business broadband services. Therefore, there are insufficient grounds to justify revisiting any of these previous grants.

### **III. THE PETITION CANNOT LAWFULLY BE GRANTED AS FILED.**

First, the Commission cannot legally modify forbearance granted by operation of law, such as the Verizon forbearance grant identified previously, based on the Petition as filed. Section 10 of the Communications Act specifies the Commission's authority with respect to addressing forbearance requests, the standards that must be followed, and the procedures to be used. There is no methodology specified in the statute regarding reversing or modifying a forbearance grant. In fact, the statute indicates that a forbearance request can only be denied, a result which petitioners now seek, within a maximum of fifteen months of the filing of the forbearance petition. This time period has long since expired and there is substantial doubt that the Commission has any statutory authority to reimpose regulations by "reversing" or "modifying" a forbearance grant, particularly when Congress granted the Verizon operating companies' forbearance.<sup>20</sup>

Petitioners argue that the court in *Ad Hoc Telecommunications Users Committee v. FCC*<sup>21</sup> found that forbearance grants can be "reassessed" by the agency or Congress.<sup>22</sup> This vague statement of the court is mere dicta made in the context of evaluating the Commission's general rulemaking powers without the benefit of a full briefing on the issue. In addition, the court did not indicate how a forbearance decision could be

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<sup>20</sup> See text accompanying notes 8-9, *supra*. Indeed, the Supreme Court has previously found that the Commission, prior to the 1996 Telecommunications Act, did not have the authority to forbear from statutory requirements. *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 228-29 (1994). From this precedent it is just as likely to conclude that the FCC cannot now modify a forbearance request without specific statutory authority.

<sup>21</sup> *Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903 (D.C. Cir. 2009) ("*Ad Hoc*").

<sup>22</sup> Petition at 23.

“reassessed.” The *Ad Hoc* decision is therefore of little use in justifying a reversal based on the Petition as filed.

Second, it would also be impermissible to modify any of the forbearance grants made by published order based on this instant Petition. At a minimum, the Commission cannot impose any new regulations on a company without conducting a notice and comment rulemaking under the Administrative Procedures Act (“APA”)<sup>23</sup> and any rules adopted under the APA applicable to all similarly situated carriers that provide business broadband services, including the carriers who joined the instant Petition, in order to be upheld under the arbitrary and capricious standard of review.<sup>24</sup> It is wholly inconsistent with this requirement to act on the Petition merely because petitioners have filed it in an open rulemaking docket.<sup>25</sup> The Petition, therefore, cannot be granted as filed, and could at most be considered a petition for rulemaking.

Third, petitioner’s main argument for reversing the previous grants is that the Commission incorrectly analyzed the competitive nature of the marketplace.<sup>26</sup> Instead,

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<sup>23</sup> 5 U.S.C. § 551, *et seq.*

<sup>24</sup> *Compare National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1000 (2005) (agency must justify any decision to treat carriers and services dissimilarly to avoid arbitrary and capricious decisionmaking).

<sup>25</sup> It should be noted that the only pending Notice of Proposed Rulemaking potentially applicable was issued in WC Docket No. 05-25, is now eight years old, was not based on current market facts related to business broadband services, and predated the instant forbearance grants. *Special Access Rates for Price Cap Local Exchange Carriers*, Order and Notice of Proposed Rulemaking, WC Docket No. 05-25, 20 FCC Rcd 1994 (2005). That Notice therefore is hopelessly stale. Furthermore, because that Notice did not include (and indeed could not have included) the issue of whether to reverse Section 10 forbearance grants, parties have not been afforded notice and opportunity to comment as required by the APA. 47 U.S.C. § 553.

<sup>26</sup> *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, 25 FCC Rcd 8622 (2010), *aff'd*, *Qwest Corp. v. FCC*, 689 F.3d 1214 (10th Cir. 2012).

petitioners urge the Commission to employ the competitive analysis utilized in the *Phoenix Forbearance Order*, which they argue will result in a finding that the market for non-TDM-based special access services is not sufficiently competitive to justify forbearance.<sup>27</sup> This claim should be rejected because its analysis is inapplicable to the services in question. The courts have upheld the Commission’s employment of different methods of analyzing competition because Section 10 permits flexibility to employ analytical models to fit the particular circumstances involved in a forbearance petition.<sup>28</sup>

The *Phoenix* decision is simply inapplicable to the services in question. There, the Commission addressed a market-specific forbearance petition for residential and business services. In that decision, which post-dates the forbearance granted for business broadband services, the Commission specifically recognized that Section 10 permits it to weigh different factors than those involved with broadband services.<sup>29</sup> Analyzing competition for enterprise advanced broadband services on a nationwide basis was appropriate because the businesses that purchase advanced broadband services do so largely on a regional and nationwide basis, and are not limited necessarily to local markets.<sup>30</sup> In the dynamic broadband market, “relying on specific geographic markets would force the Commission to premise findings on limited and static data that failed to

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<sup>27</sup> Petition at 24-60.

<sup>28</sup> “Congress did not prescribe a ‘particular mode of market analysis’ or otherwise dictate how the FCC must make predictive judgments ‘within [its] field of discretion and expertise,’ such as those required under § 10,” *Verizon Tel. Cos. v. FCC*, 570 F.3d 294, 304 (D.C. Cir. 2009) (second alteration in original) (quoting *EarthLink, Inc. v. FCC*, 462 F.3d 1, 8, 12 (D.C. Cir. 2006)).

<sup>29</sup> *Phoenix Forbearance Order*, ¶ 39 (recognizing that Section 706 of the Communications Act encourages it to use its forbearance tools under Section 10’s grant of authority, to promote availability of broadband services).

<sup>30</sup> *AT&T Forbearance Order*, ¶ 21.

account for all of the forces that influence the future market development.”<sup>31</sup> The Commission also noted that its focus on market trends for broadband services, rather than in specific geographic markets, was consistent with a number of previous orders.<sup>32</sup> Petitioners do not address any of this broadband-specific analysis. Therefore, the *Phoenix Forbearance Order* is simply inapplicable to the services in question and should not be employed.

Fourth, the claim that the instant forbearance grants should be reversed based on the market analysis of the *Phoenix Forbearance Order*, is basically a petition for reconsideration of the original grants that is now barred as untimely.<sup>33</sup>

Fifth, and in any event, even if the Commission did not have to follow APA procedures in order to re-impose regulations on a previously forborne carrier, the Commission would have to follow the same procedures that the Commission has established to grant forbearance in the first place. The Commission has specified procedures to be followed when filing a forbearance petition, including establishing a new, higher burden of proof and production of evidence requirement.<sup>34</sup> While Hawaiian Telcom does not agree with the new forbearance standards adopted by the Commission, these rules are now final, and the Commission is bound to follow them.<sup>35</sup> The petitioners

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<sup>31</sup> *Id.*, ¶ 20. See also *Embarq-Frontier Forbearance Order*, ¶ 22; *Qwest Forbearance Order*, ¶ 26.

<sup>32</sup> *AT&T Forbearance Order*, ¶¶ 18-22.

<sup>33</sup> Petitions for reconsideration of agency decisions must be made within 30 days of the date of public notice for such action. 47 C.F.R. § 1.106(f).

<sup>34</sup> *Forbearance Procedures Order*; 47 C.F.R. §§ 1.53, *et seq.*

<sup>35</sup> *Morton v. Ruiz*, 415 U.S. 199, 235 (1974); *United States v. Caceres*, 440 U.S. 741, 752 (1979).

in this case not only fail to meet their burden of proof, but they have not provided any evidence to support their claims as the rules require. Therefore, because the Petition is not “complete as filed”, the Petition should be denied.<sup>36</sup>

For all of these reasons, it would be unlawful based on the instant Petition to reimpose regulatory conditions that were previously made inapplicable to the Verizon companies by operation of law or to other ILECs through written forbearance decisions.

#### **IV. CONCLUSION**

The Commission should not now address a Petition that seeks to modify forbearance grants for non-TDM-based special access services without any submission of facts, law, or policy that would justify a change in a legal forbearance grant. In addition, it would be unlawful to now modify these forbearance grants because the Commission does not appear to have any statutory authority to do so, cannot impose regulations absent APA-compliant rulemaking applicable to all similarly situated carriers, and must follow the same procedures and burden of proof it has established for forbearance petitions. Therefore, the Petition should be denied.

Respectfully submitted,

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<sup>36</sup> The FCC’s “complete as filed” rules preclude amendment. 47 C.F.R. § 1.54.