

**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

**REPLY COMMENTS OF AT&T INC.**

Pursuant to the Commission’s *Notice*,<sup>1</sup> AT&T Inc. (“AT&T”), on behalf of itself and its affiliates, respectfully submits these reply comments in opposition to the Petition of Ad Hoc Telecommunications Users Committee, *et al.*, to Reverse Forbearance from Dominant Carrier Regulation of Incumbent LECs’ Non-TDM-based Special Access Services.<sup>2</sup>

**ARGUMENT**

**I. THE COMMENTS CONFIRM THAT THE PETITION SHOULD BE REJECTED.**

AT&T demonstrated in its initial comments that the Commission should categorically reject Petitioners’ effort, six years after the fact, to “reverse” the moderate grant of forbearance that AT&T and others received from monopoly-era regulation of enterprise broadband services.

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<sup>1</sup> FCC, 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*, 28 FCC Rcd. 1280 (rel. Feb. 15, 2013) (“*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, Docket No. 05-25, RM-10593 (Nov. 2, 2012) (“*Petition*”).

Repeating arguments that the appellate court rejected when it upheld the Commission’s decision to grant forbearance, the Petition contemplates a result – the reversal of a grant of forbearance – that the Commission, for good reason, has never previously undertaken. But even if it were within the Commission’s power to reach the result Petitioners seek, the Petitioners provide no factual or legal basis for doing so. Indeed, such a decision would require the Commission to ignore, as the Petition does, the overwhelming evidence of the competition flourishing in the enterprise broadband market under the Commission’s forward-looking regulatory approach. As described below, the other comments, including those ostensibly filed in support of the Petition, underscore the numerous and fatal flaws in the Petition.

**A. The Relief Petitioners Seek Could Only Be Provided Through a New Rulemaking.**

At the outset, it is clear that even if Section 10 contemplated the “reversal” of a grant of forbearance that Petitioners seek, the Commission could only take that step and impose the new rate and other regulations that the Petitioners’ ostensibly demand (but do not define) through a new rulemaking under the Administrative Procedure Act (“APA”). As ITTA puts it, “assuming that the Commission has the authority to re-impose dominant carrier regulation with respect to the non-TDM-based special access services provided by AT&T, legacy Embarq, Frontier, legacy Qwest, and Verizon, it can only do so through notice and comment rulemaking procedures that establish a comprehensive record on which a detailed, reasoned explanation for the departure from prior decisions can be based.”<sup>3</sup> It is just as clear that the Petition does not satisfy the APA’s

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<sup>3</sup> Comments of the Independent Telephone and Telecommunications Alliance, Docket No. 05-25, RM-10593 (Apr. 16, 2013) (“ITTA Comments”), at 3. *Accord* Comments of Hawaiian Telcom, Inc., Docket No. 05-25, RM-10593 (Apr. 16, 2013) (“Hawaiian Telcom Comments”), at 7 (“At a minimum, the Commission cannot impose any new regulations on a company without conducting a notice and comment rulemaking” under the APA); Opposition of CenturyLink, Docket No. 05-25, RM-10593 (Apr. 16, 2013), at 3 (noting that even if the Commission had the authority to “reverse” forbearance under Section 10, “the Commission could address the Petition only by rulemaking – because the Petition asks the Commission

requirements for a notice of proposed rulemaking. That defect is not remedied by the Petitioners' attempt to shoehorn its request for relief into the pending Special Access Rulemaking. As Hawaiian Telecom explained, the Notice of Proposed Rulemaking that commenced Docket 05-25 is now eight years old and "hopelessly stale."<sup>4</sup> More to the point, "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."<sup>5</sup>

The few commenters who filed in support of the Petition add nothing to overcome these fundamental legal shortcomings. In fact, the only two parties who even bothered to address this critical issue do little more than echo the Petition's own conclusory and misplaced reliance on *dicta* in the D.C. Circuit's decision rejecting the Petitioner's prior appellate challenge to the forbearance decision to the effect that the decision "is not chiseled in marble. . . ."<sup>6</sup> In doing so,

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to establish new dominant carrier, pricing and service quality 'regulations'. . . ."); Comments of Verizon and Verizon Wireless, Docket No. 05-25, RM-10593 (Apr. 16, 2013) ("Verizon Comments"), at 23 ("[A]ny Commission decision reversing a grant of forbearance would have to take the form of an order, and the Commission would have to conduct a full rulemaking before issuing that order.").

<sup>4</sup> Hawaiian Telcom Comments at 7 n.25.

<sup>5</sup> *Id.* Even if the original notice in this case somehow could be construed as extending to the services at issue in the Petition, the Commission itself noted that the scope of its original NPRM was "narrowed considerably" by the forbearance orders that Petitioners seek to reverse. Report and Order and Further Notice of Proposed Rulemaking, *Special Access for Price Cap Local Exchange Carriers*, 27 FCC Rcd. 16318, ¶ 9 (rel. Dec. 18, 2012) ("*Further NPRM*"). Nor can the *Further NPRM* itself be twisted into effective notice, as nothing in that Order suggests that the Commission was entertaining the notion of reversing its forbearance orders. The evident focus of that Order was on the DSn-level special access services that were the subject of the Commission's now-suspended pricing flexibility rules. *See, e.g. id.*, ¶56 (noting that the proposed market analysis on which the Commission sought comments will assist "in evaluating whether the pricing flexibility rules result in just and reasonable rates and what regulatory changes may be needed."). Indeed, the Petition itself, which was filed over a month before the *Further NPRM* was issued, earned only one brief mention in that Order, and that was limited to a footnote citation in a discussion of whether to include "best efforts" broadband Internet services within the proposed data collection effort. *Id.*, ¶17 and n. 43.

<sup>6</sup> *See* Comments of Comptel, Docket No. 05-25, RM-10593 (Apr. 16, 2013) ("Comptel Comments"), at 4-5 (*citing Ad Hoc Telecomms. Users v. FCC*, 572 F.3d 903, 911 (2009)); Comments of the Midwest

they, like the Petitioners, completely miss the point: even if the Commission *can* revisit its forbearance decision, that says nothing about *how* it must do so.<sup>7</sup> There is nothing in the D.C. Circuit’s decision suggesting that the Commission can grant the specific relief sought in the Petition by avoiding the substantive and procedural rulemaking requirements of the Communications Act and the APA. In short, even if the Petitioners’ counterfactual claims regarding competition in the enterprise broadband market had any merit – and they do not – the Commission cannot impose the new pricing regulations that Petitioners seek without satisfying those rulemaking standards.<sup>8</sup> And the Petition utterly fails as a vehicle for commencing that process.

**B. There Is No Market Failure That Would Justify The Extraordinary Step Sought by the Petitioners.**

Just as importantly, the Petition does not come close to establishing that there is any market failure in today’s enterprise market for optical transmission and packet-based services, much less one that would justify the extraordinary and unprecedented step of reversing a

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Association of Competitive Communications, Inc., Docket No. 05-25, RM-10593 (Apr. 16, 2013) (“MACC Comments”), at 3.

<sup>7</sup> As AT&T noted in its Initial Comments, the Commission never has reversed a forbearance determination. Austin Schlick, General Counsel, FCC, *A Third-Way Legal Framework for Addressing the Comcast Dilemma*, at 9 (May 6, 2010), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-297945A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-297945A1.pdf) (“The difficulty of overcoming section 10’s deregulatory mandate and a prior agency finding in favor of forbearance is illustrated by the fact that the FCC has never reversed a forbearance determination made under section 10, nor one made for wireless under the similar criteria of section 332(c)(1)”).

<sup>8</sup> The Petitioners cannot avoid the APA’s requirements for a rulemaking by seeking to recast their request for relief as an “adjudication.” “Issues of broad applicability” – and that aptly describes Petitioners’ effort to impose a new regulatory scheme on services that generally have not been subject to such constraints for over six years – “are more suited to a rulemaking than to an adjudication, and the Commission has long refused to develop broad new rules in an adjudicatory context.” *Acme Television, Inc.*, Letter, DA 11-646, 26 FCC Rcd. 5189, 5192 (Rel. Apr. 8, 2011) (footnote omitted). As the Supreme Court noted in the context of a broadcast license renewal dispute, “[A] rulemaking is generally a ‘better, fairer, and more effective’ method of implementing a new industry wide policy than uneven application of conditions in isolated [adjudicatory] proceedings.” *Community Television of Southern California v. Gottfried*, 459 U.S. 499, 511 (1983).

forbearance decision. As both Verizon and CenturyLink confirm, competition for these services, which was already robust when forbearance was granted, has intensified, just as the Commission predicted. The market for Ethernet services is a prime example. CenturyLink describes how dozens of competitive providers – including, notably, several of the Petitioners – “have capitalized on burgeoning bandwidth needs by providing carrier- and enterprise-grade Ethernet services over their ever-more-ubiquitous long-haul and metropolitan networks.”<sup>9</sup> As a result of this dynamic competition, CenturyLink ranks as the fourth largest Ethernet provider – behind Petitioner tw telecom, inc. – “yet accounts for less than eight percent of the revenues for those services – hardly the mark of a dominant provider.”<sup>10</sup>

Similarly, Verizon’s comments include a 33 page appendix profiling no less than 40 competitive providers of enterprise broadband services.<sup>11</sup> These companies include not only each of the six CLEC Petitioners, but also eight cable operators, three other national CLEC providers (including commenter Level 3), 17 other regional providers, and six fixed wireless providers. In short, this is the very picture of a robust marketplace, fueled by increasing customer demand that “has attracted and facilitated increased competition and innovation.”<sup>12</sup>

In the face of these facts, the comments filed in support of the Petition, to the extent they attempt to present any market evidence at all, basically rehash the same stale and largely anecdotal “evidence” cited in the Petition. Level 3, for example, offers no actual data, but simply claims that its “experience” in the enterprise broadband marketplace shows that

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<sup>9</sup> CenturyLink Comments at 36.

<sup>10</sup> *Id.*

<sup>11</sup> Verizon Comments, Appendix A.

<sup>12</sup> *Id.* at 9.

competition is not present there.<sup>13</sup> But this is the same company that is sixth largest provider of business Ethernet services in the United States, with 26,000 route miles of metro fiber in North America, including operational, facilities-based local metropolitan networks in 119 markets, and a customer base that includes large multi-national enterprise customers.<sup>14</sup> These facts, drawn from Level's 3 recent filings with the SEC but unacknowledged in its comments here, speak volumes about its true experience – and success – in the competitive market for enterprise broadband services.

For its part, Comptel claims that market failure is evidenced by the prices ILECs charge for Ethernet services. To that end, it relies on an analysis that purports to compare the Ethernet prices charged by AT&T and CenturyLink with rates offered by rural ILECs through a NECA tariff.<sup>15</sup> According to this analysis, the AT&T and CenturyLink rates are higher than the NECA counterparts, and thus are presumptively unjust and unreasonable.<sup>16</sup> But this analysis, at least with respect to AT&T, is thoroughly undermined by a caveat the authors buried in a footnote: that is, they based their comparison on the “rack rates” published in AT&T's Guidebook, not on the lower, discounted rates for service that the Guidebook indicates are available and that customers actually pay.<sup>17</sup> Indeed, the extent to which customers obtain service pursuant to contracts, with discounts off rack rates, is underscored by the comments of Verizon, which notes that since it was granted forbearance it has entered into approximately 3,300 voluntarily-

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<sup>13</sup> Comments of Level 3 Communications, LLC on Petition to Reverse Forbearance from Dominant Carrier Regulations of Incumbent LECS' Non-TDM-Based Special Access Services, Docket No. 05-25, RM-10593 (Apr. 16, 2013) (“Level 3 Comments”), at 3.

<sup>14</sup> Verizon Comments, App. A at 14-15 (citing Level 3 Communications, Inc., Form 10-K, at 14-16 (SEC filed Feb. 26, 2013), [http://www.sec.gov/Archives/edgar/data/794323/000079432313000003/lvlt-123112\\_10k.htm](http://www.sec.gov/Archives/edgar/data/794323/000079432313000003/lvlt-123112_10k.htm)).

<sup>15</sup> Comptel Comments at 10-11 and Attachment A.

<sup>16</sup> *Id.*, Att. A at 2, 8.

<sup>17</sup> *Id.*, Att. A at 3 n.6.

negotiated private carriage contracts with unaffiliated carriers, including five of the petitioners, for non-TDM based services.<sup>18</sup> And CenturyLink, citing to the decrease in its average rates for services subject to forbearance, states that prices have “plummeted.”<sup>19</sup>

Comptel’s suggestion that this flawed pricing analysis demonstrates the ILECs’ market dominance is further belied by market share data. No provider of Ethernet services has a port share that exceeds one-quarter of the market.<sup>20</sup> Since 2005, ILEC Ethernet retail port shares among U.S. providers decreased *by more than 20 percent*; at the same time, cable companies and CLECs both increased their shares. The largest cable companies alone tripled their share in that time frame.<sup>21</sup> To be sure, market share data, standing alone, provides a crude basis for proving that a carrier has market power. In this case, however, this data incontrovertibly demonstrates the ILECs’ *lack* of it.

**C. The Jury-Rigged “Market Power” Test Advocated by the Petitioners Is Inapplicable To The Enterprise Broadband Services At Issue Here.**

Finally, the comments make clear that there is no basis for applying the non-broadband *Phoenix Forbearance Order*, especially in the distorted manner advocated by the Petitioners. The comments filed in support of the Petition simply parrot the Petitioners’ proposal to use what they describe as “traditional market power framework,”<sup>22</sup> but make no serious effort actually to assess the relevance of that decision to the services and marketplace at issue here. But, as CenturyLink points out, the static test employed in the *Phoenix Forbearance Order* is inappropriate here, in no small part because it dealt only with Qwest’s legacy non-broadband

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<sup>18</sup> Verizon Comments at 6-7.

<sup>19</sup> CenturyLink Comments at 2-3 and n. 3.

<sup>20</sup> Vertical Systems Group 2012 Ethernet Leaderboard Results.

<sup>21</sup> Vertical Systems Group, Year End Ethernet Port Share Reports 2005-2012.

<sup>22</sup> *See, e.g.*, New Jersey Ratepayer Advocate Comments at 6; MACC Comments at 5; Comptel Comments at 7-8.

services.<sup>23</sup> In fact, the Commission itself held in the *Phoenix Forbearance Order* that “a different analysis may apply when the Commission addresses advanced services, like broadband services, instead of a petition addressing legacy [TDM] facilities, such as Qwest’s petition in this [Phoenix] proceeding.”<sup>24</sup>

But even if the *Phoenix Forbearance Order* had any relevance to a determination to regulate the competitive broadband services that the Petition ostensibly targets – and it does not – the contorted version of that test that the Petitioners have conjured for use here should be rejected. As AT&T described in its initial comments, Petitioners’ so-called “analysis” is jury-rigged to exclude virtually all competitors. For example, it excludes the cable companies, fixed wireless providers, systems integrators, resellers, and all other competitive providers of Ethernet services that rely in part on transmission inputs purchased from other providers, notwithstanding that these providers unquestionably are engaged and succeeding in the retail marketplace. And to further skew the results, the Petitioners contend the Commission actually should ignore the retail market altogether, and should instead analyze only the *wholesale* marketplace.

None of the parties supporting the Petition note these shortcomings. But the Commission must. And in doing so, it must emphatically reject the Petitioners’ extraordinary request that it reverse a six-year-old forbearance decision based on nothing more than rhetoric and anecdote.

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<sup>23</sup> CenturyLink Comments at 19-20.

<sup>24</sup> Memorandum Opinion and Order, *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, 25 FCC Rcd. 8622, ¶ 39 (rel. June 22, 2010) (“*Phoenix Forbearance Order*”); see also *id.* Concurring Statement of Commissioner Baker at 67.

## CONCLUSION

For the foregoing reasons, as well as those set forth in AT&T's initial comments, the Commission should reject the Petition.

Respectfully submitted,

/s/ Robert C. Barber

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