ORAL ARGUMENT NOT YET SCHEDULED

BRIEF FOR FEDERAL COMMUNICATIONS COMMISSION

IN THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

NO. 07-1426

AD HOC TELECOMMUNICATIONS USERS COMMITTEE, ET AL.,

PETITIONERS,

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE
UNITED STATES OF AMERICA,

RESPONDENTS.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties:

All parties appearing in this court are listed in the Brief of Private Petitioners.

B. Rulings Under Review:

In the Matters of 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, Memorandum Opinion and Order, 22 FCC Rcd 18705 (2007) (J.A. 469); In the Matters of Petition of Embarq Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) from Computer Inquiry and Certain Title II Common Carriage Requirements, Memorandum Opinion and Order, 22 FCC Rcd 19478 (2007) (J.A. 512).

C. Related Cases:

The orders on review have not previously been before this Court or any other Court, and counsel are not aware of any related cases pending in this Court or in any other court.

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GLOSSARY

1996 Act	Telecommunications Act of 1996
Act	Communications Act of 1934
ATM	Asynchronous Transfer Mode
APA	Administrative Procedure Act
BOCs	Bell Operating Companies
Embarq	Embarq Local Telephone Companies
ILEC(s)	incumbent local exchange carrier(s)
Frontier	Frontier Telephone of Rochester, Inc. and Citizens Communications Co.
Kbps	kilobits per second
LEC(s)	local exchange carriers
New Jersey Rate Counsel	New Jersey Division of Rate Counsel
TDM	non-time division multiplexing
UNEs	unbundled network elements

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STATEMENT OF ISSUE PRESENTED

Section 10(a) of the Communications Act of 1934 as amended, 47 U.S.C. § 151, et seq. ("Communications Act" or "Act") authorizes the Federal Communications Commission to "forbear from applying" provisions of the Communications Act or FCC regulations to a telecommunications carrier or a telecommunications service if the Commission finds that certain criteria have been met. 47 U.S.C. § 160(a). In the orders on review, the Commission heeded Congress's direction to "utiliz[e]" its section 10 "regulatory forbearance" power to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans." Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act"), § 706(a), 47 U.S.C. § 157 nt. Specifically, the Commission granted petitions filed by

several common carriers for forbearance from dominant carrier regulation for certain broadband services.[1] The principal issue for review is whether the Commission's grants of forbearance are reasonable, supported by substantial evidence, and consistent with administrative and judicial precedent.

COUNTERSTATEMENT

I. Statutory And Regulatory Background

A. Section 10 — Regulatory Forbearance

Congress in the 1996 Act sought to "'encourage the rapid deployment of new telecommunications technologies' by 'promot[ing] competition and reduc[ing] regulation' among telecommunications providers."[2] "Critical to Congress's deregulation strategy,"[3] the 1996 Act added section 10 to the Communications Act to give the Commission new authority "to reduce the regulatory burdens on the telephone company when competition develops."[4] Under section 10(a), the Commission must forbear from applying any provision of the Communications Act or its rules if it determines: (1) that enforcement of the requirement is not necessary to ensure that rates and practices are just, reasonable, and not unjustly or unreasonably discriminatory; (2) that the regulation is not needed to protect consumers; and (3) that

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[1] In the Matters of 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, Memorandum Opinion and Order, 22 FCC Rcd 18705 (2007) ("AT&T/BellSouth Order") (J.A. 469); In the Matters of Petition of Embarq Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) from Computer Inquiry and Certain Title II Common Carriage Requirements, Memorandum Opinion and Order, 22 FCC Rcd 19478 (2007) ("Embarq/Frontier Order") (J.A. 512).

[2] AT&T Inc. v. FCC, 452 F.3d 830, 832 (D.C. Cir. 2006) (quoting 1996 Act, pmbl., 110 Stat. 56, 56).

[3] Id.

[4] S. Rep. No. 104-23 at 5 (1996).

forbearance is consistent with the public interest. 47 U.S.C. § 160(a). The Commission, in applying the "public interest" component of the test, must consider whether forbearance "will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services." 47 U.S.C. § 160(b).

Section 10(c) gives a telecommunications carrier the right to petition the Commission to exercise its authority to forbear from applying a provision of the Communications Act or the Commission's regulations. 47 U.S.C. § 160(c). The Commission "may grant or deny" a forbearance petition "in whole or in part and shall explain its decision in writing." 47 U.S.C. § 160(c). A forbearance petition is deemed granted if the Commission does not deny it for failure to meet those standards within 12 months, unless the Commission extends the deadline to a period not exceeding 15 months. 47 U.S.C. § 160(c).

B. Title II

In the absence of regulatory forbearance, Title II of the Communications Act of 1934, as amended, imposes a host of requirements upon the providers of interstate common carrier telecommunications services. 47 U.S.C. § 151. For example, section 203 of the Act requires interstate telecommunications carriers to file tariffs that establish the rates, terms, and conditions of interstate communications services. 47 U.S.C. § 203. The rates and practices of such services must be just and reasonable, 47 U.S.C. § 201(b), and free from undue discrimination, 47 U.S.C. § 202(a). Interstate communications carriers also must obtain Commission authorization before acquiring, constructing, operating, or discontinuing the operation of communications facilities, 47 U.S.C. § 214, and are obliged to "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers," 47 U.S.C. § 251(a)(1).

Title II also imposes non-economic duties on telecommunications carriers that further specific public policy objectives, such as requirements that such carriers contribute to universal service support mechanisms, 47 U.S.C. § 254, ensure access to telecommunications services by people with disabilities, 47 U.S.C. § 255, comply with standards regarding the privacy of customer information, 47 U.S.C. § 222(a)-(c), (f), and facilitate the delivery of emergency services, 47 U.S.C. § 222(d)(4)(g). In addition, telecommunications carriers are subject to a formal complaint process in which the Commission or a federal court adjudicates — and can order damages, where appropriate — complaints that the carrier has violated the Act. 47 U.S.C. §§ 206-9.

In addition to regulations applicable to all telecommunications carriers, Title II imposes specific requirements on telecommunications carriers that also are local exchange carriers ("LECs")[5], incumbent local exchange carriers ("ILECs"),[6] and/or Bell Operating Companies ("BOCs").[7] For example, section 251(b) bars LECs from prohibiting or unreasonably restricting resale (47 U.S.C. § 251(b)(1)); it obliges LECs to provide number portability (47 U.S.C. § 251(b)(2)); it requires LECs to provide dialing parity to competing telephone carriers (47 U.S.C. § 251(b)(3)); it compels LECs to give access to poles, ducts, conduits, and rights-of-way

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[5] The Communications Act defines a LEC as a "person that is engaged in the provision of telephone exchange service or exchange access." 47 U.S.C. § 153(26).

[6] ILECs are the subset of LECs "that were providing a given area with monopoly or near-monopoly telephone exchange service" when the 1996 Act was passed. Ass'n of Communications Enterprises v. FCC, 235 F.3d 662, 664 (D.C. Cir. 2001).

[7] BOCs are ILECs that were once part of the Bell System, a company that had dominated, inter alia, the local exchange, long distance, and telecommunications equipment markets in the United States until it was broken apart by a 1982 consent decree. See United States v. American Tel. & Tel. Co., 552 F.Supp. 131, 188 (D.D.C.1982), aff'd, Maryland v. United States, 460 U.S. 1001 (1983). AT&T also was part of the Bell System.

to their competitors (47 U.S.C. § 251(b)(4)); and it imposes upon LECs the duty "to establish reciprocal compensation arrangements for the transport and termination of telecommunications" (47 U.S.C. § 251(b)(5)). ILECs are subject to further requirements, such as the duty to provide interconnection and collocation and the obligation to provide their competitors with non-discriminatory access to elements of their network on an unbundled basis. 47 U.S.C. § 251(c). And BOCs additionally must comply with a variety of market-opening requirements, including, inter alia, interconnection and nondiscriminatory access to network elements, directory assistance, databases and signaling, as conditions to their authorization to provide in-region long distance service. 47 U.S.C. § 271.

C. Dominant/Non-Dominant Carrier Regulation

Since the 1980s, the Commission has eased certain regulatory requirements on communications providers that it has classified as "non-dominant" carriers, i.e., those carriers that are "subject to sufficient competitive pressure" that they lack market power necessary to sustain prices either unreasonably above or below costs.[8] For example, the Commission has relaxed tariff filing requirements imposed on non-dominant carriers, permitting them to file tariffs without cost support that take effect on one day's notice;[9] and in some cases the Commission has eliminated the tariff filing requirement entirely.[10]

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[8] Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorization Therefor, 85 FCC 2d 1, 20 (¶ 55) (1980). See MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985).

[9] Tariff Filing Requirements for Nondominant Carriers, 10 FCC Rcd 13653 (1995). See Global NAPs, Inc. v. FCC, 247 F.3d 252, 254-55 (D.C. Cir. 2001); AT&T/BellSouth Order ¶ 3 & nn.8-9 (J.A. 471).

[10] In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace, Second Report and Order, 11 FCC Rcd 20730 (1996).

In contrast, the Commission generally requires dominant carriers, i.e., those carriers that retain market power, to adhere to price caps or rate of return pricing regulation, to provide longer notice periods before their tariffs take effect, and to provide supporting justification for their tariffs.[11] Applications to discontinue, reduce, or impair service filed by non-dominant carriers are subject to a shorter waiting period than the same type of applications filed by dominant carriers.[12] And non-dominant carriers are subject to less stringent procedures than dominant carriers for certain types of transfers of control. See 47 C.F.R. § 63.03(b).

In the absence of regulatory forbearance, however, non-dominant carriers remain subject to the requirements of Title II. For example, the rates and conditions of non-dominant carrier services must continue to be just, reasonable, and free from unreasonable discrimination. 47 U.S.C. §§ 201(b), 202(a). Non-dominant carriers also must adhere to interconnection requirements, 47 U.S.C. § 251(a)(1), are subject to the statute's formal complaint procedure, 47 U.S.C. §§ 206-09, and must comply with the non-economic duties required by Title II, such as making contributions to universal service support mechanisms, 47 U.S.C. § 254, ensuring access to telecommunications services by persons with disabilities, 47 U.S.C. § 225, safeguarding the privacy of customer information, 47 U.S.C. § 222(a)-(c), (f), and facilitating the delivery of emergency services, 47 U.S.C. § 222(d)(4)(g).

D. Section 706 and the Deregulation of Broadband Services

Although the 1996 Act (which is part of the Communications Act) generally creates a "pro-competitive, de-regulatory national policy framework,"[13] Congress in that statute placed

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[11] See, e.g., 47 C.F.R. §§ 61.38, 61.41, 61.58.

[12] 47 C.F.R. § 63.71(c).

[13] H.R. Conf. Rep. 104-458, at 1 (1996).

special emphasis on the deregulation of advanced telecommunications services. Section 706 of the 1996 Act directs the Commission to "encourage" the timely deployment of "advanced telecommunications capability to all Americans" by employing "regulatory forbearance" and "other regulatory methods that remove barriers to infrastructure investment." 1996 Act, § 706(a).[14] The 1996 Act defines "advanced telecommunications capability" as "high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology." 1996 Act, § 706(c)(1), 47 U.S.C. § 157 nt. The Commission has construed the term "broadband" to encompass services that transmit and receive voice, data, or video communications at high speeds. Specifically, at the time the Commission issued the orders on review, the Commission defined broadband telecommunications as having "the capability of supporting, in both the provider-to-consumer (downstream) and the consumer-to-provider (upstream) directions, a speed (in technical terms, 'bandwidth') in excess of 200 kilobits per second (kbps) in the last mile."[15]

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[14] See also 47 U.S.C. § 157 ("It shall be the policy of the United States to encourage the provision of new technologies and services to the public.").

[15] Inquiry Concerning the Deployment of Advanced Telecommunications Capability to all Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, Report, 14 FCC Rcd 2398, 2406 (¶ 20) (1999). See Inquiry Concerning Deployment of Advanced Telecommunications Capability to all Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, 17 FCC Rcd 2844, 2850 (¶¶ 8, 9) (2002); Inquiry Concerning Deployment of Advanced Telecommunications Capability to all Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, Second Report, 15 FCC Rcd 20913, 20919-20 (¶¶ 11-14) (2000). As technological advances enable carriers to transmit at increasingly higher speeds, the definition of broadband has evolved accordingly. After the orders on review were issued, the Commission described "basic broadband tier 1" as "services equal to or greater than 768 kbps but less than 1.5 mbps in the faster direction." Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to all Americans, 23 FCC Rcd 9691 n.66 (2008).

Guided by the deregulatory mandate of section 706, the Commission — in a series of decisions affirmed by the courts — has taken measures designed to ease regulatory burdens on the providers of broadband services. The Commission, for example, has reassessed the need for applying its Computer Inquiry rules to broadband services.[16] Concluding in the wake of section 706 that "broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market,"[17] the Commission decided not to extend the Computer Inquiry rules to cable operators that provide broadband Internet access service over cable facilities.[18] Shortly after the Supreme Court upheld that decision,[19] the Commission in its Wireline Broadband Internet Access Service Order[20] proceeded to eliminate the Computer Inquiry requirements for telephone companies that provide broadband Internet access services over wireline facilities. Given its "dynamic nature," the Commission decided to base its analysis on the "larger trends in the marketplace, rather than exclusively through the snapshot data that

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[16] The Computer Inquiry rules require all facilities-based carriers to provide under tariff the same underlying basic transmission service at the same prices, terms, and conditions to all information service providers, including their own enhanced service operations. Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Final Decision, 77 FCC 2d 384, 475 (¶ 231) (1980) ("Computer II"). See generally National Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 976 (2005) ("Brand X"). The Computer Inquiry rules also require the BOCs, in providing information services, to comply with structural or nonstructural separation requirements. See AT&T/BellSouth Order ¶ 7 (J.A. 473).

[17] Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4802 (¶ 5) (2002) ("Cable Modem Order"), aff'd in part and rev'd in part, Brand X Internet Services v. FCC, 345 F.3d 1120 (9th Cir. 2003), rev'd, Brand X, 545 U.S. 967 (internal quotations omitted).

[18] Cable Modem Order, 17 FCC Rcd at 4824-26 (¶¶ 42-47).

[19] Brand X, 545 U.S. at 1000-02.

[20] Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14872-98 (¶¶ 32-85) (2005) ("Wireline Broadband Internet Access Service Order"), aff'd, Time Warner Telecom, Inc. v. FCC, 507 F.3d 205 (3d Cir. 2007).

may quickly and predictably be rendered obsolete as this market continues to evolve."[21] The Third Circuit, in affirming the Wireline Broadband Internet Access Service Order, specifically rejected the argument, presented by some of the same petitioners in this case, that the Commission was required to conduct a traditional analysis of the ILECs' market dominance before lifting the Computer Inquiry requirements. The court explained that rapidly changing conditions in the broadband marketplace "justified [the Commission's] decision to refrain from a traditional market analysis and to rely instead on larger trends and predictions concerning the future of the broadband services market."[22]

The deregulatory objectives of section 706 also have informed the Commission's implementation of the unbundling requirements of the 1996 Act. The Commission, in deciding which network facilities ILECs must unbundle under section 251(c)(3), took into account the policy underlying section 706 in declining to require the ILECs to unbundle the broadband capabilities of loops that were used to serve mass market customers.[23] This Court upheld that determination as reasonably designed to advance the goals of section 706 by removing disincentives to investment and innovation.[24] Subsequently, the Commission in the Section 271 Broadband Forbearance Order[25] granted petitions by BOCs to forbear from requiring unbundling

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[21] Id. at 14880-81.

[22] Time Warner, 507 F.3d at 221.

[23] Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17088-92, 17125-26, 17132-53 (¶¶ 176-78, 242, 255-295) (2003) ("Triennial Review Order"), aff'd in part and rev'd in part, United States Telephone Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004) ("USTA II").

[24] USTA II, 359 F.3d at 578-85.

[25] Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), Memorandum Opinion and Order, 19 FCC Rcd 21496 (2004) ("Section 271 Broadband Forbearance Order"), aff'd, EarthLink, Inc. v. FCC, 462 F.3d 1 (D.C. Cir. 2006).

of the same broadband facilities under section 271, which imposes separate unbundling requirements on BOCs seeking to enter the in-region long distance market. The Commission, in assessing whether the statutory forbearance criteria were satisfied, evaluated the wholesale and retail broadband marketplace on a nationwide basis.[26] This Court, in upholding that order, specifically rejected the argument that a section 10(a) forbearance analysis requires the Commission to assess "market conditions in particular geographic markets and for specific telecommunications services." Earthlink, 462 F.3d at 8 (internal quotations omitted). The Court emphasized that section 10(a) does not compel a "particular mode of market analysis or level of geographic rigor." Id. "Given the FCC's view of the broadband market as still emerging and developing," the Court held that the Commission "reasonably eschewed a more elaborate snapshot of the current market in deciding whether to forbear" from regulating broadband facilities. Id. at 9. And the Court specifically rejected petitioners' claim that the Commission "failed to properly consider the wholesale market," explaining that "CLECs [competitive LECs] have alternate ways to compete and the BOCs will be inclined to offer reasonable wholesale rates because they face intense intermodal competition inducing them . . . to find ways to keep traffic 'on net.'" 462 F.3d at 10 n.8 (internal citations omitted).

E. Verizon Forbearance Petition

In December 2004, Verizon filed a petition under section 10 asking the Commission to forbear from applying most of the Title II and the Computer Inquiry requirements to broadband

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[26] See Section 271 Broadband Forbearance Order, 19 FCC Rcd at 21505-21507 (¶¶ 21, 23). See also id. at 21505 ("It is appropriate to consider the wholesale market in conjunction with competitive conditions in the downstream retail broadband market.").

transmission services similar to those at issue here.[27] At the eve of the statutory deadline, the four participating commissioners deadlocked with a 2-2 vote on a draft order that would have partially granted Verizon's petition.[28] Because the Commission did not deny the petition within the timeframe prescribed by section 10(c), Verizon's petition on March 20, 2006, was deemed granted by operation of law.[29]

II. This Proceeding

A. Petitions for Forbearance

The "deemed grant" of forbearance to Verizon by operation of section 10(c) triggered forbearance petitions from other carriers seeking identical relief. In particular, between July 13, 2006, and August 4, 2006, four companies — AT&T Inc. ("AT&T), BellSouth Corporation ("BellSouth"), Frontier Telephone of Rochester, Inc. and Citizens Communications Co. ("Frontier"), and Embarq Local Telephone Companies ("Embarq") — separately filed petitions asking the Commission for forbearance from the same Title II and Computer Inquiry requirements as did Verizon.[30] The carriers did not ask for forbearance from universal service requirements.[31]

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[27] "Petition of the Verizon Telephone Companies for Forbearance," WD Docket No. 04-440 (filed Dec. 20, 2004). Verizon did not request forbearance from its statutory obligation to contribute to the universal service fund. See 47 U.S.C. § 254.

[28] See Sprint Nextel Corp. v. FCC, 508 F.3d 1129, 1131 (D.C. Cir. 2007).

[29] Id. at 1131-33.

[30] "Petition for Forbearance," filed by AT&T Inc. (July 13, 2006) ("AT&T Petition") (J.A. 58); "Petition for Forbearance," filed by BellSouth Corp. (July 20, 2006) ("BellSouth Petition") (J.A. 89); "Petition for Forbearance," filed by Embarq Local Operating Companies (July 26, 2006) ("Embarq Petition") (J.A. 110); "Petition for Forbearance," filed by Frontier Communications (August 4, 2006) ("Frontier Petition") (J.A. 137). Qwest Corporation also filed a similar petition, but that petition is not before the Court in this case.

[31] AT&T Petition at 10 (J.A. 69); BellSouth Petition at 8 (J.A. 98); Embarq Petition at 2 (J.A. 113); Frontier Petition at 8 (J.A. 147).

The carriers sought forbearance relief for specific services capable of transmitting at speeds of 200 kbps in both directions listed in their petitions and for such services they may offer in the future.[32] These broadband services fall within two categories: (1) non-time division multiplexing ("TDM") packet-switched services, which route or forward packets, frames, cells, or other data units based upon routing information in the data unit, including Frame Relay services,[33] Asynchronous Transfer Mode ("ATM ") services,[34] Internet Protocol-Virtual Private Network ("VPN") services,[35] and Ethernet Service;[36] and (2) non-TDM based optical

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[32] AT&T Petition, Att. A (J.A. 88); BellSouth Petition, Att. A (J.A.107); Embarq Petition, Att. A (J.A. 134); Frontier Petition, Att. A (J.A. 155). See AT&T/BellSouth Order ¶ 13 (J.A. 144); Embarq/Frontier Order ¶ 13 (J.A. 250). On September 12, 2007, AT&T "withdr[ew] its request for forbearance from Title II dominant carrier regulation of the broadband services described in its forbearance petitions to the extent that these services are provided on an interstate interexchange basis." Letter from Robert W. Quinn, Jr., Senior Vice President, AT&T Services, Inc. to Marlene H. Dortch, Secretary, FCC (Sept. 12, 2007) (J.A. 341). AT&T pointed out that the Commission, in Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements, Report and Order and Memorandum Opinion and Order, 22 FCC Rcd 16440 (2007), had eliminated dominant carrier regulation of AT&T's interstate interexchange voice and data services. Id.

[33] Frame Relay Service is "a connection-oriented network service providing local, metropolitan and/or wide area networked connectivity where the path taken by the data unit is based upon address information included with the data unit that is of variable length (frame)." BellSouth Petition, Att. A (J.A. 107).

[34] "ATM is a high-speed Digital Transmission Service that can provide bandwidth of 622 Megabits per second or higher." Release of Funding Year 2008 Eligible Services List for Schools and Libraries Universal Service Mechanism, Public Notice, 22 FCC Rcd 18751 (2007). It is a "widely-used carrier backbone technology, and can guarantee different service quality levels to meet various customer needs." AT&T/BellSouth Order ¶ 18 (J.A. 480).

[35] "VPN service is a packet-based advanced network service that provides secure connectivity between customer locations." Frontier Petition, Att. A (J.A. 155). For example, "VPN enables business customers to communicate with branch offices, to exchange corporate network traffic and to establish communication with external partners, such as customers and suppliers." Id.

[36] "Ethernet-based services provide high-speed, dedicated pathways for large applications, including engineering, medical imaging, and streaming video applications, and are often used as part of local area networks (LANs)," Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services, Memorandum

networking, optical hubbing, and optical transmission services, i.e., "very high speed, fiber-based transmission services that, collectively, reflect many of the telecommunications transmission capabilities that technological advances have made possible,"[37] such as Optical Transport Service,[38] and Optical Networking Service.[39] The carriers did not seek forbearance from TDM-based DS1 and DS3 special access services.[40]

The carriers asserted that broadband services are "subject to robust competition on a nationwide basis" and "sold to sophisticated business customers that demand customization."[41] They claimed that the continued application of the regulations at issue here would increase their costs unnecessarily and create disincentives to innovate and invest in new broadband technologies.[42] The carriers also maintained that forbearance would further the policies of section 706 by removing outmoded regulations that deter broad infrastructure development.[43]

Opinion and Order, FCC 08-168 (released August 5, 2008) at ¶ 21 ("Qwest Broadband Forbearance Order").

[37] E.g., Embarq /Frontier Order ¶ 18 (J.A. 523).

[38] "Optical Transport Services provide point-to-point connectivity using optical fiber, with customer interfaces operating at speeds ranging from OC-3 to OC-192." Id.

[39] "Optical Networking Services provide optical transport within a closed ring architecture that enables automatic restoration upon link failure." AT&T/BellSouth Petition ¶ 19 (J.A. 480).

[40] AT&T/ BellSouth Order ¶¶ 25 n.104 (J.A. 486). DS1 and DS3 are high-speed, high-capacity circuits. "A DS0 is a two-wire basic connection, which operates at 64,000 bps, the worldwide standard speed for digitizing voice conversation using pulse code modulation. A DS1 is a four-wire connection equivalent to 24 DS0s. A DS3 is equivalent to 28 DS1s." AT&T Corp. Applications for Approval of Transfer of Control, Memorandum Opinion and Order, 20 FCC Rcd 18290 (¶ 57 n.163) (2005) (citation omitted) ("SBC/AT&T Merger Order"). See Triennial Review Order, 18 FCC Rcd at 17211 n.1154.

[41] E.g., AT&T Petition at 2 (J.A. 61); See BellSouth Petition at 4 (J.A. 94); Frontier Petition at 9 (J.A. 148).

[42] BellSouth Petition at 9 (J.A. 99).

[43] Id. at 14-15 (J.A. 104-05); Embarq Petition at 13 (J.A. 124).

The Commission addressed in a single proceeding the petitions of AT&T and its affiliate, BellSouth, establishing the same deadline for the submission of comments and reply comments and giving both petitions the same docket number, WC 06-125.[44] The Commission in a separate proceeding, WC Docket No. 06-147, consolidated the Embarq and Frontier petitions,[45] set separate pleading cycles for those petitions,[46] and ruled on those petitions in a separate order.

B. Orders on Review

AT&T/BellSouth Order. On October 11, 2007, the Commission granted in part and denied in part the petitions of AT&T and BellSouth for forbearance from Computer Inquiry requirements and Title II common carrier regulation. AT&T/BellSouth Order ¶¶ 1-2, 17-58 (J.A. 469-70, 479-500). Applying the section 10(a) standard, the Commission concluded that forbearance from dominant carrier regulation and certain Computer Inquiry requirements[47] for

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[44] Public Notice, 21 FCC Rcd 7942 (2006) (J.A. 460); Public Notice, 21 FCC Rcd 8022 (2006) (J.A. 463). Five months after AT&T filed its forbearance petition, the Commission approved AT&T's merger with BellSouth. See AT&T Inc. and BellSouth Corporation Application for Transfer of Control, Memorandum Opinion and Order, 22 FCC Rcd 5662 (2007) ("AT&T/BellSouth Merger Order"); AT&T/BellSouth Order n.2 (J.A. 469-70).

[45] Public Notice, 21 FCC Rcd 9555 (2006) (J.A. 466).

[46] Public Notice, 21 FCC Rcd 7942 (2006) (J.A. 460); Public Notice, 21 FCC Rcd 9555 (2006) (J.A. 463).

[47] The Commission granted forbearance from application of the BOC-specific Computer Inquiry rules , i.e., structural separation requirements or in the alternative non-structural separation requirements (such as comparably efficient interconnection, and open network architecture) to the extent AT&T offers information services in connection with its existing non-TDM-based, packet-switched broadband services or its existing non-TDM based, optical transmission services. AT&T/BellSouth Order ¶¶ 53-59 (J.A. 499-500). That forbearance, however, was conditioned upon AT&T's compliance with certain transmission access and nondiscrimination requirements that apply to LECs that are not BOCs. Specifically, the Commission ruled that AT&T must continue to offer as telecommunications services the basic transmission services underlying its enhanced services on a non-discriminatory basis to all enhanced service providers, including its own enhanced service operations. The Commission granted forbearance from the obligation to offer those basic transmission services pursuant to tariff. Id. ¶¶ 1, 53-62 (J.A. 493, 495, 498, 499).

the services identified in the forbearance petitions[48] was appropriate because such regulations were no longer necessary: (1) to ensure that the rates and practices for these services were just, reasonable, and not unduly discriminatory; (2) to protect consumers; and (3) to further the public interest. See 47 U.S.C. § 160(a). The Commission, however, did not grant blanket forbearance from Title II, and required AT&T in the provision of these services to comply with the regulatory obligations that apply to non-dominant carriers. See AT&T/BellSouth Order ¶¶ 36, 39, 64-75 (J.A. 491, 492, 501-07).

Section 10(a)(1). The Commission began its section 10(a)(1) analysis as to forbearance from dominant carrier regulation by considering the broadband services in question and the customers that use them. AT&T/BellSouth Order ¶ 17 (J.A. 479). The Commission explained that the specific broadband services at issue are "high-speed, high-volume services that enterprise customers, including some wholesale customers, use primarily to transmit large amounts of data among multiple locations." Id. ¶ 18 (J.A. 480).[49] Finding insufficient information to precisely define the market boundaries for these services, the Commission focused its analysis on the specific services that had been identified in the record. See id. ¶ 19 (J.A. 480).

Consistent with its approach to broadband services generally, the Commission decided that it would "consider marketplace conditions for these services broadly." AT&T/BellSouth Order ¶ 20 (J.A. 480). Relying upon the analysis set forth in the Wireline Broadband Internet

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[48] The Commission declined to grant forbearance for any services not identified in the petitions or for carriers other than AT&T. Id. ¶¶ 40-41, 44, 51, 47 n.181 (J.A. 493, 495, 498, 497).

[49] Enterprise services are telecommunications services that are offered to medium and large business customers. Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area, 20 FCC Rcd 19415, 19427 (¶ 22) (2005) ("Qwest Omaha Order"), aff'd, Qwest Corp. v. FCC, 482 F.3d 471 (D.C. Cir. 2007).

Access Service Order and Section 271 Broadband Forbearance Order, the Commission found it "appropriate to view a broadband marketplace that is emerging and changing," as the one here, "from the perspective of the larger trends that are shaping the marketplace" without regard to "specific, identified geographic markets." Id. ¶ 20 (J.A. 481). The Commission pointed out that many of the enterprise customers that purchase the broadband services at issue here have "national, multi-location operations and thus seek the best-priced alternatives from multiple potential providers having national market presences." Id. ¶ 21 (J.A. 482). And the Commission noted that even enterprise customers with more localized operations "are able to solicit telecommunications services from a range of potential providers." Id.

The Commission rejected arguments that it must utilize a traditional market analysis in this case that generally focuses upon individual customer locations. Id. n.80 (J.A. 481). Although the Commission acknowledged that its "analysis of forbearance from dominant carrier regulation is informed by its traditional market power analysis," it pointed out that the agency "is not bound by that framework." Id. Given its "discretion to tailor [its] forbearance analysis," the Commission concluded that, for the reasons set forth above, it was appropriate to analyze in this proceeding the specified broadband services on a national geographic basis. Id. n.87 (J.A. 482).

Viewed on a national basis, the Commission found the broadband services market "generally appears highly competitive," with "competitive LECs, cable companies, systems integrators, equipment vendors, and value-added resellers" competing with the broadband services at issue here. Id. ¶¶ 22, 23 (J.A. 483). The Commission specifically found both that there are "many significant providers of Frame Relay services, ATM services, and Ethernet-based services" and that others "readily could enter the market to provide[] these services." Id. ¶ 23 (J.A. 483). Although the Commission recognized that the record "does not include detailed

market share information for particular enterprise broadband services," it determined that static market data would not be significant given the "emerging and evolving nature" of the broadband market. Id. The Commission reasoned that "recent or ongoing changes in the market may indicate that the current market share of a particular firm either understates or overstates the firm's future competitive significance." Id. n.96 (J.A. 484).

The Commission also pointed out that the enterprise customers of broadband services tend to be sophisticated business users that make service choices based upon the advice of communications consultants or in-house communications experts and thus likely will be aware of the choices available in the marketplace. Id. ¶ 24 (J.A. 484).[50] Moreover, these customers generate substantial telecommunications expenditures and "deal at the most sophisticated level with [telecommunications] providers." Id. Thus, in the event AT&T attempts to impose unreasonable or unreasonably discriminatory rates or conditions on its enterprise broadband services, the Commission reasoned that competitors will respond with alternative offerings and the sophisticated broadband customers will seek out the best-priced alternatives. Id. ¶ 25 (J.A. 485).

The Commission pointed out that even if competitors cannot self-deploy their own facilities or purchase inputs from carriers other than the ILEC, "potential providers may rely on special access services purchased from the incumbent LEC at rates subject to price regulation." Id. The Commission considered, and rejected, Time Warner Telecom's[51] contention that

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[50] The Commission pointed out that enterprise broadband services are "purchased predominantly by enterprise customers, not by their competitors as wholesale inputs." AT&T/BellSouth Order n.90 (J.A. 483).

[51] After the orders on review were released, Time Warner Telecom changed its name to "tw telecom inc." The Commission in the orders on review used the former name, and to avoid confusion the Commission uses that name in this brief.

wholesale TDM-based loops, i.e., DS1 and DS3 special access circuits, cannot in many instances be used as an input to provide packetized broadband services such as Ethernet. Id. ¶ 26 (J.A. 486). The Commission explained that Time Warner Telecom's contention was undercut by its own public statements that it can deliver Ethernet services in a cost-effective manner to customers "anywhere," even "where it may be uneconomical" to build facilities connecting its network to the customers' premises. Id. The Commission noted further that Time Warner Telecom's own declarations to the agency indicated that "Time Warner Telecom, among others, can use TDM special access services to offer retail Ethernet services." Id. n.109 (J.A. 486).

The Commission also was unpersuaded by Time Warner Telecom's complaints that reliance on TDM special access inputs creates service or performance difficulties of a magnitude that impedes competition. Id. The Commission, for example, rejected Time Warner Telecom's claim that the fixed and variable mileage rates charged by the BOCs make it uneconomical for competing carriers to rely on TDM inputs. The Commission explained that the increased mileage costs for providing longer connections has not prevented Time Warner Telecom from providing Ethernet with TDM inputs and that Time Warner Telecom could minimize those charges by interconnecting at additional points. Id. Noting that transmission services generally are offered in fixed capacity increments, rather than tailored to the precise capacity of particular customers, the Commission pointed out that "all ways of obtaining transmission capacity have trade-offs, including purchasing transmission services at wholesale and self-provisioning network transmission facilities," and that the use of TDM special access with Ethernet electronics has the advantage of "enabl[ing] providers to exercise greater control over the traffic carried on those circuits." Id.

In light of the competitive market conditions, the Commission concluded that dominant carrier regulation for the services listed in AT&T's petitions was not necessary to ensure that the rates and practices for those services are just, reasonable, and not unjustly or unreasonably discriminatory. Id. ¶¶ 30-32, 37 (J.A. 488-89, 491). Indeed, the Commission concluded that customers would actually benefit from forbearance. Id. ¶¶ 29, 33 (J.A. 488, 489). The Commission determined, for example, that "detariffing these services will facilitate innovative integrated service offerings designed to meet changing market conditions and will increase customers' ability to obtain service arrangements that are specifically tailored to their individualized needs." Id. ¶ 33 (J.A. 490). The Commission also explained that eliminating advance notice requirements and cost-based pricing requirements would enable AT&T "to respond quickly and creatively to competing service offers." Id.

Section 10(a)(2). The second part of the forbearance test asks whether enforcement of the rule is "necessary for the protection of consumers." 47 U.S.C. § 160(a)(2). For reasons similar to those that supported a grant of forbearance under section 10(a)(1), the Commission found that the application of dominant carrier regulation to the specified broadband services was not necessary for the protection of consumers. The Commission explained that the pressure that AT&T faces from actual and potential competition gives AT&T an incentive to provide innovative service offerings and that dominant carrier regulation actually deters enhanced service offerings to consumers. AT&T/BellSouth Order ¶ 43 (J.A. 495). Moreover, the Commission noted that its forbearance decision does not affect AT&T's obligations under Title II relating to 911, emergency preparedness, universal service, and customer privacy. Id.

Section 10(a)(3). The final part of the forbearance test asks whether forbearance from applying the regulation "is consistent with the public interest." 47 U.S.C. § 160(a)(3). Finding

that "dominant carrier regulation impedes AT&T's efforts to compete effectively with nondominant providers," the Commission concluded that a deregulatory approach for the listed services furthers the public interest "by eliminating the market distortions that asymmetrical regulation of these services causes." AT&T/BellSouth Order ¶ 46 (J.A. 496). The Commission explained that dominant carrier regulation "keeps AT&T from responding efficiently and in a timely manner to market-based pricing promotions, including volume and term discounts, or special arrangements offered by competitors." Id. The Commission pointed out that tariff regulation gives competitors notice of AT&T's pricing strategies and competitive innovations, thereby making it unnecessarily difficult for AT&T to negotiate nationwide arrangements tailored to the needs of large business customers with geographically dispersed locations. Id.

The Commission emphasized that forbearance promotes the public policy objectives of the 1996 Act by furthering the deployment of advanced services. The Commission explained that a grant of forbearance in this case furthers Congress's explicit objective of "'promot[ing] competition and reduc[ing] regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.'"[52] The Commission found that forbearance, by encouraging the development and deployment of advanced technologies and services, furthered the goals underlying section 706 and section 7. The Commission also pointed out that its grant of forbearance relief "will help promote competitive market conditions and enhance competition among providers of telecommunications services as contemplated by section 10(b)." AT&T/BellSouth Order ¶ 47 (J.A. 496).

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[52] AT&T/BellSouth Order ¶ 47 (quoting 1996 Act Preamble, 110 Stat. at 56) (J.A. 496).

Embarq/Frontier Order. Thirteen days after adopting the AT&T/BellSouth Order, the Commission granted in part and denied in part the forbearance petitions filed by Frontier and Embarq. Embarq/Frontier Order (J.A. 512). Using the same analysis contained in the AT&T/BellSouth Order, and relying upon that decision as precedent, the Commission concluded that application of dominant carrier regulation and certain Computer Inquiry requirements[53] for the services identified in the forbearance petitions was no longer necessary: (1) to ensure that the rates and practices for these services were just, reasonable, and not unduly discriminatory; (2) to protect consumers; and (3) to further the public interest. See 47 U.S.C. § 160(a). As it had in the AT&T/BellSouth Order, the Commission did not grant forbearance from blanket Title II regulation and required Frontier and Embarq in the provision of these services to adhere to the rules applicable to non-dominant carriers. See Embarq/Frontier Order ¶¶ 59-66 (J.A. 542-45).

STANDARD OF REVIEW

Petitioners bear a heavy burden to establish that the orders on review are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under this "highly deferential standard of review," the court presumes the validity of agency action.[54] The court must affirm unless the Commission failed to consider relevant factors or made a clear error in judgment.[55] Accordingly, "the question is not what [the Court]

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[53] The Commission ruled that Embarq and Frontier must continue to offer as telecommunications services the basic transmission services underlying their enhanced services on a non-discriminatory basis to all enhanced service providers, including their own enhanced service operations. The Commission granted forbearance from the obligation to offer those basic transmission services pursuant to tariff. Embarq/Frontier Order ¶¶ 51-55 (J.A. 539-40).

[54] Islamic American Relief Agency v. Gonzales, 477 F.3d 728, 732 (D.C. Cir. 2007). See Cellco Partnership v. FCC, 357 F.3d 88, 93 (D.C. Cir. 2004).

[55] E.g., Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 43 (1983); AT&T Corp. v. FCC, 349 F.3d 692, 698 (D.C. Cir. 2003).

think[s] about the [forbearance] petition, but whether the Commission's view of the petition is reasonable."[56] In addition, the Commission's "'interpretation of its own precedent is entitled to deference.'"[57]

Judicial deference to the Commission's "expert policy judgment" is especially appropriate where, as here, the "'subject matter . . . is technical, complex, and dynamic.'"[58] The courts accord "substantial deference" to the Commission's "'predictive judgments about areas that are within the agency's field of discretion and expertise,'"[59] including its predictive judgments concerning the competitive nature of telecommunications markets in ruling upon section 10 forbearance petitions.[60]

The Court must review the Commission's interpretation of the Communications Act and 1996 Act in accordance with the standard of review articulated in Chevron USA Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984). Under Chevron, the Court "employ[s] traditional tools of statutory construction" to determine "whether Congress has directly spoken to the precise question at issue." 467 U.S. at 843 n.9, 842. If so, "the court, as well as the agency,

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[56] AT&T Inc. v. FCC, 452 F.3d 830, 837 (D.C. Cir. 2006).

[57] Id. at 839 (quoting Cassell v. FCC, 154 F.3d 478, 483 (D.C. Cir. 1998)).

[58] Brand X, 545 U.S. at 1002-03 (quoting National Cable & Telecommunications Ass'n v. Gulf Power Co., 534 U.S. 327, 339 (2002)). Accord Earthlink, 462 F.3d at 9 (quoting AT&T Corp. v. FCC, 220 F.3d 607, 616 (D.C. Cir. 2000)) ("An extra measure of deference is warranted where the decision involves a 'high level of technical expertise' in an area of 'rapid technological and competitive change.'")

[59] Nuvio Corp. v. FCC, 473 F.3d 302, 306-07 (D.C. Cir. 2006),(quoting International Ladies Garment Workers' Union v. Donovan, 722 F.2d 795, 821 (D.C. Cir. 1983)). See also FCC v. WNCN Listeners Guild, 450 U.S. 582, 596 (1981) ("Our opinions have repeatedly emphasized that the Commission's judgment regarding how the public interest is best served is entitled to substantial judicial deference.").

[60] Earthlink, 462 F.3d at 12. See also In re Core Communications, Inc., 455 F.3d 267 (D.C. Cir. 2006).

must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842-43. Where "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." 467 U.S. at 843. Under those circumstances, the Court should "uphold the FCC's interpretation as long as it is reasonable, even if 'there may be other reasonable, or even more reasonable, views.'"[61]

SUMMARY OF ARGUMENT

1.a. The Commission, in ruling on the forbearance petitions, reasonably analyzed competition in the broadband market on a nationwide basis. Section 10 does not require the Commission to use any particular form of market analysis, and a nationwide approach is particularly appropriate for broadband markets, such as the one here, that are emerging and changing. A nationwide analysis permits the Commission to give effect to the larger trends that are shaping the marketplace. It also is consistent with the sophistication and needs of enterprise customers of broadband services that often have national, multi-location operations and solicit service from a wide variety of providers. Contrary to the contention of the Private Petitioners, the Commission's consideration of competition on a nationwide basis does not constitute a departure from past practice. The Commission employed a nationwide market analysis for broadband services in the Wireline Broadband Internet Access Service Order and the Section 271 Broadband Forbearance Order, and this Court upheld that type of market analysis in its Earthlink decision.

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[61] Earthlink, 462 F.3d at 7 (quoting AT&T, 220 F.3d at 631) (internal citation omitted). See id. at 12 (Court gives deference to Commission's reasonable construction of section 10); CTIA v. FCC, 330 F.3d 502, 504 (D.C. Cir. 2003) (same).

1.b. The Commission reasonably determined that the substantial competition that exists in the enterprise broadband services market justifies forbearance from dominant carrier regulation. Not only are there a great many providers of enterprise broadband services, but the sophisticated business users that purchase these services are well aware of the telecommunications options available to them and have the ability to seek out alternatives if the ILECs assess unreasonable rates. The Commission thus reasonably concluded that dominant carrier regulation is unnecessary to ensure that the rates for the broadband services at issue here are just and reasonable. Moreover, by freeing ILECs from unnecessary regulation, forbearance will increase competition in the broadband services market and will further the policy of section 706 by encouraging the deployment of advanced services.

There is no merit to the Private Petitioners' claim that the Commission erred by not separately considering competition in the supply of wholesale special access inputs. Both the Commission in the Section 271 Broadband Forbearance Order and this Court in Earthlink flatly rejected the notion that an agency determination that the wholesale market is fully competitive is a prerequisite to a grant of forbearance. Moreover, in granting forbearance, the Commission specifically addressed the wholesale market, finding that competitive providers had viable alternatives to the ILECs' wholesale services, i.e., self-deploying their own facilities, purchasing inputs from competitive carriers and obtaining TDM-based special access such as DS1 and DS3 circuits.

1.c. Although the Private Petitioners claim that the grants of forbearance from dominant carrier regulation for the ILECs' wholesale Ethernet offerings effectively will eliminate competition in the provision of Ethernet services, they acknowledge in their brief that competitive providers generally do not use the ILECs' wholesale Ethernet offerings in providing

service to their end-user customers. And the elimination of dominant carrier regulation of the ILECs' Ethernet inputs cannot harm the competitive provision of Ethernet service that does not use the ILECs' Ethernet inputs. The Commission also reasonably rejected the Private Petitioners' claim that the TDM-based special access circuits cannot be effectively used in the competitive provision of Ethernet service. Substantial evidence in the record showed that competitive providers can and do provision Ethernet service using wholesale TDM-based special access inputs. Indeed, several of the Private Petitioners in this proceeding have announced to the marketplace that they have the ability to provision Ethernet service in this manner.

2.a. Petitioner New Jersey Division of Rate Counsel ("New Jersey Rate Counsel") lacks standing to seek review of the AT&T/BellSouth Order. Neither AT&T nor any of its ILEC affiliates provide in-region service in New Jersey, and New Jersey ratepayers are not injured by the elimination of dominant carrier regulation on AT&T-affiliated ILECs in other states.

2.b. Section 405 of the Communications Act bars the New Jersey Rate Counsel from raising its constitutional objections to section 10 because they were not intelligibly presented to the Commission in the administrative proceedings below. In any event, the New Jersey Rate Counsel's constitutional claims lack merit. Section 10 does not violate the non-delegation doctrine and separation of powers because the Commission's task in ruling on forbearance petitions is to evaluate whether the standards Congress established in section 10(a) and 10(b) are satisfied, not to create new law. Nor has the New Jersey Rate Counsel shown how the federal agency's grants of forbearance from federal requirements pursuant to a federal statute violate principles of federalism.

3. None of the other arguments raised by the New Jersey Rate Counsel have substance. Although the New Jersey Rate Counsel characterizes the forbearance proceedings as

adjudications, it faults the Commission for failing to adhere to the notice and comment procedures required for administrative rulemaking. The New Jersey Rate Counsel does not explain why rulemaking procedures apply to proceedings that it claims are adjudicatory. In any event, the Commission gave explicit notice of the forbearance petitions and provided the opportunity to comment on them. Because the "conditions" the FCC imposed on the forbearance petitions simply made clear that the agency was relaxing rather than eliminating the regulations on the broadband services that had already been identified by the petitions, they were a logical outgrowth of the initial notice of the petitions, and no further notice of the conditions was required even if the forbearance proceedings are deemed to be rulemakings rather than adjudications. The Commission also did not err in rejecting the New Jersey Rate Counsel's request to condition forbearance upon compliance with structural separation requirements. As the Commission reasonably determined, the imposition of such a condition would have imposed substantial costs on the ILECs that exceed any possible benefits.

ARGUMENT

I. THE COMMISSION'S DECISION TO GRANT FORBEARANCE FROM DOMINANT CARRIER REGULATION FOR THE SPECIFIED ENTERPRISE BROADBAND SERVICES WAS REASONABLE AND CONSISTENT WITH PRECEDENT.

A. The Commission Properly Considered the Broadband Market on a Nationwide Basis for Purpose of its Forbearance Analysis.

Section 10 "imposes no particular mode of market analysis or level of geographic rigor,"[62] leaving to the Commission the discretion to decide how best to analyze the market in ruling on petitions for forbearance. As this Court has observed, the Commission in exercising

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[62] Earthlink, 462 F.3d at 8.

that discretion has "allow[ed] the forbearance analysis to vary depending on the circumstances."[63] Most notably for present purposes, the Commission in past cases has analyzed the market for rapidly changing and technologically advanced broadband services on a nationwide level.[64] For example, the Commission, in the Wireline Broadband Internet Access Services Order, 20 FCC Rcd at 14881 (¶ 50), in analyzing a broadband service on a nationwide basis, explained that an "emerging market . . . is more appropriately analyzed in view of larger trends in the marketplace, rather than exclusively through the snapshot data that may quickly and predictably be rendered obsolete as this market continues to evolve." The Commission in the Section 271 Broadband Forbearance Order, 19 FCC Rcd 21505 (¶ 22), similarly analyzed the "emerging and changing" broadband market on a nationwide basis. Moreover, both this Court and the Third Circuit have upheld the Commission's market analysis of broadband services on a nationwide basis as reasonable.[65] The Commission reasonably adhered to that judicially-approved approach in ruling on the petitions for forbearance for the broadband services in the administrative proceedings below.

As the Commission explained, it is appropriate for the agency to continue to assess a "broadband marketplace that is emerging and changing," such as the one here, from the perspective of larger competitive trends rather than "relying on specific geographic markets [that] would force the Commission to premise findings on limited and static data that failed to account for all of the forces that influence the future market development."[66] In addition, many

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[63] Id.

[64] AT&T/BellSouth Order ¶ 20 (J.A. 481). See, e.g., Section 271 Broadband Forbearance Order, 19 FCC Rcd at 21506-07 (¶¶ 21, 23).

[65] Earthlink, 462 F.3d at 8; Time Warner, 507 F.3d at 221.

[66] AT&T/BellSouth Order ¶ 20 (J.A. 481).

of the enterprise customers of broadband services have "national, multi-location operations and thus seek the best-priced alternatives from multiple potential providers having national market presences."[67] Enterprise customers with regional or localized operations also have the ability to solicit service from a variety of providers.[68] Thus, as the Commission explained, "[v]iewing the regulatory obligations from a broad perspective is consistent with the needs of the large and mid-sized enterprise customers that use . . . . broadband services to connect geographically-dispersed locations."[69] Moreover, section 706 directs the Commission to "utiliz[e]" forbearance to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."[70] Because that statutory language "suggests a forward-looking approach," it is reasonable for the Commission in conducting a market analysis in forbearance proceedings to "account [] for section 706's goals and assess[] likely market developments."[71] In sum, given the administrative and judicial precedent supporting use of a nationwide approach, the sophistication and needs of the enterprise customers, the policy underlying section 706, and the nature of "the broadband market as still emerging and developing, [the Commission] reasonably eschewed a more elaborate snapshot of the current market in deciding whether to forbear."[72]

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[67] Id. ¶ 21 (J.A. 482).

[68] Id.

[69] Id. See Earthlink, 462 F.3d at 8 (The Commission's "decision to forbear on a nationwide basis — without considering more localized regions individually — is [not] per se improper.").

[70] Earthlink, 462 F.3d at 8.

[71] Id. See, e.g., AT&T/BellSouth Order ¶ 49 (J.A. 497).

[72] Earthlink, 462 F.3d at 9. See Time Warner, 507 F.3d at 221.

Claiming that the Commission "erroneously labeled" the services listed in the forbearance petition as broadband services,[73] the Private Petitioners contend that the broadband cases in which the Commission used a nationwide market analysis are inapposite. According to the Private Petitioners, the Commission's past decisions compel the agency to assess competitive conditions on a more localized market level and require this Court to reach the conclusion that the agency's nationwide geographic analysis constitutes an unacknowledged departure from prior and subsequent administrative forbearance decisions.[74] Particularly in light of the "deference" to which the Commission's "interpretation of its own precedent is entitled,"[75] the Private Petitioners have not satisfied their burden of establishing that the Commission unreasonably relied upon prior precedent analyzing the market for broadband service on a nationwide level.[76]

While the Private Petitioners apparently contend that the Commission was compelled by its precedent to apply some specific form of geographic market analysis, they are inconsistent in identifying the level of geographic disaggregation that allegedly is required. For example, although the Private Petitioners suggest that a "traditional market analysis" entails consideration

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[73] Brief of Private Petitioners at 16.

[74] Id. at 17-23.

[75] Cassell, 154 F.3d at 483. See Columbia Gas Transmission Corp. v. FERC, 477 F.3d 739, 743 (D.C. Cir. 2007).

[76] The Private Petitioners claim that the Commission in its orders relied upon the AT&T/BellSouth Merger Order as support "for the notion that it must consider marketplace conditions for [the types of services at issue in this case] 'broadly.'" Private Petitioners' Brief at 18, citing AT&T/BellSouth Order n.80 (emphasis added) (J.A. 481). Although the Commission, citing the AT&T/BellSouth Merger Order, noted that its forbearance analysis is informed by its traditional market power framework, it pointed out that, in appropriate circumstances, competition may be "evaluated on a broader geographic basis." AT&T/BellSouth Order n.80 (J.A. 481), citing AT&T/BellSouth Merger Order, 22 FCC Rcd at 5700 ¶ 68.

of "each customer location" as a "separate geographic market,"[77] elsewhere they rely upon cases, such as the Qwest Omaha Order and Verizon 6 MSA Order,[78] in which the Commission considered competitive trends within an entire metropolitan statistical area ("MSA").[79]

As this Court has recognized, the Commission has not adopted a one-size-fits-all approach in determining the geographic scope of its market analyses in the forbearance context. See Earthlink, 462 F.3d at 8 (describing the Commission's "capacity and propensity" to adapt different market analyses in different forbearance cases depending upon the circumstances). Indeed, the Private Petitioners themselves admit that "[h]istorically, the Commission has employed different geographic market definitions to carry out the differing statutory, economic, and policy goals of the proceeding at hand.'"[80] In light of the Commission's reasonable explanation for employing a nationwide market analysis in this case, the agency has "justified its decision to refrain from a traditional market analysis and to rely instead on larger trends and predictions concerning the future of the broadband services market."[81]

As explained above, the nationwide approach the Commission employed in both orders on review is fully consistent with the market analysis of broadband services set forth in the Wireline Broadband Internet Access Services Order and in the Section 271 Broadband

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[77] See Private Petitioners Brief at 19.

[78] In the Matter of Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas, Memorandum Opinion and Order, 22 FCC Rcd 21293 (2007), Petition for Review, Verizon Telephone Cos. v. FCC, No. 08-1012 (D.C. Cir., Jan. 14, 2008) ("Verizon 6 MSA Order").

[79] Private Petitioners Brief at 16.

[80] Id. at 21 (quoting Qwest Omaha Order, 20 FCC Rcd at 19438 n.129).

[81] See Time Warner, 507 F.3d at 221.

Forbearance Order. Contrary to the Private Petitioners' contention, [82] the services at issue in this case clearly are broadband services. "Broadband" is a term of art to describe services capable of transmitting and receiving voice, data, or video communications at high speeds. Specifically, at the time the Commission issued the orders on review, broadband services, as defined by the agency, consisted of telecommunications services that are capable of transmission speeds in excess of 200 kbps.[83] All of the services listed in the forbearance petitions unquestionably fit within that technical definition of broadband.

Significantly, in challenging the orders on review, the Private Petitioners do not dispute the Commission's stated rationale for relying on the Wireline Broadband Internet Access Services Order and the Section 271 Broadband Forbearance Order, i.e., the agency's conclusion that there are "similarities . . . between the characteristics of the present [broadband] marketplace as emerging and changing and the markets at issue in those prior orders."[84] Nor do the Private Petitioners cite to any cases in which the Commission employed a more localized market analysis to an emerging and changing broadband market such as the one in this case.

Instead, the Private Petitioners attempt to distinguish the Wireline Broadband Internet Access Services Order on the grounds that it involved a different broadband service than the broadband services in this case. [85] That argument is unavailing. The Wireline Broadband Internet Access Services Order is relevant because the broadband service market in that case has

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[82] See Brief of Private Petitioners at 16.

[83] Inquiry Concerning the Deployment of Advanced Telecommunications Capability, 14 FCC Rcd at 2406 (¶ 20) (1999). See Inquiry Concerning Deployment of Advanced Telecommunications Capability, 17 FCC Rcd at 2850 (¶¶ 8, 9).

[84] E.g., AT&T/BellSouth Order ¶ 20 (J.A. 481).

[85] See Private Petitioners' Brief at 17-18.

similar characteristics to the one here, not because the cases involve identical services. Nor is there any merit to Private Petitioners' contention that the Commission in the Wireline Broadband Internet Access Services Order declared "that it only applies . . . its 'larger trends' analysis [to] emerging wireline broadband Internet access service, and not to 'other wireline broadband services such as stand-alone ATM service, Frame Relay, gigabit Ethernet service and other high-capacity special access services.'"[86] The Commission in the section of the order quoted above considered, not an issue of market analysis, but a matter of statutory construction, i.e., whether broadband Internet access service should be classified as a Title II telecommunications service or a Title I information service. The Commission held that broadband Internet access service is a Title I information service because, unlike the Title II broadband services listed above, it "inextricably intertwine[s] transmission with information-processing capabilities."[87] The Commission did not declare, in the quotation above or in any other part of its Wireline Broadband Internet Access Services Order, that it eschews a nationwide market analysis for the types of broadband services at issue in this case.

The Private Petitioners' attempts to distinguish the Section 271 Broadband Forbearance Order fare no better. Although the Section 271 Broadband Forbearance Order involved forbearance from unbundling regulations, whereas the orders on review involved forbearance from dominant carrier regulations, both cases involve broadband services that are "emerging and changing," which fully justified the Commission's decision to employ the same nationwide

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[86] Brief for Private Petitioners at 17-18 (quoting Wireline Broadband Internet Access Services Order, 20 FCC Rcd at 14860-61 (¶ 9)) (emphasis in original).

[87] Wireline Broadband Internet Access Services Order, 20 FCC Rcd at 14860-61 (¶ 9). See, e.g. AT&T/BellSouth Order ¶ 9 (J.A. 475).

market approach in both cases.[88] See Southern California Edison Co. v. FERC, 443 F.3d 94, 101 (D.C. Cir. 2006) ("It is within agency discretion to reasonably analogize to one set of facts rather than another.").

There likewise is no basis for the Private Petitioners' claim that the Section 271 Broadband Forbearance Order is inapplicable because the Commission in the Qwest Omaha Order determined that its rationale does not "extend to 'legacy services' and 'legacy elements.'"[89] To begin with, many of the broadband services at issue in this case — including the Gigabit Ethernet service that the Private Petitioners themselves appear to acknowledge remain in the early stages of deployment [90] — are not legacy services. Moreover, in contrast to the legacy mass market switched access services at issue in the Qwest Omaha Order,[91] the non-TDM packet-switched and optical broadband services in this case have characteristics that are similar to the broadband service in the Section 271 Broadband Forbearance Order. The Section 271 Broadband Forbearance Order involved fiber-to-the-home loops, fiber-to-the-curb loops, the packetized functionality of hybrid loops and packet switching.[92] Unlike the traditional circuit switched services in the Qwest Omaha Order, the services in this case, like the ones in the Section 271 Broadband Forbearance Order, use advanced network technologies. Indeed, when the Commission considered subsequently Qwest's petition for forbearance from dominant carrier

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[88] Section 271 Broadband Forbearance Order, 19 FCC Rcd at 21505 (¶ 22).

[89] Private Petitioners' Brief at 21 (quoting Qwest Omaha Order, 20 FCC Rcd at 19469 (¶ 107)).

[90] Id. at 7, 32.

[91] The Commission in the orders on review expressly excluded legacy special access DS1 and DS3 special access from the scope of its forbearance relief. See, e.g., AT&T Order ¶ 20 (J.A. 481).

[92] Section 271 Broadband Forbearance Order, 19 FCC Rcd at 21496 (¶ 1).

regulation for the non-TDM packet-switched and optical broadband services, the agency used exactly the same nationwide market analysis as it did in the orders on review.[93]

The Private Petitioners' reliance upon the Verizon 6 MSA Order,[94] a case in which the Commission, inter alia, denied a petition for forbearance from dominant carrier regulation for mass market switched access services in six MSAs, also is inapposite. At the outset, as the Private Petitioners acknowledge, the Verizon 6 MSA Order was decided after the orders on review, and as this Court has long held, the Commission generally "is not bound retroactively by its subsequent decisions and need not explain alleged inconsistencies in the resolution of subsequent cases."[95] In any event, the Private Petitioners do not claim any similarities between the mass market switched access services market in the Verizon 6 MSA Order and the enterprise packet-switched and optical services market in this case that would warrant use of a similar type of market analysis. Contrary to the Private Petitioners' apparent claim, the Verizon 6 MSA Order does not establish that the Commission is required to conduct a so-called "traditional market power analysis," i.e., an analysis that closely parallels the analysis used in classifying carriers as dominant or non-dominant, in every case in which the agency considers whether to forbear from dominant carrier regulation.[96] Although the Commission in the Verizon 6 MSA Order generally "recognize[d] the strong relationship between the statutory forbearance criteria and the Commission's dominance analysis," the Commission did not "undertake a stand-alone

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[93] Qwest Broadband Forbearance Order, FCC 08-168 at ¶¶ 23-24.

[94] See Private Petitioners' Brief at 22-23.

[95] Freeman Engineering Associates, Inc. v. FCC, 103 F.3d 169, 179 (D.C. Cir. 1997) (quoting CHM Broad. Ltd. Partnership v. FCC, 24 F.3d 1453, 1459 (D.C. Cir. 1994)). See Northampton Media Associates v. FCC, 941 F.2d 1214 (D.C. Cir. 1991) ("[T]he Commission could hardly be faulted for ignoring 'precedents' that did not precede.'"). But see AT&T, 452 F.3d at 839.

[96] Private Petitioners' Brief at 22.

market power inquiry," emphasizing that the traditional dominance assessment "does not bind [the agency's] section 10 forbearance analysis."[97]

B. The Commission Reasonably Concluded that the Robust Competition in the Enterprise Broadband Services Market Justified Forbearance From Dominant Carrier Regulation.

The Commission reasonably found that there is robust competition for the enterprise broadband services at issue in this case.[98] As the Commission pointed out, there are "a myriad of providers prepared to make competitive offers to enterprise customers demanding packet-switched data services located both within and outside any given incumbent LEC's service territory," including "many significant providers of Frame Relay services, ATM services, and Ethernet-based services."[99] Moreover, the enterprise businesses that purchase these services are sophisticated customers that are aware of the available telecommunications options, and are "likely to make informed choices based on expert advice about service offerings and prices."[100] Indeed, many of these customers "have national, multi-location operations and thus seek the best-priced alternatives from multiple potential providers having national market presences."[101] If the ILECs should attempt to charge unreasonable rates for enterprise services, customers will seek out alternatives, and alternative providers will readily respond with competing offerings.[102] The Commission, moreover, specifically addressed the wholesale market for broadband services,

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[97] Verizon 6 SMA Order, 22 FCC Rcd at 21305 n.77 (emphasis added).

[98] E.g., AT&T/BellSouth Order ¶¶ 22, 23 (J.A. 483).

[99] Id.

[100] Id. ¶ 24 (J.A. 484).

[101] Id. ¶ 21 (J.A. 482).

[102] AT&T/BellSouth Order ¶ 25 (J.A. 485).

pointing out that providers that do not have the option of self-deploying their own facilities or purchasing inputs from competitive carriers may rely upon regulated special access services such as DS1 and DS3 services, or procure section 251 unbundled network elements ("UNEs").[103]

Given the competitive nature of the market, the sophistication of the enterprise customers, and the alternatives available to wholesale customers, the Commission reasonably determined that dominant carrier regulation of enterprise broadband services is unnecessary to ensure just and reasonable rates.[104] Moreover, as the Commission explained, the continued application of dominant carrier regulation of the specified broadband services may create inefficiencies, inhibit the ILECs from responding quickly to competing service offerings, hamper the ILECs' ability to respond in a timely manner to customers' requests for arrangements specifically tailored to their individualized needs, and impose other unnecessary costs on the carriers.[105] The Commission reasonably predicted that eliminating dominant carrier regulation "will increase competition by freeing [the ILECs] from unnecessary regulation" and determined that forbearance "will serve the public interest by promoting regulatory parity among providers."[106] See Nuvio, 473 F.3d at 306 (Court accords "substantial deference" to the Commission's predictive judgments). In addition, the Commission reasonably concluded that a grant of forbearance would advance the policy of section 706 by encouraging the deployment of

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[103] E.g., AT&T/BellSouth Order ¶¶ 20 & n.86, 25 (J.A. 481, 482, 485).

[104] Id. ¶¶ 25, 30-32, 37 (J.A. 485, 488-89). See Petition of US West Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance, 14 FCC Rcd 16252 (¶ 31) (1999) ("[C]ompetition is the most effective means of ensuring that the charges, practices, classifications, and regulations with respect to [a telecommunications service] are just and reasonable, and not unjustly or unreasonably discriminatory.").

[105] AT&T/BellSouth Order ¶ 33 (J.A. 490).

[106] Id. ¶ 49 (J.A. 497).

advanced services and further the objective of section 10(b) by promoting competitive market conditions and enhancing competition among providers of telecommunications services.[107]

The Private Petitioners argue that the Commission, in finding the enterprise broadband market to be competitive, erred by conflating competition among providers of "end-to-end *interexchange* services" with competition among providers of "*access* services."[108] Although the Private Petitioners' argument on this point is not clear, it appears that in effect they distinguish between (1) the retail provision of enterprise broadband services to end-user enterprise customers and (2) the wholesale provision of those services to competitive providers, which then include them as inputs within the retail services that they in turn provide to their own end-user customers.[109] As to the retail market, the Private Petitioners do not seriously challenge the Commission's findings, based upon substantial record evidence, that the market for packet-switched and optical broadband services is highly competitive, with "many significant providers of Frame Relay services, ATM services, and Ethernet-based services."[110] They do not attempt to controvert the Commission's conclusion that sophisticated enterprise customers can and will seek out alternative sources of supply if the ILECs attempt to charge unreasonable rates.[111] Nor

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[107] Id. ¶ 47 (J.A. 496).

[108] Private Petitioners' Brief at 2 (emphasis in original).

[109] See id. at 23 (distinguishing between "downstream services and "inputs essential for such services").

[110] AT&T/BellSouth Order ¶ 23. See Letter from Robert W. Quinn, Jr., Senior Vice-President, AT&T to Marlene H. Dortch (Aug. 28, 2007), Att. (J.A. 692) (identifying and describing the numerous providers of enterprise broadband services). Some of the Private Petitioners acknowledged below that the retail market was competitive. See, e.g., Opposition of Time Warner Telecom, Inc., CBeyond Communications, LLC, and One Communications Corp. at 11 (Aug. 17, 2006) (J.A. 188) ("[I]t is of course true that the retail market for packetized and TDM-based special access services is competitive.") (emphasis omitted).

[111] AT&T/BellSouth Order ¶ 24 (J.A. 484).

do they contest the Commission's finding that the broadband services at issue here "are purchased predominantly by enterprise customers, not by their competitors as wholesale inputs."[112]

The Private Petitioners instead seem to argue that the Commission erred by not separately considering competition concerning wholesale special access services. However, that argument is flatly inconsistent with the Commission's Section 271 Broadband Forbearance Order and this Court's decision in Earthlink. In the Section 271 Broadband Forbearance Order, the Commission expressly "reject[ed] the arguments of competitive LECs that a fully competitive wholesale market is a mandatory precursor to a finding that section 10(a)(1) is satisfied," regardless of competitive market conditions and the effects on incumbent LEC investments."[113] Relying upon its predictive judgment, the Commission concluded that, even in the absence of regulation, competitive providers "would still be able to access other network elements to compete in the broadband market or take advantage of the opportunities presented by the developing market situation to build their own facilities or obtain access to facilities from other suppliers."[114] In that case, as here, the Commission thus found it "appropriate to consider the wholesale market in conjunction with competitive conditions in the downstream retail broadband market."[115]

In affirming that decision on judicial review, this Court found no merit to the argument that the Commission had "failed to properly consider the wholesale market."[116] Finding that the

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[112] Id. n.90 (J.A. 483).

[113] Section 271 Broadband Forbearance Order, 19 FCC Rcd at 21509 (¶ 28).

[114] Id. at 21508-09 (¶ 26).

[115] Id. at 21505 (¶ 21).

[116] Earthlink, 462 F.3d at 10 n.8.

argument "warrant[ed] little discussion," the Court upheld the Commission's approach because "the CLECs have alternative ways to compete" and the ILECs will be inclined to offer reasonable wholesale rates because competitive market conditions give them an incentive to "'find ways to keep traffic 'on-net.'"'[117] Those considerations fully justify the Commission's approach in this case.[118]

C. The Petitioners' Claims Regarding Ethernet Services Are Unavailing.

(1) Contrary to the Private Petitioners' Claim, the Orders on Review Do Not Effectively Eliminate Competition for Ethernet Services.

The record evidence shows that the provision of Ethernet services, like the other broadband services at issue in this proceeding, is characterized by robust competition.[119] Many

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[117] Id. (quoting Section 271 Broadband Forbearance Order, 19 FCC Rcd at 21508 (¶ 28)).

[118] There is no merit to the Private Petitioners' claim that the orders on review "cannot be squared" with In the Matter of Petition of Qwest Communications International Inc. for Forbearance from Enforcement of the Commission's Dominant Carrier Rules As They Apply After Section 272 Sunsets, Memorandum Opinion and Order, 22 FCC Rcd 5207 (2007) ("Qwest Long Distance Forbearance Order"), a case in which the Commission granted Qwest's petition for forbearance from dominant carrier regulation for its in-region, interstate, interLATA telecommunications service. Private Petitioners' Brief at 24. The Private Petitioners base their claim of inconsistency on the Commission statement that it would "assume" in light of Qwest's failure to submit contrary evidence, that Qwest "'continues to possess exclusionary market power within its region by reason of its control over these bottleneck access facilities.'" Private Petitioners' Brief at 24 (quoting Qwest Long Distance Forbearance Order, 22 FCC Rcd at 5231 (¶ 47)). The Private Petitioners, however, ignore the fact that, notwithstanding that assumption, the Commission concluded that "[d]ominant carrier regulation of Qwest's in-region, interstate, interLATA telecommunications services is not the most effective and cost-effective way to address exclusionary market power concerns resulting from Qwest's control of any bottleneck access facilities that Qwest's competitors must access in order to provide competing services." 22 FCC Rcd at 5234 (¶ 53).

[119] See Letter from Frank S. Simone, Executive Director-Federal Regulatory, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC (Sept. 13, 2007), Att ("AT&T Sept. 13, 2007 Letter") (J.A. 344); Letter from Dee May, Vice-President Federal–Regulatory, Verizon, to Marlene Dortch (Aug. 30, 2007), Att. ("Verizon Aug. 30, 2007 Letter") (J.A. 328).

companies offer Ethernet in competition with the ILECs. AT&T, the largest Ethernet provider in the United States, has only a 19.5 percent share of the market, and its market share is declining.[120] Petitioner Time Warner Telecom, the largest non-BOC provider — and third largest nationwide after AT&T and Verizon — has a 13.7 percent share, and its market share is increasing.[121]

The Private Petitioners argue that the orders on review, by removing dominant carrier regulation of the ILECs' Ethernet inputs, "effectively eliminate[] competition for Ethernet services in most parts of the country."[122] The statements in their own brief to this Court, however, cast doubt on Private Petitioners' dire prediction of the demise of Ethernet competition. The removal of dominant carrier regulation on ILEC Ethernet inputs can have no adverse effect on the competitive provision of retail Ethernet service to the extent that such service does not utilize ILEC Ethernet inputs. And the Private Petitioners maintain that competitive providers of Ethernet generally do not use the ILECs' Ethernet inputs in the provision of service to their customers.[123]

The Private Petitioners suggest that they have been unable to obtain Ethernet inputs because the ILECs "have been slow to deploy Ethernet."[124] However, the orders on review, by eliminating the burdens of dominant carrier regulation, give ILECs increased incentives to

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[120] AT&T Sept. 13, 2007 Letter, Att. (J.A. 346); Verizon Aug. 30, 2007 Letter (J.A. 329).

[121] Verizon Aug. 20, 2007 Letter, Att. (J.A. 329).

[122] Private Petitioners' Brief at 25.

[123] Id. at 31 (asserting that competitive providers largely employ their own facilities to provide Ethernet service). See Reply Comments of BellSouth Corporation at 8 (Aug. 31, 2006) (J.A. 268) (noting that carriers "rarely purchase" the broadband services listed in its forbearance petition at wholesale). See also AT&T/BellSouth Order n.90 (J.A. 483).

[124] Private Petitioners' Brief at 7. See id. at 32.

deploy innovative technologies such as Ethernet. Indeed, record evidence shows that forbearance relief encourages ILECs to make Ethernet more widely available both on a wholesale and a retail level. In the six months after it was granted forbearance relief for its broadband services, Verizon "entered [into] wholesale agreements for Ethernet services with nearly 20 carrier customers" and retail agreements with more than 75 end-users.[125] In any event, any difficulties competitive carriers have encountered in obtaining Ethernet inputs would not be remedied by a denial of forbearance. To the contrary, the retention of burdensome regulation would tend to discourage the deployment of Ethernet to the detriment of the ILECs' wholesale and retail customers alike.[126]

The Private Petitioners suggest that it is uneconomical for competitive providers to utilize Ethernet inputs because the prices for such inputs "are unreasonably high."[127] As an initial matter, it appears as though Private Petitioners are arguing that pre-forbearance prices for such inputs were unreasonably high instead of arguing that the Commission's decision to forbear has caused prices to become unreasonably high. This argument ignores the fact that the Commission's action left in place key statutory protections governing such prices. Specifically, the Commission in the orders on review denied the ILECs' requests for forbearance from all Title II regulation,[128] thereby ensuring that those carriers remain subject to the requirement in sections 201 and 202 that their rates for Ethernet service be just, reasonable, and free from unjust

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[125] Letter from William H. Johnson, Assistant General Counsel, Verizon, to Marlene H. Dortch (Oct. 9, 2007) at 3 ("Verizon Oct. 9, 2007 Letter") (J.A. 406).

[126] See AT&T/BellSouth Order ¶ 33 (J.A. 489-90).

[127] Private Petitioners' Brief at 31 n.18.

[128] See AT&T/BellSouth Order ¶¶ 36, 39, 64-75 (J.A. 491, 492, 501-07).

or reasonable discrimination.[129] And the retention of Title II regulation ensures the continued availability of the section 208 complaint process, which enables a competitive provider to challenge the reasonableness of a wholesale Ethernet input rate and obtain a ruling on its lawfulness within five months.[130] If the Commission finds the rate to be unlawful, the complainant may seek damages from the ILEC.[131] That adjudicatory remedy is available whether or not Ethernet services are subject to dominant carrier regulation. Thus, the removal of dominant carrier regulation on ILEC Ethernet inputs does not relieve ILECs of their statutory obligation to charge just, reasonable, and non-discriminatory rates for those inputs, and the threat of complaints for damages creates incentives for them to do so.

(2) The Commission Reasonably Concluded that DS1 and DS3 TDM-Based Special Access Inputs Are Available Options for Broadband Services.

In addition to the statutory protections ensuring reasonable wholesale Ethernet inputs, the Commission helped preserve another avenue for competitive provision of the broadband services at issue here. Specifically, the Commission's orders excluded DS1 and DS3 TDM-based special access from forbearance, and thus found that those services remain available for use as wholesale inputs.[132] The Private Petitioners do not challenge this finding with respect to any other broadband service at issue in this case, such as frame relay or ATM services. They argue solely that the Commission's finding is erroneous as to Ethernet services.

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[129] 47 U.S.C. §§ 201(b), 202(a).

[130] AT&T/BellSouth Order ¶ 36 (J.A. 491). See 47 U.S.C. § 208(b)(1).

[131] See 47 U.S.C. § 209.

[132] E.g., AT&T BellSouth Order n. 86 (J.A. 482).

The parties to the proceeding submitted conflicting evidence as to whether TDM-based special access service can be effectively used as a wholesale input for Ethernet service. Although the competitive carriers recounted the added costs and inefficiencies of using DS1 and DS3 circuits, other parties submitted evidence showing that "competitors can and do provision Ethernet service using TDM-based special access as a wholesale input to their own enterprise broadband services."[133] For example, record evidence shows that "copper bonding technologies" enable Ethernet services over TDM circuits[134] and that a number of providers use TDM-based inputs to provide Ethernet service.[135] The evidence also showed that petitioner Time Warner Telecom, while complaining to federal regulators of the difficulties in using TDM-based special access inputs, was touting in the marketplace that it had the ability to "cost-effectively deliver . . . Ethernet [services] to customers anywhere," even to places where it "may be uneconomical" to directly connect to its own fiber network.[136]

Other petitioners in this case have made similar representations. Petitioner XO Communications has proclaimed its ability "to expand the availability of [its] Ethernet service

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[133] Verizon Oct. 9, 2007 Letter at 3 (J.A. 406). See, e.g., Reply Comments of AT&T (Aug. 31, 2006) at 32-33 (J.A. 248-49); Reply Comments of BellSouth at 9-11 (Aug. 31, 2006) (J.A.269-71). See AT&T/BellSouth Order ¶ 26 & n.109 (J.A. 686). AT&T in its Reply Comments noted that the Ethernet issue had been extensively addressed by AT&T in the AT&T/Bell South Merger proceeding and asked the Commission to take account of filings on Ethernet from that docket. AT&T Reply Comments at 33 & n.139 (J.A. 249) (citing Letter from Gary Phillips, AT&T and Bennett Ross, BellSouth, to Marlene Dortch, FCC, WC Docket No. 06-74 (Aug. 21, 2006) that attached Supplemental Declaration of Parley C. Casto ("Casto Dec.").

[134] Verizon Oct. 9, 2007 Letter at 3 (J.A. 406).

[135] See id. Att. (J.A. 408).

[136] See AT&T/BellSouth Order ¶ 26 (J.A. 486) (quoting "Time Warner Telecom and Overture Networks Provide Ethernet Anywhere," Time Warner Telecom Press Release (June 6, 2006)), available at http://www.overturenetworks.com/pdf_downloads/TWTC-Overture%20Networks.pdf.

offering to business customers over existing copper facilities nationwide" with a service that is "extremely cost-effective."[137] Petitioner Deltacom stated that it "is able to aggregate DS1s, DS3s, OC-n, and Ethernet links for transport through [its] Ethernet core network while providing customers with state of the art Ethernet services."[138]

Contrary to the Private Petitioners' contention, the Commission reasonably rejected as unpersuasive the competitive providers' record evidence concerning the infeasibility of using wholesale TDM-based special access inputs for Ethernet service. As noted above, that evidence was flatly contradicted by representations of competitive providers, made in the course of business, that the marketplace has developed viable solutions that permit the efficient use of TDM-based inputs in Ethernet service.[139] And the credibility of Time Warner Telecom's record evidence was undermined by its own inconsistent industry pronouncement.[140] Moreover, based on substantial record evidence, the Commission fully explained that the use of TDM special access inputs to provide Ethernet service does not create service and performance problems of a

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[137] "XO Communications Signs Multi-Million Dollar Deal With Hatteras Networks for Nationwide Mid-Band Ethernet Services Rollout," XO Communications & Hatteras Networks, Press Release (April 18, 2007), available at http://www.hatterasnetworks.com/documents/Hatteras%20XO%20MBE%20Agreement%20Press%20Release_FINAL.pdf.

[138] "Deltacom Launches New Ethernet Services Using Overture Networks Technology," Deltacom Business Solutions, Press Release (June 14, 2007), available at http://www.deltacom.com/press/Overtur%20Press%20Release%20Final.pdf.

[139] See AT&T Corp. v. FCC, 86 F.3d 242, 247 (D.C. Cir. 1996) (quoting Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951)) ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.").

[140] AT&T/BellSouth Order ¶ 26 (J.A. 486). See BellSouth Reply Comments at 8-11 (J.A. 268-71). See also Casto Dec. at 6-9.

magnitude to prevent competitive providers from "successfully competing for Ethernet service customers by relying on TDM inputs."[141]

Given the conflicting evidence as well as the specific infirmities in the competitive providers' evidence identified in the orders on review,[142] the Commission's finding concerning the feasibility of DS1 and DS3 circuits as inputs for Ethernet service was reasonable. See Consolo v. FMC, 383 U.S. 607, 620 (1978) (the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.").

II. THE COURT SHOULD DISMISS OR REJECT THE NEW JERSEY RATE COUNSEL'S CLAIMS.

A. The New Jersey Rate Counsel Lacks Standing to Challenge the AT&T/BellSouth Order.

To satisfy the "irreducible constitutional minimum of standing,"[143] a litigant has the burden to establish an actual injury that is fairly traceable to the challenged agency action and is likely to be redressed by a favorable decision.[144] Because Petitioner New Jersey Rate Counsel has failed to demonstrate that the New Jersey consumers it represents are injured by the AT&T/BellSouth Order, it lacks standing to challenge that decision.

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[141] AT&T/BellSouth Order ¶ 26 (J.A. 486).

[142] See id.

[143] Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992). The question of standing involves both constitutional limitations on the jurisdiction of federal courts and prudential limitations on its exercise. See, e.g., Bennett v. Spear, 520 U.S. 154, 161 (1997). The standing issue in this section of our brief involves only the constitutional aspects of standing.

[144] See, e.g., Sprint Communications Co., L.P. v. APCC Services, Inc., 128 S.Ct. 2531, 2535 (2008). The requirement of actual injury also is reflected in the statutory provisions limiting review of agency action to "aggrieved" persons. 28 U.S.C. § 2344; 5 U.S.C. § 702; 47 U.S.C. § 402(a). See Director, Office of Workers Compensation Department of Labor v. Newport News Shipbuilders Dry Dock Co., 514 U.S. 122, 125 (1995).

The New Jersey Rate Counsel seeks review of the AT&T/BellSouth Order in its capacity as an advocate of New Jersey ratepayers.[145] Although the New Jersey Rate Counsel contends that "New Jersey ratepayers are adversely affected by the actions of the FCC in granting relief,"[146] it has not established that the AT&T/BellSouth Order injures New Jersey ratepayers. Neither AT&T nor any of its affiliates (including BellSouth) are ILECs providing service in New Jersey. The fact that the AT&T/BellSouth Order reduces regulatory burdens on AT&T-affiliated ILECs in other states does not establish an injury to ratepayers in New Jersey.

The New Jersey Rate Counsel also alleges that the Commission's orders "affect the ability of state commissions, including the New Jersey Board of Public Utilities, to promote broadband."[147] Even assuming, arguendo, that the orders have such an effect — and, as shown below, they do not[148] — the New Jersey Rate Counsel is neither a state public utility commission nor purports to represent the interest of any such commission.

The New Jersey Rate Counsel's participation in the proceedings before the Commission does not establish its standing to seek judicial review.[149] The core component of the standing requirement arises from the case-or-controversy requirement of Article III.[150] Because the Article III restrictions do not apply to federal administrative agencies such as the FCC, "[t]he Commission may choose to allow persons without Article III 'standing' to participate in FCC

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[145] See New Jersey Rate Counsel Brief at 4.

[146] Id. at 7.

[147] Id..

[148] See Section II.B.2.

[149] See New Jersey Rate Counsel Brief at 7.

[150] E.g., Lujan, 504 U.S. at 560.

proceedings."[151] But if a participant before the agency thereafter seeks to invoke the authority of a federal court to review a Commission decision, it must satisfy the constitutional prerequisites for federal court jurisdiction.[152] The New Jersey Rate Counsel's failure to do so requires dismissal of its petition for review of the AT&T/BellSouth Order (Case No. 07-1484).[153]

B. The Court Should Dismiss or Reject the New Jersey Rate Counsel's Constitutional Arguments.

(1) The New Jersey Rate Counsel's Constitutional Issues Are Not Properly Before the Court.

Section 405(a) of the Communications Act provides that the Commission must be afforded an "opportunity to pass" on an issue as a "condition precedent to judicial review." 47 U.S.C. § 405(a). "This circuit has strictly applied . . . section [405], holding that [the Court] may not consider 'arguments that have not first been presented to the Commission.'"[154] The Court has made clear that a litigant cannot expect the Commission to "'sift pleadings and documents to identify' arguments that are not 'stated with clarity.'"[155] Thus, an argument is not preserved for judicial review if it has not been first presented clearly to the Commission in the proceeding

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[151] California Association of the Physically Handicapped, Inc. v. FCC, 778 F.2d 823, 826 n.8. (D.C. Cir. 1985). See Branch v. FCC, 824 F.2d 37, 40 (D.C. Cir. 1987).

[152] E.g., Lujan, 504 U.S. at 573 n.8.

[153] The Commission does not argue that the Court should dismiss New Jersey Rate Counsel's separate petition for review of the Embarq/Frontier Order, an order in which the Commission reduced regulatory requirements on Embarq, an ILEC that provides service in New Jersey.

[154] Charter Communications, Inc. v. FCC, 460 F.3d 31, 39 (D.C. Cir. 2006) (quoting BDPCS, Inc. v. FCC, 351 F.3d 1177, 1182 (D.C. Cir. 2003)). Accord Qwest Corp. v. FCC, 482 F.3d 471, 474 (D.C. Cir. 2007); In re Core Communications, Inc., 455 F.3d 267, 276 (D.C. Cir. 2006).

[155] Bartholdi Cable Co., Inc. v. FCC, 114 F.3d 274, 279 (D.C. Cir. 1997) (citation omitted).

below.[156] Nor is an argument preserved for judicial review merely because the party states that it incorporates arguments presented in an earlier pleading.[157]

The constitutional "arguments" raised in the New Jersey Rate Counsel's Comments in this proceeding appear below in their entirety:

> To use forbearance to preclude or limit states in regulation [sic] broadband is constitutionally infirmed. [sic]
>
> Notwithstanding the fact that each of these forbearance petitions are without merit and should be denied by the Commission based on the reasons discussed above, [New Jersey] Rate Counsel renews the arguments and incorporates those arguments hereto with respect to the constitutional infirmities associated with the Commission's forbearance authority. Specifically, any exercise of the forbearance authority contained in Section 10 of the Act violates separation of powers, equal protection, 10th Amendment, and 11th Amendment as outlined in detail in our Ex Parte filing dated December 7, 2004 in the UNE Remand proceeding (CC Docket No. 01-338 and WC No. 04-313).[158]

The first sentence quoted above is unintelligible and thus is not "presented well enough to satisfy [section] 405(a)."[159] The remainder of the "discussion" incorporates arguments presented in an earlier pleading in a separate proceeding, which under the law of this circuit is insufficient to preserve an issue for judicial review.[160] Section 405(a) thus bars the New Jersey Rate Counsel from raising its constitutional claims to the Court.

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[156] Verizon Telephone Companies v. FCC, 453 F.3d 487, 499 n.3 (D.C. 2006); New Jersey Television Corp. v. FCC, 393 F.3d 219, 222 (D.C. Cir. 2004).

[157] Bartholdi, 114 F.3d at 279.

[158] Comments of the New Jersey Division of the Rate Counsel, WC Docket 06-125 (Aug. 17, 2006) at 5-6 (J.A. 172-73).

[159] Qwest Corp. v. FCC, 482 F.3d 471, 478 (D.C. Cir. 2007). See also AT&T /BellSouth Order, n.67 (J.A. 479).

[160] See Bartholdi Cable, 114 F.3d at 279. See also AT&T/BellSouth Order, n.67 (J.A. 479).

(2) The New Jersey Rate Counsel's Constitutional Arguments Are Unavailing.

Even if the New Jersey Rate Counsel had properly raised its facial challenges to the constitutionality of section 10 below — and it did not — the Commission would have had no obligation to consider them. Because an agency "does not have jurisdiction to declare statutes unconstitutional," this Court has held that it is "entirely proper" for the Commission not to entertain a facial challenge to the constitutionality of a provision of the Communications Act.[161] In any event, as shown below, section 10 does not violate the non-delegation doctrine and the forbearance grant does not violate principles of federalism.

The Non-Delegation Doctrine. Article I, § 1 of the U.S. Constitution vests "[a]ll legislative [p]owers . . . in a Congress of the United States." This provision not only authorizes Congress to enact federal statutes, but also prohibits Congress from delegating that power to "another branch or entity."[162] The prohibition on the delegation of legislative power, however, does not forbid Congress from entrusting agencies to implement federal law and to exercise "policy judgment" in performing that responsibility.[163] When Congress "confers decisionmaking authority upon agencies, [it] must 'lay down by legislative act an intelligible principle to which the person or body authorized to act is directed to conform.'"[164] The intelligible principle acts as

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[161] Branch, 824 F.2d at 47. See generally Weinberger v. Salfi, 422 U.S. 749, 765 (1975); Johnson v. Robison, 415 U.S. 361, 368 (1974); Public Utils. Comm'n v. United States, 355 U.S. 534, 539 (1958).

[162] Loving v. United States, 517 U.S. 748, 758 (1996).

[163] Whitman v. American Trucking Assn's, Inc., 531 U.S. 457, 474 (2001).

[164] American Trucking, 531 U.S. at 472 (emphasis and brackets removed) (quoting J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928)).

a guide to agency decision-making, so that when an agency exercises its congressionally delegated powers, it is acting to implement Congress's statute rather than creating new law.[165]

The three-part forbearance standard set forth in section 10(a), and further elaborated in section 10(b) — ensuring just and reasonable rates, protecting consumers, and promoting the public interest, including a consideration of whether forbearance will "enhance competition" and "promote competitive market conditions"— provides an "intelligible principle" to guide the Commission's exercise of its decision-making authority in forbearance cases.[166] The role of the Commission in section 10 forbearance cases is to apply that congressionally-prescribed standard, not to create new law. The New Jersey Rate Counsel thus errs in claiming that section 10 is an unconstitutional delegation of legislative power to the Commission that violates the separation of powers.

Federalism. Although its argument is difficult to understand, the New Jersey Rate Counsel appears to argue that the Commission's orders violate principles of federalism by unlawfully eliminating state authority over broadband used to provide intrastate services and consumer protection matters that traditionally have been within the authority of the states.[167] The New Jersey Rate Counsel, however, does not explain how grants of forbearance from specified federal regulations by a federal agency pursuant to federal law has the effect of eliminating state authority over traditional state functions or impeding states from promoting

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[165] See Loving, 517 U.S. at 771; see also INS v. Chadha, 462 U.S. 919, 953–954 n.16 (1983).

[166] The section 10 forbearance standard is well within the bounds of permissible policy judgments that the Supreme Court has upheld against non-delegation challenges. See, e.g., American Trucking, 531 U.S. at 474. See also National Broadcasting Co. v. United States, 319 U.S. 190, 216-217, 225-226 (1943) (upholding delegation to the Commission to regulate radio broadcasting according to "public interest, convenience, or necessity").

[167] New Jersey Rate Counsel Brief at 14-15.

broadband. The Commission in the orders on review does not preempt any state regulation or otherwise purport in any way to limit state authority. The New Jersey Rate Counsel in its brief does not explain how the orders on review "violat[e] rights preserved to states under the Constitution and Supreme Court precedent."[168] Indeed, the New Jersey Rate Counsel's brief does not even identify any specific constitutional provision that the Commission allegedly has violated.

C. The New Jersey Rate Counsel's Other Arguments Lack Merit.

(1) The Commission Provided Adequate Notice and Opportunity to Comment.

The New Jersey Rate Counsel claims that the Commission violated the Administrative Procedure Act ("APA") by imposing conditions on the forbearance grant without providing notice of the specific conditions it adopted in the forbearance grant and the opportunity to comment upon them. That argument lacks merit.[169]

According to the New Jersey Rate Counsel, the "underlying proceeding is an adjudication rather than a rulemaking."[170] Under the APA, however, notice-and-comment procedures are required when an agency promulgates, amends, or repeals a substantive rule. 5 U.S.C. § 553 (b),

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[168] Id. at 15.

[169] Curiously, the New Jersey Rate Counsel also argues that the Commission violated notice-and-comment requirements in rejecting its argument that the agency should have conditioned any forbearance grant to the forbearance petitioners' compliance with structural separation requirements. New Jersey Rate Counsel Brief at 11. The New Jersey Rate Counsel's ability to propose that condition, however, arose because the Commission in fact did provide notice and opportunity for comment.

[170] New Jersey Rate Counsel Brief at 8. But see 5 U.S.C. § 551(4) ("rule" defined as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy").

(c).[171] Notice-and-comment procedures are not routinely required for adjudications[172] and the New Jersey Rate Counsel fails to provide any explanation as to why rulemaking procedures are mandated for what it claims are adjudicatory forbearance proceedings.

Even if a forbearance proceeding were thought of as similar to an informal rulemaking, the Commission in fact provided notice and an opportunity to comment. Under general APA rulemaking procedures, "an agency need not initiate a new notice-and-comment period as long as the rule it ultimately adopts is a 'logical outgrowth' of the initial notice."[173] The "logical outgrowth" standard is satisfied if "interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice and comment period."[174]

The New Jersey Rate Counsel does not dispute that the Commission gave explicit notice and provided the opportunity to comment on the carriers' requests for forbearance from Title II regulation and Computer Inquiry requirements with regard to a specified set of broadband services.[175] The "conditions" the Commission imposed simply announced that the agency had partially granted those forbearance requests by relaxing, instead of entirely eliminating

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[171] See, e.g., Air Transport Ass'n of America, Inc. v. FAA, 291 F.3d 49 (D.C. Cir. 2002).

[172] See, e.g., United States Telecom Ass'n v. FCC, 400 F.3d 29, 34 n.9 (D.C. Cir. 2005).

[173] Crawford v. FCC, 417 F.3d 1289, 1295 (D.C. Cir. 2005). See, e.g., Long Island Care at Home, Ltd. v. Coke, 127 S.Ct. 2339, 2351 (2007); National Mining Ass'n v. Mine Safety and Health Admin., 512 F.3d 696, 699 (D.C. Cir. 2008).

[174] American Coke and Coal Chemicals Institute v. EPA, 452 F.3d 930, 962-63 (D.C. Cir. 2006). See Owner-Operator Independent Drivers Ass'n, Inc. v. Federal Motor Carrier Safety Admin., 494 F.3d 188 (D.C. Cir. 2007).

[175] Public Notice, 21 FCC Rcd 8022 (2006) (J.A. 463).

regulation on the specified broadband services.[176] Those conditions were similar to conditions the Commission had imposed in prior forbearance cases.[177] The conditions were thus "'reasonably foreseeable,' which is the crux of the logical outgrowth test,"[178] and no further notice and comment was necessary even if the rulemaking requirements applied in this context.[179]

The New Jersey Rate Counsel argues that its request that the Commission provide notice and the opportunity for comment on any conditions to a forbearance grant itself "triggered the need" for the agency to provide additional notice and another round of comment.[180] That argument is frivolous. Congress gave the Commission, not the New Jersey Rate Counsel, discretion to determine how to conduct its own administrative proceedings.[181] The fact that the New Jersey Rate Counsel in comments asked the Commission to provide an unnecessary second round of notice and comment in a forbearance proceeding with a stringent statutory deadline for agency action did not create an obligation on the part of the agency to accede to that request.

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[176] See, e.g., AT&T/BellSouth Order ¶¶ 37, 42 (J.A. 491, 494) (conditioning forbearance from dominant carrier regulation upon the carriers' adherence to the less stringent "rules for non-dominant interexchange carriers"); id. ¶ 1 (J.A. 469) (conditioning forbearance of the Computer Inquiry requirements upon the carriers' compliance with the "Computer Inquiry obligations that apply to all non-incumbent [LECs].").

[177] See Qwest Omaha Order, 20 FCC Rcd at 19429 (¶ 25) (conditioning forbearance from the application of the dominant carrier regulation upon the ILEC's compliance with competitive carrier requirements).

[178] Owner-Operator, 494 F.3d at 210 (quoting Long Island Care, 127 S.Ct. at 2351) (emphasis omitted).

[179] The New Jersey Rate Counsel appears to suggest that the conditions the Commission imposed were somehow based upon factual material that the agency had not divulged on the record. There is no such undivulged factual material in this case.

[180] New Jersey Rate Counsel Brief at 12.

[181] 47 U.S.C. § 154(j). See FCC v. Schreiber, 381 U.S. 279, 289 (1965); FCC v. Pottsville, 309 U.S. 134, 142-43 (1940); City of Angels v. FCC, 745 F.2d 656, 664 (D.C. Cir. 1984).

(2) The Commission Reasonably Rejected the New Jersey Rate Counsel's Request to Condition Forbearance Upon Compliance with Structural Separation Requirements.

The Commission reasonably rejected the New Jersey Rate Counsel's request to condition forbearance upon implementation of structural separation requirements that apply to independent ILECs under section 64.1903 of the Commission's rules.[182] As the Commission explained, the adoption of that condition would impose significant costs on the carriers that exceed any potential benefits.[183] Specifically, the proposed condition would force the petitioning carriers needlessly to "restructure [their] in-region, broadband telecommunications operations at great expense and in a less efficient manner."[184] The New Jersey Rate Counsel in its brief does not claim that the restructuring required by its proposal would be without cost to the carriers. Nor does it identify in its brief any benefits that allegedly would result from the adoption of its proposal or point to any record evidence that the Commission overlooked. In the absence of any justification for the condition, the Commission acted reasonably in declining to adopt it.

Contrary to the Rate Counsel's assertion,[185] the Commission did not err in considering its Section 272 Sunset Order,[186] a case in which the Commission evaluated the costs and benefits of the structural separation condition, in deciding whether to adopt the same condition in this case. An agency's consistency with its own precedent is a hallmark of reasonable administrative

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[182] New Jersey Rate Counsel Brief at 13. See 47 C.F.R. § 64.1903.

[183] E.g., AT&T/BellSouth Order ¶ 38 (J.A. 492).

[184] Id.

[185] New Jersey Rate Counsel Brief at 13-14.

[186] Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements, Report and Order and Memorandum Opinion and Order, 22 FCC Rcd 16440 (2007).

action.[187] It was perfectly appropriate, therefore, for the Commission to consider its analysis in the Section 272 Sunset Order regarding the costs of the structural separation requirement of section 64.1903 in deciding whether to impose that requirement in this case. Moreover, the New Jersey Rate Counsel errs in contending that the Commission impermissibly "link[ed] its actions" in the Section 272 Sunset Order "so as to satisfy its obligations" in this proceeding.[188] The Commission made specific findings in the orders before the Court that the costs of applying the structural separation requirements outweighed the benefits.[189] The fact that the Commission also noted the consistency of those findings with the Section 272 Sunset Order hardly renders the agency's action arbitrary.[190]

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[187] See Verizon, 453 F.3d at 497 ("[A]n agency acting consistently with its prior actions is generally what makes an agency action not arbitrary").

[188] New Jersey Rate Counsel Brief at 13.

[189] E.g., AT&T/BellSouth Order ¶ 38 (J.A. 492).

[190] The New Jersey Rate Counsel faults the Commission for failing to respond to "multiple issues raised by [the New Jersey] Rate Counsel including but not limited to the role of state commissions as it relates to broadband deployment, whether the exercise of forbearance is constitutionally infirm, and whether the grant of forbearance is an exogenous event." New Jersey Rate Counsel Brief at 6. As the New Jersey Rate Counsel itself acknowledges, however, "the FCC is not required to address every comment." Id. at 16. None of those arguments identified above required the agency's response. For example, the New Jersey Rate Counsel has not explained why the Commission must address the "role of state commissions relating to broadband deployment" in determining whether it should forbear from federal statutory and regulatory provisions. As discussed above, New Jersey's facial challenge to the constitutionality of section 10 was not properly raised before the agency and in any event is outside the Commission's jurisdiction. And the exogenous rate ramifications, if any, associated with the partial forbearance grant are properly addressed in the rate proceedings, not in forbearance cases. The other "issues" raised by the New Jersey Rate Counsel and not addressed in the orders on review similarly are too inconsequential, irrelevant, and/or not sufficiently developed to warrant a response.

CONCLUSION

The Court should dismiss Case No. 07-1484 and deny the other petitions for review.

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September 17, 2008

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AD HOC TELECOMMUNICATIONS USERS Committee, et al.,	)	
PETITIONERS,	)	
v.	)	
FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA	)	No. 07-1426
RESPONDENTS.	)	

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Appellee" in the captioned case contains 16794 words.

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September 17, 2008

STATUTORY APPENDIX

5 U.S.C. § 553
5 U.S.C. § 706

47 U.S.C. § 157(note)[Section 706, Telecommunications Act of 1996]
47 U.S.C. § 160
47 U.S.C. § 201
47 U.S.C. § 202
47 U.S.C. § 405

5 U.S.C. § 553

UNITED STATES CODE ANNOTATED
TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I--THE AGENCIES GENERALLY
CHAPTER 5--ADMINISTRATIVE PROCEDURE
SUBCHAPTER II--ADMINISTRATIVE PROCEDURE

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved--

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice

shall include--

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply--

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

5 U.S.C. § 553 (continued)

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

5 U.S.C. § 706

UNITED STATES CODE ANNOTATED
TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I--THE AGENCIES GENERALLY
CHAPTER 7--JUDICIAL REVIEW

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

UNITED STATES CODE ANNOTATED
TITLE 47—TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5—WIRE OR RADIO COMMUNICATION
SUBCHAPTER I—GENERAL PROVISIONS

§ 157. New technologies and services

(a) In general.--The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

(b) Inquiry.--The Commission shall, within 30 months after the date of enactment of this Act [Feb. 8, 1996], and regularly thereafter, initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) and shall complete the inquiry within 180 days after its initiation. In the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.

(c) Definitions.--For purposes of this subsection:
(1) Advanced telecommunications capability.--The term 'advanced telecommunications capability' is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.
(2) Elementary and secondary schools.--The term 'elementary and secondary schools' means elementary and secondary schools, as defined in section 9101 of the Elementary and Secondary Education Act of 1965 [20 U.S.C.A. § 7801]."

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER I. GENERAL PROVISIONS

§ 160. Competition in provision of telecommunications service

(a) Regulatory flexibility

Notwithstanding section 332(c)(1)(A) of this title, the Commission shall forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that--

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest.

(b) Competitive effect to be weighed

In making the determination under subsection (a)(3) of this section, the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.

(c) Petition for forbearance

Any telecommunications carrier, or class of telecommunications carriers, may submit a petition to the Commission requesting that the Commission exercise the authority granted under this section with respect to that carrier or those carriers, or any service offered by that carrier or carriers. Any such petition shall be deemed granted if the Commission does not deny the petition

47 U.S.C. 160 (cont'd)

for failure to meet the requirements for forbearance under subsection (a) of this section within one year after the Commission receives it, unless the one-year period is extended by the Commission. The Commission may extend the initial one-year period by an additional 90 days if the Commission finds that an extension is necessary to meet the requirements of subsection (a) of this section. The Commission may grant or deny a petition in whole or in part and shall explain its decision in writing.

(d) Limitation

Except as provided in section 251(f) of this title, the Commission may not forbear from applying the requirements of section 251(c) or 271 of this title under subsection (a) of this section until it determines that those requirements have been fully implemented.

(e) State enforcement after commission forbearance

A State commission may not continue to apply or enforce any provision of this chapter that the Commission has determined to forbear from applying under subsection (a) of this section.

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER II. COMMON CARRIERS
PART I. COMMON CARRIER REGULATION

§ 201. Service and charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided*, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further*, That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: *Provided further*, That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER II. COMMON CARRIERS
PART I. COMMON CARRIER REGULATION

§ 202. Discriminations and preferences

(a) Charges, services, etc.

It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

(b) Charges or services included

Charges or services, whenever referred to in this chapter, include charges for, or services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind.

(c) Penalty

Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of $6,000 for each such offense and $300 for each and every day of the continuance of such offense.

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5--WIRE OR RADIO COMMUNICATION
SUBCHAPTER IV--PROCEDURAL AND ADMINISTRATIVE PROVISIONS

§ 405. Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order.

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided,* That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

47 U.S.C. § 405 (continued)

(b)(1) Within 90 days after receiving a petition for reconsideration of an order concluding a hearing under section 204(a) of this title or concluding an investigation under section 208(b) of this title, the Commission shall issue an order granting or denying such petition.

(2) Any order issued under paragraph (1) shall be a final order and may be appealed under section 402(a) of this title.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AD HOC Telecommunications Users Committee, et al., Petitioners,

v.

Federal Communications Commission and USA, Respondents.

Certificate Of Service

I, Sharon D. Freeman, hereby certify that the foregoing printed "Brief For Federal Communications Commission" was served this 3rd day of December, 2008, by mailing true copies thereof, postage prepaid, to the following persons at the addresses listed below:

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