

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

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
Petition of BellSouth Corporation for
Forbearance Under Section 47 U.S.C.
§ 160(c) from Title II and Computer
Inquiry Rules with Respect to Its
Broadband Services
WC Docket No. 06-125

MEMORANDUM OPINION AND ORDER

Adopted: October 11, 2007

Released: October 12, 2007

By the Commission: Chairman Martin and Commissioners Tate and McDowell issuing separate statements;
Commissioners Copps and Adelstein dissenting and issuing a joint statement.

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I. INTRODUCTION

1. In this Order, we address petitions filed by AT&T and Legacy BellSouth (jointly AT&T), requesting that the Commission forbear, pursuant to section 10 of the Communications Act of 1934, as

amended (Communications Act or Act),¹ from applying Title II of the Act and the *Computer Inquiry* rules to certain broadband services.² Verizon's forbearance petition was "deemed granted" on March 19, 2006. AT&T seeks relief comparable to the relief granted Verizon through that deemed grant.³ For the reasons set forth below, we grant substantial forbearance relief to AT&T with regard to its existing packet-switched broadband telecommunications services and its existing optical transmission services.⁴ We also relieve AT&T of its obligations under the *Computer Inquiry* rules in connection with these services, conditioned on its compliance with the *Computer Inquiry* obligations that apply to all non-incumbent local exchange carrier (LEC), facilities-based wireline carriers.⁵

¹ 47 U.S.C. § 160. Congress enacted section 10 as part of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (1996 Act).

² 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, WC Docket No. 06-125 (filed July 13, 2006) (AT&T Petition); Petition of BellSouth Corporation for Forbearance Under 47 U.S.C. § 160(c) from Title II and *Computer Inquiry* Rules with Respect to Its Broadband Services, WC Docket No. 06-125 (filed July 20, 2006) (BellSouth Petition). The Wireline Competition Bureau (Bureau) invited comment on each of the petitions. *See Pleading Cycle Established for Comments on Qwest and AT&T Petitions for Forbearance Under 47 U.S.C. § 160(c) From Title II and Computer Inquiry Rules with Respect to Broadband Services*, WC Docket No. 06-125, Public Notice, 21 FCC Rcd 7942 (WCB 2006); *Pleading Cycle Established for Comments on BellSouth Petition for Forbearance Under 47 U.S.C. § 160(c) From Title II and Computer Inquiry Rules with Respect to Broadband Services*, WC Docket No. 06-125, Public Notice, 21 FCC Rcd 8022 (WCB 2006). We note that AT&T's merger with BellSouth was approved by the Commission on December 29, 2006, five months after AT&T filed the forbearance petition that is the subject of this Order. *See AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, Memorandum Opinion and Order, 22 FCC Rcd 5662 (2007) (*AT&T-BellSouth Order*).

³ *See* Verizon Telephone Companies' Petition for Forbearance from Title II and *Computer Inquiry* Rules with Respect to their Broadband Services Is Granted by Operation of Law, WC Docket No. 04-440, News Release (rel. Mar. 20, 2006) (*March 20 News Release*); Petition of the Verizon Telephone Companies For Forbearance, WC Docket No. 04-440 (filed Dec. 20, 2004) (Verizon Petition).

⁴ For ease of exposition, we refer to the services for which we grant relief as the "the AT&T-specified services." We describe these services more fully in part III.D.1.a, below. They exclude all traditional, TDM-based, DS1 and DS3 services, and all services that do not provide a transmission capability of over 200 kilobits per second (kbps) in each direction. *See, e.g.,* AT&T Petition at 5; Legacy BellSouth Petition at 7-8; Letter from Robert W. Quinn, Jr., AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-125 (filed Sept. 12, 2007) (AT&T Sept. 12, 2007 *Ex Parte* Letter) (withdrawing its request for forbearance with respect to broadband services provided on an interstate interexchange basis that are subject to relief in the Commission's *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, WC Docket No. 02-112; *2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules*, CC Docket No. 00-175; *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) with Regard to Certain Dominant Carrier Regulations for In-Region, Interexchange Services*, WC Docket No. 06-120, Report and Order and Memorandum Opinion and Order, FCC 07-159, at para. 85 (rel. August 31, 2007) (*Section 272 Sunset Order*)); Letter from Robert W. Quinn, Jr., Senior Vice President, Federal Regulatory, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-125 (filed Sept. 7, 2007) (AT&T Sept. 7, 2007 *Ex Parte* Letter) (excluding virtual private network (VPN) services from requests for forbearance); *cf.* Letter from Edward Shakin, Vice President and Associate General Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-440, at 3 (filed Feb. 7, 2006) (Verizon WC Docket No. 04-440 Feb. 7, 2006 Letter) (circumscribing scope of Verizon's forbearance petition). TDM is an abbreviation for time division multiplexing, which combines multiple individual communications between two locations over a single channel by dividing the channel into distinctly allocable time segments.

⁵ Specifically, we grant, with regard to the AT&T-specified services, forbearance from the requirements contained in section 203 of the Act, 47 U.S.C. § 203, section 214 of the Act, 47 U.S.C. § 214, (as it relates to dominant carriers), and the following sections of the Commission's rules: 47 C.F.R. §§ 61.31-59 (general rules for dominant carriers), 47 C.F.R. § 63.71 (to the extent it provides discontinuance rules for domestic dominant carriers), 47 C.F.R. Part 69 (access charge and pricing flexibility rules), as well as *Computer Inquiry* requirements.

2. In all other respects, AT&T's requests for forbearance are denied. In particular, we do not forbear from any statutory or regulatory requirement that applies to common carriers or LECs generally regardless of whether they are incumbents or competing carriers. Nor do we forbear, except as stated above with regard to the *Computer Inquiry* rules, from any statutory or regulatory requirements that apply to AT&T in its capacities as an incumbent LEC or a Bell Operating Company (BOC), or to AT&T's affiliate, Southern New England Telephone Company (SNET), in its capacity as an independent incumbent LEC. In addition, AT&T must continue to meet its public policy obligations under Title II and the Commission's implementing rules with respect to the services at issue.⁶ This preserves important public policies related to 911, emergency preparedness, customer privacy, and universal service in connection with the broadband services for which we grant relief. The limited forbearance relief granted herein does not affect in any way the full force and effect of the merger conditions adopted in the *AT&T/BellSouth Order*.⁷

II. BACKGROUND

A. Regulatory Requirements

1. Title II Requirements

3. Title II of the Act and the Commission's implementing rules impose both economic and non-economic regulation on common carriers. Generally speaking, the most extensive regulations are imposed on dominant carriers (*i.e.*, those with individual market power). These carriers are subject to price cap or rate-of-return regulation, and must file tariffs for many of their interstate telecommunications services – on either seven or fifteen days' notice – and usually with supporting data.⁸ In contrast, nondominant carriers are generally not subject to direct rate regulation and may file tariffs, on one day's notice and without cost support, which are presumed lawful.⁹ In addition, applications to discontinue, reduce, or impair service are subject to a 60-day waiting period for dominant carriers, as opposed to a 31-day period for nondominant carriers.¹⁰ Finally, dominant carriers must follow more stringent procedures under section 214 of the Act for certain types of transfers of control for which nondominant carriers are accorded presumptive streamlined treatment.¹¹

4. The Act and our rules impose additional obligations on the BOCs, independent incumbent LECs, or incumbent LECs generally. Under section 271 of the Act, BOCs were required to demonstrate compliance with certain market-opening requirements, including, *inter alia*, interconnection and nondiscriminatory access to network elements, directory assistance, databases and signaling before providing in-region, interLATA long distance service.¹² The BOCs must continue to comply with such

⁶ See, e.g., 47 U.S.C. §§ 222, 225, 229, 251(a)(2), 254, 255.

⁷ *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5807-25, Appendix F (2007) (*AT&T/BellSouth Order*).

⁸ See 47 U.S.C. §§ 203(b), 204(a)(3); 47 C.F.R. §§ 61.38, 61.41, 61.58; *Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, CC Docket No. 96-187, Report and Order, 12 FCC Rcd 2170, 2182, 2188, 2191-92, 2202-03, paras. 19, 31, 40, 67 (1997) (*Tariff Streamlining Order*); see also *Access Charge Reform*, CC Docket Nos. 96-262, 94-1, 98-157, CCB/CPD File No. 98-63, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, 14241, para. 40 (1999) (*Pricing Flexibility Order*) (allowing price cap LECs to file tariffs for new services on one day's notice), *aff'd*, *WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001).

⁹ 47 C.F.R. §§ 1.773(a)(ii), 61.23(c); *Tariff Filing Requirements for Nondominant Carriers*, CC Docket No. 93-36, Order, 10 FCC Rcd 13653, 13653-54, paras. 3-4 (1995).

¹⁰ 47 C.F.R. § 63.71(c).

¹¹ 47 C.F.R. § 63.03(b).

¹² See 47 U.S.C. § 271.

market-opening requirements.¹³ Independent incumbent LECs, moreover, are subject to certain structural separation requirements if they wish to provide in-region, interstate, interexchange telecommunications services other than through resale.¹⁴ Incumbent LECs must meet additional obligations, including the interconnection, collocation, and other obligations set forth in section 251(c) of the Act and the Commission's implementing rules.¹⁵

5. In addition to the economic regulation described above, Title II and the Commission's rules subject all common carriers to a variety of non-economic regulations designed to further important public policy goals and protect consumers.¹⁶ These include requirements that carriers contribute to federal universal service support mechanisms on an equitable and nondiscriminatory basis,¹⁷ ensure access to telecommunications services by people with disabilities,¹⁸ meet standards regarding the privacy of their customers' information,¹⁹ and facilitate the delivery of emergency services.²⁰ All common carriers, moreover, are subject to a formal complaint process under which any person may complain to the Commission about anything the carrier may do that is contrary to the provisions of the Act.²¹

2. Computer Inquiry Requirements

6. Facilities-based wireline carriers are also subject to *Computer Inquiry* requirements. In the *Computer II Orders*,²² the Commission, in response to the convergence and increasing interdependence of computer and telecommunications technologies, established a new regulatory framework that distinguishes between "basic services" and "enhanced services."²³ The Commission determined that

¹³ See 47 U.S.C. § 271(d)(6).

¹⁴ See 47 C.F.R. § 64.1903.

¹⁵ 47 U.S.C. § 251(c).

¹⁶ See *infra* n.213.

¹⁷ 47 U.S.C. § 254(d).

¹⁸ 47 U.S.C. § 225.

¹⁹ 47 U.S.C. § 222(a)-(c), (f).

²⁰ 47 U.S.C. § 222(d)(4), (g).

²¹ 47 U.S.C. § 208.

²² *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 FCC 2d 384 (1980) (*Computer II Final Decision*), *recon.*, 84 FCC 2d 50 (1980) (*Computer II Reconsideration Order*), *further recon.*, 88 FCC 2d 512 (1981) (*Computer II Further Reconsideration Order*), *aff'd sub nom. Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982) (*CCIA v. FCC*), *cert. denied*, 461 U.S. 938 (1983) (collectively referred to as *Computer II Orders*).

²³ The Commission defined basic services as the offering of "a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information." *Computer II Final Decision*, 77 FCC 2d at 415-16, para. 83, 420, para. 96. Enhanced services, in turn, were defined as services that "combine[] basic service with computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information, or provide the subscriber additional, different, or restructured information, or involve subscriber interaction with stored information." *Computer II Final Decision*, 77 FCC 2d at 387, para. 5. In other words, an "enhanced service is any offering over the telecommunications network which is more than a basic transmission service." *Id.* at 420, para. 97. Although the Commission used the term "enhanced service" in its *Computer Inquiry* decisions and the Act uses the term "information service," the Commission has determined that "Congress intended the categories of 'telecommunications service' and 'information service' to parallel the definitions of 'basic service' and 'enhanced service' developed in [the] *Computer II* proceeding . . ." *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 992-94 (2005) (*NCTA v. Brand X*); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11511, para. 21 (1998) (*Report to Congress*).

enhanced services were not within the scope of its Title II jurisdiction but rather were within its ancillary jurisdiction under Title I of the Communications Act.²⁴ To protect against anti-competitive behavior, the Commission, pursuant to this ancillary jurisdiction, imposed structural separation requirements on AT&T.²⁵ The Commission required other facilities-based common carriers to provide the basic transmission services underlying their enhanced services on a nondiscriminatory basis pursuant to tariffs governed by Title II of the Act.²⁶ These carriers thus must offer the underlying basic service at the same prices, terms, and conditions, to all enhanced service providers, including their own enhanced services operations.²⁷

7. In the *Computer III* proceedings,²⁸ the Commission replaced this mandatory structural separation regime with a regime that gives a BOC the option of providing enhanced services pursuant to nonstructural safeguards. In developing this regime, the Commission determined that the cost of decreased efficiency and innovation imposed by the structural safeguards of *Computer II* outweighed their benefits.²⁹ The *Computer III* framework maintained the existing basic and enhanced services categories.³⁰ It adopted comparably efficient interconnection (CEI), open network architecture (ONA),

²⁴ See, e.g., *Computer II Final Decision*, 77 FCC 2d at 435, para. 132.

²⁵ *Id.* at 467-68, para. 216.

²⁶ *Id.* at 475, para. 231; see *id.* at 435, para. 132 (discussing jurisdictional basis for the Commission's *Computer II* actions); see also *CCIA v. FCC*, 693 F.3d at 211-14 (affirming the Commission's reliance on its ancillary jurisdiction in imposing structural safeguards on AT&T's provision of enhanced services); *NCTA v. Brand X*, 545 U.S. at 996 (describing *Computer II* and stating that the Commission "remains free to impose special regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction").

²⁷ See *CCIA v. FCC*, 693 F.2d at 205; see also *Computer II Final Decision*, 77 FCC 2d at 474-75, para. 231. We note that the *Computer II* "unbundling" of basic services requirement is separate and distinct from the obligation, in section 251(c)(3) of the Communications Act, that incumbent LECs provide access to unbundled network elements (UNEs). 47 U.S.C. § 251(c)(3).

²⁸ *Amendment of Section 64.702 of the Commission's Rules and Regulations*, CC Docket No. 85-229, Phase I, 104 FCC 2d 958 (1986) (*Computer III Phase I Order*), *recon.*, 2 FCC Rcd 3035 (1987) (*Computer III Phase I Reconsideration Order*), *further recon.*, 3 FCC Rcd 1135 (1988) (*Computer III Phase I Further Reconsideration Order*), *second further recon.*, 4 FCC Rcd 5927 (1989) (*Computer III Phase I Second Further Reconsideration Order*); *Phase I Order and Phase I Recon. Order vacated sub nom. California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) (*California I*); CC Docket No. 85-229, Phase II, 2 FCC Rcd 3072 (1987) (*Computer III Phase II Order*), *recon.*, 3 FCC Rcd 1150 (1988) (*Computer III Phase II Reconsideration Order*), *further recon.*, 4 FCC Rcd 5927 (1989) (*Phase II Further Reconsideration Order*); *Phase II Order vacated, California I*, 905 F.2d 1217 (9th Cir. 1990); *Computer III Remand Proceeding*, CC Docket No. 90-368, 5 FCC Rcd 7719 (1990) (*ONA Remand Order*), *recon.*, 7 FCC Rcd 909 (1992), *pets. for review denied sub nom. California v. FCC*, 4 F.3d 1505 (9th Cir. 1993) (*California II*); *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, CC Docket No. 90-623, 6 FCC Rcd 7571 (1991) (*BOC Safeguards Order*), *BOC Safeguards Order vacated in part and remanded sub nom. California v. FCC*, 39 F.3d 919 (9th Cir. 1994) (*California III*), *cert. denied*, 514 U.S. 1050 (1995); *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, CC Docket No. 95-20, Notice of Proposed Rulemaking, 10 FCC Rcd 8360 (1995) (*Computer III Further Remand Notice*), *Further Notice of Proposed Rulemaking*, 13 FCC Rcd 6040 (1998) (*Computer III Further Remand Further Notice*); *Report and Order*, 14 FCC Rcd 4289 (1999) (*Computer III Further Remand Order*), *recon.*, 14 FCC Rcd 21628 (1999) (*Computer III Further Remand Reconsideration Order*); see also *Further Comment Requested to Update and Refresh Record on Computer III Requirements*, CC Docket Nos. 95-20, 98-10, Public Notice, 16 FCC Rcd 5363 (2001) (asking whether, under the open network architecture (ONA) framework, information service providers can obtain the telecommunications inputs, including digital subscriber line (DSL) service, they require) (collectively referred to as *Computer III*).

²⁹ See *Computer III Phase I Order*, 104 FCC 2d at 964, para. 3.

³⁰ *Id.* at 964, para. 4.

and other nonstructural requirements as alternatives to the *Computer II* structural separation requirements for the BOCs.³¹ Under *Computer III*, a BOC may provide enhanced services either directly or through an affiliate that is not a *Computer II* affiliate pursuant to an ONA or, alternatively, a CEI plan.

B. Prior Broadband Relief

8. In previous orders, the Commission has taken a number of important steps aimed at easing the regulatory requirements for broadband facilities and services. Specifically, in the *Triennial Review Order*, the Commission determined, on a national basis, that incumbent LECs do not have to unbundle certain broadband elements, including fiber-to-the-home (FTTH) loops in greenfield situations, broadband capabilities of FTTH loops in overbuild situations, the packet-switched capabilities of hybrid loops, and packet switching.³² In making its determination, the Commission considered, among other things, the directive of section 706 of the 1996 Act that it encourage the deployment of advanced services, and it concluded that these facilities should not be unbundled.³³ In subsequent reconsideration orders, the Commission extended the same unbundling relief to encompass fiber loops serving predominantly residential multiple dwelling units (MDUs) and fiber-to-the-curb (FTTC) loops.³⁴ Moreover, in the *Section 271 Broadband Forbearance Order*, the Commission granted the BOCs forbearance relief from the requirements of section 271 specifically for the broadband elements for which it had granted

³¹ *Id.* An ONA plan includes a description of how a BOC unbundles its network to enable its competitors to provide enhanced services generally. *Id.* at 1019-20, para. 113, 1064-67, paras. 214-19. A CEI plan includes a description of how a BOC unbundles its network to enable its competitors to provide a particular enhanced service or set of enhanced services that the BOC intends to provide. *Id.* at 1055-56, paras. 190-91.

³² *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17141-53, paras. 272-95, 17323, para. 541 (2003) (*Triennial Review Order*), corrected by *Triennial Review Order Errata*, 18 FCC Rcd at 19022, para. 26, *aff'd in part, remanded in part, vacated in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554, 564-93 (D.C. Cir. 2004) (*USTA II*), *cert. denied*, 543 U.S. 925 (2004), *on remand, Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, 20 FCC Rcd 2533, 2541, para. 12 (2004) (*Triennial Review Remand Order*), *aff'd, Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

³³ *Triennial Review Order*, 18 FCC Rcd at 17125-27, paras. 242-44. Section 706 states, in pertinent part:

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.

“Advanced telecommunications capability” is defined . . .

with 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.

47 U.S.C. § 157 nt.

³⁴ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Order on Reconsideration, 19 FCC Rcd 20293, 20297-20303, paras. 9-19 (2004) (*Triennial Review FTTC Reconsideration Order*).

unbundling relief under section 251.³⁵ The Commission applied its section 10 forbearance analysis in light of the Act's overall goals of promoting local competition and encouraging broadband deployment.³⁶

9. In the *Wireline Broadband Internet Access Services Order*,³⁷ the Commission, among other things, generally eliminated the Title II and *Computer Inquiry* requirements applicable to wireline broadband Internet access services offered by facilities-based providers.³⁸ The Commission granted this relief for wireline broadband Internet access service and its underlying broadband transmission component, whether that component is provided over all copper loops, hybrid copper-fiber loops, an FTTC or fiber-to-the-premises (FTTP) network, or any other type of wireline facilities.³⁹ The Commission's actions did not encompass other wireline broadband services, such as stand-alone Asynchronous Transfer Mode service (ATM), Frame Relay service, Gigabit Ethernet service, and other high-capacity special access services.⁴⁰ The Commission stated that carriers and end users traditionally have used these services for basic transmission purposes and that these services, unlike broadband Internet access services, are telecommunications services under the statutory definitions and thus subject to Title II.⁴¹

10. In the *Verizon Advanced Services Waiver Order*,⁴² the Commission granted a waiver of specific regulatory requirements to allow Verizon to exercise pricing flexibility for certain advanced

³⁵ *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*; *SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c)*; *Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*; *BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket Nos. 01-338, 03-235, 03-260, 04-48, 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) (*EarthLink v. FCC*).

³⁶ 47 U.S.C. § 157 nt.

³⁷ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) (*Wireline Broadband Internet Access Services Order*), *pets. for review pending*, *Time Warner Telecom v. FCC*, No. 05-4769 (and consolidated cases) (3rd Cir. filed Oct. 26, 2005).

³⁸ *Id.* at 14872-915, paras. 32-111. The Commission found these services to be information services. *See id.* at 14909, para 102.

³⁹ *See id.*

⁴⁰ *See id.*

⁴¹ *See id.* 47 U.S.C. § 153(43), (46). We note that issues relating to this framework are pending before the Commission in a number of proceedings. *See, e.g., Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994 (2005) (*Special Access Rates for Price Cap Local Exchange Carriers*) (examining the regulatory framework to apply to price cap LECs' interstate special access services, including whether to maintain or modify the Commission's pricing flexibility rules); *Parties Asked to Refresh Record in the Special Access Notice of Proposed Rulemaking*, WC Docket No. 05-25, RM-10593, Public Notice, FCC 07-123 (rel. July 9, 2007); *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, Notice of Proposed Rulemaking, 16 FCC Rcd 22745 (2001) (*Incumbent LEC Broadband NPRM*) (examining what regulatory safeguards under Title II of the Act, if any, should apply when a carrier that is dominant in the provision of traditional local exchange and exchange access services provides broadband services); *Computer III Further Remand Further Notice*, 13 FCC Rcd at 6046, para. 6 (inviting comment on whether the Commission should eliminate the ONA, comparably efficient interconnection (CEI), and other *Computer III* requirements).

⁴² *Petition for Waiver of Pricing Flexibility Rules for Fast Packet Services, Petition for Forbearance Under 47 U.S.C. Section 160(c) from Pricing Flexibility Rules for Fast Packet Services*, WC Docket No. 04-246, Memorandum Opinion and Order, 20 FCC Rcd 16840 (2005) (*Verizon Advanced Services Waiver Order*).

services that rely on packet technology.⁴³ Pricing flexibility relief allows a carrier the ability to provide tariffed services at volume and term discounts and under contract tariffs, whereby service offerings may be negotiated and tailored to meet customers' individual needs.⁴⁴ The Commission subsequently granted AT&T and Qwest similar relief for packet-based advanced services.⁴⁵

11. On December 20, 2004, Verizon filed a petition requesting that the Commission forbear from applying Title II of the Act and the *Computer Inquiry* rules to its broadband services.⁴⁶ On December 19, 2005, the Commission, pursuant to section 10(c) of the Act, extended by 90 days (until March 19, 2006) the date by which Verizon's petition would be deemed granted in the absence of a Commission decision that the petition fails to meet the standards for forbearance under section 10(a) of the Act.⁴⁷ By their recorded vote, two Commissioners voted for and two Commissioners voted against a Memorandum Opinion and Order granting Verizon's petition in part. Section 10(c) provides that a forbearance petition "shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance under subsection (a) within one year after the Commission receives it, unless the one-year period is extended by the Commission."⁴⁸ On March 20, 2006, the Commission issued a News Release announcing that the petition had been granted by operation of law.⁴⁹ At that same time, the Chairman and other Commissioners issued statements expressing their views on the deemed grant of Verizon's forbearance petition.⁵⁰

⁴³ Generally, price cap LECs may obtain pricing flexibility in two separate phases on a metropolitan statistical area (MSA) basis to respond to competition in markets that are sufficiently competitive to warrant this relief. See *Pricing Flexibility Order*, 14 FCC Rcd at 14234, 14257, paras. 24, 68. Specifically, the *Verizon Advanced Services Waiver Order* grants Verizon phase I pricing flexibility for the advanced services at issue in MSAs where Verizon previously had qualified for phase I or II pricing flexibility for other special access services. *Verizon Advanced Services Waiver Order*, 20 FCC Rcd at 16840, para. 1.

⁴⁴ *Pricing Flexibility Order*, 14 FCC Rcd at 14287, 14291, paras. 122, 128. Under phase I relief, a price cap carrier may offer volume and term discounts and contract tariffs for certain interstate access services; however, to protect those customers that may lack competitive alternatives, the price cap LEC must continue to offer its generally available, price cap constrained (*i.e.*, subject to part 61 and part 69) tariff rates for these services. 47 C.F.R. § 69.727(a); *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994, 2001, para. 17 (2005). Under phase II relief, part 69 rate structure requirements and price cap regulation are eliminated, and tariffs may be filed on one day's notice. 47 C.F.R. § 69.727(b).

⁴⁵ *SBC Communications Inc. Petition for Waiver of Section 61.42 of the Commission's Rules*, WC Docket No. 03-250, Order, 22 FCC Rcd 7224 (WCB 2007) (*SBC Waiver Order*); *Qwest Petition for Waiver of Pricing Flexibility Rules for Advanced Communications Networks Services*, WC Docket No. 06-187, Order, 22 FCC Rcd 7482 (WCB 2007) (*Qwest Pricing Flexibility Waiver Order*).

⁴⁶ See Verizon Title II and *Computer Inquiry* Forbearance Petition at 24.

⁴⁷ 47 U.S.C. § 160(c); *Petition for Forbearance Filed by the Verizon Telephone Companies with Respect to Their Broadband Services*, WC Docket No. 04-440, Order, 20 FCC Rcd 20037 (WCB 2005).

⁴⁸ 47 U.S.C. § 160(c).

⁴⁹ *March 20 News Release*, pets. for review pending, *Sprint Nextel et al. v. FCC*, No. 06-1111 (and consolidated cases) (D.C. Cir. filed Mar. 29, 2006).

⁵⁰ Joint Statement of Chairman Kevin J. Martin and Commissioner Deborah Taylor Tate, *Petition of the Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, WC Docket No. 04-440 (rel. Mar. 20, 2006); Statement of Commissioner Michael J. Copps in Response to Commission Inaction on Verizon's Forbearance Petition, *Petition of the Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, WC Docket No. 04-440 (rel. Mar. 20, 2006); Statement of Commissioner Jonathan S. Adelstein in Response to Commission Inaction on Verizon's Forbearance Petition, *Petition of the* (continued....)

III. DISCUSSION

A. Introduction

12. Based on our analysis of marketplace conditions for the services at issue here, we grant AT&T forbearance from the application of our dominant carrier tariff filing, cost support, discontinuance, and domestic transfer of control and certain *Computer Inquiry* requirements to broadband services with regard to (1) its existing non-TDM-based, packet-switched services capable of transmitting 200 kbps or greater in each direction; and (2) its existing non-TDM-based, optical transmission services. These services include Frame Relay Services, ATM Services, LAN Services, Ethernet-Based Services, Video Transmission Services, Optical Network Services, and Wave-Based Services. This grant is restricted to services that AT&T currently offers and lists in its petitions, and excludes all TDM-based, DS1 and DS3 services.

B. Scope of Petitions

13. We begin our analysis by identifying the specific relief AT&T requests in its petitions, including the services, statutory provisions and Commission regulations that AT&T identifies in its petitions.⁵¹ As stated above, AT&T seeks relief comparable to that granted Verizon when its similar petition for forbearance was deemed granted.⁵² Specifically, AT&T requests relief from Title II and *Computer Inquiry* requirements for the broadband services specified in its petitions as well as for any additional interstate broadband services it may choose to offer in the future.⁵³ The requested relief from Title II includes the ability to offer any of the AT&T-specified services on a private carriage basis and free from the Commission's dominant carrier requirements.⁵⁴ AT&T also seeks relief from the *Computer Inquiry* rules, including the requirement that it separate out and offer any underlying transmission components of the AT&T-specified services on a common carrier basis.⁵⁵ AT&T does not seek relief from the Commission's universal service requirements.⁵⁶

14. The services for which AT&T seeks relief fall within two categories of telecommunications services capable of transmitting at speeds of 200 kilobits per second (kbps) in both directions: (1) packet-switched services, which route or forward packets, frames, cells, or other data units based on the identification, address, or other routing information contained in the packets, frames, cells, or other data units; and (2) non-TDM-based optical networking, optical hubbing, and optical transmission services.⁵⁷

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Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) from Title II and *Computer Inquiry* Rules with Respect to Their Broadband Services, WC Docket No. 04-440 (rel. Mar. 20, 2006).

⁵¹ See, e.g., *Petition of Qwest Communications International Inc. for Forbearance from Enforcement of the Commission's Dominant Carrier Rules As They Apply After Section 272 Sunsets*, WC Docket No. 05-333, Memorandum Opinion and Order, 22 FCC Rcd 5207, 5214-15, para. 11 (2007) (*Qwest Section 272 Sunset Forbearance Order*); *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, Memorandum Opinion and Order, 17 FCC Rcd 27000, 27010, para. 18 (2002) (*SBC Advanced Services Forbearance Order*).

⁵² AT&T Petition at 8; Legacy BellSouth Petition at 8.

⁵³ See AT&T Petition at 1, 7-11 (seeking relief for itself and other BOCs); Legacy BellSouth Petition at 2, 6-9 (seeking relief for itself and similarly situated carriers).

⁵⁴ AT&T Petition at 9-10 (seeking the flexibility to provide its specified services on a common-carriage or private-carriage basis); Legacy BellSouth Petition at 6 (seeking relief for all Title II common carrier requirements).

⁵⁵ See, e.g., AT&T Petition at 10.

⁵⁶ AT&T Petition at 10; Legacy BellSouth Petition at 8.

⁵⁷ See AT&T Petition at 8-9; Legacy BellSouth Petition at 7-8.

AT&T identifies in its petitions certain specific interstate broadband telecommunications services that it currently offers and for which it seeks forbearance.⁵⁸ AT&T also seeks relief from Title II and *Computer Inquiry* regulation for any additional services it chooses to offer in the future that fit within either of these two categories of services.⁵⁹

15. On September 12, 2007, AT&T narrowed the scope of its forbearance request.⁶⁰ As the Commission has recognized, enterprise customers frequently purchase high-capacity transmission services, including Frame Relay, ATM, Gigabit Ethernet, and similar services provided via emerging technologies, as interstate interexchange services.⁶¹ In AT&T's September 12 filing, it recognizes that we granted AT&T relief from dominant carrier regulation of such interstate interexchange services in our recent *Section 272 Sunset Order*, subject to certain targeted safeguards and other continuing regulatory obligations.⁶² AT&T thus "withdraws 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 and are thereby subject to the relief previously granted in the Commission's *272 Sunset Order*."⁶³ Thus, to the extent that AT&T's original petitions encompassed interstate interexchange services, those requests for forbearance are no longer before us.

C. Application of the Statutory Forbearance Criteria

16. An integral part of the "pro-competitive, de-regulatory national policy framework"⁶⁴ established in the 1996 Act is the requirement, set forth in section 10 of the Communications Act, that the

⁵⁸ The AT&T and Legacy BellSouth petitions list the following services: Frame Relay Service, ATM Service, VPN Service, Remote Network Access Service, Ethernet-Based Service, Video Transmission Service, Optical Transport Service, Optical Networking Service, and Wave-Based Transport Service. AT&T Petition at Appendix A, Legacy BellSouth Petition at Attachment A. Subsequently, AT&T narrowed the scope of services for which forbearance is sought by AT&T and Legacy BellSouth to exclude VPN services. *See* AT&T Sept. 7, 2007 *Ex Parte* Letter. Collectively, we refer to these services as the AT&T-specified services. Verizon sought forbearance relief for its Frame Relay, Asynchronous Transfer Mode Cell Relay, Internet Protocol-Virtual Private Network, Transparent Local Area Network, LAN Extension, IntelliLight Broadband Transport, Custom Connect, Verizon Optical Networking, Optical Hubbing, and IntelliLight Optical Transport services. *See* Verizon WC Docket No. 04-440 Feb. 7, 2006 Letter at 2-4, 6.

⁵⁹ *See* AT&T Petition at 9, n.22 (stating that AT&T seeks forbearance for any service offered today or in the future by AT&T or any of its affiliates that fits within the two categories described by Verizon); Legacy BellSouth Petition at 8 n.19 (stating that it "seeks relief for not only the broadband services it currently provides but also new services that are introduced and fit within either of the two categories"). In contrast, Verizon restricted its forbearance request to ten of its then-existing telecommunications services offerings. *See* Verizon WC Docket No. 04-440 Feb. 7 Letter at Attach. 1, at 1 (providing "List of Broadband Services for Which Verizon Is Seeking Forbearance").

⁶⁰ AT&T Sept. 12, 2007 *Ex Parte* Letter.

⁶¹ *Section 272 Sunset Order*, FCC 07-59 at para. 28.

⁶² AT&T Sept. 12, 2007 *Ex Parte* Letter at 1; *see also Section 272 Sunset Order*, FCC 07-59. This includes relief from: tariff obligations (as set forth in Section 203 of the Act and sections 61.31-61.38 and 61.43 of the Commission's rules), interexchange basket requirements (as set forth in section 61.42(d)(4) of the Commission's rules), international service tariff filings (as set forth in section 61.28 of the Commission's rules), discontinuance and transfer of control requirements (as set forth in sections 63.03, 63.19, 63.21, 63.23, and 63.30-63.90 of the Commission's rules), contract filing and reporting for exchange of services and routing of traffic and rates (as set forth in section 43.51 of the Commission's rules), and structural safeguards (as set forth in section 272 of the Act and section 64.1903 of the Commission's rules). As noted above, this relief is conditioned on compliance with the conditions and requirements imposed in the *Section 272 Sunset Order*.

⁶³ AT&T Sept. 12, 2007 *Ex Parte* Letter at 1.

⁶⁴ Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 113 (1996).

Commission forbear from applying any provision of the Act, or any of the Commission's regulations, if the Commission makes certain findings with respect to such provisions or regulations.⁶⁵ Specifically, the Commission is required to forbear from any such provision or regulation if it determines that (1) enforcement of the provision or regulation is not necessary to ensure the telecommunications carrier's charges, practices, classifications, or regulations are just, reasonable, and not unjustly or unreasonably discriminatory; (2) enforcement of the provision or regulation is not necessary to protect consumers; and (3) forbearance is consistent with the public interest.⁶⁶ In making this public interest determination, the Commission also must consider, pursuant to section 10(b), "whether forbearance from enforcing the provision or regulation will promote competitive market conditions."⁶⁷

1. Dominant Carrier Regulation

a. Charges, Practices, Classifications, and Regulations

17. Section 10(a)(1) of the Act requires that we analyze whether the application of dominant carrier regulation to each of the services specified by AT&T is necessary to ensure that the "charges, practices, classifications, or regulations . . . for[] or in connection with that . . . telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory."⁶⁸ Our section 10(a)(1) analysis takes into account the effect of dominant carrier regulation on AT&T's rates and practices by considering the overall marketplace for the services for which relief is sought and the customers that use them.⁶⁹ We conclude that, in light of the overall competitive alternatives available for the AT&T-specified services, as well as the way in which they are typically offered to enterprise customers, it is appropriate to forbear from dominant carrier regulation as it applies to these services. In particular, mandating that AT&T, but not its nondominant competitors, comply with requirements that directly limit the ability of customers to secure the most flexible service arrangements is unnecessary to prevent unjust, unreasonable, or unjustly or unreasonably discriminatory rates, terms, and conditions for these services.

18. We begin our analysis by looking at the broadband services identified by AT&T and the customers that use them. These types of services are high-speed, high-volume services that enterprise customers, including some wholesale customers, use primarily to transmit large amounts of data among multiple locations. For example, Frame Relay service allows local area networks to be connected across a

⁶⁵ 47 U.S.C. § 160(a).

⁶⁶ *Id.*

⁶⁷ 47 U.S.C. § 160(b). In its comments, the New Jersey Rate Counsel argues that exercise of the Commission's forbearance authority pursuant to section 10 of the Act violates separation of powers and equal protection, as well as the tenth and eleventh amendments of the Constitution. See New Jersey Rate Counsel Comments at 5-6. As we held in the *Qwest Section 272 Sunset Forbearance Order* in response to the same argument, the New Jersey Rate Counsel makes no attempt to develop this argument, and we find the assertion insufficient to call into question section 10's constitutionality. See *Qwest Section 272 Sunset Forbearance Order*, 22 FCC Rcd at 5232, para. 49 n.139 (citing *Sprint Corp. v. FCC*, 331 F.3d 952, 960 (D.C. Cir. 2003) (Administrative Procedure Act does not require the Commission to respond to conclusory comments); *MCI WorldCom v. FCC*, 209 F.3d 70, 765 (D.C. Cir. 2000) (holding that a party did not raise an argument with sufficient force to obligate the Commission to respond); *Application by Verizon Maryland Inc., Verizon Washington, D.C. Inc., Verizon West Virginia Inc., Bell Atlantic Communications Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in Maryland, Washington, D.C., and West Virginia*, WC Docket No. 02-384, Memorandum Opinion and Order, 18 FCC Rcd 5212, 5282 n.469 (2003) (regulatory agencies are not required to address arguments not stated with sufficient force or clarity)).

⁶⁸ 47 U.S.C. § 160(a)(1).

⁶⁹ *Section 271 Broadband Forbearance Order*, 19 FCC Rcd at 21505, para. 21.

public network to carry customized data applications.⁷⁰ ATM service, which was developed more recently than Frame Relay, has greater availability in urban areas, is currently a widely-used carrier backbone technology, and can guarantee different service quality levels to meet various customer needs.⁷¹ This service offers high capacity and reliability by combining some circuit-switched functionality with packet-switching and is used to deliver data that requires a very low rate of transmission delays.⁷² 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).⁷³

19. Non-TDM-based optical services are very high speed, fiber-based transmission services that, collectively, reflect many of the telecommunications transmission capabilities that technological advances have made possible. For example, AT&T's Optical Transport Services provide point-to-point connectivity using optical fiber, with customer interfaces operating at speeds ranging from OC-3 to OC-192.⁷⁴ Similarly, AT&T's Optical Networking Services provide optical transport within a closed ring architecture that enables automatic restoration upon link failure.⁷⁵ These services also provide for hubbing services, where individual optical transport links are multiplexed onto higher capacity optical links.⁷⁶ Moreover, AT&T's Ethernet services provide high-speed, point-to-point transmission using Ethernet protocol technology.⁷⁷ We find insufficient information to precisely define the market boundaries for such services, and we thus focus our analysis on the services AT&T identifies in the record generally.⁷⁸

20. We also find it appropriate, contrary to several parties' arguments,⁷⁹ to consider marketplace conditions for these services broadly.⁸⁰ In this regard, as we find below, competition for these enterprise

⁷⁰ *AT&T-BellSouth Order*, 22 FCC Rcd at 5697-98, para. 63, n.177; *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18322, para. 57, n.164 (2005) (*SBC-AT&T Order*); see also AT&T Petition at Appendix A; Legacy BellSouth Petition at Attachment A.

⁷¹ See *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, Memorandum Opinion and Order, 20 FCC Rcd 27000, 27003, para. 6, n.22 (2002).

⁷² *AT&T-BellSouth Order*, 22 FCC Rcd at 5697-98, para. 63, n.178; *SBC-AT&T Order*, 20 FCC Rcd at 18322, para. 57, n.165; see also AT&T Petition at Appendix A; Legacy BellSouth Petition at Attachment A.

⁷³ *AT&T-BellSouth Order*, 22 FCC Rcd at 5697-98, para. 63, n.179; *SBC-AT&T Order*, 20 FCC Rcd at 18322, para. 57, n.166; see also AT&T Petition at Appendix A; Legacy BellSouth Petition at Attachment A.

⁷⁴ See AT&T Petition at Appendix A; Legacy BellSouth Petition at Attachment A. OC is an abbreviation standing for "optical carrier." An OC-3 transmits at 155 megabits per second; an OC-192 transmits at approximately 10 gigabits per second (gbps). See HARRY NEWTON, *NEWTON'S TELECOM DICTIONARY*, 653, 654 (22d ed., 2006).

⁷⁵ See AT&T Petition at Appendix A; Legacy BellSouth Petition at Attachment A.

⁷⁶ See AT&T Petition at Appendix A; Legacy BellSouth Petition at Attachment A.

⁷⁷ See AT&T Petition at Appendix A; Legacy BellSouth Petition at Attachment A.

⁷⁸ See, e.g., *AT&T-BellSouth Order*, 22 FCC Rcd at 5698-99, para. 65.

⁷⁹ See, e.g., Broadview Comments at 28 (claiming that AT&T does not provide evidence for the Commission to determine the relevant geographic market and simply claim that there is a national market for broadband products); COMPTel Comments at 11.

⁸⁰ See AT&T Petition at 5 (stating that Verizon's Petition demonstrated that "broadband competition is national in scope and is not limited to Verizon's territory or the territory of any specific BOC"); Qwest Reply at 6; Verizon Reply at 17-18 (claiming that the Commission may consider a national broadband market based on its analysis in the *Wireline Broadband Internet Access Broadband Order*, the *Triennial Review Order*, the *271 Broadband Forbearance Order*, and the *Cable Modem Declaratory Ruling*). Verizon Sept. 4, 2007 *Ex Parte* Erratum at 5-8. (continued...)

broadband services tends to be based on either competitive deployment of facilities or use of special access inputs. We note that the relief we grant AT&T excludes TDM-based, DS-1 and DS-3 special access services,⁸¹ and that such special access services for other incumbent LECs likewise remain rate regulated, regardless of the specific geographic market.⁸² We also continue to believe, as the Commission determined in the *Wireline Broadband Internet Access Services Order*, that it is appropriate to view a broadband marketplace that is emerging and changing, such as we find true here, from the perspective of the larger trends that are shaping the marketplace.⁸³ Thus, in the *Wireline Broadband Internet Access Services Order*, the Commission analyzed competitive conditions for broadband Internet access services without regard to specific, identified geographic markets, finding that relying on specific geographic markets 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.⁸⁴ Similarly, the Commission relied on such an approach in the *Section 271 Broadband Forbearance Order* when – after evaluating both mass market and enterprise broadband competitive conditions generally – it granted the BOCs forbearance from access obligations for broadband loops and packet switching.⁸⁵ The similarities we find between the characteristics of the present marketplace as emerging and changing and the markets at issue in those prior orders suggest that it is appropriate for us to look more broadly at competitive trends without regard to specific geographic markets.⁸⁶

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We note that the Commission's forbearance analysis is informed by its traditional market power framework, where the Commission has noted that competitive analyses generally should focus on individual customer locations, but for reasons of administrative practicality may be aggregated and evaluated on a broader geographic basis. *See, e.g., AT&T-BellSouth Order*, 22 FCC Rcd at 5700, para. 68. Moreover, we note that, although the Commission's analysis of forbearance from dominant carrier regulation is informed by its traditional market power analysis, it is not bound by that framework. As the Commission stated in the *Qwest Omaha Order*, while it "look[s] to the Commission's previous caselaw on dominance for guidance," the traditional market power inquiry does not "bind [the Commission's] section 10 forbearance analysis." *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, 20 FCC Rcd 19415, 19423-25, paras. 14, 17, n.52 (2005) (emphasis in original) (*Qwest Omaha Order*), *aff'd*, *Qwest Corp. v. FCC*, 482 F.3d 471 (D.C. Cir. 2007).

⁸¹ AT&T excludes "traditional TDM-based special access services used to serve business customers, such as DS1 and DS3 special access circuits," from the scope of their broadband relief request. *See* AT&T Petition at 5 (requesting relief from the "application of Title II and *Computer Inquiry* requirements to the BOCs' non-TDM based broadband transmission services"); Legacy BellSouth Petition at 7-8 (stating that Verizon's forbearance request excluded "TDM-based special access services" and that BellSouth seeks "the same relief" granted Verizon).

⁸² Moreover, as discussed below, concerns regarding existing regulation of TDM special access inputs are better addressed in the pending rulemaking context. *See infra* para. 33.

⁸³ *AT&T-BellSouth Order*, 22 FCC Rcd at 5698-99, para. 65 & n.183 (discussing the marketplace evolution for these types of services); Verizon Sept. 4, 2007 *Ex Parte* Erratum; Verizon Feb. 7 WC Docket No. 04-440 *Ex Parte* Letter at 4-6 (describing how "the technology used to provide the broadband services at issue here '[is] fundamentally changing' in ways that are 'breaking down the formerly rigid barriers that separate one network from another'") (citations omitted); *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14880-81, para. 50; *id.* at 14901-03, paras. 91-94.

⁸⁴ *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14880-81, para. 50; *id.* at 14901-03, paras. 91-94.

⁸⁵ *See 271 Broadband Forbearance Order*, 19 FCC Rcd at 21496, para. 1 (granting forbearance relief for fiber-to-the-home loops, fiber-to-the-curb loops, the packetized functionality of hybrid loops, and packet switching); *see also EarthLink v. FCC*, 562 F.3d at 8 (upholding the Commission's decision in the *Section 271 Broadband Forbearance Order* as a reasonable interpretation of the forbearance statute).

⁸⁶ Certain commenters seek to distinguish the manner in which the Commission conducted its analysis in the *Wireline Broadband Internet Access Services Order* on the basis of the evidence of the intermodal competition cited (continued....)

21. Moreover, in the *ACS Dominance Forbearance Order*, the Commission found that many enterprise customers that purchase these types of services have national, multi-location operations and thus seek the best-priced alternatives from multiple potential providers having national market presences.⁸⁷ Viewing the regulatory obligations from a broad perspective is consistent with the needs of the large and mid-sized enterprise customers that use AT&T's broadband services to connect geographically-dispersed locations.⁸⁸ Many of these customers, moreover, have national, multi-location operations and thus seek the best-priced alternatives from multiple potential providers having national market presences.⁸⁹ Other enterprise customers have more regional or localized operations, but even these customers are able to solicit telecommunications services from a range of potential providers. Indeed, providers of these services often are able to self-deploy or obtain from competitive LECs the telecommunications services and facilities needed to meet potential customers' telecommunications requirements. Where self-deployment and purchasing from competitive LECs are not options, potential providers may obtain unbundled network elements (UNEs) from the incumbent LEC to meet these customers' needs.⁹⁰

22. Viewed on this basis, and consistent with the Commission's findings in several recent orders, we find that a number of entities currently provide broadband services in competition with AT&T's services.⁹¹ 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

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in that proceeding. *See, e.g.*, Broadview Comments at 25. To the extent that competition in the emerging market for enterprise broadband services addressed here relies in part on third parties' wholesale inputs, rather than competitors' own facilities, we do not find that to be a distinguishing factor in terms of the Commission's approach of viewing emerging and changing broadband markets from the perspective of the larger trends that are shaping the marketplace, although we do account for those factors in the relief ultimately granted and denied. The Commission relied on the presence of intermodal competitors in the emerging wireline broadband Internet access services market in granting relief from the compulsion to offer as telecommunications services the telecommunications inputs necessary for wireline broadband Internet access service. *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14895, para. 79. Here, however, in addition to the potential for competitors to deploy their own facilities for the provision of the relevant enterprise broadband services, we observe that the relief we grant excludes TDM-based, DS-1 and DS-3 special access services. Thus, those services, in addition to section 251 UNEs, remain available for use as wholesale inputs for these enterprise broadband services.

⁸⁷ *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S.C. § 160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area*, WC Docket No. 06-109, Memorandum Opinion and Order, FCC 07-149, at para. 101 (rel. Aug. 20, 2007) (*ACS Dominance Forbearance Order*). Thus, based on our discretion to tailor our forbearance analysis, we find that an analysis of the AT&T-specified services on a national basis is the proper approach, and reject arguments raised regarding the geographic market definition. *See EarthLink v. FCC*, 462 F.3d at 9.

⁸⁸ *E.g.*, AT&T Petition at 13 (describing the needs of customers operating on a nationwide basis).

⁸⁹ *See Verizon Sept. 4, 2007 Ex Parte Erratum* at 3.

⁹⁰ The record indicates that the broadband services for which AT&T is seeking relief are purchased predominantly by enterprise customers, not by their competitors as wholesale inputs. *See, e.g.*, Legacy BellSouth Reply at 23. Granting the requested relief, however, will not affect these competitors' ability to obtain traditional DS1 and DS3 special access services or UNEs as inputs. Nor will it affect the competitors' ability to self-deploy their own OCN facilities and services or to obtain them from non-incumbents.

⁹¹ *See AT&T-BellSouth Order*, 22 FCC Rcd at 5708, para. 82; *SBC-AT&T Order*, 20 FCC Rcd at 18332-33, para. 75; *Verizon Communications Inc. and MCI, Inc. Application for Approval of Transfer of Control*, WC Docket No. 05-75, Memorandum Opinion and Order, 20 FCC Rcd 18433, 18474-75, para. 76 (2005) (*Verizon-MCI Order*); *Qwest Section 272 Sunset Forbearance Order*, 20 FCC Rcd at 5244, para. 30; *see also Verizon Sept. 4, 2007 Ex Parte Erratum*, attaching Verizon Feb. 7 WC Docket No. 04-440 *Ex Parte Letter* at 7-9.

service territory.⁹² These competitors include the many competitive LECs, cable companies, systems integrators, equipment vendors, and value-added resellers providing services that compete against AT&T.⁹³

23. We recognize that the record in this proceeding does not include detailed market share information for particular enterprise broadband services. However, we note that other available data suggest that there are a number of competing providers for these types of services nationwide and the marketplace generally appears highly competitive.⁹⁴ In particular, the record shows there are many significant providers of Frame Relay services, ATM services, and Ethernet-based services.⁹⁵ Moreover, as we discuss below, we find that competitors either are providing, or readily could enter the market to provide, these services. In light of these factors and the emerging and evolving nature of this market, and consistent with traditional market power analysis, we do not find it essential to have such detailed information and would not give significant weight to static market share information in any event.⁹⁶

⁹² See *AT&T-BellSouth Order*, 22 FCC Rcd at 5707-08, para. 80; *SBC-AT&T Order*, 20 FCC Rcd at 18331-32, para. 73; see also *Verizon-MCI Order*, 20 FCC Rcd at 18473-74, para. 74.

⁹³ Competitors are rapidly deploying new IP-based networks and services along with other technologies to satisfy customer demand. See Telecommunications Industry Association, TIA's 2005 Telecommunication Market Review and Forecast, at 121 (2005) (stating that IP-VPNs have emerged as a lower-cost alternative to Frame Relay service). Frame Relay growth has come to a near standstill as lower cost alternatives have emerged, and unified messaging, voice over IP (VoIP), multi-cast video and IP-based network security services, not suitable for Frame Relay applications, are increasingly in demand. *Id.* at 120. As discussed in prior Commission orders, there are numerous types of business models supporting competition for enterprise customers. Some competitive LECs market integrated voice and data services to enterprise customers, primarily through leasing high-capacity loops from the incumbent LECs as unbundled network elements (UNEs) and then using the leased loops to provide a bundled offering including voice, data, and Internet access. See, e.g., *Triennial Review Order*, 18 FCC Rcd at 17014, para. 48 n.159 (observing that companies such as ITC^Deltacom, NewSouth, and Cbeyond have focused on providing integrated services to the business market).

⁹⁴ See, e.g., Verizon Sept. 4, 2007 *Ex Parte* Erratum, Verizon WC Docket No. 04-440 Feb. 7 Letter at 7 n.13 (citing a June 2005 analyst's estimated market shares for "primary" providers of enterprise data services: AT&T 35%, MCI 28%, Sprint 12%, incumbent LEC 7%, Other 19%); *id.*, Verizon Feb. 7 WC Docket No. 04-440 *Ex Parte* Letter at 7 n.14 (citing a June 2005 analyst's estimated market shares for "secondary" providers of enterprise data services: Sprint 31%, AT&T 16%, incumbent LEC 16%, MCI 6%, Qwest 6%, Other 25%); see generally *id.*, Verizon Feb. 7 WC Docket No. 04-440 *Ex Parte* Letter at Attach. 2 (citing a November 2003 analyst report estimating market shares of top providers of services to large enterprise customers: AT&T 26%, MCI 14%, Sprint 8%; and forecasting anticipated market shares for subsequent years). While these data are not ideal, for example because they predate the recent BOC/interexchange carrier mergers, and the underlying information and methodologies are not available, as noted above, we do not give significant weight to such static market share information in any event.

⁹⁵ See AT&T Petition at 12 (stating that in addition to the numerous companies that offer broadband transmission services identified by Verizon in its forbearance filings, competitors include "system integrators and other non-facilities based competitors that are able to purchase wholesale frame relay and ATM service at highly competitive rates"); Legacy BellSouth Petition at 13 (arguing that Verizon demonstrated that "the BOC is nothing more than a member of one group of suppliers that offer broadband services"); Broadview Comments at 11 (stating "it is of course true that the *retail* market for packetized and TDM-based special access services is competitive"); Time Warner Telecom Comments at 10 (arguing that AT&T is trying to rely on the retail competition for these services as a basis for forbearance relief); Sprint Nextel Comments at 13-15 (same); see also *Section 271 Broadband Forbearance Order*, 20 FCC Rcd at 21505-06, para. 22 (citing competition from competitive LECs, cable companies, systems integrators, equipment vendors, and value-added resellers).

⁹⁶ See, e.g., *Application of WorldCom, Inc. and MCI Communications Corporation For Transfer of Control of MCI Communications Corporation To WorldCom, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 18025, 18036-37, paras. 17-18 (1998); see also DOJ/FTC Horizontal Merger Guidelines, § 1.521 ("Market concentration and (continued....)")

However, our findings here concerning the granularity of competition in specific geographic markets and the level of competition for enterprise broadband services do not prejudice the issue of the appropriate level of market analysis for services subject to the open Special Access Rulemaking proceeding, WC Docket No. 05-25.⁹⁷

24. We also observe the sophistication of the enterprise customers that tend to purchase broadband telecommunications services. The Commission consistently has recognized that customers that use specialized services, similar to the AT&T-specified services, demand the most flexible service offerings possible, and that service providers treat them differently from other types of customers, both in the way they market their products and in the prices they charge.⁹⁸ These users tend to make their decisions about communications services by using either communications consultants or employing in-house communications experts.⁹⁹ This shows that customers are likely to make informed choices based on expert advice about service offerings and prices, and thus suggests that these users also are likely to be aware of the choices available to them.¹⁰⁰ The Commission has further found that the large revenues these customers generate, and their need for reliable service and dedicated equipment, provide a significant incentive to suppliers to build their own facilities where possible, and to carry the traffic of these customers over the suppliers' own networks.¹⁰¹ These services equate to substantial telecommunications expenditures for large enterprise customers, which supports the notion that these customers will continue to deal at the most sophisticated level with the providers of these services.¹⁰² Smaller enterprise customers, whose telecommunications requirements do not warrant the deployment of new facilities, tend to purchase less sophisticated services.

25. We further find that competitors can readily respond should AT&T seek to impose unjust, unreasonable, or unjustly or unreasonably discriminatory rates, terms, or conditions for its enterprise broadband services. Even in situations where competitors do not have the option of self-deploying their own facilities or purchasing inputs from carriers other than the incumbent LEC, potential providers may

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market share data of necessity are based on historical evidence. However, 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.”). We thus reject commenters' calls to base our analysis on such information. *See, e.g., AdHoc Reply* at 13-14.

⁹⁷ *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, fn. 43.

⁹⁸ *See, e.g., AT&T-BellSouth Order*, 22 FCC Rcd at 5699, para. 66; *SBC-AT&T Order*, 20 FCC Rcd at 18323, para. 60; *Verizon-MCI Order*, 20 FCC Rcd at 18465, para. 60; *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as Amended; 1998 Biennial Regulatory Review – Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets*, CC Docket Nos. 96-61, 98-183, Report and Order, 16 FCC Rcd 7418, 7426, para. 17 (2001) (*CPE Bundling Order*); *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, 3306, para. 65 (1995) (*AT&T Reclassification Order*) (citing *Competition in the Interstate, Interexchange Marketplace*, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, 5887, para. 39 (1991)).

⁹⁹ *See AT&T-BellSouth Order*, 22 FCC Rcd at 5708-09, paras. 81-82; *SBC-AT&T Order*, 20 FCC Rcd at 18332-33, paras. 74-75; *see also Verizon-MCI Order*, 20 FCC Rcd at 18474-75, para. 76.

¹⁰⁰ *See AT&T-BellSouth Order*, 22 FCC Rcd at 5708-09, para. 82; *SBC-AT&T Order*, 20 FCC Rcd at 18332-33, para. 75; *see also Verizon-MCI Order*, 20 FCC Rcd at 18474-75, para. 76.

¹⁰¹ *Triennial Review Order*, 18 FCC Rcd at 17063, para. 129.

¹⁰² *See AT&T Petition* at 5-6; *see also Legacy BellSouth Petition* at 12 (stating that customers of these broadband transmission services, “typically exert control over their buying practices through a variety of mechanisms to ensure quality and price” such as request for proposals and competitive bids); *Verizon Sept. 4, 2007 Ex Parte Erratum* at 3.

rely on special access services purchased from the incumbent LEC at rates subject to price regulation.¹⁰³ In this regard, we note that the relief we grant in this Order excludes TDM-based, DS-1 and DS-3 special access services.¹⁰⁴ Moreover, as we discuss in more detail below, competing carriers are able economically to deploy OCn-level facilities to the extent that there is demand for such services in AT&T's incumbent LEC service areas.¹⁰⁵ These conclusions are consistent with our analysis of retail enterprise services in other recent orders, where the Commission found that "so long as competitive choices remain" for retail enterprise services, large enterprise "customers should seek out best-priced alternatives," limiting the ability of a provider "to raise and maintain prices above competitive levels."¹⁰⁶

26. We reject Time Warner Telecom's assertion that TDM-based loops cannot in many instances be used to provide packetized broadband services to enterprise customers.¹⁰⁷ We find that assertion to be inconsistent with Time Warner Telecom's public statements that Time Warner Telecom can "cost-effectively deliver . . . Ethernet [services] to customers anywhere," even "where it may be uneconomical" to build facilities connecting Time Warner Telecom's network to the customers' premises.¹⁰⁸ Indeed, we observe that Time Warner Telecom has been able to compete in the provision of Ethernet services by relying on special access TDM loops (in addition to its own facilities).¹⁰⁹ We also are unpersuaded by

¹⁰³ See, e.g., Sprint Nextel Comments at 6 (stating that special access inputs are "critical" inputs to the broadband services provided by incumbent LEC competitors); Time Warner Telecom Comments at 12-16 (arguing that many competitors rely on special access facilities to serve broadband services to enterprise customers); Broadview Comments at 25-26 (arguing that competitors are dependent on the incumbent LECs' special access services"); Mobile Satellite Ventures Subsidiary Reply at 2 (stating that it relied on special access inputs from the incumbent LECs to provide mobile satellite services). We thus find inapposite commenters' arguments that AT&T has not reasonably negotiated alternative access arrangements for broadband Internet access services since the Commission issued the *Wireline Broadband Internet Access Services Order*. See EarthLink Comments at 15-18 (claiming that EarthLink and New Edge have been subjected to "blatantly unreasonable and anticompetitive conduct" from AT&T and Legacy BellSouth following the Commission's *Wireline Broadband Internet Access Services Order*). As an initial matter, AT&T and Legacy BellSouth contend that they have, in fact, reasonably sought to negotiate alternative access arrangements. AT&T Reply at 34 (stating that it is involved in ongoing negotiations with EarthLink and that it seeks to maintain a commercial relationship); Legacy BellSouth Reply at 19-20 (claiming that EarthLink's allegations omit details of the negotiations regarding a customized regional broadband aggregation network). We need not resolve that dispute in any event, however, because competitors here continue to have access to wholesale inputs on a regulated basis, in addition to the potential to self-deploy such facilities in certain circumstances. While we note that AT&T has phase II pricing flexibility in certain markets where the Commission has determined the competitive triggers have been met, this does not alter our ultimate conclusions for the reasons described above. See *supra* n.94.

¹⁰⁴ AT&T excludes traditional, TDM-based, DS1 and DS3 services from broadband transmission services. See *supra* n.4.

¹⁰⁵ See *infra* para. 38.

¹⁰⁶ See *AT&T-BellSouth Merger Order*, 22 FCC Rcd at 5608-09, para. 82; *SBC-AT&T Order*, 20 FCC Rcd at 18332-33, para. 75; *Verizon-MCI Order*, 20 FCC Rcd at 18474-75, para. 76; *Qwest Section 272 Sunset Forbearance Order*, 22 FCC Rcd at 5231, para. 46.

¹⁰⁷ Time Warner Telecom Comments at 16-20.

¹⁰⁸ *Time Warner Telecom and Overture Networks Provide Ethernet Anywhere*, Time Warner Telecom Press Release (June 6, 2006), available at: <http://www.twtelecom.com/Documents/Announcements/News/2006/Overture.pdf>.

¹⁰⁹ Specifically, Time Warner Telecom cites two declarations filed in the AT&T-BellSouth merger proceedings. See Time Warner Telecom Comments at 15-20 (citing Letter from Thomas Jones, Counsel for Time Warner Telecom, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-74, Attach. Reply Decl. of Graham Taylor (Taylor WC Docket No. 06-74 Reply Decl.); Joint Opposition of AT&T Inc. and BellSouth Corp. to Petitions to Deny and Reply to Comments, WC Docket No. 06-74, Attach. Reply Decl. of Parley C. Casto (Casto WC Docket No. 06-74 Reply Decl.)). These declarations indicate that Time Warner Telecom, among others, can use TDM special access services to offer retail Ethernet services. See Taylor WC Docket No. 06-74 Reply Decl. at para. 9 ("To the extent that (continued....)

Time Warner Telecom's concern that reliance on TDM special access inputs gives rise to service or performance problems that hinder competition.¹¹⁰ We agree that this argument is undercut by the fact that providers have been successfully competing for Ethernet services customers by relying on TDM inputs.¹¹¹ We also reject Time Warner Telecom's argument that the fixed and variable mileage rates charged by the BOCs make it uneconomical for competing carriers to rely on TDM inputs, and that forbearance should be denied because the BOCs therefore have monopoly power over such inputs.¹¹² Rather, we agree with Legacy BellSouth that the increased mileage costs for providing longer connections has not prevented Time Warner Telecom from using Ethernet over TDM arrangements; and further, that Time Warner Telecom could minimize those charges by interconnecting at additional points.¹¹³ In addition, we observe that all ways of obtaining transmission capacity have trade-offs, including purchasing transmission services at wholesale and self-provisioning network transmission facilities, and we anticipate that competitors will explore various options in seeking to provide enterprise broadband services. For example, obtaining wholesale TDM special access circuits and providing the Ethernet electronics can enable providers to exercise greater control over the traffic carried on those circuits.¹¹⁴ Further, any transmission services typically are offered in fixed capacity increments, which may not be the precise capacities particular customers prefer.¹¹⁵

27. In addition, to the extent that commenters argue for changes in the existing regulation of special access services other than those for which we grant relief, as in prior proceedings, we find that such concerns are more appropriately addressed on an industry-wide basis in pending rulemaking proceedings. As the Commission has held, "[t]o the extent that certain incumbent LECs have the incentive and ability under our existing rules to discriminate against competitors" using special access inputs, "such a concern is more appropriately addressed in our existing rulemaking proceedings on special access performance metrics and special access pricing."¹¹⁶ By addressing such issues in the context of a

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TWTC has been able to deploy Ethernet services at retail in AT&T's region, it has done so using 1) its on-net facilities; 2) TDM loops purchased from AT&T; and 3) an extremely limited number of competitive facilities.") *cited in* Time Warner Telecom Comments; Casto WC Docket No. 06-74 Reply Decl. at para. 10 ("Numerous Ethernet providers, including TWTC, AT&T, and others, offer retail Ethernet services" by using "basic DS1 or DS3 special access circuits.").

¹¹⁰ See, e.g., Time Warner Telecom Comments at 18.

¹¹¹ See, e.g., Casto WC Docket No. 06-74 Reply Decl. at para. 22.

¹¹² Time Warner Telecom Comments at 18-19.

¹¹³ Legacy BellSouth Reply Comments at 10-11.

¹¹⁴ See Casto WC Docket No. 06-74 Reply Decl. at para. 22.

¹¹⁵ For example, Time Warner Telecom notes that it would need to obtain two DS3s to provide a 50 Mbps Ethernet loop because DS3s provide approximately 45 Mbps of bandwidth. Time Warner Telecom Comments at 17. However, Ethernet supports data transfer rates in specific increments of 10 Mbps, 100 Mbps, and 1 Gbps. See NEWTON'S TELECOM DICTIONARY at 363, 364. Thus, depending upon the capacity of service desired by a particular customer, it could well be necessary to purchase excess capacity of a wholesale Ethernet service, as well.

¹¹⁶ *AT&T-BellSouth Order*, 22 FCC Rcd at 5695-96, para. 60; *SBC-AT&T Order*, 20 FCC Rcd at 18320, para. 55; *Verizon-MCI Order*, 20 FCC Rcd at 18462, para. 55; *Application of AT&T Wireless Services, Inc. and Cingular Wireless Corporation For Consent to Transfer Control of Licenses and Authorizations*, File Nos. 0001656065, et al., WT Docket No. 04-70; *Applications of Subsidiaries of T-Mobile USA, Inc. and Subsidiaries of Cingular Wireless Corporation For Consent to Assignment and Long-Term De Facto Lease of Licenses*, File Nos. 0001771442, 0001757186, and 0001757204, WT Docket No. 04-254; *Applications of Triton PCS License Company, LLC, AT&T Wireless PCS, LLC, and Lafayette Communications Company, LLC For Consent to Assignment of Licenses*, File Nos. 0001808915, 0001810164, 0001810683, and 50013CWAA04, Memorandum Opinion and Order, 19 FCC Rcd 21522, 21592, para. 193 (2004). Moreover, we note that Alpheus's concerns regarding the potential for increased (continued...)

rulemaking, we will be able to develop a comprehensive approach based on a full record that applies to all similarly situated incumbent LECs. For the same reasons, to the extent that commenters desire expanded access to section 251 UNEs under the Commission's generally applicable unbundling rules, we find it more appropriate to consider such concerns in the context of an industry-wide proceeding applicable to all similarly situated carriers, rather than in the context of a forbearance proceeding.¹¹⁷

28. Because our grant of forbearance excludes traditional TDM-based, DS1, or DS3 special access services, we reject certain commenters' concerns regarding the potential impact of forbearance on rural access to the Internet backbone.¹¹⁸ The record makes clear that rural carriers are largely using TDM-based DS1 and DS3 special access services to access the Internet backbone today,¹¹⁹ and the forbearance relief granted in this Order does not affect those services. Accordingly, rural incumbent LECs will continue to have access to the Internet backbone using those regulated special access services. While the rural carriers' concerns regarding access to the Internet backbone using packetized services appear largely speculative based on the record here, as in the *AT&T-BellSouth Order*, we commit to monitor the competitive concerns of rural carriers with respect to access to the Internet backbone.¹²⁰ We find on this record, however, that the limited forbearance relief we grant in this order will not adversely affect rural incumbent LECs' ability to access the Internet backbone.

29. We are convinced that customers would benefit from the ability of all competitors to respond to competing market-based price offerings that take the form of promotions and multi-tiered service packages. AT&T asserts that tariffing and cost support requirements limit its ability to negotiate service arrangements tailored to specific customer needs and to respond to new service offers from unregulated competitors because it must currently provide advance notice of any tariff price changes.¹²¹ AT&T further submits that the ability to negotiate in an unencumbered fashion is not only essential to enable competition in the broadband market but to encourage investment in, and development of, new broadband services.¹²² In particular, as AT&T argues, these requirements impose significant unnecessary transactions costs on its broadband business.¹²³

30. In light of these findings, we conclude that dominant carrier tariffing and pricing regulation of Frame Relay Services, ATM Services, LAN Services, Ethernet-Based Services, Video Transmission

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incentives for AT&T and Legacy BellSouth to discriminate if their merger was approved were addressed in that proceeding. See *AT&T-BellSouth Order*, 22 FCC Rcd at 5751-55, paras. 183-89.

¹¹⁷ See, e.g., Broadview Reply at 7-8; see also 47 C.F.R. §§ 1.401-1.407 (providing for petitions for rulemaking).

¹¹⁸ See NTCA Comments at 2 (arguing that forbearance will saddle rural areas with obsolete TDM connections for Internet backbone); OPASTCO Comments at 3, 6 (claiming that rural incumbent LECs need access to the Internet backbone based on reasonable and nondiscriminatory rates and terms in order to provide their customers with high-quality, affordable advanced services); NTCA Reply at 3 (arguing that if forbearance is granted, the BOCs could refuse to provide their transport services to the Internet backbone to rural incumbent LECs, unless these incumbent LECs agree to purchase both this transport and Internet backbone capacity from the BOC).

¹¹⁹ NTCA Comments at 2 (stating many rural incumbent LECs connect to the Internet using TDM circuit).

¹²⁰ *Id.* We note that the Commission has the option of revisiting this forbearance ruling should circumstances warrant. See, e.g., *Qwest Section 272 Sunset Forbearance Order*, 22 FCC Rcd at 5235, para. 55.

¹²¹ AT&T Petition at 7 (stating that tariffing requirements deny AT&T the ability to negotiate private, customer-specific contracts for broadband services); Legacy BellSouth Petition at 5 (arguing that the current regulatory regime denies Legacy BellSouth the flexibility that its competitors currently enjoy).

¹²² AT&T Petition at 6; see also Legacy BellSouth Petition at 5 (arguing that the current Title II and *Computer Inquiry* regime slows "if not impedes" Legacy BellSouth's innovation and investment).

¹²³ AT&T Petition at 6.

Services, Optical Network Services, and Wave-Based Services, as offered by AT&T today, is not necessary to ensure that AT&T's rates and practices for those services are just, reasonable, and not unjustly or unreasonably discriminatory. The competitive conditions persuade us that the contribution of tariffing requirements, and the accompanying cost support and other requirements, to ensuring just, reasonable, and nondiscriminatory charges and practices for these services is negligible. The Commission has recognized that tariffs originally were required to protect consumers from unjust, unreasonable, and discriminatory rates in a virtually monopolistic market, and that they become unnecessary in a marketplace where the provider faces significant competitive pressure.¹²⁴

31. For the same reasons, we find that continuing to subject AT&T to dominant carrier regulation in regard to its existing non-TDM-based, packet-switched broadband services therefore is no longer appropriate in light of the market conditions. Such regulation is not necessary to ensure that AT&T's charges, practices, or regulations in connection with these services are just, reasonable, and not unjustly or unreasonably discriminatory, so long as AT&T is subject to the same treatment as the nondominant competitors that provide these services.¹²⁵

32. We also find that AT&T faces sufficient competition in its provision of the specified optical transmission services because competing carriers are able to economically deploy OCn-level facilities to compete with AT&T's offerings. Specifically, we find, consistent with the Commission's findings in the *Triennial Review* and the *Triennial Review Remand Orders*, that there is substantial deployment of competitive fiber loops at OCn capacity and that competitive carriers are often able to economically deploy these facilities to large enterprise customers.¹²⁶ We further find, consistent with this precedent, that OCn-level facilities produce revenue levels that can justify the high cost of loop construction.¹²⁷ Our precedent also makes clear that large enterprise customers purchasing services over such facilities typically enter into long-term contracts that enable competing providers to recover their construction costs over lengthy periods.¹²⁸ Evidence in the record here likewise is consistent with those conclusions.¹²⁹

¹²⁴ See *ACS Dominance Forbearance Order*, FCC 07-149, at para. 103; see also *Policies and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61, Second Report and Order, 11 FCC Rcd 20730, 20738-68, paras. 14-66 (1996) (*Interexchange Forbearance Order*).

¹²⁵ See *Qwest Omaha Order*, 20 FCC Rcd at 19434-35, paras. 39, 42. As discussed in part III.D.3 & III.D.4, below, we agree with Time Warner Telecom's argument that AT&T should remain subject to nondominant carrier regulation in their provision of these services. See Time Warner Telecom Comments at 26-28.

¹²⁶ *Triennial Review Order*, 18 FCC Rcd at 17169, 17221, paras. 315, 389 (finding that requesting carriers are not impaired without OCn or SONET interface transport); *Triennial Review Remand Order*, 20 FCC Rcd at 2634, para. 183. AT&T Petition at 5 (stating that many suppliers compete to provide broadband services such as ATM, Frame Relay, Gigabit Ethernet, IP-enabled service and OCn-level transmission services); Legacy BellSouth Reply at 28 (explaining that alternative access vendors "dominate the market for OCn level circuits in BellSouth's region"); EarthLink Comments at 20 (arguing that the BOCs control almost all the essential inputs in their regions). We note that our reliance on the *Triennial Review Order* and the *Triennial Review Remand Order* is for purposes of the findings of fact made therein and not on the impairment analysis *per se*. See Sprint Comments at 18 (arguing that any reliance in this proceeding on the *Triennial Review Order* would be misplaced as the analysis conducted in that order was driven by section 251(c), as opposed to the section 10 forbearance analysis of the current proceeding); see also Broadview Rely Comments at 10 n.30.

¹²⁷ *Triennial Review Order*, 18 FCC Rcd at 17169, para. 316.

¹²⁸ *Triennial Review Order*, 18 FCC Rcd at 17169, para. 316.

¹²⁹ See, e.g., Legacy BellSouth Reply at 28 (citing RHN study estimating that 79% of the OCn circuits provisioned in Legacy BellSouth's region do not rely on Legacy BellSouth facilities); see also AT&T Reply at 24-25 (listing various competitive carriers' public statements regarding their fiber builds).

Thus, we find it no longer appropriate to subject AT&T to dominant carrier regulation for these non-TDM-based, optical services.¹³⁰

33. Given the costs associated with dominant carrier regulation, we find that customers would benefit by our granting AT&T relief from that regulation as it applies to the packet-switched and optical transmission services for which AT&T seeks forbearance. In particular, the Commission has long recognized that tariff regulation may create market inefficiencies, inhibit carriers from responding quickly to rivals' new offerings, and impose other unnecessary costs.¹³¹ We find that continuing to apply dominant carrier regulation to the AT&T-specified broadband services would have each of these effects. Specifically, tariffing these services reduces AT&T's ability to respond in a timely manner to its customers' demands for innovative service arrangements tailored to each customer's individualized needs.¹³² In addition, by mandating that AT&T provide advance notice of changes in its prices, terms, and conditions of service for these services, tariffing allows AT&T's competitors to counter innovative product and service offerings even before they are made available to the public. In contrast, detariffing of 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.¹³³ Moreover, relief from advance notice requirements and cost-based pricing requirements would enable AT&T to respond quickly and creatively to competing service offers.¹³⁴ We find that tariff regulation simply is not necessary to ensure that the rates, terms, and conditions for the AT&T-specified broadband services are just and reasonable and not unjustly or unreasonably discriminatory. The better policy for consumers is to allow AT&T to respond to technological and market developments without the Commission reviewing in advance the rates, and terms, and conditions under which AT&T offers these services.¹³⁵

34. We disagree with the parties that argue AT&T already has sufficient relief, through our pricing flexibility regime, to meet their customers' needs and compete effectively.¹³⁶ Although AT&T has obtained pricing flexibility relief for certain interstate access services,¹³⁷ that relief is both limited in scope and limited to certain geographic areas.¹³⁸ As the Commission has stated before in reducing regulatory requirements where competition is present, there comes a point at which constraints become

¹³⁰ AT&T has not asked for, nor are we granting, forbearance for the traditional, TDM-based, DS1 and DS3 special access services that the Commission has previously found that competitors rely on to serve enterprise customers. See AT&T Petition at 9; Legacy BellSouth Petition at 7.

¹³¹ See, e.g., *AT&T Reclassification Order*, 11 FCC Rcd at 3288, para. 27.

¹³² AT&T Petition at 7; see also *Interexchange Forbearance Order*, 11 FCC Rcd at 20760-61, para. 53.

¹³³ See, e.g., AT&T Petition at 19 (stating that competitive forces will ensure just and reasonable rates and broadband deployment); Legacy BellSouth Petition at 13 (same).

¹³⁴ See, e.g., AT&T Petition at 7; Legacy BellSouth Petition at 5.

¹³⁵ See *SBC Advanced Services Forbearance Order*, 17 FCC Rcd at 27012-13, para. 22.

¹³⁶ Alpheus Comments at 12-13; Broadview Reply at 12.

¹³⁷ See, e.g., *Ameritech Operating Companies Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, WCB/Pricing File No. 06-8, 21 FCC Rcd 5172 (WCB 2006). Most carriers did not include packet-switched services in price caps, and thus these services could not qualify for pricing flexibility. The Commission subsequently found that these procedural circumstances should not act to preclude AT&T from obtaining pricing flexibility for these services. *SBC Waiver Order*, 22 FCC Rcd at 7227-28, para. 7 n.30.

¹³⁸ See generally *Pricing Flexibility Order*, 14 FCC Rcd 14221. Pricing flexibility permits the LEC to enter into more individualized relationships with its customers. Price cap LECs may obtain pricing flexibility in two separate phases, each on an MSA basis.

counter-productive, especially in terms of carriers' ability to respond to customer needs.¹³⁹ This is particularly true for the broadband services for which AT&T seeks relief because, unlike many of its competitors, AT&T is limited in its ability to negotiate arrangements with customers that operate on a nationwide basis. Even when price cap carriers are permitted to tailor services to their customers through individually negotiated contracts under the *Pricing Flexibility Order*, our rules still require these contract-based tariffs to be filed with specified information that is available publicly to any party, including competitors.¹⁴⁰

35. We find that eliminating these requirements would make AT&T a more effective competitor for these services, which in turn we anticipate will increase even further the amount of competition in the marketplace,¹⁴¹ thus helping ensure that the rates and practices for these services overall are just, reasonable, and not unjustly discriminatory. Forbearing from dominant carrier regulation of the AT&T-specified services will permit customers to take advantage of a more market-based environment for these highly specialized services and allow AT&T the flexibility necessary to respond to dynamic price and service changes often associated with the competitive bidding process. In such a deregulated environment, the Commission's enforcement authority, along with market forces, will serve to safeguard the rights of consumers. AT&T will continue to be subject to sections 201 and 202 of the Act in its provision of its specified broadband services, which, among other things, mandate that AT&T provide interstate telecommunications services upon reasonable request and prohibit it from acting in an unjust or unreasonable manner or otherwise favoring particular entities in the provision of "like" services provided to other entities.¹⁴²

36. By virtue of the relief granted, AT&T may detariff the specified broadband services, but the Section 201 and 202 standards and the formal complaint process in Section 208 of the Act and Sections 1.720 through 1.735 of the Commission's rules will continue to apply to those service offerings. We expect that any complaint pertaining to services covered by this Order will be resolved within five months, as prescribed by Section 208 (b)(1) of the Act.¹⁴³

37. We also find that continued application of our dominant carrier discontinuance rules to the AT&T-specified broadband services is not necessary to ensure that the charges, practices, or regulations in connection with these services are just, reasonable, and not unjustly or unreasonably discriminatory, so long as AT&T is subject to the same treatment as nondominant carriers in relation to these services.¹⁴⁴ We conclude that subjecting AT&T to a 60-day automatic grant period for discontinuance of the existing specified broadband services, and a 30-day comment period for notice to affected customers, is not necessary under section 10(a)(1), where nondominant carriers providing those same services are subject to a 31-day automatic grant period and a 15-day comment period. However, to maintain sufficient customer protection and ensure the justness and reasonableness of AT&T's practices in connection with these services, we predicate this finding upon AT&T's compliance with the discontinuance rules that apply to nondominant carriers in the event it seeks to discontinue, reduce, or impair any of the non-TDM-based, packet-switched broadband services and non-TDM-based, optical transmission services for which

¹³⁹ See, e.g., *Pricing Flexibility Order*, 14 FCC Rcd at 14232-33, para. 17.

¹⁴⁰ 47 C.F.R. § 61.55 (requirements for contract-based tariffs).

¹⁴¹ See *supra* paras. 35-39.

¹⁴² 47 U.S.C. §§ 201-02.

¹⁴³ Section 208(b)(1) states "Except as provided in paragraph (2), the Commission shall, with respect to any investigation under this section of the lawfulness of a charge, classification, regulation, or practice, issue an order concluding such investigation within 5 months after the date on which the complaint was filed."

¹⁴⁴ 47 C.F.R. §§ 63.03(b)(2), 63.71(a)(5), (b)(4), (c).

we grant relief.¹⁴⁵ Similarly, we forbear from applying our domestic streamlined transfer of control rules to AT&T as a dominant carrier of these services, conditioned upon treatment of AT&T as a nondominant carrier for these services.¹⁴⁶

38. We reject the New Jersey Rate Counsel's argument that the Commission should impose the requirements of section 64.1903 of the Commission's rules on AT&T in the event we grant it forbearance relief in this proceeding.¹⁴⁷ That rule imposes structural separation requirements on independent incumbent LECs.¹⁴⁸ In the *Section 272 Sunset Order*, we rejected a similar argument from the New Jersey Division of Rate Counsel in connection with our determination that the BOCs should not be subject to the section 64.1903 requirements in their provision of in-region, long distance services.¹⁴⁹ We found that, as applied to those services, the section 64.1903 requirement would impose costs that would make the BOCs less effective marketplace competitors, and instead we adopted targeted safeguards to address potential competitive concerns.¹⁵⁰ Consistent with that order, we find here that, as applied to AT&T's existing specified broadband services, the section 64.1903 requirements would impose significant costs. Indeed, they would require AT&T to restructure its in-region, broadband telecommunications operations at great expense and in a less efficient manner.¹⁵¹ We find that these costs far exceed any potential benefits and therefore decline to impose the section 63.1903 requirements on AT&T in its provision of its existing specified broadband services, given the alternative targeted safeguards that apply as a result of the *Section 272 Sunset Order*. For the same reason, we decline to impose those requirements on AT&T's independent incumbent LEC affiliate, SNET.¹⁵²

39. Further, while we do grant forbearance from dominant carrier regulation for the AT&T-specified services, we do not grant forbearance from Title II as a whole, but instead ensure that AT&T remains subject to the same regulatory obligations applicable to nondominant carriers.¹⁵³ As the

¹⁴⁵ 47 C.F.R. § 63.71; see *Qwest Omaha Order*, 20 FCC Rcd at 19435-36, para. 43.

¹⁴⁶ 47 C.F.R. § 63.03; see *Qwest Omaha Order*, 20 FCC Rcd at 19435-36, para. 43.

¹⁴⁷ New Jersey Rate Counsel Comments at 8 (arguing that application of these requirements is necessary deter the BOCs from engaging in discriminatory behavior).

¹⁴⁸ Under section 64.1903 of our rules, an independent incumbent LEC that provides in-region, interstate, interexchange telecommunications services or in-region, international services is required to provide such services through a separate affiliate and such affiliate must maintain separate books of account from the independent incumbent LEC and to purchase services from the independent incumbent LEC pursuant to the incumbent LEC's tariffs. 47 C.F.R. § 64.1903(a). Section 64.1903 of the Commission's rules also forbids incumbent LECs' affiliates from jointly owning transmission or switching facilities with the independent incumbent LEC. 47 C.F.R. § 64.1903(a).

¹⁴⁹ *Section 272 Sunset Order*, FCC 07-159, at para. 85.

¹⁵⁰ *Id.*

¹⁵¹ See *Section 272 Sunset Order*, FCC 07-159, at paras. 85-86 (discussing the costs and burdens of section 63.1903 structural separation requirements).

¹⁵² See New Jersey Rate Counsel Comments at 8. We note that the *Section 272 Sunset Order* eliminated these separate affiliate requirements for AT&T's independent incumbent LEC affiliate, SNET. See *Section 272 Sunset Order*, FCC 07-159, at paras. 85-86.

¹⁵³ See *infra* parts III.D.3 & III.D.4. This should address commenters' concern regarding general Title II regulations including, for example, universal service, interconnection, customer proprietary network information (CPNI), and disability access. See Sprint Nextel Comments at 17; COMPTTEL Comments at 18; Broadview Comments at 5, 26-28; Letter from Daniel L. Brenner, National Cable & Telecommunications Association, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 04-440, 06-109, 06-125, 06-147 (filed Aug. 6, 2007); Letter from Mary C. Albert, COMPTTEL, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 04-440, 06-109, 06-125, 06-147 (filed Aug. (continued...))

Commission concluded in the *Qwest Section 272 Sunset Forbearance* and the *ACS Dominance Forbearance Order*, “dominant carrier regulation is not the most effective and cost-efficient way to address exclusionary market power concerns resulting from [an incumbent LEC’s] control of any bottleneck access facilities that [the incumbent LEC’s] competitors must access in order to provide competing services.”¹⁵⁴ We find that, to the extent dominant carrier regulation of the AT&T-specified broadband services addresses any exclusionary market power AT&T may have in relation to those services, the burdens imposed by that regulation exceed its benefits.¹⁵⁵

40. Our forbearance grant is restricted to broadband services that AT&T currently offers and lists in its petitions. We believe that limiting our forbearance grant to the identified services that are currently offered is consistent with our analysis under the forbearance framework. We do not know the precise nature of such future services, including how, and to what customers, they would be offered, information that we would need to evaluate whether they are sufficiently similar to the services for which we grant forbearance here.¹⁵⁶ Similarly, we do not know the competitive conditions associated with such potential services. We thus are unable to conclude on the record here that the section 10 criteria are met for such services. We therefore cannot find that dominant carrier regulation will not be necessary to ensure that the charges, practices, classifications, and regulations in connection with those as yet unoffered services will be just, reasonable, and not unreasonably discriminatory within the meaning of section 10(a)(1).¹⁵⁷

41. Similarly, we decline to extend the forbearance relief granted in this Order to carriers other than AT&T.¹⁵⁸ For similar reasons to those noted above, we find it appropriate to limit forbearance to AT&T. Just as we do not know the precise nature and competitive conditions associated with other possible services that AT&T might some day offer, the record before us does not provide sufficient information regarding the nature and competitive conditions associated with particular enterprise broadband services currently offered by other incumbent LECs. We find that the better course is to limit our forbearance grant to AT&T, without prejudice to the ability of other carriers to file their own forbearance petitions showing that granting them relief from dominant carrier regulation for specific broadband telecommunications services would meet the statutory forbearance criteria, or to seek such relief in the rulemaking context or through petitions to be declared nondominant.¹⁵⁹ We also agree with NTCA that certain carriers may not want to offer their broadband telecommunications free of dominant

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13, 2007); Letter from William H. Weber, Vice President and Corporate Counsel, Cbeyond, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 04-440, 06-109, 06-125, 06-147 (filed Aug. 13, 2007).

¹⁵⁴ *ACS Dominance Forbearance Order*, FCC 07-149, at para. 111; *Qwest Section 272 Sunset Forbearance Order*, 22 FCC Rcd at 5233, para. 52.

¹⁵⁵ *ACS Dominance Forbearance Order*, FCC 07-149, at para. 111; *Qwest Section 272 Sunset Forbearance Order*, 22 FCC Rcd at 5233, para. 52.

¹⁵⁶ *Cf.* 47 U.S.C. § 160(a) (directing the Commission to forbear with respect to a particular service or class of services).

¹⁵⁷ *Qwest Omaha Order*, 20 FCC Rcd at 19438, para. 50 (denying Qwest’s petition with respect to the enterprise market because Qwest had failed to provide sufficient data for its service territory for the entire MSA to allow the Commission to make a forbearance determination).

¹⁵⁸ *See* AT&T Petition at 1, 7-11 (seeking relief for itself and other BOCs); Legacy BellSouth Petition at 2, 6-9 (seeking relief for itself and similarly situated carriers). *See also* Cincinnati Bell Telephone Company Comments at 2 (supporting forbearance relief for all incumbent LECs); Hawaiian Telcom Reply at 1-2 (same).

¹⁵⁹ We note that GCI argues that the Commission lacks the authority to grant forbearance relief to any carriers other than those that file petitions for forbearance. GCI Reply at 3. Because we decline in this Order to extend our forbearance grant to carriers other than AT&T, we need not address this argument. As noted below, however, we anticipate addressing Verizon’s petition, as well as the other forbearance petitions seeking comparable relief, shortly. *See infra* para. 51.

carrier regulation and therefore should not be forced to relinquish any obligations and benefits of such regulation by a broad forbearance grant by the Commission.¹⁶⁰ Accordingly, the forbearance relief granted in this Order is limited to AT&T and the services it specified.

42. To ensure that customers will have the benefit of a single regime for AT&T's packet-switched and optical transmission broadband offerings, we condition the forbearance relief granted to AT&T on its not filing or maintaining any interstate tariffs for its specified broadband services. Thus, to the extent AT&T wishes to take advantage of the relief granted in this Order for any particular service specified in its petitions, it must follow our rules for nondominant interexchange carriers in connection with that service. Consistent with the Commission's analysis in the *Interexchange Forbearance Order*, we find that precluding AT&T from tariffing its packet-switched broadband services and its optical transmission services while taking advantage of that relief is necessary to protect consumers and the public interest because in such circumstances will limit AT&T's ability to invoke the filed rate doctrine in contractual disputes with their customers.¹⁶¹ Precluding such tariffs also will restrict AT&T's ability to assert "deemed lawful" status for tariff filings that are not accompanied by cost support.¹⁶² We distinguish this from the broadband relief granted to ACS in the *ACS Dominance Forbearance Order*, in which the Commission conditioned its forbearance relief on, among other things, ACS's continuing to file tariffs for switched access, special access, and end-user services.¹⁶³ In that instance, the Commission found that filing of tariffs was appropriate for the Commission to monitor ACS's compliance with the other conditions the Commission adopted in that order, including conditions arising from ACS's status as a rate-of-return carrier.¹⁶⁴ In addition, there was consensus in the record that continued tariffing was appropriate given the unique circumstances in the Anchorage study area. Here, we are addressing AT&T, which, unlike ACS, is not subject to rate-of-return regulation in the provision of any interstate access services, nor is it subject to many of the conditions adopted in the *ACS Dominance Forbearance Order*. Further, commenters here suggest that a mandatory detariffing regime would be more appropriate.¹⁶⁵ Accordingly, we find that these consumer protection and public interest benefits provide independent reasons for conditioning AT&T's ability to take advantage of the relief granted here on mandatory detariffing of the broadband transmission services for which we grant relief.

¹⁶⁰ NTCA Reply at 5.

¹⁶¹ See *Interexchange Forbearance Order*, 11 FCC Rcd at 20760, para. 52 (emphasis added) (finding that "not permitting nondominant interexchange carriers to file tariffs with respect to interstate, domestic, interexchange services will enhance competition among providers of such services, promote competitive market conditions, and achieve other objectives that are in the public interest, including eliminating the possible invocation of the filed rate doctrine by nondominant interexchange carriers, and establishing market conditions that more closely resemble an unregulated environment"). We note that certain exceptions to the Commission's mandatory detariffing rules exist. Pursuant to the "filed-rate" doctrine, where a filed tariff rate, term or condition differs from a rate, term, or condition set in a non-tariffed carrier-customer contract, the carrier is required to assess the tariff rate, term or condition. See *Armour Packing Co. v. United States*, 209 U.S. 56 (1908); *American Broadcasting Cos., Inc. v. FCC*, 643 F.2d 818 (D.C. Cir. 1980); see also *Aero Trucking, Inc. v. Regal Tube Co.*, 594 F.2d 619 (7th Cir. 1979); *Farley Terminal Co., Inc. v. Atchison, T. & S.F. Ry.*, 522 F.2d 1095 (9th Cir. 1975), *cert. denied*, 423 U.S. 996 (1975). Consequently, if a carrier unilaterally changes a rate by filing a tariff revision, the newly filed rate becomes the applicable rate unless the revised rate is found to be unjust, unreasonable, or unlawful under the Act. See 47 U.S.C. § 201(b); *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990).

¹⁶² See 47 U.S.C. § 204(a)(3).

¹⁶³ *ACS Dominance Forbearance Order*, FCC 07-149, at paras. 61, 89.

¹⁶⁴ See *ACS Dominance Forbearance Order*, FCC 07-149, at paras. 4, 89.

¹⁶⁵ See Alpheus Comments at 22 (arguing that permissive detariffing would allow the BOCs to tariff "purported private carriage services so they may invoke the filed rate doctrine against their retail and CLEC wholesale broadband customers").

b. Protection of Consumers

43. Section 10(a)(2) of the Act requires us to determine whether dominant carrier regulation of the AT&T-specified services is necessary to protect consumers.¹⁶⁶ For reasons similar to those that persuade us that these regulations are not necessary within the meaning of section 10(a)(1), we also determine that their application to AT&T's existing specified services is not necessary for the protection of consumers. As we found above, AT&T faces sufficient pressure from actual and potential competition to protect consumers, which gives AT&T incentive to offer innovative services. In light of these conclusions, we find that the combination of dominant carrier tariffing requirements and the accompanying cost support can hinder, instead of protect, consumers' ability to secure better service offerings. Finally, as we explain below,¹⁶⁷ we are not forbearing from any public policy obligations applicable to these services, including those related to 911, emergency preparedness, customer privacy, or universal service, and consumers therefore do not lose protections in these important areas.

44. Conversely, we find that restricting our forbearance grant to AT&T and the existing services as specified in its petitions is appropriate under section 10(a)(2).¹⁶⁸ AT&T has not provided sufficient information regarding any broadband services, other than those specifically identified in its petitions, to allow us to reach a forbearance determination under section 10(a).¹⁶⁹ We cannot make a finding on the record before us that AT&T will face sufficient competitive pressure with regard to services it does not currently offer,¹⁷⁰ or that dominant carrier regulation of these as yet unoffered services otherwise will not be necessary to protect consumers. In addition, as explained above,¹⁷¹ carriers that have not filed similar forbearance petitions are free to do so, as well as to seek relief from regulatory obligations through rulemaking proceedings or petitions to be declared nondominant.

c. Public Interest

45. Section 10(a)(3) of the Act requires us to determine whether forbearance from dominant carrier regulation for AT&T's non-TDM-based, packet-switched broadband services and its non-TDM-based, optical transmission services is consistent with the public interest.¹⁷² In making this determination, section 10(b) of the Act directs us to consider whether forbearance from enforcing the provisions at issue will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services. If we determine that forbearance will promote competition among providers of telecommunications services, that determination may be a basis for finding that forbearance is in the public interest.¹⁷³

46. We agree with AT&T that a deregulatory approach for its provision of non-TDM-based, packet-switched broadband services and non-TDM-based, optical transmission services will serve the

¹⁶⁶ 47 U.S.C. § 160(a)(2).

¹⁶⁷ See *infra* parts III.D.3 & III.D.4.

¹⁶⁸ We note that AT&T withdrew its request for relief with regard to VPN services, and interstate interexchange services for which we granted relief in the *Section 272 Sunset Order*. See AT&T Sept. 7, 2007 *Ex Parte* Letter; see also AT&T Sept. 12, 2007 *Ex Parte* Letter. The relief we grant AT&T excludes these services.

¹⁶⁹ *Qwest Omaha Order*, 20 FCC Rcd at 19438, para. 50 (denying Qwest's petition with respect to the enterprise market because Qwest had failed to provide sufficient data for its service territory for the entire MSA to allow the Commission to make a forbearance determination).

¹⁷⁰ See *supra* para. 43.

¹⁷¹ See *supra* para. 41.

¹⁷² 47 U.S.C. § 160(a)(3).

¹⁷³ 47 U.S.C. § 160(b).

public interest by eliminating the market distortions that asymmetrical regulation of these services causes.¹⁷⁴ In particular, the record in this proceeding shows that dominant carrier regulation impedes AT&T's efforts to compete effectively with nondominant providers of these services.¹⁷⁵ The record also makes clear that such 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.¹⁷⁶ In particular, AT&T has shown that dominant carrier regulation of its specified services makes it unnecessarily difficult for it to negotiate nationwide arrangements tailored to the needs of large enterprise customers with geographically dispersed locations, because its tariff filings necessarily provide competitors with notice of its pricing strategies and competitive innovations.¹⁷⁷

47. Forbearance from the application of dominant carrier regulation to AT&T's non-TDM-based, packet-switched broadband services and non-TDM-based, optical transmission services also will promote the public interest by furthering the deployment of advanced services.¹⁷⁸ Indeed, forbearance in this case is entirely consistent with section 706 of the 1996 Act and Congress's express goals 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."¹⁷⁹ Forbearance also is consistent with section 7(a) of the Act, which establishes a national policy of "encourag[ing] the provision of new technologies and services to the public."¹⁸⁰ In addition, for the reasons described above, we conclude that granting AT&T this relief will help promote competitive market conditions and enhance competition among providers of telecommunications services as contemplated by section 10(b). By allowing AT&T to compete more effectively in the provision of the broadband transmission services that it currently offers, forbearance from dominant carrier regulation of these services will enhance competition among providers in a manner consistent with the public interest.¹⁸¹

¹⁷⁴ See, e.g., AT&T Petition at 7 (arguing that forbearance would eliminate distorting effects on competition).

¹⁷⁵ See Legacy BellSouth Petition at 5 (claiming that the current Title II and *Computer Inquiry* requirements deny Legacy BellSouth and similarly situated carriers the flexibility that their competitors enjoy in the broadband market).

¹⁷⁶ See, e.g., AT&T Petition at 6; Legacy BellSouth Petition at 13-14. While we note that AT&T has phase II pricing flexibility in certain markets where the Commission has determined the competitive triggers have been met, this does not alter our ultimate conclusions for the reasons described above. See *supra*. n.94.

¹⁷⁷ See, e.g., cite from AT&T or BellSouth.

¹⁷⁸ Section 706 (c)(1) of the 1996 Act, *codified at* 47 U.S.C. § 157 nt; see AT&T Petition at 27; see also Legacy BellSouth Petition at 14-15. The Commission has concluded that section 706 is not an independent grant of forbearance authority. *Deployment of Wireline Services Offering Advanced Telecommunications Capability, et al.*, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24012, 24044-48, paras. 69-77 (1998); see also *ACS Dominance Forbearance Order*, para. 118 n.327.

¹⁷⁹ 1996 Act Preamble, 110 Stat. at 56; see 47 U.S.C. § 157 nt. In section 706 of the 1996 Act, Congress directed the Commission to encourage, without regard to transmission media or technology, the deployment of advanced telecommunications capability to all Americans on a reasonable and timely basis through, among other things, removing barriers to infrastructure investment. 47 U.S.C. § 157 nt.

¹⁸⁰ 47 U.S.C. § 157(a).

¹⁸¹ We recognize, of course, that theoretically forbearance from dominant carrier regulation for broadband telecommunications services other than those AT&T currently offers or for incumbent LECs other than AT&T also may advance purposes behind sections 7(a) and 706. In the event that AT&T or other carriers request additional relief from dominant carrier regulation, we will evaluate on the record developed with regard to those requests whether grant of those requests would advance these purposes. However, for the reasons set forth in this Order, we cannot conclude on the record before us that additional forbearance here would meet the statutory forbearance criteria.

48. Our finding that public interest benefits will accrue from allowing AT&T to provide non-TDM-based, packet-switched broadband services and non-TDM-based, optical transmission services subject to the same regulations as their nondominant competitors also is consistent with the Commission's most recent report to Congress on the availability of advanced telecommunications capability under section 706 of the 1996 Act. In that report, the Commission determined that a diverse range of broadband technologies and facilities-based platforms that promote both price and quality-of-service competition will be available to consumers, and that the prospects of such competition "lend credence to calls for restrained regulation of advanced telecommunications technologies and advanced telecommunications providers."¹⁸²

49. We disagree with the commenters that urge that forbearing from the application of dominant carrier regulation to AT&T's existing, non-TDM-based, packet-switched broadband services and existing, non-TDM-based, optical transmission services would be inconsistent with the public interest.¹⁸³ Forbearing from application of dominant carrier regulation will increase competition by freeing AT&T from unnecessary regulation and will serve the public interest by promoting regulatory parity among providers of these services. In addition, the directives of section 706 of the 1996 Act require that we ensure that our broadband policies promote infrastructure investment, consistent with our other statutory obligations under the Act. As we found in the *Wireline Broadband Internet Access Services Order*, regulation that constrains incentives to invest in and deploy the infrastructure needed to deliver broadband services is not in the public interest.¹⁸⁴ By regulating AT&T on the same terms as its nondominant competitors, we will encourage all potential investors in broadband network platforms, and not just a particular group of investors, to be able to make market-based, rather than regulatory-driven, investment and deployment decisions. This is particularly true for new technologies and services that provide voice, video, Internet access, and other broadband applications.

50. We agree with AT&T regarding the need to ensure regulatory parity between Verizon on the one hand, and AT&T on the other.¹⁸⁵ As noted above, Verizon's petition for forbearance for enterprise broadband services was deemed granted by operation of law on March 19, 2006.¹⁸⁶ We seek to avoid persistent regulatory disparities between similarly-situated competitors, and seek to minimize the time in which they are treated differently. Thus, we will issue an order addressing Verizon's forbearance petition, as well as the other BOC forbearance petitions seeking comparable relief, on grounds comparable to those set forth in this order within 30 days.¹⁸⁷

¹⁸² *Availability of Advanced Telecommunications Capability in the United States*, GN Docket No. 04-54, Fourth Report to Congress, 19 FCC Rcd 20540 (2004).

¹⁸³ See, e.g., Broadview Comments at 34-35; EarthLink Comments at 20-21, COMPTTEL Comments at 19-21; Sprint Nextel at 16-19.

¹⁸⁴ *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14878, para. 45.

¹⁸⁵ See, e.g., AT&T Petition at 2-3; Legacy BellSouth Petition at 13. We do not find, however, that concerns regarding regulatory parity, standing alone, are a sufficient basis to grant forbearance under section 10.

¹⁸⁶ We also note that the Commission recently granted ACS forbearance for certain enterprise broadband services in Anchorage. See *ACS Dominance Forbearance Order*. We agree with GCI that ACS is not necessarily similarly situated to AT&T, and note that the Commission repeatedly has found that the Anchorage marketplace has many unique characteristics. GCI Reply at 2-4; *ACS Dominance Forbearance Order*, FCC 07-149 at para. 3; *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, WC Docket No. 05-281, Memorandum Opinion and Order, FCC 06-188, para. 41 (rel. Jan. 30, 2007); *ATU Telecommunications Request for Waiver of Sections 69.106(b) and 69.124(b)(1) of the Commission's Rules*, CPD 98-40, Order, 15 FCC Rcd 20655 (2000).

¹⁸⁷ See Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and *Computer Inquiry Rules with Respect to Broadband Services*, WC Docket No. 06-125 (filed Sept. 12, 2007); Verizon Petition. We will address other similar petitions soon thereafter. See Petition of the Embarq Local Operating Companies for Forbearance (continued...)

51. Consistent with our determinations under sections 10(a)(1) and 10(a)(2),¹⁸⁸ we find that extending our forbearance from dominant carrier regulation to services that AT&T does not currently offer would be contrary to the public interest. Specifically, because the record before us is insufficient to support a finding that AT&T will lack market power with regard to these as yet unoffered services, we cannot conclude that forbearance in this instance would be consistent with the public interest. We also believe that the public interest would be better served by our allowing carriers that are not before us to file their own forbearance petitions seeking relief from dominant carrier regulation for specific broadband telecommunications services or seek regulatory relief through rulemaking proceedings or petitions to be declared nondominant, rather than extending our forbearance action to such carriers.

2. Computer Inquiry Requirements

52. As part of its request for relief similar to that granted Verizon by operation of law, AT&T seeks forbearance from application of the *Computer Inquiry* requirements to its specified broadband services.¹⁸⁹ We address first the *Computer Inquiry* requirements as they apply to AT&T and then turn to less onerous requirements that apply to AT&T's independent incumbent LEC affiliate, SNET.¹⁹⁰

a. BOC Requirements

53. Consistent with the treatment of wireline broadband Internet access service in the *Wireline Broadband Internet Access Services Order*, we forbear from application of our BOC-specific *Computer Inquiry* rules to the extent that AT&T offers information services in conjunction with its existing non-TDM-based, packet-switched broadband services or its existing non-TDM-based, optical transmission services.¹⁹¹ This forbearance action is conditioned on AT&T's compliance with the non-BOC transmission access and nondiscrimination requirements that we describe below in connection with forbearance granted for SNET.¹⁹²

54. The reasons that persuaded the Commission in the *Wireline Broadband Internet Access Services Order* to eliminate the *Computer Inquiry* rules as they applied to wireline broadband Internet access service also persuade us to forbear from application of the BOC-specific *Computer Inquiry* rules to any information services AT&T may offer in conjunction with one or more of its existing specified broadband services. Specifically, the enterprise customers that seek to obtain such information services

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Under 47 U.S.C. § 160(c) from Application of *Computer Inquiry* and Certain Title II Common-Carriage Requirements, WC Docket No. 06-147 (filed July 26, 2006); Petition of the Frontier and Citizens ILECs for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and *Computer Inquiry* Rules with Respect to Their Broadband Services, WC Docket No. 06-147 (filed Aug. 4, 2006).

¹⁸⁸ See *supra* parts III.C.1.a & III.C.1.b.

¹⁸⁹ As discussed below, we grant forbearance from certain *Computer Inquiry* requirements that would apply to the enterprise broadband service solely by virtue of their use as the transmission component of an information service. As a practical matter, however, we note that the specified broadband services all appear to be transmission services that AT&T chooses to offer on a common carrier basis today, and thus remain subject to the same Title II regulation applicable to nondominant carriers.

¹⁹⁰ SNET is AT&T's independent incumbent LEC affiliate. See *Section 272 Sunset Order*, FCC 07-159, para. 8, n.32 (citing Letter from Michelle Sclater, Director, Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 02-112 at 1 (filed Apr. 24, 2007)).

¹⁹¹ See *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14863-64, para. 14 (citing *NCTA v. Brand X*, 545 U.S. at 1000).

¹⁹² See *infra* part III.D.3.b.

demand the most flexible service offerings possible.¹⁹³ To compete effectively in providing these customized service packages, AT&T necessarily will need to adapt how it integrates each of its specified services into service packages that meet potential customers' individualized needs. Like its enterprise services competitors, AT&T also will have to offer its customers innovative service arrangements that make full use of its networks' telecommunications and information services capabilities.¹⁹⁴

55. We conclude that requiring AT&T to unbundle and offer separately the non-TDM-based, packet-switched broadband services and non-TDM-based, optical transmission services underlying these information services – or otherwise comply with the *Computer Inquiry* requirements by virtue of the use of these telecommunications services – is unnecessary to ensure that the charges or practices associated with them are just, reasonable, and not unreasonably discriminatory. On the contrary, as discussed in part III.C.1, above, competitive constraints on AT&T's non-TDM-based, packet-switched broadband services and non-TDM-based, optical transmission services will check AT&T's ability to impose such charges and practices on potential customers. Indeed, like other enterprise services providers, AT&T will have every business incentive to offer the transmission component of these services under just, reasonable, and nondiscriminatory rates, terms, and conditions in order to spread network costs over as much traffic and as many customers as possible.¹⁹⁵

56. This need to attract as many enterprise and carrier customers as possible also makes clear that application of the *Computer Inquiry* rules to AT&T's information services, to the extent that they include one or more of its existing specified services, is not necessary to protect consumers. Rather, AT&T's need to respond to changing customer demands with innovative offerings should ensure adequate consumer protection. In particular, we find that application of the *Computer Inquiry* rules to these information services constrains AT&T's ability to respond to technological advances and customer needs in an efficient, effective, or timely manner.¹⁹⁶ Eliminating this constraint should benefit potential enterprise customers by giving them increased opportunities to obtain integrated service packages that meet their needs.

57. We conclude that forbearance from applying many of the BOC-specific *Computer Inquiry* rules to AT&T's information services, to the extent that they include one or more of the specified non-TDM-based, packet-switched broadband services and non-TDM-based, optical transmission services, will serve the public interest. Specifically, application of the *Computer II* structural separation or, alternatively, the *Computer III* CEI and ONA requirements unnecessarily constrains how AT&T may offer its broadband transmission services to its enterprise customers. Removing these unnecessary constraints will promote competitive market conditions by increasing the competitive pressure on all enterprise services providers. Forbearance in these circumstances also will increase AT&T's incentives to invest in advanced network technologies that will enable it to provide enterprise customers with increasingly innovative services.

58. This forbearance determination does not extend, however, to the BOC-specific *Computer Inquiry* requirements to the extent they impose the same transmission access or nondiscrimination

¹⁹³ See AT&T Petition at 2 (stating that the sophisticated business customers purchasing these services “demand customization”); see also Legacy BellSouth Petition at 4 (stating its users “know that alternatives exist and are capable of demanding and receiving customized treatment”).

¹⁹⁴ See AT&T Petition at 4 (submitting that the broadband transmission services for which it seeks relief are even more customized than the transmission services that the Commission addressed in the *Wireline Broadband Internet Access Services Order*); see also Legacy BellSouth Petition at 12 (arguing that competitive pressures in the broadband transmission market require the “introduction of new technology and the development of innovative service platforms”).

¹⁹⁵ See *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14892-93, paras 75-76, 14902, para. 92.

¹⁹⁶ See *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14887-92, paras. 65-73, 14902, para. 92.

requirements that apply to all non-BOC, facilities-based wireline carriers in their provision of enhanced services.¹⁹⁷ We find that relief from these requirements would be contrary to the public interest as it would confer a regulatory advantage on AT&T, vis-a-vis its facilities-based, wireline competitors offering information services. We therefore condition our forbearance from the BOC specific *Computer Inquiry* requirements on compliance by AT&T with the non-BOC transmission access and nondiscrimination requirements in connection with its provision of information services in conjunction with its existing specified broadband services.

b. Non-BOC Requirements

59. The *Computer Inquiry* rules require that SNET (a) offer as telecommunications services the basic transmission services underlying its enhanced services; (b) offer those telecommunications services on a nondiscriminatory basis to all enhanced service providers, including its own enhanced services operations;¹⁹⁸ and (c) offer those telecommunications services pursuant to tariff.¹⁹⁹ For ease of exposition, we refer to these requirements as the transmission access requirement, the nondiscrimination requirement, and the tariffing requirement, respectively. We conclude that forbearance is warranted with respect to the tariff requirement listed above, but not with respect to the transmission access requirement or the nondiscrimination requirement. Accordingly, SNET will be subject to the same *Computer Inquiry* requirements as its facilities-based, wireline competitors.

60. For the reasons described above, we find that forbearance from these three requirements satisfies sections 10(a)(1) and 10(a)(2). In particular, as found above, providers of these types of transmission services face significant competitive pressure from providers that can deploy their own facilities or rely on regulated special access inputs. We find that these competitive pressures are sufficient to ensure that SNET's rates and practices are just, reasonable, and not unjustly or unreasonably discriminatory and to protect consumers absent the *Computer Inquiry* requirements.

61. We conclude, however, that forbearance is not warranted with respect to the transmission access requirement or the nondiscrimination requirement because such forbearance would not be in the public interest pursuant to section 10(a)(3). These requirements apply to all non-BOC, facilities-based wireline carriers in their provision of enhanced services.²⁰⁰ Given this, we find that forbearance from the *Computer Inquiry* transmission access and nondiscrimination requirements is not in the public interest within the meaning of section 10(a)(3), as it would confer a regulatory advantage on SNET vis-a-vis its facilities-based competitors offering information services.

62. In contrast, the reasons that persuade us to forbear from dominant carrier regulation generally with regard to SNET's existing specified broadband services also persuade us to forbear from the *Computer Inquiry* tariffing requirement to the extent SNET provides information services in conjunction with those broadband services.²⁰¹ Therefore, like its non-incumbent LEC competitors, SNET will be free to offer any information service that incorporates one or more of its existing specified broadband services

¹⁹⁷ *Computer II Final Decision*, 77 FCC 2d at 474-75, para. 231; see *infra* para. 59.

¹⁹⁸ *Computer II Final Decision*, 77 FCC 2d at 474-75, para. 231; see *CIA v. FCC*, 693 F.2d at 205.

¹⁹⁹ *Computer II Final Decision*, 77 FCC 2d at 475, para. 231. We note that, under the Commission's *Hyperion Forbearance Order*, which granted nondominant carriers permissive detariffing of interstate interexchange access services, non-incumbent LECs need not offer the basic transmission services underlying their enhanced services pursuant to tariff. See *Hyperion Telecommunications, Inc. Petition Requesting Forbearance, Time Warner Communications Petition for Forbearance, Complete Detariffing for Competitive Access Providers and Competitive Exchange Carriers*, CCB/CPD Nos. 96-3, 96-7, CC Docket No. 97-146, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 12 FCC Rcd 8596 (1997) (*Hyperion Forbearance Order*).

²⁰⁰ *Computer II Final Decision*, 77 FCC 2d at 474-75, para. 231.

²⁰¹ See *supra* part III.D.1.

without, by virtue of such offering, being required to tariff that underlying telecommunications component of those services.²⁰²

c. Scope of Relief

63. Our forbearance from the *Computer Inquiry* requirements does not extend to AT&T's information services to the extent it incorporates telecommunications components other than its existing specified broadband services. As with our analysis of dominant carrier regulation of its broadband services,²⁰³ we find that restricting our forbearance from *Computer Inquiry* obligations to services that incorporate these existing broadband telecommunications services is appropriate because we cannot conclude, on the record before us, that AT&T will lack market power with regard to any as yet unoffered broadband telecommunications services. We also cannot find, on this record, that additional forbearance from the *Computer Inquiry* rules would meet the statutory forbearance criteria.

3. General Title II Economic Regulation

64. As part of its request for similar relief to that granted to Verizon by operation of law, AT&T seeks forbearance from any economic regulation that would apply to it, under Title II and the Commission's implementing rules, in connection with its existing and future broadband services.²⁰⁴ We first address this regulation as it applies to AT&T as a common carrier or a LEC. We then turn to this regulation as it applies to AT&T as an incumbent LEC or to SNET as an independent incumbent LEC.

a. Regulation Applied to Common Carriers or LECs

65. Title II and the Commission's implementing rules impose economic regulation on common carriers or LECs generally regardless of whether they are incumbents or competing carriers. This regulation, though much less burdensome than the regulation imposed on dominant carriers, has been thought to provide important protections against unjust, unreasonable, and unjustly or unreasonably discriminatory treatment of consumers.²⁰⁵ For example, section 201 of the Act mandates that all carriers engaged in the provision of interstate or foreign communications service provide such service upon reasonable request, and that all charges, practices, classifications, and regulations for such service be just and reasonable.²⁰⁶ Section 202 of the Act makes it unlawful for any common carrier to make any unjust

²⁰² As a practical matter, however, we note that the existing specified broadband services all appear to be transmission services that AT&T chooses to offer on a common carrier basis today, and thus remain subject to the same Title II regulation applicable to nondominant carriers.

²⁰³ See *supra* part III.D.1.

²⁰⁴ See, e.g., AT&T Petition at 9-10 (seeking the flexibility to provide its specified services on a common-carriage or private-carriage basis). In this part and in part III.D.4, *infra*, we use the terms "economic regulation" and "public policy regulation" as convenient shorthands to ensure that we address the full breadth of AT&T's forbearance requests. In using these terms, we recognize that they have no well-established, specific meanings. Cf. *AT&T Inc. v. FCC*, 452 F.3d 830 (D.C. Cir. 2006) (*AT&T v. FCC*) (directing that the Commission reconcile its holding that a request for forbearance from "only 'common carrier' and 'economic' regulation under Title II" was insufficiently specific to identify the regulations from which forbearance was sought with the Commission's use of these terms in other proceedings). Our use of these terms here does not in any way prejudice our actions on remand of *AT&T v. FCC*.

²⁰⁵ See *Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services*, WT Docket No. 98-100, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 16857, 16865-72, paras. 15-31 (1998) (*PCIA Forbearance Order*) (denying PCIA's request for forbearance from sections 201 and 202 of the Act and noting that these provisions "codify[] the bedrock consumer protection obligations of a common carrier. . ."); Time Warner Telecom Comments at 26.

²⁰⁶ 47 U.S.C. § 201.

or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services, or to make or give any undue or unreasonable preference or advantage to any person or class of persons.²⁰⁷ All telecommunications carriers are obligated under section 251(a)(1) of the Act to “interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers.”²⁰⁸ Section 251(b), moreover, imposes a number of duties on LECs, including the duty not to impose unreasonable or discriminatory conditions or limitations on resale of their telecommunications services,²⁰⁹ the duty to implement number portability,²¹⁰ and the duty to provide competing telecommunications service providers with access to the LECs’ poles, ducts, and conduits under just and reasonable rates, terms, and conditions.²¹¹

66. With respect to nondominant carriers, the Commission has relaxed tariffing, transfer of control, and discontinuance regulation for carriers that lack market power, although, as discussed above, these carriers are still subject to limited regulation in these areas.²¹² In particular, section 214 of the Act requires common carriers to obtain Commission authorization before constructing, acquiring, operating or engaging in transmission over lines of communications, or discontinuing, reducing or impairing telecommunications service to a community.²¹³ The Commission’s discontinuance rules for nondominant carriers require such carriers to file applications with the Commission and provide notice to the affected customers.²¹⁴ These applications are automatically granted on the 31st day unless the Commission notifies the applicant otherwise.²¹⁵ Moreover, to the extent they are permitted to file interstate tariffs, nondominant carriers must comply with the streamlined tariffing and notice requirements of part 61, subpart C of the Commission’s rules.²¹⁶

67. We conclude that the record does not demonstrate that forbearance from these, and other, economic regulations that apply generally to nondominant telecommunications carriers and to LECs would meet the statutory forbearance criteria. Indeed, AT&T asks us to go beyond the relief the Commission has granted any competitive LEC or nondominant interexchange carrier and allow it to offer certain broadband telecommunications services free of Title II regulation, thus creating a disparity in

²⁰⁷ 47 U.S.C. § 202.

²⁰⁸ 47 U.S.C. § 251(a)(1).

²⁰⁹ *E.g.*, 47 U.S.C. § 251(b)(1).

²¹⁰ 47 U.S.C. § 251(b)(2).

²¹¹ *E.g.*, 47 U.S.C. §§ 224, 251(b)(4).

²¹² *See supra* para. 3.

²¹³ 47 U.S.C. § 214; *see, e.g., Verizon Telephone Companies Section 63.71 Application to Discontinue Expanded Interconnection Service Through Physical Collocation*, WC Docket No. 02-237, Order, 18 FCC Rcd 22737, 22742, para. 8 (2003) (applying five factors to determine whether “reasonable substitutes are available” to consumers). In 1999, the Commission granted all carriers blanket authority under section 214 to provide domestic interstate services and to construct, acquire, or operate any domestic transmission line. *See Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996, Petition for Forbearance of the Independent Telephone & Telecommunications Alliance*, Report and Order in CC Docket No. 97-11, Second Memorandum Opinion and Order in AAD File No. 98-43, 14 FCC Rcd 11364, 11372, para. 12 (1999); 47 C.F.R. § 63.01(a). We also note that, in certain instances, the Commission has granted conditional blanket discontinuance authority to carriers under section 214. *See Wireline Broadband Access Services Order*, 20 FCC Rcd at 14907-08, paras. 100-01.

²¹⁴ 47 C.F.R. § 63.71(c).

²¹⁵ *Id.*

²¹⁶ *See* 47 C.F.R. §§ 61.18 *et seq.*

regulatory treatment between AT&T and its competitors.²¹⁷ We find, based on the record before us, that granting AT&T such preferential treatment would be inconsistent with the market-opening policies and consumer protection goals that led Congress and the Commission to impose these economic regulations on carriers that lack individual market power.²¹⁸ For example, the protections provided by sections 201 and 202(a), coupled with our ability to enforce those provisions in a complaint proceeding pursuant to section 208, provide essential safeguards that ensure that relieving AT&T of tariffing obligations in relation to its specified broadband services will not result in unjust, unreasonable, or unreasonably discriminatory rates, terms, and conditions in connection with those services.²¹⁹ Accordingly, we cannot find that enforcement of these statutory and regulatory requirements is not necessary to ensure that the “charges, practices, classifications, or regulations . . . for[] or in connection with [the AT&T-specified broadband services] are just and reasonable and are not unjustly or unreasonably discriminatory” within the meaning of section 10(a)(1).²²⁰

68. AT&T also has not shown how continued enforcement of these economic regulation requirements in connection with its specified broadband services is not necessary for the protection of consumers within the meaning of section 10(a)(2) or how forbearance is consistent with the public interest within the meaning of section 10(a)(3).²²¹ On the contrary, disparate treatment of carriers providing the same or similar services is not in the public interest as it creates distortions in the marketplace that may harm consumers.²²² In particular, many of the obligations that Title II imposes on carriers or LECs generally, including interconnection obligations under section 251(a)(1) and pole attachment obligations under sections 224 and 251(b)(4), foster the open and interconnected nature of our communications system, and thus promote competitive market conditions within the meaning of section 10(b). Allowing AT&T, but not its competitors, to avoid these obligations would undermine, rather than promote, competition among telecommunications services providers within the meaning of that provision. Moreover, in originally subjecting nondominant carriers to streamlined discontinuance, transfer of control, and tariffing requirements, the Commission necessarily determined that these requirements were needed to protect the public interest and competitive markets in situations where a carrier lacks market

²¹⁷ We note that this request appears inconsistent with certain AT&T’s request for regulatory parity among broadband competitors. *See, e.g.*, AT&T Petition at 6 (arguing that “retaining Title II . . . regulation would affirmatively harm the public interest by denying AT&T (and other BOCs) the same flexibility as their competitors”); Legacy BellSouth Petition at 6 (arguing that Legacy BellSouth receive the flexibility that its competitors currently enjoy in participating in and competing in the broadband market); *see also* Legacy SBC Reply, CC Docket No. 01-337, at 3-4 (characterizing as “indefensible” regulatory disparities between incumbent LECs and nondominant interexchange carriers); *see also Applications for License and Authority to Operate in the 2155-2175 MHz Band, WT Docket No. 07-16; Petitions for Forbearance under 47 U.S.C. § 160, WT Docket No. 07-30, Order, FCC 07-161, para. 9 (rel. Aug. 31, 2007) (denying a forbearance request because the petitioners failed to demonstrate that a forbearance action was in the public interest).*

²¹⁸ *Cf.* Time Warner Telecom Comments at 26 (contending that AT&T has provided no basis for relief from Title II regulation that applies to both dominant and nondominant carriers).

²¹⁹ *See, e.g., SBC Advanced Services Forbearance Order*, 17 FCC Rcd at 27010, 27012, paras. 18, 21 (citing 47 U.S.C. §§ 201-02, 208); *PCIA Forbearance Order*, 13 FCC Rcd at 16865-72, paras. 15-31; *see also* COMPTTEL Comments at 18 (arguing that forbearance from sections 201 and 202 would significantly undermine competition); Sprint Nextel Reply at 8 (maintaining that forbearance from sections 201 and 202 would effectively gut the core of the Communications Act); Time Warner Telecom Comments at 26-27.

²²⁰ 47 U.S.C. § 160(a)(1).

²²¹ 47 U.S.C. § 160(a)(2), (a)(3).

²²² *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14865, para. 17 (creating a regulatory and analytical framework that is consistent across different platforms that supports competing services).

power.²²³ Granting AT&T, but not its competitors, forbearance from these and the other obligations that apply generally to common carriers, LECs, or nondominant carriers would result in disparate regulatory treatment for the same or similar services, create market distortions, and fail to protect consumers within the meaning of section 10(a)(2).²²⁴ Accordingly, we deny AT&T's forbearance request to the extent it seeks forbearance from Title II economic obligations, including those discussed above, that apply generally to telecommunications carriers or LECs.

b. Regulation Applied to Incumbent LECs or BOCs

69. Title II and the Commission's implementing rules also impose regulation AT&T in its capacities as an incumbent LEC and an independent incumbent LEC for its affiliate, SNET. For example, section 251(c) of the Act imposes interconnection, unbundling, and resale obligations on AT&T as an incumbent LEC.²²⁵ In addition, AT&T, as a BOC, under section 271 of the Act, was required to demonstrate compliance with certain market-opening requirements before providing in-region, interLATA long distance service and must continue to comply with such market-opening requirements.²²⁶

70. We conclude that the record before us does not show that forbearance from these and other economic regulations that apply generally to incumbent LEC or BOCs would meet the statutory forbearance criteria. Indeed the record contains no specific information regarding whether application of these regulatory requirements is not necessary to ensure that the "charges, practices, classifications, or regulations . . . for[] or in connection with [the AT&T-specified broadband services'] are just and reasonable and are not unjustly or unreasonably discriminatory" within the meaning of section 10(a)(1).²²⁷ Nor does the record suggest how continued enforcement of these requirements in connection with the AT&T-specified broadband services is not necessary for the protection of consumers or inconsistent with the public interest. We therefore deny AT&T's forbearance request to the extent it seeks forbearance from Title II economic obligations, including those discussed above, that apply generally to incumbent LECs or BOCs.

4. Public Policy Regulation

71. As part of its request for similar relief to that granted to Verizon by operation of law, AT&T seeks forbearance from any public policy regulation that would apply to it, under Title II and the Commission's implementing rules, in connection with its existing and future broadband services offerings.²²⁸ We now turn to this request.

72. Title II and the Commission's implementing rules set forth numerous public policy requirements that apply generally to all carriers, regardless of whether they are incumbents or competing carriers. These requirements advance critically important national objectives, such as ensuring the sufficiency of universal service support mechanisms, promoting access to telecommunications services by individuals with disabilities, protecting customer privacy, and increasing the effectiveness of emergency

²²³ See, e.g., *Detariffing Order*, 11 FCC Rcd at 20776-77, paras. 84-85.

²²⁴ 47 U.S.C. § 160(a)(2).

²²⁵ See COMPTTEL Comments at 17 (arguing that the section 251 requirements are necessary to ensure that the BOCs' "wholesale charges, practices, classifications and regulations for broadband services are just reasonable and not unjustly or unreasonably discriminatory"); Sprint Nextel Reply at 10 (arguing that "forbearance also could lift the symmetrical interconnection obligations of sections 251 and 252").

²²⁶ See 47 U.S.C. § 271.

²²⁷ 47 U.S.C. § 160(a)(1).

²²⁸ AT&T Petition at 10 n.28 (seeking relief from "all common carrier provisions of Title II" except with respect to universal service); Legacy BellSouth Petition at 8 (seeking relief from application of Title II regulations excluding its obligations to make universal service contributions).

services, among other objectives. For example, section 254(b) of the Act states that “[t]here should be specific, predictable, and sufficient Federal and State mechanisms to preserve and advance universal service.”²²⁹ Section 254(d) of the Act states that “[e]very telecommunications carrier that provides interstate telecommunications services shall contribute” to universal service.²³⁰ These universal service provisions ensure that all Americans, including consumers living in high-cost areas, low-income consumers, eligible schools and libraries, and rural health care providers, have access to affordable telecommunications services.²³¹

73. Similarly, Congress enacted section 225 of the Act to require each common carrier offering voice telephone service to also provide telecommunications relay service (TRS) so that individuals with disabilities will have equal access to the carrier’s telecommunications network.²³² Moreover, section 255 sets forth disability access network requirements, and 251(a)(2) prohibits telecommunications carriers from installing any “network features, functions, or capabilities” that do not comply with the disability access requirements in section 255.²³³ With regard to customer privacy, certain provisions in section 222 of the Act restrict telecommunications carriers’ use and disclosure of CPNI.²³⁴ In these provisions, Congress recognized that telecommunications carriers are in a unique position to collect sensitive personal information and that consumers maintain an important privacy interest in protecting this information from disclosure and dissemination.²³⁵ Other section 222 provisions increase the effectiveness of emergency services by facilitating the provision of vital caller location and subscriber identification information to emergency service providers.²³⁶ We note that AT&T’s obligations under CALEA are governed by the CALEA statute,²³⁷ and AT&T remains obligated to comply with those statutory requirements.

74. We find that AT&T has not shown that forbearance from these and the other public policy requirements in Title II and the Commission’s implementing rules meets the statutory forbearance

²²⁹ 47 U.S.C. § 254(b)(5). The Commission has emphasized that maintaining the long-term viability of universal service programs is a fundamental goal that must continue to be met in an evolving telecommunications marketplace in which customers are migrating to broadband service platforms. *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 24952, 24954-56, paras. 1-5 (2002) (*Universal Service Contribution Methodology NPRM*).

²³⁰ 47 U.S.C. § 254(d).

²³¹ *See generally* 47 U.S.C. § 254.

²³² 47 U.S.C. § 225. TRS enables an individual with a hearing or speech disability to communicate by telephone or other device with a hearing individual. This is accomplished through TRS facilities that are staffed by specially trained communications assistants (CAs) using special technology. The CA relays conversations between persons using various types of assistive communication devices and persons who do not require such assistive devices. *See generally Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 5140, para. 2 (2000) (*Improved TRS Order & FNPRM*).

²³³ 47 U.S.C. §§ 251(a)(2), 255.

²³⁴ 47 U.S.C. § 222(a)-(c), (f). CPNI is defined to include “(A) information that relates to the quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and (B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier.” 47 U.S.C. § 222(h)(1).

²³⁵ *See generally* 47 U.S.C. § 222.

²³⁶ 47 U.S.C. § 222(d)(4), (g).

²³⁷ 47 U.S.C. § 229; *see also* Pub. L. No. 103-414, 108 Stat. 4279 (codified as amended in sections of 18 U.S.C. and 47 U.S.C.).

criteria.²³⁸ Indeed, with regard to universal service, AT&T disavows any intent to seek relief from universal service contribution obligations.²³⁹ We believe that by excluding this relief from its forbearance request, AT&T recognized that the public interest requires it to maintain its universal service support obligations. Nevertheless, we include those obligations in our forbearance analysis to ensure that there is no ambiguity with regard to AT&T's continuing duty to include revenues from each of its specified broadband services in its federal universal service support calculations.

75. In particular, we conclude on the record before us that forbearing from the public policy requirements in Title II and the Commission's implementing rules would be inconsistent with the critical national goals that led to the adoption of these requirements. We therefore cannot find that enforcement of those requirements is unnecessary to ensure that the "charges, practices, classifications, or regulations . . . for[] or in connection with [the AT&T-specified services] are just and reasonable and are not unjustly or unreasonably discriminatory" within the meaning of section 10(a)(1) of the Act,²⁴⁰ or is not necessary for the protection of consumers within the meaning of section 10(a)(2) of the Act.²⁴¹ On the contrary, we believe that consumers will continue to receive essential protections from the continued application of these requirements in connection with the AT&T-specified services.

IV. EFFECTIVE DATES

76. Consistent with Section 10 of the Act and our rules, the Commission's forbearance decision with regard to AT&T and Legacy BellSouth shall be effective on October 11, 2007.²⁴² The time for appeal shall run from the release date of the Order.²⁴³

V. ORDERING CLAUSES

77. Accordingly, IT IS ORDERED that, pursuant to section 10 of the Communications Act of 1934, as amended, 47 U.S.C. § 160, Petitions for Forbearance filed by AT&T, Inc. and BellSouth Corporation, ARE GRANTED to the extent described herein and otherwise ARE DENIED.

²³⁸ See, e.g., AdHoc Reply at i-ii (pointing out that AT&T failed to address or justify forbearance from Title II provisions that serve public policy goals, such as privacy and disability access, that are unrelated to marketplace competition).

²³⁹ AT&T Petition at 10; Legacy BellSouth Petition at 8; see generally 47 U.S.C. § 254.

²⁴⁰ 47 U.S.C. § 160(a)(1).

²⁴¹ 47 U.S.C. § 160(a)(2).

²⁴² See 47 U.S.C. § 160(c) (deeming the petition granted as of the forbearance deadline if the Commission does not deny the petition within the time period specified in the statute); 47 C.F.R. § 1.103(a).

²⁴³ See 47 C.F.R. §§ 1.4, 1.13.

78. IT IS FURTHER ORDERED that, pursuant to section 10 of the Communications Act of 1934, as amended, 47 U.S.C. § 160, and section 1.103(a) of the Commission's rules, 47 C.F.R. § 1.103(a), this Order SHALL BE EFFECTIVE with regard to AT&T and Legacy BellSouth on October 11, 2007. Pursuant to section 1.4 and 1.13 of the Commission's rules, 47 C.F.R. §§ 1.4, 1.13, the time for appeal of the Commission's actions with regard to these carriers shall run from the release date of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX
PETITIONS FOR FORBEARANCE
WC Docket No. 06-125

Petition	Abbreviation
AT&T Inc.	AT&T
BellSouth Corporation	Legacy BellSouth

COMMENTERS
WC Docket No. 06-125

Comments	Abbreviation
Alpheus Communications, LP, DeltaCom, Inc., Integra Telecom, Inc., McLeodUSA Telecommunications Services, Inc., Mpower Communications Corp., Norlight Telecommunications, Inc., Pac-West Telecomm, Inc., TDS Metrocom, LLC, and Telepacific Corp d/b/a Telepacific Communications	Alpheus
ACS Anchorage, Inc.	ACS
Broadview Networks, Covad Communications, CTC Communications, Inc., Eschelon Telecom, Inc., NuVox Communications, XO Communications, Xspedius Management Company	Broadview
Cincinnati Bell Telephone Company LLC	Cincinnati Bell
COMPTEL	COMPTEL
EarthLink, Inc., New Edge Networks, Inc.	EarthLink
Embarq Local Operating Companies	Embarq
Iowa Telecommunications Services, Inc.	Iowa Telecom
National Telecommunications Cooperative Association	NTCA
New Jersey Division of the Rate Counsel	New Jersey Rate Counsel
Organization for the Promotion and Advancement of Small Telecommunications Companies	OPASTCO
Sprint Nextel Corporation	Sprint Nextel
Time Warner Telecom, Inc., Cbeyond Communications, LLC, One Communications Corp.	Time Warner Telecom

REPLY COMMENTERS
WC Docket No. 06-125

Reply Comments	Abbreviation
AdHoc Telecommunications Users Committee	AdHoc
AT&T Inc.	AT&T
BellSouth Corporation	Legacy BellSouth
Broadview Networks, Covad Communications, CTC Communications, Inc., Eschelon Telecom, Inc., NuVox Communications, XO Communications, Xspedius Management Company	Broadview
COMPTEL	COMPTEL
Embarq Local Operating Companies	Embarq
General Communications, Inc.	GCI
Hawaiian Telecom, Inc.	Hawaiian Telecom
Mobile Satellite Ventures Subsidiary LLC	Mobile Satellite Venture
MontanaSky.Net	MontanaSky.Net

National Telecommunications Cooperative Association	NTCA
Qwest Corporation, Qwest Communications Corporation	Qwest
Sprint Nextel Corporation	Sprint Nextel
T-Mobile USA, Inc.	T-Mobile
The Verizon Companies	Verizon

**STATEMENT OF
CHAIRMAN KEVIN J. MARTIN**

Re: Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services; Petition of BellSouth Corporation for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services

Broadband access is essential to an expanding Internet-based information economy. Promoting broadband deployment is one of the highest priorities of the FCC. To accomplish this goal, the Commission seeks to establish a policy environment that facilitates and encourages broadband investment, allowing market forces to deliver the benefits of broadband to consumers. Today, we take another step in establishing a regulatory environment that encourages such investments and innovation by granting AT&T's petition for regulatory relief of its broadband infrastructure and fiber capabilities. This relief will enable AT&T to have the flexibility to further deploy its broadband services and fiber facilities without overly burdensome regulations.

The relief afforded to AT&T is consistent with and similar to the relief provided in Commission decisions regarding broadband services, packet switching, and fiber facilities. In those decisions, the Commission determined to relax regulations where competition was significant and where regulations acted as a disincentive to deploy new broadband technologies. Accordingly, based on the specific market facts that have been placed before us, we are compelled under the "pro-competitive, deregulatory" framework established by Congress, as well as under section 10's forbearance criteria, to grant AT&T relief from the continued application of legacy regulations.

**JOINT STATEMENT OF
COMMISSIONER MICHAEL J. COPPS AND
COMMISSIONER JONATHAN S. ADELSTEIN,
DISSENTING**

Re: *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services; Petition of BellSouth Corporation for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services; WC Docket No. 06-125, Memorandum Opinion and Order (October 11, 2007).*

Let us start by noting what may already be obvious to many – dealing with the multitude of forbearance petitions before us is a risky and messy business. There are no requirements on the parties to be explicit in their requests or detailed in the data they provide. It is left to the Commission to sort through and if we don't, we hand over the writing of these rules to industry. With this as a backdrop, today's Order addresses two far-reaching forbearance petitions seeking relief from Title II and *Computer Inquiry* obligations based on the apparent belief that the broadband enterprise services at issue exist in a competitive marketplace. We find the evidence to support forbearance here altogether underwhelming.

First, the definition of the product market to which we should apply forbearance remains in dispute. Merely calling services "broadband enterprise services" does not negate the fact that they are tariffed as special access services and have been identified as such in previous orders. As our colleagues know, there is substantial data available in this and other proceedings to indicate that the special access market is anything but competitive. In fact, the Commission has committed to completing our long-pending rulemaking on this very topic. We should not be granting forbearance for rules covering special access services without a rigorous analysis of competition for these services – an analysis wanting in today's decision.

The Order suggests that forbearance will only impact the largest, most sophisticated business customers, but the record makes clear that services targeted to small, medium, and large businesses are all on the line. Moreover, these services are used as critical inputs by other communications providers, including wireless, satellite, and long distance providers that serve both residential and business customers. For that reason, business users of all sizes, competitive providers, and the Small Business Administration's Office of Advocacy have asked the Commission to conduct a careful analysis before forbearing from the rules in question. We don't see such an analysis here.

With regard to the appropriate geographic market, petitioners argue that a national analysis of the services being considered is applicable here. We have repeatedly argued that deregulating broadband is no national strategy for deploying these services, and we believe that today's Order is a missed opportunity for the Commission to critically review whether a national framework for the market specific services before us is appropriate. Particularly distressing is the fact that more than 13 months into this 15 month forbearance process the Bureau requested market data from petitioners to enable a local market analysis. Not only does this suggest that petitioners did not make their case in this regard, but it is apparent that little if any additional data was provided because the majority concluded it was unnecessary. The Order regrettably concludes that the Commission does not "find it essential to have such detailed information." Also troublesome is the fact that the Order finds that "potential" competition is sufficient to protect consumers. In places where substantial competition does not demonstrably exist, it seems that forbearance actually can make the problem worse as "potential" competitors will have even less ability to successfully compete to provide a check on any anti-competitive behavior.

We have repeatedly proffered that these kinds of decisions are too important to be made without the in-depth market analysis that might support them. Recent Congressional hearings have demonstrated

a growing impatience with policymaking via analysis-poor forbearance decisions. Here the Commission clearly has chosen not to chart a different course. The lack of data concerning the specific product and geographic markets at issue and this Order's lack of analysis cause us great concern about both the substance and the process by which the Commission grants forbearance from our rules.

While we certainly appreciate the Order's decision to implement an expedited complaint process and to retain key interconnection, universal service, privacy, disabilities access, and other Congressionally-mandated provisions -- forbearance from which would have been devastating for consumers and competition -- we cannot support this Order's decision to forbear from rules that provide critical pricing protection.

For these reasons, we dissent from today's Order.

**STATEMENT OF
COMMISSIONER DEBORAH TAYLOR TATE**

RE: 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, WC Docket No. 06-125; Petition of BellSouth Corporation for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services, WC Docket No. 06-125 Memorandum Opinion and Order.

In this decision we focus on the state of the enterprise broadband Internet access marketplace. These services are high-speed, high-volume services that large business customers use primarily to transmit large amounts of data among multiple locations- services that are vital for multi-national businesses to compete in this country and around the globe and keep America's great economic engine humming.

An integral part of the pro-competitive, de-regulatory national policy framework established by Congress in the 1996 Act is the section 10 forbearance provision. As providers of voice, broadband, and video services increasingly compete in one another's markets, the Commission has taken a number of important steps aimed at easing the regulatory requirements for broadband facilities and services on the path to competition. We now take another important step and further level the playing field and grant relief to certain providers of broadband services from certain legacy regulatory obligations. In taking this step, we recognize the facilities-based competition that exists in the business broadband Internet access market. I support moving away from regulation where the record shows that a competitive market exists, rendering those regulations unnecessary.

While it can be beneficial to eliminate regulation when appropriate, this decision takes a carefully balanced approach, providing regulatory relief where appropriate, allowing these carriers to respond to marketplace demands efficiently and effectively, but ensuring that less intrusive or less costly regulation remains that protects consumer interests and competition. Importantly, we preserve critical public policy and consumer protection obligations related to 911, emergency preparedness, law enforcement access, privacy requirements, and access for the disabled, and universal service.

**STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL**

Re: Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services; Petition of BellSouth Corporation for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services, WC Docket No. 06-125, Memorandum Opinion and Order

With this partial grant of AT&T's forbearance petition, the Commission is striking a thoughtful balance between de-regulation and consumer protection. Today we are setting up a de-regulatory framework for AT&T's business broadband services, while also ensuring that longstanding consumer protection and competition promotion measures remain in place.

Upon the expiration of the voluntary merger conditions agreed to by AT&T as the result of its merger with BellSouth, after December 29, 2010, AT&T will be relieved from existing tariffing, price freeze and facilities discontinuance requirements for non-TDM-based business broadband services. While the Order grants relief to AT&T, it does not forbear from existing regulation of DS-0, DS-1 or DS-3 type special access services most heavily relied upon by many enterprise users, wireless carriers and competitive local exchange carriers.

In the spirit of Section 10's mandate to promote both competition and the public interest, however, today's action preserves Title II jurisdiction over business broadband services. Maintaining common carrier treatment of these services is significant because our Order gives both competitors and consumers protections against discriminatory conduct and unjust and unreasonable rates, terms and conditions as mandated by Sections 201 and 202 of the Communications Act.

Furthermore, the Commission is creating a procedure whereby complaints filed relating to services covered by this Order must be adjudicated by the Commission within five months and would be subject to broad and aggressive discovery procedures. Such a swift and certain complaint process, combined with strong discovery rules, should provide the parties with greater incentives to reach mutually beneficial agreements before litigating disputes.

As competition in the broadband market continues to grow, especially through the deployment of new wireless technologies, less regulation should be required. However, many parties allege that competition in the special access market is uneven and is limited to certain urban areas, thus creating supply bottlenecks that favor incumbent local exchange carriers in the business broadband and wireless markets. Despite requests for better data to help us resolve disputes of these material facts, the Commission still has inadequate information to determine whether allegations that competition is scarce in certain segments of the special access market have merit. I will continue to work to ensure that these questions are explored further in the Special Access proceeding after a more granular record has been established through detailed mapping of business broadband facilities.

In the interim, the Commission is taking another step toward streamlining its regulation of the broadband market in the wake of the Supreme Court's 2005 *Brand X*²⁴⁴ decision which declared that broadband services provided over cable facilities are information services. Recent history has shown that thoughtful de-regulation combined with appropriate consumer protections can help spur competition and investment

²⁴⁴ *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005).

in new facilities. As a result, a virtuous cycle of competition, investment, innovation and lower prices can result. Today's Order is intended to produce just such a positive environment for American consumers.