

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

In the Matters of
Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements
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

MEMORANDUM OPINION AND ORDER

Adopted: October 24, 2007

Released: October 24, 2007

By the Commission: Chairman Martin issuing a separate statement; 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 Embarq and Frontier (collectively, petitioners), 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. Embarq and Frontier seek relief comparable to the relief granted Verizon through that deemed grant.³ Consistent with our recent *AT&T Title II and Computer Inquiry Forbearance Order*,⁴ we grant substantial forbearance relief to Embarq and Frontier with regard to their existing packet-switched broadband telecommunications services and their existing optical transmission services.⁵ We also relieve the petitioners of their tariffing obligations under the *Computer Inquiry* rules in connection with these

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 the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of *Computer Inquiry* and Certain Title II Common-Carriage Requirements, WC Docket No. 06-147 (filed July 26, 2006) (Embarq Petition); 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) (Frontier Petition). The Wireline Competition Bureau (Bureau) invited comment on each of the petitions. See *Pleading Cycle Established for Comments on Embarq Local Operating Companies' Petition for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common Carriage Requirements*, WC Docket No. 06-147, Public Notice, 21 FCC Rcd 8662 (WCB 2006); *Pleading Cycle Established for Comments on the Frontier and Citizens Communications Incumbent Local Exchange Telephone Carriers Petition 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. 06-147, Public Notice, 21 FCC Rcd 9555 (WCB 2006).

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*), *pets. for review pending*, *Sprint Nextel et al. v. FCC*, No. 06-1111 (and consolidated cases) (D.C. Cir. filed Mar. 29, 2006); Petition of the Verizon Telephone Companies For Forbearance, WC Docket No. 04-440 at 1 (filed Dec. 20, 2004) (Verizon Forbearance Petition).

⁴ *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, FCC 07-180 (rel. Oct. 12, 2007) (*AT&T Title II and Computer Inquiry Forbearance Order*) *pets. for review pending*, Nos. 07-1426, 07-1427, 07-1429, 07-1430, 07-1431, and 07-1432 (D.C. Cir. filed Oct. 22, 2007); see 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) (Legacy BellSouth Petition).

⁵ For ease of exposition, we refer to the services for which we grant relief as the "the petitioner-specified services." We describe these services more fully in part III.C.1.a, below. They exclude all traditional, TDM-based, DS-1 and DS-3 services, and all services that do not provide a transmission capability of over 200 kilobits per second (kbps) in each direction. See, e.g., Embarq Petition at 2; Frontier Petition at 7; 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 Feb. 7, 2006 *Ex Parte* Letter, WC Docket No. 04-440) (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.

services, but require their compliance with the *Computer Inquiry* obligations that apply to all non-incumbent local exchange carrier (LEC), facilities-based wireline carriers.⁶

2. In all other respects, the petitioners' 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. In addition, Embarq and Frontier must continue to meet their public policy obligations under Title II and the Commission's implementing rules with respect to the services at issue.⁷ 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.

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 independent incumbent LECs and incumbent LECs generally. Independent incumbent LECs, such as Embarq and Frontier, for example, are subject to certain structural separation requirements if they wish to provide in-region, interstate, interexchange telecommunications services other than through resale.¹² Incumbent LECs must meet

⁶ Specifically, we grant, with regard to the petitioner-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 the tariffing obligations under the *Computer Inquiry* rules.

⁷ See, e.g., 47 U.S.C. §§ 222, 225, 229, 251(a)(2), 254, 255.

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 C.F.R. § 64.1903.

additional obligations, including the interconnection, collocation, and other obligations set forth in section 251(c) of the Act and the Commission's implementing rules.¹³

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.¹⁴ These include requirements that carriers contribute to federal universal service support mechanisms on an equitable and nondiscriminatory basis,¹⁵ ensure access to telecommunications services by people with disabilities,¹⁶ meet standards regarding the privacy of their customers' information,¹⁷ and facilitate the delivery of emergency services.¹⁸ 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.¹⁹

2. Computer Inquiry Requirements

6. Facilities-based wireline carriers are also subject to *Computer Inquiry* requirements. In the *Computer II Orders*,²⁰ 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."²¹ The Commission determined that 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.²² To protect against anticompetitive behavior, the Commission required facilities-based common carriers, other than AT&T, to provide the basic transmission services underlying their enhanced services on a nondiscriminatory basis pursuant to tariffs

¹³ 47 U.S.C. § 251(c).

¹⁴ See *infra* part III.C.4.

¹⁵ 47 U.S.C. § 254(d).

¹⁶ 47 U.S.C. § 225.

¹⁷ 47 U.S.C. § 222(a)-(c), (f).

¹⁸ 47 U.S.C. § 222(d)(4), (g).

¹⁹ 47 U.S.C. § 208.

²⁰ *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*).

²¹ 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." *Id.* 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*).

²² See, e.g., *Computer II Final Decision*, 77 FCC 2d at 435, para. 132.

governed by Title II of the Act.²³ 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.²⁴

B. Prior Broadband Relief

7. 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.²⁵ 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.²⁶ In subsequent reconsideration orders, the Commission extended the same unbundling relief to encompass fiber loops serving predominantly

²³ *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"). We note that the Bell Operating Companies (BOCs) are subject to more extensive *Computer Inquiry* obligations. *See AT&T Title II and Computer Inquiry Forbearance Order*, FCC 07-180, at paras. 5-6.

²⁴ *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).

²⁵ *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).

²⁶ *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

without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.

47 U.S.C. § 157 nt.

residential multiple dwelling units (MDUs) and fiber-to-the-curb (FTTC) loops.²⁷ 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 unbundling relief under section 251.²⁸ The Commission applied its section 10 forbearance analysis in light of the Act's overall goals of promoting local competition and encouraging broadband deployment.²⁹

8. In the *Wireline Broadband Internet Access Services Order*,³⁰ 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.³¹ 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.³² The Commission's actions did not encompass other wireline broadband services, such as stand-alone Asynchronous Transfer Mode (ATM) service, Frame Relay service, Gigabit Ethernet service, and other high-capacity special access services.³³ 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.³⁴

²⁷ *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*).

²⁸ *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*).

²⁹ 47 U.S.C. § 157 nt.

³⁰ *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*), *aff'd*, *Time Warner Telecom v. FCC*, No. 05-4769 (and consolidated cases) (3rd Cir. Oct. 16, 2007) (*Time Warner Telecom v. FCC*).

³¹ *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14872-915, paras. 32-111. The Commission found these services to be information services. *See id.* at 14909, para. 102.

³² *See id.*

³³ *See id.*

³⁴ *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 Notice*) (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, 22 FCC Rcd 13352 (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* (continued....)

9. In the *Verizon Advanced Services Waiver Order*,³⁵ the Commission granted a waiver of specific regulatory requirements to allow Verizon to exercise pricing flexibility for certain advanced services that rely on packet technology.³⁶ 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.³⁷ The Commission subsequently granted AT&T and Qwest similar relief for packet-based advanced services.³⁸

10. 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.³⁹ 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 denying the petition for failure to meet the standards for forbearance under section 10(a) of the Act.⁴⁰ 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."⁴¹ On March 20, 2006, the Commission issued a News Release announcing that the petition had been granted by operation of law.⁴² At that same

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Remand Proceedings: Bell Operating Company Provision of Enhanced Services, CC Docket No. 95-20, Further Notice of Proposed Rulemaking, 13 FCC Rcd 6040, 6046, para. 6 (1998) (inviting comment on whether the Commission should eliminate the open network architecture (ONA), comparably efficient interconnection (CEI), and other *Computer III* requirements).

³⁵ *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*).

³⁶ 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.

³⁷ *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 Notice*, 20 FCC Rcd at 2001, para. 17. 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).

³⁸ *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*).

³⁹ See Verizon Petition at 24.

⁴⁰ 47 U.S.C. § 160(c); *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, Order, 20 FCC Rcd 20037 (WCB 2005).

⁴¹ 47 U.S.C. § 160(c).

⁴² *March 20 News Release*.

time, the Chairman and other Commissioners issued statements expressing their views on the deemed grant of Verizon's forbearance petition.⁴³

11. Most recently, in the *AT&T Title II and Computer Inquiry Forbearance Order*, the Commission granted in part AT&T's requests for forbearance seeking relief comparable to the relief granted Verizon when its similar petition for forbearance was deemed granted by operation of law.⁴⁴ The Commission determined that the statutory criteria were met and granted forbearance from dominant carrier regulation of AT&T's existing packet-switched broadband telecommunications services and its existing optical transmission services.⁴⁵ The Commission also granted AT&T relief from 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 LEC, facilities-based wireline carriers.⁴⁶ In all other respects, AT&T's requests for forbearance were denied.⁴⁷

III. DISCUSSION

A. Introduction

12. Based on our analysis of marketplace conditions for the services at issue here, we grant petitioners forbearance from the application of our dominant carrier tariff filing, cost support, discontinuance, and domestic transfer of control rules, and certain *Computer Inquiry* requirements with regard to (1) their existing non-TDM-based, packet-switched services capable of transmitting 200 kbps or greater in each direction; and (2) their existing non-TDM-based, optical transmission services. These

⁴³ 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 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).

⁴⁴ *AT&T Title II and Computer Inquiry Forbearance Order*, FCC 07-180. We note that AT&T had withdrawn its request for forbearance from Title II dominant carrier regulation with respect to broadband services provided on an interstate interexchange basis that are subject to the relief the Commission granted in the *Section 272 Sunset Order*. See Letter from Robert W. Quinn, Jr., Senior Vice President - Federal Regulatory, 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); see also *AT&T Title II and Computer Inquiry Forbearance Order*, FCC 07-180, at para. 15; *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements et al.*, CC Docket No. 00-175, WC Docket Nos. 02-112, 06-120, Report and Order and Memorandum Opinion and Order, FCC 07-159 (rel. Aug. 31, 2007) (*Section 272 Sunset Order*) (allowing the BOCs to provide in-region, interstate, long distance services directly or through affiliates that are neither section 272 separate affiliates nor rule 64.1903 separate affiliates, subject to nondominant carrier regulation, as long as they comply with certain targeted safeguards as well as with other continuing statutory and regulatory obligations).

⁴⁵ *AT&T Title II and Computer Inquiry Forbearance Order*, FCC 07-180, at paras. 20-25.

⁴⁶ *Id.* at paras. 54-62.

⁴⁷ *Id.* at paras. 64-75. Specifically, the Commission declined to 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 did the Commission forbear, except with regard to certain *Computer Inquiry* rules, from any statutory or regulatory requirements that apply to AT&T in its capacity as an incumbent LEC, as a BOC, or to AT&T's affiliate, Southern New England Telephone Company, in its capacity as an independent incumbent LEC. Moreover, the Commission held that AT&T must continue to meet its public policy obligations under Title II and the Commission's implementing rules with respect to its existing packet-switched broadband telecommunications services and its existing optical transmission services.

services include Frame Relay Services, ATM Services, Local Area Network (LAN) Services, Ethernet-Based Services, Video Transmission Services, Optical Network Services, and Wave-Based Services. This grant is restricted to services that the petitioners currently offer and list in their petitions, and excludes all TDM-based, DS-1 and DS-3 services.

B. Scope of Petitions

13. We begin our analysis by identifying the specific relief Embarq and Frontier request in their petitions, including the services, statutory provisions and Commission regulations that Embarq and Frontier identify in their petitions.⁴⁸ As stated above, the petitioners seek relief comparable to that granted Verizon when its similar petition for forbearance was deemed granted.⁴⁹ Specifically, the petitioners request relief from Title II and *Computer Inquiry* requirements for the broadband services specified in their petitions as well as for any additional interstate broadband services they may choose to offer in the future.⁵⁰ The requested relief from Title II includes the ability to offer any of these specified services on a private carriage basis and free from the Commission's dominant carrier requirements.⁵¹ The petitioners also seek relief from the *Computer Inquiry* rules, including the requirement that they separate out and offer any underlying transmission components of the petitioner-specified services on a common carrier basis.⁵² The petitioners do not seek relief from the Commission's universal service requirements.⁵³

14. The services for which the petitioners seek 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.⁵⁴ Embarq and Frontier list in their petitions certain specific interstate broadband telecommunications services that they currently offer and for which they seek forbearance.⁵⁵ The

⁴⁸ 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*).

⁴⁹ Embarq Petition at 5; Frontier Petition at 2; see *supra* para. 10 (describing the "deemed grant" of Verizon's Title II and *Computer Inquiry* Forbearance Petition).

⁵⁰ See Embarq Petition at 1-2 (seeking relief for itself and similarly situated carriers); Frontier Petition at 2, 6-9 (same).

⁵¹ Embarq Petition at 1 (seeking relief from those Title II common carriage requirements that apply to incumbent LEC broadband transmission services); Frontier Petition at 8 (requesting relief from the mandatory application of Title II requirements).

⁵² See, e.g., Embarq Petition at 6-10 (seeking relief from the *Computer II Final Decision* and claiming that this Commission decision "recognizes the difference between Embarq and other small, rural [incumbent LECs] and the much larger RBOCs").

⁵³ Embarq Petition at 2 (stating that it is not seeking relief from its Title II obligations related to the Communications Assistance for Law Enforcement Act (CALEA) or universal service); Frontier Petition at 8.

⁵⁴ See Embarq Petition at 2, 5; Frontier Petition at 7-8.

⁵⁵ Embarq lists the following services: Frame Relay Service, ATM Service, Ethernet Service, Optipoint OC3-OC192, and SONET Optical Connection Ring OC3-OC192. Embarq Petition at Attachment A. Frontier lists the following services: Frame Relay Service, Asynchronous Transfer Mode (ATM) Service, Virtual Private Network Service, Remote Network Access Service, Ethernet-Based Service, Video Transmission Service, Optical Transport Service, Optical Networking Service, and Wave-Based Transport Service. Frontier Petition at Attachment A. (continued....)

petitioners also seek relief from Title II and *Computer Inquiry* regulation for any additional services they choose to offer in the future that fit within either of these two categories of services.⁵⁶

C. Application of the Statutory Forbearance Criteria

15. An integral part of the “pro-competitive, de-regulatory national policy framework”⁵⁷ established in the 1996 Act is the requirement, set forth in section 10 of the Communications Act, that the 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.⁵⁸ 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.⁵⁹ 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.”⁶⁰

(Continued from previous page) _____

Collectively, we refer to these services as the petitioner-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 Feb. 7, 2006 *Ex Parte* Letter, WC Docket No. 04-440, at 2-4, 6.

⁵⁶ See Frontier Petition at 8 n.20 (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”); Embarq Petition at 2 (noting that its specified services are a “sampling” of the broadband services that Embarq offers). In contrast, Verizon restricted its forbearance request to ten of its then-existing telecommunications services offerings. See Verizon Feb. 7, 2006 *Ex Parte* Letter, WC Docket No. 04-440, at Attach. 1, at 1 (providing “List of Broadband Services for Which Verizon Is Seeking Forbearance”).

⁵⁷ Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 113 (1996).

⁵⁸ 47 U.S.C. § 160(a).

⁵⁹ *Id.*

⁶⁰ 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)).

1. Dominant Carrier Regulation

a. Charges, Practices, Classifications, and Regulations

16. 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 the petitioners 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.”⁶¹ Our section 10(a)(1) analysis takes into account the effect of dominant carrier regulation on the petitioners’ rates and practices by considering the overall marketplace for the services for which relief is sought and the customers that use them.⁶² We conclude that, in light of the overall competitive alternatives available for the petitioner-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 the petitioners, but not their 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.

17. We begin our analysis by looking at the broadband services identified by the petitioners 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 public network to carry customized data applications.⁶³ 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.⁶⁴ 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.⁶⁵ Ethernet-based services provide high-speed, dedicated pathways for large applications, including engineering, medical imaging, and streaming video applications, and are often used are part of local area networks.⁶⁶

18. 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, Embarq’s and Frontier’s Optical Transport Services provide point-to-point connectivity using optical fiber, with customer interfaces operating at speeds ranging from OC-3 to

⁶¹ 47 U.S.C. § 160(a)(1).

⁶² *Section 271 Broadband Forbearance Order*, 19 FCC Rcd at 21505, para. 21.

⁶³ *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5697-98, para. 63 n.177 (2007) (*AT&T/BellSouth Order*); *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* Embarq Petition at Attachment A; Frontier Petition at Attachment A.

⁶⁴ *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).

⁶⁵ *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* Embarq Petition at Attachment A; Frontier Petition at Attachment A.

⁶⁶ *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* Embarq Petition at Attachment A; Frontier Petition at Attachment A.

OC-192.⁶⁷ Similarly, Frontier's Optical Networking Services provide optical transport within a closed ring architecture that enables automatic restoration upon link failure.⁶⁸ These services also provide for hubbing services, where individual optical transport links are multiplexed onto higher capacity optical links.⁶⁹ Moreover, Embarq's and Frontier's Ethernet services provide high-speed, point-to-point transmission using Ethernet protocol technology.⁷⁰ We find insufficient information to precisely define market boundaries for such services, and we thus focus our analysis on the services the petitioners identify in the record generally.

19. Consistent with our approach in the *AT&T Title II and Computer Inquiry Forbearance Order*, we find it appropriate, contrary to several parties' arguments,⁷¹ to consider marketplace conditions for these services broadly.⁷² In this regard, as we find below, competition for these enterprise 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 the petitioners excludes TDM-based, DS-1 and DS-3 special access services,⁷³ and that such special access services for other incumbent LECs likewise remain rate regulated, regardless of the specific geographic market.⁷⁴ 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

⁶⁷ See Embarq Petition at Attachment A; Frontier 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).

⁶⁸ See Frontier Petition at Attachment A.

⁶⁹ See *id.*

⁷⁰ See Embarq Petition at Attachment A; Frontier Petition at Attachment A.

⁷¹ See, e.g., Broadview Comments at 28 (claiming that the petitioners do not provide evidence for the Commission to determine the relevant geographic market and simply claim that there is a national market for broadband products); COMPTTEL Comments at 11.

⁷² *AT&T Title II and Computer Inquiry Forbearance Order*, FCC 07-180, at para. 20; see 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 Services Order*, the *Triennial Review Order*, the *Section 271 Broadband Forbearance Order*, and the *Cable Modem Declaratory Ruling*); Erratum, Letter from Dee May, Vice President, Federal Regulatory, Verizon, to Marlene H. Dortch, FCC, WC Docket Nos., 06-125, 06-147, 04-440, Erratum at 5-8 (filed Sept. 4, 2007) (Verizon Sept. 4, 2007 *Ex Parte* Erratum). 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).

⁷³ See Embarq Petition at 2 (stating that it uses broadband to exclude "DS1 and DS3 special access services and TDM services"); Frontier Petition at 7 (stating that it seeks the same relief granted to Verizon and that Verizon's forbearance relief excludes "TDM-based special access services").

⁷⁴ Moreover, as discussed below, concerns regarding existing regulation of TDM special access inputs are better addressed in the pending rulemaking context. See *infra* para. 26.

the larger trends that are shaping the marketplace.⁷⁵ 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.⁷⁶ 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.⁷⁷ 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.⁷⁸

20. Moreover, in the *AT&T Title II and Computer Inquiry* and *ACS Dominance Forbearance Orders*, 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.⁷⁹ Viewing the regulatory obligations from a broad perspective is consistent with the needs of the large and mid-sized enterprise customers that use

⁷⁵ *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, 2006 *Ex Parte* Letter, WC Docket No. 04-440, 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.

⁷⁶ *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14880-81, para. 50; *id.* at 14901-03, paras. 91-94.

⁷⁷ See *Section 271 Broadband Forbearance Order*, 19 FCC Rcd at 21496, para. 1 (granting forbearance relief for FTTH loops, FTTC 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).

⁷⁸ 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 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.

⁷⁹ *AT&T Title II and Computer Inquiry Forbearance Order*, FCC 07-180, at para. 21; *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 petitioner-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.

petitioners' broadband services to connect geographically dispersed locations.⁸⁰ 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.⁸¹ 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 UNEs from the incumbent LEC to meet these customers' needs.⁸²

21. 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 the petitioners' services.⁸³ There are a myriad of providers prepared to make competitive offers to enterprise customers demanding packet-switched data services located both within and outside any given incumbent LEC's service territory.⁸⁴ These competitors include the many competitive LECs, cable companies, systems integrators, equipment vendors, and value-added resellers providing services that compete against the petitioners.⁸⁵

22. As acknowledged in the *AT&T Title II and Computer Inquiry Forbearance Order*, we recognize that the record in this proceeding does not include detailed market share information for

⁸⁰ See *AT&T Title II and Computer Inquiry Forbearance Order*, FCC 07-180, at para. 21; see also *Time Warner Telecom v. FCC*, slip op. at 29 (concluding that Commission's "broad market analysis" of the broadband Internet access services market "was both reasonable and consistent with the approach upheld by the Supreme Court in *Brand X*").

⁸¹ Verizon Sept. 4, 2007 *Ex Parte* Erratum at 3.

⁸² The broadband services for which the petitioners are seeking relief are purchased predominantly by enterprise customers, not by their competitors as wholesale inputs. See *AT&T Title II and Computer Inquiry Forbearance Order*, FCC 07-180, at para. 21 n.90. Granting the requested relief, however, will not affect these competitors' ability to obtain traditional DS-1 and DS-3 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. *Id.*

⁸³ See *AT&T Title II and Computer Inquiry Forbearance Order*, FCC 07-180, at para. 22; *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, 2006 *Ex Parte* Letter, WC Docket No. 04-440, at 7-9.

⁸⁴ See *AT&T Title II and Computer Inquiry Forbearance Order*, FCC 07-180, at para. 22; *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.

⁸⁵ Competitors are rapidly deploying new Internet Protocol (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 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).

particular enterprise broadband services.⁸⁶ 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.⁸⁷ In particular, the record shows that there are many significant providers of Frame Relay services, ATM services, and Ethernet-based services.⁸⁸ 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.⁸⁹ 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. 05-25.⁹⁰

23. 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 petitioner-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.⁹¹ These users tend to make their

⁸⁶ See *AT&T Title II and Computer Inquiry Forbearance Order*, FCC 07-180, at para. 23.

⁸⁷ See, e.g., Verizon Sept. 4, 2007 *Ex Parte* Erratum, Verizon Feb. 7, 2006 *Ex Parte* Letter, WC Docket No. 04-440, 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, 2006 *Ex Parte* Letter, WC Docket No. 04-440, 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, 2006 *Ex Parte* Letter, WC Docket No. 04-440, 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.

⁸⁸ See Frontier Petition at 11 (arguing that Verizon demonstrated that "the ILEC is nothing more than a member of one group of suppliers that offer broadband services"); *AT&T Title II and Computer Inquiry Forbearance Order*, FCC 07-180, at para. 22; see also Broadview Comments at 11 (stating "it is of course true that the *retail* market for packetized and TDM-based special access services is competitive") (emphasis in original); Time Warner Telecom Comments at 10 (arguing that the petitioners are 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).

⁸⁹ See, e.g., *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, CC Docket No. 97-211, 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 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.

⁹⁰ *Special Access Rates for Price Cap Local Exchange Carriers Notice*, 20 FCC Rcd at n.43.

⁹¹ See, e.g., *AT&T Title II and Computer Inquiry Forbearance Order*, FCC 07-180, at para. 24; *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 (continued....)

decisions about communications services by using either communications consultants or employing in-house communications experts.⁹² 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.⁹³ 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.⁹⁴ 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.⁹⁵ Smaller enterprise customers, whose telecommunications requirements do not warrant the deployment of new facilities, tend to purchase less sophisticated services.

24. We further find that competitors can readily respond should the petitioners seek to impose unjust, unreasonable, or unjustly or unreasonably discriminatory rates, terms, or conditions for their 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 rely on special access services purchased from the incumbent LEC at rates subject to price regulation.⁹⁶ In this regard, we note that the relief we grant in this Order excludes TDM-based, DS-1 and DS-3 special access services.⁹⁷ 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 Embarq's and Frontier's incumbent LEC service areas.⁹⁸ 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

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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)).

⁹² See *AT&T Title II and Computer Inquiry Forbearance Order*, FCC 07-180, at para. 22; *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.

⁹³ See *AT&T Title II and Computer Inquiry Forbearance Order*, FCC 07-180, at para. 22; *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.

⁹⁴ *Triennial Review Order*, 18 FCC Rcd at 17063, para. 129.

⁹⁵ See, e.g., Frontier Petition at 4 (arguing that broadband purchasers are "large, sophisticated users who know that alternatives exist and are capable of demanding and receiving customized treatment"); Verizon Sept. 4, 2007 *Ex Parte* Erratum at 3.

⁹⁶ 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 Reply at 2 (stating that it relied on special access inputs from the incumbent LECs to provide mobile satellite services).

⁹⁷ Embarq and Frontier exclude traditional, TDM-based, DS-1 and DS-3 services from broadband transmission services. See *supra* n.5.

⁹⁸ See *infra* para. 31.

best-priced alternatives,” limiting the ability of a provider “to raise and maintain prices above competitive levels.”⁹⁹

25. 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.¹⁰⁰ 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.¹⁰¹ 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).¹⁰² We also are unpersuaded by Time Warner Telecom’s concern that reliance on TDM special access inputs gives rise to service or performance problems that hinder competition.¹⁰³ 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.¹⁰⁴ We also reject Time Warner Telecom’s argument that the fixed and variable mileage rates charged by certain incumbent LECs make it uneconomical for competing carriers to rely on TDM inputs, and that forbearance should be denied because these carriers therefore have monopoly power over such inputs.¹⁰⁵ Rather, consistent with the *AT&T Title II and Computer Inquiry Forbearance Order*, we believe 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.¹⁰⁶ 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.¹⁰⁷ Further, any transmission services typically are

⁹⁹ See *AT&T Title II and Computer Inquiry Forbearance Order*, FCC 07-180, at para. 25; *AT&T/BellSouth 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.

¹⁰⁰ Time Warner Telecom Comments at 16-20.

¹⁰¹ *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>.

¹⁰² 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 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 DS-1 or DS-3 special access circuits.”).

¹⁰³ See, e.g., Time Warner Telecom Comments at 18.

¹⁰⁴ See, e.g., Casto WC Docket No. 06-74 Reply Decl. at para. 22.

¹⁰⁵ Time Warner Telecom Comments at 18-19.

¹⁰⁶ See *AT&T Title II and Computer Inquiry Forbearance Order*, FCC 07-180, at para. 26.

¹⁰⁷ See Casto WC Docket No. 06-74 Reply Decl. at para. 22.

offered in fixed capacity increments, which may not be the precise capacities particular customers prefer.¹⁰⁸

26. 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.”¹⁰⁹ By addressing such issues in the context of a 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.¹¹⁰

27. Because our grant of forbearance excludes traditional TDM-based, DS-1, or DS-3 special access services, we reject certain commenters’ concerns regarding the potential impact of forbearance on rural access to the Internet backbone.¹¹¹ The record makes clear that rural carriers are largely using TDM-based DS-1 and DS-3 special access services to access the Internet backbone today,¹¹² 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.¹¹³ 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.

¹⁰⁸ For example, Time Warner Telecom notes that it would need to obtain two DS-3s to provide a 50 Mbps Ethernet loop because DS-3s 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.

¹⁰⁹ *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 *et al.*, 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 *et al.*, Memorandum Opinion and Order, 19 FCC Rcd 21522, 21592, para. 193 (2004).

¹¹⁰ See, e.g., Broadview Reply at 7-8; see also 47 C.F.R. §§ 1.401-1.407 (providing for petitions for rulemaking).

¹¹¹ 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); *c.f.* 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).

¹¹² NTCA Comments at 2 (stating many rural incumbent LECs connect to the Internet using TDM circuits).

¹¹³ *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.

28. 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. As we held in the *AT&T Title II and Computer Inquiry Forbearance Order*, we find tariffing and cost support requirements limit Embarq's and Frontier's 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.¹¹⁴ We also find 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 and that these requirements impose significant unnecessary transactions costs on petitioners' broadband business.¹¹⁵

29. 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 Services, Optical Network Services, and Wave-Based Services, as offered by the petitioners today, is not necessary to ensure that the petitioners' 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.¹¹⁶

30. For the same reasons, we find that continuing to subject the petitioners to dominant carrier regulation in regard to their 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 the petitioners charges, practices, or regulations in connection with these services are just, reasonable, and not unjustly or unreasonably discriminatory, so long as the petitioners are subject to the same treatment as the nondominant competitors that provide these services.¹¹⁷

31. We also find that the petitioners face sufficient competition in their provision of the specified optical transmission services because competing carriers are able to economically deploy OCn-level facilities to compete with the petitioners' offerings. Specifically, we find, consistent with the Commission's findings in the *AT&T Title II and Computer Inquiry Forbearance*, 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.¹¹⁸ We further find, consistent with this precedent, that OCn-level facilities

¹¹⁴ See *AT&T Title II and Computer Inquiry Forbearance Order*, FCC 07-180, at para. 29.

¹¹⁵ See *id.*

¹¹⁶ 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*).

¹¹⁷ See *Qwest Omaha Order*, 20 FCC Rcd at 19434-35, paras. 39, 42. As discussed in part III.C.3 & III.C.4, below, we agree with Time Warner Telecom's argument that the petitioners should remain subject to nondominant carrier regulation in their provision of these services. See Time Warner Telecom Comments at 26-28.

¹¹⁸ *AT&T Title II and Computer Inquiry Forbearance Order*, FCC 07-180, at para. 32; *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. 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 (continued....))

produce revenue levels that can justify the high cost of loop construction.¹¹⁹ 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.¹²⁰ Evidence in the record here likewise is consistent with those conclusions.¹²¹ Thus, we find it no longer appropriate to subject the petitioners to dominant carrier regulation for these non-TDM-based, optical services.¹²²

32. Given the costs associated with dominant carrier regulation, we find that customers would benefit by our granting the petitioners relief from that regulation as it applies to the packet-switched and optical transmission services for which they seek 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.¹²³ We find that continuing to apply dominant carrier regulation to the petitioner-specified broadband services would have each of these effects. Specifically, tariffing these services reduces the petitioners' ability to respond in a timely manner to their customers' demands for innovative service arrangements tailored to each customer's individualized needs.¹²⁴ In addition, by mandating that the petitioners provide advance notice of changes in their prices, terms, and conditions of service for these services, tariffing allows the petitioners' 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.¹²⁵ Moreover, relief from advance notice requirements and cost-based pricing requirements would enable Embarq and Frontier to respond quickly and creatively to competing service offers.¹²⁶ We find that tariff regulation simply is not necessary to ensure that the rates, terms, and conditions for the petitioner-specified broadband services are just and reasonable and not unjustly or unreasonably discriminatory. The better policy for consumers is to allow the petitioners to respond to technological and market developments without the Commission's reviewing in advance the rates, and terms, and conditions under which the petitioners offer these services.¹²⁷

33. We disagree with the parties that argue Embarq already has sufficient relief, through our pricing flexibility regime, to meet its customers' needs and compete effectively.¹²⁸ Although Embarq has

(Continued from previous page) _____
section 251(c), as opposed to the section 10 forbearance analysis of the current proceeding); *see also* Broadview Reply at 10 n.30.

¹¹⁹ *Triennial Review Order*, 18 FCC Rcd at 17169, para. 316.

¹²⁰ *Id.*; *AT&T Title II and Computer Inquiry Forbearance Order*, FCC 07-180, at para. 32.

¹²¹ *See AT&T Title II and Computer Inquiry Forbearance Order*, FCC 07-180, at para. 32.

¹²² Embarq and Frontier have not asked for, nor are we granting, forbearance for the traditional, TDM-based, DS-1 and DS-3 special access services that the Commission has previously found that competitors rely on to serve enterprise customers. *See* Embarq Petition at 2; Frontier Petition at 7.

¹²³ *See, e.g., AT&T Reclassification Order*, 11 FCC Rcd at 3288, para. 27.

¹²⁴ *AT&T Title II and Computer Inquiry Forbearance Order*, FCC 07-180, at para. 33; *see also Interexchange Forbearance Order*, 11 FCC Rcd at 20760-61, para. 53.

¹²⁵ *See AT&T Title II and Computer Inquiry Forbearance Order*, FCC 07-180, at para. 33.

¹²⁶ *See id.*

¹²⁷ *See SBC Advanced Services Forbearance Order*, 17 FCC Rcd at 27012-13, para. 22.

¹²⁸ Broadview Reply at 12.

obtained pricing flexibility relief for certain interstate access services,¹²⁹ that relief is both limited in scope and limited to certain geographic areas.¹³⁰ As the Commission has stated before in reducing regulatory requirements where competition is present, there comes a point at which constraints become counter-productive, especially in terms of carriers' ability to respond to customer needs.¹³¹ This is particularly true for the broadband services for which petitioners seek relief because, unlike many of their competitors, the petitioners are limited in their 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.¹³²

34. We find that eliminating these requirements would make the petitioners more effective competitors for these services, which in turn we anticipate will increase even further the amount of competition in the marketplace,¹³³ 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 petitioner-specified services will permit customers to take advantage of a more market-based environment for these highly specialized services and allow the petitioners 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. The petitioners will continue to be subject to sections 201 and 202 of the Act in their provision of their specified broadband services, which, among other things, mandate that the petitioners provide interstate telecommunications services upon reasonable request and prohibit them from acting in an unjust or unreasonable manner or otherwise favoring particular entities in the provision of "like" services provided to other entities.¹³⁴

35. By virtue of the relief granted, Embarq and Frontier 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.¹³⁵

36. We also find that continued application of our dominant carrier discontinuance rules to the petitioner-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 the petitioners are subject to the same treatment as nondominant carriers in

¹²⁹ See, e.g., *Sprint Local Telephone Companies Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, WCB/Pricing File No. 05-35, 21 FCC Rcd 3412 (WCB 2006). Frontier has no pricing flexibility.

¹³⁰ 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.

¹³¹ See, e.g., *Pricing Flexibility Order*, 14 FCC Rcd at 14232-33, para. 17.

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

¹³³ See *supra* paras. 29-33.

¹³⁴ 47 U.S.C. §§ 201-02.

¹³⁵ 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."

relation to these services.¹³⁶ We conclude that subjecting the petitioners 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 the petitioners' practices in connection with these services, we predicate this finding upon the petitioners' compliance with the discontinuance rules that apply to nondominant carriers in the event they seek to discontinue, reduce, or impair any of the non-TDM-based, packet-switched broadband services and non-TDM-based, optical transmission services for which we grant relief.¹³⁷ Similarly, we forbear from applying our domestic streamlined transfer of control rules to the petitioners as a dominant carrier of these services, conditioned upon treatment of the petitioners as nondominant carriers for these services.¹³⁸

37. Consistent with our recent *AT&T Title II and Computer Inquiry Forbearance Order*,¹³⁹ 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 Embarq and Frontier in the event we grant them forbearance relief in this proceeding.¹⁴⁰ That rule imposes structural separation requirements on independent incumbent LECs in their provision of interstate, interexchange services.¹⁴¹ In the *Section 272 Sunset Order*, we rejected a similar argument from the New Jersey 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.¹⁴² 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.¹⁴³ Consistent with that order, we find here that, as applied to Embarq's and Frontier's existing specified broadband services, the section 64.1903 requirements would impose significant costs. Indeed, they would require Embarq and Frontier to restructure their in-region broadband telecommunications operations at great expense and in a less efficient manner.¹⁴⁴ We find that these costs far exceed any potential benefits and therefore decline to impose the section 63.1903 requirements on the petitioners in their provision of their existing specified broadband services. Those requirements, however, will continue to apply to Embarq's and Frontier's provision of interstate, interexchange services pending Commission action on any Embarq or Frontier petition seeking relief from those requirements.¹⁴⁵

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

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

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

¹³⁹ *AT&T Title II and Computer Inquiry Forbearance Order*, FCC 07-180, at para. 38.

¹⁴⁰ New Jersey Rate Counsel Comments at 8 (arguing that application of these requirements is necessary to deter the independent incumbent LECs from engaging in discriminatory behavior).

¹⁴¹ 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 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).

¹⁴² *Section 272 Sunset Order*, FCC 07-159, at para. 85.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at paras. 85-86 (discussing the costs and burdens of section 63.1903 structural separation requirements).

¹⁴⁵ *Id.* at para 126.

38. Further, while we do grant forbearance from dominant carrier regulation for the petitioner-specified services, we do not grant forbearance from Title II as a whole, but instead ensure that the petitioners remain subject to the same regulatory obligations applicable to nondominant carriers.¹⁴⁶ As the Commission concluded in the *Qwest Section 272 Sunset Forbearance* and the *ACS Dominance Forbearance Orders*, “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.”¹⁴⁷ We find that, to the extent dominant carrier regulation of the petitioner-specified broadband services addresses any exclusionary market power the petitioners may have in relation to those services, the burdens imposed by that regulation exceed its benefits.¹⁴⁸

39. Our forbearance grant is restricted to broadband services that the petitioners currently offer and list in their 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.¹⁴⁹ 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).¹⁵⁰

40. Similarly, we decline to extend the forbearance relief granted in this Order to carriers other than Embarq and Frontier.¹⁵¹ For similar reasons to those noted above, we find it appropriate to limit forbearance to these petitioners. Just as we do not know the precise nature and competitive conditions associated with other possible services that the petitioners may 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 the petitioners, without prejudice to the ability of other

¹⁴⁶ See *infra* parts III.C.3 & III.C.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. 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).

¹⁴⁷ *ACS Dominance Forbearance Order*, FCC 07-149, at para. 111; *Qwest Section 272 Sunset Forbearance Order*, 22 FCC Rcd at 5233, para. 52.

¹⁴⁸ *ACS Dominance Forbearance Order*, FCC 07-149, at para. 111; *Qwest Section 272 Sunset Forbearance Order*, 22 FCC Rcd at 5233, para. 52.

¹⁴⁹ Cf. 47 U.S.C. § 160(a) (directing the Commission to forbear with respect to a particular service or class of services).

¹⁵⁰ *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).

¹⁵¹ See Embarq Petition at 1-2 (seeking relief for itself and similarly situated carriers); Frontier Petition at 2, 6-9; see also Cincinnati Bell Comments at 2 (supporting forbearance relief for all incumbent LECs); Hawaiian Telcom Reply at 1-2 (same).

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.¹⁵² We also agree with NTCA that certain carriers may not want to offer their broadband telecommunications free of dominant 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.¹⁵³ Accordingly, the forbearance relief granted in this Order is limited to the petitioners and the services they specified.

41. To ensure that customers will have the benefit of a single regime for the petitioners' packet-switched and optical transmission broadband offerings, we condition the forbearance relief granted to the petitioners on their not filing or maintaining any interstate tariffs for their specified broadband services. Thus, to the extent the petitioners wish to take advantage of the relief granted in this Order for any particular service specified in their petitions, they 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 the petitioners from tariffing their packet-switched broadband services and their optical transmission services while taking advantage of that relief is necessary to protect consumers and the public interest because in such circumstances will limit the petitioners' ability to invoke the filed rate doctrine in contractual disputes with their customers.¹⁵⁴ Precluding such tariffs also will restrict the petitioners' ability to assert "deemed lawful" status for tariff filings that are not accompanied by cost support.¹⁵⁵ 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.¹⁵⁶ 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.¹⁵⁷ 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 Embarq and Frontier, which, unlike ACS, are not subject to rate-of-return regulation in the provision of any interstate access services, and are not subject to many

¹⁵² 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 to extend our forbearance grant to carriers other than the petitioners, we need not address this argument.

¹⁵³ NTCA Reply at 5.

¹⁵⁴ See *Interexchange Forbearance Order*, 11 FCC Rcd at 20760, para. 52 (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).

¹⁵⁵ See 47 U.S.C. § 204(a)(3).

¹⁵⁶ *ACS Dominance Forbearance Order*, FCC 07-149, at paras. 61, 89.

¹⁵⁷ See *ACS Dominance Forbearance Order*, FCC 07-149, at paras. 4, 89.

of the conditions adopted in the *ACS Dominance Forbearance Order*. Consistent with the *AT&T Title II and Computer Inquiry Forbearance Order*, we find that these consumer protection and public interest benefits provide independent reasons for conditioning the petitioners' ability to take advantage of the relief granted here on mandatory detariffing of the broadband transmission services for which we grant relief.¹⁵⁸

b. Protection of Consumers

42. Section 10(a)(2) of the Act requires us to determine whether dominant carrier regulation of the petitioner-specified services is necessary to protect consumers.¹⁵⁹ 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 the petitioners' existing specified services is not necessary for the protection of consumers. As we found above, the petitioners face sufficient pressure from actual and potential competition to protect consumers, which gives the petitioners 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,¹⁶⁰ 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.

43. Conversely, we find that restricting our forbearance grant to the petitioners and the existing services as specified in their petitions is appropriate under section 10(a)(2). These carriers have not provided sufficient information regarding any broadband services, other than those specifically identified in their respective petitions, to allow us to reach a forbearance determination under section 10(a).¹⁶¹ We cannot make a finding on the record before us that these petitioners will face sufficient competitive pressure with regard to services they do not currently offer,¹⁶² or that dominant carrier regulation of these as yet unoffered services otherwise will not be necessary to protect consumers. In addition, as explained above,¹⁶³ 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

44. Section 10(a)(3) of the Act requires us to determine whether forbearance from dominant carrier regulation for the petitioners' non-TDM-based, packet-switched broadband services and their non-TDM-based, optical transmission services is consistent with the public interest.¹⁶⁴ 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

¹⁵⁸ *AT&T Title II and Computer Inquiry Forbearance Order*, FCC 07-180, at para. 42.

¹⁵⁹ 47 U.S.C. § 160(a)(2).

¹⁶⁰ See *infra* part III.C.4.

¹⁶¹ *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).

¹⁶² See *supra* para. 39.

¹⁶³ See *supra* para. 40.

¹⁶⁴ 47 U.S.C. § 160(a)(3).

forbearance will promote competition among providers of telecommunications services, that determination may be a basis for finding that forbearance is in the public interest.¹⁶⁵

45. We agree with Embarq and Frontier that a deregulatory approach for their provision of non-TDM-based, packet-switched broadband services and non-TDM-based, optical transmission services will serve the public interest by eliminating the market distortions that asymmetrical regulation of these services causes.¹⁶⁶ In particular, the record in this proceeding shows that dominant carrier regulation impedes the petitioners' efforts to compete effectively with nondominant providers of these services.¹⁶⁷ The record also makes clear that such regulation keeps the petitioners from responding efficiently and in a timely manner to market-based pricing promotions, including volume and term discounts, or special arrangements offered by competitors.¹⁶⁸ In particular, the petitioners have shown that dominant carrier regulation of their specified services makes it unnecessarily difficult for them to negotiate nationwide arrangements tailored to the needs of large enterprise customers with geographically dispersed locations, because their tariff filings necessarily provide competitors with notice of their pricing strategies and competitive innovations.¹⁶⁹

46. Forbearance from the application of dominant carrier regulation to the petitioners' 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.¹⁷⁰ 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."¹⁷¹ 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."¹⁷² In addition, for the reasons described above, we conclude that granting the petitioners this relief will help promote competitive market conditions and enhance competition among providers of

¹⁶⁵ 47 U.S.C. § 160(b).

¹⁶⁶ See, e.g., Frontier Petition at 13 (claiming the outdated regulatory regime for broadband services "perpetuates a fragmented marketplace and inhibits the [incumbent LECs] from competing effectively with deregulated broadband service providers").

¹⁶⁷ See *id.* at 5 (claiming that the current Title II and *Computer Inquiry* requirements deny Frontier and similarly situated carriers the flexibility that their competitors enjoy in the broadband market). In addition, as the Commission observed in the *AT&T Title II and Computer Inquiry Forbearance Order*, "[w]e seek to avoid persistent regulatory disparities between similarly situated competitors, and seek to minimize the time in which they are treated differently." *AT&T Title II and Computer Inquiry Forbearance Order*, FCC 07-180, at para. 50.

¹⁶⁸ See, e.g., Frontier Petition at 13. While we note that Embarq 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* para. 33.

¹⁶⁹ See *AT&T Title II and Computer Inquiry Forbearance Order*, FCC 07-180, at para. 46.

¹⁷⁰ 47 U.S.C. § 157 nt; see Embarq Petition at 13-14; Frontier Petition at 14. The Commission has concluded that section 706 is not an independent grant of forbearance authority. *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 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.

¹⁷¹ 1996 Act Preamble, 110 Stat. at 56; 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.

¹⁷² 47 U.S.C. § 157(a).

telecommunications services as contemplated by section 10(b). By allowing the petitioners to compete more effectively in the provision of the broadband transmission services that they currently offer, forbearance from dominant carrier regulation of these services will enhance competition among providers in a manner consistent with the public interest.¹⁷³

47. Our finding that public interest benefits will accrue from allowing the petitioners 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."¹⁷⁴

48. We disagree with the commenters that urge that forbearing from the application of dominant carrier regulation to the petitioners' existing, non-TDM-based, packet-switched broadband services and existing, non-TDM-based, optical transmission services would be inconsistent with the public interest.¹⁷⁵ Forbearing from application of dominant carrier regulation will increase competition by freeing the petitioners 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.¹⁷⁶ By regulating the petitioners on the same terms as their 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.

49. Consistent with our determinations under sections 10(a)(1) and 10(a)(2),¹⁷⁷ we find that extending our forbearance from dominant carrier regulation to services that the petitioners do not currently offer would be contrary to the public interest. Specifically, because the record before us is insufficient to support a finding that the petitioners 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

¹⁷³ We recognize, of course, that theoretically forbearance from dominant carrier regulation for broadband telecommunications services other than those the petitioners currently offer or for incumbent LECs other than the petitioners also may advance purposes behind sections 7(a) and 706. In the event that the petitioners 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.

¹⁷⁴ *Availability of Advanced Telecommunications Capability in the United States*, GN Docket No. 04-54, Fourth Report to Congress, 19 FCC Rcd 20540 (2004).

¹⁷⁵ See, e.g., Broadview Comments at 34-35; EarthLink Comments at 20-21, COMPTTEL Comments at 19-21; Sprint Nextel at 16-19.

¹⁷⁶ *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14878, para. 45.

¹⁷⁷ See *supra* parts III.C.1.a & III.C.1.b.

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

50. As part of their requests for relief similar to that granted Verizon by operation of law, the petitioners seek forbearance from application of the *Computer Inquiry* requirements to their specified broadband services.¹⁷⁸

51. The *Computer Inquiry* rules require that the petitioners (a) offer as telecommunications services the basic transmission services underlying their enhanced services; (b) offer those telecommunications services on a nondiscriminatory basis to all enhanced service providers, including their own enhanced services operations;¹⁷⁹ and (c) offer those telecommunications services pursuant to tariff.¹⁸⁰ 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, the petitioners will be subject to the same *Computer Inquiry* requirements as their facilities-based, wireline competitors.

52. 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 the petitioners' rates and practices are just, reasonable, and not unjustly or unreasonably discriminatory and to protect consumers absent the *Computer Inquiry* requirements.

53. 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.¹⁸¹ 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 the petitioners vis-à-vis their facilities-based competitors offering information services.

54. In contrast, the reasons that persuade us to forbear from dominant carrier regulation generally with regard to the petitioners' existing specified broadband services also persuade us to forbear from the *Computer Inquiry* tariffing requirement to the extent the petitioners provide information services in

¹⁷⁸ 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 the petitioners choose to offer on a common carrier basis today, and thus remain subject to the same Title II regulation applicable to nondominant carriers.

¹⁷⁹ *Computer II Final Decision*, 77 FCC 2d at 474-75, para. 231; see *CCIA v. FCC*, 693 F.2d at 205.

¹⁸⁰ *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*).

¹⁸¹ *Computer II Final Decision*, 77 FCC 2d at 474-75, para. 231.

conjunction with those broadband services.¹⁸² Therefore, like their non-incumbent LEC competitors, the petitioners will be free to offer any information service that incorporates one of more of their existing specified broadband services without, by virtue of such offering, being required to tariff that underlying telecommunications component of those services.¹⁸³

55. Our forbearance from the *Computer Inquiry* requirements does not extend to the petitioners' information services to the extent they incorporate telecommunications components other than their existing specified broadband services. As with our analysis of dominant carrier regulation of their broadband services,¹⁸⁴ 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 the petitioners 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

56. As part of their requests for similar relief to that granted to Verizon by operation of law, Embarq and Frontier seek forbearance from any economic regulation that would apply to them, under Title II and the Commission's implementing rules, in connection with their existing and future broadband services.¹⁸⁵ We first address this regulation as it applies to petitioners as common carriers or LECs. We then turn to this regulation as it applies to petitioners as incumbent LECs and independent incumbent LECs.

a. Regulation Applied to Common Carriers or LECs

57. 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.¹⁸⁶ For example, section 201 of the Act mandates that all carriers engaged in the provision of interstate or foreign communication service provide such service upon

¹⁸² See *supra* part III.C.1.

¹⁸³ As a practical matter, however, we note that the existing specified broadband services all appear to be transmission services that the petitioners choose to offer on a common carrier basis today, and thus remain subject to the same Title II regulation applicable to nondominant carriers.

¹⁸⁴ See *supra* part III.C.1.

¹⁸⁵ See, e.g., Embarq Petition at 1 (seeking relief from those Title II common carriage requirements that apply to incumbent LEC broadband transmission services); Frontier Petition at 8 (requesting relief from the mandatory application of Title II requirements). In this part and in part III.C.4, *infra*, we use the terms "economic regulation" and "public policy regulation" as convenient shorthand to ensure that we address the full breadth of the petitioners' 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*.

¹⁸⁶ 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.

reasonable request, and that all charges, practices, classifications, and regulations for such service be just and reasonable.¹⁸⁷ Section 202 of the Act makes it unlawful for any common carrier to make any unjust 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.¹⁸⁸ 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.”¹⁸⁹ 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,¹⁹⁰ the duty to implement number portability,¹⁹¹ 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.¹⁹²

58. 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.¹⁹³ 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.¹⁹⁴ The Commission’s discontinuance rules for nondominant carriers require such carriers to file applications with the Commission and provide notice to the affected customers.¹⁹⁵ These applications are automatically granted on the 31st day unless the Commission notifies the applicant otherwise.¹⁹⁶ 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.¹⁹⁷

59. 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, the petitioners ask us to go beyond the relief the

¹⁸⁷ 47 U.S.C. § 201.

¹⁸⁸ 47 U.S.C. § 202.

¹⁸⁹ 47 U.S.C. § 251(a)(1).

¹⁹⁰ *E.g.*, 47 U.S.C. § 251(b)(1).

¹⁹¹ 47 U.S.C. § 251(b)(2).

¹⁹² *E.g.*, 47 U.S.C. §§ 224, 251(b)(4).

¹⁹³ *See supra* para. 3.

¹⁹⁴ 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.

¹⁹⁵ 47 C.F.R. § 63.71(c).

¹⁹⁶ *Id.*

¹⁹⁷ *See* 47 C.F.R. §§ 61.18 *et seq.*

Commission has granted any competitive LEC or nondominant interexchange carrier and allow them to offer certain broadband telecommunications services free of Title II regulation, thus creating a disparity in regulatory treatment between the petitioners and their competitors.¹⁹⁸ We find, based on the record before us, that granting the petitioners 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.¹⁹⁹ 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 the petitioners of tariffing obligations in relation to their specified broadband services will not result in unjust, unreasonable, or unreasonably discriminatory rates, terms, and conditions in connection with those services.²⁰⁰ 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 petitioner-specified broadband services] are just and reasonable and are not unjustly or unreasonably discriminatory” within the meaning of section 10(a)(1).²⁰¹

60. The petitioners also have not shown how continued enforcement of these economic regulation requirements in connection with their 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).²⁰² 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.²⁰³ 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 the petitioners, but not their 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 power.²⁰⁴ Granting the petitioners, but not their competitors, forbearance from these

¹⁹⁸ See, e.g., Frontier Petition at 6 (arguing that Frontier should 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).

¹⁹⁹ Cf. Time Warner Telecom Comments at 26 (contending that the petitioners have provided no basis for relief from Title II regulation that applies to both dominant and nondominant carriers).

²⁰⁰ 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.

²⁰¹ 47 U.S.C. § 160(a)(1).

²⁰² 47 U.S.C. § 160(a)(2), (a)(3).

²⁰³ *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).

²⁰⁴ See, e.g., *Interexchange Forbearance Order*, 11 FCC Rcd at 20776-77, paras. 84-85.

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).²⁰⁵ Accordingly, we deny the petitioners' forbearance requests to the extent they seek forbearance from Title II economic obligations, including those discussed above, that apply generally to telecommunications carriers or LECs.

b. Regulation Applied to Incumbent LECs

61. Title II and the Commission's implementing rules also impose regulation on the petitioners in their capacity as independent incumbent LECs. For example, section 251(c) of the Act imposes interconnection, unbundling, and resale obligations on the petitioners as incumbent LECs.²⁰⁶

62. We conclude that the record before us does not show that forbearance from these and other economic regulations that apply generally to incumbent LECs 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 petitioner-specified broadband services] are just and reasonable and are not unjustly or unreasonably discriminatory" within the meaning of section 10(a)(1).²⁰⁷ Nor does the record suggest how continued enforcement of these requirements in connection with the petitioner-specified broadband services is not necessary for the protection of consumers or inconsistent with the public interest. We therefore deny Embarq's and Frontier's forbearance requests to the extent they seek forbearance from Title II economic obligations, including those discussed above, that apply generally to incumbent LECs.

4. Public Policy Regulation

63. As part of their requests for similar relief to that granted to Verizon by operation of law, the petitioners seek forbearance from any public policy regulation that would apply to them, under Title II and the Commission's implementing rules, in connection with their existing and future broadband services offerings.²⁰⁸ We now turn to these requests.

64. 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 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."²⁰⁹ Section 254(d) of the Act states that "[e]very telecommunications carrier that provides

²⁰⁵ 47 U.S.C. § 160(a)(2).

²⁰⁶ See COMPTTEL Comments, Attach. at 17 (arguing that the section 251 requirements are necessary to ensure that "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").

²⁰⁷ 47 U.S.C. § 160(a)(1).

²⁰⁸ See Frontier Petition at 8 (seeking relief from application of Title II regulations excluding its obligations to make universal service contributions); Embarq Petition at 2 (seeking relief from Title II obligations except with respect to universal service and CALEA).

²⁰⁹ 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*, (continued....)

interstate telecommunications services shall contribute” to universal service.²¹⁰ 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.²¹¹

65. 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.²¹² 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 255.²¹³ With regard to customer privacy, certain provisions in section 222 of the Act restrict telecommunications carriers’ use and disclosure of CPNI.²¹⁴ 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.²¹⁵ 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.²¹⁶ We note that the petitioners’ obligations under the Communications Assistance for Law Enforcement Act (CALEA) are governed by the CALEA statute,²¹⁷ and the petitioners remain obligated to comply with those statutory requirements.

66. We find that Embarq and Frontier have 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 criteria.²¹⁸ Indeed, with regard to universal service, the petitioners disavow any intent to seek

(Continued from previous page) _____

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*).

²¹⁰ 47 U.S.C. § 254(d).

²¹¹ See generally 47 U.S.C. § 254.

²¹² 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*).

²¹³ 47 U.S.C. §§ 251(a)(2), 255.

²¹⁴ 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).

²¹⁵ See generally 47 U.S.C. § 222.

²¹⁶ 47 U.S.C. § 222(d)(4), (g).

²¹⁷ 47 U.S.C. § 229; see also Communications Assistance for Law Enforcement Act, Pub. L. No. 103-414, 108 Stat. 4279 (1994) (codified as amended in sections of 18 U.S.C. and 47 U.S.C.).

²¹⁸ See, e.g., AdHoc Reply at i-ii (pointing out that the petitioners have 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).

relief from universal service contribution obligations.²¹⁹ We believe that by excluding this relief from their forbearance requests, the petitioners recognized that the public interest requires them to maintain their universal service support obligations. Nevertheless, we include those obligations in our forbearance analysis to ensure that there is no ambiguity with regard to the petitioners' continuing duty to include revenues from each of their specified broadband services in their federal universal service contribution calculations.

67. 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 petitioner-specified services] are just and reasonable and are not unjustly or unreasonably discriminatory" within the meaning of section 10(a)(1) of the Act,²²⁰ or is not necessary for the protection of consumers within the meaning of section 10(a)(2) of the Act.²²¹ On the contrary, we believe that consumers will continue to receive essential protections from the continued application of these requirements in connection with the petitioner-specified services.

IV. EFFECTIVE DATES

68. Consistent with section 10 of the Act and our rules, the Commission's forbearance decisions with regard to Embarq Local Operating Companies and the Frontier and Citizens Incumbent Local Exchange Telephone Carriers shall be effective on October 24, 2007.²²² The time for appeal shall run from the release date of the Order.²²³

V. ORDERING CLAUSES

69. 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 Embarq Local Operating Companies and the Frontier and Citizens Incumbent Local Exchange Telephone Carriers, ARE GRANTED to the extent described herein and otherwise ARE DENIED.

70. 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 Embarq Local Operating Companies and

²¹⁹ Frontier Petition at 8; Embarq Petition at 2. *See generally* 47 U.S.C. § 254.

²²⁰ 47 U.S.C. § 160(a)(1).

²²¹ 47 U.S.C. § 160(a)(2).

²²² *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).

²²³ *See* 47 C.F.R. §§ 1.4, 1.13.

the Frontier and Citizens Incumbent Local Exchange Telephone Carriers on October 24, 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. 06-147

Petition	Abbreviation
Embarq Local Operating Companies	Embarq
The Frontier and Citizens Communications Incumbent Local Exchange Telephone Carriers	Frontier

COMMENTERS

Comments	Abbreviation
ACS of 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
Embarq Local Operating Companies	Embarq
Iowa Telecommunications Services, Inc.	Iowa Telecom
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

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
California Public Utilities Commission	California Commission
COMPTEL	COMPTEL
Embarq Local Operating Companies	Embarq
The Frontier and Citizens Communications Incumbent Local Exchange Telephone Carriers	Frontier
General Communications, Inc.	GCI
Hawaiian Telcom, Inc.	Hawaiian Telcom
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 the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements; 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

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 Embarq's and Citizens and Frontier's petitions for regulatory relief of their broadband infrastructure and fiber capabilities. This relief will enable Embarq, Citizens and Frontier to have the flexibility to further deploy their broadband services and fiber facilities without overly burdensome regulations.

The relief afforded to Embarq, Citizens and Frontier 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 Embarq, Citizens and Frontier relief from the continued application of legacy regulations.

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

Re: *In the Matters of Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements; 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; Memorandum Opinion and Order (October 24, 2007)*

This Order addresses two more in the queue of far-reaching forbearance requests for exemption from Title II and *Computer Inquiry* obligations for self-styled “broadband enterprise services.” Much as we found the evidence to support forbearance in the previous cases altogether underwhelming,¹ we also find that this Order fails to meet the standards set out by Congress in Section 10 of the Act.

The Commission’s unwillingness to engage in a serious examination of the facts is particularly disappointing here, because it appears that these petitioners may be able to present a distinctly different portrait of competitive conditions in their markets. In this case, the Commission’s failure to insist that parties be explicit in their requests or detailed in the data they provide has certainly not helped the petitioners make their case. Moreover, this Order makes no attempt to grapple with the limited local market data filed in this proceeding.

As we have said before, these kinds of decisions are too important to be made without the in-depth market analysis that might support them. We also are mindful of ongoing Congressional concerns with policymaking on forbearance petitions based upon inadequate analysis and data. The lack of data concerning the specific product and geographic markets at issue and this Order’s lack of analysis continues to cause us great concern with both the substance and the process of granting these and similar forbearance petitions.

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

¹ See *Joint Statement of Commissioners Michael J. Copps and Jonathan S. Adelstein, 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).*