

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Special Access for Price Cap Local Exchange Carriers)	WC Docket No. 05-25
)	
AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services)	RM-10593
)	

**COMMENTS OF THE
INDEPENDENT TELEPHONE & TELECOMMUNICATIONS ALLIANCE**

The Independent Telephone & Telecommunications Alliance (“ITTA”) hereby submits its comments in response to the February 15, 2013 Public Notice issued by the Federal Communications Commission (“FCC” or “Commission”) in the above-captioned proceedings.¹ The Public Notice seeks input on a joint petition (“the CLEC Petition”) filed by the Ad Hoc Telecommunications Users Committee and others (the “Petitioners”) pursuant to Section 10 of the Communications Act² and other provisions asking that the Commission reverse forbearance from dominant carrier regulation and certain *Computer Inquiry* requirements granted to Verizon, AT&T, legacy Embarq, Frontier, and legacy Qwest in their provision of non-TDM-based special access services.³

¹ “Wireline Competition Bureau Seeks Comment on Petition to Reverse Forbearance From Dominant Carrier Regulations of Incumbent LECs’ Non-TDM-Based Special Access Services,” Public Notice, WC Docket No. 05-25, RM-10593, DA 13-232 (rel. Feb. 15, 2013) (“Public Notice”).

² See 47 U.S.C. § 160.

³ Petition of Ad Hoc Telecommunications Users Committee, BT Americas, CBeyond, Computer & Communications Industry Association, Earthlink, Megapath, Sprint Nextel, and tw telecom to Reverse Forbearance from Dominant Carrier Regulation of Incumbent LECs’ Non-TDM-Based

The CLEC Petition is procedurally improper and an inappropriate attempt to invoke the forbearance process in hopes of a ruling that the Petitioners previously unsuccessfully sought both at the FCC⁴ and before the D.C. Circuit Court of Appeals.⁵ As they did in those proceedings, the Petitioners argue that the decision to grant forbearance from dominant carrier pricing regulation with respect to the special access services of AT&T, legacy Embarq, Frontier, legacy Qwest, and Verizon (which was deemed granted by operation of law) cannot be justified absent a comprehensive examination of competition in the special access marketplace. And, consistent with their advocacy in those proceedings, the Petitioners call on the Commission to “reverse” forbearance “to the extent necessary to classify incumbent LECs as dominant in the provision of non-TDM-based special access services,” and “then establish pricing regulations (to be implemented via tariffs) and service quality regulations” for such services.⁶

The Commission lacks authority to grant the CLEC Petition. Section 10 specifies the conditions under which the Commission “shall forbear” from a regulation or statutory requirement, but that provision does not give the Commission authority to “reverse” forbearance. By its plain language, Section 10 explicitly directs the Commission to *negate* statutory

Special Access Services, WC Docket No. 05-25, RM-10593 (filed Nov. 2, 2012) (“CLEC Petition”).

⁴ See, e.g., *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*, Memorandum Opinion and Order, 22 FCC Rcd 18705 (2007); *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, et al.*, Memorandum Opinion and Order, 22 FCC Rcd 19478 (2007); *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, Memorandum Opinion and Order, 23 FCC Rcd 12260 (2008).

⁵ *Ad Hoc Telecomms. Users Committee, et al. v. FCC*, 572 F.3d 903 (D.C. Cir. 2009) (disagreeing with the CLECs’ arguments that the FCC must continue to impose dominant carrier pricing regulation on ILECs and denying the petitions for review).

⁶ CLEC Petition at 8.

provisions insofar as they have outlived their usefulness in providing that the Commission “shall forbear” from application of regulatory or statutory requirements if it determines that the three-part test in Section 10 is satisfied.⁷ Indeed, the statute favors a deregulatory outcome by imposing a strict deadline for Commission action on a forbearance petition and by providing that, if the deadline is missed, the requested forbearance will be “deemed granted.”⁸

Thus, whenever forbearance from a statutory provision is granted, whether by Commission inaction or by an affirmative forbearance decision, the effect is to annul that provision as it applies to particular carriers and services.⁹ Once that happens, the Commission has no power to “re-enact” the lapsed statutory provision in the manner requested here. Thus, assuming that the Commission has authority to re-impose dominant carrier regulation with respect to the non-TDM-based special access services provided by AT&T, legacy Embarq, Frontier, legacy Qwest, and Verizon, it can do so only through notice and comment rulemaking procedures that establish a comprehensive record on which a detailed, reasoned explanation for the departure from prior decisions can be based.¹⁰

⁷ 47 U.S.C. § 160(a).

⁸ 47 U.S.C. § 160(c); *Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1132 (D.C. Cir. 2007).

⁹ See, e.g., *Sprint Nextel*, 508 F.3d at 1132 (noting that, as in the section 272 sunset context, “Congress ma[kes] the decision to extinguish [the relevant statutory provisions] by operation of law” when forbearance is deemed granted).

¹⁰ See *Amendment of 47 CFR § 73.658(j)(1)(i) and (ii), the Syndication and Financial Interest Rules*, Tentative Decision and Request for Further Comments, 94 FCC 2d 1019 ¶ 107 (1983); Austin Schlick, General Counsel, FCC, *A Third-Way Legal Framework for Addressing the Comcast Dilemma* at 9 (May 16, 2010) (“In order to overturn a grant of forbearance, the Commission would first have to compile substantial record evidence that the circumstances it previously identified as supporting forbearance had changed[.]”), available at <http://www.fcc.gov/document/statement-fcc-general-counsel-austin-schlick-third-way-legal-framework-addressing-comcast-d>. See also *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009) (placing a higher burden on the agency to justify its decision when it is a departure from established policy).

Allowing Section 10 to be invoked in the manner sought by the Petitioners would be entirely antithetical to Congress' purpose in enacting Section 10. In creating authority for the Commission to forbear from Title II common carrier regulation, Congress "anticipate[d] this forbearance authority will be a useful tool in ending unnecessary regulation," not imposing regulation.¹¹ Thus, Congress enacted Section 10 to "improve the [1996 Act's] deregulatory nature" and to provide carriers subject to excessive and burdensome monopoly regulations the means by which to compel the Commission "to forbear from regulating."¹² The Commission has made this point abundantly clear by stating that "the essential nature of a petition for forbearance is that it is a petition for relief from regulation."¹³

In seeking to "reverse" the Commission's decisions to grant forbearance to Verizon, AT&T, legacy Embarq, Frontier, and legacy Qwest – decisions that were upheld on appeal – the Petitioners ask the Commission to take improper action. Based on the foregoing, the CLEC Petition should be dismissed.

Respectfully submitted,

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¹¹ H.R. Rep. No. 204, 104th Cong., 1st Sess. 89 (1995).

¹² 141 Cong. Rec. S8069-70 (June 9, 1995) (remarks of Sen. Pressler).

¹³ *In the Matter of Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, Report and Order, WC Docket No. 07-267, ¶ 20 (rel. June 29, 2009).