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

NO. 05-1186

AT&T INC., F/K/A SBC COMMUNICATIONS INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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GLOSSARY

Br.	Brief
CMRS	commercial mobile radio service
DSL	digital subscriber line
FCC	Federal Communications Commission
IP	Internet Protocol
J.A.	Joint Appendix
Order	*Petition of SBC Communications Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services* (WC Docket No. 04-29), 20 FCC Rcd 9361 (2005)
PCS	personal communications service
PSTN	public switched telephone network
SBC	SBC Communications Inc.
VoIP	voice-over-IP

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BRIEF FOR RESPONDENTS

STATEMENT OF ISSUES

Petitioner SBC Communications Inc. ("SBC") seeks review of an order of the Federal Communications Commission, which denied a petition for forbearance that SBC had filed pursuant to 47 U.S.C. § 160(c). *Petition of SBC Communications Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services* (WC Docket No. 04-29), 20 FCC Rcd 9361 (2005) ("*Order*") (J.A. 347). SBC's forbearance petition asked the Commission to forbear from applying some Title II regulatory obligations – to the extent that they might otherwise apply at all – to communications offerings that SBC characterized as "IP ('Internet Protocol') platform" services. The case presents two issues for the Court's review.

1. Whether the Commission reasonably interpreted 47 U.S.C. § 160 to permit the agency to reject, as procedurally improper, petitions for forbearance under section 160(c) that seek forbearance from regulatory obligations that are hypothetical or uncertain.

2. Whether the Commission acted reasonably in denying SBC's petition on the alternative ground that the petition was insufficiently specific to bear SBC's burden of demonstrating that the standards of section 160(a) had been met.

JURISDICTION

The *Order* on review is final. The Court has jurisdiction to review final orders of the FCC under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

STATUTES AND REGULATIONS

Pertinent statutes and regulations in addition to those appended to the petitioner's brief are set forth in the statutory addendum to this brief.

COUNTERSTATEMENT

I. Regulatory Background

Statutory Classification Under the Communications Act. Providers of telecommunications service (47 U.S.C. § 153(46)), such as SBC, are generally subject to regulation as common carriers under Title II of the Communications Act, 47 U.S.C. §§ 201, *et seq*. Title II common carriers may be held liable for refunds or damages if their rates or terms of service are found after investigation to be unjust, unreasonable or unreasonably discriminatory. *See* 47 U.S.C. §§ 201-209. They also must comply with other federal obligations, including the duty to contribute to federal programs that support universal service policies, *see* 47 U.S.C.

§ 254, and the duty to design their networks to ensure interconnectivity with the networks of other carriers, s*ee* 47 U.S.C. § 251(a).

By contrast, the Act generally does not impose regulatory obligations on providers of information services (47 U.S.C. § 153(20)), even if the providers of such services are common carriers who also offer regulated telecommunications services. While the Commission does have jurisdiction over information services under Title I of the Communications Act, 47 U.S.C. §§ 151-161, *cf. United States v. Southwestern Cable Co.*, 392 U.S. 157, 162-168 (1968), it generally has refrained from exercising its Title I authority to regulate information services. Accordingly, the proper classification of a service as a telecommunications service or an information service has significant regulatory consequences.

IP-Enabled Services. Telecommunications in this country historically have been conducted over the public switched telephone network ("PSTN"), most uses of which have been subject to Title II regulation. However, the advent of the Internet – a global, packet-switched "network of networks" that are interconnected through the use of the common Internet Protocol – is fundamentally changing the ways in which people can communicate. *In the Matter of IP-Enabled Services* (WC Docket 04-36), Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (para. 8 & n.23) (2004) ("*IP-Enabled Services NPRM*"). Whereas the circuit-switched PSTN reserves dedicated resources along a path through the network, IP networks efficiently route traffic over a series of networks – which can be copper, fiber, coaxial cable, or wireless – without requiring the establishment of a dedicated or fixed end-to-end path. *IP-Enabled Services NPRM*, para. 8.

Explosive growth and constant change are hallmarks of the Internet. The Internet initially was used primarily for e-mail, file transfers, and (more recently) access to sites on the world wide web. *IP-Enabled Services NPRM*, para. 9. Increasingly, though, use of the Internet

is expanding to include more sophisticated services, including instant messaging, streaming media, online gaming, and IP telephony. *Id*., paras. 9-15. SBC, for example, states that it will spend $5 billion in facilities upgrades and other investment through 2007 to roll out its Project Lightspeed, "a new generation of integrated IP video, super-high-speed broadband and [voice-over-IP ("VoIP")] services."[1] The constantly evolving nature of the Internet presents unique regulatory challenges. Internet-based services provide consumers with a broad array of entirely new communications choices, but they also potentially compete with regulated PSTN services. Thus, the increasing prominence of IP-based products has raised regulatory classification issues that are critical to the future development of the telecommunications marketplace.

The Commission, in a series of rulemakings and declaratory rulings, has carefully analyzed the regulatory status of new IP-based products that are well-defined. In the *Cable Modem* proceeding, the Commission determined, on the basis of an expansive record, that cable modem service – which "transmits data between the Internet and users' computers via the network of television cable lines owned by cable companies"[2] – is an information service not subject to Title II common carrier regulation.[3] After the Supreme Court affirmed that decision, the Commission found that digital subscriber line ("DSL")-based Internet access – the telephone

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[1] SBC 2004 Annual Report at 22 (available at http://www.sbc.com/gen/investor-relations?pid=5469).

[2] *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 125 S.Ct. 2688, 2696 (2005) ("*Brand X*").

[3] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, et al.*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (para. 7) (2002) ("*Cable Modem Order*"), *rev'd in pertinent part, Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003), *rev'd*, *Brand X*, 125 S.Ct. 2688.

company equivalent of cable modem service – is likewise an information service.[4] In the *AT&T Phone-to-Phone IP Telephony Ruling*, the Commission determined that an AT&T long-distance offering – which converted calls into IP format for long-haul transport over the Internet backbone network, but which otherwise used the traditional public switched network to initiate and terminate calls – was not an information service, but rather a telecommunications service subject to traditional access charges.[5] In the *Pulver Ruling*, the FCC held that an Internet application enabling computer-to-computer telephony limited to Pulver "members" – who independently obtain broadband Internet access transmission capability from other sources – was an information service and not a telecommunications service.[6] And in the *Vonage Ruling*, the Commission determined that a voice-over-IP service offered by Vonage involved inseparably interstate communications that were not subject to traditional "telephone company regulation" by the states, but deferred action on the "complex and critically important" issue of "statutory classification" as a telecommunications service or an information service.[7]

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[4] *In the Matter of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 FCC Rcd 14853 (para. 5) (2005), *petition for review pending, Time Warner Telecom Inc. v. FCC*, 3rd Circuit No. 05-4769, filed Oct. 26, 2005.

[5] *In the Matter of Petition for Declaratory Ruling That AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, 19 FCC Rcd 7457 (paras. 1, 13) (2004) ("*AT&T Phone-to-Phone IP Telephony Ruling*").

[6] *In the Matter of Petition for Declaratory Ruling that Pulver.Com's Free World Dialup Is Neither Telecommunications Nor a Telecommunications Service*, 19 FCC Rcd 3307 (2004) ("*Pulver Ruling*"). The Pulver offering enabled customers to make VoIP calls to other Pulver customers by acting as a type of directory assistance, informing its members when fellow members were online, and assigning members customer-specific identification numbers that could be used to route the calls among them. *Pulver Ruling*, paras. 5-6, 9.

[7] *In the Matter of Vonage Holdings Corp.*, 19 FCC Rcd 22404 (paras. 1, 5 & n.46) (2004) ("*Vonage Ruling*"), *petition for review pending, Minnesota Public Utilities Comm'n v. FCC*, 8th Circuit No. 05-1069, filed January 6, 2005.

The FCC thus has made efforts to rule on the regulatory status of several discrete IP-enabled services in response to requests and on the basis of full records, and it has been able to do so promptly.[8] The Commission also commenced a rulemaking proceeding last year to examine more broadly the regulatory issues relating to services and applications that make use of the Internet Protocol. *IP-Enabled Services NPRM*, para. 1. The Commission posited at the outset of that rulemaking that most services employing Internet Protocol "have arisen in an environment largely free of government regulation"; and the agency stated that it expects that "the great majority" of such services "should remain unregulated." *Id*., para. 35. At the same time, the Commission acknowledged that the "IP-enabled services" category – defined to include all "services and applications relying on the Internet Protocol family" (*id*., para. 1 n.1) – might well be too broad to permit all such services to be treated alike for regulatory purposes. The Commission thus sought comment on "whether it would be useful to divide IP-enabled services into discrete categories, and, if so, how we should define these categories." *Id*., para. 35. The Commission has received comments from more than 150 parties in that proceeding, which remains pending.[9]

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[8] The Commission ruled on the AT&T petition in 18 months, 19 FCC Rcd at 7457 (para. 1); on the Pulver petition in 12 months, 19 FCC Rcd at 3307 (para.2); and on the Vonage petition in 14 months, 19 FCC Rcd at 22405 (para. 3).

[9] *See IP-Enabled Services and E911 Requirements for IP-Enabled Service Providers* (WC Docket No. 04-36), First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245, 10247 (para. 3 n.5), 10283-89 (App. A) (2005) ("*VoIP 911 Order*") (addressing the application of 911 obligations to providers of VoIP services, but reserving for later decision all other issues raised in the *IP-Enabled Services NPRM*), *petition for review pending*, *Nuvio Corp. v. FCC*, D.C. Circuit No. 05-1248 (filed July 11, 2005). The pending issues include IP-enabled service questions related to intercarrier compensation (*IP-Enabled Services NPRM*, paras. 61-62), universal service (*id.*, paras. 63-66), the applicability of Titles III (broadcast) and VI (cable) (*id.*, paras. 67-70), and the applicability of various consumer protection and economic regulations (*id.*, paras. 71-74).

The Forbearance Statute. Apart from authorizing the Commission to address regulatory questions through rulemaking and through declaratory orders, the Communications Act requires the agency to "forbear from applying any regulation or any provision of [the Communications Act]" to telecommunications carriers or telecommunications services if it determines that: (1) enforcement of such regulation or provision is "not necessary" to ensure just, reasonable and non-discriminatory charges and practices; (2) such enforcement is "not necessary for the protection of consumers"; and (3) forbearance is "consistent with the public interest." 47 U.S.C. § 160(a).

The Commission may act on its own motion under section 160(a) to forbear from applying statutory provisions or FCC rules. *See, e.g., MCI WorldCom, Inc. v. FCC*, 209 F.3d 760 (D.C. Cir. 2000) (affirming FCC's *sua sponte* forbearance from applying the tariff-filing requirements of 47 U.S.C. § 203 to certain carriers). In addition, section 160(c) authorizes "any telecommunications carrier" to file a petition with the Commission asking the agency to exercise its section 160(a) forbearance authority. 47 U.S.C. § 160(c). The statute requires the Commission to act on such a petition within one year (or within one year, plus 90 days, if the Commission finds such an extension to be necessary), and the petition "shall be deemed granted" if the Commission fails to deny it within the prescribed period. *Id.* Whether it acts in response to a petition or on its own motion, the Commission may forbear from applying a statutory provision or rule *only* if it finds that all three parts of the forbearance test are satisfied. *Cellular Telecomms. & Internet Ass'n v. FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003) ("*CTIA*") (affirming FCC's denial of a forbearance petition on the basis of the agency's finding that the second part of the forbearance test was not met).

II. The SBC "IP Platform Services" Proceedings

SBC's Petition for Declaratory Ruling. On February 5, 2004, SBC filed a petition asking the Commission for a declaratory ruling that: (1) "IP platform services" are "indivisibly interstate communications" within the Commission's "exclusive regulatory jurisdiction under Title I of the Communications Act"; (2) such services "do not fit any of the service-specific legacy regulatory regimes in Titles II, III, or VI of the Communications Act"; and (3) the "*Computer II* unbundling requirements do not apply to IP platform services or IP platforms." Petition of SBC Communications Inc. for a Declaratory Ruling, WC Docket No. 04-36, at 2 (filed February 5, 2004) ("Declaratory Ruling Petition") (J.A. 38).

SBC stated that IP platform offerings within the scope of its petition should be defined "broad[ly] and inclusive[ly]" to "consist of (a) IP networks and their associated capabilities and functionalities (*i.e.*, an IP platform), and (b) IP services and applications provided over an IP platform that enable an end user to send or receive a communication in IP format." Declaratory Ruling Petition at 25, 28 (J.A. 61, 64). SBC continued that "[t]he communication may be voice, data, video, or any other form of communication, so long as it is sent to or received by an end user in IP over an IP platform." *Id*. at 28 (J.A. 64). SBC stated that covered "IP platform services include the relevant offerings provided by *any* type of communications provider, including telephone companies, cable companies, wireless providers, satellite companies, powerline companies, [Internet service providers], or any other type of entity (whether or not a 'carrier')." *Id.* at 30 (J.A. 66). And SBC insisted that it should not matter "whether the provider uses copper, coaxial cable, fiber, spectrum, or any other medium." *Id*.

SBC listed some concrete "examples" of IP platform services – including voice-over-IP service "provided over a broadband connection that enables the calling party to send its

communication in IP." *Id.* at 32 (J.A. 68). But it stressed that "[t]hese are just a few examples of the IP platform services available today or likely to be available in the future." *Id.* at 33 (J.A. 69). SBC asserted that, rather than waiting to address various IP platform services "on a piecemeal, case-by-case basis," the Commission should preemptively declare that the broad category of IP platform services "will be permitted to flourish 'unfettered by Federal or State regulation.'" *Id*. at 33 (J.A. 69).

SBC's Petition for Forbearance. Contemporaneously with its declaratory ruling request, SBC filed a separate petition asking the Commission to "forbear[] from applying Title II regulation" to IP platform services "to the extent that such regulation might otherwise be found to apply." Petition of SBC Communications Inc. for Forbearance, WC Docket No. 04-29, at 2 (filed February 5, 2004) ("Forbearance Petition") (J.A. 19). Acknowledging the nexus between its forbearance and declaratory ruling petitions, SBC attached a copy of the latter to the former, and incorporated into the forbearance petition by reference "[t]he background discussion in [the declaratory ruling] petition, including the definition of IP platform services" contained in that document. Forbearance Petition at 1 & n.1 (J.A. 18). As in the declaratory ruling petition, SBC urged the Commission to take action that was potentially sweeping in scope. The carrier alleged that it would be "difficult to regulate discrete services or applications without affecting other IP platform capabilities," and that attempting to draw distinctions among services would "aggravate, rather than alleviate," regulatory uncertainty. Forbearance Petition at 8 (J.A. 25). SBC thus urged that "[f]orbearance is appropriate with respect to *all* ISP platform services,"[10]

[10] Forbearance Petition at 8 (J.A. 25) (emphasis in original).

which, in reply comments, SBC expressly equated with "the Commission's term 'IP-enabled services.'"[11]

SBC argued broadly that forbearance from applying Title II regulation to IP platform services was warranted because such regulation allegedly would "impede * * * innovation and investment" in the Internet, contrary to the public interest. Forbearance Petition at 6 (J.A. 23); *see* 47 U.S.C. § 160(a)(3). SBC also alleged that market forces would ensure that IP platform service rates and practices would be just, reasonable, and nondiscriminatory without Title II regulation. Forbearance Petition at 11-12 (J.A. 28-29); *see* 47 U.S.C. § 160(a)(1). Finally, SBC alleged that competitive market conditions with respect to IP platform services rendered Title II regulation generally unnecessary to protect consumers. Forbearance Petition at 10-11 (J.A. 27-28); *see* 47 U.S.C. § 160(a)(2). SBC asserted that the Commission could remedy any potential overbreadth of a general forbearance from Title II regulation by imposing "individual regulatory requirements to IP platform services" under Title I of the Communications Act. Forbearance Petition at 11 (J.A. 28).

III. The *Order* On Review

The FCC denied SBC's forbearance petition on two independent grounds: (1) that the petition was a procedurally improper request for forbearance from hypothetical or uncertain regulatory obligations, and (2) that the petition lacked sufficient specificity to enable the Commission to determine that the statutory criteria for forbearance had been met. *Order*, paras. 1, 3 (J.A. 347, 348).[12]

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[11] Reply Comments of SBC Communications Inc., WC Docket No. 04-29, filed July 14, 2004, at 1 & n.1 (J.A. 99) ("Forbearance Reply") (quoting *IP-Enabled Services NPRM*).

[12] The Commission also incorporated SBC's petition for declaratory ruling into its ongoing *IP-Enabled Services* rulemaking proceeding. *Order*, para. 1 n.2 (J.A. 347).

The Hypothetical Nature of the Forbearance Petition. SBC's forbearance petition, the FCC concluded, was uncertain and hypothetical in nature. *Order*, para. 4 (J.A. 348). In its contemporaneous petition for declaratory ruling, SBC had acknowledged the existence of "legal uncertainty" about the application of Title II requirements to IP platform services, Declaratory Ruling Petition at 1 (J.A. 37), and the forbearance petition itself sought forbearance only "to the extent that" its declaratory ruling request was not well taken, Forbearance Petition at 2 (J.A. 19). In these circumstances, the Commission determined, SBC's forbearance petition did not satisfy the threshold requirements for the grant of a forbearance petition filed pursuant to section 160(c).

The Commission observed at the outset that it is logically impossible to "forbear" from applying legal requirements that do *not* apply. *Order*, para. 5 (J.A. 349). Moreover, whatever might be the case with respect to *sua sponte* forbearance proceedings, which are subject neither to the "one year * * * [plus] 90 day[]" deadline for agency action under section 160(c) nor to the "deemed granted" remedy for missing that deadline, the Commission concluded that the "public interest" component of the forbearance test (*see* section 160(a)(3)) precludes the grant of any section 160(c) forbearance petition that seeks forbearance from obligations that apply only *hypothetically or uncertainly*. *Order*, paras. 6, 9, 11 (J.A. 349, 350, 351). To hold otherwise, the FCC found, logically would require the Commission to decide both the declaratory ruling question (of whether Title II applies to IP platform services to begin with) and the question of whether to forbear from any such Title II regulations – but to do so within the limited time period that Congress imposed on the agency for deciding the forbearance question alone. The Commission concluded that such an obligation "goes beyond what Congress required the Commission to complete" under the forbearance statute's "public interest" component. *Order*, para. 9 (J.A. 351).

Most importantly, the Commission determined, consideration of hypothetical or uncertain forbearance petitions under the time constraints and potential "deemed granted" remedy of section 160(c) "could result in rushed, and potentially poor, decisions" on hypothetical topics that are insufficiently developed. *Order*, para. 12 (J.A. 352). Moreover, even if well-reasoned decisions might be possible in some individual instances, an obligation to consider such petitions within the condensed time frame specified in section 160(c) would likely lead to "serious administrability concerns." *Order*, para. 10 (J.A. 351). Reading the statute to impose such an obligation likely would lead to the filing of numerous petitions "posing hypothetical questions regarding real or imagined services." *Order*, para. 11 (J.A. 351). Such an outcome would "greatly and unnecessarily strain Commission resources, which would be diverted from actual regulatory controversies of concrete consequence to theoretical disputes with disparate deadlines for resolution." *Id*. By contrast, general rulemaking proceedings and targeted declaratory ruling proceedings – which normally are not subject to condensed time deadlines and often provide more robust records – are far better suited rationally to addressing fundamental issues as to whether regulation applies to a given service or provider in the first instance; it would not serve the public interest to construe the statute to entitle private parties to displace such proceedings with truncated section 160(c) proceedings to address such issues. *Order*, para. 9 (J.A. 350-351). The Commission, accordingly, determined that SBC's petition was "procedurally improper and need not be evaluated under the section [160(c)] framework." *Order*, para. 13 (J.A. 352).

The SBC Forbearance Petition's Lack of Specificity. The Commission also denied SBC's forbearance petition for the independent, case-specific reason that SBC had not satisfied its burden of proving that the forbearance standards had been met. The Commission predicated this finding primarily on its determination that SBC's petition was "not sufficiently specific" –

with respect either to the covered services or to the legal requirements from which forbearance was sought – to establish that the forbearance standards set out in section 160(a) had been satisfied. *Order*, para. 14 (J.A. 352).

The Commission stated that, although SBC broadly described IP platform services as "'those services that enable any customer to send or receive communications in IP format over an IP platform, and the IP platforms on which those services are provided,'" SBC had not defined with sufficient clarity the term "IP platform." *Order*, para. 14 (J.A. 352) (quoting Forbearance Petition at 1 (J.A. 18)). SBC had described the platform in its formal pleadings only in very general terms, as an "overlay network" using any medium (*e.g.*, fiber, copper, spectrum, etc.) that permits end users to send or receive communications in IP format. Declaratory Ruling Petition at 19, 28-30 (J.A. 55, 64-66). In response to repeated informal staff requests for greater clarification, SBC had supplemented that description with *ex parte* filings containing diagrams of yet to be deployed "fiber-to-the-node" and "fiber-to-the-home" IP networks that appeared to be separate from the carrier's "legacy" PSTN facilities.[13] But the Commission found that SBC also "appear[ed] to request forbearance for *services* that can ride over legacy networks, such as 'broadband Internet access – in the form of * * * digital subscriber line service.'" *Order*, para. 14 & n.33 (J.A. 352) (quoting Declaratory Ruling Petition at 32 n.63 (J.A. 68)). In addition, the Commission noted that, notwithstanding the submission of diagrams of SBC's own prospective offerings, SBC's petition also had sought forbearance with respect to all "IP platform" services offered by all providers – a fact that rendered SBC's request even more open-ended and that

[13] *See, e.g.*, *Order*, para 14 & n.31 (J.A. 352) (citing Letter, dated February 11, 2005, from James K. Smith, SBC, to FCC Secretary, WC Docket No. 04-29, at 2 (J.A. 344)).

exacerbated the difficulty of applying the forbearance standards to its request. *Order*, para. 15 (J.A. 352-353).

The Commission also determined that SBC had not clearly identified the regulatory provisions from which it was seeking forbearance. It noted, for example, that SBC claimed that its petition only seeks forbearance from the "common carrier" provisions of Title II, but never clearly identifies which Title II provisions and regulations are beyond its scope. *Order*, para. 16 (J.A. 353) (citing Forbearance Petition at 1 (J.A. 18), and Forbearance Reply at 8 n.17 (J.A. 106)). It observed that, in comments in another administrative docket, SBC had identified three Title II provisions that are not limited to common carriers: 47 U.S.C. § 251(e) (dealing with telephone numbering), 47 U.S.C. § 254 (dealing with universal service), and 47 U.S.C. § 255 (addressing disability access). *Order*, para. 16 (J.A. 353). In the forbearance proceeding, however, SBC had not confirmed that those three sections constituted a comprehensive list of Title II provisions that it meant to exclude from its petition; indeed, the Commission noted that some of SBC's statements in the forbearance docket indicated that it did not mean to exclude those provisions at all. *Order*, para. 16 (J.A. 353).[14]

Finally, the Commission observed that the two core Title II provisions that SBC unambiguously did seek to incorporate into its forbearance request – the mandates of 47 U.S.C. §§ 201(b) and 202(a) that carriers provide telecommunications service subject to just, reasonable and non-discriminatory rates and terms – had never before been the subject of a forbearance

[14] The Commission pointed, in this regard, to SBC's statement that, if the agency granted its forbearance petition with respect to Title II provisions, it could still exercise Title I authority to fashion "'whatever regulations it reasonably finds to be needed to achieve important public policy objectives such as universal service * * * and disability access.'" *Order*, para. 16 (J.A. 353) (quoting Forbearance Petition at 2 (J.A. 19)).

grant with respect to any carrier or service. *Order*, para. 17 (J.A. 354). Indeed, the agency previously had expressed skepticism that forbearance from those provisions would be warranted "even in substantially competitive markets." *Id*. (citing *Personal Communications Industry Ass'n's Broadband Personal Communications Services Alliance's Petition for Forbearance For Broadband Personal Communications Services* (WTC Docket No. 98-100), 13 FCC Rcd 16857 (paras. 19, 23) (1998) ("*PCIA Order*")). The Commission determined that SBC had made no detailed effort in this proceeding to explain why that precedent no longer obtains, and it found that that shortcoming, as well, contributed to SBC's failure to bear its burden of proof in the proceeding. *Order*, para. 17 (J.A. 354).

In light of these multiple failings of definition and proof, the Commission determined that SBC had not established a basis for granting its forbearance petition even if it had not been a procedurally improper hypothetical petition. *Order*, para. 14 (J.A. 352).

SUMMARY OF ARGUMENT

The FCC reasonably denied SBC's forbearance petition for two independent reasons: (1) that the petition was procedurally improper because its sought relief from uncertain or hypothetical regulatory obligations, and (2) that the petition lacked sufficient specificity to bear the burden of demonstrating that the statutory criteria for forbearance had been met. *Order*, paras. 1, 3 (J.A. 347, 348).

1. SBC's claim (Br. 15-20) that the Commission lacked an adequate textual basis for rejecting its forbearance petition completely ignores the Commission's conclusion that the "public interest" component of the forbearance test (section 160(a)(3)) – which "constitutes a broad grant of discretion to the FCC"[15] – authorized the agency to deny section 160(c) petitions

[15] *Transportation Intelligence, Inc. v. FCC*, 336 F.3d 1058, 1064 (D.C. Cir. 2003).

that seek forbearance from uncertain or hypothetical legal requirements. *Order*, para. 6 (J.A. 349). Unlike *sua sponte* actions by the Commission to forbear from applying regulatory obligations under section 160(a), petitions for forbearance under section 160(c) are subject to a statutory deadline for Commission action and are "deemed granted" if the agency for any reason fails to meet that deadline. The Commission reasonably determined that barring uncertain or hypothetical section 160(c) petitions would serve the public interest, among other things, by preventing "rushed, and potentially poor, decisions" on topics that are insufficiently developed. *Order*, para. 12 (J.A. 352). The decisions upon which SBC primarily relies to support a putative FCC obligation to consider such petitions involved *sua sponte* forbearance proceedings that were not subject to the section 160(c) deadline and remedy, or are otherwise distinguishable.

2. The Commission's case-specific decision (*Order*, paras. 14-17 (J.A. 352-354)) to deny SBC's petition for lack of sufficient specificity regarding the services and legal obligations covered by the petition also is reasonable. The extraordinary breadth and generality of SBC's petition – along with internal inconsistencies in its presentation to the agency – prevented the FCC from being able to determine whether the statutory standards for forbearance were satisfied. SBC's contention (Br. 28-29) that the Commission should nevertheless have granted its petition "in part" with respect to those services and legal requirements that the petition did specifically delineate is flatly inconsistent with its insistence before the Commission that any attempt to distinguish among "IP platform services" would "aggravate, rather than alleviate, * * * regulatory uncertainty." Forbearance Petition at 8 (J.A. 25). It was not unreasonable for the Commission to decline to consider an approach that SBC expressly rejected in its request for relief before the agency.

STANDARD OF REVIEW

The FCC's interpretations of the Communications Act generally, *see, e.g.*, *Cellco Partnership v. FCC*, 357 F.3d 88, 94 (D.C. Cir. 2004) (citation omitted), and of section 160 in particular, *see CTIA*, 330 F.3d at 504, 507, are governed by the principles set out in *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, if "Congress has directly spoken to the precise question at issue," the Court "must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842-43. But "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. *See also Brand X*, 125 S.Ct. at 2699 (under *Chevron*, "ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion").

To the extent that petitioners challenge the reasonableness of the Commission's application of the forbearance statute, the Court must uphold the Commission's action unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This "[h]ighly deferential" standard of review "presumes the validity of agency action"; the Court "may reverse only if the agency's decision is not supported by substantial evidence, or the agency has made a clear error in judgment." *AT&T Corp. v. FCC*, 220 F.3d 607, 616 (D.C. Cir. 2000) (internal quotations omitted); *see also Bell Atlantic Telephone Cos. v. FCC*, 79 F.3d 1195, 1202-08 (D.C. Cir. 1996). Ultimately, the Court should affirm the Commission's decision if the agency examined the relevant data and articulated a "rational connection between the facts found and the choice made." *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotations omitted).

ARGUMENT

I. The Commission Reasonably Held That Petitions Seeking Forbearance From Hypothetical Or Uncertain Regulatory Obligations Are Not In The "Public Interest."

The Commission interpreted section 160 to permit it to reject, as "procedurally improper" and thus not in "the public interest" (section 160(a)(3)), all section 160(c) petitions that seek forbearance from uncertain or hypothetical regulatory obligations. *Order*, paras. 5-12 (J.A. 349-352). In light of that ruling,[16] the Commission reasonably denied SBC's contingent petition for relief from Title II regulation "to the extent that such regulation might otherwise be found to apply" (Forbearance Petition at 2 (J.A. 19)).

SBC challenges the textual basis for this action on only one ground: that the Commission's observation concerning the word "forbear" – that "it would be impossible to 'forbear from applying [a] regulation or [a] provision of this Act' that does not apply" – has no logical bearing on this case, because SBC's petition expressly sought forbearance from the application of legal requirements "only to the extent that they apply." SBC Br. 15, 16 (citations omitted); *see generally id.* 15-20. This argument wholly ignores the Commission's further and separate textual conclusion that the "public interest" component of the forbearance test (section 160(a)(3)) authorizes the agency to reject uncertain or hypothetical petitions under section 160(c) as procedurally improper. *Order*, para. 6 (J.A. 349).

It was settled law long before Congress added section 160 to the Communications Act in 1996 that, in the absence of a specific controlling mandate to the contrary, section 4(j) of the

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[16] It is well established that agencies may adopt rules either through notice and comment rulemaking proceedings or in adjudications, such as this one. *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 290-95 (1974); *SEC v. Chenery Corp.*, 332 U.S. 194, 202-03 (1947); *US West Communications, Inc. v. FCC*, 177 F.3d 1057, 1061 (D.C. Cir. 1999), *cert. denied*, 528 U.S. 1188 (2000).

Communications Act, 47 U.S.C. § 154(j), authorizes the Commission to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." By enacting that provision, Congress was "'explicitly and by implication' delegating to the Commission power to resolve 'subordinate questions of procedure.'" *FCC v. Schreiber*, 381 U.S. 279, 289 (1965) (citing *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940)). Thus, this Court and the Supreme Court have stressed that the Commission "'should be free to fashion [its] own rules of procedure and to pursue methods of inquiry capable of permitting [it] to discharge [its] multitudinous duties.'" *Nader v. FCC*, 520 F.2d 182, 195 (D.C. Cir. 1975) (quoting *Pottsville Broadcasting*, 309 U.S. at 441).

Section 160 imposes no contrary mandate in the specific circumstances presented here. The "public interest" standard that is embodied in section 160(a)(3) – and elsewhere in the Communications Act – "constitutes a broad grant of discretion to the FCC," subject to "arbitrary and capricious" review. *Transportation Intelligence, Inc. v. FCC*, 336 F.3d at 1064. In this case, the Commission reasonably interpreted that standard to permit the agency to reject as "procedurally improper" section 160(c) petitions that are hypothetical or uncertain in nature. The FCC explained, among other things, that because forbearance petitions filed under section 160(c) are subject to an abbreviated time frame for Commission action and the Commission's failure to act within that time frame causes such petitions to be "deemed granted," it is reasonable and in the public interest to limit such petitions to "controversies of concrete consequence." *Order*, para. 11 (J.A. 351). Reading the statute to enable private parties to invoke the section 160(c) procedures with respect to uncertain or theoretical regulatory issues could result in "rushed, and potentially poor, decisions" on topics that are insufficiently developed. *Order*, para. 12 (J.A. 352). That risk was particularly acute under the facts of this case, in which

SBC not only sought relief from uncertain regulatory obligations, but failed to define with specificity the services for which it sought forbearance. *See Order*, paras. 14-17 (J.A. 352-354). Even if well-reasoned decisions on petitions for forbearance from uncertain regulatory obligations might be possible in some individual instances, reading the forbearance statute to require the Commission to consider such petitions under the section 160(c) time limits would likely produce "serious administrability concerns" – leading to the filing of numerous petitions "posing hypothetical questions regarding real or imagined services," and diverting Commission resources from consideration of concrete controversies. *Order*, paras.10-11 (J.A. 351).

In similar circumstances, this Court upheld the Commission's interpretation of the Communications Act to limit the types of challenges that opponents may present to Commission decisions granting Bell company applications to provide in-region long-distance service under 47 U.S.C. § 271. *AT&T Corp. v. FCC*, 220 F.3d 607. The specific provision at issue in *AT&T*, 47 U.S.C. § 271(d)(3)(A)(i), required the Commission, within 90 days after receiving a Bell company application, to issue a written decision granting that application if it met certain statutory requirements, including the requirement that the Bell company have "fully implemented" the obligation to provide "[n]ondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)." *See* 47 U.S.C. §§ 271(c)(2)(B)(ii) & 271(d)(3)(A)(i). AT&T challenged the FCC's decision to grant a section 271 application filed by Bell Atlantic (now Verizon). Because Bell Atlantic was restricting access to certain network elements in accordance with a prior Commission *order*, AT&T argued that Bell Atlantic had not satisfied the relevant *statutory* requirement in section 271 to provide nondiscriminatory access to those network elements. *AT&T*, 220 F.3d at 630.

This Court rejected that challenge and affirmed the Commission's interpretation that section 271(d)(3)(A)(i) did not permit collateral attacks on earlier orders to form the basis of a claim that a Bell company applicant had not met the statutory requirements. 220 F.3d at 630. Finding that the statute did not speak unambiguously to the question at hand and crediting the Commission's concerns "about encumbering the ninety-day administrative process," the Court deferred to the Commission's "judgment about the most efficient way to proceed in a complex administrative matter." 220 F.3d at 630-31.

The Commission, moreover, previously has taken similar action in a section 160(c) forbearance proceeding. In the *Rate Integration Forbearance Order*,[17] the Commission addressed a section 160(c) petition filed by BellSouth asking the agency to forbear from applying the rate integration requirements of 47 U.S.C. § 254(g) to commercial mobile radio service ("CMRS") carriers. Before the Commission had ruled on BellSouth's forbearance petition, this Court remanded for further explanation a prior Commission order that had construed section 254(g) to apply to CMRS carriers.[18] Given the absence of a definitive determination that rate integration applied to CMRS carriers, the Commission dismissed BellSouth's petition as premature. *Rate Integration Forbearance Order*, paras. 5, 7. The Commission stated that "it would be meaningless for us to consider whether to forbear from application of section 254(g) to CMRS carriers before we have even considered whether [the statute should be interpreted] to appl[y] to such carriers." *Id*.

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[17] *Policy and Rules Concerning the Interstate Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as Amended* (CC Docket No. 96-61), 15 FCC Rcd 21066 (2000) ("*Rate Integration Forbearance Order*").

[18] *GTE Service Corp. and Micronesian Telecommunications Corp. v. FCC*, 224 F.3d 768 (D.C. Cir. 2000).

SBC attempts to distinguish the *Rate Integration Forbearance Order* as "support[ing] only the truism that it is impossible to forbear from requirements that *do not* apply." Br. 19-20. But that claim focuses exclusively on the Commission's separate finding that the question of forbearance from the rate integration *rule* set out in the vacated prior order was moot. *See Rate Integration Forbearance Order*, para. 6. SBC's argument ignores the part of the decision that is pertinent here – the Commission's conclusion that it would be premature to forbear from a possible *interpretation of the statute* before the Commission had resolved that interpretive question. *Id*., para. 7.

SBC cites the *Cable Modem Order* and the *Wireline-Wireless Porting Order*[19] for the proposition that the Commission previously has issued forbearance rulings with respect to uncertain or hypothetical regulatory obligations. SBC Br. 17, 18. Those decisions are readily distinguishable, however, because, unlike the *Order* on review, they involved *sua sponte* decisions by the Commission to consider forbearing from regulatory obligations "to the extent that" they might apply. *Cable Modem Order*, para. 95; *Wireline-Wireless Porting Order*, para. 35. Neither decision presented the question – crucial to the Commission's analysis in the *Order* on review – of whether the "public interest" would be served by allowing private parties to invoke the *section 160(c)* petition procedures, with their associated time deadline and "deemed

[19] *In the Matter of Telephone Number Portability; CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues* (CC Docket No. 95-116), Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 23697 (2003) ("*Wireline-Wireless Porting Order*"), *aff'd in part and rev'd in part on other grounds, U.S. Telecom Ass'n v. FCC*, 400 F.3d 29 (D.C. Cir. 2005).

granted" remedy. *See Order*, paras. 6, 9-12 (J.A. 349, 350-352).[20] Section 160(c) grants private actors (telecommunications carriers) the extraordinary power to petition for removal of virtually all of the duties that the Communications Act and the Commission's regulations otherwise impose, with far-reaching consequences if the agency fails for any reason to act within the statutory deadline. *See Order*, para. 11 (J.A. 351). It is reasonable for the Commission to adopt an interpretation of the forbearance statute that permits it to foreclose parties from invoking section 160(c) procedures in support of petitions that are hypothetical or uncertain, where such procedures would significantly complicate the agency's task, while at the same time leaving the agency with discretion to forbear from applying uncertain or hypothetical regulatory obligations in *sua sponte* proceedings that are free of the section 160(c) deadlines and remedies.

SBC also contends that "the FCC [and this Court] implicitly accepted the appropriateness of forbearance" from uncertain or hypothetical obligations in the proceedings leading to this Court's decision in *Verizon v. FCC*, 374 F.3d 1229 (D.C. Cir. 2004). Br. 18. SBC infers such acceptance from the fact that Verizon had sought forbearance in that case from section 271 obligations *in the event that* the Commission later removed corresponding section 251 obligations, and yet neither the Commission nor the Court voiced concerns about the

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[20] The Commission also correctly noted that, in the *Cable Modem Order*, it had only "*tentatively concluded*" that forbearance from Title II regulation of cable modem service would be warranted "to the extent that" that service were properly classified as a telecommunications service. *Order*, para. 4 n.10 (J.A. 348) (emphasis added) (citing *Cable Modem Order*, para. 95). Contrary to SBC's suggestion (Br. 17), asking for comment on a possible course of action does not require the Commission either to adhere to, or to distinguish, that proposed course of action in other proceedings. Moreover, unlike SBC's broad request for forbearance from Title II regulation with respect to IP platform services, the Commission's contingent grant of forbearance from certain interconnection agreement filing requirements in the the *Wireline-Wireless Porting Order* (at para. 35) was "a relatively narrow part of a comprehensive regulatory action." *Order*, para. 4 n.10 (J.A. 348-349) (citing *Wireline-Wireless Porting Order*, paras. 34-35).

hypothetical nature of the request. By the time the Commission *issued* its forbearance decision in that case, however – as SBC acknowledges (Br. 19) – the forbearance request was no longer hypothetical, because the section 251 obligations at issue had already been removed. Moreover, the Commission in that case denied Verizon's forbearance petition on two other threshold procedural grounds – that the carrier allegedly had abandoned its original forbearance request and that the request was moot.[21] Although those grounds were found on review to be factually unsupported, the Commission in its decision on the Verizon petition had no occasion to address the question of whether a petition that is hypothetical in nature at the time of filing is subject to dismissal. This Court, in addressing (and rejecting) the reasons that the Commission *did* provide for its decision, similarly had no occasion to reach the question presented here. *Verizon* thus poses no conflict with the *Order* on review. *See Cooper Industries, Inc. v. Aviall Services, Inc.*, 125 S.Ct. 577, 586 (2004) ("'Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedent.'") (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925)).

SBC also incorrectly asserts (Br. 1-2, 14, 23) that the rule against hypothetical or uncertain section 160(c) petitions that the Commission announced in the *Order* is a procedural "pretext" that contravenes this Court's decisions in *AT&T v. FCC*, 236 F.3d 729 (D.C. Cir. 2001), and *Verizon*, 374 F.3d 1229. In *AT&T*, the Court stated that the Commission could not simply "sweep * * * away" a petitioner's right to petition for forbearance under section 160 by creating an alternative regulatory mechanism subject to different standards. 236 F.3d at 738. Unlike the reasoning that the Court rejected in *AT&T*, however, the construction of section 160

[21] *Verizon*, 374 F.3d at 1232.

that the FCC adopted here does not give the agency open-ended discretion to limit a party's forbearance petition rights simply by creating other regulatory mechanisms more to its liking. *Compare* SBC Br. 23. Instead, the Commission's interpretation leaves in a prospective petitioner's hands the power to employ the section 160(c) procedures whenever it can frame a request in concrete, non-contingent terms.

SBC also misconstrues *Verizon* in suggesting that the Court there denied the Commission authority to impose reasonable procedural limitations on the section 160(c) petitioning process. Br. 1-2. What the Court found to be unreasonable in *Verizon* was the Commission's conclusion that an *ex parte* filing that *narrowed* the scope of relief being requested actually was intended by the petitioner to constitute an abandonment of its core legal rationale for forbearance and a substitution of a new petition for relief. 374 F.3d at 1233. The Court's conclusion that the FCC's reasoning in that case was unpersuasive does not foreclose the agency from imposing reasonable threshold procedural requirements with respect to section 160(c) petitions. Indeed, the Court in *Verizon* stressed that "nothing in the Act requires that the Commission make a decision on the merits of an application that is defective procedurally." 374 F.3d at 1232.[22]

Finally, SBC asserts that the Commission's interpretation undermines congressional intent because the time constraints in section 160(c) were intended generally to force the Commission to remove "'outdated regulations * * * in a timely manner'" while, in section 706 of the 1996 Act, Congress placed particular emphasis on the removal of such regulations from the "advanced services" at issue in its petition. Br. 20-21 (quoting 141 Cong. Rec. S7881-02, S7898

[22] This statement from *Verizon* is a complete rebuttal as well to SBC's assertion – made in the introduction to its argument, but never repeated – that *Chevron* step one analysis requires reversal of the *Order* because, allegedly, "section [160] straightforwardly directs the FCC to rule *on the merits* of a forbearance petition within fifteen months." Br. 14 (emphasis added).

(daily ed. June 7, 1995) (statement of Sen. Dole)).[23] But Congress, in section 160, intended that forbearance be granted only where such action would serve the "public interest." 47 U.S.C. § 160(a)(3); *see also* S. Report No. 104-23 (accompanying S. 652), at 5 (March 30, 1995) (noting that "[t]he bill gives the FCC greater regulatory flexibility by permitting the FCC to forbear from regulating carriers when it is in the public interest"); *CTIA*, 330 F.3d at 509 (FCC may not grant forbearance petition unless all three parts of forbearance test are satisfied, including the public interest part). And the statute provides no textual basis upon which to interpret the threshold requirements of section 160 differently with respect to advanced, Internet-related services than with respect to other services.

The Court should uphold the Commission's reasonable construction that the "public interest" component of the forbearance statute authorizes the agency to deny section 160(c) petitions that seek relief from legal requirements that are uncertain or hypothetical. *See CTIA*, 330 F.3d at 504, 507 (*Chevron* deference applies to FCC's interpretation of the forbearance statute).

II. The Commission Reasonably Concluded That SBC's Petition Was Insufficiently Specific To Demonstrate That Forbearance Was Warranted Under The Standards Of Section 160(a).

The need for carefully defined requests for relief is particularly acute when parties attempt to invoke the section 160(c) petition procedures, since such petitions potentially can be "deemed granted" by operation of law and can result in regulatory chaos if the scope of the

[23] Without citing anything in the record or elsewhere, SBC repeatedly claims in this regard that uncertainty regarding the application of Title II has deterred investment in such "advanced" IP facilities and services. Br. 2-3, 12-13, 21. SBC's own substantial investment in that area makes such claims highly dubious. *See* page 4 & n.1, above.

petition is unclear. In this case, the Commission ruled – independently of the threshold "hypothetical petition" analysis – that SBC's petition must be denied because it was insufficiently specific to bear the petitioner's burden of demonstrating that the section 160(a) forbearance standards had been met. *Order*, para. 14 (J.A. 352).[24] That conclusion, predicated both upon SBC's opaque descriptions of the covered services and upon its conflicting and incomplete identification of the regulatory obligations from which it sought relief, was reasonable and should be affirmed.

SBC states that it defined the offerings within the scope of it forbearance petition as "those *services* that enable any customer to send or receive communications in IP format over an IP platform" and "the IP *platforms* on which those services are provided." Br. 25-26 (citations omitted). SBC also notes that it defined an "'IP platform' as a set of network facilities designed to enable end users to send and receive communications in IP format at their premises." Br. 26 (citations omitted). And SBC states that it provided the Commission with diagrams of IP platform services that it was planning to offer. Br. 26 & n.15. SBC contends that these descriptions provided an adequate basis upon which to determine whether the forbearance standards of section 160(a) were satisfied.

[24] The FCC's statement that it did not "conduct a substantive analysis of SBC's petition under section [160(a)]," *Order*, para. 16 n.43 (J.A. 353), is an acknowledgement that the agency was unable to make affirmative findings with respect to the section 160(a) standards. It does not suggest that the Commission failed to consider whether SBC had met its burden of proof with respect to those standards.

The Commission reasonably disagreed. Even apart from lingering questions about whether SBC intended to include certain legacy PSTN facilities within the scope of its petition,[25] the Commission found that the extraordinary breadth and generality of SBC's petition made it impossible to assess whether the forbearance standards had been met. The FCC stressed that "the relief SBC seeks * * * is not limited to its own facilities," but "would extend to all IP Platform Services," whether those services involved voice, data, or video communications, whether they were offered via copper, fiber, coaxial cable, or spectrum, and without regard to the nature (*e.g.*, telephone company, cable company, wireless carrier) of the provider. *Order*, para. 15 (J.A. 352) (citing Forbearance Petition at 8 (J.A. 25)); *see also* Declaratory Ruling Petition at 28-30 (J.A. 64-66). Although SBC presented some illustrative examples of what it characterized as IP platform services, the carrier effectively acknowledged that it could not provide an exhaustive list of covered services "available today or likely to be available in the future." Declaratory Ruling Petition at 33 (J.A. 69); *see also id*. at 31-33 (J.A. 67-69).

Given a market environment in which IP services and their associated facilities are rapidly evolving, the sweep and generality of SBC's request did not provide a solid basis on which to determine whether forbearance was warranted. Indeed, it is precisely because of the breadth and evolving nature of "IP-enabled services" – which SBC equates with the term "IP platform services" as used in its forbearance petition[26] – that the Commission sought comment in

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[25] *See Order*, para. 14 & n.33 (J.A. 352) (citing Declaratory Ruling Petition at 32 n.63 (J.A. 68)). SBC argues that the Commission misunderstood its petition in pointing to statements that appeared to encompass "the legacy *facilities* sometimes used to carry DSL (a copper-based transmission technology)," SBC Br. 27 (citing *Order*, para. 14 & n.33 (J.A. 352), because other submissions expressly disclaimed any attempt to seek forbearance with respect to such facilities. Br. 27 & n.16. Such claims, however, serve only to highlight inconsistencies in SBC's presentation before the agency – inconsistencies which fully justified the Commission's decision.

[26] Forbearance Reply at 1 & n.1 (J.A. 99).

the *IP-Enabled Services NPRM* (para. 35) on "whether it would be useful to divide IP-enabled services into discrete categories" for regulatory purposes.

SBC also asserts that there was no basis for the Commission's conclusion (*Order*, para. 16 (J.A. 353)) that it was unclear from which regulatory obligations SBC had sought forbearance. Br. 29-30.[27] SBC claims that it sought forbearance only from "common carrier" or "economic" regulation under Title II, and that those terms, which the Commission itself has used in other orders, have a well understood meaning. Br. 30-31. But here, again, SBC never provided a comprehensive, as opposed to illustrative, list of excluded non-common carrier regulations; and the statements that it did make were contradictory. In places, SBC stated, without qualification, that it sought "forbearance from applying Title II regulation" to covered services. Forbearance Petition at 2 (J.A. 19). Elsewhere, as SBC's counsel notes, the carrier claimed to be seeking forbearance from Title II "common carrier" regulation. But SBC also stated that concerns about the application of non-common carrier Title II obligations relating to universal service and disability access could be addressed through the exercise of the agency's *Title I* authority.[28] That observation would have been unnecessary if those non-common carrier Title II obligations were not within the scope of SBC's request for forbearance from Title II regulation.

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[27] SBC dismissively rejects questions that the agency raised in a footnote (*Order*, para. 16 n.42 (J.A. 353)) about whether the *Computer II* and *III* rules were within the scope of SBC's forbearance petition. Br. 31. The reference to the *Computer II* rules that SBC quotes from the forbearance petition to respond to this footnote was part of a summary of the contemporaneously filed declaratory ruling petition and not part of the request for forbearance (at least not unambiguously so).

[28] *Order*, para. 16 & n.41 (J.A. 353) (citing Forbearance Petition at 2 (J.A. 19)). *See also* Declaratory Ruling Petition at ii (J.A. 33).

SBC does not even address, moreover, an additional basis for the Commission's decision: that it has "never forborne from applying sections 201 and 202 of the Act" – the core common carrier provisions that require carriers to provide service on just, reasonable, and nondiscriminatory rates and terms. *Order*, para. 17 (J.A. 354). Indeed, the Commission in 1998 expressly had declined a request by personal communications service ("PCS") carriers for forbearance from those provisions – even though the market for PCS services was substantially competitive – because it concluded that there remained some risk of unjust or discriminatory treatment of consumers. *PCIA Order*, 13 FCC Rcd 16857 (paras. 15-24); *see also Orloff v. FCC*, 352 F.3d 415, 419 (D.C. Cir. 2003), *cert. denied*, 542 U.S. 937 (2004) (noting that FCC has not forborne from applying sections 201 and 202 to commercial mobile radio service providers). The Commission concluded that to meet its burden SBC should, at a minimum, have "explain[ed] in detail" why, notwithstanding that precedent, the agency should forbear from applying sections 201 and 202 here. *Order*, para. 17 (J.A. 354). It did not.

SBC asserts, finally, that even if its forbearance petition was insufficiently specific with respect to some services and some regulatory provisions, the Commission erred in failing to exercise its authority under section 160(c) to grant the petition "in part" with respect to those services and requirements that the petition did specifically delineate. Br. 28-29. That claim is flatly inconsistent with the relief that SBC sought. SBC told the Commission that "it would be increasingly difficult to regulate discrete services or applications without affecting other IP platform capabilities," and that any attempt to do so would "aggravate, rather than alleviate, the regulatory uncertainty that exists today in this area." Forbearance Petition at 8 (J.A. 25). The Commission cannot be faulted for declining to consider an approach that SBC expressly rejected in its request for relief before the agency.

In sum, the Commission reasonably determined that SBC's petition did not identify the relief SBC sought with sufficient precision to enable the agency to make the requisite findings under section 160. That determination makes even more sense when viewed in light of the remedy included in section 160(c). If the Commission had failed to act for any reason within the statutory time period, SBC's forbearance petition would have been "deemed granted" by operation of law. But what exactly would have been deemed granted? Which services, which facilities, and which carriers would have been the beneficiaries of that forbearance? Which provisions of the Communications Act, and which FCC rules, would have been subject to forbearance? The answers to those questions cannot be determined with any degree of certainty by reading SBC's petition. Given the extraordinary nature of the forbearance provision, it was incumbent upon SBC to be clear about the specific relief sought. SBC's failure to do so amply justifies the Commission's decision to deny the petition.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for review.

Respectfully submitted,

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November 28, 2005

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

AT&T INC., f/k/a SBC Communications Inc., PETITIONER, V. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS.	)	NO. 05-1186

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 9323 words.

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