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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

In the Matter 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.)

WC Docket No. _____

PETITION FOR FORBEARANCE

Embarq Local Operating Companies

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PETITION FOR FORBEARANCE

I. INTRODUCTION AND SUMMARY

Pursuant to 47 U.S. C. § 160(c), the Embarq Local Operating Companies (“Embarq”)¹ respectfully request that the Commission exercise its statutory authority to forbear from applying *Computer II Final Decision*² to the extent it requires independent ILECs, such as Embarq, to tariff and offer the transport component of its broadband services, as defined below, on a stand-alone basis and to take service itself under those same terms and conditions.

Embarq further requests that the Commission forbear from the mandatory application of Title II common carriage requirements that apply generally to ILEC broadband transmission and that prevent Embarq from responding to customer needs and requirements in an increasingly

¹ On May 17, 2006, Sprint Nextel Corporation (“Sprint”) transferred the Sprint Local Telephone Operating Companies that were Sprint’s incumbent local exchange carrier operations, by means of a stock dividend to shareholders and the creation of a new holding company, Embarq Corporation. The former Sprint Local Telephone Operating Companies are now subsidiaries of Embarq Corporation, are totally independent of Sprint, and are known as the Embarq Local Operating Companies. Importantly, for this Petition, Embarq is no longer affiliated with a nation-wide, facilities based long distance carrier.

² *In the Matter of Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)* 77 F.C.C. 384 (1980) (*Computer II Final Decision*).

competitive market-place. Specifically, Embarq seeks relief from the mandatory application of Title II requirements regarding tariffs, prices, cost support, price caps and price flex in order to have the flexibility to provide the broadband services at issue on a common-carriage or private-carriage basis, similar to the flexibility provided by the Commission, in its *Wireline Broadband Order*,³ for broadband transmission services that are used to access the internet and the same as granted Verizon in its forbearance petition⁴. Embarq is not seeking relief from its Title II obligations related to CALEA (Section 229, 47 U.S.C. § 229) or USF (Section 254, 47 U.S.C. § 254). Embarq seeks the aforesaid relief on behalf of itself and all similarly situated ILECs.

Definitions of broadband have changed over time as technologies continue to evolve. The Commission, in the *Fourth Report*, contends that their definitions of broadband are not static.⁵ Regardless of the evolving nature of the definition of broadband and the multiplicity of platforms providing broadband services, for purposes of this Petition, Embarq uses broadband to describe current and future transmission service offerings that are capable of providing 200 Kbps in both directions, excluding DS1 and DS3 special access services and TDM-based services. Attachment A contains a detailed description of a sampling of the broadband services that Embarq offers.

³ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Red 14853 (2005) (“*Wireline Broadband Order*”).

⁴ *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, NEWS, *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*, March 20, 2006, petitions for review pending, COMPTEL, 06-1113 (DC Cir, filed March 29, 2006) & Sprint Nextel, 06-1111, (“Verizon Forbearance Petition NEWS”) Joint Statement of Chairman Kevin J. Martin and Commissioner Deborah Taylor Tate.

⁵ See Fourth Report to Congress, *Availability of Telecommunications Capability in the United States*, 19 FCC Red 20540, at 1 (2004) (“Fourth Report”).

II. BACKGROUND

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.⁶

The Commission has made great strides toward accomplishing these broadband goals in three recent decisions. In the first, the *Cable Modem Declaratory Ruling*,⁷ the Commission concluded that cable modem service, broadband access to the Internet via a cable modem, is an Information Service; establishing that cable modem service is free of Title II and *Computer II Final Decision* obligations.

Next, the Commission expanded upon its *Cable Modem Declaratory Ruling* in its *Wireline Broadband Internet Access Services Order*⁸ the Commission determined that facilities-based wireline broadband Internet access service is an information service, not a Title II telecommunications service (although carriers were provided the option to continue providing

⁶ Verizon Forbearance Petition NEWS.

⁷ *Inquiry concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185 & CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002)(“*Cable Modem Declaratory Ruling*”), *aff’d National Cable & Telecommunications Ass’n v. Brand X Internet Services*, 125 S. Ct. 2688 (2005).

⁸ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers*, CC Docket No. 02-33; *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337; *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, CC Docket Nos. 95-20, 98-10; *Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises*, WC Docket No. 04-242; *Consumer Protection in the Broadband Era*, WC Docket No. 05-271, Report and order and notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005)(“*Wireline Broadband Internet Access Services Order*”) petitions for review pending, *Time Warner Telecom v. FCC*, No. 05-4769 (3rd Cir. Filed Oct. 26.2005).

the service on a common carrier basis.) Importantly, for this Petition, the Commission determined that no ILEC had to separate out and provide the transmission component of wireline broadband Internet access service as a stand-alone telecommunications service under Title II, and further relieved all other *Computer Inquiry* obligations from the BOCs.⁹

On March 19, 2006 the Commission, by operation of law, granted Verizon's petition for Forbearance from Title II and *Computer Inquiry* Rules with Respect to their Broadband Services.¹⁰ What is particularly telling about this grant of Verizon's petition is that at the time of the grant, Verizon was not only one of the two largest ILECs in the United States, covering numerous large metropolitan areas and contiguous properties, but also the owner of MCI (now known as Verizon Business) one of the large, facilities based, nation-wide long distance carriers that, as noted below, has a major share of the nation-wide broadband market and that competes head-to-head with Embarq for Broadband Services. In its Petition, Verizon did not specifically define Broadband Services, but subsequently told the Commission that Broadband was used to describe current and future transmission services offerings capable of providing 200 Kbps in both directions, excluding however traditional special access services (DS1 and DS3 services) and TDM-based optical networking services.¹¹

Verizon also failed to specifically identify the Title II obligations for which it sought forbearance. As with the description of "Broadband Services", Verizon, subsequent to the filing

⁹ See, *Wireline Broadband Internet Access Services* order at ¶ 5.

¹⁰ *Verizon Forbearance Petition NEWS*.

¹¹ Letter from Edward Shakin, Vice President and Associate General Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-440 (filed Feb. 7, 2006).

of its Petition, informed the Commission that it was not seeking forbearance from its Title II USF obligations.¹²

Notwithstanding a certain degree of uncertainty surrounding the Verizon petition, it is clear that the Commission believed it was granting Verizon relief similar to that granted in the *Cable Modem Declaratory Ruling*, *Wireline Broadband Internet Access Services Order*, and other recent decisions.

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. The relief provided as a result of this petition is similar.¹³

Finally, on June 13, 2006 Qwest filed a forbearance petition seeking relief identical to that obtained by Verizon.¹⁴ AT&T filed its petition seeking identical relief on July 13, 2006 and Bell South followed suit on July 20, 2006.¹⁵

In the instant Petition, Embarq is seeking relief with respect to similarly defined Broadband services as sought by Verizon, but without the uncertainty as to the specific Title II and *Computer II Final Decision* obligations for which relief is sought.

Now is the time for the Commission to take the next step toward promoting the goal of increased broadband deployment. The Title II common carriage requirements and *Computer II Final Decision* rules are vestiges of a regulatory regime that developed in a world where the

¹² Letter from Susanne A. Guyer, Senior Vice President Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC WC Docket No. 04-440 (filed Feb. 17, 2006).

¹³ *Verizon Forbearance Petition*, NEWS, Joint Statement of Chairman Kevin J. Martin and Commissioner Deborah Taylor Tate.

¹⁴ Qwest Petition for Forbearance under 47 U.S.C. § 160(c) from Title II and *Computer Inquiry* Rules with Respect to Broadband Services, WC Docket No. 06-125, filed June 13, 2006.

¹⁵ In re Petition of AT&T Inc. for Forbearance under 47 U.S.C. §160(c) from Title II and Computer Inquiry Rules with Respect to its Broadband Services, WC Docket No. 06-125, filed July 13, 2006; in Petition of Bell South 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. .

ILEC represented the sole connection to the end user's premise. Given the intense intermodal competition in the broadband market today, ILECs' secondary status in every segment of the national broadband market, and the lower regulatory burdens on all other participants in the market – including the nation-wide, dominant long distance carriers – burdening Embarq and similarly situated ILECs with these unnecessary regulations is contrary to law and harmful to consumers. Indeed, applying these regulations to Embarq's provision of broadband affirmatively harms consumers by preventing more effective competition and hindering increased deployment of broadband services.

Not only will forbearance meet the Commission's goal of furthering broadband deployment, but it will also further the Commission's compliance with its obligations under Section 706 of the Telecommunications Act of 1996¹⁶, in which Congress directed the Commission to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans,” and to do so ‘without regard to any transmission media or technology.’”

A. The *Computer II Final Decision* Service Unbundling Requirements.

Although the Commission decided in the *Computer II Final Decision* that enhanced services (referred to as “information services” under the 1996 Act) should remain free from common-carrier regulation, it also imposed a series of obligations on the wireline common carriers that own transmission facilities and offer enhanced services. Of particular relevance here, the Commission held that those carriers must make that underlying transmission available on a stand-alone basis pursuant to a tariff and acquire such transmission for their own enhanced services offerings under that same tariff. As the Commission explained in *Computer II*:

¹⁶ Pub. L. No. 104-104, 110 Stat. 56.

[b]ecause enhanced services are dependent upon the common carrier offering of basic services, a basic service is the building block upon which enhanced services are offered. Thus those carriers that own common carrier transmission facilities and provide enhanced services, but are not subject to the separate subsidiary requirement, must acquire transmission capacity pursuant to the same prices, terms, and conditions reflected in their tariffs when their own facilities are utilized.¹⁷

Of particular relevance to Embarq and the instant Petition, is the fact that the *Computer II Final Decision* is the order in the *Computer Inquiry*¹⁸ proceedings recognizing the difference between Embarq¹⁹ and other small, rural ILECs and the much larger RBOCs (including what is now Verizon.) In the *Computer I Inquiry* the Commission adopted a policy of maximum separation whereby a communications common carrier had to furnish data processing services through a separate corporate entity.²⁰ In the *Computer II Final Decision* the Commission determined that structural separation was not necessary in the provision of enhanced services for carriers, other than AT&T (which then included the RBOCs) and GTE, largely because the smaller carriers, such as Embarq, could not engage in anti-competitive behavior in the nationwide enhanced services market.

¹⁷ *Computer II Final Decision*, 77 F.C.C.2d at 474-75, ¶ 231.

¹⁸ The *Computer Inquiry* is a series of FCC proceedings and decisions investigating the provisions of enhanced services by facilities based wireline common carriers. See generally, Final Decision and Order, *Regulatory and Policy Problems Presented by the interdependence of Computer and Communications Services and Facilities (Computer I)*, 28 F.C.C.2d 267 (1971); Final Decision, *Amendment of Section 64.704 of the Commission's Rules and Regulations ("Computer II Final Decision")*; Report and Order, *Computer III Further Remand Proceedings; Bell Operating Co. Provision of Enhanced Services; 1998 Biennial Review – Review of Computer III and ONA Safeguards and Requirements*, 14 FCC Rcd 4280 (1999) (collectively, "*Computer Inquiry*").

¹⁹ All of the Embarq Local Operating Companies, except for the Nevada operations of Central Telephone Company, are Rural Telephone Companies as that term is defined in Section 3(37) of the Act (47 U.S.C. § 153(37)).

²⁰ *Regulatory & Policy Problems Presented by the Interdependence of Computer & Communications Services & Facilities*, 28 FCC 2d 291 (1970) (Tentative Decision); 28 FCC 2d 267 (1971) (Final Decision), *aff'd in part sub. nom. GTE Service Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973), decision on remand, 40 FCC 2d 293 (1973).

A carrier's ability and incentive to engage in anticompetitive conduct in adjacent markets must be measured with some recognition of the parameters of those markets. Thus, what must be recognized is that while market power in the provision of telephone service may be appropriately measured within both local and national geographic markets, the provision of enhanced services and CPE has been largely undertaken, and increasingly so, on a national basis. These services, in essence, are and will continue to be directed at residential and business users spread over broad geographical markets. A carrier such as AT&T, with a nationwide network of transmission systems and local distribution plant in major metropolitan areas, could obviously harm a competitor through its control over these facilities in an anti-competitive manner. GTE, serving over 8% of the nation's telephones (see Table 1) and several major population and business centers, would also have significant ability to engage in predatory or discriminatory practices [citation omitted]. On the other hand, a carrier like Continental, with most of its resources concentrated in rural distribution plant, would not be able to deny competitive access to any significant portion of the potential customers for enhanced services. The diminished likelihood of success in such attempts also serves to diminish the incentive to try.²¹

This same recognition that the smaller ILECs cannot engage in anti-competitive behavior in the enhanced services market led the Commission in the *Computer III Phase II Order*²² to refuse the imposition of CEI/ONA nonstructural safeguard obligations on any carriers other than AT&T and the RBOCs: "...we decline at this time to apply the nonstructural safeguards established in the *Phase I Order* to the enhanced service operations of the Independents. We conclude that the ITCs are sufficiently different from the BOCs to warrant different regulatory treatment."²³ Even GTE, which at the time was much larger than Embarq, came in for the different treatment because of its inability to engage in anti-competitive behavior in a nationwide enhanced services market.

²¹ *Computer II Final Decision* at ¶ 217.

²² *In the Matters of Amendment to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry) and Policy and Rules Concerning Rates for Competitive Common Phase II Carrier Service and Facilities Authorizations Thereof Communications Protocols under Section 64.702 of the Commission's Rules and Regulations*, CC Docket No. 85-229, Report and Order, 2 FCC Rcd 3072 (1987) ("*Computer II Phase II Order*").

²³ *Id.*, at ¶ 8.

GTE is the ITC most like a BOC, yet the record reveals that it has features that clearly distinguish it. For example, an analysis of GTE's service areas demonstrates that although in the aggregate GTE is similar in size to each BOC, unlike the BOCs, its service areas are distributed nationwide in a large number of noncontiguous geographical areas. This circumstance effectively prevents GTE from exercising monopoly control in large regions of the country, comparable to those served by the BOCs. Also, compared to the BOCs, GTE service areas tend to be smaller (fewer access lines per exchange), less densely populated (fewer access lines per square mile), and they contain a smaller percentage of business customers. ... These factors indicate that GTE has more limited opportunities than the BOCs to use bottleneck control over local exchange facilities for anticompetitive purposes in the enhanced services marketplace to the detriment of competitive providers and their customers.²⁴

These statements apply even more for Embarq than for GTE and are equally as applicable to broadband services as to enhanced services. Further, these factors and that fact that the much larger RBOC, Verizon, has already been granted forbearance, demonstrate that regulation, whether Title II obligations such as tariffing or *Computer II Final Decision* need not be imposed on Embarq or other similarly situated ILECs to ensure just and reasonable broadband rates or to protect consumers.

B. The Broadband Market is Vibrantly Competitive

As noted above, the Commission has already found robust competition for broadband services in the consumer or mass market space.²⁵ Likewise, broadband competition for large business customers in the enterprise market is intense. This segment of the market has long been dominated by the major long-distance carriers -- AT&T, MCI (now known as Verizon Business), and Sprint. The big three long distance providers are also the major providers for other specialized high-speed data services provided to business customers, such as IP VPN.²⁶ And

²⁴ *Id.*, at ¶ 203.

²⁵ See, *Cable Modem Declaratory Ruling and Wireline Broadband Internet Access Services*.

²⁶ See, e.g., H. Goldberg, In-Stat/MDR, Press Release, With End-User Migration Inevitable, IP VPN Services Market Poised to Grow (February 4, 2004);

while AT&T, MCI & Sprint dominate, other carriers, such as Level 3, Qwest, and XO, also actively compete for large business customers, and, as the Commission recently recognized, even the cable companies are making important in-roads into this segment of the market.²⁷ All of these companies compete with Embarq in the Broadband Services marketplace.²⁸

In light of these facts, the Commission correctly concluded in the *Triennial Review Order* that “broadband services [] are currently provided in a competitive environment.”²⁹ “Thus “the broadband market has no dominant incumbent service provider, and only minimal regulations are appropriate.”³⁰

III. DISCUSSION

A. **The Commission’s Regulations Should Not Be Applied to Broadband Services Under Title II and the *Computer Inquiry Final Decision*.**

Under Title II, which was developed in the context of “a prior era of circuit-switched, analog voice services characterized by a one-wire world for access to communications,” ILECs are generally treated as dominant carriers, and are subjected to common carriage requirements under Title II.³¹ This includes, among other things, tariff filing, cost support, and pricing requirements. *See, e.g.*, 47 U.S.C. 201-204, 214. Applying these regulations to broadband services has inhibited Embarq’s ability to compete efficiently.

<http://www.instat.com/press.asp?ID=873&sku=IN0401350BD> (“AT&T is estimated to have the largest market share in this market with MCI and SAVVIS in second place.”).

²⁷ *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, 19 FCC Rcd 21496, ¶ 22 (2004) (“*Section 271 Order*”) (“[C]able operators have had success in acquiring not only residential and small-business customers, but increasingly large business customers as well.”).

²⁸ In all, over 30 companies compete within Embarq’s territory.

²⁹ *Triennial Review Order* at ¶ 292.

³⁰ Joint Statement of Chairman Michael K. Powell and Commissioner, Kathleen Q. Abernathy, *BPL Order* at * 182.

³¹ *Wireline Broadband Internet Access Services NPRM*, ¶ 4, 5.

1. The Commission Has Concluded that neither Cable Modem nor Wireline Broadband Internet Access Service Should Not Be Regulated Under Title II and the *Computer Inquiry Final Decision*.

As noted above, the Commission already considered the state of the current broadband market and adopted a “hands off” regulatory approach for the dominant cable providers in the *Cable Modem Declaratory Ruling*. There, the Commission reached four key conclusions:

First, the Commission concluded that cable modem service offered to end users is a Title I “information service,” and not a Title II common-carrier “telecommunications service”³².

Second, the Commission concluded that it would waive its *Computer Inquiry* rules for cable modem providers.³³ In this regard, the Commission concluded that applying the *Computer Inquiry* rules “would also disserve the goal of Section 706 that we encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing . . . measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.”³⁴

Third, the Commission concluded that, if cable companies offer broadband transmission to ISPs, it is on a private carriage basis that permits the cable company and ISP to negotiate separate agreements on an individual basis and on terms that are tailored to the specific needs of the parties.³⁵

Fourth, the Commission tentatively concluded that even if Title II applied to cable modem service, it likely would forbear from applying those regulations to cable companies.³⁶

³² Cable Modem Declaratory Ruling, ¶ 38.

³³ *Id.*, ¶ 45.

³⁴ *Id.*, 47. [Internal quotation marks omitted].

³⁵ *See, e.g., id.* at ¶ 55.

³⁶ *Id.*, ¶ 95.

Likewise, as noted above, the Commission has granted similar relief to the ILEC provision of wireline broadband Internet access, eliminating Title II regulation and *Computer II Final Decision* obligations. With regard to the *Computer II Final Decision* obligations, the Commission ruled, as it should for other broadband services, that:

[w]e agree with those commenters that argue that the Computer Inquiry obligations are inappropriate and unnecessary for today's wireline broadband Internet access market. As these parties observe, the *Computer Inquiry* rules were developed before separate and different broadband technologies began to emerge and compete for the same customers. Further, these rules were adopted based upon assumptions associated with narrowband services, single purpose network platforms, and circuit-switched technology.³⁷

And, importantly, the Commission has now granted similar relief to Verizon.

2. The Long Distance Carriers Who Dominate the Large Business Segment of the Market Are Also Largely Unregulated.

It would be equally irrational to apply the burdensome Title II and *Computer II Final Decision* rules to Embarq when it provides packet-switched services like ATM and Frame Relay to large business customers. AT&T, MCI (now Verizon Business) and Sprint, who dominate this segment of the market, bear no such burdens. While these long distance carriers are nominally subject to Title II, the Commission now largely permits these carriers to operate free of regulation.³⁸ Given the Commission's decisions not to regulate the dominant players and, now, Verizon in the broadband market it must also refrain from regulating Embarq.

³⁷ *Wireline Broadband Internet Access Services Order* at ¶ 41 (footnotes and citations omitted.)

³⁸ The Commission initially reduced the regulation of long distance interexchange carriers by declaring that they were non-dominant, and accordingly not subject to many of the regulations of Title II. See, e.g., Motion of AT&T Corp. to Be Reclassified as a Non-Dominant Carrier, 11 FCC Rcd 3271, ¶ 1 (1995). Later, the Commission removed most other Title II regulation when it ordered that nondominant interexchange carriers would be allowed to file tariffs for their interstate, domestic, interexchange services. *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934*, 11 FCC Rcd 20730 ¶ 3 (1996).

B. The Forbearance Statute, Particularly When Taken Together with Section 706, Requires the Commission to Forbear from Regulating Embarq's Broadband Services.

Verizon persuasively argued in its Forbearance Petition that forbearance was appropriate.

These arguments are equally applicable here.

“The goal of the Telecommunications Act of 1996 [was] to establish ‘a pro-competitive, de-regulatory national policy framework,’” and the Commission recently acknowledged that:

An integral part of this framework is the requirement, set forth in section 10 of the 1996 Act, that the Commission forbear from applying any provision of the Act, or any of the Commission’s regulations, if the Commission makes certain specified findings with respect to such provisions or regulations. Specifically, the Commission *is required* to forbear from any statutory provision or regulation if it determines that: (1) enforcement of the regulation is not necessary to ensure that charges and practices are just and reasonable, and are not unjustly or unreasonably discriminatory; (2) enforcement of the regulation is not necessary to protect consumers; and (3) forbearance is consistent with the public interest. In making such determinations, the Commission must also consider pursuant to section 10(b) “whether forbearance from enforcing the provision or regulation will promote competitive market conditions.”³⁹

Section 10 thus requires the Commission to “reduce the regulatory burdens on a carrier when competition develops, or when the FCC determines that relaxed regulation is in the public interest.”⁴⁰

Moreover, in the current context, Section 706 underscores the propriety of forbearing from applying the burdensome Title II and *Computer Inquiry* rules to Embarq’s broadband services. “Section 706 of the 1996 Telecommunications Act directs both the Commission and the states to encourage deployment of advanced telecommunications capability to all Americans on a reasonable and timely basis . . . [and] to take action to accelerate deployment, if necessary.”⁴¹

Notably, in instructing the Commission to encourage broadband deployment, Section 706 states

³⁹ *Section 271 Order*, at ¶ 11 (footnotes and citations omitted).

⁴⁰ 141 Cong. Rec. S7887 (daily ed. June 7, 1995).

⁴¹ *Fourth Section 706 Report* at 8.

that broadband should be defined and regulated “without regard to any transmission media or technology.”⁴² And Section 706 “direct[s] the Commission to use the authority granted in other provisions, *including the forbearance authority under section 10(a)*, to encourage the deployment of advanced services.”⁴³

In light of these standards, the Commission tentatively concluded in the *Cable Modem Declaratory Ruling*, that forbearance of Title II regulations would be appropriate in the broadband market, even for the dominant cable modem providers, because the broadband market “is still in its early stages; supply and demand are still evolving; and several rival networks providing residential high-speed Internet access are still developing.”⁴⁴ Any other conclusion with respect to the broadband services provided by Embarq and other similarly situated ILECs, a secondary player in a vibrant market marked by intermodal competition, would be arbitrary and capricious. Accordingly, as explained below, the Commission should grant this petition.

1. The Commission Should Forbear from Applying the Specified Title II Regulations to Embarq’s Broadband Services.

As the Commission has observed, “the basic elements of the existing regulatory requirements for the provision of broadband services by incumbent LECs were initially developed in a prior era of circuit-switched, analog voice services characterized by a one-wire world for access to communications” that existed “well before the development of competition between providers of broadband services” and were based upon a perceived need to curb the exercise of anti-competitive market power.⁴⁵ Given the broadband services available over

⁴² Section 706(c), 110 Stat.153.

⁴³ *Deployment of Wireline Services Offering Advanced Telecommunications Capability; Petition of Bell Atlantic Corporation For Relief from Barriers to Deployment of Advanced Telecommunications Services*, 13 FCC Rcd 24011, ¶ 69 (1998) (“Advanced Services Order”).

⁴⁴ *Cable Modem Declaratory Ruling*, ¶ 95.

⁴⁵ *Wireline Broadband Internet Access Services NPRM*, ¶¶ 4, 38.

multiple, technological platforms, the single connection to the customer premise or “one-wire” world simply does not exist in today’s broadband market. Like the application of the *Computer II Final Decision* rules, discussed below, applying Title II common carrier requirements in this age of abundant broadband competition would not be justified, particularly in light of the Commission’s statutory duty under Section 706 to promote broadband development and deployment through reduced regulation.

The Title II common carrier regulations, specified above, impose several unnecessary burdens on Embarq that prevent, rather than protect, competition. For example:

- Applying the Title II rules to broadband contributes significantly to the delay in introducing new broadband services to consumers because, unlike its competitors, Embarq must develop and file detailed cost support data, provide extensive analyses of charges assessed by their competitors for similar services, develop and file rebuttals to challenges to their filings by third parties, and respond to Commission staff questions.
- Imposing mandatory tariffs reduces Embarq’s ability to respond efficiently to customer demand and cost; imposes substantial administrative costs; limits the ability of customers to negotiate and obtain service arrangements specifically tailored to their needs; and inhibits carriers from introducing new services and responding to new offerings by rivals, who obtain advance notice of tariffed carriers’ services and promotions and can respond by undercutting the new offerings even before the tariff becomes effective.
- Imposing the requirement that broadband rates be cost-justified or be comparable to traditional narrowband wireline benchmarks prevents Embarq from experimenting with market-based pricing models, such as pricing based on revenue sharing or on the number of visits to a given Web site. These methods are already available to all other broadband competitors, and prohibiting Embarq from using them deters innovative pricing arrangements that ultimately will benefit competition.

As the Commission has concluded, “deregulation or reduced regulation may lower administrative costs, encourage investment and innovation, reduce prices and offer consumers greater choice.”⁴⁶ Imposing these Title II regulatory requirements on Embarq, but not

⁴⁶ *Wireline Broadband Internet Access Services NPRM*, ¶ 39; see *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefore*, 84 FCC 2d 445, ¶ 12 (1981) (noting that even in a market that is not yet fully competitive, the costs

competitors, has precisely the opposite effect. Given that Embarq has no market power in the broadband market, there is no justification to apply the Title II common carriage requirements.

Moreover, given that the Commission has specifically concluded in the *Cable Modem Declaratory Ruling* that forbearance from the Title II requirements is appropriate in the case of the market-leading cable modem providers, has determined in the *Wireline Broadband Internet Access Services Order* that broadband internet access providers whose market share and market power lag behind the cable modem providers, and has granted forbearance to Verizon, an ROBC and nation-wide long distance carrier, it has no choice but to decline to apply those regulations to secondary market participants in the broader broadband market like Embarq. If regulation of the dominant player in a segment of the broadband market is unnecessary, then regulation of a second-place player in the broader broadband market makes even less sense.

a. “Just and Reasonable” Prices

To grant forbearance, the Commission must first determine that “enforcement of [the challenged] regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory.”⁴⁷ In light of the competitive market in which Embarq competes to sell its broadband services, the regulations imposed by Title II and the *Computer II Final Decision* rules are not needed to ensure competitive prices, but instead prevent more effective competition that would lower prices and improve services for consumers.

of regulatory compliance “can have profoundly negative implications for consumer welfare” such that a reduction in regulatory burdens is appropriate.)

⁴⁷ Section 10(a)(1) [47 U.S.C. § 160(a)(1)].

As an initial matter, the Commission recently made clear that in the broadband market, it is appropriate to focus on the prices to consumers in deciding whether this forbearance requirement is met. The Commission found that in light of “the developing nature of the broadband market at both the wholesale and retail levels, including the ongoing introduction of new services and deployment of new facilities,” the competition within the retail market was the proper focus for determining whether forbearance was appropriate.⁴⁸

Furthermore, the Commission recently noted that the robust competition in the market, together with the secondary role of ILECs within the market, is an adequate safeguard of just and reasonable prices and practices within the market.⁴⁹ Simply put, “[t]he broadband market is still an emerging and changing market, where . . . the preconditions for monopoly are not present,” and Title II regulation is unnecessary.⁵⁰ Similarly, the competitive nature of the broadband market will ensure that broadband will be available to wholesale customers at reasonable rates.

The same is true of the regulations from which Embarq currently seeks forbearance. As the Commission previously recognized in conducting the Section 10(a)(1) analysis, “competition is the most effective means of ensuring that . . . charges, practices, classifications, and regulations . . . are just and reasonable, and not unjustly or unreasonably discriminatory.”⁵¹

Other recent precedent further supports Embarq’s petition. For example, the Commission concluded that Verizon’s, SBC’s, and BellSouth’s request for forbearance with respect to their international directory assistance services satisfied section 10(a)(1) because these carriers “would be new entrants in the market for [these services]” and, “[as such, . . . likely would face

⁴⁸ See Section 271 Order, ¶ 21.

⁴⁹ See Section 271 Order, ¶¶ 21-22.

⁵⁰ *Id.*, at ¶ 22.

⁵¹ Memorandum Opinion Order, *Petition of US West Communications, Inc. for a Declaratory Ruling Regarding the provision of National Directory Assistance*, 14 FCC Rcd 16252, ¶ 31 (1999).

competition from interexchange carriers . . . , Internet service providers, and others in the provision of those services.”⁵² The Commission also found it highly relevant that there was “no indication that the petitioners have used, or could use, their ownership interests in dominant foreign carriers to control access by other domestic carriers to directory listing information for the countries where those carriers operate.”⁵³

That reasoning applies with at least as much force here because Embarq likewise “do[es] not exercise control over the components used to provide” the broadband services of its intermodal competitors,⁵⁴ and because it faces competition in the broadband market at least as rigorous as that found in the international directory assistance market. As set out above, competition exists in all segments of the broadband market, and this competition will ensure just and reasonable prices. Therefore, the first forbearance requirement is clearly satisfied.

Moreover, the conclusion that forbearance is warranted is strongly reinforced by the Commission’s overarching obligation under Section 706 to resolve ambiguities in a way that promotes the long-term deployment of greater broadband infrastructure.⁵⁵ In turn, this increased investment will help to ensure effective competition in the long term against the dominant cable

⁵² Memorandum Opinion and Order, *Petition of SBC Communications Inc. for Forbearance from Structural Separation Requirements of Section 272 of the Communications Act of 1934, as Amended, and Request for Relief to provide International Directory Assistance Services*, 19 FCC Rcd 5211, ¶ 16 (2004) (“SBC IDA Order”)

⁵³ *Id.*, at ¶ 19.

⁵⁴ *See, id.*, at ¶ 20.

⁵⁵ *See* 47 U.S.C. §157; *Advanced Services Order* ¶ 69. Forbearance here is also consistent with the Commission’s decision to forbear from applying tariffing requirements to SBC’s provision of advanced services through its affiliate, ASI. Memorandum Opinion and Order, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, 17 FCC Rcd 27000 (2002). In that order, the Commission concluded that tariff regulation is not “necessary for ensuring that the rates, terms, and conditions for ASI’s advanced services are just, reasonable, and are not unjustly or unreasonably discriminatory,” instead finding that “the better policy is to allow ASI to respond to technological and market developments without our reviewing in advance the rates, terms, and conditions under which ASI provides service.” *Id.* 22.

modem providers, long distance carriers, and the emerging plethora of intermodal competitors thereby lowering prices and improving services for all broadband customers. Forbearance will give Embarq the appropriate incentives to invest in broadband facilities to compete with these other providers.

b. Consumer Protection and Public Interest

For largely the same reasons, Section 10(a)(2) and (3) are satisfied as well: *i.e.*, imposing Title II regulation on Embarq's broadband services is unnecessary to protect consumers,⁵⁶ and forbearance is in the public interest.⁵⁷

First, as was the case in the *Section 271 Order*, Title II regulations are unnecessary to protect consumers in light of intermodal competition and Embarq's non-dominant status in the nation-wide broadband market. There, the Commission noted that "BOCs have limited competitive advantages with regard to the broadband elements, given their position with respect to cable modem providers and others in the emerging broadband market."⁵⁸ As the Commission found in *Computer II Final Decision* with regard to enhanced services, this logic is even more compelling in the nation-wide broadband market for small, rural ILECs like Embarq. Therefore, freeing Embarq of unnecessary regulation will increase competition, thereby benefiting consumers. Section 10(a)(2) is thus satisfied.

Likewise, the Commission has repeatedly recognized that increased competition and the resulting consumer benefits satisfy the "public interest" prong of the forbearance test.⁵⁹ As the statute requires, in deciding what is in the public interest, the Commission must consider whether

⁵⁶ See 47 U.S.C. 0 160(a)(2),

⁵⁷ *Id.*, § 160(a)(3).

⁵⁸ *Section 271 Order* ¶ 30.

⁵⁹ See, *Section 271 Order* ¶ 33; *SBC IDA Order* ¶ 20-21.

forbearance will “promote competitive market conditions.”⁶⁰ Treating Embarq in a manner that is at least as favorable as that afforded to more dominant players in the market meets that test and will promote more aggressive competition that will inevitably lead to lower prices, better service, and increased availability of broadband services.

The Commission’s own words in deciding that forbearance would be appropriate to shield cable modem providers from the constraints of Title II should resolve the issue of whether to grant Embarq’s petition. There, the Commission said that forbearance “would be in the public interest because [broadband] service is still in its early stages; supply and demand are still evolving; and several rival networks providing residential high-speed Internet access are still developing,” so that “enforcement of Title II provisions and common carrier regulation is not necessary for the protection of consumers or to ensure that rates are just and reasonable and not unjustly or unreasonably discriminatory.”⁶¹ This rationale is just as compelling here, with regard to broadband market as a whole. Allowing Embarq to offer broadband services on a private carriage basis free from the regulatory strictures of Title II will enable it to better compete against its well-financed, entrenched competitors and will encourage investment in broadband facilities.

2. The Commission Should Forbear from Applying the *Computer II Final Decision Rules* to Embarq’s Broadband Offerings.

For similar reasons and as explained above with regard to small, rural ILECs such as Embarq, the Commission should also forbear from applying the intrusive *Computer II Final Decision rules* to Embarq’s broadband services. As explained above, the *Computer II Final Decision rules* were adopted at a time when “very different legal, technological and market

⁶⁰ Section 10(b) [47 U.S.C. § 160(b).]

⁶¹ *Cable Modem Declaratory Ruling* ¶ 95.

circumstances” existed, and “the core assumption underlying the *Computer II Final Decision* rules was that the telephone network is the primary, if not exclusive, means through which information service providers can obtain access to customers.”⁶² Yet, as shown above, no category of competitors in the broadband market enjoys “bottleneck” control over broadband transmission facilities in any segment of the broadband market. Thus, the “core assumption” underlying the *Computer II Final Decision* rules is misplaced when it comes to broadband services provided by Embarq.

Applying the *Computer II Final Decision* rules to Embarq’s broadband services would conflict directly with Congress’s clearly expressed desire to promote broadband development and deployment through reduced regulation. These rules hinder the development of new broadband services as well as the development of network and service arrangements that customers want, and the unnecessary costs of these rules discourage investment and discourage new broadband deployment. For example:

- Applying the requirement that Embarq separate out and offer separately the physical components of their services hampers the development of new or customized services and applications and forces adoption of less-than-optimal network designs. Indeed, manufacturers are designing next-generation equipment for other providers that already are not seen as being subject to the possibility of facing similar regulatory constraints (*e.g.*, cable operators).
- Applying the *Computer II Final Decision* rules requires Embarq to waste resources by mandating that it offer mass-market solutions even when there is no market demand for such products and services.
- Applying the requirement that the transmission component of Embarq’s broadband services be separated and offered under tariff at cost-based

⁶² *Cable Modem Declaratory Ruling* at 34 n. 139 (stating that the *Computer Inquiry* rules were directed at “bottleneck common carrier facilities”). Indeed, in *Computer II Final Decision*, the Commission expressly found that carriers that had no control over local bottleneck facilities, and therefore “[id] not have ... market power,” would not be in a position to act anti-competitively. *Computer II Final Decision* ¶ 221.

rates will interfere with the development of innovative and beneficial arrangements for ISPs to deliver content and applications to consumers.

In sum, the three prerequisites for forbearance are easily met in the case of the *Computer II Final Decision* rules. As discussed above in the context of the Title II regulations, declining to apply these out-of-date regulations will lead to more effective competition in an already competitive market made up of competitors using several, separate technological platforms. This intermodal competition prevents any possibility that Embarq can charge anything other than “just and reasonable” prices or take other steps that would harm consumers. Moreover, the public will benefit from the more efficient competition that Embarq will be able to put up against cable modem providers, nation-wide long distance carriers, mobile and fixed wireless providers, satellite provider, broadband over power line providers, and municipalities.

IV. CONCLUSION

For the foregoing reasons, the Commission should grant this petition and forbear from applying the Title II common carrier requirements specified above and *Computer II Final Decision* rules to the extent that they apply to any of Embarq’s, or other similarly situated ILECs’, broadband services.

Respectfully submitted

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July 26, 2006

Attachment A
Non-TDM Broadband Services Currently Offered

Optipoint OC3-OC192: OptiPoint services provide point-to-point high speed synchronous optical fiber-based full duplex data transmission capabilities. There are four levels of OptiPoint services: OptiPoint-3 (OC3) is provided at a terminating bit rate of 155.52 Mbps; OptiPoint-12 (OC12) is provided at a terminating bit rate of 622.08 Mbps; OptiPoint-48 (OC48) is provided at a terminating bit rate of 2488.32 Mbps; and OptiPoint-192 (OC192) is provided at a terminating bit rate of 9953.28 Mbps.

SOCR OC3-OC192: SONET OC (optical connection) Ring is a dedicated high capacity network (bandwidth) designed to provide the customer reliable functionality for the transmission of voice, data, and video via a self healing ring topology between multiple customer designated locations and Telephone Company central offices. SONET OC Ring will be offered using 2-fiber unidirectional path switch ring (UPSR) or 2-fiber bidirectional line switched ring (BLSR) topology. The SONET OC Ring network will consist of fiber optic facilities routed through local, alternative central office, internodal, and/or interoffice channel facilities that transmit DS1, DS3, STS1, OC3, OC3c, OC12, OC12c, OC48 and OC48c channel services simultaneously over primary and alternative diverse paths between customer designated locations and Telephone Company central offices.

Frame Relay: Frame Relay Service (FRS) is a fast packet network that provides the customer high speed access and throughput to different customer addresses. Utilizing statistical multiplexing, the frame relay network enables the customer to allocate circuit bandwidth to applications as needed, rather than assigning fixed channels to specific applications.

ATM: Asynchronous Transfer Mode (ATM) service is a connection-oriented fast packet network service that permits the transmission of high speed data, voice and video traffic utilizing cell switching technology. ATM cells are fixed length cells that provide symmetrical or asymmetrical duplex transmissions. Utilizing statistical multiplexing, ATM service enables customers to allocate circuit bandwidth to applications as needed on virtual paths or channels. ATM service allows multiple communications applications to be transmitted within multiple paths or channels utilizing common fiber optic or copper facilities. ATM service allows for the interconnection of customer premises equipment that is ATM compatible.

Ethernet Transport: Ethernet Transport (ET) service is a high speed data transport service that provides point-to-point data transmissions in a fast packet based protocol. ET is available at nine transport speeds: 10 Mbps, 20 Mbps, 50 Mbps, 100 Mbps, 150 Mbps, 300 Mbps, 450 Mbps, 600 Mbps and 1000 Mbps (1 Gbps).

CERTIFICATE OF SERVICE

I hereby certify that I have this 26th day of July 2006 served the following parties to this action with a copy of the foregoing PETITION FOR FORBEARANCE by hand delivery and electronic mail addressed to the parties listed below.

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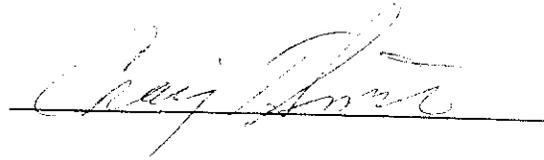
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A handwritten signature in black ink, appearing to read "Thomas Navin", is written over a solid horizontal line.