

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Qwest Petition for Forbearance Under)	
47 U.S.C. § 160(c) from Title II and)	
<i>Computer Inquiry</i> Rules with Respect)	
To Broadband Services)	
)	
Petition of AT&T Inc. for Forbearance)	
Under 47 U.S.C. § 160(c) from Title II)	WC Docket No. 06-125
And <i>Computer Inquiry</i> with Respect)	
To its Broadband Services)	
)	
Petition of BellSouth Corporation for)	
Forbearance Under Section 47 U.S.C.)	
§ 160(c) from Title II and <i>Computer</i>)	
<i>Inquiry</i> Rules with Respect to its)	
Broadband Services)	
)	
In the Matter of Petition of the Embarq)	
Local Operating Companies For)	
Forbearance Under 47 U.S.C. §160(c))	WC Docket No. 06-147
From Application of <i>Computer Inquiry</i>)	
And certain Title II Common-Carrier)	
Requirements)	

REPLY COMMENTS IN SUPPORT OF PETITIONS

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August 31, 2006

SUMMARY

Embarq's Petition for Forbearance for itself and all independent ILECs, as well as the BOC Petitions, should be granted. Contrary to some Commenters' argument, the standard for forbearance in Section 10(c) (47 U.S. C. § 160(c)) has been met. The Commission is not required to conduct a product-by-product, geographic market-by-geographic market analysis, but may view the broadband services in question as part of a nationwide market. Furthermore, Section 706 directs the Commission to take a forward looking view of the degree of competition in an emerging market, like broadband.

Sprint-Nextel's argument that ILEC special access rates are so high that ILECs must be dominant in the provision of broadband services appears to be primarily based on DS1 and DS3 services, which are not at issue in this proceeding, and is not otherwise an economically sound argument.

Furthermore, COMPTTEL's argument that residential customers, not just large, sophisticated business customers, will be adversely impacted by forbearance relies on nascent BOC broadband video offerings where the BOCs are new entrants going up against entrenched, long-standing competitors. COMPTTEL's example actually demonstrates why the ILECs need forbearance.

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REPLY COMMENTS IN SUPPORT OF PETITIONS

The Embarq Local Operating Companies,¹ hereby respectfully Reply to
Comments filed in response to the above-captioned Petitions on August 17, 2006. As

¹ On May 17, 2006, Sprint Nextel Corporation transferred the Sprint Local 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 the Embarq Local Operating Companies, are subsidiaries of Embarq Corporation, and are independent of Sprint Nextel Corporation.

noted in Embarq's own August 17, 2006 Comments, the above-captioned Petitions should be granted.

I. The three-prong forbearance test in Section 10(c) has been met.

All four Petitions point to the Commission's recognition of the broadband market as a nationwide market in support of their forbearance arguments. Some Commenters complain that such reliance fails to meet the standard for Section 10 (47 U.S.C. § 160) forbearance. For example, Broadview Networks claims, incorrectly, that a forbearance analysis under Section 10 requires a discrete product-by-product, geographic market-by-market analysis.

To apply the statutory criteria and consider the evidence, if any, offered by the ILEC Petitions, the Commission first must define the relevant product and geographic markets. The ILEC Petitions fail to do so, presuming without justification – an in contradiction with other recent filings by some of the Petitioners – that there is a monolithic national market for broadband services.²

Likewise, COMPTTEL points to the *Qwest Forbearance Order*³ for the proposition that the Commission must analyze specific products and geographic markets to determine the degree of competition necessary to justify Section 10 forbearance.⁴ However, the *Qwest Forbearance Order* was found “particularly inapt” in the recent D.C. Circuit *Earthlink*⁵ decision forbearing from Section 271 obligations for the BOCs' provision of broadband services and it is also particularly inapt in the instant proceeding. The *Qwest*

² Comments in Opposition of Broadview Networks, Covad Communications, CTC Communications, Inc., Escholon Telecom, Inc. Nuvox Communications, XO Communications, and Xspedius Management Company LLC, filed August 17, 2006, p. 18 (“Broadview Networks”).

³ *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, 20 FCC Rcd 19415 (2005).

⁴ Opposition of COMPTTEL, filed August 17, 2006, p. 9.

⁵ *EarthLink, Inc. v. FCC*, D.C. Circuit, No. 05-1087, Decided August 15, 2006, Slip Opinion at p. 15 (“*EarthLink*”).

Forbearance Order dealt primarily with local service in one MSA as opposed to the broadband services nationwide market that is the subject of this proceeding. Further, in the *Qwest Forbearance Order* the Commission explicitly stated that the order and the analysis used were of no precedential value for other proceedings:

Consistent with our statutory obligations, in this Order we therefore apply the criteria of section 10 to the regulations and statutory provisions from which Qwest seeks relief. ... We emphasize, however, that in undertaking this analysis, we do not issue any declaratory rulings, promulgate any new rules, or otherwise make any general determinations of the sort we would properly make in a rulemaking proceeding on a fuller record. [Citation omitted.] Accordingly, our sole task here is to determine whether to forbear under the standard of section 10 from the regulatory and statutory provisions at issue, and we do not – and cannot – issue comprehensive proclamations in this proceeding regarding non-dominance, non-impairment, or section 251(h) status in the Omaha MSA. [Footnote omitted.]⁶

Embarq believes that the *EarthLink* decision convincingly and correctly proves that there is no ‘one size fits all’ for Section 10 forbearance cases. Indeed, the statute itself does not dictate the methodology or analysis that the Commission must utilize.

According to EarthLink, the statute permits the FCC to grant forbearance only after a “painstaking analysis of market conditions” in “particular geographic markets and for specific telecommunications services. We disagree. On its face, the statute imposes no particular mode of market analysis or level of geographic rigor. See 47 U.S.C. § 160(a) (requiring forbearance in “any or some of [a carrier’s] geographic markets” if three conditions are met). Seizing on the phrase “geographic markets” in § 160(a), EarthLink contends the decision to forbear on a nationwide basis—without considering more localized regions individually—is *per se* improper. This argument is tenuous, at best. In context, the language simply contemplates that the FCC might sometimes forbear in a subset of a carrier’s markets; it is silent about how to determine when such partial relief is appropriate. Similarly, the statute does not require consideration of specific services. ... Instead, we are persuaded the agency reasonably interpreted the statute to allow the forbearance analysis to vary depending on the circumstances.⁷

⁶ *Qwest Forbearance Petition*, ¶ 14.

⁷ *EarthLink*, pp. 11-12.

Furthermore, Alpheus et al. is wrong to suggest that *Earthlink* is inapplicable to the instant proceeding because *EarthLink* involved forbearance from Section 271 unbundling, not common carrier regulation as in the instance proceeding.⁸ In fact, there is in only one Section 10. It is applicable to both proceeding. And, Section 10's language that "imposes no particular mode of market analysis or geographic rigor" is the same language regardless of the obligations that carriers seek Section 10 forbearance from.

The D. C. Circuit acknowledged that fact, while also acknowledging that unbundling forbearance is different from dominant carrier forbearance, but points out that, in and of itself, that difference is not determinative of the forbearance analysis the FCC must use.

First, while the FCC acknowledged [in *Qwest Forbearance Order*] that a decision to forbear from dominant carrier regulation is "informed by the [FCC's] traditional market power analysis, *id.* at 19,425, the agency was quick to note that such analysis "does not *bind* [the FCC's § 160] forbearance analysis," *id.* at 19,425 n.52 (emphasis added) (citing *AT&Corp.* 236 F.3d at 736-37).⁹

II. Section 706, in conjunction with Section 10(c) mandates Petitioners' request for forbearance.

COMPTEL is correct, the Petitioners all argue that Section 706's (47 U.S.C. § 157 nt) direction to the Commission to use its forbearance authority to remove barrier to infrastructure investment and encourage the deployment of advanced services, mandates the grant of the Petitions. However, COMPTEL goes on to complain that none of the

⁸ Opposition of Alpheus Communications, LP, Deltacom, Inc., Integra Telecom, Inc., McLeodUSA Telecommunications Services, Inc., MPower Communications Corp., Norlight Telecommunications, Inc., Pac-West Telecomm, Inc, TDS Metrocom, Inc., Telepacific Corp. d/b/a Telepacific Communications, filed August 17, 2006, p. 6.

⁹ *Id.*, p. 16.

BOCs (COMPTEL does not point to Embarq or the other independent ILECs encompassed by Embarq's Petition) need Section 706 relief because of BOC public statements that they are in fact deploying broadband facilities.¹⁰

COMPTEL misses the point. Nothing in Section 706 limits its applicability to situations where there is no investment in advanced telecommunications. It is not limited to being a jump start for non-existent services or to the very beginning of a competitive market for advanced telecommunications. Rather, Section 706(a) directs the Commission "to encourage the deployment [of advanced telecommunications] on a reasonable **and timely basis [emphasis added]**...." and authorizes regulatory forbearance, as well as other means to remove barriers to infrastructure investment. The fact that there is some deployment of advanced telecommunications infrastructure does not mean that there are no barriers to reasonably paced levels of investment that need to be removed. Section 706 is inherently forward looking and mandates a continually evolving level of advanced services as is evidenced by its direction to the Commission to conduct regular notices of inquiry following its enactment (Section 706(b)).

Again, the *EarthLink* decision is instructive as to the role of Section 706 in proceedings, such as the instant proceeding, dealing with broadband services. EarthLink complained that in granting forbearance the Commission had not completed a "painstaking analysis of market conditions"¹¹ Rather, EarthLink argued that the Commission had incorrectly considered the "emerging nature of the broadband market ... the expected rise of other intermodal broadband competition, such as fixed wireless, satellite, and broadband over powerline; and the CLECs' continued ability to compete in

¹⁰ Opposition of COMPTEL, pp. 21-26.

¹¹ *EarthLink* at p. 11.

the broadband market by deploying their own fiber loops”¹² The D.C. Circuit dismissed EarthLink’s complaint about the Commission including a forward looking view of the broadband marketplace in its forbearance analysis.

Insofar as EarthLink suggests the statute does not permit the FCC to make the forbearance decision with an eye to the future-by accounting for section 706’s goals and assessing likely market developments-the argument also fails. [Citation omitted.] Nothing in § 160 prohibits weighing such considerations in assessing the impact of forbearance on rates, consumers, and the public interest. Further, section 706 explicitly directs the FCC to “utilize[e]” forbearance to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.” As the precise interplay between section 706 and the three-part forbearance inquiry is not self-evident from the text, it is precisely the type of ambiguity entrusted to reasonable agency construction. The language of section 706 suggests a forward-looking approach and, reading the two statutory provisions together, we cannot fault the FCC for interpreting it to inform the § 160 analysis.¹³

Such a forward looking view can and should be adopted by the Commission in the instant proceeding.

III. Sprint-Nextel’s argument about ILEC dominance in the special access market is irrelevant to Embarq’s broadband Petition for forbearance.

Throughout its comments, Sprint-Nextel makes several unsupported statements purporting that ILECs exercise market power in the special access market. However, the argument bears no weight with regard to Embarq’s Petition because Sprint-Nextel’s complaints are largely based on DS1 and DS3 services¹⁴ – services which Embarq’s Petition explicitly excludes.¹⁵

¹² *Id.*

¹³ *Id.*, at pp. 11-12.

¹⁴ Sprint-Nextel’s Opposition to Petitions for Forbearance, filed August 17, 2006, pp. 6-11.

¹⁵ Embarq Petition, p. 2 (“... 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.”).

In an attempt to illustrate this argument, Sprint-Nextel refers to an estimate that its 2004 special access bill was higher under the pricing flexibility regime than it would have been under a price cap regime, an estimate that was originally filed in Sprint-Nextel's (f/k/a Sprint Corporation) comments in the *Price Cap Special Access*¹⁶ proceeding in 2005. While it is not clear from Sprint-Nextel's comments in either the 2005 proceeding or the instant proceeding, it seems likely that the information Sprint used for its estimate was largely based on DS1 and DS3 rates – rates which, as noted above, are not pertinent to the instant proceeding.

Additionally, there are two conclusions that can be drawn from that estimate—that a higher price paid by Sprint-Nextel demonstrates that ILECs exercise inordinate market power, and that the wholesale access market is not competitive—are both erroneous and are in fact refuted by Sprint-Nextel's own data. These are addressed below.

With regard to the competitive state of the market, Sprint-Nextel's erroneous conclusion appears to be based on the misplaced perception that in a competitive market, prices only decline. A quick glance at the history of the billable hourly rate charged by attorneys in the greater Washington DC area—a competitive market if one ever existed—instantly refutes this. In a competitive market, prices may either increase or decrease. In particular, in a market where demand is not held constant but is increasing rapidly (as in the case of special access), prices are often more likely to increase than decrease. This is especially true when adjustments to supply take time. Competitive markets are dynamic,

¹⁶ In the Matter of Special Access Rates for Price Cap Local Exchange Carriers, WC Docket No. 05-25 and AT&T Corporation Petition for Rulemaking to Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, RM-10593, Comments of Sprint Corporation, filed June 13, 2005.

as is competitive equilibrium. At any point in time a change to the prices of inputs, or a change in technology, can translate to price movements in either direction. Sprint-Nextel's suggestion that higher prices in a different market are clear evidence of an uncompetitive market is not supported by economic fundamentals.¹⁷

Furthermore, by comparing the prices charged under a price flexibility regime to a price cap regime, and assuming differences in the two reflect an absence of competition, Sprint-Nextel is making the *de facto* assumption that price-cap prices accurately reflect conditions in a competitive market. There is no support for such an assumption. Even if price-cap prices were initially set at a level that accurately reflected competitive conditions at the time—and Sprint-Nextel presents no evidence to suggest they were—subsequent annual changes made within the price cap mechanism make it unlikely that the price continues to reflect the specifics of a competitive market in subsequent years.

Sprint-Nextel goes on to provide “evidence” of this lack of competition by displaying annual returns on special access services taken from ARMIS reports. These returns range from approximately 42% for Verizon to over 300% for Embarq. The conclusion that is reached is “Such rates of return are unheard of in any competitive market”.¹⁸ However, well-known accounting anomalies make any conclusions derived from ARMIS-based returns highly questionable, and Sprint-Nextel's own data refutes its conclusion regarding returns in competitive markets.

It is well-established that ARMIS data reflects long-standing cost allocation rules and allocation factors that have been frozen for many years, since the 1990s and in some

¹⁷ A discussion of increasing prices in competitive markets can be found in most economics textbooks. See, for example, N. Gregory Mankiw, *Principles of Economics*, Third Edition, Thomson South-Western Publishers; 2004.

¹⁸ Sprint-Nextel's Opposition to Petitions for Forbearance, p. 9.

cases earlier. (In fact, the Commission is currently in the middle of a comment cycle addressing this very issue, CC Docket 80-286.) In simplest terms, the effect of the freeze has been to distort the relationship between investment and associated revenues earned on that investment. There is evidence that the actual allocation of investment in years following the freeze comports with the allocation of investment at the time the factor was frozen, particularly given the increase in demand for special access the market has experienced in recent years. Yet the revenues reported in ARMIS do, for the most part, accurately reflect recent data. This produces a disparity between current revenues and less-than-current investment, a disparity that suggests any calculation of return incorporating this mismatch will be flawed. Sprint-Nextel arrives at incorrect economic conclusions (“in a competitive market, returns would have been declining...”) based on flawed data, and suggests this “...demonstrates...the lack of effective competition” in the market. Sprint-Nextel’s claims are without merit.¹⁹

In summary, Sprint-Nextel has presented no real evidence that ILECs exhibit the exorbitant levels of market power in the market for special access service, let alone the broadband services at issue in the present proceeding.

¹⁹ In addition, even if the ARMIS-based returns *were* accurate, Sprint-Nextel’s contention that “Such returns are unheard of in any competitive market” is refuted by Sprint-Nextel’s own historic returns. According to Sprint-Nextel’s Annual Report to Investors from 1999, the return to its PCS investors for that calendar year was 343%. In the same year, 1999, returns to Sprint-Nextel’s wireline investors exceeded 60%, as did the returns shown in the previous year’s Annual Report, from 1998.¹⁹ And it is safe to assume—given the company’s fiduciary duty to its shareholders—that the calculation of Sprint-Nextel’s returns does not reflect the same distortions that an ARMIS-based calculation of return carries. If Sprint-Nextel’s conclusions were accurate, its own rate of return data would suggest 1) that the market for telecommunication services was not competitive in 1998-99 and 2) Sprint-Nextel exhibited an inordinate degree of market power in that market and—consistent with its suggestions here—should have been regulated.

IV. COMPTTEL's argument regarding the provision of broadband video service to consumers is misplaced.

COMPTTEL complains that the Petitioners all focus on the fact that the broadband service market customer base is largely made up of mid-sized and large businesses – “sophisticated” customers. COMPTTEL argues that the Petitioners are ignoring the fact that consumers also buy broadband services such as the video services being rolled out by AT&T and Qwest.²⁰ What COMPTTEL fails to mention is that neither AT&T nor Qwest has any market power or dominance in the provision of video services, via broadband transmission or otherwise. While Qwest's Choice TV has been available for some time in limited markets, when it was deployed Qwest was in the same position as AT&T is today – a new entrant with no market share going up against an entrenched cable monopoly and a growing satellite video service business. If anything, COMPTTEL's example demonstrates why the forbearance requested in the instant petitions is necessary and should be granted without delay.

V. Embarq faces real competition in the provision of broadband services.

COMPTTEL complains that the Petitioners have presented no real evidence of competition in the broadband market place. Their complaint ignores two factors: (1) Competitors rarely divulge their customer purchases to Embarq, and (2) the Commission's recognition that broadband is still an emerging market for which facilities deployment by numerous intermodal competitors is beginning.

²⁰ COMPTTEL does not mention in this section of their argument that consumers also are major purchasers of broadband internet access – a broadband service for which forbearance relief has already been granted. *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853 (2005) (“*Wireline Broadband Order*”).

Nevertheless, there have been several very recent public announcement regarding competitors' broadband deployment and services in Embarq's territory which demonstrate the deployment of capabilities and facilities for the provision of broadband services to retail customers and carriers:

- On August 16, 2006, Verizon Wireless announced the extension of their broadband wireless network to Sarasota, Charlotte, and Lee counties in southwest Florida. Charlotte and Lee counties are in Embarq territories. The network will enable the latest in high-speed business and entertainment services on wireless devices.²¹
- On August 15, 2006, Kent Technologies, which is headquartered in Embarq's service territory in Bonita Springs, Florida and which has competed with Embarq in USAC's Schools and Library E-Rate program, announced construction of a fiber optic network, KentConnect, to provide Metropolitan Ethernet services to businesses in southwest Florida;²²
- On June 6, 2006, Time Warner Telecom Inc. announced a working arrangement with Overture Network to provide Ethernet services to business customers nationwide.²³
- On April 7, 2006, TelCove, another entity that has competed with Embarq in the E-Rate program, announced that with 2,700 route miles connecting 14 Florida markets (including Tallahassee in Embarq's territory) that it was the dominant competitive provider in Florida of metro and intercity services, including Ethernet, to enterprise customers and carriers.²⁴

VI. Conclusion.

Iowa Telecom accurately and succinctly sums up the argument as to why Embarq's Petition (as well as the BOCs') should be granted, providing the requested forbearance to Embarq and other independent ILECs in the provision of broadband service.

²¹http://home.businesswire.com/portal/wite/home/?epi_menuItemID=e23d7f2be635f4725e0fa455c6908a0c&epi_menuID=887566059a3aedb6efaaa9e27a808a0c&epi_baseMenuID=384979e8cc48c441ef0130f5c6908a0c&searchHereRadio=false&ndmHsc=v2*A0*J2*L1*N-1002313*Zverizon+wireless+extends+broadband+network.

²² <http://www.kenttech.com/news.php?id=49>

²³ <http://www.twtelecom.com/>

²⁴ <http://www.telcove.com/press/pr040706.asp>

The Petition [Embarq's] satisfies each of the three prongs of the statutory test for forbearance, and underscores the affirmative need for Commission action to promote the public interest and advance broadband deployment in areas served by independent local exchange carriers. The Petition further demonstrates that forbearance would be in the public interest, and that the continued imposition of narrowband-era Title II and Computer Inquiry requirements are counterproductive from both a consumer and competitive perspective. [Citation omitted.] As explained by Embarq, the mandates of section 706 of the Telecommunications Act of 1996 to encourage the deployment of advanced services further support grant of the Petition. [Citation omitted.]²⁵

Respectfully submitted,

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²⁵ Comments of Iowa Telecom, filed September 17, 2006, p. 3.

Certificate of Service

I hereby certify that I have this 31st day of August 2006 served the following parties with a copy of the foregoing Reply Comments in Support of Petitions in WC Docket Nos. 06-125 and 06-147 by the method noted.

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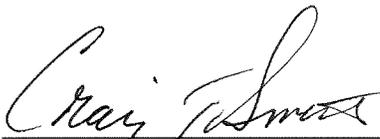
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