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Via Electronic Submission

Ms. Marlene H. Dortch
Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-A325
Washington, DC 20554

**Re: *Ex Parte Communication*
ACS of Anchorage Petition for Forbearance, WC Docket No. 06-109;
Qwest, AT&T, and BellSouth Petitions for Forbearance, WC Docket
No. 06-125; Embarq, Frontier and Citizens Petitions for Forbearance,
WC Docket No. 06-147; Special Access Rates for Price Cap Local
Exchange Carriers, WC Docket No. 05-25**

Dear Ms. Dortch:

Sprint Nextel Corporation (“Sprint Nextel”) writes to express its strong opposition to the grant of forbearance from Title II and the *Computer Inquiry* rules for any form of incumbent local exchange carrier (“ILEC”) special access services prior to determining that competition is sufficient to provide all of the protections that Title II and *Computer Inquiry* provide to consumers and competition. At this time, all evidence is to the contrary, demonstrating there is not sufficient competition in the special access market. Therefore, Sprint Nextel respectfully requests that the Federal Communications Commission (“FCC” or “Commission”) deny the pending Incumbent Local Exchange Carrier (“ILEC”) petitions seeking such relief (hereinafter the “Outstanding Petitions”).¹

The Commission Must Deny the Outstanding Petitions

In the Outstanding Petitions, the ILECs request the same relief they believe Verizon apparently received in March 2006² for its similar petition for forbearance.³

¹ See fn. 3 *infra*, for a list of the relevant petitions.

² On March 20, 2006, the Commission issued a News Release, a Joint Statement from Chairman Martin and Commissioner Tate, and separate statements from Commissioners Copps and Adelstein. The News Release reported that the four-member Commission had deadlocked and stated that Verizon’s petition “was deemed granted by operation of law, effective March 19, 2006.” *Verizon Telephone Companies’ Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to their Broadband Services Is*

While it is unclear what relief, if any, Verizon received from Title II and *Computer Inquiry* rules, it is clear that the Commission cannot, and should not, use the Verizon Forbearance outcome as precedent for action in response to the Outstanding Petitions. The forbearance process was never intended to ensure that all parties are treated the same; on the contrary, it was intended to ensure that a particular party with a unique set of facts could obtain relief from a rule that was no longer necessary in the context of that carrier's circumstances – something of a line-item veto that surgically removes specific requirements based on a unique set of facts. The Commission therefore must address, with particularity and in a carefully considered manner, the merits of each of the Outstanding Petitions separately, without reference to the outcome of any other forbearance petition.

An individualized view of each petition uncovers each petitioner's failure to satisfy the requirements of section 10 of the Act.⁴ Rather than providing "evidence or analysis to satisfy section 10(a) requirements," the ILECs "just deliver sweeping generalizations about competition" that focus on retail markets, without acknowledging that the ILECs' competitors "must rely on ILEC facilities in the wholesale market in

Granted by Operation of Law, 2006 FCC LEXIS 1333, *1 (2006)("Verizon Forbearance").

³ *Petition of ACS of Anchorage, Inc. for Forbearance from Certain Dominant Carrier Regulation of its Interstate Access Services, and for Forbearance from Title II Regulation of its Broadband Services, in Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area*, filed May 22, 2006, at 6 ("ACS seeks forbearance consistent with that granted to Verizon Telephone Companies on March 19, 2006; *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, filed June 13, 2006, at 2 ("Qwest is entitled to relief Verizon has already received."); *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*, filed July 13, 2006, at 8 ("AT&T here seeks all of the same relief that Verizon obtained . . . to the extent it did not already receive such relief when Verizon's petition was deemed granted."); *Petition of BellSouth Corp. for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to its Broadband Services*, filed July 20, 2006 and corrected August 4, 2006, at 2 ("Bellsouth . . . requests that the Commission . . . grant BellSouth and similarly situated carriers the same relief . . ."); *Petition of the Embarq Local Operating Cos. For Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements*, filed July 26, 2006, at 2 ("Embarq seeks relief . . . the same as granted Verizon in its forbearance petition."); Frontier and Citizens petition, filed August 4, 2006, at 2 (Frontier "respectfully request[s] that the Commission . . . grant Frontier and similarly situated carriers the same relief . . ." granted to Verizon).

⁴ 47 U.S.C. Section 160.

order to provide their own, competing retail services.”⁵ Such showings were not sufficient in Verizon’s case, and they are not sufficient in the “me too’s.”

Moreover, the Commission must ensure that its individual forbearance decisions are not at odds with its rulemaking decisions – and the pending special access rulemaking is closely related to the Outstanding Petitions because those requests directly impact special access services, including TDM-based circuits, packet-switched circuits and Ethernet. As the record in the *Special Access Pricing* rulemaking makes clear, the special access market has failed, and Commission action to discipline carriers’ prices and terms and conditions is urgently needed.⁶ Thus, granting the Outstanding Petitions would fly in the face of the record in that proceeding, particularly since the petitioners have not demonstrated how their individual facts differ from those presented in the *Special Access Pricing* rulemaking.

Ultimately, the Commission will need to reverse the purported grant of forbearance to Verizon, thus further demonstrating why the Commission cannot rely on the Verizon Forbearance as support for granting the Outstanding Petitions. The Commission has repeatedly stated – correctly – that it may change course after granting forbearance. For example, in another forbearance case involving Verizon, the Commission stated: “To the extent our predictions about the broadband market and the BOCs’ actions are incorrect, carriers can file appropriate petitions with the Commission and, of course, the Commission has the option of reconsidering this forbearance ruling.”⁷ Certainly, the facts in the *Special Access Pricing* proceeding demonstrate that Verizon’s special access services – whether TDM-based, packet-based or Ethernet – are not subject to effective competition and should not, therefore, be free from Title II or the *Computer Inquiry* obligations.⁸ For the reasons discussed below, the Commission cannot grant the Outstanding Petitions.

⁵ Sprint Nextel Corporation’s Opposition to Petitions for Forbearance, WC Docket Nos. 06-125 and 06-147 (August 17, 2006), at 15, 17.

⁶ *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25 (“*Special Access Pricing* rulemaking”). Parties filed Comments in the special access proceeding on August 8 and reply comments on August 15. Therein parties have raised serious concerns – and presented substantial evidence supporting those concerns – that the special access market has failed and must be subject to effective incentive regulation.

⁷ *In re Petition for Forbearance of the Verizon Telephone Companies, et al.*, 19 FCC Rcd 21496, n. 84 (2004) (citing *CellNet Communications, Inc. v. FCC*, 149 F.3d 429, 442 (6th Cir. 1998)).

⁸ As Sprint Nextel has requested in its comments to the Special Access Pricing rulemaking, the Commission should it should to remedy the problems with special access for all special access services, including those that were the subject of the *Verizon*

The Special Access Services Market – whether TDM-based, packet-switched or Ethernet – Has Failed and Is Not Ripe For *Deregulation*

In reviewing each of the Outstanding Petitions, each petitioner seeks, at a minimum, deregulation of packet-switched broadband and Ethernet services – both of which are special access services provided today in a market dominated by the very petitioners seeking forbearance. Special access is the lifeblood of a vast array of communications services, and those services are not limited to TDM-based special access services. Rather, special access services are frequently packet-based and/or Ethernet services so petitioners' attempts to "carve out" these services are nothing more than attempts to *deregulate* the special access market – at the very time the Commission is considering whether increased controls are necessary. Regardless of the technology over which these special access services ride, these services are too critical for the Commission to forbear from enforcing the various protections that Title II and the *Computer Inquiry* rules afford to consumers of these services.⁹

From a policy perspective, moreover, it is illogical to make technology-specific forbearance decisions. Such a loophole would be too easily exploited by dominant ILECs seeking to hinder their competitors by simply modifying their networks to Ethernet and packet-switched services. Thus, if the Commission deregulates Ethernet and packet-switched services, it will provide an incentive for the ILECs to move their special access services from the "regulated bucket" to the "unregulated bucket," thereby avoiding the very protections being currently considered in the *Special Access Pricing* proceeding. Already these monopoly service providers are exploiting their market power over special access services; it is not difficult to imagine how they will behave with absolutely no restrictions on this critical input to many communications providers. At a minimum, grant of the requested forbearance will likely result in unjust, unreasonable, and discriminatory rates, terms, and conditions. The proper question before the Commission in determining whether a forbearance petition satisfies section 10 is not what technology is at issue, but whether the petitioner is a dominant carrier in the relevant product and geographic markets. The overwhelming evidence before the Commission clearly demonstrates that the forbearance petitioners continue to be dominant carriers in the wholesale markets for high-capacity special access and Ethernet services across all MSAs.¹⁰

Forbearance proceeding. Comments of Sprint Nextel Corporation, filed August 8, 2007, WC Docket No. 05-25 ("Sprint Nextel Comments"), at p. 2, n. 2 and p. 3, n. 4.

⁹ See Comments of Time Warner Telecom, WC Docket No. 05-25, filed August 8, 2007, at pp. 26-28.

¹⁰ Comments of The Ad Hoc Users Group, WC Docket No. 05-25, filed August 8, 2007, ETI 2007 Study at 4 & A-8, and Declaration of Susan M. Gately, attached as Appendix 2 to Ad Hoc Comments, ¶ 10 ("Gately 2007 Decl.") (documenting BOC price

Finally, granting forbearance from regulation for non-TDM-based special access services is clearly contrary to recent Commission decisions. For example, in the *Wireline Broadband Internet Access Order*, the Commission explicitly declined to lift Title II regulation of stand-alone ATM service, frame relay, gigabit Ethernet service, and other high-capacity special access services because these “basic transmission” services are “telecommunications services under the statutory definition.”¹¹ Similarly, in the *Verizon-MCI Merger Order*, the Commission concluded that the merger “absent appropriate remedies, is likely to result in anticompetitive effects for wholesale special access services,”¹² and the *Omaha Forbearance Order*, in which the Commission held that Qwest continued to be dominant in the provision of enterprise services such as special access high capacity loops, even in the presence of an intermodal competitor in other market segments.¹³ Finally, the Commission has “expressed skepticism that it would ever be appropriate to forbear from applying” sections 201 and 202, and placed the

increases and unprecedented returns of 52% to 132% as of year end 2006); Comments of the New Jersey Division of Rate Counsel, WC Docket No. 05-25, filed August 8, 2007, at 18 (“the rate of return for the [BOCs’] special access services increased from approximately 38% in 2001 to approximately 78% in 2006”) & 19 (“in New Jersey, Verizon’s rate of return has increased from 26% in 2001 to 104% in 2006”); Comments of XO Communications, LLC, Covad Communications Group, Inc. and NuVox Communications, WC Docket No. 05-25, filed August 8, 2007, at 12-16 (“Covad, *et al.* Comments”); Comments of ATX Communications, Inc., Bridgecom International, Inc., Broadview Networks, LLC, Cavalier Telephone, LLC, DeltaCom, Inc., Integra Telecom, Inc., Lightyear, Inc., McLeodUSA Telecommunications Services, Inc., Penn Telecom, Inc., RCN Telecom Services, Inc., Savvis, Inc., and U.S. Telepacific Corp. d/b/a Telepacific Communications (Redacted Version), WC Docket No. 05-25, filed August 8, 2007, at 9-16 (“ATX, *et al.* Comments”) (special access prices and unconscionable rates of return have increased); Sprint Nextel Comments at 8-21 (providing data showing that the BOCs continue to reap a windfall from the provision of special access); Comments of Time Warner Telecom and One Communications (Redacted Version), WC Docket No. 05-25, filed August 8, 2007, at 29-31 (“TWTC/One Comments”) (stating that “[t]he increase in special access rates under pricing flexibility has been studied and documented in excruciating detail,” and providing high level summaries of such studies).

¹¹ Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 FCC Rcd 14853, 14860-61 (para. 9) (2005).

¹² *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18433 (para. 24) (2005).

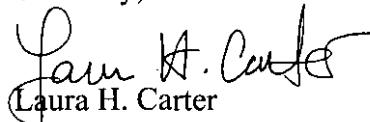
¹³ *Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, *Memorandum Opinion and Order*, 20 FCC Rcd 19415 (para. 50) (2005).

burden of proof on the petitioner to make the forbearance showing¹⁴ – a burden that none of the ILECs have made in their respective petitions.

Conclusion

It is time for the Commission to apply some discipline to the forbearance process. Incumbent LECs have exploited Section 10 and the Commission's limited resources by filing overly broad and poorly pled petitions for forbearance. Although ILECs' customers have clearly shown the special access market failure in the *Special Access Pricing* rulemaking, it is not the customers' responsibility to demonstrate in a forbearance proceeding that the absence of competition fails to discipline special access rates and practices. Rather, the carriers requesting forbearance have the responsibility to demonstrate that their individual petitions comply with section 10 of the Act. They have failed in that responsibility and it would be most unwise for the Commission to build such a house of cards by feeling pressured to provide relief where it is neither warranted nor advisable. Rather, the Commission should deny any petition that does not show, with particularity, that the petitioner meets the specific requirements of section 10 of the Act for its specific market and the services for which it seeks forbearance.

Sincerely,


Laura H. Carter

Cc: Ian Dillner
Scott Deutchman
Scott Bergmann
Chris Moore
John Hunter
Thomas Navin
Donald Stockdale
Albert Lewis
Deena Shetler

¹⁴ *Petition of SBC Communications Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services*, 20 FCC Rcd 9361, 9368 (para. 17) (2005).