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August 30, 2007

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 writes to express its strong opposition to the Commission granting forbearance from Title II and the *Computer Inquiry* rules for any form of incumbent local exchange carrier (“ILEC”) special access services, including the services listed by each of the Petitioners. Until the Commission can determine that competition is sufficient to prevent the Petitioners’ current and future exploitation of their market power, the Commission must maintain all of the protections that Title II and *Computer Inquiry* provide to consumers and competition.

The Petitioners Fail to Provide Evidence Sufficient to Warrant Forbearance

Sprint Nextel is highly concerned by reports that the Commission intends to address all of the pending ILEC petitions for forbearance by September 11. For the Commission to take action as sweeping as the parties request, the Commission must address, with particularity and in a carefully considered manner, the merits of each of the pending forbearance petitions. Yet none of the Petitioners has filed any product- or geographic-specific market data to enable the Commission to determine the extent to which each of the Petitioners is dominant with regard to the product and geographic markets at issue. Without such evidence, the Commission cannot justify granting forbearance, and therefore must deny the petitions as incomplete.

Despite the sparse state of the record more than a year after these Petitions were filed, the Wireline Competition Bureau, on August 23, 2007, requested the Petitioners to file, by August 31, 2007, “market data to enable a ‘local market analysis’ for the services identified in” the

forbearance petitions.¹ It is inconceivable that the Commission will be able to conduct the kind of analysis necessary to determine the extent to which each of the individual Petitioners is dominant in the relevant product and geographic markets within six business days of receiving the data. Furthermore, the extremely belated nature of the request effectively denies opposing parties any opportunity to review and, as will likely be necessary, rebut the “evidence” that the Petitioners will file in response to the Bureau’s request.

Relying on market data submitted at this point in these proceedings would be flatly inconsistent with the Administrative Procedure Act. On a fundamental level, the APA requires the Commission to “examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”² At this late date, the Commission obviously lacks the time even to “examine the relevant data” adequately, let alone to articulate “rational connection[s]” between that data and its ultimate determinations.

Moreover, the procedural irregularity of the Commission’s approach is underscored by the fact that – as reported by the trade press on August 20th³ – a draft order disposing of all five pending forbearance petitions is already circulating among the Commissioners. The horse has bolted well ahead of the cart. The APA requires the Commission to compile a record and *then* make a decision based on “thoughtful consideration duly attentive to the comments received.”⁴ The Commission is *not* allowed to make a decision and *then* build a record in support: “The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.”⁵ Simply put, a decision cannot have a proper basis in evidence that was not in the record when the decision was made.

Equally important, the Commissioners are not the only ones who will not have sufficient time to review the upcoming submissions. Interested parties also cannot possibly analyze and meaningfully comment on a sea of local market data in little more than a week. But the APA mandates that “the agency make available to the public, *in a form that allows for meaningful public comment*, the data” upon which its determinations rely.⁶ Indeed, “it is an abuse of

¹ Letter from Thomas J. Navin, Chief, Wireline Competition Bureau, FCC, to Susanne A. Guyer, Verizon, Melissa E. Newman, Qwest, Robert W. Quinn, AT&T, Jeffrey S. Lanning, Embarq, and Gregg C. Sayre, Frontier Communications, dated August 23, 2007.

² *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

³ *Qwest, AT&T, Embarq and Frontier would get forbearance from regulation of enterprise broadband services*, Communications Daily, at p. 9, August 20, 2007.

⁴ *Telocator Network of America v. FCC*, 691 F.2d 535, 549-50 (D.C. Cir. 1982).

⁵ *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943).

⁶ *AMA v. Reno*, 57 F.3d 1129, 1132 (D.C. Cir. 1995) (emphasis added).

discretion for [an] agency to act on the basis” of financial data submitted *ex parte* “without giving [interested parties] an opportunity to discuss it.”⁷

To protect the integrity of the Commission’s decision-making process and allow the parties that most certainly will be harmed by any further deregulation of the ILECs,⁸ the Commission must deny the petitions as filed, without prejudice to refiling with the evidentiary support necessary for the Commission to make a reasoned decision.

Petitioners Must Demonstrate they Face Substantial Competition on a Product- and Geographic Market Basis – Not on a National Basis

Although Petitioners seek forbearance on a national basis, the national market is not appropriate for consideration of these issues. The above dockets are replete with evidence that the incumbent local exchange carriers (“ILECs”) have monopoly power over specific special access channel terminations, channel mileage, and entry facilities over even high-capacity loops,⁹ and that the MSA-wide triggers have failed to predict accurately or even demonstrate the state of competition for each of those markets.¹⁰ Because these services are not fungible from

⁷ *Delta Data Systems Corp. v. Webster*, 744 F.2d 197, 203 (D.C. Cir. 1984); *see also Ober v. EPA*, 84 F.3d 304, 315 (9th Cir. 1996) (petitioners “prejudiced when they did not have notice of or an opportunity to comment on the post-comment period justifications which . . . were critical to the EPA’s approval decision”).

⁸ The Commission has already provided a great deal of premature deregulation to incumbents. For example, the Commission has (1) allowed the Section 272 safeguards to sunset; (2) Qwest is no longer subject to, and the BOCs separately are seeking waiver or forbearance from enforcement of, post-sunset section 272 structural separation rules; *Petition of Qwest Communications International Inc. for Forbearance from Enforcement of the Commission’s Dominant Carrier Rules As They Apply After Section 272 Sunsets*, WC Docket No. 05-333, Memorandum Opinion and Order, FCC 07-13 (rel. March 9, 2007); *Bellsouth Corp.’s Petition for Waiver*, WC Docket No. 05-277 (filed Sept. 19, 2005); *Petitions of Verizon’s Local and Long Distance Telephone Companies for Interim Waiver of and Forbearance from Certain Dominant Carrier Regulations for In-Region, Interexchange Services*, WC Docket No. 06-56 (filed Feb. 28, 2006, withdrawn May 25, 2007); *Petition of AT&T, Inc. for Forbearance Under 47 U.S.C. § 160(c) with Regard to Certain Dominant Carrier Regulations for In-Region, Interexchange Services*, WC Docket No. 06-120 (filed June 2, 2006); and (3) competitors’ access to unbundled network elements (“UNEs”) has been sharply limited. *See Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533 (2005), *aff’d*, *Covad Communications v. FCC*, 450 F.3d 528 (2006) (*Triennial Review Remand Order*).

⁹ As Sprint Nextel has noted, “even at the OCn level, Sprint Nextel relies upon ILECs for approximately 75% of circuits – and nearer to 85% when former AT&T and MCI facilities are included. In rural and smaller markets (non-BOC territories, including most Embarq service areas), competitive alternatives are even more limited, such that SN is even more dependent on ILEC facilities.” Sprint Nextel Comments, WCB Docket Nos. 06-125 and 06-147, at 9, filed August 17, 2006.

¹⁰ In the *UNE TRRO*, the Commission properly rejected the use of an MSA, much less the entire nation, to determine the relevant geographic market for both dedicated transport and high capacity loops. *Unbundled Access to Network Elements*, Order on Remand, 20 FCC Rcd 2533, paras. 82, 155, 164 (2005)

one location to another, absent granular evidence that there are any competitive alternatives to those particular services, it is contrary to Commission precedent, contrary to the public interest, and contrary to the requirements of section 10 of the Telecommunications Act to analyze the markets at issue in the petitions based on anything but a product- and geographic-specific basis. Any Commission decision granting the Petitions without evidence regarding the existing product and geographic markets for the services at issue in the petitions would be arbitrary and capricious.¹¹

The Commission Also Must Deny the Petitions as to Special Access Because the ILECs Remain Dominant in the Provisioning of those Services

The Petitioners likely did not file any support beyond sweeping generalizations and copies of competitors' marketing materials because such support simply does not exist. As the Commission and the Department of Justice have noted in other proceedings, the special access market is not competitive and competitive safeguards remain necessary.¹²

(*UNE TRRO*). UNE loops are equivalent to special access channel terminations and UNE transport is the equivalent of special access channel mileage. *See, e.g., UNE TRRO paras. 3 & n.1825* (drawing an analogy between a special access channel termination and a UNE loop). The Commission noted that an MSA approach "would require an inappropriate level of abstraction, lumping together areas in which the prospects for competitive entry are widely disparate." *UNE TRRO* at para. 155. As Sprint Nextel has noted in its most recent comments in WC Docket 05-25, even the MSA basis is too broad in examining the relevant geographic market for special access. *See Sprint Nextel Comments, WC Docket No. 05-25, at 13-18, filed August 8, 2007.*

¹¹ Although concerned with the timing of the request, Sprint Nextel is gratified that the Bureau has asked the parties to file "local market" data. The Bureau, however, does not define what it means by "local market" data. The lack of specificity regarding the data that the Bureau needs to evaluate the petitions makes it likely that the Petitioners once again will provide data insufficient to meet that required by the Commission's traditional market power analysis. *See Omaha Forbearance Order* at para. 117 (describing the "strong relationship between statutory forbearance criteria and the Commission's dominance analysis, particularly with regard to the statutory assessment of competitive conditions and the goal of protecting consumers."); *see also* H.R. Conf. Rep. No. 104-458 at 185 (1996) (forbearance under section 10(a)(1) of the 1996 Act requires a showing that the petitioner has no market power).

¹² *See Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160 (c) in the Omaha Metro. Statistical Area*, 20 FCC Rcd 19415 at para. 50 (2005) (*Qwest Omaha Order*); *Appropriate Framework for Broadband Access to Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 at para. 19 (2005) (*Wireline Broadband Order*); *SBC Communications Inc. and ATT Corp. Applications for Transfer of Control*, 20 FCC Rcd 18290 at para. 24 (2005) (*SBC/AT&T Order*); *Verizon Communications, Inc. and MCI, Inc. Applications for Transfer of Control*, 20 FCC Rcd 18433 at para. 24 (2005) (*Verizon/MCI Order*); *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 at para. 233 (2003), *Errata*, 18 FCC Rcd 19020, *rev'd in part on other grds., USTA v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), *cert denied sub. nom., NARUC v. USTA*, 543 U.S. 925 (2004) (*Triennial Review Order*).

Simply renaming the special access services at issue “enterprise broadband” does not make the market more competitive.¹³ Carriers that provide similar retail services in competition with the ILECs must rely on those very same ILECs to obtain the special access inputs necessary for their retail competitive products.¹⁴ The Commission will choke the very broadband competition that it seeks to promote if it forbears from enforcing the safeguards for the special access inputs on which facilities-based competitors rely to provide their own competitive enterprise services.¹⁵

As the Ad Hoc Telecommunications Users Committee so effectively noted,

The distinction between noncompetitive wholesale special access and retail end user services that rely upon wholesale special access has been submerged by the petitioners into a ‘soup’ that requires careful analysis by the Commission before it is eaten. In particular, the Commission must recognize that the presence of resale-based competition – *i.e.*, competition that utilizes broadband access and other wholesale services obtained on a noncompetitive basis from the BOCs – in retail markets does not provide a basis for deregulating the wholesale service inputs upon which that competition depends.¹⁶

¹³ The Commission has defined special access as a dedicated transmission link between two locations. See *AT&T Inc. and BellSouth Corporation, Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd 5662, ¶ 27 n.88 (2007) (“*AT&T/BellSouth Merger Order*”), citing *Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994, ¶ 7 (2005) (“*2005 Special Access NPRM*”); see also *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion & Order, 20 FCC Rcd 18290, ¶ 24 (2005) (“*SBC/AT&T Merger Order*”); *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18433, ¶ 24 (2005) (“*Verizon/MCI Merger Order*”). As this definition makes clear, “special access” includes any dedicated transmission link, regardless of the type of technology deployed over that link (including Ethernet and other packet-based services). See *AT&T/BellSouth Order*, ¶ 27 n.88 (using the term “special access” to include *all* services that involve dedicated transmission links).

¹⁴ Comments of Time Warner Telecom, Inc. (“TWTC”), WC Docket No 05-25, filed August 8, 2007 at p. 11 (hereinafter “TWTC Special Access Comments”) (TWTC “serves 20,221 customer locations and has been able to deploy loops to only 7,884 locations. Therefore, legacy TWTC serves approximately one quarter of its buildings on-net.”)

¹⁵ See Ad Hoc Reply Comments, WC Docket No. 06-125, at 16 (“Deregulating a noncompetitive service is never a good idea. Deregulating a noncompetitive service that is an essential input for competitors in an adjacent competitive market is an even worse idea, because it can lead to the elimination of competition in that adjacent market.”).

¹⁶ Ad Hoc Reply Comments, WC Docket No. 06-125, at 15-16, filed August 31, 2006.

The bottom line is, in considering the forbearance petitions before it, the Commission must separately address the retail market for these “enterprise broadband services” as well as the wholesale market for the inputs to those “enterprise broadband services.”¹⁷ With regard to wholesale inputs, the Commission must continue to guard against cross-subsidization or tying arrangements between regulated services (*e.g.*, TDM-based special access services) and whatever other services for which it decides to forbear from Title II or *Computer Inquiry* regulation. It does purchasers no good to purchase tariffed and price capped channel terminations, if the ILECs tie those services to the purchase of the non-regulated transport services.

Distinguishing TDM-Based from Other Technologies Used Over Special Access Circuits is Illogical and Will Harm Innovation and Broadband Deployment

The Petitioners exclude TDM-based special access services from their request for forbearance. The TDM/non-TDM distinction, however, is illogical and will harm not only competition, but also competing carriers’ efforts to deploy their own innovative broadband services.¹⁸ Furthermore, it is inappropriate to base Commission policy on particular technologies. The particular technology used to offer services over a facility is irrelevant to whether there has been -- or even whether there can be -- economic entry by competitors. What matters are the revenue opportunities for a service, compared to the cost of building and operating the service on a particular route.¹⁹ Building the facilities to compete head-to-head with the ILECs in their provision of Ethernet services is no different (and certainly no easier) than building TDM special access services. As TWTC has stated, “[t]he economics of loop deployment do not magically improve when a different protocol is used to transmit the signal. The same trench must be dug, the same fiber must be laid and similarly priced electronics must be attached.”²⁰

¹⁷ The Commission has recognized that retail and wholesale markets are wholly separate and must be assessed individually. *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 19237 at para. 8 (1999); *see also Association of Communications Enterprises v. FCC*, 253 F3d 29, 31-32 (D.C. Cir. 2001) (Upholding the FCC’s distinction between wholesale or carrier services and retail or end-user services); *see also* Opposition of Time Warner, Inc., CBeyond Communications, LLC, and One Communications Corp. (“Time Warner Telecom”) at 7 (the Commission “must focus on the extent to which the petitioners continue to possess market power over the facilities necessary to provide [competitive] services”).

¹⁸ As the Commission noted in the *Wireline Broadband Internet Access Order*, “the erosion of barriers between various networks and the limitations inherent in those barriers will lead to greater capacity for innovation to offer new services and products.” *Wireline Broadband Internet Access Order* at para. 40.

¹⁹ Even if the Commission uses its predictive judgment that competition will enter the market – which it should not -- the ILECs have made no showing here that the revenue opportunities for these services are high enough to justify a competitor building its own facilities, including the special access inputs to those services, and they have certainly made no such showing on a route-by-route basis.

²⁰ TWTC Special Access Comments at pp. 13-14.

The TDM/non-TDM distinction will create a loophole that the dominant ILECs will easily exploit to hinder or to gouge their competitors. Distinguishing based on technology would certainly provide an incentive for the ILECs to reconfigure their networks or their service offerings so that they are now considered non-TDM or part of the “brand name” that the Commission specifically deregulated. A special access line, whether it is carrying packets or TDM to one location is not fungible with a special access line to another location. The ILECs are attempting to exploit the cloud of uncertainty surrounding technologies that involve packet switching. Technology utilized within the telecommunications network is constantly evolving, sometimes in subtle ways and sometimes more drastically. The movement to packet-based technology is just the latest step in that process. These changes are created by engineers and scientists in laboratories throughout the world. The use of their inventions does not magically transform a market or particular route from noncompetitive to competitive. It is inappropriate for the petitioners to attempt to take advantage of this situation.

Moreover, any claim that TDM-based special access services will be sufficient to meet customers’ needs is simply false. Many special access circuits that customers currently purchase are increasingly utilizing Ethernet and other packet-based technologies. TDM-based special access lines are not effective nor efficient substitutes for packet-based or Ethernet lines.

The Commission seems to be under the misimpression that the specific services listed by the Petitioners in their forbearance requests are not “special access” services and that TDM-based special access services are “pure pipes” that can easily be converted to Ethernet and other packet-based technologies. In fact, the specific services Petitioners list are simply alternative forms of special access and TDM-based special access services are more than pure pipes – they include TDM electronics. The Petitioners are willing to exempt TDM-based DS1s and DS3s from their forbearance request because they know that the network of the future will use non-TDM based services and leasing only TDM-based services will drive up competitors’ costs and hamper their ability to offer services. When a customer purchases a TDM-based DS1, for example, it pays for the TDM electronics attached to it. It then pays again for the relevant electronics in cases where it is able to convert to another technology. Moreover, the conversion hampers service by reducing the available bandwidth. It also makes repairs more difficult because two sets of technicians need to examine two possible sources of the problem. The Petitioners, in contrast, likely will not deploy the TDM electronics on their Ethernet and other packet-based offerings at all, and thus will pay only for the electronics they use, not the ones from which they must convert. Nor will they suffer the loss of bandwidth or the repair problems inherent in unnecessarily using two technologies.²¹

Finally, in requesting forbearance from all but their TDM-based special access services, the ILECs are effectively cutting off carriers from the IP-based network of the future.²² If the

²¹ TWTC spelled out these arguments in its reply filing of August 11, 2006, in WC Docket No. 06-109, at 13-15, and the referenced declaration. *See* note 32, *infra*.

²² *See* NTCA Comments in 06-125 at 2-3 (“While it is true that many rural ILECs connect to the Internet today over Time Division Multiplex (TDM) circuits, it is easy for BellSouth and Qwest to grandfather these services as Title II services in favor of Title I regulation for the newer more attractive IP based

Commission forbears for non-TDM based special access, the ILECs will be able to enjoy packet-based and Ethernet special access themselves, while competitors would be forced to purchase the less efficient or less effective TDM technology, and purchase equipment to convert them to Ethernet or other types of technologies. Furthermore, since TDM technology is not as scalable as Ethernet, competitors costs would continue to rise by needing to deploy more and more TDM circuits, which is a major component in the ultimate end user pricing. So, while AT&T and Verizon are able to deploy to their own wireless affiliates heavily discounted Ethernet services, competitors would be forced increase their access costs. Thus, if it grants the Petitions, the Commission would be complicit in the ILECs' strategy to foreclose competition to the very services that the Commission wishes to deploy more rapidly – facilities-based broadband services.

Forbearance Will Not Accelerate the Deployment of Broadband Facilities; in Fact, it Will Hinder Broadband Deployment

As Sprint Nextel noted in its comments to the FCC's *Section 706 Inquiry on the Deployment of Advanced Telecommunications Capabilities*,²³ although carriers are deploying competitive retail broadband facilities at a rapid pace,²⁴ the availability of wholesale inputs at reasonable prices is crucial to those carriers' deployment. For that reason, the ILECs have both the incentive and the ability to harm the competitors that purchase those inputs by imposing unreasonable costs on their competitors through high prices, or by degrading the quality or by delaying the provisioning of those inputs.²⁵ If broadband deployment is truly a goal of the Commission, it must ensure that the ILECs continue to comply with the safeguards in Title II and the *Computer Inquiry* that prevent the ILECs from exploiting their dominance over these critical special access inputs. Otherwise, competitors likely will be forced to slow, if not halt,

services. It is disingenuous for BellSouth and Qwest to assert that they are only seeking remedies on non-TDM services. Anyone that has been tracking the industry knows that TDM services will eventually be obsolete. The lines between TDM/IP are rapidly disappearing in favor of IP-based services. Today, rural ILECs can provide T1-PRI services to local businesses, such as hospitals, transported over an optical Ethernet connection and converted to a T1 at each end. This type of connection is used in some cases because these businesses currently do not support any other type of connection. Notwithstanding the fact that rural ILECs may deliver services via a T1, these rural ILECs could just as easily provide transport via an Ethernet connection, and avoid a TDM connection.”).

²³ Sprint Nextel Comments, GN Docket No. 07-45, filed May 16, 2007.

²⁴ See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853, at paras. 34-40 (Describing the evolution of digital, packet based technology, and nothing that “[b]oth the providers of network platforms and those that utilize the platforms are in a position to capitalize on these changes.”). The ILECs do not need additional incentives to build out these networks.

²⁵ See T-Mobile *Ex Parte* Letter, WC Docket nos. 04-440, CC Docket Nos. 02-33, 95-20, 98-10, at 5, dated March 10, 2006 (“Verizon and other ILECs have strong incentives to raise the price and degrade the quality of those inputs in order to protect their wireline dial tone offerings from wireless competition.”)

their deployment of competitive broadband services.²⁶ In fact, as the National Telecommunications Cooperation Association (“NTCA”) has warned, even “smaller rural carriers who rely on three or fewer Internet backbone transport providers could find themselves forced to delay service expansion or increase retail broadband prices due to increased Internet backbone costs, if forbearance is granted.”²⁷

Carriers that are introducing new and innovative services are benefiting consumers by providing innovative, competitive services. Those carriers are able to reach those customers through special access lines, whether TDM- or packet-based. True competition to the ILECs comes in the form of better applications or services that end users purchase, not from withholding access to bottleneck facilities. Consumers will benefit to a much greater degree if innovators and competitors use their capital build out competing *services* instead of the last mile facilities that enable consumers to access those competing services. The Commission has consistently recognized that whether a competing carrier can build-out facilities is a matter of economics and has recognized that the last-mile is particularly problematic.²⁸ If the Commission takes away the ability to access these bottleneck facilities, the Commission will simply be harming consumers by deterring the introduction of new and innovative services.

Sections 201 and 202, by Themselves, Are Insufficient to Prevent the ILECs from Exploiting their Market Power

The Petitioners portray themselves as victims of such heavy regulation that they cannot respond to competitive pressures through the restraints provided by Title II and the *Computer Inquiry* rules.²⁹ What Petitioners obfuscate, however, is the fact that they are, in large measure,

²⁶ See Time Warner Telecom Comments at 23 (“Removing dominant carrier regulation from the petitioners’ packetized broadband facilities will force CLECs to scale back or eliminate their packetized broadband service offerings.”).

²⁷ NTCA Reply Comments, WC Docket Nos. 06-125, 06-147, at 4, filed August 31, 2006. NTCA also raised concerns that, if deregulated, the BOCs could leverage their dominance to impose tying arrangements and price squeezes on rural carriers. NTCA Reply Comments at 3.

²⁸ The Commission has concluded that the economics of constructing last-mile facilities to a customer location create “substantial” barriers to entry. *Unbundled Access to Network Elements*, Order on Remand, 20 FCC Rcd 2533, ¶ 153 (2005) (“*UNE TRRO*”) (discussing loops). The discussion of loops in the *UNE TRRO* is equally applicable to special access channel terminations, since loops and channel terminations serve identical purposes in a network. See, e.g., *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, ¶ 593 & n.1825, corrected by Errata, 18 FCC Rcd 19020 (2003) (“*UNE TRO*”) (drawing an analogy between a special access channel termination and a UNE loop); GAO Report at 13 (noting that it is unlikely to be economically viable for competitors to extend their networks to locations with less than 3 or 4 DS1s worth of demand).

²⁹ It is unclear, however, what “harm” exactly the ILECs are trying to remedy through their Petitions. It is likewise unclear how the ILECs plan to exercise their sought freedom other than to harm their potential competitors.

monopolists that exercise their monopoly power to the greatest extent possible. Where they do face limited competition in some markets and for specific products, Petitioners are incumbent providers of the services at issue, have significant economies of scale, and continue to enjoy substantial market power in the services they provide. Any grant of forbearance where they do not, today, face significant competition will simply enable them to further their dominant status. It is unnecessary to enhance their ability to compete when they have few to no competitors to the vast majority of their special access lines.

The Petitioners seek broad relief from the provisions of Title II, including the requirements under sections 201 and 202 to sell their services at just and reasonable, nondiscriminatory rates.³⁰ In the *ACS Forbearance Order*, the FCC granted ACS forbearance only from "dominant" carrier regulation, however, so it still is subject to sections 201 and 202, even with respect to the non-TDM services.³¹ The Commission certainly should not grant more extensive relief than it gave to ACS. In fact, the Commission should not grant as much relief as it did for ACS in the Anchorage market. Merely maintaining the Title II section 201 and 202 requirements is insufficient to protect purchasers from the ILECs' exploitation of their market power. The ILECs seek forbearance from tariffing, cost support and pricing requirements for their named services. Grant of the pending requests will eviscerate the already limited ability of purchasers to prove that the BOCs are overcharging by orders of magnitude for their special access services. Relying on only sections 201 and 202 will force carriers to use their already limited resources to file complaints at the Commission. The Petitioners easily out-resource any complaining carrier, and will be able, through attrition alone, to succeed in shutting down their competition even if they do violate sections 201 and 202 of the Act.³²

Conclusion

As Sprint Nextel urged in its August 17 Letter, the Commission must establish discipline over the forbearance process. This means requiring carriers to support their requests for forbearance with particularity at the outset, and not within two weeks of the statutory deadline.

³⁰ See Qwest Petition at 3 & n. 6.

³¹ See *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S.C. § 160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area*, WC Docket No. 06-109, Memorandum Opinion and Order, FCC 07-149, at para. 128 (rel. Aug. 20, 2007) (*ACS Forbearance Order*).

³² The section 202 nondiscrimination prohibition's effect on ILEC behavior is limited, because selling to an affiliate at an inflated price is merely an accounting cost to that affiliate – the affiliate's shareholders suffer no discernable harm.

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The Commission must dismiss any petition that does not provide support sufficient to comply with the requirements of section 10 of the Act.

Sincerely,

/s/ Laura H. Carter

Laura H. Carter
Vice President, Government Affairs

/s/ Anna M. Gomez

Anna M. Gomez
Vice President, Government Affairs

cc: Ian Dillner
Scott Deutchman
Scott Bergmann
Chris Moore
John Hunter
Thomas Navin
Donald Stockdale
Albert Lewis
Deena Shetler
Pam Arluk
Jay Atkinson
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