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August 31, 2007

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: 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. 06-147 ("Petition").

Dear Ms. Dortch:

The national market for broadband special access services¹ is robustly competitive and Embarq's *Petition* is ripe for granting based on the current record. No additional information is necessary, particularly not information broken down by local markets. As AT&T correctly points out,² this Commission has consistently used a national framework or nation-wide market for evaluating broadband competition and has been upheld by the Courts.³ There is no reason, nor justification, to change that national framework now. Nevertheless, Embarq is certainly willing to provide the additional information requested by the Wireline Competition Bureau.⁴

¹ As the Commission defined it, the broadband special access services in question are "... 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." *Petition* at 2.

² Letter from Robert W. Quinn, Jr. AT&T Senior Vice President to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-125, a broadband special access forbearance proceeding relating to the instant proceeding ("*AT&T Letter*").

³ See e.g.; *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798 (2002) *aff'd National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005) and *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*") *aff'd United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

⁴ Letter from Thomas J. Navin, Chief Wireline Competition Bureau to Susanne Guyer, Verizon, Melissa Newman, Qwest, Robert Quinn, AT&T, Jeffrey S. Lanning, Embarq, and Gregg Sayre, Frontier Communications, WC Docket Nos. 04-440, 06-125, 06-147, August 23, 2007 ("*Wireline Competition Bureau Request*").

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Contrary to COMPTTEL's complaints, requiring additional information to be filed at this point in time, while unnecessary to the grant of Embarq's *Petition* and the similar Forbearance Petitions of other ILECs', does not cloud the record or disadvantage parties that oppose grant of forbearance. COMPTTEL has had over a year to try and disprove the conclusive case that Embarq placed on the record with its *Petition* and Replies to Comments opposing the *Petition*, but COMPTTEL failed to do so.

Furthermore, COMPTTEL's request that the Commission retroactively adopt a "complete when filed" rule is out of time and cannot be imposed now. Nor is it remotely applicable to the forbearance situation, which is in the nature of a rule making rather than adjudication. This is so despite the fact that a forbearance petition may involve only one company because the appropriate test for a rulemaking is whether or not the proceeding regulates future conduct as opposed to resolving a dispute regarding past conduct.⁵ However, even if it the Commission were to adopt a "complete when filed" rule, Embarq's *Petition* was more than sufficient.

COMPTTEL's argument that the *ACS Forbearance Order*⁶ stands for the proposition that the Commission cannot grant forbearance without precise evidence of market share is badly misplaced. The sections pointed to by ACS dealt with retail special access service. With regard to broadband special access services, the subject matter of this docket, the Commission granted forbearance to ACS and specifically held that precise market share data was not necessary:

We recognize that the record in this proceeding does not include detailed market share information for particular enterprise broadband services in the Anchorage MSA. However, we note that other available data suggest that there are a number of competing providers for these types of services and the marketplace appears highly competitive. Moreover, as we discuss below, we find that competitors either are providing, or readily could enter to provide, these services within Anchorage. In light of these factors, we do not find it essential to have such detailed information and would not give significant weight to static market share information in any event. [Footnote omitted.]⁷

⁵ *E.g.*, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 218 (1988) (J. Scalia concurring).

⁶ *Petition of ACS 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*, __ FCC Rcd __, WC Docket No. 06-109, Memorandum Opinion and Order, FCC 07-149 (rel. Aug. 20, 2007)(“*ACS forbearance Order*”).

⁷ *Id.*, ¶ 98.

Finally, the Commission should give no credence to Sprint Nextel's attempts⁸ to link or tie Embarq's *Petition* and the similar forbearance petitions of other ILECs, to the ongoing *Special Access Pricing* docket.⁹ As the *Sprint Letter* makes clear, Sprint Nextel's interest in the Special Access proceeding is with DS1s and DS3s. As Embarq pointed out, in response to Comments of Sprint Nextel in opposition,¹⁰ the *Petition* very specifically and explicitly excludes TDM-based and DS1 and DS3 special access services from the *Petition*. Notwithstanding Sprint Nextel's continuing efforts to obfuscate the record, there is no question that DS1s and DS3s have nothing to do with this proceeding.

In response to the *Wireline Competition Bureau* Request, it must be noted that specific and detailed information about competitive providers of broadband special access services is difficult, if not impossible, to come by. These competitors are not required to file the same data with the FCC as ILECs are nor are they required, as ILECs are, to publicly file their customer contracts. And, they do not divulge competitive information to Embarq (or presumably to any ILEC.) However, through discussions with customers Embarq has learned of some, although certainly not all, broadband special access opportunities that Embarq has lost over the past two years to competitive carriers, including in some instances to the incumbent cable companies. A list of these opportunities is attached hereto as Attachment 1.¹¹ These lost special access opportunities include large and small wireless and wireline customers throughout Embarq's territory, not just its non-rural ILEC in Nevada.

Additionally, while few competitive carriers divulge specific information about their network or customers, their web sites and news releases provide some information about their competitive efforts and successes. For instance, on June 6, 2006, Time Warner Telecom Inc. announced a working arrangement with Overture Network to provide Ethernet services to business customers nationwide.¹² Then on August 2, 2007, Time Warner Telecom ("TWT") issued a press release announcing it had surpassed 10,000 Ethernet Ports in service for Enterprise Customers.¹³ According to their web site, TWT also provides, among other services, collocation and IP-VPN services in 75 metropolitan areas, including Embarq's Las Vegas territory. Of particular interest is that the fact the Vertical Systems Group, a market research and strategic consulting firm specializing in the networking industry, just released its mid-year 2007 market share results for U.S. Business Ethernet Services and identified Time Warner Telecom as the

⁸ Letter from Laura H. Carter, Sprint Nextel Vice President Government Affairs to Marlene Dortch, WC Docket No. 06-109, WC Docket No. 06-125, WC Docket No. 06-178, and WC [sic] Docket No. 05-25, August 17, 2007 ("*Sprint Letter*").

⁹ Special Access Rates for Price Cap Local Exchange Carriers, WT Docket No. 05-25 ("*Special Access Pricing*").

¹⁰ Embarq Reply Comments in Support of Petitions, WC Docket Nos. 06-125 and 06-147, August 31, 2006, p. 6.

¹¹ Due to customer proprietary concerns, the names of the individual customers have been removed.

¹² <http://www.twtelecom.com/>

¹³ See, <http://www.twtelecom.net/>

third largest Business Ethernet Service provider in the United States, only slightly behind AT&T, whose market share dropped considerably, and Verizon.¹⁴

Cox, the incumbent cable provider in Embarq's Las Vegas, Fort Walton Beach, Florida and Ocala, Florida territories, has the network already in place to provide interstate special access type services and, as evidenced by Attachment 1, has had success in winning special access business away from Embarq. According to Cox's Las Vegas website, Cox provides "Cox Carrier Access Service" which is the "ideal solution for secure and reliable connections to your stand-alone or integrated voice and data customers."¹⁵ Nationwide, Cox has also become a large Ethernet player, having just been identified as the fourth largest provider of Ethernet Business Service in the United States based on Ethernet Business Service market share.¹⁶

Additional examples of broadband special access competitors flourishing in Embarq's markets include:

- **FiberTower Corporation.** FiberTower Corporation has facilities capable of serving customers in Embarq's Fort Meyers and Orlando, Florida markets and has spectrum assets in Raleigh, North Carolina and Greenville, South Carolina. According to its website, its networks offer carrier-grade performance, point-to-point and point-to-multipoint capabilities, and TDM to Ethernet service platforms. On August 1, 2007 FiberTower Corporation announced that it had entered into an agreement with Sprint Nextel to provide Ethernet backhaul services in seven of the wireless carrier's initial WiMax launch markets.¹⁷
- **Citynet.** Citynet owns an extensive wireline network providing services to carriers throughout part of Embarq's territory in Indiana, Ohio, Pennsylvania, Virginia, and Tennessee. Citynet provides DS3 through OC-192 private line services.¹⁸
- **Kent Technologies.** On August 15, 2006, Kent Technologies, which is headquartered in Embarq's service territory in Bonita Springs, Florida and which competes 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;¹⁹

¹⁴ Vertical System Group: Mid-Year 2007 Market Share Results for U.S. Business Ethernet Services, <http://www.verticalsystems.com/prarticles/stat-flash-0807-ethernetshare.html> ("2007 Ethernet Market Share Results").

¹⁵ See, http://www.coxbusiness.com/systems/nv_lasvegas/index.html, attached hereto as Attachment 1.

¹⁶ 2007 Ethernet Market Share Results, *supra*.

¹⁷ <http://www.fibertower.com/corp/news-press-releases-080107.shtml>.

¹⁸ <http://www.citynet.net/carrierproducts.cfm>.

¹⁹ <http://www.kenttech.com/news.php?id=49>.

- **TelCove.** 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.²⁰ (On July 24, 2006 TelCove was acquired by Level 3, another facilities-based competitor of Embarq.)

Finally, Embarq has prepared Attachment 2 which, on a wire center basis, is an estimate of special access lines at risk of being lost to a competitor. The estimate is based on publicly available information regarding competitors that provide wholesale special access services. For instance, Column I – “Wire centers with Cable competitor (wholesale)” only reflects cable companies that Embarq knows from public information actually provide wholesale special access service. Thus, the estimate most likely errs on the low side. As noted above, competitors providing special access service do not, unlike the ILECs, have to publicly file such information and do not share such information directly with Embarq. Therefore, it is more likely than not that there are more competitors than what Embarq knows of. The estimates of OC3 equivalent special access lines subject to competition is based on a snapshot of access services sold in a wire center in a given month. The snapshot is converted to an OC3 equivalent for purposes of the estimate. As Column S – “Special Access Lines at Risk” shows, even this understated estimate reflects significant competition throughout most of Embarq's wire centers.

Pursuant to Section 1.1206(b) of the Commission's rules, one copy of this electronic notice is being filed in the above-referenced docket. Please call me if you have any questions.

Sincerely,



Craig T. Smith
Senior Counsel

cc: Tom Navin
Ian Dillner
Scott Deutchman
Scott Bergmann
Chris Moore
John Hunter
Don Stockdale
Marcus Maher

²⁰ <http://www.telcove.com/press/pr040706.asp>.

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ATTACHMENT 1

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Market	Carrier Customer	Service	Competitor	BEGINNING REDACTION	Date
Blountville, TN	Wireline	ATM	Ntelos		Nov-06
Bristol, TN	Wireline	OC48	Level 3		Nov-06
Dillsboro, IN	Wireline	ATM	Unknown		Jun-07
Fayetteville, NC	Wireline	OC192	Time Warner		Dec-06
Fort Myers, FL	Wireline	OC3 Ethernet	Unknown		Oct-06
Ft. Bragg, NC	Wireline	OC192	Time Warner		Dec-06
Hood River, OR	Wireline	OC3	Unknown		Jan-07
Johnson City, TN	Wireline	OC48	Unknown		Oct-06
Las Vegas, NV	Wireless	OC48	Cox		2006
Las Vegas, NV	Wireline	OC48 Entrance Facility	Built own facilities		2006
Las Vegas, NV	Wireless	OC48	Cox		2006
Las Vegas, NV	Wireline	OC12 & OC48	XO Communciations		Dec-06
Las Vegas, NV	Wireline	OC12	Cox		Jan-07
Las Vegas, NV	Wireline	OC48	Unknown		Feb-07
Las Vegas, NV	Wireline	OC12	Unknown		Mar-07
Las Vegas, NV	Wireline	OC3	Unknown		Mar-07
Las Vegas, NV	Wireless	OC48	XO Communciations		Jun-07
Las Vegas, NV	Wireline	OC3	Unknown		Aug-07
Lima, OH	Wireline	OC12			Dec-06
Lima, OH	Wireline	OC12	Unknown		Dec-06
Lima, OH	Wireline	OC12	Unknown		Dec-06
Naples, FL	Wireline	OC3	Unknown		Mar-07
Ocala, FL	Wireless	OC12	Level 3		May-07
Ohio	Wireline	OC12	Citynet		2006
Ohio	Wireline	OC12	Citynet		2006
Orlando, FL	Wireline	OC12	Unknown		Mar-07
Orlando, FL	Wireless	OC12	Level 3		May-07
Orlando, FL	Wireless	OC48	Florida Power		May-07
Rocky Mt, NC	Wireless	OC12	Unknown		Nov-06
Tallahassee, FL	Wireline	OC3	Unknown	END REDACTION	Feb-07

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ATTACHMENT 2

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