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September 7, 2007

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St., SW
Washington, D.C. 20554

Re: *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; *Petitions of AT&T Inc., BellSouth Corp., the Embarq Local Operating Companies, the Frontier and Citizens Incumbent Local Exchange Carriers, and Qwest Under 47 U.S.C. §160(c) for Forbearance from Title II and Computer Inquiry Rules with Respect to Broadband Services*, WC Docket Nos. 06-125, 06-147

Dear Ms Dortch:

Covad Communications Group, NuVox Communications, and XO Communications, LLC, by their attorneys, submit this letter to address the recent submissions by Verizon, AT&T, Qwest, Frontier, and Embarq in the above-captioned dockets in response to the August 23, 2007 letter from Thomas J. Navin, Chief of the Commission's Wireline Competition Bureau, requesting "market data" to enable the Commission to engage in a "'local market analysis'" of each carrier's pending broadband services forbearance petition. None of these incumbent local exchange carriers ("ILECs") provided the Bureau with the market-specific information lacking in their petitions and related submissions.[1] Their responses confirm that the

[1] The signatories to this letter do not concede that the Commission could properly ground a grant of forbearance on evidence solicited by the Bureau and submitted by a petitioner within the final two weeks of the 15-month statutory period for ruling on a Section 10 forbearance petition. The signatories agree with COMPTEL that to do so would "make[ ] a mockery of the rights of interested parties under the Administrative Procedure Act."

detailed evidence required to justify a grant of forbearance for any of their broadband services is absent from the record and, thus, that each of their petitions must be denied in its entirety.

The Commission's recent decision addressing a forbearance petition filed by ACS of Anchorage, Inc. ("ACS") in which ACS sought forbearance from certain regulatory and statutory obligations that apply to its enterprise broadband services provides guidance on the proper analysis to be employed by the Commission in determining whether forbearance from Title II or *Computer Inquiry* rules is warranted.[2] There, the Commission scrutinized the "existing broadband services identified by ACS,"[3] applied the forbearance criteria to those particular services, and concluded that "continuing to subject ACS to dominant carrier regulation in regard to its *existing, identified non-TDM-based, packet-switched broadband services* . . . is no longer appropriate in light of the market conditions."[4] The Commission held that limiting its forbearance grant to the identified broadband services that ACS presently offers "is appropriate" because it "cannot . . . conclude that ACS will lack market power with regard to any theoretical broadband telecommunications services that [ACS] might offer in the future."[5] Further, the Commission conducted its review of ACS's specified broadband services on a local market-specific basis. The Commission's conclusions were grounded on evidence that a number of entities provide enterprise broadband services in the Anchorage study area and its finding that the Anchorage market appears highly competitive for the particular services at issue.[6]

At the very least, the broadband forbearance framework employed by the Commission in the *Anchorage Broadband Order* should be applied to the default-grant Verizon

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Letter from Mary C. Albert, COMPTEL, to Hon. Kevin Martin, Chairman, Federal Communications Commission, WC Docket Nos. 06-125, 06-147 (filed Aug. 27, 2007), at 7.

2 *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 (rel. Aug. 20, 2007) ("*Anchorage Broadband Order*"). The signatories do not endorse the Commission's conclusions regarding the particular broadband services for which the Commission granted ACS forbearance but the signatories acknowledge that the Commission applied an appropriate analytical framework to the specific broadband services identified by ACS. *See Anchorage Broadband Order*, at ¶¶ 94-115, 123-24.

3 *Id.*, at ¶ 95.

4 *Id.*, at ¶ 104 (emphasis supplied).

5 *Id.*, at ¶ 112.

6 *Id.*, at ¶ 97-98.

broadband forbearance petition. As an initial matter, Verizon contends that it has no pending broadband forbearance petition because its petition was granted by operation of law and, consequently, it would be unlawful for the Commission to issue an order ruling on that petition at this date.[7] Verizon is incorrect. The statutory "deemed grant" of Verizon's forbearance petition does not create a jurisdictional limitation on the Commission's authority to subsequently rule on the petition after the deadline has passed. As explained in the pending Motion for Expedited Order, the principle that the Commission can issue a written decision after the statutory deadline has passed is well established judicially, and has been embraced by the Commission.[8]

The need for a written decision on the Verizon broadband forbearance petition is underscored by the position taken by Verizon in response to the Bureau's August 23rd letter. Verizon contends that the broadband services for which it received forbearance "*include* (1) all packet-switched services capable of 200 kbps in each direction and (2) all non-TDM-based optical networking, optical hubbing, and optical transmission services."[9] Apparently, Verizon now maintains that the specific broadband services identified in its February 7, 2006 ex parte letter are not the only services for which forbearance was obtained by operation of law.[10] It is critical that the Commission explicitly apply to Verizon the standard that it applied to ACS's broadband services and, consistent with the *Anchorage Forbearance Order*, the Commission should separately review each broadband product enumerated by Verizon in its *February 7 Ex Parte*. Any grant of forbearance must be limited to the particular existing services identified in the *February 7 Ex Parte* that meet the forbearance standard because it is impossible to "conclude

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7 Letter from Dee May, Vice President, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 06-125, 06-147, 04-440 (filed Aug. 31, 2007) ("*Verizon Letter*"), at 1.

8 *See* Motion for Expedited Order on Verizon Petition for Forbearance, WC Docket No. 04-440 (filed Jul. 25, 2007), at 9-12.

9 *Verizon Letter*, at 2 (footnote omitted, emphasis supplied).

10 *See* Letter from Edward Shakin, Vice President, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 04-440 (filed Feb. 7, 2006) ("*February 7 Ex Parte*"). The broadband services specified by Verizon in the *February 7 Ex Parte* are Frame Relay Service, ATM Cell Relay Service, Internet Protocol –Virtual Private Network (IP-VPN) Service, Transparent LAN Service, LAN Extension Service, IntelliLight Broadband Transport, Custom Connect, Verizon Optical Networking, Optical Hubbing Service, and IntelliLight Optical Transport Service. *February 7 Ex Parte*, Attachment 1.

that [Verizon] w[ould] lack market power with regard to any theoretical broadband telecommunications services that it might offer in the future.[11]

Moreover, in addressing Verizon's petition, the Commission must apply the forbearance criteria on a geographic and product market-specific basis, as specified in the *Anchorage Broadband Order*. Verizon's claim that the Commission "should . . . review the competitiveness of broadband services at the nationwide level"[12] is inconsistent with the local market approach taken in the *ACS Broadband Order* for each broadband service and therefore should be rejected.[13] It also is inconsistent with the Commission's analysis in the *Wireline Broadband Internet Access Order* – a decision relied upon by Verizon and the other petitioners.[14] In the *Wireline Broadband Internet Access Order*, the Bell Operating Companies argued that the

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11 *Anchorage Broadband Order*, at ¶ 112. The signatories maintain that Verizon has not met the statutory standard for forbearance from Title II or *Computer Inquiry* rules for any specific broadband service and that Verizon's petition should be denied in its entirety. If the Commission fails to deny the petition, however, it should limit any forbearance granted to Verizon to the specific services enumerated in its *February 7 Ex Parte* based upon application of the proper analytical framework.

12 *Verizon Letter*, at 5.

13 Verizon, Qwest, and AT&T would have the Commission conflate the adoption of a national outcome with the use of the entire nation as the appropriate geographic market. They are not one and the same however. In numerous proceedings, the Commission has found that a multitude of factors, including the nature and extent of competition in local markets, warranted the adoption of a nationwide regulatory scheme. In reaching that conclusion, however, the Commission did not find that the relevant geographic market for purposes of its analysis was the entire nation. *See, e.g., Review of the Section 251 Unbundling Obligations of Local Exchange Carriers; Implementation of Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*").

14 *See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; 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; 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; Consumer Protection in the Broadband Era,* Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) ("*Wireline Broadband Internet Access Order*"), *petitions for review pending, Time Warner Telecom v. FCC*, No. 05-4769 (and consolidated cases) (3rd Cir. Filed Oct. 26, 2005).

relevant geographic market for retail broadband Internet access service is regional or national and, alternatively, competitive local exchange carriers ("CLECs") and Internet service providers ("ISPs") advocated adoption of a local market approach.[15] The Commission adopted neither position, finding that "the parties' competing analyses, though useful, fail to recognize all of the forces that influence broadband Internet access service deployment."[16] Likewise, here, it is clear that a nationwide approach would fail to properly consider certain broadband services that are purchased locally and used as wholesale inputs by CLECs.[17] Thus, a blanket nationwide approach is not justified.

Application of the product and geographic specific market analysis employed in the *Anchorage Forbearance Order* also leads to the conclusion that the "me too" broadband forbearance petitions filed by AT&T and Qwest must be denied. Neither AT&T nor Qwest has provided the Commission with the data necessary to conduct the appropriate geographic market analysis.[18] Instead, both carriers have chosen in effect to ignore the Bureau's request for this information. In its cursory filing, AT&T merely repeats its claim that a "national approach is the proper analytical framework with which to evaluate the pending forbearance petitions."[19] Qwest takes a different but no less unresponsive approach. Qwest contends that an independent analysis of its petition is not appropriate because the forbearance obtained by Verizon by operation of law is "legally binding" on Qwest's and other similar forbearance petitions.[20] In Qwest's view, a decision by the Commission to allow the Verizon petition to take affect by operation of law "and to deny an identical petition filed by a different party, would be arbitrary and capricious and thereby unlawful."[21]

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15 *Id.*, at ¶ 48-49.

16 *Id.*, at ¶ 50.

17 For example, CLECs puchase such products as Metro Ethernet and SONET services as wholesale services on a local-market-by-local-market basis.

18 Nor has either company provided sufficient data to support its request for forbearance across the entire geographic market (*i.e.*, the nation) it urges the Commission to adopt.

19 Letter from Frank S. Simone, Executive Director, AT&T, to Thomas J. Navin, Federal Communications Commission, WC Docket No. 06-125 (filed Aug. 31, 2007) ("*AT&T Letter*"), at 1.

20 Memorandum from Robert B. McKenna attached to Letter from Melissa Newman, Vice President, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 06-125 (filed Sept. 4, 2007) ("*Qwest Memorandum*"), at 2.

21 *Id.*, at 3. Qwest's request for "regulatory parity" with Verizon would not lawfully be met by a Commission order compounding the problems caused by the Verizon "deemed grant." Rather, lawful regulatory parity can only be achieved through the issuance of an order in which the Commission applies the proper analytical framework to Verizon's

Moreover, neither AT&T, Qwest, Frontier,[22] nor Embarq[23] has provided the product market-specific information regarding the particular broadband services which it currently provides that would allow the Commission to determine whether individual broadband services warrant forbearance. This intransigence and the fact that there is no existing record evidence in either the AT&T, Qwest, Frontier, or Embarq dockets to support the product and geographic market-specific forbearance analysis that is called for here dictates that the AT&T, Qwest, Frontier, and Embarq petitions must be denied.

Sincerely,

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forbearance request and determines whether or not to grant forbearance for each of the particular services enumerated by Verizon in the *February 7 Ex Parte*.

22 *See* Letter from Robert D. Binder, Manager, Frontier Communications, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 06-147 (filed Aug. 30, 2007).

23 *See* Letter from Craig T. Smith, Senior Counsel, Embarq, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 06-147 (filed Aug. 31, 2007).