

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Qwest Petition for Forbearance Under)	WC Docket No. 06-125
47 U.S.C. § 160(c) from Title II and)	
<i>Computer Inquiry</i> Rules with)	
Respect to Broadband Services)	

**SPRINT NEXTEL CORPORATION'S
COMMENTS IN OPPOSITION
TO PETITION FOR FORBEARANCE**

Sprint Nextel Corporation (“Sprint Nextel”) hereby respectfully submits comments in opposition to the above-captioned petition of Qwest Corporation and Qwest Communications Corporation (jointly “Qwest”) for forbearance from Title II and *Computer Inquiry* rules for certain delineated services, which it filed on September 12, 2007 (“September 12 Petition”).¹

Qwest’s September 12 Petition is virtually identical to the Petition it filed on June 13, 2006 (“2006 Petition”). Because Qwest presents no new evidence in the record to support its Petition, Sprint Nextel requests that the Commission incorporate by reference its Opposition to the 2006 Petition filed August 17, 2006, its Reply Comments in

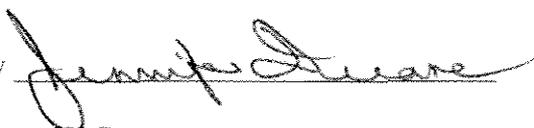
¹ See Public Notice DA 07-3923 (rel. Sept. 13, 2007).

Opposition to the 2006 Petition, filed August 31, 2006, as well as the *Ex Parte* Letters that Sprint Nextel has filed with regard to Qwest's functionally identical 2006 Petition.²

As Sprint Nextel has previously noted, the Commission must deny Qwest's Petition because it fails to provide any evidence that forbearance would be consistent with the statutory forbearance standard.³ By once again ignoring the state of the market for the access inputs for the services for which Qwest seeks forbearance, Qwest has proven Sprint Nextel's contention that the Commission cannot, based on the record in the forbearance dockets, grant Qwest's petition for forbearance as to the access elements of the service at issue.

Respectfully submitted,

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September 20, 2007

² Sprint Nextel requests that the Commission incorporate its *ex parte* letters in WC Docket No. 06-125, dated August 13, 2007, August 17, 2007, August 29, 2007, August 30, 2007, August 31, 2007 (multiple letters), September 5, 2007 (multiple letters), and September 6, 2007 (multiple letters). Sprint Nextel encloses copies of these documents for the Commission's convenience.

³ 47 U.S.C. § 160(a).

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<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> Rules 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)	
)	
Petition of the Embarq Local Operating)	
Companies for Forbearance Under)	
Section 47 U.S.C. § 160(e) from)	WC Docket No. 06-147
Application of <i>Computer Inquiry</i> and)	
Certain Title II Common-Carriage)	
Requirements)	
)	

SPRINT NEXTEL CORPORATION'S
OPPOSITION TO PETITIONS FOR FORBEARANCE

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SPRINT NEXTEL CORPORATION'S
OPPOSITION TO PETITIONS FOR FORBEARANCE

I. Introduction and Summary

On March 20, 2006, the Commission issued a news release, "inform[ing] the public" that "the Verizon Telephone Companies' petition for forbearance from Title II and *Computer Inquiry* rules with respect to their broadband services is granted by

operation of law.”¹ Since then, the other three Bell Operating Companies (“BOCs”) have filed petitions seeking the same “regulatory relief” that Verizon claims to have received.² Embarq Local Operating Companies, the largest independent incumbent local exchange carrier (“ILEC”),³ then filed a similar petition, asking for the same “relief on behalf of itself and all similarly situated ILECs.”⁴

Sprint Nextel Corporation (“Sprint Nextel”) opposes the petitions. Exactly what relief Verizon may have been granted by the Commission on March 19, 2006, is unclear, because there was no reasoned decision making, analyzing the petition or explaining its decision, as required by section 10 of the Telecommunications Act of 1996 (“1996 Act”) and by the Administrative Procedure Act (“APA”).⁵ The petitioners might hope the

¹ News Release, Petition of the Verizon Tel. Cos. for Forbearance under 47 U.S.C. § 160(c) from Application of Computer Inquiry Rules with Respect to Their Broadband Services, WC Docket No. 04-440 (Mar. 20, 2006) (“News Release”).

² Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Servs. (filed June 13, 2006); 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 Servs. (filed July 13, 2006); Petition of BellSouth Corp. for Forbearance Under Sec. 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to its Broadband Servs. (filed July 20, 2006; corrected Aug. 4, 2006). Those petitions have been consolidated in this docket. See Public Notice DA 06-1544 (rel. July 28, 2006).

³ Embarq was formerly Sprint Nextel’s local telecommunications division. On May 17, 2006, Sprint Nextel transferred the Sprint Local Telephone Operating Companies to Embarq, ownership of which was distributed to Sprint Nextel shareholders through a stock dividend. Sprint Nextel and Embarq are no longer affiliated companies. See Embarq at 1 n.1.

⁴ 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. The Commission opened a separate docket for Embarq but invited parties to submit combined comments in both dockets. Public Notice DA 06-1545 (rel. July 28, 2006).

⁵ 47 U.S.C. §§ 160(a), (b), (c); 5 U.S.C. §§ 706(2)(A), (E).

Commission will treat their petitions as a “ministerial matter,” and dispense with “the need for the Commission to independently analyze the three factors under Section 10(a),”⁶ rather than subject the petitions to critical scrutiny. The agency, however, has a duty to address the petitions on their individual merits and the risks they pose for competition and consumers. That review will confirm that the petitioners’ requests for exemption from Title II and *Computer Inquiry* rules for wholesale “broadband” services must be denied. The petitions fail to meet the stringent standards of section 10, because the petitioners continue to dominate the provision of critical network facilities in the special access market.

II. Background

The petitions seek a dramatic change in long-established rules that are critical to promoting and protecting competition in access markets.⁷ In 2005, months after Verizon had filed its own forbearance petition, the Commission issued the *Wireline Broadband Order*.⁸ By ruling that broadband access to the Internet services are “information services,” not “telecommunications services,” the Commission eliminated Title II regulation and *Computer Inquiry* rules for providers of those broadband access services.

⁶ Qwest at 7, 8.

⁷ Title II requirements include common carriage, tariffing, cost support, pricing, price caps, and price flex rules. The *Computer Inquiry* precedent requires, *inter alia*, that ILECs tariff and offer the transport component of broadband services on a stand-alone basis and take service under the same terms and conditions. Amendment of Sec. 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry), 77 FCC 384 (1980).

⁸ Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) (“Wireline Broadband Order”).

After that order appeared, BellSouth withdrew its own forbearance petition. Its withdrawal letter explained that the *Wireline Broadband Order* had “largely granted [ILECs] the relief BST was seeking,” making its petition unnecessary.⁹

The *Wireline Broadband Order* did indeed make any subsequent forbearance unwarranted. It provided ILECs with a wide range of exemptions from regulatory requirements otherwise applicable to all carriers’ services. Its reach, however, was limited to broadband Internet access services, and it did not exempt ILECs from Title II and *Computer Inquiry* precedent for the wholesale telecommunications services utilized by other carriers and service providers to support their own services.

Unlike BellSouth, Verizon did not withdraw its petition, thereby triggering the Commission’s obligation to issue a decision on the merits. The Commission’s decision came in the form of a March 20, 2006 news release, in which the Commission simply declared that Verizon’s forbearance petition was deemed granted by default, because the Commission had failed to deny Verizon’s petition within twelve months from its filing.¹⁰

Verizon’s petition had been widely criticized as impermissibly vague. The petitioners here similarly fail to specify from what rules and regulations they seek

⁹ Letter of Bennett Ross (BellSouth) to Marlene Dortch (FCC), Petition of BellSouth Telecommunications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Title II Common Carriage Requirements, WC Docket No. 04-405 (Oct. 26, 2005; corrected Oct. 26, 2005) at 2.

¹⁰ Section 10(c) states that a forbearance petition “shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance under subsection (a) within one year after the Commission receives it,” unless extended by the Commission up to 90 days. 47 U.S.C. § 160(c). The March 20 news release also contends Verizon “narrowed its petition” by ex parte letters submitted on February 7 and February 17, 2006. It is questionable, however, whether section 10 allows a petition to be amended by ex parte letters or extra-legal promises.

exemption. They simply seek whatever forbearance Verizon received, despite acknowledging “uncertainty” about the scope of forbearance Verizon may claim was granted by the Commission’s action.¹¹ To grant the instant petitions would only compound the problem, because each ILEC would feel free to interpret any forbearance grant however it sees fit.

Since the Commission has already reclassified retail broadband Internet access services as information services outside the reach of Title II and *Computer Inquiry* precedent, granting forbearance here would mean that ILECs are wholly exempt from all regulation and market safeguards associated with the wholesale telecommunications services identified in their petitions. In fact, granting the petitioners’ requests for forbearance would negate Sections 201 and 202 of the Communications Act. It would give the petitioners the power to unreasonably discriminate against competitors and in favor of their affiliates -- affiliates that include the nation’s two largest wireless carriers, the largest providers of enterprise services, and the largest long distance carriers -- and would give them the power to exploit their dominance of the special access market to frustrate competition.¹²

¹¹ BellSouth at 3; Embarq at 5.

¹² 47 U.S.C. §§ 201(b), 202(a). Other major provisions of Title II may also be affected to the detriment of competitors. These include sections 203 and 204 (tariffs); section 205 (prescription); sections 206 through 208 (complaints); section 214 (discontinuance); section 220 (depreciation); section 222 (Customer Proprietary Network Information); section 229 (Communications Assistance to Law Enforcement Act); sections 251 and 252 (interconnection); and section 254 (universal service). 47 U.S.C. §§ 201(b), 202(a), 203-206, 214, 222, 229, 251, 252, and 254.

III. ILEC market power over special access makes continued regulatory safeguards necessary.

Special access services are a critical input to the services provided by ILEC competitors, for broadband and nonbroadband services. The services identified in each of the petitions are provided at least partly over ILEC loop facilities. Because there usually is no alternative to ILEC special access, granting the petitions would give ILECs effective control over the pricing and provisioning of competitors' broadband and nonbroadband services. This is especially true in terms of the dependency of wireless carriers such as Sprint Nextel, which must rely predominantly on petitioners to connect cell site locations to their network by using the petitioners' special access channel terminations (loops), channel mileage (interoffice transport), and entrance facilities.

A. Price Flex special access rates show the petitioners exercise market power.

ILECs built their networks during a century of government-sanctioned monopoly. Except with rare, large customer facilities, it is generally uneconomic for a competitor to duplicate those network facilities. It rarely makes sense, for example, for another carrier to provision a DS1 or DS3 to serve one customer, given substantial right of way and other fixed and sunk costs associated with extending the plant used to provide special access service. Control of that network inevitably gives ILECs market power. The same is true for high-capacity loop and transport facilities, whether for TDM or packet-based services.

In Sprint Nextel's experience, special access rates charged by ILECs with Phase 2 pricing flexibility have either increased or remained flat over time. In most cases, rates are significantly higher -- sometimes more than double -- the rates charged for the same

services under price cap regulation.¹³ Sprint Corporation estimated that its 2004 special access bill was about \$103 million higher under the pricing flexibility regime than it would have been had those services been available at price cap rates.¹⁴ Since costs have not risen, and ILECs have made productivity gains in their provision of service, the fact that Sprint's special access costs rose when the ILECs were granted pricing flexibility shows that the wholesale services market is not competitive, and that ILECs set special access prices significantly above cost.

For many years, Sprint Nextel has had a policy of using alternative access vendor ("AAV") facilities as much as possible. It has done so to reduce reliance upon ILECs and to foster the growth of alternative vendors on the assumption that having more than one viable supplier will promote higher service quality and lower prices. Sprint Nextel has found it difficult and often impossible to secure service from AAVs, however. There are several reasons.

First, AAVs simply do not provide service to every location in an MSA where Sprint Nextel needs access facilities. ILECs have ubiquitous special access networks. The ILEC petitioners, as well as Verizon, have ubiquitous special access networks with the ability to provision DS1 and DS3 facilities throughout multi-state territories. AAV facilities have far more limited reach. They cover only selected geographic districts, and within those districts often reach only particular buildings -- and often only individual

¹³ While price cap rates have generally decreased over time, Sprint has found that, thanks to pricing flexibility, even long term plan rates have been higher than price cap rates.

¹⁴ See Comments of Sprint Corporation, Special Access Rates for Price Cap Local Exchange Carriers, WC Docket No. 05-25 (filed June 13, 2005).

floors or even offices within a building. Furthermore, until last year, the two largest non-ILEC providers of special access services for Sprint Nextel, and undoubtedly for all special access customers, were CLEC affiliates of the former AT&T and MCI. As a result of those carriers' recent acquisitions by the former SBC and Verizon, respectively, ILEC control of in-region capacity has become greater still, as the minor divestitures negotiated by the Department of Justice are insufficient to preserve even what little competition those carriers had provided.¹⁵

Second, even where an AAV has deployed its own facilities on a portion of a desired route, often it must rely on resold ILEC facilities for the last mile channel terminations. The ILEC channel termination rate element is usually 50 to 75 percent of the cost of an end-to-end circuit (assuming ten channel miles). This means AAVs can provide little savings, and may even be more expensive than the ILEC. Thus, it often is not financially worthwhile or operationally efficient for Sprint Nextel to rearrange its network to use an AAV's services, even if one is available.

Third, ILECs have made it administratively and financially difficult (sometimes impossible) to efficiently migrate existing special access facilities to an AAV. For example, some ILECs limit the quantities of circuits that can be migrated per night or by type of service. Some assess high nonrecurring charges for coordinated service termination. These inflated administrative and nonrecurring costs mean that, when migrating existing circuits, an AAV's recurring prices must be 50% to 75% below that charged by the ILEC for an equivalent facility, to make it economic to switch to an AAV.

¹⁵ In the months since those acquisitions closed, Sprint Nextel has already seen the competitive pressures previously provided by AT&T and MCI vanish in legacy SBC and Verizon regions.

ILEC pricing and migration strategies have been effective in thwarting use of alternative providers of special access. Despite striving to diversify its access suppliers over the past several years, and its policy of using alternative vendors wherever it is financially and operationally feasible, Sprint Nextel remains heavily dependent on ILEC special access facilities. In their territories, Sprint relies upon BOCs for almost 95% of its DS1 circuits, and 83% of its DS3 circuits. Sprint Nextel relies upon ILECs for well over 95% of the links between cell sites and switching centers. Even at the OCn level, Sprint Nextel relies upon ILECs for approximately 75% of circuits -- and nearer 85% when former AT&T and MCI facilities are included. In rural states and smaller markets (non-BOC territories, including most Embarq service areas), competitive alternatives are even more limited, such that Sprint Nextel is even more dependent on ILEC facilities. Competitive alternatives simply are not available.

B. Special access rates of return show the petitioners exercise market power.

ILEC special access market power is also shown in their rates of return for these services. The BOCs, for example, all are earning far above the Commission's well-established 11.25% reasonable rate of return for special access services, as shown by ARMIS data. In 2005, Verizon earned 41.97%. AT&T earned 91.73%. BellSouth earned 98.37%. Qwest earned 109.42%. Embarq, now the largest non-BOC ILEC, earned 359.91%.¹⁶ Such rates of return are unheard of in any competitive market.

Sprint Nextel believes ARMIS data is a reliable means to gauge the growth of special access rates of return. Aside from the magnitude of these numbers, what is most

¹⁶ The sharp rise in BOC and Embarq rates of return from 2000 through 2005 is shown in Attachments 1 and 2, respectively.

troubling is that ILEC rates of return have increased markedly since these ILECs received pricing flexibility, as the attached graphs show. In a competitive market, returns would have been declining to a competitive level as prices move closer to cost. In fact, special access rates under pricing flexibility are often higher than price cap rates. This demonstrates the petitioners' dominance in the special access market and the lack of effective competition.¹⁷

C. The Commission and the Department of Justice have found that the special access market is not competitive.

Both the Commission and the Department of Justice have effectively recognized that the special access market is not competitive, and that safeguards remain necessary. In the *Wireline Broadband Order*, the Commission expressly declined to remove Title II regulation of stand-alone ATM service, frame relay, gigabit Ethernet service, and other high-capacity special access services -- some of the very services referenced in the petitions -- because these "basic transmission" services are "telecommunications services under the statutory definition."¹⁸

That finding was consistent with other recent Commission rulings. In the *SBC/AT&T* and *Verizon/MCI Orders*, the Commission found that, "absent appropriate remedies," the mergers were "likely to result in anticompetitive effects for wholesale

¹⁷ That is not the result the Commission expected. ILECs claimed pricing flexibility was needed to enable them to lower prices in response to competition. The Commission justified pricing flexibility by finding it would give price cap LECs "the ability to lower rates in specific markets ... in response to competitive pressures in those markets." Special Access Rates for Price Cap Local Exchange Carriers, Order and Notice of Proposed Rulemaking, FCC 05-18 (rel. Jan. 31, 2005) at ¶ 70.

¹⁸ *Wireline Broadband Order* at ¶ 9.

special access services.”¹⁹ In the *Qwest Omaha Order*, the Commission found Qwest remained dominant in enterprise services, such as special access high capacity loops, despite intermodal competition in some other service markets.²⁰ And in the *Triennial Review Order*, the Commission recognized that “no third parties are effectively offering, on a wholesale basis, alternative local loops capable of providing narrowband or broadband transmission capabilities to the mass market.”²¹ ILECs have failed to provide any evidence that the special access market has become effectively competitive. The Commission and Department of Justice findings remain valid.

IV. The petitions do not meet the requirements of section 10.

A. Enforcement is necessary to ensure charges, practices, classifications, or regulations are just and reasonable and are not unjustly or unreasonably discriminatory.

Section 10(a)(1) requires a market so thoroughly competitive that the regulation has become “not necessary.” To meet that standard, the petitioners “must make a prima facie showing that sufficient competition exists so that application of the Commission’s rate level, tariffing, and rate structure rules is not necessary to ensure that the BOC

¹⁹ SBC Communications Inc. and AT&T Corp. Applications for Transfer of Control, 20 FCC Rcd 18290 at ¶ 24 (2005) (“SBC/AT&T Order”); Verizon Communications, Inc. and MCI, Inc. Applications for Transfer of Control, 20 FCC Rcd 18433 at ¶ 24 (2005) (“Verizon/MCI Order”).

²⁰ 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 ¶ 50 (2005) (“Qwest Omaha Order”).

²¹ Review of Sec. 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 18 FCC Rcd 16978 at ¶ 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”).

petitioners' rates and practices for the services in question are just, reasonable, and not unreasonably discriminatory."²²

Given ILEC market power in special access services, the petitioners cannot possibly make that showing anyway. This is not a case of petitioners seeking a level playing field, as the petitioners pretend. The petitions would effectively eliminate all safeguards against potential ILEC market abuse, up to and including sections 201 and 202 of the Act. The Commission declined to give the BOCs that freedom in the *Special Access Forbearance Order*. Indeed, it noted that, as early as in 1998, it had voiced "skepticism that it would ever be appropriate to forbear from applying those sections," and pointed out, "since then, the Commission has *never* granted a petition for forbearance from sections 201 and 202."²³

The petitions fail to provide any evidence that could justify such a reversal. The BOC petitions cite the Commission's classification of BOCs as "nondominant" for in-region interLATA services, which they claim shows they lack market power. Whether BOCs are dominant in the retail long distance market is a separate question from whether ILECs have market power over special access services. But even apart from that, the BOCs fail to note that the Commission found them nondominant in in-region interLATA services only after finding that AT&T and MCI provided retail competitive pressures and that the BOCs' ability to discriminate or price squeeze would be limited by section 272

²² Petition of SBC Communications Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Servs., 20 FCC Rcd 9361 at ¶ 32 (2005), rev'd on other grds, AT&T Inc. v. FCC, 452 F.3d 830 (2006) ("Special Access Forbearance Order").

²³ Id. at ¶ 17 (emphasis added) (noting also, "If we were to grant such a petition now, we would have to provide a rationale for abandoning our own precedent.").

safeguards, their obligation to provide unbundled network elements (“UNEs”), and price cap regulation.²⁴ Today, however, AT&T and MCI have been acquired by the largest BOCs. Section 272 safeguards have sunset by Commission default,²⁵ and the BOCs separately are seeking waiver or forbearance of post-sunset Section 272 structural separation rules.²⁶ Competitors’ access to UNEs has been sharply limited by the *Triennial Review Remand Order*.²⁷ That leaves only price caps and section 201 and 202 safeguards -- which the petitions seek to have removed.

The petitioners also rely on the *SBC/ATT* and *Verizon/MCI Orders*’ findings that, in BellSouth’s words, “there is robust competition in high capacity services, including broadband services that are the subject of th[e] petition[s].”²⁸ But the petitioners are

²⁴ Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC’s Local Exchange Area, 12 FCC Rcd 1576 at ¶ 91 (1997).

²⁵ The Commission has allowed these market protections to sunset by default, with no order or analysis, in 44 states to date. The last BOC states will be potentially subject to sunset in December this year.

²⁶ BellSouth Corp.’s Petition for Waiver, WC Docket No. 05-277 (filed Sept. 19, 2005); Petition of Qwest Communications Int’l, for Forbearance of the Commission’s Dominant Carrier Rules as They Apply After Sec. 272 Sunset Pursuant to 47 U.S.C. § 160, WC Docket No. 05-333 (filed Nov. 22, 2005; “Corrected Version” filed Nov. 30, 2005); Petitions of the Verizon Local and Long Distance Telephone Companies for Interim Waiver of and Forbearance from Certain Dominant Carrier Regulations for In-Region, Interexchange Servs., WC Docket No. 06-56 (petitions filed Feb. 28, 2006); 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). Sprint Nextel is one of many parties opposing those petitions. See, e.g., Sprint Nextel Corporation’s Opposition to Petition for Forbearance, WC Docket No. 06-120 (filed July 24, 2006).

²⁷ Review of Sec. 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”).

²⁸ BellSouth at 11.

pointing to *retail* competition in an attempt to justify *wholesale* deregulation. Whether the retail market is competitive today has no bearing on whether ILECs have market power on the wholesale side that would undermine competition. The Commission has recognized that retail and wholesale markets are wholly separate and must be assessed individually.²⁹ In any event, the petitioners do not identify any individual market in which competitive alternatives are supposedly available. They speak in broad, national generalities.

Qwest points to the *Omaha Forbearance Order*, and encourages the Commission to take deregulation “a step further,” by exempting advanced services from Title II and *Computer Inquiry* rules altogether. In that proceeding, however, the Commission acted only after undertaking a specific market analysis, and finding competition had ended Qwest’s traditional ILEC market power for some services in portions of the Omaha MSA. The Commission limited the scope of forbearance to specific services in specific wire centers where it determined Qwest lacked market power. It explicitly declined to include special access services.

The Commission explained in that order, “as we evaluate the regulations at issue pursuant to the Section 10 standard ... our inquiry is informed by the Commission’s traditional market power analysis.”³⁰ Although one may question whether the

²⁹ Deployment of Wireline Services Offering Advanced Telecommunications Capability, 14 FCC Red 19237 at ¶ 8 (1999). See also Association of Communications Enterprises v. FCC, 253 F.3d 29, 31-32 (D.C. Cir. 2001) (upholding the Commission’s distinction between wholesale or carrier services and retail or end user services).

³⁰ *Omaha Forbearance Order* at ¶ 17 (noting also 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.”).

Commission reached the right conclusions in the *Omaha Forbearance Order*, the Commission was certainly correct in recognizing that market power must determine the outcome of any forbearance petition. The House Conference Report on the Telecommunications Act of 1996 describes forbearance under section 10(a)(1) as requiring a showing that the petitioner has no market power.³¹ Because ILECs have that power over special access services, the petitions cannot meet section 10(a)(1) standards.

B. Enforcement remains necessary to protect wholesale and retail consumers.

In attempting to make the requisite showing under section 10(a)(2), the petitions again focus exclusively on the retail market. They ignore the fact that other competitors must rely on ILEC facilities in the wholesale market in order to provide their own, competing retail services. They further ignore the resulting harm to consumers that would arise from removing safeguards that ensure that the benefits of competition flow to consumers. This harm would be reflected in higher rates, lower service quality, and diminished innovation that would not occur if there was a truly competitive market.

Granting the petitions would allow the petitioners to limit, or eliminate, competition from other carriers, cable-based service providers, and Internet service providers by giving ILECs the power to impose discriminatory rates and terms for transmission service or perhaps even refuse to provide service altogether. Although section 10 does not specifically limit Commission authority to forbear from sections 201 and 202, Congress never authorized the Commission to abandon the Act's central principles that special access should be made available to other carriers at rates, terms,

³¹ H.R. Conf. Rep. No. 104-458 at 185 (1996).

and conditions that are just, reasonable, and not unreasonably discriminatory. Other than by its handling of Verizon's petition, the Commission has never exempted any carrier from its section 201 and 202 obligations.

To the contrary, the Commission and courts have recognized that sections 201 and 202 represent the central tenet of federal common carrier regulation. They are the "cornerstone of the Act,"³² the "centerpiece of the Act's regulatory regime."³³ They are critical, as the Commission recently acknowledged, because

even in substantially competitive markets, there remains a risk of unjust or discriminatory treatment of consumers, and sections 201 and 202 therefore continue to afford important consumer protections.³⁴

That remains true even where consumers do not directly purchase an ILEC's services.

Because competitors must rely on ILEC facilities, wholesale and retail consumer interests are necessarily dependent on these same market safeguards.

C. Forbearance is contrary to the public interest.

To receive forbearance, the petitioners must establish that the "regulations are no longer in the public interest because competition between providers renders the regulations no longer meaningful."³⁵ The petitions fail to make that showing.

³² Special Access Forbearance Order at ¶ 17.

³³ MCI Telecoms. Corp. v. AT&T Co., 512 U.S. 218, 220 (1994).

³⁴ Special Access Forbearance Order at ¶ 17.

³⁵ H.R. Conf. Rep. No. 104-458 at 185 (1996).

For starters, the petitions are too vague. They identify the services they want deregulated, but none of them actually identifies the specific rules or regulations from which they want exemption. They just refer to Title II as a whole, and to *Computer Inquiry* “precedent.” They purport to agree to continue to comply with Universal Service contribution and CALEA requirements,³⁶ but the scope and enforceability of those commitments are unclear. And they do not address a host of other statutory requirements that are in the public interest, and from which they would be exempted. These include, among other things, protection of consumer privacy; access to communications for deaf, hard-of-hearing and speech-impaired Americans as well as others covered by the Americans with Disabilities Act; Commission jurisdiction to hear consumer and carrier complaints about abusive rate increases, price squeezes, and unlawful conduct; and even the fundamental obligation of all carriers to interconnect.³⁷ Exempting ILECs from all these key obligations is not in the public interest, and the vague character of the petitions precludes a finding that such forbearance would meet section 10(a)(3) public interest standards in any event.

Beyond that, the petitions provide no evidence or analysis to satisfy section 10(a) requirements. They just deliver sweeping generalizations about competition. However, “petitioners must provide more than just general conclusions about market conditions” if the Commission is to grant forbearance.³⁸ In this case, “[t]he record does not contain a

³⁶ 47 U.S.C. §§ 229, 254.

³⁷ E.g., 47 U.S.C. §§ 208, 222, 251(a), 255.

³⁸ Petition of US West Communications for Forbearance from Regulation as a Dominant Carrier in the Phoenix Ariz. MSA, 14 FCC Rcd 19947 at ¶ 25 (1999), rev’d on other grds., AT&T Corp v. FCC, 236 F.3d 729 (2001).

market analysis of competition within particular geographic markets with respect to any of the requests for forbearance.”³⁹ As a result, the petitions fall far short of providing the “painstaking analysis of market conditions ... required ... under section 10 of the Communications Act.”⁴⁰

Instead of analyzing specific market conditions, the petitioners point to conclusions drawn from prior rulemakings. For example, each of the petitions cites approvingly the *Wireline Broadband Order* and the *Triennial Review Order*. Their reliance on these orders is mistaken. In the *Wireline Broadband Order*, the Commission found broadband Internet access is an information service, and thus subject to a different regulatory regime than telecommunications service. The order did not address ILEC market power or its impact on competitors or consumers; ILEC market power actually had no bearing on the Commission’s classification of these services. In the *Triennial Review Order*, the Commission’s analysis was driven by section 251(c),⁴¹ not section 10(a). In fact, throughout the lengthy *Triennial Review* proceedings, the BOCs and USTA insisted that ILEC market power over special access was *irrelevant* in judging whether competitors were impaired without access to unbundled network elements. Moreover, the *Triennial Review Remand Order* acknowledged that special access rates can be “supra-competitive,” and would increase without the “constraining effect” of

³⁹ Personal Communications Indus. Ass’n’s Broadband Personal Communications Servs. Alliance’s Petition for Forbearance for Broadband Personal Communications Servs., 13 FCC Rcd 16857 at ¶ 22, n.88 (1998).

⁴⁰ WorldCom, Inc. v. FCC, 238 F.3d 449, 459 (DC Cir. 2001).

⁴¹ 47 U.S.C. § 251(c).

section 251 unbundling.⁴² It also found competitors “impaired” for high-capacity loops and transport in the vast majority of locations nationwide.⁴³ The petitions do not bother to identify any specific alternative facilities at cell sites or customer premises.

D. Forbearance would not accelerate ILECs’ deployment of broadband facilities.

The petitioners claim that forbearance is “necessary” to encourage innovation and their investment in broadband services. The Commission’s own statistics show otherwise. Forbearance would likely do little or nothing to accelerate ILEC broadband investment, and could actually slow deployment by reducing the competitive pressures they face.

ILECs have been deploying broadband facilities rapidly, even with the existing regulations in place, due to retail market pressures from cable and the desire to expand into video services. The Commission’s latest statistics show that high speed lines increased by 33% for CY2005 alone.⁴⁴ That equates to an additional 12.3 million high-speed lines. Advanced services lines increased by 48%.⁴⁵ That is a 13.9 million line increase. At year end 2005, there were 50.2 million high speed lines and 42.8 advanced services lines deployed by ILECs.⁴⁶

⁴² Triennial Review Remand Order at ¶¶ 64, 65.

⁴³ Id. at ¶¶ 66, 146.

⁴⁴ Industry Analysis & Technology Division, Wireline Competition Bureau, High Speed Services of Internet Access (July 2006) at Table 1.

⁴⁵ Id. at Table 2.

⁴⁶ Id. at Table 1.

This expanding deployment is not limited to high-density business areas. The great majority of both types of lines are serving residential end users, not business customers. The increase in ILEC ADSL lines in 2005 actually exceeded the growth in cable modem connections.⁴⁷ ILECs have been investing heavily to respond to cable modem competition, and have been gaining ground in the marketplace, even while subject to Title II and *Computer Inquiry* rules. With ILECs already investing very heavily in these facilities, forbearance realistically could do little to materially speed the pace.

Even if forbearance were assumed to encourage investment and deployment, such impact would be irrelevant, anyway. Unlike section 251, which gives the Commission authority to balance statutory goals, section 10(a) requires a detailed analysis of “market conditions”⁴⁸ backed by “empirical evidence.”⁴⁹ The Commission is not free to disregard the impact forbearance would have on competitors and consumers, even if doing so might be thought to promote other goals such as broadband deployment and investment. And although the petitioners all cite section 706,⁵⁰ that provision cannot be read to overrule the analysis mandated by section 10. It does not allow shortcuts in evaluating petitions for forbearance.

⁴⁷ *Id.* As of December 31, 2005, the Commission estimated that high speed DSL connections were already available to 78% of households reached by ILECs. High speed cable modem services were available to 93% of households reached by cable TV systems. ADSL and cable modem connections were reported present in 87% of the nation’s ZIP codes. *Id.* at 4 & n.10.

⁴⁸ *WorldCom*, 238 F.3d at 459.

⁴⁹ *AT&T*, 236 F.3d at 735-37.

⁵⁰ 47 U.S.C. § 157 note. *E.g.*, *Qwest* at 11-12; at 13-14; *AT&T* at 27; *BellSouth* at 14; *Embarq* at 13-14.

E. The fact that Verizon claims broad forbearance by default, does not justify granting the petitions.

The petitioners say it is unfair that only Verizon has received the windfall of forbearance from enforcement of virtually all of Title II and of *Computer Inquiry* precedent. The fact that Verizon may claim to have received forbearance “by operation of law,” following the Commission’s action on its petition, does not mean that the Commission can find these petitions meet section 10(a) requirements.

In the *Wireless Forbearance* Order, the Commission explained that “the decision to forbear from enforcing statutes or regulations is not a simple one” and requires “a record that contains more than broad, unsupported allegations of why the statutory criteria is met.”⁵¹ In that proceeding, the Commission denied forbearance, because the petitions had not established with the requisite evidence that section 10(a) requirements were satisfied. The present petitions have the same, fatal problem.

Qwest argues that the Commission must grant its petition “as a ministerial act,” because it would be “impossible to find that Verizon meets the forbearance standard in section 10(a) of the Act, without finding that Qwest also meets the same standard.”⁵² Qwest’s reasoning fails, because the Commission never even attempted to explain how Verizon’s petition met section 10(a) requirements. Sprint Nextel believes such a finding would have been contrary to the record. If it were to grant these petitions, the

⁵¹ Forbearance from Applying Provisions of the Communications Act to Wireless Carriers, 15 FCC Rcd 17414 at ¶ 13 (2000) (“Wireless Forbearance Order”).

⁵² Qwest at 2, 7. AT&T and BellSouth also purport to “reserve the right” to argue that default forbearance to Verizon already applies to all BOCs, though they provide no legal justification for that view. AT&T at 2 n.2; BLS at 3 n5.

Commission would have to explain how and why the requirements of section 10 are satisfied.

The petitioners do not even know exactly what forbearance they are requesting. BellSouth acknowledges that, “[i]n the absence of an explicit order, some uncertainty exists as to the exact scope of the relief flowing from the Verizon petition.”⁵³ Embarq acknowledges the same “degree of uncertainty.”⁵⁴ It is understandable that the petitioners are unclear what relief they are seeking. Chairman Martin and Commissioner Tate acknowledged they were unsure what relief the Commission granted when it acted on Verizon’s petition, stating that it “would have been preferable to have reached consensus on a proposal clearly setting forth the relief granted today.”⁵⁵ But it is clearly wrong to suggest that the Commission can rule that the “uncertain” regulatory “relief awarded by operation of law [to Verizon] already applies to all BOCs.”⁵⁶ Verizon’s petition did not seek forbearance for other BOCs, much less all ILECs,⁵⁷ and an ostensible grant of forbearance by default cannot extend beyond the forbearance requested.

⁵³ BellSouth at 3.

⁵⁴ Embarq at 5.

⁵⁵ News Release, Joint Statement of Chairman Kevin J. Martin and Commissioner Deborah Taylor Tate at 2 n.10.

⁵⁶ AT&T at 1.

⁵⁷ Verizon had “petition[ed] the Commission to forbear from applying those [Title II common carrier and *Computer Inquiry*] requirements to any broadband services offered by Verizon.” Petition of the Verizon Tel. Cos. for Forbearance, WC Docket No. 04-440 (filed Dec. 20, 2004) (emphasis added).

Qwest, AT&T, and BellSouth argue that Verizon's claimed exemption from Title II and *Computer II* would place it at an "unfair" competitive advantage against them.⁵⁸ Their concern is ironic. Were they to receive forbearance, their market power in special access would give them an even greater unfair competitive advantage over their own competitors. Likewise, Qwest's and Embarq's understandable concerns about Verizon's size and market power⁵⁹ -- it being the second largest carrier in the country -- argue more for rescinding or narrowing any default grant of forbearance to Verizon, than for expanding any forbearance to other carriers.

In any case, Verizon's claim of forbearance is itself likely to be overturned. Sprint Nextel is one of several parties that have appealed the Commission's handling of the Verizon forbearance petition.⁶⁰ In its statement of issues filed May 10, 2006, Sprint Nextel noted that the Commission failed to engage in reasoned decision-making as required by the APA, because it did not adequately explain how granting Verizon "relief" satisfied the standards of section 10. The Commission and the petitioners are unsure of the true scope of the forbearance granted, which confirms the lack of reasoned decision-making. In addition, substantial Constitutional issues are raised by any decision in which an agency effectively amends an act of Congress, and the Commission's action, whatever its scope, had the effect of exempting Verizon from Title II of the Communications Act.

⁵⁸ Qwest at 6; AT&T at 3; BellSouth at 6.

⁵⁹ Qwest at 2, 16; Embarq at 8, 9.

⁶⁰ Sprint Nextel Corp. v. FCC, D.C. Cir. No. 06-1111 (filed Mar. 29, 2006) (lead case); COMPTEL v. FCC, D.C. Cir. No. 06-1113 (filed Mar. 29, 2006); Globalcom Inc., et al. v. FCC, DC Cir. No. 06-1115 (filed Mar. 29, 2006); XO Communications, et al. v. FCC, D.C. Cir. No. 06-1167 (filed May 11, 2006); New Jersey Div. of the Ratepayer Advocate v. FCC, D.C. Cir. No. 06-1200 (filed June 13, 2006).

Constitutional concerns are magnified when an agency seeks to render its decision immune from judicial review, as the Commission has by contending it did not need to explain its action. They would be magnified further if the scope of forbearance granted were broadened to other companies, as the petitioners request. A decision extending forbearance to other ILECs on the grounds that Verizon already received such relief would only make the Commission's decisions more vulnerable.

Two senators and two members of Congress -- each of whom was involved in adoption of section 10 of the 1996 Act -- recently wrote the Commission criticizing the March 20, 2006 news release and questioning the legality of the Commission's handling of the Verizon petition.⁶¹ The Commission should not compound its error -- an error that itself will seriously undermine competition and harm consumers -- by repeating it with other ILECs.

V. Conclusion

The petitions fail to meet section 10(a) standards. Forbearance is plainly contrary to the public interest. The petitions should be denied, and the default grant of Verizon's petition should be revisited and reversed. Instead, the Commission should act to reform special access rate regulation to protect wholesale and retail consumers against ILEC abuse and promote competition in the telecommunications market.

⁶¹ Letter of Sen. Daniel Inouye, Sen. Byron Dorgan, Rep. John Dingell, and Rep. Edward Markey to FCC Chmn. Kevin Martin (July 24, 2006).

Respectfully submitted,

SPRINT NEXTEL CORPORATION

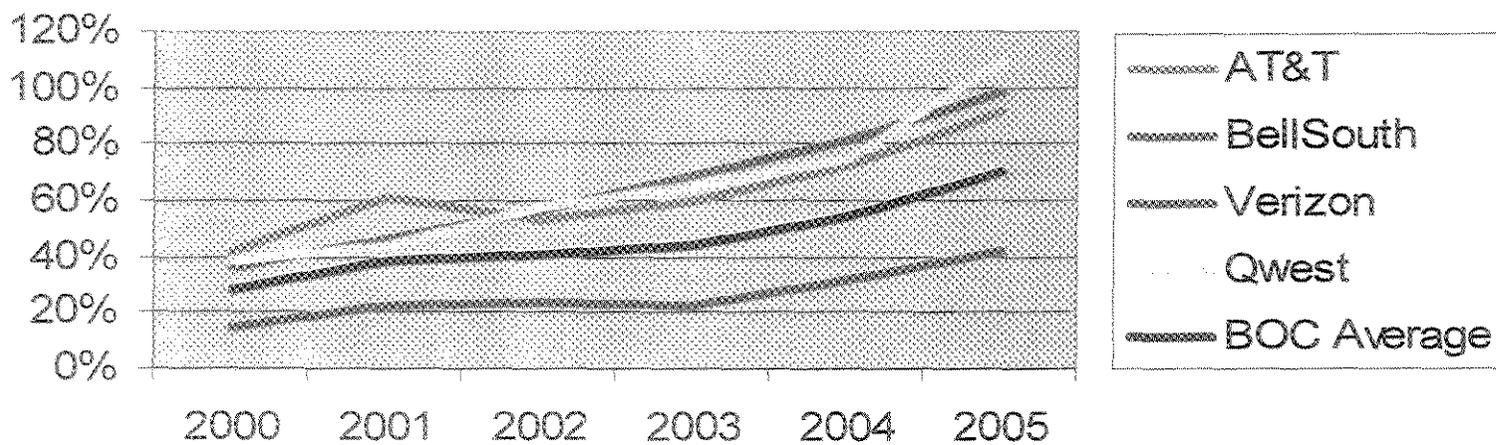
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August 17, 2006

ATTACHMENT (1)

**Bell Operating Companies
Interstate Special Access Rate of Return as
Reported in ARMIS**

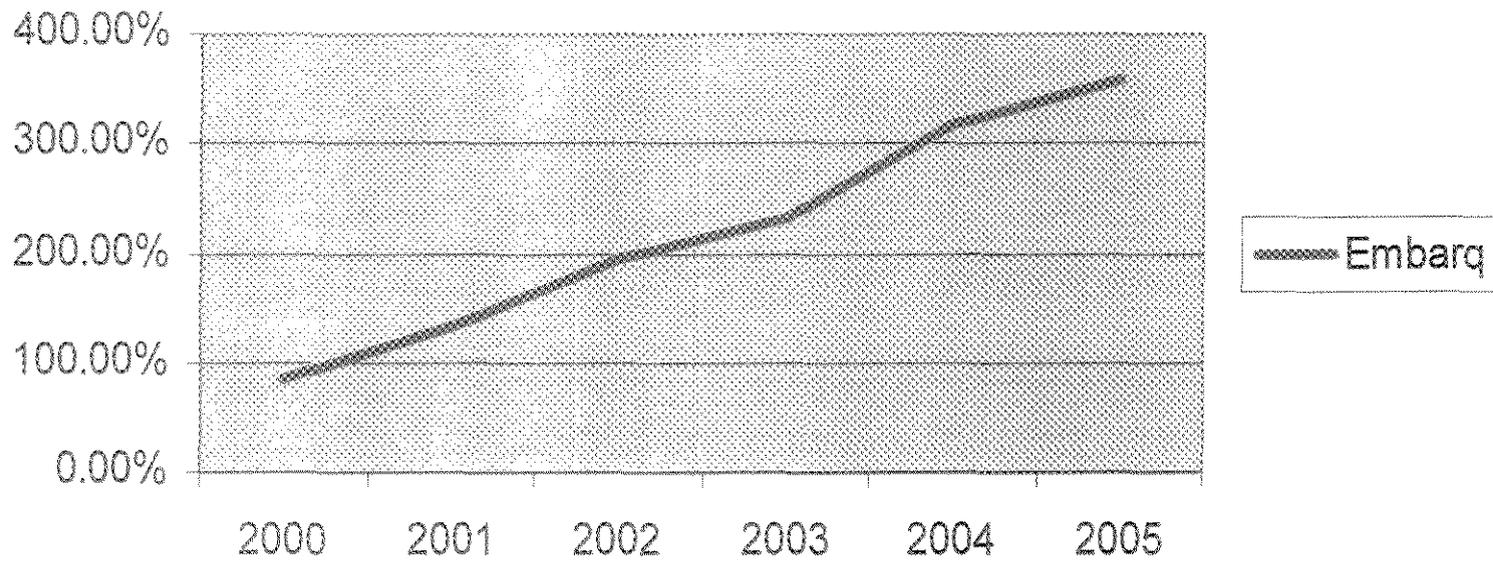


	<u>2000</u>	<u>2001</u>	<u>2002</u>	<u>2003</u>	<u>2004</u>	<u>2005</u>
AT&T	41.65%	61.18%	53.06%	60.28%	73.02%	91.73%
BellSouth	36.79%	46.31%	56.54%	69.14%	81.90%	98.37%
Verizon	15.26%	22.34%	24.08%	23.11%	31.64%	41.97%
Qwest	<u>38.14%</u>	<u>44.70%</u>	<u>57.74%</u>	<u>65.84%</u>	<u>75.09%</u>	<u>109.42%</u>
BOC Average	28.20%	38.89%	40.56%	43.88%	54.35%	69.97%

Source: FCC Report 43-01, Table I Cost and Revenue, Column (s) Special Access, Row 1915 Net Return divided by Row 1910 Average Net Investment

ATTACHMENT (2)

Embarq Interstate Special Access Rate of Return as Reported in ARMIS



	<u>2000</u>	<u>2001</u>	<u>2002</u>	<u>2003</u>	<u>2004</u>	<u>2005</u>
Embarq	84.20%	131.69%	195.18%	231.84%	316.72%	359.91%

Source: FCC Report 43-01, Table I Cost and Revenue, Column (s) Special Access, Row 1915 Net Return divided by Row 1910 Average Net Investment