

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of )  
)  
)

Qwest Petition for Forbearance Under )  
47 U.S.C. § 160(c) from Title II and )  
*Computer Inquiry* Rules with Respect to )  
Broadband Services )  
)

Petition of AT&T Inc. for Forbearance )  
under 47 U.S.C. § 160(c) from Title II )  
and *Computer Inquiry* Rules with )  
Respect to its Broadband Services )  
)

WC Docket No. 06-125

Petition of BellSouth Corporation for )  
Forbearance Under Section 47 U.S.C. )  
§ 160(c) from Title II and *Computer )  
Inquiry* Rules with Respect to its )  
Broadband Services )  
)

Petition of the Embarq Local Operating )  
Companies for Forbearance Under )  
Section 47 U.S.C. § 160(c) from )  
Application of *Computer Inquiry* and )  
Certain Title II Common-Carriage )  
Requirements )  
)

WC Docket No. 06-147

SPRINT NEXTEL CORPORATION'S  
REPLY COMMENTS IN OPPOSITION  
TO PETITIONS FOR FORBEARANCE

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## **I. Introduction and summary**

Some thirteen sets of comments were submitted, on behalf of more than thirty affected parties.<sup>1</sup> In addition to Sprint Nextel Corporation (“Sprint Nextel”), opponents to the forbearance petitions<sup>2</sup> included many competitive carriers, several Internet service providers and voice over Internet protocol providers, three associations covering competitive carriers and rural local exchange carriers, and New Jersey’s consumer advocate. The only supporters of the petitions were four incumbent local exchange carriers (“ILECs”), of whom one is a petitioner and another has its own petition pending. These four ILECs submitted only very brief statements. All other commenters voice detailed concerns about the impact forbearance would have on competitors, consumers, and the public interest.

Taken as a whole, the comments confirm Sprint Nextel’s view that the petitions should be denied. The petitioners have failed to meet the standards for forbearance under section 10 of the Act,<sup>3</sup> because they continue to have market power over wholesale special access facilities on which their competitors must rely to reach their customers.

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<sup>1</sup> Comments were filed on August 17, 2006. Public Notices DA 06-1544, 06-1545 (rel. July 28, 2006).

<sup>2</sup> 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); 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).

<sup>3</sup> 47 U.S.C. § 160(a).

Section 706<sup>4</sup> does not justify sweeping away these competitive safeguards, and Verizon's ostensible forbearance by default<sup>5</sup> does not provide grounds for granting the petitions.

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

Competitive carriers and service providers all agree that ILECs, and especially Bell Operating Companies ("BOCs"), continue to have "market power in broadband services in the wholesale and enterprise markets."<sup>6</sup> Because the Commission's forbearance analysis "must focus on the extent to which the petitioners continue to possess market power over the facilities necessary to provide [competitive] services,"<sup>7</sup> forbearance simply cannot be justified.

NTCA is among those voicing grave concern about ILEC market power over facilities that competitors need to reach their customers. NTCA's members provide many services, including enterprise and broadband-based services. Like other BOC competitors, very often NTCA's members have no choice but to rely on BOC facilities to reach their own customers. Forbearance would give BOCs "unchecked market power" -- a license "to charge one price for these services to ... affiliates and charge a higher price

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<sup>4</sup> 47 U.S.C. § 157 note.

<sup>5</sup> News Release: 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").

<sup>6</sup> Opposition of Alpheus Communications, LP, DeltaCom, Inc., McLeodUSA Telecommunications Services, Inc., MPower Communications Corp., Norlight Telecommunications, Inc., Pac-West Telecomm, Inc., TDS Metrocom, LLC, and Telepacific Corp. d/b/a Telepacific Communications ("Alpheus") at 14.

<sup>7</sup> Opposition of Time Warner Telecom, Inc., CBeyond Communications, LLC, and One Communications Corp. ("Time Warner Telecom") at 7.

for these same services to nonaffiliated companies.”<sup>8</sup> It would give them “greater opportunity to conduct predatory pricing and implement discriminatory practices” against competitors, particularly “much smaller rural communications providers,” and would permit ILECs “to refuse some providers outright access to the IP backbone.”<sup>9</sup> Like Sprint Nextel, nearly all commenters recognize that ILECs “continue to control bottleneck facilities necessary to provide packetized broadband services to enterprise customers.”<sup>10</sup>

The few ILEC supporters, in their abbreviated comments, breezily assert there is vibrant, nationwide competition in these services. Whether or not there may be *retail* competition for “broadband” services in some markets, there certainly is not a competitive market for the *wholesale* services on which competitors must rely. Cincinnati Bell, for example, is plainly wrong in claiming that competitors can readily secure other facilities, much less “self-provision,” even at the OCn level.<sup>11</sup> The inability to self-provision, however, is not just true of small carriers such as NTCA’s members. Sprint Nextel explained that market, economic, and operational realities all contribute to making competitors dependent upon ILEC facilities, even for larger competitors.<sup>12</sup> TDM-based special access facilities generally cannot be used to provide packetized

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<sup>8</sup> National Telecommunications Cooperative Association Initial Comments (“NTCA”) at 2, 3.

<sup>9</sup> Id.

<sup>10</sup> Time Warner Telecom at 12. See also Sprint Nextel Corporation’s Opposition to Petitions for Forbearance (“Sprint Nextel”) at 6.

<sup>11</sup> Comments of Cincinnati Bell Telephone (“Cincinnati Bell”) at 5-6.

<sup>12</sup> Sprint Nextel at 6-9.

broadband services to enterprises.<sup>13</sup> Thus, as Time Warner Telecom explains, “[r]emoving dominant carrier regulation from the petitioners’ packetized broadband facilities will force CLECs to scale back or eliminate their packetized broadband service offerings.”<sup>14</sup>

Embarq endorses AT&T’s and BellSouth’s claims that the *Wireline Broadband Order*’s findings of competition in Internet access services can extend to all “broadband” services.<sup>15</sup> On the contrary, that order focused on retail cable modem competition in the residential Internet access service market.<sup>16</sup> It made no findings, and cannot justify forbearance, in the business or wholesale markets. ILECs unquestionably control bottleneck facilities critical to competition in those distinct markets.

Iowa Telecom claims there is vigorous competition for broadband services “even in smaller cities and rural areas.”<sup>17</sup> Iowa Telecom’s assertions about competitive markets are ironic, given that it continues to refuse to interconnect with wholesale carriers, including Sprint Nextel’s affiliate. Iowa Telecom is blatantly attempting to block or delay VoIP and cable telephony competitors from entering its territory -- and is doing so in defiance of an order of the Iowa Utilities Board confirming its obligation to interconnect with wholesale carriers under section 251.<sup>18</sup> A market in which wholesale

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<sup>13</sup> See, e.g., Time Warner Telecom at 16-20.

<sup>14</sup> Id. at 23.

<sup>15</sup> Embarq at 3.

<sup>16</sup> See Comments of Earthlink, Inc. and New Edge Networks, Inc. in Opposition to Petitions (“Earthlink”) at 12.

<sup>17</sup> Comments of Iowa Telecom (“Iowa Telecom”) at 2.

<sup>18</sup> 47 U.S.C. § 251. See Sprint Communications Co. and MCC Telephony of Iowa LLC v. Iowa Telecoms. Servs., Iowa Utils. Bd., Docket No. FCU-06-\_\_ (ARB-05-2). Such

carriers are denied interconnection is not one in which nationwide competition for all services is robust.

Competitors too often simply have no alternatives to the ILEC for providing services -- whether for broadband services or traditional voice services.<sup>19</sup> Competitive alternatives, and opportunities for self-provisioning, are exceptions, not the rule. The specter of discrimination against competitors and in favor of affiliates is particularly troubling given that BOC affiliates include the dominant enterprise services providers, the largest long distance carriers, and the largest wireless carriers in the country. They are the last carriers to need any regulatory "relief."

### **III. The petitions lack evidence to support forbearance.**

As Broadview points out, "[t]he burden of proof lies with the ILEC petitioners."<sup>20</sup> Yet the petitions fail to provide evidence to show forbearance would meet section 10's deliberately stringent requirements. Instead, they offer generalizations and "mere conclusions" -- "devoid of evidence," "little more than regulatory rhetorical fluff."<sup>21</sup>

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rural LEC market barriers will be minimized by the Commission's grant of Time Warner Cable's Petition for Declaratory Ruling, pending in WC Docket No. 06-55 (filed Mar. 1, 2006). The Iowa Utilities Board's order was issued as Arbitration of Sprint Comms. Co. vs. Ace Comms. Grp., et al., Arbitration Order, Docket Nos. ARB-05-02, ARB-05-5, ARB-05-6 (Mar. 24, 2006). A copy is attached to Sprint Nextel Corporation's Comments in Support of Petition for a Declaratory Ruling, WC Docket No. 06-55 (filed Apr. 10, 2006).

<sup>19</sup> Sprint Nextel at 6-9.

<sup>20</sup> Comments in Opposition of Broadview Networks, Covad Communications, CTC Communications, Eschelon Telecom, NuVox Communications, XO Communications, and Xspedius Management Co. ("Broadview") at 19.

<sup>21</sup> Comments of the New Jersey Division of Rate Counsel ("NJDR") at 6; Broadview at 22; Earthlink at 23.

The petitioners failed even to address the critical “threshold issue” of defining the “relevant product and geographic markets.”<sup>22</sup> They offered no evidence of “whether or how the level of competition present is sufficient to satisfy Section 10 standards.” *Id.* They just make sweeping statements about there being a “national market” for “broadband services,” and that it is fully “competitive.” They claim VoIP demonstrates there is “national competition” in some sort of “broadband transmission service market,” but “they do not explain how a broadband competitor could offer these services if denied access (or granted access only on unreasonable terms) to the needed underlying transmission services.”<sup>23</sup>

Without evidence that there truly is a “national broadband market,” the Commission has no record that could support the findings necessary for forbearance under section 10.

In a very short statement, ACS supported the petitioners’ call for exempting all ILECs from Title II and *Computer Inquiry* requirements nationwide.<sup>24</sup> ACS has its own petition for forbearance pending in another docket.<sup>25</sup> ACS’s petition seeks forbearance from ILEC obligations in the Anchorage MSA and from Title II and *Computer Inquiry*

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<sup>22</sup> Broadview at 20.

<sup>23</sup> Earthlink at 11, 21.

<sup>24</sup> Comments of ACS of Anchorage, Inc. (“ACS”). 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).

<sup>25</sup> Petition of ACS of Anchorage, Inc. for Forbearance from Certain Dominant Carrier Regulation of its Interstate Access Services, and for Forbearance from Title II Regulation in Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Study Area, WC Docket No. 06-109 (filed May 22, 2006).

requirements for services similar to Verizon's claimed forbearance grant. Sprint Nextel opposes ACS's petition, because ACS still has market power over wholesale special access services, despite retail competition in the Anchorage MSA. But at least ACS identified and limited its geographic market and provided data about that market. The petitioners (and Verizon) did neither.

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

For the petitioners' opponents, it is no surprise that the petitions lack evidence to meet any of section 10's three separate requirements, much less all of them. Forbearance requires showing that the "regulations are no longer in the public interest because competition between providers renders the regulations no longer meaningful."<sup>26</sup> That requires a showing that cannot realistically be made.

##### **A. Section 10(a)(1)**

The competitive carriers all agree that the petitions fail the first requirement of section 10. The petitioners unquestionably "retain market power in provision of broadband in the wholesale and enterprise markets."<sup>27</sup> Enforcement of Title II and *Computer Inquiry* rules remains necessary to ensure practices and rates are just and reasonable and not unreasonably discriminatory.

The very purpose of the petitions is to secure the absolute power to discriminate, by eliminating ILECs' obligations under section 201 and 202<sup>28</sup> -- effectively gutting the very core of the Act. Forbearance would only "facilitate discrimination," something for

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<sup>26</sup> H.R. Conf. Rep. No. 104-458 at 185 (1996).

<sup>27</sup> *Alpheus* at 14.

<sup>28</sup> 47 U.S.C. §§ 201(b), 202(a).

which ILECs -- with their long distance, enterprise, and wireless affiliates -- already have “strong incentives” to do.<sup>29</sup> If forbearance were granted, ILECs would also “no longer be required under Title II to ‘establish physical connection with other carriers.’”<sup>30</sup> With alternatives to special access rarely available, and with self-provisioning rarely viable, ILEC abuses -- discrimination, anti-competitive rates and conditions, and even refusal to deal -- would be assured,<sup>31</sup> and the Commission would be powerless to do anything about them.

Several parties rightly complain about the risks posed by the vague, broad character of the petitions -- and of Verizon’s claimed forbearance grant. Forbearance could have more far-reaching, anti-competitive impacts than the Commission would anticipate. For example, competitors today routinely rely on ILEC “broadband” facilities for interconnection for exchange of traffic, such as by leasing DS1 and DS3 for handling the exchange of traffic. The Act and the Commission’s rules require cost-based interconnection facilities and require ILECs to share the cost of those facilities. Despite these requirements, interconnecting carriers are often forced to pursue arbitration to receive what the Act and the rules already require.<sup>32</sup> Forbearance, however, could eliminate those cost-based interconnection rates and avenues for challenging those rates,

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<sup>29</sup> Alpheus at 21, 24.

<sup>30</sup> NJDRC at 4.

<sup>31</sup> Earthlink, for example, outlined anticompetitive abuses by AT&T and BellSouth that followed release of the *Wireline Broadband Order*. See Earthlink at 16-18.

<sup>32</sup> For example, ILECs typically insist on assessing special access rates and require interconnecting carriers to pay for the entire capacity of the facility, despite the fact that the ILEC uses the same facility to deliver traffic its own customers originate to the interconnecting competitor. Interconnecting carriers are consequently forced to pursue their rights via arbitration.

as well as unjust and unreasonable terms and conditions. Forbearance also could lift the symmetrical interconnection obligations of sections 251 and 252. It could take away the right to bring interconnection disputes before a neutral arbitrator. It could allow ILECs to refuse interconnection altogether. With risks such as these, the safeguards of Title II and the *Computer Inquiry* rules remain necessary to ensure rates, terms, and practices are not anticompetitive, unjust and unreasonable, and not unreasonably discriminatory.

**B. Section 10(a)(2)**

Most of the commenters also agree that the petitions fail the second requirement of section 10, because enforcement remains necessary to protect the interests of wholesale and retail consumers. ILECs' competitors in broadband and enterprise markets have no economic choice but to secure special access facilities to provide their services. Many commenters share Sprint Nextel's experience that competitive alternatives for special access are rare and self-provisioning is rarely economic. Even "[l]arge and sophisticated customers cannot negotiate lower prices in markets controlled by one supplier,"<sup>33</sup> so forbearance virtually guarantees higher prices for special access facilities and thus to consumers. ILECs could even deny them altogether.

Forbearance would also harm retail consumers. The lack of enforcement would result in enterprise and broadband customers seeing "higher prices, fewer broadband alternatives and decreased service quality."<sup>34</sup>

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<sup>33</sup> Time Warner Telecom at 20.

<sup>34</sup> NJDRC at 5. It is telling that, after broadband services were exempted from universal service fund assessments, BellSouth and Verizon announced that they would continue to impose a comparably sized surcharge. They only reversed this policy after Commission pressure. Without Title II authority, it is unclear the Commission could compel the elimination of such fees.

**C. Section 10(a)(3)**

Across the board, competitive carriers agree that forbearance is not in the public interest. The petitioners' few supporters contend forbearance would save ILECs from unspecified "regulatory costs" imposed by "regulatory burdens" and "constraints."<sup>35</sup> They do not explain how forbearance can be in the public interest, when it means eliminating protection of consumer privacy; eliminating access to communications for deaf, hard-of-hearing, speech-impaired, or citizens with disabilities; eliminating Commission jurisdiction to hear consumer and carrier complaints about abusive rates, price squeezes, and unlawful conduct; and eliminating the statutory obligation to interconnect.<sup>36</sup> They are also vague about how forbearance for ILECs could affect Universal Service contribution and CALEA requirements.

Furthermore, in assessing the potential impact of forbearance on the public interest, section 10(b) requires the Commission to consider whether forbearance "will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of communications services." The comments submitted confirm that forbearance could only damage competition.

**V. Forbearance would not accelerate ILECs' deployment of broadband facilities.**

Most commenters agreed that forbearance would do little or nothing to accelerate broadband deployment or investment. The petitioners and the ILEC commenters mischaracterize section 706, in suggesting that it requires forbearance.

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<sup>35</sup> ACS at 2; Cincinnati Bell at 7; Iowa Telecom at 3.

<sup>36</sup> E.g., 47 U.S.C. §§ 208, 222, 251(a), 255.

Section 706 says the Commission and state commissions are to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans,” by adopting “regulating methods that remove barriers to infrastructure investment” and “promot[ing] competition in the local telecommunications market.” The petitioners have provided no evidence to suggest either that such capability is not being deployed on a reasonable and timely basis, or that dominant carrier regulation poses any real barrier to investment. In fact, the evidence supplied by CompTel and others shows just the opposite. Not only was Verizon deploying broadband facilities at a rapid pace before it filed its forbearance petition, so too are AT&T, BellSouth, and Qwest. They, Embarq, and other ILECs have been investing heavily in advanced telecommunications capability, undeterred by the competitive safeguards long applicable to ILECs because of their market power.

AT&T reiterated its commitment to its ongoing IP-based network upgrades, by which it has been “rapidly deploying these new broadband technologies and aggressively rolling out new services” throughout its 13-state service territory.<sup>37</sup> BellSouth’s 2005 Annual Report trumpeted how that carrier is “upgrading the network so that 50 percent of [its] households will have access to speeds of 12 to 24 megabits by the end of 2007.”<sup>38</sup> Qwest’s Annual Report touted its gains in the enterprise market and the extension of its integrated broadband services for businesses to 250 cities.<sup>39</sup> Embarq just announced its 1 millionth circuit-to-packet switch conversion, and Embarq continues to expand DSL

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<sup>37</sup> CompTel at 23, 24, quoting a recent AT&T press release.

<sup>38</sup> Id. at 25.

<sup>39</sup> Id.

services and upgrade its network, even in rural service territories.<sup>40</sup> Embarq's continuing "technological evolution" allows "Embarq to more easily offer its customer next-generation communication services," including integrated, voice, video and data.<sup>41</sup>

Clearly, the petitioners are already investing heavily in advanced telecommunications capability, even with existing competitive safeguards in place. The Commission's most recent report to Congress has found "that advanced telecoms capability is indeed being deployed on a reasonable and timely basis to all Americans."<sup>42</sup> ILECs are making those investments in response to retail competitive pressures and in order to enter video services markets. Lifting competitive safeguards would, if anything, diminish ILEC incentive to continue the rapid pace of those investments, by hampering their competition.

**VI. The fact that Verizon claims forbearance by default does not justify granting the petitions.**

The commenters almost universally agree that Verizon's claim of forbearance "by operation of law" does not apply to subsequent petitioners. Many parties complained of the uncertain scope of Verizon's claim of forbearance -- uncertainty that doubtless contributed to the improperly vague nature of these further petitions. OPASTCO also is concerned that the Commission's press release did not bother to specify what USF commitment Verizon was making,<sup>43</sup> much less whether it would be enforceable. None of

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<sup>40</sup> "Press Release: Embarq Reaches Packet Network Milestone" (issued Aug. 22, 2006).

<sup>41</sup> Id.

<sup>42</sup> Availability of Advanced Telecommunications Capability in the United States, Fourth Report to Congress, 19 FCC Rcd 20540, 20547 (2004).

<sup>43</sup> Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies ("OPASTCO"), at 3-4.

the commenters lent any support to the petitioners' claims that Verizon's grant can somehow automatically extend to other ILECs. Even Cincinnati Bell and ACS, despite endorsing forbearance for all ILECs, do not pretend that Verizon's grant has any effect on ILECs other than Verizon alone.

Commenters correctly remarked that the Commission must assess each petition on its merits, consistent with its obligations under section 10. For the petitions to be granted, the petitioners must show, and the Commission must find -- by evidence, not mere rhetoric -- that section 10's requirements have all been met. If a majority of the Commission concludes that forbearance is not warranted for ILECs other than Verizon under the standards of section 10, it may not nevertheless forbear. The appropriate remedy would be to reconsider the grant of forbearance to Verizon.

Commenters also agree with Sprint Nextel that the Commission's action on the Verizon petition is likely to be overturned.<sup>44</sup> The New Jersey Division of Rate Counsel contends further that "the constitutional infirmities associated with the Commission's forbearance authority contained in Section 10" renders the entire forbearance process unconstitutional.<sup>45</sup> Granting forbearance to other ILECs simply because Verizon's forbearance was deemed granted would push the Commission's application of section 10 far beyond constitutional limits. The result would be that the Communications Act was effectively amended -- that is, Title II of the Act would no longer apply in many circumstances where it applies by its terms -- without an adequate explanation by the Commission of why the standards Congress articulated require that result.

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<sup>44</sup> Sprint Nextel at 23-24.

<sup>45</sup> NJDRC at 5-6.

The ILEC commenters complain about the competitive advantage forbearance has granted Verizon. It is not yet clear how vigorously all of the petitioners actually compete with Verizon. But even assuming that there is competition between the petitioners and Verizon, that competition is chiefly in the retail, enterprise market. It does not affect wholesale carriers' need to access ILEC facilities to reach their customers. Embarq's comment, for example, about Verizon's status as "a gigantic ILEC with a national network and broadband offerings"<sup>46</sup> says more about the need to rescind Verizon's supposed forbearance than the need to extend such regulatory exemptions to other ILECs. If the current "asymmetrical regulatory environment" is "irrational," as ACS claims,<sup>47</sup> the Commission can correct that problem, and protect competition and the public, by taking steps to withdraw Verizon's forbearance.

## **VII. Conclusion**

The comments make clear that the petitions fail to meet section 10(a) standards. Forbearance would allow ILECs to exploit their market power over special access, by giving them license to discriminate at will. By undermining competition in the enterprise and broadband markets, it would harm wholesale and retail consumers. It would do little to accelerate investment in broadband services. The petitions should be denied, the default grant of Verizon's petition should be reversed by a proper order, and the Commission should act to reform special access rate regulation to promote competition in the telecommunications market.

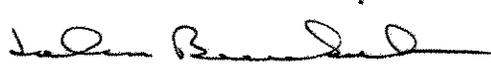
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<sup>46</sup> Embarq at 5.

<sup>47</sup> ACS at 2.

Respectfully submitted,

SPRINT NEXTEL CORPORATION

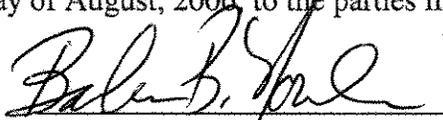
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of Sprint Nextel Corporation's Reply Comments in WC Docket Nos. 06-125 and WC Docket 06-147 was delivered by electronic mail or first class mail, postage prepaid, on this 31st day of August, 2006, to the parties listed below.

  
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