

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20544**

In the Matter of

Petition of the Embarq Local Operating  
Companies for Forbearance Pursuant to  
47 U.S.C. § 160(c) from the Contract Tariff  
Filing Requirements of the Pricing Flexibility  
Rules

WC Docket No. 07-258

**COMMENTS OF VERIZON<sup>1</sup>**

**INTRODUCTION AND SUMMARY**

As Verizon has argued elsewhere, the Commission should allow carriers to use contract arrangements on a nationwide basis, irrespective of whether and where those carriers have made the competitive showing necessary to obtain Phase I or Phase II pricing flexibility, which currently is a prerequisite to obtaining authority to enter into contract arrangements. Granting such authority, independent of the Commission's pricing flexibility regime, would allow customers in all areas of the country to obtain the recognized benefits from such flexible arrangements, which include increased competition as well as the ability to buy services more tailored to their individual needs. Because such contracts would be negotiated against the background of traditional price cap regulation in those areas where carriers have not obtained pricing flexibility, customers can only benefit, as they would sign contracts only where they are offered a better deal than existing price cap rates.

Where a carrier *has* made the competitive showing required under the Commission's existing pricing flexibility rules, however, there can be no doubt that requiring that carrier to file

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<sup>1</sup> The Verizon companies participating in this filing ("Verizon") are the regulated, wholly owned subsidiaries of Verizon Communications Inc.

its contracts as tariffs is harmful to that competition and to the consumers that benefit from it. As the Commission has recognized in a wide variety of contexts in which it has granted forbearance from tariff filing requirements, such requirements can affirmatively harm competition and consumers, such as by reducing carriers' ability to respond efficiently to customers' demands, by imposing costs on carriers that attempt to make new offerings, or by impeding consumers from obtaining flexible service arrangements specifically tailored to their needs. Therefore, the Commission should grant the Embarq Local Operating Companies' ("Embarq") petition for forbearance from the requirement to file contracts as tariffs in those areas where Embarq has obtained (or may obtain) pricing flexibility. Indeed, the Commission should extend such forbearance to all incumbent local exchange carriers that have obtained (or may obtain) pricing flexibility, as the considerations that support Embarq's petition are not unique to Embarq but apply to all such carriers.

All the factors in § 10 are satisfied here: requiring the filing of contracts as tariffs in pricing flexibility areas is not in the public interest, as tariff filings undermine rather than enhance competition; nor is it necessary to protect consumers, who instead are harmed by the anti-competitive effects of such filings, or to ensure just and reasonable rates, because competition and the residual protections of §§ 201 and 202 will be sufficient for that purpose. This is true not only in areas where Embarq has obtained (or will obtain) Phase I or II pricing flexibility, but in all areas where any incumbent carrier has made (or makes) the competitive showing necessary to obtain greater flexibility to meet the needs of its customers.

## **ARGUMENT**

1. As Verizon has explained elsewhere, the Commission should authorize the use of contract arrangements nationwide, without requiring carriers first to make the competitive

showings that are ordinarily necessary to obtain Phase I or Phase II pricing flexibility.<sup>2</sup> The authority to enter into contract arrangements nationwide, independent of the Commission’s pricing flexibility regime, would make it possible for price cap LECs to enter into individually negotiated agreements for all access services throughout their serving territories. The Commission has long recognized that individualized contracts are pro-competitive, as they “benefit consumers by unleashing competitive forces for business services to the maximum extent possible.”<sup>3</sup> Indeed, in establishing the competitive criteria to obtain pricing flexibility, the Commission recognized that “customers benefit” from contracts that “enable incumbent LECs to tailor services to their customers’ individual needs.”<sup>4</sup> Negotiated, commercial agreements, therefore, represent the best way to encourage efficient and competitive results, and provide carriers with greater flexibility to meet the needs of customers in the face of rapidly emerging technologies and an increasingly competitive market.

In addition, in those areas where carriers have not made the competitive showing necessary to obtain pricing flexibility, price cap regulation would remain in place, providing customers with an alternative to entering into contract arrangements. By authorizing the use of contract arrangements nationwide, the Commission would be allowing LECs and their customers to negotiate additional alternatives tailored to the needs of particular customers, who will agree

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<sup>2</sup> See Comments of Verizon, *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25 & RM-10593, at 45-50 (FCC filed Aug. 8, 2007) (“Verizon Comments”); Reply Comments of Verizon, *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25 & RM-10593, at 45 (FCC filed Aug. 15, 2007).

<sup>3</sup> Report and Order, *Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd 5880, ¶ 105 (1991). As the Commission held in that order, individualized contracts are superior to generic tariffs, because “no single tariff can adequately incorporate all of the individually designed variables that customers desire.” *Id.* ¶ 104.

<sup>4</sup> Fifth Report and Order and Further Notice of Proposed Rulemaking, *Access Charge Reform*, 14 FCC Rcd 14221, ¶ 128 (1999) (“*Pricing Flexibility Order*”), *aff’d*, *WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001).

to a negotiated arrangement only if it yields benefits in comparison to the generally available special access offerings, including lower rates and more flexible service terms. Allowing consumers such additional options can only improve the competitiveness of any given area, as customers will not enter into a contract arrangement unless it offers them a better deal than the LEC's price cap rates. Therefore, there is no possible basis for concern that nationwide contract authority could lead to higher prices.

For all of the same reasons, the Commission should not require carriers to file such contract arrangements as tariffs. The tariff filing requirement interferes with carriers' ability to tailor their services to the maximum extent possible to the needs of particular customers, because the carriers must ensure that a business arrangement that is mutually beneficial for the carrier and the company that negotiated it cannot be exploited by other potential purchasers. And, as discussed in further detail below, the Commission has repeatedly recognized that tariffing requirements can undermine competition. *See infra* pp. 4-9.

2. Although carriers should be permitted to enter into contract arrangements nationwide — without making the competitive showing currently required to obtain Phase I or II pricing flexibility and without any requirement to file those contracts as tariffs — where such a competitive showing *has* been made, the Commission should forbear from requiring the filing of contracts as tariffs for Embarq and all incumbent LECs. Eliminating the filing requirement for contract arrangements where competition has been demonstrated to exist readily satisfies the forbearance criteria in § 10(a), as the Commission has recognized.

Indeed, even before Congress gave the Commission express authority to do so, the Commission eliminated tariff filing requirements in response to competition. In the early 1980s, the Commission eliminated tariff filings requirements for carriers such as MCI and Sprint, as

well as resellers and other non-dominant carriers, finding, among other things, that “forbearance [from tariff filing requirements] can benefit consumers by stimulating competition.”<sup>5</sup> In the 1990s, the Commission continued to find that, where competition exists, a tariff filing requirement “inhibits price competition, service innovation, entry into the market, and the ability of firms to respond quickly to market trends”<sup>6</sup> and, therefore, can be “actually counterproductive” to the further development of competition.<sup>7</sup> The Supreme Court, although vacating one of these orders after finding that the Commission then lacked statutory authority to eliminate tariffing requirements, acknowledged “considerable sympathy” for the Commission’s conclusion that tariffs “facilitate[] parallel pricing and stifle[] price competition.”<sup>8</sup>

The Commission continued to follow that approach after Congress enacted § 10 and has granted forbearance from tariff filings requirements in a host of circumstances. In those orders, the Commission has repeatedly “recognized that tariff regulation may create market inefficiencies, inhibit carriers from responding quickly to rivals’ new offerings, and impose other unnecessary costs.”<sup>9</sup> For example, in eliminating tariff requirements for SBC’s advanced

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<sup>5</sup> Fifth Report and Order, *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 98 F.C.C.2d 1191, ¶ 10 (1984), vacated by *MCI Telecomms. Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985).

<sup>6</sup> Report and Order, *Tariff Filing Requirements for Interstate Common Carriers*, 7 FCC Rcd 8072, ¶ 36 (1992), vacated by *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218 (1994).

<sup>7</sup> Memorandum Opinion and Order, *Tariff Filing Requirements for Nondominant Common Carriers*, 8 FCC Rcd 6752, ¶ 2 (1993), vacated by *Southwestern Bell Corp. v. FCC*, 43 F.3d 1515 (D.C. Cir. 1995).

<sup>8</sup> *MCI Telecomms.*, 512 U.S. at 233.

<sup>9</sup> Memorandum Opinion and Order, *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*, 22 FCC Rcd 16304, ¶ 106 (2007) (“ACS Forbearance Order”).

services affiliate, the Commission found that “tariff regulation imposes significant costs” and prevents SBC’s affiliate “from quickly introducing new services in response to customer demands and opportunities created by technological developments,” which also reduces its “ability to respond quickly to its competitors’ advanced services offerings and tailor its own offerings to meet customers’ individualized needs.”<sup>10</sup> Another Commission order held that tariffing “may harm consumers by impeding the development of vigorous competition, which could lead to higher rates,” and that “forbearance will promote competition and deter price coordination, which can threaten competitive benefits.”<sup>11</sup> The Commission preempted Minnesota from requiring Vonage to tariff its VoIP service, in part because requiring “tariffs for [VoIP] services may actually harm consumers by impeding the development of vigorous competition.”<sup>12</sup>

Most recently, the Commission eliminated tariff filing requirements for certain of Embarq’s broadband services, finding that, although “tariffs originally were required to protect consumers from unjust, unreasonable, and discriminatory rates in a virtually monopolistic market,” tariffing requirements “become unnecessary in a marketplace where the provider faces significant competitive pressure.”<sup>13</sup> Thus, the Commission held that eliminating the contract

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<sup>10</sup> Memorandum Opinion and Order, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, 17 FCC Rcd 27000, ¶ 26 (2002).

<sup>11</sup> Second Report and Order, *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended*, 11 FCC Rcd 20730, ¶ 37 (1996) (“*Tariff Forbearance Order*”), *aff’d MCI Worldcom, Inc. v. FCC*, 209 F.3d 760, 764 (D.C. Cir. 2000) (The Commission has “long been concerned that the necessity of filing tariffs hinders competitive responsiveness.”).

<sup>12</sup> Memorandum Opinion and Order, *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22404, ¶ 20 (2004), *aff’d Minn. PUC v. FCC*, 483 F.3d 570 (8th Cir. 2007).

<sup>13</sup> Memorandum Opinion and Order, *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain*

tariff filing requirement would make Embarq a “more effective competitor[] for these services, which in turn we anticipate will increase even further the amount of competition in the marketplace, thus helping ensure that the rates and practices for these services overall are just, reasonable, and not unjustly discriminatory.”<sup>14</sup>

For the same reasons that led the Commission to forbear from tariff filing requirements in those other orders, the Commission should grant Embarq’s petition. In doing so, the Commission should forbear from requiring the filing of contracts as tariffs by *any* carrier in areas where the carrier has made (or may in the future make) the competitive showing necessary to obtain Phase I or Phase II pricing flexibility. Such forbearance satisfies each of the section 10 criteria.

*First*, requiring the filing of contracts as tariffs is “not necessary to ensure” that practices and rates here are “just and reasonable.” 47 U.S.C. § 160(a)(1). Nor is there any need to fear that LECs would “use contract tariffs in an exclusionary manner by targeting them to specific customers.”<sup>15</sup> To the contrary, the demonstrated presence of competition in those areas — along with the background requirements of §§ 201 and 202 — will suffice to ensure just and reasonable treatment, as the Commission has repeatedly held in other contexts.<sup>16</sup> In addition, as the Commission has recognized, a tariff filing requirement may *itself* facilitate practices that are neither just nor reasonable, such as price coordination.<sup>17</sup>

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*Title II Common-Carriage Requirements*, 22 FCC Rcd 19478, ¶ 29 (2007) (“*Embarq Broadband Forbearance Order*”).

<sup>14</sup> *Id.* ¶ 34 (footnote omitted).

<sup>15</sup> *Pricing Flexibility Order* ¶ 130.

<sup>16</sup> *See, e.g., Tariff Forbearance Order* ¶ 38; *ACS Forbearance Order* ¶ 107; *Embarq Broadband Forbearance Order* ¶¶ 34-35.

<sup>17</sup> *See, e.g., Order, Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC’s Local Exchange Area and Policy and Rules Concerning the Interstate*,

*Second*, requiring the filing of contracts as tariffs is not necessary for the “protection of consumers.” 47 U.S.C. § 160(a)(2). On the contrary, detariffing can only “facilitate innovative integrated service offerings designed to meet changing market conditions,” and “increase customers’ ability to obtain service arrangements that are specifically tailored to their individualized needs.”<sup>18</sup> Indeed, as the Commission recently held, the “pricing flexibility regime” alone is not “sufficient” for a company to “meet its customers’ needs and compete effectively.”<sup>19</sup> That is because the contract tariff filing requirement prevents carriers “from responding efficiently and in a timely manner” to competitors’ “market-based pricing promotions,” and makes it “unnecessarily difficult for [the carrier] to negotiate arrangements tailored to the needs of its enterprise customers, because its tariff filings necessarily provide competitors with notice of their pricing strategies and competitive innovations.”<sup>20</sup>

*Third*, forbearance from the contract tariff filing requirement is consistent with the “public interest” and the “promot[ion] of competitive market conditions.” 47 U.S.C. § 160(a)(3), (b). As the Commission has found, tariffing requirements are contrary to the public interest where competition exists because such requirements “impede[] vigorous competition . . . by: (1) removing incentives for competitive price discounting; (2) reducing or taking away carriers’

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*Interexchange Marketplace*, 12 FCC Rcd 15756, ¶ 89 (1997) (“If we were to require BOC interLATA affiliates to file tariffs for interstate, domestic, interexchange services, the ready availability of that information might facilitate tacit coordination of prices.”).

<sup>18</sup> *ACS Forbearance Order* ¶ 106.

<sup>19</sup> *Embarq Broadband Forbearance Order* ¶ 33.

<sup>20</sup> *See ACS Forbearance Order* ¶ 117; *see also* Second Order on Reconsideration and Erratum, *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 14 FCC Rcd 6004, ¶ 2 (1999) (“With the advent of competition in the provision of interstate, interexchange services, however, tariffing became less beneficial and, in some ways, harmful to consumers. . . . [T]ariffing can discourage competitive pricing, restrict the flexibility of carriers seeking to offer service arrangements tailored to an individual customer’s needs, and impose unnecessary regulatory costs on carriers.”).

ability to make rapid, efficient responses to changes in demand and cost; (3) imposing costs on carriers that attempt to make new offerings; and (4) preventing consumers from seeking out or obtaining service arrangements specifically tailored to their needs.”<sup>21</sup> Indeed, in the specific context of contract arrangements, the Commission recently recognized that requiring the filing of contracts as tariffs makes it “unnecessarily difficult” for incumbent LECs “to negotiate nationwide arrangements tailored to the needs of large enterprise customers with geographically dispersed locations, because their tariff filings necessarily provide competitors with notice of their pricing strategies and competitive innovations.”<sup>22</sup> Because tariffing itself impedes competition, Congress’s own criteria compel the conclusion that forbearance from the contract tariff filing requirement is consistent with the public interest. *See* 47 U.S.C. § 160(b).

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<sup>21</sup> *Tariff Forbearance Order* ¶ 53 (footnotes omitted).

<sup>22</sup> *Embarq Broadband Forbearance Order* ¶ 35.

## CONCLUSION

The Commission should allow price cap LECs to enter into contract arrangements nationwide, without regard to whether and where such carriers have made the competitive showing required to obtain pricing flexibility, and with no obligation to file such contracts as tariffs. At a minimum, in those areas where carriers *have* made a competitive showing (under either Phase I or Phase II), the Commission should grant Embarq’s petition and should forbear from requiring all carriers to file their contracts as tariffs.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Andrew Kizzie, do hereby certify that on this 14th day of December, 2007, I caused to be served a true copy of the foregoing Comments on Petitions for Reconsideration by delivering copies thereof via first class mail to the following:

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