

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY 1

II. A PETITION FOR FORBEARANCE IS NOT THE PROPER MECHANISM TO REVIEW THE APPROPRIATENESS OF THE CONTINUED APPLICABILITY OF THE COMMISSION’S CONTRACT TARIFF FILING REQUIREMENTS 2

III. EMBARQ’S PETITION FAILS TO SATISFY EACH COMPONENT OF THE STATUTORY FORBEARANCE CRITERIA 4

 A. Contract Tariff Filing Requirements Remain Necessary in Markets Where Competition Has Yet to Firmly Take Hold 6

 B. Denial of Embarq’s Forbearance Request Safeguards Consumer Interests and Furthers the Public Interest 9

IV. CONCLUSION 10

Requirements), and § 69.727(a) (Regulatory Relief) of the Commission's rules in areas where Embarq has received or may receive Phase I or Phase II pricing flexibility.³

Four parties filed initial comments concerning Embarq's petition. In addition to Sprint Nextel, CompTel and the New Jersey Division of Rate Counsel ("Rate Counsel") filed comments opposing Embarq's petition, while Verizon⁴ filed comments in support. The opposing parties universally agree that Embarq has failed to satisfy each of the three elements of the statutory forbearance standard to warrant granting forbearance in this instance. Moreover, the opposing parties agree that a petition for forbearance is not the appropriate vehicle to consider Embarq's request for relief from filing contract-based tariffs. In contrast, Verizon's arguments in support of Embarq's petition fail to make a convincing case for eliminating the application of these important Commission regulations.

Accordingly, for the reasons discussed in Sprint Nextel's Initial Comments and in these Reply Comments, the Commission should deny Embarq's request.

II. A PETITION FOR FORBEARANCE IS NOT THE PROPER MECHANISM TO REVIEW THE APPROPRIATENESS OF THE CONTINUED APPLICABILITY OF THE COMMISSION'S CONTRACT TARIFF FILING REQUIREMENTS

Two of the commenting parties supported Sprint Nextel's argument that a petition for forbearance is not the appropriate vehicle to implement changes to the contract tariff filing requirements contained in the Commission's pricing flexibility rules. Like Sprint Nextel, CompTel argues that forbearance from the Commission rules at issue will not provide Embarq with the right to offer contract pricing for its interstate access services subject to pricing flexibility without the use of a tariff.⁵ As CompTel explains, § 69.727(a) of the Commission

³ Embarq Petition at 2 (citing 47 C.F.R. §§ 61.55, 61.58, 69.727(a)).

⁴ The comments are filed on behalf of the regulated, wholly-owned subsidiaries of Verizon Communications, Inc.

⁵ Opposition of CompTel at 2.

rules, from which Embarq seeks forbearance, merely gives it contract tariff authority. Embarq can choose not to exercise that authority; it does not need to request forbearance. Moreover, as CompTel noted, the Commission cannot change the pricing flexibility relief it granted through a forbearance petition. Forbearance is only a means to eliminate unnecessary or obsolete regulatory provisions. It cannot be used to create new rules that have not been previously adopted. Thus, Embarq's petition is procedurally flawed and should be denied.⁶

Similarly, Rate Counsel argues that Embarq's petition is an improper attempt to modify the Commission's previously-issued order granting Embarq limited relief from tariff filing obligations for a discrete group of its existing high-capacity, non-Time Division Multiplexed ("TDM") packet-switched and optical transmission broadband services, including Frame Relay, ATM, and Ethernet-based services.⁷ Rate Counsel contends that the Commission relied upon the continued existence of the contract tariff filing requirements as a basis for its partial grant of forbearance and Embarq's forbearance petition is an attempt to circumvent the limitations the Commission found necessary to protect the public interest.⁸ It notes that if Embarq was dissatisfied with the Commission's decision, then it should have filed for reconsideration or appeal. Rate Counsel therefore urges the Commission to reject Embarq's attempt to expand on the relief it received in the broadband forbearance order through this forbearance petition.⁹

⁶ *Id.*

⁷ Comments of the New Jersey Division of Rate Counsel at 3-4, referencing the Commission's decision *In the Matter of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements and Petition of Frontier and Citizens ILECs for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules With Respect to Their Broadband Services*, WC Docket No. 06-147, 22 FCC Rcd 19478 (2007) (hereinafter "*Embarq Broadband Forbearance Order*").

⁸ Comments of the New Jersey Division of Rate Counsel at 4.

⁹ *Id.*

Sprint Nextel agrees with both CompTel and Rate Counsel that Embarq's forbearance petition is procedurally defective and the Commission therefore should deny the requested relief.

III. EMBARQ'S PETITION FAILS TO SATISFY EACH COMPONENT OF THE STATUTORY FORBEARANCE CRITERIA

Only Verizon has argued that Embarq has satisfied each component of the statutory forbearance standard.¹⁰ Its self-interest in such an outcome is plainly evident. Moreover, Verizon clearly overreaches with its argument that the Commission should permit carriers to use contract arrangements on a nationwide basis regardless of whether the carriers have made the showing necessary to obtain Phase I or Phase II pricing flexibility – a prerequisite to obtaining authority to enter into such arrangements.¹¹ Verizon's request suffers from the same procedural deficiencies that Sprint Nextel and CompTel pointed out with respect to Embarq's forbearance request. Simply put, the Commission cannot use a forbearance petition to adopt new regulations – it can only decline to enforce existing regulations that have been found, after careful deliberation, to be no longer necessary to fulfill statutory objectives.¹² Thus, Verizon's call for the Commission to grant all incumbent local exchange carriers ("ILECs") the authority to enter into contract arrangements nationally and independent of the FCC's pricing flexibility regime cannot be acted upon as part of a proceeding opened to consider Embarq's forbearance request from filing its contracts as tariffs. And, even if such

¹⁰ Comments of Verizon at 2.

¹¹ *Id.* at 1-4.

¹² *In the Matter of Fones4All Corp. Petition for Expedited Forbearance Under 47 U.S.C. § 160(c) and Section 1.53 from Application of Rule 51.319(c) to Competitive Local Exchange Carriers Using Unbundled Local Switching to Provide Single Line Residential Service to End Users Eligible for State or Federal Lifeline Service*, WC Docket No. 05-261, FCC 06-145, Memorandum Opinion and Order at ¶¶ 1, 9 (released September 29, 2006) (finding Fones4All's request for forbearance from application of certain of the Commission's unbundling regulations to be improper because it sought to expand unbundling obligations. The Commission found that a forbearance grant would simply create a vacuum rather than confer any rights upon Fones4All). *See also, Embarq Broadband Forbearance Order* at ¶ 26.

an expansive request could be addressed in this context, Verizon has made absolutely no evidentiary showing that would justify implementing this relief.

Additionally, Verizon's request for the Commission to extend its suggested forbearance to all ILECs that have obtained, or may obtain, pricing flexibility suffers from two fundamental flaws.¹³ First, the Commission has routinely declined to grant similar forbearance relief to other carriers in the context of another carrier's forbearance proceeding.¹⁴ Instead, the Commission has limited its forbearance grant to the petitioners without prejudice to the ability of the other carriers to file their own forbearance petitions requesting similar relief and making the required statutory showing.¹⁵ Second, the Commission has consistently restricted its grant of forbearance to the services that a petitioner currently offers and lists in its petition and has declined to extend forbearance relief to unoffered and unnamed services that a carrier may offer in the future.¹⁶ Asking for forbearance relief in areas where a carrier *may* obtain pricing flexibility at some indeterminate point in the future is analogous to this situation. Verizon has provided no grounds for the Commission to depart from its practice of limiting its grants of forbearance to the requesting parties and to the existing services they enumerate in their petitions in the context of this forbearance proceeding and the Commission should decline to do so. Thus, the Commission should reject Verizon's request to apply any relief granted in this forbearance request to any other ILEC.

¹³ Comments of Verizon at 2.

¹⁴ *Embarq Broadband Forbearance Order* at ¶ 40 (where the Commission declined to extend the forbearance relief granted in its Order to carriers other than Embarq and Frontier and the specific services they identified). See also *In the Matters of 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 and 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*, WC Docket No. 06-125, FCC 07-180 at ¶ 41 (released October 12, 2007) (hereinafter "*AT&T Broadband Forbearance Order*").

¹⁵ *Embarq Broadband Forbearance Order* at ¶ 40.

¹⁶ *Embarq Broadband Forbearance Order* at ¶ 39; *AT&T Broadband Forbearance Order* at ¶ 39.

A. Contract Tariff Filing Requirements Remain Necessary in Markets Where Competition Has Yet to Firmly Take Hold

Verizon's arguments regarding the harmful effects of filing tariffs are premised on the seriously flawed notion that the special access market is competitive.¹⁷ While the Commission has recognized that there may be negative aspects associated with tariff filing requirements under certain conditions, these conclusions have only been applicable in a market characterized by expansive and robust competition, such as the long distance market.¹⁸ In a series of decisions in the 1990s, the Commission examined the provision of stand-alone long distance services by non-dominant interexchange carriers ("IXCs") and ordered them to completely detariff their interstate, domestic, interexchange services after finding that the long distance market had become sufficiently competitive that it was appropriate to allow market forces, rather than regulation, to discipline IXCs' pricing behavior.¹⁹

Such a determination cannot possibly be reached regarding the special access market because under the pricing flexibility framework currently in place, the Commission makes no finding that the market for special access services in a particular Metropolitan Statistical Area ("MSA") is actually competitive.²⁰ Instead, the Commission simply applies certain "competitive triggers" that it adopted for use as predictors that sufficient competition should be expected to develop in the special access market to discipline prices.²¹ Specifically, the

¹⁷ *Id.*

¹⁸ *In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended*, CC Docket No. 96-61, FCC 99-47 at ¶¶ 15-16, Second Order on Reconsideration and Erratum (released March 31, 1999) ("*Long Distance Detariffing Proceeding*").

¹⁹ *Id.* at ¶¶ 2, 6. See also *Long Distance Detariffing Proceeding*, Second Report and Order, 11 FCC Rcd 20730, 20738-68 at ¶¶ 14-66 (1996), *aff'd* *MCI Worldcom, Inc. v. FCC*, 209 F.3d 760 (D.C. Cir. 2000).

²⁰ *In the Matter of Access Charge Reform*, CC Docket Nos. 96-262, 94-1, 98-157, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221 at ¶¶ 3-5, 24-25, 132 (1999) (hereinafter "*Pricing Flexibility Order*"), *aff'd* *Worldcom v. FCC*, 238 F.3d 449 (D.C. Cir. 2001). See generally, 47 C.F.R. Part 69, Subpart H (Pricing Flexibility Rules).

²¹ The current triggers allow price cap LECs to be granted pricing flexibility in any MSA in which a competitor has collocated equipment in a certain percentage of wire centers. *Pricing Flexibility Order* at ¶¶ 24-25; 47

Commission believed that the presence of competitive collocators at a certain percentage of wire centers in a MSA would serve as a “good predictor that competitors had made significant, irreversible sunk investments in facilities, and indicated the likelihood that a competitor could eventually extend its own network to reach its customers.”²² As Sprint Nextel discussed in its Initial Comments, these triggers have proven to be flawed and inadequate forecasters of competitive development for special access services.²³ As a result, effective competition in the special access market has failed to materialize. To the extent competition exists at all, it is limited to the offering of highest capacity special access circuits in portions of urban business centers.²⁴ ILECs, such as Embarq and Verizon, still have near-monopoly shares in the provision of special access services in their service territories.²⁵ Because there are no effective competitive constraints on these ILECs’ pricing behavior, Commission regulations requiring the filing of contract-based tariffs remain necessary to

C.F.R. §§ 69.709(b), 709(c), 711(b), (c). The Commission found that, using collocation by competitive carriers as *predictive* evidence of irreversible market entry, price cap LECs that meet certain evidentiary triggers may obtain pricing flexibility relief from its price cap rules. *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994 at ¶ 4 (2005) [Emphasis added].

²² See Government Accountability Office Report to the Chairman, Committee on Government Reform, House of Representatives, “*FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*,” GAO Report 07-80 at 3 (November 2006) (hereinafter “*GAO Special Access Report*”); See also, *Pricing Flexibility Order*, 14 FCC Rcd 14221, 14261 at ¶ 88.

²³ Sprint Nextel Initial Comments at 8-9. See also, Comments of Sprint Nextel Corporation in the *Special Access NPRM*, WC Docket No. 05-25, RM-10593, filed August 8, 2007.

²⁴ See generally, *GAO Special Access Report* at 19 (determining that less than six percent of buildings with demand for DS-1 level or higher are served by a fiber-based competitor, with competition being heaviest for those buildings with the highest levels of demand). Additionally, the Commission undertook an extensive examination of competition in loops and interoffice transport as part of its impairment analysis in the *Triennial Review Remand Order* (“TRRO”) and found significant barriers to the competitive supply of high-capacity loops and transport. *Unbundled Access to Network Elements*, Order on Remand, 20 FCC Rcd 2533 at ¶¶ 150, 152-53. The Commission determined that the competitive supply of DS-1 loops is uneconomic and highly dependent on the availability of DS3 loops in a particular geographic area. *Id.* at ¶¶ 170-171. And as the Commission noted, where demand for high-capacity loops exists only at the DS1 level, there is insufficient traffic for competitive suppliers to enter with DS3 facilities and supply DS1 loops. *Id.* at ¶ 170.

²⁵ Sprint Nextel Initial Comments at 8-9.

ensure that special access purchasers, including Sprint Nextel, have some basis for reviewing their rates and practices to ensure that they are non-discriminatory.²⁶

Additionally, the Commission has retained contract tariff filing requirements in circumstances where it has deemed the status of competition in a market insufficient to discipline prices. For example, in ruling on ACS of Anchorage's request for forbearance from certain dominant carrier regulation of its interstate access services, the Commission found that:

Second, we require ACS to continue to file all contract offerings as contract tariffs, as GCI suggests. We agree with GCI that such a requirement will help maintain the transparency, and facilitate the evaluation, of ACS' rates and offerings. . . . The transparency associated with ACS's contract tariff filings will aid the evaluation of its compliance with the other conditions of this order, including the requirement that the rates for ACS's switched access services not increase above current levels.²⁷

The Commission's determination in the ACS order is equally applicable in the special access market. The Commission has found it appropriate to remove tariffing requirements only when it has judged the market to be sufficiently competitive to warrant such relief, as it did in the long distance market.²⁸ Such a conclusion is very much in doubt regarding the special access market, where the extent of competition is currently being examined in the open *Special Access Rulemaking* proceeding.²⁹ As Rate Counsel points out in its Initial

²⁶ *Id.* at 9.

²⁷ *In the Matter of the Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S.C. § 160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area*, WC Docket No. 06-109, Memorandum Opinion and Order, 22 FCC Rcd 16304 at ¶ 61 (2007) ("ACS Forbearance Order").

²⁸ *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended*, CC Docket No. 96-61, Second Report and Order, 11 FCC Rcd 20730 at 20761-62 at ¶ 53 (1996), *stay granted*, *MCI Telecommunications Corp.*, FCC, No. 96-1459 (D.C. Cir. Feb. 13, 1997), Order on Reconsideration, 12 FCC Rcd 15014, 15016 at ¶ 2 (1997).

²⁹ *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994 (2005). Although the initial comments cycle has been completed since the summer of 2005, the FCC has not yet issued a decision. Instead, it asked for and received further comments and data on the state of competition in the special access market. See Public Notice, "Parties Asked to Refresh

Comments, the Commission has noted that issues regarding special access should be addressed in the pending *Special Access Rulemaking* and Embarq's request for relief from filing its contract as tariffs in areas where it has obtained pricing flexibility would be more appropriate for review as part of that proceeding.³⁰

B. Denial of Embarq's Forbearance Request Safeguards Consumer Interests and Furthers the Public Interest

Both CompTel and Rate Counsel contend that Embarq's forbearance request is inconsistent with the public interest and should therefore be denied.³¹ As discussed above, Verizon's arguments to the contrary are based on the faulty premise that the special access market is competitive.³² The supposed harms of filing negotiated contracts as tariffs that Verizon enumerates may arise only where competitive conditions actually exist in the marketplace.³³ The evidentiary record compiled in the *Special Access Rulemaking* is clear, however, that sufficiently competitive conditions are notably lacking in the special access market.³⁴

In the absence of effective and robust competition in the special access market, eliminating the requirement for Embarq to file its contracts as tariffs would facilitate competitively harmful and discriminatory practices, such as price squeezes, and make it more difficult to detect discriminatory rates that unduly favor affiliated entities.³⁵

Record in the *Special Access Notice of Proposed Rulemaking*, WC Docket No. 05-25, FCC 07-123 (released July 9, 2007).

³⁰ Comments of Rate Counsel at 7-8.

³¹ Opposition of CompTel at 4-6; Comments of Rate Counsel at 6-8.

³² Comments of Verizon at 8-9.

³³ *Id.*

³⁴ See, e.g., Comments of Sprint Nextel Corporation filed in the *Special Access NPRM* on August 8, 2007.

³⁵ Sprint Nextel Initial Comments at 11-13. For example, Embarq seeks forbearance from § 69.727(a), which requires it to certify that it provides the services it offers pursuant to contract tariff to an unaffiliated customer before it can provide the contract service to its long distance affiliate.

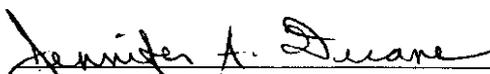
Thus, granting forbearance in this instance, given the valuable information that these contract-based tariffs provide to special access customers, would be inappropriately harmful to consumers, would fail to promote competitive conditions and would be contrary to the public interest.³⁶

IV. CONCLUSION

For the reasons discussed in these Reply Comments and in its Initial Comments, Sprint Nextel urges the Commission to deny Embarq's Petition for Forbearance from requirements to file its contract-based tariffs. Not only is Embarq's request procedurally defective but Embarq cannot show that forbearance would be consistent with each element of the statutory forbearance standard.³⁷ The Commission cannot, based on the record in this docket, grant Embarq's petition for forbearance from these important regulatory obligations. The special access market is not competitive, and grant of this petition would enable Embarq to exploit further its dominance over special access facilities.

Respectfully submitted,

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³⁶ Sprint Nextel Initial Comments at 6-14.

³⁷ 47 U.S.C. § 160(a).