

**Before The
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Petition of the Embarq Local Operating)	
Companies for Forbearance Pursuant to 47)	WC Docket No. 07-258
U.S.C. § 160 from the Contract Tariff)	
Filing Requirements of the Pricing)	
Flexibility Rules.)	

**REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES**

On October 19, 2007, the Embarq Local Operating Companies (“Embarq”) filed a petition for forbearance pursuant to section 10(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 160(c) (“Petition”). In the petition, Embarq requests that the Federal Communications Commission (“Commission”) forbear from applying its rules that require Embarq to file contract tariffs in areas where the carrier has or may receive Phase I or Phase II pricing flexibility.¹ Specifically, Embarq asks the Commission to forbear from the application of the contract tariff filing requirements in sections 61.55, 61.58, and 69.727(a) of the Commission’s rules relating to pricing flexibility.²

¹ 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, at 2 (filed Oct. 19, 2007).

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

By Public Notice, the Commission sought comment on Embarq's Petition.³ Only four comments were filed on the Petition; three of those opposed granting the Petition,⁴ and one supported the Petition.⁵

Upon review of the initial comments, the National Association of State Utility Consumer Advocates ("NASUCA")⁶ files these reply comments agreeing that Embarq's Petition should be denied. The opposing comments provide differing perspectives on the reasons why the Petition lacks merit; Verizon's comments do not help the cause.

In the first place, as COMPTTEL observes, forbearance from the rules identified by Embarq will not give Embarq what it wants: the ability not to file contracts for its price cap special access services in areas where it has obtained pricing flexibility. The key rule from which Embarq seeks forbearance, 47 C.F.R. 69.727, states,

(a) *Phase I relief.* Upon satisfaction of the Phase I triggers specified in §§69.709(b), 69.711(b), or 69.713(b) for an MSA or the non-MSA parts of a study area, a price cap LEC will be granted the following regulatory relief in that area for the services specified in §§69.709(a), 69.711(a), or 69.713(a), respectively:

- (1) Volume and term discounts;
- (2) Contract tariff authority, provided that
 - (i) Contract tariff services are made generally available to all similarly situated customers; and

³ DA 07-4617. The filing dates for initial and reply comments were subsequently extended to December 14, 2007 and January 10, 2008 respectively. DA 07-4691.

⁴ Comments of COMPTTEL; the New Jersey Division of Rate Counsel ("Rate Counsel"); and Sprint Nextel Corporation ("Sprint").

⁵ Comments of "the regulated, wholly owned subsidiaries of" Verizon Communications Inc. ("Verizon").

⁶ NASUCA is a voluntary, national association of consumer advocates in more than 40 states and the District of Columbia, organized in 1979. NASUCA's members are designated by the laws of their respective states to represent the interests of utility consumers before state and federal regulators and in the courts. *See, e.g.*, Ohio Rev. Code Chapter 4911; 71 Pa. Cons. Stat. Ann. § 309-4(a); Md. Pub. Util. Code Ann. § 2-205(b); Minn. Stat. Ann. Subdiv. 6; D.C. Code Ann. § 34-804(d). Members operate independently from state utility commissions, as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (*e.g.*, the state Attorney General's office). Associate and affiliate NASUCA members also serve utility consumers, but have not been created by state law or do not have statewide authority.

(ii) The price cap LEC excludes all contract tariff offerings from price cap regulation pursuant to §61.42(f)(1) of this chapter.

(iii) Before the price cap LEC provides a contract tariffed service, under §69.727(a), to one of its long-distance affiliates, as described in section 272 of the Communications Act of 1934, as amended, or §64.1903 of this chapter, the price cap LEC certifies to the Commission that it provides service pursuant to that contract tariff to an unaffiliated customer.

(b) *Phase II relief.* Upon satisfaction of the Phase II triggers specified in §§69.709(c) or 69.711(c) for an MSA or the non-MSA parts of a study area, a price cap LEC will be granted the following regulatory relief in that area for the services specified in §§69.709(a) or 69.711(a), respectively:

- (1) Elimination of the rate structure requirements in subpart B of this part;
- (2) Elimination of price cap regulation; and
- (3) Filing of tariff revisions on one day's notice, notwithstanding the notice requirements for tariff filings specified in §61.58 of this chapter.

If Embarq is granted forbearance from this entire rule, then for Phase I it will no longer be able to offer volume and term discounts or contract tariffs. If Embarq is granted forbearance only from the contract tariff provisions, then it will no longer be able to offer contract tariffs. But removing this one aspect of regulatory relief does not mean that forbearance will allow Embarq to offer contracts without filing them.

As COMPTTEL points out, this is the same situation found by the Commission in the *Fones4All Forbearance Petition Order*, where Fones4All was seeking forbearance from the rule that restricts local switching unbundling.⁷ The Commission concluded that

⁷ *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(d) 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, Order, FCC 06-145 (2006) (“*Fones4All Forbearance Petition Order*”).

forbearance would not give Fones4All the relief it sought, and denied the Petition as procedurally defective.⁸ As the Commission noted, forbearance “results in a void rather than an unbundled local circuit switching requirement.”⁹ Similarly, forbearance from an optional requirement for regulatory relief would not grant further relief.

Likewise, the Commission denied forbearance to Iowa Telecom, when it sought relief from rules that base rural carriers’ universal service support on their embedded costs, in order to have its support based on forward-looking costs.¹⁰ There also, the Commission found that granting forbearance from the rule would not give Iowa Telecom the right to receive another form of support.¹¹

As COMPTTEL states:

[W]hat Embarq is seeking is the adoption of a new rule by the Commission, not forbearance from an existing regulatory provision. In other words, had the Commission granted Embarq the authority to offer contracts for these services and separately had a provision requiring those contracts to be filed as tariffs, perhaps consideration of forbearance from those separate tariff provision would fall under Section 10 of the Act. But the Commission only provided contract tariff authority for these services. Thus, forbearance from the contract tariff provision does not create a right to enter into non-tariffed contracts for the services.¹²

What Embarq seeks is a new rule, not forbearance from an existing rule, just as Fones4All and Iowa Telecom sought new rules rather than forbearance from an existing rule.

⁸ *Fones4All Forbearance Petition Order*, ¶ 7.

⁹ *Id.*

¹⁰ *In the Matter of Iowa Telecom Petition for Forbearance Under 47 U.S.C. § 160(c) from the Universal Service High-Cost Loop Support Mechanism*, WC Docket No. 05-337, Order, FCC No. 07-142 (rel. August 6, 2007).

¹¹ *Id.*, ¶ 7.

¹² COMPTTEL Comments at 3 (emphasis deleted); see also Sprint Comments at 4.

As Sprint states:

Forbearance ... is intended to eliminate regulations found to be no longer necessary to fulfill regulatory and statutory objectives. Forbearance relief was never intended to be used to create new regulations or fashion remedies that have not been previously implemented. The regulations ... from which Embarq seeks forbearance ... do not require it to offer contract-based tariffs; they simply give it the authority to do so. Embarq can simply elect not to exercise that authority, it doesn't need the Commission to forbear from enforcing this provision. But if it does exercise the option to enter into contract-based tariffs, then it must comply with the governing regulations. It does not follow that forbearance from these provisions will give Embarq the right to enter into special access service contracts that are not tariffed.¹³

Sprint's conclusion is that "the Commission would have to affirmatively adopt such a requirement in an independent rulemaking proceeding outside of the forbearance process."¹⁴ NASUCA agrees. That could be in the special access rulemaking in WC Docket No. 05-25.¹⁵ Indeed, Verizon acknowledges that these issues are being addressed in that very docket.¹⁶

The Commission must find that all three prongs of Section 10 are met before it can grant forbearance.¹⁷ Put another way, the Commission has held that if only one of the prongs is not met, forbearance cannot be granted.¹⁸ With that in mind, the remainder of these reply comments will focus on the fact that Embarq has failed to show that forbearance is in the public interest, hence forbearance cannot be granted.

¹³ Sprint Comments at 5-6 (footnotes omitted).

¹⁴ Id. at 6; see also COMPTTEL Comments at 3, 7.

¹⁵ See Rate Counsel Comments at 7-8.

¹⁶ Verizon Comments at 3-4.

¹⁷ *Cellular Telecommunications & Internet Association v. FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003).

¹⁸ *Petition of Core Communications, Inc. for Forbearance from Sections 251(g) and 254(g) of the Communications Act and Implementing Rules*, WC Docket No. 06-100, Memorandum Opinion and Order, 22 FCC Rcd 14118, 14125 at ¶ 12 (2007).

For example, COMPTTEL points out that Embarq cites:

to the Commission findings of competition in the price flexibility orders to argue tariff filings should not be required. Nonetheless, in making those findings the Commission obviously still found that contract tariff filings were necessary to serve the public interest.¹⁹

Likewise, Rate Counsel asserts that the contract filing requirement is necessary to protect the public interest.²⁰

Embarq had argued that the public disclosure of contract terms facilitates price coordination rather than price competition, citing the *Long Distance Detariffing Order*.²¹ Sprint points out, however, that the Commission subsequently found that public disclosure of rates, terms and conditions was in the public interest.²² This undercuts Embarq's argument against requiring contract tariff filing.

Overall, Embarq has not shown that the contract tariffing requirement is not required by the public interest.²³ Therefore, this prong of the test not having been met, Embarq's petition must be denied.

Respectfully submitted,

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January 10, 2008

¹⁹ COMPTTEL Comments at 6.

²⁰ Rate Counsel Comments at 8.

²¹ Embarq Petition at 6, citing *Policy and Rules Concerning the Interstate Interexchange Marketplace, Implementation of § 254(g) of the Communications Act of 1934, As Amended*, Second Report and Order, 11 FCC Rcd 20730 (1996) ("*Long Distance Detariffing Order*").

²² Sprint Comments at 10-11, citing *Policy and Rules Concerning the Interstate Interexchange Marketplace, Implementation of § 254(g) of the Communications Act of 1934, As Amended*, Second Order on Reconsideration and Erratum, 14 FCC Rcd 6004 (1999).

²³ Verizon's brief discussion of this issue (Verizon Comments at 8-9) adds little to Embarq.