Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 (c) in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas	)	WC Docket No. 06-172
	)	and
and	)	WC Docket No. 07-97
Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160 (c) in the Denver, Minneapolis-St.Paul, Phoenix, and Seattle Metropolitan Statistical Areas	)	

COMMENTS OF
SPRINT NEXTEL CORPORATION

Vonya B. McCann
Charles W. McKee
900 Seventh Street NW
Washington, D.C. 20001
702-433-3786

W. Richard Morris
6450 Sprint Parkway
KSOPHN0314-3A671
Overland Park, KS 66251
913-315-9176

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On behalf of its wireless, long distance, broadband, and competitive local exchange carrier ("CLEC") operations, Sprint Nextel Corporation ("Sprint") submits the following comments in response to the Court remand of the Verizon Telephone Companies ("Verizon") and Qwest Corporation ("Qwest") petitions for forbearance from enforcement of competitive safeguards in multiple Metropolitan Statistical Areas ("MSAs") ("Petitions").[1]

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[1] Public Notice, Wireline Competition Bureau Seeks Comment on Remands of *Verizon 6 MSA Forbearance Order* and *Qwest 4 MSA Forbearance order,* DA 09-1835 (rel. Aug. 20, 2009).

I. INTRODUCTION AND SUMMARY

The Commission, in the *Verizon 6 MSA Forbearance Order* and the *Qwest 4 MSA Forbearance Order* rejected additional forbearance in all of the requested MSAs. Upon appeal by Verizon, the District of Columbia Court of Appeals remanded the Verizon case to the Commission for further action. The Commission requested remand to the Qwest case so it could perform a similar review. The court did not dictate a final outcome in its remand decision but did require the Commission to fully explain the basis of its ultimate decision related to the MSAs in question.

Sprint participated in the Verizon and Qwest proceedings when they were originally before the Commission and argued that Verizon and Qwest had not made an adequate showing that could justify forbearance from section 251(c) of the Act.[2] While Verizon and Qwest pointed to market share gains by mass market retail competitors, the

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Petitions of Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas, Inc., WC Docket No. 06-172, Memorandum Opinion and Order, 22 FCC Rcd 21293, 21294, para. 1 (2007) ("*Verizon 6 MSA Forbearance Order*"), remanded, Verizon Tel. Cos. v. FCC, No. 08-1012, slip. op. (D.C. Cir. June 19, 2009) ("*Verizon v. FCC*"). Specifically, Verizon sought forbearance in the 6 Metropolitan Statistical Areas (6 MSAs) for its mass market switched access services from the following: tariffing requirements, price cap regulation, and dominant carrier requirements concerning the processes for acquiring lines, discontinuing services, assignment or transfers of control, and acquiring affiliations. Id. Verizon also sought forbearance from loop and transport unbundling obligations under section 251(c)(3) of the Communications Act of 1934, as amended (the Act), and all Computer III obligations (e.g., open network architecture (ONA) and comparably efficient interconnection (CEI) requirements). Id.
Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas, WC Docket No. 07-97, Memorandum Opinion and Order, 23 FCC Rcd 11729, 11730, para. 1 (2008) ("*Qwest 4 MSA Forbearance Order*"), remanded, Qwest Corporation v. FCC, No. 08-1257 (D.C. Cir. Aug. 5, 2009) (Qwest Corporation v. FCC). For mass market and enterprise services, Qwest sought forbearance from dominant carrier tariffing requirements in Part 61 of the Commission's rules; Part 61 price cap regulations; dominant carrier requirements arising under section 214 of the Act and Part 63 of the Commission's rules concerning the processes for acquiring lines, discontinuing services, and assignments or transfers of control; and for certain of Qwest's services, Computer III requirements including CEI and open network architecture ONA requirements. Id. Qwest also sought forbearance in the 4 MSAs from loop and transport unbundling obligations pursuant to sections 251(c) and 271(c)(2)(B)(ii) of the Act. Id.

[2] Sprint Nextel Corporation's Opposition to Petitions for Forbearance, In the Matter of Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. §160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas, WC Docket No. 06-172, February 2, 2007 and Sprint Nextel Corporation's Reply Comments to Qwest Corporation's Petitions for Forbearance, WC Docket No. 07-97, October 1, 2007.

Act also focuses on wholesale competition. Verizon and Qwest failed to show that competing carriers have any genuine alternatives to the last mile facilities of Verizon and Qwest in the MSAs where forbearance was requested.

The Commission should affirm its previous rejection of forbearance in the Verizon 6 MSAs and the Qwest 4 MSAs. The development of actual, sustainable, facilities-based competition in an area, rather than hope that potential competition will protect the consumer and public interest, should be required before additional forbearance is given. The retention of significant levels of retail market share is often a short-hand way of looking at the retention of significant market power over the broader market. The Commission should affirm that Verizon and Qwest have not lost sufficient retail market share and it should also examine additional competitive factors and explain how these factors lead to the conclusion that additional forbearance in the MSAs in question is not justified.

Supply elasticity is low in the MSAs in question because significant barriers to entry remain high. In the wholesale market, last mile facilities to wireless tower locations and to commercial buildings continue to be provided predominately by ILECs because economic considerations create a last mile barrier to entry to compete for these customers. Cable companies have not offered a broad competitive alternative for last mile facilities that carriers need in order to compete in a self-sustaining manner.

The playing field is not level between ILECs and their competitors. ILECs receive revenue streams based solely on regulatory decisions while those streams are denied to their competitors in the form of access charges and USF payments. Many facilities are offered to competitors at prices based on "what the market will bear" rather than cost-based terms. ILEC interconnection terms and conditions force competitors to fragment their networks and build them in an inefficient manner to preserve the ILEC's ability to price discriminate for the same interconnection functionality in different market segments.

As long as there are constrained inputs, such as access to necessary last mile facilities at reasonable prices that hamper true facilities-based competition, the sustainability of competition is significantly compromised. When the competitive sustainability question is open, additional forbearance from providing needed inputs to competitors should not be granted. Indeed, roll back of current Commission policy that denies unbundled network elements ("UNEs") to long distance and wireless providers should be seriously considered to promote the sustainability of competition in these markets. Further, additional forbearance that restricts the availability of UNEs in the MSAs in question should again be rejected.

II. THE COMMISSION SHOULD AFFIRM ITS REJECTION OF FORBEARANCE FOR VERIZON AND QWEST AFTER CONSIDERING ADDITIONAL FACTORS

A. The Commission Should Explain Why the Consideration of Additional Competitive Factors Justifies Departure from Previous Precedent

The Court faulted the Commission for deviating without explanation from the standard the Commission had previously used in the Omaha and ASC[3] forbearance

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[3] In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to § 160(c) in the Omaha Metropolitan Statistical Area *("Omaha Order")*, 20 F.C.C.R. 19,415 (2005); In the Matter of Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, As Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area, 22 F.C.C.R. 1958 (2007).

decisions and relying on what appeared to be a market share test.[4] However, the Court recognized that:

> [I]t may be reasonable in certain instances for the FC (sic) to consider an ILEC's possession of [***] percent, or any other particular percentage, of the marketplace as a key factor in the agency's determination that the marketplace is not sufficiently competitive to ensure its competitors' abilities to compete. It may also be reasonable for the FCC to consider only evidence of actual competition rather than actual and potential competition.[5]

The Commission should continue to focus on the development of actual competition in addition to consideration of potential competition and should place more weight on the development of actual competition and on the ability of competitive carriers to compete in the marketplace solely on their own facilities as compared to using their own facilities in conjunction with the facilities of regulated ILECs. In this regard, the competitiveness of both the retail and the wholesale market segments are important.

The Commission can review several factors in making a decision on whether a market is competitive enough to protect consumers and the public interest. It has already been determined that the loss of market share in the MSAs in question is not sufficient to demonstrate competitive pressures will protect the public interest.[6] The Commission should reaffirm that decision. In addition, the Commission's analysis should also conclude that potential competition, in the absence of the loss of significant market share, has not produced competitive outcomes sufficient to protect the consumer and public interest. Its analysis can also reasonably conclude that (1) the competitive playing field is not yet sufficiently level, (2) end-to-end facilities-based competition has not sufficiently developed, and (3) the sustainability of competition has not been sufficiently shown to

[4] *Verizon v. FCC* at 15.
[5] *Id.* At 17-18.
[6] *Verizon 6 MSA Forbearance Order* at 21,308 and *Qwest 4 MSA Forbearance Order* at 11,749.

justify forbearance. Based on further analysis of these factors, the Commission should affirm its previous decision to deny forbearance to Verizon and Qwest.

B. Supply Elasticity Is Low In the MSAs in Question

In the *Omaha Order*[7] the Commission concluded that "supply elasticity in this market is high for all mass market services" and that "barriers to entry in the Omaha MSA for switched access services are low."[8] The Commission further states that two factors determine supply elasticity:

> whether existing competitors have or can relatively easily acquire significant additional capacity, in which case supply elasticities are high, and (2) the absence of significant barriers to entry, be they legal (*e.g.* government imposed restrictions), economic (*e.g.* capital costs, economies of scale), technological (*e.g.* a new innovation protected by a patent), or operational (*e.g.* lack of skilled workers).[9]

The Commission should review the evidence in the Remands and determine that elasticity is low in the Verizon and Qwest MSAs where forbearance has been rejected. In order for elasticity to be high, as the Commission noted in the *Qwest Order*, significant barriers to entry must be absent. There are significant barriers to entry in all of the MSAs in question. New entrants have a choice to make: enter a market using their own facilities, enter using a combination of their own facilities and the facilities of others, or enter as a reseller.

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[7] In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area *("Omaha Order")*, 20 F.C.C.R. 19,415 (2005)

[8] *Id.* at 19,433. The decision of the Commission in the *Omaha Order* appears to have been in error because last mile competition has failed to flourish in the Omaha MSA. Sprint has 212 cell sites in the Omaha area with 100% per cent served by Qwest Special Access because competitors with attractive alternatives in the wholesale market have failed to appear. Further, Sprint's records indicate that only 64 buildings of fortune 1000 customers in the area are directly served by last mile competitors while Qwest serves 2,176 of the fortune 1000 buildings. Competitive last mile alternatives are available to only 2.94% of the total of fortune 1000 buildings. This is substantial, real world evidence that supply elasticity was and continues to be low.

[9] *Id.*

Sprint does not dispute that cable company facilities primarily placed to provide video entertainment services can allow mass market retail competition with Verizon and Qwest. However, the existence of cable facilities has not significantly lowered the entry barriers faced by other competitors into the wholesale or enterprise market. As has been previously shown in other proceedings, last mile facilities to wireless tower locations[10] and to commercial buildings are provided predominately by ILECs.[11] Economic considerations create a last mile barrier to entry to compete for these customers. A competitive wholesale market for the bulk of these locations has not developed because the economic barriers to entry are high. The cost of placing last mile facilities and the current scarcity of capital keeps this barrier in place. While cable facilities may come close to many of these locations, the barriers to entry and the lack of interest in serving this market for wholesale purposes remain significant enough that cable companies have not offered a broad competitive alternative for last mile facilities that carriers need in order to compete in a self-sustaining manner.

[10] Sprint Nextel August 22, 2007 *Ex Parte* citing FCC Universal Service Monitoring Report, Table 1.5 and Telecommunications Industry Revenue Report, Table 5 (2005 percentage adjusted to include pre-merger AT&T and pre-merger MCI in-territory revenue in the ILEC percentage). 2007 data from the same reports continues to be consistent with this outcome. *See* Competitive Issues in Special Access Markets, Revised Edition, Peter Bluhm with Dr. Robert Loube, National Regulatory Research Institute (January 21, 2009) ("*NRRI Study*") at 42.
Wireless carriers are not wholly facilities-based competitors of ILECs because backhaul from wireless towers to wireless switches is predominately provided by the ILEC. No widely available, cost-effective alternative has become available. As a result, wireless services remain dependant on ILEC facilities to compete with the ILEC in the mass and enterprise markets, whether the markets be voice or broadband. The same is true of CLECs whose last mile facilities are largely provided by ILECs. CLEC services also remain dependant on ILEC facilities to compete with the ILEC in the mass and enterprise markets for voice and broadband customers.
[11] *See NRRI Study* at 26 citing Government Accountability Office, *FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services,* GAO 07-80 at 6. NRRI notes that "competition at the building level was very limited, particularly for lower-capacity services" with less than 6 % of locations having last mile alternatives at the DS-1 level and less than 15% at the D-3 level.

Both ILECs and cable companies have similar incentives: both desire to minimize the number of competitors in the market. This has resulted in the ILEC offering last mile facilities to competitors with unreasonable terms and conditions. Cable companies, on the other hand, lacking such facilities to wireless towers and many commercial buildings, have less incentive to deploy such facilities on a wholesale basis to assist competitors. As a result, cable companies have not emerged as a vigorous competitor in the wholesale market for these locations. CLECs, facing a low elasticity of supply situation, have not constructed much in the way of last mile facilities either.

Because of these high barriers to entry, the cost of last mile facilities has dictated the choice by new entrants to use a combination of their own facilities coupled with the facilities of the ILEC. Resale of ILEC retail services has failed to develop into a real option for market entry by new providers and is not a meaningful check of ILEC market power.

The Commission should conclude that the supply elasticity in the Verizon and Qwest MSAs in question is low and, under these circumstances, forbearance is not justified because forbearance would not sufficiently protect consumers or the public interest.

C. What Was Once Viewed as Robust Retail Competition is Proving to be Much Less Competitive than Originally Thought

Over the past several years the Commission has struggled to understand how competition truly works in the telecommunications market when ILEC facilities have historically been a significant input into the retail product of both ILECs and competitors. One need look no further than the long distance market to understand that removal of structural safeguards and the denial of bottleneck facilities is resulting in reduced competition in this market segment. AT&T and Verizon acquired the two largest, previously independent, long distance carriers. They also acquired much of the residential long distance traffic as they bundled long distance with other regulated and unregulated products.[12] Qwest recently tried to sell its long distance business but couldn't attract a buyer who was interested.[13] Investors have even urged Sprint Nextel to exit the traditional long distance business and to sell this network.[14] This activity is powerful evidence that the broader market views stand-alone long distance, whether it be residential or enterprise, as an endangered commodity and one that cannot compete with an integrated ILEC that has last mile facilities and cross-subsidies that favor its integrated status when it has the power to refuse reasonable access to those facilities and the cross-subsidies also flow from competitors to the ILEC. The assertion by the Commission that the long distance market was sufficiently competitive[15] is proving incorrect as time passes.

As new technology is being installed in the network, markets and market segments are changing. With the widespread adoption of Internet Protocol solutions over broadband facilities, local and long distance voice services are increasingly being viewed as Internet Protocol applications that run over broadband facilities. However, these new broadband services will rely upon the same access facilities that were necessary to the

[12] *See* Trends in Telephone Service, Industry Analysis and Technology Division Wireline Competition Bureau, August 2008 Table 9.5 and 9.6. For example, AT&T has 55.1% of interlata minutes in the West Coast and 66.1% in the Southwest Regions. Verizon has 24.7% in the Mid-Atlantic and 23.7% in the Northeast. These figures do not include wholesale minutes sold to other carriers. At the same time, Sprint, the largest long distance carrier remaining independent, saw its share drop from a high of 7.6% in 2002 to 2.1% in 2007.
[13] *E.g.*, www.nytimes.com/2009/06/09/technology/companies/09qwest.html.
[14] *E.g.*, http://kansascity.bizjournals.com/kansascity/stories/2007/01/01/daily44.html.
[15] In the Matter of Unbundled Access to Network Elements; Reviews of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, WC Docket No. 04-313; CC Docket No. 01-338, 10 F.C.C.R. 2533 at 2552.

long distance market. Last mile facilities are the scarce commodity in the market whether it be for traditional enterprise long distance services, CLEC integrated broadband services, wireless wholesale broadband backhaul, or competitive broadband to the mass market. While the long distance market may become a footnote in history as Internet Protocol becomes the dominant technology used and both local and long distance voice become only a application in that market, the low elasticity of supply of last mile broadband facilities provides the ILEC with market power in any market or market segment those last mile facilities touch. The nation has experienced this competitive collapse, as the long distance market has seriously deteriorated as ILECs have swallowed up the two largest competitors in the market and seriously chilled the ability of others to compete in this long distance segment.

The healthiest segment of the stand-alone long distance market is the enterprise segment, but even that segment is under severe strain. The enterprise segment of the market depends on broadband access from ILECs[16] to reach the customer premises and connect the long distance network to individual customer locations. This broadband access is mandated only as Special Access, and there are significant allegations by enterprise customers and competitive carriers that Special Access prices of ILECs yield unreasonably high returns to the ILECs that harm competition.[17] Other forms of ILEC broadband access, such as ILEC Ethernet service, are either not made available to ILEC competitors at all, or are not made available under reasonable terms and conditions. Competitors do not have facilities to the vast majority of buildings that are enterprise

[16] Broadband access should be thought of as TDM or IP-based facilities to customer premises capable of carrying the voice traffic of traditional DS1 and DS3 facilities. While TDM facilities have been groomed for traditional TDM traffic, VoIP solutions are increasingly entering the market and provide an alternative to traditional TDM calling.

[17] Sprint Nextel August 22, 2007 *Ex Parte* at 10-12. *See also* NRRI Study at 42.

customer locations leaving Verizon, Qwest and the other ILECs as the dominant providers.[18] And this lack of last mile broadband facilities in the wholesale market brings into question the very underpinnings of future telecommunications policy in this nation: the deployment of a vibrant, competitive broadband mesh.

In this broadband last mile context, the Commission previously determined that long distance competitors do not qualify to purchase unbundled network elements ("UNEs") to provide long distance service to enterprise customers who depend on broadband last mile facilities. Because UNEs have been unavailable, ILECs have been able to sustain the excessive rates they currently charge for Special Access. This has harmed real competition in the long distance market and contributed to its ill health. Such an outcome is a good predictor of the spread of this disease to other market segments. Like people living over a toxic waste site, not everyone is diagnosed with a terminal illness, but over time the sickness level increases and casualties mount. Something must change in the environment to change the prognosis for the community just as something must change in Special Access, UNE availability, and the availability of broadband last mile facilities to keep any market segment dependent on broadband last mile facilities in competitive health.

In addition to eliminating UNEs for long distance, previous rulings have resulted in no UNE access for wireless carriers. The pattern in wireless is becoming disturbingly similar to that in the long distance market. Verizon[19] is increasingly tying Verizon

[18] *NRRI Study* at 26.

[19] Qwest has partnered with Verizon to sell wireless services in the Qwest territory and brings Washington, Oregon, Idaho, Montana, North Dakota, South Dakota, Minnesota, Iowa, Nebraska, Wyoming, Colorado, Utah, Arizona, and New Mexico to Massachusetts, Delaware, Rhode Island, New York, New Jersey, Pennsylvania, Washington, D.C., and Virginia, as well as significant parts of Texas, California and Florida, as areas where Verizon Wireless is closely tied to the dominant RBOC in the state. *See* http://verizon.com/prodserv/maps/wrline_map.html.

Wireless to RBOC bundling advantages through common billing.[20] And the similarities do not end there. Just as Verizon has used its significant profits from Special Access and cross-subsidies to fund the purchase of former long distance competitors, it has also rolled-up several wireless competitors to become one of the two largest wireless carriers, both of which it is worth noting, are associated with the largest RBOCs.

Sprint has previously shown that over 1/3 of its wireless cell site costs are reflected in payments to ILECs for Special Access services.[21] At the corporate level, Verizon can view the big picture and is indifferent to whether it makes a dollar from its Verizon Wireless customers through (imputed) Special Access charges or in margin on Verizon Wireless. A dollar of margin is a dollar of margin at the corporate level. As a result, a transfer payment of Special Access margin from Verizon Wireless to Verizon the RBOC is a dollar earned by Verizon corporate. However, a dollar spent on Special Access by Sprint is an expense that is a dollar earned at Verizon. Thus, Verizon clearly has an incentive to take its dollar through increased Special Access rates rather than wireless rates, as it can then take the margin from both its and Sprint's wireless customers.

As noted previously, Special Access prices are bloated and are not disciplined by UNE availability in the wireless market. In addition, there are not competitors willing to provide service to the vast majority of Sprint cell cites. As of 2007, Sprint purchased,

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[20] Verizon offers ONE-BILL® which "is a billing option for paying your Verizon Wireless and your Verizon local calling services from one statement. Your ONE-BILL monthly statement includes the charges for all of your calling services." *See* www22.verizon.com/ResidentialHelp/Phone/Popups/99030.htm and www22.verizon.com/pages/onebill/

[21] In the Matter of A National Broadband Plan for Our Future, GN Docket No. 09-51, Comments of Sprint Nextel Corporation, June 8, 2009 at 12.

99% of its transport from cell sites to its switches from ILECs because competitive services have not emerged to effectively compete with the ILEC.[22]

The Commission has already determined that the actual market share of competitors in the retail local telephone market in Verizon and Qwest MSAs where forbearance has been requested is insufficient to justify forbearance and to protect both the consumer and the public interest. Much of the competition that has developed is dependent on access to broadband last mile ILEC facilities by CLECs and other carriers. The truth of the matter is that very few end users are served directly by CLEC facilities. Most are served through the use of broadband last mile facilities available from the ILEC. And to the extent that cable companies are entering the market, their broadband facilities are generally not offered to others on a wholesale basis. As a result, facilities-based competition involving wireline access to end users is not flourishing.

The economics of providing the last mile access to customers coupled with the scarcity of capital in these capital-restrained times, makes construction of last mile wireline facilities prohibitively expensive for any but the largest volume locations and highlights why potential competition is not sufficient protection of the consumer or public interest. It also highlights why previous conclusions concerning vigorous competition are incorrect. Apparent competition in the retail market does not equate to healthy, sustainable competition when last mile facilities must be purchased from the ILEC. As long as the ILEC is free to overcharge for last mile facilities or to refuse to provide them and supply elasticity is low, as is the case in the MSAs in question, apparent competition in the mass market can be quashed by ILECs denying reasonable last mile facility prices and availability.

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[22] Sprint Nextel August 22, 2007 *Ex Parte* at 9.

History has shown that the potential competition in the last mile market has not developed into real availability. The ILECs continue to have a dominant position which they are exploiting. Removing the availability of UNEs to provide the last mile facilities at a reasonable cost is the wrong action and will serve only to further harm competition. Real, facilities-based, sustainable competition providing alternatives available to multiple carriers for access to end user premises at reasonable prices must develop before forbearance is granted in any market.

Focusing on apparent competition in the mass market without recognizing that competitors remain dependant on ILEC facilities has previously resulted in incorrect conclusions concerning the underlying competitiveness of the long distance market. The rapid consolidation of the wireless market by Verizon and AT&T, as they use their cash machine funded by unreasonable Special Access charges to stress competitors, highlights the fallacy that markets are really healthy where end user competition is present but ILECs offer needed last mile facilities under unreasonable terms and conditions. Such competition is at risk and its health is in question.

D. Questions the Commission Must Ask and Answer

The Commission must ask, "Is the competitive playing field level?" As long as there are revenue streams available to ILECs and their affiliates, that are not available to others based solely on regulatory decisions, the answer to this question is clearly, "No." The ILEC's loop facilities and switches serving end users receive access charge payments for originating and terminating calls, while wireless carriers are prohibited from collecting access charges when their facilities are used to terminate wireline-originated interstate calls. Thus, wireless carriers are left to give the same service to ILECs at no charge.[23] High cost subsidies are provided to some competitors but not to others and the entire structure of such subsidies is under serious stress resulting in calls for significant reform. ILEC interconnection and transit facilities are offered to competitors at "what the market will bear" rather than under reasonable, cost-based terms. Interconnection networks are fragmented and made inefficient to cater to ILEC interests in preserving different prices for the same functionality in different market segments.

"Is the competition facilities-based?" As long as there are significant gaps in the facilities that a competitor owns or controls and those gaps are filled by ILEC facilities, there is insufficient facilities-based competition. It must be recognized that no company, given a reasonable option, places its fate in the hands of another. Yet that is the current state of competition in the long distance, CLEC and wireless markets. The fact is that last mile facilities are not provided by competitors in the vast majority of cases including the MSAs under evaluation in this proceeding. Real facilities-based competition involving more alternatives for last mile facilities for CLECs and wireless carriers to serve end users has not developed. This leaves Special Access and UNEs as the alternatives. Special Access pricing is currently at unreasonable levels that stifle competition. UNEs can be lost through forbearance proceedings like this one and are unavailable in the long distance and wireless market. Even in instances in which middle-mile competitive facilities are available, the unavailability of last mile wireline facilities continues to define the lack of real facilities-based competition.

[23] No ILEC has volunteered to pay access charges to a wireless carrier and no wireless carrier has shown the market power as a so called equal to bargain such a provision into existence. This leaves wireless carriers to pay but not to collect fees for originating and terminating calls exchanged with the wireline network.

"Is the competition sustainable?" As long as there are constrained inputs, such as access to necessary broadband last mile facilities at reasonable prices, that hamper true facilities-based competition, the sustainability of competition is in question. Unreasonable ILEC Special Access prices continue to place the overall market in a significant price squeeze that raises significant sustainability issues. And in the CLEC market, the unavailability of UNEs will create a price squeeze similar to that now occurring in the wireless and long distance markets that reduces the sustainability of competition in the CLEC market.

"Is the evolving ILEC network further harming competition?" The ILEC network is evolving into an IP-based network with new transport services such as Ethernet replacing traditional DS1 and DS3 service and broadband access allowing the provision of IP-based voice services as an application carried over that network. ILECs claim that their obligations under the Telecommunications Act of 1996 do not require Ethernet and other newer transport services to be made available as a regulated offering, nor even, in fact, made available to other carriers at wholesale rates at all. An ILEC has market power when it controls the last mile facility. It abuses that market power when it prices that last mile facility at unreasonable Special Access prices. It absolutely abuses that market power when it has no price restraints on the use of the facility for Ethernet service and it refuses to provide that facility at wholesale on reasonable terms. The broadband last mile transport becomes no less necessary because it is converted from non-Ethernet to Ethernet use.[24] And ILEC dominance in this broadband last mile transport market is an increasing problem if the ILEC is given the ability to refuse use of this facility to

[24] It should be noted that Ethernet services is in almost cases provided over the same fiber, using the same rights of way and support structures, as the previous special access service, requiring only the use of different electronics on the fiber.

competitors. Under these conditions, forbearance of regulation of the evolving ILEC network does not protect the consumer or the public interest.

"Can real competition develop before significant reforms are made in the industry?" The Commission has before it significant questions concerning inter-carrier compensation reform, high-cost fund reform, transit service availability, UNE availability, interconnection rights, and Special Access pricing, terms and conditions. Each of these areas greatly impact the real competitive environment. Further forbearance should not be granted until serious questions in each area are answered and significant reforms adopted.

III. COMPETITORS DO NOT YET PROVIDE REAL WHOLESALE COMPETITION TO ILEC LAST MILE FACILITIES

A. Cable Companies are Not Vibrant Wholesale Competitors

Sprint has vigorously sought alternatives to ILEC last mile facilities to use in both its wireline long distance and broadband business and its wireless voice and broadband business. After expending significant efforts in this area, Sprint has been unable to find significant alternatives in the bulk of the market and is left to use the Special Access facilities of the ILECs. Sprint has sought out cable company alternatives to provide the last mile backhaul from cell towers to switches. The simple fact is that cable facilities do no stop at cell towers and are often absent from enterprise building locations.

The technical characteristics of cable plant and the primary business of cable companies must also be considered in any competitive analysis. Cable plant relies upon a bus architecture where all customers and uses of coaxial distribution systems share bandwidth. In order to provide a quality video experience, significant bandwidth must be dedicated to video offerings. The cable companies have entered the broadband market over what had previously been facilities used primarily for cable video. Concerns have arisen over cable broadband users stressing the bandwidth available over the bus architecture and causing the throughput to individual customers to slow considerably. In light of these problems, it is understandable why cable companies are not eager to wholesale broadband capacity to other carriers. They have their hands full keeping up with retail demands, and all the capital requirements associated with that demand, without taking on the additional bandwidth conflicts and consumption that wholesale customers could place on their current plant.[25]

Given this lack of cable company interest in offering wholesale competition to cell towers and enterprise building locations, the market for last mile access to these locations remains largely in the hands of the ILECs. While retail mass market competition may be occurring between ILECs and cable companies, underlying healthy wholesale competition has not developed.

B. CLECs Do Not Provide A Broad, Facilities-Based Wholesale Alternative

While it is true that CLECs compete in the enterprise market, and to some limited extent in the mass market, as discussed above, they lack owned or controlled facilities to the great bulk of end user locations, including enterprise locations. Because supply elasticity is low and entry barriers to providing last mile facilities are high, CLECs are forced to rely upon either Special Access or UNEs from ILEC to provision the last mile.

[25] ILEC facilities are normally based on a loop to each premise. While there is often aggregation of loops short of the central office, this ILEC broadband aggregation point is increasingly served by fiber facilities which have the broadband capacity to handle increases in traffic. Cable facilities are significantly different because, in order to increase capacity, the coaxial cable bus must be divided and additional fiber is often required as a new node is put in service controlling the newly divided coaxial cable bus. And each time capacity is challenged on a cable company coaxial bus, the bus must be divided and a new node installed to allow adequate broadband service to individual customer locations. In the case of ILEC facilities, once a broadband loop is connected to a node served by fiber, additional loop facilities are normally not needed. In this regard, ILECs who offer broadband service already have capacity in place to serve the wholesale market.

As discussed previously, Special Access is not reasonably priced and UNEs are constantly at risk due to forbearance filings such as the ones under consideration in the MSAs in question in this proceeding. Under these circumstances, CLECs provide limited middle mile transport and are more than happy to offer that transport on a wholesale basis, but they cannot provide a widespread wholesale service that includes owned or controlled last mile transport.

Because CLECs lack an owned or controlled last mile transport network and they generally are located only in major business areas, their owned facilities do not provide a sufficient wholesale alternative to counteract the market power of the ILEC.

C. Wireless Alternatives Are Developing But Are Spectrum and Capital Constrained

The future of telecommunications is clearly in "broadband". In wireless broadband, the availability of spectrum along with capital needs and tower approval are the gating factors. Comments dealing with wireless broadband service continue to point out that more spectrum is needed to provide "bigger pipes, greater throughput, wider coverage" in the market. [26] These gating factors make supply elasticity low and expansion barriers high.

While some specialized wireless carriers purport to offer broadband wireless backhaul, the fact is that these carriers do not provide a ubiquitous footprint or have a business plan to do so. They, too, are capital constrained and this adds to the low supply elasticity in this market. The fact is that wireless simply does not provide a widespread wholesale alternative to ILEC Special Access.

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[26] *See e.g.,* In the Matter of A National Broadband Plan for Our Future, GN Docket No. 09-51, Comments of Media Access Project, June 8, 2009; Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies, June 8, 2009; Comments of the National Exchange Carrier Association, Inc., June 8, 2009; and Comments of Free Press June 8, 2009.

The addressable market for alternative carriers or technologies to provide broadband wireless backhaul is also severely restricted by Special Access contractual terms and conditions imposed by RBOCs that lock up customers on a rolling basis in a manner that makes escaping their lock-in terms very difficult and financially painful. This contributes to making the supply elasticity in this broadband last mile market low. Added to this is the fact that once independent purchasers of Special Access, the old AT&T, MCI, the old AT&T Wireless, Alltel, Western Wireless, Dobson and Rural Cellular, among many others, have been subsumed into RBOCs who have an interest in limiting Special Access and broadband last mile competition.

IV. THE LOSS OF UNE AVAILABILITY WILL FURTHER HARM COMPETITION

The CLEC market depends to a very high degree upon UNEs to obtain reasonable cost last mile facilities. Special Access, as noted previously, is overpriced allowing ILECs to restrain real competition with CLECs. As forbearance is granted and UNEs become unavailable, competition declines rather than increases. Success in the retail market by CLECs, leading to ILEC forbearance, paradoxically could sow the seeds of ultimate CLEC failure due to the unavailability of Special Access on reasonable terms and conditions, the loss of UNES, and the low supply elasticity in last mile facilities.

The Commission should reconsider its previous decision to deny UNEs to long distance and wireless carriers. The same low supply elasticity in last mile facilities that plagues CLECs also negatively impact long distance and wireless carriers. Given this reality, the Commission may do as the Court in these Remands has counseled, "examine the relevant data and articulate a satisfactory explanation for its action" including the possibility that its analysis of competitive factors will "justify its departure from its precedent."[27] Making UNEs available to long distance and wireless carriers would go a long way to protecting consumers and the public interest by making competition more robust in the face of the low supply elasticity that is present in the last mile market.

V. SCOPE OF FORBEARANCE REQUEST

Verizon and Qwest ask for different things in their petitions. Verizon appears to have asked for forbearance on switched access, the requirement for loop and transport UNEs, and forbearance from Computer III requirements such as ONA and CEI. Qwest is more expansive in its request, asking for all that Verizon has apparently requested and relief from Special Access regulation, all tariffing and price cap rules under Part 61, all dominant carrier regulations under Section 214 of the Act, and Part 63 Rules on buying and selling lines and assigning and transferring control.

In both the *Omaha Order* and the *ACS Order* the Commission dealt with the question of switched access forbearance by requiring the existing CLEC limitation on interstate switched access rates to remain in place, meaning that CLEC rates could at maximum mirror the ILEC rates. And since the ILEC rate is essentially frozen by price cap rules, this meant that the ILEC switched access rates effectively continue to have the price cap plan in place. Because switched access to end users is always a monopoly, if the Commission deviates from its initial, sound decision to deny forbearance, it must apply the switched access limitation set in the *Omaha Order* and the *ACS Order* in these cases as well.

VI. CONCLUSION

The Commission should review the evidence and again reject the Petitions for forbearance. Competition simply is not yet sufficiently established in these MSAs to

[27] *Verizon v. FCC* at 19.

justify eliminating these regulatory safeguards. The supply elasticity is low and the entry barriers are high leading to a situation where competition is not yet sustainable over owned last mile facilities. Because of this lack of competition, forbearance would create a situation where the consumer and public interest are not sufficiently protected.

Respectfully submitted,

SPRINT NEXTEL CORPORATION

By

Vonya B. McCann
Charles W. McKee
900 Seventh Street NW
Washington, D.C. 20001
702-433-3786

W. Richard Morris
6450 Sprint Parkway
KSOPHN0314-3A671
Overland Park, KS 66251
913-315-9176

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Comments of Sprint Nextel Corp. was filed electronically or via US Mail on this 21st day of September, 2009 to the parties listed below.

Norina T. Moy

Norina T. Moy

Denise Coca
Competition Policy Division
Wireline Competition Bureau
Federal Communications Commission
Denise.Coca@fcc.gov

Tim Stelzig
Competition Policy Division
Wireline Competition Bureau
Federal Communications Commission
Tim.Stelzig@fcc.gov

Best Copy and Printing, Inc.
Portals II
445 12th St., SW, Room CY-B402
Washington, DC 20554
fcc@bcpiweb.com