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Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St. S.W.
Washington, DC 20554

Re: Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. Section 160(c) from Rate Regulation Pursuant to Section 251(g) and for Forbearance from the Rate Averaging and Integration Regulation Pursuant to Section 254(g), WC Docket No. 06-100; Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92,

Response of the National Exchange Carrier Association, Inc., the National Telecommunications Cooperative Association, and the Independent Telephone and Telecommunications Alliance.

Dear Ms. Dortch:

Core Communications, Inc. (“Core”) recently filed extensive written *ex parte* submissions in WC Docket No. 06-100 and CC Docket No. 01-92, and has met several times with Commission staff to discuss its pending petition for forbearance from sections 251(g) and 254(g) of the Act.¹

The time for filing comments and replies on Core’s petition has long past.² Timely-filed comments in this proceeding demonstrated that Core’s petition was improperly filed and that Core failed to show that forbearance under section 10 of the Act would be justified.³ In its recent *ex parte* submissions, Core not only improperly attempts to supplement the record, but now seems to want to change the basic focus of its petition. The Commission should not allow its processes to be abused in this manner.

¹ See, e.g., *Written Ex Parte of Core Communications, Inc.*, WC Docket No. 06-100 and CC Docket No. 01-92, (July 6, 2006) (*Core July 6 Ex Parte*); See also Letters to Marlene H. Dortch, FCC, from Michael H. Hazzard, Counsel for Core Communications, WC Docket No. 06-100 and CC Docket No. 01-92, filed July 20, 2007 (*Core July 20 Ex Parte*); July 17, 2007 (*Core July 17 Ex Parte*); July 6, 2007; and June 26, 2007.

² By Public Notice dated May 5, 2006, the Commission established June 5, 2006 as the date for filing comments in this proceeding and June 26, 2006 as the date for Replies.

³ See, e.g., *Comments of ITTA, NECA, NTCA, and OPASTCO at 3-4 (Association Comments)*; *Embarq at 2*; *State of Hawaii at 4*; *Pennsylvania Telephone Association at 22-23*; *Verizon at 4-5 (Verizon Comments)*; WC Docket No. 06-100 (June 6, 2006).

Core re-argues at the threshold that its petition for forbearance has already been granted by operation of law because the Commission supposedly failed to release a decision on Core's petition within the one-year deadline set forth in section 10 of the Act.⁴ In Core's view, the order issued by the Chief of the Wireline Competition Bureau on March 1, 2007 extending the deadline for action on Core's request⁵ was invalid because the Bureau supposedly did not have authority to extend the statutory deadline.⁶

This argument, in Qwest's words, is "patently silly."⁷ According to Core, when the Bureau found that Core's petition raised "significant questions" requiring additional time for consideration, it was automatically stripped of authority to extend the forbearance deadline.⁸ But whether or not a given petition raises significant questions is hardly a "novel question of fact, law or policy." The Bureau's finding that additional time was needed for consideration of these issues was purely a procedural matter squarely within the Bureau's delegated authority.

In any event, the late-filed arguments presented in Core's written *ex parte* are immaterial and moot because Core continues to lack standing under section 10(c) to request the relief set forth in its petition for forbearance. As the Associations argued in their initial comments in this proceeding,⁹ Core's petition must therefore be dismissed for lack of jurisdiction.

Core now asserts in this regard that because section 10(c) permits "[a]ny telecommunications carrier, or class of telecommunications carriers" to submit a petition to the FCC seeking forbearance, it automatically has standing to submit its petition.¹⁰ Assuming for the sake of argument Core is, in fact, a telecommunications carrier (a conclusion for which Core provides no factual support), this argument ignores the fact that section 10(c) only permits carriers to seek forbearance *from laws or regulations that affect them or the services they provide*.¹¹ Congress clearly did not intend to permit "any" carrier to use forbearance as a sword to interfere with (indeed, even to harm) other carriers, as Core attempts to do here.

⁴ *Core July 6 Ex Parte* at 5; 47 U.S.C. §160. The courts have held that all factors must be demonstrated to exist before forbearance is warranted. *Cellular Telecommunications & Internet Association v. FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003).

⁵ See 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, *Order*, 22 FCC Rcd 4121 (2007) (*Core Extension Order*).

⁶ *Core Communications Application for Review*, WC Docket No. 06-100 and CC Docket No. 01-92, at 1-2 (filed Mar. 28, 2007).

⁷ *Id.*; *Qwest Comments* at 3 (filed Apr. 12, 2007).

⁸ *Id.*; *Core July 6 Ex Parte* at 9-10.

⁹ *Id.*; *Association Comments* at 2.

¹⁰ *Id.*; *Core July 6 Ex Parte* at 10.

¹¹ Specifically, section 10(c) permits a carrier or class of carriers to seek forbearance "with respect to that carrier or those carriers, or any service offered by that carrier or carriers." 47 U.S.C. § 160(c). As Verizon correctly noted in its Comments on Core's petition, "Core has made no showing that it is, or that its services are, subject to either § 251(g) or the unspecified implementing regulations that are the subject of its forbearance petition." *Verizon Comments* at 5. Verizon also pointed out that "although Core seeks forbearance from § 254(g) and various Commission regulations, it makes no representation that it is a 'provider[] of interexchange telecommunications service' covered by §254(g)." *Id.* Similarly, USTelecom demonstrated Core's services are not common carrier services regulated under sections 251(g) and 254(g). *USTelecom Comments* at 5 (filed June 5, 2006) (quoting from several previous filings made by Core). Core makes no attempt in its recent *ex partes* to rebut these arguments. The Commission can only conclude from this failure that Core indeed is not subject to, nor does it provide any services subject to, either section 251(g) or 254(g) of the Act.

Since the regulations for which forbearance is sought do not apply to Core, it has failed to meet the statutory requirement of section 10(c) that permits a carrier or carriers to seek forbearance for themselves or their services. Simply “not liking” existing FCC policies does not permit Core to seek elimination of those policies through forbearance.¹² Nor can Core claim to act on behalf of a class of carriers. The Commission made clear in the *Tier III Carriers Order*, that a petition filed on behalf of a class of carriers must demonstrate the forbearance criteria are satisfied for the entire class of carriers for which relief is sought.¹³ Here, Core has not even shown that the forbearance criteria have been satisfied for itself, much less for “all carriers operating in the United States.”¹⁴

Perhaps recognizing it cannot show standing to seek forbearance from sections 251(g) and 254(g) in their entirety, Core now appears to want to change the scope of its request. In its most recent *ex parte* meetings with Commission staff, Core presented data showing continued declines in dial-up Internet traffic, and apparently has argued that it particularly wants forbearance from “251(g) rate regulation applicable to ISP-bound traffic”¹⁵

In other words, Core is attempting to use its current forbearance petition to gain backdoor reconsideration of the Commission’s 2004 *Core Forbearance Order*.¹⁶ In that proceeding, the Commission granted Core forbearance from the “growth cap” and “new market” rules specified in the *ISP Remand Order*, but denied forbearance from that Order’s “rate cap” and “mirroring” rules.¹⁷

The Commission should reject this revised request out of hand. It is far too late for Core to seek reconsideration of the 2004 *Core Forbearance Order* or to change the fundamental direction and

¹² Core is not unlike the plaintiffs in *ACLU v. Nat’l Security Agency*, Nos. 06-2095/2140, *slip op.* (6th Cir., July 6, 2007). *ACLU* involved a challenge by the American Civil Liberties Union and others to the Bush Administration’s Terrorist Surveillance Program (“TSP”). The court concluded that plaintiffs lacked standing because they could not demonstrate that their calls had been wiretapped or that they were subjected to other TSP-related surveillance. This is not to say that no reasonable person could object to the TSP. But merely disliking a federal policy does not constitute injury in fact that is sufficient to give one standing to challenge the disliked policies in court. *See also, Miami Building & Construction Trades Council, AFL/CIO v. Sec’y of Defense*, No. 06-5142, *slip op.* (D.C. Cir. July 13, 2007). The same holds true for Core with respect to its request for forbearance from the Commission’s access charge and rate averaging rules.

¹³ *Petition for Forbearance from E911 Accuracy Standards Imposed on Tier III Carriers for Locating Wireless Subscribers under Rule Section 20.18(h)*, WT Docket No. 02-377, Order, 18 FCC Rcd 24648 (2003) (“*Tier III Carriers*”).

¹⁴ Core suggests in its July 17, 2007 *ex parte* that the Commission has granted forbearance petitions filed by bar associations and industry associations that “unlike Core, certainly are not ‘telecommunications carriers’ within the meaning of section 160. In support, it references a Commission Order granting forbearance from section 310(d) of the Act in response to a petition filed by the Federal Communication Bar Association (FCBA). *Core July 17 ex parte* at 1, citing *Federal Communications Bar Association’s Petition for Forbearance From Section 310(d) of the Communications Act Regarding Non-Substantial Assignments of Wireless Licenses and Transfers of Control Involving Telecommunications Carriers and Personal Communications Industry Association’s Broadband Personal Communications Services Alliance’s Petition for Forbearance For Broadband Personal Communications Services*, Memorandum Opinion and Order, 13 FCC Rcd. 6293 (1998). Core neglects to mention that the FCBA petition was filed “on behalf of and in cooperation with numerous carriers holding radio licenses and the associations representing their interests”, *id.* at 6296, and thus hardly stands for the proposition that Core need not be a carrier, or show particular injury to itself, in order to have standing to submit its petition.

¹⁵ *Id.* *See also Core July 20 Ex Parte* at 1.

¹⁶ *See Petition of Core Communications, Inc. for Forbearance under 47 USC §160(c) from Application of the ISP Remand Order*, WC Docket No. 03-171, Order, 19 FCC Rcd 20179 (2004).

¹⁷ *Id.*

scope of its current forbearance request.¹⁸ With only a few days remaining until the statutory forbearance deadline expires, interested parties have no opportunity whatsoever to respond to Core's new claims. For example, while it may be true that dial-up access to the Internet has declined in urban areas, rural customers continue to rely fairly extensively on dial-up connections to access the Internet (a fact which ISP-bound traffic aggregators such as Core use to engage in extensive reciprocal compensation gamesmanship).¹⁹ If Core had originally limited its request for forbearance to remaining portions of the *ISP Remand Order*, interested parties would have been able to focus their comments on this particular issue. As things stand, the Commission has no record on which to base a forbearance decision limited to the rate cap and mirroring rules.

As to the merits of Core's original request, the record in this proceeding is completely clear: Core has not shown its petition satisfies the forbearance criteria specified in section 10(a) of the Act.²⁰ Contrary to Core's claims, continued enforcement of sections 251(g) and 254(g) of the Act continues to be necessary to ensure that charges for telecommunications services are just and reasonable, and for the protection of consumers.

With respect to whether forbearance from section 251(g) and 254(g) would be "consistent with the public interest", the Commission must bear in mind the incalculable harm that would result if Core's petition is not dismissed or denied. Comments in this proceeding show that allowing Core's petition to go into effect would likely cause regulatory chaos in intercarrier compensation arrangements.²¹ Even if this were not the case, as Core suggests, the adverse impacts on rural companies and the consumers they serve would be severe. For example, in a prior phase of this proceeding the Commission considered a plan introduced by the Intercarrier Compensation Forum (ICF) that would have reduced compensation for interstate access, intrastate access, and most other types of non-access traffic to a unified rate of \$.000175 per minute over four years.²² NECA's analysis of that plan showed that carriers in its traffic sensitive pool would experience more than an 80 percent loss in intercarrier revenues, resulting, in turn, in significant increases in end user rates and universal service funding.²³ Results such as these would cause many rural LECs to stop deploying new infrastructure and many of their customers simply to abandon service, "outcomes ... antithetical to

¹⁸ In fact, the Commission only recently terminated its proceeding to consider timely-filed requests for reconsideration of Core's original forbearance order. See *Petition of Core Communications for Forbearance Under 47 USC § 160 From Application of the ISP Remand Order*, WC Docket 03-171, Public Notice, 22 FCC Rcd 2963 (2007).

¹⁹ See, e.g., *BellSouth Communications, Inc. v. US LEC of North Carolina, Inc.*, Order Denying Reciprocal Compensation, Docket No. P-561, Sub. 10 (North Carolina Utilities Commission, March 31, 2000) (subsequent history omitted). In that case, a CLEC conspired with third parties to develop and operate a network simply to generate large reciprocal compensation payments from BellSouth. One of these "customers" alone used pre-programmed dial-up modems to generate sufficient traffic for the CLEC to bill \$8.5 million monthly in reciprocal compensation charges to BellSouth. The North Carolina Commission wisely refused to permit this scandal to continue. There is, literally, no telling what additional scams of this nature might result if the Commission were to forbear from remaining portions of the *ISP-Remand Order* without an adequate record for consideration.

²⁰ WTA *Comments* at 11; RICA *Comments* at 2; Qwest *Comments* at 3 (*Qwest Comments*); WC Docket No. 06-100 (June 5, 2006).

²¹ *Qwest Comments* at 2, *Verizon Comments* at 6-7.

²² See Letter to Marlene H. Dortch, FCC, from Gary M. Epstein and Richard R. Cameron, Counsel for the Intercarrier Compensation Forum, CC Docket No. 01-92, Appendix B at 5 (Oct. 5, 2004).

²³ NECA *Comments* at 7, CC Docket No. 01-92 (May 23, 2005).

our Nation's universal service policies and principles.”²⁴ Section 10 of the Act should not be twisted from its intended purpose in this manner.

Because Core has failed to demonstrate it has standing under section 10 of the Act to request forbearance from application of sections 251(g) and 254(g), its Petition must be dismissed. Even if the Commission were to entertain Core's Petition, it must be denied because it utterly fails to show that the criteria specified in section 10 would be satisfied by forbearance from sections 251(g) or 254(g). The Associations accordingly urge[s] the Commission to issue a written order dismissing or denying Core's petition on a timely basis.

Sincerely,

NATIONAL EXCHANGE CARRIER
ASSOCIATION, INC.

By: /s/ Richard A. Askoff
Richard A. Askoff

NATIONAL TELECOMMUNICATIONS
COOPERATIVE ASSOCIATION

By: /s/ Daniel Mitchell
Daniel Mitchell

INDEPENDENT TELEPHONE &
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By: /s/ Joshua Seidemann
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WESTERN TELECOMMUNICATIONS ALLIANCE

By: /s/ Derrick Owens
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²⁴ National Rural Telecommunications Association and OPASTCO *Comments* at 12 (footnote omitted), CC Docket No. 01-92 (Aug. 21, 2001).