

**Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Petition of the Verizon Telephone) WC Docket No. 06-172
Companies for Forbearance Pursuant to 47)
U.S.C. § 160(c) in the Philadelphia,)
Pittsburgh, Boston, New York City,)
Providence and Virginia Beach)
Metropolitan Statistical Areas)

In the Matter of)
)
Petition of Qwest Corporation for) WC Docket No. 07-97
Forbearance Pursuant to 47 U.S.C. §)
160(c) in the Denver, Minneapolis-St.)
Paul, Phoenix and Seattle Metropolitan)
Statistical Areas.)

**COMMENTS
OF THE
NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES
ON REMAND**

On June 19, 2009, the United States Court of Appeals for the D.C. Circuit issued an opinion and remanded the *Verizon 6 MSA Forbearance Order* to the Federal Communications Commission (“FCC” or “Commission”).¹ On August 5, 2009, the D.C.

¹ *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 (“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*”).

Circuit remanded the *Qwest 4 MSA Forbearance Order* at the Commission’s request.²

As the Commission stated, “Because the issues in the *Verizon 6 MSA Forbearance Order* substantially overlap with those in the *Qwest 4 MSA Forbearance Order*, we seek comment on how the Commission should reconsider its analysis in the *Verizon 6 MSA Forbearance Order* and the *Qwest 4 MSA Forbearance Order* in light of the D.C. Circuit’s guidance in the *Verizon v. FCC* opinion.”³

In *Verizon v. FCC*, the D.C. Circuit remanded the *Verizon 6 MSA Forbearance Order* not because the Commission erred in denying forbearance, but because the Commission had, according to the Court,

changed tack from its precedent and applied a per se market share test that considered only actual, and not potential, competition in the marketplace. **The flaw is not in this change, but rather in the FCC’s failure to explain it.** In the *Order*, the FCC without explanation applied these newly

² *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 (“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 v. FCC*”).

³ DA 09-1835 (rel. August 29, 2009). Specifically, Verizon sought forbearance in the 6 Metropolitan Statistical Areas (“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. *Verizon 6 MSA Forbearance Order*, ¶ 1. 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.* The *Verizon 6 MSA Forbearance Order* denied Verizon’s Petitions, finding that the requirements for forbearance in 47 U.S.C. § 160 had not been met. On appeal, Verizon challenged only the Commission’s denial of forbearance on unbundling. In Qwest’s case, likewise Qwest sought forbearance for mass market and enterprise services 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. *Qwest 4 MSA Forbearance Order*, ¶ 1. 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.* The *Qwest 4 MSA Forbearance Order* also denied Qwest’s Petitions. Briefing in *Qwest v. FCC* had not yet occurred at the time of remand.

dispositive factors as if that had always been its method of competitiveness analysis.⁴

The FCC sought voluntary remand in *Qwest v. FCC* because of the similarity of the approach the Commission had taken in the *Verizon 6 MSA Forbearance Order* and the *Qwest 4 MSA Forbearance Order*.

The National Association of State Utility Consumer Advocates (“NASUCA”)⁵ files these comments in support of the Commission’s decisions to deny forbearance to Verizon and to Qwest. NASUCA as an organization and individual members of NASUCA⁶ filed joint comments at the Commission in 06-172 opposing Verizon’s petitions for forbearance, and NASUCA filed comments at the Commission in 07-97 opposing Qwest’s petitions.⁷ NASUCA and members intervened in both appeals in support of the FCC.

Although it would be tempting to spend time disputing the reasoning of the D.C. Circuit (basically because the Court exaggerated the Commission’s “departure from precedent”⁸), that would hardly be of assistance to the FCC on remand. Therefore, these

⁴ *Verizon v. FCC*, slip op. at 18 (citations omitted, emphasis added).

⁵ 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. 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.

⁶ The Pennsylvania Office of Consumer Advocate, the Public Utility Law Project of New York, Inc., the Massachusetts Office of Attorney General, the Virginia Office of Attorney General, the Maryland Office of People’s Counsel, the New Jersey Division of Rate Counsel, the New Hampshire Office of Consumer Advocate and the Connecticut Office of Consumer Counsel.

⁷ Given the similarity of the issues, the 07-97 comments incorporated the 06-172 comments by reference.

⁸ The precedent was hardly long-standing, appearing in only two cases, *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) and *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*

comments will focus first on the narrow issue of why the Commission was justified in not relying on “potential competition” in the *Verizon 6 MSA Forbearance Order* and the *Qwest 4 MSA Forbearance Order*, when it had supposedly relied on that factor in the *Omaha Order* and the *Anchorage Order*.⁹ We will also point to the many other portions of the record that justify denying forbearance that were not emphasized in the *Verizon 6 MSA Forbearance Order*.

A. In the *Omaha Order*, the Commission Relied on its Predictive Judgment for Competition. That Predictive Judgment Was Subsequently Shown to be Erroneous, and the Commission was Justified in Abandoning It in the *Verizon 6 MSA Forbearance Order*.

As the D.C. Circuit correctly pointed out, “In the *Omaha Order*, the FCC noted a number of times that its determination that the Omaha marketplace was sufficiently competitive was based on an assessment of existing *and potential* competition.”¹⁰ A close reading of the *Omaha Order* shows, however, that the potential competition referred to was almost entirely viewed as that resulting from Qwest having

the incentive to make attractive wholesale offerings available so that it will derive more revenue indirectly from retail customers who choose a retail provider other than Qwest. This gives us enormous comfort that in the mass market, unbundling loops and transport pursuant to section 251(c)(3) is “not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory.”¹¹

Further, the Commission stated:

We believe that in conjunction with the extensive facilities-based competition from Cox (both existing and potential), this competition that

251(c)(3) and 252(d)(1) in the *Anchorage Study Area* (“*Anchorage Order*”), 22 F.C.C.R. 1958 (2007). Further, the Court also overstated the substance of that precedent. See *Verizon v. FCC*, slip op. at 14-16.

⁹ Actually, the “potential competition” analysis is scarcely to be found in the *Anchorage Order*.

¹⁰ Slip op. at 16 (emphasis in original).

¹¹ *Omaha Order*, ¶ 67.

relies on Qwest's wholesale inputs – which must be priced at just, reasonable and nondiscriminatory rates¹⁸⁴ and is subject to Qwest's continuing obligations under section 251(c)(4) and section 271(c) – supports our conclusion that section 251(c)(3) unbundling obligations are no longer necessary to ensure that the prices and terms of Qwest's telecommunications offerings are just and reasonable and nondiscriminatory under section 10(a)(1).¹²

Unfortunately, the FCC's "predictive judgment" has proven to be erroneous. As NASUCA stated in a July 18, 2008 ex parte filed on the Qwest Petition,

There is no credible assertion that resale or QPP (Qwest's wholesale product) lines constitute the facilities-based competition to which the Commission has looked in gauging forbearance from unbundling. ...

On the business side, there is "minimal actual competitive penetration in all 4 MSAs." As with residential customers, Qwest's assertions of competition depend on the use of Qwest's facilities. ...

The Commission should not make the mistake it made in its *Qwest Omaha Order*, where it relied upon its "predictive judgment" that forbearance would lead to increased availability of competitive wholesale facilities. That judgment has not been borne out, and Qwest has significantly increased its own wholesale rates for its facilities, leading to an erosion of competition in Omaha and the State of Nebraska.¹³

This problem was also brought to the Commission's attention prior to the *Verizon 6 MSA Forbearance Order*. For example, in a November 28, 2007 ex parte, PAETEC, the successor to McLeod, which was the largest user of Qwest's wholesale facilities, stated,

For competitors lacking PAETEC's purchasing power, the effect may well be to force them to leave markets where forbearance is granted. Indeed, that is precisely the fate that has befallen McLeod since the Commission implemented UNE forbearance for Qwest in the Omaha Forbearance Order. Faced with exorbitant price increases and the refusal of Qwest to negotiate a realistic commercial agreement, McLeod has announced its intention to withdraw from the Omaha market. It has begun scaling back its sales efforts in Omaha in anticipation of doing so. In addition, two

¹² Id., ¶ 68.

¹³ 07-97, NASUCA ex parte at 2-3, citing 07-97, Comptel ex parte (July 2, 2008), Attachment 1 at 5; id., Attachment 2 at 3; see generally 07-97, McLeodUSA ex parte (July 10, 2008); see also 07-97, XO ex parte (July 9, 2008), Attachment at 8 (footnotes omitted).

other CLECs, Eschelon and Integra, have abandoned plans to enter the Omaha market because of Qwest's post-forbearance tactics.¹⁴

Thus the Commission was entirely capable of and entitled to abandon its “precedent” on “potential competition,” and should explain that to the Court. As former Commissioner Adelstein stated in his Statement accompanying the *Verizon 6 MSA Forbearance Order*, “In a welcome break from many recent Commission Orders, this Order does not place unwavering reliance on ‘predictive judgments’ about our hopes for the development of competition but, instead, takes a closer look at the facts on the ground.”

Finally, the Commission should clarify for the Court the true intention of the potential competition aspect of the Omaha Order. As explained by Alpheus, et al. in a November 29, 2007 *ex parte*:

Verizon seeks to justify treating resale of Verizon switched services (including its ironically-named “Wholesale Advantage” offering) as facilities-based competition by citing the *Omaha Forbearance Order*, para. 62, and the *Anchorage Forbearance Order*, para. 30. These citations are inapposite. In fact, in the Omaha decision, the Commission *first* considered the extent of residential competition provided over Cox's own independent facilities; *see Omaha Forbearance Order*, paras. 65-66. Only *after* finding a threshold level of competition provided over these facilities did the Commission also consider, as a secondary factor, the provision of switched and nonswitched wholesale services by *Qwest. Id.*, para. 67. In Anchorage, similarly, the Commission examined the extent of competition over GCI's own facilities (*Anchorage Forbearance Order*, para. 28) as a threshold issue, before considering competition using resold services (para. 30).¹⁵

The potential competition analysis is and was clearly subsidiary to the actual competition (i.e., market share) analysis on which the Commission relied in the *Verizon 6 MSA*

¹⁴ 06-172, PAETEC *ex parte* (November 28, 2007) at [6] (footnotes omitted); see also 06-172, Time Warner Telecom, et al. *ex parte* (December 3, 2007), PowerPoint at 15; 06-172, EarthLink *ex parte* (November 30, 2007) at 2.

¹⁵ 06-172, Alpheus, et al. *ex parte* (November 29, 2007) at 3 (footnote omitted, emphasis in original).

Forbearance Order and the *Qwest 4 MSA Forbearance Order*. These points should be sufficient to satisfy the Court.

B. The Commission Correctly Denied Verizon’s Six Forbearance Petitions and Qwest’s Four Forbearance Petitions Based On Substantial Record Evidence And Must Do So Again On Remand.

a. Introduction

The Commission seeks comment on:

What evidence, beyond Verizon’s market share for a particular product market, is relevant to whether forbearance from unbundling regulations is warranted? How does “the existence of potential competition . . . affect [the Commission’s] section 10 forbearance analysis”? What other issues are relevant to the Commission’s resolution of Verizon’s forbearance petitions and what additional factors should the Commission take into account in its analysis?¹⁶

The Commission asks the same questions for Qwest.¹⁷ NASUCA submits that the Commission correctly denied each of Verizon’s and Qwest’s petitions for forbearance and that such decisions were supported by substantial record evidence.

The standard established by Congress to have forbearance granted is very high.¹⁸ In order for the Commission to grant a request for forbearance, a company must meet the three statutory requirements defined in section 160(a) of TA-96.¹⁹ Congress also directed that the Commission “shall consider whether forbearance from enforcing the provision or regulation will *promote* competitive market conditions” including whether “such

¹⁶ DA 09-1835 at 3.

¹⁷ *Id.* at 4.

¹⁸ *See* 06-172, Comments of NASUCA, the Pennsylvania Office of Consumer Advocate, the Public Utility Law Project of New York, Inc., the Massachusetts Office of Attorney General, the Virginia Office of Attorney General, the Maryland Office of People’s Counsel, the New Jersey Division of Rate Counsel, the New Hampshire Office of Consumer Advocate and the Connecticut Office of Consumer Counsel. (March 5, 2007) (“Joint Consumer Comments”) at 7-12. As mentioned above, NASUCA’s comments in 07-97 incorporated the 06-172 Joint Consumer Comments by reference. Thus reference to the Joint Consumer Comments should also apply to Qwest.

¹⁹ *Id.* at 7-8, quoting 47 U.S.C. § 160(a).

forbearance will *enhance* competition among providers of telecommunications services.”²⁰ Verizon and Qwest must pass *each* statutory test for *each* regulation in *each* relevant geographic market for which it requested forbearance. The Joint Consumer Commenters and NASUCA demonstrated that Verizon’s and Qwest’s Petitions sought more relief than forbearance Petitions previously filed by other carriers,²¹ and, ultimately, failed to meet all of these requirements.

- b. Substantial record evidence supports denying Verizon’s attempts eliminate many consumer benefits and protections.²²

Granting Verizon’s forbearance petitions would have eliminated many consumer benefits and protections.²³ The Section 251(c) unbundling requirements for loops and transports, for example, continue to be necessary to enable the provision of competitive telecommunications services, particularly those that compete with Verizon’s stand-alone residential basic local exchange service offering.²⁴ By denying Verizon’s request for forbearance from these unbundling regulations, the Commission avoided foreclosing entrance into the local exchange market by any new wireline competitor. Furthermore, the access line count relied upon by Verizon to support its forbearance petition was faulty.²⁵ Granting Verizon’s request for forbearance from its unbundling obligation would accelerate the potential of an ILEC-cable duopoly where ILECs and cable companies are the only network owners with access to the end user premises. The

²⁰ 47 U.S.C. § 160(b) (emphasis added).

²¹ See Joint Consumer Comments at 12-16.

²² References to Verizon in the following text also apply to Qwest.

²³ While prior similar petitions for forbearance pertained primarily, if not exclusively, to competitive wholesale issues, Verizon’s petitions sought to eliminate many consumer benefits and protections.

²⁴ Joint Consumer Comments at 18.

²⁵ Id. at 19-20.

Commission correctly determined that Verizon failed to demonstrate satisfaction of the forbearance standards for regulations regarding unbundling of loops and transport.

The Commission also correctly denied Verizon's request for forbearance from certain tariffing regulations that apply to dominant carriers. Verizon failed to demonstrate that it is anything but the dominant carrier in these six geographic markets, particularly in the provision of residential basic local exchange service.²⁶ The notice and filing requirements for tariff changes provide consumer benefit and must continue to exist at continuing levels because of Verizon's position as the dominant carrier and the market power that it holds.

Likewise, record evidence in this proceeding demonstrated that the level of competition in the six geographic markets is insufficient to warrant removal of Verizon's price cap regulations, particularly for basic local exchange services.²⁷ When competition is not present within a particular market, as is the case here for basic local exchange service, market forces will not protect consumers of those services if price cap regulations are eliminated. Verizon neglected to provide any substantive data or analysis, including information about market share and demand and supply elasticities, to support its Petitions. Most notably, granting the requested forbearance may allow Verizon to increase its Subscriber Line Charge.²⁸

The Commission properly rejected Verizon's request for forbearance from regulations related to transfers of control and discontinuance, reduction or impairment of

²⁶ Id. at 22.

²⁷ Id. at 22-24.

²⁸ See 47 C.F.R. § 61.48(m)(2)(vi) and (vii).

service.²⁹ These regulations for dominant carriers such as Verizon provide important consumer protections and should remain in place. This is particularly true as Verizon continues to divest significant portions of its wireline operations throughout the country. Relieving Verizon of transfer of control regulations will eliminate the opportunity for the public to have a voice in assessing the impact of change in providers of the telecommunications services they receive. The public should continue to have a voice in the transfers that affect the provision of their telecommunications services. Similarly, the regulations pertaining to discontinuance, reduction, outage and impairment of services also provide vital consumer protections and must be maintained. Granting such relief would especially harm consumers without competitive alternatives.

Finally, record evidence in this proceeding demonstrates that Verizon should continue to comply with the *Computer III* and “Open Network Architecture” requirements.³⁰ In seeking such forbearance, Verizon attempts to circumvent the larger national policy debate regarding “net neutrality.” The Commission correctly rejected these efforts and therefore ensured that all telecommunications services and access to the Internet remain open and continue to offer great public and economic benefit. Maintaining non-discriminatory access to the network is vital for the public interest and will provide substantial consumer benefits. Granting Verizon forbearance from these requirements will effectively preclude consumers from receiving the benefits of an open

²⁹ Id. at 24-31.

³⁰ Id. at 31-37.

network, including unfettered access to the Internet, contrary to long held Commission policy dating back to the seminal *Hush-a-fone* and *Carterfone* decisions.³¹

- c. Substantial record evidence in this proceeding demonstrates that the level of competition in the respective geographic markets do not support forbearance from vital consumer protections and benefits.

The Joint Consumer Commenters demonstrated that the level of competition in the respective markets did not support forbearance from these vital consumer benefits and protections.³² Verizon's petitions failed on a number of levels to satisfy the statutory requirements necessary to grant forbearance, including because of their reliance on competition that is far overstated. Verizon failed to provide sufficient competitive data such as line counts at the required level of granularity that is necessary to support forbearance. Verizon's claim about market share loss in the mass market exaggerated the Company's position and fails to account for the fact that Verizon continues to be dominant provider of basic local exchange services in the mass markets.

A more granular analysis of competition is required to demonstrate the presence of alternatives to consumers to support a grant of forbearance.³³ A granular analysis is important because facilities-based cable operators, for example, have franchise areas that cover part but not all of an exchange. Verizon made overbroad claims about the presence of facilities-based cable operators in the relevant geographic markets and inappropriately relied on E911 listings.

³¹ *Hush-a-fone Corporation v. FCC*, 238 F.2d 266 (D.C. Cir. 1956); *In the Matter of Use of the Carterfone Device in Message Toll Telephone Service*, 13 FCC 2d 420 (1968), recon denied 14 FCC 2d 571 (1969).

³² *Id.* at 37-68.

³³ *Id.* at 39-44.

There was also no record evidence to support a grant of forbearance as it applies to stand-alone basic local exchange service. The reason for this was (and is) simple: Competitors do not offer such alternatives. Rather, record evidence in this proceeding demonstrated that most intermodal technologies are insufficient substitutes for wireline service,³⁴ and that the intermodal services relied upon by Verizon to support its Petitions are not substitutes for standalone basic local exchange service, either on a service basis,³⁵ or a price basis.³⁶

Finally, record evidence in this proceeding demonstrated that Verizon's reliance on reduction in retail access lines to demonstrate the presence of competition was flawed.³⁷ Given the various reasons customers may terminate service or lines may otherwise be lost, the more accurate barometer for the presence of competition within a particular geographic market in classic economic terms would be a demonstration that retail rates have declined in the face of that competition. Only then would the Commission know that competition is truly present and capable of protecting consumers' rates in the absence of regulations. At that time, forbearance may be warranted. But record evidence in this matter demonstrated that such rate competition is not present.³⁸ Furthermore, record evidence in this matter demonstrated that Verizon's description of its residential line loss between 2000 and 2005 is misleading and did not provide an accurate picture of the current state of competition.

³⁴ Id. at 46-52.

³⁵ Id. at 52-54.

³⁶ Id. at 54-61.

³⁷ Id. at 61-68.

³⁸ See also, NASUCA Ex Parte, CC Docket No. 06-172 (filed November 13, 2007).

d. Conclusion.

Based on the foregoing, the Commission correctly denied Verizon's six forbearance petitions and Qwest's four forbearance petitions based on substantial record evidence and must do so again on remand. The Commission's denial of Verizon's and Qwest's petitions for forbearance was a reasoned decision consistent with the law. Verizon and Qwest failed to show by a preponderance of the evidence that they met the required criteria to be granted forbearance under Section 160(a). None of the three conjunction criteria in Section 160(a) were met with respect to the regulatory obligations from which Verizon and Qwest sought forbearance. Competition cannot be promoted when a competitive method for entry is eliminated and no viable alternative exists. This is particularly true for stand-alone basic local exchange customers who need these regulatory protections the most. Where competition in the relevant geographic markets has not developed to the point that the market can offer the same benefits to consumers provided by the current regulations, forbearance is not in the public interest.

Respectfully submitted,

/s/

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