

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of)
)
Petition of the Verizon Telephone Companies)
For Declaratory Ruling or, Alternatively, for)
Interim Waiver with Regard to Broadband)
Services Via Fiber to the Premises)
)
and) WC Docket No. 04-242
)
Conditional Petition of the Verizon Telephone)
Companies Forbearance under 47 U.S.C. §)
160(c) with Regard to Broadband Services)
Provided Via Fiber to the Premises)

REPLY COMMENTS OF TIME WARNER TELECOM

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Time Warner Telecom, Inc. ("TWTC"), by its attorneys, hereby submits these reply comments in response to the Petitions¹ filed by Verizon in the above-referenced proceeding.

I. INTRODUCTION AND SUMMARY

In its Petitions, Verizon asks the Commission to extend the regulatory regime applicable to cable modem service to those broadband services that Verizon provides "via fiber to the premises" facilities. There are numerous reasons why this request is fatally flawed. Several parties have pointed out, for example, that it makes little sense to try to extend cable modem service regulations to other services when the Ninth Circuit's decision in *Brand X Internet*

¹ Verizon filed two Petitions in this proceeding, one for forbearance ("*Petition 1*") and one for declaratory ruling, or in the alternative, interim waiver. They ask for substantially the same relief and therefore the arguments in these reply comments address both Petitions collectively. Verizon also filed a memorandum of points and authorities, ("*VZ Memo*") attached to both Petitions.

Services v. FCC overturning significant portions of the FCC's *Cable Modem Declaratory Ruling*² makes it impossible to determine how much of that order will ultimately be deemed lawful. *See e.g.* Comments of Covad at 7-8; AT&T at 2, 4-6. As parties have also noted, it is not at all clear that there is any urgency to “clarify” the regulatory status of services provided over Verizon’s fiber to the premises facilities (though of course the regulatory status of those services is perfectly clear under the rules adopted in the *Computer Inquiry* proceedings) since Verizon seems fully committed to investing in fiber to the premises facilities under the current regulatory regime. *See e.g.* Comments of Covad at 4-5; ALTS at 4. In all events, it is clear that the issues raised by Verizon are more sensibly addressed in the Commission's broader rulemaking in the ILEC broadband classification proceeding (CC Docket No. 02-33).

While these and other concerns identified in the comments by themselves justify denial of Verizon's Petitions, TWTC focuses in these reply comments on the consequences of Verizon's Petitions for the enterprise market. For although cable modem service is only suitable for mass market (residential and very small business) customers, Verizon has not restricted the scope of its Petitions to that market. It has instead sought the elimination of essentially all regulation governing the broadband transmission provided via fiber that extends to *any* "premises," including apparently the premises of business customers that cannot be sensibly included in the mass market. Outside of the mass market (*i.e.*, outside of the market served by cable modem service) Verizon has an unquestioned dominant position, and current FCC regulations properly treat it as such. Accordingly, whatever other action the Commission may take in response to the Petitions, it must in all events ensure that Verizon continues to be treated as dominant in the

² *Inquiry Concerning High-Speed Access to Internet over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) (“*Cable Modem Declaratory Ruling*”) *rev'd Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003), *petitions for certiorari pending*.

provision of end user connections to business customers outside of the mass market and that Verizon continues to be required to provide on a tariffed, stand-alone basis, the loop and transport transmission underlying the broadband information services serving such enterprise customers.

II. DISCUSSION

In the Petitions, Verizon requests essentially complete deregulation of Fiber to the Premises (“FTTP”) and services provided over those facilities. FTTP is not defined in the *Triennial Review Order*³ or anywhere else in the Commission’s orders or rules. Read literally, that term includes any fiber end-user connection, including those used to serve business customers outside of the mass market.

Verizon’s use of the broad FTTP terminology does not appear to have been inadvertent. For example, Verizon asserts that it needs relief from *Computer Inquiry* tariffing requirements for its FTTP broadband transmission because it wants to be able to offer contracts on an individualized, case-by-case basis.⁴ This objective is only relevant to customers outside of the mass market because individualized negotiations are common among business customers with relatively sophisticated telecommunications needs whereas the average mass market customer does not even want to negotiate contracts for services. Even de-tariffed IXC rates are generally offered on a take-it or leave-it basis to mass market (residential and very small business) customers and mass market customers do not attempt to negotiate a “better deal” from their cable modem provider when they sign up for service. The logical conclusion is that Verizon is

³ See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand, 18 FCC Rcd 16978 (2003) (“*Triennial Review Order*”), *vacated in part, United States Telecomm. Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

⁴ *VZ Memo* at n. 5.

attempting, among other things, to deregulate enterprise loops so that it can further its market power in the provision of wholesale special access loops.

Verizon asks for relief from tariffing requirements in its Petitions because “there is no plausible argument that Verizon could engage in unjust or unreasonable pricing or other practices...[, and] the Commission has repeatedly found that imposing tariffs in a competitive market affirmatively *harms* competition...”⁵ (emphasis in original) Whatever the merits may be of these statements in describing Verizon’s position when competing with cable operators in the mass market, they are clearly inaccurate and inapposite with regard the enterprise special access market. Verizon clearly possesses sole control over upstream inputs in the enterprise market, and it has powerful incentives to abuse that control by discriminating against broadband competitors on price and non-price terms.⁶

Current regulation limits Verizon’s opportunities to abuse this market power to some degree. For example, the tariffing requirements of the *Computer Inquires* can reduce Verizon’s ability to misallocate costs and engage in price discrimination against their rivals. Tariff filing requirements themselves can deter a certain amount of cross-subsidization because BOCs would be forced to justify their prices with cost-based showings. The tariffing process can also give the FCC at least some opportunity to ensure that the BOCs impute the wholesale price of their special access services to their retail offerings that rely on a special access input. Moreover, Verizon has all but admitted the critical role of the *Computer Inquiry* regulations play in

⁵ *Petition 1* at 4.

⁶ The Commission has held that mass market, small and medium enterprise and large enterprise segments comprise separate markets for telecommunications: “We find here that the economic characteristics of the mass market, small and medium enterprise, and large enterprise customer classes can be sufficiently different that they constitute major market segments... These customer classes generally differ in the kinds of services they purchase, the service quality they expect, the prices they are willing to pay, the levels of revenues they generate, and the costs of delivering them services of the desired quality.” *Triennial Review Order* ¶ 123.

promoting efficient outcomes by at least preventing BOCs from denying competitors access to transmission facilities. For example, in a May 3, 2004 *ex parte*, Verizon claimed that section 271 unbundling obligations for broadband loops are unnecessary because “the Commission’s *Computer Inquiries* orders have been applied to require local telephone companies to offer their broadband transmission services separately and under tariff and on just and reasonable terms.”⁷

It is essential that the Commission continue to apply the *Computer Inquiry* rules in this manner to business end user connections outside of the mass market. This is because there are no non-ILEC sources of supply for the vast majority of high-capacity loops demanded by all but the smallest business customers. Except for business customer locations with the largest traffic demand, self-deployment of fiber loops is generally not an efficient means of reaching the customer. As the Commission has found, competitors seeking to serve enterprise customers over their own facilities face “steep economic barriers.” *Triennial Review Order* ¶ 199. Importantly, “most of the costs of constructing loops are sunk costs.” *Id.* ¶ 205. This is true of the huge costs “associated with physically laying the fiber cable.” *Id.* ¶ 312. Entities seeking to deploy fiber loops must also overcome the “inability to obtain reasonable and timely access to the customer’s premises both in laying the fiber to the location and getting it into the building thereafter, as well as convincing customers to accept the delays and uncertainty associated with deployment of alternative loop facilities.” *Id.* (citations omitted).

Because of the barriers associated with investing in new fiber loops, it is not surprising that such facilities have only been built to a very small fraction of business end users. For example, the record in Triennial Review proceeding demonstrated that only “3% to 5% of the

⁷ Verizon, *Ex Parte* Presentation, WC Dkt. Nos. 02-33, 02-112, CC Dkt. Nos. 01-337, 01-338, 02-52 at 6 (filed May 3, 2004).

nation's commercial office buildings are served by competitor-owned fiber loops." Id. n. 856. Accordingly, the Commission concluded that "in most areas, competing carriers are unable to self-deploy and have no alternative to the incumbent LEC [fiber loop] facility." Id. ¶ 314. Even where competitors deploy some of their own facilities, they are still reliant on ILEC special access. As Verizon itself has observed, although competitors employ some of their own facilities, "they are also extending the reach of those facilities by using special access purchased from incumbent local exchange carriers."⁸

Furthermore, cable companies are just as reliant as other CLECs for ILEC special access when they attempt to provide service to enterprise customers. Cable companies use their own Hybrid Fiber Coaxial ("HFC") networks to provide cable modem service to residential and some small business customers. However, many downtown areas where large businesses are located are outside of cable's network footprint. Furthermore, the limited upstream capacity of cable modem service, HFC's shared architecture that can lead to service slowdowns, and the absence of other features demanded by enterprise customers, such as ATM or Frame Relay, make cable modem service unsuitable for most of the enterprise market.⁹ As the Commission has explained, "[the] cable companies have remained focused on the mass market, largely residential service consistent with their historic residential network footprints, and bundling telephone service with cable modem services." Id. ¶ 52 (citations omitted). As of June 2002, cable companies "provided fewer than 16,000 coaxial cable connections to medium and large businesses." Id. n.

⁸ Verizon, *Ex Parte* Presentation, CC Dkt. Nos. 01-338, 96-98, 98-147 at 17 (filed Jul. 2, 2004) ("*Verizon July 2 Ex Parte*").

⁹ See *Triennial Review Order* ¶ 129 ("Large enterprises demand extensive, sophisticated packages of services. Reliability of service is essential to these customers, and they often expect guarantees of service quality. The services they might purchase include an internal voice and data network, local, long distance, and international POTS service to one or multiple locations, provisioning and maintenance of a data network such as ATM, frame relay or X.25, and customized billing.").

128. In addition, businesses represent only between three and four percent of cable modem customers.¹⁰

Moreover, there is little reason to believe that cable operators will enter the business market to any significant degree using self-provisioned fiber loops. To construct fiber loop facilities or even extend their existing HFC network to areas that serve the enterprise market, cable operators must clear the same hurdles that have prevented TWTC and other competitors from building loops to most business locations. Those hurdles include: (1) obtaining access to public rights-of-way; (2) obtaining access to buildings on reasonable terms and conditions in circumstances in which building owners have no duty and little incentive to provide such access; (3) convincing customers to wait out the delay (lasting anywhere from six to twelve months or even longer) associated with constructing new loops; (4) generating enough revenue from a particular location over a long enough period of time (usually requiring a long-term commitment from the customer) to make loop construction efficient; and (5) ensuring that the service provider can meet the telecommunications needs of the business customer at all of its locations (not just the location at which loop construction is efficient, which businesses increasing demand from their carriers. There is no reason to believe cable companies would have an easier time surmounting these entry barriers than a wireline CLEC would.

The experience of Cablevision's Lightpath division appears to support this conclusion. As Lightpath has explained, "[a]lthough Lightpath is a facilities-based provider, Lightpath relies on special access lines from incumbent LEC facilities, namely Verizon, to supplement its service

¹⁰ See *RBOCs Gird For Broadband Battleground*, TELEPHONY, May 3, 2004, at 7.

footprint and provide services to its existing and new customers.”¹¹ Not surprisingly, Verizon has attempted to leverage its control over special access inputs to harm Lightpath’s ability to compete in downstream retail enterprise service markets. For example, Lightpath complains that “Verizon does not provide quality, non-discriminatory access to special access facilities and as a result, inhibits Lightpath’s ability to meet its customers’ service expectations.” *Id.* at 2. Verizon’s poor performance is inextricably tied to its market power in special access services: “the evidence in this proceeding on Verizon’s performance, in particular, confirms that incumbent LEC provisioning of special access is well below the type of service a company would provide (and indeed could get away with providing) to its customers in a truly competitive market.”¹²

There is no reason to believe that other cable operators would escape this problem in seeking to serve businesses that are outside of the mass market. Cable operators own HFC “loops” and do not need special access circuits to provide service over their HFC infrastructure. But the available market evidence indicates that cable companies cannot rely on that infrastructure to serve customers outside the mass market. Lightpath’s website explains that, for “small offices and home offices,” Lightpath offers “Business Class Optimum Online.” Lightpath explains that this service is provided “via Cablevision's hybrid fiber coax (HFC) network. This network is the same physical network that delivers Cablevision's cable television service.”¹³ It is

¹¹ Letter from Cherie R. Kiser and Lisa N. Anderson, Attorneys for Cablevision Lightpath, Inc. to Magalie Roman Salas, Secretary, FCC, CC Dkt. No. 01-321 at 1-2 (filed Jan. 22, 2002).

¹² Letter from Cherie R. Kiser and Lisa N. Anderson, Attorneys for Cablevision Lightpath, Inc. to William F. Caton, Acting Secretary, FCC, CC Dkt. No. 01-321 at 2 (filed Feb. 12, 2002).

¹³ <http://www.lightpath.net/Interior98.html>. Notably, this service is offered not at a negotiated rate, but at a fixed price, \$109.95. *See* <http://www.lightpath.net/Interior98.html> (click on “Learn More about Business Class Optimum Online” then click on “Competitive Features and Pricing” then finally, click on “Compare to Verizon”). Thus, even

clear that the 3.5MB/384k asymmetrical service would only be appropriate for the smallest of businesses with relatively unsophisticated needs.¹⁴ For “small and medium sized businesses” and “large and enterprise” businesses, Lightpath offers ATM,¹⁵ Frame Relay¹⁶ and Private Line Service¹⁷ offered over non-HFC end user connections (probably fiber). Like any CLEC, Lightpath requires ILEC special access to provision these services.

Time Warner Cable (“TWC”) has a similar division of its services between low capacity HFC and higher capacity fiber services. For “Small Office/Home Office,” which TWC describes as “businesses with 1-5 employees,” and “Small and Middle Sized Businesses,” (at least those small and middle-sized businesses with relatively unsophisticated telecommunications needs) TWC offers its “Road Runner Business Class Service,” which offers, at the most, a 4MB/2MB asymmetrical connection over its HFC infrastructure.¹⁸ For “enterprise solutions,” TWC offers “Dedicated Access Solutions” a “High-bandwidth, fiber connectivity [product] for enterprises.”¹⁹ Even in Manhattan, one of the areas of highest competitive fiber deployment in the country, TWC has only built its fiber network to neighborhood nodes; coaxial cable runs the rest of the way to the end user.²⁰ To the extent that TWC were to seek to provide fiber-based services to

the small business market does not require the individual contracts which Verizon asserts it needs to be able to offer for its FTTP service.

¹⁴ See *id.*

¹⁵ See <http://www.lightpath.net/Interior102.html>.

¹⁶ See <http://www.lightpath.net/Interior103.html>.

¹⁷ See <http://www.lightpath.net/Interior105.html>.

¹⁸ See http://www.rrbiz.com/RoadRunner/sec_unformatted.asp?TRACKID=&CID=24&DID=29.

¹⁹ http://www.rrbiz.com/RoadRunner/sec_enterprise.asp?TRACKID=&CID=17&DID=22.

²⁰ See <http://www3.twnyc.com/NASApp/CS/ContentServer?pagename=twcnyc/newbusiness&mysect=newbusiness/privatenetwork> (“The network is made up of hub sites, which are interconnected with a fiber back

business customers, it would therefore need to deploy new fiber and, in doing so, would face the same obstacles as TWTC and others.²¹ As a result of this dynamic, the NYPSC has found that “Verizon dwarfs its competitors” in the special access services market even in New York.²² The cable companies that service that market, Lightpath and TWC, clearly do not pose a threat to this market dominance.

Accordingly, the Commission has appropriately treated the ILECs, including Verizon, as dominant in the provision of special access. In the *Pricing Flexibility Order*, the Commission found that, even where an ILEC has received Phase II pricing flexibility, it may still charge “an unreasonably high rate for access to an area that lacks a competitive alternative.”²³ Therefore, the *Pricing Flexibility Order* retained the dominant classification for ILEC special access (*see id.* ¶ 151) and required ILECs to maintain their tariffed rates to preclude them from “abusing their market power by charging dramatically higher rates to customers that lack competitive alternatives.” *Id.* ¶ 79.

Nor does the BOCs’ oft-repeated argument that IXC’s are dominant in providing end-to-end (largely interLATA) services to enterprise customers, and therefore the Commission should

bone. These hub sites are in turn connected by fiber rings to Nodes housed on each city block, servicing one or two city blocks or possibly single buildings. Last mile connectivity to the typical user is via coaxial cable runs which terminate at the node.”).

²¹ TWTC is a separately traded public corporation whose largest single owner is Time Warner Inc. TWTC conducts its business in a manner that is completely separate from Time Warner Inc.’s cable operations.

²² *See State of New York Public Service Commission, Opinion and Order Modifying Special Services Guidelines for Verizon New York Inc., Conforming Tariff, and Requiring Additional Performance Reporting*, Case 00-C-2051, Case 92-C-0665, Opinion No. 01-1, at 7 (rel. June 15, 2001).

²³ *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases of Switched Access Services offered by Competitive Local Exchange Carriers; Petition of US West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, ¶ 144 (1999) (“*Pricing Flexibility Order*”), *aff’d*, *WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001).

not be concerned about ILEC control of wholesale inputs, have any merit.²⁴ This argument confuses *market share* in a downstream market with *market power* in an upstream market. As the Commission has expressly found, BOCs are fully capable of leveraging their control over upstream inputs to harm (and eventually dominate) competition even in downstream markets that they enter for the first time with zero market share.²⁵ For many years, Verizon and other BOCs did not have an incentive to discriminate against competitors that used special access as part of interLATA services provided to large enterprise customers²⁶ because sophisticated enterprise customers need multistate access, and without the ability to provide interLATA connections among multiple points in multiple states, BOCs could not effectively compete at the retail level.²⁷ Where a price squeeze was neither possible nor advantageous for ILECs, they would simply sell wholesale service in a profit maximizing fashion. Now that the BOCs have gained

²⁴ See Comments of BellSouth Corporation, WC Dkt. Nos. 04-36, 04-29 at 40 (filed May 28, 2004) (“And in the enterprise market, it is AT&T and other large IXCs that have the lion’s share of the business broadband market. As of January 2004, AT&T, MCI and Spring controlled 79% of the frame relay market and 60% of the ATM market...The ILECs thus do not even arguably have ‘bottleneck’ control of the transmission facilities necessary to offer IP-enabled services, or, for that matter, any other information services offered over broadband facilities.”).

²⁵ See *Regulatory Treatment of ILEC Provision of Interexchange Services Originating in the ILEC’s Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Report and Order, 12 FCC Rcd 15756, ¶ 96 (1997) (holding that the fact that BOCs begin with “zero market share” in interLATA services “is not conclusive in determining whether a BOC interLATA affiliate should be classified as dominant because the affiliate’s zero market share results from its exclusion from the market until now, and, the affiliate potentially could gain significant market share upon entry or shortly thereafter, because,” of, among other things, “the BOC’s ability potentially to raise the costs of its affiliate’s interLATA rivals.”).

²⁶ See *Verizon July 2 Ex Parte* at 24 (describing IXCs’ reliance on special access circuits).

²⁷ See *id.* at 22 (“Traditionally, local telephone companies have not been major players in this market segment, because they did not have the ability to meet all of the needs of these customers. In particular, the interLATA restriction historically precluded the Bell companies from providing interLATA services, which is a critical component of the package of services that large enterprise customers demand. The Bell Companies have only recently begin to compete seriously for the nationwide and global business of large enterprise customers.”).

Section 271 approval in all 50 states,²⁸ however, the BOCs have powerful incentives to discriminate.²⁹ The continuing sunset of the 272 separate affiliate requirements (without any analysis of the consequences of such action for competition) removes another barrier to BOC market power abuse and price squeezes.³⁰

Thus, BOCs, including Verizon, are increasingly free to act on their incentives to discriminate, an incentive that the FCC has found to be heightened for BOCs like Verizon, that have large services areas.³¹ As the Commission has found, a larger network footprint allows the Verizon to capture a greater share of the benefits of such behavior because of the greater gains from the CLEC's decision not to compete. Thus, the removal of tariffing requirements will only further invite market power abuses by Verizon.

²⁸ The final 271 approval was granted only within the last year. See *Application by Qwest Communications International Inc. for Authorization to Provide In-Region, InterLATA Services in Arizona*, Memorandum Opinion and Order, 18 FCC Rcd 25504 (2003).

²⁹ See Marius Shwartz, *The Economic Logic for Conditioning Bell Entry into Long Distance on the Prior Opening of Local Markets*, 18 Journal of Regulatory Economics 247, 265-66 (Nov. 2000).

³⁰ See *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, ¶ 160 (1996) (“Together, the prohibition on joint ownership of facilities and the nondiscrimination requirements should ensure that competitors can obtain access to transmission and switching facilities equivalent to that which section 272 affiliates receive.”). As of July 29, 2004, RBOC 272 affiliates have sunset in 6 states, eliminating structural separation, affiliate transaction and nondiscrimination requirements.

³¹ See *Applications of Ameritech Corp., Transferor and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, Memorandum Opinion and Order, 14 FCC Rcd 14712, ¶ 60 (1999) (observing that the merger “would increase the incentives and ability of the larger merged entity to discriminate against rivals in retail markets where the new SBC will be the dominant incumbent LEC....The increase in the number of local areas controlled by SBC as a result of the merger will increase its incentive and ability to discriminate against [competing] carriers.”); *Application of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Landing License*, Memorandum Opinion and Order, 15 FCC Rcd 14032, ¶ 96 (2000) (concluding that “the increase in the number of local calling areas controlled by Bell Atlantic as a result of the merger will increase its incentive and ability to discriminate against carriers competing in retail markets that depend upon access to Bell Atlantic's inputs in order to provide services.”) (citation omitted).

III. CONCLUSION

In light of the demonstrable market power that ILECs retain in the provision of wholesale special access services, Verizon's Petitions should be denied insofar as they request relief for enterprise special access loops.

Respectfully submitted,

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