

**Before the
Federal Communications Commission
Washington, D.C.**

In the Matter of)
)
Petition of Verizon Telephone Companies)
for Forbearance under 47 U.S.C. § 160(c))
from Title II and *Computer Inquiry* Rules) WC Docket No. 04-440
with Respect to Their Broadband Services)

**Comments
Of
The Nebraska Rural Independent Companies**

I. Introduction

The Nebraska Rural Independent Companies (the “Nebraska Companies”)¹ hereby submit comments in the above captioned proceeding. With this Public Notice² the Federal Communications Commission (the “Commission”) seeks comment on a petition (the “Petition”)³ filed by the Verizon Telephone Companies (“Verizon”) for forbearance from applying Title II and the *Computer Inquiry* rules to any broadband services offered by Verizon.

The Nebraska Companies believe that issues such as those raised in the Petition should be addressed in a comprehensive rulemaking proceeding. The Commission

¹ Companies submitting these collective comments include: Arlington Telephone Company, The Blair Telephone Company, Cambridge Telephone Company, Clarks Telecommunications Co., Consolidated Telco, Inc., Consolidated Telecom, Inc., Consolidated Telephone Company, Eastern Nebraska Telephone Company, Great Plains Communications, Inc., Hartington Telecommunications Co., Inc., Hershey Cooperative Telephone Company, Inc., K&M Telephone Company, Inc., Nebraska Central Telephone Company, Northeast Nebraska Telephone Co., Rock County Telephone Company, Stanton Telephone Co., Inc. and Three River Telco.

² See Public Notice, Comments Invited on Petition for Forbearance Filed by the Verizon Telephone Companies with Respect to Their Broadband Services, WC Docket No. 04-440, DA 04-4049 (rel. Dec. 23, 2004).

³ See *Petition of the Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, WC Docket No. 04-440, Petition of the Verizon Telephone Companies for Forbearance (filed Dec. 20, 2004).

currently has an open Notice of Proposed Rulemaking (“NPRM”) addressing this issue⁴ and this NPRM is the appropriate mechanism in which to examine the issues raised in the Petition, as the issues can be considered in a comprehensive, instead of piecemeal, fashion.

The Nebraska Companies also believe that the Petition does not meet the statutory requirements to grant forbearance, as explained in greater detail below. Therefore, the Nebraska Companies believe that the Commission must deny the Verizon Petition.

II. The Arguments Provided By Verizon In Support Of Its Forbearance Petition Do Not Meet The Statutory Requirements To Grant Forbearance.

A. Enforcement Of The Title II Common Carriage And *Computer Inquiry* Requirements Is Necessary To Ensure That The Charges And Practices Are Just And Reasonable And Not Unjustly And Unreasonably Discriminatory.

There Is Not Sufficient Competition In The High-Speed Broadband Access Market To Ensure Just And Reasonable Charges.

Verizon asserts that the enforcement of Title II common carriage and *Computer Inquiry* requirements is not necessary to ensure that rates are just and reasonable or that carriers do not engage in unjust or unreasonable discrimination.⁵ In support of this assertion, Verizon offers statistics indicating that cable modem service is the primary provider of broadband connections to the Internet.⁶ Verizon also notes that services providing high-speed access to the Internet are provided by wireless and satellite carriers,

⁴ See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, *Universal Service Obligations of Broadband Providers*, and *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, CC Docket Nos. 95-20, 98-10, Notice of Proposed Rulemaking, FCC 02-42 (“*Wireline Broadband NPRM*”) (rel. Feb. 15, 2002).

⁵ See *Petition* at pp. 16-19 and pp. 20-23.

⁶ *Id.* at pp. 3-5.

and by electric companies through the use of power lines.⁷ In summarizing its discussion of competition, Verizon states that the Commission concluded that “broadband services [] are currently provided in a competitive environment.”⁸

The Nebraska Companies believe that Verizon has mischaracterized the Commission’s findings with respect to competition in the broadband services market contained in the *Triennial Review Order*.⁹ Verizon quotes the Commission as concluding that “broadband services [] are currently provided in a competitive environment.”¹⁰ The complete sentence from which Verizon extracted the foregoing quote reads:

We therefore tailor our unbundling requirements to most effectively address those services that are not yet fully subject to competition (*i.e.*, narrowband services in the mass market) rather than the broadband services that are currently provided in a competitive environment.¹¹

The complete quote indicates that the Commission is drawing distinctions between broadband and narrowband services for the purposes of unbundling the loop, and is not making a general finding that all broadband services are provided in a competitive environment.

Further, the Nebraska Companies do not believe that the data presented by Verizon indicates that a competitive market exists for the provision of high-speed Internet access that would ensure just and reasonable charges. Verizon has not demonstrated that

⁷ Id. at p. 6.

⁸ Id. at p. 8.

⁹ See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, and Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36 (“*Triennial Review Order*”) (rel. Aug. 21, 2003).

¹⁰ See *Petition* at p. 8.

¹¹ See *Triennial Review Order* at para. 292.

wireless, satellite, and power-line platforms for broadband service provide substantial competition in terms of market share at this time. In fact, Verizon does not even include data on market shares of broadband Internet access by type of technology. Rather, the report cited by Verizon only indicates that such services are offered.¹² The Nebraska Companies believe that the state of competition in the broadband market can best be assessed using the Commission's data. The Commission's data indicates that there are not a large number of competitors providing high-speed access to the Internet in many areas of the country. For example, in over one-third of the of the zip codes in the United States, high speed Internet access is available from two or fewer providers.¹³ In over half of the zip codes in the United States, high speed Internet access is available from three or fewer providers.¹⁴

The factors that determine whether or not a market is competitive and will deliver the benefits ascribed to a competitive market are the number of providers of a service and the market share of each of the providers. The mere presence of a few alternative providers for a service does not constitute competition. A market in which there are a few major competitors is referred to by economists as an oligopoly.¹⁵ In such a market, the providers find that over the long-run they will maximize their profits through

¹² See *Petition* at footnote 18.

¹³ See *High-Speed Services for Internet Access: Status as of June 30, 2004*, Industry Analysis and Technology Division, Wireline Competition Bureau, December 2004 at Table 12. Over one-third (36.3 percent) includes the zip codes that do not have high-speed Internet access available (5.7 percent).

¹⁴ *Ibid.* Over half (51.2 percent) includes the zip codes that do not have high-speed Internet access available (5.7 percent).

¹⁵ See Campbell R. McConnell, *Economics*, (New York: McGraw-Hill, Inc. 1978) at pp. 591-592.

collusion in the form of price leadership.¹⁶ Such collusion will result in prices that are higher than those of a regulated monopoly or a truly competitive market.¹⁷ Therefore, without the protection of the Title II common carriage and *Computer Inquiry* requirements, prices for broadband service to access the Internet provided by incumbent local exchange carriers (“ILECs”) may not be just and reasonable.

The Nebraska Companies also wish to emphasize that even if a large number of competitors exist in a market, there may still be market concentration and market power that will not result in the benefits of competition. For example, some carriers in the long-distance industry have argued that the industry is competitive because there are a large number of providers within the nation. However, a Commission report indicates that when viewed from the standpoint of market power, the long-distance industry is far from competitive, and is instead highly concentrated in terms of market power.

Information on market concentration is developed by the Department of Justice (“DOJ”), which uses such information in reviewing mergers. The DOJ often uses a measure of market concentration known as the Herfindahl-Herschman Index (“HHI”). This index ranges from zero in a perfectly competitive industry to 10,000 in an industry completely monopolized by a single firm. The most recently available HHI for ordinary long-distance service provided by long distance carriers is 2,832.¹⁸ The DOJ divides the spectrum of market concentration measured by the HHI into three regions that can be

¹⁶ Id. at pp. 598-599.

¹⁷ Id. at p. 605.

¹⁸ See Statistics of the Long Distance Telecommunications Industry, Industry Analysis & Technology Division, Wireline Competition Bureau, May 2003 at Table 9.

characterized as unconcentrated, moderately concentrated, and highly concentrated.¹⁹ The HHI for long distance service falls into the highly concentrated category, which is an HHI above 1,800. Therefore, while some might argue that the long-distance industry is competitive because it consisted of 940 firms at the time HHI cited here was calculated, there was still significant concentration of market power that cannot be characterized as a competitive market. While market concentration data for providers of high-speed broadband access to the Internet in markets served by Verizon is not available, the Nebraska Companies believe that the concentration of market power in these markets is similar, if not greater, than that in the long-distance market.

Verizon Has Mischaracterized The Commission's Findings Concerning The Forbearance Provided With Regard To Broadband Elements In The Section 271 Order.²⁰

To support their argument that enforcement of the challenged regulation is not necessary to ensure that the charges and practices are just and reasonable, Verizon uses excerpts from the Commission's recently released *Section 271 Order*. It appears that Verizon has mischaracterized the Commission's findings in an effort to support its Petition.

Verizon states that “. . . the Commission recently made clear that in the broadband market, it is appropriate to focus on the prices to consumers in deciding whether this

¹⁹ See U.S. Department of Justice and the Federal Trade Commission, Horizontal Merger Guidelines, issued April 2, 1992, revised April 8, 1997 at p. 15.

²⁰ See *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, WC Docket No. 01-338, *SBC Communications Inc.'s Petition for Forbearance under 47 U.S.C. § 160(c)*, WC Docket No. 03-235, *Qwest Communications International Inc. Petition for Forbearance under 47 U.S.C. § 160(c)*, WC Docket No. 03-260, and *BellSouth Telecommunications, Inc. Petition for Forbearance under 47 U.S.C. § 160(c)*, WC Docket No. 04-48, Memorandum Opinion and Order (“*Section 271 Order*”) (rel. Oct. 27, 2004).

forbearance requirement is met.”²¹ In fact, a sentence from the source paragraph quoted by Verizon reads:

Although in other forbearance orders, the Commission placed emphasis on the wholesale aspect of the 10(a)(1) prong, *we find that under the particular circumstances relevant to the instant analysis, it is appropriate to consider the wholesale market in conjunction with competitive conditions in the downstream retail broadband market.*²² (emphasis added)

The Commission’s statement clearly indicates that it was considering competitive conditions in “the wholesale market in conjunction with . . . the downstream retail market”²³ and was not focusing entirely on the retail market in determining whether forbearance was appropriate. Furthermore, the Commission indicated its finding were “under the particular circumstances relevant to the instant analysis”²⁴ which concerned whether unbundling obligations lifted in the *Triennial Review Order* should still be imposed in order to meet Section 271 obligations.²⁵ The “particular circumstances” that led the Commission to grant forbearance from unbundling obligations are not the same, and thus are not relevant as to whether common carriage and *Computer Inquiry* rules should continue to be enforced.

As indicated above, in over one-third of the zip codes in the United States, high speed Internet access is available from two or fewer providers. Without the protection of the common carriage and *Computer Inquiry* rules, the concentration of market power in these areas would allow the providers of high speed Internet access to collude and raise

²¹ See *Petition* at p. 16.

²² See *Section 271 Order* at para. 21.

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Id.* at para. 1.

their prices to end users. When the Commission lifted its unbundling obligations for broadband elements in the *Triennial Review Order*, and also granted forbearance from enforcing the unbundling requirements under Section 271, its action only affected the pricing and availability of unbundled network elements used in the wholesale market. As the Commission concluded “. . . the contribution of section 271 unbundling requirements to ensuring just and reasonable charges and practices is relatively modest – particularly at the retail level. . . .”²⁶ End users were still protected against unjust and unreasonable prices and practices through the application of the common carriage and *Computer Inquiry* rules. Therefore, while Verizon attempts to use the *Section 271 Order* to justify forbearance from common carriage and *Computer Inquiry* rules, the situation and circumstances are completely different than those related to the Petition, and as such do not support forbearance from common carriage and *Computer Inquiry* rules for broadband transmission as requested by Verizon.

Retention Of The Title II Common Carrier Obligations Is Critical To
Maintaining Just And Reasonable Rates For Basic Local Exchange
Service For Many Rural, High-Cost Carriers.

It appears that in its Petition, Verizon is requesting forbearance only for broadband services offered by Verizon.²⁷ However, Verizon indicates that it supports the petition for forbearance filed by BellSouth, in which BellSouth requested forbearance from Title II common carriage obligations and Computer Inquiry rules for *all* ILECs.²⁸ Therefore, the Nebraska Companies will address detrimental effects on rates for rural

²⁶ Id. at para. 21.

²⁷ See *Petition* at p. 1.

²⁸ Ibid.

companies which would likely occur if the forbearance requested by Verizon and BellSouth was applied to all ILECs.

Verizon supports BellSouth's request that the Commission should forbear from applying the cost allocation rules set out in 47 C.F.R. § 64.900, which require the allocation of ILECs' costs between regulated and non-regulated services.²⁹ Verizon references an ex parte it had filed on the allocation of costs between regulated and non-regulated services, in which it argues that if broadband services were regulated under Title I instead of Title II, changes in accounting and cost-allocation rules would be unnecessary.³⁰ Verizon asserts that changes in such rules would be unnecessary because universal service fund distributions for non-rural carriers are based on a hypothetical cost model that operates independently from the Part 64 or Part 32 accounting rules.³¹ However, because the current universal service support mechanism for rural carriers is based on embedded costs, the Nebraska Companies do not believe that the Commission would be persuaded to forbear from applying the cost allocation rules set out in 47 C.F.R. § 64.900 for rural companies. The movement of broadband services from a regulated to a deregulated category for cost allocation purposes would not result in just and reasonable rates for rural carriers, as explained below.

Section 254(k) of the Telecommunications Act of 1996 (the "Act") states that "[t]he Commission, with respect to interstate services, . . . shall establish any necessary cost allocation rules, accounting safeguards, and guidelines to ensure that services

²⁹ Id. at footnote 51.

³⁰ Ibid.

³¹ See Letter from Richard T. Ellis, Verizon, to Marlene H. Dortch, FCC, WC Docket Nos. 02-33, 01-337, 95-209, and 98-10 (filed Jan. 6, 2004) at p. 5.

included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services.” The Nebraska Companies believe that in order to comply with this provision of the Act, the elimination of Title II regulation from wireline broadband service would require all carriers offering such service to move a portion of the investment and expenses to provide broadband service to a deregulated category. This would certainly include a portion of the local loop and loop-related expenses, as wireline broadband service is provided over the local loop.

Allocating loop investment and expenses to a deregulated category would make it difficult if not impossible for rural, high-cost companies to recover their network costs. The allocation of loop costs to a deregulated category would reduce any high-cost universal service support a company would receive, as the allocated cost would decrease. While the universal service support received by rural, high-cost carriers would decrease due to this allocation, it is unlikely that such carriers would receive an amount equal to the decrease in support through wireline broadband service revenues. In fact, an allocation of loop costs to wireline broadband service would necessitate an increase in the rate for this service. A rate increase would in turn decrease demand for the service, lowering overall revenues received to maintain a loop plant and pay loop-related expenses. Therefore, the only alternative many rural, high-cost companies would have to recover their loop investment and expenses would be to raise basic local exchange rates. This would not result in just and reasonable rates for customers in rural, high-cost areas. It would also violate Section 254(b)(3) of the Act, which requires that rates in rural areas be reasonably comparable to rates for similar services offered in urban areas.

B. Forbearance Is Not Consistent With The Public Interest, As It Would Limit Innovation.

In its Petition, Verizon claims that “the Commission has repeatedly recognized that increased competition and the resulting consumer benefits satisfy the ‘public interest’ prong of the forbearance test.”³² Verizon then asserts that forbearing from regulation as it requests will lead to “lower prices, better service, and increased availability of broadband services.”³³ The Nebraska Companies believe that by introducing this narrow definition of public interest, Verizon is essentially asking the Commission not to consider other consequences, such as the impact that the restriction of access to broadband transmission services could have on information service providers (“ISPs”). Public interest is a broad concept, and a judgment as to whether forbearance is in the public interest should examine all possible impacts on consumers.

Forbearance from common carriage and *Computer Inquiry* regulations could eliminate open access to independent ISPs. Even if ILECs were to claim that they would provide broadband transmission service to independent ISPs, such claims should not be believed. Similar claims were made by AOL and Time Warner at the time of their merger, and have proven to be far from reliable.³⁴ The Commission must not permit itself to be misled by mere promises of open access, especially when the behavior of major players in the broadband market has demonstrated a propensity to abandon such promises in favor of discriminatory actions.

³² See *Petition* at p. 20.

³³ *Ibid.*

³⁴ See *An Open Access Business Model for Cable Systems: Promoting Competition and Preserving Internet Innovation on a Shared, Broadband Communications Network*, NorthNet, Inc. available at <http://northnet.net/OpenAccessModel.pdf>

The principle of open, nondiscriminatory access to essential facilities is an important part of the foundation of our system that permits innovators to confidently develop new products and services in the knowledge that they can freely deliver them to consumers. Without open access to transportation networks, manufacturers would be unable to freely ship goods to their markets. They would instead be forced to negotiate, perhaps with owners of roads and bridges, the terms under which shipment of goods could occur.

In the information services market, independent ISPs have played a crucial entrepreneurial role³⁵ in producing the "vibrant and competitive free market that presently exists for the Internet"³⁶ the Commission correctly seeks to preserve.³⁷ If the Commission were to ignore the vital role independent ISPs play in meeting consumer demand for information services, and were to eliminate their ability to freely deliver such services to consumers via wireline facilities, not only would it run counter to Congressional intent and the legal principle of open access to essential facilities, but it would be violating one of its own goals.

III. Conclusion

The Nebraska Companies recommend that the Commission should dismiss the Verizon Petition, and continue to apply the *Computer Inquiry* rules and Title II common

³⁵ See CFA: Administration's Broadband Policy Would Strangle ISPs, Destroy Competitive Internet Marketplace; available at http://www.consumerfed.org/070102_broadband_release.html

³⁶ 47 U.S.C. § 230 (b)(2).

³⁷ See *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, *Internet Over Cable Declaratory Ruling*, and *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, FCC 02-77 ("*Cable Modem Declaratory Ruling*") (rel. Mar. 15, 2002) at para. 4.

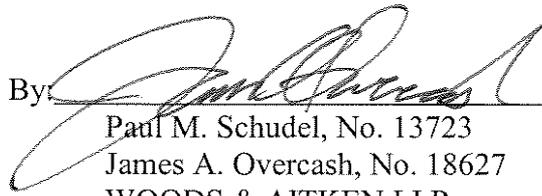
carriage requirements to broadband transmission service offered by Verizon and other ILECs. As indicated in the introduction, the Nebraska Companies believe that the issues raised by the Verizon Petition should be addressed through the *Wireline Broadband NPRM*, which provides a comprehensive framework for examining changes in regulation of ILEC broadband transmission services.

Dated: February 8, 2005.

Respectfully submitted,

The Nebraska Rural Independent Companies

Arlington Telephone Company,
The Blair Telephone Company,
Cambridge Telephone Company,
Clarks Telecommunications Co.,
Consolidated Telco, Inc.,
Consolidated Telecom, Inc.,
Consolidated Telephone Company,
Eastern Nebraska Telephone Company,
Great Plains Communications, Inc.,
Hartington Telecommunications Co., Inc.,
Hershey Cooperative Telephone Company, Inc.,
K&M Telephone Company, Inc.,
Nebraska Central Telephone Company,
Northeast Nebraska Telephone Co.,
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