

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

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

**REPLY COMMENTS OF  
THE FEDERATION OF INTERNET SOLUTION  
PROVIDERS OF THE AMERICAS**

The Federation of Internet Solution Providers of the Americas (“FISPA”), by its attorneys, hereby submits its Reply Comments to the December 22, 2004, Petition for Forbearance filed by the Verizon Telephone Companies (“Petition”).<sup>1</sup>

**INTRODUCTION**

The comments representing the competitive side of the industry, the non-incumbents, unanimously support FISPA’s Opposition to Verizon’s Petition.<sup>2</sup> This should come as no surprise to the Commission because the wealth of evidence in the record of this and related proceedings shows that today’s broadband marketplace, particularly for wholesale services, is not sufficiently competitive. The current environment provides Verizon with the incentive to continue leveraging its market power to engage in unfair, anticompetitive practices against independent ISPs. The evidence in this record, and far more than can be gathered, prove that

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<sup>1</sup> *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 Their Broadband Services*, WC Docket No. 04-440 (Dec. 22, 2004).

<sup>2</sup> *See generally*, Comments of Vonage Holdings Corp., Opposition of CloseCall America, Inc., CTC Communications Corp., FDN Communications, Inc., Gillette Global Networks, Inc. d/b/a Eureka Networks, Comments of Pac-West Telecomm, Inc., TDS Metrocom, LLC, Comments of McLeodUSA Telecommunications Services, Inc., Comments of Michigan Online Group, Inc., Opposition of Internet Junction Corporation, Comments of CompTel/ASCENT, Comments of TEXALTEL, Comments of MCI, Inc., Comments of Time Warner, Inc., XO Communications, Lightship Telecom, LLC, Conversent Communications, LLC, Comments of AT&T Corp., Comments of EarthLink, Inc., Opposition of Covad Communications Company, Opposition of Information Technology Association of America, and Comments of Sprint Corporation.

Verizon's claim that it lacks the ability to dominate the broadband marketplace is simply untrue. Far to the contrary, as the vast majority of commenters argue,<sup>3</sup> the current state of competition in the market for wholesale broadband services necessitates the denial of Verizon's Petition so that the appropriate economic and regulatory safeguards of Title II and the *Computer Inquiry* rules continue to protect the independent ISPs' ability to compete.

Indeed, Title II common carriage and *Computer Inquiry* requirements need not only remain, but their application expanded and made more effective. Experience shows that, as Verizon became more active in the retail DSL marketplace in recent years, the mere existence of Title II and *Computer Inquiry* safeguards failed to sufficiently deter Verizon from engaging in anti-competitive behavior towards its wholesale DSL customers (and retail competitors), including many FISPA members. Given the absence of a competitive market for wholesale broadband services, Verizon's unfair business practices will only increase if the requested forbearance is granted. This much is evident in the marketplace abuses described and attested to by FISPA members in the Declarations submitted with its Opposition. Indeed, the evidence of record requires that the Commission not only deny Verizon's Petition, it strongly supports the need for the Investigations and Hearings Division of the Enforcement Bureau to open an investigation of Verizon's compliance with existing Title II and *Computer Inquiry* rules. The Commission has done so in other cases in which an incumbent's behavior raised serious questions about compliance with Commission directives designed to prevent anti-competitive and abusive behavior.<sup>4</sup>

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<sup>3</sup> See *Id.*, footnote 2.

<sup>4</sup> See FCC Enforcement Bureau website listing of Local Telephone Competition Enforcement Action, available at: <http://www.fcc.gov/eb/LoTelComp/enf.html>

## **I. FISPA MEMBERS' EXPERIENCES WITH VERIZON'S CURRENT ANTI-COMPETITIVE BEHAVIOR FIND SUPPORT FROM OTHER COMMENTERS**

FISPA members are not alone. Their experiences trying to compete in the retail broadband market against Verizon and other ILEC DSL transport wholesalers is commonplace; from predatory pricing to price squeezes to outright tortious interference, ISPs have experienced it all at the hands of the dominant ILECs.

Verizon's anti-competitive and predatory pricing practices, as described by small, independent ISP, WTS Online, are all too common:

“The bottom line is simple. Verizon has retail and wholesale contracts with independent providers at a cost that is higher than their lowest priced “retail” bundled price and an unbundled price little more than the wholesale price. The result is that over 90% of DSL customers have chosen to save money (temporarily in my opinion), by taking the lower price from the unregulated subsidiary instead of an independent. This is monopolistic practice, by any definition....” *See* Comments of WTS Online at 8.

And MCI's Opposition explains how these pricing practices, absent tariff regulation, will result in a price squeeze:

“[i]n the absence of Title II's tariffing requirements, Verizon could charge significantly above-cost prices for wholesale DSL service in order to subject non-affiliated ISPs to a price squeeze. Verizon's affiliated ISP could absorb the increased costs and continue to offer a competitively priced Internet access product. Non-affiliated ISPs, however, would [sic] little choice but to pass the higher DSL costs on to their end users. This would of course, result in a loss of customers to the lower priced services of Verizon's affiliated ISPs. Ultimately, Verizon and other LECs could substantially reduce, or eliminate completely, non-affiliated ISPs in the Internet access market.”<sup>5</sup>

FISPA's Opposition demonstrates that MCI's prediction of the future for non-affiliated ISPs is all too accurate. Simply put, if forbearance is granted, the independent ISP will cease to be. That such a result is inevitable has been testified to by many FISPA members in the

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<sup>5</sup> MCI Opposition at p. 11.

Declarations filed with its Opposition. For the Commission's convenience and by way of emphasis here are some excerpts.

From FISP member Intelligence Network Online:

"Our company has also experienced anti-competitive marketplace pricing by Verizon, our ILEC wholesaler/competitor. Verizon sells DSL, frame relay and point-to-point circuit pricing to their retail customers for less than the wholesale cost offered to us. Also, by packaging "deals" that include internet and voice services, it becomes cost-prohibitive for us to compete... In addition, their resale "minimums" are so high that there is no way that anyone could ever commit to them." *Intelligence Network Declaration* at ¶ 8.

Mecklenburg Communication declared that it has "experienced everything from below wholesale cost pricing to intentionally slow installations..." *Mecklenburg Communication Declaration* at ¶ 8.

These, and the many other cited examples, reflect only a fraction of the anti-competitive practices in which Verizon is currently engaged. Remarkably, these practices are all happening with the regulatory safeguards of Title II and *Computer Inquiry* still in place! There is no doubt that, without economic regulations, anti-competitive pricing will expand until competition is gone.

But Verizon's anti-competitive behavior toward independent ISPs does not end with the price-squeezing and cross-subsidization seen today. Independent ISPs are also experiencing widespread "DSL slamming" by incumbents like Verizon. *See Internet Junction Declaration* at ¶ 9 ("... many of our customers have experienced slamming. While we were actively working with Verizon to convert customers from retail to wholesale plans (in order to save them money), some of our customers were unknowingly, and without customer permission, switched over to Verizon DSL service by Verizon.").

It should also be obvious that without the existing economic regulations, Verizon is free to cross-subsidize between unregulated and regulated services. The Commission has found that cross-subsidization can harm consumer choices in the unregulated market, thus making Title II cost allocation rules a necessary safeguard against “improperly shifting costs from unregulated to regulated offerings” that in turn “can have adverse impacts ... on competition in unregulated markets, by providing an opportunity for carriers to charge artificially low prices for their unregulated goods and services.”<sup>6</sup>

As MCI argued, “a firm that possesses market power over physical access to the network has both the incentive and the ability to restrict competitors’ access to end users, effectively preventing end users from enjoying applications or content from specific providers.”<sup>7</sup> The “Commission has long recognized the need to safeguard against the potential for a carrier with market power in an upstream market to leverage its power to harm competition in a down stream market.”<sup>8</sup> Since it is undeniable that Verizon has market power in the physical layer of the IP-based networks, the Commission must safeguard against the potential of Verizon using this lower layer power as leverage to harm competition downstream in one of the higher layers (*e.g.*, application or content layers).

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<sup>6</sup> *In the Matter of Amendment of Section 64.702 of the Commission’s Rules (Third Computer Inquiry)*, Report and Order, 104 F.C.C. 2d 958 ¶ 234 (1986) (history omitted).

<sup>7</sup> MCI Opposition at p. 4.

<sup>8</sup> *Id.* at p. 3; *see, e.g., Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC’s Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 12 FCC Rcd 15756 (1997) (“LEC Classification Order”); *Amendment of Section 64.702 of the Commission’s Rules and Regulations*, 77 F.C.C.2d ¶ 299 (1980); *see also*, Earthlink Opposition at p. 30 (commenting that forbearance will defeat the goal of the Act because the consumers “will not have the full benefits of competition, such as competitive pricing...”).

## II. A COMMISSION INVESTIGATION IS WARRANTED.

In 1999, the Commission promised to vigorously enforce its *Computer Inquiry* rules -

*The Commission will not hesitate to use its enforcement authority, including the Accelerated Docket or revised complaint procedures, to review and adjudicate allegations that a BOC is falling short of fulfilling any of its CEI obligations.*<sup>9</sup> (emphasis added).

To date, however, there is no evidence the Commission has exercised its enforcement authority in any meaningful way. As the Declarations of FISPA members and the comments of other ISPs attest, this lack of enforcement is not for want of alleged violations.<sup>10</sup>

When the Commission issued its stern warning six years ago, the market for broadband services was in its infancy;<sup>11</sup> ILECs such as Verizon were just starting to deploy broadband DSL. Interestingly, the deployment that took place in these early years came primarily at the insistence and through the efforts of data-centric CLECs, such as Northpoint, Covad, and Rhythms, each of which catered to independent ISP demand for such advanced services. Circumstances today are different; Northpoint and Rhythms are gone and the few competitive alternatives to RBOC facilities that are left are rapidly drying up, especially those serving the residential market. Now, more than ever, independent ISPs must rely on RBOC bottleneck facilities to provide high-speed services to their customers. Recognizing this reliance, the RBOCs have redoubled their efforts to eliminate independent ISPs as a viable intramodal competitor, as the experiences of FISPA members amply demonstrate.

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<sup>9</sup> *In re Computer III Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, CC Docket No. 95-20, CC Docket No. 98-10, *Report and Order*, ¶ 7 (March 10, 1999) (hereinafter *Computer III Order 1999*), 14 FCC Rcd. 4289, ¶ 15.

<sup>10</sup> *See id.*, footnote 7.

<sup>11</sup> According to the Commission's Report, *High-Speed Services for Internet Access: Subscriberhip as of June 30, 2004*, Wireline Competition Bureau, Industry Analysis and Technology Division (December 2004), in December 1999 there were only 369,792 wireline subscribers of high speed lines. This number grew to 11,398,199 by 2004.

The scofflaw attitude shown by Verizon should be viewed as an utter disrespect for Commission regulation, an attitude that FISPA submits is attributable to two factors. First, the RBOCs engage in anticompetitive behavior towards small ISPs because history makes them confident that no formal legal action will be pursued to vindicate the small ISPs' rights. Most independent ISPs are small businesses and lack the financial and personnel resources necessary to prosecute a section 207 or 208 complaint, while at the same time running their operations, servicing their customers, and trying to survive on razor-thin margins. The fact that well-healed RBOCs can and have litigated smaller competitors into oblivion is not lost on small ISPs who, over the years, have been repeatedly aggrieved by the anti-competitive business tactics that their larger ILEC competitor/wholesalers practice with impunity.

Second, RBOCs are equally confident that the Commission will not independently enforce the regulations that are on the books. FCC officials advocate bringing enforcement issues to the attention of the Commission -

“Issues can be brought to the attention of the Investigations and Hearings Division of the Enforcement Bureau. If the Division believes that a violation may have occurred, it can investigate and the FCC may pursue enforcement action on its own.”<sup>12</sup>

But the history of FCC enforcement actions pertaining to ILEC/ISP business dealings, or more appropriately lack thereof, give the RBOCs comfort that their anticompetitive marketplace behavior will escape meaningful sanctions or interdiction. Perhaps more troubling is that the Commission's inaction in response to countless informal and unpublished complaints lodged by

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<sup>12</sup> See, Robert Cannon, Senior Counsel for Internet Issues, Office of Plans and Policy, Federal Communications Commission, Where Internet Service Providers and Telephone Companies Compete: A Guide to the Computer Inquiries, Enhanced Service Providers and Information Service Providers, Version 0.7 at pg. 38. Available at: <http://www.cybertelecom.org/ci/guide.doc>

independent ISPs over the years has created a widespread belief that informing the Commission of rule violations will fall on deaf ears.

The Commission should be concerned that its existing enforcement mechanisms and past practices create significant barriers to small ISPs' (and for that matter, small businesses, in general) ability and desire to seek redress of the competitive harms they encounter with their ILEC competitors/wholesalers. The Commission should be concerned that its promises to promote true competition and to punish anti-competitive behavior ring hollow. The Commission should be concerned that it is being used to protect dominance in telecommunications. The Commission should be concerned that it is truly unnecessary to protect such dominance because the independent competitor does not want special considerations, they simply want to compete and are happy to compete against anyone, including the incumbents, if but the field of competitive battle is level for all players – not just the few big ones.

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### **III. CONCLUSION**

Absent pro-active enforcement, independent ISPs will continue to be punished in the marketplace. There is ample evidence in the record of this proceeding alone to warrant an independent investigation of Verizon and other RBOCs' compliance with the mandates of Title II and *Computer Inquiry*. FISPA joins other ISPs and competitive companies in urging the Commission to deny Verizon's requested forbearance and, instead, vigorously enforce these rules. To do otherwise would decimate independent ISPs, which are a vital, yet ailing, part of this nation's Internet economy.

**RESPECTFULLY SUBMITTED,**

**THE FEDERATION OF INTERNET SOLUTION  
PROVIDERS OF THE AMERICAS**

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