



February 17, 2006

EX PARTE

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, D.C. 20554

Re: Petition of Verizon Telephone Companies for Forbearance Under 47 U.S.C. §160 from Title II and *Computer Inquiry* Rules with Respect To Their Broadband Services, WC Docket No. 04-440

Dear Ms. Dortch:

On February 7, 2006, Verizon filed an *ex parte* letter in the above-referenced docket at the “request of the Commission’s staff” to provide additional detail in support of its request for forbearance from Title II regulation for numerous telecommunications transmission services.¹ Verizon’s *ex parte* provides further clarity regarding the parameters of its original petition, but offers no new evidentiary support or legal justification that would warrant the requested forbearance.² Most importantly, Verizon again makes clear that it is asking for forbearance from “the mandatory application of Title II” to its transmission services

¹ Letter from Edward Shakin, Vice President and Associate General Counsel, Verizon, to Marlene Dortch, Secretary, Federal Communications Commission, February 7, 2006, at 1 (Verizon February 7 *Ex Parte Letter*).

² Verizon’s original petition, filed in December of 2004, requests forbearance for “all broadband services” that Verizon “does or may offer.” Petition of Verizon Telephone Companies for Forbearance Under 47 U.S.C. §160 from Title II and Computer Inquiry Rules with Respect To Their Broadband Services, WC Docket No. 04-440. It is unclear from Verizon’s February 7 *Ex Parte Letter* whether Verizon intends to withdraw its original forbearance petition and replace it with the request for relief set out in this *ex parte* letter. For example, rather than request relief for “all broadband services,” Verizon now delineates eleven specific services for which it requests relief. See Verizon February 7 *Ex Parte Letter* at Attachment 1.

– not certain provisions of Title II, but the entire statute.³ For the reasons set out in COMPTTEL’s prior comments in opposition to Verizon’s petition, as well as the additional discussion below in response to this latest *ex parte* submission, COMPTTEL again urges the Commission to deny Verizon the forbearance relief it requests.

The most direct bar to the relief Verizon seeks – one that Verizon fails to address in its *ex parte* letter – is the Commission’s rejection, in the Wireline Broadband Internet Access Order, of the exact relief sought by Verizon in the instant forbearance petition. Although Verizon claims in this latest *ex parte* filing that its forbearance request “meets the same criteria used to justify forbearance in the Wireline Broadband Order,” exactly the opposite is true.⁴ In the Wireline Broadband Internet Access Order, the Commission found that the particular characteristics of broadband Internet access services merited different regulatory treatment under the Communications Act, as amended.⁵ In so finding, the Commission distinguished non-Internet access transmission services, which it held were subject to the full panoply of Title II obligations. The Commission expressly limited the relief granted to wireline broadband Internet access services, and excluded from the relief granted “other wireline broadband services, such as stand-alone ATM service, frame relay, gigabit Ethernet service, and other high-capacity special access services, that carriers and end users have traditionally used for basic transmission purposes.”⁶ The Commission based its decision to exclude these transmission services – the exact same services, not incidentally, for which Verizon seeks forbearance relief in the instant petition – on the fact that “these services lack the key characteristics of wireline broadband Internet access service – they do not inextricably intertwine transmission with information-processing capabilities.”⁷ The Commission concluded that “[b]ecause carriers and end users typically use these services for basic transmission purposes, these services are telecommunications services under the statutory definitions.”⁸ Verizon presents no new facts or legal argument in its *ex parte* letter that explain why the Commission

³ Verizon February 7 *Ex Parte Letter* at 3.

⁴ Verizon February 7 *Ex Parte Letter* at 4.

⁵ In the Matter of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, CC Docket No. 02-33, Report and Order and Notice of Proposed Rulemaking, FCC 05-150, (released September 23, 2005) (Wireline Broadband Internet Access Order). COMPTTEL strongly disagrees with the Commission’s decision to release incumbent LECs from Title II obligations related to their wireline broadband Internet access services and has appealed the Commission’s holding. *See* COMPTTEL v. FCC, No. 06-1466 (3rd Cir., filed February 3, 2006).

⁶ Wireline Broadband Internet Access Order at ¶ 9.

⁷ *Id.*

⁸ *Id.*

should reverse its refusal to grant the exact relief requested by Verizon less than five months ago.

In response to the Commission's request for specific delineation of the relief requested, Verizon explains that it is seeking relief "from the mandatory application of Title II common carriage regulation."⁹ Verizon asks the Commission to eliminate every provision of Title II of the Act, including the most basic obligations of sections 201 and 202 that require nondiscrimination and provision of service in a just and reasonable manner. This broad request for relief stretches beyond the Commission's previously stated constraints on such broadband relief. The Commission has held that, although section 10 gives the Commission authority to forbear from enforcing sections 201 and 202, such a decision would be a "particularly momentous step."¹⁰ Even were the Commission to countenance doing so in this proceeding, Verizon fails to explain – in either its original petition or its *ex parte* letter – how such an unprecedented departure from Commission precedent is justified under the specific test set out in section 10 of the Act. The Commission has said that it "cannot forbear in the absence of a record that will permit [the Commission] to determine that each of the tests set forth in section 10 is satisfied for a specific statutory or regulatory provision."¹¹ Verizon does not explain, as to a single specific provision of Title II, how its forbearance petition meets the section 10 test. Moreover, the Commission has already rejected the notion that forbearance petitions can be used as substitutes for broad rulemaking proceedings, such as would be the case if Verizon's forbearance request were granted and the entirety of Title II obligations were removed.¹²

As in its original petition, Verizon again contends that forbearance is justified because it is only a minor player in the broadband market, and freedom

⁹ Verizon February 7 *Ex Parte Letter* at 3.

¹⁰ In re PCIA's Petition for Forbearance for Broadband Personal Communications Services, 13 F.C.C.R. 16,857, ¶ 15 (1998).

¹¹ In re Forbearance From Applying Provisions of the Communications Act to Wireless Telecommunications Carriers, 15 F.C.C.R. 17,414, ¶ 13 (2000).

¹² *See* In the Matter of Petition of SBC Communications Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services, WC Docket No. 04-29, Memorandum Opinion and Order, FCC 05-95 at 9 (released May 5, 2005) ("While the Commission might sometimes choose to grant the relief sought by parties in the form of interim rules, permanent rules, or declarations regarding existing law, a framework permitting parties to compel a forbearance decision within the period set out in section 10(c) would unduly cabin the Commission's discretion in considering both whether and when to modify discrete aspects of the regulatory regime and could well stymie comprehensive reform. We do not believe that Congress, in framing section 10, could have intended this result, given the absence of specific deadlines for rulemaking proceedings in the statute.").

from the regulatory strictures of Title II will enable it to better compete against its well financed, entrenched competitors and encourage investment in broadband facilities. That was not true before Verizon acquired MCI, and it certainly is even less true today. In the *Verizon/MCI Merger Order*, the Commission found that “the merger, absent appropriate remedies, is likely to result in anticompetitive effects for wholesale special access services.”¹³ These wholesale special access services – for which Verizon seeks forbearance relief in the instant petition – were the subject of detailed conditions, as set out in greater detail below, that make Verizon’s forbearance petition patently invalid.

In the *Verizon/MCI Merger Order*, the Commission found that the “the relevant geographic market for wholesale special access services is a particular customer’s location.”¹⁴ Thus, Verizon’s argument in the instant proceeding that “myriad other providers compete to serve this segment of the market” is entirely unhelpful to its request for forbearance, as it provides no indication as to which, if any, of the enterprise customers currently served via Verizon’s special access services would have any alternative if special access were eliminated.¹⁵ In the Verizon/MCI merger proceeding, Verizon argued – as it does in the instant proceeding – that a multitude of competitive providers make alternative special access services available to enterprise customers.¹⁶ But the Commission rejected that argument there, and must do so here, because the “record does not, however, clearly indicate the extent to which individual buildings are served by one or more of these competitive LECs.”¹⁷ Put another way, Verizon’s painstaking research of the web sites of various competitive LECs, culled to support an argument that competitive alternatives are ubiquitously available, fails to list even a single building that could obtain service from another carrier were forbearance granted

¹³ *Verizon/MCI Merger Order* at ¶ 24.

¹⁴ *Id.* at ¶ 28.

¹⁵ Verizon February 7 *Ex Parte Letter* at 7.

¹⁶ *Compare* Verizon February 7 *Ex Parte Letter* at 7-8 (listing Sprint, McLeodUSA, TelCove, Qwest, Xspedius, Conversent, Cavalier, Global Crossing, AT&T, SAVVIS, XO, Equant, Level 3, BT Infonet, Time Warner Telecom, Looking Glass, ICG, Cogent, and OnFiber as alternative competitive providers) *with* Verizon/MCI Lew Reply Decl., WC Docket No.05-75, at Exh. 1A (listing 360 Networks, AboveNet, AT&T, Broadwing/Focal, Cablevision Lightpath, Con Ed, Cox, CTC Communications, CTSI, Elantic/Dominion, Edison Carrier Solutions/SCE, Electric Lightwave, Fiber Net, FPL Fibernet, Interstate Fibernet/ITC Deltacom, DMC Telecom, Level 3, Looking Glass, McLeod USA, Neon, NTS Communications, On Fiber, PPL Telecom, Progress Telecomm, Qwest, SBC Communications, Sprint, TelCove, Time Warner, Wiltel and XO as alternative providers of special access services).

¹⁷ *Verizon/MCI Merger Order* at ¶ 30.

and Verizon's services eliminated as wholesale special access alternatives.¹⁸ Verizon has not listed a single building with non-Verizon facilities available to it, nor has it explained how, in the absence of wholesale alternatives to Verizon's network, any competitive carrier could provide service to customers currently served via Verizon's wholesale services.

To the extent that the Commission found, in the *Verizon/MCI Merger Order*, that the combined company would be unable, in certain areas, to exercise market power to the detriment of enterprise customers, the Commission made that finding based on its conclusion that “[c]ompeting carriers can use their existing collocation facilities in the relevant wire center (or contract with a competitor that has such collocation facilities) and can purchase special access circuits or UNE loops to provide Type II services.”¹⁹ But were Verizon granted the relief requested in the instant forbearance petition – elimination of all Title II obligations -- competing carriers would have no access to either special access circuits or UNE loops, and thus could not provide any alternatives to enterprise customers. Because the Commission has concluded that “the relevant geographic market for wholesale special access services is a particular customer’s location,” the only relevant evidence of wholesale alternatives must be specific to each enterprise customer location.²⁰ Verizon has adduced no evidence of alternatives to even a single customer location, and thus it has failed to establish its entitlement to forbearance from all Title II obligations.

As the Commission concluded in the *Verizon/MCI Merger Order*, competitive carriers without their own facilities have only two options in seeking to serve enterprise customers: “competing carriers can either combine competitive transport with special access loops or, where available, high-capacity loop UNEs purchased from Verizon.”²¹ Neither of those options would be available if Verizon were granted the requested forbearance relief. Ironically, Verizon’s assertion in its *ex parte* letter that it is subject to “intense” competition in the enterprise space is based on competitive carriers use of UNEs and special access services.²² Verizon’s contention that such wholesale services are unnecessary flies in the face of the Commission’s conclusion that “it appears unlikely that a carrier would be willing to make the significant sunk investment” to deploy loop facilities to enterprise

¹⁸ See Verizon February 7 *Ex Parte Letter* at 8-10 (listing web addresses of competitive carriers that offer broadband services).

¹⁹ *Verizon/MCI Merger Order* at ¶ 36.

²⁰ *Id.* at ¶ 37.

²¹ *Id.* at ¶ 41.

²² Verizon February 7 *Ex Parte Letter* at 7.

customers.²³ The Department of Justice echoed these findings, concluding in its complaint that “[a]lthough other CLECs can, theoretically, build their own fiber connection to each building in response to a price increase by the merged firm, such entry is a difficult, time-consuming, and expensive process.”²⁴

In approving the Verizon/MCI merger, the Commission adopted numerous conditions related to provision of special access services to protect against anticompetitive harms that the Commission found would otherwise result.²⁵ Specifically, the Commission required the combined entity to implement a performance metrics plan for interstate special access services; not to raise rates paid by existing customers of MCI’s DS1 and DS3 wholesale metro private line services that MCI provides in Verizon’s incumbent local telephone company service areas; not to provide special access offerings to their wireline affiliates that are not available to other similarly situated special access customers on the same terms and conditions; and not to increase the rates set forth in Verizon’s interstate tariffs, including contract tariffs, for DS1, DS3 and OCn special access services.²⁶ It is inconceivable that the Commission would effectively freeze Verizon’s special access service terms, conditions, and rates, and then permit Verizon to eliminate nearly a dozen of its special access offerings. Such a result would require the Commission to reevaluate the terms of its approval of the Verizon/MCI merger, because the wholesale alternatives upon which the Commission based its approval would, only two short months after the merger closed, be eliminated.

Verizon’s evidence of competitive transmission offerings also suffers from an additional flaw. Although Verizon argues that numerous competitive carriers offer enterprise transmission services that could replace Verizon’s special access and UNE services, Verizon does not detail the specific offerings beyond broad characterizations.²⁷ For example, although it cites the availability of alternative Frame Relay, ATM, IP/VPN, and Ethernet providers in its recent submission to the Commission, Verizon does not explain where in its service territory each of those alternative services is actually offered. Verizon provides no information about the

²³ *Verizon/MCI Merger Order* at ¶ 39.

²⁴ DOJ *Verizon/MCI Complaint* at ¶ 3.

²⁵ See *Verizon Communications Inc. and MCI, Inc.*, WC Docket No. 05-75, FCC 05-184, App. G (rel. Nov. 17, 2005).

²⁶ 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 Their Broadband Services*, WC Docket No. 04-440, at 2 (filed Dec. 20, 2004).

²⁷ See, e.g. *Verizon February 7 Ex Parte Letter* at 7 (listing “other competitive providers of ATM and Frame Relay . . . IP/VPN . . . and Ethernet services” in Verizon territory).

migration time, price differences, and service quality differences that customers face when deciding to change from one transmission service to another. The Commission has clearly stated in considering previous forbearance requests that “petitioners must support such requests with more than broad, unsupported allegations in order for [the Commission] to exercise that statutory authority.”²⁸ Thus, it is impossible for the Commission to determine the level of cross elasticities of demand among the different service “alternatives” posited by Verizon. The fact that a competitive carrier may be offering one type of transmission service in New York provides no evidence that a different carrier seeking to serve an enterprise customer in Virginia could find any alternative to a different Verizon special access service transmission service. Even within the same geographic market, not all transmission services are substitutable for one another, and Verizon provides no evidence of any two that are substitutes. Indeed, large, multi-location enterprises would need to purchase service from a competitive alternative to Verizon that can serve all of its locations, and Verizon presents no evidence that such alternatives exist.²⁹

Verizon contends that the significant concerns raised by the Commission in the *Verizon/MCI Merger Order* regarding Verizon’s control of wholesale fiber is not relevant to the instant proceeding, because the Commission found that retail enterprise services are more competitive.³⁰ Having recognized the difference between the availability of retail and wholesale alternatives, Verizon then attempts to brush off the fact that the Commission never found that wholesale alternatives were actually available by arguing that “competing carriers can provide service to all locations either by using their own or third party facilities where they exist.”³¹ The point, of course, is that the Commission found that they do not exist, which is why the Commission maintained loop unbundling obligations and imposed conditions related to both unbundling and special access on the merged Verizon/MCI.

Verizon also attempts to distinguish between legacy services and packet-based services in an effort to fit its relief request within the parameters of the *Wireline Broadband Internet Access Order*. Verizon’s argument that the relief it requested “does not extend to traditional TDM-based special access facilities” is a

²⁸ In re Hyperion Telecommunications, Inc. Petition Requesting Forbearance, 12 F.C.C.R. 8596, ¶ 21 (1997).

²⁹ See *Verizon/MCI Merger Order* at ¶ 63 (“We find that these customers typically seek service from a provider that can serve all their locations, and generally only a few carriers serving a particular location have such capabilities.”).

³⁰ Verizon February 7 *Ex Parte* Letter at 13, citing *Verizon/MCI Merger Order* at ¶ 32.

³¹ *Id.* at 14.

non-sequitor, because it does not – in either its original petition or its new, revised petition – explain what a “TDM facility” is.³² Indeed, there is flat contradiction between Verizon’s claim that it is seeking non-TDM relief, and Verizon’s list of services for which it is seeking forbearance.³³ For example, the first service listed by Verizon as a forbearance candidate is Frame Relay. According to Verizon’s Frame Relay Tariff, FCC Tariff 20, Verizon’s Frame Relay service is available via interfaces with DS-1 and DS-3 transmission services.³⁴ The same is true for other services for which Verizon seeks forbearance. For example, Verizon’s “ATM Cell Relay Service,” which Verizon contends is a packet-only service, provides access at both the DS-1 and DS-3 levels of bandwidth.³⁵ Indeed, Verizon’s tariff states that “DS3, OC3c, OC12c and other interfaces, both electrical and optical, are supported and defined to technical specifications.”³⁶ It is difficult to square this service description with Verizon’s representation that DS-1 and DS-3 services are not implicated by the instant petition.

Finally, Verizon again presents its argument that it is a minor player in the nationwide broadband marketplace. For example, Verizon asserts as to “fast packet services and very high speed transport services,” that “Verizon’s share is not significantly different within its own local footprint than for the nation as a whole.”³⁷ In its original forbearance petition, to support its allegations that its share of the large business broadband market was minimal, Verizon repeatedly characterized MCI, AT&T and Sprint as the dominant players that collectively control “75% of the market for packet switched broadband data services such as ATM and Frame Relay” and as the major providers of other specialized high speed data services such as IP VPN.³⁸ Now that Verizon has acquired control of MCI, it has become, by its own admission, a dominant incumbent player in the broadband services market. In addition, just weeks ago, Verizon bragged to the investment community that even before the merger was consummated, it set a broadband

³² *Id.*

³³ See Attachment 1 to Verizon’s February 7 *Ex Parte Letter* (“List of Broadband Services for Which Verizon is Seeking Forbearance”).

³⁴ Verizon FCC Tariff 20 at 5-5.1 (“The NNI Port Only Connection provides connection of a digital transmission facility (384 kbps/DS1, 1.536 Mbps/DS1 and 44.736 Mbps/DS3) to Company’s FRS Network.”).

³⁵ Verizon FCC Tariff 20 at § 5.10.2(A), page 5-163.

³⁶ Verizon FCC Tariff 20 at 5-164.

³⁷ Verizon February 7 *Ex Parte Letter* at 12.

³⁸ Verizon Forbearance Petition at 7, 11, 12, 19. In contrast, Verizon alleged that it only controlled 4.2% of the nationwide Frame Relay revenues and 5.6% of nationwide ATM revenues. (Verizon Forbearance Petition at 7.

industry record by adding a net 613,000 broadband lines in the fourth quarter of 2005, “topping any prior quarterly total posted by a telecommunications or cable company.”³⁹ In light of Verizon’s affirmative statements with respect to MCI’s dominant position in the broadband market and its own record setting broadband sales, the Commission cannot possibly give any weight to the assertions in the Petition that Verizon lacks market power and is a mere second class citizen in the broadband market.⁴⁰

For the foregoing reasons and those set forth in its Opposition, COMPTEL respectfully requests that the Commission deny Verizon’s Petition for Forbearance.

Respectfully submitted,

/s/ Jason Oxman

Mary Albert
Jason Oxman

COMPTEL

³⁹ “Verizon Communications Reports Strong 4Q 2005 Results, Driven by Continued Growth in Wireless and Broadband,” (January 26, 2006). Verizon also crowed that its 5.1 million year end broadband connections represented a 47.6% increase over 2004. <http://investor.verizon.com/news/view.aspx?newsID=718>

⁴⁰ It has been reported that the merged Verizon/MCI “counts 94% of the Fortune 500 as its customers” for telecom and Internet services, including optical network products and data services such as frame relay, ATM and private line. <http://www.networkworld.com/news/2006/012306-verizon-business>.