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March 9, 2006 ***EX PARTE***

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
Room TW-A325
445 12th Street, SW
Washington, DC 20554

Re: WC Docket No. 04-440

Dear Ms. Dortch:

On March 8, 2006, Lisa Youngers of XO Communications ("XO") and the undersigned (representing Covad Communications, Time Warner Telecom, XO, Conversent Communications and CTC Communications) met with Scott Bergmann, legal advisor to Commissioner Jonathan Adelstein, to discuss Verizon's petition for forbearance from common carrier regulation filed in the above-referenced docket. The attached presentation formed the basis of the discussion.

Pursuant to Section 1.1206(b) of the Commission's rules, 47 C.F.R. § 1.1206(b), one electronic copy of this notice is being filed in each of the above-referenced proceedings.

Sincerely,

/s/
Thomas Jones

Attachment

cc: Scott Bergmann

CLEC OPPOSITION TO VERIZON'S PETITION FOR FORBEARANCE FROM TITLE II REGULATION OF ITS BROADBAND SERVICES

WC Dkt No. 04-440

(March 8, 2006)

I. THE COMMISSION IS BOUND BY ITS DECISION IN PARAGRAPH NINE OF THE *WIRELINE BROADBAND INTERNET ACCESS ORDER* AND OTHER RELEVANT ORDERS TO DENY VERIZON'S REQUEST THAT MANDATORY COMMON CARRIER REGULATION BE ELIMINATED FOR BROADBAND SERVICES

A. Legal Standard. The FCC has a duty to follow a consistent analytical approach (or explain why departures are reasonable) regardless of whether it addresses an issue in a rulemaking or petition for forbearance. *See AT&T v. FCC*, 236 F.3d 729, 736-737 (D.C. Cir. 2001) (overturning FCC denial of petition for forbearance from dominant carrier regulation where the FCC did not apply its traditional non-dominance analysis and failed to explain why such a departure was reasonable).

B. Holding in paragraph nine. In paragraph nine of the *Wireline Broadband Internet Access Order*, the FCC rejected precisely the same arguments with regard to precisely the same services that Verizon makes here. Notwithstanding Verizon's and other carriers' claims in the Dominance/Non-dominance Broadband proceeding that they lack market power in the provision of packetized services and other broadband services, the Commission determined that ILEC broadband services that are not "functionally integrated" and "inextricably intertwine[d]" with information-processing capabilities remain telecommunications services. *Wireline Broadband Internet Access Order* ¶ 9. Accordingly, the FCC clarified that "stand-alone ATM service, frame relay, gigabit Ethernet service, and other high capacity special access services" remain telecommunications services. *Id.*

C. Other orders pertaining to broadband loops. The conclusions in the *Wireline Broadband Internet Access Order* with regard to broadband end user connections are consistent with other FCC orders. The FCC has held that a transmission service provider must be compelled to offer service on a common carrier/telecommunications carrier basis if the firm has market power. *See Cable & Wireless*, 12 FCC Rcd 8516 (1997). The Commission has repeatedly held that incumbent LECs have market power in the provision of transmission facilities connecting business customers.

1. ***Verizon-MCI Merger Order***. "The record also indicates that, for many buildings, there is little potential for competitive entry" for the provision of local transmission services. *Verizon-MCI Merger Order* ¶ 39. The FCC conditioned its approval of the merger on special access behavioral requirements that *can only be justified if the merged entity has substantial and persisting market power*. Indeed, the Justice Department concluded in

its review of the Verizon-MCI merger that "[f]or the *vast majority* of commercial buildings in Verizon's territory, Verizon is the *only* carrier that owns a last-mile connection to the building." DOJ Complaint ¶ 13 (emphasis added).

2. ***Omaha Forbearance Order***. In the *Omaha Forbearance Order*, the FCC held that Qwest continued to be dominant in the provision of special access high capacity loops and transport services even where it found a substantial intermodal competitor in the market. *Omaha Forbearance Order* ¶ 51.

3. ***TRRO***. The FCC held that it is not even *possible* for a competitor to efficiently deploy DS1 and individual DS3 loops to business customers in most areas of the country. *TRRO* ¶¶ 149-154. As TWTC has demonstrated, it is also impossible for competitors to deploy Ethernet loops that offer revenue opportunities that are similar to DS1 or DS3 circuits. *See* TWTC Opposition to Verizon Petition for Reconsideration of the *Broadband Wireline Internet Access Order* at 7-8 (attached hereto).

4. **Special Access Pricing Flexibility.** While the FCC has granted the ILECs pricing flexibility in the provision of special access, the FCC continued to treat ILECs as dominant in the provision of special access. *See Special Access Pricing Flex Order* ¶ 151. Moreover, the FCC granted the ILECs pricing flexibility based on a *prediction* that competition would develop, a prediction that has not come to pass.

D. **Other orders pertaining to transmission services subject to some competition.** The conclusions in the *Wireline Broadband Internet Access Order* are also consistent with prior FCC refusals to forbear from bedrock common carrier regulation even for services subject to some competition:

1. ***PCIA Forbearance Order.*** Even in the fiercely competitive mobile wireless market, the FCC refused to forbear from Sections 201 and 202 because mobile wireless "carriers may still be able to treat some customers in an unjust, unreasonable, or discriminatory manner." *PCIA Forbearance Order* ¶ 23. As the Commission explained, "[c]ompetitive markets increase the number of service options available to consumers, but they do not necessarily protect all consumers from all unfair practices. The market may fail to deter providers from unreasonably denying services to, or discriminating against, customers whom they may view as less desirable." *Id.* The FCC reached this conclusion in 1998, when it concluded that "[t]here are at least three mobile telephone providers in each of the 50 largest Basic Trading Areas ('BTAs') and 97 of the 100 largest BTAs." *1998 CMRS Competition Third Report* at 19751. The FCC also found that "71 BTAs have four providers, 51 BTAs have five providers, and 13 BTAs have six providers." *Id*. at 19768. Moreover, these competitors *owned their own end user connections*.

2. ***SBC IP Platform Forbearance Order.*** "Even in substantially competitive markets, there remains a risk of unjust or discriminatory treatment of consumers, and sections 201 and 202 therefore continue to afford important protections." *SBC IP Platform Forbearance Order*, 20 FCC Rcd 9361 ¶ 17. The FCC has "never granted a petition for forbearance" from Sections 201 and 202. *Id*. A "petitioner seeking forbearance from sections 201 and 202 -- either independently or as part of a broader request -- should be obligated to explain in detail why the Commission should forbear from those sections even though it has never done so." *Id*.

II. ALLOWING VERIZON TO OFFER BROADBAND SERVICES OUTSIDE OF TITLE II WOULD PREVENT ENFORCEMENT OF SOCIAL POLICIES IN THE COMMUNICATIONS ACT

A. Reasonably ancillary standard. If Verizon were allowed to offer broadband transmission services as "telecommunications" rather than as "telecommunications services," "telecommunications carriers" and "common carriers," the FCC would likely lose its ability to advance critical social policy objectives established by Congress. Since many of the most important social policy objectives in the Act apply only to "telecommunications services," "telecommunications carriers" and "common carriers," the FCC would need to rely on its ancillary authority. That authority can only be exercised where proposed regulation is "reasonably ancillary" to the effective performance of the FCC's responsibilities elsewhere in the Act. This standard cannot be met where the FCC seeks to exercise ancillary jurisdiction to impose a requirement deemed necessary to advance the policies in Title II of the Act to a service that the FCC decided to remove from Title II.

B. Prohibition on treating telecommunications carriers as common carriers/telecommunications carriers when not providing telecommunications services. Furthermore, the Supreme Court has held that limits on the FCC's authority in the express jurisdictional grant that is the basis for ancillary jurisdiction apply equally to the exercise of authority under Title I. Thus, in *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) the Supreme Court held that the FCC does not have the authority under Title I to impose common carrier requirements that are "ancillary" to Title III broadcast provisions because the definition of broadcaster prohibits the FCC from treating broadcasters as common carriers. Similarly, the definition of "telecommunications carrier" in the Communications Act states that the FCC may treat an entity as a "common carrier under this Act only to the extent that it is engaged in providing telecommunications services." The FCC has interpreted the terms telecommunications carrier and common carrier to mean the same thing. Accordingly, under *Midwest Video II*, the FCC does not have ancillary authority to impose on Verizon's "telecommunications" offerings regulations that apply under the express terms of the statute only to telecommunications carriers or services or common carriers.

C. Affected social policies. The restrictions on the scope of the FCC's ancillary authority would seem to have broad implications, jeopardizing the FCC's ability, among other things, to prevent unjust or unreasonable practices under Section 201(b) (applicable to communications services provided by a "common carrier"); to enforce service discontinuance requirements under Section 214 (applicable only to a "carrier"); to enforce privacy requirements under Section 222 (applicable only to "telecommunications carriers" and "telecommunications services"), to enforce access to the hearing or speech impaired under section 225 (applicable to "carriers" and "common carriers"); and to enforce access to the disabled requirements under Section 255 (applicable to a provider of "telecommunications service"). In addition, the Commission would be unable to hear complaints against Verizon under Section 208 (applicable to a "common carrier") or initiate investigations under Section 218 (applicable to "carriers").

III. VERIZON HAS NOT PROFFERED SUFFICIENT EVIDENCE ON THE RECORD TO MEET THE FCC'S STANDARD FOR NON-DOMINANCE FOR PACKETIZED LOCAL AND INTEREXCHANGE SERVICES.

A. Carriers face the same barriers to construction for packet switched and TDM-based loops. As noted above, CLECs face substantial barriers to loop construction. Contrary to Verizon's suggestion, these barriers apply equally to the construction of both packetized and TDM based facilities. The costs of deploying a fiber facility largely stem from the cost of actually laying the fiber, not the electronics attached to the fiber. *TRRO* n. 493. Simply because packetized services rely on different electronics than TDM-based services does not magically make facilities deployment any easier for competitive carriers.

B. Verizon's Control Over Bottleneck Facilities, Not its Retail Market Share, is the Key Factor in the Dominance Analysis for all Packetized Services.

1. The FCC and DOJ have repeatedly held that ILECs continue to control bottleneck transmission facilities. Even if Verizon is subject to some competitive entry in the provision of packetized services, its control over wholesale facilities allows it to exercise market power in the downstream market. *See Ameritech-SBC Merger Order* ¶ 107; *GTE-Bell Atlantic Merger Order* ¶ 188 (describing ILECs' incentives to exploit control over bottleneck facilities to harm competition in downstream markets). Indeed, the FCC and the DOJ have only recently reiterated that ILECs, absent regulation, will be able to exercise their market power in the downstream retail market for high capacity services. In its scrutiny of the Verizon/MCI merger, the DOJ concluded that CLECs reselling Verizon's own broadband transmission facilities would not be a competitive constraint on Verizon's market power "because Verizon would control the price of the resold circuits." *Verizon/MCI Complaint* ¶ 25. The Commission came to a similar conclusion in the *TRRO*, holding that the availability to CLECs of solely resold "services priced by, and largely within the control of the incumbent LEC" (*TRRO* ¶ 48) would

encourage the incumbent LEC to abuse their market power over broadband transmission facilities. Of course, neither the FCC nor the DOJ distinguished between packetized and non-packetized facilities; the analysis is the same.

2. **Verizon's offers only evidence of its retail market share to prove that it is non-dominant in the provision of packetized services.** In light of Verizon's continued dominance over packetized and non-packetized broadband transmission facilities, Verizon only submits evidence of its own retail market share and argues that Time Warner Telecom, among other carriers, is a robust competitor for packetized services. However, Time Warner Telecom, as well as most other CLECs, must rely on the ILECs' facilities for a large portion of its broadband services. Indeed, Time Warner Telecom has previously submitted evidence to the Commission that it must rely on ILEC facilities to serve 75 percent of its customer locations. Time Warner Telecom did not make a distinction between customer locations served by packetized and non-packetized facilities because the analysis is the same.

3. **Verizon's reliance on the *AT&T Non-Dominance Order* is unpersuasive.** Verizon makes much of the Commission's market share analysis in the *AT&T Non-Dominance Order*; noting that its market share of packet switched services is less than AT&T's 60 percent share of the interexchange market. However, Verizon omits the Commission's key conclusion that non-dominance was appropriate for AT&T at a 60 percent market share because "AT&T no longer controls local bottleneck facilities." *AT&T Non-Dominance Order* ¶ 33. The same cannot be said for Verizon and the other BOCs in their provision of packetized or TDM-based services.

C. **Verizon has not proffered sufficient evidence for a non-dominance finding with respect to OCn facilities.** The mere fact that the Commission determined that CLECs are not impaired without access to OCn facilities does not mean that ILECs do not continue to dominate the market for OCn services. The Commission has previously deregulated LECs in their provision of broadband transmission facilities while continuing to retain dominant status. For example, in the *Special Access Pricing Flexibility Order* (¶ 151), the Commission determined that even if competitors make significant sunk investment in broadband transmission facilities, ILECs would continue to be accorded dominant treatment. Similarly, the *Qwest Omaha Order* (¶ 15) the Commission, while granting UNE relief, made clear that Qwest remained dominant in the market for broadband transmission services to businesses.

D. **The absence of other regulatory safeguards mandates continued dominant treatment for packetized services**. In the past, the FCC relied on the presence of mandatory Section 272 safeguards (which have now sunset), UNE loops (which are now unavailable except for DS1 and DS3 loops in some markets) and

independent MCI and AT&T competitors (which are now gone) as the basis for classifying Verizon and other BOCs as non-dominant on the provision of in-region long distance services such as ATM and frame relay. *See ILEC Classification Order* ¶¶ 104-107, 119, 126, 128, 130 (relying on the presence of Section 272 safeguards, the availability of UNEs, price caps and competition from AT&T and MCI as the bases for classifying BOCs as non-dominant in the provision of in-region interLATA services). In light of the ILECs' continued dominance over packet switched transmission facilities, and in the absence of these safeguards, the FCC must maintain dominant carrier treatment for ILEC packet switched transmission facilities.