

March 14, 2006

VIA ECFS

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Marlene H. Dortch
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Federal Communications Commission
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Ex Parte
WC Docket No. 04-440

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Dear Ms. Dortch:

In this letter, McLeodUSA Telecommunications Services, Inc. and Pac-West Telecomm, Inc. respond to the recent letters from Verizon in support of its request for forbearance from application of Title II regulation to broadband telecommunications services.¹ The Commission should deny that request for the following reasons.

Stand-Alone Broadband Is Not Wireline Broadband Internet Access Service.

The Commission should reject Verizon's claim that the Commission's findings in the *Wireline Broadband Order* are equally applicable to stand-alone transmission services.² The Commission believes that the Internet is likely to create substantial change in the telecommunications marketplace including "rapidly breaking down the formerly rigid barriers that separate one network from another,"³ and the need for providers to have "the flexibility to respond more rapidly and effectively to new consumer demands."⁴ However, even if these assessments are correct, it is the Internet that is the key transforming event. Services that are not used as part of Internet access are not part of the major changes referred to in the *Wireline Broadband Order* that the FCC used to

¹ Letter to Marlene H. Dortch from Ed Shakin filed February 7, 2006 ("Verizon February 7 Letter"); Letter to Marlene H. Dortch from Dee May filed March 2 2006 ("Verizon March 2 Letter").

² Verizon March 2 Letter p. 2.

³ Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Report and Order, CC Docket No. 02-33, 20 FCC Rcd 14853 (2005), released September 23, 2005, ("*Wireline Broadband Order*") para. 32.

⁴ *Id.* para. 79.

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justify Title I treatment for wireline broadband Internet access service. It is preposterous and contradictory for Verizon to claim that ATM and frame relay services, for example, are both fading, legacy services⁵ and at the same time “fundamentally changing” the telecommunications market justifying sweeping regulatory relief.⁶ The same is true for Ethernet and OCN services, which have been around for many years. In this connection, the Commission did not merely make a narrow legal interpretation when it noted that stand-alone broadband transmission services are telecommunications, not information services because they lack the key characteristics of wireline broadband Internet access service.⁷ The Commission equally determined that none of the policy and factual bases supporting its decision with respect to wireline broadband Internet access services are applicable to services that “carriers and end users have traditionally used for basic transmission purposes.”⁸ Accordingly, the Commission must reject Verizon’s request to mindlessly apply the *Wireline Broadband Order* to stand-alone broadband transmission services as if they shared the same factual breakthrough characteristics as the Internet.

Verizon Seeks Forbearance for Services Currently Provided Over the Circuit-Switched Network. Verizon and other ILECs are actively seeking to deploy, if they haven’t already, so-called “pseudo-wire” technology, which is an emulation of a native service, such as a traditional circuit-switched service, over a packet-switched network, *i.e.* services currently provided over the circuit-switched network such as special access service can also be provided using packet-switched technology.⁹ Thus, it is far from clear that forbearance from application of Title II to packet-switched services would not, in fact, encompass current circuit-switched services. Verizon could simply choose to migrate its provision of circuit-switched services to packet networks and then claim that they are no longer subject to Title II because they are now provisioned over packet switched networks. Further, as pointed out by COMPTTEL, ATM and Frame Relay services may be provided over special access facilities.¹⁰ Verizon’s claim that it does not

⁵ Verizon February 7 Letter at 4.

⁶ *Id.*

⁷ *Wireline Broadband Order*, para. 9.

⁸ *Id.*

⁹ <http://en.wikipedia.org/wiki/Pseudo-wire>.

¹⁰ Letter to Marlene H. Dortch from Jason Oxman, COMPTTEL, WC Docket No. 04-440, filed February 17, 2006, at 7-8.

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seek forbearance for traditional circuit-switched services is disingenuous. Granting Verizon's request would leave a giant escape hatch in the Commission's regulation of circuit-switched services.

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Verizon Retains Market Power In the Provision of Broadband Services. In numerous proceedings, the Commission has determined that ILECs possess market power in the provision of broadband services that preclude the Commission from granting the sweeping relief sought by Verizon.¹¹ It would be arbitrary and capricious for the Commission to ignore these prior determinations and forbear on the basis of Verizon's facile claims of competition. For example, in the recent *Verizon/MCI Merger Order*, the Commission found that "there is little potential for competitive entry" for the provision of local transmission services.¹² In its merger review, the Department of Justice concluded that for "the vast majority of commercial buildings in Verizon's territory, Verizon is the only carrier that owns a last mile connection to the building."¹³ In the *Triennial Review Remand Order*, the Commission found that it is not possible for competitors to construct DS1 and DS3 loops on an efficient basis in most areas of the country.¹⁴ In the *Omaha Order*, the Commission declined to find Qwest nondominant in provision of high capacity loops and transport even though it also found that Cox was a significant intermodal competitor.¹⁵ Nor has the Commission acted in the *Non-Dom Proceeding*, which is specifically looking at whether BOCs retain market power in the provision of broadband transmission services.¹⁶ Because of its findings that Verizon has

¹¹ We do not repeat here all the arguments that Verizon also retains market power in the residential broadband market. See Comments of McLeodUSA Telecommunications Services, Inc., WC 04-440, filed February 8, 2005 and Comments of CloseCall America, Inc, WC 04-440 filed February 8, 2005 for a discussion of Verizon's market power in the residential broadband market.

¹² Verizon Communications, Inc. and MCI Inc., Applications for Approval of Transfer of Control, Memorandum Opinion and Order, 20 FCC Rcd 18433 ("*Verizon/MCI Merger Order*") para. 39.

¹³ DOJ Complaint para. 13.

¹⁴ *TRRO* para. 149-154.

¹⁵ *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. Section 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, WC Docket No. 04-223, FCC 05-170, released December 2, 2005 ("*Omaha Order*") para. 51.

¹⁶ *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, CC Docket No. 01-337, FCC 01-360, released December 20, 2001 ("*NonDom Proceeding*").

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little or no competition, especially in the business market, the Commission may not make the statutory findings that Title II regulation of stand-alone broadband services is unnecessary to ensure just and reasonable rates and terms of service or to protect consumers.¹⁷ The Commission may not forbear without applying a non-dominance analysis.¹⁸ Accordingly, there is no possible basis for the Commission in this proceeding to forbear from application of Title II to broadband services or to conclude that forbearance would “promote competitive market conditions.”¹⁹

Verizon Fails To Provide Sufficient Information. If for no other reason, the Commission must deny Verizon’s petition because it fails to provide the detailed information necessary to evaluate its request under the statutory standards for forbearance. In order for the Commission to evaluate this request Verizon must submit a showing as to why each of the provisions for which it seeks forbearance is unnecessary under the statutory forbearance standards with respect to each service. Although the Bureau pressed Verizon for details backing up its request, its February 7, 2006 response does little more than name the eleven services for which it seeks forbearance, and states that it requests forbearance from application of the entirety of Title II to these services. Verizon’s refusal to cooperate with staff in providing supporting information may be reason by itself to deny the extraordinary requested relief as not in the public interest. Verizon only offers high level generalities about “broadband,” citations to CLEC websites, or contends that it should not be required to submit information such as market share for each service.²⁰ Most importantly, Verizon has not defined relevant product and geographic markets even though it also acknowledges that the services for which it seeks forbearance are not substitutes for each other.²¹ Verizon also ignores that the “relevant geographic market for wholesale special access services is a particular customer location.”²² This finding is equally applicable to the broadband services for which it seeks forbearance. Accordingly, the Commission may, and should, deny the requested forbearance because of lack of sufficient supporting information.

¹⁷ 47 U.S.C. Section 160(a)(1) and (2).

¹⁸ *AT&T v. FCC*, 236 F.3d 729, 736-737 (D.C. Cir. 2001)

¹⁹ 47 U.S.C. Section 160(b).

²⁰ Verizon February 7 Letter p. 10.

²¹ (“Broadband services sold to larger business customers, including frame relay and ATM services, compete with each other and are in separate markets from broadband services sold to residential and small business customers.”) Reply Declaration of Dennis W. Carlton and Hal S. Sider, CC Docket No. 02-33, March 1, 2002, at 5.

²² *Verizon/MCI Merger Order* para. 24.

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Competitors' Use Wholesale Broadband Services. The Commission should not conclude that forbearance is consistent with promoting competition because competitors continue to rely solely or predominantly on the services for which Verizon seeks forbearance as inputs to their own retail services. Verizon admits that 10% of its ATM and frame relay services are sold as wholesale inputs to other carriers.²³ But that is only the tip of the iceberg. Many competitive carriers rely far more heavily on Verizon ATM and frame relay services. It could seriously harm competition if the Commission were to forbear from key Title II obligations that require Verizon to offer service on just and reasonable terms and conditions. Verizon's claim that the Commission has repeatedly treated retail broadband services as separate from wholesale TDM-based services does not support forbearance.²⁴ Assuming this contention is correct, this would suggest at most that the Commission should forbear with respect to retail services, assuming Verizon has justified that relief, which is not the case, not for wholesale services provided to other carriers. The Commission should not accept Verizon's attempt to sweep under the rug competitors' reliance on its wholesale broadband offerings.

Sincerely,



Russell M. Blau
Richard M. Rindler
Patrick J. Donovan

cc: Ian Dillner
Jessica Rosenworcel
Scott Bergmann
Aaron Goldberger
Dana Shaffer
Thomas Navin
Renee Crittendon
Bill Dever

²³ Verizon March 2 Letter at 3.

²⁴ *Id.*