

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20544**

In the Matter of

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

**REPLY COMMENTS OF VERIZON**

As Verizon and other commenters have shown, the Commission lacks authority to issue a belated order on Verizon’s petition for forbearance in this docket, which was deemed granted by operation of law 16 months ago. Although the Commission retains authority to act following the “deemed grant” of a petition, it could do so only after initiating a new rulemaking, compiling a new record, and finding — on that new record — the existence of the type of market failure that would justify regulation in the first instance. But the Commission has not initiated such a proceeding and any record compiled would not show a need for such regulation given that the market for broadband services is competitive and is working well without intrusive regulation.

Of the various parties to file comments on the CLECs’ motion, only two — the Office of Advocacy of the U.S. Small Business Administration (“Advocacy”) and the City of Boston — support the CLECs’ request that the Commission issue an order on Verizon’s petition.<sup>1</sup> Neither, however, provides any lawful basis for the Commission to grant the CLECs’ motion.

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<sup>1</sup> The self-described “Telecom Investors” nominally support the CLECs’ motion. But, other than briefly quoting, out of context, a portion of the Commission’s brief in *In re Core Communications, Inc.*, Nos. 04-1368 *et al.* (D.C. Cir.), they make no argument that the Commission could or should issue a ruling on Verizon’s petition now. *See* Telecom Investors at 5. Instead, they merely repeat arguments that the same counsel raised, on behalf of various carriers, in opposition to other ILECs’ actually pending forbearance petitions. *Compare*

1. Advocacy’s primary argument is that the Commission violated the Regulatory Flexibility Act (“RFA”) by not issuing a final regulatory flexibility analysis when Verizon’s petition was deemed granted. But such an analysis is required by statute only when an agency “promulgates a final rule.” 5 U.S.C. § 604(a). Because Verizon’s petition was deemed granted by operation of law, the Commission did not promulgate any rule. In fact, the relief that Verizon received flowed directly from a decision of Congress, rather than the Commission, and from the default rule Congress adopted to address agency inaction. Such inaction by an agency is not the same as the adoption of a “final rule” and does not trigger any requirement under § 604(a). In addition, Congress in 1996 provided for judicial review only of “final agency action” for alleged non-compliance with § 604. *Id.* § 611(a)(1). But, as the Commission explained to the D.C. Circuit, when a petition for forbearance is deemed granted by operation of law, there is no final agency action.<sup>2</sup> In any event, the time for seeking review of any alleged failing on the Commission’s part has long since passed.

In addition, even when the Commission does take final action and adopts an order granting or denying a forbearance petition — which it did not do in the case of Verizon’s petition — the Commission does not issue a final regulatory flexibility analysis.<sup>3</sup> That is because,

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Opposition of Alpheus *et al.*, WC Docket No. 06-125 (FCC filed Aug. 17, 2006). As Verizon explained, such claims have no bearing on the relief afforded to Verizon by operation of law, which cannot be altered in those other forbearance proceedings. *See* Reply Comments of Verizon at 4-9, WC Docket Nos. 06-125 & 06-147 (FCC filed Aug. 31, 2006).

<sup>2</sup> *See* Brief for the FCC at 20-21, *Sprint Nextel Corp. v. FCC*, Nos. 06-1111 *et al.* (D.C. Cir. filed July 5, 2007).

<sup>3</sup> *See, e.g.*, Memorandum Opinion and Order, *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, 20 FCC Rcd 19415 (2005); Memorandum Opinion and Order, *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, 19 FCC Rcd 21496 (2004); Order, *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, 19 FCC Rcd 20179 (2004).

contrary to Advocacy’s claim (at 4-5), neither the filing of, nor the Commission’s ruling on, a petition for forbearance triggers the RFA. The RFA requires an agency to issue an initial regulatory flexibility analysis when the agency is “required . . . to publish [a] general notice of proposed rulemaking for any proposed rule.” 5 U.S.C. § 603(a). The Commission is not required to publish such a notice in the context of a petition for forbearance; in such a proceeding, the Commission is not proposing to promulgate new rules at all. Therefore, the Commission has no obligation to publish an initial regulatory flexibility analysis when a party files a petition for forbearance. For the same reason, the Commission has no obligation to issue a final regulatory flexibility analysis when it issues an order ruling on such a petition, because that order is not the “promulgat[ion] [of] a final rule.” *Id.* § 604(a).

2. The City of Boston repeats (at 5-6) some of the same claims as the CLECs, but — like the CLECs — it points to nothing during the past 16 months that suggests that enforcing the statutory and regulatory provisions that were at issue in Verizon’s petition is currently in the public interest or necessary to protect consumers or to ensure just and reasonable rates. Therefore, in addition to the fact that the Commission lacks authority to issue an order on Verizon’s petition at this time, the City of Boston has not made the type of showing of market failure that would warrant the imposition of new regulations. As explained above, the Commission could impose such regulations only after initiating a new rulemaking proceeding and only if the record in that proceeding demonstrated a need for regulation, which it would not.

The City of Boston also claims (at 7-8) to be confused about the relief that was granted by operation of law. But Verizon’s February 7, 2006 letter clarified that its petition for forbearance sought for its stand-alone broadband transmission services the same relief the

Commission provided in the *Wireline Broadband Order*<sup>4</sup> for broadband transmission services that are used for, or as an input to, broadband Internet access services.<sup>5</sup>

Finally, the City of Boston suggests (at 8-9) that Verizon's February 2006 letter could be treated as a "free standing petition for relief that substituted for the original petition." But that would be the same error the Commission made with respect to a prior Verizon petition for forbearance, which Verizon also clarified after an intervening Commission decision granted much of the relief Verizon initially sought through its petition. The Commission treated Verizon's clarification as a new forbearance petition, with a new statutory period for review.<sup>6</sup> The D.C. Circuit reversed the Commission, finding that Verizon's clarification was "a mere narrowing of[] its petition for forbearance" to cover "a subset of the network elements for which Verizon requested forbearance in its July 2002 petition." *Verizon Tel. Cos. v. FCC*, 374 F.3d 1229, 1233 (D.C. Cir. 2004). The Commission should not make the same mistake twice. In all events, more than one year and 90 days has elapsed since the February 2006 letter, so even if that letter were treated as a "free standing [forbearance] petition," as the City of Boston proposes, it would have been deemed granted by operation of law as well.<sup>7</sup>

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<sup>4</sup> Report and Order, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853 (2005), *petitions for review pending*, *Time Warner Telecom Inc. v. FCC*, Nos. 05-4769 *et al.* (3d Cir. argued Mar. 16, 2007).

<sup>5</sup> See Letter from Edward Shakin, Vice President and Associate General Counsel, Verizon, to Marlene Dortch, Secretary, FCC, WC Docket No. 04-440 (FCC filed Feb. 7, 2006).

<sup>6</sup> See Public Notice, *Commission Establishes Comment Cycle for New Verizon Petition Requesting Forbearance from Application of Section 271*, 18 FCC Rcd 22795 (2003).

<sup>7</sup> Nor is there merit to the City of Boston's suggestion (at 3 & n.9) that the Commission acted improperly by issuing a news release notifying the public that Verizon's petition was deemed granted by operation of law. Although the City of Boston complains (at 3) that the "business of the FCC cannot be conducted by news release," the release in question informed the public of the effect of a decision *by Congress* that forbearance should occur by a date certain unless the Commission takes affirmative action to deny a petition "for failure to meet the [statutory] requirements." 47 U.S.C. § 160(c).

**CONCLUSION**

For the reasons set forth above and in Verizon's opposition, the Commission should deny the CLECs' motion.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Scott H. Angstreich, hereby certify that, on this 17th day of August 2007, copies of the foregoing Reply Comments of Verizon were served via first-class mail, postage prepaid, on the following:

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