

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

In the Matter of

Petition of Qwest Corporation for Forbearance
Pursuant to 47 U.S.C. § 160(c) in the Omaha
Metropolitan Statistical Area

WC Docket No. 04-223

**REPLY COMMENTS OF VERIZON¹
IN OPPOSITION TO PETITION FOR MODIFICATION**

INTRODUCTION AND SUMMARY

Based on record evidence of extensive “facilities-based competition” — “[m]ost importantly” from Cox Communications, Inc. (“Cox”), but also from other carriers that had “deployed their own” networks in the Omaha MSA — the Commission granted Qwest Corporation (“Qwest”) forbearance from § 251(c)(3) unbundling obligations in a portion of the Omaha Metropolitan Statistical Area (“MSA”).² The D.C. Circuit upheld the Commission’s decision in all respects, holding in particular that there was “nothing unreasonable” or “arbitrary” in the Commission’s grant of forbearance “given Cox’s extensive network coverage” and “aggressive expansion in both the residential and enterprise markets,” as well as the Commission’s “forecast[] [of] an increase in competition” from Cox.³

McLeodUSA Telecommunications Services, Inc. (“McLeod”) seeks to undo the grant of forbearance from § 251(c)(3), but says nothing about facilities-based competition in the Omaha

¹ The Verizon companies participating in this filing (“Verizon”) are the regulated, wholly owned subsidiaries of Verizon Communications Inc.

² 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, ¶¶ 64, 66 (2005) (“*Qwest Omaha Forbearance Order*”), *petitions for review denied*, *Qwest Corp. v. FCC*, 482 F.3d 471 (D.C. Cir. 2007).

³ *Qwest Corp.*, 482 F.3d at 479, 480-81.

MSA, which has grown since the Commission granted forbearance. Instead, McLeod complains that a predictive judgment — that this extensive facilities-based competition will give Qwest “the incentive to make attractive wholesale offerings available”⁴ — has not come true, a claim that Qwest vigorously disputes. In all events, the Commission found that facilities-based competition in the Omaha MSA was “sufficient . . . to justify [the] forbearance relief” from § 251(c)(3) and merely took “comfort” from the prediction,⁵ so McLeod’s claims could provide no basis for revisiting the Commission’s order even if true. In addition, the Commission could not reverse its forbearance decision without, at a minimum, making findings, on a complete record, sufficient to warrant imposing UNE regulations, and McLeod says nothing about all of the other issues relevant to that analysis. Instead, its claims here essentially reduce to the same claim it made in 2005: because McLeod has adopted a business plan that depends on TELRIC-priced UNEs, the Commission must retain § 251(c)(3) unbundling no matter what the state of facilities-based competition. The Commission explicitly rejected that claim in 2005 and should reject it again now.

Like McLeod, the commenters supporting McLeod’s petition say nothing about facilities-based competition in the Omaha MSA and simply repeat McLeod’s claims about its post-forbearance experiences. These commenters, however, go even further and contend that the Commission should use McLeod’s petition as a basis for denying similar relief from UNE obligations when it rules on Verizon’s and Qwest’s pending petitions for forbearance in other MSAs. The Commission has rightly recognized that each such petition must be considered based on its specific facts, and, as Verizon has shown, facilities-based competition in the six

⁴ *Qwest Omaha Forbearance Order* ¶¶ 66-67.

⁵ *Id.* ¶¶ 64, 67.

MSAs where Verizon seeks forbearance is more advanced — with respect to both mass-market and enterprise customers — than it was in the Omaha MSA. Even aside from the fact that this facilities-based competition is sufficient to grant the relief Verizon seeks, Verizon has entered into commercial agreements for elements that are no longer required to be provided as § 251(c)(3) UNEs. Accordingly, in Verizon’s case, actual marketplace experience bears out the Commission’s conclusion that carriers have a strong incentive to enter into commercial relationships in order to keep traffic on their network.

DISCUSSION

A. As the Commission has recognized, forbearance is warranted where “market conditions” and “market forces” are sufficient to ensure that rates will be just and reasonable and that consumers will be protected in the absence of regulation, such that forbearance is in the public interest.⁶ Forbearance is thus a “means by which the Commission may remove existing requirements that have been rendered unnecessary by market developments.”⁷ Consistent with this, the Commission “encourage[d]” incumbent LECs to file petitions for forbearance from § 251(c)(3) UNE requirements where such market developments — namely, facilities-based competition from cable companies and other carriers — demonstrate that forbearance from UNE

⁶ Memorandum Opinion and Order and Notice of Proposed Rulemaking, *Personal Communication Industry Association’s Broadband Personal Communications Services Alliance Petition for Forbearance*, 13 FCC Rcd 16857, ¶ 18 (1998).

⁷ Memorandum Opinion and Order, *Petition of SBC Communications Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services*, 20 FCC Rcd 9361, ¶ 9 (2005) (“TRRO”), remanded, *AT&T Inc. v. FCC*, 452 F.3d 830 (D.C. Cir. 2006).

requirements is warranted⁸ because continuing to require UNEs would “undermine the incentives of both [I]LECs and new entrants to invest in new facilities and deploy new technology.”⁹

Here, the Commission found that existing and anticipated facilities-based competition — “[m]ost importantly” from Cox, but also from “other . . . competitors [that] have deployed their own” networks in the Omaha MSA — was “sufficient . . . to justify [the] forbearance relief” the Commission granted Qwest from § 251(c)(3). *Qwest Omaha Forbearance Order* ¶¶ 64, 66. Indeed, the Commission found that the facilities-based “competition from Cox” *alone* would have “be[en] sufficient to justify [that] forbearance” relief. *Id.* ¶ 69. The D.C. Circuit upheld the Commission’s decision in full, finding that there was “nothing unreasonable” or “arbitrary” in the Commission’s grant of forbearance “given Cox’s extensive network coverage” and “aggressive expansion in both the residential and enterprise markets,” as well as the Commission’s “forecast[] [of] an increase in competition” from Cox. *Qwest Corp.*, 482 F.3d at 479, 480-81.

That forecast had already been borne out when the case was before the D.C. Circuit in 2006. Cox announced in April 2006 that it served more than 160,000 business customers nationwide,¹⁰ and its revenues from serving those customers were expected to top \$500 million

⁸ Order on Remand, *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533, ¶ 39 (2005) (“TRO”), *aff’d*, *Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

⁹ *E.g.*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, ¶ 3 (2003) (subsequent history omitted); *see United States Telecom Ass’n v. FCC*, 290 F.3d 415, 427 (D.C. Cir. 2002) (“USTA I”).

¹⁰ *See* Cox Business Services Press Release, *Cox Communications Receives J.D. Power and Associates’ Highest Honor in Business Data Study for Small/Midsize Businesses* (Apr. 5, 2006), <http://www.coxbusiness.com/pressroom/pressreleases/jdpower2006/>.

in 2006.¹¹ In July 2006, Cox was added to the General Services Administration’s Local Service Agreement List in a number of markets — including Omaha — adding federal agencies to its enterprise customer clientele.¹² Since that time, Cox has continued to grow, ending the first quarter of 2007 with more than 187,000 commercial customers, reflecting 32.2 percent year-over-year growth,¹³ and it “remains on track to reach \$1 billion in revenue in 2010.”¹⁴ In Omaha, as in the other markets where it operates, Cox continues to “offer[] a full suite of voice, data and video services for small, medium and large businesses as well as for government and education.”¹⁵ Qwest’s comments further show that facilities-based competition has grown in the Omaha MSA since the Commission’s granted its forbearance petition. *See* Qwest Opp. at 3-6 (filed Aug. 29, 2007); David L. Teitzel Decl. ¶¶ 4, 7, 9-10 (attached to Qwest Opp.).

The Commission’s reliance on evidence of facilities-based competition, moreover, was consistent with the purpose of the 1996 Act, which is to “stimulate competition — preferably genuine, facilities-based competition.”¹⁶ As the Commission has recognized, such competition is also the “most effective means” of satisfying the criteria in § 160(a)(1).¹⁷ Sections 160(a)(3) and (b) similarly require consideration of the public interest, defined in terms of the promotion of

¹¹ Yinka Adegoke, Reuters, *Cable Sets Its Sights on Business Services* (Aug. 25, 2006), <http://www.coxbusiness.com/pressroom/recentmedia/08-25-06-re.html>.

¹² *See* Cox Business Services Press Release, *Cox Business Services Placed on GSA Schedule in California, Kansas, Nebraska and Oklahoma* (July 27, 2006), <http://www.coxbusiness.com/pressroom/pressreleases/2006-0727.html>.

¹³ *See* Cox News Release, *Cox Answers the Phone and Says “Hello” to Continued Growth* (May 1, 2007).

¹⁴ Cox News Release, *Business Customers Fuel Cox’s Strong Third Quarter* (Nov. 6, 2006).

¹⁵ Cox Business Services, *About Us*, <http://www.coxbusiness.com/aboutus/index.html> (last visited Sept. 10, 2007); *see* Cox Business Services, *Omaha; Choose Cox for a Complete Communications Solution and Get the Best of Both Worlds*, http://www.coxbusiness.com/systems/ne_omaha/ (last visited Sept. 10, 2007).

¹⁶ *United States Telecom Ass’n v. FCC*, 359 F.3d 554, 576 (D.C. Cir. 2004) (“*USTA II*”).

¹⁷ Memorandum Opinion and Order, *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, 19 FCC Rcd 21496, ¶ 24 (2004) (“*271 Broadband Forbearance Order*”) (internal quotation marks omitted).

competition, and § 160(a)(2) requires the Commission to consider the protection of “consumers” — that is, end-user customers that are the beneficiaries of such competition — rather than the parochial interests of carriers that are both customers and competitors in serving consumers. The Commission’s recognition that competition is dispositive of the forbearance criteria follows from § 160’s embodiment of the basic antitrust principle that government regulation of the marketplace is “for the protection of *competition*, not *competitors*.”¹⁸

In addition, such consideration of facilities-based competition is required under the Commission’s impairment analysis, which the Commission has recognized is “instructive,” though “not bind[ing],” on its “forbearance review.” *Qwest Omaha Forbearance Order* ¶ 63. The D.C. Circuit reached this same conclusion — and the Commission ultimately did as well — in the context of line sharing, where the same cable companies that are providing telephone service throughout the Omaha MSA and the MSAs at issue in Verizon’s pending petitions were ubiquitously providing cable modem service in competition with DSL. In light of that “robust competition,” the D.C. Circuit held that the Commission could not “inflict on the economy the sort of costs” associated with a UNE line sharing requirement.¹⁹ The Commission relied on that same competition in refusing to reinstate a UNE line sharing obligation on remand,²⁰ and the D.C. Circuit upheld that determination.²¹ Indeed, consistent with its prior ruling that the Commission could not limit its focus to the “services the request[ing] [CLEC] ‘seeks to offer’”²² — there, broadband over copper loops — the D.C. Circuit recognized that “competition from

¹⁸ *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (emphasis added; internal quotation marks omitted).

¹⁹ *USTA I*, 290 F.3d at 428-29.

²⁰ See *TRO* ¶¶ 262-263.

²¹ See *USTA II*, 359 F.3d at 584-85.

²² *USTA I*, 290 F.3d at 429.

cable providers” means that consumers “will still have the benefits of [the] competition” — which is the goal of the 1996 Act — “even if *all CLECs* were driven from the broadband market.”²³ Those conclusions are all the more applicable here — and preclude the Commission from focusing on a competitor, such as McLeod, with a business plan that requires the use of UNE loops — where there are several intermodal competitors in addition to cable companies, such as wireless and VoIP providers, that render UNE requirements affirmatively harmful to competition and, therefore, to consumers.

B. McLeod and its supporting commenters say nothing about any of this. Instead, McLeod claims that one of the Commission’s predictive judgments — that extensive facilities-based competition in the Omaha MSA will give Qwest “the incentive to make attractive wholesale offerings available”²⁴ — has not come to pass. *See* McLeod’s Pet. for Modification at 4-12, 15-16 (filed July 23, 2007) (“McLeod Pet.”). Its supporting commenters make the same claim, simply repeating the assertions found in McLeod’s petition. *See, e.g.,* Comments filed on August 29, 2007, by Alpheus *et al.* at 6-7, 10-14; CompTel at 2-9; Covad *et al.* at 2-3, 7-8; EarthLink at 1-2; Eschelon *et al.* at 5-8.

Qwest, however, has vigorously disputed McLeod’s claims and, moreover, notes that it has entered into a commercial agreement for DS0 loops in the Omaha MSA with a carrier other than McLeod. *See* Qwest Opp. at 6-17, 21. Just as the Commission adopted a “reasonably efficient carrier” standard for determining when to impose § 251(c)(3) unbundling requirements — and rejected claims of impairment based on a competitor’s “particular business model” or

²³ *USTA II*, 359 F.3d at 582 (emphasis added).

²⁴ *Qwest Omaha Forbearance Order* ¶ 67.

“particular architecture or approach”²⁵ — it should reject claims to focus its forbearance analysis on the needs of particular competitors. The text of § 160 focuses instead on “competitive market conditions,” and the “consumers” that benefit from that competition, irrespective of the interests of particular competitors with particular business plans. 47 U.S.C. § 160(a)(2), (b). The alleged inability of one carrier to reach a commercial agreement, therefore, cannot refute the Commission’s predictive judgment.

That is particularly true where, as here, McLeod’s complaint is that Qwest’s commercially offered rates are higher than TELRIC rates for UNEs, as that is an irrelevant comparison in the context of 271 elements. *See* Qwest Opp. at 18-21. As the Commission has held, TELRIC pricing does not apply to 271 elements — and for good reason.²⁶ Such pricing would be affirmatively “counterproductive” and is “no[t] necessary to protect the public interest.”²⁷ Instead, “the market price should prevail” for 271 elements, “as opposed to a regulated rate,” and a Bell company may “satisfy this standard” by offering 271 elements at rates in “its interstate . . . tariff[s]” or through commercial agreements with other carriers.²⁸ The D.C. Circuit, moreover, upheld the Commission’s “determin[ation] that TELRIC pricing was *not appropriate* . . . for elements” that are not UNEs under § 251(c)(3).²⁹ And the First Circuit recently held that requiring TELRIC rates for 271 elements “directly conflicts with, and undercuts, the [Commission’s] orders,” which “provide [BOCs] the authority to charge the

²⁵ *TRRO* ¶¶ 24, 25, 27.

²⁶ *See TRO* ¶ 656; Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, ¶ 470 (1999) (“*UNE Remand Order*”), *vacated and remanded, United States Telecom Ass’n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002).

²⁷ *TRO* ¶ 656; *UNE Remand Order* ¶ 473.

²⁸ *TRO* ¶ 664; *UNE Remand Order* ¶ 473.

²⁹ *USTA II*, 359 F.3d at 589 (emphasis added).

potentially higher just and reasonable rates [for 271 elements], in order to limit subsidization [of] and to encourage investment by . . . competitors.”³⁰

In all events, in the *Qwest Omaha Forbearance Order*, the Commission merely took “comfort” from this predictive judgment and made clear that its decision to forbear from § 251(c)(3) UNE requirements was justified based solely on the extent of facilities-based competition in the Omaha MSA. *See Qwest Omaha Forbearance Order* ¶¶ 64, 67, 69. Because the Commission’s decision to forbear did not depend on that predictive judgment, claims about that prediction cannot provide a basis for reversing the Commission’s decision. *See, e.g., Z-Tel Communications, Inc. v. FCC*, 333 F.3d 262, 270-71 (D.C. Cir. 2003) (holding that a CLEC’s challenge to evidence from which the Commission “deriv[ed] additional comfort,” but which “it was not relying upon” was “foreclosed”) (citing *AT&T Corp. v. FCC*, 220 F.3d 607, 625 (D.C. Cir. 2000)).

Given the Commission’s extensive reliance on the extensive facilities-based competition in the Omaha MSA, which does not rely on commercial agreements with Qwest, and the benefits such competition provides to end-user customers, *see Qwest Omaha Forbearance Order* ¶¶ 58-59, 64-66, 68-71, 73, 75-78, the Commission could not reverse its forbearance decision without considering all of that evidence — updated to reflect current data — along with all other evidence relevant to the forbearance criteria, as applied in the context of UNE requirements.³¹

That is because the forbearance statute requires the Commission, when presented with a forbearance petition, to make a considered decision that enforcement of the statutory provisions

³⁰ *Verizon New England Inc. v. Maine Pub. Utils. Comm’n*, — F.3d —, Nos. 06-2515 & 06-2429, 2007 WL 2509863, at *6 (1st Cir. Sept. 6, 2007).

³¹ Although the Commission indicated that it would take “appropriate action” and “has the option of reconsidering [its] forbearance ruling” in the event its “predictive judgment prove[d] incorrect,” *Qwest Omaha Forbearance Order* ¶ 83 & n.204, the Commission did not state — as McLeod and others claim — that the Commission *would* reimpose UNE requirements if this particular predictive judgment did not come true.

and regulations at issue is warranted and can be justified under the specific criteria Congress set forth in § 160(a) and (b), which are comparable to the criteria the Commission applies under § 201(b) when determining whether to promulgate regulations in the first place.³² Therefore, after a grant of forbearance, the eliminated regulatory requirements could be re-imposed only following the initiation of a new proceeding and on the basis of a complete record demonstrating the type of market failure that the courts have held could justify such UNE regulations.

C. Although McLeod’s petition is primarily concerned with its alleged experiences in the Omaha MSA, McLeod also urges the Commission not to grant forbearance from § 251(c)(3) UNE requirements in “pending and future forbearance petitions,” such as Verizon’s pending petitions for forbearance in six MSAs. McLeod Pet. at 17. The commenters supporting McLeod likewise make clear that their real opposition is to the granting of such relief in those other pending proceedings. *See, e.g.,* EarthLink at 4 (claiming that the Commission “must not rely on such predictive judgments as the basis for granting the forbearance from section 251(c)(3) sought by Verizon”); Alpheus *et al.* at 4-5, 9-10 (same).³³

Even aside from the fact that the premises of such claims are wrong — the Commission found that facilities-based competition was sufficient to justify its grant of forbearance, independent of any predictive judgments it made about wholesale offerings, and McLeod’s claims do not undermine the Commission’s prediction — the Commission could not permissibly

³² *See Cellular Telecomms. & Internet Ass’n v. FCC*, 330 F.3d 502, 512 (D.C. Cir. 2003) (interpreting § 160(a)(2) to “refer[] to the existence of a strong connection between what the agency has done by way of regulation and what the agency permissibly sought to achieve with the disputed regulation”); *Cellco P’ship v. FCC*, 357 F.3d 88, 96 (D.C. Cir. 2004) (explaining that, under § 201(b), “the Commission can adopt rules upon finding that they advance a legitimate regulatory objective”).

³³ Covad *et al.* (at 4-6) and Eschelon *et al.* (at 4-5) continue to take issue with the *Qwest Omaha Forbearance Order* insofar as it granted relief from providing DS1 and DS3 loops and transport as § 251(c)(3) UNEs. But these commenters simply repeat the same claims about the Commission’s analysis that they raised before the D.C. Circuit and that the court rejected, finding that the Commission had properly relied on “data showing Cox’s aggressive expansion in . . . [the] enterprise market[.]” *Qwest Corp.*, 482 F.3d at 479-80.

deny forbearance to Verizon based on any alleged misdeeds of Qwest, even if proven. As the Commission has repeatedly stressed, “each case must be judged on its own merits” considering “factors unique to the . . . MSA” at issue.³⁴ The Commission has further made clear that it “may reach different conclusions” in different MSAs “regarding forbearance from [UNE] obligations” based on the “competitive situation” in the MSA in question.³⁵ The record in Verizon’s forbearance proceeding shows that facilities-based competition is more advanced in each of the six MSAs than the competition in the Omaha MSA that the Commission found was sufficient to grant forbearance from UNE obligations. That fact alone should be dispositive.

In any event, in Verizon’s case, actual experience amply bears out the Commission’s conclusion that carriers have “incentive[s] to make attractive wholesale offerings available”³⁶ and that “competition[] [will] induc[e] [carriers], even in the absence of” unbundling requirements, “to find ways to keep traffic on-net,” rather than let the traffic migrate to another carrier’s network.³⁷ Following the elimination of the UNE Platform and line sharing as a UNE, Verizon successfully negotiated more than 160 commercial agreements, providing commercial alternatives to those formerly mandated UNE arrangements. Those agreements have garnered praise from Verizon’s counterparties. Covad, for example, “applaud[ed] Verizon for its leadership in striking a long-term commercial agreement” to replace UNE line sharing and noted that the “pricing in the[] agreement[] allows Covad to provide very competitive service

³⁴ *Qwest Omaha Forbearance Order* ¶ 2 & n.4; accord Memorandum Opinion and Order, *Petition of ACS Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, As Amended, for Forbearance from Section 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, 22 FCC Rcd 1958, ¶¶ 2, 9 & n.28 (2007) (“ACS Anchorage Forbearance Order”).

³⁵ *ACS Anchorage Forbearance Order* ¶ 9 n.28.

³⁶ *Qwest Omaha Forbearance Order* ¶ 67.

³⁷ *EarthLink, Inc. v. FCC*, 462 F.3d 1, 10 n.8 (D.C. Cir. 2006) (internal quotation marks omitted).

offerings.”³⁸ Similarly, Broadview described its commercial agreement with Verizon to replace UNE-P as providing its “telecommunications customers in the Northeast with the best of both worlds” and that the agreement “paves the way for future growth.”³⁹

CONCLUSION

The Commission should deny McLeod’s petition for modification.

Respectfully submitted,

Of Counsel:

Michael E. Glover

/s/ Scott H. Angstreich
Scott H. Angstreich
KELLOGG, HUBER, HANSEN, TODD,
EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W. – Suite 400
Washington, D.C. 20036
(202) 326-7900

Edward Shakin
Sherry A. Ingram
VERIZON
1515 North Courthouse Road – Suite 500
Arlington, VA 22201-2909
(703) 351-3065

Counsel for Verizon

September 13, 2007

³⁸ Covad News Release, *Covad and Verizon Sign Commercial DSL Line-Sharing Agreement* (Dec. 15, 2004) (internal quotation marks omitted), http://www.covad.com/export/sites/default/about/newsroom/pressroom/pr_2004/04_12_15_verizon.pdf.

³⁹ Broadview Networks Press Release, *Broadview Networks Announces Commercial Agreement with Verizon* (Nov. 9, 2005) (internal quotation marks omitted).