



900 17th Street, NW, Suite 400, Washington, DC 20006. PH:202 296 6650. FX:202 296 7585. www.comptel

July 17, 2008

**EX PARTE**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

Re: *Petitions of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, WC Docket No. 07-97

Dear Ms. Dortch:

On July 1 and 15, 2008, Qwest Corporation (“Qwest”) submitted *ex parte* letters in the above-captioned docket in which it implies that the Commission made an affirmative determination in the *Verizon 6 MSA Order*<sup>1</sup> that it was appropriate to include so-called “cut the cord” wireless lines in the calculation of local market share as part of the Commission’s forbearance analysis.<sup>2</sup> Contrary to Qwest’s assertion, the FCC has never determined that wireless service is in the same product market as wireline local exchange service. Indeed, the vast majority of Commission actions – from its evaluation of whether UNEs should be available to wireless carriers,<sup>3</sup> through eight straight decisions evaluating wireless mergers, to its most recent decision freezing high-cost support to ETCs – the Commission has held that wireless and wireline services comprise *separate* product markets, despite the fact that there are some wireless customers that do not subscribe to wireline service.

<sup>1</sup> *In the Matter of Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas*, WC Docket No. 06-172, Memorandum Opinion and Order, FCC 07-212 (rel. Dec. 5, 2007) (“*Verizon 6 MSA Order*”).

<sup>2</sup> Letter from Daphne Butler, Corporate Counsel, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-97 (filed July 1, 2008) (“Qwest July 1<sup>st</sup> *Ex Parte*”), at 3, 5; Letter from Craig J. Brown, Associate General Counsel, Qwest, to Marlene H. Dortch, WC Docket No. 07-97 (“Qwest July 15<sup>th</sup> *Ex Parte*”) at 1, 6.

<sup>3</sup> *In the Matter of Unbundled Access to Network Elements*, WC Docket No. 04-313, Order on Remand, FCC 04-290 (rel. Feb. 4, 2005) at ¶¶ 34-36.

As a threshold matter, Qwest incorrectly characterizes the Commission's decision in the *Verizon 6 MSA Order*, suggesting that the Commission adopted a set methodology that treats (at least some) wireless services as being within the same product market as wireline local voice service. The *Verizon 6 MSA Order*, however, reached no such conclusion. Rather, the *Verizon 6 MSA Order* concluded that Verizon had failed to demonstrate the existence of sufficient competition to warrant forbearance “*even including ‘cut the cord’ competition.*”<sup>4</sup> This does not constitute a finding that wireless service is in the same product market as wireline service; it is nothing more than a determination that the issue *was* immaterial to the Commission's conclusions in the *Verizon 6 MSA Order* because even if such lines were included, there was still not sufficient competition to grant Verizon's petitions.

In addition, the *Verizon 6 MSA Order* cannot be read in isolation. A large number of Commission decisions, including one released 6 months after the *Verizon 6 MSA Order*, have found that wireless mobile service and local wireline service are not in the same product market because the majority of consumers do not consider the services as substitutes for one another.<sup>5</sup>

The Commission's most extensive discussion as to whether wireless and wireline services are substitutes was conducted in the context of Cingular's acquisition of AT&T Wireless.<sup>6</sup> In that proceeding, the Applicants (including Cingular's joint owners, SBC and BellSouth) argued and the Commission agreed that “few customers would substitute other telecommunications services, such as wireline voice services, for mobile voice services.”<sup>7</sup> Although the Commission recognized that there were some customers that substituted wireless for wireline service, it noted that “consumers tend to use wireless and wireline services in a complementary manner and view the services as distinct because of differences in functionality.”<sup>8</sup> Consequently, the Commission's product market did *not*

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<sup>4</sup> *Verizon 6 MSA Order* at ¶ 27 (emphasis added). See also ¶ 26, n. 88 (“Late in the proceeding, Verizon filed additional market share estimates based in part on data submitted by competing facilities-based providers, its estimates of wireless substitution, and other evidence . . . . [E]ven if we consider multiple sources of competition, in addition to the relevant cable operator, evaluated consistent with the methodologies the Commission has applied in the past, we do not find forbearance justified based on the current competitive showing.”) (Emphasis added).

<sup>5</sup> *In the Matter of High-Cost Universal Service Support*, WC Docket No. 05-337, Order, FCC 08-122 (rel. May 1, 2008).

<sup>6</sup> *In the Matter of Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation For Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 04-70, Memorandum Opinion and Order, FCC 04-255 (rel. Oct. 26, 2004) (“*Cingular-AT&T Wireless Merger Order*”).

<sup>7</sup> *Id.* at ¶ 72.

<sup>8</sup> *Id.* at ¶ 239.

include wireline local service,<sup>9</sup> even though the Commission clearly understood that “all products ‘reasonably interchangeable by consumers for the same purposes’” should be included in the same product market.<sup>10</sup>

Although the Commission presumed some substitutability of wireline and wireless services in its review of the SBC/AT&T and Verizon/MCI acquisitions, it nonetheless acknowledged that “most segments of the mass market are unlikely to rely upon mobile wireless services in lieu of wireline local services.”<sup>11</sup> In several merger decisions subsequent to the SBC/AT&T and Verizon/MCI orders, the Commission has found that the wireless product market does not include wireline services.<sup>12</sup> Moreover, just two months ago, the Commission reiterated its prevailing conclusion that wireless services are not substitutes for wireline services in its decision to freeze the level of high-cost support available to wireless ETCs:

[We] did not foresee that competitive ETCs might offer supported services that were not viewed by consumers as substitutes for the incumbent LEC’s supported services. . . . These wireless ETCs do not capture lines from the incumbent LEC to become a customer’s sole service provider, except in a small portion of households. Thus, rather than providing a complete substitute for traditional wireline service, these wireless competitive ETCs largely provide mobile wireless telephony service in addition to a customer’s existing wireline service.

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<sup>9</sup> *Id.* at ¶ 74.

<sup>10</sup> *Id.* at ¶ 71.

<sup>11</sup> See, *In the Matter of Verizon Communications, Inc. and MCI, Inc. Applications for Transfer of Control*, WC Docket No. 05-75, Memorandum Opinion and Order, FCC 05-184 (rel. Nov. 17, 2005) at ¶¶ 90-91; *In the Matter of SBC Communications, Inc. and AT&T, Inc. Applications for Transfer of Control*, WC Docket No. 05-74, Memorandum Opinion and Order, FCC 05-183 (rel. Nov. 17, 2005) at ¶¶ 89-90.

<sup>12</sup> See *Applications for the Assignment of License from Denali PCS, LLC to Alaska Digital, L.L.C.*, WT Docket No. 06-114, Memorandum Opinion and Order, 21 FCC Rcd 14863 at 14876 ¶ 25 (2006); *Applications of Guam Cellular and Paging, Inc. and DoCoMo Guam Holdings, Inc.*, WT Docket No. 06-96, Memorandum Opinion and Order, 21 FCC Rcd 13580 at 13594 ¶ 19 (2006); *Applications of Midwest Wireless Holdings, L.L.C. and ALLTEL Communications, Inc.*, WT Docket No. 05-339, Memorandum Opinion and Order, 21 FCC Rcd 11526 at 11541 ¶ 26 (2006); *Applications of Nextel Communications, Inc. and Sprint Corporation*, WT Docket No. 05-63, Memorandum Opinion and Order, 20 FCC Rcd 13967 at 13983 ¶ 38 (2005); *Applications of Western Wireless Corporation and ALLTEL Corporation*, WT Docket No. 05-50, Memorandum Opinion and Order, 20 FCC Rcd 13053 at 13068 ¶ 28 (2005); *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21558 ¶ 74; *In the Matter of Applications of AT&T Inc. and Dobson Communications Corporation for Consent To Transfer of Control*, WT Docket No. 07-153, Memorandum Opinion and Order, FCC 07-196 (rel. Nov. 19, 2007) at ¶ 21.

Because the majority of households do not view wireline and wireless services to be direct substitutes, many households subscribe to both services ...<sup>13</sup>

As noted at the outset, the Commission denies wireless carriers access to UNEs to provide wireless services precisely because it has concluded that wireless service comprises a separate market from wireline local exchange service. It would be fundamentally inconsistent for the Commission to continue with this policy at the same time that it relies on the opposite conclusion to further deny UNE access to other providers based on the view that wireless service is within the same product market as wireline local service. The Commission should reject Qwest's request for forbearance in each of the four markets making clear that it will not grant such a request based upon the untenable premise that wireless and wireline service are in the same product market.

The Commission should also reject Qwest's bold contention that its failure to produce evidence demonstrating the existence of a sufficient level of competition to warrant forbearance cannot be used by the Commission to deny its petitions.<sup>14</sup> Using Qwest's reasoning, a petitioner need do no more than file a one sentence statement asking to be relieved from complying with all provisions of the Communications Act and opponents of the petition would bear the burden of proving that the petition should be denied. The Commission declined to adopt Qwest's suggested approach ten years ago when it appropriately determined that "application of those [forbearance] criteria is not a simple task, and a decision to forbear must be based on a record that contains more than broad, unsupported allegations of why those criteria are met."<sup>15</sup>

Finally, the Commission must reject Qwest's argument that the Commission must evaluate its forbearance petitions in the same manner as it would evaluate a petition to adopt a new rule and must affirmatively find that the rule is reasonably directed towards achieving a legitimate Commission goal or it must forbear from applying the rule.<sup>16</sup> Qwest has asked for forbearance from Section 251(c)(3) of the Communications Act, not just a "Commission rule." It is Congress that has determined that Section 251(c)(3) is reasonably directed towards achieving the legitimate national policy goal of opening the local telephone markets to competition. Surely, in adopting Section 10 of the Act, Congress did not intend to impose on the Commission the burden of unearthing substantial evidence to justify the continued enforcement of statutory provisions

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<sup>13</sup> *In the Matter of High-Cost Universal Service Support*, WC Docket No. 05-337, Order, FCC 08-122 (rel. May 1, 2008) at ¶¶ 20, 21.

<sup>14</sup> Qwest July 15<sup>th</sup> *Ex Parte* at 2.

<sup>15</sup> *In the Matters of Bell Operating Companies Petitions For Forbearance From The Application of Section 272 of the Communications Act of 1934 to Certain Activities*, CC Docket 96-149, Memorandum Opinion and Order, DA98-220 at ¶16 (rel. Feb. 6, 1998).

<sup>16</sup> Qwest July 15<sup>th</sup> *Ex Parte* at 2.

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whenever an ILEC asked for forbearance, no matter how unsupported the request. Qwest has offered no evidence of such a Congressional intent, and none should be presumed.

Respectfully submitted,

/s/

Mary C. Albert

cc: Dan Gonzalez

Amy Bender

Scott Deutchman

Scott Bergmann

Greg Orlando

John Hunter

Dana Shaffer

Deena Shetler

Albert Lewis

Tim Stelzig

Julie Veach

Margaret Daily

Jay Atkinson

Pamela Megna

Denis Coca

Adam Kitschenbaum

Mark Brook