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VIA ECFS

EX PARTE

July 18, 2008

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

Re: *In the Matter of Petitions of Qwest Corporation 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 -- Response to Ex Parte Filing of XO Communications, et al.*

Dear Ms. Dortch:

This letter responds to two recent arguments made in this docket for denying Qwest Corporation ("Qwest") the forbearance relief it has requested. First, the letter responds to a July 14, 2008 *ex parte* presentation by XO Communications, COVAD Communications Group and NuVox Communications (collectively "XO"), which addresses the standards for grant of a petition for forbearance under Section 10 of the Act. As discussed briefly below, that presentation is wrong on both the law and the facts. Second, Qwest wishes to reiterate that the Federal Communications Commission ("Commission") would act unlawfully if it were to deny forbearance on the ground that Qwest has not made a Metropolitan Statistical Area ("MSA")-specific showing concerning "cut-the-cord" statistics that the Commission gave Qwest no reason to believe would be required and that, in fact, the Commission's prior orders gave Qwest and the public every reason to believe would *not* be required.

1. In its *ex parte* presentation, XO misreads Section 10(b) to mean that the "Commission may grant forbearance only where it 'determines that such forbearance will promote competition among providers of telecommunications services.'"¹ Section 10(b) says nothing of the kind. Instead, it states: "If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a

¹ XO *ex parte* at 2, footnote citing to Section 10(b).

Commission finding that forbearance is in the public interest.”² In other words, an affirmative demonstration that forbearance would “promote competition” is a sufficient, but not necessary, basis for granting deregulatory relief. The “public interest” standard in the Act can also be met by reference to the other touchstones of Section 10: protection of consumers and advancement of consumer welfare. And in any event, as Qwest has demonstrated in many prior submissions, the forbearance relief it seeks would in fact “promote competition” by removing the type of burdensome regulatory asymmetries that skew competition and harm consumers when markets become fully competitive, as they are here.³

More generally, as XO apparently recognizes, the inclusion of a “public interest” standard in a statute does not give an agency a blanket license to do whatever it wants; instead, the standard must be construed in light of the other responsibilities delegated to the agency in its enabling act.⁴ Here, Section 10 establishes a strong presumption that deregulatory relief is appropriate -- a presumption so strong that such relief *is automatically granted* at the statutory deadline as an act of Congress if the Commission has not affirmatively established that the statutory prerequisites for relief are absent.⁵ XO’s position that Section 10 prohibits forbearance unless there is an affirmative showing of benefit to competitors, and that all of the other public interest ramifications of the Qwest petitions must be ignored, would turn the statute on its head.

2. On a separate matter, the Commission would act unlawfully and irresponsibly if, as some propose, it were to reject deregulatory relief for the Phoenix MSA (or any of the other MSAs covered by the Qwest petitions) on the ground that Qwest has not provided MSA-specific “cut-the-cord” data. This issue arises because, if the Federal Government’s national cut-the-cord data are used as a proxy for conditions in Phoenix, Qwest indisputably satisfies the market-share test that the Commission established in the *Verizon Six Forbearance* proceeding.⁶ Moreover, in

² 47 U.S.C. § 160(b).

³ See, e.g., *ex parte* letter from Daphne E. Butler, Qwest to Ms. Marlene H. Dortch, WC Docket No. 07-97, filed Feb. 21, 2008 at 3-7 (“Qwest Feb. 21, 2008 *ex parte*”); see also generally *ex parte* letter from Daphne E. Butler, Qwest to Ms. Marlene H. Dortch, WC Docket No. 07-97, filed June 25, 2008 at 3-7.

⁴ See *National Association for the Advancement of Colored People v. Federal Power Commission*, 425 U.S. 662, 669-70 (1976); *Sprint Communications Company L.P. v. FCC*, 274 F.3d 549, 554 (D.C. Cir. 2001); *The Business Roundtable v. Securities and Exchange Commission*, 905 F.2d 406, 413 (D.C. Cir. 1990).

⁵ Section 10(c); *Sprint Nextel Corporation v. FCC*, 508 F.3d 1129, 1132 (D.C. Cir. 2007), *reh’g denied*, 2008 U.S. App. LEXIS 2518 (D.C. Cir. Jan. 30, 2008).

⁶ As Qwest has previously explained, the Commission should not have established this market-share requirement in the first place. See, e.g., Qwest Feb. 21, 2008 *ex parte* at 2; *ex parte* letter from Daphne E. Butler, Qwest to Ms. Marlene H. Dortch, WC Docket No. 07-97, filed

that *Verizon Six Forbearance*⁷ proceeding, the Commission itself “reli[ed]” on such national data as a reasonable proxy for conditions in urban MSAs -- and further observed that its “[r]eliance on this government estimate of ‘cut the cord’ wireless substitution is consistent with the Commission’s reliance on such government survey data in prior proceedings.”⁸

The Commission would act unlawfully in two distinct respects if it were now to reject this petition on the ground that Qwest should have produced MSA-specific cut-the-cord data rather than the national “government estimate” the Commission endorsed in the *Verizon Six MSA Order*. First, as a substantive matter, the Commission was correct in the *Verizon* proceeding when it “reli[ed]” on national data as a proxy for conditions in urban MSAs subject to robust competition.

As Qwest has previously explained, the burden is on the *opponents* of forbearance to rebut the presumption that this proxy is reasonable if they have any empirical basis for doing so.⁹ Here, the Commission certainly has no basis for concluding that the national data *overstate* the cut-the-cord phenomenon in Phoenix -- and it therefore has no empirical basis for overcoming Congress’ presumption that forbearance should and will be granted if the Commission cannot conclude that the forbearance petitioner has “fail[ed] to meet the requirements for forbearance.”¹⁰

Second, the Commission would violate Section 10, the Administrative Procedure Act, and basic due process principles if, after informing the public that reliance on the Federal Government’s own national data is appropriate, it then rejected a forbearance petition at the eleventh hour on the ground that a petitioner had improperly relied on such data. For months, Qwest has reasonably proceeded on the expectation that the Commission meant what it said in the *Verizon Six MSA Order* -- that the national data are reasonable (if conservative) proxies for cut-the-cord data in highly-competitive MSAs. Although it has had fifteen months to consider Qwest’s petitions, the Commission’s staff waited until mid-July 2008, just before the statutory deadline, before giving Qwest any indication that reliance on the previously endorsed national data would be insufficient.

Mar. 14, 2008 at 6-8. Qwest’s central point here is that, even if this market-share requirement were appropriate, Qwest would meet it in the Phoenix MSA.

⁷ *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*, Memorandum Opinion and Order, 22 FCC Rcd 21293, 21308 n. 89 (2007) (“*Verizon Six MSA Order*”), *pet. for rev.* filed Jan. 14, 2008 (D.C. Cir. No. 08-1012).

⁸ See *Verizon Six MSA Order*, 22 FCC Rcd at Appendix B, 21323 n.2 (citation omitted).

⁹ See *ex parte* letter from Craig J. Brown, Qwest, to Ms. Marlene H. Dortch, WC Docket No. 07-97, filed July 15, 2008 at 5.

¹⁰ 47 U.S.C. § 160(c).

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This is the regulatory equivalent of moving the goalposts after the kicker has kicked the ball. Even as a general matter, an agency may not induce reliance on one set of standards and then change them at the last minute as a basis for denying relief.¹¹ Such a bait-and-switch would be particularly lawless, moreover, in the statutory context governed by Section 10. That provision gives the Commission a fifteen-month deadline for a reason: to ensure prompt removal of regulatory burdens unless the Commission affirmatively establishes substantive reasons for retaining them.¹² The Commission would defy that statutory mandate if it could wait until just before the deadline to change the rules on the petitioning party, deny relief, and restart the fifteen-month clock from the beginning. Doing so here would exacerbate the concern, reflected in several recent judicial decisions, that the Commission is too quick to adopt procedural pretexts for avoiding its statutory responsibilities under Section 10 and frustrating Congress's express desire for prompt forbearance once regulations have outlived their usefulness.¹³

Respectfully submitted,

/s/ Craig J. Brown

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¹¹ See generally *Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001); *University of Iowa Hospitals and Clinics v. Shalala*, 180 F.3d 943, 951 (8th Cir. 1999).

¹² See, e.g., Senator Robert Dole's statements in the relevant legislative history that the forbearance petition procedure was intended to "force the Federal Communications Commission to eliminate outdated regulations, and do so in a timely manner. Currently, there is no guarantee that the Commission will ever act on requests that it forbear on regulations."), Congressional Record, S7897 (June 7, 1995); House Report on H.R. 1555 (Report No. 104-204), 104th Cong., 1st Sess., at 89 (July 24, 1995) ("Given that the purpose of this legislation is to shift monopoly markets to competition as quickly as possible, the Committee anticipates this forbearance authority will be a useful tool in ending unnecessary regulation.").

¹³ See, e.g., *AT&T Inc. v. FCC*, 452 F.3d 830 (D.C. Cir. 2006); *Verizon Tel. Cos. v. FCC*, 374 F.3d 1229 (D.C. Cir. 2004).

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