Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of Qwest Corporation for Forbearance From Enforcement of the Commission's ARMIS and 492A Reporting Requirements Pursuant to 47 U.S.C. § 160(c)	)	WC Docket No. 07-204
	)	
Petition of Verizon for Forbearance Under 47 U.S.C. § 160(c) From Enforcement of Certain of the Commission's Recordkeeping And Reporting Requirements	)	WC Docket No. 07-273

REPLY OF THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION TO OPPOSITIONS

The National Cable & Telecommunications Association ("NCTA") hereby responds to the oppositions of Qwest and Verizon to NCTA's petition for reconsideration in the above-referenced dockets.[1] For the reasons explained in NCTA's petition for reconsideration, the Commission should require AT&T, Qwest, and Verizon to continue filing pole attachment data for states that regulate pole attachment rates.

INTRODUCTION

In the *Order*, the Commission granted petitions filed by Qwest and Verizon that sought extensive relief from the Commission's Automatic Reporting Management Information System (ARMIS) filing requirements.[2] The Commission extended the same relief to AT&T. As requested by NCTA, the Commission conditioned this relief on "each carrier's continued annual

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[1] Petition for Partial Reconsideration of the National Cable & Telecommunications Association, WC Docket Nos. 07-204, 07-273 (filed Jan. 12, 2009) (NCTA Petition).

[2] *Petition of Qwest Corp. for Forbearance from Enforcement of the Commission's ARMIS and 492A Reporting Requirements; Petition of Verizon for Forbearance from Enforcement of Certain of the Commission's Recordkeeping and Reporting Requirements*, WC Docket Nos. 07-204, 07-273, Memorandum Opinion and Order, FCC 08-271 (rel. Dec. 12, 2008) (*Order*).

public filings with the Commission of the pole attachment cost data currently submitted in ARMIS Report 43-01."[3] The Commission found, however, that this filing was "no longer necessary on an ongoing basis" with respect to states that have certified that they will regulate pole attachment rates themselves.[4]

In its petition for reconsideration, NCTA identified three reasons why the Commission erred in concluding that there was no "current, federal need" to maintain filing obligations covering states that regulate pole attachment rates. First, Section 224 establishes a federal interest in pole attachment rates even in states that choose to regulate those rates.[5] Second, it was unreasonable for the Commission to grant unconditional forbearance without considering, as it has in prior cases, whether states have in fact adopted, or even have the authority to adopt, comparable data requirements.[6] Third, the benefits of maintaining a uniform federal requirement applicable to all states preclude the Commission from finding that forbearance is in the public interest pursuant to Section 10 of the Act.[7]

As explained below, nothing in the oppositions filed by Qwest or Verizon rebuts these arguments effectively. Accordingly, the Commission should grant NCTA's petition and require the continued filing of pole attachment data for all states.

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[3] *Order* at ¶ 13

[4] *Id.* at ¶ 14.

[5] NCTA Petition at 4-5.

[6] *Id.* at 5, *citing 2000 Biennial Regulatory Review*, CC Docket No. 00-199 *et al*., Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 19911, 19985, ¶ 207 (2001) (*2000 Biennial Review FNPRM*) (seeking comment on whether three years is sufficient time to transition from federal to state data collection and whether any states are constrained in their ability to collect the necessary data).

[7] *Id.* at 6-7.

I. THE OPPOSITIONS MERELY REPEAT THE SAME FLAWED REASONING CONTAINED IN THE ORDER

In response to NCTA's petition, both Qwest and Verizon rely almost exclusively on statements in the *AT&T Forbearance Order*, released earlier in 2008, asserting that the Commission cannot retain a federal regulation merely because it benefits the states.[8] There are two significant flaws with this argument.

First, the principle announced in the *AT&T Forbearance Order* – that the Commission cannot retain requirements solely because they are relied on by the states – was based on a misreading of applicable precedent. The only prior case cited as support for this principle was the *2000 Biennial Review FNPRM*, which proposed eliminating certain accounting requirements relied on solely by state commissions.[9] But the Commission is not bound by a statement contained in a proposed rulemaking, as the *AT&T Forbearance Order* seems to suggest. Moreover, the *AT&T Forbearance Order* ignored a more recent Commission decision reinstating one of these accounting requirements "in light of its continued significance in state ratemaking processes."[10] In other words, while Qwest and Verizon would have the Commission treat the *AT&T Forbearance Order* as well-established precedent, it actually represents a departure from precedent that may not survive judicial review.

Second, the statement in the *AT&T Forbearance Order* was premised on the Commission's conclusion that there was no federal interest in the subject of the regulation and

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[8] *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160 From Enforcement of Certain of the Commission's Cost Assignment Rules*, WC Docket No. 07-21, Memorandum Opinion and Order, 23 FCC Rcd 7302 (2008) (*AT&T Forbearance Order*), *rev. pending NASUCA v. FCC*, Case No. 08-1226 (D.C. Cir. June 23, 2008)

[9] *Id*. at 7321, ¶ 32, *citing 2000 Biennial Review FNPRM*, 16 FCC Rcd at 19985, ¶ 207.

[10] *Federal-State Joint Conference on Accounting*, WC Docket No. 02-269, Report and Order, 19 FCC Rcd 11732, 11735, ¶ 8 (2004).

the forbearance criteria in Section 10 were fully satisfied.[11] But neither circumstance exists in this case. First, Section 224 of the Communications Act establishes a federal interest in ensuring that pole attachment rates are reasonable.[12] As NCTA explained, a state that elects to regulate pole attachment rates must certify to the Commission that it has rules in place to carry out that task in a manner that considers the needs of customers of attaching parties and pole owners.[13] Moreover, if a certified state fails to timely resolve a pole attachment complaint, jurisdiction reverts to the Commission "notwithstanding any such certification."[14] Consequently, while Section 224 does not give the Commission jurisdiction to regulate rates in states that do it themselves, it establishes a federal interest in making sure that consumers in all states receive the benefits of pole attachment regulation and requires the Commission to be ready and able to step in should circumstances require.

In response to this argument, Verizon suggests that federal data collection requirements should apply only *after* a state fails to resolve an individual pole attachment complaint and jurisdiction reverts to the Commission.[15] Such an approach is totally inconsistent with the intent of the rule, which is to ensure that an attaching party receives prompt attention to complaints that have languished in the states. It should be obvious that the Commission will not be able to promptly resolve complaints if a LEC's annual filing obligation is not triggered until months after a complaint is filed with the state and the Commission reasserts jurisdiction. Retaining a federal filing requirement is a far more rational approach to achieving the statutory objectives established by Congress.

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[11] *AT&T Forbearance Order*, 23 FCC Rcd at 7321, ¶ 32.

[12] 47 U.S.C. § 224(b)(1).

[13] 47 U.S.C. § 224(c)(2).

[14] 47 C.F.R. § 1.1414(e).

[15] Verizon Opposition at 4.

The principle announced in the *AT&T Forbearance Order* also is inapplicable in this case because there was no basis on which the Commission could find that elimination of the federal obligation to make pole attachment data available was in the public interest as required under Section 10 of the Act. As NCTA explained, there is substantial benefit to the Commission, the states, and attaching parties in having a uniform, easily accessible, set of data that covers every state. Conversely, there are significant costs, and no countervailing benefits, to replacing this clear federal requirement with 20 different state requirements. Neither Qwest nor Verizon even attempt to rebut this argument, let alone do so convincingly.

Finally, Verizon asserts that there is no harm from eliminating public filing requirements because parties usually negotiate pole attachment rates and "Verizon will continue to provide other parties access to appropriate data to establish and review rates as required."[16] But the Commission repeatedly has rejected this argument. The *Order* correctly found that most pole attachment rates are successfully negotiated precisely because the underlying cost data is required to be made publicly available.[17] Given the undisputed lack of competition in the marketplace for pole attachments, there is no basis whatsoever on which the Commission could conclude that Verizon or any other pole owner would voluntarily make available the necessary data in the context of a private negotiation with a competitor.

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[16] *Id*. at 5.

[17] *Order* at ¶ 13 n.43 ("Indeed, to the extent that there are few pole attachment complaints filed with the Commission, the public availability of these data may be one reason why that is the case.").

CONCLUSION

For the reasons explained above, the Commission should have conditioned its forbearance relief to Qwest, Verizon, and AT&T on the continued public availability of pole attachment data for all states. Accordingly, the Commission should reconsider its decision not to impose such a condition with respect to states that regulate pole attachment rates and require the continued filing of pole attachment data in Table III of ARMIS Report 43-01 for all 50 states and the District of Columbia.

Respectfully submitted,

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