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May 8, 2009

Via ECFS

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

Re: Petition of Verizon New England for Forbearance Pursuant to 47 U.S.C. § 160(c) in Rhode Island, WC Docket No. 08-24; Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in Cox's Service Territory in the Virginia Beach Metropolitan Statistical Area, WC Docket No. 08-49

Dear Ms. Dortch:

The undersigned competitive local exchange carriers (the "Competitive Carriers") previously recommended that the Commission revise its analytical framework for considering Verizon's pending petitions for forbearance from its Section 251(c)(3) unbundling obligations, to avoid replicating the anti-competitive consequences resulting from the *Omaha Forbearance Order*.[1] In an *ex parte* letter dated May 1, 2009, Verizon attempted to refute a number of the arguments set forth in our letter.[2] As discussed below, Verizon is wrong on all counts.

[1] Letter from Andrew D. Lipman *et al.*, Counsel to Access Point, Inc. *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 08-24 and 08-29 (filed April 23, 2009) ("Competitive Carriers April 23 Letter").

[2] Letter from Rashann Duvall, Regulatory Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 08-24 & 08-49 (filed May 1, 2009) ("Verizon May 1 Letter").

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I. Verizon Misapplies the Impairment Criteria

In its letter, Verizon continues to advance a legal theory that conflates the statutory impairment standard under Section 251(d)(2) with the wholly independent forbearance criteria set forth in Section 10(a) of the Act. It argues that "impairment" is the touchstone for the FCC's unbundling analysis and governs the standard the Commission must apply when determining which UNEs must be made available under Section 251(c)(3).[3] Verizon is wrong, because Section 10(a), not Section 251(d)(2), governs decisions to forbear from applying existing regulations, as we discuss further in the next section of this letter.

Even if Section 10(a) did incorporate an impairment analysis, however, Verizon's argument is inconsistent with the Commission's impairment standard, now codified in 47 C.F.R. § 51.317(b), and its application of that standard to the loop and transport unbundling required under 47 C.F.R. § 51.319. *See Covad v. FCC*, 450 F.3d 528 (D.C. Cir. 2006). Verizon seeks a finding that CLECs are not impaired without access to UNEs when a single cable television provider has widely deployed facilities in a market that it uses to provide voice services.[4] Verizon is wrong because of its wholly unwarranted assumption that competition solely from a franchised cable operator eliminates impairment. As shown below and in our April 23, 2009 *ex parte*, the Commission's impairment standard precludes such a conclusion.

Under the Commission's rules, "impairment" is determined by applying the standard set forth in Rule 317(b), which specifically states that impairment exists where:

> taking into consideration the availability of alternative elements outside the incumbent LEC's network, including elements self-provisioned by the requesting carrier or acquired as an alternative from a third-party supplier, lack of access to that element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market by a *reasonably efficient competitor* uneconomic. (emphasis supplied).

In adopting Rule 317(b), the Commission explicitly rejected the argument Verizon makes here that competition from cable operators alone demonstrates non-impairment. In the broadband market, for example, it found that cable companies "have not needed to overcome the same kinds of barriers as new entrants that start without any

[3] Verizon May 1 Letter at 7.

[4] *Id*. at 2-7.

facilities at all."[5] The Commission emphasized that the impairment standard assumes no minimum set of network assets or capabilities.[6] Thus, its unbundling decisions took into account competition from cable companies but gave it little weight because it has little bearing on whether a reasonably efficient competitor, that lacks the built-in advantages of the cable provider, is impaired without access to UNEs.

For the same reasons, the Commission should reject Verizon's contention in these cases that reasonably efficient competitors are unimpaired merely because of Cox's ability to offer voice services.

II. The Commission has Authority Under Section 10(a) to Apply an Analysis Closely Resembling its Traditional Market Power Inquiry

Verizon further argues that a market power analysis conflicts with the impairment standard and cannot be used in these proceedings.[7] While the Commission recognized the differences between its statutory impairment analysis and a traditional market power analysis in the *TRO*,[8] those differences simply do not matter here. Here the Commission is not undertaking an impairment analysis. If it were, it would certainly find, as it did in the *TRRO*, that competitors are impaired without loop and transport elements even where cable competitors can deploy them, because of the historical advantages possessed by such companies compared to a reasonably efficient competitor.

But these are forbearance petitions, not impairment decisions, and the text of the statutory forbearance criteria in Section 10(a)(1) requires the Commission to assess whether it can "ensure" that Verizon's "charges" and "practices" will be "just and reasonable" and not "unreasonably discriminatory" if the request for forbearance were granted. Because the focus of the statutory forbearance criteria involves analysis of the

[5] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, 17384, ¶ 98 (2003) ("*TRO*") (emphasis added), *aff'd in part, remanded in part, vacated in part sub nom. United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), *cert. denied sub nom. Nat'l Ass'n Regulatory Util. Comm'rs v. United States Telecom Ass'n*, 125 S. Ct. 313 (2004).

[6] *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order On Remand, 20 FCC Rcd 2533, 3545-46, ¶ 22 (2005) ("*TRRO*"), *aff'd sub nom. Covad Comm'ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

[7] Verizon May 1 Letter at 7-9.

[8] Even in the *TRO*, the Commission recognized that a market power analysis would be useful in the context of an impairment decision, to determine "whether an [ILEC] could raise its retail prices unchecked." *TRO*, 18 FCC Rcd at 17051, ¶ 109.

ILEC's "charges" and "practices" and whether they are "just and reasonable," it is logical for the Commission to employ a market power analysis to determine whether unbundling remains warranted. In the *Omaha Forbearance Order*, the Commission "recognize[d] the strong relationship between the statutory forbearance criteria" that "closely parallels" the Commission's market power analysis used in its dominance cases.[9]

Verizon argues that the Commission confined its use of the traditional market power analysis to Qwest's request for forbearance from dominant carrier regulation in Omaha. Verizon May 1 Letter at 9. Verizon has made this same argument in its pending appeal of the *Six MSA Order* before the D.C. Circuit and the Commission has fully refuted that incorrect premise in its brief.[10] For example, the Commission's forbearance analysis in the *Omaha Forbearance Order*, 20 FCC Rcd at 19448-49, ¶¶ 66-67, begins with an examination of the market and the allocation of market share between Qwest and Cox. *Id.* at 19448, ¶ 66 (discussing Cox share of residential market in Omaha).

Nor does *EarthLink v. FCC*, 462 F.3d 1, 8, (D.C. Cir. 2006), limit the FCC's discretion to incorporate a market power analysis in its forbearance analysis. While Verizon alleges that the D.C. Circuit in *EarthLink* "held that decisions" addressing dominant carrier regulation are "not directly applicable" to a UNE forbearance petition,[11] this is a fundamental overstatement of the court's holding. The Court found that "on its face" Section 10 "imposes no particular mode of market analysis." *EarthLink*, 462 F.3d at 8. Therefore, the FCC's analysis was upheld because "the agency reasonably interpreted the statute to allow the forbearance analysis to vary depending on the circumstances." *Id.* In short, the *EarthLink* decision stands for the proposition that the Commission has ample discretion to "tailor the forbearance inquiry to the situation at hand." *Id.* at 9.

Verizon claims that the Commission cannot provide a reasoned basis for now conducting a more nuanced forbearance analysis informed by its traditional market power inquiry. This is pure hyperbole. In fact, the *Omaha Forbearance Order* supplies the very basis for this analysis — the statutory text. As discussed in the *Omaha Forbearance Order*, 20 FCC Rcd at 19425, ¶ 17, Section 10(a)(1) certainly provides a reasoned basis for the Commission to consider market power. This is especially appropriate for UNE forbearance, where the Commission's previous failure to apply a more "nuanced"

[9] *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415, 19425, ¶ 17 (2005) ("*Omaha Forbearance Order*"), *aff'd*, *Qwest Corp. v. FCC*, 482 F.3d 471 (D.C. Cir. 2007).

[10] *Verizon Tel. Cos. v. FCC*, Docket No. 08-1012, Brief for Respondents, at 31-32 (filed July 22, 2008).

[11] Verizon May 1, 2009 Letter at 9.

analysis in the *Omaha Forbearance Order* has prompted competitors to exit the market rather than compete.[12]

Finally, Verizon's letter suggests that the Commission cannot now change the standard for analyzing petitions for forbearance from unbundling requirements. But the Supreme Court has expressly held otherwise. As the Court explained in *FCC v. Fox Television Stations Inc.*, 556 U.S. ____, No. 07–582 slip op. 10-11 (April 28, 2009), the Commission need not demonstrate "to a court's satisfaction" that the new standard is "better" than the old one, *id.* at 11; instead, "it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better." *Id.* (emphasis in original). As explained above and in our April 23 *ex parte* letter, there are ample reasons why it is reasonable for the Commission to improve its forbearance analysis.

III. The D.C. Circuit's Line Sharing Decisions Do Not Preclude the Commission from Considering Potential Harms from Duopoly in its Forbearance Analysis

Verizon asserts that the D.C. Circuit's rejection of the CLEC appeal of the *TRO* regarding line sharing undermines the concerns about duopoly expressed in the CLECs' proposed forbearance analysis. Again, Verizon overstates its case by cobbling together disparate quotes from the D.C. Circuit's decisions. Clearly, the *USTA II* court recognized that competition from cable was one factor of many the Commission considered in its decision to eliminate line sharing.[13] But the Court acknowledged that the Commission's consideration of cable competition in the *TRO* was "not 'dispositive'" to its decision to eliminate line sharing, and only "lessened any competitive benefits associated with line sharing."[14] The Court found that other factors such as "the difficulties of cost allocation" with respect to multiple carriers providing service over a single loop, factored into the elimination of line sharing.[15] The Court therefore concluded that "even if the CLECs are right that there is some impairment … the Commission reasonably found that other considerations outweighed any impairment."[16] This is hardly a conclusive finding that CLECs were not impaired without line sharing because of cable's presence in the broadband market.

[12] Competitive Carriers April 23 Letter at 2.

[13] *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 585 (D.C. Cir.) ("*USTA II*"), *cert. denied*, 125 S. Ct. 313, 316, 345 (2004).

[14] *Id.* citing *TRO*, 18 FCC Rcd at 17136, ¶ 263.

[15] *USTA II*, 359 F.3d at 584.

[16] *Id.* at 585.

Further, the principle that Verizon claims emanates from the decisions regarding line sharing cannot be squared the Commission's other impairment findings in the *TRO* regarding CLEC access to UNEs for use in providing broadband. While eliminating line sharing in the *TRO*, the Commission maintained its unbundling requirement for copper loops used to provide broadband.[17] It also mandated that ILECs allow CLECs to "line split" unbundled loops so data CLECs could provide broadband over loops used by other CLECs to provide voice.[18] The D.C. Circuit did not criticize the requirement that ILECs continue to make loops available for broadband. Instead, the presence of these alternative unbundling options factored into the Court's finding that the elimination of mandatory line sharing unbundling was "reasonable."[19]

The Commission's failed experiment with premature elimination of unbundling in Omaha[20] provides a reasoned basis for it to honor its traditional distrust of duopoly markets. The Commission has previously found that a merger resulting in duopoly carries a "strong presumption of significant anticompetitive effects."[21] It has also found that only "a market that has five or more relatively equally sized firms can achieve a level of market performance comparable to a fragmented, structurally competitive market."[22] This policy of prohibiting duopoly markets is consistent with antitrust law recognizing

[17] *TRO*, 18 FCC Rcd at 17129-30, ¶ 250 (unbundling copper loops ensures that CLECs have access to copper loops needed to provide broadband services).

[18] *Id.* at 17130-31, ¶ 252.

[19] *See USTA II*, 359 F.3d at 584 (discussing CLEC ability to use the "full functionality of a loop (voice, data, video …)" and to "obtain broadband frequencies from other CLECs through line-splitting").

[20] *See* Competitive Carriers April 23 Letter at 2-4.

[21] *Application of Echostar Communications Corp.*, Hearing Designation Order, 17 FCC Rcd 20559, 20604-05, ¶¶ 99, 102, and at 20684 (Separate Statement of Chairman Michael K. Powell) (2002).

[22] *2002 Biennial Review — Review of the Commission's Broadcast Ownership Rules Telecommunications Act of 1996*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13731, ¶ 289 (2002); *see also Applications of Time Warner Inc. and America Online, Inc*., Memorandum Opinion and Order, 16 FCC Rcd 6547, 6617, ¶ 163 (2001); *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3727, ¶ 55 (1999); *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, First Report and Order, 11 FCC Rcd 18455, 18470, ¶ 27 (1996); *Petitions for Rulemaking Concerning Proposed Changes to the Commission's Cellular Resale Policies*, Notice of Proposed Rulemaking and Order, 6 FCC Rcd 1719, 1730, ¶ 47 n.67 (1991).

that "a durable duopoly affords both the opportunity and the incentive for both firms to coordinate to increase prices … above competitive levels"[23] and that "[t]he combination of a concentrated market and barriers to entry is a recipe for price coordination."[24]

* * *

The undersigned Competitive Carriers accordingly urge the Commission to modify the framework for evaluating ILEC petitions for forbearance from the unbundling requirements of Section 251(c)(3) and adopt the March 26, 2009 proposal submitted in WC Docket Nos. 08-24 and 08-49. Under the proposed new framework — and even under the existing framework, should the Commission continue to apply it (which it should not) — Verizon's Rhode Island and Virginia Beach petitions must be denied.

Respectfully submitted,

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[23] *Federal Trade Commission v. H.J. Heinz Co. et al.*, 246 F.3d 708, 725 (D.C. Cir. 2001); s*ee also FTC v CCC Holdings*, 2009 WL 723031 *7, 15 (D. D.C. 2009)

[24] *Heinz*, 246 F.3d at 724.

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