

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Petition of Qwest Corporation for)	WC Docket No. 09-135
Forbearance Pursuant to 47 U.S.C. § 160(c))	
in the Phoenix, Arizona Metropolitan)	
Statistical Area)	

OPPOSITION TO MOTION FOR SUMMARY DENIAL

Qwest Corporation (“Qwest”) through its undersigned attorneys and pursuant to Sections 1.1 and 1.45 of the Commission’s Rules, files this Opposition to the Motion for Summary Denial filed by Broadview Networks, Inc., Nuvox, and XO Communications, LLC (“Joint Movants”).¹

Joint Movants seek to have the Commission dismiss the *Qwest Phoenix II MSA Petition* in light of the D.C. Circuit’s remand of the *Qwest 4 MSA Forbearance Order* three months after Qwest filed the *Phoenix II Petition*. Joint Movants assert that the two proceedings raise identical issues, that maintaining two proceedings would result in a “needless waste of agency and industry resources”² and that summary denial is therefore warranted.

Joint Movants are wrong on all three counts. First, while clearly related to the remand proceeding, the *Qwest Phoenix II Petition* focuses on an issue not addressed in the D.C. Circuit’s remand: satisfaction of the Commission’s desire in the *Qwest 4 MSA Forbearance Order* for Phoenix-specific wireless cut-the-cord data. In response to the Commission’s denial of

¹ Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area, Motion of Broadview Networks, Inc., Nuvox, and XO Communications, LLC for Summary Denial (filed Aug. 25, 2009).

² Joint Motion for Summary Denial at 2.

forbearance relief in Phoenix, Qwest submitted cut-the-cord data in the *Phoenix II Petition* that was not available in the original Qwest 4-MSA proceeding.

Second, maintaining both the *Phoenix II Petition* and the remand proceeding will impose no undue hardship on the Commission or industry. The Commission's synching up of the public comment process in the two proceedings demonstrates that the Commission can easily address any perceived overlap in the two proceedings to minimize administrative burdens on itself and commenting parties.

Finally, even if Qwest's Petition were duplicative, that would not present a valid ground for summary dismissal of a forbearance petition.

Given these considerations, the Commission should deny Joint Movants' Motion for Summary Denial.

I. QWEST'S *PHOENIX II* PETITION IS NOT DUPLICATIVE OF THE PENDING QWEST 4-MSA REMAND PROCEEDING

Joint Movants wrongly claim that "Qwest currently has two virtually identical forbearance petitions pending at the Commission."³ To the contrary, the Phoenix II and 4-MSA remand proceedings focus on related but distinct issues. In the Phoenix II proceeding, Qwest has submitted new factual evidence to address the Commission's concern in the *Qwest 4-MSA Order* about the absence of Phoenix-specific wireless cut-the-cord data in that proceeding. There, the Commission "recognize[d] that Qwest might have qualified for some forbearance upon a better evidentiary showing[.]" and that "Qwest may, of course, refile its petitions" with supplemented evidence.⁴ Qwest has done exactly that.

³ Joint Motion for Summary Denial at 1.

⁴ *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, Memorandum Opinion and Order, 23 FCC Rcd 11729, 11745 ¶ 22 (2008)

In contrast, the remand proceeding will address “how the Commission should reconsider its analysis in the *Verizon 6 MSA Forbearance Order* and the *Qwest 4 MSA Forbearance Order* in light of the D.C. Circuit’s guidance in the *Verizon v. FCC* opinion.”⁵ Based on the public notice seeking comment, it appears the remand will focus on the marketplace analysis the Commission should employ in evaluating forbearance petitions in general, and the remanded Verizon and Qwest’s petitions in particular.

While the D.C. Circuit’s remands are “relevant” to the Phoenix II proceeding,⁶ the issues raised in the Phoenix II proceeding are distinct.

II. MAINTAINING THE TWO PROCEEDINGS WILL NOT IMPOSE UNDUE BURDENS ON THE COMMISSION OR INTERESTED PARTIES

Maintaining the Phoenix II and Qwest 4 MSA Forbearance remand proceedings will not impose undue burdens on the Commission. Nothing prevents the Commission from issuing a single order addressing both proceedings, as it has frequently done in similar contexts in the past. Alternatively, the Commission could issue an order in one docket and refer back to that order when it acts in the second docket.

The existence of the two dockets also does not prejudice interested parties, as they can easily address related issues in consolidated filings or by other efficient means. The Commission’s extension of the comment and reply due dates in the Phoenix II proceeding to

(“*Qwest 4 MSA Forbearance Order*”), remanded, *Qwest Corporation v. FCC*, No. 08-1257 (D.C. Cir. Aug. 5, 2009) (“*Qwest Corporation v. FCC*”).

⁵ *Wireline Competition Bureau Seeks Comment on Remands of Verizon 6 MSA Forbearance Order and Qwest 4 MSA Forbearance Order*, WC Docket Nos. 06-172, 07-97, Public Notice, DA 09-1835 (WCB rel. Aug. 20, 2009), at 2 (footnote omitted) (“*Verizon 6 MSA and Qwest 4 MSA Remand Public Notice*”).

⁶ *Wireline Competition Bureau Extends Comment Due Dates on Qwest Corporation’s Petition for Forbearance in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, Public Notice, DA 09-1836 (WCB rel. Aug. 20, 2009).

match those in the remand proceeding should further minimize any perceived burdens on interested parties.

III. JOINT MOVANTS CITE NO VALID GROUNDS FOR A SUMMARY DENIAL

Even if the Phoenix II petition were duplicative of the remand proceeding, there would be no basis for summary denial of Qwest's Phoenix II MSA Petition. In moving for a summary denial, Joint Movants appear to rely in part on FCC rule, Rule 1.56,⁷ which they acknowledge is not yet effective. Even if we assume for the sake of argument that the rule reflects the approach the Commission would take to this pending petition, summary denial relief is totally inapt for the issues Joint Movants raise. As the Commission has noted, summary denial is designed to address defective pleadings, and if it is accorded, the filer is allowed the opportunity to correct the defect and refile.⁸ The Commission reviews the petition to see it is "complete, coherent, and sufficiently specific to serve as a basis for comment."⁹

Joint Movants do not come close to stating a prima facie case for summary denial. Opponents of a petition for forbearance may submit a motion for summary denial if it can be shown that the petition for forbearance, viewed in the light most favorable to the petitioner, cannot meet the statutory criteria for forbearance.¹⁰ Joint Movants do not reference the statutory criteria as a basis for their motion. Joint Movants do not allege Qwest's petition is defective in

⁷ Joint Movants incorrectly refer to this rule as Section 1.59. Joint Motion at 1 n.1.

⁸ *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, WC Docket No. 07-267, Report and Order, FCC 09-56, ¶¶ 27-28 (rel. June 29, 2009), Erratum (rel. Aug. 5, 2009) ("*FCC Forbearance Rules Order*").

⁹ *Id.* ¶ 27.

¹⁰ *Id.*, see also, Erratum, Proposed FCC Rule 1.56(a).

any manner. Joint Movants only allege that the petition is duplicative and would result in waste of resources.

Summary dismissal also would not be warranted under Sections 1.1 or 1.45 of the Commission's rules. None of the Commission actions that Joint Movants cite involved the dismissal of a carrier's claim for efficiency or resource issues, and certainly not before any determination is made on the merits of the claim. The Commission actions cited involved design of a standard for assessing late fees for USF funds, waiving of certain requirements under the price cap rules, and adopting a new procedure relating to radio broadcast stations. In no instance did the Commission deny a petition, and the substantive rights that attach to it, solely for efficiency reasons.

Similarly, the two main D.C. Circuit cases Joint Movants cite address the timing of proceedings to address competing demands, not the dismissal of a proceeding based on competing demands.¹¹ There is only one case that Joint Movants cite that resulted in an actual dismissal, and this case pertained to dismissals of applications resulting from changes in license application rules.¹² But there are no rules changes involved with Qwest's Phoenix II MSA Petition. The Commission may implement a new substantive standard for forbearance petitions pursuant to the remanded cases but until there is a new standard there will be no dismissals to arise from said standard.

¹¹ *Cutler v. Hayes*, 818 F.2d 879, 896 (D.C. Cir. 1987) (“An agency has broad discretion to set its agenda and **to first apply** its limited resources to the regulatory tasks it deems most pressing.”) (emphasis added; footnote omitted); *National Resources Defense Council v. SEC*, 606 F.2d 1031, 1056 (1979) (An agency “alone is cognizant of the many demands on it, its limited resources, and the **most effective structuring and timing of proceedings** to resolve those competing demands.”) (emphasis added).

¹² Motion for Summary Denial at 8, n.32, citing *Bachow Communications, Inc. v. FCC*, 237 F.3d 683 (D.C. Cir. 2001).

IV. CONCLUSION

For the foregoing reasons, the Commission should deny Joint Movants' Motion for Summary Denial.

Respectfully submitted,

QWEST CORPORATION

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September 4, 2009

CERTIFICATE OF SERVICE

I, Ross Dino, do hereby certify that I have caused the foregoing **OPPOSITION TO MOTION FOR SUMMARY DENIAL** to be: 1) filed with the FCC via its Electronic Comment Filing System in WC Docket No. 09-135; 2) served via email on Mr. Tim Stelzig at Tim.Stelzig@fcc.gov and Ms. Denise Coca at Denise.Coca@fcc.gov, both of the Wireline Competition Bureau, Federal Communications Commission; 3) served via email on the FCC's duplicating contractor, Best Copy and Printing, Inc. at fcc@bcpiweb.com and 4) served via First Class United States Mail, postage prepaid, on the counsel for the Joint Movants listed below.

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