

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

_____)	
In the Matter of the Petition of Qwest)	
Corporation for Forbearance Pursuant)	
To 47 U.S.C. Section 160(c) in the)	WC Docket No. 09-135
Phoenix, Arizona Metropolitan)	
Statistical Areas)	
_____)	
)	
In the Matter of the Remand by the D.C.)	
Circuit Court of Appeals of the Verizon)	WC Docket Nos. 06-172; 07-97
6 MSA Forbearance Order and the Qwest)	
4 MSA Forbearance Order)	
_____)	

**INITIAL COMMENTS OF THE
ARIZONA CORPORATION COMMISSION**

I. INTRODUCTION.

In the interest of being able to submit initial comments in both of these Dockets in the timeframe allotted, the Arizona Corporation Commission (“Arizona Commission”) is consolidating its comments for the initial phases of these proceedings. The Arizona Commission is still in the process of collecting information to supply in response to Qwest’ second petition for forbearance and hopes to be able to submit that in the reply phase of that proceeding.

Both proceedings raise very important issues for the Verizon Telephone Companies (“Verizon”) and Qwest Corporation (“Qwest”) markets at issue, as well for future markets that become the subject of forbearance petitions under Section 10 of the Communications Act of 1934, as amended (“the Act”). With respect to the *Remand Proceeding*, the Arizona Commission believes that “actual competition” should continue to be an important part of the Federal Communications Commission’s (“FCC”) evaluation of forbearance requests in the future. However, the FCC should strengthen its

analysis in various ways given the problems that developed in the Omaha market and to further ensure that the criteria of Section 10 have been met. In this regard, the Commission should put more weight on the availability of meaningful wholesale alternatives and incorporate more of a “market power” analysis which it has utilized in many contexts in the past. The Arizona Commission continues to support an analysis which is done on either a wire-center or zip code basis for purposes of Section 251 loop and transport forbearance requests. In addition, the Arizona Commission continues to advocate that the small business market be analyzed apart from the mass market or residential market because its competitive characteristics differ.

Finally, the Arizona Commission believes that Qwest’s second petition for forbearance raises serious concerns. It is the only request filed: (1) before the FCC’s new procedural rules were adopted and thus according to the terms of that Order is not subject to some of those rules, and (2) before the Remand Proceeding has been resolved, which is directly relevant to Qwest’s request for forbearance with respect to Section 251 and likely Section 271 obligations as well, making it more difficult for parties to address the appropriateness of forbearance with respect to Qwest’s second petition. Qwest would thus seem to have obtained an unfair strategic advantage over other providers simply by having filed its second petition within the window before action by the FCC on its procedural rules or action by the D.C. Circuit Court of Appeals on the Verizon and Qwest appeals. One way to rectify this in large part (short of dismissing Qwest’s second petition) would be to simply apply the totality of the procedural rules to Qwest’s second request for forbearance in the Phoenix MSA since Qwest was aware of and had notice of what was being proposed and that it may be subject to those requirements before it filed its second petition.

II. BACKGROUND.

A. Procedural History.

On March 24, 2009, Qwest filed a second petition for forbearance in the Phoenix, Arizona Metropolitan Statistical Area (“MSA”) from various requirements of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, (hereinafter referred to as the “Act”). The Wireline Competition Bureau (“WCB” or “Bureau”) noticed Qwest’s second petition for public comment on July 29, 2009.

On June 19, 2009 and August 5, 2009, respectively, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) remanded the *Verizon 6 MSA Forbearance Order*¹ and the *Qwest 4 Forbearance Order*² (“*Remand Proceeding*”). Thereafter, the Bureau issued a second public notice on August 20, 2009, setting September 21, 2009 as the comment date and October 6, 2009 as the reply comment date in the *Remand Proceeding*. The Bureau on its own motion extended the comment dates on Qwest’s second petition for forbearance for a similar timeframe as the *Remand Proceeding*, with Initial Comments due on August 20, 2009 and Reply Comments due on September 21, 2009.

On September 3, 2009 Qwest filed a request asking the Commission to extend the reply comment deadline from October 6, 2009 to October 21, 2009. On September 14, 2009, the Arizona Commission filed a request for an extension of the comment deadline until October 26, 2009 and the reply comment deadline to December 3, 2009. In response, the Bureau extended the reply deadline to October 21, 2009, and on its own

¹ *In the Matter of Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. Section 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas*, Memorandum Opinion and Order, 22 FCC Rcd. 21293 (Rel. December 5, 2007).

² *In the Matter of Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. Section 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, Memorandum Opinion and Order, 23 FCC Rcd. 11729 (Rel. July 25, 2008).

motion extended the deadline for reply comment in the *Remand Proceeding* to October 21, 2009 as well.

B. Section 10 of the Act and the Phoenix MSA.

Section 10 of the Act provides that the FCC must forbear from any statutory provision or regulation if it determines that: (1) enforcement of the regulation is not necessary to ensure that the telecommunications carrier's charges, practices, classifications, or regulations are just, reasonable, and not unjustly or unreasonably discriminatory; (2) enforcement of the regulation is not necessary to protect consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest.

Qwest filed its first petition seeking forbearance in the Phoenix, MSA in 2007 along with three other MSAs including Seattle, Minneapolis-St. Paul and Denver.³ In both its first and second petitions, Qwest sought relief from dominant carrier regulation with respect to mass market and enterprise services and from certain unbundling obligations under sections 251(c)(3) and 271(c)(2)(B)(ii). It also sought relief from certain *Computer Inquiry Requirements*.⁴ With regard to Qwest's first petition, the Commission found that "the record evidence does not satisfy the section 10 forbearance standard with respect to any of the forbearance Qwest seeks, and, accordingly, we deny the requested relief in the four MSAs."⁵ The FCC's determination with respect to Section 251(c)(3) was appealed by Qwest. Qwest's appeal resulted in a voluntary remand to the FCC which is now the subject of the *Remand Proceeding*.

³ See, *In the Matter of Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. Section 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, WC Docket No. 07-97.

⁴ *Amendment of Section 64.702 of the Commission's Rules and Regulations ("Second Computer Inquiry")*, 77 FCC2d 384 (1980)(*Computer II Final Decision*), recon., 84 FCC2d 50 (1980)(*Computer II Reconsideration Order*), further recon., 88 FCC2d 512 (1981)(*Computer II Further Reconsideration Order*), *aff'd sub nom. Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C.Cir. 1982)(*"CCIA v. FCC"*), cert. denied 461 U.S. 938 (1983)(collectively referred to as *Computer II Orders*).

⁵ *Memorandum Opinion and Order*, Docket No. 07-97, (Rel. July 25, 2008).

III. DISCUSSION.

Qwest is once again seeking forbearance from loop and transport unbundling regulation under 47 U.S.C. Section 251(c) and 271(c)(2)(B)(ii). Qwest states that it seeks this relief for its wholesale provision of voice-grade, DS1 and DS3 unbundled loop and transport facilities. Qwest is also seeking relief from dominant carrier tariff requirements (47 C.F.R. part 61), and from Price Cap Regulations (Part 61) for its interstate mass market and enterprise services in the Phoenix MSA (47 C.F.R. Sections 61-41 – 61.49). Qwest is further seeking relief from dominant carrier requirements under 47 U.S.C. Section 214 and 47 C.F.R. Part 63 regarding the process for acquiring lines, discontinuing services, and making assignments or transfers of control. Finally, Qwest once again is seeking forbearance in the Phoenix MSA from the application of the Commission's *Computer III* requirements.

A. **Forbearance from Section 251(c) Unbundling Obligations.**

The FCC noted in the *Qwest 4 MSA Forbearance Order* that in the *Triennial Review Remand Order*⁶, it had tailored its unbundling rules to account for the presence of competition by establishing “triggers” designed to eliminate high-capacity loop and transport unbundling obligations with respect to wire centers with significant demand, such as in central business districts, and by declining to order unbundling of network elements to provide service in the mobile wireless services market and long distance market, due to the evolution of retail competition that has not relied upon UNE access. Nonetheless, the FCC noted that it may one day be appropriate to conclude that there was sufficient facilities-based local exchange competition, particularly from cable companies, to justify forbearance.⁷

⁶ *In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, *Order on Remand*, 20 FCC Rcd 2533, (“*Triennial Review Remand Order*”), *aff’d*. *Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C.Cir. 2006).

⁷ *Qwest 4 MSA Forbearance Order*, 23 F.C.C.R. at 11753.

At issue in the *Remand Proceeding*, is the appropriate market share test the FCC should employ in determining whether relief from Section 251(c)(3) unbundling obligations is warranted. Issues that the FCC seeks comment on in the *Remand Proceeding* include: (1) what evidence beyond the ILEC's market share for a particular product market, is relevant to whether forbearance from unbundling regulations is warranted; (2) how does the existence of potential competition affect the FCC's section 10 forbearance analysis; (3) what other issues are relevant to the FCC's resolution of Verizon's and Qwest's forbearance petitions and what additional factors should the FCC take into account in its analysis; and (4) to what extent should any changes in the marketplace or FCC actions since the time the FCC issued the Verizon and Qwest Forbearance Orders should affect the FCC's decision?

First, it is important to note that the remand back to the FCC in both cases was on very limited grounds. The D.C. Circuit found that the FCC had not explained its change from precedent in applying a per se market share test that considered only actual, and not potential, competition in the marketplace.⁸ The Bureau's characterization of the D.C. Circuit's Order is accurate:

The Court clarified that it may be reasonable for the Commission, in certain instances, to use the market share of an incumbent local exchange carrier ("LEC") 'as a key factor in the agency's determination that a marketplace is not sufficiently competitive to ensure its competitors' abilities to compete. The court further clarified that it may 'be reasonable for the [Commission] to consider only evidence of actual competition rather than actual and potential competition.'

While the D.C. Circuit faulted the FCC for not adequately explaining its departure from prior precedent, the FCC had ample justification to resort to a per se market share test rather than a potential market share test in both the *Verizon* and *Qwest* cases.

⁸ *Verizon Telephone Companies v. FCC*, 570 F.3d 294 (D.C.Cir. 2009).

Evidence was available and introduced into the records of these proceedings which called into question the adequacy of the FCC's prior tests. Most notably, McLeodUSA Telecommunications Services, Inc., ("McLeod") brought to light problems it was encountering in the Omaha, Nebraska MSA after the FCC had granted forbearance from Section 251(c)(3) unbundling obligations in nine wirecenters. Forbearance from the Section 251(c)(3) unbundling obligations in certain wirecenters in Omaha was granted by the FCC in 2005.⁹ McLeodUSA subsequently withdrew from the Omaha market. Following is a passage from the Nebraska Public Service Commission's Order approving McLeodUSA's withdrawal from the Omaha market:

By petition received on April 11, 2008, McLeod requested approval to cease providing local exchange switched voice services in Nebraska for certain residential and small business customers for whom McLeod requires access to last mile loop network facilities.

McLeod will begin termination of its remaining residential services on or about June 10, 2008. McLeod will provide all affected customers with notice.

Upon consideration of the request and being fully advised, the Commission finds the request to be reasonable and finds that McLeod's local exchange switched voice services for certain customers may be discontinued.

Thus, the FCC's departure from its prior precedent was more than justified and was appropriate under the circumstances.

In addition to calling the potential market share test into question as a basis for Section 10 relief, the McLeodUSA experience also called into question the predictive judgments that had been made by the FCC in that case.¹⁰

⁹ See, *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. Section 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, WC Docket No. 040-223, 20 FCC Rcd. 19415 (2005) ("Omaha Forbearance Order").

¹⁰ See, *Petition for Modification of McLeodUSA Telecommunications Services, Inc.* filed on July 23, 2007, in *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. Section 160(c) in the Omaha Metropolitan Statistical Area*, WC Doc. No. 04-223.

The FCC seeks comment on what information beyond market share the FCC should utilize in the future when analyzing requests for forbearance of Section 251(c)(3) requirements.

1. “Market Power” Indicia¹¹ Should be Considered in Addition to Per Se Market Share.

Because of the dire impact of forbearance upon CLEC operations, when forbearance is granted prematurely, the Arizona Commission supports the use of multiple meaningful indicators that the Section 10 criteria have been met. CLECs devote substantial investment in reliance upon existing FCC rules. The CLECs’ continued ability to make such investments in markets is highly dependent upon the FCC having in place clear and unequivocal guidelines as to when its rules may change, especially when that change is likely to have an adverse impact upon the carrier’s operations and ability to do business. Because of the drastic impact that forbearance can have upon a carrier’s operations and in the end its retail customers, the FCC should consider using traditional indicators of “market power” in addition to a per se market share test. The FCC has used indicia of “market power” in many other contexts to determine the dominance of a particular carrier in a particular market.¹²

Such indicia of “market power” include an examination of, *inter alia*, the following: 1) the petitioner’s market share; 2) the demand elasticity of the petitioner’s customers; 3) the supply elasticity of the market and 4) the petitioner’s cost structure, size and resources.¹³ Market power refers to the control a firm can exercise in setting the

¹¹ The Arizona Commission advocated an examination of market power in its Initial Comments in the *Qwest 4 MSA Forbearance Proceeding*.

¹² See, e.g., *In the Matter of Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC’s Local Exchange Area*, 12 F.C.C.R. 15756 (1997); *In the Matter of Motion of AT&T to be Reclassified as a Non-Dominant Carrier*, 11 F.C.C.R. 3271 (1995) (“*AT&T Reclassification Order*”).

¹³ See, e.g., *AT&T Reclassification Order* at para. 38.

price of its output. A firm with market power is able to engage in conduct that may be anticompetitive or otherwise inconsistent with the public interest.¹⁴

2. More Emphasis Should be Placed on the Availability of Meaningful Wholesale Alternatives Rather than the Degree of Retail Competition in the Market.

The FCC's analysis should also put more emphasis on the availability of meaningful wholesale alternatives and should rely less upon the extent of retail competition in the marketplace. In this regard, with respect to Qwest's second petition for forbearance, we are not convinced that there has been any demonstrable change or improvement in the number of meaningful wholesale alternatives, than was the case the last time the FCC examined this issue. The following passage from the FCC's *Qwest 4 MSA Forbearance Order* would appear to be once again applicable to Qwest's second petition for forbearance:

...the record evidence indicates that competition from cable operators in the four MSAs currently does not, without more, provide a sufficient basis for relief. Nor does the record reveal that other competitors in these MSAs have deployed their own extensive last-mile facilities for use in serving the enterprise market. Although Qwest and others submitted data regarding competitive LEC lit buildings, the facilities 'coverage' suggested by those data do not approach the 75 percent threshold relied upon by the Commission in the past. Indeed, there is record evidence that some of the competition from competitive LECs enterprise services in these MSAs instead depends on access to Qwest's own facilities, including UNEs. Lacking significant evidence of the type of last-mile facilities-based competition the Commission relied on in the Qwest Omaha and ACS UNE forbearance proceedings to grant relief, we find that the criteria of section 10(a) are not satisfied with respect to Qwest's request for forbearance from UNE obligations in these MSAs.

We also examine the role of the wholesale market. The record does not reflect any significant alternative sources of wholesale inputs for carriers in the four MSAs. Although Qwest cites a significant amount of retail enterprise competition relying upon Qwest's special access services and UNEs, we found above that

¹⁴ See, *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 85 F.C.C.2d 1 (1980).

the levels of facilities-based competition do not justify forbearance and the evidence of additional competition that relies on Qwest's wholesale services is insufficient to warrant forbearance. We note that Qwest has received relief, or has pending claims of entitlement to relief, from unbundling obligations in wire centers in all four MSAs, based on the competitive triggers established in the Triennial Review Remand Order.

The Arizona Commission will comment more upon the wholesale market alternatives in the reply round of this proceeding. In addition, Qwest has relied upon many of the same types of information to meet its burden of proof that it relied upon in its unsuccessful first petition for forbearance, which the FCC found to be unpersuasive.¹⁵

3. The Commission's Analysis Should Separate the Small Business Market from the Mass Market.

The Arizona Commission continues to believe that the FCC should adopt a more granular analysis of the business market particularly in the Phoenix MSA. As in the *Qwest 4 MSA Forbearance Proceeding*, the Arizona Commission once again advocates that the FCC separate its analysis of the business market into the following three groups: 1) the small business market (under 4 lines), 2) the medium business market (4 – 100 lines) and 3) large business market (above 100 lines).¹⁶ A mass market definition that includes small business is not appropriate for the Phoenix MSA. The small business market is distinct enough from the residential market in the Phoenix MSA that it should be considered separate and apart from the residential market.

One example from the Arizona Commission's initial analysis suggests that observations by Qwest in its petition about the impacts of intermodal competition, if correct, apply only to residence market and not the small business market. The FCC in past orders, has been careful not to take action that would threaten the development of services in nascent stages, such as VoIP. Since the demise of UNE-P, CLECs find

¹⁵ See, *Qwest 4 MSA Forbearance Order* at paras. 38-41.

¹⁶ See Arizona Corporation Commission's Initial Comments in the *Qwest 4 MSA Forbearance Order* at 14.

themselves in a nascent stage in the small business market; while at the same time having exited for the most part the residential market, with the exception of the large cable provider, Cox. To grant forbearance in the small business market would severely hinder the growth of the nascent CLEC alternative now available to end-users.

4. There Is No Basis for the FCC to Refresh or Update the Underlying Records in the *Remand Proceeding*.

The FCC seeks comment on whether it should consider any changes in the marketplace or FCC actions since the time the FCC issued the *Verizon 6 MSA Forbearance Order* or the *Qwest 4 MSA Forbearance Order*. There is little statutory support for the FCC updating the record in these proceedings for changes in the marketplace. The timeframe for ruling on a forbearance request is set by statute, and enlarging the timeframe beyond that 15 month period to incorporate additional marketplace changes would appear to be unwarranted and action not contemplated by the statute.

B. Forbearance from Dominant Carrier Requirements.

The FCC has traditionally performed this analysis on a MSA basis. The Arizona Commission is in the process of reviewing the revised data submitted by Qwest and other information it has collected and will provide further comment on Qwest's request for forbearance from Dominant Carrier requirements in the reply phase of this proceeding.

III. CONCLUSION.

The FCC should utilize its traditional "market power" analysis in determining whether forbearance is in the public interest in any market. The FCC should also put more weight upon the availability of meaningful wholesale alternatives rather than the extent of retail competition in the given market. The Arizona Commission will file more extensive comments in the reply phase of these proceedings when it has additional

information to provide on the Section 10 criteria and whether Qwest has met those criteria.

RESPECTFULLY submitted this 21st day of September, 2009.

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