

**Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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)	WC Docket No. 06-172
)	
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
)	

REPLY COMMENTS OF CAVALIER TELEPHONE, LLC

October 21, 2009

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Cavalier Telephone, LLC (“Cavalier”) hereby submits its reply comments on the remands by the United States Court of Appeals of the *Verizon 6 MSA Forbearance Order*¹ and the *Qwest 4 MSA Forbearance Order*.² In particular, Cavalier respectfully responds to the Commission’s request for comment on the appropriate standard for deciding petitions to forbear from unbundling obligations. Cavalier urges the Commission to hew closely to the text of the forbearance statute, which requires a petitioner to demonstrate, at minimum, that, in the absence of unbundling obligations, competition will constrain prices and practices, as well as protect consumers. The Commission should also follow through on its observation that forbearance petitioners bear the burden of justifying forbearance and require incumbents to provide evidence and analysis on the impact of competition before granting forbearance.

These requirements are particularly important because the costs of erroneously granting an unbundling forbearance petition are extremely high. Such forbearance petitions typically seek relief primarily from unbundling copper DS0 loops – the archetype of facilities that are uneconomic to duplicate and that companies like Cavalier use to provide advanced broadband services to vulnerable populations that are typically not the focus of the incumbents. If DS0 loops are no longer available at affordable rates – something that is almost certain to occur in the current telephone/cable duopoly environment absent unbundling requirements – these services will disappear. At the same time, maintaining DS0 unbundling requirements on incumbents

¹ *Petitions of 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*, WC Docket No. 06-172, Memorandum Opinion and Order, FCC 07-212 (rel. Dec. 5, 2007), *remanded sub nom. Verizon Telephone Companies v. FCC*, 2009 U.S. App. Lexis 3269 (D.C. Cir. 2009).

² *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, FCC 08-174 (rel. Jul. 25, 2008), *remanded sub nom. Qwest Corporation v. FCC*, Case No. 08-1257 (D.C. Cir., Aug. 5, 2009).

creates zero disincentive to incumbent investment, since incumbents currently are not required to unbundle when upgrading their facilities to fiber.

I. The Text of the Forbearance Statute Requires the Forbearance Petitioner To Show that, in the Absence of the Challenged Regulations, Competition Will Constrain Prices and Practices as well as Protect Consumers

The plain language of Section 10 of the Communications Act requires a forbearance petitioner to show that, in the absence of the regulations at issue, competition will constrain prices and practices as well as protect consumers. The text of the statute provides for a grant of forbearance only if, at minimum, (1) enforcement of the challenged regulations “is not necessary to ensure that . . . charges, practices, classifications, or regulations . . . are just and reasonable and are not unjustly or unreasonably discriminatory,” and (2) enforcement of the challenged regulations “is not necessary for the protection of consumers.” 47 U.S.C. § 160(a).³ Answering these questions requires the Commission to determine whether, in the absence of the regulations at issue, competition in the market can serve these ends. If competition is not sufficient to constrain pricing and practices as well as protect consumers, forbearance must be denied.

Thus, for example, Verizon’s claim that forbearance must be granted where the incumbent does not have the largest market share is simply wrong. The fact that a forbearance petitioner may serve half or less of the lines in a particular area tells us nothing about the extent to which competition is constraining the prices and practices of the market participants. If there is only one other significant competitor – as is often the case – a duopoly environment will not constrain prices and practices, and forbearance must be denied even if the incumbent is the

³ A petitioner must also demonstrate that a grant of forbearance “is consistent with the public interest.” 47 U.S.C. § 160(a). As Cavalier explained in its initial comments, the Commission should establish a standard that gives independent weight to this public interest requirement. However, the Commission need only consider the public interest if the first two requirements of the forbearance statute are met. If they are not met, forbearance must be denied regardless of whether such action is in the public interest.

smaller of the two duopolists. The fact that the forbearance petitioner may be the second largest provider in this scenario does not alter the analysis.

While limiting regulatory asymmetry is not a bad policy goal for the Commission, as Verizon suggests, that goal cannot trump the text of the statute. If the forbearance factors are not met – which they cannot be in a duopoly environment – forbearance cannot be granted, regardless of any regulatory asymmetry.⁴

II. It is the Forbearance Petitioner’s Burden To Provide Data Showing That Competition Will Constrain Prices and Practices as well as Protect Consumers

Equally important, it is the forbearance petitioner’s burden to provide data and analysis showing that competition will constrain prices and practices as well as protect consumers. As the Commission recently emphasized, the forbearance petitioner must “produce sufficient evidence and analysis to warrant granting the relief sought.”⁵

In the past, the Commission has not sufficiently enforced this requirement, and has granted forbearance even when there is little or no evidence on whether competition will constrain the market participants’ behavior. This has led to bad decisions, like the *Omaha Forbearance Order*, where the Commission wrongly predicted that “Qwest will not react to our decision here by curtailing wholesale access to its analog DS0-, DS1-, or DS3- capacity facilities,” that competitors would continue to have access to unbundled loops and transport pursuant to Section 271(c)(2)B(iv) and (v) and that market incentives would prompt Qwest to

⁴ The Communications Act produces numerous regulatory asymmetries. See, e.g., 47 U.S.C. § 224 (providing different pole attachment rate formulas for telecom and cable providers). Other than conclusory assertions of harm, incumbents have never provided any evidence or analysis of the alleged harm of caused by the fact that incumbent carriers must provide unbundled network elements.

⁵ *In the Matter of 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, at ¶ 20 (released June 29, 2009).

make its network available to competitors at competitive rates and terms.⁶ Contrary to the Commission's predictions, at least two competitors – Integra Telecom and McLeodUSA – have conclusively demonstrated that Qwest did *not* make loops or transport available in Omaha on competitive rates or terms once it was granted forbearance.⁷

Similarly, some parties have wrongly suggested that counting the number of cut-the-cord wireless customers can provide meaningful information, even though there is no evidence of whether this phenomenon is acting as a constraining force. As Cavalier has explained, there are good reasons to believe that wireless services – most of which are provided by the incumbents' own wireless operations – are not constraining wireline pricing and practices. The competitive impact of wireless is a question that is answerable based on economic data and analysis. The incumbents have thus far offered none of either.

To make good decisions, the Commission must do more than simply examine a petitioner's market share or count the number of alleged competitors in the market. While this information is useful, it is not alone sufficient to justify a grant of forbearance. The Commission should require a petitioner to provide detailed, economic analysis on the impact of the market on pricing and practices. Only then will the Commission have the information it needs to make a proper decision.

III. The Costs of Erroneously Granting an Unbundling Forbearance Petition Are High

Requiring the forbearance petitioner to put forth solid economic data and analysis is particularly important because the cost of erroneously granting an unbundling forbearance

⁶ *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005) (“*Omaha Forbearance Order*”), *aff'd*, sub nom., *Qwest Corporation v. FCC*, 482 F.3d 471 (D.C. Cir. 2007) at ¶¶62, 79, 83.

⁷ See McLeodUSA Telecommunications Services, Inc.'s Petition for Modification of the Qwest Omaha Forbearance Order filed in WC Docket No. 04-223 on July 23, 2007 (Petition for Modification”); Comments of Integra Telecom, Inc. and Affidavit of Dudley Slater filed in WC Docket No. 06-172 on March 5, 2007.

petition is high. Unbundling forbearance petitions typically seek relief primarily from unbundling DS0 local loops – the last-mile, copper twisted pair. These facilities, which are plainly uneconomic to duplicate, have long been considered to be the archetype of elements that should be unbundled. As the Supreme Court has recognized, “A newcomer could not compete with the incumbent carrier to provide local service without coming close to replicating the incumbent’s entire existing network, the most costly and difficult part of which would be laying down the ‘last mile’ of feeder wire, the local loop, to the thousands (or millions) of terminal points in individual houses and businesses.”⁸ Indeed, Judge Williams of the D.C. Circuit has characterized “the copper wire loops historically used to carry telephone service over the ‘last mile’ into users’ homes” as “[t]he most obvious candidates” for unbundling.⁹ Accordingly, the Commission has consistently found impairment with respect to DS0 local loops.

Companies like Cavalier use these last-mile copper loops to provide advanced broadband services to residences and small businesses – often to vulnerable populations. Cavalier’s services are specifically targeted to residential and business customers who might not otherwise qualify for service, inner-city customers for which incumbents are unlikely to upgrade facilities, and cost conscious enterprise customers. Many of the communities that Cavalier serves for which Verizon is seeking forbearance, for example, are among the poorest in Virginia. If Cavalier loses access to DS0 at affordable rates – something that is almost certain to occur in the current telephone/cable duopoly environment absent unbundling requirements – these services will disappear.

At the same time, there is little cost to maintaining unbundling requirements on these archetype bottleneck facilities. The incumbents’ conclusory claims that unbundling obligations

⁸ *Verizon v. FCC*, 535 U.S. 467, 490-91 (2002).

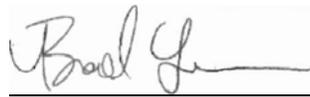
⁹ *USTA v. FCC*, 359 F.3d 554, 561 (D.C. Cir. 2004).

create disincentives to invest in network facilities are simply false with respect to DS0 loops. Incumbents currently do not unbundle their upgraded fiber facilities. Thus, unbundling obligations on DS0 loops act only to spur investment by incumbents. For these reasons, the Commission should not even considering removing unbundling obligations on DS0 loops without detailed economic analysis of the impact on carrier pricing and practices.

CONCLUSION

For the foregoing reasons, the Commission should adopt a meaningful forbearance standard that requires a petitioner to provide detailed evidence and analysis demonstrating that, in the absence of unbundling obligations, competition will constrain prices and practices, as well as protect consumers.

Respectfully submitted,



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