

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

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
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 THE  
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

The National Cable & Telecommunications Association (NCTA) hereby submits its comments in response to the Public Notice issued by the Commission in the above-captioned proceedings.<sup>1</sup>

**INTRODUCTION**

NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving more than 90 percent of the nation's cable television households and more than 200 cable program networks. The cable industry is the nation's largest provider of high-speed Internet service ("broadband") after investing over \$145 billion since 1996 to build two-way

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<sup>1</sup> Public Notice, *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 (rel. Aug. 20, 2009) (*Public Notice*); see also Order, *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; 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 Nos. 06-172, 07-97, DA 09-2083 (rel. Sept. 18, 2009) (extending reply comment deadline to October 21).

interactive networks with fiber optic technology. Cable companies also provide state-of-the-art competitive voice service over their cable network facilities to over 20 million customers.

In the *Public Notice*, the Commission sought comment on a series of issues raised by the D.C. Circuit's recent decision remanding the Commission's order on Verizon's 2006 petitions for forbearance from the local competition requirements of the Communications Act.<sup>2</sup> These questions included whether the Commission "should depart from recent precedent regarding marketplace analysis in forbearance petitions, including the *Omaha Forbearance Order* and *ACS UNE Forbearance Order*," and the extent to which "the existence of potential competition" should affect the forbearance analysis.<sup>3</sup>

The comments demonstrate that there continues to be a significant difference in opinion about how to undertake the forbearance analysis when incumbent telephone companies seek relief from the local competition rules, with most parties focusing on whether the analysis is too strict or too loose.<sup>4</sup> NCTA submits that the correct focus is on whether the Commission's analysis is consistent with the fundamental goals and requirements of the local competition provisions of the Communications Act and of Section 10. That means that the specific analysis will vary, depending on the request and requirements in question, and that the Commission should employ a finer screen in some cases than in others. Indeed, Section 10 demands a particularized analysis of each forbearance request and its impact on competition.

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<sup>2</sup> *Public Notice* at 3; see also *Verizon Tel. Cos. v. FCC*, No 08-1012, slip op. (D.C. Cir. June 19, 2009).

<sup>3</sup> *Public Notice* at 3.

<sup>4</sup> Compare Comments of Qwest Communications at 10 (arguing that Omaha decision applied an analysis that was too stringent but is acceptable) with Comments of Paetec Holding Corp. at 6-23 (arguing that Omaha decision was not sufficiently rigorous).

**THE COMMISSION'S ANALYSIS SHOULD BE SPECIFIC TO  
THE FACTS AND CIRCUMSTANCES OF EACH PETITION**

Forbearance under Section 10 requires the Commission to consider three separate issues:

(1) Whether enforcement of a requirement is necessary to ensure that a carrier's terms and conditions of service remain just and reasonable; (2) whether enforcement of a requirement is necessary to protect consumers; and (3) whether forbearance is consistent with the public interest.<sup>5</sup> This analysis is, of necessity, specific to each individual request, and in the case of requests for forbearance from the local competition requirements, is very fact-intensive.

First, and as the Commission recognized in the *Anchorage Forbearance Order*, it is critical that each individual requirement that is subject to a forbearance request be considered separately.<sup>6</sup> In Anchorage, for instance, the Commission recognized that it was necessary to make individual assessments for loops, subloops and NIDs, because the record demonstrated that the competitor did not have the same ability to provide the latter two elements as it did to provide standard loops.<sup>7</sup> Similarly, in the *Omaha Forbearance Order*, the Commission evaluated the request for forbearance from the requirement to unbundle loops separately from the requests to forbear from other Section 251(c) requirements because it concluded that there were significant differences in the extent to which competitors depended on loops and on Qwest's compliance with more basic interconnection obligations.<sup>8</sup>

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<sup>5</sup> 47 U.S.C. § 160(a).

<sup>6</sup> *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, Memorandum Opinion and Order, 22 FCC Rcd 1958, 1972-3 & n. 78 (2007) (*Anchorage Forbearance Order*).

<sup>7</sup> *Id.*

<sup>8</sup> *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160 in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415, 19456-57, ¶ 85 (2005) (*Omaha Forbearance Order*).

This separate and distinct analysis is not merely good policy, but is demanded by Section 10. Section 10(a) requires that the three-part test be met separately for each requirement that is the subject of a forbearance request.<sup>9</sup> While it is possible that certain factual showings would satisfy the Section 10(a) tests for several requirements at once, the Commission still must conduct the evaluation of each requirement separately to ensure that every part of its decision is consistent with each element of Section 10(a).

For similar reasons, the Commission should demand that petitions provide specific, localized information that focuses on the requirements for which forbearance is sought. A generic claim that competition exists in a large market, such as the New York MSA, is not sufficient to demonstrate that forbearance is warranted in a specific wire center in Newark, New Jersey, even though that wire center is in the New York MSA. This is particularly the case because competitors often do not serve entire metropolitan areas.<sup>10</sup> Thus, a showing that an incumbent has a certain market share in an MSA, or that a competitor has built facilities serving a certain percentage of locations in the MSA, would not be enough to tell the Commission where forbearance is justified within that MSA. Instead, and as discussed below, forbearance only should be granted in the specific geographic areas where it is warranted.

Moreover, to the extent that the Commission wishes to consider potential, rather than existing, competition in this analysis, it must do so in realistic ways. For instance, Verizon assumed in its original forbearance petitions that a cable network that passes a particular area can provide voice services to all of the enterprise customers in that area. In practice, however, this is not true. Cable networks have been designed primarily to serve residential customers, and often

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<sup>9</sup> 47 U.S.C. § 160(a)(1), (2), (3) (each element stating that the test relates to “such regulation or provision” or “such provision or regulation”).

<sup>10</sup> For instance, there are at least four different NCTA members serving parts of the New York MSA, and not one of them serves the entire region.

do not pass office parks or other non-residential areas. Even when they do pass commercial buildings, the cost of bringing facilities into those buildings is sufficiently high that it often is not feasible to do so, and building access also depends to a large extent on the willingness of building owners to make that access available.<sup>11</sup> As a result, the theoretical ability of cable operators to compete in the business market often does not translate into actual competition because serving those locations is not practical.

The kind of showing that would meet this requirement necessarily is fact-intensive. This is not, however, a flaw in the analysis. Rather, it is how the Commission can ensure that it has fulfilled its obligation to forbear from enforcing the requirements of the Communications Act and its rules only when those requirements no longer are necessary. Section 10 is not intended to eliminate all regulation – just those regulations that are a hindrance to competition and no longer are necessary to serve the public interest. Determining whether a regulation should be eliminated, therefore, should be as rigorous a process as adopting the regulation in the first place.

**THE COMMISSION SHOULD CONTINUE TO  
LOOK BEYOND RETAIL MARKET SHARE**

Retail competition is relevant to many types of forbearance requests, but it is not the only significant factor in determining whether forbearance is justified. This is particularly the case when the Commission is considering whether to forbear from obligations under Section 251, because Section 251, in many cases, provides the necessary inputs to competitive carriers for the provision of retail service. Consequently, analysis under Section 10(a)(1) of whether a Section 251 requirement “is not necessary to ensure that the charges, practices, classifications, or regulations . . . are just and reasonable and not unjustly or unreasonably discriminatory” must

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<sup>11</sup> These issues are described in more detail in NCTA’s initial comments on the Verizon forbearance petition in 2007. *See* Comments of National Cable and Telecommunications Association, WC Docket No. 06-172 (filed Mar. 5, 2007) at 5-8.

consider both the impact on retail customers and the effect on providers that depend on the ILEC's compliance with Section 251 to provide competitive service to retail customers.<sup>12</sup>

The Commission followed this approach in both the *Omaha Forbearance Order* and the *Anchorage Forbearance Order*, grounding its decisions in factual determinations about the locations within those markets where competitors actually had deployed facilities that could serve customers.<sup>13</sup> In both cases, the Commission did not rely solely, or even principally, on market share to determine the scope of the forbearance that it would grant.<sup>14</sup> The result was that forbearance was limited to specific geographic areas, and not afforded to either Qwest or ACS across the entire market where forbearance was requested. This is precisely the type of granular, geographically- and service-specific analysis that the Commission should undertake when it considers any petition seeking forbearance from the requirements of Section 251.

**THE COMMISSION SHOULD PRESERVE  
BASIC INTERCONNECTION OBLIGATIONS**

Regardless of any other actions the Commission might take, it must ensure that any Section 251 forbearance analysis preserves the basic interconnection obligations that apply to incumbent LECs. These obligations, including interconnection at any point, collocation, and reciprocal exchange of traffic, are the minimum requirements for the maintenance of facilities-based voice competition, which the Commission has determined is more beneficial to consumers than competition based on unbundled network elements or resale.<sup>15</sup> As the Commission has

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<sup>12</sup> 47 U.S.C. § 160(a)(1).

<sup>13</sup> *Omaha Forbearance Order*, 20 FCC Rcd at 19450-51; *Anchorage Forbearance Order*, 22 FCC Rcd at 1977.

<sup>14</sup> Another example of why a pure market share analysis is inappropriate is the case of inside wire subloops. In many cases there are no alternatives to using an ILEC's inside wire subloops in multiple tenant environments, regardless of the market share of the competitor.

<sup>15</sup> *See 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, 3704, (1999), *reversed and remanded in part sub. nom. United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) (concluding that

explained previously, “ensuring the protections of section 251 interconnection is a critical component for the growth of facilities-based local competition.”<sup>16</sup>

The development of competition for retail services does not eliminate the critical importance of these regulated interconnection arrangements. The Commission has recognized that a facilities-based competitor cannot enter the voice market without interconnecting with the ILEC and making arrangements for the exchange of traffic between the competitor’s customers and the ILEC’s customers.<sup>17</sup> In addition, because each competitor must interconnect with the ILEC, competitors often rely on access to incumbent carrier networks to exchange traffic among competitors.<sup>18</sup>

If an incumbent LEC is afforded the opportunity to offer interconnection, collocation or transport and termination on terms and conditions of its own choosing, it will have strong incentives to use those terms to limit or eliminate voice competition. Such conditions could include limitations on points of interconnection or requirements that competitors pay higher rates if they do not choose incumbent-preferred interconnection points; unbalanced rates for transport

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facilities-based competition best serves the goals of the Telecommunications Act of 1996), *Review of the Section 215 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17025 (2003) (reaffirming conclusions concerning facilities-based competition).

<sup>16</sup> *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, WC Docket No. 06-55, Memorandum Opinion and Order, 22 FCC Rcd 3513, 3519, ¶ 13 (2007).

<sup>17</sup> *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 15591-92, ¶ 179 (“[W]e conclude that national rules regarding interconnection pursuant to section 251(c)(2) are necessary to further Congress’ goal of creating conditions that will facilitate the development of competition in the telephone exchange market.”); *id.* at 16029, ¶ 1065 (“[A] new entrant that has already constructed facilities may have a relatively weak bargaining position . . . . To promote the Act’s goal of rapid competition in the local exchange, we order incumbent LECs upon request from new entrants to provide transport and termination of traffic . . . .”).

<sup>18</sup> For instance, and as the Commission has recognized, collocation at an incumbent’s central office allows efficient interconnection between competitors. *See* 47 C.F.R. § 51.323(h) (requiring incumbents to permit interconnection among collocated competitive carriers).

and termination; limitations on the amount of traffic that can be sent to certain points of interconnection; or prohibitions or limitations on indirect interconnection via incumbent facilities. All of these would impose unreasonable costs on voice competitors and change interconnection from a shared burden to one that is borne largely by competitors. They would, as a consequence, make it considerably more difficult to provide the economically efficient facilities-based competition envisioned by the 1996 Act.

In the *Omaha Forbearance Order*, the Commission recognized the importance of preserving these interconnection obligations even where there is retail competition, finding that “[f]orbearing from section 251(c)(2) interconnection and related section 251(c) requirements such as collocation likely would give Qwest, which is the only carrier in the Omaha MSA to have a ubiquitous network, the ability to exercise market power over interconnection in the market.”<sup>19</sup> Given the continuing centrality of the interconnection obligations in meeting the key purposes of the 1996 Act, and the potential impacts on facilities-based voice competition if these obligations are permitted to lapse prematurely, the Commission should continue to apply a particularly rigorous analysis if an incumbent LEC seeks forbearance from these requirements. This is particularly important because there are few, if any, marketplace benefits to eliminating these requirements. Indeed, the only likely beneficiary of removing cost-based interconnection and reciprocal compensation obligations would be the incumbent telephone company. Consequently, to remain true to the goals of the Communications Act, the threshold for granting forbearance from these obligations should remain high.

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<sup>19</sup> *Omaha Forbearance Order*, 20 FCC Rcd at 19457-58, ¶ 86.

## CONCLUSION

It is appropriate for the Commission to reevaluate how it should address requests for forbearance from the local competition rules. However, the Commission's previous decisions provide a solid framework that should be incorporated into any new analysis that is adopted. This analysis should, as before, focus on ensuring that each request is considered in light of the specific requirement that is the subject of the request and the specific factual context in which the request is made; that the Commission looks beyond retail market share to the underlying dynamics of the individual market; and that forbearance from the basic interconnection obligations is granted only when the petitioner can demonstrate that these requirements are truly unnecessary.

Respectfully submitted,

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