

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

In the Matter of	)	
	)	
Petitions of the Verizon Telephone Companies	)	WC Docket No. 06-172
for Forbearance Pursuant to 47 U.S.C. § 160(c)	)	
in the Boston, New York, Philadelphia,	)	
Pittsburgh, Providence and Virginia Beach	)	
Metropolitan Statistical Areas	)	
In the Matter of	)	
	)	
Petitions of Qwest Corporation for	)	WC Docket No. 07-97
Forbearance Pursuant to 47 U.S.C. § 160(c) in	)	
the Denver, Minneapolis-St. Paul, Phoenix,	)	
and Seattle Metropolitan Statistical Areas	)	

**REPLY COMMENTS**

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## TABLE OF CONTENTS

TABLE OF CONTENTS.....	ii
I. THE COMMISSION SHOULD NOT REVISIT THE IMPAIRMENT STANDARD IN THIS PROCEEDING.....	1
II. THE FORBEARANCE ANALYSIS SHOULD CONSIDER ALL ASPECTS OF MARKET POWER, NOT JUST MARKET SHARE.....	3
III. THE FORBEARANCE STANDARD SHOULD WEIGH THE PUBLIC INTEREST BENEFITS OF UNBUNDLING AND OPEN ACCESS.....	6
IV. CONCLUSION.....	8

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**REPLY COMMENTS**

PAETEC Holding Corp., on behalf of its operating subsidiaries, PAETEC Communications, Inc., US LEC, and McLeodUSA Telecommunications Services, Inc. (jointly referred to as “PAETEC”) respectfully reply to certain comments filed in response to the Public Notice seeking comment on the remand of recent decisions from the United States Court of Appeals for the D.C. Circuit.<sup>1</sup>

**I. THE COMMISSION SHOULD NOT REVISIT THE IMPAIRMENT STANDARD IN THIS PROCEEDING**

Verizon devotes the bulk of its comments in this docket, not to the issues actually remanded by the Court of Appeals, but rather to asking the Commission to update the

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<sup>1</sup> *Wireline Competition Bureau Seeks Comment on Remands of Verizon 6 MSA Forbearance Order and Qwest 4 MSA Forbearance Order, Pleading Cycle Established*, WC Docket Nos. 06-172, 07-97, Public Notice, DA 09-1835 (rel. Aug. 20, 2009).

impairment rules adopted in the *TRRO*.<sup>2</sup> Setting aside for a moment the merits (or lack thereof) of Verizon’s reasons for seeking a new impairment standard, this is simply not the proceeding in which these issues should be considered.

The Court of Appeals carefully explained that its remand in this case was limited to the FCC’s justification of its decision under Section 10 of the Communications Act, not Section 251. The court observed that Verizon had “unnecessarily conflate[d]” the two provisions; that is, Verizon argued that forbearance must be granted under Section 10 if it could show that the Section 251 impairment test was not met.<sup>3</sup> The court rejected this approach, and said that Verizon could best raise its impairment arguments “by a petition for a new rulemaking requesting that the FCC reassess its unbundling requirements under § 251.”<sup>4</sup> Despite this clear direction, Verizon has not filed such a petition, but insists on trying to bring impairment issues back into this forbearance proceeding.

Although Verizon couches its comments in terms of asking the Commission to “identify clearly the process it will use [to revise its impairment test] and the standards and binding timelines that it will use for making a decision,”<sup>5</sup> it is clear that the real import of its comments is to invite the Commission to reconsider the *TRRO* in this docket. If Verizon was only looking for procedural guidance, it could find it either in the Court’s suggestion to file a petition for rulemaking, or in its own comments, where it

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<sup>2</sup> *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order On Remand, 20 FCC Rcd 2533, 2644 ¶ 206 (2005), *aff’d sub nom. Covad Comm’ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006) (“*TRRO*”).

<sup>3</sup> *Verizon Tel. Cos. v. FCC*, No. 08-1012, slip op. at 11 (D.C. Cir. June 19, 2009).

<sup>4</sup> *Id.*, slip op. at 10.

<sup>5</sup> Comments of Verizon, WC Docket Nos. 06-172 and 07-97, at 2 (filed Sept. 21, 2009) (“Verizon Comments”).

quotes the Commission's statement in the *TRO* that the impairment rules could be addressed in biennial Section 11 reviews.<sup>6</sup> Indeed, the larger part of Verizon's comments address the substance of the impairment rules, while only a few pages are devoted to the procedural issue that it uses as its cover.

To the extent Verizon wishes to propose a substantive change in the Commission's rules implementing the Section 251 impairment standard, it is free to do so. Any such proposal, however, is not properly before the Commission in this narrow remand proceeding, and the Commission should decline Verizon's invitation to broaden the scope of the remand unnecessarily.

## **II. THE FORBEARANCE ANALYSIS SHOULD CONSIDER ALL ASPECTS OF MARKET POWER, NOT JUST MARKET SHARE**

Each of the RBOCs argues that the Commission should consider potential competition as a key factor in its forbearance analysis. As stated in PAETEC's initial comments, potential competition is indeed one aspect of the more comprehensive analysis needed to determine whether the incumbent carrier is dominant in relevant markets. However, a proper analysis of market power cannot be based simply on *either* a snapshot of actual market share *or* a simplistic iteration of potential competitors, as the RBOCs would have

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<sup>6</sup> Verizon Comments at 14 citing *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, ¶ 710 (2003) ("*TRO*"), *aff'd in part, remanded in part, vacated in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir 2004). Verizon appears to dismiss this option because, it says, the Commission has not completed a Section 11 review since 2002. *Id.* If Verizon believes that the Commission has not fulfilled a statutory duty, though, it has several ways of addressing that concern other than trying to shoehorn the issue into a forbearance docket.

it. Rather, the Commission must consider the appropriate market definition, identify barriers to entry, and determine supply and demand elasticities as part of its analysis.

As the appropriate factors to consider in a market analysis are discussed in detail in PAETEC's initial comments, we will not repeat them here. Rather, PAETEC simply notes that the RBOCs' proposals all suffer from several fairly obvious flaws:

- The RBOCs assume that the presence of a competitor in any product market means that they face competition for *all* services that can be offered using unbundled network elements.
- They assume that the presence of a single competitor in a market means that other competitors will be equally able to enter.
- They assume that if *some* consumers consider a particular service (such as mobile voice) as a substitute for a wireline service, then *all* consumers will be willing to substitute that service at some price.
- They assume that cable companies offer enterprise customers the same range of services over their cable networks that other carriers can offer using unbundled network elements.<sup>7</sup>
- They assume that the barriers to entry in local telecommunications services markets are no higher than they were in the long-distance market, where AT&T was found non-dominant in 1995 despite still having a relatively large market share.<sup>8</sup>

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<sup>7</sup> Verizon Comments at 8-9.

<sup>8</sup> Comments of AT&T Inc., WC Docket Nos. 06-172 and 07-97, at 10-11 (filed Sept. 21, 2009).

- They assume that if a competitor's market share has increased in the past, it must continue to increase in the future; that is, that past performance is a guarantee of future results.<sup>9</sup>

In short, the RBOCs ask the Commission to perform an incomplete and one-dimensional analysis of market conditions that would be a parody, not an application, of the market dominance criteria articulated in past decisions.

The reality is that barriers to entry in the last mile remain exponentially higher than in the interexchange market, and that most of the competitive entry to date in the last mile has been from cable companies, who enjoy unique access to end-user premises that cannot feasibly or economically be replicated by any other prospective entrant.<sup>10</sup> Accordingly, premature forbearance would create an entrenched duopoly that would be unlikely to lead to efficient competition and would not be in the public interest.<sup>11</sup>

Further, competitive entry is not consistent across geographic or product markets; neither cable companies nor wireless companies offer the full range of residential and enterprise voice and data services that carriers can offer over unbundled loops. But if the Commission forbears from requiring access to unbundled network elements, prospective competitors will be impaired from entering *all* market segments, not just those segments where so-called "intermodal" competition already exists.

The Commission should recognize these substantial omissions from the RBOCs' proposals. Rather than perform an incomplete analysis of market conditions, it should

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<sup>9</sup> Comments of Qwest Corporation, WC Docket Nos. 06-172 and 07-97, at 12-13 (filed Sept. 21, 2009).

<sup>10</sup> Comments of PAETEC Holding Corp., WC Docket Nos. 06-172 and 07-97, at 28-39 (filed Sept. 21, 2009).

<sup>11</sup> *Id.* at 12-19.

take a wider and more comprehensive look at all factors affecting the market and consider whether forbearance would truly serve the public interest in competition, or rather would serve to entrench the private interests of existing carriers by protecting them against new entry.

### **III. THE FORBEARANCE STANDARD SHOULD WEIGH THE PUBLIC INTEREST BENEFITS OF UNBUNDLING AND OPEN ACCESS**

Another common theme of the RBOC comments is that they assume there is no reason to preserve unbundling obligations once the first whiff of potential competition has been sniffed on the breeze. As would be expected, they dramatize the costs (to them) of complying with unbundling requirements, and minimize or ignore the larger public interest benefits that led Congress to impose unbundling duties in the first place.

It is high time for the Commission to take a fresh look at the real costs and benefits of unbundling, and in particular to develop a factual record concerning the public interest benefits generated by open access to bottleneck LEC facilities. A good foundation for developing this record is provided by the recent Berkman Center report on broadband access policies worldwide, on which the FCC's Broadband Task Force recently sought comments.<sup>12</sup> This report includes an extensive comparative analysis of open access policies, and concludes that the nations that have experienced the most benefits from broadband competition have been those that adopted "open access" policies requiring unbundling of bottleneck facilities:

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<sup>12</sup> Berkman Center for Internet & Society, *Next Generation Connectivity: A review of broadband Internet transitions and policy from around the world*, Draft (October 2009) ("Berkman Center Report"); see *Comment Sought on Broadband Study Conducted by The Berkman Center for Internet and Society*, NPB Public Notice #13, GN Docket Nos. 09-47, 09-51, 09-137, Public Notice, DA 09-2217 (rel. Oct. 14, 2009).

Our most surprising and significant finding is that “open access” policies—unbundling, bitstream access, collocation requirements, wholesaling, and/or functional separation—are almost universally understood as having played a core role in the first generation transition to broadband in most of the high performing countries; that they now play a core role in planning for the next generation transition; and that the positive impact of such policies is strongly supported by the evidence of the first generation broadband transition.

The importance of these policies in other countries is particularly surprising in the context of U.S. policy debates throughout most of this decade. While Congress adopted various open access provisions in the almost unanimously-approved Telecommunications Act of 1996, the FCC decided to abandon this mode of regulation for broadband in a series of decisions in 2001 and 2002. Open access has been largely treated as a closed issue in U.S. policy debates ever since.<sup>13</sup>

\* \* \*

We find that in countries where an engaged regulator enforced open access obligations, competitors that entered using these open access facilities provided an important catalyst for the development of robust competition which, in most cases, contributed to strong broadband performance across a range of metrics. ... Our pricing study (Figure 4.2) shows that prices and speeds at the highest tiers of service follow a clear pattern. *The highest prices for the lowest speeds are overwhelmingly offered by firms in the United States and Canada, all of which inhabit markets structured around “inter-modal” competition—that is, competition between one incumbent owning a telephone system, and one incumbent owning a cable system.* The lowest prices and highest speeds are almost all offered by firms in markets where, in addition to an incumbent telephone company and a cable company, there are also competitors who entered the market, and built their presence, through use of open access facilities. Companies that occupy the mid-range along these two dimensions mostly operate either in countries with middling levels of enforcement of open access policies, or in countries that only effectively implemented open access more recently.<sup>14</sup>

The RBOCs want the Commission to continue farther down the path that has led the United States to “the highest prices for the lowest speeds” for broadband access. Instead, the Commission should stop, look around, and recognize that forbearance has

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<sup>13</sup> Berkman Center Report, sec. 1.3.1, page 11.

<sup>14</sup> *Id.*, sec. 1.3.3, page 12 (emphasis added).

harmed the public interest by enabling the RBOCs to exploit their control of bottleneck facilities and stifle potential competition for broadband and other services. In considering UNE forbearance requests, the Commission should give greater weight to the public interest in promoting competition than to the RBOC interest in increased revenues, and should deny forbearance when the result would be an effective duopoly market structure.

#### **IV. CONCLUSION**

For the foregoing reasons, the Commission should adopt a new forbearance analytical framework as proposed in PAETEC's initial Comments.

Respectfully submitted,

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