

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

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

INITIAL COMMENTS

Covad Communications Company; PAETEC Holding Corp.; TDS Metrocom, LLC; and U.S. TelePacific Corp. and Mpower Communications Corp. (both d/b/a TelePacific Communications), by their undersigned counsel, respectfully submit these initial comments in response to the Public Notice (DA 10-1115) issued by the Wireline Competition Bureau in the above-captioned docket on June 22, 2010, seeking comments on the application of the regulatory framework used in the *Qwest Phoenix Forbearance Order*¹ to future forbearance petitions.²

¹ *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, Memorandum Opinion and Order, FCC 10-113 (rel. June 22, 2010) (“*Qwest Phoenix Forbearance Order*”).

² *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, 22 FCC Rcd 21293, 21294, para. 1 (2007) (“*Verizon 6 MSA Forbearance Order*”), remanded, *Verizon Tel. Cos. v. FCC*, 570 F.3d 294 (D.C. Cir. 2009). The Bureau also requested comments on the application of the framework to Qwest’s remanded forbearance petitions in WC Docket No. 07-97 and Verizon’s remanded forbearance petitions in WC Docket No. 06-172 but Qwest and Verizon withdrew those petitions by letters dated August 17, 2010 and August 23, 2010, respectively. Because Qwest and Verizon withdrew their petitions before the close of the initial comment period, it appeared that there was no longer any need for comments in response to the Public Notice. Given this, the undersigned did not file comments on August 23, 2010. However, because Verizon (as well as other parties) did file comments in this proceeding, notwithstanding the withdrawal of its petitions, the undersigned submit these comments, albeit late filed, out of an abundance of caution to reflect their views for the record.

The undersigned carriers support the use of the Commission's analysis focusing on market power in the *Qwest Phoenix Forbearance Order* in evaluating the pending Verizon petitions, and any future UNE forbearance petitions. As we discuss below, many of the factors analyzed in the *Phoenix* decision are likely to be common to all metropolitan areas throughout the United States, and the Commission need not gather redundant data on each of these factors; rather, the best use of its limited administrative resources would be to concentrate on those (relatively few) factors in the analysis that do vary significantly from one area to another.

I. THE COMMISSION NEED NOT REVISIT THE THRESHOLD MARKET ANALYSIS IN THIS PROCEEDING

The Commission's factual analysis in the *Qwest Phoenix Forbearance Order* was divided into two major stages: first, the Commission considered the definition of the relevant wholesale and retail product markets, and geographic markets, in which it needed to evaluate Qwest's market power;³ and second, it considered the actual state of competition in each relevant market based on the record.⁴ These two steps were followed by the legal and policy analysis in which the Commission determined whether forbearance was justified, based on the facts found in the previous sections.⁵

The undersigned carriers suggest that the Commission need not revisit the market definition analysis in this proceeding. Although the Commission noted that market definitions can change "over time, as technology, prices, product characteristics, and consumer preferences evolve,"⁶ those changes would be expected to take place gradually over a period of years, not over the few months since the *Qwest Phoenix Forbearance Order*. Even disruptive technologies such as cellular telephony (introduced in the early 1980s) and the Internet (the early 1990s) have

³ *Qwest Phoenix Forbearance Order*, paras. 46-65.

⁴ *Id.*, paras. 66-91.

⁵ *Id.*, paras. 92-120.

⁶ *Id.*, para. 46.

taken five to ten years, not months, to produce noticeable changes in consumer demand and pricing.

Several facts independently confirm that the Phoenix market definition findings are likely to be applicable nationwide. First, all telecommunications carriers (including Verizon, Qwest, and their competitors) purchase their transmission and switching equipment from a relatively small number of vendors who all conform to the same industry standards, so the available services and features they offer are essentially the same in all areas of the United States. Second, many of the competitors faced by Verizon in its six East Coast markets are the same companies that Qwest competes against in Phoenix – each of the four major wireless carriers operates and offers identical service packages and pricing nationwide; Cox, the principal mass-market competitor in Phoenix, also operates in two of the MSAs named in Verizon’s petitions (Providence and Virginia Beach); and both Covad and PAETEC, among other CLECs, have operations both in Phoenix and in the East Coast markets. Third, for historical and regulatory reasons, many of the services offered by Qwest and Verizon in their respective markets are very similar if not identical.⁷ Accordingly, the service choices and prices available to consumers are practically the same in all regions of the country, and any significant shift in consumer preferences in one market would soon have effects elsewhere due to the responses of the nationwide service providers.

Certainly, over time, the Commission will likely need to re-examine some of these issues, but it is highly unlikely that any of the relevant conditions have changed in the short time since the *Qwest Phoenix Forbearance Order*. Even in future proceedings, the burden should be on a party proposing a different market definition to present evidence justifying a finding that market

⁷ For example, the structure of switched access service is regulated in detail under Part 69 of the Commission’s Rules, so the supply characteristics for this service in Verizon territories cannot differ much if at all from those in Phoenix; and the structure of special access service offered by each of the RBOCs, although not so constrained by regulation, is nonetheless similar due to their common Bell System origins and use of equipment meeting common industry standards.

conditions have changed materially. In fact, under the new forbearance procedural rules, a forbearance petitioner seeking a different market definition must make a *prima facie* case in its forbearance petition with evidence to justify its proposed market definition.⁸ Otherwise, the best use of the Commission's limited administrative resources is to find that previous market definitions are valid until a party comes forward with evidence to the contrary.

II. THE COMMISSION'S COMPETITIVE ANALYSIS SHOULD FOCUS ON ACTUAL, NOT POTENTIAL, COMPETITION

The second stage of the Commission's analysis looks at the extent of competition in each relevant market. Although, as described above, the *type* of competition faced by the incumbent LEC does not vary from place to place, the *degree* to which competition has taken hold may be different from one market to another, and so this part of the analysis must be based on market-specific facts.

As in the *Qwest Phoenix Forbearance Order*, however, the Commission should base its competitive analysis on demonstrated actual competition, and should discount theories based on potential competition.⁹ The same substantial barriers to entry that the Commission considered in that decision exist in metropolitan markets nationwide. At this point, there is no evidence to justify a determination that it is significantly easier to gain access to buildings and rights-of-way, to obtain investment capital, or to actually deploy competitive loop and transport facilities in Boston, New York, or other East Coast markets than it is in Phoenix. Thus, the threat of future entry or expansion by hypothetical competitors is unlikely to impose any practical constraint on Verizon's pricing, just as the Commission found with respect to Qwest.

⁸ See 47 C.F.R. § 1.54(b); *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, 24 FCC Rcd 9543, para. 17 (2009) (explaining that "A petition for forbearance must include in the petition the facts, information, data, and arguments on which the petitioner intends to rely to make the *prima facie* case for forbearance" and that "[a] petition for forbearance must take into account relevant Commission precedent.").

⁹ *Id.*, paras. 72-74, 78.

Based on the evidence that was in the record at the time of the Commission's initial decision in this docket in 2007, it was clear that the actual competition in Verizon's six East Coast market was not significantly different in nature or greater in extent than what Qwest faces in Phoenix, and therefore the Commission would be justified in denying Verizon's petitions for the same reasons as in the *Qwest Phoenix Forbearance Order*.¹⁰ The undersigned recognize that some conditions may have changed in the past three years, and that Verizon may seek to introduce new evidence showing more extensive competition exists today. However, Verizon would have to show much more than mere incremental increases of a few percentage points in competitors' market share to demonstrate that it no longer can exercise market power. The record showed pervasive market dominance by Verizon, based on its large market share, coupled with the lack of competitive wholesale facilities and high barriers to entry. There has been no significant deployment of new competitive wholesale facilities in any of the relevant metropolitan areas since 2006, so there is no reason to suppose that competitive conditions are materially different today. Even if non-incumbents have gained a few percentage points in retail business or residential market share (which is almost inevitable, given the nationwide trend of declining ILEC line counts), the structural factors that allow Verizon to exercise market power remain unchanged especially with respect to the wholesale market for the last mile facilities.

Indeed, the record in WC Docket No. 05-25 reveals that, apart from any technical or capital-availability constraints, RBOC special access terms and conditions have the effect of "locking up" most of the potential wholesale demand, thereby eliminating any potential incentive for a competitive supplier of wholesale services to enter the market.¹¹ Until the Commission acts to break open the RBOC choke-hold on wholesale demand, the market conditions that led to the finding of continuing market dominance in Phoenix cannot be expected to change.

¹⁰ See, e.g., Opposition of ACN *et al.*, WC Docket No. 06-172, at 5-11 (filed March 5, 2007).

¹¹ See, e.g., Reply Comments of Level 3 Communications, LLC, WC Docket No. 05-25, at 9-16 (filed Feb. 24, 2010); Reply Comments of PAETEC *et al.*, WC Docket No. 05-25, at 71-74 (filed Feb. 24, 2010).

III. CONCLUSION

For the reasons stated above, the Commission should continue to apply the market definitions adopted in the *Qwest Phoenix Forbearance Order*, and should deny Verizon's six remanded petitions for forbearance based on evidence showing that Verizon continues to possess market power in each relevant market.

Respectfully submitted,

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