

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Petition of tw telecom inc. *et al.* to Establish) WC Docket No. 11-188
Regulatory Parity in the Provision of)
Non-TDM-Based Broadband Transmission)
Services)

**COMMENTS
OF
FAIRPOINT COMMUNICATIONS, INC.
AND
FRONTIER COMMUNICATIONS CORPORATION**

Michael T. Skrivan
Vice President, Regulatory
FAIRPOINT COMMUNICATIONS, INC.
1 Davis Farm Road
Portland, ME 04103
mskrivan@fairpoint.com
207-535-4150

Michael D. Saperstein
Director, Federal Regulatory Affairs
Frontier Communications Corporation
2300 N Street, NW, Suite 710
Washington, DC 20037
michael.saperstein@ftr.com
202-614-4702

Karen Brinkmann
Robin Tuttle
KAREN BRINKMANN PLLC
555 Eleventh Street, NW, Mail Station 07
Washington, DC 20004-1304
KB@KarenBrinkmann.com
202-365-0325
Counsel for FairPoint

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FairPoint Communications, Inc. (“FairPoint”) and Frontier Communications Corporation (“Frontier”) hereby jointly file comments in opposition to the Petition (“TWT Petition”) filed by tw telecom, inc., BT Americas Inc., the Ad Hoc Telecommunications Users Committee, Computer & Communications Industry Association, EarthLink, Inc., and Sprint Nextel Corporation (“TWT Petitioners”),¹ seeking to reverse in part the forbearance granted to the Verizon Telephone Companies (“Verizon”) by operation of law on March 19, 2006 (“Verizon Forbearance”).² The TWT Petitioners state no grounds for reversal of the Verizon Forbearance, and such action would be contrary to the public interest.

¹ *Comment Sought On Petition Seeking Reverse Of Forbearance Granted To Verizon Telephone Companies By Operation of Law*, Public Notice, WC 11-188, DA 11-1879 (Nov. 10, 2011).

² *See* FCC News Release, Verizon Telephone Companies’ Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to their Broadband Services Is Granted by Operation of Law, WC Docket No. 04-440 (rel. March 20, 2006).

I. The Forbearance Granted to Verizon Extends to Carriers That Have Acquired Verizon Landlines

Over the past several years Verizon has withdrawn from the landline telephone business in many areas across the country. Both FairPoint and Frontier have acquired Verizon landlines in recent years, and through this process stepped into Verizon's regulatory position in those territories, requiring FairPoint and Frontier, *inter alia*, to assume the obligations of a Bell Operating Company ("BOC") in the acquired territories, but also conferring on them the limited regulatory forbearance enjoyed by Verizon prior to the transfers of the Verizon local exchange properties.³ In the *FairPoint Order*, the Commission clearly stated that FairPoint stepped "into Verizon's shoes for any regulatory relief that the Commission has granted Verizon in the service area that pertain to the facilities and service operations that FairPoint is acquiring."⁴ This relief necessarily includes the Verizon Forbearance. While FairPoint and Frontier are not mentioned in the TWT Petition, both companies have reasonable concerns that any attempt to modify the relief granted to Verizon might affect them.

³ Notably, the Commission elaborated in the *FairPoint Order*, only by way of example and not as an exhaustive list, that FairPoint would be responsible for complying with the provisions of sections 271, 272, 273, 274, 275, and 276 of the Communications Act that have not sunset, as well as the applicable *Computer Inquiry* requirements. *See Applications Filed for the Transfer of Certain Spectrum Licenses and Section 214 Authorizations in the States of Maine, New Hampshire, and Vermont from Verizon Communications Inc. and its Subsidiaries to FairPoint Communications, Inc.*, Memorandum Opinion and Order, WC Docket No. 07-22, 23 FCC Rcd 514, ¶36 (2008) ("FairPoint Order"). *See also Applications Filed by Frontier Communications Corporation and Verizon Communications Inc. for Assignment or Transfer of Control*, Memorandum Opinion and Order, WC Docket No. 09-95, 25 FCC Rcd 5972, ¶44 (2010) ("Frontier Order") (Frontier responsible for all obligations that apply to BOCs under the Communications Act).

⁴ *See FairPoint Order, supra*, ¶37.

There is no precedent for re-imposing regulation after forbearance has been granted pursuant to Section 10 of the Communications Act, but, at a minimum, any modification to the Verizon Forbearance would have to be justified by specific and sufficient findings that re-regulation of *all* affected carriers would be necessary to protect the public interest under the Communications Act.⁵ The TWT Petitioners have presented no evidence that any such grounds for re-regulation exist.

II. The Petition Fails To Establish Why Different Regulatory Treatment of Verizon and Other Carriers In This Case Is Harmful to Consumers or Competition

The TWT Petitioners complain that the Verizon Forbearance has resulted in different regulations for carriers providing non-TDM-based broadband transmission services.⁶ The petitioners fail to justify why re-regulation is necessary, however.

The TWT Petitioners argue for regulatory parity for the broadband services that were the subject of the Verizon Forbearance.⁷ Yet regulatory parity is not mandated, in itself, by the Communications Act. Competitors may be treated differently as long as the different treatment is not unjust or unreasonable.⁸ If regulatory parity were paramount, the TWT Petitioners stop short of explaining why the FCC would have denied the same

⁵ See 47 U.S.C. §160(c) (providing that forbearance shall be deemed granted unless the Commission makes certain specific findings of the necessity of continued regulation within the statutory period); see also *Sprint Nextel Corp. v. FCC*, 508 F.3d 1129 (D.C. Cir. 2007).

⁶ See TWT Petition at 4 and 13.

⁷ See TWT Petition at 2.

⁸ See *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 80 (2d Cir. 2002), cited in *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095 (D.C. Cir. 2009) (the Commission applied an interim cap on universal service support to competitive eligible telecommunications carriers, not incumbent local exchange carriers, but the court found that different support levels did not violate competitive neutrality principles which do *not* “require precise parity of treatment”).

level of regulatory forbearance to AT&T, Embarq, Frontier, and legacy Qwest that had been granted to Verizon.⁹ The reality is that FCC precedent is replete with instances in which the Commission permitted different regulatory treatment of carriers providing the same or similar services, yet the Commission found such treatment to be “fair” or “competitively neutral.” While regulatory parity is a laudable goal, all else being equal, regulatory disparity has been allowed to persist in many scenarios, frequently because it was not deemed to have a material impact on U.S. consumers or competition. Sometimes, regulatory disparity actually is deemed necessary to promote the interests of consumers, even enhancing competition.

In considering the competitive entry of foreign carriers into the United States market for international telecommunications services, the Commission found it appropriate to apply the effective competitive opportunities (“ECO”) test to dominant foreign carriers with investments in, and influence over, U.S. carriers, but not to apply that test to U.S. carriers with investments in dominant foreign carriers.¹⁰ The Commission

⁹ See *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, Memorandum Opinion and Order, WC Docket No. 06-125, 23 FCC Rcd 12260 (2008); *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements*; *Petition of the Frontier and Citizens ILECs for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, Memorandum Opinion and Order, WC Docket No. 06-147, 22 FCC Rcd 19478 (2007); and *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*; *Petition of BellSouth Corporation for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, Memorandum Opinion and Order, WC Docket No. 06-125, 22 FCC Rcd 18705 (2007).

¹⁰ See generally *Market Entry and Regulation of Foreign-affiliated Entities*, Report and Order, IB Docket No. 95-22, 11 FCC Rcd 3873 (1995) (“Foreign Carrier Market Entry Order”).

reasoned that applying the ECO test to dominant foreign carriers was necessary to guard against competitive harms in the U.S. market, whereas the Commission has no charge to redress anticompetitive behavior in foreign markets.¹¹

The Commission frequently permits lighter regulatory obligations for carriers providing the same or similar services as more heavily-regulated carriers when it anticipates that no harm to consumers would result from deregulating the former. In the Commission's proceeding to address the regulatory treatment of interexchange services provided by local exchange carriers ("LECs") the Commission found that it was not necessary to impose the same separate affiliate requirements on new entrants into the local market as it imposed on incumbent independent LECs, because it believed that the new competitive LECs possessed little, if any, market power to charge unreasonable rates for interexchange services and thereby harm consumers.¹² Similarly, the Commission has recently deemed it appropriate to apply lighter regulation to mobile broadband providers than to fixed broadband providers in the context of its net neutrality rules.¹³ While FairPoint and Frontier do not agree with the Commission's policy choice to impose disparate regulation in either of these contexts, nonetheless it was the Commission's determination, in these instances as in many others, that such disparity was reasonable in

¹¹ See Foreign Carrier Market Entry Order, ¶ 106.

¹² See *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, CC Docket Nos. 96-149 and 96-61, 12 FCC Rcd 15756, ¶ 179 (1997).

¹³ See *Preserving the Open Internet, Broadband Industry Practices*, Report and Order, 25 FCC Rcd 17905 (2010) ("Open Internet Order").

the circumstances. For example, in its Open Internet Order, the Commission found that the still relatively nascent market for mobile broadband services was sufficiently competitive to permit lesser regulation on mobile broadband service providers than on fixed broadband providers.

In contrast, regulatory parity *is* appropriate when regulating carriers differently would harm consumers, as AT&T alleged when it petitioned the Commission to be declared non-dominant in the provision of U.S. domestic interexchange services.¹⁴ In that instance, the Commission re-classified AT&T as non-dominant in the U.S. domestic, interstate interexchange market based on its findings that AT&T lacked market power, and that excessive regulation of AT&T was having an adverse impact on competition in the market as a whole, making it less likely that AT&T's direct competitors would lower prices, for example.¹⁵

In recent years, the Commission has considered numerous petitions for forbearance under Section 10 of the Communications Act, and has treated each on its own merits. It has evaluated requests for relief from regulations governing access services, unbundled network elements, and other common carrier obligations on a market-specific basis, evaluating both the geographic market and the service market relevant to the forbearance request.¹⁶ It has not considered relevant to forbearance in Alaska what

¹⁴ See *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, FCC 95-427, 11 FCC Rcd 3271, ¶ 126 (1995) (“AT&T Non-Dominant Order”).

¹⁵ See AT&T Non-Dominant Order, ¶¶ 1, 36, 139-140, and 163.

¹⁶ See generally *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Section 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, Memorandum Opinion and Order, WC Docket No. 05-281, 22 FCC Rcd 1958 (2007); *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c)*

forbearance was or was not granted to Qwest in Arizona.¹⁷ In evaluating Verizon's request for forbearance from common carrier regulation of certain access services, the FCC sought data from Verizon on the state of competition in the *Verizon* exchange access markets, not in the AT&T, Qwest or other exchange access markets.¹⁸

The TWT Petitioners fail to establish the relevance of Verizon enjoying forbearance to a degree that other LECs do not. They simply assert regulatory disparity. The TWT Petitioners do not demonstrate either that consumers are being harmed by the Verizon Forbearance, or that the public interest would be advanced by reversing the Verizon Forbearance. Moreover, with the Congressional *imprimatur* given to the Verizon Forbearance, the Commission having declined to reject Verizon's petition,¹⁹ the justification

from Resale, Unbundling and Other Incumbent Local Exchange Requirements Contained in Section 251 and 271 of the Telecommunications Act of 1996 in the Terry, Montana Exchange, Memorandum Opinion and Order, WC Docket No. 07-9, 23 FCC Rcd 7257 (2008); Petition of Qwest Corporation for Forbearance from Enforcement of the Commission's ARMIS and 492A Reporting Requirements Pursuant to 47 U.S.C. § 160(c); Petition of Verizon for Forbearance Under 47 U.S.C. § 160(c) From Enforcement of Certain Recordkeeping and Reporting Requirements, Memorandum Opinion and Order, WC Docket Nos. 07-204 and 07-273, 23 FCC Rcd 18483 (2008); Petition of AT&T Inc. For Forbearance Under 47 U.S.C. § 160 From Enforcement of Certain of the Commission's Cost Assignment Rules; Petition of BellSouth Telecommunications, Inc. For Forbearance Under 47 U.S.C. § 160 From Enforcement of Certain of the Commission's Cost Assignment Rules, Memorandum Opinion and Order, WC Docket Nos. 07-21 and 05-342, 23 FCC Rcd 7302 (2008).

¹⁷ See *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S.C. § 160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area*, Memorandum Opinion and Order, WC Docket No. 06-109, 22 FCC Rcd 16304 (2007).

¹⁸ See Ex Parte Letter from Edward Shakin, Vice President and Associate General Counsel, Verizon, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 04-440 (Feb. 7, 2006) (putting additional information about the Verizon Forbearance Petition on record in response to a Commission Staff request).

¹⁹ See *Ad Hoc Telecommunications Users Committee v. FCC*, 572 F.3d 903 (D.C. Cir. 2009).

for re-imposing regulation on the forborne services would have to be substantial indeed. The TWT Petitioners offer no such justification.

III. The Market for Non-TDM-Based Broadband Services Is Competitive and Therefore Re-Regulation Is Not Necessary

Far from being harmed under Verizon Forbearance, consumers in FairPoint and Frontier local exchange/exchange access territories have greatly benefited from it. Importantly, they have choices in service providers, and can choose the lowest price and best service provider for advanced broadband services.

FairPoint offers a variety of non-TDM-based advanced services on a non-common carrier basis pursuant to the Verizon Forbearance, and finds this market highly competitive. For example, within its Northern New England territory, FairPoint recently participated in two significant competitive bidding opportunities to offer high-speed access services to wireless carriers that were seeking to upgrade the facilities to their cellular towers. The first bidding opportunity involved a national wireless company that sought bids on high-speed connections to over 600 tower locations within FairPoint's Northern New England territory. That wireless company awarded only 25% of service to the sites to FairPoint, with the remaining 75% of service to the sites being awarded to at least six other facility-based competitors, including a substantial portion of those remaining sites being serviced by the local cable company. The second bidding opportunity involved a different national wireless provider that wanted to upgrade its high-speed connections to more than 200 cellular towers within FairPoint's Northern New England territory. While FairPoint was successful in winning the bid to provide service to almost 70% of these towers, FairPoint lost the bid for more than 30% of the sites to other facility-based competitors in the region. Competition for these services couldn't be stronger.

Like FairPoint, Frontier offers non-TDM-based advanced services on a non-common carrier basis pursuant to the Verizon Forbearance. Frontier faces stiff competition for these services from both national competitive local exchange carriers (“CLECs”) and regional CLECs. The competition for services such as GigE rings, 100 Mb Ethernet circuits, 10 Mb direct Internet access (“DIA”), and T1 DIAs is fierce with price often a decisive component of a customer’s decision to purchase services from one of Frontier’s competitors.

With this kind of competition in the market for the services covered by the Verizon Forbearance, it is evident that neither FairPoint nor Frontier possesses any market power in the fast-growing and rapidly changing market for such non-TDM-based services. The re-regulation of these services for the incumbent LEC therefore could have devastating consequences not just to these carriers but also to their customers.

IV. Conclusion

For the foregoing reasons, the TWT Petition should be denied.

Respectfully submitted,

/s/

Michael T. Skrivan
Vice President, Regulatory
FAIRPOINT COMMUNICATIONS, INC.
1 Davis Farm Road
Portland, ME 04103
mkskrivan@fairpoint.com
207-535-4150

Karen Brinkmann
Robin Tuttle
KAREN BRINKMANN PLLC
555 Eleventh Street, NW, Mail Station 07
Washington, DC 20004-1304
KB@KarenBrinkmann.com
202-365-0325
Counsel for FairPoint

Michael D. Saperstein
Director, Federal Regulatory Affairs
Frontier Communications Corporation
2300 N Street, NW, Suite 710
Washington, DC 20037
michael.saperstein@ftr.com
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