

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

In the Matter of)
)
Petition of tw telecom inc., BT Americas)
Inc., Ad Hoc Telecommunications Users)
Committee, Computer & Communications) WC Docket No. 11-188
Industry Association, EarthLink, Inc., and)
Sprint Nextel Corp. to Establish Regulatory)
Parity in the Provision of Non-TDM-Based)
Broadband Transmission Services)

COMMENTS OF HAWAIIAN TELCOM, INC.

Hawaiian Telcom, Inc. (“Hawaiian Telcom”) hereby submits comments on the Petition filed in the above-captioned proceeding.¹ Petitioners ask the Commission to establish regulatory parity among incumbent local exchange carriers (“ILECs”) and Competitive Local Exchange Carriers (“CLECs”) in their provision of certain business broadband services based on an alleged difference between the way forbearance was granted to Verizon and other carriers.² In reality, however, the petitioners are asking the Federal Communications Commission (“FCC”) to reverse the forbearance from Title II and *Computer Inquiry* regulation that the Verizon Telephone Companies were granted by operation of law in 2006.³ For the reasons stated below, Hawaiian Telcom urges that the Petition be denied because granting the Petition would be unlawful and bad public policy.

¹ Public Notice, *Comment Sought on Petition Seeking Reverse of Forbearance Granted to Verizon Telephone Companies by Operation of Law*, Docket No. WC 11-188, DA 11-1879 (rel. Nov. 10, 2011) (“Public Notice”).

² Petition of tw telecom inc., etc., to Establish Regulatory Parity in the Provision of Non-TDM-Based Broadband Transmission Services, Docket No. WC 11-188, at 1 (dated Oct. 4, 2011) (“Petition”).

³ *Petition of the Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, WC Docket No. 04-1440 (dated Dec. 20, 2004) (“Verizon Petition”).

I. INTRODUCTION

Seven years ago, Verizon filed a petition on behalf of all of its operating telephone companies as of the filing date of the petition, seeking forbearance from the FCC's Title II⁴ and *Computer Inquiry* rules⁵ applicable to most business broadband services.⁶ Verizon's request was based on facts which demonstrated a nationwide competitive business broadband marketplace. The Commission did not adopt an order addressing the forbearance request within fifteen months of the petition's filing. Therefore, Verizon's petition was granted by operation of law pursuant to Section 10(c) of the Communications Act.⁷ Sprint Nextel Corp. appealed this forbearance grant in 2007. This appeal was denied because the grant was made by Congress pursuant to statute, and hence was an unreviewable agency action that was not appealable pursuant to 47 U.S.C. § 402(a) or 28 U.S.C. § 2342(1).⁸ tw telecom's petition points out the court's explanation that "Congress made the decision in [Section 10(c)] to 'grant' forbearance

⁴ 47 U.S.C. §§ 201, *et seq.*

⁵ *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 FCC 2d 384 (1980) *recon.*, 84 FCC 2d 50 (1980), *further recon.*, 88 FCC 2d 512 (1981), *aff'd sub nom. Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982) ("*CCIA v. FCC*"), *cert. denied*, 461 U.S. 938 (1983) (collectively referred to as *Computer II Orders*). *Amendment of Section 64.702 of the Commission's Rules and Regulations*, CC Docket No. 85-229, Phase I, 104 FCC 2d 958 (1986) ("*Computer III*").

⁶ Verizon indicated that its forbearance grant did not apply to DS-1 and DS-3 services provided in time division multiplexing ("TDM") format and did not seek to avoid payment of universal service contributions based on revenues derived from the forborne services. Letter from Edward Shakin, Verizon, to Marlene Dortch, FCC, WC Docket No. 04-1440 (dated Feb. 7, 2006); Letter from Susanne A. Guyer, Verizon, to Marlene Dortch, FCC, WC Docket No. 04-1440 (dated Feb. 17, 2006).

⁷ 47 U.S.C. § 160(c); Public Notice, *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. Mar. 20, 2006).

⁸ *Sprint Nextel Corp. v. FCC*, 508 F.3d 1129 (D.C. Cir. 2007).

whenever the Commission ‘does not deny’ a carrier’s petition” and “[w]hen the Commission failed to deny Verizon’s forbearance petition within the statutory period, Congress’s decision – not the agency’s – took effect.”⁹

At later dates, the Commission issued orders granting in part the forbearance requests petitions filed by AT&T, Qwest, Embarq, and Frontier that were similar, although not identical, to Verizon’s.¹⁰ All of these forbearance request decisions were based on facts showing a nationwide competitive advance broadband services marketplace, and not based on the particular geographic areas in which the companies operated.¹¹ The Commission limited the granted forbearance requests to the application of dominant carrier regulation under Title II of the Communications Act¹² to business services that were offered by the petitioners and listed in the petitions for forbearance.¹³ In addition, the Commission granted forbearance from the *Computer Inquiry* rules applicable specifically to Bell Operating Companies but declined to grant forbearance from most of the *Computer Inquiry* rules applicable to all facilities-based carriers.¹⁴

⁹ Petition at 8 (*quoting Sprint Nextel v. FCC*, 508 F.3d at 1132).

¹⁰ *Petition for AT&T Inc for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Service*, Memorandum Opinion and Order, WC Docket No. 06-125, 22 FCC Rcd 18705 (2007) (“*AT&T Forbearance Order*”); *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and computer Inquiry Rules with Respect to Broadband Services*, 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*, Memorandum, Opinion and Order, WC Docket No. 06-147, 22 FCC Rcd 19478 (2007).

¹¹ *See, e.g., AT&T Forbearance Order*, ¶¶ 20-21.

¹² *Id.*, ¶¶ 36-37.

¹³ *Id.*, ¶¶ 40.

¹⁴ *Id.*, ¶¶ 53, 59.

II. THE COMMISSION SHOULD DENY THE PETITION BECAUSE IT DOES NOT RAISE SUFFICIENT ARGUMENTS TO JUSTIFY MODIFYING THE ORIGINAL FORBEARANCE GRANT.

A. Petitioners' Argument is Basically that the Verizon Forbearance Grant Should be Changed because the Commission Reached a Modified Result When It Addressed Other Forbearance Petitions.

The sole basis of petitioner's argument is that the grant to Verizon operating companies is substantively different from that granted to other ILECs and CLECs.¹⁵ Petitioners rely heavily on the Commission's stated analysis in orders adopted with respect to these written grants. However, petitioners fail to cite any evidence concerning the state of the marketplace for business broadband services during any time frame and do not identify any anticompetitive issues in today's market.

In fact, the market today for business broadband services is no less competitive than it was when the Verizon forbearance was originally granted. If anything, the marketplace for advanced broadband services has become even more competitive than it was in 2006. The digital revolution has been progressing rapidly on a nationwide basis both technologically and from multiple large players. For example, Ethernet competition intensified, with substantial market share increases enjoyed by cable providers, CLECs, and other network connection providers such as Level 3.¹⁶ tw telecom is now the number three provider of Ethernet connections serving over 14,000 buildings¹⁷ and cable

¹⁵ Petition at 15-21.

¹⁶ *Competitors Gain Business Ethernet Share, Report Finds*, V2M News (Aug. 18, 2010), located at <http://www.vision2mobile.com/news/2010/08/competitors-gain-business-ethernet-share-report-f.aspx> (last accessed on Dec. 16, 2011).

¹⁷ *tw telecom's Ethernet Rise is Based on a Fiber-Rich, Customer-First Diet*, Fierce Telecom (Sept. 21, 2011), located at <http://www.carrierethernetnews.com/articles/301829/tw-telecoms-ethernet-rise-is-based-on-a-fiber-rich/> (last accessed on Dec. 16, 2011).

operators have also become a major competitive force in the Ethernet connection market.¹⁸ Competitors continue to increase their optical broadband connections, such as OC-3, OC-12, and greater bandwidth, and IP services such as virtual private networks and MPLS-based services.¹⁹

There have been no legal or policy changes that have occurred since the original 2006 Verizon grant that would justify revisiting the Verizon grant at this time. Congress has not made changes to either the forbearance statute or any of the relevant portions of the Communications Act. Furthermore, the Commission has adopted no substantive rule changes that would impact any of the forbearance grants.²⁰ Although the Commission has made a number of pronouncements about the broadband market for residential and small business customers,²¹ it has engaged in no such analysis of business broadband services.

Therefore, there is not enough justification to overturn a lawful grant simply because the Commission made pronouncements in other proceedings concerning similar

¹⁸ *Cable Operators & Ethernet: Serious Business*, Heavy Reading Insider (2011), located at http://www.heavyreading.com/insider/details.asp?sku_id=2475&skuitem_itemid=1221 (last accessed on Dec. 16, 2011).

¹⁹ See, e.g., *Ethernet & MPLS Branch Office Solutions*, MPLS Networks Today (Dec. 16, 2011), located at <http://www.mplsnetworkstoday.com/branch-office-bandwidth.php> (last accessed on Dec. 16, 2011). Even smaller companies can compete head-to-head with larger carriers offering IP services. <http://www.mplsprovider.com/> (last accessed on Dec. 16, 2011).

²⁰ The FCC's forbearance rulemaking was entirely procedural in nature and did not change the substantive rules applicable to forbearance requests. *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 (2009) ("*Forbearance Procedures Order*").

²¹ See, e.g., Federal Communications Commission, *Connecting America: The National Broadband Plan*, GN Docket No. 09-51, at 9 (rel. Mar. 16, 2010).

services offered by other companies. Indeed, on appeal, the court refused to disturb the forbearance granted to AT&T for business broadband services, even though it knew another substantive result had been reached with respect to the Verizon operating companies.²²

B. The Fact that the Commission Stated It Planned to Review the Original Verizon Forbearance Grant Does Not Justify Modifying the Grant at this Time.

AT&T refers to a 2008 Commission statement that it intended to revisit the Verizon grant within 30 days.²³ This is irrelevant. The statement is not binding on the Commission, and it is obvious that, over four years later the Commission no longer feels a revisit of the Verizon grant is warranted.

The forbearance grant by operation of law is, at a minimum, as legally enforceable as a written decision by the Commission and has the force of law. Thus, the fact that the relief may be different from other published Commission orders is irrelevant, particularly because the Verizon grant appeal was dismissed by the court of appeals. Even if such “inconsistent” decision were legally relevant at the present time, which it is not, this “inconsistency” would at most be a justification for modifying the forbearance grants providing greater forbearance to all mid-size and large ILECs consistent with the Verizon grant, not the other way around.

²² See section IV, *infra*.

²³ See *AT&T Forbearance Order*, ¶ 50.

III. BECAUSE THE MARKET FOR BUSINESS BROADBAND SERVICES IS EVEN MORE COMPETITIVE TODAY THAN IN 2006, IT WOULD BE BAD PUBLIC POLICY TO GRANT THE PETITION.

Given the highly competitive marketplace for business broadband services, the re-regulation of business broadband services would interfere with Verizon operating companies' legitimate investment incentives. In the current economic environment, re-regulating business broadband services for these companies would create uncertainty that would make economic expansion more difficult. The Petitioners request therefore would be an exceedingly erroneous economic decision, more so because petitioners show no facts which would indicate that the current regulatory status is unfair or anticompetitive as to either consumers or competitors. The Commission in the past has been cautious about interfering with private contracts when doing so could undermine investment-backed expectations of the carrier and customers alike.²⁴ No showing has been made in the Petition that invalidating existing contracts would not have such investment-squelching impact in the instant case.

More importantly, the Verizon forbearance grant permitted the Verizon companies to enter into contracts with customers to provide forbore services on an unregulated basis. Verizon operating company customers of these forbore services now have an expectation that these contracts are legal, subject only to the general contract law. It would be markedly anti-consumer to now open these contracts to new and different challenges, possibly leading to price increases and other changes in negotiated terms and

²⁴ See, e.g., *Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, *et. al*, 15 FCC Rcd 22983, ¶ 36 (2000).

conditions, particularly when the market is competitive. Such a possibility smacks of retroactive rulemaking that is disfavored in the law.²⁵

IV. THE PETITION CANNOT LAWFULLY BE GRANTED AS FILED.

The Commission cannot legally modify a forbearance granted by operation of law based on the Petition as filed.

First, there is substantial doubt that the Verizon forbearance grant can be modified at this time. Section 10 of the Communications Act specifies the Commission's authority with respect to addressing forbearance requests, the standards that must be followed, and the procedures to be used. There is no methodology specified in the statute regarding reversing or modifying a forbearance grant. In fact, the statute indicates that a forbearance request can only be denied, a result which petitioners now at least partially seek, within a maximum of fifteen months of the filing of the forbearance petition. Given that this time period has long since expired, there is substantial doubt, that the Commission has any authority to reimpose regulations by "reversing" or "modifying" a forbearance grant, particularly when Congress granted the Verizon operating companies' forbearance.²⁶

Petitioners argue that the court in *Ad Hoc Telecommunications Users Committee v. FCC*²⁷ found that forbearance grants can be "reassessed" by the agency or Congress.²⁸

²⁵ *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 216-25 (1988) (Justice Scalia concurring).

²⁶ See text accompanying note 8, *supra*. Indeed, the Supreme Court has previously found that the Commission, prior to the 1996 Telecommunications Act, did not have the authority to forbear from statutory requirements. *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 228-29 (1994). From this precedent it is just as likely to conclude that the FCC cannot now modify a forbearance request without specific statutory authority.

²⁷ *Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903 (D.C. Cir. 2009) ("*Ad Hoc*").

This vague statement of the court is mere dicta made in the context of evaluating the Commission's general rulemaking powers without the benefit of a full briefing on the issue. In addition, the court did not indicate how a forbearance decision could be "reassessed" and certainly never indicated that a grant by operation of law could be modified solely based on the reasoning set forth in a written decision with respect to other forbearance petitions. Indeed, the court in *Ad Hoc* never even questioned the fact that the Commission reached a different substantive result with respect to AT&T's "me too" forbearance grant than that granted to Verizon by operation of law.²⁹ The *Ad Hoc* decision is therefore of little use to petitioners in justifying their request.

At a minimum, however, the Commission cannot impose any new regulations on a company without conducting a notice and comment rulemaking under the Administrative Procedures Act ("APA")³⁰ and any rules adopted under the APA applicable to all similarly situated carriers that provide business broadband services, in order to be upheld under the arbitrary and capricious standard of review.³¹ The Petition, therefore, cannot be granted as filed, and could at most be considered a petition for rulemaking.

In any event, even if the Commission did not have to follow APA procedures in order to re-impose regulations on a previously forborne carrier and if the petition were considered as one seeking lesser benefits for the Verizon operating companies, the

²⁸ Petition at 22.

²⁹ *Ad Hoc* at 911.

³⁰ 5 U.S.C. § 551, *et seq.*

³¹ Compare *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1000 (2005) (agency must justify any decision to treat services dissimilarly to avoid arbitrary and capricious decisionmaking).

Commission would have to follow the same procedures that the Commission has established to grant forbearance in the first place. The Commission has specified procedures to be followed when filing a forbearance petition, including establishing a new, higher burden of proof and production of evidence requirement.³² While Hawaiian Telcom does not agree with the new forbearance standards adopted by the Commission, these rules are now final, and the Commission is bound to follow them.³³ The petitioners in this case not only fail to meet their burden of proof, but they have not provided any evidence to support their claims as the rules require. Therefore, because the Petition is not “complete as filed”, the Petition should be denied.³⁴

For all of these reasons, it would be unlawful based on the instant Petition for the Commission to reimpose regulatory conditions that were previously made inapplicable to the Verizon companies by operation of law.

V. CONCLUSION

The Verizon operating companies received a forbearance grant by operation of law, which was upheld by an appellate court. The Commission should not now address a Petition that seeks to modify this forbearance without any submission of facts, law, or policy that would justify a change in a legal forbearance grant. In addition, it would be unlawful to now modify this forbearance grant because the Commission has no statutory authority to do so, cannot impose regulations on a single company absent APA-compliant rulemaking applicable to all similarly situated carriers, and must follow the same

³² *Forbearance Procedures Order*; 47 C.F.R. §§ 1.53, *et seq.*

³³ *Morton v. Ruiz*, 415 U.S. 199, 235 (1974); *United States v. Caceres*, 440 U.S. 741, 752 (1979).

³⁴ The FCC’s “complete as filed” rules preclude amendment. 47 C.F.R. § 1.54.

procedures and burden of proof it has established for forbearance petitions. Therefore,
the Petition should be denied.

Respectfully submitted,

By: */s/ Gregory J. Vogt*

Steven Golden
Vice President External Affairs
Hawaiian Telcom, Inc.
1177 Bishop Street
Honolulu, Hawaii 96813

Of Counsel

Gregory J. Vogt
Law Offices of Gregory J. Vogt, PLLC
2121 Eisenhower Ave.
Suite 200
Alexandria, VA 22314
(703) 838-0115
Fax: (703) 684-3620
gvogt@vogtlawfirm.com

Counsel for Hawaiian Telcom, Inc.

December 20, 2011