

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20544**

In the Matter of

Petition of tw telecom inc. et al. Seeking
Reverse of Forbearance Granted to Verizon
Telephone Companies by Operation of Law

WC Docket No. 11-188

REPLY COMMENTS OF VERIZON¹

As Verizon and a majority of the other commenters responding to this Petition have demonstrated, Petitioners have not met their burden to justify re-regulating Verizon's enterprise broadband services. Those comments underscore the fact that, to re-impose regulations on Verizon's enterprise broadband services following the grant of Verizon's forbearance petition, the Commission must engage in a rulemaking process. Petitioners, as proponents of that rulemaking, bear the weight of demonstrating the existence of a marketplace failure that warrants regulation. Yet Petitioners did not even attempt to carry that burden.

Only two comments – by MegaPath Inc. and U.S. Telepacific Corp. (“MegaPath”) and COMPTTEL – were filed in support of the Petition. Neither fills that critical hole. Indeed, both largely repeat the insufficient claims in the Petition. Further, MegaPath gets things backwards by claiming that the relevant question is whether forbearance continues to be necessary, rather than whether there are marketplace harms that warrant re-regulation. When MegaPath does address the relevant question, it only offers brief and wholly unsubstantiated assertions about marketplace harms.

¹ The Verizon companies participating in this filing (“Verizon”) are the wholly owned subsidiaries of Verizon Communications Inc. that filed the petition for forbearance in WC Docket No. 04-440 (filed Dec. 20, 2004).

Because Petitioners and their few supporters have not demonstrated the existence of any marketplace harm that could warrant re-regulating Verizon's enterprise broadband services, the Petition must be denied. In all events, as Verizon has shown, the marketplace is robustly competitive and Petitioners themselves have fared well since Verizon's petition was granted. For example, tw telecom is the third-ranked player in business Ethernet service — the fastest growing and most important enterprise broadband service — and Sprint has touted its award of a series of contracts with dozens of companies for building fiber-based backhaul capable of delivering Ethernet at 15,000 of Sprint's cell sites.² Indeed, the last five-and-a-half years have provided a natural experiment as to the results of deregulation, and the evidence demonstrates that re-imposing regulation on Verizon's enterprise broadband services is unwarranted.

PETITIONERS AND THEIR SUPPORTERS FAIL TO CARRY THEIR BURDEN OF SHOWING MARKETPLACE HARMS THAT COULD JUSTIFY THE RE-REGULATION OF VERIZON'S ENTERPRISE BROADBAND SERVICES

Because Verizon's petition for forbearance was granted by operation of law, for the past five-and-a-half years, Verizon has offered its enterprise broadband services free from the statutory and regulatory obligations that were the subject of Verizon's petition. As Verizon explained, the Commission cannot re-regulate those services unless it engages in a rulemaking pursuant to the Commission's authority contained in Section 201(b) of the Communications Act.³ To invoke this authority, the Commission must identify some marketplace failure

² See Carol Wilson, *Sprint To Reveal Backhaul Contract Winners Friday*, Light Reading (Oct. 5, 2011), http://www.lightreading.com/document.asp?doc_id=213050.

³ See Verizon Comments at 5-10. MegaPath appears to concede as much, stating that “[n]othing about Verizon's deemed grant sets it apart from the Commission's traditional rulemaking authority, or authority to revisit a previously issued decision, pursuant to the Administrative Procedures Act.” MegaPath Comments at 7.

warranting regulation.⁴ In the absence of evidence demonstrating a marketplace failure, the Commission instead will “rel[y] on market forces, rather than regulation.”⁵

In addition to Verizon, three other commenters — FairPoint, CenturyLink, and Hawaiian Telecom — oppose the Petition. All three agree that to re-impose regulation on these services, the Commission must, at a minimum, engage in a rulemaking process or make specific findings that justify regulation.⁶ Hawaiian Telecom further explains that the Commission’s prior statements or decisions in other forbearance proceedings involving other carriers and on the record in those other proceedings should have no affect on the present Petition.⁷ All three commenters also agree with Verizon that Petitioners failed to meet their burden of identifying evidence justifying the need for additional regulation in this marketplace,⁸ and that parity alone cannot provide a basis for re-imposing such regulation on Verizon.⁹ Verizon, as well as companies such as FairPoint and Frontier that have acquired Verizon operating companies in recent years, has entered into a large number of private carriage contracts with consumers, and

⁴ See Verizon Comments at 6; Memorandum Opinion and Order, *Orloff v. Vodafone Airtouch Licenses LLC, d/b/a Verizon Wireless*, 17 FCC Rcd 8987, ¶ 22 n.69 (2002), *aff’d*, *Orloff v. FCC*, 352 F.3d 415, 420 (D.C. Cir. 2003).

⁵ *Id.*; see also Second Report and Order, *Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, ¶ 173 (1994) (“[I]n a competitive market, market forces are generally sufficient to ensure the lawfulness of . . . terms and conditions of service by carriers who lack market power.”).

⁶ See Hawaiian Telecom Comments at 9; CenturyLink Comments at 4-5; FairPoint Comments at 3.

⁷ See Hawaiian Telecom Comments at 6.

⁸ See CenturyLink Comments at 5; Hawaiian Telecom Comments at 10; FairPoint Comments at 7-8.

⁹ See CenturyLink Comments at 5-6; FairPoint Comments at 3-8; Hawaiian Telecom Comments at 5-6. As Hawaiian Telecom note (at 6), the proper path for achieving regulatory parity would be to provide “greater forbearance to all mid-size and large ILECs consistent with the Verizon grant, not the other way around.”

all three commenters agree that reversing the forbearance grant, thereby upsetting or invalidating settled contractual expectations, would be an unsound policy decision.¹⁰

Although Petitioners, as proponents of regulation, bear the burden of demonstrating the necessity for imposing rules on Verizon’s enterprise broadband services,¹¹ they did not come close to meeting it. Indeed, Petitioners did not even try to identify evidence of marketplace failure or consumer harm,¹² even though Petitioners themselves are participants in this marketplace. Petitioners also do not address Verizon’s own enterprise broadband services even though many of the petitioners have entered private carriage contracts with Verizon for such services. The only two commenters to support the Petition fail to meet this burden as well.

A. As an initial matter, MegaPath gets things backwards when it suggests that the relevant question is whether there is a “need for such continued relief.”¹³ Once forbearance is granted, either by the Commission or by operation of law, it is the law: these grants have no expiration, nor are they some interim solution, unless the Commission later determines, on a full record reflecting current marketplace facts, that imposing regulation on these services is necessary. MegaPath’s proposed standard also contravenes the well-established rule that places the burden of proof on proponents of additional regulation to show its necessity.¹⁴ The

¹⁰ See Hawaiian Telecom Comments at 7-8; CenturyLink Comments at 5-6; FairPoint Comments at 2-3, 8-9.

¹¹ 5 U.S.C. § 556(d) (“Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.”)

¹² FairPoint Comments at 7 (“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.”).

¹³ MegaPath Comments at 5.

¹⁴ See, e.g., *Schaffer v. Weast*, 546 U.S. 49, 56 (2005) (holding that the burden of proof in an administrative hearing is properly placed on the party seeking relief); CenturyLink Comments at 5 (“Because Petitioners failed to comply with . . . the burden of proof, the Petition should be dismissed.”); Hawaiian Telecom Comments at 10 (“The petitioners in this case not only fail to

beneficiary of a past grant of forbearance is not required to show why it should remain unregulated.

When it turns to the correct question, MegaPath offers two brief and entirely unsubstantiated assertions that the grant of forbearance to Verizon “hinders competition and consumer choice” and “has raised broadband costs significantly across the country.”¹⁵ These bare assertions fall well short of supplying a basis for the Commission to re-regulate Verizon’s enterprise broadband services. *See Int’l Union, et al. v. OSHA*, 37 F.3d 665, 669 (D.C. Cir. 1994) (explaining that “[t]he requirement of supportive evidence operates to assure a link between the agency’s substantive mandate and the real-world circumstances in which the agency operates,” and that “[i]f an agency could claim to be applying a statutory constraint merely by *asserting* the existence of some fact . . . it would be free to defeat the underlying purpose of constitutional limits on delegation”).

Not only do MegaPath’s bare assertions fail to help Petitioners carry their burden, but also their claims are at odds with the marketplace facts. As Verizon has explained, and the three other commenters opposing the petition agree, the marketplace for enterprise broadband services is robustly competitive.¹⁶ CLECs and cable operators are among the major providers of business Ethernet services,¹⁷ with Petitioner tw telecom ranked third in the United States.¹⁸ Petitioner

meet their burden of proof, but they have not provided any evidence to support their claims as the rules require.”).

¹⁵ MegaPath Comments at 1, 8. In support of these statements, MegaPath cites (at 8, n. 18) the 2009 Berkman Center study, http://transition.fcc.gov/stage/pdf/Berkman_Center_Broadband_Study_13Oct09.pdf, although it has nothing to do with competitive conditions in the enterprise broadband marketplace.

¹⁶ *See* Verizon Comments at 10-20; CenturyLink Comments at 6-7; FairPoint Comments at 8-9; Hawaiian Telecom Comments at 4-5.

¹⁷ *See* Verizon Comments at 11-12.

Sprint has benefited from this extensive competition, recently announcing that it “will end up with ‘25 to 30 significant backhaul providers’ that will likely be a mix of incumbent LECs, cable MSOs and alternative carriers, all of whom will be expected to deliver Ethernet predominantly over fiber.”¹⁹ MegaPath and TelePacific are successful marketplace participants as well. For example, MegaPath recently announced that its nationwide Ethernet footprint — which it touts as the nation’s largest — will reach “680 central offices by June 2012.”²⁰ MegaPath was also named a finalist in the Network Products Guide’s 2011 Hot Companies and Best Products awards for its VoIP offerings to enterprise customers.²¹ Similarly, TelePacific Corp., which focuses primarily on enterprise customers, was recently named one of Inc. Magazine’s “Fastest Growing Private Companies for the fifth year in a row.”²² TelePacific also recently announced that it was expanding its reach to small and medium-sized businesses by acquiring a broadband fixed wireless carrier, thus allowing it “increased availability of high bandwidth products to

¹⁸ See Press Release, *Mid-2011 U.S. Business Ethernet LEADERBOARD, Competition Heats Up as Demand for Ethernet Services Remains Strong in the First Half of the Year*, Vertical Systems Group (Aug. 16, 2011), http://verticalsystems.com/prarticles/stat-flash-08-2011-Mid-Year-2011_Leaderboard_pnews.html.

¹⁹ Wilson, *supra* (quoting Sprint Vice President of Roaming and Access Planning Paul Scieber). FairPoint notes that it has also 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,” and concludes from its experience that “[c]ompetition for these services couldn’t be stronger.” FairPoint Comments at 8.

²⁰ Press Release, MegaPath, *MegaPath Partners with ADTRAN To Deliver Nation’s Largest Ethernet Footprint* (Sept. 7, 2011), <http://www.megapath.net/about/press-releases/megapath-partners-with-adtran-to-deliver-nations-largest-ethernet-footprint/>.

²¹ Press Release, MegaPath *MegaPath Named a Finalist in the 2011 Hot Companies and Best Products Awards* (Apr. 7, 2011), <http://www.megapath.com/about/press-releases/megapath-named-a-finalist-in-the-2011-hot-companies-and-best-products-awards/>.

²² Press Release, TelePacific Communications, *TelePacific Communications Named One of America’s Fastest-Growing Private Companies in Inc. Magazine’s Annual 500/5000 List* (Aug. 25, 2011), <http://www.telepacific.com/about/press/release-template.asp?id=2181>.

customers, the ability to provision customers more quickly, and [the ability to] own the ‘last mile,’ which reduces dependency on incumbent [LECs].”²³

B. To re-impose regulations following a grant of forbearance, the Commission must engage in a rulemaking process and identify substantial record evidence of a marketplace failure that justifies regulation.²⁴ This rulemaking requirement applies regardless of whether forbearance was granted through a Commission vote or by operation of law. In either case, the end result remains the same: the statutory and regulatory obligations applicable to those services no longer apply.²⁵ MegaPath suggests that a lesser standard applies to a decision to reverse forbearance granted by operation of law rather than by Commission vote, but offers no support for that claim.²⁶ On the contrary, it follows from the fact that Congress made the policy decision to grant forbearance automatically in the event the Commission takes no action that the standard for re-imposing regulation following a grant by operation of law must be at least the same as when the Commission votes to grant forbearance. Indeed, it would make little sense for an agency to reverse a decision of Congress with a *lesser* justification than would be required to reverse one of its own decisions.²⁷

²³ Press Release, TelePacific Communications, *TelePacific Communications To Acquire Fixed Wireless Internet Service Provider Covad Wireless* (Dec. 22, 2010), <http://www.telepacific.com/about/press/release-template.asp?id=2170>.

²⁴ See FairPoint Comments at 3 (noting that, “at a minimum, any modification to the Verizon Forbearance would have to be justified by specific and sufficient findings”); CenturyLink Comments at 4-5; Hawaiian Telecom Comments at 9.

²⁵ See Verizon Comments at 6; CenturyLink Comments at 4 (explaining that “modify[ing] the Verizon grant . . . would be imposing new regulations on the company”).

²⁶ See MegaPath Comments at 7.

²⁷ See FairPoint Comments at 7-8 (noting the “Congressional *imprimatur* given to the Verizon Forbearance” requires a “substantial” justification for re-imposing regulation).

C. Like Petitioners, MegaPath and COMPTTEL rely on the Commission’s previously stated intent to regulate Verizon’s enterprise broadband services similarly to those of other incumbent LECs.²⁸ But parity alone cannot justify regulating a currently unregulated participant in a marketplace. *See National Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 1000-02 (2005). Given the inability of Petitioners and their few supporters to identify any marketplace harms warranting regulation, parity cannot suffice as a justification for imposing regulations.²⁹ Moreover, in light of the evidence presented by Verizon and other commenters that this marketplace is highly competitive,³⁰ the proper method for achieving regulatory parity would be to extend the same forbearance to other providers, rather than to re-impose regulation on Verizon.³¹

Nor does the Commission’s statement in the 2007 *AT&T Order* that it intended to issue an order with respect to Verizon’s enterprise broadband services have any effect on the current proceeding.³² As Verizon explained, that statement, far from a “specific[] promise[],”³³ cannot

²⁸ *See* MegaPath Comments at 4-5; COMPTTEL Comments at 3-4.

²⁹ *See* FairPoint Comments at 3-4, 6-7.

³⁰ *See* Verizon Comments at 10-20; Hawaiian Telecom Comments at 4-5; FairPoint Comments at 8; CenturyLink Comments at 7.

³¹ *See* Hawaiian Telecom Comments at 6. MegaPath warns (at 5) against a “haphazard series of waivers and *ad hoc* exemptions from existing rules,” but the forbearance statute expressly contemplates the possibility of disparate treatment among carriers; its text speaks of forbearance both to *individual* telecommunications carriers as well as a “class of telecommunications carriers.” 47 U.S.C. § 160(c). And as FairPoint notes (at 4), Commission precedent is “replete with instances in which the Commission permitted different regulatory treatment of carriers providing the same or similar services.”

³² *See* Memorandum Opinion & Order, *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 10(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, 22 FCC Rcd 18705, ¶ 50 (2007) (“*AT&T Order*”).

³³ MegaPath Comments at 7.

justify a decision to impose regulation on Verizon more than four years after the fact.³⁴ In the past four years, the enterprise broadband marketplace has continued to evolve and new entrants continue to roll out an array of new services; Verizon also has entered into thousands of private carriage contracts with customers of all kinds for services, valued at more than \$3 billion.³⁵ The Commission cannot ignore the evidence gathered during this time merely to fulfill its intended desire to avoid “regulatory disparities between similarly-situated competitors” when Petitioners and their few supporters have made no showing of any adverse effects that could justify changing the status quo.³⁶

D. Like Petitioners, MegaPath and COMPTTEL complain about supposed deficiencies in Verizon’s 2004 petition for forbearance and suggest that the Commission may still act on that petition. As Verizon explained, the Commission cannot now act on that long-ago granted petition, so these claims are therefore irrelevant to the *current* Petition to re-regulate Verizon’s enterprise broadband services.³⁷ If the Commission could adopt and release an order on Verizon’s 2004 petition at any time after it was granted by operation of law, it would “gut section 10” by treating “the statutory deadline [as] inconvenient,” which the D.C. Circuit made clear “cannot be correct.”³⁸ *AT&T Inc. v. FCC*, 452 F.3d 830, 836 (D.C. Cir. 2006); *see also Tri-State Bancorporation, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 524 F.2d 562, 565-68 (7th

³⁴ *See* Verizon Comments at 9; Hawaiian Telecom Comments at 5-6.

³⁵ Verizon Comments at 2; *see also* CenturyLink Comments at 5; Hawaiian Telecom Comments at 4-5.

³⁶ *AT&T Order* ¶ 50; *see* Hawaiian Telecom Comments at 4 (explaining that Petitioners rely on the Commission’s prior analysis but “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”).

³⁷ *See* Verizon Comments at 8-9.

³⁸ *See* CenturyLink Comments at 4 (noting that the “statutory time period has expired” for acting on Verizon’s 2004 petition).

Cir. 1975) (vacating agency order purporting to deny application that already had been deemed granted).³⁹

CONCLUSION

For the reasons set forth above and in the comments opposing Petitioners request to reverse the grant of forbearance to Verizon, the Commission should deny Petitioners' request, and, to the extent the Commission desires parity among providers, it should forbear from applying the regulations to these services offered by other providers.

Respectfully submitted,

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³⁹ See also CenturyLink Comments at 4 (noting that the “statutory time period has expired” for acting on Verizon’s 2004 petition).