

1776 K STREET NW  
WASHINGTON, DC 20006  
PHONE 202.719.7000  
FAX 202.719.7049

7925 JONES BRANCH DRIVE  
McLEAN, VA 22102  
PHONE 703.905.2800  
FAX 703.905.2820

www.wileyrein.com

March 28, 2013

Bennett L. Ross  
202.719.7524  
bross@wileyrein.com

**VIA ELECTRONIC FILING**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

Re: *Petition of the United States Telecom Association for Forbearance From Certain Legacy Telecommunications Regulations*, WC Docket No. 12-61

Dear Ms. Dortch:

On March 26, 2013, in connection with the above-referenced proceeding, Glenn Reynolds with the United States Telecom Association (“USTelecom”) and the undersigned of Wiley Rein LLP, counsel to USTelecom, met with Lisa Gelb, William Dever, Claudia Pabo, Jennifer Prime, Greg Kwan, and Eric Ralph with the Wireline Competition Bureau (“Bureau”).

During part of this meeting, Rick Askoff and Douglas Laws with the National Exchange Carrier Association (“NECA”) joined by telephone to discuss NECA’s estimate of the number of its members that provide in-region, interstate, interexchange services utilizing their own facilities or facilities leased from other carriers. This information was provided in response to a request from the Bureau about the number of incumbent local exchange carriers (“LECs”) that are subject to the structural separation requirements under 47 C.F.R. § 64.1903(a) of the Commission’s rules.

According to NECA, it estimates that approximately 44 incumbent LECs of the more than 1,000 carriers that participate in NECA’s traffic sensitive pool arrangement are facilities-based providers of in-region, interstate, interexchange services (*i.e.*, they own or lease transmission facilities or tandem switching that are used to provide in-region, interstate, interexchange services). This estimate is based on sampling conducted by NECA and does not include TDS Telecommunications, FairPoint Communications, or any incumbent LECs whose member companies do not participate in NECA’s traffic sensitive pool.

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We also discussed USTelecom's request for forbearance from the structural separation requirements under 47 C.F.R. § 64.1903. USTelecom responded to questions from the Bureau regarding the legal framework that the Commission should apply in assessing whether incumbent LECs should be treated as non-dominant in the provision of in-region, interexchange services. We also discussed the Commission's ability to make a determination of non-dominance based on the current record and consistent with the Commission's *LEC Classification Order* and *Qwest Phoenix Forbearance Order*.<sup>1</sup>

As a threshold matter, the Commission has never found that independent LECs are dominant in the provision of in-region, interexchange services based on any market analysis. In its *Competitive Carrier First Report and Order*, which created the dominant/non-dominant regulatory regime more than 30 years ago, the Commission classified independent LECs and pre-divestiture AT&T as dominant, with respect to both local exchange and interstate long distance services.<sup>2</sup> However, this

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<sup>1</sup> 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*, CC Docket Nos. 96-149, 96-61, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, 12 FCC Rcd 15756, 15848-49 ¶¶ 159-161 (1997) ("*LEC Classification Order*"); *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, 25 FCC Rcd 8622 (2010) ("*Qwest Phoenix Forbearance Order*"), *aff'd*, *Qwest Corp. v. FCC*, 689 F.3d 1214 (10th Cir. 2012).

<sup>2</sup> *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, First Report and Order, 85 FCC 2d 1 (1980) ("*Competitive Carrier First Report and Order*"); see also Second Report and Order, 91 FCC 2d 59 (1982); Order on Reconsideration, 93 FCC 2d 54 (1983); Third Report and Order, 48 Fed. Reg. 46,791 (1983); Fourth Report and Order, 95 FCC 2d 554 (1983) ("*Competitive Carrier Fourth Report and Order*"), *vacated*, *AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), *cert. denied*, *MCI Telecommunications Corp. v. AT&T*, U.S., 13 S. Ct. 3020 (1993); *Competitive Carrier Fifth Report and Order*, 98 FCC 2d 1191 (1984) ("*Competitive Carrier Fifth Report and Order*"); Sixth Report and Order, 99 FCC 2d 1020 (1985), *vacated*, *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985).

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classification was based solely on the Commission's determination that independent LECs at that time "share[d] in AT&T's market power" by virtue of their offering "interstate services essentially on a non-competitive, cooperative basis with Bell, generally agreeing to Bell tariffs."<sup>3</sup> Because it was premised upon a pre-divestiture market structure that has no relevancy in today's marketplace, this determination cannot reasonably justify the application of dominant carrier regulation to incumbent LECs that offer interstate long distance services on an integrated basis.

Likewise, in the *Competitive Carrier Fifth Report and Order*, which established the structural separation requirements currently codified in section 64.1903, the Commission did not conduct any market analysis in determining whether independent LECs possessed classical market power in the provision of interstate long distance services (*i.e.*, the power to control price). Instead, based on the framework adopted in the *Competitive Carrier First Report and Order*, the Commission simply declared – without any analysis or market data – that "[i]nterstate services provided directly by exchange telephone companies (not through affiliates) are regulated as dominant."<sup>4</sup>

Because the decision to apply dominant carrier regulation to incumbent LECs providing interstate long distance services on an integrated basis was established as a matter of policy, the Commission is free to change course, as long as it provides a "detailed justification" for the change.<sup>5</sup> Here, the Commission has largely provided that justification already. First, in the *LEC Classification Order*, after analyzing "traditional market power factors – market share, supply and demand substitutability, cost structure, size, and resources –, " the Commission concluded that "independent LECs do not have the ability to raise prices by restricting their own output."<sup>6</sup> Second, and more recently, in the *272 Sunset Order*, the Commission found that vibrant competition exists for interstate long distance services for both mass market and enterprise customers.<sup>7</sup> Thus, the Commission

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<sup>3</sup> *Competitive Carrier First Report and Order* ¶ 65.

<sup>4</sup> *Competitive Carrier Fifth Report and Order* ¶ 9.

<sup>5</sup> *See FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009).

<sup>6</sup> *LEC Classification Order* ¶ 157.

<sup>7</sup> *272 Sunset Order* ¶¶ 36-37 (noting that competition faced by Verizon and AT&T within their respective franchise areas from a variety of providers, including: (i) for mass market services, "competitive wireline local exchange and long distance

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would be fully justified in granting forbearance from any application of dominant carrier regulation to independent LECs providing interstate long distance services on an integrated basis.

To be sure, the Commission conducted a market analysis in addressing issues related to dominant carrier regulation in both the *272 Sunset Order* and *Qwest Phoenix Forbearance Order*. However, neither decision compels a detailed competitive analysis in order for the Commission to grant the requested relief here.

First, prior to the *272 Sunset Order*, Bell Operating Companies (“BOCs”) were forced to choose between two different regulatory regimes in providing in-region, long distance services: the BOC could provide these services on a non-dominant carrier basis through a section 272 separate affiliate; or, alternatively, it could provide these services directly or through an affiliate that was not a section 272 separate affiliate subject to dominant carrier regulation.<sup>8</sup>

Here, by contrast, incumbent LECs have no similar choice. Instead, in the *LEC Classification Order*, by virtue of its “finding that independent LECs do not have the power to raise and sustain interexchange rates above competitive levels,” the Commission determined that “it would be inconsistent with our analysis to allow independent LECs to choose whether to be regulated as a dominant carrier when providing in-region, interstate, domestic interexchange services.”<sup>9</sup> As a result, a decision by the Commission to forbear from the structural separation requirements in section 64.1903 would not trigger any need to conduct a detailed market analysis, since it would not effectively compel an independent LEC to choose to offer interstate long distance services on an integrated basis pursuant to dominant carrier regulation.

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(Continued . . .)

carriers, stand-alone long distance providers, facilities-based VoIP providers, cable circuit-switched service providers, and wireless carriers, to the extent that consumers use their services as a replacement for local or long distance services”; and (ii) for enterprise services, “interexchange carriers, competitive LECs, data/IP network providers, cable companies, other incumbent LECs, and VoIP providers”).

<sup>8</sup> *272 Sunset Order* ¶ 2.

<sup>9</sup> *LEC Classification Order* ¶ 173.

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Second, the *Qwest Phoenix Forbearance Order* addressed an incumbent LEC's request for "relief from certain longstanding wholesale and retail regulations—including requirements to sell bottleneck network elements such as last-mile copper loops to other communications service providers—in Phoenix, Arizona ... based primarily on claimed competition for traditional voice telephone services."<sup>10</sup> The Commission found that "in proceedings such as this one a traditional market power analysis is a more analytically precise method for evaluating predictive claims that competition in a market is sufficient to satisfy the section 10 criteria."<sup>11</sup>

Here, by contrast, USTelecom is not seeking forbearance from any wholesale obligations. Nor does the request for relief involve any "predictive claims" about competition in the interstate long distance market. In fact, since 1995, when it determined that AT&T lacked market power in the interstate, domestic, interexchange market, the Commission has found that the long distance market is effectively competitive by virtue of elasticity of supply, the lack of barriers to entry, high demand elasticity, and market share.<sup>12</sup> The Commission relied upon these same general factors in finding that the BOCs lacked market power in the interstate, domestic, interexchange market. It requires no leap of faith or predictive judgment for the Commission to make a similar finding for independent LECs.

To the extent the Commission concludes that a market analysis is required, however, it can rely upon the market analysis it conducted in connection with the *272 Sunset Order* in which it determined that AT&T, Qwest, and Verizon do not possess classical market power in the provision of in-region, interstate, long distance services.<sup>13</sup> Doing so would be entirely consistent with the approach the Commission articulated in the *LEC Classification Order*.

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<sup>10</sup> *Qwest Phoenix Forbearance Order* ¶ 2.

<sup>11</sup> *Id.* ¶ 41.

<sup>12</sup> *See Motion of AT&T to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, ¶¶ 53-68 (1996).

<sup>13</sup> *272 Sunset Order* ¶ 65; *see also id.* ¶ 66 (finding "it unlikely that these carriers will be able unilaterally to raise and maintain the prices of in-region, interstate, long distance services above competitive levels, or otherwise impose and maintain unjust, unreasonable, or unreasonably discriminatory terms and conditions in relation to these services").

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In defining the relevant product and geographic markets used to assess whether a carrier possesses the power to control the price of interstate long distance services, the Commission expressed its willingness to extend a general analytical framework absent “credible evidence” compelling a different approach. Specifically, in defining the relevant product market, the Commission concluded that it “need not delineate the boundaries of specific product markets, except where there is credible evidence suggesting that there is or could be a lack of competitive performance with respect to a particular service or group of services.”<sup>14</sup> Likewise, in defining the relevant geographic market, the Commission found it important to consider “the broadest geographic group of point-to-point markets in which competitive conditions are reasonably homogenous,” noting that it was unlikely “that carriers could exercise market power in most point-to-point markets.”<sup>15</sup> Thus, according to the Commission, absent “credible evidence suggesting that there is or could be a lack of competition in a particular point-to-point market or group of point-to-point markets, ... we will refrain from employing the more burdensome approach of analyzing separate data from each point-to-point market.”<sup>16</sup>

In the *272 Sunset Order*, the Commission conducted a market analysis that considered the competitive circumstances in each BOC in-region state. These are generally the same states in which the independent LECs seeking relief from the structural separation requirements in 47 C.F.R. § 64.1903 are located. Because no commenter has argued, let alone presented “credible evidence” suggesting that there is or could be a lack of competition for interstate long distance services in any particular point-to-point markets served by the independent LECs, the Commission can rely upon the geographic market data presented in the *272 Sunset Order* in determining that the independent LECs lack market power in the provision of interstate long distance services.

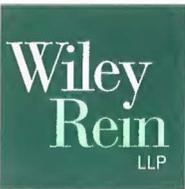
Likewise, in the *272 Sunset Order*, the Commission analyzed mass market stand-alone long distance services and bundled local and long distance services as well as enterprise and wholesale long distance services. The Commission found that the BOCs lacked classical market power with respect to these services – a finding that is equally applicable to the independent LECs given the absence of allegation, let alone any “credible evidence” suggesting that there is or could be a lack of

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<sup>14</sup> *LEC Classification Order* ¶ 40.

<sup>15</sup> *Id.* ¶¶ 66-67, n.181.

<sup>16</sup> *Id.* ¶ 67.



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competition with respect to any particular long distance service or group of services they provide.

To the extent the Commission remains concerned that incumbent LECs may attempt to discriminate against competitors, engage in improper cost shifting, or utilize price squeezes – the concerns that ostensibly underlie the structural separation requirements in section 64.1903 – it has other tools to address these issues. Specifically, the Commission could grant forbearance conditioned upon compliance with the same “targeted safeguards” adopted in the *272 Sunset Order*, which the Commission found were more appropriate and less burdensome than dominant carrier regulation. Indeed, the Commission found that it was in the public interest to waive the requirements of section 64.1903 for the AT&T and Verizon independent LECs conditioned upon their compliance with these safeguards. The Commission could take the identical approach here and grant conditional forbearance from section 64.1903 to other independent LECs on the same basis.

Pursuant to 47 C.F.R. § 1.1206, please include this ex parte filing in the above-referenced docket.

Sincerely yours,

A handwritten signature in blue ink, appearing to read "B. Ross", with a long horizontal line extending to the right.

Bennett L. Ross

cc: Lisa Gelb  
William Dever  
Claudia Pabo  
Jennifer Prime  
Greg Kwan  
Eric Ralph