

DECEMBER 10, 2007

## *FCC Denies Verizon Request For Forbearance in Six Major Markets*

In a Memorandum Opinion and Order (“Order”) released December 5, 2007, the Federal Communications Commission (“FCC” or “Commission”) denied in their entirety the Verizon Telephone Companies’ (“Verizon”) petitions for forbearance in WC Docket No. 06-172.<sup>1</sup> Verizon had sought forbearance (*i.e.*, relief from application of certain regulatory requirements) in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas (“MSAs”) from dominant carrier regulation of its mass market switched access services, Section 251(c)(3) loop and transport unbundling obligations (“UNE obligations”), and all *Computer III* obligations (*e.g.*, open network architecture and comparably efficient interconnection requirements). In a stunning defeat for Verizon, the Commission found that “the record evidence does not satisfy the section 10 forbearance standard with respect to any of the forbearance Verizon requests.” Order, at ¶ 1. As noted by the Commission, the markets at issue include some of the most populous MSAs in the nation, and a grant of Verizon’s petitions would potentially have affected over 34 million individuals across ten states. *Id.*, at n. 69.

In ruling on Verizon’s petitions, the Commission applied the analytical framework established in prior forbearance orders, specifically, the *Omaha Forbearance Order*,<sup>2</sup> and the *Anchorage Forbearance Order*.<sup>3</sup> In those orders, the Commission granted limited forbearance based on evidence that the incumbent local exchange carrier (“ILEC”) had lost significant market share to facilities-based competitors, which had substantial deployment of facilities capable of serving the end user locations in the wire center service areas for which forbearance was granted. In denying Verizon’s requests, the Commission determined that Verizon is not subject to a sufficient level of facilities-based competition in the six MSAs to grant relief under the *Omaha* and *Anchorage* precedent. The Commission specifically rejected Verizon’s suggestion that the exclusive focus of the Commission’s analysis should be facilities coverage, stating that “‘the most important[]’ factor in the Commission’s analysis in the *Qwest Omaha Forbearance Order* was evidence of ‘successful’ facilities-based competition.” *Id.*, at n. 113.

The Commission concluded that while Verizon is subject to some competition

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- <sup>1</sup> *Petitions of the 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*, Memorandum Opinion and Order, WC Docket No. 06-172 (rel. Dec. 5, 2007).
  - <sup>2</sup> *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005) (“*Omaha Forbearance Order*” or “*Omaha*”), *aff’d* *Qwest Corporation v. Federal Communications Commission*, Case No. 05-1450, (D.C. Cir. Mar. 23, 2007) (“*Qwest Omaha*”).
  - <sup>3</sup> *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, As Amended, for Forbearance From Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, Memorandum Opinion and Order, 22 FCC Rcd 1958 (2007) (“*Anchorage Forbearance Order*” or “*Anchorage*”).

in the six MSAs from both intra- and intermodal competitors, Verizon's market shares in the six MSAs "are sufficiently high to suggest that competition in these MSAs is not adequate to ensure that the 'charges, practices . . . in connection with [those] telecommunications service[s] are just and reasonable and not unreasonably discriminatory' absent the regulations at issue." *Id.*, at ¶ 27. The Commission found that even including wireless "cut-the-cord" competition and competition from Section 251(c)(4) resale and Verizon's Wholesale Advantage service, Verizon's MSA-wide market shares are not sufficient to warrant a grant of forbearance. Notably, the Commission rejected Verizon's recommendation and refrained from relying on E911 data for purposes of analyzing competition. The Commission referenced competitive local exchange carrier ("CLEC") claims that the E911 data submitted by Verizon is significantly overstated and found that those claims were "largely [ ] unrebutted in the record." *Id.*, at n. 115.

The key arguments raised by Verizon in support of forbearance were expressly rejected by the Commission. *First*, the Commission declined to include providers of over-the-top VoIP services in its competitive analysis, finding no data in the record that justified a conclusion that these providers offer

close substitute services. *Second*, the Commission disagreed with Verizon that forbearance could be justified on the claim that competitors overall primarily are using special access rather than UNEs when providing service over Verizon's facilities. The Commission pointed out that it has already rejected the argument that use of special access, in itself, is a reason to forbear from UNE obligations. *Third*, the Commission rejected Verizon's attempt to demonstrate the MSAs are competitive by calculating percentage reductions in its retail lines, noting that the abandonment of a residential access line does not necessarily indicate capture of that customer by a competitor. *Fourth*, the Commission failed to find persuasive any of the competitive fiber network data Verizon filed in the docket. The Commission agreed with CLECs that Verizon's reliance on fiber route maps as evidence of competition have little probative value.

The analysis employed by the Commission in addressing Verizon's petitions (and the conclusions reached by the Commission) likely will have a significant impact on other requests for forbearance from the same regulatory requirements. These other requests include, most notably, the pending requests by Qwest for forbearance in the Denver, Minneapolis/St. Paul, Phoenix, and Seattle MSAs.<sup>4</sup> The

<sup>4</sup> See *Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis/St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, WC Docket No. 07-97 (filed Apr. 27, 2007).

positions advanced by Qwest in support of its requests, which must be acted on by the Commission by July 2008 at the latest, are very similar to the arguments made by Verizon. Thus, the Commission's wholesale rejection of Verizon's arguments likely will affect future advocacy on the Qwest petitions.

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