Tenth Circuit Issues Decision in Qwest Phoenix Forbearance Appeal

August 7, 2012

Yesterday, the U.S. Court of Appeals for the Tenth Circuit issued its long-awaited decision in *Qwest v. FCC*, Qwest's appeal of the Federal Communication Commission's (FCC's) June 2010 decision denying Qwest's petition for forbearance from unbundling obligations and dominant carrier regulations pertaining to Qwest's provision of mass market services in the Phoenix, Arizona metropolitan statistical area (MSA). The Court denied Qwest's petition for review of the FCC's decision.

Qwest had attacked the FCC's decision in two primary ways. First, Qwest claimed that the FCC had impermissibly changed the way it analyzed petitions for forbearance from UNE obligations mid-stream. Specifically, when Qwest first filed its petition seeking forbearance in Phoenix, the FCC was applying an arithmetic "two prong" test first established in granting Qwest's prior request for UNE forbearance inOmaha. However, in the Phoenix decision, the Commission abandoned the Omaha test and substituted a market power analysis similar to that used by the Commission, the Federal Trade Commission and the Department of Justice in merger reviews. The Court ruled that the Commission was free to determine that its prior approach was flawed and to replace it with a market power analysis approach.

Second, Qwest contended that the FCC had misapplied market power analysis by affording insufficient weight to competition from wireless carriers. In particular, Qwest complained that the Commission improperly rejected evidence that the prevalence of customers that "cut-the-chord" on wireline services by choosing to rely solely on wireless devices proved that wireless networks provided effective competition to wireline networks. However, the Court determined that the FCC had not acted arbitrarily or capriciously when concluding that Qwest had failed to prove that consumers regarded mobile wireless services as substitutes for wireline offerings.

Thus, it is now clear that ILECs seeking forbearance from UNE rules will bear the burden of proof to demonstrate that sufficient competition exists in each relevant geographic and product market to prevent them from engaging in monopolistic practices. It also is evident that the Commission can conclude that wireless and wireline services are not yet fully substitutable, although the agency could find otherwise at any point as the market evolves and new evidence is submitted.

The *Phoenix Order* represents a major victory for CLECs that continue to rely on UNE facilities obtained from ILECs. There can be little doubt that it will be more difficult, although surely not impossible, for petitioners to prove that their market power has eroded than to meet the prior *Omaha Order* test. As a result, we expect that RBOCs likely will shelve plans for any additional UNE forbearance petitions until after the Presidential election is decided in November.

For further information on this decision or any Section 10 forbearance issue, please contact your usual Kelley Drye attorney or any member of the Communications practice group.