

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Remands of Verizon 6 MSA Forbearance Order)	WC Docket No. 06-172
and Qwest 4 MSA Forbearance Order)	WC Docket No. 07-97
)	

**COMMENTS OF
THE FREE STATE FOUNDATION***

I. INTRODUCTION AND SUMMARY

These comments are submitted in response to the Commission’s request for comment on remands by the United States Court of Appeals for the District of Columbia of two related Commission forbearance orders. The Free State Foundation takes no position on the ultimate outcome of the proceeding based on the particular facts at issue. Rather these comments focus on an important aspect of regulatory approach regarding consideration of forbearance petitions. In particular, they are directed to the Commission’s questions about the extent to which it should adhere to its precedents regarding the impact of potential competition on the Commission’s forbearance analysis.

The Commission should take the opportunity presented by this proceeding to follow its forbearance precedents that have properly taken potential marketplace competition into account in assessing whether there are sufficient market constraints in

* These comments express the views of Randolph J. May, President of the Free State Foundation, and Seth L. Cooper, Adjunct Fellow of the Free State Foundation. FSF is an independent, non-profit free market-oriented think tank. Their views do not necessarily represent the views of the Board of Directors, staff, or others associated with FSF.

place to protect consumer welfare. Potential competition constrains market power that an existing incumbent provider might otherwise possess. The significance of potential competition is heightened in technologically dynamic industries such as telecommunications.

II. DISCUSSION

A. Forbearance is an Important Congressional Policy for Deregulation

The Telecommunication Act of 1996's forbearance provision (hereinafter "Section 10") requires the Commission to forbear from applying any regulation to a telecommunications carrier or service if it determines enforcement is not necessary to ensure that charges are just and reasonable nor necessary to protect consumers, and if it determines that forbearance is consistent with the public interest.¹ It is an important deregulatory tool that Congress intended the Commission to use continually to adjust regulation to the evolving, and increasingly competitive, telecommunications marketplace.²

B. D.C. Circuit Remand Orders Require Consideration of Potential Competition or Reasoned Explanations for Departure from Precedent

This proceeding involves remand reconsideration of two forbearance petitions ordered by the U.S. Court of Appeals for the District of Columbia Circuit ("D.C.

¹ See 47 U.S.C. §160(a).

² For further background, see Randolph J. May, "Why Forbearance History Matters," *Perspectives from FSF Scholars*, Vol. 3, No. 11 (June 17, 2008), available at: http://www.freestatefoundation.org/images/Why_Forbearance_s_History_Matters.pdf.

Circuit”). The Commission previously had rejected the forbearance petitions of Verizon³ and Qwest,⁴ respectively. However, in *Verizon v. FCC*, the D.C. Circuit held that the Commission’s denial of Verizon’s forbearance petition was “arbitrary and capricious” and thereby contrary to the Administrative Procedures Act.⁵ The D.C. Circuit concluded that the Commission’s Section 10 forbearance analysis focused almost exclusively on Verizon’s existing market share, but did *not* consider potential marketplace competition.⁶ This was held to be contrary to Commission precedent considering UNE forbearance petitions where the Commission’s analysis had included potential marketplace competition.⁷ The D.C. Circuit remanded the case to the Commission with instructions.⁸ Because Qwest’s forbearance petition had been rejected by the Commission in a similar manner (i.e., relying almost exclusively on consideration of the incumbent’s existing market share), the D.C. Circuit separately remanded that case to the Commission for reconsideration in light of its ruling in *Verizon v. FCC*.⁹

The D.C. Circuit’s ruling in *Verizon v. FCC* imposes two requirements on the Commission:

³ *Petitions of 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*, WC Docket No. 06-172, Memorandum Opinion and Order, 22 FCC Rcd 21293 (2007), available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-212A1.pdf.

⁴ *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, Memorandum Opinion and Order, 23 FCC Rcd 11729 (2008), available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-174A1.pdf.

⁵ *Verizon Telephone Companies v. Federal Communications Commission*, 570 F.3d 294, 304 (D.C. Cir. 2009), available at: <http://pacer.cadc.uscourts.gov/docs/common/opinions/200906/08-1012-1186333.pdf>.

⁶ See *Verizon v. FCC*, 570 F.3d at 303.

⁷ See *id.*

⁸ *Id.* at 305.

⁹ *Qwest Corporation v. Federal Communications Corporation*, No. 08-1257 (D.C. Cir.) (Clerk’s Order, filed Aug. 5, 2009).

[First] On remand, the FCC must either consider whether competition might be established by some evidence other than simply whether the ILEC has met a particular market share benchmark, or justify its departure from its precedent. [Second] The FCC must also consider whether and how the existence of potential competition would affect its § 10 analysis.¹⁰

C. The Commission Should Include Potential Competition in its Forbearance Analysis

In conducting its reconsideration of both forbearance petitions, the Commission should consider evidence of both existing and potential marketplace competition. The potential for competition confronting an incumbent local exchange provider (ILEC) -- whether from competitive local exchange carriers (CLECs) or cable operators providing voice services — is crucial to a proper marketplace analysis under Section 10. Ascertaining the potential for competition in the marketplace bears directly on whether enforcement of the regulation(s) at issue is “not necessary” to ensure just and reasonable charges, or “not necessary” to protect consumers. Potential competition is also relevant to the determination of whether forbearance from enforcing regulation will promote competitive market conditions.

Potential Competition Should Be Considered Because the Industry is Dynamic, Not Static

Potential marketplace competition is an especially important factor to consider in the context of dynamic industries. With fast-paced technological change, entry of new competitors, and delivery of new services, the modern telecommunications industry has displayed enormous dynamism since enactment of the Telecommunications Act of 1996.

¹⁰ *Verizon v. FCC*, 570 F.3d at 305.

The Commission has recognized rapid evolution of the competitive telecommunications marketplace on numerous occasions. For instance, in its *Section 706 Fifth Report*, the Commission declared that it “anticipate[s] ever-greater demand for services and applications requiring greater bandwidth over an ever-expanding area...multiple industries are aggressively investing and deploying services to meet this demand, enhancing consumer choice in both providers and services.”¹¹ In addition to increased demand, the Commission observed that:

[N]etwork technology continues to evolve and improve. Previously distinct networks are now converging and overlapping to form competing broadband networks that perform all of the network applications once only possible by purchasing services from multiple service providers. Competition between broadband platform providers attempting to keep up with their competitors will drive higher speed technologies and service offerings in the marketplace. Coverage too will continue to become more ubiquitous as diversity of technologies matures.¹²

Likewise, In its *Thirteenth CMRS Competition Report* examining deployment, subscribership, usage, prices, and new technologies and services, the Commission concluded that “U.S. consumers continue to reap significant benefits – including low prices, new technologies, improved service quality, and choice among providers – from competition in the CMRS marketplace, both terrestrial and satellite CMRS.”¹³ The Commission maintained there is “effective competition” in the wireless marketplace that

¹¹ *In the matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 07-45, Fifth Report, 23 FCC Rcd 9615, 9650 (2008), available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-88A1.pdf.

¹² *Id.* at 9650-9651. See also, e.g., *id.* at 99651 (“The deployment of new broadband networks continues to help introduce next generation broadband services and applications into the marketplace.”)

¹³ *Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, WT Docket No. 08-27, Thirteenth Report (January 16, 2009) at 5 para. 1, available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-09-54A1.pdf.

demonstrates that wireless is “increasingly being used to provide a range of mobile broadband services.”¹⁴ One significant aspect of the telecommunications marketplace evolution and changing consumer demand is the phenomenon of “a growing number of wireless customers [who] have ‘cut the cord’ in the sense of canceling their subscription to wireline telephone service.”¹⁵

In the context of broadband access over wireline, the Commission has acknowledged that “fast-paced technological changes and new consumer demands are causing rapid evolution in the marketplace from these services.”¹⁶ Observing that “[t]here are numerous technologies and network designs that form, or potentially could form, part of the broadband telecommunications infrastructure of the 21st century,”¹⁷ the Commission has recognized that:

[T]he erosion of barriers between various networks and the limitations inherent in those barriers will lead to greater capacity for innovation to offer new services and products. Both the providers of network platforms and those that utilize the platforms are in a position to capitalize on these changes. In addition, as with any evolving technology, new products and providers will continue to emerge to complement existing market offerings and participants; and these offerings will grow over time as consumers demand even more advanced services, with the result that technological growth and development continue on an upward spiral.¹⁸

Accordingly, the Commission should not give undue weight to static market share information. On prior occasions, the Commission has indeed recognized the significance

¹⁴ *Id.*

¹⁵ *Id.* at 128 para 276.

¹⁶ *In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket Nos. 02-33, 01-337, 95-2, 98-10 and WC Docket Nos. 04-242, 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14865 (2005), *available at*: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-150A1.pdf.

¹⁷ *Id.* at 14873.

¹⁸ *Id.* at 14875.

of the telecommunications industry's dynamism when considering its regulatory outlook.

In contemplating the “the dynamic nature of the marketplace forces” in wireline broadband services,¹⁹ the Commission asserted that:

Changes in technology are spurring innovation in the use of networks...there is an increasing competition at the retail level for broadband Internet access service as well as growing competition at the wholesale level for network access provided by the wireline providers' intermodal and intermodal competitors. We find that an emerging market, like the one for broadband internet access, is more appropriately analyzed in view of larger trends in the marketplace, rather than exclusively through snapshot data that may quickly and predictably be rendered obsolete as this market continues to evolve.²⁰

So, the Commission should keep in mind that in a technologically-dynamic industry such as telecommunications, a focus on current market share biases any assessment of competition against the incumbent provider, because the perspective is backward-looking. The telecommunications landscape, and especially that part involving broadband and the Internet, is changing quickly enough that the agency always needs to be looking forward.²¹

Consideration of Potential Competition Furthers the Purpose of the Forbearance Provision

A forward-looking perspective that includes the competitive possibilities presented by new entrants is also fully consistent with the overall purpose of the Section 10 forbearance provision. In a notable proceeding involving a handful of forbearance

¹⁹ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd at 14880.

²⁰ *Id.* at 14881.

²¹ See Randolph J. May, “Forbearance Relief: More on Rearview Mirror Regulation” The FSF Blog (July 17, 2008), available at: <http://freestatefoundation.blogspot.com/2008/07/forbearance-relief-more-on-rearview.html>.

petitions, the Commission reiterated that “in the context of its section 10(a)(1) analysis, ‘competition is the most effective means of ensuring that charges, practices, classifications, and regulations . . . are just and reasonable, and not unreasonably discriminatory.’”²² Accordingly, the Commission went on to stress the importance of considering potential competition in such a market:

[W]e refuse to take the static view suggested by some competitors of this dynamic broadband market, thus leveling the terms of competition, providing real competitive choice, and furthering the goal of ensuring just, reasonable and nondiscriminatory rates, terms and conditions for these services.²³

Congress intended that the Commission use regulatory forbearance to make forward-looking adjustments to the regulatory mandates to better reflect the rapidly changing marketplace. Where incentive and means for increasing competition exist in the local exchange context, forbearance offers an important device to unleash those competitive forces and reduce the scope of unnecessary regulation.

Consumer Welfare is Best Protected by Potential
Competition and Competitive Marketplace Conditions

Consideration of potential marketplace competition is a critical component of any public policy focused on consumer welfare. Potential entry by new providers to challenge incumbents with additional choices in services and price speaks to the overall competitive conditions of the marketplace. Section 10 is premised on the welfare of

²² *In the matter of Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c); SBC Communications Inc.’s Petition for Forbearance under 47 U.S.C. § 160(c); Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c); BellSouth Telecommunications Inc., Petition for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket Nos. 01-33, 03-235, 03-260, 04-48, Order, 19 FCC Rcd 21496, 21507 (2004) (internal cite omitted), *available at*: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-254A1.pdf.

²³ *Id.* at 21510.

consumers. Competition exhibits a disciplining force on the charges and practices of providers to the benefit of consumers. Analysis of potential competition, therefore, is eminently sensible.

By contrast, a myopic focus only on existing market share is more consistent with an emphasis on protecting competitors instead of consumers. But protection of competitors is *not* the same thing as the protection of competition. Nor is the protection of competitors the purpose of Section 10.

D. The Commission Should Follow its Precedents that Consider Potential Competition

The Commission should follow its forbearance precedents in which its marketplace analysis included both existing and potential competition. As the D.C. Circuit observed in *Verizon v. FCC*, “the FCC’s reliance on an ILEC’s actual market share as the essential factor in its UNE forbearance analysis is contrary to its precedent in the *Omaha* and *Anchorage Orders*.”²⁴ Neither of those orders treated existing market share data as the essential factor in UNE forbearance analysis. Rather, “the FCC has consistently considered *both* actual and potential competition in assessing whether a marketplace is sufficiently competitive to warrant UNE forbearance.”²⁵ The D.C. Circuit also traced the Commission’s reliance on both existing and potential competition in the UNE forbearance context all the way back to the Commission’s *Triennial Review*

²⁴ *Id.* at 303.

²⁵ *Id.*

*Remand Order*²⁶—“the FCC’s order from which these forbearance petitions were born.”²⁷

Although not specifically discussed by the D.C. Circuit in *Verizon v. FCC*, in a prior ruling it expressly upheld the *Omaha Order* and the Commission’s inclusion of potential competition in its analysis.²⁸ In a 2007 ruling in *Qwest v. FCC*, the D.C. Circuit upheld the Commission’s finding that “the combination of tariffed ILEC facilities and facilities-based competition adequate to assure competition even if it partially relaxed Qwest’s obligations in the Omaha market.”²⁹ The D.C. Circuit pointed to the Commission’s consideration of the dynamics of significant new entrant competitors themselves, including their relevant technical expertise, economies of scale and scope, sunk investments in network infrastructure, as well as established presence and brand in the region.³⁰

Accordingly, the Commission’s precedents for including potential competition in its forbearance marketplace analysis—particularly in the UNE forbearance context—are well established. Although the Commission has strayed from its forbearance precedents on a few occasions by an exclusive reliance on existing market share data, the Commission has never (successfully) departed from that precedent with any reasonable explanation. Strong policy reasons confirm the reasonableness of those precedents

²⁶ *In the Matter of Unbundled Access to Network Elements*, WC Docket No. 04-313, Order on Remand, 20 FCC Rcd 2533 (2005), available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-290A1.pdf.

²⁷ *Id.* at 304 (quoting *Covad Communications Co. v. Federal Communications Commission*, 450 F.3d, 528, 540 (D.C.Cir. 2006)).

²⁸ *Qwest Corp. v. Federal Communications Commission*, 482 F.3d 471 (D.C. Cir. 2007).

²⁹ *Id.* at 480.

³⁰ *Id.* at 479.

because potential competition is an essential ingredient to any meaningful assessment of marketplace conditions.

III. CONCLUSION

In considering its forbearance petition analysis and applying it to the two forbearance petitions at in this remand proceeding, the Commission should act consistent with the views expressed herein.

Respectfully submitted,

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