

**Qwest Forbearance Petition**  
**Planning Meeting Memo, 9/9/09**

**Background**

**Section 10(a) of the Act** provides that the FCC shall forbear from applying any regulation or any provision of the Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of the carriers geographic markets, if the FCC determines that:

- (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications or regulations by, for, or in connection with that telecommunications carrier or telecommunications service **are just and reasonable, and are not unjustly or unreasonably discriminatory;**
- (2) enforcement of such regulation or provision is **not necessary for the protection of consumers;** and
- (3) forbearance from applying such provision or regulation is **consistent with the public interest.**

**The FCC has approved two petitions for forbearance** from unbundling obligations, one for the Omaha Metropolitan Statistical Area (MSA; Qwest, 2005) and one for the Anchorage Study Area (ACS of Anchorage, 2007).

**In September 2006, Verizon petitioned for Section 10 forbearance** in the MSAs of Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach.

**In April 2007, Qwest petitioned for Section 10 forbearance** in the MSAs of Denver, Phoenix, Seattle and Minneapolis-St. Paul MSAs. The MSP MSA comprises 58 wire centers in 11 counties. “Qwest sought forbearance from dominant carrier tariffing requirements in Part 61 of the Commission’s rules; Part 61 price cap regulations; dominant carrier requirements arising under section 214 of the Act and Part 63 of the Commission’s rules concerning the processes for acquiring lines, discontinuing services, and assignments or transfers of control; and for certain of Qwest’s services, *Computer III* requirements including CEI and open network architecture ONA requirements. Qwest also sought forbearance in the 4 MSAs from loop and transport unbundling obligations pursuant to sections 251(c) and 271(c)(2)(B)(ii) of the Act.” [DA-09-1835]

**On February 8, 2008**, subsequent to rounds of comments and an analysis of Minnesota data, the Minnesota PUC filed comments with the FCC recommending denial of Qwest's petition.

**In December of 2007 and July of 2008, respectively, the FCC rejected the Verizon and Qwest petitions** as not meeting Section 10 requirements.

**In January and July of 2008**, respectively, Verizon and Qwest appealed the FCC's decisions to the D.C. Circuit Court.

**In June of 2009, the Court remanded the Verizon decision to the FCC and, given the similarity of the two cases, the FCC sought a voluntary remand of the Qwest appeal.** That request was granted in August of 2009. The Court held that the FCC did not sufficiently explain why it used different decision-making criteria in the two most recent petitions (Verizon and Qwest-4MSA) than it used in the two previous petitions (ACS of Anchorage and Qwest-Omaha). In the first two decisions the FCC examined actual and potential competition within the study areas. In the latter two decisions the FCC focused only on actual competition (actual market share).

**The FCC now seeks comments** regarding the Verizon and Qwest petitions. Comments are due by September 21. Replies are due by October 6. The FCC sought comments as follows:

On remand, to what extent, if at all, should the Commission depart from its recent precedent regarding marketplace analysis in forbearance petitions, including the *Qwest Omaha Forbearance Order* and *ACS UNE Forbearance Order*?

What evidence, beyond Verizon's [Qwest's] market share for a particular product market, is relevant to whether forbearance from unbundling regulations is warranted?

How does "the existence of potential competition . . . affect [the Commission's] section 10 forbearance analysis"?

What other issues are relevant to the Commission's resolution of Verizon's forbearance petitions and what additional factors should the Commission take into account in its analysis?

To what extent should any changes in the marketplace or Commission actions since the time the Commission issued the *Verizon 6 MSA Forbearance Order* affect the Commission's decision? [DA-09-1835]

### **Summary of MN PUC Comments**

The MN PUC based its comments on two cycles of written comments and several hours of oral comment. The arguments of the PUC were:

Qwest has focused its arguments on revenue loss, not on the more relevant issue of the presence of competitive options available to individual consumers.

There are little to no significant alternatives to Qwest's wholesale facilities, especially for the mid-size customer.

It is economically infeasible to duplicate Qwest's facilities for all but the largest customers.

The Omaha case indicates that Qwest can be expected to raise rates drastically if forbearance is granted.

The TRRO already provides Qwest regulatory relief where there is sufficient competition.

An error in predictive judgment may be irreversible if CLECs are driven from the industry.

### **Staff Recommendation**

File a brief comment by September 21 stating that the Commission still believes that the FCC should deny Qwest's petition for forbearance.

Consider filing more substantive reply comments by October 6, perhaps addressing the weight that the FCC should place on potential competition in its analysis.