

MEMORANDUM

Date: September 14, 2006

To: The Commission
(Meeting of September 21, 2006)

From: Jane Whang
Legal Counsel III

**Subject: FCC Request for Comment on Frontier/Citizens' Petition Seeking
Forbearance from Title II and Computer Inquiry Rules With
Respect to Their Broadband Services (DA 06-49, WC Docket 06-10)**

On December 20, 2004, Verizon filed a petition with the FCC for forbearance from Title II of the Communications Act of 1934, as amended, ("Act") and the FCC's *Computer Inquiry* rules.¹ On March 19, 2006, because the FCC failed to act and issue an order, the Verizon petition was deemed granted by operation of law.²

Since the grant of Verizon's forbearance petition, a number of incumbent local exchange carriers ("ILECs") - BellSouth, Qwest, AT&T, Embarq Local Corporation - have filed similar "me, too" petitions with the FCC.³ These petitions are pending but the comment cycle has closed.

¹ The Commission extended the forbearance deadline to March 19, 2006, and Verizon amended its petition on February 7 and 17, 2006. Verizon's filings clarified the types of broadband services for which it was seeking forbearance.

² See News Release, *Verizon Telephone Companies' Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to their Broadband Services is Granted by Operation of Law*, WC Docket No. 04-440 (March 20, 2006). Pursuant to Section 10(c) of the Act, a forbearance petition is deemed granted if the Commission does not deny the petition within "one year after the Commission receives it, unless the one year period is extended by the Commission."

³ See Public Notice, *Pleading Cycle Established for Comments on BellSouth Petition for Forbearance from Title II and Computer Inquiry Rules*, DA 06-1490 (July 21, 2006); Public Notice, *Pleading Cycle Established for Comments on Qwest and AT&T Petitions for Forbearance from Title II and Computer Inquiry Rules*, DA 06-1464 (July 19, 2006);); Public Notice, *Pleading Cycle Established for Comments on Embarq Local Operating Companies*

Recently, on August 4, 2006, Frontier and Citizens Communications Incumbent Local Exchange Telephone Carriers (“Frontier/Citizens”) filed a petition with the Federal Communications Commission (“FCC”) for forbearance pursuant to 47 U.S.C. Section 160(c) from Title II and *Computer Inquiry* rules with respect to certain broadband services.

RECOMMENDATION: We recommend that the Commission submit late-filed comments on the Frontier/Citizens petition urging the FCC to issue a written order on the above-filed and pending ILEC forbearance petitions. Further, we recommend that the CPUC’s comments urge the FCC to:

- Provide guidance to the industry or state commissions as to the exact scope of forbearance that is granted.
- Address concerns raised as to whether the forbearance sought in the pending petitions meets the requirements of section 10 of the Communications Act. Section 10 contains a three-pronged test which the FCC must apply in evaluating a request for forbearance. The test requires that the FCC find 1) that forbearance will be in the public interest, 2) that enforcement of regulations are not necessary for protection of consumers, and 3) whether enforcement of the regulations is necessary to ensure that rates, terms and conditions will be just and reasonable.

I. BACKGROUND

A. Verizon Forbearance Petition

The Verizon petition sought forbearance from two principal categories of services: packet switched services capable of 200 kbps in each direction and non-TDM based high speed optical networking, hubbing, and transmission services. Verizon specifically sought forbearance from Title II regulation for the following services:

Packet switched services

Frame Relay Service (FRS)

ATM Cell Relay Service

Internet Protocol-Virtual Private Network (IP-VPN)

Transparent LAN Service (TLS)

LAN Extension Service

Non-TDM based Optical

Custom Connect

IntelliLight Broadband Transport (IBT)

Verizon Optical Networking

Optical Hubbing Service (OHS)

IntelliLight Optical Transport Service (IOTS)

Excluded from the request for forbearance were: traditional special access services (DS1 and DS3) and TDM-based special access services and optical networking.

Verizon asserted that it would continue to make these services available as wholesale common carrier services. Verizon clarified that it “does *not seek* forbearance of federal universal service obligations for the services at issue in this petition ... [and it] will continue to pay federal universal service on the services that are subject to the petition.”⁴

Verizon’s petition did not specify the scope of forbearance that it was seeking from Title II and the *Computer Inquiry* rules. However, the Verizon petition indicated that i) Title II regulation includes among other things, tariff filing, cost support, and pricing requirements; and ii) the *Computer Inquiry* rules that require Verizon to unbundle transmission services and offer the transmission component pursuant to tariffed cost-based terms and conditions are unnecessary.

In support of its petition, Verizon asserted that the market for broadband services is “marked by intense, intermodal competition with cable modem providers,” and claimed that there is enough competition for broadband services and thus Title II and *Computer Inquiry* regulation is no longer necessary to ensure just and reasonable rates, or to protect consumers and the public interest. Because the FCC did not issue a decision or statement in response to the Verizon petition, there is no guidance as to exactly what the FCC intends to regulate with regard to Verizon’s broadband services.

B. Other ILEC Petitions for Forbearance

AT&T, BellSouth, Qwest, and Embarq have subsequently filed petitions seeking similar forbearance relief for broadband services, and the comment period has closed for these petitions. There are some differences among the petitions.

- One critical difference between the Verizon and AT&T petitions is that on a national basis, AT&T is a dominant provider of these broadband services and even AT&T acknowledges that its market share is “slightly higher” than Verizon. However, AT&T argues that its market power is irrelevant.

⁴ Verizon Ex Parte letter dated February 17, 2006 (emphasis added).

- BellSouth seeks the same relief as the Verizon petition without variation and follows the Verizon petition very closely. BellSouth recognizes however that in the “absence of an explicit order, some uncertainty exists as to the exact scope of relief flowing from the Verizon petition.”⁵
- Qwest’s forbearance petition differs from that submitted by Verizon in three critical aspects. It is not clear if these are specific intentional deviations or merely oversights.
 - Qwest states it seeks forbearance from “any broadband services it...may offer”⁶ and thus is arguably broader than the Verizon petition, which only seeks forbearance for those services specifically identified.
 - The Qwest petition does not specifically state that it excludes TDM-special access services from forbearance, unlike the Verizon petition.
 - The Qwest petition does not include any language asserting it will continue to pay federal universal service on the services for which it seeks forbearance.
- Although the Embarq petition seeks forbearance from Title II requirements that “*apply generally to ILEC broadband transmission*,” the petition attempts to specify the type of forbearance it seeks (it appears to be seeking relief similar to that in the Verizon petition). *In contrast to the Verizon petition, however, Embarq specifically notes that it does not seek relief from Title II obligations related to CALEA.*

Most recently, Frontier and the Citizens ILECs also filed a petition for forbearance from Title II and *Computer Inquiry* rules with respect to their broadband services. The Frontier/Citizens petition “seeks the same relief” as granted to Verizon, including for the same categories of broadband services that Verizon listed.

- Similar to the Verizon petition, Frontier/Citizens notes that it does not seek relief from universal service obligations (but does not mention CALEA as Embarq does).

⁵ BellSouth petition at 3.

⁶ Qwest petition at 1.

II. DISCUSSION

In the absence of a FCC decision on the Verizon petition or these subsequent ILEC forbearance petitions, the CPUC can only guess as to the regulatory framework resulting from the grant of the Verizon petition “by operation of law.” Accordingly, CPUC staff believes that it is critical that the FCC clarify the scope of any forbearance that it may grant the ILECs and further address the reasons why the FCC believes that the forbearance test of 47 U.S.C. Section 160 has been met. Although the opening comment deadline on the Frontier/Citizens petition has passed (September 13, 2006), we recommend that the Commission submit **late-filed comments** on the Frontier/Citizens petition and note that its position extends to those similar forbearance petitions filed earlier this summer by the other ILECs.

As an initial matter, Staff notes that it is unclear which services exactly that the ILECs seek forbearance from Title II and *Computer Inquiry* regulation. It is also unclear in some cases whether the ILECs have identified the same broadband services in their petitions. Moreover, as AdHoc Telecommunications User Committee points out in its comments on earlier ILEC petitions, although the petitions “purport to exclude two services” from their forbearance requests (DS1/DS3 services and TDM-based special access), DS1/DS3 special access channels are “tariffed components of the services for which they explicitly seek forbearance.”⁷ Given this lack of clarity regarding the broadband services at issue in the forbearance petitions, Staff recommends that the CPUC ask the FCC to clarify in a written order exactly which services are at issue.

Moreover, because the FCC did not issue a decision on the Verizon forbearance petition, there is no guidance as to what scope of forbearance the FCC granted with respect to these services. The various ILEC petitions seek forbearance from Title II and *Computer Inquiry* rules generally and specify that pricing and structural separation rules should no longer be enforced, but are unclear as to whether other Title II requirements involving privacy, disability access, and CALEA would remain enforceable. Commissioner Copps highlighted these important issues in his statement accompanying the FCC press release on the

⁷ See AdHoc Telecommunications Users Committee comments (August 31, 2006) at 19-20. AdHoc further notes that the ILECs’ assertion that “TDM services” would be excluded from forbearance is meaningless, because business customers do not purchase any class of service called “TDM service.” Moreover, AdHoc states that TDM multiplexing is simply a technology that enables a carrier to transmit multiple signals simultaneously over a single transmission path and thus, if TDM-equipment is connected to a loop, it would be subject to Title II regulation but if the same loop were provisioned using packet-based multiplexing electronics, it would not be subject to regulatory protections. AdHoc points out, however, that such classification makes no sense and regulatory protections should apply to the loop itself and not to the type of technology/electronics associated with the loop. AdHoc comments at 22.

Verizon petition and observed that the lack of a decision has raised the risk that the following common carriage regulations will not apply to these services: CALEA, universal service,⁸ privacy rules, disability access requirements, rate regulation, interconnection in rural areas, interconnection between different technologies, and enforcement for unlawful behavior.⁹

In issuing a decision, the FCC must also *apply the forbearance test* as required under 47 U.S.C. Section 160(a) to determine that forbearance is indeed consistent with the public interest and that Title II regulations and *Computer Inquiry* rules are no longer necessary to ensure just and reasonable rates and to protect consumers. Some parties have filed comments questioning whether there is sufficient competition to justify forbearance and have further raised concerns about the impact of forbearance on consumers and the public interest. However, there is no analysis by the FCC as to these critical issues.

Accordingly, for the foregoing reasons, staff recommends that comments be filed with the FCC, requesting that the FCC issue an order applying the forbearance analysis and clarifying the scope of any forbearance that it may grant to the ILECs including which regulations will not be enforced.¹⁰

Staff assigned to this project would be Jane Whang in the Legal Division and Eric Van Wambeke in the Telecommunications Division.

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⁸ Even though Verizon noted that it was not seeking forbearance from universal service obligations for these services, in the absence of a written decision, it is unclear whether the FCC will continue to exercise universal service regulation over these ILEC broadband services.

⁹ Forbearance from requirements such as interconnection would affect the CPUC's authority over arbitrating and mediating any such interconnection disputes regarding these broadband services (to the extent that the services are subject to interconnection/UNE requirements). Further, clarification of the services at issue is essential for these analyses.

¹⁰ As Commissioner Copps noted in his statement accompanying the FCC press release announcing grant of Verizon's petition, there is "no document, no stitch of analysis, no trace of discussion, nothing that a court can use to gauge where the Commission. *Statement of Commissioner Michael J. Copps in Response to Commission Inaction on Verizon's Forbearance Petition* (March 20, 2006).