

# STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

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## PUBLIC SERVICE COMMISSION

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*Secretary*

April 18, 2007

Marlene H. Dortch  
Office of the Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW, Suite TW-A325  
Washington, DC 20554

Re: In the Matter of 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, WC Docket 06-172.

Dear Secretary Dortch:

Enclosed for filing please find the Reply Comments of the New York State Department of Public Service in the above-referenced proceeding.

Should you have any questions on these Reply Comments, please do not hesitate to contact me.

Very truly yours,

Dakin D. Lecakes

Assistant Counsel

(518) 474-4536

Enc.

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

<b>In the Matter of</b>	)	
	)	
<b>Petitions of the Verizon Telephone Companies</b>	)	<b>WC Docket No. 06-172</b>
<b>for Forbearance Pursuant to 47 U.S.C. §160(c)</b>	)	
<b>in the New York Metropolitan Statistical Area</b>	)	

**REPLY COMMENTS OF THE NEW YORK STATE  
DEPARTMENT OF PUBLIC SERVICE**

**Dated: April 18, 2007  
Albany, New York**

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**SUMMARY**

The New York State Department of Public Service (NYSDPS) respectfully submits these reply comments in the above-captioned proceeding. In these comments the NYSDPS echoes the concerns of those parties that have noted that all of the documents submitted heretofore in this proceeding have failed to inform the record such that a proper analysis could be made as to whether the forbearance relief sought by Verizon is warranted in the New York Metropolitan Statistical Area. Additionally, the NYSDPS urges denial of Verizon's petition as not being in the public interest because the test used to evaluate forbearance from section 251 of the Telecommunications Act is flawed inasmuch as it does not properly define the markets for which it should provide relief. Thus, the forbearance test cannot properly anticipate potential adverse results such as a duopoly or the elimination of competitive local exchange competition provided over unbundled network elements (UNEs).

**INTRODUCTION**

On September 6, 2006, the Verizon Telephone Companies (Verizon) filed six separate petitions pursuant to §10 of the Telecommunications Act of 1996, requesting that the

Commission forbear from applying certain of its regulations to Verizon in various Metropolitan Statistical Areas (MSA), including the New York MSA.<sup>1</sup> On September 14, 2006, the Commission issued a public notice establishing a pleading cycle for receiving comments on the Verizon petitions. After extending the date by further notices, the Commission set March 5, 2007, as its deadline for such comments, and April 18, 2007, as the date for reply comments. As the agency charged with oversight of telecommunications in New York State, the NYSDPS has a significant interest in the outcome of Verizon's petition for the New York MSA.

### **DISCUSSION**

Verizon frames its request as seeking “substantially the same regulatory relief the Commission granted in the [Commission’s] Omaha Forbearance Order.”<sup>2</sup> Verizon refines its request in footnote 3 of the Verizon NY MSA Petition seeking forbearance from loop and transport unbundling pursuant to 47 U.S.C. §251(c); dominant carrier tariffing requirements, price cap regulation; Computer III requirements, including Comparably Efficient Interconnection and Open Network Architecture; and various other dominant carrier requirements.

Although Verizon offered some evidence of existing competition in its petition and the declarations attached thereto, such data was not granular enough to allow the Commission to perform an analysis similar to that done for the Commission’s previous orders

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<sup>1</sup> Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Philadelphia, Boston, New York City, Providence, and Virginia Beach Metropolitan Statistical Areas, Petition of the Verizon Telephone Companies for Forbearance (New York Metropolitan Statistical Area), WC Docket No. 06-172 (September 6, 2006) (“Verizon NY MSA Petition”).

<sup>2</sup> Verizon NY MSA Petition at 1.

granting forbearance to the incumbents in the Omaha and Anchorage MSAs.<sup>3</sup> Indeed, the lack of such evidence caused the NYSDPS not to comment in the initial round because of our desire to provide to the Commission the NYSDPS's evaluation of Verizon's request through a meaningful wire center analysis.

Unfortunately, the NYSDPS remains unable to perform such an analysis because the comments submitted in the initial round have not sufficiently informed the record. NYSDPS is concerned that the same type of wire center analysis done in Omaha and Anchorage cannot be done for the NY MSA.<sup>4</sup> Of the data actually supplied by Verizon, the NYSDPS notes that 911 data, irrespective of its legal status is inadequate in that it does not address how many end-user locations are cabled-up, or even passed by cable plant.<sup>5</sup> Likewise, Google Earth maps and GeoTel data, as presented by Verizon, do not provide the Commission with any hard data on which to arrive at an accurate percentage of how many end-user locations competitive facilities pass.

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<sup>3</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 (issued September 16, 2005) (Omaha Forbearance Order); 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 (issued January 30, 2007) (Anchorage Forbearance Order).

<sup>4</sup> See National Cable & Telecommunications Association (NCTA) Comments at 4 (observing that "Verizon has not provided any data on a wire center basis, [but] has made only general allegations about the level of competition throughout the relevant MSAs, without breaking that information down on a more granular basis."); see also ACN Communications Services, Inc, et al. Comments at 15-16; National Association of State Utility Advocates, et al. (NASUCA) Comments at 41.

<sup>5</sup> C.f. Anchorage Forbearance Order at ¶¶ 31-34 (detailing the requirements for the Commission's "Coverage Threshold Test" used in granting forbearance to ACS of Anchorage, Inc.).

Moreover, as NASUCA and others noted in initial comments, Verizon's broad forbearance request is not in conformity with the Commission's limited grant of forbearance to Qwest in the Omaha Forbearance Order.<sup>6</sup> In the Omaha Forbearance Order, although the Commission granted limited forbearance to Qwest from its obligation under 251(c)(3) to provide unbundled loops and transport "where a facilities-based competitor has substantially built out its network," it denied much of Qwest's Petition.<sup>7</sup> Accordingly, any evaluation of Verizon's forbearance request must include an examination of each relevant market to which the request will apply. Because Verizon has not included data to perform such an analysis, despite seven months having passed from the date it filed its petition with the Commission, the Commission should deny Verizon's petition at least until such time as a proper wire center analysis may be completed.<sup>8</sup>

In the Omaha Forbearance Order, the Commission granted forbearance to Qwest from 251(c)(3) unbundled transport and loops in only 9 wire centers after performing a wire center specific analysis. Moreover, for relief from dominant carrier regulation, the Commission also examined the relevant markets not just by geographic region or by wire center, but also according to the status of the individual customer, ie. mass market (residential and small business) or enterprise market (medium to large business, government and institutional entities).<sup>9</sup>

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<sup>6</sup> See NASUCA Comments at 12-16 (observing that "Verizon seeks relief from some of the same regulations as did Qwest [in Omaha], but expands the list to include many other key regulations and requirements for which Qwest did not seek forbearance."); see also Time Warner Cable Comments at 7-9, NCTA Comments at 3-4.

<sup>7</sup> Omaha Forbearance Order at ¶2.

<sup>8</sup> See Anchorage Forbearance Order at ¶¶ 31-34.

<sup>9</sup> See *id.* at ¶ 50 (denying Qwest's forbearance request from dominant carrier regulation with regard to enterprise services).

Verizon's lack of relevant data that prevents the Commission from performing a wire center analysis also prevents the Commission from further dividing the wire center specific relief for dominant carrier regulation among its established mass and enterprise markets in any meaningful manner.<sup>10</sup>

The Commission should also consider that the situation presented by Verizon is distinguishable from the scenario presented in Omaha. The Commission explicitly stated that the Omaha proceeding considered only factors "unique to the Omaha MSA" and that the Order did not contemplate, nor make any decision with respect to, a "situation where the incumbent LEC's primary competitor uses UNEs, particularly unbundled loops, as the primary vehicle for serving and acquiring customers in the relevant market."<sup>11</sup> As noted by Broadview Networks, Inc., et al. (Broadview) in their comments, competitors in the NY MSA "continue to rely overwhelmingly on Verizon-provided unbundled loop and transport UNEs."<sup>12</sup> Moreover, the cable competitor, Time Warner, notes in its own comments that it is not equipped to service most enterprise customers in its own territory by its own last-mile facilities.<sup>13</sup> Accordingly, the NYSDPS shares Broadview's concern that any grant of forbearance would be irrational in that it could harm much of the competition on which Verizon bases its forbearance request.<sup>14</sup>

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<sup>10</sup> See Omaha Forbearance order at ¶22.

<sup>11</sup> Omaha Forbearance Order at ¶2 n.4.

<sup>12</sup> Broadview Comments at 70; see Time Warner Comments at 14 (noting that for the NY MSA CLECs serving enterprise customers "as a group overwhelmingly rely on Verizon's last-mile facilities to reach their customers").

<sup>13</sup> Time Warner Comments at 17.

<sup>14</sup> Broadview Comments at 70; see Verizon NY MSA Petition at 4, 23 (identifying "traditional CLECs" as competitive options in arguing that sufficient competition exists to warrant forbearance).

Finally, the NYSDPS observes that the Commission's forbearance test specifically applied to section 251(c) is flawed and not in the public interest inasmuch as it does not appear to define the relevant product markets and differentiate the mass market from the enterprise market.<sup>15</sup> Again, the NYSDPS notes that Time Warner, one of the main cable competitors cited by Verizon, admitted in its comments that while it is able to provide voice services to most households in its service territory, it is unable to reach most enterprise customers using its own last-mile facilities.<sup>16</sup>

Without considering the differences in the cable competitors' abilities to serve enterprise customers from their abilities to serve mass market customers, the Commission's test for forbearance from section 251 UNEs is ignoring the very market realities that caused it to grant forbearance from dominant carrier regulation to one market segment, mass, and not the other, enterprise. The NYSDPS believes that such a result is arbitrary and not rational. Moreover, basing forbearance on such a flawed test is not in the public interest in that it cannot properly anticipate potential adverse results such as a duopoly or the elimination of competitive local exchange competition provided over UNEs.

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<sup>15</sup> Compare Omaha Forbearance Order ¶15 (defining product markets as mass market and enterprise for forbearance from dominant carrier regulation) with Anchorage Forbearance Order ¶12 (stating with regard to section 251 UNEs that the Commission "did not define product markets for the purpose of its UNE forbearance analysis in the *Qwest Omaha Order*, and nothing in the language of section 10 leads us to depart from this precedent and undertake this aspect of dominant carrier analysis here.)

<sup>16</sup> Time Warner Comments at 17.

**CONCLUSION**

For all the foregoing reasons, the Commission should deny Verizon's petition for insufficient evidence and failing to demonstrate that its request for forbearance is in the public interest.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Peter McGowan". The signature is written in a cursive style with a large initial "P".

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Dated: April 18, 2007