

Telecommunications Alert: Impending FCC and Court Rulings to Shape Future of Access by Cable and Other Competitive Telecom Providers to ILEC Facilities

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Two FCC rulings on forbearance petitions and two related decisions from the U.S. Court of Appeals for the D.C. Circuit, all expected early this year, could have a significant impact on pricing structures for access by cable and other competitors to the high-capacity facilities and enterprise broadband networks of incumbent local exchange carriers (ILECs).

FCC Must Act Soon on Two Verizon Forbearance Petitions

By May 15, the FCC must act on a Verizon forbearance petition seeking relief in the Providence, Rhode Island market from regulations requiring the ILEC to unbundle certain loop and transport telecommunications facilities and make them available to competitors at cost.¹ By June 29, the FCC must decide a similar Verizon petition for regulatory relief in the Virginia Beach, Virginia market.² By statute, forbearance petitions that are not acted upon by the FCC within a specific time frame are deemed granted.³

Verizon filed both petitions in early 2008, just months after the FCC's December 2007 rejection of Verizon's original forbearance petitions for both markets, as well as other metropolitan statistical areas (MSAs).⁴ The new Verizon petitions focused on slightly smaller geographic areas than the ones in which the FCC previously rejected forbearance, and included updated information on competition in the reduced area.

To prevail, Verizon must show that the level of competition in each market is sufficient to protect the interests of consumers and that its continued compliance with FCC unbundling regulations is therefore no longer needed. Verizon recently filed updated access line information in this proceeding and attacked a new CLEC proposal to require the presence of multiple competitors, each with at least 15% of the market, before forbearance would be granted.

D.C. Circuit Decision Awaited on Verizon Court Challenge to FCC Rejection of Original Unbundling Forbearance Petitions

At the same time it submitted new forbearance petitions for Providence and Virginia Beach, Verizon appealed to the D.C. Circuit the FCC's December 2007 rejection of its original petitions, complaining that the FCC set too high a threshold for determining whether sufficient competition existed in the six MSAs.⁵ Verizon charged that the FCC erred by (a) requiring that wireline competitors to an ILEC must comprise at least a 50% market share for forbearance to be considered and (b) ignoring competition from cable voice and wireless voice services. Oral arguments were held in November 2008 and the D.C. Circuit is expected to issue a ruling this spring. A ruling against the FCC standard would make it easier for ILECs to obtain FCC forbearance from their regulatory restrictions.

D.C. Circuit Also Expected to Rule on Special Access Forbearance

Another D.C. Circuit case, argued in February and expected to be decided this spring, deals with the related issue of FCC forbearance from regulating high-capacity special access services. In 2007, the FCC granted forbearance to AT&T, Embarq, and Frontier from "dominant carrier" Title II (common carrier) regulation of their packet-switched broadband services and optical transmission services.⁶ These petitions were submitted as "me too" requests after Verizon's petition for similar forbearance from the FCC's special access regulations was "deemed granted" in 2006 when the FCC failed to act on Verizon's petition within the statutory time frame.

The FCC's 2007 orders were appealed to the D.C. Circuit by business end-users and competitive carriers.⁷ These parties claimed the FCC failed to adequately measure the extent of competition faced by the ILECs in the special access market before it granted forbearance.

Potential Impact of the Pending Decisions

If ILECs are no longer required to provide at cost-based rates certain services as unbundled network elements (UNEs) to cable and other competitors, this could mean reduced choice and increased cost for consumers. This places a significant obligation on the FCC to ensure that it has accurately assessed the level of facilities-based competition in a market before granting an ILEC forbearance from any category of FCC regulation.

If the D.C. Circuit remands either of the current forbearance cases to the FCC, it will likely be because the court decides the FCC has not adequately supported its competition assessment. It will then be up to the FCC to craft new measures of competition to be applied to future forbearance petitions, likely including Verizon's revised Providence and Virginia Beach petitions.

Endnotes

¹ *Petition of Verizon New England for Forbearance Pursuant to 47 U.S.C. § 160(c) in Rhode Island*, WC Docket No. 08-24, Petition of Verizon New England for Forbearance (filed Feb. 14, 2008).

² *Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in Cox's Service Territory in the Virginia Beach Metropolitan Statistical Area*, WC Docket No. 08-49, Petition of the Verizon Telephone Companies for Forbearance (filed Mar. 31, 2008).

³ 47 U.S.C. § 160(c).

⁴ *Petition 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 No. 06-172, Memorandum Opinion and Order, 22 FCC Rcd. 21293 (2007).

⁵ *Verizon Tel. Cos. v. FCC*, No. 08-1012 (D.C. Cir. filed Jan. 14, 2008).

⁶ *Petition of Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, WC Docket No. 06-147, Memorandum Opinion and Order, 22 FCC Rcd. 19478 (2007); *Petition of AT&T for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, WC Docket No. 06-125, Memorandum Opinion and Order, 22 FCC Rcd. 18705 (2007). The FCC said it would continue to regulate the DS1 and DS3 services offered by the carriers.

⁷ *TW Telecom Inc. v. FCC*, No. 07-1427 (D.C. Cir. filed Oct. 22, 2007).

Please contact your Mintz Levin telecommunications attorney, or any attorney listed below, for more information as we continue to follow these developments.

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