

D.C. Circuit Remands FCC Denial of Verizon Unbundling Forbearance Petitions

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Last week, the U.S. Court of Appeals for the D.C. Circuit held that the FCC had erroneously denied Verizon's petitions for forbearance from local exchange network element unbundling (UNE) regulations in a 2007 FCC order.¹ In remanding the *2007 Verizon Order*,² the court found that the FCC's reliance on the extent of *actual* competition as measured by the incumbent carrier's market share, while excluding consideration of *potential* competition, was an unexplained departure from existing FCC precedent.

Background

Section 251(c)(3) of the Communications Act, added by the 1996 Telecommunications Act, gives the FCC the power to require an incumbent local exchange carrier (ILEC) (such as AT&T and Verizon) to provide competitive local exchange carriers (CLECs) with non-discriminatory access to elements of the ILEC's network on an unbundled basis. In a 2005 order, the FCC held that an ILEC must unbundle network elements only "where [the FCC] find[s] that carriers genuinely are impaired without access to particular network elements and where unbundling does not frustrate sustainable, facilities-based competition."³ In assessing impairment, the FCC considers both actual and potential competition to the ILEC.

The FCC also has noted that an ILEC may seek forbearance under section 10 of the Communications Act from the application of the unbundling rules in specific geographic markets if it believes the objectives of section 251(c)(3) have been "fully implemented" and the forbearance requirements have been met.⁴

Verizon's Request for Use of Impairment Standard in Unbundling Forbearance Analyses Rejected

In its briefs and oral arguments, Verizon contended that the FCC must apply the "impairment" standard in deciding whether to forbear from enforcing the unbundling obligation. Verizon thus argued that when it can be shown that the CLECs in a particular market are able to compete without the ILEC's network elements, the FCC should forbear from requiring unbundling.

The D.C. Circuit rejected this argument. It held that such reasoning conflates the FCC's impairment standard under section 251 with the forbearance standard of section 10, which requires no particular mode of market analysis. The FCC affirmed that the section 10 and section 251 analyses were "wholly distinct," and that the FCC need not apply impairment standards from section 251 to section 10 forbearance petitions.

FCC Found To Have Used an Arbitrary and Capricious New Approach Without Adequate Explanation

The D.C. Circuit remanded the *2007 Verizon Order* because the FCC's analysis was not in keeping with previous assessments of forbearance petitions, and did not provide a satisfactory explanation for the analytical departure. Whereas in previous cases the FCC considered actual and potential competition, the FCC's review of Verizon's six petitions focused on the share of the retail market held by Verizon in each of the geographic markets as *the* determinative factor in deciding whether to grant forbearance. The court found that this "newly minted bright-line market share test [used] to determine whether [a] retail market...[is] sufficiently competitive to warrant forbearance from unbundling requirements" was arbitrary and capricious.

The court also criticized the FCC for finding that the Verizon markets were insufficiently competitive in light of the lack of alternative sources for wholesale inputs. In previous UNE forbearance orders, the FCC found that such a lack of wholesale alternatives did not prevent forbearance.

Importantly, however, the court did not preclude the FCC from relying solely on actual competition, as long as the FCC reasonably explained the change. For the court, the flaw was not the change in the FCC's analysis; it was the FCC's failure to adequately explain the rationale for the new analysis. Moreover, the court expressed no concern over using market share analysis in assessing whether to forbear from dominant carrier regulation.

Remand and FCC Reaction

The court did not vacate the FCC's order; thus the unbundling obligations in the six markets remain in effect. On remand, the FCC must either consider whether competition might be established by evidence other than simply whether a particular market share benchmark has been met by an ILEC, or else adequately justify its departure from its prior precedent.

Despite Verizon's request for a new order within 30 days, the court set no time limit for when the FCC, now under Democratic leadership, must act on the forbearance petitions. Acting Chairman Michael Copps stated that the FCC is "pleased that the court remand focused narrowly on the need for the Commission to better support [its] denial of the Verizon forbearance petitions." The FCC's decision on remand will affect future ILEC requests to forbear from their unbundling obligations.

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Please contact your Mintz Levin telecommunications attorney, or any attorney listed in the left column of this Alert, for more information as we continue to follow these developments.

Endnotes

¹ *Verizon Tel. Cos. v. FCC*, No. 08-1012 (D.C. Cir. June 19, 2009).

² *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*, Memorandum Opinion and Order, 22 FCC Rcd 21293 (2007) (“*Verizon Order*”).

³ *Unbundled Access to Network Elements (Triennial Review Remand Order)*, 20 FCC Rcd 2533, 2615 (2005).

⁴ 47 U.S.C. § 160(a) states that the FCC may grant a forbearance petition only if it determines: (1) that enforcement of the requirement is not needed to ensure that rates are just, reasonable, and non-discriminatory; (2) that the regulation is not necessary to protect consumers; and (3) that a grant of forbearance is consistent with the public interest.

For assistance in this area, please contact one of the attorneys listed below or any member of your Mintz Levin client service team.

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