

FCC Denies Qwest Corp.'s Petition for Forbearance in Arizona

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Garvey Schubert Barer Legal Update, June 25, 2010.

The FCC has denied Qwest Corp.'s petition seeking relief from certain wholesale and resale regulations in Phoenix, Arizona. See *In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, FCC 10-113, Memorandum Opinion and Order (rel. June 22, 2010).

In its petition, Qwest sought forbearance from a variety of regulations based on the level of competition in its service territory within the Phoenix-Mesa-Scottsdale, Arizona MSA (Phoenix MSA). Specifically, Qwest sought forbearance from loop and transport unbundling obligations of section 251(c)(3) and 271(c)(2)(B)(ii) of the Communications Act, as implemented in related provisions of the FCC's rules. For mass market and enterprise switched access services, Qwest also sought forbearance from Part 61 dominant carrier tariffing requirements; Part 61 price cap regulations; requirements applicable to dominant carriers arising under section 214 of the Act and Part 63 of the FCC's rules concerning the processes for acquiring lines, discontinuing services, and assignments or transfers of control; and certain *Computer III* requirements including comparably efficient interconnection (CEI) and open network architecture (ONA) requirements. Qwest argued that it faces sufficient competition in Phoenix to render these regulations unnecessary, based primarily on alleged competition for traditional voice telephone services.

The FCC evaluated Qwest's petition using a market power analysis, similar to that used by the FCC in many prior proceedings and by the Federal Trade Commission (FTC) and the Department of Justice (DOJ) in antitrust reviews. Under this approach, the FCC separately evaluated competition for distinct services, for example differentiating among the various retail services purchased by residential and small, medium, and large business customers, and the various wholesale services purchased by other carriers. The FCC also considered how competition varies within localized areas in the Phoenix market. The FCC concluded that, under this analysis and based on the data in the record, Qwest failed to demonstrate that there is sufficient competition to ensure that, if the FCC granted the requested relief, Qwest would be unable to raise prices, discriminate unreasonably, or harm consumers.

Among other things, the FCC found the following:

Wholesale Loops. Other than Qwest, there are no significant suppliers of relevant wholesale loops with coverage throughout the Phoenix MSA, either individually or in the aggregate.

Moreover, there are no wholesale suppliers of last-mile connection to mass market and users in the Phoenix MSA other than Qwest. The existence of significant barriers to entry, both in general and specifically in the Phoenix MSA I indicates that potential competition poses no significant competitive constraints in this MSA. There is thus inadequate facilities-based wholesale competition in broader geographic areas to support a finding that Qwest lacks market power with respect to wholesale loops. In addition, Qwest's special access services, section 271 access arrangements, Qwest's Local Service Platform (QLSP) wholesale service, and section 251(c)(4) resale are not adequate alternatives to section 251(c)(3) unbundled loops for competitive LECs.

Wholesale Dedicated Local Transport. Although there appears to be a limited amount of competitive deployment of transport facilities in Phoenix, Qwest is not subject to effective competition for its transport services in this market. The only competitive transport facilities deployed in the Phoenix MSA are on routes where Qwest already has obtained relief from UNE transport obligations by virtue of the FCC's unbundling rules (and for which further unbundling relief thus is unnecessary). Therefore, Qwest is not subject to effective competition for dedicated local transport services in relevant geographic markets in the Phoenix MSA, and Qwest has failed to demonstrate that competitive alternatives for dedicated local transport services in the relevant geographic markets exist.

Originating and Terminating Switched Access. Qwest, like other LECs, possess market power over originating and terminating switched access.

Retail Competition/Mass Market. The retail mass market for wireline services in Phoenix remains highly concentrated with two dominant providers, Qwest and Cox. Of particular importance is that Cox is Qwest's only competitor that now provides or is soon likely to provide retail service to mass market customers over its own last-mile network to any significant extent in the Phoenix MSA. Although there are several other providers that serve some mass market customers in the Phoenix MSA, they are "fringe" competitors that are able to compete only by relying extensively on UNEs and other Qwest wholesale services.

Retail Competition/Enterprise Market. Competitors offering retail enterprise services in the Phoenix MSA primarily rely upon Qwest's wholesale services, and Qwest has not demonstrated that there exists significant actual or potential competition for enterprise services by competitors that rely on their own last-mile connections to serve customers.