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# TELECOMMUNICATIONS LAW UPDATE

## D.C. CIRCUIT MULLS FCC FORBEARANCE OBLIGATION

Congress conceived of the 1996 Act as a "pro-competitive, de-regulatory" antidote to traditional common carrier regulation. Included among the provisions intended to further Congress's deregulatory aims is section 10, which *requires* the FCC to "forbear from applying any regulation or any provision" of the federal communications laws to a single carrier, a class of carriers, or a class of telecommunications services when "the Commission determines that — (1) enforcement of such regulation or provision is not necessary to ensure [just and reasonable rates and practices]; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest." Section 10 promises prompt relief from unnecessary regulatory strictures, allowing the FCC only one year, plus a single 90-day extension where necessary, to make its forbearance decisions. The only regulatory provisions beyond section 10's reach are those set forth in sections 251(c) (interconnection obligations of incumbent local telephone companies) and 271 (entry into long distance by the former Bell operating companies).

Where section 10 prescribes that forbearance determinations must be speedy, and limits such designations to specific carriers, services, and areas, the FCC has adopted rules that allow industrywide, but lesser, relief from certain regulations concerning access charges. These rules, stemming from the FCC's *Access Charge Reform* proceedings, provide carriers partial liberation from the FCC's rigorous oversight of incumbent local carriers' rates, terms, and conditions of access services. In its 1999 *Pricing Flexibility Order*, the FCC instituted a regime allowing local carriers greater pricing flexibility as markets for access services become more competitive.

Because a party may seek forbearance from almost any regulation, there is a possibility for overlap between the relief a party may obtain pursuant to section 10 and that made available by the *Pricing Flexibility Order*. The United States Court of Appeals for the District of Columbia Circuit is poised to rule on *Qwest v. FCC* (No. 00-1090), a case with potentially broad implications for the relationship between these two routes toward pricing deregulation, and for future forbearance requests of all sorts.

Before the FCC released the *Pricing Flexibility Order*, Qwest (then U S WEST) had filed petitions asking the FCC to forbear from applying dominant carrier tariff and pricing rules to Qwest in its provision of high capacity services in Phoenix and Seattle. Under FCC regulations, a "dominant carrier" is one found by the FCC to have "market power," which, in turn, the FCC has defined as the "ability to raise or maintain prices above costs, control prices, or exclude competition." Dominant carriers must file tariffs, notify the public before changing rates or terms specified in its tariffs, charge the same rates throughout an entire state or pricing zone, and comply with either traditional rate of return pricing or price caps. Other carriers need not adhere to these requirements, and thus enjoy substantial flexibility in their efforts to compete with their "dominant" rivals. Thus, Qwest asked the FCC to free it from dominant carrier regulation with respect to specific services in specific markets.

In past orders ruling on carriers' requests for nondominant treatment, the FCC has grounded its analysis on four factors: (1) the carrier's market share, (2) the elasticity of demand for the services at issue, (3) the elasticity of supply, and (4) the carrier's cost structure, size, and resources. Therefore, in its forbearance petitions for Phoenix and Seattle, Qwest submitted extensive evidence on these issues. That evidence identified facilities-based competitors for the access services at issue and demonstrated that Qwest's share of the retail market for high capacity services was no more than 30% in Phoenix and 21% in Seattle. Moreover, the evidence confirmed that competitors could, after modest infrastructure investments, accommodate all of Qwest's high capacity traffic in either area. Thus, there was high elasticity of supply and demand.

The FCC nevertheless denied Qwest's petitions. The agency concluded that Qwest's market share determinations exaggerated the extent of competitors' entry by relying on carriers' capacity rather than revenues and by utilizing retail, rather than wholesale, market share. It then denied any need to analyze the remaining "dominance" factors. Instead, the FCC emphasized that Qwest could receive "much, if not all" of the relief it sought pursuant to the *Pricing Flexibility Order*, which the agency said it preferred because that Order contemplated a far less resource-intensive inquiry than that required by section 10.

Qwest appealed, arguing that the FCC had shirked its responsibility to consider the economic evidence Qwest had presented. In response to the FCC's preference for revenue-based determinations of market share over determinations based on capacity, Qwest noted that carriers that lacked access to their competitors' revenue data would be unable to make the necessary calculations, and that the agency had previously, perhaps as a result, endorsed the use of capacity-based measurements. Qwest further argued that pricing flexibility is a complement to, not a substitute for, forbearance. Relief pursuant to the *Pricing Flexibility Order* would be incomplete because under that framework Qwest would remain bound to file tariffs, whereas its competitors would be free to change prices at will. Moreover, even if pricing flexibility *could* offer adequate relief, Qwest had chosen to petition for a *nondominance* determination, and the fact that the analysis associated with that determination was more burdensome for the FCC was irrelevant. Administrative convenience simply is not a pertinent factor for consideration under section 10.

The D.C. Circuit heard oral arguments on November 30, 2000. At least one member of the panel expressed skepticism regarding the FCC's attempt to induce Qwest to seek relief under the pricing flexibility rules rather than the Act's forbearance provisions. The FCC conceded that one reason it preferred the former to the latter was that the pricing flexibility regime allowed the FCC to proceed at its own pace rather than to be bound by section 10's stricter deadlines. A ruling could issue at any time.

**This letter is for general informational purposes only and does not represent our legal advice as to any particular set of facts, nor does this letter represent any undertaking to keep recipients advised as to all relevant legal developments. For further information on these or other telecommunications matters, please contact one of the lawyers listed below:**

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