Shirley Bloomfield
Senior Vice President – Federal Relations
Qwest Communications International Inc.

607 14th Street NW
Suite 950
Washington, DC 20005
202.429.3131
shirley.bloomfield@qwest.com

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The Honorable John D. Dingell
Chairman
Committee on Energy and Commerce
U.S. House of Representatives
2328 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Dingell:

This letter responds to your letter dated September 30, 2008. As Qwest's Senior Vice President of Federal Relations, I am pleased to be able to respond to your questions on behalf of the company. We have repeated your questions in bold italics and provide a response below to each question.

Forbearance

Are you aware of any provisions in Title II of the Communications Act that include a statutory deadline for Commission action?

Response: Yes. Aside from Section 10, there are a number of provisions in Title II with a statutory deadline for Commission action, including Section 204 (five month deadline for concluding tariff investigations),[1] Section 208 (five month deadline for ruling on certain types of complaints) and Section 271 (ninety day deadline for ruling on applications to provide interLATA services).

Have you ever been party to any proceeding at the Commission where such a statutory deadline was implicated?

Response: Yes. See more detailed response below.

In those cases, did the Commission act in accordance with the statutory deadline?

Response: In most cases, the Commission has met applicable statutory deadlines. However, Qwest was a party in at least three recent proceedings where the Commission failed to meet a statutory deadline: (1) In 2004, the Commission concluded an investigation of 1993 and 1994

[1] This deadline was established by the Telecommunications Act of 1996 ("1996 Act"). The 1996 Act maintained a twelve month deadline for investigations begun prior to the 1996 Act.

access tariffs of Qwest and other local exchange carriers ("LECs"), more than nine years after the twelve month time limit in Section 204(a)(2)(B) of the Communications Act had expired;[2] (2) In 2005, the Commission concluded a similar tariff investigation more than ten years after the applicable five month deadline in Section 204(a)(2)(A);[3] and (3) In 2006, the Commission failed to meet the 15-month deadline applicable to Verizon's request to forbear from Title II regulation of certain of its enterprise services, such that the petition was deemed granted pursuant to 47 U.S.C. § 160(c).[4]

If not, did you seek any remedy in an effort to force the Commission to comply with the statutory deadline? What was the outcome?

Response: No, Qwest did not take steps outside the context of those proceedings to force the Commission to comply with the applicable statutory deadlines.

The "deemed granted" language in Section 10 of the Communications Act perverts the forbearance process and does not serve best interests of consumers. If the deemed granted language were removed from Section 10, could companies still seek regulatory relief under Section 10? If the deemed granted language were removed, would the Commission still be operating under a statutory deadline to act on forbearance petitions?

Response: If the deemed granted language were removed from Section 10, companies could still seek relief under Section 10, and the Commission would still operate under the statutory deadlines in that section. Nevertheless, removal of this provision would contradict the deregulatory intent reflected in Section 10 and the rest of the 1996 Act. The purpose of the 1996 Act was to "reduce regulation in order to . . . encourage the rapid deployment of new telecommunications technologies."[5] Section 10 is an integral component of this deregulatory

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[2] *In the Matter of 1993 Annual Access Tariff Filings; 1994 Annual Access Tariff Filings*, CC Docket Nos. 93-193, 94-65, Order, 19 FCC Rcd 14949 (2004). The Commission rejected claims that its nine year delay in concluding the tariff investigation divested it of jurisdiction. While it acknowledged its failure to meet the twelve month deadline, it noted that the statute does not specify a consequence for noncompliance with statutory timing provisions. *Id.* at para. 22.

[3] *In the Matter of 1993 Annual Access Tariff Filings Phase 1; 1994 Annual Access Tariff Filings; AT&T Communications Tariff F.C.C. Nos. 1 and 2, Transmittal Nos. 5460, 5461, 5462, and 5464 Phase II; Bell Atlantic Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 690; NYNEX Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 328*, CC Docket Nos. 93-139, 94-65, 93-193, 94-157, Order Terminating Investigation, 20 FCC Rcd 7672, 7687 (2005) (noting that Section 204 does not specify a consequence for noncompliance with statutory timing provisions). In addition, less recently, Qwest's LEC predecessor in corporate interest, U S West Communications, Inc., was a party to a proceeding where the Commission did not meet the applicable twelve month statutory deadline. There, the Commission released a Report and Order in 1996 that terminated an investigation begun in 1993 into tariffs filed by incumbent LECs for the provision of 800 data base services. *In the Matter of 800 Data Base Access Tariffs and the 800 Service Management System Tariff and Provision of 800 Services*, CC Docket Nos. 93-129, 86-10, Report and Order, 11 FCC Rcd 15227 (1996).

[4] Qwest filed comments in this proceeding in response to Verizon's petition.

[5] Telecommunications Act of 1996, Pub. Law No. 104-104, pmbl., 110 Stat. at 56 (Feb. 8, 1996). The legislative history of the 1996 Act reflects the express underlying goal of establishing "a pro-competitive, de-regulatory national policy framework." Joint Explanatory Statement of the Committee of Conference, attachment to Conf. Rep. No. 458, 104th Cong., 2d Sess. 113 (1996).

framework, in that it requires the Commission to "forbear from applying any regulation or any provision" of the Act whenever it determines that the three criteria in Section 10 are met.[6] Congress enacted the forbearance provision to "ensure that regulations applicable to the telecommunications industry remain current and necessary in light of changes within the industry."[7] Together with the statutory deadline in Section 10, the "deemed granted" provision "force[s] the Federal Communications Commission to eliminate outdated regulations, and do so in a timely manner."[8] In the absence of this provision, a petitioner's only recourse for Commission inaction would be to ask a court to force the Commission to rule on a pending forbearance petition. Even if successful,[9] such court action would likely result in months of additional delay, thereby frustrating Congress' goal of prompt action by the Commission.

Section 10 is even more important today than it was in 1996. The development of intense intermodal competition and new technologies, such as Voice over Internet Protocol (or "VoIP"), has rendered the legacy regulatory regime reflected in Title II and the Commission's regulations increasingly outdated. In a competitive marketplace, the continuing burdens of outdated and unnecessary regulations can suppress both competition and investment. While the Commission has initiated numerous rulemaking proceedings to consider changes to this regulatory regime, many of these rulemakings are still pending – some for five years or more. As a result, forbearance often is the only means available for relatively prompt action by the Commission. Maintaining the efficacy of the statutory deadline in Section 10 is therefore critical to ensure that regulation (or deregulation) evolves to reflect continuing changes in technology and the telecommunications marketplace.

Section 10 is a unique statutory provision because, like its companion Section 11 of the Act, it establishes a presumption that deregulation is in the public interest unless there is reason to retain the regulation in question. Experience shows that, traditionally, burdensome regulations remain on the books for years after their utility has disappeared. Section 10 is meant to overcome that regulatory inertia. Over the past twelve years, the Commission has successfully used forbearance to eliminate unnecessary regulations and spur broadband development. In the vast majority of cases, those decisions have been uncontroversial. Qwest is not aware of any harm to consumers resulting from the "deemed granted" provision. Indeed, the "deemed granted" provision has been triggered only once in a controversial manner[10] – when the Commission failed to act on Verizon's enterprise forbearance petition. The resulting forbearance has enabled

[6] 47 U.S.C. § 160(a).
[7] Remarks of former Senator Larry Pressler (R-S.D.) on S. 652, 141 Cong. Rec. S7881, S7883 (June 7, 1995).
[8] Remarks of former Senator Robert Dole (R-Kans.) on S. 652, 141 Cong. Rec. S7881, S7898 (June 7, 1995).
[9] Violation of a statutory deadline does not ensure that a mandamus petition will be granted. Courts are reluctant to "take the extraordinary step of granting mandamus relief where agencies have failed to satisfy specific statutory deadlines." *W. Coal Traffic League v. Surface Transp. Bd.*, 216 F.3d 1168, 1179 (dissenting opinion) (D.C. Cir. 2000).
[10] On a few occasions, the Commission has permitted forbearance petitions to be "deemed granted" in non-controversial matters. *See Forbearance From Separate Affiliate Requirements of Section 272 In Connection With 1+ Calls From Payphones Granted By Operation of Law To Verizon On October 22, 2003 Pursuant To Section 10(c)*, News Release, Docket No. WC 02-200 (Oct. 23, 2003) (noting grant of unopposed forbearance petition).

Verizon to enter into more than a hundred contract arrangements with its enterprise customers that may otherwise have been prohibited.[11]

In addition, it must be remembered that most of the forbearance petitions granted recently served to level the playing field by ensuring that equally situated competitors were subject to the same regulatory regime. As the industry has grown, different regulations have developed for wireline carriers, wireless carriers, cable television companies, and other market participants. Forbearance actions that result in parity among competitors are especially important as the industry is increasingly marked by convergence of differing technologies.

From November 2008 well into 2009, it is highly likely that the Commission will operate with only four Commissioners. Does Qwest have any forbearance petitions pending at the Commission that could come due during that time?

Response: Yes. Qwest has a petition pending at the Commission seeking forbearance from certain Automated Report Management Information System ("ARMIS") reporting obligations. The Commission must rule on the petition by December 12, 2008.[12]

When the Commission was operating with only four Commissioners in 2006, a Verizon forbearance petition was deemed granted without a written order because a majority of Commissioners could not agree to grant or deny the petition. On appeal, the U.S. Court of Appeals for the D.C. Circuit affirmed that the petition was deemed granted by operation of law and that no written order spelling out the scope of the relief granted was required. If the Commission is again operating with only four Commissioners, do you think it is appropriate for the Commission to allow a petition to be deemed granted without an accompanying written order? Please explain. Do you think it is appropriate for the Commission to allow a petition to be deemed granted without a vote? Please explain.

Response: Qwest believes it is highly preferable for the Commission to reach consensus and issue a written order. By issuing a written order, the Commission can make clear the scope of the relief granted, as well as allow for court review of its decision. In the event of a deadlock and a deemed granted situation, Qwest believes each Commissioner should vote on the petition. This forces each Commissioner to go on record with his or her views and increases the likelihood of breaking the deadlock. If the deadlock cannot be broken, however, Qwest believes it is appropriate for the Commission to allow a forbearance petition to be "deemed granted," with the presumption going to deregulation as Congress intended.

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[11] *See* Opposition of Verizon, *In the Matter of Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, WC Docket No. 04-440 (Aug. 13, 2007), at 3.

[12] *See In the Matter of Qwest Petition for Forbearance from Enforcement of the Commission's ARMIS and 492A Reporting Requirements Pursuant to 47 U.S.C. § 160*, WC Docket No. 07-204, DA-2096 (rel. Sept. 12, 2008).

What steps can the Commission take to ensure that no other petitions are permitted to be deemed granted with no accompanying written order that clearly sets forth the scope of the relief granted?

Response: The most important step the Commission can take in this regard is to prepare draft decisions and circulate those draft decisions to all Commissioners earlier in the process, long before the twelve (or fifteen) month deadline in Section 10. In practice, the Commission almost uniformly extends the twelve month forbearance deadline to fifteen months, and Commissioners apparently do not receive draft orders until the very end of this time period. As a result, ruling on a forbearance petition on the very last day of the fifteen month period has become the norm in most cases of significance. This dramatically increases the likelihood that the Commissioners will fail to agree to a written decision by the deadline. Ruling in advance of the twelve month deadline also would further Congress' goal of prompt resolution of forbearance petitions, with the additional benefit of enabling more deliberate decision-making.

In Congress, if a vote on a bill results in a tie, the bill is rejected. Should the Commission adopt the same rule for forbearance petitions? If not, please explain how allowing a forbearance petition to be deemed granted in the event of a tie promotes the public interest.

Response: No. In *Sprint Nextel Corp. v. FCC*, the D.C. Circuit Court of Appeals ruled that a deadlocked vote cannot be considered an order of the Commission, nor can it constitute agency action.[13] In such cases, the statute provides that agency action is affirmatively necessary for denial of a petition for forbearance. In the absence of a Commission order denying the petition by the statutory deadline, a forbearance petition is deemed granted as a matter of law (that is, as a matter of Congressional, not agency, action).[14] The Commission cannot alter this statutory structure.

While seemingly counterintuitive, this outcome is consistent with the deregulatory intent of Section 10, because it recognizes the dynamic of a competitive marketplace and forces the Commission to address requests for forbearance in a "timely manner."[15] In practice, the provision has worked exactly as intended, in that the Commission has met the statutory deadline for all but one of the forbearance petitions that have been filed in the past dozen years. Congress also was well aware that there would be periods where the Commission would have only four sitting Commissioners, raising the possibility of a split vote and failure by the Commission to issue an order. Because of this and other factors that might prevent the Commission from ruling in a timely manner, the "deemed granted" provision has been essential in prompting Commission compliance with the statutory deadline in Section 10 and the deregulatory intent of the Telecommunications Act.

[13] 508 F.3d 1129, 1131 (D.C. Cir. 2007).
[14] *Id.* at 1132.
[15] Remarks of former Senator Robert Dole, 141 Cong. Rec. at S7898.

Retention Marketing

Does Qwest engage in retention marketing to consumers who have elected to change voice service providers during the porting interval?

Response: No. Qwest does not engage in retention marketing to consumers who have elected to change voice service providers during the porting interval.

Do you believe that the Committee should consider revising Section 222 or other provisions of the Communications Act concerning consumer privacy and retention marketing practices? If so, how?

Response: Qwest does not believe that the text of Section 222 requires revision, at this time. However, the current limitations on retention marketing that the Commission imposed on incumbent LECs in *Bright House Networks* are unnecessary and unlawfully discriminatory. Qwest believes that the Commission's misconstruction of Section 222 in *Bright House Networks* will be corrected in the pending appeal of that decision. Qwest believes that the appellate process should conclude before any decisions about amending Section 222 are warranted.

Fiber Deployment

What is Qwest's current policy with regard to copper lines when Qwest installs fiber at or near a home? If Qwest is not currently installing fiber at or near consumers' homes, but intends to do so in the future, please fully explain what Qwest's policy with regard to copper lines will be in such circumstances.

Response: Qwest's current policy is to keep the existing copper facilities in place as fiber is being placed except if the copper cable is known to be defective or damaged beyond repair. When Qwest does need to remove and replace the copper cable, Qwest follows the appropriate copper retirement notification process.

Pole Attachments

In Implementation of Section 224 of the Communications Act, Amendment of the Commission's Rules and Policies Governing Pole Attachments, WC Docket 07-245, the Commission is considering potential reforms to the pole attachment regime, including standardizing the rates that telecommunications carriers, cable providers, and others pay to attach components, including components used to provide broadband service, to utility poles. Should the Commission set a uniform rate for pole attachments? If so, what rate formula should the Commission use to arrive at that rate?

Response: Yes, to the extent permitted by 47 U.S.C. § 224, Qwest believes that the Commission should move to a single rate for all pole attachments, or at least those used to provide broadband

internet access. Any uniform rate adopted should apply to incumbent local exchange carrier ("ILEC") attachments as well.

The Commission has authority under Section 224 to establish a single rate for all attachments used to provide broadband internet access, including ILEC attachments. Further, the U.S. Supreme Court holding in *NCTA v. Gulf Power*, 534 U.S. 327 (2002), supports the interpretation that the Commission has general authority under section 224(b) to regulate the rates, terms, and conditions of ILEC pole attachments. The *Gulf Power* decision also provides strong support for the FCC's authority to adopt a separate rate for pole attachments used to provide broadband service.

Moving toward a single rate for attachments will reduce the competitive inequities that the current rate scheme creates and result in greater regulatory parity among competitors. Having different rates for separate categories of providers makes increasingly less sense as cable providers and telecom providers use their attachments to provide similarly functioning service bundles. The easiest and most straightforward way to address these rate disparities is to move to a single rate for pole attachments that is based on the amount of space occupied within the communications space on the pole, to the extent permitted by Section 224.

Should the Commission take steps to shorten so-called "make ready" periods, or the time it takes a pole owner to prepare a pole so that a competitor can attach fiber or other equipment? Please explain your answer.

Response: The Commission should not take steps to shorten or otherwise impose a specific time-limit on completing make-ready work. There is already an existing Commission rule that sufficiently addresses this issue. Commission Rule 1.1403(b) states that requests for access to poles, ducts, conduits and right-of-way must be in writing and that "[i]f the access is not granted within 45 days of the request for access, the utility must confirm the denial in writing by the 45th day."[16] If pole owners are not acting in compliance with this provision, then such conduct can be addressed through a complaint proceeding. Furthermore, completion of make-ready work should not have an arbitrary time limit, given the variation in scope from project to project. If a project consists of attaching to ten poles, for example, then it is likely that any make-ready work can be completed within 45 days. But if the project is a 20-mile build-out, make-ready work could take longer. The existing rule appropriately requires pole owners to act promptly in responding to a request for access.

Telephone Number Porting

Can Qwest complete an intramodal port in approximately 48 hours?

Response: Qwest's current processes reflect a porting interval of 54 hours. Reducing this interval would involve numerous changes to Qwest's Operator Support Systems ("OSS"), with

[16] 47 C.F.R. § 1.1403(b).

additional costs. Even if such changes were implemented, Qwest would be unable to accomplish a "complex port," (*i.e.*, those for more than one line, unbundled network elements ("UNE"), complex switch translations or resellers) in 48 hours. Moreover, in addition to any individual provider changes/costs, changes and costs would be incurred by the Number Portability Administration Center ("NPAC") that would increase the overall cost burden borne by the industry. No change should be made at this time.

Do you think that consumers would be well-served if the Commission established a two-day porting interval for the three largest incumbent phone companies?

Response: Such a change would not comport with "competitive neutrality," which the Commission has touted as one of its primary objectives and policy goals in formulating its porting mandates. Moreover, the three largest incumbent telephone companies are materially different from each other in terms of access line count, revenue, and geography served. The third largest incumbent (Qwest) looks nothing like the largest two and should not automatically be saddled with the same kind of changes and costs as might the other two.

At the Subcommittee hearing on July 22, 2008, Jonathan Banks of USTelecom testified that several of USTelecom's members routinely receive port requests from competitors that are longer than the standard four-day porting interval. Is that true for Qwest? What percent of the intramodal port requests received by Qwest fall within the four-business day standard?

Response: Qwest is not a member of USTelecom Association, but it agrees with Mr. Banks' remarks. Indeed, the majority of intramodal port requests that Qwest receives ask for a porting interval longer than the current standard four-business-day interval. For the last 3 months (June, July and August 2008), for example, Qwest received intramodal port requests beyond the four-business-day standard an average of 73% of the time.

Qwest appreciates the opportunity to respond to your questions. Please contact me if any questions arise in connection with our responses.

Respectfully submitted,

Shirley Bloomfield
Senior Vice President – Federal Relations
Qwest Communications International, Inc.

Copy to:
The Honorable Joe Barton, Ranking Member
Committee on Energy and Commerce

The Honorable Edward J. Markey, Chairman
Subcommittee on Telecommunications and the Internet

The Honorable Cliff Stearns, Ranking Member
Subcommittee on Telecommunications and the Internet