Before the
Federal Communications Commission
Washington, DC 20554

In the Matters of Verizon's Petition for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided via Fiber to the Premises	)	
	)	WC Docket No. 04-242
Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided via Fiber to the Premises	)	

OPPOSITION OF AT&T CORP.

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INTRODUCTION AND SUMMARY

In its two Petitions,[1] Verizon seeks "emergency" relief from application of the *Computer Inquiries* rules under which it and the rest of the industry have been operating for decades. According to Verizon, it is on the verge of offering a new bundle of voice, data and video services over a fiber-to-the-premises ("FTTP") network. Verizon says that because the Commission has not yet concluded its Wireline Broadband Proceeding, Verizon "urgently needs" a declaration that the services it offers over FTTP are not subject to the *Computer Inquiries* obligations.

Verizon's Petitions should be denied. Foremost, the posited "emergency" is simply non-existent. Verizon makes no claim that it will not proceed with its deployment of FTTP services absent the relief it seeks. And the memorandum submitted in support of the two Petitions makes all too clear that Verizon has no present plans widely to offer the video services on which it bases its demand for immediate "parity" with cable companies. The Commission should resolve the Wireline Broadband Proceeding in due course. Contrary to Verizon's claim, however, the record in that proceeding demonstrates broadband markets characterized by duopoly and monopoly and, accordingly, continued need for the basic *Computer Inquiries* unbundling and nondiscrimination requirements. It would be patently arbitrary to disregard the extensive record and grant Verizon everything it seeks in the Wireline Broadband Proceeding in the guise of "interim" relief.

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[1] *See* Petition of Verizon for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided via Fiber to the Premises (June 28, 2004); Conditional Petition of Verizon for Forbearance under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided via Fiber to the Premises (June 28, 2004) (collectively "the Petitions"). Verizon attached to the Petitions a supporting Memorandum of Points and Authorities, which is referred to hereinafter as "Verizon Mem."

Moreover, the relief Verizon requests is patently unlawful. Verizon claims it is merely asking the Commission to "declare" that Verizon's FTTP service should be governed by the same "regulatory treatment for broadband services" that applies to "cable modem services." Verizon Mem. at 2. Verizon ignores, however, that in light of the Ninth Circuit's recent decision in *Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003), "regulatory parity" would require that the Commission find that Verizon's FTTP service includes a separate "telecommunications service" component and that Verizon must separately tariff that transport service and make it available upon nondiscriminatory, just and reasonable rates. Any other holding would not only potentially subject the Commission to mandamus for flouting the mandate of *Brand X*, but also of *California v. FCC*, 39 F.3d 919 (9th Cir. 1994) ("*California III*"), given that the Commission has for nearly a decade been unable to provide the Ninth Circuit with a suitable justification for its *Computer III* elimination of structural separation in favor of the lesser nondiscrimination safeguards that Verizon now asks the Commission to repeal.

But even in the absence of *Brand X* and *California III*, the Commission has no authority to issue the declaratory order sought by Verizon. The Commission's binding *Computer Inquiries* rules require Verizon to separately tariff and offer any telecommunications service that it uses to provide information services at retail. The Commission has no authority to "declare" that these rules do not apply.

Recognizing as much, Verizon pleads in the alternative for a "waiver" of the *Computer Inquiries* rules. In order to obtain the full relief that it wants, however, Verizon necessarily must be seeking more than a waiver of the Commission's *Computer Inquiries* obligations, but also of *statutory* obligations imposed by the Communications Act. As noted, under *Brand X*, Verizon's FTTP offerings include a "telecommunications service" that is subject to the full panoply of Title

II requirements. Further, § 271 of the Communications Act requires Verizon to provide competitive carriers unbundled access to its loop plant. Verizon's requested relief is again foreclosed by basic administrative law principles: the Commission has no authority to waive provisions of the Communications Act.

Thus, the only lawful way that Verizon could obtain the relief it seeks is to show that it satisfies the statutory requirements for forbearance set forth in § 10 of the Communications Act. Verizon cannot carry its heavy burden under § 10. Verizon does not – and could not, in the face of existing duopoly and monopoly conditions – show that it satisfies the three consumer protection-focused statutory forbearance criteria (and, in all events, the forbearance relief Verizon seeks – repeal of the § 271 loop unbundling requirement – is categorically barred by §§ 10(d) and 271(d)(4)).

It is quite obvious that the purpose of Verizon's Petitions is not to obtain mere "interim" relief. As noted, existing regulatory obligations are having no impact whatsoever on Verizon's initial deployment of FTTP and the Commission is addressing comprehensively the issues raised in Verizon's Petitions in its Wireline Broadband Proceeding – which will be completed long before Verizon seeks to become a serious video competitor. Thus, it is clear that what Verizon really seeks to accomplish is to rush the Commission into making legal rulings that would bind the Commission in the pending rulemaking proceeding. The Commission in the past has properly rejected this type of piecemeal approach, and it should address the legal and policy issues raised in Verizon's Petitions comprehensively in the pending Wireline Broadband Proceeding.

I. THE COMMISSION SHOULD REJECT VERIZON'S UNLAWFUL REQUEST FOR "DECLARATORY" RELIEF.

Verizon first asks the Commission to "declare" that Verizon's FTTP offer should be governed by the same regulatory treatment that the Commission adopted with respect to cable companies in the *Cable Classification Order*. Verizon Mem. at 6-14. But there are already binding rules that govern Verizon's FTTP service and, even if there were not, *Brand X v. FCC*, *supra*, forecloses the relief that Verizon seeks. Thus, the only declaratory order that the Commission could issue in this context is that Verizon must make available the broadband transport used in its FTTP service and offer that transport to unaffiliated ISPs on a nondiscriminatory basis.

The Commission is not, as Verizon claims (Mem. at 9), writing on a blank slate with respect to the "appropriate regulatory treatment for broadband services in the context of the FTTP architecture." To the contrary, the Commission has promulgated binding rules that expressly govern Verizon's FTTP service. Those rules, issued in the *Computer Inquiries* proceedings, forbid any "Bell Operating Compan[y]" from "engaging directly or indirectly in furnishing enhanced services" unless it does so through a "separate corporation" and where "each such separate corporation shall obtain all transmission facilities necessary for the provision of enhanced services pursuant to tariff." 47 C.F.R. § 64.702(b), (c). Verizon is, of course, a "Bell Operating Company" and its FTTP offering will include high-speed Internet access, which is an "enhanced service." Rule 64.702 therefore applies to this offering and requires Verizon to provide wholesale transport service to unaffiliated ISPs on the same terms and conditions that it provides such transport to its own advanced services affiliate.

The Commission has no authority simply to "declare" that binding rules do not apply. "[A] declaratory ruling proceeding is an adjudication" in which the Commission "declares" what the current law is – "not a rulemaking under the Administrative Procedure Act." *CMRS Access Charge Declaratory Order*, 17 FCC Rcd. 13192, ¶ 20 n.51 (2002); *New York State Commission on Cable Television v. FCC*, 749 F.2d 804, 815 (D.C. Cir. 1984) (declaratory ruling proceeding is "an adjudication under section 5(e) of the Administrative Procedure Act"). The *Computer Inquiries* rules are the product of a notice and comment rulemaking proceeding, and, accordingly, can be repealed only in a notice and comment rulemaking proceeding. *American Federation of Government Employees v. FLRA*, 777 F.2d 751, 759 (D.C. Cir. 1985) ("[A]n agency seeking to repeal or modify a legislative rule promulgated by means of notice and comment rulemaking is obligated to undertake similar procedures to accomplish such modification or repeal."); *AT&T IP Telephony Classification Order*, FCC 04-97 (rel. Apr. 21, 2004) (Statement of Commissioner Abernathy) (a "declaratory ruling" proceeding "clarifies the existing state of the law" while "a rulemaking" proceeding "establishes new rules (which may modify or eliminate existing rules)"). The only way that Verizon can obtain the relief that it seeks – repeal of Rule 64.702 – is the very rulemaking proceeding it seeks to avoid in CC Docket No. 95-20, 98-10, 02-33.

But even if the Commission had not already spoken on this subject, treating Verizon the "same" as cable companies would be fatal to Verizon's requested relief. As Verizon is ultimately forced to concede (Mem. at 9), *Brand X v. FCC*, *supra*, expressly *rejected* the regulatory service classification that the Commission adopted in the *Cable Modem Classification Order*, 17 FCC Rcd. 4798 (2002). In that order, the Commission ruled that cable modem services provided to retail customers were "information services" within the meaning of section 3(41) of the Communications Act and, therefore, were not subject to the "common carrier" requirements of Title II of the Communications Act. *Cable Modem Classification Order* ¶ 33 &

n.139. The court of appeals disagreed, holding that cable broadband service was "part 'telecommunications service' and part 'information service.'" *Brand X*, 345 F.3d at 1132. Thus, under *Brand X*, the transmission component of retail cable modem service – *i.e.*, the physical transport of information between the end-user customer and the ISP – is subject to Title II. The straight-forward application of *Brand X* to Verizon's FTTP service would be to require Verizon separately to tariff the physical transport of information between the end-user customer and the ISP over its fiber facilities and to make that transport available upon non-discriminatory, just and reasonable rates – as the Commission's *Computer Inquiries* rules require.

Critically, the Court's holding in *Brand X* was based upon a construction of the Communications Act itself – a construction that the Court held was binding upon the Commission. *Brand X*, 345 F.3d at 1128-29, 1132. In light of *Brand X*, the Commission simply has no power to "declare" that Title II does not apply to "telecommunications services" that Verizon would offer over its FTTP network.

Alternatively, Verizon says (Mem. at 10-11) that the relief it seeks is consistent with other aspects of the *Cable Modem Classification Order*, namely the order's "waiver" of the application of the *Computer Inquiries* rules to cable companies and the order's findings that AOL Time Warner's access arrangement with EarthLink constituted "private carriage." Contrary to Verizon's claims (Mem. at 11), these findings were in fact "disturb[ed]" by *Brand X*. As the Commission has repeatedly recognized, the appropriate regulatory classification of wireline broadband services is a "critical" "first-step" in determining what regulation should apply to these services. *Wireline Broadband NPRM*, 17 FCC Rcd. 3019, ¶ 30 (2002); *see also generally Cable Modem Classification Order*, Separate Statement of Chairman Michael Powell. For that reason, the *Brand X* court *remanded* the portions of the *Cable Modem Classification*

Order that had purported to hold that Time Warner's dealings with AOL were "private carriage" and that had "waive[d] . . . *Computer II* requirements for cable companies who also offer local exchange service," finding that the appropriate resolution of these issues necessarily "revolve[s] around the FCC's central classification decision." *Brand X*, 345 F.3d at 1132 n.14.

In all events, as discussed below in Part II, Verizon does not satisfy the stringent requirements for a waiver here. But Verizon also badly misrepresents the scope of the "waiver" granted in the *Cable Modem Classification Order*. In that order, the Commission was addressing EarthLink's argument that the *Computer Inquiries* rules apply to any cable company that offers cable telephony. The Commission held that it would "waive" any such requirement – not, as Verizon suggests because it found that such obligations were economically unnecessary – but because the access obligations would be conditioned upon a cable company's decision to offer telephony service. *Cable Modem Classification Order* ¶ 46. Thus, the Commission held that "it is more appropriate to examine the issue of open access on a national basis involving all those Title VI cable systems that choose to offer cable modem service, rather than to divide and treat separately those that also have a common carrier local telephony offering." *Id.* Here, Verizon seeks to have the Commission engage in exactly the type of piecemeal decisionmaking that the Commission expressly rejected in the *Cable Modem Classification Order*.

The Commission's findings in the *Cable Modem Classification Order* that certain arrangements between cable companies and ISPs were "private carriage" likewise does not support the declaratory relief sought by Verizon. As noted, the Commission's binding rules require Verizon to provide wholesale transport to unaffiliated ISPs on a common carrier basis, and the Commission cannot "declare" otherwise.

Further, there could be no lawful finding that Verizon would necessarily be engaging in private carriage should it be freed of *Computer Inquiries* obligations. Verizon's networks were built for and have always been operated to provide transmission to any customer who requests it. Common carriage is the wireline rule, and private carriage the rare exception that applies only to ancillary or specialized services. *See* Reply Comments of AT&T at 26-28 (filed CC Docket No. 02-33, Jul. 1, 2002) (discussing precedent). Stand-alone broadband transmission is obviously neither. Moreover, as the Commission has held in the past, private carriage status is inappropriate where "the public interest requires common carrier operation of the proposed facility" – *i.e.*, where, as here, "alternative common carrier facilities" are not available. *Cable & Wireless, PLC*, 12 FCC Rcd. 8516, ¶ 15 (1997); *Japan-US Cable Order*, 14 FCC Rcd. 13066, ¶ 39 (1999) (holding that *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630, 642 (D.C. Cir.) "directs us to consider whether there is any legal compulsion to serve the public indifferently. In applying this prong of the test . . . the Commission has . . . generally focused on the availability of alternative facilities"). As explained in greater detail below, there are *no* "alternative common carrier facilities" to Verizon's FTTP facilities that can be utilized by ISPs.

II. THE COMMISSION SHOULD REJECT VERIZON'S UNLAWFUL WAIVER REQUEST.

Verizon asks in the alternative that the Commission "waive" application of its *Computer Inquiries* rules to its FTTP service. Verizon Mem. at 15-18. An "applicant [for waiver] faces a high hurdle even at the starting gate." *Telecommunications Relay Services Order*, 2004 WL 1469354, ¶ 110 (Jun 30, 2004). The movant must demonstrate that waiver is "in the public interest" and the Commission may "only waive a provision of its rules for 'good cause shown.'" *Id.* In making these determinations, "[t]he Commission must take a 'hard look' at applications for waiver and must consider all relevant factors when determining if good cause exists" and it "must explain why deviation better serves the public interest, and articulate the nature of the special circumstances, to prevent discriminatory application and to put future parties on notice as to its operation." *Id.*; *see also Industrial Broadcasting v. FCC*, 437 F.2d 680, 683 (D.C. Cir. 1970) (applicant bears heavy burden to demonstrate that his arguments for waiver are substantially different from those which have been carefully considered at rulemaking proceeding). Verizon falls well short of its "heavy burden of showing good cause." *Telecommunications Relay Service Order* ¶ 110.

Verizon's waiver request fails at the outset, because the relief Verizon seeks would require a waiver not only of the Commission's *Computer Inquiries* obligations, but also of *statutory* obligations imposed by the Communications Act. As noted, under *Brand X*, Verizon's FTTP offerings include a "telecommunications service" that is subject to the economic regulatory provisions of Title II that would require Verizon to tariff this offering and make it generally available upon nondiscriminatory terms and conditions. Further, § 271 requires Verizon to provide competitive carriers unbundled access to its loop plant. 47 U.S.C. § 271(c)(2)(B)(iv).[2] Although regulated entities may obtain a waiver of Commission rules in appropriate circumstances, the Commission has no authority to waive core statutory requirements. *See USF Order*, 15 FCC Rcd. 7170, ¶ 13 (1999); *see also Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) ("the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to the limitations which that body imposes").

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[2] Under *Brand X*, the offering of a retail broadband Internet access services by a ISP would include a "telecommunications service" component and, thus, ISPs would be entitled to use

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But even as to the *Computer Inquiries* rules standing alone, Verizon fails to carry its burden. Verizon's primary argument as to why a waiver of the *Computer Inquiries* rules is appropriate is that these rules are unnecessary in light of the retail competition it faces from cable companies. Verizon Mem. at 16. This, of course, is a broad attack on the general rule itself – indeed, the very one that Verizon is advancing in the Wireline Broadband Proceeding – and does not remotely present the "special circumstances" that even Verizon itself acknowledges (Mem. at 15) it must show to obtain a waiver.

Indeed, if anything, the "special circumstances" that exist here support strongly the retention of the *Computer Inquiries* rules. According to Verizon, its FTTP service will offer bandwidth well in excess of current DSL and cable modem capabilities. Verizon Mem. at 3 ("The high-speed Internet access services offered over this network will provide speeds of up to 30 Mbps – approximately 10 to 20 times faster than current-generation DSL or cable modem services."). The point of the *Computer Inquiries* rules is to prevent information service providers who happen to control bottleneck facilities from using this control to limit consumer choices of non-affiliated providers and thereby ensure that *all* information service providers have an opportunity to compete for customers. Here, to the extent that FTTP represents the logical evolution of the local network, the *Computer Inquiries* rules are necessary to ensure competition on the merits with regard to the information services that can be deployed over that network. This is particularly true to the extent that FTTP permits the offering of information and data services that cannot be offered over cable facilities.

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§ 271 network elements to provide stand-alone broadband Internet access services.

But even to the extent that existing cable modem service is a substitute for Verizon's next generation FTTP Internet access service, it is not the case that this "competition" will induce Verizon to enter into reasonable agreements with unaffiliated ISPs. Most cable companies do not broadly make their facilities available to ISPs. Thus, absent access to Verizon's broadband network, unaffiliated ISPs have no way to reach broadband Internet subscribers. And Verizon would have a strong incentive to deny offering competitively-priced access to their last-mile broadband transport to ISPs. Verizon knows that if it provides reasonable wholesale access, ISPs using that access will both undercut its broadband charges and "overpromote" broadband in ways that would contribute to the cannibalization of other Verizon services. Most notably, unaffiliated ISPs would have strong incentive to use the wholesale access they gain to offer VoIP service that would compete with the traditional local telephone services that Verizon intends to offer over its FTTP facilities.

In all events, even to the extent that retail competition from cable providers could be said to remove Verizon's incentive to abuse that power, effective competition does not exist. As AT&T recently explained in detail, Reply Comments of AT&T at 35-45 (filed WC Docket No. 04-36, Jul. 14, 2004), Verizon faces, at best, duopoly competition in relevant local geographic markets. *See* Remarks of Chairman Powell, Broadband Access Network Coordination Event (July 12, 2004) (additional broadband deployment required to "bring much-needed competition to DSL and cable"). Such duopoly competition is patently inadequate to prevent Verizon from acting on its incentives to ensure that rival ISPs do not undercut its broadband offerings. "[W]here rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding." *FTC v. PPG Indus. Inc.*, 798 F.2d 1500, 1503 (D.C. 1986). *See also FTC v. University Health, Inc.*, 938 F.2d 1206, 1218 n.24 (11th Cir. 1991) ("Significant market concentration makes it easier for firms in the market to collude, expressly or tacitly."); *United States v. Ivaco, Inc.* 704 F. Supp. 1409, 1428 n.18 (W.D. Mich. 1989) ("with only two firms in the market, the firms would be able to police cheating, or non-collusive pricing by their competitor."). That is why "existing antitrust doctrine suggests that a merger to duopoly . . . faces *a strong presumption of illegality*." *EchoStar-DirecTV Merger Order*, 17 FCC Rcd. 20559, ¶ 103 (2002), (emphasis added). *Id.* (separate statement of Chairman Powell) (duopolies "inevitably result in less innovation and fewer benefits to consumers" which "is the antithesis of what the public interest demands").

Of course, even the duopoly premise is overstated. Verizon's own data show that a significant percentage of households in the United States can only obtain DSL[3] – a percentage that can only be expected to increase going forward.[4] And Verizon has a monopoly with respect

[3] *See generally* Ex Parte Letter from David Lawson, AT&T, to Marlene Dortch, FCC, (filed in WC Docket Nos. 01-338, 96-98, 02-33, 98-147, May 26, 2004); *see also* Comments of California at 10 (filed in WC Docket No. 04-36, May 28, 2004) (only 1 in 4 customers that have broadband access in California have a choice between DSL and cable).

[4] The Bells have in place local telephone facilities to serve virtually every customer in their service territory. In contrast, cable companies do not serve all rural areas and, thus, do not serve many households that the Bells currently serve. Further, cable companies have largely finished upgrading their cable systems, whereas the Bells say that they have deployed DSL technology to about 70% of households in their territories. *Ex Parte* Letter from Dee May, Verizon to Marlene Dortch, FCC, at 9 (filed in WC Docket Nos. 01-337, -2-33, 98-10, 95-20, Nov. 13, 2003). These facts mean that, as the Bells continue to upgrade their networks, the Bells will increasingly serve homes that today have neither DSL nor cable service as an option. *See id.* (conservatively estimating this to be approximately 10% of customers in Verizon's territory). This commonsense is further confirmed by the fact that the Bells are now adding DSL customers at a faster rate than the cable companies – a trend that analysts predict will continue for the foreseeable future. *See* Bernstein Research Call, *Broadband Update: DSL Share Reaches 40% of Net Adds in 4Q . . . Overall Growth Remains Robust* (Mar. 10, 2004), at 2 ("We expect DSL to continue gaining incremental share of net subscriber additions vs. cable"); Credit Suisse First Boston, *The Broadband Battle: DSL Prepares to Overtake Cable Net Add Share* (April 20, 2004), at 1 (reporting that cable is losing share to DSL and that cable's ARPU is deteriorating); Wachovia Securities, *North American Broadband Update* (June 1, 2004), at 4 ("DSL is growing faster than cable modem.").

to most small businesses. Last year, "cable modem penetration *dropped precipitously* in the small business market, or businesses with between 20 and 99 people. Cable operators also achieved limited success in the remote office market, reaching only 4.2 percent of the market in 2003." Yankee Group, *Cable and DSL Battle for Broadband Dominance* (February 2004), at 4-5 (emphasis added). As the Yankee Group now recognizes, "*DSL operators dominate* the U.S. [small business] broadband and enterprise remote-office broadband market." *Id.* at 4 (emphasis added).

Verizon's emphasis on cable competition is nonetheless understandable. Although Verizon also touts competition from satellite, fixed wireless, and broadband-over-power line ("BPL"), noticeably absent from Verizon's filing is any hard data on the market shares enjoyed by these so-called "alternatives." That data starkly confirm that these alternative providers are not serious competitors. Combined, these platforms have only a negligible and *declining* share of broadband services. *See, e.g., High Speed Services for Internet Access: Status as of December 31, 2003,* FCC Industry Analysis and Technology Division, Tables 1 - 4 (rel. June 2004). According to the Commission's statistics satellite/fixed wireless providers have seen their share of "high-speed" lines decline from 2.8% in 1999 to 1.3% in 2003, *id.*, Chart 6, and their share of "advanced service" lines decrease from 0.7% in 1999 to 0.3% to 2003, *id.*, Chart 8. BPL does not even have a measurable share.[5]

Alternatively, Verizon says (Mem. at 17) that a waiver is necessary in order to ensure the prompt deployment of the "new" services it intends to offer over the FTTP network. But

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[5] Independent analyst estimates corroborate the Commission's numbers. Gartner, Inc., *U.S. Consumer Broadband Keeps Growing: Online Households Remain Steady* (Jan. 2, 2004), at 7 (In 2003 broadband modalities other than DSL and cable altogether accounted for only 4% to 6%
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Verizon's own filing fatally undermines this argument. Verizon makes no claim that it will be unable (or unwilling) to proceed with its roll-out of FTTP so long as current regulatory obligations apply. Thus, the "emergency" relief Verizon seeks is simply unnecessary and the Commission should instead comprehensively address these issues in its ongoing Wireline Broadband Proceeding.

Verizon's waiver request is particularly flawed with respect to its claim that interim relief is necessary to promote competition in video programming delivery markets. Verizon Mem. at 17. Buried in a footnote, Verizon acknowledges that it will not be offering video services in the near term and that it merely "plans" to do so "after the launch" of its FTTP offering. *Id.* at 7 n.8. Thus, Verizon has failed to demonstrate that ultimate resolution of the issues raised in its petition in the Wireline Broadband Proceeding will have any adverse impact whatsoever on its deployment of video services.

In this regard, any crisis here is one of Verizon's own making. *Accord, Second City Music, Inc. v. City of Chicago*, 333 F.3d 846, 850 (7th Cir. 2003) (equitable relief is not available for "self-inflicted wounds"). The *Computer Inquiries* rules have been in existence since 1980, and the unbundling obligations of § 251 and § 271 since 1996 – long before Verizon even began to contemplate its current FTTP deployment. To the extent elimination of these rules was a necessary precondition to deployment of FTTP, Verizon's should have filed the instant petition long ago. The fact that Verizon did not seek this relief at that time again strongly suggests that existing regulatory obligations are not a barrier to deployment of FTTP.

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of the market share.); In-Stat/MDR, *Reaching Critical Mass: The US Broadband Market* (Mar. 2004), at 19 (estimating satellite broadband subscribers to be 310,000 at the end of 2003).

Finally, the very Commission precedent that Verizon cites (Mem. at 18) with regard to the appropriateness of granting a waiver pending a final rulemaking undercuts Verizon's petition here. In the *Verizon Price-Cap Interim Waiver Order*, 17 FCC Rcd. 11010 (2002), Verizon sought a waiver of certain price cap rules with respect to services it was transferring from its separate advanced services affiliate to Verizon's incumbent local exchange carrier operations. Verizon contended that a waiver was appropriate because the Commission was undertaking a comprehensive reexamination of its price cap rules. The Bureau granted the waiver, finding that "special circumstances" existed. *Id.* ¶ 6. In particular, the Bureau noted that services provided by the separate affiliate were never incorporated into Verizon's price cap calculation and, thus, a waiver would "maintain[] the status quo" and prevent a situation in which Verizon was forced to make price cap calculations for the first time for these service under one set of rules and then immediately change those determinations in the wake of the Commission's ultimate decision to revise its price caps. *Id.* ¶ 9. Here, by contrast, Verizon is expressly seeking a *departure* from the "status quo" – the *Computer Inquiries* obligations have existed since the 1980s. Further, in contrast to the limited harm the Bureau concluded would flow from the waiver of the price cap rules, *id.*, the waiver sought by Verizon here could, in many cases, give Verizon a monopoly in the provision of next generation broadband services.[6]

[6] The "waiver" precedent that Verizon relegates to footnote 37 of its supporting memorandum likewise provide no support for Verizon's request here. The public notice that it cites established guidelines to be followed for carriers seeking a waiver of E911 rules, and emphasized the need to demonstrate "special circumstances" and provide detailed technical information to support its waiver request. *E911 Notice*, 13 FCC Rcd. 24609 (1998). Similarly, in the *MAG Order*, 19 FCC Rcd. 4122, ¶ n.40 (2004), the Commission merely permitted existing, interim waivers to continue in effect because it did not in that order rule precisely on the subject matter at issue in those interim waivers.

III. THE COMMISSION SHOULD REJECT VERIZON'S UNLAWFUL REQUEST FOR FORBEARANCE.

Ultimately, the only way that Verizon could lawfully obtain the full relief it seeks is to show that it satisfies the demanding forbearance criteria contained in § 10 of the Communications Act. But that showing is foreclosed by the marketplace realities.

As noted, Verizon is effectively asking for forbearance with respect to the unbundling requirements contained in § 271. Section 10(d), however, places an explicit "[l]imitation" on the remainder of section 10, providing that the "Commission may not forbear from applying the requirements of section 251(c) or 271 . . . until it determines that those requirements have been fully implemented." 47 U.S.C. § 160(d). The Commission considers § 10(d) as a "threshold matter" in forbearance proceedings, and a petitioner's failure to satisfy its requirements mandates denial of the petition without consideration of its merits. *OI&M Forbearance Order*, 18 FCC Rcd. 23525, ¶¶ 5, 9 (2003).

Verizon does not even mention § 10(d) in its supporting memorandum, much less attempt to demonstrate that *all* – or even *any* – of the requirements of § 251(c) and § 271 have been "fully implemented." Nor could it. The objectives and purposes of the Act suggest that the requirements of § 251(c) and § 271 will be "fully implemented" when, at a minimum, there is ubiquitous availability of cost-based wholesale alternatives to incumbent carriers' bottleneck facilities, such that the incumbent carriers would no longer be deemed dominant in local services markets. The word "implement" means "to carry into effect, fulfill, accomplish" and to "give practical effect to." And the word "fully" means "totally or completely." Webster's New World Dictionary. Sections 251(c) and 271 will be "fully implemented," therefore, when a practical effect results: namely, when ubiquitous and durable local competition *actually exists* and the incumbents no longer control bottleneck facilities. *Cf. Verizon Communications, Inc.* v. *FCC*, 535 U.S. 467, 532, 538 (2002) (upholding Commission rules that interpret the "statutory dut[ies]" of section 251(c) to "reach the result the statute requires" and thereby "get[] a practical result"). The requirements of § 251(c) and § 271 are not fully implemented, according to the plain meaning of those terms, where, as is the case today, local competition remains nascent.

But even if there had been "full implementation," the Commission lacks authority to forbear from the § 271 checklist unbundling obligations. Section 271(d)(4) expressly states that "[t]he Commission *may not*, by rule *or otherwise*, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B)." 47 U.S.C. § 271(d)(4) (emphasis added). This specific statutory provision concerning the competitive checklist trumps the more general provisions of § 10 concerning the Commission's forbearance authority. *See, e.g.*, *Green* v. *Bock Laundry Machine Co.*, 490 U.S. 504, 524-26 (1989) (specific statutory provision trumps a more general one). Thus, notwithstanding its general authority to forbear from enforcing provisions of the Act, the Commission "may not" use forbearance to limit the terms of the competitive checklist, which is indisputably what Verizon seeks in its Petitions. By its plain terms, § 271(d)(4) ensures that, as long as a BOC offers (or intends to offer) in-region interLATA services, it must comply with an irreducible core of network access requirements, without limitation as to whether the facility is part of an FTTP network.

In all events, Verizon does not remotely satisfy the individual § 10(a) criteria. Under § 10(a) of the Communications Act, the proponent of forbearance must make three "conjunctive" showings, and the Commission must "deny a petition for forbearance if it finds that any one of the three prongs is unsatisfied." *CTIA* v. *FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003). First, the proponent of forbearance must show that enforcement of the specific regulations at issue to the specific services at issue "is not necessary to ensure that the charges . . . are just and reasonable and not unjustly or unreasonably discriminatory." 47 U.S.C. § 160(a)(1). Second, it must show that enforcement of those regulations "is not necessary for the protection of consumers." *Id.* § 160(a)(2). And, third, it must show that non-enforcement of those regulations "is consistent with the public interest," *id.* § 160(a)(3), and, in particular, that such non-enforcement will "promote competitive market conditions" and "enhance competition among providers of telecommunications services," *id.* § 160(b).

Because these criteria focus on competition and consumer protection, both courts and the Commission have recognized that the Commission must examine detailed evidence concerning the markets for the specific services at issue. In particular, a request that seeks "the forbearance of dominant carrier regulation under Section 10" demands "a painstaking analysis of market conditions" supported by empirical evidence. *WorldCom, Inc. v. FCC*, 238 F.3d 449, 459 (D.C. Cir. 2001); *AT&T Corp.* v. *FCC*, 236 F.3d 729, 735-37 (D.C. Cir. 2001). The Commission has recognized that it cannot simply "assume that, absent" the regulation at issue, "market conditions or any other factor will adequately ensure that charges . . . are just and reasonable and are not unjustly or unreasonably discriminatory." *ARMIS Reporting Order*, 14 FCC Rcd. 11443, ¶ 32 (1999).

Section 10(a)(1). Under § 10(a)(1), Verizon's burden is to demonstrate that the access obligations from which it seeks forbearance are unnecessary to ensure just, reasonable, and nondiscriminatory terms and conditions for the services (or carriers) at issue – *e.g.*, Verizon's provision of broadband "transmission facilities" provided to unaffiliated ISPs. 47 C.F.R. § 64.702. As noted above, Verizon does not even attempt to argue that there is meaningful "wholesale" competition that would ensure just, reasonable, and nondiscriminatory terms and conditions for these telecommunications services. Further, as the *USTA II* Court recognized, hybrid fiber-copper loops and all-fiber loops are characterized by natural monopoly conditions and cannot be readily duplicated by competitive carriers. *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 578-79, 583 (D.C. Cir. 2004); *Triennial Review Order*, 18 FCC Rcd. 16978, ¶¶ 75-78 (2003).

Absent the regulations that Verizon seeks to evade, Verizon would have the ability to charge supracompetitive prices for wholesale access to broadband loops – or deny access altogether – because it is economically infeasible for ISPs to self-deploy their own broadband loops. ISPs could not turn to alternative providers for such access, because none exist. Most cable companies do not offer such wholesale access and none offer the capabilities that Verizon claims its new FTTP will deliver.

Alternatively, Verizon argues (Mem. at 20 & n.44) that even if forbearance would lead to market power harms, the Commission should weigh those harms against the potential benefits of forbearance, such as investment incentives, as the Commission did in conducting its *Triennial Review Order* "impairment" analysis. But as AT&T has previously explained, such balancing is foreclosed by the plain language of § 10(a). *Ex Parte* Letter from David Lawson, AT&T, to Marlene Dortch, at 9 (filed Apr. 15, WC Docket Nos. 01-338, 03-235, 03-260). As noted, § 10(a) requires three *conjunctive* showings. The first two showings – that enforcement of the regulation at issue is not necessary to ensure just and reasonable rates and conditions and that enforcement is not necessary to protect consumers – are absolute and do not permit the balancing permitted under section 251(d)(2)'s "at a minimum language." 47 U.S.C. § 160(a)(1), (2). And while the third showing – that forbearance is consistent with the "public interest," *id.* § 160(a)(3) – is broader in scope, the Commission cannot grant forbearance unless *all three* showings are satisfied.

Sections 10(a)(2) and 10(a)(3). Verizon also recycles its argument (Mem. at 19, 21) that *Computer Inquiries* unbundling obligations are unnecessary to promote the public interest and protect consumers because it already face effective broadband competition. As described above, the opposite is true: Verizon at best is a broadband duopolist and cannot be expected to behave in the same manner as a firm that faces effective competition from multiple competitors.

Verizon's arguments are particularly flawed in the § 10 context. Verizon fails to offer any concrete evidence in *any* actual relevant market, instead relying solely on an economically meaningless hodge podge of "national share" information. *See* Verizon Mem. at 16. Further, Verizon concedes, as it must, that there are, in fact, local markets – and the markets at issue are undeniably *local* markets – in which it has broadband monopolies, and contests only the extent of its monopolies (by arguing that it ordinarily is subject to duopoly "competition").[7]

It is Verizon's burden in this proceeding to present empirical evidence enabling the "painstaking analysis of market conditions" that § 10(a) demands. *WorldCom,*, 238 F.3d at 459; *AT&T*, 236 F.3d at 735-37. Absent such market-specific evidence, the Commission cannot determine the extent of Verizon's monopolies or the ability of duopoly "competition" to protect

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[7] *Id.* at 16, 19, 21. In this regard, Verizon mindlessly recycles its argument that cable companies "lead" DSL providers in overall subscribership. *Id.* at 16 & n.34, 19. Duopoly "competition" is problematic not just because the firm with the larger market share may exercise market power, but because there is a strong likelihood that *both* participants will have the incentive and ability to maintain prices above competitive levels rather than attempting ruthlessly to compete with the other, as they would need to do in a market with multiple competing firms. As the Supreme Court has explained, "firms in a concentrated market" can "in effect *share* monopoly power . . . by recognizing their shared economic interests and their interdependence with respect to price and output decisions." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993) (emphasis added). *See also FTC* v. *Heinz*, 246 F.3d 708, 725 (D.C. Cir. 2001) ('The creation of a durable duopoly affords both the opportunity and incentive for both firms to coordinate to increase prices."); *FTC v. PPG Indus. Inc.*, 628 F. Supp. 881, 885 n.9 (D.D.C. 1986) ("The relative lack of competitors eases coordination of actions, explicitly or implicitly,
(continued . . .)

ISPs, consumers and ensure just and reasonable rates – and, therefore, cannot make the findings necessary to justify forbearance.

(. . . continued)
among the remaining few to approximate the performance of a monopolist."), *aff'd in-part, rev'd on other grounds*, 798 F.2d 1500 (D.C. Cir. 1986).

CONCLUSION

For the foregoing reasons, Verizon's Petitions should be denied.

Respectfully submitted,

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July 22, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of July, 2004, I caused true and correct copies of the forgoing Opposition of AT&T Corp. to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: July 22, 2004
Washington, D.C.

/s/ Peter M. Andros

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