

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petition of the Verizon Telephone Companies)	
For Forbearance under 47 U.S.C. §160(c) from)	WC Docket No. 04-440
Title II and <i>Computer Inquiry</i> Rules with)	
Respect to Their Broadband Services)	

**OPPOSITION OF
THE FEDERATION OF INTERNET SOLUTION
PROVIDERS OF THE AMERICAS**

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EXECUTIVE SUMMARY

The Federation of Internet Solution Providers of the Americas (“FISPA”) is a non-profit trade association of nearly 200 Competitive Specialized Information Solution Providers (“CS-ISPs”)¹ that use and rely on the DSL and other broadband transmission facilities of Verizon, the Petitioner herein, its sister “Baby Bells” or “RBOCs,” and other incumbent Local Exchange Carriers (“ILECs”) to provide their unique services to the public. Forbearance from applying the requirements of Title II and the *Computer Inquiry* rules to Verizon and allowing the use of private carriage agreements will not serve the public interest. Unlike BellSouth’s corollary Petition,² Verizon makes little pretense of wanting to use private carriage to serve ISPs and CS-ISPs that compete with its own affiliate; rather, it is more blatant about seeking to monopolize the provision of unregulated Internet services over its digital subscriber loop facilities.

The Commission’s duties under the Act are clear and unequivocal. Those duties, first and foremost, are to ensure that providers of telecommunications services are to do so in a non-discriminatory manner and at reasonable rates. This duty arises under both Title II and Title I of the Act. Because, at its most basic level, Verizon’s Petition seeks the freedom to act in a

¹ Throughout this Opposition, companies which have traditionally been referred to as independent Internet Service Providers (“ISPs”) are referred to as Competitive Specialized Information Solution Providers (“CS-ISPs”). ISP is an antiquated term that is no longer adequate to fully describe the broad scope of unique and specialized information, technology, and Internet products, services, solutions and individualized customer support offered by the industry participants represented by FISPA. The term, ISP, broadly describes “Internet access,” which is just one of many services provided and functions performed by CS-ISPs. Ultimately, none of the specialized services and solutions offered by CS-ISPs would be possible without continued access to affordable telecommunications facilities, which remain predominantly controlled by the ILECs.

² *Petition of BellSouth Telecommunications, Inc. For Forbearance Under 47 U.S.C. §160(c) From Application of Computer Inquiry and Title II Common-Carriage Requirements*, WC Docket No. 04-405 (Oct. 27, 2004) (“BellSouth Petition”)(FISPA filed its Opposition to BellSouth’s Petition on December 20, 2004 (hereafter, “BellSouth Opposition”). Albeit broader and bolder, the forbearance relief sought by Verizon generally mirrors the relief requested by BellSouth. Therefore, large portions of FISPA’s Opposition to Verizon’s Petition parallels its BellSouth Opposition. However, due to the importance of the issues at stake in both proceedings, FISPA has chosen to submit its arguments in their entirety to ensure the records in both proceedings thoroughly reflect FISPA’s concerns).

discriminatory and an unreasonable manner, a grant of the Petition would do violence to the most fundamental duties entrusted to the Commission by Congress under either Title.

The regulatory regime under the *Computer Inquiries* is founded on the same principles, refined and focused on the specific problems created by the conflicting roles Verizon and other Baby Bells have in the industry as the sole source provider of the tools required by its competitors. *Computer Inquiry* permits Verizon and her sister RBOCs to compete in the enhanced/information and now the broadband services market despite their control over essential facilities which their much smaller customers must use to compete with them. *Computer Inquiry* effects this delicate and difficult balance of competing interests by adding requirements that are designed to neutralize some of the advantages the incumbent local carriers have by virtue of their bottleneck control over the local exchange networks and, in particular, DSL transmission lines.

FISPA's Opposition is based on irrefutable facts, well-established legal precedents and principles and overriding public interests. FISPA's Opposition rebuts, with hard evidence, Verizon's self-serving claims that today's market environment allows the lifting of regulations that require Verizon to act reasonably and non-discriminatorily towards its competitors who, of necessity, are customers as well.

Numerous FISPA members have submitted sworn declarations of their continuing need to have reasonable and non-discriminatory access to incumbent LEC DSL facilities; a necessity because they have investigated and attempted to use other means by which to provide their services to the public – cable, broadband over power, wireless and satellites. Their investigation and good faith efforts have demonstrated that, for a variety of insurmountable problems, these other technology platforms are simply not usable or, in many cases, available to them. These Declarations are a complete bar to Verizon's case for forbearance. Based on direct first-hand

knowledge and experience, they factually refute Verizon's assertions that the market is competitive and that alternative end user access methods are commercially available to CS-ISPs. This strong factual case demands the application of established legal precedents and policies based on the public interest and not Verizon's interests.

First and foremost, Verizon's Petition does not satisfy any of the Section 10(a) forbearance criteria. Therefore, a grant of Verizon's request for forbearance may not be made. Verizon's Petition has failed to demonstrate that Title II common-carriage and *Computer Inquiry* requirements are not necessary to ensure that the charges and practices for broadband services are just and reasonable and are not unjustly or unreasonably discriminatory; are not necessary for the protection of consumers; or are not necessary to protect the public interest. In addition, Verizon has not shown that forbearance will promote competitive market conditions and enhance competition among providers of telecommunications services. If any one of these criteria is missing, forbearance is not lawful.

Verizon's Petition is a textbook example of how not to justify lifting statutory protections of the public's interests. A decision to forbear from enforcing statutes or regulations is not a simple decision. It must be based upon a record that contains more than broad, unsupported allegations of why the statutory criteria are met; it must contain detailed evidence concerning the markets for the specific services at issue that is supported by empirical evidence. No such empirical evidence accompanies the Petition, only Verizon's hollow rhetoric. On the contrary, the empirical evidence, that which is submitted by FISPA herein, is to the contrary. The hard market data unequivocally demonstrates that the drastic action of forbearance cannot be and has not been justified.

Forbearance cannot be shown to serve the public interest. Stripped of its rhetoric and self-serving rationalizations, Verizon simply does not want its future broadband activities to be encumbered with the duties to be reasonable or be restrained in the slightest from playing favorites among those it allows to make use of its DSL facilities, such as its own affiliates – *e.g.*, Verizon Online (“VOL”), Verizon Advanced Data, Inc. (“VADI”).

In other contexts, the Commission has made the connection of *consumer choice* with *competitive forces*. A grant of forbearance here would deny consumer’s their choice of service providers and the variety of services that only a diverse and abundant source of alternative providers can offer. In today’s demonstrably uncompetitive marketplace for alternative broadband access supply, removal of Title II and *Computer Inquiry* rules leaves consumers with nothing to select from but what Verizon and her sister duopolists choose to offer. This does violence to the central theme of the Communications Act that was embodied in the Act since its adoption 70 years ago. Section 151 of the Act provides that –

“... the purpose of regulating interstate and foreign commerce in communications [is] to make available, so far as possible, to all people of the United States, without discrimination ... a rapid, efficient ... wire and radio communication service with adequate facilities at reasonable charges ...” 47 U.S.C. §151 (emphasis added).

The expressed intent of Congress in enacting the 1996 Act is the same. It is the clear duty of this Commission to ensure reasonable and non-discriminatory communications services when provided by common carriers under Title II or by any provider under Title I. The Commission’s duty is to adopt and enforce policies that provide to all the people, so far as possible, nondiscriminatory services with adequate facilities at reasonable rates. In short, Verizon cannot escape its Title II duties -- to operate reasonably and non-discriminatorily -- any

more than the Commission can shirk its duties to see to it that Verizon does operate reasonably and non-discriminatorily, whether by Title II or Title I.

The forbearance Verizon seeks will have a profound adverse impact on businesses in an industry enmeshed in this country's culture and daily lives. The continued existence of CS-ISPs, and the diversity of choices they bring to the public, rests on their ability to continue to have reasonably priced access to the network facilities necessary to deliver their services.

Verizon also attempts to circumvent the requirements of Section 10(a) by relying on Section 706 in support of forbearance. Verizon argues section 706 establishes a duty under which the Commission must remove barriers to infrastructure investment in order to promote broadband competition. But the argument that forbearance from regulation would serve the goals of Section 706 is nothing new. It is the same old “carrot” the Baby Bells have trotted out for many years. Just give us freedom from regulation and we will wire the world, solve the digital divide, and provide free service and products to the communications disadvantaged. Empty promises and hollow bribes of benefits will not meet the three prong test of Section 10(a). Those three prongs are conjunctive. Thus, even if the Commission were to consider that Verizon’s Section 706 promises lent some support to a public interest claim under Section 10(a)(3), that is insufficient because, standing alone, it fails to satisfy the requirements of Sections 10(a)(1) and 10(a)(2).

Finally, Verizon’s Petition should be doomed by proper application of the Regulatory Flexibility Act (“RFA”). The RFA requires each federal agency to conduct a regulatory flexibility analysis of the impact of its actions on small businesses and places the burden on the government to review all regulations to ensure that, while accomplishing their intended purposes, they do not unduly inhibit the ability of small entities to compete.

In 1996, Congress strengthened the RFA and provided for judicial review of agency compliance with the law. Now, agency actions or inactions are directly challengeable in court. As the many declarations submitted herewith demonstrate, the CS-ISPs' very survival depends on access from the ILECs and, to that end, rely on the safeguards of Title II and the *Computer Inquiries*. The Commission cannot ignore or overturn established policy designed in large part to protect these small businesses unless it does so in a reasoned manner that rests on an adequate record which is clearly and convincingly explained by the Commission.

Given the facts and market conditions as they exist today, a proper RFA analysis should doom Verizon's Petition. Forbearance will drive these small businesses out of the market. The effect, therefore, of a grant of the Petition cannot meet a major express goal of the RFA, *viz.*, to provide regulatory relief to small entities.

The Commission is left with little choice but to deny Verizon's Petition. FISPA urges the Commission to prevent further market uncertainty and turmoil by promptly denying Verizon's request.

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The Federation of Internet Solution Providers of the Americas (“FISPA”), by its attorneys, hereby submits its Opposition to the December 22, 2004, Petition for Forbearance filed by the Verizon Telephone Companies (“Petition”).³

STATEMENT OF INTEREST

FISPA was founded in May, 1996 to represent the interests of Internet Solution Providers. Our members are called “SOLUTION” providers because they provide a range of services including Internet Access, Web Hosting, Web Design and an ever-increasing number of other services that use the Internet to facilitate a “solution.” The existing regulatory framework, which Verizon’s Petition threatens to destroy, permits FISPA members the opportunity to create solutions and provide specialized services to meet the unique needs of each individual customer. These unique qualities differentiate FISPA members and other Competitive Specialized Information Solution Providers (“CS-ISPs”)⁴ from their ILEC competitor. ILECs, such as

³ *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 (Dec. 22, 2004).

⁴ Throughout this Opposition, companies which have traditionally been referred to as independent Internet Service Providers (“ISPs”) are referred to as Competitive Specialized Information Solution Providers (“CS-ISPs”). ISP is an antiquated term that is no longer adequate to fully describe the broad scope of unique and specialized information,

Verizon, control essential telecommunications facilities without which CS-ISPs could not survive. And, as FISPA's Opposition demonstrates, the continued existence of the Title II and *Computer Inquiry* rules Verizon seeks to eliminate are equally important, for without them, Verizon and other ILECs will undoubtedly use their market power to deny CS-ISPs access to their essential facilities.

FISPA offers its members education, a place to network, and to facilitate discussion and technological development. We work to educate the public about the importance of the Internet industry. We support quality standards and practices for Internet Solution Providers. We create a single voice representing the concerns of the Internet industry.

FISPA represents the interests of nearly 200 companies. Each offers a broad and unique range of Internet solutions, technologies, and information services to consumers across a wide swath of America. A large number of FISPA members provide their services in Verizon territory, but all will be impacted if Verizon's Petition is granted.⁵

technology, and Internet products, services, solutions and individualized customer support offered by the industry participants represented by FISPA. The term, ISP, broadly describes "Internet access," which is just one of many services provided and functions performed by CS-ISPs. Ultimately, none of the specialized services and solutions offered by CS-ISPs would be possible without continued access to affordable telecommunications facilities, which remain predominantly controlled by the ILECs.

⁵ A sampling of FISPA members that will be adversely affected by Title II or *Computer Inquiry* forbearance have submitted declarations in support of this Opposition and in Opposition to BellSouth's nearly identical forbearance request in WC Docket No. 04-405. Each of the attached Declarations provide irrefutable evidence showing that CS-ISPs, their customers and the communities they serve will be harmed if the Commission grants the relief requested by Verizon and other ILEC wholesaler/competitors. *See, e.g.*, Declaration of Alex Soya on Behalf of LexiSoft attached as Exhibit A (hereinafter referred to as "LexiSoft Declaration"); Declaration of Cliff LeBoeuf on Behalf of Computer Sales and Services, Inc., attached as Exhibit B (hereinafter referred to as "CSSLA Declaration"); Declaration of Joseph M. Albanese on Behalf of SiteStar, attached as Exhibit C (hereinafter referred to as "SiteStar Declaration"); Declaration of Jeffrey Scott Huffman on Behalf of WebKorner Internet Services, attached as Exhibit D (hereinafter referred to as "WebKorner Declaration"); Declaration of Larry Summers on Behalf of WTS Online, Inc., attached as Exhibit E (hereinafter referred to as "WTS Online Declaration"); Declaration of James Robert Garrett on Behalf of Kinex Networking Solutions, Inc., attached as Exhibit F (hereinafter referred to as "Kinex Declaration"); Declaration of Paul Vingiglio on Behalf of Bayou Internet, attached as Exhibit G (hereinafter referred to as "Bayou Declaration"); Declaration of Bill Heinz on Behalf of TampaBay DSL, Inc. and GoldCoast DSL, Inc., attached as Exhibit H (hereinafter referred to as "GoldCoast Declaration"); Declaration of Robert E. Mayfield on Behalf of ECSIS.NET, LLC., attached as Exhibit I (hereinafter referred to as "ECSIS Declaration"); Declaration of Gary Carr on Behalf of COL Networks, Inc., attached as Exhibit J (hereinafter referred to as "COL Declaration"); Declaration of Terry L. Miller on Behalf of Supernova Systems, Inc., attached as Exhibit K (hereinafter referred to

FISPA members and other CS-ISPs have long been the engine hidden beneath the hood of the car driving the Internet and broadband revolutions. Recent telecommunications and information technology policy decisions, rulemakings, and incumbent Bell Company (“RBOC” or “Baby Bell”) filings which tend to diminish the value and seek to further limit and even exclude the role that small, CS-ISPs play in the future of the Internet, broadband services, and information technology have awakened FISPA’s members. Verizon’s Petition is but the latest example of an agenda that began in 1987 with the first Triennial Review of the Modified Final Judgment (“MFJ”),⁶ an agenda whose goal is anti-competitive, anti-small business, anti-consumer and, now, anti-independent broadband provider. Verizon’s Petition and others like it have driven FISPA’s members to take action.

It is believed that the Federal Communications Commission’s (“Commission”) leadership is largely unaware of the contributions that FISPA members and their CS-ISP counterparts have made and continue to make to the national economy, advanced communications capabilities, and

as “Supernova Declaration”); Declaration of Faisal Imtiaz on Behalf of Computer Office Solutions, Inc., attached as Exhibit L (hereinafter referred to as “Computer Office Solutions Declaration”); Declaration of Paula C. Wilbourne on Behalf of Mecklenburg Communications Services, Inc., attached as Exhibit M (hereinafter referred to as “Mecklenburg Communications Declaration”); Declaration of Philip M. Decker on Behalf of World of Computers of Kinston, Inc., attached as Exhibit N (hereinafter referred to as “WCK Declaration”); Declaration of Troy Bourque on Behalf of Computer-N-Service Internet, Inc., attached as Exhibit O (hereinafter referred to as “C-N-S Declaration”); Declaration of Brett Tambling on Behalf of Accelerated Data Works, Inc., d/b/a Acceleration attached as Exhibit P (hereinafter referred to as “Acceleration Declaration”); Declaration of Mary Rickert on behalf of Internet Junction attached as Exhibit Q (hereinafter referred to as “Internet Junction Declaration”); Declaration of Suzanna Pilat on behalf of Intelligence Network Online attached as Exhibit R (hereinafter referred to as “Intelligence Network Declaration”); Declaration of Gregory Wanner on behalf of EWOL attached as Exhibit S (hereinafter referred to as “EWOL Declaration”).

⁶ In 1987, a scant three years after AT&T’s Divestiture of the Baby Bells, see *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 224 (D.D.C. 1982), *aff’d sub nom. Maryland v. United States*, 460 U.S. 1001 (1983), the U.S. Department of Justice issued its first triennial review of the state of competition post-divestiture. See Peter W. Huber, *The Geodesic Network, 1987 Report on Competition in the Telephone Industry*, United States Department of Justice, 1987. Incredibly, Huber’s Report concluded that all telecommunications markets affected by the monopoly control of the Baby Bells were sufficiently competitive to warrant lifting MFJ restrictions and all the Bells to compete where they willed. This was 1987 when the average long distance call still cost around \$0.25/minute and the commercial Internet was a decade away from its boom! Common sense, wisdom and trust in competitive markets over monopoly-driven agendas ultimately prevailed, ensuring that Huber’s Report would not have its author’s desired effect. The Baby Bells continue to press for re-monopolization of telecommunications markets to this day. FISPA implores the current Commission to exercise sound judgment and the foresight of its predecessors as it considers Verizon’s most recent push down this path of competitive destruction.

the extension of broadband services to smaller communities – helping to counter the so-called “digital divide.” FISPA’s Opposition documents the contributions of CS-ISPs and establishes that it would be clearly erroneous for policymakers to decide to sacrifice decades of advancement and public interest benefits for the financial gain of a few large corporations. We aim to change the Commission’s perception of small, CS-ISPs from the dispensable nuisance Verizon and other incumbents portray us as into what we are: We are the very foundation of America’s Internet economy and we, not they, have driven the Internet revolution, and we, not they, will continue to drive America into the broadband future.

Verizon’s Petition ignores FISPA members and their contributions to the Internet and broadband revolutions. But the record cannot be so easily ignored. As will be shown herein, CS-ISPs serve the public interest and their existence is critical to the continued advancement of information and Internet technologies in America.

FISPA and its members oppose Verizon’s Petition and request the Commission deny it.

I. VERIZON SEEKS THE RIGHT TO BE UNREASONABLE AND DISCRIMINATORY.

Verizon’s request for forbearance should be understood for what it is – the desire for the government-sanctioned right to be unreasonable and discriminatory. What other conclusion is possible for a Petition that asks to be relieved from the fundamental obligations of common carriage?

Private carriage lacks the fundamental characteristics of common carriage. Operating in a private carriage mode, Verizon would be under no obligation to serve a party, such as an unaffiliated ISP or CS-ISP, making a reasonable request for service. As a “private carrier,”

Verizon could stonewall such requests by offering onerous and unconscionable rates, terms and conditions.

While it is a fundamental American right that private property may be employed by its owner according to its discretion, the exercise of that right is circumscribed by competing American values – safety, health, civil order, public need and good. Private property *is* regulated – trucks have weight limits and airplane’s maintenance requirements; zoning laws limit the use of private property for everything from sites for rendering plants to the sale of liquor; protest marchers must comply with certain requirements to avoid public mayhem and manufacturing plants must adhere to environmental regulations. Verizon’s “private property” is not and should not be made immune to such standards, particularly since much of the property for which Verizon now seeks exclusionary use was built with the aid of a government-sanctioned monopoly and a protected rate base.

Verizon should not be allowed to avoid common carriage to engage in self-directed discrimination by making selective offers, at best, to preferred business partners and affiliated interests while stonewalling “strategic competitors,” such as CS-ISPs.

II. COMMON CARRIAGE AND *COMPUTER INQUIRY* WORK; THEY DO NOT NEED TO BE FIXED OR FOREBORN, INDEED, THEY SHOULD BE EXTENDED TO OTHER BROADBAND PLATFORMS AND ENFORCED WITH VIGOR.

While imperfect in its enforcement, the existing regulatory system governing CS-ISP access to RBOC networks has a long history of success. FISPA posits that what is not broken need not be fixed. Indeed, the Commission should take note of the history of achievement, technological advancement, and consumer choice given life through Title II and *Computer Inquiry* rules and consider extending and enforcing these requirements on all broadband

platforms and other facilities that remain essential to deliver information content to the American consumer, regardless of geographic location or income level.

A. Private Carriage is No Substitute for Title II Common Carrier Regulation

The principles that govern the duty of common carriage are well over a century old. They require dominant firms whose service is imbued with public interest, convenience, and necessity to provide those essential services to all who have a reasonable need for and make a reasonable request for service. These duties should not be compromised because those who request and need such services are now viewed as “competitors,” or, more accurately from the incumbent’s viewpoint, as interlopers on their private domains. The status of the “customer” in Verizon’s eyes is not determinative of the public’s interests. It is the Commission’s responsibility to protect the public’s interests, and these interests, it will be shown, are contrary to Verizon’s self-serving interests.

As a common carrier, Verizon is not responsible if a customer misuses its facilities and services. Likewise, as a common carrier, Verizon is not entitled to handicap those who request service based on its view of whether the requesting party has a right to that service if and when exercise of that right is seen as a threat to its own corporate goals. The principles of common carriage make clear that the issue is not about the carrier’s interests, but the public’s interest.

A public utility is regulated because its services are so important and ubiquitously required that economies of scale either warrant the grant of monopoly status or create the necessity for it. To control such power, government regulation is required to balance the competing interests of public need and right versus corporate goals and private rights. Whether the monopoly is a *natural* monopoly or one that warrants government recognition as a monopoly, the economic effect is the same - the cost of becoming another provider is

significantly greater than the incumbent's cost, making competitive entry uneconomical or competitive survival problematic, post-market entry.

The private carriage sought by Verizon lacks the fundamental and critically important characteristic of "common" carriage – the separation of carriage and content. The postal service delivers the mail. It does not create the content of what is delivered. Likewise, a communications common carrier does not create the content that is delivered by its facilities and, as importantly, does not use its control of those facilities to censor the content that is to be delivered. Once the protocol requirements of delivery are met, the payload may consist of any protocol, any message. Verizon's proposed exclusionary approach, *i.e.*, sole control over who may use its facilities, creates a chilling effect on the speech and diversity of views that are able to reach the public.

CS-ISPs and other information service providers are not common carriers; they are providers of information. That information may be a product of their own creation and resources or it may be that of their customers. The critical concern is that the widest diversity of content not be artificially truncated by Verizon's self-serving economic interests. The Commission should not lend its good offices to goals so clearly against the public's interest in receiving news, information and content from the broadest array of sources as possible. Congress, the courts, this Administration and the public have spoken; media diversity, not concentration, is in the public interest.⁷ This fundamental principle applies regardless of communication medium. The

⁷ See *e.g.*, FCC News Release, *Copps And Adelstein Welcome Decision Not To Appeal Third Circuit Media Ownership Ruling, But Warn Against Back-Door Commission Action*, January 27, 2005 ("The Commission should seize this second chance to do the right thing... We should immediately begin a comprehensive proceeding to adopt rules that will *promote the core values of localism, competition, and diversity*") ... At least for today, *the power of the American people triumphed over narrow corporate interests*. It's a victory for millions of people who voiced their concern about letting big media companies get even bigger. It signals how badly the FCC failed to comply with the law. We need to go back to the drawing board and get it right. I hope we learned our lesson that public anger flares quickly when the government sides with media conglomerates. *We ought to listen to the public this time.*"(emphasis added).

Commission must heed this directive and consider the negative impact vertical integration and additional concentration of the Internet medium will have on the future availability of diverse content, news and information currently available through local, regional, and national CS-ISPs. If the Commission does, it will have no choice but to deny Verizon's Petition.

The Commission is also aware that private carriage arrangements can only be effected by negotiated contracts. Contracts of adhesion, by definition, are not negotiated. The Commission is or should be aware that interconnection agreements between small CLECs and ILECs are contracts of adhesion. Such contracts have limited the ability to compete, the ability to offer competitive pricing to end users, to offer innovative services and tailored terms to meet customer need. The same result will occur here in regard to small ISP access to customers. Absent regulatory mandates, Verizon has no incentive to fairly negotiate private contractual arrangements with small, CS-ISPs. If the Petition is granted, Verizon will have the upper hand and ability to force unfavorable contractual arrangements onto small ISPs. Such contracts of adhesion are contrary to public policy.

Verizon also claims it needs to be freed from Title II common carrier obligations in order to craft "more efficient network solutions" on behalf of its ISP and CS-ISP customers, to whom it might wish to offer private carriage. This argument is disingenuous, and so blatantly fallacious that it mocks the regulatory expertise of the Commission. Verizon's ability to tailor its offerings is in no way diminished by the presence of competitors in the marketplace. Such competition, if anything, only goads a reluctant monopolist to respond to its customer's demands, something it need not do and has not done when heretofore left unchallenged by such competitive forces.

And lastly, the fundamental concern expressed in Verizon's Petition, that Title II regulation increases its cost of doing business, can be addressed by Verizon itself. It does not

require Commission action or forbearance. DSL lines are not subject to traditional rate regulation. The services provided by their use are defined by the service providers themselves. Verizon is therefore free to craft as much flexibility as it chooses into its DSL offerings. It is not the flexibility in the service offerings that must be available on a nondiscriminatory or uniform basis; it is the availability of the capacity of the DSL lines themselves. Such availability is always subject to loop qualification and other tests. It defies credulity to accept Verizon's assertion that it cannot find a way to "create new access points" for its ISP/CS-ISP subscribers. If such were the case, then it has done a poor job indeed of crafting its tariffs. The truth of the matter is that all Verizon needs to do to resolve the concerns its Petition raises is to redraft its tariffed offerings! Any number of consultants would be happy to assist in crafting a service definition and tariff that are both flexible and profitable and at the same time meet the needs of unaffiliated ISPs/CS-ISPs.

B. *Computer Inquiry* Makes Competition Work

Verizon views the *Computer II* rules as an out-of date nuisance, one that simply increases its cost of doing business. The Commission should not be surprised at Verizon's self-serving view. But *Computer II* is more than a nuisance to monopoly local exchange carriers. It is a barrier to their efforts and intrinsic intent to lessen and then eliminate diversity of choices made possible by effectively competitive markets.

Computer II is a classic example of a well-intentioned regulatory program to permit dominant entities to operate in both competitive and non-competitive markets. The ground rules are simple. To counter the advantages of dominant entities, it was necessary to establish the proverbial level playing field. This goal was to be achieved by separating competitive activities from those in which monopoly powers existed. The separation was made by defining the

boundaries between LEC lower-layer (basic) services and LEC upper-layer (enhanced) services and their associated terminal equipment. This produced a clear understanding of what a “telecommunications service” was and what it was not.

This separation is recognized in the Telecommunications Act of 1996 (“the Act” or “1996 Act”). The Act’s definition of “telecommunications service” largely aligns with the “basic” services of *Computer II*. Clearly, the authors of the Act did not expect to see *Computer II* boundaries eliminated. Indeed, the distinction was codified. The Commission itself recognizes this codification:

“In addition, in considering the statutory history of the 1996 Act, we note that at the time the statute was enacted, the Computer II framework had been in place for sixteen years. Under that framework, a broad variety of enhanced services were free from regulatory oversight, and enhanced services saw exponential growth. Accordingly, a decision by Congress to overturn Computer II, and subject those services to regulatory constraints by creating an expanded “telecommunications service” category incorporating enhanced services, would have effected a major change in the regulatory treatment of those services. While we would have implemented such a major change if Congress had required it, our review leads us to conclude that the legislative history does not demonstrate an intent by Congress to do so. As a result, looking at the statute and the legislative history as a whole, *we conclude that Congress intended the 1996 Act to maintain the Computer II framework.*” (emphasis added).

Federal and State Joint Board on Universal Service, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501 (1998) (“Stevens Report”) at ¶45.

Granting Verizon’s requested forbearance would require the Commission to disregard and ignore its own conclusion, cast aside the fundamental differences in the nature of the two service layers, and ultimately override clear Congressional intent to maintain separation between the lower and upper layer services.

When the focus of *Computer II* on enhanced services is considered, it is clear that the rules properly delineated the boundary between regulated and unregulated activities. Given the development of the industry at that time, it is not surprising that *Computer II* had more impact on

terminal equipment than upon the then still-nascent enhanced services area. The history recorded is instructive for today.

After *Carterfone* and through *Computer II*, competition in the terminal equipment sector developed, but only with great difficulty. For example, although corporations that leased PBX systems from “the phone company” now had an alternative, that alternative was an unknown – a “no name” vendor, offering unfamiliar terms of service. This phenomenon alone was seen as a risk, rather than an opportunity by many corporations. As a result, many were afraid to use an interconnect company despite the fact that their prices were lower and their offerings more innovative (as was almost always the case).

Then there was the endemic problem associated with transitioning from a monopoly market to a competitive one. Interconnect companies and their customers had to risk problems that did not arise with the incumbent monopoly’s tariffed interconnect equipment. For example, trunk circuit orders related to an interconnect company’s equipment had to be placed with the monopoly provider via its “special departments.” A stratagem that invariably resulted in processing competitive suppliers’ orders far more slowly than subscribers using incumbent-owned equipment (PBXs). Moreover, whether such “slow-rolling” existed or not in regard to a particular order, the *perception* of discrimination against interconnect companies was enough to discourage most customers from buying from interconnect vendors. These issues were resolved by *Computer II*’s detariffing terminal equipment *and* by requiring the LECs to deal at arm’s-length with their unregulated subsidiaries.

Ironically, going all the way back to the MFJ, it will be recalled that its terms required that the post-divestiture entity that would take over the terminal equipment business would be a fully separated subsidiary of the divested AT&T, *not* its “Baby Bells,” the RBOCs of today. The

approach taken in the MFJ was followed in the Commission's *ISDN Decision*.⁸ The Commission required the NT1 (Network Terminator) and ISDN line to be treated as untariffed customer premise equipment. This had a profound effect on the development of ISDN. A single line-coding standard, Reference Point U, needed to be defined: In Europe, because the demarcation was the user side of NT1 (Reference Point T), line-coding was an internal matter and thus not subject to standardization. American ISDN gear then largely grew up using the 2-wire "U interface" as the demarcation, rather than the 4-wire "S/T interface" found in most other countries.

During the mid-80s, development of ISDN standards, so-called "teleservices" were part of the Comité Consultatif International Téléphonique et Télégraphique ("CCITT" - today's ITU (International Telecommunications Union)) program of work. These were higher-layer services offered over the ISDN. *Computer II* essentially banned the RBOCs from offering teleservices as *part of* ISDN. Instead, the enhanced services, the "teleservices," were to be provided by third parties. This distinction helped lead to the development of the commercial and consumer Internet, among other things.

It is clear from this hindsight (actually, it was fairly clear at the time) that the RBOCs had *no idea* what enhanced services their subscribers really wanted. They were promoting ISDNs for Centrex telephone sets (a valid, if parochial, application), and for obsolete functions such as integrated voice and data (dumb teletype-style) terminals for logging into local minicomputers and mainframes, similar to the failed PBX terminals of a few years earlier.

But because of *Computer II* requirements, equipment vendors and customers could adapt ISDN for their own needs, such as videoconferencing, bulletin board file transfer, telecommuting (remote LAN access), leased-line backup, and, of course, Internet access. These were not bound

⁸ *In the Matter of Integrated Services Digital Networks (ISDN)*, First Report, 98 F.C.C.2d 249 (1984).

to CCITT-standard “teleservice” descriptions. They were innovations that were made possible by *Computer II*.

To this extent *Computer II* mirrored the common carrier obligation that ILECs, as carriers, would not be allowed to meddle with the payload of their subscribers’ calls.

Nevertheless, the RBOCs did succeed in effectively killing off the ISDN Basic Rate Interface in the American market. However, they did not succeed in killing off the development of a singular piece of equipment that allowed some competition to prevail in the reemerging anti-competitive environment – the modem. Between the time of *Computer II*’s issuance and the late 1990s, free from the impediments toward innovation that the RBOCs may have imposed, modem capacity increased from 2400 bits per second to 53.3 kilobits per second. This is another example of the principles of common carriage at work. The independent modem manufacturers discovered that the actual behavior of the payload was usually better than the specified behavior. *Computer II*, in that sense, did not create the opportunity for innovation, but it put teeth into the nondiscrimination requirements of common carriage – the necessary underpinning of all innovation in modern enhanced services.

It is recognized that today’s ubiquitous Internet grew out of government-funded research networks, ARPAnet and NSFnet, and were not open to public access and use. During the 1980s, an increasing number of institutions and corporations gained access to the Internet backbone, but the Acceptable Use Policy (AUP) limited commercialization. In the early 1990s, the backbone was privatized and the AUP no longer applied, opening the floodgates to a vast number of new providers. An industry structure rapidly developed in which three distinct roles emerged under the “ISP” banner:

- **Backbone** ISPs (“IBSPs”) are the long-haul providers, dealing at the wholesale level, purchasing bulk intercity pipes and selling service to large organizations and other ISPs.

Since there was no dominant player, (or the dominant players were asleep at the switch because what was developing was innovative and hence invisible to their monopoly focus of preserving and exploiting their local monopolies), a free-market system of “peering”, “transit”, and “upstream” interconnection developed.

- **Vertical** ISPs (“IVSPs”) include the retail providers, purchasing service from IBSPs and providing vertical services to their customers. Still other IVSPs provide services such as web hosting.
- **Access** ISPs (IASPs) evolved to intermediate between the IVSPs and the local exchange carriers. They provide “rent-a-modem” service, or in occasional cases offer self-provisioned bandwidth via available media.

All of these developments evolved *without* the involvement of the ILECs. Indeed, given their narrow focus of preserving and exploiting their monopolies, the ILECs managed to be among the last in the industry to become aware of the growth of the Internet. Thousands of ISPs (specifically IVSPs) were in business all over the country before the major ILECs had their own offerings.

Notably absent from this structure are “content providers”; which are neither ISPs, nor even CS-ISPs. Content providers, like Yahoo!, are merely a customer subset of ISPs/CS-ISPs. In its Reply Comments supporting BellSouth’s Forbearance Petition (WC Docket No. 04-405), Verizon lumps content providers together with ISPs. Indeed, Verizon goes so far as to describe content providers *as ISPs*,⁹ in what appears to be an attempt to create the misperception that “content” competition is the equivalent of the “content + access” competition currently offered by thousands of CS-ISPs. This is reminiscent of the old chestnut about what happens when you call a dog’s tail a leg. Does the dog have five legs? Of course not. No matter what you call it, a tail is not a leg. Except to Verizon, who calls the likes of Yahoo! *an ISP*.

⁹ See Reply Comments of Verizon in Support of BellSouth’s Petition for Forbearance, WC Docket No. 04-405, at 20 (“The role of the ISPs in the broadband market is primarily one of supplying content...”). While this view may advance Verizon’s regulatory goal, it is one that does not comport with reality. If CS-ISPs provided only “content” to their customers or if CS-ISPs believed that their customers’ primary reason for selecting them as their broadband ISP was content, FISPAs would not be participating in these forbearance proceedings.

Diverse, localized content is certainly an important aspect of many CS-ISPs' offerings to mass market customers, but CS-ISPs also offer unique, customized access services and solutions, particularly to small and medium businesses. Even certain mass market consumers (such as online "gamers") that are not adequately served by the one-size-fits-all broadband offered by Verizon choose CS-ISPs. Without Title II and *Computer Inquiry* rules, CS-ISPs cannot be guaranteed access, much less reasonably priced access, to essential ILEC telecommunications facilities. Without access to these basic building blocks, CS-ISPs have nothing with which to innovate - they cannot use their programming, software, and hardware expertise to improve upon the building block to create the unique solutions their customers demand (*see* Section III, *infra*, for more information on the clear and present danger to innovation, consumer choice, and tailored services presented by Verizon's Petition).

Thanks to *Computer II*, the ILECs could not discriminate against CS-ISPs in the provision of dial-up service. Later, they also had to provide DSL to CS-ISPs. It is hard to imagine this industry having developed as it did without the strictest application of the protections afforded by *Computer II* and the principles of reasonableness and nondiscrimination embodied in Title II. Relaxing or eliminating these protections, as requested by Verizon and others, will result in the taking of what has been created by many independent and innovative minds and surrendering it to dull and self-interested entities that have long established their disregard for fair competition.

The Commission cannot now turn its back on the long history of success, progress and pro-competitive results of the *Computer Inquiry* line of decisions.

C. The Internet Thrives Because Existing Regulations Require Openness of the ILEC's Networks.

Verizon suggests that continued regulation pursuant to Title II and *Computer Inquiry* rules will inhibit broadband innovation and deployment to the detriment of consumers. These arguments are misguided and disavowed by experience. The 35-year history of the “information” and “enhanced” services industries proves time and again that innovation and deployment of advanced technologies actually depends on a continuation of the Commission’s practice of applying regulation targeted to service layers that are not competitive (the lower, access transmission services) and not applying, or lightly applying, regulations to layers where competition exists (the higher, application and content layers).¹⁰

The *Computer Inquiries* created a vibrant market for information services by mandating that the infrastructure companies allow all comers among enhanced service providers to have access to their customers. The RBOCs were later forbidden to use their infrastructure positions to give affiliated ISPs an advantage over competing ISPs. This openly competitive environment spurred to market numerous ISPs, who, in turn, stimulated the development of the World Wide Web and commercial Internet.

It is small business that drives innovation in the American economy, not large monolithic businesses that wish to dominate the marketplace to profit from a “one-size-fits-all” approach to providing services. The Internet was brought to the public by small, CS-ISPs. The telephone companies not only did not support this paradigm-shifting development; they fought it. Only after the Internet was firmly ensconced in American life did Verizon and its large ILEC brethren begin to see it as a business opportunity. In short, the ILEC-based ISPs have never been

¹⁰ Robert Cannon, Senior Counsel, Office of Plans and Policy, Federal Communications Commission, *Where Internet Service Providers and Telephone Companies Compete: A Guide to the Computer Inquiries, Enhanced Service Providers and Information Service Providers*, Version 0.0, <http://www.tprc.org/abstracts00/ISPcompetepap.doc>

innovators.¹¹ What would make the Commission turn a blind eye to this irrefutable fact or cause the Commission to retreat from a regulatory system that is a demonstrable success? Certainly, Verizon's Petition cannot.

The Internet thrives and broadband technology is deployed because the underlying transmission networks and standards are and have been open to competitive pressures that stimulate network providers, like Verizon, to innovate. This "openness" is a result of Title II and *Computer Inquiry* regulations. The *Computer Inquiry* regime created the right conditions for a robustly flourishing competitive market for enhanced services, one which eventually evolved to include competitive ISPs. These rules are necessary for the continued proliferation of ISPs. An unregulated duopoly environment (Telco/CableCo), on the other hand, necessarily limits Verizon's incentive to aggressively compete and innovate. A pro-competitive regime, safeguarded by Title II and *Computer Inquiry* rules, ensures small ISPs access to the ILEC's lines and provides the better means for entrepreneurial innovation. Forbearance would provide Verizon the opportunity to "close" its network to unaffiliated ISPs and discriminate among and between the great diversity of services offered by the multitude of CS-ISPs. This result is contrary to the open architecture of the Internet, and, as will be shown, *infra*, Section 10 of the Telecom Act.

Verizon's Petition attempts to undermine over three decades of pro-competition policy and literally put the CS-ISP industry out of business. While the removal of Title II and *Computer Inquiry* obligations would, indeed, slightly reduce a monopoly's cost of doing

¹¹ ADSL itself had been essentially abandoned by the ILECs after failed video-on-demand trials in the early 1990s. The CS-ISPs were responsible for using ADSL for data. It was the CS-ISPs that developed a free-market system of intercarrier compensation based on peering and upstreaming. ISPs developed consumer-friendly web page creation services. ISPs are learning how to develop and deal with Voice over IP, a future service that does not pose a competitive threat to them as it does to the ILECs. ISPs, especially the smaller local ones, have been continuously innovating in their networks; the Bell affiliates are more than content to offer "me too" services leveraged to their monopoly loop services.

business,¹² it would be no more appropriate than permitting the ILECs to ban “foreign attachments” to their telephone lines, as they argued against in the *Carterfone* decision which presaged *Computer Inquiry*.

D. Business Markets Are Not Always Competitive

Verizon has defined “broadband” in a way that includes DS1 and DS3 loop services provided to business. These are the backbone of the business-ISP industry. Business ISP services are not the same as consumer services. Cable modems are rarely available to businesses, and if they were, they would not always be useful, because business Internet usage is more symmetric, and cable networks are typically highly asymmetric.

The Commission has made a complex determination of “impairment” in its recently-concluded Remand of the Triennial Review Order.¹³ The ruling severely limits CLEC access to these circuits as a UNE, which forces CLECs to the ILEC special access market, which increases costs, but at least access is still available. Now, Verizon comes before the Commission with a forbearance Petition that seeks the right to further increase the cost and complexity of special access services. When will Verizon be satisfied? Special access services should not be subject to an artificial test to determine whether or not payload is classified as “broadband” or something else still subject to common carriage.

Verizon also goes well beyond its counterpart BellSouth in seeking the removal of common carriage from enterprise packet data services, including ATM and Frame Relay. It does this by suggesting that AT&T, MCI and Sprint have a larger market share. However, those carriers are primarily *Inter-LATA* providers, while Verizon’s service is primarily of importance

¹² BellSouth, in its Petition, puts the price tag on this savings at \$3.50, but BellSouth’s Petition is short on support for this claim. Verizon cites no number of its own.

¹³ See *In the Matter of Unbundled Access to Network Elements Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338 (Rel. Feb. 4, 2005).

within LATAs. As such, its overall market share figures are meaningless, as they refer to two entirely different and non-competitive markets. Moreover, if current trends in the re-creation of the Ma Bell empire continue at their current pace, Verizon will soon *own* MCI or Sprint, just as SBC will soon *own* AT&T (and all the ATM and Frame Relay circuits and customers that come with it). When this day comes, and it will likely arrive before the Commission decides this Petition, Verizon’s arguments will be revealed for what they are – hollow rhetoric developed for the exclusive purpose of manipulating the regulatory process in its favor.

Throughout its Petition, Verizon assumes widespread competitive entry since the 1996 Act. But the 1996 Act, itself, has failed. Its intent was sound, but its implementation was made impossible by the very entities that now seek further eradication of its pro-competitive and public protection provisions. A balance must be struck. A few legacy carriers cannot continue to benefit from valuable government grants and licenses, including the use of public rights-of-way, and be allowed to extend those rights in a way that bars others from offering their service to the public. In the future, broadband services will be as, or more, important than Plain Old Telephone Service (“POTS”). Limiting the common carriage obligations of reasonableness and non-discrimination to declining services such as POTS does violence to the entire principle that the Commission is charged with assuring. That is, “to make available, so far as possible, to all the people of the United States, without discrimination... communication service with adequate facilities at reasonable charges...” as Congress so wisely provided 70 years ago. 47 U.S.C. § 151.

III. FORBEARANCE PRESENTS A CLEAR AND PRESENT DANGER TO INNOVATION, CONSUMER CHOICE, AND TAILORED SERVICES

Forbearance presents a clear and present danger that DSL-based ISP service will be offered by the long entrenched local exchange monopolists and the public’s current right and

capability to choose ISPs based on their unique needs and the CS-ISPs differentiated services will be sacrificed. Entities that have not been born, bred and matured as a monopoly, of necessity, have had to innovate and create service distinctions that appeal to various niche markets – first, in order to establish a market and, then, to sustain their presence in that market. The CS-ISP’s business plan seeks not to be the choice for every potential user, but to be an attractive choice to users that may most benefit from its unique services. Forbearance will quickly convert a market of diverse choices into an anachronistic throwback to the days of homogenized, non-differentiated, totalitarian–like services, such as those available in countries that do not value and support free enterprise and free speech, that do not tear down entry barriers, but erect them, that do not allow choice but require purchase of services from a state-controlled entity. Although for different reasons and in different ways, the same smothering atmosphere will be created – not with control directly in government hands, but in the hands of private interests created over decades of sanctioned monopoly and perpetuated by government decision. What will be sacrificed is differentiation and choice created and offered by CS-ISPs.

- ***Service Differentiation - Content Filtering***

One area of service differentiation involves content filtering. Today, this usually consists of two very different types of service. One, often thought of as “family-friendly” filtering, intentionally blocks access to services believed to be unsuitable to some classes of viewer. Courts have ruled that this cannot be mandated of an ISP, but there are CS-ISPs and FISPA members, especially focused in certain geographic regions, that choose to offer this because of their constituencies.

Another type of filtering is anti-spam defense. Here, there are several approaches at work. It is not always easy for a machine to tell spam from valid email. Some CS-ISPs leave all

filtering to the end user. Others block mail that fails some kind of protocol or other test. For example, there is currently a debate in the protocol community around Sender Policy Framework (SPF) and competing methods of distinguishing forged email. Some CS-ISPs choose block lists from among the many blacklist services now available. These services are not 100% reliable, so CS-ISPs have to choose which ones they find most useful, and implement blocking policies. Some CS-ISPs use rule-based filters such as SpamAssassin. Some use Bayesian filtering of the content. Some use human-mediated spam block services, such as Brightmail, which have rapidly-updated active spam filters that block specific spam messages before they are widespread. And for each of these anti-spam techniques, the CS-ISP chooses whether to block the mail entirely, move it to a special mailbox that the user can choose to query to search for the occasional false positive, or merely label the message as questionable so that the user can filter it. An ISP monopoly unconstrained by Title II and *Computer Inquiry* rules can destroy these variations and the public will be the loser.

- ***Service Differentiation - Symmetry vs. Asymmetry of Bandwidth***

Consumer DSL services are almost always provisioned using *Asymmetric* DSL technology. This usually works well because consumer demand tends to be much greater in the download than upload direction. Business subscriber requirements tend to be far more symmetrical. Existing DSL tariffs generally permit the CS-ISP to choose between different speed packages, allowing for a variety of upstream and downstream bandwidth offerings.

RBOC-affiliated ISPs tend to be most parsimonious in the upstream direction. BellSouth, for instance, claims in its forbearance Petition (which Verizon endorses) that its own market share of true broadband service (defined by exceeding 200 kbps in *both* directions) is particularly small because its basic consumer ADSL service has only 128 kbps upstream capacity. As FISPA

pointed out in its BellSouth Opposition, this does not mean that BellSouth's market power is weak. Rather, it proves the opposite, that its market power is great enough that it can provide an inferior upstream service *by its own choice*. Likewise, Verizon provides only 128 kbps in the upstream direction on its primary consumer-level services.

ADSL technology is capable of being less asymmetric. Some CS-ISPs use ILEC ADSL services with the upstream and downstream bandwidth both set to 640 kbps. This is near the maximum upstream and minimum downstream rate, but it provides a business-class symmetric service using inexpensive ADSL equipment. The cost of this to the underlying ILEC is essentially the same as for a more asymmetric service; the choice is made at the ISP layer, not the telecommunications service layer.¹⁴ This choice would be lost under Verizon's requested forbearance.

- ***Service Differentiation - Vertical Services***

Retail ISP/CS-ISPs provide a number of "vertical" services in addition to raw Internet access. These are also differentiators. America Online, for instance, sells a "bring your own" service that provides no access, merely permission to use its vertical services. But most subscribers pick an ISP/CS-ISP that provides a bundle of access and vertical services. The most familiar vertical service is probably email. This has many differentiators other than the aforementioned spam filtering. Email, in turn, has two functions: relaying (used for sending) and servers. The relaying function of most ISPs is straightforward, allowing users of their networks to send email anywhere via their server. There are, however, subtle differences. The Internet's mail protocol, SMTP, uses port 25. As an anti-spam measure, some ISP/CS-ISPs

¹⁴ The maximum downstream rate for ADSL is 8 meg, the maximum upstream for ADSL is 1 meg. Some ISPs use a combination of asymmetric upstream and downstream to offer a more symmetric offering, suitable for business. For example, an ILEC's 768Kbps x 512Kbps ADSL offering can be used to create a 512x512Kbps symmetric service offering.

block port 25 sent from the user to anyone but the ISP server. This prevents virus-hijacked machines from becoming bulk senders. But it also prevents users from sending mail directly, as some choose to do. A few ISP/CS-ISPs permit port 25 SMTP sending but cap the volume, which allows typical users' email to flow, but blocks the torrent caused by a virus.

Verizon Online, however, instituted a policy by which its users are required to put Verizon's domain name in the header of their message, instead of the name of their chosen email address (which, of course, could be a private domain or a different service). This *mandatory advertising* policy is incompatible with many users' preferred mode of operation, but is nonetheless imposed on Verizon's DSL subscribers.

Email receiving options are also varied. Retail ISP/CS-ISPs provide an email server that stores incoming emails until fetched. These do not all behave the same. They have different storage capacity quotas, blocking emails once the quota is full. Most support POP3, a simple protocol that allows retrieval of email by a client. A few ISPs support IMAP4, a more elaborate protocol that allows manipulation of the email on the server, and allows email to remain on the server while being filed by a mailbox or selectively retrieved. Some ISP POP3 servers support an option that allows email to be selectively retrieved by multiple clients (say, a user's desktop and laptop computers) while retaining knowledge that it has or has not been already retrieved once. Some encrypt passwords in transit; some do not. Many, but not all, offer web-based access as well. Many offer more than one mailbox per account, especially suitable for families; some only offer one.

CS-ISPs also offer additional services such as personal web pages. Web services vary in terms of storage capacity, usage quota, page creation support and available features (Common Gateway Interface or Active Server Page support, PHP programming, etc.). Some broadband

ISPs also offer dial-up support for travel, with or without a quota of “free” hours. Some provide help with virus removal; others bundle it in software. Some support only Microsoft Windows users; some provide support for Apple Macintosh and Linux users.

What becomes of this clearly beneficial diversity if the Commission grants Verizon’s Petition? Homogeneity in information services and technology benefits no one but the dominant provider of both content and transmission. The Commission must not grant Verizon the opportunity to squelch the diversity in options driven by CS-ISPs – but that is exactly what Verizon is asking the Commission for authority to do.

- ***Service Differentiation - Servers and Tunnels***

CS-ISPs often prohibit residential retail customers from having “servers” on their lines. This is widely done to prevent subscriber web servers from overloading the upstream direction; cable modem networks are especially limited in the upstream direction. But just how this is interpreted does vary from ISP to ISP. Some have policies against using secure tunneling protocols, such as IPsec. Some allow private email servers, some do not. Again, this is the type of issue that is best handled in a vibrant, competitive market with many players. These issues do not impact the underlying telecommunications layer, only the higher layers serviced by CS-ISPs.

The “layered” approach to regulatory policies, as supported by FISPA and favored by the vast majority of non-ILEC commenters in the WC Docket No. 02-33 rulemaking proceeding is fully compatible with this approach. Forbearance is not.

The preceding Sections demonstrate that the current regulatory system has worked, continues to work, and has resulted in immeasurable benefits and abundant choice to the American consumer. Verizon’s Petition creates a clear and present danger to these achievements and threatens continued diversity, tailoring of services, and customer choice made possible by

CS-ISPs. What's more, as will be shown in the following Sections, Verizon's Petition is legally deficient. For all these reasons, the Petition must be denied.

IV. VERIZON'S PETITION DOES NOT SATISFY ANY OF THE SECTION 10(a) FORBEARANCE CRITERIA; IT MUST BE DENIED

The Commission may not grant Verizon's request for forbearance unless it is convinced that Verizon has satisfied the explicit forbearance requirements set forth in section 10(a) of the Communications Act. In particular, Verizon must demonstrate that the *Computer Inquiry* and Title II common-carriage requirements: (1) are not necessary to ensure that the charges and practices for broadband services "are just and reasonable and are not unjustly or unreasonably discriminatory;" (2) are not necessary "for the protection of consumers;" and (3) are not necessary to protect the public interest,¹⁵ and, in particular, that such non-enforcement will "promote competitive market conditions" and "enhance competition among providers of telecommunications services."¹⁶ If "any one of the three prongs is unsatisfied" the Commission must deny Verizon's Petition.¹⁷

In considering Verizon's Petition, the Commission must adhere to the principle that "[t]he decision to forbear from enforcing statutes or regulations is not a simple decision, and must be based upon a record that contains more than broad, unsupported allegations of why the statutory criteria are met."¹⁸ Because these criteria focus on competition and consumer

¹⁵ 47 U.S.C. § 160(a).

¹⁶ 47 U.S.C. §160(b).

¹⁷ *CTIA v. FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003); The Commission "cannot forbear in the absence of a record that will permit [it] to determine that each of the tests set forth in Section 10 is satisfied for a specific statutory or regulatory provision;" *In the Matter of Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers*, First Report and Order, 15 FCC Rcd. 17414, ¶ 13 (2000) ("*Fixed Wireless Forbearance Order*") (internal citations omitted); *see also*, *In the Matter of Amendment of the Commission's Rules Concerning Maritime Communications*, Third Report and Order and Memorandum Opinion and Order, 13 FCC Rcd. 19853, ¶ 55 (1998) (request for forbearance from Title II common carrier obligations "cannot be granted because it is too vague, both as to the specific provisions from which we should forbear from enforcing, and as to why forbearance would be in the public interest").

¹⁸ *PCIA's Broadband PCS Alliance's Petition for Forbearance for Broadband Personal Communications Services*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 16857, ¶ 113 (1998).

protection, both the Commission and the courts 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.¹⁹ The Commission 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.”²⁰ There must be hard market data that unequivocally supports the drastic result of forbearance.²¹ Section 10(a) analysis cannot be applied in the abstract, but must focus on the specific market conditions existing with respect to the regulations and service at issue.

As set forth below, Verizon does not provide the required factual and legal basis for forbearance and thus fails to meet the statutory requirements of Section 10.

A. VERIZON DOES NOT SHOW THAT, ABSENT REGULATION, ITS RATES WILL BE “JUST AND REASONABLE” AND IT WILL NOT ENGAGE IN “UNREASONABLE AND DISCRIMINATORY” PRACTICES.

In order to satisfy the first prong of the three-part forbearance analysis, Verizon must make a *prima facie* showing that sufficient competition exists so that application of the

¹⁹ *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).

²⁰ Report and Order, Fifth Memorandum Opinion and Order, *1998 Biennial Regulatory Review – Review of ARMIS Reporting Requirements*, 14 FCC Rcd. 11443, ¶ 32 (1999).

²¹ See *Petition of US West Communications, Inc. For Forbearance from Regulation as a Dominant Carrier in Phoenix, Arizona MSA*, Memorandum Opinion and Order, 14 FCC Rcd. 19947 ¶ 25 (1999) (“*Special Access Forbearance Order*”), reversed and remanded on other grounds, *AT&T v. FCC*, 236 F.3d 729 (D.C. Cir. 2001). *Fixed Wireless Forbearance Order*, (the Commission rejected forbearance because “[t]he BOC petitioners must provide more than just general conclusions about market conditions so that interested parties have a meaningful opportunity to refute, and this Commission has a meaningful opportunity to evaluate, the BOC petitioners’ claims.”)

Computer Inquiry and Title II rules are not necessary to ensure that Verizon's rates and practices for the broadband services are just, reasonable, and not unreasonably discriminatory.²²

The Commission has never granted a carrier forbearance from Sections 201 and 202 of the Act and it should not do so here.²³ The Petition lacks any assurance of just and reasonable rates and does not explain how unjust and unreasonable discrimination against CS-ISPs will not occur. Verizon's Petition relies on broad, unsupported claims regarding the status of competition in the broadband market. However, determining whether incumbent LECs continue to possess market power over access is a highly fact-specific inquiry.²⁴ Verizon has not adequately shown that existing marketplace forces are sufficient to constrain its market power and ensure that rates and practices are just, reasonable, and not unreasonably discriminatory. Therefore, Verizon's Petition fails to meet its burden of providing sufficient evidence to satisfy section 10(a).

1. Regulation is Needed to Ensure Verizon Does Not Use its Market Power to Undermine Competition.

The implementation of the *Computer Inquiry* rules were necessary to provide some form of equity to competitors entering a market dominated by providers whose network was built by the public. These requirements were based further on the fact that the ILECs are both competitor and supplier and are therefore required to prevent anti-competitive practices such as cross-subsidization, price squeezes, predatory pricing and practices.

²² *Special Access Forbearance Order* ¶ 32.

²³ Even with the existence of the seemingly competitive wireless market, the Commission has consistently denied requests for forbearance from §§ 201 and 202 obligations. *See e.g., In the Matter of Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd. 16857, ¶ 23 (Commission denies request for forbearance from §§ 201 and 202 even "[a]ssuming all relevant product and geographic markets become substantially competitive" because "carriers may still be able to treat some customers in an unjust, unreasonable, or discriminatory manner").

²⁴ *See e.g., AT&T Corp. v. FCC*, 236 F.3d 729, 735-37 (D.C. Cir. 2001); Report and Order, Fifth Memorandum Opinion and Order, *1998 Biennial Regulatory Review – Review of ARMIS Reporting Requirements*, 14 FCC Rcd. 11443 (1999); *WorldCom, Inc. v. FCC*, 238 F.3d 449, 459 (D.C. Cir. 2001).

The ILEC networks are the only monopoly networks created and sustained by public rate payers and regulatory policy that ensures profitability. The *Computer Inquiry* rules were needed and continue to be needed to avoid the resulting distortions to the marketplace that will be created as a result of the Commission allowing the ILECs to erect barriers to market entry and thereby deny consumer choices and options for broadband services.

Verizon's Petition fatally ignores the principles of a layered-based approach to Internet regulation. Under such an approach, power should be assessed separately for each layer and a company with market power in a lower layer (*e.g., Verizon*) should be prohibited from leveraging that power to harm competition in markets that involve upper layers (*e.g., CS-ISPs*). It is undeniable that Verizon has market power in the physical (lower) layer of the IP-based networks. Consequently, the Commission must safeguard against the potential of Verizon using this lower layer power as leverage to harm competition in one of the higher layers (*e.g.* application or content layers). If Verizon succeeds in doing away with the safeguards of *Computer Inquiry* and Title II, the "just, reasonable and nondiscriminatory rates and terms of service" that exist today will not remain nor can they.

The rates and terms of service in today's marketplace are based on all the competitors that actively participate in that market. Their elimination will cause a diminution in consumer choice and narrow, if not eliminate, the array of rates and terms of service that exist today because of the diversity of the competitive participants. Therefore, economic regulation is necessary to restrain Verizon from exercising its market power to undermine competition.

2. Verizon and Cable are Equal Partners in the Broadband Duopoly.

Despite its cries to the contrary, Verizon has market power, a lot of market power. Namely, Verizon controls last-mile transmission facilities used to provide DSL service which

small CS-ISPs rely on to connect end users to the Internet, as well as to provide IP-based content and applications.²⁵ Indeed, statistics show that in the broadband marketplace, the incumbent LECs enjoy market power as either the monopoly or duopoly provider.²⁶ Thus, the fact the cable companies have slightly more market power than ILECs does not equate to the ILECs “lacking” market power. Nor does it justify abandonment of the current regulatory framework.

A recent study by the Leichtman Research Group shows that ILEC ADSL added subscribers actually exceeded net adds for cable for the First Quarter of 2004.²⁷ Additional evidence from the Pew Internet and American Life Project confirms that “DSL now has a 42% share of the home broadband market” compared with cable’s 54% share.²⁸ According to the latest data produced by industry analyst Point Topic, DSL gained 3.2 million new subscribers in the third quarter of 2004, to reach a total of 12.6 million DSL-enabled phone lines, raising DSL’s broadband market share by 3.8%.²⁹ In another report released by Jupiter Research, it is estimated that by 2008 the United States should have a 50% broadband penetration, in which DSL will narrow the 2-to-1 adoption gap, reaching more than 20%, compared to cable modem’s nearly 25% share. Jupiter figured DSL lines accounted for 6.7 % of total U.S. Internet accessibility in 2003, with cable modem representing 14.4 percent. The divide narrows

²⁵ ILECs provision approximately 92% of all loops and receive approximately 88% of all revenues of local service providers in the US. *FCC Statistics of Communications Common Carriers*, Table 5.1 – Total USF Loops for all Local Exchange Companies; Table 5.13 – Gross Revenues Reported by Type of Carrier (rel. March 2, 2004).

²⁶ As of June 30, 2003, ADSL and cable accounted for 91.0% of all high-speed lines in the U.S. and accounted for 97.3% of all high speed lines in the residential and small business market. Of those ADSL lines, incumbent LECs have a 94.6% market share and CLECs have only 5.4%. *FCC High Speed Services for Internet Access: Status as of June 30, 2003*, Table 1, Table 3 and Table 5.

²⁷ “A Record 2.3 Million Add Broadband in First Quarter of 2004,” Leichtman Research Group Press Release (May 11, 2004).

²⁸ Pew Internet Project Data Memo, at 2 (April 2004): *see* <http://pewinternet.org/reports.asp?Report=120&Section=ReportLevel1&Field=Level1ID&ID=505>

²⁹ Report found at www.point-topic.com; *see also*, <http://blog.tmcnet.com/blog/tom-keating/voip/voip-blog/dsl-statistics.asp>

incrementally until it finally reaches just over 4.5% points in 2008.³⁰ According to the FCC, in some markets, incumbent LEC's ADSL leads cable in the market share.³¹ The Pew Study further reveals that all other providers, including fixed-satellite and wireless, captured just 3% of the market.³² Moreover, in line with the FCC data, 17% of consumers are served by just one last mile broadband provider. What these statistics indicate is that incumbent LECs, such as Verizon, are now nearing equal partners with cable in the broadband market share.

3. Cable Offers Essentially No Competition in the Market For Broadband Transmission Sold to Small CS-ISPs.

As the above statistics show, currently, there are two primary methods competing to provide broadband Internet access, DSL offered by the incumbent LECs and the Internet-over-cable technology, offered by the cable television industry. However, as Verizon repeatedly points out, the two industries operate under very different conditions due to the 1996 Act which required the local telecom monopolies to open their infrastructures to competition. To date, no such directives have been given to the cable industry. As a result, not bound by the requirements of Sections 201 and 202, the cable industry has refused to open their lines to or partner with small CS-ISPs. *E.g.*, LexiSoft Declaration at ¶ 7 (explaining that the company “explored providing broadband ISP services through ... CableCo ... offering ISP services in our market. Our request for access to the CableCo's platform was completely ignored”); CSSLA Declaration at ¶7 (“Our company explored providing broadband ISP services through Time Warner and Charter, the two CableCos offering ISP service in our market. Our company initiated negotiations with these CableCos and negotiations went nowhere. Both CableCos flat out

³⁰ *DSL Leads Globally – US Gap Narrowing - The global broadband connection of choice is expected to catch up to the cable modem in the U.S.*, Robyn Greenspan, CyberAtlas (November 23, 2003), found at http://isp-planet.com/research/2003/dsl_031126.html

³¹ The FCC's statistics show that in California, ADSL has 49.6% and cable has 40.4% of the broadband market. *FCC High Speed Services for Internet Access: Status as of June 30, 2003*, Table 7 – High Speed Lines by Technology as of June 30, 2003 (rel. Dec. 2003).

³² See Pew Internet Project Data Memo.

refused to allow us access to their platforms.”); SiteStar Declaration at ¶7 (“Our company explored providing broadband ISP services through Adelphia, the predominant CableCo serving our market. We received no cooperation from Adelphia and negotiations were not fruitful. Adelphia completely ignored our company’s request for access.”); WebKorner Declaration at ¶ 7 (“Our company explored providing broadband ISP services through Time Warner, the CableCo offering ISP service in our market. Our request for access to Time Warner’s platform was ignored.”); WTS Online Declaration at ¶ 6 (“Cable is not ubiquitous ... it is telephone wires that are ubiquitous”); Kinex Declaration at ¶ 7 (“Our company explored providing broadband ISP services through Charter, the CableCo offering ISP service in our market. Our company initiated negotiations with Charter sales personnel and these negotiations went nowhere. Charter absolutely refused to allow our company any access to its platform.”); Bayou Declaration at ¶7 (“Our company explored providing broadband ISP services through Time Warner, the CableCo offering ISP services in our market. Our company initiated negotiations with Time Warner ... [the] request for access to Time Warner’s platform services ... went nowhere.”); GoldCoast Declaration at ¶ 7 (“Our company explored providing broadband ISP services through Time Warner, the CableCo offering ISP services in our market. Our company initiated negotiations with Time Warner shortly after the company merged with AOL. Our request for access to Time Warner’s platform was met with the following response: AOL/Time Warner is only interested in allowing 1 regional ISP and 1 national ISP access to its platform to satisfy the FCC’s requirements, we have met these requirements and we are not interested in any more inquiries from CS-ISPs.”); ECSIS Declaration at ¶ 7 (“Our company explored providing broadband ISP services through CableOne, the CableCo offering ISP services in our market. Our company initiated negotiations with the [sic] CableOne and these negotiations went nowhere. CableOne

absolutely refused to allow our company any access to its platform.”); COL Declaration at ¶ 7 (“Our company explored providing broadband ISP services through Time Warner, the CableCo offering ISP services in our market. Our company initiated negotiations with Time Warner and these negotiations went nowhere. Time Warner never so much as responded to our request for access to its platform.”); Supernova Declaration at ¶ 7 (“Our company explored providing broadband ISP services through the CableCo offering ISP services in our market. Our company initiated negotiations with the CableCo and these negotiations went nowhere. The CableCo summarily rejected our request for access to its platform.”); Acceleration Declaration at ¶ 7 (“Our company explored providing broadband ISP services through Cox Communications, the CableCo offering ISP service in our market. But no progress has been made towards obtaining access to Cox’s platform. According to Cox and due to “technical limitations”, only resale of their retail product was made available to us and with very thin margins. In other words, Cox would not agree to provide access to their infrastructure as part of an interconnection agreement. They only wanted us to sell their retail product for them, and in essence, become sales agents for them.”); Internet Junction Declaration at ¶ 7 (“Our company was one of the few small independent ISPs that was able to establish a relationship with Time Warner... while we were successful, we are the exception to the rule... Our success is not attributed to marketplace forces, but instead is directly linked to the FTC Conditions... attached to the AOL/Time Warner merger approval”); Intelligence Network Declaration at ¶ 7 (“Our company initiated negotiations with Time Warner, but these negotiations when nowhere.”).

Verizon seizes on the status of cable systems and cites in its Petition the fact that cable companies, their broadband “competitors,” are not subject to *Computer Inquiry* and common carriage obligations. Verizon complains that this is not “fair” or a “level playing field”. This is a

fallacious argument. The cable and telephone industries are very different, with a different history, different capital structure, different network architectures, and, for better or for worse, subject to different laws. While many CS-ISPs would no doubt like “equal access” to cable modem networks, it is even more important that they retain the access that they now have to the ILEC networks. See WTS Online Declaration at ¶ 5 (stating that “the existing marketplace lacks competitively priced, technologically-equivalent and commercially-available alternatives to Verizon and/or other ILEC wholesale transmission services which are essential for our company to provide broadband ISP services to our existing and prospective customers”); WebKorner Declaration at ¶10 (“Bottom line is that in the markets we serve, there are no alternatives to BellSouth.”); Bayou Declaration at ¶ 10 (“Bottom line is that, in the markets we serve, there are no alternatives to BellSouth.”); GoldCoast Declaration at ¶ 10 (“Bottom line is that, in the markets we serve, there are no alternatives to BellSouth.”). Verizon’s markets are no more competitive in this regard than BellSouth’s.

The ILEC position is reminiscent of a comedy routine³³ in which a faith healer was visited on stage by a man who had one deformed hand. The healer repeatedly inveighed, “Lord, will you *please* make this one hand like the other!” Then the subject looked at his hands, and the faith healer looked at them and cried out, “Wrong hand!”

Telephone companies should not be turned into cable companies. Verizon certainly likes to cite the alleged similarities of the two networks. When CS-ISPs began asking for cable modems to be opened up, some may have cited the obligations that had always applied to telephone companies. But the cable companies did not build their networks based on the guaranteed profits of a regulated monopoly that has existed and been filling the coffers of the

³³ Jack Burns and Avery Schreiber, *The Faith Healer – The Immobile Thumb*, from the album *The New Emerging Bigot*.

ILECs for nearly a century and a half. Cable companies' profits have not benefited from rate-of-return regulation. Cable companies have never been totally free from competitive alternatives such as over the air broadcasting and multichannel satellite services. For the first decades of the cable industry's existence its market penetration never exceeded 40-50% versus the typical 96% penetration of the phone industry. Given the success of cable today, it is fair to question whether cable should be immune from open access requirements. The questions surrounding the proper role of cable for the future is not a reasoned basis to allow the ILECs to foreclose the markets, in which they are dominant, to competitive and diverse providers.³⁴

Cable modem networks were developed by companies whose primary business was entertainment. They saw the Internet taking away eyeballs from television and saw themselves as able to provide a competitive Internet service. Assuming that the Commission's position in the pending *Brand X*³⁵ case prevails at the U.S. Supreme Court, cable modem services can be easily described as self-provisioned ISPs. That is, 180 degrees different from the model that the telecommunications industry has long used, in which they provisioned the bandwidth for any type of user. Closing off ILEC DSL networks because they do something that self-provisioned ISPs can do is an abrogation of the Commission's responsibility to the public and contrary to the dictates of the 1996 Act.

Another reason that cable modems do not offer common carriage to any CS-ISP is because their networks are not designed for it. The standard for cable modems, DOCSIS (Data Over Cable Service Interface Specification), was created for CableLabs during the 1990s at a

³⁴ Likewise, satellite is *not* an equivalent competitor for Internet access – not only is upstream bandwidth far more costly, but satellite transit latencies are harmful to interactive Internet activity. *E.g.*, LexiSoft Declaration at ¶ 7; SiteStar Declaration at ¶ 8; WebKorner Declaration at ¶ 8; WTS Online Declaration at ¶ 6; Bayou Declaration at ¶ 8; GoldCoast Declaration at ¶ 8; COL Networks Declaration at ¶ 8; Mecklenburg Communications Declaration at ¶ 7; WCK at ¶ 7.

³⁵ *Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003), *cert. granted*, ___ U.S. ___, 2004 WL 2153536 (Dec. 3, 2004).

time when there was no pressure to create a common carrier-like service. Instead, the model was more like that of a Local Area Network. DOCSIS makes use of an arbitration procedure for its limited upstream bandwidth, and while it has a reserved-bandwidth mechanism primarily of interest to cable telephony, it lacks the flexibility in data-bandwidth allocation found in ATM-based DSL networks. This does not mean that DOCSIS cannot be used for an IASP service that supports multiple IVSPs. It can; some cable companies do offer access to alternative ISPs. But the specific means of doing so are not well-established or standardized, and the cable companies doing so typically only invite a small number of alternative ISPs onto their cable. This stands in marked contrast to DSL, which was designed from the ground up for common carriage, and whose ATM layer permits an essentially unlimited number of CS-ISPs to share a DSLAM with minimal interaction.

Consequently, at this time, the existence of cable is irrelevant to the CS-ISPs. Cable is not an available alternative and therefore offers no competition in the market for broadband services sold to CS-ISPs.³⁶

4. A Duopoly with Cable Does Not Provide Sufficient Price Discipline.

Verizon further argues that regulation is unnecessary because the “competitive broadband market” will ensure just, reasonable and nondiscriminatory rates and terms for ILEC broadband services. This simply is not true. A duopoly partnership such as that of the ILECs and cable companies does not provide the sufficient price discipline like one that results from a robustly competitive market. “In a duopoly, ... supracompetitive pricing at monopolistic levels is a danger.”³⁷ Indeed, the CS-ISPs are already experiencing anti-competitive marketplace practices

³⁶ See LexiSoft Declaration at ¶ 7; CSSLA Declaration at ¶7; SiteStar Declaration at ¶7; WebKorner Declaration at ¶ 7; WTS Online Declaration at ¶¶ 5-6; Kinex Declaration at ¶ 7; Bayou Declaration at ¶7; GoldCoast Declaration at ¶ 7; ECSIS Declaration at ¶ 7; COL Declaration at ¶ 7; Supernova Declaration at ¶ 7.

³⁷ *FTC v. H.J. Heintz*, 246 F.3d 708, 724 (D.C. Cir. 2001).

by their ILEC wholesalers/competitors. *See* Intelligence Network Declaration at ¶ 9 (“Verizon sells DSL, frame relay and point-to-point circuit pricing to their retail customers for less than the wholesale cost offered to us. Also, by packaging “deals” that include internet and voice services, it becomes cost-prohibitive for us to compete... In addition, [Verizon’s] resale “minimums” are so high that there is no way that anyone could ever commit to them.”); Mecklenburg Communication Declaration at ¶ 8 (“Our company has also experienced anti-competitive marketplace practices by Verizon, our ILEC wholesaler/competitor. We’ve experienced everything from below wholesale cost pricing to intentionally slow installations....”); WTS Online Declaration at ¶¶ 7-16, 22-23 (“Our experiences with Verizon lead us to believe that Verizon has successfully embarked on a course to restore its monopoly powers and stranglehold on wire line telecommunications within its geographical territories. Today, Verizon is attempting to take over as much of the Internet Service business as possible while killing off as much other competition as possible. Verizon’s Petition is its latest attempt to control 100% of the data that moves over "their" wires in the form of broadband DSL or such other services as they deem appropriate and profitable. Verizon’s Petition, if granted, will guarantee the demise of rural Internet providers. This means the reduction in the availability of general computer technology in rural areas, higher prices for consumers and less choice. We view Verizon’s Petition as a request to the FCC to officially “bless” Verizon’s take over of the final 10% of the business they do not yet completely own. Already, Verizon is willing to sell at retail below its cost of doing business. In such an environment, competitors have no hope of competing. In fact, Verizon’s business practices and predatory pricing caused my company to lose 20% of its business base and cash flow over the course of the past year. The examples of monopolistic anti-competitive behavior are plentiful. Verizon has retail and wholesale contracts with independent

providers at a cost that is higher than their lowest priced "retail" bundled price and an unbundled price little more than the wholesale price. The result is that over 90% of DSL customers have chosen to save money, by taking the lower price from the unregulated subsidiary instead of an independent. Today, Verizon has an unregulated subsidiary that competes in the open market with companies that have a wholesale (or retail) contract with Verizon for the same service. The Verizon subsidiary, Verizon Online (and only Verizon Online), enjoys the following:

- Each caller to the business office of the phone company hears a pitch for DSL and referrals ONLY go to Verizon Online. It doesn't matter if you are calling for new service, to pay a bill, or whatever, you will hear a pitch for Verizon Online through music-on-hold or from the representative with whom you speak.
- Verizon field personnel receive credits for referrals that result in the installation of DSL, but only in areas where Verizon Online operates and only if the customer subscribes to Verizon Online. Some field personnel are quick to allege that repairs will be more prompt and successful if the subscriber switched to Verizon Online - this is done during repair procedures advanced by wholesale contractors.
- Verizon.com features prominent mention of DSL on its home pages - and links to Verizon Online exclusively.
- Verizon offers "bundles" that include VOL DSL service at a discount. I understand this is not illegal or against regulations - but should be if true competition is to work - at least until competitors can offer Verizon-like phone services, perhaps through VoIP.
- Verizon telemarketers, presumably under contract with Verizon Online, contact each Verizon retail customer, including those currently serviced by another company under a Verizon LEC DSL contract and, when they discover that one of "their competitors" is furnishing service, offer discounts if the customer will switch.
- Verizon Online can turn in an order to switch a Verizon DSL customer from another provider to themselves without challenge.
- Many Verizon LEC repair personnel have a DSL modem as part of their issued equipment. Sometimes, the same modem is left at a customer premise when a VOL customer's modem has failed.
- Verizon Online calls each new customer WTS Online turns in with a lower price offer.

All of the above practices are limited to Verizon Online. And that isn't the only area where it would appear that Verizon Online benefits from its relationship with Verizon in ways that unaffiliated ISPs do not. We have no way of knowing when, or if, Verizon will turn on a given location for DSL until that location suddenly gets a response in the database. Verizon also

delays provisioning service for non-affiliated ISPs in order to allow Verizon Online to launch first. This type of activity resulted in the loss of numerous customers to Verizon. Verizon does offer wholesale contracts, but the price exceeds the lowest retail cost provided by Verizon Online through bundling arrangements. Verizon now offers a very low price for business customers, \$39.95, and allows the first three months FREE. A wholesale customer of Verizon cannot compete with those prices. Through business practices and predatory pricing, it would appear that Verizon is determined to eliminate as much competition as they possibly can and in fact, Verizon Online controls 90% of DSL business done through Verizon at this time.

I was able to compete on a level playing field with Verizon Online's prices, until they reduced their prices to the point where I cannot compete because I pay Verizon more than Verizon Online charges for ISP service in some cases, and in other cases, the four or nine dollar margin isn't enough to even provide bandwidth due to the cost of bandwidth in rural areas plus Verizon's charges for connecting that bandwidth to their DSL "Cloud." If past behavior is any indication, the ISP industry, as we know it, will be history.”); Supernova Declaration at ¶ 8 (“Our company has also experienced anti-competitive marketplace practices by our ILEC wholesaler/competitors. Our ILEC wholesalers/competitors sell retail DSL services below what it costs our company to purchase the same services at wholesale.”); Kinex Declaration at ¶ 10 (“Our company has also experienced anti-competitive marketplace pricing by our ILEC wholesaler/competitor. Our current wholesale price for a DSL line exceeds the \$24.95 retail price of our ILEC wholesaler/competitor’s DSL service by over \$10 per line. In addition our ILEC wholesaler/competitor provides its customers with free modems. Our company cannot offer our customers the same deal, ultimately making our services less attractive to prospective customers.”); SiteStar Declaration at ¶ 9 (“Our company has also experienced anti-competitive

marketplace practices by our ILEC wholesaler/competitor. Our company happily signed up as an ISP partner when our ILEC wholesaler/competitor launched its wholesale DSL program. However, over time our ILEC wholesaler/competitor reduced the retail price of its own DSL service to within \$10 and now \$5 of our company's wholesale costs. These pricing tactics result in a price squeeze, which if sustained over time will force our company, and others like it, out of business.”).

Undoubtedly, without Title II safeguards, heightened anti-competitive marketplace pricing is a near certainty. Intramodal competition and the continuance of competitive choices for consumers demand the denial of Verizon's Petition.

5. Economic Regulation is Needed for the Survival of ISPs.

As CS-ISPs across the country will attest, the broadband market is not competitive.³⁸ Verizon offers no convincing market evidence to support its bare assertions to the contrary. The lack of empirical support for Verizon's claims is unsurprising because it is nothing more than wishful thinking on Verizon's part.

Rather, what marketplace evidence shows is that the Petition's request is nothing less than a death sentence for an entire sector of the economy, the CS-ISP. Intelligence Network Declaration at ¶ 4 (“Due to existing conditions in the markets in which our company provides ISP services, **our company remains highly, if not entirely, dependent on existing Title II and/or Computer Inquiry requirements to obtain access to Verizon and/or other ILEC**

³⁸ See WTS Online Declaration at ¶¶ 5-8, 25; LexiSoft Declaration at ¶ 5 (“The existing marketplace lack competitively priced, technologically-equivalent and commercially-available alternatives to BellSouth and/or other ILEC wholesale transmission services which are essential for our company to provide broadband ISP services to our existing and prospective customers”); Internet Junction Declaration at ¶ 5 (accord); Intelligence Network Declaration at ¶ 5 (accord); CSSLA Declaration at ¶ 5 (accord); SiteStar Declaration at ¶ 5 (accord); WebKorner Declaration at ¶ 5 (accord); Kinex Declaration at ¶ 5 (accord); Bayou Declaration at ¶ 5 (accord); GoldCoast Declaration at ¶ 5 (accord); ECSIS Declaration at ¶ 5 (accord); COL Declaration at ¶ 5 (accord); Supernova Declaration at ¶ 5 (accord); Computer Office Solutions Declaration at ¶ 5 (accord); Mecklenburg Communications Declaration at ¶ 5 (accord); WCK Declaration at ¶ 5 (accord); C-N-S Declaration at ¶ 5 (accord); Acceleration Declaration at ¶ 5 (accord).

wholesale transmission services which are essential to provide broadband ISP services to our existing and prospective customers.”) (emphasis added); Internet Junction Declaration at ¶ 4 (accord); CSSLA Declaration at ¶ 4 (accord); SiteStar Declaration at ¶ 4 (accord); WebKorner Declaration at ¶ 4 (accord); Kinex Declaration at ¶ 4 (accord); Bayou Declaration at ¶ 4 (accord); GoldCoast Declaration at ¶ 4 (accord); ECSIS Declaration at ¶ 4 (accord); COL Declaration at ¶ 4 (accord); Supernova Declaration at ¶ 4 (accord); Computer Office Solutions Declaration at ¶ 4 (accord); Mecklenburg Communications Declaration at ¶ 4 (accord); WCK Declaration at ¶ 4 (accord); C-N-S Declaration at ¶ 4 (accord); Acceleration Declaration at ¶ 4 (accord).

While it is true that some CS-ISPs can carry on using the ever-declining dialup method and a few will find alternative carriers, those who are dependent now on ILEC DSL services are likely to be forced out of the business. *See* WTS Online Declaration at ¶ 5 (stating that the “existing marketplace lacks competitively priced, technologically-equivalent and commercially-available alternatives to Verizon and/or other ILEC wholesale transmission services which are essential for our company to provide broadband ISP services to our existing and prospective customers.”).

The Competitive Local Access Carrier alternative has been largely shut out by the Commission’s recent decisions on line sharing, “fiber to the curb”, unbundled fiber feeder subloops, and high-capacity interoffice facilities. Fewer CLECs will be able to offer competitive DSL in the future, so CS-ISPs will have no place to turn.³⁹ As is set forth below, many CS-ISPs find the telephone system to be not only the primary, but exclusive means to get broadband information to their customers.

³⁹ *See* Kinex Declaration at ¶ 8; Bayou Declaration at ¶ 9; GoldCoast Declaration at ¶ 9; Computer Office Solutions Declaration at ¶¶ 7-8); Acceleration Declaration at ¶ 9.

6. For Most Small ISPs, the “Telephone System” is the Primary and Sometimes Exclusive, Means to Get Broadband Information to its Customers.

FCC precedent rejects forbearance *except* where there is clear and substantiated evidence of a robust competitive market.⁴⁰ Verizon suggests that the telephone network is no longer the primary means for CS-ISPs to obtain access to customers and that access is being provided by alternative means. This simply is not true and Verizon neglects to present any evidence to show otherwise. Indeed, with the migration to broadband technologies and lack of broadband access by any other means, CS-ISP reliance on the incumbent’s telephone network is as important today as ever.

In 2004, more Internet subscribers are using broadband than dialup connections.⁴¹ This has led to stagnating demand and declining volumes for dialup-based ISPs, from giant AOL to the smallest mom-n-pop ISP. Combine this market reality with ILEC demands for exorbitant switched access charges for ISP-bound calls *if* the ISP’s modem is not within the local calling area of the caller and ISPs have good reason to want to migrate to DSL and other broadband delivery platforms.

However, as has been touched upon earlier and described in greater detail below, for one reason or another, from technological limitations to insufficiently competitive market forces,

⁴⁰ *In the Matter of Petition for Forbearance of the Independent Telephone & Telecommunications Alliance*, Sixth Memorandum Opinion and Order, 14 FCC Rcd. 10840 (1999) (incumbent LECs failed to meet first prong of Section 10 forbearance standard where incumbents did not demonstrate that they face “substantial competition”); *see also*, *In the Matter of Petition for Forbearance of the Independent Telephone & Telecommunications Alliance*, Third Memorandum Opinion and Order, 14 FCC Rcd. 10816, ¶ 12 (1999) (first prong of Section 10 forbearance test not met where “independent LECs have sufficient ability through their control of bottleneck facilities to harm the in-region long distance services market by engaging in cost misallocation, access discrimination, and price squeeze); *In the Matter of 1998 Biennial Regulatory Review – Review of Depreciation Requirements for Incumbent Local Exchange Carriers*; *United States Telephone Association’s Petition for Forbearance from Depreciation Regulation of Price Cap Local Exchange Carriers*, Report and Order in CC Docket No. 98-137 Memorandum Opinion and Order in ADS 98-91, 15 FCC Rcd. 242, ¶ 54 (1999) (under first prong of forbearance test, incumbent LECs failed to “demonstrate [] that the local exchange market is sufficiently competitive” to warrant forbearance).

⁴¹ *See* “Broadband passes dial-up in U.S.” Eric Auchard (citing Nielsen/Net ratings report that concludes 51% of U.S. residential users connect to the Internet via broadband links), found at www.msnbc.msn.com/id/57509681.

these “other broadband delivery platforms” remain out of reach to the small, CS-ISP. The only broadband delivery option that is available is ILEC DSL and this option remains available only through Title II and *Computer Inquiry* dictates, which, if removed, would place ILEC DSL equally out of reach to FISPAs members and the hundreds, if not thousands, of their CS-ISP counterparts throughout America.

- ***Wireless and Satellite Options Are Limited and Generally Unacceptable for ISPs.***

ILECs including Verizon suggest, albeit again without the support of any detailed evidence, that CS-ISPs have satellite and wireless options and therefore the telephone network is no longer the primary vehicle for delivery. Such a position is fatally flawed in that it fails to recognize that satellite and wireless services neither reliable nor affordable for most CS-ISPs and, thus, are *not* viable options. Satellite and wireless, therefore, *cannot* be considered a contributing factor in the competitive equation. *See* WTS Online Declaration at ¶ 6 (“... there is limited service available via fixed wireless using regulated and unregulated bandwidth, but that methodology has a very limited footprint... Moreover, it should be noted that the two largest wireless providers are Verizon and SBC/BellSouth. 802.11 as a delivery method has limited availability and suffers from reliance on unregulated spectrum. Satellite, as a delivery medium, suffers from the need for high price and issues with transmitters.”); WebKorner Declaration at ¶ 8 (“Our company investigated the possibility of providing service via Satellite. After investigation, we determined that Satellite service is not technologically comparable to landline broadband due to latency and inadequate upload/download speeds.”); Bayou Declaration at ¶ 8 (“... Our experiences selling our ISP services through Satellite over the past one and a half years have been poor. First, the upfront equipment costs the Satellite company requires customers to pay are unattractive and, second, the technology utilized is not the equivalent of our existing

ILEC wholesale supplier. In other words, the upload/download speeds simply were not comparable and is not satisfactory to our existing or prospective customers.”); GoldCoast Declaration at ¶ 8 (“Our company investigated Broadband over ... Satellite. Our research concluded that ... Satellite service is not technologically comparable to landline broadband due to latency and inadequate upload/download speeds. Our core target audience is businesses. There is virtually no way to serve businesses with satellite, especially in downtown areas, where there is not line of sight.”); COL Declaration at ¶ 8 (“Our company also explored providing broadband ISP services through a Satellite company offering ISP service in our market. Our exploration concluded abruptly when we determined that the technology used by the Satellite company was not technologically comparable to landline service. In other words, the upload/download speeds simply were not comparable and would not be satisfactory to our existing or prospective customers.”); Mecklenburg Communications Declaration at ¶ 7 (“Our company explored providing broadband ISP services through a Satellite company offering ISP service ... in our market. Through such exploration our company concluded that providing service via ... Satellite would be cost-prohibitive, particularly in the rural areas served by our company.”); SiteStar Declaration at ¶ 8 (“Our company also explored providing broadband ISP services through iSat, a Satellite company offering ISP service in our market. Our company began offering iSat services but due to problems encountered with installation and reliability, most customers who signed up for the service have cancelled. Currently, our company serves less than 10 customers via iSat. In the final equation, the technology utilized by iSat was not the equivalent of our existing ILEC wholesale supplier”); LexiSoft Declaration at ¶ 7 (“Our company explored providing broadband ISP services through ... Satellite ... we have received no cooperation from the Satellite provider.”); WCK Declaration at ¶ 7 (“Our company explored

providing broadband ISP services through the Satellite company offering ISP service in our market. This exploration did not progress very far because of two reasons: First, the wholesale pricing offered by the Satellite company was unattractive and, second, the technology utilized was not the equivalent of our existing ILEC wholesale supplier. In other words, the upload/download speeds simply were not comparable and would not be satisfactory to our existing or prospective customers.”).

Thus, the reality is that few ISPs have succeeded in going wireless.⁴² As described by the CS-ISPs in their declarations, there are many reasons. Licensed spectrum is very costly in most areas, if available at all. There is little evidence of licensed spectrum owners offering ISPs a wholesale access service to replace DSL. Instead, they are more likely to provide a retail ISP service over their spectrum, to compete with less-well-capitalized ISPs who cannot afford the spectrum. We note that with the proposed merger of Sprint and Nextel, the two largest licensees of BRS (2.5 GHz) spectrum, prime territory for fixed wireless data access, will combine. Neither company offers a wholesale wireless product to CS-ISPs, although both have rolled out limited retail wireless ISP services that compete with CS-ISPs. Unlicensed spectrum is limited both in availability and power. Because of the low power limit, range is necessarily limited. The best results are found in rural areas that are flat (to avoid being blocked by hills), dry (to avoid rain and fog attenuation) and treeless (to avoid signal absorption). Thus wireless ISPs are most heavily concentrated in the area between the Rocky Mountains and the Mississippi River, from Texas to Kansas. A few opportunistically operate in coastal regions, and in flat areas such as Florida. But most ISPs lack the combination of clear paths and subscriber density needed to make unlicensed wireless access profitable.

⁴² Pew Internet Project Data Memo (April 2004) (reporting that fixed-satellite and wireless accounted for only 3% of the broadband market).

In urban areas, interference is also a problem. The unlicensed bands are occupied by cordless phones, microwave ovens, video extenders, home wireless local area networks, public access points, Bluetooth devices, and other sources of interference. The Commission should certainly continue to support wireless operation, but wireless access can never fully substitute for wireline access and it certainly does not now.

- ***The CLEC “Alternative” is Not Attractive Now and Will Be Less Attractive if Forbearance is Granted.***

In its nearly identical petition, supported in its entirety by Verizon, BellSouth argues that CS-ISPs will have alternative avenues of accessing their customers in a world in which ILECs are not subject to Title II and *Computer Inquiry* rules. Had forbearance been granted some years ago, prior to the dot-com collapse, a time in which there were several hundred, well-funded CLECs in existence, and had these CLECs avoided the pitfalls of overbuilding and opportunistic blue sky forecasting, in short, at a time when there was in fact a viable presence of a multitude of CLECs, BellSouth might have argued with some credibility that the impact of forbearance on CS-ISPs would be minimal. But the rules have turned on the viability of CLECs and their environment today is far more hostile than in 2000 or before.⁴³ Verizon, to its credit, does not waste much space in its petition describing imaginary alternatives that ISPs can fall back on. It simply writes them off in a flagrant show of force.

Line sharing has been removed by the *Triennial Review Order* (“TRO”), denying CLECs any semblance of a level playing field on which to compete with RBOC DSL operations. The TRO did permit the UNE Platform to take the place of RBOC voice service, but that too is nearing its sunset, thanks to the *USTA II* decision and the Commission’s December 15, 2004 *Remand Order*. The Commission’s Fiber-to-the-Home (“FTTH”) rule allows the ILEC to cut off

⁴³ See e.g., Computer Office Solutions Declaration at ¶¶ 7-8; Bayou Declaration at ¶ 9; GoldCoast Declaration at ¶ 9; Kinex Declaration at ¶ 8; WebKorner Declaration at ¶ 9; Acceleration Declaration at ¶ 9.

CLEC DSL access to subscribers whose home is overbuilt with FTTH, and allows green field FTTH sites to have no competition at the CLEC level at all, unless of course a CLEC digs up the same streets itself – hardly a likely occurrence, nor a particularly smart one if you ask the city, town or locality whose streets must be constantly disrupted to accommodate competition in the last mile. Verizon is now installing FTTH in pilot markets, and without *Computer II* and common carriage protection or CLEC access to the subscribers, residents of impacted homes will lose *all* access to CS-ISPs, except, perhaps, for a cable ISP or, if Verizon deigns to do so, a very limited choice of large ISPs that have entered into temporary commercial revenue-sharing agreements with it. Smaller, local CS-ISPs will be gone; customers will lose the vast majority of their options. This is clearly not in the public interest.

Verizon has then extended this via the Commission’s grant of its Fiber-to-the-Curb (“FTTC”) petition. Now Verizon and her sister RBOCs need merely deploy a Digital Loop Carrier system in the general vicinity of a subscriber and it need no longer provide loops to CLECs. Should Verizon decide that its FTTH scheme is too costly, it too could fall back on FTTC. We are also concerned that the Commission might continue to “boil the frog” and deny even raw UNE Loop access to an increasing number of subscribers by extending the exemption from its current 500-foot level to something even more expansive. There is little doubt that the RBOCs will take advantage of this to further reduce the number of retail subscribers who can be served by CLECs.⁴⁴ Thus, the CS-ISPs will have lost their most promising and yet unrealized alternative means of broadband access supply.

⁴⁴ If forbearance is granted, FISPAs posit that FTTx will not only *not* bring more competition to the homes passed, but will result in a dramatic drop in competition because it will not be subject to common carriage and will not be available to ISPs via tariffed access services. Even dial-up may be profoundly impacted because new FTTx systems need not implement the high-quality TDM-based telephone service, such as is offered by Integrated DLC, that modems need in order to get maximum performance.

- ***Broadband Over Power Is Not A Viable Option***

Any suggestion that broadband over power is proof of a robust, competitive marketplace is a joke. Broadband over power is non-existent in most markets. Even where it exists, it is not subject to common carriage, and the power line operator does not generally offer access to multiple competing ISPs. *See* Intelligence Network Declaration at ¶ 8 (“After contacting the power company serving our area, we were informed that they have no plans to deploy BPL at this time.”); Kinex Declaration at ¶ 9 (“Our company has researched the availability of Broadband over Power Lines (“BPL”). However, the local utility company rolling out BPL is only in testing stages and is not interested in providing wholesale services at this time.”); GoldCoast Declaration at ¶ 8 (“Our company investigated Broadband over Power Lines Our research concluded that BPL is not available in our market....”); Mecklenburg Communications Declaration at ¶ 7 (“Our company explored providing broadband ISP services through ... a utility company offering Broadband over Power Lines in our market. Through such exploration our company concluded that providing service via ...the utility company would be cost-prohibitive, particularly in the rural areas served by our company.”); Acceleration Declaration at ¶ 8 (“Our company has also investigated Broadband over Power Line technology. Currently, BPL is experimental and not deployed or commercially available in our service area.”).

A grant of forbearance given woeful lack of existing wholesale delivery alternatives is another nail, perhaps the final one, in the coffin of an entire sector of broadband service providers - the CS-ISPs.

B. FORBEARANCE WOULD HARM CONSUMERS

In order to satisfy the second prong of section 10, Verizon must demonstrate that the regulations at issue are not necessary “for the protection of consumers.”⁴⁵ Verizon has not shown, nor can it show, that existing marketplace forces would be adequate to constrain its market power and ensure that consumers are protected. Indeed, the relief Verizon seeks would negatively affect consumers in several ways.

Without Title II regulations, Verizon is free to cross-subsidize between unregulated and regulated services.⁴⁶ The Commission has found that cross-subsidization can harm consumer choices in the unregulated market making Title II cost allocation rules a necessary safeguard against “improperly shifting costs from unregulated to regulated offerings” that in turn “can have adverse impacts ... on competition in unregulated markets, by providing an opportunity for carriers to charge artificially low prices for their unregulated goods and services.”⁴⁷

Also, Verizon may charge rates that raise rival costs such as increasing wholesale rates to ISPs, which in turn harms consumers. It is well established that a lack of robust price competition may lead to rates that are excessive and harm consumers.⁴⁸ Thus, regulation is necessary for the protection of consumers. *See* Intelligence Network Declaration at ¶ 10 (“Either directly or indirectly, our company, our customers and the communities we serve will be harmed if the Commission grants the relief requested by Verizon.”) (emphasis added); Internet Junction Declaration at ¶ 10 (accord); CSSLA Declaration at ¶ 10; LexiSoft Declaration at ¶ 8 (accord); SiteStar Declaration at ¶ 10 (accord); WebKorner Declaration at ¶ 11 (accord); Kinex

⁴⁵ 47 U.S.C. § 160(a)(2).

⁴⁶ *See* discussion at Section IV(A)(4) *supra*, for a small sampling of instances where ILECs already are engaging in anti-competitive marketplace pricing.

⁴⁷ *In the Matter of Amendment of Section 64.702 of the Commission’s Rules (Third Computer Inquiry)*, Report and Order, 104 F.C.C. 2d 958 ¶ 234 (1986) (history omitted).

⁴⁸ *Special Access Forbearance Order* ¶ 34 (“Absent a sufficient showing of competition, it is clear that regulation of the BOC petitioners’ special access and high capacity dedicated transport services is necessary to protect consumers”).

Declaration at ¶ 11 (accord); Bayou Declaration at ¶ 13 (accord); GoldCoast Declaration at ¶ 11 (accord); ECSIS Declaration at ¶ 9 (accord); COL Declaration at ¶ 10 (accord); Supernova Declaration at ¶ 9 (accord); Computer Office Solutions Declaration at ¶ 12 (accord); Mecklenburg Communications Declaration at ¶ 9 (accord); WCK Declaration at ¶ 9; C-N-S Declaration at ¶ 8 (accord); Acceleration Declaration at ¶ 11 (accord); WTS Online Declaration at ¶¶ 19-20, 30 (Explaining the issues that result when a customer has service issues: “When one of Verizon Online’s customers has a problem with her system, Verizon will recommend that the customer take the computer to a local repair shop. In rural areas, more often as not, the ISP is the local computer shop. I should note that most national providers will not provide a high level of computer help and that doesn't matter much in urban areas. It does matter in rural locations where computer repair shops are few and far between. As more and more rural providers go bankrupt because they are unable to compete, consumers have fewer options for computer service. In urban areas, there is always going to be plentiful computer help at some pricing level. But as rural Internet providers are killed off due to a lack of ability to compete, the same level of computer help just isn't going to be available. [The undesirable fallout forbearance will have on customer service issues is but one example of how] either directly or indirectly, our company, our customers and the communities we serve will be harmed if the Commission grants the relief requested by Verizon.”).

1. Forbearance is Especially Harmful to Business Customers Whose Access is Provided by CS-ISPs.

One of the many shortcomings of Verizon’s Petition is that its analysis of intermodal competition focuses primarily on broadband provisioning geared toward the residential user, where cable has a larger market share. Verizon’s Petition fails to acknowledge, let alone address, the business class customers and their market needs. Many small CS-ISPs’ customer

base consists of primarily of business customers.⁴⁹ Verizon cites its low market share of ATM and Frame Relay services nationwide, but this is meaningless. Verizon's Frame Relay and ATM services are primarily intraLATA, while its nominal competitors are offering interLATA service, whose price, when applied to intraLATA usage, is uneconomical. Verizon's market share statistics are therefore meaningless and will become moot if, as expected, Verizon follows SBC's lead and in the coming weeks, if not days, acquires one of the nationwide providers of business class services used as statistical support for its requested relief.

2. *Computer Inquiry's* Administrative Costs Should Have No Bearing on the Section 10(a) Analysis.

Verizon dedicates a portion of its Petition describing the regulatory aggravations, such as CEI, it must endure and the costs it must expend to comply with the *Computer Inquiry* rules. The Petition views the *Computer Inquiry* mandates as a nuisance, a useless rule that merely increases its cost of doing business and hinders investment, so it says. From its own narrow point of view, there is a grain of truth to such an analysis: *Computer Inquiry* is indeed a nuisance to monopoly local exchange carriers, but that is its purpose.

All in all, Verizon's arguments are misguided. It is agreed that, *all things being equal*, economic regulation is not necessary in competitive markets. But section 10(a) does not permit the Commission to balance potential market power harms that would occur from deregulating a company that controls essential access facilities against the benefit that such deregulation might increase investment incentives. Such balancing is foreclosed by section 10(a)'s plain language.

⁴⁹ LexiSoft Declaration at ¶ 6; CSSLA Declaration at ¶ 6; SiteStar Declaration at ¶ 6; WebKorner Declaration at ¶ 6; Kinex Declaration at ¶ 6; Bayou Declaration at ¶ 6; GoldCoast Declaration at ¶ 6; ECSIS Declaration at ¶ 6; COL Declaration at ¶ 6; Supernova Declaration at ¶ 6; Computer Office Solutions Declaration at ¶ 6; Mecklenburg Communications Declaration at ¶ 6; WCK Declaration at ¶ 6; C-N-S Declaration at ¶ 6; Acceleration Declaration at ¶ 6.

Undoubtedly, Verizon must incur administrative costs related to compliance with the regulations. However, as set forth in more detail below, a reduction in Verizon's costs of doing business does not justify the scrapping of the *Computer Inquiry* rules. Finally, the Commission simply cannot adopt Verizon's position because it has failed to provide any hard data to support its sweeping conclusions.

C. FORBEARANCE IS NOT IN THE PUBLIC INTEREST.

As stated in Section I of this Opposition, Verizon's goal of forbearance can be read and understood as a request for the government-sanctioned right to be unreasonable and unduly discriminatory. Stripped of all the pseudo arguments and self-serving rationalizations presented by Verizon, the only way to interpret a request to lift the Title II obligations in regard to broadband DSL services is that Verizon does not want its future broadband activities to be encumbered with the duties to be reasonable or be restrained in the slightest from playing favorites with Verizon's most favored ISP – Verizon Online. Sections II and III of this Opposition lay out the historical and factual case as to why this result is not in the public's interest. It bears repeating that more, not less, competition in the market for wireline broadband market, and all communications markets, is and always should be the Commission's paramount goal. Only by ensuring that the conditions needed to stimulate such competition remain in place can the Commission be assured it has satisfied its obligation to the public. The Commission must learn from its long track record of prematurely de-regulating dominant companies and refrain from doing so here.

Since the early 1970's, common carrier regulation has been under attack for all its perceived and real deficiencies. It cannot be denied that in many cases, where competition

actually exists, deregulation has “worked.” Competition has changed the entire landscape of long distance and terminal equipment. However, the real landmark decisions that led to the creation of competition in these venues were not the result of the Commission’s leadership, but that of the courts. It took two decisions by the Courts of Appeals to open the long distance market to “true” competition after AT&T had buffaloeed the Commission into narrowing its watershed *Specialized Carrier* decision to preserve the vast majority of AT&T’s monopoly over long distance.⁵⁰ And, of course, it was the courts, not the Commission which ultimately divested AT&T of its control of bottleneck local exchange facilities through the MFJ.

Now, more than twenty years later, it is the same local networks that Verizon hopes to turn into a new kind of bottleneck, not one to prevent competitive access to customers wanting to choose a different long distance carrier, but to prevent customers from choosing a different broadband provider. The technical nature of the services may have changed, but the fundamental aspects of the anti-competitiveness involved has not. And by removing even the modest Title II protections of common carriage, Verizon’s monopoly control over content will be, if anything, even greater than that of the pre-Carterfone Bell System! This poses a fundamental risk to American democracy.

Deregulation is not a panacea that ensures better government, a better economy, a more civilized society or greater equality for all peoples. But, merely because the application of common carriage obligations in today’s environment may seem somewhat anachronistic, when

⁵⁰ *MCI Telecomm. v. FCC*, 561 F.2d 365 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978) Execunet I (holding that the FCC erred in forbidding use of private-line facilities to provide a service equivalent to MTS, because it had never previously determined that preservation of the MTS monopoly was in the public interest); *see also MCI Telecomm. v. FCC*, 580 F.2d 590 (D.C. Cir.), *cert. denied*, 439 U.S. 980 (1978) Execunet II.

considered in light of Congress' intent for what the Communications Act is intended to achieve and sustain, such a conclusion simply is not possible. The Commission expressed it very well –

By the 1996 Act, Congress intended to facilitate the introduction by private firms of new consumer services, service providers and technologies by promoting the development of competition and deregulation in all telecommunications markets.* The Act instructs the Commission ... to open telecommunications markets to competition ... The proper functioning of competitive markets, however, is predicated on consumers having access to accurate, meaningful information ... Unless consumers are adequately informed about the service choices available to them and are able to differentiate among those choices, they are unlikely to be able fully to take advantage of the benefits of competitive forces.

*2. The principal goal of the Act is to 'provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition. See Joint Statement of Managers, S.Conf. Rep. No. 104-230, 104th Cong., 2d Sess. Preamble (1996). *In the Matter of Truth-in-Billing and Billing Format*, CC Docket No. 98-170, First Report and Order and Further Notice of Proposed Rulemaking, FCC 99-72, ¶2 (1999).

The Commission's statements were made in the context of the need for clearer and more informative billing by service providers, but the relevance here is the Commission's connection of *consumer choice* with *competitive forces*. A grant of forbearance will deny consumer's their choice of service providers and the variety of services that only a diverse and abundant source of alternative providers can offer. In today's demonstrably uncompetitive marketplace for alternative broadband access supply, removal of Title II and *Computer Inquiry* rules will throw consumers to the wolves. They will be left with nothing to select from but what Verizon and what her sister duopolies choose to offer.

This does violence to the expressed intent of Congress in enacting the 1996 Act. But in truth, that intent has been embodied in the Act since its adoption 70 years ago. Section 151 of the Act provides that –

... the purpose of regulating interstate and foreign commerce in communications [is] to make available, so far as possible, to all people of the United States, without discrimination ... a rapid, efficient ... wire and radio communication service with adequate facilities at reasonable charges ... (Emphasis added.) 47 U.S.C. §151.

It is clear that the duty of this Commission is to ensure reasonable and non-discriminatory communications services when provided by common carriers under Title II or by any provider under Title I. The Commission's duty is to adopt policies, whether they are implemented by regulation or deregulation, that provides to all the people so far as possible nondiscriminatory services with adequate facilities at reasonable rates.

In short, Verizon cannot escape its duties to operate reasonably and non-discriminatorily by shedding its Title II obligations any more than the Commission can shirk its duties to see to it that Verizon does operate reasonably and non-discriminatorily, whether by Title II or Title I.

The forbearance Verizon seeks will have a profound impact on businesses in an industry enmeshed in this country's telecommunications culture. The amounts of money at stake also reach into the billions of dollars. The continued existence of CS-ISPs, and the diversity of choices to the public rest on their ability to continue to have access to the network facilities necessary to deliver their services. Indeed, the Commission must admit that, given the uncertain nature of the future of a competitive broadband communications market, independent CS-ISPs foreclosed from obtaining access to their customers may ultimately be left holding the remnants

of their once diverse and competitively intense broadband offerings. Precisely because forbearance would have such a profound effect on the ability of businesses to compete in the twenty-first century technology of broadband communications, it is incumbent upon the Commission to provide more than its preconceived judgments that overtly favor the incumbents to justify such a sacrifice of broader public interests and the disenfranchisement of small businesses.

V. SECTION 706 DOES NOT, IN AND OF ITSELF, JUSTIFY FORBEARANCE.

As is set forth above, Verizon has not provided the necessary evidence to satisfy any of the three prongs of Section 10(a). Notwithstanding this, in a desperate attempt to circumvent the requirements of Section 10(a), Verizon relies on Section 706 for support of its quest for forbearance.⁵¹ Verizon seeks to skirt the Section 10(a) requirements by presenting lofty arguments that forbearance from regulation would serve the goals of Section 706. However, the three prongs of Section 10(a) are conjunctive.⁵² Thus, even if the Commission believed Section 706 somehow supported Verizon's public interest claim under Section 10(a)(3), the Commission would still have to reject the Petition because it fails to satisfy the requirements of Sections 10(a)(1) and 10(a)(2).

VI. THE REGULATORY FLEXIBILITY ACT DEMANDS DENIAL OF THE PETITION.

“The American people deserve a regulatory system that works for them, not against them.”⁵³

⁵¹ See Verizon Petition at 10, 13.

⁵² *CTIA v. FCC*, 330 F.3d at 509.

⁵³ President William J. Clinton, Executive Order No. 12866, September 30, 1993, which, among other things, reinforced the RFA. To ensure that the agencies' regulatory programs were consistent with the philosophy of weighing the costs and benefits of available regulatory alternatives, E.O. 12866 required agencies to abide by a

Almost 25 years ago, Congress passed the Regulatory Flexibility Act (“RFA”) requiring each federal agency to conduct a regulatory flexibility analysis of the impact of its actions on small businesses.⁵⁴ The RFA offered a unique opportunity to root out some of the institutional biases that work against the small entrepreneur. The RFA was designed to place the burden on the government to review all regulations to ensure that, while accomplishing their intended purposes, they do not unduly inhibit the ability of small entities to compete. The major goals of the Act are:

1. to increase agency awareness and understanding of the impact of their regulations on small business,
2. to require that agencies communicate and explain their findings to the public, and
3. to encourage agencies to use flexibility and to provide regulatory relief to small entities.

In 1996, supported by President Clinton, Congress strengthened the RFA and provided for judicial review of agency compliance with the law. Now, actions (or inactions as may be the case here), taken by the Commission are directly challengeable in court.

Today, the RFA is intended to give small businesses⁵⁵ a special opportunity to participate in the development of regulations that significantly affect them. It marks a recognition that federal agencies, in order to develop awareness of their rulemaking activities that affect small businesses, must make greater outreach efforts. As discussed above, the *Computer Inquiry* and Title II rules directly affect the public interest and interests of CS-ISPs. Without the rules, any existing competitiveness in the broadband market will disappear. The survival of CS-ISPs depends on access from the ILECs and to that end, rely on the safeguards of Title II and

number of principles; one of which was that each agency shall tailor its regulations to impose the least burden on society, including businesses of different sizes, consistent with obtaining the regulatory objectives.

⁵⁴ 5 U.S.C. § 601

⁵⁵ The RFA also is intended to protect small governments and small non-profit enterprises. 5 U.S.C. § 601.

Computer Inquiry.⁵⁶ The Commission cannot ignore or overturn established policy designed in large part to protect these small business entities unless it does so on a reasoned basis that rests on an adequate record and is clearly and convincingly explained by the Commission.⁵⁷ Therefore, granting Verizon's Petition, either expressly or by inaction, would violate the RFA and the case law interpreting it.⁵⁸

Undoubtedly, the forbearance Verizon seeks will have an adverse effect on CS-ISPs, nearly all of whom satisfy the SBA's size and revenue definitions of a "small entity." In fact, the continued existence of CS-ISPs and the diversity of choices to consumers is in jeopardy if the current regulatory scheme is cast aside. Small entities, such as the CS-ISPs, are important not only to the growth of the Internet, but to the growth of the U.S. economy. If small businesses are expected to be the engine that grows the U.S. economy and creates jobs, the engine must be fed, not starved. De-regulating the ILECs, as Verizon requests in its Petition, puts the brakes on the small ISP engine at the very time there is a need for the accelerator to be at full throttle. The public interest is best served when there is a vibrant, growing small business economy that is

⁵⁶ LexiSoft Declaration at ¶ 4 ("Due to existing conditions in the markets in which our company provides ISP services, **our company remains highly, if not entirely, dependent on existing Title II and/or Computer Inquiry requirements to obtain access to BellSouth and/or other ILEC wholesale transmission services** which are essential to provide broadband ISP services to our existing and prospective customers.") (emphasis added); CSSLA Declaration at ¶ 4 (accord); SiteStar Declaration at ¶ 4 (accord); WebKorner Declaration at ¶ 4 (accord); Kinex Declaration at ¶ 4 (accord); Bayou Declaration at ¶ 4 (accord); GoldCoast Declaration at ¶ 4 (accord); ECSIS Declaration at ¶ 4 (accord); COL Declaration at ¶ 4 (accord); Supernova Declaration at ¶ 4 (accord); Computer Office Solutions Declaration at ¶ 4 (accord); Mecklenburg Communications Declaration at ¶ 4 (accord); WCK Declaration at ¶ 4 (accord); Acceleration Declaration at ¶ 4 (accord); C-N-S Declaration at ¶ 4 (accord) WTS Online Declaration at ¶¶ 4 (accord).

⁵⁷ Specifically, in rulemaking, all agencies are required to take some or all of the following steps in order to solicit input from small entities: publish a semiannual regulatory agenda; provide notice of rulemakings expected to affect small entities; publish proposed rules in the Federal Register; provide a description of the impact a proposed rule is expected to have on small entities as determined in initial analysis; publish notice of proposed rules in publications likely to be obtained by small entities, such as industry publications or trade association newsletters; send direct notifications of proposed rules to interested small entities or their representatives; and conduct public forums on proposed rules to solicit comments using public meetings or computer networks.

⁵⁸ Verizon may try to argue that section 10 can be interpreted to overturn these precedents, but the argument is contrary to logic and rational decision-making, the general requirements that govern agency decision-making under the APA and the requirements of the RFA that the Commission must determine what affect its actions (or inactions) has on small businesses.

creating jobs and developing new technology, technology that in turn creates whole new industries. Because forbearance would have such a profound effect on the ability of small businesses to compete in the twenty-first century technology of broadband communications, it is incumbent upon the Commission to provide more than its prejudices for incumbents to justify such a sacrifice of broader public interests and the disenfranchisement of small businesses. To do otherwise would be an injustice and a direct violation of the RFA.

VII. CONCLUSION

Verizon's assertions fail to provide relevant factual support for the relief it requests. The Petition contains broad statements that the broadband market is optimally competitive, and generalized conclusions about the need to lift Title II restrictions on the use of its network by other competitive service providers. Something more is needed. The forbearance Verizon seeks will have a profound impact on businesses in an industry enmeshed in this country's telecommunications culture. The amounts of money at stake reach into the billions of dollars. The continued existence of CS-ISPs and the diversity of choices to consumers rest on their ability to continue to have access the network facilities necessary to deliver their services. Indeed, the Commission must admit that, given the uncertain nature of the future of a competitive broadband communications market, CS-ISPs foreclosed from obtaining access to their customers may ultimately be left holding the remnants of a stillborn offering. Precisely because forbearance would have such a profound effect on the ability of businesses to compete in the twenty-first century technology of broadband communications, it is incumbent upon the

Commission to provide more than its prejudices for incumbents to justify such a sacrifice of broader public interests and the disenfranchisement of small businesses.

RESPECTFULLY SUBMITTED,

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