

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)	
)	
Petition of the Verizon Telephone Companies)	WC Docket No. 04-440
for Forbearance Under 47 U.S.C. § 160(c))	
From Title II and <i>Computer Inquiry</i> Rules)	
with Respect to Their Broadband Services)	
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**REPLY COMMENTS OF VERIZON IN SUPPORT OF ITS
PETITION FOR FORBEARANCE**

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The Commission should grant Verizon’s petition and forbear from applying any of the Title II common carrier requirements or *Computer Inquiry* rules that might ultimately be construed to apply to broadband services provided by Verizon or other incumbent local telephone companies. Nothing in the opposing comments provides a basis for denial. The Commission has correctly and repeatedly concluded that “the competitive nature of the broadband market, including new entrants using new technologies, is driving broadband providers to offer increasingly faster service at the same or even lower retail prices.”² And as the Commission recently told the Supreme Court, “establishing a minimal regulatory environment for broadband services will most effectively further the statutorily grounded policy of

¹ The Verizon companies (“Verizon”) are the affiliated local telephone companies of Verizon Communications Inc. These companies are listed in Attachment A.

² *Fourth Report to Congress on Availability of Advanced Telecommunications Capability in the United States*, 19 FCC Rcd 20540, at 20552 (2004) (“*Fourth Section 706 Report*”).

encourag[ing] ubiquitous availability of broadband to all Americans.”³ Under these circumstances, there would be no justification for applying burdensome common carrier regulations to the broadband services provided by telephone companies like Verizon—secondary broadband players both with respect to mass market and enterprise customers—and doing so would inhibit more effective and beneficial competition while decreasing investment incentives for broadband deployment.

Moreover, in the recent *Section 271 Forbearance Order*,⁴ also involving broadband, the Commission specifically rejected many of the key arguments raised here by opponents of Verizon’s petition, including that: (1) insufficient competition exists in the “wholesale” provision of broadband to permit relief from network access requirements, (2) wireline providers had market power in providing broadband services to business customers, and (3) removing regulatory requirements that apply only to local telephone companies would result in a cable/local telephone company “duopoly” for broadband services. Those arguments are equally unavailing here, and the Commission should again reject them.

Facts establishing the competitive nature of broadband and the need for regulatory parity for all players have been provided in the context of numerous proceedings before the Commission, some of which have been pending for over three years.⁵ The Commission can and

³ Brief of the Federal Petitioners, *National Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, Nos. 04-277 and 04-281, at 29-30 (U.S. filed Jan. 18, 2005) (internal quotation marks omitted; alteration in original).

⁴ *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, 19 FCC Rcd 21496 (2004) (“*Section 271 Forbearance Order*”).

⁵ See, e.g., *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 FCC Rcd 3019 (2002) (“*Wireline Broadband NPRM*”); *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, 16 FCC Rcd 22745 (2001); *Petition of Verizon for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises*, WC Docket No. 04-242 (filed June 28, 2004); *Conditional Petition of the Verizon Telephone Companies for Forbearance*

should immediately act in the context of those proceedings to ensure regulatory parity and clarify that broadband services provided by Verizon and other incumbent local exchange carriers (“ILECs”), or by any other broadband competitors for that matter, are not subject to burdensome and unnecessary common carrier regulation. However, to the extent any such regulations were ultimately determined to apply to Verizon’s broadband services, forbearance is warranted.

A. Verizon’s Petition Satisfies the Forbearance Requirements and Forbearance Is A Proper Method for Obtaining Relief from Common Carrier Regulation.

As an initial matter, several commenters complain that Verizon’s petition is somehow improper because relief from Title II’s “core” common carrier regulation is not permissible under the forbearance provision. Similarly, some commenters argue that Verizon’s reliance on Section 706 is misplaced and that that provision is irrelevant to the request for forbearance. These threshold arguments are flawed.⁶

1. First, contrary to these suggestions, nothing in the text of the forbearance provision shields the supposed “core” Title II provisions from forbearance.⁷ Instead, the statute

Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided via Fiber to the Premises, WC Docket No. 04-242 (filed June 28, 2004); *Verizon Petition for Waiver to Allow It to Exercise Pricing Flexibility for Advanced Services Where the Commission Has Granted Relief for Traditional Special Access Services*, WC Docket No. 04-246 (filed June 25, 2004) (“*Verizon Pricing Flexibility Waiver Petition*”); *Verizon Petition, in the Alternative, for Forbearance to Allow It to Exercise Pricing Flexibility for Advanced Services Where the Commission Has Granted Relief for Traditional Special Access Services*, WC Docket No. 04-246 (filed June 25, 2004) (“*Verizon Pricing Flexibility Forbearance Petition*”).

⁶ See, e.g., *Opposition of the Federation of Internet Solution Providers of the Americas*, WC Docket No. 04-440, at 55 (filed Feb. 8, 2005) (“*FISPA Comments*”); *Opposition of the Information Technology Association of America*, WC Docket No. 04-440, at 20-21 (filed Feb. 8, 2005) (“*ITAA Comments*”).

⁷ See, e.g., *Comments of Earthlink, Inc. in Opposition to the Petition*, WC Docket No. 04-440, Attachment at 10-14 (filed Feb. 8, 2005) (“*Earthlink Comments*”); *ITAA Comments*, at 16-18; *FISPA Comments*, at 27; *Comments of McLeodUSA Telecommunications Services, Inc.*, WC Docket No. 04-440, Attachment at 32 (filed Feb. 8, 2005) (“*McLeodUSA Comments*”); *Comments of AT&T Corp. on Petition for Forbearance of the Verizon Telephone Companies*, WC Docket No. 04-440, at 4 (filed Feb. 8, 2005) (“*AT&T Comments*”); *AT&T’s Opposition to*

affirmatively provides that the Commission “shall forbear from applying *any regulation or any provision* of this Act,” when the three statutory prerequisites for forbearance are satisfied. 47 U.S.C. § 160(a) (emphasis added). As the Commission recently noted, this provision is an “integral part” of the “pro-competitive, de-regulatory national policy framework” adopted in the Telecommunications Act of 1996 (“1996 Act”).⁸

Moreover, those commenters who suggest that the Commission lacks the authority to remove common carrier regulation more generally from a particular type of service through the forbearance procedure ignore the Commission’s own contrary conclusion in the *Cable Broadband Ruling*.⁹ There, the Commission itself recognized that Section 10 forbearance would be an appropriate method for removing “each provision of Title II or common carrier regulation” from cable modem services, if such regulations were otherwise to apply, and the Commission tentatively concluded that forbearance from that broad class of Title II regulation was “appropriate” in the context of cable modem services. *Cable Broadband Ruling* ¶ 95. Thus, forbearance may be used to remove regulations – including “core” Title II regulations – that are not warranted by market conditions. Declining to do so here would run afoul of the Commission’s commitment to create a regulatory regime that is “consistent . . . across multiple platforms” and avoids “embed[ding] particular technologies.”¹⁰

Petition for Forbearance of BellSouth Telecommunication’s Inc., WC Docket No. 04-405, at 4-8 (filed Dec. 20, 2004) (“*AT&T Comments on BellSouth Petition*”); *AT&T’s Reply Comments to Petition for Forbearance of BellSouth Telecommunications, Inc.*, WC Docket No. 04-405, at 4-5 (filed Jan. 28, 2005) (“*AT&T Reply Comments to BellSouth Petition*”).

⁸ *Section 271 Forbearance Order* ¶ 11 (quoting Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 113 (1996)).

⁹ *Inquiry Concerning High-Speed Access to Internet over Cable and Other Facilities*, 17 FCC Rcd 4798 (2002) (“*Cable Broadband Ruling*”).

¹⁰ *Wireline Broadband NPRM*, ¶¶ 4,6.

2. Those commenters who discount the relevance of Section 706 to Verizon's petition also miss the mark.¹¹ The Commission has previously considered the relationship between Section 706 and the forbearance statute and concluded that, while "section 706 does not constitute an independent grant of authority[,] . . . it directs us to use, among other authority, our forbearance authority under section 10(a) to encourage the deployment of advanced services."¹² Accordingly, the Commission's decision concerning advanced services like those implicated by Verizon's petition is "informed by section 706 of the 1996 Act, which . . . directs [the Commission] to promote the timely and comprehensive deployment of broadband facilities." *Section 271 Forbearance Order* ¶ 34; *see also id.* ¶ 20 ("We apply our section 10 analysis in light of the Act's overall goals of promoting local competition and encouraging broadband deployment").

B. Broadband Competition is Robust.

The Commission has ruled that the "public interest requires common carrier operation" of facilities only where the incumbent operator "has sufficient market power to warrant regulatory treatment as a common carrier."¹³ Both in its earlier comments in this proceeding and in other proceedings, Verizon has documented the state of competition and the competitive dynamics for

¹¹ *See, e.g., FISP Comments* at 55.

¹² *Deployment of Wireline Services Offering Advanced Telecommunications Capability; Petition of Bell Atlantic Corporation For Relief from Barriers to Deployment of Advanced Telecommunications Services*, 13 FCC Rcd 24011, ¶ 77 (1998) (emphasis added).

¹³ *AT&T Submarine Systems, Inc.*, 13 FCC Rcd 21585, ¶ 9 (1998); *see also, e.g., Cox Cable Communications, Inc., Commline, Inc. and Cox DTS, Inc.*, 102 F.C.C.2d 110, ¶¶ 26-27 (1985) (finding no "compelling reason" to impose common carrier regulation on a carrier that had "little or no market power"); *see generally* Michael Kende, Office of Plans and Policy, FCC, *The Digital Handshake: Connecting Internet Backbones* at 12 (OPP Working Paper No. 32, Sept. 2000) (common carrier regulation "serve[s] to protect against anti-competitive behavior by telecommunications providers with market power. In markets where competition can act in place of regulation as the means to protect consumers from the exercise of market power, the Commission has long chosen to abstain from imposing regulation").

broadband services. As we showed there, ILECs are secondary players in all segments: cable modem providers still lead in the residential and small business mass market, while other providers lead ILECs in the highly competitive enterprise segment.

Several parties quibble with the import of these facts, maintaining that Verizon defines broadband inappropriately both in terms of the product and geographic markets. In particular, some parties maintain, as they have repeatedly and to no avail in previous proceedings, that local telephone companies have market power in the provision of “wholesale” broadband by virtue of their ownership of certain facilities over which data travel,¹⁴ while others complain about Verizon’s use of national data in support of its petition.¹⁵ Still others speak in terms of the “DSL” market,¹⁶ while ignoring the well-established law that markets must be defined to include all reasonably interchangeable products. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962). Such arguments misapprehend the nature of broadband, misrepresent ILECs’ role in the market, and fail as a matter of both economics and law. *See United States Telecom Assoc. v. FCC*, 290 F.3d 415, 429 (D.C. Cir. 2002) (rejecting line sharing order that “disregard[ed] . . . the competitive context”); *see also Supplemental Declaration of Dennis W. Carlton and Hal S. Sider*, at 1-7, attached hereto as Exhibit 1 (“*Carlton Declaration*”). The Commission should reject these tired arguments that have been employed repeatedly by those intent on resisting the deregulatory approach to broadband issues required by Congress.

¹⁴ *See, e.g., Opposition of Closecall America, Inc., CTC Communications Corp., FDN Communications, Inc., Gillette Global Networks, Inc. d/b/a Eureka Networks, Pac-West Telecomm, Inc. and TDS Metrocom, LLC*, WC Docket No. 04-440, at 19-25 (filed Feb. 8, 2005) (“*Closecall Comments*”); *Comments of Earthlink, Inc. in Opposition to the Petition*, WC Docket No. 04-440, at 15 (filed Feb. 8, 2005) (“*Earthlink Comments*”); *ITAA Comments* at 6-14.

¹⁵ *See, e.g., Earthlink Comments* at 5-6; *AT&T Reply Comments to BellSouth Petition*, at 21.

¹⁶ *See, e.g., Comments of the National Association of State Utility Consumer Advocates*, WC Docket No. 04-440, at 39 (filed Feb. 8, 2005) (“*NASUCA Comments*”).

Given existing intermodal competition, there is no plausible basis for concluding that local telephone companies could exercise market power in the provision of broadband services to any separate geographic markets or to any discrete customer segment. For both mass market residential and small business customers, cable modem services retain their lead in subscribers over DSL or other competing broadband services. In fact, the Commission's *December 2004 High Speed Internet Data Report* indicates that cable provides over 60% of "high speed" lines—those allowing 200 Kbps in either direction—and over 80% of "advanced services" lines—those exceeding 200 Kbps in both directions—in the residential and small business segment of the market.¹⁷

And even though several commenters stubbornly insist that telephone companies are dominant in the small business segment of the market and that cable companies cannot effectively compete for those customers,¹⁸ there is simply no factual basis for that conclusion. According to a study completed for the Small Business Administration in March 2004, the percentage of small business customers that subscribe to various alternatives were: "45.2% for cable modems, 6.6% for satellite, 36.1[%] for DSL, 5% for wireless broadband and 7.1% for T-1 services."¹⁹ Not surprisingly, most, if not all, of the major cable companies actively market their

¹⁷ Ind. Anal. & Tech. Div., Wireline Competition Bureau, FCC, *High-Speed Services for Internet Access: Status as of June 30, 2004*, at Tables 3 and 4 and Charts 6 and 8 (Dec. 2004) ("*December 2004 High Speed Data Report*").

¹⁸ See, e.g., *Comments of Covad Communications Opposing Verizon Telephone Companies' Petition for Forbearance*, WC Docket No. 04-440, at 2 (filed Feb. 8, 2005) ("*Covad Comments*"); *Closecall Comments*, at 2; *AT&T Comments on BellSouth Petition*, at 41.

¹⁹ S. Pociask, Telenomic Research for the SBA Office of Advocacy, *A Survey of Small Businesses' Telecommunications Use and Spending*, at 69 (March 2004) at <http://www.sba.gov/advo/research/rs236tot.pdf>.

cable modem services to small (as well as medium and large) businesses.²⁰ Therefore, like all other segments, competition for small business customers is characterized by intense intermodal competition.

Likewise, local telephone companies currently are bit players in providing broadband services to enterprise customers – a very competitive segment made up of sophisticated consumers.²¹ As Verizon has previously explained, these customers have many alternatives from whom they can purchase broadband services such as ATM and Frame Relay. In addition to the traditional long distance carriers, numerous other carriers such as Level 3, Qwest, and XO actively compete to provide broadband services to enterprise customers.

And in all segments of the market, a number of other last-mile technologies – including satellite, fixed wireless, third-generation (“3G”) wireless, broadband over power lines (“BPL”), and Wi-Fi – provide still further competition today and the promise of even greater competition to come. *See, e.g., Fourth Section 706 Report* at 20553-20562. Although some commenters seek to dismiss the significance of these competing broadband platforms, they are important, and

²⁰ *See, e.g., Road Runner Business Class*, at www.bhamroadrunner.com/businessclass/biz_productpricing.shtml (“Everything you want in a business partner”); *Charter Business Internet Services*, at www.charter-business.com/CableInternet.cfm (“A Great Solution for Small and Medium Businesses”); *Cox Business Services*, www.channeldata.com/COX.htm (“We offer a full range of speeds and prices to fit the specific needs of your business”); *Comcast Small Business*, at www.comcastcommercial.com/index.php?option=content&task=view&id=19 (“Reliable, High-Speed Internet Services for your Growing Business”); *Cablevision Business Class Optimum Online*, at www.optimum.com/business/index.jhtml?pageType=ps_bcool (“For smaller businesses requiring high-speed Internet access . . .”).

²¹ Some parties have suggested that Verizon’s forbearance petition could undermine the availability of special access services used to serve business customers. *See Closecall Comments*, at 25-26; *ITAA Comments*, at 14; *AT&T Reply Comments on BellSouth Petition*, at 28. The Commission could carve out traditional TDM-based special access services in granting the forbearance relief requested with respect to broadband services. *See, e.g., Triennial Review Order*, 18 FCC Rcd 16978, ¶ 294 (2003); *FTTC Order*, 19 FCC Rcd 20293, ¶¶ 20-21 (2004).

will become increasingly so.²² For example, the *December 2004 High Speed Data Report* notes that “high-speed connections to end users by means of satellite or terrestrial wireless technologies increased by 15% during the first half of 2004.” *Id.* at 2. And Intel’s CEO commented just last week that “Wi-max is going to be truly a disruptive technology that is going to change the way we think about wireless broadband connectivity” and present another means of last-mile access to end users.²³ Under these circumstances, imposing Title II common carrier regulations and the *Computer Inquiry* rules on one (and only one) class of service providers would be affirmatively counterproductive and would jeopardize the continued development of broadband on a competitive basis.

1. In an effort to escape these facts, some parties have argued that the Commission should define a separate “wholesale” market for broadband services provided to Internet service providers (“ISPs”), and should find that local telephone companies enjoy market power in that artificially defined market.²⁴ These commenters argue that cable and other platforms do not generally provide wholesale services, leaving local telephone companies as the only wholesale option. Efforts to carve out a relevant market in this manner are deeply flawed, both in fact and in law. It has been black-letter law for more than half a century that a relevant product market must be defined to include *all* suppliers, including vertically integrated providers such as cable

²² Some commenters suggest that the Commission cannot or should not make “predictive judgments” that take into account emerging competitive alternatives. *See, e.g., Closecall Comments*, at 6-7. The Commission has previously rejected this shortsighted approach. For example, the Commission held in the *Section 271 Forbearance Order* that it “need not await the development of a fully competitive market” before granting forbearance, and that it was entitled to make informed predictive judgments concerning the future development of the market in deciding whether to grant forbearance – judgments that could be revisited if they later proved inaccurate. *Id.* at ¶ 28 & n. 84.

²³ “New Technologies,” *Communications Daily* (March 2, 2005).

²⁴ *See, e.g., Closecall Comments* at 19-24; *ITAA Comments*, at 6-14; *Earthlink Comments*, at 7.

modem providers. The Commission itself has consistently applied that bedrock principle to reject attempts to manufacture artificially separate wholesale market definitions, and it should do so again here.²⁵

It is well-settled as a matter of both antitrust law and economic theory that, in defining an economic product market, *all* suppliers in that market – including both existing vertically integrated firms and likely future entrants into the market – be taken into account. Accordingly, the *Horizontal Merger Guidelines* issued jointly by the U.S. Department of Justice and Federal Trade Commission²⁶ require the inclusion in a relevant market of all firms that currently produce or sell in the relevant market, including “vertically integrated firms to the extent that such inclusion accurately reflects their competitive significance in the relevant market.” *Horizontal Merger Guidelines* § 1.31. These so-called “uncommitted supply responses” are included in the relevant market whether they come about “by the switching or extension of existing assets to production or sale in the relevant market; or by the construction or acquisition of assets that

²⁵ The Commission recently rejected similar arguments concerning the relevance of data concerning retail broadband services when it granted forbearance as to Section 271. *Section 271 Forbearance Order* ¶ 21. While acknowledging that it had considered facts concerning wholesale markets in some previous forbearance proceedings, it concluded that “under the particular circumstances relevant to the instant analysis, it is appropriate to consider the wholesale market in conjunction with competitive conditions in the downstream retail broadband market.” *Id.* The same is true here; the vigorous intermodal competition for retail services makes these parties arguments concerning the wholesale argument irrelevant. *See also See Applications of Craig O. McCaw and AT&T Co. for Consent to Transfer of Control*, 9 FCC Rcd 5836, ¶¶ 13-14 (1994) (“*AT&T/McCaw Order*”) (noting that market definition must include alternative producers who could switch production in response to price increase); *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, 15 FCC Rcd 13523, ¶¶ 20, 22 (2000) (“*Fourth CMRS Order*”) (rejecting claims of wholesale market power in wireless market and reasoning that “to the extent that resale switch interconnection is an economically attractive way of providing CMRS service, we anticipate that the increasing degree of CMRS competition should provide incentives for facilities-based CMRS providers to agree to switch interconnection to increase their revenues”).

²⁶ US Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines* (1997), at http://www.usdoj.gov/atr/public/guidelines/horiz_book/hmg1.html.

enable production or sale in the relevant market.” *Id.* at § 1.32.

Likewise, the leading treatise on antitrust law emphasizes repeatedly that self-suppliers that can switch production to serve other customers must be considered part of the relevant market. *See, e.g.*, 2A Phillip E. Areeda, *et al.*, *Antitrust Law* ¶ 423, at 81-82 (2002). This is because, as a matter of economics, “a defendant dominating industry output – or hoping to do so – cannot raise prices to monopoly levels by reducing output when its rivals have a large volume of efficient excess capacity that can quickly generate additional and readily saleable output.” *Id.* ¶ 535c, at 221.

Both case law and Commission precedent acknowledge these economic realities. The landmark *Alcoa* case applied these principles in holding that Alcoa’s entire aluminum ingot production should be included in the relevant market, regardless of whether that production was sold to independent companies that used the ingot as an input in fabricating other products, or whether Alcoa used the production to fabricate such products itself. *See United States v. Aluminum Co. of Am.*, 148 F.2d 416, 424-25 (2d Cir. 1945) (“*Alcoa*”). In the half-century since the *Alcoa* decision, other courts consistently have applied the same principles in similar circumstances. *See, e.g.*, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 389 (1999) (faulting the Commission for failing to consider carriers that self-provide facilities in evaluating competitive alternatives).²⁷

²⁷ *See also Calnetics Corp. v. Volkswagen of Am., Inc.*, 532 F.2d 674, 691 (9th Cir. 1976) (production cross-elasticity must be considered when defining product market); *AD/SAT v. Associated Press*, 181 F.3d 216, 227 (2d Cir. 1999) (“Where there is cross-elasticity of supply, a would-be monopolist’s attempt to charge supracompetitive prices will be thwarted by the existence of firms willing to shift resources to producing the product, thereby increasing supply and driving prices back to competitive levels”); *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1436 (9th Cir. 1995) (“[D]efining a market on the basis of demand considerations alone is erroneous A reasonable market definition must also be based on ‘supply elasticity’”); *Yoder Bros. v. California-Florida Plant Corp.*, 537 F.2d 1347, 1367-68 (5th Cir. 1976) (ability of

The Commission has recognized similar principles. In approving the AT&T/McCaw merger, for example, the Commission rejected arguments that there was a separate market comprised of long-distance carriers that served wireless customers. The FCC instead found that the relevant market included *all* long-distance carriers, including those providing only wireline long-distance service, since these carriers could easily serve wireless customers as well, even if they were not currently doing so. See *AT&T/McCaw Order*, ¶¶ 13-14. The D.C. Circuit upheld the Commission's ruling, holding that "[i]t is of little consequence that consumers have no good substitutes if *producers* can immediately respond to a firm's price increase by switching production to that firm's products," and that "whatever market definition is employed, relative ease of entry by other firms should always be taken into account. The one course that would be clearly wrong would be to define the market as A alone while ignoring the ease of entry from B producers." *SBC Communications*, 56 F.3d at 1493 (internal quotation marks omitted).

Following these principles, the Commission must reject efforts to artificially define a wholesale broadband market in such a way as to create a false impression of market power on the part of local telephone companies. Any rational assessment of the state of broadband competition must include cable modem service providers and other broadband providers, regardless of whether such providers are currently offering service only on an integrated basis or

growers to switch to produce different types of flowers precludes a chrysanthemum-only market); *FTC v. Owens-Illinois, Inc.*, 681 F. Supp. 27, 47 (D.D.C. 1988) (ease with which suppliers could shift production among types of glass bottles undercut limitation of market to certain end users), *vacated as moot*, 850 F.2d 694 (D.C. Cir. 1988); *In re IIT*, 104 F.T.C. 280, 411 (1984) (captive bakers included in market with wholesale bakers because captives could readily divert production to other retail groceries in response to an increase in wholesale baker prices); *United States v. Waste Mgmt., Inc.*, 743 F.2d 976, 983 (2d Cir. 1984) (finding that market for nonresidential solid waste was not limited to Dallas but also included firms from nearby Fort Worth, who could easily supply Dallas market if such service became profitable); *SBC Communications Inc. v. FCC*, 56 F.3d 1484, 1493-94 (D.C. Cir. 1995).

are also currently providing services on a wholesale basis. All such providers – including those not currently offering wholesale services – have the ability to use their capacity to provide services at wholesale and, therefore, have the “direct effect” of constraining the behavior of all other broadband providers with respect to wholesale services. *See Alcoa*, 148 F.2d at 424-25.

And in any event, the factual predicate to the argument that alternative sources of “wholesale” broadband services are lacking is faulty. Instead, cable providers, satellite providers and other broadband providers can and do provide wholesale broadband services to ISPs, and can and do allow their customers to reach the wide-ranging sources of content available on the Internet. For example, Earthlink’s own web site makes this abundantly clear, offering high speed Internet access over DSL, cable modem, or satellite.²⁸ And despite Earthlink’s statements in its comments that “cable companies almost uniformly refuse to sell their transmission services to unaffiliated ISPs,” *Earthlink Comments* at 8, its filings with the SEC confirm Earthlink’s lack of reliance on local telephone companies, stating that Earthlink has an “agreement with Time Warner Cable and Bright House Networks, companies whose networks pass more than 22 million homes, to offer our broadband Internet services over their systems . . . In the third quarter of 2001, we started providing services to subscribers via these networks, and as of June 30, 2002, our full package of high-speed Internet access, content, applications and functionality was available in all 39 markets served. As of December 31, 2003, more than 20% of our broadband subscribers were serviced via either the Time Warner Cable or Bright House network.”²⁹ Thus, there is no inherent reason why alternative broadband platforms cannot provide wholesale broadband services, and in fact many do.

²⁸ *See Earthlink High Speed*, at www.earthlink.net/highspeed/.

²⁹ Earthlink, Inc., Form 10-K, at 17 (SEC filed Mar. 5, 2004).

2. The competitiveness of broadband becomes even clearer when other competing and emerging technological platforms are taken into account, as they must be. The Commission has recognized that a proper analysis must “examine not just the markets as they exist today,” but must also take account of “future market conditions,” including “technological and market changes, and the nature, complexity, and speed of change of, as well as trends within, the communications industry.”³⁰ See also *Horizontal Merger Guidelines* § 1.32 (“[T]he Agency will identify other firms not currently producing or selling the relevant product in the relevant area as participating in the relevant market if their inclusion would more accurately reflect probable supply responses”).

Of particular relevance here, the Commission has already recognized that the “broadband market is still an emerging and changing market, where . . . the preconditions for monopoly are not present” in light of the many current and potential competitors using different modes crossing the last-mile to customers.³¹ *Section 271 Forbearance Order* ¶ 22. As the Commission observed in the *Triennial Review Order*, “[t]here appear to be a number of promising access technologies on the horizon and we expect intermodal competition to become increasingly a substitute for . . . wireline broadband service.” *Triennial Review Order*, ¶ 246. As one legal scholar noted in discussing the relevance of emerging broadband technologies, “explosive growth of the kind that the broadband transport industry is currently undergoing can render the

³⁰ *Applications of NYNEX Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, 12 FCC Rcd 19985, ¶¶ 7, 41 (1997); *Applications of AT&T Wireless Services and Cingular Wireless Corporation For Consent to Transfer Control*, 19 FCC Rcd 21522, ¶ 41 (2004).

³¹ See also *Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, 14 FCC Rcd 2398, ¶ 48 (1999) (“The preconditions for monopoly appear absent . . . [W]e see the potential for this market to accommodate different technologies such as DSL, cable modems, utility fiber to the home, satellite and terrestrial radio”).

network externalities largely irrelevant,” and enable new entrants to make rapid gains.³²

3. Relatedly, the Commission must reject the suggestions of those who argue that local telephone companies control “bottleneck” broadband facilities, thus necessitating common carrier regulation in order to stave off anticompetitive practices.³³ One permutation of this argument is the “layers theory,” which divides the Internet into various “layers,” including a “physical” transport layer that these parties allege is controlled by local telephone companies.³⁴ As discussed above, existing intermodal competition now offers multiple methods of last-mile access to broadband customers, meaning that there simply are no broadband “bottlenecks,” whether in the “physical layer” or elsewhere. And the Commission already recognized as much when it removed these elements from the Section 251 unbundling list to begin with and then granted forbearance of Section 271. *See Triennial Review Order* ¶ 263 (noting that “the fact that broadband service is actually available through another network platform and may potentially be available through additional platforms helps alleviate any concern that competition in the broadband market may be heavily dependent upon unbundled access”). The D.C. Circuit affirmed this conclusion, in light of both existing, robust intermodal competition and the existence of other, alternative loop facilities that permit access to broadband customers. *USTA v. FCC*, 359 F.3d 554, 581-82 (D.C. Cir. 2004) (“*USTA IP*”).

³² See C. Yoo, *Vertical Integration and Media Regulation in the New Economy*, 19 Yale J. on Reg. 171, 280 (Winter 2002).

³³ See, e.g., *FISPA Comments*, at 28-29; *Comments of the Washington Bureau for ISP Advocacy*, WC Docket No. 04-440, at 29 (filed Feb. 8, 2005) (“*WBISP Comments*”); *Opposition of MCI, Inc.*, WC Docket No. 04-440, at 10 (filed Feb. 8, 2005) (“*MCI Comments*”); *AT&T Reply Comments on BellSouth Petition*, at 16-19.

³⁴ See, e.g., *FISPA Comments*, at 28-29; *WBISP Comments*, at 29; *MCI Comments*, at 10; *Berkshire Net Comments*, WC Docket No. 04-440, at 2 (filed Feb. 1, 2005) (“*Feb. 1. Berkshire Comments*”).

So too for broadband services provided to enterprise customers. The success of numerous other carriers in providing broadband services to large business customer belies any claim that local telephone companies have bottleneck control over facilities serving that segment of the market. Moreover, those providers and others have actively deployed facilities to serve enterprise customers.³⁵

Thus, existing and increasing intermodal competition evidences the lack of bottleneck broadband facilities and relieves the necessity of common carriage regulation under Title II or the *Computer Inquiry* rules. The fundamental premise of such rules – that the local telephone network is the only way to reach information service customers – has never been true in broadband, which has been marked from the beginning by the deployment of competing modes for bridging the last mile to the customer and competing packet-switched network facilities.

4. Some parties filed comments complaining that Verizon inappropriately focuses on national data in support of its petition instead of detailed data concerning particular geographic locations.³⁶ But just as local telephone companies do not possess market power on a national scale, there are no discrete geographic markets in which they can exercise market power.

As an initial matter, the complaints concerning the irrelevance of national data in this context are refuted by the Commission's previous orders concerning broadband services. For

³⁵ AT&T and other carriers have acknowledged that they do not depend on Verizon and other ILECs to serve their large enterprise customers. AT&T tells its investors that it “touches virtually all Fortune 1,000 Companies,” see David Dorman, Chairman and CEO, AT&T, presentation to Credit Suisse First Boston Media and Telecom Week, at 5 (Dec. 11, 2003), and that its core network extends “all the way to the customer premises.” See AT&T News Release, *AT&T Introduces New Business Local Access Offer for Large Companies, Government Agencies* (Apr. 16, 2003) available at <http://www.att.com/news/2003/04/16-11577>. Similarly, Royce Holland, the former CEO of Allegiance and the founder of MFS, has stated that “[t]he large corporate enterprise market . . . is all but irrelevant in the debate over competition policy because there are no bottleneck facilities.” *Allegiance CEO Urges Regulators to Stay the Course*, TR Daily (Dec. 4, 2003).

example, in the *Triennial Review Order*, the Commission made a finding of non-impairment on a national basis – a decision upheld by the D.C. Circuit. *See USTA II*, 359 F.3d at 578-85. More recently, the Commission granted forbearance from application of section 271 to broadband facilities on a national basis. *Section 271 Forbearance Order* ¶¶ 23, 37. These decisions are a complete answer to the commenters’ arguments concerning the use of national data.

Moreover, in the context of mass market customers, there is competition from cable modem providers and other actual and likely future alternative competitors in the overwhelming majority of areas where ILEC broadband service is now available. In fact, approximately 90 percent of all U.S. homes now have access to broadband service from a provider *other* than their local telephone company.³⁷ And this widespread competition holds true in Verizon’s service areas. For example, in the top 50 Verizon MSAs, on average, 92% of the population has access to cable modem service. *See Exhibit 5*. Furthermore, the Commission recently reported that “numerous competing providers report serving high-speed subscribers in the major population centers of the country.” *December 2004 High Speed Data Report*, at 4.

The case for relying on national data is equally compelling with respect to large-business customers. As explained in our earlier comments, much of the success of other providers is attributable to the fact that large business customers demand service providers who can handle their national (and international) needs, and this segment of the market is truly national in scope.

³⁶ *See, e.g., Earthlink Comments* at 5-6; *AT&T Reply Comments to BellSouth Petition*, at 21.

³⁷ *See NCTA, Industry Overview: Statistics & Resources*, <http://www.ncta.com/Docs/PageContent.cfm?pageID=86> (105 million homes passed by cable modem service as of September 30, 2004); *see also C. Moffett, et al., Bernstein Research Call, Broadband Update: Dial-up Conversion Still Accelerating, with No End in Sight* at 9 (Dec. 2, 2004) (as of the end of the third quarter 2004, cable modem service was available to 95 percent of cable subscribers).

Therefore, with respect to all segments of the broadband business, it is appropriate for the Commission to focus on national data, and that is all the more true given that national patterns with respect to broadband availability and competition hold true throughout our service areas. Therefore, reliance on national data in the context is justified.

5. Finally, some parties claim that, in the absence of common carrier regulation, broadband services would devolve into a “cozy duopoly” between local telephone companies and cable companies.³⁸ These charges cannot be squared with the facts – including intense price competition and expanding service offerings – and have recently been rejected by the Commission in the *Section 271 Forbearance Order*.

The duopoly argument fails to account for marketplace realities. As the *December 2004 High Speed Data Report* shows, the vast majority of the country is served by more than two high speed broadband providers, and, in particular, “numerous competing providers report serving high-speed subscribers in the major population centers of the country.” *Id.* at 4 & Table 12. In fact over 10% of all zip codes – presumably representing an even higher percentage of the population – are already being served by 10 or more high-speed broadband providers. *Id.* Table 12. As the Commission has repeatedly recognized, the *availability* of competing technological platforms, such as 3G mobile wireless, fixed wireless, BPL and satellite, is significant, even if the number of current subscribers is low when compared to more established technologies. *Fourth Section 706 Report* at 20552. This is particularly true given that with broadband, even the most established technologies maintain a small percentage of the total potential customer base.

³⁸ See, e.g., *Earthlink Comments* at 13-14; *Closecall Comments* at 5; *FISPA Comments*, at 28-30; *Covad Comments*, at 4; *Vonage Comments*, at 13-15.

Even on its own terms, however, the duopoly argument fails. As the Commission recently observed, “the competitive nature of the broadband market, including new entrants using new technologies, is driving broadband providers to offer increasingly faster service at the same or even lower retail prices.” *Fourth Section 706 Report* at 20552. On an almost constant basis, competitors announce new and improved service offerings or reduced prices. Attached hereto as Exhibit 2 is a chart documenting the price and speed war that is raging between cable and DSL providers.

Moreover, head-to-head comparative advertising by cable modem and DSL providers offers additional evidence that they are competing fiercely. For example, Comcast advertises on its web site that its cable modem service has “Scorching Speeds,” including “[d]ownload speeds up to 5 times faster than 768Kbps DSL.”³⁹ While the “DSL vs. Cable” section of Verizon’s web site invites customers to “take a look and see the difference,” and trumpets several advantages of its DSL product over cable, such as a “dedicated connection,” use of the same line as the customer’s telephone, billing together with telephone service, and access in any room that has a telephone jack.⁴⁰ These are but samples of the competitive slug fest that exists between cable modem and DSL providers.

The cozy duopoly theory is further shattered by the steps currently being taken by Verizon to ratchet up the competition with the introduction of next-generation broadband facilities. Verizon is in the process of spending billions of dollars to roll out next-generation fiber-to-the-premises (“FTTP”) networks that will compete with voice, data and video providers.

³⁹ See *Comcast High Speed Internet Features*, at www.comcast.com/Benefits/CHSIDetails/Slot2PageOne.asp.

⁴⁰ See *Verizon’s “DSL vs. Cable” Comparison*, at <http://www22.verizon.com/forhomedsl/channels/dsl/dsl+vs+cable.asp>.

As part of its FTTP rollout, Verizon plans to pass three million homes and businesses by the end of 2005.⁴¹ And as evidenced in the locations where Verizon's FTTP is in place, consumers will benefit from lower prices and/or better service than cable. See Verizon February 24, 2005 News Release, "Verizon Bringing Blazing-Fast Data Speeds and Crystal Clear Voice Services to Oregon with New Fiber Network," at 3 available at <http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=89498> (offering speeds of up to 5 Mbps for as low as \$34.95 and 15 Mbps for as low as \$44.95 per month). Therefore, there is absolutely no reason to believe – and certainly no evidence to suggest – that competition will suffer in the absence of common carrier regulation.

In light of these facts, it is no surprise that the Commission rejected in strong terms these same duopoly arguments in its recent *Section 271 Forbearance Order*, stating:

[W]e specifically reject the assertions of competitive carriers that forbearance should be denied because the BOCs either are not subject to competition with respect to their broadband offerings, or are constrained only by a duopolistic relationship with cable operators. Again, we refuse to take the static view suggested by some competitors of this dynamic broadband market, thus leveling the terms of competition, providing real competitive choice, and furthering the goal of ensuring just, reasonable, and nondiscriminatory rates, terms and conditions for these services. As explained above, broadband technologies are developing and we expect intermodal competition to become increasingly robust, including providers using platforms such as satellite, power lines, and fixed and mobile wireless in addition to the cable providers and BOCs.

Section 271 Forbearance Order ¶ 29. The Commission should similarly dismiss these recycled arguments here – they have not improved with age.

⁴¹ See Verizon Oct. 21, 2004 News Release, "Verizon Deploying Fiber Optics to Homes and Businesses in 6 More States in Northeast and Mid-Atlantic," at <http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=87633>.

C. Forbearance Is Not an Effort to Put ISPs, VoIP Providers, or Other Content Providers Out of Business.

Many parties have filed comments with the Commission expressing concern that the relief requested in Verizon's petition would be catastrophic to independent ISPs or to competing VoIP providers.⁴² These parties suggest that ILECs have the ability to keep those businesses off of the Internet, or at least to interfere with the services provided by ISPs and VoIP providers in order to advantage ILECs' affiliated operations. Contrary to these alarmist predictions, however, once the Commission properly defines the relevant market to include cable modem providers, other carriers, and other emerging competitors, there is no valid concern that ISPs, VoIP providers, or any other market participants will be unable to reach their customers effectively in the absence of common carrier regulation. Verizon and other competitors have every incentive to allow their customers to access legal Internet content or providers of such content. Competitors would not allow, and customers would not accept, anything less. *See Carlton Declaration* at 14-16.

Accordingly, Verizon has endorsed the "Net Freedoms" proposed by Chairman Powell to govern the operation of the Internet.⁴³ Verizon agrees that there is no reason to engage in

⁴² *See, e.g., FISPA Comments, passim; Earthlink Comments, at 2-3; ITAA Comments, passim; Vonage Comments at 6-7; Comments of the National Association of State Utility Consumer Advocates, WC Docket No. 04-440, at 15-20 (filed Feb. 8, 2005) ("NASUCA Comments"); Berkshire Net Comments, WC Docket No. 04-440 (filed Feb. 5, 2005) ("Feb. 5 Berkshire Comments"); WTS Online, Inc. Comments, WC Docket No. 04-440, passim (filed Jan. 26, 2005) ("WTS Comments").*

⁴³ *See Reply Comments of the Verizon Telephone Companies, IP Enabled Services, Petition of SBC Communications Inc. for Forbearance Under 47 U.S.C. § 160 from Application of Title II Common Carrier Regulation to "IP Platform Services," WC Docket Nos. 04-36 and 04-29, at 18-19 (filed July 14, 2004); see also Remarks of Michael K. Powell, Chairman, FCC at the Silicon Flatirons Symposium on The Digital Broadband Migration, Preserving Internal Freedom: Guiding Principles for the Industry, at 4-5 (Feb. 8, 2004) at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243556A1.pdf ("Net Freedoms Speech").*

anticipatory regulation or enshrine those or other concepts in regulation, however. Instead, Verizon and all other competitors should embrace those “Net Freedoms” voluntarily, and the regulatory approach should be reserved for instances, if any, where “weighty and extensive evidence of abuse” in the market exists.⁴⁴

Several commenters misconceive the “Net Freedoms” as an invitation for additional, intrusive regulation in the name of “network neutrality.” See, e.g., *Vonage Comments*, at 4; *NASUCA Comments*, at 25. That retrograde notion flies in the face of the “light hand” approach to regulation endorsed by the Commission. See, e.g., *Fourth Section 706 Report*, at 20542. Instead, the “Net Freedoms” are “guiding principles” to which all industry participants should (in their own self-interest) voluntarily submit.⁴⁵ See *Net Freedoms Speech*, at 1. With this “road map . . . [for] avoid[ing] future regulation,” Chairman Powell recognized “Congress’ intent that the Internet remains free of unnecessary regulation that might distort or slow its growth,” and that no such regulation is currently necessary, stating: “[T]he case for government imposed regulations regarding the use or provision of broadband content, applications and devices is unconvincing and speculative. Government regulation of the terms and conditions of private contracts is the most fundamental intrusion on free markets and potentially destructive, particularly where innovation and experimentation are hallmarks of an emerging market. Such interference should be undertaken only where there is weighty and extensive evidence of abuse.” *Id.* at 3-5. It is that vision of “Net Freedom” to which Verizon subscribes and that the

⁴⁴ See *Net Freedoms Speech* at 4.

⁴⁵ Chairman Powell correctly noted the “strong incentives that network owners have to ensure that broadband platforms remain open” because “[s]uch openness encourages competition among Internet applications and services, which will in turn make broadband platforms more valuable to both consumers and network owners.” *Net Freedoms Speech* at 4.

Commission should follow, not the heavy-handed regulatory approach preferred by some. The case for more intrusive regulation has not been made.

1. As an initial matter, when considering the comments of ISPs and VoIP providers, the Commission must consider that the purpose of telecommunications laws reflect the basic antitrust principle that the government should intervene in the marketplace only “for the ‘protection of competition, not competitors.’” *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe*, 370 U.S. at 320). The Commission has long identified that same principle with the 1996 Act more generally. See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶ 618 (1996) (local competition rules should be, as “Congress intended, *pro-competition*” rather than “*pro-competitor*”); *Federal-State Joint Board on Universal Service*, 16 FCC Rcd 6153, 6195 (2000) (“Consumers are and should be the ultimate beneficiary of the 1996 Act”). Similarly, the purpose of section 10 is not to favor the private interests of particular competitors, but “to allow the FCC to reduce the regulatory burdens on a carrier when competition develops, or when the FCC determines that relaxed regulation is in the public interest.” 141 Cong. Rec. S7881, S7887 (daily ed. June 7, 1995) (statement of Sen. Pressler). As explained above, competition for broadband services means that – without the need for intrusive regulation – all broadband providers have the incentive to ensure that their subscribers are able to reach the legal content and other services that are available over the Internet – otherwise, their subscribers will switch to a provider who does give them what they want. Given this reality, regulation should not be imposed to shield particular competitors from the effects of competition.

2. In any event, the concerns that ISPs or other content providers will lose commercially reasonable access to the Internet or that VoIP providers will be improperly disadvantaged if Verizon's petition were granted are not well-founded.

With broadband, the role of the ISPs is primarily one of supplying content and applications, not in providing facilities-based Internet access services. This means that the major providers of broadband access services, including local telephone companies, have strong business incentives to provide consumers access to ISPs or other content providers. As explained immediately above, if a broadband provider fails to provide its customers access to a content provider that is offering valuable content, consumers would react with their feet and flock to competing broadband platforms that did make such content available. And even if local telephone companies decided to stop providing access to content providers despite the fact that consumers valued access to those providers or other desirable applications, other broadband providers in the market, such as the cable companies, would quickly step in to fill the gap.

Moreover, as Verizon has explained to the Commission in other proceedings,⁴⁶ intermodal competition will also ensure that content providers have reasonable access to broadband services from Verizon or other competitors for another reason. Because ILECs face intense intermodal competition from other platforms, they will need to find ways to keep traffic on Verizon networks in order to recover their enormous capital investments, including through the provision of service offerings to content providers. The Commission recently acknowledged

⁴⁶ See, e.g., White Paper, *The Recent D.C. Circuit Decision Affirming the Broadband Portions of the Triennial Review Order Provides Further Strong Support for Granting Verizon's Petition for Forbearance from Any Section 271 Unbundling Obligations for Broadband*, at 14-15, attached to Letter from Dee May, Verizon, to Marlene H. Dortch, FCC, CC Docket Nos. 01-337 and 01-338, WC Docket Nos. 02-33 and 02-52 (filed March 26, 2004); Reply Comments of Verizon, *Petition for Forbearance of the Verizon Telephone Companies*, CC Docket No. 01-338, at 14-15 (filed Nov. 26, 2003).

as much in the *Section 271 Forbearance Order* when it found that “the evidence currently before us, taken as a whole, leads us to conclude that competition from multiple sources and technologies in the retail broadband market, most notably from cable modem broadband providers, will pressure the BOCs to utilize wholesale customers to grow their share of the broadband markets and thus the BOCs will offer such customers reasonable rates and terms in order to retain their business.” *Section 271 Forbearance Order*, ¶ 26; *see also Fourth CMRS Order* ¶ 20 (“the increasing degree of [broadband] competition should provide incentives for facilities-based [broadband] providers to agree to [provide wholesale access] to increase their revenues”).

3. Indeed, Verizon’s incentive to negotiate reasonable wholesale arrangements with ISPs and others is not merely theoretical, but instead is borne out by Verizon’s actions. Verizon has made clear that in the absence of regulation, ISPs can continue to reach their customers over Verizon’s network on commercially reasonable, market-based terms and conditions. In fact, Verizon long ago arrived at an agreement with the United States Internet Industry Association – an organization representing nearly 300 Internet providers – in which Verizon committed to negotiating commercial agreements with ISPs in a deregulated broadband environment. That agreement is attached hereto as Exhibit 3.

In fact, Verizon has shown its commitment to working with independent ISPs by offering them a number of opportunities that are not mandated by common carrier regulation. *See* Declaration of Peter J. Castleton ¶ 4. For example, Verizon offers term and volume discounts for ISPs in order to encourage increased use of Verizon’s networks. *Id.* And Verizon has offered to allow independent ISPs to band together into purchasing cooperatives in order to make it easier to achieve the volume levels necessary to obtain greater discounts. Such discounts could lower

the price per line paid by ISPs by as much as \$2.00. *Id.* Verizon has also taken many other steps, set out in more detail in the attached declaration, that benefit ISPs and enable them to compete more effectively and to receive broadband services from Verizon that are faster and/or cheaper. *Id.* ¶ 5.

Nor, contrary to the suggestions of some parties, does Verizon intend a different approach as it moves to its next-generation FTTP network. *Id.* ¶ 6. Verizon has already reached wholesale arrangements with several independent ISPs for broadband services over FTTP. *Id.*

In fact, the removal of unnecessary regulations will allow Verizon to negotiate more creative arrangements with independent ISPs and/or other content providers than is possible under the common carriage regime. *Id.* ¶ 7. For example, revenue or risk sharing arrangements could be employed, or novel methods of interconnection could prove beneficial. *See Carlton Declaration* at 8-12.⁴⁷

4. The same concerns discussed above would prevent an ILEC from improperly discriminating against a VoIP provider. Both the existence of intermodal competition and the need to keep people “on-net” would make any such approach fruitless. The result of discriminating against VoIP providers would be simply to drive customers desiring such services to competing cable modem providers or other broadband alternatives. Plus, as recent events discussed below illustrate, discrimination on any meaningful scale would be easily detectable.

⁴⁷ Some commenters also suggest that Verizon’s petition is flawed for failing to take into account the Regulatory Flexibility Act requirements, and in particular the impact of forbearance on ISPs that are small businesses. *See, e.g., FISPA Comments* at 55-58. In fact, it is these commenters who fail to take into account the benefit to small businesses more generally from increased broadband deployment, improved broadband service, and lower costs. *See, e.g., Fourth Section 706 Report* at 20586. These benefits to small businesses throughout the economy dwarf the negative effects, if any, that would result to independent ISPs.

In its comments, Vonage suggests that regulation is necessary because local telephone companies might discriminate against VoIP providers by blocking certain ports.⁴⁸ *Vonage Comments*, at 7. Real world events that have occurred since the filing of those comments, however, reveal that any such practice would be detected easily, and could be addressed by the Commission without the need for cumbersome regulation. Within the last several weeks, Vonage began reporting that a local telephone company was interfering with its VoIP services by blocking certain ports. On March 3, 2005, the Commission released a consent order with the small telephone company that allegedly was interfering with VoIP services, thereby quickly and effectively putting a stop to that practice. *See Order, Madison River Communications, LLC and affiliated companies*, File No. EB-05-IH-0110, DA 05-543 (rel. March 3, 2005).

These events clearly show that discrimination against VoIP providers or any other content providers could not be accomplished on any meaningful scale without detection, and that effective options are open, short of full-scale regulation, for the Commission to address any such isolated incidents of abuse as they arise. Handling such issues as they arise in a concrete setting, rather than through the strictures of intrusive common carriage regulation, however, is clearly preferable to uniquely burdening ILECs with regulations that inhibit their ability to compete effectively and that prevent them from entering into more creative and flexible arrangements with ISPs, VoIP providers, and other content providers.

⁴⁸ As Verizon has previously explained, one reason that discrimination against a VoIP provider is unlikely is because an ILEC cannot distinguish bits carrying voice data from bits carrying other information within a bit stream. As the story above illustrates, however, it is possible to completely block certain “ports” that may commonly be used for certain types of information, such as voice data. But recent events also show any such effort would be easily detectable and could be addressed by the Commission if it were improper.

D. Current Rules Hamper Effective Competition from ILECs and Deter More Robust Deployment of Broadband.

Several parties filed comments arguing that some of the minimal deregulatory steps already taken by the Commission – such as the price flexibility rules – give ILECs all of the flexibility that they need to compete effectively.⁴⁹ Moreover, some argue that continuing tariff requirements are necessary in order to ensure transparency and to prevent discrimination or anticompetitive practices, such as predatory pricing or price squeezes.⁵⁰ Still others suggest that ILECs need no further incentives to invest in broadband deployment, in light of the fact that they are currently investing heavily in broadband facilities,⁵¹ or that a little more delay is no big deal.⁵² These suggestions all fail to comprehend the distortions in the development of the competition for broadband services that have resulted – and would continue to result – from the imposition of unnecessary, invasive regulation. Particularly given this country’s steady decline in the broadband rankings,⁵³ the Commission must reject these misplaced arguments and free all broadband providers – and in particular secondary players like the ILECs – to compete unencumbered.

⁴⁹ See, e.g., *AT&T Reply Comments on BellSouth Petition*, at 35. Meanwhile, others argue that those same rules provide too much flexibility, and that more intense regulation would be preferable. See, e.g., *ITAA Comments*, at 14-15.

⁵⁰ See, e.g., *MCI Comments*, at 11; *AT&T Comments on BellSouth Petition*, at 18-19.

⁵¹ See, e.g., *Covad Comments*, at 7; *NASUCA Comments*, at 43-47; *Earthlink Comments*, at 15; *Opposition of Comptel/Ascent*, WC Docket No. 04-440, at 1-2 (filed Feb. 8, 2005).

⁵² See, e.g., *Vonage Comments*, at 4.

⁵³ When the Commission released the *Fourth Section 706 Report* in September 2004, the United States was ranked 11th in the world in broadband deployment. *Id.* at 20579 (Chart 14). More recent reports, however, already show a slide to 13th in the world in broadband penetration. See Anne Veigle, *Supreme Court to Hear Brand X Cable Modem Case*, *Communications Daily*, Dec. 6, 2004, at 1.

1. Those who argue that ILECs already have sufficient competitive breathing room to compete effectively ignore the harms of imposing common carrier regulation in the context of a competitive market. While it is certainly true that under pricing flexibility, local telephone companies are permitted some degree of flexibility in dealing with other market participants, that relief does not go nearly far enough. This is so for several reasons.

First, pricing flexibility so far has not been applied to all broadband services, although other proceedings requesting that relief are currently pending before the Commission.⁵⁴

Second, the flexibility that pricing flexibility permits is geographically limited and is only available in particular areas in which certain triggers are satisfied. This limitation shows the inadequacy of existing regulatory relief – particularly given the national and international nature of broadband services. For example, this limitation would prevent negotiating nationwide arrangements with ISPs or others who operate on a national basis.

Third, the pricing flexibility rules do not themselves remove telephone companies from the common carrier rubric. This limitation undermines any ability on the part of ILECs to negotiate truly individualized arrangements with customers. Such arrangements (*e.g.*, cross-promotions, cooperative service design, unique branding) require a close working relationship well beyond the typical carrier/customer setting. The ability to negotiate in an unencumbered fashion also is essential to enable both parties to minimize their risks given uncertain demand for innovative broadband services and products. If a telephone company is required to offer the same exact terms to any other requesting party, it may elect to forgo certain opportunities that could have been beneficial for both the ISP and consumers. Moreover, because such

⁵⁴ See *Verizon Pricing Flexibility Waiver Petition*; *Verizon Pricing Flexibility Forbearance Petition*.

arrangements would still be subject to the Title II framework, telephone companies are less likely to enter creative compensation arrangements for fear that such arrangements potentially would be second-guessed, modified, or invalidated by regulators.

Finally, the “contract tariff” route permitted under price flexibility is no panacea because any tariffing requirement is harmful to a competitive market. As the Commission has previously recognized, a tariffing regime, when imposed in a competitive market, “may facilitate, rather than deter, price coordination, because under a tariffing regime, all rate and service information is collected in one, central location,” thereby rendering it easier for competitors to adjust prices in response to rate changes by each other. *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as Amended*, 11 FCC Rcd 20730, ¶ 23 (1996). Forcing *any* participant in a competitive market to disclose cost information, pricing information, and network architecture plans harms, rather than promotes, competition. This concern is equally valid in the context of contract tariffs.

2. The fact that considerable broadband deployment has taken place in the absence of regulatory parity does not mean that regulatory relief is unnecessary now, as some commenters suggest. Although broadband services are robustly competitive now, there is a risk that they could become less so if the asymmetric regulatory regime is allowed to continue, since it hampers rather than promotes competitiveness. The point of a uniform, deregulatory approach to the regulation of broadband is to avoid locking in the market distortions that asymmetric regulation has caused so far.

Furthermore, although the local telephone companies’ record of broadband deployment is impressive, much remains to be done. Even where telephone companies have deployed DSL facilities, those facilities represent merely the first-generation in broadband technology. As

discussed above, mammoth additional investments will be needed to deploy next-generation, fiber-based technologies like Verizon's FTTP to locations currently served with DSL and to other parts of the network that currently lack broadband facilities and to develop new services to provide over those facilities. Local telephone companies can make the needed upgrades to their networks and develop the new services that will be provided over them, but placing ILECs in a Title II regulatory straightjacket would make it much less attractive for them to do so. Others can also build fiber networks and develop the related services, and some have already begun doing so. But a regulatory regime that encourages everyone to deploy broadband except local telephone companies, with their vast experience and know-how, is not merely discriminatory, but senseless.

E. The Commission Can Take Steps to Protect Important Public Policy Programs, and Improve Those Programs By Applying Them to All Broadband Competitors Equally.

Several parties have suggested to the Commission that Verizon's petition should be denied, in part, because forbearance might relieve Verizon and other ILECs from various public policy obligations – such as CALEA, 911, Emergency Alert System, or the Universal Service Fund – to which ILECs are currently subject.⁵⁵ These arguments are attempts to muddy the water, and the Commission has ample authority to ensure that these programs are applied appropriately to all broadband providers.

For example, as Verizon has argued elsewhere, CALEA's obligations apply more broadly than do Title II common carrier regulations, and would still apply to ILECs' broadband services

⁵⁵ See, e.g., *Vonage Comments* at 5; *Earthlink Comments*, at 15; *AT&T Reply Comments on BellSouth Petition*, at 15.

after forbearance.⁵⁶ This is because CALEA's definition of "telecommunications carrier" is broader than that used in the Communications Act, and would apply to the broadband services provided by Verizon and others following the requested forbearance. *See* 47 U.S.C. § 1001(8)(B)(ii).

With respect to other such programs, if the Commission agrees that particular provisions are needed to promote national security, emergency preparedness, or other such public policy concerns, implementing such provisions under Title I for all broadband platforms clearly would do more to advance those goals than would imposing them through Title II regulation only on the local telephone companies who are minority players. And the Commission could specify in any forbearance order that such provisions would continue to apply to ILECs and all other broadband providers.

F. ISPs' Shotgun Approach to Attacking Verizon and Verizon Online Does Nothing More Than Provide Confirmation of the Existing Competitive Environment.

Finally, in a desperate attempt to convince the Commission to regulate local telephone companies – and no other competitors – when they provide broadband services, a number of ISPs have filed comments attacking both Verizon and its affiliated ISP, Verizon Online (VOL). These allegations range from actions that are completely appropriate and permissible even under the current regulatory regime – such as joint selling practices – to the fanciful allegations of wrongdoing or discrimination uncorroborated by anything other than Internet rumors. One characteristic shared by many of these allegations is a distinct distaste for any competitive actions taken by Verizon, revealing that some independent ISPs would prefer to operate in a

⁵⁶ Letter from William P. Barr, Verizon, to Michael Powell, FCC, CC Docket Nos. 01-337 and 01-338, WC Docket Nos. 02-33 and 02-52, at 7 (filed Jan. 7, 2004); Letter from W. Scott Randolph, Verizon, to Marlene H. Dortch, FCC, CC Docket Nos. 02-33, 95-20, 98-10, and CS Docket No. 02-52 (filed Oct. 8, 2003).

competition-free bubble. But the common attribute of all of these allegations is that they are completely irrelevant to the issues presented by Verizon's petition.

1. The principal complaint of the independent ISPs is that VOL sells broadband services to end users at prices that independent ISPs consider too low.⁵⁷ In fact, some suggest that VOL sells DSL to end users for a lower price than the wholesale cost paid by independent ISPs. These complaints concerning the low prices for Verizon's broadband services are misplaced for several reasons.

First, VOL purchases wholesale broadband services from Verizon at the same tariffed price – \$26.95 per month – that is available to other ISPs that commit to the same term and volume plans. Castleton Declaration at ¶ 9. This price is well below the lowest retail broadband offering made to consumers by VOL – \$29.95 per month. *Id.* In fact, even the most expensive wholesale offer made to ISPs by Verizon is lower than the lowest VOL retail price. *Id.* Moreover, any other ISP (or buying consortium of ISPs) willing to commit to sufficiently high volume and term plans can obtain wholesale broadband service at exactly the same rate as VOL. *Id.*

In any event, the fact that retail prices offered by VOL are as low as they are is indicative of the intense and ubiquitous competition that exists for broadband services from cable modem providers and others. While such price competition may cause hardship for small ISPs who lack economies of scale or who do not provide other services for which consumers are willing to pay a higher price, low prices benefit the millions of consumers who pay less for their broadband services. And absent proof of predatory pricing – which is wholly lacking – such price

⁵⁷ See, e.g., *FISPA Comments*, at 36-37 & Exhibits; *WTS Comments*, at 6; *Initial Comments of Michigan Online Group, Inc.*, WC Docket No. 04-440, at 5 (filed Feb. 8, 2005); *Feb. 5 Berkshire Comments*, at 2.

competition should be encouraged. *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222-224 (1993) (noting that predatory pricing claim requires showing that (1) prices are “below an appropriate measure of . . . costs” and (2) a “dangerous probability” of recouping the resulting losses exists). As numerous courts have noted in the “predatory pricing” context, the strategy of pricing competitive services at an artificially low level is irrational unless there is a probability that the resulting losses could be recouped.⁵⁸ Under these circumstances, an ILEC could recoup these short-term losses in one of only two ways: (1) by driving all competitors out of the market and then raising prices to monopoly levels; or (2) by increasing rates for other non-competitive services.

Neither of these options is possible given the current state of broadband competition. *First*, competition for broadband services cannot be eliminated. With respect to both enterprise and mass market customers, numerous competing providers are providing broadband services over various technological platforms, and they will not collectively be driven out of the market by temporary efforts to under-price. Moreover, even in the unlikely event that intermodal competitors went out of service, the facilities of those providers would remain in place and intact, ready for other firms to acquire and operate to undercut the ILEC’s prices if it were to attempt to raise prices to monopoly levels.

Second, ILECs cannot recoup losses by increasing rates for other non-competitive services. Incumbents compete head-to-head with wireless, cable, and other providers for minutes of use, and those competitors constrain the ability of incumbents to raise prices for regulated services. And, rates charged by Verizon and other large carriers are largely

⁵⁸ *See, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588-589 (1986) (conduct is predatory only where it would be economically irrational for the monopolist but for the conduct’s adverse impact on competition).

constrained by price caps rather than by accounting costs. Under price caps, adding costs to the rate base for regulated services no longer allows carriers to increase the price of those services.

Accordingly, the price competition of which ISPs complain, while perhaps painful to them, merely corroborates Verizon's arguments concerning the existing, intense competition and the lack of any need for common carrier regulation.

2. Many independent ISPs also complain that they have no alternative supplier of wholesale broadband services.⁵⁹ Verizon has already responded to this argument above. In short, other, competing providers can and do provide wholesale broadband services, and Verizon has every incentive to continue to sell wholesale broadband services on commercially reasonable terms even in the absence of common carrier regulation. *See* Castleton Declaration ¶¶ 4-5.

3. Another line of attack by some ISPs is that Verizon benefits VOL, at the expense of independent ISPs, by engaging in joint selling and marketing.⁶⁰ In other words, these parties complain that Verizon advertises for VOL on its web site or when customers place call to Verizon. Not only are such practices perfectly permissible under existing regulations, they also benefit consumers by informing them of competitive alternatives that are available to them, thereby allowing them to make more informed choices in selecting an ISP. Here again, the essence of these complaints is really that these ISPs do not want to face competition – not that Verizon has done anything improper.

⁵⁹ *See, e.g., FISPA Comments*, at 30 & Exhibits; *Comments of Internet Junction Corp.*, WC Docket No. 04-440 (filed Feb. 7, 2005) (arguing that ISPs lack alternative suppliers, but admitting that it has arrangement with cable modem providers).

⁶⁰ *See, e.g., WTS Comments*, at 8; *FISPA Comments*, Exhibit E.

4. Some ISPs also allege, without providing any specifics, that Verizon discriminates against independent ISPs and in favor of VOL in other ways.⁶¹ For example, one ISP suggests that VOL gets exclusive, advance knowledge of new DSL deployment, thereby permitting it to get the jump on competing ISPs.⁶² Some parties also seem to suggest that VOL obtains confidential information concerning independent ISPs' customers that it then uses to market VOL broadband service.⁶³ Still others complain that Verizon engages in "slamming" by switching subscribers from independent ISPs to VOL, and that Verizon does not give notice to an ISP when its subscribers change to VOL.⁶⁴ These arguments too are wrong and/or irrelevant.

First, the ISPs who make these arguments seem to assume a role for VOL that it does not have. Although VOL is affiliated with Verizon, it does not control how Verizon interacts with competing ISPs. Castleton Declaration ¶ 10. For example, Verizon does not provide confidential information concerning independent ISPs' customers to VOL to permit VOL to market to independent ISP customers. *Id.* Nor does VOL control when or how broadband services are provisioned to independent ISPs. *Id.* Instead, the Verizon telephone companies provide wholesale DSL services to independent ISPs on a nondiscriminatory basis. *Id.*

Second, VOL does not get exclusive notice of new DSL deployments. *Id.* ¶ 11. Instead, Verizon attempts to provide notice to all of its ISP customers – both VOL and independent ISPs – concerning new DSL deployment approximately 90 days before they are activated. *Id.* Moreover, Verizon provides DSL loop qualification data to all of its ISP customers from the

⁶¹ See, e.g., *WTS Comments*, at 8; *FISPA Comments*, at 37 & Exhibit E; *Feb. 5 Berkshire Comments*, at 2

⁶² See, e.g., *WTS Comments*, at 8-10; *FISPA Comments*, at 37.

⁶³ See, e.g., *WTS Comments*, at 8-10; *FISPA Comments*, at 37.

⁶⁴ See, e.g., *WTS Comments*, at 9; *FISPA Comments*, at 38; *Comments of Rad-Info Inc.*, WC Docket No. 04-440, at 3 (filed Feb. 9, 2005).

same database and at the same time. *Id.* This provides both independent ISPs and VOL an opportunity to compete for new subscribers. *Id.*

Third, while some ISPs complain about “slamming,” or allege that VOL takes their customers without notice, they appear to be referring to the switching of customers to VOL with the customers’ consent. That is nothing more than perfectly permissible competition.

If some commenters mean to suggest that Verizon switched their subscribers to VOL without their customers’ knowledge and consent, they do not provide any factual support for those allegations. Even if that were to happen – and Verizon doesn’t endorse such actions – the Commission’s slamming rules apply to pre-subscription local and long distance services and not to DSL and other broadband services. Therefore, these irrelevant allegations do not provide a basis for denying Verizon’s petition.

5. Finally, some ISPs seem to believe that forbearance is inappropriate because, in their view, Verizon and/or VOL are not sufficiently innovative or provide poor customer service.⁶⁵ While Verizon certainly disagrees with those claims, they have no bearing on the forbearance decision, even if true. If Verizon or VOL provided inferior service, that would only work to the benefit of independent ISPs. Customers who are unsatisfied with Verizon or VOL will switch to competing broadband providers. And if independent ISPs truly provided better customer service or applications that were unavailable from Verizon or VOL – as some commenters claim in detail⁶⁶ – they would have a competitive opportunity to win dissatisfied customers. Therefore, even if these allegations were true, they would provide no basis for denying Verizon’s forbearance petition.

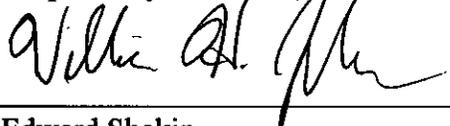
⁶⁵ See, e.g., *WTS Comments*, at 2, 11; *FISPA Comments*, *passim*.

⁶⁶ See, e.g., *FISPA Comments* at 19-25.

CONCLUSION

For the foregoing reasons, the Commission should grant Verizon's petition for forbearance.

Respectfully submitted,



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March 10, 2005

Attorneys for the
Verizon telephone companies

THE VERIZON TELEPHONE COMPANIES

The Verizon telephone companies are the local exchange carriers affiliated with Verizon Communications Inc. These are:

Contel of the South, Inc. d/b/a Verizon Mid-States
GTE Southwest Incorporated d/b/a Verizon Southwest
The Micronesian Telecommunications Corporation
Verizon California Inc.
Verizon Delaware Inc.
Verizon Florida Inc.
Verizon Hawaii Inc.
Verizon Maryland Inc.
Verizon New England Inc.
Verizon New Jersey Inc.
Verizon New York Inc.
Verizon North Inc.
Verizon Northwest Inc.
Verizon Pennsylvania Inc.
Verizon South Inc.
Verizon Virginia Inc.
Verizon Washington, DC Inc.
Verizon West Coast Inc.
Verizon West Virginia Inc.

EXHIBIT 1

**Supplemental Declaration of Dennis W. Carlton and
Hal S. Sider, CC Docket Nos. 02-33, 95-20, 98-10 and
01-337 (filed Sept. 3, 2003)**

W. Scott Randolph
Director – Regulatory Affairs



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September 3, 2003

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Ex Parte: CC Dockets No. 02-33, 95-20, 98-10, and 01-337

Dear Ms. Dortch:

Attached for inclusion in the records of the above-captioned proceedings is a Supplemental Declaration of Dennis W. Carlton, Professor of Economics at the University of Chicago and Hal S. Sider, Senior Economist and Senior Vice-President of Lexecon, Inc. This declaration supplements material originally submitted with Verizon's Comments and Reply Comments In CC Docket 01-337.

Professor Carlton and Mr. Sider conclude that ILECs cannot be considered "monopolists" in the provision of broadband transport services sold to independent ISPs in that competition from other retail providers of broadband Internet services would prevent ILECs from exercising market power by raising the price of wholesale DSL transport services if common carrier regulation of those services were eliminated. Further, the Declaration observes that common carrier regulation imposes costs on consumers by impeding an ILEC's ability to respond to changes in technology and to specialized customer requests for service in a timely manner.

Please associate this notification with the record in the proceedings indicated above. If you have any questions regarding this matter, please call me at (202) 515-2530.

Sincerely,

A handwritten signature in black ink that reads "W. Scott Randolph".

W. Scott Randolph

Attachment

cc: Michelle Carey
Brent Olson
William Kehoe
Harry Wingo
Michael Carowitz
Darryl Cooper
Gail Cohen
Robert Pepper
Simon Wilkie
Barbara Esbin

**SUPPLEMENTAL DECLARATION OF
DENNIS W. CARLTON AND HAL S. SIDER**

September 3, 2003

I. OVERVIEW AND CONCLUSIONS

1. We previously submitted a declaration in this proceeding on March 1, 2002 and a reply declaration (with Gustavo Bamberger) on April 22, 2002.¹ Among other things, those reports provided the basis for our conclusion that ILECs could not exercise market power in the provision of broadband services in the sense that elimination of common carrier regulation would not be expected to result in higher retail broadband Internet prices.

2. We have now been asked by Verizon to respond to suggestions that ILECs would exercise market power following elimination of common carrier regulation by raising the price of digital subscriber line (DSL) transport services provided on a wholesale basis to independent Internet Service Providers (ISPs). We conclude that ILECs cannot be considered “monopolists” in the provision of broadband transport services to independent ISPs and that competition from other retail providers of broadband Internet services would prevent ILECs from exercising market power by raising the price of wholesale DSL transport services following the elimination of common carrier regulation faced by ILECs. The principal reason for this is that it is the presence of competition from cable companies and other technologies, not competition

¹ Our March 1, 2002, declaration summarizes our credentials and contains copies of our curriculum vita.

from ISPs that resell ILECs' wholesale DSL transport services, that constrain the pricing of ILECs' retail DSL services and wholesale DSL transport services.

3. We also conclude that common carrier regulation imposes costs on consumers by discouraging innovative forms of contracts between ILECs and a variety of other parties, including ISPs, with the likely effect of slowing the deployment of broadband Internet services and discouraging investment in new technologies. In particular, these regulatory obligations impede ILECs' ability to invest in new technology by limiting the scope of contracts they can enter into with content providers and ISPs. The regulatory obligations faced by ILECs impede their ability to respond to changes in technology and to specialized customer requests in a timely manner.

4. In the absence of common carrier regulation, ILECs would continue to face strong incentives to provide DSL services on a wholesale basis to efficient independent ISPs. However, in the absence of regulation the scope of such arrangements would be determined by considerations of economic efficiency, with all mass market broadband platforms competing on an equal footing.

II. ILECS ARE NOT "MONOPOLISTS" OF WHOLESALE BROADBAND TRANSPORT SERVICES.

5. We understand that some commenters in these proceedings have suggested that ILECs are the only providers of wholesale broadband transport services to independent ISPs and are, therefore, properly considered "monopolists" in that "market." This characterization is wrong for two reasons.

6. First, these claims are based on the factually incorrect view that only ILECs offer broadband services on a wholesale basis to independent ISPs, as cable

companies have entered into a variety of wholesale agreements with independent ISPs.² Second, and more importantly, even if cable companies were not actively engaged in providing these wholesale services at all, it would be economically inappropriate to view “wholesale DSL transport services provided to independent ISPs” as an economic market or to view ILECs as “monopoly” suppliers of such services.

7. The first step in evaluating such a claim is to define the relevant market. This is because the exercise of defining relevant markets is undertaken in order to define the forces that influence price and to determine whether firms can exercise market power. A properly defined market, therefore, includes all firms whose participation in provision of a service significantly constrains the price under analysis. This means that in evaluating input markets, it is important to include vertically integrated firms in the market, even if these firms do not actively sell inputs to third parties.

8. More specifically, if a vertically integrated firm (that both supplies inputs to itself and sells directly to end users) competes with a non-integrated firm (that sells directly to end users and purchases inputs from another non-integrated firm), then it is essential to account for the role of the vertically integrated firm in analyzing the input market. For example, competition in sales to final customers constrains the price that the

² For example, AOL Time Warner agreed to provide transport services to a number of independent ISPs as a condition to approval of the firms’ merger. AOL Time Warner has wholesale agreements with Earthlink, Juno, and Big Net as well as a number of ISPs operating in local areas. Other cable companies have entered into voluntary wholesale agreements with independent ISPs. For example, Comcast had entered into a wholesale contract with United Online (Juno, Netzero), Cox has entered into trials with AOL and Earthlink and that, prior to its acquisition by Comcast, AT&T Broadband had entered into contracts with Earthlink, AOL and other unaffiliated ISPs. A. Breznick, *More MSOs Join Multiple-ISP Access Movement*, Cable Datacom News (Oct. 1, 2002), <http://www.cabledatcomnews.com/oct02/oct02-3.html>.

non-integrated input supplier can charge due to the ability of customers to switch between the integrated and non-integrated firms.

9. This is the approach followed by federal antitrust authorities when they analyze markets to determine whether they are susceptible to the exercise of market power. The Merger Guidelines of the Department of Justice and the Federal Trade Commission recognize that the market includes “all firms that currently produce or sell in the relevant market. This includes vertically integrated firms”³

10. Professor Areeda illustrates this principle with an example:⁴

If iron ore is the relevant market and if shares are best measured there by sales, internally used ore— so-called captive output – is part of the ore market even though it is not sold as such.

In measuring the market power of a defendant selling iron ore, the ore used internally by other firms constrains the defendant’s ability to profit by raising ore prices to monopoly levels. The higher ore price may induce an integrated firm to expand its ore production – to supply others in direct competition with the alleged monopolist, to expand its own steel production and thereby reduce the demand of other steel makers for ore, or both. Hence, captive output constrains the defendant whether or not the integrated firms sell their ore to other steel makers previously purchasing from the defendant. In sum, the integrated firm’s ore output belongs in the market.

11. Broadband Internet services encompass a variety of functions including: broadband transport and aggregation services (consolidating traffic between end users and the public Internet); routing traffic to and from Internet backbone transport networks; e-mail; and proprietary content services. Broadband Internet services are sold “at retail” to residential and small business customers by cable operators, ILEC affiliates, CLECs

³ Horizontal Merger Guidelines of the Department of Justice and Federal Trade Commission, April 8, 1997, Section 1.31.

⁴ P. Areeda, H. Hovenkamp and J. Solow, Antitrust Law vol. IIA, 535c, at 225-26 (2002).

and ISPs. In addition to their retail offerings, cable operators and ILECs offer broadband transport services on a wholesale basis to unaffiliated ISPs, which then resell these services with other components of Internet service to retail customers.⁵

12. Given retail competition between DSL, cable modem service providers and other Internet access technologies, all firms that provide broadband transport (either to themselves or to others at wholesale), including telephone companies, cable operators, and satellite and wireless providers, are properly included as participants in the “market” for wholesale broadband Internet transport services. Thus, it is economically *inappropriate* to define a separate market that consists of “wholesale DSL transport services provided to independent ISPs” alone. Although ILECs provide DSL service on a wholesale basis, that service is not properly considered a separate market as the result of competition from other technologies which constrain the price of retail services. As a result, it is economically inappropriate to characterize ILECs as “monopolists” in the provision of wholesale ADSL service.

13. Finally, independent ISPs providing service by purchasing ADSL transport on a wholesale basis from ILECs account for a relatively small share of all ADSL lines. Data from Verizon indicate that independent ISPs currently buy roughly 22 percent of all Verizon ADSL lines. Thus, in Verizon’s territory, independent ISPs

⁵ ILECs and others also offer broadband transport directly to end users, who then independently contract with ISPs to obtain Internet access. ISPs, in turn, have developed “stand alone” Internet offerings, such as AOL for Broadband, to serve those users. (AOL for Broadband’s “Bring Your Own Access” service is described at: http://www.aolbroadband.com/aolbb/nb/how/connect_byoa.adp)

account for roughly 6 percent of all mass market broadband lines. (This reflects 22 percent of ILECs' 31 percent of mass market broadband subscribers.⁶)

14. While a firm's small market shares does not necessarily imply that it does not influence market price, ILECs face rivals that are far larger than themselves in the provision of mass market broadband services. Under these circumstances, it is highly unlikely that the prices that ILECs can charge for mass market broadband services is significantly constrained by independent ISPs, as opposed to cable modem suppliers.

15. Cable companies, of course, are by far the largest retail providers of broadband Internet services and compete directly with ILEC-provided retail DSL services. As discussed in detail in our prior declarations:

- Cable modem services account for roughly two-thirds of mass market broadband subscribers. As of December 2002, cable firms provided 65 percent of broadband Internet services to mass market consumers while ADSL services provided by ILECs accounted for only 32 percent of subscribers.⁷
- Cable modem services are more widely available than ILECs' ADSL services. As of year end 2002, cable modem services were available to an estimated 84

⁶ As of December 2002, 4.9 percent of the more than 6.5 million ADSL lines in service were provided by CLECs (that utilize ILEC UNEs in providing DSL services). This reflects less than 2 percent of residential broadband Internet subscribers. High Speed Services for Internet Access: Status as of December 31, 2002, Federal Communications Commission, Industry Analysis and Technology Division, Wireline Competition Bureau, June 2003, Table 5.

⁷ FCC, Industry Analysis and Technology Division, Wireline Competition Bureau, "High Speed Services for Internet Access: Status as of December 31, 2002," (June 2003), Table 3.

percent of U.S. homes while ADSL services were available to only 61 percent of U.S. homes.⁸

- Although they now serve a relatively small number of customers, broadband services are also available from firms using satellite and fixed wireless technologies.

In addition, new technologies such as “wi-fi” and “broadband over power line” also hold promise as additional broadband Internet technologies.⁹

16. The role of competition from cable is further reflected in ILECs’ decisions to reduce DSL prices in recent months. Verizon, for example, dropped the price of its (stand-alone) DSL service to \$34.95, and lowered DSL prices to \$29.95 for customers that purchase this service from Verizon along with local and long distance service.

ILECs have dropped DSL prices in response to competition from cable firms. According to Merrill Lynch:

US cablecos have sustained a material market share lead against the telcos for broadband subs both on a cumulative and still also on a run rate basis. The three large RBOCs have all attempted to gain share by a variety of measures – but primarily through lowering the price for DSL service.¹⁰

⁸ Credit Suisse First Boston, “The Broadband Battle,” April 3, 2003, p. 8.

⁹ “Broadband over Power Line has the potential to provide consumers with a ubiquitous third broadband pipe to the home.” Statement of Chairman Michael K. Powell, Inquiry Regarding Carrier Current Systems, including Broadband over Power Line Systems; ET Docket No. 03-104, April 23, 2003.

¹⁰ Merrill Lynch, “The Telecommunicator” RBOC DSL Strategy Update – It’s (mostly) all about the price...”, July 10, 2003, p. 1.

II. ELIMINATION OF COMMON CARRIER REGULATION WOULD BENEFIT CONSUMERS.

17. While common carrier regulations do not benefit consumers by lowering prices for broadband Internet services, these rules actually harm consumers by impeding the ability of ILECs to promote utilization of their networks and to offer innovative services, and thus ILECs' ability to compete effectively with cable modem suppliers and others. More specifically, the rules (i) limit the type of contractual agreements that ILECs can enter into with third parties and thus discourage investments in which non-standard contracting terms are required to induce participation and (ii) discourage ILECs from developing innovative methods of technical coordination and interconnection with content providers and ISPs.

A. COMMON CARRIER RULES INHIBIT DEVELOPMENT OF CONTRACTS THAT RESPOND TO RISKS INHERENT IN EMERGING INDUSTRIES.

18. The provision of broadband Internet services is growing very rapidly, with the number of high speed lines in service increasing from less than three million to roughly 20 million between December 1999 and December 2002.¹¹ The industry's technology and business conditions are still emerging with ILECs, their potential partners and others competing to develop efficient service offerings. ILECs and others face complex decisions and significant risks regarding, among other things, how quickly to deploy and upgrade services, the extent to which they should vertically integrate or partner with others in providing various broadband Internet services, and how and where in the network to interconnect with ISPs and content providers.

¹¹ High Speed Services for Internet Access: Status as of December 31, 2002, Federal Communications Commission, Industry Analysis and Technology Division, Wireline Competition Bureau, June 2003, Table 1.

19. The provision of broadband Internet service requires close coordination between firms that supply various inputs (such as transport and ISP functions). Coordination between the various activities can be accomplished through vertical integration and/or through contracting. In industries characterized by technological change and risk, such as telecommunications, these contracts can be quite complex and idiosyncratic.

20. For example, studies of contracts between Internet portals and Internet content providers have found widespread use of complex, non-standard contracts. These contracts may include various forms of revenue sharing or risk sharing, and may establish performance standards and other contingency-specific considerations. Common carrier regulations, however, limit the ability of ILECs to tailor services for individual customers, and impede ILECs' ability to develop non-standard contracts with unaffiliated ISPs and content providers.

21. As noted above, it is widely recognized that firms in industries characterized by technological change and risk enter into a variety of non-standardized contracts. For example, a recent paper by Dan Elfenbein and Josh Lerner analyzes contracts entered into by Internet portals with providers of Internet content.¹² They find that portals typically enter into contracts that contain revenue shares or performance measures. They find that contracts between portals and content providers:

- Typically involve revenue sharing, typically based on product sales and less often on the number of new customers acquired.

¹² Dan Elfenbein and Josh Lerner, "Designing Alliance Contracts: Exclusivity and Contingencies in Internet Portal Alliances," unpublished manuscript, Harvard University, January 14, 2003.

- Often specify provisions relating to technical performance such as the speed with which pages are loaded, the percentage of time a web site was available, etc.;
- Often specify a minimum amount of commercial activity generated at a site through the portal (based on revenue, customers generated, the number of “click throughs”, etc.).

22. The prevalence of these types of provisions in contracts indicates that they play an important role in inducing investment and innovation in Internet industries, in which the success of any new venture is highly uncertain. Thus, impediments to these types of contracting forms, such as those resulting from common carrier regulations, will likely slow the formation of new alliances and deployment of new services. For example, as discussed above, common carrier regulation requires that contracts and terms offered to one customer be available to others and requires that price differences be justified on the basis of cost. These restrictions adversely affect ILECs' ability to compete with cable modem firms and others, which face no such regulation.

B. COMMON CARRIER RULES INHIBIT DEVELOPMENT OF NEW FORMS OF TECHNICAL COORDINATION BETWEEN ILECS AND THEIR PARTNERS.

23. ILECs can establish interconnections with content providers or ISPs, at a variety of points in the local telephone network, and ILECs can provide varying levels of service to these providers. Different ISPs and content providers may have different preferences with respect to the nature of the service they obtain from ILECs and/or may prefer different points of interconnection with the ILEC. In addition, changes in

technology over time also result in changes in the nature of services provided by ILECs and ISPs and content providers.

24. Common carrier regulation can impose significant costs on ILECs that attempt to establish new innovative forms of interconnection and services to ISPs and content providers. For example, we understand that under common carrier regulation, if an ILEC offers a new “enhanced” service in its network, it is obligated to offer on a tariffed basis (i) any basic transport telecommunication service used to access the enhanced service; and (ii) interconnection (comparable to that the ILEC provides to itself) that would enable rival suppliers of the enhanced service to connect with the ILEC’s network.¹³ For example, as discussed in more detail below, if an ILEC and ISP devise a way to have the ILEC verify an ISP subscriber’s password (a function previously performed by the ISP itself), then the ILEC needs to define interconnection standards that enable rivals to perform this function and may further be required to establish new tariffs for transport to and from the point in the ILECs’ network where this verification function takes place.

25. ILECs face these regulatory requirements even if only one customer would like the ILEC to perform such an enhanced services. We understand that compliance with these rules is costly and reduces the ability of ILECs to respond in a timely way with changes in technology and marketplace. In addition, such rules can interfere with the ability of the ISP or content provider and the ILEC from capturing the benefits of developing new forms of technical coordination.

¹³ These are typically referred to as the “comparably efficient interconnection” (CEI) and “open network access” (ONA) requirements imposed by common carrier regulation.

26. The following section shows that concerns that common carrier regulations have hampered innovation are not merely theoretical but instead have affected Verizon's ability to introduce new services.

C. COMMON CARRIER REGULATION HAS INTERFERED WITH VERIZON'S ABILITY TO OFFER NEW SERVICES.

27. Common carrier regulations obligate ILECs to provide wholesale DSL services on a tariffed non-discriminatory basis to unaffiliated ISPs. Verizon's experience indicates that these regulations are an impediment to formation of such agreements and the deployment of innovative services. More specifically, common carrier regulations limit the ability of ILECs to: establish revenue sharing contracts with unaffiliated ISPs or content providers; and limit ILECs' ability to enter into contracts with ISPs and content providers that establish special contract terms. In addition, the CEI and ONA aspects of common carrier regulation discourage ILECs from introducing innovative forms of technical interconnection and service with content providers and ISPs.

28. This is not just a matter of economic theory. Common carrier regulation has, in fact, adversely affected the deployment of new services and ILECs' ability to enter into a variety of ventures that would be beneficial to consumers. For example, regulation caused Verizon not to pursue the following opportunities:¹⁴

- Several universities and colleges requested that Verizon provide DSL capabilities to their students and offices, and the schools would market these services to their students. As this arrangement would provide Verizon with additional customers at lower customer acquisition costs, the academic

¹⁴ These examples are described in more detail in ex parte letter from W. Scott Randolph of Verizon to the FCC dated June 26, 2003 (relating to CC Dockets No. 02-33, 95-20, 98-10, and 01-337).

institutions expected a reduced price. As the provision of such a service would likely require Verizon to establish new tariffs for each such offering (since there were differences in the precise nature of the arrangements desired by each institution), Verizon was concerned that filing such tariffs would obligate it to provide services in locations in which it would otherwise choose not to do so.

- A local government hoped to accelerate deployment of DSL in its community by purchasing its own DSL equipment and contracting with Verizon to maintain and provide DSL service using that equipment. To do this, however, Verizon would have had to tariff this special arrangement, which could obligate Verizon to offer services in other circumstances.
- Verizon could provide “enhanced” capabilities that would allow ISPs to operate more efficiently. One example, noted above, was the request that Verizon provide wholesale DSL service that includes “enhanced” verification functions (e.g., user log in, password verification). Another example would be for Verizon network equipment to store video webcasts for redistribution to ISP customers, rather than the ISP making separate transmissions for each of its customers, as is done today.¹⁵ However, to provide these enhanced services, Verizon would have to (i) file new tariffs for the basic transport service; (ii) create the ability for competitors to obtain comparably efficient

¹⁵ This would be done at a Digital Subscriber Line Access Multiplexer (DSLAM), which is located in central offices and aggregates Internet traffic from individual end users and then forward the traffic to ATM hub switch, which in turn provides access to ISPs.

interconnection (CEI) to that equipment; and (iii) develop the necessary billing and support services for such interconnection. We understand that since the equipment has not been designed to accommodate multiple providers of such services, Verizon would also need to get the manufacturer to make changes in the equipment.

29. As these examples suggest, common carrier regulations impede Verizon's ability to modify services in response to unique circumstances as well as its ability to enter into contracts with unaffiliated ISPs or content providers that enable the parties to share risks through revenue sharing, specification of performance criteria and other contingencies. These circumstances are common in industries, such as the provision of Internet services, which are characterized by new and emerging technologies and highly uncertain investments.

IV. ILECs WILL CONTINUE TO FACE STRONG INCENTIVES TO OFFER WHOLESALE SERVICES TO INDEPENDENT ISPs AND TO PROVIDE CONSUMERS FULL ACCESS TO THE INTERNET EVEN IN THE ABSENCE OF COMMON CARRIER REGULATION.

30. Firms routinely face decisions about the extent to which they should vertically integrate or contract with others in producing a final product. They also routinely decide whether to use different distribution channels to deliver their products. For example, providers of broadband Internet transport services can choose to vertically integrate into the provision of retail ISP service, to contract with independent ISPs to provide retail services, or can pursue both strategies. Or they can decide to sell broadband transport to ISPs, to end users or to both. In the absence of regulation, ILECs providing broadband Internet transport services have strong business incentives to contract with efficient independent ISPs and other content providers.

31. If independent ISPs are more efficient as an ILEC, then an ILEC would benefit from providing them local broadband transport service on a wholesale basis. For example, independent ISPs that are efficient marketers can attract subscribers that otherwise would purchase cable modem services (or other broadband Internet access services). Likewise, it would be beneficial for the ILEC to provide content that attracts more subscribers. These customers generate wholesale revenue for ILECs that otherwise might be lost.

32. Some commenters have expressed concern that elimination of common carrier regulation could increase the likelihood that ILECs would pursue a strategy of impeding access to certain content providers. However, these commenters have provided no evidence to support this proposition.

33. As a preliminary matter, access to individual content providers is controlled by ISPs. Today, ISPs, including ISPs affiliated with ILECs, have no common carrier or other "access" obligation. Therefore, it is the marketplace itself, not any regulatory rule or requirement, that provides Internet users with full access to content providers on the Internet.

34. In addition, any attempt to restrict access to a given website degrades the overall quality of service received by subscribers and thus reduces the demand for the services. Broadband Internet service providers would benefit from engaging in this practice only by extracting payments from the firms that benefit from degraded access to certain sites. A broadband provider would engage in such a policy only if the profit it generates in doing so more than offsets the losses it incurs by making its service less

attractive, which reduces subscribers' willingness to pay for the service as well as the number of subscribers an ILEC can expect to attract at a given price level.

35. We are unaware of any claim that ILEC providers of DSL services or ILEC-affiliated ISPs have attempted to degrade access to any given website.¹⁶ This is not surprising since doing so would reflect an important deviation from the kind of Internet access that consumers have come to expect. Attempts by DSL providers to impede access to certain websites in this way would lessen the attractiveness of DSL as an alternative to cable modem services.

¹⁶ Commission officials have suggested that cable firms have engaged in related practices on a limited basis. However, we have no specific information regarding the nature or extent of such practices.

We declare under penalty of perjury that the above is true and correct to the best of our knowledge and belief.



Dennis Carlton



Hal Sider

Cable/DSL Competitive Offerings and Promotions		
DSL		
Verizon	Apr. 2004	Began three-month promotion of free Wi-Fi routers to new DSL customers
	June 2004	Raised maximum upstream speeds for the 1.5 Mbps service from 128 kbps to 384 kbps; reduced prices for business DSL for a savings of \$30 to \$40 a month
	Sept. 2004	Began offering a 3.0 Mbps/768 kbps service
	Oct. 2004	Removed the voice bundle requirement for standard service at \$29.95, for customers who subscribe to an annual service plan; began offering a free DSL modem/router gateway for these customers
SBC	Feb. 2004	Replaced a \$99.95 high-end offering with 3.0 Mbps/384 kbps service for \$44.99
	Apr. 2004	Reduced price for 3.0 Mbps/384 kbps service to \$36.99 when purchased with local, long-distance, and wireless service Reinstated promotion of \$26.95 per month for download speeds of up to 1.5 Mbps
	June 2004	Increased e-mail storage to 2 GB per account; expanded \$26.95 DSL promotion to any new customer with SBC bundle
	Aug. 2004	Announced increase of upload speeds from 128 kbps to 256 kbps, then 384 kbps for 384 kbps-1.5 Mbps download service, and from 384 kbps to 416 kbps, then 512 kbps for 1.5-3.0 Mbps service
	Oct. 2004	Announced discount promotion offering service at \$19.95 with a one-year contract when customers bundle the order with an unlimited local and long distance calling plan for an additional \$48.95 a month
BellSouth	3Q 2004	Offering free Wi-Fi routers to new DSL customers
	Sept. 2004	Reduced monthly rate of 1.5 Mbps service by \$7 per month; new DSL customers will receive a \$15 discount per month on any DSL service for the first six months Began six-month promotion for service for as little as \$9.95 (256 kbps/128 kbps) and \$17.95 (1.5 Mbps/256 kbps) for customers who subscribe to the unlimited long-distance plan
Qwest	Apr. 2004	Began offering Wi-Fi enabled DSL modem to all new subscribers for the purchases price of \$59.99 or a monthly rental fee of \$3
	Oct. 2004	Began 11-week promotion of \$26.99/month for Choice DSL Deluxe for the first three months, with activation fee reduced to \$9.99 for all tiers, and speed change charges waived
	Jan. 2005	Began 3-month promotion of \$25/month for Choice DSL Deluxe for the first two months, with activation fee for all tiers reduced to \$10, and speed change charges waived
CABLE		
Comcast	July 2004	Announced a new 4 Mbps tier option and an increase in e-mail storage from 10 MB to 250 MB
	Jan. 2005	Announced free upgrades to 6 Mbps/768 kbps and 4 Mbps/384 kbps for customers of 4 Mbps/384 kbps and 3 Mbps/256 kbps customers, respectively
Time Warner	July 2004	Announced launch of speeds up to 6 Mbps/512 kbps; promoted service for \$29.95 per month for six months in New York
Charter	Apr. 2004	Increased download & upload speeds to 3.0 Mbps/256 kbps
Cablevision	June 2004	Began offering bundle of Internet, telephone, and video service to new customers for \$89.95
	Oct. 2004	Launched TV ad campaign to announce that customers now experience <i>average</i> downstream speeds of 5 Mbps, a 40 percent increase from two years ago, at no additional cost; the maximum possible downstream is now 10 Mbps
	3Q 2004	Began promotional offering of the first 6 months at \$29.95/month
	Dec. 2004	Began offering customers downloads of online security products with a combined retail value of \$50, at no charge
Cox	Aug. 2004	Announced higher data speeds for all three service tiers (up to 5 Mbps download) and lowered the price on the fastest service by \$5-\$25, depending on the area
RCN	July 2004	Announced launch of download speeds of up to 7 Mbps
	Jan. 2005	Announced it will upgrade download speeds to 10 Mbps – its third upgrade in 18 months – across all markets by the end of February. Existing customers with 7 Mbps will be automatically upgraded at no extra charge; existing customers with 5 Mbps service will be upgraded to 7 Mbps at no extra charge
	Jan. 2005	Announced the launch of WebWatch, a home monitoring system that allows remote viewing of real-time video of their home or business through any PC, for \$9.95/month, in Boston
Mediacom	Jan. 2004	Announced it will double download and upload speeds to 3 Mbps and 256 kbps, respectively, at no extra charge

Sources:

Verizon. Verizon News Release *Verizon Offers Free Wireless Router with Rebate Promotion To Keep Everyone in the Family Online with DSL* (Apr. 13, 2004); Verizon News Release, *Verizon Online Triples DSL Upstream Speed and Slashes DSL Price* (June 2, 2004); Verizon News Release, *Verizon Online Adds New High-Speed Lane to the Internet for Consumers and Businesses* (Sept. 7, 2004); Verizon News Release, *Verizon Online Introduces New, Low-Priced Annual DSL Service Plan and Combination Modem and Broadband Router for Home Networking* (Oct. 4, 2004).

SBC. D. Barden, *et al.*, Banc of America Securities, *SBC Communications Inc.* (Feb. 2, 2004); SBC News Release, *SBC Yahoo! DSL Returns to Best-Ever Price of \$26.95 A Month For High Speed Internet Service* (Apr. 27, 2004); SBC News Release, *All New SBC Yahoo! DSL Express Customers Pay Less Than \$30 a Month When Ordering before End of June* (June 2, 2004); SBC News Release, *SBC Yahoo! DSL and Dial Subscribers To Receive Major E-mail and Instant Messaging Enhancements* (June 15, 2004); SBC News Release, *SBC Communications Announces Two-Phase Plan To Increase Upload Speeds for SBC Yahoo! DSL Subscribers – at No Extra Charge* (Aug. 9, 2004); SBC News Release, *SBC Communications Announces \$19.95 Monthly Residential Pricing for SBC Yahoo! DSL; Lowest Price Ever* (Oct. 28, 2004).

BellSouth. K. Schachter, *Price War Among Broadband Providers Intensifies Competition between Cable and Telecom*, Long Island Business News (July 16, 2004); BellSouth Press Release, *BellSouth Introduces New Pricing and Special Promotions for BellSouth FastAccess DSL* (Sept. 27, 2004).

Qwest. Qwest News Release, *Qwest DSL Modem Gives Customers Headstart on Wi-Fi Networking Solution*, (Apr. 8, 2004); Blarg Online Services, *Qwest DSL Promotions October 23rd 2004 – January 8th 2005*, <http://www.blarg.net/stories/Story04102801>; Blarg Online Services, *Qwest DSL Promotions January 9th, 2005 – April 9th, 2005*, <http://www.blarg.net/stories/Story05011101>; Qwest, *Residential: Qwest Choice DSL Deluxe with MSN Premium*, http://www.qwest.com/residential/products/qcdsl/msn_deluxe.html.

Comcast. Comcast News Release, *Comcast Adds New 4Mbps (“4Meg”) Speed Option to High-Speed Internet Offering* (July 27, 2004); Comcast News Release, *Comcast Enhances Broadband Service with New Speeds and More Apps for 2005* (Jan. 18, 2005).

Time Warner. B. Greenberg, *Cable Companies Use Speed To Gain Competitive Edge over DSL*, Comm. Daily (July 28, 2004); *Verizon Cable Battle Moves to Manhattan*, Long Island Business News (July 23, 2004).

Charter. Charter Comm. Press Release, *Charter Increases Internet Access Download Speed by 50 Percent* (Apr. 6, 2004).

Cablevision. Comm. Daily (June 22, 2004); Cablevision News Release, *Cablevision's Optimum Online Increases Average Downstream Speed 40 Percent with No Price Increase* (Oct. 12, 2004); A. Bourkoff, *et al.*, UBS, *High-Speed Data Update for 3Q04* at 7 (Nov. 15, 2004); Cablevision News Release, *Cablevision Offers Powerful Online Security Tools to Optimum Online High-Speed Internet Customers at No Additional Charge* (Dec. 28, 2004).

Cox. *Cox To Boost Broadband Internet Service*, Associated Press Online (Aug. 13, 2004).

RCN. B. Greenberg, *Cable Companies Use Speed To Gain Competitive Edge over DSL*, Comm. Daily (July 28, 2004); RCN Press Release, *RCN Increases Cable Modem Speed to 10 Mbps, Offers Fastest Residential Cable Modem on the Market* (Jan. 19, 2005); RCN Press Release, *RCN Launches RCN WebWatch, a New Remote Video Monitoring Service* (Jan. 26, 2005).

Mediacom. Mediacom Press Release, *Mediacom Communications To Double Speeds for Mediacom Online High Speed Internet Customers* (Jan. 5, 2004).

EXHIBIT 3

**Memorandum of Understanding between Verizon and
the United States Internet Industry Association
(June 25, 2002).**

Memorandum of Understanding

Verizon and USIIA

Purpose: The purpose of this document is to delineate points of agreement between the Verizon Telephone Companies ("Verizon") and the United States Internet Industry Association ("USIIA") as it relates to the provisioning of broadband Internet service to customers in Verizon's operating territory.

Intent: The intent of this document is to facilitate consumer choice through regulatory parity, deregulation, and the implementation of fair and reasonable commercial contracts for broadband service.

Outcome: If implemented, the following proposal and rules will facilitate the maximum deployment of broadband Internet services in the Verizon operating territory.

National Broadband Framework

Technological convergence has made it possible for a variety of facility platforms to offer broadband services. The FCC is the only regulatory body with authority over competing broadband platform providers -- cable, wireless, wireline and satellite. Accordingly, the FCC is the only regulatory body with the requisite jurisdiction to establish a uniform national framework governing this new and evolving convergent broadband marketplace. The FCC must exercise exclusive authority to encourage broadband investment and deployment in a manner that fairly governs the entire marketplace. The FCC must preempt any current or future state action that is inconsistent with the national framework or that seeks to impose regulatory requirements in a disparate manner on competing broadband platforms or providers.

Regulatory Parity

Fundamental to any uniform national framework is the premise that all providers of broadband services must be allowed to operate pursuant to the same regulatory framework with minimal regulation. This is essential to encourage investment, deployment, and the creation of new and beneficial market-driven products and services. No operators or technology platforms should be artificially advantaged or disadvantaged by asymmetrical regulatory rules.

Market-Driven Commercial Terms

Commercial agreements between Verizon and ISPs should determine their business relationship. National policy must facilitate the formation of creative commercial arrangements that allow for differentiation in business relationships based on volume, terms, points of connection, and other established market forces. Market-driven commercial agreements will facilitate the most efficient, productive, creative and technology-neutral provisioning of broadband services. Verizon and the USIIA support market-based approaches to price, terms, and conditions governing the offering of broadband services. Accordingly, existing Federal and State tariffs and other common carrier obligations should be replaced by market based commercial agreements. These business arrangements would remove constraints on both parties that deprive them of the opportunity to provide creative and innovative services to consumers.

Universal Service

No broadband service provider should be disadvantaged in the marketplace by having certain government-imposed universal service fund costs asymmetrically applied to its products while competitors are free from any such government obligation.

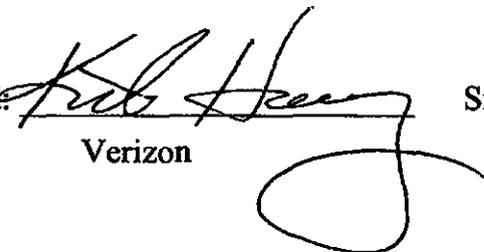
Verizon Commitment

In a deregulated broadband market Verizon is willing to commit that, at a minimum, commercial agreements for broadband services used to provide Internet services will be available and negotiated between Verizon and ISPs based on volume, terms, points of connection, and other established market forces.

Transition to Market-Based Commercial Agreements

In a deregulated broadband market, Verizon is willing to grandfather existing agreements with ISPs for the remaining term of existing agreements or transition an ISP to a negotiated, market based agreement. Information about current wholesale broadband offers will be made available to an ISP when it is considering Verizon as a business partner for the delivery of broadband Internet services to customers.

Signed on this date, June 25, 2002.

Signed: 
Verizon

Signed: David P. McElwaine
USIA

Verizon offers term and volume discounts for ISPs in order to encourage increased use of Verizon's networks. And Verizon has offered to allow independent ISPs to band together into purchasing cooperatives in order to make it easier to achieve the volume levels necessary to obtain greater discounts. Such discounts could lower the price per line paid by ISPs by as much as \$2.00.

5. Other actions taken by Verizon that benefit the hundreds of ISPs that it serves

include:

- In October 2004, Verizon revised its tariffs to reduce the rate for monthly recurring charges for selected DSL services, thereby improving the ability of ISPs to price Verizon-obtained DSL competitively;
- In July 2004, Verizon began offering 3 Mbps DSL service to ISPs, thereby allowing ISPs to purchase higher speed DSL services and to offer speeds comparable with cable modems;
- In April 2003, Verizon amended its tariffs to introduce 5-year term and volume discounts with lowered commitment levels, thereby enabling ISPs to obtain lower prices with lower volume commitments;
- In February 2003, Verizon amended its tariffs to remove termination liability when an end user with a one-year commitment moves to an ISP that has a 5-year plan with Verizon, thereby allowing independent ISPs to more easily sell end-users on their services.

6. Nor, contrary to the suggestions of some parties, does Verizon intend a different approach as it moves to its next-generation FTTP network. Verizon has already reached wholesale arrangements with several independent ISPs for broadband services over FTTP.

7. In fact, the removal of unnecessary regulations will allow Verizon to negotiate more creative arrangements with independent ISPs and/or other content providers than is possible under the current common carriage regime.

8. Some ISPs who filed comments in this proceeding make suggestions concerning the role of Verizon Online (VOL), the ISP affiliated with Verizon, and the manner in which VOL is treated by Verizon that are inaccurate.
9. Contrary to the suggestions of some commenters, VOL purchases wholesale broadband services from Verizon at the same tariffed price – \$26.95 per month – that is available to other ISPs that commit to the same term and volume plans. This price is well below the lowest retail broadband offering made to consumers by VOL – \$29.95 per month. In fact, even the most expensive wholesale offer made to ISPs by Verizon is lower than the lowest VOL retail price. Moreover, any other ISP (or buying consortium of ISPs) willing to commit to sufficiently high volume and term plans can obtain wholesale broadband service at exactly the same rate as VOL.
10. Although VOL is affiliated with Verizon, it does not control how Verizon interacts with competing ISPs. For example, Verizon does not provide confidential information concerning independent ISPs' customers to VOL to permit VOL to market to independent ISP customers. Nor does VOL control when or how broadband services are provisioned to independent ISPs. Instead, the Verizon telephone companies provide wholesale DSL services to independent ISPs on a nondiscriminatory basis.
11. VOL also does not get exclusive notice of new DSL deployments. Instead, Verizon attempts to provide notice to all of its ISP customers – both VOL and independent ISPs – concerning new DSL deployment approximately 90 days before they are activated. Moreover, Verizon provides DSL loop qualification data to all of its ISP

customers from the same database and at the same time. This provides both independent ISPs and VOL an opportunity to compete for new subscribers.

I declare under the penalty of perjury that facts stated herein are true and correct to the best of my knowledge, information, and belief.

A handwritten signature in black ink, appearing to read "Peter J. Castleton", written over a horizontal line.

Peter J. Castleton
Executive Director
Verizon

Dated: March 9, 2005

EXHIBIT 5

**Exhibit 3 from Declaration of Michael K Hassett and
Vincent J. Woodbury, Comments of Verizon,
Unbundled Access to Network Elements, WC Docket No.
04-313 (filed Oct. 4, 2004)**

Broadband Service Availability in Verizon's 50 Top MSAs

Broadband service is widely available throughout Verizon's 50 top MSAs. Table No. 1 shows the percentage of the population in each MSA for which cable modem service is available. This information was obtained from Warren Communication's *Cable Factbook* and supplemented with publicly available information. In these areas, customers have access to VoIP from an independent supplier, such as AT&T or Vonage.

Table No. 1
Cable Modem Service Availability by MSA in Verizon's 50 Top MSAs

MSA	Percentage of the Population Within the MSA That Has Access to Cable Modem Service
New York-Northern New Jersey-Long Island, NY-NJ-PA	95-100%
Washington-Arlington-Alexandria, DC-VA-MD-WV	85-89%
Philadelphia-Camden-Wilmington, PA-NJ-DE-MD	90-94%
Boston-Cambridge-Quincy, MA-NH	95-100%
Los Angeles-Long Beach-Santa Ana, CA	90-94%
Baltimore-Towson, MD	85-89%
Tampa-St. Petersburg-Clearwater, FL	95-100%
Riverside-San Bernardino-Ontario, CA	75-79%
Pittsburgh, PA	95-100%
Providence-New Bedford-Fall River, RI-MA	90-94%
Virginia Beach-Norfolk-Newport News, VA-NC	75-79%
Richmond, VA	55-59%
Dallas-Fort Worth-Arlington, TX	90-94%
Buffalo-Niagara Falls, NY	95-100%
Seattle-Tacoma-Bellevue, WA	85-89%
Worcester, MA	85-89%

MSA	Percentage of the Population Within the MSA That Has Access to Cable Modem Service
Sarasota-Bradenton-Venice, FL	85-89%
Albany-Schenectady-Troy, NY	95-100%
Springfield, MA	95-100%
Allentown-Bethlehem-Easton, PA-NJ	95-100%
Portland-Vancouver-Beaverton, OR-WA	85-89%
Trenton-Ewing, NJ	95-100%
Lakeland-Winter Haven, FL	95-100%
Syracuse, NY	95-100%
Portland-South Portland, ME	95-100%
Oxnard-Thousand Oaks-Ventura, CA	90-94%
Harrisburg-Carlisle, PA	90-94%
Santa Barbara-Santa Maria-Goleta, CA	75-79%
Scranton--Wilkes-Barre, PA	75-79%
Atlantic City, NJ	95-100%
Manchester-Nashua, NH	95-100%
Barnstable Town, MA	80-84%
Houston-Baytown-Sugar Land, TX	85-89%
Poughkeepsie-Newburgh-Middletown, NY	95-100%
Chicago-Naperville-Joliet, IL-IN-WI	90-94%
Fort Wayne, IN	55-59%
York-Hanover, PA	95-100%

MSA	Percentage of the Population Within the MSA That Has Access to Cable Modem Service
Charleston, WV	45-50%
Durham, NC	65-69%
Reading, PA	95-100%
Erie, PA	85-89%
Hagerstown-Martinsburg, MD-WV	50-54%
Roanoke, VA	55-59%
Lynchburg, VA	40-44%
Utica-Rome, NY	95-100%
Ocean City, NJ	95-100%
College Station-Bryan, TX	60-64%
Burlington-South Burlington, VT	45-49%
Lancaster, PA	90-94%
Binghamton, NY	95-100%
Weighted Average	91.6%