Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	**)**	
	)	
Petition of the Verizon Telephone Companies	**)**	**Docket No. 06-172**
For Forbearance Pursuant to 47 U.S.C. § 160(c)	**)**	
In the Boston Metropolitan Statistical Area	**)**	

OPPOSITION OF COMPTEL

March 5, 2007

Mary C. Albert
Assistant General Counsel
COMPTEL
900 17th Street N.W., Suite 400
Washington, D.C. 20006
(202) 296-6650

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SUMMARY

In a bold move, Verizon has asked the Commission to forbear from enforcing statutory and regulatory dominant carrier and unbundling requirements to its network operations in the Boston MSA and every other major metropolitan area in its in-region states with the exception of the Baltimore/Washington MSA. Verizon seeks to be free of the regulations that require it to treat its customers and competitors fairly and that require it to allow other carriers to purchase access to its bottleneck facilities, including last mile loops, at statutorily prescribed cost-based rates. Significantly, Verizon waited less than a year after it had swallowed one of its largest competitors to come back to the Commission to complain that regulation of its legacy network services hampers its ability to compete effectively in the telephone exchange markets and that such regulation is detrimental to competition and harmful to the public interest. Verizon's complaints are familiar by now, but not substantiated. Verizon's Petition is long on unsupported allegations and short on the type of hard evidence needed to satisfy the exacting criteria of Section 10 of the Communications Act. For this reason, the Commission must deny the Petition in its entirety.

There are any number of deficiencies in Verizon's Petition that, standing alone or taken together, mandate denial of its request for forbearance relief. In urging the Commission to dispense with dominant carrier regulation of its interexchange and switched access services, Verizon neglects to meaningfully address any of the factors the Commission traditionally considers in analyzing a carrier's market power and the need for continued dominant carrier regulation. Instead, Verizon repeatedly reminds the Commission that it granted Qwest forbearance from dominant carrier regulation in

Omaha, Nebraska which, in Verizon's view, is a far less competitive market than Boston. Verizon's failure to come forward with adequate evidence of the competitiveness of the Boston telephone market and its own lack of market power therein mandates the denial of its request for forbearance from dominant carrier regulation. The recent success Verizon has enjoyed in executing a significant price increase in its bundled long distance packages and stand alone DSL offerings with no loss in sales or increase in churn cannot be reconciled with its unsupported allegation that local telephone competition in the Boston MSA is vigorous.

Verizon has similarly failed to make a case for relieving it of the statutory obligation to provide competitive access to unbundled network elements ("UNEs") at cost-based rates. As a preliminary matter, the Commission incorporated Verizon's voluntary commitment not to raise the rates for unbundled loops and transport for two years as a specific condition of its approval of Verizon's acquisition of MCI. The merger condition does not expire until January 2008. To grant Verizon forbearance from the underlying obligation to provide access to unbundled loops and transport would nullify the merger condition. Having found that the merger condition requiring Verizon to maintain UNE rates at current levels for two years serves the public interest, the Commission cannot possibly find that elimination of the obligation to provide the products subject to those rates also serves the public interest.

Verizon's data regarding its loss of access lines over the past five years do not attribute MCI data to Verizon despite the fact that the merger was closed long before the Petition was filed and do not fully reflect the impact of the loss of MCI as a competitor in the Boston MSA. By choosing to use data that was almost a year old when the Petition

was filed, Verizon has painted a less than accurate portrayal of the competitive landscape. The data Verizon provided regarding the number of lines served by competitive carriers is data to which Verizon had access solely in its role as the E911 database administrator. Verizon's use of other carriers' E911 listing data to advance its deregulatory agenda violates Verizon's obligations under both Section 222 of the Communications Act and under New Hampshire state law.

Although the Commission has made clear that requests for forbearance from unbundling obligations would be processed on a wire center specific basis, Verizon provided absolutely no useful evidence that would allow the Commission to perform such a forbearance analysis. Verizon failed to disclose the number of UNE loops and transport competitors are purchasing on a wire center specific basis, failed to identify which (if any) competitor(s) is providing voice service in any particular wire center using only its own network facilities and failed to show what percentage of end user locations accessible from a particular wire center have access to a competitor's voice services. Without this information, the Commission cannot conduct the type of granular analysis it has consistently deemed necessary to determine whether forbearance from Section 251(c)(3) is warranted.

Verizon has the burden of proving that it is entitled to forbearance from the Communications Act and the Commission's regulations under Section 10 of the Act. It did not meet that burden here and its Petition for Forbearance from dominant carrier and unbundling regulation in the Boston MSA must be denied.

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OPPOSITION OF COMPTEL

COMPTEL hereby submits its opposition to the Verizon Telephone Companies' ("Verizon") Petition for Forbearance seeking "substantially the same regulatory relief" in the Boston MSA that the Commission granted Qwest in the Omaha, Nebraska MSA.[1] Specifically, Verizon requests forbearance from the loop and transport unbundling requirements of Section 251(c)(3) of the Communications Act, 47 U.S.C. §251(c)(3), and Section 1.319 of the Commission's Rules, 47 C.F.R. §§51.319(a), (b), (e); from the dominant carrier requirements arising under Section 214 of the Act, 47 U.S.C. §214, and Part 63 of the Commission's Rules, 47 C.F.R. §§ 63.03, 63.04, 63.60-63.66; from the dominant carrier tariffing requirements set forth in Part 61 of the Commission's Rules, 47 C.F.R. §§ 61.32, 61.33, 61.38, 61.58 and 61.59; from the Commission's price cap regulations, 47 C.F.R. §§61.41-61.49; and "from the Computer III requirements, including Comparably Efficient Interconnection ('CEI') and Open Network Architecture

[1] *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. §160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, FCC 05-170 (rel. Dec. 2, 2005) ("*Omaha Forbearance Order*"), *appeal pending sub nom. Qwest Corporation v. Federal Communications Commission*, Case No. 05-1450 (D.C. Cir.) ("*Omaha Forbearance Order")*; Verizon Petition at 1.

('ONA') requirements."[2] Verizon's Petition is deficient in a number of respects and these deficiencies preclude the Commission from granting any forbearance relief. The Commission should deny the Petition without delay rather than allow Verizon to continuously supplement its Petition up until the eve of the one-year (or 15 month) statutory deadline for the Commission to act.[3]

I. Preliminary Statement

In its Petition, Verizon claims that it is entitled to forbearance because of the extensive competition it faces in the Boston MSA. The evidence of competition Verizon submitted in its Petition consists in large part of E911 listing data to which Verizon has access solely by virtue of its status as the E911 database administrator in the Boston MSA.[4] Section 222(g) of the Act, 47 U.S.C. §222(g), requires carriers to provide their customer listing information to E911 database administrators to ensure that their customers have access to emergency services. Although Verizon itself has characterized this information as confidential "CLEC and customer proprietary information,"[5] it believes that it is free to use the information without the authorization of the affected

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[2] Verizon Petition at 4, n. 3.

[3] *See* FCC News Release, "Verizon Telephone Companies' Petition for Forbearance from Title II and *Computer Inquiry* Rules with Respect to their Broadband Services Is Granted by Operation of Law," Docket No. 04-440 (March 20, 2006) (noting that Verizon filed its forbearance petition on December 20, 2004 and amended the petition on February 7 and 17, 2006).

[4] November 6, 2006 Ex Parte letter from Dee May, Vice President, Verizon to Marlene H. Dortch filed in WC Docket No. 06-172.

[5] September 26, 2006 Ex Parte letter from Joseph Jackson to Marlene H. Dortch attaching September 25, 2006 letter from Sherry Ingram, Assistant General Counsel Verizon Communications, to Patrick Donovan, Bingham McCutchen filed in WC Docket No. 06-172 ("Ingram letter").

carriers or customers to advance its deregulatory agenda. Nothing could be farther from the truth.

While parties have already commented on the impropriety of Verizon's pleading strategy and its misuse of carrier confidential information in violation of the terms of its interconnection agreements and Section 222 of the Act,[6] the Commission has not yet acted on the pending Motion To Dismiss Verizon's Petition. COMPTEL once again urges the Commission to reject Verizon's Petition[7] and confirm that incumbent local exchange carriers that serve as E911 database administrators have a fiduciary duty to protect carrier and customer listing information from disclosure or use for any purpose other than providing emergency services.

Verizon accessed the E911 database not for its intended purpose, but to identify competitive carriers, to identify the number of residential and business lines served by each carrier, and to identify the wire centers where the carriers' customers are located. In its own words, Verizon queried the E911 database for the following purposes:

> In order to obtain the E911 data in question, Verizon performed a query of the master E911 databases to which it has access as the E911 database administrator. This query was designed to pull only select information from the E911 database: the name of competing carriers, the total number of E911 listings associated with each carrier, the NPA/NXX code for each listing and whether those listings were marked as a residential or business class of service by the submitting carrier.[8]

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[6] See Comments filed in response to Public Notice, DA06-2056, *Pleading Cycle Established For Comments on Motion To Compel Disclosure of Confidential Information Pursuant to Protective Order and Motion to Dismiss* (rel. Oct. 18, 2006).

[7] *See* COMPTEL's Comments In Support of Motion To Dismiss filed October 30, 2006.

[8] December 6, 2006 Ex Parte letter from Joseph Jackson, Associate Director, Federal Regulatory Advocacy, Verizon to Marlene H. Dortch, filed in WC Docket No. 06-172, at 3.

This unauthorized use by Verizon of other carriers' confidential and proprietary information violates the plain language of Section 222 of the Act. Section 222(a) of the Act imposes on Verizon the duty to "protect the confidentiality of proprietary information of, and relating to, other telecommunications carriers, equipment manufacturers, and customers, including telecommunication carriers reselling telecommunications services provided by a telecommunications carrier." 47 U.S.C. § 222(a). Section 222(b) prohibits a telecommunications carrier that obtains proprietary information from another carrier for the purpose of providing any telecommunications service from using that information for any other purpose. 47 U.S.C. § 222(b).

Verizon has access to the E911 listing data for the customers of other carriers solely because it is the E911 database administrator in the Boston MSA. Carriers provided their E911 listing data to Verizon for the purpose of enabling the provision of E911 service – that is, to facilitate the delivery of a caller's name, address, and telephone number to the Public Safety Answering Point in the event of an emergency. Indeed, all competitive carriers are required by statute to provide their customer proprietary information to Verizon because it is the E911 database administrator. Section 222(g) requires providers of telephone exchange service to provide E911 listing data to "providers of emergency support services solely for purposes of delivering or assisting in the delivery of emergency services." Section 222(h) defines "emergency support services" as "information and database management services used in support of emergency services."

Section 222 plainly prohibits Verizon from using the E911 proprietary information of other carriers for any purpose other than providing or facilitating the

provision of E911 service and E911 database management. This prohibition is so broad that Congress felt compelled to create a specific exemption in Section 222(g) to allow telecommunications carriers to provide carrier and customer proprietary information to E911 database administrators, such as Verizon, solely for the purpose of delivering or assisting in the delivery of emergency services.

The Commission cannot possibly find that Section 222 authorizes Verizon to use other carriers' E911 listing data to support its forbearance filings. Interpreting Section 222 as prohibiting carriers from sharing their customers' E911 listing data with anyone other than providers of emergency services or emergency support services, but as allowing Verizon to use other carriers' proprietary E911 listing data, to which it has access solely in its role as a provider of emergency support services, to advance its regulatory agenda would make a mockery of the confidentiality obligations imposed by the statute. Congress's failure to create an exemption that would allow carriers and/or emergency support service providers, such as E911 database administrators, to use carrier and customer confidential and proprietary data for commercial purposes completely unrelated to providing E911 services should be read as an express prohibition on such use.

In addition to violating federal law, the New Hampshire Public Utilities Commission has informed the Commission that Verizon's misuse of the E911 listing data in its Petition also violates New Hampshire state law.[9] According to the New Hampshire

[9] *See* The New Hampshire Public Utilities Commission Joinder In Competitive Carriers' Motion To Dismiss filed in WC Docket No. 06-172 on February 1, 2007. The New Hampshire counties of Strafford and Rockingham are located within the Boston MSA. See also, Lew/Verses/Garzillo Declaration at ¶6 (9 percent of the Boston MSA population lives in Rockingham and Strafford Counties in New Hampshire).

PUC, Verizon is under contract with the state of New Hampshire to compile, maintain and administer the E911 database and state law prohibits Verizon from using the E911 database for any purpose other than to support the state's E911 emergency services.

In no event should the Commission sanction Verizon's extralegal use of and failure to adequately protect confidential carrier and customer proprietary information by considering the E911 listing data in deciding the merits of Verizon's forbearance request. The Commission should either dismiss with prejudice Verizon's Petition, or at the very least, strike the E911 data from the Petition.

II. <u>The Statutory Standard</u>

Verizon bears a heavy burden in proving that it meets the statutory prerequisites to obtain forbearance from the loop and transport unbundling requirements of the Commission's rules and Section 251(c)(3) of the Act, the dominant carrier requirements of the Commission's rules and Section 214 of the Act, and the Computer III requirements. Section 10(a) of the Act, 47 U.S.C. §160, provides that the Commission may not grant forbearance from any provision of the Act or any Commission regulation unless and until it determines that three conditions have been satisfied. The Commission must make affirmative determinations that (1) enforcement of the provision or regulation is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of the provision or regulation is not necessary for the protection of

consumers; *and* (3) forbearance from applying the provision or regulation is consistent with the public interest.

In making the public interest determination, Section 10(b) requires the Commission to consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions and enhance competition among telecommunications providers. If the Commission determines that forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a finding that forbearance is in the public interest.

Verizon has fallen far short of meeting these exacting standards. Verizon has not come forward with reliable or verifiable evidence that would support a determination that forbearance from enforcing any statutory or regulatory requirements to which it is subject is warranted. Moreover, any relief from its statutory unbundling obligations is precluded by the commitment Verizon made to obtain Commission approval of its merger with MCI.

III. Any Relief Granted Verizon Must Be Circumscribed By The Terms of its Request, The *Omaha Forbearance Order* And The *Verizon/MCI Merger Order*

Verizon has requested forbearance relief in Boston "that is parallel to the relief granted in the *Omaha Forbearance Order"* and has asked the Commission to "forbear from loop and transport unbundling regulation" and "dominant carrier regulation for switched access services."[10] It is worth emphasizing that the relief the Commission granted Qwest in Omaha was limited to (1) forbearance from dominant carrier tariffing requirements and price cap regulation *for mass market switched access and broadband*

[10] Petition at 29; see also, Petition at 1, 3.

Internet access services only;[11] (2) forbearance from dominant carrier regulation under Section 214 of the Act relating to transfer of control and discontinuing *mass market switched access and broadband Internet access services* only;[12] and (3) forbearance from Sections 251(c)(3) and 271(c)(2)(B)(ii) loop and transport unbundling obligations in approximately 37% of the wire centers in the Omaha MSA where the Commission found sufficient facilities-based competition to ensure that Qwest's charges, practices, classifications and regulations would be just, reasonable and non-discriminatory, to protect consumers and to promote competitive market conditions.[13]

The Commission denied Qwest's request for forbearance from the dominant carrier statutory and regulatory requirements for enterprise services.[14] To the extent that the Commission finds that Verizon is entitled to any forbearance relief in the Boston MSA, and it should not so find, that relief should be no broader than the relief Verizon requested in its Petition and no broader than the relief granted Qwest in Omaha. In other words, the Commission should not forbear from enforcing Section 271(Verizon asked for

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[11] *Omaha Forbearance Order* at ¶¶39-42. A week after the *Omaha Forbearance Order* was adopted but two months before it was released, the Commission released *In the Matter of Appropriate Framework For Broadband Access to the Internet Over Wireline Facilities*, CC Docket No. 02-33, Report and Order and Notice of Proposed Rulemaking, FCC 05-150 (rel. Sept. 23, 2005) (*Wireline Broadband Order")*, in which it reclassified facilities-based wireline broadband Internet access service as an information service. That order is on appeal in the Third Circuit *sub nom., Time Warner Telecom Inc. v. FCC*, Case Nos. 05-4769, *et al.* The Commission declined in that order to make findings about the ILECs' dominance or nondominance in the retail market for broadband Internet access services. *WirelineBroadband Order*, at ¶84.

[12] *Omaha Forbearance Order* at ¶43.

[13] *Id*. at ¶¶59, 67-68, 73, 75, 93.

[14] *Id.* at ¶¶19, 50.

no such relief), should not forbear from enforcing the dominant carrier regulations for enterprise services and should not forbear from enforcing Computer III regulations against Verizon in the Boston MSA.

Any relief granted to Verizon must also be constrained by the commitment relating to unbundled network elements which it voluntarily made and which the Commission adopted as a specific condition of the approval of Verizon's acquisition of MCI. As discussed below, that condition precludes granting Verizon any relief from its Section 251(c)(3) unbundling obligations before January 2008.[15] Because the data Verizon offered in support of its Petition was already out of date at the time the Petition was filed, relief from Section 251(c)(3) in anticipation of the sunset of the merger condition cannot be justified on the basis of the current record.

A. Verizon Is Not Entitled To Any Relief From Section 271

In its Petition, Verizon does not request relief from any of the requirements of Section 271 of the Act, including the Section 271(c)(2)(B)(ii) loop and transport unbundling requirements.[16] Verizon made no showing that forbearance from enforcing any of the provisions of Section 271 in the Boston MSA would meet the Section 10(a) criteria. Even if the Commission were to grant Verizon forbearance from the obligations it has pursuant to Section 251(c)(3), which it should not, it cannot and must not grant Verizon relief from the obligations it has pursuant to Section 271(c)(2(B)(ii) to provide

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[15] *In the Matter of Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75, Memorandum Opinion and Order, FCC 05-184, Appendix G (rel. Nov. 17, 2005) ("*Verizon/MCI Merger Order*").

[16] See Petition at 3-4, n. 3, where Verizon lists the statutory and regulatory provisions from which it seeks relief. Verizon's list does not include any provisions of Section 271 of the Act.

unbundled loops and transport at cost-based rates. *See Qwest Omaha Forbearance Order* at ¶¶16, 111 (failure to identify specific regulations or explain how they meet the Section 10 forbearance criteria compels denial of forbearance request).

B. Verizon Is Not Entitled To Relief From Computer III Requirements

Although Verizon technically asks for relief from the Computer III requirements, there is no question that it has failed to meet its burden of demonstrating that grant of its request would satisfy each prong of the Section 10(a) test. Indeed, the only mention Verizon makes of Computer III in its Petition is in the footnote where Verizon identifies with specificity the statutory and regulatory provisions from which it seeks forbearance.[17] Verizon made absolutely no effort whatsoever to explain how or why forbearance from Computer III requirements would be consistent with the public interest or how or why enforcement of those requirements is not necessary either to ensure that Verizon's rates, terms and conditions of service are just, reasonable and nondiscriminatory or to protect consumers. Because Qwest was not granted relief from the Computer III requirements in the *Omaha Forbearance Order,*[18] Verizon cannot rely on that order as precedent for granting forbearance from the Computer III requirements in Boston.

The Commission must deny a petition for forbearance if it finds that any one of the three prongs of the Section 10(a) test is unsatisfied. *Cellular Telecommunications & Internet Association v. Federal Communications Commission,* 330 F. 3d 502, 509 (D.C. Cir. 2003). Verizon offered no evidence or argument that even one of the three prongs would be satisfied absent enforcement of the Computer III requirements. For these

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[17] *Id.*

[18] *Omaha Forbearance Order* at ¶1, n.2 and ¶2.

reasons, the Commission must summarily deny Verizon's request for relief from any Computer III requirements. *Omaha Forbearance Order* at ¶¶16, 111 (where Qwest failed to demonstrate how forbearance from certain statutory provisions and Commission regulations would satisfy Section 10, Commission refused to compose an affirmative case for forbearance relief on Qwest's behalf).

C. The Verizon/MCI Merger Conditions Preclude A Grant Of Forbearance From Loop and Transport Unbundling Obligations

In order to secure Commission approval of its merger with MCI, Verizon voluntarily made certain commitments which the Commission not only accepted, but also adopted as conditions of approval of the merger. *Verizon/MCI Merger Order*, Appendix G. The Commission specifically found that Verizon's commitments "will serve the public interest." *Id.* Among the commitments made by Verizon was one relating to the pricing of unbundled network elements ("UNEs"). The Commission approved the merger based on Verizon's promise to refrain from seeking UNE rate increases for two years:

> Unbundled Network Elements
>
> 1. For a period of two years, beginning on the Merger Closing Date, Verizon's incumbent local telephone companies will not seek any increase in state-approved rates for unbundled network elements (UNEs) that are currently in effect, provided that this restriction shall not apply to the extent that any UNE rate currently in effect is subsequently deemed invalid or is remanded to a state commission by a court of competent jurisdiction. . . .

Id. The Verizon/MCI merger closed on January 6, 2006 and the condition became effective 10 business days later.[19] Therefore, the UNE pricing condition remains in effect until January 23, 2008.

Clearly, granting Verizon forbearance from the loop and transport unbundling obligations of Section 251(c)(3) of the Act and Sections 1.319(a), (b), and (e) of the Commission's rules would nullify this merger condition. In the absence of an obligation to provision UNE loops and transport in the Boston MSA, a commitment by Verizon to abstain from seeking a rate increase for those UNEs is meaningless. By incorporating Verizon's commitment as a condition of approval of the merger, surely the Commission did not intend for Verizon to be able to renege on its promise to maintain UNE pricing at current rates for a period of two years simply by requesting forbearance from enforcement of the underlying unbundling obligations.

Verizon filed its forbearance Petition on September 6, 2006, eight months into the twenty-four month life of the merger condition. The one-year statutory deadline for the Commission to act on the Petition expires on September 5, 2007, four and one-half months before the merger condition expires. It would be inappropriate for the Commission to entertain Verizon's request for forbearance from the statutory and regulatory loop and transport unbundling obligations until the merger condition sunsets. The Commission has already determined that the public interest will be served by Verizon's continuing to make available UNE loops and transport at existing rates through

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[19] *See* Letter dated January 25, 2006 from Karen Zacharia, Verizon, to Marlene H. Dortch filed in WC Docket No. 05-75. See also *Verizon/MCI Merger Order* at Appendix G ("Unless otherwise specified herein, the Conditions described herein shall become effective 10 business days after the Merger Closing Date.")

January 2008.[20] Forbearance from enforcing the obligation to provide UNE loops and transport prior to that date cannot simultaneously serve the public interest.

The Commission should therefore deny Verizon's request for forbearance from its unbundling obligations as premature. Any evaluation of whether there is sufficient competition to justify forbearance from enforcing the statutory and regulatory unbundling requirements should be made on the basis of market data current as of the sunset of the merger condition, not as of the date of the Order approving the merger. The data Verizon submitted in support of its Petition relating to loss of access lines and the percentage of Verizon lines in wire centers served by competitors is current only as of December 2005[21] --*i.e.*, before the merger with MCI was closed -- and does not attribute MCI data to Verizon.[22] The Commission cannot possibly make an informed decision with respect to the state of competition in the Boston MSA using pre-merger data that continues to count MCI as a competitor of Verizon's and does not permit an analysis of the full impact of the Verizon/MCI combination on competitive market conditions. The Government Accountability Office ("GAO") has recently chastised the Commission for using outdated and unreliable information to assess the presence, extent of, or changes in competition for dedicated access services.[23] The Commission should not make the same mistake here.

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[20] *Verizon/MCI Merger Order* at ¶215 and Appendix G.

[21] See *e.g.*, Lew/Verses/Garzillo Declaration at ¶¶6-8, 10-11.

[22] Lew/Verses/Garzillo Declaration at ¶5, n. 2 ("Calculations of the decline in access lines and the percentage of Verizon lines in wire centers served by competitors do not attribute MCI data to Verizon.")

[23] U.S. Government Accountability Office, *FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, Report

Rather, the Commission should deny Verizon's request for relief from its unbundling obligations with an invitation to refile once the merger condition expires. At that time, Verizon should be required to support its request for forbearance with data that accurately reflects its position in the market vis-à-vis that of its competitors current as of the filing date.

IV. Verizon Has Not Shown The Existence of Competition Sufficient To Warrant Forbearance From Dominant Carrier Regulation

Forbearance from dominant carrier regulation is warranted only where there is sufficient competition to ensure that the interests of consumers and the goals of the Act are protected. In evaluating whether forbearance from dominant carrier regulation was warranted in Omaha, the Commission reviewed the state of competition to determine whether Qwest retained market power in the provision of mass market switched access and broadband Internet access services. The Commission defines market power as the "'ability to raise prices by restricting output' or 'to raise and maintain price above the competitive level without driving away so many customers as to make the increase unprofitable.'"[24] There is no question that Verizon maintains market power in mass market switched access and DSL services.

The Commission has properly recognized that application of the Section 10(a) criteria "is no simple task and a decision to forbear must be based upon a record that

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to the Chairman, Committee of Government Reform, House of Representatives, GAO-07-80 (November 2006) at 39, 43. ("GAO Report").

[24] *Omaha Forbearance Order* at ¶18, n. 54.

contains more than broad, unsupported allegations of why those criteria are met."[25] Although it repeatedly alleges that "competition in the Boston MSA is more advanced than it was in the Omaha MSA,"[26] Verizon does not support its allegation with reliable data (or any data at all in some cases) that can be independently verified or validated. The absence of such data compels the rejection of Verizon's request for relief.

In order to determine whether it should forbear from dominant carrier regulation of Qwest's mass market switched access and broadband Internet access services, the Commission examined the state of competition in Qwest's service territory in Omaha, including Qwest's market share, demand and supply elasticities, and Qwest's size, resources, and technical capabilities compared with those of its competitors.[27] Verizon has not provided the type of information that would allow the Commission to perform a similar "state of competition analysis" for the Boston MSA. Moreover, evidence in the public record, most notably Verizon's recent statements regarding its success in raising prices for its consumer long distance packages and DSL services with no decline in sales or increase in churn, belie Verizon's claims of robust competition in the mass market interstate exchange access and broadband Internet access markets.

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[25] *In the Matters of Bell Operating Companies Petitions For Forbearance From The Application of Section 272 of the Communications Act of 1934 to Certain Activities*, CC Docket 96-149, Memorandum Opinion and Order, DA98-220 at ¶16 (rel. Feb. 6, 1998).

[26] *See, e.g.*, Petition at 1, 2, 3, 26.

[27] *Omaha Forbearance Order* at ¶¶25, 28.

A. Market Share

While Verizon reports the number of residential access lines it served in the Boston MSA as of December 2005,[28] it does not disclose what its market share was either at that time or at the time its Petition was filed. Using the numbers Verizon does provide, including the number of households in the Boston MSA pulled from census data together with the number of residential lines Verizon asserts that it serves,[29] it is clear that Verizon remains dominant in the provision of mass market switched access services. The market share derived by dividing the number of Verizon residential lines by the number of households in the Boston MSA is far higher than the market shares the Commission found warranted non-dominant treatment of AT&T in the long distance market [30] and Qwest in the Omaha MSA.[31] This estimate, which assumes that Verizon is the incumbent LEC for all 1.8 million households in the Boston MSA, understates Verizon's actual market share because Verizon is not the only incumbent LEC in the MSA.[32]

In assessing Qwest's market power in Omaha, the Commission not only looked at Qwest's share of the residential access line market, but also at the decline in its retail

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[28] Lew/Verses/Garzillo Declaration at ¶6.

[29] *Id.*

[30] *In the Matter of Motion of AT&T Corp. To Be Reclassified As A Non-Dominant Carrier*, 11 FCC Rcd 3271, 3308, 3294-3295 (1995).

[31] *Omaha Forbearance Order* at ¶¶ 28-29.

[32] Lew/Verses/Garzillo Declaration at ¶6 n. 4.

access line base over the last several years.[33] While Verizon purports to give the percentage by which its retail residential access line base in the Boston MSA declined between 2000 and 2005,[34] the number is misleading because the "calculations of the decline in access lines . . . do not attribute MCI data to Verizon."[35] Because the merger between Verizon and MCI was consummated on January 6, 2006, Verizon clearly knows how many residential access lines MCI had in December 2005, yet it chose not to include those lines when calculating the percentage by which its retail access lines decreased over time. The only inference to be drawn from this omission is a negative one – *i.e.*, that Verizon did not attribute the MCI data to itself because the resulting decline in residential access lines would have been much smaller than Verizon alleges. *See International Union, UAW v. National Labor Relations Board*, 459 F.2d 1329, 1336 (D.C. Cir. 1972) (a plaintiff's failure to produce relevant and important evidence of which he has knowledge and which is peculiarly within his control creates the presumption that, if produced, the evidence would be unfavorable to his position). For this reason alone, the Commission should accord no weight to Verizon's claims with respect to the number of access lines it has lost over time.

Verizon provided no information whatsoever with respect to the number of broadband Internet access customers it serves or the number of such customers served by competitors. In the absence of any information that would allow a determination of Verizon's market share or that of its competitors, the Commission cannot possibly find

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33 *Omaha Forbearance Order* at ¶28, n. 79 and ¶39.

34 Petition at 2; Lew/Verses/Garzillo Declaration at ¶7.

35 *Id.* at ¶5, n. 2.

that Verizon has met its burden of demonstrating that it is entitled to forbearance from dominant carrier regulation for its broadband Internet access services.[36]

B. Demand and Supply Elasticity

Verizon is not entitled to forbearance from dominant carrier regulation not only because of its large market share, but also because it has failed to demonstrate that the mass market exchange access and DSL markets in the Boston MSA are characterized by high demand and supply elasticity. In the *Omaha Forbearance Order*, the Commission defined demand elasticity as the:

> willingness and ability of a firm's customers to switch to another provider or otherwise change the amount of services they purchase from that firm in response to a change in price or quality of the service at issue. High firm demand elasticity indicates customer willingness and ability to switch to another service provider in order to obtain price reductions or desired features. Moreover it also indicates that the market for that service is competitive.

Omaha Forbearance Order at ¶32. The Commission defined supply elasticity as being driven by two factors: (1) the ability of suppliers in a given market to increase the quantity of service supplied in response to an increase in price and (2) the absence of significant barriers to entry. *Id.* at ¶35.

Verizon does not address either the demand elasticity or the supply elasticity for mass market exchange access or broadband Internet access services in the Boston MSA. Nor does it address the existence of entry barriers that may impede the ability of competitors to absorb customers giving up Verizon's service due to price hikes or declines in service quality. Instead, Verizon submits quotations from the Commission's

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[36] Compare *Qwest Omaha Forbearance Order* at ¶¶25, 30, 49 where the Commission balanced Qwest's market share against that of its largest competitor in determining that Qwest was entitled to forbearance from dominant carrier regulation of its mass market broadband Internet access services.

discussion of the level of competition that Qwest faced from the cable operator in Omaha, substituting its name (in brackets) for Qwest's and substituting Boston (in brackets) for Omaha.[37] Verizon's showing is grossly inadequate. The Commission made clear that its decision granting Qwest forbearance was based on factors unique to the Omaha MSA and that the type of bootstrapping in which Verizon has engaged would not carry the day in other markets.[38]

Verizon's failure to come forward with evidence on market elasticities is not surprising in light of its recent disclosure to investors that it has been able to successfully raise prices on its consumer nationwide calling plans and DSL services. In response to a question on consumer rate increases on its DSL services and Freedom Calling Plans, which include unlimited nationwide calling for residential customers,[39] Doreen Tobin, Verizon's EVP and CFO, stated in a January 29, 2007 Earnings Conference Call that the significant rate increases had not led to either a decline in sales or an increase in churn:

> Yes, we did up the price on Freedom across the country – about $5, we felt based on the take rates we were getting and the churn that we were able to do that. We've not seen a decrease in the sales because of the increase. We also had an increase in the DSL pricing, especially at the low end. The numbers that we had – at $14.95, we've seen that move up to $17, $19 and $21 in some states. . . .We've seen very successful take rates and thought we could do it. The churn has come down significantly.[40]

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[37] *See e.g.*, Petition at 7 where Verizon states, "there are 'extensive [cable] facilities in the [Boston] MSA capable of delivering . . . mass market . . .services.' *Omaha Forbearance Order* at ¶ 66; *see id.* ¶¶ 35-36 (finding that such facilities demonstrate that supply elasticities are high). These cable operators have been 'successfully providing local exchange and exchange access services . . . without relying on [Verizon's] loops or transport.' *Id.* at ¶ 64."

[38] *Omaha Forbearance Order* at fns. 4, 46.

[39] See http://www22.verizon.com/Residential/Phone

[40] Available at http://investor.verizon.com/news/20070129/4Q06_vz-transcript.pdf

Thus, Verizon's own sales experience demonstrates conclusively that it has market power and that neither the market for mass market exchange access service nor the market for broadband Internet access service is competitive enough to warrant forbearance from dominant carrier regulation.

Verizon's inability to show that customers are willing and able to easily switch carriers in response to a price hike and that existing competitors in the Boston MSA have or can relatively easily acquire significant additional capacity to constrain any price hikes by Verizon is fatal to Verizon's request for forbearance from dominant carrier regulation. Verizon's silence on these important barometers of the state of competition and market structure speaks volumes. Its recent price hikes for both consumer long distance and DSL service in Boston and all of its other markets were executed without a loss of sales or increase in customer defections. This real world evidence is far more probative than the unsupported conclusory allegations in Verizon's Petition. Moreover, it precludes a finding that enforcement of dominant carrier regulations is not necessary to protect consumers and ensure that Verizon's rates and practices in offering mass market switched access services and mass market broadband Internet access services are just, reasonable and not unjustly or unreasonably discriminatory.[41]

C. Firm Cost, Size, Resources

In the *Omaha Forbearance Order*, the Commission concluded that, when compared to its largest competitor, Qwest did not "have sufficiently lower costs, sheer

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at 15-16.

[41] *Omaha Forbearance Order* at ¶31.

size, superior resources, financial strength or technical capabilities to warrant retaining [dominant carrier] regulations" for its mass market switched access services.[42] The Commission cannot reach the same conclusion for Verizon vis-à-vis its largest competitors in the Boston MSA. Not surprisingly, Verizon presented no evidence on this issue. However, it is clear that none of Verizon's Boston competitors comes close to Verizon in either size or resources.

Verizon identifies the cable operators Comcast and Charter as its largest competitors in the Boston MSA.[43] Comcast reported third quarter cable revenues of $6.63 billion, of which $252 million was attributable to phone service, and reported ending the third quarter with a total of 2.1 million phone customers *nationwide*.[44] Charter reported total third quarter revenues of $1.377 billion, of which $37 million was attributable to telephone service. Charter also reported ending the third quarter with 339,600 telephone customers nationwide.[45]

In contrast, Verizon describes itself as

> . . . one of the world's leading providers of communications services. Verizon's domestic wireline telecommunications business provides local telephone services, including broadband, in 28 states and Washington, D.C. and nationwide long-distance and other communications products and services. . . . Verizon now owns and operates one of the most expansive end-to-end global Internet Protocol (IP)

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42 *Id.* at ¶38.

43 Verizon Petition at 4; Lew/Verses/Garzillo Declaration ¶¶7, 13-21.

44 "Comcast Reports Third Quarter 2006 Results," available at http://www.cmcsk.com/phoenix.zhtml?c=118591&p=irol-newsArticle&ID=921791&- .

45 "Charter Reports Third-Quarter 2006 Financial and Operating Results," available at http://phx.corporate-ir.net/phoenix.zhtml?c=112298p=irol-newsArticle&ID=923898&highlights.

> networks which includes over 270,000 domestic and 360,000 international route miles of fiber optic cable and provides access to over 140 countries worldwide.[46]

Verizon reported third quarter telecommunications revenues of $23.3 billion, or almost than *three times* the *cable and telecommunications* revenues of its two largest competitors *combined*, and 46 million wireline access lines nationwide.[47]

There is no merit to Verizon's assertion that its ability to compete is hampered by its being subject to dominant carrier regulation. Its allegation that "[u]nlike other providers in the Boston MSA, to whom price cap regulation does not apply, . . . [Verizon] cannot respond to competitors' bundled service offerings"[48] is flatly contradicted by Verizon's statement to investors made the month after it filed its Petition:

> Complementing the FiOS TV rollout, Verizon now has 496,000 customers who receive a Verizon DIRECTV bundle, adding 64,000 net new customer additions in the quarter. Total net additions of 170,000 year-to-date reflect adjustments for amounts previously reported.
>
> Approximately 7.5 million Verizon Freedom packages were in service to mass market customers by the end of the third quarter 2006, an increase of approximately 2.5 million since the end of the third quarter 2005. Verizon Freedom packages, which offer local wireline services with various combinations of long distance and Internet access, are part of a *bundling strategy* designed to retain retail primary access line customers.[49]

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[46] Verizon Communications Inc. Form 10-K for the year ending December 31, 2005 at 4, available at http://eol.edgarexplorer.com/EFX_d11/EDGARpro.dll?FetchFilingHTML1?SessionID=Xu

[47] "Verizon Communications Posts Strong Third-Quarter Results as Organic Growth Initiatives Gain Momentum," available at http://investor.verizon.com/news/view.aspx?NewsID=784

[48] Verizon Petition at 27.

[49] *Verizon Communications Posts Strong Quarter Results as Organic Growth Initiatives Gain Momentum*, at 8 (Oct. 30, 2006), available at http://investor.verizon.com/news/view.aspx?NewsID=784 (emphasis added).

Verizon's failure to meet its burden of proving that sufficient competition exists in either the mass market exchange access or broadband Internet access markets or even to address the criteria the Commission considers in determining whether dominant carrier regulation remains necessary to ensure just, reasonable and nondiscriminatory rates, terms and conditions for switched access and broadband services, to protect consumers and to promote competition mandates denial of its request for forbearance.

V. Verizon Is Not Entitled To Forbearance From Its Obligations To Offer Unbundled Loops and Transport

If the Commission decides to review the merits of Verizon's request for forbearance from its Section 251(c)(3) loop and transport unbundling obligations despite its merger commitments, it must deny that request as unsupported by the evidence. Verizon has failed to demonstrate that forbearance from enforcement of its loop and transport unbundling obligations will satisfy each of the three prongs of the Section 10(a) test. On the contrary, enforcement of these obligations remains necessary to ensure that both wholesale and retail prices are just, reasonable and nondiscriminatory. Moreover, forbearance would neither protect consumers, promote competitive market conditions nor enhance competition in the Boston MSA. Accordingly, the Commission should deny Verizon's request.

As noted above, the Commission should not even entertain Verizon's request for forbearance from its statutory and regulatory obligations to offer unbundled loops and transport until its voluntary commitment not to raise prices, which the Commission incorporated as a condition of its approval of its merger with MCI, expires.[50]

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[50] Because Verizon has not requested forbearance from its obligation to provide UNE loops and transport at cost-based rates pursuant to Section 271(c)(2)(B)(ii),

Significantly, Verizon did not acknowledge this commitment in its Petition nor explain how the nullification of the merger condition through forbearance from the obligation to offer unbundled loops and transport can be reconciled with the Commission's findings in the *Verizon/MCI Merger Order*. [51]

For example, in determining that the elimination of MCI as a competitor in the wholesale Type II special access market would not have an appreciable adverse impact on price or availability of Type II special access, the Commission reaffirmed that the availability of unbundled network elements serves as a check on special access pricing and that "regardless of whether competitors are able to negotiate significant discounts, where competitive duplication of the last-mile facility is not economic, competing carriers will be able to rely on high-capacity loop and transport UNEs priced at Total Element Incremental Cost (TELRIC). . . ."[52] In addition, the Commission found that competitors could use their collocations in conjunction with unbundled loops to offer wholesale DSL service "[g]iven that unbundled DS0 loops are available throughout Verizon's region."[53]

If the Commission were to forbear from enforcing Verizon's obligation to provide unbundled loops and transport in the Boston MSA, the basis for these critical

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forbearance from enforcing Section 251(c)(3) would not relieve Verizon from its Section 271 obligations.

[51] In contrast, Verizon did acknowledge that the *Verizon/MCI Merger Order* prohibits Verizon from raising its DS1 and DS3 special access rates for 30 months following the merger closing. Verizon Petition at 24, n.38.

[52] *Verizon/MCI Merger Order* at ¶43.

[53] *Id.* at n. 130.

Commission findings – *i.e.*, the continued availability of unbundled network elements both as a constraint on special access pricing and as a building block for alternatives to Verizon's DSL and other services – would disappear. The Commission's justification for predicting minimal anticompetitive effects from the merger[54] would also evaporate. The Commission's determination that Verizon's commitment not to raise UNE rates for a period of two years following the merger closing date serves the public interest means that it would be *per se* contrary to the public interest for the Commission to refuse to enforce Verizon's obligation to provide access to UNEs.

A. Verizon Has Provided No Evidence of The Extent To Which Competitors Use Unbundled Network Elements To Serve Their Customers

In evaluating whether sufficient competition existed to justify forbearance from enforcing the Section 251(c)(3) obligations to provide unbundled loops and transport in Omaha, the Commission reviewed the state of competition in both the retail and wholesale markets on a granular wire center basis.[55] Verizon's showing with respect to the state of competition in the wholesale market for mass market and enterprise local exchange and exchange access services is woefully inadequate and that inadequacy makes it impossible for the Commission to conclude that there is sufficient facilities-based competition in some or all of Verizon's Boston MSA wire center service areas to justify forbearance.

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[54] In approving the merger, the Commission stated that it found "further comfort in certain voluntary commitments which the Applicants have made relating to unbundled network elements," including the commitment not to seek rate increases for a period of two years. *Id.* at ¶51.

[55] *Omaha Forbearance Order* at ¶¶25, 65.

First, Verizon's Petition contains no data on the volume of unbundled loops and transport competitors purchase from Verizon in order to provide service to their own end users or even on the number of competitors that purchase UNEs from Verizon. Because Verizon did provide the number of voice grade equivalent lines served using Verizon's Wholesale Advantage service (the commercially negotiated UNE-P replacement product) and the number of Verizon voice grade equivalent lines being resold by competitors,[56] its failure to provide the number of voice grade equivalent lines being served with unbundled loops and transport is another glaring omission in its presentation that creates the presumption that such evidence would undermine the basis for its request for forbearance. *International Union, UAW v. National Labor Relations Board*, 459 F.2d 1329, 1336 (D.C. Cir. 1972) (party's failure to produce relevant and important evidence of which he has knowledge and which is peculiarly within his control creates the presumption that the evidence would be unfavorable to his position).

The Commission did not take competitive telecommunications services offered over UNE loops and transport into account in determining whether forbearance was warranted in Omaha because competition based on UNE loops and transport made up only "a fraction of the overall local exchange and exchange access market in the MSA."[57] The Commission made very clear that its decision did not consider and did not reach the "situation where the incumbent LEC's primary competitor uses unbundled network elements (UNEs), particularly unbundled loops, as the primary vehicle for serving and

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[56] Petition at 14-15; Lew/Verse/Garzillo Declaration at ¶32..

[57] *Omaha Forbearance Order* at ¶68.

acquiring customers."[58] Without knowing how many CLEC lines are served using UNEs and whether that number represents more than "a fraction" of the local exchange and exchange access market in the Boston MSA, the Commission cannot possibly decide whether forbearance from enforcing Verizon's obligation to provide UNEs will (1) ensure that Verizon's rates, terms and conditions for equivalent services will be just, reasonable and nondiscriminatory, (2) protect consumers or (3) serve the public interest and promote and enhance competition.

Second, Verizon concedes that not all carriers that serve enterprise customers own and operate their own facilities and that it is one of the largest wholesale suppliers to competing carriers in the enterprise market.[59] To the extent that competitors rely on Verizon UNEs to serve their own mass market and enterprise end users, and there is no evidence to the contrary, granting Verizon forbearance from the obligation to provide UNE loops and transport will not satisfy any of the three prongs of the Section 10(a) test.

Enforcement of Section 251(c) remains necessary to ensure that Verizon's wholesale charges, practices, classifications, and regulations are just and reasonable and are not unjustly or unreasonably discriminatory. Absent the statutory obligation to provide unbundled loops and transport at cost-based rates, Verizon could drive competitors that rely on UNEs out of the Boston market by charging them unreasonable rates for inputs or denying them access altogether to the facilities they need to provide service. As one of the "largest wholesale suppliers" in the Boston MSA, Verizon has both the incentive and the ability to raise its competitors' costs and deny them access to

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58 *Id.* at n.4.

59 Lew/Verses/Garzillo Declaration at ¶¶38-39.

its network in an effort to win back customers served by competitors that rely on UNEs. Any increase in the cost of wholesale inputs will lead in turn to an increase in retail prices to the detriment of consumers. Forbearance, therefore, will neither ensure that Verizon's rates, charges and practices are just and reasonable nor protect consumers. *See Omaha Forbearance Order* at ¶68, n.185 ("granting Qwest forbearance from application of section 251(c)(3) on the basis of competition that exists only due to section 251(c)(3) would undercut the very competition being used to justify the forbearance").

The implementation of price hikes on wholesale inputs is not merely a theoretical possibility. In granting Qwest relief from loop and transport unbundling obligations in certain wire centers in Omaha, the Commission predicted that even without the obligation to offer UNE loops and transport, market incentives would prompt Qwest to make its network facilities available at competitive rates and terms.[60]

Unfortunately, the Commission's predictive judgment has proven wrong. McLeodUSA Telecommunications Services, Inc., a facilities-based CLEC in Omaha, has notified the Commission that one year after its forbearance decision, Qwest "continues to steadfastly refuse to negotiate any commercial or Section 271 pricing for the delisted high capacity UNEs for the affected central offices," and instead offers only tariffed special access loops and transport as a substitute for the UNEs that it is no longer required to provide.[61] McLeod also noted that Cox Communications, whose network in Omaha was the basis for the Commission's finding of competition sufficient to warrant

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[60] *Omaha Forbearance Order* at ¶¶67, 81, 83.

[61] *See* December 15, 2006 Letter from Chris MacFarland, Group Vice President – Chief Technology Officer, McLeod USA to Marlene H. Dortch filed in WC Docket No. 05-281 at 2.

forbearance, has refused to entertain any commercial arrangements to lease last mile network facilities to McLeod.[62] Due to its inability to obtain reasonably and competitively priced loop and transport facilities, McLeod has made the decision to exit the Omaha market unless the D.C. Circuit reverses the Commission's decision in the *Omaha Forbearance Order.*[63]

The Commission has previously determined that forbearance will not serve the public interest or promote competitive market conditions where, as here, it is likely to lead to an increase in prices for wholesale inputs that competitors need to provide service:

> Specifically, we find that forbearance would be likely to raise prices for interconnection and UNEs (particularly those that may constitute bottleneck facilities), inputs competitors must purchase from incumbent LECs in order to provide competitive local exchange service. Because we find that the result of forbearance would be higher costs for competitive LECs which could impair their ability to enter and compete in local markets, we cannot find that forbearance would promote competitive market conditions.

In the Matter of the 1998 Biennial Regulatory Review – Review of Depreciation Requirements for Incumbent Local Exchange Carriers, CC Docket 98-137, Report and Order in CC Docket No. 98-137, Memorandum Opinion and Order in ASD 98-91, FCC 99-397 at ¶63 (released December 30, 1999). Verizon has offered no reason for the Commission to reach different findings here.

As the Commission recognized in approving the Verizon/MCI merger, the availability of unbundled loops and transport also serves to constrain Verizon's ability to

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62 *Id.*

63 *Id.* at 2-3. McLeod also stated that the Commission's Order "has significantly devalued McLeodUSA's network assets in the Omaha market" contrary to the Commission's conclusion that its forbearance decision would not strand competitive carriers' investments. *Omaha Forbearance Order* ¶79.

raise rates for special access products purchased by both wholesale and retail customers.[64] Verizon acknowledges that it sells special access facilities capable of serving millions of voice grade equivalent lines to competitors in the Boston MSA.[65] If the Commission declines to enforce Verizon's obligation to make loops and transport available to competitors on an unbundled basis, it will eliminate not only the source of cost-based wholesale inputs, but also the check on special access pricing that protects both wholesale and retail special access customers. Forbearance, therefore, will neither ensure that Verizon's rates are reasonable, protect consumers, promote competitive market conditions nor enhance competition among telecommunications providers.

B. Verizon Has Not Provided Wire-Center Specific Evidence of Competition

Verizon has also failed to make an adequate showing of competition in the retail market to justify forbearance. In the *Omaha Forbearance Order*, the Commission granted forbearance from Section 251(c)(3) loop and transport unbundling obligations only in those wire centers where it determined that facilities-based competition for telecommunications services was sufficiently developed that access to UNEs was no longer necessary to ensure that Qwest's prices, charges practices, classifications and regulations remain just and reasonable and not unjustly or unreasonably discriminatory.[66] The Commission tailored Qwest's relief to specific thresholds of facilities-based competition in wire centers where a competitor's voice services were available to a

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[64] *Verizon/MCI Order* at ¶55.

[65] Lew/Verses/Garzillo Declaration at ¶¶39, 42.

[66] *Qwest Omaha Forbearance Order* at ¶63. The actual percentages are confidential and proprietary.

certain percentage of the end user locations accessible from those wire centers.[67] *See also Petition of ACS Anchorage, Inc. Pursuant To Section 10 of the Communications Act of 1034, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, WC Docket No. 05-281, Memorandum Opinion and Order, FCC 06-188 (released January 30, 2007)(forbearance relief granted only in wire center service areas where competitor's voice-enabled cable plant covered certain percentage of end user locations accessible from the wire center) (*Anchorage Forbearance Order*). Verizon has not provided any wire center specific data that would allow the Commission to undertake a similar analysis for the Boston MSA.

While Verizon alleges that competitors are "providing mass-market voice service in wire centers that account for [] percent of Verizon's residential access lines;" that "there are at least one or more known competing fiber providers" in [] percent of wire centers in Boston that "represent approximately [] percent of Verizon's retail switched business lines;" and that "competing carriers are serving business customers in [] percent of the wire centers in the Boston MSA, and these wire centers account for [] percent of Verizon's retail switched business lines in the MSA,"[68] it does not identify any of the wire centers to which it refers or identify any of the competitors allegedly providing voice service accessible to end users served by those wire centers. Without this information, Verizon's allegations cannot be independently verified and, therefore, must be rejected.

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[67] *Id.* at ¶62.

[68] Lew/Verses/Garzillo Declaration at ¶¶ 7, 9-10, 40-41. The actual percentages cited by Verizon have been omitted because Verizon has asserted that the information is confidential and proprietary.

Moreover, because Verizon does not present the percentage of end user locations accessible from any specific wire center that facilities-based competitors are capable of serving, it has not shown that the threshold requirements established in the *Omaha Forbearance Order* and *Anchorage ForbearanceOrder* have been met for any wire center. Finally, Verizon does not show whether any competitor in any wire center is providing voice service using unbundled loops or transport purchased from Verizon. Without this information, the Commission cannot possibly determine whether forbearance from enforcing the Section 251(c)(3) unbundling obligation in any wire center will eradicate the very competition that Verizon alleges justifies forbearance.[69]

C. Verizon's Allegations of Intense Enterprise Competition Are Greatly Exaggerated

Verizon's contention that it faces robust competition for enterprise services in the Boston MSA[70] appears to be greatly exaggerated and inconsistent with reality. For example, Verizon's Petition identifies AT&T as operating "what is likely the largest competitive fiber network in the Boston MSA" and as "the largest competitor for enterprise customers in the nation."[71] Contrary to the allegation in its Petition that AT&T is a formidable competitor in Boston, Verizon's chief marketing officer, recently discounted any competitive threat from AT&T whatsoever. "'I don't see AT&T to be an

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[69] See *Omaha Forbearance Order* at ¶68, n.185 ("[g]ranting Qwest forbearance from the application of Section 251(c)(3) on the basis of competition that exists only due to section 251(c)(3) would undercut the very competition being used to justify the forbearance").

[70] Petition at 16-24; Lew/Verses/Garzillo Declaration at ¶¶44-65.

[71] Lew/Verses/Garzillo Declaration at ¶¶9, 49.

immediate direct threat within our own footprint,' Bob Ingalls, Verizon Telecom's chief marketing officer said in an interview."[72]

Verizon also alleges that it faces a "dramatic increase in competition" from systems integrators. In an apparent attempt to create the impression that it has lost out on substantial business, Verizon goes to great lengths to identify large dollar government contracts that have been awarded to systems integrators.[73] What Verizon does not disclose is the role that it plays as a partner in providing telecommunications under many of the very contracts that it cites as being awarded to systems integrators. For example, Verizon cites a $3 billion contract awarded to Lockheed Martin to provide managed network services to 37,000 U.S. Postal services locations, and names AT&T, Hewlett Packard Co., Hughes Network System, Inc. and "large local exchange carriers" as members of the team.[74] What Verizon omits from its discussion is Lockheed Martin's identification of Verizon itself as a "major teammate" on the project.[75] Similarly, Verizon references a $2 billion contract awarded to Lockheed Martin in January 2006 to create a new Air Force communications network and identifies Northrup Grumman, Telcordia Technologies and SAIC as members of the team.[76] The only member of the

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[72] David Ho, "Telecom Giants Set To Spar," AJC.Com/Business (January 14, 2007) available at http://www.ajc.com/business/content/business/stories/2007/01/13/0114verizon.html.

[73] Lew/Verses/Garzillo Declaration at ¶¶63-64.

[74] *Id.* at ¶64.

[75] "Lockheed Martin Selected To Manage U.S. Postal Service Integrated Network Services," available at http://www.lockheedmartin.com/wms/findPage.do?dsp=fec&ci=15962&rsbci=0&fti=112

[76] Lew/Verses/Garzillo Declaration at ¶64 and n. 152.

Lockheed Martin team that Verizon omitted from the list is Verizon itself.[77] Nor did Verizon mention that it is one of Northrop Grumman's "big business" partners on the $9 billion NetCENTS contract awarded by the Air Force[78] and a "teammate" of Northrop Grumman's on the $2 billion contract to run the State of Virginia's information infrastructure.[79]

Verizon obviously made a conscious decision to withhold from disclosure its own participation in these major contracts awarded to its "competitors." For what reason? To make the market in which it provides services appear more competitive than it actually is or to downplay its role as one of the largest and most successful market participants? To the extent that Verizon is sharing in the spoils of the government contract awards it references, it is far more appropriately characterized as a partner of the systems integrators than as a competitor.

D. Wireless and Over The Top VoIP Are Not Wireline Substitutes

The Commission should also reject Verizon's contention that it faces substantial competition from wireless and over-the-top VoIP providers and that such competition

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[77] "Lockheed Martin Awarded $2 billion Contract To Build Network Mission's Operations System," available at http://www.lockheedmartin.com/wms/findPage.do?dsp=fec&ci=17411&rsbci=0&fti=112

[78] "Northrop Grumman Wins U.S. Air Force Network Centric Solutions Contract," available at http://www.irconnect.com/noc/press/pages/news_releases.html?d=63758.

[79] "Commonwealth of Virginia Selects Northrop Grumman For $2 Billion IT Infrastructure Partnership," available at http://www.irconnect.com/noc/press/pages/news_releases.html?d=8973. The award of the contract was announced by Northrop Grumman on November 14, 2005, prior to the consummation of Verizon's merger with MCI. MCI was the original teammate named by Northop Grumman.

should be considered in the forbearance analysis.[80] While Verizon cited national data on wireless and VoIP usage, it offered no evidence that consumers in the Boston MSA rely on interconnected over-the-top VoIP or wireless services as complete substitutes for wireline service. Verizon readily concedes that it has no data on the extent to which "customers are using wireless service in place of traditional wireline service" in the Boston MSA[81] and offers no Boston specific data on VoIP or wireless subscribership. The best Verizon does put forth are analysts' estimates of the percentage of wireless customers nationwide that have given up wireline service and analysts' estimates or projections of VoIP penetration nationwide.[82] The Commission has previously found such analyst estimates and projections completely unreliable for purposes of analyzing competition and market share. *Verizon/MCI Merger Order* at ¶49, n. 135 (rejecting analyst projections of national market share as unreliable and likely masking variations in market share among narrower geographic regions). Verizon has provided no reason for the Commission to find differently here.

In the *Verizon/MCI Merger Order*, the Commission determined that wireless services should be included in the local telephone service product market *only to the extent* that customers rely on wireless as a complete substitute for, rather than as a complement to, wireline service.[83] The Commission also declined to include over-the-

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[80] Petition at 8-14; Lew/Verses/Garzillo Declaration at ¶¶23-29, 33-36. Over-the-top VoIP providers are non-facilities based providers.

[81] Petition at 11.

[82] Lew/Verses/Garzillo Declaration at ¶¶12, 27-29, 35.

[83] *Verizon/MCI Merger Order* at ¶91.

top VoIP services in the relevant product market for purposes of analyzing demand substitutability for wireline service.[84] Verizon's failure to come forward with evidence that customers in the Boston MSA rely on wireless or VoIP services as complete substitutes for wireline service compels the Commission to reject Verizon's argument that wireless and VoIP should be considered in the forbearance analysis. Just as it did in the *Omaha Forbearance Order* when Qwest failed to provide reliable data concerning the full substitutability of VoIP and wireless services for wireline services, the Commission should reject Verizon's unsupported assertion that competition from wireless and VoIP providers should be factored into the forbearance analysis for the Boston MSA.[85]

CONCLUSION

Verizon's requests to be free of unbundling and dominant carrier regulation not only in Boston, but also in virtually every other major metropolitan area from New England to Virginia Beach, are unprecedented, unwarranted and ungrantable. In analyzing the merits of Verizon's requests, the Commission must not lose sight of the fact that Verizon describes itself as "one of the world's leading providers of communications services" and one of the largest wholesale suppliers to other carriers operating within its footprint. Perhaps because of its size, Verizon was unable to come up with any useful evidence that the retail or wholesale markets in the Boston MSA are sufficiently competitive to support a grant of forbearance. Releasing Verizon from the obligation to provide access to cost-based UNEs pursuant to Section 251(c)(3) of the Act

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[84] *Id.* at ¶¶87- 88.

[85] *Omaha Forbearance Order* at ¶72; *see also Anchorage Forbearance Order* at ¶29.

and from dominant carrier regulation will result in higher rates for wholesale inputs for competitors and higher retail rates for consumers. Based on McLeod USA's experience in Omaha, Nebraska, the Commission cannot prudently assume that Verizon will make its network facilities available to other carriers at competitive rates, terms and conditions once it is relieved of the obligation to provide UNEs. Moreover, based on the significant rate increases Verizon has successfully implemented for its long distance packages and stand alone DSL service, the Commission cannot assume that dominant carrier regulation is not necessary to protect consumers and serve the public interest. Verizon's effort to show that there is sufficient competition in the Boston MSA to ensure that the interests of consumers and the goals of the Act will be protected if forbearance is granted was anemic at best and reflects its indifference to the pro-competitive purposes of the Act. This proceeding presents the perfect opportunity for the Commission to remind the ILECs that they bear the burden of proving that forbearance is warranted under Section 10(a) and that broad unsupported allegations that a market is competitive are insufficient to meet that burden.

For the foregoing reasons, the Commission should deny Verizon's Petition for forbearance from statutory and regulatory requirements in the Boston MSA.

March 5, 2007

Respectfully submitted,

Mary C. Albert
Assistant General Counsel
COMPTEL
900 17th Street N.W., Suite 400
Washington, D.C. 20006
(202) 296-6650