

**REDACTED FOR PUBLIC INSPECTION**

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

In the Matter of Petitions of Verizon )  
Telephone Companies for Forbearance )  
Pursuant to 47 U.S.C. § 160(c) in the Boston, ) WC Docket No. 06-172  
New York, Philadelphia, Pittsburgh, )  
Providence and Virginia Beach Metropolitan )  
Statistical Areas )

**OPPOSITION OF EARTHLINK, INC. AND NEW EDGE NETWORK, INC.  
TO THE PETITIONS OF VERIZON TELEPHONE COMPANIES FOR FORBEARANCE**

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### SUMMARY

The Federal Communications Commission's consideration of Verizon's forbearance petitions must be guided by two fundamental questions:

- 1) Is granting these petitions in the best interests of competition;
- 2) Are they good for the consumer in a rapidly evolving marketplace; and
- 3) Does granting these petitions bolster marketplace protection of Internet neutrality?

Unfortunately, the answers are straightforward: no, no and no.

In essence, Verizon is asking the Commission to buy an argument that less is, in fact, more.

The reality is that for the 35 million consumers from New Hampshire to North Carolina who would be affected by these petitions, the result of granting Verizon forbearance would be fewer choices not more.

Verizon is asking for the Commission to permit it to strangle competition and restrict consumer choice to just a few established mega-players, including Verizon, bent on dominating the market, not opening it or advancing it:

- The negative impact of this “less is more” model puts broadband, particularly higher speed broadband, in the control of two or, in a few, limited areas, three providers, enabling them to raise prices and discriminate among Internet content and applications.
- It means less, not more, broadband investment because Verizon will have achieved, through these petitions, substantial deregulation without investing in new fiber networks. This runs directly against the FCC's “new wires, new rules” policy embraced by the FCC and adopted in the 2003 *Triennial Review Order*.
- It means less, not more, broadband investment because Verizon potentially can dictate the rates, terms and conditions for the legacy UNE copper loops used by EarthLink and its CLEC partners, making it harder for companies like EarthLink to invest in new network electronics to turbocharge those loops and create an additional, high capacity broadband “fast lane” to all 35 million Americans in these areas.
- It means less, not more, economic growth and jobs because the petitions deprive small businesses of innovative new services that they could have used to become more productive, cut costs, and create jobs.

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- It means less net neutrality, not more, because there will be fewer independent providers of last-mile broadband transmission, making it more likely that the incumbent providers can, in parallel, raise prices and block, impair, degrade, or discriminate among Internet content and applications.

Not surprisingly Verizon is attempting to create a world that manifestly harms consumers, competition and the public interest. Verizon's petitions studiously ignore their impact on America's broadband future. On this basis alone, Verizon's Petitions must be rejected.

Further, Verizon's Petitions, demonstrate a lack of sensitivity to the interests of the consumer and toward competition more generally. A few compelling facts reinforce this:

- Verizon has violated Section 222's consumer privacy protections and potentially the laws of at least nine states by using E911 data concerning customers of competing carriers in order to file these Petitions. As the New Hampshire Public Utilities Commission has moved, on this basis alone, all of these Petitions must be dismissed.
- Verizon fails to provide any evidence as to the extent of competition in any of the actual, relevant geographic markets – each Verizon wire center – as required by the FCC in both the *Omaha* and *Anchorage Forbearance Orders*.
- Unlike both Qwest in *Omaha* and ACS in *Anchorage*, Verizon fails to show that it has lost substantial retail market share.
- Contrary to the Commission's express direction in *Omaha*, Verizon relies on competition from UNE-based providers in Philadelphia and Virginia Beach to justify forbearance from section 251. In *Omaha*, the Commission rejected such "circular justification," on the clear ground that "granting forbearance [from section 251] on the basis of competition that exists only due to section 251(c)(3) would undercut the very competition being used to justify forbearance."

Verizon may claim that broadband is awash in competition from emerging mobile and fixed wireless, satellite, broadband-over-power lines (BPL) and WiMax. But these claims prove false upon examination:

- The Commission, in both *Omaha* and *Anchorage* rejected ILEC pleas to grant forbearance based on non-existent or undeployed potential technologies. The most recent FCC data shows that BPL served a grand total of 5,208 broadband lines *nationwide*, which is less than one-hundredth of one percent of broadband lines nationwide.
- In the market for broadband above 2.5 Mbps, FCC data show that wireless technologies are almost non-existent. 99.93% of all advanced service broadband lines above 2.5 Mbps are provided over wired facilities – DSL, fiber or coaxial

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cable. Wireless provides just 19,802 out of nearly 30 million (less than one tenth of one percent) advanced service lines over 2.5 Mbps.

- Even at lower speeds, wireless broadband – with the exception of EarthLink’s municipal Wi-Fi in Philadelphia – is priced far above Verizon’s DSL service, and will thus exert no competitive discipline on the price Verizon charges for affordable, basic broadband.
- Even the scant information Verizon has presented here shows that only a small number of households in Boston (270,000 out of 1 million), New York (80,000 out of 7 million) and Philadelphia (only in portions of Delaware County, PA), can choose to have wireline broadband provisioned over something other than Verizon’s loops or the cable company’s coax. For the vast majority of households in each of these MSAs in nine states, the only wired broadband connections are those of Verizon and/or the cable company.

For years, Verizon argued that the Big 3 facilities-based oligopoly in the long distance market (at that time, AT&T, MCI and Sprint) lacked sufficient competition to protect consumers, and thus that the public interest required that Verizon be permitted to enter the long distance business.

Verizon’s arguments are just as valid today. The chief difference, it seems is that Verizon is grown up and that playing field has shifted to their advantage.

A wire line duopoly – or at best in a few places, a triopoly – is not enough competition to protect consumers or to spur the availability of advanced broadband services at affordable rates. The public interest, protection of consumers, competition and maximum investment in an advanced broadband infrastructure all demand that the Commission deny Verizon’s Petitions.

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TO THE PETITIONS OF VERIZON TELEPHONE COMPANIES FOR FORBEARANCE**

EarthLink, Inc. (“EarthLink”) and its Competitive Local Exchange Carrier (“CLEC”) subsidiary, New Edge Network, Inc. (“New Edge”), hereby oppose the petitions for forbearance in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach MSAs filed on September 6, 2006 by the Verizon Telephone Companies (“Verizon”).<sup>1</sup> These petitions fail to satisfy the requirements of Section 10(a), in that they would reduce broadband competition and choices for residential and

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<sup>1</sup> Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston Metropolitan Statistical Area, WC Docket No. 06-172 (filed Sept. 6, 2006) (“Verizon Boston Petition”); Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the New York Metropolitan Statistical Area, WC Docket No. 06-172 (filed Sept. 6, 2006) (“Verizon New York Petition”); Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Philadelphia Metropolitan Statistical Area, WC Docket No. 06-172 (filed Sept. 6, 2006) (“Verizon Philadelphia Petition”); Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Pittsburgh Metropolitan Statistical Area, WC Docket No. 06-172 (filed Sept. 6, 2006) (“Verizon Pittsburgh Petition”); Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Providence Metropolitan Statistical Area, WC Docket No. 06-172 (filed Sept. 6, 2006) (“Verizon Providence Petition”); Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Virginia Beach Metropolitan Statistical Area, WC Docket No. 06-172 (filed Sept. 6, 2006) (“Verizon Virginia Beach Petition”) (collectively, “Verizon’s Petitions”).

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business consumers, leading to higher prices, lower service quality and reduced innovation in high speed Internet Protocol (“IP”) transmission services. Indeed, grant of these petitions would further retard the deployment of facilities-based advanced broadband services, undermining, rather than accelerating, the availability of advanced broadband services at affordable rates and harming, rather than helping, the United States’ economic growth and productivity. Moreover, grant of these petitions moves in the wrong direction with respect to ensuring that the market will address “net neutrality” concerns. Rather than maintaining choices in the last mile broadband transmission and thus helping the market to police anticompetitive blocking, service degradation or discrimination, this petition would shrink those choices and buttress what is largely a duopoly for last-mile transmission in the Verizon region. Loop unbundling at cost-based rates for facilities-based entrants remains necessary to protect residential and business consumers, safeguard the public interest, and ensure that the market can deliver broadband retail prices’ terms and conditions that are affordable, just and reasonable.

Given the unprecedented scope of Verizon’s Petitions, the potential for harm here cannot be understated. Taken together, these petitions threaten the competitive landscape for over 34.5 million Americans, in almost 13 million households. And, unlike the relatively small territories at issue in the *Omaha* and *Anchorage* forbearance proceedings, Verizon’s Petitions cover a massive geographic area – covering parts of ten states from New Hampshire to North Carolina. As explained further below, forbearance even in the most competitive pockets of these expansive MSAs would have a ripple effect, limiting competition and harming consumers in adjacent less populated areas and even outside the MSAs.

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### **INTRODUCTION**

EarthLink, a leading Internet innovator, is one of the pioneers in opening the Internet to the mass market. For over ten years, EarthLink has been on the cutting edge of delivering the Internet to American consumers and businesses, first through dial-up, then broadband and now VoIP, wireless voice, and municipal wireless Internet services. Over the past ten years, EarthLink has helped the Internet grow from the specialized province of a few tech-savvy early adopters to an integral part of American work and family life. And EarthLink has seen – and helped – millions of Americans adopt broadband services and capabilities that were not possible with dial-up services.

EarthLink's hallmark has been to provide high quality, reliable, customer-friendly Internet services: its motto is "we revolve around you." EarthLink's focus on individual customers has been successful. Over the past three years, EarthLink has won numerous awards for customer satisfaction in broadband and dial-up services. It now delivers to its customers a full range of broadband services and applications, including Internet access, VoIP, and innovative wireless services from Helio, a joint venture between SK Wireless and EarthLink. EarthLink offers its Internet access customers a variety of enhanced offerings, including pop-up, spam and spyware blockers, anti-virus protection, and parental controls. It also provides cutting edge ADSL 2+ services in eleven markets – including two (New York and Philadelphia) at issue in this proceeding – with Internet and IP transmission of up to 8 Mbps. EarthLink has also been a leader in developing and deploying municipal Wi-Fi broadband networks – working with Philadelphia (PA), New Orleans (LA), San Francisco (CA), Anaheim (CA), Milpitas (CA), Pasadena (CA), Atlanta (GA), Houston (TX), Alexandria (VA), and other cities. With the exception of its

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nascent municipal Wi-Fi operations, however, EarthLink does not own last-mile transmission facilities to its customers.

Although best known for its mass market services, EarthLink has also made a substantial push into the enterprise markets. In April 2006, EarthLink acquired New Edge, a CLEC operating nationwide. New Edge is directly collocated in nearly 600 incumbent LEC central offices, and has dedicated connections, using UNE loops, resale, and other last mile access technologies, to over 10,000 central offices – allowing New Edge to reach approximately 98 percent of business locations nationwide where DSL is available.

### **Mass Markets**

EarthLink's core business is to provide mass market Internet access and, as part of that access, a suite of Internet applications. Within the areas covered by the Petitions, EarthLink provides broadband data and voice services through whatever means it can find in the marketplace. In all six of the MSAs covered by these Petitions, and particularly in New York and Philadelphia MSAs, UNE loops are an important – and, in the case of higher speed broadband services, critical – part of providing affordable broadband alternatives for mass market consumers.

Moreover, EarthLink's experience is that mass market consumers increasingly are looking for providers to offer bundles of communications services. Consumers do not want just voice service, or just broadband Internet access, but both together.<sup>2</sup> EarthLink

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<sup>2</sup> Indeed, in what has been referred to as the “halo effect,” the availability of VoIP has led to accelerated growth and improved subscriber retention for broadband services. See Jeffrey Halpern, *et al.*, Bernstein Research Call, *Quarterly VoIP Monitor: The “Halo Effect” of VoIP Driving Faster Cable Broadband and Basic Subscriber Growth*, (August 24, 2005).

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has met this demand by offering combined high speed Internet access and VoIP service for between \$49.95 and \$69.95 per month.<sup>3</sup> Again, UNE loops allow EarthLink to give customers bundled services that meet their Internet and voice needs in one package.

*1.5 Mbps DSL.* Throughout these six MSAs, EarthLink offers a 1.5 Mbps broadband Internet access service. These lower speed broadband services are provided using either DSL transmission purchased from Verizon or UNE loop-based DSL service obtained from Covad. Because EarthLink can only resell Verizon DSL where Verizon operates DSL, the Covad UNE-based DSL services allow EarthLink to serve areas Verizon may not reach. In addition, the UNE loop-based DSL service from Covad puts critical competitive pressure on Verizon to continue to sell EarthLink DSL transmission on reasonable terms notwithstanding the *Wireline Broadband Internet Access Order*, as well as to continue to deploy its own services.<sup>4</sup> Without the UNE-based alternative from Covad, the market would lose an important check on Verizon wholesale DSL offering and pricing. Moreover, because the UNE loop-based DSL is provided using electronics, DSLAMs and backbone independent of Verizon, EarthLink has a much greater ability to differentiate this service than when it resells Verizon transmission. As the Commission recognized in the *Wireline Broadband Internet Access Order*, intramodal UNE-based

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<sup>3</sup> See DSL and Home Phone Service, <http://www.earthlink.net/voice/bundles/dslhomephone/> (last visited Feb. 28, 2007). The \$49.95 package combines DSL service of up to 1.5 Mbps with 500 minutes of VoIP calling. The \$69.95 package combines DSL service of up to 8 Mbps with unlimited VoIP calling. There is also a \$64.95 package of 1.5 Mbps DSL service and unlimited VoIP calling. EarthLink also offers a package of TimeWarner/BrightHouse resold cable modem service along with unlimited VoIP calling for \$62.90. This package, however, is limited to the TimeWarner/BrightHouse serving areas.

<sup>4</sup> *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005).

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competition provided additional competitive stimulus to ensure that both Verizon and the cable companies continue to deploy their service offerings.<sup>5</sup>

*Higher Speed Broadband Services.* In addition, in the Time Warner-served portions of the New York MSA, EarthLink offers a higher speed, up to 5.0 Mbps broadband service, reselling Time Warner's cable modem service. EarthLink also has a very limited and highly restricted ability to resell Comcast cable modem service in the Boston MSA.

As its flagship higher speed broadband service, in the New York and Philadelphia MSAs, EarthLink also offers an up to 8 Mbps DSL broadband Internet access (both on a standalone basis and as a line powered voice bundle of Internet Access and VoIP service). This ultra-fast broadband service is provided using telecommunications services purchased from Covad – which itself uses unbundled legacy copper loops for last-mile transmission.<sup>6</sup> These higher speed DSL services are not substitutes for EarthLink's 1.5 Mbps offerings,<sup>7</sup> and compete directly with the higher speed broadband services offered by Verizon over its FiOS network and by the cable company.

Because EarthLink/Covad use their own electronics to provide Internet access and bundled VoIP service, these UNE-based services are functionally equivalent to a “third pipe” into homes. These next-generation EarthLink services never pass through the ILEC switch or otherwise enter the PSTN (except for VoIP call termination). UNE loops thus allow EarthLink to provide Internet-based data and voice services that are wholly

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<sup>5</sup> *Id.* at ¶ 57.

<sup>6</sup> This service is available in cities across the country, including Atlanta, Chicago, Dallas, Los Angeles, Miami, New York City, Philadelphia, San Diego, San Francisco, Seattle and the Washington, DC metropolitan area and can easily be expanded to other geographic areas.

<sup>7</sup> See discussion at p. 16 - 25, *infra*.

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independent of the services offered by Verizon or the local cable company. The availability pursuant to Section 251(c) of this functional third pipe pushes both Verizon and the cable company to improve service and value to consumers, while constraining their ability to engage in anticompetitive behavior such as raising rivals' costs, conducting price squeezes or blocking, degrading or otherwise impairing Internet applications.

UNE-based services give EarthLink the greatest ability to innovate and to tailor its offerings to its customers' evolving needs. When EarthLink uses wholesale broadband arrangements with incumbent LECs or cable companies, it must live within limits largely dictated to it by those sellers. In contrast to UNE loop-based broadband services, resale leaves little room for competition over service quality and other transmission features. Since the *Wireline Broadband Order*, ILECs have even more ability to use commercial negotiations to limit or control the extent of resale competition. Even when services were offered under tariff, Verizon (and other large ILECs) set unreasonably high rates for higher-speed DSL (*i.e.*, 2 Mbps and above) to protect legacy T1 pricing structures.<sup>8</sup> Some ILECs (although not Verizon to date) have placed contract

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<sup>8</sup> When it was under tariff, Verizon, for example, offered patently inflated pricing for higher speed ADSL, even compared with other incumbent LECs. *Compare*, Verizon Telephone Companies Tariff F.C.C. No. 20, § 5.1.6(C) (effective Feb. 20, 2007) (Verizon offers wholesale 7.1 Mbps ADSL as low as \$81.95/mo (de-tariffed on July 31, 2006)), *with*, National Exchange Carrier Association, Inc., Tariff F.C.C. No. 5, § 17.4.9(C)(2)(b) (effective Sept. 30, 2006) (NECA incumbents offer wholesale 6 Mbps ADSL for as low as \$13.45/mo). This pricing strategy is not new. As the Commission staff have explained, “[a]lthough the ILECs have possessed DSL technology since the late 1980s, they did not offer the service, for concern that it would negatively impact their other lines of businesses . . .,” especially with T1 prices in a “range of \$ 300 to \$ 3000 per month.” Cable Services Bureau, *Broadband Today: A Staff Report to William E. Kennard, Chairman, Federal Communications Commission*, (Oct. 1999), appended to FCC

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limitations on serving business customers or on the further resale of broadband transmission.<sup>9</sup> Onerous restrictions are not limited to ILEC agreements. EarthLink's resale agreement with Comcast severely limits customers to whom EarthLink can market its services. These types of restrictions stifle the ability of wholesale customers to offer the public a wider array of innovative services. UNE based-DSL provides both a check on these types of restrictions, and a necessary antidote.

*Municipal Wi-Fi.* In the City of Philadelphia, which is only one part of the Philadelphia MSA, EarthLink will be the network provider for the Philadelphia Wi-Fi network. This network, however, is not yet a substitute for EarthLink's UNE-based DSL services, either at 1.5 Mbps or at the higher up to 8 Mbps speeds. EarthLink has only recently begun operating a 15 square mile "proof-of-concept" area, and has not yet built the remainder of the 135 square mile Philadelphia network. Moreover, as currently contemplated, the Philadelphia network will provide service up to a symmetrical 1 Mbps.<sup>10</sup> Higher capacity users, such as those seeking download speeds above 2.5 Mbps, would still need to purchase EarthLink's ADSL2+ service. In the other areas covered by Verizon's Petitions, municipal Wi-Fi networks are unbuilt and, at best, only being contemplated.

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*Chairman Kennard Releases Cable Staff Report on the State of the Broadband Industry*, Report No. CS 99-14, 1999 FCC LEXIS 5099, \*45 & n. 73 (1999).

<sup>9</sup> *Application for Consent to Transfer of Control Filed by AT&T and BellSouth Corporation*, *Ex Parte* Presentation of EarthLink, Inc., WC Docket No. 06-74, attachment at 2 (filed Oct. 4, 2006); *Ex Parte* Presentation of EarthLink, Inc., WC Docket No. 06-74 (filed Oct. 5, 2006); *Ex Parte* Presentation of EarthLink, Inc., WC Docket No. 06-74 (filed Oct. 4, 2006); *Ex Parte* Presentation of EarthLink, Inc., WC Docket No. 06-74 (filed Sept. 28, 2006).

<sup>10</sup> Press Release, EarthLink Press Room, EarthLink Lets Free Wi-Fi Ring In The City Of Brotherly Love (January 11, 2007), *available at* [http://www.earthlink.net/about/press/pr\\_philly\\_announcement/](http://www.earthlink.net/about/press/pr_philly_announcement/).

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*Broadband-Over-Powerlines (BPL)*. Leaving no stone unturned, EarthLink is also an investor in BPL. This technology, however, is wholly nascent, and thus is still an over-the-horizon service of the type that the Commission has refused to use as a basis for forbearance.<sup>11</sup> EarthLink recently announced that it will participate in a BPL test to nine apartment complexes in the Washington, DC area,<sup>12</sup> and has conducted product tests in other markets.<sup>13</sup> BPL – which according to the FCC’s most recent report served a mere 5,208 lines nationwide as of June 30, 2005<sup>14</sup> – is nowhere near ready for commercial, market-wide, mass market deployment.

EarthLink, therefore, relies on ubiquitous cost-based UNEs to give customers an important and economical choice for Internet and bundled Internet/voice services – particularly on a widespread geographic basis and with respect to higher speed services above 2.5 Mbps. Verizon’s Petitions, which overlook the broadband product markets altogether, would give Verizon the ability to reduce competition in those markets to the detriment of both competition and consumers.

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<sup>11</sup> See discussion at p. 20-22, *infra*.

<sup>12</sup> See Press Release, EarthLink Press Room, Telkonet and EarthLink to Deliver Broadband Over Power Lines to D.C. Apartment Dwellers (Oct. 17, 2006), *available at* [http://www.earthlink.net/about/press/pr\\_broadband\\_powerlines/](http://www.earthlink.net/about/press/pr_broadband_powerlines/).

<sup>13</sup> See Press Release, EarthLink Press Room, Progress Energy and EarthLink Testing Broadband Over Power Lines with Area Customers (Feb. 18, 2004), *available at* [http://www.earthlink.net/about/press/pr\\_progress\\_energy/](http://www.earthlink.net/about/press/pr_progress_energy/).

<sup>14</sup> See Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, *High-speed Services for Internet Access: Status as of June 30, 2006*, at Table 5 (January 2007), *available at* [http://hraunfoss.fcc.gov/edocs\\_public/attachment/DOC-270128A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachment/DOC-270128A1.pdf). (“*High-speed Services for Internet Access*”).

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### **Enterprise Markets**

EarthLink Business Solutions, together with EarthLink's CLEC subsidiary, New Edge, provides communications solutions to small- and medium-sized enterprise businesses. New Edge operates its "BigFoot" DSL network, which offers xDSL and networking services to approximately 98 percent of the business locations in the United States. In the areas covered by Verizon's Petitions, EarthLink Business Solutions provides high speed Internet access to businesses, including DSL, IP over Frame, T1, and Direct Internet Access. Most recently, EarthLink Business Solutions announced that, working with New Edge, it would expand its business class DSL service to 320 small cities and towns in 29 states. In addition, New Edge provides wholesale services, including Aggregation and IP services, DSL, T1, Frame Relay and ATM services.

New Edge has been an innovative service provider, specializing in the provision of broadband IP transmission and private networks to small- and medium-sized businesses. Differentiating itself from incumbent carriers, New Edge was one of the first communications carriers to achieve compliance with Payment Card Industry (PCI) security standards established by the credit card associations for protecting cardholders and businesses from fraud. New Edge also developed a managed networks product with a break-through price point of \$99 per month per remote location. And New Edge was one of the first carriers to provide national, flat-rate pricing for private broadband networks with locations anywhere in the United States.

New Edge's products have enhanced communications, reduced costs, and improved efficiency for a wide range of small- and medium-sized businesses located outside of central metropolitan business districts – supplying networking technology that has fueled productivity and enhanced job growth in diverse sectors of the economy.

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- A major business franchise owner, for example, replaced the independent dial-up connections used by his eight individual locations with a Virtual Private Network (VPN) specifically designed by New Edge to meet his networking needs. The VPN delivers streaming real time video surveillance that allows the franchisee to simultaneously monitor security and employee productivity at each store location, and provides remote access to real time point of sale and inventory information for more accurate revenue and industry reporting. In addition, New Edge installed a firewall at the company headquarters that controls Internet activity at all locations, allowing for oversight of employee web activity. New Edge also provided a fast, secure broadband connection, speeding transactions, decreasing costs, and improving customer satisfaction with faster service in the food line. All of this led to increased profits, and, with New Edge's national footprint, the franchisee remains free to add new locations to the private, secure network.
- New Edge has also provided a convenience store chain of 86 locations, with an ATM over DSL network, a private wide area network, remote network management, and security certifications from multiple credit card companies. New Edge services allowed those stores to troubleshoot remotely from its central headquarters, a practice that resolves issues more quickly, enables technicians to prioritize problems, and has resulted in an annual savings of \$5,000 in the cost of technician travel time alone.
- Similarly, a leader in discount bed and bath products with 122 store locations chose New Edge to provide a managed private network, which allows the company to more accurately control inventory, improve sales reporting, and implement on-demand stocking practices that have led to substantial reductions in inventory costs. In addition, the New Edge services shortened the company's credit card transaction time from 45 second to three seconds, cutting costs and increasing customer satisfaction.
- New Edge has also provided a national convenience store chain with more than 1,650 locations, with a customized broadband network with DSL access that enabled faster processing of debit and credit transactions, improved revenue reporting, and provided three times the bandwidth for half the cost of its old network.
- And New Edge helped yet another fast food chain with 39 restaurants replace their old dial-up network with a private broadband network to accommodate new bandwidth-intensive applications and improve customer service.

These are just a few examples. Diverse multi-site businesses, ranging from gas stations to mall kiosks, are now relying on New Edge networks and services to meet their needs when it comes to inventory, payroll, purchasing, communications, and customer

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transactions. Making these businesses more efficient and productive in the global economy helps to preserve jobs and promote economic growth. New Edge is uniquely suited to provide customized networking solutions to businesses operating in multiple locations, particularly those that span the traditional Bell regions. Indeed, the RBOCs themselves are New Edge customers, as some of them use New Edge networking solutions to accommodate their own demands for out-of-region services.

The New Edge line of products and services – and the small and medium-sized businesses and jobs that have come to rely upon them – depend on the continued availability of UNEs at cost-based rates. In all of the markets covered by Verizon’s Petitions, New Edge purchases DSL services from CLECs that use UNE loops and transport to provide service to New Edge. In New York and Pittsburgh, for example, New Edge purchases DS3 multiplexing and DS1 connections provided by XO Communications via UNEs from Verizon. In the other areas and increasingly across the country, including the Verizon markets subject to these petitions, New Edge is relying on UNE-based services provided by Covad to connect to the New Edge network and provide VPN to its customers.

### **I. VERIZON’S PETITIONS HARM CONSUMERS BY REDUCING COMPETITION, INNOVATION AND DIVERSITY IN THE FACILITIES-BASED INTERNET, BUNDLED VOICE/INTERNET, AND INTERNET VIDEO MARKETS.**

#### **A. Forbearance from Sections 251(c)(3) and 252(d)(1) Would Harm Competition and Consumers in the Facilities-Based Residential Internet, Internet Video, and Bundled Voice/Internet Markets.**

In an entirely backward approach, divorced from the reality of today’s markets, Verizon’s Petitions examine only the market for stand-alone voice services. As discussed in Section II, below, Verizon’s analysis of standalone voice markets itself is insufficient

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to demonstrate forbearance should be granted. Even more problematic, however, Verizon entirely ignores the impact of forbearance on broadband Internet access competition, and, by extension, bundled voice and broadband Internet access competition. Because Verizon fails even to discuss these relevant product markets, it cannot show that it has met the requirements of Section 10(a), and its petitions must be denied.

UNE loop-based DSL provides a critical alternative to Verizon and the cable company, particularly for consumers seeking affordable, higher speed broadband services. Today, in the vast majority Verizon's territory, if you want an affordable, basic broadband service or a higher speed broadband service above 2.5 Mbps, there are only three sources for the broadband Internet transmission into the home: (1) Verizon; (2) a cable company (which generally does not provide the basic, affordable broadband services available over DSL); and (3) a CLEC that leases Verizon copper UNE loops and attaches its own electronics to provide broadband service. As discussed further below, mobile wireless and satellite appear to be in a different – and much more expensive – market than wireline broadband and do not offer higher speed services. Overbuilders such as RCN have only a small presence in portions of the Boston, New York and Philadelphia MSAs. BPL and WiMax are still “over-the-horizon” technologies, which the Commission has appropriately declined to use as the basis for forbearance. Resale of the ILEC or cable company's service simply is another means to distribute the products that the ILEC or cable company choose to make available.

Moreover, when UNE loop-based broadband providers combine Internet access with voice, they are in a unique position, as compared with a reseller. A good example is

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EarthLink's line powered ("LPV") bundle of voice/data service. Using Covad's underlying ADSL2+ transmission service and EarthLink's softswitches, the Covad network provides LPV service, converting the analog last mile transmission over the low frequency portions of the loop into IP form, while splitting off the high speed data packets.<sup>15</sup> In eleven markets nationwide, including the New York and Philadelphia markets at issue here, this allows EarthLink to offer line-powered voice telephone service and Internet access of up to 8 Mbps. This is a true advanced service that – using existing copper loops – is capable of handling real-time standard definition video. As the Commission has recognized, competition over service quality and features is one of the key advantages of UNE-based competition over resale competition.<sup>16</sup> By using UNEs, EarthLink and Covad are not wedded to the ILEC's technological choices. As discussed further below,<sup>17</sup> access to UNE-L – as contemplated and specifically authorized by the *TRO* – allows competitive providers such as EarthLink and Covad to use distinct, innovative alternatives to further the deployment of advanced telecommunications services to consumers, consistent with Section 706.

Verizon's petitions threaten the competitive vitality and usefulness of UNE loop-based broadband as check on the behavior of Verizon and the cable company. Section 251(c)(3) and 252, from which Verizon now seeks forbearance, ensure that the UNE-L prices are both cost-based and stable over time, which protects UNE-based competitors

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<sup>15</sup> With the electronics collocated in the ILEC central office, the ADSL2+ platform offers a superior VoIP service that is not subject to electric power outages and that eliminates the need for installation of additional customer-end equipment.

<sup>16</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 15667-69 (¶¶ 332-334) (1996).

<sup>17</sup> *See infra* at 40-42.

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from a Verizon price squeeze<sup>18</sup> and allows consumers to benefit from broadband service that is priced independently of Verizon's services. Because Section 251 requires cost-based UNE prices, UNE-based providers can set retail prices and create offerings that are responsive to the needs of consumers.

**1. *Relevant Product Markets and Market Participants.*** Broadband internet access, Internet/voice bundled service, and video services are relevant product markets that cannot be ignored in this proceeding. Indeed, recent marketplace evidence and the Commission's own statistics show that the broadband Internet access market itself is not a single product market, but likely consists of at least two or three product markets – (1) fixed lower speed broadband service of less than 2.5 Mbps, (2) mobile lower speed broadband service of less than 2.5 Mbps, and (3) higher speed broadband service above 2.5 Mbps that is capable of handling streaming video and other bandwidth intensive applications.

Relying on the Department of Justice and Federal Trade Commission Horizontal Merger Guidelines, the Commission has defined the relevant product market “as the smallest group of competing products for which a hypothetical monopoly provider of the products would profitably impose at least a small but significant and nontransitory increase in price.”<sup>19</sup> A product market can reasonably be viewed as a group of products for which a moderate (*e.g.*, five percent) price increase will not cause most consumers to

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<sup>18</sup> See discussion at 27 - 34, *infra*.

<sup>19</sup> *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18433, 18446 n.82 (2005) (citing Horizontal Merger Guidelines, issued by the U.S. Department of Justice and the Federal Trade Commission, (Apr. 2, 1992, revised Apr. 8, 1997) §§ 1.11, 1.12) (“*DOJ/FTC Guidelines*”).

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switch to other potential substitute products.<sup>20</sup> Here, if all broadband Internet-access providers – the cable company, Verizon, UNE-based providers like EarthLink, cable overbuilders, and resellers – were united in a hypothetical monopolist, there is little doubt that the hypothetical monopolist could increase prices for broadband Internet access services, and sustain such an increase, for most or all customers.

Recent economic evidence, however, shows that for most consumers lower speed broadband service, such as low speed DSL service, and higher speed broadband services, such as multimegabit DSL and cable modem services, are not ready substitutes. In particular, many customers are willing to pay a substantial premium for the higher speed broadband services, and the prices for the higher speed services do not respond significantly to the availability of lower speed services. Consequently, higher speed and lower speed broadband services constitute distinct product markets.<sup>21</sup>

Investment analyst Sanford Bernstein recently concluded that the Internet access market, previously thought of as dial up vs. broadband, has segmented even further to reflect the gap in realized speed between traditional DSL (less than 1 Mbps average throughput) and FIOS or cable broadband (greater than 4 Mbps).<sup>22</sup> Bernstein observes, “[t]he broadband market has proven *less price sensitive, and less cross-elastic*, than once imagined, as consumers have at least up to now, been willing to trade price for speed.”<sup>23</sup> Indeed, in 2006, cable prices did not decline even when the prices of substantially slower

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<sup>20</sup> See *DOJ/FTC Guidelines* § 1.11.

<sup>21</sup> See Craig Moffet, *et. al.*, Bernstein Research, *US Cable & Telecom: Is Today's DSL Tomorrow's Dial Up?*, (December 4, 2006) (“Bernstein Research”).

<sup>22</sup> See *id.*

<sup>23</sup> *Id.* at 3 (emphasis added). Limited sensitivity of the demand for a service to the prices of other potential substitutes is a classic sign that the service in question constitutes a separate product market.

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DSL services declined significantly:<sup>24</sup> Comcast's cable modem revenue per unit actually *increased*, from \$42.91 to \$43.14 per month, in 2005 and 2006.<sup>25</sup> Verizon's CFO recently confirmed as much at a recent Wall Street investment conference, saying "cable modem pricing . . . seems to have stabilized, even though some folks have dropped DSL pricing."<sup>26</sup> Divergent pricing for these different classes of broadband services<sup>27</sup> is a classic sign that lower speed and higher speed broadband services constitute separate product markets, as consumers are largely unwilling to shift to lower-speed Internet access in response to a small but non-transitory increase in the price of higher-speed service.

As the Commission has recognized, the number and capacity of facilities-based competitors, including UNE-based competitors, are most important in conducting a competitive analysis, because these are the only suppliers that can impose meaningful price discipline on incumbent suppliers and are the only sources of meaningful innovation.<sup>28</sup> In both the lower speed (less than 2.5 Mbps) and higher speed (above 2.5

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<sup>24</sup> *Id.* at 2.

<sup>25</sup> *See id.*, Exhibit 1.

<sup>26</sup> Comments of Doreen Toben, Chief Financial Officer, Verizon at the UBS 34<sup>th</sup> Annual Global Media Conference, at 12 (December 6, 2006), *available at* [http://investor.verizon.com/news/20061206/20061206\\_transcript.pdf](http://investor.verizon.com/news/20061206/20061206_transcript.pdf) ("*Comments of Doreen Toben*").

<sup>27</sup> *See, e.g., supra* n. 8.

<sup>28</sup> *Applications for the Assignment of License from Denali PCS, L.L.C. to Alaska DigiTel, L.L.C. and the Transfer of Control of Interests in Alaska DigiTel, L.L.C. to General Communication, Inc.*, Memorandum Opinion and Order, 21 FCC Rcd 14863 (¶ 31) (2006); *Applications of Western Wireless Corporation and ALLTEL Corporation; For Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 20 FCC Rcd 13053, 13070-71 (¶ 38) (2005).

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Mbps) broadband markets, the loss of a UNE-based broadband provider is competitively significant.

As Bernstein's analysis indicates, cable is really only a participant in the higher speed broadband market. Cable companies' services are generally priced around \$50 per month, and, unlike the ILECs, they do not offer a lower speed, lower-priced broadband service. Verizon, on the other hand, participates in both markets, with low price, low speed offerings and high priced high speed offerings. Currently, Verizon offers lower speed DSL service of up to 786 Kbps for \$19.99 per month – which Verizon just raised at the start of 2007 – while offering high-speed FiOS service of up to 15 Mbps for \$49.99 and up to 30 Mbps for \$179.95.<sup>29</sup> At least in the markets where cable and Verizon compete head to head, this means that, without the UNE-based provider, the higher speed broadband market generally has two facilities-based participants and the lower speed, affordable broadband market has only one facilities-based participant (and only two even if cable is included).

In a few portions of three MSAs covered by Verizon's Petitions, cable overbuilder RCN is a minor participant in both markets, with both lower-speed broadband offerings (1.5 Mbps for \$16.95 per month) and higher-speed broadband offerings (5 Mbps for \$30 per month and 10 Mbps for \$40 per month).<sup>30</sup> According to Verizon's Petitions, RCN appears to operate in certain portions of the Boston MSA, a few areas in the New York MSA, and a single county in the Philadelphia MSA. While

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<sup>29</sup> See Verizon High Speed Internet, <http://www22.verizon.com/content/consumerdsl/plans/all+plans/all+plans.htm> (last visited Mar. 5, 2007); see Packages and Prices, <http://www22.verizon.com/content/ConsumerFiOS/packages+and+prices/packages+and+prices.htm> (last visited Mar. 5, 2007).

<sup>30</sup> See <http://www.rcn.com/specialoffers/offer.php?id=1> (last visited Mar. 4, 2007).

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the Petitions provide little detail as to the extent of RCN's operations,<sup>31</sup> all available information suggests that RCN has only a tiny share of the few markets it serves. According to Verizon, in the Boston MSA, for example, RCN's facilities pass just 270,000 of the 1.8 million homes in the MSA (or just 15% of the homes in the MSA) and provides service to just [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL] residential lines compared to Verizon's [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] residential lines.<sup>32</sup> Verizon offers less information about RCN's operations in the New York MSA, although it does confess that RCN, which operates only in parts of Manhattan and Queens, provides service to approximately [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL] residential lines in the New York MSA compared to the [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] served by Verizon.<sup>33</sup> Moreover, the reach of RCN's facilities appears to be tiny: the 2007 Television and Cable Factbook reports that RCN in New York passes only 80,000 homes and thus, at most, could serve one percent of the seven million households in the MSA.<sup>34</sup> Finally, Verizon reports that, in parts of a single county in the Philadelphia MSA, RCN provides service to

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<sup>31</sup> Exhibit 3 of each petition, for example, which purports to depict the presence of cable providers in each MSA, does not show RCN's facilities.

<sup>32</sup> Verizon Boston Petition, Attachment A, Declaration of Quintin Lew, Judy Verses, and Patrick Garzillo Regarding Competition in the Boston Metropolitan Statistical Area, WC Docket No. 06-172, at ¶¶ 6, 18, & 19 (filed September 6, 2006) (hereinafter "Lew Decl. – Boston MSA").

<sup>33</sup> Verizon New York Petition, Attachment A, Declaration of Quintin Lew, Judy Verses, and Patrick Garzillo Regarding Competition in the New York Metropolitan Statistical Area, WC Docket No. 06-172, at ¶¶ 6, 27 (filed September 6, 2006) (hereinafter "Lew Decl. – New York MSA").

<sup>34</sup> See Television & Cable Factbook No. 75, Volume 2 at D-1060 (Warren Communications News 2007). According to the 2007 Television & Cable Factbook, RCN has approximately 50,000 cable customers in New York. *Id.*

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approximately [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL] residential lines in the Philadelphia MSA as compared to Verizon's [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] residential lines in the MSA.<sup>35</sup> Even if RCN were to be able to reach every home in Delaware County (and there is no evidence in the record that they can do so), Delaware County has only 206,000 households of the 2.4 million households (less than nine percent) in the Philadelphia MSA.

None of the other alternatives (CMRS, satellite, municipal broadband or BPL) promises to place near-term or even medium-term discipline on cable and Verizon's pricing in either the higher-speed or lower-speed broadband markets. While some of these technologies might potentially challenge facilities-based wireline broadband in the future, the Commission's *Omaha Forbearance Order* makes clear that the forbearance analysis of UNE-L concerns the short to medium run, rather than the long run.<sup>36</sup> The Commission reaffirmed this approach in the *Anchorage Forbearance Order*.<sup>37</sup> In both of

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<sup>35</sup> Verizon Philadelphia Petition, Attachment A, Declaration of Quintin Lew, Judy Verses, and Patrick Garzillo Regarding Competition in the Philadelphia Metropolitan Statistical Area, WC Docket No. 06-172, at ¶¶ 6, 21 (filed September 6, 2006) (hereinafter "Lew Decl. – Philadelphia MSA").

<sup>36</sup> *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. §160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415, 19444-45 (¶ 60 & n.156) (2005) ("*Omaha Forbearance Order*" or "*Omaha*") (granting forbearance only where a competitor "has constructed substantial competing "last-mile" facilities, . . . through which it is willing and able, within a commercially reasonable time, to offer the full range of services that are substitutes for the incumbent LEC's local service offerings").

<sup>37</sup> *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, Memorandum Opinion and Order, FCC 06-188, WC Docket No. 05-281 (¶ 32) (rel. January 30, 2007) ("*Anchorage Forbearance Order*" or "*Anchorage*") (adopting the *Omaha* approach); *see id.*, ¶ 23 (denying forbearance where

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those decisions, the Commission did not consider non-existent (or non-deployed) potential substitutes for copper loops and it should not do so here.<sup>38</sup> Instead, the Commission found that only actual, existing competition or competition that could become available in a “commercially reasonable” period of time justified forbearance.<sup>39</sup> A “commercially reasonable” period of time implies that a short run or, at most, medium run, not a long run, test, is appropriate. In adopting this approach, the Commission has correctly determined that it is inappropriate to subject consumers to anticompetitive price increases for long periods of time simply because price relief ultimately may arrive. Broad coverage BPL and Wi-Max networks are nascent technologies not yet deployed in any of the markets at issue. Indeed, the FCC’s own statistics show that BPL serves just 5,208 broadband lines nationwide. At present, therefore, BPL cannot impose meaningful competitive discipline on either Verizon or the cable company.

Although Internet access via satellite or CMRS is more widely available, these services are priced much higher than DSL or cable modem service, and thus cannot discipline a small but significant (and non-transitory) price increase above competitive levels. Indeed, these prices are so much higher than landline broadband services of similar speeds that they appear to be a distinct product market. Sprint Nextel, for

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“where no competitive carrier has *constructed* substantial competing last mile facilities capable of providing telecommunications services”) (emphasis added).

<sup>38</sup> *Omaha*, 20 FCC Rcd at 19444-45; *Anchorage* at ¶¶ 23, 32; see also *Personal Communications Industry Association’s Broadband Personal Communications Services Alliance’s Petition for Forbearance for Broadband Personal Communications Services*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 16857, 16868-69 (¶¶ 22, 23) (1998) (declining to find CMRS marketplace sufficiently competitive where some of six competitive PCS licensees may not have begun to offer service).

<sup>39</sup> *Id.*

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example, charges \$60 per month for wireless broadband, if the subscriber also has Sprint Nextel mobile voice service, and \$80 per month for standalone service, with an average download speed of 400-700 kbps and a maximum peak throughput of up to 2 Mbps.<sup>40</sup> Verizon Wireless similarly charges \$60 per month for subscribers with a Verizon Wireless voice plan, also with an average download speed of 400-700 kbps.<sup>41</sup> These prices are well above the \$19.95 Verizon charges for its lowest speed service, or the \$29.95-39.95 (for up to 1.5 Mbps service) per month at which EarthLink offers UNE-based DSL service in the lower speed broadband market. Indeed, these prices generally exceed the prices that EarthLink and the cable companies charge for higher-speed broadband services.

Satellite and CMRS also lack the technological capabilities to be adequate substitutes for wireline facilities based broadband Internet transmission services. As reflected above, CMRS provides less capacity at higher prices than DSL, cable modem, or FIOS. Internet via satellite is not full duplex and highly interactive applications are challenged on this platform.

The Commission's most recent broadband report confirms that CMRS, satellite and BPL are not alternatives to wireline facilities-based Internet access, particularly with respect to services above 2.5 Mbps. According to the Commission itself, over 93% of *all* broadband (60 million of 64 million lines) is provided by a cable company or an

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<sup>40</sup> See Sprint Mobile Broadband Solutions, <http://powervision.sprint.com/mobilebroadband/> (last visited Feb. 28, 2007).

<sup>41</sup> See Broadband Access Promotion, <http://b2b.vzw.com/broadband/promo.html> (price) (last visited Mar. 5, 2007); see [http://news.vzw.com/pdf/Verizon\\_Wireless\\_Press\\_Kit.pdf](http://news.vzw.com/pdf/Verizon_Wireless_Press_Kit.pdf).

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incumbent telephone company.<sup>42</sup> The much heralded independent alternatives are still tiny. Again, BPL serves just 5,208 lines nationwide. Fixed wireless supplies only about 360,000 lines nationwide. Mobile wireless not affiliated with an ILEC (e.g., Sprint and T-Mobile) serves less than 2 million total broadband lines nationwide. Even for lower speed broadband services (below 2.5 Mbps), satellite, fixed wireless, mobile wireless and BPL together account for only a small fraction of broadband lines.

These statistics are even more striking in the higher speed broadband market. For advanced service lines (lines exceeding 200 kbps in both directions) with speeds above 2.5 Mbps in the faster direction, fixed and mobile wireless, satellite, and BPL, *taken together*, had a market share of just *0.07 percent*, accounting for just 19,802 out of the nearly 30 million high speed lines.<sup>43</sup> The other *99.93 percent* of these faster broadband services were provided over DSL, fiber or cable modem – strong evidence that the incumbent telco–cable duopoly is particularly entrenched with respect to these higher speed services.<sup>44</sup> And these DSL, fiber and cable modem lines themselves are virtually all provided by the incumbent LEC and the cable company, rather than by overbuilders.<sup>45</sup>

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<sup>42</sup> See *High-speed Services for Internet Access* at Table 5.

<sup>43</sup> *Id.*

<sup>44</sup> The FCC also reported 10,363 lines provided over “traditional wireline” facilities offer advanced services at between 2.5 and 10 mbps speeds. *Id.* By contrast, for advanced services of between 200 kbps and 2.5 mbps speed in the faster direction, fixed and mobile wireless, satellite and broadband-over-powerlines together account for about 12% of all advanced services lines nationwide in that market. *Id.*

<sup>45</sup> Although the FCC collects the data necessary to break down its information transfer rate table according to whether the provider is ILEC-affiliated, cable-affiliated or independent of the ILEC and cable, the FCC does not publish such data. See *id.* at Table 5; FCC Form 477. Nonetheless, other FCC data shows that 97.4% of all DSL, cable modem and fiber broadband lines of any speed are provided by either the ILEC or the cable company. See *id.* at Table 6 (reporting that ILECs and cable provide 51.3 million out of 52.7 million DSL, fiber and cable modem high speed lines).

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Of the six MSAs that are subject to Verizon's Petitions, Philadelphia is the only MSA with a municipal Wi-Fi service, and even that is only beginning to be built and will serve only the City of Philadelphia, and not the entire MSA, when fully built.

EarthLink's municipal Wi-Fi service in Philadelphia competes in the lower speed broadband market. As now contemplated, the Philadelphia Wi-Fi network is targeting download (and upload) speeds of approximately 1 Mbps, which will be sufficient to handle simple web browsing and email (and possibly even voice service). The service is priced at \$21.95 per month, which makes it competitive with the ILEC DSL offerings in this market. At present, however, EarthLink has only built out and started providing service in the 15 square mile "proof-of-concept" area of Philadelphia. Moreover, even when fully deployed, this service will not be available in any portion of the Philadelphia MSA outside of the City of Philadelphia itself.

In sum, in the higher-speed broadband market in these six MSAs, excluding UNE-based providers, there are *at most* three last-mile facilities-based competitors – cable, overbuilder RCN and Verizon. Indeed, in the vast majority of these MSAs, there will be only two last-mile facilities-based competitors in this higher speed broadband market, other than UNE-based competitors. In the lower speed market for affordable, non-mobile broadband, other than the few areas served by RCN, only UNE-based services, and, in Philadelphia when fully built out, EarthLink's municipal Wi-Fi service, hold out the prospect of providing price discipline to Verizon's broadband services. CMRS and satellite appear to compete in neither of these markets.

The bundled Internet access and voice market may also constitute a separate relevant product market. Whatever the extent of competition in the standalone broadband

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markets (which is discussed above) and the standalone voice market (which EarthLink questions below), the market for bundled services is constrained by the market for facilities-based Internet access. If Verizon's Petitions are granted, consumers will thus have no viable alternatives for bundled services other than Verizon and perhaps the local cable company. Even if the consumer pieces together different parts of the bundle, by purchasing broadband Internet access from one provider and telephone service from another, Verizon's market power with respect to high speed Internet access would provide it with substantial ability to raise the price of the bundle of Internet and voice services well above competitive levels. Thus, a hypothetical monopolist provider of combined facilities-based wireline Internet access and voice could profitably sustain a small, but significant and nontransitory price increase above competitive levels.

Finally, Verizon's Petitions would effectively foreclose the development of a UNE loop-based Internet video service to compete with cable and FiOS based multichannel video services. Video is a fundamental part of the Commission's broadband deployment strategy. As Chairman Martin recently made clear: "By enhancing the ability of new entrants to provide video services . . . we are advancing our goal of universal affordable broadband access for Americans, as well as our goal of increased video competition."<sup>46</sup> The ability to deploy broadband networks rapidly, however, is intrinsically linked to the ability to offer video to consumers. Moreover, pursuant to Section 706's definition of advanced telecommunications capability, the

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<sup>46</sup> Statement of FCC Chairman Kevin J. Martin, *Re: Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, MB Docket No. 05-311 (rel. Dec. 20, 2006) ("*Chairman Martin Statement on Cable Franchise Order*").

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Commission has a direct statutory obligation to promote “video telecommunications using any technology.”<sup>47</sup>

Granting Verizon’s Petitions, however, would undercut this promising source of video competition before it even develops. As Chairman Martin has explained, the FCC’s most recent data on cable TV bear out that the “average monthly cable rate [for consumers] was significantly lower only in areas with another wire-based competitor.”<sup>48</sup> Further, as Chairman Martin recently enunciated, “Greater competition in the market for the delivery for multichannel video programming is a primary and long-standing goal of federal communications policy . . . Congress recognized that competition between multiple cable systems would be beneficial, [and] would help lower cable rates. . . .”<sup>49</sup> Contrary to consumers’ interests and federal communications policy, Verizon’s Petitions would squash UNE-based video competition before it can even get off the ground.

**2. *Raising Rivals’ Costs and the Risks of Duopoly and Oligopoly.***

Granting Verizon’s Petitions would effectively limit the competitive significance of UNEs, ending the independence of the UNE-L virtual pipe over a broad swath of Verizon territory, including parts of New Hampshire, Massachusetts, New Jersey, New York, Delaware, Maryland, Rhode Island, Pennsylvania, Virginia and North Carolina. The reduction in competition, and the corresponding price increases and dampened innovation, will occur not just in the six major MSAs targeted by Verizon, but also in the

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<sup>47</sup> See Pub. L. 104-104, Title VIII, § 706 (Feb. 8, 1996) (codified at 47 U.S.C. § 157 note).

<sup>48</sup> Statement of FCC Chairman Kevin J. Martin, *Re: Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, MM Docket No. 92-266 (rel. Dec. 27, 2006).

<sup>49</sup> See *Chairman Martin Statement on Cable Franchise Order*.

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surrounding areas. Thus, throughout most of Verizon's territory, forbearance would create an effective higher-speed broadband duopoly and an effective lower-speed affordable broadband monopoly in these relevant product markets. Even in the few areas where RCN has facilities, forbearance would create an oligopoly of three providers in the higher-speed broadband market, and a duopoly in the lower-speed broadband market. Verizon itself has recognized that such highly concentrated broadband markets cannot adequately protect consumers or spur the availability of advanced broadband services at affordable rates.

Although Verizon asks for the same relief as Qwest,<sup>50</sup> and thus would remain subject to Section 271 unbundling requirements in its former Bell regions (which do not include Virginia Beach), Verizon would potentially be able to raise the rates for UNEs substantially, and thus affect the retail prices charged by EarthLink and other UNE loop-based broadband competitors. This is a classic, anticompetitive "raising rivals' cost" strategy, in which Verizon, as the monopoly supplier of unbundled loops, can exercise market power by raising the input costs of its UNE loop-based competitors, as a way to force those competitors to increase their retail prices.<sup>51</sup> To remain financially viable, the UNE-based competitors would be forced to pass these cost increases along to retail customers. By allowing Verizon to have greater control over UNE loop rates, forbearance would limit the extent to which a UNE-based provider could discipline Verizon's market behavior. In essence, this makes UNE-based entry more akin to resale,

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<sup>50</sup> See *infra* pp. 48-55.

<sup>51</sup> See Thomas Krattenmaker & Steven Salop, *Anticompetitive Exclusion: Raising Rivals' Costs To Achieve Power Over Price*, 96 Yale L. J. 209, 234-36 (1986) (describing the "bottleneck" method of raising rivals' costs, whereby a supplier can increase the price of a necessary input to the point where an independent downstream producer cannot compete profitably against the vertically integrated incumbent producer).

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which, as the Act itself recognizes, cannot discipline the behavior of facilities-providers.<sup>52</sup>

Forbearance could even result in a retail price squeeze. As the Commission has explained, a retail price squeeze occurs when the ILEC increases input prices charged to its competitors, and then lowers its retail price, forcing competitors “either to match the price reduction and absorb profit margin reductions or maintain their retail prices at existing levels and accept market share reductions.”<sup>53</sup> Indeed, for Verizon, this price squeeze strategy would be rational in the Internet access markets because the high costs of entry (including collocation, DSLAMs, and other equipment) would deter any subsequent UNE-based competitors – who would face the prospect of a similar response – from reentering the market in response to a subsequent increase in price, allowing Verizon to sustain above-cost retail prices.

The UNE-L rates offered by Qwest following the *Omaha Forbearance Order* bear out this prediction. After obtaining forbearance from the pricing standard, Qwest raised wholesale DS0 prices from \$12.14<sup>54</sup> to \$15.71<sup>55</sup> – an increase of almost 30

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<sup>52</sup> See, e.g., 47 U.S.C. 271, which required the presence of a facilities-based competitor, not just a reseller, as a precondition of Bell Company entry into the long distance markets.

<sup>53</sup> *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21912 (¶12) (1996).

<sup>54</sup> See [http://www.qwest.com/about/policy/sgats/SGATSdocs/nebraska/NE\\_7th\\_Rev\\_5th\\_Amended\\_2\\_16\\_05\\_Exh\\_A\\_Clean.pdf](http://www.qwest.com/about/policy/sgats/SGATSdocs/nebraska/NE_7th_Rev_5th_Amended_2_16_05_Exh_A_Clean.pdf) at § 9.2 (Unbundled Loops) (detailing rates available pursuant to interconnection agreements prior to the *Omaha Forbearance Order*.)

<sup>55</sup> See <http://www.qwest.com/wholesale/downloads/2006/060525/QCommDS0LoopFacilityOFOMSAExA5-11-06.xls> (Because there is no tariffed rate for Qwest’s DS0 Loop facility, this figure was taken from Qwest’s spreadsheet detailing rates for DS0 Loops in Omaha.)

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percent. This has led at least one UNE-L-based CLEC to announce that it will no longer be accepting customers in Omaha.<sup>56</sup> Without Section 251's pro-competition regulations, Verizon can use its power to set UNE prices to control both its prices and the UNE providers' prices, thereby limiting UNE-based providers as effective competitors.

In the vast majority of Verizon's territory, where RCN has no presence, forbearance, by effectively ending the independence of UNE-based alternatives from Verizon's retail pricing decisions, would convert the higher speed broadband market from a market with as many as three (or many more) independent competitors into a duopoly, with Verizon and the UNE loop-based providers' prices controlled by Verizon and the cable company controlling its own prices. In the lower speed broadband market, with the exception of the City of Philadelphia (but not MSA-wide) where EarthLink will eventually fully build out its municipal Wi-Fi network, forbearance would effectively reduce the market to a single provider by allowing Verizon, through its UNE prices, to control the retail prices of its UNE-based competitors.

The Commission has previously found that merger even from three to two raises substantial risks of coordinated effects and the loss of innovation and service quality.<sup>57</sup>

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<sup>56</sup> Letter from Chris MacFarland, Group Vice President-Chief Technology Officer, McLeod USA, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-281 (December 15, 2006) ("*MacFarland Letter*").

<sup>57</sup> See *Application of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation; (Transfers) and EchoStar Communications Corporation; (Transferee)*, Hearing Designation Order, 17 FCC Rcd 20559, 20624-26 (¶¶ 170-77) (2002) ("*Hughes/EchoStar Order*"). See also *Amendment of the Commission's Space Station Licensing Rules and Policies*, First Report and Order and Further Notice or Proposed Rulemaking in IB Docket No. 02-34 and First Report and Order in IB Docket No. 02-54, 18 FCC Rcd 10760, 10789 (¶ 64) (2003) ("[W]e find that the factors that have led courts to disfavor mergers to duopoly also support establishing a procedure that will maintain at least three competitors in a frequency band, unless an interested party can rebut our presumption that three is necessary to maintain a

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In discussing the market for direct broadcast services, the FCC set out the conditions that facilitate such coordinated effects: “(1) there are few firms in the market; (2) there are high barriers to entry; (3) products are relatively homogeneous; (4) contracts are for relatively short periods, and the prices and terms are observable by other sellers; and (5) market conditions are relatively stable.”<sup>58</sup>

All of these factors are present in the low and high speed markets for facilities-based Internet access and bundled Internet/voice services. First, at most, there are currently four facilities-based providers of Internet access and Internet/voice bundled services (including cable overbuilders and again, taking the UNE-based providers as a single provider). Second, the market for facilities-based services exhibits extremely high barriers to entry. Even with the continued availability of cost-based UNEs, new entrants must invest considerable resources in order to provide competing Internet access services that can independently dimension and control the IP transmission.<sup>59</sup> Third, the high speed Internet access and bundled services offered by Verizon and the cable company are relatively homogeneous, particularly within each of the lower speed and higher speed product markets. In some instances, of course, where Verizon has not built out FiOS, these services are not homogenous in that only the cable company offers the higher speed

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competitive market.”); *FTC v. Staples*, 970 F. Supp. 1066, 1081 (D.D.C. 1997) (finding markets were highly concentrated where the number of “office superstore competitors” dropped from three to two). United States Dept. of Justice Antitrust Div. and Federal Trade Commission, 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41552, § 0.1 (1992) (“where only a few firms account for most of the sales of a product, those firms can exercise market power, perhaps even approximating the performance of a monopolist . . .”).

<sup>58</sup> *Id.* at 20625 (¶ 173).

<sup>59</sup> As explained above, companies require collocation, DSLAMs, servers and routers, soft switches, and backbone transmission facilities to independently dimension and control Internet access services.

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Internet transmission demanded by some customers. And, of course, Verizon, but not the cable company, offers lower speed broadband service. But this further segmentation of the market only exacerbates the risks of market concentration as, in these instances, forbearance would leave only *one* facilities-based service provider in the relevant markets. Fourth, providers generally enter short-term contracts with consumers for these services, and the prices and terms of service are easily observable to competitors. Finally, profitable deviations from established parallel pricing would be difficult to sustain because providers can and will respond quickly to match any changes in price.

Consumers are already seeing price increases from highly concentrated broadband markets, which will only be exacerbated if forbearance is granted. Already, cable companies have been able to increase rates for cable modem services over the past two years,<sup>60</sup> and Verizon itself recently raised prices on its lower speed DSL services.<sup>61</sup> Without Section 251-priced UNEs, the substantial entry barriers that currently prevail would be raised even higher.

The resulting loss of competition would condemn consumers to higher rates, reduced innovation, and less diverse services. As explained above, by eliminating competitors such as EarthLink, Verizon will be able to increase prices. Both the Commission and the courts have recognized that

the combination of a concentrated market and barriers to entry is a recipe for price coordination. Where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to . . . achieve profits above competitive levels.

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<sup>60</sup> *See, supra*, n. 26 and accompanying text.

<sup>61</sup> *Comments of Doreen Toben* at 12.

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The creation of a durable duopoly affords both the opportunity and incentive for both firms to coordinate to increase prices.<sup>62</sup>

So, too, granting Verizon's Petitions would likely reduce innovation and service quality.

Facing reduced competitive pressure, Verizon and the cable company would have less incentive to improve services and quality in the provision of Internet access and bundled Internet/voice.<sup>63</sup> And, finally, consumers in Verizon's territory would have fewer affordable choices of data, voice, and video services, with some technologies, such as the ADSL2+ used by EarthLink, potentially priced significantly higher or even terminated altogether.

Forbearance is anticompetitive and harmful to consumers even in those limited areas where RCN provides a full-facilities-based alternative to both Verizon and the cable company. As described above, RCN does provide broadband service in some of the affected Verizon territories, but RCN's presence in these markets is tiny. In no MSA – which is not the relevant geographic market in any event – does RCN even offer service to more than 27 percent of households; in New York, RCN passes only about 1.1 percent of households. Even where RCN is an active competitor, the affordable, non-mobile and higher speed broadband Internet access markets would be, at best, a triopoly made up of the cable company, RCN, and Verizon.

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<sup>62</sup> *Application of Birmingham Christian Radio, Inc., Assignor and Radio South, Inc., Assignee; For Consent to Assignment of License of WSPZ(AM)*, Memorandum Opinion and Order, 18 FCC Rcd 7909, 7920 (¶ 31) (2003)(quoting *FTC v. Heinz*, 246 F.3d 708, 724-25 (2001)).

<sup>63</sup> *See Hughes/EchoStar Order*, 17 FCC Rcd at 20626 (¶¶ 176-77)

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Verizon itself has recognized that “the addition of even a single competitor to a three-firm environment will produce significant competitive benefits.”<sup>64</sup> As Verizon told the FCC in its Section 271 long distance applications, the risk of tacit collusion and the resultant harm to consumers remains significant even when there are three firms in a market, and those risks can only be attenuated through added competition. This is equally true in the present context. An oligopoly of three broadband providers is inadequate to protect consumers and spur the availability of advanced broadband services at affordable rates.

Further, excluding competitors from access to cost-based UNE loops in any portion of these six metropolitan MSAs will also likely limit competition in the surrounding areas, including areas beyond the MSA boundaries. A competitor entering these markets must incur many expenses, such as advertising and marketing, over the whole MSA, not just piece parts. Moreover, Verizon’s Petitions, unlike those at issue in *Omaha* and *Anchorage*, have strategically selected high-density and economically critical areas of Verizon’s in-region territory. It is beyond question that facilities-based entrants such as EarthLink and others must be able to serve the core parts of an MSA in order to spread the significant fixed costs of operation – including marketing, personnel, management and real estate – across a larger group of customers. If high-density portions of MSAs – or, in the worst case, the entire MSA – face significant price increases for key inputs, however, competitive entry will suffer in a much broader area.

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<sup>64</sup> *Application by New York Telephone Company (d/b/a Bell Atlantic – New York), Bell Atlantic Communications, Inc., NYNEX Long Distance Company, and Bell Atlantic Global Networks, Inc., for Authorization to Provide In-Region, InterLATA Services in New York, Application of Bell Atlantic – New York for Authorization to Provide In-Region, InterLATA Services in New York, CC Docket No. 99-295, at 76 (filed September 29, 1999).*

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Forbearance, whether granted MSA wide or on a more limited basis, can “punch holes” in a competitive entry strategy across a much greater swathe of its in-region territory than any particular wire center or other narrow geographic market.

**3. Section 271 Is Not A Sufficient Backstop.** In areas where Verizon would retain its Section 271 unbundling obligations if its petitions were granted, the Section 271 process would not provide an adequate “backstop” to Section 251 deregulation. Forbearance from Section 251(c)(3) unbundling, as implemented through Section 252, substitutes a well-known and defined cost-based pricing standard that is stable and predictable for one that is ill-defined, unpredictable, and, in the ILECs’ view, not even cost-based.

Citing a single sentence from the *UNE Remand Order*, ILECs – including Verizon – have argued that just and reasonable prices under Section 271 are “market-based” prices.<sup>65</sup> But if the standard for “just and reasonable” prices under Section 271 is simply whatever price the market will bear, Section 271 cannot prevent a raising rivals’ cost strategy that replicates duopoly pricing either by driving UNE-based competitors from the market or effectively controlling their retail prices by raising UNE prices at will. In the present context, the ILEC’s reading of Section 271 would allow Verizon to extract any commercial profit EarthLink could anticipate, given its lack of viable alternatives. Moreover, market-based UNE prices would allow Verizon effectively to link EarthLink’s prices to Verizon’s own retail pricing decisions. The only remedy for a competitor trapped such a squeeze is a formal adjudication after the pricing misbehavior has

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<sup>65</sup> *Georgia Public Service Commission Petition for Declaratory Ruling and Confirmation of Just and Reasonableness of Established Rates*, BellSouth’s Opposition, WC Docket No. 06-90 at 2 (filed May 19, 2006); Comments of Verizon, WC Docket No. 06-90 at 17 (filed May 19, 2006).

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occurred. Given the high barriers to entry in these markets, after-the-fact enforcement is not sufficient to prevent an ILEC from deterring entry through the threat of a price squeeze. Only if Section 271 prices are tied to some reasonable measure of cost can Section 271 function as a regulatory backstop that prevents Verizon from using its control of UNE loop prices to raise UNE providers' costs so that Verizon (and the cable company, if it operates in the market) can raise retail prices to duopoly levels. Under these "fact-specific" circumstances,<sup>66</sup> the "market-based" price will simply be the rate set by the duopoly.

Such pricing, based on the exercise of market power, cannot be just and reasonable. It is well established that "a basic principle used to ensure that rates are 'just and reasonable' is that rates are determined on the basis of cost."<sup>67</sup> Although a just and reasonable rate is not always strictly tied to costs, the Commission must specially justify any departure from cost-based rates.<sup>68</sup> While the Commission has at times deviated from strict cost-based regulation to adopt price-cap regulation<sup>69</sup> or surrogates for cost,<sup>70</sup> and has used one carrier's price-regulated rates to benchmark another carrier's generally non-

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<sup>66</sup> *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17389 (¶ 664) (2003) ("*Triennial Review Order*").

<sup>67</sup> *MCI Telecommunications Corp. v. FCC*, 675 F.2d 408, 410 (D.C. Cir. 1982) (quoting 47 U.S.C. § 201(b)).

<sup>68</sup> *Competitive Telecommunications Ass'n v. FCC*, 87 F.3d 522, 529 (D.C. Cir. 1996); *AllTel Corp. v. FCC*, 838 F.2d 551, 556-58 (D.C. Cir. 1988).

<sup>69</sup> *See National Rural Telecomm. Ass'n v. FCC*, 988 F.2d 174 (D.C. Cir. 1993).

<sup>70</sup> *See AllTel*, 838 F.2d at 551.

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price regulated rates when a carrier's claimed costs exceed prevailing market rates,<sup>71</sup> the FCC has never found rates that are substantially above-cost because of market power to be just and reasonable.

Here, there is no reason to believe that Verizon's so-called "market rates" for loops would reflect costs rather than the exercise of Verizon's market power. Verizon comes forward with no evidence that there is a functioning wholesale market for residential loops. The principal competitor on which Verizon relies to support forbearance – the cable company – has no comparable obligation to make UNE loops available and does not sell wholesale access to their loops. Thus, Verizon is the monopoly supplier of the inputs on which UNE-based providers rely. If left to select a "market price" for UNE-L without any regulatory check, Verizon would have the ability and the incentive to set UNE prices at sufficiently high levels so as to raise the costs of UNE-based rivals so substantially that they, too, must set retail prices at duopoly levels.

Moreover, there is no special access rate that is the analogue of the residential UNE loop rate.<sup>72</sup> Special access rates have been developed in the context of enterprise rather than residential markets. And, in any event, there is substantial evidence that special access rates themselves have been infected by market power because of premature

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<sup>71</sup> See *AT&T v. Business Telecom Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 12312 (2001); see *Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923 (2001).

<sup>72</sup> In the TRRO, the Commission noted that it is not reasonable to use access to special access services as a rationale for relaxing controls on UNE prices (the reason being that the ILECs have considerable control over special access rates). See *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, 20 FCC Rcd 2533, 2561-75 (2004) ("TRRO"), *affirmed*, *Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

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deregulation of those rates.<sup>73</sup> The recent General Accounting Office (“GAO”) Report on special access competition also concluded that pricing flexibility for special access services have, on average, led to substantially higher prices than would exist in a competitive market.<sup>74</sup> Citing the GAO Report, the National Association of Regulatory Utility Commission recently passed a supporting resolution to initiate an investigation of special access pricing.<sup>75</sup>

In some of the areas covered by Verizon’s Petitions, such as a portion of the Virginia Beach MSA, the operating Verizon affiliate is not a Bell Operating Company and, therefore, is not subject to Section 271 unbundling requirements.<sup>76</sup> In these areas, granting Verizon’s Petitions with respect to Section 251(c)(3) would eliminate not just the pricing standard for UNEs, but any and all obligation to make UNEs available. That drastic step contradicts the Commission’s decision in the *Omaha Forbearance Order* to forbear from Section 251(c)(3) only in light of “the continued applicability of Qwest’s

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<sup>73</sup> See, e.g., *Special Access Rates for Price Cap Local Exchange Carriers*, Comments of the Ad Hoc Telecommunications Users Committee, WC Docket No. 05-25 (filed June 13, 2005) (including, *Competition in Access Markets: Reality or Illusion, A Proposal for Regulating Uncertain Markets*, Prepared for the Ad Hoc Telecommunications Users Committee by Lee. L. Selwyn, Susan M. Gately and Helen E. Golding (Aug. 2004)) (explaining that pricing flexibility standards have led to substantial increases in special access rates, allowing the exercise of market power for channel terminations to locations served exclusively by the RBOCs).

<sup>74</sup> See GAO Report to the Chairman, Committee on Government Reform, House of Representatives, *Telecommunications: FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services* at 13 (November 2006) (“GAO Report”) available at <http://www.gao.gov/new.items/d0780.pdf>.

<sup>75</sup> See *Resolution on Special Access*, NARUC Board of Directors (February 21, 2007), available at <http://naruc.org/associations/1773/files/resolutions/winter07/res.on.special.access.pdf>.

<sup>76</sup> See Comments of Virginia State Corporation Commission at 7, WC Docket No. 06-172 (filed Dec. 15, 2006) (explaining that Verizon South, the incumbent telephone company in a large portion of the Virginia Beach MSA, is the former GTE South Inc. and, thus, not subject to Section 271).

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wholesale obligations to provide these network elements under sections 271(c)(2)(B)(iv) & (v).”<sup>77</sup> As the Commission made clear, continued availability of UNEs remains crucial to existing and emerging competition.<sup>78</sup> In areas where Verizon is not subject to Section 271, therefore, forbearance from Section 251 cannot satisfy the requirements of Section 10.<sup>79</sup>

Forbearance would thus create a substantial risk of significant and non-transitory price increases for facilities-based Internet access, Internet/voice, and Internet-based video services. It would likewise create a substantial risk of dampened innovation and reduced service quality and diversity. Because the availability of reasonably-priced UNEs remains necessary to discipline the duopoly (or, at best, triopoly) provision of facilities based Internet services, Verizon’s Petitions cannot meet the requirements of Section 10(a)(1), (2) & (3), and must be denied.

**B. Forbearance from Section 251(c)(3) and 252(d)(1) Would Strengthen Verizon’s “Gatekeeper” Ability to Block, Degrade, Impair and Unreasonably Discriminate Against Internet Content and Applications, including Video Applications.**

In the current marketplace, the availability of UNEs – and the ability of ISPs like EarthLink to purchase UNE-based last-mile transmission from CLECs – helps constrain Verizon and its cable competitor from blocking, degrading or discriminating against particular Internet content or applications. If Verizon, for example, were to prefer Google over Yahoo!, an ISP purchasing common carrier DSL transmission from a CLEC

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<sup>77</sup> *Omaha Forbearance Order*, 20 FCC Rcd at 19467-68 (¶105).

<sup>78</sup> *Id.* at 19467.

<sup>79</sup> Verizon’s Virginia Beach petition would also contradict the Commission’s approach in the *Anchorage Order* (¶¶ 39-45), wherein the FCC imposed a continuing UNE access obligation at an FCC-specified price as a condition of the forbearance grant.

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could use its own DSLAMs and UNE loops to provide an Internet access service that treats Yahoo! and Google comparably in last mile transmission. The same would be true if Verizon or a cable operator were to block streaming video that competed with their own video products. An ISP could buy a UNE-based last mile transmission service from a CLEC and provide unrestricted access to streaming video.

Consumers have traditionally had open Internet access to the content they want using the applications and devices they want – and this openness has been instrumental to the extraordinary growth and innovation of the Internet. Eliminating UNEs would leave a highly concentrated market for facilities-based Internet transmission services that threatens the fundamentally open nature of the Internet. Without UNE-based competition, Verizon and the cable company could more easily leverage their control over last mile facilities to block competitors' devices, impair the transmission of competitors' services or discriminate against unaffiliated content and application providers. This heightened ability to constrain end users' freedom to access the entire Internet threatens both consumer choice and continued innovation.

In the absence of any ubiquitous network comparable to Verizon's or the cable company's, UNEs now function as an effective third pipe to every home and business that protects against such strategic behavior. The availability of this additional network helps ensure that the substantial interests of affiliated content providers do not clog the pipes and that the current environment of consumer-driven Internet innovation continues. Without Section 251's competitive restraint, the need for net neutrality regulation is all the more compelling.

**C. Forbearance Would Undermine Section 706’s Goal of an Advanced Communications Infrastructure and Renege on the “New Wires, New Rules” Approach Adopted in the Triennial Review Order.**

Verizon’s Petitions also must be rejected because forbearance would undermine investment in an advanced communications infrastructure. Section 706 directs the Commission to encourage the deployment of advanced telecommunications to all Americans.<sup>80</sup> Today, UNE-based competitors are fulfilling Section 706’s desire for an advanced telecommunications infrastructure by combining copper loops with their own DSLAMs and other electronics.<sup>81</sup> This creates services that are unique and independent of the ILEC’s or cable companies’ choices as to how they develop and dimension their services. Furthermore, companies like EarthLink, with its CLEC partner COVAD, as well as CLECs such as Cavalier, are using these old, embedded copper unbundled loops to offer new advanced services, such as ADSL2+. The potential for these new services to be delivered over copper loops pushes both Verizon and the cable companies to invest in their networks, improve their products, and avoid consumer-unfriendly blocking and other anti-competitive tactics.

In the *TRO*, the FCC drew a bright line between unbundling of old copper loops and new fiber and hybrid fiber coax loops, recognizing that requiring the unbundling of old copper loops would not deter ILECs from building out their own advanced service facilities.<sup>82</sup> Indeed, then-Commissioner Martin embraced this approach, explaining that “new fiber local loops to a customer premise . . . should be free of “old-style” legacy

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<sup>80</sup> See Pub. L. 104-104, Title VII, § 706 (Feb. 8, 1996) (codified at 47 U.S.C. § 157 note).

<sup>81</sup> This has become an even more potent tool for delivering broadband as equipment manufacturers continue to improve DSL equipment, particularly for use in Europe.

<sup>82</sup> See *Triennial Review Order*, 18 FCC Rcd at 17151 (¶ 291); See also *id.* at 17152 (¶293) (drawing a bright line between old and new networks).

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Rules,” which would remain applicable to the copper legacy loops.<sup>83</sup> This line, which was advocated by Verizon<sup>84</sup> and upheld by the D.C. Circuit,<sup>85</sup> balanced the pro-competitive advantages of unbundling with the “costs” claimed by the ILECs. Indeed, the Commission expressly prohibited ILECs from degrading “old” networks.<sup>86</sup>

Granting Verizon’s petitions would significantly backtrack on the “new wires, new rules” approach taken in the *TRO*. Changing the rules on “old wires” would actually reduce the available advanced services options for consumers. It also would reduce investment in those advanced services by shutting out EarthLink and its CLEC partners, who would otherwise invest to better utilize the existing copper loops for those services. Such exclusion would harm the very goal of an advanced communications infrastructure that Section 706 seeks to advance. This is particularly true given the strategic regulatory forbearance Verizon seeks here. As explained above, while Verizon targets six MSAs, granting forbearance in those areas would in fact retard the entry of UNE-L facilities-based competition across vast and economically critical areas of the country, with a particularly deleterious impact on competitive build-out in less-dense and more rural areas adjacent to the metro MSAs.

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<sup>83</sup> *At the Crossroads*, Remarks by Commissioner Kevin J. Martin 20th Annual PLI/FCBA Telecom Conference, Washington, D.C., December 12, 2002, *available at* <http://www.fcc.gov/Speeches/Martin/2002/spkjm215.txt>

<sup>84</sup> *See* Thomas J. Tauke, *Laying the Last Mile*, Speech to the Progress and Freedom Foundation (Aug. 21, 2001), *available at* <http://newscenter.verizon.com/leadership/speeches/tauke-ppf-08212001.html>; *See also Triennial Review Order*, 18 FCC Rcd at 17152 n.843 (citing Verizon FCC submissions advocating this approach).

<sup>85</sup> *See United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

<sup>86</sup> *Triennial Review Order*, 18 FCC Rcd at 17152-53 (¶ 294).

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Forbearance also reduces broadband investment because it dulls Verizon's incentives to complete its own fiber deployment. Simply put, allowing Verizon to achieve deregulation for its "old wires" via forbearance removes the regulatory incentive for Verizon to invest in fiber in order to achieve UNE deregulation. Instead, standing the Commission's policy on its head, Verizon would be allowed to end Section 251(c)(3) and 252 UNE requirements solely because *others* – particularly cable – had invested in telephony.

More generally, the copper loops have been paid for by consumers through their regulated telephone rates over the last 100 years. They are an existing and valuable national asset, and Verizon should not be permitted to foreclose access to them for its own benefit.

### **D. Forbearance Will Also Reduce Competition And Harm Consumers In The Business Market.**

As in the residential market, forbearance will also disrupt competition and impair consumer choice in the business markets. As discussed above, having recently acquired the New Edge subsidiary, EarthLink has been expanding its offerings to small- and medium-sized businesses. Through a combination of its own and others' facilities, New Edge has a presence in over 10,000 end offices with the ability to service approximately 98 percent of business locations nationwide where DSL is available. With this network – which required substantial facilities investment – New Edge has been able to develop innovative services for business customers, especially businesses needing to process credit card transactions.<sup>87</sup> Moreover, New Edge led the way with national, flat-rate

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<sup>87</sup> See *supra* at 10-12.

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pricing for private broadband networks.<sup>88</sup> As detailed above, New Edge is uniquely suited to provide low cost, highly customized, cross-region networking services to small- and medium-sized businesses.

In all of the markets covered by Verizon's Petitions, New Edge purchases IP transmission services from UNE-based CLECs to reach its end-user customers and provide them unique networking solutions that reduce costs, improve communications, and increase productivity. Thus, New Edge – and the small- and medium-sized businesses it serves – relies on the continued availability of UNE loops and transport at cost-based stable prices.

Granting forbearance from Section 251(c)(3) would inhibit competition and diminish the choices available to these small- and medium-sized businesses. Without any obligation to offer UNE loops or transport at cost-based rates, Verizon would have at least as compelling a reason to raise the costs of rival UNE-based suppliers of broadband services to business customers as it has to raise the costs of corresponding suppliers of mass market services. Specifically, Verizon would be able to increase the rates for all network elements used by competitive providers, raising its rivals' costs to protect its margins in the enterprise market – long regarded as one of the Bell Company revenue “sweet spots.”

Again, this is precisely what has happened to the price of Omaha-area UNE loops and transport following the *Omaha Forbearance Order*. Previously priced at about \$75/month, Omaha-area DS1 loops are now \$120/month, and the price of Omaha DS3 loops has nearly doubled, increasing from \$791 to \$1,400 per month. The prices for

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<sup>88</sup> See *supra* at 10.

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dedicated transport have also increased dramatically, with fixed DS1 service jumping from about \$35 to \$70 per month, and fixed DS3 service climbing from about \$220 to \$330 per month. These price hikes are even more striking when it comes to per-mile transport rates. For DS1 services, per-mile prices have tripled for 0 to 25 miles, increased by nearly 500 percent for between 25 and 50 miles, and skyrocketed from \$0.79 to \$12.00 per mile per month – over 1,400 percent – for service over 50 miles. And for DS3 services, per-mile prices from 8 to 25 miles, 25 to 50 miles, and over 50 miles, have jumped by almost 100 percent or higher per mile per month.<sup>89</sup>

Price hikes of this magnitude are simply not sustainable for UNE-based providers, who will be driven from these markets. In Omaha, for example, McLeodUSA Telecommunications Services, Inc. (“McLeodUSA”) has told the Commission that Qwest, having obtained forbearance from Section 251’s pricing standard, has been unwilling to negotiate reasonably commercial pricing for UNE loops and transport, forcing it to pay the exorbitantly high rates detailed above. As a result, McLeodUSA has significantly retrenched its Omaha operations and, barring appellate relief from the *Omaha Forbearance Order*, “will either sell or cease its operations in the Omaha market, despite its enormous investment in its own network facilities.”<sup>90</sup> There is no reason to believe that this scenario would not be replicated if the Commission were to grant Verizon’s Petitions. Competitive carriers throughout the regions at issue have made

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<sup>89</sup> These figures compare Qwest’s tariffed rates to the UNE loop and transport rates that were available through interconnection agreements prior to the *Omaha Forbearance Order*. See [http://www.qwest.com/about/policy/sgats/SGATSdocs/nebraska/NE\\_7th\\_Rev\\_5th\\_Amen ded\\_2\\_16\\_05\\_Exh\\_A\\_Clean.pdf](http://www.qwest.com/about/policy/sgats/SGATSdocs/nebraska/NE_7th_Rev_5th_Amen ded_2_16_05_Exh_A_Clean.pdf) at § 9.2 (Unbundled Loops) & § 9.6 (Unbundled Dedicated Interoffice Transport).

<sup>90</sup> *MacFarland Letter* at 1.

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substantial investments based on the reasonable understanding that they would have access to UNEs at cost-based rates. To grant Verizon's Petitions now would allow Verizon to raise these rivals' costs and drive them from the markets, not only stranding their investments, but also sending a chilling signal throughout the country to other potential competitors and innovators.

Thus, forbearance from Section 251 threatens to leave companies like New Edge, and, more importantly, its customers with no alternative to Verizon for facilities-based IP transmission services. Verizon, however, presents no evidence that the cable companies – on whose competitive presence Verizon principally relies – present a viable alternative for the small- and medium-sized enterprise customers currently served by New Edge and EarthLink Business Solutions. Cable companies' traditional focus on residential consumers suggests that they have neither the facilities nor the business plans in place to serve enterprise customers or to supply dedicated transport to New Edge.

Absent any competitive check, Verizon, like Qwest in Omaha, will have the ability and incentive to raise the underlying transmission costs of companies like New Edge, resulting in higher prices and fewer choices for enterprise customers. Forced to cover its costs of service, New Edge will be required to significantly raise prices for its products. The high input costs for loops and transport would almost surely prevent companies like New Edge from entering markets where there is no access to TELRIC-priced UNEs.

Because incumbent carriers like Verizon do not offer the kind of customized cross-region networking products provided by carriers like New Edge, the real losers will be the small and medium-sized businesses that would be able to use such products to

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reduce costs, and increase efficiency and productivity. The services that New Edge can provide using UNEs create real value and real efficiencies for small businesses – allowing them to create more jobs and produce more products at lower prices.

### **E. The Commission Should Not Forbear From Discontinuance Requirements Applicable To Unbundled Loops.**

In the *TRO*, the Commission also created specific network notification procedures and procedures for objections to the retirement of copper loops.<sup>91</sup> Specifically, the Commission required ILECs seeking to retire copper loops to provide public notice of those plans, with at least 90 days' notice prior to the effective date of those plans.<sup>92</sup> The FCC seeks public comment on these notices.<sup>93</sup> Affected CLECs and ISPs that are directly interconnected with the ILEC may object to these retirements within nine business days of the FCC's public notice.<sup>94</sup> These objections are deemed denied unless the FCC acts to the contrary within 90 days after the FCC public notice.<sup>95</sup> ILECs must also comply with any state discontinuance procedures.<sup>96</sup>

Verizon makes no showing of how forbearance from these requirements regarding the retirement of copper loop facilities in any way meets the requirements of Section

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<sup>91</sup> *Triennial Review Order*, 18 FCC Rcd at 17146-48 (¶¶ 281-284). The Commission has sought comment on rule changes to these requirements as proposed by a group of CLECs, arguing that the current rules do not adequately safeguard against ILECs' discriminatory and anticompetitive retirement of copper loops. *See XO Communications, LLC, et. al., Petition for a Rulemaking to Amend Certain Part 51 Rules Applicable to Incumbent LEC Retirement of Copper Loops and Copper Subloops*, RM 11358 (filed January 18, 2007).

<sup>92</sup> 47 C.F.R. § 51.325(a)(4).

<sup>93</sup> 47 C.F.R. § 51.333(b).

<sup>94</sup> 47 C.F.R. § 51.333(b)-(c).

<sup>95</sup> 47 C.F.R. 51.333(f).

<sup>96</sup> *Triennial Review Order*, 18 FCC Rcd at 17148 (¶ 284) (expressly declining to preempt state requirements).

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10(a). To the contrary, granting Verizon forbearance from Section 214 dominant carrier discontinuance requirements would make it even easier for Verizon to provide service using only its new fiber facilities and foreclose even the possibility of any UNE-based competition in the Verizon territories. Verizon has the incentive and the ability to discriminate against competitors by decommissioning the critical copper loop plant that competitive carriers rely upon for the “last mile” access to their customers. As CLEC submissions have pointed out, ILECs, including Verizon, have been increasingly retiring the copper loops and replacing them with fiber optic cable.<sup>97</sup> ILEC incentives to do this will only be enhanced as CLECs like EarthLink use legacy copper loops to provide advanced services, including video. The existing procedures give the Commission at least a short window of opportunity to review proposed loop retirements and halt those that will be blatantly anticompetitive. There is no basis for modifying those procedures now. Specifically, the Commission should not remove ILEC discontinuance procedures with respect to UNE loops.

As discussed above and below, Verizon has wholly failed to demonstrate that forbearance from UNE regulations meets the requirements of Section 10(a). Because UNEs remain necessary for robust competition, the protection of consumers, and the public interest, the Commission should decline Verizon’s invitation to make it easier to withdraw UNE loops from service when, for example, it has built out its FiOS plant. Doing so would allow Verizon to eliminate UNE loops – and thus access to UNE loops –

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<sup>97</sup> See Letter from Patrick Donovan, Counsel for Cavalier Telephone LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 06-74, 06-172, 05-281 (December 11, 2006) (collecting documents showing ILEC network changes and copper loop retirements).

altogether, a step that the Commission refused to embrace in *Omaha*, which required continued access to UNEs pursuant to Section 271.<sup>98</sup>

**II. VERIZON’S REQUEST FOR UNE FORBEARANCE FAILS TO MEET EVEN THE BASIC REQUIREMENTS OF THE *QWEST OMAHA ORDER*.**

**A. Verizon Fails to Show That It Has Lost Significant Market Share Comparable to Qwest in Select Omaha Wire Centers or ACS in Select Anchorage Wire Centers Among Residential or Business Voice Customers.**

A cornerstone of Qwest’s request for relief in the Omaha proceeding, and ACS’s request in the Anchorage proceeding, was the fact that a lengthy period of sustained competition had caused Qwest to lose more than half its retail lines in the Omaha MSA, as compared with 1997 levels.<sup>99</sup> Verizon, by contrast, makes no comparable showing. In fact, Verizon admits that in the Philadelphia MSA, it retains an approximately **[BEGIN CONFIDENTIAL] [END CONFIDENTIAL]** percent share of the residential lines,<sup>100</sup>

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<sup>98</sup> *Omaha*, 20 FCC Rcd at 19468 (tying the grant of Section 251(c)(3) forbearance to the continued applicability of Section 271 unbundling requirements); *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage LEC Study Area*, *Petition of ACS of Anchorage, Inc. for Forbearance from Sections 251(c)(3) and 252(d)(1)*, WC Docket No. 05-281, at 1-2 (filed Sept. 30, 2005, amended Oct. 6, 2005).

<sup>99</sup> *See Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, *Ex Parte* Letter from Cronan O’Connell, Vice President, Federal Regulatory Affairs, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 04-223, at 3 (filed June 16, 2005) (including a chart showing that total Qwest retail lines in service (residential and business) decreased to 200,911 in December 2004 from 403,794 in December 1997). Qwest’s actual market share loss was redacted from the final Commission decision. *See Omaha Forbearance Order*, 20 FCC Rcd at 19430 (¶ 28 & n.79) (“Qwest’s retail access line base in the Omaha MSA has declined by **[REDACTED]** percent over the last several years, falling from **[REDACTED]** in December 1997.”) (citing Letter from Cronan O’Connell, Vice President, Federal Regulatory Affairs, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 04-223, Attach. 1 at 5 (filed May 20, 2005)).

<sup>100</sup> Lew. Decl. – Philadelphia MSA at ¶ 8.

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and Verizon fails even to *disclose* its market share of business lines. In the New York MSA, Verizon admits that it has an approximately [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] percent share of residential lines.<sup>101</sup> In the Boston MSA, Verizon's share of the retail residential market is [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] percent,<sup>102</sup> and in the Pittsburgh MSA, [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] percent.<sup>103</sup> In the Providence MSA, it is [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] percent,<sup>104</sup> and in the Virginia Beach MSA, [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] percent<sup>105</sup>

The Commission has found that “[a]lthough... market share should not be the ‘sole determining factor of whether a firm possesses market power,’ such information certainly is significant to a determination of whether a carrier has market power.”<sup>106</sup>

Verizon's own submissions to the Commission show that Verizon has by far the [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] market share in the MSAs for which it has chosen to disclose. Under those circumstances, it is in no position to receive the

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<sup>101</sup> Lew Decl. – New York MSA at ¶ 8.

<sup>102</sup> Lew. Decl. – Boston MSA at ¶ 7.

<sup>103</sup> Verizon Pittsburgh Petition, Attachment A, Declaration of Quintin Lew, Judy Verses, and Patrick Garzillo Regarding Competition in the Pittsburgh Metropolitan Statistical Area, Attachment A to Petition of the Verizon Telephone Companies for Forbearance, WC Docket No. 06-172, at ¶ 9 (filed September 6, 2006).

<sup>104</sup> Verizon Providence Petition, Attachment A, Declaration of Quintin Lew, Judy Verses, and Patrick Garzillo Regarding Competition in the Providence Metropolitan Statistical Area, WC Docket No. 06-172, at ¶ 7 (filed September 6, 2006).

<sup>105</sup> Verizon Virginia Beach Petition, Attachment A, Declaration of Quintin Lew, Judy Verses, and Patrick Garzillo Regarding Competition in the Virginia Beach Metropolitan Statistical Area, WC Docket No. 06-172, at ¶ 9 (filed September 6, 2006).

<sup>106</sup> *Petition of U.S. West Communications, Inc., for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, Order, 14 FCC Rcd 19947, 19962 (¶ 25 & n. 94) (1999) (quoting *In the Matter of Motion of AT&T to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, 3307 (1995)).

same forbearance relief granted to Qwest or ACS, both of which had lost far more market share when its forbearance petition was granted.

**B. Verizon Fails to Present Any Data Supporting Its Claims in Any Wire Center.**

Even more glaring than its failure to show a meaningful loss of market share is Verizon's failure to provide any data supporting its claims in any *wire center*. Verizon seeks relief – and presents all of its data – at the MSA level. However, the Commission in the *Omaha Forbearance Order* “considered and rejected the idea of measuring facilities-based coverage on an MSA basis” and instead used wire center data to make its determination.<sup>107</sup> Indeed, the Commission specifically noted that “[u]sing such a broad geographic region would not allow us to determine precisely where facilities-based competition exists, which are the only locations in which we have determined that the forbearance criteria of section 10(a) are satisfied with respect to section 251(c)(3) obligations.”<sup>108</sup>

In *Omaha*, the Commission recognized that competitive conditions are not the same in every wire center. Thus, it examined the record in that case on a wire center-by-wire center basis, specifically evaluating the extent to which locations in the mass market and enterprise markets were “covered” by alternative facilities, *i.e.*, whether “an intermodal competitor . . . where it uses its own network, including its own loop facilities, . . . is willing and able, within a commercially reasonable time, to offer the full range of

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<sup>107</sup> *Omaha Forbearance Order*, 20 FCC Rcd at 19451 (¶ 69 & n.186). *See also, e.g., Id.* at 19438 (¶ 50 & n.129) (“For example, when evaluating whether certain network elements should be made available on an unbundled basis, which implicates issues of economic self-provisioning, *the Commission has focused its analysis on wire centers*, which also is the approach we adopt today when analyzing Qwest’s unbundling obligations arising under section 251 and section 271 of the Act.”) (emphasis added).

<sup>108</sup> *Id.* at 19451 (n. 186).

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services that are substitutes for the incumbent LEC's local service offerings."<sup>109</sup> While Verizon's Petitions and support declarations contain statements such as "[Cable companies] are providing mass market voice service to wire centers that account for *X* percent of Verizon's residential access lines in the MSA,"<sup>110</sup> these statements simply serve to mask the actual degree of facilities-based competition. There is no way to tell from these statements whether the cable company reaches 90 percent or .9 percent of the homes in those wire centers within the MSA. Either way, by simply noting whether some part of a wire center is served by a cable company, Verizon is implicitly assuming that every resident in a wire center enjoys direct facilities-based competition if any customer in that wire center does. This exaggerated and unsubstantiated representation of the extent of effective facilities-based competition is clearly inappropriate. Verizon provides the Commission with no basis on which to evaluate the extent to which intermodal competitors "cover" residences or businesses in each wire center within the MSA. In the absence of such evidence, Verizon certainly cannot carry its minimum burden of proof in any geographic area and establish that competition is sufficiently robust to warrant forbearance.

The *Anchorage Order* further reaffirms the holding that only wire center data, and not some larger geographic area, is sufficiently granular to evaluate a request for UNE forbearance. Thus, the Commission in *Anchorage* rejected study area or MSA data because it does not capture differences in customer's availability of service or the build out of competitors' networks:

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<sup>109</sup> *Omaha Forbearance Order*, at n. 156.

<sup>110</sup> *See, e.g.*, Lew Decl. – New York MSA at ¶ 7.

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we once again find it appropriate to analyze competitive conditions more granularly, by wire center service areas. In particular, the wire center service areas in the Anchorage study area are sufficiently small and discrete to enable us to grant forbearance in the geographic areas where the standards of section 10 are satisfied, without being administratively unworkable, as would be the case with a loop-by-loop (or customer-by-customer) analysis.<sup>111</sup>

Having provided data only at the MSA level, the evidence submitted by Verizon to support its Petitions is inappropriate and insufficiently granular as a matter of law.

In any event, simply looking to see where Verizon has a single intermodal competitor is not the proper way for the Commission to analyze forbearance in this case. As discussed in Section I.A.2 above, Verizon's request for forbearance here would give it the ability to raise prices to duopoly levels by raising the costs of the UNE-based providers in the market – which are the only facilities-based alternative to Verizon and the cable companies in the market for high speed, video-capable Internet access and bundled high speed Internet access and voice services.

### **C. Verizon Cannot Rely on UNE-Based Competition as a Basis for Forbearance from 251(c)(3).**

In its petitions with respect to Philadelphia and Virginia Beach, Verizon cites competition from UNE-based providers as part of its justification for forbearance.<sup>112</sup> But, as the Commission made clear in its *Omaha Forbearance Order*, UNE loop-based competition cannot be considered when determining whether to forbear from the requirement to provide UNE loops under Sections 251(c)(3) and 252.<sup>113</sup>

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<sup>111</sup> *Anchorage Order*, ¶ 16.

<sup>112</sup> Verizon Philadelphia Petition at 15-16; Verizon Virginia Beach Petition at 14-15.

<sup>113</sup> *See Omaha Forbearance Order*, 20 FCC Rcd at 19450 (¶ 68).

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In the Philadelphia MSA, Verizon’s request for forbearance is predicated in part on competition from carriers “using a combination of their own facilities together with wholesale inputs obtained from Verizon, such as unbundled loops and transport.”<sup>114</sup> Specifically, Verizon points out that Cavalier Telephone provides UNE-based service to more than [Begin Highly Confidential] [End Highly Confidential] residential lines in the Philadelphia MSA and that Broadview Networks provides UNE-based service to approximately [Begin Highly Confidential] [End Highly Confidential] residential lines in the Philadelphia MSA.<sup>115</sup> Similarly, Verizon seeks forbearance in Virginia Beach based in part on competition from Cavalier Telephone, which provides service to Virginia Beach customers “using its own circuit switches together with unbundled loops obtained from Verizon.”<sup>116</sup> According to Verizon, Cavalier uses UNEs to serve some [Begin Highly Confidential] [End Highly Confidential] residential lines in the Virginia Beach MSA.<sup>117</sup>

Verizon’s reliance on UNE-based competition cannot be countenanced. In *Omaha*, the Commission “emphasized” that its analysis would not take account of “competitive telecommunications services being offered over UNE loops and transport provisioned under section 251(c)(3).”<sup>118</sup> As the Commission explained, “[g]ranted 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

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<sup>114</sup> Verizon Philadelphia Petition at 15.

<sup>115</sup> *Id.* at 15-16.

<sup>116</sup> Verizon Virginia Beach Petition at 14.

<sup>117</sup> *Id.* at 15.

<sup>118</sup> *Omaha Forbearance Order*, 20 FCC Rcd at 19450 (¶ 68).

to justify the forbearance, and we decline to engage in that type of circular justification.”<sup>119</sup>

For the same reason, Verizon’s “circular justification” for forbearance in Philadelphia and Virginia Beach must be rejected. Simply put, competition from carriers relying on section 251-priced UNEs cannot be a basis for forbearing from section 251 pricing. Moreover, as explained above, without such pricing regulation, Verizon – as the sole supplier of these UNE inputs – will have the ability to raise costs for these rivals, limiting, if not eliminating, their ability to discipline either duopoly (higher-speed broadband) or monopoly (lower-speed broadband) retail prices. Thus, the UNE-based carriers and services cited by Verizon are precisely those that are likely to be eliminated should the Commission grant Verizon’s request for forbearance in Philadelphia and Virginia Beach. Indeed, any competitive pressure on Verizon from such UNE-based carriers demonstrates not that forbearance is warranted, but that the availability of section 251 pricing is necessary to achieve just and reasonable rates, to protect consumers, and to promote the competition that is key for the public interest.

**III. VERIZON’S PETITIONS MUST BE DIMISSED BECAUSE THEY VIOLATE FEDERAL AND STATE CONSUMER PRIVACY LAWS.**

In each of its petitions, Verizon has unlawfully relied on E911 data submitted by other carriers about consumers who choose not to do business with Verizon. This misappropriation and misuse of private customer information runs throughout Verizon’s petitions and supporting declarations. Given Verizon’s flagrant disregard for laws

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<sup>119</sup> *Id.* n.185. The Commission’s *Anchorage Order* echoed this conclusion, noting that competition from GCI services dependant on section 251 UNE loops could not justify forbearance from section 251. *See Anchorage Order*, ¶ 30 & n.92.

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protecting consumer privacy, EarthLink joins the New Hampshire Public Utilities Commission, and other movants, in calling on the FCC to dismiss Verizon's Petitions.<sup>120</sup>

There is no question that Verizon relied extensively on information it gleaned from the E911 databases that it operates – or, in the case of Virginia Beach, formerly operated.<sup>121</sup> But these E911 database entries are carrier proprietary network information, submitted only to allow customer locations to be transmitted to 911 operators in an emergency. Expressly recognizing the importance of keeping such information confidential, Congress enacted section 222(b) of the Communications Act, which makes absolutely clear that – without exception – “a telecommunications carrier [here, Verizon] that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose. . . .”<sup>122</sup> Although plainly aware of this confidentiality requirement,<sup>123</sup> Verizon chose to ignore it, relying on consumers' private information, not for the “purpose of providing any telecommunications service” but for the purpose of advancing its own regulatory agenda.

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<sup>120</sup> See New Hampshire Public Utilities Commission Amended Joinder in Competitive Carriers Motion To Dismiss, WC Docket No. 06-172 (filed Feb. 7, 2007) (“*New Hampshire Motion to Dismiss*”); Comptel's Comments in Support of Motion to Dismiss, WC Docket No. 06-172 (filed Oct. 30, 2006); ACN Communication Services, Inc., et al., Motion to Dismiss, WC Docket No. 06-172 (filed Oct. 16, 2006).

<sup>121</sup> Verizon's self-interested use of consumers' private information is particularly troubling in Virginia Beach, where Verizon has apparently retained and misused E911 information, long after it ceased being the E911 administrator for the area.

<sup>122</sup> 47 U.S.C. § 222(b).

<sup>123</sup> Verizon's actions are clearly knowing and intentional. In defending its subsequent refusal to disclose certain information prior to the issuance of the Second Protective Order, Verizon described the information that it continued to withhold as “CLEC and customer proprietary information.”

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Verizon's argument that Section 222 does not reach information it holds as the E911 database administrator is shocking and must be rejected if Section 222 is to have any meaning.<sup>124</sup> As Cox has pointed out, if Verizon's argument were accepted, there would be no federal protection for E911 database information.<sup>125</sup> Verizon, and other E911 database administrators, would be free to use that information for *any* purpose, including their own marketing activities. Of course, this is exactly the type of conduct that Section 222 proscribes.

In misusing the proprietary E911 information, Verizon may also have violated laws in at least nine of the ten states covered by the Petitions. Like Congress, these states have recognized the crucial importance of protecting the private information submitted by carriers to allow their customers to be located in an emergency. In this proceeding, the New Hampshire Public Utilities Commission has moved to dismiss Verizon's Petitions on the grounds that Verizon has misappropriated the proprietary E911 data in violation of New Hampshire law.<sup>126</sup> Most likely, Verizon's state privacy law violations do not end with New Hampshire. As compiled in Exhibit 1, at least nine of the ten states have enacted a statute protecting the confidentiality of customer information submitted for E911 purposes. Nearly all of these state laws expressly prohibit the use or disclosure of E911 proprietary information for any purpose other than the provision of emergency services.<sup>127</sup> Indeed, Pennsylvania has criminalized the misuse of such private consumer information, making disclosure of "ANI/ALI database information for purposes other

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<sup>124</sup> *Ex Parte* Presentation of Verizon, WC Docket No. 06-172 (filed Dec. 6, 2006).

<sup>125</sup> *Ex Parte* Presentation of Cox Communications, Inc., WC Docket No. 06-172 (filed January 12, 2007).

<sup>126</sup> *See New Hampshire Motion To Dismiss.*

<sup>127</sup> *See Ex. 1.*

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than providing emergency response services to a 911 call . . . a misdemeanor of the third degree.”<sup>128</sup>

In short, Verizon’s self-interested use of proprietary information invades the privacy of consumers up and down the east coast, is contrary to federal and state laws, and cannot be countenanced. The unlawful use of E911 data in the Verizon Petitions amounts to “unclean hands” and, as the Commission and courts have held, “lack of clean hands would preclude” Commission consideration of all equitable relief, including forbearance relief.<sup>129</sup> Because Verizon has improperly misappropriated and relied on this confidential information throughout all of its submissions in this proceeding, the Commission should dismiss Verizon’s Petitions in their entirety.

**IV. VERIZON’S PETITIONS SHOULD NOT BE CONSTRUED AS REQUESTING, AND HAVE NOT DEMONSTRATED, FORBEARANCE FROM DOMINANT CARRIER REGULATION WITH RESPECT TO THE ENTERPRISE MARKETS.**

Verizon asks the Commission to grant it “substantially the same regulatory relief the Commission granted in the *Omaha Forbearance Order*.” Verizon New York Petition at 1. The Commission should take Verizon’s statement at face value and limit the scope

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<sup>128</sup> 35 PA. STAT. ANN. § 7019(a) (2006).

<sup>129</sup> *Algreg Cellular Engineering*, Initial Decision, 7 FCC Rcd. 8686, 8751 (1992). See also, *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 360 (1995) (noting “Equity’s maxim that a suitor who engaged in his own reprehensible conduct in the course of the transaction at issue must be denied equitable relief because of unclean hands, a rule which in conventional formulation operated *in limine* to bar the suitor from invoking the aid of the equity court”); *Western Union Telegraph Company*, Initial Decision, 95 F.C.C. 2d 924, 950 (¶ 112) (1982); *American Telephone and Telegraph Co.*, Notice of Apparent Liability for Forfeiture, 95 F.C.C. 2d 1097, 1103 (¶ 17) (1983) (waiver request “must be denied” due to “failure to have ‘clean hands’ when seeking relief from this Commission”).

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of the Petitions only to the relief granted to Qwest in the *Omaha Forbearance Order*. This would specifically exclude dominant carrier relief for the enterprise markets.

Verizon creates ambiguity with respect to the scope of its Petitions because, when it lists in footnote 3 the statutory and regulatory provisions from which it seeks forbearance, Verizon – notwithstanding its statements that it seeks the same regulatory relief granted to Qwest – seems to include relief that the Commission expressly did not grant to Qwest.<sup>130</sup> Specifically, Verizon states in footnote 3 that it seeks forbearance from dominant carrier regulation, but does not specifically limit that request to the mass markets, as distinguished from the enterprise markets. In the *Omaha Forbearance Order*, however, the Commission specifically *denied* Qwest’s request for forbearance from dominant carrier regulation with respect to its enterprise services.<sup>131</sup>

Verizon’s ambiguity is significant because any request for forbearance from dominant carrier relief with respect to the special access market directly implicates the

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<sup>130</sup> Footnote 3 reads in its entirety:

Specifically, Verizon requests that the Commission forbear from applying loop and transport unbundling regulation pursuant to 47 U.S.C. § 251(c), *see* 47 C.F.R. § 51.319 (a), (b), (e). The Commission has determined that section 251(c) has been “‘fully implemented’ for all incumbent LECs nationwide.” *Omaha Forbearance Order* ¶¶ 51, 52; *see* 47 U.S.C. § 160(d). Verizon also seeks forbearance 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 price cap regulation set forth in Part 61 of the Commission’s rules (*id.* §§ 61.41-61.49); from the Computer III requirements, including Comparably Efficient Interconnection (“CEI”) and Open Network Architecture (“ONA”) requirements; and from dominant carrier requirements arising under section 214 of the Act and Part 63 of the Commission’s rules concerning the processes for acquiring lines, discontinuing services, assignments or transfers of control, and acquiring affiliations (*id.* §§ 63.03, 63.04, 63.60-63.66).

Verizon New York Petition at 4 n.3.

<sup>131</sup> *Omaha Forbearance Order*, 20 FCC Rcd at 19424 (¶15).

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issues and record being considered by this Commission in its special access docket.<sup>132</sup>

Given that CLECs and enterprise end users have documented specific problems with the existing regulation (or lack thereof) with respect to special access services where the ILEC meets the existing pricing flexibility thresholds, it can hardly be appropriate to forbear from all dominant carrier regulation of special access service irrespective of the pricing flexibility rules.<sup>133</sup> At a minimum, the Commission cannot grant forbearance from special access regulation without addressing head-on the existing, well-documented lack of competition and choice in the special access market.

### CONCLUSION

Accordingly, the Commission must deny Verizon's requests for forbearance from 251(c)(3) in both the enterprise and the mass markets, and must also deny Verizon's request for forbearance from dominant carrier regulation in the enterprise market. These regulations remain necessary to ensure that rates, terms and conditions are just, reasonable, and nondiscriminatory, to protect consumers – particularly against duopoly pricing – and to protect the public interest, including competition. In particular, granting forbearance from Section 251(c)(3) in the mass market will threaten the consumer freedom and innovation created by the open Internet by removing or reducing the efficacy of UNE-based providers that today offer the functional equivalent of an independent, additional “pipe” to homes and businesses.

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<sup>132</sup> See *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25.

<sup>133</sup> See *supra* n.73.

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March 5, 2007

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**Exhibit 1**

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**State Prohibitions on E911 Data Use and Disclosure**

**Delaware** - DEL. CODE ANN. 16 Del. C. § 10010(a) (2007)

- “The information made available to the State, its representatives or providers of emergency services *shall be used solely for purposes of delivering or assisting in the delivery of E-911 emergency services* or services that notify the public of an emergency.”

**Massachusetts** - MASS. ANN. LAWS. ch. 166, § 14A(d) (2006)

- “Subscriber information provided in accordance with this section *shall be used only for the purpose of responding to emergency calls* or for use in any ensuing investigation or prosecution, including the investigation of false or intentionally misleading reports of incidents requiring emergency service.”

**New Hampshire** - NH RSA 106-H:9

- “III. (a) Notwithstanding any other provision of law, and except as otherwise provided in RSA 82-A [relating to the communications service tax], the records and files of the department, related to this section are confidential and privileged. Neither the department, *nor any vendor or any of its employees to whom such information become available in the performance of any contractual services for the department shall disclose any information obtained from the department’s records, files, or returns . . . .*”

**New Jersey** - N.J. STAT. ANN. § 52:17C-10(a) (2007)

- “Subscriber information provided in accordance with this section *shall be used only for the purpose of responding to emergency calls* or for the investigation of false or intentionally misleading reports of incidents requiring emergency service.”

**New York** - N.Y. County LAW § 308(4) (Consol. 2006)

- “Records, in whatever form they may be kept, of calls made to a municipality's E911 system *shall not be made available to or obtained by any entity or person*, other than that municipality's public safety agency, another government agency or body, or a private entity or a person providing medical, ambulance or other emergency services, and *shall not be utilized for any commercial purpose other than the provision of emergency services.*”

**North Carolina** - N.C. GEN. STAT. § 62A-9(a) (2006)

- “This information shall be used only in providing emergency response services to 911 calls.”

**Pennsylvania** - 35 PA. STAT. ANN. § 7019(a) (2006)

**REDACTED FOR PUBLIC INSPECTION**

- “This information *shall be used only in providing emergency response services to a 911 call or for purposes of delivering or assisting in the delivery of emergency notification services or emergency support services* except as provided in subsection (c). *A person who uses or discloses ANI/ALI data base information for purposes other than providing emergency response services to a 911 call*, delivering or assisting in the delivery of emergency notification services or emergency support services, or other than as provided in subsection (c) *commits a misdemeanor of the third degree.*”

**Rhode Island - R.I. GEN. LAWS § 39-21.2-4 (2007)**

- “Automatic number identification (ANI) and automatic location identification (ALI) information that consists of the name, address, and telephone numbers of telephone subscribers *shall be confidential. Dissemination of the information contained in the 911 automatic number and automatic location data base is prohibited...*”

**Virginia - VA. CODE ANN. § 2.2-3705.2(10)&(11) (2006)**

- “Subscriber data, which for the purposes of this subdivision, means the name, address, telephone number, and any other information identifying a subscriber of a telecommunications carrier, provided directly or indirectly by a telecommunications carrier to a public body that operates a 911 or E-911 emergency dispatch system or an emergency notification or reverse 911 system, *if the data is in a form not made available by the telecommunications carrier to the public generally.* Nothing in this subdivision shall prevent the release of subscriber data generated in connection with specific calls to a 911 emergency system, where the requester is seeking to obtain public records about the use of the system in response to a specific crime, emergency or other event as to which a citizen has initiated a 911 call.”
- “Subscriber data, which for the purposes of this subdivision, means the name, address, telephone number, and any other information identifying a subscriber of a telecommunications carrier, collected by a local governing body in accordance with the Enhanced Public Safety Telephone Services Act (§ 56-484.12 et seq.), and other identifying information of a personal, medical, or financial nature provided to a local governing body in connection with a 911 or E-911 emergency dispatch system or an emergency notification or reverse 911 system, *if such records are not otherwise publicly available.* Nothing in this subdivision shall prevent the release of subscriber data generated in connection with specific calls to a 911 emergency system, where the requester is seeking to obtain public records about the use of the system in response to a specific crime, emergency or other event as to which a citizen has initiated a 911 call.”