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March 5, 2007

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Federal Communications Commission
Office of the Secretary

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, DC 20554

Re: Redacted Copies of Opposition Containing Highly Confidential & Confidential Information in WC Docket No. 06-172

Dear Ms. Dortch,

Attached are two copies of the Opposition of EarthLink Inc. and New Edge Network, Inc. to the Petitions of Verizon Telephone Companies for Forbearance in redacted form along with a third copy that we ask you to stamp and return. We are also filing, under separate cover, one copy of the same in unredacted form and one copy of the same in partially redacted form.

Please let me know if I can be of further assistance. I can be reached at 202-730-1320.

Sincerely,

John T. Nakahata
Counsel for EarthLink, Inc. & New Edge Network, Inc.

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

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MAR - 5 2007

Federal Communications Commission
Office of the Secretary

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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March 5, 2007

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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, 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.
- 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.

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- 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 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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**Before the
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Pursuant to 47 U.S.C. § 160(c) in the Boston,) WC Docket No. 06-172
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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**

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”).¹ These petitions fail to satisfy the requirements of Section 10(a), in that they would reduce broadband competition and choices for residential and

¹ 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.

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

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.² EarthLink

² 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.³ 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.⁴ 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

³ 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 Time Warner/BrightHouse resold cable modem service along with unlimited VoIP calling for \$62.90. This package, however, is limited to the Time Warner/BrightHouse serving areas.

⁴ *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.⁵

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.⁶ These higher speed DSL services are not substitutes for EarthLink's 1.5 Mbps offerings,⁷ 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

⁵ *Id.* at ¶ 57.

⁶ 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.

⁷ 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.⁸ Some ILECs (although not Verizon to date) have placed contract

⁸ 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.⁹ 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.¹⁰ 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.

*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).*

⁹ *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).*

¹⁰ 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/.

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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.¹¹ EarthLink recently announced that it will participate in a BPL test to nine apartment complexes in the Washington, DC area,¹² and has conducted product tests in other markets.¹³ BPL – which according to the FCC’s most recent report served a mere 5,208 lines nationwide as of June 30, 2005¹⁴ – 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.

¹¹ See discussion at p. 20-22, *infra*.

¹² 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/.

¹³ 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/.

¹⁴ 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. (“*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.¹⁵ 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.¹⁶ By using UNEs, EarthLink and Covad are not wedded to the ILEC's technological choices. As discussed further below,¹⁷ 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

¹⁵ 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.

¹⁶ *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).

¹⁷ See *infra* at 40-42.

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from a Verizon price squeeze¹⁸ 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."¹⁹ 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

¹⁸ See discussion at 27 - 34, *infra*.

¹⁹ *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.²⁰ 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.²¹

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).²² 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.”²³ Indeed, in 2006, cable prices did not decline even when the prices of substantially slower

²⁰ See DOJ/FTC Guidelines § 1.11.

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

²² See *id.*

²³ *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:²⁴ Comcast's cable modem revenue per unit actually *increased*, from \$42.91 to \$43.14 per month, in 2005 and 2006.²⁵ 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."²⁶ Divergent pricing for these different classes of broadband services²⁷ 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.²⁸ In both the lower speed (less than 2.5 Mbps) and higher speed (above 2.5

²⁴ *Id.* at 2.

²⁵ *See id.*, Exhibit 1.

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

²⁷ *See, e.g., supra* n. 8.

²⁸ *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 \$179.95.²⁹ 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).³⁰ 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

²⁹ 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).

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