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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.⁸⁹

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.”⁹⁰ 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

⁸⁹ 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_Amended_2_16_05_Exh_A_Clean.pdf at § 9.2 (Unbundled Loops) & § 9.6 (Unbundled Dedicated Interoffice Transport).

⁹⁰ *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.⁹¹ 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.⁹² The FCC seeks public comment on these notices.⁹³ 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.⁹⁴ These objections are deemed denied unless the FCC acts to the contrary within 90 days after the FCC public notice.⁹⁵ ILECs must also comply with any state discontinuance procedures.⁹⁶

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

⁹¹ *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).

⁹² 47 C.F.R. § 51.325(a)(4).

⁹³ 47 C.F.R. § 51.333(b).

⁹⁴ 47 C.F.R. § 51.333(b)-(c).

⁹⁵ 47 C.F.R. 51.333(f).

⁹⁶ *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.⁹⁷ 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 –

⁹⁷ 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 271.⁹⁸

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.⁹⁹ 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,¹⁰⁰

⁹⁸ *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).

⁹⁹ *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)).

¹⁰⁰ *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.¹⁰¹ In the Boston MSA, Verizon's share of the retail residential market is [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] percent,¹⁰² and in the Pittsburgh MSA, [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] percent.¹⁰³ In the Providence MSA, it is [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] percent,¹⁰⁴ and in the Virginia Beach MSA, [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] percent¹⁰⁵

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.”¹⁰⁶

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

¹⁰¹ Lew Decl. – New York MSA at ¶ 8.

¹⁰² Lew. Decl. – Boston MSA at ¶ 7.

¹⁰³ 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).

¹⁰⁴ 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).

¹⁰⁵ 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).

¹⁰⁶ *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.¹⁰⁷ 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.”¹⁰⁸

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

¹⁰⁷ *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).

¹⁰⁸ *Id.* at 19451 (n. 186).

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services that are substitutes for the incumbent LEC's local service offerings."¹⁰⁹ 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,"¹¹⁰ 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:

¹⁰⁹ *Omaha Forbearance Order*, at n. 156.

¹¹⁰ 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.*¹¹¹

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.¹¹² 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 252.¹¹³

¹¹¹ *Anchorage Order*, ¶ 16.

¹¹² Verizon Philadelphia Petition at 15-16; Verizon Virginia Beach Petition at 14-15.

¹¹³ 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."¹¹⁴ 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.¹¹⁵ 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."¹¹⁶ According to Verizon, Cavalier uses UNEs to serve some **[Begin Highly Confidential] [End Highly Confidential]** residential lines in the Virginia Beach MSA.¹¹⁷

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)."¹¹⁸ As the Commission explained, "[g]ranteeing 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

¹¹⁴ Verizon Philadelphia Petition at 15.

¹¹⁵ *Id.* at 15-16.

¹¹⁶ Verizon Virginia Beach Petition at 14.

¹¹⁷ *Id.* at 15.

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

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

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

¹¹⁹ *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.¹²⁰

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.¹²¹ 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. . . .”¹²² Although plainly aware of this confidentiality requirement,¹²³ 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.

¹²⁰ 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).

¹²¹ 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.

¹²² 47 U.S.C. § 222(b).

¹²³ 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.¹²⁴ As Cox has pointed out, if Verizon's argument were accepted, there would be no federal protection for E911 database information.¹²⁵ 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.¹²⁶ 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.¹²⁷ Indeed, Pennsylvania has criminalized the misuse of such private consumer information, making disclosure of "ANI/ALI database information for purposes other

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

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

¹²⁶ *See New Hampshire Motion To Dismiss.*

¹²⁷ *See Ex. 1.*

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

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.¹²⁹ 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

¹²⁸ 35 PA. STAT. ANN. § 7019(a) (2006).

¹²⁹ *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.*¹³⁰ 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.¹³¹

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

¹³⁰ 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.

¹³¹ *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.¹³²

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.¹³³ 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.

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

¹³³ See *supra* n.73.

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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)

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- “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.”