

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

In the Matter of)	
)	
Petitions of Qwest Corporation for)	WC Docket No. 07-97
Forbearance Pursuant to 47 U.S.C. § 160(c))	
in the Denver, Minneapolis-St. Paul,)	
Phoenix, and Seattle Metropolitan Statistical)	
Areas)	

**EARTHLINK, INC. AND NEW EDGE NETWORK, INC.
OPPOSITION TO QWEST CORPORATION PETITIONS
FOR FORBEARANCE IN THE DENVER, MINNEAPOLIS-ST. PAUL,
PHEONIX, AND SEATTLE METROPOLITAN STATISTICAL AREAS**

August 31, 2007

SUMMARY

Qwest's forbearance petitions ask the Commission to embrace a future – for nearly 13 million Americans – where:

- There are fewer choices and higher prices for consumers.
- There is less competition and innovation.
- There is less investment in advanced telecommunications.
- There is less marketplace protection of Network Neutrality.

In essence, Qwest's petitions for forbearance in these four MSAs ask the Commission to buy an argument that less is, in fact, more.

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

- It puts broadband, particularly higher speed broadband, in the control of at best two providers, enabling them to raise prices and discriminate among Internet content and applications.
- It means less, not more, broadband investment because Qwest 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 Qwest 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 nearly 13 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, to cut costs, and to 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.

Qwest's petitions studiously ignore their impact on America's broadband future. On this basis alone, Qwest's Petitions must be rejected.

Further, Qwest's Petitions demonstrate a lack of sensitivity to the interests of the consumer and toward competition more generally:

- Qwest fails to provide adequate evidence as to the extent of competition in any of the actual, relevant geographic markets – each Qwest wire center – as required by the FCC in both the *Omaha* and *Anchorage Forbearance Orders*.
- Unlike its showing in *Omaha* and ACS's showing in *Anchorage*, Qwest fails to show that it has lost substantial retail market share.
- Qwest seeks forbearance from special access regulations that were specifically denied in *Omaha* and, most recently, in the second Anchorage forbearance decision, where the FCC denied special access forbearance on the grounds that the ILEC would have the incentive and ability to manipulate the terms of such services and raise its rivals costs, increasing end-user prices, decreasing competition and harming consumers.

Qwest 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. And the Commission followed this precedent in its recent Anchorage decision. 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, with no BPL service in Colorado, Arizona or Minnesota.
- 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 mobile broadband is priced far above Qwest's DSL service, and will thus exert no competitive discipline on the price Qwest charges for affordable, basic broadband.

A wireline duopoly is not enough competition to protect consumers or to spur the availability of advanced broadband services at affordable rates. This is just as true for the nearly 13 million Americans in Denver, Minneapolis-St. Paul, Phoenix and Seattle who would be harmed by Qwest's petitions as it is for the 35 million Americans in Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach who would be harmed by

Verizon's petitions for similar relief. The Commission must stem the forbearance tidal wave and protect consumers and competition across the nation.

The public interest, protection of consumers, competition and maximum investment in an advanced broadband infrastructure all demand that the Commission deny Qwest's Petitions.

TABLE OF CONTENTS

INTRODUCTION1

I. Background.....3

 A. Mass Market.....3

 B. Enterprise Market.....8

II. QWEST’S PETITIONS HARM CONSUMERS BY REDUCING COMPETITION, INNOVATION AND DIVERSITY IN THE FACILITIES-BASED RESIDENTIAL INTERNET, BUNDLED VOICE/INTERNET, AND INTERNET VIDEO MARKETS.....11

 A. Forbearance from Section 251(c)(3) Would Harm Competition and Consumers in the Facilities-Based Residential Internet and Bundled Voice/Internet Markets.11

 1. Relevant Product Markets and Market Participants.....13

 2. Raising Rivals’ Costs and the Risks of Duopoly and Oligopoly.....24

 3. Section 271 Is Not A Sufficient Backstop.31

 B. Forbearance from Section 251(c)(3) and 252(d)(1) Would Strengthen Qwest’s “Gatekeeper” Ability to Block, Degrade, Impair and Unreasonably Discrimination Against Internet Content and Applications.....35

 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*.37

 D. Forbearance Will Also Reduce Competition And Harm Consumers In The Business Market.....39

 E. The Commission Should Not Forbear From Dominant Carrier Discontinuance Requirements Under Section 214, Particularly With Respect To Unbundled Loops.....41

III. QWEST’S REQUEST FOR UNE FORBEARANCE FAILS TO MEET EVEN THE BASIC REQUIREMENTS OF THE *OMAHA FORBEANCE ORDER*.43

 A. Qwest’s Request For Forbearance From Dominant Carrier Requirements For Special Access Service Goes Beyond The Relief Granted in *Omaha* and Must Be Denied.....43

 B. Qwest Does Not Show That It Is No Longer Preeminent Among Either Residential or Business Voice Customers.45

 C. Qwest Fails to Present Adequate Data Supporting Its Claims in Any Wire Center.....47

 D. Qwest Cannot Rely on UNE-Based Competition as a Basis for Forbearance from 251(c)(3).49

CONCLUSION.....50

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

In the Matter of)
)
Petitions of Qwest Corporation for) WC Docket No. 07-97
Forbearance Pursuant to 47 U.S.C. § 160(c))
in the Denver, Minneapolis-St. Paul,)
Phoenix, and Seattle Metropolitan Statistical)
Areas)

**EARTHLINK, INC. AND NEW EDGE NETWORK, INC.
OPPOSITION TO QWEST CORPORATION PETITIONS
FOR FORBEARANCE IN THE DENVER, MINNEAPOLIS-ST. PAUL,
PHOENIX, AND SEATTLE METROPOLITAN STATISTICAL AREAS**

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 Denver, Minneapolis-St. Paul, Phoenix, and Seattle MSAs filed on April 27, 2007 by Qwest Corporation (“Qwest”).¹

INTRODUCTION

These petitions fail to satisfy the requirements of Section 10(a). They would reduce broadband competition and choices for residential and 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,

¹ Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver Metropolitan Statistical Area, WC Docket No. 07-97 (filed April 27, 2007) (Qwest Denver Petition); Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Minneapolis-St. Paul Metropolitan Statistical Area, WC Docket No. 07-97 (filed April 27, 2007) (Qwest Minneapolis-St. Paul Petition); Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix Metropolitan Statistical Area, WC Docket No. 07-97 (filed April 27, 2007) (Qwest Phoenix Petition); Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Seattle Metropolitan Statistical Area, WC Docket No. 07-97 (filed April 27, 2007) (Qwest Seattle Petition) (collectively, “Qwest Petitions”).

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 in the Qwest region and buttress what the Congressional Research Service has recognized is largely a duopoly for last-mile transmission in the Qwest region.² 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 services on terms and conditions that are affordable, just and reasonable.

Given the unprecedented scope of Qwest's Petitions, the potential for harm here cannot be understated. Taken together, these petitions threaten the competitive landscape for nearly 13 *million* Americans, in over *four and a half million* households. And, unlike the relatively small territories at issue in the *Omaha* and *Anchorage* forbearance proceedings, Qwest's Petitions cover a massive geographic area – covering large parts of four western states. The smallest of the MSAs at issue here, the Denver, Colorado MSA, is nearly three times larger than the Omaha MSA.³ In addition, as explained further below, forbearance even in the most competitive pockets of these expansive MSAs would

² See *Access to Broadband Networks*, CRS Report for Congress (June 28, 2006).

³ The Denver MSA has a population of over 2.4 million, while the Omaha MSA has a population of approximately 850,000. Annual Estimates of the Population of Metropolitan and Micropolitan Statistical Areas: April 1, 2000 to July 1, 2006 (CBSA-EST2006-01), *available at* <http://www.census.gov/population/www/estimates/CBSA-est2006-annual.html>.

have a ripple effect, limiting competition and harming consumers in adjacent less populated areas throughout the MSAs and beyond.

I. Background.

A. Mass Market.

EarthLink, a leading Internet innovator, is one of the pioneers in opening the Internet to the mass market. EarthLink's hallmark has been to provide high quality, reliable, customer-friendly Internet services: its motto is "we revolve around you." 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 focus on individual customers has been successful. 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.

Across the nation and throughout the areas covered by these petitions, EarthLink provides broadband data and voice services through whatever means it can find in the marketplace.⁴ In all four of the MSAs covered by these Petitions, and particularly in Seattle, UNE loops are an important – and, in the case of higher speed broadband

⁴ With the exception of its municipal Wi-Fi operations, none of which are located in any of these four MSAs, EarthLink does not own last-mile transmission facilities of its customers. As described in the text, while EarthLink has invested in certain developing broadband technologies, at present it relies in most locations on other companies' wireline broadband facilities – and CLEC leased UNE loops where available – to serve its customers.

services, critical – part of providing affordable broadband alternatives for mass market consumers. As discussed below, the availability pursuant to Section 251(c) of this functional third “broadband” pipe pushes both Qwest 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.

1.5 Speed Broadband. Throughout these four MSAs and across the country, EarthLink offers a 1.5 Mbps broadband Internet access service using either DSL transmission purchased from Qwest or UNE loop-based DSL service obtained from CLECs.⁵ UNE-based DSL services allow EarthLink to serve areas Qwest may not reach. In addition, the UNE loop-based DSL service from Covad puts critical competitive pressure on Qwest 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.⁶ Moreover, because UNE loop-based DSL is provided using electronics, DSLAMs and backbone independent of Qwest, EarthLink has a much greater ability to differentiate this service than when it resells Qwest transmission. As the Commission recognized in the *Wireline Broadband Internet Access Order*, intramodal

⁵ Where it uses UNEs, EarthLink purchases UNE-based broadband telecommunications services from a CLEC. As was contemplated in the *Triennial Review Order*, these CLECs lease UNEs to provide these telecommunications services. *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 (2003) (“*Triennial Review Order*”); *see also* 47 U.S.C. § 251(c)(3).

⁶ *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) (“*Wireline Broadband Internet Access Orders*”).

UNE-based competition provided additional competitive stimulus to ensure that both Qwest and the cable companies continue to deploy their service offerings.⁷

Higher Speed Broadband Services. As its flagship higher speed broadband service, EarthLink provides up to 8 Mbps ADSL 2+ broadband Internet access as a line powered voice bundle of Internet Access and VoIP service in twelve geographic regions – including the Seattle MSA at issue in this proceeding.⁸ This ultra-fast broadband service is provided using a DSL telecommunications service purchased from Covad – which itself uses unbundled legacy copper loops for last-mile transmission.⁹ EarthLink offers this service to nearly 13 million households nationwide, passing 560,000 in the Seattle MSA.

Increasingly, EarthLink’s experience is that consumers are looking for a single bundle. Consumers do not want just voice service, or just broadband Internet access, but both together.¹⁰ EarthLink has met this demand by offering combined high speed Internet access and VoIP service for between \$49.95 and \$69.95 per month.¹¹

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

⁷ *Id.* at 14884 (¶ 57).

⁸ This service is available in cities across the country, including Atlanta, Chicago, Dallas, Los Angeles, Miami, New York City, Philadelphia, San Diego, San Francisco, San Jose, Seattle and the Washington, DC metropolitan area and can easily be expanded to other geographic areas.

⁹ These higher speed DSL services are not substitutes for EarthLink’s 1.5 Mbps offerings, and compete directly with the higher speed broadband services offered by the cable company.

¹⁰ 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).

¹¹ *See* DSL and Home Phone Service, Service Plans, available at <http://www.earthlink.net/voice/bundles/dslhomephone/> (last visited August 4, 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.

broadband 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 independent of the services offered by Qwest or the local cable company. The availability pursuant to Section 251(c) of this functional third pipe pushes both Qwest 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 impairing Internet applications.

Resale. To provide some of its lower speed broadband services, EarthLink purchases wholesale broadband transmission services from Qwest. And, in both Minneapolis and Seattle, EarthLink purchases wholesale broadband transmission services from the cable company. But when EarthLink uses wholesale broadband arrangements with incumbent LECs or cable companies, it must live within limits largely dictated to it by those sellers and has only a limited ability to innovate. In contrast to UNE loop-based broadband services, which give EarthLink substantial ability to innovate and to tailor its offerings to its customers’ evolving needs (because EarthLink, in that case, controls the electronics), resale leaves little room for competition over transmission speeds, service quality and other transmission features. Just as significantly, UNE-based competitors (and the threat of entry by UNE-based providers) disciplines the resale market, and has, thus far, checked Qwest’s incentive and ability to impose anticompetitive restrictions on resale contracts. Since the *Wireline Broadband Internet Access Order*, however, ILECs have even more ability to use commercial negotiations to limit or control the extent of

resale competition.¹² Some ILECs have placed contract limitations on serving business customers or on the further resale of broadband transmission.¹³ Without cost-based access to copper loops, competitors will have little ability to compel Qwest to avoid such behaviors. Thus, maintaining the availability of UNE based-DSL is crucial as it provides both a check on these types of restrictions, and a necessary antidote.

Municipal Wi-Fi and Broadband Over Power Lines (BPL). EarthLink has also been a leader in developing and deploying municipal Wi-Fi broadband networks – working with Philadelphia (PA), New Orleans (LA), Anaheim (CA), Milpitas (CA), and Corpus Christi (TX). However, as indicated by recent press reports, EarthLink is currently reexamining the business model for these deployments, many of which have not yet been constructed.¹⁴ EarthLink is also an investor in BPL, although this has only limited availability, is still under construction and must also see its business model actually prove itself. Nationwide and in the four MSAs at issue here, both of these technologies remain nascent.

¹² Even when services were offered under tariff, some RBOCs, set unreasonably high rates for higher-speed DSL (*i.e.*, 2 Mbps and above) to protect legacy T1 pricing structures. *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).

¹³ *See, e.g.*, *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, attachment at 2 (filed Oct. 5, 2006); *Ex Parte* Presentation of EarthLink, Inc., WC Docket No. 06-74, attachment at 2 (filed Sept. 28, 2006).

¹⁴ *See, e.g.*, Carol Wilson, *EarthLink scaling back, not leaving muni Wi-Fi*, Telephony Online (Aug. 29, 2007), available at http://telephonyonline.com/home/news/earthlink_municipal_wi-fi_082907/.

B. Enterprise Market.

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.

EarthLink Business Solutions, together with EarthLink's CLEC subsidiary, New Edge, provides communications solutions and high speed Internet access to small- and medium-sized enterprise 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 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.

New Edge's products regularly enhance communications, reduce costs, and improve efficiency for a wide range of small- and medium-sized businesses located outside of central metropolitan business districts – supplying networking technology that fuels productivity and enhances job growth in diverse sectors of the economy. Diverse multi-site businesses, ranging from gas stations to franchise restaurants 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 transactions. Making these businesses more efficient and productive in the global economy helps to preserve jobs and promote economic growth in the United States.

A few examples illustrate this:

- New Edge provided an ATM over DSL network for a chain of over 250 drugstores with 60 innovative pharmacy kiosks. The kiosks, which are located in doctors' offices, clinics, businesses, and hospitals, allow customers to fill and refill prescriptions remotely. New Edge's networking solution gave the company the bandwidth it needed for the kiosk applications, including a real-time audio and videoconferencing feature that lets customers speak to live pharmacists around the clock. A resounding success, the kiosks have reduced costs per prescription and dramatically improved customer convenience and satisfaction.
- The nation's largest short-term small loan provider selected New Edge to install a private MPLS DSL network that connected 260 stores, allowing them to quickly and securely share revenue and customer transaction information between the remote store locations and headquarters. This network doubled the company's bandwidth while cutting their recurring monthly costs by 30

percent. It also provides the company with the flexibility to support rapid growth and future applications.

- Similarly, a mobile electronic device retailer with 25 stores in major airports across the county chose New Edge to provide an ATM over DSL network, which allows the company to improve file sharing among locations, monitor employee activity, and process credit and debit transactions in as little as 6 seconds, down from 30 seconds. In addition, the retailer implemented a real-time remote inventory management system that resulted in an immediate savings of \$60,000.
- New Edge also provided a managed VPN to a full service laboratory with five remote locations, which enables real-time secure communication among remote sites and allows customers to order lab services and view test results online. Taking advantage of the added bandwidth and security, the laboratory also has implemented a paperless management system with electronic patient records that has increased efficiency. The company also implemented VoIP at all locations, which has saved them 35 percent annually in long-distance costs.
- New Edge installed a VPN to connect the 19 locations of an oil and fuel distributor to company headquarters. The new network gives the company the ability to add low-latency applications, improve company-wide communication and speed file-sharing among remote locations. As a result, the company has seen an increase in employee productivity and faster data transfer and, with a new Internet-based loyalty program, expects to see annual double-digit revenue growth.

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. New Edge purchases UNEs loops and transport directly where collocated and purchases UNE-based services from CLECs in other locations. Increasingly across the country, including the Qwest 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.

II. QWEST’S PETITIONS HARM CONSUMERS BY REDUCING COMPETITION, INNOVATION AND DIVERSITY IN THE FACILITIES-BASED RESIDENTIAL INTERNET, BUNDLED VOICE/INTERNET, AND INTERNET VIDEO MARKETS.

A. Forbearance from Section 251(c)(3) Would Harm Competition and Consumers in the Facilities-Based Residential Internet and Bundled Voice/Internet Markets.

Qwest’s Petitions solely examine the market for standalone voice services, which is entirely backward-looking and divorced from the reality of today’s product markets. As discussed further below in Part III, even Qwest’s analysis of standalone voice markets is insufficient to demonstrate forbearance should be granted. In particular, in seeking forbearance from dominant carrier requirements with respect to special access services, Qwest asks for relief that the Commission expressly rejected as unwarranted in *Omaha* and it fails to justify forbearance in the voice markets. But even more significantly, Qwest ignores entirely the impact of forbearance on facilities-based Internet access competition, and by extension bundled voice, video and Internet access competition.

In discussing VoIP service, Qwest asserts that “[c]ompetitive broadband services are now widely available from multiple providers.”¹⁵ But that conclusory and self-serving assertion is belied by reality. A more rigorous analysis of the broadband market is required to provide assurance that consumers are – or will be – protected. As the Federal Trade Commission explained in its recent report on Broadband Connectivity and Competition Policy, “the mere counting of providers using new technologies does not answer the question of whether or not they are effective competitive alternatives to cable

¹⁵ See, e.g., Qwest Seattle Petition at 15.

and DSL.”¹⁶ Because Qwest fails to adequately discuss these relevant markets, Qwest cannot show that it has met the requirements of Section 10(a), and thus, its petitions must be denied.

Any analysis of what is really going on in these markets reveals that UNE loop-based DSL provides a critical alternative to Qwest and the cable company. An accurate assessment of broadband Internet access shows considerable market segmentation, with at least three distinct product markets: (1) affordable, lower speed up to 2.5Mbps fixed broadband; (2) high speed fixed broadband above 2.5 Mbps capable of applications like streaming video; and (3) mobile broadband Internet access.

In the vast majority of Qwest’s territory today, a consumer typically has only two independent choices for affordable, basic fixed broadband (generally, below 2.5 Mbps) – Qwest and CLECs that lease Qwest copper UNE loops and attach their own electronics to provide broadband service– with Clearwire’s fixed wireless service as a possible third alternative only in Seattle. The options in the higher speed market are nearly as limited. Consumers looking to buy high speed broadband service above 2.5 Mbps in these MSAs have at most three independent choices for broadband transmission into the home: (1) Qwest; (2) a cable company (which generally does not provide the basic, affordable, fixed broadband services available over DSL); and (3) UNE-based CLECs. 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. Municipal wireless networks are still nascent in these MSAs and, even when developed, will cover only portions of areas at issue. BPL and WiMax remain “over-the-horizon”

¹⁶ See Broadband Connectivity Competition Policy, FTC Staff Report, at 104 (June 2007).

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, and is not independent of those offerings, either in function or pricing.

Thus, UNE loop-based broadband providers (and the potential entry of such providers) serve as the only functionally independent "third pipe" that places real market discipline on Qwest and the cable company throughout the four MSAs. Qwest's petitions threaten the competitive vitality and usefulness of UNE loop-based broadband as check on the behavior of Qwest and the cable company. Even if Qwest retained its section 271 obligation to make UNE loops available, section 251(c), from which Qwest now seeks forbearance, ensures that UNE-Ls remain available at prices that are both cost-based and stable over time. Section 251(c) is necessary to prevent Qwest from raising the costs of its rivals at will, and thereby limiting effective price competition. Absent such competition, consumers of broadband services will face the high prices and more limited service quality that are characteristic of monopolized industries.

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. The Justice Department and the Commission define 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."¹⁷ A product market can reasonably be viewed as a group of products for which a

¹⁷ *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

moderate (*e.g.*, five percent) price increase will not cause a substantial proportion of consumers to switch to other potential substitute products.¹⁸ Here, in each of the broadband markets discussed below, if Qwest, UNE-based providers like EarthLink, resellers, and any other facilities-based participants were united in a hypothetical monopolist, there is little doubt that the hypothetical monopolist would increase prices for broadband Internet access services, and sustain such an increase, for most or all customers.

a. Broadband Internet Access Markets.

Recent marketplace evidence shows that the broadband Internet access market itself is not a single product market, but likely consists of at least three product markets: (1) fixed lower speed broadband service of less than 2.5 Mbps, (2) higher speed fixed broadband service above 2.5 Mbps that is capable of handling streaming video and other bandwidth intensive applications; and (3) mobile lower speed broadband service of less than 2.5 Mbps.¹⁹ For most consumers, mobile broadband services, 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

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 (internal quotations omitted) (“*DOJ/FTC Guidelines*”).

¹⁸ See *DOJ/FTC Guidelines* § 1.11.

¹⁹ The 2.5 Mbps cut-off reflects the cut-off employed by the Commission in its statistics on high-speed Internet access. 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/attachmatch/DOC-270128A1.pdf (“*High-Speed Services for Internet Access*”). According to FCC statistics, mobile operators generally do not yet offer a higher speed mobile offering. In any event, such a service would likely be priced significantly above higher speed fixed broadband services, based on the fact that lower speed mobile broadband generally is priced at or above the levels of higher speed fixed broadband services.

broadband services, and the prices for the higher speed services do not respond significantly to the availability of lower speed services. Consequently, higher speed, lower speed, and mobile broadband services constitute distinct product markets.²⁰

Supporting this market analysis, 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).²¹ 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.”²² Indeed, in 2006, cable prices did not decline even when the prices of substantially slower DSL services declined significantly:²³ Comcast’s cable modem revenue per unit actually *increased*, from \$42.91 to \$43.14 per month, in 2005 and 2006.²⁴

Divergent pricing for these different classes of broadband services 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 even a substantial and non-transitory increase in the price of higher-speed service. In both the lower speed (less than 2.5 Mbps) and higher speed (above 2.5 Mbps)

²⁰ See Craig Moffet, *et al.*, Bernstein Research, *US Cable & Telecom: Is Today’s DSL Tomorrow’s Dial Up?*, (December 4, 2006).

²¹ See *id.*

²² *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.

²³ *Id.* at 2.

²⁴ See *id.*, Exhibit 1.

fixed broadband markets, the loss of UNE-based broadband providers is competitively significant.

Lower Speed Fixed Broadband. Without UNE-based broadband Internet Access providers, Qwest will have a monopoly over affordable, basic broadband service (below 2.5 Mbps) in Denver, Phoenix, and Minneapolis-St. Paul and compete only with Clearwire's fixed wireless broadband service in Seattle. Currently, Qwest offers very-low speed DSL service of 256 kbps for \$19.99 per month and offers stand alone lower speed DSL service of up to 1.5 Mbps for \$26.99 per month.²⁵ In Seattle, but not in any of the other MSAs, Clearwire offers fixed wireless service of up to 1.5 Mbps for \$29.99 per month.²⁶ UNE-based providers like EarthLink compete in all four MSAs with an up to 1.5 Mbps offering for \$29.95-39.95.²⁷ As Bernstein's analysis indicates, cable is not a participant in this market because, unlike the ILECs, cable generally does not offer a lower speed, lower priced broadband service. And as discussed further below, mobile broadband services are priced too high to impose any real price discipline on Qwest. Thus, other than UNE-based providers of lower speed broadband, like EarthLink, and Clearwire in Seattle, no provider currently competes with Qwest's offerings in this market.

²⁵ Which Broadband Internet Speed is right for you?, <http://www.qwest.com/residential/products/internet/index.html> (last visited Aug. 30, 2007).

²⁶ Notwithstanding Clearwire's success, spectrum limitations and investment costs remain formidable barriers, making it unlikely that there would be substantial entry by other fixed wireless providers.

²⁷ EarthLink High Speed Details, <http://www.earthlink.net/highspeed/pricing/?id=dsl> (last visited August 20, 2007).

Higher Speed Broadband. Currently, Qwest offers stand alone high-speed DSL service of up to 7 Mbps for \$36.99.²⁸ Cable, as confirmed by Bernstein, is really a participant in this higher speed broadband market, offering multimegabit cable modem services that are generally priced around \$50 per month. Relying on section 251 priced UNE loops, CLECs like EarthLink in partnership with Covad also compete in this market, offering a functionally independent high speed ADSL service with speeds up to 8 Mbps for \$39.95 to \$49.95.²⁹ While Qwest also points to fiber based competitors, these companies have historically served the enterprise markets, and Qwest makes no effort to document their presence or ability to serve the mass market here.³⁰ Because their deployment has been geared toward serving business customers, fiber-based companies generally have not built their facilities to reach mass market customers and could not readily serve the mass market in the near future if Qwest and the cable company tried to raise significantly the price of high speed broadband service. Wireless broadband providers, discussed further below, do not compete in this market because they offer much slower services that cannot impose market discipline on Qwest or the cable company. Thus, without UNE-loops, the higher speed Internet access market is a strong duopoly of Qwest and cable services throughout these four MSAs.

Lower Speed Mobile Broadband. None of the other alternatives (CMRS, satellite, municipal broadband or BPL) promises to place near-term or even medium-term discipline on cable and Qwest's pricing in the higher-speed broadband market or Qwest's

²⁸ Which Broadband Internet Speed is right for you?, <http://www.qwest.com/residential/products/internet/index.html> (last visited Aug. 30, 2007).

²⁹ EarthLink High Speed Details, <http://www.earthlink.net/highspeed/pricing/?id=dsl> (last visited August 20, 2007).

³⁰ See, e.g., Qwest Seattle Petition at Declaration of Robert H. Brigham and David L. Teitzel, (¶¶ 37-38) ("Brigham Seattle Decl.").

pricing in the lower-speed broadband market. 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.³¹ The Commission reaffirmed this approach in the *Anchorage Forbearance Order*.³² In both of those decisions, the Commission did not consider non-existent (or non-deployed) potential substitutes for copper loops and it should not do so here.³³ Instead, the Commission found that only actual, existing competition or competition that could become available in a “commercially reasonable” period of time justified forbearance.³⁴ 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

³¹ *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”).

³² *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, 22 FCC Rcd 1958 at 1977 (¶ 32) (2007) (“*Anchorage Forbearance Order*” or “*Anchorage*”) (adopting the *Omaha* approach); *see id.*, ¶ 23 (denying forbearance where “where no competitive carrier has *constructed* substantial competing last mile facilities capable of providing telecommunications services”) (emphasis added).

³³ *Omaha*, 20 FCC Rcd at 19444-45; *Anchorage*, 22 FCC Rcd at 19428, 19431 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 four competitive PCS licensees may not have begun to offer service). Indeed, in the Commission’s recent order on the ILEC’s second Anchorage forbearance petitions, the Commission “decline to include facilities-based voice over Internet Protocol (VoIP) service and wireless service as close substitute products” for mass market services. *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S.C. § 160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area*, WC Docket No. 06-109, at ¶ 28 (rel. Aug. 20, 2007) (“*Anchorage II*”).

³⁴ *Omaha*, 20 FCC Rcd at 19445 n. 156.

to subject consumers to anticompetitive price increases for long periods of time simply because price relief ultimately may arrive.

Although Internet access via satellite or CMRS is more widely available, for the most part these services are priced much higher than DSL or cable modem service, and thus cannot discipline the markets at issue here. Indeed, these prices are much higher than landline broadband services of similar speeds, and so clearly constitute a distinct product market. Sprint Nextel, for example, charges \$60 per month (for unlimited capacity),³⁵ with average download speeds ranging from 400 kbps to 1600 kbps, where EVDO-A is available.³⁶ Verizon Wireless similarly charges \$60 per month for subscribers with a Verizon Wireless voice plan, with an average download speed of 600-1400 kbps.³⁷ These prices are well above the \$19.99 Qwest 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 Qwest, 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. In general, CMRS provides less capacity at higher prices than DSL, cable modem, or fiber, while Internet via satellite is not full duplex and highly interactive applications are challenged on this platform.

³⁵ See Mobile Broadband Connection Plans, *available at* <http://nextelonline.nextel.com/NASApp/onlinestore/en/Action/SubmitRegionAction> (last visited Aug. 28, 2007).

³⁶ See Sprint Mobile Broadband Network, *available at* <http://powervision.sprint.com/mobilebroadband/> (last visited Aug. 28, 2007).

³⁷ See Broadband Access Promotion, *available at* <http://b2b.vzw.com/broadband/promo.html> (price) (last visited Aug. 28, 2007); *see* http://news.vzw.com/pdf/Verizon_Wireless_Press_Kit.pdf.

No Other Alternatives Discipline the Lower and Higher Speed Fixed

Broadband Markets. The Commission's most recent broadband report confirms that CMRS, satellite and BPL are not meaningful alternatives to wireline facilities-based Internet access for most consumers. According to the Commission itself, over 93% of *all* broadband (60 million of 64 million lines) is provided by a cable company or an incumbent telephone company.³⁸ The much heralded independent alternatives are still tiny and, in many cases, nonexistent in these MSAs.

Broad coverage BPL and WiMax 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, with zero lines in the Minneapolis, Denver and Phoenix MSA. Indeed, there are clearly only a paltry number in the entire state of Washington.³⁹ At present, therefore, BPL is unlikely to impose meaningful competitive discipline in the near future on either Qwest or, in the higher speed fixed market, the cable company.

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. BPL serves just 5,208 lines nationwide. There are no BPL lines in Denver, Phoenix, and Minneapolis-St. Paul and only a few in the entire state of Washington. Fixed wireless supplies only about 360,000 lines nationwide and, as mentioned above, other than in Seattle, Clearwire, a major provider of fixed wireless services, has no coverage in the

³⁸ See *High-Speed Services for Internet Access*, Table 6.

³⁹ See *High-Speed Services for Internet Access*, Table 9.

remaining MSAs.⁴⁰ Mobile wireless not affiliated with an ILEC (e.g., Sprint and T-Mobile) serves fewer than 2 million total broadband lines nationwide.

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*, accounted for only 0.07 percent (just 19,802) of the nearly 30 million high speed lines.⁴¹ 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.⁴²

Resale. Resale of Qwest’s services is similarly limited in its ability to discipline the broadband internet access markets. A reseller remains bound to the ILEC’s choices and lacks the flexibility to independently dimension and control the broadband transmission. EarthLink and Covad, by contrast, are not wedded to the ILEC’s technological choices when the only thing that they get from Qwest is the unbundled copper loop. This independence is the key to providing a true third alternative for consumers and to disciplining the market. As the Commission has recognized, competition over service quality and features is one of the key advantages of UNE-based competition over resale competition.⁴³ Moreover, the availability of the UNE alternative

⁴⁰ See http://www.clearwire.com/maps/seattle_area.htm.

⁴¹ See *High-Speed Services for Internet Access*, Table 5.

⁴² 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.*

⁴³ *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).

disciplines the resale market, placing a check both on resale prices and anticompetitive contracting restrictions.

In sum, without the UNE-based provider, the higher speed broadband market generally has only two facilities-based participants – cable and Qwest. And the lower speed, affordable broadband market would be a Qwest controlled monopoly with the possible exception of Clearwire in Seattle. Indeed, in the vast majority of these MSAs, excluding UNE-based providers, only Qwest provides affordable, lower speed broadband. Accordingly, UNE-based services are the main source of crucial market discipline on Qwest’s broadband services.

b. Bundled Internet Access and Voice Market.

The bundled Internet access and voice market may also constitute a separate relevant product market. The price that a supplier can charge for bundled voice and Internet access is constrained by the prices that prevail for stand-alone Internet access and stand-alone voice services. Given the limited competitive discipline that would be present for Internet access (and likely also for voice service) if forbearance were granted, Qwest would have substantial ability to raise the price of bundled voice and Internet access service above competitive levels alone or in concert with the cable company, depending on the product market.

If Qwest’s Petitions are granted, consumers will thus have no viable alternatives for bundled services other than Qwest 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, Qwest’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.

c. Internet Video Market.

Finally, Qwest's Petitions would effectively foreclose the development of a UNE loop-based Internet video service to compete with cable and fiber-based 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."⁴⁴ The ability to profitably deploy broadband networks rapidly, however, is intrinsically linked to the ability to offer video to consumers because video can be a primary source of the revenue required to offset the high cost of deploying broadband networks. Moreover, pursuant to Section 706's definition of advanced telecommunications capability, the Commission has a direct statutory obligation to promote "video telecommunications using any technology."⁴⁵ Granting Qwest's Petitions would undercut this promising source of video competition before it even develops. As Chairman Martin recently enunciated, "Greater competition in the market for the delivery for multichannel video programming is a primary and long-standing goal

⁴⁴ *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, 22 FCC Rcd 5101 at 5190 (2006) ("Chairman Martin Statement on Cable Franchise Order").

⁴⁵ See Pub. L. 104-104, Title VIII, § 706 (Feb. 8, 1996) (codified at 47 U.S.C. § 157 note).

of federal communications policy . . . Congress recognized that competition between multiple cable systems would be beneficial, [and] would help lower cable rates. . . .”⁴⁶

Contrary to consumers’ interests and federal communications policy, Qwest’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 Qwest’s Petitions would effectively limit the competitive significance of UNEs, ending the independence of the UNE-L virtual pipe over a broad swath of Qwest territory, including parts of Washington, Colorado, Arizona, Minnesota and Wisconsin. The reduction in competition, and the corresponding price increases and dampened innovation, will occur not just in the four major MSAs targeted by Qwest, but also in the surrounding areas. Thus, throughout most of Qwest’s territory, forbearance would create an effective higher-speed duopoly and an effective lower-speed monopoly in these relevant Internet access product markets.

Qwest 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 Qwest, as the monopoly supplier of unbundled loops, exercises market power by raising the input costs of its UNE loop-based competitors.⁴⁷ To remain financially viable, the UNE-based competitors would be forced to pass these cost increases along to retail customers. By allowing Qwest to have greater control over UNE loop rates, forbearance

⁴⁶ See *Chairman Martin Statement on Cable Franchise Order*, 22 FCC Rcd at 5189.

⁴⁷ 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).

would limit the extent to which a UNE-based provider could discipline Qwest's market behavior. In essence, this makes UNE-based entry more akin to resale, which, as the Act itself recognizes, cannot discipline the behavior of facilities-based providers.⁴⁸ Less than two weeks ago, the Commission recognized that the potential for executing a raising rivals' costs strategy is grounds for denial of forbearance.⁴⁹

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."⁵⁰ Indeed, for Qwest, this price squeeze strategy would be rational in the Internet access markets because the high sunk costs of entry (including collocation, DSLAMs, and other equipment)⁵¹ 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 Qwest to sustain above-cost retail prices.

⁴⁸ 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.

⁴⁹ In the Commission's recent *Anchorage II* decision, the Commission denied forbearance from dominant carrier regulation of special access services on the grounds that ACS retained "the incentive and ability to increase its rivals' costs by manipulating the terms and conditions under which it offered and provisioned such services." *Anchorage II*, ¶ 87.

⁵⁰ *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).

⁵¹ Sunk costs are costs that cannot be recovered upon exiting the market. See William J. Baumol, John C. Panzar, and Robert D. Willig, *Contestable Markets and the Theory of Industry Structure*. New York: Harcourt Brace Jovanovich, Inc., at 280 (1982).

The UNE-L rates offered by Qwest following the *Omaha Forbearance Order* bear out this prediction.⁵² Indeed, McLeodUSA has filed a Petition with the FCC requesting that it reinstate Qwest's section 251(c)(3) unbundling obligations in the Omaha MSA, arguing that, in its experience, the Commission's predictive judgment that Qwest would offer wholesale access to dedicated facilities on reasonable terms and conditions once released from the legal mandate of section 251(c) has proven incorrect.⁵³ After obtaining forbearance from the pricing standard, Qwest raised wholesale DS0 prices from \$12.14⁵⁴ to \$15.71⁵⁵ – an increase of almost 30 percent.⁵⁶ As McLeod points out, “there is no cost justification” for this increase, rather “Qwest is merely able to extract a 30% monopoly premium for the standalone DS0 loop since CLECs have no alternative.”⁵⁷ As a result of these and other Qwest price increases and practices discussed further below, McLeod has told the Commission that it has no choice but to exit the Omaha market entirely. Moreover, McLeod “has been unable to entice a buyer for its Omaha assets,”

⁵² *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*, 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).

⁵³ *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Petition for Modification of McLeodUSA Telecommunications Services, Inc., WC Docket No. 04-223 (filed July 23, 2007) (*McLeodUSA Petition*).

⁵⁴ *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) (detailing rates available pursuant to interconnection agreements prior to the *Omaha Forbearance Order*.)

⁵⁵ *See* <http://www.qwest.com/wholesale/downloads/2006/060525/QCommDS0LoopFacilityOFOMSAExA5-11-06.xls> at § 109.2.1.1 (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.)

⁵⁶ *See McLeodUSA Petition* at 8, <http://www.qwest.com/wholesale/clecs/commercialagreements.html>.

⁵⁷ *Id.* at 8-9.

and other new competitors have entirely abandoned plans to enter the Omaha market.⁵⁸

In short, the Commission's decision to grant forbearance from UNE-L regulations in nine Omaha wire centers has undermined competition in the entire Omaha market.

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.⁵⁹ 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."⁶⁰ All of these factors are present in the low and high speed markets for facilities-based Internet access and bundled Internet/voice services.

The resulting loss of competition from forbearance would condemn consumers to higher rates, reduced innovation, and less diverse services. First, as explained above, by

⁵⁸ See *id.* at 18.; See also, *Petitions of Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas*, Comments of Integra Telecom, Inc., WC Docket No. 06-172, at 4-5 (March 5, 2007).

⁵⁹ See *Application of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation; (Transferors) 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 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 . . .").

⁶⁰ *Id.* at 20625 (¶ 173).

eliminating UNE-based competitors such as EarthLink, Qwest will be able to increase retail prices substantially. 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.” Furthermore, “[w]here 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.”⁶¹ This is not a new story, but rather consistent with the Commission’s experience with wireless and long distance – duopoly/oligopoly leads to higher prices.⁶² Second, granting Qwest’s Petitions would likely reduce innovation and service quality. Facing reduced competitive pressure, Qwest and the cable company would have less incentive to improve services and quality in the provision of Internet access and bundled Internet/voice.⁶³ And, finally, consumers in Qwest’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.

⁶¹ *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)).

⁶² See Sixth Annual CMRS Competition Report, Thomas J. Sugrue Opening Remarks (power point slide *Average Price Per Minute for Mobile Telephone Service* showing dramatic drop in prices as wireless industry moved from a duopoly to a fully competitive market), June 20, 2001, available at <http://wireless.fcc.gov/cmrsreports.html>; As RBOCs themselves have recognized, “the addition of even a single competitor to a three-firm environment will produce significant competitive benefits.” See *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). See also Parker, Philip, and Lars-Hendrik Röller, *Collusive Conduct in Duopolies: Multimarket Contact and Cross-Ownership in the Mobile Telephone Industry*, 28:2 *Rand Journal of Economics*: 304-322 (1997) (finding, during the period of CMRS duopoly, that “cellular prices are significantly above competitive levels”); Gagnepain, Philippe and Pedro Pereira, *Entry, Costs Reduction, and Competition in the Portuguese Mobile Telephony Industry*, 25 *International Journal of Industrial Organization*, 461-481 (2007).

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

Excluding competitors from access to cost-based UNE loops in any portion of these four metropolitan MSAs will also likely limit competition in the surrounding areas, including areas beyond the MSA boundaries. Moreover, Qwest's Petitions, unlike those at issue in *Omaha* and *Anchorage*, have strategically selected large MSAs that include high-density and economically critical areas of Qwest's in-region territory. Forbearance, whether granted MSA wide or on a more limited select wire-center basis, would "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. An inability to serve densely populated MSAs denies competitors the economies of scale they require to compete effectively against incumbent suppliers. The Omaha experience bears this out as well. While the Commission granted forbearance only in select wire centers that met certain competitive thresholds, the unavailability of reasonably priced UNE loops in those wire centers has made competitive service and competitive entry impossible.⁶⁴

In the lower speed broadband market, granting these petitions thus leads to a facilities *monopoly* for Qwest (with the possible exception of fixed wireless in Seattle), a result inconsistent with section 10's criteria for forbearance. While there may be two providers in the high speed broadband market (and possibly the lower speed market in Seattle), duopoly does not provide sufficient competition to protect consumers from increased prices and decreased innovation and quality of service, and thus duopoly – particularly when the ILEC remains the dominant voice provider – should never be a basis for forbearance from unbundling. But even if duopoly has been seen by some as sufficient in other markets, it should not be seen as sufficient here.

⁶⁴ See *McLeod Petition* at 8.

The markets targeted by Qwest in these petitions differ from the Omaha and Anchorage MSAs in at least two crucial ways. First, both Omaha and Anchorage were small MSAs that had proven themselves to be effectively natural duopolies – where at most two competitive providers could profitably operate, particularly in the mass markets. In both MSAs, there were only two non-resellers of mass market voice and broadband services competing head to head. By contrast, the MSAs in which Qwest seeks forbearance cover large portions of four states, including demographically diverse areas, which have *attracted and sustained* facilities-based UNE loop competitors that give consumers a real third choice beyond the duopoly of Qwest and the cable company. Blindly following *Omaha* and *Anchorage* here – both of which were plurality decisions that were expressly limited to their facts and did not set forth rules of general applicability⁶⁵ – would ignore these market differences, harming consumers, impeding competition, and disserving the public interest.

Second, because there was no reliance on UNE loops to provide mass-market broadband in Omaha and Anchorage, the effect of section 251 forbearance on broadband Internet access markets, the bundled Internet/voice market, and the Internet video market was not at issue in either proceeding. Not so here. As EarthLink has explained, it relies on UNE-loops to reach nearly 13 million homes nationwide, and 560,000 in these MSAs. And New Edge similarly relies on UNE-L's purchased by CLECs to provide broadband

⁶⁵ *Omaha*, 20 FCC Rcd at 19,424 n.46 (“[O]ur decision today is based on the totality of the record evidence particular to the Omaha MSA. The presence of a subset of similar facts in other markets . . . might result in a different outcome.”); *Id.* n.47 (“[W]e do not craft any new tests for impairment or incumbent LEC status, or any other generally applicable tests we might fashion were a different category of petition before us.”); *Anchorage*, 22 FCC Rcd at 1964 n.28 (“[T]his proceeding considers factors unique to the Anchorage study area. The Commission may reach different conclusions in other markets regarding forbearance from section 251(c)(3) and section 252(d)(1) obligations where the competitive situation differs from the situation in Anchorage.”)

and other services to the enterprise market. Neither Qwest nor the Commission can ignore how forbearance will impact broadband Internet access in these 4 MSAs.

Indeed, as described herein, a broadband duopoly has even worse implications for consumers than duopoly provision of stand alone voice service because broadband service, unlike voice service, has a significant quality dimension. Relying solely on Qwest and, in the higher speed market, the cable company to provide broadband Internet access eliminates marketplace protections for network neutrality, contradicts the Commission's new wires new rules policy, and runs counter to the broadband deployment goals mandated by section 706 and embraced by the Commission.

3. Section 271 Is Not A Sufficient Backstop.

The Section 271 process does 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. Qwest's behavior in Omaha makes it apparent that section 271 alone fails to ensure just and reasonable commercial rates for unbundled copper loops.

Citing a single sentence from the *UNE Remand Order*, ILECs have argued that just and reasonable prices under Section 271 are "market-based" prices.⁶⁶ 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

⁶⁶ *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).

ILEC's reading of Section 271 would allow Qwest to extract any commercial profit EarthLink could anticipate, given its lack of viable alternatives. Moreover, market-based UNE prices would allow Qwest effectively to link EarthLink's prices to Qwest's own retail pricing decisions. Only if Section 271 prices are tied to some reasonable measure of cost can Section 271 function as a regulatory backstop that prevents Qwest from using its control of UNE loop prices to raise UNE providers' costs so that Qwest (and the cable company, if it operates in the market) can raise retail prices to duopoly levels. Under these "fact-specific" circumstances,⁶⁷ 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. "[A] basic principle used to ensure that rates are 'just and reasonable' is that rates are determined on the basis of cost,"⁶⁸ and the Commission must specially justify any departure from cost-based rates.⁶⁹ While the Commission has at times deviated from strict cost-based regulation to adopt price-cap regulation⁷⁰ or surrogates for cost,⁷¹ and has used one carrier's price-regulated rates to benchmark another carrier's generally non-price regulated rates when a carrier's claimed costs exceed prevailing market rates,⁷² the

⁶⁷ *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").

⁶⁸ *MCI Telecommunications Corp. v. FCC*, 675 F.2d 408, 410 (D.C. Cir. 1982) (quoting 47 U.S.C. § 201(b)).

⁶⁹ *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).

⁷⁰ *See National Rural Telecomm. Ass'n v. FCC*, 988 F.2d 174 (D.C. Cir. 1993).

⁷¹ *See AllTel*, 838 F.2d at 551.

⁷² *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).

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 Qwest's so-called "market rates" for loops would reflect costs rather than the exercise of Qwest's market power. The principal competitor on which Qwest 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, Qwest 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, Qwest 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, as the Commission found in the TRRO, 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).⁷³ There is no special access rate that is the analogue of the residential UNE loop rate. 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 deregulation of those rates.⁷⁴ The recent General Accounting Office ("GAO") Report on special access

⁷³ See *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533, 2561-75 (2004) ("TRRO"), *aff'd*, *Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

⁷⁴ 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

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.⁷⁵

Citing the GAO Report, the National Association of Regulatory Utility Commission recently passed a supporting resolution to initiate an investigation of special access pricing.⁷⁶

Again, the Omaha experience is evidence that cannot be ignored here. In *Omaha*, section 271 plainly has not been enough to prevent Qwest, having obtained forbearance from section 251(c), from curtailing access to dedicated facilities. Indeed, as discussed above, McLeodUSA has filed a Petition with the FCC requesting that it reinstate Qwest's section 251(c)(3) unbundling obligations in the Omaha MSA on this basis.⁷⁷

* * *

Because the availability of reasonably-priced UNEs remains necessary to discipline the duopoly provision of facilities-based Internet services, Qwest's Petitions cannot meet the requirements of Section 10(a)(1), (2) & (3), and must be denied.

channel terminations to locations served exclusively by the RBOCs (“*Ad Hoc Comments on Special Access*”).

⁷⁵ 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>.

⁷⁶ 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>.

⁷⁷ See *supra* at 26-27.

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

In the current marketplace, the availability of UNEs, and the ability of ISPs to purchase UNE-based last-mile transmission from CLECs, serve as marketplace protections for network neutrality. By virtue of the Commission’s UNE-L regulations, the market itself works to constrain the ability of Qwest or its cable competitor from blocking, degrading, impairing or discriminating against particular Internet content or applications. If Qwest, for example, were to prefer Google over Yahoo!, a CLEC can 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 Qwest and a cable operator were to block streaming video that competed with their own video products. An ISP can buy a UNE-based last mile transmission service from a CLEC and provide unrestricted access to streaming video. Thus, under the current regulatory regime, the market – rather than government regulatory intervention – can, and will, safeguard consumers’ ability to use the Internet whenever and however they want.

Without UNE-based competition, ILECs 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. UNEs today function as an effective “third pipe” to every home and business, the availability of which helps ensure that the current environment of consumer-driven Internet innovation continues. This effective third pipe provides marketplace protection of net neutrality.

Companies such as EarthLink and its CLEC partners, however, can only provide this check on anticompetitive discrimination if access to copper UNE loops remains available at forward-looking cost-based prices. For CLECs, the eleven years since the 1996 Act have been plagued by regulatory instability in the availability of UNE loops. Despite the persistent uncertainty as to the governing regulatory regime, CLECs nevertheless invested in facilities and brought competitive broadband access to millions of homes and businesses. Today, there is finally some regulatory stability in this market, and CLECs are taking advantage of it – relying on unbundled copper loops to provide the only competitive alternative to the Qwest and cable duopoly capable of checking anticompetitive restrictions on the Internet. The last thing the Commission should do is upset the apple cart, plunging UNE-based providers back into uncertainty. In the end, regulatory instability undermines consumers’ choices for access to the Internet by making it difficult for competitors to invest in the kinds of services that provide alternatives to Qwest and cable company offerings.

Without the availability of unbundled copper loops, the need for net neutrality regulation is all the more compelling. If the Commission were to forbear from copper loop unbundling regulations in these four MSAs, independent competitive offerings from companies like EarthLink – a key structural check on Qwest and the cable company’s anticompetitive and discriminatory practices – will be eliminated.⁷⁸ Without this marketplace protection of net neutrality, the high concentration in broadband market provides both the incentive and ability for Qwest and cable companies to block, impair, degrade or discriminate among Internet content and applications. The Commission will

⁷⁸ See *supra* at Part II.A.2.

only be left with one alternative – direct market interventions to monitor and regulate broadband providers’ conduct.⁷⁹

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*.

Qwest’s petition must be rejected because the forbearance Qwest requests would undermine, rather than promote, investment in an advanced communications infrastructure. Section 706 directs the Commission to encourage the deployment of advanced telecommunications to all Americans.⁸⁰ 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.⁸¹ 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+.

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.⁸² Indeed, then-Commissioner Martin embraced this approach, explaining that “new fiber local loops to a customer premise . . . should be free of “old-style” legacy

⁷⁹ Indeed, any costs associated with maintaining the availability of UNE loops are likely dwarfed by the costs of implementing effective net neutrality regulation.

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

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

⁸² 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).

rules,” which would remain applicable to the copper legacy loops.⁸³ This line, which was advocated by ILECs⁸⁴ and upheld by the D.C. Circuit,⁸⁵ balanced the pro-competitive advantages of unbundling with the “costs” claimed by the ILECs. Indeed, the Commission expressly prohibited ILECs from degrading “old” networks.⁸⁶

Granting Qwest’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 Qwest seeks here. As explained above, granting forbearance in the four MSAs, or even in certain wire centers within the MSAs, 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.

The copper loops themselves are an already existing and valuable national asset. They have been paid for by consumers through their regulated telephone rates over the

⁸³ *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>.

⁸⁴ *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 Qwest FCC submissions advocating this approach).

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

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

last 100 years. Qwest should not be permitted now to foreclose access to this national resource.

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

As discussed above, 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.⁸⁷ New Edge is uniquely suited to provide low cost, highly customized, cross-region networking services to small- and medium-sized businesses. New Edge purchases UNEs directly where it is collocated and, in other locations, 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 – rely on the continued availability of UNE loops and transport at cost-based stable prices.

Granting forbearance from Section 251(c) would inhibit competition and diminish the choices available to these small- and medium-sized businesses. Qwest 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*,

⁸⁷ See *supra* at 8-10.

where the Commission granted forbearance from section 251(c). As McLeod has told the Commission, in Omaha, Qwest has only offered the tariffed discounted rates from its special access tariff if McLeod binds itself to term and volume commitments that would require it to forgo UNE rates where they are still available.⁸⁸ Thus, competitors' only real option is to obtain DS1 and DS3 lines under Qwest's special access tariff at staggering price increases. Qwest's non-recurring charges for high capacity circuits are set at \$626.50 – an increase of about 360 percent, while the price for DS1, for example, has jumped from about \$75 dollars per month to between \$180 and \$202 per month, depending on the wire center Zone.⁸⁹ Price hikes of this magnitude are simply not sustainable for UNE-based providers, who will be driven from these markets. As discussed above, McLeod is being forced out of the Omaha market, stranding its investment, while another carrier, Integra, has canceled its plans to enter the market.

There is every reason to believe that this scenario will simply be replicated if the Commission were to grant Qwest's Petitions in these four MSAs. Competitive carriers throughout the regions at issue have made substantial investments based on the reasonable understanding that they would have access to UNEs at cost-based rates. To grant Qwest's Petitions now would allow Qwest to raise these rivals' costs and drive them from the markets – thereby stranding the investments of these competitors and 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 Qwest for facilities-based IP

⁸⁸ *McLeodUSA Petition* at 5, 11.

⁸⁹ *Id.* at 9-10.

transmission services. 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. Qwest presents no evidence that the cable companies – on whose competitive presence Qwest 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, Qwest 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 increased 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 access to unbundled copper loops and transport at cost-based prices is not available . Because incumbent carriers like Qwest 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 reduce costs, and increase efficiency and productivity.

E. The Commission Should Not Forbear From Dominant Carrier Discontinuance Requirements Under Section 214, Particularly With Respect To Unbundled Loops.

Qwest’s request for forbearance from section 214 dominant discontinuance requirements must be denied. In the *TRO*, the Commission also created specific network

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

Qwest makes no showing of how forbearance from these requirements regarding the retirement of copper loop facilities in any way meets the requirements of Section 10(a). To the contrary, granting Qwest forbearance from Section 214 dominant carrier discontinuance requirements would make it even easier for Qwest to foreclose even the possibility of any UNE-based competition in the Qwest territories. Qwest 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's submissions have documented in the record, ILECs have

⁹⁰ *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 Petition of XO Communications, LLC, Covad Communications Group, Inc., NuVox Communications and Eschelon Telecom, Inc. for a Rulemaking to Amend Certain Part 51 Rules Applicable to Incumbent LEC Retirement of Copper Loops and Copper Subloops*, Petition for Rulemaking, RM-11358 (filed Jan. 18, 2007) ("Petition of XO Communications").

⁹¹ 47 C.F.R. § 51.325(a)(4).

⁹² 47 C.F.R. § 51.333(b).

⁹³ 47 C.F.R. § 51.333(b)-(c).

⁹⁴ 47 C.F.R. 51.333(f).

⁹⁵ *Triennial Review Order*, 18 FCC Rcd at 17148 (¶ 284) (expressly declining to preempt state requirements).

been increasingly retiring the copper loops and replacing them with fiber optic cable.⁹⁶ Indeed, the Commission is currently considering CLEC petitions requesting that it initiate a rulemaking to establish certain safeguards for incumbent copper loop retirement and to strengthen copper loop retirement procedures to protect against discriminatory and anticompetitive modifications to incumbent LEC networks.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.

III. QWEST'S REQUEST FOR UNE FORBEARANCE FAILS TO MEET EVEN THE BASIC REQUIREMENTS OF THE *OMAHA FORBEARANCE ORDER*.

A. Qwest's Request For Forbearance From Dominant Carrier Requirements For Special Access Service Goes Beyond The Relief Granted in *Omaha* and Must Be Denied.

Qwest requests forbearance from dominant carrier regulation in the enterprise market. In the *Omaha Forbearance Order*, the Commission specifically *denied* Qwest's request for forbearance from dominant carrier regulation with respect to its enterprise

⁹⁶ See Letter from Patrick J. 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). While ILECs may claim that retaining the copper loops is costly, the costs of maintaining copper loops is small relative to the competitive benefits that are likely to flow from the continued availability of these loops at cost-based prices.

⁹⁷ See *Policies and Rules Governing Retirement of Copper Loops by Incumbent Local Exchange Carriers*, BridgeCom International *et al.* Petition for Rulemaking and Clarification, RM-11358 (filed Jan. 18, 2007); Petition of XO Communications.

services.⁹⁸ Most recently, in *Anchorage II*, the Commission denied the ILEC's request for forbearance from dominant carrier regulation of special access services. The Commission found that *even if* certain conditions proposed by the ILEC would ensure just and reasonable special access rates, forbearance was not warranted because the ILEC "would still have the incentive and ability to increase its rivals' costs by manipulating the terms and conditions under which it offered and provisioned such services."⁹⁹ As a result, the Commission explained, granting forbearance could lead to increased end-user prices, which would harm consumers, and "would likely reduce competition" – contrary to the requirements of section 10.¹⁰⁰ For the same reasons, the Commission should likewise deny Qwest's request for special access relief in these four MSAs.

In addition, Qwest's request for forbearance from dominant carrier relief with respect to the special access market directly implicates the issues and record being considered by this Commission in its special access docket.¹⁰¹ As discussed above, the record in that proceeding contains substantial evidence that special access rates themselves have been infected by market power because of premature deregulation of those rates.¹⁰² Indeed, the Commission recently reopened the special access proceeding asking parties to refresh the record and seeking updated information on prices, costs, and conditions in the special access market.¹⁰³ After surveying the updated record, the clear weight of the evidence establishes that the BOCs are exploiting their dominance in the

⁹⁸ *Omaha Forbearance Order*, 20 FCC Rcd at 19424, 19438 (¶¶ 50).

⁹⁹ *Anchorage II*, ¶ 87.

¹⁰⁰ *Id.* at ¶¶ 90-91.

¹⁰¹ *See Ad Hoc Comments on Special Access*.

¹⁰² *Id.*

¹⁰³ Public Notice, *Parties Asked To Refresh Record in the Special Access Notice of Proposed Rulemaking*, WC Docket No. 05-25, RM-10593 (July 9, 2007).

provision of special access services to assess unreasonably high rates and that this practice is constrained by neither competition nor government regulation.¹⁰⁴ 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.¹⁰⁵ 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.

B. Qwest Does Not Show That It Is No Longer Preeminent Among Either Residential or Business Voice Customers.

All indications are that Qwest remains the strongest and largest competitor in the Denver, Phoenix, Minneapolis-St. Paul, and Seattle MSAs, and Qwest has failed to demonstrate that this is not the case. While the Commission clearly relied on evidence of Qwest's market share loss in *Omaha*, here, there is simply no meaningful evidence that Qwest's market share has declined in these MSAs. "[A]lthough... market share should not be the 'sole determining factor of whether a firm possesses market power,'" the Commission has found that "such information certainly is significant to a determination of whether a carrier has market power."¹⁰⁶

¹⁰⁴ See, e.g., Reply Comments of Sprint Nextel Corporation, WC Docket No. 05-25, RM-10593 at 6-11 (filed Aug. 10, 2007) (summarizing the evidence in the record and concluding that "on the vast majority of routes, Sprint Nextel and others that depend on special access have no alternatives to the special access offerings of the incumbents").

¹⁰⁵ See *supra* n.73.

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

Qwest presents no evidence that indicates substantial loss of market share in these MSAs. While Qwest cites data from TNS analyses, these figures bear no real relation to Qwest's actual market share because the TNS data does not examine any actual market, but simply combines all possible means of communicating from a home, without actually analyzing whether these connections are substitutes that constrain a small, but significant and non-transitory increase in price. Indeed, if people are buying cell phones to supplement their landline connections (as is overwhelmingly the case) rather than to "cut the cord" on their landline Qwest service, TNS incorrectly translates this into a decrease in Qwest's market share. Similarly, TNS wrongly reports a loss in Qwest's "market share" if people buy stand alone broadband Internet access from a non-Qwest provider without any change to their Qwest landline voice service. Qwest also relies on data of retail residential and business line loss,¹⁰⁷ but this is exactly the type of evidence that the Commission rejected in *Omaha*.¹⁰⁸ Thus, the data provided by Qwest cannot reasonably substitute for the actual definition of a relevant market, determination of the competitors actually participating in that defined market, the market shares of those competitors, and the incentive and ability of those competitors and any other relevant potential competitors to discipline a small, but significant and non-transitory increase in price.

A cornerstone of the Commission's decision to grant relief in the Omaha proceeding was the fact that a lengthy period of sustained competition had eroded

¹⁰⁷ See Brigham Seattle Decl. at ¶ 5, Qwest Denver Petition at Declaration of Robert H. Brigham and David L. Teitzel, ¶ 5 ("Brigham Denver Decl."); Qwest Minneapolis-St.Paul Petition at Declaration of Robert H. Brigham and David L. Teitzel, ¶ 5 ("Brigham Minneapolis Decl."); Qwest Phoenix Petition at Declaration of Robert H. Brigham and David L. Teitzel, ¶ 5 ("Brigham Phoenix Decl.").

¹⁰⁸ Qwest also relies on data of retail residential and business line loss since 2000, see Brigham Seattle Decl. at ¶ 5, Brigham Denver Decl. at ¶ 5; Brigham Minneapolis Decl. at ¶ 5; Brigham Phoenix Decl. at ¶ 5, but this is exactly the type of evidence that the Commission rejected in *Omaha*. See *Omaha Forbearance Order*, 20 FCC Rcd at 19430 (¶ 28 & n.79) [Check pin cite].

Qwest's market share. And Qwest wishes to rely on the Commission's Omaha decision as precedent in requesting forbearance for these MSAs. But since Qwest clearly suffered a loss of market share in Omaha, and that market share loss remains confidential, it is incumbent upon Qwest to put on the record here whether the market share losses in these MSAs are the same, greater or less than in *Omaha*. Qwest should not be permitted to rely selectively on the *Omaha* decision as precedent.

C. Qwest Fails to Present Adequate Data Supporting Its Claims in Any Wire Center.

Qwest fails to provide adequate data at the wire center level, notwithstanding the fact that the Commission in the *Omaha* and *Anchorage Orders* rejected the use of a MSA-wide geographic market, and instead analyzed the impact of forbearance within specific wire centers. 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.¹⁰⁹ The *Anchorage Forbearance 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.¹¹⁰ Yet Qwest has failed to put the necessary data in the record for such an analysis.

While Qwest's Petitions and support declarations contain statements for each MSA such as "[the cable company is] serving a geographic area within the [] MSA encompassing Qwest wire centers that account for over X % of the Qwest retail

¹⁰⁹ *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).

¹¹⁰ *Anchorage* 22 FCC Rcd at 1968-9 (¶ 16).

residential lines and Y % of the Qwest retail business lines in the [] MSA,”¹¹¹ 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, Qwest 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.

Qwest does provide wire center data of CLEC wholesale and UNE purchases – but this is insufficient to meet the test set out in *Omaha* and *ACS*. Without fuller wire center data, Qwest’s petitions do not provide an adequate basis on which to evaluate the extent to which intermodal competitors actually “cover” residences or businesses in each wire center within the MSA. In the absence of such evidence, Qwest certainly cannot carry its minimum burden of proof in any geographic area and establish that competition is sufficiently robust to warrant forbearance. Having provided the bulk of its data only at the MSA level, the evidence submitted by Qwest to support its Petitions is inappropriate and insufficiently granular both as a matter of economics and as a matter of law.¹¹²

In any event, simply looking to see where Qwest has a single intermodal competitor is not the proper way for the Commission to analyze forbearance in this case.

¹¹¹ See, e.g., Brigham Seattle Decl. at ¶ 8.

¹¹² While EarthLink urges the Commission to deny these petitions, we note that any relief granted to Qwest must be limited to those wire centers for which it has provided data. Plainly, Qwest has not met its burden of demonstrating that it meets the forbearance standard for wire centers for which it fails to provide any data.

As discussed above, forbearance would grant Qwest the ability to raise prices to monopoly or duopoly levels by raising the costs of the UNE-based providers in the market – which are the only facilities-based alternative to Qwest in the lower speed Internet access market and to the Qwest-cable company duopoly in the markets for high speed, video-capable Internet access, bundled high speed Internet access and voice, and Internet video services.

D. Qwest Cannot Rely on UNE-Based Competition as a Basis for Forbearance from 251(c)(3).

Qwest appears to include competition from UNE-based providers as part of its justification for forbearance.¹¹³ 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 252.¹¹⁴

Qwest’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 Qwest, such as unbundled loops and transport. 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).”¹¹⁵ As the Commission explained, “[g]ranted Qwest forbearance from the application of section 251(c)(3) on the basis of competition that

¹¹³ See, e.g., Brigham Seattle Decl. at ¶ 25 (citing white pages listing data that includes CLECs utilizing “unbundled loops . . . purchased from Qwest” as a measure of CLEC competition.) At the same time, Qwest seems to have placed all of the UNE lines into the business category, which probably overstates business and understates mass-market. See *id.* ¶ 24.

¹¹⁴ See *Omaha Forbearance Order*, 20 FCC Rcd at 19450 (¶ 68).

¹¹⁵ *Omaha Forbearance Order*, 20 FCC Rcd at 19450 (¶ 68).

exists only due to section 251(c)(3) would undercut the very competition being used to justify the forbearance, and we decline to engage in that type of circular justification.”¹¹⁶

For the same reason, Qwest’s “circular justification” for forbearance must be rejected. Simply put, competition from carriers relying on section 251-priced UNEs cannot be a basis for forbearing from section 251 pricing. Indeed, any competitive pressure on Qwest 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.

CONCLUSION

Accordingly, the Commission must deny Qwest’s requests for forbearance from 251(c)(3) in both the enterprise and the mass markets, and must also deny Qwest’s request for forbearance from Section 214 discontinuance requirements, and 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.

¹¹⁶ *Id.* n.185. The Commission’s *Anchorage Forbearance 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*, 22 FCC Rcd at 1976-7 (¶ 30 & n.92).

Respectfully submitted,



Christopher Putala
Paul Kenefick
EARTHLINK, INC.
575 7th Street NW
Suite 325
Washington, DC 20004
(202) 638-8520 tel

John T. Nakahata
Stephanie Weiner
Justin Dillon
HARRIS, WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street NW
Washington, DC 20036
(202) 730-1300 tel

*Counsel for EarthLink, Inc. and New Edge
Network, Inc.*