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Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
Room TW-325
445 12th Street, S.W.
Washington D.C. 20554

RE: In the Matter of Petition of Verizon for Forbearance in Boston, New York, Philadelphia, Pittsburgh, Providence, Virginia Beach Statistical Areas, WC Docket No. 06-172

Dear Ms. Dortch:

On behalf of One Communications Corp., ("One Communications"), Cbeyond, Inc., and Time Warner Telecom Inc., ("TWTC"), this letter responds to the allegations made by Verizon in two recent *ex parte* letters[1] regarding competition in the six MSAs where it seeks forbearance from UNE obligations.

Faced with extremely low cable market share results yielded by its own E911 data and the cable companies' submissions in this docket[2], Verizon has now attempted to move the goal posts as the forbearance clock winds down. This effort takes several different forms, each of which is easily rejected. *First*, Verizon claims that the FCC never closely examined the retail market share of facilities-based competitors in previous UNE forbearance decisions. Verizon asserts that the FCC was only concerned with "potential" competition from cable companies. *See Verizon Nov. 16 Letter* at 6. This is a complete distortion of the three-pronged test from prior UNE forbearance orders. The test examines (1) the *current* market share of facilities-based providers; (2) the facilities coverage of such providers; and (3) the extent of facilities-based wholesale competition. *Second*, Verizon tries to

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[1] *See* Letter of Evan T. Leo, Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 06-172 (filed Nov. 16, 2007) ("*Verizon Nov. 16 Letter*"); Letter of Joseph Jackson, Associate Director, Federal Regulatory, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 06-172 (filed Nov. 19, 2007) ("*Verizon Nov. 19 Letter*").

[2] *See, e.g,* Letter of Brad E. Mutschelkaus, Counsel, Broadview *et al.*, to Marlene H. Dortch, Secretary, FCC WC Dkt. No. 06-172, at 3-4 (filed Nov. 20, 2007) ("*Broadview et al., Letter*").

artificially diminish its own market share and boost that of competitors by including services such as over-the-top VoIP and wireless into the "denominator" of its newly fashioned market share calculation. The FCC has rejected this approach in previous forbearance orders and must do the same here. *Third*, Verizon again repeats its claim that competitors have provided no evidence of their own facilities deployment. This is simply not the case.

1. Verizon's Attempt To Change The Current Forbearance Standard Should Be Rejected

Verizon's focus on a single prong of the forbearance test (cable network "coverage") to the exclusion of current wholesale or retail competition is a clear departure from past forbearance decisions and must be rejected. The Commission has twice held that forbearance from unbundling obligations is only appropriate where, among other things, there is both sufficient facilities-based retail market share and sufficient facilities coverage by competing providers. Importantly, in both the Omaha and Anchorage Orders, the FCC granted forbearance only where there was extensive *current facilities-based* competition.[3] The FCC determined that competition provided over the incumbent's own facilities was irrelevant. *See Omaha Order* ¶ 60 (limiting forbearance to wire centers in which there is sufficient competition from a competitor that relies on its own loops). Moreover, the FCC clearly examined the extent to which wholesale competition was present in the market at issue. If facilities-based providers have achieved sufficient market share, *only then* did the Commission examine the facilities coverage of such providers. As explained in the Anchorage Order, the test is crystal clear:

> In the following subsections, we: (i) examine the level of retail competition and the role of the wholesale market in the study area to determine *as a threshold matter* whether the Anchorage study area is sufficiently competitive to support forbearance; (ii) examine the extent to which *competitive facilities deployment* is responsible for this level of competition and how the market would be affected in the absence of access to UNEs; and (iii) expressly condition the relief we grant ACS on the requirement that ACS provide continued access to loops at just and reasonable rates, terms, and conditions in the manner set forth below after ACS is no longer required to provide UNEs in the relevant wire centers. (emphasis added).

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[3] *See 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, ¶ 59 (2005) ("*Omaha Order*") ("As explained below, we find that the substantial intermodal competition for telecommunications services provided over Cox's *own extensive facilities* is sufficient to grant Qwest forbearance from the application of its section 251(c)(3) obligations with respect to loops and transport . . ."); *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as amended, for Forbearance from Section 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, Memorandum Opinion and Order, 22 FCC Rcd 1958, ¶ 2 (2007) ("*Anchorage Order*") (granting forbearance in those wire centers "where the level of facilities-based competition by the local cable operator, General Communication Inc. (GCI), ensures that market forces will protect the interests of consumers and that such regulation, therefore, is unnecessary.").

Anchorage Order ¶ 26. This conjunctive test has been employed by the FCC when examining both the Anchorage and Omaha markets. In Anchorage, *"Consistent with prior forbearance proceedings*, [the FCC evaluated] the Petitioner's request for relief by examining the level of competition in the retail market . . ." *Id.* ¶ 27 (emphasis added).[4] The market share test also looks to current retail competition in both the business and the residential markets: the FCC separately examined the extent to which GCI had captured both residential and business customers. *See id.* ¶ 28. Verizon's assertions to the contrary therefore lack any basis in the Commission precedent.

2. Verizon's Data Regarding Its Switched Access Line Declines Are Irrelevant To Whether Forbearance Should Be Granted

Verizon suggests that switched access line declines experienced by ILECs nationwide and by Verizon in the MSAs at issue demonstrate that competitors are successfully taking away local exchange market share from Verizon. *See Verizon Nov. 16 Letter* at 4. But this information is irrelevant for several reasons.

First, millions of consumers have dropped their second switched access lines in favor of a broadband connection, a larger percentage of which are provided by the ILECs. Losses for second lines have nothing to do with competitive pressures and, in fact, mask Verizon's duopoly position in the broadband market.

Second, and relatedly, substantial numbers of switched access lines have been replaced by the ILECs' special access services. These include traditional special access lines to businesses, as well as more consumer oriented DSL and FiOS offerings. Indeed, in its most recent special access reply comments, Verizon touted the large increase in its number of special access lines noting that " the number of special access lines Verizon provided increased by between 16 and 26 percent per year [over the past five years]."[5] The demand shift to special access has nothing to do with competitive pressures in the local exchange market for the same reason that the declining number of telegraphs transmitted by AT&T throughout much of the 20th century had no bearing on whether AT&T faced any long-distance competition during that same period.

Third, the latest statistical report from the FCC shows that both ILECs and CLECs have been losing access lines over at least the past reporting year, demonstrating that these dynamics affect both

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[4] *See also id.* ¶ 9 ("Most notably, we apply the *same analytic framework* to our analysis of the level of competition in the Anchorage study area in this proceeding that the Commission applied to its analysis of competition in the Omaha MSA. In each case, the Commission *begins by examining the level of retail competition to the incumbent LEC* and the role of the wholesale market. The Commission *then evaluates* the extent to which competitive facilities can and will be used to provide competitive services in each wire center service area where relief is sought.") (emphasis added).

[5] *Special Access Rates for Price Cap Local Exchange Carriers*, Reply Comments of Verizon, WC Dkt. No. 05-25, at 1 (filed Aug. 15, 2007).

competitors and incumbents alike. In fact, CLEC lines have been declining at a more rapid rate than the ILECs'. As the Commission's own data, set forth below, demonstrate, CLEC switched business lines have decreased over the last reporting year, while ILEC switched business lines have *actually increased.*[6]

Switched Access Lines	ILEC Total	CLEC Total	ILEC Business	CLEC Business
June 2005	143,757,708	33,975,336	48,442,019	17,637,219
January 2006	143,773,101	31,387,839	49,380,575	17,514,508
June 2006	142,249,668	29,782,241	49,834,733	17,409,291

3. Verizon's Latest Faulty Evidence Regarding Mass Market Shares Does Not Justify Forbearance

No doubt worried that its E911 data and data submitted by cable companies in the record show that facilities-based competitors' market shares in both the business and residential markets are much too low to justify forbearance, Verizon attempts an eleventh hour gambit to redefine the market in ways that have been previously rejected in the UNE forbearance context.[7] Despite its best efforts, Verizon cannot even manage to gerrymander a test that it can pass.

Verizon's "new" calculation of its mass market market-share in the six MSA is faulty for the fundamental reason that Verizon includes competitors that rely on Verizon's own facilities and so-called "edge" competitors that do not offer substitutes for wireline service. For example, Verizon counts CLEC lines that are served using Wholesale Advantage (Verizon's UNE-P replacement product) and resale. As described above, the Commission has focused on the extent to which carriers are providing service over their *own facilities* to determine whether competition is sufficiently robust to justify forbearance. It also appears that because Verizon is counting the number of competitive listings in the E911 database as well as resale and Wholesale Advantage customers, that it may be double counting the number of competitive lines. The FCC has never in past forbearance orders held that over-the-top VoIP services (which by definition are not "facilities-based") are a replacement for traditional wireline services. *Omaha Order* ¶ 72, *Anchorage Order* ¶ 29. Moreover, in many instances, Verizon's own broadband service is used as an input for over-the-top VoIP service. Like over-the-top VoIP, wireless service has also never been found to be a viable replacement for wireline services in the forbearance context. *See id.* In the Omaha and Anchorage orders, the FCC explained that Qwest and ACS did not supply sufficient market evidence regarding over-the-top VoIP or wireless for the FCC to even analyze how these services might affect the forbearance analysis. *See id.*

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[6] *See* Local Telephone Competition, Status as of June 30, 2006, at Table 1 (rel. Jan. 2007).

[7] *See Verizon Nov. 16 Letter at* 7 ("The denominator is the sum of (1) Verizon's retail residential wireline access lines (including MCI), (2) the number of Wholesale Advantage and resale lines Verizon provides to CLECs, (3) the number of competitive residential listings in the E911 database, (4) the number of over-the-top VoIP subscribers, and (5) the number of households (excluding those served by Verizon Wireless) that have cut the cord.").

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Verizon's last minute submission of a third party analyst report on "cutting-the-cord" on a *national basis* and conclusory statements regarding over-the-top VoIP usage does not come close to meeting even the lowest evidentiary standard for forbearance in these six discrete geographic markets. As Broadview *et al.* note, "Verizon has provided absolutely no data showing (or, at a minimum, estimating) wireless usage and substitutability in the six geographic markets for which it is seeking forbearance." *Broadview et al., Letter* at 8. For all these reasons, Verizon's last minute submission of market share data is unreliable, is irrelevant to the forbearance analysis and should be dismissed. However, even if Verizon's hopelessly faulty data is accepted, by Verizon's own admission, its market share **[proprietary begin]**

[proprietary end]. *See Verizon Nov. 16 Letter* at Figure 2.

4. The Information In the Record Regarding The Business Market Clearly Fails Both the Coverage and Market Share Prongs of the Forbearance Test

Crucially, Verizon only makes the most cursory mention of business market data in its most recent *ex partes*. This is no doubt because, as the cable companies recent submissions indicate, they are simply not serving the business market to any significant degree. The limited information that Verizon presents in its latest *ex parte* only underscores this point. Indeed, Verizon boasts that Time Warner Cable ("TWC") provides data services to **[proprietary begin]**

[proprietary end] According to TWC's own data, it has only a **[proprietary begin]** **[proprietary end]** *See Broadview et al.,* Letter at 2. The data which Verizon does not mention is equally damning. For example, Charter has **[proprietary begin]** **[proprietary end]** as compared to over **[proprietary begin]** **[proprietary end.** [8] Comcast apparently provides few if any lines or services to businesses in its markets, although some small businesses may subscribe to its residential CDV product.[9]

In the business market, Verizon is reduced to arguing that even though its business E911 line data may substantially overcount competitive entry, "they still provide an accurate measure of overall competitive activity" because a 300 employee company may only use 24 lines and therefore each line should be given more competitive weight. *See Verizon Nov. 16 Letter* at 11. While it may be true that each business line serves many employees, this does not affect *relative market share* because all competitors serving the business market, as well as Verizon, serve multiple employee businesses with PBX systems containing relatively few access lines per employee.

The data submitted by cable companies also demonstrate that the coverage prong of the forbearance test is not met, especially with respect to the business market. For the coverage test to be

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[8] *See* Letter of K.C. Halm, Counsel, Charter Communications, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 06-172, at 3 (filed Nov. 6, 2007).

[9] *See* Letter of Michael Sloan, Counsel, Comcast, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 06-172, at 3 (filed Nov. 9, 2007) ("*Comcast Letter*").

met, at least one facilities-based retail competitor must be "willing and able within a commercially reasonable time of providing" the full range of services that act as substitutes for the ILEC's to 75 percent of the end user locations in a wire center. *See Omaha Order* ¶ 69. It is clear that many of the cable companies filing in this proceeding simply do not provide a substitute for the "full range of services" offered by Verizon in the business market. For example, Comcast states that, while some small business customers may subscribe to its CDV service, the CDV product only serves as a substitute for DS0 services for mass market customers. *See Comcast Letter* at 3. Comcast does not give any indication as to when even business DS0 services will be available over its network footprint, let alone whether its network is even capable of providing DS1 and DS3 services at this time. *See id.* To the extent that cable companies offer services above a DS0, they are extremely limited, indicating that, regardless of their "network coverage", they cannot provide the full range of services to businesses throughout their coverage area. For example, TWC only provides **[proprietary begin]** **[proprietary end]** circuits throughout the entire New York MSA.[10] This is so despite the fact that TWC allegedly covers more than **[proprietary begin]** **[proprietary end]** of businesses in its territory in the New York MSA. *See* Verizon Nov. 16 Letter at 11. Similarly, even though Cox may provide **[proprietary begin]** **[proprietary end]** of DS1s in Providence, it provides **[proprietary begin]** **[proprietary end]** services.[11] Both the Cox and TWC data imply that they are unable to provide the DS0, DS1, and DS3 services throughout the areas that their networks allegedly "cover."

Cable companies' low DS1 and DS3 figures are unsurprising because, as has been determined by the FCC and stated repeatedly in this docket, cable companies are generally unable to provide substitutes for DS1 and DS3 services using their hybrid-fiber-coax networks.[12] Instead, they must rely on their much less extensive fiber-facilities. In doing so, they face the same deployment barriers as CLECs.

5. Verizon Mischaracterizes Evidence That Has Been Placed On The Record By Traditional CLECs

Verizon has repeatedly and incorrectly asserted that CLECs have failed to place evidence on the record regarding the reach of their own networks. Verizon has said this again, but such repetition does make it so. *First*, Verizon recently stated that XO "is the *only CLEC* thus far to provide the

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[10] *See* Letter of Brian Murray, Counsel, Time Warner Cable, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 06-172, at Exhibit 2 (filed Nov. 5, 2007).

[11] *See* Letter of J.G. Harrington, Counsel, Cox, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 06-172, at 5 (filed Oct. 30, 2007).

[12] *See e.g.*, Opposition of Time Warner Telecom *et al.*, WC Dkt. No. 06-172 at 38-39 (filed Mar. 5, 2007) ("*Opposition*") (*citing Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533, ¶ 193 (2005)); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability,* Report and Order, 18 FCC Rcd 16978, ¶ 52 (2003).

number of buildings it currently serves and is capable of reaching." (emphasis added) *Verizon Nov. 19 Letter* at 2. Verizon asserts that the comments of Time Warner Telecom, Cbeyond, and One Communications "did not contain any of these carriers' own data." *Id.* at 3. Neither of these statements is true. In comments filed with One Communications and Cbeyond,[13] TWTC stated that, "of the **[proprietary begin] [proprietary end]** buildings served on-net by TWTC's fiber in the New York MSA [the only market of the six which TWTC serves], **[proprietary begin] [proprietary end]** is characterized by demand for telecommunications service at the level of a single DS-1." *Opposition* at 20. As TWTC showed, because of high barriers to entry, these **[proprietary begin] [proprietary end]** on-net buildings constitute only **[proprietary begin] [proprietary end]** percent of its total locations that it serves in the New York MSA. *See id.* at 21. Moreover, because One Communications serves nearly all of its customers at the DS-1 level or below, "it is in most cases not economically feasible for One Communications to deploy any loop facilities in the Verizon markets in which it competes, including Philadelphia, Pittsburgh, Providence, New York and Boston." *Id.* As One Communications stated previously in this docket, "In fact, in the six MSAs at issue, One Communications has deployed its own loop facilities to three locations."[14] All of these are in the Boston MSA.

Second, in an attempt to discredit the very GeoResults data which it has relied on previously in this proceeding and in other contexts, Verizon argues that, although XO's reported lit buildings in four MSAs are "only 8 percent higher than what GeoResults reports . . . this is hardly proof that other CLEC data would shake out the same way." *Verizon Nov. 19 Letter* at 5-6. But other CLEC data ignored by Verizon *does* "shake out the same way." In its comments, TWTC *et al.* noted that GeoResults' "estimate **[proprietary begin]**

[proprietary end]." *Opposition*, n.56.

For the foregoing reasons, the FCC must reject Verizon's last ditch effort to alter the well established three-pronged forbearance standard in this proceeding and cloud the record with irrelevant and misleading evidence regarding market share. Verizon has not met its burden, and its petitions must accordingly be rejected.

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[13] Cbeyond does not provide service in any of the markets at issue and, therefore, has no data to provide.

[14] Letter from Jonathan Lechter, Counsel, One Communications, TWTC, and Cbeyond, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 06-172 (filed Apr. 17, 2007), at 2.

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Respectfully submitted,

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