

November 30, 2007

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
Room TW-325  
445 12<sup>th</sup> 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., Cbeyond, Inc., and Time Warner Telecom Inc., this letter responds to Verizon's November 28<sup>th</sup> *ex parte* in the above-referenced proceeding.<sup>1</sup> The additional detail Verizon provides in its latest submission only underscores the fact that much of the competition upon which Verizon relies has no bearing on whether forbearance should be granted.

For reasons explained below, customers served by competitors that rely on Verizon's loop and transport facilities as well as those served by CMRS and over-the-top VoIP service providers should not be included in the retail market share calculation which forms the basis of the first of the three prongs of the UNE forbearance test. As *Alpheus et al.* and *Broadview et al.* demonstrate in their November 29<sup>th</sup> letters, when lines attributed to these categories are removed, Verizon's retail market share far exceeds the threshold necessary to justify forbearance.<sup>2</sup> For this reason, Verizon's petitions must be denied.

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<sup>1</sup> See Letter of Evan T. Leo, Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No 06-172 (filed Nov. 28, 2007) ("*Verizon Letter*").

<sup>2</sup> See Letter of Andrew D. Lipman, Counsel, *Alpheus et al.*, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 06-172 (filed Nov. 29, 2007) ("*Alpheus et al. Letter*"); Letter of Brad E. Mutschelknaus, Counsel to *Broadview et al.*, to Marlene H. Dortch, Secretary, FCC WC Dkt. No. 06-172 (filed Nov. 29, 2007) ("*Broadview et al. Letter*").

As many parties have repeatedly reiterated, the UNE forbearance standard consists of three prongs, each of which measures in different ways the extent of facilities-based wireline competition. Each prong must be satisfied for forbearance to be justified. According to the *Anchorage Order*,

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.

*Anchorage Order* ¶ 26 (emphasis added). The FCC has established that the market share *and* coverage prongs can only be satisfied by competition from competitors that rely on their own loop facilities<sup>3</sup> and that provide substitutes for all of the incumbent's wireline services.<sup>4</sup> The FCC's decision to count only competitors that provide substitutes for the full range of services offered by the incumbent makes good economic sense since customers increasingly demand bundles of service offerings. For example, residential customers increasingly demand that their service providers offer voice, video and data<sup>5</sup> and even the smallest business customers increasingly demand that their service providers offer bundles of voice and data. Indeed, Cavalier states that it relies on Verizon DS0 UNEs to provide voice,

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<sup>3</sup> 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 . . .") (emphasis added); *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.").

<sup>4</sup> See *Omaha Order* ¶ 65 ("In accord with this determination, we take account of telecommunications services provided over intermodal facilities to the extent these services compete as substitutes for Qwest's wireline telecommunications service offerings. Of greatest importance in our analysis is competition from Cox, which uses its cable plant to provide circuit-switched local exchange and exchange access services in this market.").

<sup>5</sup> See *Exclusive Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Report and Order and Further Notice of Proposed Rulemaking. FCC 07-189 ¶ 19 (rel. Nov. 13, 2007).

broadband and video.<sup>6</sup> Carriers that are unable to provide such bundles are increasingly placed at a competitive disadvantage. Therefore, consistent with past precedent, only the market shares of competitors that use their own loops to provide the full range of substitute services offered by ILECs should be deemed relevant to the retail market-share prong of the forbearance analysis. Here, as in Omaha and Anchorage, it is clear that only the cable companies satisfy this definition, at least with respect to the residential market.

Moreover, as many commenters have indicated, Verizon must meet the market-share prong separately for both the residential and business markets. *See, e.g., Broadview et al. Letter* at n.4. For example, in the *Anchorage Order*, the FCC separately examined the extent to which GCI had captured both residential and business customers. *See Anchorage Order* ¶ 28. Verizon's latest faulty submissions only attempt to show "competitor" market share in the residential market and therefore have no bearing on whether forbearance would be appropriate in the business market. Verizon's singular focus is unsurprising as the evidence provided by cable companies indicates that they serve few if any business lines. For example, Comcast apparently provides a minimal number, if any lines or services to businesses in its markets.<sup>7</sup>

No doubt recognizing that relying on cable retail market share alone even in the residential market will lead to a rejection of its petitions with respect to that market, Verizon tries to change the rules of the game at the last minute by counting lines served by competitors that rely on Verizon's loop facilities (either via the lease of UNEs, resale or Verizon's tariffed Wholesale Advantage product). Verizon argues that resale and Wholesale Advantage lines should be counted, because the FCC held in Omaha that, post-forbearance, competitors were "still able to rely on section 251(c)(4) resale and the other markets opening provisions from which" the FCC did not forbear in the Omaha Order. *Verizon Letter* at 2 (citing *Omaha Order* ¶ 62). But Verizon's interpretation of the test is *exactly backwards*. The FCC predicted (wrongly, it turns out), that carriers could rely on resale and Section 271 UNEs in Omaha *only because* the market share and coverage tests had been met through facilities-based wireline competition from Cox.<sup>8</sup> Similarly, UNE lines have no place in the market-share analysis. Without explicitly saying so, Verizon apparently includes Cavalier's lines provided over UNE loops in Virginia Beach and Philadelphia as part of the competitor market share. *See Alpheus et al. Letter* at 3.

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<sup>6</sup> *See Cavalier ex parte* presentation at 3, attached to Letter of Andrew D. Lipman, Counsel, Cavalier, to Marlene H. Dortch, Secretary, FCC WC Dkt. No. 06-172 (filed Nov. 20, 2007).

<sup>7</sup> *See Letter* of Michael C. Sloan, Counsel, Comcast Cable, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 06-172, at 3 (filed Nov. 9, 2007).

<sup>8</sup> *See Omaha Order* ¶ 59 ("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, in light of the continued application in the Omaha MSA of other statutory and regulatory provisions designed to promote the development of competitive markets for telecommunications services and the actual competition these regulations have facilitated.").

Inclusion of these lines is inappropriate as the FCC sensibly rejected the inclusion of retail services provided over UNEs in its prior analysis. *See Omaha Order* ¶ 68.

Because the inclusion of UNE, Wholesale Advantage and resale lines *still* leaves Verizon with an overwhelming market share, Verizon searched for another way to artificially inflate the number of competitively provided lines. Its solution is to argue that wireless and over-the-top VoIP lines should count as part of the “competitive” retail market share. This tired argument has been rejected before and Verizon provides no rationale for why it should not be rejected again. In any case, even if these services were cognizable under the market share analysis, Verizon’s wireless and over-the-top VoIP data are so flawed that they must be disregarded.

The FCC rejected inclusion of over-the-top VoIP and wireless in Omaha and Anchorage, because neither Qwest nor ACS provided evidence that either product could provide a *substitute for the range of services* provided over Verizon’s wireline facilities in the MSA in question. The FCC held that “[b]ecause Qwest has not submitted sufficient data concerning the *full substitutability* of interconnected VoIP and wireless services in its service territory in the Omaha MSA, and because the data submitted do not allow us to further refine our wire center analysis, we do not rely here on intermodal competition from wireless and interconnected VoIP services...” *Omaha Order* ¶ 72 (emphasis added), *see also Anchorage Order* ¶ 29. Of particular importance, the FCC noted that ACS conceded that it could not determine the extent to which wireless substitution was occurring in Anchorage and that it could only provide “general statements by industry analysts projecting wireless competition to grow in the future.” *Anchorage Order* n.91.

For many of the same reasons, over-the-top VoIP lines and wireless lines must not be included in the market-share analysis in this proceeding. *First*, by definition, over-the-top VoIP is not a facilities-based service. Indeed, many over-the-top VoIP customers in these six MSAs continue to rely on Verizon’s DSL service as a necessary input for their service.

*Second*, as the FCC concluded previously, neither wireless nor over-the-top VoIP is capable of providing the full range of substitute services provided by a Verizon DS0 loop. Over-the-top VoIP is only a switched voice service. Moreover, neither Verizon Wireless nor any other wireless carrier provides a residential broadband service that can serve as a viable replacement for wireline broadband (DSL or cable modem). For example, Verizon Wireless’ BroadbandAccess mobile wireless product is available for \$59.99/month, over twice the price of DSL service which provides twice the bandwidth as BroadbandAccess.<sup>9</sup> According to Verizon, BroadbandAccess is targeted to business customers who are willing to pay for expensive (and limited bandwidth) broadband access while they travel for

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<sup>9</sup>*Compare Verizon Wireless, BroadbandAccess*, <http://www.verizonwireless.com/b2c/store/controller?item=planFirst&action=viewPlanList&sortOption=priceSort&typeId=5&subTypeId=13&catId=409> (last visited Nov. 30, 2007) (noting that Broadband Access has download speeds of 600 Kbps – 1.4 Mbps and at average upload speeds of 500 Kbps – 800 Kbps); *with Verizon, Plans and Prices*, <http://www22.verizon.com/content/consumerdsl/plans/all+plans/all+plans.htm> (last visited Nov. 30, 2007) (stating that Verizon’s \$27.99 DSL service has a 3 Mbps download speed and 768 Kbps upload speed).

work.<sup>10</sup> The appeal of mobile broadband is inherently limited. Indeed, analysts believe that most customers will stick with wireline service for broadband because of its inherent advantages over wireless, advantages that they predict will only increase in the future.<sup>11</sup> Verizon's own limited data placed into the record are not to the contrary. In its November 16 *ex parte* Letter, Verizon only submitted data regarding the extent to which customers were "cutting the cord" and replacing their wireline voice service with wireless voice service.<sup>12</sup> Verizon has provided no data regarding the extent to which residential customers are using wireless broadband service.

*Third*, even if over-the-top VoIP and wireless were included in the retail market share analysis, Verizon has not provided market specific data regarding the extent to which these services are actually being used in the six MSAs. Like the information provided by ACS in Anchorage, Verizon's estimates of wireless substitution are based on analyst reports regarding Verizon Wireless' *national* wireless market share (25 percent) and estimates of the extent to which customers were cutting-the-cord *nationwide* (16 percent). In fact, the available evidence indicates that Verizon's wireless market share is, in reality, 50 percent higher in-region than out of region.<sup>13</sup> This is unsurprising as Verizon has greater brand-recognition in-region and is able to offer landline voice, wireless voice, DSL and video

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<sup>10</sup> Verizon Wireless News Release, *Verizon Wireless Expands BroadbandAccess 3G Network to Cover 14 Markets from Coast to Coast* (Sept. 22, 2004), available at <http://news.vzw.com/news/2004/09/pr2004-09-22c.html> ("The expansion of BroadbandAccess enables Verizon Wireless' *business customers* in many markets across the country to remain connected and productive even when out of the office,' said Roger Entner, program director of wireless and mobile services for The Yankee Group.") (emphasis added).

<sup>11</sup> Marguerite Reardon, *Sprint Nextel Prepares to Take On DSL Providers*, c/net News.com, Apr. 6, 2006, [http://www.news.com/Sprint-Nextel-prepares-to-take-on-DSL-providers/2100-1039\\_3-6058607.html](http://www.news.com/Sprint-Nextel-prepares-to-take-on-DSL-providers/2100-1039_3-6058607.html) ("I think wireless broadband as a replacement to regular broadband will only find a niche appeal,' said Charles Golvin, an analyst with Forrester Research. 'In the long term, I see Sprint partnering with cable operators and others to provide broadband service. I don't see them going after the market entirely on their own.' The biggest issue wireless broadband faces is price. Today, Sprint's EV-DO service costs about \$60 per month. Verizon offers its comparable DSL service for \$14.95 per month. Wireless broadband will also be challenged to keep up with developments in fixed-line broadband. Improvements in DSL technology will greatly increase speeds. Verizon is also spending billions of dollars to deploy fiber to homes, which can provide almost limitless amounts of bandwidth. 'The problem is wired broadband will always be cheaper and faster than wireless,' said Julie Ask, an analyst with Jupiter Research.").

<sup>12</sup> See *ex parte* Letter of Evan T. Leo, Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 06-172, 6-7 (filed Nov. 16, 2007) ("*Verizon Nov. 16 Letter*");

<sup>13</sup> See Mark Cooper, CU/CFA, *Remonopolizing Local Telephone Markets: Is Wireless Next?*, at 3 (July 2004) (attached to Response of Plaintiff United States to Public Comment on the Proposed Modified Final Judgment, *United States v. SBC Communications, Inc.* (D.D.C. Oct. 5, 2004) (Case No: 1:00CV02073), at <http://www.usdoj.gov/atr/cases/f205900/205973.htm> ("Market shares for wireless firms affiliated with ILECs are 50 percent higher in the home territory, than outside.").

bundles (FiOS) only in-region. If Verizon Wireless has a higher than 25 percent in-region market share, then in its region Verizon retains a substantially larger percentage of the *allegedly* 16 percent of customers nationwide that have cut-the-cord.

There is also reason to doubt that 16 percent of customers in these markets have actually cut-the-cord. The analyst report submitted by Verizon suggests that the extent to which customers rely on wireless only for voice service varies significantly on a market-by-market basis based on demographic factors.<sup>14</sup> Similarly, there is no reason to believe that, as Verizon alleges, over-the-top VoIP subscribers are distributed on a state-by-state basis in exact proportion to the number of broadband connections in each state. *See Verizon Nov. 16 Letter* at 7. Moreover, it is logical to assume that state-by-state variances in broadband prices and circuit-switched phone service would affect the cross-elasticity of demand between over-the-top VoIP and circuit-switched phone service. Where broadband is relatively cheaper, it is likely that, all other things being equal, there would be more over-the-top VoIP subscribers. This is only one of many reasons why over-the-top VoIP subscribership might vary significantly by market. For these reasons, Verizon's national data regarding wireless substitution and VoIP subscribership are unreliable as applied to the six markets in question.

For the foregoing reasons, Verizon's attempt to conjure up a market-share test that it can finally pass must be rejected. Non-facilities based providers or providers that are unable to offer a substitute for all of the services available via Verizon's facilities cannot be included in the retail market-share calculation prong of the forbearance analysis. The FCC has come to this conclusion before and it must do so again here.

Respectfully submitted,

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/s/

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<sup>14</sup> *See Attachment C, Morgan Stanley, Telecom Services - Cutting the Cord: Wireless Substitution is Accelerating, at 6-9 (Sept. 27, 2007), attached to Verizon November 16 Letter.*