

*Access Point; Affinity; Alpheus; ATX; Bridgecom; Broadview; Cavalier; CIMCO; Close Call; CP Telecom;
Deltacom; DSLnet; Globalcom; Lightyear; Matrix; McLeodUSA; MegaPath; PAETEC; Consolidated; RNK;
segTEL; Talk America; TDS Metrocom; & TelePacific Communications
WC Docket No. 08-24
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EXHIBIT 2

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July 10, 2007

VIA ECFS

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

Re: *Ex Parte*, WC Docket No. 06-172

Dear Ms. Dortch:

The undersigned CLECs submit this letter to supplement the record concerning the harm to competition that would result if Verizon were granted forbearance from its specific obligation to provision basic and DSL qualified copper (*i.e.*, conditioned 2- and 4-wire) loops as § 251(c)(3) unbundled network elements (“copper loop UNEs”) in the six Metropolitan Service Areas at issue in this proceeding. As shown below, granting copper loop UNE forbearance would harm mass market consumers, competition and the public interest in these MSAs.

The Commission cannot rely, as it did in previous forbearance rulings, on a predictive judgment that Verizon will offer commercially reasonable alternatives to copper loop UNEs absent a § 251(c)(3) obligation. Verizon’s conduct to date demonstrates that it has no incentive to offer reasonable terms for access to these facilities. Rather, it likely will demand unreasonably high prices that will result either in substantial price increases for consumers or reduced availability of competitive telecommunications, information, and video services. If the Commission does not deny Verizon’s forbearance request for these reasons, it must, at a minimum, establish the actual rates, terms and conditions for alternatives to copper loop UNEs before granting the § 251(c)(3) relief Verizon seeks.

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I. Copper Loop UNE Forbearance Would Harm, Not Protect, Mass Market Consumers, Competition, and the Public Interest

In its forbearance Petitions,¹ Verizon seeks, among other things, relief from its obligation to offer copper loop UNEs. Currently, however, *it does not offer alternatives to these facilities in its tariffs or otherwise*. Verizon's current commercial offering, Wholesale Advantage, is designed for switched voice service only, and is not capable of delivering to consumers higher-bandwidth services over copper loops. As this letter will show, if Verizon chooses to introduce a "commercial" alternative to copper loop UNEs in the future, it is likely to do so on economically unreasonable terms.

Consequently, forbearance from Verizon's loop unbundling obligation would result either in removing these copper facilities from the wholesale market, or increasing their prices to such a level as to make them effectively unusable. Either outcome would unequivocally harm both the competitors whose services rely on these copper facilities and the subscribers of these services. Consumers would face both reduced access to advanced services, and higher prices for basic telecommunications services. Section 10 of the Act does not permit forbearance in such instances² and therefore, Verizon should not be relieved of its § 251(c)(3) obligation to offer them.

¹ Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Boston Metropolitan Statistical Area; Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the New York Metropolitan Statistical Area; Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Philadelphia Metropolitan Statistical Area; Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Pittsburgh Metropolitan Statistical Area; Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Providence Metropolitan Statistical Area; Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Virginia Beach Metropolitan Statistical Area, WC Doc. No. 06-172 (filed Sept. 6, 2006) (collectively referred to as "Petitions").

² See 47 U.S.C. § 160(a)(2) (if "enforcement of such regulation or provision is [] necessary for the protection of consumers," forbearance is not appropriate); 47 U.S.C. § 160(a)(3) & (b) (the public interest does not support forbearance if doing so would not enhance or promote competition among providers of telecommunications services).

Copper facilities are not just used to provide Plain Old Telephone Service. Competitors are able to provision innovative, reliable and cost-effective DSL and other high-bandwidth services over them. For instance, Cavalier offers digital TV (“IPTV”), high-speed Internet and telephone service to residential subscribers over copper loop UNEs.³ DSLnet also offers an array of DSL services over copper facilities. In addition, Covad utilizes copper loop UNEs to provide a Line Powered Voice (“LPV”) product⁴ over which EarthLink currently offers “DSL & Home Phone” service along with Internet Video service to retail customers.⁵ InfoHighway and XO are other examples of CLECs that use copper loop UNEs in association with Ethernet over copper technologies to provision of high-capacity services to mass market and enterprise customers⁶ at fiber-like speeds of 5-30 Mbps.⁷

The harmful impact on consumers and competition of eliminating access to copper loop UNEs cannot be overstated. For instance, Cavalier offers services over copper loop UNEs to about 75,000 mass market customers in the Philadel-

³ See also Opposition of Cavalier Telephone Subsidiaries to Verizon’s Petitions for Forbearance, WC Doc. No. 06-172 (FCC filed Mar. 5, 2007) (“Cavalier 3/5/07 Opposition”), Declaration of Jim Vermeulen, ¶¶ 2-3.

⁴ This offering provides customers value-added bundles of local and long distance voice and high-speed Internet access with speeds of up to 25 mbps for a single monthly fee. See Comments of Broadview Networks, Inc. *et al.*, WC Doc. No. 06-172, at 74 (FCC filed Mar. 5, 2007) (“Broadview *et al.* 3/5/07 Comments”).

⁵ Opposition of EarthLink, Inc. *et al.*, WC Doc. No. 06-172, at 25-26, 39 (FCC filed Mar. 5, 2007) (“EarthLink *et al.* 3/5/07 Opposition”).

⁶ While this letter focuses on the impact of copper loop UNE forbearance on mass market customers, enterprise customers would be harmed as well since they benefit from these types of services offered over copper UNEs.

⁷ See InfoHighway Communications; Zoom High Speed Internet Access, available at <http://www.infohighway.com/Zoom.html> (“Utilizing innovative Ethernet First Mile Plus (EFM+) technology, InfoHighway is able to extend the reach of its state-of-the-art multi-Gigabit IP network over the existing metro copper infrastructure. ZOOM provides business-grade, dedicated Internet access at fiber-like speeds ranging from 5 Mbps to 30 Mbps, direct to the customer premise, without sacrificing service performance or quality”); see also Broadview *et al.* 3/5/07 Comments, at 75.

phia MSA and about 31,500 mass market customers in the Virginia Beach MSA.⁸ Without access to unbundled copper facilities in these MSAs, Cavalier has emphasized that it would be forced to stop offering services to these customers and would exit these markets.⁹ Covad, DSLnet, EarthLink, InfoHighway, XO, and other competitors that rely on copper loop UNEs in the six MSAs would also be impacted adversely along with their customers. For these reasons, mass market consumers, competition, and the public interest in general would be tremendously harmed if Verizon were relieved of its obligation to offer copper loop UNEs in the six MSAs at issue.

II. The Commission Cannot Rely on a Predictive Judgment that Verizon will Offer Just and Reasonable Commercial Alternatives to Copper Loop UNEs if Verizon is Not Obligated to Offer Them

When the Commission granted § 251(c)(3) UNE forbearance in the *Omaha Order*, it found that competitors could continue to rely upon Section 271(c) rights to obtain access to unbundled loops and transport,¹⁰ and made a “predictive judgment” that, “based on previous experience in the market for wireline local exchange service served by Qwest and in other markets, Qwest will not react to our decision here by curtailing wholesale access to its analog, DS0, DS1 or DS3-capacity facilities.”¹¹ The Commission predicted that “Qwest’s market incentives will prompt it to make its network available – at competitive rates and terms – for use in conjunction with competitors’ own services and facilities.”¹² It further stated that “[w]e will monitor the accuracy of this predic-

⁸ Nationwide Cavalier serves about 444,100 residential with approximately 498,670 lines; and about 125,093 business customers over approximately 1,020,681 lines. See Cavalier 3/5/07 Opposition, at 9. All of these customers could be at risk if Verizon’s forbearance petitions were granted because the core segment of Cavalier’s business would be adversely impacted. *Id.*

⁹ Cavalier 3/5/07 Opposition, at 9, Declaration of Justina Sun, ¶ 7.

¹⁰ *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Doc. 04-223, Memorandum Opinion and Order, 20 FCC Rcd 19415, ¶ 67 (2005) (“*Omaha Order*”) (subsequent history omitted).

¹¹ *Omaha Order*, ¶ 79.

¹² *Id.*, ¶ 83.

tion in the wake of our decision; in the event it proves too optimistic, we will take appropriate action.”¹³

Numerous comments filed thus far in this proceeding demonstrate that the Commission’s predictive judgment was inaccurate in the *Omaha Order*. At least one competitive carrier plans to exit that market due to the unavailability of reasonably-priced UNE loops, and others have cancelled plans to expand there.¹⁴ The Commission must anticipate that the same damage to competition would happen in the six MSAs at issue here if Verizon’s Petitions were granted.¹⁵ Apart from the Omaha experience, however, Verizon’s own conduct, as shown below, demonstrates it has no desire or incentive to offer copper loops at all, let alone make them available at competitive rates and terms, absent a specific regulatory obligation to do so. Moreover, even if Verizon did make a commercial alternative offering available, the rates and terms of the offering would likely be unreasonable and its § 271 obligations would not prevent this from happening. For these reasons, the Commission cannot rely on a predictive judgment that Verizon will

¹³ *Id.*

¹⁴ See Opposition to Verizon’s Petitions filed by ACN *et al.*, WC Doc. No. 06-172, at 48 (FCC filed March 5, 2007) (“ACN *et al.* 3/5/07 Opposition”) (citing Letter from Chris MacFarland, Group Vice President - Chief Technology Officer, McLeodUSA, to Marlene Dortch, Secretary, FCC, WC Docket 05-281 (filed Dec. 15, 2006) (explaining that because forbearance granted by the FCC in the Omaha Market has made it extremely difficult for McLeodUSA to remain in the Omaha market and has severely devalued the investment in its network facilities in the market, McLeodUSA “will either sell or cease its operations in the market, despite its enormous investment in its own network and facilities”)); Comments of Integra Telecom, Inc. WC Doc. No. 06-172 (FCC filed mar. 5, 2007) (“Integra 3/5/07 Comments”), Declaration of Dudley Slater, ¶ 8 (emphasizing that it entirely abandoned its plans to enter the Omaha market as a result of the FCC’s *Omaha Order* and that it was “substantially less attractive economically to enter the Omaha market without access to unbundled network elements at TELRIC rates in the entire Omaha market. Consequently, it “decided that the capital it was prepared to invest to provide service in the Omaha market would be better deployed in other markets.”); see also EarthLink *et al.* 3/5/07 Opposition, at 44-45; Broadview *et al.* 3/5/07 Comments, at 54.

¹⁵ See, e.g., Reply Comments of Opponents filed by ACN *et al.*, WC Doc. No. 06-172, at 10-14 (FCC filed April 18, 2007) (summarizing comments filed by numerous parties on March 5, 2007).

offer commercially reasonable alternatives to copper loop UNEs if it is not compelled by law to offer them.

A. After Repeated Requests, Verizon Has Not Offered any Commercial Wholesale Alternatives to Copper Loop UNEs

As noted above, Verizon today offers no alternative to copper loop UNEs, either under tariff or by contract, that provides the same functionalities as these network elements.¹⁶ The wholesale services that Verizon now offers are limited to voice-grade services that cannot use full bandwidth available on conditioned copper facilities; and DS1 and DS3 digital services that are not suitable, either technically or financially, for mass-market applications, and are not generally available in residential neighborhoods anyway.

Recognizing this, Cavalier requested on September 21, 2006, that Verizon make available proposed commercial wholesale agreements that would be offered to current users of UNEs in the event that Verizon's petitions for forbearance were granted. Verizon responded that "it did not have additional information."¹⁷ On September 29, 2006, Cavalier filed a letter in this proceeding requesting that the Commission require Verizon to provide this information and emphasized its need to access copper loops.¹⁸ Cavalier subsequently noted in its March 5, 2007, comments that "Verizon has advanced no contentions, no evidence, and not even vague reassurances about post forbearance rates, terms and conditions for any potential substitutes for unbundled loops and transport currently provided under § 251(c)."¹⁹ In its April 18, 2007 reply comments, Verizon dismissed Cavalier's request for detailed information and stated that it "will have a continuing incen-

¹⁶ See Cavalier 3/5/07 Opposition, Declaration of Jim Vermeulen, ¶ 12 (concluding that "there is not currently any commercially reasonable offering of wholesale loop facilities, either from Verizon or any other provider, that could serve as a workable substitute for unbundled copper loops" in Philadelphia and Virginia Beach).

¹⁷ See Cavalier 3/5/07 Opposition, at Exhibit C.

¹⁸ See Letter from Patrick Donovan, Counsel for Cavalier Telephone, LLC, Bingham McCutchen, LLP, to Marlene H. Dortch, Secretary, FCC, WC Doc. No. 06-172 (Sep. 29, 2006).

¹⁹ Cavalier 3/5/07 Opposition, at 10.

tive to provide access to loops and transport at commercially negotiated rates in order to keep business on its network.”²⁰

Nine months have passed since Cavalier’s first request and Verizon has yet to provide a response that includes rates, terms and conditions for its commercial wholesale alternatives. If the six MSAs were truly competitive as Verizon claims throughout its Petitions, Verizon would have had an incentive to respond promptly and provide this information when it was first requested. Its ambivalence demonstrates that it does not have the “market incentives ... to make its network available – at competitive rates and terms – for use in conjunction with competitors’ own services and facilities.”²¹ This is especially true for copper loop UNEs, since there are no special access or other tariffed alternatives to them. The mere fact that Verizon does not want to tell the Commission, even under the terms of the Protective Order, what wholesale services it will offer if forbearance is granted should be enough to suggest any such offerings will be unattractive.

B. Even If Verizon Did Offer a Commercial Alternative, It Would Likely Not Include Commercially Reasonable Rates, Terms And Conditions

While Verizon suggests that it would have the incentive to offer commercially reasonable rates and terms, the truth is that Verizon has no such incentive in the absence of its § 251(c)(3) obligations. Even if Verizon chose to offer a post-forbearance contractual replacement for UNE loops, it is unlikely that the terms of such an offering would be comparable to the rates that could be expected to exist in a truly competitive market.²²

Since Verizon has refused to provide a specific proposal outlining its pricing for commercial wholesale alternatives to copper loop UNEs, we must assume Verizon’s commercial pricing will be no lower than the recurring and non-recurring charges Verizon originally proposed to charge for copper loop UNEs in

²⁰ Verizon Reply Comments, WC Doc. 06-172, at n.72 (FCC filed Apr. 18, 2007).

²¹ See *Omaha Order*, ¶ 83.

²² As explained in the Reply Comments of Full Service Network in Opposition to Verizon’s Petition for Forbearance, WC Doc. No. 06-172, at 11 (FCC filed Apr. 18, 2007), this is entirely consistent with the experience of carriers that previously used Verizon’s UNE unbundled switching, and were forced into unreasonable “commercial” agreements (or else out of business) after the Commission eliminated Verizon’s Section 251(c)(3) obligation as to switching.

rate proceedings before various state commissions. For instance, in post *TRO* hot cut proceedings in both Pennsylvania and Delaware, Verizon proposed non-recurring charges between \$167.53 and \$300.40. Although the state commissions never approved these rates, it must be assumed that Verizon still plans to impose these charges if it is freed to do so. We have also assumed that Verizon will seek to impose recurring charge increases for a 2-wire copper loop of \$8.75 in Virginia, \$17.00 in Pennsylvania, and \$10.49 in Delaware. Table 1, below, illustrates the UNE rates in these states versus the commercial agreement rates Verizon will likely, at a minimum, demand. As the table reveals, Verizon's non-recurring rates could easily double or triple from current levels. In addition, we expect Verizon's non-recurring charges for copper loop conditioning, which is required to provision broadband over copper, will be astronomical.

Table 1
Pricing Comparison Existing UNE Rates Versus Commercial (Section 271)

	Existing UNE Rates			<u>Commercial</u> ²³
	<u>Virginia</u>	<u>Pennsylvania</u>	<u>Delaware</u>	
2-Wire DS0 New Loop w/Dispatch				
<u>Non Recur-</u>				
<u>ring</u>				
Service Order	\$10.81	\$0.00	\$2.99	\$14.66-\$23.84
Installation	\$2.68	\$1.44	\$25.11	\$42.85-\$55.61
Premise Visit	\$47.55	\$1.44	\$110.02	\$110.02
Total	\$61.04	\$2.88	\$138.12	\$167.53- \$189.47
Expedite	N/A	N/A	N/A	\$54.51 - \$56.38
<u>Recurring</u>				
UNE Loop	\$10.74	\$6.77	\$10.07	\$19.49
OSS	\$3.83	\$0.00	\$2.76	\$3.93
Total	\$14.57	\$6.77	\$12.83	\$23.32

²³ Non-recurring charges based upon Verizon Delaware filing in Delaware PSC Case 96-324, Phase II on April 27, 2005 and Verizon Pennsylvania filing in PA PUC Case M-0031754 on November 18, 2004.

Table 1
Pricing Comparison Existing UNE Rates Versus Commercial (Section 271)

	Existing UNE Rates			<u>Commercial</u> ²³
	<u>Virginia</u>	<u>Pennsylvania</u>	<u>Delaware</u>	
2-Wire DS0 Hot Cut w/Dispatch - IDLC				
<u>Non Recurring</u>				
Service Order	\$10.81	0.00	N/A	\$14.66 - \$23.84
Installation	\$2.89	\$1.49	\$23.64	\$42.85 - \$55.61
Premise Visit	\$11.74	\$1.49	N/A	\$110.02
Surcharge	N/A	N/A	N/A	\$81.10 - \$110.93
Total	\$25.44	\$2.98	\$23.64	\$248.63- \$300.40
Expedite				\$54.51 - \$56.38
<u>Recurring</u>				
UNE Loop	\$10.74	\$6.77	\$10.07	\$19.49
OSS	\$3.83	\$0.00	\$2.76	\$3.93
Total	\$14.57	\$6.77	\$12.83	\$23.32

Cavalier previously explained that it would have to pass these increased wholesale charges through to its end user customers in the form of higher retail prices²⁴ and that it would not remain competitive at such rate levels. As Cavalier stated, in order to compete, it “must offer products that are comparable in features and quality to those offered by the incumbent provider, Verizon, at a significantly lower price.”²⁵ Cavalier found that even a “modest increase would dramatically impact Cavalier’s ability to compete against Verizon.”²⁶ Verizon’s proposed rate increases, however, are not “modest” – they would average over \$10 per month per customer. Cavalier further emphasized that “its customers would not tolerate a large price increase and [it] would lose so many customer to [its] competitors that would put the viability of [its] business plan in [the Virginia Beach and Philadelphia] markets into serious question.”²⁷ Therefore, “Cavalier has concluded that if

²⁴ See Cavalier 3/5/07 Opposition, Declaration of Justina Sun, ¶ 6 & Declaration of Jim Vermeulen, ¶¶ 9-10.

²⁵ See Cavalier 3/5/07 Opposition, Declaration of Justina Sun, ¶ 3.

²⁶ *Id.*, ¶ 6.

the Commission grants that requested forbearance relief, it will likely sell its assets, or otherwise cease or limit its operation in Philadelphia, Virginia Beach and the surrounding markets in the two MSAs.”²⁸

C. Verizon’s Obligation to Offer Section 271 Network Elements Under the § 201 Just And Reasonable Standard Does Not Ensure That Verizon’s Offerings Will Be “Competitive” or Protect Consumers

In the *TRO*, the Commission held “the requirements of section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under section 251”²⁹ and that these facilities must be “priced on a just, reasonable and not unreasonably discriminatory basis – the standards set forth in sections 201 and 202.”³⁰ This obligation, however, is meaningless if it cannot be enforced, and Verizon has vigorously opposed state commission efforts to examine or prescribe rates for Verizon’s Section 271 offerings, generally in the context of § 252 arbitration or tariff proceedings.³¹

For instance, the Maine Public Utilities Commission (“ME PUC”) ordered Verizon to file a wholesale tariff that included all of Verizon’s wholesale obliga-

²⁷ *Id.*

²⁸ *Id.*, ¶ 7.

²⁹ *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 and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, ¶ 653 (2003) (“*TRO*”), corrected by Errata, 18 FCC Rcd 19020 (2003), *aff’d in part, remanded in part, vacated in part, United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), *cert. denied sub nom. Nat’l Ass’n Regulatory Util. Comm’rs v. United States Telecom Ass’n*, 125 S. Ct. 313 (2004).

³⁰ *TRO*, ¶ 656.

³¹ Verizon argues, *inter alia*, that only the FCC has this authority and in doing so, has avoided state commission review of § 271 obligations in most instances and where it has not, it is aggressively appealing the state commission decisions. See attached Exhibit A for a list of various state commission decisions in the Northeast discussing Section 271 where Verizon has litigated or still litigating this issue.

tions, both those under § 251 as well as those under § 271 of the Act;³² however, the tariff Verizon later proposed did not include rates for § 271 UNEs. Because of this, the ME PUC issued decisions in 2004 and 2005 that generally ordered Verizon to continue providing § 271 UNEs at TELRIC rates as a temporary measure until Verizon filed a tariff proposing rates that the ME PUC determined were just and reasonable.³³ Verizon refused to accept the ME PUC's decisions and appealed them to United States District Court for the District of Maine, claiming that the ME PUC had no authority to set rates for 271 elements and that the ME PUC's decision to require TELRIC rates was preempted.³⁴ Verizon sought a preliminary injunction, but the Court had no qualms denying Verizon's request.³⁵ In a subsequent decision that ruled on cross motions for summary judgment filed by the parties to the proceeding, the Court granted the ME PUC motion and held that the ME PUC could lawfully set rates for § 271 elements and was not preempted from ordering the provision of § 271 elements at TELRIC rates on a temporary basis.³⁶ Unwilling to yield to the Court's decision, Verizon continued its relentless legal challenge. A day after the Court's decision was

³² The ME PUC issued these orders because Verizon had previously promised to make this tariff available in return for the ME PUC's support of Verizon's FCC application to enter the InterLATA long distance market in Maine.

³³ *Verizon-Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21)*, Docket No. 2002-682, Order Part II at 12-15 & 21, 2004 Me. PUC LEXIS 291, at *25-32 & *44-45 (Me. P.U.C. Sep. 3, 2004), Order at 6, 2005 Me. PUC LEXIS 74, at *24 (Me. P.U.C. Mar. 17, 2005), Order at 19-21, 23-24, 30, 33, 38, 40, 43-44, 2005 Me. PUC LEXIS 267, at *46-47, *49-51, *57-58, *72-73, *78-79, *80-81, *90-91, *92-93, *96-97, *103-106 (Me. P.U.C. Sep. 13, 2005); *aff'd*, *Verizon New England Inc. v. Maine Pub. Utils. Comm'n*, 441 F. Supp. 2d 147 (D. Me. July 18, 2006), *appeal pending*, *Verizon New England Inc. v. Maine Pub. Utils. Comm'n*, No. 06-2151, (1st Cir. filed Jul. 19, 2006).

³⁴ In its appeal, Verizon also asserted that the ME PUC erroneously interpreted § 271 checklist item 4 and 5 by requiring Verizon to provide access to line sharing, entrance facilities and dark fiber loops and transport.

³⁵ *See Verizon New England Inc. v. Maine Pub. Utils. Comm'n*, 403 F. Supp. 2d 96, 108 (D. Me. 2005).

³⁶ *See* 441 F. Supp. 2d at 152-153, 158.

issued, Verizon filed its notice of appeal to the United States Court of Appeals to the First Circuit, where the case is currently pending.³⁷

Verizon vigorously disputes state commission authority to establish § 271 rates and contends that special access offerings satisfy its § 271 obligations.³⁸ However, if Verizon's position were adopted, since each of the six MSAs at issue in this proceeding have some form of Phase II special access pricing flexibility, there would be no effective regulation of Verizon's special access rates in these markets if Verizon's forbearance request was granted. This is an outcome that Verizon would far prefer over having its special access rates scrutinized by state commissions and potentially found unjust and unreasonable.³⁹

³⁷ The New Hampshire Public Utilities Commission ("NH PUC") also held in a number of decisions that Verizon must offer certain 271 elements at TELRIC or at the FCC's prescribed transitional rates until such time as new rates are established and approved by the NH PUC. Verizon challenged these decisions and the appeal is now pending before the First Circuit as well. *See Proposed Revisions to Tariff NHPUC No. 84 (Statement of Generally Available Terms and Conditions); Petition for Declaratory Order re Line Sharing*, Docket Nos. DT 03-201 and 04-176 (consolidated), Order No. 24,442, Order Following Brief at 41-50, 2005 N.H. PUC LEXIS 24, at *61-75 (N.H. P.U.C. Mar. 11, 2005) and *Verizon New Hampshire Wire Center Investigation, Verizon New Hampshire Revisions to Tariff 84*, DT 05-083 and DT 06-012 (consolidated), Order No. 24, 598, Order Classifying Wire Centers and Addressing Related Matters at 46, 2006 N.H. PUC LEXIS 23, at *74 (N.H. P.U.C. Mar. 10, 2006) *rev'd in part, Verizon New England, Inc. v. N.H. Pub. Utils. Comm'n*, No. 05-CV-94-PB, 2006 U.S. Dist. LEXIS 59339 (D. N.H. 2006), *appeal pending, New Hampshire Public Utilities Comm'n v. Verizon New England, Inc.*, No. 06-2429 (1st Cir. filed Sep. 21, 2006).

³⁸ *VERIZON-MAINE Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21)*, Docket No. 2002-682, Order at 8 (Me. P.U.C. Oct. 6, 2006) (explaining that Verizon position is that its special access rates were lawfully approved by the FCC and that the FCC has "expressly approved" special access rates as the benchmark for section 271 elements).

³⁹ It warrants mentioning that in the FCC proceeding which is reviewing special access pricing rules (WC Doc. No. 05-25), there is record evidence Verizon and other BOCs are making monopolistic returns on their special access services (which otherwise means their special access rates are not just and reasonable). *Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange*

Moreover, it has become apparent that Verizon is challenging state commission authority because it realizes the Commission has, to date, not shown a willingness to establish just and reasonable rates, terms and conditions for non-251 network elements. For instance, in November of 2005, Momentum Telecom, Inc. f/k/a Momentum Business Solutions, Inc. (“Momentum”) filed a complaint against BellSouth Telecommunications, Inc. (“BellSouth”) asserting that the rates, terms, and conditions under which it offers local switching violates sections 201(b) and 202(a) of the Act, among others.⁴⁰ On March 2, 2006, the day before the Enforcement Bureau’s decision was due,⁴¹ Momentum filed a motion to withdraw its complaint with prejudice ostensibly because the Enforcement Bureau had no desire to issue a decision on rates within the 90 day period in which the Commission must address such complaints.⁴² In Verizon’s eyes, what this means

Carrier Rates for Interstate Special Access Services, WC Docket No. 05-25, RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994, FCC 05-18, ¶ 27 (rel. Jan. 31, 2005). Because of this, Verizon does not want the ME PUC specifically investigating its special access rates and coming to this conclusion. If ME PUC did and since over 15 years have passed since Verizon’s special access rates were subject to rate of return regulation, the ME PUC’s decision would unquestionably provide the substantial evidence the FCC would need to dramatically overhaul its special access pricing rules so that they produce just and reasonable rates. Verizon clearly does not want this to happen as this could cause its year-over-year monopolistic returns to end abruptly.

⁴⁰ *Momentum Telecom, Inc. f/k/a Momentum Business Solutions, Inc., Complainant, v. BellSouth Telecommunications, Inc., Defendant*, File No. EB-05-MD-029, Order of Dismissal, 21 FCC Rcd 2247, DA-06-520 (Enforcement Bureau, Mar. 3, 2006).

⁴¹ The Commission must act on 47 U.S.C. § 271(d)(6) complaints within 90 days. See 47 U.S.C. § 271(d)(6)(B).

⁴² Rate proceeding require far more than 90 days. Indeed, after the Virginia State Corporation Commission declined to act on a Section 252 arbitration and referred the matter to the Commission, the Wireline Competition Bureau found the task of setting rates to be enormously difficult and time consuming. The entire proceeding took over four (4) years from the filing of a petition for arbitration to final resolution of the pricing issues raised. See *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, CC Docket Nos. 00-218, 00-251, Memorandum Opinion and Order, 20 FCC Rcd 5279 (WCB Mar. 11, 2005) (in this decision the Wireline Competition Bureau

– given the lack of competitive and regulatory pressure – is that the § 201 just and reasonable standard can be ignored.

III. Conclusion

For the forgoing reasons, the Commission needs to preserve copper loop UNEs and cannot rely on its predictive judgment that Verizon will at some point offer just and reasonable commercial alternatives to them. The marketplace is just not creating an incentive for Verizon to do this voluntarily at this time. If the Commission does not deny Verizon's forbearance request for these reasons, the Commission needs to specifically establish the rates, terms and conditions associated with accessing commercial alternatives to Verizon's copper loop UNEs (or decide if any commercial proposal Verizon offers is just and reasonable) before relieving Verizon of its § 251(c)(3) obligation to offer them.

Sincerely,

/s/ Philip J. Macres

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Mpower Communications Corp.;
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Penn Telecom, Inc.;
RCN Telecom Services, Inc.;
RNK Inc.;
segTEL, Inc.;
Talk America Holdings, Inc.;
TDS Metrocom, LLC; and
U.S. Telepacific Corp. d/b/a
Telepacific Communications

resolved all the pricing issues in this arbitration; however, the arbitration itself commenced in March 2001, after the Commission granted Worldcom's October 26, 2000 preemption and arbitration petition).

Exhibit A
LIST OF VARIOUS STATE COMMISSION DECISIONS IN THE
NORTHEAST DISCUSSING SECTION 271

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State	Citations to Decisions
District of Columbia	<i>Petition of Verizon Washington, DC Inc. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 TAC-19, Recommended Decision, ¶¶ 265-69 (issued Sep. 6, 2005), Commission Order, ¶¶ 90-92, 2005 D.C. PUC LEXIS 257, at *80-83 (D.C. P.S.C. Dec. 15, 2005)</i>
Delaware	<i>In the Matter of the Application of Verizon Delaware, Inc., for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Delaware Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the Triennial Review Order (filed February 20, 2004), PSC Doc. No. 04-68, Arbitration Award, ¶ 220 (issued Mar. 24, 2006), <i>aff'd</i>, amended or modified in part and remanded for resolution of remaining issues, Commission Order No. 7144 (Del. P.S.C. Mar. 20, 2007)</i>
Maine	<i>Verizon-Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21), Docket No. 2002-682, Order Part II at 12-15 & 21, 2004 Me. PUC LEXIS 291, at *25-32 & *44-45 (Me. P.U.C. Sep. 3, 2004), Order at 6, 2005 Me. PUC LEXIS 74, at *24 (Me. P.U.C. Mar. 17, 2005), Order at 19-21, 23-24, 30, 33, 38, 40, 43-44, 2005 Me. PUC LEXIS 267, at *46-47, *49-51, *57-58, *72-73, *78-79, *80-81, *90-91, *92-93, *96-97, *103-106 (Me. P.U.C. Sep. 13, 2005); <i>aff'd</i>, <i>Verizon New England Inc. v. Maine Pub. Utils. Comm'n</i>, 441 F. Supp. 2d 147 (D. Me. July 18, 2006), <i>appeal pending</i>, <i>Verizon New England Inc. v. Maine Pub. Utils. Comm'n</i>, No. 06-2151, (1st Cir. filed Jul. 19, 2006)</i>
Massachusetts	<p><i>Complaint of CTC Communications Corp. against Verizon Massachusetts regarding Provisioning of Unbundled Network Elements at Tariffed Rates, D.T.E. 04-87-B, Order on Motions for Reconsideration and Relief of Verizon Massachusetts and Order on Cost Recovery for Non-Tariffed Services, 2007 Mass. PUC LEXIS 1, at *13-14 (Mass. D.T.E. Jan. 17, 2007)</i></p> <p><i>Petition of Verizon New England, Inc. d/b/a Verizon Massachusetts for Arbitration of Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Massachusetts Pursuant to Section 252 of the Communications Act of 1934, as amended, and the Triennial Review Order, DTE 04-33, Arbitration Order, at 261-62 (Mass. D.T.E. July 14, 2005)</i></p> <p><i>Proceeding by the Department of Telecommunications and Energy on its own Motion to Implement the Requirements of the Federal Communications Commission's Triennial Review Order Regarding Switching for Mass Market Customers; Investigation by the Department of Telecommunications and Energy on its own motion as to the propriety of the rates and charges set forth in the following tariff: M.D.T.E.</i></p>

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LIST OF VARIOUS STATE COMMISSION DECISIONS IN THE
NORTHEAST DISCUSSING SECTION 271

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State	Citations to Decisions
	<i>No. 17, filed with the Department on June 23, 2004 to become effective on July 23, 2004 by Verizon New England, Inc. d/b/a Verizon Massachusetts, D.T.E. 03-60/04-73, Consolidated Order Dismissing Triennial Review Order Investigation and Vacating Suspension of Tariff M.D.T.E. No. 17, at 72-73 (Mass. D.T.E. Dec. 14, 2004)</i>
Maryland	<i>In the Matter of the Petition of Verizon Maryland Inc. for Consolidated Arbitration of an Amendment to Interconnection Agreements of Various Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers Pursuant to Section 252 of the Telecommunications Act of 1996, Case No. 9023, Order No. 80958 at 101, 2006 Md. PSC LEXIS 15, at *153-54 (Md. P.S.C. July 31, 2006)</i>
New Hampshire	<i>See Proposed Revisions to Tariff NHPUC No. 84 (Statement of Generally Available Terms and Conditions); Petition for Declaratory Order re Line Sharing), Docket Nos. DT 03-201 and 04-176 (consolidated), Order No. 24,442, Order Following Brief at 41-50, 2005 N.H. PUC LEXIS 24, at *61-75 (N.H. P.U.C. Mar. 11, 2005) and Verizon New Hampshire Wire Center Investigation, Verizon New Hampshire Revisions to Tariff 84, DT 05-083 and DT 06-012 (consolidated), Order No. 24, 598, Order Classifying Wire Centers and Addressing Related Matters at 46, 2006 N.H. PUC LEXIS 23, at *74 (N.H. P.U.C. Mar. 10, 2006) rev'd in part, Verizon New England, Inc. v. N.H. Pub. Utils. Comm'n, No. 05-CV-94-PB, 2006 U.S. Dist. LEXIS 59339 (D. N.H. 2006), appeal pending, New Hampshire Public Utilities Comm'n v. Verizon New England, Inc., No. 06-2429 (1st Cir. filed Sep. 21, 2006).</i>
New Jersey	<i>Petition of Verizon New Jersey Inc. for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers in New Jersey Pursuant to Section 252 of the Communications Act Of 1934, as Amended, the Triennial Review Order and the Triennial Review Remand Order, Docket No. TO05050418, Recommended Decision at 85-86 (issued Dec. 1, 2005), Arbitrator's Decision on Exceptions at 25 (issued Jan. 3, 2005), Board Order at 14, 2006 N.J. PUC LEXIS 25, at *35-36 (N.J. B.P.U. Mar. 27, 2006)</i>
Pennsylvania	<i>Petition of Verizon Pennsylvania Inc. and Verizon North Inc. for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Pennsylvania Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the Triennial Review Order, P-00042092, Recommended Decision at 124-25 (issued Aug. 31, 2005), Commission Opinion and Order at 150, 2006 Pa. PUC LEXIS 23, at *208 & *423 (Pa. P.U.C. Feb 21, 2006)</i>
Rhode Island	<i>Petition of Verizon-Rhode Island for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Rhode Island to Implement the Triennial Review Order and</i>

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LIST OF VARIOUS STATE COMMISSION DECISIONS IN THE
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State	Citations to Decisions
	<p><i>Triennial Review Remand Order</i>, Doc. No. 3588, Arbitration Decision, at 6 (issued Nov. 10, 2005), <i>aff'd</i>, Commission Order No. 18522, at 3-7, 2006 R.I. PUC LEXIS 8, at *4-12 (R.I. Feb. 1, 2006)</p> <p><i>Verizon-Rhode Island's Filing of February 18, 2005 to Amend Tariff No. 18</i>, Doc. No. 3662, Order No. 18310, at 9-10, 2005 R.I. PUC LEXIS 26, at *15-16 (R.I. P.U.C. July 28, 2005)</p>
Vermont	<p><i>Petition of Verizon New England, Inc., d/b/a/ Verizon Vermont, for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Vermont, Pursuant to Section 252 of the Communications Act, as amended, and the Triennial Review Order</i>, Docket 6932, at 264, 2006 Vt. PUC LEXIS 27, at *511-512 (VT P.S.B. Feb. 27, 2006)</p>