Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in Cox's Service Territory in the Virginia Beach Metropolitan Statistical Area	)))))))	WC Docket No. 08-49

COMMENTS OF NUVOX COMMUNICATIONS AND XO COMMUNICATIONS, LLC

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May 13, 2008

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NuVox Communications and XO Communications, LLC (hereinafter referred to jointly as "Commenters"), through counsel and pursuant to the Public Notice issued by the Federal Communications Commission ("FCC" or "Commission") on April 15, 2008,[1] hereby provide their comments on the petition filed by the Verizon Telephone Companies ("Verizon") on March 31, 2008 seeking forbearance from certain of the Commission's rules within the portion of Verizon's incumbent local service territory in the Virginia Beach Metropolitan Statistical Area ("MSA") where Cox Communications, Inc. is the incumbent cable operator. Verizon seeks substantial deregulation,[2] pursuant to Section 10 of the Communications Act of 1934, as amended ("Act").[3]

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1 *Pleading Cycle Established for Comments on the Verizon Telephone Companies Petition for Forbearance in the Virginia Beach Metropolitan Statistical Area,* WC Docket No. 08-49, Public Notice, DA 08-878 (rel. Apr. 15, 2008) ("*Second Verizon Virginia Beach Petition*").

2 The Verizon Petition requests that the Commission forbear from applying to Verizon: (1) loop and transport unbundling obligations, under 47 U.S.C. § 251(c) (51 C.F.R. §§ 51.319(a), (b) and (e)); (2) Part 61 dominant carrier tariff requirements (51 C.F.R. §§ 61.32, 61.33, 61.58 and 61.59); (3) Part 61 price cap regulations (51 C.F.R. §§ 61.41-61.49); (4) Computer III requirements, including CEI and ONA requirements; and (4) dominant carrier requirements, arising under Section 214 of the Act and Part 63 of the Commission's rules, addressing the processes for acquiring lines, discontinuing services,

The Commission should summarily deny or dismiss Verizon's petition because the facts presented in the petition are simply a subset of the same facts upon which Verizon relied in support of its prior forbearance petition for the Virginia Beach Metropolitan Statistical Area ("MSA") which was unanimously denied in its entirety just two and a half months before Verizon filed the new Virginia Beach petition.[4] Because it has failed to submit any additional material facts in support of its Rhode Island petition, Verizon has failed to make a *prima facie* case to justify a different outcome than the one the Commission reached in the prior proceeding. Its petition therefore should be dismissed as facially insufficient or summarily denied. If the Commission declines to dismiss or summarily deny the petition, which it should not, it must deny Verizon the forbearance it seeks on the merits because Verizon clearly has not met the statutory prerequisites for forbearance contained in Section 10 of the Act.

I. INTRODUCTION AND SUMMARY

The Act allows the Commission to forbear from applying certain statutory provisions, or certain of its rules and regulations, only if the Commission affirmatively finds that each of the requirements established by Congress is satisfied, for each of the markets within which forbearance is requested. Under Section 10, a grant of forbearance is lawful if the Commission determines that:

> (1) enforcement of such regulation or provision is not necessary to ensure that that charges, practices, classification or regulations... are just, reasonable, and are not unjustly or unreasonably discriminatory;

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assigning or transferring control and acquiring affiliation (51 C.F.R. §§ 63.03, 63.04, and 63.60-63.66).

3 47 U.S.C. § 160.

4 *Petitions of the 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*, Memorandum Opinion and Order, WC Docket No. 06-172, FCC 07-212 (rel. Dec. 5, 2007) ("*6-MSA Order*").

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest.

Importantly, the Commission's public interest analysis also must address whether a grant of forbearance will promote competitive market conditions, or otherwise will enhance competition among providers of telecommunications services. The Act places the full burden of proving that forbearance relief is warranted on the petitioning party, and does not obligate the Commission to consider evidence not pled by the petitioner.

On September 6, 2006, Verizon filed a group of petitions seeking forbearance from certain statutory provisions and Commission rules within six major MSAs. Verizon sought substantial deregulation within the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach MSAs. Specifically, Verizon asked for forbearance from dominant carrier regulation of its mass market switched access services,[5] Section 251(c)(3) loop and transport unbundling obligations, and all *Computer III* obligations (*e.g.,* open network architecture ("ONA") and comparably efficient interconnection ("CEI") requirements) within those markets.[6]

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5 Specifically, Verizon sought forbearance from tariffing requirements, price cap regulation, and dominant carrier requirements concerning the processes for acquiring lines, discontinuing services, assignment or transfers of control, and acquiring affiliations. *See, e.g.,* Letter from Joseph Jackson, Associate Director, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 06-172, at 7 (filed Jun. 13, 2007).

6 *See Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Boston Metropolitan Statistical Area,* WC Docket No. 06-172 (filed Sept. 6, 2006), at 1; *Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the New York Metropolitan Statistical Area,* WC Docket No. 06-172 (filed Sept. 6, 2006), at 1; *Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Philadelphia Metropolitan Statistical Area,* WC Docket No. 06-172 (filed Sept. 6, 2006), at 1; *Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Pittsburgh Metropolitan Statistical Area,* WC Docket No. 06-172 (filed Sept. 6, 2006), at 1; *Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Providence Metropolitan Statistical Area,* WC Docket No. 06-172 (filed Sept. 6, 2006),

In support of its requests, Verizon asserted that the relief it sought was "substantially the same regulatory relief the Commission granted in the *Omaha Forbearance Order*."[7]

At the conclusion of a comprehensive fifteen-month proceeding which involved the active participation of over seventy different entities and resulted in a written record totaling in excess of five hundred separate documents, a unanimous Commission denied Verizon's petitions in their entirety, "find[ing] that the record evidence does not satisfy the section 10 forbearance standard with respect to any of the forbearance Verizon requests."[8] In particular, applying the framework adopted in the *Omaha Forbearance Order*[9] and the *ACS Forbearance Order*,[10] the Commission determined "that forbearance from the application to Verizon of the section 251(c)(3) obligations to provide unbundled access to loops, certain subloops, and transport to competitors in the 6 MSAs does not meet the standards set forth in section 10(a) of the Act."[11] Verizon has sought judicial review of the Commission's forbearance denial in the D.C. Circuit.[12] A briefing schedule has yet to be established in that case.[13]

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at 1; *Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Virginia Beach Metropolitan Statistical Area*, WC Docket No. 06-172 (filed Sept. 6, 2006), at 1 (the "*Verizon 6-MSA Petitions*").

7 *See, e.g., Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Boston Metropolitan Statistical Area*, WC Docket No. 06-172 (filed Sept. 6, 2006), at 1.

8 *6-MSA Order*, at ¶ 1.

9 *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 (2005) ("*Omaha Forbearance Order*"), *aff'd Qwest Corporation v. Federal Communications Commission*, Case No. 05-1450 (D.C. Cir. Mar. 23, 2007).

10 *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, WC Docket No. 05-281 (rel. Jan. 30, 2007) ("*Anchorage Forbearance Order*").

11 *6-MSA Order*, at ¶ 36.

12 *Verizon Telephone Companies v. Federal Communications Commission, et al.*, No. 08-1012 (D.C. Cir. filed Jan. 14, 2008). Numerous parties, including the Commenters, have intervened in that appeal.

On March 31, 2008, less than four months after release of the *6-MSA Order*, Verizon filed a new petition seeking forbearance in the Virginia Beach MSA wherever Cox is the incumbent cable operator (except for Knotts Island in Currituck County, North Carolina).[14] The Commission rules and statutory provisions for which forbearance is being requested in this petition are identical to the rules and provisions from which Verizon sought – and was denied – forbearance in the *6-MSA Proceeding*.[15] Verizon concedes that the eleven counties and independent cities that make up the Cox service territory contain over 90 percent of the population within the Virginia Beach MSA,[16] one of the six MSAs for which forbearance was explicitly denied in the *6-MSA Order*.

Verizon's petition should be dismissed or summarily denied. The petition consists of nothing more than a repackaging of the forbearance request that was rejected by the Commission a mere two months ago. Verizon attempts to mislead the Commission into concluding that this new petition is something other than a reprise of its Virginia Beach MSA petition. It is not. The Commission should not countenance the diversion of its – and numerous interested parties' – limited resources to retry a case that was finally concluded after fifteen months of review and analysis a scant two months ago. This petition amounts to a purposeful effort by Verizon to hold the Commission's agenda hostage until it gets its way and to divert crucial industry resources from the business of competing. The Commission should send

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13 Verizon has indicated that it plans to raise the following issues in its brief: (1) whether the FCC's denial of forbearance violates Sections 10 and 251(d)(2) or is otherwise contrary to law; and (2) whether the order unlawfully departs from the Commission's past precedent without reasoned explanation, or is otherwise arbitrary, capricious, or an abuse of discretion. *See Verizon v. FCC*, No. 08-1012, Statement of Issues To Be Raised (D.C. Cir. filed Feb. 14, 2008).

14 *See Second Verizon Virginia Beach Petition*, at 4-5.

15 *Id.*, at n. 5 ("This is the same relief that Verizon sought in the Six MSA proceeding.").

16 *Id.*, at 4-5.

Verizon a clear signal that it will not reward such tactics by dismissing or summarily rejecting the petition.

At best, Verizon's attempt to get the Commission to reach a different conclusion on the basis of the same facts before it in the *6-MSA Proceeding* constitutes an impermissible request for reconsideration of the *6-MSA Order*. Because that request was not made within the time period prescribed by statute for petitions for reconsideration, the petition must be rejected by the Commission.

In addition to the facial shortcomings of Verizon's petition, each of the forbearance claims raised by Verizon fail on the merits. A grant of forbearance by the Commission is lawful only if Verizon demonstrates that substantial actual facilities-based (*i.e.*, competitive loop-based) competition exists for each relevant product market, and within each relevant geographic market. The data proffered by Verizon does not meet this standard. Moreover, Verizon improperly relies on certain categories of information expressly rejected by the Commission (including purported access line loss data and data regarding wireless usage by Verizon Wireless customers) in attempting to make its case.

With regard to Verizon's request for relief from Part 61 dominant carrier tariffing requirements, dominant carrier requirements under Section 214 of the Act and Part 63 of the Commission's rules, and the Commission's *Computer III* requirements, including CEI and ONA requirements, Verizon's petition lacks *any* analysis of the statutory requirements of Section 10. Significantly, Verizon does not address whether it maintains market power within the geographic market subject to its forbearance request, nor does it discuss supply and demand elasticities, or its costs, resources, structure, and size within that market. Absent any such analysis, a grant of

forbearance by the Commission for those non-Section 251 dominant carrier obligations is not justified.

It is also clear that the Verizon petition is not consistent with the public interest, and therefore does not satisfy the third prong of the Section 10(a) test. Verizon offers no evidence that the regulations at issue are hindering its ability to compete. Rather, competition and consumer interests will continue to benefit from unbundling throughout the Virginia Beach MSA. Indeed, the evidence is compelling that competitive conditions there are such that continued unbundling is required because market forces alone cannot be relied upon to sustain competition. In making its public interest determinations, Section 10(b) requires the Commission to consider whether forbearance will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. The Commission must not only establish that forbearance would not unduly *harm* consumers and competition, it also must find that substantial competitive *benefits* would arise from forbearance. Verizon has failed to establish such benefits would accrue to the public and, accordingly, the Commission should conclude that the Section 10 standard has not been met.

II. THE STANDARD FOR ANALYSIS OF SECTION 10 FORBEARANCE PETITIONS IS WELL-ESTABLISHED

Section 10(a) of the Act allows the Commission to forbear from applying any regulation or any provision of the Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, if the Commission determines that:

> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations . . . are just and reasonable and are not unjustly or unreasonably discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest.[17]

The D.C. Circuit and the Commission have made it clear that all three prongs of the forbearance standard must be met for forbearance to be permissible.[18] The three prongs are conjunctive and the Commission must deny any petition which fails to satisfy any single prong.[19] In making its determinations, the Commission must consider "whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services."[20]

Further, the burden of proof in a forbearance proceeding rests squarely on the party petitioning for relief.[21] The petitioning party must "provide evidence demonstrating with specificity why [it] should receive relief under the applicable substantive standards."[22] Anecdotes cannot sustain a petitioning party's burden of demonstrating that the regulations or provisions in question are unnecessary and forbearance is consistent with the public interest.[23] Instead, a petitioning party must provide detailed, market-specific evidence. Moreover, as the Commission emphasized in the *Omaha Forbearance Order*, it is under no statutory obligation to

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17 47 U.S.C. § 160(a).

18 *See Petition for Forbearance From E911 Accuracy Standards Imposed on Tier III Carriers for Locating Wireless Subscribers Under Rule Section 20.18(H)*, Order, 18 FCC Rcd 24648, 24653 (2003) ("*E911 Forbearance Order*"); *see also Cellular Telecommunications & Internet Ass'n v. FCC,* 330 F.3d 502, 509 (D.C. Cir. 2003).

19 *E911Forbearance Order*,18 FCC Rcd at 24653.

20 47 U.S.C. § 160(b).

21 *E911 Forbearance Order*, 18 FCC Rcd at 24658.

22 *Id.*

23 *Id.*

evaluate a forbearance petition "otherwise than as pled."[24] While general unsupported claims are never sufficient to support forbearance, unsubstantiated claims are especially lacking in situations – like the present case – where the Commission has already found (and been upheld by the courts) that telecommunications carriers are impaired without access to the unbundled loops and dedicated transport from which the petitioning party seeks forbearance.

The Commission has stated repeatedly that each forbearance request "must be judged on its own merits"[25] and that its forbearance determinations do not result in rules of general applicability.[26] Indeed, the Commission has professed its understanding that forbearance proceedings are not the appropriate context in which to craft any new regulatory tests of general applicability. In the *Omaha Forbearance Order*, for instance, the Commission expressly stated:

> We emphasize, however, that in undertaking this analysis, we do not issue any declaratory rulings, promulgate any new rules, or otherwise make any general determinations of the sort we would properly make in a rulemaking proceeding on a fuller record.[27]

Verizon presents its petition as a request for "substantially the same regulatory relief the Commission granted in the *Omaha Forbearance Order*" and contends that it "meets any possible forbearance standard, "including the one recently applied in the *6-MSA Order*."[28] Verizon is incorrect. As shown below, Verizon falls far short of meeting the forbearance requirements developed in the *Omaha Forbearance Order* and the *Anchorage Forbearance Order* and recently applied in the *6-MSA Order*.

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24 *Omaha Forbearance Order*, at n. 161.

25 *Id.*, at ¶ 2.

26 *Id. See also Anchorage Forbearance Order*, at ¶ 11.

27 *Omaha Forbearance Order*, at ¶ 14. *See also Anchorage Forbearance Order*, at ¶ 11.

28 *Second Verizon Virginia Beach Petition*, at 1.

A. Verizon Mischaracterizes The Forbearance Framework Developed And Applied In Previous Commission Orders

The starting point for the Commission's forbearance analysis under the *Omaha Forbearance Order* framework requires the party petitioning for forbearance from Section 251(c)(3) unbundling obligations to show separately for each product market that competitive carriers have constructed competing last-mile facilities and that each of those competitive carriers is willing and able to use its facilities, including its own loop facilities, within a commercially reasonable period of time to provide a full range of services that are substitutes for the incumbent local exchange carrier's ("ILEC's") local service offerings to 75% of the end user locations accessible from a wire center.[29] The Commission determined that such coverage is the minimum needed to ensure that "significant competition from competitors that do not rely heavily on [the ILEC's] wholesale services" is present in a wire center before forbearance is granted.[30] As stated by the Commission in the *Omaha Forbearance Order*:

> We find that forbearing from section 251(c)(3) and the other market-opening provisions of the Act and our regulations where no competitive carrier has constructed substantial competing "last-mile" facilities is not consistent with the public interest and likely would lead to a substantial reduction in the retail competition that today is benefiting customers in the Omaha MSA.[31]

The same requirement was applied in the *Anchorage Forbearance Order*, where the Commission "tailor[ed] ACS's relief to those locations where the record indicates that GCI provides sufficient facilities-based competition to ACS to satisfy the forbearance criteria of

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29 *See Omaha Forbearance Order*, at n. 156, ¶ 69.

30 *Id.*, at ¶ 60. This showing of competitive facilities coverage is a necessary, but not a sufficient, precondition for granting Section 251(c)(3) forbearance. As discussed below, in both the *Omaha Forbearance Order* and the *Anchorage Forbearance Order*, the Commission relied on considerable additional evidence of actual competition in reaching its forbearance determinations.

31 *Id.*

section 10(a)." More specifically, ACS was granted forbearance in "the only wire center service areas where GCI's voice-enabled cable plant covers at least 75% of the end user locations that are accessible from that wire center."[32]

Contrary to Verizon's contention, however, the Section 251(c)(3) forbearance framework developed in the Omaha and Anchorage forbearance proceedings (and applied in the *6-MSA Order*) does not begin and end with a showing that the threshold percentage of "coverage" by competitive facilities in a wire center has been reached by a single competitor.[33] As the Commission stated in the *6-MSA Order*, "we reject Verizon's suggestion that, in prior orders, the Commission granted forbearance based simply on cable coverage . . . Rather, the '[m]ost important[]' factor in the Commission's analysis in the *Qwest Omaha Forbearance Order* was evidence of 'successful' facilities-based competition . . . In measuring such success, the Commission did not look solely at facilities coverage."[34]

Several important criteria in addition to competitive facilities coverage must be met. To ensure that the significant anti-competitive effects of a duopoly market do not occur, it is critical that at least two facilities-based competitors offering substitutable services meet the coverage threshold in a particular wire center. If Verizon faces a single facilities-based competitor in a particular wire center, the wire center is not sufficiently competitive to protect

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32 *Anchorage Forbearance Order*, at ¶ 21.

33 Verizon contends here that the facilities-based "coverage threshold" established in the Omaha and Anchorage forbearance orders constitutes the entirety of the standard for analysis of Section 251(c)(3) forbearance requests established in those proceedings. *See Second Verizon Virginia Beach Petition*, at 5 ("In both Omaha and Anchorage, the dispositive factor in granting forbearance from unbundling obligations was the extent to which cable voice services were available. In both cases, the Commission adopted a 'coverage threshold test' that provided relief in every wire center in which cable voice services could be made available, within a commercially reasonable time, to 75 percent of homes in the wire center.") (citations and emphasis omitted).

34 *6-MSA Order*, at n. 113 (citations omitted).

against the risks of tacit collusion between Verizon and the competitor that would necessarily lead to restricted service choices and higher prices for consumers.

The Commission has consistently endorsed the view – uniformly held by economists[35] – that duopoly markets are insufficiently competitive to protect against anti-competitive conduct. In the *UNE Remand Order*, for example, the Commission concluded that an ILEC/cable duopoly does not constitute sufficient competition to realize the local market-opening goals of the 1996 Telecom Act. The Commission noted:

> We believe that Congress rejected implicitly the argument that the presence of a single competitor, alone, should be dispositive of whether a competitive LEC would be "impaired" within the meaning of section 251(d)(2). For example, although Congress fully expected cable companies to enter the local exchange market using their own facilities, including self-provisioned loops, Congress still contemplated that incumbent LECs would be required to offer unbundled loops to requesting carriers.[36]

The Commission went on to state that a standard that would be satisfied by the existence of a single competitor "would not create competition among multiple providers of local service that would drive down prices to competitive levels" and that "such a standard would more likely create stagnant duopolies comprised of the incumbent LEC and the first new entrant in a particular market."[37] Similarly, in reviewing proposed mergers among competing satellite

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35 *See, e.g.,* Arthur G. Fraas & Douglas F. Greer, *Market Structure and Price Collusion: An Empirical Analysis*, The Journal of Industrial Economics, Vol. 26, No. 1, (Sept. 1977), at 21.

36 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd 3696, 3726 (1999) ("*UNE Remand Order*").

37 *Id.*

television providers, the Commission recognized that a merger resulting in duopoly "create[s] a strong presumption of significant anticompetitive effects."[38]

In the *Omaha Forbearance Order,* the Commission dismissed concerns that forbearing from application of unbundling requirements to Qwest would result in a cable/ILEC duopoly on the ground that "the actual and potential competition from established competitors which can rely on the wholesale access rights and other rights they have under Sections 251(c) and 271 from which we do not forbear, minimizes the risk of duopoly and of coordinated behavior or other anticompetitive conduct" in the Omaha MSA.[39] The Commission predicted that in the absence of a Section 251(c)(3) unbundling obligation, Qwest would have the incentive to make attractive wholesale offerings available to competitors that do not have their own last-mile facilities, thereby avoiding the development of a Qwest/Cox duopoly.[40]

Unfortunately, the Commission's predictive judgment in the *Omaha Forbearance Order* turned out to be incorrect. McLeodUSA Telecommunications Services, Inc. ("McLeodUSA"), a competitor in the Omaha MSA dependent on access to Qwest's last-mile facilities, has petitioned the Commission to reinstate Qwest's Section 251(c)(3) loop and transport unbundling obligations in the Omaha MSA because 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."[41] McLeodUSA detailed it has made repeated good faith attempts to negotiate replacement

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38 *In the Matter of Application of EchoStar Communications Corporation,* Hearing Designation Order, 17 FCC Rcd 20559, 20605 (2002).

39 *Omaha Forbearance Order*, at ¶ 71.

40 *Id.*, at ¶ 67.

41 *In the Matter of 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 Jul. 23, 2007) ("*McLeodUSA Petition*"), at 1.

wholesale arrangements with Qwest and that "Qwest has conclusively refused to negotiate wholesale pricing for voice-grade, DS1, and DS3 loops and transport for the nine affected wire centers."[42]

If Verizon and a single competitor maintain the only last-mile facilities available to serve customers, there is no evidence to support the prediction that, if Section 251(c)(3) forbearance is granted, a wholesale market will develop or that the retail market behavior of the two carriers will deviate at all from the behavior of Qwest and Cox in Omaha. In that circumstance, Section 251(c)(3) forbearance is not warranted.[43]

Finally, and most importantly, as an ILEC seeking Section 251(c)(3) forbearance under the *Omaha Forbearance Order* framework, Verizon must prove that its facilities-based competitors are providing a "full range of services that are substitutes" for Verizon's local service offerings.[44] This requirement is critical to ensure that Verizon faces enough competition to guarantee that the interests of consumers and the goals of the Act are protected.[45] Substitutability cannot be known with certainty, and is best measured by the level of penetration the facilities-based competitive carriers have been able to achieve, for if the competitors' local service offerings are true substitutes for Verizon's services, it can be expected that an appreciable percentage of users who previously obtained local service from Verizon will choose

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42 *Id.*, at 4. At the same time, Cox has not entered the wholesale market, offering a wholesale loop and/or transport product to McLeodUSA and other competitive carriers.

43 Several Commissioners confirmed in the recent *6-MSA Order* that a duopoly environment is not adequate to ensure sustainable competition in the absence of regulation. *See* Statement of Commissioner Michael J. Copps, Concurring, *6-MSA Order* ("The Telecom Act envisioned more than just a cable-telephone duopoly as sufficient competition in the marketplace."); Statement of Commissioner Jonathan S. Adelstein, Concurring, *6-MSA Order* ("Finally, as I've stated before, I continue to believe that the Act contemplates a competitive environment based on more than a simple rivalry – or duopoly – of a wireline and cable provider.").

44 *See, e.g., Omaha Forbearance Order*, at n. 156.

45 *Id.*, at ¶ 61.

to purchase service from the competitors. Conversely, a purported facilities-based competitor that has not been successful in achieving a significant level of market penetration cannot be assumed to be offering the full range of services that are substitutes for Verizon's local service offerings. Of course, market penetration for each facilities-based competitor must be measured on a product market-specific basis. Competitive inroads by a facilities-based competitor in one product market (*e.g.*, mass market) proves nothing regarding the substitutability of the competitor's services in a different product market (*e.g.*, enterprise market).[46]

The Commission has long recognized the importance of market share evidence in conducting its forbearance analyses. In its November 1999 order denying a US West petition seeking forbearance from dominant carrier regulation in the provision of certain special access and high capacity transport services in the Phoenix MSA, the Commission stated: "Although we have found that market share should not be the '*sole* determining factor of whether a firm possesses market power,' such information certainly is significant to a determination of whether a carrier has market power."[47]

The Commission's decision to grant Qwest and ACS partial forbearance from Section 251(c)(3) loop and transport unbundling obligations in the Omaha and Anchorage markets, respectively, was grounded on the significant market share facilities-based competitors

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46 For example, cable television plant using DOCSIS 2.0 technology is incapable of providing high-speed integrated voice and data services ubiquitously to business customers. Because of bandwidth limitations, such technology is only capable of supporting highly sporadic offerings of such services. *See, e.g., Anchorage Forbearance Order*, at n. 137.

47 *Petition of US 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 (1999) (emphasis in original; footnote omitted). The D.C. Circuit endorsed the Commission's focus on market share as a *prima facie* showing of competition, but it nevertheless remanded the proceeding to the Commission on the ground that the Commission "failed to address the evidence other than the market share data offered by US West to show its diminished market power." *AT&T Corp. v. FCC*, 263 F. 3rd 729, 734 (D.C. Cir. 2001).

in each market were able to achieve.[48] In both MSAs, at the time forbearance was granted, the cable company and the ILEC held roughly equal market positions in the MSA as a whole. In the *6-MSA Order*, the Commission explicitly confirmed that in partially granting Qwest's forbearance petition for the Omaha MSA it had "relied on the state of competition *and* the level of competitive facilities deployment . . ."[49] Similarly, the Commission reiterated its decision to grant ACS relief from Section 251(c)(3) unbundling obligations only in those wire centers in the Anchorage study area "where it found that the level of facilities-based competition by GCI ensured that market forces would protect the interests of consumers and that such regulation, therefore, was unnecessary."[50] Verizon is incorrect that in those orders "[t]he Commission did not employ a market-share test for unbundling relief."[51] In both cases, the presence of significant actual facilities-based competition was a prerequisite to the Commission's forbearance determination. The same criterion need be applied here.

B. Verizon Must Show, Separately For Each Product Market, That Each Of The Omaha And Anchorage Order Criteria Are Met

Thus, in order to justify the forbearance from Section 251(c)(3) unbundling obligations requested in the instant petition, Verizon must show separately for each product market that each of the criteria explained above has been met.

1. Verizon Must Show That Sufficient Aggregate Facilities-Based Competition Exists In Each Product Market

The critical first step in the forbearance analysis involves a determination of whether sufficient facilities-based (*i.e.*., competitive loop-based) competition exists at the

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48 *See, e.g., 6-MSA Order*, at n. 113.

49 *Id.*, at ¶ 7 (emphasis supplied).

50 *Id.*, at ¶ 9.

51 *Second Verizon Virginia Beach Petition*, at 10.

aggregate level in the Virginia Beach MSA. Verizon must make a separate showing of actual facilities-based competition in the Virginia Beach MSA (measured as a market penetration percentage) for each of the three product markets at issue: the mass market, the enterprise market, and the broadband market.

Only true facilities-based competition is properly included in this analysis. The Commission has defined a facilities-based competitor for purposes of its Section 251(c)(3) forbearance analysis as a carrier that can successfully provide local exchange and exchange access services without relying on the ILEC's loops or transport.[52] Yet a significant portion of the competitive activity Verizon would have the Commission focus on here is the result of continued use of Verizon local loops (*i.e.,* Verizon wholesale services, unbundled network elements ("UNEs") and special access). Verizon asks the Commission to include in the analysis of market share the number of Verizon residential Wholesale Advantage lines and Verizon resold lines.[53] These lines are not facilities-based since, by definition, they rely on use of Verizon-provided local loops. They therefore must be omitted from the analysis. Verizon would include in its market share calculation the "many CLECs that provide retail competition in the MSA."[54] Yet virtually all of the lines provided by these carriers are provided through use of

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52 *See, e.g., Omaha Forbearance Order*, at ¶ 64. In the *Omaha Forbearance Order*, the Commission specified that Section 251(c)(3) forbearance is warranted "only in locations where Qwest faces sufficient *facilities-based competition* to ensure that the interests of consumers and the goals of the Act are protected under the standards of section 10(a)." *Id.*, at ¶ 61 (emphasis supplied). And in the *Anchorage Forbearance Order*, the Commission limited the grant to ACS of relief from Section 251(c)(3) unbundling obligations to those "portions of its service territory . . . where a facilities-based competitor has substantially built out its network." *Anchorage Forbearance Order*, at ¶ 1.

53 *Second Verizon Virginia Beach Petition*, at 13.

54 *Id.*, at 27.

special access services or UNEs obtained from Verizon.[55] These lines also therefore must be omitted from the market share calculation. Verizon's failure to limit its market penetration showing to facilities-based (*i.e.*, competitive loop-based) competitive activity is a meager attempt to end-run the Commission's well-established forbearance requirements that should not be countenanced by the Commission.

Verizon also improperly attempts to include cut-the-cord wireless lines held by Verizon Wireless customers as competitive lines for purposes of determining competitive market penetration in the Virginia Beach MSA. Verizon acknowledges, however, that in the *6-MSA Order* the Commission explicitly rejected Verizon's bid to include Verizon Wireless lines on the competitive side of the ledger.[56] Indeed, the Commission's position on this issue is well-established. As noted in the *6-MSA Order,* attributing Verizon Wireless' share of cut-the-cord wireless lines to Verizon "is consistent with [the Commission's] methodology in prior orders" and "is warranted because, as the Commission repeatedly has found, 'a wireline-affiliated [wireless] carrier would have an incentive to protect its wireline customer base from intermodal competition.'"[57]

Verizon's attempt to count Verizon Wireless lines on the competitive side of the ledger constitutes an impermissible bid to change the test applied by the Commission in its prior forbearance orders, including the *6-MSA Order*. Verizon's plea that the Commission consider

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55 In the *6-MSA Order*, the Commission noted that "the evidence shows . . . that in serving mass market customers many [ ] intramodal competitors rely on access to Verizon's last-mile facilities, including UNEs, and Verizon's other wholesale services in all 6 MSAs." *6-MSA Order*, at ¶ 23 (footnote omitted).

56 *Second Verizon Virginia Beach Petition*, at 15.

57 *6-MSA Order*, at Appendix B, n. 6, quoting *Applications of Nextel Communications, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations,* WT Docket No. 05-63, Memorandum Opinion and Order, 20 FCC Rcd 13967, 14018 (2005).

cut-the-cord wireless "competition" amounts to a request for reconsideration of the *6-MSA Order*. Verizon unquestionably had the right to petition the Commission to reconsider its decision. Under the express terms of the Act and the Commission's rules, however, Verizon was obligated to file its petition for reconsideration "within thirty days from the date upon which public notice is given of the order, decision, report or action complained of."[58] That statutorily-prescribed thirty-day window closed well before Verizon filed its second Virginia Beach forbearance petition. The Commission may only extend or waive the statutory thirty-day filing period in "extraordinary circumstances."[59] Verizon did not claim extraordinary circumstances and, indeed, no plausible case can be made that extraordinary circumstances exist here.[60] Thus, Verizon's effort to include cut-the-cord lines in the competitive market share analysis for the Virginia Beach MSA must be rejected as an untimely petition for reconsideration of the *6-MSA Order*.[61]

Moreover, there is legitimate grounds to exclude *all* wireless lines from the calculation of competitive market share in the Virginia Beach MSA. As noted in Section II.A, *supra*, Verizon must produce evidence of sufficient facilities-based competition from

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58 47 U.S.C. § 405. *See also* 47 C.F.R. § 1.106(f).

59 *Gardner v. FCC*, 530 F.2d 1086, 1091 (D.C. Cir. 1976). *See also Reuters Limited v. FCC*, 781 F.2d 946 (D.C. Cir. 1986).

60 Rejection of Verizon's argument would not preclude Verizon from pursuing its case that the Commission's forbearance test is improper and should be modified. As previously noted, Verizon has filed a petition for review of the *6-MSA Order* in the D.C. Circuit. Although briefing has yet to occur in that appeal, Verizon has indicated that it intends to argue that the Commission erred in its application of the Section 10 standard to the facts in the six MSAs at issue, including the Virginia Beach MSA.

61 Even if Verizon had filed a timely petition for reconsideration, that petition would warrant dismissal. As noted herein, Verizon is seeking judicial review of the *6-MSA Order* in the D.C. Circuit. It is well established that a party may not simultaneously seek both agency reconsideration and judicial review of the same agency order. *See, e.g., Wade v. FCC*, 986 F.2d 1433 (D.C. Cir. 1993). *See also City of New Orleans v. SEC*, 137 F.3d 638 , 639 (D.C. Cir. 1998).

competitors providing a "full range of services that are substitutes" for Verizon's local service offerings.[62] Services that are not actual substitutes for Verizon's wireline local exchange services are not properly included in the competitive analysis. In a new survey conducted for Verizon, it was found that "an overwhelming majority [of American consumers] – including those who have a cell phone – [ ] plan to keep and continue using their landline home phone indefinitely."[63] A whopping eighty-three percent of survey respondents intend to continue using their wireline service for the foreseeable future.[64] The overwhelming reasons given for the plan to retain wireline service were the reliability and safety of wireline versus wireless service.[65] Clearly, according to Verizon's own survey, American consumers today do not consider wireless service to provide the reliability or safety that would make it a true substitute for wireline voice service. Thus, wireless lines should be completely excluded from the Commission's competitive analysis of the Virginia Beach MSA.

Importantly, as noted above, the calculation of aggregate facilities-based competition must be performed separately for each relevant product market. Since there are three distinct product markets at issue here – the mass market, the enterprise market, and the broadband market – there must be three separate market share calculations. Moreover, each product market-specific market share computation can only include those forms of competitive activity that are actually occurring in that product market. For example, it would not be appropriate to include non-Verizon Wireless cut-the-cord wireless lines in the calculation of

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62 *See* p. 14, *supra*, quoting *Omaha Forbearance Order*, at n. 156.

63 News Release, New Survey Shows 83 Percent of Consumers Continue to Rely on Landline Voice Service for its Quality, Safety Features (Mar. 27, 2008), at 1, available at http://newscenter.verizon.com/press-releases/verizon/2008/new-survey-shows-83-percent-of.html.

64 *Id.*

65 *Id.* ("Ninety-four percent of the respondents cited reliability and 91 percent cited safety as the key factors for retaining landline service.").

competitive market share in the enterprise market (assuming the Commission continues to include cut-the-cord wireless lines at all) since, as Verizon itself acknowledges, cut-the-cord wireless services are not a substitute for wireline services provided by Verizon for enterprise customers.[66]

2. For Each Product Market In Which The Aggregate Market Share Threshold Is Met, A More Granular Analysis Of Facilities Coverage and Market Penetration Must Occur

If, after conducting the analysis described in Section II.B.1, it is determined that the aggregate competitive market share in any particular product market does not meet the threshold established by the Commission in its prior forbearance orders,[67] the inquiry must stop and the request for forbearance must be rejected. This is what occurred in the *6-MSA Order*, where the Commission denied Verizon's requests for forbearance from Section 251(c)(3) UNE obligations because the evidence "demonstrate[d] that Verizon is not subject to a sufficient level of facilities-based competition in the 6 MSAs to grant relief under the Commission's *Qwest Omaha* and *ACS UNE* precedent."[68]

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66 In its petition, Verizon does not include mobile wireless services as a source of competition in the enterprise market. *See Second Verizon Virginia Beach Petition*, at 26-31. This position is consistent with recent filings of the United States Department of Defense and all other Federal Executive Agencies ("DOD/FEA") in proceedings before the New York State Public Service Commission and the Virginia State Corporation Commission. These filings unequivocally confirm that wireless is not replacing wireline services for business users. *See Tariff Filing of Verizon New York to Implement Pricing Flexibility for Non-Basic Services*, N.Y. Pub. Serv. Comm'n, Case No. 06-C-0897, Initial Comments of the United States Department of Defense and All Other Federal Executive Agencies (filed Oct. 22, 2007), at 13; *see also Application of Verizon Virginia Inc. and Verizon South for a Determination that Retail Services Are Competitive and Deregulating and Detariffing of the Same*, Virginia State Corp. Comm'n, Case No. PUC-2007-00008, Post-Hearing Brief of the United States Department of Defense and All Other Federal Executive Agencies (filed Sept. 14, 2007).

67 In both the *Omaha Forbearance Order* and the *Anchorage Forbearance Order*, the Commission found that the competitive inroads achieved by facilities-based competitors had resulted in aggregate market share declines for the incumbent that placed the incumbent at a roughly equal market position vis-a-vis its competitors.

68 *6-MSA Order*, at ¶ 36.

Assuming the aggregate competitive market penetration threshold is met in a particular product market, however, a more granular analysis must be undertaken to determine whether there is sufficient competition to warrant forbearance. First, for each product market, there must be a determination of competitors' facilities-based (*i.e.*, competitive loop-based) coverage by wire center.[69] A wire center-specific assessment of competitors' last-mile facilities must be made to determine which (if any) wire centers meet the 75% coverage threshold first established in the *Omaha Forbearance Order*.[70] In conducting this evaluation, only those competitive facilities that can be used to provide substitutable services to customers in the product market being analyzed within a commercially reasonable period of time may be considered. Finally, for each wire center that meets the product market-specific coverage threshold, the level of actual facilities-based competition in that wire center must be considered. The Commission has consistently held, beginning with the *Omaha Forbearance Order*, that forbearance from Section 251(c)(3) unbundling obligations is only justified in those wire centers where a sufficient level of actual facilities-based competition exists.[71]

Through consistent application of the multi-pronged framework discussed herein the Commission can ensure that forbearance is granted only in those circumstances where

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69 Verizon urges the Commission to analyze competitive facilities coverage on a rate center basis rather than a wire center basis. *See Second Verizon Virginia Beach Petition*, at 7-9. The Commenters submit that while use of rate centers (rather than wire centers) in the competitive analysis may be appropriate in certain circumstances, Verizon is asking the Commission to change the test that has been applied consistently in past forbearance orders. *See Omaha Forbearance Order*, at ¶¶ 66, 69; *Anchorage Forbearance Order*, at ¶ 14; *6-MSA Order*, at ¶ 36. The Commission should not do so without first carefully considering all of the potential ramifications of such a change.

70 *See Omaha Forbearance Order*, at ¶ 62.

71 *Id.,* at ¶ 64 ("[W]e conclude that sufficient facilities-based competition for local exchange and exchange access services exists in *certain of Qwest's Omaha MSA wire center service areas* to justify forbearance relief for several reasons. Most importantly, we find that Cox has been successfully providing local exchange and exchange access services in these wire center service areas without relying on Qwest's loops or transport.") (footnote omitted, emphasis supplied).

continued regulation is not necessary to ensure that the incumbent's "charges, practices, classifications, or regulations . . . are just and reasonable and are not unjustly or unreasonably discriminatory."[72]

III. VERIZON'S PETITION SHOULD BE DISMISSED BECAUSE IT IMPROPERLY SEEKS A DIFFERENT OUTCOME ON THE BASIS OF THE SAME FACTS BEFORE THE COMMISSION IN THE 6-MSA PROCEEDING

Verizon is seeking forbearance from the identical rules and statutory provisions for which it sought forbearance in the first Virginia Beach MSA petition. That petition was soundly rejected by the Commission last December. Verizon contends, however, that competition from cable, traditional CLECs (including those that rely on Verizon's Wholesale Advantage service and Section 251(c)(4) resale), and cut-the-cord wireless competition (including "competition" from Verizon Wireless subscribers) demonstrate that the forbearance standard applied by the Commission in the *6-MSA Order* "unquestionably is satisfied in cox's service territory in the Virginia Beach MSA."[73] What Verizon fails to acknowledge is that the competitive data upon which it relies here was before the Commission in the prior proceeding. Verizon has merely repackaged that data in an effort to gain another bite at the apple.

Verizon highlights the competitive inroads cable telephony provider Cox purportedly has made in the residential and enterprise markets.[74] Yet Verizon fails to admit that the record in the prior proceeding – where its forbearance request was denied – contained substantially identical data regarding Cox's penetration in the same geographic area. Indeed, in

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72 47 U.S.C. § 160(a)(1).

73 *Second Verizon Virginia Beach Petition*, at 10.

74 *Id.*, at 2 ("Cox has been competing aggressively in Virginia Beach for all types of customers and has achieved significant success.").

addition to the Cox market penetration data submitted by Verizon midway through that docket,[75] Cox itself submitted more reliable, up-to-date market penetration data just weeks before the Commission's decision in December 2007.[76] The Commission relied in large part on that data in concluding that "competition from cable operators . . . does not present a sufficient basis for relief."[77]

The same conclusion holds true for the remainder of the information Verizon would have the Commission consider in the instant petition. The data regarding cut-the-cord wireless and CLEC competition is, at best, a few months more recent than the data before the Commission in the *6-MSA Proceeding*. Indeed, just four days before Commission adoption of the *6-MSA Order*, Verizon provided the Commission with charts containing up-to-date data purporting to show mass market cut-the-cord wireless, traditional CLEC, and cable telephony penetration in the Virginia Beach MSA.[78]

Verizon likely will contend that the data before the Commission in the *6-MSA Proceeding* was for a different geographic market than the market for which it is seeking relief in this proceeding (*i.e.,* Virginia Beach MSA vs. Cox service territory in the Virginia Beach MSA). That contention is unavailing. The cable penetration data for the Virginia Beach MSA produced in the *6-MSA Proceeding* by both Cox and Verizon *included data for the entire geographic area*

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75 The bulk of the market penetration information presented to the Commission by Verizon, presented in the form of E911 carrier line counts, was submitted at the same time as its reply comments in April 2007.

76 *See* Letter from J.G. Harrington, Counsel to Cox Communications, LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 06-172 (filed Oct. 30, 2007) ("*Cox Data Ex Parte*").

77 *6-MSA Order*, at ¶¶ 23, 27, 37. At most, the cable penetration data filed by Verizon with its second Virginia Beach petition is only several months more recent than the Cox-provided data submitted to the Commission for consideration in the *6-MSA Proceeding*.

78 *See* Confidential Attachment A to Letter from Evan T. Leo, Counsel to Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 06-172 (filed Dec. 3, 2007).

encompassed in the instant petition. Every access line in the Cox service territory in the Virginia Beach MSA was included in previously-filed data. Indeed, by Verizon's own admission, the geographic market in which it is seeking forbearance here represents over 90 percent of the population of the geographic market (*i.e.*, Virginia Beach MSA) for which it sought forbearance in the *6-MSA Proceeding*. Verizon, in filing the instant petition, is seeking to force the Commission – and the industry – to conduct a costly new forbearance proceeding to address the same information that was found insufficient in the prior proceeding.

Verizon struggles to make the case that its second Virginia Beach petition is more than just a replica of its prior petition for the Virginia Beach MSA by in effect asking the Commission to interpret the same facts in a different way. For example, Verizon urges the Commission to "attribute[] Verizon Wireless customers who have cut the cord to the competitive side of the ledger, rather than treating them as equivalent to a Verizon wireline customer."[79] Verizon argues this would be appropriate because Verizon's wireline business "is affected by losses to Verizon Wireless the same as if those losses were to another competitive provider."[80] Similarly, Verizon seeks a new interpretation of the same facts through the use of rate centers (rather than the established use of wire centers) [81] and carrier white pages listings[82] as the basis by which to analyze competitive activity. The Commission should not be taken in by this attempt to dress up the same facts to gain another chance at forbearance. Instead, the Commission should send a clear signal that it will not countenance manipulation of Section 10 and its procedures in this manner by dismissing or summarily denying Verizon's petition.

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79 *Second Verizon Virginia Beach Petition*, at 14.

80 *Id.*

81 *Id.*, at 7.

82 *Id.*, at 11-12.

There is considerable precedent for Commission rejection of Verizon's petition on the grounds that the factual issues Verizon raises are duplicative of issues that have already been litigated in a previous Commission proceeding.[83] Indeed, the Commission and the courts have long held that issue preclusion applies to prevent agency re-litigation of factual disputes.[84] For example, in its VHF frequency assignment proceeding, the Commission precluded parties from raising new objections based on interference issues stating, "Unless a party were to come forward with some *newly discovered evidence which for good reason was not available at the time* of the allotment proceeding or otherwise demonstrate good cause, we do not contemplate that 'gain' versus 'loss' issues will be considered again in an assignment proceeding to determine if an application for the allotment should be granted."[85] The doctrine of issue preclusion is triggered when only questions of fact are at stake. Such preclusion serves the parties' interest in avoiding the cost and vexation of repetitive litigation and the public's interest in conserving agency resources.[86]

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83 *See, e.g., Petition for Relief of Fal-Comm Communications, Petition vs. Continental Cablevision of Michigan, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 13319; n.1 (1997) ("Fal-Comm filed this second petition . . . which is duplicative of CSR-4874-L, seeking the same relief for the same issues against Continental Cablevision of Michigan, Inc. Accordingly, this second petition will be dismissed."); *Petition of Budd Broadcasting Company, Inc. for Modification of Market Station WGFL(TV)*, Memorandum Opinion and Order, 14 FCC Rcd 4366, ¶ 3 (1999) ("The principles of *res judicata* and collateral estoppel may be applied to prevent agency litigation of factual disputes."). *See also Auction 65 Public Notice Regarding Long Form/FCC Form 601 Applications Accepted for Filing*, 21 FCC Rcd 13010 (2006).

84 *See United States v. Utah Construction and Mining*, 384 U. S. 394, 422 (1966) ("When an administrative agency is acting in a judicial capacity and resolved disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose.") The FCC's use of issue preclusion in licensing adjudications has been upheld in *Gordon County Broadcasting Co. v. FCC*, 446 F.2d 1335, 1338 (D.C. Cir. 1971).

85 *In re Table of Television Channel Allotments*, Notice of Proposed Rulemaking, 833 FCC 2d 51, n.76 (1980) (emphasis added).

86 *See Univ. of Tenn. v. Elliott*, 478 U.S. 788, 798 (1986) (citing *Allen v. McCurry*, 449 U.S. 90, 94 (1980)).

For the doctrine of issue preclusion to apply, four elements generally must be present: (1) there must be an issue essential to the prior decision and identical to the one previously litigated; (2) the prior decision must have become a final judgment on the merits; (3) the barred party must have been a party to the prior litigation; and (4) the barred party had to have had a full and fair opportunity to litigate the issue in the earlier proceeding.[87] In this case, all four prongs have been met: (1) the issue of Verizon's eligibility for forbearance from dominant carrier, *Computer Inquiry*, and Section 251(c)(3) unbundling rules is presented in both cases and is sought here based on the same underlying factual assertions as in the prior case; (2) the *6-MSA Order* is a final decision on the merits; (3) Verizon was a party to the *6-MSA Proceeding*; and (4) Verizon had a full and fair opportunity to present all of the arguments it makes in the instant petition in the prior forbearance docket. On this basis, therefore, the Commission should reject or summarily deny Verizon's petition.

IV. VERIZON'S PETITION MUST BE DENIED ON THE MERITS BECAUSE VERIZON HAS NOT ESTABLISHED THAT SUFFICIENT COMPETITION EXISTS WITHIN EACH RELEVANT MARKET TO WARRANT FORBEARANCE

Should the Commission not dismiss Verizon's petition, it should deny Verizon forbearance from Section 251(c)(3)'s unbundling requirements. The burden of proof to justify forbearance falls squarely upon Verizon as the petitioning party,[88] and to meet the first two prongs of Section 10(a), Verizon must prove that enforcement of Section 251(c)(3) is not necessary to ensure that its charges and practices are just and reasonable and not unreasonably discriminatory, and that enforcement of Section 251(c)(3) is not necessary for the protection of

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87 *See in re Petition of: Budd Broadcasting Company, Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 4366, ¶ 3 (1999); *In re Applications of Montgomery Media Network, Inc.*, Memorandum Opinion and Order, 4 FCC Rcd 3749, ¶ 4 (1989).

88 *See E911 Forbearance Order*, 18 FCC Rcd at 24658.

consumers.[89] Verizon has failed to demonstrate that sufficient actual facilities-based competition exists in the relevant markets to ensure that its rates and charges are just and reasonable and not unreasonably discriminatory and that enforcement of Section 251(c)(3) and the regulations it requests forbearance from are not necessary for the protection of consumers.

Critically, Verizon has failed to present its analysis in terms of the relevant product markets. It is *not* the burden of either the Commission or interested parties to extrapolate this data, sort these issues out and, after identifying the relevant markets, to apply the mixture of anecdotes and general information Verizon provided with its petition in an attempt to conduct the careful analysis Verizon chose not to undertake. And it is certainly not appropriate as a legal matter for the Commission to accept without sufficient documentation Verizon's overly-broad contentions regarding the level of competition in the Virginia Beach MSA. Verizon has the burden of demonstrating that sufficient facilities-based competition *for each relevant product market* exists *in each relevant geographic market* before forbearance can be approved for network elements used to serve *that product market in that geographic market.* In previous forbearance decisions, the Commission made clear that there is no short-cut available to Verizon (or the Commission) when considering an issue of such wide-ranging importance.

A. Verizon Impermissibly Ignores The Requirement That The Forbearance Analysis Must Be Product Market-Specific And Fails To Provide Evidence To Demonstrate Sufficient Facilities-Based Competition Exists In Each Product Market

In its petition, Verizon ostensibly provides and analyzes data for each relevant product market in the Virginia Beach MSA. Upon closer inspection, however, Verizon falls far short of meeting this fundamental requirement in a number of critical ways. First, Verizon fails to provide sufficient data on market coverage by facilities-based competitors in the mass market

[89] 47 U.S.C. § 160(a).

or the enterprise market.[90] Instead, it relies on high-level or imprecise data obtained from websites or supplied by GeoTel. Second, Verizon fails to provide sufficient data to determine the market penetration of facilities-based competitors in the enterprise product market either in the entire Virginia Beach MSA or in individual wire centers. Instead, it seeks to combine data about use of its own services in these geographic markets with high-level, qualitative information about the offerings of competitors, including those that are not facilities-based. Third, Verizon provides absolutely no market coverage or penetration information about service to small business customers. Finally, Verizon simply ignores the broadband market and provides no data or analysis whatsoever of that product market. The broadband market is a distinct product market that cannot be lumped into the voice mass market. When taken together, these failures are so severe as to justify denial of the petition. They also are inexcusable. Verizon controls the filing of its petition and is well aware of the Commission's forbearance requirements. It should not be allowed to game the process in this manner.

B. Verizon's Access Line Loss Should Not Be Considered In The Forbearance Analysis

Verizon cites decreases (between 1999 and 2007) in its retail residential switched access lines, contending that these line losses provide an "independent basis to determine...that the requested forbearance is appropriate."[91] However, data showing declines in Verizon's

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90 For example, According to Verizon, "Cox's website indicates that it offers telephony services throughout its service territory in the Virginia Beach MSA," *Second Verizon Virginia Beach Petition*, at 6, but it never indicates whether or where Cox is using its own facilities to provide this service. Verizon further states that because "the evidence indicates that Cox provides telephony services throughout the entire portion of the Virginia Beach MSA...it is unnecessary to analyze cable facilities coverage at a more granular geographic level." *Id.,* at 7. But, in fact, the Commission requires such a granular examination of where (and to which product market) facilities are deployed.

91 *Second Verizon Virginia Beach Petition*, at 17. Verizon also cites line losses for business switched access customers to support its petition but again provides no specifics as to whether these lost lines are being gained by facilities-based competitors. *Id.*, at 31.

residential switched access lines provide no evidence of the actual facilities-based competition that is a prerequisite to Section 251(c)(3) forbearance. The Commission recognized this in the *Anchorage Forbearance Order* where it "reject[ed] ACS's contention that the sheer fact of its line loss compels forbearance,"[92] and in the *6-MSA Order*, where it stated: "[W]e reject Verizon's attempt to demonstrate the MSA is competitive by calculating percentage reduction in retail lines...[T]he abandonment of a residential access line does not necessarily indicate capture of that customer by a competitor."[93] As the Commission correctly noted in the *6-MSA Order*, line loss by an ILEC does not necessarily indicate that the customer has decided to purchase service from a competitor "but, for example, may indicate that the consumer converted a second line used for dial-up Internet access to an incumbent LEC broadband line for Internet access."[94] It also may indicate that the consumer has abandoned its wireline voice service in favor of a non facilities-based offering. In short, line loss may be caused by a great many factors and provides no indication as to whether Verizon faces sufficient facilities-based competition in Virginia Beach. Before Verizon can argue that the Commission should deviate from its precedent and include line loss data in its forbearance analysis, it must produce evidence showing that decreases in its line counts are attributable to consumers moving from one Verizon product to the service of an unaffiliated facilities-based provider.[95]

Further, it is important to note that business switched access lines are only one product offering in the overall enterprise market and thus cannot be used alone to indicate whether sufficient facilities-based competition is present.

92 *Anchorage Forbearance Order*, at n. 88.

93 *Verzion 6-MSA Order*, at ¶ 39.

94 *Id. See also Anchorage Forbearance Order*, at n. 88.

95 Verizon's effort to convince the Commission to take its purported line losses into account in conducting its forbearance analysis also should be dismissed as another untimely request for reconsideration of the *6-MSA Order* (where inclusion of line loss information was expressly rejected by the Commission).

C. Competitors' Use Of Verizon's Special Access Services Should Not Be Considered In The Forbearance Analysis

Verizon alleges that "competitors in Cox's service territory in the Virginia Beach MSA also are competing extensively using special access obtained from Verizon" and that such information is "relevant in the forbearance analysis."[96] Verizon provides data on use of special access services by non-wireless carriers, hoping to convince the Commission (without providing any proof) that use of special access services by other than wireless competitors is exclusively for the provision of local exchange services.

Beginning with the *Triennial Review Remand Order* ("*TRRO*"), however, the Commission has repeatedly stated that competition provided by use of an incumbent's special access facilities is not a sufficient basis to grant regulatory relief.[97] Most recently, in the *6-MSA Order*, the Commission confirmed that "competition that relies on Verizon's own facilities is not a sufficient basis to grant forbearance from UNE requirements."[98] The Commission provided an extensive rationale in support of this conclusion, noting that under the *TRRO*, Verizon has already obtained relief from unbundling obligations and that "[it] repeatedly has recognized that the availability of UNEs is a competitive constraint on special access pricing."[99] Verizon has provided no evidence or legal basis for the Commission to deviate from this well-established principle. The Commission thus should adhere to its findings in the *6-MSA Order* and disregard the special access data submitted by Verizon in conducting its forbearance analysis.

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96 *Second Verizon Virginia Beach Petition*, at 30-31.

97 *See Unbundled Access to Network Elements*; *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers* WC Docket Nos. 04-313, 01-338, Order on Remand, FCC 04-290, 20 FCC Rcd 2533, ¶ 46 (rel. Feb. 4, 2005) ("*Triennial Review Remand Order*" or "*TRRO*"), *affirmed Covad Communications v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

98 *6-MSA Order*, at ¶ 42.

99 *Id.*, at ¶ 38.

D. Verizon Has Failed To Show That The Aggregate Facilities-Based Competition Threshold Has Been Met In Any Relevant Product Market

Verizon contends that "current data demonstrate that the forbearance standard applied by the Commission in the *Six MSA Order* unquestionably is satisfied in Cox's service territory in the Virginia Beach MSA."[100] Verizon's contention is based on the residential market presence of the cable provider (*i.e.*, Cox),[101] various wireless providers that are serving cut-the-cord customers, and the use of Verizon's Wholesale Advantage service and resold lines by non facilities-based competitors.[102] Verizon does not provide data and calculate a market share for the mass market (including small businesses) or the enterprise market. Nor does it provide any evidence whatsoever on competitors' share of the broadband market. Thus, the Verizon petition does not provide sufficient data by product market with which the Commission can conduct its forbearance analysis.[103] Even for the residential market, there are numerous flaws with Verizon's market share calculation for Virginia Beach which, when taken into account, cause the

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100 *Second Verizon Virginia Beach Petition*, at 10-11.

101 The Commenters will refrain from commenting on the accuracy of the cable data supplied by Verizon until after the Commission has obtained Virginia Beach-specific market penetration data from Cox. The Commenters urge the Commission to request complete data from Cox as soon as possible.

102 Verizon argues that its market share calculation is conservative because it excludes competition from over-the-top VoIP services and that the Commission "misrepresents the evidence" in finding these services are not close substitutes for traditional voice service. *Second Verizon Virginia Beach Petition*, at 16. The Commission, however, did not include over-the-top VoIP providers in its competitive analysis in the *6-MSA Proceeding* because they do not serve "customers over their own network facilities." *6-MSA Order*, at n. 72. Verizon's retort that these services can be provided over competitive networks is inadequate because there is no evidence that these over-the-top VoIP services are in fact being provided over competitive networks and, even if they were, their inclusion could lead to double counting of competitive access lines.

103 In Section IV.D.3.c, *infra*, the Commenters provide data on the business market share of Verizon and its facilities-based competitors in the Virginia Beach MSA. The data demonstrate that Verizon does not currently face successful facilities-based competition in the enterprise market.

competitors' share of the market to fall short of the Commission's established market penetration threshold. These shortcomings are explained below.

1. Verizon Misuses Cut-The-Cord Wireless Data In Its Petition

First, as discussed above, Verizon misinterprets the Commission's discussion of cut-the-cord wireless lines in the residential market share analysis section of the *6-MSA Order*.[104] The Commission did not make a sweeping ruling that such a service is *always* a substitute for local telephone service. Rather, it noted that the discussion of cut-the-cord wireless data in the *6-MSA Proceeding* was justified "based on the record [there]."[105] The Commission's caution is warranted. As discussed in Section II.B.1, *supra*, there is significant justification (based on a new Verizon survey and the *Mikkelsen Study*[106]) for completely excluding wireless service from the competitive analysis on the ground that the overwhelming majority of residential consumers do not consider wireless services to be substitutes for wireline voice service. Even if the Commission decides to continue to include cut-the-cord wireless lines in its competitive analysis, however, it must recognize that determinations of when wireless services substitute for wireline services for particular users – as well as assessments about the quality of the cut-the-cord wireless data collected – are still more an art than a science.

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104 The Commenters continue to disagree with any suggestion that mobile wireless service is a sufficiently close substitute for wireline voice service to justify the inclusion of wireless lines in the Commission's competitive analysis. *See* Section II.B.1, *supra.*

105 *6-MSA Order*, at n. 89.

106 Kent W. Mikkelsen, *Mobile Wireless Service to "Cut the Cord" Households in FCC Analysis of Wireline Competition* (Apr. 2008) ("*Mikkelsen Study*"), appended to Letter from Brad E. Mutschelknaus, *et al.*, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-97 (filed Apr. 22, 2008).

The survey of cut-the-cord wireless substitution by the Centers for Disease Control,[107] which was addressed in the *6-MSA Order* and upon which Verizon relies in this proceeding,[108] has the advantage of being conducted by a neutral third party and, thus, may be considered an appropriate source – so long as the results are used appropriately. Because the *CDC Survey's* conclusions are averages over a large geographic area, they cannot be used to indicate the precise cut-the-cord number in a specific geographic area. However, Verizon seeks to do exactly that, translating a nationwide cut-the-cord statistic into equivalent local access lines.[109] The Commission cannot have any confidence that such a calculation provides an accurate determination of the market share of cut-the-cord wireless users in the Virginia Beach MSA, especially in any wire center.

Even if Verizon could cram a square peg into a round hole, the Commission should adopt the recommendation outlined in a recent Gillan Associates paper and base its analysis of wireless-only usage on the lower bound of the *CDC Survey's* 95% confidence interval and not the point estimate contained in the *Survey*.[110] The *Survey* provides point estimates as well as lower and upper bounds with a 95% confidence interval.[111] Use of the lower

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107 S. Blumberg and J. Luke, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, January-June 2007*, Division of Health Interview Statistics, National Center for Health Statistics, rel. Dec. 10, 2007. ("*CDC Survey*").

108 *Second Verizon Virginia Beach Petition*, at 12.

109 *Id.*, at 13. The absurdity of Verizon's statistical technique becomes particularly evident when one attempts to translate the nationwide result to each rate center.

110 Gillan Associates, *Properly Estimating the Size of the Wireless-Only Market* (Mar. 2008) ("*Gillan Wireless Paper*"), appended to Letter from Brad E. Mutschelknaus, *et al.*, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-97 (filed Apr. 22, 2008).

111 As pointed out in the *Gillan Wireless Paper*, the *CDC Survey* employs a sample to estimate a population average. Taking into account that all sample means are likely to deviate from the actual population mean to some extent, the *Survey* utilizes confidence intervals to encompass the range of values within which the actual mean is likely to reside. A 95% confidence interval means that there is a 95% likelihood that the actual average is within the upper and lower bounds of the interval. *Gillan Wireless Paper*, at 5.

bound of the confidence interval would minimize any error of overestimating the data, a critical factor when the data is unconfirmed. As pointed out in the *Gillan Wireless Paper*, focusing exclusively on the point estimate contained in the June-December 2006 *Survey* and the more recent January-June 2007 *Survey* "could lead one to conclude that the percentage of wireless-only households continues to grow throughout the nation . . . Expanding the comparison to include an analysis of the confidence intervals from each survey, however, supports a different conclusion."[112] Given the potential importance of the wireless-only calculation, it is critical that the Commission conservatively employ the most accurate and reliable estimate available.

Finally, as recommended in the *Gillan Wireless Paper*, the Commission should further refine its use of the *CDC Survey* to exclude identifiable groups that are not representative of the population as a whole.[113] As the *Survey* notes, the second largest group of cut-the-cord wireless users are those between 18-24 years of age (some 28%).[114] These users therefore have a significant impact on the results of the *Survey*. It is well-documented, however, that college-age adults exhibit unique purchasing patterns and behavioral choices that are not representative of the population as a whole. As the *Gillan Wireless Paper* recommends, "the Commission should remove from its analysis the distorting influence of college-age wireless-only respondents." The *Paper* concludes:

> The unique qualities of wireless service make it the ideal communications solution for young adults. Matching the behavioral patterns of young adults, however, does not mean that wireless service is a meaningful economic substitute for more mature households, much less a viable

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112 *Id.*

113 *Id.*, at 6-7.

114 *CDC Survey*, at 6.

> offering to meet the communications needs of the nation's business community.[115]

In sum, the Commission should interpret the data in the *CDC Survey* very carefully. To account for potential shortcomings of the *Survey*, the Commission should rely on the lower bound of the *CDC Survey's* 95% confidence interval and exclude the lowest age group (*i.e.*, below 24 years of age). Further, as it did in all previous Section 251(c)(3) forbearance orders, including the *6-MSA Order*, the Commission should then eliminate from this result the cut-the-cord wireless share held by Verizon's affiliate Verizon Wireless. And, as discussed below, Wholesale Advantage and Resold lines also should be omitted from the analysis. After correcting for these flaws, the residential market share held by competitors in the Virginia Beach MSA decreases considerably from the level suggested by Verizon.[116]

2. Verizon Improperly Includes Wholesale Advantage and Resold Lines In Its Competitive Analysis

Verizon also misinterprets the Commission's *6-MSA Order* in seeking to include Wholesale Advantage and Section 251(c)(4) resold lines in the calculation of market share in Virginia Beach. The Commission's discussion of these services in the *6-MSA Order* was at best dicta. These services, after all, are not facilities-based and the Commission has held time and again that only facilities-based (*i.e.*, competitive loop-based) competition is properly included in the forbearance analysis.[117] Even if the Commission were to include these services in its market share calculation (which it should not), the Commission's most recent *Local Competition*

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115 *Gillan Wireless Paper*, at 7 (footnote omitted).

116 A definitive calculation of the residential market share held by competitors in the Virginia Beach MSA cannot be made without specific data on Cox's market presence in Virginia Beach.

117 *See, e.g., Omaha Forbearance Order*, at ¶ 64. *See also* Section II.B.1, *supra.*

Report[118] shows that use of ILEC resold lines is plummeting, indicating that today, resold services do not represent a viable substitute for the wireline services provided by Verizon. In sum, these lines should not be included in the facilities-based market share calculation.

At the outset of this section, the Commenters noted that Verizon has failed to produce a separate market share calculation for the mass market, the enterprise market, or the broadband market. Instead, Verizon seeks to use its residential share – which has been shown to fall short of the Commission's threshold – along with high-level and anecdotal information about competitive activity in these other markets to leverage itself into meeting the Commission's forbearance requirements. The Commission should demand more, especially because more precise data is available.[119]

3. Verizon Fails To Show Sufficient Facilities-Based Competition Exists In Any Relevant Product Market At The Wire Center Level

As discussed above, in the *Omaha Forbearance Order*, the Commission found it crucial that the primary competitor to Qwest was "successfully providing local exchange and exchange access services without relying on Qwest's loops and transport."[120] Similarly, in the *Anchorage Forbearance Order*, the Commission found the extent to which ACS's competitor, GCI, has constructed last-mile facilities to be highly relevant to its forbearance analysis and limited its grant of forbearance to "those locations where the record indicates that GCI provides sufficient facilities-based competition to ACS to satisfy the forbearance criteria of section

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118 *Local Telephone Competition: Status as of June 30, 2007*, Industry Analysis and Technology Division, Wireline Competition Bureau, March 2008, at Table 4 (available at www.fcc.gov/wcb/stats).

119 The Commission also should reject Verizon's continued use of fiber network data. In the *6-MSA Order*, the Commission concluded, "We agree with commenters that Verizon's reliance on fiber route maps have little probative value." *6-MSA Order*, at ¶ 40.

120 *Omaha Forbearance Order,* at ¶ 64 (emphasis supplied).

10(a)."[121] The Commission recently hewed to these same requirements – "substantial deployment of facilities capable of serving end-user locations" and "sufficient facilities-based competition" – in reaching its decision in the *6-MSA Order*.[122] Yet in its petition, Verizon provides insufficient evidence regarding the existence of facilities-based (*i.e.,* non-UNE or Verizon wholesale services-based) competition in each wire center in Virginia Beach. The absence of this data cannot be overlooked and clearly demonstrates Verizon's failure to meet its burden of proof.

As further shown below, Verizon has failed to provide sufficient evidence of the actual wholesale or retail facilities-based competition that is the absolute prerequisite to a finding that the consumer protection requirements of Section 10(a) have been met and the grant of forbearance for any wire center (or rate center) in Virginia Beach is justified.

a. Cable Competition

The principal basis in Verizon's petition for granting forbearance is the presence of Cox in the Virginia Beach MSA. Verizon has not provided sufficient information, however, to fully analyze Cox's market coverage or penetration. Thus, as indicated above, the Commenters cannot address the competitive impact of Cox's presence in a comprehensive manner until Cox supplies additional data. That said, the Commenters can address select aspects of competition by Cox in the enterprise market.

While Verizon provides some data on Cox's coverage and penetration of the mass market, it has failed to provide any such data for the enterprise market and, hence, fails to meet its burden of proof regarding cable-based telephony competition in that product market. Instead, Verizon argues there is sufficient enterprise competition based on Cox's "ubiquitous *cable*

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121 *Anchorage Forbearance Order*, at ¶ 21.

122 *6-MSA Order*, at ¶ 35.

network in the portion of the Virginia Beach MSA for which Verizon is seeking relief," its technical skill, network investments, established presence and brand, and marketing efforts, and deployment of "fiber facilities to many enterprise locations."[123] The Commission should discount these highly imprecise claims and instead base its findings on the hard evidence of facilities-based competition, which is available and which the Commenters present below.

At the outset, the Commission should recognize that, unlike mass market users, the medium-size and large businesses that comprise the enterprise market generally require more sophisticated services than traditional voice-grade DS0s, such as DS1 services, fractional DS1s, and other high capacity services. Verizon fails to demonstrate that Cox is able – or will be able within a commercially reasonable period of time – to adequately serve a sufficient number of these customers with its current cable plant. Verizon also ignores problems inherent to cable-based provision of services to the enterprise market due to a lack of physical proximity, technical inability, or both.[124] To the extent Cox has deployed some amount of fiber or other infrastructure within the wire centers in the Virginia Beach MSA that can support high-capacity telephony services, it can only serve businesses within close proximity to such infrastructure, an operational reality which cautions against broad conclusions regarding the availability of competitive enterprise services without engaging in a more detailed analysis as required by the Commission. As succinctly stated by the New York State Department of Public Service Staff:

> [C]able-based telephony is of little assistance to the enterprise market at this point in time since most small and medium-sized businesses are not 'cabled-up' (i.e. current cable-based services are television rather than voice driven)

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123 *Second Verizon Virginia Beach Petition*, at 21-25.

124 Based on industry norms, enterprise customers for standard "off-the-shelf" services expect to receive service within 30 calendar days. The time frame for mass market customers is between 10-14 calendar days.

> and larger businesses generally have T-carrier systems for their telecommunications needs . . .[125]

All indications are that cable providers *operating their cable-technology facilities* still do not occupy a meaningful position in the business marketplace, at least one sufficient at this time to support forbearance from Section 251(c)(3) unbundling obligations. In the *Triennial Review Remand Order*, the Commission found that cable transmission facilities are not used to serve business customers to any significant degree.[126]

In the just decided *6-MSA Order*, the Commission found that "other evidence in the record demonstrates the comparatively limited role of the cable operators serving enterprise customers in these MSAs today."[127] One of these MSAs, of course, was the Virginia Beach MSA, which includes the geographic area in Verizon's current petition. Cox has constructed some fiber facilities and has been marketing its services to businesses, but this does not indicate that it currently poses a sufficient competitive threat. In fact, as demonstrated below, data from GeoResults indicates that, at best, Cox and other facilities-based competitors have gained a market share in particular rate centers that is grossly insufficient to meet the Commission's required threshold to obtain forbearance. It is difficult (and highly speculative) to anticipate whether Cox and other competitors will be successful in increasing this share. Thus, suggestions by Verizon that there is sufficient competitive presence today in the enterprise market within the Virginia Beach MSA is incorrect.

Moreover, to the extent that Cox intends to continue to rely on its traditional cable system rather than other modes of delivery to provide telephony to enterprise customers, cable

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125 *See Department of Public Service Staff White Paper*, Case Nos. 05-C-0237, 05-C-0242, New York State Public Service Commission, (Jul. 6, 2005) ("*NYS Staff White Paper*"), at 31.

126 *Triennial Review Remand Order,* at ¶ 193.

127 *6-MSA Order*, at ¶ 37.

system technology still faces serious technical and operational hurdles before it can be used to provide enterprise level services in any competitively meaningful fashion. Simply because a cable system passes near a business location does not mean that the cable operator can serve that business customer within a commercially reasonable period of time, if at all. Existing cable technology does not yet support the provision of reliable, economic, or large scale services at a DS1 level to enterprise customers, primarily because of timing/clocking and upstream bandwidth problems.[128] While CableLabs, the recognized standards body for the cable industry, issued specifications in May 2006 to address the timing/clocking problems in part, full commercial deployment is just beginning.[129] To provide enterprise-level telephony services, even if the timing/clocking problems are solved, cable systems must make significant upgrades to their network capacity at considerable expense. Otherwise, cable systems will remain seriously constrained in the amount of enterprise-level services they can accommodate.[130]

In short, the provision of competitive facilities-based telephony to enterprise customers using cable technology is still several years in the future. Such competition is not present today, and every indication is that it will not be available in a reasonable timeframe. This is especially true for large business customers. Accordingly, there is not sufficient competition from Cox in the enterprise market today to support forbearance in the Virginia Beach MSA.

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128 *See, e.g.,* Letter from John Nakahata, Counsel for General Communication Inc. ("GCI"), to Marlene Dortch, Secretary, FCC, WC Docket No. 05-281 (Nov. 14, 2006), at 9 ("*GCI Nov. 14 Ex Parte*"); Comments of GCI on ACS of Anchorage, Inc. Forbearance Petition, WC Docket No. 05-281, (Aug. 11, 2006), at 14-15, 17.

129 *Id.*

130 The Commission acknowledged these issues in the *Anchorage Forbearance Order,* when it referenced GCI's statement that "it will need to undertake a 'large-scale upgrade of its network capacity before it can provide all business customers with DS1 services over its [cable] plant.'" *Anchorage Forbearance Order*, at n. 137.

b. Competition from Mobile Wireless Services

Like competition from cable-based services, any competition Verizon currently experiences from wireless services does not support granting forbearance in any individual rate center (or wire center). Indeed, while in the *6-MSA Order* the Commission included discussion of cut-the-cord wireless service in its analysis of the aggregate residential market share calculation, wireless services are not relevant in any wire center forbearance analysis because, as the Commission recognized in the *Omaha Forbearance Order,* wireless coverage and penetration data generally is not available to support a granular forbearance analysis. In the *Omaha Forbearance Order*, the Commission found that:

> Verizon 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 to rationalize forbearance from unbundling obligations.[131]

The Commission made a similar finding in the *Anchorage Forbearance Order*, noting the lack of sufficient data to evaluate the extent of substitution of wireless services in the Anchorage study area.[132] The conclusion reached by the Commission in the Omaha and Anchorage forbearance proceedings is equally applicable here, since Verizon has failed to offer any data about cut-the-cord wireless coverage and penetration in each wire center.

In addition to the lack of granular data in the residential market, Verizon's petition offers no evidence, and indeed no discussion whatsoever, regarding mobile wireless service as a competitor in the enterprise market. Verizon therefore has absolutely failed to meet

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131 *Omaha Forbearance Order*, at ¶ 72 (emphasis supplied).

132 *Anchorage Forbearance Order*, at ¶ 29.

its burden of proof in this regard, and further discussion regarding wireless competition in the enterprise market is not necessary.

In the mass market, wireless service, standing alone, cannot currently be considered a true substitute for wireline service.[133] Today, wireline service gives consumers not only access to other end users for "telephone" calling but also provides access to the Internet, whether through a broadband or dial-up connection. While there are data services currently available over mobile phones, wireless access today is simply incapable of offering the sort of quality service that customers demand and have come to expect. Currently, these critical features can only be provided by telephone companies or cable providers. This conclusion was recently confirmed by Commissioner McDowell, who stated: "[C]onsumers who use wireless devices to access broadband do not expect their experience to duplicate the wired, desktop experience of broadband access."[134] As such, wireless service today cannot substitute completely for wireline access lines – it is merely complementary. This shortcoming is particularly critical in the current context, where the Commission has been asked to forbear from enforcing Verizon's obligation to provide the UNEs required by many wireline service providers.

Even assuming, *arguendo*, that wireless service is capable, in theory, of serving as a complete substitute for mass market wireline service today or in a reasonably short time frame (which it is not), Verizon has still failed to meet its burden. Verizon has offered no concrete evidence that wireless service actually has become an adequate substitute for wireline voice and

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133 *See, e.g., Mikkelsen Study,* cited in n. 106, *supra.*

134 *Development of Nationwide Broadband Data to Evaluate the Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscribership*, WC Docket No. 07-38, Statement of Commissioner Robert M. McDowell (rel. Mar. 19, 2008).

broadband service. That is because it has not. While intermodal competition between wireline and mobile wireless services likely will increase in the future, wireless services do not yet enjoy the ubiquity, capability, or the service quality to qualify as a suitable substitute for wireline service offerings.[135]

In addition, Verizon offers no data at all regarding the number of small business users that have abandoned their wireline phone in favor of wireless services, and so therefore completely ignores this important component of the mass market. Because Verizon makes its case regarding mass market customers' use of wireless alternatives based solely on residential wireless use, should the Commission consider wireless usage in the mass market in its forbearance analysis (which it should not), it should require Verizon to put forth its evidence regarding wireless substitutability among small business users and bifurcate the mass market and address small businesses and residential subscribers as separate markets.[136]

Thus, wireless service, because of its inherent limitations, is not a complete substitute for wireline service today. At best, it remains a complement to wireline services. Verizon has failed to provide any concrete data that suggests otherwise. Moreover, even should the Commission find that wireless is a substitute for wireline service for mass market customers (which it should not), Verizon has provided inadequate information to permit the Commission to take wireless competition into account in conducting its analysis of forbearance in the mass market.

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135 *See, e.g., Triennial Review Order*, at ¶ 445.

136 The Commenters believe that it is particularly appropriate to treat small business customers as a separate market since they are increasingly purchasing larger bandwidth circuits that are symmetric and have guaranteed service levels to meet their data requirements. Even if the Commission does not separate these two classes of customers, Verizon has the burden of producing evidence of facilities-based competition for both residential and small business customers, which it has not done.

In the *6-MSA Order*, the Commission included discussion of "cut-the-cord wireless substitution" in its aggregate residential market share analysis.[137] While the Commenters believe that wireless services (including cut-the-cord wireless lines) should be considered irrelevant to the Section 251(c)(3) forbearance analysis, at the very least, the Commission must properly analyze any information that bears on this issue. This means that: (a) cut-the-cord data is, at most, relevant to residential voice competition; (b) any data supporting residential voice cut-the-cord wireless competition must supplied on a granular (*i.e.*, wire center) basis; and (c) should the Commission seek to rely on the *CDC Survey*, it must utilize the relevant data from the survey and address the limitations of that data.

In sum, it is clear that the Commission cannot accept Verizon's simple use of the *CDC Survey* to calculate the presence of facilities-based competition from wireless service providers in each of the product markets and individual wire centers that comprise the Virginia Beach MSA.

c. Alternative Network Facilities Serving Enterprise Customers

Verizon attempts to justify forbearance in the enterprise market in the Virginia Beach MSA on the purported existence of the "extensive competitive facilities-based networks" deployed by competitors.[138] Verizon's "proof" consists of figures purporting to represent the number of competitive fiber networks in the Virginia Beach MSA.[139] According to the data cited by Verizon, excluding Cox and AT&T, there are "two known competing providers that operate fiber networks" in this territory.[140]

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137 *See 6-MSA Order*, at n. 89.

138 *Second Verizon Virginia Beach Petition*, at 27.

139 *Id.*

140 *Id.*, at 28.

There are numerous fundamental problems with Verizon's competitive fiber route data. Specifically, Verizon does not present the data on a sufficiently granular (*i.e.*, wire center) basis to provide meaningful input to the Commission. Further, Verizon does not indicate how many competing fiber providers operate in each wire center, and it does not identify the fiber providers it claims are operating each route.

Verizon also does not meet the Section 10 requirement that it identify which, if any, of these fiber networks reach, and can support the offering of a full range of services, within a commercially reasonably period of time, to individual customer locations. Verizon fails to acknowledge that merely passing a customer location does not necessarily enable the owner of competitive fiber to provide service at that customer location. While some competitive carriers have constructed fiber rings in geographic areas where they offer local exchange services, the vast majority of commercial buildings are not located on those fiber rings and the carriers must construct building "laterals" to serve customers located in those commercial buildings. The construction of laterals is extremely difficult, time consuming, and costly. According to XO Communications, LLC ("XO"), the extraordinary costs of constructing laterals results in XO not being able realistically to add a building to its network unless customer demand at that location exceeds three DS-3's of capacity.[141] Finally, Verizon fails to identify whether (and to what extent) the competitive fiber on its route maps is being used to provide telecommunications services (versus fiber being put to private use) and also fails to differentiate between fiber transport and fiber being used to provide local exchange access. In light of these myriad

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141 *See In the Matter of Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, RM-10593, *Declaration of Ajay Govil on Behalf of XO Communications, Inc.* (filed Aug. 8, 2007), at 10.

shortcomings, Verizon's representations regarding alternative facilities deployment should be ignored.

Reliable data about the extent of facilities-based competition in the enterprise market does exist however. GeoResults data is a neutral source for this type of information used throughout the industry.[142] As such, it can be relied upon by the Commission, especially, as noted below, when it contains sufficient data to calculate not only a share of buildings served by facilities-based competitors but also a share based on the addressable demand that facilities-based competitors could serve.[143] In previous Section 251(c)(3) forbearance proceedings, the Commission calculated an aggregate market share for the residential market, but did not perform a similar calculation for the enterprise market. Yet with each successive forbearance petition, the Commission has received more reliable data about the extent of facilities-based competition in the enterprise market. Here, there is no reason for the Commission not to use the GeoResults data to perform market share calculations for the enterprise market and to use that calculation as the threshold criterion for deciding whether forbearance is warranted.

The Commenters have obtained recent GeoResults data for all rate centers in the Virginia Beach market. These data identify all commercial buildings in the relevant rate centers, all buildings where competitors are serving customers using their own facilities (*i.e.*, CLEC Lit

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142 In the *Verizon 6-MSA Order*, the Commission found that "it is not unreasonable for the Commission to use the GeoResults [data for] total number of buildings." *Verizon 6-MSA Order,* at n. 135. In addition, the Commission noted that competitors had indicated that "GeoResults is a reliable, independent source of competitive market data relied on by incumbents, competitors, and regulators." *Id.,* at n. 136.

143 The "demand" data allows the Commission to determine more precisely the extent of successful facilities-based competition. In fact, because these data show the total demand in a building where competitors have facilities – and not just the demand served by competitors – it overstates the amount of competition in a particular location. Competitors, for instance, often only have building access rights to particular customers. In addition, customers of other providers may have long-term agreements which limit competitive opportunities.

Commercial Buildings), the overall user demand in each wire center and, most importantly, the amount of that demand that competitors can serve using their own facilities.[144]

Table 1 contains the commercial building data by rate center for the Virginia Beach MSA, and it proves that extremely few commercial locations are served by competitors using their own facilities.

TABLE 1

Rate Center	Total Number of Commercial Buildings in MSA	% of Commercial Buildings Served by Facilities-Based CLECs
Gloucester	808	0.37%
Hayes	604	0.33%
Newport News 1	3615	3.29%
Newport News 2	4170	2.37%
Newport News 3	3551	2.00%
Newport News 4	418	0.00%
Norfolk 1	3342	3.08%
Norfolk 2	22928	3.57%
Norfolk 3	5937	2.24%
Norfolk 4	2846	2.11%
Norfolk 6	573	1.05%
Toano	361	1.39%
Williamsburg	2719	2.50%

Table 2 shows CLECs' "addressable demand" share in each rate center, *i.e.*, the percentage of total demand in each wire center (measured on a DS0 basis) that facilities-based

144 A CLEC Lit Commercial Building is defined as any Commercial Building that has fiber-enabled network office equipment that has been placed there by one or more CLECs, which generally indicates that a CLEC has deployed its own fiber or has a long-term lease of dark fiber to that building.

CLECs have a potential to serve.[145] The specific purpose of this table is to address concerns that although CLEC facilities may only reach a very small percentage of commercial buildings in a rate center, those buildings account for a disproportionate percentage of total demand in those rate centers. As Table 2 shows, this highly conservative share of facilities-based competitive presence indicates that in a majority of rate centers the CLEC "addressable market" share is below 10% and in no instance does the share exceed 25%.

TABLE 2

Rate Center	Total Demand (DS0s) in Commercial Buildings	% of Total Demand in Commercial Buildings Addressable by Facilities-Based CLECs
Gloucester	7321	6.42%
Hayes	4965	1.43%
Newport News 1	35,370	21.72%
Newport News 2	39,031	16.33%
Newport News 3	32,173	8.31%
Newport News 4	2410	0.00%
Norfolk 1	31,891	19.15%
Norfolk 2	224,266	23.72%
Norfolk 3	48,333	10.76%
Norfolk 4	22,334	9.82%
Norfolk 6	2951	3.25%
Toano	2946	3.12%
Williamsburg	31,718	12.90%

145 A CLEC is considered to have the "potential to serve" the total demand in any commercial building to which it has facilities even if it may not have the right to access all customers.

In sum, the GeoResults data indicate that insufficient facilities-based competition exists today in the enterprise market in Virginia Beach.

d. Wholesale Service Offerings

In determining whether the requirements of Section 10(a)(1) are satisfied, the Commission must examine "competition in the retail *and* wholesale markets" in the relevant geographic area.[146] In the *6-MSA Order*, the Commission examined the "role of the wholesale market" and found the "record does not reflect any significant alternative sources of wholesale inputs."[147] The showing in Verizon's second Virginia Beach petition offers no basis to alter this finding, for the petition gives short shrift to competition in the wholesale market, mentioning it only in passing and not providing the type of granular information required in a forbearance analysis. Once again, Verizon has not offered either market-specific coverage or penetration data sufficient to satisfy the forbearance test.

The Commenters agree with the Commission that competition in the wholesale market is an important factor in determining whether sufficient actual facilities-based competition exists to warrant a grant of forbearance. The Commenters urge the Commission to recognize that wholesale competition is a condition precedent to facilities-based retail competition – and not vice versa. It cannot be assumed that a wholesale market will develop after a grant of forbearance, even if there is a competitive provider with facilities covering the mass market and some facilities in the enterprise market. The Commission needs to look no further than McLeodUSA's pending exit from the Omaha market as proof of this conclusion.[148]

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146 *6-MSA Order*, at ¶ 37 (emphasis supplied).

147 *Id.*, at ¶ 38.

148 *See Petition of McLeodUSA Telecommunications Services, Inc. to Cease Providing Local Exchange Voice Services in Nebraska Wire Centers*, Application No. C-3992, Nebraska Public Service Commission (filed Apr. 11, 2008), at 2. ("It does not make economic

Moreover, if retail competitors are forced to exit the market because they can no longer access UNEs, the likelihood of wholesale competition developing becomes even more diminished. Thus, in addition to the other reasons set forth herein by the Commenters, until retail competitors in each product market are able to rely upon wholesale inputs from competitive providers, the Commission should not grant Verizon's forbearance petition.

V. VERIZON HAS NOT SHOWN IT IS ENTITLED TO RELIEF FROM DOMINANT CARRIER OR *COMPUTER INQUIRY* REQUIREMENTS

In addition to its request for forbearance from Section 251(c)(3) unbundling obligations, Verizon requests relief from Part 61 dominant carrier tariffing requirements, dominant carrier requirements arising under Section 214 of the Act and Part 63 of the Commission's rules, and the Commission's *Computer III* rules, including CEI and ONA requirements.[149] Again, Verizon has failed to demonstrate that continued enforcement of these requirements is not necessary to ensure that its charges and practices are just and reasonable and not unreasonably discriminatory, and that enforcement is not necessary for the protection of consumers.

As noted by the Commission in the *Omaha Forbearance Order*, forbearance from dominant carrier regulation is justified only if the state of competition is such that the interests of consumers and competition would be protected in the absence of the regulations at issue.[150] In the Omaha forbearance proceeding, the Commission noted that dominant carrier regulations initially were imposed on ILECs, including Qwest, as a result of a Commission determination

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sense under the arrangements offered by Qwest to date for McLeodUSA to continue to provide local exchange voice services to its remaining residential customers and many of its small business customers in the Omaha MSA, nor is it economically viable for McLeodUSA to convert these customers to a resale platform.").

149 *See* n. 2, *supra.*

150 *Omaha Forbearance Order*, at ¶ 19.

that those carriers "have market power in the provision of most services within their service area."[151] Consequently, forbearance from dominant carrier regulation must be preceded by a finding that the ILEC seeking forbearance no longer has market power in the provision of the services for which it seeks forbearance.[152]

Market share, supply and demand elasticities, and the firm's cost, structure, size, and resources are all relevant to the Commission's analysis of whether the ILEC seeking freedom from dominant carrier regulation retains market power.[153] In granting Qwest forbearance from certain dominant carrier regulations with respect to its mass market exchange access services and its mass market broadband Internet access services in the *Omaha Forbearance Order*, the Commission found that each of these economic factors justified forbearance.[154]

Conversely, in denying Verizon forbearance from dominant carrier regulation in the *6-MSA Order*, the Commission held that:

> Verizon's market shares in the MSAs at issue, measured consistent with [its] approach in the *Qwest Omaha Forbearance Order* and the *ACS Dominance Forbearance Order*, are sufficiently high to suggest that competition in these MSAs is not adequate to ensure that the 'charges, practices, classifications, or regulations . . . for [ ] or in connection with that . . . telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory' absent the regulations at issue.[155]

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151 *Id.*, at ¶ 11. The Commission defines market power as the "'ability to raise prices by restricting output' or 'to raise and maintain price above the competitive level without driving away so many customers as to make the increase unprofitable.'" *Id.*, n. 54.

152 *Id.*, at ¶ 22.

153 *Id.*, at ¶ 31.

154 *Id.*, at ¶¶ 39-43.

155 *6-MSA Order*, at ¶ 27 (footnote omitted).

The Commission confirmed in the *6-MSA Order* that when determining whether a carrier has market power in conducting a dominance analysis, it does not limit itself to market share alone, but also looks at other factors such as supply substitutability, elasticity of demand, and firm cost, size, and resources.[156] It concluded, however, that "these additional factors presented much more compelling evidence of the competitiveness of the marketplace in the . . . *Qwest Omaha Forbearance Order* and the *ACS Dominance Forbearance Order,* than . . . for the 6 MSAs based on the record here."[157]

Verizon has failed to provide any data in the instant petition to evaluate these factors. Indeed, Verizon fails to address these factors at all in its petition. In the absence of any market-specific information that may be used to evaluate Verizon's market share, as well as the other economic factors relevant to an analysis of whether dominant carrier regulation is necessary to protect consumers and competition, the Commission should conclude that Verizon has failed to meet its burden of proof and Verizon's request for forbearance from dominant carrier rules should be denied.

Similarly, Verizon has failed to meet its burden of proof that forbearance from the *Computer III* requirements is justified. The only mention Verizon makes of *Computer III* in its petition is in the introductory footnote where Verizon identifies with specificity the statutory and regulatory provisions from which it seeks forbearance.[158] Verizon makes absolutely no effort whatsoever to explain how or why forbearance from *Computer III* requirements would be consistent with the public interest or how or why enforcement of those requirements is not necessary either to ensure that Verizon's rates, terms and conditions of service are just,

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156 *Id.*, at ¶ 28 (footnote omitted).

157 *Id.*

158 *See Second Verizon Virginia Beach Petition*, at n. 5.

reasonable and nondiscriminatory or to protect consumers. Denial of Verizon's request for forbearance from the Commission's *Computer III* rules therefore must follow.

VI. FORBEARANCE WOULD NOT BE IN THE PUBLIC INTEREST

Beyond Verizon's failure to demonstrate that ongoing Section 251(c)(3) unbundling and dominant carrier regulations are not necessary to ensure that its charges and practices are just and reasonable and likewise are unnecessary for the protection of consumers, as discussed above, it is clear that Verizon's request for forbearance in the Virginia Beach MSA is not consistent with the public interest, and therefore does not satisfy the third prong of the Section 10(a) test. There are several reasons compelling the conclusion that the grant of forbearance to Verizon would run counter to the public interest. And it is not an exaggeration to suggest that granting forbearance would have a significant deleterious public interest impact that would extend far beyond the geographic market under consideration here.

A. Competition Would Be Diminished If Forbearance Is Granted

In the *Omaha Forbearance Order*, the Commission analyzed the third prong of the Section 10(a) test (*i.e.,* whether forbearance from the unbundling obligations of Section 251(c)(3) would be in the public interest) largely on the basis of the actual competition which existed within the wire centers of the Omaha MSA. The Commission noted that the factors upon which it based its conclusions regarding satisfaction of the first two prongs of the Section 10(a) standard "also convince us that granting Qwest forbearance from the section 251(c)(3) access obligation for loop and transport elements would be consistent with the public interest under section10(a)(3)."[159] The principal factor guiding the Commission in the Omaha case, of course, was evidence of sufficient actual facilities-based competition in the particular wire centers in

[159] *Omaha Forbearance Order*, at ¶ 75.

which forbearance was granted. Likewise, in the *Anchorage Forbearance Order*, the Commission based its grant of forbearance on the fact that "ACS is subject to a significant amount of competition in the Anchorage study area."[160]

As discussed above, Verizon has not demonstrated sufficient actual facilities-based competition from cable companies, wireless service providers, alternate transport providers, or other sources in the Virginia Beach MSA. Accordingly, not only has Verizon failed to meet the first two prongs of the Section 10(a) standard, it has clearly failed to satisfy the public interest standard under Section 10(a)(3).

In the *Omaha Forbearance Order*, the Commission also found that the costs of continued Section 251(c)(3) unbundling outweighed the benefits;[161] something which Verizon claims is true generally in Virginia Beach.[162] Because Verizon has failed to demonstrate sufficient actual facilities-based competition in any relevant geographic market (*i.e.,* wire center) in the Virginia Beach MSA, the Commission has no basis to conclude, even "in certain limited areas of the [subject] MSA," that the costs of unbundling outweigh the benefits.

More particularly, Verizon offers no evidence in its petition that the regulations at issue are hindering its ability to compete. Rather, despite the costs of unbundling, competition and consumer interests will continue to benefit from unbundling throughout Virginia Beach. Indeed, the evidence is compelling that competitive conditions in the MSA are such that continued unbundling is required because market forces alone cannot be relied upon to sustain competition.

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160 *Anchorage Forbearance Order*, at ¶ 49.

161 *Omaha Forbearance Order*, at ¶¶ 76-77.

162 *See Second Verizon Virginia Beach Petition*, at 33.

Verizon relies in part on the competition provided by "traditional CLECs" to support its requested relief in both the mass market and the enterprise market.[163] Yet these competitors in the Verizon incumbent local operating territory – including the Commenters – continue to rely overwhelmingly on Verizon-provided unbundled loop and transport UNEs to serve their thousands of customers located throughout the Verizon footprint. As discussed in detail above, these service providers have no practical alternatives to use of Verizon's wholesale network facilities, particularly Verizon's last mile capabilities, to reach consumers. If the current regulatory obligation on Verizon to make these wholesale inputs available to competitors on cost-based (*i.e.,* TELRIC) rates and terms were to disappear through forbearance, it is difficult to see how consumers and competition would benefit. Indeed, the result would quite likely be the opposite; wholesale rates for loops and transport would rise, driving some competitors out of the market entirely and forcing the remaining carriers to raise rates and limit service options.

Verizon contends that "[e]liminating unbundling regulation also will 'further the public interest by increasing regulatory parity' between telecommunications providers in the Virginia Beach MSA."[164] Verizon argues that because it is losing customers to intermodal competitors, it would be in the public interest to end allegedly unequal regulation between the different technological modes of delivery. In the *Omaha Forbearance Order*, however, the Commission made clear that the impetus to create technological parity is warranted only "[o]nce the benefits of competition have been sufficiently realized and competitive carriers have

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163 *See Second Verizon Virginia Beach Petition - Lew/Wimsatt/Garzillo Declaration*, at ¶ 30 ("A number of CLECs in Virginia Beach are serving mass-market customers using Verizon's Wholesale Advantage product, which is the market-based successor to the regulated UNE platform service that Verizon was at one time required to provide."), and at ¶¶ 47-53.

164 *See Second Verizon Virginia Beach Petition*, at 35, *quoting Omaha Forbearance Order*, at ¶ 77.

constructed their own last-mile facilities and their own transport facilities."[165] As shown herein, there is not yet sufficient actual competition from facilities-based competitors in any wire center in Virginia Beach. Steps taken to establish technological parity cannot precede the emergence of sufficient competition but, instead, must effectively derive from it. Given the state of the market in the Virginia Beach MSA and Verizon's failure to meet its burden of proof, establishing technological parity at this time would be unwarranted, premature, and certainly *not* in the public interest.[166]

In making its public interest determinations, Section 10(b) requires the Commission to consider whether forbearance "will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services."[167] A finding that forbearance will promote competition could form the basis for a conclusion that forbearance is in the public interest. At the same time, however, a mere finding that forbearance would not be detrimental to the public is not enough. The Commission must not only establish that forbearance would not unduly *harm* consumers and competition, it also must find that substantial competitive *benefits* would arise from forbearance. Verizon has failed to establish such benefits would accrue to the public and, accordingly, the Commission should conclude that the Section 10 standard has not been met.

B. Consumers Would Be Harmed If Forbearance Is Granted

Even if the Commission concludes that the needs of individual competitors do not present a compelling basis upon which to resolve Verizon's petition (and the Commenters do not

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165 *Omaha Forbearance Order*, at ¶ 78.

166 Notably, Verizon fails to make the argument, relied upon by the Commission in the *Omaha Forbearance Order*, that forbearance would motivate it to compete vigorously on both a retail and a wholesale basis. *See Omaha Forbearance Order*, at ¶¶ 79-81.

167 47 U.S.C. § 160 (b).

suggest that this is the case), Section 10(a)(3) compels the Commission to give great weight to the interests of *telecommunications consumers* in the Virginia Beach MSA. Careful consideration of the current state of competition in Virginia Beach leads inexorably to the conclusion that consumers would suffer significant harm should forbearance be granted.

As discussed above, competitive carriers continue to rely on Verizon's loops and transport facilities to reach their customers. Continued access to Verizon's loops and transport under Section 251(c)(3) at TELRIC rates is critically important to carriers serving either the mass market or the enterprise market in the Virginia Beach MSA. Unfortunately, widespread wholesale alternatives to use of Verizon's facilities and services do not presently exist, nor are they on the horizon, and complete self-supply generally is not practically or economically feasible. The ability to use Verizon's network at cost-based rates remains absolutely essential to ensure that consumers of competitive carriers continue to enjoy the value-added competitive services they currently enjoy today and to take advantage of the competitive innovations of tomorrow.

Because competitive carriers remain reliant on access to Verizon's loop and transport UNEs, the grant to Verizon of forbearance from UNE unbundling obligations (including TELRIC pricing) would force competitive carriers to raise prices, narrow their service offerings, and curtail the introduction of innovative products and services. Thus, tens of thousands of consumers in Virginia Beach soon would be faced with less carrier and service choices and, perhaps most importantly, higher prices.

VII. CONCLUSION

For all of the forgoing reasons, Verizon's petition should be dismissed. If the Commission declines to dismiss the petition, it must deny Verizon the forbearance it seeks on the ground that Verizon has not met the statutory prerequisites contained in Section 10 of the Act.

Respectfully submitted,

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May 13, 2008