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REDACTED - FOR PUBLIC INSPECTION

May 13, 2008

VIA HAND DELIVERY AND ECFS

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

Re: In the Matter of Petition of 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

Dear Ms. Dortch:

In accordance with the Second Protective Order entered in the above-referenced docket,[1] I hereby enclose for filing on behalf of Sprint Nextel Corporation ("Sprint Nextel") two copies of the redacted version of its comments in opposition to the above-referenced petition.

Additionally, copies of the Highly Confidential Information are being submitted to you along with Gary Remondino, Tim Stelzig and Denise Coca of the Wireline Competition Bureau pursuant to the Second Protective Order. One redacted copy will be filed on the ECFS and one redacted copy will be provided electronically to the Competition Policy Division and Best Copy and Printing, Inc.

Please do not hesitate to contact me if you have any questions concerning this filing.

Sincerely,

/s/ Jennifer A. Duane

Jennifer A. Duane

Enclosure

cc: Best Copy and Printing, Inc. (via email to fcc@bcpiweb.com)
Competition Policy Division (via email to CPDcopies@fcc.gov)

[1] *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, Second Protective Order, DA 08-880 (WCB released April 15, 2008).

CONFIDENTIAL INFORMATION REDACTED – FOR PUBLIC INSPECTION

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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**

SPRINT NEXTEL CORPORATION'S COMMENTS IN OPPOSITION TO VERIZON'S PETITION FOR FORBEARANCE IN COX'S SERVICE TERRITORY IN THE VIRGINIA BEACH METROPOLITAN STATISTICAL AREA

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Dated: May 13, 2008

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BEFORE THE
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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**

SPRINT NEXTEL CORPORATION'S OPPOSITION TO THE VERIZON TELEPHONE COMPANIES PETITION FOR FORBEARANCE

Sprint Nextel Corporation ("Sprint Nextel") hereby respectfully submits its comments in opposition to the above-captioned petition of the Verizon Telephone Companies ("Verizon") seeking forbearance from enforcement of a host of statutory obligations and Federal Communications Commission ("Commission") regulations in that portion of the Virginia Beach Metropolitan Statistical Area ("MSA") served by Cox Communications, Inc. ("Cox").[1] Sprint Nextel urges the Commission to once again deny the petition in its entirety because Verizon has failed to satisfy each element of the statutory forbearance criteria enumerated in 47 U.S.C. § 160(a). Moreover, the Commission should not allow Verizon to continue to clutter its docket with a series of repetitive, virtually identical forbearance petitions that merely rehash arguments and evidence that the Commission has previously considered and rejected. Thus, the Commission must immediately dismiss the instant petition, and any future Verizon

[1] *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 (filed March 31, 2008) (hereinafter "*Verizon VA Beach Petition*"). Specifically, Verizon seeks forbearance in the following counties and independent cities located entirely within the Virginia Beach-Norfolk-Newport News, VA-NC MSA: Virginia Beach City, Norfolk City; Chesapeake City; Newport News City; Hampton City; Portsmouth City; York County; James City County; Gloucester County; Poquoson City; and Williamsburg City. Verizon VA Beach Petition at 1, n. 2.

forbearance petitions, that do nothing but cover the same ground as its previous forbearance requests. The motion to dismiss Verizon's latest forbearance petition that several competitive local exchange carriers ("CLECs") filed on April 29, 2008 gives the Commission a ready vehicle in which to act and the Commission should promptly grant the CLECs' motion.[2]

I. INTRODUCTION AND SUMMARY

On March 31, 2008 Verizon filed a petition asking the Commission to forbear from enforcing the loop and transport unbundling requirements of section 251(c) of the Act,[3] the dominant carrier regulations applicable to its mass market switched access services under Title II of the Act,[4] and the obligations imposed in the *Computer III Inquiry* that govern Verizon's incumbent local exchange operations in Cox's service territory in the Virginia Beach MSA. Verizon claims that its forbearance petition seeks substantially the same regulatory relief that the Commission granted in the *Qwest Omaha Forbearance Order.*[5] Verizon's petition also seeks the identical relief it requested in its prior petition seeking forbearance for the entire Virginia Beach MSA and it relies on substantially the same facts to support its claim.[6] The Commission, however, in December 2007 unanimously denied in its entirety Verizon's Virginia Beach MSA

[2] Public Notice, "*Pleading Cycle Established for Comments on Motion to Dismiss or Deny Verizon Virginia Beach Petition for Forbearance,*" WC Docket No. 08-49, DA 08-1056 (May 2, 2008) (setting May 19 as the due date for initial comments, with reply comments due by May 27).
[3] 47 U.S.C. § 251(c); 47 C.F.R. § 51.319(a), (b), (e).
[4] Specifically, Verizon seeks forbearance from tariffing requirements (47 C.F.R. §§ 61.32, 61.33, 61.38, 61.58, 61.59), from price cap regulation (47 C.F.R. §§ 61.41-61.49), and dominant carrier obligations associated with the procedures for acquiring lines, discontinuing services, assignment or transfers of control, and acquiring affiliations (47 U.S.C. § 241; 47 C.F.R. §§ 63.03, 63.04, 63.60-63.66).
[5] Verizon VA Beach Petition at 1, 3, citing *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) (hereinafter "*Qwest Omaha Forbearance Order*"); *aff'd, Qwest Corp. v. FCC,* 482 F.3d 471 (D.C. Cir. 2007).
[6] *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 September 6, 2006).

forbearance petition – as well as the identical requests it filed for the Boston, New York, Philadelphia, Pittsburgh and Providence MSAs - finding that the "record evidence does not satisfy the section 10 forbearance standard" for any of Verizon's forbearance requests.[7]

Just over three months after this unequivocal rejection, Verizon files the instant petition, limiting its forbearance request to a mere subset of the Virginia Beach MSA – that served by Cox as the incumbent cable operator (with the exception of Knotts Island in Currituck County, North Carolina).[8] As in its Virginia Beach MSA petition, Verizon claims that it faces robust competition throughout the geographic area served by Cox from a wide range of technologies and a broad array of service providers, including wireline, wireless, cable and Voice over Internet Protocol ("VoIP") providers.[9] In particular, Verizon argues that competition from Cox's provision of cable telephony, from traditional CLECs, including those companies that rely on Verizon's Wholesale Advantage service and section 251(c)(4) resale, and from cut-the-cord wireless competition demonstrates that the forbearance criteria applied in the *Six MSA Order* is satisfied in that segment of the Virginia Beach MSA in which Cox operates.[10]

Verizon's latest forbearance foray simply highlights the fundamental shortcomings of the current forbearance framework and underscores the need for Commission action in its pending rulemaking to adopt meaningful procedural regulations

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[7] *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 at ¶ 1 (released December 5, 2007) ("*Six MSA Order*").

[8] Verizon VA Beach Petition at 4-5. Verizon states that it has excluded Knotts Island from its forbearance request because Cox has previously indicated that it does not provide voice service in that area. *Id.* at 5, n.7, citing Cox's Comments in WC Docket No. 06-172. Verizon is not the incumbent local exchange carrier for the remainder of Currituck County, North Carolina.

[9] Verizon VA Beach Petition at 3-5.

[10] Verizon VA Beach Petition at 5-32.

to bring some much needed structure to the forbearance process.[11] Verizon appears intent on filing and refiling a continuing stream of forbearance petitions that target novel and arbitrary geographic markets in the hope that the Commission will eventually capitulate and grant it the relief it seeks. In this instance, Verizon has failed to present any new material evidence that should cause the Commission to depart from its prior precedent and reach a different conclusion in this matter. Accordingly, the Commission should deny Verizon's request for forbearance in this limited portion of the Virginia Beach MSA from the same statutory and regulatory safeguards that the Commission recently found necessary to continue throughout the entire Virginia Beach MSA.

II. THE COMMISSION SHOULD DENY VERIZON'S PETITION BECAUSE THE EVIDENCE DOES NOT JUSTIFY FORBEARANCE

Verizon's most recent forbearance petition is a transparent exercise in gerrymandering, selectively picking and choosing parts of the Virginia Beach MSA that might increase its chances of meeting the Commission's market share tests while excluding areas where it continues to face little or no facilities-based competition. It also argues that the same competitive data it presented in the Virginia Beach MSA forbearance petition should now be examined on a rate center basis rather than by wire center.[12] In doing so, Verizon ignores prior Commission precedent that clearly establishes the wire center as the proper geographic unit for its forbearance analysis from unbundling and dominant carrier regulations and holds that forbearance is not justified unless facilities-based competitive services are available to at least 75 percent of the end

[11] *In the Matter of Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended,* WC Docket No. 07-267, Notice of Proposed Rulemaking (released November 30, 2007).
[12] Verizon VA Beach Petition at 7.

user locations accessible from a particular wire center.[13] Evaluating facilities-based competition on a wire center basis is also consistent with the method the Commission adopted in examining loop impairment in the *Triennial Review Remand Order* ("TRRO").[14]

Verizon essentially reproduces the Virginia Beach MSA petition that the Commission previously rejected only last December. Verizon relies on the same competitive data, including company websites and competitors' promotional materials, to show that it has lost retail market share to various intra-modal and inter-modal competitors. Furthermore, it acknowledges that the cities and counties that form Cox's service territory account for approximately 91% of the population within the Virginia Beach MSA, in which the Commission found the current state of facilities-based competition insufficient to warrant forbearance in the *Six MSA Order*.[15] At best, the data showing the cable penetration of Cox are just a few months more recent than the information Cox provided to the Commission in the *Six MSA* proceeding, where the Commission found that "competition from cable operators . . . does not present a sufficient basis for relief."[16] Similarly, Verizon presents information relating to cut-the-cord wireless substitution that does not substantially differ, and is only marginally more recent, from what was before the Commission in the *Six MSA* proceeding. Verizon

[13] *Qwest Omaha Forbearance Order,* 20 FCC Rcd at 19444; Wireline Competition Bureau Discloses Cable Coverage Threshold in Memorandum Opinion and Order Granting Qwest Corporation Forbearance Relief in the Omaha Metropolitan Statistical Area, Public Notice, 22 FCC Rcd 13561 (2007) (revealing that Qwest received unbundling relief in wire centers where Cox's cable facilities reached more than 75 percent of the end-user locations).

[14] *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* WC Docket No. 04-313, Order on Remand, 20 FCC Rcd 2533 at ¶¶ 155-159 (2004) ("*TRRO*"), *aff'd sub. nom, Covad Communications Co. v. FCC,* 450 F. 3d 528 (D.C. Cir. 2006).

[15] Verizon VA Beach Petition at 4-5.

[16] *Six MSA Order* at ¶¶ 23, 27, 37.

references the Center for Disease Control's ("CDC") most recent survey, which calculates a wireless substitution rate of 13.6 percent nationwide as of the end of June 2007 to support its contention that it has lost significant market share to wireless providers.[17] This figure is just slightly higher than the CDC's December 2006 estimate that 12.8 percent of households nationwide exclusively subscribed to a mobile wireless service, which the Commission referenced in its *Six MSA Order* in determining Verizon's market share.[18] And, in any case, it is inappropriate to factor in wireless service in calculating Verizon's market share for forbearance purposes, particularly where wireless service is still considered primarily a complementary, not a substitute, service to wireline.

The Commission recently addressed the question of wireless substitution in its decision adopting an interim, emergency cap on the amount of high-cost support that competitive eligible telecommunications carriers ("ETCs") may receive.[19] The Commission observed that wireless competitive ETCs do not capture lines from incumbent local exchange carriers ("ILECs") to become a customer's sole service provider, except in a small portion of households.[20] Thus, it found that wireless competitive ETCs largely provide service in addition to a customer's existing wireline service rather than act as a complete replacement.[21] Consistent with this conclusion, it is improper for the Commission to place wireless service in the same product market as

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[17] Verizon VA Beach Petition at 12-13, citing Stephen J. Blumberg & Julian V. Luke, Div. of Health Interview Statistics, Nat'l Ctr. For Health Statistics, CDC, *Wireless Substitution: Early Release Estimates from the National Health Interview Survey, January-June 2007,* at 2 (December 10, 2007) ("*CDC Wireless Substitution Survey*").

[18] *Six MSA Order* at Appendix B, n. 2.

[19] *In the Matter of High-Cost Universal Service Support; Federal-State Joint Board on Universal Service,* WC Docket No. 05-337; CC Docket No. 96-45, Order at ¶ 1 (released May 1, 2008).

[20] *Id.* at ¶ 20.

[21] *Id.* The Commission noted that because the majority of households do not view wireline and wireless services to be direct substitutes, many households subscribe to both services and receive support for multiple lines, which has led to a rapid increase in the size of the fund.

wireline service and include estimates of wireless-only subscribers in its market share calculation under its section 10 forbearance review.[22] Moreover, eliminating wireless cut-the-cord customers is consistent with the approach the Commission followed with its market share calculations in the *Qwest Omaha Forbearance Order* and the *ASC UNE Forbearance Order.*[23]

Additionally, Verizon attributes Verizon Wireless customers who have cut the cord to the competitive side of the analysis in calculating the respective shares of the residential voice market in Cox's service territory in the Virginia Beach MSA.[24] Verizon contends that such an approach is appropriate because Verizon's wireline business is "affected by losses to Verizon Wireless the same as if those losses were to another competitive provider" and Verizon Wireless is regarded from a consumer perspective as an alternative to Verizon's wireline service to the same extent as any other wireless or competitive provider.[25] Treating Verizon Wireless cut-the-cord customers as equivalent to competitive lines, however, is contrary to the Commission's method in the *Six MSA Order,* as well as in previous decisions in which it has calculated carriers' market shares, and has the effect of increasing the overall market share of competitive providers while

[22] In the pending Qwest 4 MSA forbearance proceeding, WC Docket No. 07-97, several CLECs filed a study prepared by Gillan Associates in March 2008 that discussed how the Commission should properly estimate the size of the wireless-only market if it decides to include cut-the-cord wireless substitution in its residential market share analysis as part of its forbearance analysis. The study proposed several recommendations for using the estimate, including that it i) should be developed from the best-available data collected from a neutral party, such as the CDC; ii) should reflect regional differences in wireless acceptance; iii) should reflect the lower bound of the 95% confidence interval to guard against adopting an inflated figure of wireless-only subscribers; and iv) should exclude identifiable groups that because of unique factors can be expected to evince wireless preferences that are not representative of the population as a whole. Gillan Associates Study at 1-2.

[23] Qwest Omaha Forbearance Order at ¶ 72; *Petition of ACS Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c) and 252(d)(1) in the Anchorage Study Area,* Memorandum Opinion and Order, WC Docket No. 05-281 at ¶ 29 (released January 30, 2007) ("*ACS UNE Forbearance Order*").

[24] Verizon VA Beach Petition at 14-15.

[25] *Id.*

reducing Verizon's share.[26] The Commission should decline once again to adopt the new approach Verizon advocates. Instead, to the extent it decides to include cut-the-cord wireless customers in its market share analysis, it should continue to attribute Verizon Wireless' market share to Verizon consistent with its prior practice.

A. The Petition Should Be Denied as to Verizon's Section 251(c) Obligations

Verizon has failed to demonstrate that it should be relieved of its section 251(c) loop and transport obligations consistent with the Commission's analysis in previous forbearance decisions.[27] Verizon's petition again refers generally to the level of competition it faces at the retail level from Cox's provision of cable telephony and from various CLECs, VoIP providers, and wireless carriers.[28] It estimates competitors' market share based on residential white page listings (as opposed to the E911 database listings it used in the *Six MSA* proceeding) rather than actual line counts.[29] But white pages listing only produce estimates and the Commission has relied on actual line counts to calculate market share.[30] Additionally, in the *Six MSA Order,* the Commission expressly rejected Verizon's reliance upon evidence of retail "line loss" to demonstrate that a particular market is competitive.[31] The Commission recognized that there are many possible

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[26] *Six MSA Order* at Appendix B, n. 1 and n. 6. The Commission explained that attributing Verizon Wireless' share to Verizon is warranted because it has repeatedly found that "a wireline-affiliated [wireless] carrier would have an incentive to protect its wireline customer base from intermodal competition." *Application 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 at ¶ 142 (2005); *Applications of AT&T Wireless Services, Inc., Transferor, and Cingular Wireless Corp., Transferee,* Memorandum Opinion and Order, 19 FCC Rcd 21522, 21615 at ¶ 243 (2004).
[27] *See Qwest Omaha Forbearance Order*, 20 FCC Rcd 19415, 19444; *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,* WC Docket No. 05-281, Memorandum Opinion and Order, 22 FCC Rcd 1958, 1971-72, FCC 06-188 (released January 30, 2007) (hereinafter "*ACS UNE Forbearance Order*").
[28] Verizon VA Beach Petition at 5-32.
[29] Verizon VA Beach Petition at 11.
[30] *Six MSA Order* at ¶ 27, n. 89.
[31] *Six MSA Order* at ¶ 32.

reasons for reductions in retail lines that are unrelated to the existence of last-mile facilities-based competition, such as the conversion of a second line used for dial-up Internet access to an ILEC broadband line for Internet access.[32] And none of the market share gains made by these mass market retail competitors establish that Verizon is no longer the dominant provider in the wholesale market in Cox's service territory in the Virginia Beach MSA. Verizon has not shown that competitive service providers have any meaningful alternatives to its facilities; continued access to the unbundled network elements ("UNEs") of loops, subloops, and transport remain critical inputs enabling carriers to compete at the vast majority of wire centers in Cox's service territory in the Virginia Beach MSA. Thus, any competitors' gains in the retail market have little significance as long as these competitors remain dependent on Verizon for facilities, services, interconnection and collocation to provision their services. Moreover, the retail competition that currently does exist in this geographic area will cease to be sustainable if the Commission forbears from regulating the very wholesale services upon which that retail competition depends.

Carriers and customers continue to have limited competitive alternatives to Verizon's enterprise and wholesale services, including special access, and Verizon has failed to present evidence of adequate facilities-based competition for enterprise services to make relief from unbundling obligations appropriate.[33] While Verizon primarily relies on Cox's provision of cable telephony in its service territory to support its forbearance claims, cable telephony is still mainly a competitive alternative for residential customers and is not yet a viable option for wholesale and enterprise customers, due in large part to

[32] *Six MSA Order* at ¶¶ 32, 39.
[33] *Six MSA Order* at ¶ 36.

a lack of ubiquitous network coverage to accommodate the needs of those customers. The Commission concluded as much in the *Six MSA Order*, finding that the record evidence showed the comparatively limited role of the cable operators in presently serving enterprise customers in these MSAs.[34] Similarly, wireless service is not yet a sufficient competitive alternative to Verizon for enterprise customer needs. And VoIP service is not an alternative access technology since it is still dependent on either fiber or cable to the home or business. In this regard, the Commission has consistently declined to factor competition from over-the-top VoIP providers into its forbearance analysis.[35] Moreover, Verizon makes no attempt to quantify the extent of VoIP competition in the geographic market it has selected for its forbearance request; thus, it is not a reliable indicator of competitive market conditions in that portion of the Virginia Beach MSA served by Cox.

In addition, Verizon contends that it faces competition for enterprise customers from a wide variety of service providers, including traditional telecommunications carriers such as AT&T, Sprint Nextel, Level 3, Cavalier and PAETEC.[36] It also claims that several of these competitors serve enterprise customers using their own facilities and notes that at least two known competing providers operate fiber networks within Cox's service territory in the Virginia Beach MSA that span at least **[Begin Verizon Confidential]** **[End Verizon Confidential]** route miles.[37] Verizon's petition, however, fails to indicate the extent to which these two carriers' route miles overlap. Even if both of them are on the same route, which Verizon has not demonstrated, then

[34] *Six MSA Order* at ¶ 37.
[35] *Six MSA Order* at ¶ 23.
[36] Verizon VA Beach Petition at 27.
[37] *Id.* at 28.

there may be facilities-based competition on that one route, but that indicates very little about the general level of competition throughout the area. Additionally, to put the number of competitive route miles in perspective, it is instructive to note that Verizon indicates in its ARMIS report that in 2007 it had 17,728 miles of transport fiber in the state of Virginia, having added 3124 sheath miles in 2007.[38]

In any case, the Commission acknowledged the limited usefulness of the competitive fiber network data that Verizon presented in the *Six MSA Order*, including fiber network maps and the number of route miles on these networks, finding that such information has little probative value and is not informative for identifying where any unbundling relief would be warranted or where a competitive carrier might serve a substantial number of buildings within a wire center.[39] The Commission should similarly give little weight to Verizon's data on competitive fiber networks in the instant proceeding.

In the *Six MSA Order*, the Commission's forbearance analysis of Verizon's unbundling obligations also focused on the role of the wholesale market and it found that the record did not reflect any significant alternative source of wholesale inputs for carriers in the six MSAs.[40] The Commission also disagreed with Verizon's argument that "forbearance could be justified based simply on the claim that competitors overall are using special access rather than UNEs when providing service over Verizon's facilities."[41] Verizon again makes this argument in this Virginia Beach MSA petition,

[38] *See* ARMIS Report 43-07, Table II, column d, row 322. Verizon reported 23,502 sheath kilometers of fiber for 2006 and 28,530 sheath kilometers in 2007, a gain of 5208 kilometers, or 3124 miles in 2007. The ARMIS data is not disaggregated by MSA.
[39] *Six MSA Order* at ¶ 40.
[40] *Six MSA Order* at ¶ 38.
[41] *Id.*

asserting that it faces extensive competition from carriers using its special access facilities to serve enterprise customers.[42] The Commission should again reject the notion that the use of special access by competing carriers is a reason to forbear from UNE obligations. First, Verizon has already received relief from high capacity loop and transport unbundling obligations based on the competitive triggers established in the *TRRO*[43] in several of the wire centers for which it seeks forbearance in this matter. The Commission rightly concluded in the *Six MSA Order* that it would be contrary to the public interest to grant Verizon additional unbundling relief based on the same competition upon which it relied to eliminate unbundling obligations through the *TRRO* process.[44] Second, in the *Six MSA Order,* the Commission discounted Verizon's claim that competitors' use of special access facilities shows that UNEs are unnecessary for competition because its rules prohibit the use of UNEs exclusively for interexchange service and mobile wireless service and Verizon's data failed to specify the special access facilities used to provide local service.[45] Verizon's attempt to remedy these evidentiary deficiencies in this petition by presenting only special access data for competitors "other than wireless carriers" again misses the mark. It again fails to indicate the extent to which special access services are used as an input for interexchange services. And it again ignores the Commission's view that the availability of UNEs acts as a competitive constraint on special access pricing.[46] Considering Verizon's overpricing of its special

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[42] Verizon Virginia Beach Petition at 30-31.
[43] *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* WC Docket No. 04-313, Order on Remand, 20 FCC Rcd 2533 (2004) ("*TRRO*"), *aff'd sub. nom, Covad Communications Co. v. FCC,* 450 F. 3d 528 (D.C. Cir. 2006).
[44] *Six MSA Order* at ¶ 38.
[45] *Id.*
[46] *Six MSA Order* at ¶ 38.

access services, as discussed *infra* in section III.A, eliminating what little competitive restraint UNEs are providing to Verizon would clearly be contrary to the public interest.

Given the evidence that Verizon continues to exert control over the enterprise, wholesale and special access markets, the Commission cannot conclude that Verizon should be relieved of its obligations to unbundle its loops and transport facilities in that portion of the Virginia Beach MSA served by Cox.

B. The Petition Should Be Denied as to Verizon's Title II and *Computer III Inquiry* Obligations

Verizon seeks far-reaching exemptions from its Title II and *Computer III Inquiry* obligations. In particular, Verizon seeks exemption from dominant carrier tariffing obligations[47] and price cap rules under Part 61 of the FCC's rules applicable to its mass market switched access services.[48] It seeks exemption from all section 214 procedures and Part 63 rules applicable to dominant carriers.[49] And it seeks exemption from all *Computer III Inquiry* requirements, including the open network architecture ("ONA") and comparably efficient interconnection ("CEI") rules, intended to preclude network discrimination against facilities-based competitors.[50]

The Commission has previously determined that forbearance from dominant carrier regulation is justified upon a finding that the incumbent LEC no longer has market

[47] 47 C.F.R. §§ 61.32, 61.33, 61.38, 61.58 and 61.59.
[48] 47 C.F.R. §§ 61.41-61.49.
[49] 47 U.S.C. § 214; 47 C.F.R. §§ 63.03, 63.04, 63.60-63.66.
[50] *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, CC Docket No. 85-229, Report and Order, 104 FCC 2d 958 (1986); *Application of ONA and Nondiscrimination Safeguards to GTE Corp.*, CC Docket No. 92-256, Report and Order, 9 FCC Rcd 4922 (1994). The *Computer Inquiry* rules require dominant carriers to (i) offer as telecommunications services the basic transmission services underlying their enhanced services (transmission access requirement); (ii) offer those telecommunications services on a non-discriminatory basis to all enhanced service providers, including their own enhanced services operations (nondiscrimination requirement); and (iii) offer those telecommunications services pursuant to tariff (tariffing requirement).

power in the provision of the services for which it seeks forbearance.[51] Verizon, however, has failed to demonstrate that it no longer possesses market power throughout Cox's service territory in the Virginia Beach MSA so that the continued enforcement of these requirements is no longer necessary. In the *Six MSA Order*, for example, the Commission found that while Verizon faced competition for mass market customers from a number of CLECs, the evidence showed that these intramodal competitors rely on access to Verizon's last-mile network facilities, including UNEs and Verizon's other wholesale services in all six MSAs.[52] It also declined to include "over-the-top" VoIP providers in its competitive analysis due to the absence of record evidence to justify a finding that these providers offer close substitute services.[53]

Moreover, the Commission has consistently held that the switched access market is not competitive, recognizing that all local exchange carriers ("LECs") serve two distinct customer groups for mass market switched access services – end users and interexchange carriers ("IXCs") - and they all have monopoly power over the rates they impose on IXCs for terminating calls to their end user customers.[54] To guard against the abuse of this monopoly power, the Commission has imposed several conditions on its grant of forbearance from dominant carrier regulation of interstate switched access services in its prior decisions.[55] In the *Qwest Omaha Forbearance Order*, for example, the Commission applied the same access charge benchmarks under which CLECs operate

[51] *Qwest Omaha Forbearance Order* at ¶ 22.
[52] *Six MSA Order* at ¶ 23.
[53] *Id.*
[54] *See Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers,* CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923, 9938 at ¶ 38 (2001); *see, e.g., Qwest Omaha Forbearance Order* at ¶¶ 27, 33; *Six MSA Order* at ¶¶ 25-27.
[55] *Qwest Omaha Forbearance Order* at ¶¶ 39-41.

and required Qwest to cap its interstate access rates at its currently tariffed rates.[56] It imposed similar conditions on ACS of Anchorage in granting its requested relief from dominant carrier regulation of its interstate switched access services.[57] While Sprint Nextel disputes that Verizon has demonstrated that forbearance from dominant carrier regulation of its interstate switched access services is warranted in the instant petition, the Commission must, at the very least, place the same cap on Verizon's switched access rates going forward as it did in the *Qwest Omaha Forbearance Order* and the *ACS Dominance Forbearance Order* before granting it any such relief.

Additionally, Verizon's petition barely touches on how it satisfies the conditions necessary to justify forbearance from the *Computer III* requirements. Indeed, in the *Six MSA Order,* the Commission observed that record evidence addressing the requested relief from the *Computer III* requirements was noticeably lacking.[58] The Commission adopted the *Computer III* non-structural safeguards to preclude the Bell Operating Companies ("BOCs") from using exclusionary market power arising from their control over ubiquitous local telephone networks to thwart competition in the enhanced services market.[59] It found in the *Six MSA Order* that Verizon failed to show that it no longer possesses exclusionary market power and forbearance therefore would not be appropriate.[60] Verizon has again failed to make its case for forbearance from the *Computer III* requirements in the instant petition. Thus, the Commission should again

[56] *Id.* at ¶ 41.
[57] *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S.C. § 160(c) for Forbearance from Certain Dominant Carrier Regulation of its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services in the Anchorage, Alaska Incumbent Local Exchange Carrier Study Area,* WC Docket No. 06-109 at ¶¶ 40, 59-61 (released August 20, 2007) (hereinafter *"ACS Dominance Forbearance Order").*
[58] *Six MSA Order* at ¶ 45.
[59] *See Amendment of Section 64.702 of the Commission's Rules and Regulations,* CC Docket No. 85-229, Phase I, 104 FCC 2d 958, 964 at ¶ 4 (1986) (*Computer III Phase I Order*).
[60] *Six MSA Order* at ¶ 45.

deny this portion of Verizon's request for having failed to meet the statutory criteria necessary for it to justify its forbearance requests.

III. VERIZON'S PETITION FAILS TO SATISY SECTION 10's FORBEARANCE REQUIREMENTS

Verizon bears a heavy burden to demonstrate that it meets each element of the statutory criteria to obtain forbearance from the Commission regulations and legal obligations at issue in this proceeding. Section 10(a) of the Act provides that the Commission may not grant forbearance from any Commission regulation or statutory provision until it finds that three conditions have been met. The Commission must make affirmative determinations that (1) enforcement of the Act's provisions or the Commission's regulation is not necessary to ensure that the telecommunications carrier's charges, practices, classifications, or regulations are just, reasonable, and not unjustly or unreasonably discriminatory; (2) enforcement of the provision or regulation is not necessary for the protection of consumers; and (3) forbearance from applying the provision or regulation is consistent with the public interest.[61] Section 10(b) also requires the Commission, as part of its public interest determination, to examine whether forbearance from enforcing the provision or regulation at issue will promote competitive market conditions and enhance competition among telecommunications providers.[62]

The Commission must deny a petition for forbearance if it determines that any one of the three elements of the section 10(a) standard is not met.[63] As discussed in more

[61] 47 U.S.C. § 160(a).
[62] 47 U.S.C. § 160(b).
[63] *Cellular Telecommunications & Internet Association v. Federal Communications Comm'n*, 330 F.3d 502, 509 (D.C. Cir. 2003) (explaining that the three elements of section 10(a) are conjunctive and that the Commission could properly deny a petition for failure to meet any one prong). Additionally, the Commission has held that it would be appropriate to deny a petition for forbearance even if only one of the

detail below, the Commission should deny Verizon's petition for failure to satisfy the three components of the statutory forbearance standard.

A. Verizon Has Not Demonstrated That Compliance With Section 251(c), Title II, and the *Computer III Inquiry* Rules Is Not Necessary to Ensure Just, Reasonable and Non-Discriminatory Charges and Practices

Verizon continues to maintain its market dominance throughout that portion of the Virginia Beach MSA that Cox serves. The competitors Verizon identified in its petition continue to depend in large part on Verizon's facilities to serve both their mass market and enterprise customers. CLECs continue to need access to Verizon's loop and transport network elements to provision their competitive services. Competitive IXCs depend on Verizon for exchange access service. Wireless carriers also depend on Verizon for special access backhaul and transport facilities.

Sprint Nextel's own experience confirms that Verizon's control over the local loop and special access facilities and the lack of ubiquitous facilities-based alternative providers preclude any finding that the enterprise and wholesale markets are sufficiently competitive to justify forbearance from these critical regulations. For example, despite Sprint Nextel's policy of continually seeking alternative access providers for its special access needs, Verizon accounts for 91% of Sprint Nextel's special access purchases for both its wireless and wireline networks in LATA 252, which encompasses the Virginia Beach MSA. More specifically, Sprint Nextel purchases **[Begin Sprint Highly Confidential]** **[End Sprint Highly Confidential]** wireline DS1 connections and **[Begin Sprint Highly Confidential]** **[End Sprint Highly Confidential]** wireline DS3

three elements of section 10(a) is not satisfied. *Petition of Core Communications, Inc. for Forbearance from Sections 251(g) and 254(g) of the Communications Act and Implementing Rules,* WC Docket No. 06-100, Memorandum Opinion and Order, 22 FCC Rcd 14118, 14125 at ¶ 12 (2007).

connections from Verizon in LATA 252. In contrast, Sprint Nextel purchases **[Begin Sprint Highly Confidential] [End Sprint Highly Confidential]** wireline DS1 connections and **[Begin Sprint Highly Confidential] [End Sprint Highly Confidential]** wireline DS3 connections from alternative access vendors ("AAVs") in LATA 252.

Wireless carriers like Sprint Nextel must locate their cell sites throughout their licensed service areas, including in suburban and rural areas, to provide the ubiquitous coverage that consumers demand. They cannot provide their services without connecting their cell sites with their mobile switches. The Commission has recognized that these backhaul facilities are critical inputs in the provision of wireless services.[64] Verizon holds a virtual monopoly over the backhaul facilities that Sprint Nextel needs to provide its services. As Sprint Nextel reported in its initial comments filed in the *Six MSA* proceeding, it has **[Begin Sprint Highly Confidential] [End Sprint Highly Confidential]** cell sites and **]Begin Sprint Highly Confidential] [End Sprint Highly Confidential]** mobile switching centers in the Virginia Beach MSA, yet **[Begin Sprint Highly Confidential] [End Sprint Highly Confidential]** of them have any AAV alternatives, leaving Sprint Nextel wholly dependent on Verizon for **[Begin Sprint Highly Confidential] [End Sprint Highly Confidential]** of its special access purchases for its wireless network.[65]

Clearly, the Commission may not grant forbearance while Verizon retains its dominance in the special access market. The evidence submitted in the Commission's

[64] *AT&T/BellSouth Merger Order,* 22 FCC Rcd 5662, 5676 at ¶ 27 (2007).
[65] *See In the Matter of 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,* WC Docket No. 06-172, Sprint Nextel Corporation's Opposition to Petitions for Forbearance (Confidential Version) at Appendix B (filed March 5, 2007).

pending *Special Access Pricing* rulemaking overwhelmingly demonstrates that the special access market is not competitive.[66] According to the FCC's own data, ILECs received 92.7 percent of all special access revenues in 2001; by 2005, their market share of an even larger market increased to 94.1 percent.[67] Special access was a $16 billion per year business for the ILECs in 2005/2006, with AT&T and Verizon combined accounting for an 82 percent share of the nationwide ILEC special access market as measured by revenues.[68] To the extent competition exists at all, it is limited to the offering of highest capacity special access circuits in select portions of urban business centers.[69] Given that meaningful competition in the special access market has not materialized, there are no competitive constraints on Verizon's pricing behavior. Instead of being forced to price its special access services at or near marginal costs, as occurs in a truly competitive market, it has used its flexibility to extract monopoly rents from its competitors in the wireless, long distance and Internet broadband access markets. Over the last several years, Verizon has realized excessive returns from its provision of special access services that completely contradict the notion that the special access market is competitive.[70] In

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[66] *See* Comments filed in response to the recent FCC Public Notice, *Parties Asked to Refresh Record in the Special Access Notice of Proposed Rulemaking,* WC Docket No. 05-25, RM-10593, FCC 07-123 (released July 9, 2007) ("2007 Notice"); *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers,* WC Docket No.05-25, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994 (2005) ("2005 Notice").

[67] *See* Sprint Nextel Written Ex Parte, *Special Access NPRM,* WC Docket No. 05-25 at 19 (October 5, 2007).

[68] Government Accountability Office Report to the Chairman, Committee on Government Reform, House of Representatives, "*FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services,*" November 2006 at 19 ("GAO Special Access Report"). The GAO reported that "[d]ue to increasing data transmission needs, special access services are a growing segment of the telecommunications market and represented about $16 billion in revenues in 2005 for the [RBOCs]." GAO Special Access Report at 1.

[69] GAO Special Access Report at 19 (determining that less than six percent of buildings with demand for DS1 level or higher are served by a fiber-based competitor, with competition being heaviest for those buildings with the highest levels of demand).

[70] In any truly competitive market, sellers must lower their prices closer to cost in response to competitive pressures. One need only look at the pricing behavior of electronics manufacturers, such as for DVDs or

2004, immediately before the FCC initiated its currently stalled review of special access price regulation, Verizon achieved a rate of return of 31.64 percent. In 2005, Verizon's return was 41.97 percent and, in 2006, it enjoyed a return of 51 percent.[71] Returns of these magnitudes are well in excess of the FCC's authorized rate for rate-of-return carriers of 11.25 percent, indicating that there is no competition keeping Verizon's special access prices in check.[72] Thus, the regulatory safeguards found in the unbundling requirements, Title II regulations and the *Computer III Inquiry* requirements remain necessary to ensure just, reasonable and non-discriminatory pricing.

Moreover, the competitive situation that currently exists in the Omaha MSA in the aftermath of the Commission's grant of forbearance to Qwest from its loop and unbundling obligations is particularly instructive. McLeodUSA Telecommunications Services, Inc. has petitioned the Commission to reconsider its grant of forbearance in the Omaha MSA because of Qwest's refusal to provision loops and transport at rates and terms that would permit McLeod to compete effectively in the market.[73] McLeod has indicated that because of Qwest's excessively priced special access rates and unreasonable wholesale pricing for last mile loop facilities, it is no longer able to economically compete; therefore, it intends to withdraw from the Omaha market.[74] The

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digital televisions, to see how, in a genuinely competitive market, sellers reduce prices as they gain efficiencies and scale economies.

[71] These returns are based on data contained in the FCC's ARMIS Report 43-01, Table 1 Cost and Revenue, Column(s) Special Access, Row 1915 Net Revenue divided by Row 1010 Average Net Investment.

[72] *Special Access Pricing NPRM,* 20 FCC Rcd 1994 at ¶ 35 (noting that "[i]n recent years, the BOCs have earned special access accounting rates of return substantially in excess of the prescribed 11.25% return for rate-of-return LECs").

[73] *Petition for Modification of McLeodUSA Telecommunications Services, Inc.*, WC Docket No. 04-223 (filed July 23, 2007).

[74] *McLeodUSA Petition for Modification* in WC Docket No. 04-223 at 14-15.

Commission surely did not mean for this to be the result of its prior forbearance grant, as the ability to drive out both existing and potential competition is not good for consumers.

Because Verizon does not face effective competition, consumers could face the same result in that portion of the Virginia Beach MSA served by Cox as consumers face today in the Omaha MSA. Accordingly, the Commission should find that Verizon has not met the first element of the statutory forbearance standard.

B. Verizon Has Not Demonstrated That Compliance with Section 251(c), Title II, and the *Computer III Inquiry* Rules Is Not Necessary to Protect Consumers

Verizon has failed to prove that the market-opening requirements of section 251(c) and the market safeguards of Title II and the Commission's *Computer III Inquiry* rules are no longer needed to protect consumers. In truth, granting forbearance in this instance, given the lack of extensive facilities-based competition to act as a check on Verizon's market power, would only harm consumers. It would impede new entrants and discourage competitive entry or cause competitors to exit or forego entering the market, as has occurred in the Omaha MSA after the Commission's grant of forbearance. Forbearance would only increase Verizon's market power in the enterprise and wholesale markets. And it would limit competitive choices available to consumers and in all likelihood increase their costs for communications services. At best, consumers would be faced with a duopoly between Verizon and the cable telephony provider. Consumers can hardly benefit from such an environment.

C. Granting Forbearance in this Matter Would be Contrary to the Public Interest and Would Harm Competition

Because Verizon continues to dominate the special access market within Cox's service territory in the Virginia Beach MSA, even its facilities-based competitors,

including those intermodal competitors it references in its petition, must depend on Verizon's network to serve their customers. CLECs using UNE-loops to compete depend on Verizon's facilities. Cable telephony competitors depend on Verizon's special access services to link their enhanced cable networks together and to provide their own services. Wireless carriers and competitive IXCs must depend substantially on Verizon's special access services. While Verizon references potential gains made by "over-the-top" VoIP providers, to the extent such service providers may eventually gain a significant place in the market, they will also likely depend on Verizon's facilities, either directly or indirectly, to provide their services. There are simply no adequate wholesale alternatives to Verizon within Cox's service territory in the Virginia Beach MSA at this time. Forbearance would only further adversely affect the prospect of any meaningful competition developing in the enterprise and wholesale services market.

In addition, Verizon's request for relief from some, but not all, tariff filing requirements applicable to its interstate switched access services is contrary to the public interest. Verizon is seeking forbearance from the tariff filing requirements that it finds burdensome; yet, it will retain the benefits that filing tariffs yields. For example, Verizon can force wireless carriers to pay it access charges simply by writing the charges into a tariff, whereas wireless carriers, which the Commission has prohibited from filing tariffs, must negotiate a contract with Verizon in order to charge it for access services. Even though the Commission has already determined that *complete* detariffing is in the public interest for the competitive markets faced by IXCs and wireless carriers, it does not follow that the *piecemeal* detariffing that Verizon seeks in this proceeding is in the public interest. Tariffs provide both benefits and costs to the ILECs and their access customers.

If Verizon obtains forbearance from the "costly" parts of tariffing, it alters the balance of interests that justifies the filing of tariffs in the first place. The Commission should reject this piecemeal detariffing approach and, instead, institute a rulemaking to determine the proper balance of interests that should apply if the ILECs face competition for local service. At the very least, and pending the outcome of such a rulemaking, the Commission should grant the forbearance that Verizon seeks only on the condition that Verizon pay access charges to all of its competing local carriers, including wireless carriers, at the same rate that it charges those carriers in its own tariffs.

In summary, granting Verizon's forbearance within Cox's service territory in the Virginia Beach MSA would reduce competition, decrease innovation and quality of service, and increase cost for consumers. Thus, a grant of forbearance under these circumstances would be contrary to the public interest.

IV. CONCLUSION

As cogently explained in the CLECs' pending motion to dismiss, the Commission should summarily dismiss Verizon's petition for forbearance from unbundling and dominant carrier regulations within Cox's service territory in the Virginia Beach MSA. The fundamental tenets of issue preclusion bar Verizon from seeking the same relief based on the same set of facts through the filing of a multitude of forbearance petitions. The Commission should reject Verizon's attempts to co-opt the Commission's regulatory agenda in this manner by having it devote limited resources to evaluating duplicative forbearance requests.

If the Commission does consider the merits of Verizon's petition, it should deny the requested relief because Verizon fails to provide adequate evidence that forbearance

would be consistent with the statutory standard.[75] By ignoring the state of the market for the services for which it seeks forbearance, particularly in the wholesale and enterprise markets, Verizon has failed to satisfy each element of the statutory criteria. Verizon has not shown that facilities-based competitors have made sufficient and substantial market share gains to warrant the elimination of dominant carrier regulations and the unbundling protections. The Commission cannot, based on the record in this docket, grant Verizon's petition for forbearance from these important statutory and regulatory safeguards.

Respectfully submitted,

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[75] 47 U.S.C. § 160(a).