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EX PARTE

May 30, 2008

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

Re: ***Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, WC Docket No. 07-97**

Dear Ms. Dortch:

Earlier today, Dr. Kent Mikkelsen, Senior Vice President of Economists Incorporated, Brad Mutschelknaus of Kelley Drye & Warren LLP, representing Covad Communications Group, NuVox Communications, and XO Communications, LLC, and the undersigned, representing Cbeyond Inc., Integra Telecom, Inc., One Communications Corp., and Time Warner Telecom Inc., met with Denise Coca, Margaret Dailey, Adam Kirschenbaum, Al Lewis, Pam Megna, Jesse Skinner, and Tim Stelzig of the Wireline Competition Bureau regarding the above-captioned proceeding. Deena Shetler and Jay Atkinson of the Wireline Competition Bureau also participated via phone.

Dr. Mikkelsen, Mr. Jones, and Mr. Mutschelknaus discussed Qwest's argument that the Commission should consider so-called "cut-the-cord" mobile wireless subscribers in its analysis of Qwest's pending forbearance petitions and the reasons that this argument should be rejected. A copy of the materials on which these discussions were based, which have already been submitted into the record, is attached.

Please do not hesitate to contact me if you have any questions or concerns about this submission.

Respectfully submitted,

/s/ Thomas Jones

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Mobile Wireless Service to "Cut the Cord" Households in FCC Analysis of Wireline Competition

Kent W Mikkelsen

April 21, 2008

Verizon filed petitions in 2006 seeking forbearance from certain regulations, including dominant carrier regulation applicable to its mass market switched access services and unbundling regulations, in six geographic areas.[1] In its December 2007 decision to deny these petitions, the Commission used market share statistics that reflected both wireline voice customers and certain mobile wireless voice customers—those that subscribe only to mobile wireless voice service and have "cut the cord" to wireline voice service.[2] Specifically, the numerator used to calculate Verizon's share included Verizon's wireline voice customers and Verizon mobile wireless customers that have "cut the cord." The denominator includes wireline customers of Verizon and competitors and all "cut the cord" customers.

It is my understanding that, in determining whether or not to forbear applying (1) dominant carrier economic regulation to mass market switched access services, and (2) unbundling regulations to DS-0, DS-1 and DS-3 loops and DS-1 and DS-3 interoffice transport facilities, the Commission evaluates, among other things, the degree of competition in providing wireline voice services to "mass market" customers.[3] By including mobile wireless voice services in its calculation of market shares, the Commission appears to have concluded that mobile wireless voice services should be considered part of the wireline services market. Based

[1] *In re Petitions of the Verizon Telephone Companies for Forbearance 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, 22 FCC Rcd. 21293, ¶ 1 (rel. Dec. 5, 2007) ("*Verizon 6-MSA Order*").

[2] *Id.* ¶¶ 27, 37 and Appendix B.

[3] *See, e.g., id.* ¶ 37 ("We begin our analysis by examining competition in the retail and wholesale markets in the relevant MSAs. With respect to retail competition for mass market customers, Verizon's MSA-wide mass market shares . . . taken in conjunction with other factors[] are not sufficient to warrant forbearance from dominant carrier regulation. Consistent with our precedent, we likewise are not persuaded that these data, in themselves, support the grant of forbearance from UNE obligations.").

on the evidence I have reviewed, there is ample reason to doubt a market definition that includes mobile wireless services in the wireline services product market. If the relevant market includes only wireline services but not mobile wireless services, then including mobile wireless services in share calculations as the Commission has done does not accord with normal practices in assessing competition and tends to overstate the extent of competition.

Merger Guidelines approach to market definition

It is my understanding that the FCC assesses whether to grant a petition for forbearance from dominant carrier and unbundling regulations based in part on the extent to which the petitioner faces competition in the provision of the services for which it seeks forbearance. In order to undertake such an analysis, it is necessary to define the relevant product market. A considerable body of thought and experience in the assessment of competition has been developed in the context of antitrust analysis. The DOJ-FTC Merger Guidelines lay out a widely accepted method to define a "relevant market."[4] The purpose for defining a relevant market is to distinguish products or services that compete closely with one another from products or services that are less important to competition. The Commission has itself used the Merger Guidelines approach to define relevant markets.[5]

Following the Merger Guidelines approach, a relevant market is "a product or group of products such that a hypothetical profit-maximizing firm that was the only present and future seller of those products ('monopolist') likely would impose at least a 'small but significant and nontransitory' increase in price."[6] The Merger Guidelines also define the relevant market as the

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[4] U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines*, 57 F.R. 41552 (1992) (rev. Apr. 8, 1997) ("Merger Guidelines").

[5] *See, e.g., In re Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd. 18433, ¶ 21 (rel. Nov. 17, 2005) ("*Verizon/MCI Merger Order*"); *see also In re Applications of Nextel Communications, Inc. and Sprint Corporation For Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 20 FCC Rcd. 13967, ¶ 39 (rel. Aug. 8, 2005) ("*Sprint/Nextel Merger Order*").

[6] Merger Guidelines, §1.11.

narrowest set of products or services that meet the criteria.[7] In practice, the Merger Guidelines method considers a narrow set of products or services and investigates whether that set of products or services meets the criteria to be a relevant market. If the criteria for a relevant market are not met, the Merger Guidelines approach broadens the set of products or services under consideration and investigates whether the criteria are met by the broader set. Once a set of products or services is identified that meets the relevant market criteria, the Merger Guidelines approach proceeds to analyze the structure (i.e., the number and relative size of suppliers) of the relevant market.

Applying the Merger Guidelines approach to wireline services

Applying this method to the question at hand, one begins by considering the narrowest potential market definition — whether wireline voice services provided to mass market customers constitute a relevant market.[8] One asks whether, if there were only one firm providing wireline voice service to a specific geographic area now or in the future, it would be profitable for such a firm to raise prices by a small but significant amount (e.g., 5-10 percent) for a significant period of time (e.g., one year).

A critical part of the answer to this question depends on how current purchasers of wireline voice services would respond to such a price increase. This is easiest to see by considering the extremes. If no purchaser of wireline services would drop its service in response to such a price increase, it would clearly be profitable for the hypothetical monopolist to raise price. At the other extreme, if all purchasers of wireline services would drop their service in response to such a price increase, it would clearly not be profitable to raise price. Such extremes are almost never observed, however. It becomes an empirical question to determine the extent to

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[7] *Id.* § 1.0.

[8] The Commission has concluded in other proceedings that wireline services should not be included in the relevant market for mobile wireless services. *See e.g., In re Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation For Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 19 FCC Rcd. 21522, ¶ 239 (rel. Oct. 26, 2004) ("*AT&T/Cingular Merger Order*"). The issue discussed here—whether mobile wireless services should be included in the market for wireline services—though related, is different because the analysis starts by considering a hypothetical price increase for wireline services, not mobile wireless services.

which customers would decrease their purchases in response to such a price increase. It is also worth noting that growth or decline in the number of wireline voice customers for reasons other than a change in the price of wireline is not part of the market definition analysis.[9]

When the degree of price responsiveness has been determined, it is often useful to consider the variable profit margin[10] that the hypothetical monopolist earns. Charging a higher price to customers that retain their service tends to increase profits, while giving up variable profits on customers that drop their service tends to decrease profits. Whether the hypothetical price increase is profitable overall—which in turn determines whether the set of products or services under consideration is a relevant product market—normally depends on the balance between these two factors.

Economists use the term "demand elasticity" to describe the extent to which customers will reduce their level of purchase in response to a change in price, holding other factors constant.[11] When the demand elasticity is known or can be estimated quantitatively, it has a direct role in determining whether or not the products or services under consideration are a relevant market. Very commonly, no suitable elasticity estimate is available, forcing analysts to rely on various indicators to guide a judgment about demand elasticity.

The most recent estimate of demand elasticity for wireline services in the U.S. of which I am aware is found in a 2003 paper by Rodini, Ward and Woroch.[12] The authors use data from 2000 and 2001 to estimate the demand elasticity for secondary fixed lines. They find that the

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[9] The market definition test is concerned with whether a hypothetical price increase would be unprofitable due to the loss of sales relative to the level of sales absent the price increase. If demand is shrinking or growing, this is adjusted for in assessing the level of sales that would be made absent the price increase.

[10] Variable profit margin is usually defined as the difference between price and variable cost, expressed as a percentage of the price. Variable costs are those that increase or decrease with increases or decreases in the quantity of goods or services produced.

[11] Formally, demand elasticity can be expressed as the percentage change in quantity purchased associated with a 1 percent change in price.

[12] *See* Mark Rodini, Michael R. Ward and Glenn A Woroch, "Going mobile: Substitutability between fixed and mobile access," 27 *Telecommunications Policy* 457, 457-476 (2003).

demand for secondary fixed lines is relatively inelastic: -0.62 in 2001. In other words, an increase of 1 percent in the price of a secondary line would lead customers to decrease the number of such lines by only 0.62 percent. The authors also note that the demand for primary fixed lines is even more inelastic (i.e., the demand elasticity would be a smaller number in absolute value).[13]

Other authors have used the Rodini-Ward-Woroch demand elasticity estimate to answer the market definition question regarding wireline voice service.[14] In this case, the determination is very easy. When the demand elasticity for a product is in the relatively inelastic range, an increase in price results in an increase in total revenues.[15] Using the available estimate, a price increase of 1 percent is estimated to reduce the number of secondary (or primary) fixed lines by less than 1 percent, resulting in an increase in total revenues. Regardless of the variable profit margin, a price increase would be profitable. From this it follows that wireline service exhibiting the estimated demand elasticity is a relevant market.

A finding that wireline service is a separate relevant market without including mobile wireless service does not imply that there is no substitutability between wireline and mobile wireless services. It simply means that, in response to a small wireline price increase, purchasers of wireline service would not turn from wireline service to mobile wireless service in such great numbers that the wireline price increase would be unprofitable. In other words, one cannot rely on the presence of mobile wireless alternatives to constrain the price of wireline service. Rather, the price of wireline services is constrained principally by competition among firms supplying wireline service and by regulation.

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[13] Earlier studies have also found the demand for wireline service to be inelastic. As one paper put it, "Other work in this area generally supports [the] finding that the price elasticities for landline service approach zero in recent periods. . . ." Christopher Garbacz and Herbert G. Thompson, Jr., "Demand for telecommunications services in developing countries," 31 *Telecommunications Policy* 276, 278 (2007).

[14] Phoenix Center for Advanced Legal and Economic Public Policy Studies, Policy Bulletin No. 10, "Fixed-Mobile 'Intermodal' Competition in Telecommunications: Fact or Fiction?" Mar. 31, 2004, http://www.phoenix-center.org/pcpb.html.

[15] This can be verified in most basic economics textbooks. *See, e.g.,* Paul A. Samuelson and William D. Nordhaus, *Economics* 72 (17th ed. 2001).

Shares within a relevant market

Once a relevant market has been defined, competition analysis normally proceeds to determine the shares of sales that each supplier makes (or, in some cases, could make) in the relevant market. Normal procedure does not include assigning a share to customers that choose not to purchase the product in the relevant market. In the case of wireline service, shares would be assigned to the ILEC, CLEC and cable providers based on their sales or the number of lines in service. Households with no wireline connection, such as those that had "cut the cord," would not be included in the share calculation. Including households with no wireline connection would depart from standard economic practice and could overstate the amount of competition for wireline services.

Additional evidence regarding a wireline market

As noted above, determining the set of products or services that belongs in a well-defined relevant market rests on facts regarding demand elasticities and margins. In general, the greater the number of substitutes, and the closer or more similar those substitutes are to the products or services in question, the higher the demand elasticity will be. The demand elasticity for a product or service is not immutable, and can change over time. Given that Rodini-Ward-Woroch derived their demand elasticity estimate for wireline telephone service using data from 2000 and 2001, it is appropriate to consider whether secondary indicators offer evidence as to the extent to which demand elasticity for wireline telephone service has changed. Nonetheless, I am not aware of any analysis that shows that the demand for wireline service has become sufficiently elastic that wireline service (exclusive of wireless services) is no longer a relevant market.

Wireline and mobile wireless services are obviously similar in that they both offer voice communication. However, they also have numerous distinguishing characteristics. Wireline service typically provides high and consistent transmission quality, unlimited service for a flat rate, a common connection point for all members of a household, subscription costs that are generally lower than for mobile wireless service, and more accurate and reliable enhanced 911 emergency capability than mobile wireless service.[16] Mobile wireless service can be used both at home or away, often limits the usage available without additional fees, typically costs more than wireline service, offers variable transmission quality, and is often limited by the battery life of a user's cell phone. Mobile wireless service can also combine text or Internet capabilities with conventional phone service.

Moreover, while the flat-rate pricing features familiar to wireline customers are increasingly available to mobile wireless users,[17] and the practice of offering larger "buckets" of monthly minutes as part of a subscription package has made mobile wireless pricing structures more closely resemble the typical wireline pricing structure, prices for wireline and mobile wireless service still differ greatly. For example, AT&T offers a voice-only unlimited wireless calling plan for $99.99 per month.[18] By contrast, Verizon's unlimited local and long distance landline calling plan is only $46.99 per month.[19] Similarly, Verizon offers unlimited wireless local and long distance calling and mobile Internet for $99.99 per month,[20] but Verizon's

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[16] Three-quarters of landline telephone users responding to a recent survey said that voice quality, reliability and consistency of service were greater with their landline home phone than with mobile wireless service. *See* http://newscenter.verizon.com/press-releases/verizon/2008/new-survey-shows-83-percent-of.html (last visited Apr. 3, 2008).

[17] At least since 2000 and continuing into 2008, the Commission has pointed to the beginning and spread of unlimited local wireless calling plans. *See Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Fifth Report, 15 FCC Rcd. 17660, 17668-69 (rel. Aug. 18, 2000), and Twelfth Report, 23 FCC Rcd. 2241, ¶ 113 (rel. Feb. 4, 2008).

[18] *See, e.g.,* http://www.wireless.att.com/cell-phone-service/cell-phone-plans/individual-cell-phone-plans.jsp?WT.svl=calltoaction&q_defaultPlanSkuId=sku1210020 (last visited Apr. 8, 2008) (describing AT&T's $99.99 unlimited Individual Cell Phone Plan, which does not include any data features).

[19] *See, e.g.,* https://www22.verizon.com/Residential/Phone/Unlimited+Calling+Plans/Unlimited+Calling+Plans.htm (last visited March 19, 2008); *see also* http://promo.consumerfiber.com/FiOS-Bundle (last visited Mar. 21, 2008) (advertising stand-alone retail price (i.e., prior to "Bundle Savings Discount") for "Verizon Freedom Essentials" unlimited calling plan as $46.99).

[20] *See, e.g.,* http://www.verizonwireless.com/b2c/splash/splash.jsp?v=7 (last visited Apr. 7, 2008) (describing Verizon's Unlimited Anytime Calling Basic Plan, including HTML browsing, but not data messaging, for $99.99 per month).

unlimited local and long distance landline calling plan bundled with its basic DSL plan is only $62.48.[21]

At some point in time, mobile wireless service may be a sufficiently close substitute for wireline service that it would serve as a competitive check on wireline prices. However, there is insufficient evidence to support this conclusion. I am not aware that anyone has demonstrated that the demand for wireline service is now so elastic that wireline service (exclusive of wireless service) is not a relevant market.

The evidence the Commission has cited to suggest that mobile wireless service competes with wireline service is largely dated or unpersuasive.[22] For instance, the Commission found evidence that in 2005 Sprint planned significant efforts to induce wireline customers to "cut the cord" and expressed hope that the merger of Sprint and Nextel would promote mobile wireless competition with wireline services. This may have been a reasonable expectation in 2005. However, when the Commission makes decisions several years later judging whether mobile wireless belongs in the wireline market, it would now be reasonable to investigate whether the "nascent" intermodal competition the Commission found has materialized. I have been unable to find evidence that Sprint actually pursued the marketing plan the Commission referred to in 2005 or that targeting "cut the cord" customers has been a major Sprint business strategy in recent years, if ever.

The Commission cites as evidence of wireless-wireline competition the increasing percentage of the population that has "cut the cord." This percentage, by itself, does not give much, if any, insight into the demand elasticity for wireline service. Certain types of consumers who have subscribed to both wireline and mobile wireless services find that the special features of wireline service are not of sufficient value to justify continuing with wireline service, given

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[21] *See* http://www22.verizon.com/ForYourHome/NationalBundles/NatBundlesHome.aspx (last visited Apr. 4, 2008) (offering Verizon "Freedom Essentials" unlimited local and long distance calling plan for $46.99 per month and Verizon "High Speed Internet Starter Plan" with download speeds of up to 768 Kbps for an average of $15.49 per month, for a total monthly price of $62.48).

[22] *Verizon/MCI Merger Order* ¶¶ 90-91; *Sprint/Nextel Merger Order* ¶¶ 141-143.

the price and quality of mobile wireless service available. For instance, the value of having a common connection point for all members of a household may be low or zero for single-person households or adults living with unrelated roommates.[23] Such a decision does not provide any additional information about the demand elasticity of consumers that continue to subscribe to wireline service. Yet it is the ability of mobile wireless to constrain the wireline prices charged to these remaining wireline consumers that is at issue in assessing wireline competition.

The Commission has noted that wireline carriers "consider" possible substitution between wireline services and mobile wireless services when making strategic plans regarding wireline services.[24] However, the Commission has not disclosed how or to what extent this factor enters the carriers' strategy decisions. Such consideration may not provide any evidence regarding the degree of price sensitivity between wireline and mobile wireless service. For instance, strategic plans may note that the widespread adoption of mobile wireless service has decreased the minutes of local and long distance traffic over landlines and contributed to a decrease in the number of landlines in use. Such references provide no evidence that landline service providers are altering their prices or services to compete with mobile wireless services. Even if documents provide some evidence of competition, it may be limited to discussions of particular customer types that are most likely to "cut the cord."

Similarly, Qwest's petition for forbearance in Denver raises several arguments which shed little or no light on the product market for wireline services. First, Qwest points out that there are more wireless subscribers than wireline access lines in Colorado.[25] While it is likely true that consumers who have mobile wireless service would be more willing to drop wireline

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[23] The National Center for Health Statistics 2006 survey found, "Nearly one-half of all adults living with unrelated roommates live in households with only wireless telephones (44.2 percent). This is the highest prevalence rate among the population subgroups examined." *See* http://www.cdc.gov/nchs/products/pubs/pubd/hestats/wireless2006/wireless2006.htm (last visited Feb. 28, 2008).

[24] *See, e.g., Verizon/MCI Merger Order* ¶ 91; and *AT&T/Cingular Merger Order* ¶ 241.

[25] Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Colorado Metropolitan Statistical Area, Declaration of Robert H. Brigham and David L. Teitzel Regarding The Status Of Telecommunications Competition In The Denver, Colorado Metropolitan Statistical Area, WC Dkt. No. 07-97, ¶¶ 36-7 (filed Apr. 27, 2007).

service than those without, this observation conveys no information about the degree of willingness of wireline subscribers to drop wireline service in response to a price increase. After advancing the "cut the cord" argument discussed above, Qwest then states that consumers who have both wireline and mobile wireless services are decreasing wireline usage minutes while increasing mobile wireless service usage minutes. It is possible that some consumers are more willing to drop their landline service if they use it less, but one still cannot tell what the willingness level is and whether it is sufficiently high that mobile wireless service should be included in the relevant market with wireline service.

Suppose that the Commission is able through additional inquiry to gather sufficient evidence to conclude that mobile wireless voice service is part of the same relevant market as wireline voice service. The Commission must still be careful not to use such a finding to infer that mobile wireless voice service belongs in the same relevant product market with wireline services for services other than voice such as ADSL, DS1, and DS3 services. In evaluating whether to grant forbearance in unbundling DS-1 and DS-3 loops and DS-0 loops used to provide ADSL, the Commission considers competition in providing such loops. A comparison of Verizon's wireless Internet and ADSL offerings is illustrative. Verizon's mobile wireless Internet "BroadbandAccess Plan"[26] provides average download speeds of 600 Kbps to 1.4 Mbps, average upload speeds of 500 to 800 Kbps and a monthly data usage allowance of 5 GB for $59.99 per month.[27] By contrast, one of Verizon's residential DSL plans, its "High Speed Internet Service Power Plan," offers faster download speeds of up to 3 Mbps, upload speeds of up to 768 Kbps and no data usage limits for only $29.99 per month.[28] Just as with voice service, it is not clear that mobile wireless offers a competitive alternative to services such as ASDL, DS1, and DS3 services provided by wireline. Without defining relevant product markets with

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[26] Verizon advertises its BroadbandAccess service as a way to "connect to the Internet, your company intranet or email" and to "enjoy the freedom and mobility to work where you need to without the hassles of Wi-Fi hotspots." *See* http://b2b.vzw.com/productsservices/wirelessinternet/ (last visited Apr. 7, 2008).

[27] *See* http://www.verizonwireless.com/b2c/store/controller?item=planFirst&action=viewPlanDetail&sortOption=priceSort&catId=409&lid=//global//plans//wireless+internet+plan (last visited Apr. 8, 2008).

[28] *See* http://www22.verizon.com/content/consumerdsl/plans/all+plans/all+plans.htm (last visited Apr. 8, 2008). This rate could increase after the first year.

respect to these services, the Commission cannot make a sound decision regarding what degree of competition exists in providing these services, and thus whether forbearance would harm consumers.[29]

Conclusion

In evaluating petitions for forbearance, the Commission examines the state of competition for wireline services in a specific geographic area and at a specific point in time. The Commission appears to have little basis for determining that mobile wireless services are now part of the relevant market for wireline services. If circumstances change and if additional evidence is presented, it may be appropriate to make such a determination in the future. For now, however, well-accepted procedures for assessing competition would not calculate wireline shares by including mobile wireless-only customers that do not purchase wireline services because they have "cut the cord."

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[29] I understand that in its Anchorage forbearance order, the Commission explicitly declined to define relevant markets. *See In re Petition of ACS Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Section 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, Memorandum Opinion and Order, 22 FCC Rcd. 195, ¶ 12 (2007). It is sometimes possible to make competitive evaluations without defining a relevant market if one can make limiting statements such as "the relevant market is at least as broad as X." Such statements should only be made when one has done sufficient analysis of the relevant product market to dispose of the competitive issue and it is not necessary to pursue the market definition exercise to its conclusion. Such statements would be based on, not offered as a substitute for, careful analysis of product substitution issues.

CURRICULUM VITÆ

Kent W Mikkelsen

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Background	Born: September 20, 1954 Married, 3 children
Education	Ph.D., Economics, Yale University, 1984 M.Phil., Economics, Yale University, 1981 M.A., Economics, Yale University, 1980 B.A., Economics, Brigham Young University, 1978, *summa cum laude*
Fellowships, Honors and Awards	College Valedictorian, Brigham Young University, 1978 H. B. Earhart Fellow, 1978-1979 University Fellow, Yale University, 1978-1980 Richard Bernhard Fellow, 1980-1981 Research Scholar, International Rice Research Institute, 1981
Fields of Concentration	Industrial Organization, Economic Development

Professional Experience

1986-present: Senior Vice President, Economists Incorporated

1984-1986: Economist, Economic Analysis Group, Antitrust Division, U.S. Department of Justice

1983-1984: Visiting Assistant Professor, University of Michigan

1982: Acting Instructor, Yale University

1981-1982: Teaching Fellow, Yale University

1979-1983: Research Fellow, Yale University

Testimony

Expert witness for Government in *United States* v. *Calmar Inc. and Realex Corp.*, United States District Court, District of New Jersey, Civil Action No. 84-5271.

Expert witness for Defendant in *Sunbelt Television, Inc.* v. *Jones Intercable, Inc.*, United States District Court, Central District of California, Case No. CV-91-3506 WDK (Kx).

Expert witness for Defendant in *Stag-Parkway, Inc.* v. *The Dometic Corporation*, United States District Court, Northern District of Georgia, Case No. 1-91-CV-2579-JOF.

Expert witness for Plaintiff in *Thomas L. Hopkins (Commonwealth of Virginia)* v. *Smithfield Foods, Inc.,* Virginia Circuit Court, Isle of Wight County, No. 96-125.

Expert witness for Defendant in *Elpizo Limited Partnership* v. *Marriott International, Inc.* and *Host Marriott Corporation* v. *Maryland Hospitality, Inc.,* Court of Common Pleas for Philadelphia County, Pennsylvania, October Term, 1994, No. 607.

Expert witness for Plaintiff in *Thomas L. Hopkins (Commonwealth of Virginia)* v. *Smithfield Foods, Inc.,* Virginia Circuit Court, Isle of Wight County, No. 97-80.

Testimony (continued)

Expert witness for Defendant in *Consumer Health Foundation* v. *Humana Group Health Plan, Inc., et al.,* United States District Court, District of Columbia, Case No. 1:98CV02920 (GK).

Expert witness for Defendant in *United States* v. *Broadcast Music, Inc.* United States District Court, Southern District, New York, 64 Cir. 3787 (LLS).

Expert witness for Defendants Advance Stores Company, Inc. and Discount Auto Parts, Inc. in *Coalition for a Level Playing Field LLC et al.* v. *AutoZone, Inc., et al.,* United States District Court, Eastern District of New York, No. CV 00 0953 (LDW) (ETB).

Expert witness for Defendant in *United States* v. *Broadcast Music, Inc.* United States District Court, Southern District, New York, 64 Cir. 3787 (LLS), remand proceeding.

Expert witness for Defendants in *Ramallo Bros. Printing, Inc.* v. *El Día, Inc. et al.*, United States District Court, District of Puerto Rico, Civil No. 02-2400 (JAF).

Expert witness for Defendant in *Marco Island Cable, Inc.* v. *Comcast Cablevision of the South, Inc.*, United States District Court, Middle District of Florida, Case No. 2:04-cv-26-FtM-29-DNF.

Testimony, *Federal Communications Commission En Banc Hearing Regarding Local Television Ownership Rules,* February 12, 1999.

Testimony, *United States Senate Committee on Commerce, Science, and Transportation, Hearing on Media Ownership,* May 22, 2003.

Selected Consulting Matters

Detroit Free Press and Detroit News Joint Operating Agreement (JOA)—Prepared economic and business analysis used in hearing before Administrative Law Judge.

Selected Consulting Matters (continued)

Soft Drink Price Fixing—Analysis of evidence of price fixing and estimation of damages in Department of Justice investigations and private damage suits against various Coca-Cola bottlers.

Federal Communications Commission Inquiry into Cable Television—Supervised and wrote up research projects regarding cable rates and vertical market structure submitted with briefs filed by TCI.

GenCorp acquisition from Goodyear, Department of Justice review—Analyzed demand and supply-side substitution for vinyl laminates.

York acquisition of Hyster, Federal Trade Commission review—Analyzed geographic market definition in forklift trucks.

Stag-Parkway v. *Dometic*—For defendant, testified regarding lack of injury and damages due to price discrimination in sales to distributors.

Sunbelt Television v. *Jones Intercable*—For defendant, testified regarding market definition and monopoly power in local advertising and critiqued plaintiff's damage study.

Kiwifruit antidumping investigation by International Trade Commission—Coordinated preparation of economic analysis for New Zealand respondents.

State of Virginia v. *Smithfield Foods*—For plaintiff, evaluated the economic gain defendant received through non-compliance with environmental laws.

Federal Communications Commission Inquiries into Broadcast Television—For three broadcast networks, prepared comments on the economic effects of prime-time access rules and station ownership rules.

Selected Consulting Matters (continued)

Elpizo Ltd. Partnership v. *Marriott*—For defendant, analyzed plaintiff's damages model and testified regarding inappropriateness of plaintiff's damages model.

Media Ownership Rules—Researched and submitted three separate papers to FCC on behalf of ABC, CBS and Newspaper Association of America.

Cable & Wireless Optus acquisition of AAPT—Presented analysis of multiple telecommunications markets to Australian Competition and Consumer Commission.

TeleCell Cellular, Inc. et al. v. *GTE Mobilnet of South Texas Limited Partnership*—For defendant, analyzed damages claims of plaintiffs for compensation allegedly less favorable than another cellular agent.

Kesmai Corp. et al. v. *America Online*—For defendant, analyzed plaintiff's claim of damages to internet games business.

Federal Communications Commission En Banc Hearing—Presented testimony on FCC local television ownership rules.

Consumer Health Foundation v. *Humana*—For defendant, evaluated damages from alleged delay in releasing payment.

API v. *Granite*—Advisor to court-appointed special master making findings on below-cost pricing in road construction.

Hearst Acquisition of San Francisco Chronicle—For Hearst, prepared analysis showing prospects for competition by *San Francisco Examiner* outside the JOA and incremental contribution of *Examiner* to JOA profits.

Denver Post-Denver Rocky Mountain News JOA—For applicants, analyzed probable failure and incremental unprofitability of the *News.*

United States v. *BMI*—For defendants, testified about a reasonable royalty rate for a music performing right blanket license.

Vitamin Price Fixing Case—Submitted expert reports finding no incentive for two vitamin producers to participate in conspiracies involving vitamins they did not manufacture.

Newspaper-Broadcast Cross-Ownership Rule—For the Newspaper Association of America, submitted a paper to the FCC on structural change since 1975 and potential benefits of joint ownership.

Advance-Discount Robinson-Patman Case—For defendants, testified about drawing cost inferences from pricing data.

U. S. Senate Commerce Committee Hearing—Presented testimony supporting elimination of three FCC rules governing ownership of broadcast stations.

IPSCO v. Mannesmann Steel Mill Case—For defendant, analyzed damages from deficiencies of a steel mill.

TRICO v. NKK et al. Steel Mill Case—For plaintiff, analyzed damages from deficiencies of a steel mill.

FCC "Omnibus" Broadcast Ownership Proceeding—For CBS, Fox and NBC, analyzed station ownership, news broadcast and diversity issues.

FCC Cable Bundling and Retransmission—For Disney, submitted analysis of proposals to mandate a la carte cable programming and value of cable retransmission rights for ABC stations.

Heavy-Duty Trucks—For defendant Mack Trucks, submitted expert report discussing market definition, market power, alleged anticompetitive practices and damages.

Selected Consulting Matters (continued)

Printing Monopolization—For defendant El Día, testified on market definition, dangerous probability, and alleged anticompetitive practices including predatory pricing.

Dissolution of Birmingham JOA—For *Birmingham News Post-Herald* and *Birmingham Post-Herald*, presented to DOJ an analysis of the incremental unprofitability of the *Post Herald.*

Cable Monopolization—For defendant Comcast, testified on alleged monopolization and anticompetitive practices including exclusive contracts and on damages.

Regulatory Impact—For a consortium of telecommunications firms in Bermuda, analyzed the impact of proposed regulatory changes.

VIA ECFS

EX PARTE

May 7, 2008

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

Re: Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas, WC Docket No. 07-97

Dear Ms. Dortch:

Cbeyond Inc., Integra Telecom, Inc., One Communications Corp. and Time Warner Telecom Inc.,[1] through their undersigned counsel, explain in this *ex parte* letter why the Commission should not consider mobile wireless service as a substitute for wireline voice or data services in the above-captioned proceeding.

In its recent *ex parte* submissions, Qwest, citing to the *6-MSA Order*,[2] suggests that the Commission should include "cut-the-cord" or "wireless -only" households (*i.e.,* those that have replaced their wireline service with mobile wireless service) in its calculation of competitors' market share in the 4 MSAs at issue.[3] Qwest relies on the Commission decision in the *6-MSA*

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[1] Time Warner Telecom Inc. amended its Certificate of Incorporation effective March 12, 2008 to change its name to tw telecom inc. in preparation for a broader name change that will be effective July 1, 2008. The company will continue to use and be known as Time Warner Telecom Inc., its trade name, until July 1, 2008.

[2] *In re Petitions of the Verizon Tel. Cos. 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, 22 FCC Rcd. 21293 (rel. Dec. 5, 2007) ("*6-MSA Order*").

[3] *See, e.g.,* Letter from Daphne E. Butler, Corporate Counsel, Qwest to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 07-97, at 7 & nn.17-18 (filed Mar. 10, 2008) ("Consistent with its

Order to include "cut-the-cord wireless substitution" in its forbearance analysis.[4] But that decision was and is in error and must now be reversed.

The Commission itself realizes this. Most obviously, just last week, the Commission reached the diametrically opposed conclusion that "the majority of households do not view wireline and wireless services to be direct substitutes."[5] As Dr. Kent Mikkelsen explained in his white paper, "Mobile Wireless Service to 'Cut the Cord' Households in FCC Analysis of Wireline Competition," which was recently filed in the above-referenced docket,[6] even if a small minority of households do view mobile wireless as a substitute for wireline voice service, this does not mean that mobile wireless service belongs in the same product market as wireline voice service. Accordingly, the customers who have cut the cord and rely on wireless voice service exclusively should not be included in the mass market share counts for the Denver, Minneapolis, Phoenix and Seattle MSAs. But even if the FCC includes mobile wireless in the wireline voice market, which it should not, it must exclude cut-the-cord wireless customers of ILEC-affiliated wireless carriers from its market share calculation.

I. Application Of The DOJ-FTC Merger Guidelines Demonstrates That Mobile Wireless Service Does Not Belong In The Wireline Voice Service Product Market.

As Dr. Kent Mikkelsen explained in his white paper, the Commission generally uses the DOJ-FTC Merger Guidelines to determine the scope of the relevant product market for its competition analysis (and thus, whether one product belongs in the same market as another).[7] Under the Merger Guidelines, a relevant product market is "a product or group of products such that a hypothetical profit-maximizing firm that was the only present and future seller of those

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past reliance upon the [National Center for Health Statistics] wireless substitution data, the Commission once again relied upon the most recent NCHS data available in the *Verizon 6 MSA Order*. . . . [I]t used that statistic in the calculation of market share detailed in Appendix B of the *Verizon 6 MSA Order*. On December 10, 2007, the NCHS released its preliminary estimates of wireless substitution for the first half of 2007. According to the NCHS report, this 'cord cutter' group had grown to an estimated *13.6 percent* by June 2007. . . .") (emphasis in original).

[4] *See 6-MSA Order* n.89. *See also id.*, Appendix B.

[5] *See High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, Order, WC Docket No. 05-337, ¶ 21 (rel. May 1, 2008) ("*CETC Interim Cap Order*").

[6] *See* K. Mikkelsen, "Mobile Wireless 'Cut the Cord' Households in FCC Analysis of Wireline Competition," Apr. 21, 2008, WC Dkt. No. 07-97 (filed Apr. 22, 2008) ("Mikkelsen White Paper") (attached hereto).

[7] *See, e.g., Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd. 18433, n.83 (2005) ("*Verizon/MCI Merger Order*"); *Applications of Nextel Communications, Inc. and Sprint Corporation For Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion & Order, 20 FCC Rcd. 13967, ¶ 39 (2005) ("*Sprint/Nextel Merger Order*").

products ('monopolist') likely would impose at least a 'small but significant and nontransitory' increase in price."[8] It is often profitable for a monopolist to impose a nontransitory price increase on customers, even if this causes some customers to switch to other services. In other words, the monopolist will increase prices so long as the resulting loss of customers is outweighed by profits gained from increasing prices paid by those customers that continue to purchase the service in question.[9] It is clear, therefore, that the existence of some cross-demand elasticity between products (i.e., a small increase in demand for one product in response to an increase in the price of another) does not, by itself, mean that they belong in the same product market.

This is particularly true in the case of wireline service. As Dr. Mikkelsen explains, the available evidence indicates that demand for secondary fixed lines is "relatively inelastic" and the demand for primary fixed lines is "even more inelastic." Mikkelsen White Paper at 5. A hypothetical price increase would therefore be profitable because few customers would reduce their consumption of wireline service as a result of such an increase. *Id.* Thus, according to Dr. Mikkelsen, "wireline service is a separate relevant market without including mobile wireless service." *Id.* This does not mean, however, that there is no substitution between wireline service and mobile wireless service. Rather, Dr. Mikkelsen states,

> It simply means that, in response to a small wireline price increase, purchasers of wireline service would not turn from wireline service to mobile wireless service in such great numbers that the wireline price increase would be unprofitable. In other words, one cannot rely on the presence of mobile wireless alternatives to constrain the price of wireline service.

Id. Thus, the presence of some amount of substitution does not demonstrate that wireline and wireless service are part of the same product market.

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[8] DOJ & FTC, Horizontal Merger Guidelines, 57 F.R. 41552, §1.11 (1992) (rev. Apr. 8, 1997) ("Merger Guidelines"). The Merger Guidelines also define the relevant market as the narrowest set of products or services that meet the criteria. *See id.* § 1.0.

[9] *See* Mikkelsen White Paper at 4 (explaining that "[w]hether the hypothetical increase is profitable overall—which in turn determines whether the set of products or services under consideration is a relevant product market—normally depends on the balance between" increasing profits by "[c]harging a higher price to customers that retain their service" and "giving up variable profits on customers that drop their service").

It follows that, contrary to Qwest's claims,[10] the availability of mobile wireless alternatives does *not* constrain Qwest's retail wireline prices. This is demonstrated by Qwest's own pricing behavior. If, as Qwest alleges, significant numbers of its customers viewed the four national facilities-based providers of mobile wireless service as offering substitutes for wireline voice and DSL service, then Qwest would be forced to lower its rates for such wireline services. According to a recent analyst report, however, Qwest *increased* its total price for bundled broadband and unlimited voice (local and long distance) service by three percent from the first quarter of 2007 to the first quarter of 2008.[11]

II. The Commission Must Cease Including Mobile Wireless Service In The Wireline Voice Product Market For Purposes Of Analyzing Petitions For Forbearance From Unbundling Requirements.

In the *6-MSA Order*, the Commission treated mobile wireless service as belonging to the same product market as wireline voice service.[12] In doing so, the FCC relied solely on its analysis in the *Verizon/MCI Merger Order* and *AT&T/BellSouth Merger Order*; the relevant discussion in both of those orders is virtually identical:

> [G]rowing numbers of subscribers in particular segments of the mass market are choosing mobile wireless service in lieu of wireline local services. . . . We also find that Verizon considers this growing substitution in developing its marketing, research and development, and corporate strategies for its local service offerings. Finally, we base our finding [to include mobile wireless service in the wireline product market] on the Commission's determination in the *Sprint/Nextel Order* that Sprint/Nextel, after the merger, would likely take actions that would increase intermodal competition between wireline and mobile wireless services, as well as Sprint's plans to focus its efforts on encouraging consumers to "cut the cord." . . . Based on [these factors], we conclude that mobile wireless services should be included within the product market for local services to the extent that customers

[10] *See, e.g.*, Petition of Qwest Corp. for Forbearance Pursuant to Section 47 U.S.C. § 160(c) in the Denver MSA, WC Dkt. No. 07-97, at 14 (filed Apr. 27, 2007) ("Data indicate that customers would have a viable alternative should Qwest attempt to raise its wireline prices. . . . Wireless competition accordingly protects against wireline price increases in the first instance."); *see also* Reply Comments of Qwest, WC Dkt. No. 07-97, at 26 (filed Oct. 1, 2007).

[11] *See* Bank of America Equity Research, "Battle for the Bundle: Consumer Wireline Services Pricing: Bells Hike Prices Across the Board, Cox Bails on Pivot," at 5 (Apr. 14, 2008).

[12] *See 6-MSA Order* n.89 ("In addition, based on the record here, and consistent with recent precedent, we include cut-the-cord wireless substitution.") (citing *Verizon/MCI Merger Order* ¶¶ 90-91 and *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd. 5662, 5714, ¶ 95 (2007) ("*AT&T/BellSouth Merger Order*")).

> rely on mobile wireless service as a complete substitute for, rather than complement to, wireline service.

Verizon/MCI Merger Order ¶ 91; *see also AT&T/BellSouth Merger Order* ¶ 96.

This explanation cannot support treating mobile wireless service as a substitute for wireline voice service in the instant proceeding. Most importantly, the Commission has itself now rejected the reasoning in the *6-MSA Order*. In its recent order establishing an interim cap on the amount of high-cost support for competitive eligible telecommunications carriers ("CETCs"), the Commission explained that limiting the subsidies for CETCs made sense because "wireless competitive ETCs do not capture lines from the incumbent LEC to become a customer's sole service provider, except in a small portion of households." *CETC Interim Cap Order* ¶ 20. The Commission then concluded that "the majority of households do not view wireline and wireless services to be direct substitutes." *See id.* ¶ 21. Moreover, the Commission rejected CTIA's reliance on a recent Centers for Disease Control and Prevention ("CDC") survey as evidence that mobile wireless is a substitute for wireline voice service. The Commission did so, even though the CDC survey upon which CTIA relied was the same survey the FCC relied upon in the *6-MSA Order* and even though that CDC survey found a slightly higher rate of customers cutting the cord than the data relied upon in the *Verizon/MCI Merger Order* and the *AT&T/BellSouth Merger Order*. As the Commission explained in rejecting CTIA's argument, the CDC study's finding that nearly 13 percent of the population has cut the cord[13] "fails to demonstrate that wireless ETCs are a complete substitute for wireline ETCs." *See id.* n.63. There is no basis for concluding that the mobile wireless services that wireless ETCs offer are any different from those offered by mobile wireless providers in the Denver, Minneapolis, Phoenix or Seattle MSAs or that the substitutability analysis would be any different in those MSAs than in high-cost areas. The Commission must therefore apply the conclusions it reached in the *CETC Interim Cap Order* to the forbearance petitions at issue in this proceeding.

Furthermore, the Federal-State Joint Board on Universal Service has now recommended that the Commission create separate high cost funds for wireline voice service (i.e., the "Provider of Last Resort" fund) and mobile wireless voice service (i.e., the "Mobility Fund").[14] This proposal obviously reflects the Joint Board's recognition that wireline and mobile voice services offer consumers *different* services and that a customer in a high-cost area that is able to receive affordable mobile voice service will still demand and need wireline voice service. That recognition accords with the Commission's finding last year in the *Qwest 272 Sunset Order*[15]

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[13] The CDC survey data could be misconstrued to support the conclusion that the rate at which households are cutting the cord is increasing, but as economist Joseph Gillan has explained, the data does not support this conclusion. *See* Gillan Associates, "Properly Estimating the Size of the Wireless-Only Market," March 2008, WC Dkt. No. 07-97, at 5-6 (filed Apr. 22, 2008) ("Gillan Study").

[14] *See High-Cost Universal Service Support*; *Federal-State Joint Board on Universal Service*, Recommended Decision, 22 FCC Rcd. 8998, ¶¶ 16-23 (2007).

that a majority of presubscribed interexchange customers also subscribe to mobile wireless services.

Even apart from these clear and dispositive conclusions, the Commission's explanation in the *Verizon/MCI Merger Order* and the *AT&T/BellSouth Merger Order* for treating mobile wireless services as belonging to wireline voice product market is flawed and cannot support that approach in the instant forbearance proceeding. *First* and foremost, the presence of *some* past increase in the number of customers that cut the cord does not mean that *enough* of the *existing* wireline voice customers view wireless and wireline services as substitutes to include mobile wireless in the same product market as wireline service (i.e., to prevent a monopolist serving all wireline customers from profitably imposing a significant and non-transitory rate increase on wireline customers). To begin with, the percentage of the population that has "cut the cord" in the past is not indicative of the demand elasticity for wireline service. Mikkelsen White Paper at 8. The only relevant inquiry is whether mobile wireless service constrains the prices that Qwest charges its huge number of "remaining wireline customers." *Id.* at 9. Nor is the marginal increase in the percentage of total customers that subscribe solely to mobile wireless customers relevant, because, again, the real question is whether a hypothetical monopolist in the provision of wireline service to *existing wireline customers* could profitably increase price. Such an increase in price might well increase the total number customers that cut the cord, but the increase in wireline prices would still be profitable if enough of the existing wireline customers retain that service.

Moreover, the available evidence indicates that those that purchase wireline service today are unlikely to cease purchasing wireline service in favor of mobile wireless if wireline service prices increase. Wireline voice service offers several distinct features that mobile wireless service does not offer. For example, wireline service provides, among other things, "high and consistent transmission quality," "a common connection point for all members of a household," and "more accurate and reliable enhanced 911 emergency capability than mobile wireless service." *Id.* at 6-7. Existing purchasers of wireline service typically view these features as important enough that they would not cut the cord if forced to pay higher prices for wireline service. According to a recent survey of landline phone owners commissioned by Verizon, 83 percent of respondents "intend to continue using their landline home phone *indefinitely*."[16] Fully 94 percent of the survey respondents cited reliability and 91 percent cited safety as the primary reasons they retain wireline service. *See Verizon cut-the-cord survey.* Importantly, 74 percent of

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[15] *See Petition of Qwest Communications International Inc. for Forbearance from Enforcement of the Commission's Dominant Carrier Rules As They Apply After Section 272 Sunsets*, Memorandum Opinion and Order, 22 FCC Rcd. 5207, ¶ 17 (rel. Mar. 9, 2007) ("*Qwest 272 Sunset Order*").

[16] Press Release, "Verizon, New Survey Shows 83 Percent of Consumers Continue to Rely on Landline Voice Service for Its Quality, Safety Features" (Mar. 27, 2008), http://newscenter.verizon.com/press-releases/verizon/2008/new-survey-shows-83-percent-of.html ("*Verizon cut-the-cord survey*") (reporting results of survey of more than 800 landline phone customers, 74 percent of whom also have a mobile phone) (emphasis added).

those surveyed reported that their landline home phone service "trumped their mobile phone in terms of voice quality, reliability, and consistency of service." *Id.* There is no reason to believe that existing wireline customers in the Denver, Minneapolis, Phoenix and Seattle MSAs are any different from those in the Verizon region.

The differences in service characteristics and pricing reflect a fundamental distinction in consumers' minds between wireline voice and mobile wireless service. Not surprisingly, while the price structures for wireline and mobile wireless services have become somewhat more similar recently, they still "differ greatly." *See* Mikkelsen White Paper at 7-8 (describing substantial differences in prices between wireline and mobile wireless service).

Second, the Commission's assertion that Verizon "considers this growing substitution" in developing its marketing and corporate strategies offers little support for the inclusion of mobile wireless in the wireline voice product market. As Dr. Mikkelsen explains, "the Commission has not disclosed how or to what extent this factor enters the carriers' strategy decisions." *Id.* at 9. Corporate strategists "consider" many factors, and "[s]uch consideration may not provide any evidence regarding the degree of price sensitivity between wireline and mobile wireless service." *Id.* In this proceeding, Qwest has not provided any evidence as to whether, and if so, how, it accounts for mobile wireless service in developing its marketing strategy for wireline voice service. In any event, some consideration of wireless substitution in a strategic plan does not, by itself, support the conclusion that a wireline carrier believes that wireless service constrains its ability to unilaterally increase the price of wireline service. *Id.* For example, it is possible, indeed likely, that a wireline carrier would focus its consideration of wireless on a narrow subset of customers, such as college students, that are most likely to "cut the cord."[17] There is every reason to believe that a hypothetical wireline monopolist could unilaterally increase wireline prices profitably, notwithstanding the possibility that such an increase might cause a narrow subset of customers to discontinue their wireline service.

Third, the Commission's prediction in the *Sprint/Nextel Merger Order* that the combined company would position its mobile wireless service in the marketplace so as to increase the extent to which consumers view mobile wireless to be a substitute for wireline voice service has proven to be incorrect. *Sprint/Nextel Merger Order* ¶ 142. Since the merger, the combined company has experienced a multitude of well-publicized problems with its network reliability and service quality.[18] A recent J.D. Power and Associates survey ranked Sprint dead last among

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[17] *See* Gillan Study at 6 (discussing the prevalence of cut-the-cord behavior among college-age adults).

[18] *See, e.g.*, Marguerite Reardon, "Broken connection for Sprint Nextel," CNET News.com, Jan. 29, 2007, http://www.news.com/2100-1039_3-6154071.html (last visited May 5, 2008) (discussing the network integration problems that caused Sprint to lose approximately 300,000 subscribers in the fourth quarter of 2006).

mobile wireless carriers in customer satisfaction in every region in the U.S.[19] The most heavily weighted factor in that survey was customers' perception of call quality,[20] which is based on dropped calls and other metrics.[21] Given the importance of reliability among those choosing between wireline and mobile wireless voice service,[22] it is hard to see how Sprint-Nextel offers anything close to a viable substitute for wireline service. In fact, far from gaining customers, Sprint-Nextel has been losing customers in droves—it suffered a net loss of about 1.2 million customers in the fourth quarter of 2007 alone and is expected to continue to lose market share for the foreseeable future.[23]

There is no evidence that any of the factors that the Commission relied upon in concluding that Sprint-Nextel would increase competition with wireline service offerings post-merger has had a significant effect in that regard. The Commission concluded that, while ILEC-affiliated wireless carriers would have an incentive to avoid encouraging customers to cut the cord, it concluded that Sprint-Nextel would have no similar incentive. *See Sprint/Nextel Merger*

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[19] *See* Jason Gertzen, "Consumers Give Sprint Nextel Failing Grade in Latest Survey," Kansas City Star, Apr. 25, 2008, *available at* http://www.crmbuyer.com/story/62756.html (last visited May 6, 2008).

[20] *See* "J.D. Power and Associates Reports: Despite Higher Costs for Additional Services, Wireless Customers Report Particularly High Levels of Satisfaction with Wireless Plan Upgrades," PRNewswire, Apr. 24, 2008, http://news.moneycentral.msn.com/ticker/article.aspx?Feed=PR&Date=20080424&ID=8534540&Symbol=MHP (last visited May 5, 2008) (listing six key factors on which customer satisfaction is measured in the semiannual J.D. Power and Associates survey: call quality (32%); brand image (17%); cost of service (14%); service plan options (14%); and billing (12%)).

[21] *See* "J.D. Power and Associates Reports: Alltel, T-Mobile, U.S. Cellular and Verizon Wireless Each Make a Sound Connection with Wireless Users and Rank Highest in Customer Satisfaction with Call Quality," Reuters, Mar. 27, 2008, http://www.reuters.com/article/pressRelease/idUS140283+27-Mar-2008+PRN20080327 (last visited May 5, 2008) (stating that the survey "measures wireless call quality based on seven problem areas that impact overall carrier performance," including dropped calls); *see also* Mergent, Inc., "The North America Telecommuniications Sectors: A Company and Industry Analysis," at 5 (November 2007) ("Dropped calls and other glitches caused Sprint to lose about 850,000 long-term contract subscribers in the past year.").

[22] *See also Verizon cut-the-cord survey, supra* note 16 (finding that 94% of respondents cited reliability as their main reason for retaining landline service).

[23] *See* "S&P Cuts Sprint Nextel's Credit to Junk," The Street.com, May 1, 2008, http://www.thestreet.com/newsanalysis/techtelecom/10414729.html (last visited May 5, 2008). Sprint's market share of postpaid subscribers has descreased steadily from 25.3% in the first quarter of 2006 to 22.7% in the fourth quarter of 2007 and it is expected to decline to 19.9% in the fourth quarter of 2008. *See* "US Wireless 411," UBS Investment Research, at 11 (Mar. 18, 2008).

Order ¶ 142. But this does not mean that Sprint-Nextel would necessarily focus its marketing efforts on convincing customers to cut the cord or that, if it did, such efforts would be successful. The Commission did state that non-ILEC affiliated wireless carriers tend to have more customers that cut the cord than ILEC-affiliated mobile wireless carriers (*id.*), but it did not specify the magnitude of the difference. More importantly, there is no basis for concluding that enough customers have cut the cord to prevent a wireline monopolist from unilaterally increasing the price of wireline service.

The Commission pointed to several of Sprint's and Nextel's pre-merger service offerings and promotions as evidence that the companies would effectively increase the level at which customers cut the cord, but none of these appear to have made much of a difference. For example, the Commission noted that Nextel offered a "Campus Unlimited Program," designed to allow customers to use unlimited mobile wireless calling within a corporate or institutional campus. *Id.* n.313. Sprint-Nextel continues to offer this service today,[24] but the service only provides connections *within* a corporate or institutional campus. It does not include any connectivity between the campus itself and the PSTN. It therefore depends on a wireline connection, and could not justify counting subscribers to that service as "cut-the-cord" customers.

In addition, the Commission relied on Nextel's claim that "Nextel's testing of advanced broadband services [] will lead a substantial portion of Nextel's customers to cancel their DSL subscription." *Id.* But there is no evidence that the availability of mobile broadband services has led business customers, of Nextel or any other carrier, to give up their fixed broadband service. As Dr. Mikkelsen points out, there is no reason to think that such substitution would occur given the substantial differences between xDSL and mobile wireless services. *See* Mikkelsen White Paper at 10.

The Commission also cited to the fact that Sprint was the "first carrier to offer E911 Phase II services with a handset-based location technology." *Sprint/Nextel Merger Order* n.313. But according to Verizon's recent survey, the majority of landline phone customers retain landline service in large part because of its dependability and reliability in an emergency.[25] Accordingly, customers do not appear to perceive the E911 service offered by Sprint (and now offered by other mobile wireless carriers) as sufficiently reliable to replace the emergency access calling available on wireline voice lines.

Finally, the Commission also cited to several steps that Sprint and Nextel took to extend wireline voice features to mobile wireless service, such as offering free incoming minutes, unlimited night and weekend calls and reducing overage charges. *See id.* But, again, there is no basis for concluding that these changes had any material effect on customers' perception of

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[24] *See* Sprint Nextel, Custom Network Solutions, http://www.nextel.com/en/solutions/network_security/custom_network.shtml (last visited May 6, 2008) (describing "Campus Unlimited Program")

[25] *See generally Verizon cut-the-cord survey.*

mobile wireless service as a substitute for wireline service. Nor has the Commission made any attempt to study the effect these changes have had on customer perceptions.

In sum, the Commission's recent conclusion that wireless service is not a substitute for wireline service should, by itself, rule out counting cut-the-cord customers as those won by competitors in the market share analysis in the Denver, Minneapolis, Phoenix and Seattle MSAs. But even the Commission had not reached that decision, the rationale offered by the Commission in the past for treating mobile wireless service as part of the wireline voice market must now be rejected.

III. Even If The FCC Defines The Wireline Voice Product Market To Include Mobile Wireless Service, Cut-The-Cord Customers of ILEC-Affiliated Wireless Carriers Should Be Excluded From The Competitive Market Share Calculation.

In the *6-MSA Order*, the FCC reiterated its prior holding that ILEC-affiliated wireless carriers, like Verizon Wireless, have the incentive to protect their wireline customer base.[26] Based on this conclusion, the Commission excluded Verizon Wireless' proportion of cut-the-cord customers from the total number of customers deemed to have been won by facilities-based competitors. Indeed, the Commission counted Verizon Wireless customers as Verizon ILEC customers for purposes of its market share calculation. However, the Commission included AT&T Mobility's share of the cut-the-cord customers in the total number of customers deemed to have been won by facilities-based competitors. This is so even though AT&T Mobility is affiliated with an ILEC. This differential treatment appears to be based on the Commission's assumption that ILEC-affiliated wireless carriers market and price their service in a manner that prevents customers from viewing the mobile wireless service as a substitute for wireline service within their ILEC regions, but ILEC-affiliated wireless carriers do not do this when competing outside of their ILEC regions. But there is no basis for this assumption.

Both Verizon Wireless and AT&T Mobility set their prices on a national, not regional, basis. For example, Verizon Wireless offers only "nationwide" individual and family voice plans.[27] Likewise, AT&T offers only "Nation" individual and family calling plans.[28] Both carriers recently introduced unlimited nationwide calling plans for $99.99 per month. *See*

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[26] *See 6-MSA Order*, Appendix B, n.6 ("As noted above, attributing Verizon Wireless' share to Verizon is consistent with our methodology in prior orders. This approach 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.'") (internal citations omitted).

[27] *See* Verizon, Voice Plans, http://www.verizonwireless.com/b2c/store/controller?item=planFirst&action=viewPlanOverview&catType=voice&lid=//global//plans//voice+plans//view+all (last visited Apr. 29, 2008) (describing all voice plans).

[28] *See* AT&T, FamilyTalk Cell Phone Plans, http://www.wireless.att.com/cell-phone-service/cell-phone-plans/family-cell-phone-plans.jsp?WT.srch=1 (last visited Apr. 29, 2008).

Mikkelsen White Paper nn.18-20. Consistent with the trend toward nationwide, unlimited service plans,[29] Verizon Wireless also recently introduced three "Nationwide Messaging" plans that allow "customers to use unlimited messaging on their wireless handsets."[30] These national pricing plans are evidence that AT&T Mobility and Verizon Wireless market and price their services outside of their ILEC territories in the same way that they market and price their services within their ILEC territories.

Accordingly, if the Commission concludes, as it has in the past and should in the future, that the services offered by Verizon Wireless and AT&T Mobility are not substitutes for, and do not belong in the same product market as, wireline voice service within these carriers' respective ILEC territories, the Commission must treat them exactly the same way outside of their ILEC territories. For example, in the Denver, Minneapolis, Phoenix and Seattle MSAs, AT&T Mobility and Verizon Wireless price their services in the same way that they price them in their respective ILEC territories. Since the Commission did not classify Verizon Wireless cut-the-cord customers in-region as counting toward the market share gained by competitors in the *6-MSA Order*, the Commission must exclude the Verizon Wireless and AT&T Mobility cut-the-cord customers from the competitors' market share in the four MSAs at issue here.

Finally, the Commission should treat Qwest Wireless cut-the-cord customers in the same way that it treated Verizon Wireless customers in the *6-MSA Order*. Just as Verizon has the incentive to protect their wireline customer bases from wireless competition in the MSAs at issue in the 6-MSA proceeding, so too does Qwest have that incentive in the four MSAs at issue here. Just as the Commission counted Verizon Wireless customers as Verizon ILEC customers for purposes of its market share calculation in the *6-MSA Order*, the Commission should treat Qwest Wireless customers as Qwest ILEC customers in this proceeding. Thus, in the Denver, Phoenix, Minneapolis and Seattle MSAs, the Commission should exclude Verizon Wireless, AT&T Mobility and Qwest Wireless cut-the-cord customers from its calculation of facilities-based competitors' market share, and it should include Qwest Wireless customers in the Qwest ILEC market share.

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[29] It should be noted that these new flat-rate unlimited pricing plans are not designed to induce wireline customers to cut the cord. *See, e.g.*, John C. Hodulik, UBS Investment Research, "US Wireless 411," at 3 (Mar. 18, 2008) ("We believe the recent launch of unlimited voice for $100 per month at AT&T and Verizon . . . appeals largely to the high-end subscriber base and will likely have limited impact on subscriber and ARPU trends."); *see also* Lehman Brothers Equity Research, "Sprint Nextel Corp.," at 2 (Feb. 29, 2008) (concluding that "the impact [of Sprint's $99 unlimited voice and data offering] will be marginal given our estimate that the universe of customers impacted represents only a low single digit percent of the entire industry's customer base").

[30] *See* Press Release, Verizon, "Verizon Wireless Introduces Nationwide Messaging Plans" (Apr. 14, 2008), http://news.vzw.com/news/2008/04/pr2008-04-14f.html.

IV. Conclusion.

For the foregoing reasons, the FCC should not include cut-the-cord wireless substitution in its competition analysis in the instant proceeding. If it does include cut-the-cord customers in its calculation of competitors' market share, it must at least exclude Qwest Wireless, Verizon Wireless, and AT&T Mobility cut-the-cord customers from the calculation.

Respectfully submitted,

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