

KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.

SUMNER SQUARE

1615 M STREET, N.W.

SUITE 400

WASHINGTON, D.C. 20036-3209

(202) 326-7900

FACSIMILE:

(202) 326-7999

June 10, 2008

Via Hand Delivery

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Suite TW-A325
Washington, DC 20554

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Federal Communications Commission
Office of the Secretary

*Re: 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:

On behalf of Verizon, attached are the Reply Comments of Verizon and supporting material for filing in the above-captioned proceeding ("Reply"). These Reply Comments and supporting material contain Confidential and Highly Confidential Information. Confidential Information has been marked "CONFIDENTIAL – SUBJECT TO FIRST PROTECTIVE ORDER IN WC DOCKET NO. 08-49" in accordance with the First Protective Order in this proceeding.¹ Highly Confidential Information has been marked "HIGHLY CONFIDENTIAL INFORMATION – SUBJECT TO SECOND PROTECTIVE ORDER IN WC DOCKET NO.

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, First Protective Order ¶ 5, WC Docket No. 08-49, DA 08-879 (rel. Apr. 15, 2008) ("First Protective Order").*

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08-49 BEFORE THE FEDERAL COMMUNICATIONS COMMISSION” in accordance with the Second Protective Order in this proceeding.²

In accordance with the Public Notice³ and the Second Protective Order,⁴ we are providing:

- a. One original and six copies of the Redacted Reply (in paper form), and
- b. One original of the Highly Confidential Reply (in paper form).

Verizon is delivering under separate cover:

- a. Two copies of the Highly Confidential Reply (in paper form) to Gary Remondino;
- b. One copy of the Highly Confidential Reply (in electronic form) to Tim Stelzig and Denise Coca;
- c. One copy of the Redacted Reply (in electronic form) to the Competition Policy Division; and
- d. One copy of the Redacted Reply (in electronic form) to Best Copy and Printing, Inc.

All inquiries relating to access (subject to the terms of the applicable protective orders) to any confidential information submitted in this Reply should be addressed to:

Evan T. Leo
Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C.
1615 M Street, NW
Suite 400
Washington, DC 20036
Tel.: 202-326-7930

² *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*, Second Protective Order ¶ 14, WC Docket No. 08-49, DA 08-880 (rel. Apr. 15, 2008) (“Second Protective Order”).

³ FCC Public Notice, *Pleading Cycle Established for Comments on the Verizon Telephone Companies Petition for Forbearance in the Virginia Beach Metropolitan Statistical Area*, WC Docket No. 08-49, DA 08-878, at 2 (Apr. 15, 2008).

⁴ Second Protective Order ¶ 14.

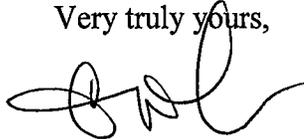
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Fax: 202-326-7999
E-mail: eleo@khhte.com

We are also tendering to you certain copies of this letter for date-stamping purposes. Please date-stamp and return these materials.

Thank you for your assistance in this matter. Please contact me at 202-326-7930 if you have any questions regarding this filing.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Evan T. Leo', with a stylized flourish at the end.

Evan T. Leo

Attachment

cc: Competition Policy Division, Wireline Competition Bureau
Best Copy and Printing, Inc.
Gary Remondino (Highly Confidential version)
Tim Stelzig (Highly Confidential version)
Denise Coca (Highly Confidential version)

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

REPLY COMMENTS OF VERIZON

Michael E. Glover
Of Counsel

Edward Shakin
Rashann Duvall
Verizon
1515 North Court House Road
Suite 500
Arlington, Virginia 22201
(703) 351-3179

Evan T. Leo
Kellogg, Huber, Hansen, Todd,
Evans & Figel, P.L.L.C.
1615 M Street, NW
Suite 400
Washington, DC 20036
(202) 326-7930

Attorneys for Verizon

June 10, 2008

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- Attachment A: Reply Declaration of Patrick Garzillo
- Attachment B: Declaration of Luis Salazar
- Attachment C: Competitors' Share of Residential Lines in Cox's Service Territory in the Virginia Beach MSA

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I. INTRODUCTION AND SUMMARY

The Commission should grant Verizon's forbearance petition for Cox's service territory in the Virginia Beach MSA. The level of competition in Virginia Beach meets both the coverage threshold test the Commission established in the Omaha and Anchorage orders, and the new share-of-residential-lines test the Commission applied in the *Six MSA Order*.¹ By the Commission's own measure, Verizon now serves fewer than **[Begin Confidential]** **[End Confidential]** of the residential access lines in Cox's service territory in the Virginia Beach MSA. Accordingly, the requested relief should be granted.

The commenters do not seriously dispute that Verizon meets the Commission's coverage threshold and share-of-residential-lines tests. The commenters instead argue that the Commission should impose more demanding criteria than it has used in the past. For example, the commenters rehash claims that the Commission should not place significant or any weight on competition from cable or wireless. But this Commission and the D.C. Circuit have repeatedly rejected such arguments and the commenters provide no basis for taking a different approach here. Moreover, it would be irrational to wholly ignore wireless competition, particularly given the large and increasing number of consumers who use wireless instead of any wireline service.

¹ *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, 22 FCC Rcd 21293 (2007) ("*Six MSA Order*").

The commenters also complain about the geographic areas for which Verizon seeks relief. Consistent with the Commission's prior forbearance decisions, Verizon's petition seeks relief for the area defined by Cox's contiguous cable franchise territory, which in this case covers more than 90 percent of the population of the Virginia Beach MSA. Verizon's petition demonstrates that within that area it is appropriate to analyze competition on a rate-center basis, rather than on a wire-center or MSA basis. As Verizon explained, rate centers equally reflect the areas in which competing carriers and Verizon provide local telephone service, and Cox and other cable operators internally track their coverage by rate center. There is accordingly no basis to the commenters' claim that it would be more appropriate to use an MSA or wire-center analysis to decide this petition. In any event, Verizon is providing competitive data on a wire-center basis with this filing.

II. VERIZON'S PETITION MEETS BOTH THE COVERAGE THRESHOLD AND SHARE-OF-RESIDENTIAL-LINES TESTS

Verizon meets both the coverage threshold test the Commission established in the Omaha and Anchorage orders, and the share-of-residential-lines test the Commission applied in the *Six MSA Order*. Although the commenters quibble with a few aspects of Verizon's showing, their claims are misplaced.

A. Coverage Threshold Test

Verizon's petition demonstrates that Verizon meets the Commission's "coverage threshold test" in Cox's service territory in the Virginia Beach MSA, which provides relief in every wire center where cable voice services could be made available, within a

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commercially reasonable time, to 75 percent of homes in the wire center. See *Virginia Beach Pet'n* at 5-9; *Anchorage Forbearance Order*² ¶¶ 31-32; *Omaha Forbearance Order*³ ¶¶ 57, 59-60. Verizon provided evidence of Cox's public statements that Cox provides telephone services throughout its service territory in the Virginia Beach MSA. See *Virginia Beach Pet'n* at 5-9; *Lew/Wimsatt/Garzillo Decl. Exh. 3*. Verizon also explained that, because the evidence indicates that Cox provides telephone services throughout the entire portion of the Virginia Beach MSA for which Verizon is seeking relief, it is unnecessary to analyze cable facilities coverage at a more granular geographic level, but that even if the Commission were to do so it should analyze coverage at the level of individual rate exchange areas (or rate centers), rather than at the wire center serving area level. See *id.* at 7-9.

Cox does not dispute the accuracy of any of its prior statements that it provides voice coverage throughout its service territory in the Virginia Beach MSA.⁴ Although Cox claims (at 2) that since the Six MSA proceeding it has deployed no major new

² *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, Memorandum Opinion and Order, 22 FCC Rcd 1958 (2007) ("*Anchorage Forbearance Order*").

³ *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005) ("*Omaha Forbearance Order*").

⁴ There is no basis to Comptel *et al.*'s claim (at 10-11) that Cox's public statements, including its sworn affidavits to regulators and Cox's website are too "vague" and "circumstantial." If true, Cox's statements are dispositive. And Comptel *et al.* fails to provide any basis or evidence to suggest that Cox was anything less than truthful in making those statements.

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facilities and has experienced **[Begin Confidential]**

[End Confidential], it does not claim, much less prove, that it does not provide voice service throughout its territory (or that it did not do so at the time of the Six MSA proceeding). Cox's failure to provide probative evidence in its possession strongly suggests that the data are unfavorable, and Cox's failure to produce the data should be construed against it. *See International Union, UAW v. NLRB*, 459 F.2d 1329, 1336 (D.C. Cir. 1972) (party's failure to produce "relevant evidence within [their] control" "gives rise to an inference that the evidence is unfavorable to [them]."). In any event, the Commission should require Cox to provide immediately current data regarding its voice coverage in Virginia Beach. *See also* NuVox/XO at 38 ("[t]he Commenters cannot address the competitive impact of Cox's presence in a comprehensive manner until Cox supplies additional data."); *id.* at 32 n.101 ("The Commenters urge the Commission to request complete data from Cox as soon as possible").

Several commenters complain that Verizon has failed to provide cable coverage data on a more granular basis, such as the wire-center level. *See Comptel et al.* at 11-12; *Cbeyond et al.* at 14-16; NuVox/XO at 21-22; *Cavalier* at 12-13. There is no basis to these claims. As an initial matter, the data on which the Commission relied to perform a more granular analysis in the Omaha, Anchorage, and Six MSA proceedings were obtained from the cable operators themselves, because only those entities have access to precise information on the availability of their voice services. *See Anchorage*

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Forbearance Order ¶ 28; *Omaha Forbearance Order* ¶ 28; *Six MSA Order* ¶ 23. The Commission should accordingly require Cox promptly to provide such data here.

Regardless, the evidence shows that voice service is already available throughout the area covered by Verizon's petition, so there is no need for a more granular analysis. The Commission has held that where competition is fairly uniform across a given geographic area, it is unnecessary to conduct a more granular geographic analysis.⁵

Even if the Commission were to perform a more granular analysis, however, rate centers equally reflect the areas in which competing carriers and Verizon provide local telephone service, as Verizon has previously explained. *See Virginia Beach Pet'n* at 7-9. Verizon also explained that Cox and other cable operators internally track their coverage by rate center. *See id.* at 8-9. The mere fact that data can be converted to a different geographic area – which incidentally is not a precise process – does not justify imposing such a requirement. It is far more sensible to use a geographic framework that actually reflects the areas that providers use in the ordinary course of business.

In any event, Verizon supplied with its petition data showing that, based on Cox's residential directory listings, Cox was providing voice service to customers in [Begin

⁵ *See, e.g., Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, 12 FCC Rcd 15756, ¶¶ 66-67 (1997) (holding that because competitive choices for interexchange service are fairly uniform nationwide, the interexchange market should be analyzed as national in scope); *Motion of AT&T Corp. To Be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, ¶ 22 (1995).

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Highly Confidential]

[End Highly Confidential]. See Lew/Wimsatt/Garzillo Decl.⁶ ¶¶ 7, 17 & Exh. 5. And attached to the accompanying Reply Declaration of Patrick Garzillo are data that allocate these rate-center data to wire centers. See Garzillo Reply Decl.,⁷ Exh. 1. As that declaration further explains, however, this allocation process is necessarily imperfect and it is more accurate to rely on rate center data. See *id.* ¶¶ 5-12.

B. Share-of-Residential Lines Test

Verizon's petition also demonstrates that the share-of-residential-lines test is satisfied in Cox's service territory in the Virginia Beach MSA. As of February 2008, competitors' share of residential lines in Cox's service territory is at least **[Begin Confidential]** **[End Confidential]** percent, when all cut-the-cord wireless subscribers (including those of Verizon Wireless) are included, as they should be, on the competitive side of the ledger. See Virginia Beach Pet'n at 10-11, 13 & Attach. B. Verizon also explained, however, that even when Verizon Wireless cut-the-cord subscribers are attributed to Verizon, competitors' share of residential lines in Cox's service territory in the Virginia Beach MSA would still be approximately **[Begin Confidential]** **[End Confidential]** percent or more, which likewise meets the Commission's test. See *id.* at

⁶ Declaration of Quintin Lew, John Wimsatt, and Patrick Garzillo Regarding Competition in Cox's Service Territory in the Virginia Beach Metropolitan Statistical Area (filed Mar. 31, 2008) ("Lew/Wimsatt/Garzillo Decl.") (attached as Attach. C to Virginia Beach Pet'n).

⁷ Reply Declaration of Patrick Garzillo ("Garzillo Reply Decl.") (attached as Attach. A hereto).

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15 & Attach. B. Verizon demonstrated that both of these figures were conservative because they exclude certain forms of competition that Verizon faces, such as competition from over-the-top VoIP providers like Vonage, Skype, and others.⁸ *See id.* at 16.

Verizon's petition further demonstrates that the decline in Verizon's residential retail lines provides an independent basis to determine that competitors serve **[Begin Confidential]** **[End Confidential]** of the access lines in Cox's service territory in the Virginia Beach MSA, and that the requested forbearance is appropriate. *See Virginia Beach Pet'n* at 17-18. Verizon demonstrated that this was true even after addressing the one concern the *Six MSA Order* raised with these data (the loss of second lines to DSL), and also after accounting for other factors that might cause a decrease in retail lines. *See id.* at 18-19; *Six MSA Order* ¶ 32.

Several CLEC commenters take issue with Verizon's use of Cox's residential directory listings to gauge the number of Cox's retail residential lines. *See Cavalier* at 20-22; *Comptel et al.* at 12-13; *Cbeyond et al.* at 25-26. These parties claim that directory listings are "estimates" that may not be reliable because "CLECs are more likely to serve specialized sets of customers that may well have different practices in terms of listing lines in white pages." *Comptel et al.* at 13. Not one of the two dozen

⁸ Columbia Capital and M/C Venture Partners ("Telecom Investors") argue (at 4, 5) that Verizon "mistakenly continues to include over the top VoIP . . . in its market share calculations." That is incorrect; Verizon's calculations exclude such competition. *See Virginia Beach Pet'n* at 16.

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CLECs making this claim states that its practices differ. In any event, the practices of CLECs are irrelevant here. Verizon used directory listings only for Cox, and Cox has not argued, much less shown, that Verizon has overstated its lines. *See Sprint Communications Co. v. FCC*, 274 F.3d 549, 562 (D.C. Cir. 2001). In fact, Cox's silence suggests that the opposite is likely to be true, and the Commission should require Cox to provide accurate information about the number of subscribers and lines it currently serves.⁹

Several commenters argue that Verizon's directory listings have been criticized by the Virginia State Corporation Commission ("Virginia SCC"). *See Cavalier* at 21-22; *Cbeyond* at 26 n.32; *Cox* at 6-7. These claims are misplaced and do not provide a basis to question to the accuracy of Verizon's directory listings data. As an initial matter, Verizon demonstrated in its petition that the correlation between directory listings and switched access lines is greater than 95 percent, *see Lew/Wimsatt/Garzillo Decl.* ¶ 20 & Exh. 5, which shows that no such concerns exist. As the attached Declaration of Luis Salazar explains, various concerns with Verizon's directory listings arose in 2004 due to

⁹ Several commenters note that Qwest has recently stated that only about 75 percent of its residential lines are listed in the white pages directory. *See Cbeyond et al.* at 7, 26. Qwest's practices are irrelevant here. Verizon has explained that the listings data provided here include unlisted numbers, and also that the correlation between its own residential lines and residential directory listings is more than 95 percent. *Lew/Wimsatt/Garzillo Decl.* ¶¶ 19-20. Even if the correlation for Cox were lower (and there is no evidence of that here), that would only make Verizon's estimate of Cox's lines conservative. There is also no basis to Cavalier's claim (at 21) that when former MCI lines are included the 95-percent correlation would be lower. The opposite is in fact true. *See Lew/Wimsatt/Garzillo Decl.*, Exh. 5 (correlation is 97 percent when all lines other than legacy Verizon, including former MCI, are included).

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what the Virginia SCC has called a “perfect storm” of events, including “merging Bell Atlantic’s and GTE’s directory operations; converting directory related computer systems; unnecessarily cumbersome processes for both wholesale and retail listings; and, of course, human error.” Status Report of Division of Communications, *Investigating Directory Errors and Omissions*, Case No. PUC-2005-00007, at 2 (VA SCC Aug. 31, 2005) (attached as Salazar Decl.¹⁰ Exh. 1). But these concerns principally involved mistakes with listings in printed directories (such as incorrect addresses), and not omitted or duplicate listings in Verizon’s directory listing database; thus, these issues did not affect the number of listings in Verizon’s database. *See* Salazar Decl. ¶ 5. In any event, following a proceeding to address these concerns, Verizon implemented a number of corrective measures. *See id.* ¶ 6. And as a result of these measures, Verizon’s performance with respect to directory listings has been strong. *See id.* ¶ 7.

The commenters also argue that the Commission should ignore data regarding Verizon’s loss of retail lines. Verizon’s petition demonstrated that, between year-end 1999 and year-end 2007, Verizon’s residential retail lines in Cox’s service territory in the Virginia Beach MSA declined by approximately **[Begin Confidential]** **[End Confidential]** percent. *See* Lew/Wimsatt/Garzillo Decl. ¶ 8. Comptel *et al.* suggest (at 16) that “it is likely that a large proportion of the lost residential lines are second lines that were replaced by Verizon’s own DSL lines.” *See also* Cavalier at 25; NuVox/XO at 30. This is wrong and irrelevant. Verizon’s petition demonstrates that, based on a

¹⁰ Declaration of Luis Salazar (“Salazar Decl.”) (attached as Attach. B hereto).

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limited study that Verizon performed in 2007, only about [Begin Confidential] [End Confidential] percent of customers dropped their second line for DSL, and that number is likely to be even lower today. See Lew/Wimsatt/Garzillo Decl. ¶ 8 n.10. Verizon explained that even if the Commission attributed *all* lost second lines to Verizon despite evidence that the actual percentage is much lower, Verizon *still* has lost [Begin Confidential] [End Confidential] or more of its total residential lines in Cox's service territory in the Virginia Beach MSA.¹¹

III. THE COMMISSION SHOULD REJECT THE COMMENTERS' ATTEMPTS TO MODIFY THE PREVIOUSLY APPLIED TESTS

Because they are unable to prove that Verizon fails the coverage threshold and share-of-residential-lines tests, the commenters are left to argue that the Commission should raise the bar and modify those tests in order for these parties to maintain a competitive advantage by subjecting Verizon to needless regulation. There is no basis for such an approach.

A. The Commission Correctly Included Wireless Cut-the-Cord Competition in the Analysis

In its calculation of competitors' share of residential lines, the Commission previously included the percentage of households who have cut the cord according to the most recent official government estimate by the Centers for Disease Control and

¹¹ Comptel *et al.* also claim (at 16) that declines in Verizon's residential lines "are likely more than offset by millions of customers added by Verizon Wireless." But this supports the view that millions of subscribers – including those of Verizon Wireless – view wireless service as a viable competitive alternative for Verizon's wireline service.

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Prevention (“CDC”) – which as of the end of June 2007 was 13.6 percent.¹² See Virginia Beach Pet’n at 12; 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 (Dec. 10, 2007) (“June 2007 CDC Wireless Substitution Survey”); *Six MSA Order* ¶ 27 n.89 & App. B. The CDC has recently issued an updated report with data for December 2007, which shows that the percentage of households who have cut the cord has risen to 15.8 percent. See 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, July-December 2007*, at Table 1 (May 13, 2008) (“December 2007 CDC Wireless Substitution Survey”). Applying this more current figure demonstrates that competitors now serve at least **[Begin Confidential]** **[End Confidential]** percent of residential access lines in Cox’s service territory in the Virginia Beach MSA. See Attach. C. Even using the Commission’s methodology that treats Verizon Wireless cut-the-cord customers the same as Verizon wireline customers,

¹² Quoting a study by Gillan & Associates, Cbeyond *et al.* argue (at 28) that the Commission should not rely on the CDC’s 13.6 percent nationwide “point-estimate of wireless households, but should instead use the lower bound of the 95% confidence interval.” But Cbeyond fails to recognize that the 95-percent confidence interval applies only to the CDC’s *regional* estimates, not its nationwide total. In the South region that includes Virginia, the 95-percent confidence interval is 15.05-19.40 percent; thus, even the lower bound of this range is roughly the same as the nationwide average, and higher than the dated 13.6 percent total that Cbeyond claims is appropriate. In any event, even if the Commission were to use a regional total, there is an equally strong case for using the upper bound rather than the lower bound.

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competitors serve approximately [Begin Confidential] [End Confidential] percent of the residential lines in Cox's service territory in the Virginia Beach MSA.

Several commenters argue that the Commission should ignore the recent CDC data and instead rely on a supposedly "Virginia-specific estimate [that] Verizon itself recently provided to the Virginia Commission showing only 6% of Virginia households are wireless only." Cavalier at 19; *see also* Cox at 3 n.7.¹³ But the CLECs' own expert states precisely the opposite. *See* Gillan Associates, *Properly Estimating the Size of the Wireless-Only Market*, at 3-4 (Mar. 2008) ("The estimate [of cut-the-cord households] should be developed from the best available data collected by a neutral third party. The semi-annual [CDC study] . . . is the best currently available information, routinely developed, using valid survey techniques by a neutral third party."), attached as Attach. B to Cbeyond *et al.* Comments. In any case, the commenters grossly mischaracterize the data that Verizon submitted in Virginia. In January 2007, Verizon submitted to the Virginia SCC a range of estimates for wireless-only households. *See* Direct Testimony of Mr. Harold E. West, III on Behalf of Verizon Virginia Inc. and Verizon South Inc. at 62-65, Case No. PUC-2007-00008 (VA SCC filed Jan. 17, 2007). The *lowest* of those estimates was a March 2006 report by Forrester Research estimating this figure at 6

¹³ Cavalier argues (at 19) that in the last year, less than [Begin Confidential] [End Confidential] of former Cavalier customers chose to port their landline number to wireless or VoIP. But this says nothing about the percentage of Cavalier customers who have cut the cord in the past. Moreover, Cavalier provides no evidence that its own experience is representative of customers in Cox's service territory in Virginia Beach as a whole. And given that Cavalier's service uses below-cost UNEs, there is reason to doubt this is the case.

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percent *nationwide* as of year-end 2005. Thus, contrary to the commenters' claims, this estimate was neither "Virginia-specific" nor "recent."

Unable to rebut the fact that a large, growing percentage of the population now uses wireless instead of any wireline service, the commenters argue that the Commission should reject its prior approach and ignore competition from wireless, claiming that wireless service is not a perfect substitute for wireline for *all* customers. See Cavalier at 15-27 & Exh. 5; Cbeyond *et al.* at 43-51 & Attach. E; NuVox/XO at 19-20; Telecom Investors at 9-10; Comptel *et al.* at Exh. 1. But this is not the correct test. Different services can impact the ability to raise prices so long as they are considered reasonably interchangeable by "marginal" customers – that is, the subset of customers who will switch between the services in the putative market in response to small changes in relative prices. The Commission has recognized that in order for two competing technologies to constrain each other's prices, it "only requires that there be evidence of sufficient substitution for significant segments of the mass market," not that every customer views the two services as substitutes. See *Verizon/MCI Order*¹⁴ ¶ 91; J. Gregory Sidak & Hal J. Singer, *Evaluating Market Power with Two-Sided Demand and Preemptive Offers To Dissipate Monopoly Rent: Lessons for High-Technology Industries from the Antitrust Division's Approval of the XM-Sirius Satellite Radio Merger*, at 5, n.11

¹⁴ *Verizon Communications Inc. and MCI Inc., Applications for Approval of Transfer of Control*, 20 FCC Rcd 18433, Memorandum Opinion and Order (2005) ("*Verizon/MCI Order*").

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(May 1, 2008) (“it is the *marginal* customer who constrains prices”).¹⁵ That test is satisfied here.

For the same reason, there is no merit to the commenters’ claim that the Commission should discount wireless competition because, in the high-cost universal service proceeding (WC Docket No. 05-337), it found that in high-cost areas “wireless competitive [eligible telecommunications carriers] do not capture lines from the incumbent LEC to become a customer’s sole service provider, except in a small portion of households.” *High-Cost Universal Service Support*, Order, WC Docket No. 05-337, FCC 08-122, ¶ 20 (rel. May 1, 2008). But the question whether wireless cut-the-cord competition is sufficient to justify treating wireless carriers identical to wireline carriers for purposes of receiving universal service support is, from an economic perspective, very different from the question whether the two services are competitive alternatives and should be so treated – at least in the case of cut-the-cord customers who *have already*

¹⁵ There is likewise no merit to the claim that a recent Verizon survey found that “an overwhelming majority . . . plan to keep and continue using their landline home phone indefinitely” and that “American consumers today do not consider wireless service to provide the reliability or safety that would make it a true substitute for wireline voice service.” NuVox/XO at 20 (internal quotation marks omitted); *see also* Cbeyond *et al.* at 48. In any event, the survey involved only existing landline subscribers, and not subscribers who have *already* decided to cut the cord. Moreover, even within that group, approximately 17 percent of households stated that they would consider cutting the cord in the future. *See* Verizon News Release, *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>. Taken together with customers who have already cut the cord, this is fully consistent with the evidence in Verizon’s petition that, by 2010, analysts expect 20-33 percent of consumers to cut the cord. *See* Lew/Wimsatt/Garzillo Decl. ¶ 24 & n.30.

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chosen wireless service instead of wireline. The Commission's findings with respect to this first question accordingly do not bear on the second question, which is the relevant inquiry here.

Cbeyond *et al.* claim (at 17) that “[w]hile it might be true that Verizon’s wireline division would be hurt by losses to Verizon Wireless, Verizon Communications Inc. has a substantial interest in keeping Verizon’s wireline customers from abandoning the Verizon families of companies completely.” That is true, but irrelevant. Regardless of Verizon’s incentives to keep customers on its wireline or wireless network, its ability to do so is dictated by competition.¹⁶ And the evidence shows that Verizon has been losing substantial numbers of wireline customers and that wireless is highly competitive. *See* Virginia Beach Pet’n at 12-13, 17-18, 20. In order to keep cut-the-cord customers with Verizon Wireless, the simple fact is that Verizon Wireless must offer highly competitive terms to keep the customer from going to a competitive alternative.

Cbeyond *et al.* further argue (at 19-20) that Verizon could use “wireless/wireline bundling” to retain customers. But given that the Commission includes only cut-the-cord competition in its analysis, this claim is likewise irrelevant to the analysis. In any event,

¹⁶ The same is obviously true for AT&T Mobility. There is accordingly no basis to Cbeyond *et al.*’s claim (at 52) that the Commission should exclude AT&T Mobility customers from the competitive side of the analysis because it is “affiliated with an ILEC.” In any event, AT&T Mobility is *not* affiliated with an ILEC in Cox’s service territory in the Virginia Beach MSA. Cbeyond *et al.* also claims that AT&T Mobility sets its prices on a national basis, but to the extent that claim is correct it merely shows that AT&T must set its prices to reflect *all* areas where it faces competition, regardless of whether it has an affiliated ILEC in that area.

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such wireless/wireline bundles are highly beneficial to consumers, and can be copied by other competitors through joint ventures or other arrangements. Thus, Verizon has no unique ability to retain wireless or wireline customers.

Finally, several commenters argue that Virginia Beach has a lower-than-average population of certain demographic groups (18-24 year-olds, persons in poverty, and Hispanics) that are more likely than average to cut the cord. *See Cbeyond et al.* at 29; *Cavalier* at 18. But the evidence they present is highly selective and misleading. As an initial matter, these commenters do not present any data for Cox's service territory in the Virginia Beach MSA or for the MSA as a whole. They instead rely on data for just Virginia Beach City (*Cbeyond*) or the entire state of Virginia (*Cavalier*). The most complete data currently available from the U.S. Census¹⁷ show that Cox's service territory in the Virginia Beach MSA has a *higher*-than-average percentage of 18-24 year-olds, who are especially likely to cut the cord (11.1 percent versus 9.9 percent nationwide). Moreover, these data show that Cox's service territory in the Virginia Beach MSA has a much *higher*-than-average population of adults who rent their home, who are also *more* likely to cut the cord than average (30.9 percent versus 14.5 percent for adults in general). *See* U.S. Census Bureau, *American Fact Finder: Fact Sheet*, <http://factfinder.census.gov/> (demographic data for the U.S. and counties and independent

¹⁷ The Census Bureau's American Community Survey on which this analysis is based does not report data for counties with a population of less than 65,000 (York, James City, and Gloucester Counties, as well as Poquoson and Williamsburg Cities). These areas account for only 12 percent of the population of Cox's service territory in the Virginia Beach MSA. *See* Virginia Beach Pet'n, Attach. A.

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cities in the Virginia Beach MSA); *December 2007 CDC Wireless Substitution Survey* at 3 & Table 1; *see also* Craig Moffett *et al.*, Bernstein Research, *U.S. Telecom, Cable & Satellite: A Subscriber Scorecard . . . Who's Winning the Wars?* at 15-16 (May 27, 2008) (“[I]t is difficult to dismiss this extraordinarily high rate of Wireless substitution as simply limited to one specific demographic when the rate of increase in wireless substitution across all demographic segments between December 2005 and December 2007 is so high. For every population segment that the CDC tracks, wireless substitution increased markedly over the two-year period.”).

As for Cavalier’s claim (at 18) that “many senior citizens live in the state, and part of the Virginia Beach MSA at issue here is well known as ‘a retirement mecca,’” the facts show otherwise. According to the U.S. Census Bureau, the percentage of the population in Cox’s service territory in the Virginia Beach MSA that is 60 years and older is in fact *lower* than, the national average (15 percent in Virginia Beach versus 17 percent nationwide). *See* U.S. Census Bureau, *County Population Estimates – Characteristics: County Population by Age, Sex, Race, and Hispanic Origin*, <http://www.census.gov/popest/counties/asrh/files/cc-est2006-alldata-51.csv> (Virginia estimates for July 1, 2006); U.S. Census Bureau, *Resident Population: National Population Estimates for the 2000s; Monthly Postcensal Resident Population, By Single Year of Age, Sex, Race, and Hispanic Origin*, <http://www.census.gov/popest/national/asrh/files/NC-EST2007-ALLDATA-R-File14.csv> (national estimates for July 1, 2006).

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B. The Commission Correctly Included Non-UNE Wholesale Competition in the Analysis

In prior forbearance orders, the Commission has found that ILECs who face facilities-based competition have “the incentive to make attractive wholesale offerings available so that it will derive more revenue indirectly from retail customers who choose a retail provider other than [the ILEC].” *Omaha Forbearance Order* ¶ 67; *see also Anchorage Forbearance Order* ¶ 45.¹⁸ The D.C. Circuit upheld the Commission’s determination in Omaha, explaining that “the *TRRO*¹⁹ explicitly recognized that an ILEC’s tariffed offerings could, in certain circumstances, be an avenue for competitive entry,” and that the Commission was reasonable to conclude those circumstances were met given “the combination of tariffed ILEC facilities and facilities-based competition.” *Qwest Corp. v. FCC*, 482 F.3d 471, 480 (D.C. Cir. 2007).²⁰

In light of these findings – which are as correct today as they were at the time – there is no merit to the argument several commenters make that the Commission should modify its calculation of competitors’ share of residential lines by excluding competitors

¹⁸ These previous findings put the lie to claims that wholesale and resale lines should be attributed to Verizon, or that the Commission’s prior discussion of such competition should be treated as mere dicta. *See Comptel et al.* at 14; NuVox/XO at 36.

¹⁹ *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533 (2005) (“*Triennial Review Remand Order*” or “*TRRO*”), *aff’d*, *Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

²⁰ The Commission has also previously rejected arguments that forbearance is not warranted because various facilities-based competitors may not offer wholesale access to their facilities – although, as Verizon demonstrated, Cox does in fact do so in Cox’s service territory in the Virginia Beach MSA. *See Virginia Beach Pet’n* at 25-26; *Omaha Forbearance Order* ¶¶ 67, 71.

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who provide service through non-UNE wholesale alternatives such as Wholesale Advantage and resale. See Comptel et al. at 14; Cbeyond et al. at 9; NuVox/XO at 36-37; Telecom Investors at 5-9; Cavalier at 20. Just as the Commission and the D.C. Circuit anticipated, Verizon is making attractive non-UNE wholesale offerings available, including in Virginia Beach, even when it has no obligation to do so. See Virginia Beach Pet'n at 13; Lew/Wimsatt/Garzillo Decl. ¶ 30. Cavalier argues (at 6) that "there are no alternatives to the UNEs Cavalier leases from Verizon at regulated rates, and that are essential for Cavalier to provide service." See also Cbeyond et al. at 21-22; Comptel et al. at 25; Telecom Investors at 19-21; Reply Comments of Cities of Chesapeake, Norfolk, Portsmouth, and Virginia Beach in WC Docket No. 08-49 at 4-5 (filed May 27, 2008) ("Reply Comments of VA Cities"). Cavalier further claims (at 7; Wainwright Decl. ¶ 15) that "if the Commission grants the requested forbearance relief, Cavalier will likely exit the entire Virginia Beach MSA." As an initial matter, Cavalier's premise is wrong: Verizon will continue to offer unbundled loops at market-based rates. This is true both because these loops still must be made available under Section 271, and because the competitive market gives Verizon an incentive to keep the customer on its network rather than switch to the ubiquitous facilities-based alternatives.

To the extent that Cavalier is claiming that, given its business model, the use of market-priced loops and other facilities would not be sufficiently profitable, that claim is neither supported by an evidentiary record nor relevant to the Commission's inquiry here. The fact that a few competitors claim their chosen business models are based on access to

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below-cost inputs is not a legitimate consideration in the forbearance inquiry. The UNE regime was never intended to become a permanent fixture but was meant to apply when carriers otherwise were not capable of competing. Moreover, it is competition in general – not the interests of individual competitors – that is relevant here, and the interests of competition would be harmed, not helped, by subjecting one and only one facilities-based competitor to continuing unbundling obligations.

Cavalier attempts to justify the continued existence of its UNE-centric business model by claiming (at 3-4) that it is “the only CLEC remaining in Virginia Beach that serves residential customers in any meaningful numbers”; “the only facilities-based competitive provider in Virginia Beach for traditional customers of plain old telephone service or ‘POTS’ without high speed internet or cable”; and that its prices for phone service “are on average about \$10 a month cheaper than either Verizon or Cox.” Cavalier has its facts wrong.²¹

First, the claim that Cavalier may be the only “CLEC” to serve residential customers is utterly disingenuous and pure word play: cable and wireless are the most significant competition to residential customers for competitive local exchange service (supplemented by over-the-top VoIP), whether or not these providers are considered

²¹ Cavalier is also incorrect in claiming (at 2) that Verizon has sought retail rate deregulation from the Virginia SCC “on the ground that it will continue to make the network elements at issue here available at TELRIC rates to competitors.” The Virginia SCC is obviously aware that Verizon could seek unbundling relief at any point in the future.

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