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VIA ECFS

EX PARTE

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

Re: Petition of Verizon New England for Forbearance Pursuant to 47 U.S.C. § 160(c) in Rhode Island, WC Docket No. 08-24; 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:

The undersigned competitive local exchange carriers (the "Competitive Carriers") urge the Commission to modify the existing analytical framework applied in considering petitions for forbearance from Section 251(c)(3) unbundling obligations of the Act so as to prevent many of the anti-competitive consequences that resulted in the Omaha MSA in the aftermath of the *Omaha Forbearance Order*. Because a cable-RBOC duopoly can not benefit consumers, the Competitive Carriers urge the Commission to adopt a new framework. Under this proposed new framework, Verizon's Rhode Island and Virginia Beach petitions must be denied. If, however, the Commission applies its existing framework (which it should not), Verizon's petitions also fail to satisfy that standard and should be denied anyway.

I. THE SECTION 251(C)(3) FORBEARANCE STANDARD APPLIED IN PAST DECISIONS IS FLAWED

On March 26, 2009, a coalition of competitors proposed to the Commission a new framework for evaluation of ILEC petitions for forbearance from the

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unbundling requirements of Section 251(c)(3) of the Act.[1] For the reasons discussed below, the Commission should now modify the forbearance framework it created in the *Omaha Forbearance Order*[2] to be consistent with the Act's impairment framework, sound competition policy and economics, and the statutory forbearance criteria.[3]

A. The Omaha Forbearance Standard Harms Consumers and Competition by Subjecting them to a Duopoly

In evaluating previous RBOC forbearance petitions requesting relief from the Act's unbundling provisions, the Commission has, over the objection of wireline competitors, granted forbearance in markets where only one viable competitor to the incumbent is providing facilities based competition. The resulting market reality, characterized by a cable-RBOC duopoly in the residential market and significantly more limited competition in the enterprise market has — as competitors correctly warned — chilled investment, marginalized or wholly drove out competitors and allowed the entrenched incumbents to raise prices.[4]

1. The Commission's Predictive Judgment About Wholesale Competition Proved Mistaken

The failed Omaha experiment is evidence that a cable-RBOC duopoly does not benefit consumers. For one, wireline competitors have largely abandoned the Omaha market. McLeodUSA, previously the largest facilities-based CLEC operating in pre-forbearance Omaha, ceased selling services to new customers and continues the costly process of exiting from the Omaha market due to the *Omaha Forbearance Order*. This withdrawal from Omaha was directly caused by the absence of any enforceable unbundling rule which deprived competitors of reasonable access to the loop facilities that are essential to competition.[5]

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[1] Letter from Andrew D. Lipman *et al*., Counsel for Alpheus Communications, L.P. *et al*. to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 08-24 and 08-49, (filed Mar. 26, 2009) ("Joint Letter").

[2] *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005) ("*Omaha Forbearance Order*"), *aff'd, Qwest Corp. v. FCC*, 482 F.3d 471 (D.C. Cir. 2007).

[3] It is well-established that the Commission is "entitled to reconsider and revise its views as to the public interest and the means to protect that interest," so long as it gives a reasoned explanation for the revision. *See, e.g., DirecTV, Inc. v. FCC*, 110 F.3d 816, 826 (D.C. Cir. 1997).

[4] *See, e.g.,* McLeodUSA Petition for Modification, WC Docket No. 04-223, at 4, 8 (July 23, 2007).

[5] *See* Letter from William A. Haas, VP — Regulatory and Policy, PAETEC Communications, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97, at 3-6 (filed July 10, 2008); *See* Letter from Russell Blau, Counsel to PAETEC Communica-

In the *Omaha Forbearance Order*, the Commission rendered a "predictive judgment" that Qwest would have an incentive to offer commercially reasonable wholesale alternatives to Section 251(c)(3) obligations. The Commission's prediction was wrong. Instead of being incented to offer its largest wholesale customer in the market reasonable prices to continue accessing Qwest's deregulated network facilities, as predicted by the FCC, Qwest's "negotiations" consisted of offering McLeodUSA take it or leave it terms featuring a 30% price increase on DS0 loops and its standard special access offerings on high capacity loops and transport.[6] The complete lack of incentive for Qwest to offer CLECs a reasonably priced "commercial" wholesale option created by the limited presence of Cox in Omaha could not be clearer than the fact a CLEC can get exactly the same commercial special access pricing in other Qwest markets as in Omaha. The alleged competition from Cox has caused Qwest to do absolutely nothing to keep wholesale customers in Omaha as opposed to what it offers in markets that have less retail competition.

It should come as no surprise that the Commission's predictive judgment has been proven incorrect — antitrust law has for decades operated under the premise that "where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to restrict output and achieve profits above competitive levels."[7] As the D.C. Circuit has explained, in a market "characterized by few producers, price leadership occurs when firms engage in interdependent pricing, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests with respect to price and output decisions."[8] Despite this principle, one that the Commission has applied in other contexts, it adopted a forbearance test predicated on a contrary prediction that robust wholesale competitive behavior would emerge between two firms, one of which was not even capable of or willing to offer a comparable wholesale service in the vast majority of locations required by competitors. The FCC's failure to give due weight to the incontrovertible fact that Cox was not a wholesale provider of last mile access to nearly all non-residential end user locations meant its prediction was doomed to fail.

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tions, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97, at 1 (filed June 25, 2008).

[6] *See* Letter from William A. Haas, VP — Regulatory and Policy, PAETEC Communications, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97, at 3-6 (filed July 10, 2008); *See* Letter from Russell Blau, Counsel to PAETEC Communications, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97, at 1 (filed June 25, 2008).

[7] *F.T.C. v. PPG Indus.*, 798 F.2d 1500, 1503 (D.C.Cir.1986).

[8] *Federal Trade Commission v. H.J. Heinz Co. et al.*, 246 F.3d 708, 725 (D.C. Cir. 2001) (citing *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993)).

In a highly concentrated market where there are two dominant suppliers and high barriers to entry, each of the two market participants has an incentive to foreclose other competitors' access to critical inputs that would facilitate entry. In the absence of any regulatory compulsion to offer that access, such as through unbundling, it is not surprising that neither the RBOC nor the cable MSO offers wholesale access on terms that allow meaningful competition to develop. In hindsight, it is inconceivable how anyone could rationally have predicted that Qwest, which so enthusiastically sought to avoid providing UNEs under Section 251(c)(3) at cost-based rates that granted it a reasonable return on its investment, would have been incented to turn around and provide reasonable wholesale access anyway, when in fact Qwest could achieve higher revenues by recapturing its wholesale customers' end users and serving those same customers on a retail basis after driving those competitors out of the market.

Verizon's April 10 *ex parte* suggests that the revised test submitted by competitors lacks merit because there could be a market where a single competitor cable operator satisfies the Commission's market share threshold and yet should not receive forbearance. Verizon ignores, however, the fundamental dangers of duopoly.[9] In such a market, the ILEC and the cable operator each have monopolist behavior incentives. The revised test cures this deficiency by denying forbearance until a market is competitive enough to support *two* competitors in addition to the incumbent and each competitor has a significant enough share of the market to suggest that broader competition is possible and even likely.

In addition, the Omaha forbearance standard refused to recognize the importance of wholesale competition to the development of meaningful retail competition. The *Omaha Forbearance Order*, while acknowledging the lack of any alternative for wholesale supply of loops, simply ignored the consequences of this lack of wholesale competition. In highly concentrated markets such as local telephone markets, the owners of the critical last mile connections have no incentive to offer access that provides a means for competitors to enter the market where entry barriers would ordinarily preclude such competitive entry. The presence of retail competition alone, from a single competitor that was also not providing wholesale access, proved unable to create further competition. As demonstrated in Omaha, in fact, forbearance led to further concentration and less competition.

2. Duopoly Markets Are Contrary to the Public Interest

Duopoly markets are unduly concentrated and therefore not competitive.

[9] *See* Letter from Nneka Ezenwa, Director, Federal Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 08-24 and 08-49 (filed April 10, 2009) ("Verizon April 10 Ex Parte").

The Commission's Omaha forbearance framework was predicated on the supposition that competition from cable companies was sufficient to check the ILEC's market power in local telephone markets where the cable company achieved certain levels of market share and facilities coverage. This proposition ignored the uniformly held view of economists, antitrust law and the Commission itself, as well as ample practical experience, that duopoly markets are not competitive. Under antitrust doctrine, "the more plausible theories and the evidence suggest strongly that oligopoly pricing departs from competitive norms, often substantially."[10] Other parties in this proceeding have explained that economic analysis shows that duopolies lead to supracompetitive prices.[11]

Until the *Omaha Forbearance Order*, the Commission itself consistently had held that duopoly markets are insufficiently competitive because duopolists tend to collude, even if tacitly, so as to achieve supracompetitive rates and restrict product offerings. For example, it explained that a merger resulting in duopoly carries a "strong presumption of significant anticompetitive effects."[12] In his separate statement, Chairman Powell emphasized "[a]t best, this merger would create a duopoly in areas served by cable; at worst it would create a merger to monopoly in unserved areas. Either result would decrease incentives to reduce prices, increase the risk of collusion, and inevitably result in less innovation and fewer benefits to consumers. That is the antithesis of what the public interest demands."[13]

When considering the marketplace for wireless services, the Commission has held that "the duopoly market structure was established in full recognition of the fact that only two carriers to a market was not ideal in terms of promoting competition"[14] and that "duopoly cellular market" is "imperfectly competitive."[15]

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[10] Phillip E. Areeda and Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application § 404b (2d edition 1998-2006 and supp. Sep. 2006).

[11] *See, e.g.,* Opposition of Telecom Investors to Verizon New England's Petition, WC Docket No. 08-24, at 20-33 (filed March 28, 2008) ("Telecom Investors Rhode Island Opposition"); Opposition of Telecom Investors to Verizon's Petition, WC Docket No. 08-49, at 21-34 (filed May 13, 2008) ("Telecom Investors Virginia Beach Opposition").

[12] *Application of Echostar Communications Corp.*, Hearing Designation Order, 17 FCC Rcd 20559, 20604-05, ¶¶ 99, 102 (2002).

[13] *Id.*, 17 FCC Rcd at 20684, Separate Statement of Chairman Michael K. Powell.

[14] *Petitions for Rulemaking Concerning Proposed Changes to the Commission's Cellular Resale Policies*, Notice of Proposed Rulemaking and Order, 6 FCC Rcd 1719, 1730, ¶ 47 n.67 (1991).

[15] *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, First Report and Order, 11 FCC Rcd 18455, 18470, ¶ 27 (1996).

Overall, the Commission has observed that only "a market that has five or more relatively equally sized firms can achieve a level of market performance comparable to a fragmented, structurally competitive market."[16]

Even when addressing the marketplace for instant messaging, the Commission stated:

> From among all entrants into the IM business, AOL points especially to Microsoft as a significant rival. AOL claims that Microsoft's presence, and especially its recent growth in the market, demonstrates that AOL does not dominate IM. … However, Microsoft has not always been able to leverage its control of the Windows desktop into dominance of other applications. In addition, in IM today, AOL benefits from network effects and first mover advantages; and, as we discuss below, the proposed merger would give AOL significant, additional advantages over Microsoft, Yahoo!, and smaller IM providers. *And even if Microsoft's NPD did grow to rival AOL's, the result would be merely a duopoly, not the healthy competition that exists today in electronic mail and that we hope will exist in new IM-based services and AIHS in particular.*[17]

And as the Commission explained in regard to ILEC/cable duopolies:

> We believe that Congress rejected implicitly the argument that the presence of a single competitor, alone, should be dispositive of whether a competitive LEC would be "impaired" within the meaning of section 251(d)(2). For example, although Congress fully expected cable companies to enter the local exchange market using their own facilities, including self-provisioned loops, Congress still contemplated that incumbent LECs would be required to offer unbundled loops to requesting carriers. A standard that would be satisfied by the existence of a single competitive LEC using a non-incumbent LEC element to serve a specific market, without reference to whether competitive LECs are "impaired" under section 251(d)(2), would be inconsistent with the Act's goal of creating robust competition in telecommunications. In particular, such a standard would not create competition among multiple providers of local service that would drive down prices to competitive levels. Indeed, such a standard would more likely create stagnant duopolies comprised of the incumbent LEC and the first new entrant in a particular market. An absence of multiple providers serving various markets would signifi-

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[16] *2002 Biennial Review — Review of the Commission's Broadcast Ownership Rules Telecommunications Act of 1996*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13731, ¶ 289 (2002).

[17] *Applications of Time Warner Inc. and America Online, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 6547, 6617, ¶ 163 (2001) (emphasis supplied).

> cantly limit the benefits of competition that would otherwise flow to consumers.[18]

The Commission's policy of prohibiting duopoly markets is consistent with antitrust law. As the D.C. Circuit explains, in the context of approving the FTC's rejection of a merger to duopoly, "a durable duopoly affords both the opportunity and the incentive for both firms to coordinate to increase prices … above competitive levels"[19] and that "[t]he combination of a concentrated market and barriers to entry is a recipe for price coordination."[20] Thus under *Heinz*, there is a "presumption" that a duopoly market such as in *Heinz* would "lessen competition." Indeed, courts continue to uphold the FTC's application of the D.C. Circuit's analysis in Heinz barring undue concentration in markets where there are two principal competitors.[21]

The Department of Justice has likewise prohibited mergers to duopoly, most notably in the complaint it filed to block the merger of WorldCom and Sprint. In that complaint, the DOJ found that in a number of telecommunications markets there were three competitors that controlled over 80% of the market share. While the applicants Sprint and WorldCom were second and third in market share, the Department determined that the post merger HHI would lead an unduly concentrated market with two principal participants — in other words a duopoly.[22] This duopoly then would have "facilitate[d] coordinated or collusive pricing or other anticompetitive behavior by the" duopolists.[23] The duopolists would also "be able to raise prices without losing sufficient sales" to fringe competitors to cause the price increase to be unprofitable.[24] This fringe competition was therefore "insufficient to prevent coordinated pricing or other anticompetitive behavior" by the two principal players in the market.[25]

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[18] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3727, ¶ 55 (1999).

[19] *H.J. Heinz Co.*, 246 F.3d at 725.

[20] *Id.* at 724.

[21] *See FTC v CCC Holdings*, 2009 WL 723031 *7, 15 (D.D.C. 2009) (upholding FTC's injunction to prevent merger from 3 to 2 competitors in the market for software used to estimate costs to repair damaged vehicles).

[22] *United States v. WorldCom, Inc. and Sprint Corp.*, Complaint, ¶¶ 62, 90, 107 (June 26, 2000) ("DOJ Complaint").

[23] DOJ Complaint, ¶ 69.

[24] DOJ Complaint, ¶ 70.

[25] DOJ Complaint, ¶ 71. The DOJ reached similar conclusions regarding the other markets it found would exist as post-merger duopolies. *See id*, ¶¶ 94-95, 112, 134.

Experience in the cable market unfortunately bears out the Commission's and the antitrust agencies' concern with duopolies. For example, on March 1, 2007, Comcast increased its rates by 4.3 percent throughout the Washington, D.C. metropolitan region, notwithstanding the November 2006 approval for Verizon to enter the cable television business in Maryland's Montgomery and Prince George's counties.[26] Verizon, too, has raised its rates by 7.6 percent since its initial entry, to the disappointment of county officials who had been assured by Verizon of the "'benefits of choice,' including less expensive service." "So much for the idea that 'competition will bring down rates,' said Montgomery County Council President Marilyn Praisner…. 'That clearly hasn't happened.'"[27]

One senior policy analyst with the Consumers Union conjectured that the companies do not plan to compete over price, but instead over bundled services.[28] If so, this is contrary to the public interest as expressed by former Chairman Martin when commenting about the lack of choice inherent in bundling. According to Chairman Martin, "[c]able companies explain away their skyrocketing prices by saying they are giving you more and more channels. At no time, however, have the cable companies actually asked if you want those additional channels. You have to pay for them whether you want them or not."[29] It stands to reason that the benefits of unbundled availability would also extend to other services, like telephone and broadband. Otherwise, customers will not be able to avail themselves of lower prices for one service, *e.g.*, Internet access, without purchasing services that they do not want, *e.g.*, video or phone. Moreover, a customer that has to change all three services — phone, broadband and video — in order to switch providers for one service will find it much more burdensome. Former Chairman Martin argued that "the solution to high cable bills isn't price controls or additional government regulation. It is more competition and more choice."[30] However, it is increasingly evident that a cable-telco duopoly provides neither.

Former Chairman Martin's concerns were recently confirmed when the Commission reported that average cable rates actually *increased* from one year to the next in areas with wireline competition.[31] In its Report, the Commission

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[26] Ann E. Marimow, *Cable War Fails to Offer Rate Relief in Montgomery*, WASHINGTON POST, Feb. 18, 2007 at C11.

[27] *Id.*

[28] *Id.*

[29] John McCain and Kevin Martin, *Make Cable Go A La Carte*, LOS ANGELES TIMES, May 25, 2006.

[30] *Id.*

[31] *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992: Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, Report on Cable Industry Prices, 21 FCC Rcd 15087 (2006).

revealed that cable rates in communities with a wireline competitor saw increases greater than the overall market in 2004. In those areas, cable rates increased 5.3% to $35.94.[32]

Similar evidence of the danger of a deregulated duopoly is provided by the steady rate increases in California following the California's Public Utility Commission's ("CPUC") decision to lift price caps for the state's dominant ILECs. In August 2006, the CPUC found that the ILECs "no longer possess market power" based on "the demonstrated presence of competitors throughout their service territories" and that competition would protect the interest of consumers.[33] In support of its decision, the CPUC "relied heavily on the conclusion that wireless mobility services are a close substitute for wireline telephone service."[34] However, the latest analysis conducted in California demonstrates that many consumers will "find it difficult to substitute wireless for wireline service."[35] Consequently and instead of price competition, "California consumers have experienced a staggering stream of rate hikes."[36] The TURN Study accordingly concluded that, "that wireless service is not a 'close substitute' for wireline for most customers" and that "[w]ireless substitution is unlikely to provide a pricing constraint on local telephone company services."[37] The TURN Study further found that cable alternatives also have "substantial limitations on the ability of these services to constrain telephone company price increases."[38] In addition, since release of the *Qwest 4-MSA Order*, both the DOJ and, the telecommunications regulatory authority in the United Kingdom, Ofcom, "have conducted rigorous analyses and released reports that conclude, based on the widely accepted methodology for defining relevant product markets, that wireline and wireless services are complementary and not substitutable services and therefore belong in separate product markets, notwithstanding that a certain subgroup of wireline customers have cut-the-cord and are now exclusively using wireless services."[39]

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[32] *Id.*, Table 1.

[33] D.06-08-30 at 132 and 275.

[34] *See*, Trevor R. Roycroft, Ph.D., "Why 'Competition' is Failing to Protect Consumers - Full Report," The Utility Reform Network, at ii (March 25, 2009) ("TURN Study").

[35] *Id*., at 18.

[36] *Id*., at C-2.

[37] *Id*. at 15.

[38] *See* Trevor R. Roycroft, Ph.D., "Why 'Competition' is Failing to Protect Consumers - Brief," The Utility Reform Network, at 4 (March 25, 2009).

[39] Letter from Brad E. Mutschelknaus, Counsel to Broadview Networks, Inc. *et al*., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 08-24 and 08-49, at 2 (filed April 20, 2009). *See also*, Letter from Thomas Jones, Counsel to One Communications

The Commission already has substantial evidence of Verizon's natural incentive to raise rates in a duopoly market. For instance, Verizon raised its rates on special access services where it had been granted pricing flexibility. In another example, after broadband deregulation, with cable providers its only real competition, Verizon quickly raised prices on DSL, adding a "Supplier Surcharge" that essentially equaled the USF contribution that it was no longer subject to — notwithstanding its assurances to the Commission that deregulation would reduce its costs.[40] In essence, it appropriated USF savings for itself, not its customers. Verizon then withdrew its surcharge, not in response to competitive pressure, but in response to the Commission's Letter of Inquiry.

Verizon has also imposed rate increases in many other services that are supposedly subject to competition. These include:

- a $5.00 increase in rates charged to an estimated 7.5 million subscribers to Freedom local/long distance calling plans, an increase of more than 10% over the previous $35-40 base;
- a $5.00 increase in rates charged to an estimated 2 million subscribers to 768 Kbps Lite broadband service, an increase of more than 30% over the previous $15 base;
- a $3.00 increase in FiOS Premier video tier, from $40 to $43.[41]

At bottom, the Commission cannot find that the resulting duopoly market in Rhode Island or Virginia Beach would protect against anticompetitive behavior. As the above and the record fully show, duopoly markets do not encourage competitive behavior but rather spur price increases and other anticompetitive conduct.

B. The Omaha Forbearance Framework Fails to Recognize Distinctions Between Relevant Product Markets

The Commission's competition analysis in the *Omaha Forbearance Order* failed to take account of separate residential and business markets — both in analyzing deployment of competitive loop facilities and in evaluating competitors' market share. In considering whether facilities based competitors had deployed their own loop facilities to 75% of all end user locations in the geographic market, the Commission did not differentiate between residential locations and business locations. Thus it could have granted forbearance for UNEs

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Corp. *et al*., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 08-24, at 7-11 (filed Dec. 3, 2008).

[40] Letter from W.S. Randolph, Verizon, to Marlene Dortch, Secretary, FCC, WC Docket No. 01-337, at 6 (June 26, 2003).

[41] Buckingham Research Group, Research Note for December 22, 2006 at 1-2.

used in business markets even if *no* business locations were actually served by the facilities based cable provider. The Commission simply failed to examine whether and to what extent competitors had actually deployed loop facilities in the business market. The Commission was instead apparently content to assume that cable competitors would extend their networks serving residential customers to business markets in a reasonable period of time without any data to support its assumption.

With respect to market share, the Commission limited its analysis to residential market share and "predicted" that competitors would make similar inroads in the business market. The Commission further erred by not analyzing the extent to which competitors, including Cox Cable in Omaha, were actually serving business customers that demand the kind of robust and reliable services that competitors use UNEs to provide.

C. The Existing Framework For Analyzing "Facilities-Based Competition" In UNE Forbearance Proceedings Is Irrational

The Commission's UNE forbearance decisions have not rationally focused on the presence of actual facilities-based competitors in deciding whether to forbear from the Act's central market opening measure. In the *Omaha Forbearance Order*, for example, the Commission included resale as the equivalent to facilities based competition, despite the fact that resellers obviously rely on the ILEC's facilities to provide service. Similarly, the Commission has treated so called "commercial agreement" UNE-P replacement services as facilities based competitors, although competitors using these services obtain loops and local switching from the ILEC.

The Commission cannot rationally base its forbearance decision on competition that relies on the RBOCs' loops as a basis for eliminating access to those same loops because they do not constitute independent facilities-based competition. In addressing this precise issue, the Commission has held that "[g]ranting forbearance from the application of section 251(c)(3) on the basis of competition that exists only due to section 251(c)(3) would undercut the very competition being used to justify the forbearance," and it properly "decline[d] to engage in that type of circular justification."[42]

More importantly, the Commission's forbearance decisions under Section 10(a) must consider whether regulation is prospectively "necessary" to ensure reasonable prices and to protect consumers. Verizon's arguments in favor of forbearance assert that UNE regulation is unnecessary because its market conduct will be constrained by competition even if UNEs are withdrawn. To the extent that that "competition" is dependent on Verizon's voluntary choice to offer resold services or underlying facilities on "reasonable" terms, however, it cannot rationally be expected to serve as a substitute for regulatory constraints. If Verizon's

[42] *Omaha Forbearance Order*, 20 FCC Rcd at 19450, ¶ 68 n.185.

retail pricing were being challenged by competition from resellers or special-access based carriers, Verizon could simply increase the costs of those competitors as much as it feels necessary to allow it to set retail prices as desired.

D. The Past Geographic Analysis Ignores Marketplace Realities

The Commission's previous decisions have been based on an inconsistent analysis of geographic markets. While the Commission has evaluated market share on an MSA wide basis, it has looked at facilities coverage on a wire center basis. This approach ignores how competitors make investment and entry decisions. If the competitor cannot obtain reasonably priced loop facilities throughout the geographic areas needed to achieve minimum viable scale it is unlikely to be able to enter any part of the market.

McLeodUSA's experience in Omaha is a prime example of this. Although the Commission only granted forbearance in 9 of Omaha's 24 wire centers, they were the 9 wire centers with the highest concentration of revenue opportunity. McLeodUSA can still obtain UNEs in the other 15 wire centers, but the revenue opportunity in those markets would not allow it to recover the investments and expenses necessary to maintain its network that was designed and constructed to compete across the entire MSA, including the wire centers where the Commission granted forbearance. Accordingly, the company was forced to make a business decision to discontinue its operations to the residential and small and medium business customers throughout the Omaha metropolitan area in Nebraska.

E. The Omaha Test Does Not Identify Locations Where Competitors Have Facilities Available to Serve Customers

The Omaha decision found that forbearance could be granted where a competitor "uses its own network, including its own loop facilities, through which it is willing and able, within a commercially reasonable time, to offer the full range of services that are substitutes for the incumbent LEC's local service offering" to at least 75 percent of end user locations in a wire center.[43] Rather than relying on *actual* geographic reach of facilities, this approach is speculative and engages in a predictive judgment as to whether a competitor may be "willing and able" to deliver substitute services "within a commercially reasonable time." A more reasonable standard is whether the competitor holds its services out as currently available to the relevant locations.

The current facts in Omaha debunk the prior predictive judgments used to justify deregulation before robust facilities-based competition is actually in place. While it is true that Cox has continued to extend its network facilities to more enterprise locations in the Omaha MSA, its limited network coverage is nowhere near the levels required for true wholesale competition to exist. Indeed, since

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[43] *Omaha Forbearance Order*, 20 FCC Rcd at 19444, ¶ 60 n.156.

McLeodUSA last filed data supporting its Petition for Modification of the *Omaha Forbearance Order* in the Summer and Fall of 2007, Cox's network connectivity to enterprise end user locations has increased a tiny fraction beyond its prior reach. And, taking advantage of the absence of competitive pressure from Cox and the withdrawal of McLeodUSA from the business market, Qwest reportedly has instructed its sales agents not to present *any* competitive pricing offers (*i.e.* reduced pricing in exchange for entering a new term agreement) to business customers in the Omaha market, even to customers seeking to renew expiring customer-specific contract offers. Qwest's reported directive to its agents is compelling evidence that the grant of forbearance has eliminated competition in Omaha to the detriment of Omaha business customers, which is exactly what CLECs had themselves predicted in opposing the forbearance petition.

It is now five years since the Commission predicted that Cox would expand its network to enterprise locations, and it has not done so anywhere to the degree necessary to sustain a competitive market in Omaha. The "commercially reasonable time" that the Commission used as its justification for its predictive judgment has come and gone.

II. THE PROPOSED NEW STANDARD MORE CLOSELY ADHERES TO THE REQUIREMENTS OF § 10 AND § 251

The competitors' proposed new standard provides a more stable and consistent framework that the Commission could apply in future UNE forbearance proceedings to eliminate the defects in the Commission's previous UNE forbearance decisions.

A. The Commission Should Standardize the MSA as the Appropriate Geographic Market for Analyzing the Statutory Forbearance Criteria

Section 10 of the Act specifically provides for the Commission to consider forbearance in one or more "geographic markets," so that the definition of these markets is a critical element of the statutory analysis. Consistent with the need for a more stable and consistent framework that is predicable for competitors, incumbents and investors alike, the Commission should identify a stable and administrable geographic market.

Because loop and transport elements are point to point connections, the Commission has recognized that the theoretically proper geographic market for such connections is each separate point to point route. Analyzing each individual route, however, would obviously "be administratively impractical and inefficient."[44] Aggregating the analysis at a broader geographic market at the level

[44] *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

necessary for adminstrability is reasonable. Because the competitive effects from the elimination of unbundling would affect an entire MSA,[45] it make sense to use the MSA as the geographic market. The Commission has used this geographic market for analyzing competition in special access services as well as in the other forbearance decisions.

ILECs should not be permitted to seek relief in parts of geographic markets smaller than the MSA, or to gerrymander new "market" areas composed of parts of several MSAs. To do so would ignore marketplace realities as described above. Allowing the petitioner to define the scope of the analysis could lead to absurd results where there are pockets of a market where competitors may access UNEs and another pocket of locations in the same MSA where UNEs are no longer available. This would significantly impede the ability of competitors to make economically rational choices regarding where to invest and which markets to enter.

B. The Commission Should Require the Presence of Two Facilities Based Wireline Competitors Before Granting Forbearance

The presence of two competitors in a particular market is absolutely critical to avoiding the dangers of a duopoly which, to consumers and competition, are no better than monopolies. The proposed framework's requirement of two competitors fixes the flaw in past analyses which led to premature elimination of unbundling in markets such as Omaha, where the presence of a single competitor operating only in the retail market, left the incumbent Qwest free to raise its rivals costs and impeded entry, eventually driving out competition to the detriment of consumers. Similarly, the proposal's focus on wireline competition recognizes that competition from wireless (whether fixed or mobile), satellite, and broadband over powerline is currently insignificant and not capable of disciplining the incentive of the two principal competitors to tend toward duopolistic behavior.[46]

1. One Competitor with Unique Market Access Cannot Ensure Reasonable Pricing

Verizon's April 10 *ex parte* parrots the argument it has made in other forbearance proceedings — that somehow the Act's impairment standard (*not* the

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Third Report and Order in CC Docket No. 96-91, 12 FCC Rcd 15756, 15761-62, ¶ 5 (1997).

[45] *See* section I.D above.

[46] We emphasize that this test is based on current marketplace realities, and is not intended to blind the Commission to technological change. If at some future time the Commission finds that competition from a non-wireline technology is sufficiently pervasive to impose real market discipline on ILEC pricing behavior, then it should modify the standard accordingly.

Section 10 forbearance standard) is met where there is just *one* competitor to the RBOC that has achieved a sufficient market share. But Verizon fundamentally misconstrues the Act's impairment framework and the Commission's rules. In the *TRRO*, the Commission clarified, and the D.C. Circuit affirmed, that the forbearance analysis is conducted from the vantage point of a "reasonably efficient competitor". In other words, the Commission allows unbundling only where the reasonably efficient competitor is impaired without access to UNEs.[47] The converse is that where a *reasonably efficient competitor* could compete over its own facilities, then the Commission should not require unbundling.

Verizon's argument makes several critical errors. First, it ignores that the Commission has already adopted unbundling rules based on these principles of general applicability. The time to challenge that rule has long past. Verizon's attempt to impose a single competitor unbundling test is a collateral attack on the Commission's unbundling rules that the Commission need not entertain.[48]

Second, the Commission has squarely rejected BOC arguments that cable companies are the reasonably efficient hypothetical competitor envisioned under the impairment standard and determined that they are not. Instead, the FCC established that its impairment standard assumes no minimum set of network assets or capabilities.[49]

The Commission explicitly rejected BOC arguments seeking to preclude impairment in markets where cable competed because it recognized the significant advantages cable companies enjoy as a result of their existing customer base and their existing cable television infrastructure. Therefore, cable's presence in the cable modem market did not mean that new entrants were unimpaired, because cable companies "have not needed to overcome the same kinds of barriers as new entrants that start without any facilities at all."[50] The Commission ex-

[47] When evaluating whether lack of access to an ILEC network element "poses a barrier or barriers to entry … that are likely to make entry into a market uneconomic," the FCC makes that determination with regard to a "reasonably efficient competitor." *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order On Remand, 20 FCC Rcd 2533, 3545-46, ¶ 22 (2005), *aff'd sub nom. Covad Comm'ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006) ("*TRRO*"). Specifically, in analyzing entry from the perspective of the reasonably efficient competitor, the Commission "do[es] not attach weight to the individualized circumstances of the actual requesting carrier. Thus, we do not presume that a hypothetical entrant possesses any particular assets, … even if a specific competitive carrier in fact enjoys such advantages as a result of its unique circumstances." *Id*. at 2548, ¶ 26.

[48] *Verizon Tel. Cos. v. FCC*, Docket No. 08-1012, Brief for Respondents, at 37-42 (filed July 22, 2008).

[49] *TRRO*, 20 FCC Rcd at 3545-46, ¶ 22.

[50] *TRO*, 18 FCC Rcd at 17046, ¶ 98.

plained that "[c]able telephony and cable modem service … developed because cable operators have been able to overlay additional capabilities onto networks that they built for other purposes, often under government franchise, and therefore have first-mover advantages and scope economies not available to other new entrants, which lower their incremental costs of providing the additional services."[51]

Third, Verizon continues to seek support for its single competitor view of impairment from the D.C. Circuit's decision vacating and remanding the Commission's *Line Sharing Order* in *USTA I*.[52] Verizon's argument is misplaced. Before the D.C. Circuit, the Commission confessed that it had "adopted the Line Sharing Order with indifference" to the presence of cable competition in the residential broadband market.[53] The D.C. Circuit's concern with the *Line Sharing Order* is not applicable here.

The court did not bar the Commission from re-adopting a line sharing requirement and it probably could not have done so. It merely indicated that any "order unbundling the high frequency portion of the loop" should address the state of competition in the markets for which competitors would use the HFPL to compete.[54] The Commission's subsequent unbundling orders did analyze the state of competition from cable television companies in the impairment analysis and found that, particularly for copper loops, competitors remained impaired, as discussed above, despite cable's presence in the market.[55] The Commission reached similar conclusions in the *TRRO*.[56]

In analyzing whether to forbear from its unbundling rules, it would be folly for the Commission to eliminate unbundling based entirely on deployment by a single competitor, the legacy cable operator, that possessed significant advantages in overcoming the barriers to entry faced by more typical entrants. In such cases, as in Omaha, the presence of competition from the legacy cable operator says nothing about the ability of subsequent, reasonably efficient competitors — lacking cable's legacy advantages — to enter and compete successfully in the market in the absence of UNEs.

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51 *Id*.

52 *See*, *generally*, Verizon April 10 Ex Parte.

53 *U.S. Telecomm. Ass'n v. FCC*, 290 F3d 415, 429 (D.C. Cir. 2002) ("*USTA I*").

54 *Id*.

55 *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17046, 17127, ¶¶ 98, 245 (2003) ("*TRO*") (subsequent history omitted).

56 *See TRRO*, 20 FCC Rcd at 2637-38, ¶ 193.

2. The Proposal Rationally Limits the Analysis to Facilities-Based Competitors to the ILEC

Unlike the Commission's existing framework that includes purported competition from non-facilities based competitors such as resellers or UNE based competitors, and non-substitutable services such as wireless, the competitors' proposed standard rationally addresses competition from other wireline competitors, as only these competitors offer services that are substitutable for the services provided by the ILEC.

The market share of non-ILEC facilities-based competitors should not include carriers that use ILEC transmission facilities; *e.g.* special access, commercial agreements, or resale. As discussed above, it is irrational to include resale-based competition under the umbrella of facilities-based competitors. Resale does not provide meaningful competition, as competitors have no ability to differentiate their products from those offered by the ILECs.

Nor should the Commission include UNE loop based competition or so-called "wholesale" UNE-P replacement services under the facilities based competitor umbrella. A competitor using a UNE-P replacement service is entirely at the ILEC's mercy. The RBOCs claim they have no regulatory duty to offer these services and can impose whatever rates, terms and condition they decide are warranted. If so, the ILECs can also withdraw these services whenever they deem it necessary. It would be illogical to eliminate UNE loop based competition in markets where the "competition" on which the decision is based comes from those very same loops.

3. Focusing on Substantial Wireline Competitors is Consistent with the Unbundling Provisions of the Act and the Commission's Rules

Similarly, the Commission need not consider fringe competition from so-called nascent services, such as Wi-Max, fixed wireless or satellite, nor should it consider wireline carriers with negligible market shares that are unlikely to expand outside of an isolated market niche. Although incumbents cry "wolf" at nascent services such as fixed wireless, satellite and broadband over powerline, the market shares of these competitors is infinitesimally small. As the DOJ has recognized, because none of these services has ever been shown to generate a "substantial share" of the market, it is likely that their presence in the market will not impede the ILEC's "ability to raise prices without losing sufficient sales."[57] In addition to their lack of substantial market presence, the lack of brand presence by these competitors and the "superior capacity and coverage" of the incumbent

[57] *See* DOJ Complaint, ¶ 70.

networks, renders these "fringe" competitors unlikely to "prevent coordinated pricing or other anticompetitive behavior" likely to occur in a duopoly market.[58]

The DOJ's findings regarding the residential long distance market are equally applicable in the local market. The strength of the brand names of the cable company and the ILEC in their market, and their superior network capacity and coverage, give them enormous advantages over nascent services and niche wireline competitors, just as WorldCom, AT&T and Sprint possessed enormous advantages over smaller long distance competitors at the time of the DOJ's complaint to block the WorldCom/Sprint merger.

4. The Proposed Market Share Test is a Reasonable Measure to Guard Against Dangers Inherent in Highly Concentrated Markets

The Commission's Omaha forbearance decision assumed, in the face of enormous evidence otherwise, that competition from cable competitors alone would be sufficient to discipline monopolistic behavior in the absence of unbundling. One of the ways the Competitors propose to address this is by requiring that forbearance from UNE obligations under Section 10 should not be granted unless there are two or more substantial facilities based wireline competitors, each having at least 15% of the market share.

As an initial matter, the requirement that there be two facilities based competitors is consistent with the Commission's determination in the Section 271 *Broadband Forbearance Order* that Section 10(a) does not require a perfectly competitive market. Competitors' proposal does not require a perfectly competitive market nor anything remotely close to it.

Under the horizontal merger guidelines, a market of three competitors is highly concentrated. The DOJ considers any market with an HHI above 1800 to be highly concentrated under the guidelines. Where the incumbent has 70% of the market and its two competitors each have 15%, the HHI would be $70^2 + 15^2 + 15^2 = 4900+225+225 = 5350$. Admittedly, this is an extreme case (in the real world, both competitors are unlikely to have exactly the same market shares), but even if the ILEC share were reduced to 60% or 50% the market would still be well above the threshold of a highly concentrated market.[59] The goal of the proposed market share analysis is not to identify a perfectly competitive market. It is instead, consistent with the purpose of Section 10, to identify when a market is competitive enough that the market opening measure of requiring the ILEC to provide unbundled access to its network is no longer necessary to protect consumers against the harm of an unchecked monopoly. Consistent with this Commission's

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[58] *See* DOJ Complaint, ¶ 71.

[59] Even at the other extreme, where each of three competitors had a 33% market share, the HHI would be $33^2 \times 3 = 3267$, which is still "highly concentrated."

precedent, and settled law from the realm of antitrust, a duopoly does not provide that assurance. The standard proposed by the Competitors provides far more comfort that enduring competition has firmly taken root and that eliminating unbundling — and the competition reliant on unbundled access to the ILEC's legacy loop infrastructure — will not harm consumers.

By recognizing that forbearance from unbundling does not require a perfectly competitive market, the proposed standard is also consistent with *USTA II*, and the Commission's impairment rules adopted in the *TRRO*, in particular the need to take potential competition into account in its forbearance analysis. Adopting a framework that provides for the possibility of eliminating unbundling, even where markets are highly concentrated, is consistent with the D.C. Circuit's command that the Commission's impairment analysis account for potential competition even in geographic markets where competition is not yet fully developed, but the indicia of competition are similar to markets where more robust competition occurs.[60]

C. The Proposed Test Appropriately Analyzes Distinct Product Markets

As discussed above, the Commission's previous UNE forbearance standard improperly conflates product markets, particularly the residential and business markets, and utterly ignores the need for separate evaluation of wholesale and retail markets. The Competitors' proposal acknowledges the importance of analyzing these separate product markets discretely. Thus, the Competitors' proposal explains that:

> A petition shall only be granted if either the Wholesale Test or the Retail Test is satisfied in an MSA for a relevant product market. The FCC shall forbear from enforcing the incumbent LEC's Section 251(c)(3) unbundling obligation only in the product market in which the Wholesale Test or Retail Test is satisfied.[61]

The Commission has previously analyzed separate wholesale and retail markets for wireline services.[62] It has also separately analyzed competition in

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[60] *See, e.g.*, *TRRO*, 20 FCC Rcd at 2558-60, ¶¶ 43-45; *USTA II*, 359 F.3d at 575.

[61] Joint Letter, at Attachment p.1.

[62] *See AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5676-79, ¶¶ 27-33 (2007) ("*AT&T/BellSouth Merger Order*"); *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18304-21, ¶¶ 24-55 (2005) ("*SBC/AT&T Merger Order*"); *Verizon Communications Inc. and MCI, Inc. Application for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18433, 18447-63, ¶¶ 24-55 (2005) ("*Verizon/MCI Merger Order*").

retail and business markets.[63] It has recognized the substantial differences in the services demanded by business customers and residential customers.[64] As it recognized, “bandwidth, security and other technical limitations” render cable modem service an “imperfect substitute” for services competitors typically provide to business customers using UNE loops.[65] It has also separately addressed business and residential markets in its review of RBOC mergers.[66]

The proposed standard further explains that for “purposes of determining the relevant product market, when applying the Wholesale Test, the FCC shall examine the relevant markets for wholesale loop inputs.” Under this framework the FCC would separately assess whether wireline competitors that have deployed their own loop facilities offer *wholesale substitutes* for the specific network elements available under the Commission’s rules — namely DS0 loops, dry copper loops (including conditioning) DS1 loops, DS3 loops; DS1 transport, and DS3 transport.

When the Commission applies the proposed test in the retail market, it would “examine the relevant markets for retail services that are provided using UNE loop inputs.”[67] As discussed above, the Commission would “treat inputs used to serve residential customers as belonging to a different product market from inputs used to serve business customers,” and would “treat downstream retail services provided via UNE loops to residential customers as belonging to a different product market from downstream retail services provided via UNE loops to business customers.” In other words, when applying the retail test, residential and business retail product markets should be examined separately with each of the product markets broken down by the retail services that could be provided to these retail customers over UNE loops and transport.

In considering the different product markets competitors serve using UNE loop and transport inputs, the Commission should recognize the substantial differences between residential and business services. The networks, services, features and customer care necessary for competitors to function in business

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[63] *See, generally, TRO*.

[64] *TRRO*, 20 FCC Rcd at 2638, ¶ 193 (“most business that cable companies serve, or are likely to serve, are home offices or very small stand-alone businesses, neither of which typically requires high-capacity loop facilities.”).

[65] *Id.*

[66] *See AT&T/BellSouth Merger Order*, 22 FCC Rcd at 5676-5727, ¶¶ 27-121; *SBC/AT&T Merger Order*, 20 FCC Rcd 18304-50, ¶¶ 24-107; *Verizon/MCI Merger Order*, 20 FCC Rcd at 18447-93, ¶¶ 24-108.

[67] Joint Letter, at 3.

markets, even for very small business customers is vastly different than that needed to provide residential service.[68]

D. The Proposed Facilities Coverage Analysis More Reliably Captures Markets Where Competition has Taken Root

The Competitors propose that the Commission examine whether "end user connections" are actually deployed at 75% of the end user locations in a particular market, in lieu of the insufficient "commercially reasonable time frame" standard used in past decisions.[69] This will provide greater certainty that consumers will continue to benefit from competition in the absence of UNEs. Otherwise, large segments of a market could find themselves without a competitive alternative in the absence of UNE-based competition.

The 75% threshold is consistent with the Commission's impairment framework, which calls for an examination of potential competition as well as actual competition. If actual competition is present at 75% of the locations, it is reasonable to expect that competition and competitive facilities deployment will spread to much of the remaining 25% of the market.

III. VERIZON FAILS TO SATISFY THE PROPOSED NEW AND OLD SECTION 251(C)(3) FORBEARANCE STANDARDS AND ITS PETITIONS SHOULD OTHERWISE BE DISMISSED

A. Verizon Fails to Satisfy the New Proposed Standard at the Retail or Wholesale Level

Verizon has failed to produce evidence in either the Rhode Island or Virginia Beach dockets that there are multiple, ubiquitous, facilities-based wireline competitors in either the retail residential, retail business, or wholesale markets. Verizon cannot show that multiple facilities-based wireline competitors have actually deployed loops to at least 75% of end user locations in the geographic market and that those wireline competitors are offering retail services to the locations in question via the loops they have actually deployed. Nor can Verizon show that at least two wireline facilities-based competitors individually have captured at least 15% retail residential or business market share for each product market.[70] Moreover, Verizon cannot show that "at least two facilities-based

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[68] Letter from Thomas Jones, Esq., Counsel to One Comm. *et al.*, WC Docket Nos. 08-24 and 08-49, at 13-15 (filed April 14, 2009).

[69] *See* section I.E above.

[70] *See, e.g.,* Letter from Andrew D. Lipman *et al.*, Counsel for Affinity Telecom, Inc. *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 (filed July 14, 2008) ("Affinity *et al.* July 14, 2008 Letter"); Letter from Brad E. Mutschelknaus, Counsel to Broadview Networks, Inc. *et al.*, to Marlene H. Dortch, Secretary, FCC, WC

wireline competitors in the wholesale loop market, each of which has actually deployed end user connections to at least 75% of end user locations, and who individually have captured at least 15% wholesale market share in the relevant product market."[71] Verizon's lack of evidence simply reflects the fact there is no significant alternative source of wholesale inputs for carriers in Rhode Island and Virginia Beach, and no significant retail competition from any source other than the cable company.

B. Verizon Fails to Satisfy the Existing Standard

Even if the Commission were to continue using the forbearance analysis from previous UNE forbearance orders rather than adopt the framework proposed in Section I above, Verizon's petitions must *still* be denied. As demonstrated in earlier filings, Verizon has not shown sufficient competition to support UNE forbearance and therefore the statutory criteria for forbearance are not met.[72] Verizon clearly remains dominant in the local exchange market, and is by far the major supplier of last-mile connectivity for businesses in both Rhode Island and the Virginia Beach market.

Although Verizon recently submitted additional data that purports to show the level of competition and market share in both Rhode Island and Virginia Beach, the Commission cannot rely on it.[73] At the outset, the Commission cannot give credence to Verizon's numbers, which are invalid or otherwise statistically unreliable as even Verizon notes[74] and the Commission has previously found.[75] For example, Verizon urges the Commission to rely on the CDC's national cut-the cord estimates of wireless cut-the court subscribers even though more granular

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Docket Nos. 08-49 and 08-24, at 17 (filed April 3, 2009) ("Broadview *et al*. April 3, 2009 Letter").

[71] *See* Broadview *et al*. April 3, 2009 Letter, at 17.

[72] *See, e.g.,* Opposition of Access Point, Inc. *et al*., WC Docket No. 08-24 (filed March 28, 2008) ("Access Point *et al*. Opposition"); Reply Comment of Access Point, Inc. *et al*., WC Docket No. 08-24 (filed March 28, 2008); Opposition of One Communications Corp. *et al*., WC Docket No. 08-24 (filed March 28, 2008); Broadview *et al*. April 3, 2009 Letter.

[73] *See, generally,* Verizon April 10 Ex Parte.

[74] *Id*., at 3.

[75] *Petitions of Qwest Corporations for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix and Seattle Metropolitan Statistical Areas*, Memorandum Opinion and Order, 23 FCC Rcd 11729, 11743-45, ¶ 21 (2008) ("*Qwest 4-MSA Order*") (declining to rely on the Center for Disease Control national cut-the-cord figures because the CDC estimates do not contain reliable geographically-specific data).

regional data is available, and then incredibly asks to boost that nationwide average "by at least 5 percentage points."[76]

Moreover, Verizon's arguments are based on unsound policy, even if its numbers were not so flawed. As shown in this and similar forbearance proceedings, mobile wireless service should not be included in the Commission's market share analysis.[77] Indeed, it has been proven that wireless service does not constrain local service rates and that the presence of wireless providers will have limited impact on the price increases for wireline service.[78] Moreover, contrary to Verizon's submissions, Verizon's wholesale products, *i.e.*, Wholesale Advantage and resale, should not be counted as competitive lines because they do not constitute independent facilities-based competition.[79] If they are considered at all, Verizon's resale and wholesale lines should be attributed to Verizon since the services are provisioned over Verizon's facilities. Either way, Verizon's market share using its updated figures, excluding cut-the cord wireless, does not satisfy the Commission' current threshold market share requirement to support forbearance from dominant carrier or unbundling regulations in Rhode Island and Virginia Beach.

Even if Verizon did satisfy the market share requirements (which it does not), the Commission should still deny Verizon's Rhode Island and Virginia Beach forbearance petitions because the record demonstrates that the Commission cannot make any predictive judgments as it did in the *Omaha Forbearance Order* or make any predictions that Verizon will act differently than Qwest. The Commission must take heed of the lessons learned in Omaha and decline to make similar erroneous predictions again. Indeed, because the Commission's "predictive judgment" in the *Omaha Forbearance Order* that Qwest would make reasonable wholesale offerings in that MSA has not been fulfilled[80] and as discussed in Section I, there is no basis for the Commission to make similar predictions and denial of Verizon's petitions is proper.

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[76] Verizon April 10 Ex Parte at 3-5.

[77] *See, e.g.*, Letter from T. Jones, Counsel for Cbeyond, Inc., *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 08-24, at 7-11 (filed Dec. 3, 2008) ("Cbeyond *et al.* December 3, 2008 Letter"); Access Point *et al*. Opposition; Letter from T. Jones, Counsel for Cbeyond, Inc., *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97, at 2- 10 (filed May 7, 2008); *see also, generally*, K. Mikkelsen, "Mobile Wireless 'Cut the Cord' Households in FCC Analysis of Wireline Competition," *filed as an attachment to* Letter from Thomas Jones *et al*., Counsel to Cbeyond, Inc. *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97 (filed Apr. 22, 2008).

[78] TURN Study, at 10-15.

[79] *See, e.g.,* Cbeyond *et al.* December 3, 2008 Letter, at 11-13; Access Point *et al*. Opposition, at 21.

[80] *See, e.g.,* Affinity *et al.* July 14, 2008 Letter.

C. The Pending Motions to Dismiss Warrant Rejecting Verizon's Petitions

As made clear in the Motions to Dismiss filed by Access Point, Inc. *et al*., in both proceedings, Verizon disingenuously relies on essentially the same facts in Rhode Island and Virginia Beach it presented to the Commission in Verizon's petitions for forbearance in the Providence and Virginia Beach MSAs, which the Commission soundly rejected.[81] In both the Providence and Virginia Beach MSAs, the Commission unanimously denied both petitions less than four months before Verizon filed the instant petitions. Because Verizon proffers no new material facts to support of either of its petitions, Verizon cannot expect a different outcome than the one the Commission reached in the Providence MSA and Virginia Beach MSA. For these reasons, both Petitions should be rejected "as facially insufficient or summarily denied for failure to meet the mandates of the Administrative Procedure Act ("APA"), the Commission's rules, and the forbearance standard in Section 10 of the Communications Act of 1934, as amended ("Act")."[82]

* * *

The Commission must take heed of the lessons learned in Omaha and change course to ensure that there is sufficient wholesale or retail competition in any MSA where a petition for forbearance pursuant to Section 10 has been filed. The undersigned Competitive Carriers accordingly urge the Commission to modify the framework for evaluating ILEC petitions for forbearance from the unbundling requirements of Section 251(c)(3) and adopt the March 26, 2009 proposal submitted in WC Docket Nos.08-24 and 08-49. Under the proposed new framework — and even under the existing framework, should the Commission continue to apply it (which it should not) — Verizon's Rhode Island and Virginia Beach petitions must be denied.

[81] *See* Motion of Access Point, Inc. *et al*., to Dismiss or, in the Alternative, Deny Petition for Forbearance, WC Docket No. 08-24, at 5-9 (filed March 17, 2008) ("Access Point Rhode Island Motion to Dismiss"); Motion of Access Point, Inc. *et al*., to Dismiss or, in the Alternative, Deny Petition for Forbearance, WC Docket No. 08-49, at 5-10 (filed April 29, 2008) ("Access Point Virginia Beach Motion to Dismiss"). *See also*, Letter from Brad E. Mutschelknaus, Counsel to Broadview Networks, Inc. *et al*., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 08-49 and 08-24, at 21-25 (filed April 3, 2009).

[82] *See* Access Point Rhode Island Motion to Dismiss, at 5-9; Access Point Virginia Beach Motion to Dismiss, at 5-10).

Respectfully submitted,

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