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April 23, 2009

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

Re: *Petition of Verizon New England for Forbearance Pursuant to 47 U.S.C. § 160 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 companies, through counsel, submit this letter to supplement their recent filing regarding a proposed standard to govern requests for forbearance from Section 251(c)(3) unbundling obligations.[1] Specifically, the signatories wish to provide additional support for their comments concerning the anticompetitive effects of a wireline telecom market duopoly. Such a market arrangement directly threatens the prospects for critical U.S. broadband growth and is fundamentally inconsistent with the mandates of the 1996 Telecom Act.[2] Even in the absence of deliberate collusion, the mere existence of such a restrictive market structure inevitably constrains competition and denies its benefits to consumers. Consequently, it is imperative that the Commission adopt an unbundled network element "(UNE") forbearance analysis which requires at least two wireline facilities-based competitors to the incumbent local exchange carrier ("ILEC").

1 Letter from Brad Mutschelknaus, *et al.*, Counsel to Broadview Networks, Inc., *et al.*, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 08-24, 08-49 (filed Apr. 3, 2009).

2 Telecommunications Act of 1996, PUB. L. NO. 104-104, 110 STAT. 56 (1996) ("*1996 Act*").

I. The Current Wireline Telco/Cable Duopoly Obstructs Critical U.S. Broadband Expansion

At this time, the urgency of broadband access and expansion is front and center for government officials, economists, regulators, and business and residential customers.[3] Extension of broadband penetration, stimulation of broadband applications, and incentives for broadband usage are a cornerstone of the Obama administration's national infrastructure policy. An imposing $7.2 billion has been dedicated by the recently-enacted Recovery Act[4] to help bring about these results. Underlying our national awareness of the imperative is a recognition that as a nation, the U.S. has lagged in world broadband development. Statistics vary and debates continue regarding appropriate methods of calculation. It is clear, however, that the U.S. is not keeping up with (much less leading) the rest of the world.[5] Acting Commissioner Copps has summarized the situation as follows:

> You know something is wrong when the best case scenario is that a consumer has a choice between two broadband connections, both of which are more expensive and considerably slower than what consumers in other industrialized nations enjoy. And that's how it works in our

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3 *See, e.g., SBC Communications, Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, WC Docket No. 05-65, 20 FCC Rcd 18290 ("*SBC/AT&T Merger Order*"), Statement of Commissioner Michael J. Copps, Concurring (2005) ("The bottom line is that these issues are vitally important to the future of our country. Telecommunications are going to be a major driver of our economy in this new century. We just have to get the legal and regulatory landscape right. If we get it wrong, American consumers will pay and so will American technology, innovation and entrepreneurship. No less than our global competitiveness in the new information age is at stake.").

4 AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009) ("Recovery Act").

5 Every source proffers a slightly (or significantly) different set of data. In a series of statements in 2006 and 2007, Commissioner Copps cited sources placing the U.S. anywhere from 11th to 25th among industrialized nations in broadband deployment. *See, e.g.*, Copps, Michael J., *America's Internet Disconnect*, http://www.washingtonpost.com/wp-dyn/content/article/2006/11/07/AR2006110701230.html (Nov. 8, 2006); *Improving Internet Access to Help Small Business Compete in a Global Economy*, U.S. SENATE COMMITTEE ON SMALL BUSINESS AND ENTREPRENEURSHIP, Testimony of FCC Commissioner Michael J. Copps (Sept. 26, 2007). In its recently issued broadband Notice of Inquiry, the Commission cited figures produced by the Organization for Economic Cooperation and Development, Broadband Growth and Policies in OECD Countries (2008), which placed the U.S. 14th in average download speed and 15th in broadband penetration. *In the Matter of a National Broadband Plan For Our Future*, Notice of Inquiry, GN Docket No. 09-51 (rel. Apr. 8, 2009). The current Digital Opportunity Index on the International Telecommunications Union website places the U.S. 20th. http://www.itu.int/ITU-D/ict/doi/index.html.

> wealthy metropolitan areas. Over much of the rest of America, it just gets worse.[6]

As Acting Chairman Copps has repeatedly noted, a primary cause of the current broadband shortfalls in the U.S. is the telco/cable duopoly that continues to dominate too many markets:

> We all know that America's broadband performance leaves a lot to be desired. To me, the culprit is clear: a stultifying lack of competition in the broadband market, which in the words of the Congressional Research Service is a plain old "cable and telephone . . . duopoly."[7]

Commissioner Adelstein also has cited the telco/cable duopoly as a key factor in the current U.S. broadband dilemma.[8]

Under a market duopoly, an incumbent wireline carrier and its ostensible competitor, the major cable company, too easily are able to delay and burden network access for new entrants until that access is effectively denied.[9] The latest "killer apps," the newest IP-based

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6 *Amendment of Part 15 Regarding New Requirements and Measurement Guidelines for Access to Broadband over Power Line Systems*, ET Docket No. 04-37, *Carrier Current Systems, Including Broadband over Power Line Systems*, ET Docket No. 03-104, Memorandum Opinion and Order, 21 FCC Rcd 9308, 9341, Statement of Commissioner Michael J. Copps (2006) ("*Broadband Power Lines Copps Statement*").

7 *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, WT Docket No. 06-150, 22 FCC Rcd 15289, Statement of Commissioner Michael J. Copps, Approving in Part, Concurring in Part (2007). In the last three years, Commissioner Copps has issued a similar analysis repeatedly in Commission proceedings and other public fora. *See, e.g., America's Internet Disconnect*; *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to all Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Fifth Report, 23 FCC Rcd. 9615, Dissenting Statement of Commissioner Michael J. Copps (2008); *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, Order on Reconsideration of the Second Order and Report, 21 FCC Rcd 6703, Statement of Commissioner Michael J. Copps (2006). *See also United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, Memorandum Opinion and Order, FCC 06-165, Concurring Statement of Commissioner Jonathan S. Adelstein, (2006) ("*Adelstein United Power Line Council Order Statement*").

8 *See* Anderson, Nate, *FCC Commissioners: U.S. in Dire Need of "National Broadband Strategy"* (Sept. 27, 2007), available at http://arstechnica.com/tech-policy/news/2007/09/fcc-commissioners-us-in-dire-need-of-national-broadband-strategy.ars.

9 As noted by Acting Chairman Copps, "the big losers are small companies squeezed out by the behemoths that have come to dominate the industry." *Improving Internet Access to*

solutions, and the added competition to compel lower prices and continually enhance service packages are all left waiting on the market doorstep, unable to be effectively delivered to U.S. consumers. It is imperative that the Commission ensure that no additional markets are sacrificed to these duopolies. Requests for ILEC forbearance from unbundling requirements in markets which house but a single facilities-based non-ILEC competitor therefore must not be granted.[10] Only with this commitment can the Commission help to loosen the duopoly grip on markets so that broadband and the entrepreneurial agents that drive it so effectively in other countries can flourish in the U.S.

II. A Market Duopoly Does Not Deliver the Competition Guaranteed by the Act

The 1996 Act was enacted to vest this country with sustained telecom competition, fueling economic growth and improved standards of living. Market dominance by a duopoly of incumbent providers does not deliver upon that promise. Instead, this two-provider market effectively obstructs entry by would-be competitors, reduces alternatives for consumers, sustains prices at supra-competitive levels, and generally dooms end users to far less competition than the 1996 Act intended. Without continued unbundling obligations, this obstructive duopolist behavior will effectively doom consumer prospects for legitimate sustainable market competition.

The Commission has long recognized the need for multiple non-incumbent facilities-based providers to ensure competition in a market. In the *AT&T Non-Dominant Carrier Order*, the Commission described the competitiveness of the interstate domestic interexchange market, noting as a key factor that "AT&T faces at least two full-fledged facilities-based competitors. . . . In addition, there is at least one other nationwide facilities-based provider . . . and dozens of regional facilities-based carriers."[11] In the 1999 *UNE Remand Order,*[12] the Commission spoke clearly regarding the Act's requirement for multiple non-incumbent facilities-based providers to achieve sustained competition:

Help Small Business Compete in a Global Economy, U.S. SENATE COMMITTEE ON SMALL BUSINESS AND ENTREPRENEURSHIP, Testimony of FCC Commissioner Michael J. Copps (Sept. 26, 2007).

10 The signatories recognize the Commission's well-established prerogative to make an exception when confronted by legitimately extraordinary circumstances. They respectfully suggest, however, that only under such circumstances could a duopoly market arrangement be deemed sufficient for UNE forbearance purposes.

11 *Motion of AT&T Corp. To Be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd. 3271, ¶70 (1995). The Commission also observed that "AT&T ha[d] not controlled bottleneck facilities for over ten years" and noted the additional presence of several hundred small resellers.

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

> [A]lthough 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.[13]

> Indeed, under the [single competitor] test proposed by the incumbents, the first new entrant to deploy transport facilities in any particular market would determine the degree and pace of competition in that market as well as the scope of an incumbent LEC's unbundling obligation, and would potentially result in the presence of only two competitors in the market (*e.g.,* a duopoly). Limiting the development of competition in such a manner is contrary to the goals of the Act and is inconsistent with the purpose of our unbundling rules.[14]

In recent years, as the Commission has considered incumbent provider requests for relief from regulations they contend are no longer justified, Commissioners Copps and Adelstein in particular have repeatedly restated their belief that an entrenched duopoly market does not meet the requirements of the 1996 Act.[15]

> We have consistently stated our view that competition must mean more for consumers than a choice between two

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13 *Id.*, ¶55.

14 *Id.*, ¶344.

15 *See, e.g., Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements* WC Docket No. 02-112, Report and Order and Memorandum Opinion and Order, 22 FCC Rcd 16440, Joint Statement of Commissioner Michael J. Copps and Commissioner Jonathan S. Adelstein, Concurring in Part, Dissenting in Part (2007) ("*272 Sunset Order Joint Statement*"); *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, Concurrence of Commissioner Michael J. Copps (2007), appeal pending *Verizon Telephone Companies v. Federal Communications Commission*, No. 08-1012 (D.C. Cir.); *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, Statement of Commissioners Michael J. Copps and Jonathan S. Adelstein, Concurring (2007). *See also Revision of Parts 2 and 15 of the Commission's Rules to Permit Unlicensed National Information Infrastructure (U-NII) Devices in the 5 GHz Band*, Report and Order, 18 FCC Rcd 24484, Separate Statement of Commissioner Kathleen Q. Abernathy (2003).

> providers – a cable and a telephone company – and that such a result would represent an unfortunate back-sliding for consumers.[16]

Finally, the Commission has underscored its recognition that duopoly is inconsistent with acceptable levels of competition by its repeated assurances in a string of decisions that the approval (or forbearance) at issue is appropriate because it will not lead to duopoly.[17]

III. Market Duopolies Are Not Competitive

Market duopolies are inherently noncompetitive.[18] They are restrictive without regard to the specific participants and without necessity for any form of deliberate or explicit collusion. Compared to a monopoly scenario, duopolies do loosen the market bottleneck slightly; however in an analysis of competitive market scenarios, economists invariably locate them adjacent to monopolies and at a considerable distance from any version of full competition.[19]

Generally, a duopoly market is characterized by the following attributes:

- *Extremely limited market participation;*[20]

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16 *272 Sunset Order Joint Statement.*

17 *See, e.g., SBC-AT&T Merger Order*, ¶108 ("the record does not support commenters' conclusions that the merger will "tip" the backbone market to duopoly, increase transit prices to supra-competitive levels, or lower service quality."); *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18433, ¶¶ 109, 117, 126, 138, Memorandum Opinion and Order (2005) ("*Verizon/MCI Merger Order*"); *AT&T and BellSouth Corporation Application for Transfer of Control*, 22 FCC Rcd 5662, ¶¶ 129, 149 (2007); *Petition of Qwest Corporation for Forbearance Pursuant to 47 USC §160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415, ¶ 71(2005) ("*Omaha Forbearance Order*"); *Use of Returned Spectrum in the 2 GHz Mobile Satellite Service Frequency Band*, IB Docket Nos. 05-220, 05-221, 20 FCC Rcd 19696, ¶¶ 32-33 (2005) ("accordingly we disagree that reassigning the 2 GHz MSS spectrum to ICO and TMI results in a duopoly.").

18 Duopolies are the extreme form of oligopoly, which is described by Areeda & Kaplow as "a market populated by a small number of producers . . . where the behavior of several firms results in economic performance that falls significantly short of a competitive result." Phillip Areeda & Louis Kaplow, ANTITRUST ANALYSIS, ¶¶112, 227 (5th ed.) Aspen Law & Business (New York 1997) ("AREEDA").

19 Categorically, oligopolies are a market arrangement with very limited competition and, as noted, duopolies are the ultimate form of oligopoly. Any more restrictive allocation of market share would be a complete monopoly. *See, e.g.,* David E. O'Connor & Christopher Faille, BASIC ECONOMIC PRINCIPLES, pp. 96-98, Greenwood Press (Westport 2000) ("*O'Connor & Faille*").

20 This may appear to be a given. However, Areeda and Kaplow cite the number of market participants as a key factor in noncompetitive results. AREEDA, at 255 ("The degree of

- *Extremely high concentration;*[21]
- *High barriers to entry;*[22]
- *Supra-competitive pricing;*[23] and
- *Interdependent market behavior.*[24]

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industry concentration is generally thought to be one of the most important factors affecting interdependent behavior.").

21 There are various measures for market concentration. A leading method for DOJ/FTC antitrust analysis is the Herfindahl-Hirschman Index ("HHI"). Department of Justice and Federal Trade Commission Horizontal Merger Guidelines, § 1.5 (Apr. 2, 1992, revised Apr. 8, 1997) ("*DOJ-FTC Horizontal Merger Guidelines*"). Under the DOJ concentration analysis, a score below 1000 indicates an unconcentrated market; a score between 1000 and 1800 indicates a moderately concentrated market and any score over 1800 suggests a highly concentrated market. The score is arrived at by adding the squared market shares of the companies. Consequently, a monopoly provider has an HHI of 10,000 (100^2). An evenly split duopoly would achieve an HHI of 5000 and any imbalance between the companies would immediately cause the score to increase. Obviously, even at its lowest index, concentration under a duopoly vastly exceeds the threshold for a highly concentrated market.

22 *See, e.g., O'Connor & Faille* at 97-98 (attributing the difficulty of market entry – and exit – to the lack of fluid competition). By contrast, competitive markets, achieving a long-run competitive equilibrium, have few or no barriers. *See* David S. Colander, ECONOMICS (5th ed), McGraw-Hill/Irwin (Boston 2004) ("*Colander*"). As a result, courts finding significant barriers to market entry are more likely to find monopoly power. ANTITRUST LAW DEVELOPMENTS (6th ed.), Vol I, p. 233, ABA Book Publishers (Chicago 2007).

23 *See, e.g., Colander*, at 297 (citing a correlation between high barriers to market entry and the extent to which price exceeds cost). The limited number of providers permits tacit agreement even without deliberate collaboration. At a minimum, duopolists are instinctively compelled to pursue parallel track behavior regarding production and pricing. Each duopolist's ability to issue and respond to the other company's signals (intentional or otherwise) permits the two companies to edge market prices upwards. Additionally, the immediate mirroring ability of each company makes competitive efforts by the other largely ineffective and, consequently, the two companies may comfortably allow their respective prices to remain well above a competitive level. AREEDA, at ¶ 112. Once selling at a noncompetitive price, the barriers to entry preclude a serious price challenge by third parties.

24 This is discussed under various labels, including "conscious parallelism," which attempts to distinguish the behavior from explicit or even tacit collusion. *See* Steinberg, Harry, *Oligopolistic Interdependence: The FTC Adopts a "No-Agreement" Standard to Attack Parallel Non-Collusive Practices*, 50 BROOK. L. REV. 255 (1984).

It is the last characteristic which particularly dooms any effort to present a duopoly market as adequately competitive and open to new entrants. Economists have explained that the interdependent behavior of duopolists need not be a matter of deliberate choice or even explicit action or communication. Instead, the insidious effect of a duopoly arrangement is that each market participant inevitably acts with a heightened awareness of the actions and reactions of the other player.[25] Because of this commercially intimate relationship, the companies function in a form of involuntary interdependence, resulting in a high potential for parallel behavior. Without requiring any deliberate action or explicit agreement,[26] duopolists instinctively interact in a manner which serves to restrain the competitive growth of the market. In fact, they are compelled to do so by the interactive nature of their market relationship, wherein every action by one company has a major and immediate effect upon the other company, which in turn is compelled to react.[27] The *DOJ-FTC Horizontal Merger Guidelines* describe limited-provider markets in which companies can exercise sufficient market power to approximate monopoly behavior either by explicit or implicit coordination.[28] Among the natural effects of this process are that duopoly prices frequently will be set above competitive levels[29] and both employment and production may not be maximized.[30]

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25 This behavior contrasts significantly with the behavior of participants in fully competitive markets. In the latter, there are enough players that each can implement its business decisions without having a major impact on the others and without needing to pay particularly close attention to the others. *See, e.g.*, Posner, Richard A., *Oligopoly and the Antitrust Law: A Suggested Approach*, 21 STAN. L. REV. 1562 (1969) ("*Posner*"), cited in Andrew I. Gavil, AN ANTITRUST ANTHOLOGY, Anderson Publishing Co., (Cincinnati 1996).

26 In other words, even were the duopolists to operate in good faith, the innate problem of duopoly behavior would remain. As William Fellner notes, it is pointless to legislate against it, because the behavior simply responds to essentially unavoidable knowledge: "Not much is gained by trying to force a group of oligopolists to behave as if they were not aware of their individual influence on each other's policies." Fellner, quoted in Werden, Gregory J., *Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law with Oligopoly Theory*, 71 ANTITRUST L. J. 719, 726 (2004) ("*Werdon*"). It has been proposed that the effectiveness of instinctual oligopolistic behavior is such that "an express agreement may add little to the strength of tacit coordination." AREEDA, ¶ 229.

27 *See, e.g.*, *O'Connor & Faille*, at 97-98, *Colander*, at 294. Werden describes this interplay of action and reaction as a form of communication or signaling. *Werdon*, at 735 ("An unspoken agreement results from communications purely in the form of marketplace actions").

28 *DOJ-FTC Horizontal Merger Guidelines*, § 0.1.

29 *See, e.g.*, *Posner*, at 75 ("The result of the interdependent relationship is a tendency to avoid vigorous price competition."). The Commission recognized this effect of overly concentrated markets in a 2006 decision, noting that "[a]s a general matter, if firms produce nearly homogeneous products or services and compete for customers on the basis of price, then there exists a direct relationship between the number of firms in the relevant market and the observed level of product price." *In the Matter of Constellation, LLC, PanAmSat I, LLC, Carlyle PanAmSat II, LLC, PEP PAS, LLC, and PEOP PAS,*

It is not surprising, then, that duopoly arrangements are strongly disfavored under competition analysis. Proposed mergers resulting in a duopoly are closely scrutinized. Applicants face an exceptionally high burden of proof to establish that the proposed transaction does not violate antitrust principles. The concern regarding this proposed market concentration is so intense that scholars recommend that mergers into duopoly should be deemed presumptively illegal.[31]

The Commission is well aware of these concerns and has acknowledged them in various proceedings. In its EchoStar/DirecTV merger analysis, the Commission concluded that "existing antitrust doctrine suggests that a merger to duopoly or monopoly faces a strong presumption of illegality."[32] The next year, the Commission structured a mechanism for assignment of satellite services operating rights to ensure that at least three providers would remain within the frequency band.[33] The Commission explained: "[w]e base this presumption that three is a sufficient number of remaining licenses on the Commission's reasoning in the EchoStar-DirecTV Hearing Designation Order."[34] Elsewhere, Commissioner Copps has spoken to the market concentration resulting from the current cable/telco duopoly for residential broadband services, noting it to be "well over three times what the Department of Justice considers 'highly concentrated.'"[35]

LLC, Transferors and Intelsat Holdings, Ltd., Transferee Consolidated Application for Authority to Transfer Control of PanAmSat Licensee Corp. and PanAmSat H-2 Licensee Corp., Memorandum Opinion and Order, 21 FCC Rcd 7368, ¶28 (2006).

30 Schumpeter, Joseph A., *Imperfect Competition and Antitrust Policy*, in Paul Samuelson, READINGS IN ECONOMICS (6th ed.) McGraw-Hill Book Company (New York 1970) (describing the struggle for market control in an oligopoly and noting that the resulting "equilibrium" no longer guarantees maximized employment and production).

31 *In the Matter of Application of EchoStar Communications Corporation*, Hearing Designation Order, 17 FCC Rcd 20559, 20605 (2002) (citing PHILLIP E. AREEDA, HERBERT HOVENKAMP & JOHN L. SOLOW, ANTITRUST LAW, ¶ 911 at 54-55 (Rev. ed. 1998). Although the Commission is not reviewing a proposed merger in the instant dockets, it is difficult to understand how any market arrangement which is so concentrated and noncompetitive that it is considered presumptively illegal under antitrust laws could be deemed effectively competitive under Section 10 of the Act.

32 *Id.*, at 20604-05.

33 *Amendment of the Commission's Space Station Licensing Rules and Policies; Mitigation of Orbital Debris*, Order, 18 FCC Rcd 10760, ¶¶ 62-64 (2003).

34 *Id.*

35 *Broadband Power Lines Copps Statement.*

IV. A Telecom Market Duopoly Does Not Constitute Sufficient Competition to Meet the Requirements of Section 10

As discussed above, the duopoly market structure acts to preserve market share concentration and to preclude the entry of new participants. Moreover, it does so without any need for deliberate action or malicious intent. Even without deliberate collusion or ill intent, the players cannot truly function independently. They are locked into an interdependent cycle of behavior.[36] Surpassed only by the monopolist provider, duopolists represent an extreme constriction of the market. It is unsurprising that antitrust review and other competitive market analyses disfavor duopoly to such an extent that a merger into duopoly is deemed presumptively illegal.

A telecom market duopoly stands in stark and unforgiving contrast to the sustained competition envisioned by the 1996 Act. That, in itself, is cause for grave concern; however, there is additional basis for alarm. Telco/cable duopolies currently control much of the U.S. broadband market and, as several commissioners have repeatedly noted, the unacceptably slow pace of U.S. broadband growth is directly attributable to those constricted market arrangements.

> Only rational competition policies can ensure that the U.S. broadband market does not default into a stagnant duopoly … which is a serious concern given that cable and DSL providers now control approximately 96 percent of the residential broadband market.[37]

Leading economic theorists, legal scholars and the Commission's own expertise confirm that an unfettered duopoly telecom market does not achieve the sustained competition intended by the 1996 Act. Instead, it is a market doomed to limited growth and thwarted potential. It is also a market which, without continuing regulatory oversight and incumbent unbundling obligations, will effectively block critical expansion of U.S. broadband capabilities. The Commission must adopt a forbearance analysis standard that precludes this fate.

V. There is No Precedent that Precludes the Commission from Determining That Telecommunications Duopolies are Not in the Public Interest

Verizon has objected to any UNE forbearance test which requires that multiple competitors be present.[38] The company erroneously contends that the D.C. Circuit has

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36 Recognition of this market inevitability all too effectively trumps the predictive optimism regarding Qwest's post-forbearance market behavior shown by the Commission in the *Omaha Forbearance Order*.

37 *Adelstein United Power Line Council Order Statement.*

38 *See, e.g.,* Letter from Nneka Ezenwa, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 08-24, 08-49 (filed Apr. 10, 2009), at 9.

previously rejected such "multiple competitor" tests.[39] Verizon is wrong. As explained above, the Commission has determined numerous times that a duopoly market structure is not in the public interest and must be rejected – and those decisions have withstood judicial review. The single case proffered by Verizon as support for its proposition, *USTA I*,[40] is badly misconstrued by Verizon.

USTA I is inapposite and distinguishable in at least two ways. First, in *USTA I* the Court was assessing whether there could be a finding of impairment under Section 251(d)(2) of the Act. In this case, impairment is not an issue.[41] Instead, the Commission must consider whether the separate and distinct requirements of Section 10 have been met. Thus, the issue is whether a duopoly market structure satisfies the requirements of Section 10(a) that enforcement of the statutory provision or Commission rule at issue is no longer necessary to ensure just and reasonable and not unreasonably discriminatory charges, that enforcement is no longer necessary for the protection of consumers, and that forbearance is consistent with the public interest.[42] The Commission must also find that forbearance will "enhance competition among providers of telecommunications services" (which it does not).[43] Obviously, the statutory requirements for "impairment" findings and "forbearance" determinations are not identical, or there would simply be no need for separate statutory provisions.

Second, in *USTA I* the D.C. Circuit simply did not decide – or even consider – whether the Commission could require the existence of multiple facilities-based competitors before granting deregulation to the ILEC. The Court found that the Commission, in ordering unbundling of the high frequency spectrum of copper loops so as to enable competitors to provide DSL services (*i.e.*, line sharing), "completely failed to consider the existence of competition in broadband services" coming from numerous sources, including "cable television companies, incumbent LECs, some utilities and 'wireless cable' companies".[44] The Court's decision to remand the matter to the Commission for further analysis was based on its conclusion that the Commission improperly "adopted the Line Sharing Order with indifference to petitioners' contentions about the state of competition in the market."[45] The *USTA I* court most certainly did not adopt the position advanced by Verizon that a single competitor to the ILEC (*i.e.*, a duopoly market structure) constitutes sufficient competition to justify deregulation.

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39 *Id.*

40 *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 428-429 (D.C. Cir. 2002) ("*USTA I*").

41 Since there is no requirement that Verizon provide UNEs in areas where they have demonstrated non-impairment pursuant to the Commission's rules, Verizon by necessity seeks forbearance only in areas where impairment still exists.

42 47 U.S.C. § 160(a)(1)-(3).

43 47 U.S.C. § 160(b).

44 *Id.*, at 428.

45 *Id.*, at 429.

VI. Conclusion

As shown above, the anticompetitive effects of a duopoly telecom market structure are considerable. Such a market arrangement directly threatens the prospects for critical U.S. broadband growth and is fundamentally inconsistent with the pro-competitive mandates of the 1996 Act. The mere existence of a duopoly market structure inevitably constrains competition and denies its benefits to consumers, even in the absence of deliberate collusion. In order to prevent the anticompetitive consequences of a telecom market duopoly from occurring, the Commission should insist that at least two wireline facilities-based competitors to the ILEC be present in a market before any forbearance from Section 251(c)(3) unbundling obligations is granted.

Respectfully submitted,

Broadview Networks, Inc., Cavalier Telephone Company, Covad Communications Company, NuVox, and XO Communications, LLC

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