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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:

In the above-referenced dockets, Verizon is seeking forbearance from the requirement to offer UNEs under Section 251(c)(3), much as Qwest did in Omaha five years ago. Like Qwest, Verizon argues that the continued availability of UNEs is not necessary to ensure a competitive marketplace, and that market forces will protect the public interest even in the absence of this regulatory mandate. Qwest's actions following the grant of forbearance in Omaha, however, prove that market forces associated with mass market retail voice competition alone do not compel BOCs to offer reasonable prices or otherwise commercially reasonable terms and conditions for its wholesale offerings. Contrary to the Commission's prediction that Qwest would have adequate market incentives to make its network available to competitors — at competitive rates and terms, Qwest has instead demonstrated that it will exercise its exclusionary market power and do what it can to force competitors out of its markets.

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For reasons we have explained previously, Verizon has not demonstrated sufficient competition in either of these markets to justify forbearance, and its petitions should be denied.[1] However, even if there were widespread *retail* competition in these markets, it would not be in the public interest to approve forbearance without imposing the Section 271 conditions proposed below to address the attendant risk of post-forbearance duopoly.[2]

A. A Section 271 Public Interest Condition is Necessary

No market currently qualifies for UNE forbearance. Forbearance should never be approved in any market where the result is likely to be a permanent duopoly or a closed market with high barriers to new entry. If, however, the Commission were to find that some market qualifies without the presence of a facilities-based competitor offering ubiquitous and reasonably priced wholesale access, then a Section 271 public interest condition should be imposed to temper the effect of a post-forbearance duopoly.

1. Section 271 — Fulfilling An Unfulfilled Promise

Under Section 271(c)(2)(B),[3] all BOCs that have been authorized to provide interLATA services in their in-region states have an "*independent obligation* to provide access to loops, switching, transport and signaling regardless of any unbundling analysis under section 251."[4] In other words, the Section 271 obligation to provide access to these

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[1] Letter from Andrew D. Lipman *et al.*, Counsel to Access Point, Inc. *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 08-24 and 08-29 (filed April 23, 2009) ("Competitive Carriers April 23 Letter").

[2] In certain Virginia Beach wire centers at issue, Verizon's incumbent affiliate is not a Bell operating Company ("BOC") and therefore, Section 271 does not apply to it. In these wire centers, the Commission would need to specifically impose conditions that are similar to and accomplish the same result as these Section 271 conditions on Verizon's affiliate. The Commission has imposed conditions in a prior UNE forbearance ruling. *See Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, WC Docket No. 05-281, Memorandum Opinion and Order, 22 FCC Rcd 1958, ¶¶ 39-46 (2007) (imposing conditions in granting of forbearance), *appeals dismissed*, *Covad Communications Group, Inc. v. FCC*, Nos. 07-70898, 07-71076, 07-71222 (9th Cir. 2007).

[3] 47 U.S.C. § 271(c)(2)(B)(iv)-(vi) & (x).

[4] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, 17384, ¶ 653 (2003) ("*TRO*") (emphasis added), *aff'd in part, remanded in part, vacated in part sub nom. United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), *cert. denied sub nom. Nat'l Ass'n Regulatory Util. Comm'rs v. United States Telecom Ass'n*, 125 S. Ct. 313 (2004).

network elements requirement persists regardless of impairment. The FCC found that Section 271 network elements should be "priced on a just, reasonable and not unreasonably discriminatory basis—the standards set forth in sections 201 and 202."[5] But due to the lack of specificity in Sections 201 and 202 with respect to price-setting standards, the BOCs have taken advantage of this vacuum to unilaterally impose excessive, non-negotiable rates for Section 271 network elements.

The differing pricing standards for Section 251 UNEs and Section 271 network elements have made it virtually impossible for CLECs attempting to obtain Section 271 network elements at reasonable rates. Unlike the clear forward-looking cost-based rate standard that applies to Section 251(c)(3) UNEs,[6] there is no statutory rate standard for Section 271 network elements, and the FCC has only provided general guidance that such prices must be "just, reasonable and not unreasonably discriminatory" consistent with Sections 201 and 202. This ambiguous standard has resulted in widespread confusion, delay, and uncertainty with respect to Section 271 offerings.

To date, BOC offerings for Section 271 network elements have largely consisted of tariffed special access services for loops and transport — *which would have been available without Section 271* — and illusory take-it-or-leave-it "commercial agreements" for switching. Qwest's conduct after the Commission granted Section 251(c)(3) forbearance in the Omaha Metropolitan Statistical Area ("MSA") presents a striking example. As the Commission's decision was based in significant part on a "predictive judgment" that, even without Section 251(c)(3) obligations, Qwest would make reasonable wholesale offerings pursuant to Section 271 in order to keep CLECs such as McLeodUSA on its network.[7] Yet Qwest refused to negotiate wholesale pricing for voice-grade, DS1 and DS3 loops and transport, offering only its generally available special tariffed access rates (providing for a discount only if unreasonable volume requirements are met), and claiming that this offer satisfied its Section 271 obligations.[8]

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5 *Id*., at 17386, ¶ 656.

6 Pursuant to Section 252(d)(1), Section 251 UNEs must be made available at forward-looking cost-based rates pursuant to the FCC's "TELRIC" methodology. *See* 47 C.F.R. § 51.505.

7 *See Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. §160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, WC Docket No. 04-223, 20 FCC Rcd 19415, 19467-68, ¶ 105 (2005) ("*Omaha Forbearance Order*") ("Our justification for forbearing from Qwest's section 251(c)(3) obligations for loops and transport in certain areas depends in part on the continued applicability of Qwest's wholesale obligations to provide these network elements under sections 271(c)(2)(B)(iv) and (v)").

8 *See* McLeodUSA Petition for Modification, WC Docket No. 04-223, at 4, 8 (filed July 23, 2007). As PAETEC has explained elsewhere, the fact that Qwest's special access offerings were in existence at the time of the *Omaha Forbearance Order* renders Qwest's

Qwest similarly offered "commercial" pricing for basic and DSL qualified copper loops at rates that were more than 30% higher than the "commercial" rate for such loops with Qwest's local switching attached.[9] In addition, Qwest specifically excluded all wholesale performance standards, including Section 271 performance metrics, from its offering, and adopted an intractable "take it or leave it" approach that allowed no room for negotiation of more favorable terms.

CLEC attempts thus far to establish reasonable prices for Section 271 elements have fallen on deaf ears with the BOCs and the Commission. Even a state commission

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(Footnote Continued...)

argument nonsensical. It is unfathomable that the Commission would rely on a "predictive judgment" that Qwest would offer reasonable prices on a commercial basis if the Commission meant only that it expected Qwest would continue to offer its existing special access services. The only logical conclusion is that the Commission was predicting that market forces would compel Qwest to offer commercial pricing for loops and transport at rates that were materially less than Qwest's existing tariffed special access pricing. A plain reading of the *Omaha Forbearance Order* demonstrates this as it precludes Qwest's reliance on tariffed special access services to satisfy its separate Section 271 obligation and carefully distinguished Section 271 loop and transport offerings from Qwest's special access offerings:

> To begin with, we note that withdrawal of these loop and transport offerings [DS0, DS1, DS3-capacity facilities] would be impermissible under section 271, which requires Qwest to make loop and transport facilities (among others) to competitors at just and reasonable rates and terms. ***In addition,*** Qwest offers ***similar special access services*** pursuant to tariffing or contract filing requirements and cannot cease offering such ***services*** to customers without authority under Section 214.

Omaha Forbearance Order, 20 FCC Rcd at 19455, ¶ 80. The Commission's ruling distinguishing Qwest's obligation to offer Section 271 loops and transport offerings from "similar" special access offerings wholly undermines Qwest's recurring efforts to equate special access offerings with Section 271 network elements. And the Commission's predictive judgment was that market forces would compel Qwest to offer commercial pricing for loops and transport at rates that were materially less than the existing tariffed special access pricing (that existed in December 2005) to address the concern that Qwest would use forbearance to price squeeze facilities-based competitors out of the Omaha market. *See* Letter from William A. Haas, Vice President — Regulatory and Public Policy, PAETEC, to Marlene H. Dortch, Secretary FCC, WC Docket No. 07-97, at 7 (filed July 10,2008) ("PAETEC July 10, 2008 Letter").

[9] PAETEC July 10, 2008 Letter, at 8.

request for the FCC to set Section 271 prices for commercial UNE-P has fallen on deaf ears at the Commission.[10] That inaction has permitted BOCs to claim that the "market price," which they unilaterally set (associated with a market dominated by a BOC), should apply instead of a regulated rate, even though that is not what the Commission has meant by "just and reasonable" in any other context.[11]

Pricing is not the only current stumbling block to the availability of reasonable Section 271 offerings. Under Sections 251 and 252, if agreements cannot be negotiated, unresolved disputes regarding terms and conditions are submitted to arbitration for a determination of what is reasonable. Section 251 compliance, including the arbitration process, is subject to oversight by state public utility commissions. But no such oversight exists under Section 271. As a result, BOCs refuse to include Section 271 offerings within Section 252 interconnection agreements and impose onerous conditions, restrictions or limitations on any Section 271 offering they make (such as not being able to commingle a Section 271 network element with any Section 251 UNEs), knowing full well that they do not have to answer to a state regulatory authority for their unreasonable demands, and that the FCC has been unwilling to engage to date.

CLECs have tried to turn to state commissions to establish reasonable rates, terms and conditions for Section 271 network elements and include such provisions in Section 252 agreements. Many state commissions have been willing to investigate the reasonableness of BOC 271 prices. However, those efforts have largely failed because reviewing courts have held that Section 271 vests only the FCC with enforcement of the ongoing obligations.[12] Because the FCC, in turn, has failed to ensure that BOCs offer

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[10] *See* Petition of the Georgia State Public Service Commission for Declaratory Ruling and Confirmation of Just and Reasonableness of Established Rates, WC Docket No. 06-80 (filed April 18, 2006).

[11] Although BOCs have even made the unsubstantiated claim that TELRIC rates discourage investment, this contention was rejected by the Supreme Court. *See Verizon Communications v. FCC*, 535 U.S. 467 (2002).

[12] *See* State of Rhode Island and Providence Plantations Public Utilities Commission, *In re: Verizon-Rhode Island's Filing of February 18, 2005 to Amend Tariff No. 18*, Report and Order, Docket No. 3662 (July 28, 2005) ("At this time, it is apparent to the Commission that at the bistro serving up the BOCs' wholesale obligations, the kitchen door numbered 271 is for "federal employees only."); *see also, e.g., Illinois Bell Telephone Co., Inc., v. Box.*, 548 F.3d 607 (7th Cir. 2008); *Verizon New England, Inc., v. Maine Public Utilities Commission*, 509 F.3d 1 (1st Cir. 2007); *Qwest Corp. v. Arizona Corp. Commission*, 2007 WL 2068103 (D. Ariz. 2007); *Dieca Communications, Inc., v. Florida Public Service Commission*, 447 F.Supp.2d 1281 (N.D. Fla. 2006); *Sw. Bell Tel., L.P. v. Missouri Public Service Commission*, 461 F.Supp.2d 1055, 1067 (E.D. Mo. 2006); *Southwestern Bell Tel. L.P. v. Mo. Pub. Serv. Com'n*, 530 F.3d 676, 681-83 (8th Cir.

reasonable rates for Section 271 network elements, reasonable Section 271 offerings have not materialized.

Over nine years have passed since the FCC started granting the BOCs the right to offer in-region long distance services under Section 271 by the FCC. The FCC needs to enforce the BOCs equally important Section 271 obligation to offer the 271 network elements on more well defined just and reasonable terms and conditions. The FCC's failure to date must be rectified, so that presumptively reasonable rates are established and arbitration before state public utility commissions is an option to promote just and reasonable provisions associated with a BOC's Section 271 offerings that can be incorporated into Section 252 interconnection agreements, commingling obligations reinforced and to deter onerous and unconscionable terms and conditions that would otherwise apply in standalone 271 agreements that render them mostly useless absent the rightful ability to use them in conjunction with Section 251(c) UNEs, interconnection and collocation rights.

2. The Failed Omaha Experiment and Evidence in These Proceedings Demonstrates the Need for Section 271 Conditions

As discussed above and in other filings,[13] Qwest's actions following the grant of forbearance conclusively demonstrate that the market forces associated with mass market retail voice competition alone will not compel a BOC to offer reasonable prices or otherwise commercially reasonable terms and conditions for its wholesale offerings. Contrary to the Commission's prediction that "Qwest's market incentives will prompt it to make its network available — at competitive rates and terms,"[14] Qwest has instead demonstrated that it will exercise its exclusionary market power and do what it can to force competitors out of its markets.[15] Given that the Commission's experiment in Omaha failed to produce the predicted results, it cannot ignore those facts and repeat its mistake by predicting that Verizon will act differently than Qwest did.

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2008), cert. denied, 129 S.Ct. 971 (2009); *Michigan Bell Tel. Co. v. Lark*, 2007 WL 2868633 (E.D. Mich. 2007) (subsequent history omitted); *see also* 47 U.S.C. § 271(d)(6).

13 *See, e.g.,* Petition for Modification of McLeodUSA Telecommunications Services, Inc., WC Docket No. 04-223 (filed July 23, 2007) ("McLeodUSA Petition for Modification").

14 *Omaha Forbearance Order*, 20 FCC Rcd at 19456, ¶ 83.

15 *See, e.g.*, PAETEC July 10, 2008 Letter; *see also* McLeodUSA Petition for Modification.

Indeed, if granted UNE forbearance, Verizon's behavior will likely be just as bad if not worse. As it did in the six MSA proceeding, Verizon may claim it can be trusted to offer reasonable post-forbearance terms because of the number of "commercial agreements" it signed for line sharing and UNE-P replacement products after the Commission eliminated its TELRIC pricing obligations for those elements.[16] The sheer number of agreements, however, is meaningless without context, and Verizon remains close-mouthed about the actual substance of each these agreements. Unlike Qwest, Verizon does not file these documents with the Commission or make them available publicly on its website or otherwise. The Commission should not make any predictive judgments on commercial offerings that it has never seen.

Moreover, the Commission must recognize that any carrier that was buying line sharing or UNE-P as UNEs *had* to either sign the commercial agreement or disconnect its existing customers. The only thing "commercial" about these agreements is the fact that they are not subject to regulatory scrutiny. They are really nothing more than a monopolist's standard take-it-or-leave-it offering. The Commission should recall Full Service Network's detailed description of the "non-negotiable," "draconian and patently inequitable terms" of the Verizon wholesale product.[17] As Full Service explained, "there is every indication that CLECs can expect similar treatment if Verizon is granted the forbearance it seeks in its petitions."[18] Verizon's continued silence in response to these facts speaks volumes.

More illuminating than the mere number of agreements would be how many carriers are still serving customers under those agreements,[19] and how many (if any) *new* customers they have added since signing. In other words, the more important issue is whether Verizon's commercial offering enable a competitor to successfully compete in the market. Verizon's Form 477 data provides a resounding no to that question wherein it show steep declines in UNE-P lines since the implementation of the *TRO* in states affected by these petitions; *see* Table 1, below. If CLECs have simply used "commercial

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[16] Letter from Dee May, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-172, at 3 (filed Sept. 12, 2007) ("more than 160 commercial agreements"); *id.* at 4 ("more than 150 commercial agreements").

[17] *See* Reply Comments of Full Service Network in Opposition to Verizon's Petition for Forbearance, WC Doc. No. 06-172, at 11-12 (filed Apr. 18, 2007). This document is incorporated herein by reference.

[18] *See id*. at 12.

[19] Unlike, for example, Qwest (which lists its wholesale "commercial" agreements on its website), Verizon treats the very existence of such agreements as Top Secret. Therefore, it is impossible for anyone but Verizon to say whether it is counting agreements with companies that have gone out of business, sold their former UNE-P operations, or simply never actually ordered any service after signing.

agreements" to control the attrition of their legacy customer bases, but have stopped marketing and selling services that require these Verizon facilities, then Verizon's claims of reasonableness are hollow indeed.

Table 1			
State	**UNE-P lines as of June 30, 2004**	**Wholesale Advantage lines as of December 31, 2007**	**Percent Change**
Virginia *	339,081	141,247	-58.34%
Rhode Island	38,336	14,767	-61.48%

* Verizon East exchanges only.
Source: Verizon Responses to FCC Local Competition Reports.[20]

3. Evidence in the Special Access Proceeding Shows That Special Access Rates Are Not Competitive and Should Not Be Considered Default 271 Rates

It would be improper for the Commission to grant forbearance on a perverse theory that Verizon's special access offering somehow satisfies its Section 271 obligations, as this would effectively render these obligations meaningless. As the record in the Commission's open special access proceeding demonstrates, the BOCs do not offer just and reasonable rates, terms and conditions for special access because they continue to possess market power in the provision of special access. Consequently, they have maintained or raised their DS1 and DS3 special access rates when given pricing flexibility and have been able to both retain customers and increase sales in the wake of rising prices.[21]

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[20] Federal Communications Commission, Wireline Competition Bureau, Industry and Analysis Division, Local Telephone Competition and Broadband Deployment, available at http://www.fcc.gov/wcb/iatd/comp.html.

[21] *See, e.g.*, Comments of ATX Communications, Inc., *et al.*, WC Doc. No. 05-25, RM-10593 at 6, 9-11, Attachment 4 (filed Aug. 8, 2007) ("ATX *et al.* August 8, 2007 Comments"); Comments of the Ad Hoc Telecommunications Users Committee, WC Doc. No. 05-25, RM-10593, at Declaration of Susan Gately ¶ 17, Exhibits 1-2 (filed Aug. 8, 2007) ("Ad Hoc Comments"); Comments of Sprint Nextel Corporation, WC Doc. No. 05-25, RM-10593, at Declaration of Bridger Mitchell, ¶¶ 54-55, Exhibit 1 (filed Aug. 8, 2007); Comments of Global Crossing North America, Inc., WC Doc. No. 05-25, RM-10593, at Declaration of Janet Fischer ¶ 5, Tables 1-4 (filed Aug. 8, 2007); Reply Comments of ATX Communications Services, Inc., *et al.*, WC Doc. No. 05-25, RM-10593, at 14-19 (filed July 29, 2005); Comments of the Ad Hoc Telecommunications Users Committee, WC Doc. No. 05-25, RM-10593, at Declaration of M. Joseph Stith

As the Commission is well aware, the record in that proceeding provides overwhelming evidence of marketplace failure and a need for special access reform. The October 5, 2007 *ex parte* letter[22] submitted by 360 Networks *et al*., succinctly summarizes the reasons why the pricing flexibility rules have failed to produce competitive special access rates:

- Rates are Not Forward-Looking. The FCC's predictive judgment and market-based approach have failed to produce forward-looking rates reflective of a competitive market.
    - Special Access rates are dramatically higher than forward-looking, cost-based rates for comparable UNE services and rates offered by competitors;
    - BOCs' excessive special access rates-of-return demonstrate that special access prices are unreasonable;
    - Pricing Flexibility has permitted "substantial and sustained" price increases above price cap rates; and
    - Prices for the BOCs' retail high-capacity service offerings, *e.g.*, Verizon's DSL and FiOS, are significantly lower because competition exists in these markets.
- The Special Access Market is Not Competitive. BOCs continue to possess a bottleneck because almost no viable competitive alternatives to the BOCs' special access services exist.
- GAO Report Validates CLEC Concerns. Report found that (I) facilities-based competition to end users exist in only a relatively small set of buildings; (2)

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(filed June 13, 2005); Comments of CompTel/ALTS *et al*., WC Doc. No. 05-25, RM-10593, at Declaration of Janet Fischer (filed June 13, 2005); Comments of ATX Communications Services, Inc., *et al*., WC Doc. No. 05-25, RM-10593, at 10-13 (filed June 13, 2005); Reply Comments of 360 Networks (USA) *et al*., WC Docket No. 05-25 and RM-10593, at 10-14 (filed Aug. 15, 2007).

[22] *See* Letter from Philip J. Macres, Counsel to 360 Networks *et al*. to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, at 2 (filed Oct. 5, 2007). *See also, e.g.*, Comments of XO Communications, LLC *et al*., WC Docket No. 05-25, at 1 (filed Aug. 8, 2007) ("[r]apidly approaching three years since initiating this proceeding to examine the regulatory framework and rates that apply to price cap local exchange carriers' ("LECs"') special access services and despite overwhelming evidence of market failure, the Commission has yet to take meaningful long-term action to address the BOCs and other incumbent local exchange carriers' ("ILECs") detrimental exercise of market power in the markets for special access services."). *See also, generally,* Comments of Time Warner Telecom Inc. *et al.*, WC Docket No. 05-25 (filed Aug. 8, 2007); Comments of ATX Communications, Inc. *et al*., WC Docket No. 05-25 (filed Aug. 8, 2007).

prices for special access services in MSAs with Phase II pricing flexibility are on average higher than prices elsewhere; and (3) the effects of Phase I and Phase II pricing flexibility contracts on prices serve to impede rather than promote competition.

- BOCs Impose Unreasonable Non-Price Terms and Conditions. BOCs impose terms designed to limit competition; growth commitments, limits on use of competitors' facilities, limits on use of UNEs, non-cost-based regional commitment plans.
- BOC Mergers Increase the Need for Reform. Increased concentration facilitates potential for harm; increased economies of scale reduce BOC costs; larger BOC footprints increase the incentive for BOCs to harm competition. Indeed, the rates are not forward looking — the FCC's predictive judgment and market-based approach have failed to produce forward-looking rates reflective of a competitive market.

Moreover, a NARUC-commissioned study by the National Regulatory Research Institute that was released in January 2009 even recommended that the Commission reset special access rates as an interim measure.[23]

4. Without UNEs or presumptively reasonable rates for 271 elements, Verizon will have no incentive to reduce special access rates to levels reflective of a competitive wholesale marketplace.

Because Verizon does not face a threat from wholesale competition, it is unsurprising that Verizon's special access rates and rates-of-return have skyrocketed in locations where its special access prices have been freed from price cap regulation.[24] Relief from price cap regulation in the absence of wholesale alternatives has left Verizon free to impose supracompetitive prices.[25]

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[23] *See* Nat'l Regulatory Research Inst., "Competitive Issues in Special Access Markets, Revised Edition," No. 09- 02, Jan. 21, 2009 ("NRRI Study"), *available at* http://nrri.org/pubs/telecommunications/NRRI_spcl_access_mkts_jan09-02.pdf.

[24] ATX *et al*. August 8, 2007 Comments, at 2-15; *see also, generally, e.g.*, Ad Hoc Comments. The U.S. Government Accountability Office ("GAO") and the Commission have discredited the Phase II pricing flexibility standard as an accurate predictor of facilities-based competition that could constrain monopolistic BOC pricing. *FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, Report to the Chairman, Committee on Government Reform, U.S. House of Representatives, Government Accountability Office, GAO-07-80, at 12-13 (Nov. 2006) ("GAO Report").

[25] GAO Report at 13.

As shown in Table 2 below, Verizon's special access DS1 loop rates in the Norfolk-Virginia Beach Market Service Area have increased approximately 27 percent since it obtained special access pricing flexibility.[26]

Table 2								
Comparison of Verizon Virginia's DS1 Channel Termination Price Cap Rates With Pricing Flexibility Rates								
Month to Month Rates (No Term)			**1 Year Term Monthly Rates**			**2 Year Term Monthly Rates**		
Price Cap[27]	Price Flex[28]	% Increase	Price Cap[29]	Price Flex	% Increase	Price Cap[30]	Price Flex[31]	% Increase
$231.49	$293.06	26.60%	Same as MTM	Same as MTM	Same as MTM	$196.77	$249.10	26.60%

26 This percentage compares DS1 channel terminations in Rate Zone 3 wire centers with Price Band 6 wire centers. It is our understanding that Rate Zone rates are the price cap rates, whereas Price Band rates are the pricing flexibility rates. Verizon's FCC No. 1 Tariff indicates that more than half of the wire centers in the Norfolk-Virginia Beach Market Service Area are Price Band 6 wire centers. *See* Verizon — FCC No. 1 Section 14.7 at 14-57.

27 *See* Verizon — FCC No. 1 Section 7.5.9(A)(1)(a) at 7-250 (Rate Zone 3).

28 *See* Verizon — FCC No. 1 Section 7.5.9(A)(1)(a) at 7-250 (Price Band 6).

29 Verizon offers no discounts to 1 year terms.

30 *See* Verizon — FCC No. 1 Section 7.5.16(A) at 7-274 (Rate Zone 3).

31 *See* Verizon — FCC No. 1 Section 7.5.16(A) at 7-274 (Price Band 3).

Similarly, as shown in Table 3, Verizon's special access DS1 loop rates in the Providence-Warwick MSA have increased the same amount since it obtained special access pricing flexibility.[32]

Table 3								
Comparison of Verizon Rhode Island's DS1 Channel Termination Price Cap Rates With Pricing Flexibility Rates								
Month to Month Rates (No Term)			**1 Year Term Monthly Rates**			**2 Year Term Monthly Rates**		
Price Cap[33]	Price Flex[34]	% Increase	Price Cap[35]	Price Flex	% Increase	Price Cap[36]	Price Flex[37]	% Increase
$231.49	$293.06	26.60%	Same as MTM	Same as MTM	Same as MTM	$196.77	$249.10	26.60%

32 This percentage compares DS1 channel terminations in Rate Zone 3 wire centers with Price Band 6 wire centers. It is our understanding that rate zones rates are the price cap rates, whereas price band rates are the pricing flexibility rates. Verizon's FCC No. 11 Tariff indicates that all wire centers in the Providence-Warwick MSA are Price Band 6 Wire Centers. *See* Verizon — FCC No. 11 Section 15.3 at 15-25.

As shown in Table 4 below, Verizon's pricing flexibility special access rates for DS1 loops in the Norfolk-Virginia Beach Market Service Area are approximately 387 to 473 percent more than UNE rates.

Table 4 **Comparison of Typical DS1 UNE Rates in the Virginia Beach Market Service Area with Channel Termination Pricing Flexibility Rates**						
	Month to Month Rate (No Term)		**1 Year Term Monthly Rate**		**2 Year Term Monthly Rate**	
UNE DS1[38]	Price Flex[39]	% Above UNE Rates	Price Flex[40]	% Above UNE Rates	Price Flex	% Above UNE Rates
$51.13	$293.06	473.17%	Same as MTM	Same as MTM	$249.10	387.19%

(Footnote Continued...)

33 *See* Verizon — FCC No. 11 Section 31.7.9.(A)(1)(a) at 31-122.

34 *See* Verizon — FCC No. 11 Section 31.7.9.(A)(1)(a) at 30-55.

35 Verizon offers no discounts to 1 year terms. See Verizon-FCC No. 11 Section 7.4.10(B)(1)(b) at 7-274.

36 *See* Verizon — FCC No. 11 Section 31.7.9.(A)(1)(a) at 31-122. A fifteen percent discount is applied as Verizon's tariff provides. *See* Verizon-FCC No. 11 Section 7.4.10(B)(1)(b) at 7-274.

37 *See* Verizon — FCC No. 11 Section 31.7.9.(A)(1)(a) at 30-55. *See* Verizon-FCC No. 11 Section 7.4.10(B)(1)(b) at 7-274.

38 *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, Memorandum Opinion and Order, 19 FCC Rcd 1259, at Appendix A — Rates (WCB 2004). Most of the wire centers in the Norfolk-Virginia Beach Market Service Area are classified by Verizon as being located in UNE Cell Zone 1. *See* Verizon — FCC No. 1 Section 14.7 at 14-57 (identifying the wire centers in the Norfolf-Virginia Market Service Area); *see* http://www22.verizon.com/wholesale/utils/attach-redirect/?target=%20/wholesale/attachments/log/densitycellbystate.xls (identifying the UNE Cell Zones of the wire centers in the Norfolk-Virginia Beach Market Service Area).

39 *See* Verizon — FCC No. 1 Section 7.5.9(A)(1)(a) at 7-250 (Price Band 6).

40 Verizon offers no discounts to 1 year terms. *See* Verizon-FCC No. 11 Section 7.4.10(B)(1)(b) at 7-274.

In addition, as shown in Table 5 below, Verizon pricing flexibility special access rates for DS1 loops in the Providence-Warwick MSA are approximately 21 to 42 percent more than UNE rates.

Table 5						
Comparison of Typical DS1 UNE Rates in the Providence MSA with Channel Termination Pricing Flexibility Rates						
	Month to Month Rate (No Term)		**1 Year Term Monthly Rate**		**2 Year Term Monthly Rate**	
UNE DS1[41]	Price Flex	% Above UNE Rates	Price Flex	% Above UNE Rates	Price Flex	% Above UNE Rates
$206.52	$293.06	41.90%	Same as MTM	Same as MTM	$249.10	20.61%

Verizon's rates-of-return have skyrocketed as a result. In 2007, Verizon's inter-state special access rate-of-return in Virginia and Rhode Island were approximately 142.31 percent and 62.7 percent, respectively,[42] which is far above the Commission's last authorized rate-of-return of 11.25 percent.[43]

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41 Verizon PUC RI No. 18, Part M Section 2, Page 5, available at http://www22.verizon.com/tariffs/viewdocact.asp?system_id=3120709&lib=TMPI_PCDP_LIB&doc=106196&checkout=false&fileExt=.PDF&Frameset=Created. Close to half of the wire centers in the Providence-Warwick MSA are classified by Verizon as being located in UNE suburban zone which have DS1 loop rates that are higher than the DS1 loop rates in the rural or urban zones. *See* Verizon — FCC No. 11 Section 15.3 at 15-25 (identifying wire centers in the Providence-Warwick MSA) and http://www22.verizon.com/wholesale/utils/attach-redirect/?target=%20/wholesale/attachments/log/densitycellbystate.xls (identifying the UNE zone of the wire centers in the Providence-Warwick MSA).

42 Verizon's Rhode Island and Virginia 2007 rates of return were calculated using ARMIS data reported for interstate special access services. Specifically, we divided the net return by average net investment of Verizon in each of these states to calculate the rates of return. *See* ARMIS 43-01, Table 1, Cost and Revenue, rows 1910, 1915, col. s.

43 The NRRI study on special access concluded that the BOCs' special access rates of return are excessive even when earnings were adjusted to address the separations freeze and found such "high earnings as evidence that the three RBOCs continue to have market power...." NRRI study at 71.

Because nothing in the record "reflect[s] any significant alternative sources of wholesale inputs for carriers"[44] in the MSAs at issue in this proceeding, Verizon's special access rates are similarly not constrained by the presence of competitive facilities. It therefore lacks an incentive, absent regulation, to offer its last mile facilities on a wholesale basis at just and reasonable rates and terms. Rather, Verizon's special access rates will continue to spike further upward if Section 251(c)(3) facilities at TELRIC-based rates are no longer available to CLECs. It is therefore critical that the UNEs remain available as the Commission "repeatedly has recognized that the availability of UNEs is a competitive constraint on special access pricing."[45]

B. Proposed Section 271 Public Interest Conditions

For the foregoing reasons, in any MSA in which a substantial competition finding is based solely on the retail competition prong, the Commission should require that Verizon make available (via amendments to existing Section 252 interconnection agreements and in new Section 252 interconnection agreements) the rates, terms and conditions associated with access to loop and transport network elements under Section 271.[46] The Section 271 provisions must contain just and reasonable terms and conditions and prices for Section 271 network elements. The following terms or conditions are deemed unreasonable on their face:

- Any limitation or restriction regarding combination of Section 271 network elements or commingling Section 271 network elements with Section 251(c) UNEs, interconnection facilities, collocation arrangements or other wholesale services, including, but not limited to, special access services;
- Any limitation or restriction that requires a CLEC to maintain a certain volume of Section 271 network elements during the term of the agreement;
- Any limitation or restriction regarding use of Section 251(c)(3) UNEs if the carrier uses Section 271 network elements;
- Any non-recurring charge exceeding $25 to convert an existing UNE loop or transport facility to a Section 271 network element loop or transport facility;

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[44] *Petitions of Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas*, Memorandum Opinion and Order, 22 FCC Rcd 21293, 21315, ¶ 38 (2007).

[45] *Id*.

[46] These provisions would accordingly be subject to Section 252(b)(1) arbitration.

- Any restriction that network elements previously made available pursuant to Section 251(c)(3) (including, but not limited to, conditioned copper loops, subloops, DS1 and DS3 loop and transport, dark fiber loops and transport) are not available pursuant to Section 271(c)(3);
- Any limitation that Section 271 network elements will not be provisioned if doing so requires routine network modifications; and
- Any term restricting a customer's ability to pursue any regulatory remedy, such as a rate reasonableness complaint, relating to network elements or any other service as a condition of purchasing the Section 271 network elements.

In addition, the Commission should declare that Section 271 network element non-recurring and monthly recurring rates for loops and transport will be presumed just and reasonable if set no higher than 15% above state commission-approved prices for comparable UNEs. Rates set higher than that level should ordinarily be suspended and subject to investigation under Section 205. This is intended only as a safe harbor, not as a rate prescription; the presumption may be rebutted by a factual cost showing in the Section 205 investigation.

* * *

As demonstrated in the Competitive Carriers' April 23 Letter, Verizon has not demonstrated sufficient competition in either the Rhode Island or Virginia Beach markets to justify forbearance and therefore, its petitions should be denied. Nor can the Commission make the same mistaken prediction it made in Omaha that competitive forces in a duopolistic market will compel a BOC to make its Section 271 offerings available at competitive rates and terms in the wake of a Section 10 forbearance decision that relieves it of its Section 251(c)(3) unbundling obligations.

If the Commission were to grant Verizon's requested unbundling relief based solely on the extent of retail service competition in the Rhode Island and Virginia Beach markets (which it should not), the Section 271 conditions proposed herein would be essential to ensure the rates, terms and conditions associated with Verizon's wholesale offerings will remain just and reasonable as the law requires, unlike the commercially unreasonable rates that resulted from the failed Omaha experiment.

Respectfully submitted,

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