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Ex Parte

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, D.C. 20554

Re: Petition of Verizon New England Inc. 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:

I am writing in response to several CLEC filings in the above-captioned proceedings.[1] These filings purport to provide additional reasons why the Commission should abandon its

[1] *See* Letter from Brad Mutschelknaus & Genevieve Morelli, Kelley Drye & Warren LLP (counsel for Broadview Networks, Covad, NuVox, and XO), to Marlene Dortch, FCC, WC Docket Nos. 08-24 & 08-49 (Apr. 3, 2009) ("CLEC April 3 Letter"); Letter from Thomas Jones et al., Willkie Farr & Gallagher LLP (counsel for One Communications, tw telecom, Integra Telecom, and Cbeyond), to Marlene Dortch, FCC, WC Docket Nos. 08-24 & 08-49 (Apr. 14, 2009) ("CLEC April 14 Letter"); Letter from Samuel Feder, Jenner & Block LLP (counsel for Cavalier Telephone & TV), to Marlene Dortch, FCC, WC Docket No. 08-49 (Apr. 22, 2009) ("Cavalier April 22 Letter"); Letter from Mary Albert, Comptel, to Marlene Dortch, FCC, WC Docket Nos. 08-24 & 08-49 (Apr. 22, 2009) ("Comptel April 22 Letter"); Letter from Andrew Lipman et al., Bingham McCutchen LLP (counsel for Alpheus, TDS Metrocom, and PAETEC), Brad Mutschelknaus et al., Kelley Drye & Warren LLP (counsel for Broadview Networks, Cavalier, Covad, NuVox, and XO) & Thomas Jones et al., Willkie Farr & Gallagher LLP, to Marlene Dortch, FCC, WC Docket Nos. 08-24 & 08-49 (Apr. 22, 2009) ("CLEC April 22 Letter"); Thomas Jones & Nirali Patel, Willkie Farr & Gallagher LLP, to Marlene Dortch, FCC, WC Docket Nos. 08-24 & 08-49 (Apr. 23, 2009) ("CLEC April 23 Letter"); Letter from Brad Mutschelknaus & Genevieve Morelli, Kelley Drye & Warren LLP, to Marlene Dortch, FCC, WC Docket Nos. 08-24 & 08-49 (Apr. 23, 2009) ("Broadview et al. April 23 Letter"); Andrew Lipman et al., Bingham McCutchen LLP (counsel for Access Point, Alpheus, ATX Communications, PAETEC et al.), to Marlene Dortch, FCC, WC Docket Nos. 08-24 & 08-49 (Apr. 23, 2009) ("PAETEC et al. April 23 Letter"); Andrew Lipman et al., Bingham McCutchen

settled precedent and adopt a new forbearance standard that further raises the bar for unbundling relief. As Verizon has already demonstrated, it would be improper for the Commission to take such an approach, which is inconsistent with the impairment standard.[2] As described below, the CLEC filings also are flawed for multiple additional reasons.

A. Services at Issue Here Are Subject to Intense Competition

Verizon has demonstrated that in both Rhode Island and Cox's service territory in the Virginia Beach MSA there are multiple types of competitors serving both mass-market and enterprise customers. With respect to mass-market customers, there is extensive competition from cable, wireless, and over-the-top VoIP providers.[3] With respect to enterprise customers, there is extensive competition from cable, traditional CLECs, fixed wireless, and numerous other providers at the retail level such as system integrators.[4] Verizon further demonstrated that with respect to both types of customers, it satisfies the tests the Commission has previously applied in granting forbearance from unbundling regulation.[5]

Ignoring this evidence, the CLECs focus their efforts on arguing that "market duopolies are inherently noncompetitive" and "not . . . sufficient competition to meet the requirements of Section 10."[6] These arguments are misplaced.

LLP (counsel for TDS Metrocom and PAETEC) & Thomas Jones et al., Willkie Farr & Gallagher LLP (counsel for Cbeyond, One Communications, and tw telecom), to Marlene Dortch, FCC, WC Docket Nos. 08-24 & 08-49 (Apr. 23, 2009) ("Cbeyond et al. April 23 Letter"); Letter from Andrew Lipman et al., Bingham McCutchen LLP, to Marlene Dortch, FCC, WC Docket Nos. 08-24 & 08-49 (Apr. 27, 2009) ("CLEC April 27 Letter").

[2] *See* Letter from Rashann Duvall, Verizon, to Marlene Dortch, FCC, WC Docket Nos. 08-24 & 08-49 (May 1, 2009) ("May 1, 2009 Ex Parte"); Letter from Nneka Ezenwa, Verizon, to Marlene Dortch, FCC, WC Docket Nos. 08-24 & 08-49 (Apr. 10, 2009) ("April 10, 2009 Ex Parte").

[3] *See* Petition of Verizon New England for Forbearance, WC Docket No. 08-24, at 4-20 (FCC filed Feb. 14, 2008) ("R.I. Pet'n"); Petition of the Verizon Telephone Companies for Forbearance, WC Docket No. 08-49, at 5-20 (FCC filed Mar. 31, 2008) ("Virginia Beach Pet'n").

[4] *See* R.I. Pet'n at 20-31; Virginia Beach Pet'n at 20-32.

[5] *See* R.I. Pet'n at 4-17, 20-26; Virginia Beach Pet'n at 5-17, 20-26; Reply Comments of Verizon, WC Docket No. 08-24, at 2-8 (FCC filed May 12, 2008) ("R.I. Reply"); Reply Comments of Verizon, WC Docket No. 08-49, at 2-10 (FCC filed June 10, 2008) ("Virginia Beach Reply"); May 1, 2009 Ex Parte at 2-6.

[6] Broadview et al. April 23 Letter at 6, 10; Comptel April 22 Letter at 10. *See also* CLEC April 23 Letter at 5-6; PAETEC et al. April 23 Letter at 4-5.

Regardless of the standard that the Commission applies, as the record of this proceeding abundantly shows there will be no duopoly in any of the markets at issue here. To the contrary, in addition to cable, there are multiple competitors serving both mass-market and enterprise customers using their own facilities.[7]

Moreover, even if the Commission were to limit its analysis to competition from cable, which it should not, the forbearance standard would still be met. Actual experience shows that Verizon and cable compete fiercely, racing to deploy new and better services (such as FiOS, cable VoIP, and faster broadband services) at competitive rates. For example, the price of a basic wireline broadband connection has fallen by at least half since 2001, and consumers today can get at least 10-20 times the speed for the same $50 spent in 2001.[8] Telephone and cable companies have also competed aggressively to provide new service bundles of voice, data, and video, and prices for these bundles have steadily declined.[9]

Further, as a matter of regulatory parity, it makes no sense to continue stringent regulations on Verizon. As Verizon has demonstrated, Cox now serves **[Begin Confidential]**

[End Confidential].[10] As a result, there is no rational basis to subject Verizon to the most burdensome form of economic regulation, while imposing no comparable regulation on Cox. The Commission has repeatedly recognized the importance of parity between direct competitors offering comparable services.[11] The Commission also has recognized that the goal of regulatory

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[7] *See* R.I. Pet'n at 1-2, 12-14, 20, 26-27; Virginia Beach Pet'n at 2-3, 12-14, 20, 26-27.

[8] *See, e.g.*, R. Katz et al., Bear Stearns, *Byte Fight!*, at 73, Exh. 38 (Apr. 2000) ($50 for 640 kbps Bell Atlantic DSL service); J. Hodulik et al., UBS, *Consumer RGUs Hitting the Wall*, at 8 (Mar. 2, 2009) ($17.99 for 1 Mbps Verizon DSL with a two-year contract; $49.99 and $59.99 for 10 and 20 Mbps Verizon FiOS, respectively).

[9] *See, e.g.*, D. Barden et al., Banc of America Securities, *Wireline Services Pricing Update*, at 8 (Oct. 8, 2004) (4Q04 entry-level triple-play pricing averages of $113.81 for telcos and $122.99 for cable); B. Kraft et al., Bank of America, *Initiating Coverage of the Cable & Satellite Sector*, at 14 Exh. 5 (Oct. 20, 2008) (3Q08 entry-level triple-play pricing averages of $101.45 for telcos and $121.08 for cable).

[10] *See* May 1, 2009 Ex Parte at 4 & Attach. A.

[11] *See, e.g.*, *Promotion of Competitive Networks in Local Telecommunications Markets*, Report and Order, 23 FCC Rcd 5385, ¶ 1 (2008) (prohibiting exclusive contracts for telecommunications services in apartment buildings to "create parity for the provision of telecommunications services to customers"); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, ¶ 1 (2005) (adopting rules that further "the goal of developing a consistent regulatory framework across platforms by regulating like services in a similar functional manner"); *see also id.* ¶ 17 (describing its regulatory goal of "crafting an analytical framework

parity is particularly important now that cable companies and telephone companies are competing directly for the provision of the "triple play" of services.[12]

The CLECs' additional arguments add no weight to their claims. First, the CLECs argue that the Commission should reverse its determination that facilities-based competition will ensure reasonable wholesale rates based on the experience of McLeod in Omaha. But there is no basis for the Commission to rely on this one isolated example, which involves an entirely different ILEC and took place several years ago. Regardless of what happened in Omaha, Verizon has demonstrated that it *has* continued to enter into commercial agreements for discontinued UNEs, such as the Wholesale Advantage agreements that replaced UNE-P and the commercial agreements that replaced line sharing.[13] In any event, while the CLECs simply rely on McLeod's explanations for exiting Omaha, Qwest has demonstrated that there is another side to the story that the CLECs ignore.[14] For example, Qwest explained that McLeod's decision to exit Omaha was not due to the Commission's grant of forbearance, but instead related to McLeod's previously announced national strategic marketing plan to shift its focus from serving mass-market customers to serving small and medium-sized business customers.[15] Consistent

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that is consistent, to the extent possible, across multiple platforms that support competing services"); *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901, ¶ 2 (2007) (establishing a regulatory approach that "furthers [its] efforts to establish a consistent regulatory framework across broadband platforms by regulating like services in [a] similar manner.").

[12] *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 As Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, ¶ 2 (2007) ("We believe this competition for delivery of bundled services will benefit consumers by driving down prices and improving the quality of service offerings. We are concerned, however, that traditional phone companies seeking to enter the video market face unreasonable regulatory obstacles, to the detriment of competition generally and cable subscribers in particular."); *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235, ¶ 21 (2007) (The result of maintaining disparities between the regulation of video and voice services will be to "reduce competition in the provision of triple play services and result in inefficient use of communications facilities.").

[13] *See* R.I. Pet'n at 13; R.I. Lew/Wimsatt/Garzillo Decl. ¶ 30; Virginia Beach Pet'n at 13; Virginia Beach Lew/Wimsatt/Garzillo Decl. ¶ 30.

[14] *See* Letter from R. Steven Davis, Qwest, to Marlene Dortch, FCC, WC Docket No. 07-97 (June 19, 2008) ("Qwest Letter").

[15] Qwest Letter at 3 (citing McLeod's May 2007 SEC filing: "Our new strategy focuses on sales to small- and medium-sized enterprise customers who seek high-capacity services. These

with this decision to shift its strategy nationwide, McLeod's petition to cease providing local exchange service in Omaha was limited to mass-market customers – a fact that CLECs neglect to mention despite relying on that petition.[16] In fact, as Qwest explained, McLeod continues to provide service to enterprise customers in Omaha *today*,[17] which McLeod's new owner (PAETEC) has recently confirmed in the record here.[18] Qwest further demonstrated that McLeod's partial exit from Omaha has been inconsequential to competition as a whole – which has *grown* in the time since the Commission granted Qwest's Omaha petition.[19]

Second, the CLECs cite the examples of the cellular industry from 1984 to 1998 and the concentrated video programming distribution marketplace to argue that the addition of competitors to a duopoly market structure reduces prices.[20] But as noted above, this is a false comparison because even after forbearance there will continue to be multiple facilities-based competitors providing each of the types of services at issue here. In any event, the history of both the wireless and video programming industries demonstrate precisely the opposite of what the CLECs are arguing for here. In both of those industry segments, facilities-based competition has emerged and has provided consumers with enormous benefits – without unbundling regulation.

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enterprises generate greater revenue and profit margins than the services sought by residential and very small business customers, which were our historic focus.").

[16] *See* CLEC April 3 Letter at 10; CLEC April 14 Letter, Attach. at 5; Comptel April 22 Letter at 3-4; Comptel, "The Importance of Wholesale Competition to Market Performance" at 16-17 n.32 ("Comptel Paper"), *attached to* Comptel April 22 Letter; QSI Consulting, Inc., *An Analysis of Verizon's Petition for Forbearance: A Quantification of the Impact of Forbearance*, at 15 (Apr. 2009) ("QSI Study"), *attached to* CLEC April 22 Letter; PAETEC et al. April 23 Letter at 2-3, 12-13; CLEC April 27 Letter at 3-4; Cavalier April 22 Letter, Attach. at 8-9.

[17] *See* Qwest Letter at 12 ("The truth is McLeod has only exited the market segment it <u>wanted</u> to exit, driven out not by the *Omaha Forbearance Order* but rather, by its own refocused company-wide business plan. . . . Importantly, McLeod has <u>not</u> petitioned the Nebraska PSC to exit the market on which it intends to focus as part of its national plan: small- and medium-sized enterprise market.").

[18] *See* Letter from Mary Albert, Comptel, to Marlene Dortch, FCC, WC Docket Nos. 08-24 & 08-49 (Apr. 29, 2009) (noting that Keith Wilson of PAETEC informed the Commission that McLeod serves 2,500 access lines in Omaha today).

[19] Qwest Letter at 9-11.

[20] *See* CLEC April 23 Letter at 6 n.29; PAETEC et al. April 23 Letter at 5; Declaration of Dr. Stanley M. Besen at 9-10 ("Besen Decl."), *attached to* Cbeyond et al. April 23 Letter.

Third, Comptel's discussion of the "the emergence of layered network architectures" is both irrelevant and confused.[21] According to Comptel, "[t]he correct regulatory policy is to ensure that all lower layers [of the network] – and network segments – that cannot be efficiently duplicated remain available as wholesale inputs to support competition in higher layers."[22] In Comptel's view, it is "difficult – and often unnecessary – for competing last-mile networks to be deployed."[23] Comptel's theoretical arguments have nothing to do with the factual reality here, however, because Verizon's network *has* been duplicated in large part – both by cable operators as well as by wireless providers. For example, Cox has admitted that of the 39 wire centers in Cox's service territory in the Virginia Beach MSA for which Verizon seeks relief, Cox provides **[Begin Confidential]** [24] **[End Confidential]** and that with respect to Rhode Island, Cox provides **[Begin Confidential]** [25] **[End Confidential]**

In any event, even on its own terms, Comptel's theory of network layers does not support unbundling regulation. Even after forbearance, Verizon will continue to make its network available to competitors, and those competitors may provide their "higher-layer" services over these facilities. The only issue is the appropriate price of such access, and as the Commission and the courts have recognized, requiring that such access be priced at TELRIC rates creates significant disincentives to invest, by both competitors and incumbents alike.[26] Verizon's

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[21] Comptel Paper at 17.

[22] Comptel Paper at 15.

[23] Comptel Paper at 7 n.16.

[24] **[Begin Confidential]** **[End Confidential]** Cox also provides data for the Shipps Corner wire center (PRANVAXB), but there are no Verizon retail lines associated with that wire center.

[25] *See* R.I. Reply, Exh. 1 (Verizon data as of December 2007/January 2008, including lines served by the former MCI); April 10, 2009 Ex Parte, Attach. A at Exh. 6A (Rhode Island) (December 2008 Verizon retail lines by wire center, excluding lines served by the former MCI).

[26] *See United States Telecom Ass'n v. FCC*, 290 F.3d 415, 424 (D.C. Cir. 2002) ("*USTA I*") (unbundling creates a disincentive "for a CLEC to innovate" because "it can get the element cheaper as a UNE."); *id.* at 429 (unbundling creates "disincentives to research and development by both [incumbents] and CLECs"); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 429 (1999) ("*Iowa Utils. Bd.*") (Breyer, J., concurring in part and dissenting in part) ("Nor can one guarantee that firms will undertake the investment necessary to produce complex technological innovations

massive investment also provides further evidence that each of these services is, contrary to Comptel's and other CLECs' claims, highly competitive.

B. The CLECs Misrepresent Verizon's Pricing Behavior in Rhode Island

Verizon has demonstrated that, as a result of the significant competition it faces for mass-market and enterprise customers both in Rhode Island and in Cox's service territory in the Virginia Beach MSA, Verizon has lost a very significant percentage of its residential and business access lines, and those totals continue to decline.[27] The CLECs make no attempt to reconcile these trends with their claims that there is insufficient competition. The CLECs instead claim that Verizon's pricing behavior demonstrates that competition does not impose a meaningful constraint.[28] But the CLECs' discussion of Verizon's prices is flawed in several respects.

With respect to mass-market services, the CLECs claim that "Verizon's own pricing behavior reveals that it does not believe that most of its customers view mobile wireless voice services as a substitute for wireline voice service."[29] The CLECs claim that over the past three years, Verizon has increased its rates in Rhode Island for certain local services.[30] As the CLECs acknowledge, however, during this period Verizon also reduced some rates and has offered discounts to subscribers who purchase a bundle of services to Verizon.

As an initial matter, Verizon must obtain approval from the Rhode Island PUC to increase its rates. The Rhode Island PUC granted Verizon pricing flexibility in 2006, based on its determination that "competition in the residential telephone market has developed in Rhode

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knowing that any competitive advantage deriving from those innovations will be dissipated by the sharing requirement."); *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, ¶ 76 (2005) ("*Omaha Forbearance Order*") (unbundling "reduc[es] the incentives to invest in facilities and innovation"); *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533, ¶ 36 (2005) ("unbundling can create disincentives for incumbent LECs and competitive LECs to deploy innovative services and facilities").

[27] *See* R.I. Pet'n at 17-20, 30-31; Virginia Beach Pet'n at 17-20; 31-32.

[28] *See* CLEC April 23 Letter at 8, 14-15; PAETEC et al. April 23 Letter at 10; CLEC April 27 Letter at 8-15.

[29] CLEC April 23 Letter at 8.

[30] *Id.* at 8 & n.39.

Island" and that such competition is "real, substantial, and fully functioning."[31] And the PUC did not revisit or question that prior determination when it approved Verizon's rate adjustments. Indeed, the fact that Verizon has lowered some rates while raising others is fully consistent with what is frequently found in competitive markets.

Although the CLECs attempt to characterize Verizon's discounts as targeted to "only narrowly defined subsets of its larger wireline customer base," the reality is that a substantial majority of customers purchase these bundles. For example, according to one recent study, only about 10 percent of all wireline customers purchase local service only, with 90 percent purchasing some combination of local, long distance and enhanced services.[32] Thus, Verizon's decision to offer bundled discounts does not prove the absence of significant wireline-to-wireless competition, but just the opposite.

With respect to business customers, the CLECs claim that "Verizon increased prices for retail business services in Rhode Island nearly twenty times" since September 2006.[33] Here, too, however, the CLECs acknowledge that Verizon has also introduced numerous "discounts and package deals" that reduce prices. Although the CLECs state that these discounts typically require term commitments, this is consistent with how most business customers purchase service and are consistent with behavior in a competitive market.

C. The Commission Should Reject Cavalier's UNE-Centric Arguments

Verizon has demonstrated that forbearance from unbundling regulation is in the public interest. As the Commission found in Omaha, the costs of the unbundling obligations that Verizon faces in the Virginia Beach MSA outweigh the benefits. *See Omaha Forbearance Order* ¶ 76. Given the extensive facilities-based competition that already exists both in Rhode Island and in Cox's service territory in the Virginia Beach MSA, and the potential for even greater facilities-based competition to emerge, any potential benefits from unbundling regulation are slim, while the costs of such regulatory intervention are significant. *See id.* ¶ 77. Forbearance will give both Verizon and other facilities-based competitors greater incentives to continue to invest in facilities, which will ensure the continued growth of long-lasting facilities-based competition. Eliminating unbundling regulation also will "further the public interest by increasing regulatory parity" between telecommunications providers in Rhode Island and the Virginia Beach MSA. *Id.* ¶ 78; *see id.* ¶ 49. Asymmetrical regulation imposes artificial price

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[31] *Verizon-Rhode Island's Successor Alternative Regulation Plan*, Report and Order, Docket No. 3692, at 37 (R.I. PUC Mar. 17, 2006), http://www.ripuc.org/utilityinfo/telecom/3692-VRI-Ord18550(3-17-06).pdf.

[32] Harold Ware, NERA, *Can Competition Regulate Rates for Basic Telephone Services?*, Presentation to International Telecommunications Society Conference, at 6 n.13 (June 2008).

[33] CLEC April 23 Letter at 13.

constraints that delay and impede full and fair competition among providers and harms consumers.[34]

Cavalier ignores all of this and urges the Commission to find that Cavalier's UNE-based business model is in the public interest.[35] Cavalier claims that it provides service to various customer groups that are typically unserved or underserved, and that is consistent with the American Recovery and Reinvestment Act of 2009 ("ARRA") to promote competition to such areas.[36] But given that Cavalier uses Verizon's *existing* facilities to serve Cavalier's customers, Cavalier has no argument that it is providing service to areas or customers that would not otherwise receive it. In any event, even after forbearance, Cavalier will still be able to serve customers using non-UNE wholesale alternatives that Verizon will offer, just as it has in other cases where unbundling requirements have been eliminated (*e.g.*, Wholesale Advantage replacing the UNE-Platform).

D. The Commission Should Reject QSI's Study

To further buttress their alarmist claims, the CLECs have submitted a study by QSI Consulting claiming that granting Verizon's forbearance petitions would cost consumers $73 million per year in Rhode Island and $138 million per year in Virginia Beach.[37] The QSI Study is rehashed from a near-identical report that the CLECs submitted two years ago in the Six-MSA proceeding, which the Commission gave no weight in that proceeding. The QSI study is a transparent attempt to claim consumer harm where none exists. QSI reaches its conclusions only by assuming away virtually all competition, including from cable and wireless. With respect to traditional CLECs, QSI ignores the fact that most competitive carriers do not use UNEs and, therefore, would not be impacted by forbearance from unbundling regulation.

<u>First</u>, QSI assumes away intermodal competition in concluding that competition is inadequate to protect consumers. QSI does not conduct any independent analysis of competition in Rhode Island or Virginia Beach, nor does it address any of the data that Verizon supplied. QSI instead argues with little or in most cases no support that such competition does not exist or is inadequate. As Verizon has demonstrated however, there is widespread facilities-based competition for both mass-market and enterprise customers both in Rhode Island and in Cox's service territory in the Virginia Beach MSA.

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[34] *See, e.g.*, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, ¶¶ 45, 71, 79 & n.241 (2005).

[35] *See* Cavalier April 22 Letter, Attach. at 3-4.

[36] Cavalier April 22 Letter, Attach. at 3.

[37] *See* QSI Study at 4-5, 25.

QSI argues (at 9) that "cable operators do not present an economically-viable alternative to Verizon's wholesale loop and transport network elements." But whether or not CLECs regard cable wholesale services as a viable alternative is not the core issue here. As the Commission has recognized, the real issue is instead whether there is sufficient *retail* competition to protect consumers, and wholesale competition is relevant only to the extent necessary (if at all) to facilitate retail competition. Where, as here, cable companies have deployed facilities to serve end-user customers, the Commission has found that competition from cable alone is sufficient to constrain retail prices and there is no need to consider whether cable or other types of competitors provide wholesale services to CLECs. *See Omaha Forbearance Order* ¶¶ 67, 71. Indeed, it is well established that firms who self-supply competitive facilities impose pricing discipline and must be included in the analysis regardless of whether they choose to offer their facilities on a wholesale basis.[38]

QSI also claims (at 10) that cable networks do not reach many business customers, and even if they do "the cable network is not necessarily constructed to reliably serve most business customers." But the evidence here proves otherwise. As noted above, the data that Cox has submitted here demonstrate that it provides widespread coverage to business customers using its own facilities. Cox's data also demonstrate that it is serving a very large number of business customers and lines, and providing each of the types of services that business customers demand.[39]

QSI next claims (at 9) that CLECs have deployed "limited" loop and transport facilities in Rhode Island and Cox's service territory in the Virginia Beach MSA. As Verizon has demonstrated, CLECs have in fact deployed extensive fiber networks both Rhode Island and in Cox's service territory in the Virginia Beach MSA, wherever appreciable demand for high-capacity services exists.[40] QSI is unable to rebut this showing, and is therefore left to argue (at 9) that "[t]o the extent CLECs have their own transport facilities, there are a number of problems that limit the viability of these CLEC facilities for use by other CLECs." But, as discussed above, whether or not CLECs regard wholesale services offered by other CLECs as a viable

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[38] *See, e.g., Iowa Utils. Bd.*, 525 U.S. at 389 (faulting the Commission for failing to consider carriers that self-provide facilities in evaluating competitive alternatives); U.S. Dep't of Justice & Federal Trade Comm'n, *Horizontal Merger Guidelines* § 1.31 (1992) (the relevant market begins with all firms that currently produce or sell in the relevant market, including "vertically integrated firms to the extent that such inclusion accurately reflects their competitive significance in the relevant market").

[39] *See* Letter from Jason Rademacher, Dow Lohnes PLLC (counsel to Cox Communications, Inc.), to Marlene Dortch, FCC, WC Docket No. 08-49, at 4 (Apr. 20, 2009) ("Cox Virginia Beach Data Submission"); Letter from J.G. Harrington, Dow Lohnes PLLC, to Marlene Dortch, FCC, WC Docket No. 08-24, at 4 (Apr. 21, 2009) ("Cox Rhode Island Data Submission").

[40] *See* R.I. Pet'n at 26-28; R.I. Lew/Wimsatt/Garzillo Decl. ¶¶ 46-52; Virginia Beach Pet'n at 26-28; Virginia Beach Lew/Wimsatt/Garzillo Decl. ¶¶ 47-53.

wholesale alternative is not the real issue. Rather, it is the scope of retail competition, which is substantial in the areas at issue here. In any event, as the Commission has recognized and as Verizon has shown, competing carriers can and do lease facilities from each other. *See, e.g.*, *Verizon/MCI Order*[41] ¶ 64. Thus, whatever supposed "problems" CLECs face in leasing facilities from each other, they do not pose a meaningful obstacle to competition.

QSI further argues (at 10) that "wireless services are not yet a viable wholesale alternative for either residential or business customers." But as discussed, whether wireless services offer CLECs a wholesale alternative is not the issue. What matters is whether these services offer end users a competitive alternative, and it is beyond serious question that they do. As Verizon has demonstrated, wireless services are being used extensively for voice services,[42] and are increasingly being used for data services.[43] In addition, fixed wireless services are now a viable alternative for high-capacity services, and fixed wireless providers are offering services on both a retail and wholesale basis.[44]

In sum, the central assumption of QSI's study – that competition would be insufficient to constrain prices after forbearance – is false. QSI makes no attempt to analyze the record in this proceeding, and it provides no data of it its own. Its less than two pages of largely unsupported assertions about competition is far too thin a read on which to base its exaggerated claims of consumer harm.

<u>Second</u>, QSI argues that after forbearance wholesale prices will rise from UNE levels to the commercial rates that Verizon charges. But eliminating UNEs where there is facilities-based competition will benefit consumers by promoting further competition and investment, as the Commission and the courts have found. QSI also argues that Verizon's commercial rates will increase following forbearance, but the source on which QSI relies – the GAO's special access report – shows the opposite, that deregulation has resulted in *lower* prices for special access.

QSI assumes that, if Verizon is granted forbearance, wholesale prices for loops and transport will rise to the levels that Verizon charges pursuant to tariffs and commercial

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

[42] *See* R.I. Pet'n at 12-13; R.I. Lew/Wimsatt/Garzillo Decl. ¶¶ 22-29; Virginia Beach Pet'n at 12-13; Virginia Beach Lew/Wimsatt/Garzillo Decl. ¶¶ 21-28; May 1, 2009 Ex Parte at 15-17.

[43] *See, e.g.*, S. Flannery et al., Morgan Stanley, *4Q Trend Tracker: Stable FCF Supports Sector* at 41 (Mar. 16, 2009) ("We believe we entered the early stages of wireless displacement of broadband (particularly DSL) with laptop cards, smartphone, tethering of 3G devices, etc."); J. Armstrong et al., Goldman Sachs, *'08 Outlook: Searching for Safety from Consumer Wireline Headwinds*, at 11 Exh. 8 (Jan. 9, 2008) (estimating wireless data subscriber growth).

[44] *See* R.I. Pet'n at 28-29; R.I. Lew/Wimsatt/Garzillo Decl. ¶ 56; Virginia Beach Pet'n at 28-30; Virginia Beach Lew/Wimsatt/Garzillo Decl. ¶¶ 54-58.

agreements. QSI then treats the difference between these two sets of rates as a "harm" to consumers. QSI's analysis is flawed in several respects.

As an initial matter, it is inappropriate to treat the difference in UNE and commercial rates as a consumer harm. Both the Commission and the courts have recognized that unbundling harms competition and that the costs of excessive unbundling to consumers outweigh any benefits. *See Omaha Forbearance Order* ¶ 76. As the Commission has explained, "excessive network unbundling requirements tend to undermine the incentives of both incumbent LECs and new entrants to invest in new facilities and deploy new technology." *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, ¶ 3 (2003). Similarly, the D.C. Circuit has recognized that mandated unbundling "imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities." *USTA I*, 290 F.3d at 427. Given the extensive facilities-based competition that already exists in Rhode Island and Cox's service territory in the Virginia Beach MSA, and the potential for even greater facilities-based competition to emerge, any potential benefits from unbundling regulation are slim, while the costs of such regulatory intervention are significant. *See Omaha Forbearance Order* ¶ 77. Forbearance will give both Verizon and other facilities-based competitors greater incentives to continue to invest in facilities, which will ensure the continued growth of long-lasting facilities-based competition.

There also is no merit to QSI's claim (at 11-12) that forbearance will enable Verizon to raise prices for special access services. QSI bases this assumption, first, on its claim that there is insufficient competition in the areas at issue to constrain Verizon's special access prices. As demonstrated above, however, this assumption is flawed and QSI ignores the extensive record of competition developed in these proceedings. Given that the rest of QSI's analysis stems from this flawed premise, it is unreliable and should be disregarded on that basis.

In any case, QSI also attempts to support its theory of wholesale price increases with the GAO's November 2006 report regarding special access.[45] According to QSI (at 12), "the GAO report is a clear and definitive demonstration that Verizon's requested relief from the TELRIC pricing requirements would generally translate into upward pressure on wholesale prices for network elements used by competing CLECs." In fact, the GAO report proves exactly the opposite – that special access prices have *decreased* in the wake of deregulation. As Verizon has explained in WC Docket No. 05-25, the *GAO Report* found that, between 2001 and 2005, consumers of special access services have paid *less* for DS1 and DS3 special access services in *all* areas (both Phase I and Phase II) since the advent of pricing flexibility. *See GAO Report* at 14, 27-28, 32. The *GAO Report* also found that customers in areas with complete pricing flexibility (*i.e.*, Phase II areas) are paying significantly *less* for high-capacity services than they

[45] *See* U.S. Gov't Accountability Office (GAO), *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, House of Representatives, GAO-07-80 (Nov. 2006) ("*GAO Report*").

were prior to the advent of pricing flexibility, and that prices in both Phase I and Phase II areas declined by *more than* would have been required by price caps alone. *See id.* at 32. Based on these findings, the GAO emphasized that it "does not call for the reregulation of dedicated access prices." *Id.* at 15, 44.[46]

Third, QSI argues (at 14) that a rise in wholesale prices will "induce retail price increases." QSI claims that "[i]n response to these wholesale price increases, CLECs may seek to flow through these cost increases to their end-user customers in order to maintain their levels of profitability." QSI further assumes (at 16) that as the CLECs increase their rates "Verizon will opt to increase its retail rates in tandem with other market participants." None of these claims withstands scrutiny.

QSI's theories about retail price increases are based on its view that UNE-based CLECs provide the most significant form of competition today, and that intermodal competition is irrelevant. But this is not the case for either mass-market or enterprise customers. More than two-thirds of the supposed price increases QSI predicts relate to mass-market voice, broadband, and video services, yet intermodal competitors – not traditional CLECs – are the major source of competition for these services. As Verizon demonstrated, and as the Commission has recognized, cable, wireless, and over-the-top VOIP services provide extensive competition to Verizon's voice services, while cable and increasingly wireless provide competition to Verizon's broadband services.[47] As Verizon's data show, consumers clearly prefer these intermodal alternatives to the resale-like competition that UNE-based CLECs provide; in both Rhode Island and Cox's service territory in the Virginia Beach MSA, cable and wireless have each captured far more mass-market customers for voice services than all CLECs *combined*, including those who rely on UNEs as well as the large number of customers who use resale or Verizon's Wholesale Advantage service.[48]

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[46] Ignoring these findings, QSI focuses on the GAO Report's statement that "in areas where FCC granted full pricing flexibility . . . list prices and average revenues tend to be higher than or the same as list prices and average revenues in areas still under some FCC price regulation." QSI at 10 (quoting GAO Report at 1). Verizon has previously explained that the correct focus is the prices customers actually pay, not rack rates.

[47] *See, e.g.*, Verizon*/MCI Order* ¶ 102 (concluding that for mass-market customers, "competition from intermodal competitors is growing quickly, and we expect it to become increasingly significant in the years to come."); *id.* ¶ 105 ("[W]e find that intermodal competitors, including facilities-based VoIP and mobile wireless providers, are likely to capture an increasing share of mass market local and long distance services.").

[48] *See* Declaration of Quintin Lew, John Wimsatt, and Patrick Garzillo Regarding Competition in Rhode Island Exh. 5, R.I. Pet'n Attach. E ("R.I. Lew/Wimsatt/Garzillo Decl."); Declaration of Quintin Lew, John Wimsatt, and Patrick Garzillo Regarding Competition in Cox's Service Territory in the Virginia Beach Metropolitan Statistical Area Exh. 5, Virginia Beach Pet'n Attach. C ("Virginia Beach Lew/Wimsatt/Garzillo Decl."); April 10, 2009 Ex Parte at Exhs. 5A.

QSI does not deny the existence of this intermodal competition, but argues (at 20) that it should not count, because "intermodal competition is not price constrained competition." This is wrong as a matter of economics, and it is empirically false. Intermodal forms of competition offer consumers different packages of price, quality, and functionality that provide more meaningful competition than service that merely duplicates an incumbent's offerings or shares a single network. As the Commission has recognized, only where competitors have "direct control of their networks" can they "ensure the quality of their service and . . . offer products and pricing packages that differentiate their services from the perspective of end users." [49]

With respect to enterprise customers, the Commission has found that "intermodal competition from cable telephony, mobile wireless service providers, and providers of certain VoIP services will likely continue to provide these customers with viable alternatives." *Verizon/MCI Order* ¶ 77 (referring to enterprise customers). As Verizon has demonstrated, cable operators and fixed wireless operators are investing heavily to serve enterprise customers. And even though this intermodal competition may not yet be as extensive as in the mass market, its trajectory is more than sufficient to constrain price. As QSI concedes (at 16-17), "the potential for . . . entry . . . creates downward pressure on retail telecommunications prices."

In addition to intermodal competition, enterprise customers face retail competition from a wide variety of other sources – such as traditional telecom carriers, managed service providers, systems integrators, and equipment vendors. As Verizon demonstrated, many competitors are using their own facilities to provide a large number of business lines throughout the areas at issue here.[50] The Commission reached these same conclusions in the *Verizon/MCI Order*, where it examined retail enterprise competition throughout Verizon's region. *See Verizon/MCI Order* ¶¶ 56-81.

As in the mass-market, the use of UNEs to serve enterprise customers does not account for the majority, or even a significant fraction, of the total competition. To the contrary, competition based on UNEs represents only a "minor portion of the competition" in the areas at issue. *Omaha Forbearance Order* ¶ 68. For example, Verizon demonstrated that, as of December 2007, competing carriers as a whole are purchasing **[Begin Confidential] [End Confidential]** percent of DS1s and **[Begin Confidential] [End Confidential]** percent of DS3s from Verizon as special access rather than UNEs in Rhode Island, and **[Begin Confidential] [End Confidential]** percent of DS1s and **[Begin Confidential] [End**

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[49] *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, ¶ 112 (1999); *see also Iowa Utils. Bd.*, 525 U.S. at 429 (Breyer, J., concurring in part and dissenting in part) ("It is in the *un*shared, not in the shared, portions of the enterprise that meaningful competition would likely emerge."); *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 510 n.27 (2002).

[50] *See* R.I. Pet'n at 20-29; R.I. Lew/Wimsatt/Garzillo Decl. ¶¶ 41-56; Virginia Beach Pet'n at 21-30; Virginia Beach Lew/Wimsatt/Garzillo Decl. ¶¶ 42-58.

Confidential] percent of DS3s, respectively, in Cox's service territory in the Virginia Beach MSA.[51] Moreover, just as this is true for competitors as a whole, the major competing carriers in each of these areas also are purchasing most (and typically the vast majority or all) of their DS1s and DS3s as special access rather than as UNEs.[52]

Finally, QSI fails to provide any supporting data for its calculations, and its study should be rejected on that basis alone; the limited information that QSI does provide indicates that its black-box approach is highly flawed. Although Verizon pointed out these errors at the time of QSI's 2007 study, QSI has repeated them verbatim here. The Commission should therefore conclude that QSI has no answer to these obvious flaws in its approach.

For one thing, QSI fails to provide one of the two key pieces of data it used to calculate its results – the number of homes and businesses it assumed were in Rhode Island and Cox's service territory in the Virginia Beach MSA and that would be subject to rate increases.[53] It is therefore impossible to replicate QSI's analysis and test its validity. QSI appears to have assumed that all customers in the MSAs would be subject to price increases, even though many households and businesses already are served by a competitive facilities-based provider and would not face price increases even under QSI's own theories.

For another thing, the second piece of QSI's calculation – the estimated annual increase in rates – is riddled with flaws and relies on data that are incomplete, inconsistent, and wrong. With respect to business customers, QSI claims (at 23) that it "collected Verizon's current UNE and special access recurring rates for key network elements, *i.e.*, local loops and transport" and then "calculated the difference between UNE-based and special-access based rates for various network element combinations under which end-user markets in the study are typically served." On pages 13-14, QSI purports to provide the difference between the UNE and special access prices for DS1 loops, DS1 transport, and DS3 transport. On page 26, QSI provides the "increase

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[51] *See* Reply Declaration of Patrick Garzillo, Exh. 2 ("R.I. Garzillo Reply Decl.") (excluding Verizon affiliates, former MCI, and unknown), *attached to* R.I. Reply; Reply Declaration of Patrick Garzillo, Exh. 2 ("Virginia Beach Garzillo Reply Decl.") (excluding Verizon affiliates, former MCI, and unknown), *attached to* Virginia Beach Reply.

[52] *See* R.I. Garzillo Reply Decl. Exh. 2; Virginia Beach Garzillo Reply Decl. Exh. 2.

[53] QSI claims (at 22-23 n.54) that it "derived the volume information" for mass-market voice, enterprise, and broadband "by pooling various data sources, including the ILEC and CLEC line count data from the FCC's most recent Local Competition Report, ARMIS 43-08 Reports, the FCC Report High-Speed Services for Internet Access, the FCC most recent Annual Report on video competition, publicly-available wire center line count data from the FCC's high-cost fund support calculations, MSA-level population and household counts from the Census Bureau, county-level population and personal income data from the Regional Economic Information System of the Bureau of Economic Analysis, and cable penetration data from the National Cable and Telecommunications Association."

in total annual business retail expenditures," which presumably is supposed to be the difference in these monthly rates times twelve months. But the totals QSI provides on page 26 do not match that calculation, and QSI provides no other explanation as to how these totals were derived. Moreover, in calculating the difference between special access and TELRIC rates, QSI relies on special access rates that are highly inflated, thereby exaggerating the gap that is the basis for its estimate. QSI does not rely on the special access rates that customers actually pay, or even the lowest rates that are available, but instead (at 12 n.31) uses "month-to-month" rack rates on the grounds that "they present a closer substitute to UNEs (for which no term discounts apply) than term rates." As Verizon has demonstrated, and as numerous independent studies have recognized, Verizon offers substantial discounts – of up to 65 percent or more – from its rack rates, and these are the appropriate rates to compare since they are what consumers generally pay.

QSI's explanation as to how it derived its totals for residential customers is equally flawed. QSI states (at 23-24) that it "reasonably assumes that the price increases in retail markets will be smaller than the price increases in the wholesale market, and will be accompanied by decreases in demand." Given that QSI does not provide its estimate of wholesale rate increases, or any information or explanation about demand, this statement is meaningless. Moreover, QSI's analysis with respect to mass-market voice and broadband services is based on the price difference between a UNE loop and a two-wire analog loop purchased as special access. But special access is not a mass-market service, and there is no basis to assume that Verizon's commercial price for mass-market loops would be the same as the special access price. The loops provided to business customers typically have additional features – and added costs – compared to those provided to mass-market customers.

QSI also seeks to inflate its unsupported estimates of consumer harm by including "residential video" services in its analysis (something that it did not include in its 2007 report). But none of the relief that Verizon seeks here would affect competition for video services, which is dominated by cable and satellite providers. QSI never explains (much less demonstrates) how forbearance from unbundling of Verizon's facilities will affect video competition – particularly in light of Verizon's FiOS service, which has introduced a strong new facilities-based competitor into the video marketplace. QSI asserts (at 23) that "CLECs such as Cavalier in Virginia are now offering video services over copper loops," but there is no evidence to suggest that those low-bandwidth video offerings compete with the broadband video services that most consumers purchase, no evidence that any CLEC other than Cavalier provides such low-demand video services, and no evidence of any CLEC providing such services in Rhode Island. In fact, it is not even clear that Cavalier is still pursuing such video services anywhere; on March 16, 2009, Cavalier issued a press release announcing that it would be reselling DirecTV service.[54] In any case, QSI's explanation of how it "calculate[d] the increase in retail video prices stemming from the elimination of CLECs in video competition" is likewise flawed. It states (at 24) only that it

[54] Cavalier Telephone Press Release, *Cavalier Teams Up with DIRECTV To Beat Cable with More Competitive Service Bundles* (Mar. 16, 2009), http://www.cavtel.com/press/cavalier-teams-up-with-directv-to-beat-cable-with-more-competitive-service-bundles/.

uses “FCC’s estimates of cable price elasticity to market concentration.” This statement is not only impermissibly vague, but also cites to a FCC study that calculated the effect on cable prices from competition by *facilities-based* overbuilders such as Verizon FiOS, not CLECs who rely on unbundled loops.

Sincerely,

/s/

Rashann Duvall

cc:	Acting Chairman Copps	Commissioner Adelstein	Commissioner McDowell
	Scott Deutchman	Mark Stone	Nick Alexander
	Mark Stone	Julie Veach	Randy Clarke
	Marcus Maher	Tim Stelzig	Don Stockdale

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