Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matters of	
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	WC Docket No. 06-172
Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas	WC Docket No. 07-97

REPLY COMMENTS OF VERIZON

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TABLE OF CONTENTS

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INTRODUCTION AND SUMMARY

Verizon demonstrated in its comments that the Commission on remand should identify the process — as well as the clear standards and binding timelines for that process — that carriers may use to modify unbundling requirements in specific areas to conform to current competitive conditions and the impairment standard. Despite extraordinary competitive developments — including the rapid expansion of intermodal competition from cable, mobile and fixed wireless, and IP-based providers — only traditional telephone carrier incumbents, among many competing providers, are subject to unbundling requirements. The Commission must have *some* process to conform unbundling obligations to the changed conditions in the market and to the statutory unbundling standard.

[1] The Verizon companies participating in this filing ("Verizon") are the regulated, wholly owned subsidiaries of Verizon Communications Inc.

Although the fact that incumbents such as Verizon have lost half or more of their mass-market lines in many areas is a sufficient basis, standing alone, to eliminate unbundling requirements in those areas, the Commission cannot, consistent with the statute, automatically retain unbundling in areas where such an extreme market-share test is not met. Indeed, even in areas where incumbents have not yet lost half of their mass-market lines, competing providers offer service on a widespread basis and the incumbents often face annual line losses near or in double-digits. Regardless of the procedure the Commission uses, it must consider both the availability of existing competitive alternatives and the potential of new competitive alternatives, not merely backward-looking measures of market losses. Consistent precedent from the Supreme Court, the D.C. Circuit, and the Commission compels that conclusion.

Therefore, the Commission should reject suggestions from some commenters that it ignore some competitive alternatives that use non-wireline technologies to offer competing services. In particular, there is clear evidence that increasing numbers of consumers are abandoning their wired service to rely exclusively on mobile wireless alternatives. There is simply no support for commenters' suggestions that the Commission's competitive analysis should exclude this significant source of competition.

Some commenters, in a transparent attempt to ensure perpetual unbundling, urge the Commission to adopt tests for the elimination of UNE requirements that would complicate the Commission's task unnecessarily and require unbundling to be maintained long after its market-opening purposes definitively have been served. Such comments ignore the fact that Congress intended unbundling to be limited and transitional, not boundless and indefinite. The Commission should reject these proposed standards, none of which finds any support in the forbearance or impairment provisions, or in judicial or Commission precedent.

These commenters, moreover, base their contentions in large part on the assertion that the Commission's decision to grant forbearance in Omaha was in error and, indeed, unlawful. But the D.C. Circuit *upheld* the *Omaha Order*[2] and, in so doing, rejected many of the contentions pressed here. Accordingly, arguments that the Commission must change course because that order was somehow irrational or unlawful are meritless.

DISCUSSION

I. THE COMMISSION SHOULD SPECIFY THE PROCESS IT INTENDS TO USE TO CONFORM UNBUNDLING REQUIREMENTS TO CHANGED MARKET CONDITIONS AND THE STATUTORY UNBUNDLING STANDARD

A. As Verizon demonstrated in its comments, the Commission's *Order on Remand* should identify the process the Commission will use — as well as the standards and binding timelines it will apply — to conform its unbundling regulations to changing marketplace realities and the impairment standard. *See* Verizon Comments at 3-17. The Commission needs a mechanism to adapt its UNE rules to current competitive conditions. The communications marketplace for both mass-market and enterprise customers has changed dramatically since late 2004, when the Commission closed the record in its last unbundling proceeding. Intermodal competition from cable, wireless, and IP-based providers has expanded rapidly, and incumbent carriers such as Verizon have lost half or more of their mass-market lines in many areas and continue to experience losses in other areas at a high single- or double-digit annual rate. Despite those fundamental developments, the Commission's unbundling rules have remained unaltered

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

since early 2005, except in the 15 wire centers where the Commission has granted forbearance. *See* Verizon Comments at 4-13.

The process, standards, and timelines the Commission establishes to conform its unbundling rules to current marketplace realities and the statutory impairment standard should be consistent with the Commission's long-standing recognition that UNE requirements should be "lifted as soon as competition eliminates the need for them." *Local Competition Order*[3] ¶ 6; *see id.* ¶¶ 246, 248. Regardless of whether that process utilizes forbearance petitions — as the Commission stated it would in the *Triennial Review Remand Order*[4] — or some other procedural mechanism, the Commission must have *some* process to update its nearly five-year-old UNE regulations in response to changing competitive circumstances and to conform to the impairment standard. The Commission, therefore, should identify clearly the process it will follow and the standards and binding timelines it will employ for making a decision. Carriers can then apply for the elimination of UNE requirements where those standards are satisfied. *See* Verizon Comments at 13-17.

Several commenters urge the Commission not to reopen the record in responding to the D.C. Circuit's remand. *See, e.g.*, Broadview Networks, Inc. et al. Comments at 36-38 (remand decision should be based on record at time of original denial); CBeyond et al. Comments at 32-35 (same). These commenters' desire to keep the Commission in the dark regarding the current state of competition in these Metropolitan Statistical Areas ("MSAs") — which, as Verizon has

[3] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*") (subsequent history omitted).

[4] Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533 (2005) ("*Triennial Review Remand Order*" or "*TRRO*"), *petitions for review denied*, *Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

explained, only strengthens its original showing that the forbearance criteria are satisfied, *see* Verizon Comments at 4-11 — is telling. But the important point, for present purposes, is that the Commission should use the remand to articulate clearly the process it will employ, and the standards and timelines it will follow, in adapting its UNE requirements to conform to current and developing competitive conditions and the impairment standard.

B. Many of the commenters, however, proceed from the view that the elimination of the UNE obligations the Commission imposed in the *Triennial Review Remand Order*, whether through forbearance or otherwise, never has been (and never will be) warranted. Indeed, most competitors assert that the Commission was wrong to forbear in the *Omaha Order*. *See, e.g.*, Comptel Comments at 4; Cavalier Comments at 5. But neither Congress nor the Commission ever intended unbundling to be permanent. To the contrary, Congress's purpose in enacting 47 U.S.C. § 251 was to establish a transitional mechanism to promote the development of facilities-based competition. *See USTA v. FCC*, 359 F.3d 554, 576 (D.C. Cir. 2004) ("*USTA II*") ("[T]he purpose of the Act is not to provide the widest possible unbundling, or to guarantee competitors access to ILEC network elements at the lowest price that government may lawfully mandate. Rather, its purpose is to stimulate competition — preferably genuine, facilities-based competition."). As the Commission has recognized repeatedly, once competitors are capable of deploying their own facilities and using them to compete without UNEs, unbundling should end. Starting with its first order promulgating unbundling regulations, the Commission explained that it would review unbundling mandates "*proactively*" so that "regulatory burdens are lifted *as soon as* competition eliminates the need for them." *Local Competition Order* ¶ 6 (emphases added). And, in its last order promulgating UNE rules, the Commission "*encourage[d]*" incumbents "to seek forbearance from the application of" unbundling regulations in geographic areas based on competitive developments in those areas. *TRRO* ¶ 39 (emphasis added).

In addition, claims that the *Omaha Order* was erroneous or unlawful cannot be sustained in light of the D.C. Circuit's decision upholding that order. In denying competitors' petitions for review of the *Omaha Order*, the D.C. Circuit rejected many of the same arguments commenters repeat here. *See Qwest Corp. v. FCC*, 482 F.3d 471, 479-80 (D.C. Cir. 2007). For example, there, as here, competitors complained that the Commission's reliance on competition from Cox, the incumbent cable provider, was insufficient to justify forbearance. *See id.* at 479. But the court properly saw "nothing unreasonable" in the Commission's decision to grant forbearance based on Cox's extensive facilities and substantial residential market share, along with the fact that Cox "was 'actively marketing' itself to enterprise customers." *Id.* And there, as here, competitors asserted that the Commission should ignore competition from CLECs using resold services or services leased from Qwest either under 47 U.S.C. § 271 or through voluntary agreements (i.e., "commercial product[s] designed to replace UNE-P . . . even in the absence of a legal mandate to do so," *Omaha Order* ¶ 82). *See Qwest*, 482 F.3d at 480. Rejecting that contention, the D.C. Circuit explained that the Commission had sensibly found "the combination of tariffed ILEC facilities and facilities-based competition adequate to assure competition even if it partially relaxed Qwest's obligations in the Omaha market." *Id.* Nothing in the D.C. Circuit's decision in *Verizon Telephone Cos. v. FCC*, 570 F.3d 294 (D.C. Cir. 2009), purports to disturb those conclusions. In light of the D.C. Circuit's decision upholding the *Omaha Order*, therefore, arguments that the Commission must reverse course from the *Omaha Order* on the ground that the order was unlawful or erroneous in the first place are meritless.

Nor is it correct to assert, as many commenters do,[5] that the Commission's *Omaha Order* has been undermined by the failure of predictive judgments made in that order. The Commission's key prediction in the *Omaha Order* was that Cox would continue to compete aggressively for business customers using its extensive facilities originally deployed to serve the mass market. *See Omaha Order* ¶ 66 (concluding, based on a number of factors, that "Cox pose[d] a substantial competitive threat to Qwest" in the enterprise market); *Qwest*, 482 F.3d at 479 (concluding that the Commission reasonably "forecast[ed] an increase in competition" in the enterprise market based on those factors). Even with the benefit of hindsight, the commenters offer no basis for claims that that prediction did not come true. On the contrary, as Verizon has previously shown[6] and as at least one competitor here admits, "it is true that Cox has continued to extend its network facilities to more business locations in the Omaha MSA." PAETEC Comments at 23. In other words, competition from Cox for enterprise and mass-market customers has developed in precisely the way the Commission predicted it would. And, as Verizon has shown, the same is true of the cable companies operating in the six MSAs where Verizon sought forbearance. *See* Verizon Comments at 4-6, 8-9.

Further, competitors' complaints about the situation in Omaha focus on *wholesale* sales, whereas relevant inquiry is into competitive conditions in providing service to *retail* customers. In the UNE forbearance context, the Commission must consider whether rates for "local services" (*Verizon*, 570 F.3d at 300) — that is, *retail* rates — will remain just and reasonable and

[5] *See* Comptel Comments at 5-11; Broadview Networks, Inc. et al. Comments at 13, 16-17; Cavalier Comments at 5; CBeyond et al. Comments at 9, 24; PAETEC Comments at 9-10; NASUCA Comments at 5-6; Massachusetts Comments at 12; Arizona Corp. Comm'n Comments at 7.

[6] Reply Comments of Verizon in Opposition to Petition for Modification at 4-5, *Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223 (filed Sept. 13, 2007).

whether "consumers" (47 U.S.C. § 160(a)) — not competitors — will be protected without unbundling mandates. The impairment standard similarly is designed to provide the benefits of facilities-based competition to consumers, not to guarantee cheap sources of wholesale supply to support the business plans of individual competitors. *See USTA II*, 359 F.3d at 580. Assertions about difficulties facing one or two CLECs in Omaha do not establish that retail consumers have been harmed.

Moreover, although allegations like those made here regarding Qwest's post-forbearance wholesale offerings in Omaha have been raised for years, the Commission has never found them to have merit, and Qwest has repeatedly rebutted them.[7] In all events, the claims largely reduce to the assertion that Qwest's post-forbearance wholesale rates are higher than TELRIC.[8] Given that TELRIC rates are nearly "confiscat[ory]," *Verizon v. FCC*, 535 U.S. 467, 489 (2002), however, no one should be surprised that market rates are higher. Indeed, in the § 271 context, the Commission and courts have rejected the claim that market rates that are higher than TELRIC are not just and reasonable. *See, e.g.*, *Verizon New England, Inc. v. Maine Pub. Utils. Comm'n*, 509 F.3d 1, 9 (citing *UNE Remand Order*[9] ¶ 473), *reh'g denied*, 509 F.3d 13 (1st Cir. 2007).

[7] *See*, *e.g.*, Letter from R. Steven Davis, Qwest, to Marlene Dortch, FCC, WC Docket No. 07-97 (June 19, 2008); Opposition of Qwest Corp., *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. Section 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223 (filed Aug. 29, 2007).

[8] *See* Petition for Modification of McLeodUSA Telecommunications Services, Inc., *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. Section 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223 (filed July 23, 2007).

[9] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*") (subsequent history omitted).

Finally, the CLEC that supposedly cancelled its plans to offer service in Omaha after the Commission granted forbearance from UNE obligations in nine wire centers in Omaha candidly admitted that its plan to offer service in Omaha had been "based upon an expectation that [it] would be able to obtain unbundled network element loops and transport from Qwest *at TELRIC rates*."[10] A carrier that bases its business plan on the ability to lease elements of an incumbent's network at prices that are so low that they "fall well below the costs" the incumbent "actually historically incurred in constructing the elements," *USTA II*, 359 F.3d at 562, is bound to be disappointed when the incumbent's obligation to provide elements at those artificially low prices is eliminated. But that does not indicate that unbundling must be retained to protect consumers where, as here, there is robust intermodal competition to provide service to those customers.

II. IN DETERMINING WHETHER TO ELIMINATE UNBUNDLING REQUIREMENTS, THE COMMISSION SHOULD CONSIDER ALL AVAILABLE COMPETITIVE ALTERNATIVES AS WELL AS POTENTIAL COMPETITION

As Verizon has demonstrated, regardless of whether the Commission is applying the forbearance criteria or the impairment standard, it must consider all competitive alternatives — both intermodal and intramodal — in a forward-looking analysis that takes account of the availability of those alternatives, as well as the potential for new competitive alternatives. *See* Verizon Comments at 18-27. Binding judicial authority interpreting the impairment standard of the Telecommunications Act of 1996 ("1996 Act") compels that conclusion. *See id.* at 18, 23-24. The D.C. Circuit has held that competitors are not impaired when "competition is possible" without UNEs, *USTA II*, 359 F.3d at 575, that the Commission must consider the "potential for

[10] Comments of Integra Telecom, Inc. at iii, *Verizon Petitions for Forbearance in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas*, WC Docket No. 06-172 (filed Mar. 5, 2007) (emphasis added); *see also* Comptel Comments at 6 (acknowledging this fact).

competition" before requiring unbundling, *Covad Communications Co. v. FCC*, 450 F.3d 528, 541-42 (D.C. Cir. 2006), and that the "Commission cannot ignore intermodal alternatives" in assessing impairment, *USTA II*, 359 F.3d at 572-73; *see USTA v. FCC*, 290 F.3d 415, 429 (D.C. Cir. 2002) ("*USTA I*"). The Commission similarly has concluded in a variety of contexts that, in a dynamic market with emerging intermodal competitors, the Commission must perform a forward-looking assessment of competitive conditions that accounts for the availability of competitive alternatives and the potential for new competitive alternatives, rather than relying "exclusively . . . [on] snapshot data that may quickly and predictably be rendered obsolete as th[e] market continues to evolve."[11] *See* Verizon Comments at 20-22; AT&T Comments at 6-13.

Thus, although backward-looking market share evidence that competitors now serve more mass-market lines than incumbents in many areas will provide the Commission with a dispositive basis to eliminate unbundling obligations, the Commission cannot retain UNE obligations whenever such an extreme market-share test is not satisfied. Instead, in applying either the forbearance criteria or the impairment standard, the Commission must consider all intramodal and intermodal competitors, and must consider not only for existing market shares, but also the availability of competitive alternatives to customers who have not yet switched from the incumbent, as well as the potential for new competitive marketplace entrants employing novel technologies and platforms.

However, in a transparent effort to perpetuate unbundling indefinitely, competitors propose a variety of standards, many of which would require the Commission to find not only

[11] *E.g.*, Report and Order and Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853, ¶ 50 (2005) ("*Wireline Broadband Order*"), *petition for review denied*, *Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007).

that the incumbent has lost half or more of its mass-market lines in a given area but also that multiple wireline competitors are offering wholesale services in that area.[12] Such standards find no support in either the forbearance statute or the impairment standard, or in precedent or common sense. As explained below, the various approaches other commenters advocate are fatally flawed and should be rejected.

A. The Commission Must Employ a Forward-Looking Analysis that Considers the Availability of Competitive Alternatives and Potential New Competitive Alternatives

Several commenters assert that the Commission should focus primarily or exclusively on backward-looking measures of market share and should downplay or ignore the availability of competitive alternatives and potential new competitive alternatives — what the D.C. Circuit called "potential competition," *Verizon*, 570 F.3d at 305 — in determining whether to eliminate UNE obligations. *See* Comptel Comments at 14 ("The Commission's projections of 'potential competition' should not factor into the forbearance analysis at all."); CBeyond et al. Comments at 20-26; PAETEC Comments at 33-36; Sprint Comments at 5; Massachusetts Comments at 20-21; NASUCA Comments at 4-6; *see also* Arizona Corp. Comm'n Comments at 6-7.

But the commenters who urge the Commission to limit its analysis to backward-looking measures of market share do not dispute that the communications industry is dynamic and rapidly changing. *See* Verizon Comments at 4-11. They also fail to offer any rational basis for the Commission to deviate from its long line of precedent in a variety of contexts — precedent supported by leading antitrust authorities — establishing that a proper analysis of competition is not limited to a backward calculation of actual competitive success to date, but also includes a

[12] Such proposed standards are also flawed in focusing on *wholesale* competitors. As noted above, both the forbearance standard and the impairment analysis focus on competition for retail consumers, not the number of providers offering wholesale service.

forward-looking analysis of marketplace trends, including the availability of competitive alternatives and the potential for new competitive alternatives to enter the marketplace. *See*, *e.g.*, *Wireline Broadband Order* ¶ 50 (competition "is more appropriately analyzed in view of larger trends in the marketplace, rather than exclusively through the snapshot data that may quickly and predictably be rendered obsolete as th[e] market continues to evolve"); *Verizon-MCI Merger Order*[13] ¶ 74 (market-share analysis "may misstate the competitive significance of existing firms and new entrants"); Verizon Comments at 20-23; AT&T Comments at 6-13. Here, those marketplace trends all show ever greater availability and penetration by existing and new non-UNE competitors, even in areas where incumbents have not yet lost half or more of their mass-market lines. *See* Verizon Comments at 4-11.

Nor do the competitors attempt to reconcile their proposal for an analysis that considers only backward-looking measures of market share with the impairment standard or the court and Commission decisions interpreting that standard. As the D.C. Circuit has repeatedly held, the impairment standard requires the Commission to consider the "potential for competition" before requiring unbundling. *Covad*, 450 F.3d at 541-42. That flows directly from the statute's language, which allows the Commission to impose unbundling only where its absence "would impair the *ability*" of a competitor to compete. 47 U.S.C. § 251(d)(2)(B) (emphasis added). Where competition is "*possible*" without UNEs, *USTA II*, 359 F.3d at 575 (emphasis added); *accord Covad*, 450 F.3d at 540, the Commission cannot ignore the potential for competition —

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

both from existing available alternatives that are rapidly increasing their market share and from newly entering competitive alternatives — in requiring unbundling.[14]

B. The Commission Must Consider All Intermodal Competitors

Several commenters assert that the Commission should ignore intermodal competition and retain unbundling unless there are multiple "wireline" competitors offering wholesale services in a particular area.[15] But both forbearance and impairment are about "competition" and "consumers." 47 U.S.C. § 160(a)-(b); *see Verizon*, 570 F.3d at 300. Neither is about ensuring that certain competitors that elected to build a UNE-based business plan have enduring sources of wholesale supply at artificially low rates. As the Seventh Circuit put it, the purpose of unbundling is "to *enable* carriers . . . to compete," not "to enable them to take an almost free ride on services that [an incumbent] has spent a lot of money to create." *Illinois Bell Tel. Co. v. Box*, 548 F.3d 607, 611 (7th Cir. 2008) (Posner, J.) (emphasis added); *see also USTA II*, 359 F.3d at 580 (in light of intermodal competition, elimination of broadband unbundling appropriate "even if CLECs proved unable to compete" without it). Thus, when the requirements of the forbearance statute are satisfied or the impairment standard is not met, there is no basis for continuing unbundling in the hope that it will produce another facilities-based wireline competitor willing to lease its network to competitors at low rates (and in the face of evidence that unbundling at TELRIC rates discourages investment in basic wireline infrastructure, *see*

[14] Although the D.C. Circuit indicated that "it may be reasonable in certain instances" for the Commission to focus on a lack of actual competition to date, *Verizon*, 570 F.3d at 304, it did not suggest that the Commission could ignore the availability of competitive alternatives and potential new competitive alternatives as a matter of course.

[15] *See* PAETEC Comments at 6-7, 29-32; Broadview Networks, Inc. et al. Comments at 14-21; CBeyond et al. Comments at 18, 27-30; Comptel Comments at 17, 20.

TRRO ¶ 220 (crediting evidence that, while switching was available as a UNE, CLECs' investment in facilities declined by 56 percent)).

1. *There Is No Risk of Anticompetitive Duopoly*

Eliminating unbundling based on competition from cable — as was done in the *Omaha Order* and upheld by the D.C. Circuit — does not result in an anticompetitive "duopoly," as some claim. *E.g.*, PAETEC Comments at 12-19. As an initial matter, the duopoly claim ignores significant competitors other than incumbent telephone and cable companies. Mass-market consumers in the areas at issue here are increasingly adopting services provided by mobile wireless carriers and IP-based service providers. *See* Verizon Comments at 6-8.[16] In the enterprise segment, ILECs and cable companies face competition from intermodal competitors such as fixed wireless providers as well as fiber-based competitors, along with other competitors aggregating incumbents' special access services (for which prices have been declining) with other facilities. *See id.* at 9-11. The communications marketplace therefore is not a duopoly and would not become one, even after the elimination of existing unbundling requirements.

Even setting aside the mobile wireless providers and other competitors providing voice services in these areas, the telecommunications industry is not the kind of industry in which a cozy duopoly can develop to the detriment of consumers. When an incumbent (or cable provider) loses a customer, it loses the revenue associated with that customer but retains most of the costs, because its costs are largely the fixed costs associated with its network.[17] That gives

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[16] The numerous popular and emerging IP-based services do not require purchase of ILEC broadband service; for example, over-the-top Voice-over-Internet Protocol ("VoIP") service from providers such as Vonage and Skype can be used with cable modem service and other non-ILEC broadband services, and Clearwire offers voice and Internet bundles over its 4G WiMAX network. *See* Verizon Comments at 7-8.

[17] *See* Qwest Comments at 17-18; Howard A. Shelanski, *Adjusting Regulation to Competition: Toward a New Model For U.S. Telecommunications Policy*, 24 Yale J. Reg. 55,

each provider a significant incentive to win that customer back, rather than to carve up the market with another company.[18] And actual experience confirms that conclusion, as Verizon and the cable companies operating in its areas have competed fiercely in recent years, racing to deploy new and better services (such as FiOS, cable VoIP, and faster broadband services) at competitive rates. As a consequence, prices for voice, data, and video bundles have steadily declined, while entry-level download speeds for data services have doubled or tripled.[19] In addition, when mobile wireless and other IP-based competitors are considered, any supposed risk of an anticompetitive duopoly is further dispelled, because "[a] high ratio of fixed to marginal costs makes even partial substitutes potent motivators of competitive behavior."[20]

Further, the fact that incumbents and cable providers are *inter*modal competitors makes anticompetitive coordination even less likely. As the D.C. Circuit has recognized, "'[t]he facts that different companies are using different technologies to bring broadband to residential consumers and that each existing broadband technology has advantages and disadvantages as a means of delivery to millions of customers opens the possibility of intermodal competition, like that between trucks, trains, and planes in transportation. . . . Anti-competitive coordination

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89-93 (2007) ("Shelanski") (explaining that "telecommunications networks involve large, fixed costs and low marginal costs of adding new subscribers" and that "firms with high fixed costs and low marginal costs suffer greater economic harm from losing a customer than do other kinds of firms, because they cannot reduce their costs in proportion to their loss of revenue").

[18] *See* Shelanski at 93 ("The fact that telecommunications networks are high capacity and have low marginal costs of adding consumers raise[s] the probability that providers will compete through prices rather than restrain supply in an effort to keep prices high.").

[19] *Compare* David W. 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), *with* David W. Barden et al., Bank of America/Merrill Lynch, *Battle for the Bundle: Cable Chips Away at Bell Pricing Gap* at 17, Table 12 (July 15, 2009) (2Q09 entry-level triple-play pricing averages $88.91 for telcos and $108.61 for cable — a decline of 22 percent for telcos and 12 percent for cable).

[20] Shelanski at 93; *see* Qwest Comments at 18 & n.37.

among competitors is difficult in such markets.'" *EarthLink, Inc. v. FCC*, 462 F.3d 1, 11-12 (D.C. Cir. 2006) (quoting Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, 14 FCC Rcd 2398, 2423-24 (1999)) (ellipsis in original).[21] The Department of Justice has similarly recognized the competitive benefits of intermodal competitors, which "can differentiate their products" and compete on available service features, where "enough consumers find the products sufficiently substitutable."[22]

2. *The Commission Cannot Ignore Competition from Mobile Wireless Providers*

Some commenters assert that the Commission should ignore competition from mobile wireless carriers entirely, on the theory that mobile wireless is not a sufficiently close substitute for wireline telephone service. *E.g.*, Cavalier Comments at 5-6. That argument is unfounded. The Commission has already found that mobile wireless service and wireline telephone service are substitutes for at least the significant (and growing) group of customers who have already cut the cord.[23] Other industry observers similarly have recognized this evident fact.[24] Further, the

[21] *See also* U.S. Dep't of Justice and FTC, *Horizontal Merger Guidelines* § 2.11 (rev. 1997) ("coordination may be limited or impeded by product heterogeneity").

[22] U.S. Dep't of Justince, *Voice, Video and Broadband: The Changing Competitive Landscape and Its Impact on Consumers* at 34 (Nov. 2008), *available at* http://www.usdoj.gov/atr/public/reports.239284.pdf.

[23] *See, e.g.*, Memorandum Opinion and Order, *Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, 23 FCC Rcd 11729, ¶¶ 19-20 (2008) ("*Qwest Four MSA Order*").

[24] *See, e.g.*, Jessica R. Cohen & David W. Barden, Bank of America/Merrill Lynch, *Battle For The Bundle: The Internet Goes Negative* at 11 (Aug. 19. 2009) ("As the economy weakens, we believe wireless substitution is increasing because, unlike broadband or pay TV, *fixed line voice is almost perfectly substitutable by wireless*; there is little perceived sacrifice for many consumers when they give up their landline.") (emphasis added); Simon Flannery et al., Morgan Stanley, *Telecom Services — 2Q09 Preview: Strong Cash Flow Likely as Top-line Pressures Persist* at 15 (July 20, 2009) ("*Wireless substitution* and cable telephony (VoIP) also

commenters who advocate ignoring wireless identify no "evidence tending to show [that any] inframarginal customers" who do not view wireline and wireless as substitutes "are numerous enough" to prevent wireless services from constraining retail prices for mass-market services. *Comcast Corp. v. FCC*, 579 F.3d 1, 7 (D.C. Cir. 2009); *see* Qwest Comments at 16-18 (explaining that customers who do view wireless as a substitute constrain incumbents' pricing for wireline voice services).

The competitors' submissions provide no basis for the Commission to depart from its precedent and ignore wireless in the competitive analysis. Although competitors assert that incumbents should have the burden of performing a rigorous econometric analysis showing the cross-elasticity of demand between wireless and wireline, given the Commission's prior findings and the extensive records on which those findings were based, it is the *competitors* that must demonstrate that the Commission's prior findings are wrong. As explained below, the sources competitors cite provide no basis to exclude wireless *entirely* from the competitive analysis, as competitors seek to do.

As an initial matter, however, competitors ignore one recent study that is directly contrary to their claims. In December 2008, Dr. William Taylor and Dr. Harold Ware released a report, which is attached, finding that "data on price trends and substitution of wireless for landline services show that mobile services currently represent an effective competitive

continue to fuel line loss across the industry.") (emphasis added); Simon Flannery et al., Morgan Stanley, *Telecom Services — 2Q Trend Tracker: Attractive Valuations & Share Shifts Favor the Bells* at 77 (Aug. 31, 2009) ("The US Bells continue to experience higher line loss due to heavier competition and *wireless substitution*.") (emphasis added); Thomas O. Seitz & Patrick B. Rien, Barclays Capital, *Telecom Services — Wireline* at 1 (Feb. 2, 2009) ("It is widely understood that the traditional voice wireline business is being pressured by alternative technologies (*wireless*, VoIP) and that this trend is likely being exacerbated by the weak economy.") (emphasis added).

constraint on landline access pricing." *Taylor/Ware Report*[25] at 1. The study found that "changes in price and demand from 2001 to 2007 imply that wireless is a substitute for wireline service rather than a complement" and that, during this time, the "price of wireless service relative to wireline service declined by about 12%." *Id.* at 5. The study further calculated the "cross-price elasticity" between wireless and wireline, which it found to be "about 1.4" — a figure that "strongly suggests that wireless is a good substitute for landline." *Id.* The study further analyzed the competitive impact of wireless as compared to cable and found that wireless "is at least as potent of a competitor as cable telephone service." *Id.*

To support the claim that wireless should be ignored, Cavalier relies on a declaration from Dr. Michael Pelcovits, but the declaration fails to provide any support for excluding wireless from the competitive analysis. Dr. Pelcovits relies primarily on "porting activity" to justify his conclusion that there is "little diversion from wireline to wireless." Pelcovits Decl. at 10. He states that "27,000 numbers have been ported between wireline and wireless carriers in Virginia," and 2.2 million nationwide, which he claims "is a very small percentage of the 20 million households that have cut the cord in the last several years." *Id.* at 10-11. These data do not prove the absence of a substitution effect; if anything, they prove the opposite. The fact that few cut-the-cord households may choose to port their wireline number merely reflects the fact that the vast majority of households that cut the cord at one time had *both* a wireline and a wireless phone — as is the case with the vast majority of all U.S. households today. For example, an IDC survey found that only 18 percent of respondents who do not have a landline

[25] William E. Taylor & Harold Ware, NERA Economic Consulting, *The Effectiveness of Mobile Wireless Service as a Competitive Constraint on Landline Pricing: Was the DOJ Wrong?* (Dec. 11, 2008) ("*Taylor/Ware Report*") (Ex. A), *available at* http://www.nera.com/image/PUB_DOJ_Effectiveness_Wireless_Service_0109_FINAL.pdf.

had never owned a landline.[26] When households with both wireline and wireless decide to cut the cord, they typically do not port their wireline number, because that would entail getting rid of their existing wireless number. The phenomenon reflects the fact that many consumers view their wireless phone as their primary phone.[27] In general, porting from wireline to wireless would occur only in cases where a household with no wireless phone purchases such phone for the first time at the same time as the household decides to give up its landline.[28]

Competitors also rely on a March 2009 study by Dr. Trevor Roycroft, which was prepared on behalf of The Utility Reform Network ("TURN"). *E.g.*, PAETEC Comments at 18. Dr. Roycroft purported to study the effect of retail rate deregulation in California. Dr. Roycroft does not conduct an econometric analysis of any kind; he merely concludes that wireless does not constrain wireline prices given his observation that, in the wake of deregulation, incumbents raised their basic local rates. Dr. Roycroft, however, analyzed rates only for stand-alone basic local service and ignored the discounts that carriers typically build into the bundled service

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[26] *See* Irene Berlinsky, IDC, *Why, When, and Who Cuts the Cord: IDC's 2008 Landline Displacement Survey Data* at 1 (June 2008).

[27] *See, e.g.*, Stephen K. Blumberg & Julian V. Luke, Division of Health Interview Statistics, National Center for Health Statistics, Centers for Disease Control, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July-December 2008*, at 3 (May 6, 2009) ("Among households with both landline and cellular telephones, 24.4% received all or almost all calls on the cellular telephones, based on data for the period July through December 2008. These wireless-mostly households make up 14.5% of all households."), *available at* http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless200905.pdf.

[28] Dr. Pelcovits also argues that wireless broadband service does not constrain broadband wireline service, but this is irrelevant. The Commission has recognized that Internet access is sold in a separate market from voice service and that there are multiple competitive alternatives for that separate product. *See, e.g.*, *Wireline Broadband Order* ¶¶ 3, 47-59; *Omaha Order* ¶ 30. The Commission has further determined that competitors are not impaired in their ability to provide broadband services, and the D.C Circuit upheld that determination. *See USTA II*, 359 F.3d at 585. There is accordingly no basis to Dr. Pelcovits's claim that competitors should be permitted to use unbundled loops to provide both broadband and voice services. *See* Pelcovits Decl. at 19 n.27.

offerings that many consumers now purchase. In addition, Dr. Roycroft failed to account for the fact that basic local service rates in California had been held artificially low by regulation for more than a decade, during which time traditional sources of subsidy for such services (such as long-distance toll revenue and high-cost universal service support) have eroded substantially. As a result, some increases to basic service rates were to be expected and do not provide evidence of market power. Although Verizon increased its basic service rate by $2.25 (or 12.7 percent), this was the first major increase in 14 years (since January 1, 1995) and was substantially below the $3.25 increase that the California Public Utilities Commission authorized. Even with this increase, Verizon California's stand-alone basic rate is lower (in real terms) today than it was in 1995.[29]

Finally, some competitors claim that consumers who have already cut the cord must be excluded from the analysis *because* they have cut the cord. *See* CBeyond et al. Comments at 10-16. This counter-intuitive theory lacks merit. As the competitors admit, the relevant question is whether enough customers view mobile wireless service as a substitute for wireline voice service that they would switch to wireless service in response to a price increase from the wireline provider (and vice versa). *See id.* at 10-11; *see also Verizon-MCI Merger Order* ¶ 91 (for wireless to be in the same product market requires only "that there be evidence of sufficient substitution for significant segments of the mass market"). As the Commission has held, a customer's decision to cut the cord demonstrates that the customer views wireless as a substitute

[29] Today's basic service rate of $19.91 is equivalent to $14.10 in 1995, taking into account the 41-percent inflation that has occurred over the past 14 years. *See* Bureau of Labor Statistics, Consumer Price Index, All Urban Consumers (Jan. 1995 = 150.3; Feb. 2009 = 212.193). This is 18 percent lower than the $17.25 rate that prevailed in 1995. *See* Decision, *Alternative Regulatory Frameworks for Local Exchange Carriers and Related Matters*, D.94-09-065, 56 Cal. PUC 2d 117 (Cal. PUC Sept. 15, 1994).

for wireline. *See Qwest Four MSA Order* ¶¶ 19-20. There is no reason to assume, as the competitors' novel theory does, that such customers no longer view wireline as a substitute for wireless and could never be induced to purchase wireline service again. More importantly, there is no reason to believe, as the competitors do, that no consumer who has *not* already cut the cord views wireless as a substitute. In fact, the data demonstrate exactly the opposite — "wireless substitution rates have continued to rise," *id.* ¶ 19, that trend is projected to continue, *see* Verizon Comments at 6-7, 26-27, and customers who have not cut the cord are making an increasing percentage of their calls on wireless phones,[30] all of which shows that there are still plenty of wireline customers who view wireless service as a substitute. There is accordingly no basis to exclude wireless service providers from a rational analysis of competitive conditions in the unbundling context.

C. Requiring a "Market Power" Analysis in UNE Forbearance Proceedings Would Be Inappropriate

Several commenters contend that the Commission should conduct an elaborate "market power" analysis in every UNE forbearance proceeding.[31] But precedent under both the forbearance and the unbundling statutes rejects such an approach. First, the D.C. Circuit has repeatedly held that § 10 "imposes no particular mode of market analysis." *EarthLink*, 462 F.3d at 8; *accord Verizon*, 570 F.3d at 304. Thus, the claim that a market-power analysis *must* be

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[30] *See supra* note 27; *see also* Memorandum Opinion and Order, *Petition of Qwest Communications International Inc. for Forbearance from Enforcement of the Commission's Dominant Carrier Rules As They Apply After Section 272 Sunsets*, 22 FCC Rcd 5207, ¶ 38 (2007) ("[T]he evidence in the record is consistent with the Commission's previous finding that customers are highly sensitive to changes in the price of wireline interstate, interLATA telecommunications services and that customers are willing to shift usage to wireless and over-the-top VoIP providers in response to changes in relative prices.").

[31] *See* Broadview Networks, Inc. et al. Comments at 22-36; CBeyond et al. Comments at 8-32; PAETEC Comments at 24-47; Comptel Comments at 18; Arizona Corp. Comm'n Comments at 2, 8-9.

performed to determine whether forbearance is required cannot be reconciled with the statute. Indeed, that is exactly the contention that the D.C. Circuit rejected in *EarthLink*, explaining that the Commission need not conduct "a 'painstaking analysis of market conditions' in 'particular geographic markets and for specific telecommunications services.' " 462 F.3d at 8.

Second, claims that a market-power analysis *should* be performed are equally erroneous. The Commission has correctly found that unbundling is unrelated to market power — or the lack thereof. The Commission could not have been more clear on this point in the *Triennial Review Order*,[32] where it "reject[ed]" the notion that it "should require the unbundling of network elements to remove an incumbent LEC's market power in the retail market." *TRO* ¶ 109. "The purposes of a market power analysis are not the purposes of section 251(d)(2)," the Commission explained, because "the [1996] Act requires only that network elements be unbundled if competing carriers are impaired." *Id.* The impropriety of relying on notions of market power extends as well to wholesale offerings, because "an analysis that focused exclusively on" alleged market power in such offerings "would fail to give weight to the possibility or actuality of self-provisioning." *Id.* ¶ 110; *see id.* ¶ 111 (rejecting reliance on the *Horizontal Merger Guidelines* in the unbundling context because they "do[ ] not fit the purposes of the [1996] Act"). In addition, as the Commission also has recognized, "market power analyses are neither easily verifiable nor administratively simple"; instead, they are "complicated," "require[ ] considerable time and expense to prepare," and are "controversial and difficult to resolve." *Id.* ¶ 396. For these reasons, such a burdensome analysis is particularly unsuited to a proceeding with a statutory deadline, such as a forbearance proceeding. The Commission cannot change course and decide

[32] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*" or "*TRO*") (subsequent history omitted).

that market-power analyses should be performed in unbundling forbearance proceedings without a reasoned explanation, which it could not give because it correctly rejected the notion that unbundling is tied to market power.

Moreover, an exclusive focus on market power in this context ignores the other, direct regulation of incumbents' retail and wholesale rates that will remain even after the elimination of unbundling requirements. Incumbents' retail rates for their mass-market services either are regulated directly at the state level, under state statutes that routinely incorporate the just-and-reasonable standard that also appears in § 10(a)(1), or have been deregulated based on state determinations that intermodal competition is sufficient to ensure that incumbents' rates remain just and reasonable without direct regulatory intervention.[33] Similarly, regulatory protections remain in place with respect to incumbents' DS-1 and DS-3 special access rates, including price caps, pricing flexibility rules, common carriage obligations, and Commission enforcement action if rates are found not to be just and reasonable.[34] The Commission relied in the *Omaha Order* on

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[33] *See, e.g.*, Final Order at 17, *Possible Extension of Board Jurisdiction Over Single Line Flat-Rated Residential and Business Rates for Local Exchange Carriers*, Docket No. INU-08-1 (Iowa Utils. Bd. June 27, 2008) (finding that "competitive offerings from CLECs, wireless carriers, and cable providers" provide "competitive choices" that "will allow the market to . . . ensure that . . . prices remain just and reasonable"), *available at* http://www.state.ia.us/government/com/util/docs/orders/2008/0627_inu081.pdf; Ind. Code §§ 8-1-2.6-1.1 to 8-1-2.6-1.4 (declaring that "competition has become commonplace in the provision of telecommunications services in Indiana," citing "wireless," "cable," and "Internet Protocol enabled services," among others, and fully deregulating "basic telecommunications service" as of June 30, 2009).

[34] Even if wholesale rates were relevant to the § 10(a)(1) analysis, those same regulatory protections exist for wholesale sales of DS-1 and DS-3 services. With respect to mass-market services, federal law continues to require incumbents' retail telecommunications services to be offered to competitors at a regulated and discounted wholesale rate. *See* 47 U.S.C. § 251(c)(4). In addition, Bell Operating Companies have obligations to provide loops and transport — including DS-0, DS-1, and DS-3 loops and transport — to competitors under § 271, which the Commission has held is subject to the just-and-reasonable standard. *See TRO* ¶ 663. For this reason, competitors' concerns that forbearance alone could affect their ability to provide broadband over copper, *see* Cavalier Comments at 4; Broadview Networks, Inc. et al. Comments

the existence of "other regulatory protections," *Omaha Order* ¶ 103, and should do the same on remand here. Mandating unbundling cannot be "necessary" to ensure just-and-reasonable rates or to protect consumers, *see* 47 U.S.C. § 160(a), where other regulations fulfill that purpose directly. Further, unbundling, with its attendant costs, should not be used to address indirectly matters that other regulations address directly. *Cf. TRRO* ¶ 23 ("[N]either the impairment inquiry nor the other aspects of the unbundling framework should be distorted to compensate for alleged failings in related but distinct areas of the Commission's regulatory regime.").

Indeed, making the incumbent's lack of market power the *sine qua non* of forbearance would ignore unbundling's well-documented anticompetitive consequences. Unbundling — far from being "an unqualified good" — "inflict[s]" significant costs "on the economy," *USTA I*, 290 F.3d at 429, and in return produces at most "synthetic" competition, *Covad*, 450 F.3d at 548 (internal quotation marks omitted); *see AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 429 (1999) (Breyer, J., concurring in part and dissenting in part) (the "meaningful competition" the 1996 Act was designed to encourage occurs only "in the *un* shared, not in the shared, portions of the enterprise"). Unbundling "discourage[s] . . . investment in innovation." *USTA II*, 359 F.3d at 572; *see USTA I*, 290 F.3d at 424.[35] And it is "an especially intrusive form of economic

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at 9-10, are unfounded. More fundamentally, the Commission already has addressed the transition away from copper loops by adopting procedures that provide the Commission and the public with advance notice. *See* 47 C.F.R. § 51.333; *TRO* ¶¶ 281-283. The Commission should not consider rules that discourage the deployment of fiber by limiting the retirement of copper.

[35] *See also USTA I*, 290 F.3d at 429 (unbundling creates "disincentives to research and development by both [incumbents] and CLECs"); *Iowa Utils. Bd.*, 525 U.S. at 429 (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 knowing that any competitive advantage deriving from those innovations will be dissipated by the sharing requirement."); *Omaha Order* ¶ 76 (unbundling "reduc[es] the incentives to invest in facilities and innovation"); *TRRO* ¶ 36 ("unbundling can create disincentives . . . to deploy innovative services and facilities").

regulation — one that is among the most difficult to administer," *TRRO* ¶ 36, because it "creat[es] complex issues of managing shared facilities," *Omaha Order* ¶ 76; *see USTA I*, 290 F.3d at 429 (noting "the tangled management inherent in shared use of a common resource"); *Iowa Utils. Bd.*, 525 U.S. at 428 (Breyer, J., concurring in part and dissenting in part) ("Even the simplest kind of compelled sharing, say, requiring a railroad to share bridges, tunnels, or track, means that someone must oversee the terms and conditions of that sharing."). Where a combination of vibrant intermodal competition and other forms of direct regulation exist to ensure that retail rates remain just and reasonable and to protect consumers, the public interest favors the elimination of unbundling to avoid those anticompetitive effects and to achieve regulatory parity between incumbents and intermodal competitors. *See Omaha Order* ¶ 78 (UNE forbearance "place[s] intermodal competitors on an equal regulatory footing by ending unequal regulation of services provided over different technological platforms").

Finally, in describing their proposed market-power tests, commenters take various positions on the appropriate geographic unit for forbearance. *Compare* Broadview Networks, Inc. et al. Comments at 30 (advocating analyzing forbearance on "an MSA-wide basis"), Cbeyond et al. Comments at 16-17 (same), *and* PAETEC Comments at 45-47 (same) *with* Arizona Corp. Comm'n Comments at 2 (advocating analyzing forbearance on "either a wire-center or zip code basis") *and* Massachusetts Comments at 18 (wire center or "even more granular level"). The petitions at issue here seek relief on an MSA-wide basis.[36] Therefore, there is no basis for declaring in this proceeding that UNE forbearance petitions will be entertained only on an MSA-wide basis. Instead, the Commission should decide individual

[36] Although Verizon had filed separate petitions seeking relief in a state (Rhode Island) and in a cable company's service territory within an MSA (Virginia Beach), those petitions are not before the Commission on remand.

petitions on their facts. Indeed, in the recent *Forbearance Procedures Order*,[37] the Commission stated that it "expect[ed] the . . . scope of the relief sought to vary widely from petition to petition" and accordingly determined that it "would judge on a case-by-case basis whether or not a petition for forbearance requires supporting data at, for example, the wire center level." *Id.* ¶ 30; *cf. Omaha Order* ¶ 61 n.161 (granting forbearance in smaller areas within an MSA where record evidence allowed the Commission to do so "in an administrable fashion"). Commenters offer no basis for the Commission to depart from its recently announced approach.

CONCLUSION

In responding to the D.C. Circuit's remand, the Commission should identify the process it will use to conform its UNE rules to current marketplace evidence and the statutory impairment standard, and should set forth clear standards and binding timelines that will apply when doing so, consistent with the foregoing comments.

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[37] Report and Order, *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, 24 FCC Rcd 9543 (2009).

Respectfully submitted,

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