REDACTED -- FOR PUBLIC INSPECTION

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October 21, 2009

VIA COURIER & ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
Room TW-325
445 12th Street, S.W.
Washington D.C. 20554

Re: ***Petitions of Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in Boston, New York, Philadelphia, Pittsburgh, Providence, Virginia Beach Metropolitan Statistical Areas,*** **WC Docket No. 06-172**

Dear Ms. Dortch:

On behalf of Cbeyond, Inc., Integra Telecom, Inc., One Communications Corp. and tw telecom inc., please find enclosed two copies of a redacted version of Reply Comments submitted for filing in the above referenced docket. Redacted copies will also be provided electronically to the Competition Policy Division of the Wireline Competition Bureau and to Best Copy and Printing, Inc. A redacted version will also be filed on the ECFS.

Pursuant to the Second Protective Order in this proceeding, one copy of the highly confidential version is being filed with the Secretary's Office under separate cover, two copies of the highly confidential version will be filed with Gary Remondino, and copies of the highly confidential version will be provided electronically to Jeremy Miller and Tim Stelzig.

Please contact us if you have any questions with respect to this submission.

Respectfully submitted,

Thomas Jones
Jonathan Lechter

Attorneys for Cbeyond, Inc., Integra Telecom, Inc., One Communications Corp. and tw telecom inc.

Enclosure

cc: Competition Policy Division (via e-mail to CPDcopies@fcc.gov)
Best Copy and Printing, Inc. (via e-mail to fcc@bcpiweb.com)

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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

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 Dkt. No. 06-172
Petitions of the 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 Dkt. No. 07-97

REPLY COMMENTS OF CBEYOND, INTEGRA, ONE COMMUNICATIONS AND TW TELECOM

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October 21, 2009

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REPLY COMMENTS OF CBEYOND, INTEGRA, ONE COMMUNICATIONS AND TW TELECOM

Cbeyond, Inc., Integra Telecom, Inc., One Communications Corp. and tw telecom inc. (collectively, "Joint Commenters"), by their attorneys, hereby file these reply comments in response the comments filed in the above-referenced dockets on September 21, 2009.

I. INTRODUCTION AND SUMMARY

The initial comments demonstrated conclusively that the FCC must construct its forbearance framework with tested tools of economic analysis, not predictive judgments based on mere hopes of future entry and product substitution. The errors made by the FCC in past forbearance orders (e.g., including mobile wireless voice customers in the forbearance analysis, assuming that cable providers serving the mass market could rapidly deploy facilities and services to meet the needs of business customers) were the

direct result of the FCC's failure to apply standard procedures for defining markets and measuring competition within markets. To remedy these defects, the Joint Commenters argued that, in analyzing petitions for forbearance from unbundling rules in the future, the FCC should adopt either (1) the Joint Commenters' "Proposed Standard"[1] or (2) assess the level of competition in the relevant product markets by applying a market competition analysis informed by the FTC/DOJ Horizontal Merger Guidelines.[2]

While the incumbent LECs give lip service to the soundness of relying on established principles for defining markets and measuring competition, their comments reflect a skewed view of these principles that would yield unsound conclusions. For example, the incumbents argue that the FCC should apply the FTC/DOJ market definition test to determine the extent to which existing intermodal service providers offer services in the same downstream retail markets in which CLECs offer service via unbundled network elements. Under the FTC/DOJ test, product markets are defined based on customer demand patterns (e.g., cross-price elasticity) and whether the prospective substitute product can restrain a price increase by existing firms in the

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[1] *See Joint Commenters Comments* at 18 ("(1) at least two facilities-based non-ILEC wireline competitors in the wholesale loop market, each of which has actually deployed end-user connections to 75 percent of end-user locations in the relevant product market, each of which has deployed wholesale operations support systems sufficient to support the wholesale demand in the relevant product market, and each of which has garnered at least 15 percent of wholesale loop market share in the relevant product market ('Wholesale Test'); or (2) at least 75 percent of end-user locations are served by two or more facilities-based non-ILEC wireline competitors that offer retail service in the relevant downstream product market via loops that the competitors have actually deployed, and there are at least two facilities-based competitors to the ILEC that have each garnered at least 15 percent of retail market share in the relevant product market ('Retail Test').").

[2] *See* U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines (Apr. 2, 1992, rev. Apr. 8, 1997) ("FTC/DOJ Horizontal Merger Guidelines" or "Guidelines").

relevant market.[3] Where such information is unavailable, indirect evidence of substitutability, including information regarding companies' internal marketing and pricing strategies, can be used. But the incumbents would rather assume substitutability than proffer the actual evidence required to meet the FTC/DOJ test. Until the incumbents prove substitutability through a rigorous application of FTC/DOJ market definition principles, intermodal services cannot be assumed to belong to the downstream retail product markets served by CLECs via unbundled network elements ("UNE").

Similarly, the incumbent LECs argue that the FCC must take into account committed potential entry as defined by the Guidelines (entry requiring the expenditure of sunk costs) in the unbundling framework. Under the Guidelines, such entry is only considered if it is likely, timely (i.e., it will occur within two years) and sufficient (i.e., the competitor's entry will be sufficient in scope and market influence to have a constraining effect on the incumbent's prices).[4] But while the Joint Commenters agree that the FCC should utilize the FTC/DOJ committed potential entry test, there is no indication that the test would ever be met in the local markets at issue.[5]

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[3] Specifically, a product market is "a product or group of products such that a hypothetical profit-maximizing firm that was the only present and future seller of those products ('monopolist') likely would impose at least a 'small but significant' and nontransitory' increase in price" ("SSNIP"). Guidelines § 1.11; *see also id.* § 1.0 ("Market definition focuses solely on demand substitution factors -- i.e., possible consumer responses."). In particular, the inquiry concerns the extent to which customer demand is elastic or inelastic. If buyers are more likely to switch products or eliminate purchases all together in response to a price increase, they are considered to have "elastic" demand; if they are less likely to switch or eliminate purchases all together in response to a price increase, they have "inelastic demand."

[4] *See* Guidelines § 3.0 *et seq.* The Joint Commenters discussed the FTC/DOJ committed entry standard at length in their comments. *See* Joint Commenters Comments at 20-26.

[5] The only recent exception is the cable companies' entry into the mass market voice and broadband markets facilitated by their hybrid-fiber coax facilities funded by revenues from their legacy video deployments. In that case, at least a portion of the cable

Furthermore, Qwest's assertion that incumbent market share is irrelevant to the forbearance process should also be rejected. Qwest's argument is premised on the assumption that regulation has pushed incumbent rates below competitive levels. There is no basis for this assertion, and Qwest does not provide any.

Finally, Verizon's suggestion that the UNE forbearance process should be replaced by some alternative process for determining when it is appropriate to eliminate unbundling obligations should be rejected. The incumbent LECs have the statutory right to seek forbearance from unbundling obligations, and the FCC recently adopted an order to streamline that process. There is no basis to abandon that process now.

II. THE FCC MUST DEFINE MARKETS AND SUBSTITUTES BASED ON THE FRAMEWORK IN THE FTC/DOJ GUIDELINES

There is widespread agreement among commenters, including the incumbents, that the FCC should define product markets and substitutes based on the framework in the FTC/DOJ Guidelines. Under that framework, a product market is a product or group of products "such that a hypothetical profit-maximizing firm that was the only present and future seller of those products ('monopolist') likely would impose at least a 'small but significant[6] and nontransitory' increase in price" ("SSNIP").[7] At base, the SSNIP test

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companies' sunk entry costs were paid for through legacy revenues from a different market. No other competitor would benefit from a similar advantage.

[6] The Guidelines suggest that a five percent increase in price would be considered "significant" in most cases. *See* Guidelines § 1.11.

[7] *See id.*; Cavalier Comments, Declaration of Dr. Michael D. Pelcovits, at 5 (*citing* Guidelines § 1.0) ("*Pelcovits Declaration*") ("Market definition focuses solely on demand substitution factors -- i.e. possible consumer responses. According the Merger Guidelines, '[a] market is defined as a product or group of products and a geographic area in which it is produced or sold such that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future producer or seller of those products in that area likely would impose at least a 'small but significant and nontransitory' increase in price.' This is often referred to as the 'SSNIP' test."). Unless

examines whether enough customers would switch to a prospective substitute to prevent a price increase by the hypothetical monopolist in a product market. If that test is met, the prospective substitute is part of the product market.

In those markets where there is insufficient information to apply the SSNIP test, secondary information may be used such as the prices and characteristics of the services analyzed, whether a company's own marketing and advertising materials and strategies reflect its views as to the extent to which customers view products as substitutes and the suitability of competitors' network architectures to meet the demands of a particular market (e.g., whether the network architecture is shared close to the customer location or provides a dedicated connection between the customer and a major aggregation point like a wire center).[8]

The FCC should employ the SSNIP test and utilize valid secondary data where necessary to determine whether certain intermodal services (e.g., cable modem service, wireless voice service, wireless broadband service) belong in the same product markets

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otherwise indicated, all comments cited herein refer to submissions filed in WC Dkt. Nos. 06-172 & 07-97 on or around September 21, 2009.

[8] *See* Joint Commenters Comments at 15. As explained, the Joint Commenters have utilized this kind of information to demonstrate that residential telephone services belong in a different product market from business telephone services. *See* Letter from Thomas Jones *et al.*, Counsel, One Communications Corp. *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Dkt. Nos. 08-24 & 08-49, at 13-16 (filed Apr. 14, 2009) (explaining that: (1) the service features and characteristics demanded by and marketed to even the smallest business customers are qualitatively different from those demanded by and marketed to residential customers; (2) the differences in the levels of customer support and features demanded by residential and small business customers are reflected in the different prices charged for those services; (3) competitors' practices for marketing and advertising to small business customers are different than would be the case if they sought to acquire residential customers; (4) competitors such as Integra and One Communications provide more proactive and personalized customer service to their business customers than they would if they served residential customers; and (5) competitors that serve only business customers must design their networks differently than would be the case if they served residential customers).

as services offered by CLECs via unbundled loop and transport facilities. Because the burden is on the incumbent petitioner to prove that forbearance is in the public interest,[9] the incumbent petitioner must prove that a particular service is part of a relevant product market.

As explained in detail below, the incumbent LECs have not met their burden to show that that wireless voice, wireless broadband or HFC-based services provided by cable companies occupy any of the relevant product markets. Until the incumbents prove otherwise, these products are not relevant to the unbundling analysis.

A. Wireless Voice Service

In their comments, the incumbents appear to move away from their theory that the presence of cut-the-cord customers, by itself, proves that wireless service belongs in the wireline voice service market. Rather, the incumbents agree with the DOJ and other commenters that the FTC/DOJ market definition test is the appropriate way to measure substitutability.[10] As Qwest states, "in order for wireless to serve as a price-constraining

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[9] *See Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, Report and Order, 24 FCC Rcd 9543, ¶ 20 (2009) ("*Forbearance Rules Order*") ("We conclude that the petitioner bears the burden of proof – that is, of providing convincing analysis and evidence to support its petition for forbearance. This has historically been the case in American jurisprudence....The petitioner asks the Commission to forbear from enforcing against it one or more rules or statutory provisions, which the Commission will do if it determines that the petition meets the statutory criteria"). It is also worth noting that because the D.C. Circuit repeatedly remanded the horizontal ownership rules, it is unsurprising that the court heavily scrutinized the FCC's justification when it made no changes in the ownership limit that had previously been struck down.

[10] *See* U.S. Department of Justice, *Voice, Video and Broadband: The Changing Competitive Landscape and Its Impact on Consumers* 65 (Nov. 2008) ("*DOJ Study*"), *available at* http://www.usdoj.gov/atr/public/reports/239284.pdf ("The existence of some consumers who choose to substitute wireless service for access to the landline network does not demonstrate that wireless service is an effective constraint on prices for access to landline services. That determination turns in part on the number of customers who would choose to substitute to wireless services entirely in response to a specified price

substitute for wireline services, all customers need not view it as a substitute. As long as there are a *sufficient number of customers* willing to 'cut-the-cord'...this serves to constrain Qwest's prices."[11] Similarly, Verizon recognizes that wireless voice service should be included in the wireline voice service market if the customers that would switch to the wireless service are "numerous enough" to constrain prices of wireline services.[12]

Verizon argues that, in light of the recent D.C. Circuit decision in *Comcast* overturning the cable horizontal ownership rules, the burden is on the FCC to prove that wireline and wireless services *are not* substitutes and that courts will reverse any FCC determination of nonsubstitutability unless it is backed up by evidence.[13] But the reasoning of the court in *Comcast* is irrelevant to the forbearance analysis. *First*, unlike the rulemaking at issue in *Comcast*, petitioners seeking forbearance bear the burden of proving that forbearance is in the public interest. Therefore, as mentioned, if a petitioner believes that it should be granted forbearance based in part on wireline/wireless voice substitution, it must prove that a sufficient number of customers is willing to switch to wireless service to constrain a price increase in wireline service. The incumbent LECs

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increase for landline telephone service, compared with the number of customers who would choose to stay with landline and pay the additional price."); *Pelcovits Declaration* at 8 ("The existence of some substitutability does not obviate the need to investigate whether a real-world firm (let alone a hypothetical monopolist used in the SSNIP test of market definition) can exercise market power. If it was this simple, then there would be no need for the comprehensive and sophisticated analyses routinely performed by the antitrust agencies in merger reviews or other investigations of monopolization.").

[11] *See* Qwest Comments at 17 (emphasis added).

[12] *See* Verizon Comments at 27 (internal quotation marks omitted).

[13] *See id.* at 25-26 (citing *Comcast Corp. v. FCC*, 579 F.3d 1 (D.C. Cir. Aug. 28, 2009) ("*Comcast*")).

have failed to do so,[14] even though they could perform the necessary analysis with data already in their possession.[15]

Second, the court in *Comcast* held that the Commission erred in asserting, "*without evidence*" regarding demand elasticity or customer demand patterns, that enough customers were unwilling to switch to DBS in response to an increase in wireline cable prices that DBS did not belong in the same product market as cable wireline service. At the same time, cable companies provided compelling evidence that DBS's unique programming options would entice many customers to switch.[16] The situation in the instant proceeding is quite different. There is ample evidence already on the record demonstrating that, in accordance with the FTC/DOJ Horizontal Merger Guidelines and relevant secondary information, wireless and wireline voice services are not in the same market. The FCC can rely on this evidence to draft an order that would be upheld on appeal. Indeed, the DOJ recently concluded that wireless and wireline voice service do not occupy the same product market because the available data shows that there is little

[14] *See* Cavalier Comments at 3 ("Third, the Commission should not rely on alleged competition from wireless services in the absence of economic data showing that wireless services effectively constrain wireline pricing. Incumbent carriers have yet to furnish any meaningful analysis of this issue and thus cannot meet their burden to show that forbearance should be granted.").

[15] *See Pelcovits Declaration* at 9-10 ("Verizon could undertake rigorous statistical analysis of wireline-wireless substitutability, but has not produced such evidence along with this Petition. This is particularly troubling because Verizon would have access to the valuable data necessary to perform regression or diversion analysis.").

[16] *Comcast* at 13 ("Comcast, on the other hand, points beyond DBS companies' growing market share to their exclusive arrangements with certain highly sought after programmers as evidence that competition has led and will likely continue to lead subscribers to switch services.").

cross-price elasticity between wireless and wireline services.[17] Moreover, the CDC cut-the-cord data relied upon heavily by the incumbent LECs shows that large demographic groups (e.g., the elderly, homeowners) highly value the unique attributes of wireline service and therefore have relatively inelastic demand, making these groups susceptible to a wireline voice price increase.[18] Similarly, FCC number porting data demonstrates that few customers are porting wireline numbers to wireless carriers, demonstrating low cross-price elasticity.[19]

Additionally, studies of incumbent LEC rates in California, Illinois and Texas after intrastate rate deregulation demonstrate that wireless voice service does not constrain the price of wireline voice service.[20] California deregulated local phone rates

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[17] *See DOJ Study* at 66 ("In addition, there is little evidence that landline telephone companies consider the threat of wireless substitution sufficient to change their access prices. In response to customers 'cutting the cord,' a telephone company can either lower its prices to all customers to keep subscribers from switching, or leave prices where they are. A company would choose the first option if the loss of revenue from cord-cutting is expected to be greater than the loss of revenue from reducing the fees paid by customers who would not switch. If, however, the extent of wireless substitution in response to price changes is small, the company would choose not to lower prices. In fact, stand-alone landline access prices have remained relatively stable and do not appear to have declined substantially below the levels at which they are capped by regulation.") (internal citations omitted).

[18] *See Ex Parte* Letter of Samuel L. Feder, Counsel, Cavalier, to Marlene H. Dortch, Secretary, FCC, WC Dkt. Nos. 08-24 & 08-29, Supplementary Declaration of Michael D Pelcovits ¶ 2 (filed May 8, 2009) ("As the CDC dataset demonstrates, there are major demographic groups that have done relatively little cord cutting. For example, only 9.9% of homeowners have cut the cord, and only 3.3 percent of senior citizens have cut the cord. *")*; *id.* ¶ 3 ("Verizon has failed to explain how the low level of cord cutting among some large demographic groups is consistent with the simple theory that wireless prices do constrain and will constrain wireline prices.").

[19] *See Pelcovits Declaration* at 11 ("The data for Virginia is mirrored in nationwide data, where the total number of ports from wireline to wireless carriers is reported to be 2.2 million. This is a very small percentage of the 20 million households that have cut the cord in the last several years.").

[20] *See* Paetec Comments at 18.

on the assumption that "wireless mobility services are a close substitute for wireline for most customers" and would be able to constrain the incumbents' price increases.[21] However, incumbents in the state have imposed "a staggering stream of rate hikes" following deregulation.[22] As a result, a recent study of the local telephone service rates in California concluded that "[w]ireless substitution is unlikely to provide a pricing constraint on local telephone company services."[23] As CompTel explains, the incumbents raised price following intrastate rate deregulation in Illinois and Texas as well.[24]

B. HFC-Based Cable Services

The FCC should not restrict its market definition analysis to wireless voice service. For example, there is ample evidence on the record that the services provided over HFC networks are not viewed as a substitutes by business customers for the services provided unbundled loop and transport facilities.

Verizon makes much of cable companies' entry into the business market by citing largely anecdotal evidence from the latest incumbent LEC "Fact Report."[25] But there is no reason to believe that enough business customers currently receiving high capacity services over unbundled copper or fiber facilities would switch to HFC-based services in response to a post-forbearance incumbent price increase.

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

[22] *See id.*; *see also* CompTel Comments at 23-24 ("Since 2006, AT&T and Verizon have increased basic local service rates by between 13% and 26%, increases that are estimated to cost California consumers more than $100 million annually.").

[23] Paetec Comments at 18 (citing *TURN Study* at 15).

[24] *See* CompTel Comments at 25-26.

[25] *See* Verizon Comments at 8-9.

As the FCC has found, and Paetec again reiterates, the demands of business customers are not generally met with HFC-based services.[26] This is because of the inherent limitations of the HFC network architecture. HFC networks, like fixed and mobile wireless and residential FTTH networks, all utilize shared configurations. In these architectures, traffic is aggregated at a local point close to the customer which often has limited capacity.[27] As the Joint Commenters have explained, and as panelists at the recent Broadband Workshops reiterated, it is difficult if not impossible to deliver the guaranteed service levels demanded by business customers over shared networks, including HFC-based networks.[28] These inherent limitations explain why providers

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[26] *See Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533, ¶ 193 (2004) ("*TRRO*"); Paetec Comments at n.108 ("[S]tandard cable plant used to serve residential customers is based on coaxial cable, which is not a viable substitute for the dedicated high capacity broadband connectivity demanded in the business market.").

[27] *See* Jason Livingood, *FCC National Broadband Plan Workshop, Technology-Fixed Broadband*, Transcript at 112 (Aug. 13, 2009) ("Today a node serves between, on average, 250 and 500 homes, though that depends and varies based on band width demands."); Saul Hansell, N.Y. Times, Bits Blog, *The Cost of Downloading All Those Videos*, Apr. 20, 2009, *available at* http://bits.blogs.nytimes.com/2009/04/20/the-cost-of-downloading-all-those-videos/?pagemode=print ("In a cable system, there is a fixed amount of bandwidth that is shared among all the customers in a node, often about 500 homes. That capacity, in current technology, provides about 38 megabits per second to share. That means if four homes are all downloading very long files at 10 Mbps, a fifth customer going online, will start to slow down everyone's connections.").

[28] *See* TWTC *et al.*, Workshop Response, WC Dkt. Nos. 09-51 *et al.*, CC Dkt. No. 98-147, at 6 (filed Sept. 15, 2009) ("Most business customers...demand reliable and stable bandwidth speeds. One workshop panelist asserted that even a next-generation DOCSIS 3.0 cable modem system cannot provide stable and reliable bandwidth because bandwidth is shared near the edge of the network at a local node. To mitigate the harm that one customer's usage patterns can cause to other customers' service, cable modem providers impose bandwidth caps and restrictions for 'heavy users;' something that many business customers cannot tolerate. But even with these practices, cable modem providers often do not guarantee a particular level of throughput. Advertised speeds [even for business class cable modem services] are merely theoretical maximums that providers try their best to maintain.").

deploy cheaper shared networks to satisfy the needs of mass market customers while providers construct more expensive dedicated networks (e.g., a direct connection from the customer location to the serving wire center) to satisfy the needs of business customers.

This is not to say that *no* business customers view HFC-based services and DS0, DS1 and DS3 services as substitutes. There is no doubt that *some* portion of the business market views HFC-based services as a substitute for traditional wireline services. But the relevant inquiry is whether a *sufficient number* of business customers would shift to HFC-based services to prevent incumbents from raising the price of DS0, DS1 or DS3 services post-forbearance. The incumbents have not even attempted to show that this is the case.

C. Wireless Broadband Service

Verizon also argues that wireless broadband services can serve as a substitute for wireline broadband services.[29] But neither Verizon nor any other incumbent LEC has presented information regarding the extent of wireless and wireline broadband substitution or cross-price elasticity to determine whether wireless broadband services occupy any of the product markets at issue. Moreover, the available evidence indicates that they do not. This is because, as Dr. Pelcovitz notes, "wireless broadband services are typically more expensive, slower and less flexible than wireline broadband service."[30]

Indeed, many panelists at the Broadband Workshops agreed that the inherent limitations of wireless broadband technologies and networks, including spectrum

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[29] *See* Verizon Comments at 6, 9.

[30] *Pelcovits Declaration* at 16.

scarcity, cell site congestion (i.e., the shared network problem)[31] and high fiber backhaul rates,[32] preclude wireless broadband from serving as a full substitute for traditional wireline facilities for both mass and enterprise market customers.[33] Given these shortcomings, Integra has found that wireless providers "cannot offer end-user

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[31] *See* Statement of Craig E. Moffett, Vice President & Senior Analyst, Sanford Bernstein, *FCC National Broadband Plan Workshop, Deployment-Wired*, Transcript at 27-28 (Aug. 12, 2009) ("And that if you think about throughput . . . you can't support . . .anything like the kind of oversubscription levels in a wireless broadband network that you have today in a wired voice network. And therefore, you need a radically smaller radii anyway in order to support a large number of simultaneous users and the cost structure of the network would expand exponentially. At least for the foreseeable future, that means that for very high bandwidth applications, you're likely to see usage caps . . . because you simply cannot charge enough to make it economically attractive.").

[32] *See* Statement of Hunter Newby, CEO, Allied Fiber, *FCC National Broadband Plan Workshop, Deployment-Wired*, Transcript at 23 (Aug. 12, 2009) ("But, you know, as Craig [Moffett, VP & Senior Analyst, Sanford Bernstein] pointed out regarding wireless, a lot of [the new services] cannot be supported unless there's fiber to the tower."); Statement of Marcus Weldon, CTO, Alcatel-Lucent, *FCC National Broadband Plan Workshop, Deployment-Wired*, Transcript at 38 (Aug. 12, 2009) ("[F]iber architectures are being looked to back haul 3G and LTE deployments, for example. . . . So I do agree...that wireless will not solve the problem.").

[33] *See* Statement of Ed Evans, Chairman and CEO, Stelera Wireless, *FCC National Broadband Plan Workshop, Wireless Broadband Deployment-General*, Transcript at 39-40 (Aug. 12, 2009) ("[W]hile DSL is prevalent in a lot of rural markets, I mean, candidly, there's a lot of bad DSL that's out there. . . . As you get farther and farther away from that central office, we've seen DSL speeds that cap out at 256k [and] it's been very easy to cherry pick those guys off the edge of their networks until you get closer to their CO where, you know, their speeds are closer to [1.5 Mbps]."). Said another wireless provider: "I would definitely agree. You know, in our markets, we don't try and compete with DSL and cable. I mean, quite frankly, we can't do that. You know, we can't deliver what they can deliver, but again, in our rural areas, we go where DSL and cable aren't." Statement of Scott Zimmer, President, Air Advantage, *National Broadband Plan Workshop, Wireless Broadband Deployment-General,* Transcript at 41 (Aug. 12, 2009).

connections at prices that are low enough or at levels of service quality that are sufficient to enable Integra to rely on those facilities to serve business customers."[34]

Rather, as the Broadband Workshop panelists explained, wireless broadband will likely serve as a complement for wireline broadband service for most customers for the foreseeable future and will be the first choice only for customers that (1) highly value mobility or (2) do not have the option of wireline broadband. Verizon's own panelists on the Broadband Workshops stated that they do not believe that Verizon wireless broadband services can serve as a substitute for wireline broadband service even in the mass market.[35]

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[34] *See* Joint Opposition of Integra Telecom, Inc., tw telecom inc., Cbeyond, Inc., and One Communications Corp., WC Dkt. No. 09-135, Attach. D - Declaration of Steve Fisher ¶ 10 (filed Sept. 21, 2009) ("*Joint Opposition*").

[35] *See* Tom Sawanobori, Vice President, Network and Technology Strategy, Verizon, *FCC National Broadband Plan Workshop, Wireless Broadband Deployment-General*, Transcript at 17 (Aug. 12, 2009) ("By enabling consumers to access broadband with higher speeds and capacity, LTE and other 4G technologies will provide consumers with even greater value. While these wireless networks will provide higher capabilities, they will not be able to match the kind of throughput you'll see on wired technologies such as . . . FiOS. However, we think that there's still complement for these, both technologies to exist [and] wireless broadband may be the only technology available [in some places] so that this 5 to 12 megabits per second average will be more than adequate for today and the future applications for those where they don't have a wire connection."); *id.* at 51-52 ("Clearly, when we have fiber optic offerings, those are preferred by many customers for the video capability. . . . Wireless mobile broadband really complements that, so people - - most people want to be able to move, have their broadband on the go. . . . So I think most customers utilize that as a complement, so they are using both."); *id.* at 51 ("So with regard to the fixed versus the mobile . . . we're clearly seeing customers who still want and desire DSL capabilities."); *see also* Statement of Link Hoewing, Verizon, *FCC National Broadband Plan Workshop, Building the Fact Base: The State of Broadband Adoption and Utilization*, Transcript at 62 (Aug. 19, 2009) ("[O]ne of the [primary] factors that [Bank of America analysts] looked at was how many people are actually using primarily broadband over wireless. I wouldn't say there's substitution going on.").

D. Satellite And Broadband Over Power lines

Even the incumbent LECs do not attempt to argue that broadband over power line ("BPL") or satellite broadband technologies are relevant to forbearance in the markets at issue. These services, which the FCC relied on in eliminating the *Computer Inquiry* rules in the *Wireline Broadband Order,* are simply not viable substitutes for DS0, DS1 or DS3 services, nor is there any reason to believe that they will become so in the coming years. BPL has been deployed in few locations due to technical difficulties, and the inherent limitations of satellite technology (e.g., high latency) make it a poor substitute for even mass market wireline broadband service.[36]

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[36] *See* Brett Glass, Founder, Lariat.net, *FCC National Broadband Plan Workshop, Deployment*, Transcript at 95 (Aug. 12, 2009) ("The other thing which some of the customers say is a big impediment [to adopting satellite] is . . . constraints on the use of the bandwidth, which consists of latency . . . some of the[m] don't like the asymmetry if they happen to be pushing a lot of bandwidth upstream . . . . I hope for the benefit of my colleagues who do satellite that . . . the FCC will consider the fact that satellite is different."); *see also* Mark D. Dankberg, ViaSat, *FCC National Broadband Plan Workshop, Technology-Wireless*, Transcript at 133-34 (Aug. 13, 2009) (stating in response to whether high latency will effect satellite broadband customers that "you have to make tradeoffs" and "to the extent that you could provide the same speeds and volumes with no latency, certainly that would be preferable, but to the extent that you have to trade off capital costs be it in volume versus latency, we see the market evolving toward taking acceptable latency in order to get excellent speeds and volumes."); Harlin McEwen, Chair, Public Safety Spectrum Trust, *FCC National Broadband Plan Workshop, Public Safety and Homeland Security*, Transcript at 90-91(Aug. 25, 2009) ("Unfortunately . . . the latency of satellite for public safety is getting better but it hasn't been, you know, to the level that we need for every day kinds of use."); Wayne Kawamoto, Small Business Computing.com, *Satellite Equals Broadband Lite*, Feb. 1, 2005, *available at* http://www.smallbusinesscomputing.com/webmaster/article.php/3466881 ("The latency isn't usually a problem when you're viewing Web pages, but can affect applications such as VoIP and real-time interactive gaming. 'I think that latency can be reduced to a certain minimum when software inefficiencies are removed. . . . At that point it would be limited to the speed that the info can travel from the earth to the satellite and back.'"(quoting Andrew B. King, President, Web Site Optimization, LLC)).

E. Services Provided Via Incumbent LECs' Own Last Mile Facilities

Incredibly, Verizon again asserts that the availability of incumbent LECs' tariffed alternatives (e.g., special access) should be taken into account in determining whether elimination of unbundled network elements is appropriate. As CompTel argued, the FCC has repeatedly rejected this argument in the *TRRO* and in unbundling forbearance decisions.[37]

Verizon nevertheless insists that tariffed alternatives should be taken into account because their prices have declined over time.[38] But as Dr. Stanley Besen has explained, whether or not a price is set above competitive levels does not depend on price changes,

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[37] *See* CompTel Comments at 20 (*citing TRRO* ¶ 59) ("[A] rule that foreclosed access to all UNEs wherever competitors had access to tariffed alternatives would diminish the facilities-based competition that is the most effective discipline to anticompetitive price squeezes."); *see also 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*, Memorandum Opinion and Order, 23 FCC Rcd 11729, ¶ 41 (2008), *remanded*, *Qwest Corp. v. FCC*, No. 08-1257 (D.C. Cir. Aug. 5, 2009) ("In support of its request for UNE relief, Qwest also argues that competitors are competing extensively using special access rather than UNEs when providing service over Qwest's facilities. While Qwest can demonstrate a fair amount of retail enterprise competition using Qwest's special access services and UNEs, consistent with the Commission's precedent, competition that relies on Qwest's own facilities is not a sufficient basis to grant forbearance from UNE requirements."); *Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas*, Memorandum Opinion and Order, 22 FCC Rcd 21293, ¶ 42 (2007), *remanded*, *Verizon Tel. Cos. v. FCC*, 570 F.3d 294 (D.C. Cir. 2009) ("In support of its request for UNE relief, Verizon also argues that competitors are overall using special access rather than UNEs when providing service over Verizon's facilities. . . . While Verizon can demonstrate a fair amount of retail enterprise competition using Verizon's special access services and UNEs, competition that relies on Verizon's own facilities is not a sufficient basis to grant forbearance from UNE requirements.")

[38] *See* Verizon Comments at 11.

but on the difference between a firm's prices and costs (i.e, its margins).[39] As TWTC has shown, the evidence indicates that in those limited locations where competitors' facilities are available, competitors' rates are much lower than incumbent LEC rates, indicating that the incumbents' rates are set at supracompetitve levels.[40] In order to obtain these still supracompetitively priced incumbent LEC rates, competitors must agree to onerous terms and conditions such as annual monetary or circuit commitments.[41]

Verizon even points to the availability of resold incumbent LEC tariffed facilities from "network integrators and managed service providers,...equipment manufactures and value added resellers" as a justification for elimination of the unbundling rules.[42] But if, as the FCC has held, incumbent special access services are not relevant to the UNE forbearance analysis, it must certainly be the case that *resold* incumbent LEC special access services are not relevant either.

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[39] *See generally* Letter of Thomas Jones, Counsel, tw telecom inc., to Marlene H. Dortch, Secretary, FCC, WC Dkt No. 05-25, ("*TWTC Special Access Letter*") Attach. B - Declaration of Stanley M. Besen (filed July 9, 2009).

[40] *TWTC Special Access Letter* at 4 ("Nevertheless, in order to accommodate AT&T's demand for an apples-to-apples comparison, TWTC has attached hereto updated charts that compare the incumbent LECs' prices for DSls and DS3s under terms and conditions that closely resemble those offered by TWTC and other CLECs: one-year contracts with no volume or minimum dollar spending requirements. Unsurprisingly, as the new charts show, TWTC would pay AT&T and other incumbent LECs far more for a DS1 or DS3 circuit offered on a one-year term but not subject to a minimum volume or dollar spending requirement than TWTC would pay a non-incumbent LEC for the same facilities offered under similar terms and conditions. This is particularly true of special access services that include a mileage component, no doubt a reflection of AT&T's willingness to exploit its exclusive control over transmission facilities that reach outside of downtown areas. In any event, AT&T can at least take heart that, while its one-year, no volume prices are bad and clearly show that it exercises market power, Verizon's and Qwest's prices, including their mileage prices, are even worse.").

[41] *See id.* at 20-22.

[42] *See* Verizon Comments at 11.

For similar reasons, as Paetec argues, the FCC should not consider incumbents' UNE-P replacement products in determining whether unbundling is appropriate because these services combine competitive switching with an ILEC loop.[43] Over-the-top VoIP services should be excluded on the same basis because they ride on the incumbent LECs' own facilities.

III. BOTH ILECS AND CLECS AGREE THAT THE FCC SHOULD ANALYZE POTENTIAL ENTRY BASED ON THE FTC/DOJ HORIZONTAL MERGER GUIDELINES FOR COMMITTED POTENTIAL ENTRY

Incumbent LECs and competitive LECs agree that the FCC should follow the FTC/DOJ Horizontal Merger Guidelines for committed potential entry in determining whether a prospective entrant will have the ability to constrain incumbent prices post forbearance. Under the Guidelines test, the FCC would analyze two different types of potential entry: (1) "committed entry," which is entry that requires "expenditure of significant sunk costs of entry and exit," and (2) "uncommitted entry," which is entry that does not require significant sunk costs. As AT&T correctly states, under the Guidelines, committed potential entry will only be taken into account if it is likely, timely (i.e., will occur within two years) and sufficient (i.e., the competitor's entry will be sufficient in scope and market influence to have a constraining effect on the incumbent's prices).[44]

In contrast, a so-called uncommitted entrant is relevant if it can enter a market without substantial expenditure of sunk costs within a year on a scale necessary to

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[43] *See* Paetec Comments at 34.

[44] AT&T Comments at n.13 ("The Guidelines define entry as 'easy' if it is 'timely, likely, and sufficient in magnitude, character and scope to deter or counteract the competitive effects of concern.' In this context, 'timely' means that potential competitors can be in the market within two years.") (internal citations omitted).

restrain the existing firms in the market from raising price.[45] As the FCC has recognized, *existing firms* in a market high supply elasticity (i.e., excess capacity) can rapidly increase output to restrain other firms in the market from increasing price.[46]

Although the incumbent LECs assert that potential entry meets these tests and should therefore be considered in forbearance proceedings, this is not so. All of the available evidence indicates that the committed entry test cannot be met in the local markets at issue and entrants must incur sunk costs, thereby foreclosing consideration of uncommitted entry. It makes sense, therefore, for the FCC to presume that only actual entry will be taken into account in forbearance proceedings.

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[45] *See* Guidelines § 1.0 ("A firm is viewed as a participant if, in response to a 'small but significant and nontransitory' price increase, it likely would enter rapidly into production or sale of a market product in the market's area, without incurring significant sunk costs of entry and exit. Firms likely to make any of these supply responses are considered to be 'uncommitted' entrants because their supply response would create new production or sale in the relevant market and because that production or sale could be quickly terminated without significant loss. Uncommitted entrants are capable of making such quick and uncommitted supply responses that they likely influence the market premerger, would influence it post-merger, and accordingly are considered as market participants at both times. This analysis of market definition and market measurement applies equally to foreign and domestic firms"); *DOJ-FTC Commentary on the Horizontal Merger Guidelines* 37 (Mar. 2006), *available at* http://www.usdoj.gov/atr/public/guidelines/215247.pdf ("*Commentary*") ("Uncommitted entry normally takes the form of incumbent firms using their existing assets to make products or perform services those firms do not currently make or perform.").

[46] The FCC use of the term "elasticity of supply" incorporates both (1) "the supply capacity of existing competitors: supply elasticities tend to be high if existing competitors have or can easily acquire significant additional capacity in a relatively short time period" and (2) where there are "low entry barriers: supply elasticities tend to be high even if existing suppliers lack excess capacity if new suppliers can enter the market relatively easily and add to existing capacity." *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier,* Order, 11 FCC Rcd 3271, ¶ 57 (1995) ("*AT&T Non-Dominance Order*"). Because the local markets at issue in the forbearance context exhibit high entry barriers, only the first definition is relevant.

A. The Cases Cited By The Incumbent LECs Do Not Support The Conclusion That Potential Committed Entry Is Likely In The Local Markets In Question

Verizon and AT&T cite to numerous FCC orders in an attempt to show that the FCC has repeatedly deregulated markets based on evidence of committed potential entry. But this conclusion is not supported by the holdings of the cited cases. Rather, the cases show that, in markets where entrants with excess capacity have *already overcome* the sunk costs of entry, they can increase output to restrain the incumbent firm from increasing price. If anything, the incumbent LECs' own summary of these cases undercuts their suggestion that the FCC has consistently deregulated markets based on a committed potential entry analysis.

- AT&T argues that the FCC found that AT&T was non-dominant with respect to interexchange services because, despite AT&T's majority share of the market "AT&T's competitors...*have or could quickly acquire the capacity* to take away enough business from AT&T to make unilateral price increases by AT&T unprofitable."[47] As Covad *et al.*, argue, AT&T faced two major carriers, MCI and Sprint, as well as dozens of smaller carriers that had *already entered* the interexchange market and could rapidly increase supply.[48]

- AT&T notes that, in the *AT&T/Dobson Merger Order*, the FCC examined the supply response of *existing rivals* in the market.[49] Furthermore, as AT&T

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[47] *See* AT&T Comments at 10 (citing *AT&T Non-Dominance Order* ¶ 58) (emphasis added).

[48] *See* Covad *et al.* Comments at 34 ("The Commission's conclusion was based on its assessment of several market characteristics including, importantly, extensive evidence of actual and potential facilities-based competition from three carriers with competing national networks as well as dozens of regional facilities-based carriers, all of which collectively possessed significant excess capacity.").

[49] *See* AT&T Comments at 12 (citing *Applications of AT&T Inc. and Dobson Commc'ns Corp.*, Memorandum Opinion and Order, 22 FCC Rcd 20295, ¶ 52 (2007)) ("[I]f our count of the number of rival service providers and our scrutiny of their spectrum holdings and network coverage indicates that the response of rival service providers will likely be sufficient to limit the availability and incentive of the combined entity to raise prices unilaterally, we would find that the transaction is not harmful to competition in a specific market even in the presence of a relatively high post-transaction market share of the combined entity.").

correctly states, the availability of spectrum in secondary markets can inhibit the market power of existing players because that capacity can be brought swiftly to bear to increase rivals' supply.[50]

- AT&T argues that the FCC deregulated certain satellite communications services because "rival satellite systems; should be able to offer [competing] service[s] in the future" *since they are already transmitting in these markets.*[51] The FCC also found that "sufficient excess capacity exists in the switched voice service market to absorb all of Comsat's switched voice traffic."[52]

- Verizon cites the *AT&T/Cingular Wireless Merger Order* for the proposition that the "presence and capacity of other firms matter more for future competitive conditions than do current subscriber-based market shares."[53] The next sentence of that order makes clear that the FCC was less concerned with static market share data because of the presence of substantial competition from firms that were already competing in the CMRS market. Such competitors had already incurred substantial sunk costs and were able to rapidly expand capacity as necessary.[54]

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[50] *See id.* at n.41 (citing *Applications of Western Wireless Corp. and ALLTEL Corp.*, Memorandum Opinion and Order, 20 FCC Rcd 13053, ¶ 78 (2005)) ("[I]f a current provider in any of these markets is capacity constrained, or if a new entrant would like to enter these markets, then there is sufficient unused spectrum available that could be obtained in the secondary market.").

[51] *Id.* at 11; *Comsat Corp. Petition Pursuant to Section 10(c) of the Communications Act of 1934, as Amended, for Forbearance from Dominant Carrier Regulation and for Reclassification as a Non-Dominant Carrier et al.*, Order and Notice of Proposed Rulemaking, 13 FCC Rcd 14083, ¶ 111 (1998) ("*Comsat Order*") ("Because U.S. separate satellite systems were able to provide transmit and receive occasional-use video services to 55 countries in 1997, they should be able to offer such service in the future to and from these markets. Thus, these 55 countries should be regarded as competitive markets for occasional-use video service.").

[52] *Comsat Order* ¶ 81.

[53] *See Verizon Comments* at 20-21 (citing *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation For Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 19 FCC Rcd 21522, ¶ 148 (2004) ("AT&T/Cingular Wireless Merger Order")).

[54] *See AT&T/Cingular Wireless Merger Order* ¶ 148 ("In particular, current market shares understate the likely future competitive importance of Verizon Wireless, Sprint, T-Mobile, and Nextel. These firms all compete fiercely for customers; all are investing substantially in capacity and new services in this sector; and Verizon Wireless, T-Mobile, and Nextel have been gaining nationwide market share over recent quarters.").

- Verizon cites the *Verizon-MCI Merger Order* for the proposition that a market share analysis "may misstate the competitive significance of existing firms and new entrants."[55] But the FCC made this statement in the context of competition for retail enterprise service, including from "systems integrators" and "value added resellers" that rely on the incumbent's own wholesale facilities to provide service.[56] Such non-facilities-based entry is relatively easy and can occur without expenditure of sunk costs. However, as the FCC has held in the unbundling context and as the Joint Commenters reiterate below, entry via resale of ILECs' facilities is irrelevant to whether facilities based competition can constrain incumbents prices in local telecommunications markets.[57]

- AT&T notes that the DOJ closed an investigation of the merger of Whirlpool and Maytag despite their high shares because "Samsung and other foreign manufacturers could increase their imports into the U.S." and "*[e]xisting U.S. manufacturers* have access capacity and could increase their production."[58]

Collectively, these cases stand for the proposition that, in those instances where multiple actual entrants have already gained a significant foothold in the market and possess substantial excess capacity, they can expand output and restrain the anti-competitive practices of other firms in the market. Under this analysis, it would be reasonable for the FCC to take into account the supply response of firms *currently* in a market, but which possess a smaller market share than the incumbent, in determining whether forbearance is appropriate. This is because such existing competitors *have already incurred the sunk costs of entry*.

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[55] *See* Verizon Comments at 20 (citing *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18433, ¶ 74 (2005) ("*Verizon-MCI Merger Order*")).

[56] *See Verizon-MCI Merger Order* ¶ 74.

[57] *See Infra* discussion at 16-18.

[58] AT&T Comments at 6 (emphasis added) (*citing* Dept. of Justice, Press Release, *Department of Justice Antitrust Division Statement on the Closing of its Investigation of Whirlpool's Acquisition of Maytag* (Mar. 29, 2006), http://www.usdoj.gov/atr/public/press_releases/2006/215326.htm)).

The Joint Commenters agree that the FCC should consider the constraining effect of such existing competitors on the incumbent's post-forbearance conduct. In fact, the Joint Commenters' Proposed Test would grant forbearance based, in part, on the presence of two facilities-based wireline providers that cover 75 percent of the customer locations serving a particular market, even if those competitors has each garnered only a 15 percent market share. If a competitor has already incurred the substantial sunk costs in constructing last-mile facilities and gained sufficient market share to demonstrate that it is a viable competitor, it may be able to increase supply in a particular market to check the incumbent's ability to raise rates.

B. All Of The Available Evidence Indicates That Committed Potential Entry Is Unlikely To Occur In The Local Markets At Issue

While a supply response from an actual competitor may serve to discipline an incumbent LECs' prices, there is no reason to believe that committed potential entry is likely to occur in the local markets at issue. With the exception of cable company entry into the mass market voice and broadband markets (made possible by their ability to leverage their legacy video investment in HFC facilities),[59] entry on a sufficient scale to check incumbent behavior post-forbearance has simply not occurred, making future entry unlikely. For this reason, the FCC should presume that only actual competition, not potential competition, is relevant to the forbearance analysis.

This is particularly true in the business market where customers demand services that can only be provided via intramodal fiber or copper facilities. All of the available evidence indicates that, due to the high sunk costs of fiber deployment, further entry (i.e., additional last-mile fiber construction) by CLECs and cable companies would never be

[59] *See* Paetec Comments at 30.

"timely, likely and sufficient" in scale to restrain incumbents' prices post forbearance. As the FCC has repeatedly held, carriers must still be able to economically justify the substantial sunk costs involved last mile facilities construction, even to locations near their fiber networks.[60] The Joint Commenters and others have repeatedly demonstrated that, while fiber deployment is feasible at those few locations where the revenue is sufficient to justify construction, the available revenues are insufficient to justify loop deployment to the overwhelming majority of commercial customer locations.[61] Accordingly, there is no reason to believe that fiber deployment will ever occur in enough locations to constrain the ability of the incumbent to raise price post forbearance to business retail and wholesale customers.

Notwithstanding the proven difficulties in deploying last-mile fiber facilities, Verizon asserts that widespread fiber-based deployment is just around the corner. Verizon cites to anecdotal evidence from competitors' press statements that cable companies and CLECs have expanded their fiber transport networks and serve many end-user locations now. Because their networks pass "near" tens of thousands of additional buildings, Verizon argues that competitors can easily expand their networks to reach

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[60] *See TRRO* ¶ 150 ("The economics of deploying loops are determined by the costs associated with such deployment and the potential revenues that can be recouped from a particular customer location. Competitive LECs face large fixed and sunk costs in deploying competitive fiber, as well as substantial operational barriers in constructing their own facilities.").

[61] *See, e.g., TWTC Special Access Letter* at 15-17. *See generally* Opposition of Time Warner Telecom Inc., Cbeyond, Inc., and Eschelon Telecom, Inc. (Erratum), Attach. A - Declaration of Stephanie Pendolino on Behalf of TWTC, WC Dkt. No. 07-97 (filed Sept. 13, 2007) (discussing TWTC deployment costs and limited number of TWTC "target" buildings).

these buildings.[62] For these reasons, Verizon implies that the FCC should grant forbearance in those geographic markets where competitors own fiber transport networks and have begun serving some end-user locations over their own fiber facilities because market-wide fiber deployment will arrive soon thereafter.[63] In other words, Verizon argues that evidence of limited fiber deployment meets the FTC/DOJ committed potential entry standard. But there is no basis for this conclusion. In fact, detailed evidence filed recently in the Phoenix Forbearance Proceeding demonstrates that fiber-based deployment is limited and is likely to stay that way for the foreseeable future.

1. CLEC Fiber Deployment

As Integra and TWTC reiterated less than a month ago, they must rely on the incumbent for last-mile connections unless a particular customer location generates the many thousands of dollars of monthly revenue necessary to justify construction. Because such revenue is rarely available, competitors serve few customer locations using their own loop facilities.

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[62] *See* Verizon Comments at 10-11 ("Traditional, fiber-based competitors have also continued to deploy fiber networks into new areas and to add additional lit buildings to their existing networks, even during the recent economic downturn. These new deployments are in addition to the more than 100,000 route miles of fiber that competitive carriers have already deployed within those areas in which demand for high-capacity services is concentrated, with an average of six known fiber-based providers within each of the top 50 MSAs. Even beyond the tens of thousands of buildings already connected to those networks, fiber-based competitors recognize that their networks pass nearby, and are capable of reaching, a significant number of the buildings with special access demand in incumbents' territories. For example, Level 3 recently told investors that '[o]ver 100,000 enterprise buildings [are] within 500 [feet] of [Level 3's] US network.'").

[63] *See id.* at 11 ("Statements such as these demonstrate that, when competing carriers evaluate their own competitive significance in the marketplace (as opposed to when they file legal and regulatory pleadings), they focus on the 'reach' of their networks, and not on the number of buildings to which those networks are already connected.").

Integra stated that it must earn approximately **[highly confidential begin] [highly confidential end]** in monthly recurring revenue to justify fiber loop construction.[64] Because most of Integra's businesses demand no more than single or multiple DS1s of service, each customer generates on average **[highly confidential begin] [highly confidential end]** in revenue per month, making loop deployment infeasible in the vast majority of circumstances.[65] As a result, Integra has only built end-user connections to **[highly confidential begin] [highly confidential end]** customer locations in the Phoenix MSA as of August 21, 2009.[66]

TWTC faces similar obstacles in deploying facilities to its customer locations.[67] Given the **[highly confidential begin] [highly confidential end]** average loop deployment cost in Phoenix (assuming a loop length of a mile or less), TWTC must earn **[highly confidential begin] [highly confidential end]** per month for **[highly confidential begin] [highly confidential end]** months to reach the **[highly confidential begin] [highly confidential end]** percent internal rate of return necessary to justify construction.[68] TWTC targets particular buildings with the assumption that it can win

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[64] *See Joint Opposition*, Attach. B - Declaration of Dave Bennett ¶ 4.

[65] *See id.*

[66] *See id.* ¶ 5.

[67] TWTC's target customer is a medium to large sized business, while Integra targets mostly smaller sized businesses. Therefore, on average, TWTC's customers generate more monthly revenue than the average Integra customer does. For that reason, TWTC has been able to deploy facilities to more locations than Integra. However, as explained, the **[highly confidential begin] [highly confidential end]** of TWTC's customers in Phoenix are served with off-net facilities, because most customer locations do not generate sufficient revenue to justify construction.

[68] *See Joint Opposition,* Attach. C - Declaration of Scott Liestman ¶ 6 ("We rarely construct these facilities beyond a mile, as it is generally cost prohibitive, except where there are extraordinary revenue opportunities.").

[highly confidential begin] [highly confidential end] percent of the telecommunications spending in that building.[69] Therefore, in order to earn **[highly confidential begin] [highly confidential end]** per month, TWTC targets buildings with approximately **[highly confidential begin] [highly confidential end]** in monthly telecommunications spending.[70]

Given these constraints, TWTC used GeoResults building telecom spend data to determine the percentage of commercial buildings in Phoenix (those with two or more DS1s of demand) to which it has not yet constructed loops but to which it might be able to in the future. Based on that analysis, TWTC concluded that it can realistically serve an additional **[highly confidential begin] [highly confidential end]** percent of the market[71] in Phoenix. Given that it has currently constructed loops to **[highly confidential begin] [highly confidential end]** of commercial buildings in Phoenix, TWTC will not be able to construct loops in the future to more than **[highly confidential begin] [highly confidential end]** percent of the commercial buildings in Phoenix.[72]

Even these numbers overstate the number of buildings where deployment is possible. Problems obtaining rights of way, building access and other issues unrelated to the price of deployment ensure that TWTC and Integra will be unable to deploy facilities to a portion of those locations where deployment otherwise meets the companies' theoretical cost models.

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[69] *See id.* ¶ 7.

[70] *See id.* ¶ 8.

[71] The market is defined as those buildings with two DS1s of demand or more. *See id.*

[72] *See id.*

While these analyses were performed for Phoenix, there is no reason to believe that either Integra or TWTC would be able to deploy fiber to a materially greater percentage of buildings in any other market. Nationwide, TWTC relies on its own loop facilities to serve only **[highly confidential begin] [highly confidential end]** of its customer locations.[73]

Integra's and TWTC's limited loop deployment in Phoenix comports with the available data regarding the extent to which competitors have deployed fiber loops in the aggregate. When the GAO studied some of the 10-MSAs at issue in this proceeding, it concluded that competitors had deployed loops to fewer than 10 percent of buildings demanding DSx service in nearly all of those markets.[74] Given the sunk costs of construction, the GAO believed that many business locations with lower levels of customer demand would likely never see competitive alternatives.[75]

2. Cable Company Fiber Deployment

While cable companies were able to leverage their legacy video businesses to overcome the sunk costs necessary to deploy their HFC networks to mass market customers,[76] cable companies do not appear to enjoy similar advantages in funding the construction of last-mile fiber necessary to provide services demanded by business customers. In order to justify fiber construction, cable companies conduct build/buy

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[73] *See id.* ¶ 5.

[74] *GAO, FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, GAO-07-80, at 20 (Nov. 2006) ("*GAO Report*").

[75] *See id.* at 13.

[76] As discussed in more detail below, the available evidence indicates that cable companies' HFC networks cannot provide services that act as a viable substitute for DS0, DS1 or DS3 services demanded by businesses.

analyses just like CLECs. Given the high sunk costs of fiber construction, cable companies, like CLECs, serve relatively few customer locations with their own fiber.[77] As Covad *et al.*, argue, these costs have precluded more than an incremental expansion of Cox's limited last-mile fiber footprint in Omaha in the over four years since the FCC granted forbearance.[78]

IV. QWEST PROVIDES NO BASIS FOR ITS ARGUMENT THAT COMPETITOR MARKET SHARE IS LOW BECAUSE INCUMBENT LEC PRICES ARE SET BELOW COMPETITIVE LEVELS DUE TO REGULATION

Qwest argues that the FCC should not even consider market share estimates in determining whether forbearance is appropriate because incumbent LECs' high market shares are artificially inflated. This is so, asserts Qwest, because rate regulation (it is unclear if Qwest is referring to state or Federal) has reduced incumbent LEC prices below competitive levels. As a result, competitive entry is purportedly suppressed because CLECs cannot profitably compete with the incumbent.[79] Furthermore, because incumbent LEC prices are below competitive levels, Qwest asserts that it is unsurprising

[77] *See* Sprint Nextel Comments at 3 ("Supply elasticity is low in the MSAs in question because significant barriers to entry remain high....Cable companies have not offered a broad alternative for last mile facilities that carriers need in order to compete in a self-sustaining manner.").

[78] *See* Covad *et al.*, Comments at 22.

[79] *See* Qwest Comments at 11-12 ("[I]f a regulatory body maintains a rate at an artificially low level, for universal service or other public interest reasons, this may discourage competitive entry. In such a case, a high market share may not be a reflection of market power, but may simply indicate that regulators have set the rates below the appropriate market level.").

that incumbent LECs would increase prices in the absence of rate regulation (it is unclear, but Qwest may be referring here to its price increase post-forbearance in Omaha).[80]

Qwest does not provide a single cite in its comments to support its assertion that rate regulation has pushed either its interstate or intrastate rates below competitive levels.[81] In fact, all of the available evidence shows that, in the absence of regulation, Qwest will raise rates well above competitive levels. According to evidence filed in the special access docket, in those locations where CLECs, including TWTC, have deployed their own last-mile facilities, their prices are much lower than Qwest's.[82] As explained above, TWTC only constructs fiber to those locations where it can achieve a positive rate of return over a relatively short period of time. If it can achieve a profit at rates much lower than Qwest, then surely Qwest's rates are well above both competitive levels and its own costs. This is particularly the case for Qwest's DS1 and DS3 services, which are often provided via copper. For those facilities, Qwest's sunk costs of construction have been recovered long ago.

Moreover, rates for interstate and intrastate services have been deregulated in many areas, permitting Qwest to raise its rates in those areas to what it alleges is the competitive level. For example, Qwest has taken advantage of pricing flexibility to raise

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[80] *See id.* at 16 ("For an ILEC to be deemed to have market power, it is not enough that it is able to raise prices, but it must be able to sustain a price increase above competitive levels. Even if an ILEC has been granted the ability to raise its local prices by a state commission, it is highly likely that the prices are still below competitive levels.").

[81] For example, there is no indication that Qwest ever asked or sought permission from the FCC to make an above-the-cap filing or that it has argued at state commissions that rate regulation does not permit Qwest to obtain a reasonable rate of return or meet competitive prices.

[82] *See Supra* n.40.

the rates in every MSA where it has received Phase II pricing flexibility (including Omaha) above the rates in price cap areas.[83] This is true for both one year, no volume terms as well as for volume/term agreements.[84] Similarly, as discussed above with respect to California and Illinois, many states have already eliminated intrastate rate regulation.

Furthermore, even in MSAs in which Qwest has increased prices after receiving Phase II pricing flexibility, competitive entry has not accelerated. The evidence of price increases by incumbent LECs in Phase II MSAs is widespread enough to support the inference that incumbent LECs are able to increase special access prices in those areas without experiencing substantial market share loss to any competitors, including new entrants.[85]

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[83] The FCC has granted Qwest Phase I and Phase II pricing flexibility for channel terminations in the following 20 MSAs: Albuquerque, NM; Bellingham, WA; Boise City, ID; Colorado Springs, CO; Davenport-Rock Island-Moline, IA-IL; Des Moines, IA; Dubuque, IA; Eugene-Springfield, OR; Fargo-Moorehead, ND-MN; Iowa City, IA; Medford, OR; Olympia, WA; Omaha, NE; Phoenix, AZ; Portland, OR-WA; Rochester, MN; Salt Lake City-Ogden, UT; Spokane, WA; St. Cloud, MN; and Yakima, WA. *See Qwest Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, Memorandum Opinion and Order, 17 FCC Rcd 7363, ¶ 8 n.25 (2002).

[84] *See TWTC Special Access Letter*, Attach. A (showing that all of Qwest's price flex rates on one year, no volume terms are universally higher than Qwest's price cap rates on one year, no volume terms). Qwest's "RCP" plan provides the same percent discount off of price flex and price cap rates, so that price flex rates will remain above price cap rates after the RCP discount is applied. *See* Qwest FCC Tariff No. 1, Access Service, § 7.1.3 (B)(1) ("**A RCP is an optional pricing plan that allows DS1 and/or DS3 customers to receive 22% price reductions for committing to a minimum quantity of DS1 and/or DS3 circuits provided to customer under Sections 7 and 17 of this Tariff for a 48-month term. The price reductions are taken from the month-to-month** rates provided under Sections 7 [price cap] and 17 [price flex] of this Tariff for the DS1 and DS3 circuits.").

[85] *See TWTC Special Access Letter*, Attach A (showing that incumbents' special access rates are almost uniformly higher in Phase II areas than in areas which remain under price caps).

V. THE FORBEARANCE PROCESS REMAINS THE APPROPRIATE FORUM FOR DETERMINING WHETHER UNBUNDLING OBLIGATIONS SHOULD BE ELIMINATED

Verizon argues at length that the FCC must specify the process it intends to use to eliminate unbundling requirements.[86] It argues that any process must remedy the alleged failure of the impairment rules to keep up with new and emerging technologies and entrants.[87] Verizon asserts, "[t]hat process can be forbearance proceedings or it can be some other process."[88]

The FCC need not concern itself with this argument. The incumbents have a statutory right to file forbearance petitions. As the FCC recognized in the *TRRO*, ILECs are free to seek forbearance from unbundling obligations where they deem appropriate.[89] Moreover, the forbearance process is capable of keeping up with technological changes and new market entry that might have occurred since the *TRRO* triggers were designed. The FCC need only analyze these changes by using the appropriate analytical tools as discussed throughout this pleading.

Additionally, the FCC has shown its preference for the forbearance process by defining forbearance procedural rules to make that process work more smoothly. Qwest recently filed a petition for forbearance from unbundling obligations in Phoenix that will be subject to at least some of those rules.[90] There is no basis for changing the process by

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[86] *See* Verizon Comments at 4, 12-17.

[87] *See id.* at 12.

[88] *See id.* at 4.

[89] *See TRRO* ¶ 39.

[90] *See generally Forbearance Rules Order*; *see also Pleading Cycle Established for Comments on Qwest Corporation's Petition for Forbearance in the Phoenix, Arizona Metropolitan Statistical Area*, Public Notice, 24 FCC Rcd 9470 (2009).

which the FCC determines that unbundling rules are appropriate. Instead, the FCC should focus its resources on establishing a sound analytical framework for considering such petitions.

VI. CONCLUSION

The Commission should assess the merits of the 10 MSAs at issue in this remand in according with the discussion herein.

Respectfully submitted,

/s/

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