

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

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

Michael E. Glover
Of Counsel

Edward Shakin
Rashann Duvall
Katharine R. Saunders
VERIZON
1320 North Courthouse Road
Ninth Floor
Arlington, VA 22201
(703) 351-3097

Attorneys for Verizon

August 23, 2010

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The Commission should not apply its *Qwest Order*² test going forward, either with respect to unbundling: where the *Qwest Order* ignores the binding statutory impairment standard, or with respect to dominant carrier regulation: where the *Qwest Order* fails to recognize the significant changes in the market and the resulting intermodal competition. The Commission should instead provide a viable mechanism to conform its UNE rules to marketplace changes and the statutory impairment standard, and also establish a forward-looking test for evaluating non-dominance.³

In its public notice, the Commission asks about removal of two forms of regulation, unbundling and dominant carrier regulation. With respect to unbundling, the key question is

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

² *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. §160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, 25 FCC Rcd 8622 (2010) (“*Qwest Order*”).

³ In the absence of a reasonable, known, and lawful standard on either issue, Verizon has, by separate letter, withdrawn its remanded petitions for forbearance in the 6 MSAs. See Letter from Kathleen Grillo, Verizon to Marlene Dortch, FCC, *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* (Aug. 23, 2010).

what process the Commission will use to conform its unbundling requirements to the statutory impairment standard in response to significant changes in the market. With respect to dominant carrier regulation, the question is what the appropriate process and standard are for removing dominant carrier regulation.

First, the Commission has repeatedly recognized that it must provide some mechanism to conform its unbundling rules to the statutory impairment standard in response to competitive developments in particular market areas. The Commission previously designated forbearance petitions as the mechanism to be used for this purpose, but has since refused to apply the statutory impairment standard in response to such petitions. But whether through the forbearance process or otherwise, there must be some mechanism to conform the unbundling rules to the statutory impairment standard in light of the ongoing, rapid marketplace changes (including the rapid migration of consumers toward wireless and other intermodal alternatives).

That is all the more true in light of the significant changes that have occurred in the years since the Commission last visited its unbundling rules. The impairment standard turns on the *ability* of alternative providers to compete without using unbundled elements, not the share of the market they have already won. In a number of areas, however, Verizon's local telephone companies now have less than half the wireline lines, and when wireless cut-the-cord competition is taken into account, as it must be, less than a third of the lines. Under these circumstances, there is no question that alternative providers are *able* to compete without using unbundled elements, and no plausible argument that the statutory impairment standard is satisfied. As the Commission and the courts have correctly recognized, imposing unbundling requirements on only one of the various competing providers under these circumstances is

affirmatively anticompetitive and ultimately harms consumers. Accordingly, it is vital to provide some mechanism to conform the unbundling rules to today's market conditions.

Second, the Commission's standard for removing dominant carrier regulation has never rested on an assessment of market share alone, as the *Qwest Order* improperly purports to do. Previously, the Commission has recognized that sole reliance on a backward-looking measure of market share is flawed. Market share measures, by definition, must rely on data that shows where the market has been, not where it is going. In dynamic markets like telecommunications, a share analysis, standing alone, will fail to provide an accurate picture of the marketplace. The *Qwest Order* further compounds that error by artificially excluding from consideration various existing and emerging competitors, so that a finding that a carrier is dominant is inevitable. Going forward, the Commission should correct the errors inherent in the *Qwest Order* so that any test it applies is both forward-looking and conforms to the facts by considering all existing and emerging potential sources of competition, rather than artificially excluding competitors from consideration.

DISCUSSION

I. As the Commission Has Recognized, There Must Be Some Mechanism To Conform Its Unbundling Rules To The Statutory Standard In Response To Competitive Developments In Particular Areas

The Commission has correctly recognized that the Commission must have *some* process, whether forbearance petitions or otherwise, to conform its unbundling rules to the statutory impairment standard as competition in particular areas continues to increase. The Commission and the Courts have recognized the harm that comes from leaving unbundling obligations in place after they are no longer necessary. As the D.C. Circuit has explained, "unbundling is not an unqualified good," but instead "comes at a cost, including disincentives to research and development by both ILECs and CLECs and the tangled management inherent in shared use of a

common resource.”⁴ Where there is already extensive and growing competition, there is “no reason to think [unbundling] would bring on a significant enhancement of competition,” and “nothing in the Act appears a license to the Commission to inflict on the economy the sort of costs” associated with unbundling.⁵

Previously, the Commission directed parties to use forbearance petitions as the vehicle to review and modify its unbundling requirements in light of competitive developments in particular areas. As the Commission itself explained, “rather than initiating a number of separate proceedings to address, case-by-case, situations where the Commission’s impairment findings did not perfectly match local market realities, the Commission instead invited incumbent LECs to seek forbearance from the application of the Commission’s unbundling rules in specific geographic markets”⁶

Notwithstanding its prior directions, the Commission since that time has declined to apply the statutory impairment standard in response to forbearance petitions. Most recently, in its *Qwest Order* test, the Commission applied a backward-looking measure of market share. But the statutory impairment standard turns on the *ability* of competitors to compete without using unbundled elements,⁷ not on the share of the market they already have achieved. As such, the

⁴ *United States Telecom Assoc. v. Federal Communications Comm’n*, 290 F.3d 415, 429 (D.C. Cir. 2002) (“USTA I”).

⁵ *Id.*

⁶ *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, Memorandum Opinion and Order, 22 FCC Rcd 1958, ¶ 5 (2007) (citing *Triennial Review Order*); see also *Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metro. Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415, ¶ 39 (2005).

⁷ See 47 U.S.C. § 251(d)(2) (“the Commission shall consider, at a minimum, whether . . . the failure to provide access to such network elements would *impair the ability* of the telecommunications carrier seeking access to provide the services that it seeks to offer.”) (emphasis added); see also *Earthlink, Inc. v. FCC*, 462 F.3d 1, 9-10 (D.C. Cir. 2006) (noting

Commission's *Qwest Order* applies a standard that is fundamentally out of sync with the statutory impairment test.

Going forward, whether through forbearance petitions or otherwise, the Commission must provide some mechanism to bring its unbundling rules in line with the statutory impairment standard and the realities of today's communications landscape, particularly in light of the significant changes in the market since the Commission last addressed its unbundling rules. There must be a vehicle by which providers may receive timely determinations to bring the unbundling requirements into compliance with the impairment standard: a mechanism to remove unbundling obligations where competitors *can* compete, and by necessary extension, where they already *are* competing without using unbundled elements.

The need to provide such a mechanism is all the more important where, as here, there has been an explosion in the availability of competitive alternatives since the Commission last visited its unbundling rules, including from cable telephony, other providers of VoIP and from wireless services. For example, in a number of areas, Verizon's local telephone companies now serve less than half of the wireline lines. When the growth in consumers cutting-the-cord in favor of wireless is taken into account, Verizon is the telephone service provider for less than a third of households.

Under circumstances such as these, where competitors already have entered the market and are serving large numbers of customers – and collectively significantly more than the now inaptly-named “incumbent” provider – there is simply no question that alternative providers are *able* to compete without using unbundled elements. There is no plausible basis under the statute to impose unbundling requirements on one – and only one – competitor. As both the

distinction between analysis for purposes of assessing dominant carrier regulation and analysis for unbundling requirements).

Commission and the courts have recognized, far from increasing competition, imposing unbundling obligations in such circumstances is inherently anticompetitive and ultimately harms consumers.⁸ It is critical that the Commission provide some mechanism to conform its unbundling rules to today's market realities in particular areas.

II. An Appropriate Standard For Removing Dominant Carrier Regulation Should Be Forward-Looking and Reflect All Sources of Competition, Both Existing and Potential

The Commission, federal antitrust authorities, and the courts all have long recognized that an appropriate competition analysis must be forward-looking and must consider all sources of competition, including both existing and potential. In fact, the Commission itself previously has rejected relying on market share alone as a basis for determining whether to apply dominant carrier regulations. In its *Qwest Order*, however, the Commission inexplicably abandoned these sound principles in favor of a test based solely on backward-looking measures of market share, and went even further by ignoring obvious existing competitors for purposes of calculating market shares. That test is inherently flawed and should be replaced with one that is consistent with competition law and the Commission's prior orders.

A. Backward-Looking Measures of Market Share Alone Are Not an Appropriate Basis For Evaluating Competition in Dynamic Industries Undergoing Rapid Change

The Commission has readily recognized that in a dynamic marketplace, market share calculations alone can "significantly overstate" a party's market position, particularly

⁸ See Comments of Verizon and Verizon Wireless, *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, RM 10593, at Attachment A, Decl. of Michael D. Topper, ¶¶ 18, 53 (Jan. 19, 2010) ("Topper Decl.") (explaining that price regulation may "deter entry by competitive providers and thereby stymie the very competitive process that the Commission seeks to encourage.")

considering “other market factors that affect market power.”⁹ This view is echoed in multiple Commission orders evaluating various sectors of the communications industry.¹⁰ Likewise, the Department of Justice and Federal Trade Commission’s Merger Guidelines recognize the limitations of using traditional market share measures in dynamic marketplaces.¹¹ In particular, the Department of Justice has explained that “[i]n any industry subject to significant technological change, it is important that the evaluation of competition be forward-looking rather than based on static definitions of products and services.”¹²

In dynamic industries such as communications, the Commission has recognized that an appropriate competition analysis must “consider technological and market changes, and the nature, complexity, and speed of change of, as well as trends within, the communications

⁹ *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) with Regard to Certain Dominant Carrier Regulations for In-Region, Interexchange Services*, Order, 22 FCC Rcd 16440, ¶ 39 (2007).

¹⁰ *See also, e.g., Amendment of Parts 2 and 25 of the Commission’s Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range*, First Report and Order and Further Notice of Proposed Rule Making, 16 FCC Rcd 4096, ¶ 298 (2000) (noting that market share of direct broadcast satellite (DBS) firms in multichannel video programming distribution market “may understate their competitive importance” given the “fast growth of DBS”); *Petition of the People of the State of California and the Public Utilities Commission of the State of California To Retain Regulatory Authority over Intrastate Cellular Service Rates*, Report and Order, 10 FCC Rcd 7486, ¶ 103 (1995) (rejecting California commission’s static analysis of wireless market because it did “not fairly reflect the speed at which [the commercial mobile radio services] market structure conditions affecting cellular services are evolving”).

¹¹ U.S. Department of Justice & Fed. Trade Comm’n, *Horizontal Merger Guidelines*, § 1.521, <http://www.justice.gov/atr/public/guidelines/hmg.htm> (rev. ed. Apr. 8, 1997). (“*Guidelines*”) (explaining that “Market concentration and market share data of necessity are based on historical evidence. However, recent or ongoing changes in the market may indicate that the current market share of a particular firm either understates or overstates the firm’s future competitive significance.”)

¹² Ex Parte Submission of the United States Department of Justice, *Economic Issues in Broadband Competition; A National Broadband Plan for Our Future*, GN Docket No. 09-51, at 6 (Jan. 4, 2010).

industry.”¹³ As economist Michael Topper previously explained, "in a dynamic marketplace, current market shares would likely understate the competitive significance of emerging technologies that offer lower costs, better features, or other characteristics that suggest growing market acceptance."¹⁴

The need for a forward-looking evaluation is especially important here, given the considerable regulatory lag inherent in obtaining relief from dominant carrier regulation and a fast moving market. The fact that the Commission was still considering forbearance petitions filed four years ago is testament to the problem of regulatory lag. In that time, the marketplace has seen a dramatic shift, as mass-market customers have moved to cable telephony, other VoIP providers and wireless. It also has seen explosive growth in broadband and the myriad new services that flow from that and a host of other changes. And the pace of change only appears to be increasing. A backward-looking measure simply cannot reflect those shifts.

B. A Proper Analysis Should Include Intermodal Technologies and Not Segment the Marketplace Artificially

Going forward, the Commission should consider all existing and emerging potential sources of competition, rather than artificially exclude competitors from consideration. Given the substantial shift of consumers to wireless and other intermodal technologies, these providers must be included in any assessment of the relevant market. Similarly, competition should be assessed over a geographic area based on marketplace realities, such as by MSA, and should define the relevant products from the perspective of purchasers, including all technologies that purchasers view as viable alternatives.

¹³ *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, ¶ 41 (2004).

¹⁴ Topper Decl. ¶ 22.

1. The Commission Should Consider Wireless and Other Intermodal Competition

Given the rising speed at which consumers are moving toward wireless and other intermodal competitors such as IP-based, over-the-top VoIP providers, future assessment of competition must include these products and providers. Going forward, the Commission should not ignore major market shifts because they lack a particularized price study, but rather follow the guidance of the new draft merger guidelines and “consider reasonably predictable effects of recent or ongoing changes in market conditions in interpreting market concentration and market share data.”¹⁵ Otherwise, any analysis will improperly exclude ongoing and viable competitors by artificially segmenting the market into unreasonably narrow divisions.

Mobile Wireless Carriers. First, any appropriate test to be applied going forward must include competition from wireless. The Commission’s *Qwest Order* test improperly ignores the sizeable (and growing) shift as consumers use wireless as their primary source of telephone service and increasingly cut-the-cord-completely.¹⁶

The movement by consumers to wireless is simply too substantial a change in the market to ignore, as the Commission has previously recognized.¹⁷ Wireless minutes now far surpass landline totals.¹⁸ Consumers are increasingly cutting-the-cord and abandoning their wireline

¹⁵ Department of Justice, *Horizontal Merger Guidelines: For Public Comment*, <http://www.ftc.gov/os/2010/04/100420hmg.pdf>, at 17 (Apr. 20, 2010).

¹⁶ *Qwest Order* ¶ 55.

¹⁷ See, e.g., *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, ¶ 15 (2008).

¹⁸ See CTIA, U. S. Wireless Quick Facts, <http://www.ctia.org/advocacy/research/index.cfm/AID/10323> (last visited August 18, 2010) (reporting 2.3 trillion annualized wireless minutes for 2009); Dr. Robert Roche and Lesley O’Neil, *CTIA’s Wireless Industry Indices, Semi-Annual Data Survey Results: A Comprehensive Report From CTIA Analyzing the U.S. Wireless Industry Year-End 2008 Results*, Chart 58 and Chart 59 (May 2009) (respectively reporting for 2007 about 2.1 trillion wireless minutes of use

phones for wireless. As of December 2009, more than 24% of households have made the shift from wireline to wireless, and an additional 15% of households with a landline received all or almost all calls on wireless telephones.¹⁹ And these consumers are not necessarily returning to wireline. Instead, the overall market – by both demographics and minutes of use – is shifting toward wireless.

The *Qwest Order* incorrectly determines that wireless and wireline services may be considered in the same relevant market only if the petitioner offers quantitative proof that the prospect of buyer substitution to mobile wireless access constrains the price of wireline access.²⁰ Importantly, the absence of a complicated price elasticity or similar study does not mean that there is no impact on prices, particularly where real-world facts show that consumers are using one service as a substitute for another. In any event, the Commission *did* have available data that suggests that decreases in wireless pricing has an impact on wireline customers' behavior. Qwest had cited a report (filed in the record in an earlier Verizon forbearance petition) by Doctors William Taylor and Harold Ware.²¹ That report compared cut-the-cord wireline line loss to changes in the relative prices of wireless and wireline and calculated an estimated

and about 348 billion interstate switched access minutes and about 593 billion wireless interstate minutes of use and about 349 billion interstate switched access minutes).

¹⁹ Stephen Blumberg and Julian V. Lake, Centers for Disease Control, *Wireless Substitution: Early Release of the Estimates From the National Health Interview Survey, July-December 2009*, <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201005.pdf>, at 1, Table 5 (May 12, 2010) (“*CDC Study*”) (about 14.9 percent of total households have landlines, but rely on wireless phones for all or almost all of their calls).

²⁰ *Qwest Order* ¶¶ 55-56.

²¹ See Ex Parte Letter from Rashann Duvall, Verizon, to Marlene H. Dortch, FCC, *Petition of Verizon New England Inc. for Forbearance Pursuant to 47 U.S.C. § 160(c) in Rhode Island; Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in Cox's Service Territory in the Virginia Beach Metropolitan Statistical Area*, WC Docket Nos. 08-24, 08-49, at Attachment B, “The Effectiveness of Mobile Wireless Service as Competitive Constraint on Landline Pricing: Was the DOJ Wrong” (May 1, 2009) (“Taylor Ware Report”).

elasticity that “strongly suggests that wireless is a good substitute for wireline.”²² Moreover, the Taylor Ware report conservatively did not take into account the significant improvements in the quality of wireless service over the period reviewed. Economists recognize that as wireless call quality improves, the consumer is receiving a higher quality product at the same cost – a de facto price decrease. Therefore, the changes in the relative prices was actually *more* pronounced than those relied upon by the report authors. The criticism the Commission cited in opposition to this report was wrong,²³ and it missed the bigger point: in the absence of any contrary data and the overwhelming evidence of large numbers of customers moving away from wireline service to wireless, it is evident that direct competition is occurring.

Thus, the Commission’s *Qwest Order* test ignores the real-world evidence that buyers – by making the substitution in substantial numbers – view the two services as valid substitutes.

VoIP-Based Providers. Mass-market consumers can also choose from numerous over-the-top VoIP services. Customers can select a growing array of options from companies such as Vonage or Skype that mirror the quality and convenience of traditional wireline telephone service. As broadband service becomes more prevalent,²⁴ these trends may continue as consumers elect VoIP providers rather than traditional wireline for their telephony needs. Just

²² *Id.* at 5.

²³ See *Qwest Order* at n.174 (citing declaration of Michael Pelcovits filed by Cavalier). The claim in that declaration that the Taylor Ware Report assumes the central question is incorrect. While the report authors concede that they would have preferred for controls of other factors, they did not assume their result and in fact included adjustments to account for reductions in wireline access lines unrelated to cut-the-cord losses. See Taylor Ware Report at 5.

²⁴ Compare *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706*, Sixth Broadband Deployment Report, GN Docket Nos. 09-137, 09-51; FCC 10-129, ¶ 4 (July 20, 2010) (“Today, inter connected VoIP is subscribed to by over 21 million Americans”) with *Universal Service Contribution Methodology*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, ¶ 19 (2006) (noting that the number of interconnected VoIP subscribers had grown from 150,000 in 2003 to 4.2 million by the end of 2005).

like wireless and cable, these options provide valid competition for conventional wireline in the eyes of consumers, and should not be excluded from the analysis.

Wholesale (Non-UNE) Competition. Competitors who serve mass-market customers over incumbents' networks without unbundling should also be included in any analysis. These include "commercial product[s]" that incumbents "designed to replace UNE-P . . . even in the absence of a legal mandate to do so."²⁵ These entities receive access to incumbents' networks at market rates that enable them to provide service to mass-market customers.²⁶

2. Cable and Other New Competitors Should Not Be Discounted, Nor Should Regulation Be Weighted In Their Favor

Even setting aside its issues with excluding intermodal competition, the Commission's *Qwest Order* discounts vigorous competition from cable telephony providers, asserting that "the move from monopoly to duopoly is not alone necessarily sufficient to justify forbearance."²⁷

As an initial matter, this argument is predicated entirely on the erroneous decision wholly to exclude a number of competitors, including wireless and other VoIP providers from the analysis. In addition, economists and the DOJ have long recognized that the number of competitors in a marketplace says nothing about the actual extent of competition. As the DOJ previously explained, "[i]n markets . . . with differentiated products subject to large economies of scale (relative to the size of the market), the Department does not expect to see a large number of suppliers."²⁸ Similarly, as Dr. Michael Topper explained in the context of the Commission's special access proceeding, "[m]arkets with a relatively small number of competitors can exhibit

²⁵ *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415, ¶ 82 (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).

²⁶ See Ex Parte Letter from Dee May, Verizon, to Marlene Dortch, FCC, WC Docket Nos. 08-24, 08-49, at 6 (March 9, 2009).

²⁷ *Qwest Order* ¶¶ 30, 32.

vigorous competition and yield large consumer benefits despite the fact that their structure is not entirely consistent with the textbook model of a perfectly competitive market.”²⁹

Moreover, the *Qwest Order* affirmatively hampers vigorous competition by confirming a benefit on largely unregulated competitors even as it handicaps traditional wireline providers. Rather than increase fair competition, that Order would put a thumb on the scale to favor particular competitors over others. This is particularly egregious where those providers now serve more customers than the supposed incumbents.

3. The Enterprise Market Should Include All Technologies That Purchasers View As Viable Alternatives

The enterprise market, both in terms of products and in geography, should reflect marketplace realities, rather than applying overly narrow or artificial definitions that unfairly skew the analysis and lack economic justification. The Commission should view different capacities of dedicated services as well as transport and channel terminations as purchasers do, rather than treat them as separate product markets. Similarly, the appropriate geographic area should be based on how customers and incumbents assess competition, such as at the MSA level, rather than on an artificially narrow basis such as each customer’s location.

Contrary to the conclusions in the *Qwest Order*, many high-capacity customers view different service capacities as interchangeable. In fact, the economics of high-capacity services— from both the demand and supply side make one bandwidth or speed of service a viable substitute for another speed of service. Thus, for some customers it may be more economical to purchase a single DS3 rather than several individual DS1s. For these types of customers DS1s and DS3s are indeed interchangeable. Moreover, many high-capacity services customers purchase DS1 services and DS3 services in combinations that comprise complete circuits. A

²⁸ *DOJ Comments* at 7.

typical circuit may have a DS3 channel termination or DS3 transport that is multiplexed to as many as 24 DS1 channel terminations. Dr. Michael Topper has previously confirmed that there is no sound economic basis for treating different service capacities as separate products for purposes of analyzing competition.³⁰

In addition to using overly narrow product definitions, the *Qwest Order*'s designation of "each customer location as a separate geographic market" is overly narrow and is not appropriate from an economic perspective.³¹ Dr. Topper has previously confirmed that such narrow geographic market definitions are unjustified and can unfairly skew the analysis, resulting in the appearance of a monopoly where in fact none exists.³²

Indeed, competitive providers neither market nor deploy these services at individual addresses. To the contrary, competitive providers typically enter large geographic areas such as an entire city, groups of cities, or even an entire state.³³ After deploying facilities in an area, competitive providers market their services across broad geographic areas rather than at the building level. Likewise, many customers do not purchase services at the individual building level.³⁴ For example, many customers purchase services for a number of different locations that

²⁹ Topper Decl. ¶ 5.

³⁰ See Topper Decl. ¶¶ 26, 35 ("In assessing the competitiveness of high-capacity services, the focus should be from the perspective of purchasers, and include all technologies that purchasers view as viable alternatives.").

³¹ See *Qwest Order* ¶ 36.

³² See Topper Decl. ¶¶ 54-61 ("An overly small [geographic] scale will improperly exclude potential competitors from the market and thereby understate the degree of competition in a given geographic market.").

³³ See, e.g., XO Press Release, *XO Communications Expands Network Presence in Seattle Metropolitan Area* (July 12, 2010) (announcing XO's expansion into Seattle); Level 3 Press Release, *Level 3 Expands Operations in the Southwestern United States* (May 13, 2010) (announcing Level 3's expansion in Arizona, Nevada and Utah).

³⁴ See, e.g., Reply Comments of Verizon and Verizon Wireless, *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, RM 10593, at Attachment B, Reply Decl. of Quintin Lew and Anthony Recine, ¶ 12 (Feb. 24, 2010).

may be widely dispersed within a metropolitan area.³⁵ Thus, there is no sound economic basis for defining the geographic market at the customer location level.

CONCLUSION

For all the reasons addressed above, the Commission should not apply its *Qwest Order* test going forward, but should instead provide a viable mechanism to conform its unbundling rules to marketplace changes and the statutory impairment standard in particular areas, and also establish a forward-looking test for evaluating non-dominance.

Respectfully submitted,



Edward Shakin
Rashann Duvall
Katharine R. Saunders
VERIZON
1320 North Courthouse Road
Ninth Floor
Arlington, VA 22201
(703) 351-3097

Attorneys for Verizon

Michael E. Glover
Of Counsel

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³⁵ *See id.*