

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

In the Matter of)
)
Petition of Verizon Telephone Companies for) WC Docket No. 08-49
Forbearance Pursuant to)
47 U.S.C. § 160(c) in Cox's Service Territory in)
the Virginia Beach Metropolitan Statistical Area)
)

OPPOSITION

Andrew D. Lipman
Russell M. Blau
Patrick J. Donovan
Philip J. Macres
BINGHAM MCCUTCHEN, LLP
2020 K Street, NW
Washington, DC 20006
(202) 373-6000

Attorneys for

COMPTEL;
Access Point, Inc.;
Affinity Telecom, Inc.;
Alpheus Communications, L.P. ;
ATX Communications, Inc.;
Bridgecom International, Inc.;
Broadview Networks, Inc.;
Cavalier Telephone Corporation ;
CIMCO Communications, Inc.;
Close Call America, Inc.;
CP Telecom, Inc.;
Covad Communications Group, Inc.;
Deltacom, Inc.;
DSLnet Communications, LLC;
Globalcom, Inc.;

Lightyear Network Solutions, LLC;
Matrix Business Technologies;
McLeodUSA Telecommunications Services,
Inc.;
MegaPath, Inc.;
PAETEC Holding Corp.;
Penn Telecom, Inc. d/b/a Consolidated
Communications Penn Telecom;
RNK Inc. d/b/a RNK Communications;
segTEL, Inc;
Talk America Holdings, Inc.;
TDS Metrocom, LLC; and
U.S. TelePacific Corp. and Mpower
Communications Corp., both d/b/a
TelePacific Communications

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Summary

Verizon's approach to selecting a geographic forbearance area is arbitrary. The Commission should require an area for forbearance that has a basis in economic or market analysis, such as an entire MSA. Verizon's proposal has no basis other than serving Verizon's expedient goal of crafting an area where it thinks it might meet the MSA market share test if it were applied to Verizon's gerrymandered proposed forbearance area.

Verizon has not shown sufficient competition even under the incomplete approach of the *Verizon Six MSA Forbearance Order*. Estimates of residential lines derived from white page listings rather than actual line data are an insufficient basis to determine competitor market share. But even with its white pages estimates, Verizon has not shown sufficient competitor market share because it counts its own wireless customers as competitors, and because it counts its own wholesale products as competitive lines. Verizon's access line loss percentages are seriously overstated and misleading in many respects because Verizon has been gaining lines due to FiOS, and because Verizon cannot show that all lost lines represent lines actually gained by facilities-based competitors.

Verizon has not shown competition in the enterprise market because it relies on information that the Commission has already rejected, such as information gleaned from websites, fiber miles, and number of competitor networks. Verizon has essentially defaulted on its obligation to show a competitive wholesale market. It merely states that Cox provides wholesale service and references a Cox website without any information concerning the actual availability or provision of wholesale service.

The Commission may not rely on a predictive judgment that Verizon will offer reasonable terms and conditions to copper loops absent UNE obligations. If it does not deny the petition, the Commission should establish reasonable rates, terms, and conditions for alternatives to copper loops. Verizon has not offered any arguments in support of forbearance from offering inside wire subloop UNEs.

The Commission should reject Verizon's proposed justification for forbearance based on alleged non-impairment. Verizon's ability to obtain relief from unbundling obligations based on non-impairment is already defined and provided for in the FCC's unbundling rules.

Verizon has not met the statutory standard for forbearance from UNE obligations because forbearance would lead to higher prices and fewer choices of service options and service providers for consumers. Forbearance would harm competition. For essentially the same reasons, it has not justified forbearance from dominant carrier regulation or *Computer III* requirements.

Forbearance from unbundling obligations would be unlawful for the additional reasons that the Commission may not decouple forbearance from Section 251(d)(2) impairment; the Commission has not previously applied a reasonable interpretation of "fully implemented;" and the Commission is examining in other proceedings serious questions concerning the reasonableness of Verizon's special access, Section 271, and Section 251(c)(4) resale offerings.

The Commission should promptly deny the Petition.

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Metropolitan Statistical Area)
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OPPOSITION

The undersigned competitive carriers submit this Opposition to the above-captioned petition¹ of Verizon Telephone Companies seeking forbearance from application of important regulatory obligations to it in an arbitrarily-defined portion of the Virginia Beach Metropolitan Statistical Area (MSA).²

I. VERIZON PROPOSES AN ARBITRARY GEOGRAPHIC AREA

Section 10(a) of the Act provides that the Commission may grant forbearance in “any or some” of a carrier’s “geographic markets.”³ For all the reasons provided to the Commission in

¹ Petition of Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in Cox’s Service Territory in the Virginia Beach Metropolitan Statistical Area, WC Docket No. 08-49 (filed Mar. 31, 2008) (“Verizon Petition”).

² *Pleading Cycle Established for Comments on the Verizon Telephone Companies Petition for Forbearance In the Virginia Beach Metropolitan Statistical Area*, Public Notice, WC Docket No. 08-49, DA 08-878 (WCB rel. April 15, 2008).

³ 47 U.S.C. § 150(a).

the *Forbearance Procedures Rulemaking*,⁴ the Commission should establish standards to limit abuse of the forbearance process by ILECs by, among other things, repeatedly proposing arbitrary and irrational geographic forbearance areas.⁵ In the absence of rules that already address the issue, the Commission should deny forbearance petitions based on the alleged extent of competition that are not based upon a geographic area defined according to reasonable economic criteria, or by reliance on geographic markets determined by other agencies pursuant to reasonable criteria.

As with its recent petition for Rhode Island, Verizon's approach to selecting a geographic forbearance area is exactly the opposite of what it should be. Instead of identifying a local telecommunications market based on some reasonable economic criteria that the Commission could accept and then attempting to justify forbearance in that area, it gerrymanders itself a so-called "market" area in which it thinks it has the best chance to meet the forbearance test that it believes that the Commission should apply, in this case the incomplete test the Commission employed in the *Verizon Six MSA Forbearance Order*. Verizon admits this approach, stating that:

In prior decisions, the Commission has determined that forbearance is appropriate only in those areas where cable voice services are widely available. [citing *Omaha Forbearance Order* ¶¶ 28, 69]. This petition is accordingly tailored to those areas in the Virginia Beach MSA where this is the case⁶

⁴ *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as amended*, Notice of Proposed Rulemaking, WC Docket No. 07-267, FCC 07-202 (rel. Nov. 30, 2007).

⁵ Initial Comments of Access Point *et al.*, WC Docket No. 07-267, at 5 (filed Mar. 7, 2008).

⁶ Verizon Petition at 4.

This approach would permit Verizon to pick and choose any area, defined by any criteria it likes, for requesting forbearance. Verizon could propose forbearance for a street, a building, or perhaps the area served by a particular cell site, if it thinks that arbitrary area could meet the market share threshold that the Commission previously applied on an MSA-wide basis. While this might serve Verizon's interests, the Commission should instead insist on the selection of a geographic market that has a basis rooted in rational economic analysis and then apply the appropriate forbearance test in that market.

The irrationality of Verizon's approach is highlighted by a comparison of rationales provided for the geographic areas proposed in the Rhode Island and Virginia Beach petitions. In the Rhode Island petition, Verizon averred that the entire state of Rhode Island was an appropriate geographic market because it was a state and/or because the state had a tenuous relationship to a study area.⁷ Although that reasoning was invalid,⁸ those criteria are abandoned here without explanation because Verizon does not apply for either the state of Virginia or for an area that has anything to do with study areas.

The Rhode Island and Virginia Beach petitions are superficially consistent in requesting forbearance for portions of an MSA served by a cable operator. But the economic market in which Verizon competes for voice service is not defined by the video franchise areas of cable operators. Verizon does not initiate service, provide, or price voice service based on cable franchise areas, which are not, therefore, suitable for measuring whether Verizon in its market faces sufficient competition to warrant forbearance. Although not necessarily a definitive guide

⁷ Petition of Verizon New England for Forbearance Pursuant to 47 U.S.C. § 160(c) in Rhode Island, WC Docket No. 08-24, at 3-4 (filed Feb. 14, 2008).

⁸ Opposition of Access Point *et al.*, WC Docket No. 08-24, at 13 (filed Mar. 28, 2008).

for this proceeding, the criteria of the DOJ Horizontal Merger Guidelines for defining geographic markets would not produce a cable video franchise area as a voice geographic market for Verizon.⁹

But even if a cable operator's franchise area otherwise made sense as a way to define Verizon's voice market, the Commission could not accept that as a reasonable area because Verizon does not actually apply for forbearance in the Cox portion of the Virginia Beach MSA. Instead, Verizon omits portions of the MSA where Cox does not provide voice service.¹⁰ Verizon's selected geographic area is doubly unreasonable because it does not actually seek forbearance in the area in which it claims is a reasonable area to request forbearance.

Verizon's proposed forbearance area is also unreasonable because it omits without explanation New Kent County, which is adjacent to, but not in, the Virginia Beach MSA and is served by Cox. If Verizon were to argue that New Kent County should be excluded because it is within the boundaries of a different MSA, that would contradict the premise of its Petition that MSA boundaries can be ignored whenever convenient in delineating a forbearance area. In the absence of any consistent explanation, Verizon's omission of adjacent Cox service areas is another arbitrary feature of its proposed forbearance area.

⁹ Horizontal Merger Guidelines, United States Department of Justice, Revised April 8, 1997. In particular, the Guidelines, reflecting sound economic theory, require that the following factors (at a minimum) be considered in determining geographic market definition: "(1) evidence that buyers have shifted or have considered shifting purchases between different geographic locations in response to relative changes in price or other competitive variables; (2) evidence that sellers base business decisions on the prospect of buyer substitution between geographic locations in response to relative changes in price or other competitive variables; (3) the influence of downstream competition faced by buyers in their output markets; and (4) the timing and costs of switching suppliers." Verizon's Petition provides no evidence whatsoever as to how the arbitrary market boundaries it has proposed relate to these criteria.

¹⁰ Verizon Petition, n.7.

Verizon is wrong that “MSAs themselves are simply a collection of counties and independent cities....”¹¹ An MSA, as determined by the U.S. Bureau of the Census and the Office of Management and Budget (“OMB”), is not a random aggregation of political jurisdictions. It is defined as a metropolitan area comprised of a large population nucleus, together with adjacent communities having a “high degree of social and economic integration[.]”¹² Because an MSA has a high degree of internal economic and social coherence, it is more likely that any estimation of competition, or application of a single competitive test to the entire area, if otherwise accurate, will be correct anywhere in the MSA.

The Commission has found that:

MSAs best reflect the scope of competitive entry, and therefore are a logical basis for measuring the extent of competition. Because competitive LECs generally do not enter new markets on a state-wide basis, we reject proposals to define the geographic scope of pricing flexibility on the basis of states or study areas.¹³

And, the Commission found that using MSAs:

appears to meet the requirements of clarity and ease of use. MSAs are precisely defined and easily understood by both technical and non-technical personnel. Equally important, MSA information enjoys wide distribution, is used for many different purposes, and is periodically updated. This attribute is very attractive because it

¹¹ Verizon Petition at 4.

¹² The most recent OMB definition of metropolitan areas is contained in OMB Bulletin No. 07-01 (Dec. 18, 2006). See <http://www.whitehouse.gov/omb/bulletins/fy2007/b07-01.pdf>.

¹³ *Access Charge Reform*, CC Docket No. 96-262 *et al.*, *Fifth Report and Order and Further Notice of Proposed Rulemaking*, 14 FCC Rcd 14221, 14260, ¶ 72 (1999) (citations omitted).

does not require expenditure of any additional resources on the part of the Commission or the industry to implement....¹⁴

An MSA, therefore, is reasonable for use as an area in which the Commission may consider forbearance.

But part of an MSA, without any valid economic rationale for subdividing the MSA, makes no sense at all. Forbearance in only part of an MSA would likely lead to marketplace dysfunctions because critical economic inputs to competitive telecommunications services would be unavailable in part of an area that otherwise has a high degree of social and economic integration. This could lead to pricing distortions and dislocations within the MSA and potentially result in significant harms including reductions in growth and productivity. In a separate proceeding, McLeodUSA has explained to the Commission that it is not economically feasible for a competitor to provide service in only those wire centers in an MSA to which unbundling forbearance does not apply.¹⁵ Forbearance in part of an otherwise cohesive economic unit would constitute undue government interference in marketplace dynamics. The Commission acknowledged related concerns in the *Verizon Six MSA Forbearance Order*.¹⁶ The fact that a different cable operator may serve the omitted parts of the Virginia Beach MSA merely shows the expedience of Verizon's proposed geographic area aimed at removing areas of the economic unit that may have a lesser degree of cable penetration.

¹⁴ *Definition of Congested Areas in the Broadcast Auxiliary Services and the Cable Television Relay Service*, MM Docket No. 90-500, *Notice of Proposed Rulemaking*, 5 FCC Rcd 6687, 6687, ¶ 5 (1990).

¹⁵ Declaration of Pritesh D. Shah, McLeodUSA Telecommunications Services, Inc., July 23, 2007, ¶ 8, attached to Petition for Modification of McLeodUSA Telecommunications Services, Inc., WC Docket No. 04-223, filed July 23, 2007.

¹⁶ *Verizon Six MSA Forbearance Order*, n.102.

Although Verizon's choice of a gerrymandered geographic area is invalid, it assumes, but has not attempted to justify, application to such an area of the market share threshold that the Commission previously applied to an MSA. Because the proposed forbearance area omits portions of the MSA sharing a high degree of social and economic integration with areas covered by the Petition, the Commission could not be confident based on the MSA-wide threshold that independent facilities-based competition has become deeply rooted in the arbitrary geographic area selected by the ILEC. Because only part of the economic unit is proposed for forbearance, it is possible that economic factors at work throughout the area will undermine whatever degree of independent-facilities-based competition has developed in the area spotlighted by the ILEC. The Commission would most likely need to apply a considerably higher threshold to a portion of an MSA, although the Commission should not in any event consider forbearance in only a portion of an MSA. Verizon's petition is deficient because it has not justified application of the MSA-wide threshold to its proposed geographic forbearance area.

Verizon's proposal that the Commission "should analyze coverage at the level of the individual rate exchange areas (or rate centers), rather than at the wire center serving area level as the Commission has done in previous forbearance orders,"¹⁷ is no more than a fishing expedition. It states that "rate centers equally reflect the areas in which competing carriers and Verizon provide local telephone service."¹⁸ But the Commission has already examined and denied Verizon's earlier application for Virginia Beach in which data was presented at the wire center level. Therefore, assuming that rate center and wire center information "equally reflect"

¹⁷ Verizon Petition at 7.

¹⁸ *Id.*

competition, no useful purpose would be served by now considering the same competitive situation viewed on a rate center basis.

Accordingly, the Commission should reject Verizon's proposed arbitrarily gerrymandered geographic forbearance area.

II. VERIZON HAS NOT SHOWN SUFFICIENT COMPETITION TO WARRANT FORBEARANCE FROM SECTION 251(C)(3) LOOP AND TRANSPORT UNBUNDLING OBLIGATIONS

A. Verizon Has Not Provided a Sufficient Market Segment Analysis

To determine “the extent to which ... forbearance will enhance competition,”¹⁹ and whether a grant of relief meets the statutory criteria,²⁰ the Commission must conduct a separate analysis of the extent to which competition exists within each market segment, *i.e.*, mass market, small and medium enterprises (“SMEs”), and larger enterprises, as well as each transport or loop type, *i.e.*, DS0, DS1, and DS3.²¹ To satisfy the requirements of Section 10 with respect to the “protection of consumers” and the promotion of “competitive market conditions,”²² Verizon must demonstrate with specificity the existence of *actual* competition – the presence of an active competitor winning market share and providing services over its own network – in each of the affected market segments.²³ Providing evidence of purported competition in one market segment

¹⁹ 47 U.S.C. § 160(b).

²⁰ *Id.*, at § 160(a)(1)-(3).

²¹ *TRO*, ¶¶ 209-210.

²² 47 U.S.C. § 160(a)(2) and (b).

²³ *See Petition for Forbearance from E911 Accuracy Standards Imposed on Tier III Carriers for Locating Wireless Subscribers Under Rule Section 20.18(h)*, WT Docket No. 02-377, Order, 18 FCC Rcd 24648, 24658, ¶ 24 (2003) (stating that in “pursuing relief through the vehicle of forbearance, . . . the Petitioner [has] the obligation to provide evidence demonstrating with specificity why [it] should receive relief under the applicable substantive standards”). *See*

(e.g., the residential mass market) can hardly be considered specific evidence of the state of competition in *other* market segments (e.g., SME voice and broadband services).

But Verizon does not provide a market share or other analysis that would permit the Commission to conduct a forbearance analysis for each market segment. Verizon does not differentiate between SMEs and larger enterprises or between different kinds of transport or loop products. Although Verizon alleges “greater competition for enterprise customers in Cox’s service territory in the Virginia Beach MSA than in either Omaha or Anchorage,”²⁴ the “evidence” marshaled by Verizon in support of this point is both superficial and tangential, failing to provide any meaningful indication of actual competition in Cox’s service territory in the Virginia Beach MSA. Instead, Verizon falls back on arguments about Cox’s marketing efforts, its network “coverage,” and its penetration in the *residential mass market segment* as proxies for any showing of actual competition in the enterprise market. For example, Verizon’s first argument is simply that Cox has a ubiquitous network that *enables* potential delivery of enterprise services.²⁵ Likewise, Verizon argues that Cox’s success in the *mass market* must translate into Cox posing a “competitive threat” in the market for *enterprise customers* in Virginia Beach.²⁶ As noted previously, the Commission should require evidence of actual competition at the time of the Petition, not prognostications by the petitioner. Similarly, Verizon essentially makes no effort to show competition in the wholesale market other than a reference to

also Omaha Forbearance Order, 20 FCC Rcd at 19477, ¶ 64 and n.177 (specifically finding that Cox had already “captured [a substantial portion] of the residential voice market in the Omaha MSA”).

²⁴ *Id.*, at 20.

²⁵ *Id.*, at 21.

²⁶ *Id.*, at 23.

Cox's website from which it is not possible to assess the extent to which Cox offers wholesale service in Virginia Beach.

Accordingly, the Petition should be rejected for failure to provide a sufficiently segmented market share analysis.

B. Verizon Has Not Shown Cable Coverage

In its prior forbearance orders, the Commission reasoned that it would be appropriate to forbear from application of Section 251 unbundling obligations "only in wire centers where a competitor has facilities coverage of at least 75% of the end user locations accessible from a wire center"²⁷ with "coverage" defined as existing where a competitor "uses its own network, including its own loop facilities, through which it is willing and able, within a commercially reasonable time, to offer the full range of services that are substitutes for the incumbent LEC's local service offerings."²⁸ Verizon has not made any showing at all of cable coverage.

First, Verizon's petition does not include any concrete factual information about the location or extent of actual facilities-based cable competitive presence. Instead, it relies on vague assertions of the existence of cable competition that are at best circumstantial. The only evidence of cable coverage that Verizon provides is a reference to Cox's website purporting to

²⁷ See *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, WC Docket No. 05-281, Memorandum Opinion and Order, 22 FCC Rcd 1958, 1977, ¶ 31 (2007) ("*Anchorage UNE Forbearance Order*"), *appeals dismissed, Covad Communications Group, Inc. v. FCC*, Nos. 07-70898, 07-71076, 07-71222 (9th Cir. 2007) (dismissing appeals for lack of standing); see also *Verizon Six MSA Forbearance Order*, ¶ 37.

²⁸ *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, 20 FCC Rcd 19415, 19444, n.156 (2005) ("*Omaha Forbearance Order*"), *aff'd, Qwest Corp. v. FCC*, 482 F.3d 471 (D.C. Cir. 2007).

show that Cox offers telephony services throughout its service territory in the Virginia Beach MSA.²⁹ This type of information is too vague to permit any findings of actual cable competition in any location in Virginia Beach.

Second, Verizon has provided no evidence of cable coverage on a wire center basis. The current area for assessing cable coverage is no larger than individual wire centers. Assessing facilities-based competition on a wire center basis is consistent with the approach the Commission followed in assessing loop impairment in the *TRRO*,³⁰ and the approach the Commission used in assessing UNE loop forbearance petitions in Omaha,³¹ Anchorage,³² and the *Verizon Six-MSA Forbearance Order*.³³ Verizon's poorly supported sweeping assertions that cable facilities exist throughout Cox's service area does not provide sufficient granularity to permit the Commission to make a finding of facilities-based competition in any wire center, because no wire center information is provided. Moreover, the Commission cannot consider cable coverage on the scale of the entire MSA, because "using such a broad geographic region would not allow [the Commission] to determine precisely where facilities-based competition exists."³⁴ Although Verizon suggests that the Commission should alternatively consider

²⁹ *Id.*, at 6.

³⁰ See *Unbundled Access to Network Elements, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No 04-313, CC Docket No. 01-338, Order on Remand, 20 FCC Rcd 2533, 2618-22, ¶¶ 155-159 (rel. Feb. 4, 2005) ("*TRRO*"), *aff'd*, *Covad Communications Co. v. FCC*, 450 F3d 528 (DC Cir 2006).

³¹ *Omaha Forbearance Order*, ¶¶ 60-61.

³² *Anchorage UNE Forbearance Order*, ¶¶ 14-16.

³³ *Verizon Six MSA Forbearance Order*, ¶¶ 35-36.

³⁴ *Omaha Forbearance Order*, ¶ 69, n.186.

forbearance on a rate center basis,³⁵ it has not submitted any cable coverage information on that basis either.

Therefore, the Petition fails to show actual facilities-based coverage that is needed to support forbearance at any geographic level.

C. Verizon’s Showing of Residential Line Share Is Insufficient

Verizon incorrectly claims its market share data demonstrates forbearance is justified under the approach to measuring competition applied by Commission in the *Verizon Six MSA Forbearance Order*.

First, Verizon relies on residential white page listings rather than actual line data to determine the market share of its competitors. As noted by Qwest in its recent filings concerning its pending UNE forbearance petitions for Denver, Minneapolis-St. Paul, Phoenix, and Seattle, using white pages listings produces only “estimates.”³⁶ Qwest recommends that the Commission obtain actual line counts.³⁷ Because white pages listings are mere estimates, the Commission has relied on “actual” switched access lines when addressing petitions seeking forbearance from dominant carrier and unbundling rules.³⁸ Although Verizon claims that the number of residential white pages listings is an accurate indicator of the number of residential lines it and competitors

³⁵ Verizon Petition at 7-8.

³⁶ See Letter from Melissa E. Newman, Qwest Corp., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-97, at 4 (dated March 10, 2008).

³⁷ *Id.*, at 5.

³⁸ *Verizon Six MSA Forbearance Order*, n.89 (noting that the Commission relies on actual line counts) & n.115 (noting that in the *Qwest Omaha* or *Anchorage UNE* forbearance proceedings, “the Commission relied upon actual line counts submitted by the incumbent LEC and the major cable provider in the market . . .” to calculate market shares, and citing *Omaha Forbearance Order*, ¶ 28-29, 58 n.152; *Anchorage UNE Forbearance Order*, ¶ 28).

are serving because the correlation between white page residential listings and Verizon's total residential lines is high, it has not demonstrated that there would be a similar correlation for competitive carriers. CLECs do not serve a legacy monopoly customer base. CLECs are more likely to serve specialized sets of customers that may well have different practices in terms of listing lines in white pages.

Verizon notes that the Commission used white page listings to some extent to calculate market share in determining whether to forbear from applying the Commission's dominant carrier rules to Qwest's provision of in-region, interstate, interLATA telecommunications services on an integrated basis.³⁹ But this calculation was not the primary market share analysis on which the Commission relied in that proceeding.⁴⁰ And, in any event and as noted above, the Commission has previously required "actual line counts," not estimates, to forbear from Section 251(c)(3) obligations. Therefore, the Commission should not rely on white pages listings in this proceeding to measure market share.

Second, Verizon asserts that if the Commission is unwilling to count Verizon wireless "cut-the-cord" customers as competitive lines, it should exclude them from the analysis entirely. We agree that the Commission should exclude wireless cut-the-cord from its analysis, not just Verizon customers. That is what the Commission did in its market share calculations in the *Omaha Forbearance Order* and *Anchorage UNE Forbearance Order*. Moreover, as the attached white paper entitled "Mobile Wireless Service to 'Cut the Cord' Households in FCC Analysis of

³⁹ Verizon Petition at 11.

⁴⁰ *Petition of Qwest Communications International Inc. for Forbearance from Enforcement of the Commission's Dominant Carrier Rules As They Apply After Section 272 Sunsets*, Memorandum Opinion and Order, 22 FCC Rcd 5207, 5218, ¶ 17 (2007).

Wireline Competition” concludes, “well accepted procedures for assessing competition would not calculate wireline shares by including mobile wireless-only customers that do not purchase wireline services because they have ‘cut-the-cord.’”⁴¹

Verizon’s showing of residential market share is also flawed because it counts its wholesale products, *i.e.*, Wholesale Advantage and resale, as competitor lines. As explained, the Commission may not consider these products as supporting a grant of the Petition because they do not constitute independent facilities-based competition. If considered at all, Verizon’s resale and Wholesale Advantage lines should be attributed to Verizon since the services are provisioned over Verizon’s facilities or excluded from the equation altogether. In either case, Verizon does not satisfy the Commission’s market-share test.⁴²

Third, Verizon contends that its market share percentages are conservative because it excludes competition from over-the-top and nomadic VoIP services such as Vonage, Skype, and others. But as Verizon noted, the Commission has found that these types of VoIP providers do not “offer close substitute services.”⁴³ For all the reasons provided in the *Verizon Six MSA Order*, the Commission should not count over-the-top VoIP providers as competitor lines.⁴⁴

⁴¹ Kent Mikkelsen, *Mobile Wireless Service to ‘Cut the Cord’ Households in FCC Analysis of Wireline Competition* (Economists Incorporated White Paper, dated April 21, 2008) at 11 (attached hereto as Exhibit 1).

⁴² For the reasons discussed above, cut-the-cord wireless should not be included in the market share percentages.

⁴³ *Verizon Six MSA Forbearance Order*, ¶ 23. As the Commission clarified, “we recognize competition from entities such as cable operators that utilize VoIP technology to provide voice services to their customers over their own network facilities - that is, providers of ‘fixed’ VoIP service.” *Id.*, at n.72.

⁴⁴ *Id.*, at ¶ 23.

Accordingly, Verizon's Petition does not satisfy the Commission's threshold market share requirements to support forbearance from dominant carrier or unbundling regulations in Cox's service territory in the Virginia Beach MSA. The Commission must find again that Verizon's "market share[] [is] sufficiently high to suggest that competition" in this area "is not adequate to ensure that the 'charges, practices, classifications or regulations ...for[] or in connection with that ... telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory' absent the regulations at issue."⁴⁵

D. Verizon's Line Loss Claims Lack Merit

Verizon asserts that forbearance is warranted since its retail switched access lines in Cox's service territory in the Virginia Beach MSA have steadily declined.⁴⁶ The Commission has already rejected the view that line share loss shows competition sufficient to justify forbearance. "[W]e reject Verizon's attempt to demonstrate that a particular MSA is competitive by calculating percentage reductions in retail lines."⁴⁷ The Commission found that "[t]here are many possible reasons for such decreases unrelated to the existence of last-mile facilities-based competition. For example, ... the abandonment of a residential access line does not necessarily indicate capture of that customer by a competitor, but may indicate that the consumer converted a second line used for dial-up Internet access to an incumbent LEC broadband line for Internet access."⁴⁸

⁴⁵ *Id.*, at ¶ 27.

⁴⁶ Verizon Petition at 17-18, & 30-31.

⁴⁷ *Verizon Six MSA Forbearance Order*, ¶ 32.

⁴⁸ *Id.*, at ¶ 32; *see also* Trends in Telephone Service, Industry Analysis Division, Wireline Competition Bureau, 7-1 (February 2007) (observing that "the number of lines provided by wireline carriers has declined, likely due to some consumers substituting wireless service for

In fact, Verizon's access line loss percentages are seriously overstated and misleading in many respects. First, it is likely that a large proportion of the lost residential lines are second lines that were replaced by Verizon's own DSL lines, which rose from 150,000 in 2000 to over 8.2 million in 2007.⁴⁹ Second, Verizon's wireline losses are aligned with the industry ILEC trends in subscribership (*i.e.*, the declines are not a product of competitive conditions specific to Cox's service territory in the Virginia Beach MSA),⁵⁰ and are likely more than offset by millions of customers added by Verizon Wireless and broadband and FiOS lines.⁵¹ In fact, Verizon has publicly stated that its FiOS service and long-term contract arrangements⁵² are prompting access line *gains*. During Verizon's 2007 Third Quarter Earnings Conference Call, it announced that "Take Rhode Island, for example. We began offering FiOS TV in parts of the state earlier this year. In those markets where we offer FiOS TV, we are actually seeing access line gains"⁵³

wireline service, and some households eliminating second lines when they move from dial-up Internet service to broadband service."); *Anchorage UNE Forbearance Order*, ¶ 28 n.88 (citing Trends in Telephone Service, Industry Analysis Division, Wireline Competition Bureau, 7-1 (June 2005)).

⁴⁹ Verizon 2000 Annual Report at 7; Verizon 2007 Annual Report at 3; *see also* Sprint Nextel Corporation's Opposition to Petitions for Forbearance, WC Docket No. 06-172 at 13 (filed Mar. 5, 2007); *see also* Comments of National Association of State Utility Consumer Advocates *et al.*, WC Docket No. 06-172, at 65 (filed Mar. 5, 2007); *see also* Comments of Broadview Networks, Inc. *et al.*, WC Docket No. 06-172, at 26 (filed Mar. 5, 2007).

⁵⁰ *See, e.g.*, FCC, *Local Telephone Competition: Status as of June 30, 2007*, at Table 1 and 2 (March 2008); *see* Comments of the National Association of State Utility Consumer Advocates, WC Docket No. 06-172, at 66 (filed March 5, 2007).

⁵¹ Verizon 2000 Annual Report at 6-7; Verizon 2007 Annual Report at 3.

⁵² For instance for Verizon's bundled offerings require "one and two year commitment[s]." *See* <http://www22.verizon.com/ForYourHome/NationalBundles/NatBundlesHome.aspx#>

⁵³ VZ-Q3 2007 Verizon Earnings Conference Call, Statement of Doreen Toben, Verizon Chief Financial Officer, at 4 available at http://investor.verizon.com/news/20071029/3Q07_vz_transcript.pdf.

As Verizon explained, it has deployed FiOS in Virginia Beach, so the same trend is likely to be experienced there.⁵⁴ Likewise, in Verizon's 2007 Second Quarter Earnings Conference Call, Verizon specifically stated, "we see a correlation between FiOS penetration and line loss improvements...."⁵⁵ Verizon's line loss argument therefore reflects past conditions, not current or future market trends, and does not support the forbearance relief it requests.

In any event, Verizon's line loss statistics alone cannot and do not show that *facilities-based* competition in the Virginia Beach MSA where Cox operates is sufficient to meet the statutory forbearance standard. Verizon fails to identify the percentage of its line losses that are attributed to carriers that use Verizon's own last-mile network to reach their customers, including carriers that resell Verizon's service, carriers that use Verizon's Wholesale Advantage service, carriers that use UNE loops purchased from Verizon in combination with their own network facilities and carriers that use special access lines purchased from Verizon. Those lines have not actually been "lost," but only converted from retail to wholesale, and provide no evidence of sufficient facilities-based competition to protect consumers and the public interest.

E. Verizon Has Not Shown Robust and Ubiquitous Facilities-Based Competition in the Enterprise Market

Verizon's showing of competition in the enterprise market consists of quotes from the *Omaha Forbearance Order* about Cox's participation in the enterprise market in Omaha, followed by assertions that Cox competes to the same or a greater extent in Virginia Beach.⁵⁶

⁵⁴ Verizon Petition at 23.

⁵⁵ VZ-Q2 2007 Verizon Earnings Conference Call, Statement of Doreen Toben, Verizon Chief Financial Officer, at 5.

⁵⁶ Verizon Petition at 21-25.

This showing is unpersuasive because the Commission rejected the same assertions in the *Verizon Six MSA Forbearance Order*. There, the Commission found that:

[E]vidence in the record demonstrates the comparatively limited role of the cable operators in serving enterprise customers in these MSAs today. Nor does the record reveal other competitors in these MSAs that have deployed their own extensive last-mile facilities for use in serving the enterprise market. Indeed, there is significant record evidence that much of the competition from competitive LECs for enterprise services in these MSAs instead depends on access to Verizon's own facilities, including UNEs."⁵⁷

Given that Cox's service territory in the Virginia Beach MSA comprises most of the geographic area of that MSA and encompasses 91% of the population of the MSA, it is improbable that Cox now provides significant competition in the wholesale market.

In any event, the evidence provided by Verizon in support of its claims of significant facilities-based competition in the enterprise market are unpersuasive and/or have already been rejected by the Commission. Verizon points to Cox's website advertising, asserting that Cox competes aggressively for enterprise customers and has deployed facilities to serve enterprise customers in all locations where enterprise customers are located in Virginia Beach.⁵⁸ But Cox previously described Verizon's estimates of its success in the enterprise market as "wildly inflated" and references to Cox's websites as at "*best unreliable* and at *worst willfully misleading*."⁵⁹ Even if not exaggerated, Verizon's reliance on website postings is unpersuasive⁶⁰

⁵⁷ *Verizon Six MSA Forbearance Order*, ¶ 37.

⁵⁸ *Verizon Petition* at 24.

⁵⁹ *Comments of Cox Communications, Inc.*, WC Docket No. 06-172, at 27-28 (filed Mar. 5, 2007) (emphasis supplied).

⁶⁰ *Verizon Six MSA Forbearance Order*, ¶ 40.

and simply does not constitute evidence of actual, sustainable, and robust competition in the enterprise market.

Verizon asserts generally that Cox's cable network is capable of reaching many enterprise customers, but ignores that "[e]ven where cable television [copper coaxial] networks reach [] business customers," the networks "typically lack the capacity to serve large numbers of business customers that require telecommunications and Internet services at DS-1 and higher speeds."⁶¹ The record in the Commission's special access proceeding demonstrates cable operators, such as Cox, cannot offer sufficient service level guarantees to support competitive enterprise services and have severe security and reliability concerns.⁶²

Verizon asserts that Cox has thousands of fiber miles in Virginia Beach.⁶³ It fails to show precisely where Cox's purported fiber cable network is in relation to the enterprise customers, if it is lit and operational, or how many customers or what percentage of customers in what wire centers actually have access to these fiber facilities. Verizon's references to several Cox enterprise customers do not show that Cox is able to offer facilities-based competition to more than a few locations.

While Verizon maintains that "there are a wide variety of competitors serving enterprise customers in Cox's service territory,"⁶⁴ this does not show that there are significant independent facilities-based competitors. This "variety" of competitors encompasses CLECs that "use[]

⁶¹ Comments of XO *et al.*, WC Docket No. 05-25, at Declaration of Ajay Govil, XO ¶ 24 (filed Aug. 8, 2007).

⁶² Comments of XO *et al.*, WC Docket No. 05-25, at Declaration of Ajay Govil, XO ¶ 22-24 (filed Aug. 8, 2007); Ad Hoc Comments, WC Docket No. 05-25, at 7 (filed Aug. 8, 2007).

⁶³ Verizon Petition at 25.

⁶⁴ *Id.*, at 27.

unbundled network elements (UNEs), particularly unbundled loops, ... as [a] primary vehicle for serving and acquiring customers.”⁶⁵ As the Commission stated in the *Omaha Forbearance Order*, which is equally applicable here, “forbearance from application of section 251(c)(3) on the basis of competition that exists only due to section 251(c)(3) would undercut the very competition being used to justify the forbearance.”⁶⁶ The Commission should again “decline to engage in that type of circular justification.”⁶⁷

Verizon contends that UNE forbearance is warranted because competitors in Cox’s service territory in Virginia Beach are competing extensively using Verizon’s special access services.⁶⁸ The Commission previously has rejected this argument as well, holding that “competition that relies on Verizon’s own facilities is not a sufficient basis to grant forbearance from UNE requirements.”⁶⁹ The Commission emphasized that it already had “eliminated UNE obligations for the exclusive provision of interexchange service or mobile wireless service based on the fact that competition for such services arose in the absence of UNEs.”⁷⁰ The competitive triggers established in the *TRRO* establish a basis for relief from unbundling obligations in Virginia Beach. The Commission accordingly found that it would not be “in the public interest to grant additional relief from UNE obligations based on that same competition” and emphasized

⁶⁵ *Omaha Forbearance Order*, at n.4.

⁶⁶ *Id.*, at ¶ 68 n.185.

⁶⁷ *Id.*

⁶⁸ Verizon Petition at 30.

⁶⁹ *Verizon Six MSA Forbearance Order*, ¶ 42.

⁷⁰ *Id.*, at ¶ 38.

that “the Commission repeatedly has recognized that the availability of UNEs is a competitive constraint on special access pricing.”⁷¹

Verizon also asserts that “a number” of competitors in Cox’s service territory in the Virginia Beach MSA are using their own or other alternative facilities to serve enterprise customers.⁷² It points to GeoTel data showing at least two known competing providers that operate fiber networks within Cox’s service territory in the Virginia Beach MSA.⁷³ The Commission flatly rejected this type of evidence to justify forbearance and held that “[w]e do not find persuasive any of the competitive fiber network data that Verizon has filed in this docket, including ... the number of route miles on these networks; the number of wire centers in an MSA that a competing fiber provider can reach; or the materials from competitors’ web-sites describing their service offerings and territories.”⁷⁴ The Commission emphasized that, “just as the *Triennial Review Remand Order* found the number of route miles, lists of fiber wholesalers, and counts of competitive networks to be unreliable and unsuitable as triggers for the impairment test, we also find that such data are not informative for identifying where any unbundling relief would be warranted.”⁷⁵ The same conclusions are fully applicable here.

Accordingly, Verizon has not shown competition in the enterprise market.

⁷¹ *Id.*, at ¶ 38.

⁷² Verizon Petition at 28. Verizon also asserts that fixed wireless is another means by which carriers may extend their existing networks. This claim has been fully refuted in the Commission special access proceeding. Sprint has explained that this is nascent and limited technology and XO has emphasized that “fixed wireless is not an option.” Comments of XO *et al.*, WC Docket No. 05-25 (filed Aug. 8, 2007) at Declaration of Ajay Govil, XO ¶ 21; Reply Comments of Sprint, WC Doc. No. 05-25, at 14 (filed Aug. 15, 2007).

⁷³ Verizon Petition at 28.

⁷⁴ *Verizon Six MSA Forbearance Order*, ¶ 40.

⁷⁵ *Id.*

F. Verizon Has Not Shown Robust and Ubiquitous Facilities-Based Competition in the Wholesale Market

The Commission must not only examine the status of competition in each retail market segment, but also the role of the wholesale market at the wire center level.⁷⁶ The Commission found in the *Omaha Forbearance Order* that facilities-based wholesale competition “minimizes the risk of duopoly and of coordinated behavior or other anticompetitive conduct.”⁷⁷ Verizon must demonstrate that sufficient competition exists to ensure that the ILEC will continue to offer loops and transport that competitors may not duplicate at wholesale on terms and conditions that will permit competition. The record must support the conclusion that the ILEC has “very strong market incentives” to continue offering loops and transport on a wholesale basis to competitors on reasonable terms and conditions that would permit competition despite the elimination of UNEs.⁷⁸ This very strong incentive will not exist unless there is an independent facilities-based provider of loops that could absorb retail customers that could migrate off Verizon’s network if Verizon fails to make reasonable wholesale offerings.⁷⁹ Without such a competitive showing, and in the absence of the regulatory necessity to do so, there is absolutely no incentive for Verizon to offer its own last mile facilities at competitive rates and terms—as has already been proven in Omaha.⁸⁰

In this case, because Verizon has not alleged, much less shown, significant independent facilities-based wholesale competition for copper, DS0, DS1 and DS3 services, the Commission

⁷⁶ *Anchorage UNE Forbearance Order*, ¶ 10.

⁷⁷ *Omaha Forbearance Order*, ¶ 71.

⁷⁸ *Omaha Forbearance Order*, ¶ 81; *Anchorage UNE Forbearance Order*, ¶¶ 39-42.

⁷⁹ *Omaha Forbearance Order*, ¶ 81.

⁸⁰ McLeodUSA Petition for Modification at 4-12.

cannot find that Verizon has strong incentives to make reasonable wholesale offerings. Nor has Verizon attempted to show that the rates, terms and conditions for wholesale services that it offers or intends to offer as substitutes for unbundled network elements, including copper, DS0, DS1 and DS3 loop and transport facilities and dark fiber transport, are just and reasonable and will promote competitive market conditions in the portions of the Virginia Beach MSA where it seeks forbearance relief.⁸¹

Verizon's showing of wholesale competition is merely the statement that Cox provides wholesale services in Cox's service territory in the Virginia beach MSA,⁸² and a reference to Cox's website.⁸³ It has not shown what wholesale services Cox may provide or whether Cox provides wholesale service to any or more than a few customer locations. Indeed, consistent with the Commission's previous finding, nothing in Verizon's petition "reflects any significant alternative sources of wholesale inputs for carriers" in Virginia Beach.⁸⁴ Therefore, Verizon has essentially defaulted on its obligation to show the existence of a viable and ubiquitous facilities-based wholesale market in the absence of UNEs. There is no basis on the current record to make a finding that there is such a competitive market in Cox's service territory in the Virginia Beach MSA, or that there would be in a forborne UNE environment.⁸⁵

⁸¹ See Comments of Access Point *et al.*, WC Docket No. 07-267, at 27-28 (filed March 24, 2008).

⁸² Verizon Petition, at 25.

⁸³ *Id.*, at 26.

⁸⁴ *Verizon Six MSA Forbearance Order*, ¶ 38.

⁸⁵ A number of the wire centers at issue in this proceeding are served by Verizon South, which is the former GTE South Inc. Because Verizon South is not a Bell Operating Company ("BOC") 271 checklist obligations do not apply to it. Forbearance would relieve Verizon of any continuing duty to offer loop or transport facilities on a wholesale basis from these wire centers.

The Commission's "predictive judgment" in the *Omaha Forbearance Order* that Qwest would make reasonable wholesale offerings in that MSA has proven erroneous and cannot rationally provide any guidance in this proceeding. The Commission should consider UNE forbearance, assuming other requirements are met, only if there is an actual, robustly competitive and ubiquitous wholesale market in existence at the time the Petition is filed and the ILEC demonstrates that its rates and terms for § 251(c)(3) alternatives are just and reasonable. This approach will eliminate the potential for erroneous predictive judgments and the attendant risk of harming competition.

G. Verizon Presents No Arguments to Support Forbearance from Offering Copper Loop UNEs

As demonstrated in the Verizon Six MSA forbearance proceeding,⁸⁶ copper facilities are not just used to provide Plain Old Telephone Service. Competitors are able to provision innovative, reliable and cost-effective DSL and other high-bandwidth services over them. CLECs have invested enormous amounts in equipment that "unleashes the full potential of the

⁸⁶ See Letter from Andrew Lipman, *et al.*, Counsel for Alpheus *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-172 (filed July 10, 2007) ("July 10, 2007 Ex Parte of CLECs, WC Docket No. 06-172") (attached hereto as Exhibit 2); Letter from Andrew D. Lipman, Counsel for Alpheus *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-172 (filed Oct. 3, 2007) ("October 3, 2007 Ex Parte of CLECs, WC Docket No. 06-172") (attached hereto as Exhibit 3); Letter from Andrew D. Lipman, Counsel for Alpheus *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-172 (filed Nov. 16, 2007) ("November 16, 2007 Ex Parte of CLECs, WC Docket No. 06-172") (attached hereto as Exhibit 4). Rather than repeat the arguments set forth in Exhibits 2 through 4, Commenters incorporate them by reference and briefly summarize them herein.

embedded copper loop plant.”⁸⁷ Unbundling of standalone copper facilities has significantly increased investment just as the Commission envisioned.⁸⁸

Cavalier offers digital TV (“IPTV”),⁸⁹ high-speed Internet and telephone service to residential subscribers over copper loop UNEs.⁹⁰ DSLnet also offers an array of DSL services over copper facilities. Covad uses copper loop UNEs to provide a Line Powered Voice (“LPV”) product⁹¹ over which EarthLink currently offers “DSL & Home Phone” service.⁹² Broadview and XO use copper loop UNEs in association with Ethernet over copper technologies to provision of high-capacity services to mass market and enterprise customers at fiber-like speeds of 5-30 Mbps.⁹³

The Commission should not and cannot rely, as it did in previous forbearance rulings, on a predictive judgment that Verizon will offer commercially reasonable alternatives to copper

⁸⁷ See October 3, 2007 Ex Parte of CLECs, WC Docket No. 06-172, at 7 (citing *TRO*, ¶ 244).

⁸⁸ *Id.*, at 8.

⁸⁹ IPTV delivers television programming to households via a high-speed connection using Internet protocols. November 16, 2007 *Ex Parte* of CLECs, WC Docket No. 06-172, at 1-2. It “requires a subscription and IPTV set-top box, and offers key advantages over existing TV cable and satellite technologies. IPTV is typically bundled with other services like Video on Demand (VOD), voice over IP (VOIP) or digital phone, and Web access, collectively referred to as *Triple Play*.” See *id.* (citing and quoting wiseGEEK, What is IPTV). IPTV adds many advantages such as “the ability for digital video records (DVRs) to record multiple broadcasts at once or view picture-in-picture without the need for multiple tuners.” *Id.* With IPTV, “one can watch one show, while using picture-in-picture to channel surf.” *Id.*

⁹⁰ See July 10, 2007 Ex Parte of CLECs, WC Docket No. 06-172, at 3.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*, at 3.

loop UNEs absent a § 251(c)(3) obligation.⁹⁴ Verizon does not offer alternatives to these facilities in its special access tariffs or otherwise and has no incentive to offer reasonable terms for access to copper loops, particularly since they can be used to provide competitive video services.⁹⁵ Rather, Verizon likely will demand unreasonably high prices that will result either in substantial price increases for consumers or reduced availability of competitive telecommunications, information, and video services.⁹⁶ If the Commission does not deny Verizon's forbearance request, it must, at a minimum, establish the rates, terms and conditions for alternatives to copper loop UNEs before granting the Section 251(c)(3) forbearance Verizon seeks.⁹⁷

H. Verizon Presents No Arguments to Support Forbearance from Offering Inside Wire Subloop UNEs

Although Verizon frames its Petition, in part, as one for forbearance from loop and transport unbundling requirements, it fails to make any case for relief from its obligation under 47 C.F.R § 51.319(b) to provision inside wire subloops for access to multiunit premises wiring. Commenters explained in the Verizon Six MSA forbearance proceeding that the Commission must deny Verizon's petition with respect to these UNEs. Denial here is also proper for the same reasons.⁹⁸

⁹⁴ *Id.*, at 1 and 14.

⁹⁵ *Id.*, at 1, 6-14; November 16, 2007 *Ex Parte* of CLECs, WC Docket No. 06-172, at 2-4.

⁹⁶ *Id.*, at 1.

⁹⁷ *Id.*

⁹⁸ See March 5, 2007 Opposition of ACN *et al.*, WC Docket No. 06-172, at 40-43. Rather than repeat these arguments, Commenters incorporate them by reference.

III. THE STATUTORY CRITERIA FOR FORBEARANCE FROM SECTION 251(C)(3) LOOP AND TRANSPORT UNBUNDLING ARE NOT MET

Section 10(a) states that the FCC “shall forbear from applying any regulation or any provision [of the Act] ... to a telecommunications carrier or telecommunications service” if it determines that:

- (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations, by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
- (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
- (3) forbearance from applying such provision or regulation is consistent with the public interest.⁹⁹

All three prongs of this standard must be afforded a plain meaning interpretation¹⁰⁰ and must be satisfied before the Commission grants a petition for forbearance. The prongs “are conjunctive,” meaning that “[t]he Commission could properly deny a petition for forbearance if it finds that any one of the three prongs is unsatisfied.”¹⁰¹ The Commission must also consider whether forbearance will promote competitive market conditions.¹⁰²

Verizon has not justified forbearance under these standards. In the absence of a showing of robust competition, market forces will be insufficient to discipline prices. Forbearance would permit Verizon to raise its retail rates to even higher unreasonable levels. In the absence of

⁹⁹ 47 U.S.C. § 160(a)(1)-(3).

¹⁰⁰ *AT&T v. FCC*, 452 F.3d 830, 836 (D.C. Cir. 2006) (rejecting the Commission’s “new rule” that “conflicts with the statute’s plain meaning”).

¹⁰¹ *In re Core Commu’ns., Inc.*, 455 F.3d 267 (D.C. Cir. 2006), quoting *Cellular Telecomms. & Internet Ass’n v FCC*, 330 F.3d 502, 509 (D.C. Cir. 2001).

¹⁰² 47 U.S.C. § 160(b).

wholesale competition, Verizon would be able raise prices of critical inputs provided to its competitors causing them to raise prices or exit the market. Forbearance would lead to higher prices for consumers and few choices of service options and service providers. For these same reasons, forbearance would not serve the public interest.

Accordingly, the Commission must deny the Petition under the standards of Section 10(a).

IV. FORBEARANCE FROM SECTION 251(C)(3) LOOP AND TRANSPORT UNBUNDLING BASED ON VERIZON'S IMPAIRMENT ANALYSIS WOULD BE UNLAWFUL

Verizon contends that its Petition demonstrates that there is ubiquitous facilities-based competition and sufficient competitor market share to preclude a finding of impairment in Cox's service territory in the Virginia Beach MSA.¹⁰³ Verizon contends that the Commission must forbear from application of UNE rules where there is no impairment.¹⁰⁴ It further contends that the Commission may forbear even where CLECs are impaired but that it may not require unbundling where the evidence shows that the impairment standard is not met.¹⁰⁵

The Commission has rules in place that define where impairment exists.¹⁰⁶ Verizon's Petition does not demonstrate that CLECs are unimpaired under those rules anywhere or in any wire center in Virginia Beach. A cable operator's presence in the market does not change that

¹⁰³ Verizon Petition, at 36.

¹⁰⁴ *Id.*, at 37.

¹⁰⁵ *Id.*

¹⁰⁶ *TRRO*, ¶ 5.

result.¹⁰⁷ Therefore, even assuming that the Commission may forbear where no impairment exists, there is no basis on the current record for forbearance based on Verizon's unsubstantiated assertion of no impairment. Verizon is able to obtain, under existing rules, all the "relief" to which it is entitled based on non-impairment. As the Commission previously held in the *Verizon Six MSA Forbearance Order*, it would not be "in the public interest to grant additional relief from UNE obligations ..." beyond the relief provided in the *TRRO*.¹⁰⁸

There is no basis for Verizon's apparent assumption that the Commission must consider claims of non-impairment based on individual ILEC petitions. Section 251(d) contemplates that the Commission shall implement the impairment standards via rulemaking.¹⁰⁹ And, as Verizon notes, the Commission has provided that forbearance may be used to provide unbundling deregulation in some cases notwithstanding impairment.¹¹⁰ Therefore, insofar as Verizon wants to obtain relief based on alleged non-impairment, rather than forbearance standards, it may seek to obtain modified impairment rules.

¹⁰⁷ *UNE Remand Order*, ¶ 55 (explaining that "although Congress fully expected cable companies to enter the local exchange market using their own facilities, including self-provisioned loops, Congress still contemplated that incumbent LECs would be required to offer unbundled loops to requesting carriers.").

¹⁰⁸ *Verizon Six MSA Forbearance Order*, ¶ 38.

¹⁰⁹ 47 U.S.C. § 251(d) ("Within 6 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.")

¹¹⁰ Verizon Petition at 37.

If anything, the fact that CLECs are impaired under the Commission's rules counsels against forbearance, as competitive carriers have argued.¹¹¹ Accordingly, the Commission should reject Verizon argument that alleged non-impairment supports forbearance.

V. FORBEARANCE FROM § 251(C)(3) LOOP AND TRANSPORT UNBUNDLING BASED ON THE OMAHA FORBEARANCE ORDER WOULD BE UNLAWFUL

Section 10(d) provides that "the Commission may not forbear from applying the requirements of section 251(c) or 271 ... until it determines that those requirements have been fully implemented."¹¹² Although the *Omaha Forbearance Order* found that this requirement was satisfied, it relied on a patently unreasonable interpretation of the statute that was inconsistent with past Commission rulings, and without explaining the inconsistency. Its ruling that "fully implemented" means no more than initial rulemaking contradicted previous statements that saw the adoption of unbundling rules as the beginning, not the end, of implementation of Section 251(c).¹¹³ In fact, when the Commission initially adopted its Section 251(c) rules in the *Local Competition Order*, it explained that these rules are merely "the initial measures that will enable the states and the Commission to begin to implement sections 251 and 252."¹¹⁴ The *Omaha*

¹¹¹ See, e.g., *Opposition of Affinity Telecom, Inc. et al.*, WC Docket No. 07-97, at 63-66 (filed Aug. 31, 2007).

¹¹² 47 U.S.C. §160(d).

¹¹³ See *Opposition of ACN et al.*, WC Docket No. 06-172, at 52-58 (filed Mar. 5, 2007) ("March 5, 2007 *Opposition of ACN et al.*, Docket No. 06-172") (attached hereto as Exhibit 5).

¹¹⁴ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, First Report and Order 11 FCC Rcd 15499, ¶ 6 (1996) (emphasis added) ("*Local Competition Order*"). The Commission found that Section 251 involves an "allocation of responsibilities" between itself and the states. *Id.*, ¶ 41. Both the Commission and the states administer the Commission's rules and the states perform other critically important functions pursuant to Section 251. *Id.*, ¶ 53.

Forbearance Order ignored these previous findings and failed to explain its reason for abandoning precedent.¹¹⁵ It should not repeat this mistake by granting Verizon's Petition based on the Omaha Forbearance Order definition of "fully implemented."¹¹⁶

Although this issue was raised in the appeal of the *Omaha Forbearance Order*, the D.C. Circuit declined to rule on the inconsistency between the Commission's current interpretation of Section 251(c) and the Commission's prior rulings because the Commission never had an "opportunity to pass" on these arguments.¹¹⁷ Since the arguments are now squarely presented, the Commission must revisit its ruling in the *Omaha Forbearance Order* and establish a definition of "fully implemented" that is consistent with its view expressed in the *Local Competition Order*, or provide a complete justification for reversing course.¹¹⁸

The *Omaha Forbearance Order* also improperly decoupled Section 10 forbearance from Section 251(d)(2) impairment,¹¹⁹ and, while noting that Qwest still remains obligated to make

¹¹⁵ See *AT&T v. FCC*, 236 F.3d 729, 734 (D.C. Cir. 2001). The finding of *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*") that the FCC in its *TRO* had unlawfully delegated authority to the states to establish, pursuant to Section 251(d)(2), unbundling standards does not invalidate the FCC's view in the *Local Competition Order* that, under the Act, states play a key role, such as through setting prices and conducting arbitrations, in implementing Section 251(c).

¹¹⁶ Other arguments demonstrating why the Commission's interpretation of "fully implemented" in the *Omaha Forbearance Order* was unlawful are set forth in the attached March 5, 2007 Opposition of ACN *et al.* and are incorporated herein by reference. See March 5, 2007 Opposition of ACN *et al.*, WC Docket No. 06-172, at 53-58.

¹¹⁷ *Qwest*, 482 F.3d at 478.

¹¹⁸ *Columbia Broad. Sys., Inc. v. FCC*, 454 F.2d 1018, 1026 (D.C. Cir. 1971) (FCC must explain its reasons for reversing its course; enumerate factual differences between similar cases; and explain the relevance of those differences to the purposes of the Act); *Greyhound Corp. v. ICC*, 551 F.2d 414, 416 (D.C. Cir. 1977).

¹¹⁹ Rather than repeat those arguments, they are incorporated by reference. See March 5, 2007 Opposition of ACN *et al.*, WC Docket No. 06-172, at 49-51.

special access, § 271 and § 251(c)(4) resale offerings available, it failed to consider the significant open proceedings before the Commission that are addressing problems with these non-UNE offerings.¹²⁰ The Commission should not repeat the same mistakes in addressing Verizon's Petition.

VI. OTHER REQUESTED FORBEARANCE IS UNWARRANTED

A. Verizon Is Not Entitled to Forbearance from Dominant Carrier Regulation

As discussed in Section II of this Opposition, Verizon has failed to show robust facilities-based competition. This precludes any grant of non-dominant treatment. Moreover, just over eight months ago in the *272 Sunset Order*, the Commission held that Verizon failed to present persuasive evidence that “it no longer possesses exclusionary market power within its region as a result of its control over a ubiquitous telephone exchange service and exchange access network.”¹²¹ As a result of Verizon's exclusionary control over these bottleneck access facilities, the Commission declined to relieve Verizon from dominant carrier regulation of its interstate exchange access services, including price cap regulation of most exchange access services, accounting and cost allocation rules and related reporting requirements, and equal access requirements.¹²² This past December, the Commission in the *Verizon Six MSA Forbearance Order* denied, among other things, Verizon's request for forbearance from dominant carrier regulation of its mass market switched access services in the Virginia Beach MSA, because

¹²⁰ *Id.* at 58-66.

¹²¹ *Petition of Qwest Communications International Inc. for Forbearance from Enforcement of the Commission's Dominant Carrier Rules As They Apply After Section 272 Sunsets*, Memorandum Opinion and Order, 22 FCC Rcd 5207, 5231, ¶ 47 (2007) (“*Section 272 Sunset Order*”).

¹²² *Id.*

Verizon failed to show there was sufficient last mile facilities-based competition to warrant such relief in this MSA.¹²³ Verizon has additionally not complied with the Commission's directive in the *Verizon Six MSA Forbearance Order* that "applicants for forbearance relief from dominant carrier regulation should address whether and how a grant of relief at the geographic level they seek would impact other rates in the applicable study area."¹²⁴

Moreover, for the reasons discussed in Section I above, it would also be impractical for the industry and regulators to implement non-dominant treatment in the gerrymandered geographic area proposed by Verizon.

Accordingly, the Commission should deny Verizon's request for forbearance from dominant carrier regulation of its mass market switched access services.

B. Verizon Is Not Entitled to Forbearance from Computer III Requirements

Although Verizon has asked the Commission to forbear from enforcing the Computer III requirements,¹²⁵ no such relief was granted in the *Omaha Forbearance Order*. Verizon mentions Computer III only once in its Petition – and that is in the footnote where it lists the statutory and regulatory provisions from which it seeks forbearance. Verizon's throwaway reference does not come close to meeting its burden of proving that grant of its request would satisfy each prong of Section 10(a). Verizon does not bother to offer any argument whatsoever with respect to how or why enforcement of the CEI, ONA, or any other Computer III requirements is not necessary either to ensure that Verizon's rates, terms and conditions of service are just, reasonable and

¹²³ *Verizon Six MSA Forbearance Order*, ¶¶ 27, 33-34.

¹²⁴ *Id.* n. 102.

¹²⁵ Verizon Petition at 3, n.4.

nondiscriminatory or to protect consumers. Nor does Verizon discuss how or why forbearance from the *Computer III* requirements would be consistent with the public interest.

In order to meet the public interest forbearance criterion, the Commission has ruled that a petitioner must explain how the benefits of a regulation can be attained in the event of forbearance.¹²⁶ Verizon has not done so. The CEI and ONA non-structural safeguards were implemented to prevent the Bell Operating Companies (“BOCs”) from using “exclusionary market power” arising from their control over ubiquitous local telephone networks to discriminate against unaffiliated information services providers.¹²⁷ In the recent *Section 272 Sunset Order*, the Commission found that Verizon had failed to present persuasive evidence that it no longer possesses exclusionary market power within its region as a result of its control over ubiquitous telephone exchange service and exchange access networks.¹²⁸ Similarly, Verizon’s inability to demonstrate that it no longer possesses exclusionary market power in the Virginia Beach MSA caused the Commission to deny its request for forbearance from the Computer III requirements in the *Verizon 6 MSA Forbearance Order*. The Commission correctly found that Verizon’s exercise of exclusionary market power could both harm consumers and lead to charges, practices, classifications or regulations for or in connection with its local exchange or

¹²⁶ *Petition of Ameritech Corporation for Forbearance from Enforcement of Section 275(a) of the Communications Act of 1934, as Amended*, CC Docket No. 98-65, Memorandum Opinion and Order, 15 FCC Rcd 7066, ¶ 7 (1999).

¹²⁷ *California v. FCC*, 39 F.3d 919 at 925, 928 (9th Cir. 1994); *Verizon Six MSA Forbearance Order*, ¶ 45.

¹²⁸ *Section 272 Sunset Order*, ¶ 64.

interexchange services that are unjust, unreasonable, or unjustly or unreasonably discriminatory and that such results would be contrary to the public interest.¹²⁹ Nothing has changed.

As was the case with its previous Petition for forbearance in the Virginia Beach MSA,¹³⁰ Verizon's current Petition presents no evidence that the Computer III requirements are not necessary to ensure that its charges, practices, classifications, or regulations for or in connection with its local exchange and exchange access services are just, reasonable and not unjustly or unreasonably discriminatory or to protect consumers. Nor did Verizon argue, let alone demonstrate, how the nondiscrimination objectives of the CEI and ONA requirements could be achieved if the Commission were to forbear from applying the requirements.

The Commission must deny a petition for forbearance if it finds that any one of the three prongs of the Section 10(a) test is unsatisfied.¹³¹ Verizon offered absolutely no evidence or argument that even one of the three prongs would be satisfied absent enforcement of the Computer III requirements. Accordingly, the Commission must summarily deny Verizon's request for relief from any Computer III requirements.¹³²

¹²⁹ *Verizon Six MSA Forbearance Order*, ¶ 45.

¹³⁰ Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. §160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas, WC Docket No. 06-172 (filed Sept. 6, 2006).

¹³¹ *Cellular Telecommunications & Internet Association v. Federal Communications Commission*, 330 F. 3d 502, 509 (D.C. Cir. 2003).

¹³² *Verizon Six MSA Forbearance Order*, ¶ 45; *see also, Omaha Forbearance Order*, ¶¶ 16, 111 (where Qwest failed to demonstrate how forbearance from Commission regulations would satisfy Section 10, Commission refused to compose an affirmative case for forbearance relief on Qwest's behalf).

VII. CONCLUSION

The Commission should promptly deny the Petition.

Respectfully submitted,

/s/ Andrew D. Lipman

Andrew D. Lipman
Russell M. Blau
Patrick J. Donovan
Philip J. Macres
BINGHAM MCCUTCHEN, LLP
2020 K Street, NW
Washington, DC 20006
(202) 373-6000

Attorneys for

COMPTEL;
Access Point, Inc.;
Affinity Telecom, Inc.;
Alpheus Communications, L.P. ;
ATX Communications, Inc.;
Bridgecom International, Inc.;
Broadview Networks, Inc.;
Cavalier Telephone Corporation ;
CIMCO Communications, Inc.;
Close Call America, Inc.;
CP Telecom, Inc.;
Covad Communications Group, Inc.;
Deltacom, Inc.;
DSLnet Communications, LLC;
Globalcom, Inc.;

Lightyear Network Solutions, LLC;
Matrix Business Technologies;
McLeodUSA Telecommunications Services,
Inc.;
MegaPath, Inc.;
PAETEC Holding Corp.;
Penn Telecom, Inc. d/b/a Consolidated
Communications Penn Telecom;
RNK Inc. d/b/a RNK Communications;
segTEL, Inc.;
Talk America Holdings, Inc.;
TDS Metrocom, LLC; and
U.S. TelePacific Corp. and Mpower
Communications Corp., both d/b/a
TelePacific Communications

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