November 13, 2007

Chairman Kevin J. Martin
Chairman
Federal Communications Commission
445 12th St. NW
Washington, D.C. 20554

Ex Parte Filing: WC Dockets No. 06-172; 07-97; 06-125; 06-147; 04-440

Dear Chairman Martin:

Improving the feeble condition of the U.S. broadband market is perhaps the paramount issue facing policy-makers in this country today. The U.S. is clearly trailing most of our major economic rivals in broadband transmission speed, investment, subscribership and competitiveness.[1] While residences in many other nations routinely have access to broadband services at speeds of 10 to 100 Mbps, 95% of all broadband connections to American homes are below 10 Mbps.[2] Investment in broadband in the U.S. lags behind several other countries.[3] Prices for broadband service generally are several times higher (per megabit) in the U.S. than in most European countries.[4] The cable-telco duopoly dominates the provision of broadband services in the U.S. – serving approximately 96% of the nation's homes. The paucity of truly high-speed, competitive broadband services harms our national security, our economy, our health care, our education, and our quality of life.

The Federal Communications Commission (FCC), under your leadership, is to be commended for recognizing the importance of broadband connectivity to our nation's future. You have

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[1] One think tank, ITIF, concludes that the U.S. falls 12th among the 30 OECD nations in broadband connectivity when including price and speed as well as subscribership. ITIF also notes that a majority of Japanese households served by NTT East have 100 Mbps service available over fiber for about $27/month (adjusted for purchasing power parity). See "Assessing Broadband in America: OECD and ITIF Broadband Rankings," by Daniel K. Correa, Information Technology and Innovation Foundation, April 2007, available at http://www.itif.org/index.php?id=57.

[2] "High-Speed Services for Internet Access: Status as of June 30, 2006, Industry Analysis and Technology Division Wireline Competition Bureau, January 2007," available at http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-270128A1.pdf.

[3] According to ITU Data, the U.S. investment in telecommunications was less than 1/2 of the amount spent by Mexico, France and New Zealand, less than 1/3 of the amount spent by Japan and Canada, less than 1/4 of the amount spent in Spain and Great Britain, and less than 1/8 of the amount spend by S. Korea (measured as a percentage of GDP). ITU Connect the World Database, 2006.

[4] Almost two years ago, the Wall Street Journal reported that American consumers were paying about 11 times more per megabit of service than consumers in France. See, "For U.S. Consumers, Broadband Service is Slow and Expensive," By Jesse Drucker, The Wall Street Journal, November 16, 2005. Last year, Free Press/Consumer's Union/Consumer Federation of America reported that DSL connections of 24 Mbps were commonplace in Europe at a price of about $40. In contrast, American consumers are paying more for a connection that is 1/10 the speed. See, "Broadband Reality Check II, The Truth Behind America's Digital Decline" by S. Derek Turner, August 2006.

frequently addressed the need to improve the deployment and use of broadband services to all Americans.

Unfortunately, Verizon and Qwest are seeking to upend one of the few U.S. policies that has succeeded in encouraging the deployment of affordable, high-speed, competitive broadband services. The pending petitions for forbearance filed by these companies would take this nation in exactly the opposite direction – reducing the opportunity for competitive investment in broadband facilities and likely causing rate increases for broadband services to many American residential and small business consumers. These petitions should be denied.

Verizon proposes to close off its copper network to competitors in 6 major markets in the northeast, while Qwest proposes a similar change covering 4 major markets in the mid-west and west. If granted, these petitions could undermine the ability of facilities-based broadband competitors to reach 13 million households and almost 35 million Americans in the Verizon region and 4.6 million households and about 13 million people in the Qwest region. Together, these petitions could eliminate competition and raise rates for broadband services for about 40% of all the homes in America.

Competitive broadband providers such as Earthlink, Covad, Cavalier, DSLNet/Megapath and many others have built broadband networks to offer voice, video and data services to residences and small businesses at speeds up to 30 Mbps. By adding their own electronics to Verizon's or Qwest's copper loops, these companies can offer a lower-priced, higher-speed offerings than those offered by either Verizon or Qwest over those loops.

If access to these loops on an unbundled basis is eliminated, many, if not all, of the competitive broadband providers will either raise their rates or withdraw from these markets, stranding billions of dollars in broadband equipment and subjecting the consumer to the higher rates charged by the incumbent provider. In fact, a recent report issued by the competitive industry calculated that, if the FCC eliminates Verizon's unbundling obligations in all 6 markets, consumers would suffer a total rate increase of $2.4 billion annually, the equivalent of $114 annually for an average household.[5]

We have already learned the lesson of prematurely deregulating essential facilities in the special access market. In 2001, the FCC granted pricing flexibility to the incumbent providers of special access based in part on a prediction that competition would develop for special access. Since 2001, incumbent providers of special access have increased their market share and consistently raised their prices to outrageously high levels. One organization representing large businesses claims that incumbents are the sole provider of dedicated access to 98% of all businesses nationwide.[6] Another entity estimated that the incumbents over-earned $7.4 billion between

[5] AN ANALYSIS OF VERIZON'S PETITION FOR FORBEARANCE: *A Quantification of the Impact of Forbearance*, QSI Consulting, Impact Study, available at http://www.publicknowledge.org/pdf/qsi-verizon-study.pdf.

[6] Economics and Technology, Inc., "Competition in Access Markets: Reality or Illusion, A Proposal for Regulating Uncertain Markets," at 16-22 (Aug. 2004) ("ETI Report"), appended as Attachment A to Ad Hoc

2001 and 2006 due to their inflated special access prices.[7] By systematically raising their prices year after year, AT&T's after-tax rate of return for interstate special access services grew from an exorbitant 40% in 2000 to an astronomical 100% in 2006, while Verizon's return more than tripled from 15% to 52%.[8]

These rate increases not only harm consumers, they also inhibit broadband deployment. Rural telephone companies maintain that the higher special access rates they pay to the Bell Companies reduce the funds the rural companies have available to build broadband networks in rural areas. Nascent competitive providers of service, who have perhaps the greatest incentive to deploy competitive broadband services, instead must fork over a significant portion of their revenues directly to their competitor rather than using those funds to build their own broadband facilities.

The unbundling provisions that Verizon and Qwest seek to dismantle are precisely the provisions that other countries are using to achieve greater broadband investment and penetration. In France, the national regulatory commission's dedication to local loop unbundling is widely credited for vaulting France into a leadership position among European countries in broadband deployment.[9] Japan requires local loop unbundling for both fiber and copper loops. The fierce competition generated by these local loop unbundling policies in both countries has driven the

Telecommunications Users Committee Reply Comments, WC Docket No. 05-65 (May 10, 2005) ("Ad Hoc 2005 Reply Comments"). Declaration of Susan M. Gately, appended as Attachment B to Ad Hoc 2005 Reply Comments, ¶¶ 19-25 ("2005 Gately Decl.").

[7] See Testimony of Gary Forsee, Chairman and CEO of Sprint-Nextel, before the U.S. House Subcommittee on Telecommunications of the Committee on Energy and Commerce, Oct. 2, 2007, available at http://energycommerce.house.gov/cmte_mtgs/110-ti-hrg.100207.DigFuture.Part6.shtml.

[8] The harm caused by premature deregulation of special access services was confirmed by the Government Accountability Office, which found in a November, 2006 report that, "[I]n areas where the FCC granted full pricing flexibility due to the presumed presence of competitive alternatives, list prices and average revenues *tend to be higher* than or the same as list prices and average revenues in areas still under some FCC price regulation." United States Government Accountability Office, Report to the Chairman, Committee on Government Reform, House of Representatives, *Telecommunications: FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, November 2006 ("*GAO Report*").

[9] An article in BusinessWeek magazine reported the following:

> How did France—not always seen as a paragon of the free market—turn into such a hotbed of broadband competition? The surge can be traced government actions at the start of the decade that have proved far more effective at stimulating broadband competition than the policies of the FCC. In 2000, France's national telecom regulator forced former state-owned monopoly France Telecom (FTE) to open up its network to rival operators, a process known as "local loop unbundling." That encouraged telecom upstarts and carriers from other countries, including Telecom Italia (TI) and Deutsche Telekom (DT), to rent access to France Telecom's wires and start offering competing broadband services. And that, in turn, spurred France Telecom to improve its own prices and services, becoming the first major telecom company in Europe to roll out residential VoIP service in June, 2004.

"*Vive la* High-Speed Internet!: French policy has nurtured competition among providers, advancing the country to the cutting-edge of broadband technology," by Jennifer L. Schenker; BusinessWeek, July 18, 2007, available at http://www.businessweek.com/globalbiz/content/jul2007/gb20070718_387052.htm.

industry to migrate to the provision of fiber services to gain a competitive advantage.[10] Similarly, the U.K. has implemented a local loop unbundling policy since 2001 and has seen its rate of broadband adoption soar to the top among the G7 countries.[11]

Verizon and Qwest's claim that they will continue to provide access to their copper network at reasonable rates if their petitions are granted should be viewed with a high degree of skepticism. These companies made the same argument in order to convince the courts to eliminate UNE-P, and then immediately raised their wholesale rates to non-competitive levels and effectively eliminated that form of competitive service. Competitive firms have begun to withdraw from the Omaha market because of Qwest's demand for higher loop rates after Qwest's forbearance petition was granted in that market. And Verizon has challenged in court the states' authority to set rates in the absence of a federal rate regime. Competitive providers claim that they have tried to elicit from Verizon what it would charge for unbundled loops if these petitions were granted, but Verizon has not been forthcoming. Based on this history, the incumbents' arguments that they will provide access to their copper network in a manner that permits meaningful broadband competition simply cannot be accepted at face value.

Furthermore, granting these forbearance petitions would conflict with the recent AT&T Broadband Forbearance Order. In that decision, the FCC granted AT&T freedom from certain tariffing and *Computer Inquiry* rules for several high-speed, high-volume services used by enterprise customers to transmit large amounts of data to multiple locations. But the FCC specifically limited that decision to these high-capacity, non-TDM services and acknowledged that its order did not apply to the type of DS0, DS1 or DS3 services that are the subject of the instant Verizon and Qwest forbearance petitions.[12] The FCC's analysis in the AT&T Broadband Forbearance Order maintained that enterprise customers may have alternatives to the broadband

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[10] *Understanding the Japanese Broadband Miracle; Taka Ebihara; Office of the Japan Chair, Center for Strategic and International Studies (CSIS)*, April 4, 2007, available at www.itif.org/files/Ebihara_Japanese_Broadband.pdf.

[11] In 2001 the UK sat in twenty-first place in the OECD countries in terms of broadband penetration. Six years later there are more than 13 million broadband subscribers (representing more than 50 per cent of the UK's 24.4 million households), and the UK now leads the G7 in terms of the availability of first generation broadband, with 99.6 per cent availability. Local loop unbundling (LLU) and the wide availability of wholesale DSL products, has lead to strong retail and wholesale competition, which in turn has resulted in falling prices and stimulated high levels of take-up. The 'virtuous circle' . . . where industry innovation drives user adoption and market growth, is now a reality.

"Pipe Dreams? Prospects for Deployment of Next Generation Broadband in the UK," published on April 16, 2007, by the Broadband Stakeholders Group, available at http://www.broadbanduk.org/content/view/236/7/.

[12] "We note that the relief we grant AT&T excludes TDM-based, DS-1 and DS-3 special access services, and that such special access services for other incumbent LECs likewise remain rate regulated, regardless of the specific geographic market." *In the Matter of Petitions of AT&T Inc. and BellSouth Corporation for Forbearance Under 47 U.S.C. 160(c) from Title II and Computer Inquiry Rules with Respect to its Broadband Services*, WC Docket No. 06-125, Memorandum Opinion and Order, FCC 07-180, released Oct. 12, 2007, ("*AT&T Broadband Forbearance Order*") para. 20.

services at issue in that order, acknowledging by omission that residential and small businesses do not have the same competitive alternatives.[13] Finally, the order notes that, if an enterprise customer cannot build its own broadband facilities, it can obtain services from a competitive local exchange carrier (CLEC) that leases unbundled network elements (UNEs).[14] These competitive UNE-based services, the availability of which was relied upon by the FCC in granting AT&T relief, will not be available if the Verizon and Qwest petitions are granted. Granting the Verizon and Qwest petitions, therefore, would not only be susceptible to remand on its own, but would undermine the rationale used for granting the AT&T Broadband Forbearance Order.

We understand the argument for deregulating services when there is sufficient competition to provide the consumer with a choice of alternative providers. But deregulating carriers with market power *before* such competitive alternatives are proven to exist can be extremely counter-productive. Granting these petitions, essentially removing the foundational local loop facilities from the market based on speculative evidence of competitive alternatives, will effectively prevent competition from continuing to develop and will further entrench the existing providers' dominant status. As the special access market demonstrates, once the dominant provider genies are out of the bottle, it can be quite difficult to re-instate the necessary pro-competitive rules later. The applicants simply have not demonstrated that there are sufficient competitive providers in these markets to warrant abandoning the existing pro-competitive regime.

In summary, granting these forbearance petitions is likely to eliminate competitive voice and broadband services to the mass market of residential and small business consumers and cause significant rate increases to residential and small business consumers. We urge you to reject these petitions and adhere to the current local loop unbundling policy that has been shown to promote lower prices and greater investment in broadband networks.

Respectfully submitted,

Consumer Federation of America
Consumers Union
EDUCAUSE
Free Press
Media Access Project
New America Foundation
Public Knowledge
U.S. Public Interest Research Groups

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[13] "Viewing the regulatory obligations from a broad perspective is consistent with the needs of the large and mid-sized enterprise customers that use AT&T's broadband services to connect geographically-dispersed locations." *AT&T Broadband Forbearance Order*, para. 21.

[14] "Where self-deployment and purchasing from competitive LECs are not options, potential providers may obtain unbundled network elements (UNEs) from the incumbent LEC to meet these customers' needs." *AT&T Broadband Forbearance Order*, para. 21.