

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

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

**MOTION TO DISMISS OR, IN THE ALTERNATIVE,  
TO DENY PETITIONS FOR FORBEARANCE  
ON THE BASIS OF LATE-FILED DATA**

ACN Communications Services, Inc., the AdHoc Telecommunications Users Committee, Alpheus Communications, L.P., ATX Licensing, Inc., BridgeCom International, Inc., Broadview Networks, Inc., BT Americas Inc., Cavalier Telephone LLC, COMPTEL, Covad Communications Group, Inc., DSLnet Communications, LLC, EarthLink, Inc., Eschelon Telecom, Inc., Eureka Telecom, Inc. d/b/a InfoHighway Communications, IDT Telecom, Integra Telecom, Inc., McLeodUSA Telecommunications Services, Inc., MegaPath, Inc., Monmouth Telephone & Telegraph, Inc., Mpower Communications Corp., NuVox Communications, PAETEC Communications, Inc., Penn Telecom, Inc., RCN Telecom Services, Inc., RNK, Inc., segTEL, Inc., Sprint Nextel Corporation, Talk America Inc., TC3 Telecom, Inc., TelNet Worldwide, US LEC Corp., U.S. Telepacific Corp. d/b/a Telepacific Communications, and XO Communications, Inc. (referred to herein as “Joint Movants”), through counsel, and pursuant to 47 C.F.R. §§ 1.1 and 1.45, hereby move the Federal Communications Commission (“Commission”) to dismiss each of the Petitions of the Verizon Telephone Companies (“Verizon”) in the above-captioned proceeding or, in the alternative, to deny forbearance within

each of the six Metropolitan Statistical Areas (“MSAs”) identified by the Verizon Petitions.<sup>1</sup> For the reasons discussed herein, any grant of forbearance by the Commission would violate the mandates of the Administrative Procedure Act (“APA”) for federal rulemaking proceedings,<sup>2</sup> and would contradict the forbearance standard established by the Telecommunications Act of 1996.<sup>3</sup> Moreover, a decision by the Commission to dismiss or deny Verizon’s Petitions would serve the public interest by fostering reasoned decision-making, by protecting interested parties from insufficient notice of the substance underlying Verizon’s requests for sweeping deregulation, and

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<sup>1</sup> Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Boston Metropolitan Statistical Area (filed Sept. 6, 2006); Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the New York Metropolitan Statistical Area (filed Sept. 6, 2006); Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Philadelphia Metropolitan Statistical Area (filed Sept. 6, 2006); Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Pittsburgh Metropolitan Statistical Area (filed Sept. 6, 2006); Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Providence Metropolitan Statistical Area (filed Sept. 6, 2006); Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Virginia Beach Metropolitan Statistical Area (filed Sept. 6, 2006), WC Docket No. 06-172 (consolidated) (the “Verizon Petitions” or “Petitions”).

<sup>2</sup> As indicated in its initial Public Notice regarding this matter, this proceeding is being conducted by the Commission pursuant to its notice and comment rulemaking procedures. *See Pleading Cycle Established for Comments on Verizon’s Petitions for Forbearance in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas*, Public Notice, 21 FCC Rcd 10174 (2006).

<sup>3</sup> *See* 47 U.S.C. § 160. This provision allows the Commission to forbear from applying any regulation or any provision of the Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, if the Commission determines that:

- (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations . . . 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.

In making its determinations, the Commission must consider “whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services.”

by ensuring that this proceeding is not tainted by the fact that many stakeholders who would be impacted by such deregulation have been deprived of the fullest and fairest opportunity to provide their input to the Commission. Furthermore, such action would not prejudice Verizon, as it would be permitted to refile its Petitions at any time. In support of this Motion, the Joint Parties submit as follows.

## I. INTRODUCTION

This proceeding has been corrupted beyond repair by Verizon's ongoing efforts to game the forbearance process. Verizon's efforts began at the time it filed its Petitions when it refused to make available to interested parties all of the designated "confidential" information set forth in its Petitions and accompanying materials, and relied upon to support its forbearance requests.<sup>4</sup> Verizon also chose to rely on wrongly appropriated confidential and proprietary E911 database listing information in violation of state law and its interconnection agreements with various carriers.<sup>5</sup> Further, the Verizon Petitions improperly relied on the specific thresholds for

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<sup>4</sup> Although the Commission later ordered Verizon to produce such information, under the terms and conditions of its Second Protective Order, it still has not addressed the threshold issue of whether Verizon's conduct warrants dismissal of the Petitions. *See 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*, Order, 22 FCC Rcd 892 (2007) ("Second Protective Order"). Even now, under the *Second Protective Order*, highly confidential information is not accessible by key stakeholders such as state regulators and other governmental entities.

<sup>5</sup> Last October, several interested parties moved the Commission to dismiss the Verizon Petitions on the grounds that Verizon's use of proprietary and confidential E911 listings violates both federal and state law, and various interconnection agreements between Verizon and competitive local exchange carriers ("CLECs"). *See 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*, Motion to Dismiss of ACN Communications Services, et al., WC Docket No. 06-172 (filed Oct. 16, 2006). The motion remains pending. More recently, on May 16, 2007, Cavalier Telephone LLC ("Cavalier") filed suit against Verizon in Federal District Court for the Eastern District of Virginia seeking to enjoin Verizon from using or disclosing Cavalier's customer data contained in the E911 database. *See*

forbearance relief developed and applied in the *Omaha Forbearance Order*.<sup>6</sup> Verizon used the competitive triggers established in the *Omaha Forbearance Order* to plead its case for forbearance in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach MSAs notwithstanding the fact that parties to the Omaha proceeding are prohibited by the terms of its protective order from using the confidential *Omaha Forbearance Order* in any other regulatory proceeding or for any other purpose.<sup>7</sup> Through these various means, Verizon engaged in improper and dilatory tactics, squandered valuable Commission and industry resources, and produced information that falls far short of meeting its burden of proof.

Now, Verizon has made yet another attempt to evade informed analysis and review of its forbearance requests. With more than two-thirds of the statutory clock for addressing its forbearance requests having run,<sup>8</sup> and on the last day of the formal pleading cycle established by

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*Cavalier Telephone, LLC v. Verizon Virginia, Inc.*, Civil No. 2:07CV229 (E.D. Va. filed May 16, 2007).

<sup>6</sup> See *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 (2005) (“*Omaha Forbearance Order*”), *aff’d Qwest Corporation v. Federal Communications Commission*, Case No. 05-1450, (D.C. Cir. Mar. 23, 2007) (“*Qwest Omaha*”).

<sup>7</sup> Interested parties have repeatedly claimed that Verizon’s use of the *Omaha Forbearance Order* effectively denies any opportunity to submit meaningful comment on its forbearance requests. Indeed, several of the parties to this motion filed a motion to modify the protective order in the Omaha forbearance proceeding to permit use of confidential information by authorized parties for purposes of analyzing and responding to other forbearance petitions, including the instant Verizon Petitions. See *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Motion to Modify Protective Order, WC Docket No. 04-223 (filed Oct. 11, 2006). The Commission has yet to act on that motion. Of course, the Commission’s refusal to act on the motion in a timely manner sabotages the forbearance process because each day that passes without a ruling means that interested parties will have less opportunity to review and analyze data relied upon by Verizon.

<sup>8</sup> Section 10(c) permits the Commission to extend the one year statutory deadline by an additional 90 days. 47 U.S.C. § 160(c).

the Commission, Verizon finally made its first attempt at producing market-specific empirical data to support its claims.<sup>9</sup> Even overlooking for the moment the suspect nature of the data, it is patently inequitable and contrary to the integrity of the proceeding to submit such fundamental and voluminous information at this late date.<sup>10</sup> Interested parties have no meaningful opportunity to review and analyze such data, nor any reasonable opportunity to advise the Commission of its apparent strengths and shortcomings. Moreover, even if the Commission reopened the pleading cycle to give interested parties additional time to file formal comments on the data, the Commission would have insufficient time to fully analyze those comments, and to take account of them in its final forbearance rulings, within the statutory time frame. Verizon should not be rewarded for its gaming of the forbearance process.

In light of these circumstances, a Commission decision relying on the data submitted by Verizon in conjunction with its reply comments would be contrary to law. The APA requires notice and comment,<sup>11</sup> and the federal courts have interpreted that requirement to mean a formal comment filing, with adequate time for review and analysis.<sup>12</sup> At the outset, it is highly likely

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<sup>9</sup> In 11 exhibits totaling over 500 pages accompanying its reply comments, Verizon for the first time offered wire center specific data for each of the six MSAs at issue purporting to show the extent of competition by competitive carriers in residential and business markets.

<sup>10</sup> Moreover, although Verizon's reply comments and accompanying exhibits were filed on April 18, 2007, those documents were not posted on the Commission's Electronic Comment Filing System ("ECFS") and made available for public inspection and copying until May 8, 2007.

<sup>11</sup> 5 U.S.C. § 533(c) ("After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments...").

<sup>12</sup> See *American Medical Ass'n v. Reno*, 57 F.3d 1129, 1132 (D.C. Cir. 1995) ("Notice of a proposed rule must include sufficient detail on its content and basis to allow for meaningful and informed comment."); *Engine Mfrs. Ass'n v. EPA*, 20 F.3d 1177, 1181 ("[T]he Administrative Procedure Act requires the agency to make available to the public, in a form that allows for meaningful comments, the data the agency used to develop the proposed rule."); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 55 (D.C. Cir. 1977) ("...proposed rule must provide sufficient information to permit informed adversarial critique.").

that many interested stakeholders are unaware of the existence of Verizon's extensive data production. And, as Verizon is most assuredly aware, it is not reasonable to expect that parties will be able to analyze the voluminous exhibits submitted by Verizon with its reply comments and effectively utilize the *ex parte* process to address the merits of those exhibits within the limited time left in this proceeding. It may be impossible for interested parties to retain outside experts to analyze the data,<sup>13</sup> for those experts to fully review the data and provide useful written analysis of the data, and for interested parties to present and review that data with the Commission under the *ex parte* process. It is similarly unlikely that the Commission will have adequate time to thoroughly review and analyze the data provided by Verizon independently or to carefully review and consider the *ex parte* submissions parties manage to submit within this remaining time period.

At bottom, Verizon had an obligation to plead the merits of its case in the Petitions at the time the Petitions were filed. This is especially vital given the time-limited nature of forbearance proceedings. Verizon did not do so. It is now attempting to cure its patently insufficient initial showing and, at the same time, evade reasoned review and analysis of its "proof" by submitting its substantive case in the eighth month of this twelve month proceeding. The Commission should not permit Verizon to manipulate the forbearance process in this manner.

The prejudice resulting from Verizon's behavior is not theoretical. For example, several of the exhibits accompanying Verizon's reply comments contain carrier-specific information obtained by Verizon from the E911 database purporting to show the level of competitive activity in each wire center within the six MSAs at issue. Recently, in the context of an ongoing retail

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<sup>13</sup> Verizon designated all but two of the 11 exhibits accompanying its reply comments "Highly Confidential Information" and the *Second Protective Order* limits access to Highly Confidential Information to Outside Counsel and Outside Consultants. *Second Protective Order*, ¶ 8.

services deregulation proceeding, the staff of the Virginia Corporation Commission has raised serious questions regarding the veracity of the competitive line counts contained in the E911 database for Virginia, and efforts are underway in that proceeding to determine the accuracy of the E911 database line count information.<sup>14</sup> Verizon's unwillingness to file any carrier-specific line count information for each wire center in any of the six MSAs in which it is seeking forbearance until after the comment cycle has closed threatens the Commission's ability to undertake the type of rigorous analysis being performed before the Virginia Commission – and significantly constrains interested parties from assisting the Commission in that analysis – thereby calling into question the Commission's opportunity to engage in reasoned decision-making.

The only reasonable approach is to require Verizon to begin the forbearance process anew by rejecting the Petitions without prejudice. Verizon may refile its Petitions at any time using any or all of the exhibits and data submitted with its reply comments. Interested parties would be afforded adequate notice and opportunity to submit comments and reply comments responding to the information submitted by Verizon, and the Commission would be accorded reasonable time to analyze all parties' submissions and reach a decision on the basis of a full and complete record. Thus, rejecting the Petitions would not prejudice Verizon and, more importantly, would protect the legitimacy of the Commission's forbearance processes.

## **II. THE COMMISSION MAY NOT RELY ON EMPIRICAL DATA THAT IS NOT SUBJECT TO REASONABLE PUBLIC REVIEW AND COMMENT**

The federal courts have interpreted the APA to require that interested parties be given reasonable and timely notice of and access to the information that will be relied on by an agency

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<sup>14</sup> See *Motion of the Staff of the State Corporation Commission to Compel Responses from the Verizon Companies*, Case No. PUC-2007-00008, Virginia Corporation Commission (May 4, 2007).

in its decision-making, and an opportunity to review, analyze and raise questions regarding such information.<sup>15</sup> The courts generally have also concluded that an agency may not rely on any information for which interested parties are not given adequate time, access and opportunity to comment, in particular, where the comment cycle has closed.<sup>16</sup> Here, the established case law dictates that the information submitted by Verizon with its reply comments cannot be relied upon by the Commission in reaching its forbearance determination since the comment cycle has closed and interested parties therefore do not have an adequate opportunity to respond to Verizon's late-filed data on the record in a logical and well-organized way.

The *ex parte* process, which affords interested parties the opportunity to supplement their participation in a proceeding being conducted under the Commission's notice and comment rulemaking procedures, was not designed to function as a substitute for the orderly notice and comment process.<sup>17</sup> Use of the *ex parte* process to "build a record" on critical points of contention necessarily leads to a situation where interested parties – and the Commission – are forced to contend with a record that may change on a daily basis up to the time the Commission acts. Additionally, no participant can ever be sure that it has seen, let alone been able to adequately respond to, every *ex parte* submission made by others, no matter how material.

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<sup>15</sup> See *supra* n. 10.

<sup>16</sup> The U.S. Court of Appeals for the Ninth Circuit has twice determined that a federal agency commits reversible error where it relies on material, post-comment information to support its final rule. See *Ober v. EPA*, 84 F.3d 304, 315 (9th Cir. 1996) ("Petitioners were prejudiced when they did not have notice of or an opportunity to comment on the post-comment period justifications which were submitted by the State and were critical to the EPA's approval decision."); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1403 (9th Cir. 1995) ("...opportunity for public comment is particularly crucial when the accuracy of important material in the record is in question.").

<sup>17</sup> Among other things, the *ex parte* process demands that all interested parties, even those with limited resources for advocacy (which includes many competitive carriers, consumers, and others), expend resources beyond those devoted to preparing comments and reply comments in order to ensure that their views are included in the record. Many interested parties may not have the financial wherewithal to do so.

Reliance on a process that permits participants to add substantive information to the record essentially up to the moment the agency acts, especially where there are tight statutory deadlines involved, does not satisfy the requirements of the APA.

**III. VERIZON HAD THE BURDEN OF PRODUCING COMPLETE INFORMATION AT THE OUTSET OF THIS PROCESS AND SHOULD BE HELD ACCOUNTABLE FOR ITS FAILURE TO DO SO**

Rejection of Verizon's Petitions is the only appropriate course of action. The burden of proof in a forbearance proceeding rests squarely on the petitioning party. As the Commission emphasized in the *Omaha Forbearance Order*, it is under no statutory obligation to evaluate a forbearance petition "otherwise than as pled."<sup>18</sup> Verizon's Petitions therefore must be evaluated and judged by the Commission as they were presented by Verizon at the time of filing – not on the basis of the supplemental information submitted by Verizon long after the Petitions were docketed. After all, the forbearance process is unique, enabling a party seeking forbearance to initiate the proceeding, with a deadline "enforced" by the potential of a "deemed grant" if the Commission fails to act. This places a heavy burden on the petitioner to file complete documentation at the outset of the process. Here, Verizon in its sole discretion determined the timing of its filings and the nature and extent of the data included in support of its Petitions. Consequently, Verizon bears responsibility if it comes up short.

As filed, the Petitions fail to sustain Verizon's burden of proof in numerous respects. First, the Petitions fail to provide the Commission and interested parties detailed data showing the nature and extent of competitive activity in each wire center in each subject MSA.<sup>19</sup> Second,

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<sup>18</sup> *Omaha Forbearance Order*, n. 161.

<sup>19</sup> In the recent *Qwest Omaha* opinion, the U.S. Court of Appeals for the D.C. Circuit affirmed the Commission's use of wire centers as the geographic market when analyzing whether forbearance from Section 251(c) unbundling obligations was warranted. *Qwest Omaha*, Slip Op. at 14-16. At the time it filed its Petitions, Verizon was aware that such

the limited evidence actually presented in the Petitions is rife with flaws. The Petitions do not identify how Verizon has treated its acquisition of MCI in the information it uses to support its Petitions. Further, the Petitions tout Verizon’s “Wholesale Advantage” service contracts as evidence of competition in the mass market, yet the Petitions provide absolutely no information regarding the terms of service offered, nor do they identify the current or future pricing of such services. Moreover, Verizon’s Petitions fail to identify the extent to which the alternative facilities Verizon points to as evidence of competition are located in wire centers in which Verizon already has gained relief from Section 251(c)(3) unbundling requirements as a result of the *Triennial Review Remand Order’s* impairment triggers.<sup>20</sup> In addition, the data in Verizon’s Petitions regarding switched access line loss is flawed and misleading. Verizon suggests that to the extent a customer drops a Verizon line, the customer is being served by a competitor.<sup>21</sup> In fact, a decline in Verizon’s number of access lines proves nothing regarding the extent of competition in the local exchange market.<sup>22</sup> This is particularly true given the likely “loss” of access lines to either Verizon Wireless or Verizon’s broadband services.

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information was provided by the petitioner and was relied upon by the Commission in the Omaha proceeding.

<sup>20</sup> There are numerous wire centers within the six MSAs at issue in which Verizon has been afforded some loop and/or transport unbundling relief due to the application of the *Triennial Review Remand Order’s* impairment criteria. Thus, it is reasonable to conclude, in the absence of any evidence to the contrary, that any competitive facilities deployment that does exist within the six MSAs at issue has already been taken into account through the extensive regulatory relief that Verizon has received by operation of the *TRRO* triggers.

<sup>21</sup> Verizon Petition – Boston, at 2; Verizon Petition – New York, at 2; Verizon Petition – Philadelphia, at 2; Verizon Petition – Pittsburgh, at 2; Verizon Petition – Providence, at 2; Verizon Petition – Virginia Beach, at 2.

<sup>22</sup> As the Commission found in the *Anchorage Forbearance Order*, “abandonment of a residential access line does not necessarily indicate capture by a competitor.” *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, n. 88 (2007) (“*Anchorage Forbearance Order*”).

Importantly, Verizon has offered no reason why the type of exhibits and other supporting data filed with its reply comments (which address some of the shortcomings outlined above) could not have been filed with its Petitions. In the absence of any extenuating circumstances to explain why the wire center specific data and other information submitted by Verizon along with its reply comments could not have been filed along with the Petitions, one can only conclude that Verizon deliberately chose to refrain from filing the information until the very last day in the comment cycle in an effort to obtain a competitive advantage by doing so. The Commission must not permit Verizon to game the forbearance process in this way.

The public interest requirements of Section 10(a) will be served only if the Commission is able to make a forbearance determination on the basis of a complete and accurate factual record. Rejecting Verizon's pending Petitions and permitting Verizon to refile them would serve the public interest by ensuring the development of a complete factual record, and providing the Commission and stakeholders with more time to fully evaluate the record before rendering its decision. Moreover, Verizon would not be prejudiced by such action. Indeed, if it desires, Verizon may immediately refile its Petitions on the basis of the same information provided with its reply comments. Doing so would simply provide the Commission appropriate time to engage in reasoned decision-making. On the other hand, denial of the instant motion would reward Verizon for deliberately engaging in behavior designed to evade thorough review of its forbearance requests.

#### **IV. CONCLUSION**

For the reasons set forth herein, the Joint Movants respectfully request that the Commission dismiss each of Verizon's Petitions in the above-captioned proceeding or, in the

alternative, deny forbearance relief within each of the six MSAs identified by the Verizon Petitions.

Respectfully submitted,



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Dated: May 22, 2007

**CERTIFICATE OF SERVICE**

I, Susan Ray, hereby certify on this 22<sup>nd</sup> day of May, 2007, that copies of the foregoing Motion to Dismiss or, in the Alternative, to Deny Petitions for Forbearance on the Basis of Late-Filed Data were served via first class mail, postage prepaid to the following:

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