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

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

**REPLY IN SUPPORT OF**
**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, LLC (referred to herein as "Joint Movants"), through counsel, and pursuant to 47 C.F.R. §§ 1.1 and 1.45, hereby submit this reply in support of their motion 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.[1] On May 29, 2007, Verizon filed an opposition to the Motion (the "Opposition").[2]

The Opposition continues Verizon's pattern of trying to game the forbearance process. Verizon justifies withholding wire center data until the end of the formal comment cycle on the ground that it was under no obligation to submit wire center data in the first place, despite the fact that Verizon extensively cited to the *Omaha Forbearance Order*[3] in its Petitions and certainly knew that the Commission had engaged in a wire center by wire center analysis in evaluating Qwest's petition for essentially the same relief. Moreover, Verizon self-servingly declares that no one was harmed by its hide-the-ball tactics because the Commission will have a few more months before a decision is due and in the *Omaha* proceeding such data was not produced until later in the process. Neither argument excuses Verizon's refusal to submit readily-available information it knew was highly relevant to the Commission's analysis until the last day of the formal comment cycle.

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1 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").

2 Verizon Telephone Companies, Opposition to Second Motion to Dismiss, WC Docket No. 06-172 (consolidated) (filed May 29, 2007) ("Opposition").

3 *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*").

In *Omaha*, the Commission was faced with a request for forbearance in a single MSA, while in the Verizon proceeding forbearance is being sought in six major markets. More generally, as the Commission is well aware, Section 10 forbearance petitions place a significant strain on the Commission and other parties due to the statute's tight deadlines for action and the unique "deemed granted" provision. In these proceedings, as in Section 271 interLATA entry proceedings before, the Commission must aggressively act to enforce the orderly presentation of evidence to ensure fundamental fairness and compliance with the mandates of the Administrative Procedure Act ("APA").[4]

## I. VERIZON HAD AN OBLIGATION TO PRODUCE COMPLETE INFORMATION TO SUPPORT ITS FORBEARANCE REQUEST FROM THE OUTSET

Verizon's primary contention is that it was not obligated to submit wire center level data with its forbearance petitions. It contends that the Commission "does not need to consider" wire center specific data in order to grant its Petitions, allegedly because "competition is so prevalent throughout each of the six MSA [sic] that a wire-center analysis is unnecessary."[5] Wire center data, according to Verizon, was submitted only in response to criticisms in the comments, as if such comments raised new or unanticipated issues.

Section 10 petitions are extraordinary in many ways. One unusual feature of the Section 10 construct is that a petitioner may request forbearance from "any regulation" or "any provision" that the petitioner selects, meaning that forbearance requests can be very expansive or very narrow, depending upon the relief the petitioner seeks. In this case, Verizon seeks "relief"

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4 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).

5 Opposition at 7.

modeled after forbearance that the Commission granted in the *Omaha Forbearance Order*, by asking that the unbundling and dominant carrier regulations forborne from in *Omaha* be extended to six MSAs in Verizon's territory. It did so with full knowledge that wire center information was extremely relevant to the Commission's analysis in the *Omaha* proceeding.

The Commission is not obligated to consider Verizon's Section 10 petition "otherwise than as pled."[6] Verizon apparently was only invoking *Qwest* in its Petitions in the hope that its utterly unprecedented request might somehow be favorably equated with the unique relief crafted for Qwest in *Omaha.* Having chosen to seek forbearance in reliance on *Omaha*, however, Verizon bore the burden to submit evidence that would tend to support relief under the *Omaha* standard.[7] It failed to do so. Verizon certainly could, if it chose, attempt to support its Petitions without wire center level data, and allow its requests to stand or fall based on that level of proof. But, despite Verizon's claims that the Commission need not consider more granular data, it obviously was not willing to rely on this level of proof, precisely because it knows that if reviewed under the *Omaha* standard, the Petitions would be denied.

Verizon cannot try to manipulate the forbearance process by withholding information, creating "moving targets" where resources are limited and time is of the essence, and denying parties a fully meaningful opportunity to review and comment upon relevant data. As explained in the Motion, Verizon could have and should have fully pled the merits of its case in the Petitions at the time they were filed. The need for Verizon to submit its data at the outset is especially critical given the time-limited nature of forbearance proceedings, where both the Commission and interested parties are placed under significant resource constraints in a

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6 *Omaha Forbearance Order*, n. 161.

7 *See, e.g., id.*, ¶ 50 (denying Qwest request for forbearance from dominant carrier regulation for enterprise services on the ground that "Qwest has not submitted sufficient data … to allow us to reach a forbearance determination").

petitioner-led process. If petitioners can submit forbearance requests but withhold highly relevant data until the majority of the time period for review has passed (and after interested parties have expended significant resources in the proceeding given the data previously provided), the forbearance process quickly would break down.

Verizon points to the Section 271 interLATA entry application process as an example where the Commission routinely completed data-intensive proceedings in short time periods,[8] and as support for its assertion that sufficient time remains within the statutory timeframe for full review and analysis. The recent proliferation of forbearance requests, however, creates challenges more difficult to surmount than was the case with Section 271 authorizations. The Commission took extraordinary steps to staff and consider the 40 Section 271 applications it had before it over the course of seven years (averaging out to less than six applications per year).[9] Right now, in contrast, *more than 20* forbearance petitions are pending before the Commission on myriad issues and the Commission has not announced any plans to allocate more than routine resources to the resolution of those petitions.

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8 Opposition at 8.

9 *See* http://www.fcc.gov/Bureaus/Common_Carrier/in-region_applications/. Moreover, in conducting its analysis of Bell Operating Company in-region interLATA entry applications under Section 271, the Commission was able to draw upon the expertise and evaluation of the applicable state commission and the U.S. Department of Justice ("DOJ"). Section 271(d)(2) specifically requires the Commission to consult with the Attorney General and the state commission of any state that is the subject of an application. 47 U.S.C. § 271(d)(2). In contrast, the Commission is not able to rely upon such assistance when conducting Section 10 forbearance proceedings. Notwithstanding the Commission's inability to require DOJ or state commission input in forbearance proceedings, several states have submitted comments in this docket expressing reservations about whether forbearance is warranted. *See, e.g.,* Comments of the Delaware Public Service Commission and the Delaware Division of the Public Advocate, WC Docket No. 06-172 (filed Mar. 5, 2007); Comments of the Virginia State Corporation Commission, WC Docket No. 06-172 (filed Dec. 15, 2006).

Verizon also ignores the fact that in the Section 271 context, the Commission vigorously enforced a "complete as filed" standard for Section 271 applications.[10] The Commission's rationale for imposing a "complete as filed" standard in the Section 271 application process is equally sound here. There, the Commission concluded that it had "neither the time nor the resources to evaluate a record that is constantly evolving" and it recognized that allowing a petitioner to provide new information at any time during the proceeding would be "unfair to interested third parties seeking to comment on a fixed record," that reliance on *ex partes* to address late-filed information would exacerbate problems by creating an arms race of *ex parte* proliferation, that allowing petitioners to rely on new factual evidence might encourage "gam[ing] the system," and that late-filed information would impair the ability of relevant federal and state entities to weigh in. Moreover, the Commission concluded that its "complete as filed" requirement did not pose an undue hardship to the petitioner, as any dismissal would be without prejudice.[11]

Verizon also disingenuously tries to shift blame for delay in this proceeding to those opposing its Petitions by suggesting that comment extension requests by the competitive industry created the current situation.[12] This allegation has no merit. This proceeding has been delayed repeatedly due to problems created by Verizon's own improper use of third party data and refusal to make supporting information available to interested parties.[13] Indeed, the "delay" in

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10 *See, e.g., Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, As Amended, To Provide In-Region InterLATA Services in Michigan*, Memorandum Opinion and Order, 12 FCC Rcd 20543, ¶¶ 49-57 (under the "complete as filed" rule, applicants are obligated to address all facts the applicant can reasonably anticipate will be at issue. Evidence submitted in violation of this standard will be accorded no weight).

11 *See id.*, ¶¶ 49-54.

12 *See* Opposition at 3-4.

13 *See* Motion at 3-4.

the comment cycle that Verizon asserts was caused by Joint Movants in fact was occasioned by Verizon's failure to make relevant information available. The comment cycle was extended so that parties would have a *better* opportunity to comment on the Petitions, not to allow Verizon to withhold required information for even longer.[14]

Given this, Verizon's claim that it submitted wire center level data in response to comments is disingenuous. Verizon knew the *Omaha* standard it was attempting to invoke in its Petitions and that, accordingly, the types of information deemed relevant in *Omaha* would be relevant to the Commission's analysis of its Petitions. It knew that its Petitions called for data similar to that used in *Omaha* to assess whether the forbearance from Section 251(c)(3) unbundled loops and dedicated transport unbundling should be permitted. It reasonably could have, and should have, anticipated that commenters would point out this deficiency in Verizon's Petitions and urge dismissal on that ground. Verizon should not be allowed to excuse its delay on the ground that commenters rightfully cited to Verizon's failure of proof in the comment round.

Similarly, Verizon's claims that an MSA-wide standard should be applied do not justify its failure to submit wire center level data at the outset. Regardless of whether Verizon contends that the legal standard should be changed to an MSA-wide analysis, Verizon knew when it filed

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[14] Public Notice, Wireline Competition Bureau Grants Extension of Time to File Commons on Verizon's Petitions for Forbearance in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas, DA 06-2057, at 2 (Oct. 18, 2006) (WCB grants extension on its own motion "in the interest of developing a thorough and complete record in this proceeding" and to "minimize the piecemeal submission of arguments and analysis in the form of *ex parte* submissions after the reply comment deadline"); CompTel, Motion for Extension of Time, at 3, WC Docket 06-172 (Dec. 6, 2006) (requesting an extension of time to provide parties "an opportunity to digest and analyze and new information Verizon makes available" pursuant to an anticipated Protective Order); CompTel, Motion for Extension of Time, at 1-2, WC Docket 06-172 (Jan. 25, 2007) (requesting an extension of time because Protective Order had just been adopted and an extension would enable "the creation of a more complete record").

its Petitions that the "precedent" it invoked requires the submission of wire center level data. At the time it filed the Petitions, it should have submitted such relevant data for the Commission to consider. Its failure to do so warrants dismissal or denial without prejudice.

Finally, Verizon asserts that in the *Omaha* proceeding, the cable companies submitted wire center level data and that here, the burden is on those opposing Verizon's Petitions to produce such information. Verizon's argument is irrelevant. Qwest was the first incumbent local exchange carrier ("ILEC") to submit a petition seeking forbearance from existing UNE obligations on the basis of facilities-based competition in the market. It was not clear at the time Qwest filed its petition what types of information would be relevant to the Commission's forbearance analysis. Understandably in that context, probative information might not have been submitted until later in the process, after the Commission had an opportunity to refine its analysis of the petition and develop a decision-making framework. But this is not the case with Verizon's Petitions. As discussed, Verizon knew the types of information the Commission found relevant in the *Omaha* context, but refused to provide such data until the reply round, when opposing parties would have far less of an ability to respond. The delay is exacerbated by the fact that Verizon ultimately submitted data that had been in its possession all along, not third party data that it obtained after the Petitions were filed.[15]

## II. THE COMMISSION HAS AUTHORITY TO DISMISS OR DENY VERIZON'S PETITION FOR FAILURE TO SUBMIT TIMELY EVIDENCE

Verizon's final argument is that the Commission is obligated to consider its evidence, no matter how late in the process it chooses to submit that evidence.[16] Here again, Verizon ignores

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[15] It also is irrelevant that Verizon submitted *its own* line count information on a wire center basis in the Petitions. Without competitor line count information, Verizon's own lines tell us nothing. Indeed, various commenters pointed out that Verizon is "losing" lines to Verizon Wireless and to Verizon's own broadband service offerings.

[16] Opposition at 10-11.

the unique circumstances presented by a petition for forbearance under Section 10 of the Act. Because forbearance petitions are "deemed granted" if not denied by the Commission within the statutory time period, due process requires that the Commission and other parties have a meaningful opportunity to review and evaluate all information on which the petitioner seeks to rely. Chairman Martin recently remarked that Section 10 is an "unusual" statutory provision that, unlike the waiver standard, allows the Commission to grant relief from otherwise applicable statutory, as well as Commission, mandates.[17] In addition, Section 10 petitions may be initiated by a petitioner at any time, and theoretically could address as many or as few of the Act's provisions or regulations as the petitioner might identify. In light of these circumstances, the Commission needs to ensure that the process for evaluating forbearance applications is orderly and fair. The closest analogue to the fairness concerns raised by a Section 10 application is the Section 271 process. There, the Commission strictly enforced a "complete as filed" rule in order to ensure that all parties had an opportunity to participate and to avoid ruling on a "moving target."

The only reasonable approach is to follow a procedure much like the one the Commission followed in reviewing Section 271 applications. When, as here, a petitioner submits significant new evidence after its initial petition has been filed, the Commission should begin the forbearance process anew by rejecting the petition without prejudice. Under this standard, 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

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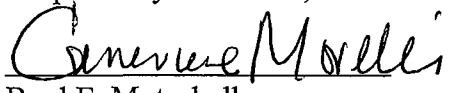
[17] Speech of FCC Chairman Kevin J. Martin to the 2006 ABA Administrative Law Conference, at 6 (October 16, 2006).

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.

## III. 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: June 5, 2007

## CERTIFICATE OF SERVICE

I, Susan Ray, hereby certify on this 5th day of June 2007, that copies of the foregoing Reply in Support of 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, on the following:

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