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June 14, 2007

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

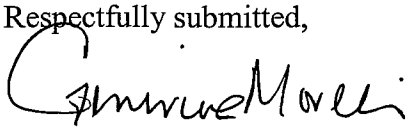
Re: *Ex Parte Notification*: WC Docket No. 06-172, Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas

Dear Ms. Dortch:

Yesterday, the undersigned and Brad Mutschelknaus, of Kelley Drye & Warren LLP, representing Covad Communications Group, XO Communications, LLC, and NuVox Communications, Chris McKee and Angela Simpson, of Covad Communications Group, Lisa Youngers, of XO Communications, LLC, Mary Albert and Jerry James, of Comptel, Russ Merbeth, of Eschelon Telecom, Inc., Paul Kenefick, of EarthLink, Inc., and Phil Macres of Bingham McCutchen, LLP, met with Commissioner Tate's Legal Advisor, Nick Alexander. At that meeting, we discussed and supported the pending motion to dismiss or, in the alternative, to deny the petitions filed by the Verizon telephone companies in the above-captioned docket.

The attached document was referred to during the meeting.

Respectfully submitted,



Genevieve Morelli

cc: Nick Alexander

VERIZON'S 6-MSA FORBEARANCE PETITIONS MUST BE DISMISSED OR DENIED

- **Verizon has repeatedly attempted to manipulate the forbearance process.**
  - Verizon refused to make all designated "confidential" information available to interested parties authorized under the *First Protective Order* to view such information.
    - The Commission later ordered Verizon to produce such information.
  - Verizon relies on wrongly appropriated confidential and proprietary E911 database listing information to support its forbearance requests.
    - This violates state law, Verizon's interconnection agreements with various carriers, and Section 222(g) of the Act.
    - An October 2006 motion to dismiss Verizon's Petitions on this basis remains pending.
    - Cavalier has filed suit to enjoin Verizon from using or disclosing Cavalier's customer data contained in the E911 database.
  - Verizon relies upon the competitive triggers established in the *Omaha Forbearance Order* to plead its case for forbearance but parties to the Omaha proceeding are forbidden from using the confidential *Omaha Forbearance Order* in any other regulatory proceeding or for any other purpose.
    - An October 2006 motion to modify the Protective Order in the Omaha case to permit use of the unredacted *Omaha Forbearance Order* and underlying confidential information by authorized parties in other related forbearance proceedings remains pending.
- **Verizon's withholding of critical market-specific data until the final day of the formal pleading cycle is its most recent attempt to evade reasoned analysis and review of its forbearance requests.**
  - Two-thirds of the 12-month statutory review period had expired before Verizon filed this data.
  - Verizon could have filed this data with its Petitions – the data was not unavailable until the reply comment date.
  - This late-filed data, which purports to show the extent of competition on a wire center-by-wire center basis throughout the 6 MSAs at issue, is essential to a reasoned analysis of Verizon's forbearance requests.

- **Interested parties have no meaningful opportunity to review and analyze this late-filed data and to apprise the Commission of its strengths and shortcomings.**
    - Reopening the pleading cycle would not cure the problem because it would not provide the parties and the Commission adequate time for review and analysis.
    - The *ex parte* process was not designed to act as a substitute for the orderly notice and comment process.
    - The delays in this proceeding have been the product of Verizon's gamesmanship, *i.e.,* its refusal to make certain information available to authorized parties and its improper use of third party data.
- **In light of the circumstances, a Commission decision relying on Verizon's late-filed data would be contrary to law.**
    - The Administrative Procedure Act requires adequate time for review, analysis and comment.
    - The Commission may not rely on any information for which interested parties are not given adequate time, access, and opportunity to comment, particularly where the comment cycle has closed.
- **Verizon's Petitions must be evaluated as they were presented at the time of filing – not on the basis of late-filed information – and must be rejected for Verizon's failure to sustain its burden of proof.**
    - The Commission has no obligation to evaluate a forbearance petition otherwise than as pled.
        - The "complete as filed" rule is routinely enforced by the Commission in time-limited proceedings (*e.g.*, Section 271 interLATA entry applications, Section 271(d)(6) complaints, accelerated docket complaints).
        - Wire center level data was not submitted until after Qwest Omaha forbearance petition was filed because it was not clear at the time of filing what type of evidence would be relevant to the Commission's analysis.
    - Forbearance petitions present special circumstances because they are "deemed granted" if not denied during the statutory time period.
    - As filed, Verizon's Petitions fail to sustain Verizon's burden of proof in numerous respects.

- The Petitions fail to provide detailed data showing the nature and extent of competitive activity in each wire center in each subject MSA.

- The limited "evidence" presented in the Petitions is rife with flaws.

- **Verizon's recent contention that it was not obligated to submit wire center level data with its forbearance petitions must be rejected.**

  - Verizon chose to model its requested relief on the forbearance the Commission granted Qwest in the *Omaha Forbearance Order* where wire center information was considered extremely relevant.

- **Initial review shows that Verizon's late-filed wire center level data systematically overstates the level of facilities-based competition and distorts the distribution of competitive activity.**

  - Additional time is required to verify the results of this initial review.

- **In sum: the Commission should not reward Verizon's gaming of the forbearance process by considering Verizon's late-filed data. Verizon's Petitions should be rejected and Verizon should be required to re-start the forbearance process.**