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30 November 2007

VIA HAND DELIVERY AND ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St., S.W.
Washington, DC 20554

Re: *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.

Dear Ms. Dortch:

In accordance with the Second Protective Order in the above-referenced proceeding[1], enclosed for filing are two copies of the redacted version of the attached letter being submitted by EarthLink, Inc.

Under separate cover and in accordance with the Second Protective Order in this proceeding, copies of the Highly Confidential Information are being submitted to you along with Gary Remondino, of the Wireline Competition Bureau. To the extent that any party wishes to access the Highly Confidential Information associated with this filing, it should send its request in writing to Chris McCall (cmccall@harriswiltshire.com) along with executed Acknowledgements of Confidentiality associated with the Second Protective Order.

Also enclosed is an extra copy of this redacted filing, please date stamp and return it to the courier. Please let me know if you have any questions or concerns.

Sincerely,

John T. Nakahata
Counsel to EarthLink, Inc.

[1] *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, Order, 22 FCC Rcd. 892, DA 07-208, ¶ 15 (WCB rel. Jan. 25, 2007) ("Second Protective Order").

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ATTORNEYS AT LAW

November 30, 2007

Ex Parte

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

Re: *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

Dear Ms. Dortch:

Verizon's November 28, 2007 ex parte provides the Commission with data purporting to show that Verizon "constitutes a small share" of the market in the New York, Boston, Philadelphia, Pittsburgh, Providence, and Virginia Beach MSAs.[1] But these data, and accompanying explanations show, once again, that Verizon asks this Commission to grant forbearance based on unprecedented and wholly unreliable statistical gymnastics, entirely ignoring the *purpose* of the Commission's inquiry into relative market shares. Furthermore, the Commission's recent *AT&T-Dobson Order*[2] once again finds that a facilities-based duopoly is not sufficient competition to protect consumers – a conclusion that cannot be analytically squared with Verizon's requested forbearance here.

I. VERIZON'S DATA CONTINUE TO FAIL TO SATISFY THE *OMAHA* FRAMEWORK.

As EarthLink explained in its November 21, 2007 ex parte, the Commission considered Cox's "very high levels of retail competition that do not rely on Qwest facilities" as a critical basis for its prediction that Qwest would continue to have an incentive to wholesale loops at

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1 Letter from Evan T. Leo, Counsel for Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 06-172 at 2, Figure 1 (filed Nov. 28, 2007) ("Verizon Nov. 28 Ex Parte").

2 *Applications of AT&T Inc. and Dobson Communications Corporation; For Consent to Transfer Control of Licenses and Authorization*, Memorandum Opinion and Order, WT Docket No. 07-153, FCC 07-196 at ¶¶ 53-57 (rel. Nov. 19, 2007) ("*AT&T-Dobson Order*").

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reasonable rates: "The very high levels of retail competition that do not rely on Qwest's facilities – and for which Qwest receives little or no revenue – provide Qwest with the incentive to make attractive wholesale offerings available so that it will derive more revenue indirectly from retail customers who choose a retail provider other than Qwest."[3] That prediction (albeit an incorrect one) allowed the Commission to conclude that the wholesale market would continue to function to discipline Qwest's prices and offerings, and thus Section 10(a)(1) could be satisfied with respect to loop services.[4] The amount of loop-based retail competition was critical to the Commission's prediction because it directly affects Verizon's calculation as to whether it is better to drive a UNE-loop based competitor out of business, or to keep the UNE-loop based competitor in business as a wholesale customer.

Verizon, in both its November 16 and November 28 ex partes, ignores this fundamental point, and therefore includes as facilities-based CLEC lines:

- UNE loop lines, even though UNE-loop competition depends on the very rules from which Verizon seeks forbearance and the Commission in *Omaha* appropriately rejected use of UNE loops to justify forbearance from unbundling rules as a "circular justification."[5]

- "Wholesale Advantage" lines (*i.e.*, the former UNE-P lines, now sold at "market" rates) even though Verizon has complete discretion as to how to price those lines, so they provide no discipline to Verizon's wholesale or retail prices.

- Resale lines, which are priced based on Verizon's retail prices, less avoided cost, with Verizon reaping 100% of the subscriber line charge and switched access revenue associated with the line – which the Commission has long recognized does not constitute independent facilities-based competition.[6]

None of these lines can be included as full facilities-based CLEC retail lines, because in the absence of a functioning wholesale market for loops (which the Commission found did not exist

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[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, 19449 (¶ 67) (2005) (*"Omaha"*); Letter from John T. Nakahata, Counsel for EarthLink, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 06-172 at 3 (filed Nov. 21, 2007) ("EarthLink Nov. 21 Ex Parte").

[4] Of course, if the Commission decides that it can no longer predict that Verizon would have an incentive to make loop facilities available at wholesale levels even at *Omaha* market share levels, which the post-*Omaha* experience demonstrates, then the Commission must deny the petition because there will be no assurance that the rates for loops will be just and reasonable, and thus Section 10(a)(1) cannot be satisfied.

[5] *Omaha*, 20 FCC Rcd. at 19450 (¶ 68 n. 185). The Commission in *Omaha* emphasized, "we do not take [into] account in our analysis . . . competitive telecommunications services being offered over UNE loops and transport provisioned under Section 251(c)(3)." *Id.* at ¶ 68.

[6] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd. 15499, 15667-69 (¶¶ 332-334) (1996).

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in *Omaha* and which does not exist here), none can be reasonably relied upon to discipline Verizon's wholesale loop prices. All must be excluded from an appropriate comparison of retail loop-based market shares.

Verizon justifies inclusion of Wholesale Advantage and resale lines on the grounds that the Commission considered them as part of the *Omaha* analysis. But Verizon quotes selectively from the *Omaha Order*, quoting the order out of context and ignoring the fact that the Commission cited Qwest's wholesale products only against the backdrop of Cox's very high level of competition that was independent of Qwest's loops.[7] The Commission's citation of wholesale products cannot be shorn of the context in which it occurred.

In a further effort to depress its share of retail loop-based competition, Verizon then turns to purported competition from wireless and over-the-top VoIP. But this ploy should be rejected for several reasons:

- As EarthLink and other parties have previously set forth, the Commission has consistently declined to include wireless and over-the-top VoIP in its analysis, both in *Omaha* and *Anchorage*.[8]

- Wireless "cord cutters" are properly excluded because it is not clear how these "cord cutters" affect Verizon's incentives to sell wholesale loops at reasonable rates. "Cord cutters" are by definition selecting no wireline providers, so Verizon does not gain revenue from "cord cutters" by selling additional wholesale lines.

- In any event, Verizon's calculation and attribution of the number of "cord cutters" to each MSA is unreliable and must be discarded. Verizon starts with an estimate of the nationwide percentage of "cord cutters" – derived with an unstated and non-transparent methodology – published in a single analyst report.[9] Verizon then simply assumes that this percentage will be the same in each of these MSAs.

- As to over-the-top VoIP, Verizon ignores the fact that the Commission has, on multiple occasions, held that over-the-top VoIP is most closely analogized to toll service, rather than to CMRS, local service, or even an all distance bundle.[10] Toll services do not discipline the wholesale price of local network access service.

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[7] *See Omaha*, 20 FCC Rcd. at 19449-19450 (¶ 67).

[8] *Omaha,* 20 FCC Rcd. at 19452 (¶ 72); *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. 16304, 16319 (¶ 28) (2007) (*"Anchorage"*).

[9] Letter from Evan T. Leo, Counsel for Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-162 at 7 (filed Nov. 16, 2007).

[10] *See Universal Service Contribution Methodology*, 21 FCC Rcd. 7518, 7545 (¶ 53) (2006); *In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2007* at ¶ 16, MD Docket No. 07-81, FCC 07-140 (rel. Aug. 6, 2007).

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- And, as with CMRS, Verizon's attribution of the number of over-the-top VoIP subscribers to each MSA is unreliable. Verizon starts with a single nationwide estimate of the number of over-the-top VoIP subscribers – again one not compiled in an open and transparent manner – and then mixes and matches other data sets to attribute these subscribers to each MSA. The potential for error in this process is huge, rendering Verizon's numbers unreliable.

Thus, as the Commission did in the *Omaha Order*, the Commission should not include purported wireless and over-the-top VoIP competition when evaluating the relative retail market shares of Verizon and its full facilities (including loop) based competitors.

Finally, Verizon's November 28 ex parte again confirms other reasons why its data must be rejected. Most notably, Verizon touts the fact that the cable data yielded line counts that were higher than its residential E911 line counts. But that does not confirm the accuracy of the E911 counts, because the data are for different periods, with cable data from a later period at a time when cable subscribership was growing. It remains highly likely that Verizon's E911 counts vastly overstated the degree of competition at the time – and that they would still overstate the degree of competition from competitors other than the cable companies. Moreover, even with respect to cable, as EarthLink has previously demonstrated, the E911 data produced some gross errors.[11]

Taking all these points together, Verizon's bar chart in its November 28, 2007 ex parte is highly misleading. As others have persuasively shown, because CLEC UNE-L lines and Verizon wholesale lines provide services over Verizon facilities, a more correct bar chart depicting Verizon's share of loops would exclude the wireless and over-the-top VoIP connections and would reassign UNE-L, Wholesale Advantage and resale lines to Verizon as Verizon-provided loops.[12]

But even if these lines are not included as a part of Verizon's market share, there is certainly no basis for including them in the competitive market share. In that case they should be excluded from both the Verizon lines and the full-facilities-based CLEC lines. When that is done and the purported wireless and over-the-top VoIP lines are also excluded, the results show that in no wire center does the facilities-based CLEC's share of loop-based retail residential customers come within **[BEGIN HIGHLY CONFIDENTIAL]** **[END HIGHLY CONFIDENTIAL]** percentage points of Verizon's. Verizon's continued dominance in all of these MSAs, and thus its lack of an incentive to make wholesale loops available at a reasonable rate is illustrated in the bar chart below:[13]

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[11] EarthLink Nov. 21 Ex Parte at 5, Table 1.

[12] Letter from Andrew D. Lipman, Russel M. Blau, and Philip J. Macres, Counsel for Alpheus, et. al., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 06-172 (filed Nov. 29, 2007) ("Bingham Nov. 29 Ex Parte").

[13] This chart is derived from the data in Attachment A of Verizon's Nov. 28 Ex Parte. It is consistent with the data provided in Attachment A to the Bingham Nov. 29 Ex Parte other than the exclusion of wholesale lines and the removal of the additional Verizon-reported CLEC carrier lines in the Philadelphia MSA, rather than just Cavalier's lines. If anything, the competitive market share

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Accordingly, Verizon has failed to show that, with forbearance, the prices of wholesale loops – the telecommunications service for which forbearance is sought, will remain just and reasonable. Thus, Section 10(a)(1) has not been satisfied.

II. Recent Commission Precedent Confirms That Duopoly Markets Are Unable To Adequately Protect Consumers.

In its recent opinion on AT&T Inc.'s acquisition of Dobson wireless, the Commission found that competitive harm was likely and required divestiture in four markets where the merger would reduce the number of networks "from three to two or (in one case) from two to one."[14] Citing other wireless merger decisions, the Commission found that "any market in which the merger would reduce the number of competitors to two or fewer . . . presents a significant likelihood of successful unilateral effects and/or coordinated interaction even if the merged entity's market share is not especially high.[15] The Commission expressed concern that, in those markets, "post-merger, competing service providers would not be sufficiently numerous to deter anticompetitive behavior by the merged entity."[16] Moreover, the Commission did not include resellers when determining the number of competitors, but focused only on facilities-based wireless competitors.[17]

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depicted is overstated to the extent that it improperly includes other UNE-loop based CLEC lines that Verizon has not chosen to separately identify (such as Covad lines).

[14] *AT&T-Dobson Order* at ¶ 56.

[15] *Id.*

[16] *Id.* ¶ 57.

[17] *Id.* ¶¶ 37-38.

The Commission's analysis in the *AT&T-Dobson Order* is consistent with both economic theory and Commission precedent. The Commission has yet to provide any rational explanation for treating the post-forbearance duopoly provision of services any differently. EarthLink submits that no rational explanation exists: competitive harm here is no less likely than the Commission has found it to be in the wireless context. The telco/cable duopoly provision of services that results from section 251 forbearance presents the same "significant likelihood" of anti-competitive behavior. Accordingly, the Commission should follow its own precedent and find that forbearance from section 251(c)(3) will result in a duopoly that cannot protect consumers as required by section 10(a)(2).

Sincerely,

John T. Nakahata
Stephanie Weiner
Counsel to EarthLink, Inc. and New Edge Networks

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