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April 7, 2008

**Via Hand Delivery**

Marlene H. Dortch  
Office of the Secretary  
Federal Communications Commission  
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FILED/ACCEPTED

APR - 7 2008

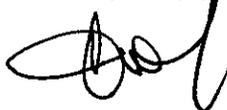
Federal Communications Commission  
Office of the Secretary

Re: *Petition of Verizon New England for Forbearance Pursuant to  
47 U.S.C. § 160(c) in Rhode Island, WC Docket No. 08-24*

Dear Ms. Dortch:

On behalf of Verizon, attached is Verizon's Opposition to Motion To Dismiss or, in the Alternative, Deny Petition for Forbearance for filing in the above-captioned proceeding. The attachment to this document contains Highly Confidential Information. In accordance with the Public Notice<sup>1</sup> and the Second Protective Order,<sup>2</sup> we are providing an original and six copies of the Redacted version, and one original of the Highly Confidential version. Please contact me at (202) 326-7930 if you have any questions regarding this filing.

Very truly yours,



Evan T. Leo

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Attachment

<sup>1</sup> FCC Public Notice, *Pleading Cycle Established for Comments on Motion To Dismiss or Deny Verizon Rhode Island Petition for Forbearance*, WC Docket No. 08-24, DA 08-651, at 2 (Mar. 21, 2008).

<sup>2</sup> *Petition of Verizon New England for Forbearance Pursuant to 47 U.S.C. § 160(c) in Rhode Island*, Second Protective Order ¶ 14, WC Docket No. 08-24, DA 08-471 (rel. Feb. 27, 2008).

**REDACTED – FOR PUBLIC INSPECTION**

cc: Competition Policy Division, Wireline Competition Bureau  
Best Copy and Printing, Inc.  
Gary Remondino (Highly Confidential version)  
Tim Stelzig (Highly Confidential version)  
Denise Coca (Highly Confidential version)

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of )  
 )  
Petition of Verizon New England for ) WC Docket No. 08-24  
Forbearance Pursuant to )  
47 U.S.C. § 160 in Rhode Island )

**VERIZON’S OPPOSITION TO MOTION TO DISMISS OR, IN THE  
ALTERNATIVE, DENY PETITION FOR FORBEARANCE**

The Motion To Dismiss or, in the Alternative, Deny Petition for Forbearance filed by Access Point, Inc. *et al.* (“Movants”) is baseless and should be rejected.<sup>1</sup>

At the time the Commission decided Verizon’s prior petition covering the entire Providence MSA, the available data showed that Verizon missed the Commission’s new bright-line test by only a small margin. The Commission accordingly made clear that it would entertain new petitions based on more current data and that “future relief . . . might be warranted . . . upon a showing of a more competitive environment.”<sup>2</sup> Given the rapid growth of competition, the most current data show that Verizon easily meets the Commission’s bright-line test in the Rhode Island portion of the Providence MSA, which is served by a single cable company that offers telephone services throughout the state. Verizon’s petition therefore covers only the Rhode Island portion of the MSA, includes updated information on the state of competition, and addresses various other issues the Commission raised with respect to certain data used in the previous petition.

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<sup>1</sup> See Motion To Dismiss or, in the Alternative, Deny Petition for Forbearance, WC Docket No. 08-24 (FCC filed Mar. 17, 2008).

<sup>2</sup> *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*, Memorandum Opinion and Order, 22 FCC Rcd 21293, ¶ 36 (2007) (“*Six MSA Order*”).

Based on all of this, there is no merit to Movants' claim that Verizon is seeking to re-litigate the determinations in the *Six MSA Order* or to have the Commission reach a different result on the "same facts." Verizon's petition instead demonstrates that it now meets the bright-line tests established in the *Six MSA Order*, based on *new* facts that were not available at the time of that proceeding. Verizon's petition is therefore ripe for review under Section 10 of the Communications Act, which authorizes carriers to file forbearance petitions and does not permit the Commission to impose a waiting period before it will accept such filings, which is what Movants improperly seek here. There is accordingly no basis to dismiss Verizon's petition; the Commission should instead act expeditiously to grant it.

**I. VERIZON'S RHODE ISLAND PETITION RELIES ON NEW DATA; AS A MATTER OF FACT AND LAW IT MUST BE ANALYZED ON ITS OWN TERMS PURSUANT TO SECTION 10 OF THE ACT**

Verizon's Rhode Island petition relies on more recent data than what was provided or relied upon in the Six MSA proceeding. In that prior proceeding, the Commission established (unlawfully in Verizon's view) a bright-line test, which looks at competitors' share of residential lines, to determine whether forbearance is warranted. The Commission determined, based on the record before it, that Verizon missed that test by a small fraction with respect to the Providence MSA. *See Six MSA Order* ¶¶ 27, 37. The Commission indicated, however, that it would accept new petitions based on more current data and that "future relief from unbundling obligations might be warranted . . . upon a showing of a more competitive environment." *Id.* ¶ 36; *see also* Statement of Chairman Kevin J. Martin, WC Docket No. 06-172 (Dec. 5, 2007) ("Although significant competition exists in Verizon's markets, particularly in Providence and Virginia Beach, the Commission determined based on the specific market facts before us that Verizon's

petitions do not warrant regulatory relief like that afforded to Qwest in Omaha. As competition in these markets continues to develop, I am happy to reevaluate these markets based on updated market facts.”).

The most current data included in Verizon’s petition show that the Commission’s bright-line test is now met in the Rhode Island portion of the Providence MSA. These data are anywhere from a full quarter to a full year more current than what was before the Commission in the prior petition for the Providence MSA, and they demonstrate that competition has grown rapidly even in this window. For example, the Rhode Island petition relies on January 2008 directory listings data to show Cox’s residential lines, compared to data that were no more recent than October 2007 (and as old as December 2006) in the Providence MSA petition – a difference of at least three months and as much as 10 months.<sup>3</sup> With respect to Verizon’s residential retail lines, Wholesale Advantage lines, and Resale lines, the Rhode Island petition relies on data from January 2008 and December 2007, compared to December 2006 data in the Providence MSA petition – a difference of 12 months. Verizon’s petition demonstrates that, based on these updated data that show continued growth of competition and a concomitant decline in Verizon’s own retail lines, the Commission’s bright-line test is easily met in Rhode Island.

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<sup>3</sup> On October 30, 2007, Cox provided its residential line counts in response to the Commission’s request. *See* Letter from J.G. Harrington, Counsel for Cox Communications, Inc., to Marlene Dortch, Secretary, FCC, WC Docket No. 06-172 (Oct. 30, 2007). That request was “limited to data as of December 31, 2006, or the most recent data available.” Letter from Dana R. Shaffer, Chief, Wireline Competition Bureau, FCC, to J.G. Harrington, Counsel for Cox Communications, Inc., at 2 n.8, WC Docket No. 06-172 (Oct. 29, 2007). Cox did not specify the vintage of its data. Movants attempt to mischaracterize these data as more recent than they are, claiming (at 6) that “Cox itself submitted more reliable, up-to-date market penetration data just weeks before the Commission’s decision in December 2007.”

In addition to providing more recent data, Verizon’s Rhode Island petition seeks different – and more narrow – geographic relief than the Providence MSA petition. This approach is consistent with the *Omaha Forbearance Order*<sup>4</sup> and responds to concerns in the six MSA proceeding that the relief Verizon sought was too broad. In previous forbearance decisions, the Commission has relied principally on competition from cable in granting relief. See *Omaha Forbearance Order* ¶ 28; *Anchorage Forbearance Order*<sup>5</sup> ¶ 28. As Verizon has demonstrated in its Rhode Island petition, it makes sense to analyze competition for Rhode Island separately – rather than together with parts of Massachusetts that, in combination, form the Providence MSA – because the two regions are served by different cable operators that are at different stages in their deployment of cable voice services. In Rhode Island, Cox deployed telephony services nearly a decade ago – the first state-wide deployment in the nation – and has since captured an enormous number of residential customers. This competition is more relevant to whether forbearance is appropriate in Rhode Island than what a different cable operator may be doing in a different state. And, for present purposes, this is yet another way in which the factual issues before the Commission differ from those at issue in the Six MSA proceeding.

In addition to providing more recent data for a different geographic area, the Rhode Island petition also addresses other concerns that were raised with Verizon’s data

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<sup>4</sup> *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*”).

<sup>5</sup> *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 (2007) (“*Anchorage Forbearance Order*”).

in the prior proceeding. First, with respect to the key factual issue in this proceeding – the extent of cable competition – the Rhode Island petition relies on the directory listings that cable companies have obtained, rather than the E911 listings data that Movants and other parties previously have criticized. *See Six MSA Order* ¶ 14. Second, Verizon provided data on cable competition on a rate-center basis rather than on a wire-center basis, which addresses concerns regarding Verizon’s methodology of allocating to wire-center data that, like directory listings, are associated with rate centers in the ordinary course of business. Third, Verizon revised the data regarding its decrease in residential lines to address concerns that those data did not necessarily account for the loss of second lines to DSL or for Verizon’s acquisition of MCI lines. *See id.* ¶ 39 & n.129. For each of these additional reasons, there is no merit to Movants’ claim that Verizon’s Rhode Island petition rests on the “same facts” as the Providence MSA petition.

Given that Verizon’s petition seeks a determination based on new facts and for a new geographic area, the Commission is obligated to review Verizon’s Rhode Island petition on its terms. Section 10 of the Act provides that “[a]ny telecommunications carrier” may “submit a petition to the Commission requesting that the Commission exercise the authority granted under this section with respect to that carrier . . . or any service offered by that carrier.” 47 U.S.C. § 160(c). Nothing in Section 10 permits the Commission to refuse to consider whether a request for forbearance meets the statutory criteria *today*, simply because the Commission found that they were not satisfied based on older (or incomplete) evidence. Congress instead provided the Commission with one year – or, at most, one year and 90 days – “after the Commission receives” a forbearance petition, to deny the petition “for failure to meet the requirements for forbearance” for the

reasons set forth in the statute, or it “shall be deemed granted.” *Id.* The statute does not permit the Commission to deny a petition based on the amount of time that has passed since a previous petition, or in order to “conserve” industry and Commission resources, as Movants would have it (at 5).

It is particularly important for the Commission to review a forbearance petition in these circumstances given the way in which it has interpreted the statutory criteria. In the *Six MSA Order*, the Commission held (unlawfully in Verizon’s view) that whether competitors’ have achieved a certain share of residential lines is a dispositive factor in determining whether forbearance is warranted. *See Six MSA Order* ¶ 27. Having established a bright-line test that, by its nature, may not be met one day but is met the next, it is entirely reasonable – indeed required – to permit parties that initially fail that test to reapply as the facts change. And given the rapid rate at which competition is growing, it is to be expected that parties may reapply just a few months after a failed petition.

Movants are fully aware of the new data in Verizon’s Rhode Island petition, and therefore have no basis to claim (at 5) that Verizon is merely seeking to re-litigate the “same facts” as before. Movants try to divert attention from this fatal weakness in their argument by accusing Verizon of using the wrong cut-the-cord data from the Centers for Disease Control (“CDC”) study. Movants do not dispute that the CDC has released a *new* study since the *Six MSA Order* (which relies on data from June 2007 as compared to December 2006 data in the older study), which is all that matters for present purposes. They instead claim that it is appropriate to use the cut-the-cord percentage for the Northeast region rather than the nationwide average on which Verizon’s petition relied,

even though the Commission itself used the nationwide average in the *Six MSA Order*. See *Six MSA Order* App. B. The issue of which figure is more appropriate has nothing to do with the instant motion, but instead goes to the substance of Verizon's petition and is therefore properly addressed in the ordinary comment cycle. In any event, even if the cut-the-cord figure for the Northeast were used here, Verizon would still meet the standards in the *Six MSA Order*. See Attachment.

## **II. VERIZON'S PETITION IS NOT SUBJECT TO ISSUE PRECLUSION AND CANNOT BE CAST AS A PETITION FOR RECONSIDERATION**

In an effort to get around the broad rights that Section 10 creates for carriers to file forbearance petitions, Movants argue (at 9) that Verizon should not be permitted to file the Rhode Island petition because it raises factual issues that "are duplicative of issues that have already been litigated in a previous Commission proceeding." But, as Movants concede (at 10), in order for the doctrine of issue preclusion to apply, "there must be an issue essential to the prior decision and identical to the one previously litigated." As demonstrated above, that is not remotely the case here. To the contrary, the Rhode Island petition relies on completely new facts as compared to the Providence MSA petition that the Commission denied and also addresses the basis for that prior denial. There is accordingly no basis to Movants' claim that the Commission has already decided the facts and issues raised here. And, for the same reasons, there is no merit to Movants' throw-away claim (at 11) that Verizon's petition should be treated as an untimely petition for reconsideration.

**CONCLUSION**

For the reasons set forth herein, the Commission should deny the Motion To Dismiss or, in the Alternative, Deny Petition for Forbearance.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Shakin', written over a horizontal line.

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Dated: April 7, 2008

**REDACTED – FOR PUBLIC INSPECTION**

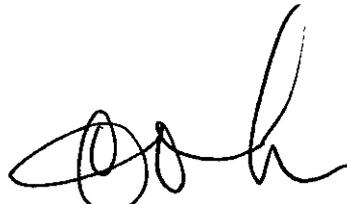
**CERTIFICATE OF SERVICE**

I, Evan T. Leo, hereby certify that true and correct copies of the foregoing Verizon's Opposition to Motion To Dismiss or, in the Alternative, Deny Petition for Forbearance, in WC Docket No. 08-24, were delivered by U.S. mail and via e-mail, this 7th day of April 2008, to the individuals on the following list:

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