

the instant petition. Because it has failed to submit any additional material facts in support of its second Virginia Beach petition, Verizon has failed to make a *prima facie* case to justify a different outcome than the one the Commission reached in the prior proceeding. Its petition therefore should be dismissed as facially insufficient or summarily denied for failure to meet the mandates of the Administrative Procedure Act (“APA”),⁴ the Commission’s rules,⁵ and the forbearance standard in Section 10 of the Communications Act of 1934, as amended (“Act”).⁶

At best, Verizon’s attempts to get the Commission to reach a different conclusion on the basis of the same facts before it in the *6-MSA Proceeding* constitute an impermissible request for reconsideration of the *6-MSA Order*. Because that request was not made within the time period prescribed by statute for petitions for reconsideration, the instant petition must be rejected by the Commission.

II. BACKGROUND

On September 6, 2006, Verizon filed a group of petitions seeking forbearance from certain statutory provisions and Commission rules within six major MSAs. Verizon sought substantial deregulation within the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach MSAs. Specifically, Verizon asked for forbearance from dominant carrier regulation of its mass market switched access services,⁷ Section 251(c)(3) loop and transport

⁴ See 5 U.S.C. § 706(2)(A) (requiring agency action that is arbitrary, capricious, or an abuse of discretion to be vacated).

⁵ See 47 C.F.R. § 1.106(f) (prescribing the period allowed for filing a petition for reconsideration).

⁶ 47 U.S.C. § 160.

⁷ Specifically, Verizon sought forbearance from tariffing requirements, price cap regulation, and dominant carrier requirements concerning the processes for acquiring lines, discontinuing services, assignment or transfers of control, and acquiring affiliations. See, e.g., Letter from Joseph Jackson, Associate Director, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 06-172, at 7 (filed Jun. 13, 2007).

unbundling obligations, and all *Computer III* obligations (e.g., open network architecture (“ONA”) and comparably efficient interconnection (“CEI”) requirements) within those markets.⁸ In support of its requests, Verizon asserted that the relief it sought was “substantially the same regulatory relief the Commission granted in the *Omaha Forbearance Order*.”⁹

At the conclusion of a comprehensive fifteen-month proceeding that involved the active participation of over seventy different entities and resulted in a written record totaling in excess of five hundred separate documents, a unanimous Commission denied Verizon’s petitions in their entirety, “find[ing] that the record evidence does not satisfy the section 10 forbearance standard with respect to any of the forbearance Verizon requests.”¹⁰ In particular, applying the framework adopted in the *Omaha Forbearance Order*¹¹ and the *ACS Forbearance Order*,¹² the

⁸ See *Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Boston Metropolitan Statistical Area*, WC Docket No. 06-172 (filed Sept. 6, 2006), at 1; *Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the New York Metropolitan Statistical Area*, WC Docket No. 06-172 (filed Sept. 6, 2006), at 1; *Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Philadelphia Metropolitan Statistical Area*, WC Docket No. 06-172 (filed Sept. 6, 2006), at 1; *Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Pittsburgh Metropolitan Statistical Area*, WC Docket No. 06-172 (filed Sept. 6, 2006), at 1; *Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Providence Metropolitan Statistical Area*, WC Docket No. 06-172 (filed Sept. 6, 2006), at 1; *Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Virginia Beach Metropolitan Statistical Area*, WC Docket No. 06-172 (filed Sept. 6, 2006), at 1 (the “*Verizon 6-MSA Petitions*”).

⁹ See, e.g., *Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Boston Metropolitan Statistical Area*, WC Docket No. 06-172 (filed Sept. 6, 2006), at 1.

¹⁰ *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, WC Docket No. 06-172, FCC 07-212 (rel. Dec. 5, 2007), at ¶ 1 (“*6-MSA Order*”).

¹¹ *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).

¹² *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*

Commission determined “that forbearance from the application to Verizon of the section 251(c)(3) obligations to provide unbundled access to loops, certain subloops, and transport to competitors in the 6 MSAs does not meet the standards set forth in section 10(a) of the Act.”¹³ Verizon has sought judicial review of the Commission’s forbearance denial in the D.C. Circuit.¹⁴ A briefing schedule has yet to be established in that case.¹⁵

On March 31, 2008, less than four months after release of the *6-MSA Order*, Verizon filed a new petition seeking forbearance in the Virginia Beach MSA wherever Cox is the incumbent cable operator (except for Knotts Island in Currituck County, North Carolina).¹⁶ Verizon’s new petition seeks forbearance from the same Commission rules and statutory provisions from which it sought – and was denied – forbearance in the *6-MSA Proceeding*.¹⁷ Verizon concedes that the eleven counties and independent cities that make up the Cox service territory contain over 90 percent of the population within the Virginia Beach MSA,¹⁸ one of the six MSAs for which forbearance was explicitly denied in the *6-MSA Order*.

Verizon attempts to mislead the Commission into concluding that this new petition is something other than a reprise of its Virginia Beach MSA petition. It is not. The

Anchorage Study Area, Memorandum Opinion and Order, WC Docket No. 05-281 (rel. Jan. 30, 2007) (“*Anchorage Forbearance Order*”).

¹³ *Verizon 6-MSA Order*, at ¶ 36.

¹⁴ *Verizon Telephone Companies v. Federal Communications Commission, et al.*, No. 08-1012 (D.C. Cir. filed Jan. 14, 2008). Numerous parties, including several of the Joint Movants, have intervened in that appeal.

¹⁵ Verizon has indicated that it plans to raise the following issues in its brief: (1) whether the FCC’s denial of forbearance violates Sections 10 and 251(d)(2) or is otherwise contrary to law; and (2) whether the order unlawfully departs from the Commission’s past precedent without reasoned explanation, or is otherwise arbitrary, capricious, or an abuse of discretion. *See Verizon v. FCC*, No. 08-1012, Statement of Issues To Be Raised (D.C. Cir. filed Feb. 14, 2008).

¹⁶ *See Second Virginia Beach Petition*, at 4-5.

¹⁷ *Id.*, at n. 5 (“This is the same relief that Verizon sought in the Six MSA proceeding.”).

¹⁸ *Id.*, at 4-5.

Commission should not countenance the diversion of its limited resources – and those of numerous interested parties – to retry a case that was finally concluded after fifteen months of review and analysis so recently. This petition amounts to a purposeful effort by Verizon to hold the Commission’s agenda hostage until it gets its way and to divert crucial industry resources from the business of competing. The Commission should send Verizon a clear signal that it will not reward such tactics by dismissing or summarily rejecting the petition.

It is especially important for the Commission to communicate that it will not countenance such tactics because Verizon appears to have decided to confront the Commission with multiple petitions in a concerted effort to undo the result of the December 2007 *6-MSA Order*. On February 14, 2008, Verizon filed a petition seeking forbearance in the state of Rhode Island – a geographic area that comprises a substantial portion of the Providence MSA, another of the six MSAs for which forbearance was denied in the *6-MSA Order*.¹⁹ In the Rhode Island petition, as here, Verizon relies on data that was presented to the Commission in the *6-MSA Proceeding* and found to be insufficient to support a grant of forbearance.²⁰ The Commission should not reward Verizon’s serial refile of denied claims by considering the Virginia Beach petition.

III. VERIZON’S PETITION IMPROPERLY SEEKS A DIFFERENT OUTCOME ON THE BASIS OF THE SAME FACTS BEFORE THE COMMISSION IN THE 6-MSA PROCEEDING

¹⁹ See *Petition of Verizon New England for Forbearance Pursuant to 47 U.S.C. § 160 in Rhode Island*, WC Docket No. 08-24 (filed Feb. 14, 2008) (“*Verizon Rhode Island Petition*”).

²⁰ The Joint Movants filed a motion to dismiss or, in the alternative, deny Verizon’s Rhode Island forbearance petition. *Petition of Verizon New England for Forbearance Pursuant to 47 U.S.C. § 160 in Rhode Island*, WC Docket No. 08-24, Motion to Dismiss Or, In the Alternative, Deny Petition for Forbearance (filed Mar. 17, 2008) (“*Rhode Island Motion to Dismiss*”). That motion remains pending at the Commission.

Verizon is seeking forbearance from the identical rules and statutory provisions within a subset of the geographic area for which it was denied forbearance in the previous Virginia Beach MSA petition. Verizon contends that competition from cable, traditional competitive local exchange carriers (“CLECs”) (including those that rely on Verizon’s Wholesale Advantage service and Section 251(c)(4) resale), and cut-the-cord wireless competition demonstrate that the forbearance standard applied by the Commission in the *6-MSA Order* “unquestionably is satisfied in Cox’s service territory in the Virginia Beach MSA.”²¹ What Verizon ignores is that the competitive data upon which it relies was before the Commission in the prior proceeding. Verizon has merely repackaged that data in an effort to gain another bite at the apple.

Verizon highlights the competitive inroads cable telephony provider Cox purportedly has made in the residential and enterprise markets. Yet Verizon fails to admit that the record in the prior proceeding – where its forbearance request was denied – contained substantially identical data regarding Cox’s penetration in the same geographic area. Indeed, in addition to the Cox market penetration data submitted by Verizon midway through that docket,²² Cox itself submitted more reliable, up-to-date market penetration data just weeks before the Commission’s decision in December 2007.²³ The Commission relied in large part on that data in

²¹ *Second Virginia Beach Petition*, at 10.

²² The bulk of the market penetration information presented to the Commission by Verizon, presented in the form of E911 carrier line counts, was submitted at the same time as its reply comments in April 2007.

²³ See Letter from J.G. Harrington, Counsel to Cox Communications, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 06-172 (filed Oct. 30, 2007) (“*Cox Data Ex Parte*”).

concluding that “competition from cable operators . . . does not present a sufficient basis for relief.”²⁴

The same conclusion holds true for the remainder of the information Verizon proffers in the instant petition. The data regarding cut-the-cord wireless and CLEC competition is, at best, a few months more recent than the data before the Commission in the *6-MSA Proceeding*. Indeed, just four days before Commission adoption of the *6-MSA Order*, Verizon provided the Commission with charts containing up-to-date data purporting to show mass market cut-the-cord wireless, traditional CLEC, and cable telephony penetration in the Virginia Beach MSA.²⁵

Verizon likely will contend that the data before the Commission in the *6-MSA Proceeding* was for a different geographic market than the market for which it is seeking relief in this proceeding (*i.e.*, Virginia Beach MSA vs. Cox service territory in the Virginia Beach MSA). That contention is unpersuasive. The cable penetration data for the Virginia Beach MSA produced in the *6-MSA Proceeding* by both Cox and Verizon *included data for the entire geographic area encompassed in the instant petition*. Every access line in the Cox service territory in the Virginia Beach MSA was included in previously-filed data. Indeed, by Verizon’s own admission, the geographic market in which it is seeking forbearance here represents over 90 percent of the population of the geographic market (*i.e.*, Virginia Beach MSA) for which it sought forbearance in the *6-MSA Proceeding*. Verizon, in filing the instant petition, is seeking to

²⁴ *6-MSA Order*, at ¶¶ 23, 27, 37. At most, the cable penetration data filed by Verizon with the instant petition is only several months more recent than the data submitted to the Commission for consideration in the *6-MSA Proceeding*.

²⁵ See Confidential Attachment A to Letter from Evan T. Leo, Counsel to Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 06-172 (filed Dec. 3, 2007).

force the Commission – and the industry – to conduct a costly new forbearance proceeding to address the same information that was found insufficient in the prior proceeding.

Verizon struggles to make the case that its new petition is more than just a repeat of its previous petition by effectively asking the Commission to interpret the same facts in a different way. First, Verizon urges the Commission to “attribute[] Verizon Wireless customers who have cut the cord to the competitive side of the ledger, rather than treating them as equivalent to a Verizon wireline customer.”²⁶ Verizon argues this would be appropriate because Verizon’s wireline business “is affected by losses to Verizon Wireless the same as if those losses were to another competitive provider.”²⁷ Second, Verizon argues that the same competitive data should be analyzed on a rate center rather than a wire center basis.²⁸ Third, Verizon offers an estimate of competitors’ market share based on carrier white pages listings rather than E911 database listings.²⁹

The Commission should not be taken in by this attempt to dress up the same facts to gain another chance at forbearance. Instead, the Commission should send a clear signal that it will not countenance manipulation of Section 10 and its procedures in this manner by dismissing or summarily denying Verizon’s petition.

IV. THE COMMISSION SHOULD DISMISS OR SUMMARILY DENY VERIZON’S PETITION BASED ON ESTABLISHED ISSUE AND CLAIM PRECLUSION PRINCIPLES

There is considerable precedent for Commission rejection of Verizon’s petition on the grounds that the factual issues Verizon raises are duplicative of issues that have already been

²⁶ *Second Virginia Beach Petition*, at 14.

²⁷ *Id.*

²⁸ *Id.*, at 7.

²⁹ *Id.*, at 11.

litigated and claims that should have been raised in a previous Commission proceeding.³⁰

Indeed, the Commission and the courts have long held that issue preclusion applies to prevent agency re-litigation of factual disputes.³¹ The doctrine of issue preclusion is triggered when only questions of fact are at stake. Such preclusion serves the parties' interest in avoiding the cost and vexation of repetitive litigation and the public's interest in conserving agency resources.³²

For the doctrine of issue and claim preclusion to apply, four elements generally must be present: (1) there must be an issue essential to the prior decision and identical to the one previously litigated; (2) the prior decision must have become a final judgment on the merits; (3) the barred party must have been a party to the prior litigation; and (4) the barred party had to

³⁰ See, e.g., *Petition for Relief of Fal-Comm Communications, Petition vs. Continental Cablevision of Michigan, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 13319; n.1 (1997) (“Fal-Comm filed this second petition . . . which is duplicative of CSR-4874-L, seeking the same relief for the same issues against Continental Cablevision of Michigan, Inc. Accordingly, this second petition will be dismissed.”); *Petition of Budd Broadcasting Company, Inc. for Modification of Market Station WGFL(TV)*, Memorandum Opinion and Order, 14 FCC Rcd 4366, ¶ 3 (1999) (“The principles of *res judicata* and collateral estoppel may be applied to prevent agency litigation of factual disputes.”). See also *Auction 65 Public Notice Regarding Long Form/FCC Form 601 Applications Accepted for Filing*, 21 FCC Rcd 13010 (2006).

³¹ See *United States v. Utah Construction and Mining*, 384 U. S. 394, 422 (1966) (“When an administrative agency is acting in a judicial capacity and resolved disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose.”) The FCC’s use of claim preclusion in licensing adjudications was upheld in *Gordon County Broadcasting Co. v. FCC*, 446 F.2d 1335, 1338 (D.C. Cir. 1971). Another example of the Commission’s use of this doctrine was in its VHF frequency assignment proceeding. There, the Commission precluded parties from raising new objections based on interference issues stating, “Unless a party were to come forward with some *newly discovered evidence which for good reason was not available at the time* of the allotment proceeding or otherwise demonstrate good cause, we do not contemplate that ‘gain’ versus ‘loss’ issues will be considered again in an assignment proceeding to determine if an application for the allotment should be granted.” *In re Table of Television Channel Allotments*, Notice of Proposed Rulemaking, 833 FCC 2d 51, n.76 (1980) (emphasis added).

³² See *Univ. of Tenn. v. Elliott*, 478 U.S. 788, 798 (1986) (citing *Allen v. McCurry*, 449 U.S. 90, 94 (1980)).

have had a full and fair opportunity to litigate the issue in the earlier proceeding.³³ In this case, all four prongs have been met: (1) the issue of Verizon's eligibility for forbearance from dominant carrier, *Computer Inquiry*, and Section 251(c)(3) unbundling rules is presented in both cases and is sought for an overlapping area based on the same underlying factual assertions; (2) the *6-MSA Order* is a final decision on the merits; (3) Verizon was a party to the *6-MSA Proceeding*; and (4) Verizon had a full and fair opportunity in the earlier proceeding to present all of the arguments it makes in the instant petition in the prior petition for forbearance. On this basis, therefore, the Commission should dismiss or summarily deny Verizon's petition.

V. VERIZON'S PETITION, AT BEST, IS AN UNTIMELY PETITION FOR RECONSIDERATION OF THE 6-MSA ORDER THAT CANNOT BE CONSIDERED BY THE COMMISSION

Verizon's "same facts/different interpretation" strategy constitutes an attempt to change the test applied by the Commission in each of its prior forbearance orders, including the *6-MSA Order*. Verizon's plea that the Commission consider cut-the-cord wireless competition (including "competition" attributable to Verizon Wireless) and employ rate centers (as opposed to wire centers) and carrier white pages listings to analyze the nature and extent of competition in the Virginia Beach MSA constitute requests for reconsideration of the test established by the Commission in the *Omaha Forbearance Order* and the *Anchorage Forbearance Order* and applied by the Commission in the *6-MSA Order*.

Verizon unquestionably had the right to petition the Commission to reconsider its decision and modify the test employed in the *6-MSA Order*. However, under the express terms of the Act and the Commission's rules, Verizon was required to file its petition for

³³ See *In re Petition of: Budd Broadcasting Company, Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 4366, at ¶ 3 (1999) (discussing how "[t]he principles of *res judicata* and collateral estoppel may be applied to prevent agency re-litigation of factual disputes."); *In re Applications of Montgomery Media Network, Inc.*, Memorandum Opinion and Order, 4 FCC Rcd 3749, at ¶ 4 (1989).

reconsideration “within thirty days from the date upon which public notice is given of the order, decision, report or action complained of.”³⁴ That statutorily-prescribed thirty-day window closed well before Verizon filed its new Virginia Beach MSA petition. The Commission may extend or waive the statutory thirty-day filing period only in “extraordinary circumstances.”³⁵ Verizon did not claim extraordinary circumstances and, indeed, no plausible case can be made that such circumstances exist here.³⁶ Thus, Verizon’s petition must be rejected as an untimely petition for reconsideration of the *6-MSA Order*.³⁷

VI. CONCLUSION

For all of the reasons outlined above, the Commission should dismiss or deny Verizon’s petition.

³⁴ 47 U.S.C. § 405. *See also* 47 C.F.R. § 1.106(f).

³⁵ *Gardner v. FCC*, 530 F.2d 1086, 1091 (D.C. Cir. 1976). *See also Reuters Limited v. FCC*, 781 F.2d 946 (D.C. Cir. 1986).

³⁶ Rejection of Verizon’s petition would not preclude Verizon from pursuing its case that the Commission’s forbearance test is improper and should be modified. As previously noted, Verizon has filed a petition for review of the *6-MSA Order* in the D.C. Circuit. Although briefing has yet to occur in that appeal, Verizon has indicated that it intends to argue that the Commission erred in its application of the Section 10 standard to the facts in the six MSAs at issue, including the Virginia Beach MSA. *See* n. 15, *supra*.

³⁷ Even if Verizon’s petition had been filed in a timely manner, it still would warrant dismissal. As noted herein, Verizon is seeking judicial review of the *6-MSA Order* in the D.C. Circuit. It is well established that a party may not simultaneously seek both agency reconsideration and judicial review of an agency’s order. *See, e.g., Wade v. FCC*, 986 F.2d 1433 (D.C. Cir. 1993). *See also City of New Orleans v. SEC*, 137 F.3d 638, 639 (D.C. Cir. 1998).

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April 29, 2008

CERTIFICATE OF SERVICE

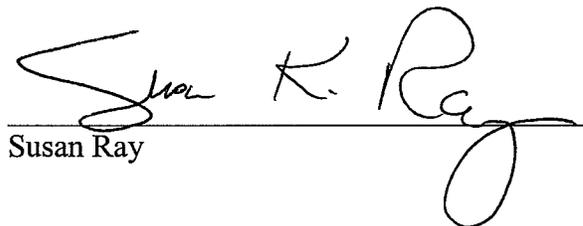
I, Susan Ray, hereby certify on this 29th day of April, 2008, that copies of the foregoing Motion to Dismiss or, in the Alternative, Deny Petition for Forbearance were served via first-class mail, postage-prepaid, to the following:

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