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May 19, 2008

**Via ECFS**

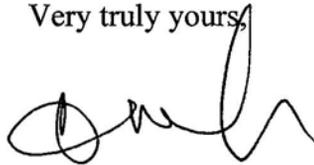
Marlene H. Dortch  
Office of the Secretary  
Federal Communications Commission  
445 12th Street, SW  
Suite TW-A325  
Washington, DC 20554

*Re: Petition of the Verizon Telephone Companies for Forbearance Pursuant to  
47 U.S.C. § 160(c) in Cox's Service Territory in the Virginia Beach Metropolitan  
Statistical Area, WC Docket No. 08-49*

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. Please contact me at (202) 326-7930 if you have any questions regarding this filing.

Very truly yours,



Evan T. Leo

Attachment

cc: Competition Policy Division, Wireline Competition Bureau  
Best Copy and Printing, Inc.

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

In the Matter of )  
 )  
Petition of the Verizon Telephone )  
Companies for Forbearance Pursuant to ) WC Docket No. 08-49  
47 U.S.C. § 160(c) in Cox’s Service )  
Territory in the Virginia Beach )  
Metropolitan Statistical Area )

**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 Covad *et al.* (“Movants”) is baseless and should be rejected.<sup>1</sup>

Verizon’s petition demonstrated that given the rapid and ongoing growth in competition in Cox’s service territory in the Virginia Beach MSA, Verizon now unquestionably meets the share-of-residential-lines test articulated in the *Six MSA Order*,<sup>2</sup> as well as the coverage-threshold test applied in previous forbearance orders. Because Verizon’s petition relied on these updated data, the claim that Verizon is seeking to re-litigate the decision reached in the *Six MSA Order* is simply wrong.

At the time the Commission decided Verizon’s prior petition covering the entire Virginia Beach 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 . . .

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<sup>1</sup> See Motion To Dismiss or, in the Alternative, Deny Petition for Forbearance, WC Docket No. 08-49 (FCC filed Apr. 29, 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 (2007) (“*Six MSA Order*”).

might be warranted . . . upon a showing of a more competitive environment.”<sup>3</sup> Given the rapid growth of competition – indeed, cable operators report a 10-percent increase in telephony customers in the past quarter alone, Cox reports 30-percent year-over-year growth in business customers, and the Centers for Disease Control and Prevention (CDC) reports that the percentage of cut-the-cord households has grown from 13.6 to 15.8 in the last six-month period – the most current data show that Verizon now meets the Commission’s bright-line test in Cox’s service territory in the Virginia Beach MSA. Verizon’s current petition is therefore limited to Cox’s service territory in the Virginia Beach MSA, and also 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.

Based on the differences between the current petition and Verizon’s prior petition for the entire Virginia Beach MSA, 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.

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<sup>3</sup> *Six MSA Order* ¶ 36.

**I. VERIZON’S 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 Virginia Beach 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 Virginia Beach 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.”).

Verizon’s petition demonstrates that, based on updated data that show rapid and ongoing growth of competition and a concomitant decline in Verizon’s own retail lines, the Commission’s bright-line test is easily met in Cox’s service territory in the Virginia Beach 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 Virginia Beach MSA, and they demonstrate that competition has grown rapidly even in this window. For example, the current petition relies on February 2008 directory listings data to show Cox’s

residential lines, compared to data that were no more recent than November 2007 (and as old as December 2006) in the original Virginia Beach MSA petition – a difference of at least three months and as much as 13 months.<sup>4</sup> With respect to Verizon’s residential retail lines, Wholesale Advantage lines, and Resale lines, the current Virginia Beach petition relies on data from February 2008 and December 2007, compared to December 2006 data in the original Virginia Beach MSA petition – a difference of at least 12 months.

In addition to providing more recent data, Verizon’s current petition seeks different – and more narrow – geographic relief than the original Virginia Beach MSA petition. This approach is consistent with the *Omaha Forbearance Order*<sup>5</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>6</sup> ¶ 28. Verizon’s petition is accordingly tailored to those areas in the Virginia Beach MSA where cable voice services are widely available, responding to

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<sup>4</sup> On November 14, 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 (Nov. 14, 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.

<sup>5</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>6</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*”).

concerns that Verizon's prior forbearance petition, for the entire Virginia Beach MSA, was too broad.

In addition to providing more recent data for a different geographic area, Verizon's petition also addresses other concerns that were raised with Verizon's data in the prior proceeding. First, with respect to the key factual issue in this proceeding – the extent of cable competition – the 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 petition rests on the "same facts" as the Virginia Beach 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 current 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 different) 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. Indeed, in the first quarter of 2008 alone, four of the five major cable companies (Comcast, Time Warner, Cablevision, and Charter) added *over 1 million* telephony subscribers – an increase of 10 percent.<sup>7</sup> Cox also reports that its business unit grew by

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<sup>7</sup> *See* Time Warner Cable Press Release, *Time Warner Cable Reports 2008 First-Quarter Results* at Table 2 (Apr. 30, 2008); Comcast Press Release, *Comcast Reports First Quarter 2008 Results* (May 1, 2008); Cablevision News Release, *Cablevision Systems Corporation Reports First Quarter 2008 Results* (May 8, 2008); Charter Press Release, *Charter Reports First Quarter Financial and Operating Results* (May 12, 2008); *see also*

30 percent in the past year.<sup>8</sup> In addition, the CDC has just issued a report that indicates that, between July and December 2007, the percentage of households who have cut the cord grew from 13.6 to 15.8 – the second largest such increase in the past four years.<sup>9</sup> This represents a nearly 25-percent increase in cut-the-cord households as compared to the figure on which the Commission relied in the *Six MSA Order* (12.8 percent as of December 2006). *See Six MSA Order App. B.*

In sum, Movants are fully aware of the new data in Verizon’s petition, and therefore have no basis to claim (at 5-8) that Verizon is merely seeking to re-litigate the “same facts” as before.

## **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 8-9) that Verizon should not be permitted to file the Virginia Beach 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 9), 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 Virginia Beach petition relies on completely new facts as compared to the Virginia

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Cox News Release, *Cox Deepening Bundle Relationships, Delivering More Commercial Services and Investing for the Future* (May 14, 2008) (reporting 15.9 percent year-over-year increase in telephone subscribers) (“Cox May 14, 2008 News Release”).

<sup>8</sup> *See* Cox May 14, 2008 News Release.

<sup>9</sup> *See* Stephen J. Blumberg & Julian V. Luke, Div. of Health Interview Statistics, Nat’l Ctr. for Health Statistics, CDC, *Wireless Substitution: Early Release Estimates from the National Health Interview Survey, July-December 2007*, at Table 1 (May 13, 2008).

Beach 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 10) 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,



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*Attorneys for Verizon*

Dated: May 19, 2008

**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. 08-49, were delivered by U.S. mail and via e-mail, this 19th day of May 2008, to the individuals on the following list:

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