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May 8, 2009

BY HAND DELIVERY

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

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

In the Matter of 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

REDACTED FOR PUBLIC INSPECTION

Dear Ms. Dortch:

On behalf of Broadview Networks, Inc., Cavalier Telephone, Covad Communications Company, NuVox, XO Communications, LLC, and Kelley Drye & Warren LLP, enclosed please find two copies of the Ex Parte Submission submitted in the above-referenced proceedings. This ex parte submission has been redacted for public inspection.

In accordance with paragraph 14 of the *Second Protective Order* issued in each of the above-captioned proceedings, respectively dated February 27, 2008 (DA 08-471) and April 15, 2008 (DA 08-880), a copy of the Ex Parte Communication containing Highly Confidential information are being submitted to your attention under separate cover.

Kindly date stamp the duplicate of this letter and return it to the courier. Please contact the undersigned at (202) 342-8400, if you have any questions about this letter.

Respectfully submitted,

Genevieve Morelli

Counsel to Broadview Networks, Inc., Cavalier Telephone, Covad Communications Company, NuVox, and XO Communications, LLC

Enclosures

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May 8, 2009

VIA ECFS

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

Re: **Ex Parte Submission, WC Docket Nos. 08-24, 08-49**
REDACTED – FOR PUBLIC INSPECTION

Dear Ms. Dortch:

On May 1, 2009, Verizon filed an *ex parte* letter purporting to show that it meets the market share standard applied in previous Section 251(c)(3) forbearance proceedings with respect to both residential and enterprise customers in Rhode Island and Cox's service territory within the Virginia Beach Metropolitan Statistical Area ("MSA").[1] The purpose of this filing is to bring to the Commission's attention various critical shortcomings in Verizon's analysis.[2] Verizon's has blatantly manipulated the data in an effort to convince the Commission that

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1 Letter from Rashann Duvall, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 08-24, 08-49 (filed May 1, 2009)("*Verizon May 1st Ex Parte*").

2 The signatories reiterate that their recommendation remains for the Commission to adopt the proposed Section 251(c)(3) forbearance standard discussed in their April 3, 2009 letter. *See* Letter from Brad Mutschelknaus, Counsel to Broadview Networks, Inc., *et al*, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 08-24. 08-49 (filed Apr. 3, 2009)("*CLEC April 3rd Ex Parte*"). That said, the purpose of this submission is to address issues associated with Verizon's erroneous and distorted conclusions regarding its market position in Rhode Island and Virginia Beach measured against past Commission forbearance requirements.

forbearance is warranted.[3] In reality, however, Verizon has not proven that sufficient facilities-based (*i.e.,* competitive loop-based) competition exists in any product market in Rhode Island or the Virginia Beach MSA.

I. Facilities-Based Competition in the Business Market

Verizon contends that "it meets the Commission's forbearance standard with respect to enterprise customers."[4] Verizon's contention is without merit because Verizon's assessment of competition in the business market is flawed in several critical respects.

First, Verizon's assessment of competition in the market for business services focuses exclusively on switched access lines. Verizon fails to acknowledge that the market for business services has fundamentally changed in the last dozen years. As shown in Figure 1, the predominant form of capacity used to serve business customers in Rhode Island and Virginia has shifted from switched capacity (*i.e.*, switched business lines) to non-switched capacity (*i.e.*, special access).[5] When the 1996 Telecom Act was passed, only 15% of Verizon's capacity being used to serve business customers in Rhode Island and Virginia was special access.[6] By 2007, over 90% of its capacity to serve business customers in those states was non-switched special access lines.[7] Consequently, measuring business market share today by looking only at relative market share for 15% of total capacity is meaningless. Any analysis of relative market share should look at both switched and non-switched connections.

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3 Verizon's decision to exclude certain areas within the Virginia Beach MSA from its forbearance request represents another attempt to manipulate the forbearance process. By excluding certain geographic areas from the Commission's analysis, Verizon has gerrymandered its request in order to present the most favorable view of competition in the Virginia Beach MSA. Yet Verizon fails to acknowledge that customers in those excluded geographic areas would be significantly negatively impacted by a premature grant of Verizon's petition, since Cavalier Telephone would be forced to curtail service within the entire Virginia Beach MSA, not merely the parts of the Virginia Beach MSA that are the subject of Verizon's petition.

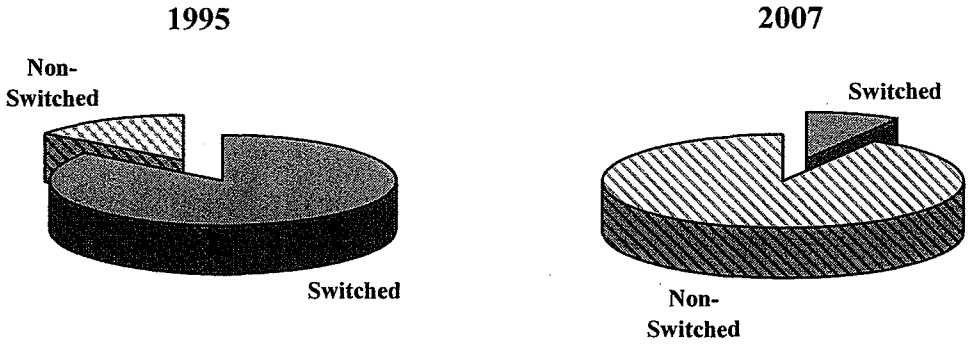
4 *Id.*, at 5.

5 Source: ARMIS 43-08. Total Capacity used to serve business customers is the sum of Single Line Business Lines, Multi-line Business Lines (Other than Payphone Lines), and Non-Switched Digital Special Access Lines (64 kbps or equivalent).

6 Source: 1995 ARMIS 43-08. Data for Virginia and Rhode Island combined.

7 Beginning in 2008, Verizon is no longer required to report special access capacity volumes as part of its ARMIS filing.

Figure 1: Comparing Switched Capacity to Non-Switched Capacity Used to Serve Business Customers in Rhode Island and Virginia



Figures 2 and 3 show the growth in non-switched capacity used to serve business customers in Rhode Island (Figure 2) and Virginia (Figure 3) from 1991 through 2007.

Figure 2: Shift in Business Capacity to Non-Switched Services 1991-2007 Verizon-Rhode Island (millions of VGE)

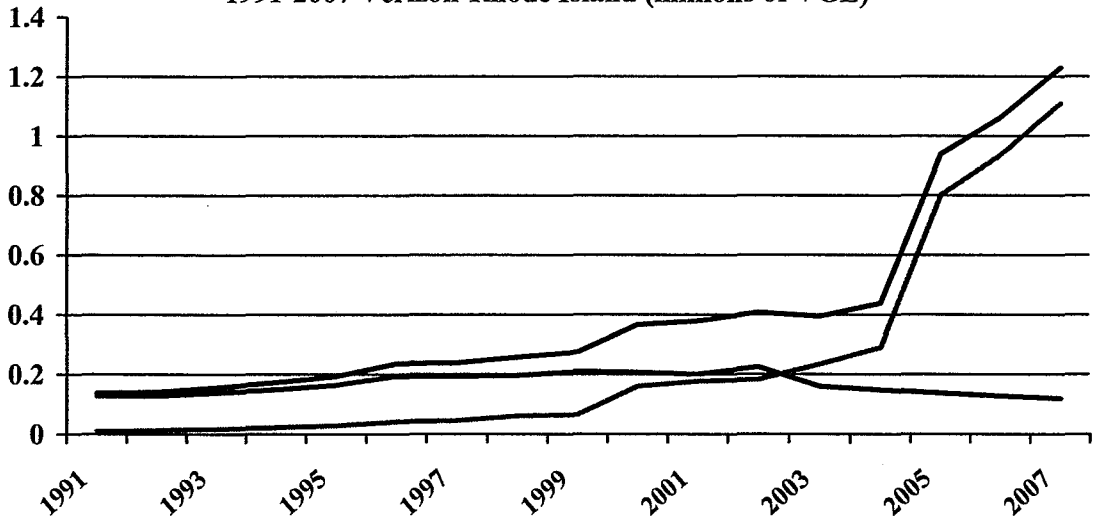
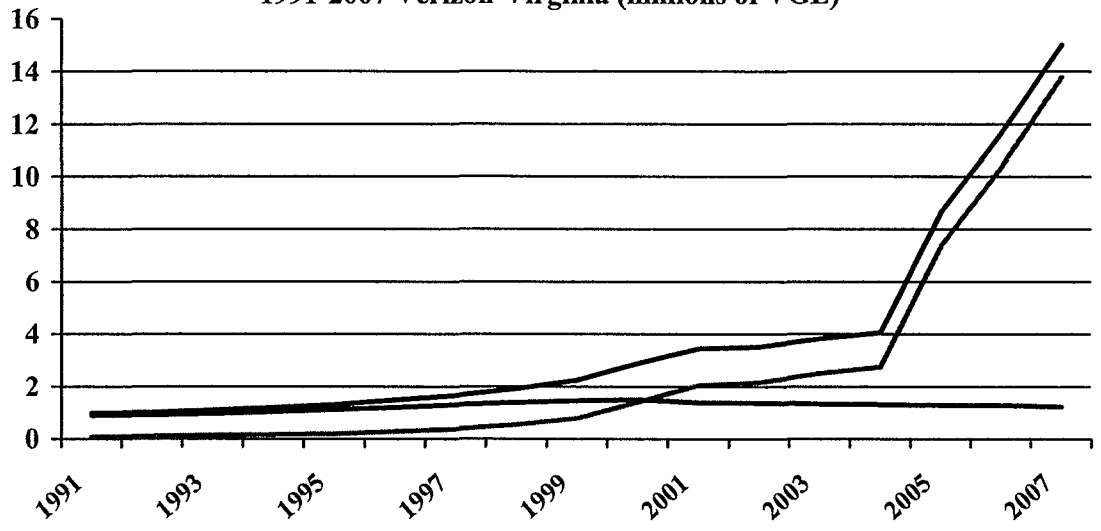


Figure 3: Shift in Business Capacity to Non-Switched Services 1991-2007 Verizon-Virginia (millions of VGE)



Importantly, when all forms of capacity used to serve business customers are considered, Cox's share of the business market is considerably smaller than described by Verizon. Tables 1 and 2 illustrate this conclusion.

***** BEGIN HIGHLY CONFIDENTIAL *****

Table 1: Analysis of Cox Share of Business Capacity (VGE) – Rhode Island[8]

[8] Table 1 and Table 2 assume that the data provided to the Commission by Cox is a raw count of DS1s, without conversion to voice grade equivalents ("VGEs"). A conversion to VGEs was performed for purposes of these tables. If the data filed by Cox is in fact in VGE form, the market shares attributed to Cox in Table 1 and Table 2 are overstated.

[9] UNE Count includes Loops and EELs (i.e., access connections to customers), but does not include interoffice facilities.

Table 2: Analysis of Cox Share of Business Capacity (VGE) – Virginia Beach

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As shown above, Cox's business market share in Virginia Beach is ***** BEGIN HIGHLY CONFIDENTIAL ***** ***** END HIGHLY CONFIDENTIAL ***** and Cox's business market share in Rhode Island is ***** BEGIN HIGHLY CONFIDENTIAL ***** ***** END HIGHLY CONFIDENTIAL**. These market share estimates are significantly below the threshold employed by the Commission in past Section 251(c)(3) forbearance analyses.

Second, it is worth noting that Verizon's assertion that Cox serves ***** BEGIN HIGHLY CONFIDENTIAL ***** ***** END HIGHLY CONFIDENTIAL ***** percent of the number of business lines that Verizon serves in the Cox service territory in the Virginia Beach MSA and Rhode Island, respectively"[11] is not a market share calculation. It instead represents the ratio of Cox lines to Verizon lines in those markets (assuming Verizon's math is correct). Verizon's statement is easily misread and suggests that Verizon intended to create the misimpression that Cox's share in the switched business market is far higher than it actually is. Even if the Commission were to improperly narrow its focus to the switched

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10 Cox did not report the capacity of its "OCN and other" lines. This analysis assumes a VGE capacity of 672 VGEs per line.

11 *Verizon May 1st Ex Parte*, at 5.

capacity business market (which it should not), Cox's market share is only ***** BEGIN HIGHLY CONFIDENTIAL ***** ***** END HIGHLY CONFIDENTIAL ***.**

In sum, a more comprehensive assessment than Verizon has provided of competitive activity in the business market in Rhode Island and Virginia Beach proves that facilities-based competition in the business market falls far short of the level necessary to justify forbearance from unbundling obligations.

II. Facilities-Based Competition in the Residential Market

Verizon's discussion of residential market competition in its *May 1st Ex Parte* is likewise misleading and serves to inflate competitive activity in Rhode Island and the Virginia Beach MSA. Most significantly, in calculating Cox's "share-of-residential-lines" in those markets, Verizon compares its residential line counts (measured by directory listings) to Cox's access lines.[12] Directory listings are a closer measure of *customers* than *lines*, however, since many customers have multiple lines. Thus, Verizon's calculation understates the number of lines Verizon has relative to the number of Cox lines in Rhode Island and Virginia Beach. In recognition of this fact, the calculations contained in the *Cavalier April 24th Ex Parte*[13] were all performed on an apples-to-apples "customer count" basis.

Further, Verizon completely ignores the point raised in the *Cavalier April 24th Ex Parte* regarding the Verizon Wireless wireless market share used in estimating competitive market activity in Rhode Island and the Virginia Beach MSA.[14] As noted in the *Cavalier April 24th Ex Parte*, in deriving the market shares contained in its April 10, 2009 *ex parte* letter,[15] Verizon appears to have used the Verizon Wireless national share of the wireless market.[16] That is inappropriate. Information provided to the Virginia State Corporation Commission ("VCC") by Verizon in the VCC's recent retail services deregulation proceeding demonstrates that Verizon Wireless's in-region market share is significantly higher than the national average and is more than 50%.[17] Thus, the calculations contained in the *Cavalier April 24th Ex Parte* ascribed a 55% wireless market share to Verizon Wireless based on Verizon's discovery responses in the VCC

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12 *Id.*, at 4 and Attachment A.

13 Letter from Brad Mutschelknaus, Counsel to Cavalier Telephone, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 08-24, 08-49 (filed Apr. 24, 2009)("*Cavalier April 24th Ex Parte*").

14 *Cavalier April 24th Ex Parte*, at 3.

15 Letter from Nneka Ezenwa, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 08-24, 08-49 (filed Apr. 10, 2009) *("Verizon April 10" Ex Parte").*

16 *Cavalier April 24th Ex Parte*, at 3.

17 *Id.*, n. 7.

proceeding. The signatories maintain that this is the best available data estimating Verizon Wireless's market share in a state where Verizon is the dominant local exchange carrier. In addition, because the data reflects Verizon Wireless's share of wireline numbers ported to a wireless carrier, the data better estimates Verizon Wireless's share of cut-the-cord wireless customers. Verizon has completely failed to rebut these conclusions.

III. Verizon Criticisms of the GeoResults Data Submitted by CLECs are Unfounded

Verizon repeats its conclusory complaint in the *May 1st Ex Parte* that "data from GeoResults are incomplete and understate the extent of competitive facilities."[18] Verizon charges that "GeoResults does not receive complete data for all CLECs, and some CLECs do not appear to provide any data to GeoResults."[19] Not surprisingly, Verizon provides absolutely no evidence to back up its criticisms. Verizon chooses instead to make vague and unsubstantiated claims that it no doubt hopes will result in the Commission treating the GeoResults data with skepticism. Verizon also contends that "GeoResults data typically exclude information from Cox and AT&T, which are two of the largest competitors in Rhode Island."[20] The signatories can state with certainty, however, that the GeoResults data submitted for Rhode Island and Virginia Beach include information for both Cox and AT&T. In the absence of any actual evidence from Verizon that GeoResults data understate competitive facilities, and in the face of evidence that Verizon's claim regarding Cox and AT&T data is false, the Commission should ignore Verizon's contentions.

Finally, Verizon also repeats its allegation that the GeoResults data is misleading because it overstates "the universe of relevant buildings" in Rhode Island and Virginia Beach by including locations that do not generate significant demand for telecommunications services, and do not require the higher-capacity facilities ... that are of concern to the CLECs here."[21] This allegation already has been disproved. The GeoResults data submitted in these dockets includes tables showing the "addressable demand" share (*i.e.*, the percentage of total demand in each wire center that facilities-based CLECs have a potential to serve) in each rate center in the markets at issue.[22] The specific purpose of these tables is to address concerns about whether CLEC facilities reach buildings that account for a disproportionate percentage of the total demand in those rate centers. And, as noted in previous submissions, CLEC "addressable market" share is

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18 *Verizon May 1st Ex Parte*, at 6-7.

19 *Id.*, at 7.

20 *Id.*

21 *Id.*

22 *See* Reply Comments of Covad Communications Group, *et al.*, WC Docket No. 08-24 (filed May 12, 2008)("*Covad, et al. Reply Comments*"), at 13-16; Comments of NuVox Communications and XO Communications, LLC, WC Docket No. 08-49 (filed May 13, 2008)("*NuVox, et al. Comments*"), at 48-50.

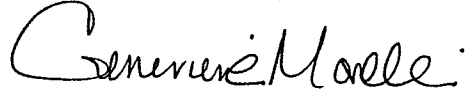
below 13% in every rate center in Rhode Island and the Virginia Beach MSA.[23] Thus, Verizon's contention that the CLECs "do not fairly represent the extent or significance of competitive fiber"[24] is without merit.

IV. Conclusion

For all of the foregoing reasons, and for the reasons set forth in the signatories' previous filings in the instant dockets, Verizon's forbearance petitions for Rhode Island and the Virginia Beach MSA should be denied in their entirety.

Respectfully submitted,

Broadview Networks, Inc., Cavalier Telephone, Covad Communications Company, NuVox, and XO Communications, LLC



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cc: Julie Veach
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23 *Covad, et al. Reply Comments*, at 15; *NuVox Comments*, at 49.

24 *Verizon May 1st Ex Parte*, at 7.