

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
)
Petition for Waiver of the Commission's) WCB/Pricing File No. 06-10
Price Cap Rules for Services Transferred)
from VADI to the Verizon Telephone)
Companies)

ORDER

Adopted: June 8, 2006

Released: June 8, 2006

By the Chief, Pricing Policy Division, Wireline Competition Bureau:

I. INTRODUCTION

1. The Verizon telephone companies (Verizon)1 seek the temporary extension of a waiver of section 61.42(g) of the Commission's rules2 to exclude advanced services under Tariff FCC No. 20 from price caps in the 2006 annual access tariff filing.3 These services include those that were transferred to Verizon from its former separate advanced services affiliate, Verizon Advanced Data Inc. (VADI).4 Due to unique circumstances, as explained below, we extend Verizon's limited waiver of section 61.42(g) for purposes of the 2006 annual access tariff filing.5

II. BACKGROUND

2. As a condition of the merger between GTE Corporation and Bell Atlantic Corporation, the Commission ordered the merged company to offer advanced services through a separate advanced services affiliate until such time as provided for in the sunset provisions of the merger order.6 On May 1,

1 Verizon telephone companies are the affiliated local telephone companies of Verizon Communications Corp.

2 47 C.F.R. § 61.42(g).

3 Petition for Waiver of the Commission's Price Cap Rules for Services Transferred from VADI to the Verizon Telephone Companies at 1, 6 (filed Feb. 10, 2006) (Verizon Petition).

4 Id. at 2. In addition to the former VADI services, Verizon includes all new advanced services in Tariff FCC No. 20. Id.; see Tariff FCC No. 20, Section 5, Parts I-IV.

5 See 47 C.F.R. § 61.43 (annual price cap filing requirements).

6 Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of Domestic and International Section 214 and 310 Authorizations and Applications to Transfer Control of a Submarine Cable Landing License, CC Docket No. 98-184, Memorandum Opinion and Order, 15 FCC Red

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2001, Verizon sought permission to expedite the sunset of these requirements.⁷ On September 26, 2001, the Common Carrier Bureau granted Verizon's request, explaining that re-integration of these assets from VADI into Verizon on an accelerated basis was in the public interest.⁸ The Bureau also noted that a then recent court ruling would, in any event, have caused the separate affiliate condition to terminate automatically in January 2002.⁹

3. On November 30, 2001, Verizon filed a petition for an interim waiver of sections 61.42(g), 61.38, and 61.49 of the Commission's rules with respect to the assets transferred from VADI to Verizon.¹⁰ Section 61.42(g) provides that new services must be included in the first annual price cap tariff filing following completion of the base period in which they are introduced.¹¹ On June 10, 2002, the Wireline Competition Bureau granted Verizon a limited waiver of section 61.42(g) for purposes of its 2002 annual access filing.¹² The Bureau has extended this waiver for annual access filings since then.¹³

4. Verizon filed its present petition on February 10, 2006, seeking to extend the temporary waiver for advanced services for purposes of the 2006 annual access tariff filing.¹⁴ The Pricing Policy Division issued a public notice on February 14, 2006, seeking comment on Verizon's petition.¹⁵ Verizon

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14032, 14038-39, para. 5; 14258, App. D (2000) (*Bell Atlantic-GTE Merger Order*). The Bell Atlantic-GTE merger, which was completed on June 30, 2000, created Verizon Communications.

⁷ Letter from Gordon R. Evans, Vice President, Federal Regulatory, Verizon, to Dorothy Attwood, Chief, Common Carrier Bureau, CC Docket No. 98-184 (filed May 1, 2001).

⁸ *Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of Domestic and International Section 214 and 310 Authorizations and Applications to Transfer Control of a Submarine Cable Landing License*, CC Docket No. 98-184, Order, 16 FCC Rcd 16915, 16918, para. 6 (Com. Car. Bur. 2001) (*VADI Accelerated Transfer Order*). The Common Carrier Bureau became the Wireline Competition Bureau in 2002 as part of organizational changes at the Commission. See generally *Establishment of the Media Bureau, the Wireline Competition Bureau and the Consumer and Governmental Affairs Bureau*, Order, 17 FCC Rcd 4672 (2002).

⁹ The separate affiliate condition automatically terminated nine months after the date of a final and non-appealable judicial decision determining that the separate advanced services affiliate is a "successor or assign" of the incumbent. *Bell Atlantic-GTE Merger Order*, 15 FCC Rcd at 14288-89, App. D, para. 11.c. The Bureau noted that, under the court's ruling in *Association of Communications Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir. 2001), VADI is a successor or assign of Verizon. *VADI Accelerated Transfer Order*, 16 FCC Rcd at 16916, para. 2 n.5.

¹⁰ Verizon Petition for Waiver of the Price Cap Rules, WCB/Pricing File No. 02-16 (filed Nov. 30, 2001); see also *Petition for Waiver of the Commission's Price Cap Rules for Services Transferred from VADI to the Verizon Telephone Companies*, WCB/Pricing File No. 04-16, Order, 19 FCC Rcd 7095, 7096, para. 3 (Wireline Comp. Bur. 2004) (*2004 Waiver Order*).

¹¹ 47 C.F.R. § 61.42(g).

¹² *Verizon Petition for Interim Waiver of Sections 61.42(g), 61.38 and 61.49 of the Commission's Rules*, WCB/Pricing No. 02-16, Order, 17 FCC Rcd 11010 (Wireline Comp. Bur. 2002) (*2002 Waiver Order*). The Bureau deferred consideration of the remainder of Verizon's waiver request until a later date. *Id.* at 11010, para. 1.

¹³ *Verizon Petition for Interim Waiver of Section 61.42(g) of the Commission's Rules*, WCB/Pricing No. 03-11, Order, 18 FCC Rcd 6498 (Wireline Comp. Bur. 2003) (*2003 Waiver Order*); *2004 Waiver Order*, 19 FCC Rcd 7095; *Verizon Petition for Waiver of the Commission's Price Cap Rules for Services Transferred from VADI to the Verizon Telephone Companies*, WCB/Pricing No. 05-17, Order, 20 FCC Rcd 8900 (Wireline Comp. Bur. 2005) (*2005 Waiver Order*).

¹⁴ Verizon Petition at 1, 6.

¹⁵ *Comments Sought on Verizon Petition to Extend Waiver of Section 61.42(g) of the Commission's Rules*, WCB/Pricing File No. 06-10, Public Notice, 21 FCC Rcd 1549 (Wireline Comp. Bur. 2006).

supplemented its petition with further information on April 18, 2006.¹⁶ The New Jersey Division of the Ratepayer Advocate (New Jersey Ratepayer Advocate) and Time Warner Telecom (Time Warner) submitted comments opposing Verizon's request for a waiver.¹⁷

III. DISCUSSION

5. The Commission may waive its regulations for good cause shown.¹⁸ For the reasons discussed below, we find that Verizon faces special circumstances with respect to its advanced services that warrant a temporary deviation from the Commission's rules, and that such a deviation will serve the public interest.¹⁹ Accordingly, we find that good cause exists to grant Verizon an extension of the limited waiver of section 61.42(g) for advanced services in Tariff FCC No. 20.

A. Recent Regulatory Developments

6. Verizon based its prior requests for a waiver of section 61.42(g) on the pendency of proceedings to establish the appropriate regulatory treatment of broadband services.²⁰ Certain of these issues have been recently resolved. On August 5, 2005, the Commission adopted the *Wireline Broadband Internet Access Services Order*, which, among other regulatory relief, allows facilities-based wireline broadband Internet access providers to offer the telecommunications transmission component of their wireline broadband Internet access services on a common-carrier basis or a non-common carrier basis.²¹ That Order also allows those wireline broadband Internet access service providers that choose to offer that transmission component as a telecommunications service to do so on a permissive detariffing basis.²² On December 20, 2004, Verizon filed a petition requesting that the Commission forbear from applying Title II of the Communications Act of 1934, as amended, and the Commission's *Computer Inquiry* rules to Verizon's broadband services.²³ Pursuant to section 10(c) of that Act,²⁴ the relief requested by Verizon

¹⁶ Letter from Donna Epps, Vice President-Federal Regulatory Advocacy, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WCB/Pricing File No. 06-10, at 1-2 (filed April 18, 2006) (Verizon April 18 *Ex Parte* Letter).

¹⁷ New Jersey Division of the Ratepayer Advocate Comments (filed March 3, 2006); Time Warner Telecom Reply (filed March 10, 2006).

¹⁸ 47 C.F.R. § 1.3.

¹⁹ See *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969)) (explaining the necessary criteria to establish good cause for a waiver).

²⁰ Verizon Petition at 1-5.

²¹ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14899-903, paras. 86-95 (2005) (*Wireline Broadband Internet Access Services Order*), petitions for review pending, *Time Warner Telecom v. FCC*, No. 05-4769 (and consolidated cases) (3rd Cir. filed Oct. 26, 2005).

²² *Id.* at 14900-03, paras. 89-95.

²³ *Petition of the Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, WC Docket No. 04-440 (deemed granted by operation of law, effective March 19, 2006) (*Verizon Forbearance Petition*). See also Letter from Edward Shakin, Vice President and Associate General Counsel, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 04-440 (filed Feb. 7, 2006); Letter from Susanne A. Guyer, Senior Vice President-Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 04-440 (filed Feb. 17, 2006).

²⁴ 47 U.S.C. § 160(c).

was deemed granted by operation of law, effective March 19, 2006.²⁵ Verizon now contends that, despite the resolution of some of the questions regarding the appropriate treatment of broadband services, a waiver is still necessary and appropriate here.²⁶

7. According to Verizon, these recent regulatory developments and the need to implement change in an orderly fashion support its request for a waiver to continue to exclude the Tariff 20 advanced services from price caps.²⁷ Verizon explains that it has started to develop internal systems and implement other changes that would permit it to serve customers on a non-common carrier basis for a large part of the Tariff 20 services at issue.²⁸ It argues that it would waste resources and not be in the public interest “to require Verizon either to rush this process in a manner that harms customers or to place these Internet access services, and related broadband transmission services, in price caps, only to remove them a few months later.”²⁹ Time Warner opposes Verizon’s petition, claiming that Verizon’s request for a waiver is moot following the recent grant by operation of law of Verizon’s broadband forbearance petition, and thus Verizon no longer requires a waiver.³⁰

8. As a threshold matter, we do not address in this Order the extent to which Verizon may offer any advanced services on a non-tariffed basis or outside the Commission’s price cap rules as a consequence of the March 19, 2006 grant of forbearance through operation of law. For purposes of addressing Verizon’s waiver request, however, we will assume without deciding that a waiver is required to enable Verizon to exclude services offered through Tariff 20 from price caps in its 2006 annual access tariff filing.

9. Verizon has explained that it is currently in the process of making business changes to respond to recent regulatory developments that may make it unnecessary for Verizon to offer certain services under tariff or price cap regulation on a going forward basis. These special circumstances warrant waiving the requirement that Verizon move these services into price caps for a short period of time. Given the recent nature of these regulatory developments, it is appropriate to allow Verizon a reasonable period of time to respond to these changes without requiring it to incur the financial costs or administrative burdens of reintegrating advanced services into price caps. Accordingly, to the extent that the services at issue are subject to the recent regulatory developments, we find it is in the public interest to grant Verizon a waiver to exclude these services from price caps while it completes operational changes that affect the future provisioning of these services to its customers.

B. Pending Proceedings

10. Verizon also seeks a waiver for those advanced services in Tariff 20 that Verizon asserts are not affected by the regulatory developments discussed in the previous section.³¹ Verizon observes that the Commission continues to consider significant issues related to the regulation of advanced services,

²⁵ *Verizon Telephone Companies’ Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to their Broadband Services Is Granted by Operation of Law*, Press Release, Federal Communications Commission, Westlaw 707632 (issued March 20, 2006) (“This is to inform the public that, pursuant to section 10(c), the relief requested in Verizon’s petition was deemed granted by operation of law, effective March 19, 2006.”).

²⁶ Verizon April 18 *Ex Parte* Letter at 1-2.

²⁷ Verizon April 18 *Ex Parte* Letter at 1-2.

²⁸ Verizon April 18 *Ex Parte* Letter at 1.

²⁹ Verizon April 18 *Ex Parte* Letter at 2.

³⁰ Time Warner Reply at 2.

³¹ Verizon April 18 *Ex Parte* Letter at 2.

including whether to establish a separate price cap category for these services.³² Accordingly, Verizon renews its argument from prior waiver proceedings that it serves the public interest to exclude these services from price caps until the Commission addresses these open questions.³³ For example, Verizon argues that incorporating competitive advanced services into price caps on a going forward basis could result in changes to the rates of other less competitive services and that such an outcome would not be in the public interest.³⁴ The Bureau previously has granted waivers to Verizon to exclude advanced services from price caps pending resolution of questions regarding whether or how the price cap rules should apply to these services.³⁵ We continue to believe that these special circumstances warrant a waiver to maintain the status quo by temporarily excluding these services from price caps while the Commission considers these questions.

11. We are not persuaded by commenters' arguments that the waiver is not in the public interest. Time Warner challenges Verizon's claims that it would be burdensome for Verizon to incorporate the Tariff 20 services into price caps.³⁶ Time Warner argues that BellSouth included similar advanced services in price caps, thus demonstrating that it would not be burdensome for Verizon to do so.³⁷ Verizon responds that "BellSouth never provided those services through a separate affiliate and thus did not have to go through the substantial work involved in integrating these services into the price cap framework."³⁸ We agree. The Bureau has previously recognized the burdens Verizon faces in incorporating the VADI advanced services into its price cap indices and converting the VADI demand data for price cap calculations,³⁹ and Time Warner's arguments do not persuade us to reach a different conclusion here.⁴⁰

³² Verizon April 18 *Ex Parte* Letter at 2 (citing, e.g., *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994, 2013, para. 52 (2005)).

³³ Verizon April 18 *Ex Parte* Letter at 2.

³⁴ Verizon Petition at 6; Verizon April 18 *Ex Parte* Letter at 2. Price cap rules group services together in different baskets, service categories, and service subcategories. The rules also identify the total permitted revenues for each basket or category of services. Within these baskets or categories, incumbent local exchange carriers have some flexibility to change the rate level of a specific service. 47 C.F.R. § 61.42 *et seq.* If, for example, Verizon were to place advanced services within a price cap basket or service category and then lower the prices for these services, Verizon could use the "headroom" created by the rate decreases to raise the prices of other services within that basket or service category. We do not understand the New Jersey Ratepayer Advocate's suggestion that a waiver is not warranted because Verizon's arguments about headroom are not supported by empirical data and, in any event, that the creation of headroom somehow raises issues regarding retroactive ratemaking and the filed rate doctrine. *See* New Jersey Ratepayer Advocate Comments at 2-3. The creation of headroom is a function of the flexibility provided to carriers pursuant to the Commission's price cap rules. Neither the rule against retroactive ratemaking nor the filed rate doctrine would preclude Verizon, pursuant to those rules, from offsetting rate decreases for some services with increases for other services within the same basket.

³⁵ *2005 Waiver Order*, 20 FCC Rcd 8900, 8902-03, paras. 7-8.

³⁶ Time Warner Reply at 6-7.

³⁷ Time Warner Reply at 6-7.

³⁸ Letter from Donna Epps, Vice President - Federal Regulatory Advocacy, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WCB/Pricing File No. 06-10, at 3 (filed May 1, 2006).

³⁹ *2002 Waiver Order*, 17 FCC Rcd at 11012-13, paras. 8-9.

⁴⁰ Time Warner also argues that SBC, before it merged with AT&T, requested that certain advanced services be placed under price caps, so that the services could subsequently qualify for pricing flexibility. Time Warner Reply at 7 (citing SBC Communications Inc. Petition for Waiver of Section 61.42 of the Commission's Rules, WC Docket No. 03-250 (filed Dec. 9, 2003)). Contrary to Time Warner's suggestion, however, SBC's request does not show that placing advanced services into price caps is not burdensome for Verizon. Indeed, AT&T clarified its waiver request in a subsequent filing, explaining that it sought the ability to exercise pricing flexibility *without* having to

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12. Neither are we convinced by Time Warner's argument that price cap regulation of the services at issue is necessary to prevent rate increases "to supracompetitive levels."⁴¹ Verizon's Tariff 20 rates are subject to Part 61, subparts E and F of the Commission's rules.⁴² These rules provide protection against unreasonable rate increases by requiring Verizon to justify any rate increase it seeks for its advanced services. In particular, Part 61 rules require Verizon to provide cost and other supporting data in the tariff review process.⁴³ The Commission previously has stated its belief that these rules are sufficient to protect customers from unreasonable price increases for Verizon's advanced services.⁴⁴ Moreover, the Commission emphasized that it would view any filings to increase generally available tariffed rates for Verizon's advanced services with particular scrutiny.⁴⁵ We conclude, therefore, that Time Warner's concerns are misplaced.

13. Finally, the New Jersey Ratepayer Advocate argues that the current federal and state jurisdictional separations freeze distorts the price cap regime and affects the reasonableness of rates, thus counseling against allowing Verizon to continue to exclude its advanced services from price caps.⁴⁶ The current separations freeze is unrelated to the relief requested by Verizon here. Under the grant of a waiver, Verizon would continue to allocate costs jurisdictionally in accordance with the Commission's separations rules to the extent they apply to the services at issue, regardless of whether those services are included in price caps. In any event, this proceeding is not the appropriate forum in which to address highly complex issues related to the separations process. We note that the Commission recently issued an Order and Further Notice of Proposed Rulemaking, extending the separations freeze and seeking comment on issues relating to reform of the jurisdictional separations process.⁴⁷

14. In conclusion, we find that Verizon has demonstrated good cause to waive section 61.42(g) of the Commission's rules, and the arguments of the New Jersey Ratepayer Advocate and Time Warner do not persuade us otherwise. Accordingly, we grant Verizon an extension of the limited waiver of section 61.42(g) to exclude advanced services under Tariff FCC No. 20 from price caps only for purposes of the 2006 annual access tariff filing.

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place the services at issue into price caps, so that it could avoid the cost and burden of doing so. Letter from Davida Grant, Senior Counsel, SBC, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 03-250 (filed Nov. 15, 2005).

⁴¹ Time Warner Reply at 3-6.

⁴² See 47 C.F.R. Part 61, Subparts E & F.

⁴³ *Id.*

⁴⁴ *Verizon Petition for Waiver of Pricing Flexibility Rules for Fast Packet Services*, WC Docket No. 04-246, Memorandum Opinion and Order, 20 FCC Rcd 16840, 16849, para. 15 (2005) (*Verizon Advanced Services Waiver Order*). Time Warner also contends that, because the *Verizon Advanced Services Waiver Order* granted Verizon the opportunity to exercise pricing flexibility for the services at issue, Verizon does not need the instant waiver. Verizon's ability to exercise pricing flexibility under certain circumstances, however, does not relieve it of the burdens associated with incorporating these services into price caps.

⁴⁵ *Verizon Advanced Services Waiver Order*, 20 FCC Rcd at 16849, para. 15.

⁴⁶ New Jersey Ratepayer Advocate Comments at 3. The Ratepayer Advocate contends that these services "should no longer be excluded from annual access tariff filings." *Id.* Nothing in Verizon's waiver request or the relief we grant here relieves Verizon of any obligation to include these services in its 2006 annual access tariff filing. The question is, rather, whether those services must be incorporated into Verizon's *price cap* calculations.

⁴⁷ See *Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Order and Further Notice of Proposed Rulemaking, FCC No. 06-70 (rel. May 16, 2006).

IV. ORDERING CLAUSE

15. Accordingly, IT IS ORDERED that, pursuant to sections 201-205 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 201-205, section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, and the authority delegated pursuant to sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, section 61.42(g) of the Commission's rules IS WAIVED for advanced services in Verizon's Tariff FCC No. 20, including those transferred from VADI to Verizon, only with respect to Verizon's 2006 annual access tariff filing requirements under section 61.43 of the Commission's rules, 47 C.F.R. §§ 61.42(g), 61.43.

FEDERAL COMMUNICATIONS COMMISSION

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