

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

In the Matter of)
)
Hawaiian Telcom Inc. Petition for Waiver of)
Sections 61.42(g), 61.38, and 61.49 of the) WCB/Pricing File No. 06-19
Commission's Price Cap Rules for Advanced)
Services Formerly Offered by Verizon)
Hawaii, Inc.)
)

ORDER

Adopted: June 12, 2006

Released: June 12, 2006

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

I. INTRODUCTION

1. Hawaiian Telcom Inc. (Hawaiian) filed a petition on April 11, 2006, seeking a waiver of sections 61.42(g), 61.38, and 61.49 of the Commission's rules to exclude certain Advanced Services from price caps in the 2006 annual access tariff filing. Due to unique circumstances, as explained below, we grant Hawaiian a waiver of rule 61.42(g) for purposes of the 2006 annual access tariff filing. We deny Hawaiian's request for a waiver of rules 61.38 and 61.49.

II. BACKGROUND

2. Hawaiian has requested a waiver of sections 61.42(g), 61.38, and 61.49 of the Commission's rules so that it may exclude certain Advanced Services from price caps for purposes of the 2006 annual access tariff filing. Hawaiian states that it is the "successor entity to Verizon Hawaii which, through its parent and prior to a transfer of control consummated on May 2, 2005, received similar waivers of these rules each year since 2002." Hawaiian petitions the Commission to extend this waiver to its Advanced Services for purposes of the 2006 annual access tariff filing.

1 Hawaiian Telcom Inc. Petition for a Waiver of Sections 61.42(g), 61.38, and 61.49 of the Commission's Price Cap Rules for Advanced Services Formerly Offered by Verizon Hawaii, WCB/Pricing File No. 06-19 (filed Apr. 11, 2006) (Hawaiian Petition). See 47 C.F.R. §§ 61.42(g) (new services must be included in the annual price cap filing in the year after the one in which they are introduced), 61.38 (supporting information to be submitted with letters of transmittal), 61.49 (supporting information to be submitted with letters of transmittal for tariffs of carriers subject to price cap regulation). Hawaiian seeks relief for those Hawaiian FCC Tariff No. 2 services it identified in Exhibit A to the Hawaiian Petition ("Advanced Services").

2 Hawaiian Petition at 1.

3 See id.

4 See id.

3. 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.⁵ On May 1, 2001, Verizon sought permission to expedite the sunset of these requirements.⁶ On September 26, 2001, the Common Carrier Bureau granted Verizon's request, explaining that re-integration of these assets from Verizon's advanced services affiliate (VADI) into Verizon on an accelerated basis was in the public interest.⁷ 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 2002.⁸

4. 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.⁹ 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.¹⁰ 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.¹¹ The Bureau has extended this waiver for annual access filings since then.¹²

⁵ *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 Rcd 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.

⁶ 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).

⁷ *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).

⁸ 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.

⁹ 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*).

¹⁰ 47 C.F.R. § 61.42(g).

¹¹ *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.

¹² *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*).

5. Hawaiian filed its present petition on April 11, 2006.¹³ As the successor entity to Verizon Hawaii, Hawaiian seeks to extend the temporary waiver for its Advanced Services for purposes of the 2006 annual access tariff filing.¹⁴ The Bureau issued a public notice seeking comment on Hawaiian's petition.¹⁵ Pacific LightNet, Inc. (Pacific LightNet) submitted comments.¹⁶

III. DISCUSSION

6. The Commission may waive its regulations for good cause shown.¹⁷ In general, the waiver request must demonstrate special circumstances warranting a deviation from the general rule, and that such a deviation will serve the public interest.¹⁸ For the reasons discussed below, we find that good cause exists to grant Hawaiian a waiver of section 61.42(g) for its Advanced Services for purposes of the 2006 annual access tariff filing and that such a grant will be in the public interest.

7. Hawaiian asserts arguments similar to those Verizon made in support of previous waiver requests.¹⁹ Hawaiian contends that a waiver would be in the public interest because it would maintain the status quo until the completion of rulemaking proceedings that may affect the appropriate regulation of advanced services by incumbent local exchange carriers.²⁰ Hawaiian further asserts that, if the Advanced Services were included in price caps, a reduction in the rates for these services would create "headroom," allowing Hawaiian to make offsetting increases to other rates within the same price cap service category.²¹ Thus, Hawaiian argues that including the Advanced Services in price caps "might upset settled customer expectation with respect to other services."²² Finally, Hawaiian argues that the unique circumstances surrounding the recent transfer of control to Hawaiian and the initiation of Hawaiian's tariff make the burden of incorporating the services at issue into price caps particularly high.²³

8. Pacific LightNet neither opposes nor supports Hawaiian's Petition but rather seeks clarification of one of Hawaiian's justifications for a waiver grant.²⁴ Pacific LightNet points out that the Hawaiian Public Utilities Commission (HPUC) conditioned the Carlyle Group's acquisition of Hawaiian (formerly Verizon Hawaii) from Verizon Communications upon a prohibition of a general utility rate increase prior to 2009 (except in the case of a compelling financial need).²⁵ Hawaiian responds that the HPUC's

¹³ *Hawaiian Telcom Inc. Petition for a Waiver of Sections 61.42(g), 61.38, and 61.49 of the Commission's Price Cap Rules for Advanced Services Formerly Offered by Verizon Hawaii*, WCB/Pricing File No. 06-19 (filed Apr. 11, 2006) (Hawaiian Petition).

¹⁴ *See id.* at 3-4.

¹⁵ *See Comments Sought on Hawaiian Telecom Inc. Petition For a Waiver of Sections 61.42(g), 61.38, and 61.49 of the Commission's Rules*, WCB/Pricing File No. 06-19, Public Notice, DA 06-863 (Wireline Comp. Bur. rel. Apr. 14, 2006).

¹⁶ Comments of Pacific LightNet, Inc. Relating to the Petition of Hawaiian Telcom Inc. for Waiver of the Price Cap Rules, WCB/Pricing File No. 06-19 (filed Apr. 24, 2006) (Pacific LightNet Comments).

¹⁷ 47 C.F.R. § 1.3.

¹⁸ *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)).

¹⁹ *See* Hawaiian Petition at 6-7; *see, e.g., 2003 Waiver Order, 2004 Waiver Order, 2005 Waiver Order.*

²⁰ *See* Hawaiian Petition at 6-7.

²¹ *See id.* at 6

²² *Id.*

²³ *See id.* at 4-6.

²⁴ *See* Pacific LightNet Comments at 1-2.

²⁵ *See id.*

acquisition condition applies only to intrastate rates, not to jurisdictionally interstate services that are the subject of Hawaiian's petition.²⁶

9. Verizon's prior requests for a waiver of section 61.42(g) were based on the pendency of proceedings to establish the appropriate regulatory treatment of broadband services.²⁷ 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.²⁸ 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.²⁹ Hawaiian states that it is currently considering its options under the *Wireline Broadband Internet Access Order* and does not plan to detariff any of the services at issue before July 1, 2006.³⁰ Consistent with the *Verizon 2006 VADI Waiver Order*, these special circumstances warrant waiving the requirement that Hawaiian into price caps services that it may detariff in the near future.³¹ Given the recent nature of both the transfer of control and the regulatory developments, it is appropriate to allow Hawaiian a reasonable period of time to respond to these changes without incurring the burdens and expenses of incorporating these services into price caps.

10. We are further persuaded that Hawaiian has demonstrated good cause to waive section 61.42(g) of the Commission's rules for its other Advanced Services offered through Hawaiian Tariff No. 2 with respect to the 2006 annual access tariff filing requirements only. The Bureau previously has granted waivers to Verizon to exclude these advanced services from price caps pending resolution of questions regarding whether or how the price cap rules should apply to advanced services.³² 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. Consistent with our previous statements regarding Verizon's advanced services, this limited waiver temporarily will allow Hawaiian to avoid the burdens associated with incorporating its Advanced Services into its price cap indices and converting the demand data from multiple sources (VADI, Verizon Hawaii, and Hawaiian Tariff No. 2) for price cap calculations.³³ Furthermore, as Hawaiian points out, if it were to place the Advanced Services into price caps, this could create "headroom" within a service category or band that

²⁶ Reply Comments of Hawaiian Telcom, Inc., WCB/Pricing File No. 06-19 (filed Apr. 28, 2006) (Hawaiian Reply Comments).

²⁷ See, e.g., *2002 Waiver Order*; *2003 Waiver Order*; *2004 Waiver Order*; *2005 Waiver Order*.

²⁸ *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).

²⁹ *Id.* at 14900-03, paras. 89-95.

³⁰ Hawaiian Reply Comments at 3.

³¹ *Petition for Waiver of the Commission's Price Cap Rules for Services Transferred from VADI to the Verizon Telephone Companies*, WCB/Pricing File No. 06-10, Order, DA No. 06-1238 (rel. June 8, 2006).

³² See *2005 Waiver Order*, 20 FCC Rcd 8902, para. 7. The Commission is currently considering the appropriate price cap treatment of advanced services in the *Special Access* proceeding. *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994 (2005).

³³ See Hawaiian Petition at 2-5; see also *2005 Waiver Order*, 20 FCC Rcd 8902, para. 7.

could result in changes to the rates of other less competitive services, and such an outcome would not be in the public interest.³⁴

11. Hawaiian also requests a waiver of sections 61.38 and 61.49 of the Commission's rules. Hawaiian does not, however, explain why a waiver of these rules is necessary. Hawaiian has established that special circumstances warrant deviation from the general rule requiring the inclusion of new services in price caps and that it is in the public interest to allow such deviation. This relief is effected by waiving section 61.42(g). In contrast, Hawaiian has not provided any facts or analysis to support a waiver of sections 61.38 and 61.49. Accordingly, we deny Hawaiian's request for a waiver of these rules.

IV. ORDERING CLAUSES

12. 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 Hawaiian's FCC Tariff No. 2, only with respect to Hawaiian'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.

13. IT IS FURTHER ORDERED that Hawaiian Telcom Inc.'s request for waiver of sections 61.38 and 61.49 of the Commission's rules, 47 C.F.R. §§ 61.39, 61.49, IS DENIED as set forth herein.

FEDERAL COMMUNICATIONS COMMISSION

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³⁴ See Hawaiian Petition at 6.