

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

In the Matter of)	
)	
Hawaiian Telcom, Inc. Petition for a Waiver of)	
Section 61.42(g) of the Commission's Price Cap)	WCB/Pricing File No. 09-04
Rules for Advanced Services Formerly Offered by)	
Verizon Hawaii, Inc.)	

ORDER

Adopted: June 4, 2009

Released: June 4, 2009

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

I. INTRODUCTION

1. Hawaiian Telcom, Inc. (Hawaiian) filed a petition on April 17, 2009, seeking a waiver of section 61.42(g) of the Commission's rules to exclude certain Advanced Services from price caps in its 2009 annual access tariff filing.¹ As explained below, we grant Hawaiian a waiver of rule 61.42(g) for purposes of the 2009 annual access tariff filing.

II. BACKGROUND

2. Hawaiian has requested a waiver of section 61.42(g) of the Commission's rules so that it may exclude certain Advanced Services from price caps for purposes of the 2009 annual access tariff filing.² Hawaiian states that it and its "predecessor entity Verizon Hawaii, have received similar waivers from the Commission for each tariff year since 2002."³ Hawaiian petitions the Commission to extend this waiver to its Advanced Services for purposes of the 2009 annual access tariff filing.⁴

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,

¹ Hawaiian Telcom, Inc. Petition for a Waiver of Section 61.42(g) of the Commission's Price Cap Rules for Advanced Services Formerly Offered by Verizon Hawaii, Inc. (filed Apr. 17, 2009) (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). Hawaiian seeks relief for those Hawaiian Telcom, Inc. Tariff FCC No. 2 services it identified in Exhibit A to the Hawaiian Petition (Advanced Services).

² Hawaiian Petition at 1-2.

³ *Id.* at 1.

⁴ *See id.* at 1-2.

⁵ *Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of* continued ...

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 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.⁸ On June 10, 2002, the Bureau granted Verizon a limited waiver of section 61.42(g) for purposes of its 2002 annual access filing.⁹ Since then, this waiver had been extended on an annual basis until last year when Verizon did not request a waiver.¹⁰

4. On May 2, 2005, the Carlyle Group closed its acquisition of 100 percent of the equity of Verizon Hawaii, and formed Hawaiian.¹¹ After the transfer of control from Verizon to Hawaiian, Hawaiian concurred in three of Verizon's tariffs for several months and then issued its own tariffs, which mirrored the rates, terms and conditions of service contained in the Verizon tariffs.¹² Under these tariffs, Hawaiian has continued to provide the same services previously provided by Verizon Hawaii, including the Advanced Services covered by the Commission's waivers.¹³ On June 12, 2006, the Bureau granted

(continued from previous...)

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 (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 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*).

⁹ *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.

¹⁰ *Verizon Petition for Interim Waiver of Section 61.42(g) of the Commission's Rules*, WCB/Pricing File No. 03-11, Order, 18 FCC Rcd 6498 (Wireline Comp. Bur. 2003) (*2003 Waiver Order*); *2004 Waiver Order*, 19 FCC Rcd 7095; *Petition for Waiver of the Commission's Price Cap Rules for Services Transferred from VADI to the Verizon Telephone Companies*, WCB/Pricing File No. 05-17, Order, 20 FCC Rcd 8900 (Wireline Comp. Bur. 2005) (*2005 Waiver Order*); *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, 21 FCC Rcd 6470 (Wireline Comp. Bur. 2006) (*2006 Waiver Order*); *Petition for Waiver of the Commission's Price Cap Rules for Services Transferred from VADI to the Verizon Telephone Companies*, WC Docket No. 07-31, Order, 22 FCC Rcd 10259 (Wireline Comp. Bur. 2007) (*2007 Waiver Order*).

¹¹ Hawaiian Petition at 2-3.

¹² *Id.* at 3.

¹³ *Id.*

Hawaiian a waiver of section 61.42(g) for the purposes of the 2006 annual access tariff filing.¹⁴ The Bureau concluded that good cause existed to grant Hawaiian a waiver to exclude these Advanced Services from price cap regulation pending resolution of questions regarding whether or how the price cap rules should apply to advanced services.¹⁵ Moreover, the Bureau agreed with Hawaiian that, if it were to place the Advanced Services into price caps, this could create “headroom” within a service category or band that could result in changes to the rates of other less competitive services, and such an outcome would not be in the public interest.¹⁶ On May 27, 2008, the Bureau granted Hawaiian a similar waiver of section 61.42(g) for the purposes of the 2008 annual access tariff filing.¹⁷

5. On April 17, 2009, Hawaiian filed its current petition requesting a similar waiver of section 61.42(g) for the 2009 annual access tariff filing. The Bureau issued a public notice seeking comment on Hawaiian’s petition.¹⁸ No comments were received.

III. DISCUSSION

6. The Commission may waive its regulations for good cause shown.¹⁹ In general, the waiver request must demonstrate special circumstances warranting deviation from the general rule, and that such a deviation will serve the public interest.²⁰ 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 2009 annual access tariff filing and that such a grant is in the public interest.

7. Hawaiian contends that the unique circumstances surrounding the 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.²¹ 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 rates for less competitive services within the same price cap basket or service

¹⁴ *Hawaiian Telcom Inc. Petition for 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, Inc.*, WCB/Pricing File No. 06-19, Order, 21 FCC Rcd 6552 (Wireline Comp. Bur. 2006). See also, *Hawaiian Telcom Inc. Petition for a Waiver of Section 61.42(g) of the Commission’s Price Cap Rules for Advanced Services Formerly Offered by Verizon Hawaii, Inc.*, WCB/Pricing File No. 08-13, Order, 22 FCC Rcd 10254 (Wireline Comp. Bur. 2007) (order granting similar request for the 2007 annual access filing).

¹⁵ *Id.* at 6555, para. 10.

¹⁶ *Id.*

¹⁷ *Hawaiian Telcom Inc. Petition for a Waiver of Section 61.42(g) of the Commission’s Price Cap Rules for Advanced Services Formerly Offered by Verizon, Hawaii, Inc.*, WCB/Pricing File No. 08-13, Order, 23 FCC Rcd 8316 (Wireline Comp. Bur. 2008) (*2008 Waiver Order*).

¹⁸ See *Comments Sought on Hawaiian Telcom, Inc. Petition For Waiver of Section 61.42(g) of the Commission’s Rules*, WCB/Pricing File No. 09-04, Public Notice, DA 09-910 (Wireline Comp. Bur. rel. Apr. 24, 2009).

¹⁹ See 47 C.F.R. § 1.3.

²⁰ 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)).

²¹ See Hawaiian Petition at 3-5.

category.²² Thus, Hawaiian argues that including the Advanced Services in price caps “could upset settled customer expectations with respect to the pricing of other services.”²³

8. We conclude that Hawaiian has demonstrated good cause to waive section 61.42(g) of the Commission’s rules for its Advanced Services offered through Hawaiian Tariff FCC No. 2 with respect to the 2009 annual access tariff filing requirements.²⁴ The Bureau previously has granted waivers to both Verizon and Hawaiian 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.²⁵ 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 waivers, this limited waiver 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 for price cap calculations.²⁶ 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 could result in changes to the rates of other less competitive services, and such an outcome would not be in the public interest.²⁷

IV. ORDERING CLAUSES

9. 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 Telcom, Inc.’s Tariff FCC No. 2, with respect to Hawaiian’s 2009 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

Albert M. Lewis
Chief, Pricing Policy Division
Wireline Competition Bureau

²² See *id.* at 5-6.

²³ *Id.* at 6.

²⁴ See *id.* at Exhibit A.

²⁵ See *2005 Waiver Order*, 20 FCC Rcd at 8902-03, 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); *Parties Asked to Refresh the Record in the Special Access Notice of Proposed Rulemaking*, WC Docket No. 05-25, Public Notice, 22 FCC Rcd 13352 (2007).

²⁶ See Hawaiian Petition at 2-6; see generally *2008 Waiver Order*.

²⁷ See Hawaiian Petition at 5-6.