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Ex Parte

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

Re: Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services CC Docket No. 01-337; Review of the Section 251 Unbundling Obligations of Incumbent LECs CC Docket No. 01-338; Appropriate Framework for Broadband Access to the Internet over Wireline Facilities CC Docket No. 02-33; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities CC Docket No. 02-52 and Verizon's Petition for a Declaratory Ruling or, Alternatively, Interim Waiver and Verizon's Conditional Petition for Forbearance under 47 U.S.C. Section 160(e) with Regard to Broadband Services Provided via Fiber to the Premises WC Docket No. 04-242

Dear Ms. Dortch:

I am writing to update the Commission on recent developments concerning Verizon's deployment of fiber-to-the-premises ("FTTP") facilities in selected states, and to provide additional authority in support of Verizon's petition for forbearance from the application to such facilities of any stand-alone section 271 unbundling obligations.

1. Verizon is completing work on the deployment of FTTP networks in select markets in Texas, California, and Florida. It has recently announced the rollout of Verizon Fios, a suite of high-speed Internet services provided over those networks. *See* Verizon News Release (July 19, 2004) (attached). These new services will facilitate a wide array of voice, data, and video applications, including video chat and conferencing, digital movie downloads, voice-over-IP services, and the quick uploading of multi-megabit emails with photo attachments. They will be available first in Keller, Texas later this summer, with additional deployment sites in southern California and in the Tampa area of Florida, where Fios will be available to consumers later this

year. More generally, Verizon remains on track to pass one million homes and businesses with fiber loops in parts of nine states by the end of the year.

2. These new deployments in Texas, California, and Florida underscore the tendency of market forces, if unhindered by regulatory burdens, to foster innovative technology and services at competitive rates. Indeed, Verizon Fios far exceeds both the upstream and downstream data speeds currently available from cable broadband service providers, and it is available at comparable or lower prices. Current residential broadband speeds offered by cable modem providers range from 2 Mbps/256 kbps to 3.5 Mbps/1 Mbps.¹ By contrast, Verizon Fios will offer residential broadband speeds ranging from 5 Mbps/2Mbps to 30 Mbps/5Mbps. Moreover, Verizon's service will be offered at a starting price of \$34.95, substantially lower than the \$39.95 to \$44.95 price range for the slower broadband services offered by cable modem providers in many areas.²

3. Verizon's deployment of these faster and cheaper broadband services confirms that, as Verizon has explained in detail in prior submissions, the Commission is fully justified in relying on market forces to yield "just and reasonable" rates and terms in the competitive market for broadband services. *See* 47 U.S.C. § 160(a)(1).³ Courts and agencies have long recognized the

¹ *See* Competition in the Provision of Voice Over IP and Other IP-Enabled Services, *IP-Enabled Services*, WC Docket No. 04-36, Appendix A, A-5, Table 2 (filed May 28, 2004) ("Broadband Competition: May 2004"). In Keller, Texas, high speed Internet service is currently offered at maximum download speeds of between 384 Kbps and 3Mbps. *See* Charter Communications, *Get It Now*, at <http://www.charter.com/products/highspeed/highspeed.aspx>. Comcast and Time Warner Cable recently announced plans to offer customers higher speed tiers of cable modem service in addition to their current offerings. Comcast's higher download speed of 4 Mbps will be available for \$52.95 per month later this year, and Time Warner Cable's higher speeds of up to 6 Mbps/512 kbps will be available for between \$64.95 and \$84.95 starting in August 2004. Brigitte Greenberg, *Cable Revving Up Engines On Internet Service*, *Communications Daily*, July 28, 2004, at 2. The decision of these companies to offer additional higher speed options further emphasizes the intensely competitive nature of the evolving broadband market.

² *See* Broadband Competition: May 2004, A-5, Table 2. In Keller, Texas, providers currently offer high speed Internet service at prices of \$29.99 and \$39.99 for maximum download speeds of 384 Kbps and 3Mbps, respectively. *See* Charter Communications, *Get It Now*, at <http://www.charter.com/products/highspeed/highspeed.aspx>.

³ The "just and reasonable" standard originates from the Interstate Commerce Act, *see, e.g.*, Interim Decision and Order, *AT&T and the Associated Bell System Companies Charges for Interstate and Foreign Communication Service*, 9 F.C.C. 2d 30, ¶ 67 (1967), and appears in numerous state and federal statutes, including sections 10(a)(1) and 201(b) of the Communications Act. *See* 47 U.S.C. § 160(a) (requiring the Commission to "forbear from applying any regulation or any provision of this chapter . . . if the Commission determines

“wide discretion” that the “just and reasonable” standard confers upon agencies. *See, e.g., Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 721 (D.C. Cir. 2000) (observing that Federal Power Act confers “wide discretion” on FERC to determine whether rates are “just and reasonable” or “undu[ly] discriminat[ory]”). The phrase “just and reasonable rates” has “no intrinsic meaning applicable alike to all situations[.]” *Chicago v. FPC*, 458 F.2d 731, 750 (D.C. Cir. 1971).

In particular, the Supreme Court has “consistently rejected any thought that costs should be the controlling factor in rate making.”⁴ Instead, the “just and reasonable” standard “accommodate[s] rates designed . . . to reflect the value of a service rather than its cost . . . [and] to reflect competitive market factors[.]”⁵ Courts have accordingly determined that agencies “may rely upon market-based prices in lieu of cost-of-service regulation to assure a ‘just and reasonable’ result.” *Consumers Energy Co. v. FERC*, 367 F.3d 915, 922-23 (D.C. Cir. 2004) (citation omitted).⁶ Likewise, the Commission has found that “market forces will generally ensure that the rates, practices, and classifications . . . are just and reasonable and not unjustly or

that,” *inter alia*, “enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are *just and reasonable* and are not unjustly or unreasonably discriminatory”) (emphasis added); 47 U.S.C. § 201(b) (“All charges, practices, classifications, and regulations for and in connection with such communication service, shall be *just and reasonable*, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful.”) (emphasis added).

- ⁴ *Alabama Great S. R.R. v. United States*, 340 U.S. 216, 223 n.4 (1951) (holding that Interstate Commerce Commission was entitled to consider relevant factors other than cost when setting differential between all-rail rate and joint rail-barge rate, including necessity for maintaining competition).
- ⁵ Win Whittaker, *A Price-Level (Incentive) Regulation Proposal for Oil Pipelines*, 46 Okla. L. Rev. 415, 429-30 (1993) (citing *Assoc. Gas Distrib. v. FERC*, 824 F.2d 981, 1010-11 (D.C. Cir. 1987) (recognizing that “value of service ratemaking . . . has an established place” in rate regulation); *Consol. Rail Corp. v. United States*, 812 F.2d 1444, 1454 (3d Cir. 1987) (affirming ICC pricing plan “rely[ing] primarily on market forces”); *Houston Lighting & Power Co. v. United States*, 606 F.2d 1131, 1148 (D.C. Cir. 1979) (holding that rates which exceed fully distributed costs are “neither arbitrary nor forbidden by the Act”)).
- ⁶ *See also Ting v. AT&T*, 319 F.3d 1126, 1145 (9th Cir. 2003), (“in contrast to 1934, when Congress enacted §§ 201(b) and 202(a) to protect customers for whom AT&T was the only option, the FCC now defers to the market unless the market is seriously flawed or not competitive”), *cert. denied*, 124 S. Ct. 53 (2003); *see also Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 870 (D.C. Cir. 1993) (“it is rational to assume that the terms of their voluntary exchange are reasonable”) (citation omitted).

unreasonably discriminatory.”⁷ And the D.C. Circuit has held that the “generality of these terms” permits the Commission “to value the free market, the benefits of which are well-established,” and entitles the Commission to reject any stricter reading of these terms that “would harm consumers and would be contrary to Congress’ clearly articulated policy in favor of competition in telecommunications services.” *Orloff v. FCC*, 352 F.3d 415, 420-21 (D.C. Cir. 2003) (internal quotations omitted), *cert. denied*, 124 S. Ct. 2907 (2004).

4. Of particular relevance to Verizon’s broadband forbearance petition, the flexibility inherent in the “just and reasonable” standard accommodates rates designed to provide *non-cost incentives* to carriers. In *Permian Basin*, for example, the Supreme Court held that a regulatory agency’s “responsibilities [in applying the ‘just and reasonable’ standard] include the protection of *future*, as well as present, consumer interests.” *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 798 (1968) (emphasis added). And the Court further held that, in applying this standard, the agency may discharge its responsibilities to future consumer welfare by “provid[ing] a *useful incentive*” for risky research and development projects that will bear fruit only in the longer term. *Id.* (emphasis added). The D.C. Circuit has similarly concluded “that in setting rates within a just and reasonable range,” a regulatory agency “may consider what future activities it wishes to encourage.” *Natural Gas Pipeline Co. of Am. v. FERC*, 765 F.2d 1155, 1168 (D.C. Cir. 1985).⁸

Here, too, in considering whether Verizon’s forbearance petition meets the standards of section 10(a)(1), the Commission should place significant weight on the longer term consumer benefits of creating investment incentives for the deployment of innovative new technologies.

5. Finally, the discretionary nature of the services at issue is yet another factor that supports the Commission’s reliance on market forces to ensure “just and reasonable” rates. Broadband Internet access is a new service option that consumers are free to purchase or not, depending on whether the service and its price suit them. The introduction of such new services is thus fundamentally a competitive phenomenon, as Verizon has explained in detail in its prior submissions.⁹ As a result, the justness and reasonableness of rates is properly “established by

⁷ Second Report and Order, *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 11 FCC Rcd 20730, ¶ 21 (1996) (finding tariffs unnecessary to ensure just and reasonable rates); *see also* Memorandum Opinion and Order, *Orloff v. Vodafone Airtouch Licenses*, 17 FCC Rcd 8987 (2002) (finding that “haggling” practices did not violate section 201(b)’s “just and reasonable” requirement given market’s competitive nature), *aff’d*, *Orloff v. FCC*, *supra*.

⁸ *See also American Pub. Gas Ass’n v. FPC*, 567 F.2d 1016, 1056 (D.C. Cir. 1977) (holding that an agency must consider incentives in establishing just and reasonable rates).

⁹ *See, e.g.*, Declaration of Alfred E. Kahn and Timothy J. Tardiff at ¶ 13 (Dec. 18, 2001), filed as Exh. B to the Comments of Verizon Communications, *Request for Comments on Deployment of Broadband Networks and Advanced Telecommunications*, Docket No. 011109273-1273-01 (Nat’l Telecomm. & Info. Admin. Dec. 19, 2001).

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what customers are willing to pay for such non-essential services.”¹⁰ In sum, given the discretionary nature of broadband services, the competitive market for those services, and the public benefit of encouraging innovative new technology like FTTP and Fios, the Commission is more than justified in relying on market forces to yield “just and reasonable” rates and terms.

Sincerely,



Edward Shakin

Attachment

cc: Christopher Libertelli
Matthew Brill
Scott Bergmann
Jessica Rosenworcel
Daniel Gonzalez
John Rogovin
John Stanley
Michelle Carey
Thomas Navin
Jeffrey Carlisle
William Maher

¹⁰ Order, *Investigation into Regulatory Alternatives for NYNEX*, 1995 Me. PUC Lexis 19, at *131 (1995); see Notice of Proposed Rulemaking, *Revisions to the Price Cap Rules for AT&T*, 8 FCC Rcd 5205, ¶¶ 3-4 (1993) (concluding there was “substantial reason to consider moving [optional calling plans] from [price caps] to streamlined regulation,” as had “already [been] done for [other] services subject to effective competition,” and noting that “[b]ecause the current rates for their optional plans already appear to be determined by market forces, not the price cap limits, customers are unlikely to be harmed by streamlined regulation”); Order, *Appropriate Regulatory Plan to Succeed Price Cap Regulation for Verizon Massachusetts’ Intrastate Retail Telecom. Svcs.*, 2003 Mass. PUC Lexis 17 (2003) (maintaining pricing flexibility for “discretionary,” or “non-basic,” residential services, such as Directory Listing Service, Busy Line Verification and Busy Line Interrupt, Ringmate Ring ID Service, and Integrated Services Digital Network (“ISDN”), because market forces had yielded “just and reasonable rates for these services”).

NEWS RELEASE



FOR IMMEDIATE RELEASE
July 19, 2004

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Verizon Poised to Deliver First Set of Services to Customers Over Its Fiber-to-the-Premises Network

***‘Verizon Fios’ Initially Will Offer Three High-Speed Data Options
Including Speeds 10 Times Faster Than Current Consumer
Broadband Services and Prices as Low as \$34.95***

Additional Fiber Deployments Under Way in California and Florida

NEW YORK – Verizon customers in Keller, Texas, soon will be the first to receive groundbreaking high-speed Internet services over Verizon’s fiber-to-the-premises (FTTP) network. The company is raising the bar on consumer broadband today by introducing data speeds of up to 30 megabits-per-second (Mbps) in Keller later this summer and in other markets later this year. Prices start at \$34.95 per month.

The company also announced additional fiber deployments that are under way in California and Florida.

The new suite of fiber-optic services will be called Verizon Fiossm (FYE-ose). FTTP technology utilizes fiber-optic connections – instead of copper wire – directly into homes and businesses to enable a broad array of voice, data and video applications.

Fios consists of three consumer Internet access services. At 30 Mbps, the fastest data service is ten times faster than consumer broadband speeds typically available today. Entry and mid-level services at speeds of 5 Mbps and 15 Mbps also beat the speeds and prices of today's consumer broadband.

“Fios will set the new standard for consumer broadband services in America,” said Bob Ingalls, president of Verizon's Retail Markets group. “Our customers will be amazed at the online world that Fios opens to them, as it can make applications like video chat and conferencing, digital movie downloads, and interactive multi-player games a part of their daily lives.”

Ingalls added that Verizon is using the most advanced technology to deliver downstream and upstream speeds that will give customers truly interactive, two-way broadband capabilities.

“The Internet is an increasingly interactive place where quickly sending information is just as important as quickly receiving it,” he said. “From uploading multi-megabit e-mails with photo attachments, to using voice-over-IP services or interacting with the office from home, Fios will give customers unprecedented speed, efficiency and productivity at very competitive prices.”

Each Fios service is available either as part of a bundle of local and long-distance calling services from Verizon or as a stand-alone Internet access service. The company plans a Fios video offering to give consumers an alternative to cable TV in 2005.

Maximum connection speeds and pricing for Fios consumer services are:

- 5 Mbps/2 Mbps for \$34.95 a month as part of a calling package, or \$39.95 a month stand-alone
- 15 Mbps/2 Mbps for \$44.95 a month as part of a calling package, or \$49.95 a month stand-alone
- 30 Mbps/5 Mbps at pricing to be announced later

“In addition to an outstanding array of high-speed access options, we will provide our customers with a first-class installation experience, where a Verizon technician visits the home, sets up the connection and configures the service for you,” said Ingalls.

Each consumer data offer includes the suite of services currently available to Verizon Online DSL customers at no additional charge, including: MSN Premium content; Verizon’s new Broadband Beat entertainment portal optimized for high-speed access featuring news games, streaming video and more; up to nine e-mail accounts with 30 megabytes (MB) of storage for the primary account and an additional 10 MB for each sub-account; address book and calendar; 10 MB personal Web space and a Web site building tool; and access to newsgroups.

Verizon Expands FTTP Deployment in California and Florida

Verizon also has begun building its FTTP network in parts of California, Florida and Texas:

- In California, Verizon plans to pass about 100,000 homes and businesses with FTTP technology in the Huntington Beach area and in other parts of Southern California.
- In Florida, Verizon plans to pass about 100,000 homes and businesses with FTTP technology in the Tampa area and other parts of Hillsborough County.
- In Texas, Verizon plans to pass 100,000 homes in part of the Dallas-Fort Worth metroplex, including Keller, which was announced by the company in May.

Verizon intends to pass 1 million homes and businesses in parts of nine states with fiber by the end of the year.

“Thousands of people can now see for themselves that fiber from Verizon is coming down their streets and heading straight for their doors, and the excitement in these communities is building,” said Paul Lacouture, president of Verizon’s Network Services group.

“Our approach to FTTP recognizes that broadband is a truly interactive technology, with upstream capabilities playing just as key a role in consumers’ online activities as downstream speeds,” Lacouture added. “This is in contrast to other providers’ plans that focus primarily on one-way entertainment applications that meet more limited, short-term customer needs. Our FTTP deployment will help ensure that our network meets customers’ needs today and supports any imaginable requirement that could evolve tomorrow. It will transform the way customers think about and use communications, information and entertainment services.”

A Dow 30 company, Verizon Communications (NYSE:VZ) is one of the world’s leading providers of communications services, with approximately \$68 billion in annual revenues. Verizon companies are the largest providers of wireline and wireless communications in the United States. Verizon is also the largest directory publisher in the world, as measured by directory titles and circulation. Verizon’s international presence includes wireline and wireless communications operations and investments, primarily in the Americas and Europe. For more information, visit www.verizon.com.

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