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August 12, 2004

VIA ECFS

Marlene H. Dortch, Secretary
Office of the Secretary
Federal Communications Commission
Room TW-A325
445 12th St., S.W.
Washington, D.C. 20554

Re: In the Matter of Petition of the Verizon Telephone Companies for Declaratory Ruling, or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided via Fiber to the Premises; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided via Fiber to the Premises; WC Docket No. 04-242

Dear Ms. Dortch:

Please find attached the Opposition of EarthLink, Inc. to Verizon's request for special temporary authority to be filed in the above-referenced proceeding.

Please contact the undersigned if you have any questions regarding this filing.

Respectfully submitted,

John W. Butler
Counsel for EarthLink, Inc.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Petition of the Verizon Telephone Companies for Declaratory Ruling, or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided via Fiber to the Premises	)	
Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided via Fiber to the Premises	)	WC Docket No. 04-242

OPPOSITION OF EARTHLINK, INC. TO VERIZON'S REQUEST FOR SPECIAL TEMPORARY AUTHORITY

EarthLink, Inc. hereby opposes Verizon's Request for "Special Temporary Authority" to "offer the FTTP broadband access service to ISPs on a detariffed basis, subject to individually negotiated contracts until the Commission rules on the merits of Verizon's pending petitions."[1]

I. The Relief Requested Is Far Broader Than The Relief Granted in the Cases Offered In Support of Verizon's Request for Special Temporary Authority.

EarthLink's first objection to the request is that, despite Verizon's claim that the requested temporary authority is narrow in scope, the request is in fact quite broad. Specifically, the request is (1) broad in terms of the services affected, (2) broad in terms

[1] Letter dated August 9, 2004, from Dee May to Marlene H. Dortch, WC Docket No. 04-242, at 2 (hereinafter the "Verizon Letter").

of the time that it could remain in effect, and (3) broad in terms of its potential negative effect on competition in the market for Internet access service.

With respect to the scope of services covered, despite the fact that Verizon opens its request by talking about the service that it will begin next week in a single city, the request on its face applies to all FTTP transmission services that Verizon might offer. Thus, the impact of granting the request would be substantial in light of Verizon's intent to "pass[] one million homes, by the end of this year."[2] That level of impact contrasts sharply with the Commission's careful qualification in the first case that Verizon cites in support of its request, in which the Commission stated that, "[i]n granting Verizon's request, we emphasize that the authority granted by this action is limited to the 'few hundred homes' described in Verizon's request and is limited to the geographic area of this new housing development."[3] The second case cited by Verizon[4] is also readily distinguishable. In that case, the Commission allowed otherwise potentially prohibited cooperation between Verizon and a separate subsidiary in order to provide resold DSL service to a competitive local exchange carrier. The relief requested there furthered competition by allowing an additional resale provider to participate in the relevant market. In contrast, the instant request, if granted, would allow Verizon to discriminate against potential ISP competitors. With respect to both cited cases, in contrast to the situation here, only the timing, not the substance, of the ultimate outcome was at issue.

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[2] Verizon Consolidated Reply Comments in WC Docket No. 04-242 at 1 (August 2, 2004).

[3] *In Re Application of GTE Corporation 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*, Order, 16 FCC Rcd 11810, 11812 (2001), *cited by* Verizon Letter at 2 n.4.

[4] *In Re Application of GTE Corporation 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*, Order, 16 FCC Rcd 14009 (2001).

Finally, the authority granted in the two cited cases allowed Verizon to offer service that it would otherwise have been legally barred from offering. Here, Verizon will offer the service with or without the requested relief.

Second, and related to the number of consumers that could ultimately be impacted by the requested relief, is the period of time for which the authority could be in place. As EarthLink and others have already argued, the Verizon petitions are so facially deficient that they should be promptly and firmly denied. That said, the only statutory restriction on the time that the requested authority could remain in effect is the fifteen-month period allowed by section 10 of the Communications Act for Commission decisions on forbearance petitions. Given the rate of expected FTTP growth projected by Verizon, many millions of customers and potential customers could be affected by the requested relief. Moreover, the "first mover" advantage thus gained by Verizon could take a great deal of time to overcome, even if the Commission did ultimately rule against Verizon's petitions, as it must under the Communications Act.

Third, although Verizon characterizes the scope of the requested Special Temporary Authority as being narrow – the ability to "offer the FTTP broadband access service to ISPs on a detariffed basis, subject to individually negotiated contracts"[5] – in fact the "special" relief sought would appear to give Verizon the entire broad scope of the relief requested in its original petitions. Specifically, it appears that Verizon would argue that granting it the authority to enter into individualized contracts with ISPs without being required to file the terms of those contracts as tariffs would convert Verizon's

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[5] Verizon Letter at 2. Obviously Verizon has no interest in avoiding tariff publication with respect to its mass market customers; use of standard pricing, terms and conditions is the only practicable means of dealing with the millions of customers that Verizon hopes will subscribe to its new service.

offerings to ISPs into "private carriage."[6] Private carriers are not subject to title II of the Act, and therefore have no obligations under sections 201 and 202 of the Act[7] to provide service upon request at reasonable and nondiscriminatory rates. If Verizon were to escape these requirements, it would be free, under the Communications Act at least, to refuse service to a requesting ISP. It is this ability that Verizon rather clearly seeks. If Verizon obtained and exercised that ability, it would mean that customers would have a choice of only one ISP – Verizon – for use over these fiber services. That result would in no way further the public interest.

With respect to a potential Verizon refusal to deal with ISPs on commercially reasonable terms, Verizon's claim that it "has already committed to negotiating contracts with ISPs to provide FTTP broadband access service"[8] should be treated with extreme skepticism. This is apparently a reference to the "agreement" between Verizon and the United States Internet Industry Association (an entity of which Verizon is a member and major financial supporter) that is attached as Exhibit B to Verizon's Consolidated Reply (August 2, 2004). That document has absolutely no legally binding effect, commits

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[6] *See* Verizon Memorandum of Points and Authorities in WC Docket No. 04-242 at 4 (June 28, 2004) (arguing that in the *Cable Modem Declaratory Ruling* "the Commission determined that if cable companies offer broadband transmission to ISPs, they may do so on an individual-case basis rather than a common-carriage basis."). In fact, the Commission made the determination that only one cable company, AOL Time Warner, offered service to ISPs on a private carriage basis. *See Cable Modem Declaratory Ruling* at ¶54. Moreover, Verizon's repeated protestations notwithstanding, it is a legal and logical impossibility that the Commission's decision on this point survives under the Ninth Circuit's decision in *Brand X Internet Service v. F.C.C.*, 345 F.3d 1120 (9th Cir. 2003). That is the case because the court held that the transmission component of cable modem service is a "telecommunications service," which the Communications Act states *shall* be treated as a common carrier service. *See* 47 U.S.C. § 153(44) (emphasis added) ("A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services. . . ."). It is axiomatic that a single service cannot be a common carriage service when offered to one customer, but a private carriage service when offered to another customer.

[7] 47 U.S.C. §§ 201-202.

[8] Verizon Letter at 3.

Verizon to nothing in any event (enforceable or not), and amounts at best to a contract by Verizon with itself.

The Commission may act only on the basis of evidence in the record, and the record is devoid of any indication that Verizon has entered into any contracts with independent ISPs. There is similarly no evidence that any such contracts, if they were shown to exist, contain commercially reasonably terms that would allow ISPs to offer service over the new transmission service at consumer rates that could compete with Verizon in the Internet access market. Absent such evidence, the Commission must give substantial weight to the likely negative effect on competition that would result from relieving Verizon of its statutory duties to provide transmission service to ISPs upon request at reasonable rates and on reasonable terms and conditions.

II. The Commission Has No Statutory Authority to Grant the Relief Requested.

Verizon cites to no statutory or regulatory basis for the "Special Temporary Authority" that it seeks, and there is none. As EarthLink explained in detail in its comments in this proceeding, the only mechanism for granting relief from the statutory requirements that Verizon wishes to avoid is found in section 10 of the Act.[9] That section allows for forbearance from regulations and provisions of the Act applicable to telecommunications services and telecommunications carriers only after the Commission has made the requisite statutory findings, not before. Verizon has acknowledged that statutory requirements (of which tariffing clearly is one under section 203 of the Act[10])

[9] *See* 47 U.S.C. § 160.

[10] 47 U.S.C. § 203.

may be removed only through forbearance.[11] There is simply no mechanism that allows the Commission to "conditionally" or "temporarily" grant a forbearance request while the Commission is still considering the merits of the request, and to do so here would therefore plainly contravene the statute.

III. The Factual Assumptions Underlying the Request for Special Temporary Authority Do Not In Fact Exist.

As is the case with the underlying alternative petitions in this docket, Verizon here relies solely on the Commission's *Cable Modem Declaratory Order* as the justification for granting the requested relief. Specifically, Verizon argues that "[b]ecause Verizon's FTTP broadband access service will be provided under circumstances that parallel those of cable modem service, *i.e.*, over a broadband cable network, Verizon believes that its FTTP broadband access service falls under the same determinations and waivers of the *Cable Modem Declaratory Ruling*."[12] This argument fails for two independent reasons.

First, it bears repeating that the Ninth Circuit in *Brand X* did overturn the fundamental holding of the *Cable Modem Declaratory Ruling*. Verizon clings to a footnote in the court's decision to argue that there is enough left of that ruling to support its petitions, but Verizon is still unwilling to quote and address the full text of the

[11] *See* Verizon Consolidated Reply at 14 n.38 ("Obviously, the Commission should waive only those rules that it has authority to waive, and it should use its forbearance authority to address any statutory requirements as needed."). As EarthLink discussed in its comments in this docket, section 10 is the sole available mechanism for providing relief from both regulations and statutory provisions relating to common carriers. *See* EarthLink Comments at 5-6. It is not necessary for the Commission here to confirm that its waiver authority no longer applies to common carrier regulations following the enactment of the Telecommunications Act of 1996, because the amendments to the Communications Act made by the 1996 Act make it clear beyond question that the *Computer Inquiry* rules regarding unbundling and tariffing of transmission services underlying information services offered by vertically integrated information service providers are now codified in the Communications Act itself. *See* EarthLink Comments at 6-7.

[12] Verizon Letter at 2.

footnote upon which it relies. *See* Verizon Consolidated Reply at 13 (quoting footnote 14 of the *Brand X* opinion, but omitting the introductory phrase of that footnote, which reads: "Because the various petitioners' claims all revolve around the FCC's central classification decision, which we have vacated, we decline . . . .").[13] As discussed above, the court's holding that the transmission component of cable modem service is a common carrier telecommunications service cannot logically or legally coexist with the Commission's finding in the *Cable Modem Declaratory Order* that AOL Time Warner offered broadband transmission to ISPs on a private carriage basis. On the waiver issue, as also discussed above, Verizon acknowledges, as it must, that statutory requirements cannot be "waived," and it is obvious that once a service has been determined to be a telecommunications service, the tariffing requirement from which Verizon seeks relief is imposed directly by the statute, not merely by a Commission rule. Thus, when one scratches below the surface of Verizon's facile reliance on footnote 14 of the *Brand X* opinion, it becomes clear that such reliance is misplaced.

Finally with respect to Verizon's reliance on the overturned *Cable Modem Declaratory Ruling*, Verizon is not as a factual matter similarly situated to the entities addressed in that ruling. Specifically, Verizon by its own admission has not obtained cable franchises or begun to provide video programming over the affected facilities.[14] Thus, even if it were not the case (which it is) that Verizon is relying on a Commission ruling that has in all relevant respects been overturned by the reviewing court, Verizon's

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[13] *Brand X,* 345 F.3d at 1132 n.14. Verizon also fails to acknowledge that *it* was a petitioner in *Brand X*, and that the relief it sought from the court, which was not granted, was the same relief that it seeks here, *i.e.*, to be treated the same as the cable companies. If Verizon is correct about the effect of the court's ruling, that means that the Ninth Circuit has already ruled that Verizon is not entitled to the very relief that it seeks here. Thus, if the Commission were to accept the fundamental premise of Verizon's argument, that acceptance would compel denial of the relief requested.

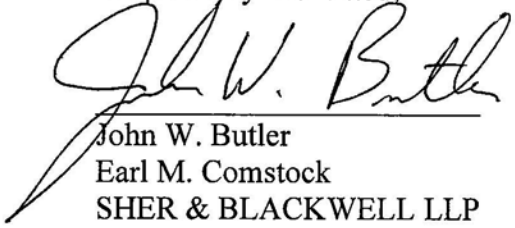
[14] *See* Verizon Consolidated Reply at 11-12.

argument that it falls within the scope of that ruling is in any case incorrect as a simple matter of fact.

IV. Conclusion.

For all of the foregoing reasons, and for the reasons stated in EarthLink's comments in this docket, both the alternative petitions and Verizon's request for Special Temporary Authority must be denied. EarthLink respectfully urges the Commission promptly to enter an order so ruling.

Respectfully submitted,



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