

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

In the Matters of)	
)	
Verizon’s Petition for Waiver of Pricing Flexibility Rules for Fast Packet Services)	WC Docket No. 04-246
)	
)	
Verizon’s Petition for Forbearance Under 47 U.S.C. Section 160(c) from Pricing Flexibility Rules for Fast Packet Services)	

AT&T REPLY COMMENTS

Pursuant to the Wireline Competition Bureau’s Public Notice,¹ AT&T Corp. (“AT&T”) submits these reply comments on Verizon’s petition for waiver of, or alternatively, forbearance from Section 69.729 of the Commission’s pricing flexibility rules and paragraph 173 of the Commission’s *Pricing Flexibility Order*² to permit it to exercise pricing flexibility for certain advanced services that rely on packetized technology, including Frame Relay, Asynchronous Transfer Mode (“ATM”), and other packet-switched services other than DSL (“Advanced Services”), in those areas where

¹ *Pleading Cycle Established for Comments on Verizon’s Petition for Waiver or, Alternatively, Forbearance, to Allow it to Exercise Pricing Flexibility for Fast Packet Services*, WC Docket No. 04-246, DA 04-2116 (July 13, 2004). Verizon filed its Petitions for Waiver and Forbearance, respectively, and Memorandum of Points and Authorities in Support of Verizon’s Petition for Waiver of Pricing Flexibility Rules and Contingent Petition for Forbearance on June 25, 2004 (“*Verizon Mem.*”).

² See *Access Charge Reform*, CC Docket No. 92-262, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd. 14221 (1999) (“*Pricing Flexibility Order*”), *aff’d*, *WorldCom, Inc. v. FCC*, 238 F.3d 449 (2001).

Verizon has already obtained pricing flexibility for traditional special access services.³ In addition to AT&T, only three parties, the New Jersey Division of Ratepayer Advocate (“Ratepayer Advocate”), Sprint Corporation (“Sprint”) and SBC Communications Inc. (“SBC”), filed oppositions or comments.

For the reasons explained by AT&T, the Ratepayer Advocate and Sprint, Verizon cannot obtain pricing flexibility through the particular waivers and forbearance it seeks; neither waiver nor forbearance could remotely be justified in these circumstances or on the bases Verizon asserts; and relief would particularly be inappropriate as the Commission considers closely related issues in an ongoing, comprehensive proceeding. Granting Verizon’s petitions, which would provide it with the principal relief Verizon seeks in the *Dom / Nondom* proceeding, would entirely subvert that broader rulemaking proceeding. Accordingly, the Commission should *deny* Verizon’s petitions. For this reason and those stated in AT&T’s January 7, 2004 Opposition to SBC’s Petition for Waiver, the Commission should *reject* SBC’s comments asking that it be entitled to the relief requested by Verizon.

BACKGROUND

Verizon’s “fast packet” advanced data services were originally in a separate affiliate, known as Verizon Advanced Data Inc. (“VADI”), so that Verizon could provide these services on an unregulated basis. Following the court’s decision in *ASCENT v.*

³ Petition for Waiver of Pricing Flexibility Rules for Fast Packet Services, WC Docket No. 04-246, Verizon Petition for Waiver to Allow it to Exercise Pricing Flexibility for Advanced Services where the Commission has Granted Relief for Traditional Special Access Services (filed June 25, 2004) (“*Verizon Waiver Petition*”).

FCC, 235 F.2d 662 (D.C. Cir. 2001), at Verizon's initiative, these services were transferred to the Verizon operating companies that now offer them under Verizon Tariff F.C.C. No. 20. At Verizon's request, the Wireline Competition Bureau granted Verizon waivers of Section 61.42(g) of the Commission's rules so that it would *not* be required to incorporate these advanced services in price caps in the 2002, 2003 and 2004 annual access filings.⁴ Verizon contends that because it has already made the competitive showing necessary to obtain pricing flexibility for its *traditional* special access services, there is no point to either requiring these *advanced* services to be incorporated into price caps *or* to require additional market-by-market competitive showings in order to obtain the same relief that Verizon has already been granted for traditional special access services. *Verizon Mem.* at 7-8.

ARGUMENT

1. Contrary to Verizon's assertions, Verizon has not and cannot show that it is entitled to pricing flexibility for its advanced packet-switched services via either waiver *or* forbearance. As AT&T showed (at 6-8), the Commission has already indicated that it never intended these advanced or "non-traditional" access services to be governed by the deregulatory processes established by the *Pricing Flexibility Order*, and is instead considering such broad relief as part of the *Dom / Nondom* proceeding.⁵ In addition,

⁴ *Verizon Petition for Waiver of the Commission's Price Cap Rules*, 19 FCC Rcd. 7095 (2004); *Verizon Petition for Interim Waiver of Section 61.42(g) of the Commission's Rules*, 18 FCC Rcd. 6498 (2003); *Verizon Petition for Interim Waiver of Section 61.42(g), 61.38, and 61.49 of the Commission's Rules*, 17 FCC Rcd. 11,010 (2002) (collectively the "*Verizon Interim Waiver Orders*").

⁵ *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, 16 FCC Rcd. 22745, ¶ 22 (2001) ("*Dom / Nondom NPRM*").

Verizon cannot obtain pricing flexibility through waiver or forbearance because advanced packet-switched services were never part of the price cap regime to which pricing flexibility applies (*id.*) and their regulatory status is currently under review in the *Dom / Nondom* proceeding. For both these reasons, Verizon's waiver and forbearance petitions, even if granted, would not and cannot yield the pricing flexibility relief that Verizon seeks.

2. In all events, as both Sprint and the Ratepayer Advocate confirm, Verizon has *not* justified a waiver or forbearance because it has not shown "special circumstances." As Sprint points out (at 2), "[r]ather than allow the Commission to complete its work in that proceeding, Verizon claims it needs immediate relief, ostensibly" because of the unique circumstance that Verizon transferred its services from VADI back to Verizon. But there is nothing "unique" or "special" about this circumstance, as Verizon *knew* that services outside of price caps were not subject to the FCC's pricing flexibility regime. Sprint at 2. Indeed, as the Ratepayer Advocate explains (at 2-3),

Verizon is now asking the Commission to jettison the restrictions associated with the initial [price cap] waiver grant and subsequent grant of additional waivers so that it can be treated as if it provided fast packet services through a separate affiliate or as if it made rate caps filing for the period 2002 thru 2004.

Verizon wants the Commission to relieve it of its business decision and at the same time, exempt Verizon from making market-by-market showings for the advance[d] services in question under the claim there is undue administrative burden. Such claims are not supported by any evidence.... (citations omitted).

Although Verizon contends that it needs flexibility to compete with others' packet-switched services, Verizon has *not* identified a single instance in which the current regulatory structure has impeded its efforts to provide a packet-switched service

or respond to particular competitive circumstances. Verizon has not demonstrated that there is any real need – much less “special circumstances.” *See* AT&T at 14. This is not surprising because Verizon’s own website reveals that it has enjoyed enormous success in the advanced services market even without the pricing flexibility it now seeks. On November 20, 2003, Verizon touted its success in the advanced services enterprise market, stating: “One year after Verizon announced an ambitious plan to expand its high-speed data network nationwide, it has closed over 900 sales with more than 550 of its largest customers, including 65 Fortune 500 corporations as well as many educational institutions.”⁶

3. Furthermore, Verizon never identifies the source of the restrictions on its pricing flexibility (as opposed to the restrictions on the Commission’s provisions for deregulating “traditional special access services”) and thus never justifies why such provisions should be subject to waiver or forbearance. Nor does Verizon point to any overbroad rule or requirement that requires relief in the particular circumstances; indeed, it admits that the “individualized” relief it has already sought and secured is what now prompts these additional petitions for relief. Nor does Verizon indicate why it should not have to provide such services through a separate affiliate, as the Commission has elsewhere required as a condition of permitting pricing flexibility for advanced services. *See* AT&T at 11-14.

⁶ Enterprise Solutions News Release, November 20, 2003, “*Verizon Extends Winning Streak, Signing Over 900 Contracts for Enterprise Advance Services in First Year; Successful Initiative Spurs Ongoing Expansion of Nationwide Network as Company Becomes an ‘All-Distance’ Service Provider*” (available at www.verizon.com).

4. And even if Verizon were entitled to relief from the Commission's provisions for *deregulation*, it has not begun to justify such relief. As AT&T demonstrated (at 11-19), Verizon never presented the detailed market analyses that are required in any forbearance petition demonstrating that competition and consumers would not be harmed if forbearance were granted. It has not, for example, shown that particular markets for the services it identifies are currently competitive and does not address the principal risks to competition (especially through the increased threat of discrimination and, in particular, price squeezes) that the Commission has identified and that are most directly raised by the petitions. Prominently, Verizon's market assertions fail to distinguish between local *and* interLATA advanced services and totally distort the status of competition in local markets. *See* AT&T at 15-24.

Verizon's general claims about competition for advanced services are *grossly insufficient* to justify a waiver or forbearance. Indeed, as the Ratepayer Advocate confirms (at 3), "Verizon's request for forbearance . . . is based upon no empirical evidence" but only on "mere unsubstantiated statements that the requirements of Section 10 are met." Because of Verizon's dominance in the local advanced services market (where the Bells control over 90% of the retail ATM and Frame Relay services -- clear confirmation of their enduring market power⁷), any grant of pricing flexibility would permit Verizon to engage in anticompetitive price squeezes and discriminatory pricing. As AT&T explained (at 20-24), access to last-mile transmission facilities is a

⁷ *See, e.g., Inquiry Regarding Carrier Current Systems, including Broadband over Power Line Systems*, ET Docket No. 03-104, Reply Comments of AT&T Corp. at 2-5 (Aug. 20, 2003) ("*AT&T BPL Reply Comments*").

“necessary input” for a broad array of local and long distance business services, including advanced, high speed packet-based services. Verizon can create an anticompetitive price squeeze by charging rivals a greater margin for access than the ILEC earns on its own integrated end-user services, and thereby deter efficient competitive supply of the retail service. *Id.*

5. Moreover, in addition to the inadequacy of its showing on the status of competition, as Sprint highlights (at 5), Verizon’s petition is plagued by *vagueness* because it asks for relief for Frame Relay, ATM “*and other packet-switched services other than DSL*” without any explanation of what services Verizon currently or might in the future offer that would be subject to this broad relief. Given this vagueness, the Commission cannot make the findings required by Section 10, 47 U.S.C. § 160.

6. As AT&T showed (at 24-27), the Commission should *not* expand pricing flexibility to advanced services at this time, because the Bells’ market behavior following grants of pricing flexibility for traditional special access services confirms the noncompetitive nature of special access markets, and AT&T and others have sought *Mandamus* relief requiring the Commission to revamp that failed regime. The Bells have used their control over special access to reap monopoly rents, put competitors in a price squeeze, and foreclose competitive broadband offerings.⁸ If notwithstanding these

⁸ *AT&T Special Access Petition; Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM No. 10593, Reply Comments of AT&T Corp. at 43-47 (Jan. 23, 2003) & Decl. of Janucz A. Ordover and Robert D. Willig at ¶¶ 66-74; *see also Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, Comments of AT&T Corp. at 4-27 (Mar. 1, 2002) & Decl. of Alan Benway, at ¶¶ 11, 13, 15-17 (In 17 out of 28 markets evaluated, the ILEC special access rate exceeded AT&T’s retail rate for local Frame Relay service, and in almost two-thirds of the markets surveyed, AT&T’s local ATM service rate).

marketplace realities, and the pendency of *Mandamus* and the *Dom / Nondom NPRM*, the Commission were inclined to even consider pricing flexibility for advanced services (which it should *not*), the Commission should be developing a more stringent pricing flexibility test and require Verizon to comply with that. Given the change in market conditions, with numerous competitors exiting local markets since Verizon's pricing flexibility grants, at a minimum, Verizon must be required to show, using a detailed analysis of local market conditions, that such pricing flexibility is justified. To be sure, "Verizon should not be allowed to do an end-run around the Commission rules to gain pricing flexibility in MSAs where it may not have qualified . . ." Sprint at 5. For all these reasons, the Commission should *deny* the relief sought in Verizon's waiver and forbearance petitions.

7. Indeed, the *only* party supporting Verizon is *SBC*, who last year petitioned for a blanket waiver of Section 61.42(f) of the Commission's pricing rules so that it would be able to include any "existing or future packet-switched offerings under price cap regulation in the special access basket, high capacity/DDS service category."⁹ In particular, *SBC* asked to include under price cap regulation its loop-based BPON service and OPT-E-Man service, as well as an undefined set of future services that *SBC* simply identifies as "packet-switched offerings." *SBC* sought expedited treatment to enable it to include "packet-switched" services in price caps in its 2004 annual price cap tariff filing and "ultimately take advantage of the pricing flexibility afforded services subject to price caps." *SBC* Petition at 2-4. As AT&T demonstrated in its January 7, 2004 Opposition to

⁹ *SBC* Communications Petition for Waiver or Section 61.42 of the Commission's Rules, WC Docket No. 03-250 (Dec. 9, 2003) ("SBC Petition").

SBC's waiver petition, SBC failed to meet the criteria for waiver, and like Verizon's petition here, SBC's request was premature in light of the Commission's consideration of the regulatory treatment of ILEC advanced services in the *Dom / Nondom NPRM*.

Moreover, as AT&T demonstrated, grant of SBC's petition would substantially increase the risk of higher special access rates because by dropping the rates for these services it could create "headroom" under the price cap ceiling that can be used to raise prices of other services within the same basket. AT&T Opp. to SBC at 9. Wisely, the Commission declined to act on SBC's petition, thus preventing SBC from including these services within price caps for the 2004 annual filing. Now SBC supports Verizon's petition and asks that the Commission extend "the same relief . . . to all dominant LECs offering advanced services relying on packetized technology." SBC Comments at 2. In particular, SBC urges the Commission to "grant Verizon's waiver request to permit Verizon and other LECs to take advantage of pricing flexibility for their advanced services in areas where that carrier has received pricing flexibility for special access services." To the contrary, for the reasons AT&T has explained, there is no lawful basis for Verizon or any other ILEC to be granted pricing flexibility through a waiver process.

In light of the foregoing, AT&T respectfully suggests that the most prudent course is to *reject* Verizon's unsupported waiver and forbearance requests and comprehensively address the appropriate regulation of packet-switched services through the *Dom / Nondom NPRM* and related proceedings.

CONCLUSION

Thus, for the reasons stated above and in AT&T's Comments, both Verizon's petition for waiver and its petition for forbearance should be *denied*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Tracy L. Rudnicki, hereby certify that on this 13th day of August 2004, the foregoing AT&T Reply Comments were served on the parties listed on the attached Service List.

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