

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

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

REPLY COMMENTS OF VERIZON

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August 13, 2004

SUMMARY

In its *Petition for Waiver* and *Petition for Forbearance*, Verizon seeks to be relieved from the apparent requirement in Section 69.729 of the Rules and Paragraph 173 of the *Pricing Flexibility Order* that it file a duplicative competitive showing in order to gain pricing flexibility for certain advanced services, including ATM and frame relay services, which are currently being provided outside of price caps pursuant to Commission waivers.

AT&T and Sprint, among the three dominant players in the retail fast-packet marketplace, oppose this relief in order to impede a small competitor in a market segment that they dominate from gaining the same pricing flexibility that they themselves enjoy. There is no justification for precluding Verizon from flexibly pricing advanced services, which clearly would benefit consumers by allowing Verizon to compete more effectively with these dominant carriers.

Verizon has met its burden of demonstrating that each of the three elements for seeking forbearance from Commission rules has been met. First, applying any rule that would preclude Verizon from exercising pricing flexibility is unnecessary to prevent unreasonable pricing or practices because the market for advanced services is competitive, and AT&T, MCI and Sprint are by far the dominant players in that marketplace, not Verizon. AT&T's attempt to dissect the market into local and interstate components is erroneous since the business customers that purchase these services overwhelmingly purchase any-distance services for national business operations. AT&T has failed to prove that a price squeeze exists or would even be theoretically possible just because Verizon is allowed pricing flexibility for the fast-packet services that compete with AT&T, but that AT&T itself generally does not buy. Second, consumers will not be harmed by granting forbearance, because the marketplace is competitive. Third, the public interest would be served by granting the waiver because Verizon would be relieved of the duplicative and unnecessary burden

created by strict enforcement of the rules and relief would foster competition in the advanced services marketplace.

AT&T is flatly wrong that advanced services are ineligible for flexible pricing. The FCC has specifically held that packet-switched services such as DSL and frame relay are special access services that are eligible for flexible pricing treatment. Since Verizon is only seeking flexible pricing for these services, there is absolutely no justification for delaying a decision on the request until the FCC considers further and broader relief in the *Dom/Nondom* and *Wireline Broadband* proceedings.

Verizon has also demonstrated that it is entitled to relief in the form of a waiver because of its special circumstances. Strict enforcement of the rule is not in the public interest because (1) it would prevent Verizon from providing more effective competition to the dominant carriers due to its inability to flexibly price these services, and (2) it creates an unnecessary and duplicative burden of having to reprove entitlement to pricing flexibility. Therefore, the Commission should grant either Petition.

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REPLY COMMENTS OF VERIZON

I. INTRODUCTION

The interexchange carriers who oppose Verizon's request for waiver or forbearance have presented no reasons why Verizon should not be allowed to obtain the same pricing flexibility for advanced services such as ATM and frame relay that it has already obtained for other special access services. The interexchange carriers do not use Verizon's advanced services as inputs for their own advanced services. On the contrary, they do sometimes use Verizon's special access services to provide connections to their own ATM and frame relay switches, in addition to using their own last-mile facilities and those of competing carriers, but Verizon's petition does not seek relief for those underlying special access services. Those special access services have already received pricing flexibility. The petition instead seeks relief for advanced services that Verizon provides in competition with the interexchange carriers, but that those carriers themselves generally do not buy. And the interexchange carriers already dominate the fast-packet services at issue, while Verizon has a relatively small market share. By blocking Verizon from obtaining the same type of pricing flexibility for advanced services that they already enjoy, they hope to lock in this dominance and inhibit competition. A grant of Verizon's requests for

forbearance or waiver would improve competition by allowing Verizon to offer the same type of contract arrangements that the competitors offer and that customers demand.

AT&T's arguments that advanced services do not qualify for pricing flexibility because they are excluded from price caps ignores the fact that other local exchange carriers already have obtained pricing flexibility for them, and that the Commission has specifically found that these services are eligible for pricing flexibility.

AT&T's argument that these services should not be granted the same flexibility as other services that are classified as "special access" because the Commission is deciding the regulatory status of advanced services in the broadband proceedings makes no sense. In those proceedings, the Commission is considering whether to give these services *more* streamlined regulatory treatment, including total deregulation. That is no reason to refrain from allowing these services the *same* pricing flexibility that special access services generally are eligible for under the current rules.

The interexchange carriers already offer individualized contracts for advanced services, and Verizon only seeks to do the same. It is clear that grant of either Verizon's *Petition for Waiver*¹ or its *Petition for Forbearance*² would serve the public interest by giving consumers additional choices at competitive prices and by reducing unnecessary regulatory burdens.³

¹ See *Petition for Waiver of Pricing Flexibility Rules for Fast Packet Services* (filed June 25, 2004) ("*Petition for Waiver*") (seeking waiver of 47 C.F.R. §69.729 (2003) and *Access Charge Reform*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, ¶173 (1999) ("*Pricing Flexibility Order*")).

² See *Petition for Forbearance Under 47 U.S.C. § 160(c) from the Pricing Flexibility Rules for Fast Packet Services* (filed June 25, 2004) ("*Petition for Forbearance*") (seeking forbearance from enforcement of 47 C.F.R. §69.729 (2003) and *Pricing Flexibility Order*").

³ See *Memorandum of Points and Authorities in Support of Verizon's Petition for Waiver of Pricing Flexibility Rules and Contingent Petition for Forbearance* (filed June 25, 2004) ("*Memorandum*").

II. VERIZON'S PETITION EASILY SATISFIES THE LEGAL STANDARD FOR FORBEARANCE OR FOR A WAIVER.

The interexchange carriers argue that Verizon has not demonstrated that it has met the test for gaining forbearance from or for a waiver of the Commission's rules.⁴ These carriers, among the three dominant players in the retail fast-packet marketplace, are opposing this relief in order to impede a small competitor from gaining the same pricing flexibility that they themselves enjoy. Verizon seeks relief to allow it to use the same flexibility to offer contract prices that would meet the needs of the large business customers that purchase advanced services. Because the interexchange carriers continue to dominate this market segment, there is no justification for precluding Verizon from flexibly pricing advanced services, which clearly would benefit consumers.

As demonstrated in its *Petitions*, Verizon clearly meets the standards for forbearance from or for a waiver of the Commission's rules.

A. Verizon's Petition Meets The Three Criteria For Forbearance.

1. Enforcement of the Section 69.729(b) of the Rules and Paragraph 173 is Unnecessary to Prevent Unreasonable Pricing. Despite certain claims to the contrary, Verizon established in its *Petitions* that the market for advanced services⁵ is competitive and that pricing flexibility

⁴ See AT&T Opposition to Verizon's Petition for Waiver or, Alternatively, Forbearance to Allow it to Exercise Pricing Flexibility for Fast Packet Services, WC Docket No. 04-246, at 11-12 (filed Aug. 3, 2004) ("AT&T Opposition"); Opposition of Sprint Corporation, WC Docket No. 04-246, at 5-6 (filed Aug. 3, 2004) ("Sprint Opposition"); see also Letter from the State of New Jersey, New Jersey Division of the Ratepayer Advocate, WC Docket No. 04-246, at 3-4 (filed Aug. 3, 2004) ("NJ Ratepayer Advocate Letter").

⁵ As an initial matter, some commenters claim that Verizon's *Petition for Forbearance* is too vague because Verizon uses the language "Frame Relay, Asynchronous Transfer Mode ("ATM"), and other packet-switched services other than DSL" but does not identify the "other" services. Sprint Opposition at 5. On the contrary, Attachment B to Verizon's *Memorandum* clearly identifies these other services. In addition, Verizon's *Petition for Waiver*

would further enhance competition. *Memorandum* at 12, 14, 18. Moreover, Verizon has already made the showing necessary to obtain Phase 1 or Phase II relief in specific geographic areas under the Commission's rules for special access services generally, and has already obtained pricing flexibility relief for the special access transmission services that the long distance carriers sometimes purchase for use as inputs for their own fast-packet services.⁶ Verizon is simply asking for the Commission to recognize that no further showing is necessary in these circumstances for its own fast-packet services that compete with those offered by the interexchange carriers but that the interexchange carriers themselves generally do not buy.

Evidence of market share. Verizon's detailed market share data and other record evidence confirm that enforcement of the pricing flexibility competitive showing requirements is unnecessary and affirmatively harmful. Specifically, Verizon showed that AT&T, MCI, and Sprint collectively "hold 79% and 60% of the Frame Relay and ATM markets, respectively," while "Verizon holds only 4.9% and 5.1% of those same markets."⁷ AT&T never attempts to dispute this market share information.⁸

and *Petition for Forbearance* did not include DSL because the market does not demand pricing flexibility for DSL at this time.

⁶ See *Verizon's Petitions for Pricing Flexibility for Special Access and Dedicated Transport Services*, 18 FCC Rcd 11356 (2003), 18 FCC Rcd 6237 (2003), 17 FCC Rcd 5359 (2002), and 16 FCC Rcd 5876 (2001). Pricing flexibility was granted for the last four MSAs as recently as May 12, 2004. See *Verizon Petition For Pricing Flexibility For Special Access And Dedicated Transport Services*, 19 FCC Rcd 8689 (2004).

⁷ *Memorandum* at 8-9; see *Competition in the Provision of Voice Over IP and Other IP-Enabled Services, Report Prepared for and Submitted by BellSouth, Qwest, SBC, and Verizon, Appendix A: Broadband Competition: May 2004*, WC Docket No. 04-36, at A-19 (filed May 28, 2004) ("*BOC Broadband Report*").

⁸ AT&T's attempt to recast the market between interstate and local services is misleading, and is refuted in pages 6-8, *infra*.

Given this concrete and unrefuted evidence that Verizon does not have a dominant share of the market, and in fact competes with incumbent interexchange carriers that control far greater shares, it would make little sense to deny pricing flexibility to Verizon and allow it for the others. The evidence already available is sufficient to show that enforcement of the rule is unnecessary to protect against unreasonable prices.

What is more, Verizon established that, in addition to competition from IXCs, it faces increased competition from alternative sources of broadband service, including cable modem, fixed wireless, and satellite. *Memorandum* at 12. Although AT&T tries to downplay broadband competition from cable modem, fixed wireless and satellite service providers, AT&T Opposition at 17-19, competition from these alternative providers is, in fact, significant and growing rapidly. As Verizon noted in the *BOC Broadband Report*, the availability and use of alternative last-mile broadband facilities for large businesses is rapidly increasing, just as it is for other segments of the broadband market. For example, Cox's Business Services division estimated that it has already garnered 10-13 percent of the market (based on revenue) in areas where its services are currently available.⁹

In addition, a recent study by In-Stat/MDR cited in the *BOC Broadband Report* found that 41 percent of "enterprises" (businesses with 5,000 or more employees) were using cable modem service, 40 percent were using fixed wireless, and 21 percent were using satellite, in place of or in addition to other alternatives such as high-speed incumbent local exchange carriers ("ILEC") lines.¹⁰ With respect to the "middle market" (businesses with between 500 and 5,000

⁹ *Memorandum* at 12; Cox Communications, presentation before the UBS Media Week Conference (Dec. 11, 2003), available at http://media.corporate-ir.net/media_files/irol/76/76341/presentations/UBS_Warburg_Dec_2.ppt.

¹⁰ K. Burney & C. Nelson, In-Stat/MDR, *Cash Cows Say 'Bye-Bye': The Future of Private Line Services in US Businesses (5+ Employees)* at 19 Table 9 (Dec. 2003).

employees), 32 percent were using cable modem, 29 percent fixed wireless, and 9 percent were using satellite. *Id.* In addition, the study finds that 40 percent of enterprise businesses and 38 percent of middle-market businesses plan to use cable modem in the next 12 months, and that 54 percent and 44 percent, respectively, plan to use fixed wireless within that time. *Id.* at 19, Table 10.

SBC confirms that “[a]dvanced services generally are more competitive than traditional special access services.” In its comments SBC noted,

Cable operators not only currently dominate the provision of mass-market broadband services, as the Commission has in fact recognized, but also small business broadband services. For the larger business markets, the major IXCs (AT&T, WorldCom and Sprint) are the dominant providers of advanced services and collectively account for two thirds of this market in SBC’s region.¹¹

Indeed, even as recently as this past December, AT&T’s Chairman noted that AT&T’s network “touches virtually all Fortune 1,000 companies.” *Memorandum* at 11 (citing the *BOC Broadband Report* at 5).

“*Long distance*” vs. “*local*” markets for advanced services. Contrary to AT&T’s claim (at 19-20), there is not a separate and distinct local-only market for advanced services such as frame relay and ATM in which it claims that Verizon controls a 90 percent market share. The large businesses that buy the vast majority of these advanced services are national in scope and they almost always purchase any-distance services to serve all of their locations throughout the country. *See* attached Declaration of Thomas F. Maguire, ¶¶ 3-5. That is precisely why Verizon and other former Bell companies historically have been small players in this market, because they only recently obtained the authority to provide long distance services. The interexchange

¹¹ Comments of SBC Communications Inc. In Support of Verizon’s Petition For Waiver, WC Docket No. 04-246 at 2 (filed Aug. 3, 2004) (internal citations omitted) (“SBC Comments”).

carriers have long dominated this market segment because they could sell advanced services to these customers that included both the “local” and “long distance” portions as a single service. Likewise, now that Verizon has long distance authority, it can compete by providing the intraLATA (or “local”) portion through the local exchange carrier and the interLATA (or “long distance”) portion through the separate section 272 affiliates. For this reason, it looks like the local exchange carriers have a disproportionate share of the revenues in the “local” market, but this is only because they separately report intraLATA revenues from the interLATA revenues of their long distance affiliates while their integrated competitors treat the entire packet-switched system as “long distance.” In both cases, however, the customer wants, and ultimately receives, any-distance service that connects its locations in many different service areas.

For this reason, it is misleading to try, as AT&T does, to define a separate segment that includes local services only and that excludes the any-distance services (including the local component of those services) that the interexchange carriers sell to these customers as a single integrated service. Moreover, the revenues that can be attributed to local and long distance portions of the advanced services market demonstrate that the advanced services market is national in scope. A January 2004 report by Schwab Soundview Capital Markets notes, “ATM and frame relay services constitute the majority of telecom spending by businesses and nearly 85% of revenue opportunity within ATM and frame relay services is in long distance service offerings.”¹² Because almost no customers purchase purely local Advanced Services, Verizon’s and other ILECs’ provision of only the local portion is immaterial to any market analysis. Moreover, because the businesses that purchase frame relay and ATM are national in scope,

¹² *BOC Broadband Report* at 24 (citing M. Bowen, *et al.*, Schwab Soundview Capital Markets, *AT&T Corp.* at 2 (Jan. 21, 2004)).

Verizon is at a distinct disadvantage in these markets because AT&T, MCI and Sprint are the carriers with national networks that can readily meet these customers' needs.

Special access services. AT&T complains (at 19-20) that competing carriers rely upon Verizon's special access services as an essential input to their own advanced services and that Verizon has used its alleged control over this input to impede competition. But Verizon already has received pricing flexibility relief for the special access services that the interexchange carriers purchase as inputs to their own advanced services, and those special access services are not at issue here.¹³ And as to these special access services, the Commission has already found that Verizon qualifies for pricing flexibility based on the competitive showings already made. The only issue here is whether, when Verizon adds packet switches to these facilities to provide advanced services that compete with the fast packet services offered by the dominant interexchange carriers, a denial of similar pricing flexibility to Verizon is necessary "to ensure against unjust, unreasonable or discriminatory charges or practices"? The answer clearly is no.

Price squeeze. AT&T once again parades out its shop-worn price squeeze argument, claiming that Verizon and other ILECs possess the ability to leverage their "control of special access services" to "exercise market power over broadband services" and "price squeeze its competitors." AT&T Opposition at 17, 20. Even aside from the fact that the underlying special access transmission services that are the focus of AT&T's claims are not at issue here, AT&T provides no evidence that this is likely or even possible. In fact, AT&T has proved the exact

¹³ For the same reasons, AT&T's complaint (at 16) that Verizon has not demonstrated competition in the "wholesale" market for advanced services is incorrect. As AT&T admits, it does not need to purchase Verizon's advanced services to provide its own ATM, frame relay, or other packet-switched services. In fact, the majority of customers who purchase frame relay and ATM are not carriers seeking wholesale inputs for other services but retail enterprise customers seeking frame relay and ATM fast packet applications to transmit their own data. Unlike special access services, such as DS1 and DS3, frame relay and ATM are primarily retail service applications and not wholesale inputs to other services.

opposite: at one point in its pleading, AT&T argues that alleged ILEC dominance in the special access services that are sometimes used by competitors to provide their own fast-packet services has allowed them to charge supra-competitive pricing, forcing its competitors to pay excessive costs. AT&T Opposition at 22. Of course, Verizon has been pricing these special access services under the flexible pricing rules for some time. If AT&T's theory were true, one would expect that Verizon's current market share in advanced services, even with current regulatory constraints,¹⁴ would be quite high. As demonstrated above, however, AT&T, MCI and Sprint continue to dominate this market segment even though AT&T's concocted price squeeze "incentive" has been, according to AT&T, around for quite some time.

On the contrary, it would be virtually impossible for Verizon to engage in anti-competitive conduct like a price squeeze. As AT&T recognizes, Verizon's special access services have been granted pricing flexibility in the geographic areas that would be affected by these petitions. AT&T Opposition at 1-2. The Commission, therefore, has already determined that the market for special access in these areas is competitive, which eliminates the primary requirement for a price squeeze – a finding that the carrier controls an essential facility.¹⁵ As a result, Verizon would be unable to "charg[e] supracompetitive special access rates."¹⁶

¹⁴ AT&T argues, without foundation, that Verizon's offer of advanced services outside of price cap regulation already affords it substantial flexibility. AT&T Opposition at 24. This unabashed rhetoric belies the fact that Verizon may not offer contract pricing options currently made available by its dominant competitors in this market.

¹⁵ *Ameritech Operating Companies Petition for a Declaratory Ruling and Related Waivers to Establish a New Regulatory Model for the Ameritech Region*, 11 FCC Rcd 14028, at ¶ 20, n. 44 (1996) ("A price squeeze can occur when an entity that provides both a retail product and a necessary input for providing that retail product possesses market power over the input. A price squeeze exists when the price of the input product is so high, relative to the price of the retail product, that competing providers of the retail service are unable to make a profit").

¹⁶ AT&T Opposition at 22. AT&T is using this proceeding to again argue that the FCC should eliminate pricing flexibility altogether. This issue is pending in another proceeding and any

A grant of pricing flexibility for advanced services would have no impact on the prices that the interexchange carriers pay for special access as inputs to their own advanced services. Nor would a grant of pricing flexibility for advanced services allow Verizon to create a price squeeze by reducing the margin between the prices for advanced services and the prices for special access. As is shown in the attached declaration, all Verizon is seeking to do is *match* the contract offerings that carriers like AT&T have been using to win customers by undercutting Verizon's prices for advanced services by as much as 40 percent. *See* Declaration, ¶¶ 8-11. These carriers have already established the margin – Verizon needs to price in the same way if it wants to be a meaningful participant in this market.

Moreover, the Commission has set a high burden of proof for those making price squeeze arguments. In the *SWBT Kansas/Oklahoma 271 Order on Remand*, the Commission rejected AT&T's and Worldcom's claims that Southwestern Bell Telephone Company price squeezed competitors through its pricing of what they claimed was an essential input — in that case, unbundled network elements (“UNEs”).¹⁷ The Commission noted that a party alleging a price squeeze must show that the margin between the wholesale and retail rates “doom[s] competitors to failure” or would impede competition. *Id.*, ¶¶ 10, 15. The Commission determined that AT&T and Worldcom failed to prove a price squeeze because the margin between the wholesale and retail rates was sufficient to permit competition and because Worldcom was, in fact, able to enter the market. *Id.*, ¶¶ 18-20. The Commission, commenting on the heavy burden for

consideration of this argument should be dealt with in that proceeding. *See AT&T Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Special Access Services*, RM 10593 (filed Oct. 15, 2002).

¹⁷ *Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, Order on Remand, 18 FCC Rcd 24474, ¶ 1 (2003).

demonstrating a price squeeze, noted that even a demonstration that a price squeeze “dooms competitors to failure” may not warrant denial of an application in all cases. *See id.* ¶ 1.

Here, AT&T’s bare theoretical allegations fall far short of the proof required to demonstrate the likelihood of a price squeeze if Verizon is provided pricing flexibility for its fast packet services so that it can compete more effectively with the prices charged by AT&T and others for these services. AT&T merely hypothesizes that Verizon will have an “opportunity” to implement a price squeeze. AT&T Opposition at 20. But, as shown, Verizon’s ability to compete with AT&T’s contract prices cannot be characterized as a price squeeze. AT&T’s ability to maintain a dominant position in the Advanced Services market further shows that it is not by any stretch of the imagination doomed to failure in this market. Moreover, because it is relatively easy for competitors to deploy these types of advanced services largely with their own facilities, a price squeeze would be untenable because an ILEC would never hope to succeed to harm competition with long term consequences. For all of these reasons, the first prong of the Section 10 forbearance standard is met because denial of pricing flexibility is not necessary to prevent unreasonable pricing.

2. Consumers Will Not Be Harmed If Forbearance Is Granted. Because the advanced services marketplace is competitive, as indicated in Section II.A.1, *supra*, enforcement of the rule at issue is unnecessary. Indeed, if Verizon attempted to raise advanced services prices or attempted to force unreasonable conditions on these offerings, customers could easily move to a competing provider’s advanced services. This ability to change service providers is an effective check to prevent consumer harm. The second prong of the forbearance test is therefore met.

3. Forbearance Should Be Granted Because It Would Serve the Public Interest. Allowing Verizon to offer advanced services pursuant to flexible pricing provisions will increase the ability of one non-dominant competitor in these markets to offer attractive deals to customers. As demonstrated in Verizon's petitions, Verizon has been unable to meet many customer's needs because it is forced to charge tariff prices. Granting forbearance would therefore promote competition and benefit consumers.

Grant of forbearance would also reduce significant regulatory burdens in having to make duplicative competitive showings. Verizon explained in its *Petitions* in detail how such burdens require extensive resurveying of offices and recalculation of revenue showings. *Memorandum at 8.* Indeed, these recalculations are not required to maintain pricing flexibility once it is granted. The commenters ignore these arguments.

Some commenters assert that the Commission should deny the requested relief on the grounds that Verizon made a "business decision" to undo the transfer of the Advanced Services to a separate affiliate. *See, e.g., Sprint at 4.* AT&T incorrectly argues that the Commission has decided that these advanced services can only be flexibly priced if they are offered within a separate affiliate.¹⁸ These arguments ignore the fact that Verizon is not seeking deregulation of its advanced services, as it had when the services were in the separate affiliate, but only the same pricing flexibility that it already has for other special access services. There is no need to maintain these services in a separate affiliate to meet the section 10 forbearance criteria. Further, establishing a separate affiliate as proposed by AT&T would merely add cost, redundant

¹⁸ AT&T Opposition at 5, 10. As SBC has pointed out, simply because the FCC has granted SBC's request for flexible pricing for services that happened to be provided by a separate affiliate does nothing to show that the same relief is not warranted if the services are offered directly. SBC Comments at 3.

personnel and unneeded customer confusion, all of which would hinder Verizon competitively in the marketplace.

Indeed, the Commission is statutorily required to forbear if Verizon proves to the Commission that it meets all three elements of the statutory test. 47 U.S.C. § 160 (stating that “the Commission shall forbear from applying any regulation or any provision of this Act” if the Commission determines the requesting carrier meets the three-prong test). As demonstrated above, Verizon’s *Petition for Forbearance* meets this burden of proof, and therefore the Commission must grant forbearance.

B. Verizon’s Petition Also Meets The Standards For The Grant Of A Waiver.

AT&T and Sprint claim that Verizon has not met the standards for grant of a waiver because it has not demonstrated that it has suffered any harm from compliance with the rule as written. Sprint Opposition at 5; AT&T Opposition at 4-5, 14; *see also* NJ Ratepayer Advocate Letter at 3. These claims are incorrect.

Under the Commission’s rules, a waiver may be granted “for good cause shown.” 47 C.F.R. §1.3. For instance, waiver is appropriate where particular facts would make strict compliance inconsistent with the public interest.¹⁹ Requiring Verizon to duplicate its efforts by again making the competitive showings for Phase I and II relief would undermine the deregulatory aims behind pricing flexibility. The goal of pricing flexibility is to remove regulatory constraints in order to spur competition, *Pricing Flexibility Order*, ¶ 19, yet applying the competitive showings requirement in this case would unnecessarily add regulatory burdens and impede effective competition by Verizon.

Although, as the dominant service providers, AT&T and Sprint would benefit from strict application of the rules, enforcing the competitive showing requirement would disserve the

¹⁹ *See Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

public interest by placing additional regulatory burdens on a new entrant in a marketplace already dominated by interexchange carriers.²⁰ Verizon would have to repeat the survey of collocation in hundreds of offices, re-generate substantial amounts of revenue data, and serve all of its collocators with notice of this process despite the fact that the Commission has determined that the competitive triggers have been met for special access services generally. *Memorandum* at 8. This process would constitute a significant hardship for Verizon, as it struggles to compete in a market segment that is dominated by AT&T, MCI and Sprint. Because enforcement of the competitive showing requirement would disserve the public interest by unnecessarily burdening a new entrant, waiver is an appropriate regulatory tool to relieve Verizon of this burden.

In addition to removing an unnecessary burden, waiver of the competitive showings rules would affirmatively serve the public interest by enhancing competition. Currently, Verizon cannot respond effectively to marketplace developments by offering the customized pricing and discounts and flexible contract terms that the IXC and emerging market participants can and do offer. *ATU Waiver*, ¶ 17 (finding grant of waiver to allow ILEC to offer term and volume discounts would serve the public interest by permitting petitioner to respond to competitive developments in the relevant market). As a result, Verizon has lost business to IXCs who were able to offer customized solutions.

For example, Verizon lost one customer, a mid-sized Long Island bank, because the interexchange carrier was able to offer flexible contract terms which resulted in monthly savings to the customer of \$18,000 over Verizon's tariffed rates. *See Declaration*, ¶ 8. Similarly, Verizon

²⁰ *See ATU Telecommunications (Request for Waiver of Sections 69.106(b) and 69.124(b)(1) of the Commission's Rules*, Order, 15 FCC Rcd 20655, ¶¶ 14-16 (2000) ("ATU Waiver") (citing *Expanded Interconnection with Local Telephone Company Facilities*, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369, 7454 (1992)) (finding exhibited level of competition in Anchorage, AK exchange market sufficient to merit finding of special circumstances).

lost a national financial services brokerage customer because the competing interexchange carrier's total Frame Relay solution was 15-20% lower than Verizon's bid. *See id.*, ¶ 9. Verizon also missed an opportunity to provide service to a global financial services brokerage company because Verizon's total package was non-competitive even with deep discounts on the long distance Frame Relay components. *See id.*, ¶ 10. Verizon likewise missed an opportunity, created by a major financial merger, because it was unable offer customer specific pricing or customized "special assembly" design. *See id.*, ¶ 11. Customer feedback indicated that Verizon's overall pricing was significantly higher (20%-40%) than all of the quotes provided by the interexchange carriers.

In the examples outlined above, Verizon's FCC No. 20 tariff rates for local Frame Relay service were not competitive with the incumbent interexchange carriers' prices. Granting Verizon pricing flexibility, therefore, would enable Verizon to price its services competitively and thereby exert downward pressure on rates. Moreover, by enabling Verizon to provide individualized competitive offers, customers would benefit from greater competition and expanded choices. Thus, granting the requested waiver unquestionably would serve the public interest.

Finally, a waiver is appropriate given the current regulatory environment and pending proceedings. As SBC commented:

It would be counter-intuitive for the Commission to find that it does not serve the public interest to subject Verizon's advanced services to price cap regulation pending the outcome of the broadband proceeding, but require Verizon to include its advanced services under price caps to avail itself of pricing relief for these highly competitive services.

SBC Comments at 3. Given these special circumstances for these advanced services in this marketplace, it would be inequitable and nonsensical to deny Verizon the limited relief requested here.

III. FAST PACKET SERVICES ARE ELIGIBLE FOR PRICING FLEXIBILITY.

AT&T is alone in its argument (at 6-8) that the advanced services at issue in these proceedings are not eligible for pricing flexibility. It argues that “advanced packet-switched loop-based services” entail significant and unique regulatory issues that have never been addressed before. AT&T claims that the Commission intended to restrict pricing flexibility to “traditional special access services,” which do not include advanced services. *Id.* at 7. Based on these assertions, AT&T argues that the regulatory treatment of advanced services should be left to the *Dom/Nondom*²¹ and *Wireline Broadband*²² proceedings. AT&T Opposition. at 8. AT&T is wrong for three reasons.

First, when the FCC first established price cap regulations for local exchange carriers, it excluded the then-existing packet-switched service because it was “not subject to scrutiny as part of our investigation of LEC productivity, and should therefore be excluded.”²³ Rule 61.42(f), however, only excludes those services from price caps as have been or are designated by order. *See* 47 C.F.R. § 61.42(f). AT&T has cited no order that excludes the Advanced Services from price caps. Indeed, services such as ATM and frame relay were not even tariffed at the time of the *LEC Price Cap Order*.

²¹ *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, 16 FCC Rcd 22745 (2001) (“*Dom/Nondom NPRM*”).

²² *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Notice of Proposed Rulemaking, 17 FCC Rcd 3019 (2002).

²³ *Policy and Rules Concerning Rates for Dominant Carriers*, Second Report & Order, 5 FCC Rcd 6786, ¶ 195 (1990) (“*LEC Price Cap Order*”).

The Commission's practices since then confirm this interpretation. The Commission consistently has permitted local exchange carriers to include advanced services, such as the ATM and Frame Relay services that are at issue in these proceedings, within the special access category over the last fourteen years.²⁴ Indeed, the price cap rules allow special access services to be included in the special access basket "as the Commission shall *permit* or require." 47 C.F.R. § 61.42(e)(3)(emphasis added).

AT&T argues (at 13-14) that advanced services are "end-to-end" services with special functionalities that are not the same as "traditional" access services. This is incorrect. All special access services are "end-to-end" – they provide a connection between points within a LATA for communications that continue to a point in another state through inter-LATA facilities or services provided by another carrier or by the customer itself. The only thing that makes these services "advanced" is that they include packet switching functions for routing data to various points. These functions do not put these services in a different price cap category from other forms of special access.²⁵ This is evidenced by the fact that other local exchange carriers who provide these services also include them in the special access price cap service categories. Further, Bell Atlantic incorporated these services in the special access basket prior to the merger with GTE and prior to creation of the VADI affiliate. Even today, Verizon incorporates

²⁴ For instance, the former Bell Atlantic companies, prior to offering services in VADI, provided frame relay and ATM services in the special access pricing basket. We are not aware that this was challenged by any carriers and the Commission permitted such treatment in accordance with its understanding of the rules. Other carriers, such as BellSouth, have treated advanced services similar to the ones in question in the same manner. *See* sources cited in note 29, *infra*.

²⁵ Part 69.4(b) of the Commission's rules establishes categories of access service elements, and the special access category is the only logical place to put these services. They certainly do not belong in the switched access category with circuit-switched services. Moreover, AT&T does not contest that these services are access services. AT&T Opposition at 4 (classifying Verizon's advanced services as "advanced or 'non-traditional' access services").

advanced services in the special access for the state of New Jersey.²⁶ Therefore, these fast-packet services are properly includible with other special access services that have been granted pricing flexibility.

Second, AT&T is also flatly wrong that the regulatory flexibility adopted in the *Pricing Flexibility Order* was limited to only a subset of “traditional” special access services. The *Pricing Flexibility Order* specifically adopted rules that allowed for flexible pricing for all services within the “trunking basket,” which at that time included those services that are identified as special access services.²⁷ LECs were allowed to geographically deaverage rates for services in the trunking basket and to introduce new services on a streamlined basis. *Pricing Flexibility Order*, ¶¶ 37, 59. The FCC also allowed price cap LECs to seek additional regulatory flexibility for “special access and dedicated transport services” by proving that certain triggers were met, as well as for other switched access services.²⁸

Nowhere in this order, or in the rules themselves, does the FCC even refer to “traditional special access services,” and nowhere is there any such limitation on the type of special access

²⁶ Verizon’s operating company in New Jersey still incorporates its advanced services in the special access basket because the New Jersey Board of Public Utilities did not approve the transfer of the advanced services assets to the VADI affiliate.

²⁷ *Pricing Flexibility Order*, ¶ 4. Special access services were segregated in their own special access service basket pursuant to the CALLS plan. *Access Charge Reform, Sixth Report & Order*, 15 FCC Rcd 12962, at ¶ 172 (2000).

²⁸ The FCC established two phases of flexible regulation that could be sought. Under Phase I, the price cap LEC can provide services with volume and term discounts and through contract tariffs. Under Phase II, price cap LECs may price services without the rate structure requirements of the price cap rules, without price cap regulation, and pursuant to tariff revisions filed on one day’s notice. 47 C.F.R. § 69.729. Separate competitive showings, or triggers, were established for each phase of flexible regulatory relief, and for each of the following categories of services: (1) dedicated transport and special access service other than channel terminations, (2) channel terminations, and (3) common line, traffic-sensitive and tandem-switched transport services. *Id.* §§ 69.709-713. The FCC has not yet established Phase II triggers for the third category of services.

service that may be eligible for pricing flexibility. In fact, the FCC specifically recognized in the *Pricing Flexibility Order* that the FCC had declared certain packet-switched services, such as DSL, to be special access, and that DSL was eligible for pricing flexibility if the triggers were met. *Pricing Flexibility Order*, at ¶ 100, n.280. In 2001, the FCC specifically found that frame relay services were properly regulated under price caps and were eligible for pricing flexibility.²⁹ The FCC also recognized that advanced services were eligible to be regulated under the price cap regime when it granted Verizon several waivers³⁰ to avoid rolling the very same advanced services at issue here into price caps as would have been required by the new service rule, Section 61.42(g).³¹ AT&T neither cites any order or rule in support of its bare allegation³² nor

²⁹ See *BellSouth Petition for Pricing Flexibility for Special Access and Dedicated Transport Service*, 16 FCC Rcd 18174, ¶ 15 (2001) (“2001 BellSouth Order”); See also *BellSouth Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, 15 FCC Rcd 24588 (2000). AT&T’s argument that the issue was not addressed in the *2001 BellSouth Order*, because no party had challenged BellSouth’s decision to include advanced services in its price cap tariffs, is just wrong. WorldCom specifically argued that the Bureau had no power to grant pricing flexibility for packet switched services because the Commission had excluded them from price caps. The full Commission rejected this argument and found that “these services properly have been regulated under price caps and are eligible for pricing flexibility under the Commission’s rules.” *2001 BellSouth Order* at ¶ 15. Moreover, even if no party challenged the annual access tariff filings in which BellSouth included these services in the price cap indexes, the Commission’s staff certainly reviews all annual access tariff filings and would have been vigilant enough to exclude ineligible services from price caps.

³⁰ AT&T argues that waiver or forbearance is not justified because the constraints that Verizon seeks to lift were created by Verizon’s previous requests to keep these services out of price caps and that principles of equitable estoppel should bar further relief. AT&T Opposition at 9-10. However, there is no principle of estoppel that prevents Verizon from seeking relief on a step-by-step basis. Indeed, the principle of equitable estoppel is irrelevant in this context. “Under [the doctrine of equitable estoppel], a party is deemed to have agreed to a particular course of action – despite the lack of an explicit agreement to that effect – where that party acted in a particular manner, intended another party to rely on its actions, and the other party reasonably relied on that conduct to its detriment.” See *Bell Atlantic-Delaware, Inc. v. Global NAPs, Inc.*, 15 FCC Rcd 20665, ¶ 17 (2000). Here, AT&T has not shown that it (or any other party) either relied on Verizon’s requests for waiver or that its reliance was detrimental.

³¹ See, e.g., *Verizon Petition for Interim Waiver of Section 61.42(g) of the Commission’s Rules*, 18 FCC Rcd 6498, ¶ 8 (2003). AT&T never challenged any of Verizon’s interim waivers on the

identifies this contrary precedent when it asserted that the FCC has never addressed pricing flexibility for “advance packet-switched loop-based services.”

Third, AT&T’s blatant attempt to gain for itself a special market advantage in advanced services is underscored by its argument that the FCC should delay consideration of pricing flexibility until the *Dom/Nondom* and *Wireline Broadband* proceedings are concluded.³³ The relief that is requested in the instant petitions is different from, and far less, than is contemplated in those rulemaking proceedings. Here, Verizon is only seeking to gain the same pricing flexibility that it has already obtained for other special access services under price caps. At most, Phase I relief would permit Verizon to offer advanced services pursuant to contract tariffs, something that the dominant market players (AT&T and MCI) are already allowed to do, but it

basis that a waiver was unnecessary because the services were ineligible for price cap treatment. In fact, AT&T acknowledges that Bell Atlantic provided advanced services subject to price cap rules prior to the merger. AT&T Opposition at 6.

³² AT&T quotes a passage in the *Dom/Nondom* NPRM that distinguishes advanced services from “traditional access services” for purposes of defining a “larger business market” for advanced services. AT&T Opposition at 7. While the passage quoted is somewhat cryptic, it should be noted that an NPRM is not a Commission order, but rather a proposal that seeks comments in order to form the basis of an order and/or rules. *See, e.g., AT&T Communications, Inc., Apparent Liability for Forfeiture*, 16 FCC Rcd 16596, ¶ 8, n. 26 (2001) (“The purpose of an NPRM is not to promulgate rules or state policy, but to stimulate comments and debate to aid in the rulemaking process”); *Radio-Television News Directors Association v. FCC*, 184 F.3d 872, 886 at n. 16 (D.C. Cir. 1999) (citing *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 845 (1986)) (stating that “[t]he NPRM does not bind the FCC, which is free to adopt a contrary position after consideration of public comments”). Furthermore, the NPRM does not say that advanced services are not special access services ineligible for pricing flexibility. In fact, in describing the existing regulatory structure for advanced services, the Commission stated that the BOCs and GTE are subject to price cap regulation, including pricing flexibility for interstate access services as competition develops. *See Dom/Nondom NPRM*, ¶ 37. This is the regulatory structure from which the Commission is considering granting further relief for advanced services by deregulating these services entirely.

³³ AT&T claims that the request for waiver is a broad attack on “the general rules” and does not justify a waiver. AT&T claims that these issues would better be addressed in the *Dom/Nondom* and *Wireline Broadband* proceedings. AT&T Opposition at 10.

would still be subject to Title II prohibitions against unreasonable pricing and practices and unreasonable discrimination, including specific constraints adopted in the *Pricing Flexibility Order* (see, e.g., ¶ 129), and it would still be subject to Section 208 complaints. The *Dom/Nondom* and *Wireline Broadband* proceedings, on the other hand, may go well beyond this type of pricing flexibility to permit complete elimination of Title II regulation for advanced services. Therefore, there is no reason to delay, until those rulemaking proceedings are completed, a decision to grant the more limited relief that Verizon is seeking here.

IV. CONCLUSION

For the foregoing reasons, the Commission should grant Verizon's *Petition for Waiver* or, alternatively, Verizon's *Petition for Forbearance*.

Respectfully submitted,

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Dated: August 13, 2004