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

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SEP 15 2006

In the Matter of )  
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Verizon's Petition for Waiver )  
of the Commission's Rules to Treat )  
Unrecovered Local Number Portability Costs )  
as Exogenous Costs under Section 61.45(d) )  
)

CC Docket No. 95-116

**ORDER**

**Adopted: September 14, 2006**

**Released: September 14, 2006**

By the Chief, Wireline Competition Bureau

**I. INTRODUCTION**

1. In this Order, we grant in part a petition filed by Verizon seeking a waiver of section 61.45(d) of the Commission's rules to permit it to treat its unrecovered carrier-specific local number portability (LNP) costs as an exogenous cost adjustment and to recover LNP costs from end users via the end-user common line (EUCL) charge.<sup>1</sup>

**II. BACKGROUND**

2. Section 251(b)(2) of the Communications Act of 1934, as amended (Act), requires all local exchange carriers (LECs) "to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission."<sup>2</sup> Number portability allows residential and business telephone customers to retain, at the same location, their existing telephone numbers when switching from one telephone service provider to another.<sup>3</sup> Congress recognized that number portability was necessary in developing competition for local exchange services because customers are reluctant to switch carriers if they must also change their telephone numbers.<sup>4</sup>

<sup>1</sup> Verizon's Petition for Waiver of the Commission's Rules to Treat Unrecovered Local Number Portability Costs as Exogenous Costs under Section 61.45(d), CC Docket No. 95-116, at 1-2 (filed July 6, 2006) (Petition) (citing 47 C.F.R. § 61.45(d)). Verizon seeks relief on behalf of "the regulated, wholly owned subsidiaries of Verizon Communications Inc." (hereinafter Verizon). Petition at 1 n.1. A public notice established the time frames for filing comments in this proceeding. *Comments Sought on Verizon's Petition for Waiver to Treat Certain Local Number Portability Costs as Exogenous Costs*, CC Docket No. 95-116, 21 FCC Rcd 7848 (Wireline Comp. Bur. July 11, 2006); Erratum (July 14, 2006).

<sup>2</sup> 47 U.S.C. § 251(b)(2).

<sup>3</sup> See 47 U.S.C. § 153(30).

<sup>4</sup> *Telephone Number Portability*, CC Docket No. 95-116, Third Report and Order, 13 FCC Rcd 11701, 11702-03, para. 3 nn.4, 7 (1998) (*Cost Recovery Order*) (citing Congressional history), *aff'd on recon.*, Memorandum Opinion and Order on Reconsideration and Order on Application for Review, 17 FCC Rcd 2578 (2002) (*Order on Reconsideration and Review*).

3. Section 251(e)(2) of the Act requires that the costs of establishing number portability be borne by all telecommunications carriers on a "competitively neutral basis" and vests the Commission with authority to establish a cost recovery system that satisfies this requirement.<sup>5</sup> In the 1998 *Cost Recovery Order*, the Commission adopted the rules and standards that govern the recovery of carrier-specific costs associated with providing LNP.<sup>6</sup> The Commission determined that an exclusively federal cost recovery mechanism for number portability would enable it to satisfy the competitive neutrality mandate, and it adopted a special pricing mechanism that it found to be consistent with this mandate.<sup>7</sup>

4. On March 31, 2006, AT&T filed a petition seeking a waiver of section 61.45(d) of the Commission's rules in order to treat the unrecovered LNP costs of certain AT&T LECs as exogenous and to recover these costs from end users through the EUCL charge.<sup>8</sup> AT&T explained that the Commission had approved initial implementation costs to be recovered over a five-year period from 1999-2004.<sup>9</sup> At the time of its tariff filing in 1999, AT&T forecast the number of access lines it expected to serve over the five-year recovery period to arrive at a monthly LNP end-user charge per line.<sup>10</sup> The number of access lines that AT&T actually served over that time, however, declined in an unprecedented manner, and the

<sup>5</sup> 47 U.S.C. § 251(e)(2) ("The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission."). In the *Number Portability First Report and Order*, the Commission interpreted the statutory requirement of competitive neutrality and adopted a mechanism for recovering the costs of providing interim number portability. *Telephone Number Portability*, CC Docket No. 95-116, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8352, 8415-24, paras. 121-40 (1996) (*Number Portability First Report and Order*) (subsequent history omitted). In the associated further notice of proposed rulemaking, the Commission also tentatively concluded that price-cap LECs should be permitted to treat their long-term number portability costs as exogenous and to recover them through price-cap adjustments. *Id.* at 8466, para. 230.

<sup>6</sup> See generally *Cost Recovery Order*, 13 FCC Rcd 11701. Specifically, the Commission determined that it was competitively neutral to allow incumbent LECs to recover their carrier-specific LNP costs through a tariffed and levelized monthly end-user charge, which could end no later than five years after it began. *Id.* at 11776-77, paras. 142-43; see 47 C.F.R. § 52.33(a)(1). The subsequent *Cost Classification Order* provided additional LNP cost recovery guidelines to incumbent LECs, consistent with the Commission's narrow definition of what costs qualified for special recovery through the federal LNP charge. See generally *Telephone Number Portability Cost Classification Proceeding*, CC Docket No. 95-116, Memorandum Opinion and Order, 13 FCC Rcd 24495 (Com. Car. Bur. 1998) (*Cost Classification Order*), *aff'd*, *Order on Reconsideration and Review*, 17 FCC Rcd 2578. As a result of the directives that rates be levelized and recovered over five years, incumbent LECs were obliged to estimate their total initial implementation costs, project the number of access lines they anticipated would be assessed end-user charges during the recovery period, and divide the latter into the former. In this way, each incumbent LEC arrived at the per-line monthly LNP charge that it would assess on its end users every month for a five-year period.

<sup>7</sup> *Cost Recovery Order*, 13 FCC Rcd at 11720, para. 29. The Commission also determined that incumbent LECs' number portability costs would not be subject to jurisdictional separations. *Id.* In addition, the Commission concluded that it likely would not be competitively neutral to allow recovery of such costs in interstate access charges because the costs would flow through to charges imposed on interexchange carriers (IXCs). See *id.* at 11773, para. 135.

<sup>8</sup> *Petition of AT&T Inc. for Waiver of the Commission's Rules to Treat Certain Local Number Portability Costs as Exogenous Costs Under Section 61.45(d)*, CC Docket No. 95-116, Order, 21 FCC Rcd 8076, para. 1 (rel. July 10, 2006) (*AT&T LNP Exogenous Cost Waiver Order*), appeal docketed, No. 06-3731 (3d Cir. Aug. 14, 2006). The EUCL is a flat-rated charge imposed on end users to recover the interstate-allocated portion of local loop costs. See 47 C.F.R. § 69.152. The EUCL is also referred to as the subscriber line charge (SLC). The residential and single-line business SLC is currently capped at \$6.50 per line. See *id.* § 69.152(d)(1)(D).

<sup>9</sup> *AT&T LNP Exogenous Cost Waiver Order*, 21 FCC Rcd at 8078, para. 5.

<sup>10</sup> *Id.*

total end-user charges it collected at the end of its recovery period amounted to \$211 million less than it had anticipated it would recover.<sup>11</sup> AT&T asserted that its unrecovered LNP costs were incurred as the result of a government mandate to provide LNP and were outside AT&T's control, and that these costs were proper costs that were not recovered elsewhere.<sup>12</sup> On July 10, 2006, the Commission adopted the *AT&T LNP Exogenous Cost Waiver Order*, which granted AT&T's petition for a waiver.<sup>13</sup> The Commission found that AT&T's LNP costs qualified for exogenous treatment and that recovery of those costs through the EUCL charge met the statutory requirement for competitive neutrality.<sup>14</sup>

5. On July 6, 2006, Verizon filed a petition seeking a waiver of section 61.45(d) of the Commission's rules to permit Verizon to treat unrecovered LNP costs as exogenous costs "and to recover those costs through a small addition to its end-user common line charge."<sup>15</sup> In 1999, Verizon's LNP tariffs went into effect seeking to recover its initial LNP implementation costs over a five-year period ending in 2004.<sup>16</sup> Similar to AT&T's circumstances, Verizon experienced an unexpected and unprecedented overall decline in access lines.<sup>17</sup> Because fewer lines were served, the end-user charges collected by Verizon amounted to substantially less than it had projected it would collect at the time it made its tariff filings. Specifically, Verizon asserts that its LECs recovered \$100 million less than it had projected.<sup>18</sup> It argues that it is similarly situated to AT&T for purposes of being allowed to recover its remaining LNP costs and seeks relief that is similar to what the Commission granted to AT&T.<sup>19</sup>

### III. DISCUSSION

6. We find that Verizon has demonstrated special circumstances warranting a waiver of section 61.45(d). Section 1.3 of the Commission's rules provides the Commission with the authority to grant waivers "if good cause therefore is shown."<sup>20</sup> Courts have interpreted this rule as requiring petitioners to demonstrate that special circumstances warrant a deviation from the general rule and that such a deviation will serve the public interest.<sup>21</sup> We find that it is in the public interest and consistent with Commission precedent to waive this rule and allow Verizon to treat as exogenous its unrecovered LNP implementation costs and to recover those LNP costs from end users through the EUCL charge.

7. To qualify for exogenous cost treatment, a carrier must show that the costs at issue were beyond the control of the carrier and were proper costs that have not been recovered elsewhere.<sup>22</sup> In the *AT&T LNP Exogenous Cost Waiver Order*, the Commission found that AT&T satisfied both of these

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<sup>11</sup> *Id.* at 8078, para. 6.

<sup>12</sup> *Id.* at 8082-84, paras. 13-15.

<sup>13</sup> See generally *id.*

<sup>14</sup> *Id.* at 8080-84, paras. 10-15.

<sup>15</sup> Petition at 1-2.

<sup>16</sup> *Id.* at 7-8.

<sup>17</sup> *Id.* at 8-11.

<sup>18</sup> *Id.* at 12.

<sup>19</sup> *Id.* at 4; see generally *AT&T LNP Exogenous Cost Waiver Order*, 21 FCC Rcd 8076.

<sup>20</sup> 47 C.F.R. § 1.3.

<sup>21</sup> *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

<sup>22</sup> See *LEC Price Cap Order*, 5 FCC Rcd at 6807, para. 166.

conditions and thus qualified for exogenous treatment of its unrecovered LNP costs.<sup>23</sup> Verizon argues that it also meets these conditions for the same reasons as AT&T did.<sup>24</sup> We agree that its unrecovered LNP costs qualify for exogenous cost treatment.<sup>25</sup>

8. Like AT&T, Verizon implemented LNP and incurred related costs as a result of government mandates set forth in the Act and Commission rules, and given the Commission's detailed LNP requirements, the amount of the costs were outside Verizon's control.<sup>26</sup> The New Jersey Division of the Rate Counsel (NJRC) asserts that Verizon's under-recovery was not beyond its control and does not constitute an exogenous event; however, the NJRC fails to refute that the costs at issue were triggered by government mandates.<sup>27</sup> Further, as in the case of AT&T, Verizon's costs were determined to be carrier-specific costs directly related to the implementation of LNP, and the LNP end-user charge was the sole federal cost recovery mechanism provided by the Commission to recover these costs.<sup>28</sup> Accordingly, Verizon's costs are proper costs that have not been recovered in access charges or elsewhere and thus qualify for exogenous treatment.

9. Verizon has demonstrated that allowing this recovery will serve the public interest and that good cause exists for granting the requested waiver. Congress determined that implementation of LNP is in the public interest and required LECs to provide LNP in accordance with requirements prescribed by the Commission. To implement this Congressional directive, Verizon incurred costs directly related to the implementation of LNP, and its LNP tariffs to recover these costs went into effect after being scrutinized by the Commission under stringent cost recovery standards.<sup>29</sup> In the *Cost Recovery Order*, the Commission determined that a five-year cost recovery period was appropriate after

<sup>23</sup> *AT&T LNP Exogenous Cost Waiver Order*, 21 FCC Rcd at 8082-84, paras. 13-15.

<sup>24</sup> Petition at 7, 13.

<sup>25</sup> Petition at 3-13. Verizon's LECs are regulated under the Commission's price cap regime, set forth in Part 61 of its rules. Under these rules, a carrier's rates are limited by a price cap index (PCI) that may be adjusted from time-to-time. See 47 C.F.R. §§ 61.41-61.49. One of the ways PCIs may be adjusted is through exogenous cost adjustments. Exogenous costs generally are triggered by administrative, legislative, or judicial action beyond the carrier's control that have not been recovered elsewhere. See *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786, 6807, para. 166 (1990) (*LEC Price Cap Order*), recon. granted in part and denied in part, Order on Reconsideration, 6 FCC Rcd 2637 (1991). Section 61.45(d) provides that exogenous costs "shall be limited to those cost changes that the Commission shall permit or require by rule, rule waiver, or declaratory ruling." 47 C.F.R. § 61.45(d). These costs are created by such events as: the expiration of amortizations; changes in the Uniform System of Accounts; separations changes; changes in universal service fund obligations; the reallocation of regulated and nonregulated costs; tax law changes; retargeting the PCI for price cap carriers taking advantage of the low-end adjustment mechanism; inside wire amortizations; and the completion of amortization of equal access expenses. *Id.* § 61.45(d)(1); *LEC Price Cap Order*, 5 FCC Rcd at 6807, para. 166; see also *Access Charge Reform*, CC Docket No. 96-262 et al., First Report and Order, 12 FCC Rcd 15982, 16147-48, paras. 379-80, clarified on recon., Order on Reconsideration, 12 FCC Rcd 10119, 10120-21, paras. 4-6 (1997), rev. denied sub nom. *Southwestern Bell Telephone Co. v. FCC*, 153 F.3d 523 (8th Cir. Aug. 19, 1998). Verizon seeks a waiver of this rule because LNP costs are not listed in the rules as costs to be accorded exogenous treatment. See 47 C.F.R. § 61.45(d)(1).

<sup>26</sup> See *id.* at 7.

<sup>27</sup> NJRC Comments at 3-6, 11 (filed July 19, 2006) (NJRC Comments). The Commission has previously determined that unrecovered LNP costs may receive exogenous treatment. *AT&T LNP Exogenous Cost Waiver Order*, 21 FCC Rcd at 8082-84, paras. 13-15.

<sup>28</sup> See generally *Long-Term Number Portability Tariff Filings*, CC Docket No. 99-35, Memorandum Opinion and Order, 14 FCC Rcd 11883 (1999) (*LNP Tariff Investigation Order*). 47 C.F.R. § 52.33(a)(1).

<sup>29</sup> *LNP Tariff Investigation Order*, 14 FCC Rcd 11883.

balancing consumers' needs against carriers' interests.<sup>30</sup> As in the case of AT&T, an unprecedented and unforeseen decline in access lines precluded Verizon from recovering a significant portion of its allowed implementation costs within that period.<sup>31</sup> As the Commission has previously found, allowing a limited additional recovery is consistent with the policy underlying the original five-year rule.<sup>32</sup> Accordingly, we find that special circumstances warrant a deviation from the rule in order to permit recovery of these costs through an exogenous adjustment to EUCL charges in a manner that does not cause any EUCL to exceed its present cap.<sup>33</sup> The public interest will be served by permitting Verizon to recover these costs over a brief period in a manner that is competitively neutral and results in reasonable charges.<sup>34</sup>

10. Consistent with the Commission's findings in the *AT&T LNP Exogenous Cost Waiver Order*, we find that Verizon, through an exogenous cost filing, may seek recovery of its allowed LNP implementation costs that it was unable to recover during the five-year recovery period.<sup>35</sup> Verizon's circumstances, however, differ somewhat from AT&T in ways that impact how the recovery may be implemented.<sup>36</sup> Verizon does not have room between its various EUCL charges and the EUCL cap in all its service territories.<sup>37</sup> In those study areas where it does have room between its EUCL and the EUCL cap, Verizon states that the EUCL increases will vary and estimates that such increases will be no higher

<sup>30</sup> *Cost Recovery Order*, 13 FCC Rcd at 11776-77, paras. 143-44.

<sup>31</sup> Petition at 5-12 (explaining the unprecedented decline in access lines precluded Verizon's recovery of certain LNP costs). We disagree with the NJRC's contention that Verizon has not provided sufficient information in this regard. See NJRC Comments at 9-10.

<sup>32</sup> *AT&T LNP Exogenous Cost Waiver Order*, 21 FCC Rcd at 8084, para. 16 (citing *Cost Recovery Order*, 13 FCC Rcd at 11776-77, paras. 143-44).

<sup>33</sup> Accordingly, we disagree with NJRC's assertions that Verizon failed to establish special circumstances or that relief should be denied because other carriers were able to predict and recover their LNP costs within the five-year recovery period. NJRC Comments at 5-7, 11-12.

<sup>34</sup> See 47 C.F.R. § 61.45(d). For these reasons we also waive the requirement that these costs be recovered exclusively through a separate monthly charge to be assessed over no more than five years. See 47 C.F.R. § 52.33(a).

<sup>35</sup> To verify Verizon's cost recovery, the Commission will require Verizon to file tariffs to make the exogenous adjustment. In those filings, Verizon must demonstrate the precise amount of LNP costs in fact recovered through end-user charges it imposed, its precise line counts over the recovery period, and thus the amount of unrecovered implementation costs. We note that, consistent with the Commission's decision in the *AT&T LNP Exogenous Cost Waiver Order*, Verizon has agreed to forego recovery for the disparity between treatment of PBX lines for LNP and EUCL purposes. Specifically, PBX lines qualify for 9 LNP end-user charges, but only one EUCL. Compare 47 C.F.R. § 52.33 with 47 C.F.R. § 69.152. Accordingly, Verizon has agreed to forego additional recovery for 8 of 9 PBX lines upon which LNP end-user charges originally were imposed. See Letter from Donna Epps, Vice President, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 95-116 (filed July 31, 2006) (Verizon July 31 *Ex Parte* Letter). We reject the NJRC's assertions that Verizon failed to adequately track its cost recovery during the five-year period and should have requested relief prior to its expiration. NJRC Comments at 5-6. But see Verizon Reply at 4 (denying that Verizon did not monitor its cost recovery). We also reject the NJRC's assertion that Verizon should be required to demonstrate where line losses occurred and recover its under-recovery on a state-by-state basis. NJRC Comments at 6-7. We grant Verizon the right to make an exogenous cost adjustment in accordance with the Commission's exogenous cost rules and consistent with this Order.

<sup>36</sup> AT&T's service areas were all below the EUCL cap, and AT&T's exogenous LNP recovery did not cause any EUCL increase to exceed the cap. In Verizon's case, some of its higher-cost service areas are presently at the EUCL cap, and Verizon seeks recovery through the EUCL where there is room under the cap in order to avoid exceeding it.

<sup>37</sup> Petition at 15.

than \$0.21 per month to primary residential lines.<sup>38</sup> In those study areas where it does not have any room between its EUCL and the EUCL cap, or has insufficient room to recover the applicable amount in the recovery period, full recovery cannot be granted based on the terms of the *AT&T LNP Exogenous Cost Waiver Order* because the application of the Commission's exogenous cost rules would result in LNP costs being recovered from interexchange carriers through the Presubscribed Interexchange Carrier Charge (PICC) and Carrier Common Line Charge (CCL).<sup>39</sup> As Verizon recognizes, the *Cost Recovery Order* bars the recovery of LNP costs from other carriers as a violation of the competitive neutrality requirement.<sup>40</sup> Accordingly, to the extent that the exogenous cost mechanism would result in passing these LNP costs through to other carriers via the PICC and CCL charges, such an outcome would be inconsistent with the Commission's prior findings. To address this, Verizon requests a waiver to allow the suppression of the PICC and CCL charges in the amount they would be increased as a result of the proposed exogenous adjustment to recover LNP costs.<sup>41</sup> We grant Verizon's request and direct Verizon to suppress any increases to its PICC and CCL charges to the extent such increases result from the exogenous cost adjustment allowed in this Order.

11. We reject the NJRC's contention that Verizon's LNP under-recovery should be offset by any cost reductions that could result from numerous other events and changes in the telecommunications marketplace that the NJRC asserts may be categorized as exogenous events.<sup>42</sup> Exogenous cost treatment

<sup>38</sup> Petition at 2. Verizon may file its exogenous adjustment prior to the next annual access filing for recovery over the remainder of the 2006-07 access period. Verizon will be required to remove this adjustment in its 2007 annual access filing.

<sup>39</sup> Under the Commission's rules, a price cap LEC collects its allowed revenue, known as CMT Revenue, from EUCLs, PICCs, and CCL charges in that order in recovering the interstate allocated portion of local loop costs. If the EUCL cap prevents a carrier from collecting its allowed revenue through the EUCL charge, it can assess multi-line business PICCs on IXCs. After the multi-line business PICC cap is reached, a carrier can assess CCL charges on IXCs. See 47 C.F.R. §§ 69.152-69.154; *Cost Review Proceeding for Residential and Single-Line Business Subscriber Line Charge (SLC) Caps*, CC Docket Nos. 96-262, 94-1, Order, 17 FCC Rcd 10868, 10875-76, para. 15 (2002) (citing *Access Charge Reform*, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962 (2000), *aff'd in part, rev'd in part, and remanded in part sub nom., Texas Office of Public Util. Counsel v. FCC*, 265 F.3d 313 (5<sup>th</sup> Cir. 2001), *cert. denied sub nom., Nat'l Assn' of State Util. Consumer Advocates v. FCC*, 535 U.S. 986 (2002)). We do not address here whether Verizon is permanently foreclosed from recovering the additional amounts it will not recover from suppression of the PICC and CCL.

<sup>40</sup> *Id.* at 16 (citing *Cost Recovery Order*, 13 FCC Rcd 11773-74, paras. 135-36); see also *AT&T LNP Exogenous Cost Waiver Order*, 21 FCC Rcd at 8080-82, paras. 10-11. We reject the NJRC's unsupported assertions that competitive neutrality should no longer be of concern when determining LNP cost recovery here. NJRC Comments at 5-6. Specifically, the NJRC contends, without any analysis, that, "[w]ith the two largest IXCs now part of new AT&T and Verizon Communications Inc., there is simply no need for competitive neutrality at this time." NJRC Comments at 5. The NJRC also argues that competitive neutrality concerns have "been overtaken by subsequent events," such as "the separations freeze (which causes under allocation of costs to the interstate jurisdiction) reclassification of VOIP as an interstate service and classification of DSL as an information service." NJRC Comments at 6. The NJRC's assessment is inconsistent with the 1996 Act and the *Cost Recovery Order*, and it fails to present persuasive arguments justifying forbearance from the Act's competitive neutrality requirements. 47 U.S.C. § 251(b)(2); *Cost Recovery Order*, 13 FCC Rcd at 11720, 11734, paras. 28 n.112, 60 (cases cited therein).

<sup>41</sup> Petition at 13 n.38.

<sup>42</sup> NJRC Comments at 7-8. The NJRC contends that waivers such as those granted to Verizon to exclude advanced services from price caps "are 'exogenous events' that may result in cost reductions." NJRC Comments at 8 (citing *Petition for Waiver of the Commission's Price Cap Rules for Services Transferred from VADI to the Verizon Telephone Companies*, WCB/Pricing File No. 06-10, Order, 21 FCC Rcd 6470 (Wireline Comp. Bur. June 8, 2006) (*VADI Services Waiver Order*). The NJRC acknowledges that it has already raised this issue in an Application for (continued....)

is a narrowly defined remedy and limited to special cases. As noted above, whether or not an event qualifies for exogenous cost treatment is a determination made by the Commission based upon whether specific requirements can be established. This proceeding is not the appropriate forum to establish whether exogenous cost treatment is warranted in other unrelated instances.<sup>43</sup>

12. Lastly, the NJRC raises several issues that the Commission already addressed and rejected in the *AT&T LNP Exogenous Cost Waiver Order*, and we are not persuaded to reach different conclusions here.<sup>44</sup> Specifically, the NJRC argues that: (1) relief is barred by the statute of limitations, (2) allowing recovery amounts to retroactive ratemaking, and (3) the comment cycle was too short and violates due process.<sup>45</sup> As discussed below and consistent with the Commission's findings in the *AT&T LNP Exogenous Cost Waiver Order*, we reject these arguments.

13. The NJRC renews its assertion that the two-year statute of limitations set forth in section 415 of the Act bars recovery.<sup>46</sup> Section 415 defines the circumstances in which, and the parties to whom, it applies.<sup>47</sup> Previously, the Commission rejected the NJRC's contention that subsection (a) applied in the case of LNP recovery sought by a carrier in a petition filed with the Commission.<sup>48</sup> Further, whether section 415 is relevant is a fact-specific inquiry, and the NJRC offers neither a sufficient explanation nor analysis of how or why it believes the statute is applicable.<sup>49</sup> Consequently, we remain unpersuaded that section 415 bars recovery in these circumstances.

14. The NJRC also raises retroactive ratemaking objections, but its arguments are unconvincing. Specifically, the NJRC asserts that the recovery mechanism for LNP is rate regulation and not price cap regulation, and as such, "the attempt to recover now for the prior under recovery" is prohibited because it constitutes retroactive ratemaking.<sup>50</sup> The NJRC argues that the rule against retroactive ratemaking prohibits the recovery of costs that were not recovered during the period that a

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Review of the *VADI Services Waiver Order*, and thus the instant proceeding is not the appropriate forum to address it.

<sup>43</sup> Further, the Commission has previously refused to require that LNP under-recovery amounts be weighed against overall rates calculated under price caps. *AT&T LNP Exogenous Cost Waiver Order*, 21 FCC Rcd at 8084, para. 16 n.78. LNP cost recovery was designed as an extraordinary end-user federal recovery mechanism. *Cost Classification Order*, 13 FCC Rcd at 24499, para. 9. The Commission has reiterated that this was established as a unique procedure *in addition to and separate from* the price cap and rate-of-return mechanisms to enable incumbent LECs to recover LNP implementation costs. *AT&T LNP Exogenous Cost Waiver Order*, 21 FCC Rcd at 8084, para. 16 n.78; *Cost Classification Order*, 13 FCC Rcd at 24499, para. 9. Accordingly, the effects of other events referred to by the NJRC are not relevant to evaluating Verizon's petition for LNP recovery here.

<sup>44</sup> NJRC Comments at 2-11; *AT&T LNP Exogenous Cost Waiver Order*, 21 FCC Rcd at 8085-86, paras. 17-19.

<sup>45</sup> NJRC Comments 2-11.

<sup>46</sup> *Id.* at 3, 10 (citing 47 U.S.C. § 415).

<sup>47</sup> See 47 U.S.C. § 415(a)-(g).

<sup>48</sup> *AT&T LNP Exogenous Cost Waiver Order*, 21 FCC Rcd at 8085, para. 17. The Commission explained that this subsection "refers to a suit instituted by a carrier in a district court of the United States to recover charges due from a customer subscribing to its service" (citing *Municipality of Anchorage d/b/a Anchorage Telephone Utility v. Alascom, Inc.*, File No. E-87-35, Memorandum Opinion and Order, 4 FCC Rcd 2472, 2474, para. 18 (Com. Car. Bur. 1989)). *Id.*

<sup>49</sup> The NJRC merely cites to several proceedings without a sufficient explanation or analysis. Petition at 10 (cases cited therein).

<sup>50</sup> NJRC Comments at 3.

lawful tariff was in place, just as refunds in this situation also would not be permissible.<sup>51</sup> Consistent with the *AT&T LNP Exogenous Cost Waiver Order* and for the reasons given therein, we reject the NJRC's arguments and find that in these circumstances exogenous cost recovery for unrecovered LNP costs does not constitute retroactive ratemaking.<sup>52</sup>

15. Finally, although the NJRC alleges that the short time frame for filing comments is a violation of due process, we note that it made its filing in advance of the deadline.<sup>53</sup> As the Commission determined in the *AT&T LNP Exogenous Cost Waiver Order*, an abbreviated comment cycle did not adversely affect participation by industry and consumer representatives when addressing the exogenous LNP cost recovery issue.<sup>54</sup> Consistent with that conclusion, we find no due process violation here.

#### IV. IMPLEMENTATION ISSUES

16. Verizon agrees to follow the precedent set by the Commission in the *AT&T LNP Exogenous Cost Waiver Order* regarding how Lifeline customers are treated for purposes of exogenous cost recovery.<sup>55</sup> Verizon agrees not to seek recovery from Lifeline customers for that portion of the EUCL that is attributable to the exogenous cost increase authorized by this waiver.<sup>56</sup> Instead, to enable Verizon to recover the amounts allowed in this waiver, we permit it to increase its allowed exogenous adjustment to account for the fact that it will not recover the portion of the EUCL attributable to LNP costs from its Lifeline customers. Commission staff will review all the Verizon adjustments discussed here for accuracy in the course of the tariff review process.

17. Similarly, Verizon also agrees not to seek recovery from the federal Lifeline support mechanism for that portion of the EUCL that is attributable to the exogenous cost increase authorized by this waiver. Thus, we also find that good cause exists to waive section 54.403(a)(1) of the Commission's rules.<sup>57</sup> This section requires carriers to recover for Tier I Lifeline support the "tariffed rate in effect for the primary residential End User Common Line charge" as determined by section 69.152 of the Commission's rules.<sup>58</sup> Instead, Verizon shall use the EUCL rate minus the per-line exogenous cost adjustment when filing FCC Form 497 to recover LNP costs from the federal universal service fund for its Lifeline customers in those areas where the exogenous cost adjustment is in effect. At the termination of the exogenous cost recovery granted in this Order, this waiver shall expire and Verizon will recover federal universal service support for its Lifeline customers in accordance with the Commission's rules.

#### V. ORDERING CLAUSES

18. Accordingly, IT IS ORDERED that, pursuant to sections 1, 2, 4(i), 4(j), 201-205, 251,

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<sup>51</sup> *Id.* at 9.

<sup>52</sup> *AT&T LNP Exogenous Cost Waiver Order*, 21 FCC Rcd at 8085-86, para. 18. As the Commission has explained, LNP recovery beyond the past five-year recovery period is warranted where, as here, end users are continuing to benefit from LNP beyond this period. *Id.*

<sup>53</sup> The NJRC filed its comments on July 19, 2006; comments were due on July 21, 2006.

<sup>54</sup> *AT&T LNP Exogenous Cost Waiver Order*, 21 FCC Rcd at 8086, para. 19.

<sup>55</sup> Verizon July 31 *Ex Parte* Letter at 1-2 (citing *AT&T LNP Exogenous Cost Waiver Order*, 21 FCC Rcd at 8086-87, para. 20; *Cost Recovery Order*, 13 FCC Rcd at 11777-78, para. 145).

<sup>56</sup> Verizon July 31 *Ex Parte* Letter at 2.

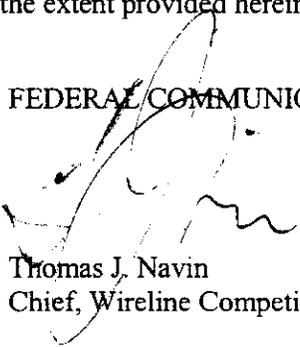
<sup>57</sup> 47 C.F.R. § 54.403(a)(1).

<sup>58</sup> 47 C.F.R. § 69.152.

and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 154(j), 201-205, 251, and 332, section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, and the authority delegated pursuant to sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, Verizon's Petition for Waiver of the Commission's Rules to Treat Unrecovered Local Number Portability Costs as Exogenous Costs under Section 61.45(d) of the Commission's rules, 47 C.F.R. § 61.45(d), IS GRANTED to the extent provided herein and IS OTHERWISE DENIED.

19. IT IS FURTHER ORDERED that, pursuant to sections 1, 2, 4(i), 4(j), and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 154(j), and 254, and section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, and the authority delegated pursuant to sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, section 54.403(a)(1) of the Commission's rules, 47 C.F.R. § 54.403(a)(1), IS WAIVED to the extent provided herein.

FEDERAL COMMUNICATIONS COMMISSION



Thomas J. Navin  
Chief, Wireline Competition Bureau