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VIA U.S. EXPRESS MAIL

Marlene Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

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RE: Application fore Review In the Matter 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

Dear Secretary Dortch:

The New Jersey Division of the Rate Counsel ("Rate Counsel") hereby files the enclosed Application for Review in the above proceeding. Enclosed are an original and five copies. Please stamp one copy and return in the enclosed envelope.

Very truly yours,

SEEMA M. SINGH, Esq.
RATEPAYER ADVOCATE

By: _____
Christopher J. White, Esq.
Deputy Ratepayer Advocate

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Certificate of Service

On this 5th day of October 2006, I served the by overnight delivery a copy of the *Application for Review* on the following:

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter	)	
	)	
Verizon's Petition for Waiver	)	CC Docket
Of the Commission's Rules to Treat	)	No. 95-116
Unrecovered Local Number Portability	)	
Costs as Exogenous Costs under	)	
Section 61.45(d)	)	

APPLICATION FOR REVIEW FILED BY THE NEW JERSEY PUBLIC ADVOCATE

RONALD K. CHEN
PUBLIC ADVOCATE OJ NJ

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Dated: October 5, 2006

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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Verizon's Petition for Waiver	)	CC Docket
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Section 61.45(d)	)	

APPLICATION FOR REVIEW FILED BY THE NEW JERSEY PUBLIC ADVOCATE

INTRODUCTION

The New Jersey Division the Rate Counsel ("Rate Counsel")[1] hereby files this Application for Review ("AR") in accordance with Section 1.115 of the Federal Communications Commission's ("Commission's") rules.[2] Rate Counsel seeks review of

[1] / Effective July 1, 2006, the New Jersey Division of the Ratepayer Advocate is now the Rate Counsel. The office of Rate Counsel is a Division within the New Jersey Department of the Public Advocate. The Department of the Public Advocate is a government agency that gives a voice to New Jersey citizens who often lack adequate representation in our political system. The Department of the Public Advocate was originally established in 1974, but it was abolished by the New Jersey State Legislature and New Jersey Governor Whitman in 1994. The Division of the Ratepayer Advocate was established in 1994 through enactment of Governor Christine Todd Whitman's Reorganization Plan. See New Jersey Reorganization Plan 001-1994, codified at N.J.S.A. 13:1D-1, et seq. The mission of the Ratepayer Advocate is to make sure that all classes of utility consumers receive safe, adequate and proper utility service at affordable rates that are just and nondiscriminatory. In addition, the Ratepayer Advocate works to insure that all consumers are knowledgeable about the choices they have in the emerging age of utility competition. The Department of the Public Advocate was reconstituted as a principal executive department of the State on January 17, 2006, pursuant to the Public Advocate Restoration Act of 2005, P.L. 2005, c. 155 (N.J.S.A. §§ 52:27EE-1 et seq.). The Department is authorized by statute to "represent the public interest in such administrative and court proceedings . . . as the Public Advocate deems shall best serve the public interest," N.J.S.A. § 52:"27EE-57, i.e., an "interest or right arising from the Constitution, decisions of court, common law or other laws of the United States or of this State inhering in the citizens of this State or in a broad class of such citizens." N.J.S.A.§52:27EE-12, and the office of the Rate Counsel, formerly known as the Ratepayer Advocate, became a division therein to continue its mission of protecting New Jersey ratepayers in utility matters. The Division of the Rate represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities. The Rate Counsel participates in Federal and state administrative and judicial proceedings.

[2] / *See* 47 C.F.R. § 1.115.

the *Order* of the Chief of the Wireline Competition Bureau ("Bureau"), issued on September 14, 2006, in which the Bureau granted 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.[3] The Bureau's *Order* was released on September 14, 2006.

EXECUTIVE SUMMARY

Rate Counsel notes at the outset that the Chief of the Wireline Bureau granted Verizon's request for a waiver, not by a vote of the full Commission upon Verizon's Petition. Importantly, Verizon's filed a "me too" petition seeking a waiver shortly following a decision by the full Commission to grant a waiver to AT&T, Inc.[4] (AT&T) for essentially the same type of relief on the same basis. The Commission's decision in AT&T case is now on appeal to the U.S. Court of Appeals for the Third Circuit[5]. The Bureau's decision on the Verizon Petition is procedurally defective. The decision should have been made in the first instance by the Commission. See, 47 C.F.R. § 0.91 (b). The Bureau's Order exceeded its delegated authority under the regulations and has not been properly issued. For that reason, Rate Counsel submits the Bureau's Order should be vacated. If the Commission does not vacate the decision, the Commission should act

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[3]/ *I/M/O 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 ("*Order*").

[4]/ *I/M/O 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, Adopted June 30, 2006, Released July 10, 2006.

[5]/ *NJ Division of Ratepayer Advocate v. FCC*, Docket No. 06-3731, U.S. Court of Appeals for the Third Judicial Circuit.

expeditiously on the Application for Review and address the remaining issues raised by the Rate Counsel as soon as possible but in no event later than 30 days from the date of *filing this AR.*

For the reasons discussed below, Rate Counsel submits that the Bureau's decision should be vacated because (1) the Bureau Order ignored the fact that LNP recovery is a flat rate recovery mechanism and not a rate cap. As such, the attempt to recover now for prior under recovery is precluded under the prohibition of retroactive ratemaking; (2) as a matter of law the recovery sought by Verizon is barred by the two year statute of limitations set forth in 47 U.S.C. § 415. The previously established five year recovery period for LNP costs ended on January 31, 2004 and therefore, a subsequent action to recover additional sums would have required to be filed by January 31, 2006; (3) the requested relief is not warranted under the facts and law as an exogenous event; (4) the short comment cycle allowed on the Petition denies fundamental due process which warrant vacating the *Order*; (5) Verizon failed to submit sufficient evidence and the record fails to show good cause for the grant of the waiver; (6) and, the *Order* is not supported by substantial evidence and lacks a reasoned basis and is otherwise arbitrary and capricious.

The Ratepayer Advocate respectfully asks that the Commission:

(1) rule on the Application for Review within 30 days

(2) vacate the *Order* as it exceeds the Bureau's authority and issue a decision by the Commission,

(3) grant such other relief as the Commission deems appropriate.

BACKGROUND

The Commission is vested with the authority to establish a cost recovery system *that satisfies the requirements of Section 251(e)(2) of the Communications Act of 1934,* as amended (Act).[6] 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 LEC s as exogenous and to recover these costs from end users through the EUCL charge.[7] On July 10, 2006 the Commission adopted the *AT&T LNP Exogenous Cost Waiver Order*, which granted AT&T's petition for a waiver.[8]

On July 6, 2006 Verizon filed a petition seeking a waiver upon similar reasons asserted by AT&T in its Petition. In its petition, Verizon asserted that it was similarly situated to AT&T[9] with respect to under-recovery of certain of their carrier-specific local number portability (LNP) implementation costs ("LNP") estimates.[10] Verizon further asserted that like AT&T, it satisfieed the Commission's standard for exogenous costs relief and asked the FCC to allow Verizon to waive § 61.45(d) of the FCC's rules so that

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6/ 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.

7/ *Supra.* at footnote 4.

8/ Id.

9/ *I/M/O 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, FCC 06-97, Order adopted June 30, 2006 (*rel.* July 10, 2006).

10/ 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), Docket No. 95-116, at 17-18.

Verizon could treat as exogenous costs LNP implementation costs which Verizon alleges it had not recovered through the FCC mandated surcharge.[11] Verizon sought to recover these "costs" from end users via the end user common line charge (EUCL). For reasons set forth below, the Order issued by the Chief of the Wireline Bureau should be overturned and the Petition filed by Verizon denied.

On September 14, 2006 the Chief, Wireline Competition Bureau issued an Order granting Verizon's Petition which Rate Counsel submits is beyond its delegated authority and the Order must be issued by the Commission.[12] Pursuant to 47 C.F.R. § 0.291 the Chief of the Wireline Bureau's authority is limited by rule. That delegated authority was exceeded by issuing the Order upon Verizon's Petition when the AT&T Order was issued by the Commission.

POINT I

The Chief of the Wireline Bureau Erred in Rejecting Rate Counsel's Objection Based Upon Retroactive Ratemaking

The Order permits retroactive adjustments which in turn raise the issue of improper retroactive ratemaking. The grant of a waiver as exogenous event is simply a change from the flat rate recovery mechanism authorized in the LNP recovery Order. Moreover, LNP recovery under rate caps was rejected by the Commission and such decision cannot be resuscitated as an exogenous event applied to rate cap regulation.

The rule against retroactive ratemaking prohibits after the fact recovery of under recoveries or over recoveries. Verizon has offered no explanation as to why it could not track its line loss even though Bellsouth and Quest did and fully recovered their costs.

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[11]/ Petition at 4.

[12]/ *Supra*, at footnote 3.

Rate Counsel submits that like AT&T, Verizon has not provided any data to support its assertions that the change in the telecommunications market was so unpredictable that it caused Verizon to overestimate the number of access lines it would have during the five-year recovery period and cause it to under recover its overall LNP costs estimate to justify the grant of a waiver and recovery through increased EUCL charges. The Rate Counsel submits that the requested relief is an impermissible retroactive rate-making. The Bureau erred in granting the waiver and the public interest requires denial of the Petition.

POINT II

The Chief of the Wireline Bureau Erred in Rejecting the Rate Counsel's Argument that the LNP Recovery Waiver Barred by the Statute of Limitation

Rate Counsel submits that Verizon's Petition is barred by the statute of limitations which expired on January 31, 2006. Verizon should have and could have sought a waiver prior to the expiration of the five year period. Verizon's failure in this regard precludes the relief now sought after the end of the five year recovery period.

The relief requested is also precluded by the two year statute of limitations contained in 47 U.S.C. § 415. The FCC has imposed as part of Commission proceeding Section 415 to bar recovery for claim outside of its two year statute of limitations. *See Communications Vending Corporation of Arizona, Inc., et al., v. FCC* et al., 365 F. 3d

1064, (D.C. Circuit) 1073-1074.[13] The Bureau erred when it rejected Rate Counsel's statute of limitations argument.

POINT III

The Chief of the Wireline Bureau Erred in Finding that Verizon had Produced Sufficient Evidence That It's LNP Shortfall Is Properly Recoverable As An Exogenous Cost

Rate Counsel submits that the Bureau erred in finding that Verizon submitted sufficient evidence and has failed to justify, demonstrate and show good cause for the grant of a waiver. Like AT&T, Verizon argues that it failed to recover fully its LNP costs due to factors beyond its control and because of certain unforeseeable developments. While the Rate Counsel concedes that a carrier may seek exogenous costs adjustments under rate cap regulation for cost increases or decreases for actions outside of the carrier's control, such as a result of a Commission's regulatory actions, erogenous events can not support the Bureau's decision to permit a flat rate mechanism to be recast as a rate cap regime. Verizon failed to provide a sufficient link between the mandate pursuant to Section 251(e)(2) of the Act to provide LNP and Verizon's alleged loss of access lines resulting in a $100 million shortfall. Rate Counsel submits that Verizon's arguments in support of the waiver are baseless on the record. Verizon asserts that as a result of new and unexpected competitors, wireline providers have undergone substantial and immediate losses in terms of number of access lines"..."[T]he number and strength

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[13]/ *See also, I/M/O AT&T Corp. and AT&T of the Virgin Islands, Inc., v. Virgin Islands Telephone Corporation, D/B/A/ Innovative Telephone, Memorandum & Opinion Order,* File No. EB-04-MD-002, FCC No. 04-195, adopted August 4, 2004; and *Davel Communications, Inc., a Delaware Corporation; Access Anywhere LLC; Kristin Moelle; Automated Telecom Technology Inc., dba A-Tel Inc.; Central Telephone Company: Steve Peterman, dba Colorado Payphones; Communications management Services LLC v. Qwest Corporation, a Colorado Corp.* Appeal from the U.S. District Court for the Western District of Washington, Argued December 8, 2005, Opinion by Judge Berzon filed June 26, 2006, (9th Cir.), No. 04-35677, D.C. No. CV-03-03680-MJP.

of those changes were not anticipated - ... short of a telecommunications crystal ball - .... by any *ILEC* when Verizon's five-year tariff was adopted.[14]

Rate Counsel submits that the underlying basis asserted by the FCC for adopting LNP recovery, through a flat rate charge to consumers, the need for competitive neutrality to interexchange carriers ("IXCs") can not be used now to support the course reversal and made by the Bureau in this *Order* and treat the under recovery as an exogenous event, as if LNP recovery was a rate cap mechanism in the first instance. In addition, the concern over competitive neutrality for IXCs is no longer appropriate. With 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. Therefore, the Bureau's reliance upon competitive neutrality to support the grant of the waiver is flawed and misplaced.

Verizon made an error in judgment as to the impact of the so called "new and unexpected wireline competitors."[15] In fact Verizon knew well before the end of the five year recovery period that line counts were declining. Verizon made FCC Form 477 filings through out the five year period which clearly showed access lines were declining. Verizon should not have waited over two (2) years after the recovery period ended to seek relief. The Bureau ignored these facts.

In competitive markets, errors and omissions by a company should fall upon the company and its shareholders not consumers. The Bureau erred in granting the waiver when Verizon simply failed to monitor its cost recovery and take appropriate timely action to remedy the situation. This was not beyond Verizon's control or otherwise not

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[14]/ Petition at 10.

[15]/ Id, at 10.

foreseeable. Therefore, this does not constitute an exogenous event. As a result, the *Bureau's Order should be overturned.*

POINT IV

The Chief of the Wireline Bureau Erred in Providing a Short Comment Cycle Denying Fundamental Due Process

The period for comments set by the Commission denied fundamental due process. The FCC allowed an extremely short comment period on the instant petition. The original Public Notice, DA-06-1434, dated July 11, 2006, established a pleading cycle which allocated just five working days for comments, and four working days for reply comments. In addition, Verizon's Petition for Waiver dated June 30, 2006, and originally categorized as filed on June 30, 2006, was not scanned and made publicly available for review on the Commission's Home Page at http://www.fcc.gov./cgb/ecfs, until July 12, 2006. On July 14, 2006, the Commission issued an Erratum to the previously issued Public Notice which corrected the filing date of Verizon's Petition from June 30th to July 6, 2006, and made the initial comment filing date July 21, 2006, with reply comments due by July 25, 2006, which actually only gives parties two working days to submit reply comments. By such action the FCC simply denied Rate Counsel due process. The due process claim must be decide by the Commission and not by the Bureau because the Commission issued the public notice.

POINT V

The Chief of the Wireline Bureau Erred in finding Verizon Provided Sufficient Evidence to Support its $100 Million Shortfall Claim

Exogenous events are generally those events that increase or decrease costs that are triggered by administrative, legislative or judicial action beyond the control of

carriers. The Bureau erred here as well. The facts show that Verizon simply failed to adequately track its cost recovery during the five-year period and request relief prior to expiration of the five year period. The responsibility for the under recovery rests solely upon Verizon and its officers and shareholders. It is improper to shift the responsibility on to ratepayers in the first instant and have the shortfall recovered under end users common line ("EUCL") charge. The EUCL is intended to compensate for the cost of the local loop used to provide interstate services. Even if the Order was correct that the under recovery qualified as an exogenous event – which it can not, then, the recovery should be from interstate access charges. As noted above, the competitive neutrality concerns previously relied upon by the Bureau to justify a flat charge to end users has been overtaken by subsequent events, such as the grant of in-region long distance, mergers between IXCs and incumbent local exchange carriers, 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.

More importantly, Verizon's Petition is devoid of adequate or sufficient support as to its claim it could not have anticipated line loss due to competition. In fact, Verizon does not even provide a breakdown of alleged un-recovered costs by company or by region. Thus, the Petition lacks allocation data based upon a state by state analysis. The absence of such information raises a concern for New Jersey ratepayers as it should for ratepayers throughout different service regions and states. Assuming the Commission upholds the Bureau - which it should not-, ratepayers in regions that experienced small line losses should not in effect help pay for short falls in states where larger line losses occurred. Verizon also overlooks the fact that other incumbent carriers were able to

predict and recovery their LNP costs within the five year period. This alone undercuts Verizon's claim that a waiver is appropriate.

The Rate Counsel submits the Bureau erred when it accepted Verizon's statement that "[W]hatever relief the Commission affords AT&T should also be provided to other, similarly situated carriers such as Verizon."[16] Although Verizon would have the Commission assume that it functions under the same set of circumstances as AT&T, Verizon has other issues which the Bureau did not factor in when making a its decision on this Petition. "Exogenous events" can result in adjustments that increase or decrease rates. As noted above, there have been numerous changes in the telecommunications marketplace. Each of these events can be categorized as an "exogenous event." These other "exogenous events" have impacts and those impacts need to be assessed. To the extent rate reductions should have been implemented, any LNP under recovery may be wiped out. Verizon has provided no data for which this analysis can be made. The Bureau should have denied the Petition on this bases alone. An even more concrete concern is that Verizon has received five (5) waivers related to its price cap filings related to delay in re-integration of its VADI to the Verizon Telephone Companies.[17] Such waivers are "exogenous events" that may result in cost reductions that should be offset against any alleged LNP under recovery. In that regard, the Rate Counsel filed on July 6, 2006 an application for review related to the *Waiver Order* and its affect on the Verizon's 2006 price cap filing. In that application for review, the Rate Counsel asks the FCC to:

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[16] / Petition at 1.

[17] / *I/M/O 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 adopted June 8, 2006 ("*Waiver Order*").

> direct the Bureau to suspend, investigate and issue an accounting *Order* for Verizon's 2006 annual access tariffs filing and initiate an investigation as to whether *exogenous* adjustments are necessary due to the regulatory changes implemented since 2001 and to remedy the error in granting serial waivers, thereby correcting harms to consumers from the grant to Verizon of perpetual waivers have also have resulted in permitting Verizon's request for a waiver of the Commission's price cap rules for services transferred from VADI to telephone companies has had on Verizon's alleged costs.

The VADI waivers along with the other exogenous events may trigger rate reductions that would eliminate or reduce the alleged LNP under recovery. The Bureau erred when it permitted Verizon to pursue this waiver, without directing Verizon to submit data to show the overall effect on rate caps of the VADI waiver and all exogenous events that have occurred subsequent to the LNP Recovery Order. Absent such data, the Bureau erred in granting the Petition.

POINT VI

The Chief of the Wireline Bureau Erred in finding Verizon's Petition Demonstrated Good Cause in Support of a Waiver of Section 61.45(d)

In general, a waiver request must demonstrate special circumstances warranting a deviation from the general rule, and that such a deviation will serve the public interest.[18] For the reasons discussed above, the Bureau erred when it found good cause in this matter as Verizon has failed to demonstrate good cause to support the relief requested. Ultimately, Verizon's basis for the relief sought is that they made a mistake in judgment and failed to properly monitor and account for LNP cost recovery. Verizon has failed to establish "special circumstances" that warrant deviation from the Commission's general rules. Similarly, while it is true, that Section 61.45(d) as applied to the rate cap

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[18]/ *Northeast Cellular Telephone Co. v. FCC* 897 F. 2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F. 2d 1153, 1159 (D.C. Cir. 1969)).

regulation permits exogenous costs adjustments for "extraordinary" events, Verizon has *failed to demonstrate "extraordinary" circumstances, let alone sufficient "good cause"* to permit under recovery of LNP costs. Based upon the record, the Bureau cannot support its finding of "good cause." Permitting recovery through EUCL charge based upon granting a waiver and finding an "exogenous event" that is applicable in a price cap regime and using that to permit recovery of under recovery of LNP charge, after having expressly rejected recovery of LNP through price caps in the *LNP Recovery Order*, when the LNP recovery mechanism is a rate of return recovery method is arbitrary, capricious, and an abuse of discretion and constitutes impermissible retroactive ratemaking by the Bureau. Therefore, the Bureau's Order should be vacated.

CONCLUSION

In view of the foregoing, the Ratepayer Advocate respectfully asks that the Commission to:

(1) rule on the Application for Review within 30 days

(2) vacate the *Order* as it exceeds the Bureau's authority and issue a decision by the Commission,

(3) grant such other relief as the Commission deems appropriate.

Respectfully submitted

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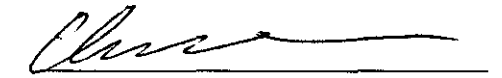
By: 

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Dated: October 2, 2006