

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

In the Matter of)	
)	
Verizon’s Petition to Treat Unrecovered Local)	
Number Portability Costs as Exogenous Costs)	CC Docket No. 95-116
Under Section 61.45(d) or, in the Alternative,)	
For Limited Waiver of the End User Common)	
Line Caps in Section 69.152.)	

**COMMENTS OF
THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER
ADVOCATES**

I. INTRODUCTION

In response to the Public Notice released on December 12, 2006,¹ the National Association of State Utility Consumer Advocates (“NASUCA”)² hereby submits its comments on the Verizon Telephone Companies’ (“Verizon’s”) petition for waiver of Federal Communications Commission (“FCC” or Commission”) rules as part of Verizon’s claim for recovery of allegedly unrecovered Local Number Portability (“LNP”) costs. Verizon’s Petition should be denied, for the reasons set forth herein.

¹ Public Notice, DA-06-2490 (December 12, 2006).

² NASUCA is a voluntary association of advocate offices in more than 40 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA’s members are designated by the laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. *See, e.g.*, Ohio. Rev. Code Ch. 4911; 71 Pa. Cons. Stat. Ann. § 309-4(a); Md. Pub. Util. Code Ann. § 2-205; Minn. Stat. § 8.33; D.C. Code Ann. § 34-804(d). NASUCA members operate independently from state utility commissions as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (*e.g.*, the state Attorney General’s office). NASUCA’s associate and affiliate members also serve utility consumers, but are not created by state law or do not have statewide authority.

II. VERIZON'S WAIVER REQUESTS

The Commission is vested with the authority to establish a cost recovery system for LNP.³ On June 30, 2006, Verizon filed a Petition in this docket seeking a waiver of 47 C.F.R. § 61.45(d) in order to recover the portion of its LNP costs that Verizon claimed it had been unable to recover pursuant to the Commission's *1998 LNP Cost Recovery Order*.⁴ That amounted, according to Verizon, to \$100 million. The June 30, 2006 Verizon Petition was granted **in part** by an Order of the Chief of the Wireline Competition Bureau on September 14, 2006.⁵ On November 16, 2006, Verizon filed another petition seeking an "additional"⁶ waiver from the same rule, in order to recover more of the costs that had been the subject of the earlier petition, which Verizon said had not been allowed by the *September 14, 2006 WCB Order*. In the alternative, Verizon's November 16, 2006 petition sought waiver of 47 C.F.R. § 69.152 in order to recover

³ See 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, ¶¶ 121-40 (1996) ("*Number Portability First Report and Order*"). 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, ¶ 230.

⁴ *Telephone Number Portability*, CC Docket No. 95-116, Third Report and Order, 13 FCC Rcd 11701 (1998) ("*1998 LNP Cost Recovery Order*").

⁵ *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, 21 FCC Rcd 10140, (Wireline Comp. Bur. Sept. 14, 2006) ("*September 14, 2006 WCB Order*").

⁶ *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), or, in the Alternative, for Limited Waiver of the End User Common Line Caps in Section 69.152*, CC Docket No. 95-116 (filed November 16, 2006) at 2.

those additional amounts. The amount this time was \$28 million.⁷

Specifically, Verizon sought an additional waiver to allow Verizon “to treat as exogenous costs those LNP costs that remain unrecovered at the end of the 2006-07 access period.”⁸ The *September 14, 2006 WCB Order* had limited the recovery to that period.⁹ Verizon’s alternative request would waive § 69.152, which establishes limits or caps on end-user common line (“EUCL”) charges, in order to allow Verizon to recover its alleged remaining LNP costs through “a small increase to the EUCL charges in those jurisdictions” where end users have not been assessed under the *September 14, 2006 WCB Order* because it would cause the EUCL charge to exceed the cap.¹⁰

III. VERIZON’S PETITION IS AN UNTIMELY APPLICATION FOR REVIEW OF THE *SEPTEMBER 14, 2006 WCB ORDER*.

The problem with the *September 14, 2006 WCB Order*, from Verizon’s perspective, is that by limiting recovery to the 2006-2007 access period, the Order did not allow full recovery of all the dollars Verizon had asked for.¹¹ If Verizon wanted to seek modification of that holding, Verizon was required to seek relief within 30 days by filing an application for review.¹² After 30 days, the *Order* became final, from Verizon’s

⁷ Petition at 1-2; *see also* Petition at 3-4.

⁸ Petition at 2.

⁹ *September 14, 2006 WCB Order*, ¶ 10, n. 38.

¹⁰ Petition at 2.

¹¹ Petition at 1-2.

¹² Alternatively, Verizon could have filed a request for reconsideration under Section 1.106 of the Commission’s rules. Verizon did not file such a request.

perspective, and may not be challenged by Verizon.¹³

The *September 14, 2006 WCB Order* purported to be following the Commission's July 10, 2006 order that granted additional LNP recovery to AT&T Inc.¹⁴ Unlike the *September 14, 2006 WCB Order*, the *AT&T LNP Exogenous Cost Waiver Order* did not contain any explicit limitation on the period of recovery.¹⁵ To that extent, the *September 14, 2006 WCB Order* clearly deviated from the *AT&T LNP Exogenous Cost Waiver Order*.

Verizon's primary request under consideration here is nothing but a challenge to that deviation. Under the Commission's procedural rules, Verizon cannot avoid its responsibility to seek correction of the limitation by, instead of a petition for review or reconsideration, waiting and filing a purportedly new petition.

IV. VERIZON'S ALTERNATIVE RELIEF MUST BE REJECTED.

Verizon's alternative relief requests waiver of the EUCL rate caps, so that they can be increased above \$6.50 in certain areas.¹⁶ To begin, the relief Verizon seeks cannot be granted by waiver. The rate caps established in 47 C.F.R. § 69.152 were implemented

¹³ NASUCA member the New Jersey Division of Rate Counsel ("NJRDC") timely filed an application for review on October 5, 2006. No action by the Commission has been taken on this application for review.

¹⁴ See *September 14, 2006 WCB Order*, ¶ 10, citing *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, ¶ 1 (rel. July 10, 2006) ("*AT&T LNP Exogenous Cost Waiver Order*").

¹⁵ The Commission did note that "AT&T has estimated that the proposed exogenous cost adjustment would range from 24 to 37 cents and would last for two years in the Southwestern Bell region and one year in the Ameritech and PacBell regions" (*AT&T LNP Exogenous Cost Waiver Order*, ¶ 16), but this did not represent a limitation on that recovery.

¹⁶ Petition at 12, n. 40 (listing the areas where the EUCL cap would be exceeded). As Verizon's list makes clear, these areas are legacy GTE and Contel study areas.

as part of the Commission's action in adopting the CALLS Order.¹⁷ There were compromises made and policies implemented based upon adoption of the CALLS proposal. Any revision to these rules, including allowing a specific carrier not to follow them, would require a rulemaking.¹⁸

In addition, by seeking to increase the \$6.50 cap to recover these costs, Verizon is also seeking to impose additional costs on the customers who are already paying the largest EUCLs. It is also likely that the customers in question reside in rural areas, and are least likely to be able to take advantage of the LNP that they have already paid for.

As a result of these flaws, the petition should be dismissed on procedural grounds.¹⁹

V. THE ISSUES IMPLICATED HERE SHOULD CAUSE THE COMMISSION NOT TO APPROVE THE WAIVER.

On a procedural and substantive level, the reasons why Verizon's request should be denied are legion. Those reasons go back to the Commission's errors in the *AT&T LNP Exogenous Cost Waiver Order*, and are amplified by the Bureau's errors in the *September 14, 2006 WCB Order*.²⁰

¹⁷*In the Matter of Access Charge Reform*, CC Docket No. 96-262, Sixth Report and Order, FCC 00-193 (rel. May 2000) ("CALLS Order")

¹⁸ In any event, this relief could not be granted by the Bureau. As discussed below, the interplay between Commission action and Bureau action is part of the problem here.

¹⁹ At the very least, the Commission must not allow the Bureau to rule on the instant petition.

²⁰ Those errors have been pointed out by NJDRC on numerous occasions since the *AT&T LNP Exogenous Cost Waiver Order*. NASUCA endorses NJDRC's efforts.

A. The AT&T LNP Exogenous Cost Waiver Order was erroneous.

Among the objections to this Commission order are that (1) it disregarded that the LNP recovery established in the *1998 LNP Cost Recovery Order* was a flat rate recovery mechanism and not a rate cap, and 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 AT&T Inc. was barred by the two year statute of limitations set forth in 47 U.S.C. § 415;²¹ (3) the requested relief was not warranted under the facts and law as an exogenous event; (4) the short comment cycle allowed on the Petition denied fundamental due process which warrant vacating the *Order*; (5) AT&T Inc. failed to submit sufficient evidence and the record failed to show good cause for the grant of the waiver; (6) and, the *Order* was not supported by substantial evidence and lacked a reasoned basis and is otherwise arbitrary and capricious.²²

B. The September 14, 2006 WCB Order was erroneous.

To the extent that it depended on the Commission's erroneous analysis and findings in the *AT&T LNP Exogenous Cost Waiver Order*, the *September 14, 2006 WCB Order* was also in error. As noted above, the NJDRC timely filed an application for review from the Bureau Order, which the Commission has not acted upon.²³

²¹ 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. See *Communications Vending Corporation of Arizona, Inc. v. FCC*, 365 F. 3d 1064, 1073-1074 (D.C. Cir. 2004); see also, *Davel Communications, Inc., v. Qwest Corporation*, 460 F.3d 1075, 1091-1093 (9th Cir. 2006) (opinion subsequently amended in other regards).

²² These grounds were raised by NASUCA, NJDRC and others. See *AT&T LNP Exogenous Cost Waiver Order*, ¶¶ 7, 15 n. 74, 17-19. The NJDRC appealed that order, No. 06-3731 (3d Cir. Aug. 14, 2006); the appeal was dismissed due to a finding of lack of standing. Thus the substantive issues were never reached.

²³ As also noted above, Verizon did not file an application for review. On that basis, the Commission would be without jurisdiction to remove the limitation from the Order that prompted Verizon to file this improper petition.

C. The Bureau Order and delay of review

NJDRC has argued that the Bureau's decision on the Verizon Petition is procedurally defective, and that the decision should have been made in the first instance by the Commission.²⁴ The Bureau's Order exceeded its delegated authority under the regulations and was not properly issued. Yet as noted above, the distinctive decision in the Bureau Order to limit the time period for Verizon's recovery apparently led to Verizon's failure to timely seek review of the Bureau Order, which dooms the current Verizon petition.

The issuance of the Order by the Bureau also has separate consequences for judicial review of this decision which has harmed consumers. The necessity for NJDRC to seek review of the Order, along with the lack of timeline for a Commission decision on that application, means that the Order will not be subject to timely review in the courts.²⁵

If the Bureau acts on Verizon's instant petition, this will further delay and complicate the situation. NASUCA joins NJDRC in urging the Commission to take on this decision, and not to allow the Bureau to improperly address the petition. Only in this fashion will the decision on this petition be subject to timely judicial review, if the Commission continues down the erroneous path begun in the *AT&T LNP Exogenous Cost Waiver Order*.

²⁴ See NJDRC Application for Review (October 5, 2006) at 2, citing 47 CFR § 0.91(b).

²⁵ NJDRC had asked the Commission to rule on its application within 30 days. *Id.* at 3. Clearly, that has not occurred. NASUCA urges the Commission to expeditiously address NJDRC's application.

VI. CONCLUSION

For the reasons set forth herein, NASUCA urges the Commission to deny Verizon's Petition.

Respectfully submitted,

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