

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

FILED/ACCEPTED

JUL 13 2007

Federal Communications Commission
Office of the Secretary

In the Matter of)
)
Petition for Waiver of the Commission's Price) WC Docket No. 07-31
Cap Rules for Services Transferred from VADI)
To the Verizon Telephone Companies)

OPPOSITION OF VERIZON¹

I. INTRODUCTION AND SUMMARY

The New Jersey Division of Rate Counsel's ("NJRC") Application for Review of the Wireline Competition Bureau's ("Bureau") Order in the above-captioned proceeding² is devoid of merit, and the Commission should reject it. As it has done in the past, the NJRC seeks review of a Bureau decision to extend a waiver of section 61.42(g) of the Commission's rules as it applies to certain services offered by Verizon. This waiver, which has allowed Verizon to keep these services outside of its price caps, was first granted because of the regulatory uncertainty surrounding these services. With that uncertainty replaced by the clarity that most of these services will be sold by Verizon on a non-tariffed, private carriage basis, the waiver has been extended to allow Verizon to transition the services to non-common carrier treatment without unduly disrupting customers. As Verizon has explained previously, and as the Bureau has repeatedly found, this waiver's continued effect is squarely in the public interest and is clearly within the Bureau's authority to grant. The NJRC's cookie-cutter Application for Review

¹ The Verizon companies participating in this filing ('Verizon') are the regulated, wholly owned subsidiaries of Verizon Communications Inc.

² See *Petition for Waiver of the Commission's Price Cap Rules for Services Transferred from VADI to the Verizon Telephone Companies*, Order, WC Dkt. No. 07-31, DA 07-2367 (Jun. 6, 2007) ("2007 Waiver Order"); Application for Review Filed by the New Jersey Division of Rate Counsel, WC Dkt. No. 07-31 (June 28, 2007) ("Application for Review").

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presents no new arguments or evidence, and simply rehashes the same arguments it has made in opposition to past Bureau decisions. The Commission should affirm the Bureau's order and deny the Application for Review.

II. BACKGROUND

As a condition of the Bell Atlantic/GTE merger, Verizon was required to transfer certain advanced services to a separate affiliate, known as Verizon Advanced Data Inc. ("VADI"). On September 16, 2001, the Common Carrier Bureau granted Verizon's request to accelerate the sunset of the separate affiliate requirement for these services as a result of the D.C. Circuit Court's decision in *Ass'n of Comm'ns Enter. v. FCC*, 235 F.3d 662 (D.C. Cir. 2001).³ Verizon subsequently filed a series of interstate tariff filings to transfer the VADI services to Verizon's FCC Tariff No. 20.

In late 2001, Verizon filed a petition for waiver of 47 C.F.R. § 61.42(g) of the Commission's rules in order to permit it to exclude the Tariff 20 services from price caps pending completion of the Commission's proceeding to determine the regulatory status of advanced services, including how price caps would apply to those services. The Bureau granted this waiver, finding that it would advance the public interest by permitting Verizon to avoid what might be an unnecessary expenditure of resources while preserving the status quo pending resolution of the broader policy proceeding.⁴ The Bureau granted extensions of this waiver each year from 2003 through 2005 on this same rationale.

³ *Application of GTE and Bell Atlantic for Consent to Transfer Control*, 16 FCC Rcd 16915, ¶ 6 (2001).

⁴ *Verizon Petition for Interim Waiver*, 17 FCC Rcd 11010 (2002).

Following the Commission's *Wireline Broadband Internet Access Order*, and the "deemed grant" of Verizon's broadband forbearance petition, none of the broadband services sold out of Tariff 20 remain subject to mandatory tariff regulation.⁵ As a result, Verizon requested an extension of the waiver in order to allow it to continue to transition these services (the "VADI broadband services") from Title II treatment to non-common carrier treatment without disrupting customers. Verizon argued that it would make no sense to compel it to undertake the burdensome process of placing the broadband services under price caps only to remove them from tariff regulation thereafter. In its *2006 Waiver Order*, the Bureau found that this burden would indeed be substantial and that a waiver would provide Verizon with "a reasonable period of time to respond to these changes without requiring it to incur the financial cost or administrative burdens of reintegrating advanced services into price caps."⁶ In addition, the Bureau granted Verizon's request for waiver with regard to services not affected by the forbearance petition (the "non-broadband services"), noting that there were pending proceedings that could affect the treatment of those services, including "whether or how the price cap rules should apply to these services."⁷

In early 2007, Verizon requested a waiver of the price cap rules for the VADI broadband services until such time as those services are completely detariffed, noting that it was continuing

⁵ See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853 (2005) ("*Wireline Broadband Internet Access Services Order*"); FCC News Release, "Verizon Telephone Companies' Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to Their Broadband Services is Granted by Operation of Law," WC Dkt. No. 04-440 (Mar. 20, 2006).

⁶ See *Petition for Waiver of the Commission's Price Cap Rules for Services Transferred from VADI to the Verizon Telephone Companies*, Order, 21 FCC Rcd 6470, ¶ 9 (2006) ("*2006 Waiver Order*").

⁷ *Id.*, ¶ 10.

to undertake efforts to transition these services to non-common carrier treatment and that an extended waiver was appropriate given that it is now clear that these services will be sold on a private carriage basis.⁸ Verizon explained that this process of transitioning to private carriage includes several aspects, including selling all new broadband services on a purely private carriage basis, grandfathering existing eligible services sold under tariff, and detariffing eligible services currently sold under tariff as tariffed arrangements expire and/or customers enter private carriage service contracts. Verizon also explained that it is working closely with its customers to reach private carriage agreements as quickly as possible – although this process takes some time, particularly given that many customers previously opted for tariffed term plans that have not yet expired.⁹ Finally, Verizon requested an extension of the waiver for the non-broadband services, again noting that proceedings were pending that might impact their regulatory treatment.¹⁰

In its *2007 Waiver Order*, the Bureau granted Verizon an additional waiver, although, as in past years, for a limited time. The Bureau granted Verizon a one-year extension of the waiver for the VADI broadband services, noting that it was “in the public interest to grant Verizon a waiver to exclude these services from price caps so it may complete operational changes that affect the future provisioning of these services.”¹¹ With respect to the non-broadband services in Tariff 20, the Bureau concluded that “the burden to reincorporate these few remaining services

⁸ See Petition for Waiver of the Commission’s Price Cap Rules for Services Transferred from VADI to the Verizon Telephone Companies, WC Dkt. No. 07-31, 6-10 (Feb. 9, 2007).

⁹ The process of transitioning customers to private carriage may take some time, both because many customers previously opted for tariffed term plans that have not yet expired and because many large corporate and government customers, if operating outside the tariff regime, insist on complex contractual arrangements that may require many months of negotiations to complete.

¹⁰ *Id.* at 10-11.

¹¹ *2007 Waiver Order*, ¶ 10.

into price caps is no longer significant,” but, “[g]iven the immediacy of the approaching annual access filing deadline,” the Bureau granted Verizon a one-year extension for these services.¹²

III. THE NJRC’S APPLICATION FOR REVIEW IS WITHOUT MERIT.

The NJRC requests that the Commission vacate the Bureau’s 2007 Waiver Order and that it direct the Bureau to suspend, investigate, and issue an accounting order of Verizon’s 2007 annual access tariff and determine whether exogenous cost adjustments are necessary “to remedy the error in granting serial waivers.”¹³ The NJRC’s claims are without legal merit.

A. The Bureau Relied on Sufficient Evidence in Granting This Waiver.

The NJRC contends that the Bureau erred in concluding that “Verizon faces special circumstances with respect to its advanced services that warrant a temporary deviation from the Commission’s rules” and that Verizon met the “for good cause shown” waiver standard.¹⁴ Given the impact of the *Wireline Broadband Order* and the deemed grant of Verizon’s broadband forbearance petition, however, the Bureau properly reasoned in 2006 that a waiver was appropriate to avoid imposing an unnecessary burden on Verizon to bring the VADI broadband services under price caps while it developed systems and transitioned customers to private carrier arrangements.¹⁵ The Bureau followed this sound reasoning in the 2007 Waiver Order.¹⁶ In addition, the Bureau granted Verizon a waiver for non-broadband services because of the “immediacy of the approaching annual access filing deadline,” and the fact that Verizon would

¹² *Id.*, ¶ 12.

¹³ Application for Review at 4.

¹⁴ Application for Review at 5.

¹⁵ 2006 Waiver Order, ¶ 9.

¹⁶ 2007 Waiver Order, ¶ 7.

face a significant burden in bringing these services under price caps in such a limited time.¹⁷ Avoiding the imposition of wasteful regulatory requirements and avoiding hardship on service providers clearly constitutes good cause for granting a waiver of the Commission's rules.¹⁸

In objecting to the Bureau's findings, the NJRC first argues that the Bureau's reliance on the *Wireline Broadband Internet Access Services Order* and the deemed grant of Verizon's broadband forbearance petition is inappropriate because those matters are currently pending on appeal. The NJRC has raised this argument before, both in this proceeding and in its Application for Review of the *2006 Waiver Order*.¹⁹ However, unless and until an appellate court reaches a different result, these proceedings are final, and Verizon and the Commission must adhere to their outcome. The NJRC may not like the result of those proceedings, but its displeasure does not change the fact that Verizon no longer must tariff the VADI broadband services and therefore application of the price cap rules to those services while Verizon transitions them to private carriage would be a waste of resources.

The NJRC next argues that a waiver is inappropriate in this case because the Bureau relied on Verizon's "conclusory statements" and "did not request Verizon to produce the operational plans or any data to support the changes Verizon contemplates that are the stated

¹⁷ *Id.*, ¶ 12.

¹⁸ See generally *N.E. Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (good cause exists "where particular facts would make strict compliance inconsistent with the public interest"); *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969) (waiver is appropriate to "take into account considerations of hardship, equity, or more effective implementation of overall policy").

¹⁹ Application for Review Filed by the New Jersey Division of Ratepayer Advocate, DA 06-1238, WCB/Pricing File No. 06-10, 5 (July 6, 2006). The New Jersey Division of Ratepayer Advocate is essentially the predecessor entity to the NJRC. See Application for Review at 1, n.1.

underpinning for seeking this waiver.”²⁰ It further characterizes the Bureau’s reasoning as “*ipse dixit*.”²¹ *These arguments fail.*

As we have previously argued, the Bureau was not required to seek disclosure of Verizon’s operational plans or any other evidence to support this waiver. The NJRC has made this argument before, but it continues to provide no support for this proposition. Moreover, by once again advancing this argument, the NJRC ignores the precedent (provided by Verizon in previous filings) that shows that regulatory agencies have significant discretion to determine what types of evidence they consider persuasive.²²

Moreover, it was reasonable for the Bureau to rely on Verizon’s statements regarding the burden it would face if required to incorporate all services at issue into price cap indices. Verizon continues to have every incentive to transition customers to detariffed offerings as rapidly as possible and is in fact doing so. Indeed, as promised, all of the VADI broadband services covered by the petition have now been grandfathered, and thus new customers and orders will be added solely through private carriage arrangements. The Bureau correctly understood the significant complexities that attend the price cap regime and further understood that bringing these services under price cap regulation would be a waste of resources, given that

²⁰ Application for Review at 6-7.

²¹ Application for Review at 8.

²² See *Richardson v. Perales*, 402 U.S. 389, 407 (1971); *Earthlink, Inc. v. FCC*, 462 F.3d 1, 8 (D.C. Cir. 2006) (noting in forbearance context that Commission that the Commission is not required to engage in any “particular mode of market analysis” or consider “specific services”); *EchoStar Commc’ns Corp. v. FCC*, 292 F.3d 749, 753 (D.C. Cir. 2002) (“[t]here is no support for [the claim] that uncorroborated and untested testimony and hearsay testimony cannot constitute substantial evidence”); *Honeywell Int’l, Inc. v. EPA*, 372 F.3d 441, 447 (D.C. Cir. 2004) (EPA was not required to seek background material or records for statements on which it relied to reach factual conclusions).

it is now settled that Verizon may sell these services on a non-tariffed, private carriage basis, and *such waste disserves the public interest.*

Finally, the NJRC argues that the Bureau's decision circumvents the purpose of the price cap rules because the waiver treats Verizon differently from other providers.²³ Again, despite being informed repeatedly of the precise reasons that Verizon was granted relief in the initial waiver – the historical impact of the Bell Atlantic/GTE Merger and the burden required to bring these services under price caps given their uncertain regulatory treatment – the NJRC continues to insist that Verizon was never entitled to a waiver of these rules. Because of the unique circumstances arising from the merger, and the subsequent de-regulation of the VADI broadband services, the NJRC's claim of discriminatory treatment is nonsensical. In addition, the NJRC ignores the Bureau's intent to treat Verizon as it would any other carrier with regard to the non-broadband services, requiring it to bring those services within price caps by the 2008 annual access filing.²⁴

B. The Bureau Has Sufficient Authority to Grant These Waivers, and No Exogenous Cost Adjustment is Appropriate.

As it did in the *2006 Waiver Order* and as it has in several other filings, the NJRC suggests that the Bureau exceeded its delegated authority in granting this waiver to Verizon and urges the Commission to suspend, investigate, and issue an accounting order for Verizon's 2007 annual access tariff filings and initiate an investigation into exogenous cost adjustment. The NJRC's claims lack legal support and have no merit.

²³ Application for Review at 9.

²⁴ *2007 Waiver Order*, ¶ 12 n.44.

The *2007 Waiver Order*, like all five previously granted waivers, is squarely within the Bureau's authority, which allows the Bureau to "[a]ct on requests for interpretation or waiver of rules."²⁵ Though the NJRC again cites Sections 0.291(a)(2) and (e) of the Commission's rules as limiting the Bureau's authority, it provides no analysis showing that either of these rules is applicable here. Indeed, they are not. Section 0.291(a)(2) is not triggered because Verizon's waiver request involves no "novel questions of fact, law, or policy which cannot be resolved under outstanding precedents and guidelines." The Bureau has ruled on closely related issues in each of the last five years. Moreover, as it is now clear in light of the deemed grant of Verizon's broadband forbearance petition that the VADI broadband services at issue here need not be tariffed, waiver of the price cap requirement for the period of transition away from tariffs cannot be considered "novel." Section 0.291(e) is likewise inapplicable here because the Bureau did not issue "notices of proposed rulemaking, notices of inquiry, or reports or orders arising from either of the foregoing" as prohibited by that section.²⁶

Just as clearly, the Bureau did not exceed its authority by failing to require an exogenous cost adjustment or supposedly failing to protect ratepayers.²⁷ First, the Commission's rules specify the types of events that trigger exogenous cost adjustments, and reintegration of services from a separate affiliate is not included in that list.²⁸ Second, the Bureau has already explained in its *2006 Waiver Order* why keeping the VADI services outside of price caps does not harm ratepayers:

²⁵ 47 C.F.R. § 0.91(b) (2007).

²⁶ *Id.* §§ 0.291(a)(2), (e).

²⁷ Application for Review at 12-13.

²⁸ 47 C.F.R. § 61.45(d)(1).

Verizon's Tariff 20 rates are subject to part 61, subparts E and F of the Commission's rules. These rules provide protection against unreasonable rate increases by requiring Verizon to justify any rate increase it seeks for its advanced services. In particular, Part 61 rules require Verizon to provide cost and other supporting data in the tariff review process. The Commission previously has stated its belief that these rules are sufficient to protect customers from unreasonable price increases for Verizon's advanced services. *2006 Waiver Order*, ¶ 12 (footnotes omitted).

The NJRC does not even address this analysis, let alone offer a reason for reviewing the Bureau's decision. Moreover, prices have not in fact increased, which supports the Commission's decision on this point and further demonstrates the lack of any public interest concerns of the type that the NJRC is alleging.

C. The Bureau Had Good Cause to Grant the Waiver.

The NJRC also argues that the Bureau did not have good cause to grant Verizon's waiver. Specifically, the NJRC notes that Verizon has not been required to bring these services within price caps even though other carriers have been required to operate under price caps during the same time period and again repeats its erroneous claims that there is no evidence to support this waiver. In addition, the NJRC seems to imply that the Bureau has effectively modified the price cap rules by granting Verizon's waivers. Again, neither of these two arguments has merit.

First, the NJRC's argument that Verizon is being treated differently from other carriers is simply a rehash of its meritless claim of discrimination, which must fail because Verizon is uniquely situated. Moreover, as shown above, there is sufficient evidence and good cause to support the grant of this waiver.²⁹

²⁹ See *supra* Section II.A.

Second, Verizon has not requested a rule change, and the Bureau has not attempted to modify the rules as they apply to Verizon. As the NJRC is aware, each of the successive waivers granted to Verizon was separately applied for, placed on public notice for comment, and granted based on the facts and circumstances that existed at the time of the grant. The Bureau's grant of these waivers proved prescient given the ultimate deregulatory treatment of the VADI broadband services, as the waivers did in fact eliminate significant and unnecessary burdens on Verizon. The extension granted in the *2007 Waiver Order* maintains the status quo while Verizon transitions the VADI broadband services to private carriage agreements. Verizon has neither sought nor been granted any unusual or unwarranted treatment or rule modification by the Bureau's actions.

IV. THE RELIEF SOUGHT BY THE NJRC IS IMPROPER.

The NJRC asks the Commission to vacate the *2007 Waiver Order* and “direct the Bureau to investigate, suspend and issue an accounting Order” for Verizon’s 2007 annual access tariffs filing.³⁰ Because the Bureau acted properly, there is no basis to vacate the *2007 Waiver Order*. Moreover, because Verizon’s access tariff was filed in accordance with Section 204(a)(3) of the Act and was not suspended by the Commission within the statutory time period, it is “deemed lawful.”³¹ Therefore, portions of the relief that the NJRC requests – including an accounting – are unavailable. Finally, the NJRC’s request for suspension and investigation is untimely: Verizon’s annual access tariff filing was made on fifteen days’ notice, so any request for suspension and investigation of that filing would have been due within seven days (*i.e.*, by June

³⁰ Application for Review at 13.

³¹ 47 U.S.C. § 204(a)(3).

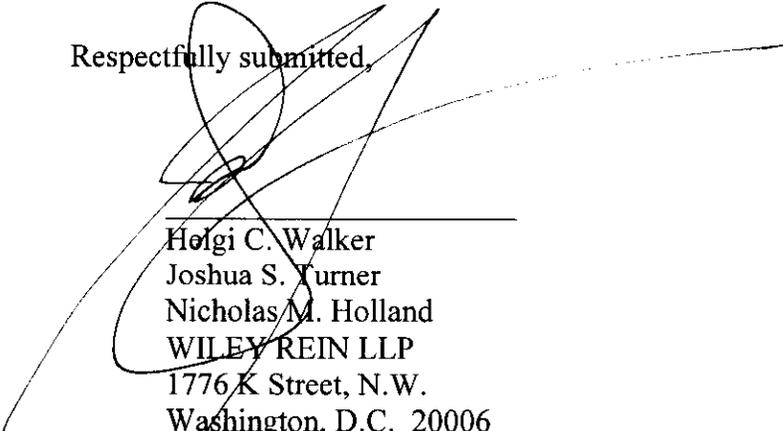
22).³² The NJRC cannot evade those time limits by incorporating its request for suspension in an application for review.

V. CONCLUSION

For the foregoing reasons, the Commission should deny the Application for Review and affirm the Bureau's 2007 *Waiver Order*.

Respectfully submitted,

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³² 47 C.F.R. § 1.773(a)(2)(iii).

CERTIFICATE OF SERVICE

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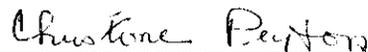
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