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August 5, 2002

Via ETFS, E-mail and Hand Delivery

Marlene H. Dortch
Secretary
Federal Communications Commission
The Portals
TW-A325
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: Verizon PARTS Service, Tariff F.C.C. No. 20, Application No. 49
DSL Price Discrimination

Dear Ms. Dortch:

EarthLink, Inc., an independent ISP, by its attorneys, files this objection to the request for special permission of The Verizon Telephone Companies, F.C.C. Tariff No. 20, Application No. 49 (filed July 26, 2002). As described more fully below, the Packet at Remote Terminal Service (PARTS) described in Verizon's illustrative tariff that is the subject of the special permission request would result in DSL price discrimination against unaffiliated Internet Service Providers (ISPs). As such, the PARTS service would violate Section 202(a) and 201(b) of the Communications Act, and the Commission's *Computer Inquiry* precedent. Under these circumstances, there can be no public interest justification for granting the special permission exemption from the Commission's price cap rules in order to facilitate Verizon's unjust and unreasonable service.

EarthLink notes that the Bureau's June 12 Order¹ granting Verizon "a limited waiver of section 61.42(g) of the Commission's rules" and the referenced limited special permissions² for services transferred from VADI to Verizon "for the June 2002 filing requirements only" provides

¹ *In the Matter of Verizon Petition for Interim Waiver of Sections 61.42(g), 61.38 and 61.49 of the Commission's Rules, Order*, WCB/Pricing No. 02-16, DA 02-1377, ¶ 1 (rel. June 12, 2002) ("Order").

² *Id.*, ¶ 3 and n. 13.

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no support for Verizon's PARTS special permission request. Indeed, the Order noted that the "Bureau previously granted special permission to waive sections 61.38 and 61.49 of the Commission's rules *with respect to services transferred from VADI back to Verizon, under limited circumstances.*" Unlike those services, however, PARTS is not being transferred from VADI to Verizon,³ and so "special circumstances" do not justify the exception to the price cap rules.⁴ Indeed, especially without those special circumstances, Verizon's speculation that the *Dom/Non-Dom Proceeding*⁵ would affect existing regulation of the PARTS service merely begs the Bureau to prejudge in a waiver decision the outcome of that pending proceeding.⁶ Further, while the Order found the benefits of avoidance of the Section 61.42(g) obligations would "outweigh any harm to competition" in that case,⁷ the PARTS service presents a distinct and compelling case of price discrimination against Verizon competitors. Finally, the supporting data required under the rules that Verizon seeks to avoid here could impact resolution of the price discrimination issues.

The proposed PARTS constitutes price discrimination because, while PARTS is available only to customers collocated at Verizon serving wire centers, PARTS Tariff, § 5.3.1.A, nothing prevents Verizon from providing its affiliated ISP such collocation while denying collocation to unaffiliated ISPs.⁸ PARTS would effectively implement a significant ADSL price discrimination because the ADSL service offering under PARTS from the customer NID to the Verizon DSLAM

³ In its June 24 letter, Verizon explains that it "is preparing to introduce" PARTS, not that the service is being transferred from VADI to Verizon. Letter of Richard T. Ellis, Verizon, to Marlene Dortch, Application No. 49 at 1 (filed June 24, 2002).

⁴ *Id.*, ¶ 6 (finding the "special circumstances" of the timing of the VADI to Verizon transfer to be justification for rule waiver).

⁵ *In the Matter of Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, CC Dkt. No. 01-337, FCC 01-360 (rel. Dec. 20, 2001) ("*Dom/Non-Dom Proceeding*").

⁶ See Melcher v. FCC, 134 F.3d 1143, 1164 (D.C. Cir. 1998) (FCC's reasoning was "highly sound" to reject *ad hoc* waiver requests and, instead, to proceed with a notice-and-comment rulemaking where issues raise questions of policy and broad application); Turro v. FCC, 859 F.2d 1498, 1500 (D.C. Cir. 1998) (affirming FCC decision "to address policy concerns . . . in a rulemaking proceeding and not in the context of an *ad hoc* waiver proceeding.").

⁷ Order, ¶ 9.

⁸ Under *Computer III*, a BOC's affiliated ISP may collocate equipment in BOC wire centers, but unaffiliated ISPs were not granted that right. See, *In the Matter of Amendment of Sections 64.702 of the Commission's Rules*, Report and Order, 104 F.C.C. 2d. 958, 1037-38 (¶¶ 151-153) (1986) ("*Computer IIF*"). *Id.*, ¶ 153 ("because collocation merely reduces transmission costs, it does not address the more general issues of equal functionality with regard to CEI").

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(operating at ADSL speeds of 768 kbps/128 kbps) would cost a monthly recurring rate of \$21.00. PARTS Tariff, § 5.3.4.B. By contrast, the same Verizon ADSL Service is available to non-collocated (i.e. unaffiliated) ISPs only under Verizon Infospeed DSL Service at a monthly recurring rate of up to \$39.95. Verizon Tariff, F.C.C. No. 20, § 5.1.6.A (Verizon Infospeed DSL Solutions, Month-to-Month Plan, without volume or term restrictions). Moreover, while the PARTS DSL service requires no volume or term commitments, or early termination charges, the least-cost Verizon Infospeed DSL (which is the only Verizon DSL available to non-collocated ISPs) is offered at \$29.95/month for a five year, one-million line volume commitment, with termination liability charges and shortfall liability. Verizon Tariff, F.C.C. No. 20, § 5.1.6.C (Volume/Term plan), § 5.1.5.C (Shortfall Liability), § 5.1.6.E (Termination Liability Charges). These price and price condition differences in PARTS plainly favor the affiliated/collocated ISP.

This price discrimination by Verizon is overt and repugnant to the public interest, Sections 201(a) and 202(b) of the Act, and the *Computer Inquiry* requirements for full, open, and nondiscriminatory access to the BOC service underlying its information services. Indeed, as the Commission has recently explained:

The internet service providers require ADSL service to offer competitive internet access service. We take this issue seriously, and note that *all carriers have a firm obligation under section 202 of the Act to not discriminate in their provision of transmission service to competitive internet or other enhanced service providers.* Indeed, the Commission has already found that where there is an incentive for a carrier to discriminate unreasonably in its provision of basic transmission services used by competitors to provide enhanced services, section 202 acts as a bar to such discrimination. In addition, *we would view any such discrimination in pricing, terms, or conditions that favor one competitive enhanced service provider over another or the carrier, itself, to be an unreasonable practice under section 201(b) of the Act.*⁹

For these reasons, Earthlink requests that the Commission deny Verizon's request for special permission; should it nonetheless be granted, Earthlink requests for the Commission to find the PARTS tariff unlawful and contrary to the Communications Act.

⁹ *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended; 1998 Biennial Regulatory Review – Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets, Report and Order*, 16 FCC Rcd 7418, ¶ 46 (2001) (emphasis added).

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Please feel free to contact the undersigned at 202/887-6230 should you have any questions regarding this matter.

Sincerely,

/s/

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Certificate of Service

I, Elizabeth Diaz, state that copies of the foregoing “Objection to Verizon’s Application No. 49” were delivered via ETFS, e-mail, or hand delivery this day, August 5, 2002, to the following:

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