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August 30, 2002

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

Re: Request for Section 205 Investigation of Verizon DSL Pricing  
Tariff F.C.C. No.s 1, 11 and 20, Transmittal No. 232

Dear Ms. Dortch:

EarthLink, Inc., an independent ISP, by its attorneys, files this request for the Commission to initiate an investigation under Section 205(a) of the Communications Act<sup>1</sup> concerning the arbitrary and discriminatory pricing of Digital Subscriber Line (“DSL”) services offered by The Verizon Telephone Companies in its FCC Tariff No. 20, called Infospeed DSL, especially in light of the proposed Verizon Packet at Remote Terminal Service (PARTS) in Transmittal No. 232. To be clear, this letter is not an objection to the PARTS tariff, but rather requests an investigation of Infospeed DSL recurring rates at the same time that the Commission may be considering an investigation of PARTS and Infospeed rates. EarthLink files this letter in this proceeding because it appears from the WorldCom Petition and the Verizon Reply regarding PARTS that the FCC is asked to determine whether the two services are the same and whether Verizon is engaging in unreasonable discrimination by offering PARTS and Infospeed to different customers at widely different rates.

Verizon’s Tariff F.C.C. No. 20 recurring rates for Infospeed DSL service are excessive and discriminatory, especially in light of the facts presented in the PARTS tariff proceeding. Specifically, according to the Verizon PARTS Workpaper 1 (item 13), the recurring cost of providing DSL private virtual connection (“PVC”) at 768 Kbps/128 Kbps from the end-user’s network interface device (“NID”) to the ATM port is no more than \$14.61 per month, for which Verizon charges a PARTS PVC monthly rate of \$21.00 under the PARTS offering. Proposed

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<sup>1</sup> 47 U.S.C. § 205(a). As the Commission has noted, “[w]e have ample authority under the Act to conduct an investigation to determine whether rates for DSL services are just and reasonable...” *In the Matter of GTE Telephone Operating Co.s*, Memorandum Opinion and Order, 13 FCC Rcd. 22466, ¶ 32 (1998).

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PARTS Tariff F.C.C. No. 1, § 16.9.5.B. For the same upstream/downstream speed and the same private virtual connection, however, Verizon charges a monthly rate of \$39.95 in its Infospeed DSL tariff. 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 lowest-price Infospeed DSL, which *does* carry such restrictions, is still more expensive than PARTS. Verizon Tariff, F.C.C. No. 20, § 5.1.6.C (\$29.95/month for a five year, one-million line Volume/Term plan), § 5.1.5.C (Shortfall Liability), § 5.1.6.E (Termination Liability Charges). Especially in light of the low recurring cost of \$14.61, the difference between Verizon's recurring charges under PARTS and Infospeed is wholly arbitrary, and strongly suggests that the Infospeed recurring rates are excessive and unreasonable.

Contrary to Verizon's suggestions,<sup>2</sup> the PVC in PARTS and the Infospeed service are technically and operationally equivalent. With each service, Verizon offers a 768/128 Kbps DSL connection from the end-user's NID to the ATM port at the Verizon DSLAM. As described in the respective tariff sections, the Infospeed DSL and the PVC aspect of PARTS are substantially the same<sup>3</sup> and, as Verizon has argued, "PARTS is an input to that [Infospeed] service not unlike other services that Verizon uses to provide DSL service."<sup>4</sup> Once the traffic is routed through the DSLAM, Verizon then assesses a separate charge for an ATM Port (in the case of PARTS) or for an ATM transport connection (in the case of Infospeed).<sup>5</sup> The recurring rates for the PARTS PVC or Infospeed, however, are separate from Verizon's additional ATM connection/port charges or collocation expenses. Thus, an ISP ordering Verizon Infospeed DSL also faces ATM

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<sup>2</sup> Verizon Reply, Transmittal No. 232, at 12 (Aug. 22, 2002).

<sup>3</sup> *Compare*, PARTS Tariff F.C.C. No. 1, § 16.9.1.A (PARTS "is an access service that uses Digital subscriber Line (DSL) technology. Data traffic generated by a Customer-provided modem is transported to an ATM Port in the end user's serving wire center . . ."), *with*, Verizon Tariff F.C.C. No. 20, § 5.1.1.A (Infospeed DSL "Solutions are data access services that use DSL technology. Data traffic generated by a Company-provided or Customer-provided modem is transported to the Verizon Infospeed Connection Point."), *and, id.* § 5.1.1.D (visual depiction of Infospeed service showing "connection point" beyond the serving wire center).

<sup>4</sup> Verizon Reply, Transmittal No. 232, at 10. The PVC is the PARTS component that is the "input" for its Infospeed DSL when the end-user is served from a remote terminal.

<sup>5</sup> *Compare* Proposed Verizon Tariff F.C.C. No. 1, § 16.9.5.A (PARTS ATM Ports rates), *with*, Verizon Tariff F.C.C. No. 20, § 5.1.2.C (Infospeed service requires ISP to separately purchase access to Verizon's "data network interface services . . . [which] may include . . . ATM . . . [and a] minimum connection speed of DS-3 or higher is required for ATM . . ."). Apart from the artificially imposed collocation requirement, it is unclear what, if any differences there are between PARTS and Infospeed DSL services.

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charges, as does the competitive LEC ordering PARTS. The Verizon Reply (at 12, n. 9) further claims that the PARTS and Infospeed rates are different because Infospeed rates did not take into account additional remote terminal installation costs included in PARTS; however, but this would only further suggest that Infospeed pricing is excessive. Since Infospeed provides DSL via both central office and remote terminal facilities, the Infospeed recurring costs should be *less* than the PARTS recurring cost of \$14.61/month.

The Infospeed recurring rates are of particular concern because Verizon is a dominant carrier that has never cost-justified the Infospeed rates or provided support under price caps, and it currently offers service pursuant to a temporary FCC staff waiver.<sup>6</sup> While Verizon has chosen to limit PARTS to collocated carriers and thereby permitting ISPs to purchase only Infospeed DSL,<sup>7</sup> Sections 201 and 202 of the Communications Act forbid Verizon from charging a significantly different and higher recurring Infospeed rate, which is more than twice the apparent cost of the service, for essentially the same service as offered in PARTS.<sup>8</sup>

The difference in recurring rates is not only arbitrary, it also discriminatory against unaffiliated ISPs. The Verizon PARTS cost data establish that the recurring cost of providing the service (\$14.61/month) is well below the \$29.95 to \$39.95/month of Infospeed recurring rates, which has a disparate impact as between affiliated and unaffiliated ISPs. For an unaffiliated ISP, the additional cost amounts to a network expense that is not recovered from another subsidiary, that is, it is “real money.” The affiliated Verizon ISP, even if it pays the same inflated Infospeed

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<sup>6</sup> *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 (rel. June 12, 2002).

<sup>7</sup> As noted by WorldCom, there would appear to be no legitimate basis for the PARTS tariff restriction to collocated carriers since a DS3 connection without collocation would also handle traffic for the PARTS customer, in much the same way as ISPs currently purchase ATM and DS3 access to connect to Verizon's Infospeed DSL service. WorldCom Communications Petition to Reject or, In the Alternative, to Suspend and Investigate, Transmittal No. 232, at 5 (Aug. 16, 2002).

<sup>8</sup> See, *In the Matter of AT&T Communications Revisions to Tariff F.C.C. No. 1*, Memorandum Opinion and Order, 7 FCC Rcd. 156, ¶ 7 (CCB 1991) (Commission initiated investigation of AT&T tariff upon finding that “customers are to be charged different rates for what is otherwise the same service . . . . Such apparent discrimination in the terms and conditions of service raise serious questions of compliance with the prohibition against unreasonable discrimination contained in Section 202(a) of the Communications Act, 47 U.S.C. § 202(a)”; *In the Matter of Revisions to Southwestern Bell Tel. Co., Tariff F.C.C. No. 68*, Order, 4 FCC Rcd. 2624 (CCB 1988) (FCC rejects tariff on the basis, in part, that “[u]ltimately, the proposed tariff revisions could result in different customers paying different rates for the same service.”).

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prices, is merely paying its Verizon affiliate and so Verizon, in fact, faces economic costs well below the current price of the service. In this way, Verizon's inflation of Infospeed recurring rates has raised the costs of DSL for unaffiliated ISPs in a discriminatory manner.

This arbitrary price setting for equivalent services and price discrimination by Verizon violates Sections 201(a) and 202(b) of the Act, as well as 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.*<sup>9</sup>

For these reasons, Earthlink requests that the Commission initiate an investigation under Section 205(a) of the Communications Act to determine whether Infospeed DSL recurring rates are unreasonable and discriminatory under Sections 201 and 202 of the Act. Please feel free to contact the undersigned at 202/887-6230 should you have any questions regarding this matter.

Sincerely,

/s/

Mark J. O'Connor  
Kenneth R. Boley  
Counsel for EarthLink, Inc.

cc (via email):  
Tamara Preiss (tpreiss@fcc.gov)

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<sup>9</sup> *In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace, et al., Report and Order*, 16 FCC Rcd 7418, ¶ 46 (2001) (emphasis added).

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Certificate of Service

I, Angelica Brooks, state that copies of the foregoing Letter were delivered via hand delivery, or facsimile/first-class mail as indicated, this day, August 30, 2002, to the following:

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