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Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Reference: Verizon Application No. 86

Dear Ms. Dortch:

On April 10, 2003, Verizon filed Application No. 86, seeking special permission to file revisions to its FCC Tariffs No. 1 and 20 without meeting certain obligations required by the Commission's rules. Verizon requested a waiver of Section 61.74 and limited waivers for Sections 61.38 and 61.49 to, among other things, permit Verizon to file its tariff revisions without cost support. EarthLink, Inc. urges the Commission to deny Verizon's waiver request to the extent that it would permit Verizon to file its proposed tariff revisions without cost support.

Section 61.49(f)(2) of the Commission's rules provides, "Each tariff filing submitted by a price cap LEC that introduces a new loop-based service . . . must be accompanied by cost data sufficient to establish that the new loop-based service . . . will not recover more than a just and reasonable portion of the carrier's overhead costs." A "new service offering" is "[a] tariff filing that provides for a class or sub-class of service not previously offered by the carrier involved and that enlarges the range of service options available to ratepayers." 47 C.F.R. § 61.3(x). Verizon's waiver request references a proposed tariff filing introducing, by its own admission, a "new service offering." That offering, called the Verizon Infospeed Digital Subscriber Line (DSL) Solutions Five-Year Term and Volume Discount Plan (5N-VDTP), is a loop-based offering that has not been previously offered by the carrier and that enlarges the range of service options available to ratepayers, not just in terms of volume pricing, but also with regard to the service speeds. Thus, cost justification materials must be provided with the tariff filing under Section 61.49(f)(2).

"An applicant for waiver must clearly demonstrate that the general rule is not in the public interest when applied to its particular case and that the grant of the waiver will not undermine the public policy served by that rule." *American Tel. and Tele. Co.,* Memorandum

Opinion and Order, 94 F.C.C.2d 545 (1983) (*citing* Wait Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969)). Verizon has failed to carry this burden. It has made no case for the requested waiver as it pertains to the cost justification filing. Its sole justification is of little relevance to the cost justification requirement: It requests the waiver, "Given the possibility that Verizon Infospeed DSL Solutions may eventually be excluded from price caps as a result of [a] pending rulemaking … [to] avoid unnecessary impacts on Verizon's price cap indexes and price cap rates that would occur if the service were included in price caps, only to be removed later." Application No. 86 at 1-2.

The provision of cost justification material will have no impact on Verizon's price cap indexes and rates but will allow the FCC and interested parties to ensure that services are cost-based and rationally and fairly priced. While a subsequent shift in FCC rules may indeed obviate the need for Verizon to file such information in the future, speculation about the outcome of a pending proceeding—especially one as contentious as the *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services,* CC Docket No. 01-337—is not a legitimate basis for a waiver here.

Verizon's statement that "Cost support was included in a filing introducing Verizon Infospeed DSL Solutions under The Bell Atlantic Telephone Companies Transmittal No. 1076 in Tariff F.C.C. No. 1" likewise is not helpful: it only serves to note that five years ago Bell Atlantic provided cost justification material for a similarly named service offered at different speeds and prices.

Indeed, the reasons for the cost justification requirement—to ensure a reasonable relationship between costs and rates to protect consumers from anti-competitive pricing—remains valid. "We conclude that new and restructured services must receive special treatment because they present possible means of avoiding price cap pricing restrictions." *Policy and Rules Concerning Rates for Dominant Carriers*, 54 FR 19836, ¶ 24 (May 8, 1989). Even as it relaxed other requirements, the FCC intentionally retained the cost justification requirement for loop-based services like DSL: "We also eliminate the new services test in Sections 61.49(f) and (g) for all new services except loop-based services. We are concerned that new services that employ local loop facilities raise cost allocation issues that the Commission has not yet addressed. … Until these issues are resolved, it is not appropriate to permit price cap LECs to file tariffs for new loop-based services without satisfying the cost support requirements of the new services test." *Access Charge Reform*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, ¶ 39 (1999). The issues have still not been resolved with regard to DSL, and the cost justification requirement still holds.

For these reasons, EarthLink urges the denial of Verizon's requested waiver of the requirement to file its tariff revisions with cost support.

Sincerely,

/s/

Kenneth R. Boley
Counsel for EarthLink, Inc.

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