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March 29, 2007

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

FCC/MELLON MAR 29 2007

Re: Petition of Hawaiian Telcom, Inc., for Waiver of Section 61.42(g)
of the Commission's Rules, 47 C.F.R. § 61.42(g)

Dear Ms. Dortch:

Hawaiian Telcom, Inc., through its attorneys, hereby submits the above-referenced Petition for Waiver. As required by the Commission's rules, enclosed are an original and four copies of the Petition, FCC Form 159, and the requisite fee of \$775.00

Please stamp and return to me the additional copy provided for that purpose. Please direct any questions concerning this matter to me at (202) 637-2225.

Very truly yours,



Richard R. Cameron

Enclosures

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

In the Matter of)
)
HAWAIIAN TELCOM, INC.) WC Docket No. _____
)
Petition for a Waiver of Section 61.42(g) of)
the Commission's Price Cap Rules)
for Advanced Services Formerly Offered by)
Verizon Hawaii, Inc.)

**PETITION OF HAWAIIAN TELCOM INC.
FOR WAIVER OF THE PRICE CAP RULES**

Hawaiian Telcom, Inc. ("HTI") hereby petitions the Commission for a limited waiver for the 2007 tariff year of Section 61.42(g) of the Commission's price cap rules, as those rules pertain to certain advanced services provided by HTI and previously provided by Verizon Hawaii, Inc. ("Verizon Hawaii"). HTI is the successor entity to Verizon Hawaii which, through its parent and prior to a transfer of control consummated on May 2, 2005, received similar waivers from the Commission for each tariff year since 2002. Last year, the Commission extended the waiver to HTI for the 2006 tariff year.¹ HTI now petitions the Commission to extend this waiver to cover the advanced services listed in Attachment A, which are now offered by HTI, for the 2007 tariff year. This request is substantially similar to the temporary waiver that the Commission granted last year. The waiver should be extended for the 2007 tariff year because good cause exists for excluding these advanced services from price cap regulation.

¹ See *Hawaiian Telecom Inc. Petition for Waiver of Sections 61.42(g), 61.38, and 61.49 of the Commission's Price Cap Rules for Advanced Services Formerly Offered by Verizon Hawaii, Inc.*, Order, DA 06-1260 (rel. June 12, 2006)(granting waiver of Section 61.42(g) for certain advanced services from price caps)("2006 HTI Waiver Order").

I. BACKGROUND

HTI is the largest provider of telecommunications services in the Hawaiian Islands. HTI began operations on May 2, 2005 when The Carlyle Group closed its acquisition of 100 percent of the equity of Verizon Hawaii from Verizon Communications (“Verizon”) and renamed the company Hawaiian Telcom, Inc. (“HTI”). Because of this former relationship between Verizon and HTI, this Petition should be considered against the backdrop of the Commission’s treatment of the advanced services provided by Verizon prior to the 2005 transaction.

In 2000, as a condition to the merger between GTE and Bell Atlantic, Verizon spun off certain advanced services to the newly-formed Verizon Advanced Data Inc. (“VADI”). Under the *Bell Atlantic-GTE Merger Order*,² VADI was to retain control over these advanced services until the expiration of applicable sunset provisions. On September 26, 2001, the Common Carrier Bureau (now the Wireline Carrier Bureau) granted Verizon’s request to expedite the sunset of the advanced services requirements.³ Pursuant to the Common Carrier Bureau’s decision, Verizon reintegrated the VADI services and began providing them directly to consumers. The services were transferred to the Verizon telephone companies’ Tariff FCC No. 20.

² *Application of GTE Corporation and Bell Atlantic Corporation for Consent to Transfer Control of Domestic and International Section 214 and 310 Authorizations and Applications to Transfer Control of a Submarine Cable Landing License*, CC Docket No. 98-184, Memorandum Opinion and Order, 15 FCC Rcd 14032 (2000) (*Bell Atlantic-GTE Merger Order*).

³ *Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of Domestic and International Section 214 and 310 Authorizations and Applications to Transfer Control of a Submarine Landing License*, CC Docket No. 98-18, Order, 16 FCC Rcd 16915 (2001).

On November 30, 2001, Verizon filed a petition for waiver of sections 61.42(g), 61.38, and 61.49 of the Commission's rules on price cap indexes pending the outcome of the Commission's rulemaking proceeding concerning whether advanced services should be given non-dominant treatment based on the nature of the services themselves rather than the identity of the carrier providing the services.⁴ The Commission granted an initial limited waiver on June 10, 2002⁵ and has extended the waiver several times at Verizon's request.⁶ The waiver applied to all of Verizon's operations, including those of Verizon Hawaii, Inc., which later became HTI. Verizon filed its most recent waiver petition on February 8, 2007.⁷

After the transfer of control was consummated on May 2, 2005, HTI concurred in three of Verizon's tariffs through October 2005.⁸ At that time, HTI issued tariffs in its own name, designated Hawaiian Telcom, Inc. Tariff FCC Nos. 1, 2, and 3, respectively (the "HTI Tariffs"). The rates, terms, and conditions of service contained in the HTI Tariffs precisely

⁴ Verizon Petition for Waiver of the Price Cap Rules (Nov. 30, 2001).

⁵ *Verizon Petition for Interim Waiver of Sections 61.42(g), 61.38 and 61.49 of the Commission's Rules*, WCB/Pricing No. 02-16, Order, 17 FCC Rcd 11010 (June 10, 2002) ("2002 Waiver Order").

⁶ *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 (2006); *Petition for Waiver of the Commission's Price Cap Rules For Services Transferred from VADI to the Verizon Telephone Companies*, WCB/Pricing No. 05-17, Order, DA 05-1335, 20 FCC Rcd 8900 (Pric. Pol .Div. Wir. Comp. Bur. 2005) ("2005 VADI Waiver Order"); *Petition for Waiver of the Commission's Price Cap Rules For Services Transferred from VADI to the Verizon Telephone Companies*, WCB/Pricing No. 04-16, Order, DA 04-1062, 19 FCC Rcd 7095 (Pric. Pol .Div. Wir. Comp. Bur. 2004) *Verizon Petition for Interim Waiver of Section 61.42(g) of the Commission's Rules*, WCB/Pricing No. 03-11, Order, 18 FCC Rcd 6498 (Pric. Pol .Div. Wir. Comp. Bur. 2003).

⁷ See Public Notice, *Comments Sought on Verizon Petition for Waiver of Price Cap Rules*, WCB/Pricing No. 07-31, DA 07-799 (rel. Feb. 21, 2007).

⁸ The tariffs concurred in by HTI were Verizon Telephone Companies (Verizon) Tariff FCC No. 14, Facilities for Interstate Access; Verizon Tariff FCC No. 20, Communications Services Tariff; and Verizon Tariff FCC No. 21, Special Construction.

mirror those contained in the Verizon's tariffs in which HTI previously concurred.⁹ Under the new tariffs, HTI continues to provide the same services previously provided by Verizon Hawaii, Inc., including the advanced services covered by the Commission's waivers. Because the rates for the advanced services contained in the HTI Tariffs reflect the exclusion of those services from the Commission's price cap rules, and because the same considerations that led the Commission to grant HTI's petition last year still apply, HTI now petitions the Commission to extend its existing waiver of the price cap rules for these advanced services to cover HTI for the 2007 tariff year. The services for which HTI seeks this extension are set forth in Exhibit A to this Petition.

II. THE COMMISSION SHOULD EXTEND ITS WAIVER OF THE PRICE CAP RULES TO APPLY TO ADVANCED SERVICES OFFERED BY HTI IN THE 2007 TARIFF YEAR

Section 1.3 of the Commission's rules permits the Commission to waive any of its rules "for good cause shown."¹⁰ The Commission may waive its rules when particular facts make strict compliance inconsistent with the public interest and, in making this determination, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.¹¹ In granting a waiver, the Commission

⁹ The Commission granted HTI's September 29, 2005 application for Special Permission to waive the requirements of Section 61.54(i)(2), 61.58, 61.59 and 61.74 of the Commission's Rules and Regulations.

¹⁰ 47 C.F.R. § 1.3.

¹¹ *Sandwich Isles Communications, Inc. Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary and Sections 36.611, and 69.2(hh) of the Commission's Rules*, CC Docket No. 96-45, Order, DA 05-1355, 20 FCC Rcd 8999 (Wir. Comp. Bur. 2005), at para. 8.

generally must determine, therefore: (1) that special circumstances warrant a deviation from the general rule; and (2) that such deviation will serve the public interest.¹²

HTI's request meets this test. *First*, HTI unquestionably faces special circumstances that support the extension of the exemption of advanced services from the Commission's price cap rules. HTI has inherited from Verizon a set of advanced services rates that have consistently been excluded from the company's price cap calculations since they were reintegrated into Verizon's ILEC offerings in 2002. HTI is aware of no other case in which services formerly subject to price caps have been spun off from an incumbent local exchange carrier ("ILEC") to a separate affiliate, operated by that affiliate for several years, reabsorbed by the ILEC, sold to an unaffiliated third party, and then reintegrated into that new party's price cap tariffs.

Since the sale of Hawaiian Telcom closed, the regulatory landscape has continued to change, and Hawaiian Telcom has continued to evaluate its pricing options under the Commission's rules. In particular, in August, 2005, the Commission adopted the *Wireline Broadband Internet Access Services Order*, which concludes that wireline broadband Internet access services are information services, and allows wireline broadband Internet access service providers to offer the transmission component of such services at wholesale on either a common-carrier basis or a non-common-carrier basis.¹³ In the 2006 HTI Waiver Order, the Commission granted HTI a waiver to give it "a reasonable period of time to respond to [the transfer of control from Verizon and the recent regulatory developments] without incurring the burdens and

¹² *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969)).

¹³ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14899-903, paras. 86-95 (2005).

expenses of incorporating these services into price caps.”¹⁴ HTI has now detariffed its digital subscriber line (“DSL”) services, as contemplated in the *Wireline Broadband Internet Access Services Order*.¹⁵ The regulatory status of other advanced services covered by this waiver, however, remains uncertain.¹⁶ HTI therefore continues to evaluate its regulatory options, such as forbearance or Phase I or Phase II pricing flexibility for some or all of the services covered by this petition. It would serve no purpose to require HTI to re-integrate these services into price caps for what may ultimately be only a short period of time, particularly when these services have already remained outside of price cap for five years under both Verizon Hawaii and HTI without any negative impact.

Furthermore, even putting aside the complexities raised by the intervening transfers of control and the ongoing evolution of the regulatory framework for advanced services, the Commission’s rules simply do not provide meaningful guidance on how the price cap rules might apply in this case. The advanced services at issue here do not fit neatly into the existing framework of section 61.42 of the Commission’s rules, leaving HTI with the daunting challenge of navigating a complicated pricing regime that does not clearly provide for the situation HTI now faces. Section 61.42(g) perhaps comes the closest, requiring that “new services” subject to price caps be included in the applicable basket in the first annual price cap

¹⁴ *2006 HTI Waiver Order*, ¶ 9.

¹⁵ Hawaiian Telcom, Inc. Tariff Transmittal No. 19

¹⁶ In March 2006, for example, the Commission granted Verizon’s forbearance petition seeking deregulation of its packet-switched broadband services with speeds above 200 kbps by operation of law in March 2006. 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 Docket No. 04-440 (rel. Mar. 20, 2006).

tariff filing following completion of the base period in which the new services are introduced.¹⁷ In this case, however, the advanced services in question are not “new,” having been provided for many years by HTI and its predecessors, including VADI. Because HTI continues to provide the same services, at the same rates, under an identical tariff, section 61.42(g) does not appear to apply. The lack of a clear rule strongly suggests that a waiver is appropriate in this case.

Second, extension of the Commission’s past waivers clearly would serve the public interest in two ways. For one, as the Commission recognized in the *2006 HTI Waiver Order*, re-integrating these advanced services in the price cap regime could create “headroom” that HTI could then use to increase rates for other services in the same price cap basket or service category.¹⁸ If HTI were to place these advanced services into the proper price cap basket, future reductions in the price of these services could create headroom that would allow rates for other services within that basket to rise. The Commission also acknowledged this contingency in its *Order granting Verizon’s 2005 waiver petition*:

Price cap rules group services together in different baskets, service categories, and service subcategories. The rules also identify the total permitted revenues for each basket or category of services. Within these baskets or categories, incumbent LECs have some flexibility to change the rate level of a specific service. . . . If, for example, Verizon were to place advanced services within a price cap basket or service category and then lower the prices for these services, Verizon could offset the rate decreases by raising the prices of other services within that basket or service category.¹⁹

¹⁷ 47 C.F.R. § 61.42(g) (2005). The Commission’s rules define a “new service offering” as one contained in “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).

¹⁸ *2006 HTI Waiver Order* at para. 10 (stating that if HTI “were to placed the Advanced Services into price caps, this could create ‘headroom’ within a service category or band that could result in changes to the rates of other less competitive services, and such an outcome would not be in the public interest”).

¹⁹ *2005 VADI Waiver Order* at para. 6, n. 22.

As the Commission thus implicitly recognized, including advanced services in price caps could upset settled customer expectations with respect to the pricing of other services. In contrast, keeping advanced services out of price cap regulation would eliminate any possibility that future rate reductions could create “headroom” that HTI could use to raise rates for other services. A waiver for advanced services is therefore in the public interest.

Further, the Commission has not yet determined the ultimate treatment of advanced services under its price cap rules. While the Commission recently concluded that broadband wireline Internet access services constitute information services, not subject to Commission pricing regulation, and that wholesale broadband transmission services sold as inputs to these information services could be offered on a private carriage basis,²⁰ the Commission has not yet determined what regulatory treatment it will apply to other advanced services. The Commission is currently weighing various regulatory approaches to broadband and other advanced services, including the advanced services at issue here.²¹ It is possible that advanced services will be either deregulated or allocated to a separate price cap category in the future.²² Given the continuing uncertainty, it would not serve the public interest to force HTI to reformulate its price caps to include its advanced services, only to find that these services may be subject to substantially different treatment in the near future. HTI applauds the Commission’s efforts to clarify the regulatory framework within which advanced service providers must operate. But it would be premature for the Commission to require HTI to reintegrate its advanced services into price caps before these proceedings reach a conclusion.

²⁰ *Wireline Broadband Internet Access Services Order* at paras. 86-95.

²¹ *See Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25 et al., Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994, 2013, para. 52 (2005).

²² *See 2005 Waiver Order* at para. 7; *2002 Waiver Order* at para. 9.

III. CONCLUSION

For the foregoing reasons, the Commission should extend its waiver of section 61.42(g) of its price cap rules to apply to HTI's advanced services identified in Exhibit A for the 2007 tariff year. This waiver would serve the public interest by allowing HTI to exclude these services from its price cap indexes for purposes of its annual access tariff filings.

Respectfully submitted,



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Attorneys for Hawaiian Telcom, Inc.

March 29, 2007

EXHIBIT A

**ADVANCED SERVICES UNDER
HAWAIIAN TELCOM INC. TARIFF FCC NO. 2**

- | | |
|--|--------------------|
| 1. Frame Relay Service I | Section 5.2 |
| 2. High Capacity Broadband Access Cloud | Section 5.3 |
| 3. Asynchronous Transfer Mode Network Service I | Section 5.4 |
| 4. Frame Relay Service III | Section 5.6 |
| 5. Asynchronous Transfer Mode (ATM) Cell Relay | Section 5.7 |
| 6. Transparent LAN Service | Section 5.8 |