



STATE OF NEW JERSEY
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VIA ELECTRONIC FILING

Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

**Re: Petition of Verizon for Declaratory Ruling or, Alternatively, for Interim Waiver
with Regard to Broadband Services provided Via Fiber to the Premises.
WC Docket No. 04-242**

Dear Secretary Dortch:

The New Jersey Division of the Ratepayer Advocate ("Ratepayer Advocate") hereby submits this letter in lieu of more formal comments in the above-captioned proceeding.

The Ratepayer Advocate is an independent New Jersey State agency that represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities. The Ratepayer Advocate participates actively in relevant Federal and state administrative and judicial proceedings. The above-captioned proceeding is germane to the Ratepayer Advocate's continued participation and interest in implementation of the Telecommunications Act of 1996.¹ The New Jersey Legislature has declared that it is the policy of the State to provide diversity in the supply of telecommunications services, and it has found that competition will "promote efficiency, reduce regulatory delay, and foster productivity and innovation" and "produce a wider selection of services at competitive market-based prices."² The Ratepayer Advocate supports the customer benefits that will be realized through the introduction and

^{1/} Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act"). The 1996 Act amended the Communications Act of 1934. Hereinafter, the Communications Act of 1934, as amended by the 1996 Act, will be referred to as "the 1996 Act," and all citations to the 1996 Act will be to the 1996 Act as it is codified in the United States Code.

^{2/} N.J.S.A. 48:2-21.16(a)(4) and 48:2-21.16(b)(1) and (3).

expansion of competition in New Jersey and the Nation's telecommunications markets. Competition should result in lower prices, greater consumer choices, and more rapid technological innovation and deployment.

The Ratepayer Advocate respectfully submits that the Federal Communications Commission ("Commission") should deny and dismiss the petitions filed by the Verizon Telephone Companies ("Verizon") as being premature, containing inadequate and insufficient support on which to make any determination, and lacking empirical evidence to otherwise support any exercise of the Commission's forbearance authority under Section 10 of the Act.³

Verizon requests a declaratory ruling from the Commission that any Verizon broadband service offered via fiber to the premises on a nationwide basis can be offered in the same manner as cable operators offer cable modem service. In the alternative, Verizon also asks that the Commission issue a waiver from its *Computer II/III* rules.⁴ Lastly, Verizon asks that to the extent the Commission does not grant the declaration or waiver, the Commission should exercise its forbearance authority and decline to enforce Title II requirements as it relates Verizon's fiber to the premises broadband offering.

Verizon indicates that it plans to use its new fiber to the premises infrastructure to offer an attractive package of voice, multichannel video programming, and high-speed Internet access (essentially broadband cable modem service) in the near future.⁵ In addition, Verizon claims that its roll out of fiber to the premises has begun and has identified Keller Texas as its first deployment with a goal of offering said service in parts of nine states by the end of 2004.⁶ Verizon also asserts that it is in the process of obtaining local cable television franchises to offer Title VI services in competition with existing cable operators.⁷

Despite the claim by Verizon that it wants to be treated the same as cable operators are treated, the Ratepayer Advocate submits that Verizon is actually trying to be treated differently than cable operators with respect to the *Commission's Cable Modem Declaratory Ruling*.⁸ The Commission's

^{3/} 47 U.S.C. § 160.

^{4/} See Final Decision, *Amendment of Section 64.702 of the Commission's Rules and Regulations ("Computer II")*, 77 F.C.C. 2d. 384 (1980); Report and Order, *Computer III Further Remand Proceedings: Bell Operating Co. Provisions of Enhances Services*, 14 FCC Rcd 4289 (1999) ("Computer III")

^{5/} See *Memorandum of Points and Authorities in Support of Verizon's Petition For Declaratory Ruling Or Interim Waiver and Conditional Petition For Forbearance With Respect to Broadband Services Provided Via Fiber to the Premises ("Memorandum")* at 2-3.

^{6/} *Id.* at 2.

^{7/} *Id.*

^{8/} Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to Internet over Cable and Other Facilities*, 17 FCC Rcd 4798 (2002) ("*Cable Modem Declaratory Ruling*"). The Ninth Circuit vacated in part the FCC's ruling. See *Brand X Internet Servs. v. FCC*, 345 F.3d. 1120 (9th Cir. 2003), *petitions for certiorari pending*.

determinations in the *Cable Modem Declaratory Ruling* applied to existing cable operators that had local cable franchises in operation, who had upgraded their systems to offer telephony and cable modem services, and who were actually offering cable modem services at the time.

These cable operators had not requested or received any declaratory ruling, and had not sought waivers or forbearance from any Commission requirements prior to offering their cable modem services. In fact, cable operators had publically disclosed the terms, conditions, and prices of their cable modem offering through filings with local franchising authorities and mailings to their customers. These cable operators needed no special treatment or relief in order to make infrastructure investments in their businesses. It is simply premature to grant any relief to Verizon when its infrastructure deployment is incomplete, it has no broadband service offering via fiber to the premises at this time, and no details exists as to the price, terms and conditions of its broadband service offering via fiber to the home. In a true competitive market, competitors should not be shielded from risks of making investments for new services in the market place.

Notwithstanding the above, Verizon characterization that the Commission has granted a waiver of *Computer II/III* requirements and the Commission's tentative conclusion that Title II forbearance is appropriate to cable operators under its *Cable Modem Declaratory Ruling* is misleading and provide no basis for granting the relief requested by Verizon.⁹ Verizon's assertion that the Ninth Circuit did not disturb the Commission's waiver finding is simply wrong. The Ninth Circuit clearly indicated that they were not reaching this issue and expected the Commission to address it on remand.¹⁰ The Commission asked for comments on whether forbearance from telecommunications service obligations is appropriate in the Notice of Proposed Rukemaking issued as part of the *Cable Modem Declaratory Ruling*. Until that phase of the *Cable Modem Declaratory Ruling* is actually decided and an order or regulations issued, it is premature to even consider Verizon's forbearance request.¹¹ More importantly, Verizon is seeking a benefit of a waiver when Verizon does not meet the conditions under which the waiver was granted. The Commission granted the waiver to a cable

^{9/} *Memorandum* at 9-11.

^{10/} See *Brand X Internet Servs. v FCC*, at foot note 14 wherein the Court states: “[b]ecause the various petitioners’ claims all revolve around the FCC’s central classification decision, which we have vacated, we decline here to consider their remaining claims (including those directed at the validity of the FCC determination that AOL Time Warner offers cable transmission to unaffiliated ISPs on a private carriage basis and its waiver of the Computer II requirements for cable companies, who also offer local exchange service), leaving them for reconsideration by the FCC on remand.”

^{11/} The three determinations required by Section 10 of the Act cannot be made in absence of Verizon actually offering a broadband service with disclosure of the terms, conditions, and price of its offering. Without terms, condition and price, one cannot make any determination that service is “just and reasonable and not unjustly or unreasonably discriminatory,” that enforcement is not necessary “for protection of consumers,” and forbearance is consistent with the public interest. 47 U.S.C. § 160.

operator that “additionally offers local exchange service.”¹² Verizon is not a cable operator at this time and therefore it cannot avail itself of this waiver.¹³

Verizon admits that the Commission has several ongoing rulemaking proceedings to determine the appropriate regulatory treatment of broadband services offered by telephone companies and cable companies.¹⁴ Pending final orders and/or adoption of rules in those proceeding, the Commission should not consider granting any relief to Verizon. As Commissioner Copps noted in his dissent in the *Cable Modem Declaratory Ruling*- “we are out-flying the range of our most advanced radar” and “[w]ith so much at stake, I would have hoped for a little more modesty and measured pace on our part.” There is simply no adequate record now and one cannot be developed until the Commissions decides the pending rulemakings. Accordingly, and for the reasons stated herein, the Ratepayer Advocate urges the Commission to deny and dismiss Verizon’s petitions. The undersigned may be contacted should you have any questions or require additional information.

Respectfully submitted,

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RATEPAYER ADVOCATE

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¹²/ *Cable Modem Declaratory Ruling* at 4825, ¶45.

¹³/ It is clear that considerable time is required to obtain a cable franchise and make the required regulatory filing to have initial rates approved by the local franchising authority. Verizon desire to obtain a national determination when it has yet to even obtain one cable franchise let alone cable franchises in substantial parts of the country demonstrates the fundamental flaw in their petitions.

¹⁴/ *Memorandum* at 12.