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August 9, 2002

VIA OVERNIGHT DELIVERY

Secretary James P. McNulty
Pennsylvania Public Utility Commission
P.O. Box 3265
Keystone Building, 3rd Floor
Harrisburg, PA 17101-3265

Re: In Re.: Petition of US LEC of Pennsylvania Inc. for Arbitration with Verizon Pennsylvania Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996; Docket No. A-310814F7000

Dear Secretary McNulty:

Please find enclosed the original and 9 copies of the Post-Hearing Reply Brief of Verizon Pennsylvania Inc. in the above-captioned proceeding. Also enclosed is one extra copy of the brief. Please date-stamp and return the extra copy in the self-addressed, postage prepaid envelope.

Also included for the record are copies of the Best and Final Offer of Verizon Pennsylvania Inc. (5 copies), Post-Hearing Brief of Verizon Pennsylvania Inc. and Appendix to our Post-Hearing Brief (11 copies each). While these documents have been served on the parties and the ALJ on the dates indicated, they inadvertently were not filed with the Secretary. Please date-stamp the extra copies of these pleadings as well and return them in the self-addressed, postage prepaid envelope.

If you have any questions, please call me at 202-326-7959.

Sincerely,

Scott H. Angstreich

cc: Service List

ORIGINAL

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

In Re: Petition of US LEC of Pennsylvania Inc. for Arbitration with Verizon Pennsylvania Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996	:	**Docket No. A-310814F7000**

POST-HEARING REPLY BRIEF OF VERIZON PENNSYLVANIA INC.

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August 9, 2002

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

In Re: Petition of US LEC of Pennsylvania Inc. for Arbitration with Verizon Pennsylvania Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996	:	**Docket No. A-310814F7000**

POST-HEARING REPLY BRIEF OF VERIZON PENNSYLVANIA INC.

Verizon Pennsylvania Inc. ("Verizon"), by counsel and pursuant to Prehearing Order No. 2, files this Post-Hearing Reply Brief concerning the remaining open issues in the Petition for Arbitration of US LEC of Pennsylvania Inc. ("US LEC").

SUMMARY

US LEC's positions with respect to the contested issues in this proceeding are legally and factually without foundation. Because US LEC's positions are inconsistent with federal law, they must be rejected for that reason alone. Moreover, US LEC's claims that its proposals would promote the interests of competition are thoroughly refuted in Verizon's Post-Hearing Brief and by the record. Instead, US LEC's proposals would simply enable US LEC and other CLECs to exploit perceived opportunities for regulatory arbitrage. A few points bear additional emphasis.

I - II. Verizon has demonstrated that US LEC's proposal on these issues unfairly burdens Verizon with all of the additional costs caused by US LEC's choice of network architecture. Specifically, Verizon would have to bear the costs – without compensation – of transporting local calls 50 or more miles outside of the local calling area where they originate solely because of US LEC's decision to serve an entire LATA from a single switch. The record shows, however, that US LEC's tariffed rates increase when it must transport such calls back to its own customer. Verizon further demonstrated that Verizon's proposal fairly allocates these

additional costs, using the cost-based rates this Commission established and that US LEC's witness conceded could be used for this purpose, and is consistent with federal law and decisions of this and other state commissions. Finally, Verizon demonstrated, and US LEC's witness conceded, that Verizon's proposal would require no changes to US LEC's existing physical network architecture.

Despite these concessions, US LEC repeats its incorrect claims that Verizon's proposal would prevent it from interconnecting at any technically feasible point on Verizon's network using any method. With respect to the allocation of costs, US LEC's claim that Verizon's proposal violates federal law is squarely foreclosed by binding FCC and Third Circuit precedent, which US LEC simply ignores. Moreover, this Commission previously has recognized that US LEC's proposal is both expensive and inefficient and has adopted an interconnection agreement that contains provisions similar to Verizon's proposal. US LEC concedes that those provisions are consistent with federal law; its arguments that Verizon's proposal is not must be rejected.

III. US LEC fails to raise any objection to the proposed language in Verizon's Best and Final Offer, which simply clarifies that Voice Information Services traffic is not subject to reciprocal compensation to the extent such traffic is "interstate or intrastate exchange access, information access, or exchange services for such access." US LEC has thus waived any such objection, and the Commission should adopt Verizon's proposed language. In any event, Verizon's position is indisputably consistent with federal law and the remainder of the parties' agreement.

IV. US LEC again fails to address the language in Verizon's Best and Final Offer and does not and cannot raise any substantive objection to a provision that requires separate trunking for traffic that US LEC will not permit its customers to originate. To ensure that carriers can

effectively control the 976-type traffic at issue, the Commission should adopt Verizon's proposal.

V. US LEC offers no federal law basis for its proposal that all traffic that the parties exchange, including traffic that the receiving carrier does not terminate, be referred to as "terminating traffic." Notably, US LEC does not venture to argue that Verizon's proposal would cause confusion; US LEC's would. Instead, US LEC argues that this Commission should contradict two decades of FCC precedent based on a supposed "possibility" that the FCC will change course in the future. That claim merely emphasizes that US LEC's proposal is a tendentious effort to reap a collateral litigation advantage. The Commission should not indulge such gamesmanship.

VI. Verizon has demonstrated that payment of reciprocal compensation on Virtual FX traffic is contrary to federal law; the overwhelming majority of state commissions to address this issue agree. US LEC claims that payment of such compensation is the "historical practice," but that claim is misleading: historically, interLATA FX calls were subject to access charges, and the overwhelming majority of state commissions that have addressed this issue agree that intraLATA FX calls are likewise outside the scope of section 251(b)(5)'s reciprocal compensation obligation.

Not only is US LEC's proposal contrary to law, it is contrary to sound policy and basic fairness. US LEC attempts to dispute this by claiming that, when it provides Virtual FX service, US LEC, not Verizion, is providing the "longer haul." US LEC Br. at 45. That claim is false. Verizon must transport the call across the LATA and is deprived of the toll charges that would normally apply to this interexchange call. US LEC delivers the call to its customer located near the US LEC switch and collects thousands of dollars a year in "toll" charges – the same toll

charges that Verizon cannot collect. US LEC's effort to deny Verizon any compensation and to collect reciprocal compensation to boot is unfair and anticompetitive.

VIII. US LEC's proposal to impose a non-federally authorized compensation framework on Verizon in the event that the *ISP Remand Order* regime is vacated is without basis in federal law; US LEC does not even argue to the contrary. The parties have already agreed to a general change-of-law provision to govern this and other subsequent changes to governing federal regulatory regime. The Commission must reject US LEC's proposal.

IX. US LEC's claim that Verizon seeks the "unrestricted ability" to modify rates contained in the interconnection agreement is false: Verizon's proposal provides that generally applicable tariffs, duly approved or allowed to go into effect after regulatory scrutiny, should bind all carriers equally. US LEC seeks a discriminatory advantage, by urging this Commission to adopt a rule making tariffed rates binding on Verizon and all other carriers, but not US LEC. The Commission should reject this proposal.

ISSUE-BY-ISSUE REPLY ARGUMENT

Issues 1 and 2: ***(Glossary, Section 2.45; Interconnection Attachment, Sections 7.1.1.1, 7.1.1.1.1, 7.1.1.2, 7.1.1.3)***

VERIZON'S VGRIP PROPOSAL IS CONSISTENT WITH FEDERAL LAW AND SOUND POLICY AND SHOULD BE ADOPTED

In its post-hearing brief, Verizon demonstrated that Issues 1 and 2 pertain only to the allocation between the parties of the costs that result from US LEC's choice of network architecture. Verizon further demonstrated that US LEC's proposal, by requiring Verizon to transport traffic from throughout a LATA to a single point in that LATA (US LEC's switch), would cause Verizon to incur costs that it otherwise would not incur and for which it will receive no compensation from its customers, US LEC, or any other source. While US LEC's proposal would thus require Verizon to transport traffic 50 or more miles without compensation, US LEC can and does receive additional compensation from its customers when it transports traffic from its switch to its customers over distances of 10 or more miles. Finally, Verizon demonstrated that its Virtual Geographically Relevant Interconnection Points ("VGRIP") proposal, in contrast to US LEC's proposal, provides it with fair compensation for these costs, based on the unbundled network element rates that this Commission has already established. US LEC's witnesses conceded nearly all of these points during the hearing. Verizon's proposal is thus consistent with both federal law and sound policy, as this Commission, the FCC, the Third Circuit, and other state commissions have all found.

Despite its witnesses' concessions, US LEC continues to argue that Verizon's proposal would somehow prevent it from interconnecting at any technically feasible point on Verizon's network using any means it deems fit. *See, e.g.*, US LEC Br. at 6-9, 14-16. Yet Mr. Hoffman could not have been more explicit in admitting that, under VGRIP, US LEC may establish a

single point of interconnection ("POI") per LATA, at any technically feasible point on Verizon's network, using any method it might want to use. *See* Verizon Br. at 8-9; July 17 Hearing Transcript ("Trans.") at 43:13-20, 44-1:11, 49:6-11. With respect to the allocation of the costs of US LEC's choices, US LEC's arguments are based on a selective view of the evidence here and a failure to address relevant precedent, including the FCC's express holdings that Verizon's policy does not violate its current rules and that an incumbent LEC must be compensated for a CLEC's expensive interconnection choices; the Third Circuit's clear directive that this Commission should consider shifting such costs to CLECs; this Commission's own determination that US LEC's proposal would be both expensive and inefficient; and the decisions of numerous state commissions that have rejected US LEC's proposal.

For the reasons in Verizon's Post-Hearing Brief and discussed further below, Verizon's proposed interconnection language for Issues 1 and 2 should be adopted.

A. Verizon's VGRIP Proposal Fairly Compensates Verizon for the Additional Costs That It Incurs When US LEC Selects a Single Interconnection Point Per LATA

1. In Transporting Traffic to US LEC's Single Interconnection Point, Verizon Incurs Additional Costs for Which It Would Receive No Compensation Under US LEC's Proposal

As a result of US LEC's decision "to provide service over a large area with a single switch," Hoffman Testimony at 5:5-6, when a Verizon customer calls her neighbor, who is a US LEC customer, Verizon may be required to transport that call far outside of the local calling area in which those two people are located. Specifically, Verizon would have to transport the call from the local calling area where it originated (for example, Allentown) to US LEC's switch (in Philadelphia), possibly through one or more tandem switches. *See* Trans. at 32:18 - 33:10. US LEC does not deny either that Verizon must perform these functions or that Verizon would not perform these functions if that call were between two Verizon customers located in Allentown.

Instead, US LEC asserts that the record contains no evidence of the costs Verizon bears as a result of performing these functions and does not show that Verizon is not being compensated for performing the functions through its current rates. *See* US LEC Br. at 18-20.

However, this Commission already established the costs of transport and switching when it set the rates that Verizon could charge when a CLEC seeks access to those elements of Verizon's network on an unbundled basis. The 1996 Act and the FCC's rules require that these rates be based on the forward-looking cost of providing those services, and the FCC has found that the rates this Commission established comply with these federal law requirements. *See* 47 U.S.C. § 252(d)(1)(A)(i) (Verizon App. Tab 34); 47 C.F.R. § 51.505 (Verizon App. Tab 35); *Pennsylvania 271 Order* ¶ 55 (Verizon Supp. App. Tab 1).[1] Accordingly, these rates suffice to establish the costs that Verizon bears when it must transport a call to US LEC's single interconnection point ("IP") per LATA. Indeed, US LEC's witness admitted that those rates could be used to calculate the additional costs that Verizon bears as a result of US LEC's proposal. *See* Trans. at 34:20 - 35:4. And those are the rates used under sections 7.1.1.1.1, 7.1.1.2, and 7.1.1.3 of Verizon's VGRIP proposal. *See* D'Amico Rebuttal Testimony at 5:13-21.

Moreover, there can be no question that Verizon's current retail rates do not compensate it for performing these functions. If a Verizon customer in Allentown were to call a US LEC customer located in Philadelphia, Verizon would have to transport the call from Allentown to US LEC's switch in Philadelphia. However, Verizon would be compensated for that transport, whether through toll charges (if it were the intraLATA toll carrier) or access charges (if another

[1] Memorandum Opinion and Order, *Application of Verizon Pennsylvania Inc., et al., for Authorization To Provide In-Region, InterLATA Services in Pennsylvania*, 16 FCC Rcd 17419 (2001) ("*Pennsylvania 271 Order*").

carrier transported the call).[2] Verizon's local exchange service rates do not compensate it for these services.[3] Although Verizon must perform the *exact same* functions when a Verizon customer in Allentown calls a US LEC customer in Allentown – that is, it must transport the call from Allentown to US LEC's switch in Philadelphia – under US LEC's proposal, Verizon would have to do so *for free*. *See* Verizon Br. at 10-11.

Notably, while US LEC's proposal would require Verizon to bear these costs without compensation, US LEC can require full compensation for all the costs that it incurs. First, US LEC's witness conceded that Verizon compensates US LEC, through the payment of reciprocal compensation, for the switching function that US LEC performs in completing a call from a Verizon customer to a US LEC customer. *See* Trans. at 33:7-14. Second, US LEC's other witness conceded that US LEC's rates are based, in part, on how far its customer is located from its switch. *See* Trans. at 102:12 - 104:4. In fact, US LEC's rates increase when its customer is served out of a Verizon end office that is located only 10 miles away from US LEC's switch. *See* US LEC Local Exchange Tariff § 4.2 (US LEC Hearing Ex. 5). Accordingly, US LEC can and does receive compensation from its customers for the additional transport it must provide as a result of its decision to serve callers in a local calling area from a switch located far outside that

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[2] This example assumes that the US LEC customer located in Philadelphia does not have a phone number associated with the Allentown local calling area. *See* Issue 6, *infra*.

[3] US LEC mischaracterizes the record when it suggests that Verizon's local rates might recover the costs of carrying toll traffic. *See* US LEC Br. at 19-20. In fact, Verizon's witness testified that its local rates "generally . . . are below costs," Trans. at 218:4-8, meaning that they would not even cover the costs of the switching and transport between end offices necessary to complete calls that remain within the local calling area. Nor has Verizon attempted to rely on its local and toll rates "as a proxy for the costs" it incurs. US LEC Br. at 20. Verizon's VGRIP proposal relies on the cost-based, unbundled network element rates this Commission has established to determine the costs Verizon incurs. *See* Trans. at 135:16-21.

local calling area.[4] Yet, while US LEC requires its customers to pay higher rates if US LEC transports traffic over a distance of even 10 miles, US LEC's proposal would force Verizon to transport traffic 50 miles or more without compensation.

2. VGRIP Fairly Allocates Costs Between Verizon and US LEC

In contrast to US LEC's proposal – under which it would receive full compensation and Verizon would bear uncompensated costs – VGRIP fairly allocates costs between Verizon and US LEC. US LEC has the choice of compensating Verizon for the tasks it performs as a result of US LEC's interconnection choices or performing those tasks itself, by arranging for the transport of traffic from a Verizon tandem or end office. *See* Verizon Br. at 11-12.

US LEC, however, argues that VGRIP is unfair because it is not reciprocal – Verizon is not similarly obligated to compensate US LEC for transporting US LEC-originated traffic from US LEC's switch to Verizon's IPs. *See* US LEC Br. at 21. In the scenario US LEC envisions, a US LEC customer in Allentown would call a Verizon customer in Allentown. As a result of US LEC's decision to serve the Allentown customer from a switch located in Philadelphia, it would have to transport that call from Allentown to Philadelphia and then from its switch in Philadelphia to the Verizon end office serving Verizon's customer, or to the Verizon tandem that end office subtends. As shown above, US LEC can and does obtain compensation for these transport costs – from Allentown to Philadelphia and then back again – from its customers.

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[4] As Verizon has explained, US LEC would not be required to bear these transport costs if it assigned an Allentown telephone number to an end user with no physical presence in the Allentown local calling area. *See* Verizon Br. at 13-14. Although US LEC has stated that it currently has only six such customers and that none of them is an ISP, nothing prevents US LEC from altering its business practices to take full advantage of the regulatory arbitrage opportunity that would be provided if US LEC's proposal is adopted here. Notably, US LEC has argued that it should be able to expand the number of customers in Pennsylvania to which it assigns numbers associated with a local calling area different from the one in which they are physically located. *See* US LEC Br. at 33-34.

Thus, even if US LEC were correct that traffic between the parties is "roughly balanced," *id.* – and it is not: US LEC receives from Verizon between two and three times as much traffic as it originates, *see* Trans. at 75:10-22 – that fact would be immaterial because US LEC is compensated for the traffic it originates, while Verizon is not.

Moreover, requiring Verizon to pay US LEC for transporting traffic from its switch in Philadelphia back to Allentown would enable US LEC to shift these costs from its end-user customers, who currently pay for that transport, to Verizon, which would receive no compensation. The FCC has explained that such shifting of costs "undermines the operation of competitive markets" because consumers do not "receive accurate price signals." *ISP Remand Order* ¶¶ 68, 71.[5] Accordingly, the FCC has found that "viable, long-term competition among efficient providers of local exchange and exchange access services cannot be sustained where the intercarrier compensation regime does not reward efficiency and may produce retail rates that do not reflect the costs of the services provided." *Id.* ¶ 71. For these reasons, US LEC is incorrect in contending that adopting VGRIP would raise barriers to local competition. *See* US LEC Br. at 21-22. To the contrary, sustainable local competition requires that carriers compete "on the basis of the quality and efficiency of the services they provide, [not] on the basis of their ability to shift costs to other carriers." *ISP Remand Order* ¶ 71.

US LEC also claims that, because its current IP is not established via collocation, under VGRIP it would have to compensate Verizon for transporting traffic within the Philadelphia local calling area. *See* US LEC Br. at 17-18. Although this is a correct reading of Verizon's proposal, it is also the case that, if US LEC found it cost-justified to establish an IP at a

[5] Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151 (2001) ("*ISP Remand Order*") (Verizon App. Tab 14), *remanded*, *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

collocation site at a Verizon tandem, then Verizon would bear some of the costs of transporting a call outside of a local calling area, even though Verizon would not receive any compensation for those costs. *See* D'Amico Rebuttal Testimony at 4-5. Thus, VGRIP is a compromise proposal that provides US LEC with options based on the network architecture that it finds more advantageous.

Moreover, to the extent that the transport costs within the local calling area are the source of US LEC's objection to VGRIP, US LEC's witness admitted that it would be "eas[y]" to distinguish between the transport inside and outside of a local calling area.

> Q. . . . [W]ould you agree with me that one could easily calculate the portion of the transport that was within the local calling area versus the portion of the transport that was outside the local calling area?
> A. Yes.

Trans. at 52:25 - 53:5. Accordingly, the possibility that US LEC would be required to bear a portion of the cost of transporting traffic within the relatively small confines of a local calling area in no way justifies requiring Verizon to bear the uncompensated costs of transporting traffic from throughout the entire LATA to US LEC's switch in Philadelphia. At most, it would justify the adoption of a slightly modified version of Verizon's proposal to account for this issue.

B. Verizon's VGRIP Proposal Is Consistent with Decisions of the FCC, This Commission, the Third Circuit, and Other State Commissions

1. The FCC's Decisions Support VGRIP

US LEC's claim that "VGRIPs does not comply with federal law" has been squarely rejected by the FCC. In the *Pennsylvania 271 Order* – which US LEC never cites in its brief – the FCC unambiguously held that Verizon's similar GRIP proposal "do[es] not represent a violation of our existing rules." *Pennsylvania 271 Order* ¶ 100. The FCC further rejected claims that "Verizon's policies in regard to the financial responsibility for interconnection facilities fail

to comply with its obligations under the Act." *Id.* In light of these clear statements, US LEC's contention cannot be accepted.

Furthermore, the FCC's holding in the *Pennsylvania 271 Order* is consistent with its conclusion in the *Local Competition Order*[6] that "a requesting carrier that wishes a 'technically feasible' but expensive interconnection would, pursuant to section 252(d)(1), *be required to bear the cost of that interconnection*, including a reasonable profit." *Local Competition Order* ¶ 199 (emphasis added). Previously, Ms. Montano acknowledged the existence of the FCC's rule, but claimed, without support, that it is only "a very narrow exception" to what she claimed was the "rule of the road" that an ILEC must bear the cost of a CLEC's chosen network architecture. Montano Rebuttal Testimony at 3; *see also* Verizon Br. at 14 n.11. Now, however, US LEC denies the very existence of the requirement that CLECs bear the cost of expensive interconnection, contending that the FCC is only "considering such an exemption, [but] none exists under current FCC rules." US LEC Br. at 18. This is nonsense. The FCC's statement in paragraph 199 of the *Local Competition Order* was not a prediction about a rule that the FCC would consider adopting in a rulemaking initiated five years later. Instead, it was a statement about CLECs' obligations under the FCC's current rules – namely, that they must bear the costs of "expensive" interconnection choices.[7] And the FCC took precisely this position in 1998,

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[6] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*") (subsequent history omitted) (Verizon App. Tab 3).

[7] US LEC contends that Verizon "has defined no baseline against which to measure" when interconnection is expensive, because its witness stated "that delivering traffic to a point within a local calling area could also be expensive" for Verizon. US LEC Br. at 18. In fact, Mr. D'Amico simply noted that there might be "extreme circumstances" – such as if US LEC's IP were on "top of [a] mountain" – that might cause transport within a local calling area to be expensive. Trans. at 138:7-10. However, he clearly stated that "VGRIP is designed to address . . . th[e] expensive arrangement when [traffic is] hauled outside of a calling area." *Id.* at 138:9-12.

when it argued in federal court that an incumbent LEC may "obtain additional compensation if a specific request for interconnection warrants it."[8]

Nothing in the Wireline Competition Bureau's recent arbitration order supports US LEC's claim that Verizon is not entitled, under the FCC's current rules, to obtain compensation when a CLEC requests expensive interconnection. *See* US LEC Br. at 18. In large part, this is because the Bureau failed to address paragraph 199 of the *Local Competition Order* despite having found that "Verizon raises serious concerns about the apportionment of costs caused by a competitive LEC's choice of points of interconnection." *Virginia Arbitration Order* ¶ 54.[9] Moreover, the Bureau did not find that VGRIP is contrary to federal law, but concluded only – based on its selective reading of FCC precedent – that the CLECs' proposals were "more consistent" with federal law than VGRIP. *Id.* ¶ 53 n.123. In light of its failure to address relevant FCC precedent, however, even this conclusion must be rejected as erroneous. *See* Verizon Br. at 20-22. And, of course, that decision was not rendered by the FCC itself, is still subject to FCC review, and is neither entitled to the deference normally accorded to a federal agency's interpretation of a statute that it administers nor in any way binding on this Commission. *See id.* at 19-20, 22.

2. This Commission's Decisions Support VGRIP

This Commission has long recognized that requiring Verizon to transport traffic "to one central point, solely for [the CLEC's] convenience," is "both expensive and inefficient."

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[8] Memorandum of the Federal Communications Commission as Amicus Curiae, *U S WEST Communications, Inc. v. AT&T Communications of the Pacific Northwest, Inc.*, No. CV 97-1575 JE, at 22 & n.17 (D. Or. filed Aug. 16, 1998) (Verizon App. Tab 37).

[9] Memorandum Opinion and Order, *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, CC Docket Nos. 00-218, *et al.*, DA 02-1731 (Wireline Comp. Bur. rel. July 17, 2002) ("*Virginia Arbitration Order*") (Verizon App. Tab 10).

MCImetro Arbitration Order at 11.[10] US LEC ignores this aspect of the *MCImetro Arbitration Order*, just as it ignores the Third Circuit's directive that "the PUC should consider shifting costs to" a CLEC, if that CLEC's "decision on interconnection points . . . prove[s] more expensive to Verizon." *MCI Telecomm.*, 271 F.3d at 518 (citing *Local Competition Order* ¶ 209). Instead, US LEC focuses on the Third Circuit's statement that a state commission "must keep in mind whether the cost of interconnecting at multiple points will be prohibitive, creating a bar to competition in the local service area." *Id.* at 517. In light of the Third Circuit's subsequent statement that the PUC "*should* consider shifting costs" to the CLEC, *id.* at 518 (emphasis added), it is clear that the court was not limiting Verizon's ability to obtain compensation when a CLEC selects an expensive POI. Instead, and consistent with VGRIP, the court found that a CLEC may choose to establish only one physical point of interconnection per LATA between the two carriers' networks, but that it cannot force the ILEC to bear all the costs of that decision.

Consistent with its earlier decision and the Third Circuit's later ruling, in the *Sprint Arbitration Order*,[11] this Commission found that, under federal law, "CLECs that choose a technically feasible but expensive interconnection point must bear the costs of that interconnection." *Sprint Arbitration Order* at 55 n.37. Moreover, the Verizon-Sprint Agreement that the Commission approved requires Sprint, in specified circumstances, to establish additional POIs or to compensate Verizon for the transport of traffic from a virtual IP to Sprint's chosen

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[10] Opinion and Order, *Joint Application of Bell Atlantic-Pennsylvania, Inc. and MCImetro Access Transmission Services, Inc., for Approval of an Interconnection Agreement Under Section 252(e) of the Telecommunications Act of 1996*, A-310236F0002 (Pa. PUC Sept. 3, 1997) (emphasis added) ("*MCImetro Arbitration Order*") (Verizon App. Tab 22), *rev'd in part on other grounds, MCI Telecomm. Corp. v. Bell Atlantic-Pennsylvania*, 271 F.3d 491 (3d Cir. 2001).

[11] Opinion and Order, *Petition of Sprint Communication Company, L.P. for an Arbitration Award of Interconnection Rates, Terms and Conditions Pursuant to 47 U.S.C. § 252(b) and Related Arrangements with Verizon Pennsylvania, Inc.*, A-310183F0002 (Pa. PUC Oct. 12, 2001) ("*Sprint Arbitration Order*") (Verizon App. Tab 25).

POI. *See* Verizon-Sprint Agreement Interconnection § 1.2.3.1.3.6. US LEC concedes that this agreement "complie[s] with [federal] law's requirements." US LEC Br. at 9. Yet this agreement, like VGRIP, requires the CLEC to bear the costs of its interconnection choices, either by performing the tasks itself or by compensating Verizon.[12] US LEC's concession simply confirms that VGRIP complies with federal law and with this Commission's decisions.

3. Other State Commission Decisions Support VGRIP

Numerous other state commissions – including the North Carolina, South Carolina, and Ohio commissions – have issued thorough, well-reasoned decisions in which they have rejected positions nearly identical to US LEC's and determined that it is appropriate to require CLECs to bear the costs of their interconnection choices. *See* Verizon Br. at 18-19. US LEC does not address these decisions at all in its brief.

C. US LEC's Proposal Violates Federal Law

Under the terms of US LEC's Best and Final Offer on Issues 1 and 2, US LEC's POI can be on Verizon's network, while its IP could be its switch.[13] Given that its own proposal expressly allows for the POI and the IP to be in different locations, US LEC has necessarily abandoned its previous argument that federal law requires the POI and IP to be at the same location. Nonetheless, for the reasons Verizon has explained, US LEC's Best and Final Offer is

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[12] As Verizon has previously explained, the trigger that the Commission established for the application of the VGRIP-like provisions of the Verizon-Sprint Agreement means that those provisions will be of limited utility in preventing CLECs from requiring Verizon to bear the vast majority of the costs incurred by CLECs' chosen POIs and, therefore, should not be adopted here. *See* Verizon Response at 10 n.8; Verizon Br. at 17 n.17. US LEC still has not addressed this issue.

[13] US LEC states that it modified its initial offer on these issues "based on testimony during the hearing that elaborated on the Parties' existing network architecture." US LEC Br. at 12. Verizon understands this to mean that US LEC has concluded that Mr. Hoffman was correct when he stated that, under the parties' current arrangement, US LEC's POI is at Verizon's tandem while US LEC's IP is at its switch. *See* Verizon Br. at 23 & n.28.

contrary to US LEC's own understanding of federal law, as it would require Verizon to transport traffic to US LEC's IP, rather than the POI. *See* Verizon Br. at 23-24.

Issue 3: (Glossary, Section 2.75; Additional Services Attachment, Section 5.1; Interconnection Attachment, Section 7.3.7)

VERIZON'S PROPOSED TREATMENT OF VOICE INFORMATION SERVICES TRAFFIC FOR RECIPROCAL COMEPNSATION PURPOSES TRACKS FEDERAL LAW PRECISELY

US LEC and Verizon agree that reciprocal compensation under their interconnection agreement shall not apply to "interstate or intrastate exchange access, information access, or exchange services for such access." *See* Proposed Agreement, Glossary § 2.75. The parties' agreed language on this point simply tracks applicable federal law. Accordingly, US LEC can have no legitimate objection to the clarification that, to the extent Voice Information Services traffic falls within one of those enumerated categories of traffic, it is not subject to reciprocal compensation. As Verizon explained in its Post-Hearing Brief, that is precisely what the proposed language in Verizon's Best and Final Offer provides. *See* Verizon Br at 25-26. In its brief, US LEC raises no challenge to the language in Verizon's Best and Final Offer. Because Verizon's proposal is consistent with federal law and the parties' agreement, and because US LEC has offered no objection to that proposal in its opening brief, the Commission should adopt it.[14]

US LEC's assertion that "US LEC interprets [the definition of Information Services] to exclude calls to Voice Information Service Providers," US LEC Br. at 27, is both internally

[14] US LEC should not be permitted to raise any objections to Verizon's Best and Final Offer in its reply brief. US LEC was provided ample notice of Verizon's proposal and the rationale behind it, and accordingly had every opportunity to address it in its opening brief. The Arbitrator made clear at the outset of this proceeding that, in those circumstances, a party may not spring arguments on the other side in its reply. *See* May 17, 2002 Pre-Hearing Transcript at 17:6-12, 18:5-6.

inconsistent and inconsistent with federal law. First, US LEC claims (without any citation to the record) that Voice Information Services traffic "typically" involves a call that originates and terminates in the same local calling area.[15] Even if true, this would mean that at least on some occasions such calls do not originate and terminate in the same local calling area, and therefore constitute exchange access. Moreover, US LEC's argument that, when a provider offers the capability of retrieving "recorded voice announcement information," it is not "offering of a capability for . . . retrieving . . . information via telecommunications," *id.* at 27, contradicts the plain language of the definition of Information Services.[16] Notably US LEC cites no authority – because there is none – that information service providers exclude those who provide information in recorded form. To the contrary, the FCC has explicitly held that retrieval of recorded information is an enhanced service, the FCC's term for an information service. *See, e.g.*, Memorandum Opinion and Order, *Petition of Nevada Bell*, 16 FCC Rcd 19255, ¶ 1 (2001) (Verizon Supp. App. Tab 2).

US LEC also argues that it may be difficult to determine the volume of Voice Information Services traffic that must be excluded from the scope of the parties' reciprocal compensation obligations. Problems of implementation provide no basis for ignoring the clear requirements of federal law; the parties should be able to resolve such issues easily once their legal obligations are defined.

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[15] US LEC's citation to the New York PSC's Order holding that calls to chatlines are subject to reciprocal compensation is unavailing because the New York PSC adopted a special lower compensation rate applicable to *all* "convergent traffic," that is, traffic that tends to be overwhelmingly one-way, including calls to chatlines and ISP-bound traffic. The NY PSC's approach to the problem of convergent traffic thus prefigured the FCC's approach to access traffic, including information access traffic, in the *ISP Remand Order*.

[16] US LEC's claim that "Information Access" for purposes of application of the FCC's reciprocal compensation rules include only services offered by a BOC is frivolous: the FCC explicitly rejected it in the *ISP Remand Order* (¶ 44 & n.82).

Because US LEC has raised no legitimate legal or practical objection to Verizon's proposal, the Commission should adopt it.

Issue 4: (Additional Services Attachment, Section 5.3)

SEPARATE TRUNKING OF 976-TYPE TRAFFIC IS ESSENTIAL TO PERMIT VERIZON TO CONTROL ACCESS TO THOSE SERVICES

As with Issue 3, US LEC has failed to respond to Verizon's Best and Final Offer on this issue, and it therefore should not be heard to object to it in its reply brief. Moreover, US LEC has *never* defended its proposed language on this issue, and has therefore provided no basis for the Commission to adopt it.

The evidence in this proceeding makes clear that maintaining control over 976-type traffic is a matter of concern to both sides – otherwise, US LEC would have no reason to block all traffic to Verizon's "caller-paid information services" under the terms of its tariff. *See* Verizon Br. at 28. Verizon has explained that the separate trunking requirement is necessary to ensure appropriate billing and blocking in those circumstances where callers are subject to separate charges for the calls that they make. US LEC does not and cannot explain why it objects (if it does object) to a separate trunking requirement for traffic that it does not permit its customers to generate.

Issue 5: (Glossary, Section 2.56; Interconnection Attachment, Sections 2.1.2, 8.5.2, and 8.5.3)

BECAUSE IT IS, AT A MINIMUM, DISPUTED WHETHER ALL OF THE TRAFFIC RECEIVED BY A LEC FOR DELIVERY TO ITS CUSTOMERS IS TERMINATED BY THE LEC, THE TERM "RECEIVING PARTY," NOT "TERMINATING PARTY," SHOULD BE USED

US LEC's argument on this point is notable for what it does not say. First, US LEC does not claim that its proposal has any support in federal law. Second, US LEC does not claim that the use of the term "receiving" traffic would lead to any conceivable confusion or uncertainty.

Instead, US LEC argues that its proposal to use the phrase "terminating party" is supported by "decades of common practice in the industry." US LEC Br. at 30. But that claim is simply incorrect: it has been consistent practice in all regulatory matters to use the term "terminating" to refer to the completion of the entire end-to-end communication. Verizon has established that the FCC has used this terminology consistently for at least two decades. An interconnection agreement is a *regulatory* document, negotiated by lawyers and "directors of regulatory affairs." To suggest that the accepted regulatory significance of the word "terminating" is irrelevant here is accordingly insupportable.

Indeed, the best that US LEC can do is to speculate that "there remains a distinct possibility that the FCC could conclude . . . that . . . calls to ISPs do terminate at the ISP." US LEC Br. at 31 (emphasis omitted). To put the matter this way is to prove Verizon's point: no matter what the "possibilities" are – and in fact the only legally correct conclusion is that ISP-bound traffic does *not* terminate at the ISP, as the FCC has repeatedly and consistently held – US LEC acknowledges, as it must, that the question is at a minimum hotly disputed.

Finally, US LEC's claim that Verizon is attempting to gain a regulatory advantage is stone-throwing by denizens of a glass house. Verizon gains no collateral advantage by

proposing the word "receiving," because it uses the term to refer to calls – such as conventional local voice calls – that the receiving carrier unquestionably terminates to an end-user customer. By contrast, US LEC undoubtedly hopes to pretend that if the Commission adopts its proposed language, it will have collateral regulatory significance. Verizon strongly rejects the notion that the Commission's resolution of this issue has any collateral significance at all.

Because Verizon's proposal is supported by a consistent course of FCC decisions spanning two decades, and because Verizon's proposed language is clear, accurate, and *neutral*, the Commission should adopt it.

Issue 6: (Glossary, Section 2.56; Interconnection Attachment, Section 7.2)

PAYMENT OF RECIPROCAL COMPENSATION ON INTEREXCHANGE TRAFFIC IS INCONSISTENT WITH FEDERAL LAW AND SOUND REGULATORY POLICY

Stripped of rhetoric and distractions, US LEC's brief offers three arguments to justify its bid for reciprocal compensation on Virtual FX traffic. First, it claims that it has been a common practice to pay reciprocal compensation on such traffic. Second, it argues that permitting US LEC to claim reciprocal compensation on Virtual FX traffic benefits consumers. Third, it claims that when it provides that service it incurs elevated transport costs. US LEC Br. at 45-46 (claiming that "US LEC provides the longer haul associated with delivering the call from the end office switch to the 'distant' location of the terminating party"). The first of these arguments is at best partially correct and provides no justification for the result US LEC seeks. The second argument is simply false. And the third argument is flatly contradicted by the testimony of US LEC's own witnesses.

The facts are these. First, although intraLATA FX traffic has often been improperly treated as subject to reciprocal compensation in the past, the overwhelming weight of authority

holds, consistent with binding federal law, that such traffic is not subject to reciprocal compensation. Indeed, US LEC is able to cite only three state commission decisions in support of its position (and misleadingly cites a fourth decision that specifically *rejected* its position). And interLATA FX traffic – a service that US LEC provides – is without question subject to access charges, even though US LEC proposes requiring reciprocal compensation for such traffic.

Second, nothing about Verizon's proposal puts any restriction on US LEC's ability to offer Virtual FX service. If the service provides a benefit to US LEC's customers, US LEC will continue to provide it, and they will continue to pay for it, but US LEC and its customers – not Verizon and its customers – should bear the costs. Any other result is *anti*competitive.

Third, US LEC's claim that it has any elevated transport costs in serving Virtual FX customers is utterly inconsistent with the clear testimony of US LEC's own witness, who testified that US LEC's Virtual FX customers are usually located within five miles of US LEC's switch. The evidence established beyond question that *Verizon* incurs the cost of transporting calls from distant calling areas. And, though US LEC incurs no additional cost in serving its Virtual FX customers (compared to other local customers), it nonetheless charges them thousands of dollars a year for the service of enabling *Verizon's* customers to avoid toll charges. As a matter of basic fairness, not to mention regulatory sanity, US LEC should compensate Verizon in this situation – because it is Verizon that incurs the costs and loses the toll revenues that US LEC acknowledges would ordinarily apply to these interexchange calls – not the other way around.

A. The Overwhelming Weight of Authority Recognizes That Virtual FX Traffic Is Not Subject to Reciprocal Compensation Under Federal Law

US LEC does not and cannot claim that federal law requires payment of reciprocal compensation on Virtual FX traffic, which is interexchange and therefore outside the scope of section 251(b)(5). Instead, US LEC argues that carriers "historically" have billed each other for reciprocal compensation for delivering those calls. US LEC Br. at 39. That claim is, at best, misleading. Prior to 1996, there was no historical practice associated with payment of reciprocal compensation on FX traffic, because incumbent LECs did not pay reciprocal compensation. Since the introduction of local competition, it has become increasingly clear that "Virtual FX" arrangements are a serious source of regulatory arbitrage, to the point that Verizon realized that the assumption that assigned telephone numbers were associated with the physical location of the called party was no longer a tenable one. Trans. at 231-32.[17] By contrast, there is a clear historical practice with respect to other FX arrangements, specifically interLATA FX arrangements. And, despite the fact that interLATA FX calls are "locally dialed," they are recognized for what they are: interexchange calls that are subject to access charges. *See* Haynes Rebuttal Testimony at 4-5.

This point is particularly important because US LEC offers an interLATA FX service. US LEC claims (without evidence) that this interLATA FX service "bears no relationship at all to US LEC's FX service and should be ignored." US LEC Br. at 37. That is wrong. US LEC cannot deny that "locally dialed" traffic may be sent to US LEC's switch for onward transmission to US LEC customers located anywhere in US LEC's 14-state area. The call would

[17] US LEC compares its Virtual FX service to Verizon's FX and FX-like service, but that comparison proves nothing: Verizon does not claim that it is entitled to reciprocal compensation on FX traffic and has offered to pay access charges on such traffic. And FX traffic makes up a tiny percentage of the traffic that CLECs send to Verizon. *See* Haynes Rebuttal Testimony at 6.

be rated and routed by Verizon like a local call, because US LEC does nothing to distinguish those interLATA FX numbers. And US LEC would bill Verizon reciprocal compensation. That violates federal law, and US LEC's effort to have the Commission adopt that result in the parties' agreement likewise is contrary to federal law.

Moreover, US LEC's claim of "historical practice" rings particular hollow when the overwhelming weight of state commission authority has recognized that Virtual FX traffic is not subject to reciprocal compensation, in keeping with federal law. *See* Verizon Br. at 32-33 (citing nine state commission decisions). US LEC cites the three minority opinions on this issue,[18] but they primarily rely on the same reasoning that the Wireline Competition Bureau relied upon – without finding Virtual FX traffic to be subject to reciprocal compensation under federal law, they suggest that proper tracking of such traffic would be logistically difficult.[19] Verizon has explained in detail that (1) the record in this proceeding establishes that distinguishing FX traffic

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[18] US LEC also cites the decision of the Florida PSC, but the Florida PSC *rejected* application of reciprocal compensation to Virtual FX traffic. *See* Verizon Br. at 33 & n.41.

[19] Moreover, in the case of North Carolina, the NCUC authorized payment of reciprocal compensation on Virtual FX traffic only after adopting the incumbent LEC's proposed interconnection architecture, which required the CLEC, not Verizon, to bear the costs of transporting the call outside the originating local calling area. *See* Verizon Br. at 18-19. Adoption of Verizon's interconnection architecture proposals would attenuate somewhat the severe anticompetitive effects of US LEC's proposal to require payment of reciprocal compensation on FX traffic. *See* Haynes Testimony at 12-13.

In an order issued yesterday, this Commission repeated, in a *dictum*, the Wireline Competition Bureau's conclusion with respect to the difficulties of properly tracking this traffic. *See* Opinion and Order, *Level 3 Communications, LLC v. Marianna & Scenery Hill Tel. Co.*, Docket No. C-20028114, at 5 n.2 (Pa. PUC Aug. 8, 2002) ("*Level 3 Order*") (citing *Virginia Arbitration Order* ¶ 301) (Verizon Supp. App. Tab 3). There is no indication that this was a contested issue in that proceeding, which involved an emergency request for an injunction. Moreover, in that same order, this Commission required Level 3 to establish an escrow account containing an amount equal to the charges that Marianna & Scenery Hill incurred in carrying Level 3's Virtual FX traffic, suggesting that such tracking is feasible. *See id.* at 10. In addition, as explained below, the record here demonstrates that separating FX traffic from local traffic is feasible.

from local traffic is feasible, and (2) in any event, any alleged difficulties of implementation do not justify ignoring the plain requirements of federal law.[20] Verizon Br. at 34-35, 39-40. Thus, the minority view is wholly unpersuasive.

Finally, it is worth emphasizing what Verizon is *not* arguing. It is not arguing that there should be any change in the routing or end-user rating of traffic. *Cf.* US LEC Br. at 35. Verizon's concern is with inter-carrier compensation, not with end-user billing, and not with call routing. *See* Haynes Testimony at 6-7.

Because federal law provides that interexchange traffic, including Virtual FX traffic, is outside the scope of section 251(b)(5)'s reciprocal compensation obligation, the Commission should adopt Verizon's proposed language on this issue.

B. Payment of Reciprocal Compensation on FX Traffic Is Anticompetitive

In its Post-Hearing Brief, Verizon established that payment of reciprocal compensation on Virtual FX traffic promotes anticompetitive regulatory arbitrage. When a Verizon customer calls a US LEC Virtual FX subscriber, Verizon must transport an interexchange call from a distant local calling area to the point of interconnection by the US LEC switch. US LEC then picks up the traffic and delivers it a short distance to its customer. If US LEC had assigned its customer a telephone number associated with the customer's physical location, the Verizon customer would have paid toll charges. US LEC promotes its service by explaining that the Virtual FX customer must pay the toll charges that the Verizon customer avoids, to the tune of thousands of dollars per year. *See* Verizon Br. at 36-37.

[20] Although US LEC claims that it would have to "expend considerable efforts" in order to avoid billing reciprocal compensation for intraLATA and interLATA FX traffic (US LEC Br. at 44), it cites no record evidence in support of this vague assertion, and the Commission therefore cannot credit it. The only evidence in the record is that distinguishing FX traffic for purposes of accurately billing reciprocal compensation is relatively easy and inexpensive. *See* Verizon Br. at 39-40.

Thus, Verizon continues to bear the same costs of originating and transporting the interexchange call and is deprived of the toll charges that would ordinarily apply. US LEC incurs no additional costs and charges its customers thousands of dollars. Yet US LEC claims that Verizon should be compensating US LEC in this situation. That argument is utterly absurd.

The argument is so absurd that US LEC does not attempt to defend its case on the facts; instead, it misrepresents the facts. It claims that "US LEC, not Verizon, is providing the so-called 'toll' component of the service; that is US LEC provides the longer haul associated with delivering the call from the end office switch to the 'distant' location of the terminating party." US LEC Br. at 45-46. US LEC cites no record evidence in support of this eye-popping claim, and for good reason: there is no such evidence. US LEC's witness testified directly to the contrary: she stated on redirect that US LEC's FX customers are generally located within five miles of US LEC's switch. *See* Verizon Br. at 36. The situation is the exact opposite of what US LEC claims: it is Verizon that provides the "toll" component by transporting the call from the distant local calling area; US LEC simply hands the call off the short distance to its customer within the same local calling area as its switch.

US LEC also argues at length that Virtual FX service somehow benefits rural customers. This claim is hogwash. The rural customers in question are not US LEC customers; they are Verizon customers, and any "services" to which rural customers will supposedly lose "access" (US LEC Br. at 37-38) if US LEC were to stop providing Virtual FX service to its 6 customers in Pennsylvania would not include telecommunications services. Perhaps US LEC is concerned that rural customers lack adequate access to florists (*see* Trans. at 220), but the 1996 Act is not about providing increased access to fresh flowers, it is about promoting genuine local telecommunications competition. And providing reciprocal compensation on Virtual FX traffic

actually discourages carriers like US LEC from deploying facilities in remote areas that would compete with Verizon's facilities, because US LEC must bear the cost of those facilities. Instead, it is more profitable for US LEC to allow Verizon to continue providing service and to search for ways to be paid for the service that Verizon provides, as with Virtual FX arrangements. *See* Haynes Rebuttal Testimony at 9. US LEC has essentially admitted as much, arguing that US LEC should be permitted to take advantage of Verizon's "ubiquitous network" (Montano Testimony at 28:19) without constructing facilities of its own. US LEC is seeking a free-ride on Verizon's network, pure and simple. Haynes Rebuttal Testimony at 9. Payment of reciprocal compensation on virtual FX traffic would amount to paying US LEC *not* to compete. *Id.*

To the extent that US LEC's Virtual FX customers are willing to pay US LEC so that Verizon's customers can call them without incurring toll charges, US LEC will presumably continue to offer this service. But US LEC should then be required to pay Verizon access charges – to compensate it for provision of the "toll" component of the service – and it should not demand that Verizon's local subscribers subsidize this service through the payment of reciprocal compensation. Regulatory arbitrage is not competition. It kills competition. *See ISP Remand Order* ¶ 71.

C. Whether US LEC's Virtual FX Service Is Consistent with Commission Orders Is Not at Issue Here

US LEC argues at length that it has committed no "impropriety" in offering Virtual FX service in Pennsylvania. This is a sharp break from its position at the outset of this proceeding, when US LEC asserted that it did not provide Virtual FX service in Pennsylvania because it was not permitted to do so. *See* Montano Testimony at 21 (claiming that "US LEC does not currently utilize 'virtual NXX' service in Pennsylvania" but arguing that "it should be able to" do so).

US LEC's concession that it was not permitted to offer Virtual FX service in Pennsylvania – a concession that it now wishes it had never made – was presumably an acknowledgement of the plain language of this Commission's orders, which "require[] assignment of . . . customers' telephone numbers with NXX codes that correspond to the rate centers in which the customers' premises are physically located."[21] Just yesterday, this Commission reaffirmed those orders.[22] US LEC now argues in vituperative terms that its Virtual FX service – the same service that it initially denied offering – is perfectly consistent with this Commission's rules, though it does not discuss or venture to distinguish the *Focal Order*. For all of US LEC's bluster, it cannot explain how its practice of assigning "telephone numbers with NXX codes that [do not] correspond to the rate centers in which the customers' premises are physically located" is consistent with the plain terms of the *Focal Order*.

But whether US LEC's Virtual FX service is lawful or unlawful is not at issue in this proceeding. In the *Focal* decision itself, the Commission held that such matters are to be dealt with in enforcement proceedings where appropriate, and not in arbitrations. The sole issue here is whether US LEC is entitled to reciprocal compensation on Virtual FX traffic. For all of US LEC's efforts to distract the Commission from the merits, that is the only issue that the Commission is called upon to decide. And, for all of the reasons that Verizon has set forth, US

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[21] *See* Opinion and Order, *Petition of Focal Communications Corporation of Pennsylvania for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement With Bell Atlantic-Pennsylvania, Inc.*, Docket No. A-310630F0002, at 11 (Pa. PUC Jan. 24, 2001) ("*Focal Order*") (Verizon Supp. App. Tab 4).

[22] *See Level 3 Order* at 11 ("[i]n the *Focal Order* we prohibited carriers from 'assigning telephone numbers to customers using NXX codes that do not correspond to the rate centers in which the customers' premises are physically located' and stated that any failure to comply with this directive would be subject to civil penalties") (quoting *Focal Order* at 42-43); *see also* Motion of Commissioner Pizzingrilli, *Level 3 Communications, LLC v. Marianna & Scenery Hill Tel. Co.*, Docket No. C-20028114 (Pa. PUC Aug. 8, 2002) (opening statewide, generic investigation into carriers' use of virtual NXXs) (Verizon Supp. App. Tab 5).

LEC is not entitled to such compensation under federal law, and should not be paid such compensation as a matter of policy and basic fairness. Any other result will do irreparable harm to competition in the local telecommunications market in Pennsylvania.

Issue 8: (Interconnection Attachment, Sections 8.1 and 8.1.1; General Terms and Conditions, Section 50.2)

THE PARTIES' RECIPROCAL COMPENSATION OBLIGATIONS MUST BE GOVERNED BY APPLICABLE FEDERAL LAW

US LEC has provided no basis in federal law for its proposal for reciprocal compensation provisions to govern in the event the *ISP Remand Order* regime ceases to govern this issue. For that reason alone, the Commission has no authority to impose that proposal on Verizon, and it should reject US LEC's proposal out of hand.[23]

It bears noting, however, that US LEC's "policy" justification for its proposal is specious.[24] The parties *have* a change-of-law provision in their agreement, which provides that superceding federal law will govern this issue; there is thus no basis for arguing that the Agreement leaves the parties subject to any uncertainty. Accordingly, the Commission should adopt Verizon's position on this issue.

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[23] The Wireline Competition Bureau adopted Verizon's position on this issue. US LEC does not disagree with that determination and its suggested ground for distinguishing it has no basis in the language of the Bureau's order.

[24] US LEC's claims are particularly suspect because it claims that it does not serve any ISPs in Pennsylvania, so the provisions at issue do not apply to it directly in any event. *See* Trans. at 150:23 - 151:5.

Issue 9: (Pricing Attachment, Section 1.5)

GENERALLY APPLICABLE TARIFF PROVISIONS, WHICH ARE SUBJECT TO SEARCHING REGULATORY REVIEW, SHOULD SUPERCEDE PRICING TERMS IN THE AGREEMENT

Rather than debate the merits of this issue, US LEC indulges in rhetoric – it claims that Verizon "seeks the unrestricted ability to modify rates that the parties have agreed to." US LEC Br. at 49. This is false (*see* Verizon Br. at 42), and in thus defending its position US LEC effectively concedes that its position is untenable. US LEC seeks to avoid the application of generally applicable law to US LEC – unless US LEC considers some provision to be to its advantage. In other words, US LEC proposes that Commission- and FCC-approved tariffs should bind Verizon and other carriers – but not US LEC. That position is not only legally baseless, but also unfair and discriminatory.

Far from supporting US LEC's position on this issue, the decision of the Wireline Competition Bureau actually supports Verizon. In particular, the Bureau held that, under the parties' agreement, "if a commission establishes new rates, that would constitute a change in law, which the parties would be able to incorporate into the agreement pursuant to the change of law provisions of the contract." *Virginia Arbitration Order* ¶ 599. The Bureau declined to provide that all tariffed rates would *automatically* supersede rates arbitrated by the FCC, but only because the Virginia commission has stated that it refuses to apply federal law in its state proceedings. *Id.* ¶ 600.

The Commission should adopt Verizon's position on this issue, because generally applicable tariffs, duly reviewed and allowed to become effective by the responsible regulator, should apply to all carriers and customers equally.

CONCLUSION

For the foregoing reasons, and those stated in Verizon's Post-Hearing Brief, the disputed issues should be resolved in Verizon's favor.

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August 9, 2002

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

In Re: Petition of US LEC of Pennsylvania Inc. for Arbitration with Verizon Pennsylvania Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996	:	**Docket No. A-310814F7000**

POST-HEARING REPLY BRIEF OF VERIZON PENNSYLVANIA INC.

SUPPLEMENTAL APPENDIX

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August 9, 2002

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2 Memorandum Opinion and Order, *Petition of Nevada Bell*, 16 FCC Rcd 19255 (2001) (excerpted)

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4 Opinion and Order, *Petition of Focal Communications Corporation of Pennsylvania for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement With Bell Atlantic-Pennsylvania, Inc.*, Docket No. A-310630F0002 (Pa. PUC Jan. 24, 2001) (excerpted)

5 Motion of Commissioner Pizzingrilli, *Level 3 Communications, LLC v. Marianna & Scenery Hill Tel. Co.*, Docket No. C-20028114 (Pa. PUC Aug. 8, 2002)

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Application of Verizon Pennsylvania Inc.,	)	
Verizon Long Distance, Verizon Enterprise	)	CC Docket No. 01-138
Solutions, Verizon Global Networks Inc., and	)	
Verizon Select Services Inc. for Authorization	)	
To Provide In-Region, InterLATA Services in	)	
Pennsylvania	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: September 19, 2001 **Released: September 19, 2001**

By the Commission: Commissioner Copps dissenting and issuing a statement.

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which the Pennsylvania Commission established the pricing of UNEs in the MFS III Order.[216] The court found that the Pennsylvania Commission had failed to demonstrate that the TSLRIC methodology it applied complies with TELRIC.[217] The district court's order is currently on appeal.

54. In the Global Order, released on September 30, 1999, the Pennsylvania Commission ordered Verizon to adjust its rates to reflect modifications the Pennsylvania Commission made to its earlier decisions.[218] On June 8, 2001, the Pennsylvania Commission released an interim order reviewing Verizon's implementation of the Global Order rates, and setting rates for unbundled elements related to DSL, line sharing, collocation in remote terminals, dark fiber, and sub-loops.[219] Verizon has filed revisions to its tariff to implement most of these rates, and, pursuant to an order by the Pennsylvania Commission, will file the remainder on September 28, 2001.[220]

(ii) Discussion

55. Based on the evidence in the record, we find that Verizon's charges for UNEs made available in Pennsylvania to other telecommunications carriers are just, reasonable, and nondiscriminatory in compliance with checklist item 2. The Pennsylvania Commission concludes that Verizon has satisfied the requirements of this checklist item.[221] The Commission has previously held that it will not conduct a *de novo* review of a state's pricing determinations and will reject an application only if "basic TELRIC principles are violated or the state commission makes clear errors in factual findings on matters so substantial that the end result falls outside the range that the reasonable application of TELRIC principles would produce."[222] In reviewing Verizon's Pennsylvania pricing, we find that the Pennsylvania Commission generally followed basic TELRIC principles, and that the resulting rates are within the range that reasonable application of TELRIC would produce.

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[216] Memorandum and Order, *MCI Telecomm. Corp. v. Bell Atlantic-Pennsylvania, Inc.*, No. 97-CV-1857, *slip op.* At 10-13 (M.D. Pa. June 30, 2000), appeal pending, No. 00-2257 (3d Cir., filed July 28, 2000).

[217] *See id.*

[218] Verizon Application App. B, Tab J, Sub-Tab 6 (Pennsylvania Commission's Opinion and Order Resolving Several Dockets (Sep. 30, 1999)) (Global Order).

[219] Verizon Application App. B, Tab S, Sub-Tab 2 (Pennsylvania Commission's Interim Opinion and Order Setting UNE Rates (June 8, 2001)).

[220] *See* Letter from Clint E. Odom, Verizon, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 01-138, at Attach. D (filed Aug. 8, 2001) (Verizon Aug. 8 *Ex Parte* Letter).

[221] Pennsylvania Commission Comments at 55, 61.

[222] *SWBT Kansas/Oklahoma Order* 16 FCC Rcd at 6266, para. 59; *Bell Atlantic New York Order*, 15 FCC Rcd at 4084, para. 244.

56. As an initial matter, we find that the Pennsylvania Commission followed basic TELRIC principles. We reject AT&T's and WorldCom's assertion that the district court's findings demonstrate that the Pennsylvania Commission did not apply TELRIC in its MFS III cost proceeding.[223] The Commission, in adopting the TELRIC methodology, specifically noted that TELRIC is "a version of the methodology commonly referred to as TSLRIC."[224] Thus, the Pennsylvania Commission's use of TSLRIC does not necessarily result in UNE rates that violate TELRIC. Similarly, AT&T and WorldCom assert that Verizon's Pennsylvania UNE rates use an embedded cost methodology, and estimate the cost of replicating rather than replacing Verizon's network, in violation of our TELRIC methodology.[225] We are unconcerned with labels and general characterizations of the approach a state commission uses in setting rates. Instead, we consider allegations of specific decisions in violation of a TELRIC approach, and the actual rates that are in effect.

57. The orders of the Pennsylvania Commission provide numerous indicia that it has followed a forward-looking approach that is consistent with TELRIC. In the MFS III Order, the Pennsylvania Commission made a decision to use Next Generation Digital Loop Carriers rather than existing Digital Loop Carriers.[226] In the Final MFS III Order, the Pennsylvania Commission adjusted the common overhead factor to prevent Verizon from being made whole in the face of anticipated losses arising from competition.[227] In the Global Order, the Pennsylvania Commission made adjustments to the cost of capital and the copper feeder fill factor to better reflect forward-looking levels.[228] We note that these, as well as the vast majority of the specific decisions made by the Pennsylvania Commission, are consistent with the TELRIC methodology, and are not challenged here.

58. We also find that the Pennsylvania Commission properly applied the TELRIC methodology with respect to several issues disputed by the parties. First, WorldCom asserts that the fill factors for copper cable and DLCs are unreasonably low.[229] A fill factor is the estimate of the proportion of a facility that will be used. In other words, the per-unit cost associated with a particular element should take into account the total cost associated with the element divided by

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[223] *See* AT&T Comments at 13; WorldCom Comments at 19-20.

[224] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, 11 FCC Rcd 15499, 15845-46, para. 678 (1996) (*Local Competition First Report and Order*).

[225] AT&T Comments at 19-22; WorldCom Comments at 18-22. AT&T also asserts that the rates are "the product of an arbitrary negotiated settlement." AT&T Comments at 10-11. Given that both AT&T and WorldCom are able to state with specificity various alleged TELRIC defects with the methodology used in Pennsylvania, we find this assertion without merit.

[226] MFS III Order at 69-70.

[227] Final MFS III Order at 7-9.

[228] *See* Global Order at 74-76.

[229] WorldCom Comments at 23.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matters of	)	
	)	
Petition of Nevada Bell, Pacific Bell,	)	
Southwestern Bell Telephone Company,	)	
Southern New England Telephone, and the	)	
Ameritech Michigan Bell, Ohio Bell, Illinois	)	
Bell, Indiana Bell, and Wisconsin Bell	)	
Telephone Companies To Provide Operator-	)	CC Docket No. 00-227
Assisted Reverse Directory Assistance	)	
Services and Electronic Reverse Directory	)	
Assistance Services and for Waivers of and/or	)	
Forbearance from Any Comparably Efficient	)	
Interconnection or Telecommunications Act	)	
of 1996 Requirements	)	
	)	
Petition of Qwest Corporation To Provide	)	
Operator-Assisted Reverse Directory	)	
Assistance Service and for Waiver of Any	)	
Comparably Efficient Interconnection	)	CC Docket No. 01-126
Requirements Deemed Applicable	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: November 1, 2001 **Released: November 1, 2001**

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. Electronic and operator-assisted reverse directory assistance services are enhanced services that permit a customer to dial the carrier's database and retrieve subscriber name and address information by providing a telephone number. This service is enhanced to the extent that it involves computer processing applications that act on the format or content of the subscriber's transmitted information to provide the subscriber with additional information.[1] Therefore, absent a waiver, a Bell Operating Company (BOC) may not provide reverse directory services involving computer processing applications on an integrated basis (*i.e.*, directly through telephone

[1] See 47 C.F.R. § 64.702(a).

operating companies), unless it complies with the Commission's comparably efficient interconnection (CEI) requirements.

2. In prior orders, the Common Carrier Bureau (Bureau) conditionally waived its CEI requirements to permit petitioners' predecessors to offer electronic reverse directory services on an integrated basis, based on showings that waivers would serve the public interest.[2] In this order, we grant requests filed by Qwest Corporation and SBC for waiver of the Commission's CEI requirements based on similar showings.[3] We also extend our prior conditional waivers to permit all Qwest and SBC operating companies to provide electronic and operator-assisted reverse directory services on an integrated basis without complying with the CEI requirements.[4] We condition the waivers on Qwest's and SBC's compliance with the Commission's joint cost rules,[5] and appropriate amendments to Qwest's and SBC's cost allocation manuals.[6] Finally, we

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[2] *Ameritech Petition for Waiver of Computer III Rules for Reverse Search Capability*, Order, 13 FCC Rcd 8762, 8767-68, ¶¶ 10-12 (Com. Car. Bur. 1997) (*Ameritech CEI Waiver*); *US West Communications, Inc. Petition for Computer III Waiver*, Memorandum Opinion and Order on Reconsideration, 11 FCC Rcd 7997, 8007-08, ¶¶ 24-25 (Com. Car. Bur. 1996) (*BellSouth and SWBT CEI Waiver*); *U S West Communications, Inc. Petition for Computer III Waiver*, Order, 11 FCC Rcd 1195, 1200, ¶¶ 33-34 (Com. Car. Bur. 1995) (*U S West CEI Waiver*).

[3] The November 2, 2000, petition filed by Nevada Bell, Pacific Bell, Southwestern Bell Telephone Company (SWBT), Southern New England Telephone (SNET), and the Ameritech Michigan Bell, Ohio Bell, Illinois Bell, Indiana Bell, and Wisconsin Bell Telephone Companies (Ameritech) (collectively, SBC) seeks a waiver of and, in addition or in the alternative, forbearance from the Commission's CEI requirements for reverse directory services. SBC requests that it be permitted to provide electronic and operator-assisted reverse directory services without complying with the Commission's CEI requirements to include all the SBC companies named above. The June 8, 2001, petition filed by Qwest Corporation (Qwest) seeks authority to provide operator-assisted reverse directory services on an integrated basis and for waiver of any CEI requirements deemed applicable. Qwest requests an extension of the waiver the Commission previously granted it for electronic reverse directory services to include operator-assisted reverse directory services.

[4] The Bureau issued separate public notices seeking public comment on the Qwest and SBC petitions. *See Pleading Cycle Established for Comments on SBC Resubmission of Petition for Waiver and/or Forbearance To Provide Reverse Directory Services*, Public Notice, CC Docket No. 00-227, DA 00-2525 (rel. Nov. 7, 2000) (*SBC Public Notice*); *Pleading Cycle Established for Comments on Qwest Petition for Waiver To Provide Operator-Assisted Reverse Directory Assistance Services*, Public Notice, CC Docket No. 01-126, DA 01-1445 (rel. June 15, 2001) (*Qwest Public Notice*). Although no party filed comments on SBC's petition, WorldCom, Inc. (WorldCom) submitted comments opposing Qwest's petition. On April 6, 2000, the Policy and Program Planning Division (Policy Division) granted SBC special temporary authority to provide electronic and operator-assisted reverse directory services on an integrated basis without complying with the CEI requirements. *SBC Public Notice* at 1. Similarly, on June 13, 2001, the Policy Division granted Qwest special temporary authority to provide operator-assisted reverse directory services on an integrated basis. *Qwest Public Notice* at 1.

[5] 47 C.F.R. § 64.901. Section 64.901 addresses a carrier's obligation to separate its regulated costs from nonregulated costs according to specified cost allocation methods.

[6] *See* 47 C.F.R. § 64.903(b) (addressing certain LECs' obligation to file and accurately maintain cost allocation manuals.) *See also, Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities; Amendment of Part 31, the Uniform System of Accounts for Class A and Class B Companies To Provide Nonregulated Activities and To Provide for Transactions Between Telephone Companies and Their Affiliates*, Report and Order, 2 FCC Rcd 1298 (1987) (*Joint Cost Order*), *modified on recon.*, 2 FCC Rcd 6283 (1987), *modified on* (continued....)

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120

Public Meeting held August 8, 2002

Commissioners Present:

Glen R. Thomas, Chairman
Robert K. Bloom, Vice Chairman
Aaron Wilson, Jr.
Terrance J. Fitzpatrick
Kim Pizzingrilli

Level 3 Communications, LLC C-20028114

v.

Marianna & Scenery Hill Telephone Company

OPINION AND ORDER

BY THE COMMISSION:

Before us for consideration is the Order Certifying Material Question (Certification Order) of Administrative Law Judge (ALJ) Robert A. Christianson, dated July 23, 2002. By way of the Certification Order, ALJ Christianson denied a Petition for Interim Emergency Relief (Petition) filed by Level 3 Communications, LLC (Level 3) on July 12, 2002. The Petition seeks injunctive relief against Marianna & Scenery Hill Telephone Company (M&SH), to prevent the termination of telecommunications traffic between M&SH customers and certain Internet Service Providers (ISPs) in Pittsburgh.

Preliminary Matter

Pursuant to our Rules of Administrative Practice and Procedure, Level 3 and M&SH filed Briefs regarding the material question on August 2, 2002. *See* 52 Pa. Code §5.305.

On August 5, 2002, M&SH filed a Motion to Strike Portions of the Brief of Level 3 Communications, LLC. The Motion to Strike objects to two affidavits filed with the Brief of Level 3, Attachments A and B, and certain references in Level 3's Brief related to these affidavits. M&SH essentially argues that the affidavits to which Level 3 refers are not part of the evidentiary record in this case. M&SH explains that the affidavits were not sponsored as statements. Rather, Level 3 relied upon the oral testimony of its witnesses presented during the course of the July 18, 2002 hearing. We note that the affidavits, which are the subject of the Motion to Strike, are the affidavits appended to the Level 3 Petition seeking interim emergency relief.

On August 7, 2002, Level 3 filed its Answer to the Motion to Strike stating that the affidavits were the contained in the oral testimony of its witnesses.

In view of the fact that we are not relying on the material referenced in the Motion, the Motion to Strike is deemed moot.

Background

On July 12, 2002, Level 3 filed a Formal Complaint and Petition seeking to prohibit any termination, suspension, interruption or modification of the exchange of traffic between Level 3 and Marianna. In the Formal Complaint, Level 3 avers that such action by M&SH would disrupt service between Level 3 customers and M&SH customers.

Level 3 is authorized to provide competitive local exchange carrier (CLEC) service and competitive access provider (CAP) service in Verizon Pennsylvania Inc.'s (Verizon PA) service area. Level 3 has obtained appropriate authorizations from this Commission to engage in those activities and has an approved interconnection agreement between itself and Verizon PA. *See Joint Petition of Verizon Pennsyvlania, Inc. and Level 3 Communications, LLC,* Docket No. A-310633F0002 (Order entered April 23, 2001).

Level 3 avers that it conducts operations in the Washington, PA rate center served by Verizon PA. As part of its operations in the Washington rate center, Level 3 provides local telecommunications services to ISP customers. Local traffic exchanged between Verizon PA and Level 3 flow through Verizon PA tandem switches. This is required by the Verizon PA/Level 3 Interconnection Agreement. Under the Verizon PA/Level 3 Interconnection Agreement, Verizon PA will transit calls between Level 3 and third-party carriers, such as M&SH, through the Verizon PA tandem switches. Level 3 understands that Verizon PA will only transit such third-party calls through a tandem switch. Consequently, when a M&SH customer places a call to a Level 3 customer, the call is routed to the Verizon PA tandem switch and Verizon PA "hands" that call off to Level 3 for completion.

M&SH takes the position that Level 3's business operations in the Washington rate center amount to the creation of "virtual NXXs," a practice which M&SH alleges has been declared unlawful by Commission Order. *See Application of MFS Intelenet of Pennsylvania, Inc.*, Docket No. A-310203F002 (Short Form Order entered July 31, 1996) (*MFS II*); and *Petition of Focal Communications Corporation of Pennsylvania For Arbitration Pursuant to Section 251(b) .....*, Docket No. A-310630F0002 (Order entered August 17, 2000) (*Focal*).

M&SH explains that Level 3 has converted toll calls to local calls under the following circumstances. Level 3 has obtained the 724-825 NXX code from the North American Numbering Plan Administrator (NANPA) indicating that this NXX code should be associated with Verizon PA's Washington rate center.[1] However, M&SH states that some telephone numbers are actually given by Level 3 to Internet Service Providers (ISPs) located in the Pittsburgh exchange and which is outside of M&SH's local calling area. The crux of M&SH's objection to Level 3's business practices is stated below:

> Because the NXX number block is claimed to be assigned to a rating center within the local calling area of Marianna & Scenery Hill, the incumbent carrier's switch misreads (and mis-rates) the call as local. By misleading Marianna & Scenery Hill's switch into affording local call treatment for a toll call, the practice of "virtual NXX" denies the payment of access charges and toll compensation to the incumbent carrier and causes Marianna & Scenery Hill's long distance trunks to carry the longer call duration of Internet traffic for free.

(M&SH Answer, p. 2).

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[1] NXX codes are the first three digits of a 10-digit telephone number and have been traditionally distributed to telephone companies in these blocks of 10,000 telephone numbers. On October 29, 2001, however, this Commission implemented mandatory thousands-block number pooling for the 724 area code, which means that telephone numbers are now distributed in blocks of one thousand. *See Implementation of Number Conservation Measures Granted to Pennsylvania by the Federal Communications Commission in its Order released July 20, 2000 – 1K Pooling*, Docket Nos. M-00001427, P-00961072F0002 (order entered July 19, 2001). All LNP-capable carriers in the 724 area code are required to participate in this number conservation measure.

M&SH advises that through the alleged mis-assignment of numbers, Level 3 is able to avoid payment of the access charges that all other interexchange carriers (IXCs) must pay in handling traffic between M&SH and Pittsburgh. Also, M&SH argues that Pennsylvania law and approved tariffs require IXCs, such as Level 3 is one, to pay Feature Group D originating access charges when they handle customers' calls to Pittsburgh.

M&SH's switch rates the traffic as a local call[2] M&SH states that, pursuant to the Local Exchange Routing Guide (LERG),[3] Level 3 has requested that calls to its 724-825 NXX code be routed to Level 3's switch in Pittsburgh. The only facilities M&SH has in Pittsburgh are toll trunks. M&SH became aware of the problem in April 2002, when it discovered that it was handling a large amount of traffic on a local basis for a telephone number that was supposedly assigned to Verizon PA's Washington office.

M&SH further states that such operations will cause it to incur an access expense on the Verizon PA terminating end for Level 3's traffic. Verizon PA has billed M&SH for transit of the traffic to Level 3's "virtual NXX's" in Pittsburgh.

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[2] There is no viable alternative to the current system, under which carriers rate calls by comparing the originating and terminating NPA-NXX codes. The NPA-NXX rating is an industry wide established compensation mechanism. Attempting to rate calls by their geographical starting and ending point raises billing and technical issues that have no concrete, workable solutions at this time. *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc. and for Expedited Arbitration,* CC Dkt. No. 00-218 (Order released July 17, 2002) at paragraph 301.

[3] The LERG is a document issued by Telcordia (formerly Bellcore) that is used to identify NPA-NXX routing and homing information, as well as network element and equipment designation. It contains a listing of local routing data such as destination codes, switching entities, rate centers and locality information by LATA. The LERG is an essential tool for networking planning.

M&SH contacted Level 3 on or about May 14, 2002, and advised Level 3 that it would only carry the traffic at issue for another thirty days while the parties discussed the establishment of a lawful and mutually satisfactory arrangement. Negotiations did not produce a mutually acceptable arrangement.[4] As a result, M&SH indicated that, as of the end of the most recent negotiating period, July 20, 2002, it would route calls to the 724-825 NXX code to Washington, PA – the designated rate center and not to Pittsburgh where they had been routed previously. M&SH decided to take this action because the numbers in question are associated with the Washington exchange.

The Formal Complaint and Petition followed. Level 3 has advised that a seven-day notice to customers informing them that they could experience a failure of telephone calls to their ISP was provided by M&SH on July 20, 2002. We are further advised that on July 27, 2002, M&SH began routing the traffic to its Washington, PA rate center and this has resulted in a failure of these calls to be completed.

On July 18, 2002 a hearing was held before ALJ Christianson concerning the petition for interim emergency relief. ALJ Christianson denied the interim emergency relief petition. Then, on July 23, 2002, he issued a Certification Order. ALJ Christianson discussed the positions of the parties, as follows:

> This proceeding is based upon traffic between M&SH customers and internet providers in Pittsburgh. This traffic is local service, as now experienced by these [M&SH end-user] customers. At this time there are close to 65 such [internet service provider] customers [in the Pittsburgh exchange that have been assigned 724-825 telephone numbers]. An EAS arrangement between M&SH and Verizon [PA] operations in the City of Washington, Washington County is also involved

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[4] The parties, among other discussions, attempted to negotiate the dispute at a facilitation session in which the Commission's Bureau of Fixed Utilities Services (FUS) participated on July 9, 2002.

> here, by serving to make the traffic local. The situation is somewhat complicated but Level 3 asserts that this traffic [from M&SH customers to Pittsburgh ISPs with 724-825 telephone numbers] is proper and should continue while M&SH finds various faults with the situation.
>
> The parties have been seeking a solution to their problems for a few weeks. Recently, members of the Commission's FUS [Bureau of Fixed Utility Service] staff were involved in the process. M&SH has established various deadlines for termination of this traffic (again, the details are rather complicated). We held the hearing under a M&SH termination deadline of Saturday, July 20, 2002. However, actual termination action was delayed because of a notice and response period (of seven days) to the 65 customers of M&SH. This notice and response period was negotiated and adopted on Friday, July 19, 2002.

(Certification Order, p. 2).

ALJ Christianson discussed the pertinent criteria for an issuance of interim emergency relief, denied the emergency relief and certified the denial to the Commission for review.[5]

Discussion

The material question certified by ALJ Christianson is as follows:

> Should the Commission prohibit M&SH from taking any action that suspends, interrupts, modifies or terminates the exchange of end user customer service with Level 3?

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[5] 52 Pa. Code §3.10 requires that when a presiding officer rules on a Petition for interim emergency relief, the ruling must be certified to the Commission as a material question.

To prevail on its request for interim emergency relief, Level 3 must establish by a preponderance of the evidence that the facts and circumstances of the case satisfy the four requirements set forth in Section 3.7(a) of our Rules of Administrative Practice and Procedures. All elements must be met for relief to be appropriate. The failure of a petitioner to prove any one of the elements compels the denial of such relief. *Crums Mill Associates, et al. v. Dauphin Consolidated Water Supply*, Docket No. C-00934810 (Order entered April 16, 1993), slip op. at 4 (*Crums Mill*); *Leonard v. Thornburgh*, 463 A.2d 77 (Pa. Cmwlth.1983).

The four elements are: (1) that its right to relief is clear, (2) that there is an immediate need for relief, (3) that the failure to grant the relief would result in irreparable harm, and (4) that the requested relief would not injure the public interest. 52 Pa. Code §3.7(a); also *Big Apple Dinner Theater, Inc. v. The Bell Telephone Company of Pennsylvania*, Docket No. C-00934817 (Order entered June 13, 1994); *Land Yacht Motorcars, Inc. v. Bell Atlantic-Pennsylvania, Inc.*, Docket No. C-0099254 (Order entered June 26, 2001).

(1) Is the Right to Relief Clear?

Yes, the right to relief is clear. At this stage we are not required to determine the merits of the controversy, only that, in addition to satisfying the other criteria, the claim raises substantial legal questions. *Land Yacht, supra*. We find that Level 3 raises a substantial legal claim on the merits. Further, we find that M&SH acted inappropriately by executing a self-help remedy. Both parties included FUS in their discussions on July 9, 2002. At that time, both parties were advised by the Commission that the staff of FUS did not have the authority to rule/arbitrate a resolution to the dispute. Further, both parties were advised to seek a formal resolution through appropriate means (i.e. formal complaint, Alternative Dispute Resolution mediation, Emergency Order).

M&SH choose not to utilize these procedures in place at the Commission and instead executed a self-help remedy that jeopardized access to the Internet.

We are persuaded that policy considerations counsel in favor of maintaining the status quo. In this case, the status quo is as it existed prior to M&SH's self-remedy of re-routing Level 3's traffic on July 27, 2002. M&SH, in conjunction with Law Bureau, shall draft a notice rescinding M&SH's July 20, 2002 letter which notified customers of the change in service. M&SH shall mail the notice of rescission to all the customers who received the July 20, 2002 letter and M&SH shall reroute the Level 3 traffic in the manner in which that traffic was routed prior to July 27, 2002.

(2) Is the Need for Relief Immediate?

Yes, the need for relief is immediate. When faced with the question of whether ILECs should have the obligation to complete calls if underlying intercarrier arrangements for such calls do not compensate the ILECs in a proper manner, we conclude that all carriers are obligated to complete calls where it is technically feasible to do so regardless of whether they believe that the underlying intercarrier compensation arrangements for completion of calls are proper.

Notwithstanding the vigorous legal and policy dispute that exists between Level 3 and M&SH, both TA-96 and the Public Utility Code, 66 Pa. C.S. §1501, express a clear statutory mandate to provide reasonably continuous service. Thus, when M&SH implemented its self-help remedy, it threatened the reasonably continuous service to customers thereby requiring this Commission to take this dramatic action.

(3) Is the Harm Irreparable to Level 3?

Yes, Level 3 will suffer irreparable harm resulting from M&SH's self-help remedy of re-routing the traffic to Verizon PA's end office in Washington, PA. Level 3 may not only incur economic or financial losses, but also damage to its business reputation from which it may not be able to recover.

Notwithstanding this conclusion, we also acknowledge the fact that M&SH itself stands to suffer harm should it not have taken the steps of re-routing this traffic to Washington, PA. Generally, in analyzing the factors for granting interim emergency relief, our focus is strictly on the harm to the Petitioner. Nevertheless, in this particular case, we recognize that preservation of the status quo will also result in M&SH suffering financial harm. First, M&SH could be exposed to substantial loss of access charges, originating and terminating charges, and transport/transit charges. Second, we are concerned that the continuation of this arrangement could result in the clogging of the limited capacity of M&SH's trunks with the longer call duration of ISP traffic, thereby jeopardizing continuous and reliable service to end-users of both parties.

Thus, we direct that the following steps be taken in order to mitigate the harm to M&SH as a result of our conclusion: Level 3 is to either obtain a surety bond or to place in a separate bank escrow account an amount equal to these charges. Within five days of the entry date of this Order, Level 3 shall provide the appropriate documentation verifying the establishment of the surety bond or escrow account. Further, as a result of the fact that Verizon PA is involved in this matter, we direct that Verizon PA be made an indispensable party to this case.

Moreover, we also direct that this matter move forward in an expeditious manner culminating in a recommended decision within 45 days of the entry date of this Order

with a 10 day exception period and seven days for reply exceptions. We will expect to have our final decision in this matter for the October 24, 2002 public meeting.

(4) Is the requested relief in the Public Interest?

Yes, the requested relief is in the public's interest for several reasons. First, strong statutory pronouncements favor reasonably continuous service and disfavor the disruption of telecommunications traffic, which is part of the Public Switched Telephone Network. We find that the self-help remedy utilized M&SH was not in the public's best interest. As previously discussed, the parties should have sought the appropriate forum for expedited resolution prior to taking action which directly threatened the reasonably continuous service of end-user customers.

Second, the public's interest in preserving existing area codes demands that carriers efficiently use their numbering resources. For several years now, this Commission has been in the forefront in implementing number conservation measures in the Commonwealth including thousands-block number pooling which was implemented in the 724 area code on October 29, 2001. Of concern to us is the fact that the record as developed so far (Trans. 62-63) indicates that Level 3 has potentially used NXX codes in a manner contrary to this Commission's stated policy regarding number conservation. In the *Focal Order* we prohibited carriers from "assigning telephone numbers to customers using NXX codes that do not correspond to the rate centers in which the customers' premises are physically located" and stated that any failure to comply with this directive would be subject to civil penalties for violations under Section 3301 of the Public Utility Code. *Focal* at 42-43.

Consequently, we will direct Level 3 to refrain from assigning any previous unassigned numbers from its NXX codes to ISPs residing outside of the rate center to which that NXX code is associated pending a final order in this matter. Further, we

direct the ALJ and the parties to develop a record on the issue of Level 3's NXX utilization and its participation in the pooling in 724 area code.[6] The record should also examine whether civil penalties should be imposed against Level 3; **THEREFORE,**

IT IS ORDERED:

1. That the Motion to Strike Portions of the Brief of Level Communications, LLC, that was filed by Marianna & Scenery Hill Telephone Company on August 5, 2002, is moot, consistent with this Opinion and Order.

2. That the Petition for Emergency Relief by Level 3 Communications, LLC is hereby granted, to the extent consistent with the discussion contained in this Opinion and Order.

3. That the certified Material Question is answered in the affirmative and the Order denying emergency relief shall be reversed consistent with this Opinion and Order.

4. That a copy of this Order shall be served upon Verizon Pennsylvania Inc. who is hereby made an indispensable party to these proceedings.

5. That, within five (5) days of the date of entry of this Opinion and Order, Level 3 Communications, LLC shall provide appropriate documentation demonstrating either a surety bond or the establishment of a bank escrow account consistent with this Opinion and Order.

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[6] We note that as of August 6, 2002, Level 3 has a combined total of 58 NXX codes in all of Pennsylvania's nine active area codes

6. That upon receiving appropriate surety bond or bank escrow documentation from Level 3, Marianna & Scenery Hill Telephone Company shall then immediately restore the status quo relative to the routing of this traffic as it existed prior to July 27, 2002.

7. That Marianna & Scenery Hill Telephone Company, in Conjunction with Law Bureau shall draft a notice rescinding M&SH's July 20, 2002 letter and that Marianna & Scenery Hill shall mail the rescinding notice to all customers who received the July 20, 2202 letter.

8. That this matter is remanded to the Office of Administrative Law Judge for such expedited proceedings resulting in a Recommended Decision within 45 days of the entry date of this Order.

9. That the record in this matter be expanded to include Level 3, LLC's NXX utilization and its participation in the pooling of the 724 area code and whether civil penalties should be imposed against Level 3.

10. That Level 3, LLC is directed to immediately refrain from assigning any previously unassigned numbers from its NXX codes to Internet Service Providers residing outside of the rate center to which that NXX code is associated pending a final order in this matter.

11. That a copy of this Order shall be served upon Verizon Pennsylvania Inc. and the presiding Administrative Law Judge shall pursue whether Verizon Pennsylvania Inc. should be deemed an indispensable party to these proceedings.

BY THE COMMISSION,

James J. McNulty
Secretary

(SEAL)

ORDER ADOPTED: August 8, 2002

ORDER ENTERED:

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265

Public Meeting held January 24, 2001

Commissioners Present:

John M. Quain, Chairman
Robert K. Bloom, Vice Chairman
Nora Mead Brownell
Aaron Wilson, Jr.
Terrance J. Fitzpatrick

Re: Petition of Focal Communications Corporation of Pennsylvania for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement With Bell Atlantic – Pennsylvania, Inc.

Docket No. A-310630F0002

OPINION AND ORDER

BY THE COMMISSION:

This matter involves this Commission's consideration, pursuant to Section 252(e) of 47 U.S.C. § 252(e), of the federal Telecommunications Act of 1996 (TA-96), of two versions of an Interconnection Agreement between Focal Communications Corporation of Pennsylvania (Focal) and Verizon Pennsylvania Inc. f/k/a/ Bell Atlantic-Pennsylvania, Inc. (Verizon) arrived at through compulsory arbitration. *See* Order entered August 17, 2000, at the above-captioned docket.

On August 17, 2000, the Commission entered a final Opinion and Order which adjudicated two (2) unresolved issues consistent with the directives of TA-96, 47 U.S.C.§ 252(d), and this Commission's Order in I*n Re: Implementation of the*

Verizon's position is that Focal should have no "legitimate" reason to insist that both ordinary voice and ISP-bound traffic be defined as eligible for reciprocal compensation without reference to where the calling and called parties' physical premises are actually located. (Verizon September 19, 2000 letter). In essence, Verizon vigorously maintains that regardless of whether the called party is a residential customer, corporation, or ISP, to be local for purposes of reciprocal compensation, the called party must have a local physical presence. *Id.*

Focal refutes each and every allegation of Verizon. Particularly, it opposes the notion that its service, Virtual Exchange, is improper under *MFS-II* and interprets Verizon's imposition of a "physical presence" criteria in the definition of local traffic as an attack on this tariffed service. Focal counters that its Virtual Exchange service is identical to the FX service provided by Verizon. (September 28, 2000 letter). Focal asserts that there is no effort to flaunt any Commission order or attempt to trick Verizon or its switches. Further, it states that there is no misassignment of NXX's involved. In short, Focal avers that Verizon's language is nothing more than another effort to avoid the legal obligation to compensate Focal for transporting and terminating calls. *Id.*

Disposition

On consideration of the positions of the Parties, we shall direct that the language submitted by Focal be used in the final interconnection agreement. Verizon's definition, on its face, appears to anticipate the concerns which it alluded to in the final Order. These were concerns relative to allegations of the misuse of NPA-NXX Codes by Focal in its business operations. *See* August 17, 2000 Order, slip op., p. 43. In the final Order, we were clear that the misuse of NXX Codes would be the subject of a separate proceeding should Verizon have cause to proceed forward with such allegations. We agree with Focal that it is improper from a matter of procedure, separate and apart from

the substantive harm which Verizon seeks to avert, to inject this qualification of local traffic at this stage of the proceedings. At the same time, we note that as long as Focal is in compliance with our *MFS II* directive that requires assignment of its customers' telephone numbers with NXX codes that correspond to the rate centers in which the customers' premises are physically located, then we have no problem with the language proposed by Focal in Section 5.7.1.[4] Otherwise, Verizon has the option of filing a Formal Complaint against Focal and the details of the allegations by Verizon on this matter should be handled as a separate proceeding. Therefore, in light of the above, we shall direct that the final Interconnection Agreement incorporate the terms of Section 5.7.1. as proposed by Focal.

Conclusion

Based on the foregoing, we direct that a final interconnection agreement, consistent with this Order shall be filed by the Parties; **THEREFORE,**

IT IS ORDERED:

1. That a final Interconnection Agreement incorporating the language proposed by Verizon Pennsylvania Inc. for Section 4.2.3.2(b) shall be submitted for review under 47 U.S.C. § 252(e), within 10 (ten) days after the date of entry of this Opinion and Order.

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[4] We note, parenthetically, that this Commission has determined that only **local** calls to ISPs are eligible for reciprocal compensation and we emphasize that long distance calls to ISPs are not eligible for reciprocal compensation since settlement for those types of calls are normally compensated on an access charge basis.

PENNSYLVANIA PUBLIC UTILITY COMMISSION
HARRISBURG, PENNSYLVANIA 17105-3265

Level 3 Communications, LLC	**PUBLIC MEETING AUGUST 8, 2002**
v.	**AUG-2002-OSA-0244***
Marianna & Scenery Hill Telephone Company	**Docket No. C-20028114**

MOTION OF COMMISSIONER KIM PIZZINGRILLI

The case before us raises the broader issue of virtual NXXs and the impact of this practice on number conservation measures across the Commonwealth. As part of this Commission's on-going initiative to ensure the efficient use of numbering resources, I believe it is appropriate to open an on-the-record proceeding to further investigate this matter. The Office of Administrative Law Judge (OALJ) is directed to conduct this investigation, to provide for such comments and hearings as may be appropriate to address this matter culminating in an investigative report regarding the use of virtual NXXs. In particular, I request that the OALJ investigate the following issues related to virtual NXXs:

- How many carriers in the Commonwealth are actively utilizing virtual NXX arrangements?
- In what Pennsylvania exchanges are virtual NXXs being utilized?
- What are the benefits of these arrangements to customers and the telephone companies using them?
- Are there detriments of such arrangements to customers and the telephone companies using them?
- What is the impact on number conservation, if any, of these arrangements?
- How many customers utilize this service to provide in-coming local calling from exchanges outside of customers' local calling areas?
- What is the impact of local number portability on the deployment and use of virtual NXX arrangements?
- What are the compensation arrangements among carriers for virtual NXXs?
- What are the billing and technical issues that are present when attempting to rate calls by their geographical starting and ending point?
- Any other issues the OALJ deems necessary and relevant to this investigation.

THEREFORE, I MOVE THAT:

1. The Commission shall open a generic investigation regarding virtual NXX codes.

2. Law Bureau shall draft the appropriate Order in this matter.

August 8, 2002
DATE

KIM PIZZINGRILLI, COMMISSIONER

CERTIFICATE OF SERVICE

I hereby certify that, on this 9th day of August 2002, I caused copies of the Post-Hearing Reply Brief of Verizon Pennsylvania Inc. to be served on the following parties by electronic and overnight mail:

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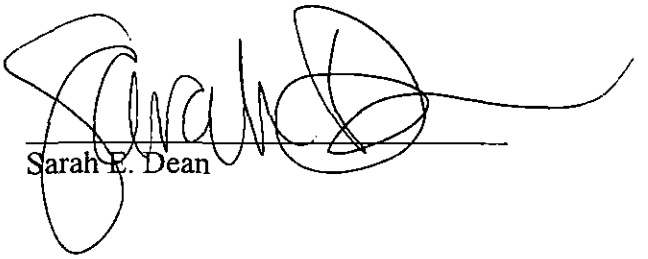

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August 9, 2002

Secretary James P. McNulty
Pennsylvania Public Utility Commission
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Harrisburg, PA 17101-3265

RE: Petition of US LEC of Pennsylvania, Inc. for Arbitration with Verizon-Pennsylvania Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996
Docket No. A- 310814F7000

BTL

Dear Secretary McNulty:

Enclosed please the original and ten (10) copies, one for time-stamp and return of US LEC of Pennsylvania, Inc.'s Reply Brief filed in the above-referenced case.

If you have any questions, please call me.

DOCUMENT FOLDER

Very truly yours,

Linda C. Smith

LCS/sw
Enclosure

cc: ALJ Cocheres
Wanda Montano
Todd Murphy

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BEFORE THE

PENNSYLVANIA PUBLIC UTILITY COMMISSION

In Re: Petition of US LEC of Pennsylvania Inc. for Arbitration with Verizon-Pennsylvania Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996	:	**Docket No. A-310814F7000**

POST HEARING REPLY BRIEF OF
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Dated: August 9, 2002

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

In Re: Petition of US LEC of Pennsylvania Inc. for Arbitration with Verizon-Pennsylvania Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996	:	**Docket No. A-310814F7000**

POST HEARING REPLY BRIEF OF US LEC OF PENNSYLVANIA INC.

US LEC of Pennsylvania Inc. ("US LEC"), by its undersigned counsel, and pursuant to Procedural Order No. 2 entered in this proceeding, respectfully submits its post-hearing Reply Brief in this matter.

INTRODUCTION

The key issue presented in this case goes beyond the simple question of whether the Commission should adopt language proposed by US LEC or Verizon for each issue in dispute between the parties. The more fundamental question is whether the contract language proposed by US LEC or Verizon is more likely to result in an interconnection agreement that will enhance the development of real competition in the provision of local services in Pennsylvania. Ultimately, that is the measure by which the contract language should be judged. In each instance, US LEC has proposed language that it believes furthers three main goals: it implements the statutory rights and duties imposed by the Act, as interpreted by the FCC and this Commission, maintains long-standing, industry-wide, customs and practices and advances and encourages the development of true competition in the market for local exchange services.

In contrast, Verizon's proposed language seeks to take advantage of, and even extend, its monopoly position in the marketplace. Through its proposals, Verizon asks the Commission to

overturn or set aside clear policy choices found in the Act and FCC regulations, seeks to change decades of custom and practice, and to shift costs improperly from Verizon to US LEC. A contract modeled on Verizon's language would severely impede the development of facilities-based competition in Pennsylvania. In support of its anti-competitive position, Verizon relies on far-fetched hypotheticals, incomplete citations to the record, unsupported allegations of arbitrage and fears of wholesale adoptions by other CLECs rather than facts to support its preferred resolution of each issue.[1] Verizon relies on worst case scenarios to present its argument because the realities of the market, and the manner in which US LEC provides services do not support Verizon's position.[2] In this reply brief, US LEC responds to Verizon's hypotheticals and provides further support for US LEC's position with respect to each issue.

ISSUES 1 AND 2: INTERCONNECTION AND TRANSPORT OBLIGATIONS

1. Verizon Largely Ignores Federal Law and FCC Rules

In stark contrast to US LEC's detailed analysis of each Party's duties under the Act and FCC's rules and how those duties would be implemented (or violated) by each Party's contract proposal, Verizon primarily ignores the Act and FCC rules in its analysis of Issues 1 and 2. Instead Verizon focuses on vague statements in dicta in FCC and Commission orders, a vague statement in the Third Circuit Order that this Commission never implemented, and arbitration

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[1] Indeed, the essence of Verizon's argument in this case can be summed up in one word: "arbitrage". On no less than nine (9) separate occasions, and without any credible evidence at all, Verizon accuses US LEC of regulatory arbitrage and urges the Commission to adopt its proposed contract language over US LEC's to preclude any further arbitrage. As we will show, Verizon's "doom-and-gloom" scenario simply does not exist.

[2] Verizon's mantra appears to be that if the Commission adopts US LEC's proposed resolution of the issues, then other CLECs, with different business plans, will adopt the resulting agreement and run rough-shod over Verizon. As the Commission well knows, the Act and its implementing regulations give the Commission full authority to prevent any such abuses. As such, the Commission should decide this arbitration based on the positions and business plans of these parties, and not on unsubstantiated fears of future problems.

decisions from other state commissions. No matter how hard it tries, however, Verizon cannot point to a Commission or FCC decision that adopts its VGRIPs contract language. For this reason, and others set forth herein, the Commission should scrutinize Verizon's position for what it does ***not*** say, in addition to what it does say.

The only federal authority Verizon cites in support of its position that it may shift *all* of its originating transport costs to US LEC are two vague quotes from the FCC's *Local Competition Order*[3] and three equally vague quotes from the FCC's order approving Verizon's Section 271 application to provide long distance service in Pennsylvania.[4] Verizon Brief at 14-16. With respect to the "expensive interconnection" quotes plucked from the *Local Competition Order*, Verizon does not point to any FCC rule or order interpreting when a particular interconnection arrangement is "expensive."[5] Nor does Verizon explain how those statements support shifting *all* of Verizon's originating transport costs to US LEC (as opposed to only "expensive" transport costs incurred by Verizon). Verizon also takes the statements from the *Local Competition Order* out of context not only by ignoring the specific rules adopted by the FCC, but also by ignoring the FCC's rationale for adopting national interconnection rules. As the FCC stated:

> [w]e believe that national standards will tend to offset the imbalance in bargaining power between incumbent LECs and competitors and encourage fair agreements in the marketplace

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[3] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, ¶¶ 199, 209 (1996) (subsequent history omitted) ("*Local Competition Order*").

[4] *Application of Verizon Pennsylvania Inc., et al. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, 16 FCC Rcd 17419 (2001) ("*Pennsylvania 271 Order*"). Verizon also quotes dicta from the FCC's *ISP Remand Order*. Verizon Brief at 7. However, the *ISP Remand Order* had nothing to do with interpreting an ILEC's interconnection obligations under federal law. Rather, the Order concerned intercarrier compensation obligations for ISP-bound traffic, a contentious issue with which this Commission is very familiar.

[5] The FCC Amicus Brief cited by Verizon (Verizon Brief at 14-15) does not clarify when a particular interconnection arrangement is expensive. Indeed, the Oregon Commission's order cited by Verizon supports US LEC's position that *Verizon* must "*demonstrate*" its costs in order to be entitled to recover them from US LEC. Verizon Brief at 15, n.12.

> between parties by setting minimum requirements that new entrants are guaranteed in arbitrations.[6]

One of those minimum requirements is that Verizon may not shift to US LEC the cost of transporting its originating traffic unless it meets its burden of proving its costs under Section 251(d)(2) and FCC Rule 51.505(e). As US LEC explained in its Brief, and as shown in Section 2 herein, Verizon has not even tried to meet this burden.

In adopting national interconnection rules, the FCC designed them in part to offset an ILEC's anticompetitive motives:

> Given that the incumbent LEC will be providing interconnection to its competitors pursuant to the purpose of the 1996 Act, the LEC has the incentive to discriminate against its competitors by providing them less favorable terms and conditions of interconnection than it provides itself. Permitting such circumstances is inconsistent with the procompetitive purpose of the Act.[7]

The record shows that through its VGRIP's option three proposal, Verizon would engage in precisely the type of discriminatory behavior that the FCC sought to prohibit. Verizon repeatedly compares the transport it performs when completing a local call between its own customers to the transport it performs when completing a local call between a Verizon customer and a US LEC customer *for the same local rate paid by the Verizon end user*. D'Amico Direct at 4, 8; Tr. 134:2-9 (D'Amico Cross), 160:21-162:4 (D'Amico Redirect); Verizon Brief at 9-10. Verizon's counsel, Mr. Panner, established at the hearing that Verizon transports its customers' local traffic within a local calling area, and may at times even transport its customers traffic through a tandem, when completing local calls between two Verizon customers. Tr. 28:4-31:16 (Hoffmann Cross). Yet under option three of VGRIPs, Verizon seeks to "double-dip", *i.e.*, to charge its customer the local rate *and* to charge US LEC for transport both within the local calling area and to a Verizon tandem. Thus while Verizon is willing to transport traffic on its own network within a local calling area, and to—or through—a tandem, for the local rate

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6 *Local Competition Order* at ¶ 216.

7 *Local Competition Order* at ¶ 218.

typically paid by an end user, it is not willing to perform the same transport and tandem switching when it interconnects with US LEC without additional compensation. The FCC could not have intended any "expensive" interconnection exemption to so violate the pro-competitive purposes of the Act.

Verizon relies on the *Pennsylvania 271 Order* as "evidence" that VGRIPs complies with current FCC rules. Verizon Brief at 15-16. However, even a cursory reading of that *Order* demonstrates that is *not* what the FCC said. The FCC said that Verizon's ***policies*** of separating the POI (physical point of demarcation) from the IP (financial point of demarcation) do not violate FCC rules. This statement can just as easily be read to support the proposition that US LEC's policy of establishing an IP at its switch that is separate from the POI does not violate FCC rules. Nowhere in the *Pennsylvania 271 Order* did the FCC approve of Verizon's specific VGRIP contract language or Verizon's policy of shifting *all* of its originating transport costs to a CLEC. This is because, as the FCC has repeatedly explained, its Section 271 orders do not resolve "new and unresolved disputes about the precise content of an incumbent LEC's obligations to its competitors."[8] Rather, it is the arbitrator's function to resolve such disputes and to adopt contract language that implements each party's obligations. This is precisely what the *FCC Arbitration Order* did – the FCC Wireline Bureau considered a new and unresolved dispute concerning interpretation of the FCC's rules and paragraphs 199 and 209 of the *Local Competition Order* and it resolved that dispute by rejecting VGRIPs entirely.[9]

Verizon tries mightily to distinguish the *FCC Arbitration Order* as merely another recommended arbitration order that has yet to be approved by a state commission. Verizon Brief

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[8] *Joint Application by SBC Communications Inc., et al., for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, 16 FCC Rcd 6237, ¶ 19 (2001), *aff'd in part and remanded, Sprint Communications Co. v. FCC*, 274 F.3d 549 (D.C. Cir. 2001).

[9] *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc., and for Expedited Arbitration*, CC Docket No. 00-218, Memorandum Opinion and Order, ¶¶ 39, 51-54 (Wireline Comp. Bureau, rel. July 17, 2002) ("*FCC Arbitration Order*").

at 7, 20. Verizon argues that the *FCC Arbitration Order* is not relevant or should not be given substantial weight by this Commission (Verizon Brief at 19, 20) and that it is flawed and misinterprets FCC rules. Verizon Brief at 20-22. Verizon's characterization of the *FCC Arbitration Order*, however, is not entirely accurate and omits important information.

Whether or not the FCC is acting in an arbitrator's role heretofore played only by state commissions, the fact remains that the FCC's interpretation of its own rules should be accorded more weight than another state commission's interpretation of FCC rules.[10] To be sure, the *FCC Arbitration Order* is not yet a final order of the FCC, nevertheless, it is in effect[11] and Verizon has told the FCC in its application for 271 authority for Virginia that it intends to abide by its terms.[12] If no application for review is filed with the FCC and if the FCC does not reconsider the Order on its own motion, the Bureau's Order is treated as a final order of the full FCC that has the same force and effect as any other order initially adopted by the full FCC.[13] Indeed, notably absent from Verizon's Brief is *any* representation that it plans to seek review of the *FCC Arbitration Order* and to ask the FCC to reverse the Wireline Bureau's adoption of a single POI and IP per LATA over VGRIPs. If a petition for review is filed, but the FCC does not reverse the Wireline Bureau—in whole or in part, then those portions of the *FCC Arbitration Order* that

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[10] *Cf. US West Communications v. MFS Intelenet, Inc. et al.*, 193 F.3d 1112 (10th Cir. 1999) (reviewing *de novo* state agency interpretation of federal law and federal agency's implementing rules) (subsequent history omitted) and *Capital Network System, Inc. v. FCC , et al.*, 28 F.3d 201 (D.C. Cir. 1994) (according deference to federal agency's interpretation of its own rules) (subsequent history omitted).

[11] *Procedures for Arbitrations Conducted Pursuant to Section 252(e)(5) of the Communications Act of 1934, as amended*, Order, FCC 01-21, ¶ 9 (rel. Jan. 19, 2001) (arbitration order issued under delegated authority is effective upon release).

[12] *Application by Verizon Virginia for Authorization to Provide In-Region, InterLATA Services in Virginia* (WC Docket No. 02-214) at 13 ("CLECs in Verizon's former Bell Atlantic service territory also may request in interconnection negotiations those service offerings and arrangements that the Commission found in the Virginia Arbitration Order to be required by applicable law . . . Verizon is sending an industry letter advising CLECs in Virginia that Verizon will accept such requests from CLECs.").

[13] 47 U.S.C. § 155(c)(3) (any order adopted by delegated authority that is not reviewed by the Commission "shall have the same force and effect, and shall be made, evidenced, and enforced in the same manner, as orders, decisions, reports, or other actions of the Commission.").

are affirmed on review also have the same force and effect, and are entitled to receive just as much weight in subsequent proceedings, as any other order initially adopted by the full FCC. In short, the *FCC Arbitration Order* is in effect, relevant and entitled to substantial weight.

Verizon also claims that the Commission should disregard the *FCC Arbitration Order* as precedent that is applicable to this case because of alleged "failures." Verizon Brief at 20-22. Specifically, Verizon claims that the Wireline Bureau did not "address" or "distinguish" Verizon's arguments about the "expensive" interconnection exception recognized by paragraphs 199 and 209 of the *Local Competition Order* and about the *Pennsylvania 271 Order's* endorsement of Verizon's "policies." It therefore claims that the *FCC Arbitration Order* is not a "proper understanding of the FCC's rules implementing federal law." Verizon Brief at 21. The Commission may not, however, abandon the *FCC Arbitration Order* as guidance based on these claimed failures. Verizon clearly raised its "expensive" interconnection and *Pennsylvania 271 Order* arguments before the Wireline Bureau and the Wireline Bureau clearly considered and distinguished the FCC statements in those orders.[14] It was not arbitrary and capricious for the Wireline Bureau to consider and reject Verizon's arguments. Indeed, "[w]hen an agency considers a particular factor and rationally concludes that it should not affect its decision, the agency is not acting arbitrarily. It is exercising the judgment Congress entrusted to it."[15] Therefore, the fact that the *FCC Arbitration Order* does not endorse, or spend multiple paragraphs distinguishing, Verizon's "expensive" interconnection and *Pennsylvania 271 Order* arguments is not grounds for disregarding that Order as applicable precedent.[16]

Notably absent from Verizon's Brief is any citation to an FCC rule or order setting standards for state commissions to follow in determining whether a particular form of interconnection is "expensive." In contrast, US LEC points to an open FCC Notice of Proposed

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[14] *FCC Arbitration Order* at ¶¶ 50, 53, n.123, 54.

[15] *Valuevision International, Inc. v. FCC*, 149 F.3d 1204, 1210 (D.C. Cir. 1998) (denying petition for review based on allegations that FCC arbitrarily and capriciously ignored factors raised by petitioner).

[16] Moreover, the U.S. Courts of Appeals, not this Commission, have exclusive jurisdiction to determine whether an FCC order is arbitrary and capricious and should be reversed. 47 U.S.C. § 402.

Rulemaking that is exploring if and when an ILEC may charge a CLEC for the transport of the ILEC's originating traffic to the POI selected by the CLEC. US LEC Brief at 19. US LEC also submitted evidence that various factors could contribute to making a particular interconnection arrangement expensive. US LEC Brief at 19. Finally, US LEC cited FCC rules that require Verizon to prove its costs through the submission of cost studies in order to set rates for the interconnection services it provides US LEC. US LEC Brief at 9. Nonetheless, Verizon insists that the Commission ignore these factors and cost study requirements and adopt instead Verizon's unilateral, nebulous, single-factor definition of "expensive" interconnection.

With respect to Pennsylvania precedent, Verizon argues that the *Focal Arbitration Order*, in which the Commission adopted a proposal similar to US LEC's, was an aberration that should not control the outcome of this proceeding. Verizon Brief at 17. Although Verizon urges the Commission to apply instead its *MCI Arbitration Order*, the Third Circuit Order, and the *Sprint Arbitration Order*, none of those orders supports adoption of VGRIP's onerous requirements.

As an initial matter, the Commission may not simply disregard its *Focal Arbitration Order*. Although Verizon attempts to distinguish it from other Commission precedent, it makes no attempt to distinguish it from the facts of this case. Furthermore, the *Focal* and *Sprint Arbitration Orders* share common results – they both rejected Verizon's GRIPs or VGRIPs proposal in favor of the proposal offered by the CLEC.[17] Like US LEC's proposal in this case, both the Focal and Sprint proposals were based in part on their particular network interconnection architecture with Verizon and in part on transport compensation compromises that each CLEC was willing to make. As such, it is perfectly appropriate for the Commission to consider all precedent relevant to Issues 1 and 2, including its *Focal Arbitration Order*.

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[17] *Petition of Focal Communications Corporation of Pennsylvania for Arbitration Pursuant to Section 252(b) of the Telecommunications act of 1996 to Establish an Interconnection Agreement with Bell Atlantic-Pennsylvania, Inc.*, Docket Not. A-310630F0002, Opinion and Order, 47 (PA PUC Aug. 17, 2000) ("*Focal Arbitration Order*"); *Petition of Sprint Communication Company, L.P. for an Arbitration Award of Interconnection Rates, Terms and Conditions Pursuant to 47 U.S.C. § 252(b) and Related Arrangements with Verizon Pennsylvania, Inc.*, Docket No. A-310183F0002, Opinion and Order, 55-56 (Pa. PUC Oct. 12, 2001) ("*Sprint Arbitration Order*").

Despite Verizon's attempts to argue that the Commission's *MCI* and *Sprint Arbitration Orders* support VGRIPs, those decisions cannot be read as Verizon suggests. In the first place, both the Third Circuit and the Commission itself rejected important features of VGRIPs in these cases. In the *MCI Arbitration Order*, for example, the Commission's initial conclusion that Verizon could require MCI to establish multiple, physical connections to each Verizon access tandem was reversed by the Third Circuit.[18] This multiple, physical connection requirement is precisely the outcome that would result from implementing option one of Verizon's VGRIPs proposal. US LEC Brief at 15-16. Therefore, it necessarily follows that the Third Circuit, and the FCC,[19] also would likely reject VGRIPs' option one. As Verizon continuously reminds the Commission, US LEC is not required to implement option one. However, if US LEC declines to implement option one, VGRIPs requires US LEC to pay for *all* of Verizon's originating transport costs under option three. US LEC Brief at 16-18. As US LEC showed in its Brief, option three violates both US LEC's interpretation of FCC rules and Verizon's interpretation of FCC rules. US LEC Brief at 16-18. Further, as described herein (*see* Section 2, *infra*), there is no basis for Verizon to claim legitimately that it has met its burden of proving its costs – a prerequisite to shifting any costs for Verizon's originating traffic to US LEC.[20]

Verizon also claims that in the *Sprint Arbitration Order*, the Commission adopted a "VGRIP-like proposal." Verizon Brief at 16-17. What Verizon fails to acknowledge is that in the *Sprint Arbitration Order*, the Commission actually *rejected* VGRIPs.[21] Further, there are many more differences between Sprint's compromise proposal and VGRIPs than there are

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[18] *MCI Telecommunications Corp. et al. v. Bell Atlantic-Pennsylvania et al.*, 271 F.3d 491, 518 (3d Cir. 2001).

[19] *See Pennsylvania 271 Order* at ¶ 100, n.345 ("to the extent that Verizon required competitive LECs to physically interconnect with Verizon at every tandem area (a smaller geographic area than a LATA), Verizon would not be in compliance with our rules").

[20] Although Verizon claims that the Third Circuit Order supports its argument that it is entitled to recover uncompensated costs (Verizon Brief at 16), Verizon does point to any authority, either in the Third Circuit Order or subsequent Commission orders, that provides guidance on the type or amount of costs Verizon must prove in order to qualify for additional compensation from US LEC.

[21] *Sprint Arbitration Order* at 51-56.

similarities. As Verizon notes, its interconnection agreement with Sprint includes additional POI and "virtual IP" options. Verizon Brief at 17. However, unlike VGRIPs, the Sprint agreement admits that an additional physical connection between the parties' networks is a POI and places no collocation requirements on the additional POI. Second, that virtual IP option is similar to VGRIPs in name only. Unlike VGRIPs, which requires an additional physical IP/POI or virtual IP regardless of traffic volume, Sprint does not have to establish the virtual IP until a certain threshold of traffic (8.9 million minutes of use) and distance (20 miles outside of a local calling area) are reached.[22] Nor does Sprint have to establish the virtual IP at a Verizon end office (as required by VGRIPs); it may establish the virtual IP at a Verizon tandem. Also in contrast to VGRIPs, the Sprint IP does not have to be on Verizon's network (as required by VGRIPs) and it may be located anywhere within 5 miles of Verizon's tandem switches. All of these features of the Sprint proposal adopted by the Commission are substantial departures from Verizon's VGRIPs proposal.[23]

Verizon also cites other state commission orders that have approved Verizon's VGRIPs proposal or arrangements similar to VGRIPs. Verizon Brief at 18-19. As Verizon implicitly acknowledges, these orders are not binding on this Commission. Verizon Brief at 20. What Verizon fails to acknowledge, however, is that other state commission have rejected proposals similar to VGRIPs and adopted proposals similar to US LEC's. For example, in rejecting BellSouth's efforts to require an IP in each BellSouth local calling area, the Kentucky Public Service Commission approved Level 3's proposal to require each LEC to bear financial

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[22] *Sprint Arbitration Order* at 52. Verizon again claims that this traffic threshold is unreasonable because it should not be required to bear a single cent of additional transport costs. Verizon Brief at 17, n.17. However, one could argue that by adopting this traffic volume and distance threshold (which was voluntarily offered as a compromise by Sprint), the Commission has implicitly endorsed one possible standard for when a single CLEC-IP per LATA becomes "expensive." If that is indeed the standard, there is no doubt that Verizon has not met it here.

[23] As US LEC explained in its Brief (at 13, 15, n.43), the *Sprint Arbitration Order* approved an interconnection arrangement that is similar to US LEC's proposal. Like Sprint, US LEC's IP can be located at a point not on Verizon's network (*e.g.*, at US LEC's switch). Like Sprint's five-mile distance limit, US LEC's non-distance-sensitive entrance facility eliminates the Commissions' expressed concerns about requiring Verizon to transport traffic to a US LEC-IP that is distant from Verizon's tandem.

responsibility for delivering its traffic to the POI selected by Level 3.[24] The Michigan Commission,[25] New York Commission,[26] and the Florida Commission (by adopting the Staff Recommendation)[27] reached the same results. Therefore, to the extent the Commission gives any weight at all to out-of-state precedent, it must also consider the precedent that supports US LEC's position on Issues 1 and 2.

2. *Verizon Admits That It Has Not Met Its Burden of Proving Its Costs*

Verizon's only effort to establish the costs it incurs to deliver traffic to US LEC's chosen IP is through the use of hypotheticals and summary conclusions that are not supported by record evidence. Yet, in order for Verizon to charge US LEC for the interconnection services it provides, Verizon is required to satisfy the requirements of Section 252(d) and FCC Rule 51.505(e). Together, the Act and FCC rules require Verizon to charge cost-based rates and to

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[24] *Petition of Level 3 Communications, LLC for Arbitration with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996*, Case No. 2000-404, Order, 1-4 (Ky. PSC March 14, 2001) (US LEC App. Tab 8). Like this Commission's *Sprint Arbitration Order*, the Kentucky Commission required Level 3 to establish an additional POI once traffic reached an OC-3 threshold. That level is significantly higher than the DS-3 threshold adopted in the *Sprint Arbitration Order*. *See Newton's Telecom Dictionary* (14th Ed. 1998) (defining DS-3 as operating at 44.736 Mbps and OC-3 as operating at three times 51.840 Mbps).

[25] *Petition of Level 3 Communications, LLC for Arbitration Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996 to Establish an Interconnection Agreement with Ameritech Michigan*, Case No. U-12460, Opinion and Order, 33-35 (Mich. PSC Oct. 24, 2000) (US LEC App. Tab 11). Again, the OC-12 threshold adopted for additional POIs is significantly higher than the DS-3 threshold adopted in the *Sprint Arbitration Order*. *See Newton's Telecom Dictionary* (14th Ed. 1998) (defining DS-3 as operating at 44.736 Mbps and OC-12 as operating at 622.08 Mbps).

[26] *Joint Petition of AT&T Communications of New York, Inc., TCG New York Inc. and ACC Telecom Corp. Pursuant to Section 252(b) of the Telecommunications Act of 1996 for Arbitration to Establish an Interconnection Agreement with Verizon New York Inc.*, Case 01-C-0095, Order Resolving Arbitration Issues, 25-28 (July 26, 2001) (finding that each carrier is financially responsible for delivering its originating traffic, including originating VNXX traffic, to the POI). Although Verizon included portions of this decision in its Appendix, it did not include the portion addressing interconnection issues. Therefore, US LEC has attached excerpts of this decision to its Reply Brief.

[27] Memorandum to Director, Division of the Commission Clerk & Administrative Services, from Division of Competitive Services and Division of Legal Services, Docket No. 000075-TP, *Investigation into Appropriate Methods to Compensate Carriers for Exchange of Traffic Subject to Section 251 of the Telecommunications Act of 1996*, Issue 15(b), Staff Recommendation, Issue 14 at 38 (Fl. P.S.C. Nov. 21, 2001). (US LEC App. Tab 7).

submit cost studies to support those rates. Because Verizon bears the burden of proof regarding rates, it is also required to prove that the interconnection requested by US LEC is "expensive" such that Verizon is entitled to charge US LEC for Verizon's interconnection services. Verizon's hypotheticals and unsupported allegations do not come close to satisfying its burden of proof. Verizon's responses to US LEC's interrogatories confirm that it has not even attempted to perform the required cost studies or analyses:

> **Interrogatories No. 7 and 9**
>
> 7. Please provide all cost studies and other documents in your possession, custody or control relating to an analysis of Verizon's purported costs based upon a single Interconnection Point or Point of Interconnection per LATA with a CLEC.
>
> 9. Please provide all traffic studies, cost studies, network planning, and other documents in your possession, custody or control relating to an analysis of Verizon's purported costs of delivering Verizon's originating local traffic to US LEC's IP at its switch in (a) the Pittsburgh (234) LATA and (b) the Philadelphia (228) LATA.
>
> **Response to Interrogatories No. 7 and 9**
>
> Verizon does not possess any traffic studies, costs studies, or other documents referenced in these interrogatories.[28]

By arguing that it is "possible" to calculate Verizon's costs of delivering its originating traffic to US LEC's IP (Verizon Brief at 12), Verizon again admits that it has made no such cost showing. In fact, as US LEC showed in its Brief, Verizon has presented no factual evidence to support its claim that it would be forced to provide "expensive" interconnection (however defined) if the Commission adopts US LEC's proposal. US LEC Brief at 18-20.

Similarly, and contrary to Verizon's claim (Verizon Brief at 9), the question of whether Verizon would be required to provide transport and tandem switching[29] for which it receives no

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[28] US LEC Ex. 3 at 2-3.

[29] As US LEC noted in Section 1, *infra*, Verizon's counsel established that sometimes Verizon transports calls between two Verizon customers through a Verizon tandem for the same local rate.

compensation also remains open. It remains open because Verizon has not proved that the rates it receives from its end users for providing local and above-cost services that subsidize its local rates are less than the alleged cost it incurs to transport calls to US LEC's IP together with whatever reciprocal compensation Verizon pays US LEC to terminate a call. Verizon did not introduce into evidence the rates it currently charges its end users for its local or above-cost services that subsidize its local services. Tr. 164:10-165:24 (D'Amico Cross). Nor did Verizon introduce any evidence on the costs it incurs in transporting and terminating its own traffic in order to show the relationship between its end user rates and the cost it incurs to complete its customers' local calls. Further, Verizon's own witnesses cannot support any claim that there is any relationship between these end user rates and Verizon's costs of transporting traffic. US LEC Brief at 19-20.

In sum, because Verizon failed to introduce appropriate evidence, it is impossible to determine if US LEC's preferred method of interconnection is "expensive." Further, because Verizon has not shown that the rates it receives from its customers are insufficient, there is no factual basis to support Verizon's claim that it incurs uncompensated costs in delivering traffic to US LEC. Verizon Brief at 6, 9-11. Thus while it may be theoretically *possible* to calculate the cost differential that Verizon claims exists, Verizon, who bears the burden of proof in showing its costs,[30] has made absolutely no effort to do so. It is therefore irrelevant whether it is "possible" to use the Commission-approved UNE rates to calculate the costs Verizon allegedly incurs to deliver traffic to US LEC.[31] Verizon Brief at 12.

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30 47 C.F.R. § 51.505(e).

31 Moreover, one component of the costs Verizon proposes to charge US LEC is not based on UNE rates and instead is a rate that has never been evaluated by this Commission – namely, the "other costs" component of Verizon's transport penalty. Verizon Brief at 11, n.7.

3. Verizon Mischaracterizes Certain Testimony by US LEC

Verizon continues its quest to pull off the "magic trick" of avoiding its interconnection duties by limiting them to the Verizon-defined POI and refusing to apply them to the Verizon-defined physical IP. In support of its position, Verizon selectively quotes testimony by Mr. Hoffmann on cross-examination to support its argument that this issue is not about network engineering, but instead about how costs shall be allocated. Verizon Brief at 8-9. However, Verizon omits the first question in this series which sets up the important distinction between what Mr. Hoffmann initially testified to and the "concession" Verizon claims Mr. Hoffmann made during cross examination:

> Q. You've testified that under the terms of the agreement proposed by Verizon that Verizon is trying to dictate the physical manner in which US LEC establishes its chosen IP; is that your testimony?
>
> A. Yes.

Tr. 43:8-12 (Hoffmann Cross). However, the questions Verizon quotes in its Brief changed from using the term "physical IP" to "POI." As Mr. Hoffmann previously testified, and clarified on redirect, VGRIPs only permits US LEC to exercise its interconnection rights with respect to the Verizon-defined POI, not with respect to the Verizon-defined physical IP.[32] Hoffmann Direct at 11; Tr. 72:4-74:2 (Hoffmann Redirect). Therefore, contrary to Verizon's representation, Mr. Hoffmann did not concede that US LEC may elect any technically feasible point of physical connection to Verizon's network or any technically feasible method of physical connection to Verizon's network (at least not without incurring Verizon's transport penalty (Tr. 49:6-11 (Hoffmann Cross)). Despite Verizon's inaccurate characterization, Issues 1 and 2 concern not only the allocation of transport costs, but also Verizon's efforts to dictate the physical network architecture US LEC must establish in order to avoid Verizon's transport penalty.

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[32] As Mr. D'Amico admitted, the physical IP is a physical connection between two networks. Tr. 121:23-122:9 (D'Amico Cross). It is therefore a point of interconnection or interconnection point *as those terms are used by the FCC* that is subject to restrictions under Section 251(c)(2) and FCC rules. US LEC Brief at 15-16.

Verizon's claim that, based on the testimony of Mr. Hoffmann and Ms. Montano, US LEC receives full compensation for the terminating functions it provides Verizon is also incorrect. Verizon Brief at 10, 12. As Mr. Hoffmann explained, under option three, US LEC would not receive the agreed-to reciprocal compensation rate. Tr. 49:6-11 (Hoffmann Cross). To the contrary, the rate US LEC would receive would be 44% less than the agreed-to rate. Hoffmann Rebuttal at 4. The fact that US LEC may receive compensation from its customer for transporting traffic over some distance (Verizon Brief at 12-13 (citing Ms. Montano's testimony)) is irrelevant. Under the current calling-party's-network-pays system, a carrier's rates recover the carrier's costs of completing calls *originated* by its customers.[33] That is why, under current reciprocal compensation rules, the originating carrier is responsible for the entire cost of the call, including paying the terminating carrier compensation for the transport and termination services it provides.[34] Thus Verizon may not point to US LEC's end user rates as support for the proposition that any reduction in the reciprocal compensation rate Verizon pays US LEC is more than offset by the revenues US LEC receives from its customer.

4. Federal Rules Impose A Financial Obligation on Verizon to Transport Its Originating Traffic Beyond The POI

Verizon objects to establishing US LEC's IP at US LEC's switch because it allegedly imposes transport obligations on Verizon beyond the POI. Verizon Brief at 23-24. As US LEC explained in its Brief, however, Verizon has a financial obligation not only to transport its originating traffic to the POI, but also to compensate US LEC for the transport services US LEC provides in terminating Verizon's customers' traffic. US LEC's Best and Final Offer ("BFO") does not require Verizon to "perform the transport" from the POI to US LEC's switch. Verizon

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[33] *See Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, FCC 01-132, ¶ 37 (rel. April 27, 2001) ("*Intercarrier Compensation NPRM*"); *TSR Wireless, LLC. v. U S West Communications, Inc.*, File Nos. E-98-13, E-98-15, E-98-16, E-98-17, E-98-18, Memorandum Opinion and Order, FCC 00-194, ¶ 34 (rel. June 21, 2000) ("*TSR Wireless*"), *aff'd, Qwest Corp. et al. v. FCC et al,* 252 F.3d 462 (D.C. Cir. 2001).

[34] *Intercarrier Compensation NPRM* at ¶ 9, 37.

Brief at 24. Like VGRIPs, US LEC's BFO gives Verizon the option of physically performing the transport function or compensating US LEC for performing the transport function. Unlike VGRIPs, however, both of US LEC's options comply with FCC rules. US LEC Brief at 12-13.

Whether US LEC provides its own transport or pays Verizon for transport, US LEC is financially responsible for delivering its originating traffic to Verizon's IPs, which are located either at Verizon's tandem or end office switch (depending on traffic volume). Tr. 131:8-132:18 (D'Amico Cross). Verizon bears an identical obligation under US LEC's proposal as Verizon is financially responsible for transporting its originating traffic to US LEC's IP, which is also located at US LEC's switch. In short, US LEC is not asking Verizon to do anything more than what US LEC has already agreed to do (and what Verizon already does under the Party's current arrangements). Tr. 133:5-18 (D'Amico Cross). Thus, US LEC's proposal imposes symmetrical obligations on the Parties, while Verizon's proposal imposes asymmetrical obligations, shifting *all* transport costs for both Parties' originating traffic to US LEC. Verizon has not explained why this wholesale cost shifting is consistent with the Act, FCC rules, or the procompetitive intent of the Act. The Commission should not condone Verizon's attempt to disadvantage its competitor in this manner. Instead, the Commission should resolve the disputes in Issues 1 and 2 by rejecting VGRIPs and adopting US LEC's BFO.

ISSUE 3: APPLICATION OF RECIPROCAL COMPENSATION OBLGATIONS TO "VOICE INFORMATION SERVICES TRAFFIC"

Verizon's feeble attempts to present any credible argument in support of its claim that the Commission should endorse its definition of an entirely new class of "Voice Information Services" traffic that is excluded from the parties' reciprocal compensation obligations must be rejected. US LEC has established that the categories of traffic that Verizon considers "Voice Information Services" traffic fit squarely into the definition of "Reciprocal Compensation Traffic" that controls the payment of reciprocal compensation, and Verizon has given the

Commission no persuasive factual or legal reason to accept its invitation to carve out a new category of traffic so that Verizon can unjustifiably limit the applicability of such payments.

Despite Verizon's claim that its proposed treatment of "Voice Information Services" traffic is consistent with federal law and should be adopted by the Commission (Verizon Brief at 26), US LEC demonstrated that this is not the case. Verizon cites no persuasive legal authority, nor could it, that would warrant placing "Voice Information Services" traffic in a separate category from the other traffic that is covered by its reciprocal compensation obligations. Verizon's interpretation of the FCC's rules defining "Reciprocal Compensation" and "Reciprocal Compensation Traffic" are incorrect to the extent that Verizon claims that "Voice Information Services" traffic does not fall within their purview. As US LEC explained at length in its Brief, such traffic cannot properly be characterized as interstate or intrastate Exchange Access, Information Access, or exchange services for Exchange Access or Information Access. US LEC Brief at 26-27.

Verizon ignores entirely the recent Wireline Bureau decision, which rejected Verizon's attempt to define its reciprocal compensation obligations in the same manner as it does here, by excluding "interstate or intrastate Exchange Access, Information Access, or exchange services for Exchange Access or Information Access."[35] Verizon Brief at 25. Verizon's position that all Section 251(g) traffic should be automatically excluded from its reciprocal compensation obligations was rejected in that case, and the same result should obtain here. Verizon similarly fails to address US LEC's argument that Verizon's proposal is defective because there is no technically feasible, cost-effective way to segregate "Voice Information Services" traffic from other traffic that the Commission deems eligible for reciprocal compensation. Montano Direct at

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[35] *FCC Arbitration Order* at ¶ 257.

12; US LEC Brief at 28-29. Verizon has not succeeded in challenging US LEC's position that there is no factual or legal basis to exclude "Voice Information Services" traffic from the scope of the parties' reciprocal compensation obligations, and US LEC's proposal should be adopted.

ISSUE 4: DEDICATED TRUNKING FOR VOICE INFORMATION SERVICES TRAFFIC

Verizon has failed to demonstrate any meaningful grounds in support of its position that US LEC should be required to provide dedicated trunking, at its own expense, for Voice Information Service traffic that originates on US LEC's network for delivery to Voice Information Service providers served by Verizon. The Commission should therefore reject Verizon's attempt to foist this inappropriate obligation on US LEC, and should adopt US LEC's position that no such separate trunking requirement may be imposed.

Although Verizon reiterates its concern about having the ability to accurately bill and block delivery of such traffic where there is no mechanism for billing the calling party (Verizon Brief at 27-28), it fails to provide any credible reason why US LEC should be responsible for the separate trunking requirements it proposes. Even though Verizon seeks to force US LEC to absorb the expense of implementing separate trunking arrangements, it failed to submit any testimony that might support its position that this approach is justified in terms of (1) being necessary in the first instance; and (2) demonstrating that the amount of traffic generated by US LEC customers destined for Voice Information Services connected to Verizon's network is sufficiently large as to warrant a separate trunk. Nor has Verizon shown that its proposal is warranted because it cannot address its billing concerns on its own network, without imposing a separate trunking requirement on US LEC. *See* Montano Direct at 14-15. Verizon simply has not met its burden of proving that its position should be adopted, and its Brief merely restates the

perceived problem without offering a shred of support that would influence the Commission to accept its proposal.

Despite the fact that Verizon failed to provide any testimony that might support its attempt to force US LEC to provide dedicated trunking at its own expense, Verizon claims that its position should be adopted "because US LEC itself does not permit its customer to place such calls." Verizon Brief at 28. This argument is irrelevant, and it should be disregarded by the Commission. Verizon, not US LEC, is the party that seeks to impose a significantly costly separate trunking requirement on another party without having made the requisite demonstration that any such action is necessary. Verizon is mistaken in asserting that "US LEC has no legitimate basis for objecting" to Verizon's demands (Verizon Brief at 28), when Verizon, the proponent of the separate trunking requirement, has not shown that it is warranted. Verizon has not justified its proposal, and it should be rejected by the Commission.

ISSUE 5: TERMINATING PARTY' VS. "RECEIVING PARTY"

US LEC urges the Commission to reject Verizon's attempt to interject the entirely new concept of a "receiving party" in lieu of the term "terminating party" when referring to the carrier that terminates a call for purposes of traffic measurement and billing over interconnection trunks. Despite Verizon's wordsmithing in an effort to convince the Commission that its proposal should be adopted because carriers actually "receive" the traffic that forms the basis of reciprocal compensation obligations (Verizon Brief at 28-30), Verizon presents no compelling reason why its attempt to modify decades of industry practice should be accepted.

Nowhere has Verizon even attempted to define the term "receiving party." Rather, it seeks to support its position by stating that its proposal is "neutral, *accurate*, and readily understandable." Verizon Brief at 30 (emphasis in original). US LEC does not agree with

Verizon's interpretation, and submits that Verizon's proposal bears none of the characteristics Verizon attributes to it. As US LEC explained in its Brief, the alleged accuracy and neutrality of the term is not settled because the FCC law on this subject is in a state of flux. US LEC Brief at 31. Verizon's proposed modification to current industry terminology is likewise far from readily understandable, as it would be disruptive and confusing to eliminate the phrase "terminating party," which is firmly established and known throughout the industry, and replace it at this juncture with Verizon's proposed language.

Significantly, Verizon has not cited any authority indicating that its new and novel interpretation has been accepted for use in an interconnection agreement by any regulatory body or tribunal. The Commission should recognize that Verizon's proposal is without precedent and lacks merit, and it should adopt US LEC's recommendation to direct the parties to continue to employ the phrase "terminating party" in their interconnection agreement.

ISSUE 6: RECIPROCAL COMPENSATION FOR FX SERVICES

US LEC's basic position is that the decades-old custom and practice in the industry of routing and rating a call based on the originating and terminating NPA/NXX's, and basing inter-carrier compensation on those same factors should continue.[36] This practice has governed the rating, routing and compensation of local calls (those where the originating and terminating callers are physically located in the same local calling area), intraLATA toll calls (those where the originating and terminating callers are physically located in different local calling areas), and "foreign exchange" calls (those where the NPA/NXX's of the originating and terminating parties

[36] US LEC understands that the Commission has decided to open a generic proceeding to address the issue of virtual NXX traffic. US LEC will, of course, abide by any Commission determination arising out of that proceeding; however, in the interim, US LEC urges the Commission to adopt its proposed language as the basis for the parties' reciprocal compensation obligations as US LEC's approach reflects the realities of intercarrier billing systems.

are associated with the same local calling area even though the parties may be physically located in different local calling areas). Indeed, as the record in this case clearly shows: Verizon admits that calls to FX customers are indistinguishable from other local calls (Tr. at 194-95; *FCC Arbitration Order* at ¶ 300), admits that an FX call is handled and routed the same as any other local call (Tr. 228), admits that the physical location of the terminating party has no impact on the costs it incurs to transport a call (Haynes Rebuttal at 12), and, finally, admits to having billed and collected reciprocal compensation from CLECs for calls from CLEC customers to Verizon's Foreign Exchange customers. Tr. 191: 10-14; 205: 7-13; 203:8-205:20.

Verizon utterly ignores this historical practice and, instead, argues for "fixing" a system which plainly is not broken. The facts simply do not support Verizon's position and its proposed "fix" is unworkable, burdensome and expensive—in short, the "fix" is worse than the finely-tuned system already in place.

In support of its position, Verizon makes four arguments: that US LEC's position is inconsistent with federal law, that US LEC's proposal would result in arbitrage, that US LEC's proposal does not adequately address interLATA-type traffic and, finally, that Verizon can now distinguish FX traffic from local traffic for compensation purposes. Neither the facts nor the law support these arguments.

In the first place, in light of the recent *FCC Arbitration Order* which, by its terms, interpreted and applied the FCC's own rules, US LEC is hard-pressed to understand how Verizon can claim that federal law does not permit the parties to pay each other reciprocal compensation for transporting and terminating FX traffic. Even more fundamentally, it is inconceivable that Verizon can wholly ignore the conclusions enunciated in the *Arbitration Order* and claim that it

has no impact here.[37] In that arbitration, the FCC's Wireline Competition Bureau specifically considered the question of whether federal law required the parties to compensate each other based on the actual originating and terminating end-points of the call or on the NPA/NXX of the originating and terminating numbers. This is precisely the same question Verizon raises here. Yet, in arguing its position to this Commission, Verizon ignores the conclusions of the Wireline Bureau and points, instead, to the rejected analysis found in the *ISP Remand Order*. Verizon Brief at 32-33. To be sure, the D.C. Circuit did not vacate the *ISP Remand Order*, but it plainly rejected the very legal analysis that Verizon relies upon here—that reciprocal compensation does not apply to traffic identified in section 251(g) of the Telecom Act. The D.C. Circuit declined to accept the FCC's reasoning and this Commission should decline to accept it as well. Thus, when confronted with "dueling federal authorities", as is the case here, US LEC submits that the valid, binding determinations of the Wireline Bureau, which Verizon has agreed to accept in Virginia, take precedence, and provide greater weight of authority, than the oft-rejected views of the FCC.

In support of its second argument, Verizon raises once again the false, yet ugly, specter of regulatory arbitrage, claiming that US LEC's proposal, if adopted, would result in US LEC earning revenue from both its customers and Verizon while Verizon would get no compensation for the traffic in question. Verizon Brief at 35. Surprisingly absent from Verizon's discussion is any recognition or acknowledgement that US LEC's FX service is fundamentally similar to Verizon's FX service (US LEC Brief at 35–37), that the traffic between the two carriers is relatively balanced (Tr. 68:6-9), that Verizon has substantially more FX customers in

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[37] What makes Verizon's position here especially disingenuous is that in its recent filing at the FCC seeking authority to offer interLATA toll services in Virginia pursuant to section 271 of the Act, Verizon states that it will abide by the terms of the Arbitration Order. (*See, supra,* n. 12) One can only marvel at the legal dexterity that permits Verizon to abide by a decision interpreting federal law in one state while, at the very same time, claiming that the very same decision is wholly irrelevant to the very same question posed in another state.

Pennsylvania (estimated to number as many as 6,000, including Verizon's FX-like services offered to ISPs) than US LEC (US LEC has only 6 FX customers, none of whom are ISPs) and that the costs and charges the parties incur for providing FX service are roughly the same.

Thus, in Verizon's FX service, as in US LEC's, a customer pays Verizon an extra charge "in order to be able to receive calls originated in a distant exchange without a toll charge being imposed on the calling party." Verizon Brief at 35; *see also*, Tr. at 190-91. Similarly, Verizon is "thus paid by *its* subscriber precisely to ensure that [US LEC] will not be paid any toll charges by *its* subscriber for an interexchange call." (*Id.*, emphasis in original). In both instances, the carrier serving the originating party provides the same service: it is responsible for carrying the call to the other carrier's POI/IP, where it is handed off for transport and termination. Finally, both parties have billed and collected reciprocal compensation for calls originated by customers of the other carrier and terminated to their own FX customers.

The similarity of the parties' respective FX offerings is critical because Verizon gives the misguided impression that it is providing some kind of service for which it is not receiving any compensation when, in fact, that simply is not the case. Indeed, quite the opposite is true. Both parties are paid by their customers for the services they provide and both currently pay reciprocal compensation to the other carrier for transporting and terminating the call. Montano Rebuttal at 12-13. Thus, Verizon admits that a call to an FX customer served by either party is rated and routed as a local call. Tr. 230-31. In that arrangement, when Verizon's customer originates the call, Verizon is compensated by its originating customer (through the monthly fee for service) for taking the call and handing it off to US LEC who then bills Verizon for the services it performs *for Verizon's customer* in terminating the call.[38] Conversely, when US LEC's

[38] It makes no difference where US LEC's FX customer is located in relation to its switch, nor does it matter whether US LEC's FX service is inbound only or two way. Verizon admits that its FX

customer originates the call, US LEC is compensated by its originating customer (through the monthly fee for service) for taking the call and handing it off to Verizon, who then bills US LEC for the services its performs *for US LEC's customer* in terminating the call. The fact that Verizon and US LEC also receive compensation from their FX customers for the FX portion of the services they provide (Montano Rebuttal at 13) has no impact whatever on the services that US LEC and Verizon perform for each other.[39]

Not satisfied with that arrangement, Verizon contends that it should be paid "the toll charges that ordinarily would apply." Verizon Brief at 35. That assumes, incorrectly, that the originating caller would still make the call if she knew she was going to incur toll charges. Tr. at 244-45. More important, assuming that the call is to an FX customer, since it is rated and routed as local, the services that US LEC and Verizon perform as the carrier serving the originating party are the same, regardless of where the terminating customer is located. In that scenario, they both are properly compensated for that service out of the monthly fees they charge their customers. Indeed, if the Commission adopts Verizon's position and directs US LEC to pay any access charges to Verizon at all for a call to an FX customer served by US LEC, then it will be ordering US LEC to pay Verizon for a service that it does not provide.[40]

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customers can be located at any distance from its switch, from as little as 5 miles, to as much as 20 miles (Tr. 251-52). Similarly, Ms. Montano testified that US LEC's FX customers do have facilities in some local calling areas (Montano Rebuttal at 11), so US LEC plainly does "bear the cost of transporting a Virtual FX customer's traffic to Verizon's distant point of interconnection." Verizon Brief at 36.

[39] Verizon implies that US LEC failed to meet its burden of proving "that it incurs any additional costs in providing Virtual FX service as compared to ordinary local exchange service." Verizon Brief at 36. There is no such burden placed upon US LEC and Verizon does not point to any authority for the proposition that there is.

[40] Verizon argues, incorrectly, that "there is no situation, and US LEC cites none, in which a carrier both charges its subscriber toll charges . . . and receives intercarrier compensation." Verizon Brief at 37. Of course there is such a situation—Verizon's own FX service. The charges Verizon levies on its FX customer are designed to replace the toll revenue it loses and it has billed and collected intercarrier compensation from US LEC.

Verizon's third argument is predicated entirely on the unsupported allegation that US LEC bills Verizon for reciprocal compensation for an interLATA FX call, despite the utter lack of any evidentiary support in the record for that proposition. As expected, Verizon highlights US LEC's "Local Toll Free Service" as the epitome of all that is wrong with US LEC's FX service and its proposal to base the parties' intercarrier compensation obligations on the NPA/NXX's of the originating and terminating parties. In the first place, as US LEC patiently explained in its Post-Hearing Brief, the Local Toll Free Service is offered to its customers as a long-distance service, *not* a local service. That distinguishes it entirely from US LEC's FX service, which is the only service at issue here.[41] Secondly, there is nothing in the record to establish the two most fundamental propositions—that US LEC has any Local Toll Free customers in Pennsylvania and, if it does, whether US LEC bills Verizon for reciprocal compensation for any calls made to a Local Toll Free customer with a telephone number in Pennsylvania. In the absence of any such evidence, Verizon's hyperbolic distortion of US LEC's Local Toll Free service is entirely hypothetical and speculative.

Verizon's final argument is its proposed "fix". In the first place, it is crystal clear from the record that the "fix", which involves creating a data-base of FX customers, conducting traffic studies and then estimating the amount of traffic that is terminating to FX subscribers, is entirely intrusive, unworkable and expensive. It would require US LEC to inquire from its customers how they intend to utilize the services they purchase and where they intend to locate all of their facilities.[42] It distinguishes traffic based solely on the identity of the end-user. It is dependent upon shifting customer bases, shifting traffic patterns, estimates of traffic and unworkable algorithms. It would require US LEC to add wholly unnecessary steps and processes to an

[41] None of US LEC's six foreign exchange customers utilize US LEC's Local Toll Free Service.

already cumbersome billing process. Clearly, given that US LEC has only 6 FX customers in the entire state of Pennsylvania, none of which are ISPs, the cost to US LEC of Verizon's "fix" is likely to be substantially more expensive than the amount of reciprocal compensation and other revenue that US LEC receives from its FX customers and the traffic they generate. Critically, nothing in the record demonstrates that Verizon's "fix" actually works. Verizon states that it been offered in Florida, but nowhere does Verizon state that its "fix" has been implemented, is functioning smoothly and is accurate.

Missing from Verizon's argument is the acknowledgement that there is a clear, irreconcilable conflict between Verizon's proposed contract language and its alleged "fix" that it wants to implement to distinguish between calls to FX subscribers and local calls. Verizon's contract language states that reciprocal compensation will be paid based on the originating and terminating end-points of the call. In contrast, Verizon's proposed "fix" has nothing whatever to do with the beginning and end-points of a call; rather, like the compensation system it seeks to replace, it is based entirely on the NPA/NXX of the called party. Thus, the database of FX subscribers that Verizon proposes to create is not predicated on the endpoints of the calls to those subscribers, but on their NPA/NXX. The Commission should follow the lead of the FCC and adopt US LEC's proposed language.

ISSUE 8: COMPENSATION ARRANGEMENT TO GOVERN THE EXCHANGE OF ISP TRAFFIC IF THE COMPENSATION FRAMEWORK IN THE FCC'S *ISP REMAND ORDER* IS VACATED OR REVERSED ON APPEAL

With respect to what compensation arrangement should govern the parties' exchange and termination of ISP-bound traffic in the event the compensation framework in the FCC's *ISP Remand Order* is vacated or reversed on appeal, Verizon has presented no justifiable reason why

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[42] A customer can have facilities in many locations, not all of which would utilize FX arrangements.

the Commission should not accept US LEC's position. US LEC's offer of compromise on this issue, which would require the parties to continue to compensate each other at the rates set forth in the *ISP Remand Order* but with waiver of other terms and conditions (such as growth caps and new market conditions), is eminently reasonable and most likely to result in stability for both parties.

In contrast, Verizon continues to insist that US LEC's proposal is unsatisfactory and suggests, instead, that the Commission should require the parties to go through lengthy negotiations and, most likely, litigation in order to establish an entirely new arrangement if the compensation framework in the *ISP Remand Order* is vacated or reversed on appeal.[43] Verizon Brief at 40-41. Verizon offers no justification for this position other than to reiterate its prior arguments that the parties' obligations should be subject to continual alteration based on modifications in federal law. Instead, the Commission should accept US LEC's reasonable compromise proposal, which will minimize any disruption to the terms of the agreement that might be caused by a change in federal law. Implementation of Verizon's position would force the parties to negotiate, and most certainly litigate, a new compensation framework. Adoption of Verizon's proposal would yield a costly, intrusive and inefficient result, and it would be squarely against the best interests of both parties. US LEC urges the Commission to reject Verizon's position and adopt US LEC's more reasonable proposal.

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[43] Verizon claims that adoption of US LEC's position "would lead to the wrong result" and violate federal law because the D.C. Circuit has decided to maintain the FCC's growth cap and new market provisions. This argument mischaracterizes US LEC's position, which is simply to avoid protracted, costly litigation in the event that the current reciprocal compensation regime is vacated or overturned. In contrast to the uncertainties that would result under Verizon's proposal if such a scenario were to occur, US LEC's proposal would result in minimal disruption to the parties and the Commission.

ISSUE 9: PROPRIETY OF CHANGES TO NON-TARIFFED RATES SPECIFIED IN THE AGREEMENT

Despite Verizon's heated claims to the contrary, the Commission should not bless its attempt to retain liberal authority to modify all of the rates contained in the parties' agreement, including those non-tariffed rates that Verizon and US LEC have specifically agreed to. Instead, the Commission should adopt US LEC's proposal to maintain the specific rates fixed in the agreement for the life of the agreement unless those rates are superceded by the result of a formal Commission cost case. Verizon's position on this issue is not persuasive and violates the principles of regulatory certainty that US LEC seeks to preserve by agreeing to the non-tariffed rates at issue. Therefore, US LEC's position should be adopted.

In an attempt to disguise the nature of the unfairly skewed, and, for all practical purposes, unilateral nature of the process that would ensue if Verizon decided to change a non-tariffed rate, Verizon seeks refuge in the claim that it "is not free to modify its generally applicable charges unilaterally." Verizon Brief at 42. Verizon states that because proposed changes to non-tariffed rates are either submitted to the Commission before they are effectuated or result from generic ratemaking proceedings, US LEC and other interested parties are able to participate in the review process. Verizon Brief at 42-43. However, Verizon ignores the considerable burden—*financial* as well as the costs of distracting management personnel—that is placed on CLECs to dispute a particular rate proposal. The entire process undermines the purpose of having a binding interconnection agreement that provides relative pricing certainty to the parties in the first place.

For that reason, Verizon's reliance on statements made by the Arbitrator concerning rate flexibility for dark fiber offerings that are not currently tariffed *in Pennsylvania* is misplaced. US LEC's concern relates to non-tariffed rate elements for which the parties have already agreed to prices. As the Arbitrator noted, for such rate elements in an agreement of limited duration (as

is the instant agreement), "it's not hardly an agreement if you haven't agreed on prices."[44] Although US LEC recognizes that Verizon's tariffed rates may change during the life of the agreement, and understands that all rates may be modified pursuant to the terms of the Applicable Law provisions, it seeks the certainty of having agreed-upon rates established wherever possible.[45] There is no credible reason why non-tariffed rates cannot remain fixed for the life of the agreement, and Verizon has offered no argument that should compel the Commission to accept its position that such rates can be changed at Verizon's discretion. US LEC's position on this issue should therefore be adopted by the Commission.

---

[44] Transcript of July 23, 2002, Conference Call at 303.

[45] Verizon's cries of "arbitrage," Brief at 43, can easily be dispensed with. Because US LEC has agreed to adhere to the non-tariffed rates specified in the agreement absent any changes in Applicable Law, Verizon's claim that US LEC will seek to unfairly "exploit" those rates unless lower rates are generally available is not persuasive.

CONCLUSION

For the reasons set forth herein, and in its Initial Post-Hearing Brief, the Commission should adopt US LEC's proposed resolution of each unresolved issue and reject Verizon's proposed language. In each instance, the resolution advocated by US LEC (a) implements the statutory rights and duties imposed by the Act, as interpreted by the FCC and this Commission, (b) maintains widespread and long-held customs and practices within the telecommunications industry, and (c) advances and encourages the development of true competition in the market for local exchange services.

Respectfully submitted,

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Dated: August 9, 2002

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the participants listed below via electronic and first class mail.

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Dated: August 9, 2002

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on July 26, 2001

COMMISSIONERS PRESENT:

Maureen O. Helmer, Chairman
Thomas J. Dunleavy
Leonard A. Weiss
Neal N. Galvin

CASE 01-C-0095 - Joint Petition of AT&T Communications of New York, Inc., TCG New York Inc. and ACC Telecom Corp. Pursuant to Section 252(b) of the Telecommunications Act of 1996 for Arbitration to Establish an Interconnection Agreement with Verizon New York Inc.

ORDER RESOLVING ARBITRATION ISSUES

(Issued and Effective July 30, 2001)

BY THE COMMISSION:

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The interconnection agreement with Verizon forms the basis for AT&T to enter and compete in the local exchange market. Its terms are critical to the company's competitive growth and to its provision of stable and reliable service. Accordingly, the Commission finds that AT&T has a valid interest in the continuing performance of the terms in the agreement in the event of a transfer. However, AT&T's interests are best addressed in the context of the Commission review of any proposed transfer of Verizon's assets that would occur pursuant to PSL §99(2). Were any such transfer to be proposed, we would expect Verizon to discuss the matter with AT&T and other CLECs. It is also reasonable to expect that Verizon would negotiate terms to ensure continued performance under existing interconnection agreements. The actions available to the Commission pursuant to PSL §99(2) provide an adequate forum for the presentation and consideration of any such matters by the affected parties. Accordingly, the Commission finds that other regulatory practices apply to asset transfers, and AT&T proposed language need not be adopted.

Interconnection Points/Network Architecture

AT&T states that the Act permits it to interconnect with Verizon at any technically feasible point, and the FCC has ruled that a CLEC has the option to designate a single point of interconnection (POI) in each LATA.[33] AT&T proposes that its financial responsibility for local calls be consistent with its physical interconnections. It insists that Verizon should bear the cost of local traffic originating from its customers and, as a corollary, that AT&T should not be charged any of Verizon's costs. AT&T maintains this is consistent with the financial responsibilities it bears for the traffic it originates and delivers to Verizon.

AT&T objects to Verizon's proposal to transfer local traffic at Verizon tandems and at the end offices where it is

[33] CC Docket No. 00-65, Application by SBS Communications, Inc. etc. for Provision of In-Region InterLATA Services in Texas (released June 30, 2000), ¶78.

collocated, as this would permit Verizon to avoid local traffic costs. In support of its position, AT&T points to a FCC decision and to state regulatory decisions in Indiana, Wisconsin and Michigan. AT&T contends that Verizon's proposal penalizes it for establishing 250 collocation facilities in New York and discourages it from providing any other competitive facilities.

If AT&T has the right to designate POIs, Verizon insists that it should have the right to designate the interconnection points for financial purposes. Verizon points to §252(d)(1) of the Act as requiring AT&T to compensate it for added interconnection costs. According to Verizon, AT&T's position has been rejected in North and South Carolina and elsewhere. Consequently, to the extent AT&T's POIs and Verizon's interconnection points do not coincide, Verizon believes AT&T should be financially responsible for transporting traffic between them. It observes that the rates AT&T currently pays only cover certain costs, and AT&T's interconnection proposal involves other costs for which it makes no provision. Were AT&T's proposal to be adopted, Verizon believes new interconnection rates would be needed.

While there are a number of unresolved matters relating to interconnection, the most significant issues involve where the carriers interconnect and how the costs of the facilities will be allocated between them. Verizon has proposed a fundamental change by seeking to separate the physical point of interconnection (POI) from the financial responsibility, or the interconnection point (IP). If this were to occur, AT&T would have to pay to have traffic originated by Verizon customers on Verizon's network hauled to the physical point of interconnection. AT&T is strongly opposed to this and it proposes to keep the existing arrangement. While not raised explicitly by either party, Verizon's proposal appears to be designed to address internet traffic issues. CLECs are permitted to use "virtual NXXs" that allow a CLEC to activate a telephone number (NXX) in an exchange where it has no physical

presence.[34] Calls from the local calling area of the exchange where the NXX is addressed are rated as local calls, even though this traffic is terminated to a CLEC customer (invariably an internet service provider) at a location outside the local calling area. Verizon considers this unfair, because it must haul what is essentially a toll call without receiving compensation from the originating customer or the CLEC, and it must pay reciprocal compensation when the call is terminated on the CLEC's network. Thus, Verizon raises a legitimate issue, and under its proposal, AT&T would pay for the transport of this traffic. The problem with this, however, is that not only would AT&T pay for the transport of traffic associated with virtual NXX calls, it would also pay for the transport of traffic associated with its facilities-based local exchange business.[35] This Commission and the FCC have taken steps to equitably address the costs and compensation of internet traffic. We are inclined to allow such measures to take hold before going any further, especially with any proposal that has significant consequences for the development of facilities-based competition.

Our orders establishing the framework for competition,[36] recognize that CLEC networks would, in all likelihood, not mirror the incumbent's. This has proven to be correct, as most CLEC network designs use a single central office switch and long loops to serve a region, rather than the more traditional design of many switches and short loops. The policy established in our Competition II proceeding, that remains applicable, assumes that a carrier is responsible for the costs to carry calls on its own network.

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[34] Case 00-C-0789, Omnibus Proceeding to Investigate the Interconnection Agreements Between Telephone Companies, Order Establishing Requirements for the Exchange of Local Traffic (issued December 22, 2000).

[35] The carriage, terms, conditions and charges associated with AT&T's UNE-Platform business are not affected by this issue.

[36] Case 94-C-0095 - Proceeding Concerning Universal Service and the Competitive Framework for the Local Exchange Market.

We recognize that there is some tension between our decision to require CLECs to pay for the transport of internet traffic on similar calls originated from the customers of independent telephone companies.[37] However, that decision had no significant impact on the full service, facilities-based operations of the CLECs, because in this instance, the CLEC is not directly competing for customers within the independent telephone company.

We reject Verizon's proposal and shall keep in place the existing framework that makes each party responsible for the costs associated with the traffic that their respective customers originate until it reaches the point of interconnection. AT&T's language in this regard is adopted. However, AT&T's proposal to interconnect at any technically feasible point on Verizon New York's network (including tandems, end offices, outside plant and customer premises) is too broad and vague, particularly with respect to Verizon's outside plant. Verizon's language provides an acceptable list of possible interconnection points and methods, and it is therefore adopted, provided it is amended to allow bona fide requests for additional points and methods of interconnection beyond those specified on the list.

Other Network Architecture and Interconnection Issues

Verizon claims that AT&T's proposed interconnection methods are incomprehensible, and that AT&T seeks preferential treatment. It objects to an AT&T proposal to use intra-building interconnections where both companies have a presence. It claims AT&T could obtain an unfair competitive advantage where its switches are located in the same buildings as Verizon's, or where they both have entrance facilities. However, AT&T insists that the intra-building connections it seeks are not discriminatory, as it is entitled to interconnect at any technically feasible point. We find that AT&T's proposal to use

[37] Case 00-C-0789, Order Establishing Requirements for the Exchanged Local Traffic (issued December 22, 2000).

intra-building interconnections is efficient for both of them, and it is adopted.

Verizon objects to AT&T's proposals for converting existing interconnections to the new arrangement.[38] It complains that AT&T is not willing to pay all the transition costs for new network architecture, and the AT&T transition process includes a timeline for which neither party is currently prepared. Verizon also objects to AT&T's proposal to grandfather existing arrangements for indefinite periods, while AT&T pursues new architecture in other instances.

Verizon objects further to AT&T's term "exchange access trunks", which it says is confusing and conflicts with other interconnection principles to which AT&T subscribes. It believes AT&T's transition strategy will prolong the interconnection process at Verizon's expense, and the initial, high-usage trunk groups AT&T has proposed adds unnecessary trunking. Instead, it believes existing two-way trunk groups should be converted to one-way use, and new trunk groups should be constructed for the other carrier to use. Verizon also objects to making any billing changes before the trunk groups are changed, and it insists on full compensation for the services it provides.

Both parties have proposed language for the transition to a new network architecture. We find that AT&T should pay for all relevant, incremental costs triggered by AT&T's actions during the transition. The parties are directed to develop a schedule that accomplishes the transition of existing arrangements, including the conversion of two-way trunks, within one year, unless they mutually agree to another timeframe.

Finally, the parties disagree about interconnections at locations other than intermediate hubs on Verizon's network. According to Verizon, AT&T should only use DS-3 interface facilities at offices designated in the National Exchange Carriers Association (NECA) tariff as intermediate hub

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[38] Verizon objects specifically to AT&T's proposed Section 4.1.4.

locations. It claims that if AT&T orders DS-3 facilities to offices not properly equipped, there may not be sufficient interoffice facilities to handle the traffic. AT&T claims that Verizon cannot legally deny it such a connection, especially if it is a more efficient than other interconnections.

We are requiring the parties to cooperate and forecast the traffic that passes between them. As discussed below, Verizon has proposed that AT&T connect directly to its end offices when AT&T's traffic reaches a specified threshold. In view of that proposal, which we are accepting with certain modifications, it is unreasonable to deny AT&T the use of the most efficient interconnections at any given Verizon end office. The parties are therefore directed to include language in the interconnection agreement permitting AT&T DS-3 connections at any end office, provided however, that AT&T gives Verizon adequate notice of its needs in the forecasting process.

AT&T's Originating Traffic

AT&T objects to Verizon's proposal calling for it to deliver originating traffic to the company's end offices rather than to POIs of its own choosing. In instances where it has small amounts of originating traffic volumes for a particular end office, AT&T plans to deliver its traffic instead to a Verizon tandem switch. In these cases, AT&T believes Verizon should charge it UNE-based rates for transport between the Verizon tandem and the end office. This would permit AT&T to avoid construction of facilities to Verizon end offices when it does not have sufficient traffic to warrant such action.

In Case 00-C-0789, a proceeding in which we investigate telephone company interconnection agreements, we addressed a similar issue involving traffic between independent telephone companies and CLECs. We found that if the call volumes between an independent and a CLEC exceeded the capacity of a DS-1 channel, the CLEC was responsible for arranging for direct trunking. We find that the same approach is reasonable here. If the traffic between AT&T and any given Verizon end office exceeds the DS-1 level, AT&T shall be responsible for

Cocheres, Louis

From: Cocheres, Louis
Sent: Tuesday, September 03, 2002 4:23 PM
To: Aaron Panner; Angstreich, Scott; ANTHONY E. GAY (E-mail); Cohn, Robin F.; JULIA A. CONOVER (E-mail); LINDA C. SMITH (E-mail); Michael L. Shor; Paiva, Suzan D.; Rindler, Richard M.
Subject: A-310814F7000 US LEC/Verizon Arbitration

TO ALL PARTIES:

Ladies and Gentlemen:

Would it be possible for one of you to supply an electronic copy of the Agreement and its Attachments which were Exhibit B to the US LEC Petition for Arbitration by the end of the week? I expect that my Recommended Decision will be posted on the Commission's website, and I will need an electronic version of the Agreement to include as an attachment.

Thank you

ALJ Cocheres

pc: File Room

Please update your contacts with my new e-mail address lcocheres@state.pa.us

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ORIGINAL

September 3, 2002

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SEP 3 2002

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

VIA OVERNIGHT DELIVERY

Secretary James P. McNulty
Pennsylvania Public Utility Commission
P.O. Box 3265
Keystone Building, 3rd Floor
Harrisburg, PA 17101-3265

Re: *Petition of US LEC of Pennsylvania Inc. for Arbitration with Verizon Pennsylvania Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996;* Docket No. A-310814F7000

Dear Secretary McNulty:

Please find enclosed for filing 4 copies of a letter submitting supplemental authority in the above-captioned proceeding. Also enclosed is one extra copy of the letter. Please date-stamp and return the extra copy in the self-addressed, postage prepaid envelope.

If you have any questions, please call me at 202-326-7921.

DOCKETED
NOV 20 2002

Sincerely,

Aaron M. Panner

cc: Service List

114

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September 3, 2002

VIA OVERNIGHT DELIVERY AND ELECTRONIC MAIL

Hon. Louis Cocheres
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
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Harrisburg, PA 17120

Re: *Petition of US LEC of Pennsylvania Inc. for Arbitration with Verizon Pennsylvania Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*; Docket No. A-310814F7000

Dear Judge Cocheres:

Please find enclosed for filing in this proceeding a copy of the recent decision of the South Carolina Public Service Commission ("SC PSC") in its arbitration of an interconnection agreement between US LEC of South Carolina Inc. and Verizon South Inc., pursuant to 47 U.S.C. § 252(b). The arbitration between the parties presented six of the issues that are currently pending before Judge Cocheres in the above-captioned docket.

The SC PSC adopted Verizon's position with respect to Virtual FX traffic (Issue 6) and with respect to the regime to govern reciprocal compensation for ISP-bound traffic (Issue 7 in South Carolina, Issue 8 here). The SC PSC adopted US LEC's position with respect to reciprocal compensation for Voice Information Services traffic (Issue 3), separate trunking for Voice Information Services traffic (Issue 4); use of the term "terminating" rather than "receiving" (Issue 5); and treatment of subsequent changes in tariff rates (Issue 8 in south Carolina, Issue 9 here).

Two of the issues that are before Judge Cocheres – those concerned with interconnection architecture – were settled before the matter was submitted to the SC PSC for decision. With respect to those issues (Issues 1 and 2), the parties agreed to a slightly modified version of Verizon's VGRIPs proposal, with which the parties' current interconnection architecture in South Carolina is already compliant.

If you have any questions, please call me at 202-326-7921.

Sincerely,

Aaron M. Panner

cc: Service List

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2002-181-C - ORDER NO. 2002-619

AUGUST 30, 2002

IN RE: Petition of US LEC of South Carolina Inc. for Arbitration of an Interconnection Agreement with Verizon South, Inc.	)))	ORDER ON ARBITRATION

I. INTRODUCTION

This matter comes before the Public Service Commission of South Carolina ("Commission") on the Petition of US LEC of South Carolina Inc. ("US LEC") for arbitration to establish an interconnection agreement with Verizon South Inc. ("Verizon South"), pursuant to Section 252(b) of the Telecommunications Act of 1996 (the "1996 Act"). In its petition for arbitration, US LEC initially raised nine issues. A Hearing on the issues raised in US LEC's Petition was scheduled for August 12, 2002. On or about August 5, 2002, the Commission was advised by the parties that, through negotiations that had continued after the Petition had been filed, they had resolved three of the nine issues initially presented for arbitration. The remaining issues address different aspects of their interconnection arrangements.

US LEC made a bona fide request for interconnection, services or network elements pursuant to section 252(a) of the 1996 Act on or about December 15, 2001. Pursuant to Section 252(b)(1), US LEC could bring a petition for arbitration of outstanding issues during the period from the 135th day to the 160th day after December

15, 2001. The Commission has 9 months, or until September 16, 2002, to resolve the matters raised in the petition. *See*, 252(b)(4)(C) of the 1996 Act.

US LEC filed its Petition on or about May 24, 2002. Verizon filed its Response on June 18, 2002. Upon the filing of the Petition and Response, the Commission established a schedule and procedures for arbitration. See Commission Order No. 2002-483 dated June 25, 2002 as modified by the Commission in Order No. 2002-557, dated July 31, 2002. The parties in this matter filed testimony setting forth the outstanding issues to be arbitrated by the Commission.

In light of the parties' settlement of three of the initial nine issues, the parties agreed to submit the remaining issues to the Commission for consideration and resolution based on the pre-filed testimony and subsequent briefs. In that regard, US LEC presented the pre-filed direct and rebuttal testimony of Ms. Wanda G. Montano, Vice President, Regulatory and Industry Affairs for US LEC Corp., the parent company of US LEC of South Carolina Inc. and the pre-filed direct and rebuttal testimony of Mr. Frank R. Hoffmann, Jr., Senior Interconnection Manager for US LEC Corp., the parent company of US LEC of South Carolina Inc. Verizon South presented the pre-filed direct and surrebuttal testimony of Mr. Peter J. D'Amico, a Senior Product Manager in the Interconnection Product Management Group for Verizon Services Corporation and the pre-filed direct and surrebuttal testimony of Mr. Terry Haynes, a manager in the State Regulatory Policy and Planning Group for Verizon.

II. LEGAL STANDARDS AND PROCESSES FOR ARBITRATION UNDER THE 1996 ACT

The 1996 Act provides that parties negotiating an interconnection agreement have the duty to negotiate in good faith.[1] After negotiations have continued for a specified period, the 1996 Act allows either party to petition a state commission for arbitration of unresolved issues.[2] The petition must identify the issues resulting from the negotiations that are resolved, as well as those that are unresolved.[3] The petitioning party must submit along with its petition "all relevant documentation concerning: (1) the unresolved issues; (2) the position of each of the parties with respect to those issues; and (3) any other issues discussed and resolved by the parties."[4] A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the state commission receives the petition.[5] The 1996 Act limits a state commission's consideration of any petition (and any response thereto) to the unresolved issues set forth in the petition and the response.[6]

Through the arbitration process, the Commission must now resolve the remaining disputed issues in a manner that ensures the requirements of Sections 251 and 252 of the 1996 Act are met. The obligations contained in those sections of the 1996 Act are the obligations that form the basis for negotiation, and if negotiations are unsuccessful, those sections then form the basis for arbitration. Once the Commission provides guidance on

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[1] 47 U.S.C. § 251(c)(1).
[2] 47 U.S.C. § 251(b)(2).
[3] *See generally,* 47 U.S.C. §§ 252(b)(2)(A) and 252(b)(4).
[4] 47 U.S.C. § 252(b)(2).
[5] 47 U.S.C. § 252(b)(3).
[6] 47 U.S.C. § 252(b)(4).

the unresolved issues, the parties will incorporate those resolutions into a final agreement that will then be submitted to the Commission for its final approval.[7]

The purpose of this arbitration proceeding is the resolution by the Commission of the remaining disputed issues set forth in the Petition and Response.[8] Under the 1996 Act, the Commission shall ensure that its arbitration decision meets the requirements of Section 251 and any valid Federal Communications Commission ("FCC") regulations pursuant to Section 252; shall establish rates according to the provisions of Section 252(d) for interconnection, services, and network elements; and shall provide a schedule for implementation of the terms and conditions by the parties to the Agreement.[9]

III. FINDINGS OF FACT

1. US LEC is a corporation organized and formed under the laws of the State of Delaware. US LEC is authorized by this Commission to provide local exchange service in South Carolina. US LEC was granted authority to provide facilities-based and resold local exchange and interexchange services in the State of South Carolina by this Commission on November 10, 1997, in Docket No. 97-300-C, Order No. 97-957. US LEC is, and at all relevant times has been, a "local exchange carrier" ("LEC") under the 1996 Act.

2. Verizon South is a corporation organized and formed under the laws of the State of Delaware, having an office at 1301 Gervais Street, Suite 825, Columbia, South Carolina 29201. Verizon South is authorized by this Commission to provide local

[7] 47 U.S.C. § 252(e).
[8] 47 U.S.C. § 252 (b)(4)(c).
[9] 47 U.S.C. § 252(c).

exchange and other services within its franchised areas in South Carolina. Verizon South is, and at all relevant times has been, an "incumbent local exchange carrier" ("ILEC") under the terms of the 1996 Act.

3. US LEC has one switch located in Charleston, South Carolina. US LEC commenced facilities-based operations in May, 2002.

4. US LEC and Verizon began negotiations of an interconnection agreement but were unable to finalize all of the terms. Thus, this Commission was called upon to arbitrate the final unresolved terms of the interconnection agreement.

IV. CONCLUSIONS OF LAW

A. GENERAL

This arbitration is being conducted pursuant to Section 252 of the Act. Pursuant to Section 252(b)(4)(A), we limit our consideration to the remaining issues set forth in the Petition and the Response.

The appropriate legal standard to be applied in this case is stated in Sections 252(c) and 252(d)(2) of the 1996 Act, as follows:

> (c) Standards for Arbitration.--In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall—
>
> (1) ensure that such resolution and conditions meet the requirements of Section 251, including the regulations prescribed by the Commission pursuant to Section 251;
>
> (2) establish any rates for interconnection, services, or network elements according to subsection (d); and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d)(2) . . .a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless –

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

B. UNRESOLVED ISSUES

The remaining unresolved issues to be resolved by this Commission are identified as follows:

Issues 3 and 4 deal with whether the parties are obligated to pay each other reciprocal compensation for terminating calls to Voice Information Service Providers and whether US LEC can be required to construct a dedicated trunk for delivering Voice Information Services Traffic to providers served by Verizon South.

Issue 5 concerns whether the parties will continue to use the traditional "originating party"—"terminating party" nomenclature in widespread use throughout the industry in connection with the exchange of traffic or whether Verizon South can introduce the entirely new term of a "receiving party" instead of a terminating party.

Issue 6 asks whether, in calculating their reciprocal compensation obligations, the parties will continue to utilize the NPA/NXX of the calling and called numbers as the

factors determining whether a call is local or toll or whether they will be required to change that historical system and, instead, determine their obligations based on the physical end-points of the originating and terminating callers.

Issue 7 addresses the compensation framework that will govern the parties' reciprocal compensation obligations for terminating calls to Internet service providers ("ISPs") in the event the compensation framework in the FCC's Internet Order is vacated or reversed on appeal.

Finally, Issue 8 deals with whether Verizon South should be permitted to change its non-tariffed charges during the term of the agreement, *i.e.*, those fixed by the parties during their negotiations of the interconnection agreement, or must such charges remain fixed for the entire term.

These items are discussed separately below.

1. ISSUE 3 – Is US LEC entitled to reciprocal compensation for terminating "Voice Information Services" traffic? (Glossary, Section 2.75; Additional Services Attachment, Section 5.1; Interconnection Attachment, Section 7.3.7).

US LEC's Position: Yes. The traffic that Verizon South now seeks to define as Voice Information Services Traffic fits completely the definition of Reciprocal Compensation Traffic that is eligible for reciprocal compensation.

Verizon South's Position: No. "Voice Information Services" traffic is defined to include only traffic that is not subject to reciprocal compensation under current law.

Discussion:

At issue is whether US LEC—and Verizon South, for that matter—is entitled to be paid reciprocal compensation for terminating "Voice Information Services" traffic. As stated in US LEC's Petition, and in the testimony of Ms. Wanda Montano, Verizon South seeks to define an entire category of traffic that it urges the Commission to exclude from

the parties' reciprocal compensation obligations. (Direct Prefiled Testimony of Ms. Wanda G. Montano (hereafter, "Montano Direct") at 11). Verizon South first defines "Voice Information Services Traffic" as a class of traffic that "provides [i] recorded voice announcement information or [ii] a vocal discussion program open to the public." (Verizon South Template, Additional Services Attachment, Section 5.1). Verizon South then asks the Commission to exclude the defined class of traffic from its reciprocal compensation obligations.

The Commission finds that Verizon South's request lacks a sound basis in law or fact. We decline Verizon South's request and rule in favor of US LEC's position. We reject Verizon South's proposal because the categories of traffic that Verizon South defines as Voice Information Services Traffic fit completely within the definition of "Reciprocal Compensation Traffic" that is the basis for the parties' reciprocal compensation obligations. (Montano Direct at 12)

FCC rules define "Reciprocal Compensation" as an arrangement "in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of telecommunications traffic that originates on the network facilities of the other carrier."[10] Similarly, "Reciprocal Compensation Traffic" is defined as "[t]elecommunications traffic originated by a Customer of one Party on that Party's network and terminated to a Customer of the other Party on that other Party's network, except for Telecommunications traffic that is inter-

[10] FCC Rule 51.701(e). The FCC defines "telecommunications traffic" as "Telecommunications traffic exchanged between a LEC and a telecommunications carrier other than a CMRS provider, except for telecommunications traffic that is interstate or intrastate exchange access, information access, or exchange services for such access." FCC Rule 51.701(b)(1).

state or intrastate Exchange Access, Information Access, or exchange services for Exchange Access or Information Access."[11]

The categories of traffic included in the definition of "Voice Information Services Traffic" fit this definition of "Reciprocal Compensation Traffic." Whether the call is a [i] "recorded voice announcement information or [ii] a vocal discussion program open to the public," it is originated by a customer of one party on that party's network and is terminated by a customer of the other party on that party's network. (*Id.*) Further, that type of call cannot be characterized as interstate or intrastate Exchange Access, Information Access, or exchange services for Exchange Access or Information Access.

"Exchange Access" is defined in the Telecommunications Act as "the offering of access to telephone exchange services or facilities *for the purpose of the origination or termination of telephone toll services*." 47 U.S.C. § 153 (16) (emphasis added). The term has this same meaning for purposes of the parties' exchange of traffic in South Carolina because they have defined it in their proposed Interconnection Agreement as having "the meaning set forth in the [1996] Act." (Glossary at § 2.33).

"Information Access" is not defined in the 1996 Act; rather, it is defined in the Modified Final Judgment as "the provision of specialized exchange telecommunications services *by a BOC* in an exchange area in connection with the origination, termination, transmission, switching, forwarding or routing of telecommunications traffic to or from the facilities of a provider of information services."[12]

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[11] Glossary, Section 2.75.

[12] *United States v. AT&T*, 552 F. Supp. 131, 229 (D. D.C. 1982)(emphasis added).

In turn, "Information Services" is defined in the 1996 Act as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." (47 U.S.C. § 153(20)).

US LEC properly interprets these definitions to exclude calls to Voice Information Service Providers, especially those providers who offer a service that offers "a vocal discussion program open to the public." That traffic does not fit the definition of "Information Service," and it typically involves a call that originates and terminates in the same local calling area. Indeed, the New York Public Service Commission addressed the issue and concluded that calls to so-called "chatlines" were eligible for reciprocal compensation.[13]

We similarly find that, to the extent that US LEC provides service to a Voice Information Service Provider who offers "recorded voice announcement information," that service does not constitute "Information Access" because, by its terms, information access is defined as a service provided "by a BOC". The term does not apply when the service is provided by a competitive local exchange provider. We have not found any decision by the FCC or any state commission which holds that a call to a recorded voice announcement is not eligible for reciprocal compensation.

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[13] *Proceeding on Motion of the Commission to Reexamine Reciprocal Compensation*, Docket No. 99-C-0529, *Opinion and Order Concerning Reciprocal Compensation*, Order No. 99-10 (N.Y.P.S.C., rel. Aug. 26, 1999).

The FCC Wireline Competition Bureau ("Wireline Bureau") recently addressed this issue, albeit in a more generalized fashion.[14] Verizon South alleges here that Voice Information Services Traffic is excluded from the parties' reciprocal compensation obligations because it is traffic that falls within the scope of Section 251(g) of the Act, and pursuant to the FCC's *ISP Remand Order*[15], all 251(g) traffic is excluded from reciprocal compensation.[16] In its arbitration before the Wireline Bureau, Verizon sought to define its reciprocal compensation obligations in exactly the same way that it does here—as excluding "interstate or intrastate Exchange Access, Information Access, or exchange services for Exchange Access or Information Access."[17] Verizon argued that all 251(g) traffic fell within those defined areas of traffic and, therefore, should be excluded automatically from its reciprocal compensation obligations.[18] The Wireline Bureau rejected Verizon's argument, stating: "[w]e disagree with Verizon's assertion that every form of traffic listed in Section 251(g) should be excluded from Section

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[14] *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc., and for Expedited Arbitration*, CC Docket No. 00-218, Memorandum Opinion and Order, ¶¶ 39, 51-54 (Wireline Comp. Bureau, rel. July 17, 2002) ("*FCC Arbitration Order*").

[15] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Dkt Nos. 96-98, 99-68, Order on Remand and Report and Order, FCC 01-131 (rel. Apr. 27, 2001) ("*ISP Remand Order*"), *rev'd, WorldCom v. FCC*, 01-1218 (D.C. Cir., May 3, 2002).

[16] *Response of Verizon South Inc. to Petition For Arbitration Filed By US LEC of South Carolina Inc.* at pp. 17-18.

[17] *Compare, FCC Arbitration Order* at ¶ 257, *quoting*, Verizon's Proposed Agreement to WorldCom, Part C, Interconnection Attach., § 7.3.1., *with*, Verizon South's Proposed Agreement to US LEC, Interconnection Attach., § 7.3.1.

[18] *FCC Arbitration Order* at ¶ 257.

251(b)(5) reciprocal compensation."[19] In essence, the Wireline Bureau concluded that Verizon was relying entirely on the 251(g) arguments that had been rejected by the D.C. Circuit and "decline[d] to adopt Verizon's contract proposals that appear to build on the logic that the court has now rejected."[20]

We conclude that the same reasoning applies with equal force here: to the extent that Verizon South's argument against reciprocal compensation for Voice Information Services Traffic is predicated entirely on a faulty reading of the interplay between sections 251(b)(5) and 251(g), we reject it.[21] In short, the Commission finds that there is no legal or factual basis to exclude what Verizon South has defined as "Voice Information Services Traffic" and, as such, the parties shall be required to compensate each other for exchanging and terminating such traffic in accordance with US LEC's position on this issue.

2. ISSUE 4 – Should US LEC be required to provide dedicated trunking at its own expense for Voice Information Service traffic that originates on its network for delivery to Voice Information Service providers served by Verizon South? (Additional Services Attachment, Section 5.3).

US LEC's Position: No.

Verizon South's Position: Yes.

[19] *Id.* at ¶ 261.

[20] *Id.*

[21] The Wireline Bureau did not reach the ultimate question of whether reciprocal compensation would be owed on calls to such information service providers as, for example, time and temperature recordings on the grounds that the parties agreed such services did not exist in Virginia and were not likely to be offered. (*FCC Arbitration Order* at ¶ 314.)

Discussion:

Closely related to Issue 3 is the question raised in Issue 4 of whether US LEC should be required to provide dedicated trunking, at its own expense, for Voice Information Service traffic that originates on US LEC's network for delivery to Voice Information Service providers served by Verizon South.

The Commission concludes that Verizon South has stated no reasonable basis for its position that, if US LEC's customers seek to call Voice Information Services connected to Verizon South's network, then US LEC must provide, at its own expense, a separate, dedicated trunk to carry that traffic. At the outset, we note Verizon South's concession that this situation is unlikely to arise in South Carolina because it does not provide (and does not plan to provide) the services for which it seeks to impose a separate trunking requirement on US LEC (Verizon South Response at 19). Verizon South's contention that it must nevertheless insist on separate trunking language because the issue may arise in other states where portions of interconnection agreements are subject to "'cross-border opt-in'" (Verizon South Response at 20) is simply an insufficient basis for this Commission adopt Verizon South's proposed resolution in light of the fact that the purported factual predicate for the proposed requirement is so remote here in South Carolina. Further, Verizon South's contention is further weakened because its Brief to the Commission, Verizon South states that it "cannot agree to delete the requirement for separate trunking – even though such trunking is unlikely to be required in South Carolina – lest carriers in other states claim that such an accommodation must be made available in each state where Verizon does provide those services." Brief at 8 (emphasis

added). As this Commission is finding that Verizon South may not require US LEC to install dedicated trunking in these instances, Verizon South is not "agreeing" to delete this requirement but is in fact "ordered" by the Commission to delete this requirement.

Furthermore, we find that Verizon South's proposal would impose significant costs on US LEC, when Verizon South has not made any showing, first, that such a dedicated facility even is necessary or, second, that the amount of traffic generated by US LEC's customers and destined for Voice Information Services connected to Verizon South's network is sufficiently large as to warrant a separate trunk. (Montano Direct at 14-15).

Verizon South similarly has failed to demonstrate that its proposal is warranted because of an inability to address its billing concerns on its own network (Montano Direct at 15). We note that Verizon South presented no testimony on this issue even though it is the proponent of the separate trunking requirement that is opposed by US LEC. In its Brief to the Commission, Verizon South states that separate trunking of pay-per-call services is essential to permit Verizon South to control access to those services. Further, Verizon South submits that separate trunking is necessary to ensure that it does not bill reciprocal compensation for such traffic. We find that Verizon South's stated reasons are without merit, particularly in light of the fact that this Commission has found, in Issue 3 above, that reciprocal compensation is appropriate for calls to Voice Information Service Providers. We therefore find that Verizon South's proposal is unjustified, and the Commission rules in US LEC's favor on this issue and rejects Verizon South's proposed language.

3. ISSUE 5 – Should the term "terminating party" or the term "receiving party" be employed for purposes of traffic measurement and billing over interconnection trunks? (Glossary, Section 2.56; Interconnection Attachment, Sections 2.1.2, 8.5.2, and 8.5.3).

US LEC's Position: The term "terminating party" should be utilized, consistent with the plain language of Section 251(b)(5) and other sections of the agreement.

Verizon South's Position: The term "receiving party" is more accurate and should be used.

Discussion:

Verizon South seeks use of the term "receiving party" rather than "terminating party" in the interconnection agreement to indicate the carrier that terminates a call for purposes of traffic measurement and billing over interconnection trunks. According to Verizon South, the traffic that competing local exchange companies exchange with one another includes both conventional local traffic and traffic bound for enhanced service providers, including ISPs. While both parties agree that the receiving carrier terminates conventional local voice traffic, Verizon South does not agree that the receiving carrier terminates traffic delivered to ISPs and other enhanced service providers. Verizon South bases its position on the FCC's position that local carriers do not terminate such traffic; rather, such traffic is delivered to enhanced service providers, including ISPs, for onward transmission.

This Commission recognizes that throughout the industry, traffic has been referred to as either originating or terminating. Thus, in any call, there is an originating party served by an originating carrier and a terminating party served by a terminating

carrier.[22] Even in the proposed interconnection agreement, this tradition is, for the most part, continued. Thus, in section 7.2 of the interconnection agreement, the parties agree that they will compensate each other for the "transport and termination" of Reciprocal Compensation Traffic.[23] In turn, "Reciprocal Compensation" is defined with respect to the "transport and termination" of "Reciprocal Compensation Traffic", which, itself, is defined with reference to traffic that is "terminated on the other Party's Network." [24]

Against this long-standing, historical backdrop, Verizon South proposes to interject the new term of a "receiving party" which Verizon South asserts is a more accurate term than "terminating party." Thus, in various sections of the Interconnection Attachment dealing with the delivery, measurement and billing of traffic, Verizon South no longer refers to the delivery or measurement of traffic from the "originating party" to the "terminating party"; rather, Verizon South refers to traffic delivered from the "originating party" to the "receiving party". Verizon South does not define the term "receiving party".

The FCC has twice ruled that calls to ISPs are exempt from carriers' Section 251(b)(5) compensation obligations by stating that calls to ISPs do not terminate there. In both instances, the D.C. Circuit has remanded the FCC's decisions. While the FCC's decision is still valid in that the D.C. Circuit has not reversed the FCC's decision, US LEC asserts that there remains a distinct possibility that the FCC could conclude that, in fact, for purposes of reciprocal compensation, calls to ISPs *do* terminate at the ISP. US

[22] Montano Direct at 15.

[23] *Id.*

[24] *Id.*

LEC argues that in the event that the FCC changes its ruling or a court overturns the FCC's ruling, then if US LEC has agreed that calls to ISPs are "received" by US LEC but not "terminated" by US LEC, that Verizon South will assert that US LEC is not entitled to receive reciprocal compensation for terminating calls to ISPs.[25]

Upon consideration of the parties positions on this issue, we direct the parties to continue to use the term "terminating party" for billing, measurement and compensation purposes throughout the agreement. As such, we reject Verizon South's proposition to include the new term of a "receiving party" in lieu of the term "terminating party" when referring to the carrier that terminates a call for purposes of traffic measurement and billing over interconnection trunks. This Commission can find no compelling reason in Verizon South's position why its attempt to modify decades of industry practice should be accepted. Furthermore, Verizon South has not cited any authority indicating that its new interpretation has been ordered for use in an interconnection agreement by any regulatory body or tribunal. Like the FCC, this Commission has also ruled that ISP-bound traffic does not terminate at the ISP's server but continues to the ultimate Internet destination. However, this Commission is also aware, as noted by US LEC, that the FCC's determination is under review. This Commission agrees with US LEC's position that should the FCC's decision either be changed or reversed on appeal that it is more appropriate for the language in the interconnection agreement to contain terms of normal usage rather than new terms which are not used in the industry and which could give rise to further interpretation and potential litigation. As the situation presently stands, for

[25] Montano Direct at 16-17.

purposes of traffic bound to enhanced service providers and ISPs, an exception to the reciprocal compensation rules applies. It is better to leave the exception in place, rather than to redefine the exception by introducing new or novel terms and concepts. Therefore, we find that Verizon South's proposal is without precedent and lacks merit, and as such we adopt US LEC's recommendation and direct the parties to continue to employ the phrase "terminating party" in their interconnection agreement.

4. ISSUE 6 – (A) Should the parties be obligated to compensate each other for calls to numbers with NXX codes associated with the same local calling area? (Glossary, Section 2.56; Interconnection Attachment, Section 7.2).

US LEC's Position: The determination of whether a call is rated as local or toll for billing purposes is based upon the NXX of the originating and terminating numbers. This practice must be maintained such that calls between an originating and terminating NXX, associated with the same local calling area, should continue to be rated as local. Under any scenario, Verizon South is responsible to bring traffic originated on its network to the US LEC-IP. The associated cost to Verizon South does not change based upon the location of US LEC's customers.

Verizon South's Position: Reciprocal compensation does not apply to interexchange traffic, defined by reference to the actual originating and terminating points of the complete end-to-end communications.

(B) Should Verizon South be able to charge originating access to US LEC on calls going to a particular NXX code if the customer assigned the NXX is located outside of the local calling area associated with that NXX code?

US LEC's Position: Verizon South should not be allowed to charge US LEC originating access for calls to an NXX code if the customers assigned that NXX is located outside of the local calling area to which that NXX is assigned.

Verizon South's Position: Intrastate and interstate access charges are governed by the parties' tariffs.

Issue No. 6 addresses two key aspects of the way the parties will compensate each other for exchanging Foreign Exchange, or FX, traffic. The first aspect is whether the parties should be obligated to pay each other reciprocal compensation for calls to

numbers with NXX codes associated with the same local calling area. US LEC contends that this practice has been the industry standard for decades and the parties should continue to base the rating, routing and inter-carrier compensation mechanisms on the NPA/NXX's of the calling and called parties. Verizon South, on the other hand, disagrees and argues that the parties' reciprocal compensation obligations should be determined by the actual beginning and end-points of the call at issue.

The second aspect of Issue 6 asks whether the parties should be able to charge originating access to each other on calls originating on their networks for termination to a customer with a particular NXX code if the customer assigned the NXX is physically located outside of the local calling area associated with that NXX code. US LEC's position is that if the Commission concludes that the parties should continue to base their inter-carrier compensation obligations on the NPA/NXX of the calling and called parties, then the physical location of those parties is irrelevant. Verizon South's position is that the parties' tariffs govern the result and that if the actual, physical location of the called party is outside of the local calling area to which the called party's NPA/NXX is assigned then, regardless of how the call is rated and routed, the call is an intraLATA toll call and originating access charges are due to the carrier serving the originating party.

In considering these issues, the Commission recognizes and acknowledges that in a prior arbitration we concluded that reciprocal compensation should be based on the physical location of the calling and called parties, not the NXX codes of those parties.[26]

[26] *See, e.g., Petition of Adelphia Business Solutions of South Carolina, Inc. for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b)*

We find that US LEC presents no compelling reason for this Commission to reverse that prior decision.

In inviting this Commission to revisit its earlier decision on this issue, US LEC proposes that intercarrier compensation should apply to all calls that are "local" to the calling party, regardless of the physical location of the ultimate called party and that Verizon South should be prohibited from billing US LEC access charges for that traffic.[27] US LEC contends that its position is consistent with historical practice in the industry of rating a call as local or toll by referring to and comparing the NXX's of the calling and called parties and that its position also is consistent with the parties' practice of billing and paying each other reciprocal compensation for calls to their respective FX customers. US LEC also suggests that compensation for this traffic as local more accurately reflects the costs incurred by both parties, arguing that the costs Verizon South incurs to transport a call destined for a US LEC customer do not vary with the actual location of the called customer.[28] US LEC further contends that its proposal regarding intercarrier compensation for calls to customers who use these "FX" arrangements, among other things, will benefit those businesses, including ISPs, who find it desirable to obtain local numbers in several communities, while maintaining a limited number of physical locations, in order to reach and to serve a broader base of customers. Indeed, US LEC claims that one benefit of this type of service is that it provides wider, more reasonably priced access to

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of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, Docket No. 2000-516-C, Order on Arbitration, Order No. 2001-045 (Jan. 16, 2001).

[27] Montano Direct at 18.

[28] Montano Direct at 25.

the Internet through the use of local telephone numbers, especially in rural and sparsely populated areas of the state. Finally, US LEC argues that there is no practical, cost-effective, accurate way for the parties to segregate FX traffic from other locally dialed traffic.

Verizon South, on the other hand, asserts that the physical end-points of a call should determine whether it is local or toll, not whether the NXXs are associated with the same local calling area. Under Verizon South's position, the parties should be obligated to pay reciprocal compensation for calls to numbers with NXX codes associated with the same local calling area, only when the call actually terminates to the other party's end users physically located in the same local calling area. Verizon South argues that when the called party's physical location is not in the same rate center as the calling party then the communication is an intraLATA toll call and should be subject to access charges.

This issue centers on the treatment of a particular type of traffic, similar to traditional foreign exchange ("FX") service, but more broadly referred to as "virtual NXX" because it encompasses more flexible service alternatives that do not use FX network configurations. This service allows a customer (typically a business) to obtain a telephone number in a local calling area in which it is not physically located.[29] As far as the person calling that number is concerned, the caller is making a "local" call to a telephone number in the caller's local dialing area, but the party answering the call is actually located somewhere else. A business customer may wish to establish such a "virtual" presence in the second local calling area so that calls to the business customer

[29] Montano Direct at 21.

from the businesses' own customers within the second local calling area are viewed as local calls by the businesses' own customers.[30]

This Commission has already addressed this issue in a prior arbitration and that decision supports Verizon's position in that this Commission held that "reciprocal compensation is not due to calls placed to 'virtual NXX' numbers as the calls do not terminate within the same local calling area in which the call originated."[31] The Commission squarely held that compensation for traffic depends on the end points of the call – that is, where it physically originates and terminates. In rejecting the claim that "the local nature of a call is determined based upon the NXX of the originated and terminating number," the Commission noted that, "[w]hile the NXX code of the terminating point is associated with the same local service area as the originating point, the actual or physical termination point of a typical call to a 'virtual NXX' number is not in the same local service area as the originating point of the call."[32]

The Commission finds that its prior resolution of this issue is correct. The FCC's rules have always made clear that reciprocal compensation under 47 U.S.C. § 251(b)(5) "do[es] not apply to the transport and termination of interstate or intrastate interexchange traffic." *Local Competition Order*, 11 FCC Rcd at 16013, ¶ 1034.[33] The FCC confirmed that result in its April, 2001, *ISP Remand Order*, in which it held that reciprocal compensation does not apply to "interstate or intrastate exchange access, information

[30] *Id.* at 21-23.

[31] *See Adelphia Order* at 7.

[32] *Id.* at 8.

[33] This portion of the *Local Competition Order* has never been challenged and remains binding federal law.

access or exchange services for such access." 47 C.F.R. § 51.701(b)(1). The FCC has made clear that this exclusion covers all interexchange communications: whenever a LEC provides service "in order to connect calls *that travel to points – both interstate and intrastate – beyond the local exchange*," it is providing an access service. *ISP Remand Order,* 16 FCC Rcd at 9168, ¶ 37 (emphasis added). "Congress excluded all such access traffic from the purview of section 251(b)(5)." *Id.*

It is undisputed that the calls at issue here "travel to points . . . beyond the local exchange." *Id.*; *see* Haynes Direct Testimony at 10. Accordingly, such traffic simply is not subject to reciprocal compensation under federal law, as this Commission has recognized. As described above, the Commission has already approved the result provided for by Verizon's proposed language on this issue and has squarely rejected the result proposed by US LEC. Indeed, the weight of other state commission authority is in agreement with this analysis, holding that reciprocal compensation does not apply to virtual NXX traffic because it does not physically originate and terminate in the same local calling area. These additional state commissions include those in Ohio,[34] Florida,[35] Connecticut,[36] Illinois,[37] Texas,[38] Tennessee,[39] Georgia,[40] and Missouri.[41] The

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[34] *See* Arbitration Award, *Petition of Global NAPs, Inc. for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with United Telephone Company of Ohio d/b/a Sprint, and Ameritech Ohio*, Case Nos. 01-2811-TP-ARB, *et al.*, at 8, 11 (Ohio PUC May 9, 2002) ("*Ohio Arbitration Order*"), *reh'g denied*, Entry on Rehearing, Case Nos. 01-2811-TP-ARB, *et al.* (Ohio PUC July 18, 2002).

[35] *See* Staff Memorandum, *Investigation into Appropriate Methods to Compensate Carriers for Exchange Carriers for Exchange of Traffic Subject to Section 251 of the Telecommunications Act of 1996*, Docket No. 000075-TP, Issue 15, at 69, 72, 96-97 (Fla. PSC Nov. 21, 2001), approved at Florida PSC Agenda Conference (Dec. 5, 2001).

[36] Decision, *DPUC Investigation of the Payment of Mutual Compensation for Local Calls Carried over Foreign Exchange Service Facilities*, Docket No. 01-01-29, at 44 (Conn.

Commission is also cognizant that some state commissions, as well as the FCC Wireline Bureau, have decided this "virtual NXX" issue differently that we have. However, we are not aware of any court ruling on this issue.

"Virtual FX" traffic – that is, traffic sent to a "Virtual NXX" – is, by definition, interexchange traffic. *See* Haynes Direct Testimony at 10. A "Virtual NXX" is an exchange code assigned to end users physically located in exchanges other than the one

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Dep't Pub. Util. Control Jan. 30, 2002) ("The purpose of mutual compensation is to compensate the carrier for the cost of terminating a local call" *and "since these calls are not local*, they will not be eligible for mutual compensation.") (emphasis added)

[37] Arbitration Decision, *TDS Metrocom, Inc. Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Arrangements with Illinois Bell Telephone Co. d/b/a Ameritech Illinois Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket No. 01-0338, at 48 (Ill. Commerce Comm'n Aug. 8, 2001); Arbitration Decision, *Level 3 Communications, Inc. Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Illinois Bell Telephone Company d/b/a Ameritech Illinois*, Docket No. 00-0332, at 9 (Ill. Commerce Comm'n Aug. 30, 2000) ("FX traffic does not originate and terminate in the same local rate center and therefore, as a matter of law, cannot be subject to reciprocal compensation.").

[38] Revised Arbitration Award, *Proceeding to Examine Reciprocal Compensation Pursuant to Section 252 of the Federal Telecommunications Act of 1996*, Docket No. 21982, at 18 (Tex. PUC Aug. 31, 2000) (finding FX-type traffic "not eligible for reciprocal compensation" to the extent it does not terminate within a mandatory local calling scope).

[39] Interim Order of Arbitration Award, *Petition for Arbitration of the Interconnection Agreement Between BellSouth Telecommunications, Inc. and Intermedia Communications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket No. 99-00948, at 42-44 (Tenn. Regulatory Auth. June 25, 2001).

[40] Final Order, *Generic Proceeding of Point of Interconnection and Virtual FX Issues*, Docket No. 13542-U, at 10-12 (Ga. PSC July 23, 2001) ("The Commission finds that reciprocal compensation is not due for Virtual FX traffic.").

[41] Arbitration Order, *Application of AT&T Communications of the Southwest, Inc., TCG St. Louis, Inc., and TCG Kansas City, Inc., for Compulsory Arbitration of Unresolved Issues With Southwestern Bell Telephone Company Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Case No. TO-2001-455, at 44 (Mo. PSC June 7, 2001) (finding VFX traffic "not be classified as a local call").

to which the code was assigned. *See id.* at 7.[42] Such a service would be valuable to customers that expect to receive a high volume of incoming calls from ILEC customers within the exchange of that NXX, because the CLEC's "Virtual NXX" arrangement allows such calls to be made without the imposition of a toll charge on the calling party. *Id.* at 7-8. In one common arrangement, a CLEC assigns an ISP that is collocated with its switch telephone numbers in every local calling area within a broad geographic area – a LATA, or an entire state, for example. The ISP would then be able to offer all of its subscribers a locally rated access number without having to establish more than a single physical presence in that geographic area. *Id.* If the ISP had been assigned an NXX associated with the calling area in which it is actually located, many of those calls would be rated as toll calls. *Id.* at 8.

The decision of the FCC's Wireline Competition Bureau in the *Virginia Arbitration Order*[43] – in adopting language allowing the NPA-NXX of the called party to govern payment of reciprocal compensation – does not call our conclusion into question. The Bureau never addressed the basic question whether Virtual FX traffic is subject to reciprocal compensation under federal law. Instead, the Bureau simply suggested that, in the absence of a concrete proposal for distinguishing Virtual FX traffic from local traffic for billing purposes, the parties would not be compelled to give effect to that distinction,

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[42] *See also Adelphia Order* at 4.

[43] Memorandum Opinion and Order, *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, CC Docket Nos. 00-218 *et al.*, DA 02-1731 (Wireline Comp. Bur. rel. July 17, 2002) ("*Virginia Arbitration Order*") (Verizon App. Tab 8).

irrespective of the requirements of federal law. *Virginia Arbitration Order* ¶ 301. The Bureau's failure to respect the limitations on Verizon's reciprocal compensation obligations was both inconsistent with federal law and unsupported on the record, but in any event it has no application here, because, as discussed below, Verizon *has* presented evidence that carriers *can* accurately estimate the volume of FX and Virtual FX traffic exchanged between them. Thus, the *Virginia Arbitration* provides no basis for failing to implement the clear requirements of federal law in South Carolina.[44]

Even if federal law did not clearly resolve this question – which it does – the Commission adopts Verizon's proposal because it is consistent with sound regulatory policy. As US LEC's website describes, when a US LEC customer subscribes to a Virtual FX service, it pays an extra charge to US LEC in order to be able to receive calls originated in a distant exchange without a toll charge being imposed on the calling party. *See* US LEC's "Enhanced Local Services," at 2 (US LEC describing "Foreign exchange" as involving "an inbound-only call, toll-free to the calling party, which is paid for by the called party").[45] US LEC is thus paid by *its* subscriber precisely to ensure that Verizon

[44] The FCC recently released an order recognizing that when an interconnecting carrier implements an interconnection arrangement that makes calls by an incumbent's customers "appear local and involve no toll charges to callers in those areas" that the incumbent may assess appropriate charges on the interconnecting carrier. *See* Order on Review, *Mountain Communications, Inc. v. Qwest Communications International, Inc.*, FCC 02-220, EB-00-MD-017, ¶ 5 (rel. July 25, 2002), *aff'g, Mountain Communications, Inc. v. Qwest Communications International, Inc.*, DA 02-250, Memorandum Opinion and Order, 17 FCC Rcd 2091 (2002). The *Virginia Arbitration Order* was released before the *Mountain Communications* decision, and the Bureau's decision cannot be reconciled with that unanimous decision of the full Federal Communications Commission.

[45] Available at http://www.uslec.com/local_service.htm.

will *not* be paid any toll charges by *its* subscriber for an interexchange call. There is nothing necessarily wrong with that, so long as US LEC compensates Verizon appropriately for the service that Verizon continues to provide. But it would be deeply inconsistent with regulatory policy and basic fairness to require Verizon to *pay* US LEC, when Verizon continues to bear the same costs of originating the interexchange call, when Verizon is deprived of the toll charges that would ordinarily apply, and when US LEC is already receiving compensation from its customers. US LEC's proposal thus amounts to an extraordinarily clear example of attempted regulatory arbitrage – that is, a situation in which US LEC will earn revenues (both from its subscribers and from Verizon) while Verizon is forced to bear the bulk of the real costs of providing the service and is deprived of toll revenues to boot.

Under these circumstances, the only sensible result is that US LEC should compensate Verizon for the services that it continues to provide – *i.e.*, Verizon should continue to receive at least a portion of the toll charges that it would otherwise receive from its customer in the form of access charges paid by US LEC.[46] Indeed, there is no situation, and US LEC cites none, in which a carrier both charges its subscriber toll charges – as US LEC admits it does – and receives inter-carrier compensation. In every such circumstance, the inter-carrier compensation flows the other way, from the carrier who is receiving the toll charges to the carrier who is providing the access but receiving no revenue from its subscriber for the call.

[46] By the same token, if a US LEC customer originates a call to a Verizon FX customer, Verizon should pay intrastate access charges.

This is not only a matter of fairness between the parties, it is also fundamental to the structure of basic service rates, and the "decades-old public policy goal of assuring the widespread availability of affordable telephone service." Haynes Direct Testimony at 6. Traditionally, basic local exchange rates only entitle an end user to service *within the exchange*. *Id.* at 5. If the end user wishes to make a call outside the end user's local calling area, the end-user must generally pay a toll charge, which the LEC either keeps (if it is providing the interexchange service) or receives a part of in the form of access charges. *Id.* at 5-6. Some dialing arrangements – such as toll-free 800 numbers – allow the calling party to make an interexchange call without incurring the toll charges that would normally apply. *Id.* at 6. But the LEC continues to be compensated for providing access to the local exchange – in the case of 800 numbers, through access charges. Haynes Rebuttal Testimony at 11-12.

We find that federal law, sound policy, and basic fairness compel adoption of Verizon's proposed language. Whatever practical difficulties the parties may face in implementing that language would provide no basis for permitting the severe market distortions that adoption of US LEC's proposal could cause. But the record establishes that there need not be any significant problems with implementing Verizon's proposal, because a practical method for distinguishing FX and Virtual FX traffic from traffic that is subject to reciprocal compensation has already been proposed in other states and could inexpensively be implemented in South Carolina.

As Terry Haynes testified, it is a relatively straightforward matter to do a traffic study, based on an analysis of known FX and Virtual FX numbers, to determine the

proportion of calls exchanged between the parties that are not subject to reciprocal compensation but that should be subject to access charges. *See* Haynes Surrebuttal Testimony at 5. That testimony made clear that performing such studies is "simple" and "not expensive." *Id.* In sum, the record establishes that there is no practical obstacle to implementing this Commission's established policy.

Accordingly, the Commission accepts Verizon's proposed language and rejects US LEC's proposed language. The Commission's decision is based upon the following for three reasons. First, US LEC's proposal is inconsistent with federal law, which explicitly provides that reciprocal compensation does not apply to interexchange traffic, as this Commission has recognized. Second, US LEC's proposal would create unacceptable regulatory arbitrage opportunities and discourage true local competition. Third, Verizon has explained that the parties can accurately and inexpensively distinguish FX and Virtual FX traffic from local traffic for inter-carrier compensation purposes.

5. ISSUE 7 – What compensation framework should govern the parties' exchange and termination of ISP-bound traffic in the event the interim compensation framework set forth in the FCC's Internet Order is vacated or reversed on appeal? (Interconnection Attachment, Sections 8.1 and 8.1.1; General Terms and Conditions, Section 50.2).

US LEC's Position: In the event the interim compensation framework of the Internet Order ultimately is vacated or reversed on appeal, the parties should continue to compensate each other at the rates set forth in the FCC's Internet Order, but waive any other terms and conditions of that Order (*e.g.*, the growth caps and new market restrictions).

Verizon South's Position: The parties' obligations are governed by federal law.

Discussion:

Issue 7 addresses the question of what compensation arrangement should govern the parties' exchange and termination of ISP-bound traffic in the event the compensation framework in the FCC's *ISP Remand Order* is vacated or reversed on appeal. US LEC suggests that, in the event that portion of the *ISP Remand Order* is vacated or reversed on appeal, then the parties should continue to compensate each other at the rates set forth in the Order, but waive any other terms and conditions of that Order (e.g., the growth caps and new market restrictions). Verizon South, on the other hand, contends that if the compensation framework is vacated or reversed, then the parties should have to negotiate and, if necessary, arbitrate a new compensation framework.

As noted above, the D.C. Circuit has remanded the *ISP Remand Order*, but has expressly refused to vacate that order; as a result, the rules the FCC adopted remain in effect pending further FCC proceedings on remand. The FCC's *ISP Remand Order* sets forth a specific intercarrier compensation regime that governs the exchange of ISP-bound traffic between Verizon South and US LEC during the course of this arbitrated agreement. This issue arises to address possible solutions in case there is a subsequent change of law on this point during the term of the interconnection agreement.

Federal law does not obligate Verizon South, or entitle this Commission, to impose rules to address potential contingencies with respect to the meaning of federal law. Compensation for ISP-bound traffic, and all reciprocal compensation traffic, should be paid in conformance with federal law which governs the issue. This Commission finds that US LEC's proposed language has no basis in law. Therefore, this Commission

rejects US LEC's position and finds that the parties' obligations should simply conform to those imposed by federal law. Any subsequent change of law on this point during the term of the interconnection agreement may be addressed pursuant to the change of law clause in the interconnection agreement. *See* US LEC Petition, Attach. B, at 3, General Terms and Conditions § 4.6.

6. ISSUE 8 – Should Verizon South be permitted to change its non-tariffed charges during the term of the agreement, or must such charges remain fixed for the entire term? (Pricing Attachment, Section 1.5).

US LEC's Position: Although tariffed charges may change during the term of the agreement due to changes in applicable tariffs, non-tariffed charges must remain fixed for the term of the agreement.

Verizon South's Position: Applicable tariff charges take precedence over charges set out in the agreement; regulatory decisions modifying applicable charges should be incorporated into the agreement.

Discussion:

The issue raised is whether Verizon South should be permitted to change its non-tariffed charges during the term of the agreement or whether such charges must remain fixed for the entire term. We adopt US LEC's position that although tariffed charges may change during the term of the agreement due to changes in applicable tariffs, non-tariffed charges—i.e., charges fixed in the agreement and not subject to any tariff—must remain fixed for the term of the agreement.

According to Section 1.5 of the proposed Pricing Attachment, Verizon South reserves the right to supercede *any* rates (i.e., both tariffed rates and non-tariffed rates) set forth in the parties' agreement with tariffed rates that are put in place *after* the parties have executed the agreement. Although Verizon South claims that it is not free to modify its tariffed rates generally because such changes take place only after they are submitted

to the Commission before they are effectuated or emerge as a result of generic proceedings in which interested parties are able to participate in the review process (Verizon South Response at 32-33), we find Verizon South's justification unpersuasive. We find that Verizon South's position fails to recognize the considerable burden, both in terms of financial cost and in diversion of personnel whose resources would otherwise be devoted to more pressing matters, that is placed on CLECs to dispute a particular rate proposal. The entire process undermines the purpose of having a binding interconnection agreement that provides relative pricing certainty to the parties in the first instance. (Montano Direct at 32).[47]

This issue also was addressed in the recent FCC Arbitration before the Wireline Bureau. In that case, Verizon South's affiliate argued, as it does here, for the right to supercede any price by filing a subsequent tariff. WorldCom pointed out that, among other problems, permitting Verizon to supercede negotiated prices with subsequent tariffs shifts the burden of proof from Verizon (which has the burden of proving reasonableness of its rates in a negotiated interconnection agreement) to a CLEC (which must prove that a filed tariff should be rejected).[48] The Wireline Bureau "reject[ed] Verizon's proposed language because it would allow for tariffed rates to replace automatically the rates arbitrated in this proceeding. Thus, rates approved or allowed to go into effect by the

[47] We similarly reject Verizon South's "arbitrage" claims (*See* Verizon South Reponse at 33). Because US LEC has agreed to adhere to the non-tariffed rates specified in the agreement absent any changes in Applicable Law, we are not convinced by Verizon's contention that US LEC will seek to unfairly "exploit" those rates unless lower rates are generally available.

[48] *FCC Arbitration Order* at ¶ 592.

Virginia Commission would supercede rates arbitrated under the federal Act."[49] Instead, the FCC adopted WorldCom's language that would permit tariff revisions that "materially and adversely" affect the negotiated terms of the agreement to become effective only upon the parties' written consent or upon the affirmative order of the Virginia Commission.[50]

Here, US LEC submits that non-tariffed rates that the parties have negotiated, or that have been fixed by the Commission, should be fixed for the term of the agreement (with the exception of rates that must be modified due to changes in applicable law, which are addressed in other sections of the agreement). The Commission agrees with US LEC's position that Verizon South should not be permitted the unrestricted ability to modify rates through subsequent tariff filings that would supercede the nontariffed rates as contained in the interconnection agreement. US LEC's position recognizes that the parties will enjoy the "benefits of their bargain" for the term of the agreement except in those instances where changes in rates are required to be modified due to changes in applicable law. Therefore, we reject Verizon South's proposal, and adopt US LEC's proposal.

IV. CONCLUSION

The parties are directed to implement the Commission's resolution of the issues addressed in this Order by including language in the interconnection agreement which complies with the rulings and framework established and set forth herein.

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[49] *Id.* at ¶ 600.

[50] *Id.* at ¶ 590.

The Parties are directed to, and shall, file an agreement with the Commission, which contains the agreed upon language contained in Exhibit B to US LEC's Petition and which complies with the rulings and framework established in this Order, within sixty (60) days of receipt of this Order.

The Commission retains jurisdiction of this arbitration until the parties have submitted an interconnection agreement for approval by the Commission in accordance with Section 252(e) of the Act.

This Order is enforceable against US LEC and Verizon. US LEC affiliates are not bound by this Order. Similarly, Verizon affiliates which are not incumbent local exchange carriers are not bound by this Order. This Commission cannot enforce contractual terms upon a US LEC affiliate or Verizon affiliate which is not bound by the 1996 Act.

This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

Mignon L. Clyburn, Chairman

ATTEST:

Gary E. Walsh, Executive Director
(SEAL)

CERTIFICATE OF SERVICE

I hereby certify that, on this 3rd day of September 2002, I caused copies of the attached letter submitting supplemental authority to be served on the following parties by electronic and overnight mail:

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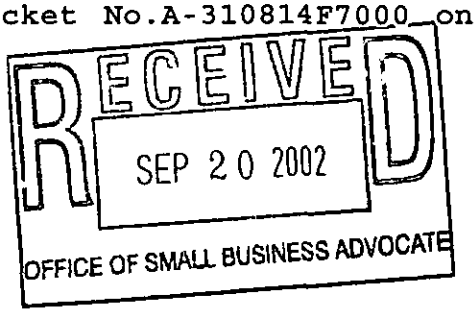
Sarah E. Dean

ACKNOWLEDGEMENT OF RECEIPT & ACCEPTANCE OF SERVICE

AND NOW, to wit, this _____ day of_____, 20__,

the undersigned, as evidenced by execution hereof, acknowledges receipt, and accepts service of Recommended Decision an official Commission document entered, issued, or otherwise promulgated under date of September 17, 2002 at Docket No.A-310814F7000 on behalf of:



CAROL F PENNINGTON ESQ
SMALL BUSINESS ADVOCATE
COMMERCE BLDG SUITE 1102
300 NORTH SECOND STREET
HARRISBURG PA 17101
MESSENGER

_____
Signature

Kindly sign and date this acceptance of service and acknowledgement of receipt, and, return the same for filing to:

SECRETARY'S BUREAU RECORD RETENTION
PA PUBLIC UTILITY COMMISSION
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Harrisburg, PA 17105-3265

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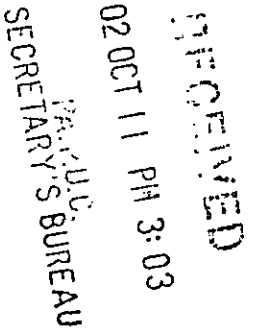

ACKNOWLEDGEMENT OF RECEIPT & ACCEPTANCE OF SERVICE

SRB

AND NOW, to wit, this 17th day of Sept., 2002

the undersigned, as evidenced by execution hereof, acknowledges receipt, and accepts service of Recommended Decision an official Commission document entered, issued, or otherwise promulgated under date of September 17, 2002 at Docket No.A-310814F7000 on behalf of:

CHARLES HOFFMAN DIRECTOR
PA PUC OFFICE OF TRIAL STAFF
PO BOX 3265
HARRISBURG PA 17105-3265
MESSENGER

Elaine C. Meisinger
Signature

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TO: → SECRETARY'S BUREAU RECORD RETENTION
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September 18, 2002

VIA ELECTRONIC MAIL and FIRST-CLASS MAIL

Honorable Louis Cocheres
Administrative Law Judge
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor, L-M West
Harrisburg, Pennsylvania 17120

Re: Petition of US LEC of Pennsylvania Inc. For Arbitration with Verizon Pennsylvania, Inc., Docket No. A-310814F7000

Dear Judge Cocheres:

Enclosed for filing in the above-captioned case is a September 16, 2002 decision of the South Carolina Public Service Commission ("SC PSC") in its recent arbitration between US LEC and Verizon Pennsylvania, Inc.'s affiliate Verizon South, Docket No. 2002-181-C. The enclosed decision is the SC PSC's ruling on Verizon South's Petition for Clarification and Reconsideration of the SC PSC's August 30, 2002 ruling. The August 30, 2002 decision was forwarded to you by Verizon on September 3, 2002.

The SC PSC's September 16, 2002 decision rejects Verizon South's Petition for Clarification and Reconsideration with respect to matters raised by Verizon South concerning Issue 3 (reciprocal compensation for Voice Information Services traffic) and Issue 5 ("terminating" versus "receiving" party). The SC PSC denied Verizon South's requests and affirmed its rulings in favor of US LEC on both Issues 3 and 5.

Please do not hesitate to contact me if you have any questions regarding this matter.

Sincerely,

Robin F. Cohn

Enclosure
cc: James J. McNulty, Secretary
Service List

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2002-181-C - ORDER NO. 2002-661

AUGUST 30, 2002

IN RE:	Petition of US LEC of South Carolina Inc. for Arbitration of an Interconnection Agreement with Verizon South, Inc.	) ORDER ON PETITION) FOR CLARIFICATION) AND) RECONSIDERATION) FILED BY VERIZON) SOUTH, INC.

This matter comes before the Public Service Commission of South Carolina on the Petition for Clarification and Reconsideration ("Petition") filed by Verizon South, Inc. ("Verizon South"). By its Petition, Verizon South seeks clarification and reconsideration of two of the issues addressed by the Commission in its "Order on Arbitration," Order No. 2002-619, dated August 30, 2002. First, with respect to Issue 3 concerning reciprocal compensation for Voice Information Services Traffic, Verizon South requests that the Commission clarify that nothing in its order requires payment of reciprocal compensation on such traffic to the extent that such traffic is "interstate or intrastate exchange access, information access, or exchange services for such access." Second, with respect to Issue 5 regarding the use of the phrase "terminating party" or "receiving party" to describe the party receiving the variety of traffic exchanged between the parties, Verizon South submits that the Commission's decision was inconsistent with its own prior precedents, as well as prior decisions of the Federal Communications Commission ("FCC"), and, accordingly, the Commission should reconsider its position

on Issue 5. US LEC of South Carolina Inc. ("US LEC") filed a Response to Verizon South's Petition ("Response"). For the reasons stated below, the Commission denies Verizon South's Petition.

I. Issue 3 – Is US LEC entitled to reciprocal compensation for terminating "Voice Information Services" traffic?

In Order No. 2002-619, the Commission found US LEC's position on this issue to be persuasive and found that Verizon South's position lacked a sound basis in law or fact. Order No. 2002-619 at 8. Further, the Commission found that "there is no legal or factual basis to exclude what Verizon South has defined as 'Voice Information Services Traffic' and, as such, the parties shall be required to compensate each other for exchanging and terminating such traffic in accordance with US LEC's position on this issue." Order No. 2002-619 at 12.

Verizon South offers by its Petition that the Commission should clarify its decision in Order No. 2002-619 because the Commission stated in Order No. 2002-619 that "to the extent that US LEC provides service to a Voice Information Service Providers who offers 'recorded voice announcement information,' that service does not constitute 'Information Access' because, by its terms, information access is defined as a service provided 'by a BOC'." Order 2002-619 at 10. Verizon South asserts that the Commission's decision is contrary to the determination of the FCC in its *ISP Remand Order* that CLECs can and do provide information access. Verizon South argues that the FCC in the *ISP Remand Order* stated that "'information access' was meant to include all access traffic that was routed by a LEC 'to or from' providers of information services." *ISP Remand Order*, ¶ 44. Thus Verizon South asserts that the Commission should clarify

Order No. 2002-619 to reflect that Voice Information Services Traffic, to the extent it is "interstate or intrastate exchange access, information access, or exchange services for such access," is not subject to reciprocal compensation under the parties' agreement. Petition at 3.

By its Response, US LEC asserts that Verizon South's request for "clarification" would undermine entirely the Commission's decision in Order No. 2002-619. Response at 1. Further, US LEC asserts that Verizon South raises no new arguments in its Petition, relying instead on the same arguments from the FCC's *ISP Remand Order* that the Commission considered and rejected previously." Response at 2.

In considering Verizon South's request for clarification, the Commission notes that US LEC's witness Montano stated in her testimony that, unlike intra- or interLATA toll traffic, which is clearly distinguishable, calls to so-called "Voice Information Service Providers" are indistinguishable from all other local traffic. Montano Direct at 12. Thus the only way to separate the traffic is to program switches to "flag" calls to an identified database of providers. Montano Direct at 13. This approach is not only expensive and often inaccurate, because it is not always possible to identify every single number that might be assigned to a Voice Information Service Provider, it is also intrusive because it would force US LEC and every other CLEC to inquire into the proposed business plans of all customers so as to identify those who intend to offer "Voice Information Services." Montano Direct at 12-13. Additionally, this process would slow the operation of US LEC's switches significantly because it would force the switch to add additional steps in the process of handling every call. Montano Direct at 13.

The Commission agrees with US LEC that the clarification requested by Verizon South would potentially vitiate the Commission's decision in Order No. 2002-619 with respect to this issue. This Commission reasserts that to the extent that Verizon South's argument against reciprocal compensation for Voice Information Services Traffic is predicated on a faulty reading of the interplay between sections 251(b)(5) and 251(g), we reject it. *See* Order No. 2002-619 at 11-12 for discussion where this issue was addressed by the FCC Wireline Competition Bureau. And as there is no practical way for US LEC to program its switches (not practical, that is, in that the process is expensive, inaccurate, and intrusive for the customers), the Commission declines to adopt the clarification proposed by Verizon South.

II. Issue 5 – Should the term "terminating party" or the term "receiving party" be employed for purposes of traffic measurement and billing over interconnection trunks?

In Order No. 2002-619, this Commission in declining to adopt the term "receiving party" instead of "terminating party" found that Verizon South's proposal to introduce the term "receiving party" for "terminating party" to be without precedent and lacking merit. Order No. 2002-619 at 18. In so finding, the Commission stated that it "can find no compelling reason in Verizon South's position why its attempt to modify decades of industry practice should be accepted" and that "Verizon South has not cited to any authority indicating that its new interpretation has been ordered for use in an interconnection agreement by any regulatory body or tribunal." Order No. 2002-619 at 17.

By its Petition, Verizon South cites to the record of a Maryland proceeding in which US LEC's attorneys used the term "receive" to refer to traffic that US LEC receives from Verizon. Petition at 3. Further, Verizon South notes that US LEC's technical witness also used the term "receive" to refer to traffic that US LEC receives from Verizon. Petition at 3-4. Thus Verizon South asserts that US LEC's position here in South Carolina in the instant proceeding that use of "receiving party' would modify decades of industry practice is nullified by the references by US LEC to "receiving" traffic, rather than terminating traffic, from the Maryland proceeding. Further, Verizon South asserts that "the Commission's generalization that traffic received by a carrier for delivery to its customers is terminated by the receiving carrier is an oversimplification and inconsistent with this Commission's explicit determination that ISP-bound traffic, for example, is not terminated by the receiving carrier but is delivered to the ISP for onward transmission." Petition at 4

By its Response, US LEC asserts that "the sole basis for Verizon's request for reconsideration of the Commission's decision on Issue 5 is that US LEC's attorneys happened to use the word "receiving" in the context of an arbitration proceeding in another state and that US LEC's witness was confused by inartful questioning from Verizon's counsel." Response at 3. US LEC further asserts that neither reason provides an adequate basis for the Commission to reverse its prior decision from Order No. 2002-619

In Order No. 2002-619, this Commission, in ruling on Issue 5, recognized that traditionally traffic has been referred to as either originating or terminating. Order No.

2002-619 at 15. In declining to adopt Verizon South's position on this issue, the Commission found "no compelling reason in Verizon South's position why its attempt to modify decades of industry practice should be accepted," Order No. 2002-619 at 17. Upon consideration of Verizon South's Petition, the Commission finds that references to "receiving" traffic by US LEC attorneys and witnesses does not invalidate US LEC's position in the instant proceeding. Such minimal usage of the term "receiving" as described by Verizon South does not indicate that the industry has shifted away from the traditional terms of "originating" and "terminating" when discussing exchange of traffic.

Further, this Commission also noted in its "Order on Arbitration" that it had previously ruled that ISP-bound traffic does not terminate at the ISP but continues to the ultimate Internet destination. This Commission also noted that the FCC had also ruled that ISP-bound traffic does not terminate at the ISP's server and that the FCC's determination is under review. Thus the Commission stated that it "agrees with US LEC's position that should the FCC's decision either be changed or reversed on appeal that it is more appropriate for the language in the interconnection agreement to contain terms of normal usage rather than new terms which are not used in the industry and which could give rise to further interpretation and potential litigation." Order No. 2002-619 at 17. The Commission further recognized that an exception to the reciprocal compensation rules applies with respect to traffic bound for enhanced service providers and ISPs, and the Commission concluded that "it is better to leave the exception in place, rather than to redefine the exception by introducing new or novel terms and concepts." Order No. 2002-619 at 18.

Upon consideration of Verizon South's request for reconsideration on this issue, the Commission finds no new argument or compelling reason to grant reconsideration. In Order No. 2002-619, this Commission acknowledged that it, and the FCC, had previously found that traffic destined to ISPs did not terminate at the Internet service provider but continued on to the ultimate Internet destination. However, the Commission also found no compelling reason to change nomenclature to account for that exception. Just as importantly, the Commission recognized that the exception found by the FCC is under review. Should review of the FCC's decision result in reversal of the FCC's decision, the Commission found in Order No. 2002-619 that it is better to have terms of normal usage in the interconnection agreement rather than new terms which could give rise to interpretation and litigation. The Commission finds that the use of "receiving party" by attorneys and a witness in a proceeding in another state does not warrant reconsideration of this issue and does not mean that US LEC's position with regard to this issue was false. Minimal usage of the term "receiving" as described by Verizon South in its Petition does not indicate that the industry has shifted away from the traditional terms of "originating" and "terminating" when discussing exchange of traffic. Therefore, this Commission finds it appropriate to continue to use the phrase "terminating party" in lieu of "receiving party" in the interconnection agreement. However, the Commission makes clear that its decision in no way abrogates the prior decision of this Commission in which this Commission held that ISP-bound traffic does not terminate at the ISP's server but continues to the ultimate Internet destination.

IT IS THEREFORE ORDERED THAT:

1. The Commission denies Verizon South's request for clarification with respect to Issue 3.

2. The Commission denies Verizon South's request for reconsideration with respect to Issue 5.

3. The Parties are directed to implement the Commission's resolution of the issues addressed by this Order and by Order No. 2002-619 by modifying the language of the Interconnection Agreement to the extent necessary to comply with the rulings and framework established by this Order and Order No. 2002-619. The Parties shall file an Interconnection Agreement incorporating the Commission's decisions within sixty (60) days after receipt of this Order.

4. This Order and Order No. 2002-619 are enforceable against US LEC and Verizon South. Verizon South affiliates which are not incumbent local exchange carriers are not bound by this Order or by Order No. 2002-619. Similarly, US LEC affiliates are not bound by this Order or Order No. 2002-619. This Commission cannot enforce contractual terms upon a Verizon South affiliate or US LEC affiliate which is not bound by the 1996 Act.

5. This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

Mignon L. Clyburn, Chairman

ATTEST:

Gary E. Walsh, Executive Director
(SEAL)

CERTIFICATE OF SERVICE

I hereby certify that, on this 18th day of September, 2002, I caused copies of the attached letter submitting supplemental authority to be served on the following parties by electronic and first-class mail:

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September 27, 2002

Thomas J. McNulty
Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harriburg, PA 17120

ORIGINAL

Re: *Service List Change*

Dear Mr. McNulty:

Please remove Mark Sievers from the Service List for Docket No. A-310814F7000. Mark is no longer with the firm.

Thank you.

Sincerely,

Erica Hudson Carden

Erica Hudson Carden
Telecommunications Administrative Coordinator

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October 3, 2002

VIA HAND DELIVERY

ORIGINAL

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

Re: In Re: Petition of US LEC of Pennsylvania Inc. for Arbitration with Verizon Pennsylvania Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996, Docket No. A-310814F7000

Dear Mr. McNulty:

Enclosed please find the original and 9 copies of the Exceptions of Verizon Pennsylvania Inc. in the above-captioned docket. Please call if you have any questions.

Very truly yours,

Suzan DeBusk Paiva

Suzan DeBusk Paiva

Cc: Office of Special Assistants (via hand delivery)
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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

In Re: Petition of US LEC of Pennsylvania Inc. for Arbitration with Verizon Pennsylvania Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996	:	**Docket No. A-310814F7000**

EXCEPTIONS OF VERIZON PENNSYLVANIA INC.

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October 3, 2002

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

In Re: Petition of US LEC of Pennsylvania Inc. for Arbitration with Verizon Pennsylvania Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996	:	**Docket No. A-310814F7000**

EXCEPTIONS OF VERIZON PENNSYLVANIA INC.

Verizon Pennsylvania Inc. ("Verizon"), by counsel and pursuant to 52 Pa. Code § 5.533, files these Exceptions to the Recommended Decision of Administrative Law Judge ("ALJ") Louis G. Cocheres.

SUMMARY

It is crucial that the Commission analyze and properly resolve the important legal and policy issues presented in this case – something that the Recommended Decision ("ALJ Rec. Dec.") simply did not do. On the two issues of significant impact to the industry – whether ILECs must pay reciprocal compensation on toll traffic disguised as local through the use of "virtual" NXX codes and whether CLECs who minimize their investment in network facilities in Pennsylvania may shift their transport costs to the ILECs – the Recommended Decision reaches the wrong result with little independent analysis. Its recommendations are not only inconsistent with federal law and with this Commission's prior decisions, but also represent bad telecommunications policy for Pennsylvania.

This case is an interconnection agreement arbitration under the federal Telecommunications Act. US LEC's proposed contract language – most notably with respect to treatment of Virtual NXX traffic (Issue 6) and interconnection architecture (Issues 1 and 2) – is intended to create opportunities for US LEC improperly to foist its costs of doing business upon

Verizon – a form of "regulatory arbitrage" that undermines development of competition. By accepting US LEC's positions and language on these important issues, the Recommended Decision ignores federal law and this Commission's own pronouncements in this area, and threatens to discourage, not to promote, competition.

Exception 1 Reciprocal Compensation on Virtual NXX Traffic (Issue 6): With its virtual NXX service, US LEC charges its customers thousands of dollars per year to establish arrangements through which those customers can receive toll-free calls from Verizon customers located in areas where the US LEC customer has no physical presence. The practice of CLECs assigning virtual NXX numbers has been forbidden by this Commission, and will be the subject of a generic investigation. To the extent the practice is allowed, the Commission should reject US LEC's proposed contract language, which not only requires Verizon to bear the transport costs for what are really toll calls and deprives Verizon of toll revenues and access charges, but also requires Verizon to ***pay*** US LEC reciprocal compensation.

Because of its network architecture – and the fact that it generally allows its customers to receive in-bound calls only to their numbers – US LEC incurs no additional costs to provide this virtual NXX service beyond what US LEC would incur to provide ordinary local service to its customers located in the same local calling area as US LEC's switch. In either case, US LEC provides service simply by manipulating number assignments out of a single switch, and expects Verizon to haul the call to US LEC's switch. The same is not true of the costs US LEC seeks to impose on Verizon, however. *Verizon* would bear the bulk of the cost of providing this virtual NXX service, but US LEC does not propose to compensate Verizon for the additional transport burdens. At the same time, *Verizon* is deprived of the toll charges that Verizon's callers would otherwise pay to Verizon for these interexchange calls. On top of that, instead of the access

charge US LEC would pay to Verizon for originating a call destined to a US LEC customer outside the local calling area, US LEC demands that Verizon ***pay*** US LEC reciprocal compensation. In the face of these undisputed facts, however, the ALJ recommended that the Commission allow US LEC a reciprocal compensation windfall *on top* of the thousands of dollars that US LEC is already charging its customers for this service.

That recommendation is clearly erroneous and the Commission should reject it. Federal law does *not* allow payment of reciprocal compensation on interexchange "Virtual NXX" traffic. Awarding US LEC compensation in this circumstance encourages it and other CLECs to compete not "on the basis of the quality and efficiency of the services they provide," but "on the basis of their ability to shift costs to other carriers." *ISP Remand Order*[1] ¶ 71. As the South Carolina Commission rightly held in rejecting US LEC's position on this issue, "US LEC's proposal . . . amounts to an extraordinarily clear example of attempted regulatory arbitrage – that is, a situation in which US LEC will earn revenues (both from its subscribers and from Verizon) while Verizon is forced to bear the bulk of the real costs of providing the service and is deprived of toll revenues to boot." *SC Arbitration Order*[2] at 27. For this reason, the vast majority of state commissions to rule on this issue have held that the traffic at issue here is not subject to reciprocal compensation. This Commission should reach the same result.

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[1] Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151 (2001) ("*ISP Remand Order*") (Verizon App. Tab 14), *remanded*, *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002). Verizon submitted several administrative decisions to the ALJ in two appendices that are now part of the administrative record. The references to "Verizon App. Tab __" and "Verizon Supp. App. Tab __" are to those appendices of authorities.

[2] Order on Arbitration, *Petition of US LEC of South Carolina Inc. for Arbitration of an Interconnection Agreement with Verizon South Inc.*, Docket No. 2002-181-C, Order No. 2002-619 (S.C. PSC Aug. 30, 2002) ("*SC Arbitration Order*").

Exception 2 Improper Shifting of Transport Costs to Verizon (Issues 1 & 2): The ALJ exacerbated the harm created by his recommendation on the Virtual NXX issue by also accepting US LEC's interconnection proposal. The ALJ determined that US LEC should be permitted to shift costs imposed by its choice of network architecture onto Verizon. US LEC chooses to minimize its investment in network equipment in Pennsylvania by serving an entire LATA from a single switch without building any additional facilities into the network; as a result Verizon may have to haul traffic many miles – transport costs that Verizon would not otherwise incur, and for which it is not compensated by its customers – for US LEC's benefit. Verizon is not seeking to modify the parties' existing architecture; it simply seeks to be compensated for the costs it indisputably incurs. Binding precedent from the United States Court of Appeals for the Third Circuit, which ultimately reviews this Commission's decision in interconnection arbitrations, as well as decisions of the FCC and this Commission, require that when a CLEC chooses an expensive interconnection arrangement – like the arrangement that US LEC has chosen to implement in Pennsylvania – the CLEC must bear an appropriate share of the costs. The ALJ's contrary determination was unlawful and uneconomic, and should be reversed.

Exception 3 (Issue 3): The ALJ's treatment of Voice Information Services traffic is likewise wrong. The ALJ correctly determined that Verizon's proposed definition of Voice Information Services covers traffic that "fit[s] squarely within the meaning of 'Information Access.'" ALJ Rec. Dec. at 19. There can accordingly be no serious dispute that such traffic is *not* subject to reciprocal compensation under the negotiated provisions of the interconnection agreement, which reflect the requirements of federal law. Both parties have agreed to language that excludes "interstate or intrastate Exchange Access, ***Information Access***, or exchange services for Exchange Access or Information Access" from the scope of their reciprocal

compensation obligations. *See* US LEC Pet'n, Exh. B at 64, Interconnection Attachment § 7.3 (emphasis added); *cf.* 47 C.F.R. § 51.701(b)(1) (excluding "interstate or intrastate exchange access, ***information access***, or exchange services for such access" from the scope of reciprocal compensation obligations under the FCC's rules) (emphasis added). The ALJ's ruling that Information Access nonetheless is subject to reciprocal compensation is plainly wrong.

Exception 4 (Issue 4): Finally, the ALJ's resolution of the treatment of information services traffic for which the information service provider imposed a separate charge is also wrong. The ALJ acknowledged that the parties have a fundamental interest in maintaining control of this traffic – typically (in Verizon's case) calls to 556 and 976 numbers – because (among other reasons) many customers want to be able to block calls to these numbers. Verizon proposed to maintain control by instituting separate trunking for such traffic *if* US LEC chooses to send such traffic to Verizon, *which it currently chooses not to do.* US LEC's witness offered no support for any contrary proposal, and its witness advocated simply deleting the relevant provision. *See* Direct Testimony of Wanda G. Montano ("Montano Direct") at 15:12. Yet the ALJ adopted language that US LEC had disavowed in its testimony, which purports to impose an obligation on parties to pay bills that their customers incur without providing any mechanism for effective blocking. That result invites abuse; the Commission should accordingly adopt Verizon's proposed language or delete the provision altogether.

EXCEPTIONS

Exception 1: VERIZON EXCEPTS TO THE ALJ'S RECOMMENDATION THAT PAYMENT OF RECIPROCAL COMPENSATION BE REQUIRED ON INTEREXCHANGE "VIRTUAL NXX" TRAFFIC BECAUSE IT IS INCONSISTENT WITH FEDERAL LAW AND SOUND REGULATORY POLICY (ISSUE 6)

The Commission has prohibited CLECs from "assigning telephone numbers to customers using NXX codes that do not correspond to the rate centers in which the customers' premises are physically located."[3] In response to a recent dispute involving another CLEC and an independent ILEC, the Commission has reaffirmed its existing policy and opened an investigation into this practice.[4] While this arbitration may not be the proper forum to address the propriety of US LEC's admitted assignment of virtual NXXs, it does present an issue of first impression for this Commission to resolve if the virtual NXX practice is to be allowed. Specifically, it deals with the question whether inter-carrier compensation should be paid for this novel type of traffic, which was unknown before the introduction of local competition following adoption of the 1996 Act.

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[3] *See* Opinion and Order, *Petition of Focal Communications Corporation of Pennsylvania for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Bell Atlantic-Pennsylvania, Inc.*, Docket No. A-310630F0002, at 47 (Pa. PUC Aug. 17, 2000) ("*Focal Order*") (Verizon Supp. App. Tab 4).

[4] Opinion and Order, *Level 3 Communications, LLC v. Marianna & Scenery Hill Tel. Co.*, Docket No. C-20028114, at 11 (Pa. PUC Aug. 8, 2002) (Verizon Supp. App. Tab 3) ("[i]n the *Focal Order* we prohibited carriers from 'assigning telephone numbers to customers using NXX codes that do not correspond to the rate centers in which the customers' premises are physically located' and stated that any failure to comply with this directive would be subject to civil penalties") (quoting *Focal Order* at 47-48) (Verizon Supp. App. Tab 3); *see also* Motion of Commissioner Pizzingrilli, *Level 3 Communications, LLC v. Marianna & Scenery Hill Tel. Co.*, Docket No. C-20028114 (Pa. PUC Aug. 8, 2002) (opening statewide, generic investigation into carriers' use of virtual NXXs) (Verizon Supp. App. Tab 5).

In providing Virtual NXX service, US LEC assigns its customer a telephone number that is associated with an exchange in which the customer is not physically located and in which US LEC consequently has not deployed facilities to serve that customer. Virtual NXX service thus allows Verizon's customers to call US LEC's customers in a distant local calling area without incurring the toll charges that Verizon would otherwise be able to collect. In providing Virtual NXX service, US LEC does nothing that it does not do for a US LEC customer receiving an ordinary local call. Nevertheless, US LEC charges its Virtual NXX customers $12,000 per year for this service, and for only one reason: so that they may receive calls from distant customers who do not have to pay toll charges to Verizon.

In this proceeding, even though US LEC's service deprives Verizon of otherwise-applicable toll charges, US LEC asks this Commission to require Verizon to *pay* reciprocal compensation *on top* of the thousands of dollars per year that US LEC already charges its own customer, and to exempt US LEC from the access charges that should be paid to Verizon for originating and transporting this interexchange traffic. US LEC's proposal, however, is not only inconsistent with federal law, but also threatens to promote anticompetitive regulatory arbitrage at the expense of genuine local competition.

The dispute can be understood only by recognizing the way in which US LEC is attempting to manipulate the pre-existing regulatory structure for its own advantage. Local telephone exchange service rates in Pennsylvania generally include the ability to make local calls within a local calling area. *See* Direct Testimony of Terry Haynes ("Haynes Direct") at 5:16-6:3. Calls outside the local calling area are generally subject to an additional charge, typically priced on a usage-sensitive basis. *See id.* at 6:3-5. This distinction between local and toll service is

rooted in the decades-old public policy of promoting widespread availability of affordable local telephone service. *Id.* at 6:6-8.

Traditionally, whether a call is charged to the calling party as "local" or "toll" has depended on comparing the telephone numbers of the calling party and the called party. Each ordinary telephone number has both an area code (referred to in industry jargon as an "NPA" – a reference to "Numbering Plan Area") and an exchange code or "NXX." *Id.* at 4:3-18. Each exchange code is associated with a particular "central office," the Verizon switch serving the particular geographic area. *Id.* The local calling area for each exchange code is set forth in Verizon's tariff (and is set out in the front of Verizon's telephone directories). Thus, for example, the local calling area for a customer in a Philadelphia exchange includes all the NXXs in the Philadelphia Regional Calling Area (city and near suburban exchanges); because the local calling area does not include exchanges in Allentown calls to Allentown are toll calls.

Because call rating – that is, the determination of whether the caller should be charged a separate toll charge – depends on comparing NXX codes, however, a customer can arrange to make calls to and receive calls from a distant local calling area without the calling party incurring the toll charges that would ordinarily apply by purchasing foreign exchange (or "FX") service. Hearing Transcript ("Tr.") 223:24-224:6. Verizon has traditionally provisioned FX service by establishing a dedicated connection, or "private line," between a customer and the distant central office within the local calling area of interest. Rebuttal Testimony of Terry Haynes ("Haynes Rebuttal") at 8:3-5. For example, if a Verizon customer in Philadelphia wished to make calls to and receive calls from Allentown without toll charges, the customer could purchase local exchange service from Verizon in a central office within the Allentown local calling area, and pay Verizon to establish a dedicated connection between Allentown and

the customer's location in Philadelphia. In such an arrangement, Verizon would actually provide local exchange service out of a central office in Allentown, and would construct a dedicated connection from Allentown to Philadelphia.

US LEC's Virtual NXX service provides a superficially similar functionality to Verizon's traditional FX service. US LEC assigns its customers a telephone number with an NXX code associated with a particular geographic area, which is outside the local calling area in which the US LEC customer is located. Haynes Direct at 7:5-8. When a Verizon customer dials that NXX code, the call will be routed to US LEC's distant switch. *Id.* at 6:17-18. Verizon will rate the call to the calling party by comparing the calling party's exchange code with the called party's exchange code and will rate the call as a local call. *Id.* at 10:11-14.

For example, suppose a Verizon customer physically located in Allentown calls a US LEC customer in Philadelphia. If US LEC assigns its customer a number associated with the customer's actual location in Philadelphia, Verizon will assess toll charges for that call. Haynes Direct at 6:18-7:1; Tr. 177:8-11 (US LEC's Montano conceding that such a call is not a local call). But, if US LEC assigns its customer a number associated with the Allentown local calling area, Verizon will treat the call as a local call for rating purposes – but Verizon must still transport the call all the way to Philadelphia because US LEC does not have facilities to accept the traffic in Allentown. US LEC is thus able to control whether or not Verizon can charge its customers the toll charges that would ordinarily apply to a call from Allentown to Philadelphia.

In this way, US LEC's Virtual NXX service operates as a toll-free service, where the called party agrees to pay charges in lieu of the toll charges otherwise applicable to the calling party. Haynes Direct at 6:9-13; Hearing Exh. VZ-6 (describing US LEC's virtual NXX service as "toll free" service). Traditional FX service is also a toll-free-type service, but it raised no

issues with respect to inter-carrier compensation in a single carrier environment: Verizon would in principle be compensated for lost toll revenues because its FX customer would pay an additional charge for the dedicated connection used to provide the FX service. Haynes Rebuttal at 8:3-7. But, with US LEC's Virtual NXX service, the matter is not so simple because the FX subscriber is no longer a Verizon customer, and the payments in lieu of toll charges are paid not to Verizon, but to US LEC instead. *See* Hearing Exh. VZ-6 (tolls paid by the "called party" – US LEC's customer). Under US LEC's proposal adopted by the ALJ, however, the additional transport costs are still being borne by Verizon, for which it receives no compensation.

There is an additional regulatory complication. As US LEC acknowledges, it minimizes its investment in network equipment in Pennsylvania by serving an entire LATA – a broad area encompassing many local calling areas – from a single switch. Direct Testimony of Frank R. Hoffmann, Jr. ("Hoffmann Direct") at 4:13-5:8. Because it purports to offer service in many different local calling areas from that single switch, it has obtained NXX codes associated with calling areas quite distant from its switch, and forces other local carriers to direct all traffic destined for any of those NXX codes to its single switch. Haynes Rebuttal at 2:19-22. This means that US LEC can provide Virtual NXX service without providing any functionality beyond what it ordinarily provides to any other local customer. That is, the fact that a US LEC customer in Philadelphia happens to be assigned a telephone number associated with Allentown rather than Philadelphia does not require US LEC to do any additional work; it simply assigns the customer a different telephone number. In fact, it is actually *less expensive* for US LEC to serve Virtual NXX customers, because they are generally located within five miles of US LEC's switch. *See* Tr. 182:20-24.

This is in contrast to traditional FX service. Because NXX codes are associated with a single switch, Verizon provides FX service by provisioning a dedicated connection between the customer's premises and the "foreign" central office. Haynes Rebuttal at 8:3-7. It is that dedicated connection for which the customer pays an additional charge. *Id.* In the case of US LEC, however, US LEC establishes no additional facilities and is being paid simply for providing its customers toll-free calling arrangements, where the toll charges that are eliminated were previously being paid to Verizon. Notably, unlike real FX service, US LEC's Virtual NXX service is *in-bound* only – its customers can receive calls from distant exchanges, but cannot place calls to those same exchanges. Hearing Exh. VZ-6. US LEC is happy to accept $12,000 per year to deprive *Verizon* of toll charges, but will not permit its customers to avoid paying toll charges to US LEC by making out-bound calls from the virtual NXX number.

It is important to emphasize several arguments that Verizon is *not* making here. While it is an important issue that will be addressed in a separate Commission investigation, Verizon is not challenging US LEC's ability to provide Virtual NXX service in this proceeding. Haynes Rebuttal at 9:9-11. Verizon is not challenging the system of end-user call rating based on assigned telephone numbers. *Id.* at 2:18-3:4. Verizon is not challenging the system of routing calls based on those same numbers. *Id.* at 2:19-20. Verizon is not challenging US LEC's ability to serve many local calling areas from a single switch.

The *only* question here is one of inter-carrier compensation: when a Verizon customer places a toll-free call to a US LEC Virtual NXX customer, should Verizon be required to pay US LEC reciprocal compensation on top of the thousands of dollars that US LEC is already collecting from its customer in lieu of toll charges, and despite the fact that Verizon is being deprived of those same toll charges? Or, should US LEC be required to compensate Verizon for

originating this traffic and delivering it to US LEC's switch, as well as for the toll revenues that Verizon loses as a result of US LEC's control over number assignment? Federal law, the strong weight of state commission precedent, and basic principles of regulatory rationality and fairness all provide the same answer. It is US LEC, not Verizon, that should pay.

The Recommended Decision addresses none of these issues. Instead, the ALJ simply observed that, in the past, Verizon has charged reciprocal compensation for traditional FX traffic, which entirely avoids the important question because, before the advent of local competition, reciprocal compensation was not even a possibility. The undisputed evidence showed that any such charges by Verizon in recent years have been miniscule, that Verizon offered to eliminate any such charges, and that Verizon's FX service offers no regulatory arbitrage threat. Principally, however, the ALJ simply copied verbatim a determination of the Wireline Competition Bureau at the FCC, acting in place of the Virginia State Commission – a flawed decision still subject to full FCC review that is not binding on this Commission at all and that addressed none of Verizon's legal or policy arguments. Indeed the sole basis for the Wireline Bureau's conclusion was the claim that it would be difficult for the parties to distinguish local traffic from Virtual NXX traffic – something the evidence demonstrated is absolutely not true in this case. The unrebutted evidence in *this* proceeding demonstrated that the parties can accurately and inexpensively distinguish FX and Virtual NXX traffic from local traffic for inter-carrier compensation purposes. The ALJ's reliance on the Wireline Bureau's unreviewed ruling – particularly in light of the overwhelming weight of state commission precedent on the other side of this issue – was misplaced.

A. Federal Law Does Not Require Payment of Reciprocal Compensation for Interexchange Traffic

1. The FCC's Rules: The FCC's rules have always made clear that reciprocal compensation under 47 U.S.C. § 251(b)(5) "do[es] not apply to the transport or termination of interstate or intrastate interexchange traffic." *Local Competition Order* ¶ 1034.[5] The FCC confirmed that result in its April 2001 *ISP Remand Order*, in which it held that reciprocal compensation does not apply to "interstate or intrastate exchange access, information access or exchange services for such access." .47 C.F.R. § 51.701(b)(1) (Verizon App. Tab 35). The FCC has made clear that this exclusion covers all interexchange communications: whenever a LEC provides service "in order to connect calls *that travel to points – both interstate and intrastate – beyond the local exchange,*" it is providing an access service. *ISP Remand Order* ¶ 37 (emphasis added). "Congress excluded all such access traffic from the purview of section 251(b)(5)." *Id.*

The FCC's determination that interexchange traffic is not subject to reciprocal compensation binds this Commission and requires it to reverse the Recommended Decision on Issue 6, which is inconsistent with this rule. It is undisputed that the calls at issue here "travel to points . . . beyond the local exchange." *Id.*; *see* Haynes Direct at 10:8-10. Accordingly, such traffic simply is not subject to reciprocal compensation under federal law.

In its recent *Mountain Communications*[6] decision, the FCC made clear yet again that number assignment does not and cannot control inter-carrier compensation obligations. There,

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[5] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) (Verizon App. Tab 3). This portion of the *Local Competition Order* has never been challenged and remains binding federal law.

[6] Order on Review, *Mountain Communications, Inc. v. Qwest Communications International, Inc.*, File No. EB-00-MD-017, 2002 WL 1677642, ¶ 6 (rel. July 25, 2002) ("*Mountain Communications*"), *aff'g* Memorandum Opinion and Order, *Mountain Communications, Inc. v. Qwest Communications International, Inc.*, 17 FCC Rcd 2091 (Chief, Enf. Bur. 2002).

as here, the interconnecting carrier had a practice of assigning telephone numbers without regard to the customer's physical location. That assignment practice, the FCC explained, "prevents [the originating carrier] from charging its customers *for what would ordinarily be toll calls*."[7] For that reason, the FCC ruled that the receiving carrier was required to compensate the originating carrier for facilities used to transport such calls to its switch.

2. *Other State Commission Authority:* The overwhelming weight of state commission authority is in agreement with this analysis, holding that reciprocal compensation does not apply to virtual NXX traffic because it does not physically originate and terminate in the same local calling area. These state commissions include those in Ohio,[8] Florida,[9]

[7] *Id.* ¶ 5 (emphasis added).

[8] *See* Arbitration Award, *Petition of Global NAPs Inc. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon North Inc.*, Case No. 02-876-TP-ARB (Ohio PUC Sept. 5, 2002) ("*Ohio Arbitration Award*") ("while the Commission is not prohibiting the use of Virtual NXX, . . . the Commission is affirming that the intercarrier compensation for such calls [is] based on the geographic end points of the call").

[9] *See* Order on Reciprocal Compensation, *Investigation into Appropriate Method to Compensate Carriers for Exchange of Traffic Subject to Section 251 of the Telecommunications Act of 1996*, Docket No. 000075-TP, Order No. PSC-02-1248-FOF-TP (Fla. PSC Sept. 10, 2002).

Connecticut,[10] Illinois,[11] Texas,[12] South Carolina,[13] Tennessee,[14] Georgia,[15] and Missouri.[16]

Though full copies were placed in the record, the ALJ never addressed these decisions or their

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[10] Decision, *DPUC Investigation of the Payment of Mutual Compensation for Local Calls Carried over Foreign Exchange Service Facilities*, Docket No. 01-01-29, at 44 (Conn. DPUC Control Jan. 30, 2002) (Verizon App. Tab 19) ("The purpose of mutual compensation is to compensate the carrier for the cost of terminating a local call" *and, "since these calls are not local*, they will not be eligible for mutual compensation.") (emphasis added).

[11] Arbitration Decision, *TDS Metrocom, Inc. Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Arrangements with Illinois Bell Telephone Co. d/b/a Ameritech Illinois Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket No. 01-0338, at 48 (Ill. Commerce Comm'n Aug. 8, 2001) (Verizon App. Tab 17); Arbitration Decision, *Level 3 Communications, Inc. Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Illinois Bell Telephone Company d/b/a Ameritech Illinois*, Docket No. 00-0332, at 9 (Ill. Commerce Comm'n Aug. 30, 2000) (Verizon App. Tab 16) ("FX traffic does not originate and terminate in the same local rate center and therefore, as a matter of law, cannot be subject to reciprocal compensation.").

[12] Revised Arbitration Award, *Proceeding to Examine Reciprocal Compensation Pursuant to Section 252 of the Federal Telecommunications Act of 1996*, Docket No. 21982, at 18 (Tex. PUC Aug. 31, 2000) (Verizon App. Tab 32) (finding FX-type traffic "not eligible for reciprocal compensation" to the extent it does not terminate within a mandatory local calling scope).

[13] Order on Arbitration, *Petition of Adelphia Business Solutions of South Carolina, Inc. for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996*, Docket No. 2000-516-C, Order No. 2001-045, at 7 (S.C. PSC Jan. 16, 2001) (Verizon App. Tab 27) ("Applying the FCC's rules to the factual situation in the record before this Commission regarding this issue of 'virtual NXX,' this Commission concludes that reciprocal compensation is not due to calls placed to 'virtual NXX' numbers as the calls do not terminate within the same local calling area in which the call originated."); *see also SC Arbitration Order.*

[14] Interim Order of Arbitration Award, *Petition for Arbitration of the Interconnection Agreement Between BellSouth Telecommunications, Inc. and Intermedia Communications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket No. 99-00948, at 42-44 (Tenn. Reg. Auth. June 25, 2001) (Verizon App. Tab 21).

[15] Final Order, *Generic Proceeding of Point of Interconnection and Virtual FX Issues*, Docket No. 13542-U, at 10-12 (Ga. PSC July 23, 2001) (Verizon App. Tab 20) ("The Commission finds that reciprocal compensation is not due for Virtual [NXX] traffic.").

[16] Arbitration Order, *Application of AT&T Communications of the Southwest, Inc., TCG St. Louis, Inc., and TCG Kansas City, Inc., for Compulsory Arbitration of Unresolved Issues With Southwestern Bell Telephone Company Pursuant to Section 252(b) of the*

reasoning. US LEC has relied on three minority opinions on this issue,[17] but they are wholly unpersuasive. Without finding Virtual NXX traffic to be subject to reciprocal compensation under federal law, they suggest that proper tracking of such traffic would be logistically difficult.[18] As Verizon explained, however, (1) the record in this proceeding establishes that distinguishing FX traffic from local traffic is feasible (*see infra* at 1.C), and (2) in any event, any alleged difficulties of implementation do not justify ignoring the plain requirements of federal law.

The *Virginia Arbitration Order*[19] – the exclusive basis for the Recommended Decision – does not call this conclusion into question. First of all, the Bureau's decision is "not binding precedent" upon this Commission. ALJ Rec. Dec. at 16. The Bureau is a subdivision within the FCC, its decision is still subject to FCC review, and it is not entitled to the deference normally accorded to a federal agency's interpretation of a statute that it administers. *See, e.g., Caiola v. Carroll*, 851 F.2d 395, 399 (D.C. Cir. 1988) (refusing to defer when interpretation rendered by official who was "*not* the head of the agency"). Therefore, the *Virginia Arbitration Order* is

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Telecommunications Act of 1996, Case No. TO-2001-455, at 44 (Mo. PSC June 7, 2001) (Verizon App. Tab 18) (finding that Virtual NXX traffic should "not be classified as a local call").

[17] US LEC has relied on decisions from Michigan, Kentucky, and North Carolina. US LEC has also cited the decision of the Florida PSC, but the Florida PSC *rejected* application of reciprocal compensation to Virtual NXX traffic. *See supra* at 14 n.9.

[18] Moreover, in the case of North Carolina, the NCUC authorized payment of reciprocal compensation on *traditional* FX traffic only after adopting the incumbent LEC's proposed interconnection architecture, which required the CLEC, not Verizon, to bear the costs of transporting the call outside the originating local calling area. *See infra* at 39 n.36. Because the ALJ rejected Verizon's proposed interconnection architecture, the North Carolina decision provides no support for the Recommended Decision. *See* Haynes Direct at 11:5-10.

[19] Memorandum Opinion and Order, *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and*

entitled to no more weight than a comparable recommended decision in an arbitration conducted in another state that has yet to be reviewed by the full state commission.

Just as important, the Bureau never even addressed the basic question whether Virtual NXX traffic is subject to reciprocal compensation under federal law, and its decision is plainly inconsistent with the reasoning of *Mountain Communications*, a decision the *full FCC* issued weeks after the *Virginia Arbitration Order* was released. Instead, the Bureau simply suggested that, in the absence of a concrete proposal for distinguishing Virtual NXX traffic from local traffic for billing purposes, the parties would not be compelled to give effect to that distinction, irrespective of the requirements of federal law. *Virginia Arbitration Order* ¶ 301. The Bureau's failure to respect the limitations on Verizon's reciprocal compensation obligations was both inconsistent with federal law and unsupported on the record, but in any event it has no application here, because Verizon *did* present unrebutted evidence that carriers *can* accurately estimate the volume of FX and Virtual NXX traffic exchanged between them. *See* Tr. 232:10-25, 234:4-14, 236:16 - 240:1.

Indeed, the only two state commissions to rule on this issue since the *Virginia Arbitration Order* – those of South Carolina and Ohio – have *reaffirmed* that Virtual NXX traffic is *not* subject to reciprocal compensation, rejecting the Bureau's truncated discussion. *See SC Arbitration Order* at 25; *Ohio Arbitration Award* at 10 (finding that the *Virginia Arbitration Order* is neither a "final decision nor a legally binding precedent"). Thus, the *Virginia Arbitration Order* provides no basis for failing to implement the clear requirements of federal law here.

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for Expedited Arbitration, CC Docket Nos. 00-218 *et al.*, DA 02-1731 (Wireline Comp. Bur. Rel. July 17, 2002) ("*Virginia Arbitration Order*") (Verizon App. Tab 10).

- 3. *Historical Practice – InterLATA FX:* The Recommended Decision relied on the fact that Verizon has, in the past, collected reciprocal compensation for CLEC-originated calls bound for Verizon's FX customers to hold that such payments are "industry practice" in Pennsylvania. That reliance was inappropriate. Prior to 1996, there was no historical practice associated with payment of reciprocal compensation on FX traffic, because incumbent LECs did not pay reciprocal compensation. Since the introduction of local competition, it has become increasingly clear that Virtual NXX arrangements are a serious source of regulatory arbitrage, to the point that the assumption that assigned telephone numbers were associated with the physical location of the called party is no longer a tenable one. Tr. 231-32.[20]

By contrast, there is a clear historical practice with respect to other FX arrangements, specifically interLATA FX arrangements. The only difference between an interLATA FX arrangement and an intraLATA FX arrangement is that the former allows a customer located in a different LATA (even a distant state) to obtain a number that would be locally rated to the calling party in a distant exchange. Because local carriers like Verizon were not permitted to provide service across LATAs, such calls – though originated by the local telephone company – had to be handed off to a long-distance carrier for completion to the interLATA FX customer. The question of appropriate inter-carrier compensation for such calls has already been squarely resolved by the FCC. *See* Haynes Direct at 7:15-8:22 (citing *AT&T Corp. v. Bell Atlantic-Pennsylvania*, 14 FCC Rcd 556, ¶ 71 (1998) ("*AT&T v. BA-PA*") (Verizon App. Tab 1), *recon.*

[20] US LEC compares its Virtual NXX service to Verizon's FX and FX-like service, but that comparison proves nothing: Verizon does not claim that it is entitled to reciprocal compensation on FX traffic and has offered to pay access charges on such traffic. And FX traffic makes up a tiny percentage of the traffic that CLECs send to Verizon. *See* Haynes Rebuttal at 6. Moreover, since Verizon's FX service allows both in-bound and out-bound calling, reciprocal compensation would flow both ways, unlike the case with virtual NXX in-bound only products like US LEC's.

denied, 15 FCC Rcd 7467 (2000)). And, despite the fact that interLATA FX calls are "locally dialed," they are recognized for what they are: interexchange calls that are subject to access charges – not reciprocal compensation. Rebuttal Testimony of Wanda G. Montano ("Montano Rebuttal") at 28:5-9.

This point is significant for several reasons. First, it reflects the basic principle that inter-carrier compensation payments must be governed by the actual physical location of the parties. US LEC's contrary claim – that inter-carrier compensation should be governed by the telephone number that the carriers choose to assign – is incorrect as a matter of law. Assignment of phone numbers is easily manipulated and reflects nothing about underlying costs. The only way for this Commission to ensure that regulatory policy is correct and consistent is to concern itself with the substance of the service arrangement – *i.e.*, the actual path of the call – a principle that applies equally in the intraLATA and interLATA context.

Second, just as interLATA FX involves exchange access, so too does intraLATA FX involve exchange access. That is, in both circumstances, the originating local carrier is making its local exchange facilities available to a second carrier so that the second carrier can provide its customer a service. Haynes Rebuttal at 11:16-12:6. In all such cases, the second carrier must pay for such access, and that should likewise be the result in the case of intraLATA FX. *Id.*

Third, the FCC determination on this point provides an additional reason that US LEC's proposed contract language cannot be accepted. US LEC's proposed language governing this issue would provide that designation of traffic as subject to reciprocal compensation "shall be based on the originating NPA-NXX rate center and the terminating NPA-NXX rate center." US LEC Pet'n, Exh. B at 64, Interconnection Attachment § 7.2. But US LEC cannot deny that "locally dialed" traffic may be sent to US LEC's switch for onward transmission to US LEC

customers located anywhere in US LEC's 14-state area. The call would be rated and routed by Verizon like a local call, because US LEC does nothing to distinguish those interLATA FX numbers. And US LEC would bill Verizon reciprocal compensation. But even US LEC did not defend that result and for good reason: requiring payment of reciprocal compensation on interLATA FX traffic would squarely violate federal law. US LEC's effort to have the Commission adopt that result likewise is contrary to federal law.[21]

Finally, the fact that Verizon may have charged reciprocal compensation for CLEC-originated traffic that Verizon has delivered to its FX (and FX-type) customers in the past does not say anything about the proper resolution of the issue presented here. As an initial matter, under Verizon's proposal, *all* traffic – Verizon-originated and CLEC-originated – would be subject to reciprocal compensation based on the physical location of the called party, not the assigned telephone number. Just as important, the volume of traffic originated by CLECs for delivery to Verizon's FX customers has not been significant. Verizon's witness testified that, when a traffic study was done in Florida, it was determined that, if Verizon had systematically corrected its reciprocal compensation billing to exclude FX traffic not subject to such charges, the *total* monthly adjustment *for all CLECs in the state* would have amounted to much less than one percent of traffic. Haynes Rebuttal at 6:12-16. Verizon agrees that CLEC-originated traffic delivered to Verizon's FX customers is not subject to reciprocal compensation, but there has never been enough of such traffic to matter. US LEC does not and cannot maintain that the volume of Virtual NXX traffic that it receives is either negligible in absolute terms or

[21] The ALJ never addressed this issue at all.

insignificant relative to the total volume of traffic that it receives.[22] In Verizon's case, however, both are true.

* * * * *

Because federal law provides that interexchange traffic, including Virtual NXX traffic, is outside the scope of section 251(b)(5)'s reciprocal compensation obligation, the Commission should reverse the Recommended Decision and instead adopt Verizon's proposed language.

B. Payment of Reciprocal Compensation on Virtual NXX Traffic Would Contribute to Regulatory Arbitrage

Even if federal law did not clearly resolve this question – and it does – the Commission should adopt Verizon's proposal because it is consistent with sound regulatory policy. When a US LEC customer subscribes to a Virtual NXX service, it pays an extra charge to US LEC in order to be able to receive calls originated in a distant exchange without a toll charge being imposed on the calling party. *See* US LEC's "Enhanced Local Services," at 2 (Hearing Exh. VZ-6) (US LEC describing "Foreign exchange" as involving "an inbound-only call, toll-free to the calling party, which is paid for by the called party"). US LEC is thus paid by *its* subscriber precisely to ensure that Verizon will *not* be paid any toll charges by *its* subscriber for an interexchange call. There is nothing necessarily wrong with that, so long as US LEC compensates Verizon appropriately for the service that Verizon continues to provide. But it would be deeply inconsistent with regulatory policy and basic fairness to require Verizon to *pay* US LEC, when Verizon continues to bear the same costs of originating and transporting the

[22] The ALJ relied on US LEC's claim that it has six Virtual NXX customers in Pennsylvania (ALJ Rec. Dec. at 41) without recognizing that each of those customers could have been assigned numbers in every local calling area throughout the LATA. In any event, the Recommended Decision indisputably *invites* abuse, even if it does not endorse existing abuses.

interexchange call, when Verizon is deprived of the toll charges that would ordinarily apply, and when US LEC is already receiving compensation from its customers.

Each of these points is clearly established in the record.

First, US LEC charges its Virtual NXX customers a $500 fixed charge and $1000 per month in Pennsylvania, with additional charges added on. *See* Tr. 175:17-19. Yet US LEC provided no evidence that it incurs any additional costs in providing Virtual NXX service as compared to ordinary local exchange service. To the contrary, Ms. Montano testified that when US LEC provides Virtual NXX service, its customers are generally located close to US LEC's switch:

> Q. Do you know whether any of USLEC's FX customers in Pennsylvania are located near the USLEC switch?
>
> A. Yes, I believe they are.
>
> Q. What's that distance?
>
> A. I believe it is less than five miles

Tr. 182:20-24. Ms. Montano could think of no example in which a Virtual NXX customer is located more than 12 miles from the US LEC switch. *Id.* at 183:4. Moreover, US LEC advertises its Virtual NXX service as in-bound only, so that US LEC will never bear the cost of transporting a Virtual NXX customer's traffic to the point of interconnection on Verizon's network.

Second, US LEC justifies these charges purely on the basis of the subscriber's ability to receive calls from parties located in a foreign exchange without those calling parties incurring any toll charge. US LEC's "Enhanced Local Services," at 2 (Hearing Exh. VZ-6). Indeed, US LEC explicitly informs its Foreign exchange subscribers that they are paying those toll charges through their payments to US LEC. *Id.*

- *Third,* the "toll charges" that US LEC requires its subscribers to pay in order to receive Foreign Exchange service are precisely those toll charges that Verizon does not receive because of US LEC's manipulation of number assignments. Haynes Rebuttal at 12:4-5.

Fourth, US LEC insists that Verizon should be required to deliver traffic originated LATA-wide to its switch. In that arrangement, Verizon is bearing the cost of originating a call and transporting it across the LATA – the very interexchange service for which US LEC is being paid by its customer, and for which Verizon is no longer being paid by its customer. Haynes Rebuttal at 8:10-19.

Under these circumstances, the only sensible result is that US LEC should compensate Verizon for the services that it continues to provide – *i.e.*, Verizon should continue to receive at least a portion of the toll charges that it would otherwise receive from its customer in the form of access charges paid by US LEC.[23] Indeed, there is no situation, and US LEC cites none, in which a carrier both charges its subscriber toll charges – as US LEC admits it does – and receives inter-carrier compensation. In every such circumstance, the inter-carrier compensation flows the other way, from the carrier who is receiving the toll charges to the carrier who is providing the access but receiving no revenue from its subscriber for the call.

This is not only a matter of fairness between the parties, it is also fundamental to the structure of basic service rates, and the "decades-old public policy goal of assuring widespread availability of affordable telephone service." Haynes Direct at 6:7-8. Traditionally, basic local exchange rates only entitle an end user to service *within the exchange. Id.* at 5:16-18. If the end user wishes to make a call outside the end user's local calling area, the end-user must generally pay a toll charge, which the LEC either keeps (if it is providing the interexchange service) or

receives a part of in the form of access charges. *Id.* at 5:16-6:7. Some dialing arrangements – such as toll-free 800 numbers – allow the calling party to make an interexchange call without incurring the toll charges that would normally apply. *Id.* at 6:9-12. But the LEC continues to be compensated for providing access to the local exchange – in the case of 800 numbers, through access charges. Haynes Rebuttal at 11:22-12:12.

In the case of Virtual NXX traffic, US LEC wants to offer its customers the benefit of access to a foreign exchange without the necessity of deploying any facilities serving customers in that exchange. *See id.* at 9:13-14 (noting that US LEC seeks "to take advantage of Verizon's 'ubiquitous network'" (Montano Direct at 28:19) without constructing facilities of its own). US LEC should not be able to take money *away* from the subscribers in the local exchange rather than *contribute* to the support of the local exchange in this circumstance. Otherwise, Verizon and its subscribers would, in effect, be required to sponsor US LEC's provision of Virtual NXX services to US LEC's subscribers. That result turns basic principles of telecommunications regulation on their head. *Id.* at 8:10-23.

US LEC also argues at length that Virtual NXX service somehow benefits rural customers. This claim is hogwash. US LEC does not offer itself as a choice of an alternative carrier available to customers located in those rural areas. The rural customers in question are not US LEC customers; they are Verizon customers, and any "services" to which rural customers will supposedly lose "access" (US LEC Br. at 37-38) if US LEC were to stop providing Virtual NXX service to its six customers in Pennsylvania would not include telecommunications services. Providing reciprocal compensation on Virtual NXX traffic actually discourages carriers like US LEC from deploying facilities in remote areas that would compete with

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[23] By the same token, if a US LEC customer originates a call to a Verizon FX customer,

Verizon's facilities, because US LEC must bear the cost of those facilities. Instead, it is more profitable for US LEC to allow Verizon to continue providing service and to search for ways to be paid for the service that Verizon provides, as with Virtual NXX arrangements. *See* Haynes Rebuttal at 9:10-12. US LEC is seeking a free-ride on Verizon's network, pure and simple. Haynes Rebuttal at 9:14-16. Payment of reciprocal compensation on Virtual NXX traffic would amount to paying US LEC *not* to compete. *Id.*

C. The Record Establishes that FX and Virtual NXX Traffic Can Be Practically Distinguished from Local Traffic for Inter-Carrier Compensation Purposes

Federal law, sound policy, and basic fairness compel adoption of Verizon's proposed language. And the record establishes that implementation of that language is a straightforward matter: there need not be any significant problems with implementing Verizon's proposal, because a practical method for distinguishing FX and Virtual NXX traffic from traffic that is subject to reciprocal compensation has already been proposed in other states and could inexpensively be implemented in Pennsylvania.

As Terry Haynes testified, it is a relatively straightforward matter to do a traffic study, based on an analysis of known FX and Virtual NXX numbers, to determine the proportion of calls exchanged between the parties that are not subject to reciprocal compensation but that should be subject to access charges. *See* Tr. 232:10-25, 234:4-14, 236:16-240:1. That testimony made clear that performing such studies is "easy to do" and "fairly inexpensive." *Id.* at 237:3, 17. If it is easy for an incumbent LEC to perform such a study on a base of three million customers (*see id.* at 238:22-23), then it should be positively trivial for US LEC, which claims to provide Virtual NXX service to six customers in Pennsylvania. *Id.* at 79:1.

Verizon should pay intrastate access charges. Verizon has offered to do just that. Tr. 235:10-11.

Notably, US LEC introduced no testimony to support any claim that it would be burdensome to determine the volume of traffic that it delivers to its Virtual NXX customers. Accordingly, the record establishes unambiguously that there is no practical obstacle to implementing Verizon's proposed language. Based on comparable evidence, the South Carolina Commission concluded that "the parties can accurately and inexpensively distinguish FX and Virtual NXX traffic from local traffic for inter-carrier compensation purposes."[24] Accordingly, the ALJ's reliance on the *factual* determination of the Wirelines Competition Bureau – which was based on a *different record* – is contrary to the evidence and cannot be sustained.

Exception 2: VERIZON EXCEPTS TO THE ALJ'S FINDING WITH RESPECT TO THE ALLOCATION OF COSTS RESULTING FROM US LEC'S INTERCONNECTION CHOICES BECAUSE IT IS CONTRARY TO FEDERAL LAW AND COMMISSION POLICY (ISSUES 1 AND 2)

Based solely on the *Virginia Arbitration Order* – which he acknowledged is "not binding precedent" – and despite "disagree[ing] with portions of . . . US LEC['s] argument," the ALJ recommended the adoption of US LEC's proposed language pertaining to the allocation of the costs that result from US LEC's chosen network architecture. ALJ Rec. Dec. at 9, 16. The record demonstrated that US LEC's proposal would require Verizon to transport local traffic outside of the local calling area where it originates, without receiving compensation for that transport from its customers, US LEC, or any other source – even though the need for this transport is directly attributable to US LEC's choices. The ALJ's decision is thus contrary not only to this Commission's precedents, but also to a binding decision of the Third Circuit, which expressly directs this Commission to "consider shifting [these] costs to" the CLEC that causes them. *MCI Telecomms. Corp. v. Bell Atlantic Pa.*, 271 F.3d 491, 518 (3d Cir. 2001). The Commission, therefore, should adopt Verizon's proposed language on this issue, because it

[24] *SC Arbitration Order* at 29.

provides a reasonable and fair allocation of the costs at issue. At the very least, the relevant provisions of the interconnection agreement between Verizon and Sprint that this Commission approved last year should be adopted here; unlike US LEC's proposal, that agreement prevents Verizon from bearing some of the "unreasonable transport costs" that result directly from US LEC's interconnection decisions. *Sprint Arbitration Order*[25] at 56.

A. The Conclusion that Verizon Is Not Entitled to Compensation for Transporting Traffic Outside of a Local Calling Area Is Erroneous and Contrary to Law

This Commission has squarely held that requiring Verizon to transport traffic "to one central point, solely for [a CLEC's] convenience," is "both expensive and inefficient, from an overall public switched network perspective." *MCImetro Arbitration Order* at 11.[26] Yet this is precisely what would result from adopting US LEC's proposal here.

US LEC serves customers in the Philadelphia and Pittsburgh LATAs from a single switch in each LATA, located in Philadelphia and Pittsburgh, respectively. *See* Hoffmann Direct at 5:6-8. Therefore, when a Verizon customer in, for example, Allentown calls an Allentown resident who is a US LEC customer, the call must be transported outside of the Allentown local calling area to US LEC's switch in Philadelphia, a distance of approximately 50 miles. *See* Direct Testimony of Peter J. D'Amico ("D'Amico Direct") at 8:3; Tr. 32:18 - 33:10. Under US LEC's proposal, it is Verizon that must bear the cost of performing this transport. Yet Verizon would

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[25] Opinion and Order, *Petition of Sprint Communication Company, L.P. for an Arbitration Award of Interconnection Rates, Terms and Conditions Pursuant to 47 U.S.C. § 252(b) and Related Arrangements with Verizon Pennsylvania, Inc.*, A-310183F0002 (Pa. PUC Oct. 12, 2001) ("*Sprint Arbitration Order*") (Verizon App. Tab 25).

[26] Opinion and Order, *Joint Application of Bell Atlantic-Pennsylvania, Inc. and MCImetro Access Transmission Services, Inc., for Approval of an Interconnection Agreement Under Section 252(e) of the Telecommunications Act of 1996*, A-310236F0002 (Pa. PUC Sept. 3, 1997) ("*MCImetro Arbitration Order*") (Verizon App. Tab 22), *rev'd in part on other grounds, MCI Telecomm. Corp. v. Bell Atlantic-Pennsylvania*, 271 F.3d 491 (3d Cir. 2001).

not receive toll revenues (or access charges) for this call, even though a call from Allentown to Philadelphia is a toll call. *See* D'Amico Direct at 8:8-9. Moreover, Verizon would not bear these costs in completing a local call between two of its own customers in Allentown – such a call would not be routed through Philadelphia. *See* Tr. 28:22-32:3.

In sum, US LEC's proposal requires Verizon to transport a local call as though it were a toll call without receiving toll revenues, or any other compensation, solely because of US LEC's business decision to serve customers throughout the Philadelphia LATA from a single switch. *See* Verizon Br. at 9-11; Verizon Reply Br. at 6-7; Hoffmann Direct at 5:5-6. In fact, while Verizon would receive no compensation under US LEC's proposal for transporting this call, US LEC can and does receive compensation from its own customers when it must transport a call to Allentown from its switch in Philadelphia – US LEC charges higher prices to customers located further away from its switch. *See* Tr. 102:12 - 104:4; US LEC Ex. 5, §§ 4.2, 6.1; Verizon Br. at 12-14; Verizon Reply Br. at 8-9. There can be no question that requiring Verizon to perform transport that it otherwise would not perform and for which it receives no compensation is "expensive." *See* Verizon Reply Br. at 7-8 & n.8.

In the *MCImetro Arbitration Order*, to prevent Verizon from bearing these transport costs, this Commission required MCI to establish one point of interconnection ("POI") per access tandem serving area. *See MCImetro Arbitration Order* at 11. The Third Circuit subsequently reversed that part of this Commission's decision, finding that a CLEC is allowed to establish only a single POI per LATA. *See MCI*, 271 F.3d at 517-18. The court, however, did not take issue with this Commission's finding that a single POI per LATA "would be both expensive and inefficient, from an overall public switched network perspective." *MCImetro Arbitration Order* at 11. Nor did it reject this Commission's conclusion that an "interconnection

agreement should be as economically neutral as possible for transport costs to each company's switch." *Id.* To the contrary, the Third Circuit agreed with the Commission's underlying reasoning and stated that, "[t]o the extent . . . that Worldcom's decision on interconnection points may prove more expensive to Verizon, the PUC *should* consider shifting costs to Worldcom." *MCI*, 271 F.3d at 518 (emphasis added) (citing *Local Competition Order* ¶ 209); *see also US West Communications, Inc. v. Jennings*, Nos. 99-16247 *et al.*, 2002 WL 31102838, at *8 (9th Cir. Sept. 23, 2002) ("agree[ing]" with the Third Circuit's holding). The Third Circuit's directive – which is binding on this Commission – is consistent with this Commission's own finding that, pursuant to the "federal requirements" governing interconnection agreements, "CLECs that choose a technically feasible but expensive interconnection point must bear the costs of that interconnection, pursuant to § 252(d)(1)." *Sprint Arbitration Order* at 55 & n.37 (citing *Local Competition Order* ¶ 199); *see* Verizon Br. at 16-17; Verizon Reply Br. at 12-14.

Instead of basing the Recommended Decision on this Commission's earlier decisions or the binding Third Circuit decision, the ALJ relied on the decision of the FCC's Wireline Competition Bureau that CLEC proposals similar to US LEC's "more closely conform[] to our existing rules and precedent than do Verizon's proposals." *Virginia Arbitration Order* ¶ 53; *see* ALJ Rec. Dec. at 13-16.[27] There are several reasons why the ALJ's reliance on this order is misplaced. As noted above, the Bureau's decision is neither binding nor entitled to any deference and cannot provide a basis for the ALJ to recommend a result that is inconsistent with binding court of appeals precedent – namely, the Third Circuit's decision – that requires this

[27] Although the ALJ briefly discussed the *Sprint Arbitration Order*, he erroneously concluded that the Commission "rejected Verizon's concern about transport costs." ALJ Rec. Dec. at 12. In fact, the Commission concluded that Sprint's proposed language – which differs markedly from US LEC's proposal, *see infra* pp. 35-36 – "would assist in alleviating *the*

Commission to "consider shifting [the] costs" at issue here to US LEC, if US LEC's chosen network architecture "prove[s] more expensive to Verizon." *MCI*, 271 F.3d at 518; *see* Verizon Br. at 22. Likewise, the Bureau's decision does not provide a basis for the ALJ to ignore or override this Commission's previous conclusions that a single POI per LATA is, in fact, "expensive" and not "economically neutral" – because it requires Verizon to perform transport "solely for [US LEC's] convenience" without receiving compensation. *MCImetro Arbitration Order* at 11. For this reason, the ALJ's recommendation to adopt US LEC's proposal must be rejected.

Moreover, as a substantive matter, the Bureau's decision provides no reason for this Commission to deviate from its prior orders. In adopting the CLECs' proposed language, the Bureau did *not* find that Verizon's proposal was contrary to federal law; nor could it, in light of the FCC's prior holding that Verizon's policies in this regard "*do not represent a violation of our existing rules*." *Pennsylvania 271 Order*[28] ¶ 100 & n.341 (emphasis added); *see* Verizon Br. at 21-22. Indeed, the Bureau failed to address relevant FCC decisions. *See* Verizon Br. at 20-21 & n.25. Most significant, the Bureau never attempted to reconcile its decision with paragraph 199 of the *Local Competition Order*, where the FCC found – as this Commission and the Third Circuit have – that "a requesting carrier that wishes a 'technically feasible' but expensive interconnection would, pursuant to section 252(d)(1), be required to bear the cost of that interconnection, including a reasonable profit." *Local Competition Order* ¶ 199. The Bureau's failure to do so is especially noteworthy in light of its finding that "Verizon raises serious

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unreasonable transport costs that Verizon must pay today under other interconnection agreements." *Sprint Arbitration Order* at 56 (emphasis added).

[28] Memorandum Opinion and Order, *Application of Verizon Pennsylvania Inc., et al. for Authorization To Provide In-Region, InterLATA Services in Pennsylvania*, 16 FCC Rcd 17419 (2001) ("*Pennsylvania 271 Order*") (Verizon App. Tab 5).

concerns about the apportionment of costs caused by a competitive LEC's choice of points of interconnection." *Virginia Arbitration Order* ¶ 54.

B. Verizon's Proposal Fairly Compensates Verizon for the Additional Costs That It Incurs When US LEC Selects a Single Point of Interconnection Per LATA

Verizon's proposal – known as Virtual Geographically Relevant Interconnection Points ("VGRIP") – provides that, when traffic must be transported to a US LEC switch that is located outside of the local calling area where the call originated, US LEC must either perform this transport itself or must compensate Verizon for performing those tasks. If US LEC chooses not to perform those tasks itself, the VGRIP proposal provides that the amount it charges Verizon for reciprocal compensation shall be reduced by:

> Verizon's transport rate (calculated by taking the dedicated transport per mile rate multiplied by the average mileage between the originating end offices and the CLEC POI plus the fixed dedicated transport rate and dividing the total by the average minutes of use for a DS1), tandem switching rate (to the extent the traffic is tandem switched), and other costs (to the extent Verizon purchases such transport from US LEC or a third party), from Verizon's originating End Office to US LEC's IP.

Verizon Proposal, Interconnection § 7.1.1.1.1; *accord id.* §§ 7.1.1.2, 7.1.1.3. The three components listed here – transport, switching (if performed), and other costs (if incurred) – are precisely the additional costs that Verizon would incur because of US LEC's choice to serve callers in a local calling area from a switch located well outside that local calling area. Moreover, the first two components – transport and switching – utilize the cost-based, UNE rates that this Commission has established. *See* Tr. 34:5-19; Verizon Br. at 11.[29]

During the hearing before the ALJ, US LEC's witness admitted that these rates could be used to calculate the additional costs that Verizon bears as a result of US LEC's proposal. *See*

[29] The third component is based on the actual costs Verizon incurred in purchasing transport from US LEC or a third party.

Tr. 34:20-35:4. Accordingly, application of these rates will provide fair and reasonable compensation to Verizon when it must transport local calls as though they were toll calls as a result of US LEC's chosen network architecture. *See* Verizon Br. at 12; *see also* Verizon Reply Br. at 9-11.

Requiring US LEC to bear these costs is "economically neutral" and sound public policy. As this Commission has found, the need for Verizon to transport a local call outside of the local calling area in which it originates is caused by US LEC's decision as to where to establish its POI. *See MCImetro Arbitration Order* at 58. Because US LEC causes these costs, it should bear them.[30] In contrast, if Verizon were forced to bear these costs – for which it would receive no compensation – then end users would not "receive accurate price signals," thereby "undermin[ing] the operation of competitive markets," as the FCC has explained. *ISP Remand Order* ¶¶ 68, 71. Sustainable local competition instead requires that carriers compete "on the basis of the quality and efficiency of the services they provide, [not] on the basis of their ability to shift costs to other carriers." *Id.* ¶ 71. For these reasons, the Commission should adopt Verizon's VGRIP proposal.

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[30] *See* Order on Arbitration, *Petition of AT&T Communications of the Southern States, Inc. for Arbitration of Certain Terms and Conditions of a Proposed Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to 47 U.S.C. Section 252*, Docket No. 2000-527-C, Order No. 2001-079, at 22 (S.C. PSC Jan. 30, 2001) (Verizon App. Tab 28) ("it would be neither equitable nor fair for this Commission to permit AT&T to shift costs to BellSouth as a result of [its] network design"); Recommended Arbitration Order, *Arbitration of Interconnection Agreement Between AT&T Communications of the Southern States, Inc., and TCG of the Carolinas, Inc., and BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996*, Docket Nos. P-140, Sub 73 & P-646, Sub 7, at 9, 15 (N.C. Utils. Comm'n Mar. 9, 2001) (Verizon App. Tab 31) (finding it "equitable . . . and in the greater public interest" to require AT&T "to compensate BellSouth for . . . transport beyond the local calling area" because AT&T's selection of a single POI per LATA "force[s] BellSouth to incur additional transport costs"), *aff'd*, Order Ruling on Objections and Requiring the Filing of the Composite Agreement, Docket Nos. P-140, Sub 73 & P-646, Sub 7 (N.C. Utils. Comm'n June 19, 2001).

Finally, it is important to recognize – as the ALJ did – that adopting Verizon's proposal in no way affects US LEC's right to establish a single POI per LATA "at any technically feasible point within [Verizon's] network." 47 C.F.R. § 51.305(a)(2). Although US LEC argued repeatedly that Verizon's proposal would limit its rights under federal law to select its network architecture, the ALJ correctly found that, "*contrary to US LEC's representations*, the real focus of these two combined issues is the proper allocation of costs between the parties." ALJ Rec. Dec. at 11 (emphasis added); *see* Tr. 43:13-20, 44:1-11, 49:6-11 (admitting that, under Verizon's proposal, US LEC can choose the location of its POI(s) and the method by which it establishes those POIs); Verizon Br. at 8-9, 24-25; Verizon Reply Br. at 5-6.[31]

C. This Commission Should Not Adopt US LEC's Proposal.

If the Commission decides not to adopt Verizon's VGRIP proposal, it should instead adopt the provisions in section 1.2.3 of Part V of the agreement approved in the *Sprint Arbitration Order*. In an arbitration under the 1996 Act, the Commission is required to resolve disputed issues in accordance with federal law; it is not limited to the proposals presented by the parties at the start of the arbitration. *See* 47 U.S.C. § 252(c)(1) (Verizon App. Tab 34). This Commission has already approved the Sprint-Verizon Agreement in a prior arbitration, and thus determined that section 1.2.3 complies with the requirements of federal law. *See* Verizon Reply Br. at 14-15. In contrast, as explained below, US LEC's proposal is contrary to both federal law and this Commission's decisions.

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[31] Accordingly, the Third Circuit's statement that a state commission "must keep in mind whether the cost of interconnecting at multiple points will be prohibitive, creating a bar to competition in the local service area" is not implicated here. *MCI*, 271 F.3d at 517. In any event, given the Third Circuit's statement that this Commission "*should* consider shifting costs" to the CLEC, *id.* at 518 (emphasis added), it is clear that the court was not limiting Verizon's right to compensation when a CLEC selects a single POI.

- Any obligation Verizon has under federal law to transport traffic unquestionably ends at the POI. Indeed, the supposed problem with VGRIP identified by the Wireline Competition Bureau is that a CLEC's financial responsibility for transporting traffic began at an IP located further inside Verizon's network than the POI, "*rather than [at] the point of interconnection*" itself. *Virginia Arbitration Order* ¶ 53 (emphasis added). Under US LEC's proposal, however, Verizon would be required to bear all the costs of transporting traffic from the local calling area where the traffic originated to US LEC's switch. Yet, as US LEC's witness admitted at the hearing, the points of interconnection of the two carriers' networks is not at US LEC's switch, but instead at Verizon's tandem switches. *See* Tr. 20:6-11, 38:14-17, 40:3-7.[32] US LEC's attempt to impose an obligation on Verizon to bear the costs of transporting traffic past the POI must be rejected. *See* Verizon Br. at 23-24.

Furthermore, US LEC's proposal has none of the features that this Commission found would "assist in alleviating the *unreasonable transport costs* that Verizon must pay today under other interconnection agreements." *Sprint Arbitration Order* at 56 (emphasis added). Namely, that agreement provides that, in certain instances, Sprint will be required to establish multiple interconnection points ("IPs") – including virtual interconnection points – and to pay for transporting traffic from the virtual interconnection point to Sprint's switch.[33] In contrast, under

[32] The location of the POIs is consistent with federal law, which limits a CLEC's right to request a point of interconnection to "any technically feasible point *within the incumbent LEC's network*." 47 C.F.R. § 51.305(a)(2) (emphasis added).

[33] The Sprint-Verizon Agreement requires Sprint to establish an additional POI or virtual POI at a point where the parties exchange more than 8.9 million minutes of traffic per month, equivalent to the amount of traffic carried over a DS-3 facility, assuming other criteria are also satisfied. *See* Sprint-Verizon Agreement, Part V, § 1.2.3.1.3.1. Verizon's witness testified that, despite the Commission's prediction that Sprint's proposal "will substantially reduce the transport costs that Verizon incurs," using the DS-3 level as the cutoff is of limited utility in preventing a CLEC from requiring Verizon to bear the vast majority of the costs caused by the CLEC's chosen network architecture. *See* D'Amico Direct at 6:12-7:18. Verizon therefore

US LEC's proposal, it will never be required to establish an IP at any point other than its switch or to bear those transport costs. Accordingly, US LEC's proposal requires Verizon to bear precisely those "unreasonable transport costs" that this Commission found were unwarranted in the *Sprint Arbitration Order* and were "expensive" in the *MCImetro Arbitration Order*. For these reasons, in the event the Commission accepts the ALJ's recommendation not to adopt Verizon's proposal, it should nonetheless reject the ALJ's recommendation to adopt US LEC's proposal and instead adopt section 1.2.3 of Part V of the Sprint-Verizon Agreement.

Exception 3: VERIZON EXCEPTS TO THE ALJ'S RECOMMENDED TREATMENT OF VOICE INFORMATION SERVICES TRAFFIC FOR RECIPROCAL COMPENSATION PURPOSES BECAUSE IT IS CONTRARY TO FEDERAL LAW AND THE PARTIES' AGREEMENT

Both parties have agreed that reciprocal compensation will not apply to "interstate or intrastate Exchange Access, Information Access, or exchange services for Exchange Access or Information Access." *See* US LEC Pet'n, Exh. B at 64, Interconnection Attachment § 7.3. In addition, to avoid later disputes, Verizon's proposed agreement identifies seven specific types of telecommunications traffic that are subject to that general exclusion. US LEC took issue with only one – "Voice Information Service" traffic – but, as that term is defined in the proposed agreement,[34] such traffic is not subject to reciprocal compensation.

The ALJ recognized that Voice Information Services "fit squarely within the meaning of 'Information Access.'" ALJ Rec. Dec. at 19. That should have resolved this issue in Verizon's

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proposes that, if the Commission adopts section 1.2.3 of the Sprint-Verizon Agreement, it should reduce the cutoff to 200,000 minutes per month, which is equivalent to the amount of traffic carried over a DS-1 facility. US LEC did not address the issue of the appropriate cutoff in its rebuttal testimony or in its briefs.

[34] "Voice Information Service means a service that provides [i] recorded voice announcement information or [ii] a vocal discussion program open to the public." "Voice Information Service Traffic means intraLATA switched voice traffic, delivered to a Voice Information Service." US LEC Pet'n, Exh. B at 43, Additional Services Attachment § 5.1.

favor, because there is *no* dispute that Information Access is *not* subject to reciprocal compensation – US LEC simply argued (incorrectly) that Voice Information Services do not fit this definition. Yet the ALJ concluded that Voice Information Services *both* fit the definition of traffic not subject to reciprocal compensation *and* "are subject to reciprocal compensation obligations." ALJ Rec. Dec. at 19. That latter conclusion is plainly wrong.[35]

Because the language to which the parties agreed tracks the language in the FCC's current reciprocal compensation regulations, the ALJ may have been confused by US LEC's reliance on the decision of the D.C. Circuit, in which the court asked the FCC for further clarification of its *ISP Remand Order*. *See WorldCom*, 288 F.3d at 434; *see* 47 C.F.R. § 51.701(b)(1) (reciprocal compensation not required for "interstate or intrastate exchange access, information access, or exchange services for such access") (Verizon App. Tab 35). But the D.C. Circuit explicitly declined to vacate the order, which thus remains binding federal law. *See WorldCom*, 288 F.3d at 434; *see also* Memorandum Opinion and Order, *Joint Application of BellSouth Corporation, et al., for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, 17 FCC Rcd 9018, ¶ 272 (2002) (rules adopted in the *ISP Remand Order* "remain in effect") (Verizon App. Tab 7).

The ALJ also referred again to the *Virginia Arbitration Order* but that decision is inapposite here. There, the parties disputed whether they would adopt a provision excluding all

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[35] Ironically, the ALJ suggested that the scope of this issue might be limited because "to the extent that any Verizon or CLEC customer decides to use a Voice Information Service provider from outside a local calling area, the call will automatically be treated as toll . . . and subject to access charges, not reciprocal compensation." ALJ Rec. Dec. at 21. That *should* be true, but because the ALJ authorized CLECs to recover reciprocal compensation on Virtual NXX traffic, presumably CLECs will assign their clients access numbers associated with every local calling area in the LATA, and no Verizon customer would incur toll charges for such calls. Thus, the ALJ unwittingly illustrated the danger to competition inherent in his Virtual NXX ruling.

access traffic from the scope of their reciprocal compensation obligations. Here, the parties have *agreed* that "Reciprocal compensation shall not apply to interstate or intrastate Exchange Access, Information Access, or exchange services for Exchange Access or Information Access." *See* US LEC Pet'n, Exh. B at 64, Interconnection Attachment § 7.3. The *only* question here for the Commission is whether Voice Information Services traffic falls within the parties' agreed exclusion for "interstate or intrastate Exchange Access, Information Access, or exchange services for Exchange Access or Information Access." *Id.* Because the ALJ properly recognized that it does, he should have adopted Verizon's proposed language. The Commission should correct his error.

Exception 4: VERIZON EXCEPTS TO THE RECOMMENDED DECISION'S FAILURE TO RECOGNIZE THAT SEPARATE TRUNKING OF 976-TYPE TRAFFIC IS ESSENTIAL TO PERMIT VERIZON TO CONTROL ACCESS TO THOSE SERVICES (ISSUE 4)

Verizon's concern here is not with information services traffic generally, but only with that separate sub-class of traffic for which the Voice Information Service provider imposes a separate charge on the calling party. *See* Verizon's Best and Final Offer at 5. Such traffic raises special concerns, because where a carrier provides billing service to its voice information service provider subscriber, it must be able accurately to bill such traffic, and block delivery of such traffic where there is no mechanism for billing the calling party – where, for example, there is no agreement between the originating carrier and the carrier serving the information services provider for end-user billing. US LEC has effectively acknowledged the validity of these concerns: US LEC itself does not permit its customer to place such calls. The record demonstrates that US LEC *blocks* all traffic to Verizon's "caller-paid information services" under the terms of its tariff. *See* US LEC Local Exchange Tariff, Section 4, Original Page 1 (Hearing Exh. VZ-4). Indeed, the ALJ recognized that "US LEC acknowledged the existence of

a billing issue." The separate trunking requirement is intended to ensure that Verizon can continue accurately to account for and to control such traffic. Since US LEC does not permit its customers to place such calls, it can have no legitimate objection to the clarified language in Verizon's Best and Final Offer – and, indeed, US LEC did not object to that clarified language in its opening brief before the ALJ.

Even if the ALJ were not inclined to accept Verizon's proposed language, it was plainly erroneous for him to accept US LEC's proposed language because there was *no* evidence in the record to support it. To the contrary, US LEC's witness – testifying after the initial petition was filed – made clear that US LEC sought to delete the language at issue, not to modify it. Montano Direct at 15:11-12 ("The Commission should . . . direct that Section 5.3 of the Additional Services Attachment to the Agreement *should be deleted.*") (emphasis added).

The language that the ALJ adopted invites abuse. That language distorts the original language of Verizon's proposal, which requires a CLEC that chooses to permit its customers to originate Voice Information Services traffic to pay all bills incurred for such calls, even if the CLEC cannot collect from their customers. To illustrate, if US LEC permitted its customers to make calls to Verizon 976 numbers (as noted, it does not), Verizon would have no way to collect compensation for such calls from US LEC's customers. Accordingly, under Verizon's proposal, US LEC need not send such traffic to Verizon, but if it does, it must send such traffic over a separate trunk and, in the absence of a signed billing agreement, it must agree to pay the charges that its customers incur.

It is one thing to impose that requirement in the context of Verizon's proposal, which makes clear that a CLEC need not originate such traffic, imposes a separate trunking requirement so that such traffic can be accurately accounted for, and involves only traffic that is clearly

identifiable by a dedicated NXX code – *e.g.*, 976. It is entirely another to adopt the language in the Recommended Decision, which provides no mechanism for control of traffic, does not explain how the CLEC will identify such traffic or clearly delineate the parties' obligations, and that would risk exposing Verizon to abusive claims.

Suppose, for example, that a carrier like US LEC found a client willing to establish a $.50 per minute astrology information line. Suppose further that US LEC set up mechanical dialers in a horse barn to originate calls – over lines purchased from Verizon – for the purpose of racking up charges. US LEC might attempt to collect the charges incurred from Verizon, claiming that the provision at issue authorized the scam. To be sure, such an arrangement would be unlawful, but it might (perhaps in less egregious form) be difficult to detect. Moreover – unfortunately – the scenario is not as far-fetched as it might sound: US LEC itself has been found by another state commission to have perpetrated a similar scheme.[36]

Accordingly, even if the Commission were inclined to accept the ALJ's finding that Verizon failed to carry its burden of proof on the separate trunking issue – and it should not – it should simply delete the proposed language at the risk of inviting serious abuse in the future.

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[36] *See* Order, *BellSouth Telecommunications, Inc. v. US LEC of North Carolina, Inc.*, Docket No. P-561, Sub 10 (N.C. Utils. Comm'n Mar. 31, 2000) (finding that US LEC and an ISP partner had established connections on the BellSouth network solely for the purpose of generating reciprocal compensation minutes of use); *id.* at 54 (characterizing US LEC's conduct as "perhaps even criminal") (Commissioner Pittman, concurring).

CONCLUSION

For the foregoing reasons, the Commission should reject the ALJ's Recommended Decision on Issues 1, 2, 3, 4, and 6 and adopt Verizon's proposed language.

Respectfully submitted,

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October 3, 2002

CERTIFICATE OF SERVICE

I hereby certify that, on this 3rd day of October 2002, I caused copies of the Exceptions of Verizon Pennsylvania Inc. to be served on the following parties by electronic and overnight mail (unless indicated by an asterisk):

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ORIGINAL

October 3, 2002

Secretary James P. McNulty
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Harrisburg, PA 17101-3265

RE: Petition of US LEC of Pennsylvania, Inc. for Arbitration with Verizon-Pennsylvania Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996
Docket No. A- 310814F7000

SRB

Dear Secretary McNulty:

Enclosed please the original and ten (10) copies, one for time-stamp and return of the Exceptions of US LEC of Pennsylvania, Inc.'s in the above-referenced case.

If you have any questions, please call me.

Very truly yours,

Linda C Smith

Linda C. Smith

LCS/sw
Enclosure

cc: Office of Special Assistants
ALJ Cocheres
Wanda Montano
Todd Murphy

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BEFORE THE

PENNSYLVANIA PUBLIC UTILITY COMMISSION

In Re: Petition of US LEC of Pennsylvania Inc. for Arbitration with Verizon-Pennsylvania Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996	:	**Docket No. A-310814F7000**

EXCEPTIONS OF US LEC OF PENNSYLVANIA INC. TO RECOMMENDED DECISION OF ALJ COCHERES

Pursuant to 52 Pa. Code § 5.533 and 5.535, and the September 17, 2002, Notice from the Commission, US LEC of Pennsylvania Inc. ("US LEC"), by its undersigned counsel, respectfully submits the following exceptions to the Recommended Decision of Administrative Law Judge Louis G. Cocheres ("ALJ") in this matter.

US LEC agrees with the Recommended Decision of ALJ Cocheres with respect to Issues 1, 2, 3, 4 and 6. With respect to Issues 5 and 9, however, as demonstrated below, and in US LEC's Opening and Reply Briefs, there is insufficient evidence in the record to support the ALJ's Recommended Decision. Indeed, as we will demonstrate below, the *only* evidence in the record, supports the position advocated by US LEC on both issues. The Pennsylvania Public Utility Commission ("Commission") should adopt the Recommended Decision on Issues 1, 2, 3, 4 and 6 and reject the Recommended Decision and adopt the positions advocated by US LEC on Issues 5 and 9.

Exception 1: Record Evidence and Judge Cocheres' Legal Analysis Support US LEC's Position On Issue 5 that the Term "Terminating Party" Should Be Used Consistently Throughout the Agreement

Issue 5 presented the question of whether the phrase "terminating party" or "receiving party" should be used for purposes of traffic measurement and billing over interconnection trunks. US LEC advocated the view that the traditional nomenclature "terminating party" should

be used; in contrast, Verizon argued to replace that with the phrase "receiving party." US LEC presented evidence on the custom and practice in the industry and argued that Verizon sought to game the system in an effort to avoid its compensation obligations for ISP traffic in the event the FCC ultimately concluded that traffic did, indeed, terminate at the ISP. Verizon presented no evidence at all. Instead, Verizon merely argued in its briefs its view that the phrase "receiving party" more accurately described traffic destined for ISPs.

In resolving Issue 5, Judge Cocheres adopted a portion of US LEC's position, but modified it by recommending that the parties use the term "other party" rather than "terminating party" or "receiving party" in Sections 2.56 of the Glossary and Section 2.1.2 of the Interconnection Attachment—the sections that deal specifically with ISP-bound traffic. US LEC takes exception to this recommendation and requests that the Commission adopt US LEC's position in its entirety and direct the parties to use "terminating party" in those sections as well as all other relevant sections of the Agreement.

As Judge Cocheres found, US LEC's testimony that the term "terminating party" is an industry standard was uncontradicted. Recommended Decision at 27. Judge Cocheres' analysis of the FCC decisions cited by Verizon also supports US LEC's position that the FCC consistently uses the phrase "terminating party," even when the terminating party's customer is an ISP. Recommended Decision at 27-28. Departing from this cogent analysis, Judge Cocheres inexplicably begins the explanation of his recommendation by implying that US LEC's proposed language refers to the *ISP* as the "terminating party." This is simply incorrect. As is readily apparent from the language of the sections of the proposed Agreement, the "terminating party" is either US LEC or Verizon, and, as Judge Cocheres found, the FCC had no problem distinguishing between "terminating parties" and ISPs. By ordering the use of "other party," the

Commission would be endorsing a distinction that neither the industry nor the FCC has ever made.

Second, US LEC respectfully disagrees with Judge Cocheres' statement that use of "other party" will not give Verizon "an alleged advantage in the continuing fray regarding reciprocal compensation." Section 251(b)(5) and the FCC's rules implementing reciprocal compensation all use "terminating" to refer to the LEC entitled to reciprocal compensation, or "termination" to refer to the functions a LEC performs that entitle it to reciprocal compensation. If the contract does not use "terminating party" in only those sections that deal with ISP-bound traffic, it could give Verizon an advantage in any subsequent litigation. In short, it does not matter whether Verizon's preferred "receiving party" or Judge Cocheres' "other party" is used or, for that matter, whether Verizon is willing to accept the phrase "other party." In either case, Verizon gains the advantage it sought initially—removing the word "terminating" from any discussion of the exchange of ISP-bound traffic—in arbitrating this issue.[1]

Finally, Judge Cocheres seems to believe that Section 4 (Applicable Law) of the Agreement will alleviate any advantage the Recommended Decision grants Verizon on this issue by forcing the parties to incorporate any new rules from the FCC. It will not. Given Verizon's litigious history on this issue, it is quite clear that if the FCC changes its views on reciprocal compensation for ISP-bound traffic, such that no FCC rules specific to ISP-bound traffic exist, "Applicable Law" will require reciprocal compensation only for traffic that is originated by one party and terminated by the other. Since the word "terminating" will have been removed from the sections of the agreement discussing the exchange of ISP-bound traffic, Verizon surely will

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[1] *See, e.g., Petition of US LEC of North Carolina Inc. for Arbitration With Verizon South Inc. Pursuant to Section 252(b) of the Telecommunications Act*, Docket No. P-561, Sub 19, Proposed Recommended Arbitration Order of the Public Staff at 7-8 (Sept. 6, 2002) ("Verizon's efforts to substitute the term 'receiving party' appears to be an effort to achieve through linguistics what it has not been able to gain through litigation").

seize the opportunity to argue that "Applicable Law" does not require any compensation for the functions US LEC performs for Verizon and its customers in terminating calls to ISPs. This is certain to result in endless rounds of fruitless negotiation to incorporate the "change in law," followed by years of additional litigation. The Commission should not sanction such a result.

It is noteworthy that Verizon's position on this issue was recently considered and rejected by the South Carolina Public Service Commission in its decision resolving the arbitration between US LEC's and Verizon's South Carolina affiliates.[2] The South Carolina Commission adopted US LEC's position in full and Verizon sought reconsideration, arguing that the Commission's decision failed to take account of Verizon's arguments concerning the question of whether or not traffic terminates at an ISP. In resolving that issue on reconsideration, the South Carolina Commission noted as follows:

> this Commission acknowledged that it, and the FCC, had previously found that traffic destined to ISPs did not terminate at the Internet service provider but continued on to the ultimate Internet destination. However, the Commission also found no compelling reason to change nomenclature to account for that exception. Just as importantly, the Commission recognized that the exception found by the FCC is under review. Should review of the FCC's decision result in reversal of the FCC's decision, the Commission found . . . that it is better to have terms of normal usage in the interconnection agreement rather than new terms which could give rise to interpretation and litigation.[3]

In short, standard industry practice, this Commission's rulings prior to the *ISP Remand Order*, and the FCC precedent cited by Verizon all support adopting US LEC's position and maintaining the use of "terminating party" in each section of the agreement addressing the

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[2] *Petition of US LEC of South Carolina Inc. for Arbitration with Verizon South, Inc., Pursuant to 47 U.S.C. § 252 (b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996*, Docket No. 2002-181-C at 15-17 (SC PSC Aug. 30, 2002) ("*South Carolina Arbitration Decision*") ("This Commission can find no compelling reason in Verizon South's position why its attempt to modify decades of industry practice should be accepted").

[3] *South Carolina Arbitration Decision*, Order On Petition For Clarification and Reconsideration Filed By Verizon South, Inc., at 7 (September 16, 2002).

exchange of traffic. There is no reason to depart from this precedent and order the parties to use either "receiving party" or "other party" in limited sections of the agreement. The Commission should reverse the Recommended Decision and adopt US LEC's position on this issue.

Exception 2: ALJ Cocheres Erred in Ruling That Verizon Should Be Able To Change Non-Tariffed Rates at Any Time During The Life of The Agreement.

Issue 9 deals with whether Verizon should be permitted to change its non-tariffed rates at any time after the execution of the Agreement or if they should remain fixed during the term of the Agreement. US LEC's position is that if it purchases services and/or facilities out of Verizon's tariffs, then it makes those purchases with full knowledge that Verizon can change the rates, terms and conditions upon the filing of an amended or new tariff. US LEC also argued that if it purchases out of the Agreement services and/or facilities for which there was no filed tariff, then those rates should remain fixed for the full term of the Agreement, absent a Commission order entered following a full, generic, cost docket on the services/facilities at issue. Verizon argued that it should have the right to change its non-tariffed rates at any time during the life of the Agreement by simply filing a tariff, even after the Agreement had been signed and approved.

Judge Cocheres resolved this issue by adopting Verizon's position. In his view, US LEC's position was internally inconsistent. Recommended Decision at 48. He could see no difference between participating in a proceeding to change a tariffed rate and participating in a proceeding to replace a non-tariffed charge. *Id.* There is, in fact, no internal inconsistency because US LEC's position is based on the expectations set by the Agreement, on how rate changes affect US LEC's business plan, and the fundamental principle that US LEC is entitled to negotiate and arbitrate an individualized interconnection agreement with Verizon that includes rates fixed for the term of the Agreement.

First, it is quite clear from the Agreement itself that either party can purchase services or facilities from the other either under the terms of the Agreement or the party's respective tariff. Thus, by way of example, US LEC can purchase transport from Verizon either "pursuant to this

Agreement or an applicable Verizon Tariff . . .." Agreement at § 2.3.1.2 (Interconnection Attachment). Similarly, rates for compensation can be found in either "the Pricing Attachment, [or] an applicable Tariff . . .." *Id.* at § 6.1.1 (Interconnection Attachment).

If US LEC makes a business decision and elects to purchase a service or facility out of a tariff, it does so on the expectation that Verizon can increase the rates charged for that service or facility by filing a new/amended tariff that will take effect within thirty (30) days of filing unless the Commission acts during that period either on the merits of the filing or to extend the thirty day period by another thirty days. 52 Pa. C.S.A. §53.59(f)(2).[4] On the other hand, US LEC also believes that it is entitled to purchase a service or facility (for which there may or may not be a filed tariff) out of the Agreement for a fixed price that will not change during the term of the Agreement. In fact, some of the rates the parties have incorporated in the Agreement explicitly refer to a Verizon tariff as the source for the rate and others include a fixed rate in the Agreement with no reference to a tariff. There are any number of reasons why US LEC would agree to a tariffed price in one instance but want a fixed price in another, including general certainty in business planning or the importance of a particular service at a particular rate to US LEC's business plan.

The difference in expectations also is reflected in that provision of the Agreement which provides that it cannot be "waived or modified except by a written document that is signed by the Parties." Agreement at §1.3. However, either party "shall have the right to add, modify, or withdraw, its Tariff(s) at any time, without the consent of, or notice to, the other Party." *Id.* Thus, the question here is whether Verizon can change US LEC's expectations as to the prices it will pay for services by being able to replace negotiated rates (for which there is no tariff on file)—which otherwise cannot be changed except by agreement of the parties, or upon valid commission order—with tariffed rates/charges anytime it chooses.

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[4] In the event of a rate reduction, the new rate becomes effective ten (10) days after filing if the Commission takes no action within that ten day period. 52 Pa. C.S.A. §53.59(f)(1).

Sections 251 and 252 establish a process for negotiations and arbitration of interconnection agreements. Nowhere in Sections 251 or 252 did Congress provide for one party to set unilaterally the terms of interconnection pursuant to tariff. As the FCC has recognized, "[u]sing the tariff process to circumvent the section 251 and 252 process cannot be allowed."[5] The fact that US LEC has an *opportunity* to participate in the tariff process does not change the fact that permitting a tariff to supercede a negotiated or arbitrated provision of an agreement undermines the purpose and utility of individually negotiated/arbitrated agreements. First, by forcing US LEC to participate in the tariff process, Verizon avoids the give-and-take of the negotiation process, thereby depriving US LEC of any bargaining power it possesses with respect to that particular rate. Second, by requiring that tariffed rates automatically supercede negotiated rates, Verizon may actually be undoing a trade-off that was bargained for in the negotiating process. Taken to its extreme, this ruling could permit Verizon to completely undo all negotiated/ arbitrated interconnection agreements for all CLECS with whom it has an Interconnection Agreement by filing tariffs that supercede any individually negotiated rates. In short, adopting Verizon's proposal to replace all rates in the Agreement with tariffed rates undermines the Telecommunications Act's Interconnection Agreement framework as well as US LEC's right to negotiate a fixed rate and US LEC's bargaining power in negotiating subsequent changes to the Agreement. US LEC therefore urges the Commission to reject the Recommended Decision on Issue 9 and adopt US LEC's position instead.

Here, too, the South Carolina Commission considered and rejected Verizon's position, adopting US LEC's position in full. Responding to Verizon's argument that rate changes are not accomplished unilaterally, but only after consideration by the Commission, the South Carolina PSC held as follows:

> We find that Verizon South's position fails to recognize the considerable burden, both in terms of financial cost and in diversion of personnel whose resources would otherwise be devoted to more pressing matters, that is placed on CLECs to

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5 *Bell Atlantic v. GlobalNAPs*, 15 FCC Rcd 12946, ¶ 23 (1999) (subsequent history omitted).

> dispute a particular rate proposal. The entire process undermines the purpose of having a binding interconnection agreement that provides relative pricing certainty to the parties in the first instance. (citation omitted) . . . US LEC's position recognizes that the parties will enjoy the 'benefits of their bargain' for the term of the agreement except in those instances where changes in rates are required to be modified due to changes in applicable law.[6]

This reasoning is equally persuasive here. The Commission should reject the ALJ's Recommendation with respect to Issue 9 and adopt US LEC's position.

Conclusion

US LEC urges the Commission to adopt the Recommended Decision with respect to Issues 1, 2, 3, 4, and 6. However, ALJ Cocheres erred as a matter of fact and law in his Recommended Decision with respect to Issues 5 and 9. As to those issues, US LEC respectfully asks the Commission to reject those portions of the Recommended Decision and, instead, to adopt the positions advocated by US LEC.

Respectfully submitted,

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Dated: October 3, 2002

[6] *South Carolina Arbitration Decision* at 32-33.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the participants listed below via electronic and first class mail.

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Linda C. Smith

Dated: October 3, 2002

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DATE: October 17, 2002

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OCT 17 2002

TO: Cheryl W. Davis, Director
Office of Special Assistants

FROM: James McNulty
Secretary
nvl

Petition of US LEC of Pennsylvania, Inc., for Arbitration with Verizon Pennsylvania, Inc., Pursuant to Section 252 (b) of the Telecommunications Act of 1996.

Copies of the Recommended Decision have been served upon all parties of interest.

Exceptions have been filed by:

US LEC of Pennsylvania Inc
Verizon Pennsylvania Inc

Reply Exceptions have been received from:

cc: Susan Hoffner, ALJ