BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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<tr><td>FOCAL COMMUNICATIONS
CORPORATION OF WASHINGTON,

Petitioner,

v.

VERIZON NORTHWEST INC.

Respondent.</td><td>)
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Docket No. UT-013019

VERIZON NORTHWEST'S BRIEF IN
RESPONSE TO ISSUES RAISED
BY THE COMMISSION

June 21, 2001</td></tr>
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Verizon Northwest Inc. ("Verizon Northwest") submits the following brief on the six sets of issues posed by this Commission in its April 26, 2001 Prehearing Conference Order in this matter, as amended on May 8, 2001.

The main issue in this case really is compensation for Internet traffic. Petitioner Focal Communications Corporation of Washington ("Focal") requests this Commission to require Verizon Northwest to make its sister company's North Carolina Time Warner Agreement available for adoption in Washington in its entirety. Focal essentially wants to adopt the Agreement's reciprocal compensation provisions as they pertain to Internet traffic.

Focal's claim to be entitled to adopt a North Carolina agreement in Washington is based solely upon provisions in the FCC's Order approving the merger of Bell Atlantic Corporation and GTE Corporation (which, in turn, resulted in the formation of Verizon Communications). Reciprocal compensation provisions, however, clearly fall outside the scope of the Bell Atlantic/GTE Merger Conditions for the reasons stated below. Consequently, the North Carolina

Time Warner Agreement's reciprocal compensation provisions are not available for adoption in Washington. The FCC's recent *Order on Remand* further supports this position.

Verizon Northwest is ready and willing to work out the particulars of an appropriate interconnection agreement with Focal to the extent required by law. It is not opposed to Focal's interstate MFN adoption of qualifying terms. On the contrary, it opposes merely the interstate MFN adoption of terms that are not available – i.e., reciprocal compensation for ISP-bound traffic. Since Focal cannot adopt the North Carolina Time Warner Agreement's reciprocal compensation terms in this regard, its Petition must be denied.

A. The FCC's *Order on Remand* Divests this Commission of Authority Over Rates and Ratemaking For ISP-Bound Traffic.

<u>Issue No. 5.</u> The FCC's *Order on Remand* divests this Commission of any authority over rates and ratemaking for ISP-bound traffic.[1] As the FCC stated, "[b]ecause we now exercise our authority under Section 201 to determine the appropriate inter-carrier compensation for ISP-bound traffic, however, *state commissions will no longer have authority to address this issue*."[2] This Commission's authority with respect to interconnection agreements derives from

[1] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, CC Docket No. 99-68 (rel. April 27, 2001) ("*Order on Remand*") (Exhibit A).

[2] *Id.*, ¶ 82 (emphasis added). In addition, this Commission is preempted because any regulations for ISP-bound traffic proposed by this Commission would be in actual conflict with the FCC's rate regime and the FCC's findings as to what is in the public interest. In the *Order on Remand*, the FCC tentatively found that "a bill and keep approach" - under which carriers "recover the costs of delivering traffic to ISP customers directly from those customers" - is "likely to be more economically efficient than recovering these costs from originating carriers" because it "is likely to send appropriate market signals and substantially eliminate existing opportunities for regulatory arbitrage." *Id. at* ¶ 67; *accord, id.* at ¶ 6. Adoption by this Commission of an entirely different rate structure in this area would conflict with the FCC's determination that a "bill and keep" regime is most likely to facilitate competitive entry. Moreover, the FCC ordered that carriers that were not exchanging Internet traffic pursuant to an interconnection agreement prior to the adoption of its *Order on Remand* would exchange ISP-bound traffic on a bill and keep basis until further FCC action. *Id.* at ¶ 81. Presumably, were this Commission to establish

(continued . . .)

Section 252(e), which concerns requests for local interconnection, services, or network elements pursuant to Sections 251 and 252. The FCC has determined that rates for ISP-bound traffic, on the other hand, are governed by Section 201, which grants the FCC exclusive jurisdiction, not Section 251(b)(5). Thus, any issues between the parties concerning rates for ISP-bound traffic are governed by Section 201, not Section 251.[3] This Commission therefore does not have the authority to deal with these issues.

B. The Time Warner North Carolina Agreement is a "Pre-Merger Agreement" Under the Merger Conditions.

Issue No. 1 (a)-(b). The North Carolina Time Warner Agreement is a "Pre-Merger Agreement" subject to Paragraph 32 of the GTE/Bell Atlantic Merger Conditions,[4] because it was signed on June 21, 2000 and June 26, 2000 by Time Warner and GTE South, respectively, and because the Certificate of Merger was filed on June 30, 2000.[5]

As the Commission correctly notes, the Merger Order was released on June 16, 2000. Paragraph 32 of the Merger Conditions defines a "Pre-Merger Agreement" as one "voluntarily negotiated by a GTE incumbent LEC with a telecommunications carrier, pursuant to 47 U.S.C. § 252(a)(1), *prior to the Merger Closing Date* . . ."[6] The Merger Closing Date, in turn, "means

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its own rate regime for ISP-bound traffic, it would expect those rates to be incorporated into any new interconnection agreements. Here, again, there would be an actual conflict between the FCC's regulations and this Commission's.

[3] *Id.* at ¶ 82.

[4] *See In re GTE Corporation, Transferor and Bell Atlantic, Transferee, for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations,* CC Docket No. 98-184, FCC 00-221, Memorandum Opinion and Order, Appendix D (June 16, 2000) ("Merger Order" or "Merger Conditions," as appropriate) (Exhibit B). *See also* Merger Conditions, ¶ 32.

[5] *See* Certificate of Merger of Beta Gamma Corporation with and into GTE Corporation Under Section 904 of the Business Corporation Law (dated June 30, 2000) (Exhibit C).

[6] *See* Merger Conditions, ¶ 32 (emphasis added).

the day on which, pursuant to their Merger Agreement, Bell Atlantic and GTE cause a Certificate of Merger to be executed, acknowledged, and filed with the Secretary of State of New York as provided in New York Corporation Law, Section 907."[7] As noted above, that date was June 30, 2000. Accordingly, the parties voluntarily negotiated – and executed – the Time Warner Agreement prior to the June 30, 2000 Merger Closing Date. The Time Warner Agreement therefore is a Pre-Merger Agreement.

C. The Merger Conditions' Out-Of-State Adoption Requirement Applies Only To Interconnection Arrangements Under Section 251(c), Which Does Not Include Reciprocal Compensation.

Issue No. 2 (a), (c). In Paragraphs 31 and 32 of the Merger Conditions, the FCC intended that incumbent local exchange carriers ("ILECs"), including Verizon Northwest, make available for adoption by third-party carriers particular provisions in their existing interconnection agreements. Specifically, Verizon Northwest must make available for adoption, "any . . . provisions of an interconnection agreement (including the entire agreement) *subject to 47 U.S.C. § 251(c)* . . .[8] In short, the FCC intended ILECs to make available any and all terms that have been mandated by 47 U.S.C. § 251(c).[9] Excluded, therefore, from the category of "adoptable" terms are those obligations – including those contained in Section 251(b)(5) – that fall outside the scope of Section 251(c). As noted above, moreover, the FCC's *Order on Remand* has

[7] *Id.*, "Conditions" Section.

[8] *See* Merger Conditions, ¶¶ 31, 32 (emphasis added).

[9] The condition also applies to certain FCC decisions cited in Paragraph 39 of the Merger Conditions, which do not involve reciprocal compensation. The Order also lists six specific items that are excluded from the Conditions. For example, pricing must be state-specific; it cannot be imported from one state to another under the Conditions.

determined that ISP-bound traffic does not even fall within the ambit of Section 251 of the Act.[10] Thus, the Merger Conditions categorically do not provide for interstate MFN of terms related to reciprocal compensation for ISP-bound traffic.

The term “interconnection arrangement,” for purposes of adoption under the Merger Conditions, therefore, does not include all of the “arrangements” in a particular interconnection agreement. Under the plain language of Paragraphs 31 and 32 of the Merger Conditions, only those arrangements subject to Section 251(c) need be made available. The FCC accordingly makes reference to “*qualifying* interconnection arrangements and UNEs” in Paragraphs 31 and 32 as a shorthand for those arrangements.[11]

The FCC would not have created a distinction between “qualifying” interconnection arrangements and interconnection arrangements generally if it intended that *all* of the terms of a given agreement encompassing *all* of the arrangements contained therein could be adopted by a third-party carrier. The FCC language is unequivocal: certain arrangements contained within an interconnection agreement were *eligible* for adoption, while others – such as Section 251(b)(5) reciprocal compensation provisions – were not. Had the FCC intended for an outside carrier to be able to adopt all of the terms of an interconnection agreement without limitation, it simply would have said so. It did not. “Qualifying” or “eligible” interconnection arrangements, therefore, must be understood as something other than the broader category of interconnection arrangements generally, of which qualifying arrangements are but a subset.

[10] *See* Order *on Remand* at ¶¶ 4, 34, 39, 44.

[11] *See* Merger Conditions, ¶¶ 31, 32 (emphasis added).

Although all arrangements in an interconnection agreement might be characterized as "interconnection arrangements," the Merger Conditions require that all provisions falling outside the purview of Section 251(c) and Paragraph 39 (in addition to those specifically excepted) may be seen as "disqualified" interconnection arrangements. These "disqualified" interconnection arrangements need not be made available for Section 252(i) adoption.

Furthermore, that the Merger Conditions' out-of-state adoption provisions apply only to interconnection arrangements under Section 251(c) is demonstrated by still other facts. The Merger Conditions are a slightly modified version of those adopted in connection with the SBC/Ameritech Merger. For example, the genesis of the MFN Conditions in Paragraph 32 of the Merger Conditions involved here was Paragraph 43 of the SBC/Ameritech Merger Conditions. The latter, however, allowed interstate adoption of any "interconnection arrangement or UNE."[12] That agreement contained no reference to Section 251(c). Nevertheless, when the SBC/Ameritech Merger Conditions were revised to apply to provisions of interconnection agreements (rather than just interconnection arrangements and UNEs), the reference to Section 251(c) was added to make clear that the provisions that are covered are those that are the subject of Section 251(c).

That makes good sense. The reference to Section 251(c) makes clear, for example, that resale arrangements under Section 251(c)(4) are covered, but still "cabins" the scope of the conditions to the core requirements of Section 251(c). Otherwise, provisions of interconnection agreements that are wholly unrelated to interconnection but are included in a single agreement

[12] *See* SBC/Ameritech Conditions, 14 FCC Rcd 14712, App. C, ¶ 43 (1999).

for convenience – including even non-telecommunications matters, such as information services or even the purchase of a used truck – would suddenly become subject to an MFN obligation for the first time.

Even if the Merger Order was not so clear, the result would be the same. This Commission is obligated to interpret any ambiguities in the Merger Conditions in a manner consistent with sound public policy. To that end, the FCC has long been concerned about the economic inefficiencies of paying reciprocal compensation for ISP-bound traffic. In fact, the FCC in its *Order on Remand* found overwhelming evidence that paying CLECs the much higher reciprocal compensation rate for Internet traffic has "created opportunities for regulatory arbitrage and distorted the economic incentives related to competitive entry into the local exchange and exchange access markets."[13] CLECs were not competing based on their "ability to provide efficient and quality services to ISPs."[14] Rather, they used ISP customers as a means "to reap an intercarrier compensation windfall."[15] Paying CLECs reciprocal compensation for delivering ISP-bound traffic gives them a strong disincentive to serve residential and small business customers because those customer groups originate the vast majority of dial-up ISP-bound calls (large corporations generally do not use dial-up access). For these reasons, the FCC created "an interim compensation mechanism"[16] designed to "produce meaningful reductions in

[13] *See Order on Remand* at ¶ 2.

[14] *Id.* at ¶ 86.

[15] *Id.*

[16] *Id.* at ¶ 67.

intercarrier payments"[17] and to impose "a standstill on any expansion of the old compensation regime."[18]

In short, even if the Merger Conditions out-of-state adoption provisions did not apply only to interconnection arrangements under Section 251(c) – which they do – allowing Focal to adopt the North Carolina Time Warner Agreement's reciprocal compensation provisions would only "expand" the old compensation regime, contrary to public policy.

D. Language From the FCC's Merger Order Should Not Be Taken Out of Context.

Issue No. 2 (b). The FCC's use of the parenthetical phrase ("including the entire agreement") can be squared with the phrase "subject to 47 U.S.C. 251(c)" in Paragraphs 31 and 32. First, the parenthetical phrase must be read in context. Under Paragraphs 31 and 32 of the Merger Conditions, Verizon ILECs must make available for adoption, "any . . . provisions of an interconnection agreement (including the entire agreement) *subject to § 47 U.S.C. 251(c)* . . ."[19] In short, Verizon Northwest has an obligation to make a sister company's "entire" ***251(c)*** interconnection agreement available for adoption. For the reasons previously stated, disqualified interconnection arrangements – such as reciprocal compensation provisions required by Section ***251(b)(5)*** – fall outside this obligation.

Divorcing the parenthetical phrase from the rest of the sentence would make all of the provisions included in an interconnection agreement subject to adoption, even if individual arrangements were entirely unrelated to the requirements of Section 251(c). Such a reading

[17] *Id.* at ¶ 84.

[18] *Id.* at ¶ 81.

would render the references to that Section in the Merger Conditions a nullity. It also would render meaningless the FCC's repeated distinction between "qualifying" interconnection arrangements and interconnection arrangements generally.

Second, the language ("including the entire agreement") cannot be read disconnected from the reference to Section 251(c). The FCC describes in both Paragraphs 31 and 32 of the Merger Conditions six explicit types of "disqualified" interconnection arrangements (e.g., state-specific pricing mechanisms, state-specific performance standards, specific contract terms adopted as a result of state arbitrations, and so forth) that do not qualify for adoption. These six exceptions are in addition to all other "disqualified" interconnection arrangements implied by those same Paragraphs, – i.e., those arrangements that do not fall within the scope of Section 251(c) or Paragraph 39. When the FCC refers to an "entire" agreement, therefore, it refers only to all of the qualifying arrangements contained in that agreement. The FCC used the word "entire" as emphasis to express its intention that Verizon Northwest had to make all of its ***qualifying*** terms available to third-party carriers. It does not require Verizon Northwest to provide third parties with all, including disqualified, terms of an interconnection agreement for adoption. Such an interpretation is inconsistent with the reference to Section 251(c).

Finally, the absence of the parenthetical phrase, "including the entire agreement," in Paragraph 32 subpart (2) does not indicate anything about the FCC's intent. If the Commission gives the omission of this parenthetical phrase any weight, however, it would work in Verizon Northwest's favor. If this Commission believes (1) that Verizon Northwest is otherwise

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[19] *See* Merger Conditions, ¶¶ 31, 32 (emphasis added).

obligated to allow Focal to adopt all of the terms of the Time Warner Agreement in view of that parenthetical phrase; and (2) that the FCC did not draw a distinction between "qualifying" interconnection arrangements and interconnection arrangements generally, then the absence of the parenthetical phrase in Paragraph 32 would only mean that that Verizon Northwest could provide something less than the entire interconnection agreement to third-party carriers in Section 252(i) adoptions (especially where, as here, the interconnection agreement in issue is a Pre-Merger Agreement). This interpretation would confirm, not negate, Verizon Northwest's position that Section 251(c) limits the scope of interconnection arrangements that must be provided to a requesting third-party carrier under the Merger Conditions.

E. Paragraph 300 and Footnote 686 of the Bell Atlantic/GTE Merger Order Support Verizon Northwest's Position.

<u>Issue No. 2 (d), (e).</u> Paragraph 300 of the Merger Order and accompanying Footnote 686 do not affect the interpretation of Paragraphs 31 and 32 of the Merger Conditions. On the contrary, it is the other way around. For the reasons stated in response to Issue No. 2(a)-(c), the meaning of the language in both Paragraphs is clear: Verizon Northwest must offer for adoption to third-party carriers only *qualifying* interconnection arrangements included in a sister company's interconnection agreement. Those qualifying interconnection arrangements have been further defined by Paragraphs 31 and 32 as including just those terms mandated by Section 251(c). Consequently, the term "entire interconnection agreements" used in Footnote 686 must be understood in its proper context. Given the limitations the FCC imposed in the Merger Conditions on the adoption of interconnection terms, "entire" means that all ***qualifying*** interconnection arrangements must be made available. Reciprocal compensation provisions included pursuant to Section 251(b)(5), among others, fall outside that obligation. Moreover, the statement "or selected provisions from them" merely highlights the fact that a third party can adopt either (1) an "entire" interconnection agreement as qualified, or (2) a particular provision from such a qualified agreement.

Assuming arguendo that the "last antecedent rule" did somehow apply in this proceeding, it would work in Verizon Northwest's favor.[20] Footnote 686 first makes reference to "out-of-region and in-region agreements."[21] It then goes on to define those agreements as "entire interconnection agreements or selected provisions from them."[22] The word "entire" in the phrase "entire interconnection agreements" clarifies that "out-of-region and in-region agreements" include "entire" agreements – *again, as qualified by Section 251(c) and Paragraph 39 of the Merger Conditions.* They also include selected, qualifying provisions from those "entire" agreements where appropriate. In short, the phrase clarifies that Verizon Northwest need only provide for adoption those terms falling within the purview of Section 251(c) and Paragraph 39.

F. Paragraphs 31 and 32 of the Merger Conditions Rest on Policy Considerations That Support the Denial of Focal's Application.

Issue No. 2(f). Paragraphs 31 and 32 of the Merger Conditions show that the FCC rejected the "one size fits all" approach that Focal advances. The FCC specifically provided for exceptions to the agreement terms that Verizon Northwest has to make available for Section 252(i) adoption in order to take into consideration state-specific variations. The FCC also

[20] The FCC's Merger Order and Merger Conditions are not statutes, and they do not involve any action by a legislature. The "last antecedent rule" usually applies to statutes only. *See Enterprise Leasing, Inc. v. City of Tacoma*, 139 Wash.2d 546, 552, 988 P.2d 961, 964 (1999) ("The fundamental object of statutory interpretation is to ascertain and give effect to the intent of the *legislature*, which is done by 'first looking to the plain meaning of the words in the *statute*.'") (emphasis added).

[21] *See* Merger Order, ¶ 300, fn. 686.

[22] *Id.*

limited the types of interconnection arrangements available for adoption to those – "subject to § 251(c)." In so doing, the FCC recognized that if a third-party carrier from one state (such as Washington) were to adopt an interconnection agreement first implemented in another state (such as North Carolina), certain terms and provisions that were appropriate for North Carolina might not be appropriate in Washington. In a word, the FCC rejected a "one size fits all" approach. The FCC recognized that those excepted categories would have to be negotiated by the contracting parties themselves, with an eye toward the controlling legal authority in the adoptive state.

As noted throughout this proceeding, Focal's interest in adopting the North Carolina Time Warner Agreement *in toto* mostly has to do with its desire to import that Agreement's reciprocal compensation language pertaining to ISP-bound traffic. For the reasons previously stated, however, the Merger Conditions do not entitle Focal to do so because those provisions are subject to Section 251(b)(5) – not Section 251(c). Furthermore, and as noted previously, the FCC's *Order on Remand* preempts any state commission action in this area.[23]

Although the FCC based its *Order on Remand* on a straightforward construction of the terms of the Act, it also explained that its interpretation was buttressed by the fundamental public policy objectives underpinning the Act – namely, promoting competition. The FCC resoundingly confirmed that ISP reciprocal compensation provides an unwarranted "windfall" for new entrants serving ISPs.[24] Indeed, imposing supposedly "reciprocal" compensation on the one-way flow of

[23] *See Order on Remand* at ¶ 82.

[24] *Id.* at ¶ 70.

traffic to ISPs generates an enormous revenue flow for carriers that sign up ISPs as their customers. As the FCC explained:

> [T]his led to classic regulatory arbitrage that had two troubling effects: (1) it created incentives for inefficient entry of LECs intent on serving ISPs exclusively and not offering viable local telephone competition, as Congress had intended to facilitate with the 1996 Act; (2) the large one-way flows of cash made it possible for LECs serving ISPs to afford to pay their own customers to use their services, potentially driving ISP rates to consumers to uneconomical levels.[25]

The FCC was thus "convinced" that "intercarrier payments for ISP-bound traffic have created severe market distortions."[26] In particular, the FCC found that the "record is replete with evidence that reciprocal compensation provides enormous incentive for CLECs to target ISP customers."[27]

The FCC determined that ISP reciprocal compensation had so severely distorted incentives that "some ISPs even seek to become CLECs in order to share in the reciprocal compensation windfall, and, for a small number of entities, this revenue stream provided an inducement to fraudulent schemes to generate dial-up minutes."[28] Even worse, the agency explained that "viable, long-term competition among efficient providers of local exchange and exchange access services cannot be sustained where the intercarrier compensation regime does

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[25] *Id.* ¶ 21.

[26] *Id.* ¶ 76.

[27] *Id.* ¶ 70.

[28] *Id.*

not reward efficiency and may produce retail rates that do not reflect the costs of the services provided."[29]

As mentioned above, to put an end to these market distortions, the FCC exercised its rulemaking authority under Sections 251(g) and 201 to establish new compensation standards to govern the exchange of ISP-bound traffic in the future.[30] Section 251(g) provides that, for the enumerated services, the restrictions and obligations in effect on the date of enactment should apply "until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission."[31] The section thus expressly recognizes the authority of the FCC to establish new rules governing the services listed in the section. In the Order on Remand, the FCC distinguished between carriers already exchanging ISP-bound traffic with incumbents under existing interconnection agreements and carriers seeking to establish such interconnection arrangements for the first time. For the former, the FCC decided to soften the shock of putting a halt to the ISP reciprocal compensation gravy train by establishing a transitional regime that specifies maximum rates of compensation that will be gradually reduced over time until the Commission adopts a permanent system that eliminates all reciprocal compensation payments, most likely "bill and keep" – that is, a system in which each carrier simply bills its own customers and no compensation changes hands between the carriers.[32]

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[29] *Id.* ¶ 71.

[30] In fact, the FCC appeared to suggest that it intended its statutory construction to apply only prospectively. *See Order on Remand* at ¶ 82.

[31] *See* Section 251(g).

[32] *See Order on Remand* ¶¶ 77-79. The FCC issued a notice of proposed rulemaking to consider the exact parameters of the new system that should apply, but announced its initial conclusion that bill and keep would be the best solution. *See Developing a Unified Intercarrier Compensation Regime,* CC Docket No. 01-92, Notice of Proposed Rulemaking, FCC 01-132, 2001 WL 455872 (rel. April 27, 2001).

For situations "where carriers are not exchanging traffic pursuant to interconnection agreements prior to adoption of this Order (where, for example, a new carrier enters the market or an existing carrier expands into a market it previously had not served)," the FCC determined that "a different rule applies."[33] In those cases, to prevent the distortions caused by ISP reciprocal compensation from infecting *new* interconnection arrangements, the FCC directed that bill and keep should apply to such traffic *immediately* upon the effective date of the Order.[34]

G. "Specific Performance Measures" Means Performance Measures Other Than Those Contained in the Bell Atlantic/GTE Merger Order.

Issue No. 3. The "specific performance measures" referenced in Paragraphs 31 and 32 are performance measures (also known as metrics), other than those included in the Merger Order, that are state-specific or CLEC-specific.[35] Recognizing that performance standards depend on state-specific systems, personnel, and competitive situations, the FCC provided that performance standards could not be adopted "out-of-region." This Commission has not adopted any specific performance measures in Washington. Verizon Northwest nevertheless provides the FCC's Merger Order performance standards to all CLECs in this state. The fact that the FCC decided not to allow CLECs to adopt performance standards out of region underscores Verizon Northwest's argument that Focal is not entitled to adopt the North Carolina Time Warner Agreement *in toto*.

H. This Commission Should Not Give Any Weight to the Common Carrier Bureau's Correspondence.

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[33] *Id.* at ¶ 81.

[34] *Id.*

[35] The FCC performance measurements are appended to the Merger Conditions as Attachments A-1a and A-1b. They include OSS response time, OSS availability, Order Confirmation Timeliness, Reject Timeliness, Missed Appointments, Installation Quality, and Collocation Performance, among others. (Exhibit B at Pages 76-77).

Issue No. 4. The letter from the FCC's Common Carrier Bureau, CC Docket No. 98-184, DA 00-2890 (December 22, 2000), does not control the Commission's decision in this case.[36] As noted in Verizon Northwest's Answer to Focal's Petition, the FCC has not definitively ruled that Verizon Northwest must allow Focal to adopt in Washington each and every provision of the North Carolina Time Warner Agreement. Verizon Northwest is seeking clarification of the letter, and Focal is participating in that process as well.[37]

The FCC recently took action to settle the meaning of the Merger Condition language. On April 10, 2001, the FCC issued a Notice of Inquiry on the precise adoption issues discussed in the advisory letter.[38] Comments were due on April 30, 2001 and replies were due by May 14, 2001. This Commission should wait for the FCC to act before ruling upon Focal's Petition.[39] This would avoid the time and expense of having to relitigate the issues if this Commission reaches one conclusion and the FCC reaches another.

I. The Commission Should Not Make the North Carolina Time Warner Agreement Available to Focal As a Matter of Law or Policy Because the Law Prohibits Such Action.

[36] *See* Focal Petition, Exhibit D.

[37] *See* Verizon's Motion to Dismiss from Expedited Review and in the Alternative Answer to Petition for Enforcement of Section 252 (i) and Motion to Transfer to a Non-Expedited Docket and Request for Mediation, Docket No. UT-013019, Exhibits A and B.

[38] *See* Open Proceedings, Federal Communications Commission, 2001 FCC LEXIS 1977, *10 (April 10, 2001). (Exhibit D).

[39] In any event, for the reasons previously stated, whatever the FCC does will have no impact on the fact that Focal cannot adopt the North Carolina Time Warner Agreement's reciprocal compensation provisions as they pertain to ISP-bound traffic.

<u>Issue No. 6.</u> This Commission may not lawfully require Verizon Northwest to make the North Carolina Time Warner Agreement available to Focal in its entirety. For the reasons stated above, the FCC's Bell Atlantic/GTE Merger Order and Merger Conditions are clear: Verizon Northwest need only make available for adoption those interconnection arrangements contained within a particular interconnection agreement that are subject to Section 251(c). Reciprocal compensation provisions, as described within Section 251(b)(5), clearly fall outside that obligation. The FCC's *Order on Remand*, moreover, has definitively addressed compensation for ISP-bound traffic.

CONCLUSION

For the foregoing reasons, Focal's Petition should be denied in its entirety.

DATED this _____ day of June, 2001.

Respectfully submitted,

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By Its Attorneys

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