BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

FOCAL COMMUNICATIONS CORPORATION OF WASHINGTON,	)	Docket No. UT-013019
Petitioner,	)	
v.	)	VERIZON NORTHWEST'S BRIEF IN REPLY TO INITIAL BRIEF OF FOCAL COMMUNICATIONS CORPORATION OF WASHINGTON
VERIZON NORTHWEST INC.	)	
Respondent.	)	July 6, 2001

INTRODUCTION

Verizon Northwest Inc. ("Verizon Northwest") submits the following brief in reply to the Initial Brief of Focal Communications Corporation of Washington ("Focal") on the six sets of issues posed by this Commission in its April 26, 2001 Prehearing Conference Order, as amended on May 8, 2001. The parties appear to agree that the only real bone of contention between them is whether or not Focal should be able to "opt in" to the North Carolina Time Warner Agreement's compensation provisions as they pertain to Internet-bound traffic. Contrary to Focal's arguments, however, it is not entitled to those provisions for three independent reasons: (1) the FCC's *Order on Remand*; (2) the FCC's Merger Order and Merger Conditions (which Verizon accepted voluntarily); and (3) the Time Warner Agreement itself. In fact, both the FCC's *Order on Remand* and the Merger Order and Merger Conditions preclude Focal from insisting on such an adoption.

This Commission should deny Focal's request to adopt the Time Warner Agreement's provisions pertaining to compensation for Internet-bound traffic. Although under no circumstances is Focal entitled to compensation for Internet-bound traffic pursuant to any local interconnection agreement, the proper course for Focal to pursue is either to negotiate any other

interconnection terms with Verizon Northwest or to adopt any other interconnection terms from another Verizon Northwest Washington interconnection agreement pursuant to Section 252(i) of the Telecommunications Act of 1996 (the "Act") and this Commission's Interpretive and Policy Statement.

ARGUMENT

A. The FCC's *Order on Remand* Makes Clear That Internet-Bound Traffic Does Not Fall Within the Scope of Section 251(b)(5) and Thus Does Not Fall Within the Reciprocal Compensation Provisions of Local Interconnection Agreements.

The MFN ("most favored nation") condition set forth in Paragraph 32 of the Merger Conditions on which Focal relies gives the contract adoption provisions of Section 252(i) of the Act limited interstate effect with regard to Verizon incumbent local exchange carriers. The FCC has made clear in its *Order on Remand*, moreover, that the compensation for Internet-bound traffic that Focal seeks is not subject to Section 252(i) adoption.[1] Paragraph 32 explains the relationship between that MFN condition and Section 252(i) of the Act as follows:

> Exclusive of price and state-specific performance measures *and subject to the Conditions specified in this Paragraph*, qualifying interconnection arrangements or UNEs shall be made available to the same extent and under the same rules that would apply to a request under 47 USC § 252(i), provided that the interconnection arrangements or UNEs shall not be available beyond the last date that they are available in the underlying agreement and that the requesting telecommunications carrier accepts all reasonably related terms and conditions as determined in part by the nature of the corresponding compromises between the parties to the underlying interconnection agreement.[2]

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[1] *See Intercarrier Compensation for Internet-Bound Traffic, Order on Remand and Report and Order*, CC Docket Nos. 96-98 and 99-68, FCC 01-131, at ¶¶ 21, 29 (rel. Apr. 27, 2001) ("*Order on Remand*"), attached as Exhibit A to Verizon Northwest's Opening Brief.

[2] *See* Merger Conditions at ¶ 32 (emphasis added), attached as Exhibit B to Verizon Northwest's Opening Brief.

As noted in Verizon Northwest's Opening Brief, while the MFN condition allows carriers to adopt negotiated provisions from other states, it expressly limits those qualifying provisions to those that are "subject to 47 U.S.C.§ 251(c)."[3] Despite this express limitation, Focal rests its entire argument that it should be able to adopt the Time Warner Agreement *in toto* on the proposition that the scope of the MFN condition also extends to matters that are covered by a different part of Section 251 – specifically, the reciprocal compensation requirement in Section 251(b)(5). The *Order on Remand*, however, makes Focal's assertions beside the point.

In that Order, the FCC again confirmed that Internet-bound traffic is not subject to the reciprocal compensation requirements of Section 251(b)(5). As the FCC explained, it has "long held" that enhanced service provider traffic – which includes traffic bound for ISPs – is interstate access traffic.[4] The FCC further held that "the service provided by LECs to deliver traffic to an ISP constitutes, at a minimum, 'information access' under section 251(g)."[5] Consequently, these services are excluded from the scope of the reciprocal compensation requirements of Section 251(b)(5).[6] Therefore, even if the MFN condition were somehow construed (incorrectly) to apply to matters subject to Section 251(b)(5), the *Order on Remand* conclusively establishes that the provision addressing Internet-bound traffic still would not be covered. On the contrary, such

[3] Verizon Northwest notes that both Verizon Northwest and Focal agree that Paragraph 32 of the Merger Conditions governs the MFN adoption Focal seeks here. In other words, the parties agree that the Time Warner Agreement is a Pre-Merger Agreement.

[4] *See Order on Remand* at ¶ 28.

[5] *Id*. at ¶ 30. *See also, id*. at ¶ 44.

[6] *Id*. at ¶ 34 ("We conclude that a reasonable reading of the statute is that Congress intended to exclude the traffic listed in subsection (g) from the reciprocal compensation requirements of subsection (b)(5)").

provisions fall within Section 251(g), which is outside the reciprocal compensation provisions of Section 251(b)(5).[7] Indeed, Section 251(c) is devoid of any reference to Section 251(g).

The FCC consequently has eliminated any lingering dispute, and there is no question that provisions of interconnection agreements that address Internet-bound traffic cannot be adopted in other states under Paragraph 32 of the Merger Conditions. In short, the *Order on Remand* makes clear that carriers cannot rely on the terms of the Merger Conditions to expand into new states the very form of "regulatory arbitrage" that, in the FCC's words, "distorts the development of competitive markets."[8] For this reason, Focal's Petition should be denied with regard to the adoption of the Time Warner Agreement's language pertaining to compensation for Internet-bound traffic.

B. If Focal Were Permitted to Adopt the North Carolina Time Warner Agreement in its Entirety, It Still Would Not Be Entitled to Reciprocal Compensation for Internet-Bound Traffic.

Despite Focal's curious assertion that the FCC's *Order on Remand* "does not affect this case in any way," it neglects to share a key fact with this Commission that directly contradicts this statement.[9] Even if Focal had been permitted to adopt the entire Time Warner Agreement in October 2000, that agreement still would not have provided it with a right to reciprocal compensation for Internet-bound traffic. The FCC's *Order on Remand* not only confirms this

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[7] While Focal in its Initial Brief makes much of the fact that Section 251(c) references Section 251(b) (an argument Verizon Northwest discusses more fully below), Section 251(c) is devoid of any reference to Section 251(g). Indeed, as the *Order on Remand* makes clear, only the FCC has the authority to prescribe compensation rates for such "information access." *See Order on Remand* at ¶¶ 52, 82. Moreover, Focal is not entitled to the declining compensation rates prescribed by the FCC, which are designed to move all carriers to bill-and-keep arrangements for Internet-bound traffic within thirty-six (36) months. This point also is discussed more fully below. *Id.* at ¶ 7.

[8] *Id. at* ¶¶ 21, 29.

[9] *See* Focal Brief at 14.

fact but also prohibits Focal from obtaining such compensation on a going forward basis. The pertinent interim provision of the Time Warner Agreement provides as follows:

> The Parties have not agreed as to how ESP/ISP Traffic should be exchanged between the Parties and whether and to what extent compensation is due either Party for exchange of such traffic. GTE's position is that the FCC cannot divest itself of rate setting jurisdiction over such traffic, that such traffic is interstate and subject to Part 69 Principles, and that a specific interstate rate element should be established for such traffic. TWTC's position is that ESP/ISP traffic should be treated as local for the purposes of intercarrier compensation and should be compensated on the same basis as voice traffic between end users and that state commissions may continue to rule on the issue of mutual compensation for ESP/ISP Traffic. The FCC has issued a NPRM on prospective treatment of ESP/ISP Traffic. Nevertheless, without waiving any of its rights to assert and pursue its position on issue related to ESP/ISP Traffic, *each Party agrees, solely for the purposes of facilitating the completion pending further regulatory action on these issues, that until such issues are resolved, the Parties shall exchange and track ESP/ISP Traffic but no compensation shall be paid for ESP/ISP Traffic exchanged between the parties and neither party shall bill the other for such traffic*. At such time as the law governing the issue of compensation for termination of ESP/ISP Traffic is resolved the Parties will conduct a true-up to apply, effective as of the effective date of this Agreement, the appropriate compensation principles established by such governing law to the ESP/ISP Traffic tracked by the Parties, *or if such governing law precluded any compensation, no compensation will apply* . . . This interim agreement not to compensate for ESP/ISP Traffic, shall in no manner whatsoever establish any precedent, waiver, course of dealing or in any way evidence either Party's position or intent with regard to exchange and/or compensation of ESP/ISP Traffic, each Party reserving all its rights with respect to these issues.[10]

In short, GTE and Time Warner agreed to an interim bill-and-keep arrangement for compensation for Internet-bound traffic until the FCC provided "governing law" resolving the issue.[11] Therefore, even if Focal had been operating under all of the Time Warner Agreement's terms since last fall, it still would have had no right to any compensation during that interim period. This completely undermines Focal's position here.

[10] *Id.*, Exhibit E, Section 3.1 (emphasis added).

[11] As discussed previously, that "governing law" states that ISP-bound traffic is not local, and that such traffic is not subject to the reciprocal compensation provisions of Section 251(b)(5).

As noted above, the FCC reconfirmed in the *Order on Remand* that Internet-bound traffic is interstate, non-local traffic that is not subject to the reciprocal compensation provisions of Section 251(b)(5).[12] The FCC instead ruled that Internet-bound traffic is information access traffic subject to Section 201.[13] Thus, the "governing law" referred to in the Time Warner Agreement completely eliminates reciprocal compensation from the equation. Indeed, the uncertainty about the role of reciprocal compensation in this area is what led to the inclusion of the above-cited interim language in the first place. The FCC accordingly determined 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."[14]

In view of these holdings, the FCC adopted a set of declining rate caps designed to wean CLECs who had become dependent upon reciprocal compensation for Internet-bound traffic:

> Because the record indicates a need for immediate action with respect to ISP-bound traffic, however, in this Order we will implement an interim recovery scheme that: (i) moves aggressively to eliminate arbitrage opportunities presented by the existing recovery mechanism for ISP-bound [traffic] by lowering payments and capping growth; and (ii) initiates a 36-month transition towards a complete bill and keep recovery mechanism while retaining the ability to adopt an alternative mechanism based upon a more extensive evaluation in the *NPRM* proceeding. Specifically, we adopt a gradually declining cap on the amount carriers may recover from other carriers for delivering ISP-bound traffic. We also

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[12] *See Order on Remand* at ¶ 28.

[13] *Id.* at ¶ 4.

[14] *Id.* at ¶ 67; *accord, id.* at ¶ 6.

> cap the amount of traffic for which any such compensation is owed, in order to eliminate incentives to pursue new arbitrage opportunities.[15]

The FCC also ordered that carriers that were not already exchanging Internet-bound traffic pursuant to an interconnection agreement prior to the adoption of its *Order on Remand* would exchange Internet-bound traffic on a bill and keep basis until further FCC action.[16] Simply put, the FCC decided as a matter of policy that the arbitrage created by applying Section 251(b)(5)'s reciprocal compensation provisions to Internet-bound traffic should end, and that carriers should move toward bill and keep in all instances.

What is perhaps most important for this proceeding, however, is that the FCC's Order clarifies that when a carrier did not have a contractual claim to reciprocal compensation for Internet-bound traffic in the first place, the carrier would not be permitted to avail itself of the FCC's declining payment scheme.[17] After all, the FCC had adopted its declining rate caps to *decrease* CLEC reliance upon pre-existing reciprocal compensation arrangements and to move parties towards bill and keep arrangements for Internet-bound traffic.[18] It was not designed to allow CLECs that had never before received reciprocal compensation for Internet-bound traffic to suddenly take advantage of such payments. Specifically, the *Order on Remand* states:

> For the year 2001, a LEC may receive compensation, *pursuant to a particular interconnection agreement*, for ISP-bound minutes up to a ceiling equal to, on an annualized basis, the number of ISP-bound minutes *for which that LEC was entitled to compensation under that agreement* during the first quarter of 2001, plus a ten percent growth factor. For 2002, a LEC may receive compensation,

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[15] *Id.* at ¶ 7.

[16] *Id.* at ¶ 81.

[17] *Id.* at ¶¶ 78, 82, nn. 154-155.

[18] *Id.* at ¶ 7.

> pursuant to a particular interconnection agreement, for ISP-bound minutes up to a ceiling equal to the minutes for which it was entitled to compensation under that agreement in 2001, plus another ten percent growth factor. In 2003, a LEC may receive compensation, pursuant to a particular interconnection agreement, for ISP-bound minutes up to a ceiling equal to the 2002 ceiling applicable to that agreement.[19]

Focal had no contractual claim that it was "entitled" to receive reciprocal compensation for Internet-bound traffic before the FCC's ruling; thus, the volume cap established as preemptive law provides for bill and keep for all such traffic going forward. During the first quarter of 2001, immediately preceding the issuance of the FCC's *Order on Remand*, Focal maintained its operations with Verizon Northwest under an interconnection agreement that had expired on September 24, 2000.[20] Not only was that agreement no longer "effective" after that date (as Focal complains), but also it never included any language setting rates for reciprocal compensation for Internet-bound traffic.[21] On the contrary, that Agreement provided solely for a bill-and-keep arrangement in this area:

> Interconnection is comprised of transport and termination. Pricing for all elements of interconnection shall be based on forward-looking economic cost. The parties agree that compensation for transport and termination shall be handled using the bill and keep method until further order of the Commission. Upon such order, prices and terms for Interconnection Services shall be specified in an amendment to this Agreement replacing Appendix 4 to this Attachment 14.[22]

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[19] *Id.* at ¶ 78 (emphasis added).

[20] *See* Focal Petition, ¶ 4. Specifically, Focal had adopted pursuant to Section 252(i) the interconnection agreement between GTE Northwest Incorporated and AT&T Communications of the Pacific Northwest, Inc., effective September 24, 1997 ("AT&T Agreement"). (Exhibit A). Pursuant to Section 2 of the AT&T Agreement, GTE sent a Notice of Termination to Focal on June 23, 2000, terminating the agreement effective September 24, 2000. When Focal did not respond, GTE sent a second Notice of Termination on July 28, 2000. Focal did not serve its MFN Request under the Merger Order and Merger Conditions until October 4, 2000 -- ten days after the AT&T Agreement had been terminated.

[21] *See* Focal Petition, ¶ 4. *See also* AT&T Agreement, Attachment 14 at Pages 4 and 15 (Exhibit B).

[22] *See* Exhibit B at Pages 4 and 15.

During the term of Focal's adoption, Focal never requested to come out of bill and keep or to amend or supplement the contract with inter-carrier compensation rates. As a result, there was no compensation paid to Focal for Internet traffic during the first quarter of 2001. Moreover, as discussed above, even if Focal had been permitted to adopt the Time Warner Agreement in October 2000, that agreement also provided only for a bill-and-keep arrangement with regard to Internet-bound traffic – not a right to compensation for same. Consequently, no compensation would have been paid during the first quarter of 2001 under either contract.

There likewise would not have been any right to a "true-up" under the Time Warner Agreement had Focal adopted it in October 2000. As indicated above, that agreement states that "parties will conduct a true-up to apply, effective as of the effective date of this Agreement, the appropriate compensation principles established by such governing law to the ESP/ISP Traffic tracked by the Parties, *or if such governing law precluded any compensation, no compensation will apply.*"[23] The "compensation principles" outlined in the *Order on Remand* in turn provide that for 2001 CLECs are entitled to compensation on an annualized basis for "the number of Internet-bound minutes for which that LEC was entitled to compensation under [its] agreement during the first quarter of 2001, plus a ten percent growth factor."[24] Since Focal would not have been entitled to any compensation under the Time Warner Agreement's bill and keep provisions during the first quarter of 2001, it is not entitled to any compensation (or true-up) going forward.

Because Focal was not entitled to any compensation for Internet-bound traffic during the first quarter of 2001 (or at any other period) under either its expired interconnection agreement

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[23] *See* Focal Petition, Exhibit E, Section 3.1 (emphasis added).

[24] *See Order on Remand* at ¶ 78 (emphasis added).

going forward or the Time Warner Agreement (had it been adopted), Focal is not entitled to any such compensation now. The FCC's *Order on Remand*, the "governing law" in this area, expressly precludes such compensation for Focal for the reasons stated.[25] As the FCC's rationale provides, to allow Focal to avail itself of the FCC's declining, interim rate caps at this point – when Focal never received reciprocal compensation for Internet-bound traffic in the past and never came to depend upon it as a source of revenue (as did many other CLECs) – would only perpetuate the regulatory arbitrage specifically criticized in the *Order on Remand*.[26] Indeed, it would turn that Order on its head.

Finally, prior to the FCC's *Order on Remand*, Focal could have pursued under Section 252(i) any number of interconnection agreements that existed in Washington that would have provided it with a contractual claim to reciprocal compensation for Internet-bound traffic during the first quarter of 2001.[27] It freely chose not to do so, and the only agreements that exist now provide no right to compensation for Internet-bound traffic. Focal's failure to adopt another interconnection agreement in Washington that would have provided it with a claim to compensation (and its failure to anticipate the consequences of the FCC's ruling) should not now be laid at Verizon Northwest's feet. Focal simply does not have the right to have this Commission reverse (and revise) history so Focal can make different choices. The *Order on Remand*, read in conjunction with the language of the Time Warner Agreement, makes clear that Focal may not now avail itself of the FCC's declining compensation rate structure for Internet-bound traffic.

[25] *See* Focal Petition, Exhibit E, Section 3.1.

[26] *See Order on Remand* at ¶¶ 21, 29, 82, n. 154.

[27] *See, e.g.,* Interconnection, Resale and Unbundling Agreement Between GTE Northwest Incorporated and Electric Lightwave, Inc. (Exhibit C).

C. The MFN Condition Set Forth In Paragraph 32 Is Limited To Matters That Are Subject To Section 251(c).

Contrary to Focal's claims, and as discussed at length in Verizon Northwest's Opening Brief, the right to adopt provisions of an interconnection agreement across state lines is expressly limited to matters that are "subject to 47 U.S.C. § 251(c)." By its own terms, the quoted language acts as a clear limitation on the scope of the MFN condition. Moreover, the history of that language confirms that to be the case.[28] Focal nevertheless argues that although the express terms of the condition are limited to matters that are subject to Section 251(c), this Commission should construe the condition to apply to matters covered by Section 251(b) – solely because that latter Section is referred to in Section 251(c). While the *Order on Remand* renders this argument irrelevant for the reasons previously stated, Focal's position cannot be reconciled with the Act in any event.

On its face, Section 251(c) imposes "additional" obligations on incumbent carriers that differ from those imposed by Section 251(b). Moreover, while Section 251(c)(1) does require all local exchange carriers to *negotiate* terms and conditions of agreements in order to meet the duties imposed in Section 251(b), this duty to negotiate does not also incorporate into Section 251(c) all of the substantive requirements of Section 251(b). Focal cannot point to any authority that suggests it does. If the FCC had intended to include Section 251(b) obligations in the provisions that could be adopted across state lines, it surely would have listed that subsection along with Section 251(c).

As discussed in Focal's Petition and in both Verizon Northwest's Answer and Opening Brief, the FCC presently is considering the scope of the Merger Conditions' MFN provisions as

[28] *See* Verizon Northwest's Opening Brief at pages 6-7, pertaining to the history of the Section 251(c) vis-à-vis the SBC/Ameritech Order.

they pertain to reciprocal compensation generally.[29] Focal itself chose to raise this issue with the FCC in November 2000, and filed its most recent FCC arguments on March 1, 2001.[30] Focal nevertheless would have this Commission prejudge this pending legal issue, before the FCC has had an opportunity to act. At best, this Commission should refrain from ruling on Focal's Petition until the FCC has had an opportunity to complete its work. This would avoid any need to relitigate the issue if this Commission reaches one conclusion and the FCC reaches another.[31] There really is no point in waiting, however. Even if the FCC could lawfully reverse its position and unilaterally modify Verizon's voluntary acceptance of the Merger Conditions as Focal hopes – which the FCC cannot – the agreement Focal seeks to adopt, as shown above, would provide it with no relief at all. The Commission consequently should deny Focal's Petition now.

D. Verizon Northwest is Ready and Willing to Negotiate an Appropriate Interconnection Agreement with Focal.

Focal's false claims about the practical effect of Verizon Northwest's position should not deter the Commission from rejecting Focal's Petition. Verizon Northwest is ready and willing to negotiate the particulars of an interconnection agreement with Focal within the confines of the law. Focal claims, however, that Verizon Northwest's adherence to the FCC's *Order on Remand* and Merger Conditions as written would leave Focal with only a "skeleton" interconnection agreement.[32] Specifically, Focal asserts that Verizon Northwest will permit it to adopt those provisions of the Time Warner Agreement subject to Section 251(c), *and only those provisions*:

[29] *See* Focal's Petition at ¶¶ 7-8; Verizon Northwest's Motion to Dismiss from Expedited Review and in the Alternative Answer to Petition at ¶¶ 7-8; Verizon Northwest's Opening Brief at 16.

[30] *See* Focal's correspondence dated November 9, 2000 and March 1, 2001. (Exhibits D and E. respectively).

[31] *See* Focal Petition at 16.

[32] *See* Focal's Initial Brief at 15.

> It is Verizon that fails utterly to explain what public policy goal could possibly be furthered by permitting a carrier to import only a portion of an interconnection agreement and then requiring that carrier to negotiate—or worse, to arbitrate—another separate agreement to cover everything outside of § 251(c)(2)-(6). In practical terms, if the Commission accepts Verizon's argument, Focal will obtain only a skeleton agreement missing critical components. Focal will then have to negotiate a completely separate agreement with Verizon. Indeed, Verizon has tried to require Focal to enter into a 21-page supplemental agreement, which Focal clearly could not execute.[33]

This completely misstates Verizon Northwest's position. Verizon Northwest has agreed to make available to Focal all of the provisions of the Time Warner Agreement that it is required to make available by law (which, for the reasons stated, excludes provisions relating to compensation for Internet-bound traffic). Verizon Northwest has *not* stated, however, that it will not also provide other terms that, while not required by the Merger Conditions, are otherwise necessary for a fully functional agreement. At bottom, while the Merger Conditions require that only some contract terms be made available for adoption, Verizon Northwest will *voluntarily* make the other necessary terms available as well. Moreover, Focal may flesh out an interconnection agreement by adopting appropriate provisions of other Washington contracts under Section 252(i) of the Act.

Verizon Northwest's proposed "Supplemental Agreement," attached to Focal's Petition as Exhibit E, does just what Focal claims it wants – in large part by filling gaps that require information specific to Washington. While the proposed Supplemental Agreement also includes contract terms and corresponding definitions prohibiting reciprocal compensation for Internet-bound traffic,[34] that proposed language is consistent with both the FCC's *Order on Remand* and the Merger Conditions. Indeed, it does nothing more than reflect the current state of the law in

[33] *Id.*

[34] *See* Focal Petition, Exhibit E, Section 3.2.2.4.

that area. Under these circumstances, and despite Focal's contrary assertions, the proposed Supplemental Agreement does not leave Focal with only a "skeletal" version of the Time Warner Agreement. It instead provides Focal with a fully functional interconnection agreement.

Although Focal maligns the proposed Supplemental Agreement, intimating that it is intended to supplant the North Carolina Agreement *in toto*, Focal again overstates the facts.[35] Large portions of the Supplemental Agreement consist of terms and conditions that are left to state-specific negotiations under Paragraph 32 of the Merger Conditions. In fact, a sizable number of those provisions are concerned with various rates specific to Washington. Other provisions set forth the parties' mailing addresses or commit both parties to do various things in accordance with "applicable law" (hardly an objectionable requirement). Most notable, however, is the fact that the Time Warner Agreement is approximately 148 pages in length. Focal never adequately explains how Verizon Northwest's proposed Supplemental Agreement, totaling only 21 pages, could possibly supplant the Time Warner Agreement in its entirety. In short, Verizon Northwest's proposed Supplemental Agreement cannot and does not represent a wholesale replacement of the Time Warner Agreement's terms.[36]

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[35] Focal's argument is partly based on another misrepresentation: that Paragraph 32 of the Merger Conditions carves out only two explicit exceptions to interstate adoption. *See* Focal Brief at 8-9. In fact, Paragraph 32 carves out six, including (1) state-specific pricing mechanisms, (2) state-specific performance standards, (3) specific contract terms adopted as a result of state arbitrations, (4) specific contract terms determined as a result of negotiations with a state commission or telecommunications carrier outside of the negotiation procedures of 47 U.S.C. § 252(a)(1); (5) interconnection arrangements that are infeasible given the technical, network and OSS attributes of the state for which it is made; and (6) interconnection arrangements that are not consistent with the laws and regulatory requirements of the state for which it is made.

[36] The only portion of the proposed Supplemental Agreement Focal objects to is the language dealing with compensation for Internet-bound traffic. Its only real goal in this proceeding is, as noted, to obtain reciprocal compensation for Internet-bound traffic in the face of the *Order on Remand*'s contrary mandate. Having filed for expedited relief from this Commission before the FCC released the Order, it was Focal – not Verizon Northwest – that first suggested that this matter be removed from the expedited track once the FCC issued its ruling (so that the parties could negotiate terms). Doing so, Focal tacitly admitted that its only real concern in moving on an expedited basis in the first place was obtaining compensation for Internet-bound traffic before the FCC prohibited it.

In an attempt to prop up this argument, however, Focal turns to the explanatory parenthetical "(including an entire interconnection agreement)" and claims that this phrase changes the plain meaning of the MFN condition entirely. Focal again asserts that this phrase means that a carrier may always adopt an entire agreement in another state, despite the various limitations set forth in Paragraph 32 of the Merger Conditions, because no interconnection agreement is confined to just Section 251(c) matters. The simple answer to this is that the parenthetical phrase cannot and does not mean what Focal claims. As discussed at length in Verizon Northwest's Opening Brief, the parenthetical is itself immediately followed by the phrase "subject to 47 U.S.C. § 251(c)," making clear that it too is subject to that same limitation. Consequently, the only reasonable reading of that parenthetical is that it was added to clarify that, if an agreement was confined to such core Section 251(c) matters, that entire *qualifying* agreement could be adopted in another state.

Unable to overcome the express language of the MFN condition contained in Paragraph 32, Focal finally argues that reading the condition as it is written would undermine the intent of the Merger Conditions. That simply is incorrect. The limitation enables carriers to adopt agreement provisions dealing, for example, with interconnection, unbundled access, and resale, which are at the heart of the local competition policies in Section 251(c) of the Act, and for that very reason were the subject of additional obligations that were imposed uniquely on incumbents. Other matters were appropriately left to negotiation or arbitration on a state-by-state basis rather than allowing them to be adopted in other states under the MFN condition.

At bottom, Focal demands *carte blanche* to import any provision negotiated in another state, regardless of whether the provision is within the scope of Section 251(c), is consistent with the laws or policies of the second state, or even relates to telecommunications competition.

However, Congress gave the states the primary responsibility to review interconnection agreements;[37] to reject provisions that are inconsistent with the public interest, convenience, and necessity; and to establish or enforce other requirements of state law in such review.[38] Focal's approach would violate those statutory provisions. Furthermore, Focal's approach would violate the express language contained in Paragraph 32 of the Merger Conditions, which specifies that disputes regarding the availability of interconnection arrangements should be resolved by negotiation or by the relevant state commission under 47 U.S.C. § 252 to the extent applicable. Focal's reading, entitling it to the adoption of the Time Warner Agreement *in toto* as a matter of course, not only would undermine the intent of Congress but also would eviscerate the FCC's policy in this area.

In short, Focal has several ways to obtain an interconnection agreement with Verizon Northwest for Washington without the unlawful relief Focal seeks in its Petition. The Commission should deny Focal's Petition now, and leave Focal to pursue these lawful options.

CONCLUSION

Focal admittedly filed its Petition in this docket in an attempt to obtain compensation from Verizon Northwest in Washington for Internet-bound traffic. The FCC has made clear that Focal is not entitled to such compensation – not under the Merger Conditions and not under the Act. It is also clear that the North Carolina Time Warner Agreement that Focal seeks to import into Washington would not, under its terms, provide Focal any claim to such compensation. Focal's Petition to adopt the Time Warner Agreement in its entirety should be denied. Although

[37] *See* 47 U.S.C. § 252(e).

[38] *See* 47 U.S.C. § 252(e)(3).

under no circumstances is Focal entitled to compensation for Internet-bound traffic pursuant to any local interconnection agreement, the proper course for Focal to pursue is either to negotiate any other interconnection terms with Verizon Northwest or to adopt any other interconnection terms from another Verizon Northwest Washington interconnection agreement pursuant to Section 252(i) of the Telecommunications Act of 1996 (the "Act") and this Commission's Interpretive and Policy Statement.

DATED this _____ day of July, 2001.

Respectfully submitted,

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By Its Attorneys

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