BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

FOCAL COMMUNICATIONS CORPORATION OF WASHINGTON, Petitioner, v. VERIZON NORTHWEST, INC., Respondent.	)))))))))))	DOCKET NO. UT-013019

REPLY BRIEF OF
FOCAL COMMUNICATIONS CORPORATION OF WASHINGTON

Focal Communications Corporation of Washington ("Focal"), by its undersigned attorneys, hereby submits its reply brief in this matter, in accordance with the Prehearing Conference Order, issued April 26, 2001. Focal's position has been set forth fully in its Initial Brief. Since Verizon's Initial Brief raises no arguments that have not been addressed previously in Focal's Initial Brief and, more importantly, by the FCC's opinion letter ("Opinion Letter"), dated December 22, 2000, Focal will limit its Reply Brief to simply summarizing the very straightforward facts, law and policy that support its position.

Focal does agree with one observation from Verizon's brief: "[t]he main issue in this case really is compensation for Internet traffic."[1] More specifically, the case arises from Verizon's willingness to do just about anything, including reneging on its merger commitments, in order to avoid its obligation to compensate CLECs for termination of Internet traffic originated by Verizon's customers.

THE FCC HAS ADDRESSED EVERY ISSUE RAISED BY VERIZON IN FAVOR OF, AND CONSISTENT WITH, FOCAL'S POSITION IN THIS PROCEEDING.

1. The Merger Conditions allow Focal to opt-in to an entire negotiated agreement.

To support its position that Verizon is only obligated to make available to Focal those provisions of an interconnection agreement that are delineated in section 251(c) of the Act, Verizon Northwest restates, nearly verbatim, the legal arguments Verizon presented in its December 6, 2000, letter to the Common Carrier Bureau of the FCC.[2] But Verizon's argument that only 251(c) obligations can be taken across state borders ignores some fundamental facts.

First, it is obvious, based upon a plain reading of the Merger Conditions and the Bell Atlantic/GTE Merger Order[3], that all interconnection arrangements, including those set forth in section 251(b) and entire interconnection agreements, can be adopted across state borders "…to the same extent and under the same rules that would apply to a request under 47 U.S.C. § 252(i)."[4] Verizon's position flies in the face of the express language of paragraph 32 of the Merger Conditions in the Bell Atlantic/GTE Merger Order, which specifically allows carriers to adopt an "entire agreement." Indeed, because every full agreement contains numerous terms and conditions not specifically listed in 251(c), under Verizon's theory, no carrier could ever adopt an "entire agreement" across state borders, and the language in the MFN provisions and the Bell Atlantic/GTE Merger Order[5] would be rendered meaningless. As noted by the FCC:

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1 Verizon Initial Brief at p. 1.

2 Letter from Patricia E. Koch, Assistant Vice President, Verizon Communications, Inc. , to Carol E. Mattey, Deputy Chief, Common Carrier Bureau, FCC (Dec. 6, 2000).

3 *GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, Memorandum Opinion and Order, 15 FCC Rcd 14032, Appendix D, p. 1 (rel. June 16, 2000) ("Bell Atlantic/GTE Merger Order"). (The Bell Atlantic/GTE Merger Conditions are contained in Appendix D (the "Merger Conditions").)

4 Merger Conditions at ¶ 32.

5 Bell Atlantic/GTE Merger Order at ¶ 300, n. 686.

> Verizon is incorrect in asserting that the reference to section 251(c) limits a CLEC's opt-in rights under the MFN provisions of the *Merger Conditions*…. Specifically, Verizon asserts that subjects addressed by section 251(b), e.g., reciprocal compensation, number portability, and access to rights-of-way, fall outside the scope of the *Merger Conditions* because of the express reference to section 251(c) in the MFN provisions. Section 251(b) is incorporated explicitly into section 251(c) at the outset of that subsection, however, and further in the subsection establishing a duty for the incumbent LECs to negotiate agreements in good faith.[6]

Verizon's brief also places much emphasis on what a "qualifying" interconnection agreement means. However, the obvious meaning is that it includes any agreement, in whole or part, which falls within the definition of paragraph 32 of the Merger Conditions, for example, that it was *voluntarily negotiated* prior to the close of the merger. By contrast, an arbitrated agreement, or arbitrated portions, would not be "qualifying." As noted by the FCC:

> The plain language of the *Merger Conditions* permit a CLEC to obtain an entire interconnection agreement under the MFN provisions, so long as the agreement was voluntarily negotiated and meets the timing and location requirements specified in the conditions. Focal thus correctly points out that, in the *Bell Atlantic/GTE Merger Order*, the Commission articulated its understanding of the term "interconnection arrangement" to encompass "entre interconnection agreements or selected provisions from them."[7]

Verizon's tortured logic, that portions of an agreement addressing 251(b)(5) do not qualify, has been soundly rejected by the FCC, which clarified that it meant what it said when it said that an "entire agreement" can be imported across state borders under the same terms and conditions that apply to a 47 U.S.C. 251(i). The Opinion Letter clearly explained that the MFN provisions apply to entire interconnection agreements, so that carriers may import interconnection agreements from one state into another state.

And finally, the Opinion Letter explaining that carriers are entitled to import entire agreements across state borders is binding in this case. The Common Carrier Bureau acted under delegated authority in issuing the Opinion Letter, *giving the Opinion Letter the force of law*. 47

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[6] December 22, 2000 Opinion Letter at pp. 2-3 (footnotes omitted).

C.F.R. § 0.5(c) (2000). Verizon's suggestion that the Opinion Letter is still unsettled because Verizon has sought further review and/or a waiver of the merger conditions, is simply incorrect as a matter of law. Verizon may be annoyed that the Bureau rejected its novel interpretation of the Merger Conditions in the context of Focal's opt-in request, but that does not entitle Verizon to ask a state commission to adopt an interpretation of the FCC's own Merger Conditions – conditions Verizon voluntarily agreed to in return for approval of its merger – that the FCC itself refused to adopt.

2. As part of the FCC's merger proceeding, the policy arguments raised by Verizon were resolved in favor of imposing the requirement that entire interconnection agreements be importable across state borders.

If Verizon felt that there were policy reasons why interconnection agreements in their entirety should not be importable across state borders, Verizon should have raised those (and presumably did raise those) in the merger proceedings at the FCC. The explicit obligations of paragraph 32 of the Merger Conditions expand the state-specific adoption duties imposed on Verizon by section 252(i) of the Telecommunications Act of 1996 to encompass a region-wide duty. When the FCC decided to extend region-wide the benefit under 252(i) of avoiding the burden of negotiating (or arbitrating) an interconnection agreement, it did so to reduce a CLEC's risk and cost of entry, lower a CLEC's barriers to entry, and spread the use of best practices.[8] Certainly in deciding to implement the MFN requirement, the FCC weighed all the policy implications of allowing all interconnection provisions, including those relating to compensation for local and Internet traffic, to be imported across state borders. The FCC obviously determined that it was in the public interest to enact such a requirement to address the increase in Verizon's competitive power that was going to result from the approval of the merger.

[7] December 22, 2000 Opinion Letter at p. 2 (footnotes omitted).
[8] Bell Atlantic/GTE Merger Order at ¶¶ 300-05, 352, 356, and 370.

3. This Commission has jurisdiction to enforce Focal's opt-in, which occurred more than seven months before the FCC's Remand Order was published in the Federal Register.

Verizon's contention that the FCC's recent order on ISP compensation[9], impacts Focal's ability to opt-in to the Time Warner Agreement has also been addressed by the FCC in favor of Focal. In a similar context, the Public Utilities Commission of California recently sought an interpretation from the FCC on the very issue of when a carrier's opt-in rights expired under the FCC's ISP Remand Order. In the California proceeding, Focal sent a letter to Pacific Bell on April 17, 2001 advising it that Focal was exercising its 252(i) rights with respect to a certain interconnection agreement. The California Commission's legal staff determined, *in consultation with the FCC*, that competitive local exchange carriers were eligible to invoke Section 252(i) of the Act, as it applies to rates paid for exchange of reciprocal compensation, up and until May 15, 2001.[10]

In this case, Focal invoked its right to opt-in to the Time Warner Agreement on *October 4, 2000*, long before the FCC Order was adopted. Focal's opt in right was fixed and intact when Focal exercised it last year, Verizon's delay tactics notwithstanding. Indeed, it is only Verizon's arbitrary and unreasonable conduct that has kept this issue outstanding so long.

Focal acknowledges that this FCC Order currently preempts state commissions from addressing the *substantive* issue of compensation for Internet traffic, at least on a prospective basis. However, in this case, Focal is not asking for this Commission to address the substantive issue of compensation. Instead, Focal is seeking enforcement of its opt-in right, which it exercised back in October, 2000.

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9 In the matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996l Intercarrier Compensation for ISP-Bound Traffic, CC docket 96-98, 99-68, Order on Remand and Report and Order, (FCC 01-131, Released April 27, 2001) ("ISP Remand Order"). This Order is now on appeal to the DC Circuit.

CONCLUSION

For the reasons stated in Focal's Initial Brief and herein, Focal respectfully requests that the Commission require Verizon to honor Focal's request to opt in to the Time Warner Agreement in its entirety, without further delay.

RESPECTFULLY SUBMITTED this 6th day of July, 2001.

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[10] A copy of the letter ruling issued by the Director of the Telecommunications Division of the Public Utilities Commission of the State of California is attached.