

**BEFORE THE  
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

FOCAL COMMUNICATIONS	)	
CORPORATION OF WASHINGTON,	)	
	)	
Petitioner,	)	DOCKET NO. UT-013019
	)	
v.	)	
	)	FOCAL MOTION TO STRIKE OR
VERIZON NORTHWEST, INC.,	)	TO RESPOND TO PORTIONS OF
	)	VERIZON'S REPLY BRIEF
Respondent.	)	
.....	)	

Focal Communications Corporation of Washington (“Focal”), by and through its undersigned attorneys, moves to strike portions Verizon Northwest’s Brief in Reply to Initial Brief of Focal Communications Corporation of Washington (“Verizon’s Reply Brief”). In the alternative, Focal requests leave to respond to such portions of Verizon’s Reply Brief as set forth herein. In support of its motion, Focal states as follows:

**BACKGROUND**

This proceeding involves Focal’s request, under the FCC’s Merger Conditions and Section 252(i) of the Telecommunications Act of 1996, to opt-in to the Time Warner Agreement from North Carolina. The Prehearing Conference Order entered in this proceeding on April 26, 2001 set forth the issue in this proceeding as follows:

The Commission must determine whether to require that Verizon make available to Focal the Time Warner Agreement, in its entirety.

The Prehearing Conference Order also set forth specific issues relating directly to this question, which the parties were directed to address. Parties filed simultaneous initial briefs on June 21, 2001 addressing those questions, with simultaneous reply briefs filed

on July 6, 2001. Subsection B of Verizon's Reply Brief is entirely devoted to a new argument, raised by Verizon for the first time, that even if Focal were permitted to adopt the Time Warner Agreement in its entirety, Focal would not be entitled to compensation for Internet-bound traffic under the terms of the agreement itself. Focal first emphasizes that it does not concur with Verizon's interpretation of the Time Warner Interconnection Agreement. Moreover, Verizon's argument on reply is outside the scope of this proceeding and is not responsive to any argument raised in Focal's initial brief and should therefore be stricken.

**I. VERIZON'S ARGUMENTS INTERPRETING THE TIME WARNER AGREEMENT SHOULD BE STRICKEN BECAUSE THEY ARE BEYOND THE SCOPE OF THE PROCEEDING AND WERE NOT RAISED IN EITHER OF THE PARTIES' INITIAL BRIEFS.**

What is at issue in this proceeding is whether Focal is entitled to opt-in to the entire Verizon / Time Warner agreement, imported from North Carolina, pursuant to the FCC's Merger Conditions. Nowhere in Focal's petition initiating this case, Verizon's Answer, the Prehearing Conference Order, Focal's Initial Brief, nor Verizon's Initial Brief was the interpretation of any specific provision of the Time Warner Agreement put in issue. The interpretation of the agreement is irrelevant and immaterial to the question of Focal's opt-in right. As a matter of proper procedure and fairness, if Verizon really believed that interpretation of the agreement was within the scope of this proceeding, it should have raised this argument in its Answer and its Initial Brief. By waiting to raise the argument for the first time in its Reply Brief, Verizon prevented Focal from responding to the argument.

Given the foregoing, the Focal respectfully requests that the Commission strike the following portions of Verizon's Reply Brief:

- a. On page 1, line 9: "and (3) the Time Warner Agreement itself."
- b. All of Section B, pages 4 through 10.
- c. On Page 17, lines 1 and 2: "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."

**II. ANY FUTURE DISPUTE OVER THE INTERPRETATION OF THE IMPORTED AGREEMENT CAN BE RESOLVED PURSUANT TO THE TERMS OF THE AGREEMENT IN THE APPROPRIATE FORUM.**

Focal is entitled to opt-in to the Time Warner Agreement in its entirety for all of the reasons set forth in Focal's Initial and Reply Briefs. In the future, if the parties do not agree on the proper interpretation of the agreement (which seems reasonably likely given the history), either party may file an enforcement action with the Commission at that time. However, it is not the purpose of the instant proceeding to determine whether or not the Time Warner agreement would result in compensation to Focal for termination of ISP-bound traffic. Indeed, if Verizon's interpretation of the Time Warner agreement is correct, it is quite puzzling that Verizon would oppose Focal's attempt to opt-in to that agreement. Verizon should instead be welcoming Focal's adoption request, because, if Verizon is correct, Focal would be foreclosed from receiving compensation. As Verizon's Reply brief correctly notes, however, relevant text from the negotiated Verizon / Time Warner agreement from North Carolina includes the following:

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.

In fact, the question of compensation for ISP-bound traffic is very much unresolved. In the ISP Remand Order,<sup>1</sup> the FCC did announce a transitional scheme that could result in a lower rate for ISP-bound traffic under certain conditions, for example, that the ILEC offer to exchange all “251(b)(5) traffic” at the same lowered rates.<sup>2</sup> The FCC ultimately seeks to make such traffic subject to bill and keep. However, the FCC’s ISP Remand Order has already been appealed by numerous parties<sup>3</sup> to the D.C. Circuit Court of Appeals, and this appeal will likely receive expedited consideration. Moreover, the D.C. Circuit has previously expressed a high degree of skepticism about the FCC’s attempts to distinguish ISP-bound traffic from other traffic for compensation purposes.<sup>4</sup> Thus, it remains to be seen whether compensation will ultimately be owed pursuant to this agreement.

Focal is not in any way seeking to expand its right to compensation beyond that which it would be entitled pursuant to the Time Warner agreement from North Carolina. Focal merely seeks whatever compensation may ultimately be due pursuant that agreement.

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<sup>1</sup> In the matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; 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 has been appealed to the DC Circuit.

<sup>2</sup> Pursuant to the ISP Remand Order, “251(b)(5) traffic” now includes all telecommunications traffic, with the exception of access traffic delivered to an IXC or traffic delivered to an information services provider. See Footnote 177.

<sup>3</sup> NARUC recently passed a resolution supporting the court challenge of the FCC’s Order (see attached).

<sup>4</sup> Bell Atlantic Telephone Co. v. FCC, 206 F3d 1 (2000).

## CONCLUSION

For the reasons set forth in Section I above, Focal requests that the portions of Verizon's brief addressing interpretation of the Time Warner Agreement be stricken. In the alternative, Focal requests leave to respond to Verizon's arguments on that issue, as set forth in Section II above.

RESPECTFULLY SUBMITTED this \_\_\_ day of July, 2001.

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