

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

FOCAL COMMUNICATIONS)	
CORPORATION OF WASHINGTON,)	
)	Docket No. UT-013019
Petitioner,)	
)	VERIZON NORTHWEST’S BRIEF IN
v.)	OPPOSITION TO FOCAL’S MOTION
)	TO STRIKE OR RESPOND
VERIZON NORTHWEST INC.)	
)	
Respondent.)	August 8, 2001
_____)	

Verizon Northwest Inc. (“Verizon Northwest”) submits the following opposition brief in response to the Motion to Strike or Respond to Portions of Verizon’s Reply Brief of Focal Communications Corporation of Washington (“Focal”). Focal’s motion should be denied because it was entirely appropriate for Verizon Northwest to include within its Reply Brief a discussion of the contents of the North Carolina Time Warner Agreement as they pertain to compensation for ISP-bound traffic. Contrary to its assertions, Focal has had actual notice of the fact that all of that contract’s terms were “within the scope” of this proceeding from the day it filed its Petition. To the extent Focal merely wants to advise this Commission that the FCC’s *Order on Remand* has been appealed to the D.C. Circuit, its motion has accomplished that purpose. The motion should be denied in its entirety, however, for the reasons set forth more fully below.

ARGUMENT

I. FOCAL HAS BEEN ON NOTICE OF THE FACT THAT THE CONTENTS OF THE TIME WARNER AGREEMENT HAVE BEEN AN ISSUE SINCE THE OUTSET OF THIS PROCEEDING.

Despite Focal’s assertions to the contrary, it has long had actual notice that the Time Warner Agreement’s terms pertaining to compensation for Internet-bound traffic are “within the

scope” of this proceeding. Specifically, Focal had this notice on three separate occasions, and from three separate sources: (1) Focal’s Petition, in which it argued that, “Federal and Washington law requires Verizon to make the Time Warner Agreement available to any requesting carrier in Washington *in its entirety and verbatim, without substantive revision or amendment*”;¹ (2) Verizon’s response to Focal’s Petition, in which Verizon stated, “That interim provision in the Time Warner Agreement [the provisions pertaining to compensation for Internet-bound traffic] provided for the payment of such compensation *only until the date of an FCC order in the pending declaratory ruling proceeding.*”;² and (3) this Commission’s April 26, 2001 Prehearing Conference Order in which the Commission asked in Issue No. 6, “Whether the Commission, as a matter of state law and policy, should require Verizon to make available to Focal the Time Warner Agreement, *in its entirety.*”³

First, in its own Petition, Focal sought a right to adopt the Time Warner Agreement “in its entirety and verbatim, without substantive revision or amendment.”⁴ Focal accordingly knew the content of that contract when it initiated this proceeding, and (as this continuing briefing cycle attests) has remained steadfast in attempting to adopt every provision from it no matter how inapplicable. Having put the contract “in its entirety” in issue from the outset, Focal should not now be heard to argue that Verizon Northwest has inappropriately addressed the policy

¹ See Focal Petition at 6 (emphasis added).

² 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 at 5 (emphasis added).

³ See Prehearing Conference Order dated April 26, 2001 (emphasis added).

⁴ See Focal Petition at 6.

consequences of permitting the wholesale adoption of that agreement (especially where, as here, the particular terms in issue do not even provide Focal with the relief it seeks).

Second, and again contrary to Focal's assertion that it had no notice of the "contract contents" argument, Verizon Northwest's response to Focal's Petition plainly stated, "That interim provision in the Time Warner Agreement [the provisions pertaining to compensation for Internet-bound traffic] provided for the payment of such compensation only until the date of an FCC order in the pending declaratory ruling proceeding."⁵ Simply because Focal did not anticipate the consequences of the FCC's *Order on Remand* does not permit Focal to turn back the hands of time to reserve a right for itself that it never had in the first place.

Finally, this Commission requested in Issue No. 6 of the Prehearing Conference Order that the parties address whether, as a matter of state law and policy, Focal should be able to adopt the Time Warner Agreement in its entirety. As discussed at length in Verizon Northwest's Reply Brief, even if this Commission were to require Verizon Northwest to make available to Focal the Time Warner Agreement in its entirety, that still would not get Focal anywhere in terms of a "right" to reciprocal compensation for Internet-bound traffic given that contract's deference to the FCC's final ruling in this area. Since this Commission's Order specifically requested the parties to address such policy consequences, however, Verizon Northwest has properly addressed the futility of acceding to Focal's request under the circumstances.

Notably, Washington courts have long recognized that the law does not require performance of an idle or futile act – a policy this Commission and others have applied when

⁵ 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 at 5 (emphasis added).

denying requests that would have provided only empty relief to an “aggrieved” party.⁶

Requiring Verizon Northwest to make this language available to Focal would result in precisely the type of idle or futile act disfavored under Washington law and public policy. In short, the FCC has definitively resolved the issue and has adopted a policy of phasing out reciprocal compensation for Internet-bound traffic – not creating new rights to such compensation where none existed before. Focal’s insistence upon adopting language that does not provide it with the relief it seeks in this area is simply pointless. By pointing this out in its Reply Brief, Verizon Northwest thus was fully within the bounds of appropriate argument.

II. THE ISP ORDER ON REMAND HAS NOT BEEN STAYED AND IS THE LAW OF THE LAND THAT CONTROLS THIS PROCEEDING.

Furthermore, while Focal is correct that several parties have appealed the FCC’s *Order on Remand* to the D.C. Circuit, Focal has not shared with this Commission the more pertinent fact that the D.C. Circuit **refused** to stay it when specifically asked by another CLEC to do so.⁷

In *In re Core Communications, Inc.*, the D.C. Circuit denied Core Communications’ expedited application for a stay of the *Order on Remand* in view of an ongoing appeal in which Core

⁶ See *Kesner v. Inland Empire Land Co.*, 150 Wash. 1, 5, 272 P. 29, 31 (1928); *Music v. United Insurance Co.*, 59 Wash.2d 765, 768, 320 P.2d 603 (1962). See also *Washington Utilities and Transportation Commission v. U.S. West Communications, et al.*, Docket No. UT-941464, et al., 1995 Wash. UTC LEXIS 54, *47-48 (Dec. 27, 1995) (denying GTE’s request for damages after noting Public Counsel’s argument that while GTE might be entitled to a finding that competing carrier had improperly passed toll traffic to GTE without payment of GTE access charges, such a finding would be a “futile act” where GTE had failed to enumerate its alleged damages). See also *In the Matter of Southwestern Bell Communications Services, Inc., Filing to Introduce Block of Time: 300 Minutes and Make Miscellaneous Text Changes*, Docket No. 01-SBLC-693-TAR, 2001 Kan. PUC LEXIS 166 at ¶ 29 (April 23, 2001) (“Furthermore, the Commission should construe a statute to avoid rendering application of a statute impracticable or inconvenient, or to avoid requiring performance of a futile act.”); *Department of Public Utility Control Investigation Into Southern New England Telephone Company Insufficient Facilities and Installation Delays*, Docket No. 85-08-05, 1991 Conn. PUC LEXIS 25, *9 (March 13, 1991) (“Based on the evidence in this proceeding, the authority finds that the Company’s current accelerated modernization schedule cannot be accelerated further and that an order to that effect would be a futile act. . .”); *Investigation on the Commission’s Own Motion Into the Operations, Rates, and Practices of Russell V. Wilson*, OII No. 83-11-03, 1986 Cal. PUC LEXIS 727, *15 (Nov. 18, 1986) (holding it would be an “idle act” for the Commission to amend an OII or to give corporation (RWT) an additional opportunity to be heard where counsel had failed to make an offer of proof).

⁷ In some forums, failure to note this crucial determination would be sanctionable conduct.

Communications and others are participating.⁸ In short, the *Order on Remand* is the law of the land. Given the D.C. Circuit's position, it does not appear that any pending or future appeal of that Order will have the effect of staying it.

Finally, since the *Order on Remand* is controlling authority in this area, the FCC's determinations contained therein also are controlling – including that “251(b)(5) traffic” includes all telecommunications traffic between a LEC and a telecommunications carrier “*that is not interstate or intrastate access traffic delivered to an IXC or an information service provider.*”⁹ Focal itself concedes this very point in its motion.¹⁰ In short, Focal has admitted that its entire argument that it has a right to adopt not only those portions of an interconnection agreement as prescribed by Section 251(c) but also those contained under Section 251(b) is unavailing. Accordingly, for the reasons stated in the previously filed briefs, the Time Warner Agreement's language as it pertains to Internet-bound traffic cannot be adopted. This Commission can logically expect that the FCC will reach a consistent conclusion in its ongoing consideration of the scope of the Merger Conditions' MFN provisions as they pertain to reciprocal compensation generally.¹¹

CONCLUSION

Perhaps the most important reason to deny Focal's Motion is the very desperation of its plea here, asking this Commission to ignore the contents of the very agreement it seeks

⁸ See *In re Core Communications, Inc.*, 2001 WL 799957 (D.C. Cir. June 14, 2001) (Exhibit A).

⁹ See *Order on Remand* at 127, fn. 177 (emphasis added).

¹⁰ See *Focal Motion to Strike or to Respond to Portions of Verizon's Reply Brief* at 4, fn. 2.

¹¹ 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.

permission to adopt. Like the would-be Wizard of Oz, Focal is telling this Commission to “pay no attention to the man behind the curtain.” This is because once the Commission does consider the content of the Time Warner Agreement in its entirety, it will conclude that it cannot provide Focal the relief it seeks. For the foregoing reasons, Focal’s motion to strike portions of Verizon Northwest’s Reply Brief or to respond thereto -- as well as Focal’s Petition to adopt the Time Warner Agreement should be denied.

DATED this _____ day of August, 2001.

Respectfully submitted,

Verizon Northwest Inc.

By Its Attorneys

Kimberly A. Newman
Thomas M. Finan
Hunton & Williams
1900 K Street, N.W.
Washington, DC 20006
(202) 955-1500

CERTIFICATE OF SERVICE

I hereby certify that I have served Verizon Northwest's Brief in Opposition to Focal's Motion to Strike or Respond upon Ms. Carole J. Washburn, Washington Utilities & Transportation Commission, 1300 S. Evergreen Park Drive SW, Olympia, WA 98504-7250 and Gregory J. Kopta, Davis Wright Tremaine LLP, 2600 Century Square, 1501 Fourth Avenue, Seattle, WA 98101-1688, via overnight delivery and electronic mail on August 8, 2001.
