BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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

ANSWER OF
FOCAL COMMUNICATIONS CORPORATION OF WASHINGTON
IN RESPONSE TO VERIZON'S PETITION FOR REHEARING

Focal Communications Corporation of Washington ("Focal"), by its undersigned attorneys, hereby submits its Answer in response to the Petition for Administrative Review, dated November 5, 2001, filed November 6, 2001, by Verizon Northwest, Inc. ("Verizon").

It has been more than a year since Focal first requested to adopt an interconnection agreement between Verizon and Time Warner, pursuant to the voluntarily-negotiated FCC Merger Commitments, agreed to by Verizon in consideration for the approval of the merger between GTE and Bell Atlantic.[1]

The Initial Order in this matter correctly characterized Verizon's continued refusal to honor its voluntarily-negotiated Merger Commitments as "egregious conduct,"[2] and this conduct has not abated a single degree. Verizon's Petition for Review has no basis in law or fact and

[1] *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.

should be denied. Verizon should be directed to immediately honor Focal's request to adopt the full and complete interconnection agreement between Verizon and Time Warner, as required in the voluntarily-negotiated Merger Commitments, consistent with this Commission's Interpretive and Policy Statement, and as directed in the Initial Order.

BACKGROUND

Focal is a national facilities-based CLEC and has provided service in Washington since 1999. In order to operate inVerizon (formerly GTE) territory, Focal initially adopted the interconnection agreement between Verizon and AT&T, pursuant to 47 U.S.C. §252(i).[3] After operating under this adoption of the AT&T agreement for over a year, Verizon notified Focal that the contract would be terminated upon its expiration date, September 24, 2000. Following some unproductive negotiations with Verizon for a successor to the AT&T agreement, Focal requested to adopt a negotiated agreement between Verizon and Time Warner from North Carolina, by a letter dated October 24, 2000.[4] Focal's request to adopt the Time Warner agreement was issued pursuant to voluntarily-negotiated Merger Conditions, bargained for and agreed to by Verizon in order to secure regulatory approval of the marriage between the former GTE and Bell Atlantic companies. Among the conditions accepted by Verizon was an obligation to permit CLECs to "import" all or part of a pre-merger negotiated GTE contract from one GTE state into any other part of GTE's territory (subject to various conditions and limitations), essentially a cross-border Most Favored Nation (MFN) provision. Specifically, Paragraph 32 of the Merger Commitments provides, in relevant part, as follows:

June 16, 2000) ("Bell Atlantic/GTE Merger Order"). (The Bell Atlantic/GTE Merger Conditions are contained in Appendix D (the "Merger Conditions or Merger Commitments").)

[2] See Initial Order at ¶ 51.

[3] Focal's adoption of the GTE-AT&T agreement was approved July 28, 1999 in Docket UT-990365.

> … Bell Atlantic/GTE shall make available in the GTE Service Area to any requesting telecommunications carrier any interconnection arrangement, UNE, or provisions of an interconnection agreement subject to 47 USC. § 251(c) that was 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… 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 U.S.C. § 252(i)… Disputes regarding the availability of an interconnection arrangement or UNE shall be resolved pursuant to negotiation between the parties or by the relevant state commission under 47 U.S.C. § 252 to the extent applicable.[5]

Focal invoked Paragraph 32 to import an agreement into Washington that was negotiated between GTE and Time Warner in North Carolina. Notwithstanding its acceptance of the Merger Conditions, Verizon has steadfastly refused to honor Focal's request to adopt the GTE-Time Warner agreement.

SUMMARY

As its main claim, Verizon argues, incorrectly, that Paragraph 32 of the Merger Conditions does not obligate it to offer those portions of interconnection agreements related to reciprocal compensation. Indeed, Verizon's strained interpretation of Paragraph 32 has been specifically rejected by the FCC's Common Carrier Bureau (CCB) in an opinion letter issued December 22, 2000.[6] The FCC has emphasized that the Merger Conditions require Verizon to make an entire negotiated agreement available for import from one GTE state to another. Verizon incorrectly dismisses the CCB letter as mere "informal" musings of the Deputy Chief of the Common Carrier Bureau and suggests that the CCB letter is not binding. In fact, and as should be well known to Verizon's District of Columbia-based counsel, pursuant to explicit FCC

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[4] A copy of Focal's October 4, 2000 letter is attached as Ex. B to Focal's Petition for Enforcement (March 21, 2001).

[5] The full text of this lengthy Paragraph 32 is attached as Ex. A to Focal's initial Petition for Enforcement (March 21, 2001), and was also attached as Ex. A to Verizon's Petition for Review (Nov. 5, 2001).

regulations, such letters, issued under delegated authority, carry the full force and weight of the FCC, unless and until stayed or modified by the full Commission.

Verizon also claims that the FCC's recent order on compensation for Internet-bound traffic bars Focal from its requested relief. [7] Again, Verizon is misstating federal law. The FCC Order cited by Verizon explicitly refuses to disturb previous state decisions or existing agreements addressing compensation for Internet-bound traffic, although the FCC did assert jurisdiction over this traffic on a prospective basis. Focal has been entitled to the GTE-Time Warner agreement since it was requested back on October 4, 2000, and the FCC's order, released April 27, 2001 did not disturb Focal's previous right to invoke Paragraph 32 of the Merger Conditions. It is only through Verizon's continued unreasonable conduct that the issue is still unresolved more than a year later.

ARGUMENT

1. As confirmed by the FCC, the Merger Conditions allow Focal to opt-in to an entire negotiated agreement from another GTE state, not just limited portions.

Verizon's obligations under the Bell Atlantic/GTE Merger Order and Merger Conditions are crystal clear: a requesting telecommunications carrier is entitled to adopt any interconnection arrangement, including an entire agreement, to the same extent and under the same rules that would apply to a request under 47 U.S.C. § 252(i), so long as it was voluntarily negotiated – pre-merger – anywhere in GTE's legacy service area. Verizon attempts to insert ambiguity in the Merger Conditions where there is none, arguing that Verizon is only obligated to make available

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[6] December 22, 2000 CCB Opinion Letter, attached as Exhibit A.

[7] 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.

to Focal those provisions of an interconnection agreement that are delineated in § 251(c) of the Federal Telecommunications Act (FTA), and not provisions under § 251(b). A plain reading of the Merger Conditions and the Bell Atlantic/GTE Merger Order should leave no doubt 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)."[8] 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." 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 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 "entire interconnection agreements or selected provisions from them."
>
> 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.[9]

[8] Merger Conditions at ¶ 32.

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

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.

2. The FCC Opinion Letter confirming that the Merger Conditions require Verizon to allow CLECs to import an entire agreement is valid and binding.

The Opinion Letter issued by the FCC's Common Carrier Bureau – explaining that carriers are entitled to import entire agreements across state borders – is binding in this case. Verizon's suggestion that the Opinion Letter is informal, or that the matter 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. The Common Carrier Bureau acted under delegated authority in issuing the Opinion Letter, giving the Opinion Letter the force of law, pursuant to FCC Regulations.[10]

Verizon's citation to sections 553(b)-(d) of the federal Administrative Procedure Act (APA) is misplaced.[11] Section 553 of the APA applies to "rulemaking," a term of art which has a specific meaning under §551 of the APA and the interpretive case law.[12] Here, the CCB was merely confirming to Verizon that the Merger Conditions mean what they say, and was not engaging in rulemaking to establish new policy or modify existing policy. Verizon may be disappointed 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.

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[10] 47 C.F.R. § 0.5(c) (2000).
[11] See Verizon's Petition for Review at 5, n.10.
[12] 5 U.S.C §§ 551, 553.

Verizon's reliance on an Interim ALJ decision from New Jersey, is also puzzling.[13] That Interim Decision, which Verizon acknowledges is not binding on this Commission, does not even appear to address the same issue. The New Jersey Interim Decision appears to address *arbitrated* portions of an interconnection agreement and insurance provisions, which are not at issue in this docket. Most significantly, the New Jersey Interim Decision does not address the question, at issue here and explicitly considered by the FCC: whether a negotiated provision addressing § 251(b) is included within the meaning of agreements described in §251(c), a question that has been resolved in Focal's favor by the CCB letter. The CCB Letter was issued under delegated authority from the FCC and is therefore afforded the same weight as a full FCC order.

3. The FCC's ISP Compensation Order – issued in April, 2001 – does not impact Focal's right to import the GTE-Time Warner agreement because Focal's request dates back to October 4, 2000 and the delay in this case has resulted solely from Verizon's refusal to honor its Merger Commitments.

Verizon now claims that the FCC's order addressing compensation for Internet-bound traffic preemptively bars this Commission from granting Focal's requested relief.[14] However, the FCC order cited by Verizon actually emphasized that it was establishing a <u>prospective</u> regime only and explicitly refused to disturb existing contracts or state decisions:

> 82. The interim compensation regime we establish here applies as carriers re-negotiate expired or expiring interconnection agreements. It does not alter existing contractual obligations, except to the extent that parties are entitled to invoke contractual change-of-law provisions. This Order does not preempt any state commission decision regarding compensation for ISP-bound traffic for the period prior to the effective date of the interim regime we adopt here.[15]

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[13] See Verizon's Petition for Review at 12-13 & Ex. G.

[14] See Verizon's Petition for Review at 2, n.3, and 11, citing, "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 is now on appeal to the DC Circuit.

[15] ISP Remand Order at ¶ 82.

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.[16]

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.

[16] 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 as Exhibit B. Although not binding on this Commission, the California decision is informative because the California staff consulted with the FCC.

4. The Finding in the Interim Decision that Focal's right to the Time Warner agreement should date back to December 22, 2000 is appropriate; Verizon should not be permitted to benefit from its egregious behavior in refusing to honor its Merger Commitments.

Verizon urges the Commission to make Focal's adoption of the Time Warner agreement effective, if at all, only on a prospective basis.[17] Although it does not disclose its motivation in its pleading, the Commission should understand that Verizon's reason for seeking this modification of the Initial Order is an attempt to further benefit from its own delay in issuing this agreement. Verizon believes, erroneously, that it may gain some advantage from making Focal's adoption of the Time Warner agreement effective some time after the first fiscal quarter of 2001.

The significance of the first fiscal quarter of 2001 flows from the FCC's ISP Remand Order, which caps a CLEC's entitlement to compensation for Internet-bound traffic to the number of minutes for which the CLEC was entitled to compensation during the first quarter.[18] If Verizon can game this proceeding to leave Focal without any interconnection agreement during that quarter, it apparently believes that it may be able to cap Focal's compensation for Internet-bound traffic at zero.[19] For the same reason, Verizon also inserts gratuitous, and incorrect statements in its brief that Focal and Verizon had agreed to exchange traffic on a bill and keep basis.[20] Although not really relevant to the issue now before this Commission, Verizon's suggestions that Focal agreed to bill and keep, either in the prior AT&T opt-in agreement or the requested Time Warner agreement are absolutely false.

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[17] Verizon Petition for Review at p. 13-14.
[18] FCC ISP Remand Order at ¶ 78.
[19] Verizon's view on this subject is explained in a letter from its counsel, Nigel Atwell, dated October 10, 2001. This letter and the entire chain of correspondence on this matter are also attached as Exhibits C-E.
[20] See, e.g., Verizon's Petition for review at p. 3 (line 9-12), p. 13 (line 10-11), p. 15 (lines 20-21).

Although Focal emphatically disagrees with Verizon's claim that no compensation was owed for Internet-bound traffic during the first fiscal quarter of 2001, the question is not currently ripe in any event.[21] However, the Commission should not be misled about Verizon's motivation for seeking to modify the Initial Order's findings as to the effective date of Focal's adoption of the Time Warner agreement. The Initial Order got it exactly right: Verizon's egregious conduct in refusing to honor the Merger Commitments warrants a departure from the ordinary rule that an agreement becomes effective only upon Commission approval.

CONCLUSION

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

RESPECTFULLY SUBMITTED this 16th day of November, 2001.

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[21] As correctly noted in the Initial Order, issues regarding the interpretation and enforcement of the GTE/Time Warner agreement are not yet ripe. See Initial Order at ¶ 18.