BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

FOCAL COMMUNICATIONS CORPORATION OF WASHINGTON	)	DOCKET NO. UT-013019
Petitioner,	)	REPLY OF VERIZON NORTHWEST, INC. TO ANSWER OF FOCAL COMMUNICATIONS CORPORATION OF WASHINGTON TO VERIZON NORTHWEST'S PETITION FOR ADMINISTRATIVE REVIEW
v.	)	
VERIZON NORTHWEST, INC.,	)	
Respondent.	)	

Verizon Northwest Inc. ("Verizon Northwest"), by its undersigned attorneys, hereby submits its Reply to the Answer of Focal Communications Corporation of Washington ("Focal") to Verizon Northwest's Petition for Administrative Review. As an initial matter, Verizon incorporates by reference all of its arguments as set forth in its Petition. Several points raised in Focal's Answer, however, merit separate comment. First, Focal continues to misstate the precedential value of the *Mattey* opinion letter. It simply does not control this case. Second, Verizon Northwest has not made "gratuitous and incorrect statements" regarding the parties' prior compensation arrangements for Internet-bound traffic (as alleged by Focal).[1] On the contrary, Focal has never had the right to right to receive reciprocal compensation for such traffic under any agreement with Verizon Northwest. Third, Focal continues to misrepresent the FCC's ruling in the *Remand Order*. Verizon Northwest addresses each of these points in turn below.

[1] *See* Focal Answer at 9.

I. ARGUMENT

A. The December 22, 2000 Mattey Opinion Letter Does Not Control This Proceeding.

Despite Focal's contrary assertions, Verizon Northwest's reliance upon 47 C.F.R. §§ 553(b)-(d) for the proposition that the *Mattey* opinion letter does not control this proceeding is entirely appropriate. Instead, it is Focal's reliance upon 47 C.F.R. § 0.5(c) for the proposition that the *Mattey opinion* letter has the "force of law"[2] that is in error, for three key reasons:

First, 47 C.F.R. § 0.5(c) delegates to the Common Carrier Bureau the authority to act on matters that are "minor or routine or settled in nature and those in which immediate action may be necessary." There is nothing minor, routine, or settled about the scope of the *Merger Conditions* as they relate to Section 252(i). On the contrary, as noted in Verizon Northwest's Petition, the issue of which provisions can be adopted from an out-of-state interconnection agreement is the subject of ongoing Common Carrier Bureau and FCC proceedings, both of which were initiated shortly after the issuance of the *Mattey* letter.[3] As these two proceedings demonstrate, the adoption issue is clearly one of major importance given its impact not only upon Verizon Northwest's operations but also upon Verizon's operations nationally. Indeed, both Verizon and Focal are involved in the Common Carrier Bureau and FCC proceedings and are anticipating rulings that will definitively resolve this issue.[4] The existence of the present dispute provides further illustration that the issue is neither minor nor routine nor settled. Under these circumstances, there has been no final word from the FCC on this issue and clearly

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[2] *See* Focal Answer at 6.

[3] *See* FCC Public Notice, *Common Carrier Bureau Seeks Comment on Letters Filed by Verizon and Birch Regarding Most-Favored Nation Condition of SBC/Ameritech and Bell Atlantic/GTE Orders*, DA 01-722 (March 30, 2001) at Exhibit E to Verizon Northwest's Petition; Open Proceedings, Federal Communications Commission, 2001 FCC LEXIS 1977, *10 (April 10, 2001) at Exhibit F to Verizon Northwest's Petition.

[4] *See* Verizon and Focal correspondence to Ms. Dorothy Attwood, Chief, Common Carrier Bureau dated February 20, 2001 and March 1, 2001, respectively, at Exhibits A and B.

no controlling delegation of authority to the Common Carrier Bureau under 47 C.F.R. § 0.5(c).

Second, the *Mattey* letter was not an "action" within the meaning of 47 C.F.R. § 0.5(c). Instead, it was an informal opinion issued by a staff member in response to a request from a member of the public. It had no ordering clause and did not otherwise require any party to do anything. Indeed, an informal staff opinion is never binding, and Focal has offered no authority showing otherwise. Had the FCC intended the *Mattey* opinion letter to be binding, moreover, it would have taken the requisite steps to seek public comment in order to make that intention clear. It never did.

When the FCC issues binding decisions, it must do so pursuant to the Administrative Procedure Act ("APA").[5] The APA defines a "rule" as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . ."[6] Since the FCC never placed the *Mattey* opinion letter on public notice and never requested public comment on it, however, it cannot be binding on any party, and particularly not on a third party who had no opportunity to present its views on this issue.[7] Consequently, Focal's reliance upon the *Mattey* opinion letter as controlling precedent in this proceeding is wholly misplaced.[8] Indeed, even a request for declaratory ruling is routinely put out for comment, whether at the Commission or staff level. In fact, when Verizon questioned the conclusions reached

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[5] *See* 5 U.S.C. § 551, *et seq.*

[6] *See* 5 U.S.C. § 551(4).

[7] *See* 5 U.S.C. § 553(b)-(d) (requiring, among other things, a 30-day period for public comment). Likewise, if the letter had been issued in a binding adjudication (it was not), then the FCC first would have needed to serve it on the parties to be charged (i.e., Verizon) and then would have had to solicit public comment. *See* 5 U.S.C. § 554 (a)-(e).

[8] Even a request for a declaratory ruling is routinely put out for comment, whether at the Commission or staff level. The most relevant example of that process is that when Verizon questioned the conclusions reached in the *Mattey* opinion letter, the Common Carrier Bureau issued the above-described public notice requesting comment. *See also, e.g., Intercarrier Compensation for Internet-Bound Traffic, Order on Remand and Report and Order*, CC Docket Nos. 96-98 and 99-68, FCC 01-131 (rel. Apr. 27, 2001) ("*Order on Remand*").

in the *Mattey* opinion letter, the Common Carrier Bureau issued the above-described public notice requesting comment.

Third, Verizon's reliance upon the ALJ's decision in New Jersey on this issue is hardly "puzzling," as Focal asserts.[9] On the contrary, the New Jersey decision is directly on point. Focal's whole premise is that pursuant to Section 252(i) and Paragraph 32 of the *Merger Conditions*, it has a right to adopt the entire North Carolina Time Warner Agreement in Washington without qualification. The New Jersey decision holds otherwise, limiting the adoptable terms to those governed by Section 251(c):

> Arbitrator O'Hern has determined that *Verizon's Most Favored Nation (MFN) obligations under the Bell Atlantic/GTE Merger Conditions ("the Merger Conditions") and under 252(i) do* ***not*** *require the importation of* ***each*** *elected provision of the Connecticut Agreement.* He will state his reasons more fully in his decision on the merits of the remaining issues, but recites his reasoning here in shorthand form and requests that Verizon prepare an order acceptable in form to Cablevision Lightpath in form suitable for his facsimile signature. *Arbitrator O'Hern will recommend to the Board that it find the Mattey decision not to be binding in this arbitration. That letter opinion was antecedent to a proceeding that settled without adjudication. He will further recommend to the Board that it find generally that only provisions of an interconnection agreement governed by Section 251(c) are importable . . . The 252(i) obligations of Verizon are determined by statute and are not part of a carrier's 251(c) obligations.*[10]

This is precisely Verizon Northwest's argument: only provisions of an interconnection agreement governed by Section 251(c) are importable. Given the differing approaches of both the New Jersey ALJ and the ALJ in this proceeding, the parties should await final Common Carrier Bureau/FCC rulings on the scope of the *Merger Conditions* in order to

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[9] *See* Focal Answer at 7.

[10] *See Arbitrator's Interim Decision on Verizon's Most-Favored-Nation Obligations Under Sec 251(i) and the Bell Atlantic/GTE Merger Conditions*, State of New Jersey Board of Public Utilities Docket No. TO01080498 (October 25, 2001) at Exhibit G to Verizon Northwest's Petition (emphasis added).

finally resolve this issue. In so doing, the parties will avoid the risk of costly, duplicative litigation about what terms may and may not be adopted.

B. Despite Its Protestations, Focal Did Agree to Bill and Keep in Its Current Interconnection Agreement with Verizon.

Focal next dismisses as "absolutely false" Verizon's statement that Focal and Verizon had agreed to exchange Internet-bound traffic on a bill and keep basis in its now expired interconnection agreement.[11] Focal is wrong. That agreement never included any language setting rates for reciprocal compensation for Internet-bound traffic.[12] Instead, it 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.[13]

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 has never been compensation paid to Focal for Internet-bound traffic at any time. Notably, Focal has failed to support its contentions that Verizon's representations about the parties' bill and keep arrangements are "gratuitous and incorrect" with even a single shred of evidence.[14] In short, the expired agreement speaks for itself. Focal's bald-faced assertions to the contrary are baseless and simply do not create some antecedent right to reciprocal compensation for Internet-bound traffic that

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[11] *See* Focal Answer at 9.

[12] *See* AT&T Agreement, Attachment 14 at pages 4 and 15 at Exhibit D to Verizon Northwest's Petition.

[13] *Id.* at 4.

[14] *See* Focal Answer at 9.

predates the FCC's *Remand Order*. This and other relevant points about the *Remand Order* are discussed more fully below.

C. The FCC's *Remand Order* Clearly Bars the Adoption of the North Carolina Time Warner Agreement's Terms Governing Compensation for Internet-Bound Traffic.

Despite Focal's attempt to show otherwise, the FCC's *Remand Order* has direct application to this case and bars the adoption of the Time Warner Agreement's terms governing compensation for Internet-bound traffic. This is true for three key reasons:

First, as noted in Verizon Northwest's Petition, the MFN ("most favored nation") condition set forth in Paragraph 32 of the *Merger Conditions* gives the contract adoption provisions of Section 252(i) of the Telecommunications Act (the "Act") limited interstate effect.[15] While Paragraph 32 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)." 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 *Remand Order*, 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).[16] As the FCC explained, it has "long held" that enhanced service provider traffic – which includes traffic bound for ISPs – is interstate access traffic.[17] 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)."[18] Consequently, these services are excluded from the scope of the

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[15]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.

[16]*Order on Remand* at ¶¶ 21, 29.

[17]*Id.* at ¶ 28.

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

reciprocal compensation requirements of Section 251(b)(5).[19] Therefore, even if the *Merger Conditions* were somehow construed (incorrectly) to apply to matters subject to Section 251(b)(5), the *Remand Order* conclusively establishes that the provision addressing Internet-bound traffic still would not be covered. On the contrary, such provisions fall within Section 251(g), which is outside the reciprocal compensation provisions of Section 251(b)(5).[20] 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 any legitimate reading of Paragraph 32 of the *Merger Conditions*. In short, the *Remand Order* 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."[21]

Second, Focal's contrary assertion that the *Remand Order* has only "prospective" application and does not disturb "existing contracts" (a claim clearly made to support Focal's misguided argument that it has the right to adopt the "entire" Time Warner Agreement) completely misses the point.[22] In support of its position, Focal cites the following paragraph from the *Remand Order*:

> 82. *The interim compensation regime we establish here* as carriers renegotiate expired or expiring interconnection agreements. *It* does not

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[19] *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)").

[20] While Focal in its Initial Brief makes much of the fact that Section 251(c) references Section 251(b), 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.

[21] *Id. at* ¶¶ 21, 29.

[22] *See* Focal Answer at 7.

> 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.[23]

As noted in Section B above, Verizon Northwest's agreement with Focal expired by its terms on September 24, 2000. Even if it had not expired, however, it did not provide for any compensation for Internet-bound traffic. Instead, it provided a bill and keep regime for such traffic.

This particular detail about the expired agreement is critical. As this Commission is aware, the FCC had adopted its interim compensation regime, a series of declining rate caps, in order to *decrease* CLEC reliance upon pre-existing reciprocal compensation arrangements and to move parties towards bill and keep arrangements for Internet-bound traffic.[24] It was not designed to allow CLECs like Focal that had not previously 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, 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.[25]

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[23] *Id.* (citing *Remand Order* at ¶ 82) (emphasis added).

[24] *See Remand Order* at ¶ 7.

[25] *Id.* at ¶ 78 (emphasis added).

Even if the expired agreement had remained in effect, it would not have provided for any compensation for Internet-bound traffic in the first quarter of 2001 (i.e., it would have provided only for bill and keep). Accordingly, Focal would not now qualify for any compensation under the declining rate caps. Likewise, and as described at length in Verizon Northwest's Petition, the Time Warner Agreement also established a bill and keep regime for Internet-bound traffic. Even if Focal had been permitted to adopt it on December 27, 2000, the Time Warner Agreement still would not have provided a right to compensation for Internet-bound traffic during the first quarter of 2001. In short, Focal would not have qualified for the declining rate caps under its expired agreement or the Time Warner Agreement.

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 (1) never received reciprocal compensation for Internet-bound traffic in the past under its expired agreement, (2) consequently never came to depend upon it as a source of revenue, and (3) would not have received such compensation even if it had adopted the Time Warner Agreement – would only perpetuate the regulatory arbitrage specifically criticized in the *Remand Order*.[26] Indeed, it would turn that Order on its head.

In short, the present applicability of the *Remand Order* to this proceeding cannot be ignored. For the reasons set forth above, the bill and keep arrangements in both the current agreement and the Time Warner Agreement by their terms do not provide Focal with a right to compensation under the FCC's interim compensation regime. As even Focal acknowledges, that is precisely what Focal is after.[27]

Third, under these circumstances, Verizon Northwest simply cannot fathom why Focal continues to insist on adopting terms that cannot possibly confer upon it the "right" it seeks. 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

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

[27] *See* ALJ's Initial Order at ¶ 17.

when denying requests that would have provided only empty relief to an "aggrieved" party.[28] 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.

[28] *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).

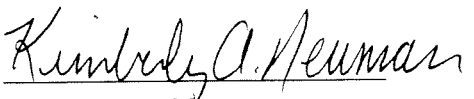
V. CONCLUSION

For the foregoing reasons and for the reasons stated in Verizon Northwest's Petition, the Commission must deny Focal's request to adopt the Time Warner Agreement *in toto*. Alternatively, the Commission should await the FCC's decision on this precise issue and, until the FCC acts, require the parties to continue exchanging traffic under a bill and keep arrangement.

DATED this 30th day of November, 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 Petition for Administrative Review 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 November 30, 2001.

Kimberly A. Newman

December 3, 2001

RECEIPT

verizon

Gordon R. Evans
Vice President
Federal Regulatory

1300 I Street, NW, Suite 400 West
Washington, DC 20005

Phone 202 515-2527
Pager 888 802-1089
Fax 202 336-7922
gordon.r.evans@verizon.com

February 20, 2001

Ms. Dorothy Attwood, Chief
Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, N.W.
Washington, D.C. 20554

Re: Focal MFN Request

Dear Ms. Attwood:

By this letter, Verizon requests that you review and clarify the attached informal staff opinion letter, responding to a request by Focal Communications ("Focal Response"), which addressed the scope of the most-favored nation ("MFN") provisions of the *Bell Atlantic/GTE Merger Order*, FCC 00-221 (rel. June 16, 2000).

By way of context, Focal's letter argued that the expanded MFN provision in the merger conditions should be construed to allow it to adopt a provision in a 1998 agreement from another state that provided for the interim payment of inter-carrier compensation on Internet-bound traffic. That interim provision provided for the payment of compensation only until the date of an FCC order in the then-pending declaratory ruling proceeding. The Commission subsequently decided that case, holding that Internet traffic was not local. The issue here arises because, while Verizon has permitted Focal to adopt all of the other provisions of the agreement at issue, we did not agree that Focal could adopt the single provision that addressed compensation for Internet traffic. As we explained in our response to Focal's letter, we believe that the interim provision addressing compensation for Internet traffic is not subject to the expanded MFN conditions for several independent reasons.

The Focal Response addressed only one of the reasons that the disputed provision is not subject to the expanded MFN condition. Specifically, it addressed the issue of whether the expanded MFN condition allows a carrier to adopt those provisions of a negotiated interconnection agreement from another state that address only matters that are subject to section 251(c) – as the conditions expressly state – or whether the expanded MFN conditions also apply to matters subject to section 251(b). The Focal Response interpreted the condition broadly to apply to provisions that address matters covered by section 251(b). In reaching that conclusion, we believe that the Focal Response failed to consider the policy implications of interpreting the merger conditions in such a broad fashion and failed to take into account the specific language of the Bell Atlantic/GTE merger conditions.

Exhibit A-1

First, in terms of the broader policy implications, the sole issue in dispute between the parties was whether an interim provision that dealt with the issue of inter-carrier compensation on Internet traffic is subject to the expanded MFN condition. As you are aware, some states have ordered inter-carrier compensation payments for Internet-bound traffic, while other states have found that requiring such payments would inhibit the development of local competition and, therefore, have refused to order them. In light of the D.C. Circuit Court's remand, the Commission is currently considering the appropriate federal legal and policy response to the problems created when so-called "reciprocal compensation" obligations are imposed on the ever-growing volume of one-way calls to the Internet. As the Commission considers whether and how to remedy the significant market distortions that result from imposing reciprocal compensation obligations on such traffic, it makes no policy sense to exacerbate the problem by allowing a carrier to import into additional states an inter-carrier payment provision for Internet-bound traffic. This is particularly the case where the second state has found that imposing reciprocal compensation obligations on Internet-bound traffic results in uneconomic arbitrage that deters local competition and has refused to require reciprocal compensation payments on such traffic.

Second, from a legal standpoint, we believe that the Focal Response also failed to give effect to the express language of the merger conditions. Paragraph 30, 31(a), and 32 of those conditions each contains identical language allowing a carrier to adopt in another state "any interconnection arrangement, UNE, or provisions of an interconnection agreement (including an entire agreement) *subject to 47 U.S.C. § 251(c)* and paragraph 39 of these Conditions" that were negotiated after the closing date (emphasis added).

In construing the terms of the conditions, the Focal Response initially suggests that the parenthetical phrase might be read disconnected from the succeeding language that explicitly states that the adoption right extends only to obligations subject to section 251(c). As a result, it suggests that the parenthetical might be read separately from the rest of the sentence to expand the scope of the condition to cover all of the provisions of an interconnection agreement, including those that go beyond the matters addressed by section 251(c).

Of course, if that were true, there would be no logical stopping point. Indeed, if the parenthetical were read in a manner divorced from the rest of the sentence, it would mean that all of the provisions included in an interconnection agreement would be subject to the expanded MFN condition, even if individual provisions were entirely unrelated to the requirements of any provision of section 251.

As a result, the Focal Response itself appears to recognize that such an overbroad construction of the condition is untenable, and that the parenthetical – "(including an entire agreement)" – cannot reasonably be read disconnected from the reference to section 251(c). Instead, the Focal Response ultimately bases its conclusion on the notion that section 251(c) somehow incorporated 251(b) by reference, simply because section 251(b) is mentioned in section 251(c). Read in context, however, the statutory cross-reference to section 251(b) simply clarifies that the enumerated section 251(c) obligations imposed on incumbent local exchange carriers are in addition to, not in lieu of, those obligations imposed on all local exchange carriers in 251(b). Indeed, section 251(c) is entitled "*Additional* Obligations of Incumbent Local Exchange Carriers," and the text of the provision itself expressly states that the obligations imposed under that

section are "[i]n *addition to* the duties contained in subsection (b)" (emphasis added). Consequently, the fact that the merger conditions explicitly refer only to section 251(c) demonstrates that the expanded MFN condition applies to the additional substantive obligations imposed on incumbents under section 251(c), and not the separate obligations imposed on all carriers under section 251(b). Otherwise, the condition would have specified section 251(b) as well as (c).

Likewise, there is no basis in the language of the condition, or of the Commission's order adopting those conditions, for the Focal Response's conclusion that the reference to section 251(c) was merely to the "type of agreement" that is subject to that provision. If the Commission wanted to refer to the provision of the Act that describes the requirements for interconnection agreements, it would have cited section 252, which specifies the detailed requirements for such agreements, not section 251(c), which lists a number of discrete obligations imposed on incumbents.

In any event, even if the merger condition could be read to include the provisions of section 251(b), it still would not apply to provisions of agreements that address the payment of compensation for Internet traffic. As the Commission expressly has ruled, the "section 251(b)(5) reciprocal compensation obligations should apply only to traffic that originates and terminates within a *local* area." *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶ 1034 (1996) (emphasis added) "Local Competition Order"); *see also* 47 C.F.R. § 51.703(a) ("Each [local exchange carrier] shall establish reciprocal compensation arrangements for transport and termination of *local* telecommunications traffic" (emphasis added)). In contrast, "the reciprocal compensation provisions of section 251(b)(5) . . . do not apply to the transport or termination of interstate or intrastate interexchange traffic." Local Competition Order at ¶ 1034. And the Commission expressly has held that "ISP-bound traffic is *non-local* interstate traffic" and "*the reciprocal compensation requirements of section 251(b)(5) of the Act and [the FCC's implementing] rules do not govern inter-carrier compensation for this traffic.*" *Inter-Carrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689, ¶ 26 n.87 (1999) (emphasis added). While that order was subsequently vacated and remanded for further explanation (which is under consideration by the Commission), the Commission's prior order remains its only previous decision addressing whether section 251(b)(5) applies to Internet traffic. And, as we have explained in the ongoing remand case, there is no reason for the Commission to reach a different conclusion now. Certainly the Focal Response could not have intended to preempt that finding or prejudge the results of the pending proceeding.

Of course, the single issue addressed by the Focal Response does not resolve the issue of whether the disputed provision can be adopted in other states. Verizon also has identified several other reasons why the interconnection agreement in question is not subject to adoption in another state. For example, we have previously explained that (1) the disputed provision expired by its own terms when the Commission released its Declaratory Ruling, and the merger conditions do not permit a carrier to adopt an expired agreement; (2) the expanded MFN conditions do not apply to provisions in agreements that are inconsistent with state laws and regulatory policies of the state in which the MFN request is made, as is the case here; and (3) the expanded MFN provision does not apply to state-specific pricing provisions, such as the provision in question. The Focal Response agreed that these issues needed to be resolved before the agreement could

Response agreed that these issues needed to be resolved before the agreement could be adopted, but, consistent with the express terms of the condition, it appropriately said that these issues were for the applicable state, not the Commission, to resolve.

Nonetheless, the Focal Response only further complicates an already complicated situation as the Commission considers how to resolve the broader issue of whether reciprocal compensation applies to Internet traffic, and it has the potential to further exacerbate an already difficult problem. Accordingly, Verizon asks that you review the Focal Response and clarify that the MFN provisions of the merger conditions apply only to obligations imposed on incumbent local exchange carriers under section 251(c), and do not, therefore, apply to provisions of an agreement that address inter-carrier compensation on Internet traffic.

Sincerely,

cc: Carol Mattey
Anthony Dale

December 3, 2001

Focal Communications Corporation
200 North LaSalle Street
11th Floor
Chicago, Illinois 60601

312-895-8400
312-895-8403 fax

FOCAL

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March 1, 2001

VIA OVERNIGHT MAIL

Ms. Dorothy Attwood, Chief
Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: Clarification of Bell Atlantic/GTE Merger Conditions

Dear Ms. Attwood,

On behalf of Focal Communications Corporation ("Focal"), this letter responds to the February 20, 2001 letter ("Verizon's Letter") submitted by Verizon, Inc. ("Verizon") concerning the most-favored nation ("MFN") provisions of the *Bell Atlantic/GTE Merger Order*.[1] Verizon requests that you "review and clarify" the determination set forth in Carol Mattey's opinion letter ("Opinion Letter"), dated December 22, 2000, which explained that the MFN provisions apply to entire interconnection agreements, so that carriers may import interconnection agreements from one state into another state. For the reasons set forth below, Focal respectfully requests that you deny Verizon's request to change this determination, and, more importantly, given Verizon's conscious decision to ignore the Opinion Letter, Focal further requests that you require Verizon to abide by the express requirements of the MFN provisions.

The first argument raised in Verizon's Letter is that the Opinion Letter fails to consider the policy implications of interpreting the Merger Conditions in what Verizon contends is a "broad" fashion. On the contrary, the Opinion Letter sets forth a straight-forward and reasoned reading of the Merger Conditions. 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 resale, number portability, dialing parity, access to rights of way and reciprocal compensation.

[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*, FCC 00-221 (rel. Jun. 16, 2000) (*"Bell Atlantic/GTE Merger Order"*), Appendix D (the "Merger Conditions"), ¶ 32. *See also Bell Atlantic/ GTE Merger Order*, ¶¶ 300-05.

Moreover, Verizon's argument misses the point. 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 (the "Act") to encompass a region-wide duty. When the Commission 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.[2] Certainly in deciding to implement the MFN requirement, the Commission weighed the policy implications that Verizon is now raising of allowing all interconnection provisions, including reciprocal compensation provisions, to be imported across state borders. The Commission 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.

In the context of this argument, Verizon also inexplicably claims that the "sole issue in dispute between the parties" and the only contract provision at issue is the "single provision that addressed compensation for Internet traffic."[3] This is simply untrue. Verizon's position has been that Focal cannot adopt *any* provisions of any negotiated agreement that address matters covered by section 251(b). In fact, as recently as January 11, 2001, Verizon tried to force Focal to negotiate a separate agreement to obtain provisions relating to section 251(b) duties and some unrelated matters in the context of another request by Focal to opt-in to a pre-merger negotiated agreement. By letters dated January 11, 2001, Verizon responded to Focal's October 4, 2000, request to adopt in the states of Washington and Virginia the negotiated, pre-merger interconnection agreement in North Carolina between GTE South Inc. and Time Warner Telecom.[4] In addition to requesting Focal's signature on an adoption letter, Verizon sought Focal's signature on a 21 page Supplemental Agreement purporting to reflect Focal's and Verizon's "agreement" that the MFN provisions only apply to interconnection arrangements under Section 251(c) and setting forth a new set of terms and conditions drafted by Verizon that cover a variety of matters including zero reciprocal compensation for Internet traffic, traffic audits, and limitations on the prices Focal may charge for its services.

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[2] *Id.* at ¶¶ 300-05, 352, 356, and 370.

[3] Verizon's Letter at 1 and 2.

[4] A copy of Verizon's Washington letter and attachments, which are substantively identical to Verizon's Virginia letter and attachments, is attached hereto.

Verizon's Letter also restates the legal arguments from its December 6, 2000, letter 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's position flies in the face of the express language of the Merger Conditions[5] in the *Bell Atlantic/GTE Merger Order*[6], which specifically allow Focal to adopt an "entire agreement." As noted above with respect to Focal's request to adopt certain GTE agreements, Verizon continues to assert its position even after Ms. Mattey issued the Opinion Letter. This illustrates Verizon's continued anticompetitive behavior in attempting to deny CLECs the exercise of their rights as defined by the Act and this Commission. Verizon's actions in defying the staff's interpretations of the Commission's own orders provides compelling evidence that the protections envisioned by the Commission in enacting the MFN requirement are sorely needed.[7]

Verizon may be annoyed that its interpretation of the MFN provision has been rejected, but that is not enough. Verizon has failed to articulate any reasoned basis for its strained interpretation. Under Verizon's theory that 251(b) obligations cannot be taken across state borders, 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* would be rendered meaningless. Yet, Section 251(c) incorporates by express reference, all of the duties of section 251(b). Indeed, the Opinion Letter simply states the obvious facts, based upon a plain reading of the Merger Conditions and the *Bell Atlantic/GTE Merger Order*, that all interconnection arrangements, including those set forth in section 251(b) and entire interconnection agreements, can be adopted across state borders. The Letter Opinion does not "further complicate an already complicated situation"[8] There is nothing complicated about the plain language of the MFN provision. Verizon alone is responsible for complicating this issue by pursuing its ridiculous and anticompetitive interpretation of the Merger Conditions and failing to comply with staff's reasoned interpretation.

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[5] Merger Conditions at ¶ 32.

[6] *Bell Atlantic/GTE Merger Order* at ¶ 300, n. 686.

[7] Focal finds it curious that, while Verizon participated fully in the process which resulted in the Opinion Letter, Verizon has refused to abide by staff's interpretation. Indeed, since Verizon admits that the Opinion Letter is sufficiently binding that it requires a request for reconsideration, then there is no reasonable basis for Verizon to refuse to comply with the MFN provision as interpreted in the Opinion Letter.

[8] Verizon's Letter at 4.

For the reasons set forth herein and in Focal's November 9, 2000 letter, Focal respectfully requests that you deny Verizon's request to change the determinations set forth in the Letter Opinion and further affirm Verizon's obligation to comply with the express requirements of the MFN provisions.

Very truly yours,

Jane Van Duzer

Jane Van Duzer
Senior Counsel-Regulatory

cc: Carol Mattey (w/encl.)
Anthony Dale (w/encl.)
Pamela Arluk (w/encl.)
Gordon R. Evans (w/encl.)