

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION  
COMMISSION

FOCAL COMMUNICATIONS	)	
CORPORATION OF WASHINGTON	)	DOCKET NO. UT-013019
	)	
Petitioner,	)	
	)	THIRD SUPPLEMENTAL
v.	)	ORDER
	)	
VERIZON NORTHWEST, INC.,	)	ORDER STRIKING IN PART
	)	VERIZON'S COMPLIANCE
Respondent.	)	FILING
	)	
.....	)	

**SYNOPSIS:** *The Commission strikes the Reservation of Rights paragraph in the Supplemental Agreement Verizon filed in compliance with the Second Supplemental Order in this proceeding. The Commission also strikes the adoption letter Verizon filed with the Supplemental Agreement. The Commission otherwise finds the Supplemental Agreement to be in compliance with the terms of the Second Supplemental Order.*

1     **NATURE OF PROCEEDING:** In this Order the Commission rules on Focal's Motion to Strike Portions of Verizon Compliance Filing. Focal's Motion pertains to the revised North Carolina Supplemental Agreement Verizon filed, as well as to a letter<sup>1</sup> from Jeffrey A. Masoner, Verizon Vice President, Interconnection Services Policy and Planning, Wholesale Marketing Division to John Barnicle, Focal President and C.O.O. (Masoner letter). Verizon filed these documents with the Commission on April 12, 2002.

2     **ORDER:** The Commission entered its Second Supplemental Order in this proceeding on April 4, 2002. The Second Supplemental Order affirmed the Initial Order of Administrative Law Judge Larry Berg and ordered Verizon to file a Supplemental Agreement in accord with the Commission's order within 10 days after the order was entered.

3     **MOTION TO STRIKE:** Focal filed a Motion to Strike Portions of Verizon Compliance Filing on April 19, 2002. Verizon filed its Opposition to Focal's Motion to Strike Portions of Verizon's Compliance Filing on May 2, 2002.

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<sup>1</sup> Attached to this Order as Appendix A.

4       **COMMISSION:** The Commission strikes the Reservation of Rights paragraph in the Supplemental Agreement filed by Verizon as well as the Masoner adoption letter Verizon filed with the Supplemental Agreement. The Commission finds that the remaining portions of the Supplemental Agreement comply with the terms of the Second Supplemental Order.

5       **PARTIES AND REPRESENTATIVES:** Gregory J. Kopta, attorney, Seattle, represents Focal. Kimberly A. Newman, attorney, Washington D.C., represents Verizon.

6       **BACKGROUND.** Focal is a competitive telecommunications local exchange carrier, or CLEC. Verizon is an incumbent local exchange carrier, or ILEC. Under the Telecommunications Act of 1996, ILECs must open their networks for use by CLECs. This is implemented through agreements providing terms for the interconnection. The Initial Order directed Verizon to allow Focal to opt-in to an existing interconnection agreement between GTE and Time-Warner from the state of North Carolina, pursuant to provisions of an order of the Federal Communications Commission allowing GTE to merge with Bell Atlantic into what became Verizon. The Commission then affirmed the Initial Order and required Verizon to file *only* a Supplemental Agreement complying with the terms of its Order affirming the Initial Order.

7       Ordering paragraph 2 of the Commission's Second Supplemental Order provides:

Verizon must file a revised Supplemental Agreement whose **only** revisions are (1) to state Washington-specific prices to replace North Carolina-specific rates that were originally made part of the *GTE South/Time Warner Agreement*; (2) to state any relevant Washington-specific performance measures; and (3) to change the names of, and contact information for, the parties, the Commission, and the state. The filing must be made no later than 10 days after this Order is entered.

Second Supplemental Order ¶ 73 (emphasis added).

8       On April 12, 2002, Verizon filed a revised Supplemental Agreement and the Masoner letter. The revised Supplemental Agreement contained the following paragraph:

Reservation of Rights. Each Party reserves the right to update the Verizon North Carolina Terms to incorporate intervening changes in law to the extent permitted by the Verizon North Carolina Terms and neither party waives its right to challenge the legality or enforceability of the Verizon North Carolina Terms as a result of intervening or subsequent changes in law.

9 Verizon Supplemental Agreement ¶ 4. Verizon also added this same language to the final “Whereas” paragraph of the Supplemental Agreement.

10 Verizon also filed with the Supplemental Agreement the adoption letter from Mr. Jeffery A. Masoner, Verizon’s Vice President – Interconnection Services Policy & Planning to Mr. John Barnicle, President and C.O.O. of Focal. The Masoner letter is a six-page letter containing seven numbered paragraphs. Paragraph 1 requires Focal to agree to three points: 1) to be bound by and adopt the North Carolina terms “as they are in effect on the date hereof after giving effect to operation of law”; 2) to use the new contact information provided in this paragraph; and 3) to certify that Focal will only use the new interconnection agreement to provide service in Verizon territory in the state of Washington.

11 In Paragraph 2 of the letter, Verizon advises Focal what the effective date of the agreement will be and requires Focal to sign an original of the letter attesting to Focal’s adoption of the terms of the letter so that it can be filed with the Commission.

12 In Paragraph 4 of the letter, Verizon states that adoption of the North Carolina terms “will not result in reciprocal compensation for Internet traffic” and explains why it has taken this position.

13 The itemized paragraphs end with Paragraph 7 which states that if Focal attempts to apply the terms of the North Carolina agreement in a manner that conflicts with paragraphs one through six, Verizon reserves the right to seek legal or equitable relief.

14 **FOCAL’S MOTION.** Focal argues that the Commission’s Second Supplemental Order did not authorize any reservation of rights provisions related to changes of law if they were not a part of the original North Carolina Agreement. On that ground, Verizon recommends that this additional language be stricken from the Supplemental Agreement.

15 Focal also argues that the Commission should strike the Masoner letter because it requests that Focal accept additional terms and conditions not contained in the Verizon North Carolina Agreement. Mr. Masoner’s letter includes Verizon’s substantive interpretation of the GTE South/Time Warner Agreement.

16 Focal contends that the Second Supplemental Order included all the changes that the Commission authorized Verizon to make to the Supplemental Agreement in compliance with the Order. Any extraneous matter, such as the “Reservation of Rights” paragraph and the Masoner letter, should be stricken as non-compliant.

17 **VERIZON’S OPPOSITION.** Verizon asserts that it fully complied with the Commission’s Second Supplemental Order. Verizon argues that the “Reservation of

Rights” paragraph adds no new terms to the Supplemental Agreement but rather makes clear that existing rights are preserved. According to Verizon, the North Carolina Agreement contained a provision acknowledging the controversy about whether reciprocal compensation is payable for Internet-bound traffic, and provided for the adjustment of the agreement in the event of an FCC decision resolving the matter.<sup>2</sup> Verizon contends that the FCC *Order on Remand*<sup>3</sup> resolved that controversy but that the North Carolina agreement had not yet been modified to reflect it. Thus, Verizon added the language at issue to protect itself with regard to the FCC’s decision.

18 Verizon also explained that the United States Court of Appeals for the District of Columbia had just remanded the *Order on Remand* back to the FCC because its approach to the reciprocal compensation issue was flawed. In the second remand, the Court of Appeals required Verizon to provide a different rationale for its conclusion that ISP-bound traffic was not subject to reciprocal compensation provisions of the Telecommunications Act of 1996. However, in the meantime, Verizon asserts that the *Order on Remand* remains in effect and Verizon wants to protect its rights accordingly.

19 Finally, Verizon argues that the Masoner letter that was submitted along with the Supplemental Agreement is nothing more than the standard adoption letter Verizon routinely sends to CLECs that adopt one of Verizon’s agreements with another carrier. Verizon has sent such letters in a number of jurisdictions throughout the United States. Furthermore, the adoption letter is the same as past adoption letters submitted to this Commission by Verizon.

20 **COMMISSION DISCUSSION AND DECISION.** We agree with Focal that the Ordering paragraph from the Second Supplemental Order authorizes Verizon to make a compliance filing of only what is ordered therein: a Supplemental Agreement revised to contain Washington-specific prices, Washington-specific performance measures, and changes in contact information.

21 The Supplemental Agreement Verizon filed should have contained no other changes save these. If the “Reservation of Rights” paragraph was not in the North Carolina Agreement, even if its purpose is merely to reserve exercise of the parties existing rights, as Verizon claims, it still does not belong in the revised Supplemental Agreement because it goes beyond the terms of the Second Supplemental Order.

22 Nor are we persuaded that the Masoner letter is appropriately submitted as complying with the terms of the Second Supplemental order in this proceeding. It represents

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<sup>2</sup> Section V, ¶ 3.1 of the North Carolina Agreement.

<sup>3</sup> Implementation of the Local Competition Provision in the Telecommunications Act of 1996 and Inter-Carrier Compensation for ISP-Bound Traffic, Order on Remand and Report and Order, CC Docket Nos. 96-98 and 99-68, 16 FCC Rcd 9151 (2201) (*Order on Remand*).

additional terms of agreement not contained in the Supplemental Agreement and not permitted under the Second Supplemental Order. It improperly requires Focal to agree with Verizon's interpretation of the law regarding reciprocal compensation for ISP-bound traffic. Whether or not Verizon should pay Focal such compensation under the North Carolina agreement is a matter of interpretation of the contract, now that it has been adopted. That Verizon has submitted the Masoner letter numerous times in this jurisdiction as well as in other jurisdictions, does not mean that it is properly submitted in this particular case. The letter exceeds what is permitted under the specific terms of the Second Supplemental Order.

23 For these reasons, we grant Focal's Motion to Strike Paragraph 4 "Reservation of Rights" in the Supplemental Agreement submitted by Verizon, as well as the Masoner letter which accompanied Verizon's compliance filing in this case. We otherwise find the filed Supplemental Agreement to be in compliance with the terms of the Second Supplemental Order.

24 Verizon must file a revised Supplemental Agreement in accord with this order. The filed revised Supplemental Agreement must not be accompanied by a Masoner or any other type of adoption letter. Verizon must file the revised Supplemental Agreement within 10 days of entry of this order.

DATED at Olympia, Washington and effective this \_\_\_\_ day of May, 2002.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner

**NOTICE TO PARTIES: This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-09-810, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-09-820(1).**