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September 25, 2002

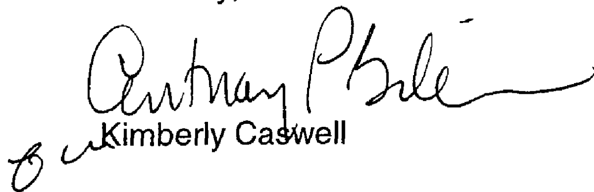
Ms. Blanca S. Bayo, Director
Division of the Commission Clerk
and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 000075-TP (Phase IIA)
Investigation into appropriate methods to compensate carriers for exchange of traffic subject to Section 251 of the Telecommunications Act of 1996

Dear Ms. Bayo:

Please find enclosed an original and 15 copies of Verizon Florida Inc.'s Motion for Partial Reconsideration And, In the Alternative, Motion for Stay Pending Appeal for filing in the above matter. Also enclosed is a diskette with a copy of the Motion in Word format. Service has been made as indicated on the Certificate of Service. If there are any questions regarding this matter, please contact me at 813-483-2617.

Sincerely,



Kimberly Caswell

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into appropriate methods to compensate carriers for exchange of traffic subject to Section 251 of the Telecommunications Act of 1996	)	Docket No. 000075-TP (Phase IIA) Filed: September 25, 2002

MOTION OF VERIZON FLORIDA INC. AND ALLTEL FLORIDA, INC. FOR PARTIAL RECONSIDERATION AND, IN THE ALTERNATIVE, MOTION FOR STAY PENDING APPEAL

This Motion for Reconsideration concerns two rulings in the Commission's Order number PSC-02-1248-FOF-TP, issued September 10, 2002 (*Order*).[1] First, Verizon Florida Inc. (Verizon) asks the Commission to reconsider its decision requiring the originating carrier to bear all the costs of transporting traffic to a distant point of interconnection designated by the alternative local exchange carrier (ALEC). The Commission should instead require each party to bear a fair share of the costs of such transport.

Second, Verizon, as well as ALLTEL Florida, Inc. (ALLTEL), ask the Commission to reconsider its adoption of the originating carrier's retail local calling area as the default for determining reciprocal compensation obligations. The best alternative is for the Commission to adopt the ILEC's local calling area as the default. If it declines to do so, it should approve its Staff's Primary Recommendation presented at the August 20, 2002 agenda conference. That Recommendation advised that there is no need to adopt a default, and that the local calling area definition should be left to negotiations between the parties. (Staff Memorandum, Primary Recommendation on Issue 13, Aug. 8, 2002 (Primary Staff Rec.).)

Reconsideration of both rulings is justified because they overlook and fail to properly consider several important points of fact and law. *See, e.g., Stewart Bonded Warehouse, Inc. v. Bevis*, 294 So. 2d 315 (Fla. 1974); *Diamond Cab Co. v. King*, 146 So. 2d 889 (Fla. 1962); *Pingtree v.Quaintance*, 394 So. 2d 161 (Fla. 1st DCA 1981).

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[1] Verizon believes the due date for motions for reconsideration is September 27, 2002, because the Commission on September 12, 2002 issued an Order amending its September 10, 2002 Order in this case. Verizon is filing its Motion today out of an abundance of caution.

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If the Commission declines to reconsider its ruling allowing the originating carrier to determine reciprocal compensation obligations, then Verizon and ALLTEL ask the Commission to stay that portion of its Order pending conclusion of the appeal of the originating carrier ruling.

MOTION FOR PARTIAL RECONSIDERATION

I. Verizon Urges the Commission to Reconsider Its Decision Requiring the Originating Carrier to Bear All the Cost of Transport to a Distant Point of Interconnection.

With regard to the issue of the responsibilities of interconnecting carriers for transporting traffic to each other, the Commission decided that the ALEC may designate a single point of interconnection (POI) within the LATA, and that the originating carrier must deliver its traffic to that point, at its sole expense. The Commission ruled that, based on its interpretation of federal law, "an originating carrier is precluded by FCC rules from charging a terminating carrier for the cost of transport, or for the facilities used to transport the originating carrier's traffic from its source to the point(s) of interconnection in a LATA." *Order* at 24. This holding is directly contrary to the Commission's decision in its *BellSouth-Sprint Arbitration Order*,[2] in which it determined that an ALEC could establish a single POI per LATA, but must bear the cost of transporting local traffic to the POI, if it is located outside of the local calling area. Yet the *Order* does not discuss or attempt to distinguish that earlier, thoroughly reasoned decision. Moreover, the Commission's holding and reasoning are inconsistent with FCC orders that similarly are not addressed in the *Order*. Accordingly, the Commission should grant reconsideration on this issue and hold, as it did in the *BellSouth-Sprint Arbitration Order*, that ALECs are required to bear the transport costs at issue here. Such a decision is both required by federal law and consistent with sound public policy. At a minimum, the Commission should clarify that an

[2] Final Order on Arbitration, *Petition of Sprint Communications Company Limited Partnership for Arbitration of Certain Unresolved Terms and Conditions of a Proposed Renewal of Current Interconnection Agreement with BellSouth Telecommunications, Inc.*, Docket No. 000828-TP, Order No. PSC-01-1095-FOF-TP (May 8, 2001) ("*BellSouth-Sprint Arbitration Order*").

originating carrier's obligation to transport traffic (and to bear the cost of such transport) to the POI is limited, consistent with federal law, to a POI on the ILEC's network.

A. The Commission's Ruling Is Inconsistent with Federal Law, Its Own Prior Decision, and Sound Public Policy.

Based on its interpretation of 47 U.S.C. § 252(d)(2)(A), the *TSR Wireless Order*,[3] and the *Intercarrier Compensation NPRM*,[4] the Commission held that, under federal law, ILECs are "precluded . . . from" charging ALECs for the transport that the ILEC must perform when an ALEC's POI is located outside of the local calling area where a local call originates. *Order* at 25-26. The Commission further concluded that the transport costs at issue are *de minimis*. *See id.* at 24. For the reasons set forth below, reconsideration is warranted, because these conclusions are based on a failure to consider relevant points of law.

First, the Commission found that adopting the ILECs' proposals "would provide for asymmetrical recovery" of costs and, therefore, "potentially conflicts" with 47 U.S.C. § 252(d)(2)(A), which requires that reciprocal compensation arrangements provide for "mutual and reciprocal recovery by each carrier of costs associated with the transport and termination . . . of calls that originate on the network facilities of the other carrier." *Order* at 23, 25; 47 U.S.C. § 252(d)(2)(A).

The ILEC proposals at issue, however, pertain to the cost of interconnection under § 252(d)(1), not to reciprocal compensation under § 252(d)(2)(A). *See* Verizon Post-Hearing Statement at 14. In interpreting § 252(d)(1) in this context, the FCC has explained that, "[o]f course," an ALEC that "wishes a 'technically feasible' but expensive interconnection" point is "required to bear the cost of that interconnection." *Local Competition Order*,[5] 11 FCC Rcd at ¶ 199; *see also id.* at ¶ 209 (ALEC "must usually compensate incumbent ILECs for the additional

[3] *TSR Wireless, LLC v. U S West Communications, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 11166 (2000) ("*TSR Wireless Order*").
[4] *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 (2001) ("*Intercarrier Compensation NPRM*").
[5] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*") (subsequent history omitted).

costs incurred by providing interconnection").[6] This Commission has previously interpreted § 252(d)(1) and ¶ 199 of the *Local Competition Order* in exactly the same manner. In the *BellSouth-Sprint Arbitration Order*, this Commission held that it is "consistent with ¶ 199 of the Local Competition Order" to require Sprint "to bear the costs of facilities from [a] local calling area to Sprint's POI" when "Sprint designates a POI outside of BellSouth's local calling area." *BellSouth-Sprint Arbitration Order* at 60. The decision in the *Order* simply cannot be reconciled with the Commission's earlier decision, which is never addressed in the *Order*. The Commission's failure to provide a reasoned explanation for its departure from prior precedent renders its decision arbitrary. *See, e.g., Couch v. Fla. Dep't of Health and Rehabilitative Services*, 377 So. 2d 32, 34 (Fla. 1st DCA 1979).[7]

Second, the Commission found that the *TSR Wireless Order* "appear[s] to prohibit an originating carrier from imposing any originating costs on a co-carrier." *Order* at 24. However, as Verizon and other ILECs explained, the *TSR Wireless Order* did not address calls — similar to those at issue here — that must be transported to a wireless carrier's switch located outside of the local calling area in which they originate and terminate. This Commission rejected that explanation, on the ground that the FCC subsequently amended 47 C.F.R. § 51.703(b) by deleting the word "local." *See id.* at 20, 23. The FCC, however, recently reiterated that its *TSR*

[6] The Commission attempted to distinguish ¶ 199 of the *Local Competition Order* in its *Order* on the ground that the FCC's order "limits consideration of technical feasibility to operational or technical concerns and excludes the use of economic factors." *Order* at 22. That argument is incorrect. The FCC excluded consideration of costs only with respect to the *selection* of a point of interconnection; it clearly required an ALEC to pay the costs resulting from the POI selected. *See Local Competition Order*, 11 FCC Rcd at ¶ 199 ("1996 Act bars consideration of costs in determining 'technically feasible' points of interconnection," but, "pursuant to section 252(d)(1)," ALEC "required to bear the cost of that interconnection"). Indeed, it is because ALECs bear those costs that the FCC found that they would "have an incentive to make economically efficient decisions about where to interconnect." *Id.* at ¶ 209.

[7] In any event, even if § 252(d)(2)(A) were relevant, it is the ALECs' proposals that result in "asymmetrical recovery." *Order* at 23. In the *BellSouth-Sprint Arbitration Order*, the Commission found that BellSouth bears "additional costs directly associated" with Sprint's decision to locate its POI outside of the local calling area where the call originates, because BellSouth must perform transport that goes beyond the "'typical' activities" it would perform in completing a local call that remains within the local calling area. *BellSouth-Sprint Arbitration Order* at 58, 61. The Commission found further that, although BellSouth would be required to "deliver the traffic outside of the local calling area" as though it were an intraLATA toll call, it would not receive the same compensation it would for carrying an intraLATA toll call. *Id.* at 59-60. For these reasons, the Commission required Sprint, not BellSouth, to pay for that transport. *See id.* at 63.

Wireless Order addressed the situation where calls "originate . . . and terminate over *facilities that are situated entirely within a single MTA*" and explained that the deletion of the word "local" from its reciprocal compensation regulations did not alter the scope of that order. *Mountain Communications, Inc. v. Qwest Communications Int'l, Inc.*, 17 FCC Rcd 2091, 2097, ¶ 11 & n.33 (Chief, Enf. Bur.) (emphasis added), *aff'd*, 17 FCC Rcd 15135 (2002).[8] Accordingly, this Commission erred in relying on the FCC's amendment to its regulations in finding that the *TSR Wireless Order* is relevant to the issue presented in this case — where traffic must be transported outside of the local calling area in which it originates.

Third, the Commission similarly concluded that the *Intercarrier Compensation NPRM* "appear[s] to prohibit" the ILECs' proposals here. *Order* at 24, *citing Intercarrier Compensation NPRM*, 16 FCC Rcd at ¶ 112. Yet the FCC, in that paragraph, explained that application of its reciprocal compensation rules "has led to questions concerning which carrier should bear the cost of transport to the POI." *Intercarrier Compensation NPRM*, 16 FCC Rcd at ¶ 112. The FCC did not state that its rules resolve that question against the position the ILECs put forward here — nor could it have, in light of its conclusion in the *Pennsylvania 271 Order*[9] that a Verizon policy requiring ALECs to bear the cost of transporting traffic from an interconnection point (IP) to the POI "do[es] not represent a violation of our existing rules." 16 FCC Rcd at ¶ 100.

Verizon expects that ALECs will point to the recent decision of the Wireless Competition Bureau—a subdivision within the FCC—that ALEC proposals similar to those the Commission adopted here are "more consistent" with the FCC's rules than Verizon's proposals, which required ALECs to bear the cost of transport from an IP to the POI. *Bureau Arbitration Order*[10]

[8] Since 1996, the FCC's definition of the traffic that is subject to reciprocal compensation has differed depending on whether the traffic is exchanged between a LEC and a CMRS provider or between two LECs. *Compare* 47 C.F.R. § 51.701(b)(2) (LEC-CMRS traffic) *with id.* § 51.701(b)(1) (LEC-LEC traffic).
[9] *Application of Verizon Pennsylvania Inc., et al. for Authorization To Provide In-Region, InterLATA Services in Pennsylvania*, Memorandum Opinion and Order, 16 FCC Rcd 17419 (2001) ("*Pennsylvania 271 Order*").
[10] *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, Memorandum Opinion and Order, CC Docket Nos. 00-218, *et al.*, DA 02-1731 (Wireline Comp. Bur. July 17, 2002) ("*Bureau Arbitration Order*").

at ¶ 53. Yet that decision—which is not a decision of the FCC itself, is still subject to FCC review, and is neither entitled to deference[11] nor in any way binding on this Commission—is most notable for what it does *not* say. The Bureau did not find—as this Commission did—that requiring ALECs to bear these costs *violates* the 1996 Act and the FCC's rules. Moreover, in finding that the ALECs' proposals were more consistent with federal law, the Bureau did not attempt to reconcile its decision with ¶ 199 of the *Local Competition Order*, which this Commission—like other state commissions,[12] the Third Circuit,[13] and the Ninth Circuit[14]—have found permits an ILEC to recover from an ALEC the costs of transporting local traffic from an IP to the POI. *See BellSouth-Sprint Arbitration Order* at 60. For these reasons, the Bureau's ruling does not control here. Instead, the Commission should adhere to its thoroughly reasoned *BellSouth-Sprint Arbitration Order*.

Fourth, to the extent the Commission based its rejection of the ILECs' position on its conclusion there is no "discernable authority" for the proposition "that a point of interconnection and an interconnection point are separate entities," *Order* at 23, that conclusion was erroneous. Authority for distinguishing between the POI and the IP can be found in orders of the FCC and of this Commission. As described above, in approving Verizon's § 271 application in Pennsylvania, the FCC found that a Verizon policy that "distinguishes the POI from the IP, which it defines as the point where traffic is dropped off for billing purposes," "do[es] not

[11] *See Caiola v. Carroll*, 851 F.2d 395, 399 (D.C. Cir. 1988) (refusing to defer when interpretation rendered by official who was "*not* the head of the agency").

[12] *See, e.g.*, Order on Arbitration, *Petition of AT&T Communications of the Southern States, Inc. for Arbitration of Certain Terms and Conditions of a Proposed Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to 47 U.S.C. Section 252*, Docket No. 2000-527-C, Order No. 2001-079, at 22-24 (S.C. PSC Jan. 30, 2001) ("*South Carolina Arbitration Order*"); Recommended Arbitration Order, *Arbitration of Interconnection Agreement Between AT&T Communications of the Southern States, Inc., and TCG of the Carolinas, Inc., and BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996*, Docket Nos. P-140, Sub 73 & P-646, Sub 7, at 15 (N.C. Utils. Comm'n Mar. 9, 2001) ("*North Carolina Arbitration Order*"), *aff'd*, Order Ruling on Objections and Requiring the Filing of the Composite Agreement, Docket Nos. P-140, Sub 73 & P-646, Sub 7 (N.C. Utils. Comm'n June 19, 2001).

[13] *MCI Telecomm. Corp. v. Bell Atlantic-Pennsylvania*, 271 F.3d 491, 518 (3d Cir. 2001) ("[t]o the extent... [an ALEC's] decision on interconnection points may prove more expensive to Verizon, [a state commission] should consider shifting costs to [that ALEC]").

represent a violation of our existing rules." *Pennsylvania 271 Order*, 16 FCC Rcd at ¶ 100 & nn.341, 343, 346. The *BellSouth-Sprint Arbitration Order* similarly recognized the distinction between the POI and the IP (referred to by BellSouth as a virtual point of interconnection, or VPOI). As this Commission explained:

> the term "POI" refers to the place where BellSouth's and Sprint's network[s] physically interface for the mutual exchange of traffic. We also note that the term "VPOI" refers to an implicit "POI" for billing purposes. The VPOI is not a physical interface; however, it refers to a physical point on BellSouth's network beyond which BellSouth would be entitled to recover costs for delivery of BellSouth-originated local traffic to Sprint's end-users.

BellSouth-Sprint Arbitration Order at 58. The Commission required Sprint to "designate at least one VPOI 'within' [each] BellSouth local calling area" in which Sprint has obtained an NXX code and to compensate BellSouth at "TELRIC rates for Interoffice Dedicated Transport . . . between . . . Sprint's VPOI and Sprint's POI." *Id.* at 62, 63. Neither the FCC's *Pennsylvania 271 Order* nor this Commission's *BellSouth-Sprint Arbitration Order* — both of which provide clear authority for the distinction between the POI and the IP — are addressed in the *Order*.

Fifth, this Commission found that the "transport costs identified as being at issue in this proceeding are *de minimis*." *Order* at 24. This, too, is contrary to the *BellSouth-Sprint Arbitration Order*, where the Commission found that "there are additional costs directly associated" with transporting a call to a POI outside of the local calling area where the call originates. *BellSouth-Sprint Arbitration Order* at 58; *see id.* ("there are costs associated with the use and maintenance of th[e] facilities" for that transport). This Commission further found that TELRIC rates provide an appropriate basis for the quantification and recovery of those costs. *See id.* at 62. Applying these rates to the millions of minutes of traffic exchanged between ILECs and ALECs demonstrates that the costs at issue are not *de minimis* — if they were, the ALECs would not be so adamant in their opposition to paying for this transport.

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[14] *U S West Comm., Inc. v. Jennings*, No. 99-16247 (9th Cir. Sept. 23, 2002) ("[T]o the extent that [an ALEC's] desired interconnection points prove more expensive to U S West,...the [state commission] should consider shifting costs to [that ALEC]").

Finally, requiring ALECs to bear these costs is also sound public policy. As this Commission has found, the need for an ILEC to transport a local call outside of the local calling area in which it originates is caused by the ALEC's decision as to where to establish its POI. *See BellSouth-Sprint Arbitration Order* at 58. Because the ALEC causes these costs, it should bear them. *See South Carolina Arbitration Order* at 22 ("it would be neither equitable nor fair for this Commission to permit AT&T to shift costs to BellSouth as a result of [its] network design"); *North Carolina Arbitration Order* at 9, 15 (finding it "equitable . . . and in the greater public interest" to require AT&T "to compensate BellSouth for . . . transport beyond the local calling area" because AT&T's selection of a single POI per LATA "force[s] BellSouth to incur additional transport costs"). In contrast, if the ILEC were forced to bear these costs, it would receive no compensation for transporting calls outside of the local calling area, which this Commission has recognized is beyond the "'typical' activities" that an ILEC would be expected to perform in completing local calls. *BellSouth-Sprint Arbitration Order* at 61. Therefore, shifting these uncompensated costs to the ILEC would mean that end users do not "receive accurate price signals," which the FCC has explained "undermines the operation of competitive markets." *ISP Remand Order* at ¶¶ 68, 71.[15] Sustainable local competition, however, requires that carriers compete "on the basis of the quality and efficiency of the services they provide, [not] on the basis of their ability to shift costs to other carriers." *Id.* at ¶ 71.

B. In Any Event, the Commission Should Clarify that an Originating Carrier's Obligation to Transport Traffic Ends at a POI that Is Located on the ILEC'S Network.

The Commission found that "an originating carrier has the responsibility for delivering its traffic to the point(s) of interconnection designated by the [ALEC] in each LATA." *Order* at 24. Verizon does not dispute this holding, as far as it goes, but it does not go far enough. Under the FCC's regulations, the point of interconnection must be "within the incumbent LEC's network."

[15] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001)

47 C.F.R. § 51.305(a)(2) ("An incumbent LEC shall provide . . . interconnection . . . [a]t any technically feasible point within the incumbent's network."). This Commission recognized as much in finding that ALECs have the "right to unilaterally designate single POIs . . . at any technically feasible location on an incumbent's network within a LATA." *Order* at 23.[16] However, by omitting the words "within the incumbent LEC's network" from the description of an originating carrier's obligations, the *Order* creates ambiguity, which Verizon proposes that the Commission clarify.

II. Verizon and ALLTEL Ask the Commission to Reconsider Its Decision Adopting the Originating Carrier's Retail Local Calling Area as the Basis for Determining Reciprocal Compensation Obligations.

The Commission ruled that, as between interconnecting carriers, the originating carrier's retail local calling area will determine reciprocal compensation obligations. Under this approach, the direction of the call will determine the nature of the intercarrier compensation—specifically, whether it will be subject to reciprocal compensation or access charges.

For example, Sarasota and Tampa are in different Verizon local calling areas within the same LATA. Today, when an ALEC customer in Sarasota calls a Verizon customer in Tampa, the ALEC pays Verizon terminating access charges for completing the call. The same is true if the call travels in the opposite direction; Verizon pays the ALEC terminating access for completing a call from its Tampa subscriber to the ALEC's Sarasota subscriber. Verizon and the ALEC, likewise, pay each other reciprocal compensation for terminating each other's calls within the Sarasota, Tampa, and other Verizon tariffed local calling areas. While the ALEC is free to set and change its retail local calling areas at will, these changes do not affect the nature of intercarrier compensation today between Verizon and ALECs.

The Commission's decision, however, allows an ALEC unilaterally to redefine intercarrier compensation obligations, so that the ALEC could designate a LATA, the state, or even the

("*ISP Remand Order*"), *remanded*, *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

[16] Verizon does not seek reconsideration of this conclusion, which is consistent with federal law. *See* Verizon Post-Hearing Statement at 11.

entire country as its local calling area within which all calls will be subject to reciprocal compensation. If, in the example, the ALEC designates the LATA as its retail local calling area, access charges would no longer apply to any of the ALEC's traffic within the LATA. The ALEC would pay Verizon reciprocal compensation, rather than terminating access, to terminate the call from its customer in Sarasota to Verizon's customer in Tampa. Verizon's reciprocal compensation rates, which are required to be TELRIC-based, are about 10 times lower than access rates.[17]

This new arrangement would not apply to the same call going in the opposite direction, because Verizon's intercarrier compensation obligations would be defined by its own local calling areas. Verizon would still have to pay the ALEC terminating access charges for the call from Verizon's Tampa customer to the ALEC's Sarasota customer, because the call crosses Verizon's local exchange boundary. Verizon would pay the lower reciprocal compensation rates only when its subscriber's call originated and terminated within a Verizon local calling area.

As discussed below, this non-reciprocal compensation scheme violates the Telecommunications Act of 1996 (Act) and the FCC's implementing Rules, as well as Florida law forbidding circumvention of access charges. In addition, the Commission's decision is arbitrary and capricious because it would create exactly the same anticompetitive result the Commission sought to prevent in rejecting LATA-wide reciprocal compensation. Indeed, it would encourage regulatory arbitrage by ALECs on an enormous scale. There is no evidence supporting the Commission's conclusion that using the originating caller's local calling area is the most competitively neutral way to determine reciprocal compensation obligations.

[17] The sum of Verizon's originating and terminating access charges averages about $0.09 per minute. (Trimble, Tr. 92.) Reciprocal compensation rates are typically less than $0.004 per minute. (*See, e.g.*, Hearing Ex. 15, documents produced in response to Items 6(e) and 7 of Staff's First Request for Production of Documents to Verizon). There is no requirement for access rates to be cost-based; on the contrary, when the Commission established the access charge regime in 1983, its "overriding goal was to implement access charges that maintain the financial viability of the LECs while maintaining universal service." *Intrastate Telephone Access Charges for Toll Use of Local Exchange Services*, 83 FPSC 100, 1983 Fla. PUC Lexis 71, at *15 (1983). The Commission has maintained this link between access charges and universal service, directing the ILECs to continue to fund universal service though "markups on the services they offer," including access. *Determination of Funding for Universal Service and Carrier of Last Resort Responsibilities*, 95 FPSC 12:375, 1995 Fla. PUC Lexis 1748, at *56 (1995).

The Commission's decision is arbitrary and capricious for the further reason that it fails to consider the massive administrative problems and expense that it would cause.

These problems require the Commission to reconsider its originating carrier decision and to make a different ruling that is consistent with the law and the evidence in this case. In this regard, the best resolution is to adopt the ILEC's tariffed local calling areas as the default. If the Commission declines this alternative, it should approve its Staff's Primary Recommendation that there is no need to adopt a default option, and that carriers should continue to negotiate the local calling area for reciprocal compensation purposes.

A. The Originating Carrier Ruling Violates Federal Law.

The originating carrier scheme the Commission has created violates section 251(b)(5) of the Act and the FCC's implementing regulations, because it is not reciprocal in nature, it does not yield symmetrical rates, and it ignores the Act's distinction between local and access traffic.

Section 251(b)(5) of the Act requires all local exchange carriers to "establish reciprocal compensation arrangements for the transport and termination of telecommunications." The FCC originally interpreted this requirement to apply only to local traffic, and has consistently found that reciprocal compensation does *not* apply to access traffic—that is, "calls that travel to points—both interstate and intrastate—beyond the local exchange." *ISP Remand Order* at ¶ 37; *see also Local Competition Order* at ¶ 1033-34; 47. C.F.R. § 51.701(b)(1). The FCC found it "reasonable to interpret section 251(b)(5) to exclude traffic subject to...intrastate access regulations," as well as traffic subject to interstate access regulations, because "'it would be incongruous to conclude that Congress was concerned about the effects of potential disruption to the interstate access charge system, but had no such concerns about the effects on analogous intrastate mechanisms.'"[18] "[A]s a legal matter...transport and termination of local traffic are different services than access service for long distance telecommunications....The Act

preserves the legal distinctions between charges for transport and termination of local traffic and interstate and intrastate charges for terminating long-distance traffic." *Local Competition Order* at ¶ 1033.

As to determining the jurisdictional nature of traffic, the FCC has long held that the jurisdiction of a call is determined by its end points. *See ISP Remand Order* at ¶ 14 and n. 27. Consistent with FCC rulings, this Commission agrees that traffic is properly classified as either local or toll based on its end points. *Order* at 28.

States must establish symmetrical reciprocal compensation rates, unless the state Commission finds, based on a cost study, that the costs of the ILEC's and ALEC's systems justify a different compensation rate. *Id.* at ¶ 1089. "Symmetrical compensation arrangements are those in which the rate paid by an incumbent LEC to another telecommunications carrier for transport and termination of traffic originated by the incumbent LEC is the same as the rate the incumbent LEC charges to transport and terminate traffic originated by the other telecommunications carrier." *Id.* at ¶ 1069; *see also* 47 C.F.R. § 51.711(a)(1). The symmetrical rate rule is based on the FCC's assumption that "[b]oth the incumbent LEC and the interconnecting carriers usually will be providing service in the same geographic area." *Id.* at ¶ 1085.

Allowing the originating carrier to determine reciprocal compensation obligations satisfies none of these federal requirements.

First, the originating carrier ruling will produce "reciprocal compensation arrangements" that are not reciprocal. To be reciprocal, the same transport and termination arrangements must apply to the same traffic exchanged between the same parties. This is not true under the Commission's ruling. If the ALEC designates a larger local calling area than the ILEC has, entirely different transport and termination arrangements will apply to the traffic exchanged, depending upon its direction. In the example above, the ALEC will compensate the ILEC under

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[18] *Remand Order* n.66, *quoting Local Competition Order* at 15869. Although the D.C. Circuit remanded the ISP Remand Order to permit the FCC to clarify its reasoning, it left the Order in place as governing

reciprocal compensation rules for the Sarasota-Tampa call, while the ILEC will compensate the ALEC under the state access charge regime for the same call going the other way.

The non-reciprocity of this arrangement should be obvious, as it was to Staff members who emphasized this problem with the originating carrier approach:

> Ms. Simmons: One area for the ALEC, a different area for the ILEC.
> I think that's problematic. To me at the wholesale level I think it needs to be reciprocal whatever it is in terms of the area.
>
> * * *
>
> Mr. Dowds: If you, if you literally mirror for wholesale purposes retail local calling areas, you readily allow that you have explicit conflicts because you have one carrier saying the call is toll, you have another saying it's local.
>
> (Dec. 5, 2001 Special Agenda Transcript (Sp. Ag. Tr.) at 61.)
>
> Ms. Simmons: I mean we're talking about reciprocal compensation. We're supposed to have a reciprocal arrangement and I think geographically we've got to have one definition. I don't see how there can be multiples, you know, one for the LEC, one for the ALEC, because we're at the wholesale level.
>
> *Id.* at 63.
>
> Ms. Simmons: Commissioners, Mr. Dowds made a comment about how he didn't understand how you could have different compensation, intercarrier compensation depending on the direction of the route, whether it's ILEC to ALEC or ALEC to ILEC, and I would agree with that. It just seems to me we're, we're talking about a reciprocal arrangement. In order for it to be reciprocal I think the governing intercarrier compensation would need to be the same regardless of the direction of the call. That would be the only thing that would make sense to me.
>
> *Id.* at 68.

Indeed, that is the only thing that makes sense. A reciprocal compensation arrangement means just that—the governing intercarrier compensation must be the same regardless of the direction of the call. While carriers can set any local calling areas they wish for their retail customers, they are not free to do so for purposes of intercarrier compensation. There must be a single geographic definition of local calling area at the wholesale level, because the Act requires reciprocity at that level. The Commission overlooked the plain requirement that a reciprocal compensation arrangement must be reciprocal.

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federal law. *See WorldCom, Inc. v. FCC*, 288 F. 3d 429 (D.C. Cir. 2002).

A second problem, which is a corollary of the lack of reciprocity of compensation arrangements, is that the rates for transport and termination of interconnecting carriers' traffic will not be symmetrical, as the FCC requires. Under the Commission's new scheme, if the ALEC designates a larger calling area than the ILEC does, then it pays lower rates than the ILEC does for the same traffic crossing the ILEC's exchange boundaries.

Third, the originating carrier ruling violates the FCC's (and the Commission's own) rulings that the jurisdiction of a call is to be determined by reference to its physical end points. Under the originating carrier approach, there is no uniform concept of jurisdiction. Jurisdiction will depend not on the originating and terminating points of a call, but on the retail local calling plan of the customer making the call. A call with the same end points can be classified as local for one carrier and toll for another carrier.

Fourth, the originating carrier ruling ignores the Act's distinction between access and local traffic. As discussed, Congress did not intend for the newly created reciprocal compensation obligation to affect compensation for traffic that was subject to state access regimes before the Act was passed (that is, traffic traversing ILEC boundaries). But that is exactly how the Commission has employed it here. It has created a "reciprocal compensation" scheme that may include pre-Act intrastate (and perhaps even interstate) access traffic under section 251(b)(5) of the Act. While federal law does not prevent states from taking deliberate action to modify their intrastate access regimes to the extent permitted by their statutes, it does prevent them from using the reciprocal compensation requirement itself as a vehicle for doing so. As discussed, the reciprocal compensation provision was explicitly intended *not* to be used to change the intercarrier compensation applicable to pre-existing access traffic.

The Commission must reconsider its originating carrier ruling because it violates federal law and regulations governing a state's establishment of a reciprocal compensation mechanism.

B. The Originating Carrier Ruling Violates State Law.

The Commission cannot order the use of the originating carrier's local calling area as the reciprocal compensation default because it would modify the intrastate access regime, over which the Commission has no jurisdiction.

The Commission acknowledged its lack of authority over access charges when it dismissed MCI's 1997 petition seeking reductions in GTE's access charges. The Commission held that "[t]he specific provisions of Section 364.163, Florida Statutes, clearly limit [the Commission's] authority to act with regard to switched access rates." *Complaint by MCI Telecomm. Corp. Against GTE Florida Inc. Regarding Anti-competitive Practices Related to Excessive Intrastate Switched Access Pricing*, Final Order Granting Motion to Dismiss, 97 FPSC 10:681, 1997 Fla. PUC Lexis 1430, at *9 (1997). Because Chapter 364 prescribes a "specific and detailed process for the capping and reduction of access charges," the Commission concluded that the statutes could not be construed "as authorizing [the Commission] to reduce access charges *in any other manner for any other reason.*" *Id.* at *13-14 [emphasis added]. When "a statute specifies a certain process by which something must be done, it implies that it shall not be done in any other manner." *Id.* at *13-14, *citing Botany Worsted Mills v. U.S.*, 278 US 282; 73 L.Ed. 379, 385 (1929); and *Investigation of a Circuit Judge of the Eleventh Judicial Circuit of Florida*, 93 So. 2d 601, 606 (Fla. 1957).

Indeed, the Legislature forbade not only direct attempts to change the access charge regime, but also indirect efforts to circumvent access charges. Section 364.16(3)(a) states:

> No local exchange telecommunications company or alternative local exchange telecommunications company shall knowingly deliver traffic, for which terminating access service charges would otherwise apply, through a local interconnection arrangement without paying the appropriate charges for such terminating access service.

Enforcement of the access/local traffic distinction was so critical to the Legislature that section 364.16 is one of only four key provisions of Chapter 364 that the Commission may not waive for any ALEC. Fla. Stat. § 364.337(2).

The Commission has, in the past, properly interpreted section 364.16(3) to find that it is unlawful for an ALEC to circumvent access charges when its retail local calling area differs from the ILEC's. *BellSouth/Telenet Arbitration Order*, 1997 Fla. PUC Lexis 476 (*Telenet Order*), at *20 ("while an ALEC may have a different local calling area than an incumbent LEC, it is required by statute to pay the applicable access charges").

The Commission admits that its authority to establish a local calling area default for reciprocal compensation purposes "is not limitless, and that Sections 364.16(3)(a), Florida Statutes, and 364.163, Florida Statutes, restrict our authority in the area of access charges." *Order* at 37. Nevertheless, it inexplicably departs from its past interpretations of the statutes and concludes that "[t]hese provisions only address our authority with regard to access charges once the local calling scope has been defined." *Id.* As to its earlier decision that section 364.16(d) does, in fact, forbid an ALEC from avoiding access charges through its retail local calling area definition, the Commission asserts: "Given that the Telenet order addressed a specific issue in an arbitration proceeding, we appreciate its conclusions but do not believe that decision has precedential value in the instant proceeding." *Order* at 38-39.

As further support for its legal arguments, the Commission states its belief that its decision does not "translate into rate-setting" (*Order* at 38); claims the ILECs "offer nothing to dispute what appears to be a clear delegation of authority from the FCC to state commission to make determinations as to the geographic parameters of a local calling area" (*Order* at 39); and states that no party "has provided evidence or testimony based in fact or law that would prohibit us from defining a local calling area—including defining a LATA as a local calling area—for purposes of reciprocal compensation" (*Order* at 39).

Verizon discusses each of these asserted justifications in turn below. None of them support the Commission's decision to allow carriers to avoid access charges by means of their local calling area definition.

i. The General Jurisdictional Grant in Section 364.01 Does Not Permit the Commission to Ignore Sections 364.163 and 364.16(3).

While the Commission recognizes the statutory constraints on its authority to modify the intrastate access charge regime, it concludes that these constraints were not meant to affect the Commission's latitude to set local calling areas. Under the Commission's interpretation of section 364.01, the Commission can establish local calling areas for reciprocal compensation purposes in any way it believes best promotes consumer choice and competition. But once the local calling area is defined through that choice, it is only *then* that the Commission must abide by the directives in sections 364.163 and 364.16((3).[19] The Commission reaches this conclusion through misapplication of principles of statutory construction.

There is nothing to support the Commission's interpretation of the general jurisdictional grant in section 364.01 to confer unconstrained authority to define local calling areas for reciprocal compensation purposes, without regard to the jurisdictional limitations over access charges in sections 364.163 and 364.16(3)(a). Section 364.01 does not address establishment of local calling areas at all. But the Commission views it as an unconditional grant of authority to define local calling areas for all purposes based on the 1993 Florida Supreme Court decision in *Florida Interexchange Carriers Association v. Beard*, 624 So. 2d 248 (1993). *Order* at 37. There, the Court held that the Commission's exclusive jurisdiction to regulate telecommunications under section 364.01 gave it the authority to determine local calling routes, based on the needs of the community, and in accordance with then-existing regulations requiring telephone companies to investigate expansion of local calling scopes. The Commission acknowledges that this case was decided prior to the 1995 legislative changes that removed the Commission's authority over access charges, but states: "Nevertheless, we believe that the general grants of authority set forth in Section 364.01 authorize us to address

[19] *Order* at 38. ("The provisions of Section 364.01, Florida Statutes, should be read to authorize us to act to define the local calling area where necessary to ensure the widest range of consumer choice and to eliminate barriers to competition, but once that calling area is defined, our authority is limited by the specific statutory provisions applicable to access charges, Section 364.163, and Section 364.16(3)(a), Florida Statutes.")

the specific issue presented in this case in the same manner as those provisions [were] interpreted in the *Florida Interexchange Carriers v. Beard* case. *Order* at 37.

The Commission never explains just *why* it believes a case pre-dating the 1995 legislative changes (as well as the 1996 Act) allows it to establish local calling areas as if those dramatic statutory changes never occurred. There is no such explanation. The Commission must apply the existing statute, and that statute says the Commission cannot, either directly or indirectly, modify the intrastate access charge regime or allow ALECs to circumvent it. The Commission's decision is impermissible because it will change access traffic into local traffic (in contravention of section 364.163), and will allow ALECs, through their interconnection agreements, to avoid otherwise applicable access charges (in contravention of section 364.16(3)(a).).

Verizon agrees with the Commission that there is no need to resort to statutory construction when the language of a statute is clear. *Order* at 37. But then the Commission fails to apply this fundamental rule of statutory construction; it simply ignores Sections 364.163 and 364.16(3), which clearly limit the Commission's jurisdiction to modify the access charge regime, as even the Commission has recognized. It discusses only the asserted clarity of section 364.01, claiming that it "is clear in authorizing us to act with regard to this issue"—which, or course, contains no language indicating that the Commission can ignore the rest of the statute in defining local calling areas. "When the agency's construction of a statute clearly contradicts unambiguous statutory language, the construction will not stand, even though the statute deals with matters within the agency's regulatory jurisdiction and expertise." (2 Fla. Jr. Admin. Law § 211 and cases cited therein.)

Contrary to the Commission's view, there is no conflict between section 364.01, on one hand, and sections 364.163 and 364.16(3)(a), on the other, such that it is justified in construing the statute to ignore the latter provisions when it establishes local calling areas. *Order* at 38. Again, section 364.01 is a general jurisdictional grant. To the extent that it gives the

Commission any authority to establish local calling areas, that authority must be exercised in accordance with the other, more specific provisions in the statute, including sections 364.163 and 364.16(3). A statute must be read as a whole; where other sections of a statute may be applicable to construction of a particular provision, "all must be construed together"—not in some successive way, as the Commission has held in this case. (48A Fla. Jur. Statutes § 114 and cases cited therein.) In addition, specific provisions (here, sections 364.163 and 364.16(3)(a)) will control over general ones (here, section 364.01). *Sutherland Stat. Const.* § 46.05 (5th ed.).

The conflict in this case is not between the relevant statutory provisions, but, rather, between the Commission's policy choice and the Legislature's limitations on that choice. As the Supreme Court has made clear, the Commission's policy objectives cannot supersede a clear statutory directive. *See Verizon Florida, Inc. v. Jacobs*, 810 So. 2d 906 (2002). Verizon agrees that the Commission can regulate "to ensure the widest range of consumer choice and to eliminate barriers to competition," *Order* at 38, but only to the extent that that regulation is consistent with the clearly expressed legislative intent to preserve the intrastate access charge regime.

The Commission's attempt to both acknowledge and avoid the jurisdictional limitations of sections 364.163 and 364.16(3) leads to nonsensical results. Assume, for example, that an ALEC establishes the entire state as its local calling area, as it may under the default originating carrier approach the Commission has established. Its local interconnection agreement will define the entire state as the relevant area for assessing reciprocal compensation, and will thus allow it to avoid paying terminating access charges on any of its traffic in the State.

Once the Commission has allowed the carrier to define its entire state as the local calling area, it is only then, in the Commission's view, that it needs to consider sections 364.163 and 364.16(3)(a). That is, the Commission becomes subject to section 364.163's strictures against modification of the access charge regime and it must enforce 364.16(3)(a)'s prohibition on

carriers using local interconnection arrangements to deliver traffic for which access charges would otherwise apply.

Of course, at this stage, the Commission will have already effectively altered the access charge regime and expressly permitted carriers to avoid access charges through their local interconnection arrangements. So the requirements of sections 364.163 and 364.16(3)(a) will be rendered meaningless. After having eliminated the access/local distinction the Legislature was so careful to preserve, it is impossible for the Commission then to enforce this same distinction.

Moreover, if the Commission is correct that the *FIXCA* case affirms the Commission's unconditional right to define local calling areas without regard to later-enacted statutes, then the Commission can ignore not just the provisions removing the Commission's jurisdiction over access charges, but also the 1995 provision eliminating its authority to mandate expanded local calling. Fla. Stat. § 364.385. Under the Commission's interpretation of § 364.01 in the *Order*, its authority to order expanded area service (EAS) today would remain the same as it was in 1993, when the FIXCA case was decided, because section 364.01 is an absolute grant of authority to define local calling area. Of course, that is not the view the Commission has consistently taken in denying requests to initiate EAS proceedings.

Because the Commission's statutory interpretation leads to these absurd and unreasonable results, it would be rejected by a reviewing Court. *See, e.g., State ex rel. Fla. Industrial Comm'n v. Willis*, 124 So. 2d 48, 51 (Fla. 1st DCS 1960) ("a statute should not be construed to bring about an unreasonable or absurd result and...should be construed to effectuate the intention of the legislature in enacting the statute.") The Commission must read Chapter 364 correctly to recognize that sections 364.163 and 364.16(3)(a) impose limits on its authority to establish a local calling area; and that these limits prevent it from defining reciprocal compensation obligations by reference to the originating carrier's retail local calling area.

ii. The Commission's Ruling Is Impermissible Rate-setting.

The Commission admits that "[i]t is clear from the plain language of Section 364.163, Florida Statutes, that the Legislature has reserved for itself the authority to determine access charge rates." But the Commission denies that its decision is tantamount to adjusting access rates. *Order* at 38. This conclusion is demonstrably incorrect.

Verizon's terminating access charge rate is about .05. Its reciprocal compensation rate, which must be TELRIC-based under the Act, is about .004. The Commission would presumably agree that it couldn't directly order Verizon to reduce its access rate from .05 to .004. But the Commission apparently believes it can approve the same outcome by allowing carriers to adjust their own access charges. Once a carrier declares that its access traffic is local, it will pay .004 for termination of the same traffic for which it paid .05 the day before.

Both results are just as impermissible under the statute. The rate caps and rate adjustment percentages the Legislature prescribed in 1995 were deliberate choices, made only after careful analysis of competing options--including cost-based access rates. In fact, just such an amendment was proposed and ultimately withdrawn. It read, in relevant part: "Both interconnection services and network access services shall...be offered at cost-based prices." (Sen. Comm. On Commerce & Ec. Opp., Proposed Am. 35, Apr. 4, 1995 pkg.) This amendment would have had exactly the effect the Commission has now sanctioned—cost-based interconnection and access rates. The Commission has no authority to approve an approach the Legislature did not. It cannot disregard the Legislature's plainly expressed intent to maintain the intrastate access regime intact and to protect against circumvention of access charges.

iii. The Commission Has Not Explained Its Departure from Its Prior Interpretation of Relevant Law.

In the Telenet case, Telenet's resale of BellSouth's call forwarding service resulted in the delivery of traffic for which access charges would otherwise apply. Telenet argued that it

need not pay access charges on these calls because they stayed within Telenet's local calling area. The Commission rejected this rationale. It observed that Telenet's local calls would be toll or EAS calls if they were made using BellSouth's, AT&T's or MCI's networks. It recognized that an ALEC could designate its local calling area as it liked, but it could not, *as a legal matter*, avoid paying access charges, regardless of its retail local calling scope: "Section 364.16(3)(a), Florida Statutes...does not allow an ALEC to knowingly deliver traffic where terminating access charges would otherwise apply. Therefore, while an ALEC may have a different local calling area than an incumbent LEC, it is required by statute to pay the applicable access charges." *Telenet Order* at 20.

In this case, the Commission has made exactly the opposite interpretation of Section 364.16(3)(a)—that it does *not* require the ALEC to pay otherwise applicable access charges when it designates a calling area larger than the ILEC's. As explanation for this departure from its previous legal interpretation, the Commission offered only that it was made in an arbitration proceeding involving call forwarding. It did not explain *why* these differences justified an opposing interpretation of the law.

Moreover, any differences in the facts do not change the law itself. In the *Telenet Order*, the Commission held that the law prevented an ALEC from avoiding paying access charges if its retail local calling area is bigger than the ILEC's. The law is the same as it was in 1997, so the Commission's interpretation of that law to answer the same question should be the same.

Because the principle of *stare decisis* applies to administrative agencies in Florida (*see, e.g., Couch v. Fla. Dep't of Health and Rehabilitative Services*, 377 So. 2d 32, 34 (Fla. 1st DCA 1979)), the Commission must provide a reasoned analysis for the departure from its prior precedent. Its failure to do so here renders its decision arbitrary.

iv. The FCC Did Not Preempt State Law Prohibiting Circumvention of Access Charges.

The Commission contends that the FCC has unequivocally granted the states authority to determine the local calling area for reciprocal compensation purposes. It states that: "ILEC parties offer nothing to dispute what appears to be a clear delegation of authority from the FCC to state commissions to make determinations as to the geographic parameters of a local calling area." *Order* at 39.

The Commission has apparently overlooked all of the ILECs' arguments about the effect of sections 364.163 and 364.16(3)(a) on the Commission's authority to set local calling areas. What the FCC did was affirm the states' authority to establish local calling areas for reciprocal compensation purposes, "consistent with the state commission's historical practice of defining local service areas for wireline LECs." *Local Competition Order* at ¶ 1035. The FCC did *not* preempt any state constraints on local calling area designation, including sections 364.163 and 364.16(3). In fact, it made sure to say that state authority must be exercised consistent with historical practice.

It is incorrect, as a matter of law, to conclude, as the Commission did, that the FCC eliminated any state statutory constraints on Commission jurisdiction to designate local calling areas for intercarrier compensation purposes.

v. Verizon and Others Thoroughly Explained the Constraints on the Commission's Authority to Designate a Local Calling Area for Reciprocal Compensation Purposes.

As the final justification for its conclusion that the Commission has unconditional legal authority to designate the local calling area, it states:

> Further, no party to this proceeding has provided evidence or testimony based in fact or law that would prohibit us from defining a local calling area—including defining a LATA as a local calling area—for purposes of reciprocal compensation.

Order at 39.

Verizon is not sure what this statement means. Parties are not required or expected to present testimony or "evidence" on legal issues, such as the scope of the Commission's authority to change local calling areas. Legal issues are treated primarily in the parties' briefs. Even so, witnesses for Verizon and others did, in their testimony, express their opinions that the law does not permit the Commission to use the LATA or larger areas as the local calling area for reciprocal compensation purposes. (*See, e.g.*, Trimble, Tr. 104; Ward, Tr. 172-73; Busbee, Tr. 208, 210.) The Commission apparently overlooked this testimony and, in any event, mistakenly believes that a party must offer testimony or other evidence to support its positions on legal issues.

* * *

Because the Commission has misconstrued the law affecting its jurisdiction to designate the local calling area for reciprocal compensation purposes, its decision must be reconsidered.

C. The Originating Carrier Ruling Will Create the Very Anticompetitive Effects the Commission Sought to Prevent.

The Commission's primary criterion for the local calling area default is that it must be "as competitively neutral as possible." *Order* at 50. The Commission rejected the LATA-wide reciprocal compensation default because it does not satisfy this requirement. In this regard, the Commission was particularly concerned about discrimination against IXCs and the resulting impact on the intraLATA toll market:

> As offered by AT&T witness Cain, in a LATA-wide calling regime, ALECS and ILECs would exchange all traffic in a LATA and compensate each other on the basis of reciprocal compensation rates. An IXC, however, would continue to be required to pay originating access and terminating access to the respective LEC, essentially creating a separate, more costly form of intraLATA toll service. AT&T witness Cain offers no remedy for this disparity, suggesting instead that erosion of the IXC's competitive position is inevitable and attributable to layers of non-cost-based prices in the access charge regime. Whether or not witness Cain's projection that economic Darwinism will consume IXCs providing intraLATA toll service is accurate, we believe this possibility deserves notice as a potential consequence of LATA-wide local calling.

Order at 49; *see also Order* at 49-50.

The Commission disapproved the LATA-wide local calling default for the additional reason that it would "provide ALECs with a disincentive to negotiate" and would thus undermine the Commission's preference for a "business solution, as opposed to a regulatory solution, to industry disputes." *Order* at 49.

These are sound conclusions, supported by the evidence. But the Commission overlooked the fact that they apply equally to its chosen default option. Under the originating carrier approach, ALECs can--and likely will--define their local calling area as the entire LATA, because it will allow them to achieve their admitted objective of avoiding access charges. (*See, e.g.*, Cain, Tr. 221, 217-20; AT&T's Posthearing Brief, at 7-8; Florida Digital Network, Inc.'s Post-Hearing Brief, at 4, 6, 9; US LEC's Posthearing Brief, at 5.) The result of adopting either the originating carrier or LATA-wide default option will thus be the same "separate, more costly form of intraLATA toll service."

In fact, using the originating carrier's local calling area to define reciprocal compensation obligations would present even greater competitive neutrality problems than setting the LATA as the default Because it creates directional differences in application of intercarrier compensation, the originating carrier approach discriminates not only against IXCs, but ILECs, as well. As explained earlier, to the extent ALECs' local calling areas are bigger than the ILECs' tariffed local calling areas, ILECs (along with the IXCs) will pay access charges on the same traffic for which ALECs pay lower reciprocal compensation rates.

During the course of the proceeding, Verizon, ALLTEL and Sprint made clear that the originating carrier approach necessarily presented all the same competitive concerns than the LATA-wide proposal would, and more. (*See generally* Verizon's Post-Hearing Statement; Trimble, Tr. 97-99, Sprint Brief at 13; Ward, Tr. 184-85; Busbee, Tr. 210.) Before testimony was even submitted in this phase, the Commission's own Staff identified the originating carrier approach as the most problematic and least competitively neutral of the potential choices for determining reciprocal compensation obligations:

> Mr. Dowds: ...it just strikes me as highly anomalous that the form of compensation will differ based upon the direction of the call, which is really what you're, you're allowing for here. It seems to me that you've encouraged gaming.

Ag. Conf. Tr. at 64.

> Mr. Dowds: ...another problem with mirroring for wholesale purposes retail local calling areas is you have an issue of competitive, that it's not competitively neutral.

Id. at 61-62.

Mr. Trimble elaborated upon the gaming problem Mr. Dowds identified in conjunction with the originating carrier approach. For example, an ALEC may set up shop to market outbound calling services. In that case, it may establish a large "local" calling area for its retail customers and would pay reciprocal compensation for calls that would otherwise be subject to terminating access charges. (Trimble, Tr. 98-99.) Moreover, if the ALEC, for instance, marketed LATA-wide local calling in the Tampa area, it could deliver all traffic to Verizon in Tampa, and then require Verizon to deliver the traffic throughout the LATA. The ALEC could presumably demand a premium from its customers, even though it would incur no additional costs, while Verizon would get no additional revenue from its customers and would be deprived of the terminating access charges that should properly apply to such traffic. Or the same ALEC may instead choose to market inbound calling services, in which case it would charge higher terminating access rates for its inbound traffic—for call between the same local exchange carriers and the same geographic points to which it pays the lower reciprocal compensation rate. (Trimble, Tr. 98-99.)

These are only some of the more obvious arbitrage opportunities presented by the Commission's decision. Given the experience with Internet-bound traffic, the ALECs will have no problem identifying such opportunities, with the same results—severe market distortions that inflict serious harm on genuine local service competition. *See ISP Remand Order* at ¶¶ 2, 4-7, 21, 69-70.

The Commission acknowledged that the "directional differences in compensation" arising from the originating carrier option "appear to be anomalous and inequitable." *Order* at 51. But it dismissed this serious concern by concluding that these differences would likely not be sustainable over time and that "more uniformity will emerge as a result." *Order* at 51. In other words, the originating carrier approach will prompt carriers to move toward uniform retail local calling areas—which, of course, is directly contrary to the Commission's asserted goal of choosing the approach that would yield "the widest range of consumer choice." *Order* at 38. Moreover, the only logical conclusion is that the uniformity that would result would be uniform LATA-wide local calling, completely eliminating intraLATA access charges, in direct conflict with Florida law.

Aside from the troubling directional differences in compensation that characterize the originating carrier approach, the artificial cost advantages available to the ALECs under this scheme are more pronounced than they would be under the LATA-wide approach. The ALEC, as originating carrier, could designate the entire state or even the country as its local calling area, in an attempt to circumvent not just intrastate, but interstate, access charges, as well.

Furthermore, given the competitive advantages the originating carrier approach would give ALECs over *both* IXCs and ILECs, the Commission's ruling would create at least as great a disincentive to negotiate as the Commission identified in conjunction with the LATA-wide reciprocal compensation approach. To the extent that availability of negotiation away from the originating carrier default prompted the Commission to choose that default (Aug. 20, 2002 Ag. Conf. Tr., Item 21, at 7), then that reasoning is mistaken. As discussed, the originating carrier approach will give the ALECs just what they wanted (and more). Indeed, GNAPs, which has supported the originating carrier approach in its arbitrations with Verizon here and elsewhere, has stated that its position "largely mirrors" the LATA-wide reciprocal compensation approach. (GNAPs' Petition for Arbitration with Verizon, filed Dec. 20, 2001, at 20.)

The Commission's decisions must be supported by competent, material and substantial evidence—that is, evidence that is "sufficiently relevant and material that a reasonable man would accept it as adequate to support the conclusion reached." (*De Groot v. Sheffield,* 95 So. 2d 912, 916 (Fla. 1st DCA 1957).) In this case, the Commission has cited *no* evidence at all to support its conclusion that the originating carrier approach is the most competitively neutral option. In fact, the only discernible rationale underlying the Commission's choice seems to be that it "receive[d] less attention from the parties" and that it was the only option left after the Commission discarded the LATA-wide and ILEC-calling-area defaults. *Order* at 50. This is plainly not the evidentiary basis necessary to sustain the Commission's finding of superior competitive neutrality.

Because it permits carriers to define reciprocal compensation obligations using the LATA (or even larger areas), the originating carrier scheme necessarily presents the same competitive neutrality problems the LATA-wide option does. It is arbitrary and capricious to choose a default option that suffers the same drawbacks as the rejected option and that the Commission believes will yield the very uniformity of calling areas that it purports to prevent. The Commission must thus reconsider its decision.

D. The Originating Carrier Ruling Is Arbitrary Because It Fails to Consider the Massive Administrative Problems and Enormous Costs It Would Cause.

There is no evidence in this case that Verizon or ALLTEL could implement an originating carrier system of reciprocal compensation, which would require them to accommodate and reflect in their billing the local calling areas of every carrier with which they interconnect. Likewise, as the Commission acknowledges, there are no data in the record on the potential cost of reconfigure billing systems to comply with an originating carrier ruling to reciprocal compensation. *Order* at 44.

Because ALECs can set and change their local calling areas at will, and because a single ALEC may itself have a number of different retail local calling areas under different calling

plans, accurately tracking and billing reciprocal compensation will be impossible. Indeed, the Commission's decision ostensibly requires the receiving carrier to customize its intercarrier billing on a customer-by-customer basis. Staff was correct that it would be a "nightmare" to try to line up wholesale with retail local calling areas for billing reciprocal compensation, given the variability in retail local calling scopes. (Ag. Conf. Tr. 59; *see also, e.g.*, Ward, Tr. 185; Trimble, Tr. 97-100.)

The Commission also overlooked that current systems are built to reflect the ILEC's local calling areas in several respects. For example, under standard industry practice, specific NXX codes are associated with particular exchanges for a myriad of call rating, routing, and billing purposes. To construct such systems on a customized basis, allowing for non-mutual calling areas, would be enormously costly if it is even possible.

Despite the obvious administrative nightmares associated with the originating carrier scheme, the Commission concluded that all ILECs could implement the originating carrier approach solely on very limited, general testimony that BellSouth uses "billing factors" as a basis for assessing intercarrier compensation. *Order* at 50-51. In other words, BellSouth does not actually record or otherwise track traffic to verify its jurisdiction, but relies on the originating carrier to accurately report its own interstate, intrastate, and local usage. *Order* at 50.

The record contains no details about how this "factor" system works, whether non-BellSouth carriers could implement it, or how complex it might be to administer after more and more ALECs seek to take advantage of the Commission's originating carrier ruling. In any event, ILECs should not be forced to simply trust the ALEC (or ALEC/IXC) to report its traffic correctly, particularly given the IXCs' overriding motivation to avoid access charges.

The concern about misreporting traffic is not just theoretical. It is not true, as the Commission said, that "[t]here is nothing in the record" to suggest that ILECs cannot rely on the "integrity" of ALECs and IXCs to correctly report their traffic. Verizon, for example, pointed out that as ILECs have become better able to verify the jurisdiction of IXCs' access minutes, they

have discovered problems with IXCs assigning intrastate access minutes to the interstate jurisdiction, where access charges are lower. These problems are beginning to come to light through Commission complaints here and elsewhere. (*See, e.g.*, Verizon's Post-Hearing Statement at 9-10, *citing* Shiroishi, Tr. 77; Complaint of BellSouth Telecomm., Inc. Regarding the Practices of WorldCom, Inc. in the Reporting of Percent Interstate Usage for Compensation for Jurisdictional Access Services, Fla. P.S.C. Docket No. 020420-TP, filed May 14, 2002; Complaint of Carolina Tel. and Tel. Co., d/b/a/ Sprint Against Broadwing Comm. Services, Inc., North Carolina Util. Comm'n Docket No. T454, sub 9 (accusing Broadwing of deliberately underreporting its intrastate access minutes); Complaint of BellSouth against WorldCom, Inc. in South Carolina P.S.C. Docket No. 2002-166-C (accusing WorldCom of access arbitrage).) Given BellSouth's aggressiveness in pursuing fraudulent self-reporting of traffic, it is surprising that it would agree to rely on billing factors, rather than accurate traffic measurement.[20] In any event, because the originating carrier approach creates greater opportunities for arbitrage, experience shows that it will inevitably lead to more Commission complaints about that practice.

There is no competent and substantial evidence supporting the Commission's conclusion that all ILECs can administer an originating carrier approach to defining intercarrier compensation obligations. The Commission's decision in this regard is thus arbitrary, and must be reconsidered.

[20] To the extent the Commission was comfortable choosing the originating carrier approach because BellSouth first suggested it, the Commission should understand that BellSouth no longer supports that approach to the extent it once did. First, BellSouth has never advocated the establishment of a default local calling area for reciprocal compensation purposes. In an earlier stage of this proceeding, BellSouth did suggest using the originating carrier's local calling area as the default if the Commission insisted on choosing one. In this stage of the proceeding, however, BellSouth has asked the Commission to use the ILEC's local calling area as the default if one is adopted: "BellSouth does not believe that a default local calling area definition is necessary at his time. However, in the event the Commission is inclined to adopt such a definition, *the default local calling area should be defined as the ILEC's local calling area*. Such a definition has previously been selected by several state commissions in establishing the definition of local calling area for reciprocal compensation purposes." (BellSouth Brief at 6 [emphasis added].) BellSouth suggests use of the originating carrier's local calling area as the default *only* if it rejects BellSouth's preferred default of the ILEC's local calling area. *Id.* at 8, 13.

E. There Is No Need to Adopt a Default Option.

All parties in this case supported negotiations as the primary means of defining the local calling area for reciprocal compensation purposes. In addition, when this proceeding was initiated, no party raised the local calling area issue for resolution in this case. Nevertheless, the Commission believed it was necessary to adopt a default local calling area for purposes of reciprocal compensation because the issue was assertedly "becoming too commonplace in arbitration cases...and some finality is important in order to avoid litigating this issue multiple times." *Order* at 50; *see also id.* at 51.

Verizon and ALLTEL question this premise, which was not supported by any facts. The Commission offered no account of how many times the issue had been litigated. In Verizon's case, the issue of local calling area for reciprocal compensation purposes had never been presented in an arbitration until *after* it was identified as an issue in this case—and even then, it was raised in only *one* arbitration. Verizon has thus been able to negotiate this issue in virtually all cases.

BellSouth's experience has been similar. BellSouth witness Shiroishi observed that "[i]t has not been BellSouth's experience that this issue is one that requires the Commission to establish a default definition," because it has not been "highly contested and arbitrated." (Shiroishi, Tr. 21, 53-54. BellSouth's Brief at 5-6.) Indeed, BellSouth and its interconnectors have negotiated various forms of expanded local calling areas for reciprocal compensation purposes. The existence of these alternatives prove that there is no need for a Commission-mandated default to prompt negotiating parties to achieve the industry solutions the Commission supports.

Indeed, the Staff on the Primary Recommendation correctly observed that adoption of a default would "predispose the parties toward regulatory solutions as opposed to negotiated business solutions." They did "not believe a compelling case can be made...to designate a

default in the event negotiations are unproductive. (Primary Staff Recommendation (Bloom, Keating) at 36.)

Adopting an originating carrier default ruling will only cause the local calling issue to come before the Commission in even more arbitrations. Whatever the ruling in this generic case, parties will remain free to bring the local calling issue to arbitration. As explained, the originating carrier ruling--with its obvious advantages for ALECs--will remove the ALEC's incentive to negotiate anything else. Even though an originating carrier ruling in this generic docket may signal the likely resolution of the local calling area issue in an arbitration, that does not mean all ILECs can agree in negotiations to use the originating carrier's local calling area for purposes of assessing reciprocal compensation.

First, carriers cannot agree to something they cannot do. As discussed in the preceding section, the originating carrier approach will present enormous practical problems. Neither Verizon's nor ALLTEL's existing systems can accommodate the originating carrier ruling and any attempt to do so would be enormously expensive.

A second reason Verizon cannot agree to an originating carrier approach in negotiations is that, under the FCC's conditions of the merger between GTE and Bell Atlantic, Verizon is required to offer interconnection agreement provisions that are voluntarily negotiated in one state to carriers across the entire Verizon footprint. *Application of GTE Corp. and Bell Atlantic Corp.*, Memorandum Op. and Order, 15 FCC Rcd 14032, App. D, at para. 31 (2000). If Verizon agrees to the originating carrier approach in a Florida contract, it risks exporting this disastrous scheme to all other states in the Verizon footprint.

Verizon and ALLTEL maintain that using the ILECs' local calling areas as the default would be the best resolution of this issue, because that is the most competitively neutral and administratively simple approach. (*See generally* Verizon's Post-Hearing Statement, Direct and Rebuttal Testimony of Verizon Witness Trimble.) However, if the Commission chooses an originating carrier (or LATA-wide) scheme over the ILEC's calling area, either of these defaults

will certainly "predispose the parties toward regulatory solutions," as Verizon and ALLTEL explained above. Because there is no demonstrated need to set a default, and because establishing the default as the originating carrier's retail local calling area will cause just the increased litigation the Commission seeks to prevent, the Commission should reconsider its decision. Verizon and ALLTEL ask the Commission to adopt the ILECs' local calling areas as the default. If the Commission declines to do so, then it should adopt the Primary Staff Recommendation on this issue.

MOTION FOR STAY PENDING APPEAL

If the Commission does not reconsider its decision ordering the originating carrier's local calling area as the default for assessing reciprocal compensation, an appeal will be necessary to challenge this impracticable and anticompetitive ruling. In that event, Verizon and ALLTEL ask the Commission to grant a stay pending judicial review, in accordance with Commission Rule 25-22.061 and Florida Rule of Appellate Procedure 9.310.

Rule 25-22.061 requires the Commission to grant a stay, upon a motion by the affected company, if the order being appealed involves a decrease in rates charged to customers. As discussed in the Motion for Reconsideration, if the ALEC defines its local calling area larger than the ILEC's tariffed local calling areas, then the ALEC will pay TELRIC-based reciprocal compensation, rather than access charges, on traffic traversing an ILEC's local calling area. The originating carrier ruling thus substantially and immediately reduces the intercarrier compensation rates paid to the ILEC. Because the decision allows a decrease in rates charged for exactly the same traffic, the parties are entitled to a stay as a matter of right.

Even if the Commission disagrees that it must grant a stay, all of the conditions for obtaining a discretionary stay pending judicial review are met. F.A.C. § 25-22.061(2).

First, an appeal will be likely be successful for all the reasons discussed in this Petition. The Commission's decision is arbitrary because the originating carrier default it chose will cause

the same anticompetitive outcomes that led the Commission to reject the LATA-wide reciprocal compensation approach. There is no evidence, let alone competent, material and substantial evidence, supporting the Commission's choice of the originating carrier's local calling area for reciprocal compensation purposes, or its conclusion that carriers can even implement this ruling. The decision is also contrary to federal and state law. Any one of these reasons would be sufficient to overturn the decision.

Second, Verizon, ALLTEL (and the ILEC and intraLATA industry) will suffer irreparable harm in the absence of a stay. If access traffic is converted into local traffic, as it would be under an originating carrier approach, "there are clearly millions of dollars at risk for both IXCs' and ILECs' intraLATA toll revenues as well as millions of dollars for ILECs' intraLATA access revenues." (Ward, Tr. 74.) Sprint estimates that LATA-wide local calling for reciprocal compensation purposes would cause it to lose $14 million in revenue annually. (Hearing Ex. 11, at 2.) Verizon's losses, conservatively estimated, would also run into the millions of dollars annually. (Trimble, Tr. 145 and Hearing Ex. 15, confidential response to item 7 of Staff's First Request for Production of Documents to Verizon; see also Order at 47-48.) ALLTEL will lose $700,000 annually. *Order* at 47. As Primary Staff correctly pointed out, a LATA-wide local calling area would "cost ILECs millions in lost access charge revenues and potentially decimate the IXCs' place in the intraLATA toll market." (Primary Staff Rec. at 36.) As explained, since an originating carrier approach necessarily permits LATA-wide local calling areas for reciprocal compensation purposes, it will have the same, and even worse, effects, as the jurisdiction of a call will depend on its direction.

The losses flowing from the anticompetitive effects of the originating carrier approach are irremediable. If the Commission's ruling takes effect, it will give the ALECs a definitive competitive advantage over their ILEC and IXC (particularly stand-alone IXC) competitors. The ALECs will gain a cost advantage that has nothing to do with their efficiency, but rather with the Commission's decision allowing them to pay lower intercarrier compensation than their

competitors do for the same traffic. Once lost, market share is extremely difficult and expensive to gain back.

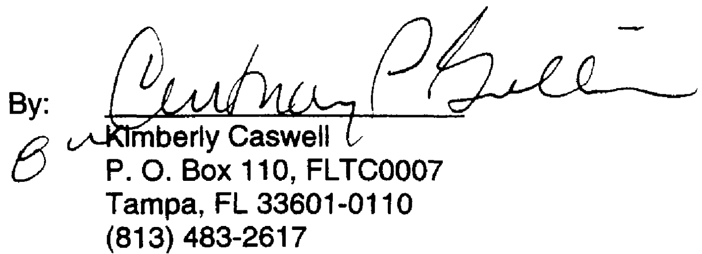
In addition to the competitive harms flowing from the Commission's decision, it will cause Verizon and ALLTEL to incur substantial expanse to try to develop a billing system that can accommodate multiple local calling areas for intercarrier compensation purposes. Verizon and ALLTEL would not incur these expenses, but for ALECs' decisions to take advantage of the Commission's originating carrier default.

Third, maintaining the status quo will not cause "substantial harm or be contrary to the public interest." F.A.C. § 25-22.061(2). There is no evidence that the public has been harmed by lack of a Commission-mandated default for the local calling area for reciprocal compensation purposes. Indeed, ALECs already have the undisputed ability to define their retail local calling areas as they wish, including offering LATA-wide local calling plans. And there is no evidence that intercarrier compensation costs constrain their freedom to define their retail local calling areas differently from the ILEC. Many ALECs today offer services with local calling areas that do not coincide with the ILEC's (Ward, Tr. 184), and "[i]t is very common for ALECs to bundle a variety of services based upon its total underlying costs, including both reciprocal compensation and telephone exchange access services." (Busbee, Tr. 208; *see also* Selwyn, July 5-6, 2001, Tr. 612-13.) Dr. Selwyn, testifying on behalf of AT&T and several other ALECs and IXCs, acknowledged that "ALECs may compete directly with the ILEC and with each other by offering customers local calling areas that differ from that being offered by the ILEC." (Selwyn, July 5-6, 2001 Tr. 611.) In addition, IXCs and wireless carriers have been able to offer attractively priced retail packages with toll-free local calling scopes as large as the entire nation, regardless of their obligations to pay access charges to the terminating local exchange carrier. (Shiroishi, Tr. 54-56; Busbee, Tr. 208.) MCI's "The Neighborhood" service, for example, offers nationwide calling for "one low monthly price." (See www.mci.com, visited Sept. 24, 2002.) All of these facts

disprove any claim that ALECs cannot offer innovative calling plans with calling scopes that differ from the ILECs'.

If the Commission does not reconsider its ruling adopting the originating carrier's local calling area as the default for reciprocal compensation purposes, then Verizon and ALLTEL ask the Commission to stay this aspect of its Order until an appellate court can decide the issues raised in the Motion for Reconsideration.

Respectfully submitted on September 25, 2002.

By: 

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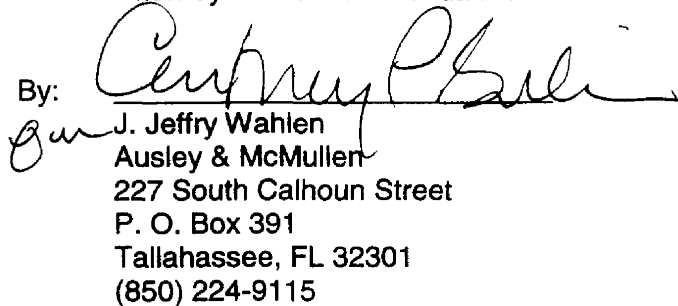
By: 

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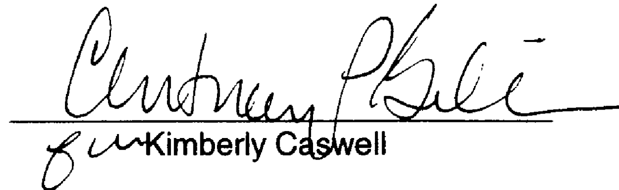
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of Verizon Florida Inc.'s Motion for Partial Reconsideration And, In the Alternative, Motion for Stay Pending Appeal in Docket No. 000075-TP (Phase IIA) were sent via U.S. mail on September 25, 2002 to the parties on the attached list.



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