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September 5, 2003

D. BRUCE MAY, JR.
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VIA HAND DELIVERY

Blanca S. Bayo
Division of Commission Clerk and
Administrative Services
Florida Public Service Commission
Capital Circle Office Center
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

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Re: In re: Petition of Verizon Florida Inc. (f/k/a GTE Florida Inc.) against Teleport Communications Group, Inc. and TCG South Florida, for review of a decision by The American Arbitration Association in accordance with Attachment 1 Section 11.2(a) of the Interconnection Agreement between GTE Florida Inc. and TCG South Florida, Docket No. 030643-TP

Dear Ms. Bayo:

Enclosed for filing in the docket referenced above are the original and seven (7) copies of:

1. Amended Public Version of Verizon's Petition for Review, previously filed on July 18, 2003; and
2. Amended Public Version of Verizon's Opposition to TCG's Motion to Dismiss, previously filed on August 25, 2003.

Verizon has amended and resubmitted its Petition for Review and its Opposition to TCG's Motion to Dismiss pursuant to FPSC staff's instruction that Verizon redact that information specifically asserted to be confidential by either

AUS	_____
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Verizon or TCG. Verizon also requests, pursuant to staff's instruction, that the original Petition for Review filed on July 18, 2003 and the Opposition to TCG's Motion to Dismiss filed on August 25, 2003 be returned to Verizon¹ at the following address:

Aaron M. Panner
Kellogg, Huber, Hansen, Todd & Evans, PLLC
1615 M Street, N.W., Suite 400
Washington, D.C. 20036

For our records, please acknowledge your receipt of this filing on the enclosed copy of this letter. Thank you for your consideration.

Sincerely,

HOLLAND & KNIGHT LLP



D. Bruce May, Jr.

DBM:kjg
Enclosures

cc: Felicia Banks (via hand-delivery)
Jeremy L. Susac (via hand-delivery)
Marsha Rule (via hand-delivery)

¹ Pursuant to Florida Administrative code Rule 25-22.006, Verizon has contemporaneously filed with the Commission a request for confidentiality of certain portions of its Petition for Review, TCG's Motion to Dismiss and Verizon's Opposition to TCG's Motion to Dismiss.

**BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION**

In Re:

Petition of Verizon Florida Inc.
(f/k/a GTE Florida Inc.) against
Teleport Communications Group, Inc. and
TCG South Florida, for review
of a decision by The American Arbitration
Association in accordance with Attachment 1
Section 11.2(a) of the Interconnection
Agreement between GTE Florida Inc. and
TCG South Florida

Docket No. 030643-TP

Filed: September 5, 2003

PETITION OF VERIZON FLORIDA, INC.

DOCUMENT NUMBER-DATE

08387 SEP-5 3

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Introduction

Verizon Florida Inc., f/k/a GTE Florida Inc. (“Verizon”) respectfully submits this petition for review of a decision by the American Arbitration Association (“AAA”) misinterpreting an interconnection agreement between Verizon and TCG South Florida (“TCG”), approved by the Florida Public Service Commission (“Florida PSC” or “Commission”) in March 1998 (the “Agreement”).¹

In the decision under review, the AAA-appointed Arbitrator ignored the plain language of the Agreement, flouted foundational principles of contract law, and refused to apply binding decisions of this Commission that directly address and dispose of the issues that were before him. Although the Agreement explicitly limits reciprocal compensation to “Local Traffic,” which the Agreement defines as traffic that originates and terminates within the same geographically-defined exchange area, the Arbitrator held that TCG was nevertheless entitled to reciprocal compensation payments for Virtual NXX traffic – *i.e.*, traffic that, by definition, terminates outside of the local calling area where it originated. In holding that Virtual NXX traffic is local traffic subject to reciprocal compensation, the Arbitrator – a retired criminal court judge with no telecommunications law experience – failed to grasp the significance of this Commission’s binding determination that “calls terminated to end users outside the local calling

¹ TCG opted into an earlier interconnection agreement between Verizon and AT&T of the Southern States, Inc. (“AT&T”) pursuant to 252(i) of the federal Telecommunications Act of 1996 (“1996 Act”). 47 U.S.C. § 252(i). The Florida PSC approved the Verizon – AT&T interconnection agreement on May 22, 1997. *See* Final Order Approving Arbitration Agreement, *Petition by AT&T Communications of the Southern States, Inc. for Arbitration of Certain Terms and Conditions of a Proposed Agreement with GTE Florida Inc. Concerning Interconnection and Resale Under the Telecommunications Act of 1996*, Order No. PSC-97-0585-FOF-TP, Docket No. 960847-TP (Fla. PSC May 22, 1997). A copy of that Agreement is attached hereto as Exhibit A.

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area in which their NPA/NXXs are homed are not local calls for purposes of intercarrier compensation.”²

Given the sheer magnitude of TCG’s exploitation of Virtual NXX arrangements – TCG admitted in discovery that a * _____* of the telephone numbers it had assigned between 1998 and 2002 were Virtual NXX numbers – it is imperative that this Commission act to rectify this unlawful, anti-competitive distortion of the telecommunications marketplace by reversing the Arbitrator’s ruling that Verizon is required to pay reciprocal compensation for such traffic, and by requiring TCG to pay applicable access charges. Nearly one-half of TCG’s business consists of selling a product to TCG’s customers whereby TCG gets paid so that Verizon’s customers avoid paying applicable toll charges to Verizon. This Commission has held that TCG owes access charges for these non-local calls.³ Nevertheless, the Arbitrator inexplicably held that TCG could bill Verizon reciprocal compensation. The Commission must remedy this error and prevent the unwarranted and anti-competitive subsidy that it threatens to create.

Critically, the record in this arbitration proceeding demonstrates beyond any doubt that Virtual NXX traffic can easily be both identified and tracked. In response to discovery requests, TCG disclosed the name, address, and telephone numbers assigned to its Virtual NXX customers. TCG produced * _____* assigned Virtual NXX numbers. Separately, Verizon introduced evidence establishing that Virtual NXX traffic can readily be

² Order on Reciprocal Compensation, *Investigation into Appropriate Methods To Compensate Carriers for Exchange of Traffic Subject to Section 251(b)(5) of the Telecommunications Act of 1996*, Order No. PSC-02-1248-FOF-TP, Docket No. 00075-TP (Fla. PSC Sept. 10, 2002).

³ Final Order on Petition for Arbitration, *Petition for arbitration of unresolved issues negotiation of interconnection agreement between Verizon Florida Inc. by US LEC of Florida Inc.*, Order No. PSC-03-0762-FOF-TP, Docket No. 020412-TP, at 39 (Fla. PSC June 25, 2003) (“Therefore, we find that the originating carrier shall be able to charge originating access on traffic that originates in one local calling area and is delivered to a customer located in a different local calling area, if the NXX of the called number is associated with the same local calling area as the NXX of the calling number.”).

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tracked. In particular, Verizon introduced testimony concerning an inexpensive and straightforward traffic study that Verizon had performed to determine the total volume of ALEC-originated traffic in Florida that terminated to Verizon FX numbers. This evidence directly refuted TCG's assertion that Virtual NXX traffic could not be separated from traffic properly subject to reciprocal compensation. It also provides the basis of Verizon's request here – a request that could not have been made in the arbitration proceeding itself – that the Commission rule that Verizon is entitled to bill access charges for Virtual NXX traffic.⁴

The Arbitrator additionally failed to consider the overwhelming evidence establishing beyond question that Verizon and AT&T – the parties to the interconnection agreement that TCG adopted – did not intend for their contract to require reciprocal compensation for Internet-bound traffic. As this Commission's prior decisions specifically instructed, Verizon offered extensive testimony concerning the parties' understanding and intent in entering into the Agreement. The Verizon official who negotiated the reciprocal compensation provisions of the Agreement provided *unrebutted* testimony that the parties intended their obligations to be co-extensive with federal law. Indeed, in discovery, *AT&T admitted as much*. Verizon also introduced into evidence Comments that former GTE and AT&T had filed with the Federal Communications Commission in early 1997, contemporaneous with their negotiation of the Agreement. In its Comments, *AT&T repeatedly told the FCC that Internet-bound traffic is non-local, and interstate in nature, and that such traffic does not terminate at an ISP's modem or server bank*. Former GTE filed Comments explicitly agreeing with AT&T's position on the interexchange nature of Internet-bound traffic. Notwithstanding this compelling evidence of the

⁴ The Agreement expressly provides that "All Switched Exchange Access Service and all IntraLATA Toll Traffic shall continue to be governed by the terms and conditions of the applicable federal and state tariffs." Agreement, Part V, § 43.3.2. Because Verizon's right to recover access charges was governed by federal and state tariffs, Verizon could not seek relief in an arbitrating proceeding under the Agreement itself.

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parties' contemporaneous intent, and notwithstanding the fact that the contract language exactly tracks the federal law reciprocal compensation requirements, * the Arbitrator invoked his own

*

This decision is unlawful, contrary to the plain language of the Agreement, and contrary to *all* of the evidence introduced as to the parties' specific intent.

Pursuant to the terms of the parties' Agreement, which this Commission approved and over which this Commission retains jurisdiction, the Arbitrator's decision is subject to corrective review by the Florida PSC. For the reasons discussed in this Petition, Verizon respectfully requests that the Commission reverse the Arbitrator's decision, enforce the actual language of the parties' interconnection agreement, and restore Commission precedent to its rightful, binding place.

Jurisdictional Statement

1. The complete name and address of the Petitioner is:

Verizon Florida Inc.
f/k/a GTE Florida Inc.
MC: FLTC0007
201 North Franklin Street
Tampa, Florida 33602
2. All notices, pleadings, orders and documents in this proceeding should be provided to the following on behalf of Verizon Florida Inc.:

Mary Coyne
Verizon Communications
1515 N. Courthouse Road
Suite 500
Arlington, VA 22201

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Richard Chapkis
MC: FLTC0007
201 North Franklin Street
Tampa, Florida 33602

Aaron M. Panner
David L. Schwarz
Kellogg, Huber, Hansen, Todd & Evans, PLLC
1615 M Street, N.W., Suite 400
Washington, D.C. 20036

3. The complete name and address of the Respondent to the Petitioner is:

TCG South Florida
1200 Peachtree Street, 8th Floor
Atlanta, GA 30309

4. Both Verizon and TCG are authorized to provide local exchange and exchange access services in the state of Florida.

5. Pursuant to 47 U.S.C. § 252, section 364.162 of the Florida Statutes, and section 11.2(a) of Attachment 1 of the Agreement, the Florida PSC has jurisdiction to hear this dispute involving the interpretation of interconnection agreement terms and conditions. Section 364.01 of the Florida Statutes instructs the Commission to utilize this authority to encourage and promote competition, and to “prevent[] anticompetitive behavior.”

6. The Agreement, which this Commission approved and over which this Commission retains jurisdiction under Florida law, contains a limited Alternative Dispute Resolution provision designed to encourage the expeditious resolution of contractual disagreements and to narrow disputes before they are brought before this Commission. *See* Agreement, Attach. 1, § 1. Under the terms of the Agreement, parties are directed to attempt to resolve any disputes informally, through inter-company negotiations. Should those informal discussions fail to resolve the issue, either can initiate an arbitration proceeding before the AAA. Any decision by the AAA-appointed arbitrator can be directly appealed to the Florida PSC, *see*

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id., Attach. 1, § 11.2, where it is subject to de novo review in accordance with this Commission's authority, under section 252 of the 1996 Act, to interpret and enforce previously-approved interconnection agreements. *See Verizon Maryland Inc. v. Maryland Pub. Serv. Comm'n*, 535 U.S. 635 (2002); *BellSouth Telecomms. Inc. v. MCI Metro Access Transmission Servs. Inc.*, 317 F.3d 1270, 1274 (11th Cir. 2003) (en banc) ("the authority to approve or reject agreements carries with it the authority to interpret agreements that have already been approved"). Pursuant to the terms of the Agreement, this appeal renders the Arbitrator's decision non-final. *See* Agreement, Attach. 1, § 11.2 ("A decision of the Arbitrator shall not be final in the following situations: (a) a Party appeals the decision to the [Florida Public Service] Commission . . .").

7. In accordance with terms of section 13.1 of Attachment 1 to the Agreement, which safeguard the confidentiality of the arbitration process, Verizon has filed this petition under seal.

Background

I. The Interconnection Agreement Between AT&T and GTE

8. The interconnection agreement at issue is the product of negotiations between former GTE and AT&T that began in the fall of 1996, shortly after passage of the 1996 Act. These negotiations were part of a nationwide dialogue between the two carriers, the purpose of which was to develop a template that could be used in all of the jurisdictions, including Florida, in which AT&T sought interconnection to former GTE's facilities.⁵

9. Former GTE and AT&T began negotiations toward an agreement in Florida in late 1996. At roughly the time these negotiations were getting underway, the FCC issued its

⁵ See TCG's Revised Response to Request for Admission No. 2 *

* (attached hereto as Ex. B).

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Local Competition Order,⁶ which implemented the local competition provisions of the 1996 Act. In that initial rulemaking, the FCC clarified as a matter of federal law that reciprocal compensation was limited to “local traffic,” which it defined as “telecommunications traffic . . . that originates and terminates within a local service area established by a state commission.” 47 C.F.R. § 51.701(b)(1) (1997).

10. Former GTE and AT&T negotiated the key reciprocal compensation provisions to conform to their rights and duties under federal law. The Preface to the Agreement announces that the parties negotiated “reciprocal provision of interconnection services pursuant to the Act and in conformance with GTE’s and AT&T’s duties under the Act.”⁷ Part II, section 38.7 of the Agreement provides that: “Reciprocal Compensation for the exchange of traffic shall be paid as described in Part V and Attachment 15, at the prices specified in Attachment 14,” Agreement, Part II, § 38.7, which provide, in turn, that “Reciprocal Compensation applies for transport and termination of *Local Traffic* billable by GTE or AT&T which a Telephone Exchange Service Customer originates on GTE’s or AT&T’s network for termination on the other Party’s network,” *id.*, Part V, § 43.3.1 (emphasis added).⁸ This provision is substantively identical to the

⁶ First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) (“*Local Competition Order*”), *modified on recon.*, 11 FCC Rcd 13042 (1996), *vacated in part, Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff’d in part, rev’d in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), *decision on remand, Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), *aff’d in part, rev’d in part sub nom. Verizon Communications Inc. v. FCC*, 122 S. Ct. 1646 (2002).

⁷ Agreement, Preface, Recitals, at 1.

⁸ Attachment 15 provides that “where AT&T and GTE interconnect using their own networks . . . , (a) Local Calls: Unless otherwise provided in Attachment 14, Bill and Keep shall apply to Local Traffic. In the event traffic (defined from the point of interconnection) is out of balance, the rates specified in Attachment 14 shall apply.” Agreement, Attach. 15, § 2(C)(1)(a). The relevant portion of Attachment 14, in turn, provides that:

On each three (3) month anniversary of the Interconnection Activation Date in a Market Area, the Parties will review the minutes of usage for interconnect traffic for the prior quarter. If the minutes of usage imbalance for interconnect traffic for that period is less than ten (10%) percent, neither Party shall charge

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then-existing FCC regulations, which provided that reciprocal compensation applied “for transport and termination of local telecommunications traffic.” 47 C.F.R. § 51.701(a) (1997).

11. The interconnection agreement goes on to define Local Traffic “for purposes of interconnection and mutual compensation . . . [as] traffic: (i) *that originates and terminates in the same GTE exchange area*; or (ii) originates and terminates in different GTE exchange areas that share a common mandatory local calling area such as mandatory Extended Area Service (EAS).” *Id.*, Attach. 11, at 6-7 (emphasis added). This definition is substantively identical to the then-applicable FCC regulations, which provided that “local telecommunications traffic means . . . telecommunications traffic . . . that originates and terminates within a local service area established by a state commission.” 47 C.F.R. § 51.701(b)(1) (1997).

12. Evidence introduced during the arbitration proceeding established that it was no coincidence that the Agreement’s reciprocal compensation provisions track the FCC’s regulations almost word-for-word. In its responses to Verizon’s written discovery, TCG admitted that the AT&T and GTE intended the Agreement’s reciprocal compensation provisions to track the parties’ respective rights and duties under federal law.⁹ Verizon additionally introduced testimony from William Munsell, the GTE employee who had negotiated the reciprocal compensation provisions of GTE’s interconnection agreement with AT&T. As Mr. Munsell explained in his testimony, in light of the prevailing regulatory uncertainty as to the scope of carriers’ rights and duties under the 1996 Act, GTE’s primary objective in its negotiations with AT&T was to adopt reciprocal compensation provisions that would implement

the other for services provided under this Appendix. If an imbalance is greater than ten (10%) percent, then the appropriate party may bill the other using the rates discussed in this Appendix.

Id., Attach. 14, App. 4, § 6.

⁹ TCG’s Revised Response to Verizon Request for Admissions Nos. 3, 4, and 5.

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the requirements of federal law.¹⁰ It is for this reason, Mr. Munsell explained, that the key reciprocal compensation terms precisely track the FCC's then-existing rules to implement section 251(b)(5) of the 1996 Act. *See* Munsell Declaration ¶ 8.

13. As further evidence of the parties' intent, Verizon also introduced formal filings with the FCC that both AT&T and former GTE had made contemporaneous with their negotiations. In March 1997, AT&T filed Comments with the FCC in which it argued at great length that Internet-bound traffic is "*inseparably interstate*" and "*do[es] not terminate*" locally at the ISP modem.¹¹ GTE had precisely the same view as AT&T of the interstate nature of Internet traffic. In that same 1997 proceeding, former GTE filed comments *agreeing* with AT&T that "Internet access usage should be presumptively classified as jurisdictionally interstate" because "[s]uch a presumption comports with the overwhelmingly interstate character of Internet traffic."¹² Thus, both AT&T and former GTE are on record asserting that Internet-bound traffic does not terminate at an ISP's point of presence, and is identical to other interstate traffic. These contemporaneous statements demonstrate that the parties understood Internet-bound traffic to be non-local at precisely the moment that they were negotiating the Agreement.

II. The TCG – Verizon Arbitration

A. The Nature of the Dispute

¹⁰ *See* Declaration of William Munsell on Behalf of Verizon Florida Inc., *TCG South Florida v. Verizon Florida Inc.*, No. 71 Y 181 00852 1, ¶ 10 (AAA Sept. 3, 2002) ("Munsell Declaration") (attached hereto as Ex. C).

¹¹ Comments of AT&T, *Usage of the Public Switched Network by Information Service and Internet Service Providers*, CC Docket No. 96-263, at iii & 30 (FCC filed Mar. 24, 1997) ("AT&T Comments") (Ex. H to Verizon's Motion for Partial Summary Judgment) (attached hereto as Ex. D).

¹² Reply Comments of GTE, *Usage of the Public Switched Network by Information Service and Internet Service Providers*, CC Docket No. 96-263, at 3 (FCC filed Apr. 23, 1997) ("GTE Comments") (Ex. I to Verizon's Motion for Partial Summary Judgment) (attached hereto as Ex. E).

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14. TCG opted into the interconnection agreement between AT&T and the former GTE in March 1998. TCG began to bill Verizon reciprocal compensation on approximately April 1, 1999, claiming that traffic was “out of balance,” under the terms of Attachment 14, Appendix 4, Section 6, thereby triggering the move from Bill and Keep to reciprocal compensation. Because TCG sent its initial bills to the improper billing address, Verizon did not receive TCG’s initial bill until September of 1999.¹³ At that time, Verizon instructed TCG to begin to send bills to the appropriate address.

15. Because TCG’s bills improperly included reciprocal charges for Internet-bound traffic, which Verizon understood to be non-local, interstate traffic that was not subject to reciprocal compensation under section 43.3.1 of the Agreement, Verizon paid only that portion of TCG’s invoices encompassing actual local traffic. Over time, TCG continued to bill Verizon reciprocal compensation for Internet-bound traffic, and Verizon continued to limit its payments to actual local traffic. Unbeknownst to Verizon, TCG additionally billed Verizon reciprocal compensation for non-local, Virtual NXX traffic.

B. The Proceedings Before the American Arbitration Association

16. On approximately December 1, 2001, TCG filed a Demand for Arbitration with the AAA, seeking to recover reciprocal compensation from Verizon for Internet-bound traffic.¹⁴ Verizon filed its Answer on January 3, 2002. Verizon additionally filed a counterclaim, seeking

¹³ See Munsell Declaration ¶ 15; see also Direct Testimony of William Munsell on Behalf of Verizon Florida Inc., *TCG South Florida v. Verizon Florida Inc.*, No. 71 Y 181 00852 1 (AAA Sept. 3, 2002) (“Munsell Testimony”) (attached hereto as Ex. F).

¹⁴ TCG additionally sought to recover reciprocal compensation at the tandem switching rate, claiming that its single switch had the potential to serve a geographic area comparable to that served by a Verizon tandem. Verizon opposed this claim on the grounds that TCG’s switch did not actually serve a comparable geographic area, and that TCG could not consistently invoke new FCC regulations to claim that it was entitled to recover the reciprocal compensation at the tandem switching rate while disregarding the existing FCC rules establishing that reciprocal compensation was not owed for Internet-bound traffic. Because Verizon has been paying reciprocal compensation at the tandem switching rate, Verizon has elected not to challenge this aspect of the Arbitrator’s decision.

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to recover any amounts that Verizon had unknowingly paid when TCG improperly billed it reciprocal compensation for Virtual NXX traffic.¹⁵ Verizon and TCG agreed to the appointment of the Honorable Judge Chuck Miller – a retired state criminal court judge – as the Arbitrator for the proceedings.

17. In March 2002, Verizon and TCG served written discovery requests on one another. Following motions to compel more complete responses, TCG admitted that: (a) it sold a Virtual NXX product through which it assigned its customers telephone numbers with an NPA-NXX that did not correspond to the rate center in which the customers' service locations were physically present; (b) it billed Verizon reciprocal compensation for Virtual NXX traffic whether or not the telephone calls originated and terminated in the same local exchange area, as required by the Agreement; (c) it had assigned * _____ * Virtual NXX telephone numbers to its customers; (d) * _____ * telephone numbers that it had assigned between 1998 and 2002 were Virtual NXX numbers; and (e) * _____ * of the telephone numbers assigned to TCG's ISP customers were Virtual NXX numbers.¹⁶ TCG additionally admitted that it had the capacity to identify its Virtual NXX customers, and the specific telephone numbers assigned to them.

18. On July 29, 2002, in accordance with the briefing schedule established by the Arbitrator, Verizon and TCG each submitted motions for summary judgment. In its Motion, Verizon demonstrated that Virtual NXX traffic is not subject to reciprocal compensation under

¹⁵ See Answer and Counterclaim of Verizon Florida Inc., *TCG South Florida v Verizon Florida Inc.*, No. 71 Y 181 00852 1 (AAA filed Jan. 3, 2002) (attached hereto as Ex. G).

¹⁶ See TCG's Revised Response to Verizon Interrogatory Nos. 17-20; TCG's Second Supplemental Response to Verizon Interrogatory Nos. 18, 26 (attached hereto as Ex. H).

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the plain language of the parties' Agreement.¹⁷ The Agreement provides that reciprocal compensation was owed solely for "Local Traffic," Agreement, Part V, § 43.3.1, which it defines as traffic that physically originated and terminated within the same Verizon exchange area, *id.*, Attach. 11, at 6-7. Because Virtual NXX traffic, by definition, terminates outside of the geographic exchange area associated with the assigned NPA-NXX, it necessarily follows that such traffic is not local traffic subject to reciprocal compensation under the terms of the Agreement.

19. Verizon additionally demonstrated that Internet-bound traffic is not subject to reciprocal compensation under the terms of the parties' Agreement. Following this Commission's instructions in Order No. PSC-99-1477-FOF-TP,¹⁸ Verizon offered extensive evidence concerning the intent of AT&T and former GTE in negotiating the key reciprocal compensation provisions of the Agreement. First, Verizon demonstrated that the parties intended the reciprocal compensation provisions to conform to the federal law requirements established by the 1996 Act and the FCC's implementing decisions. In addition to the language of the Agreement, which precisely tracks the FCC's then-existing regulations concerning reciprocal compensation, Verizon offered a declaration from the GTE employee who had negotiated the specific contract provisions. His testimony was confirmed by TCG, which admitted in response to Verizon's written discovery requests that AT&T intended the reciprocal compensation provisions to conform to federal law. Because federal law does not require, and has never

¹⁷ See Motion for Summary Judgment of Verizon Florida Inc., *TCG South Florida v. Verizon Florida Inc.*, No. 71 Y 181 00852 1 (AAA filed July 29, 2002) (attached hereto as Ex. I).

¹⁸ See Order on Arbitration of Interconnection Agreement, *Request for Arbitration Concerning Complaint of Intermedia Communications, Inc against GTE Florida Inc. for breach of terms of Florida Partial Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act of 1996, and Request for Relief*, Order No. PSC-99-1477-FOF-TP, Docket No. 980986-TP, 99 FPSC at 7:379 (Fla. PSC July 30, 1999) (attached to TCG's Motion for Summary Judgment at tab 4) ("*GTE -- Intermedia Decision*") (attached hereto as Ex. J).

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required, reciprocal compensation for Internet-bound traffic,¹⁹ and because the Agreement adopted federal law requirements, it followed that the parties had no obligation to pay reciprocal compensation for Internet-bound traffic.

20. Second, Verizon offered un rebutted evidence that, at the time they entered into their interconnection agreement, both AT&T and the former GTE understood Internet-bound traffic to be *non-local, interstate* traffic. In Comments filed with the FCC in early 1997,²⁰ AT&T asserted that “the vast majority of enhanced communications provided by ESPs is *interstate, the most prevalent use being Internet communications.*” AT&T Reply Comments at 17 (emphasis added). AT&T additionally argued that that ISP traffic is “overwhelmingly” interstate in character because “the caller and the data center are almost always in different states.” AT&T Comments at 29. Because only a “small fraction” of such traffic can reach the network or home page “without crossing state boundaries,” *id.*, AT&T argued, such calls “do not *terminate* at the ESP’s POP (or point of presence),” *id.* at 30. Finally, AT&T asserted that “to the extent that there is intrastate communication, it is for the most part inseverable and indistinguishable from the interstate traffic that is generated by the consumer.” AT&T Reply Comments at 17. GTE filed Comments in the same FCC proceeding in which it agreed with

¹⁹ See, e.g., Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689, 3706 ¶ 26 n.87 (1999) (“*ISP Declaratory Ruling*”), vacated and remanded, *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000); Order on Remand, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 16 FCC Rcd 9151, 9163, 9165-70, ¶¶ 23, 30-39 (2001) (“*ISP Order on Remand*”), remanded, *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002); Memorandum Opinion and Order, *Joint Application by BellSouth Corp., et al., for Provision of In-Region, InterLATA Services In Georgia and Louisiana*, 17 FCC Rcd 9018, 9173, ¶ 272 (2002) (“[U]nder a prior Commission order, ISP-bound traffic is not subject to the reciprocal compensation provisions of section 251(b)(5) and 252(d)(2). This decision was reaffirmed by the Commission on remand. Although the D.C. Court has remanded this latest Commission decision, the court did not vacate it and our rules remain in effect.”)

²⁰ Reply Comments of AT&T, *Usage of the Public Switched Network by Information Service Providers*, CC Docket No. 96-263, et al. (FCC filed Apr. 23, 1997) (“AT&T Reply Comments”) (attached hereto as Ex. K).

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AT&T that “Internet access usage” was jurisdictionally interstate, because *Internet traffic originates and terminates interstate, not locally*.²¹

21. In its own Motion for Summary Judgment, TCG argued that the Arbitrator was bound by prior Florida PSC decisions interpreting different contracts between different parties involving different contract language, different evidence of the parties’ understandings of Internet-bound traffic at the time of their agreement, and different post-agreement conduct.²² Disregarding this Commission’s clear holdings in the *GTE – Intermedia*, *BellSouth – TCG*, and *BellSouth – GNAPs* cases – in which the Commission refused to adopt a generic conclusion – TCG argued that Florida law *required* reciprocal compensation for Internet-bound traffic, and that the Arbitrator must reflexively adopt the holding of prior Florida PSC decisions involving entirely different circumstances.²³

22. In response, Verizon demonstrated that this Commission had never held that Florida law *required* reciprocal compensation for Internet-bound traffic.²⁴ Rather, this Commission has always focused on “the plain language of the contract, the intent of the parties at the time their Agreement was executed and the subsequent actions of the parties.” *GTE-Intermedia Decision* at 7:378. Verizon established that the reciprocal compensation provisions in the Agreement differed significantly from those at issue in prior proceedings. Verizon

²¹ See GTE Comments at 14-15.

²² Final Order Granting Extension of Time and Denying Motion for Reconsideration, *Complaint and/or Petition for Arbitration by Global NAPs, Inc. for Enforcement of Section VI(B) of its Interconnection Agreement with BellSouth Telecommunications, Inc., and Request for Relief*, Order No. PSC-00-1511-FOF-TP, Docket No. 991267-TP, at 13 (Fla. PSC Aug. 21, 2000) (concluding that the Florida PSC is “not required to follow prior decisions in arbitrating complaints under the Act, particularly when the contract at issue is a different contract than those previously interpreted”) (attached hereto as Ex. L).

²³ See TCG Motion for Summary Judgment (attached hereto as Ex. M).

²⁴ See Opposition of Verizon Florida Inc. to TCG’s Motion for Summary Judgment (attached hereto as Ex. N).

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additionally showed that the parties intended to adopt the federal law requirements for reciprocal compensation – which have never included Internet-bound traffic – and that both AT&T and former GTE understood Internet traffic to be non-local, interstate traffic at the time they negotiated the underlying agreement. Finally, Verizon demonstrated that its post-agreement conduct was fully in accord with its understanding of the Agreement, as it had neither charged nor paid reciprocal compensation to TCG for Internet-bound traffic. In other words, none of the factors that had in the past led the Florida PSC to find that a contract required reciprocal compensation were present here.

23. The Arbitrator did not rule on the parties' cross-motions for summary judgment. Instead, the Arbitrator set the matter for a hearing on October 11, 2002. Each of the parties submitted written direct and rebuttal testimony, as well as a series of exhibits. On the eve of the hearing, the parties additionally reached an agreement to take the complex and highly technical question of damages outside of the scope of the hearing. Once the Arbitrator had resolved the questions of liability, the parties agreed, they would reconcile their respective billing records to ascertain the amount of any damages owing under the Arbitrator's decision on the merits. In other words, the parties agreed to forego cross-examination of their respective damages witnesses in favor of a detailed data reconciliation process.

24. The parties participated in a one-day hearing on October 11, 2002, the transcript of which is attached hereto as Exhibit O.

C. The Arbitrator's Decision

25. On December 30, 2002, the Arbitrator issued an Interim Award which reflects a fundamental misunderstanding of the telecommunications industry, basic principles of contract law, and the binding decisions of the FCC and the Florida PSC. The decision completely ignores

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this Commission's settled holding that Virtual NXX traffic is, by definition, non-local traffic, and accordingly is not subject to reciprocal compensation under federal or state law. The decision additionally ignores the unbroken line of decisions in which this Commission has held that the determination of whether Internet-bound is subject to reciprocal compensation depends upon the language of the parties' interconnection agreement, the evidence of the parties' understanding or intent at the time they entered into the agreement, and the parties' post-agreement conduct. Instead of examining the actual evidence presented at the hearing, the Arbitrator went outside of the record and based his decision on his own purported understanding of the state of the telecommunications industry in 1996, even though the Arbitrator admittedly had no prior experience or expertise in the industry. His decision is unlawful, and cannot stand.

1. *Virtual NXX*

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²⁵ Interim Award of Arbitrator, *TCG South Florida v. Verizon Florida Inc.*, No. 71 Y 181 00852 1 (AAA Dec. 30, 2002) ("Interim Decision") (attached hereto as Ex. P).

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²⁶ This Commission has indicated that TCG's understanding of the Agreement is irrelevant. Rather, when a CLEC opts into an existing interconnection agreement under section 252(i) of the 1996 Act, that CLEC is bound by the terms of the underlying agreement. *See, e.g.,* Memorandum Opinion and Order, *Global GNAPS, Inc. Petition for Preemption of the New Jersey Board of Public Utilities Regarding Interconnection Dispute with Bell Atlantic-New Jersey, Inc.*, 14 FCC Rcd 12530, 12534, ¶ 8 n.25 (1999) ("the carrier opting into an existing agreement takes all the terms and conditions of that agreement"); Final Order on Complaint, *Complaint and/or Petition for Arbitration by Global NAPS, Inc. for Enforcement of Section VI(B) of Its Interconnection Agreement with BellSouth Telecommunications, Inc., and Request for Relief*, Order No. 00-0802-FOF-TP, Docket No. 991267-TP, 00 FPSC at 4:354, 4:359 (Fla. PSC Apr. 24, 2000) (looking to intent of parties to the original agreement).

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2. *Internet-Bound Traffic*

29. The Arbitrator's decision with respect to Internet-bound traffic is similarly devoid of legal or factual support. Once again, the Arbitrator disregarded the plain language of the Agreement, which restricts reciprocal compensation to local traffic in terms that *precisely track* the then-existing FCC regulations governing the implementation of section 251(b)(5) of the 1996 Act. As the FCC recognized in its recent *Starpower*²⁷ decision, when parties negotiate reciprocal compensation terms that bear "striking similarities" to the FCC's standards, and explicitly announce their intent to conform to the parties duties under the Act, the parties thereby express their intent to adopt the requirements of federal law and to be bound by the FCC's eventual elaboration of the requirements of section 251(b)(5) – "*i.e.*, whatever the Commission determines is compensable under section 251(b)(5) will be what is compensable under the agreements." *Starpower*, 17 FCC Rcd at 6887, ¶ 31.

30. If there were any lingering doubt as to the parties' intent, it was definitively established by the *unrebutted* evidence introduced by Verizon. *First*, TCG expressly admitted that AT&T intended the Agreement's key reciprocal compensation provisions to conform to the

²⁷ See Memorandum Opinion and Order, *Starpower Communications, LLC v. Verizon South Inc*, 17 FCC Rcd 6873 (2002) ("*Starpower*").

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parties' obligations under the 1996 Act. *Second*, the GTE employee that actually negotiated the reciprocal compensation provisions offered unchallenged testimony that, in light of the prevailing uncertainty as to the substantive scope of section 251(b)(5) at the time AT&T and GTE were negotiating their model interconnection agreement, the parties elected to adopt the federal standards. That way, their rights and duties would be co-extensive with the federal law requirements established over time. *Finally*, Verizon offered unrebutted evidence that, at the exact same time they were negotiating the Agreement, both AT&T and GTE filed Comments with the FCC in which they unambiguously asserted that Internet-bound traffic was *plainly* interstate in nature, and that (in AT&T's own words) Internet-bound calls "do not *terminate* locally at the ESP's POP" (or point of presence). AT&T Comments at 30; *see also id.* at 29-30 ("Therefore, it cannot be seriously questioned that the vast majority of ESPs' Internet and online services overwhelmingly involve interstate traffic"); AT&T Reply Comments at 17 ("AT&T demonstrated not only that the services provided by ESPs are overwhelmingly interstate in nature, but also that to the extent that there is intrastate communication, it is for the most part inseparable and indistinguishable from the interstate traffic that is generated by the consumer.").

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3. *Damages*

33. In the wake of the Arbitrator's Interim Decision, TCG refused to participate in the data reconciliation to which the parties had agreed on the eve of the October hearing, through

²⁸ See AT&T Reply Comments at 17 ("to the extent that there is intrastate communication, it is for the most part inseverable and indistinguishable from the interstate traffic that is generated by the consumer").

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which they would ascertain the quantum of damages owing under the Arbitrator's merits decision by reconciling their calling and billing records. Verizon repeatedly asked TCG to engage in the reconciliation of records to which the parties had previously agreed, and Verizon repeatedly pointed out the need for such a reconciliation. In particular, Verizon demonstrated that there were fundamental flaws in TCG's billing systems that rendered TCG's bills inherently unreliable. Among other problems, the evidence established that TCG was billing Verizon for interLATA calls that originated on other carriers' networks outside of the state of Florida. The evidence further showed massive swings in TCG's intraLATA toll and reciprocal compensation billings, figures that could only be explained by errors in translating calling records into billing records. As Verizon explained in correspondence with TCG and the Arbitrator, Verizon had agreed to forego its right to cross examination in October in favor of a collaborative process whereby the parties would work through the various issues that Verizon had discovered and intended to challenge.

34. TCG flouted that agreement, and then asked the Arbitrator to assume the accuracy of bills. *

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**Count I
(Virtual NXX Traffic)**

35. Paragraphs 1 through 34 are incorporated by reference as if set forth fully herein.

36. The Arbitrator's decision that TCG was entitled to bill and recover reciprocal compensation payments for Virtual NXX traffic is contrary to settled Florida PSC precedent, federal law, and the plain language of the parties' interconnection agreement.

37. The Arbitrator's decision is also arbitrary and capricious, contrary to the overwhelming weight of the evidence introduced during the arbitration proceeding, and results from a failure to engage in reasoned decision making.

**Count II
(Access Charges for Virtual NXX Traffic)**

38. Paragraphs 1 through 37 are incorporated by reference as if set forth fully herein.

39. This Commission has held that Virtual NXX traffic is non-local. This Commission additionally has held that calls originating in one local calling area and terminating in a different local calling area are subject to originating access charges, even if the calling and called telephone numbers share the same NPA-NXX.

40. Verizon's state tariff provides that Verizon can bill originating access charges for calls that originate from a Verizon customer in one local calling area and terminate in another local calling area. Because this Commission has held that Virtual NXX traffic is subject to access charges, Verizon is entitled to recover originating access charges for calls to TCG-assigned Virtual NXX numbers.

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**Count III
(Internet-Bound Traffic)**

41. Paragraphs 1 through 40 are incorporated by reference as if set forth fully herein.

42. The Arbitrator's decision that Internet-bound traffic was subject to reciprocal compensation under the terms of the parties' interconnection agreement is contrary to federal law, Florida PSC precedent, and the plain language of the parties' interconnection agreement.

43. The Arbitrator's decision is also arbitrary and capricious, contrary to the overwhelming weight of the evidence introduced during the arbitration proceeding, and results from a failure to engage in reasoned decision making.

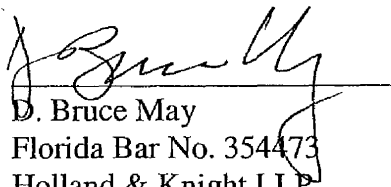
Prayer for Relief

WHEREFORE, as relief for the harms stated herein, Verizon as an aggrieved party respectfully requests that the Florida PSC:

- a. declare that the Arbitrator's decisions are invalid for the reasons discussed above;
- b. enter an order declaring that Virtual NXX traffic is not subject to reciprocal compensation under the terms of the parties' Agreement;
- c. enter an order declaring that Virtual NXX traffic is subject to originating access charges under the terms of the parties' Agreement when such traffic originates in one local calling area and terminates in a different local calling area;
- d. enter an order declaring that Verizon may utilize the list of Virtual NXX numbers produced by TCG during the arbitration proceeding to identify calls subject to originating access charges;
- e. enter an ordering directing TCG to supplement, on a periodic basis, the list of the telephone numbers assigned to its Virtual NXX customers;
- f. enter an order declaring that Internet-bound traffic is not subject to reciprocal compensation under the terms of the parties' Agreement;
- g. prohibit TCG from unlawfully continuing to bill Verizon reciprocal compensation for Virtual NXX or Internet-bound traffic; and
- h. grant such other relief as may be appropriate in this case.

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Respectfully submitted,



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