ORIGINAL

MEMORANDUM

June 5, 2007

TO: OFFICE OF COMMISSION CLERK

FROM: OFFICE OF THE GENERAL COUNSEL (TAN)

RE: DOCKET NO.060767-TP, Petition of MCImetro Access Transmission Services LLC d/b/a Verizon Access Transmission Services for arbitration of disputes arising from negotiation of interconnection agreement with Embarq Florida, Inc.

On June 4th, 2007, Embarq Florida, Inc. submitted a Post-Hearing Statement and Brief. However, due to a scrivener's error, the electronic version submitted to the Clerk's office failed to include page numbers. Please enter the attached Post-Hearing Statement and Brief with page numbers in the above-mentioned docket.

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of MCImetro Access Transmission Services LLC d/b/a Verizon Access Transmission Services for arbitration of disputes arising from negotiation of interconnection agreement with Embarq Florida, Inc.	DOCKET NO. 060767-TP DATED: June 1, 2007

EMBARQ FLORIDA, INC.'S POST-HEARING STATEMENT AND BRIEF

Embarq Florida, Inc. ("Embarq"), in accordance with Order No. PSC-07-0063-PCO-TP as modified by Order No. PSC-07-0118-PCO-TP, submits the following Post-hearing Statement and Brief.

INTRODUCTION

The Commission's goal in this proceeding is to resolve each issue in this arbitration consistent with the requirements of Section 251 of the Telecommunications Act of 1996 ("1996 Act"), the regulations prescribed by the Federal Communications Commission ("FCC") and also with the Commission's rulings. Embarq and Verizon Access have continued to negotiate in good faith and have resolved a significant number of issues since Verizon Access's request for arbitration was filed with this Commission.

There are three issues remaining in dispute between the parties. On the three disputed issues Embarq proposes that:

- Intercarrier compensation for all VNXX traffic should be based on the physical location of the calling and called parties, consistent with Commission and FCC precedent.
- Verizon Access should reimburse Embarq for any transit traffic charges Embarq incurs if Verizon Access fails to comply with the terms of the interconnection

agreement to establish a direct interconnection when indirect traffic exceeds a DS1 threshold.

- Transit traffic should be compensated at the rate of $.005/ per minute of use ("MOU"). This rate is a reasonable commercial, market-based rate and is consistent with prior Commission orders regarding the appropriate rate for transit service.

Embarq's positions on these issues are fair, reasonable and consistent with the 1996 Act and with Commission and FCC precedent and, therefore, the Commission should approve Embarq's proposed language and reject the language proposed by Verizon Access.

ISSUES, POSITIONS AND ARGUMENT

ISSUE 1: What compensation should apply to VNXX traffic under the interconnection agreement?

Embarq's Position: **Consistent with Commission and FCC precedent, intercarrier compensation should be based on the physical location of the calling and called parties, not the NPA/NXXs. Any traffic that physically originates and terminates outside of Embarq's local calling area, including VNXX traffic, is interexchange traffic that is subject to access charges.**

Argument: Past Commission precedent clearly establishes that for VNXX traffic the jurisdiction of a call is determined by the physical locations of the called and calling parties.[1] The Generic Reciprocal Compensation Order provides, in pertinent part, that:

> We find that carriers shall be permitted to assign telephone numbers to end users physically located outside the rate center to which the telephone number is homed. In addition, we find that intercarrier compensation for

[1] *In re: Investigation into appropriate methods to compensate carriers for exchange of traffic subject to section 251 of the Telecommunications Act of 1996*, Order No. PSC-02-1248-FOF-TP, issued September 10, 2002 in Docket No. 000075-TP ("Generic Reciprocal Compensation Order").

> calls to these numbers shall be based upon the end points of the particular calls. This approach will ensure that intercarrier compensation will not hinge on a carrier's provisioning and routing method, nor an end user's service selection. We find that calls terminated to end users outside the local calling area in which their NPA/NXXs are homed are not local calls for purposes of intercarrier compensation; therefore, we find that carriers shall not be obligated to pay reciprocal compensation for this traffic. (at page 33)

The Commission's ruling means that the physical location of the calling and called parties is determinative of the jurisdiction, not the number that is dialed. In addition, the Commission specifically held that reciprocal compensation does not apply to non-local VNXX traffic. Verizon Access's witness, Mr. Price, attempts to distinguish its $.0007/MOU compensation rate from typical intercarrier compensation mechanisms. (See, for example, Tr. at 28; Hearing Exhibit 7, Price Deposition at page 7.) However, $.0007/MOU is the same rate Embarq and Verizon Access have agreed to for local ISP-bound traffic under the terms of the interconnection agreement. (See, Section 55.2.1 and Table One, Line 242 of the Draft Interconnection Agreement, included as Attachment C to Verizon's Petition for Arbitration.) Consequently, Verizon Access is essentially advocating that non-local ISP-bound VNXX traffic should be treated the same as local ISP-bound traffic, which is inconsistent with the Commission's ruling the Generic Reciprocal Compensation Order.

The Commission affirmed its ruling regarding the jurisdiction of and compensation for non-local VNXX traffic in a subsequent arbitration between Embarq and Florida Digital Network, Inc. ("FDN") stating:

> A VNXX occurs when a telephone number NPA-NXX assigned to a specific geographic local calling area is assigned to a customer who is not physically located in that local calling area. Use of VNXXs is typically used by a CLEC to connect its customers to dial-up internet service

> providers. If the call originates and terminates within the local calling area, then reciprocal compensation would apply. However, VNXX calls do not typically occur within a geographic local calling area and are considered toll calls, and thus, are not subject to reciprocal compensation.[2]

In that proceeding, the parties agreed to the principle established in the Generic Reciprocal Compensation Order, that is, that the end points of a VNXX call determine its jurisdiction for intercarrier compensation purposes. Embarq strongly disagrees with any suggestion that the parties' agreement in the FDN case concerning the meaning of the ruling in the Generic Reciprocal Compensation Order renders the FDN decision inapplicable to the instant case.[3] To the contrary, the parties' agreement in the FDN arbitration supports the clear meaning of the Generic Reciprocal Compensation Order that the end points of a call determine its jurisdiction for intercarrier compensation purposes. Based on these prior Commission decisions, the type of call depicted in Verizon Access witness Price's Exhibit DP-2 (Hearing Exhibit 12) is not a local call, is not subject to reciprocal compensation or the FCC's ISP-rate (i.e. $.0007/MOU), and it should result in Embarq's receipt of originating access charges from Verizon Access.[4]

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[2] *In re: Petition for arbitration of certain unresolved issues associated with negotiations for interconnection, collocation, and resale agreement with Florida Digital Network, Inc. d/b/a FDN Communications, by Sprint-Florida, Incorporated*, Order No. PSC-06-0027-FOF-TP, issued January 10, 2006 in Docket No. 041464-TP at page 36.

[3] That suggestion was made during the deposition of Embarq's witness Fox. (Hearing Exhibit 8, Fox Deposition at page 9)

[4] While Embarq's position is that, consistent with Commission precedent, originating access is due to Embarq for calls such as those depicted in DP-2, Embarq's position is that terminating access is not applicable for VNXX enabled traffic. Embarq believes no terminating access is due because for VNXX calls, the carrier using the VNXX numbering arrangement is acting as the IXC and is responsible for compensating the originating carrier for this nonlocal traffic. Given that Verizon Access is acting as both the IXC and the terminating carrier in the VNXX arrangements at issue in this arbitration, any terminating access charges would be due from Verizon Access, which would essentially be paying itself. (See, Hearing Exhibit 3, Embarq's Response to Staff's Interrogatory No. 14 (c).) Mr. Price confirmed that Verizon Access does not expect to receive terminating access charges for this Embarq-originated ISP-bound VNXX traffic. (Hearing Exhibit 7, Price Deposition at page 25)

The Commission's decisions holding that the physical end points of call determine its jurisdiction comport with numerous FCC decisions applying an end-to-end analysis using the physical originating and terminating end points of a call to determine jurisdiction. These decisions include rulings that the end-to-end analysis applies to so-called "enhanced" prepaid calling cards, [5] debit card calling services,[6] 800 access service,[7] and nationwide 800 travel service.[8]

ISP-Bound VNXX Calls

Verizon Access may argue that ISP-bound VNXX calls should be treated differently. They are wrong. Embarq recognizes that the Commission has not applied specifically the analysis used in the Generic Reciprocal Compensation Order to ISP-bound calls. But, since the functions performed by Embarq and Verizon for ISP-bound VNXX calls are the same as the functions performed for voice VNXX calls, they should be treated exactly the same. (Tr. at 44)

Court rulings support the Commission's authority to apply access charges to non-local, ISP-bound calls.[9] In *GNAPS,* the Massachusetts Department of

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[5] *In the Matter of AT&T Corporation Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services; Regulation of Prepaid Calling Card Services,* WC Docket No. 03-133; WC Docket No. 05-68, FCC 05-41, released February 23, 2005 (20 FCC Rcd 4826).

[6] *In the Matter of Time Machine, Inc., Request for a Declaratory Ruling Concerning Pre-Emption of State Regulation of Interstate 800-Access Direct Card Telecommunications Services,* DA 95-2288, released November 3, 1995 (11 FCC Rcd 1189).

[7] *In the Matter of Southwestern Bell Telephone Company Transmittal Nos. 1537 and 1560 Revisions to Tariff FCC No. 68,* DA 88-840; CC Docket No. 88-180, released April 22, 1988 (3 FCC Rcd 2339).

[8] *In the Matter of Teleconnect v. Local Exchange Carriers,* FCC 95-28, released February 14, 2995 (10 FCC Rcd 1626).

[9] See, *Global NAPS, Inc. v. Verizon New England, Inc.*, 444 F.3d 59 (1st Cir. 2006) ("*GNAPS*"). Additionally, see, *Global NAPs, Inc. v. Verizon New England*, 454 F. 3d 91 (2d Cir. 2006), an appeal involving the Verizon ILEC's and Global NAPs' arbitration of an interconnection agreement in Vermont, where the U.S. Second Circuit Court of Appeals expressed a similar view regarding the scope of the ISP Remand Order. And, very recently, the United States District Court for the Western District of Washington made a similar ruling in *Qwest v. Washington State Utilities and Transportation Commission*, 2007 U.S. Dist. LEXIS 26194 (W.D. Wash., April 9, 2007).

Telecommunications and Energy ("DTE") arbitrated a dispute regarding an interconnection agreement between Verizon New England, Inc. and Global NAPs, Inc. In its arbitration order, the DTE had required Global NAPs to pay Verizon access charges for all virtual NXX traffic, including non-local, ISP-bound traffic. (*GNAPS* at page 66) The DTE rejected Global NAPs' argument that state commissions were preempted by the ISP Remand Order from regulating intercarrier compensation for all ISP-bound traffic.

In Global NAPs' appeal of the DTE's order, Verizon and the DTE argued that the DTE retained the authority to decide the issue because the FCC had preempted state commission regulation of only local traffic sent to an ISP, and, the FCC did not rule that virtual NXX traffic is local traffic. (*GNAPS* at page 68) The First Circuit accepted the arguments of Verizon and the DTE stating:

> Regardless which approach is used, the ISP Remand Order does not clearly preempt state authority to impose access charges for interexchange VNXX ISP-bound traffic; it is, at best, ambiguous on the question, and ambiguity is not enough to preempt state regulation here." *GNAPS* at page 72

Ironically, in the *GNAPS* case, Verizon Access's sister ILEC in New England argued that access charges should apply to non-local, ISP-bound calls. According to the First Circuit:

> Verizon argued that the entire VNXX system was a way for Global NAPs to engage in regulatory arbitrage. In effect, Verizon argued, Global NAPs's VNXX system was a way to provide toll-free services to Verizon customers (so that Verizon would not get any fees from those customers), deprive Verizon of the access fees it would normally get for toll-free calls, and instead require Verizon to pay Global NAPs reciprocal compensation. (*GNAPS* at page 66)

The *GNAPS* decision is particularly applicable here, because Verizon Access wants to engage in the same sort of "regulatory arbitrage" that the Verizon ILEC objected to in *GNAPS*. Mr. Price acknowledged that the Verizon's VNXX traffic is not voice, but dial up internet traffic. (Tr. at pages 17 & 18) And, Mr. Price admitted that Verizon Access would not engage in its VNXX scheme for terminating ISP-bound traffic if it is required to pay the originating access charges that typically apply to such non-local calls. (Hearing Exhibit 7, Price Deposition at pages 70-72)

What the Verizon ILEC in New England opposed, Verizon Access argues in favor of here. But, because the First Circuit's decision in *GNAPS* shows that the Commission is not preempted with respect to non-local, ISP-bound VNXX calls, Embarq urges the Commission to reject Verizon Access's attempt at regulatory arbitrage and determine that these calls are subject to originating access charges. This identical issue was raised by Verizon Access in its arbitration of an interconnection agreement with Embarq in Ohio and the Ohio Commission ruled in Embarq's favor.[10] Specifically, the Ohio Commission stated:

> Given that an ILEC must perform the exact same functions when originating a voice vNXX call and ISP-bound call, the Commission sees no reason to treat these two types of calls differently, absent FCC preemption. (Ohio Arbitration Award at page 7)

Verizon Access's Proposal

Despite the fact that Verizon Access's position would require Embarq to pay compensation for most VNXX traffic, Verizon Access attempts to market its position as a

[10] *In the Matter of the Petition of Verizon Access Transmission Services, Inc. for Arbitration with United Telephone Company of Ohio dba Embarq Under Section 252(b) of the Telecommunications Act of 1996*, Case No. 06-1485-TP-ARB, Arbitration Award, issued April 18, 2007 ("Ohio Arbitration Award"). (Hearing Exhibit 6, Attachment to Embarq's Response to Staff's POD No. 12)

"compromise" and characterizes Embarq's proposal as the "traditional ILEC position." (Tr. at 30) Verizon Access characterizes its proposal as "market-based" because some other companies have agreed to the arrangement. But, the agreement by some is no reason whatsoever to impose the arrangement on Embarq. Mr. Price acknowledged that interconnection agreements are typically lengthy documents, covering dozens of issues and involving give and take by the parties. (Hearing Exhibit 2, Verizon Access's Response to Staff's Interrogatory No. 20) Because each interconnection agreement involves negotiation on numerous issues, with various gives and takes by each party, it is wholly unfair to extract one provision from an interconnection agreement between Verizon Access and a third party and impose that provision on Embarq. There is simply no way to know why a third party might agree to Verizon Access's arrangement for VNXX traffic without knowing the trade-offs of the entire negotiation or the strategy and capability of the third party.

Verizon Access's position that the Commission should impose its so called "market-based" solution on Embarq is conceptually no different from the "pick and choose" right that CLECs previously had under the Telecommunications Act of 1996.[11] Under pick and choose, a CLEC could select different elements from an ILEC's interconnection agreements with other CLECs and incorporate those elements into its own interconnection agreement. The Verizon ILECs vigorously opposed pick and choose.[12] They argued that permitting pick and choose would harm negotiations and was unfair because it failed to recognize the various tradeoffs that are made in any negotiation

[11] See, § 251(i) of the 1996 Act.
[12] See, for example, *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 at 800, 801 (1997).

process. Ultimately, the FCC eliminated the "pick and choose" requirement.[13] But, what Verizon Access is proposing here actually goes beyond pick and choose – by asking the Commission to impose on Embarq an isolated provision from interconnection agreements to which Embarq was not a party. Verizon Access's position might well be called "pick and impose."

Verizon Access also suggests that its proposed solution should be an "interim" solution until the FCC possibly rules on VNXX compensation in its intercarrier compensation rulemaking that has been pending for over six years.[14] While Embarq recognizes that the FCC requested comments on various issues related to intercarrier compensation in its original Notice of Proposed Rulemaking issued in April 2001 and in a subsequent Further Notice of Proposed Rulemaking issued in March 2005, Embarq has had no indication that the FCC intends to render a comprehensive decision in the intercarrier compensation docket any time soon. In any event, there is no certainty that the FCC will address compensation for VNXX traffic when it does rule. Therefore, Embarq urges the Commission to resolve this issue without regard for possible action by the FCC at an indeterminate time in the future.

Resolution

In contrast to Verizon Access's convoluted and self-serving "market-based" proposal, Embarq's position on this issue is straight-forward. The physical end points of a call should determine the compensation that is payable. In other words, if the person originating a call is physically located in a different local calling area from the person

[13] See, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, FCC Order 04-164, released July 13, 2004 (19 FCC Rcd 13494). See, also, FCC Rule 47 CFR § 51.809.

[14] See, *In the Matter of a Unified Intercarrier Compensation Regime*, FCC Docket No. 01-92.

receiving the call, access charges should apply. Specifically, Embarq's originating access rates should apply to any traffic provisioned through the use of Verizon Access's VNXX numbering scheme. Embarq's position is the only one consistent with Commission, FCC, and judicial precedent and should be adopted by the Commission.

ISSUE 4: **When the Parties exchange traffic via Indirect Connection, if Verizon Access has not established direct end office trunking sixty days after reaching a DS1 level, should Verizon be required to reimburse Embarq for any transit charges billed by an intermediary carrier for Local Traffic or ISP-bound Traffic originated by Embarq?**

Embarq's Position: **Embarq's language requires Verizon Access to pay any transit charges incurred by Embarq if Verizon Access fails to establish direct connection within a certain time frame, as agreed to by the parties. This specific enforcement mechanism is designed to provide a reasonable incentive for Verizon Access to comply with the direct connection requirement.**

Argument: The parties have agreed that, when traffic volumes between an Embarq end office and Verizon Access reach a DS1 level, Verizon Access will establish a direct connection with Embarq's end office. (Tr. at 21) So, there is no dispute with respect to Verizon Access's obligation to establish a direct connection when the exchange of indirect traffic reaches a certain level. But, the parties disagree over what should happen when Verizon Access fails to fulfill its duty to establish the direct connection.

Indirect traffic is traffic that is exchanged between the parties via another ILEC's tandem. (Tr. at 47) While many ILECs refuse to interconnect on an indirect basis (and

have sound legal arguments for doing so), Embarq has established a compromise arrangement to exchange a small amount of traffic indirectly with Verizon Access where Embarq's end office subtends another ILEC's tandem. (Id.) Although Verizon Access has agreed to establish a direct connection to Embarq's end office once the cumulative volumes of indirect traffic reach a DS1 level, Embarq is finding that carriers (particularly CLECs that terminate large volumes of one-way, ISP-bound traffic) are extremely slow to establish the direct connection with Embarq's network despite a contractual obligation to do so. As a result, Embarq, as the originating carrier, potentially is liable for transit charges from the tandem owner. (Id.)

The majority of Verizon Access's indirect traffic is traffic originated by Embarq and terminated to Verizon Access. (Tr. at 58) Because of the directional flow of the traffic, Verizon Access has very little economic incentive to provide a direct connection. Since Embarq, and not Verizon Access, potentially suffers if Verizon Access fails to honor its contractual obligation to establish a direct connection, it is appropriate that the interconnection agreement contain a specific financial incentive to encourage Verizon Access to comply with its contractual obligation. (Tr. at 47 & 48)

Verizon Access has raised several objections to Embarq's proposal that there be a financial consequence if Verizon Access breaches its obligation. These objections include claims by Verizon Access that Embarq's proposed language on Issue 4:

1) may be contrary to 49 CFR §51.703(b);

2) assumes incorrectly that Verizon Access has sole control over the timeframe for establishing a direct end office connection;

3) ignores the possibility that the DS1 threshold could be triggered in a given month, only to be followed by later months when the traffic does not reach the threshold;

4) is unnecessary; and

5) is unprecedented

However, as Embarq demonstrates in the following discussion, Verizon Access's arguments are unavailing.

Rule 51.703(b)

Verizon Access claims that Embarq's proposal may violate FCC Rule 51.703(b) because 47 CFR §51.703(b) prohibits a LEC from assessing charges on another telecommunications carrier for telecommunications traffic that originates on the LEC's network. (Tr. at 21) But that is not what Embarq proposes, and, by suggesting that it is, Verizon Access is misusing the rule to excuse its failure to comply with its contractual agreement to establish direct trunks.

There is a significant difference between: (1) Embarq's assessing charges on Verizon Access for telecommunications traffic that originates on Embarq's network; and (2) using the unnecessary transit charges Embarq pays to a third party as the appropriate measure of damages for that breach. Because the harm to Embarq that would be caused by Verizon Access's breach is equal to the transit charges that Embarq pays unnecessarily, it

is appropriate to use those transit charges as the measure of damages.[15] Since Rule 51.703(b) does not prevent the use of the transit charges as the proper measure of damages, the nature of the traffic is immaterial.

Situations outside Verizon Access's Control

Embarq recognizes that there are situations that may be outside the control of Verizon Access that might prevent the timely establishment of direct end office trunks. Accordingly, Embarq has proposed additional language that provides for an extension of the deadline if the direct connection cannot be established because of some fault of Embarq or a third party. (Hearing Exhibit 6, Embarq's Response to Staff's POD No. 12) And, in response to questions from staff during his deposition, Mr. Fox agreed in concept to language that would insure the 90 day interval began after an order is accepted, to address concerns that Verizon Access expressed about potential delays resulting from Embarq's requirements for customer profiles. (Hearing Exhibit 8, Fox Deposition at page 61)

Traffic Fluctuations

Verizon Access's claim that traffic may pass the threshold, then later go below it, is purely theoretical. Verizon Access did not provide a single example where that situation had occurred. In fact, Mr. Price admits that this scenario is unlikely. (See, Hearing Exhibit 7, Price Deposition at pages 67 & 68, confirming a statement he made under cross-examination during the Ohio Arbitration Hearing on this issue.) If these fluctuations are a legitimate concern, the parties can negotiate language to address the apparently rare instance where the traffic volumes fluctuate in that way. In fact, Mr. Fox

[15]See, *MCI v. BellSouth*, 298 F. 3d 1269 (11th Cir. 2002) where the Court reversed a determination by the Florida Public Service Commission that it lacked the authority in an arbitration proceeding to impose interconnection agreement terms that included a liquidated damages provision.

has indicated Embarq's willingness to do so. (Tr. at 58; Hearing Exhibit 8, Fox Deposition at page 61) That hypothetical situation is, however, no reason to give Verizon Access a free ride when it fails to build a direct connection when the traffic passes the threshold and does not fall below it subsequently.

Necessity for Embarq's Proposal

Verizon Access's assertion that Embarq's proposal is unnecessary because Verizon Access has already agreed to establish a direct connection when transit traffic exceeds a DS1 level evades that real issue of providing for consequences to Verizon Access if it breaches its agreement to establish direct trunks. There is nothing unusual about contracting parties' agreeing to a specific remedy if one party breaches the agreement. Because the vast majority of the traffic flows from Embarq to Verizon Access, the language Embarq proposes is necessary to give Verizon Access a proper incentive to do what it has promised to do and provides a reasonable financial consequence if Verizon Access fails to meet its obligation.

Verizon Access also claims that the provision is unnecessary because Embarq has recourse to the normal dispute resolution provisions in the interconnection agreement. (Tr. at 21) But the dispute resolution procedures may be inadequate to give Embarq the relief to which it is entitled. If Verizon Access were to breach its obligation and cause Embarq to incur unnecessary transit charges, and Embarq were to invoke the dispute resolution procedures and proceed before the Commission, Verizon Access is likely to argue that the Commission is without jurisdiction to award monetary damages to Embarq. Upon questioning by Embarq's counsel during his deposition, Mr. Price provided no reassurance to the contrary. (Hearing Exhibit 7, Price Deposition at pages 61-62) The

result is that Embarq could suffer financial harm because of Verizon Access's breach, but might not have an effective remedy. By contrast, Embarq's proposed language makes it clear that Verizon Access must reimburse Embarq for any transit charges that Embarq incurs unnecessarily as a result of Verizon Access's failure to meet its obligation to establish direct connections.

Precedent for Embarq's Proposal

Verizon's argument that Embarq's proposed language is unprecedented also lacks merit. Mr. Price dismisses the numerous Embarq agreements that require a CLEC to pay Embarq's transit charges if they don't establish a direct connection by characterizing them as providing a choice rather than imposing an incentive. (Hearing Exhibit 7, Price Deposition at page 40) Mr. Price's flimsy distinctions are purely semantic. While the language in these agreements may not be identical to language Embarq proposes in this proceeding, the effect is the same, that is, a CLEC either establishes a direct connection when traffic reaches a certain level, or it reimburses Embarq for any transit charges Embarq incurs. (Hearing Exhibit 3, Attachment to Embarq's Response to Staff's Interrogatory Nos. 35-39)

The Ohio Arbitration Award also provides precedent for the financial incentive proposed by Embarq. The Ohio Commission approved Embarq's proposal with only a suggestion to modify the language to fully address delays caused by third parties. (Ohio Arbitration Award at page 11) The modifications suggested in the Ohio arbitration decision are reflected in the language proposed by Mr. Fox in his response to staff's discovery. (Hearing Exhibit 6, Embarq's Response to Staff's POD No. 12)

Resolution

It is indisputable that Embarq is the party that will potentially suffer financial harm if Verizon Access fails to establish a direct connection, unless Embarq's proposed language is adopted. Because the flow of traffic when the parties have an indirect connection is primarily to Verizon Access, Embarq, as the originating carrier, is liable to incur transit charges assessed by the owner of the tandem switch through which the parties indirectly interconnect. None of Verizon Access's arguments against Embarq's proposal address this fundamental inequity of financial risk. To ensure that Verizon Access has a sufficient financial incentive to comply with the terms of the interconnection agreement, the Commission should adopt the language proposed by Embarq.

ISSUE 5: What rate should apply to transit traffic under the Parties' interconnection agreement?

Embarq's Position: **The parties agree that transit service is not a § 251 obligation. Embarq's proposed transit traffic rate of $.005/MOU is a reasonable commercial, market-based rate. In addition, Embarq's proposed rate is consistent with prior Commission orders regarding the appropriate rate for transit traffic.**

Argument: Embarq and Verizon Access agree that Embarq is not required to provide transit service under § 251 of the 1996 Act. In addition, the parties agree that the rate for transit service is not a cost-based rate. (Tr. at 36, 50 & 51) The focus of the dispute in this proceeding is what is an appropriate "market-based" rate for transit service. (Tr. at pages 24 and 50)

Commission Jurisdiction

Embarq's and Verizon Access's agreement that transit service is not a § 251 obligation and, therefore, that transit service is not required to be offered at cost-based

rates is consistent with the Commission's rulings in two earlier proceedings relating to BellSouth's provision of transit service.[16] In the Joint CLEC Arbitration Order involving an arbitration between BellSouth and several CLECs where the rate for transit service was an issue, the Commission determined:

> Further, we find that the TIC is not required to be TELRIC-based and is more appropriately, in this instant proceeding, a negotiated rate between the parties. A TELRIC rate is inappropriate because transit service has not been determined to be a § 251 UNE. (at page 52)

Subsequently, in the BellSouth Transit Traffic Order, a generic proceeding to establish rates, terms and conditions for BellSouth's provisioning of transit service, the Commission observed:

> We agree that §251 contains no explicit obligation to provide transit service, but as the FCC has stated, the question is whether there is an implied obligation. Indeed, the FCC has acknowledged that this issue needs to be decided and has teed it up in the ICF FNPRM. (ICF FNPRM ¶128) This Commission need only acknowledge in this proceeding that §251(a) requires all telecommunications carriers to interconnect directly or indirectly, and that transit service has been expressly recognized by the FCC as a means to establish indirect interconnection. (ICF FNPRM ¶125) (at page 44)

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[16] See, *In re: Joint petition by TDS Telecom d/b/a TDS Telecom/Quincy Telephone; ALLTEL Florida, Inc.; Northeast Florida Telephone Company d/b/a NEFCOM; GTC, Inc. d/b/a GT Com; Smart City Telecommunications, LLC d/b/a Smart City Telecom; ITS Telecommunications Systems, Inc.; and Frontier Communications of the South, LLC ["Joint Petitioners"] objecting to and requesting suspension and cancellation of proposed transit traffic service tariff filed by BellSouth Telecommunications, Inc.; In re: Petition and complaint for suspension and cancellation of Transit Traffic Service Tariff No. FL2004-284 filed by BellSouth Telecommunications, Inc., by AT&T Communications of the Southern States, LLC.*, Order No. PSC-06-0776-FOF-TP in Docket Nos. 050119-TP & 050125-TP, issued September 18, 2006, hereinafter "BellSouth Transit Traffic Order" and *In re: Joint petition by NewSouth Communications Corp., NuVox Communications, Inc., and Xspedius Communications, LLC, on behalf of its operating subsidiaries Xspedius Management Co. Switched Services, LLC and Xspedius Management Co. of Jacksonville, LLC, for arbitration of certain issues arising in negotiation of interconnection agreement with BellSouth Telecommunications, Inc.*, Order No. 05-0975-FOF-TP in Docket No. 040130-TP, issued October 11, 2005, hereinafter "Joint CLEC Arbitration Order." While Embarq is aware that BellSouth is now AT&T, Embarq will continue to use "BellSouth" in this brief, since that is name used throughout the referenced orders.

In the BellSouth Transit Traffic Order, the Commission found that, while transit service might not be required under § 251, the Commission had the authority to require it and to settle disputes related to provisioning under section 364.16, Florida Statutes. (Order at page 17) In the Order, the Commission required the parties who could not reach agreement with BellSouth regarding the rates, terms and conditions for transit service to seek resolution of any disputes under sections 364.16, 364.161 and 364.162. (Order at page 18) During the deposition of Mr. Fox in this proceeding, the Commission staff attorney asked whether the parties were requesting the Commission to resolve the transit service rate issue under state law, as required of parties to the BellSouth transit traffic proceeding. (Hearing Exhibit 8, Fox Deposition at pages 25-27) While the negotiation of the agreement that is the subject of this arbitration was initiated and conducted under the procedures set forth in § 252 of the 1996 Act and Verizon filed this arbitration in accordance with those procedures, § 252(e)(3) specifically recognizes the Commission's ability to include and resolve state law issues in the context of a § 252 arbitration. Therefore, there is no conflict between the Commission's decision in the BellSouth Transit Traffic Order and the parties' request that the Commission resolve this issue in the context of their § 252 interconnection agreement arbitration.

Embarq's Market-based Rate Proposal

While Verizon Access has agreed that Embarq's transit service rate need not be based on costs, Verizon Access has nevertheless proposed a rate that reflects Embarq's TELRIC-based rates for the network elements required to provide the transit service. (Tr. at 24) Mr. Price never adequately explained Verizon Access's reliance on this cost-based rate, even when specifically asked for an explanation. (Hearing Exhibit 7, Price

Deposition at pages 48 & 49) On the other hand, Embarq has recommended a market-based rate supported by ample evidence that it is a reasonable rate in the commercial market.

In support of its proposed rate of $.005/MOU, Embarq has identified 21 CLECs that have agreed to the $.005/MOU rate in negotiated or adopted[17] interconnection agreements with Embarq. (Hearing Exhibit 3, Attachment to Embarq's Response to Staff's Interrogatory Nos. 35-39) At least four of these CLECs terminated a significant amount of traffic to Embarq on a monthly basis as of December 2006. (Hearing Exhibit 4, Embarq's Confidential Response to Staff's Interrogatory No. 38) In addition, as support for its proposed rate, Embarq has provided the price list of a competitive transit provider in Florida, which shows a comparable rate to the rate proposed by Embarq. (Hearing Exhibit No. 10, Embarq's Response to Verizon Access's POD No. 2) Finally, Embarq has demonstrated that the Commission has considered, and never rejected, the concept of a tandem intermediary charge ("TIC") to be added to cost-based network element rates for transit service in the two BellSouth dockets discussed. The BellSouth rates that result from the addition of a TIC charge to BellSouth's network element costs are comparable to the $.005/MOU rate Embarq seeks in this proceeding. (See, Joint CLEC Arbitration Order at page 53 and the Staff Recommendation in the BellSouth Transit Traffic docket, Hearing Exhibit No. 8, Fox Deposition Exhibit No. 2, at page 66)[18] In fact, the ultimate transit traffic rate that Verizon Access agreed to in its

[17] Verizon Access implies that adoption of an interconnection agreement by a CLEC does not necessarily indicate the CLEC's agreement with the terms of adopted agreement. (Hearing Exhibit 7, Price Deposition at page 50) Contrary to Verizon's implications, when a CLEC voluntarily adopts an interconnection agreement, the CLEC is presumed to have understood and accepted the terms of the adopted agreement.

[18] In footnote 30, on page 65 of the Staff Recommendation in the BellSouth Transit Traffic docket, the staff details the TELRIC-based rates for the BellSouth network elements it uses in its calculations. Using the TELRIC-based rates for the network elements that are comparable to Embarq TELRIC-based rates for

interconnection agreement with BellSouth exceeds the upper end of the BellSouth charge contemplated by staff in the discussion of the TIC charge in the August 17, 2006 staff recommendation in the BellSouth Transit Traffic docket. (Tr. at 17; Hearing Exhibit 8, Fox Deposition Exhibit 2, at page 66)

While Embarq believes that the appropriate rate for transit service is a market-based rather than a cost-based rate, it should be obvious that a market-based rate would be set at a level sufficient to recover the costs of the providing the service. (Hearing Exhibit 8, Fox Deposition at page 66) In addition to the recovery of costs, a market-based rate appropriately reflects the added value the service provides to the CLEC purchasing it. (Hearing Exhibit 3, Embarq's Response to Staff's Interrogatory Nos. 33 & 39) Because Embarq's costs are higher than BellSouth's, as demonstrated by the level of its TELRIC approved network elements rates, it is reasonable for Embarq's transit service rate to be higher than BellSouth's rate or Verizon Florida ILEC's rate.[19]

Verizon Access's Proposed Reference Points

In contrast to the sound foundation Embarq has presented for its proposed rate, none of the rates offered by Verizon Access are appropriate or applicable. Several of Verizon Access's suggested rates reflect the TELRIC-based rates of either BellSouth or Verizon ILEC, which are demonstrably lower than the rates approved by the Commission for Embarq based on Embarq's cost. (See, footnotes 18 and 19.) Verizon Access also

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network elements set forth in Table One of the parties' proposed interconnection agreement (Attachment C to Verizon Access's Petition for Arbitration), BellSouth's TELRIC-based rate equates to .000941 compared to Embarq's rate of .002867. Adding the same TIC charge (.0015) applied to the BellSouth TELRIC rate to Embarq's TELRIC rate equates to .004367 compared to BellSouth's rate of .002441.

[19] See, footnote 18 for a comparison of BellSouth's rates to Embarq's. Based on the Commission order approving network element rates for Verizon (*In Re: Investigation into pricing of unbundled network elements (Sprint/Verizon track)*, Order No. PSC-02-1574-FOF-TP), Verizon's TELRIC-based rate for the comparable network elements necessary to provide transit service are .0016835 compared to Embarq's rate of .002867. Adding the .0015 TIC charge to Verizon's network element costs equates to a rate of .0031835 compared to Embarq's rate of .004367.

suggests that the Commission look to Embarq's interstate access rates as a reference point, but these rates should not be considered outside of the context of Embarq's entire interstate access rate structure and, therefore, are inappropriate to consider as a basis for Embarq's market-based transit service rate. Finally, Verizon proposes that the Commission apply Embarq's TELRIC-based network element rates, without consideration for the other factors essential in establishing a market-based rate, that is, additional costs not covered by the TELRIC-based rates, as well as the value-added component of Embarq's transit service.

Resolution

Verizon has failed to demonstrate the applicability of the rates it suggests or reconcile its proposal to the market-based standard that Verizon Access agrees is applicable to transit service. Embarq has proposed a reasonable commercial rate for its transit service. And, Embarq has provided ample evidence to support the reasonableness of its proposed rate. Therefore, the Commission should approve the rate proposed by Embarq.

CONCLUSION

Embarq's positions on the remaining disputed issues in this arbitration are fair, reasonable and consistent with Commission and FCC precedent and should be adopted by the Commission. Specifically, the Commission should: 1) prevent Verizon Access from engaging in regulatory arbitrage and order that originating access charges are payable for non-local, ISP-bound VNXX traffic; 2) if Verizon Access breaches its obligation to install a direct connection, require Verizon Access to reimburse Embarq for the transit charges Embarq incurs because of that breach; and 3) adopt the commercially

reasonable, market-based rate of $.005/MOU that Embarq has proposed for its transit service.

Respectfully submitted this 1st day of June 2007.

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