BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: US LEC of Florida, Inc.'s Attempted Adoption of Interconnection Agreement Between Verizon Virginia, Inc. and Level 3 Communications, LLC and Request for Approval of the Adopted Agreement	))))))	Docket No. 010676-TP Filed: September 10, 2001

VERIZON FLORIDA INC.'S BRIEF OF JURISDICTIONAL ISSUES

On May 4, 2001, US LEC of Florida, Inc. (US LEC) asked the Commission to approve its adoption of an interconnection agreement between Verizon Virginia Inc. and Level 3 Communications, LLC (Virginia Level 3 Agreement). US LEC purported to make this interstate adoption request under a "most-favored-nation" (MFN) provision of the FCC's Order approving the merger between GTE and Bell Atlantic. *See Application of GTE Corp. and Bell Atlantic Corp. for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations*, Memorandum Op. and Order, 15 FCC Rcd 14032, at Sec. IX (*Merger Conditions*), para. 31 (2000).

On May 30, 2001, Verizon notified the Commission that it had not agreed to US LEC's request to adopt the Virginia Level 3 Agreement in Florida and pointed out that, in any event, the Commission had found it lacked the jurisdiction to approve or deny adoptions pursuant to the FCC *Merger Conditions*. (Letter from K. Caswell, Verizon, to B. Bayo, FPSC, dated May 30, 2001, *citing Petition by Verizon Florida Inc. and SBC National, Inc. for Acknowledgement of Adoption of Collocation and DS3 Terms of Interconnection Agreement Between SBC Telecom, Inc. and Verizon Northwest Incorporated*, Order No. PSC-01-0603-FOF-TP (March 13, 2001) (*SBC Order*).)

On July 25, 2001, Verizon, US LEC, and Commission Staff participated in a conference call to discuss the parties' positions on US LEC's adoption request. As a result of that call, Commission Staff asked the parties to brief the following issues:

1. May the Verizon Virginia/Level 3 Agreement be acknowledged in Florida pursuant to the Bell Atlantic/GTE merger conditions?

2. In accordance with the FPSC's decision in Docket No. 001718-TP, if the agreement may be acknowledged in Florida, does the Commission have jurisdiction to resolve complaints arising under the agreement?

3. If the Commission has jurisdiction to resolve complaints arising under the agreement, should it exercise that jurisdiction?

Verizon understands that US LEC's principal interest in the Virginia Level 3 Agreement is its provisions addressing reciprocal compensation for Internet-bound traffic. The Commission cannot acknowledge US LEC's adoption of these provisions because they are not subject to interstate adoption under the FCC's *Merger Conditions*. To the extent that the parties disagree about the scope of the interstate MFN condition, this is not the appropriate forum to settle that dispute, which is now before the FCC.

Below, Verizon responds to each of the specific issues Staff identified for briefing.

Issue 1: May the Verizon Virginia/Level 3 Agreement be acknowledged in Florida pursuant to the Bell Atlantic/GTE merger conditions?

Verizon's Position: * The Virginia Level 3 Agreement may be acknowledged, **except for** its intercarrier compensation provisions. These provisions are not subject to interstate adoption under the FCC's *Merger Conditions*. *

The FCC's *Merger Conditions* require Verizon to permit requesting carriers to adopt interconnection agreements across state lines, under certain conditions (discussed below). In its *SBC Order*, this Commission correctly concluded that it had no jurisdiction to approve or deny such interstate adoptions because they are made pursuant to the *Merger Conditions*, rather than the Telecommunications Act of 1996 (the Act). The Commission observed that "the Merger Conditions confer no jurisdiction on this Commission." *SBC Order* at 3. In the absence of such jurisdiction, the Commission concluded that simple acknowledgement of the interstate MFN agreement was appropriate, so that it could track future agreement activity between the companies. *Id.*

The Commission's reasoning in the *SBC Order* is sound. The acknowledgement process used in that case remains the appropriate means of addressing interstate MFN adoptions, given the Commission's lack of authority to approve or deny such adoptions. The Commission could thereby take notice of and track adoptions that the parties voluntarily enter into or that forums (here, the FCC) which do have jurisdiction order. Verizon urges the Commission to maintain the acknowledgement approach for interstate adoptions under *the Merger Conditions*.

Of course, acknowledgement is appropriate only for agreements subject to the *Merger Conditions*. Most of the provisions in the Virginia Level 3 Agreement fit this criterion. The intercarrier compensation provisions, however, do not. As Verizon explains in the following sections, the *Merger Conditions* require interstate adoptions only of interconnection agreement provisions subject to section 251(c) of the Act. Reciprocal compensation obligations appear in section 251(b)(5), not section 251(c), and thus are outside the scope of permissible adoptions under the *Merger Conditions*.

Even if the *Merger Conditions* were misconstrued as encompassing items subject to section 251(b), Verizon would still not be obligated to permit the interstate adoption of terms addressing intercarrier compensation for Internet-bound traffic, such as those found in the Virginia Level 3 Agreement. In its April *Remand Order*, the FCC definitively confirmed that Internet-bound traffic is outside the scope of *both* 251(b) and 251(c). *Implementation of the Local Competition provisions in the Telecomm. Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, FCC 01-031 (April 27, 2001) (*Remand Order*). Thus, there can be no doubt that the requirement allowing interstate adoption of interconnection agreement provisions implementing section 251(c) obligations does not apply to any provision interpreted to provide reciprocal compensation for Internet-bound traffic. These very issues are now before the FCC, and it is that agency, and no other, that must interpret the conditions it adopted in approving the Bell Atlantic/GTE merger.

Finally, even if the intercarrier compensation provisions of the Virginia Level 3 Agreement were somehow misread to be within section 251(c) of the Act, these provisions would not be available for adoption into Florida, in any event. The *Merger Conditions* require Verizon to permit adoption of interconnection terms between former Bell Atlantic and former GTE territories only if they were voluntarily negotiated after the merger (that is, after June 30, 2000). The intercarrier compensation provisions of the Virginia Level 3 Agreement were negotiated prior to June 30, 2000. Thus, they are not available for adoption from Virginia (a former Bell Atlantic state) into Florida.

A. The Interstate MFN Requirement Is Limited to Matters That Are Subject to Section 251(c).

The *Merger Conditions* permit interstate adoptions of "any interconnection arrangement, UNE, or provisions of an interconnection agreement (including the entire agreement) subject to 47 U.S.C. § 251(c)." *Merger Conditions* at paras. 31 & 32. The right to adopt provisions of an interconnection agreement across state lines is thus expressly limited to matters that are "subject to 47 U.S.C. § 251(c)." By its own terms, the quoted language limits the scope of the MFN condition. The history of that language confirms that to be the case.

The Bell Atlantic/GTE *Merger Conditions* are a slightly modified version of those adopted in connection with the earlier SBC/Ameritech merger. The genesis of the interstate MFN condition in paragraphs 31 and 32 of the Bell Atlantic/GTE *Merger Conditions* was paragraph 43 of the SBC/Ameritech conditions. The latter, however, allowed interstate adoption of any "interconnection arrangement of UNE." 14 FCC Rcd 14712, App. C. para. 43 (1999). That agreement contained no reference to section 251(c). But when the SBC/Ameritech condition was revised to apply to provisions of interconnection agreements (rather than just interconnection arrangements and UNEs), the reference to section 251(c) was added to make clear that the provisions that are covered are those that are the subject of 251(c). That makes good sense. It makes clear, for example, that resale arrangements under 251(c)(4) are covered, but still cabins the scope of the conditions to the core requirements of section 251(c). Otherwise, provisions of interconnection agreements that are wholly unrelated to interconnection, but are included in a single agreement for convenience--including even

non-telecommunications matters, such as information services or even the purchase of a used truck--would suddenly become subject to an MFN obligation for the first time.

Although the express terms of the interstate MFN condition are limited to matters subject to section 251(c), US LEC asks the Commission to construe the condition to apply to matters covered by section 251(b), as well. It claims that the explanatory parenthetical, "(including an entire interconnection agreement)," changes the plain meaning of the MFN condition entirely. US LEC apparently believes that this phrase means that a carrier may adopt an entire agreement in another state, without regard to the limitations set forth in the *Merger Conditions*. (*See* Letter from W. Montano, US LEC, to K. Caswell, Verizon, at 2 (June 1, 2001) (US LEC June 1 Letter).)

The parenthetical phrase cannot and does not mean what US LEC asserts. The parenthetical is immediately followed by the limiting phrase "subject to 47 U.S.C. § 251(c)." Consequently, the only reasonable reading of that parenthetical is that it was added to clarify that, if an agreement was confined to such core section 251(c) matters, that entire *qualifying* agreement could be adopted in another state.[1]

The limitation enables carriers to adopt agreement provisions dealing, for example, with interconnection, unbundled access, and resale, which are at the heart of the local competition policies in section 251(c) of the Act, and for that very reason were the subject of additional obligations that were imposed uniquely on incumbents. Other

[1] US LEC's proposed reading would effectively write out of the *Merger Conditions* the limiting phrase "subject to 47 U.S.C. §251(c)," and is, therefore, in error. If its tortured construction were correct, then there would have been no need for the FCC to include the "subject to" limitation where it appears in both paragraphs 31 and 32; it would have simply required Bell Atlantic/GTE to make available any interconnection agreement within any Bell Atlantic/GTE state. This Commission may not reasonably conclude that the qualifying words in two portions of the *Merger Conditions* are mere surplusage. Accordingly, the FCC must have intended to require the interstate adoption of only certain interconnection arrangements and the entirety of only certain agreements, *viz*., those that were subject to section 251(c).

matters were appropriately left to negotiation or arbitration on a state-by-state basis, rather than allowing them to be adopted in other states under the MFN condition. If the FCC had intended to include section 251(b) obligations in the provisions that could be adopted across state lines, it surely would have listed that subsection along with section 251(c). The Commission must decline US LEC's request to recognize its attempted adoption of out-of-state provisions outside the ambit of section 251(c).

A. US LEC Is Not Entitled to Adopt the Intercarrier Compensation Provisions Just Because They May Be Related to Provisions Regarding Geographically Relevant Interconnection Points.

US LEC contends that, regardless of the fact that reciprocal compensation provisions pertain to section 251(b) (rather than section 251(c)), US LEC is still entitled to adopt them because section 251(c) obligations relative to the establishment of geographically relevant interconnection points (GRIPs) are related to the intercarrier compensation provisions of the Virginia Level 3 Agreement. (US LEC June 1 Letter, at 3.) US LEC purports to base this view on language in the *Merger Conditions* that specifies, among other requirements, that "the requesting telecommunications carrier accept all reasonably related terms and conditions as determined in part by the nature of the corresponding compromises between the parties to the underlying interconnection agreement."[2] In other words, for a CLEC to be able to MFN an interconnection agreement provision under the *Merger Conditions*, it must adopt other related provisions of the underlying agreement. Otherwise, the CLEC could adopt a provision beneficial to it, while not taking another provision that was necessary for the

[2] US LEC June 1 Letter at 3, referring to *Merger Conditions* at para. 31.

ILEC to agree to the provision being adopted. For example, in this case, if the reciprocal compensation provisions were subject to MFN obligations, which they are not, the intercarrier compensation scheme would not be subject to an adoption unless the CLEC were to take the GRIP provisions, as well.

Contrary to US LEC's view, the obverse is not the case. That is, the *Merger Conditions* do not specify that to the extent that a CLEC is permitted to adopt certain interconnection agreement provisions, it is also entitled to all related terms and conditions even if they are otherwise not subject to MFN obligations under the *Merger Conditions*. Yet that is exactly the tortured logic US LEC uses in claiming that linkage between GRIPs and the intercarrier compensation arrangement transforms non-MFNable terms into those subject to adoption under the *Merger Conditions*.

When Level 3 negotiated a rate for Internet-bound traffic, Verizon's offering that rate was dependent upon and inextricably linked to Level 3 accepting the specified GRIP architecture. But accepting the GRIP architecture was not dependent upon establishment of a compensation rate for Internet-bound traffic. In other words, even if the Agreement were subject to interstate MFN obligations (and it is not), it would be possible to get GRIP architecture without the Internet traffic compensation scheme, but it would not be possible to get the Internet traffic compensation scheme without GRIP architecture. The fact that GRIP architecture is in a contract, such as the Virginia Level 3 Agreement, does not sweep in the intercarrier compensation provisions. The Commission should reject this plainly untenable position and decline to acknowledge the intercarrier compensation provisions in the Virginia Level 3 Agreement.

C. The FCC's *Order on Remand* Makes Clear That Internet-Bound Traffic Is Outside the Scope of Section 251(b)(5) and Thus Beyond the Reciprocal Compensation Provisions of Local Interconnection Agreements.

As explained above, US LEC urges an interpretation of the Merger Conditions that would extend the *Merger Conditions'* MFN obligation to section 251(b) reciprocal compensation obligations. Aside from the plain fact that this obligation is expressly limited to section 251(c) matters, US LEC's arguments are simply beside the point. The FCC's *Remand Order* puts to rest any conceivable claim that the FCC's MFN condition allows carriers to adopt in other states the provisions of an interconnection agreement that address intercarrier compensation for Internet-bound traffic. As an initial matter, the *Merger Conditions* explain the relationship between that MFN condition and the adoption provision in section 252(i) of the Act as follows:

> Exclusive of price and state-specific performance measures *and subject to the Conditions specified in this Paragraph*, qualifying interconnection arrangements or UNEs shall be made available to the same extent and under the same rules that would apply to a request under 47 USC § 252(i), provided that the interconnection arrangements or UNEs shall not be available beyond the last date that they are available in the underlying agreement and that the requesting telecommunications carrier accepts all reasonably related terms and conditions as determined in part by the nature of the corresponding compromises between the parties to the underlying interconnection agreement.[3]

The *Remand Order* again confirmed that Internet-bound traffic is not subject to the reciprocal compensation requirements of section 251(b)(5). As the FCC explained, it has "long held" that enhanced service provider traffic--which includes traffic bound for ISPs--is interstate access traffic.[4] The FCC further held that "the service provided by

[3] *Merger Conditions* at ¶¶ 31 & 32 (emphasis added).

[4] *Remand Order* at ¶ 28.

LECs to deliver traffic to an ISP constitutes, at a minimum, 'information access' under section 251(g)."[5] Consequently, these services are excluded from the scope of the reciprocal compensation requirements of section 251(b)(5).[6] Therefore, even if the MFN condition were somehow construed (incorrectly) to apply to matters subject to section 251(b)(5), the *Remand Order* conclusively establishes that the provision addressing Internet-bound traffic still would not be covered. On the contrary, such provisions fall within section 251(g), which is outside the reciprocal compensation provisions of section 251(b)(5). Indeed, section 251(c) is devoid of any reference to Section 251(g). The FCC consequently has eliminated any lingering dispute, and there is no question that provisions of interconnection agreements that address Internet-bound traffic cannot be adopted in other states under either paragraph 31 or 32 of the *Merger Conditions*.

US LEC assumes the *Remand Order* left undisturbed existing reciprocal compensation provisions for Internet-bound traffic. That assumption is ill-founded. In its *Remand Order*, the FCC declared that Internet-bound traffic is not now, *and never has been,* subject to the reciprocal compensation obligation in section 251(b)(5). The FCC further found that Congress, when it enacted the 1996 Act, took care to exclude "information access" traffic from the reciprocal compensation obligations in section 251(b)(5). To do so, it enacted section 251(g) to preserve the rules that already existed for compensating this category of traffic.

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

[6] *Id*. at ¶ 34 ("We conclude that a reasonable reading of the statute is that Congress intended to exclude the traffic listed in subsection (g) from the reciprocal compensation requirements of subsection (b)(5)").

In elaborating its construction of the Act, the FCC made it clear that it was determining what the Act, as properly read, has always meant. *Id.* ¶54 (stating that order "clarified that the proper analysis [of the Act] hinges on Section 251(g), which limits the reach of the reciprocal compensation regime mandated in Section 251(b)(5)"). *Cf*. *Energy Reserves Group, Inc. v. Department of Energy*, 589 F.2d 1082, 1100 (Temp. Emerg. Ct. App. 1978) ("Interpretative rules simply state what the statute or regulation has always meant in the opinion of the administrative agency issuing the interpretative rule."). Contrary to US LEC's suggestion, the FCC did not, in its *Remand Order,* pull ISP-bound traffic outside the scope of Section 251(b)(5). Such traffic was never within the scope of Section 251(b)(5) in the first place.

US LEC should be well aware of this principle, as it was recently affirmed in another dispute between US LEC and a Verizon company. In an arbitration between Verizon South Inc. and US LEC in North Carolina, the arbitrator rejected US LEC's request for reciprocal compensation for Internet-bound traffic. He explained that the *Remand Order* made clear that US LEC "is not and never was…entitled to reciprocal compensation for ISP-bound traffic" under the Agreement at issue. *US LEC of North Carolina Inc., Claimant, and Verizon Corp., Respondent*, Second Interim Award (Aug. 20, 2001).

In sum, the *Remand Order* makes clear that carriers cannot rely on the terms of the *Merger Conditions* to expand into new states the very form of "regulatory arbitrage" that, in the FCC's words, "distorts the development of competitive markets."[7] Quite aside from the Commission's lack of jurisdiction to interpret the FCC's *Merger*

[7] *Id. at* ¶¶ 21, 29.

Conditions, as a matter of sound public policy, US LEC should not be permitted to export to Florida the Virginia Level 3 Agreement's language pertaining to intercarrier compensation.

B. US LEC Cannot Export Provisions Negotiated Before the Merger Closing Date.

The *Merger Conditions* distinguish between interconnection provisions negotiated before the GTE/Bell Atlantic merger and those negotiated after the merger. If a provision otherwise eligible for interstate adoption was voluntarily negotiated by GTE before the merger, it may be exported only to other former GTE states. *Merger Conditions* at para. 32. If a provision otherwise eligible for interstate adoption was voluntarily negotiated after the merger close, then it may be adopted as between former GTE and former Bell Atlantic territories. *Merger Conditions* at para. 31.

US LEC claims that the reciprocal compensation provisions it seeks to adopt were negotiated after the merger close, so that it may use paragraph 31 of the *Merger Condi*tions to export a provision from a former Bell Atlantic region in Virginia to the former GTE territory in Florida. Once again, US LEC has mistakenly interpreted the *Merger Conditions*.

The intercarrier compensation and corresponding network architecture provisions of the Virginia Level 3 Agreement were negotiated prior to June 30, 2000, as illustrated by the Agreement's "Whereas" clause stating that negotiations on the "network architecture and Intercarrier Compensation provisions" were substantially complete prior to June 30, 2000. Because the intercarrier compensation arrangement in the Level 3 Virginia Agreement was negotiated pre-merger, it is not available for interstate adoption

into the former GTE region of Florida. It would thus be improper for the Commission to acknowledge the Virginia Level 3 Agreement's intercarrier compensation arrangement here. The Commission still can, however, acknowledge the rest of the Agreement.

Issue 2: In accordance with the FPSC's decision in Docket No. 001718-TP, if the agreement may be acknowledged in Florida, does the Commission have jurisdiction to resolve complaints arising under the agreement?

Verizon's Position: * For the reasons stated above, the intercarrier compensation provisions of the Level 3 Virginia Agreement may not be acknowledged in Florida, so it is not necessary to determine if the Commission has jurisdiction to resolve complaints under that portion of the Agreement. In any event, no such complaints have been presented, so it is premature for the Commission to decide this question. *

As explained in response to Issue 1, acknowledgement is an appropriate procedure to address adoption of out-of-state agreements permitted under the *Merger Conditions*. However, acknowledgement of the intercarrier compensation provisions in the Level 3 Virginia Agreement would be improper because those provisions are not subject to the *Merger Conditions'* interstate MFN obligations.

To the extent that US LEC disagrees with Verizon's interpretation of the Merger Conditions, this Commission need not and should not attempt to resolve the dispute. The FCC is the ultimate arbiter of the meaning of its *Merger Conditions*, and the issue of interstate adoption under those *Conditions* is already before it.[8] All briefing in that

[8] *Common Carrier Bureau Seeks Comment on Letters Filed by Verizon and Birch Regarding Most-Favored Nation Condition of SBC/Ameritech and Bell Atlantic/GTE Orders*, Public Notice, CC Docket Nos. 980141 and 98-184, DA 01-722 (March 30, 2001). Comments and replies were filed on March 14 and April 30, respectively. The issue is also before the FCC in a formal complaint proceeding, *Global NAPs, Inc. v. Verizon Comm., et al.*, File No. EB-01-MD-010.

proceeding has been concluded and a decision is pending. Thus, the most prudent course--and the course consistent with past Commission decisions on this matter--would be for the Commission to await the FCC's decision interpreting its own *Merger Conditions* and to decline to acknowledge the Virginia Level 3 Agreement here pending the FCC's decision. US LEC remains free to adopt the remaining portion of the Virginia Agreement or any one of the numerous other agreements available to it in Florida.[9]

Because acknowledgement of the Virginia Level 3 Agreement would be improper, the Commission need not reach the question of whether it can resolve any complaints under that Agreement. In any event, no such complaints have been presented. The only issue before the Commission at this point is the threshold matter of whether US LEC can adopt the Virginia Level 3 Agreement here in Florida. US LEC has made no complaint under that Agreement; the question, rather, is whether it will be permitted to operate under the Agreement in the first instance.

In general, if an interconnection agreement is subject to adoption under the *Merger Conditions* (unlike the Agreement at issue here), and this Commission acknowledges it here, then the Commission has jurisdiction to resolve at least certain complaints under that agreement. Verizon believes the scope of that jurisdiction may depend upon the nature of the complaint, so that the jurisdictional issue should be treated within the context of a specific complaint. Because no specific complaint is before the Commission in this case, it is neither necessary nor useful to engage in a discussion of the specific kinds of complaints the Commission might properly resolve.

[9] If US LEC wishes to adopt the Virginia Level 3 Agreement without its intercarrier compensation provisions, those provisions will be replaced by a reference to the rate regime prescribed by the FCC's *Remand Order*.

Issue 3: If the Commission has jurisdiction to resolve complaints arising under the agreement, should it exercise that jurisdiction?

Verizon's Position: * As explained above, the Commission need not and should not reach the questions of whether it can or should resolve complaints arising under the agreement, because no such complaints have been presented here. *

As Verizon explained above in response to Issue 2, the parties' existing dispute is whether the FCC's *Merger Conditions* require US LEC to adopt the Virginia Level 3 Agreement here in Florida. This is not a complaint under the Agreement, but rather a fundamental disagreement about whether the Agreement (and particularly, the intercarrier compensation provisions of that Agreement) will govern the parties' relationship in the first instance.

Rather than ruling on this disagreement, Verizon has advised the Commission that it should, consistent with its past findings, defer to the FCC's pending decision as to the scope of Verizon's interstate MFN obligations under the *Merger Conditions*. It is impossible to comprehensively address, in the abstract, whether the Commission can or even should address the range of complaints that might arise under an agreement adopted through the interstate MFN.

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For all the reasons discussed in this Brief, Verizon urges the Commission to decline to acknowledge at least the intercarrier compensation provisions in the Virginia Level 3 Agreement here in Florida.

Respectfully submitted on September 10, 2001.

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