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February 24, 2003

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

Re: Docket No. 020412-TP
Petition for arbitration of unresolved issues in negotiation of interconnection agreement with Verizon Florida Inc. by US LEC of Florida Inc.

Dear Ms. Bayo:

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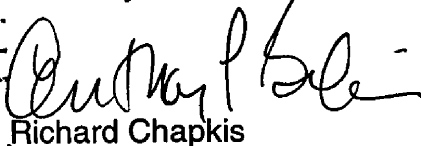
Please find enclosed for filing an original and 15 copies of Verizon Florida Inc.'s Post-Hearing Brief in the above matter. Also enclosed is a diskette with a copy of the Brief in .pdf format. Service has been made as indicated on the Certificate of Service. If there are any questions regarding this matter, please contact me at 813-483-2617.

Sincerely,



Richard Chapkis

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for arbitration of unresolved issues in negotiation of interconnection agreement with with Verizon Florida Inc. by US LEC of Florida Inc.	))))	Docket No. 020412-TP Filed: February 24, 2003

POST-HEARING BRIEF OF VERIZON FLORIDA INC.

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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POST-HEARING BRIEF OF VERIZON FLORIDA INC.

Verizon Florida Inc. ("Verizon"), by counsel, files this Post-Hearing Brief concerning the remaining issues[1] in the Petition for Arbitration of US LEC of Florida Inc. ("US LEC").

SUMMARY

The Florida Public Service Commission ("Commission"), in its *Reciprocal Compensation Order*,[2] addressed the two principal issues presented in this arbitration. First, with respect to interconnection architecture, the Commission has ruled that an ALEC is entitled to choose a single point of interconnection *on the incumbent carrier's network* within the LATA, and has further ruled that the ILEC should bear the cost of transporting the traffic originated by its customers to that point. US LEC's proposal here ignores the requirement that the point of interconnection that it selects must be on *Verizon's* network.

Second, with respect to Virtual NXX traffic, this Commission held, as a matter of law, that such traffic is not subject to reciprocal compensation but instead is intrastate exchange access traffic that is subject to intrastate access charges in the absence of a

[1] The parties have settled Issue 4.

[2] Order on Reciprocal Compensation, *Investigation into Appropriate Methods To Compensate Carriers for Exchange of Traffic Subject to Section 251 of the Telecommunications Act of 1996*, Docket No. 000075-TP, Order No. PSC-02-1248-FOF-TP, at 25-26 (Fla. PSC Sept. 10, 2002) ("*Reciprocal Compensation Order*"), *reconsideration denied*, Order Denying Motions for Reconsideration, *Investigation into Appropriate Methods To Compensate Carriers for Exchange of Traffic Subject to Section 251 of the*

contrary agreement by the parties. In this proceeding, the Commission should therefore make clear that Virtual NXX traffic is not subject to reciprocal compensation and that US LEC is obligated to pay originating access charges on Virtual NXX traffic originated on Verizon's network. In addition, although the Commission held that its Reciprocal Compensation Order does not apply by its terms to ISP-bound traffic, the Commission should make clear that Virtual NXX traffic delivered to ISPs is to be treated in the same manner as Virtual NXX traffic terminated to a voice customer. This resolution not only reflects the parties' understanding that the Commission's resolution of this issue would govern ISP-bound traffic, but also is the only result consistent with the *ISP Remand Order*.

The Commission should also resolve the remaining issues in this proceeding in Verizon's favor. With respect to each disputed issue, only Verizon's proposal is consistent with the requirements of federal law, the Federal Communications Commission's ("FCC") rules and orders, and this Commission's (and other state commissions') interpretation of the FCC's guidance.

ISSUE-BY-ISSUE ARGUMENT

Issue 1: Is US LEC permitted to select a single Interconnection Point (IP) per Local Access and Transport Area (LATA), to select the interconnection method, and to require Verizon to bear the financial responsibility to deliver its originating traffic to the IP chosen by US LEC?

**** US LEC's proposal, which would require Verizon to bear the cost of transporting traffic to a point on US LEC's network, violates federal law and the Commission's decisions, and should be rejected. Either Verizon's initial proposal or its current proposal, each of which complies with federal law, should be adopted. ****

Telecommunications Act of 1996, Docket No. 000075-TP, Order No. PSC-03-0059-FOF-TP (Fla. PSC Jan. 8, 2003) ("*Order Denying Reconsideration*").

This issue raises the question of how the costs that result from US LEC's chosen network architecture should be allocated between the parties. Verizon initially proposed interconnection language, referred to as Virtual Geographically Relevant Interconnection Points or "VGRIP," that reasonably and fairly allocates those costs, consistent with US LEC's right, under federal law, to choose a single Point of Interconnection ("POI") per LATA. *See* D'Amico Direct Testimony at 3-5. Verizon's VGRIP language is substantially the same as the BellSouth language that the Commission, in a previous arbitration, found "appropriate" and "in accordance with the FCC Rules and Orders." *BellSouth-Sprint Arbitration Order*[3] at 58, 61; *see* Munsell Rebuttal Testimony at 3. Verizon presented here the exact same evidence that led the Commission, in the *BellSouth-Sprint Arbitration Order*, to conclude that "BellSouth incurs additional transport costs in completing a local call when Sprint's POI is located outside of BellSouth's local calling area" for which it should receive compensation from Sprint. *See BellSouth-Sprint Arbitration Order* at 58; *see id.* at 52 (Diagram 29-1); Munsell Rebuttal Testimony at 4-6 & Exh. 1; D'Amico Direct Testimony at 12-15.

The Commission's conclusion in the *BellSouth-Sprint Arbitration Order* that the ALEC, not the ILEC, should bear these additional costs is consistent with decisions of the FCC and all federal courts to address the issue. *See Local Competition Order*,[4] 11 FCC Rcd at 15603, ¶ 199 ("a requesting carrier that wishes a 'technically feasible' but expensive interconnection would, pursuant to section 252(d)(1), *be required to bear the*

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

cost of that interconnection, including a reasonable profit"); *id.* at 15608, ¶ 209 (same); *Pennsylvania 271 Order*,[5] 16 FCC Rcd at 17474 ¶ 100 ("Verizon's policies do not represent a violation of our *existing* rules"); *MCI Telecomms. Corp. v. Bell Atlantic Pa.*, 271 F.3d 491, 518 (3d Cir. 2001) ("[t]o the extent . . . [an ALEC's] decision on interconnection points may prove more expensive to Verizon, the PUC should consider shifting costs to [that ALEC]"); *US West Communications, Inc. v. Jennings*, 304 F.3d 950, 961 (9th Cir. 2002) (same); *MCImetro Access Transmission Servs. v. BellSouth Telecomms., Inc.*, No. 5:01-CV-921-H, at 8-14 (E.D.N.C. Jan. 21, 2003) (upholding state commission decision substantially the same as the *BellSouth-Sprint Arbitration Order* and finding that all "courts addressing the issue appear to have found cost-shifting [of the type at issue here] quite consistent with the FCC rules").[6]

However, during the course of this arbitration, the Commission issued an order in its generic intercarrier compensation proceeding that reached conclusions with respect to Issue 1 here that depart from those in the *BellSouth-Sprint Arbitration Order*. *See Reciprocal Compensation Order* at 25-26. Specifically, the Commission held that "an

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[4] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*") (subsequent history omitted).

[5] Memorandum Opinion and Order, *Application of Verizon Pennsylvania Inc., et al. for Authorization To Provide In-Region, InterLATA Services in Pennsylvania*, 16 FCC Rcd 17419 (2001) ("*Pennsylvania 271 Order*").

[6] In a decision that US LEC relied on in its testimony, the Wireline Competition Bureau, a subdivision within the FCC, held that language similar to US LEC's proposal here "more closely conforms to our existing rules and precedent than do Verizon's proposals." Memorandum Opinion and Order, *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, CC Docket Nos. 00-218, *et al.*, DA 02-1731, ¶ 53 (Wireline Comp. Bur. rel. July 17, 2002) ("*Virginia Arbitration Order*"). That decision — which is not a decision of the FCC itself, is still subject to FCC review, and is neither entitled to deference nor in any way binding on this Commission — is not controlling here. Indeed, a federal district court in North Carolina, in upholding a state commission decision approving interconnection agreement language similar to Verizon's VGRIP language, recently described the Bureau's resolution of this issue as "something of an aberration." *MCImetro*, No. 5:01-CV-921-H, at 13.

originating carrier is precluded by FCC rules from charging a terminating carrier for the cost of transport, or for the facilities used to transport the originating carrier's traffic from its source to the point(s) of interconnection in a LATA." *Id.* at 26. Verizon sought reconsideration of this aspect of the Commission's order, which the Commission denied. *See Order Denying Reconsideration* at 15-23. Although Verizon continues to maintain that the *Reciprocal Compensation Order* is based on a misinterpretation of federal law and is an unexplained and thus impermissible departure from the *BellSouth-Sprint Arbitration Order*, Verizon recognizes that this Commission's decision in the generic docket is inconsistent with Verizon's initial position on Issue 1.

The parties have continued to negotiate the open issues in this arbitration and, in light of the Commission's *Reciprocal Compensation Order*, Verizon has proposed new language to US LEC with respect to Issue 1, which (to the extent the Commission does not reverse the policy adopted in the *Reciprocal Compensation Order*) the Commission should adopt. That language states, in pertinent part, that "Each Party, at its own expense, shall provide transport facilities to the technically feasible Point(s) of Interconnection on Verizon's network in a LATA selected by US LEC." Under this language, Verizon and US LEC would each bear the cost of transporting traffic originated by their respective customers to the POIs between the parties' networks. Verizon's proposed language, however, makes clear that the POIs must be "on Verizon's network." This language is consistent with the FCC's regulations and the Commission's orders. Specifically, the FCC's regulations provide that a point of interconnection chosen by the ALEC must be "within the incumbent LEC's network." 47 C.F.R. § 51.305(a)(2); *id.* ("An incumbent LEC shall provide . . . interconnection . . . [a]t any technically feasible point within the incumbent's network."). In addition, in the *Order*

Denying Reconsideration, the Commission clarified that "the point of interconnection designated by the ALEC, to which the originating carrier has the responsibility for delivering its traffic, must be within the ILEC's network." *Order Denying Reconsideration* at 23. This clarification also reconfirms the Commission's holding in the *BellSouth-Sprint Arbitration Order* that the ILEC "has financial responsibility on its side of the POI." *BellSouth-Sprint Arbitration Order* at 60.[7]

While Verizon's current proposal thus complies with federal law and the Commission's decisions, US LEC's does not. Under the parties' current interconnection architecture, which US LEC has argued should remain unchanged as a result of this arbitration, there are two POIs, both of which are at Verizon's tandem switches and, thus, on Verizon's network. *See* Hoffman Direct Testimony at 8; US LEC's Responses to Verizon's First Set of Combined Interrogatories and Document Requests at 2 (Response 1) ("US LEC Interrogatory Responses"). Under US LEC's proposal, however, Verizon would be required to bear the cost of transporting traffic originated on its network to US LEC's Interconnection Point ("IP"), which is its switch. *See* Montano Direct at 12; Hoffman Direct at 8. US LEC's switch is unquestionably not on Verizon's network. US LEC's proposal, therefore, would require Verizon to bear the cost of transporting traffic beyond the POI, in violation of the FCC's regulations and the Commission's decisions. For these reasons, the Commission must reject US LEC's proposal.

Issue 2: If US LEC establishes its own collocation site at a Verizon end office, can Verizon request US LEC to designate that site as a US LEC IP and impose additional charges on US LEC if US LEC declines that request?

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[7] Even the Wireline Competition Bureau, in the decision on which US LEC relies, recognized that an ALEC's "financial responsibility for the further transport of Verizon's traffic . . . begin[s] at . . . the point of interconnection." *Virginia Arbitration Order* ¶ 53.

**** The Commission need not resolve this issue, which is entirely hypothetical and is moot if the Commission rejects Verizon's VGRIP proposal. In any event, US LEC's concerns are based on a misreading of the provision at issue. ****

US LEC's dispute with respect to this issue is entirely hypothetical. The portion of Verizon's VGRIP proposal at issue here, section 7.1.1.2, applies *only* if US LEC establishes a collocation site at a Verizon end office. *See* D'Amico Direct Testimony at 16. US LEC has stated that it currently has no collocation sites in Florida and that it has no plans to establish any such sites. *See* Hoffmann Direct Testimony at 11; Montano Direct Testimony at 9. In addition, if this Commission resolves Issue 1 by rejecting Verizon's VGRIP proposal, Issue 2 is rendered moot. Verizon's current proposal with respect to Issue 1 contains no counterpart to section 7.1.1.2. If this Commission were to reach the merits of this issue, US LEC's position should be rejected as it is based on its misunderstanding of Verizon's proposal. Verizon does not claim to be able to "force" US LEC to designate a collocation site as a geographically relevant IP. *See* D'Amico Direct Testimony at 16-17; Munsell Rebuttal Testimony at 9. Although Verizon is entitled to make such a request, US LEC is equally entitled to refuse that request. Indeed, US LEC's actual dispute here ultimately turns not on whether it can refuse Verizon's request — which it clearly can — but on the financial consequences of such a refusal, which is the subject of Issue 1. *See, e.g.*, Hoffmann Rebuttal Testimony at 7.

Issue 3: Is US LEC entitled to reciprocal compensation for terminating and/or delivering "voice information services" traffic?

**** US LEC is not entitled to reciprocal compensation for "voice information services traffic" because such traffic is "interstate or intrastate exchange access information, or exchange services for such access." 47 C.F.R. § 51.701(b)(1). ****

Under current law, reciprocal compensation does not apply to "interstate or intrastate exchange access, information access, or exchange services for such access."

47 C.F.R. § 51.701(b)(1). Both parties have agreed to language that tracks that rule precisely. The proposed agreement excludes "interstate or intrastate Exchange Access, Information Access, or exchange services for Exchange Access or Information Access." *See* US LEC Pet'n, Exh. B at 64, Interconnection Attachment § 7.3. In addition, to avoid later disputes, Verizon's proposed agreement identifies seven specific types of telecommunications traffic that are subject to that general exclusion. US LEC takes issue with only one – "Voice Information Service" traffic – but, as that term is defined in the proposed agreement,[8] such traffic is not subject to reciprocal compensation.

US LEC's claim that Voice Information Services traffic can *never* constitute "interstate or intrastate exchange access, information access, or exchange services for such access" is incorrect as a matter of law. As the FCC made clear in the *ISP Remand Order*, reciprocal compensation does not apply to "traffic destined for an information service provider" because such traffic falls into the category of "information access." *ISP Remand Order* 16 FCC Rcd at 9171, ¶ 44.[9] The FCC further held that "Congress's reference to 'information access' in section 251(g) was intended to incorporate the meaning of the phrase 'information access' as used in the AT&T

[8] "Voice Information Service means a service that provides [i] recorded voice announcement information or [ii] a vocal discussion program open to the public." "Voice Information Service Traffic means intraLATA switched voice traffic, delivered to a Voice Information Service." US LEC Pet'n, Exh. B at 43, Additional Services Attachment § 5.1.

[9] Order on Remand, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 16 FCC Rcd 9151 (2001) ("*ISP Remand Order*"), *remanded, WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002). Although the D.C. Circuit Court of Appeals remanded the *ISP Remand Order* to the FCC, the court explicitly declined to vacate the order, which thus remains binding federal law. *See WorldCom*, 288 F.3d at 434; *see also* Memorandum Opinion and Order, *Joint Application of BellSouth Corporation, et al., for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, 17 FCC Rcd 9018, 9173, ¶ 272 (2002) (rules adopted in the *ISP Remand Order* "remain in effect").

Consent Decree" set forth in *United States v. AT&T*.[10] The Consent Decree defined "information access" as "the provision of specialized exchange telecommunications services . . . in connection with the origination, termination, transmission, switching, forwarding or routing of telecommunications traffic to or from the facilities of a provider of information services."[11] And "information services" were in turn defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information which may be conveyed via telecommunications."[12] The definition of Voice Information Services in the proposed agreement at the very least *includes* such traffic, because (among other things) that definition includes calls that are intended to retrieve "recorded voice announcement *information*." US LEC Pet'n, Exh. B at 43, Additional Services Attachment § 5.1 (emphasis added). The FCC has explicitly held that retrieval of recorded information is an enhanced service, the FCC's term for an information service. *See*, *e.g.*, Memorandum Opinion and Order, *Petition of Nevada Bell*, 16 FCC Rcd 19255, 19255, ¶ 1 (2001). And US LEC itself has conceded in prior proceedings that Verizon's definition of "Voice Information Services" includes services that allow callers to retrieve information. Hearing Transcript, *Arbitration of US LEC of Maryland, Inc. v. Verizon Maryland*, Case No. 8922, at 245:4-10 (Md. PSC) ("Md. Tr.").

US LEC may also attempt to rely on the *Virginia Arbitration Order* but, for reasons that US LEC has conceded (Md. Tr. at 359:22-360:3), such reliance would be misplaced. There, the parties disputed whether they would adopt a provision excluding

[10] *See ISP Remand Order*, 16 FCC Rcd at 9171 ¶ 44 (citing *United States v. AT&T*, 552 F. Supp. 131, 196, 229 (D.D.C. 1982)).

[11] *See id.*

[12] *AT&T*, 552 F. Supp. at 229.

all access traffic from the scope of their reciprocal compensation obligations. Here, the parties have already agreed to such a provision: "Reciprocal compensation shall not apply to interstate or intrastate Exchange Access, Information Access, or exchange services for Exchange Access or Information Access." *See* US LEC Pet'n, Exh. B at 64, Interconnection Attachment, § 7.3; *see also* Md. Tr. at 359:18 - 359:21. The *only* question here is whether Voice Information Services traffic may fall within the parties' agreed exclusion for "interstate or intrastate Exchange Access, Information Access, or exchange services for Exchange Access or Information Access." US LEC Pet'n, Exh. B at 64, Interconnection Attachment, § 7.3. *Id.* Because there can be no serious dispute that it may, the Commission should adopt Verizon's proposed language.

Nor should such traffic be subject to a reciprocal compensation scheme. Like ISP-bound traffic, information services traffic is exclusively one-way, and the same opportunity for regulatory arbitrage described by the FCC in its Order exists when carriers recover the cost of terminating traffic from originating carriers rather than from their own voice information service provider customers.[13] Moreover, providers of information services often recover fees from Verizon's end-user customers in exchange for the services they provide. The fees that the service provider assesses for the call should include the costs of transport and termination. There is no reason why Verizon should have to subsidize information services calls by paying those costs out of its own pocket.

Finally, to the extent that US LEC argues that the definition of Voice Information Service Traffic in section 5.1 of the Additional Services Attachment may include traffic

[13] *See ISP Remand Order*, 16 FCC Rcd 9182, ¶ 68 (describing the inaccurate price signals inherent in a calling party's network pays regime, giving carriers "the incentive to seek out customers, including but not limited to ISPs, with high volumes of incoming traffic").

that is not information access, Verizon has no objection to a clarification in the Commission's order approving the agreement that Voice Information Service Traffic is not subject to reciprocal compensation only to the extent that such traffic is "interstate or intrastate exchange access, information access, or exchange services for such access." 47 C.F.R. § 51.701(b)(1). It is Verizon's intention to track, not to alter, the terms of federal law.

Issue 5: Should the term "terminating party" or the term "receiving party" be employed for purposes of traffic measurement and billing over interconnection trunks?

**** Because it is, at a minimum, disputed whether all of the traffic received by a LEC for delivery to its customers is terminated by the LEC, the term "receiving party," not "terminating party," should be used. ****

The traffic that competing local telephone companies exchange with one another includes both conventional local traffic and traffic bound for information service providers, including traffic bound for ISPs. The parties agree that the receiving carrier terminates conventional local voice traffic. But Verizon does not agree that the receiving carrier terminates traffic delivered to ISPs and other information service providers. Rather, as the FCC has repeatedly held over a course of nearly two decades, local carriers do *not* terminate such traffic; rather, such traffic is delivered to information service providers for onward transmission. That is the basis for the FCC's repeated determination that such traffic is *access* traffic – *i.e.*, traffic that travels beyond the local exchange:

> Among the variety of users of access service are facilities-based carriers, resellers (who use facilities provided by others), sharers, privately owned systems, *enhanced service providers*,[[14]] and other private line and WATS customers, large and small, who "leak" traffic into the exchange. *In each*

[14] Enhanced Services under the FCC's terminology and Information Service Provider under the consent decree are equivalent – thus traffic bound for ESPs and information access traffic are essentially the same. ISPs are both ESPs and Information Service Providers.

case the user obtains local exchange services or facilities which are used, in part or in whole, for the purpose of completing interstate calls which transit its location and, commonly, another location in the exchange area.

Memorandum Opinion and Order, *MTS and WATS Market Structure*, 97 F.C.C.2d 682, 711, ¶ 78 (1983) (emphasis added).

The FCC has thus long recognized that calls to the locations of ESPs do not terminate there, but "transit" those locations to their ultimate destination. *Id.* Indeed, the FCC recognized that an ESP "might *terminate* few calls at its own location and thus would make relatively heavy interstate use of local exchange services and facilities." *Id.* (emphasis added). The FCC has repeatedly confirmed this analysis in the past 15 years.[15]

Verizon is *not* asking the Commission to rule on or to apply the definition of "termination" to any particular class of traffic. Rather, Verizon includes this brief summary of the ample FCC authority on this point simply to establish that US LEC's claim – that all the reciprocal compensation traffic that the parties exchange is terminated by them – is incorrect. The Commission should therefore adopt a neutral, *accurate*, and readily understandable term to describe the broad class of traffic that local carriers may exchange, and refer to the party that receives such traffic as the "receiving party." It is beyond serious dispute that the carrier receives the traffic – if it

[15] *See* Notice of Proposed Rulemaking, *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 2 FCC Rcd 4305, 4306, ¶ 7 (1987) (ESPs, "like facilities-based interexchange carriers and resellers, use the local network to provide interstate services"); Order, *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 3 FCC Rcd 2631, ¶ 2 (1988) (describing ESPs as "providers of interstate service[ ]" and "exchange access users"); First Report and Order, *Access Charge Reform*, 12 FCC Rcd 15982, 16131-32, ¶ 341 (1997) (ISPs "may use incumbent LEC facilities to originate and terminate interstate calls"); Memorandum Opinion and Order, *GTE Tel. Operating Cos.; GTOC Tariff No. 1; GTOC Transmittal No. 1148*, 13 FCC Rcd 22466, 22476, ¶ 19 (1998) (Internet-bound calls "do not terminate at the ISP" . . . but continue to the ultimate destination or destinations, very often at a distant Internet website accessed by the end user.").

did not, there would be nothing for it to deliver to its customer. And it is, at a minimum, hotly contested whether all of that traffic is terminated by the receiving carrier.

Notably, in prior proceedings between these parties, US LEC's attorneys and witnesses have used the term "receive" to refer to traffic that US LEC receives from Verizon. Md. Tr. at 30:9-10; 120:2. US LEC's technical witness, Mr. Hoffmann, also used the term "receive" to refer to traffic that US LEC receives from Verizon. Md. Tr. at 123:19. By contrast, US LEC's regulatory witness, Ms. Montano, could not explain what "terminate" might mean and was unable to use the term coherently in her testimony.[16] In particular, Ms. Montano testified that when Verizon originates a call destined for a US LEC customer, it is also Verizon that terminates the call. Thus, although Ms. Montano has claimed in her testimony that "in any call, there is an originating party served by an originating carrier and a terminating party served by a terminating carrier" (Montano Direct at 21), she appeared to testify under cross-examination that in any call there are at least two carriers who perform a termination function.

US LEC's claim that Verizon is attempting to modify industry practice is simply false – US LEC's counsel and Mr. Hoffmann have effectively testified to that. And US LEC's claim that Verizon is attempting to gain a regulatory advantage is stone-throwing by denizens of a glass house. Verizon gains no collateral advantage by proposing the

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[16] A portion of her testimony follows:

Q. Has US LEC ever received traffic from Verizon in the State of Maryland?
A. We have had traffic terminated to us by Verizon in the State of Maryland.
Q. You're saying that Verizon terminates that traffic?
A. Yes.
Q. It's your testimony that when Verizon originates traffic it also terminates it?
A. It terminates it to my network if it's destined to my subscribers, yes.

. . . .

Q. How do you define termination. You've been repeatedly referring to Verizon terminating a call to US LEC's network. How do you define that term?
A. It's the point at which a call leaves your network and therefore it's terminated at your network and it hits someone else's network.

Md. Tr. at 255:1 - 257:23.

word "receiving," because it uses the term to refer to calls – such as conventional local voice calls – that the receiving carrier unquestionably terminates to an end-user customer. By contrast, US LEC undoubtedly hopes to pretend that if the Commission adopts its proposed language, it will have collateral regulatory significance. Verizon strongly rejects the notion that the Commission's resolution of this issue has any collateral significance at all. But to avoid such confusion, and to ensure that the language of the agreement is accurate, clear, and neutral, this Commission should adopt Verizon's proposed language.

Issue 6: **(A) Should the parties pay reciprocal compensation for calls that originate in one local calling area and are 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?**

(B) Should the originating carrier be able to charge originating access on the traffic described in Issue 6(A)?

**** Consistent with its ruling in the Reciprocal Compensation Order, the Commission should rule that Virtual NXX traffic is not subject to reciprocal compensation, and require the parties to pay access charges on interexchange traffic, including ISP-bound traffic delivered to virtual NXX numbers. ****

The Commission resolved the basic issue presented here in the *Reciprocal Compensation Order.* In that generic proceeding, the Commission – adopting Verizon's position in this arbitration – determined that intercarrier compensation should be based on the physical location of the calling party and the customer receiving the call. *Reciprocal Compensation Order* at 30. Two further conclusions followed from that correct determination. First, reciprocal compensation does not apply to Virtual NXX calls where, by definition, the calling party and the customer receiving the call are not physically located in the same local calling area. *Id.* at 31. Second, in the absence of

contrary agreement between the parties to an interconnection agreement, the "default" rule is that intrastate access charges apply to Virtual NXX calls. *Id.* at 33.

Despite the straightforward terms of the *Reciprocal Compensation Order*, the parties have been unable to resolve this issue because of a disagreement over how the Commission's decision should apply to ISP-bound Virtual NXX traffic. Both parties made clear in their prior submissions that whatever resolution this Commission reached with respect to Virtual NXX voice traffic would apply to ISP-bound traffic as well. Now having lost this issue, US LEC appears to be attempting to recant: its counsel has indicated that US LEC plans to argue that the Commission's rule governing Virtual NXX traffic should not apply to ISP-bound Virtual NXX traffic.

US LEC is wrong as a matter of federal law. To be sure, this Commission indicated in the *Reciprocal Compensation Order* that its discussion of Virtual NXX traffic would be limited by its terms to non-ISP-bound traffic. *Reciprocal Compensation Order* at 26. But the FCC has made clear in its *ISP Remand Order* that, to the extent ISP-bound traffic is subject to existing interstate or intrastate access charges, federal law *preserves* the application of those access charges. The interim ISP-bound traffic compensation regime applies *only* in those situations where traffic is not subject *either* to reciprocal compensation under section 251(b)(5) *or* access charges under state or federal law. There can be no dispute that, under long-standing federal law, ISP-bound calls have been subject to access charges *to the same extent as* calls bound for ordinary business end-users. For this reason, this Commission's determination that non-ISP-bound Virtual NXX calls are subject to intrastate access charges necessarily applies to ISP-bound traffic as well.

Verizon elaborates on these points below. *First*, in case US LEC should contest the point, Verizon briefly explains why the Commission's resolution of the Virtual NXX issue is the only resolution that accords with federal law and sound regulatory policy; moreover, the vast (and growing) majority of states to consider this issue have reached the same result. *Second*, Verizon elaborates on this Commission's determination that intrastate access charges apply to Virtual NXX traffic in the absence of contrary agreement between the parties; the parties have been unable to reach agreement here in part because US LEC has refused to identify what percentage of traffic that it receives from Verizon is Virtual NXX traffic. Third, Verizon explains why this Commission's determination that Virtual NXX traffic is subject to intrastate access charges applies to ISP-bound Virtual NXX traffic as well.

A. This Commission Correctly Determined That Virtual NXX Calls Are Not Subject to Reciprocal Compensation Because They Are Properly Classified as Toll Calls.

The Commission's fundamental conclusion in the *Reciprocal Compensation Order* is that "classification of traffic as either local or toll has historically been, and should continue to be, determined based upon the end points of a particular call." *Reciprocal Compensation Order* at 30. Likewise, "proper application of a particular intercarrier compensation mechanism is based upon . . . the jurisdiction of a call as being either local or long distance." *Id.* Accordingly, and contrary to US LEC's position in this arbitration, "calls to virtual NXX customers located outside of the local calling area to which the NPA/NXX is assigned are not local calls for purposes of reciprocal compensation" and therefore "are not subject to reciprocal compensation." *Id.* at 31. Instead, such traffic "would be considered *intrastate exchange access*" under federal law. *Id.*

That determination is correct for several reasons. *First*, it is compelled by the terms of federal law. The FCC's rules have always made clear that reciprocal compensation under 47 U.S.C. § 251(b)(5) "do[es] not apply to the transport and termination of interstate or intrastate interexchange traffic." *Local Competition Order*, 11 FCC Rcd at 16013, ¶ 1034.[17] The FCC confirmed that result in its April 2001 *ISP Remand Order*, in which it held that reciprocal compensation does not apply to "interstate or intrastate exchange access, information access or exchange services for such access." 47 C.F.R. § 51.701(b)(1). The FCC has made clear that this exclusion covers all interexchange communications: whenever a LEC provides service "in order to connect calls *that travel to points – both interstate and intrastate – beyond the local exchange*," it is providing an access service. *ISP Remand Order*, 16 FCC Rcd at 9168, ¶ 37 (emphasis added). "Congress excluded all such access traffic from the purview of section 251(b)(5)." *Id.* It is undisputed that the calls at issue here "travel to points . . . beyond the local exchange." *Id.*; *see* Haynes Direct at 10:8-10. Indeed, the very point of Virtual FX traffic is that the "call is transported on a long distance bas[is]." Md. Tr. at 412:17. Accordingly, such traffic simply is not subject to reciprocal compensation under federal law.

In its recent *Mountain Communications*[18] decision, the FCC made clear yet again that number assignment does not and cannot control inter-carrier compensation obligations. There, as here, the interconnecting carrier had a practice of assigning telephone numbers without regard to the customer's physical location. That assignment

[17] This portion of the *Local Competition Order* has never been challenged and remains binding federal law.

[18] Order on Review, *Mountain Communications, Inc. v. Qwest Communications International, Inc.*, File No. EB-00-MD-017, 2002 WL 1677642, ¶ 6 (rel. July 25, 2002) ("*Mountain Communications*"), *aff'g*

practice, the FCC explained, "prevents [the originating carrier] from charging its customers *for what would ordinarily be toll calls*."[19] For that reason, the FCC ruled that the receiving carrier was required to compensate the originating carrier for facilities used to transport such calls to its switch.

Second, the FCC's determination is the only determination that accords with sound regulatory policy. When a US LEC customer subscribes to a Virtual FX service, it pays an extra charge to US LEC in order to be able to receive calls originated in a distant exchange without a toll charge being imposed on the calling party. *See* US LEC Interrogatory Responses at 5 (Response 3(b)) (describing charges for Virtual NXX service). US LEC is thus paid by *its* subscriber precisely to ensure that Verizon will *not* be paid any toll charges by *its* subscriber for an interexchange call. There is nothing necessarily wrong with that, so long as US LEC compensates Verizon appropriately for the service that Verizon continues to provide. But it would be deeply inconsistent with regulatory policy and basic fairness to require Verizon to *pay* US LEC, when Verizon continues to bear the same costs of originating and transporting the interexchange call, when Verizon is deprived of the toll charges that would ordinarily apply, and when US LEC is already receiving compensation from its customers.

Recent decisions of other commissions emphasize this point. As the Massachusetts Department of Telecommunications and Energy recently held, treating Virtual NXX traffic as though it were local:

Memorandum Opinion and Order, *Mountain Communications, Inc. v. Qwest Communications International, Inc.*, 17 FCC Rcd 2091 (Chief, Enf. Bur. 2002).

[19] *Id.* ¶ 5 (emphasis added).

would artificially shield [the ALEC] from the true cost of offering the service and will give [the ALEC] an economic incentive to deploy as few new facilities as possible. By artificially reducing the cost of offering the service, [the ALEC] will be able to offer an artificially low price to ISPs and other customers who experience heavy inbound calling. The VNXX customers will be able to offer an artificially low price to their calling party subscribers, thus sending inaccurate cost signals to the calling parties concerning the true cost of the service. The result would be a considerable market distortion based on an implicit Verizon subsidy of [the ALEC's] operations.

Massachusetts Order at 36-37.[20]

Third, the weight of state commission authority is in agreement with this analysis, holding that reciprocal compensation does not apply to virtual NXX traffic because it does not physically originate and terminate in the same local calling area. These state Commissions include those in Vermont,[21] Ohio,[22] Connecticut,[23] Illinois,[24] Texas,[25] South Carolina,[26] Tennessee,[27] Georgia,[28] and Missouri.[29]

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[20] Decision and Order, *Petition of Global NAPs, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996, for Arbitration to Establish an Interconnection Agreement with Verizon New England, Inc.*, Docket No. 02-45 (Massachusetts D.T.E. Dec. 12, 2002) ("*Massachusetts Order*").

[21] Final Order, *Petition of Global NAPs, Inc. for Arbitration Pursuant to § 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon New England, Inc., d/b/a Verizon Vermont*, Docket No. 6742, at 21-24 (Vt. PSB Dec. 26, 2002) ("*Vermont Final Order*").

[22] *See* Arbitration Award, *Petition of Global NAPs Inc. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon North Inc.*, Case No. 02-876-TP-ARB (Ohio PUC Sept. 5, 2002) ("*Ohio Arbitration Award*") ("while the Commission is not prohibiting the use of Virtual NXX, . . . the Commission is affirming that the intercarrier compensation for such calls [is] based on the geographic end points of the call").

[23] Decision, *DPUC Investigation of the Payment of Mutual Compensation for Local Calls Carried over Foreign Exchange Service Facilities*, Docket No. 01-01-29, at 44 (Conn. DPUC Control Jan. 30, 2002) ("The purpose of mutual compensation is to compensate the carrier for the cost of terminating a local call" *and*, "*since these calls are not local*, they will not be eligible for mutual compensation.") (emphasis added).

[24] Arbitration Decision, *TDS Metrocom, Inc. Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Arrangements with Illinois Bell Telephone Co. d/b/a Ameritech Illinois Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket No. 01-0338, at 48 (Ill. Commerce Comm'n Aug. 8, 2001); Arbitration Decision, *Level 3 Communications, Inc. Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Illinois Bell Telephone Company d/b/a Ameritech Illinois*, Docket No. 00-0332, at 9 (Ill. Commerce Comm'n Aug. 30, 2000) ("FX traffic does not originate and terminate in the same local rate center and therefore, as a matter of law, cannot be subject to reciprocal compensation.").

[25] Revised Arbitration Award, *Proceeding to Examine Reciprocal Compensation Pursuant to Section 252 of the Federal Telecommunications Act of 1996*, Docket No. 21982, at 18 (Tex. PUC Aug.

Accordingly, any claim by US LEC that the Commission resolved this issue incorrectly in the *Reciprocal Compensation Order* would be utterly without merit.

B. The Commission Should Confirm That Intrastate Access Charges Apply to Virtual NXX Traffic.

The *Reciprocal Compensation Order* makes clear that Virtual NXX traffic is interexchange traffic subject to intrastate access charges – at least in the absence of a contrary agreement by the parties. As the Commission held, "traffic that originates in one local calling area and terminates in another local calling area would be considered *intrastate exchange access*." *Reciprocal Compensation Order* at 31. As a result, "it seems reasonable to apply access charges to virtual NXX/FX traffic that originates and terminates in different local calling areas." *Id.* at 32. The Commission made clear that this analysis "creates a default for determining intercarrier compensation." *Id.* at 33.

31, 2000) (finding FX-type traffic "not eligible for reciprocal compensation" to the extent it does not terminate within a mandatory local calling scope).

[26] Order on Arbitration, *Petition of Adelphia Business Solutions of South Carolina, Inc. for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996*, Docket No. 2000-516-C, Order No. 2001-045, at 7 (S.C. PSC Jan. 16, 2001) ("Applying the FCC's rules to the factual situation in the record before this Commission regarding this issue of 'virtual NXX,' this Commission concludes that reciprocal compensation is not due to calls placed to 'virtual NXX' numbers as the calls do not terminate within the same local calling area in which the call originated."); *see also* Order on Arbitration, *Petition of US LEC of South Carolina Inc. for Arbitration*, Order No. 2002-619, Docket No. 2002-181-C (S.C. PSC Aug. 30, 2002) ("*SC Arbitration Order*").

[27] Interim Order of Arbitration Award, *Petition for Arbitration of the Interconnection Agreement Between BellSouth Telecommunications, Inc. and Intermedia Communications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket No. 99-00948, at 42-44 (Tenn. Reg. Auth. June 25, 2001).

[28] Final Order, *Generic Proceeding of Point of Interconnection and Virtual FX Issues*, Docket No. 13542-U, at 10-12 (Ga. PSC July 23, 2001) ("The Commission finds that reciprocal compensation is not due for Virtual FX traffic.").

[29] Arbitration Order, *Application of AT&T Communications of the Southwest, Inc., TCG St. Louis, Inc., and TCG Kansas City, Inc., for Compulsory Arbitration of Unresolved Issues With Southwestern Bell Telephone Company Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Case No. TO-2001-455, at 44 (Mo. PSC June 7, 2001) (finding that Virtual FX traffic should "not be classified as a local call").

The Commission left open the possibility that parties might treat such traffic differently *if* they mutually agreed to do so. *Id.* at 33 ("parties are free to negotiate intercarrier compensation terms in their agreements that reflect the most efficient means of interconnection"). In this case, however, the parties have not so agreed, and the Commission should accordingly make clear that intrastate access charges apply to such traffic unless the parties agree to other arrangements. Nothing in federal or state law would authorize this Commission to order either party to forfeit the intrastate access charges that are due on this traffic in the absence of such an agreement.

Moreover, the record makes clear why requiring the parties to track and pay intrastate access charges for Virtual NXX/FX traffic makes sense. First, although the Commission expressed concern that such treatment would entail "costly modifications to . . . networks and billings systems" (*id.*), the record of this proceeding establishes that this is not the case. As Mr. Haynes testified, it is a relatively straightforward matter to distinguish interexchange traffic, based on an analysis of known FX and Virtual NXX numbers, and thereby to determine the proportion of calls exchanged between the parties that are not subject to reciprocal compensation but that should be subject to access charges. Haynes Rebuttal at 23:7-25:17. That testimony made clear that performing such studies is "inexpensive." *Id.* at 24:15. If it is easy for an incumbent LEC to perform such a study on a base of three million customers, then it should be positively trivial for US LEC, which claims to provide Virtual FX service to 18 customers in Florida (*see* US LEC Interrogatory Responses at 5 (Response 3(b)). And Verizon has offered to perform this study for US LEC. Haynes Rebuttal at 25:4-16. Nothing in the record would support any claim that it would be burdensome for US LEC to determine the volume of traffic that it delivers to its Virtual NXX customers.

Moreover, while it is theoretically possible that the amount of reciprocal compensation that US LEC has billed on account of traffic delivered to its Virtual NXX customers is small, US LEC has steadfastly refused to document that claim. What *is* clear is that US LEC has billed Verizon an astonishing sum for reciprocal compensation in Florida – over $1 million dollars in six months; an amount equivalent to more than *$2000 per year for every single customer that US LEC claims to have in the Tampa LATA.* *See* US LEC Interrogatory Responses at 5 and 11 (Responses 3(a) and 9(a)). Even if US LEC's Virtual NXX customers were typical, they would account for tens of thousands of dollars in reciprocal compensation each year. In all likelihood, however, Virtual NXX customers are *not* typical, and they pay for Virtual NXX precisely because they expect to receive a disproportionate volume of traffic. Moreover, US LEC should have been paying intrastate access charges on all of that traffic.[30] Accordingly, the improper treatment of this traffic has likely cost Verizon hundreds of thousands of dollars per year in US LEC's case alone.

C. Virtual NXX Traffic Delivered to ISPs Must Be Treated in the Same Way as Other Virtual NXX Traffic.

The parties to this proceeding have always made clear that the Commission's resolution of the Virtual NXX issue would apply not only to voice traffic, but to ISP-bound traffic as well. In its petition, US LEC specifically referred to Virtual NXX numbers assigned to ISPs. US LEC Pet'n at 21. US LEC again referred to ISP-bound traffic in the Direct Testimony of its regulatory witness. *See* Montano Direct at 29:12-13 ("virtual NXX arrangements enable ISPs . . . to offer local dial-up numbers throughout

[30] By contrast, US LEC has paid virtually nothing to Verizon on account of FX traffic originated by US LEC customers. Indeed, Verizon has billed about $130 dollars per month in reciprocal compensation for such traffic *for all CLECs in Florida combined.* *See* Haynes Rebuttal Testimony at 5:10-12. That traffic amounts to a mere 00.05% of the traffic that Verizon receives.

Florida"). If US LEC had believed that the *ISP Remand Order* took this issue out of the Commission's hands, it would not have asked the Commission to resolve this issue.

In any event, under the terms of the *ISP Remand Order*, the Commission's resolution of this issue with respect to traffic bound for ordinary voice customers also applies to ISP-bound traffic as a matter of federal law. The *ISP Remand Order* expressly states that the transitional rule governing inter-carrier compensation for ISP-bound traffic does not displace the preexisting access regime and reaffirms that existing interstate and intrastate access charge regimes apply to *all* traffic, including ISP-bound traffic, as they did before the *ISP Remand Order* was adopted:

> Congress preserved the pre-Act regulatory treatment of all the access services enumerated under section 251(g). These services thus remain subject to Commission jurisdiction under section 201 (or, to the extent they are *intra*state services, they remain subject to the jurisdiction of state commissions)....*This analysis properly applies to the access services that incumbent LECs provide (either individually or jointly with other local carriers) to connect subscribers with ISPs for Internet-bound traffic.*

ISP Remand Order, 16 FCC Rcd at 9169, ¶ 39 (emphases added).

The FCC thus emphasized not only that the reciprocal compensation provisions in section 251(b)(5) of the Act do *not* apply to ISP-bound traffic, but also that Congress "did not intend to disrupt . . . *pre-existing [access]* relationships." *Id.* at 9168, ¶ 37 (emphases added). Driving this point home, the FCC also cited the Eighth Circuit's decision in *Competitive Telecommunications Ass'n v. FCC*, in which the court held that "LECs will continue to provide exchange access . . . for long-distance service, and continue to receive payment, under pre-Act regulations and rates." *Id.* at 9168-69, ¶ 38 (*citing* 117 F.3d 1068, 1073 (8th Cir. 1997)). Thus, the *ISP Remand Order* affirms, rather than removes, the state commissions' authority to maintain intrastate access

charges where they had that authority before the *ISP Order on Remand*, including in the case of Internet-bound calls.

Thus, to the extent that US LEC argues that the statement in the *ISP Remand Order* that "state commissions will no longer have authority to address this issue" (*ISP Remand Order*, 16 FCC Rcd at 9189, ¶ 82) means that this Commission lacks jurisdiction to decide the issue that US LEC itself presented for decision, US LEC is incorrect. State commissions undoubtedly have the authority to determine the operation of their intrastate access charge regimes. Pursuant to the *ISP Remand Order*, this Commission's determination that VNXX traffic is subject to intrastate access charges applies with equal force to ISP-bound traffic.

This conclusion also reflects the operation of the FCC's "ESP Exemption," the policy that permits Enhanced Services Providers, including ISPs, to purchase access to the local exchange for the provision of interstate services from local business tariffs rather than from interstate access tariffs. *See generally ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 409 (D.C. Cir. 2002) ("ISPs . . . purchase [interstate] access through intrastate tariffs"). Pursuant to that policy, ISPs are treated for purposes of end-user billing as though they were business end-users. Accordingly, to the extent that a caller places a call to an ISP access number that is rated as toll, such toll charges fully apply and the access charges due as a result must be paid. For the same reason, if an ISP purchases a "toll substitute service" such as 800 service, FX service, Virtual NXX service, the ISP must pay the same additional charges as any other end user, and access charges again apply.

A simple hypothetical best illustrates how the *ISP Remand Order* operates when an end-user calls an ISP located in a different exchange. Suppose a Verizon residential

customer in Sarasota calls an ISP in Tampa served by US LEC. Absent a virtual NXX arrangement, the call works as follows: (1) the customer makes a "1+" toll call; (2) Verizon carries the call from the end-user to the end-user's preferred intraLATA toll carrier (which might be Verizon itself); the interLATA toll carrier carries the call to US LEC, and US LEC carries the call to the ISP; and (3) the end-user pays for the toll call, the intraLATA toll carrier (assuming that Verizon is not the carrier) pays originating access to Verizon, and the intraLATA toll carrier also pays terminating access to US LEC.

This is the way all such calls are handled today, and nothing in the FCC's *ISP Remand Order* changes this access arrangement. To the contrary, as noted above, the order expressly *preserves* this arrangement. Indeed, if the *ISP Remand Order* were understood to override existing access charges applicable to ISP-bound calls, a toll call from an end-user in Florida to an ISP access number in Texas would not be subject to *interstate* access charges. That is plainly not the law.

Applying this analysis to the case of ISP-bound Virtual NXX traffic makes clear that intrastate access charges apply to such calls under the *ISP Remand Order.* Suppose that, instead of assigning its ISP customer a telephone number associated with a Tampa exchange, US LEC assigned its customer a number associated with the Sarasota exchange.[31] In such a case, the *same* customer is calling the *same* ISP, *i.e.*, the customer is making the same call, but US LEC is providing a "toll substitute service" (and receiving handsome compensation for that service) while Verizon (which is still doing the same work of transporting the traffic) is deprived of toll charges. Because US

[31] Note that the ISP would pay precisely the same additional charges for Virtual NXX service as any business end user.

LEC is being compensated by its customer precisely so that Verizon's customer will be relieved of the toll charges that would otherwise apply to the call, US LEC is required to pay originating access charges to Verizon for such calls, just as it would in the case of non-ISP bound Virtual NXX calls.[32] Indeed, if the Commission were to relieve US LEC of the obligation to pay such access charges, the Commission would not only violate federal law, but it would also encourage the very type of anticompetitive regulatory arbitrage that the *ISP Remand Order* is designed to extinguish, that is, US LEC would be able to "on the basis of [its] ability to shift costs to other carriers" and not "on the basis of the quality and efficiency of the services [it] provide[s]." *ISP Remand Order*, 16 FCC Rcd at 9183, ¶ 71.

Notably, other state commissions that have decided this issue have squarely held *both* that state commission authority to determine the proper treatment of Virtual NXX traffic also governs ISP-bound traffic *and* that payment of intrastate access charges is required to avoid anticompetitive results. The recent decision of the Massachusetts Department of Telecommunications and Energy is particularly instructive. There, an ALEC took the position that it was not required to pay Verizon access charges when it used virtual NXX service to deliver Internet-bound calls. The ALEC argued that the *ISP Remand Order* "changed everything" regarding inter-carrier compensation and the distinctions between local and toll traffic. *See* Massachusetts Order at 24. The Massachusetts Department rejected that argument, explaining that the FCC's order "explicitly recognized that intrastate access regimes in place prior to the

[32] The same result would apply in the case of 1-800 services, which, like VNXX arrangements, are designed to give callers toll-free access. A typical call delivered to a 1-800 number would result in the 1-800 service provider paying Verizon originating access for initiating the call to the 1-800 number. The 1-800 provider is then compensated by the customer to whom it provides the 1-800 service – just as US LEC's VNXX customer would compensate US LEC for its VNXX service.

Act remain unchanged until further state commission action" and "continues to recognize that calls that travel to points beyond the local exchange are access calls." *Id.*

Likewise, the Vermont Public Service Board found that "VNXX traffic simply represents a means by which competitors seek to use NXX number assignments to convert what would otherwise be a toll call into a local call. Physically, the call is indistinguishable from other calls that the Board has classified as toll. The only difference is the [ALEC's] designation of a rate center (within the caller's local calling area) that has little or no relationship to the physical destination. We find that this artificial designation of the termination point distorts the existing toll and local distinctions." Vermont Final Order at 42.

Accordingly, the Commission should make clear that, as both US LEC and Verizon have acknowledged from the outset, ISP-bound VNXX traffic must be treated in the same way as other VNXX traffic and is subject to intrastate access charges.

Issue 7: What compensation framework should govern the parties' exchange of ISP-bound traffic in the event the interim compensation framework set forth in the FCC's Internet Order is vacated or reversed on appeal?

**** The parties' reciprocal compensation obligations must be governed by applicable federal law; no special change-of-law provision is required with respect to this issue. ****

As noted above, the D.C. Circuit has remanded the *ISP Remand Order*, but expressly refused to vacate that order; as a result, the rules the FCC adopted remain in effect pending further FCC proceedings on remand. That order sets forth a specific intercarrier compensation regime that governs the exchange of Internet-bound traffic between Verizon and US LEC during the course of this arbitrated agreement. If there is

a subsequent change of law on this point, the parties' obligations will conform to that change pursuant to the change of law clause in the agreement. *See* US LEC Petition, Exh. B, at 3, General Terms and Conditions § 4.6.

In any event, US LEC's proposed provision, if applied, would lead to the wrong result. Under US LEC's proposed provision the FCC's "growth cap and new market provisions" in the *ISP Remand Order* would have been eliminated as a result of the D.C. Circuit's decision to remand the FCC's order for further proceedings. However, as noted above, in *WorldCom Inc. v. FCC*, the D.C. Circuit expressly decided to leave those rules in effect. US LEC's proposal, therefore, would have yielded results contrary to governing federal law.

Notably, the South Carolina Public Service Commission rejected US LEC's proposal on this issue, adopting the very arguments that Verizon offers here:

> Federal law does not obligate [Verizon], or entitle this Commission, to impose rules to address potential contingencies with respect to the meaning of federal law. Compensation for ISP-bound traffic, and all reciprocal compensation traffic, should be paid in conformance with federal law which governs the issue. This Commission finds that US LEC's proposed language has no basis in law. Therefore, this Commission rejects US LEC's position and finds that the parties' obligations should simply conform to those imposed by federal law. Any subsequent change of law on this point during the term of the interconnection agreement may be addressed pursuant to the change of law clause in the interconnection agreement.[33]

Likewise, the Wireline Competition Bureau adopted Verizon's position on this issue and rejected attempts – like US LEC's – to adopt an anticipatory rate structure for this traffic. The Bureau correctly noted that "the general change of law provision in each interconnection agreement is sufficient to address any changes that may result from the

[33] *SC Arbitration Order* at 30-31.

ongoing proceedings related to the [*ISP Remand Order*]." *Virginia Arbitration Order* ¶ 254.

The Commission should adopt Verizon's position on this issue.

Issue 8: Under what circumstances, if any, should tariffed charges which take effect after the agreement becomes effective, take precedence over non-tariffed charges previously established in the agreement for the same or similar services or facilities?

**** Generally applicable tariff provisions, which are subject to searching regulatory review, should supersede pricing terms in the agreement. ****

In negotiating the present agreement, Verizon has attempted to conform all of the agreement's terms to the requirements of applicable law. This principle applies with respect to pricing in particular. In general, the pricing provisions of Verizon's agreements within a particular state are uniform, and they are intended to reflect generally applicable rates set by regulators in appropriate adversary proceedings.

For this reason, it is both fair and appropriate that, if the generally applicable charges for a particular service change, the charges under the agreement should change along with them. The principle that the charges for services provided to CLECs should be nondiscriminatory is deeply embedded both in the history of telecommunications regulation and in the 1996 Act in particular: federal law specifically requires that charges for interconnection unbundled network elements, services offered for resale, and collocation must be "just, reasonable, and *nondiscriminatory*." 47 U.S.C. § 251(c)(2), (3), (4), (6) (emphasis added); *see also id.* § 252(d)(1). By providing that applicable tariffs and other charges that are mandated or approved by the FCC or this Commission should supersede any charges set forth in the agreement, Verizon's proposed language gives effect to the letter and the spirit of these non-discrimination

provisions. Otherwise, a carrier may be at a permanent advantage by the mere fortuity of when the carrier executed the governing interconnection agreement.

US LEC claims that Verizon's proposed language would give Verizon "unbridled discretion to modify its rates at will." US LEC Petition at 25. This is nonsense. Verizon is not free to modify its generally applicable charges unilaterally. Those charges will change in one of two ways. The first possibility is that Verizon will publicly file a tariff with the appropriate state or federal commission – tariffs that do not go into effect until interested parties have had an opportunity to raise a challenge to them – in which case US LEC will have every opportunity to challenge the tariff. The second possibility is that the industry or some segment of it will participate in a generic ratemaking proceeding of some other type; again, in that circumstance, US LEC would presumably be able to participate in the proceedings and ensure that such new rates are just, reasonable, and in conformance with applicable law.

Accordingly, US LEC has no legitimate reason to resist Verizon's proposed language, and Verizon has every reason to be concerned about arbitrage. So long as the rates contained in the interconnection agreement place an ALEC at an advantage, it will exploit those rates, but if a new generally applicable rate is lower, the ALEC will likely claim that it is entitled to purchase service out of the tariff, notwithstanding the existence of an agreement. In this way, an ALEC hopes to gain the benefit of rate reductions without facing any risk that other charges will increase under applicable law.

Faced with a comparable problem, the New York Public Service Commission ruled that "it is better to allow the new agreement between AT&T and Verizon to absorb tariff amendments and changes that are intended to implement substantial

telecommunications policy initiatives than to freeze it at its inception."[34] The PSC noted that "the tariff process promote[s] comparable interconnections for competitive carrier and unbundled access on similar terms" and that "[t]he tariff process permits ample opportunity for interested persons to participate and seek changes (or even the rejection) of proposed tariffs before they become effective."[35] The same reasoning argues in favor of adopting Verizon's proposed language here.

US LEC will likely rely on the *Virginia Arbitration Order*, but that decision actually supports Verizon. In particular, the Bureau held that, under the parties' agreement, "if a commission establishes new rates, that would constitute a change in law, which the parties would be able to incorporate into the agreement pursuant to the change of law provisions of the contract." *Virginia Arbitration Order* ¶ 599. The Bureau declined to provide that all tariffed rates would *automatically* supersede rates arbitrated by the FCC, but only because the Virginia commission has stated that it refuses to apply federal law in its state proceedings. *Id.* ¶ 600.

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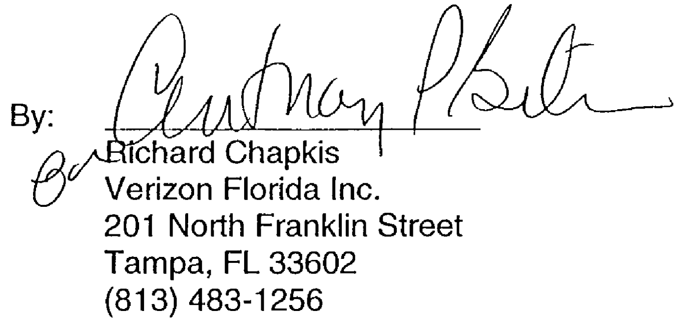
[34] Order Resolving Arbitration Issues, *Joint Petition of AT&T Communications of New York, Inc., TCG New York Inc. and ACC Telecom Corp. Pursuant to Section 252(b) of the Telecommunications Act of 1996 for Arbitration to Establish an Interconnection Agreement with Verizon New York Inc.*, Case 01-C-0095, at 5 (N.Y. PSC July 30, 2001).

[35] *Id.* at 4.

CONCLUSION

For the foregoing reasons, the disputed issues should be resolved in Verizon's favor.

Respectfully submitted on February 24, 2003.

By: 

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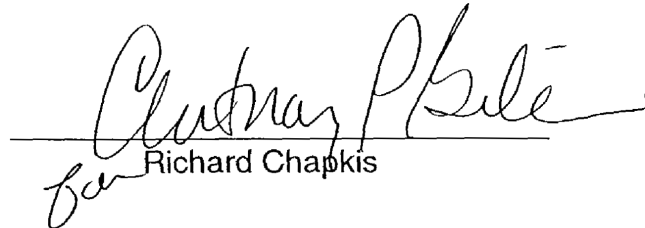
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of Verizon Florida Inc.'s Post-Hearing Brief in Docket No. 020412-TP were sent via U.S. mail on February 24, 2003 to the parties on the attached list.



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