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February 24, 2003

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HAND DELIVERY

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

Re: Docket No. 020412-TP

Dear Ms. Bayo:

Enclosed please find the following documents for filing in the above-referenced docket:

1. Original and fifteen copies of US LEC of Florida Inc.'s ("US LEC") Post-Hearing Brief; and

2. A disk containing a copy of the Post-Hearing brief.

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the copy to me.

Thank you for your assistance with this filing.

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Sincerely,

Martin P. McDonnell

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cc: All Parties of Record
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BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

Petition of US LEC OF FLORIDA INC.	)	
For Arbitration with Verizon-Florida, Inc.	)	
Pursuant to 47 U.S.C. § 252(b) of the	)	Docket No. 020412-TP
Communications Act of 1934, as amended	)	
By the Telecommunications Act of 1996	)	Filed: February 24, 2003
	)	

POST-HEARING BRIEF OF US LEC OF FLORIDA INC.

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Dated: February 24, 2003

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POST-HEARING BRIEF OF US LEC OF FLORIDA INC.

US LEC of Florida Inc. ("US LEC"), by its undersigned counsel, and in accordance with the Florida Public Service Commission's ("Commission") *Prehearing Order* issued on October 29, 2002,[1] respectfully submits its post-hearing brief in the above-referenced matter.

INTRODUCTION AND STATEMENT OF THE CASE

US LEC is an alternative local exchange carrier ("ALEC") providing facilities-based services in the State of Florida[2] and is interconnected with Verizon Florida, Inc. ("Verizon") in the Tampa Local Access and Transport Area ("LATA"). On December 1, 2001, US LEC and Verizon began negotiating a new interconnection agreement. The parties were able to resolve the vast majority of issues before US LEC filed its petition with the Commission requesting arbitration of nine (9) specific issues that the parties could not resolve. Since then, US LEC and Verizon have resolved two (2) of the issues and have withdrawn them from the arbitration.[3]

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[1] *Petition for arbitration of unresolved issues in negotiation of interconnection agreement with Verizon Florida Inc. by US LEC of Florida Inc.*, Docket No. 020412-TP, Prehearing Order, Order No. PSC-02-1483-PHO-TP (Fla. PSC Oct. 29, 2002) ("*Prehearing Order*").

[2] *Applications for certificates to provide alternative local exchange telephone service*, Notice of Proposed Agency Action Order Granting Certificates to Provide Alternative Local Exchange Telecommunications Service, Order No. PSC-97-1604-FOF-TX (Fla. PSC Dec. 22, 1997).

[3] Issues 4 and 9 identified in US LEC's Petition for Arbitration have been settled through continuing good faith negotiation between the parties.

US LEC's basic positions with regards to the remaining issues are as follows:

Issues 1 and 2 collectively involve US LEC's right to choose the method by which it will interconnect with Verizon in each LATA, the number of Points of Interconnection ("POIs") that US LEC establishes in each LATA, whether Verizon can require US LEC to identify more POIs than the law requires, and the allocation of costs between US LEC and Verizon for transporting calls originating on each of their networks. Consistent with state and federal law, US LEC is authorized to select the interconnection point and method, and to require Verizon to bear the financial responsibility of delivering its originating traffic to the POI chosen by US LEC.

Issues 3 deals with whether the parties are obligated to pay each other reciprocal compensation for terminating calls to Voice Information Service Providers. State and federal law make clear that US LEC is entitled to reciprocal compensation for the termination and/or delivery of traffic that Verizon has defined as "Voice Information Services" traffic.

Issue 5 concerns whether the parties will continue to use the traditional industry nomenclature of "originating party"/"terminating party" in connection with the exchange of traffic, or whether Verizon will be allowed to introduce the entirely new concept of a "receiving party" instead of a "terminating party." Verizon has failed to proffer any reasonable basis why the parties should abandon the traditional reference to a "terminating party" in the agreement.

Issue 6 asks whether, in calculating their reciprocal compensation obligations, the parties will continue to utilize the NPA/NXX of the calling and called numbers as the factors determining whether a call is billed as local or toll, or whether they will be required to change that historical system and, instead, determine their obligations based on the actual, physical endpoints of the originating and terminating callers. Because the FCC has jurisdiction over

intercarrier compensation for ISP-bound traffic, this issue concerns only voice traffic.[4] Limiting the issue to voice traffic, it is clear that, notwithstanding the fact that the traffic may technically be interexchange traffic, the parties' historical practice of billing each other reciprocal compensation for these calls and the technological and economic burdens of implementing Verizon's proposed new system outweigh any conceivable benefits and, therefore, the Commission should reject Verizon's proposal.

Issue 7 addresses the compensation framework that will govern the parties' reciprocal compensation obligations for terminating calls to Internet Service Providers ("ISPs") in the event the compensation framework in the FCC's *ISP Remand Order* is vacated or reversed on appeal.[5] Verizon's proposal would likely result in unnecessary negotiations and costly litigation.

Finally, Issue 8 deals with whether Verizon should be permitted to change its non-tariffed charges during the term of the agreement, *i.e.*, those fixed by the parties during their negotiations of the interconnection agreement, or whether such charges must remain fixed for the entire term.

In its consideration of the remaining issues, the Commission is guided by the principles established in its recent *Reciprocal Compensation Order*[6] which resolved many of these issues in US LEC's favor. And, as US LEC clearly demonstrates herein, consistent with state and federal law, and public policy of promoting competition in local markets, the Commission should find for US LEC on the remaining issues.

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[4] *Investigation into appropriate methods to compensate carriers for exchange of traffic subject to Section 251 of the Telecommunications Act of 1996*, Docket No. 000075-TP (PHASE I), Order Approving Stipulation, Order No. PSC-02-0634-AS-TP (Fla. PSC May 7, 2002).

[5] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, Order on Remand and Report and Order FCC 01-131 (rel. Apr. 27, 2002) ("*ISP Remand Order*"), *remanded, WorldCom v. FCC*, 288 F.3d 429 (D.C.Cir. May 3, 2002).

[6] *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 (PHASES II an IIA), Order on Reciprocal Compensation, Order No. PSC-02-1248-FOF-TP (Fla. PSC Sept. 10, 2002) ("*Reciprocal Compensation Order*"); *Investigation into appropriate methods to compensate carriers for exchange of traffic subject to Section*

ISSUES OF FACT, LAW, AND POLICY

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: ****Pursuant to state and federal law, US LEC has the right to choose a single IP per LATA at any technically feasible point and each originating carrier must bear the cost of delivering its originating traffic to the IP selected by US LEC.****

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?**

US LEC: ****Under 47 U.S.C. § 251(c)(2)(B), Verizon must provide US LEC interconnection at any technically feasible point selected by US LEC. Therefore, Verizon cannot require US LEC either to designate a site as a US LEC IP, including US LEC's own collocation site, or pay additional charges.****

Issues 1 and 2 concern the manner in which the parties will implement their respective interconnection and compensation duties into contract language that will govern their exchange of traffic. This Commission has already rejected Verizon's VGRIPs position as inconsistent with federal law and it should do so again in this arbitration and adopt US LEC's position on Issues 1 and 2.

Summary of US LEC's and Verizon's Positions

US LEC's position is straightforward and would allow the parties to continue operating using their existing network interconnection architecture and transport compensation arrangements. Specifically, under US LEC's proposal, US LEC would select the POI(s) or physical IP where the parties exchange traffic and the method of interconnection used at the POI(s). Each party would bear the financial obligation of delivering its originating traffic to the POI(s) selected by US LEC and, to the extent Verizon uses US LEC transport to deliver its originating traffic from the POI(s) to US LEC's network, Verizon would pay US LEC a non-distance sensitive entrance facility for the use of such transport.

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

In contrast, Verizon characterizes its proposal as offering US LEC three "options." First, Verizon wants the right to designate the IP, or, given that US LEC has already designated its IPs in the Verizon LATA in which it provides service in Florida,[7] to require US LEC to transition to additional IPs. Montano Direct at 6-7. Second, Verizon wants to designate the method US LEC must use to interconnect with Verizon, specifically collocation, even though collocation is not a part of US LEC's historic or current network architecture. Montano Direct at 7; Hoffmann Direct at 11. Third, if US LEC fails to establish the physical IPs requested by Verizon, then Verizon intends to penalize US LEC by imposing transport charges for Verizon's originating traffic, from the Verizon end office to US LEC's IP—even for transporting Verizon's originating traffic *within the local calling area*. Montano Direct at 7; D'Amico Direct at 15.

Even though the parties have operated under their existing network architecture for nearly four years, VGRIPs would give Verizon the right to "request" that US LEC alter the existing architecture and agree to a new architecture within 30 days. Hoffmann Direct at 9. Moreover, Verizon's proposals would violate both FCC rules and the Commission's prior rulings by requiring US LEC to bear Verizon's transport costs from the originating end office. Hoffmann Direct at 10, 12-13; Montano Direct at 7. As US LEC will show, its proposal to resolve Issues 1 and 2 is consistent with federal law and rules and the Commission's recent interpretation of those rules in its *Reciprocal Compensation Order*. The Commission should therefore adopt US LEC's position on Issues 1 and 2.

Overview of Applicable Federal and State Law

The Act and FCC rules define each party's interconnection and compensation rights and duties. Section 251(c)(2) imposes special interconnection duties on incumbent local exchange carriers ("ILECs"), such as Verizon.[8] For example, the Act and the FCC recognize that new entrants, such as US LEC, must be able to determine the most efficient location for the exchange

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[7] Verizon has three tandems in the Tampa LATA. US LEC has established POIs at two of those tandems where US LEC has numbers and has been assigned NXX codes. Additionally, US LEC has agreed that where it delivers at least 200,000 MOUs/month to a Verizon end office, it will establish direct end office trunks to that Verizon end office. Hoffmann Direct at 8.

[8] 47 U.S.C. § 251(c)(2).

of traffic. Montano Direct at 8. Thus, the Act grants ALECs, not Verizon, the right to select the POI/default IP, which Verizon must provide at any technically feasible point selected by US LEC.[9] Montano Direct at 8. Notably, the Act does not define the terms POI or IP, although in interpreting the Act, the FCC has used the two terms interchangeably when discussing an ILEC's interconnection duties.[10]

The interaction between the parties' interconnection duties and their compensation obligations determines the financial responsibilities each party bears for transporting its originating traffic. Both US LEC and Verizon are subject to Section 251(b)(5).[11] This Section requires that each party: (i) establish reciprocal compensation arrangements for the transport and termination of telecommunications;"[12] (ii) bear financial responsibility for transporting its originating telecommunications traffic to the point of interconnection selected by the requesting carrier;[13] and (iii) compensate the terminating carrier for the transport[14] and termination services provided to terminate the call.[15] Together, Verizon's interconnection and compensation duties, sometimes referred to as "the rules of the road," require Verizon to bear financial responsibility for delivering traffic originated by its customers to US LEC's chosen POI.[16] Montano Direct at 4.

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[9] 47 U.S.C. § 251(c)(2)(B).

[10] *Cf. Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, ¶¶ 207, 209 (rel. Aug. 8, 1996) (subsequent history omitted) ("*Local Competition Order*") (points of interconnection) with *Local Competition Order* at ¶ 209, 211 (interconnection points).

[11] 47 U.S.C. § 251(b)(5).

[12] 47 U.S.C. § 251(b)(5).

[13] 47 C.F.R. § 51.703(b); *Local Competition Order* at ¶¶ 1042, 1062; *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.*, Memorandum Opinion and Order, DA 02-1731, at ¶ 52 (rel. Jul. 17, 2002) ("*FCC Arbitration Order*"). This Commission adopted a similar principle in its generic docket where it held that "an originating carrier has the responsibility for delivering its traffic to the point(s) of interconnection designated by the alternative local exchange carrier (ALEC) in each LATA for the mutual exchange of traffic." *Reciprocal Compensation Order* at 25.

[14] FCC rules define transport as "the transmission... of telecommunications traffic...from the interconnection point between the two carriers to the terminating carrier's end office switch that directly serves the called party." 47 C.F.R. § 51.701(c).

[15] 47 U.S.C. § 251(b)(5); 47 C.F.R. §§ 51.701(e), 51.703(e).

[16] *TSR Wireless, LLC. v. U S West Communications, Inc.*, File Nos. E-98-13, E-98-15, E-98-16, E-98-17, E-98-18, Memorandum Opinion and Order, FCC 00-194, ¶ 34 (rel. June 21, 2000) ("*TSR Wireless*")

Requiring the originating LEC to bear the costs of delivering its originating traffic to the POI selected by the ALEC, and to compensate the terminating LEC for the transport and termination functions it performs, is consistent with the current calling-party's-network-pays ("CPNP") regime.[17] As the FCC has found, a LEC's costs of delivering its originating traffic to the network of a co-carrier are recovered in the LEC's end users' rates. The FCC has explained its rationale as follows:

> In essence, the originating carrier holds itself out as being capable of transmitting a telephone call to any end user, and ***is responsible for paying the cost of delivering the call to the network of the co-carrier*** who will then terminate the call. Under the Commission's regulations, ***the cost of the facilities used to deliver this traffic is the originating carrier's responsibility,*** because these facilities are part of the originating carrier's network. ***The originating carrier recovers the costs of these facilities through the rates it charges its own customers for making calls.*** This regime represents ***"rules of the road"*** under which all carriers operate, and which make it possible for one company's customer to call any other customer even if that customer is served by another telephone company.[18]

Although the FCC is considering modifications to the traditional CPNP regime and its rules of the road, to date the FCC has yet to adopt any such new rules.[19] Therefore, the Commission must apply existing FCC rules to resolve Issues 1 and 2.

Pre-empting and standing in the place of the Virginia Commission, the FCC's Wireline Competition Bureau ("Wireline Bureau") considered Verizon Virginia's arguments concerning the interpretation of the FCC's rules and paragraphs 199 and 209 of the *Local Competition Order*[20] (the paragraphs on which Verizon relies to support VGRIPs) and it resolved that dispute

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(emphasis added), *aff'd, Qwest Corp. et al. v FCC et al,* 252 F.3d 462 (D.C. Cir. 2001); *In the Matter of Developing a Unified Intercarrier Compensation Regime,* CC Docket No. 01-92, Notice of Proposed Rulemaking, FCC 01-132, at ¶ 70 (rel. Apr. 27, 2001) ("*Intercarrier Compensation NPRM*"); *FCC Arbitration Order* at ¶ 67.

17 *Intercarrier Compensation NPRM* at ¶ 9.

18 *TSR Wireless* at ¶ 34 (emphasis added).

19 *Intercarrier Compensation NPRM* at ¶ 112-14.

20 Verizon argues that the Commission should disregard the *FCC Arbitration Order* as precedent that is applicable to this case because of certain alleged "failures." D'Amico Direct at 10-11. Specifically, Verizon claims that the Wireline Bureau did not "address" or "distinguish" Verizon's arguments about the "expensive" interconnection exception recognized by paragraphs 199 and 209 of the *Local Competition Order* and did not note the *Pennsylvania 271 Order's* endorsement of Verizon's "policies." D'Amico Direct at 11-12. Verizon's claims are

by rejecting VGRIPs entirely.[21] In addition, the Wireline Bureau clarified that under FCC rules, Verizon must also compensate the competitive local exchange carrier ("CLEC")/ALEC for the dedicated transport that the CLEC/ALEC provides from the POI to the CLEC/ALEC's switch, at which point the termination portion of reciprocal compensation applies.[22]

Verizon tip-toes around and ignores applicable state law because it does not support its arguments. D'Amico Direct at 5-6; Munsell Rebuttal at 6-7. In the recent arbitration involving AT&T and BellSouth, the Commission ruled that "AT&T should be permitted to designate the interconnection points in each LATA for the mutual exchange of traffic, with both parties assuming financial responsibility for bringing their traffic to the AT&T designated interconnection point."[23] More recently, the Commission also generally considered the FCC's rules and specifically rejected the arguments made by Verizon "that a point of interconnection and an interconnection point are separate entities because the distinction lacks any discernable authority."[24] Instead, the Commission ruled that "ALECs have the exclusive right to unilaterally designate single POIs for the mutual exchange of telecommunications traffic at any technically feasible location on an incumbent's network within a LATA", and that "an originating carrier

misplaced and the Commission should not abandon the *FCC Arbitration Order* as guidance based solely on Verizon's allegations. Verizon clearly raised its "expensive" interconnection and *Pennsylvania 271 Order* arguments before the Wireline Bureau and the Wireline Bureau unmistakably considered and distinguished the FCC statements in those orders. *FCC Arbitration Order* at ¶¶ 50, 53, n.123, 54; *see also* Md. Tr. at 206-7. It was not arbitrary and capricious for the Wireline Bureau to consider and reject Verizon's arguments. Indeed, "[w]hen an agency considers a particular factor and rationally concludes that it should not affect its decision, the agency is not acting arbitrarily. It is exercising the judgment Congress entrusted to it." *Valuevision International, Inc. v. FCC*, 149 F.3d 1204, 1210 (D.C. Cir. 1998) (denying petition for review based on allegations that FCC arbitrarily and capriciously ignored factors raised by petitioner).

[21] *FCC Arbitration Order* at ¶¶ 39, 51-54.

[22] *FCC Arbitration Order* at ¶¶ 66, 67 n. 187. The *FCC Arbitration Order* provides a succinct summary of the obligations Verizon bears under federal rules: (1) competitive LECs have the right, subject to questions of technical feasibility, to determine where they will interconnect with, and deliver their traffic to, the incumbent LEC's network; (2) competitive LECs may, at their option, interconnect with the incumbent LEC's network at only one place in a LATA; (3) all LECs are obligated to bear the cost of delivering traffic originating on their networks to interconnecting LECs' networks for termination; and (4) competitive LECs may refuse to permit other LECs to collocate at their facilities.

[23] *Petition by AT&T Communications of the Southern States, Inc., d/b/a AT&T for Arbitration of Certain Terms and Conditions of a Proposed Agreement with BellSouth Telecommunications, Inc., Pursuant to 47 U.S.C. Section 252*, Docket No. 000731-TP, Final Order on Arbitration, Order No. PSC-01-1402-FOF-TP, at 41 (Fla. PSC June 28, 2001).

[24] *Reciprocal Compensation Order* at 25.

has the responsibility for delivering its traffic to the point(s) of interconnection designated by the alternative local exchange carrier (ALEC) in each LATA for the mutual exchange of traffic."[25]

Verizon relies heavily on the Sprint arbitration decision in which the Commission directed Sprint to compensate BellSouth when BellSouth delivers its originating traffic to a Sprint POI outside of the local calling area.[26] D'Amico Direct at 5-6; Munsell Rebuttal at 3. However, the Sprint decision predated both the AT&T arbitration decision and the Commission's *Reciprocal Compensation Order.* Montano Direct at 6, 10-11. Moreover, the *Reciprocal Compensation Order* was the result of a generic proceeding that governs all LECs, and the individual arbitrations are only binding on the ILEC and ALEC that participated in each arbitration. Montano Direct at 6. Commission precedent supports US LEC's position that Verizon is required to bear the costs of delivering its originating traffic to the POI selected by US LEC, and to compensate US LEC for the transport and termination functions it performs. Montano Rebuttal at 3-4.

Verizon also cites to other state commission orders that have approved Verizon's VGRIPs proposal or arrangements similar to VGRIPs. D'Amico Direct at 8-10. However, these orders are not binding on this Commission. Instead, , the Commission's recent *Reciprocal Compensation Order* is the most persuasive precedent for the Commission to follow. At the same time, however, should the Commission decide to consider decisions from other states, it is quite clear that other state commissions have rejected proposals similar to VGRIPs and adopted proposals similar to US LEC's. For example, in rejecting BellSouth's efforts to require an IP in each BellSouth local calling area, the Kentucky Public Service Commission approved Level 3's proposal to require each LEC to bear financial responsibility for delivering its traffic to the POI selected by Level 3.[27] Commissions in Michigan,[28] New York,[29] and Pennsylvania

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[25] *Reciprocal Compensation Order* at 25.

[26] *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, Final Order on Arbitration, Order No. PSC-01-1095-FOF-TP , at 36 (Fla. PSC May 8, 2001).

[27] *Petition of Level 3 Communications, LLC for Arbitration with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of*

(Recommended Decision of the ALJ)[30] have reached the same results. Therefore, to the extent the Commission gives any weight at all to out-of-state precedent, it must also consider the precedent that supports US LEC's position on Issues 1 and 2.

US LEC's Proposal Is Consistent with Federal And State Law

As both of US LEC's witnesses testified, the parties' current interconnection architecture is working and US LEC sees no reason to change it. Hoffmann Direct at 10-11; Montano Direct at 9. The fact that the parties executed an interconnection agreement and interconnected in the Tampa LATA in 1998 (Hoffmann Direct at 7), and are currently operating under these arrangements, is substantial evidence that US LEC's requested points and method of interconnection are technically feasible.[31] Because Verizon has not offered any evidence to show that US LEC's requested interconnection architecture is not technically feasible, Verizon has a duty to provide it.[32]

The parties' current network interconnection arrangements also are consistent with the requirement that Verizon bear the costs of delivering its originating traffic to US LEC's network.[33] US LEC picks up Verizon's originating traffic at its POI at Verizon's tandem and is compensated for a non-distance sensitive entrance facility to deliver Verizon's traffic to US LEC's switch (in addition to receiving compensation for terminating the call). Hoffmann Rebuttal at 8-9. This is consistent with Verizon's duty to compensate US LEC for transport

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1996, Case No. 2000-404, Order, 1-4 (Ky. PSC March 14, 2001). The Kentucky Commission required Level 3 to establish an additional POI once traffic reached an OC-3 threshold.

[28] *Petition of Level 3 Communications, LLC for Arbitration Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996 to Establish an Interconnection Agreement with Ameritech Michigan*, Case No. U-12460, Opinion and Order, 33-35 (Mich. PSC Oct. 24, 2000). The Michigan Commission required Level 3 to establish an additional POI once traffic reached an OC-12 threshold.

[29] *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, Order Resolving Arbitration Issues, 25-28 (N.Y. PSC Jul. 26, 2001) (finding that each carrier is financially responsible for delivering its originating traffic, including originating VNXX traffic, to the POI).

[30] *Petition of US LEC of Pennsylvania, Inc., for Arbitration with Verizon Pennsylvania, Inc., Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket No. A-310814F7000, Recommended Decision, at 9-17 (Pa. PUC Sept. 13, 2002) ("*Pennsylvania Recommended Decision*").

[31] 47 C.F.R. §§ 51.305(c), 51.321(c).

[32] 47 C.F.R. §§ 51.302(e), 51.321(d).

[33] *FCC Arbitration Order* at ¶ 52; *Reciprocal Compensation Order* at 25; *TSR Wireless* at ¶ 34.

under Section 251(b)(5) and FCC Rules 51.701, 51.703, and 51.709[34] and should continue under US LEC's proposal. Hoffmann Rebuttal at 3, 6-7. Furthermore, the non-distance sensitive pricing of the entrance facility resolves entirely any concern of Verizon's that its costs could vary based upon the distance between the POI and US LEC's switch: it ensures that Verizon would not bear a greater transport obligation if US LEC's switch was located some distance from Verizon's tandem. Hoffmann Rebuttal at 8-9.

In sum, US LEC's network architecture is consistent with federal and state requirements. Pursuant to the Commission's *Reciprocal Compensation Order* and the FCC's rules of the road, Verizon is responsible for delivering its originated traffic to the US LEC designated POI for the mutual exchange of traffic and for compensating US LEC for the transport it uses to deliver its originating traffic to US LEC's network.[35] Because US LEC's proposal is consistent with applicable law, the Commission should adopt it.

Verizon's Proposal Is Not Consistent with Either Federal Or State Law

As mentioned above, Verizon describes its VGRIPs proposal as including three "options." At the core of Verizon's VGRIPs proposal, however, is the reality that Verizon would either deny US LEC its right under federal law to designate the POI and method of interconnection, or penalize US LEC for exercising its federal rights by charging US LEC for the transport capacity used to deliver traffic that *originates* on Verizon's network.[36] Hoffmann Direct at 9-10; D'Amico Direct at 15. Mr. Hoffmann described this transport penalty as follows: (1) the penalty starts with a lower reciprocal compensation rate than the rate negotiated by the parties; (2) Verizon's distance-sensitive transport rate (measured from the end office to US LEC's IP) is deducted from this lower reciprocal compensation rate; (3) Verizon's tandem switching rate is further deducted; and (4) to the extent Verizon buys transport form US LEC or a third party, those "other costs" also are deducted. Hoffmann Rebuttal at 3-5; Md. Tr. at 112-116. By Mr. Hoffmann's calculation, if the cost of tandem switching is included in the transport

34 *See also FCC Arbitration Order* at ¶¶ 66, 67 n. 187.

35 *Reciprocal Compensation Order* at 25; *TSR Wireless* at ¶ 34.

36 *FCC Arbitration Order at* ¶ 67 n. 187; *see also* 47 C.F.R. §§ 51.703(b), 51.709(b).

penalty that US LEC would incur under VGRIPs (under US LEC's current network architecture), the revised calculation demonstrates that Verizon would deprive US LEC of approximately 87% of the reciprocal compensation rate it otherwise is entitled to under current law. Hoffmann Rebuttal at 3.

The only federal authority Verizon cites in support of its position that it may shift *all* of its originating transport costs to US LEC are two vague quotes from the FCC's *Local Competition Order*[37] and some equally vague quotes from the FCC's order approving Verizon's Section 271 application to provide long distance service in Pennsylvania.[38] D'Amico Direct at 9, 10-12. With respect to the "expensive interconnection" quotes plucked from the *Local Competition Order*, Verizon does not and cannot point to any FCC rule or order interpreting when a particular interconnection arrangement is "expensive." Nor does Verizon explain how those statements support shifting *all* of Verizon's originating transport costs to US LEC (as opposed to only "expensive" transport costs incurred by Verizon)--costs that Verizon is already compensated for by its end users.

Verizon relies on the *Pennsylvania 271 Order* as "evidence" that VGRIPs complies with current FCC rules. D'Amico Direct at 11. This Commission has already disagreed with Verizon's position and found that VGRIPs does not comply with FCC rules.[39] Moreover, even a cursory reading of the *Pennsylvania 271 Order* demonstrates that the FCC simply said that Verizon's *policies* of separating the POI (physical point of demarcation) from the IP (financial point of demarcation) do not violate FCC rules. Nowhere in the *Pennsylvania 271 Order* did the FCC approve of Verizon's specific VGRIPs contract language or Verizon's policy of shifting *all* of its originating transport costs to a CLEC/ALEC. This is because, as the FCC has explained

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[37] *Local Competition Order* at ¶¶ 199, 209.

[38] *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*"). US LEC anticipates that Verizon also will quote dicta from the FCC's *ISP Remand Order*. However, the *ISP Remand Order* had nothing to do with interpreting an ILEC's interconnection obligations under federal law. Rather, the Order concerned intercarrier compensation obligations for ISP-bound traffic, a contentious issue with which this Commission is quite familiar.

[39] *Reciprocal Compensation Order* at 25-26.

repeatedly, its Section 271 orders do not resolve "new and unresolved disputes about the precise content of an incumbent LEC's obligations to its competitors."[40] Rather, it is this Commission's function as an arbitrator to resolve such disputes and to adopt contract language that implements each party's obligations. Because this Commission has already considered this issue at least twice, in the *AT&T Arbitration* and the *Reciprocal Compensation Order*, and rejected Verizon's position each time, it should reject Verizon's position again in this proceeding and adopt US LEC's.

Verizon Has Not Met Its Burden of Proof

Verizon bases its limiting interpretation of FCC rules on language in the FCC's *Local Competition Order* concerning so-called "expensive" forms of interconnection. D'Amico Direct at 18. Notably absent from Mr. D'Amico's testimony is any citation to a FCC rule or order setting standards for state commissions to follow in determining whether a particular form of interconnection is "expensive." This is because, although the FCC is considering such an exemption, none exists under current FCC rules.[41] Indeed, the FCC is exploring factors that could cause a particular interconnection arrangement to be "expensive," including, but not limited to, the balance of traffic and the location of the delivery point.[42] And as Mr. Hoffmann testified, any combination of factors, including volume and balance of traffic, availability of facilities, and distance, could affect whether a particular interconnection arrangement is expensive. Hoffmann Direct at 18; Md. Tr. at 132. Even Mr. D'Amico admitted that Verizon's costs could vary based on balance of traffic, distance, and terrain. Md. Tr. at 180-2. Yet Verizon stubbornly insists that the Commission ignore these factors that influence whether a particular

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[40] *Joint Application by SBC Communications Inc., et al., for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, 16 FCC Rcd 6237, ¶ 19 (2001), *aff'd in part and remanded, Sprint Communications Co. v. FCC*, 274 F.3d 549 (D.C. Cir. 2001).

[41] *Intercarrier Compensation NPRM* at ¶ 112-14.

[42] *Intercarrier Compensation NPRM* at ¶ 114.

interconnection arrangement is "expensive" and adopt instead Verizon's unilateral and simplistic definition that interconnection is "expensive" as soon as the call leaves the local calling area. Md. Tr. at 182.

Even if the claimed "expensive" interconnection exception did exist, however, Verizon has not met its burden of proof to qualify for it. Montano Rebuttal at 4-6. First, the Act and FCC rules require Verizon to charge cost-based rates and to submit cost studies to support those rates.[43] Montano Rebuttal at 4-5. However, Verizon admits in response to US LEC's request for production of documents that it does not have any such studies.[44] Montano Rebuttal at 6. Moreover, even though Verizon is currently financially responsible for delivering its originating traffic to US LEC's network (Hoffmann Direct at 14), Verizon has made no effort to quantify in any manner the costs it incurs under the current arrangement, or the costs it might incur under US LEC's proposal for the successor agreement. Md. Tr. at 171-2, 179-80. Verizon's only effort to establish the costs it incurs to deliver traffic to US LEC's chosen IP is through the use of hypotheticals and summary conclusions that are not supported by record evidence. These arguments do not come close to satisfying Verizon's burden of proof under FCC Rule 51.505(e).

Second, Verizon would also have to demonstrate that it is not already compensated for the costs of delivering traffic originated by its customers through the revenues it receives for providing the full range of services to those customers.[45] Montano Rebuttal at 4-5. Verizon has presented no evidence that it does not already recover the cost of delivering its originating traffic to US LEC through the rates Verizon charges its customers. Mr. D'Amico implied that Verizon's local rates only recover the costs of delivering Verizon's originating traffic within the

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[43] 47 U.S.C. § 252(d); 47 C.F.R. § 51.505(e).

[44] Ex. 6 - Verizon Response to US LEC Request for Production of Documents 1 and 2 (Sept. 20, 2002).

[45] *TSR Wireless* at ¶ 34.

local calling area, while Verizon's toll rates recover the costs of delivering Verizon's originating traffic outside of the local calling area. D'Amico Direct at 13-14. Yet, as Mr. Hoffmann testified, Verizon could also receive compensation from other sources, such as subsidies. Md. Tr. at 72. Indeed, at the Maryland hearing, Mr. Haynes admitted that above-cost rates for other services provided by Verizon do contribute to recovering the costs that Verizon incurs to provide local service. Md. Tr. at 473.

Third, Mr. D'Amico's claim that Verizon would be required to perform additional functions under US LEC's proposal is incorrect. As Mr. D'Amico himself admitted, Verizon transports calls within a local calling area, and perhaps outside of it to a local tandem, and performs tandem switching when a call is completed between two Verizon customers. Md. Tr. at 193-6. Yet under VGRIPs, Verizon refuses to perform those same functions for US LEC without additional compensation, and yet it will continue to charge its end users the same rate. Md. Tr. at 193-6. In short, VGRIPs option three would enable Verizon to receive additional compensation from US LEC for the same functions it normally performs for its local service rate.

In sum, because Verizon failed to introduce appropriate evidence, it is impossible to determine if US LEC's preferred method of interconnection is "expensive." Montano Rebuttal at 4-7. Further, because Verizon has not shown that the rates it receives from its customers are insufficient, there is no factual basis to support Verizon's claim that it incurs uncompensated costs in delivering traffic to US LEC. D'Amico Direct at 12, 14. If the Commission were to adopt Verizon's proposal without also requiring Verizon to prove its "expensive" cost, and despite its finding in the *Reciprocal Compensation Order*, this Commission would have to ignore the fact that Verizon, through its own chosen network design, contributes to the cost of interconnecting its network with US LEC's. Montano Rebuttal at 5. The Commission also

would have to ignore the fact that Verizon is already receiving compensation from its customers for providing them access to the public switched telephone network and, therefore, could be compensated twice for performing one function. Montano Rebuttal at 5-6. While it may be theoretically *possible* to calculate the cost differential that Verizon claims exists, it is Verizon who bears the burden of proof in showing its costs.[46] Verizon has made absolutely no effort to do so. Montano Rebuttal at 6. It is therefore irrelevant whether it is "possible" to use the Commission-approved UNE rates to calculate the costs Verizon allegedly incurs to deliver traffic to US LEC.[47]

ISSUE 3: Is US LEC entitled to reciprocal compensation for terminating and/or delivering "Voice Information Services" traffic?

US LEC: ****Yes. The traffic that Verizon now seeks to define as Voice Information Service traffic fits completely within the definition of traffic that is eligible for reciprocal compensation under the agreement.****

At issue is whether US LEC is entitled to be paid reciprocal compensation for terminating "Voice Information Services" traffic. As stated in US LEC's Petition, and in the testimony of Ms. Wanda Montano, Verizon seeks to define an entire category of traffic that it wants the Commission to exclude from the parties' reciprocal compensation obligations. Montano Direct at 16. Verizon first defines "Voice Information Services Traffic" as a class of traffic that "provides [i] recorded voice announcement information or [ii] a vocal discussion program open to the public." (Verizon Template, Additional Services Attachment, Section 5.1). Then, without any sound basis in law or fact, Verizon asks the Commission to exclude the defined class of traffic from its reciprocal compensation obligations in an effort to deprive US LEC of compensation for providing a valuable service to Verizon customers. Montano Direct at 16. The

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[46] 47 C.F.R. § 51.505(e).

Commission should decline Verizon's request.

In fact, the categories of traffic that Verizon now defines as Voice Information Services Traffic fit completely the definition of "Reciprocal Compensation Traffic" that is the basis for the parties' reciprocal compensation obligations. Montano Direct at 16. FCC rules define "Reciprocal Compensation" as an arrangement "in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of telecommunications traffic that originates on the network facilities of the other carrier."[48] Similarly, "Reciprocal Compensation Traffic" is defined in the proposed agreement as "[t]elecommunications traffic originated by a Customer of one Party on that Party's network and terminated to a Customer of the other Party on that other Party's network, except for Telecommunications traffic that is interstate or intrastate Exchange Access, Information Access, or exchange services for Exchange Access or Information Access."[49]

The categories of traffic included in Verizon's definition of "Voice Information Services Traffic" fit this definition: Whether the call is a "recorded voice announcement information or [ii] a vocal discussion program open to the public," it is originated by a customer of one party on that party's network and is terminated by a customer of the other party on that party's network. Nor can the traffic be characterized as interstate or intrastate Exchange Access, Information Access, or exchange services for Exchange Access or Information Access.

"Exchange Access" is defined in the Act as "the offering of access to telephone exchange services or facilities *for the purpose of the origination or termination of telephone toll*

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[47] Moreover, one component of the costs Verizon proposes to charge US LEC is not based on UNE rates and instead is a rate that has never been evaluated by this Commission--namely, the "other costs" component of Verizon's transport penalty.

[48] 47 C.F.R. § 51.701(e). The FCC defines "telecommunications traffic" as "Telecommunications traffic exchanged between a LEC and a telecommunications carrier other than a CMRS provider, except for telecommunications traffic that is interstate or intrastate exchange access, information access, or exchange services for such access." 47 C.F.R. § 51.701(b)(1).

services."[50] The term has this same meaning for purposes of the parties' exchange of traffic in Florida because they have defined it in their proposed agreement as having "the meaning set forth in the Act."[51] As long as calls to Voice Information Service providers are dialed on a local basis, they cannot be classified as "telephone toll services."

"Information Access" is not defined in the Act; rather, it is defined in the Modified Final Judgment as "the provision of specialized exchange telecommunications services *by a BOC* in an exchange area 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."[52]

In turn, "Information Services" is defined in the Act as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." [53]

US LEC interprets these definitions to exclude calls to Voice Information Service Providers, especially those providers who make available a service that offers "a vocal discussion program open to the public." That traffic does not fit the definition of "Information Service" and it typically involves a call that is dialed on a local basis. Indeed, the New York Public Service Commission addressed the issue and concluded that calls to so-called "chatlines" that would fit Verizon's proposed definition were eligible for reciprocal compensation.[54]

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49 Proposed Interconnection Agreement - Glossary § 2.75.

50 47 U.S.C. § 153(16) (emphasis added).

51 Proposed Interconnection Agreement – Glossary § 2.33.

52 *United States v. AT&T*, 552 F. Supp. 131, 229 (D.D.C. 1982) (emphasis added).

53 47 U.S.C. § 153(20).

54 *Proceeding on Motion of the Commission to Reexamine Reciprocal Compensation*, Docket No. 99-C-0529, *Opinion and Order Concerning Reciprocal Compensation*, Order No. 99-10 (N.Y. PSC Aug. 26, 1999).

Similarly, to the extent that US LEC provides service to a Voice Information Service Provider who offers a "recorded voice announcement information," that service does not constitute "Information Access" because, by its terms, information access is defined as a service provided "by a BOC". It does not apply when the service is provided by an ALEC. Nor is US LEC aware of any decision by the FCC or any state commission that holds that a call to a recorded voice announcement is not eligible for reciprocal compensation. Verizon has cited no such authority, and its attempt to bolster its unsupportable position by questioning US LEC's witness at the Maryland hearing about whether callers to recorded voice announcements retrieve "information" (Md. Tr. at 245) does not alter this conclusion.

This issue was resolved in US LEC's favor in the August 30, 2002 *South Carolina Arbitration Decision*. The South Carolina Commission found that "Verizon South's request lacks a sound basis in law or fact," and directed the parties to compensate each other for exchanging and terminating "Voice Information Services" traffic in accordance with US LEC's proposal.[55] Moreover, on September 13, 2002, the Pennsylvania ALJ similarly recommended US LEC's position and clarified that the ALJ's "understanding of the current state of the law is that Voice Information Services are subject to reciprocal compensation obligations."[56] This Commission should likewise reject Verizon's unsubstantiated interpretation and endorse US LEC's position.

The Wireline Bureau also addressed this issue, albeit in a more generalized fashion. Verizon alleges here that Voice Information Services Traffic is excluded from the parties' reciprocal compensation obligations because it is traffic that falls within the scope of Section

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[55] *Petition of US LEC of South Carolina Inc. for Arbitration of an Interconnection Agreement with Verizon South, Inc.*, Docket No. 2002-181-C, Order on Arbitration, Order No. 2002-619, at 8, 12 (S.C. PSC Aug. 30, 2002) ("*South Carolina Arbitration Decision*"). Verizon's South Carolina affiliate sought reconsideration of

251(g) of the Act and, pursuant to the FCC's *ISP Remand Order*, all 251(g) traffic is excluded from reciprocal compensation.[57] In its arbitration before the Wireline Bureau, Verizon's affiliate, Verizon Virginia, sought to define its reciprocal compensation obligations in exactly the same way that Verizon does here—as excluding "interstate or intrastate Exchange Access, Information Access, or exchange services for Exchange Access or Information Access."[58] Verizon Virginia argued that all 251(g) traffic fell within those defined areas of traffic and, therefore, should be excluded automatically from its reciprocal compensation obligations.[59] The Wireline Bureau rejected Verizon Virginia's argument, stating: "[w]e disagree with Verizon's assertion that every form of traffic listed in section 251(g) should be excluded from section 251(b)(5) reciprocal compensation."[60] In essence, the Wireline Bureau concluded that Verizon Virginia was relying entirely on the 251(g) arguments that had been rejected by the D.C. Circuit and "decline[d] to adopt Verizon Virginia's contract proposals that appear to build on the logic that the court has now rejected."[61] That reasoning applies with equal force here: to the extent that Verizon's argument against reciprocal compensation for Voice Information Services Traffic is predicated entirely on a faulty reading of the interplay between sections 251(b)(5) and 251(g), it should be rejected.[62]

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that portion of the *South Carolina Arbitration Decision*, and in a vote held on September 10, 2002, the South Carolina Commission denied the request.

[56] *Pennsylvania Recommended Decision* at 19-21.

[57] *Verizon Response* at 17-19.

[58] *Compare*, *FCC Arbitration Order* at ¶ 257, *quoting*, Verizon Virginia's Proposed Agreement to WorldCom, Part C, Interconnection Attach., § 7.3.1., *with*, Verizon's Proposed Agreement to US LEC, Interconnection Attachment § 7.3.1.

[59] *FCC Arbitration Order* at ¶ 257.

[60] *FCC Arbitration Order* at ¶ 261.

[61] *FCC Arbitration Order* at ¶ 261.

[62] The Wireline Bureau did not reach the ultimate question of whether reciprocal compensation would be owed on calls to such information service providers as, for example, time and temperature recordings on the grounds that the parties agreed such services did not exist in Virginia and were not likely to be offered. *FCC Arbitration Order* at ¶ 314.

In addition, another flaw in Verizon's efforts to exclude this category of traffic from the parties' reciprocal compensation obligations is that there is no technically feasible, cost-effective way to segregate the traffic from other traffic that unquestionably is eligible for reciprocal compensation.[63] Montano Direct at 17-18. The calls at issue here have all the attributes of all other locally-dialed calls: they are dialed using either seven (7) or ten (10) digit local numbers and, without any separate trunking, are transported over existing local interconnection trunks between US LEC and Verizon. Ex. 2 – US LEC's Responses to Fla. PSC's Second Set of Interrogatories (4-8) at 5. Unlike intra- or interLATA toll traffic, which clearly is distinguishable, calls to so-called "Voice Information Service Providers" are indistinguishable from all other local traffic. Montano Direct at 18.

Consequently, the only way to separate the traffic is to program switches to "flag" calls to an identified database of providers. Montano Direct at 18. This is not only expensive and fairly inaccurate, it also is intrusive (it would force US LEC to inquire into the proposed business plans of all new customers) and would slow the operation of US LEC's switches. Montano Direct at 18.[64] Moreover, even assuming that the technical issues regarding the call processing can be overcome, Verizon's proposal ignores privacy concerns that customers may raise about sharing information about their business with other companies. Montano Direct at 18.

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[63] *See Pennsylvania Recommended Decision* at 21.

[64] The North Carolina Staff addressed this issue, suggesting that although reciprocal compensation should apply to traffic (other than toll traffic) connecting end users with vocal discussion programs open to the public, it should not apply to traffic connecting an end user with recorded voice announcement information and toll traffic connecting end users with vocal discussion information. *Petition of US LEC of North Carolina, Inc. for Arbitration with Verizon South, Inc., Pursuant to Section 252(b) of the Telecommunications Act*, Docket No. P-561, Sub 19, Proposed Recommended Arbitration Order of the Public Staff, at 5-6 (NCUC Sept. 6, 2002) ("*North Carolina Staff Recommendation*"). However, the North Carolina Staff failed to consider or address the issue of the technical feasibility of segregating the excluded traffic from other traffic that unquestionably is eligible for reciprocal compensation, leaving it to the parties to figure out. US LEC disagrees with this aspect of the Staff's recommendation.

In short, there is no legal or factual basis to exclude what Verizon has defined as "Voice Information Services Traffic." As such, the Commission should reject entirely Verizon's request to identify and define "Voice Information Services Traffic" as a separate category of traffic. Section 2.75 of the Glossary should be eliminated from the proposed agreement and those sections purporting to exclude "Voice Information Services Traffic" from the parties' reciprocal compensation obligations should be revised accordingly.

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

US LEC: ****The term "terminating party" should be employed. For billing, measuring, and engineering purposes, traffic is referred to as either originating or terminating. Thus, for any call under the agreement, there is an originating party served by an originating carrier and a terminating party served by a terminating carrier.****

Along with attempting to define a new category of traffic as exempt from reciprocal compensation—Voice Information Services Traffic—Verizon also seeks to change literally decades of common practice in the industry: the use of the term "terminating party" to indicate the carrier that terminates a call for purposes of traffic measurement and billing over interconnection trunks.[65] Verizon offers no persuasive argument in support of its proposal, which was rejected in both the *South Carolina Arbitration Decision*[66] and by the North Carolina Staff.[67] US LEC urges the Commission to adopt its position here.

Historically, and currently, traffic has been referred to as either originating or terminating for billing, measuring, and engineering purposes. Montano Direct at 20. Thus, 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 20. Even in the proposed interconnection agreement, this

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[65] *Verizon Response* at 20-22.

[66] *South Carolina Arbitration Decision* at 15-17 ("This Commission can find no compelling reason in Verizon South's position why its attempt to modify decades of industry practice should be accepted").

tradition is, for the most part, continued. For example, in Section 7.2 of the proposed agreement, the parties agree that they will compensate each other for the "transport and termination" of Reciprocal Compensation Traffic. Montano at 21. In turn, "Reciprocal Compensation" is defined with respect to the "transport and termination" of "Reciprocal Compensation Traffic", which, itself, is defined with reference to traffic that is "terminated on the other party's Network." Montano at 21.

Against this long-standing historical backdrop, Verizon seeks to interject the novel concept of a "receiving party". Montano at 20. Thus, in various sections of the Interconnection Attachment dealing with the delivery, measurement and billing of traffic, Verizon no longer refers to the delivery or measurement of traffic from the "originating party" to the "terminating party"; rather, Verizon refers to traffic delivered from the "originating party" to the "receiving party". Verizon does not define the term "receiving party" and states that the only reason it wants to change this traditional designation is to respond to the FCC's view that calls to ISPs do not terminate there.[68]

Therein lies the source of the problem. Indeed, twice now, the FCC has tried to carve out calls to ISPs from carriers' Section 251(b)(5) compensation obligations by stating that calls to ISPs do not terminate there, and each time the D.C. Circuit has slapped the FCC's administrative wrist and said "no." In fact, the D.C. Circuit has not found *any* of the FCC's reasons for that conclusion to be persuasive. Thus, there remains a distinct possibility that the FCC could conclude on its third opportunity to consider the issue that, in fact, for purposes of reciprocal compensation, calls to ISPs *do* terminate at the ISP.

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[67] *North Carolina Staff Recommendation* at 7-9 ("Verizon's efforts to substitute the term 'receiving party' appears to be an effort to achieve through linguistics what it has not been able to gain through litigation").

[68] *Verizon Response* at 20-22.

In that event, if this Commission has ruled, or if US LEC has agreed, that calls to ISPs are "received" by US LEC, but not "terminated" by US LEC, then given Verizon's litigious history on this issue, Verizon is likely to pounce on that distinction and argue, yet again, that US LEC is not entitled to receive reciprocal compensation for terminating calls to ISPs. Montano Direct at 22-23. The Commission should not sanction Verizon's "shell game," and should instead follow the lead of the South Carolina Commission and direct the parties to continue to use the term "terminating party" for billing, measurement, and compensation purposes throughout the agreement.[69]

Indeed, Verizon's affiliate raised these very points in the South Carolina arbitration with US LEC. The South Carolina Commission acknowledged Verizon South's concerns,[70] yet also concluded that the issue of reciprocal compensation for ISP traffic remained in doubt. In the interests of stability and certainty, and in order to avoid potential further litigation, the South Carolina Commission wisely determined that the "exception" for ISP traffic should not be re-written to introduce "new and novel terms and concepts."[71]

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)?

US LEC: ****A) Yes. Whether a call is rated as local or toll for purposes of reciprocal compensation is based upon the NPA/NXX codes of the originating and terminating numbers. There is no viable method in place for replacing this practice with one focused on the originating and terminating points of the call.****

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69 *See South Carolina Arbitration Decision* at 18 ("Verizon South's proposal is without precedent and lacks merit").

70 *South Carolina Arbitration Decision* at 17 – 18.

71 *South Carolina Arbitration Decision* at 18.

> ****B) No. Originating access charges should not apply for calls if the customers assigned the NPA/NXX's are located outside of the local calling area to which the NXX is homed. The FCC recently rejected Verizon's arguments and determined that carriers are entitled to receive reciprocal compensation for terminating such calls.****

The Commission has previously ruled that the FCC has exclusive jurisdiction over intercarrier compensation for ISP-bound traffic, including ISP-bound traffic using Foreign Exchange ("FX") arrangements similar to those in dispute here in Issue 6.[72] Thus, this issue concerns only voice traffic using FX-like arrangements. When this issue is limited to voice traffic, it is clear that the burdens of implementing Verizon's proposed new system outweigh any conceivable benefits and, therefore, the Commission should reject Verizon's proposal.

US LEC proposes that reciprocal compensation should apply to all non-ISP-bound calls that are rated and billed as local to the calling party, regardless of the physical location within the LATA of the ultimate called party, and that Verizon's proposal to assess access charges for that traffic should be rejected. Montano Direct at 23-25. US LEC's basic position is that the decades-old custom and practice in the industry of routing and rating a call is based on the originating and terminating NPA/NXX's, and basing intercarrier compensation on those same factors should continue. Montano Direct at 24.

Verizon proposes to change the historical rating and routing of calls based on NXX codes and asks the Commission to treat calls to FX and FX-like customers as toll calls, but *only* for the purpose of determining how US LEC and Verizon will compensate each other for transporting

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[72] *Investigation into appropriate methods to compensate carriers for exchange of traffic subject to Section 251 of the Telecommunications Act of 1996*, Docket No. 000075-TP (PHASE I), Order Approving Stipulation, Order No. PSC-02-0634-AS-TP (Fla. PSC May 7, 2002). Verizon contends that the *ISP Remand Order* applies only to traffic to ISPs delivered to ISPs within the same local calling area as the calling party. Verizon is wrong because the FCC did not distinguish "local" ISP-bound traffic from "non-local" ISP-bound traffic. In fact, the FCC repudiated its earlier distinction between "local" and "non-local" for all traffic. *ISP Remand Order* at ¶ 34. In fact, the *ISP Remand Order* makes clear that the new federal regime applies to all ISP-bound traffic: "We conclude that this definition of 'information access' was meant to include *all* access traffic that was routed by a LEC 'to or

and terminating these calls. Montano Direct at 25; Haynes Rebuttal at 2. On the other hand, Verizon does *not* propose to start billing its customers toll charges for these calls. Md. Tr. at 483-4. Under Verizon's unreasonable proposal, US LEC would pay Verizon an originating access charge, but since Verizon does not bill its own customer (after all, to Verizon's customer, the call is local), US LEC would not be paid any terminating access. This is hardly an equitable arrangement and it is one that the Commission should decline to adopt.

In support of its proposal to assess access charges for FX traffic, Verizon relies heavily on the Commission's recent *Reciprocal Compensation Order* to argue that the question of the appropriate compensation for FX traffic is settled. Haynes Rebuttal at 9; Haynes Direct at 10-11. Verizon is wrong. In fact, the Commission specifically stated otherwise, concluding that while carriers may not be "obligated" to pay reciprocal compensation for FX traffic, the Commission would not "mandate a particular intercarrier compensation mechanism" for FX traffic.[73] Instead, the Commission found that:

> [s]ince non-ISP virtual NXX/FX traffic volumes may be relatively small, and the costs of modifying the switching and billing systems to separate this traffic may be great, we find it is appropriate and best left to the parties to negotiate the best intercarrier compensation mechanism to apply to virtual NXX/FX traffic in their individual interconnection agreements.

The Commission explicitly stated that because the record before it did not include the factual information necessary to make an assessment about whether reciprocal compensation or access charges should apply to virtual NXX traffic, the question would be "better left for parties to negotiate in individual interconnection agreements."[74] Thus, US LEC acknowledges that while the Commission has stated calls to virtual NXX customers located outside of the local

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from' providers of information services, of which ISPs are a subset." *ISP Remand Order* at 44 (emphasis added). Nowhere does the Order limit its regime to "local" ISP-bound traffic.

[73] *Reciprocal Compensation Order* at 33.

calling area to which the NXX is assigned should not be considered local calls, the Commission has *not* resolved the issue of whether reciprocal compensation or access charges are payable on such traffic exchanged between two specific carriers. Montano Direct at 27. US LEC asks that the Commission do so in this proceeding with respect to non-ISP-bound traffic exchanged with Verizon using FX arrangements.

There are a number of reasons why the Commission should reject Verizon's proposal to assess access charges for FX traffic. First, the Commission should leave the present reciprocal compensation mechanism in place because, as far as the person calling such an FX service number is concerned, the call is indistinguishable from any other local call. Montano Rebuttal at 10. Indeed, as the record in this case clearly shows: Verizon admits that calls to FX customers are indistinguishable from other local calls from their billing system's perspective (Haynes Rebuttal at 2; Ex. 3 – Verizon Responses to Staff's First Set of Interrogatories at 8; *FCC Arbitration Order* at ¶ 300); admits that an FX call is handled and routed the same as any other local call (Haynes Rebuttal at 1); admits that the physical location of the terminating party has no impact on the costs it incurs to transport a call (Haynes Rebuttal at 12); and admits to having billed and collected reciprocal compensation from ALECs for calls from ALEC customers to Verizon's FX and FX-like customers. Haynes Rebuttal at 5; Ex. 3 – Verizon Responses to Staff's First Set of Interrogatories at 8. Indeed, since switching and billing systems cannot distinguish between calls to a "virtual NXX" from calls to a "physical NXX", rating codes have traditionally been used for intercarrier compensation purposes. Montano Rebuttal at 9.

Not only does the call appear indistinguishable from any other locally-dialed call, but because Verizon's responsibilities in delivering such calls are the same as for any other local call, its incurs no additional costs in delivering traffic destined to a US LEC FX customer.

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[74] *Reciprocal Compensation Order* at 33.

Montano Direct at 33; Haynes Rebuttal at 12. Under its FX service arrangement, when a US LEC customer calls a Verizon customer, US LEC must transport that call to the IP and incur the related switching and transport expenses. US LEC then hands the call off to Verizon, and from that point, Verizon is solely responsible for the transport and termination of the call to the called customer. *See* Montano Rebuttal at 12. The reverse is true when the call travels in the opposite direction. Whenever a Verizon customer calls a US LEC customer, Verizon must incur the expenses only on its side of the IP. *See* Montano Rebuttal at 12. Because all traffic routed from Verizon to US LEC must pass through the IP, from a network, routing, and cost perspective, it makes no difference to Verizon where the US LEC customer is located. Montano Direct at 24-25; Md. Tr. at 345-8. When Verizon delivers a call to US LEC, Verizon must deliver the call to the same location and, therefore, incurs the same transport and switching expenses whether the US LEC customer is located 10 feet or 10 miles from the IP. Md. Tr. at 476-81. Likewise, it makes no difference to US LEC where the Verizon customer is located. Because Verizon incurs no additional costs when it exchanges FX traffic with US LEC, the compensation structure should be the same as it would be when the US LEC customer has a physical presence. That compensation structure requires the originating carrier — in this case Verizon — to compensate the terminating carrier, US LEC.

It should also be noted that Verizon itself successfully markets a similar service. US LEC's FX service is similar to Verizon's FX products, in that both products provide local numbers outside of the local calling area of an end user. Montano Rebuttal at 14. The similarity of the parties' respective FX service offerings is critical for two reasons. First, the similarity shows the absurdity of Verizon's argument that US LEC is "gaming the system" by providing FX and FX-like service but Verizon is not. Md. Tr. at 489-92. Second, the similarity is

important because Verizon gives the misguided impression that it is providing some kind of service for which it is not receiving any compensation when, in fact, that simply is not the case. Indeed, quite the opposite is true. *See* Haynes Direct at 12. Under a FX service arrangement, when Verizon's customer originates the call, Verizon is compensated by its originating customer (through the monthly fee for service) for taking the call and handing it off to US LEC who then bills Verizon for the services it performs *for Verizon's customer* in terminating the call.[75] Montano Direct at 36. Conversely, when US LEC's customer originates the call, US LEC is compensated by its originating customer (through the monthly fee for service) for taking the call and handing it off to Verizon, who then bills US LEC for the services its performs *for US LEC's customer* in terminating the call. The fact that Verizon and US LEC also receive compensation from their FX customers for the FX portion of the services they provide (Md. Tr. at 266, 272, 278, 353-4, 425-6) has no impact whatsoever on the services that US LEC and Verizon perform for each other.

The inequity of Verizon's proposal is further complicated by the simple fact that, unlike the requirement in the Act that reciprocal compensation charges must be cost-based, Verizon's originating and terminating access charges have no such statutory limitation and, as a result, are priced significantly above cost. Montano Direct at 34-35. There is plainly no sustainable basis to require US LEC to pay Verizon above-cost access charges, and to deny compensation to US LEC, when Verizon incurs no additional costs to justify receipt of access charges, and US LEC provides the same termination functions whether a customer's presence in a particular calling area is virtual or physical. Montano Direct at 35.

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[75] *TSR Wireless* at ¶ 34. ("Under the Commission's regulations, the cost of the facilities used to deliver this traffic is the originating carrier's responsibility because these facilities are part of the originating carrier's network. The originating carrier recovers the costs of these facilities through the rates it charges its own customers for making calls.")

Another Verizon argument is predicated entirely on the unsupported allegation that US LEC improperly bills Verizon for reciprocal compensation for an *inter*LATA FX call, despite the utter lack of any evidentiary support in the record for that proposition. Haynes Direct at 18. Verizon highlights US LEC's "Local Toll Free Service" as the epitome of all that is wrong with US LEC's FX service and its proposal to base the parties' intercarrier compensation obligations on the NPA/NXX's of the originating and terminating parties. Haynes Direct at 18; Md. Tr. at 283-323. Yet as Ms. Montano has patiently explained, US LEC's Local Toll Free Service is tariffed as a long distance service, not a local service (Montano Rebuttal at 12; Md. Tr. at 295-6), and it is provisioned differently from a traditional FX service.[76] Moreover, as Mr. Haynes admitted at the Maryland hearing, Verizon may provide the same type of interLATA service to its customers through remote call forwarding.[77] Md. Tr. at 440-2, 446-7, 454-5. Perhaps even more importantly, Verizon has demonstrated that it currently bills ALECs reciprocal compensation for calls terminating to those interLATA customers. Md. Tr. at 443, 447, 454-6. Thus, because Verizon itself engages in the very practice of which it complains, Verizon's cries of arbitrage are inherently suspect.[78]

The Wireline Bureau recently rejected Verizon's efforts to change this standard industry practice. In that proceeding, the position of Verizon's affiliate was summarized as follows:

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[76] *See* Md. Tr. at 295-96: Q. Ms. Montano, do you have a situation where you would receive a call at your switch here, for this customer Z in Columbia, South Carolina, assigned a number associated with Essex? I don't ask in particular, but for example, do you offer service like that?

A. The long distance portion of my company does, yes. We provide it pursuant to our long distance tariffs.

Q. So US LEC does provide the service like the one I've drawn on the board? Is that correct?

A. We provide a service where a customer in Columbia, South Carolina could have a number in Maryland. Is terminated as a local call by an originating network to us, is a local call that terminates there. [sic] We then remote call forward the call on our long distance network and we charge the customer a long distance charge for that call.

[77] Mr. Haynes distinguished remote call forwarding from an FX service on the basis of the "significant network differences involved." Md. Tr. at 454. Thus it appears that Mr. Haynes would have to agree that US LEC's Local Toll Free Service, which utilizes remote call forwarding (Md. Tr. at 295, 301, 343-4), is also different from an FX product.

> Verizon objects to the petitioners' call rating regime because it allows them to provide a virtual foreign exchange ("virtual FX") service that obligates Verizon to pay reciprocal compensation, while denying it access revenues, for calls that go between Verizon's legacy rate centers. This virtual FX service also denies Verizon the toll revenues that it would have received if it had transported these calls entirely on its own network as intra-LATA toll traffic. Verizon argues simply that "toll" rating should be accomplished by comparing the geographical locations of the starting and ending points of a call.[79]

Fundamentally, these are the same arguments that Verizon has made in this case. Montano Direct at 32; Md. Tr. at 504-12. Similarly, the CLECs/ALECs articulated the same arguments before the Wireline Bureau that US LEC presents to this Commission. For example, they argued that calls to FX customers are indistinguishable from other calls that terminate within the local calling area[80] and it would be difficult and costly to segregate that traffic.

Considering all the arguments made by the parties, the Wireline Bureau rejected Verizon's effort to change the way carriers compensate each other for exchanging FX traffic. The Wireline Bureau stated its conclusion as follows:

> We agree with the petitioners that Verizon has offered no viable alternative to the current system, under which carriers rate calls by comparing the originating and terminating NPA-NXX codes. ***We therefore accept the petitioners' proposed language and reject Verizon's language that would rate calls according to their geographical end points.*** Verizon concedes that NPA-NXX rating is the established compensation mechanism not only for itself, but industry-wide. The parties all agree that rating calls by their geographical starting and ending points raises billing and technical issues that have no concrete, workable solutions at this time.[81] (emphasis added).

In light of the recent *FCC Arbitration Order* which, by its terms, interpreted and applied the FCC's own rules, US LEC is hard-pressed to understand how Verizon can claim that federal

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78 *See* Md. Tr. at 491-2 (Mr. Haynes attempting to distinguish Verizon's actions from US LEC's).

79 *FCC Arbitration Order* at ¶ 286.

80 *FCC Arbitration Order* at ¶ 300.

81 *FCC Arbitration Order* at ¶ 301.

law does not permit the parties to pay each other reciprocal compensation for transporting and terminating FX traffic. Even more fundamentally, it is inconceivable that Verizon can wholly ignore the conclusions enunciated in the *FCC Arbitration Order* and claim that it has no impact here.[82]

It should also be noted that in arguing its position to this Commission, Verizon relies on the rejected analysis found in the unrelated *ISP Remand Order* (Haynes Direct at 10), and makes only a half-hearted attempt to distinguish the more recent *FCC Arbitration Order* that is directly on point. Haynes Direct at 21. To be sure, the D.C. Circuit did not vacate the *ISP Remand Order*, but it plainly rejected the very legal analysis that Verizon relies upon here—that reciprocal compensation does not apply to traffic identified in section 251(g) of the Telecom Act.[83] The D.C. Circuit declined to accept the FCC's reasoning and this Commission should decline to accept it as well. Thus, when confronted with "dueling federal authorities", as is the case here, US LEC submits that the valid, binding determinations of the Wireline Bureau, which Verizon apparently has agreed to accept in Virginia, should take precedence.

Verizon also cites to an FCC case in which AT&T allegedly could have routed calls from Charleston, South Carolina to Atlanta, Georgia so that a caller in Charleston would appear to be making a local call, even though it was answered in Georgia. Haynes Direct at 8-9. In that case, the FCC ruled that an *inter*LATA FX call was not a local call for the purposes of compensation and, thus, access charges were due. Montano Rebuttal at 14-15. However, Verizon does not mention that, in the context of *intra*LATA FX calls—the types of calls that are at issue here—it

[82] What makes Verizon's position here especially disingenuous is that in its affiliate's recent filing at the FCC seeking authority to offer interLATA toll services in Virginia pursuant to section 271 of the Act, Verizon states that it will abide by the terms of the Arbitration Order.

[83] Similarly, the Wireline Bureau rejected Verizon Virginia's proposed definition of reciprocal compensation traffic, which defined that traffic as any traffic except, among other categories, information access traffic. *FCC Arbitration Order* at ¶ 261.

argued to the FCC that "intraLATA FX service is a type of local exchange service."[84] Moreover, Verizon's example is not applicable here because the portion of the *AT&T* case that Verizon refers to dealt with an *interstate inter*LATA FX service. Montano Rebuttal at 15. That is an extreme example that is not at all comparable to US LEC's practice of assigning an FX number to a customer within the same LATA, as is the case in this proceeding. Montano Rebuttal at 15. Nor is it comparable to US LEC's Local Toll Free service, which is described in US LEC's tariff as a form of remote call forwarding. Montano Rebuttal at 15.

The Wireline Bureau does not stand alone in reaching the conclusion that Verizon's proposal should be rejected under federal law.[85] Several state commissions, when confronted with the same arguments that Verizon makes here, have reached the same result articulated in the *FCC Arbitration Order*. For example, the Kentucky Public Service Commission found that a CLEC/ALEC's FX service should be treated the same as BellSouth's FX service, and both services should be treated as local traffic:

> Both utilities offer a local telephone number to a person residing outside the local calling area. BellSouth's service is called foreign exchange ("FX") service and Level 3's service is called virtual NXX service. The traffic in question is dialed as a local call by the calling party. BellSouth agrees that it rates foreign exchange traffic as local traffic for retail purposes. These calls are billed to customers as local traffic. If they were treated differently here, BellSouth would be required to track all phone numbers that are foreign exchange or virtual NXX type service and

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[84] *AT&T Corp. v. Bell Atlantic-Pennsylvania*, 14 FCC Rcd 556, 589, ¶76 (1998), *reconsideration denied*, 15 FCC Rcd 7467 (2000).

[85] The *North Carolina Staff Recommendation* favors US LEC's position on this issue, consistent with prior decisions authorizing reciprocal compensation payments on NXX calls where both customers are located within the same LATA. *North Carolina Staff Recommendation* at 8-9. Although North Carolina Staff's position is that US LEC must provide "traditional FX" service, the North Carolina Commission has never adopted this position. In any event, as the record reveals (Md. Tr. at 370, 380), US LEC clearly satisfies that requirement: it provides a dedicated facility between its switch and its FX customer. US LEC's service therefore meets the definition used by the North Carolina Commission in its *MCI Recommended Arbitration Order*. *See Petition of MCImetro Access Transmission Services, LLC for Arbitration of Certain Terms and Conditions of Proposed Agreement with BellSouth Telecommunications, Inc. Concerning Interconnection and Resale Under the Telecommunications Act of 1996*, Docket No. P-474, Sub 10, Recommended Arbitration Order, at 73-74 (NCUC Apr. 3, 2001) ("*MCI Recommended Arbitration Order*").

> remove these from what would otherwise be considered local calls for which reciprocal compensation is due. This practice would be unreasonable given the historical treatment of foreign exchange traffic as local traffic.
>
> Accordingly, the Commission finds that foreign exchange and virtual NXX services should be considered local traffic when the customer is physically located within the same LATA a[s] the calling area with which the telephone number is associated.[86]

These decisions are consistent with the results reached by the North Carolina Utilities Commission[87] and the Michigan Public Service Commission on a number of occasions. Each time, the Michigan Commission has decided not to reclassify foreign exchange service as non-local exchange traffic exempt from reciprocal compensation requirements.[88]

Furthermore, the public interest is served by adopting US LEC's position and would be harmed by adopting Verizon's. First, requiring US LEC to pay access charges for FX traffic would increase costs to businesses and their customers. Verizon does not propose to bill its own subscribers toll rates for calls to customers using US LEC's virtual NXX arrangements. Haynes Rebuttal at 5; Md. Tr. at 483-4. Instead, those toll charges would be assessed against US LEC. US LEC, in turn, would be forced to recover those charges from its FX customers. Those customers will have to raise rates that they charge their own customers that rely upon FX arrangements to access businesses.

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[86] *Petition of Level 3 Communications, LLC for Arbitration with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996*, Case No. 2000-404, Order, at 7 (Ky. PSC Mar. 14, 2001).

[87] *MCI Recommended Arbitration Order* at 67-74.

[88] *TDS Metrocom, Inc.*, Case No. U-12952, Opinion and Order (Mich. PSC Sept. 7, 2001), 2001 WL 1335639; *Application of Ameritech Michigan to revise its reciprocal compensation rates and rate structure and to exempt foreign exchange service from payment of reciprocal compensation*, Case No. U-12696, Opinion and Order (Mich. PSC Jan. 23, 2001); *Petition of Level 3 Communications, LLC for Arbitration Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996 to Establish an Interconnection Agreement with Ameritech Michigan*, Case No. U-12460, Opinion and Order (Mich. PSC Oct. 24, 2000); *Petition of Coast to Coast Telecommunications, Inc. for arbitration of interconnection rates, terms, conditions, and related arrangements with Michigan Bell Telephone Company, d/b/a Ameritech Michigan*, Case No. U-12382, Order Adopting Arbitrated Agreement (Mich. PSC Aug. 17, 2000); *Complaint of Glenda Bierman against CenturyTel of Michigan, Inc. d/b/a CenturyTel*, Opinion and Order, Case No. U-11821 (Mich. PSC Apr. 12, 1999).

Verizon proposes to "fix" the historical system of rating calls – a system that is not broken. Montano Rebuttal at 19. In the first place, it is crystal clear from the record that the "fix", which involves creating a database of FX customers, conducting traffic studies and then estimating the amount of traffic that is terminating to FX subscribers, is entirely intrusive, unworkable and expensive. Montano Rebuttal at 19. As Mr. Haynes admitted, the billing system "has to be told separately that it's outside the local calling area because it doesn't know that." Md. Tr. at 495. Thus, the "fix" would require both parties to inquire from its customers how they intend to utilize the services they purchase and where they intend to locate all of their facilities.[89] Montano Rebuttal at 19-20. It distinguishes traffic based solely on the location of the end user. It is dependent upon shifting customer bases, shifting traffic patterns, estimates of traffic and unworkable algorithms. It would require both parties to add wholly unnecessary steps and processes to an already cumbersome billing process. As Mr. Haynes admitted, "it is not a simple matter overnight to make [the fix] work tomorrow." Md. Tr. at 484-5. Clearly, given that US LEC has only 17 FX customers in Verizon's territory in Florida, the cost to US LEC of Verizon's "fix" is likely to be substantially more expensive than the amount of reciprocal compensation and other revenue that US LEC receives from its FX customers and the traffic they generate. Montano Rebuttal at 20.

Critically, Verizon's contract proposal does not include or define the proposed "fix" about which Mr. Haynes testified. Montano Rebuttal at 20. Equally critical to resolution of this issue is that nothing in the record demonstrates that Verizon's "fix" actually works, as evidenced by the fact that Verizon has been discussing a "fix" for over a year. Montano Rebuttal at 20. But, nowhere does Verizon state that its "fix" has been implemented, is functioning smoothly and is accurate, or has been reviewed by a state commission. Montano Rebuttal at 20.

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[89] A customer can have facilities in many locations, not all of which would utilize FX arrangements.

Missing entirely from Verizon's argument is the acknowledgement that there is a clear, irreconcilable conflict between Verizon's proposed contract language and its alleged "fix" that it wants to implement to distinguish between calls to FX subscribers and local calls. Montano Rebuttal at 20. Verizon's contract language states that reciprocal compensation will be paid based on the originating and terminating end-points of the call. Montano Rebuttal at 20. In contrast, Verizon's proposed "fix" has nothing to do with the beginning and end-points of a call; rather, like the compensation system it seeks to replace,[90] it still relies on the NPA/NXX of the called party. Montano Rebuttal at 20-21. The Commission should follow the lead of the FCC and adopt US LEC's proposed language.

In the end, Verizon's proposal is little more than an effort to foist additional costs on US LEC and other ALECs. As such, the Commission should adopt US LEC's proposal because it facilitates one of the fundamental goals of the Act — the deployment of competition. The use of FX services has enabled ALECs to provide end users with attractive local services throughout the state, including lightly populated areas. Verizon seeks to roll back this opportunity, which would result in increased toll charges to consumers and/or increased charges or equipment costs imposed upon ALECs. Verizon's proposal would make it more difficult for ALECs to provide competitive services, especially in sparsely populated areas. This is not in the best interests of the citizens of Florida. The Commission should adopt US LEC's position on Issue 6.

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?

US LEC: ****In the event the FCC's interim compensation framework is vacated or reversed, the parties should continue to compensate each other at the rates set

[90] Indeed, at the Maryland hearing, Mr. Haynes admitted that carriers look to the NPA/NXXs of the calling and called parties to rate and route calls. Md. Tr. at 474-6. He also admitted that the billing system was designed to rate calls based on this NPA/NXX comparison. Md. Tr. at 476.

> forth in the FCC's *ISP Remand Order*, but waive any other terms and conditions of that Order (*e.g.*, the growth caps and new market restrictions).****

Issue 7 addresses the question of what compensation arrangement should govern the parties' exchange and termination of ISP-bound traffic in the event the compensation framework in the FCC's *ISP Remand Order* is vacated or reversed on appeal. US LEC suggests that, in the event that portion of the *ISP Remand Order* is vacated or reversed on appeal, then the parties should continue to compensate each other at the rates set forth in the Order, but waive any other terms and conditions of that Order (*e.g.*, the growth caps and new market restrictions). Montano Direct at 40-41. Verizon, on the other hand, contends that if the compensation framework is vacated or reversed, then the parties should have to negotiate and, if necessary, arbitrate a new compensation framework.[91] Given the extensive litigation over this issue that already has occupied this Commission, such a prospect is daunting, at best.

Unlike the CLECs/ALECs that were parties in the recent arbitration before the Wireline Bureau, US LEC is not arguing for a return to state rates or for an expensive, retroactive, true-up in the event the compensation framework governing ISP-bound traffic is vacated or reversed.[92] Instead, in the interests of certainty and stability, and in order to avoid expensive and time-consuming negotiations and litigation, US LEC is willing to forego the opportunity to be compensated at state rates and proposes that the parties accept the rate structure—but not the limitations on growth and new markets—set forth in the *ISP Remand Order* for the balance of the term of the agreement, or until the FCC imposes a permanent rate structure governing that traffic. Montano Direct at 40.

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[91] *Verizon Response* at 31-32.

[92] For this reason, the Wireline Bureau's conclusion in the arbitration—that the parties' standard change of law provisions should govern—should be disregarded here.

Verizon declined US LEC's offer of compromise and refuses to address the issue in the agreement at all. Montano Direct at 40. Evidently, Verizon prefers instead to engage in lengthy negotiations and, most likely extensive litigation, with US LEC in order to fix obligations that can, and should be addressed at this stage of the proceeding. Montano Direct at 40.

Given the long battles between ALECs and Verizon over compensation for ISP-bound traffic that have been waged for years in Florida, US LEC sees Verizon's position as ensuring months of fruitless negotiations and possibly additional years of litigation over US LEC's entitlement to a payment stream that this Commission has held in the past was proper. Instead, US LEC submits that the proposed compromise—a certain rate structure guaranteed for the life of the contract—is a vastly superior alternative and should be adopted by the Commission.

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?**

US LEC: ****Non-tariffed charges must remain fixed for the term of the agreement, unless changed pursuant to a valid Commission order. A carrier should not have unbridled discretion to modify its rates at will, particularly those rates that are reflected in the parties' interconnection agreement.****

The issue raised is whether Verizon should be permitted to change its non-tariffed charges during the term of the agreement, or must such charges remain fixed for the entire term. US LEC submits that tariffed charges should be permitted to change during the term of the agreement due to changes in applicable tariffs, however, non-tariffed charges—*i.e.*, charges fixed in the agreement and not subject to any tariff—must remain fixed for the term of the agreement. US LEC's position was adopted by the South Carolina Commission, which found Verizon South's proposal "unpersuasive" and directed the parties to incorporate US LEC's proposed

language in their interconnection agreement.[93] US LEC urges the Commission to likewise reject Verizon's unreasonable proposal.

Verizon seeks the unrestricted ability to modify rates that the parties have agreed to in the agreement through subsequent tariff filings that would supercede the rates in the agreement. According to Section 1.5 of the proposed Pricing Attachment, Verizon reserves the right to supercede *any* rates (*i.e.*, both tariffed rates and non-tariffed rates) set forth in the parties' agreement with tariffed rates that are put in place after the parties have executed the agreement.

Although Verizon claims that it is not free to modify its tariffed rates generally because such changes take place only after they are submitted to the Commission before they are effectuated or emerge as a result of generic proceedings in which interested parties are able to participate in the review process (Verizon Response to US LEC Petition at 34), Verizon's justification is not convincing. Verizon fails to recognize the considerable burden, both in terms of financial cost and in diversion of personnel whose resources would otherwise be devoted to more pressing matters, that is placed on ALECs to dispute a particular rate proposal. The entire process undermines the purpose of having a binding interconnection agreement that provides relative pricing certainty to the parties in the first instance. Montano Direct at 43-44.

In addition to the US LEC/Verizon South Carolina arbitration, this issue was addressed in the recent arbitration before the Wireline Bureau. In that case, Verizon argued, as it does here, for the right to supercede any price by filing a subsequent tariff. WorldCom pointed out that, among other problems, permitting Verizon to supercede negotiated prices with subsequent tariffs shifts the burden of proof from Verizon (which has the burden of proving reasonableness of its

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[93] *South Carolina Arbitration Decision* at 31-33. The *North Carolina Staff Recommendation* similarly suggests that US LEC's position be adopted. *North Carolina Staff Recommendation* at 13.

rates in a negotiated interconnection agreement) to a CLEC/ALEC (which must prove that a filed tariff should be rejected).[94]

The Wireline Bureau "reject[ed] Verizon's proposed language because it would allow for tariffed rates to replace automatically the rates arbitrated in this proceeding. Thus, rates approved or allowed to go into effect by the Virginia Commission would supercede rates arbitrated under the federal Act."[95] Instead, the FCC adopted WorldCom's language that would permit tariff revisions that "materially and adversely" affect the negotiated terms of the agreement to become effective only upon the parties' written consent or upon the affirmative order of the Virginia Commission.[96]

Here, US LEC submits that non-tariffed rates that the parties have negotiated, or that have been fixed by the Commission, should be fixed for the term of the agreement (with the exception of rates that must be modified due to changes in Applicable Law, which are addressed in other sections of the agreement). The Commission should reject Verizon's proposal.

CONCLUSION

For the reasons set forth herein, the Commission should adopt US LEC's proposed resolution of each unresolved issue and reject Verizon's proposed language. In each instance, the resolution advocated by US LEC (a) implements the statutory rights and duties imposed by the Act, as interpreted by the FCC and this Commission, (b) maintains widespread and long-held customs and practices within the telecommunications industry, and (c) advances and encourages the development of true competition in the market for local exchange services.

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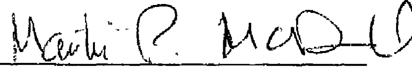
[94] *FCC Arbitration Order* at ¶ 592. This ruling was cited and discussed by the South Carolina Commission in connection with its ruling in US LEC's favor. *South Carolina Arbitration Decision* at 32-33.

[95] *FCC Arbitration Order* at ¶ 600.

[96] *FCC Arbitration Order* at ¶ 590.

Respectfully submitted,



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I HEREBY CERTIFY that a copy of the foregoing was served on the following individuals by U.S. Mail this 24th day of February, 2003.

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