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April 29, 2003

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BY OVERNIGHT MAIL

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

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

Dear Ms. Bayo:

I write to submit, as supplemental authority relevant to issues in the above-captioned proceeding, an Order of the Pennsylvania Public Utility Commission ("PA PUC") in the arbitration between US LEC of Pennsylvania, Inc. and Verizon Pennsylvania Inc.[1] The PA PUC reversed several determinations of the Administrative Law Judge on which US LEC had relied; the PA PUC also reversed one holding on which Verizon had relied. A copy of the decision is attached.

First, with respect to treatment of "Voice Information Services" traffic (**Issue 3**), the PA PUC reversed the Administrative Law Judge and **adopted Verizon's position** in this proceeding, holding that Voice Information Services traffic is not subject to reciprocal compensation. As the PA PUC held:

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[1] Opinion and Order, *Petition of US LEC of Pennsylvania, Inc., for Arbitration with Verizon Pennsylvania Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, A-310814F7000 (PA PUC rel. Apr. 18, 2003) ("*Order*").

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> We agree with . . . Verizon that Voice Information Services do indeed fall squarely within the definition of Information Access. As a result, our reading and interpretation of the regulations cited above leads us to conclude that Voice Information Services are excluded from the definition of telecommunications traffic and thus are not subject to reciprocal compensation.

Order at 24.

Second, with respect to treatment of "Virtual FX" Traffic (**Issue 6**), the PA PUC reversed the ALJ's determination and instead **agreed with Verizon** that "calls to VNXX telephone numbers that are not in the same local calling area as the caller should not be subject to reciprocal compensation." *Id.* at 58. The PA PUC held:

> [W]e are not convinced that US LEC's arguments that the industry-wide practice of rating a call based upon its assigned NXX is viable under the recent phenomena of VNXX. Although the calls that are made to VNXX telephone numbers appear to be local to the end-user caller, the location of the calling and called parties leads us to conclude that they are in the *nature* of interexchange calls that [the 1996 Act] would remove from reciprocal compensation obligations. Based on an "end-to-end" analysis of a VNXX call, the physical locations of the caller and called party are in two different exchanges that may not be local to each other. As a result, we are of the opinion that calls to VNXX telephone numbers should not be subject to reciprocal compensation.
>
> The [PA PUC] believes that the intercarrier compensation for calls utilizing virtual NXX/FX codes should be based upon the end points of the call, rather than upon the NPA/NXX assigned to the calling and called parties. As noted by the FCC, it has traditionally determined the jurisdictional nature of a call by its origination and termination points or end points, and not by its telephone number assignment. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, CC Docket No. 99-68, 16 FCC Rcd 9151 (2001) (*ISP Remand Order*), *remanded*, *WorldCom, Inc v. FCC*, 288 F.3d 429 (D.C. Cir. 2002); s*ee also Teleconnect Co. v. Bell Telephone Co. of Penn.*, E-88-83, 10 FCC Rcd 1626 (1995) (*Teleconnect*), *aff'd sub. nom. Southwestern Bell Tel. Co. v. FCC,* 116 F.3d 593 (D.C. Cir. 1997); *Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corporation*, 7 FCC Rcd 1619 (1992) (*Bell South Memory Call*), *aff'd*, *Georgia Pub. Serv. Comm'n v. FCC*, 5 F.3d 1499 (11th Cir. 1993); *see generally, Mountain Communications; AT&T Corp. v. Bell Atlantic-Pennsylvania*, 14 FCC Rcd 556 (1998), *recon. denied*, 15 FCC Rcd 7467 (2000).

> The [PA PUC] acknowledges that pursuant to the end-to-end analysis used by the FCC, the VNXX traffic in question would not be considered local under the current interpretation of [the 1996 Act] as the traffic terminates outside of the local calling area of the calling party (ILEC customer). The FCC's regulations require reciprocal compensation only for the transport and termination of traffic "that originates and terminates within a local calling area established by a state commission." 47 C.F.R. §51.701(a)-(b)(1). Since VNXX traffic does not originate and terminate in the same rate center or local exchanges, we conclude that VNXX FX traffic is not subject to reciprocal compensation.

Id. at 61-62. The PA PUC also declined to order payment of originating access charges and instead held, "as an interim determination, that such traffic be compensated on a 'Bill and Keep' basis." *Id.* at 58.

In addition, with respect to incorporation of generally applicable tariffs (Issue 9 in the *Order*, **Issue 8** in this proceeding), the PA PUC found that "negotiated, non-tariff rates, which otherwise cannot be changed except by agreement" would not be modified by the filing of a tariff covering the service in question. *Id.* at 74-75.

I have enclosed one extra copy of this letter. Please date-stamp and return the extra copy in the self-addressed, postage-prepaid envelope. Thank you for your assistance. If you have any questions, please call me at (202) 326-7921.

Sincerely,

Aaron M. Panner

cc: Parties of Record (by first class mail)

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265

Public Meeting held April 17, 2003

Commissioners Present:

Glen R. Thomas, Chairman
Robert K. Bloom, Vice Chairman
Aaron Wilson, Jr.
Terrance J. Fitzpatrick
Kim Pizzingrilli

Petition of US LEC of Pennsylvania, Inc. for Arbitration with Verizon Pennsylvania Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996

A-310814F7000

OPINION AND ORDER

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I. MATTER BEFORE THE COMMISSION

Before the Commission for disposition are Exceptions filed to the Recommended Decision (R.D.) of Administrative Law Judge (ALJ) Louis G. Cocheres, issued September 17, 2002, in this telecommunications arbitration proceeding. Exceptions were filed by US LEC of Pennsylvania, Inc. (US LEC) and Verizon Pennsylvania Inc. (Verizon) on October 3, 2002. Pursuant to the cover letter accompanying the Recommended Decision, the Parties were informed that Reply Exceptions would not be entertained by the Commission.

II. HISTORY OF THE PROCEEDING

This proceeding is the Petition for Arbitration (Petition) of unresolved issues arising between US LEC and Verizon, for the purpose of establishing an Interconnection Agreement pursuant to the provisions of the federal Telecommunications Act of 1996 (TA-96), 47 U.S.C. §252, and the Commission's *Implementation Orders*.[1]

US LEC is a certificated competitive local exchange carrier (CLEC) which provides facilities-based telecommunications services. US LEC is interconnected with Verizon in the Philadelphia and Pittsburgh LATAs. Verizon and US LEC first entered into an Interconnection Agreement in 1999. On November 17, 2001, Verizon and US LEC began negotiations for a new Interconnection Agreement (Agreement). The Parties were able to resolve the majority of the contractual issues. However, on April 26, 2002, US LEC filed its Petition which initially referred eleven issues to the Commission for arbitration. Three of those issues (Issue Nos. 7, 10 and 11) were subsequently resolved by the Parties prior to the issuance of the Recommended Decision in this matter. Said Petition included a copy of the proposed Interconnection Agreement and all of its attachments. Verizon filed a timely response on May 21, 2002.

US LEC waived the time restrictions set forth in TA-96, for the arbitration of unresolved issues. 47 U.S.C. §252(b)(4)(C); US LEC Prehearing Memorandum, dated May 15, 2002. A Prehearing Conference was held by telephone on May 17, 2002, and the Parties agreed upon a procedural schedule.

One hearing was held in Harrisburg, Pennsylvania on July 17, 2002. US LEC presented two witnesses, their prepared statements and attached exhibits and

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[1] *See Implementation of the Telecommunications Act of 1996*; Docket No. M-00960799 (Order entered June 3, 1996; Order on reconsideration entered September 9, 1996).

five additional exhibits (two were late-filed). Verizon presented three witnesses, their prepared statements and attached exhibits and six additional exhibits. A post-hearing conference was held on-the-record on July 23, 2002.

Each Party submitted its Best and Final Offers on July 25, 2002. Main and Reply Briefs were filed on August 1, 2002 and August 9, 2002, respectively. Included with the briefs were extensive appendices containing many of the legal authorities cited by the Parties. No part of our decision should be interpreted as consenting to exclusive or concurrent federal court jurisdiction over any appeal.

III. DISCUSSION

A. Standard of Review

Section 252(c) of TA-96, 47 U.S.C. §252(c), sets forth the standards for a State commission to use when arbitrating unresolved issues:

> (c) STANDARDS FOR ARBITRATION.--In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall—
>
> (1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251;
>
> (2) establish any rates for interconnection, services, or network elements according to sub-section (d); and
>
> (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

In addition, 47 U.S.C. §252(e) provides the standards by which the state commission may approve or reject an Interconnection Agreement:

> (e) Approval by State commission.
>
> (1) Approval required. Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) Grounds for rejection. The State commission may only reject--

* * *

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) if it finds that the agreement does not meet the requirements of section 251 [47 USCS § 251], including the regulations prescribed by the Commission pursuant to section 251 [47 USCS § 251], or the standards set forth in subsection (d) of this section.

In addressing the standards under which this Commission must review Interconnection Agreements, ALJ Cocheres concluded that only determinations of the Federal Communications Commission (FCC), acting pursuant to the delegated authority of TA-96, were entitled to deference upon judicial review. *See* R.D., p. 3; citing *MCI Telecommunication Corporation v. Bell Atlantic-Pennsylvania*, 271 F. 3d 491, 515-516 (3rd Cir. 2001) (*MCI v. Bell*). The presiding ALJ also noted that the determinations of the FCC Wireline Bureau Staff, acting in the capacity as arbitrator for an Interconnection Agreement in the jurisdiction of Virginia, addressed similar issues as presented in the instant arbitration. The FCC Wireline Bureau's Staff determinations were in accord with ALJ Cocheres' understanding of the law and the FCC regulations. Consequently, he placed emphasis on the reasoning of the FCC Staff and quite often adopted said reasoning as his own. *See* R.D., pp. 3-4 citing *In the Matter of 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 et al*, CC Docket No. 00-218, CC Docket No. 00-249 and CC Docket No. 00-251, Memorandum Opinion and Order, by the Chief, Wireline Competition Bureau, released July 17, 2002 (*VA Arbitration Order*).

B. Unresolved Issues

As a preliminary matter, we note that any issue or Exception that we do not specifically address has been duly considered and will be denied without further discussion. It is well settled that we are not required to consider, expressly or at length, each contention or argument raised by the parties. *Consolidated Rail Corporation v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); also *see*, generally, *Univ. of Pa. v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

The Parties combined Issue Nos. 1 and 2 for hearing and briefing purposes. The designation of the issues, below, is taken from the Petition for Arbitration filed by US LEC. (R.D., pp. 6-7):

1. Issue No. 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?

Issue No. 2: Should Verizon be permitted to force US LEC to designate its collocation site at a Verizon end office as the US LEC-IP where Verizon will deliver its traffic? (R.D., p. 7 citing Petition at 4 and 10).

a. Position of the Parties

Verizon proposed language to establish a Virtual Geographically Relevant Interconnection Point (VGRIP). The VGRIP proposal has been presented by Verizon in

other arbitration proceedings.[2] Under the VGRIP proposal, when traffic must be transported outside of the local calling area where the call originated, the CLEC would be required to either perform this transport itself or compensate Verizon for the additional costs incurred as a result of US LEC's decision to serve callers in a local calling area from a switch which is located outside of Verizon's local calling area. *See* VZ Proposal, Interconnection Attachment Sections 7.1.1.1.1; 7.1.1.2, 7.1.1.3. Verizon's VGRIP proposal would offset its reciprocal compensation obligation to the CLEC by additional costs comprised of the following components: distance sensitive transport, fixed dedicated transport, switching, and other costs. These are costs that Verizon incurs based on US LEC's network architecture, *i.e.* its choice of one switch per Local Access and Transport Area (LATA).

The VGRIP establishes a demarcation point pursuant to which a CLEC would bear financial responsibility for traffic which is transported to this location. The point of financial responsibility, as distinguished from the point where the traffic is physically exchanged (point of interconnection or POI), is referred to as the inter-connection point (IP). This is a "virtual" location chosen on Verizon's network without regard to where the traffic is actually physically exchanged. US LEC concisely described Verizon's VGRIP proposal as follows:

> Verizon describes its VGRIPs proposal as including three "options." However, these options have been unilaterally

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[2] *See In the Matter of Global NAPs, Inc. Petition for Arbitration Pursuant to 47 U.S.C. 252(b) of Interconnection Rates, Terms and with Verizon Pennsylvania, Inc.;* Docket No. A-310771F7000 (Recommended Decision of ALJ Smolen issued October 23, 2002); *Petition of Sprint Communication Company, L.P. for an Arbitration Award of Interconnection Rates, Terms and Conditions Pursuant to 47 U.S.C. §252(b) and Related Arrangements with Verizon Pennsylvania, Inc.*, Pa. PUC Docket No. A-310183F0002, Opinion and Order (October 12, 2001) (*Sprint Arbitration Order*), slip op., p. 56; *VA Arbitration Order*.

> defined by Verizon, thus significantly limiting any alleged choice US LEC has in establishing interconnection arrangements with Verizon. Under the first option, Verizon may request that US LEC establish a collocated IP at each Verizon tandem where US LEC provides local service. D'Amico Direct at 10. Under the second option, if US LEC establishes a collocation arrangement at a Verizon end office, Verizon may request that US LEC establish an IP at that collocation arrangement. D'Amico Direct at 10. Verizon repeatedly emphasizes that US LEC may decline these requests. D'Amico Direct at 10, 12; D'Amico Rebuttal at 3-4. However, if US LEC declines, it is stuck with option three. Tr. 49:1-50:5 (Hoffmann Cross). Under option three, the virtual IP option, US LEC must pay for the costs of transporting Verizon's originating traffic *from the Verizon end office* to US LEC's chosen IP. Tr. 124:1-9 (D'Amico Cross).

US LEC M.B. at 14. (Emphasis in the original.)

Verizon took the position that because US LEC selected a single interconnection point in each LATA, its VGRIP proposal would fairly compensate it for the loss of toll revenue and the added costs of transport and switching costs for calls originating on its network that were delivered to US LEC customers at US LEC's designated POIs. Verizon also argued that its proposed contract language would allocate the costs of US LEC's interconnection format equitably and in accordance with federal law and prior FCC and Commission decisions. (R.D., pp. 8-9).

Verizon primarily relied upon *MCI v. Bell*, 271 F. 3d 491, 515-516 (3rd Cir. 2001), for the position that it had the right to be compensated by the CLEC for "expensive" interconnection based on the CLEC's choice of POI. Verizon also relied upon language in the *FCC Local Competition Order*, ¶199 and state commission decisions in North Carolina

and South Carolina, which upheld VGRIP-like proposals.[3] Verizon distinguished the *VA Arbitration Order* and argued against the relevance of this decision. Verizon contended that the *VA Arbitration Order* did not follow prior FCC guidance and represented an erroneous application of federal law. (R.D., pp. 8-9).

US LEC opposed Verizon's VGRIP proposal as inconsistent with both federal and state policies which have as their goal, removing barriers to local competition. US LEC asserted that, contrary to Verizon's arguments, federal rules imposed the obligation on Verizon to transport its originating traffic beyond the point of interconnection (POI). (R.D., pp. 7-8 citing US LEC M. B., pp. 12-18; 21-22; R.B., pp. 2-11). US LEC additionally argued that Verizon's arguments in support of VGRIP ignored the requirements of TA-96 and FCC rules, were based on limited quotations from federal and state cases which ultimately did not support Verizon's position, and that Verizon had mischaracterized its testimony about US LEC's right to interconnect engineering. (R.D., p. 8).

b. ALJ Recommendation

The ALJ recommended that US LEC's proposal be adopted without modification. While noting that he did not agree with all portions of US LEC's arguments, ALJ Cocheres concluded that the Commission has previously reviewed the VGRIP proposal and rejected it. (R.D., pp. 9-16). The ALJ also relied on relevant text from the *VA Arbitration Order* and generally adopted the reasoning as his own. The ALJ noted that Verizon made the same arguments in the *VA Arbitration Order* as in the present case, and that those arguments were rejected. (R.D., pp. 12-16).

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3 *See 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 (1996) (*Local Competition Order*)

c. **Exceptions**

Verizon excepts to the recommendation of ALJ Cocheres and raises the following general objections. Verizon argues that law and Commission precedent support its position that it is entitled to receive compensation for transporting traffic outside of its local calling area. Also, Verizon argues that its VGRIP proposal fairly and equitably compensates it for the additional costs that it incurs when US LEC selects a single point of interconnection per LATA. Finally, Verizon relies on Section 252(c)(1) of TA-96, to argue that the Commission is not limited to the proposals of the Parties at the start of an arbitration to resolve the disputed issues. Therefore, as an alternative, Verizon urges the Commission to resolve this issue consistent with the proposal adopted in the *Sprint Arbitration Order*. (VZ Exc., pp. 26-35). We discuss in more detail those contentions, below.

Regarding the applicable law, Verizon opines that the ALJ's decision is contrary to *MCI v. Bell*. This case is relied on by Verizon for the proposition that it expressly directed this Commission to consider shifting costs of "expensive" inter-connection to the CLEC that causes them. (VZ Exc., p. 26).

Verizon also argues that the ALJ's reliance on the *VA Arbitration Order* is misplaced because: (1) the FCC Wireline Bureau's decision is neither binding nor entitled to any deference by this Commission and cannot provide a basis for the ALJ to recommend a result that is inconsistent with *MCI v. Bell* which stated that the Commission should consider shifting costs to the CLEC if the CLEC's chosen network architecture proves more expensive to Verizon; and (2) the FCC Wireline Bureau's decision does not provide a basis for the ALJ to ignore or override this Commission's previous conclusions that a single POI per LATA is expensive and not economically neutral, and that a requesting carrier is required to bear the cost of that interconnection, including a reasonable profit, pursuant to TA-96, Section 252(d)(1), 47 U.S.C.

§252.(d)(1). *See* VZ Exc., pp. 26-30. Moreover, Verizon critiques the *VA Arbitration Order* as failing to reconcile its recommendation with Para. 199 of the *Local Competition Order* and Para. 100, n. 342 of the *Pennsylvania Section 271 Order*.[4]

Verizon aggressively defends its VGRIP proposal as one that fairly and equitably compensates it for the additional costs that it incurs in transporting traffic to the CLEC's POI when the CLEC, such as US LEC, selects a single point of interconnection per LATA that is outside of the local calling area where the call originated. (VZ Exc., pp. 31-33). Under the VGRIP proposal, US LEC must either perform this transport itself or compensate Verizon for performing the task. Verizon explains that its VGRIP proposal provides that the amount US LEC charges Verizon for reciprocal compensation shall be reduced by:

> Verizon's transport rate (calculated by taking the dedicated transport per mile rate multiplied by the average mileage between the originating end offices and the CLEC POI plus the fixed dedicated transport rate and dividing the total by the average minutes of use for a DS1), tandem switching rate (to the extent the traffic is tandem switched), and other costs (to the extent Verizon purchases such transport from US LEC or a third party), from Verizon's originating End Office to US LEC's IP.

See Verizon Proposal, Interconnection §7.1.1.1; *accord id.* §§7.1.1.2, 7.1.1.3.

Verizon explains that the above plan is fair because the three components (transport, switching (if performed), and other costs (if incurred) listed in Verizon's proposal are precisely the additional costs that Verizon claims it would incur based on US LEC's choice to serve callers in a local calling area from a switch located outside of

---

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

that local calling area. Verizon emphasizes that it is important to recognize, as did the ALJ, that contrary to US LEC's opposition, should the Commission adopt VGRIP, this would not affect US LEC's right to establish a single POI per LATA at any technically feasible point within Verizon's network in accordance with 47 C.F.R. §51.305(a)(2). (VZ Exc., pp. 31-33).

Finally, Verizon requests that if the Commission decides not to adopt its VGRIP proposal, it should instead adopt the provision in Part V, Section 1.2.3. of the Agreement approved in the *Sprint Arbitration Order*, rather than adopt US LEC's proposal. (VZ Exc., pp. 33-35).

d. Disposition

On consideration of the positions of the Parties, we are not persuaded that the ALJ's recommendation should be reversed in favor of either Verizon's VGRIP proposal or the adoption of Section 1.2.3 of Part V that was approved in the Sprint-Verizon Interconnection Agreement.

The VGRIP establishes a point at which the CLEC will bear financial responsibility for traffic. The point where financial responsibility attaches, under VGRIP, is the IP (interconnection point) and is a "virtual," as compared to actual, location which is chosen on Verizon's network on the basis that the POI could be located at an inconvenient or inefficient point on the network. Verizon provides the following example:

> US LEC serves customers in the Philadelphia and Pittsburgh LATAs from a single switch in each LATA, located in Philadelphia and Pittsburgh, respectively. . . . Therefore, when a Verizon customer in, for example, Allentown calls an Allentown resident who is a US LEC customer, the call must be transported outside of the Allentown local calling area to

> US LEC's switch in Philadelphia, a distance of approximately 50 miles. . . . Under US LEC's proposal, it is Verizon that must bear the cost of performing this transport. Yet Verizon would not receive toll revenues (or access charges) for this call, even though a call from Allentown to Philadelphia is a toll call. . . .

(VZ Exc., pp. 27-28).

Thus, the IP is chosen by Verizon based on proximity to Verizon's central offices or tandem serving areas. The VGRIP proposal is Verizon's attempt to have the CLEC's choice of POI equitably moderated as VGRIP provides a financial deterrent for the choice of an expensive POI. However, under VGRIP, an IP could result in imposing financial responsibility on the CLEC for traffic originating on Verizon's network.

Based on the foregoing, while the choice of one POI in a LATA could result in increased transport costs to Verizon, and this concern is valid, we find that this issue has been addressed by the courts and FCC rules. A review of both sources leads us to reject Verizon's VGRIP proposal as an unacceptable approach to Verizon's concerns.

In *MCI v. Bell*, the court, citing *U.S West Communications v. AT&T Communications of the Pa. Northwest,* 31 F. Supp. 2d 839 at 852 (D.Or. 1989) (*US West*) acknowledged that a state commission may have discretion in providing for multiple IPs within a LATA or otherwise shift costs where the CLEC's choice of interconnection proves expensive:

> To the degree that a state commission may have discretion in determining whether there will be one or more inter-connection points within a LATA, the commission, in exercising that discretion, must keep in mind whether the cost of interconnecting at multiple points will be prohibitive, creating a bar to competition in the local service area. See *AT&T-Pac.,* 31 F. Supp. 2d at 852. If only one inter-connection is necessary, the requirement by the commission

> that there be additional connections at an unnecessary cost to the CLEC, would be inconsistent with the policy behind the Act. . . .
>
> To the extent, however, that Worldcom's decision on interconnection points may prove more expensive to Verizon, the PUC should consider shifting costs to Worldcom. *See* 11 FCC Rcd 15499 P 209 (1996).

(271 F. 3d at 518).

In reversing the Commission's determination to direct one POI per access tandem serving area, the court, in the above-cited language, did leave open the potential for the Commission to use its discretion to consider shifting costs from Verizon so as to achieve an equitable apportionment of transport costs where the CLEC decision on interconnection points proves expensive. Nevertheless, the discretion left to this Commission should be exercised consistent with current law and policy. On review of the record, we are not convinced that the choice of a single POI per LATA is expensive to Verizon. We agree with US LEC's witness Frank R. Hoffman, Jr., who pointed out that the FCC has not formally ruled on whether or not a single POI per LATA is, per se, expensive. Mr. Hoffman notes that the FCC expressed its concern in its *Local Competition Order* as to whether requiring CLECs to pay ILECs for transport outside of a local calling area or requiring CLECs to increase the number of POIs per LATA would be considered forcing the competitive carrier into an inefficient replication of the ILEC network.[5] (US LEC St. 1, pp. 15-16). Verizon has not adequately demonstrated how expensive the POI choices of US LEC actually are. Neither has it shown the magnitude of alleged economic harm.

Also, even though Verizon's proposal would, in theory, allow US LEC to obtain interconnection at any technically feasible point in accordance with 47 U.S.C.

[5] *See Local Competition Order*, ¶199.

§251(c)(2) and 47 C.F.R. §51.305(a)(2), the financial consequences of exercising this privilege run counter to FCC rules implementing the TA-96 prohibition against imposing costs on traffic originating on a LEC's network. *See VA Arbitration Order*, Para. 53. Under VGRIP, Verizon's costs would be imposed on US LEC in contravention of Section 252 of TA-96. 47 C.F.R. §51.703(b).[6] We conclude that the VGRIP proposal, as presented by Verizon in this record, would be contrary to the FCC's requirement that places the financial obligation on originating carriers to deliver traffic to the point where it is "handed off" to the terminating carrier. Current rules prohibit the imposition of those costs on the terminating CLEC.[7]

Finally, we find the result and reasoning reached in the *VA Arbitration Order* to be supportable, and Verizon's reliance on the *Sprint Arbitration Order* to be distinguishable from the circumstances here.

In the *Sprint Arbitration Order*, we accepted a "compromise" proposal of Sprint, which provided an appropriate balancing of considerations involving additional costs to Verizon where the CLEC's choice of POI is inefficient as per Verizon's network.

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6 §51.703 Reciprocal compensation obligation of LECs.

* * *

(b) A LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network.

7 *See Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, FCC 01-132, ¶ 70 (rel. April 27, 2001) (*Intercarrier Compensation NPRM*). 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 FCC regulations, the cost of the facilities used to deliver this traffic is the originating carriers' responsibility, because these facilities are part of the originating carriers' 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.

(Slip op., p. 55). Sprint's compromise proposal, summarized at slip op., p. 52 of the Order, provides for the grandfathering of existing Verizon/Sprint interconnection locations and required that new Sprint facilities be established within five (5) miles of Verizon's switching center, tandem, or end office switch. Sprint's proposal additionally called for additional interconnection points if traffic is greater than 8.9 million minutes per month (the equivalent of Verizon's DS3-type traffic) and greater than twenty (20) miles and not in a local calling area. (*Id.*).

We do not find the "compromise" proposal, adopted in the Sprint Arbitration, an appropriate disposition for this proceeding. In the Sprint Arbitration this Commission expressed a concern to maintain competitive neutrality in light of the CLEC's right to choose one POI per LATA. The pertinent considerations are reprinted, below:

> Sprint's proposal will substantially reduce the transport costs that Verizon incurs under the present interconnection point arrangement. In addition, it will ensure that Verizon does not dictate the specific area where Sprint interconnects its facilities with Verizon because Sprint has the option of locating its POP anywhere within five miles from Verizon's tandem. Furthermore, the grandfathering of Sprint's existing locations would ensure that other CLECs that decide, under the "most favored nation" (MFN) clause of TA-96, to opt into the Sprint/Verizon interconnection agreement arrangement would be bound to the five-mile limitation. . . . This, in our view, would assist in alleviating the unreasonable transport cost that Verizon must pay today under other interconnection agreements. Furthermore, transport costs to Sprint's existing interconnection points should pose no problem to Verizon in light of the fact that the record shows that most of Sprint's existing interconnection points are located close to Verizon's tandems.

(Slip op., pp. 55-56) (Notes omitted).

Integral to the *Sprint Arbitration Order* reasoning was the fact that Sprint had interconnection points located close to Verizon's tandems. Therefore, while the compromise proposal was reasonable in the Sprint Arbitration, such a proposal in the instant proceeding does not account for the fact that US LEC, unlike Sprint, does not have a legacy network based on its status as an incumbent in Pennsylvania.[8] It is, apparently, US LEC's business plan, as with other CLECs, to generally maximize the use of one switch per LATA. The FCC rules and TA-96 strike a balance between the needs of the CLEC and the ILEC. The interconnection must be technically feasible, while, at the same time, the CLEC cannot be impermissibly forced into duplicating the ubiquitous network or replicating the architecture of the incumbent. Therefore, while this Commission has the discretion to consider a shifting of costs where the interconnection choices of the CLEC prove expensive, we do not find Verizon's VGRIP proposal to be an acceptable response and we will not adopt it.

We also conclude that the VGRIP proposal is inconsistent with the *VA Arbitration Order* and that determinations in other states militate against its adoption.[9]

Verizon has made extensive argument to discount the precedent value of the *FCC VA Arbitration Order*. While this Order, as noted by Verizon, is not conclusive upon this Commission, we find that the FCC Wireline Bureau's reasoning and the result is consistent with the determination of the full FCC. *See TSR Wireless, LLC v. US West Communications, Inc.*, 15 FCC Rcd 11166 (2000) (holding that LECs may not charge for either transport or facilities for LEC-originated, intraMTA traffic to the paging carrier's

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8 Sprint is a CLEC, but also has a "legacy" network based on its status as an incumbent local exchange carrier in Pennsylvania.

9 The NY PSC rejected the VGRIP under analogous circumstances. *Petition of Global Naps, Inc. Pursuant to Section 252(B) of The Telecommunications Act of 1996, For Arbitration to Establish an Intercarrier Agreement with Verizon New York, Inc.*, Case 02-C-0006 (NY PSC May 24, 2002) (*Global New York Order*).

point of interconnection), *aff'd sub nom, Qwest Corp. v. FCC*, 252 F.3d 462 (D.C. Cir. 2001).

Also, the FCC's *Intercarrier Compensation NPRM*, Paragraph No. 70, strongly implies that under current rules, originating carriers must bear the cost of transporting traffic to the POI of the terminating carrier.

Based on the foregoing, the current system of each Party having responsibility for transport of originating traffic should not be circumvented by language which imposes a financial responsibility on the CLEC for Verizon's originating traffic. To the extent a demonstration is made that the CLEC's choice of interconnection points is unduly expensive to Verizon and acts counter to the goals of TA-96, we would consider a modification in a separate proceeding wherein Verizon would have the burden of proof. We shall deny Verizon's Exceptions and adopt the ALJ's recommendation on this issue. We note that in light of the fact that we are rejecting Verizon's VGRIP proposal, Issue No. 2, which would permit Verizon to require US LEC to designate its collocation site at a Verizon end office as the US LEC-IP where Verizon will deliver its traffic, is a moot issue, since that requirement was part of Verizon's VGRIP proposal.

2. Issue No. 3: Is US LEC entitled to reciprocal compensation for terminating Voice Information Services traffic? (*See* Petition p. 12).

a. Positions of the Parties

US LEC asserted that Verizon inappropriately sought to exclude the entire category of "Voice Information Services" traffic from Verizon's reciprocal compensation

obligations.[10] US LEC argued that Voice Information Services fit within the definition of "Reciprocal Compensation Traffic" which is the basis for reciprocal compensation obligations. US LEC explained that the only traffic excluded from reciprocal compensation obligations was interstate or intrastate Exchange Access, Information Access, or exchange services for Exchange Access or Information Access. US LEC presented the definition for each of the excluded categories and concluded that Voice Information Services did not fit into any of them.[11] Referring to the *VA Arbitration Order*, US LEC noted that the Wireline Bureau had already rejected similar Verizon arguments which attempted to exclude telecommunications traffic from reciprocal compensation obligations if the traffic fell within the purview of Section 251(g) of TA-96. 47 U.S.C. §251(g).[12] US LEC posited that there was no technically feasible, cost-effective way to segregate Voice Information Services traffic from other traffic. (R.D., pp. 17-18 referring to US LEC M.B., pp. 28-29).

Verizon contended that Voice Information Services falls within the exclusions to reciprocal compensation and that, pursuant to 47 C.F.R. §51.701(b)(1), it is not required to pay reciprocal compensation for traffic that is interstate or intrastate exchange access, information access or exchange services for such access. Verizon noted that it had revised its Best and Final Offer to track the language of the FCC regulation. Verizon also disputed US LEC's assertion that Voice Information Services traffic typically originated and terminated within a local calling area. Based on the concept that

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[10] For purposes of this Agreement the Parties agree that: (a) Voice Information Service means a service that provides [i] recorded voice announcement information or [ii] a vocal discussion program open to the public, and (b) Voice Information Service Traffic means intraLATA switched voice traffic, delivered to a Voice Information Service. Voice Information Service Traffic does not include any form of Internet Traffic. Voice Information Service Traffic also does not include 555 traffic or similar traffic with AIN service interfaces, which traffic shall be subject to separate arrangements between the Parties. Section 5.1 of Additional Services Attachment.

[11] US LEC M.B., pp. 25-27.

[12] US LEC M.B., pp. 27-28.

Voice Information Services fell within the exclusions to reciprocal compensation, Verizon dismissed the US LEC position that Voice Information Services traffic could not be identified and segregated. (R.D., pp. 18-19).

b. ALJ Recommendation

After considering the positions of the Parties, the ALJ recommended that the position of US LEC be adopted. He reasoned that Voice Information Services should be subject to reciprocal compensation obligations. The ALJ noted that the reciprocal obligations agreed upon by the Parties may change through the requisite review by the FCC of its decision in the *ISP Remand Order*[13] as directed by the remand by the United States Court of Appeals, D. C. Circuit. *WorldCom, Inc. v. Federal Communications Commission*, 288 F. 3d 429 (D.C. Cir. 2002) (*WorldCom v. FCC*). (R.D., p. 19).

The ALJ also found that Voice Information Services fit squarely within the meaning of Information Access as used in *United States v. AT&T*, 552 F. Supp. 131, 229 (D.D.C. 1982) (*Modified Final Judgment*). The ALJ additionally found that Voice Information Services fall within the definition of Information Access because Verizon's customers will originate traffic which Verizon must transmit, switch, or route to a provider of information services. Voice Information Service providers, according to ALJ Cocheres, fit squarely within the meaning of Information Services as used in Sections 153(20) and 251(g) of TA-96 (47 U.S.C. §§153(20) and 251(g)) because they offer the capability of storing, retrieving, utilizing or making available information via telecommunications. (R.D., pp 19-20).

[13] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, at CC Docket No. 96-98 and CC Docket No. 99-68, Released April 27, 2001.

c. Exceptions

In Exceptions, Verizon argues that the ALJ's conclusion that Voice Information Service fits squarely within the meaning of Information Access, as defined by the *Modified Final Judgment*, should have resolved the issue in its favor, because there is no dispute among the Parties that Information Access is not subject to reciprocal compensation. Verizon argued that the ALJ erred in concluding that Voice Information Services should be subject to reciprocal compensation obligations, even though he determined that Voice Information Services fit the definition of traffic not subject to reciprocal compensation. (VZ Exc., p. 35).

Verizon argues further that the *VA Arbitration Order* is not relevant in this instance because the parties in that proceeding disputed a provision as to whether all access traffic should be excluded from reciprocal compensation obligations. Verizon continues that in the matter before us, the Parties have agreed that reciprocal compensation shall not apply to interstate or intrastate Exchange Access, Information Access, or exchange services for Exchange Access or Information Access. (VZ Exc., pp. 35-37). As such, Verizon argues that since the ALJ recognized that Voice Information Services fall within the meaning of information access, the ALJ should have adopted Verizon's proposed language.

d. Disposition

The resolution of this matter turns on a determination as to whether Voice Information Service fits the definition of Information Access. Upon our careful consideration of the positions of the parties and the finding of the ALJ, we are persuaded to adopt the position of Verizon. We reach this conclusion for several reasons.

First, 47 C.F.R. §51.701(b)((1), reads as follows:

(b) *Telecommunications traffic* For purposes of this subpart telecommunications traffic means

(1) Telecommunications traffic exchanged between a LEC and a communications carrier other than a CMRS provider, except for telecommunications traffic that is interstate or intrastate exchange access, **information access**, or exchange service for such access. (Emphasis ours).

Furthermore, the FCC in its *ISP Remand Order* stated that Information Access referred to all access traffic that was routed by a LEC to or from providers of information services, The relevant portion of Paragraph 44 of the *ISP Remand Order* is stated below:

> 44. We conclude that Congress's reference to "information access" in section 251(g) was intended to incorporate the meaning of the phrase "information access" as used in the AT&T Consent Decree. [78] . . . Under the consent decree, "information access" was purchased by "information service providers" and was defined as "the provision of specialized exchange telecommunications services . . . in connection with the origination, termination, transmission, switching, forwarding or routing of telecommunications traffic to or from the facilities of a provider of information services." [80] We conclude that this definition of "information access" was meant to include all access traffic that was routed by a LEC "to or from" providers of information services . . . . The record in this proceeding also supports our interpretation. [82] When Congress passed the 1996 Act, it adopted new terminology. The term "information access" is not, therefore, part of the new statutory framework. Because the legacy term "information access" in section 251(g) encompasses ISP-bound traffic, however, this traffic is excepted from the scope of the "telecommunications" subject to reciprocal compensation under section 251(b)(5).

78. *United States v. AT&T*, 552 F. Supp. At 196, 229.

80. *United States v. AT&T*, 552 F. Supp. At 196, 229.

82. *See, e.g.*, Letter from Gary L. Phillips, SBC, to Jon Nuechterlein, Deputy General Counsel, FCC, at 9 (Dec. 14, 2000). Some have argued that "information access" includes only certain specialized functions unique to the needs of enhanced service providers and does not include basic telecommunications links used to provide enhanced service providers with access to the LEC network. *See, e.g.*, Brief of WorldCom, Inc., D.C. Circuit No. 00-1002, *et al.*, filed Oct. 3, 2000, at 16 n.12. The MFJ definition of information access, however, includes the telecommunications links used for the "origination, termination, [and] transmission" of information services, *and "where necessary*, the provision of network signalling" and other functions. *United States v. AT&T*, 552 F. Supp. At 229 (emphasis added). Others have argued that the "information access" definition engrafts a geographic limitation that renders this service category a subset of telephone exchange service. *See* Letter from Richard Rindler, Swindler, Berlin, to Magalie Roman Salas, Secretary, FCC, at 3 (Apr. 12, 2001). We reject that strained interpretation. Although it is true that "information access" is necessarily initiated "in an exchange area," the MFJ definition states that the service is provided "*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" *United States v. AT&T*, 552 F. Supp. At 229 (emphasis added). Significantly, the definition does not further require that the transmission, once handed over to the information service provider, terminate within the same exchange area in which the information service provider first received the access traffic.

Pursuant to the above cited regulation and the definition of "Information Access" from the *ISP Remand Order*, Information Access traffic is excluded from the definition of telecommunications traffic.

Next, we note that pursuant to 47 U.S.C. §153(20), the term information service is defined as follows:

> The term information service means 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.

We agree with the ALJ and Verizon that Voice Information Services do indeed fall squarely within the definition of Information Access. As a result, our reading and interpretation of the regulations cited above leads us to conclude that Voice Information Services are excluded from the definition of telecommunications traffic and thus are not subject to reciprocal compensation.

Paragraph Nos. 36 and 37 of the *ISP Remand Order* also convince us that Voice Information Services should not be subject to reciprocal compensation. These paragraphs, as stated below, could not be any clearer in that regard:

> 36. We believe that the specific provisions of section 251(g) demonstrate that Congress did not intend to interfere with the Commissions pre-Act authority over nondiscriminatory interconnection . . . obligations (including receipt of compensation)[footnote omitted] with respect to exchange access, information access, and exchange services for such access provided to IXCs or information service providers. We conclude that Congress specifically exempted the services enumerated under section 251(g) from the newly imposed reciprocal compensation requirement in order to ensure that section 251(b)(5) is not interpreted to override either existing or future regulations prescribed by the Commission. [footnote omitted] We also find that ISP-bound traffic falls within at least one of the three enumerated categories in subsection (g).
>
> 37. This limitation in section 251(g) makes sense when viewed in the overall context of the statute. All of the services specified in section 251(g) have one thing in common: they are all access services or services associated with access. [footnote omitted] Before Congress enacted the 1996 Act, LECs provided access services to IXCs and to information service providers in order to connect calls that travel to points – both interstate and intrastate – beyond the local exchange.

> In turn, both the Commission and the states had in place access regimes applicable to this traffic, which they have continued to modify over time. It makes sense that Congress did not intend to disrupt these pre-existing relationships. [footnote omitted] Accordingly, Congress excluded all such access traffic from the purview of section 251(b)(5).

Finally, we note that the FCC also found, in Paragraph 44 of the *ISP Remand Order,* that Information Access traffic is excepted from the scope of telecommunications services that are subject to reciprocal compensation under 47 USC §251(b).

Based upon the foregoing discussion, we shall grant Verizon's Exceptions and reverse the ALJ's recommendation on this issue.

3. Issue No. 4: Should US LEC be required to provide dedicated trunking at its own expense for Voice Information Service traffic that originates on its network for delivery to Voice Information Service providers served by Verizon? (*See* Petition, p. 14).

a. Positions of the Parties

US LEC argued that Verizon has no reasonable basis for requiring US LEC to provide separate, dedicated trunking to carry US LEC customer traffic to Voice Information Service providers. US LEC pointed out that such trunking would impose significant costs on US LEC without any showing by Verizon that the trunks were necessary or justified by the traffic. (R.D., p. 22). US LEC, therefore, requests that Section 5.3 of the Additional Services Attachment to the Agreement be deleted.

Verizon posited that US LEC's proposed revisions acknowledged the need for an accurate billing mechanism. Verizon's proposed language was, therefore,

designed to accurately bill US LEC customers who call Voice Information Service providers on the Verizon network or to block delivery of those calls where no billing mechanism exists. Verizon noted that US LEC should not be concerned about the separate trunking issue because US LEC's tariff did not permit its customers to call Voice Information Service providers on Verizon's network. (R.D., p. 23).

In its Reply Brief, US LEC argued that Verizon's concerns about a billing mechanism for such calls by US LEC customers was not a sufficient justification to impose the costs of separate trunks on US LEC. US LEC asserted that Verizon failed to introduce any proof which demonstrated separate trunks were required and also failed to explain why Verizon was unable to address any billing issues on its own network. (R.D., pp. 22-23).

Verizon asserted in its Reply Brief that US LEC failed to respond to Verizon's Best and Final Offer and made no attempt to defend its own proposed language. Verizon emphasized that the proposed language from both Parties highlighted their concerns about caller-paid information services. (R.D., p. 23).

b. ALJ Recommendation

The ALJ recommended that US LEC's proposal be adopted without modification. The ALJ concluded that Verizon failed to adduce any evidence on the need for separate trunking and that Verizon made no effort to introduce and carry its burden of proof. As such, the ALJ recommended adoption of US LEC's language in its Best and Final Offer that modifies Section 5.3 (page 43) of the Additional Services Attachment as

proposed in the Interconnection Agreement and attached as Exhibit B to its Petition. (R.D., pp. 23-25).[14]

c. **Exceptions**

In its Exceptions, Verizon explains that its concern is not with information services traffic, generally, but with a separate sub-class of information services traffic (*i.e.*, 556 and 976 type services)[15] for which the Voice Information Service provider imposes a separate charge on the calling party. Verizon claims that such traffic raises special concerns, because where a carrier provides billing service to its Voice Information Service provider subscriber, it must be able to accurately bill such traffic and block delivery of such traffic where there is no mechanism for billing the calling party. Verizon maintains that the separate trunking requirement would ensure that Verizon would be able to continue to accurately account for and control such traffic. (VZ Exc., p. 37).

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14 The ALJ noted that Verizon produced no witness or evidence to describe the need for separate trunking and/or its concern with billing issues. He further noted that were it not for the specific language revisions proposed by US LEC and its testimony, there would have been no clue to understanding Verizon's position and Verizon's Main Brief could be perceived as an attempt to introduce extra-record evidence into the proceeding. *See* US LEC St. 2, pp. 14-15.

15 These services are classified as "Audiotex Services" in Sections 36 and 36A of Verizon's Tariff-Telephone Pa. Pa. P.U.C. No. 1. These services are provided via facilities that connect callers to sponsor-provided passive recorded announcements, interactive recorded announcements or live programs within a defined Audiotex Service Serving Area. 556 Audiotex Service consists of all programs, both live and recorded, whose message is sexually explicit, lewd, or otherwise considered to be adult as that term is commonly understood, and all programs with a history of or potential for a level of uncollectibles which is unacceptable to the Telephone Company. 976 Audiotex Service consists of one-on-one non-adult live programs and all recorded programs, passive or interactive, which are not classified as 556 service.

Verizon also argues that the ALJ was wrong to have accepted US LEC's proposed language because there was not sufficient evidence in the record to support it. Verizon notes that US LEC's witness made it clear that it wanted the language in Section 5.3 deleted, rather than modified. Verizon asserts that the language recommended by the ALJ invites abuse because it distorts the original language of Verizon's proposal, which would require US LEC, if it chose to allow its customers to originate Voice Information Services, to pay all bills incurred for such calls, even if the CLEC cannot collect from their customers. (VZ Exc., p. 38). Verizon asserts that the language recommended by the ALJ provides no mechanism for control of that type of traffic, does not explain how the CLEC will identify such traffic, does not clearly delineate the Parties' obligation, and risks exposing Verizon to abusive claims. Verizon concludes its Exceptions by requesting that if the Commission were inclined to accept the ALJ's finding that Verizon failed to carry its burden of proof on the separate trunking issue, it should simply delete the proposed language at the risk of inviting serious abuse in the future. (VZ Exc., p. 39).

d. Disposition

On consideration of the positions of the Parties, we agree with the ALJ that Verizon has not carried its burden of proof. On our review, the record is not sufficient to make a determination as to how the language addressing the specific sub-type of traffic (*i.e.*, 976, 556 traffic) referenced by Verizon should be phrased. Although Verizon argues that its Best and Final Offer seeks to impose a distinct charge on the calling party for the Voice Information Services, which typically include 556 and 976 calls, the actual language proposed by Verizon does not include any reference to that specific subset of calls. We are not sure whether calls other than 556 and 976 would also be part of that subset. Based on the foregoing, we are of the opinion that it would not be prudent at this time to adopt Verizon's proposed language.

At the same time, we are also concerned that a lack of record evidence exists for us to determine whether US LEC's proposed language in its Best and Final Offer would be reasonable. The language proposed by US LEC in Section 5.3 is as follows:

> The Parties shall have the option to route Voice Information Service Traffic that originates on its own network to the appropriate Voice Information Service connected to the other Party's network. For such Voice Information Service Traffic, unless the originating Party has entered into a written agreement with the terminating Party under which the originating Party will collect from its Customer and remit to the terminating Party the Voice Information Service providers' charges, the originating Party shall pay to the terminating Party without discount any Voice Information Service provider charges billed by the terminating Party to the originating Party. The originating Party shall pay the terminating Party such charges in full regardless of whether or not the originating Party collects such charges from its own Customer.

The ALJ concluded that US LEC's proposal is fundamentally fair because it provides for reciprocal liability for the charges at issue, while Verizon's proposal does not. However, we are not convinced that the record or the ALJ's proposed language adequately addresses the concerns raised by Verizon concerning accurate end-user billing for 976 and 556 traffic.

In light of the above, and based on the fact that: (1) US LEC originally requested that Section 5.3 of the Additional Services Attachment to the Agreement be deleted[16] and (2) Verizon suggested, in its Exceptions, that the ALJ's proposed language in Section 5.3 be deleted at the risk of inviting serious abuse in the future,[17] we are of the opinion that the record evidence in this proceeding, supports deletion of the language in

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[16] US LEC St. 2.0, p. 15.

[17] VZ Exc., p. 39.

Section 5.3 as the fairest resolution of this issue. We note that this action should not provide any harm to the Parties because the record adequately demonstrates that US LEC currently does not permit its customers to make calls to 976 and 556 information service providers on Verizon's network.[18]

Therefore, we shall reverse the ALJ's recommendation and grant Verizon's Exceptions to the extent they are consistent with this disposition.

4. Issue No. 5: Should the term "terminating party" or the term "receiving party" be employed for purposes of traffic measurement and billing over interconnection trunks? (*See* Petition, p. 15).

a. Positions of the Parties

The Parties disputed use of the words "receiving party" versus "terminating party," to identify ISP-bound traffic. There was no dispute over the use of the term "originating party" to identify the subscriber which initiates the ISP-bound call. (R.D., p. 27).

US LEC argued that Verizon's attempt to interject the use of the term "receiving party" instead of "terminating party" in the sections of the Agreement that deal specifically with ISP-bound traffic (*i.e.,* Sections 2.56 of the Glossary and Section 2.1.2 of the Interconnection Attachment) was a departure from industry practice. US LEC asserted that Verizon failed to justify its attempt to depart from industry standard language and noted that the term "receiving party" was not a defined term. US LEC also argued that use of the term was inconsistent with other portions of the Agreement that spoke in terms of "termination" and "terminated."

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[18] VZ M.B., pp. 27-28.

US LEC rejected Verizon's position that Verizon was attempting to conform its use of the word "receiving party" to the FCC's view that calls to ISPs do not terminate at the ISPs premises. US LEC noted that each time the FCC has attempted to justify removing calls to ISPs from reciprocal compensation obligations of TA-96, it has been reversed. In the event the FCC changed its terminology to "received" for ISP traffic, US LEC did not want to give Verizon the opportunity to attempt to avoid reciprocal compensation obligations for ISP traffic. *See* R.D., pp. 25-26.

Verizon relied upon four FCC decisions to support its position that the alleged standard industry term "terminating," to distinguish outgoing customer calls from incoming customer calls, was not appropriate for use in the instant Agreement. *See,* Notice of Proposed Rulemaking, *In the Matter of Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 2 FCC Rcd 4305, ¶7 (1987) (discussion Enhanced Service Providers ESPs); *In the Matter of Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 3 FCC Rcd 2631, ¶2 (1988) (describing ESPs as "providers of interstate service[]" and "exchange access users"); First Report and Order, *In the Matter of Access Charge Reform*, 12 FCC Rcd 15982, ¶341 (1997) ("*Access Charge Reform Order*") (ISPs "may use incumbent LEC facilities to originate and terminate interstate calls"); Memorandum Opinion and Order, *In the Matter of GTE Telephone Operating Cos.; GTOC Tariff No. 1; GTOC Transmittal No. 1148*, 13 FCC Rcd 22466, ¶19 (1998) ("*GTE Tariff Order*") (Internet-bound calls "do not terminate at the ISP . . . but continue to the ultimate destination or destinations, very often at a distant Internet website accessed by the end user.").

Verizon accused US LEC of trying to convince the Commission that US LEC's proposed language will have collateral regulatory significance. It argued that that the central issue concerned the proper characterization of traffic destined to ISPs.

Based on the above-cited references, Verizon asserted that for nearly two decades, the FCC had repeatedly held that calls were not "terminated" at information service providers (which the FCC concludes now include ISPs) premises. Rather, the FCC held that these calls were transmitted, or transited, to their ultimate destination. Verizon pointed out that under the Consent Decree, "Enhanced Services Provider" and "Information Service Provider," are equivalent under the FCC's terminology. Consequently, since ISPs are both ESPs and information service providers, Verizon reasons that traffic bound for ESPs and information access traffic are essentially the same. And, based on this reasoning, Verizon opined that the Commission should adopt its terminology because it is a neutral, accurate, and a readily understandable term to describe the broad class of traffic that local carriers may exchange. (R.D., p. 26; VZ M.B., pp. 28-30).

In reply, US LEC did not agree that the term "receiving party" was neutral, accurate and readily understandable because the law on this subject was in a state of flux. (R.D., p. 26).

b. ALJ Recommendation

As noted by ALJ Cocheres, the key to this dispute lay in understanding how the Parties believe using the word "terminating" or its derivatives in the Agreement will enhance or detract from their positions on the obligations to pay for reciprocal compensation for ISP-bound traffic. (R.D., p. 27).[19]

On review of the FCC citations provided by Verizon, the ALJ concluded that Verizon was correct in its position that the FCC has concluded that ISP traffic is interstate and subject to the access charge regime. (R.D., p. 28). However, the FCC has

[19] As noted, the *ISP Remand Order* was remanded and the FCC's rationale to exclude reciprocal compensation for ISP-bound traffic based on Section 251(g) of TA-96 has been rejected. *See WorldCom v. FCC.*

exempted ISP traffic from access charges and allowed carriers to continue to receive reciprocal compensation for ISP traffic. The ALJ noted that the industry standard terminology to use "originating" and "terminating" is consistent with the position of US LEC because the proper compensation regime for ISP traffic is in a state of flux. (*Id.*).

In light of the foregoing observation, the ALJ concluded that referring to an ISP as a "terminating party" may not be appropriate according to the tenor of FCC decisions which struggled with the appropriate intercarrier compensation regime for this traffic. However, to eliminate any perceived advantage to be gained by the Parties through use of the competing terms, the ALJ recommended using the word "other," to the extent needed to distinguish between ISPs and a terminating party. In making this recommendation, the ALJ determined that neither "terminating" nor "receiving" will be used in the ISP traffic sections. As such, by replacing "terminating party" with "other party" in Section 2.56 of the Glossary on page 33 and Section 2.1.2 of the Interconnection Attachment on page 52, the ALJ reasoned it will be possible to distinguish which party agreed to certain financial obligations without giving either party an alleged advantage.

In the two sections that do not concern ISP-bound traffic (*i.e.*, Sections 8.5.2 and 8.5.3 of the Interconnection Attachment on page 66), the ALJ recommended the adoption of US LEC's proposals in its Best and Final Offer. The ALJ noted that Section 4 of the Agreement, pertaining to Applicable Law, would permit the Parties to incorporate the new rules into the Agreement in the event the FCC changes the existing reciprocal compensation rules. (R.D., pp. 26-29).

c. **Exceptions**

US LEC excepts to that part of the ALJ's recommendation that substituted the term "other party" in lieu of the Parties' suggested and competing terms of "terminating party" and "receiving party." US LEC requests that the Commission adopt its position in its entirety. (US LEC Exc., p. 2).

In support of it Exception on this matter, US LEC argues that the ALJ incorrectly implied that US LEC's proposed language refers to the ISP as the terminating party. US LEC's asserts that it is clear from the language in the proposed Agreement that the term "terminating party" is either US LEC or Verizon and the FCC had no problem distinguishing between terminating parties and ISPs. US LEC argues that by ordering the use of "other party," the Commission would be endorsing a distinction that neither the industry nor the FCC has ever made. (US LEC Exc., pp. 2-3).

US LEC also disagrees with the ALJ's statement that the use of the term "other party" will not give Verizon an alleged advantage in the continuing fray regarding reciprocal compensation. US LEC opines that regardless of whether Verizon's proposed terminology or the ALJ's recommended terminology is adopted, Verizon would gain the advantage it initially sought when it proposed that the word terminating be removed from any discussion of the exchange of ISP-bound traffic in this arbitration issue. (US LEC Exc., p. 3).

US LEC also excepts to the ALJ's view that the Applicable Law provisions in Section 4 of the Agreement will be available to alleviate any advantage that Verizon could gain on this issue by forcing the Parties to incorporate any forthcoming rules from the FCC. US LEC is of the opinion that since the word terminating will have been removed from the sections of the agreement discussing the exchange of ISP-bound traffic, Verizon will seize the opportunity to argue that Applicable Law does not require

any compensation for the functions US LEC performs for Verizon and its customers in terminating calls to ISPs. (US LEC Exc., pp. 3-4).

d. Disposition

Although the ALJ may have incorrectly implied that the reference to an ISP as a "terminating party" was applicable in cases where, as US LEC argues, the term could have referred to itself or Verizon, it is clear that the disputed provisions were concerned with the use of the term for ISP-bound traffic. We conclude that the result of the ALJ recommendation, with minor modification discussed below, would be fair to both US LEC and Verizon.

The ALJ correctly characterized this issue as one where the parties believe the use of the word "terminating" or its derivatives will either enhance or detract from their positions if the FCC subsequently modifies its existing rules as to whether reciprocal compensation will apply to ISP-bound traffic. US LEC is concerned that the recommended substitution of the term "other party" for "terminating party" will provide an advantage to Verizon if the FCC's rules are reversed.

After reviewing the record and US LEC's concerns in its Exceptions, we conclude that it would be fair to both Parties if the following language were added to Section 2.56 of the Glossary on page 33, and Section 2.1.2 of the Interconnection Attachment on page 52:

> In the instance that: (1) the FCC modifies its rules so that the local exchange carriers reciprocal compensation obligation, pursuant to Section 251(b)(5), will apply to ISP-bound traffic, or (2) the FCC determines that Internet calls terminate at the ISP, and are thus subject to reciprocal compensation, then the term other party, above, shall automatically be interpreted as terminating party, or any appropriate substitute term that may

be defined by the FCC to accomplish the spirit of the two conditions listed above in this paragraph, without formal amendment to this Agreement.

Incorporating the above language as a condition of the Agreement will ensure that traffic destined to ISPs will be characterized on a neutral basis in accordance with the present FCC rules as well as any potential changes in the FCC rules. We are hopeful that it will also alleviate the Parties concerns about any delays associated with Applicable Law arguments that may occur in the future.

Therefore, we shall grant US LEC's Exceptions in part, and deny them, in part, consistent with this discussion, and modify the ALJ's recommendation consistent with the discussion above.

5. Issue No. 6: (a) Should the parties be obligated to compensate each other for calls to numbers with NXX codes associated with the same local calling area?

(b) Should Verizon be able to charge originating access to US LEC on calls going to a particular NXX code if the customer assigned the NXX is located outside of the local calling area associated with that NXX code? (*See* Petition, p. 16).

a. Position of the Parties

This issue deals with compensation for foreign exchange (FX) traffic. The first part of the issue concerns whether the Parties should pay reciprocal compensation for calls with NXX codes[20] in the same local calling area. The second part concerns the

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20 NXX codes represent the second set of three digit numbers following the area code in a ten digit number.

use of Virtual NXX (VNXX) Codes and whether the Parties, particularly Verizon, should be able to charge originating access to one another when calls originating on one network terminate with a customer on the other network who has an assigned NXX code in a local calling area where the terminating customer has no physical presence. (R.D., p. 30).

(i) FX Service

US LEC described a traditional FX arrangement as those instances when a customer was assigned a NPA/NXX code in a local calling area where the customer had no physical presence. US LEC explained that if an originating customer on one network dialed an FX customer in the same local calling area on the other network, the call would be rated as a local call, and the terminating party would be entitled to reciprocal compensation. *See* US LEC M.B., pp. 34-35. US LEC noted that: (1) historically, calls were rated and routed according to their NPA/NXX codes; (2) calls placed to NPA/NXX codes in the same local calling area were rated as local calls; (3) if the originating customer were served by one party and the terminating customer were served by the other party, the originating party would be responsible for paying reciprocal compensation to the terminating party; and (4) if the originating caller was in a local calling area different from the terminating customer, the call would be rated as an intraLATA toll call.

US LEC claimed that FX services offered by Verizon and itself are functionally similar. Also, US LEC pointed out that Verizon admitted to billing and receiving reciprocal compensation from CLECs whose customers called Verizon FX customers. (R.D., pp. 30-31).

After disputing Verizon's characterizations of US LEC's FX service, US LEC pointed out the following public interest benefits to continuing to treat this traffic as local for all purposes, including intercarrier compensation: (1) it provides CLEC

customers with a local presence in additional local calling areas (Montano Direct, pp. 20-21); (2) it allows businesses using FX to expand in the geographic area that they can reach with local calls (Tr. 25:9-14); (3) treating these calls as local is consistent with the way Verizon has always treated its own FX service (Tr. 189:25-195:9), Enhanced IntellilinQ PRI Hub Service (Tr. 195:20-205:20) and Internet Protocol Routing Service ("IPRS") (Tr. 205:21-208:14); and (4) CLEC FX service provides a competitive alternative to the FX services provided by Verizon. (Montano Direct, p. 21). (R.D., pp. 31-32 citing US LEC MB, p. 37).

US LEC claimed that Verizon's proposal would increase US LEC's costs by denying it intercarrier compensation and imposing access charges on this traffic, both of which would make it uneconomic for US LEC to offer its version of FX service. Based on the foregoing, US LEC contended that Verizon's proposal would harm the public interest and hurt competition. US LEC further noted that the same arguments made by Verizon in this matter were considered and rejected in favor of the CLEC position in the *VA Arbitration Order* at §301. US LEC also highlighted the fact that the Commissions in North Carolina, Kentucky and Michigan, as well as the Florida Commission Staff, agreed with the FCC Wireline Bureau and US LEC. (R.D., p. 32).

US LEC, citing the *VA Arbitration Order,* disputed Verizon's suggestion that US LEC's FX service violated federal law. US LEC submitted that the D.C. Circuit Court specifically rejected the same reasoning in the *ISP Remand Order* that Verizon advocated in this case. (R.D., pp. 33-34).

US LEC argued that adoption of Verizon's plan would compensate Verizon for services it did not provide and costs it did not incur. US LEC argued that the cost to Verizon to carry a call from a Verizon customer to a US LEC FX customer was the same as from the same Verizon customer to a US LEC customer in the local calling area. In other words, Verizon was not, according to US LEC, losing toll revenue because it was

only transporting a local call in both situations. According to US LEC, it makes no sense for Verizon to recover "lost toll revenue" in the FX scenario from US LEC because US LEC was still required to carry the FX call to the physical location for the US LEC customer. (R.D., p. 33; US LEC M.B., pp. 45-47).

Verizon alleged that VNXX codes as proposed to be used by US LEC violate this Commission's prior decisions that require carriers to assign customers NXX codes that correspond with the rate centers where the customers are physically located. *See,* R.D., p. 38 citing *Petition of Focal Communications Corporation of Pennsylvania for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement With Bell Atlantic-Pennsylvania, Inc.*, Docket No. A-310630F0002; (Opinion and Order, entered January 29, 2001) slip op., p. 11 (*Focal Order*); and *Level 3 Communications, LLC v. Marianna & Scenery Hill Telephone Company*, Opinion and Order, entered August 8, 2002, at Docket No. C-20028114 (*Level 3 Order*). (R.D., p. 38).[21]

US LEC disagreed with Verizon's allegations that US LEC's VNXX service violated this Commission's precedent.

Verizon disputed US LEC's representation that reciprocal compensation for FX traffic was the historical practice in the industry. Verizon argued that prior to 1996,

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[21] In *Level 3LLC v. Marianna & Scenery Hill Telephone Company*, Docket No. C-20028114, three orders were entered. On August 8, 2002, this Commission granted, with conditions, a petition of Level 3 for emergency relief. By Order entered October 11, 2002, we granted reconsideration but kept in place certain restrictions on the assignment by Level 3 of new telephone numbers to new ISP customers pending an investigation of whether Level 3's practices complied with applicable law. By Order entered January 27, 2003, we adopted the Recommended Decision of ALJ Michael C. Schnierle, in substantial part, and dismissed, without prejudice, the Formal Complaint of Level 3. We also vacated the numbering administration restrictions imposed as well.

there was no historical practice associated with payment of reciprocal compensation on FX traffic because incumbent LECs did not pay reciprocal compensation. Verizon noted that there is, however, a clear historical practice with respect to interLATA FX arrangements and that federal law requires access charges, not reciprocal compensation, for interLATA FX traffic.[22] Verizon pointed out that US LEC has the potential to violate the law because it offers interLATA FX service and is easily able to bill Verizon for reciprocal compensation for those calls. (R.D., p. 37).

Verizon claimed that the cases cited by US LEC to support reciprocal compensation payments for FX traffic were a minority view. Verizon pointed out that nothing in Verizon's proposal prevented US LEC from offering virtual FX, but merely that US LEC and its customers should be required to pay for it. *See* VZ R.B., pp. 20-21; R.D., p. 37. Verizon noted the following states are in agreement that reciprocal compensation should not apply to virtual NXX traffic because it does not physically originate and terminate in the same local calling area: Ohio, Florida, Connecticut, Illinois, Texas, South Carolina, Tennessee, Georgia and Missouri. (R.D., pp. 35-36; VZ M.B., pp. 33-34).

Verizon also relied upon FCC's rules and statements in the *Local Competition Order* and the *ISP Remand Order*, for the proposition that reciprocal compensation does not apply to the transport and termination of interstate and intrastate interexchange traffic because the call does not originate and terminate in the same local calling area. Verizon suggested that the applicable portion of the *VA Arbitration Order* failed to follow federal law. (R.D., pp. 35-36).

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[22] *See AT&T Corp. v. Bell Atlantic-Pennsylvania*, 14 FCC Rcd 556, ¶71 (1998), *reconsideration denied*, 14 FCC Rcd 7467 (2000).

Verizon asserted that the payment of reciprocal compensation would be anti-competitive. Verizon stressed that US LEC's FX customers pay fees to US LEC for the service in lieu of the toll charges that Verizon would have otherwise collected from Verizon's customers even though Verizon continues to incur the costs of delivering Verizon originated FX traffic to the US LEC switch. Verizon also submitted that allowing reciprocal compensation for FX traffic discouraged CLECs from deploying facilities in remote areas to compete with Verizon's facilities. Verizon emphasized that, contrary to US LEC's representation that US LEC was carrying the toll portion of the FX call, US LEC's FX service gave it a free ride on Verizon's facilities. As such, Verizon argued that if US LEC continued to offer FX service, US LEC should be required to pay access charges to Verizon for this traffic. (R.D., pp. 37-38).

Verizon also contended that permitting reciprocal compensation for delivering FX traffic to US LEC is a form of regulatory arbitrage. Verizon believed that US LEC's FX system was designed to deprive Verizon of the toll revenue from its customers who wished to call US LEC FX customers. Verizon considered it unfair to require Verizon to pay reciprocal compensation for US LEC FX traffic when Verizon bore the costs for originating and transporting the interexchange call. Verizon asserted that US LEC failed to provide evidence that it incurred any additional charges different from providing local service. Verizon noted that US LEC specifically justified the charges for its FX services by informing its customers that they were paying the toll charges for the incoming calls. Verizon also accused US LEC of manipulating number assignments to deprive Verizon of the toll charges that should have been paid by the Verizon customer. Verizon argued that Verizon's originating call costs were being inflated because US LEC only had one switch per LATA. Verizon believed that it should be compensated for its lost toll revenue and that reciprocal compensation should only be due for calls originating and terminating within the same local exchange. *See* R.D., p. 36.

In response to Verizon's claim that US LEC's FX plan resulted in regulatory arbitrage, US LEC pointed out that its FX plan was fundamentally similar to Verizon's and that traffic between the two carriers was relatively balanced. US LEC also alleged that Verizon had about 6,000 FX customers in Pennsylvania as compared to six for US LEC and that the charges to their customers were roughly equal. US LEC explained that each carrier received reciprocal compensation for transporting FX calls to the other and that there was no lost toll revenue. US LEC asserted that Verizon's "lost toll revenue" argument rested on the faulty assumption that Verizon's customers would be willing to incur toll charges to dial the same US LEC customers without FX service. (R.D., p. 34).

As a related attack on US LEC's proposed FX service, Verizon argued that US LEC's tariffed Local Toll-Free service provided interLATA FX service in violation of federal law. Verizon asserted that the same federal prohibition for paying reciprocal compensation for interLATA calls should also apply to intraLATA calls. *See* R.D., p. 36; VZ M.B., pp. 31-32, 38-39. In response, US LEC emphasized that Verizon erroneously characterized US LEC's tariffed Local Toll Free Service as an FX service because Verizon failed to notice that US LEC offered a tariffed Foreign Exchange local service. US LEC contended that there was no evidentiary support for Verizon's allegations that US LEC billed Verizon for reciprocal compensation for carrying Verizon traffic to US LEC Local Toll Free Service customers and that there was no evidence that US LEC had Local Toll Free Service customers in Pennsylvania. *See* R.D., p. 34. Therefore, US LEC averred that Verizon's concerns about a service entitled "Local Toll Free Service" bore no relationship to US LEC's FX Service and should be ignored by the Commission in determining this issue.

Finally, US LEC regarded Verizon's suggestions to fix the FX system as intrusive, unworkable and expensive. These suggestions would, *inter alia*, require creating an FX customer database, conducting traffic studies, and estimating the amount

of traffic which terminated at US LEC FX subscribers. In noting that it only had six Pennsylvania FX customers, US LEC submitted that the expense of Verizon's "cure" could not be recovered from those customers. (R.D., pp. 34-35; VZ M.B., pp. 31-32, 38-39). However, Verizon asserted that distinguishing FX traffic was feasible and that, even if implementation were difficult, it would not excuse the parties from compliance with federal law. *See* R.D., p. 37.

b. ALJ Recommendation

On consideration of the positions of the Parties, the ALJ recommended that US LEC's proposal be adopted as modified by his recommendation in Issue 5, pertaining to the use of the term "other" rather than "terminating" party. (R.D., p. 38). The ALJ concluded that Verizon's position to oppose reciprocal compensation for FX service was substantially undermined by its admission that it offered FX service to its current customers and had collected reciprocal compensation from the other CLECs for terminating CLEC calls to Verizon's FX customers. (*Id.*). The ALJ was not persuaded by Verizon's offer to change that practice for US LEC in view of the current industry practice in Pennsylvania. (*Id.*).

The ALJ found that the rendition of FX service in Pennsylvania is not illegal. He noted that both US LEC and Verizon have Commission-approved tariffs on file that allow them to offer intraLATA FX service to their customers.[23]

Therefore, ALJ Cocheres concluded that the central issue concerns whether US LEC should be permitted to render FX service using a virtual NXX format. (R.D., p. 39). On this issue, the ALJ was persuaded by the FCC Wireline Bureau's conclusion in the *VA Arbitration Order*. After reviewing the VNXX issue and the same arguments

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[23] VZ Exh. 4 (US LEC tariff), original page 22. Haynes Rebuttal Test., pp. 5-6.

made by the Parties, the FCC Staff rejected Verizon's position and adopted the position advocated by the CLECs. The pertinent reasoning of the FCC Wireline Bureau is reprinted, below:

> 301. 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.
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> 303. Additionally, we note that state commissions, through their numbering authority, can correct abuses of NPA-NXX allocations. As discussed earlier, the Maine Commission found that a competitive LEC there was receiving NPA-NXXs for legacy rate centers throughout the state of Maine although it served no customers in most of those rate centers. [n. 994 *See Investigation Into Use of Central Office Codes (NXXs) by New England Fiber Communications, Inc., LLC d/b/a/ Brooks Fiber*, Docket No. 98-78, Maine PUC (rel. June 30, 2000).]
>
> To the extent that Verizon sees equivalent abuses in Virginia, it can petition the Virginia Commission to review a competitive LEC's NPA-NXX allocations.

FCC Wireline Bureau Arbitration Order at §§301-303 (Notes omitted).

The ALJ agreed with the above analysis and adopted it. (R.D., p. 40).

The ALJ also addressed the Parties' arguments concerning this Commission's ruling in the *Focal Order*. In the *Focal Order*, this Commission stated:

> With regard to BA-PA's argument that Focal escapes any obligation to pay for the use of BA-PA's transport network by assigning its customers telephone numbers with NXXs that misrepresent the actual locations of those customers, we agree with Focal that the alleged transport concerns raised by BA-PA are irrelevant in this proceeding because they are advanced as examples under the existing interconnection agreement between BA-PA and Focal, and not under the agreement that is being arbitrated. (Focal R.Exc., p. 17). At the same time, however, we are of the opinion that if the allegations by BA-PA concerning any abuse by Focal in assigning telephone numbers to customers using NXX codes that do not correspond to the rate centers in which the customers' premises are physically located are true, then we admonish Focal to comply with the directives in our *MFS II Order* and to refrain from this practice.[67] At any rate, it is more appropriate to address the specifics of violation issues in a separate proceeding.
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> [67] Failure to comply with this directive will be deemed as a direct violation of this Order and our *MFS II Order* and will be subject to Civil Penalties for Violations under Section 3301 of the Public Utility Code, 66 Pa. C.S. §3301.

(Slip op., p. 43).

The ALJ concluded that there was insufficient evidence to demonstrate whether US LEC was abusing the NXX system. He noted that US LEC has six VNXX customers in Pennsylvania, none of which are ISPs. (R.D., p. 41). He also noted that this Commission has opened an investigation at Docket No. I-00020093 into the use of the NXX system in Pennsylvania and suggested that if there is a problem with US LEC's FX plan, it can be investigated as a part of that proceeding.

Based on the foregoing, and in the interim, the ALJ recommended that the language offered by US LEC in its Best and Final Offer be adopted. Thus, under the

ALJ's recommendation, there would be a continuation of the FX format that each Party is currently using and each Party would continue the practice of paying reciprocal compensation to the other. (R.D., pp. 41-42).

c. **Exceptions**

In its Exceptions, Verizon emphasizes that it is not challenging the following issues in this arbitration: (1) US LEC's ability to provide VNXX service in this proceeding;[24] (2) the system of end-user call rating based on assigned telephone numbers;[25] (3) the system of routing calls based on those same numbers;[26] and (4) US LEC's ability to serve many local calling areas from a single switch. Rather, Verizon argues that the only issue it is challenging is US LEC's resistance to adequately compensating Verizon for: (1) originating VNXX traffic and delivering it to US LEC's switch and (2) the lost toll revenues that Verizon would have otherwise received. Verizon is of the opinion that the strong weight of state commission determinations and basic principles of regulatory rationality and fairness all support its argument that US LEC should pay Verizon adequate compensation. (VZ Exc., pp. 11-12).

Verizon generally asserts that the ALJ's recommendation on the use of VNXX codes reaches the wrong result with little independent analysis and should be rejected as inconsistent with federal law and this Commission's prior decisions. Verizon states that the recommendation also threatens to promote anticompetitive regulatory arbitrage at the expense of genuine local competition. Verizon submits that the recommended language proposed by US LEC would create opportunities for US LEC to improperly pass off its cost of doing business upon Verizon, thus undermining the development of competition in Pennsylvania. (VZ Exc., pp. 1-2).

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24 Haynes Rebuttal, pp. 9:9-11.

25 *Id.*, pp. 2:18-3:4.

26 *Id.*, pp. 2:19-20.

Specifically, Verizon reiterates it position that this Commission, in the *Focal Order*, has prohibited CLECs from assigning telephone numbers to customers using NXX codes that do not correspond to the rate centers in which the customers' premises are physically located. Verizon argues that this Commission reaffirmed that prohibition in the *Level 3 Order* while opening its generic investigation into the use of virtual NXX codes. Verizon submits that although this instant arbitration may not be the proper forum to address the propriety of the use of VNXX codes by US LEC, it presents an issue of first impression for this Commission to resolve if the virtual NXX practice is to be allowed. And, if VNXX is allowed, it presents an issue of first impression for the type of intercarrier compensation that should be used. (VZ Exc., p. 6).

Verizon argues that the ALJ's recommended use of VNXX codes permits US LEC to do nothing more than it would otherwise do when a US LEC customer receives an ordinary local call. Verizon points that US LEC, nevertheless, charges its virtual NXX customers $12,000 per year for this service so that those customers could receive calls from distant callers and at the same time: (1) deprives Verizon of otherwise applicable toll charges; (2) requires Verizon to pay reciprocal compensation on top of the thousands of dollars per year that US LEC already charges its own VNXX customers; and (3) exempts US LEC from paying access charges to Verizon for the use of its facilities in originating and transporting traffic that Verizon alleges to be interexchange traffic. (VZ Exc., p. 7).

Verizon repeats that it does not object to the use of VNXX codes. However, Verizon wants to be adequately compensated for the use of its facilities when US LEC uses them to provide FX-type services. In this regard, Verizon stresses that its traditional FX service is more fair than US LEC's version of FX service. The difference between the traditional FX service Verizon offers and the type of FX service offered by

US LEC via VNXX codes, is that Verizon's service provides local service out of a distant exchange via a dedicated connection, or "private line," between a customer and the distant central office within the local calling area of interest.[27] (VZ Exc., p. 8). As such, Verizon argues that both Verizon and the interconnecting ILEC are adequately compensated. Verizon submits that US LEC's virtual NXX service manipulates the pre-existing regulatory structure for its own advantage by providing a "superficially similar functionality" to Verizon's traditional FX service without adequate compensation for the transport costs that Verizon incurs to complete the call. Verizon provided the following explanation in support of this argument on pp. 9-10 of its Exceptions, which we reprint:

> For example, suppose a Verizon customer physically located in Allentown calls a US LEC customer in Philadelphia. If US LEC assigns its [local] customer a number associated with the [US LEC local] customer's actual location in Philadelphia, Verizon will assess toll charges for that call. Haynes Direct at 6:18-7:1; Tr. 177:8-11 (US LEC's Montano conceding that such a call is not a local call). But, if US LEC assigns its local customer [that is physically located in Philadelphia] a number associated with the Allentown local calling area, Verizon will treat the call [from a Verizon customer physically located in Allentown] as a local call for rating purposes – but Verizon must still transport the call all the way to Philadelphia because US LEC does not have facilities to accept the traffic in Allentown. US LEC is thus able to control whether or not Verizon can charge its customers the toll charges that would ordinarily apply to a call from Allentown to Philadelphia.
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> In this way, US LEC's Virtual NXX service operates as a toll-free service, where the called party agrees to pay charges in lieu of the toll charges otherwise applicable to the calling party. Haynes Direct at 6:9-13; Hearing Exh. VZ-6 (describing US LEC's virtual NXX service as "toll free" service). Traditional FX service is also a toll-free-type service, but it raised no issues with respect to inter-carrier compensation in a single carrier environment: Verizon would

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[27] Rebuttal Testimony of Terry Haynes ("Haynes Rebuttal"), p. 8, lines 3-5.

> in principle be compensated for lost toll revenues because its FX customer would pay an additional charge for the dedicated connection used to provide the FX service. Haynes Rebuttal at 8:3-7. But, with US LEC's Virtual NXX service, the matter is not so simple because the FX subscriber is no longer a Verizon customer, and the payments in lieu of toll charges are paid not to Verizon, but to US LEC instead. *See* Hearing Exh. VZ-6 (tolls paid by the "called party" – US LEC's customer). Under US LEC's proposal adopted by the ALJ, however, the additional transport costs are still being borne by Verizon, for which it receives no compensation.

Verizon is also concerned about another regulatory complication that is created as a result of VNXX. Verizon argues that since the US LEC network minimizes its investment in Pennsylvania by serving an entire LATA from a single switch, US LEC is able to obtain NXX codes associated with different calling areas that are quite distant from its switch. Consequently, all other local carriers are forced to direct traffic destined for any of those NXX codes to US LEC's single switch in a LATA.[28] Verizon states that this enables US LEC to provide VNXX service without providing any functionality beyond what it ordinarily provides to any other local customer. Verizon asserts that this is in contrast to traditional FX service because US LEC has established no additional facilities (*i.e.*, dedicated connections between the customer's premises and the "foreign" central office) and is being paid simply for providing its customers with toll-free calling arrangements, where the toll charges that are eliminated were previously being paid to Verizon. Verizon also notes that unlike "real" FX service, US LEC's VNXX service is *in-bound* only. This means that US LEC's customers can only receive calls from distant exchanges, but cannot place calls to those same exchanges.[29] This means that, unlike the case with traditional FX Service, US LEC's VNXX customers are not able to make out-bound toll-free calls from the virtual NXX number. (VZ Exc., pp. 10-11).

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28 Haynes Rebuttal at 2:19-22.

29 Hearing Exh. VZ-6.

Verizon continues that the ALJ's recommendation addresses none of these issues. Verizon excepts to the ALJ observation that Verizon has charged reciprocal compensation for traditional FX traffic in light of the fact that before the advent of local competition, reciprocal compensation was not even a possibility. Verizon also complains that the *VA Arbitration Order*, which the ALJ relied on in his reasoning is flawed, not binding on this Commission, and still subject to full FCC review. Verizon distinguishes the facts in that order from the record in the instant proceeding. Verizon notes that the sole basis for the Wireline Bureau's conclusion – that it would be difficult for the parties to distinguish local traffic from VNXX traffic – is not true in this case. It points out that the unrebutted evidence in this proceeding demonstrated that the parties can accurately and inexpensively distinguish FX and VNXX traffic from local traffic for intercarrier compensation purposes. (VZ Exc., p. 12).

Based on the foregoing, Verizon excepts to the ALJ's recommendation because he did not adequately consider the following arguments: (1) federal law does not require payment of reciprocal compensation for interexchange tariffs; (2) payment of reciprocal compensation on virtual NXX traffic would contribute to regulatory arbitrage; and (3) the record establishes that FX and virtual NXX traffic can be practically distinguished from local traffic for intercarrier compensation purposes.

i. Federal Law

Regarding federal law concerning reciprocal compensation of inter-exchange traffic, Verizon states that FCC rules have always made clear that reciprocal compensation under 47 U.S.C. § 251(b)(5) "do[es] not apply to the transport or termination of interstate or intrastate interexchange traffic."[30] The FCC confirmed that

[30] *Local Competition Order* ¶1034 (Verizon App. Tab 3). This portion of the *Local Competition Order* has never been challenged and remains binding federal law.

result in its *ISP Remand Order* wherein it held that reciprocal compensation does not apply to "interstate or intrastate exchange access, information access or exchange services for such access."[31] As a result, Verizon argues that the FCC's determination that interexchange traffic is not subject to reciprocal compensation binds this Commission and requires it to reverse the ALJ on Issue 6. (VZ Exc., p. 13).

Verizon also cites a recent FCC decision involving *Mountain Communications*,[32] in which the FCC determined that number assignment does not and cannot control intercarrier compensation obligations. Verizon notes that the interconnecting carrier in *Mountain Communications*, as in this case, had a practice of assigning telephone numbers without regard to the customer's physical location. In that case, Verizon states that the FCC explained that the assignment practice "prevents [the originating carrier] from charging its customers *for what would ordinarily be toll calls*."[33] For that reason, the FCC ruled that the receiving carrier was required to compensate the originating carrier for facilities used to transport such calls to its switch.

Verizon reiterates its arguments pertaining to other state commission rulings (*i.e.*, Ohio, Florida, Connecticut, Illinois, Texas, South Carolina, Tennessee, Georgia, and Missouri) that support Verizon's position that reciprocal compensation does not apply to virtual NXX traffic because it does not originate and terminate in the same local calling area. Verizon criticizes the ALJ's recommendation because, it alleges, he never addressed any of those decisions or their reasoning. (VZ Exc., pp. 14-16).

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31 47 C.F.R. §51.701(b)(1) (Verizon App. Tab 35).

32 Order on Review, *Mountain Communications, Inc. v. Qwest Communications International, Inc.*, File No. EB-00-MD-017, 2002 WL 1677642, ¶ 6 (rel. July 25, 2002) ("*Mountain Communications*"), *aff'g* Memorandum Opinion and Order, *Mountain Communications, Inc. v. Qwest Communications International, Inc.*, 17 FCC Rcd 2091 (Chief, Enf. Bur. 2002).

33 *Id.* ¶5 (emphasis added).

Verizon argues that the three minority opinions relied upon by US LEC on this issue are wholly unpersuasive.[34] Verizon claims that these state commission rulings merely suggest that proper tracking of VNXX traffic would be logistically difficult but did not make any finding as to whether VNXX traffic should be subject to reciprocal compensation under federal law.[35] In the instant proceeding, however, Verizon argues that it adequately explained that: (1) the record in this proceeding establishes that distinguishing FX traffic from local traffic is feasible and, (2) in any event, any alleged difficulties of implementation do not justify ignoring the plain requirements of federal law. (VZ Exc., p. 16).

With regard to the *VA Arbitration Order,* Verizon continues its criticism that this order never addressed the basic question whether VNXX traffic is subject to reciprocal compensation under federal law. Verizon states that the *VA Arbitration Order* is inconsistent with the reasoning of *Mountain Communications*, which Verizon points out, is a decision of the full FCC issued weeks after the *VA Arbitration Order*.

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[34] US LEC has relied on decisions from Michigan, Kentucky, and North Carolina. Verizon notes that US LEC has also cited the decision of the Florida PSC, but the Florida PSC *rejected* application of reciprocal compensation to VNXX traffic. *See supra*, p. 14, n.9.

[35] Moreover, in the case of North Carolina, the North Carolina Utilities Commission (NCUC) authorized payment of reciprocal compensation on *traditional* FX traffic only after adopting the incumbent LEC's proposed interconnection architecture, which required the CLEC, not Verizon, to bear the costs of transporting the call outside the originating local calling area. *See infra*, p. 39, n. 36. Because the ALJ rejected Verizon's proposed interconnection architecture, the North Carolina decision provides no support for the Recommended Decision. *See* Haynes Direct, pp. 11:5-10.

Verizon claims the Wireline Bureau was influenced by the absence of a concrete proposal for distinguishing VNXX traffic from local traffic for billing purposes. It criticizes this as a basis for reaching a result that the parties should not be compelled to give effect to the distinction between VNXX traffic and local traffic, irrespective of the requirements of federal law. Verizon maintains that this reasoning has no application here, because Verizon did present unrebutted evidence that carriers can accurately estimate the volume of FX and VNXX traffic exchanged between them.[36] Thus, Verizon submits that the *VA Arbitration Order* provides no basis for failing to implement the clear requirements of federal law here. (VZ Exc., pp. 16-17).

ii. Regulatory Arbitrage

Verizon objects to the ALJ's reliance on the fact that past industry practice in Pennsylvania has shown that Verizon collected reciprocal compensation for CLEC-originated calls bound for its own FX customers. Verizon explains that prior to 1996, there was no historical practice associated with payment of reciprocal compensation on FX traffic because incumbent LECs did not pay reciprocal compensation to each other. Verizon asserts that it has become increasingly clear, only since the introduction of local competition, that VNXX arrangements are a serious source of regulatory arbitrage, to the point that the assumption that assigned telephone numbers were associated with the physical location of the called party is no longer tenable.[37]

Verizon counters, however, that there is clear historical practice on the appropriate intercarrier compensation with respect to interLATA FX arrangements.

36 *See* Tr. 232:10-25, 234:4-14, 236:16 - 240:1.
37 Tr. 231-32.

Because local carriers such as Verizon were not permitted to provide service across LATAs, such calls, even though they were originated by the local telephone company, had to be handed off to a long-distance carrier for completion to the interLATA FX customer. As such, Verizon argues that the FCC squarely resolved the question of appropriate intercarrier compensation (*i.e.*, access charges) for such calls.[38] Verizon argues that despite the fact that interLATA calls are locally dialed, they are interexchange calls that are subject to access charges rather than reciprocal compensation.

Verizon argues that the same reasoning must apply to intraLATA calls. Verizon contends that since the assignment of phone numbers is easily manipulated and reflects nothing about underlying costs, intercarrier compensation payments must be governed by the actual physical location of the parties and the path of the call and not by the telephone number that the carriers choose to assign to the end-user, as argued by US LEC. (VZ Exc., p. 19; Haynes Rebuttal, 11:16-12:6.).

Verizon also objects to the ALJ's reference to the fact that Verizon may have charged reciprocal compensation for CLEC-originated traffic that Verizon has delivered to its FX (and FX-type) customers in the past. Verizon argues that the focus should be about what is the proper resolution of the issue presented here. Regardless of past practice, Verizon claims that under its proposal in this proceeding, all traffic – both Verizon-originated and CLEC-originated – would be subject to reciprocal compensation based on the physical location of the called party and not the assigned telephone number. (VZ Exc., pp. 19-21).

Verizon's theory that adoption of the ALJ recommendation would contribute to regulatory arbitrage is as follows: when a US LEC customer subscribes to a

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[38] *See* Haynes Direct at 7:15-8:22 (citing *AT&T Corp. v. Bell Atlantic-Pennsylvania*, 14 FCC Rcd 556, ¶ 71 (1998) (Verizon App. Tab 1), *recon. denied*, 15 FCC Rcd 7467 (2000)).

VNXX service, it pays an extra charge to US LEC in order to be able to receive calls originated in a distant exchange without a toll charge being imposed on the calling party.[39] Verizon concedes that there is nothing necessarily wrong with that, so long as US LEC appropriately compensates Verizon for the service that Verizon continues to provide. Verizon claims that it would be inconsistent with regulatory policy and basic fairness to require Verizon to *pay* reciprocal compensation to US LEC, when Verizon continues to bear the same costs of originating and transporting the interexchange call, when Verizon is deprived of the toll charges that would ordinarily apply, and when US LEC is already receiving compensation from its customers. (VZ Exc., p. 21).

Verizon continues to explain that US LEC charges its VNXX customers a $500 fixed charge and $1000 per month in Pennsylvania, with additional charges added on. Yet, states Verizon, US LEC provided no evidence that it incurs any additional costs in providing VNXX service as compared to ordinary local exchange service. (VZ Exc., p. 22).[40]

Verizon notes that US LEC justifies its VNXX charges purely on the basis of the subscriber's ability to receive calls from parties located in a foreign exchange without those calling parties incurring any toll charge. As such, Verizon submits that US LEC explicitly informs its FX subscribers that they are paying those toll charges through their payments to US LEC. Verizon asserts that those "toll charges" that US LEC requires its subscribers to pay in order to receive FX service are precisely those toll charges that Verizon does not receive because of US LEC's manipulation of number assignments.[41] At the same time, Verizon argues that US LEC insists that Verizon should

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39 *See* US LEC's "Enhanced Local Services," at 2 (Hearing Exh. VZ-6) (US LEC describing "Foreign exchange" as involving "an inbound-only call, toll-free to the calling party, which is paid for by the called party").

40 *See* Tr. 175:17-19.

41 Haynes Rebuttal, pp. 12:4-5.

be required to deliver traffic originated LATA-wide to its switch. In that arrangement, Verizon complains it is bearing the cost of originating a call and transporting it across the LATA – the very interexchange service for which US LEC is being paid by its customer, and for which Verizon is no longer being paid by its customer.[42] (VZ Exc., pp. 22-23).

Verizon contends that under these circumstances, US LEC should compensate Verizon for the services that it continues to provide – *i.e.*, Verizon should continue to receive at least a portion of the toll charges that it would otherwise receive from its customer in the form of access charges paid by US LEC. By the same token, Verizon has offered that if a US LEC customer originates a call to a Verizon FX customer, Verizon should pay intrastate access charges.[43] (VZ Exc., p. 23).

iii. Identification of VNXX Traffic

Finally, Verizon notes that, contrary to the ALJ's view, the record in this proceeding does establish that FX and VNXX traffic can be practically distinguished from local traffic for intercarrier compensation purposes. Verizon argues that there need not be any significant problems with implementing its proposal because a practical method for distinguishing FX and VNXX traffic from traffic that is subject to reciprocal compensation has already been proposed in other states and could, inexpensively, be implemented in Pennsylvania. Verizon explains that the record demonstrates that this could be accomplished simply and inexpensively by requiring US LEC to conduct a traffic study, based on an analysis of known FX and VNXX

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42 Haynes Rebuttal, pp. 8:10-19.

43 Tr. 235:10-11.

numbers, to determine the proportion of calls exchanged between the Parties that are not subject to reciprocal compensation but that should be subject to access charges.[44]

Verizon further noted that US LEC introduced no testimony to support any claim that it would be burdensome to determine the volume of traffic that it delivers to its VNXX customers. Accordingly, Verizon is of the opinion that the record establishes unambiguously that there is no practical obstacle to implementing Verizon's proposed language. Verizon concludes that the ALJ's reliance on the factual determination of the Wireline Bureau was based on a different record and is contrary to the evidence in this proceeding and cannot be sustained. (VZ Exc., p. 26).

d. Disposition

Before we begin our analysis of this issue, it is important to stress that this disposition shall not address the merits of US LEC's use of VNXX codes in Pennsylvania to provide "FX-like" service. Verizon does not challenge the CLEC's use of VNXX and this is a consideration which is the subject of a generic investigation. *See* Docket No. I-00020093 (Initial Prehearing Conference before ALJ Paist held January 17, 2003).[45] The merits on the use of VNXX codes and compensation, will be resolved in the *VNXX Generic Investigation*, *supra*. Rather, we shall only address, based on the record evidence in this proceeding, the type of intercarrier compensation that we conclude should apply to the traffic at issue here.[46] Also, our ruling here is limited to only intrastate traffic per our decision in the *Level 3 Order*. This determination is, however, without

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[44] *See* Tr. 232:10-25, 234:4-14, 236:16-240:1.

[45] We note Verizon's citation of the *Focal Order* for the proposition that NXX codes should be assigned to customers that correspond with the rate centers in which the customer is physically located. (R.D., p. 41).

[46] The *ISP Remand Order* has virtually preempted state commission rate authority over intercarrier compensation for ISP-bound traffic. Thus, our determination is limited to voice traffic only.

prejudice to this Commission's consideration of intercarrier compensation for FX-like, toll substitute, or other similar services in any forthcoming investigation.[47]

Upon our review of the record and Verizon's Exceptions, we shall modify the ALJ's recommendation on this issue, consistent with our discussion. We conclude that calls to VNXX telephone numbers that are not in the same local calling area as the caller should not be subject to reciprocal compensation. However, we also conclude that assessing originating access charges on those types of VNXX calls to the terminating party is not appropriate. As such, we will direct, as an interim determination, that such traffic be compensated on a "Bill and Keep" basis, unless the Parties to this Agreement propose an alternative arrangement for our approval or the Commission takes subsequent action that modifies this interim determination. *See Local Competition Order*, Para. 1111 ". . . it is clear that bill-and-keep arrangements may be imposed in the context of the arbitration process for termination of traffic, at least in some circumstances." In light of the fact that this is an issue of first impression for this Commission, and there appears to be a divergence among the state commissions and FCC Staff which have considered the issue, we conclude that although this result was not expressly advanced by either of the Parties in their Final and Best Offers, it would better implement the objectives of TA-96 under the current rules and provides appropriate conditions which should be placed upon the Parties to the proposed Agreement. This resolution shall be applicable to Verizon's interconnection agreements and not other ILECs'. As noted, Section 252(c) of TA-96, provides that "[i]n resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall . . . ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251."

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[47] Pursuant to Para. 1035 of the *Local Competition Order*, the state commissions have the authority to, *inter alia*, determine what geographic areas should be considered "local areas" for the purposes of applying reciprocal compensation obligations under Section 251(b)(5) of TA-96, 47 U.S.C. § 251(b)(5).

(Emphasis added). However, as noted, this does not foreclose the Parties to this Agreement from proposing an alternative arrangement for our approval.

As noted, US LEC argues that the Commission should adopt its language which would direct that calls are rated as local (in which case reciprocal compensation must apply under federal law) or toll (in which case reciprocal compensation would not apply) based on the NXX codes of the calling and the called parties. In other words, US LEC wants the Commission to rule that reciprocal compensation should apply to a call under circumstances where the VNXX code it assigns to the called party is in the same local calling area as the NXX code assigned to the calling party – irrespective of the physical location of the called party. At the same time, US LEC contends that access charges should apply to calls to VNXX codes only when the NXX of the caller is not associated with the same local calling area as the VNXX code.

Verizon, on the other hand, argues that the Commission should direct that calls be rated as local or toll based on the physical location of the calling and called parties. In other words, Verizon wants the Commission to rule that federal law does not require reciprocal compensation for a call when one of Verizon's customers makes a call to a CLEC's virtual NXX telephone number as the call terminates outside of the local calling area of the Verizon customer. Verizon heavily relies upon the "end-to-end" analysis used by the FCC in various related orders. Verizon asserts that the FCC has used this traditional analysis to determine the jurisdictional nature of a call as interstate. Verizon reasons that since the calling party and the called party are in different physical locations that are not part of each other's local calling area, the call must be considered "exchange access" (*i.e.*, a toll call) under federal law. Consequently, Verizon takes the added step to assert that by definition, this traffic is not subject to reciprocal compensation and must be subject to originating access charges.

Both Parties concede that the routing of calls is based on the standard industry-wide practice of utilizing NXX codes, which are associated with rate centers.[48] When a telecommunications carrier receives a NXX code from the North American Numbering Plan Administrator, the carrier assigns the NXX code to a rate center. However, the Parties disagree concerning the implications of utilizing the NXX code for call rating purposes (*i.e.*, the determination of whether a call is local or whether the caller should be charged a separate toll charge). US LEC maintains that Verizon, in its campaign to end the payment of reciprocal compensation to CLECs for VNXX calls, is seeking to alter the standard industry-wide practice of rating calls by comparing the calling party's NXX with the terminating party's NXX.[49]

We acknowledge that the telecommunications industry has historically compared the destination points (or rate centers) of NXX codes to determine the appropriate billing treatment of calls as local or toll. This method was utilized because the NPA/NXX code was generally assigned to a customer residing in the same exchange to which the NPA/NXX was homed. Consequently, the "location" of the NPA/NXX was a reasonable proxy for the actual physical location of the particular customer being called. Accordingly, it was a reasonable presumption that the result of an "end-to-end" analysis of a call and the comparison of the calling party's NXX code with the

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[48] A rate center is a geographic location identified by a vertical and horizontal coordinate within an exchange area, from which mileage measurements are determined for the application of toll rates and private line interexchange mileage rates. A rate center may have more than one NXX code, but each code is assigned to one and only one rate center. (US LEC St. 2.0, n. 8, p. 21; Verizon Witness Haynes Direct Testimony, pp. 3-4).

[49] US LEC in its Petition in footnote 21 on p. 17 states that it does not utilize "virtual NXX" service in Pennsylvania. However, in order to compete with Verizon's FX service, and to be able to offer its customers a full range of services, US LEC believes that it should be able to utilize this type of service. We note that this statement appears to be contrary to the testimony presented during the arbitration hearing. Based upon our review of the transcripts, it appears that US LEC has approximately six customers that subscribe to FX service using VNXX codes. None of those six customers are ISP customers, however. Tr., pp. 243-244.

terminating party's NXX code were consistent, as the assignment of the NXX codes corresponded with the true physical location of the customers. In other words, by comparing the NPA/NXXs of the calling and called parties, carriers were able to determine whether the call remained within the local calling area and rate it as a local call or to determine whether the NPA/NXX terminated outside of the local calling area and rate it as a toll call. As a result, carriers could rate the call accurately.

However, this presumption is no longer valid in an environment where NPA/NXXs are disassociated from the rate centers to which they are homed and we are not convinced that US LEC's arguments that the industry-wide practice of rating a call based upon its assigned NXX is viable under the recent phenomena of VNXX. Although the calls that are made to VNXX telephone numbers appear to be local to the end-user caller, the location of the calling and called parties leads us to conclude that they are in the nature of interexchange calls that TA-96 would remove from reciprocal compensation obligations. Based on an "end-to-end" analysis of a VNXX call, the physical locations of the caller and called party are in two different exchanges that may not be local to each other. As a result, we are of the opinion that calls to VNXX telephone numbers should not be subject to reciprocal compensation.

The Commission believes that the intercarrier compensation for calls utilizing virtual NXX/FX codes should be based upon the end points of the call, rather than upon the NPA/NXX assigned to the calling and called parties. As noted by the FCC, it has traditionally determined the jurisdictional nature of a call by its origination and termination points or end points, and not by its telephone number assignment. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, CC Docket No. 99-68, 16 FCC Rcd 9151 (2001) (*ISP Remand Order*), *remanded, WorldCom, Inc v. FCC*, 288 F.3d 429 (D.C. Cir. 2002); *see also Teleconnect Co. v. Bell Telephone Co. of Penn.*, E-88-83, 10 FCC Rcd 1626 (1995) *(Teleconnect),*

aff'd sub. nom. Southwestern Bell Tel. Co. v. FCC, 116 F.3d 593 (D.C. Cir. 1997); *Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corporation,* 7 FCC Rcd 1619 (1992) (*Bell South Memory Call*), *aff'd, Georgia Pub. Serv. Comm'n v. FCC,* 5 F.3d 1499 (11th Cir. 1993); *see generally, Mountain Communications; AT&T Corp. v. Bell Atlantic-Pennsylvania,* 14 FCC Rcd 556 (1998), *recon. denied,* 15 FCC Rcd 7467 (2000).

The Commission acknowledges that pursuant to the end-to-end analysis used by the FCC, the VNXX traffic in question would not be considered local under the current interpretation of TA-96 as the traffic terminates outside of the local calling area of the calling party (ILEC customer). The FCC's regulations require reciprocal compensation only for the transport and termination of traffic "that originates and terminates within a local calling area established by a state commission." 47 C.F.R. §51.701(a)-(b)(1). Since VNXX traffic does not originate and terminate in the same rate center or local exchanges, we conclude that VNXX FX traffic is not subject to reciprocal compensation.

We are also in agreement with several aspects of the Florida Public Service Commission's (PSC) reasoning concerning this issue. The Florida PSC concluded that the appropriate intercarrier compensation should be determined by the physical origination and termination of a call:

> We believe that the classification of traffic as either local or toll has historically been, and should continue to be, determined based upon the end points of a particular call. We believe this is true regardless of whether a call is rated as local for the originating end user (*e.g.*, 1-800 service is toll traffic even though the originating customer does not pay the toll charges). We acknowledge that an ILEC's costs in originating a virtual NXX call do not necessarily differ from the costs incurred originating a normal local call. However, we do not believe that a call is determined to be local or toll based upon the ILEC's costs in originating the call. In addition, we do not believe that the proper application of a

> particular intercarrier compensation mechanism is based upon the costs incurred by a carrier in delivering a call, but rather upon the jurisdiction of a call as being either local or long distance.
>
> This raises the issue of whether reciprocal compensation or access charges should be applied to virtual NXX/FX traffic. We agree with BellSouth witness Ruscilli that calls to virtual NXX customers located outside of the local calling area to which the NPA/NXX is assigned are not local calls for purposes of reciprocal compensation. As such, we believe that they are not subject to reciprocal compensation. ...

The Florida Commission further noted that, although its conclusion created a default for determining intercarrier compensation, it did not mandate a particular intercarrier compensation mechanism for virtual NXX/FX traffic. Rather, the Florida PSC determined that it would be 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.[50]

Notwithstanding that we conclude that VNXX should not be subject to reciprocal compensation, at this time, we also conclude that Verizon's position regarding the imposition of originating access charges on VNXX traffic is not appropriate based on this record. We are mindful of the Illinois Commerce Commission which considered the issue and noted the following: "As Verizon recognizes, it will incur no more additional cost for transporting a virtual NXX call to the POI than it does for transporting any other

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[50] The Florida Commission concluded: (1) that carriers shall be permitted to assign telephone numbers to end users physically located outside the rate center to which the telephone number is homed (as noted, we are not making a determination on this issue in this Opinion and Order); (2) that intercarrier compensation for calls to these numbers shall be based upon the end points of the particular calls; (3) that calls terminated to end users outside the local calling area in which their NPA/NXXs are homed are not local calls for purposes of intercarrier compensation; and (4) that carriers shall not be obligated to pay reciprocal compensation for this traffic.

Global-bound local call to the POI, and we have already found that such additional cost will be trivial." *See Global NAPs, Illinois Petition for Arbitration Pursuant to Section 252(b) . . . with Verizon North, Inc. . . .*; 2002 Ill. PUC LEXIS 946 (*Global Ill Order*) (note omitted). As in the Illinois case, both Parties to the instant arbitration admit: (1) that calls to FX customers are indistinguishable from other local calls (Tr., pp. 194-195); (2) that an FX call is handled and routed the same as any other local call (Tr., p. 228); and (3) that the physical location of the terminating party has no impact on the costs it incurs to transport a call. (Haynes Rebuttal, p. 12).

Based on the foregoing, the position of US LEC regarding the increased costs to Verizon is well-taken. Verizon's request for originating access for VNXX does not appear justified based on cost incurrence principles. On the contrary, it appears, based on this record, that the cost to Verizon to deliver traffic to US LEC's POI is the same for an ordinary local call as for a call to a VNXX telephone number. Verizon's network facilities associated with its intraLATA toll facilities do not appear to be taxed differently in any perceptible way for ordinary local traffic, as compared to VNXX traffic. Thus, the basis of Verizon's harm would appear to be alleged lost toll revenues. And, Verizon's entitlement to these foregone toll revenues is primarily based on its position that current rules define what occurs with VNXX as interexchange toll.

At present, we are concerned about the effect of requiring originating access charges on VNXX traffic where it has not been shown, on this record, that originating access charges are appropriate. As noted by the Illinois Commerce Commission, which relied, in part, on the reasoning and analysis of *Essex Telcom, Inc. -vs- Gallatin River Communications*, L.L.C, 2002 Ill PUC LEXIS 703 (2002), Verizon's proposal for originating access is administratively problematic, as well as unrelated to cost incurrence principles. In the *Global Illinois Order*, it was noted that Verizon's automated recording systems are not able to recognize virtual NXX calls for the purpose of assessing originating access charges on this traffic; Verizon's request for

distinguishing virtual NXX calls was applicable for a *single* CLEC but not for the multiple CLECs that could opt into the Interconnection Agreement; Verizon was silent with respect to the terminating access charges it would owe the CLEC if virtual NXX calling were treated as toll calling for intercarrier compensation purposes; and Verizon did not acknowledge that it will also receive compensation, through local service charges, from the Verizon customer that places a local call to a CLEC virtual NXX.

Furthermore, we are not convinced that the instant record provides any more workable solution to the ability of Verizon to properly account for VNXX traffic for this Commission's consideration of a more detailed intercarrier compensation mechanism than Verizon has presented in other jurisdictions where this issue has been litigated.[51] Similar to the considerations faced by the FCC Staff in the *VA Arbitration Order*, we are not convinced that Verizon has proposed any workable and detailed proposal for conducting a traffic study to develop a factor to account for virtual FX traffic.

ALJ Cocheres expressed his agreement with the FCC Wireline Bureau with regard to Verizon's proposal to conduct a traffic study to develop a factor to distinguish FX and VNXX traffic from traffic that is subject to reciprocal compensation. As noted, the Wireline Bureau recommended the dismissal of Verizon's proposal stating "Verizon's contract fails to lay out such a mechanism in any detail."[52] In the instant case, Verizon argues in its Exceptions, that its witness, Terry Haynes, testified in this proceeding that it is a relatively straightforward matter to conduct a traffic study, based on an analysis of known FX and VNXX numbers, to determine the proportion of calls exchanged between the parties that are not subject to reciprocal compensation but that should be subject to

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[51] Verizon has argued that a proposal to account for VNXX traffic has been offered in Florida. Our review does not disclose any details of such a plan and the Florida PSC has, apparently, left it up to parties to negotiate compensation for VNXX traffic.

[52] Order at ¶302.

access charges. (VZ Exc., p. 25 citing Tr. 232:10-25, 234:4-14, 236:16-240:1). Verizon argues that if it is easy for an incumbent LEC to perform such a study on a base of three million customers, then US LEC should have no difficulty to perform a study for six VNXX customers in Pennsylvania. Verizon contends that, based on comparable evidence, the South Carolina Commission concluded that "the parties can accurately and inexpensively distinguish FX and VNXX traffic from local traffic for intercarrier compensation purposes."[53]

In the instant proceeding, Verizon's proposal to have US LEC conduct a traffic study is not materially different from that approach considered expensive and problematic in the *VA Arbitration Order*, at Para. 302. Further, the questions which arose in the *Global Illinois Order* are not answered here, as well.

Based on our concern that Verizon presents no reasonable and practical method to separate VNXX FX-type traffic from local traffic for intercarrier compensation purposes in the present case, we shall direct that the compensation be according to "Bill and Keep" until revised in any forthcoming investigation or proceeding. This resolution shall be applicable to Verizon's Interconnection Agreements and not other ILECs'.

Lastly, we believe that VNXX may provide a functionally equivalent service to Verizon's "traditional" FX service. Indeed VNXX appears to be a competitive response to FX service, which has been offered in the market by ILECs for years. As noted by ALJ Cocheres, until this proceeding, Verizon offered FX service to its current customers and collected reciprocal compensation from CLECs for terminating this traffic. (R.D., p. 38). We would agree with Verizon that there are differences between traditional FX service that has been offered by the ILECs prior to local exchange competition and the recent introduction of "functionally equivalent" FX-type service offerings that

[53] *South Carolina Order*, p. 29.

employ VNXX codes and that have been introduced by the CLECs since the arrival of competition in the local exchange.

Generally, subscribers to traditional, *i.e.* inter-company FX service (which is the functional equivalent to VNXX FX Service) were required, and in many instances still are required, to maintain local dial tone service in the normal exchange in which they were located as well as in the desired foreign exchange.[54] The traditional FX subscribers also paid for the dedicated facilities between the rate center, or the exchange, in which they were physically located and the rate center, or exchange, of the foreign exchange.[55] Thus, the NXX code associated with the foreign exchange was actually associated with a rented terminal that was physically served from the foreign exchange and all calls to that FX telephone number made by customers in the local calling area of that FX telephone number were appropriately rated as local calls by the ILECs. This arrangement worked fine in a single-carrier environment as no issues were ever raised with regard to intercarrier compensation between the ILECs. While we acknowledge that differing network architectures necessitate differing methods of providing this service; nevertheless, we believe that virtual NXX and FX service may be similar services. Therefore, since it is a competitive alternative, we will not assess access charges on VNXX traffic at this time.

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[54] The FX subscriber's local company generally rented a terminal in the foreign exchange on behalf of the FX subscriber. The rate for that rented terminal was generally 85% of the one-party tariffed residential or business local service rate offered by the ILEC in that foreign.

[55] The rates charged for those dedicated facilities helped Verizon recover some of the toll revenue it lost through the offering of FX service. Furthermore, in addition to the monthly rate for the dedicated facilities, the ILECs sometimes assessed mileage charges on the traditional FX customer based on the $0.01 multiple of the day station-to-station initial period message toll rate between the normal exchange and the foreign exchange to also help recover some of the toll revenue that would be lost under FX service.

In conclusion, we direct, in the interim, that no reciprocal compensation shall be paid for VNXX traffic between Verizon and US LEC, that Verizon shall not assess originating access charges to US LEC for VNXX calls by Verizon's customers, and that the compensation should be according to "Bill and Keep" between Verizon and US LEC, pending revision and any forthcoming investigation or proceeding.[56]

6. **Issue No. 8: What compensation framework should govern the Parties' exchange and termination of ISP-bound traffic in the event the FCC's Internet Order is vacated or reversed on appeal?**

a. **Position of the Parties**

US LEC is of the opinion that in the event that the *ISP Remand Order* is vacated or reversed on appeal, the Parties should continue to compensate each other at the rates set forth in the *ISP Remand Order* for Internet-bound traffic, but that other terms and conditions in that Order, such as growth caps and new market restrictions, be waived. (US LEC M.B., p. 47).

Verizon argued that the *ISP Remand Order* sets forth a specific intercarrier compensation regime that governs the exchange of Internet-bound traffic between Verizon and US LEC during the course of this arbitrated agreement. If there is a subsequent change of law on this point, Verizon submitted that the Parties' obligations should conform to that change pursuant to the change of law clause in the agreement. Verizon also argued that there was no basis in federal law to support the US LEC proposal and that US LEC had incorrectly interpreted the *WorldCom, Inc.* decision by seeking to eliminate the growth cap and new market provisions. (VZ M.B., pp. 40-41).

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56 *See,* Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* at CC-Docket No. 96-98;

b. ALJ Recommendation

The ALJ, in noting that US LEC's proposal is laudable because it would avoid future litigation, recommended that Verizon's proposal be adopted without modification because the issue of reciprocal compensation is far too contentious to be solved by the language proposed by US LEC. The ALJ noted that the FCC's Wireline Bureau reviewed substantially the same issue and came to the same result. Accordingly, the ALJ recommended that Verizon's original language in Section 50.2 of the General Terms and Conditions (page 25) and Section 8.1 of the Interconnection Attachment (page 65) be incorporated into the Agreement and that Section 8.1.1 of the Interconnection Attachment (page 65) be rejected.

c. Exceptions

No Party has excepted to the ALJ's recommendation.

d. Disposition

We shall approve the ALJ's recommendation and direct that the proposed Interconnection Agreement incorporate this recommendation.

Intercarrier Compensation for ISP-Bound Traffic at CC-Docket No. 96-98, 16 FCC Rcd 9151 (2001, *remanded, WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

7. Issue No. 9: **Should Verizon be permitted to change its non-tariffed charges during the term of the agreement, or must such charges remain fixed for the entire term? (*See* Petition, p. 27).**

a. **Position of the Parties**

Verizon posits that the non-tariffed rates and charges (*i.e.*, rates and charges fixed in the Agreement) for services listed in the Agreement should change to tariffed rates and charges whenever it files rates and charges for those same services in subsequent tariff filings during the term of the Agreement. Verizon PA viewed the need to change rates in the Agreement as required by the duty to maintain non-discriminatory rates for all the CLECs. Verizon PA explained that it tried to make its rates uniform within each state. As such, Verizon believes that rates and charges that have been fixed in the Agreement should change to reflect a particular tariffed rate/charge if Verizon subsequently decides or is ordered to include that particular rate/charge in its tariff. Verizon claimed its ability to change rates would always be subject to regulatory review on the federal or state level and that US LEC has the ability to intervene at any time that it files new tariffs with proposed rate changes.[57] (R.D., p. 47).

US LEC posited that the non-tariffed rates and charges for services that the Parties agreed upon in the Agreement should remain fixed for the term of the Agreement, regardless of whether Verizon files subsequent tariffs that establish rates and charges for those services. However, US LEC was willing to accept the possibility that tariffed rates could change and that the rates in the Agreement based on those tariffed rates could be changed by the Applicable Law provisions of the Agreement. US LEC dismissed Verizon's proffered opportunity to participate in whatever proceeding generated the new Verizon rate proposal as being distracting to management, financially burdensome and

[57] VZ M.B., pp. 42-43.

undermining the pricing certainty of the Agreement.[58] Finally, US LEC asserted that its position is consistent with the FCC's Wireline Bureau decision that rejected a similar Verizon position in the *VA Arbitration* case.[59] (R.D., pp. 46-47).

b. ALJ Recommendation

The ALJ adopted Verizon's proposal without modification. The ALJ saw no viable distinction between a rate case to change a tariffed rate and a rate case to replace a non-tariffed charge. As such, the ALJ was unable to accept US LEC's characterization that Verizon's rate proposal would be distracting to management, financially burdensome and undermining the pricing certainty of the Agreement. The ALJ opined that US LEC's position was inconsistent in light of the fact that new rates could be included in the Agreement when regulators changed currently tariffed rates that were previously included in the Agreement but newly proposed tariff rates could not be included in the Agreement if they were initially non-tariffed rates. (R.D., p. 48).

The ALJ noted that although the FCC's Wireline Bureau specifically ruled against similar arguments made by Verizon in the *FCC Wireline Bureau Arbitration Order,*[60] his reading of those same portions of the Wireline Bureau's Order indicated the basis for some support for Verizon in this case. In this regard, the ALJ stated:

> Notwithstanding Verizon's representation to the contrary, I note that the Wireline Bureau specifically ruled against similar arguments made by Verizon in the FCC Wireline Bureau Arbitration Order. Id. at §§598-603. Even so, my reading of those same portions of the Wireline Bureau's Order indicated the basis for some support for Verizon in this case. More specifically, the [Wireline] Bureau did not permit any amendment to any agreed upon rates. It made no

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58 US LEC R.B., pp. 28-29.

59 US LEC M.B., pp. 49-50.

60 *Id.*, pp. §§598-603.

distinction between tariffed and non-tariffed rates. It did not allow either to be amended. Id. at §§598-600. The Bureau was concerned that Virginia's refusal to apply federal law would lead to state approved rates which did not comply with federal law, would replace federally determined rates and would not be appealable to the federal courts. Id. §§600-601.

The situation is different in Pennsylvania. This Commission has accepted the authority delegated to it by the Telco Act and embraced the federal standards. The reservations expressed by the Bureau are simply not applicable in this case. Any rate approved by this Commission for a listed non-tariffed charge should comply with the federal standard and could be substituted for the one listed in the Agreement. Accordingly, I recommend the adoption of the original language of Section 1.5 of the Pricing Attachment (page 115). Finally, I emphasize that Verizon's proposed language does not give Verizon unfettered discretion to change the non-tariffed charges. The proposal only permits changes to the non-tariffed charges when those changes are required and/or approved by orders of this Commission and/or the FCC.

(R.D., p. 49).

c. Exceptions

US LEC takes exception to the ALJ's view that there is internal inconsistency in US LEC's position. US LEC asserts that its position is based on the expectations set by the Agreement, on how rate changes affect US LEC's business plan, and the fundamental principle that US LEC is entitled to negotiate and arbitrate an individualized Interconnection Agreement with Verizon that includes rates fixed for the term of the Agreement. (US LEC Exc., p. 5).

US LEC argues that the Agreement permits it to purchase certain services either pursuant to the Agreement or an applicable Verizon Tariff. If it makes a business decision to purchase a service or facility from a tariff, it does so knowing that Verizon

can increase the rates charged by filing a new or amended tariff. At the same time, US LEC believes that it is entitled to purchase a service or facility from Verizon for a fixed price that will not change during the term of the Agreement. US LEC argues that there are any number of reasons why it would agree to a tariffed price in one instance and a fixed price in another. These include general certainty in business planning or the importance of a particular rate to US LEC's business plan. (US LEC Exc., pp. 5-6).

US LEC also submits that pursuant to Section 1.3 of the Agreement (p. 1), the Principle Document cannot be waived or modified except by a written document that is signed by the parties. US LEC continues that Section 1.3 of the Agreement also gives either party the right to add, modify, or withdraw its Tariff(s) at any time without the consent of, or notice to, the other party. As such, US LEC argues Verizon could unilaterally change US LEC's expectations as to the prices it will pay for services by being able to replace non-tariffed negotiated rates and charges (which otherwise cannot be changed except by agreement of the parties, or upon valid commission order) with tariffed rates and charges which can be changed any time Verizon PA chooses. (US LEC Exc., p. 6).

US LEC further argues that Sections 251 and 252 of TA-96 do not provide for one side to unilaterally set the terms of interconnection pursuant to tariff. US LEC continues that its right to participate in the tariff process should not undermine the purpose and utility of individually negotiated/arbitrated agreements. In that regard, US LEC argues that, taken to the extreme, Verizon's position would permit Verizon to completely undo all negotiated/arbitrated Interconnection Agreements for all CLECs with whom it has an Interconnection Agreement by filing tariffs that supersede any individually negotiated rates. (US LEC Exc., p. 7).

d. Disposition

We agree with US LEC that the disposition of this issue turns on a determination of whether Verizon can change US LEC's expectations as to the prices it will pay for services by being able to replace negotiated, non-tariff rates, which otherwise cannot be changed except by agreement. After due consideration of the Parties' positions and the ALJ's finding on this issue, we are of the opinion that US LEC's position is consistent with the non-disputed terms of the agreement as well as with the intent of TA-96.

First, Section 1.3 of the Agreement would prohibit Verizon from changing or modifying the non-tariffed rates/charges in the Agreement with tariffed rates and charges. That section reads as follows:

> This Agreement constitutes the entire agreement between the parties on the subject matter hereof, and supercedes any prior or contemporaneous agreement, understanding, or representation, on the subject matter hereof. **Except as otherwise provisioned in the Principal Document, the Principal Document may not be waived or modified except by a written document that is signed by the Parties. Subject to the requirements of Applicable Law, a Party shall have the right to add, modify, or withdraw, its Tariff(s) at any time, without the consent of, or notice to the other party.** (Emphasis Ours).

Based on our reading of this Agreement, we conclude that, unless specifically allowed by the Interconnection Agreement (e.g., agreement by the parties or valid Commission Order), the non-tariffed rates negotiated in this Agreement must remain in effect throughout the term of the Agreement and thus cannot be unilaterally changed through the filing of tariff revisions by Verizon.

We also are persuaded by US LEC's argument that the ALJ's recommendation to adopt Verizon's proposal would undermine TA-96's Interconnection Agreement framework by limiting US LEC's right to negotiate a fixed rate and also by limiting US LEC's bargaining power in negotiating subsequent changes to the Agreement. Although we agree with the ALJ that the situation in the instant Pennsylvania arbitration is different than the *VA Arbitration* proceeding conducted by the FCC's Wireline Bureau because this Commission has accepted the authority delegated to it by TA-96 and embraced the federal standards in establishing the Interconnection Agreement rates and charges, we disagree with the outcome of the ALJ's recommendation that would permit Verizon to change the rates through tariff filings for those rates that had been established via the negotiation or arbitration clauses of Section 252 of TA-96. As such, we find that the ALJ's recommendation would undermine the purpose and utility of individually negotiated/arbitration agreements because it easily allows Verizon to replace rates that were arrived at through negotiation or arbitration with rates filed by Verizon in a subsequent tariff filing. This is consistent with the FCC determination that using the tariff process to circumvent the negotiation and arbitration processes in Sections 251 and 252 of TA-96 cannot be allowed.

Based upon the foregoing discussion, we shall grant the Exceptions of USLEC and reverse the ALJ on this issue.

IV. CONCLUSION

The Parties, shall, consistent with the Commission's *Implementation Order*, file, or cause to be filed, an Interconnection Agreement consistent with the resolution of disputed issues set forth in this Opinion and Order.

V. ORDER

1. That with regard to Issue Nos. 1 and 2, the language offered by US LEC of Pennsylvania, Inc., in its Best and Final Offer to replace:

   a. Section 2.45 of the Glossary (page 31),

   b. Section 2.1.5.3 of the Interconnection Attachment (page 53),

   c. Section 7.1.1.1 of the Interconnection Attachment (pages 61-62) and

   d. Section 7.1.1.3 of the Interconnection Attachment (page 63),

be made part of the Agreement.

2. That with regard to Issue Nos. 1 and 2, the request by US LEC of Pennsylvania, Inc., in its Best and Final Offer to delete Sections 7.1.1.1.1 and 7.1.1.2 in their entirety from the Interconnection Attachment (pages 62-63) be granted.

3. That the ALJ's recommendation concerning Issue No. 3 is reversed and the language proposed by Verizon Pennsylvania Inc.:

   a. that maintains Section 2.75 of the Glossary (page 31) so all references to Voice Information Service Traffic is retained and this action is modified consistent with Verizon Pennsylvania Inc.'s Best and Final Offer,

   b. that maintains the last sentence of Section 5.1 of the Additional Services Attachment (page 43) and

   c. that maintains Section 7.3.7 of the Interconnection Attachment (page 65),

be made part of the Agreement.

4. That the ALJ's recommendation concerning Issue No. 4 be reversed and that Section 5.3 of the Additional Services Attachment (page 43) be deleted in its entirety.

5. That the ALJ's recommendation concerning Issue No. 5 be modified and the language offered by US LEC of Pennsylvania, Inc., in its Best and Final Offer be revised as follows:

a. Section 2.56 of the Glossary (page 33) be modified by deleting the words "Terminating Party" from the Section,

b. Section 2.56 of the Glossary (page 33) be modified by adding the words "other Party" in place of the words "Terminating Party" in the last sentence of the Section,

c. Section 2.56 of the Glossary (page 33) be amended to add the clarifying Commission language consistent with the discussion in the Disposition section of Issue No. 5 in this Opinion and Order,

d. Section 2.1.2 of the Interconnection Attachment (page 52) be modified by deleting the words "Terminating Party" and "Terminating" from the Section,

e. Section 2.1.2 of the Interconnection Attachment (page 52) be modified by adding the words "other Party" to be substituted for the words "Terminating Party" in the last line of the Section,

f. Section 2.1.2 of the Interconnection Attachment (page 52) be amended to add the clarifying Commission language consistent with the discussion in the Disposition section of Issue No. 5 in this Opinion and Order, and

g. Sections 8.5.2 and 8.5.3 of the Interconnection Attachment (page 66) be modified as proposed by US LEC in the Interconnection Agreement attached as Exhibit B to the Petition.

6. That the ALJ's recommendation with regard to Issue No. 6 be modified, consistent with this Opinion and Order, and that the Parties revise the appropriate sections of the Agreement to reflect: (1) that VNXX traffic is not subject to reciprocal compensation; (2) that it is not appropriate to assess originating access charges on VNXX traffic; and (3) that in the interim, until a final compensation determination is made in the *Generic Investigation Regarding Virtual NXX Codes* at Docket I-00020093, VNXX traffic as defined in this proceeding (*i.e.*, calls to VNXX telephone numbers that are in the same local calling area as the caller) be compensated on a "Bill and Keep" basis, consistent with the discussion contained in the body of this Opinion and Order.

7. That with regard to Issue No. 7, which had been settled by the Parties, the following agreed-to language as recommended by the Administrative Law Judge should replace Section 12.4 of the Interconnection Attachment (page 71):

> 12.4 US LEC shall exercise its best efforts to enter into a reciprocal Telephone Exchange Service traffic arrangement (either via written agreement or mutual Tariffs) with any CLEC, ILEC, CMRS carrier, or other LEC, to which it delivers Telephone Exchange Service traffic that transits Verizon's Tandem Office.

8. That with regard to Issue No. 8, to which no exceptions were filed, the originally proposed language of Verizon Pennsylvania Inc., as recommended by the Administrative Law Judge in:

a. Section 50.2 of the General Terms and Conditions (page 25) and

b. Section 8.1 of the Interconnection Attachment (page 65),

be incorporated into the Agreement.

9. That with regard to the ALJ's recommendation pertaining to Issue No. 8, to which no exceptions were filed, Section 8.1.1 (as proposed by US LEC of Pennsylvania, Inc.) of the Interconnection Attachment (page 65) be rejected.

10. That with regard to Issue No. 9, the ALJ's recommendation is reversed and language corresponding with US LEC's position in Section 1.5 of the Pricing Attachment (page 115) be incorporated into the Agreement.

11. That with regard to the ALJ's recommendation pertaining to Issue No. 11, the following agreed-to language should replace Section 9.3 of the General Terms and Conditions (pages 5-6):

> 9.3 If any portion of an amount billed by a Party under this Agreement is subject to a good faith dispute between the Parties, the billed Party shall give notice to the billing Party of the amounts it disputes (Disputed Amounts) and include in such notice the specific details and reasons for disputing each item. A Party may also dispute prospectively with a single notice a class of charges that it disputes. Subject to the requirements of Applicable Law, notice of a dispute may be given by a Party at any time, either before or after an amount is paid, and a Party's payment of an amount shall not constitute a waiver of such Party's right to subsequently dispute its obligation to pay such amount or to seek a refund of any amount paid. The billed Party shall pay by the Due Date all undisputed amounts. Billing disputes shall be subject to the terms of Section 14, Dispute Resolution.

12. That with regard to the ALJ's recommendation pertaining to Issue No. 11, the following agreed-to language should replace Sections 21.1.1, 21.1.2, 21.1.3, and 21.1.4 of the General Terms and Conditions (pages 12-13):

> 21.1.1 Commercial General Liability Insurance, on an occurrence basis, including but not limited to, premises-operations, broad form property damage, products/completed operations, contractual liability, independent contractors, and personal injury, with limits of at least $1,000,000 combined single limit for each occurrence.
>
> 21.1.2 Commercial Motor Vehicle Liability Insurance covering all owned, hired and non-owned vehicles, with limits of at least $1,000,000 combined single limit for each occurrence.
>
> 21.1.3 Excess Liability Insurance, in the umbrella form, with limits of at least $10,000,000 combined single limit for each occurrence.
>
> 21.1.4 Workers Compensation Insurance as required by Applicable Law, and Employers Liability Insurance with limits of not less than $100,000 per occurrence and $500,000 per policy provided that the Excess Liability Insurance maintained pursuant to Section 21.1.3 has a deductible of no more than $100,000 and covers losses in excess of the total applicable limits of the underlying Employers Liability Insurance.

13. That with regard to the ALJ's recommendation pertaining to the miscellaneous issue "Inaccurate Rates," Appendix A to the Pricing Attachment be approved subject to the corrections noted above and to include whatever changes have been made to the tariffed rates in the interim.

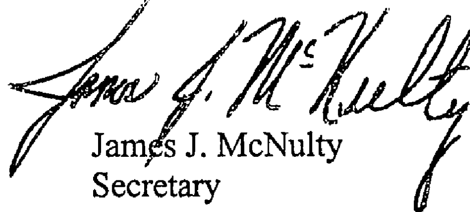
14. That with regard to the ALJ's recommendation pertaining to the miscellaneous issue "Term of the Agreement," and to which no exceptions have been filed, the term of the Agreement be set for a 24-month period and the effective date of the

Agreement be set at ten days after the fully executed Agreement is filed with the Commission which complies with this Opinion and Order.

15. That the remaining portions of the Agreement by and between US LEC of Pennsylvania Inc. and Verizon Pennsylvania Inc. f/k/a Bell Atlantic-Pennsylvania, Inc. for the Commonwealth of Pennsylvania be approved as attached to the Recommended Decision.

16. That upon the filing of a fully executed Agreement, which complies with this Opinion and Order the record shall be marked closed.

BY THE COMMISSION,



James J. McNulty
Secretary

(SEAL)

ORDER ADOPTED: April 17, 2003

ORDER ENTERED: APR 18 2003