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June 1, 2007

Ann Cole, Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

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

Dear Ms. Cole:

Enclosed for filing in the above matter are an original and 15 copies of Verizon Access Transmission Services' Post-Hearing Statement and Brief. Also enclosed is a diskette with a copy of the Brief in Word format. Service has been made as indicated on the Certificate of Service. If there are any questions regarding this filing, please contact me at 770-284-5498.

Sincerely,

CMP
COM 5
CTR
ECR
GCL
OPC
RCA
SCR
SGA
SEC
OTH Rpt

Dulaney L. O'Roark III

Enclosures

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of Verizon Access Transmission Services' Post-Hearing Statement and Brief were sent via overnight delivery(*) on May 31, 2007 and U.S. mail(**) on June 1, 2007 to:

Lee Eng Tan, Staff Counsel (*)
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Dulaney L. O'Roark III

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

VERIZON ACCESS TRANSMISSION SERVICES'
POST-HEARING STATEMENT AND BRIEF

Verizon Access Transmission Services ("Verizon" or "Verizon Access") files its Post-hearing Statement and Brief on the three issues remaining for the Commission's resolution in this arbitration of a new interconnection agreement ("ICA") between Verizon and Embarq Florida, Inc. ("Embarq"). Verizon asks the Commission to adopt its positions and associated contract language with respect to these issues.

ISSUE 1: WHAT COMPENSATION SHOULD APPLY TO VIRTUAL NXX ("VNXX") TRAFFIC UNDER THE INTERCONNECTION AGREEMENT ("ICA")? (ICA § 55.4.)

**** Until the FCC decides the vNXX compensation issue in its ongoing rulemaking, the Commission should adopt for the parties' ICA the same kind of compensation approach carriers have negotiated in the absence of regulatory intervention, and that this Commission has approved for the BellSouth/Verizon ICA and many others. ****

A telephone number is referred to as a "virtual NXX" or "vNXX" number when it is assigned to a customer in a local calling area different from the one where the customer is physically located. *See* Ex. 14, at 7-8 and Ex. 12. The parties' disagreement about vNXX calls concerns the intercarrier compensation that should apply to them--specifically, which entity should receive compensation for handling vNXX traffic, and what rate should apply.

The FCC intends to decide the issue of vNXX compensation in its ongoing Intercarrier Compensation Rulemaking. *See* Ex. 2, at 7, *citing Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, CC Docket No. 01-92, 16 FCC Rcd 9610, at ¶ 115 (2001) and Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685, at ¶ 15 n. 48 (2005). Therefore, any solution reached in this arbitration will necessarily be interim, pending nationwide action by the FCC. The interconnection agreement should specify rapid implementation of the FCC's vNXX compensation regime following its adoption. Ex. 14, at 10-11, 21-22.

Verizon Access and Embarq agree that, until the FCC acts, the Commission should resolve the parties' dispute about vNXX compensation in this arbitration. The only question is *how* the Commission should resolve it. Ex.7, at 11, 159; Ex. 14, at 22.

Embarq takes the traditional ILEC position that it should be paid switched access for handling vNXX traffic. Ex. 14, at 37. As Verizon witness Price explained, this position is rooted in the ILEC's historical status as an exchange access provider to interexchange carriers ("IXCs"). In the exchange access arena, ILECs are compensated through access charges for the functions they provide to originate jurisdictionally interexchange "toll" calls, so they contend that access charges apply to interexchange vNXX calls. ILECs have also expressed concerns that vNXX calling may increase the amount of traffic for which the ILEC is providing a substantial amount of transport, especially if the CLEC has just one point of interconnection ("POI") in the LATA. *Id.* at 9-10.

The traditional CLEC perspective is that vNXX calls are local, so the CLEC should receive reciprocal compensation for terminating them. To support this view,

CLECs cite the fact that calls to numbers assigned to the same rate center are typically rated as local for retail billing purposes. Ex. 14, at 9. CLECs also emphasize that their networks have many fewer switches than the ILECs' legacy networks. Therefore, a single CLEC switch may serve an area comprising a number of ILEC exchange areas, and the CLEC switch often contains many more NPA/NXX codes than reside in a single ILEC switch. *Id.* at 4-5.

In this arbitration, Verizon Access is advocating neither the traditional CLEC position nor the ILEC position with respect to compensation for vNXX calls. Contrary to Embarq witness Fox's misrepresentations, Verizon Access's proposal does *not* require the Commission to rule that vNXX calls are local, it does *not* "deem[] this traffic subject to Section 251(b)(5) of the Act," and it does *not* "seek[] to charge Embarq reciprocal compensation" for vNXX traffic.[1] Indeed, one of the advantages of Verizon Access's proposal is that it is not linked to specific legal definitions, so it avoids the usual debates about the nature of vNXX traffic. Ex. 14, at 23; Ex. 7, at 14-15, 18-20 103-04; Ex. 2, at 8. It simply applies a specified level of compensation (not reciprocal compensation) to vNXX traffic if certain conditions are met. This type of compromise approach has been implemented by carriers across the country, including several in Florida, without any regulatory compulsion. Such a market-based solution moves away from the polarized win-lose paradigm of regulatory decision-making and obviates the need to resolve the

[1] *See* Ex. 14, at 36, 52-53. *See also id.* at 21-23; Ex. 7, at 103-04. In fact, much of Mr. Fox's prefiled direct testimony on Issue 1 was not relevant to that issue or to any Verizon Access position. For example, Mr. Fox alleged that some CLECs' vNXX arrangements might be violating the FCC's number porting rules (Ex. 14, at 39-40), but Embarq acknowledged in discovery that the discussion was not specific to Verizon Access. *See* Ex. 3, at 4. Verizon Access responds here only to Embarq's arguments that relate to Issue 1, which asks the Commission to resolve the matter of intercarrier compensation for vNXX traffic.

thorny regulatory issues that have caused so much litigation in recent years. Ex. 14, at 12-13; Ex. 7, at 103-04.

The foundation of this approach is a trade-off in which the CLEC receives some compensation for handling vNXX calls originated by the ILEC, in exchange for the CLEC's commitment to accept greater responsibility for transporting the traffic from the ILEC's originating end office. Ex. 14, at 11-12. Verizon Access proposed to Embarq the same vNXX compensation arrangement here that it recently negotiated with BellSouth in Florida and its other states. Ex. 14, at 11-12. Under this arrangement, if the parties have at least one point of interconnection ("POI") for exchange of traffic in each ILEC tandem serving area where Verizon Access assigns telephone numbers to its customers, the compensation rate for dial-up Internet vNXX traffic is $0.0007 per minute of use (the same as the FCC's default rate for Internet service provider ("ISP")-bound traffic that an originating carrier hands off to another carrier for delivery to an ISP in that same local calling area). *Id.* at 11-12; Verizon Access's ICA § 55.4.3. This measure of compensation is several times lower than the reciprocal compensation rates the parties agreed to in the new ICA. *See* Ex. 14, at 23; Verizon Access's Petition for Arbitration, Pricing Attachment ("Reciprocal Compensation Rates") (pricing local end office switching at $0.002221 per minute of use ("MOU"); local tandem switching at $0.002053 per MOU; and local shared transport at $0.000814 per MOU) .

In LATAs where the parties do not have a POI in each of Embarq's tandem serving areas, vNXX traffic (voice, as well as ISP-bound) would be exchanged on a bill-and-keep basis under Verizon Access's proposal. Ex. 14, at 11-12, 23.

This compromise solution is similar to the arrangements a number of ILECs and CLECs have agreed to use. Aside from the BellSouth/Verizon Access ICAs, Verizon Access (and other CLECs) have implemented such region-wide agreements with a number of other carriers, including SBC (before its merger with AT&T) and with the Verizon ILECs (before their merger with MCI). In Florida, the Verizon ILEC has, likewise, implemented similar intercarrier compensation agreements with numerous carriers, including AT&T (before its merger with SBC), KMC Data LLC, Level 3 Communications, TelCove Investment, LLC, CommPartners, LLC, Vycera Communications, Inc., AmeriMex Communications Corp., Ganoco, Inc., Bright House Networks Information Services, LLC, Volo Communications of Florida, Inc., Neutral Tandem-Florida, LLC, SBC Long Distance, and Sprint Communications Company Limited Partnership. These multi-state agreements avoid the uncertainty of disparate, state-specific outcomes that may result from litigation; they eliminate billing and invoicing problems for multi-state carriers; they allow parties to appropriately weigh their own business interests; and they obviate the need for state commissions to decide difficult, controversial issues about the nature of vNXX traffic. Ex. 2, at 5-6; Ex. 14, at 23-25.

The fact that a number of sophisticated carriers (including Sprint) voluntarily adopted the type of approach Verizon Access proposes is the best proof that it appropriately balances their interests with the ILECs' interests. Mr. Fox's suggestion that the Commission cannot judge the merits of this approach without knowing the trade-offs these other carriers may have made in negotiations (Ex. 14, at 53) is unconvincing. Given the number of these carriers, their geographic dispersion, and the

diversity of their business plans and operations, it is clear that the compromise approach they are all using does not depend on particular trade-offs or other case-specific circumstances. *See* Ex. 7, at 15-16. There is no reason to believe that "Embarq's circumstances or its business interests are or would be radically different than these other large, sophisticated companies that have large networks that they operate in many states." Ex. 7, at 75. Indeed, Embarq has not suggested anything unique about its situation that might prevent implementation of Verizon Access's proposal in the parties' ICA.

Moreover, as Mr. Price explained, Embarq's simplistic assumption that adoption of Verizon Access's compromise proposal would cause Embarq to lose $1.5 million a month in originating access charges is wrong. If the Commission orders Verizon Access to pay access charges on all vNXX calls, such that dial-up Internet calls become subject to toll charges, consumers are not likely to reach their Internet providers through dial-up access. Ex. 7, at 70, 78. Today, consumers are used to reaching their Internet providers without a toll charge; "[p]eople will not use their computer in the same way if they would have to incur toll charges in order to reach their ISP that way." Ex. 7, at 70-71. This public interest aspect of the parties' dispute makes it especially important for the Commission to consider creative solutions—like the compromise Verizon Access has presented here—that will preserve end users' expectations about how they use the Internet while treating the underlying carriers fairly in terms of intercarrier compensation. Ex. 7, at 15, 70-73, 78.

Although Embarq, unlike other major carriers, would not negotiate a vNXX compromise, Verizon Access remains willing to accept this approach if the Commission

wishes to adopt it as an interim resolution of the vNXX compensation issue until it is settled by the FCC. Verizon Access's position--a significant departure from the typical CLEC litigation position--is a reasonable alternative to Embarq's proposal. In particular, Verizon Access's compromise proposal addresses Embarq's concern about having to provide a substantial amount of transport (*see* Ex. 14, at 39), because Verizon Access will receive no compensation for handling vNXX traffic where it does not establish a POI in the Embarq access tandem serving area. Contrary to Mr. Fox's implication that this network build-out commitment is not a compromise because Verizon "must interconnect with Embarq anyway if it wants to receive Embarq's traffic" (Ex. 14, at 54), Verizon Access is *not* required to establish POIs in each access tandem serving area (but only a single POI per LATA, as Mr. Fox himself acknowledged, *id.*). As Mr. Price explained, Mr. Fox's testimony was misleading, because it ignores the difference between "just having interconnection" and the specific type of interconnection in Verizon Access's proposal that "obligates Verizon to have transport at a minimum to the various tandems that Embarq operates in order to receive compensation." Ex. 7, at 17.

Indeed, Verizon Access's proposal here is consistent with the approach that Sprint, "Embarq's predecessor company" (Ex. 14 at 42), recommended in its arbitration with FDN Communications. In that case, Sprint, like Verizon Access here, explained that "establishing a POI at each tandem is the best approach to establish efficient interconnection arrangements and ensure a reasonable sharing of costs incurred to transport traffic between the parties."[2] This "reasonable sharing of costs" is exactly what Verizon Access's vNXX compensation proposal would achieve.

[2] Ex. 14, at 25, *quoting* Petition for Arbitration of Certain Unresolved Issues Associated with Negotiations for Interconnection, Collocation and Resale Agreement with Florida Digital Network, Inc. by Sprint-Florida

Nothing in the Commission's past decisions prevents it from adopting Verizon Access's solution for Issue 1, and Mr. Fox could not claim otherwise. Indeed, the two cases he cited in his testimony—the Commission's *Reciprocal Compensation Order* and the *Sprint/FDN Arbitration Order*—emphasize that the Commission has explicitly declined to mandate a particular intercarrier compensation mechanism for vNXX traffic.[3] Commission policy is, instead, that it is "appropriate and best left to the parties to negotiate the best intercarrier compensation mechanism to apply to virtual NXX/FX traffic in their individual interconnection agreements." *Reciprocal Compensation Order* at 27-28; Ex. 7, at 77, 89. If parties are unable to agree on a compensation mechanism, the Commission's "default" view is that *non-ISP* vNXX calls are not subject to reciprocal compensation. *Id.* But most vNXX calls are ISP-bound, and Verizon Access is not proposing to apply the parties' agreed-upon reciprocal compensation rate to non-local vNXX calls, in any event. Ex. 7, at 14-15, 77; Ex. 14, at 26.

The Commission's policy favoring negotiation is, of course, consistent with Verizon Access's progressive approach—and the industry trend—that intercarrier compensation arrangements are best negotiated by the parties themselves. Unfortunately, Embarq is out of step with the industry; it remains wedded to the traditional ILEC view of compensation and has refused to consider – or even acknowledge -- Verizon Access's compromise between the traditional ILEC and CLEC positions. The Commission should, therefore, adopt this market-tested solution that

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Incorporated, Order No. PSC-06-0027-FOF-TP, 06 FPSC 1:50, at 81 (Jan. 10, 2006) ("Sprint/FDN Arbitration Order"); *see also* Ex. 8, at 12-13.

[3] *Investigation into Appropriate Methods to Compensate Carriers for Exchange of Traffic Subject to Section 251 of the Telecomm. Act of 1996, Order on Reciprocal Compensation*, Order No. PSC-02-1248-FOF-TP ("*Reciprocal Compensation Order*"), at 27-28 (Sept. 10, 2002); *Sprint/FDN Arbitration Order*, at 89.

numerous carriers, including Sprint, are already using in Florida—some for over two years now. *See* Ex. 14, at 24-25.

ISSUE 4: WHEN THE PARTIES EXCHANGE TRAFFIC VIA INDIRECT CONNECTION, IF VERIZON ACCESS HAS NOT ESTABLISHED DIRECT END OFFICE TRUNKING SIXTY DAYS AFTER REACHING A DS1 LEVEL, SHOULD IT BE REQUIRED TO REIMBURSE EMBARQ FOR ANY TRANSIT CHARGES BILLED BY AN INTERMEDIARY CARRIER FOR LOCAL TRAFFIC OR ISP-BOUND TRAFFIC ORIGINATED BY EMBARQ? (ICA § 61.2.4.)

**** No. Verizon Access already agreed to establish direct trunks within the agreed-upon timeframe, and Embarq has shown no need for its unprecedented self-enforcing penalty. Verizon Access should not be forced to pay Embarq's transit bills, because Verizon Access alone cannot control the timeframe for establishing direct trunks. ****

This issue concerns the parties' exchange of "Indirect Traffic" (or transit traffic) which is traffic originated by one Party and terminated to the other, but where a third-party carrier provides the transiting service. ICA, § 1.63. With indirect interconnection, there is no direct trunk group between the parties, and the third-party transiting carrier charges each originating carrier for handling its traffic. Ex. 14, at 14-15. The agreed-upon portion of section 61.2.4 of the ICA reflects this customary compensation arrangement, requiring each originating party to pay the transit charges assessed on that party by the transiting carrier. *Id.* at 14; Ex. 7, at 102.

Verizon Access has agreed to establish direct trunks between it and the terminating carrier, Embarq, once the transit traffic between them exceeds a DS1 level. ICA, § 61.1.5; Ex. 14, at 15. Embarq, however, proposes a special penalty provision to enforce the agreed-upon section 61.1.5. This provision would require Verizon Access to pay *all* transiting charges--*on Embarq's originating traffic*, as well as on Verizon Access's own originating traffic--if Verizon Access does not establish a direct

connection with Embarq within 90 days after traffic exchanged by indirect interconnection exceeds a DS1 level.[4] This deviation from the industry-standard practice of each carrier paying its own transit bills is, to Verizon Access's knowledge, unprecedented. Ex. 14, at 27; Ex. 7, at 63. As Mr. Price testified, "no other ILEC that Verizon Access has interconnected with has ever requested, demanded...such a provision." Ex. 7, at 63. Indeed, at the arbitration hearing in Ohio, Mr. Fox admitted that its proposed language does not appear in any existing Embarq contracts. Ex. 7, at 124; *see also* Ex. 7, at 63. None of the provisions quoted in Embarq's discovery responses are the same as Embarq 's proposed language here. Those provisions typically give the other party the option to either implement direct interconnection *or* reimburse Embarq for transit charges. Some that require reimbursement (or payment of "terminating compensation") prohibit indirect traffic altogether. *See* Ex. 7, at 29-30, 40; Ex. 10, at 3-19. These are not like Embarq's proposal here, which does *not* give Verizon Access the option of choosing between establishing direct trunks or paying Embarq's tandem charges, and which does allow some indirect traffic. *See* Ex. 7, at 40.

The Commission should reject Embarq's extraordinary proposal for a number of reasons. **First**, it is unnecessary. As noted, Verizon Access has already agreed to establish direct trunks when indirect traffic reaches the DS1 level (ICA, § 61.1.5; Ex. 14, at 15) and even Mr. Fox acknowledged that the ICA's normal dispute resolution provisions would apply to any breach of that provision. *See* Ex 7, Tr., at 16. There is no reason to carve out section 61.1.5 for special enforcement treatment. Embarq cannot

[4] Embarq's proposed § 61.2.4; Ex. 7, at 27; Ex. 14, at 14-15. Although the wording of Issue 4 and the draft ICA submitted with Verizon Access's Petition reflect the 60-day timeframe Embarq originally proposed, Embarq later agreed to a 90-day period for establishment of direct trunks. *See, e.g.*, Ex. 14, at 44.

expect the Commission to approve its self-enforcing penalty mechanism in the absence of compelling proof that existing enforcement mechanisms for breach of the ICA are inadequate. Ex.14, at 29, 59. But Embarq offered no such proof. Its only response to Verizon Access's criticism in this regard was that Embarq "may still need to rely on the dispute resolution provisions" to enforce its self-enforcing penalty provision. Ex. 14, at 57; Ex. 8, at 65. This is because Embarq's language would give it the unilateral discretion to decide that it was Verizon Access's fault (Ex. 8, at 14)—rather than the fault of Embarq or a third party—that direct trunks were not established within the contractual timeframe. As Embarq itself recognizes, Verizon Access is not likely to simply accept Embarq's determination, so the parties will have to resort to dispute resolution to determine fault, in any event. *See* Ex. 7, at 37-38; Ex. 8, at 14. There is, therefore, no point in including Embarq's "supplemental" enforcement provision.

Second, Embarq presented no evidence to support Mr. Fox's general claim that "carriers (particularly CLECs who terminate large volumes of ISP-bound traffic) are extremely slow to establish the direct connection with Embarq's network once the volume trigger is met." Ex. 14, at 43. It did not describe any instances, let alone many instances, where carriers had been unduly slow to establish direct connections, and Mr. Fox's vague, general comments did not appear to be Florida-specific. *See* Ex. 8, at 19-20. Other carriers' behavior is, in any event, irrelevant to the Verizon Access/Embarq ICA under arbitration.

Third, with respect to Verizon Access—the only other party that matters in resolving this Issue--Embarq admitted that Verizon Access's indirect traffic had not reached any volume trigger for establishment of direct trunks. Ex. 3, at 8. In fact, *indirect traffic is likely to remain insignificant*, because Verizon Access is already directly

connected with Embarq throughout Florida.[5] This evidence proves that Embarq's tandem reimbursement proposal is a solution in search of a problem.

Fourth, Embarq has offered no proof that carriers' failure to establish direct trunks imposes so great a financial burden on Embarq that it justifies a special self-enforcing penalty provision. It is not true, as Mr. Fox alleged, that "[t]here is no dispute that Embarq suffers financial damage when Verizon Access fails to establish a direct connection." Ex. 14, at 56. Verizon does, indeed, dispute this allegation. Embarq has acknowledged that Verizon Access has not caused Embarq *any* financial damage. Ex. 3, at 8; Ex. 8, at 51. And any financial harm caused by other carriers has been minimal (and is irrelevant to this ICA, in any event). Indeed, Mr. Fox's testimony was carefully worded to avoid saying that Embarq has actually had to pay transit charges because of other carriers' delays in establishing direct trunks--noting only that Embarq may be "*liable* for *potential* transit charges from the tandem owner." Ex. 14, at 43 (emphasis added); *see* also Ex. 7, at 167-69, 174. In this regard, Embarq admitted that it provides much of its own tandem switching in Florida, so there is less potential for financial harm here than in other states. Indeed, from March 2006 to March 2007, Embarq paid only $14,500 in transit charges, all to BellSouth, allegedly due to other carriers "failing to establish a direct connection as agreed to in their Interconnection Agreements." Ex. 3, at 7; Ex. 9, at 6. There is nothing in the record to verify this figure—for instance, information on what contract provision(s) may have been violated, how long it took to establish the direct trunks, what the cause of any delays was and who was responsible for them. But even accepting the $14,500 as accurate, it is certainly not substantial

[5] Exhibit A (at 17) explains that Verizon Access has direct connections to all but one of Embarq's access tandem serving areas in Florida and Verizon Access has placed orders to establish that remaining direct connection. Because Verizon Access is already directly connected with Embarq throughout Florida, Mr. Fox's unexplained and unsupported allegation that "interLATA EAS situations in Florida create significant opportunities for future indirect traffic" (Ex. 3, at 7) makes no sense.

enough to justify the extraordinary penalty Embarq proposes for the parties' ICA, particularly because none of the $14,500 was attributed to Verizon Access. Ex. 3, at 8, Ex. 8, at 51.

Fifth, Embarq has not even tried to use existing dispute resolution proceedings to address the apparently few delays in direct trunk installations, so it has not proved that its special new enforcement mechanism is necessary. Ex. 9, at 6 ("Embarq has not formally invoked the dispute resolution provision to get carriers to fulfill their agreement to establish direct connection."); Ex. 8, at 20. Embarq admitted that it notifies each carrier when its T1 threshold is met and, "[i]n most all cases these carriers have proceeded to establish direct connections." Ex. 9, at 6. In fact, Mr. Fox admitted that there have been no problems with recalcitrant CLECs in Florida: "in every instance that I am aware of in Florida the CLEC was responsive and initiated the order that they agreed to and fulfilled that." Ex. 8, at 19-21. He alluded to only one "nationwide carrier" with a large traffic volume that had allegedly been slow to establish direct connections, and even then compliance was obtained through repeated follow-up contacts and meetings. Ex. 8, at 19-20. Dispute resolution, let alone an extraordinary new provision, was not necessary to secure compliance with carriers' obligations to establish direct trunks. *See also* Ex. 7, at 152, 166-67.

If quick redress for a claimed breach of the obligation to timely establish direct trunks were as critical as Embarq claims, Embarq would have sought dispute resolution under its existing contracts. Embarq has offered no evidence that existing dispute resolution mechanisms are inadequate to address the direct trunking obligation, so it has not proved the need for the extraordinary new one it proposes.

Sixth, Embarq's language for section 61.2.4 may be contrary to FCC restrictions on the extent to which a LEC may charge other carriers for traffic originating on the

LEC's network. *See* 47 C.F.R. § 51.703(b) (stating that a "LEC may not assess charges on any telecommunications carrier for telecommunications traffic that originates on the LEC's network)." *See also* Ex. 2, at 18; Ex. 14, at 15. This Commission has interpreted Rule 51.703(b) to prevent deviation from the "originating carrier pays" regime currently used by the industry.[6]

Mr. Fox did not deny that Embarq's proposal would allow it to charge Verizon Access for Embarq's originating traffic. His only response was that, in his layman's opinion, Verizon Access's legal concern has no merit, because any penalty Verizon Access incurred under Embarq's language would be Verizon Access's own fault. Ex. 14, at 55. This logic is obviously not correct. If it were, the Commission could adopt any unlawful penalty it wished simply by concluding that that penalty will never take effect if the party does nothing wrong.

Seventh, Embarq's transit charge reimbursement proposal would unfairly hold Verizon Access liable for delays by others that must cooperate with Verizon Access to establish direct trunks. *See* Ex. 7, at 32. Embarq acknowledged that Verizon Access alone cannot always control the timeframe for installation of direct trunks, which is a joint undertaking with another carrier. Ex. 14, at 44. That other carrier may be Embarq or a third party that sells transport in the area where Verizon Access needs it. Although Embarq revised its language to forego compensation for delays caused by Embarq, and Mr. Fox denied any "intent that Verizon Access be responsible for transit costs due to circumstances beyond its control" (Ex. 14, at 55), Embarq did not actually propose

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[6] *Joint Petition by TDS Telecom d/b/a TDS Telecom/Quincy Tel., et al.; Petition and Complaint for Suspension and Cancellation of Transit Traffic Service Tariff filed by BellSouth Tel., Inc.*, Order No. PSC-06-0776-FOF-TP ("BellSouth Transit Order"), at 21-24 (Sept. 18, 2006).

revised language to address delays by third parties. *See id.* at 44-45. Contrary to Mr. Fox's argument that Embarq's new language would "allow[] for circumstances beyond either party's control", the language he presented addresses only delays that are "the fault of Embarq," *id.*, not delays caused by a third party. This is unfair, particularly given Embarq's inability to cite any past problem with Verizon Access.[7]

Verizon Access expects Embarq to try to support its penalty proposal by citing the Ohio Commission's ruling in the Verizon Access/Embarq arbitration there. In that case, the Commission adopted a revised version of Embarq's proposal, ordering additional language making clear that Verizon Access will not be liable for transit charges when third parties delay installation of direct trunks beyond 90 days. Ex. 6, at 20

The Ohio Order provides little meaningful guidance for the Commission here. Aside from the simple fact that the Ohio Commission made the wrong decision to order a self-enforcing penalty at all, unique, Florida-specific considerations prevent application of the Ohio result to Florida. As noted, Verizon Access is already directly connected with Embarq throughout Florida and Embarq provides its own tandem services here, a fact that prompted Embarq itself to admit that the potential for financial harm in Florida is less than in other states. In addition, there was no evidence in the Ohio record about delays caused by Embarq's requirement for completion of a "customer profile" in conjunction with ordering. Ex. 7, at 80. Mr. Price testified that "Embarq's insistence on this profile, which to [his] understanding is unique in the industry" could render Embarq's

[7] In response to Staff discovery, Embarq presented language that it had proposed to conform to the arbitrator's decision in Ohio. That language would excuse Verizon Access from reimbursement for transit charges when delays are caused by third parties. *See* Ex. 6, at 5. Although Embarq's discovery response did not state that it was proposing that same language here, Mr. Fox in his deposition said he believed that Embarq had revised its proposal in response to Staff's request. Ex. 8, at 13, 16.

proposed 90-day timeframe "insufficient for the parties to do the work, particularly if the clock starts long before an order can even be placed for a new trunking." Ex. 7, at 27, 32.

Embarq has advanced no legitimate, let alone compelling, reason for the Commission to accept its proposal to make the direct trunking obligation in section 61.2.4 subject to a "financial incentive." Ex. 14, at 44. The effect and possible intent of Embarq's language, which gives Embarq the discretion to decide fault for any delays, is to shift its expenses to its competitor by giving Embarq the authority to blame Verizon Access for all delays in direct trunk establishment. Ex. 14, at 17. The Commission should thus reject Embarq's proposal. In the unlikely event that Verizon Access fails to comply with its contractual obligation to establish direct trunks after indirect traffic reaches the specified threshold, Embarq can use the ICA's dispute resolution provisions to address that claimed breach.

If, despite the lack of justification for its need, the Commission decides to adopt a penalty provision to enforce Verizon Access's contractual obligation to establish direct trunks, Verizon Access asks the Commission to order the parties to negotiate the following changes to Embarq's language: First, the installation period should start only after Embarq accepts the customer profile from Verizon Access. Mr. Fox agreed to this change in his deposition, so it should not be controversial. Ex. 8, at 22 ("it wouldn't be fair to start the 90-day clock until we accepted that profile"); *see also* Ex. 7, at 32; Ex. 8, at 61. Second, consistent with Staff's discussion with Mr. Price during his deposition, sections 61.1.5 and 61.2.4 should be revised to reflect a 120-day period for direct trunk installation, thereby removing any doubt about the sufficiency of the installation period. Ex. 7, at 32-33. Third, the revised language should express Embarq's stated intent (Ex.

14, at 44-45, 55; Ex. 8, at 13, 16) to excuse Verizon Access from reimbursing Embarq for transit charges when a third party causes delays beyond the specified installation period. Fourth, the threshold for establishment of direct trunks should be flexible enough to accommodate temporary traffic spikes. Mr. Fox already agreed in concept to this change. *See* Ex. 7, at 35-36

The Commission should remain aware, however, that no amount of revision can eliminate Verizon Access's concern that the very concept of a transit reimbursement provision is inconsistent with FCC Rule 703(b).

ISSUE 5: WHAT RATE SHOULD APPLY TO TRANSIT TRAFFIC UNDER THE PARTIES' INTERCONNECTION AGREEMENT?

**** The Commission should set a reasonable transit rate based on the comprehensive, relevant range of data points Verizon Access presented. It should reject Embarq's proposed transit rate, which—at double the existing rate Verizon Access pays Embarq--is unreasonably high. ** (ICA Pricing Attachment, line 246.)**

Verizon Access agrees with Embarq that neither the FCC nor this Commission has established any pricing standard for transit service. But Embarq agreed to arbitrate the transit rate and, in the absence of any controlling standard, the Commission must look to the best available reference points to derive a reasonable transit rate. As Mr. Price explained, these reference points demonstrate that Embarq's proposed rate of $0.005 is unreasonably high. It is *more than double* the $0.002045 transit rate paid under the parties' existing contract. Ex. 7, at 90. Aside from this existing rate, the Commission might look to (1) the analogous Embarq interstate rate of $0.002052; (2) the sum of the common transport and tandem switching rate elements the Commission approved for Embarq (that is, $0.002867); (3) the $0.002071 transit rate in the existing

interconnection agreement between Verizon Florida Inc. and Sprint; and (4) the transit rates in Embarq's recently negotiated agreement with BellSouth in Florida and the other BellSouth states ($0.0015 in 2007, $0.0020 in 2008, and $0.0025 thereafter). Ex. 5, at 12. These references provide a zone of reasonableness that will allow the Commission to set a suitable transit rate for the parties' ICA. Ex. 2, at 21; Ex. 7, at 46, 56, 83.

Embarq's few references to rates in other states and contracts with other carriers are not as compelling as the comprehensive range of reference points Verizon has presented. In contrast to Verizon Access's reference points, Mr. Fox alleged only that BellSouth has a tariffed transit rate of $.006 in South Carolina; another company, Neutral Tandem, has Georgia and Florida tariffs setting its transit rate at $.0046425, "assuming 10 miles of T1 transport"; and 21 (originally counted as 15) carriers in Florida (including an Embarq affiliate) have agreed to Embarq's $.005 transit rate. Ex. 14, at 47-48; Ex. 8, at 47.

As an initial matter, the Neutral Tandem rate Mr. Fox calculated appears too high. Neutral Tandem's Florida price schedule shows a transit rate of $0.003102, and Mr. Fox assumed 185,000 monthly minutes of use for the T-1 facility. Ex. 9, at 7. This assumption is too low (it should be about 250,000 MOU), so Mr. Fox's resulting calculation of the transit rate would be artificially high.[8]

But even assuming that Mr. Fox has accurately presented other companies' rates, they are not as relevant as Verizon Access's reference points that are specific to Florida and the parties before the Commission.

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[8] Ex. 7, at 54. Mr. Fox's use of an artificially low number for monthly minutes-of-use results overstates the calculation of the effective per-minute rate. This is because the minutes-of-use number is used as the denominator in the calculation and the lower the number, the higher the result. The mathematic effect of an artificially low minutes-of-use assumption is to increase the resulting per-minute rate by approximately 35 percent – the ratio of 250,000 to 185,000.

With respect to the Embarq Florida contracts Mr. Fox cites as including the $.005 transit rate, it is not clear how many of them were actually negotiated, as opposed to adopted. *See* Ex. 8, at 32. Even where a contract with that rate was negotiated, it does not necessarily mean the carrier agreed that the rate was reasonable. As Mr. Fox acknowledged, if a carrier originates no or very little transit traffic, it might decide "that the transit rate was simply not worth pursuing or litigating because the effect would not be significant." *See* Ex. 8, at 33; *see also* Ex. 2, at 21; Ex. 7, at 51-52. That appears to be largely the case here. Embarq has interconnection agreements with 102 carriers. All except 21 of those have transit rates ranging from $0.002045 to $0.002867. Ex. 6, at 7-9. Twenty-one carriers have the $.005 rate in their ICAs. Of those carriers, only five had transmitted any transit traffic in a representative month. *See* Ex. 8, at 47-49, 68.

In contrast to Embarq's lack of information as to the extent the $.005 could be considered a truly negotiated, market rate, Mr. Price, who was involved in the negotiation of Verizon Access's transit rate with BellSouth, verified that it was "heavily negotiated" and, therefore, indisputably a market-based rate. Ex. 7, at 51-52.

In discovery, Embarq stated that the Commission's primary consideration in setting a transit rate "should be the comments that the staff and Commission made" in a 2006 Order relating to BellSouth's transit traffic obligations, "where the FPSC determined that transit traffic was not a §251 requirement." Ex. 3, at 9. In particular, Embarq argued that the Commission should focus on "staff's recommendation that BellSouth's market-based rate, which reflects the value-added services associated with providing an intermediary function, should be considered a 'just and reasonable' rate."[9]

[9] Ex. 3, at 13, *citing* Joint Petition by TDS Telecom d/b/a TDS Telecom/Quincy Tel., et al., Docket No. 050110-TP; Petition and Complaint for Suspension and Cancellation of Transit Traffic Service Tariff filed

Embarq claimed that the Staff Recommendation there set a maximum rate of $.0023, which is "2.43 times above the Commission-approved TELRIC-based rates." Ex. 3, at 10. Embarq, therefore, concluded that its proposed $.005 rate, which is "approximately a multiple of 1.75 above Embarq's commission' approved TELRIC rates for tandem switching and common transport," was reasonable under the logic of the Bellsouth Transit Order. Ex. 3, at 10; Ex. 8, at 41.

Embarq's presentation of that Order and underlying recommendation were misguided and even misleading. As Mr. Fox acknowledged, the Commission did not set any transit rate in the BellSouth transit proceeding, nor did it suggest any upper bound, let alone indicate that a reasonable transit rate would be two and a half times a carrier's TELRIC elements. Ex. 8, at 59, 41-42 (Fox) ("I did not find that as much as I looked for it in the Commission order."). Mr. Fox's theory that the Commission approved a Staff rate guideline by not approving it defies logic: "by them not setting a rate or not supporting what the Staff said, I took that as a passive approval." Ex. 8, at 57.

Staff's BellSouth Transit Recommendation, in any event, supports Verizon Access's position, not Embarq's. In its Recommendation, Staff concluded that the two "most viable" options for a BellSouth transit rate were: (1) the Commission-approved tandem switching and common transport TELRIC-based rates; and (2) the rates for the transiting functions in BellSouth's interstate access tariff. Bellsouth Transit Recommendation at 65-66. Staff expressed no preference for one option or the other, and its upper bound recommendation of $0.0023 was apparently derived from the TELRIC and interstate access options (not any formula relating TELRIC rates to the

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by BellSouth Tel., Inc., Docket No. 050125-TP, Docket No. 050125-TP Staff Recommendation (dated Aug. 17, 200) ("BellSouth Transit Recommendation") (submitted into the record here as part of Exhibit 8). The Order (No. PSC-06-0776-FOF-TP) ("BellSouth Transit Order") was issued on September 18, 2006.

transit rate). Ex. 8, at 133-34.

In this arbitration, Verizon Access has identified as two relevant data points the same options Staff identified in its BellSouth Transit Recommendation—that is, the Commission-approved rates in the parties' existing contract and the analogous interstate rates. So Staff's reasoning in the BellSouth Transit Recommendation is consistent with Verizon Access's testimony here.

Embarq's presentation on the transit rate issue was confusing and contradictory in other respects. Although Embarq denied approaching the tandem rate "as a cost-based topic," (Ex. 8, at 29-32, 54), it tried to justify its purported need for a higher rate than BellSouth or Verizon with cost-based rationale—testifying, for example, that Embarq "provides transit services in less urban areas than the RBOCs in Florida" (Ex. 3, at 10), so it is relatively more costly for Embarq to provide such services (Ex. 8, at 44-45); and "per unit network cost per Bellsouth is substantially lower than it is for Embarq" (Ex. 8, at 34-35, 67). When asked by Staff, however, whether Embarq had provided any testimony or evidence supporting the notion that transit service costs more in less urban areas, Mr. Fox admitted it had not, "mainly again because we don't think that this is a cost-based issue per se." Ex. 8, at 45.

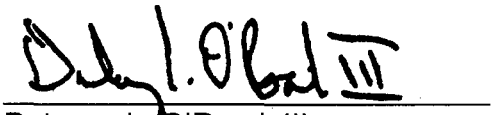
Embarq cannot have it both ways; it cannot claim that its costs justify a much higher rate and then deny the relevance of information about its costs. The Commission should disregard Mr. Fox's suggestion that transiting costs vary by geography, because it was unsupported and unfounded. As Mr. Price testified, there is no reason for believing that operating a tandem in a rural area costs more than operating a tandem in an urban area. Ex. 7, at 57.

Indeed, Mr. Fox did not appear certain what costs its transit rate proposal was supposed to recover. In his deposition, Mr. Fox first stated that, aside from "the network elemental costs and the tandem intermediary costs," he couldn't "think of any specific costs" involved with providing tandem service. Ex. 8, at 29. Instead of doing any analysis of what the rate is supposed to cover, Embarq apparently copied verbatim the elements from BellSouth's transit case,[10] and acknowledged an "intangible," "value-added" component that could not be quantified. Ex. 8, at 56-57, 64.

In sum, Embarq has proposed an arbitrary and unreasonable transit rate that is out of line with the most relevant data points. Verizon Access, therefore, asks the Commission to set a transit rate based on the more comprehensive and meaningful range of rates Verizon Access has presented.

[10] *Compare* Ex. 3, at 11 *with* BellSouth Transit Recommendation, Ex. 8, at 133 (transit rate is designed to recover costs of providing billing records, handling billing disputes, use of network resources, and product management).

Respectfully submitted on June 1, 2007.

By: 

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