

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
AMERITECH CORP., Transferor, And)	CC Docket No. 98-141
SBC COMMUNICATIONS, INC.,)	
Transferee,)	
For Consent to Transfer Control.)	
)	
GTE CORPORATION, Transferor, And)	
BELL ATLANTIC CORPORATION,)	CC Docket No. 98-184
Transferee,)	
For Consent to Transfer Control.)	

REPLY COMMENTS OF VERIZON¹

I. Introduction and Summary

The Commission's *Reciprocal Compensation Order* has eliminated any conceivable dispute over the meaning of the Bell Atlantic/GTE merger condition which allows terms of voluntarily negotiated interconnection agreements to be adopted across state lines under certain circumstances. The conclusions reached in that order confirm that, under *any* reasonable reading of the merger condition, provisions of an agreement governing inter-carrier compensation for Internet-bound traffic are not subject to adoption in another state. That order lays to rest the issues in this proceeding, and makes clear that carriers cannot rely on the terms of

¹ The Verizon telephone companies ("Verizon") are the local exchange carriers affiliated with Verizon Communications Inc. identified in the attached list.

the merger conditions to expand into new states the very form of “regulatory arbitrage” that, in the Commission’s words, “distorts the development of competitive markets.”²

II. Provisions of Agreements Addressing Inter-carrier Compensation for Internet-Bound Traffic Are Not Within The Scope of the Expanded MFN Condition

The sole issue here is whether the provisions of an interconnection agreement that address inter-carrier compensation arrangements for Internet-bound traffic are within the scope of the expanded most-favored nation (“MFN”) condition. *See* BA/GTE Merger Condition ¶ 32.³ They are not.

As explained in our prior submissions, the relevant condition that allows carriers to adopt negotiated provisions from other states is limited by its express terms to these matters that are “subject to 47 U.S.C. § 251(c).” Despite this express limitation, some parties argue here that the scope of the condition also extends to matters that are covered by a different part of section 251 – namely, the reciprocal compensation requirement in section 251(b)(5). As we explain below, those claims are misplaced. But more fundamentally, they are now beside the point, as this Commission’s own recent order makes clear.

In its recent *Reciprocal Compensation Order*, the Commission again confirmed that Internet-bound traffic is not subject to the reciprocal compensation requirements of section 251(b)(5). As the Commission explained, it has “long held” that enhanced service provider traffic – which includes traffic bound for Internet service providers – is interstate access traffic. The Commission further held that “the service provided by LECs to deliver traffic to an ISP constitutes, at a minimum, ‘information access’ under section 251(g).” *Id.* at & 30. *See, also, id.*

² *See Intercarrier Compensation for ISP-Bound Traffic, Order on Remand and Report and Order*, CC Docket Nos. 96-98 and 99-68, FCC 01-131, &¶ 21, 29 (rel. Apr. 27, 2001) (“*Reciprocal Compensation Order*”).

at & 44. As such, these services are excluded from the scope of the reciprocal compensation requirements of section 251(b)(5). *Id.* at & 34 (“We conclude that a reasonable reading of the statute is that Congress intended to exclude the traffic listed in subsection (g) from the reciprocal compensation requirements of subsection (b)(5)”).

The *Reciprocal Compensation Order*, therefore, puts to rest *any* conceivable claim that the expanded MFN condition allows carriers to adopt in other states the provisions of an interconnection agreement that address inter-carrier compensation for Internet-bound traffic. Indeed, even if the merger condition were somehow construed (incorrectly, we believe) to apply to matters covered by section 251(b)(5), the Commission’s order conclusively establishes that the provision addressing Internet-bound traffic still would not be covered.⁴

Accordingly, the *Reciprocal Compensation Order* has eliminated any lingering dispute, and there is no question that provisions of interconnection agreements that address Internet-bound traffic cannot be adopted in other states under the expanded MFN condition in the Bell Atlantic/GTE merger conditions.

III. The Expanded MFN Condition Also Is Limited To Matters That Are Subject To Section 251(c), That Are Consistent With State Policies, and To Provisions That Have Not Expired.

The express terms of the merger conditions impose several additional limitations that apply here as well.

³ A copy of this paragraph is attached.

⁴ Moreover, the Commission’s order makes clear that provisions addressing inter-carrier compensation for Internet-bound traffic are not subject to the expanded MFN condition for an additional reason. The merger condition expressly provides that provisions of an agreement must be made available only “to the same extent and under the same rules that would apply to a request under 47 U.S.C. § 252(i).” By its terms, however, the scope of section 252(i) parallels those matters that are the subject of the core requirements of section 251 – namely, “interconnection, service [for resale], or network element.” It does not by its terms, apply to other matters such as interstate access arrangements.

First, contrary to the claims of some commenters, the right to adopt provisions of an interconnection agreement across state lines is expressly limited to matters that are “subject to 47 U.S.C. § 251(c).” The quoted language, by its own terms, acts as an express limitation on the scope of the expanded MFN condition. Moreover, the history of that language confirms that to be the case.

As the Commission is well aware, the Bell Atlantic/GTE merger conditions are a slightly modified version of those adopted in connection with the SBC/Ameritech merger. The genesis of the expanded MFN condition in paragraph 32 of the Bell Atlantic/GTE conditions was paragraph 43 of the SBC/Ameritech conditions. The latter, however, allowed interstate adoption of any “interconnection arrangement or UNE.” 14 FCC Rcd 14712, App. C, & 43 (1999). That agreement contained no reference to section 251(c). But when the SBC/Ameritech condition was revised to apply to provisions of interconnection agreements (rather than just interconnection arrangements and UNEs), the reference to section 251(c) was added to make clear that the provisions that are covered are those that are the subject of 251(c). That makes good sense. It makes clear, for example, that resale arrangements under 251(c)(4) are covered, but still cabins the scope of the conditions to the core requirements of section 251(c). Otherwise, provisions of interconnection agreements that are wholly unrelated to interconnection but are included in a single agreement for convenience – including even non-telecommunications matters, such as information services or even the purchase of a used truck – would suddenly become subject to an MFN obligation for the first time.

Nonetheless, some parties argue that, even though the express terms of the conditions are limited to matters that are subject to section 251(c), the Commission nonetheless should construe the condition to apply to matters covered by 251(b) solely because that latter section is referred

to in 251(c). As Verizon demonstrated in its February 20 request for clarification, however, that argument cannot be reconciled with the terms of the Act. By its own terms, section 251(c) imposes “additional” obligations on incumbent carriers that differ from those imposed by section 251(b). Moreover, while section 251(c)(1) does require all local exchange carriers to *negotiate* terms and conditions of agreements in order to meet the duties imposed in section 251(b), this duty to negotiate does not somehow incorporate into section 251(c) all of the substantive requirements of 251(b). Nor can the commenters point to *any* authority that suggests it does. If the Commission had intended to include section 251(b) obligations in the provisions that could be adopted across state lines, it surely would have listed that subsection along with section 251(c).

The commenters, however, dwell on the explanatory parenthetical “(including an entire interconnection agreement)” and claim that this phrase somehow changes the plain meaning of the entire condition. They assert that this phrase means that a carrier may always adopt an entire agreement in another state, despite the substantive limitations, because no interconnection agreement is confined to section 251(c) matters. But the simple answer is that the parenthetical phrase cannot mean what they claim. Quite the contrary, the parenthetical is itself immediately followed by the phrase “subject to 47 U.S.C. § 251(c),” making clear that it too is subject to that same limitation. Consequently, the only reasonable reading of that parenthetical is that it was added to clarify that, if an agreement was confined to such core section 251(c) matters, the entire agreement could be adopted in another state. Whether or not any agreements to date have been confined to such matters has no relevance, and the Commission never undertook to examine all agreements to ascertain if any existed. The parenthetical was inserted simply to avoid uncertainty in the event such an agreement existed or was subsequently entered into. Indeed, as

noted above, it would be nonsensical to suggest that matters completely unrelated to section 251 could be adopted across state lines, just because they happened to be included in a single agreement for the convenience of the parties.

For this reason, it also makes no sense to suggest that the reference to section 251(c) was, as some commenters claim, an indication of the “type of agreement” that could be adopted. No party has argued that paragraph 43 of the SBC/Ameritech conditions – which does not include the express limitation to matters covered by 251(c) – addresses anything except the “type” of interconnection agreements entered into under sections 251 and 252. In addition, it is section 252, not section 251(c), that fully describes the “type of” interconnection agreements that local exchange carriers enter into with one another. If the Commission had wanted to clarify the “type” of interconnection agreement that could be adopted, it would have used language such as “the type of interconnection agreement described in 47 U.S.C. § 252.” Instead, it said that the provisions that are subject to the expanded MFN condition are those that address matters “subject to” section 251(c). Given that phraseology and history, it cannot validly be questioned that the Commission intended the statutory reference to have substantive effect.

Unable to overcome the express language of the condition, several commenters argue that reading the condition as it was written would undermine the intent of the conditions. That simply is not right. The limitation enables carriers to adopt agreement provisions dealing, for example, with interconnection, unbundled access, and resale, which are at the heart of the local competition policies in section 251(c) of the Act and for that very reason were the subject of additional obligations that were imposed uniquely on incumbents. Other matters were appropriately left to negotiation or arbitration on a state-by-state basis rather than allowing them to be adopted in other states under the expanded MFN condition.

Second, the merger condition is expressly limited to the cross state adoption of terms that are “consistent with the laws and regulatory requirements of [] the state for which the request is made.” BA/GTE Merger Condition ¶ 32. This limitation preserves the right of each state to ensure that interconnection agreements adopted in that state are consistent with its laws and policies and that the state not be forced to accept a provision just because it was voluntarily negotiated elsewhere. Despite the commenters’ claims to the contrary, this limitation is a proper recognition that the merger conditions should not and, indeed, cannot undermine the authority given the states in section 252(e) of the Act to approve or reject interconnection agreements. Therefore, when a state finds (as has the Commission) that payment of compensation for Internet-bound traffic is a form of regulatory arbitrage that undermines the development of true local competition policies and requirements, then the provisions of an agreement that are contrary to that policy determination may not be adopted in that state. And as the previous staff letter appropriately recognized, it is up to the relevant state commission to determine whether an individual provision is contrary to the policy of that state.

Third, provisions in the underlying agreement may not be adopted after the “date that they are available in the underlying agreement.” BA/GTE merger conditions ¶ 32. As we previously explained, however, the underlying provisions at issue here expired by their own terms at the time that the Commission adopted its initial *Declaratory Ruling* establishing that Internet traffic is not subject to reciprocal compensation under section 251(b)(5). While the merger conditions appropriately assign the resolution of any disputes about the continuing viability of the underlying provision to the state commission, the simple fact is that the provision in dispute here terminated by its own terms and is no longer available.

IV. The Merger Conditions Should Not Be Modified.

A number of parties implicitly concede that the expanded MFN condition does not apply, and argue that the Commission should modify the Condition to expand its scope. Their arguments must be rejected.

As an initial matter, these parties essentially demand *carte blanche* to import any provision negotiated in another state, regardless of whether the provision is within the scope of 251(c), is consistent with the laws or policies of the second state, or whether it even relates to telecommunications competition. However, Congress gave the states the exclusive responsibility to review interconnection agreements, *see* 47 U.S.C. § 252(e), to reject provisions that are inconsistent with the public interest, convenience, and necessity, *see id.*, and to establish or enforce other requirements of state law in such review. *See* 47 U.S.C. § 252(e)(3). The modifications the commenters seek would violate those statutory provisions. Recognizing this, paragraph 32 of the merger conditions specifies that disputes regarding the availability of interconnection arrangements should be resolved by negotiation “or by the relevant state commission under 47 U.S.C. § 252 to the extent applicable.” There is no reason for this Commission to upset the statutory scheme to modify the conditions to remove this authority from the states, as the commenters want, or to force the states to accept provisions from other states that they may not find appropriate.

Nor should the Commission revisit its decision to limit the expanded MFN condition to negotiated agreements, as some parties ask. The Commission examined this issue at length in connection with both the SBC/Ameritech and the Bell Atlantic/GTE mergers and found that “expanding the condition to encompass arbitrated arrangements without qualification could interfere with the state arbitration process under sections 251 and 252 of the Communications

Act.” BA/GTE Merger Order at &303. *See, also*, SBC/Ameritech Merger Order at & 491.⁵ The parties have provided no arguments that justify changing that finding.

In any event, the Commission lacks the statutory authority to expand the merger conditions, which were voluntary to begin with, and contain numerous requirements that the Commission has no independent statutory authority to impose. Included among these is the requirement to allow carriers to adopt voluntarily negotiated provisions of agreements entered into in other states. Absent a voluntary undertaking by the parties, the Commission lacks authority under the Act to impose such a requirement forcibly.

V. Verizon Is Not “Estopped” From Addressing the Limitations In the Merger Condition.

Two parties claim that Verizon should be estopped from raising claims that the merger conditions are limited to section 251(c) matters and to provisions that are consistent with state policy, because neither Bell Atlantic nor GTE cited those limitations during the pleading cycle prior to adoption of the conditions. There was no reason for Bell Atlantic or GTE to have addressed the limitations when the merger was being debated, because the then-proposed conditions were (and still are) clear on their face. If any party had argued, as the commenters are now, that the conditions meant anything other than what the clear language specifies, Bell Atlantic and GTE would have addressed the issue. But no party claimed then that the language

⁵ In approving the Bell Atlantic/GTE merger, the Commission expedited arbitrations by allowing them to proceed in a second state without waiting for the statutory 135 day negotiation period to expire. *See* Bell Atlantic/GTE Merger Order at &302.

was unclear, because it is not. Therefore, there was no reason for Bell Atlantic and GTE to explain its meaning during the comment cycle.⁶

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May 14, 2001

⁶ Global NAPs inappropriately raises in this proceeding specific issues that are the subject of a separate formal complaint against Verizon and, indeed, attaches the complaint to its comments. Those issues should be addressed in the complaint proceeding and not here. Verizon will respond to Global NAPs' specific allegations in its answer in the complaint case.

THE VERIZON TELEPHONE COMPANIES

The Verizon telephone companies are the local exchange carriers affiliated with Verizon Communications Inc. These are:

Contel of the South, Inc. d/b/a Verizon Mid-States
GTE Midwest Incorporated d/b/a Verizon Midwest
GTE Southwest Incorporated d/b/a Verizon Southwest
The Micronesian Telecommunications Corporation
Verizon California Inc.
Verizon Delaware Inc.
Verizon Florida Inc.
Verizon Hawaii Inc.
Verizon Maryland Inc.
Verizon New England Inc.
Verizon New Jersey Inc.
Verizon New York Inc.
Verizon North Inc.
Verizon Northwest Inc.
Verizon Pennsylvania Inc.
Verizon South Inc.
Verizon Virginia Inc.
Verizon Washington, DC Inc.
Verizon West Coast Inc.
Verizon West Virginia Inc.

Bell Atlantic/GTE Merger Conditions

32. In-Region Pre-Merger Agreements. Subject to the Conditions specified in this Paragraph, Bell Atlantic/GTE shall make available: (1) in the Bell Atlantic Service Area to any requesting telecommunications carrier any interconnection arrangement, UNE, or provisions of an interconnection agreement (including an entire agreement) subject to 47 U.S.C. § 251(c) and Paragraph 39 of these Conditions that was voluntarily negotiated by a Bell Atlantic incumbent LEC with a telecommunications carrier, pursuant to 47 U.S.C. § 252(a)(1), prior to the Merger Closing Date and (2) in the GTE Service Area to any requesting telecommunications carrier any interconnection arrangement, UNE, or provisions of an interconnection agreement subject to 47 U.S.C. § 251(c) that was voluntarily negotiated by a GTE incumbent LEC with a telecommunications carrier, pursuant to 47 U.S.C. § 252(a)(1), prior to the Merger Closing Date, provided that no interconnection arrangement or UNE from an agreement negotiated prior the Merger Closing Date in the Bell Atlantic Area can be extended into the GTE Service Area and vice versa. Terms, conditions, and prices contained in tariffs cited in Bell Atlantic/GTE's interconnection agreements shall not be considered negotiated provisions. Exclusive of price and state-specific performance measures¹ and subject to the Conditions specified in this Paragraph, qualifying interconnection arrangements or UNEs shall be made available to the same extent and under the same rules that would apply to a request under 47 U.S.C. § 252(i), provided that the interconnection arrangements or UNEs shall not be available beyond the last date that they are available in the underlying agreement and that the requesting telecommunications carrier accepts all reasonably related² terms and conditions as determined in part by the nature of the corresponding compromises between the parties to the underlying interconnection agreement. The price(s) for such interconnection arrangement or UNE shall be established on a state-specific basis pursuant to 47 U.S.C. § 252 to the extent applicable. Provided, however, that pending the resolution of any negotiations, arbitrations, or cost proceedings regarding state-specific pricing, where a specific price or prices for the interconnection arrangement or UNE is not available in that state, Bell Atlantic/GTE shall offer to enter into an agreement with the requesting telecommunications carrier whereby the requesting telecommunications carrier will pay, on an interim basis and subject to true-up, the same prices established for the interconnection arrangement or UNE in the negotiated agreement. This Paragraph shall not impose any obligation on Bell Atlantic/GTE to make available to a requesting telecommunications carrier any terms for interconnection arrangements or UNEs that incorporate a determination reached in an arbitration conducted in the relevant state under 47 U.S.C. § 252, or the results of negotiations with a state commission or telecommunications carrier outside of the negotiation procedures of 47 U.S.C. § 252(a)(1). Bell Atlantic/GTE shall not be obligated to provide pursuant to this Paragraph any interconnection arrangement or UNE unless it is feasible to provide given the technical, network and OSS attributes and limitations in, and is consistent with the laws and regulatory requirements of, the state for which the request is made and with applicable collective bargaining agreements. Disputes regarding the availability of an interconnection arrangement or UNE shall be resolved pursuant to negotiation between the parties or by the relevant state commission under 47 U.S.C. § 252 to the extent applicable.

¹ The performance measures applicable to the state where the agreement will be performed will apply.

² See *Local Competition Order*, 11 FCC Rcd 15499 (1996), ¶¶ 1309-1323.