III. INTERCARRIER COMPENSATION

Issue I-5 (Implementation of the ISP Remand Order)

A. Several of Verizon's Proposed Provisions Are Completely Unrelated to This Issue, and the Few That Are Relevant Do Not Provide Adequate Detail.

Most of the provisions Verizon included in the DPL for Issue I-5 have nothing to do with the implementation of the ISP Remand Order, and the Commission should not inadvertently endorse any of those provisions when it resolves this issue. Sections 6 through 6.4 and 7.2, which address matters such as passing CPN on calls, the use of PLU, and Verizon's VGRIPS proposal, concern issues raised elsewhere in this proceeding. Sections 7.3.3 through 7.3.8 address a variety of traffic types that Verizon asserts are not subject to reciprocal compensation. Sections 7.4.2-7.7 address a variety of subjects, but do not address implementation of the ISP Remand Order. Sections 7.11 and 7.13-7.14 address VGRIPs and reciprocal compensation, and Sections 7.15-7.17 address other matters that are unrelated to implementation of the ISP Remand Order. Verizon's efforts to shoehorn this language into Issue I-5 is improper, and should not be sanctioned by the Commission.[25]

Of the provisions that Verizon lists under Issue I-5 in the DPL, only sections 7.3.2.1, 7.4.1, 7.8, 7.10, and 7.12 are relevant. These sections do little more than reference the ISP Remand Order and define Measured Internet Traffic, and thus fail to provide sufficient detail to implement the ISP Remand Order. Verizon's belief that "the ISP Remand Order operates as a matter of law [and thus] needs no implementing

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[25] In addition, as explained in WorldCom's Motion to Strike, Verizon's inclusion of new language in the DPL violates this Commission's orders, and that language should be rejected.

language in an interconnection agreement to make it effective on the parties," Verizon Br. at IC-2, is incorrect. As discussed elsewhere in this brief, the absence of detail will inevitably create disputes which could be avoided if the contract clearly spelled out the carriers' rights and responsibilities. The carriers' history regarding reciprocal compensation suggests that such disputes will occur, and will involve Verizon's refusal to pay its bills. Therefore, the contract should contain detailed implementation provisions that: identify the rate applicable to ISP traffic in Virginia; establish a method for calculating the 3:1 ratio established in the Order, and include UNE-P traffic in the 3:1 calculation; and set forth the number of minutes of ISP-bound traffic eligible for compensation. Although Verizon's witness agreed to the inclusion of each of these provisions, Verizon's proposed language contains none of this detail. Tr. 10/11/01 at 1865, 1854-55, 1869-1871 (Pitterle, Verizon). In contrast, WorldCom's proposed sections x.3.2, x.4, x.4.1 and x.5 contain this level of detail, and should be adopted by the Commission.

B. Verizon's Objections to the WorldCom Language Are Meritless.

In its brief, Verizon has offered several criticisms of the WorldCom language, none of which have any merit. First, Verizon ignores the fact that WorldCom's proposed language references the access regime, and claims that the WorldCom proposal would allow WorldCom to receive reciprocal compensation for traffic that is not eligible for reciprocal compensation.[26] Verizon also refuses to consent to the inclusion of contract

[26] Verizon also attempts to exclude clear statements of its responsibilities from the interconnection agreement. For example, Verizon objects to WorldCom's proposal that Verizon pay all past-due reciprocal compensation prior to being able to take advantage of the ISP Remand Order.

language that requires Verizon to satisfy the prerequisites articulated in the ISP Remand Order. As explained below, the WorldCom language implements the requirements of the Order, is consistent with the law, and should be adopted.

1. Verizon's Objections to WorldCom's Proposed Sections x.1 Through x.5 Are Groundless.

In its brief, Verizon complains that WorldCom's proposed language will require reciprocal compensation to be paid for traffic that is not eligible for such compensation. For example, Verizon asserts that under WorldCom's proposal "all traffic exchanged with Verizon VA not in excess of the 3:1 ratio is eligible for reciprocal compensation," and complains that "arguably the proposed language would subject toll traffic to reciprocal compensation rather than the access regime." Verizon Br. at 4. This criticism is invalid. Nothing in WorldCom's proposed language undoes the access charge regime or otherwise applies reciprocal compensation to ineligible traffic. Instead, the WorldCom language appropriately differentiates between different types of traffic and the different forms of compensation due. Specifically, WorldCom's proposed contract provides that "[t]he Parties will charge each other for the termination of intraLATA toll calls in accordance with each Party's respective Switched Access tariffs." WorldCom Proposed ICA, Attachment I, § 4.3.1.

Verizon's assertion that WorldCom's language should be rejected because it makes the 3:1 ratio absolute is also unpersuasive. WorldCom did not intend to make the ratio absolute, and does not believe that its language does so. Nothing in the Agreement precludes Verizon from rebutting this presumption. If the Commission believes that the agreement should contain express contract language noting the rebuttable nature of the

3:1 presumption, WorldCom has no objection to adding such language. Tr. 10/11/01 at 1690 (Ball, WorldCom).

Verizon next objects to the provisions proposed by WorldCom that require Verizon to satisfy the prerequisites set forth in the ISP Remand Order. Although Verizon asserts that it has satisfied these prerequisites, Verizon's assertion that it has offered to exchange all § 251(b)(5) traffic at rates equal to the rate caps for ISP-bound traffic by virtue of sending a letter to the industry should be rejected. The offer to exchange traffic at these rates should be set forth in a legally enforceable document, such as a tariff filing with the Virginia SCC. In any event, even if Verizon had satisfied these requirements, it would be appropriate to include them in the interconnection agreement because they are continuing obligations imposed upon Verizon by the ISP Remand Order. Verizon's objection to the portion of WorldCom's language that requires it to pay all past due amounts for termination of ISP-bound traffic is also meritless. The disputed provision is a reasonable enforcement tool which requires Verizon to pay amounts due for ISP-bound traffic under the prior rate regime (reciprocal compensation) before it can take advantage of the new regime established by the ISP Remand Order. Verizon owes WorldCom over $100 million for ISP-bound traffic, and the inclusion of contract language requiring payment of past due bills for ISP-bound traffic before Verizon can avail itself of the new rates may hasten the settlement of past due bills. Tr. 10/11/01 at 1834 (Ball, WorldCom). Remarkably, Verizon asserts that no compensation is due for this traffic, even though the Virginia Commission has previously ruled that ISP-bound traffic is local, and there is no dispute regarding the rates applicable to ISP-bound traffic at any time in the past. Verizon's claim that the amount past due is in dispute, and that it owes nothing to

WorldCom under the existing contract, illustrates the necessity of including a "past due" provision.

Finally, Verizon's objections to WorldCom's proposed section x.5, which implements the minutes-of-use ("MOU") cap set forth in the ISP Remand Order, rest on a mischaracterization of the WorldCom language. WorldCom has proposed that during the year 2002 the information access rates shall be billed by MCIm to Verizon "on ISP-bound traffic for MOU only up to a ceiling equal to the number of ISP-bound minutes originated on Verizon's network and delivered by MCIm for the year 2001, plus a ten percent growth factor." Although Verizon claims that this language rewrites the growth cap by deleting the phrase "for which that LEC was entitled to compensation," which was included in the ISP Remand Order, it is identical to ISP-bound MOU originated by Verizon and delivered by MCIm is identical to the number of MOU for which MCIm is entitled to compensation. Tr. 10/11/01 at 1694-1695 (Ball, WorldCom).

2. WorldCom's Proposed Section x.6 Appropriately Establishes A Procedure for Addressing ISP-Bound Traffic if the ISP Remand Order is Reversed, Vacated, Modified, or Remanded.

WorldCom's proposed section x.6 specifies that ISP-bound traffic shall be treated as § 251(b)(5) traffic both prospectively and retroactively in the event the ISP Remand Order is modified, reversed, vacated, or remanded. WorldCom proposed a separate change-in-law provision for this section because the carriers' history demonstrates that Verizon is unlikely to render any payment for ISP-bound traffic in the absence of such a requirement. In addition, because judicial decisions operate retrospectively, WorldCom has proposed that the parties be allowed to terminate the reciprocal compensation provisions if the ISP Remand Order is vacated. As explained below, Verizon's objections to these aspects of the WorldCom language are groundless, and the WorldCom provisions should be included in the interconnection agreement.

The ISP traffic compensation provisions merit a specific change-of-law clause because of the history of the carriers' dealings regarding this issue. The past few years are replete with examples of Verizon refusing to pay amounts due for termination of ISP-bound traffic if there is the least bit of ambiguity in the controlling order. If the contract does not specify the compensation that is due for ISP traffic in the event the Order is modified, stayed, or remanded, Verizon will likely stop all payments.[27] The agreement's general change-of- law provision would not adequately address this situation, because it requires negotiation of new contract terms, and Verizon will have no incentive to negotiate terms requiring it to begin paying reciprocal compensation for ISP-bound traffic. In sum, unless the agreement contains a specific provision describing the compensation scheme to be applied if the ISP Remand Order is reversed, WorldCom will again be required to carry a large uncollectible on its books. Tr. 10/11/01 at 1842-1844 (Ball, WorldCom). Verizon's proposal that the carriers rely on the agreement's general change-of-law provisions should therefore be rejected.[28]

Verizon's assertion that a reversal of the ISP Remand Order might not require that reciprocal compensation be paid for ISP-bound traffic ignores the fact that, prior to the ISP Remand Order, traffic was classified as either exchange or exchange access traffic,

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[27] Indeed, in its brief, Verizon notes that it "does not agree that ISP-bound traffic is or was ever subject to sections 251(b)(5) reciprocal compensation obligations."

[28] Although Verizon asserts that there is no logical reason "to have a separate change of law provision for one issue," it has proposed precisely such a provision in connection with Issue VI-1(E).

and that some form of compensation should be provided for termination of that traffic. There is no logical reason to conclude that no compensation would apply to this traffic following judicial reversal or modification of the Order. The fact that Verizon currently owes WorldCom over $100 million for termination of ISP-bound traffic makes Verizon's position particularly objctionable. Tr. 10/11/01 at 1834 (Ball, WorldCom).

Verizon's assertion that a judicial order modifying the ISP Remand Order should not be applied retroactively because Verizon has not received retroactive refunds of the difference between the lower rates set forth in the ISP Remand Order and the higher reciprocal compensation rates it paid in some states for ISP-bound traffic is irrelevant, and ignores the fact that no such refunds were required by the terms of the ISP Remand Order. Indeed, in the ISP Remand Order the Commission repeatedly noted that the new rule would only operate prospectively and "does not alter existing ... interconnection agreements." ISP Remand Order ¶ 81-82; see also id. ¶¶ 49, 54, 56, 77, 78. Further, the FCC expressly acknowledged that, under current law, most states require reciprocal compensation for the exchange of calls to ISPs. Id. ¶ 68. Thus, the fact that Verizon has received no refunds since entry of the ISP Remand Order proves nothing more than that Verizon was not entitled to such refunds pursuant to the terms of the Order.

In contrast, when a federal court applies a rule of federal law to the parties before it, "that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate [the court's] announcement of the rule." Rivers v. Roadway Express, Inc., 511 U.S. 298, 312 (1994) (quoting Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 97 (1993)). Simply put, if the D.C. Circuit vacates the ISP

Remand Order, it is as if that decision never existed. See Rivers, 511 U.S. at 311-12 (1994); National Fuel Gas Supply Corp. v. FERC, 59 F.3d 1281, 1289 (D.C. Cir. 1995) (upholding the FERC's retroactive application of a D.C. Circuit decision which had vacated an earlier Order of the Commission). Accordingly, if the D.C. Circuit determines that the ISP Remand Order imposes an unlawful regime for ISP-bound traffic, any terms of the interconnection agreement based on those provisions would be contrary to the Act from the date that they became effective. Therefore, any such terms should be terminable by either party retroactively if the ISP Remand Order is vacated, and WorldCom's proposed section x.6 should be included in the interconnection agreement.

Issue I-6 (Rating of Calls Based on the NPA-NXX of the Calling and Called Parties)

The interconnection agreement should provide that a call's status as "local" will be determined by reference to the NPA-NXXs of the calling and called numbers, and that this method for determining a call's jurisdiction will apply to foreign exchange ("FX") service. Thus, a party terminating FX traffic should receive reciprocal compensation from the originating carrier if the NPA-NXX Codes indicate that the call is local. Verizon's assertion that the jurisdiction of calls should be determined by comparing the physical locations of the calling and called parties, and that CLEC FX traffic should be treated as toll traffic, is inconsistent with industry precedent and practice as well as Verizon's treatment of its own FX service. In addition, Verizon's proposal that CLEC FX service be treated as toll traffic allows Verizon to impose above-cost access charges on calls to CLEC FX customers, and would deprive WorldCom of reciprocal compensation for this traffic. At bottom, Verizon's position is an attempt to insulate its FX service from the competition that would occur if CLEC FX service were treated as local, and should be rejected by this Commission.[29]

Verizon's insistence that CLEC FX service be treated as a toll call is inconsistent with the manner in which Verizon FX service is treated. For example, in its brief, Verizon poses a hypothetical in which a CLEC assigns a Staunton telephone number to a customer located in Roanoke, and complains that if a customer in Staunton calls that number it appears to the Verizon switch and end-user to be a local call because of the NPA-NXXs of the parties. However, Verizon ignores the fact that it can and does assign

[29] In addition, as explained In WorldCom's Motion to Strike, the new language that Verizon has included in the November DPL, section 2.80, should be rejected on procedural grounds.

telephone numbers in precisely the same fashion when it deals with CLECs. Verizon also assigns phone numbers to customers located in different localities, and this method of assigning numbers is the essence of FX service, whether the provider is the ILEC or a CLEC. See WorldCom Exh. 15, Rebuttal Test. of D. Grieco and G. Ball at 24-25. Thus when a Verizon customer calls a Verizon FX customer, the Verizon switch records a local call and the Verizon end-user is billed for a local call based on the NPA-NXXs of the calling and called parties; there is no reason that CLEC FX service should be treated differently. See WorldCom Exh. 3, Direct Test. of D. Grieco and G. Ball at 54.

Verizon's proposal that CLEC FX service be treated as toll traffic is also inconsistent with industry practice. See WorldCom Br. at 81-83; WorldCom Exh. 3, Direct Test. of D. Grieco and G. Ball at 56. As Verizon concedes, it is standard industry practice for all switches to rate calls based on the NPA-NXX. See Verizon Br. at IC-16, n.8 ("It is Verizon's belief that this same characteristic (i.e., that the switch rates are all based on the originating and terminating NPA-NXX) is present in virtually all other LEC end office switches."). WorldCom's proposed contract language is consistent with this industry standard, and specifically references the NPA-NXX as the method for determining if a call is local and if reciprocal compensation is due. Verizon's novel suggestion that the physical location of the customers be used to determine whether or not reciprocal compensation is due is inconsistent with this practice, and should be rejected.

Verizon's claim that FX traffic should be treated as toll traffic is also inconsistent with the statutory definitions of local (or exchange) service and toll service. 47 U.S.C. § 153(47) defines telephone exchange service as "service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service." On the other hand, toll service is defined as "telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service." 47 U.S.C. § 153(48). FX traffic does not fit within this statutory definition of toll service, because a Verizon local subscriber placing a call to a Verizon assigned FX number does not incur a separate charge beyond the charges for the local exchange service. In fact, the ability to originate calls to FX numbers is included in the local exchange service charge, which is consistent with the definition of telephone exchange service.

Verizon's assertion that its FX service is not a local service, but is instead an "alternative pricing structure for toll service," is also contradicted by its tariffs. Specifically, in the Verizon Virginia, Inc. Local Exchange Services Tariff, S.C.C. VA. No. 202, at Section 4.a., in which the Verizon FX service offering is found, Verizon defines its own FX service as "exchange service furnished from one exchange to a location in another exchange. . . ."[30] Notably, Verizon's FX service is not found in Verizon's access or long distance tariffs. Nor does Verizon's description of its FX

[30] Accordingly, the Commission has approved Verizon's offering and provisioning of FX service in Virginia as local service. See WorldCom Exh. 15, Rebuttal Test. of D. Grieco and G. Ball at 27.

service indicate that Verizon charges toll rates to customers who place calls to Verizon's FX customers.

The ISP Remand Order does not support Verizon's belief that the jurisdiction of a call should be based on the endpoints of the communication. The FCC's analysis has traditionally only been used to determine whether or not particular traffic is interstate and thereby within the FCC's jurisdiction, and the D.C. Circuit rejected the FCC's attempt to transplant this analysis to the question of whether a call is local as lacking "for want of reasoned decision making." Bell Atlantic Tel. Cos. v. FCC, 206 F.3d 1, 3 (D.C. Cir. 2000). Moreover, the Commission has never determined that the physical locations of the calling and called parties determine whether a call is local, but has instead left that determination to the states. See Local Competition Order ¶ 1035 ("state commissions have the authority to determine what geographic areas should be considered 'local areas' for the purpose of applying reciprocal compensation obligations under section 251(b)(5), consistent with the state commissions' historical practice of defining local service areas for wireline LECs."). As noted repeatedly by WorldCom's witnesses, all states and all carriers (including the state of Virginia and Verizon-VA) distinguish between local and toll calls by comparing the NPA NXXs of the calling and called parties. See WorldCom Exh. 15, Rebuttal Test. of D. Grieco and G. Ball at 24. Verizon's reliance on the ISP Remand Order is therefore misplaced.

Verizon's similar assertion that FX traffic is not eligible for reciprocal compensation because the ISP Remand Order "established a precedent for excluding traffic from the reciprocal compensation obligations of § 251(b)(5), even though – to the end user and the end office switch alike – the traffic appears local," Verizon Br. at IC-18, is also incorrect. As this Commission recognized in that Order, section 251(b)(5) requires reciprocal compensation for the transport and termination of all telecommunications traffic that does not fall within one of the exceptions articulated in section 251(g) of the Act. See 47 U.S.C. §§ 251(b)(5), 251(g). The Commission determined that calls to ISPs are interstate "information access" services within the section 251(g) exception, but said nothing about how local carriers should be compensated when they exchange FX traffic. Verizon has not claimed, nor could it, that FX calls are interstate access services, and the ISP Remand Order therefore does not support its claim that these calls should be treated as toll calls.

Finally, Verizon's reliance on state commission decisions from other jurisdictions such as Maine, which purportedly have resolved this issue in Verizon's favor, is misplaced. Many states have rejected ILECs' proposals to withhold reciprocal compensation of FX calls, and have applied the industry standard practice of treating FX calls as local calls based on the NPA-NXXs of the calling and called party. See WorldCom Exh. 3, Direct Test. of D. Grieco and G. Ball at 55-56 (citing decisions from the California, Michigan, Kentucky, and North Carolina state commissions). Indeed, the Maine decision cited by Verizon illustrates the negative impacts on the competitive market for FX service that Verizon's proposal would generate. See WorldCom Exh. 15, Rebuttal Test. of D. Grieco and G. Ball at 32-33.

In sum, the Commission should reject Verizon's proposal to treat CLEC FX service as toll traffic because it is inconsistent with industry practice, Verizon's practice and its tariffs, and state commission practice, and is anticompetitive. The Commission should order the inclusion of WorldCom's proposed language, pursuant to which the NPA-NXXs of parties determines whether a call is subject to reciprocal compensation.

Issue III-5 (WorldCom's Entitlement to the Tandem Reciprocal Compensation Rate)

As WorldCom explained in its opening brief, the Act and the Commission's rules make clear that, where the switch of a carrier other than an incumbent serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the CLEC should charge the incumbent LEC's tandem rate. See 47 C.F.R. § 51.711(a). Verizon no longer disputes that this is the applicable test. Nor does it dispute that WorldCom's switches satisfy the geographic comparability test.[31]

That should end the matter. Nonetheless, Verizon asserts that the Commission should decline to adopt WorldCom's proposal because WorldCom has not demonstrated that it serves a "geographically dispersed customer base" within its serving area. But that is not what the law requires. Indeed, although Verizon accuses WorldCom and AT&T of trying to "rewrite the law in order to maximize their reciprocal compensation payments," Verizon Br. at IC-23, in fact, it is Verizon which has attempted to graft additional requirements onto the FCC's rule in order to minimize its own reciprocal compensation

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[31] See Tr. 10/10/01 at 1605-06 (D'Amico, Verizon). WorldCom's switches serve 11 Virginia rate centers which are also served by the ILEC with its tandem and subtending end office architecture. Specifically, in providing service to the Virginia rate centers in LATA 236, Verizon uses approximately 12 local/access tandems and 62 end office switches to serve these same rate centers. WorldCom uses just 2 switches in serving these 11 rate centers. WorldCom is able to serve such large geographic areas via its extensive transport network and bears the costs of that owned network. Thus, each one of WorldCom's switches in the Washington area, in serving these Virginia rate centers, serves an area that is at the very least comparable to if not greater than the service area of any of the 12 tandem switches used by Verizon in serving this same area. See WorldCom Exh. 3, Direct Test. of D. Grieco and G. Ball at 75-76.

payments.[32] Simply stated, the Commission's rule is that a CLEC is entitled to the tandem rate if "its switch serves a geographic area comparable to that served by the incumbent LECs tandem switch." There is no further requirement that "the CLEC actually serve a geographically dispersed customer base."

Nor should the Commission accept Verizon's invitation to graft this requirement onto the existing rule. First, in addition to exceeding the requirements of existing law, such an additional requirement would be utterly impractical. Indeed, Verizon's own witness made clear that he did not know how the Commission would determine whether the customer base is sufficiently "geographically dispersed." Thus, for example, counsel for AT&T asked Verizon's witness what he believed "the relevant considerations would be? Would it be number of customers, location of the customers? Would those things be relevant, in your opinion?" Tr. 10/10/01 at 1600-1601. Although Verizon's witness indicated he thought they would be, he was forced to conceded that he "just [didn't] know the formula or the combination for how that should be done." Id. at 1601 (D'Amico, Verizon). When pressed, he made clear that he had absolutely no idea how such a test would be administered: "I would say that one customer seems – I'm not sure if it's appropriate to just have one customer in a given area, but if you were to ask me should it be 10 or 20 or 40, I don't have a feel for that." Id. In response to a question from the Commission, Verizon's witness again indicated that he believed that there

[32] Apparently, Verizon would also like to add a new requirement that CLEC switches serve residential customers. Verizon Brief at IC-27, n.13. Verizon's argument that it may be inferred that the geographic coverage of WorldCom switches is less than that of Verizon tandems because WorldCom does not serve residential customers is specifically rebutted by the WorldCom testimony which actually describes the geographic coverage of WorldCom switches.

needed to be "a definition – not a definition, but some meat put around serves." Id. at 1606. Again, however, when asked whether Verizon could suggest a test for what that should be, he indicated it could not. Id. Given that even Verizon cannot articulate what a test should be, Verizon cannot seriously argue that WorldCom somehow failed to meet the relevant test.

In addition to being impossible to administer, determining the geographical locations of a CLEC's customer base provides no relevant information. It may provide insight into the CLEC's marketing and sales success, but a CLEC is not be required to gain market share from the ILEC in order to qualify for the tandem rate. Indeed, the Commission established this rule because it recognized that CLECs would deploy new technologies that could attain the same geographic coverage as the incumbent's tandems, not because it sought to penalize a given CLEC for not attaining marketing success. Local Competition Order ¶ 1090.

In short, the Commission should decline to alter the existing rule, which holds that if a CLEC has established network facilities and opened NPA/NXXs which allow end users within rate centers to originate and terminate local exchange service, such rate centers are within the physical or geographic reach of the CLEC's network regardless of the number of customers the CLEC has been able to attract.[33] Because WorldCom has demonstrated that it meets the Commission's current rule, its proposal should be adopted.

[33] Verizon also complains that it cannot take advantage of a lower end office rate by bypassing the tandem and connecting directly to the CLECs end office switches. This argument is irrelevant under the rule promulgated by Commission. Moreover, it is difficult to credit given Verizon's VGRIPs proposal and its extreme resistance to transporting its own traffic even to a POI on its own network much less to a CLEC end office.