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December 17, 2001

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
445 12th Street, SW, Room TW-B204
Washington, DC 20554

**RE: CC Docket No. 98-184 Bell Atlantic/GTE Merger;
CC Docket No. 98-141 SBC/Ameritech Merger**

Dear Ms. Salas:

The attached letter should be placed in the record of the above captioned docket.

Pursuant to section 1.1.206(a)(1) of the Commission's rules, an original and one copy of this letter are being submitted to the office of the Secretary. Please associate this notification with the record in this proceeding above.

If there are any questions regarding this matter, please call at 202 515-2527.

Sincerely,

A handwritten signature in cursive script that reads "G. R. Evans".

Gordon R. Evans
Vice President
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December 17, 2001

Ms. Carol Matthey
Federal Communications Commission
445 12th Street, SW, Room
Washington, DC 20554

**RE: CC Docket No. 98-184 Bell Atlantic/GTE Merger;
CC Docket No. 98-141 SBC/Ameritech Merger**

Dear Ms. Matthey:

This letter briefly supplements our discussions from our meeting on December 13.

As we outlined in prior submissions, the Commission's most recent order addressing the issue of inter-carrier compensation for Internet-bound traffic resolves any possible question as to whether paragraph 32 of the Bell Atlantic/GTE merger conditions permits carriers to adopt across state boundaries the provisions of an interconnection agreement that address the issue of compensation for such traffic.

By its express terms, paragraph 32 applies only to matters that are "subject to 47 U.S.C. 251 (c)." In a previous letter, you expressed the view that section 251(c) incorporates section 251(b) by reference, and that paragraph 32 therefore permitted the cross-state adoption of provisions addressing matters covered by section 251(b) where the other requirements of paragraph 32 are satisfied. While we disagree, the resolution of that question does not matter for present purposes because the Commission's most recent order again reaffirmed that Internet traffic is not covered by section 251(b).

Indeed, the Commission first reached this conclusion in its 1999 Order relating to compensation for Internet-bound traffic. As the Commission itself has explained, in that order the Commission "previously found . . . that such traffic is interstate traffic subject to the jurisdiction of the Commission under section 201 of the Act and is not, therefore, subject to the reciprocal compensation provisions of section 251(b)(5)." Remand Order, paragraph 1 (footnotes omitted). While the D.C. Circuit remanded that determination on the grounds the Commission had not provided an adequate explanation, the Commission's recent order reaffirmed its previous conclusion. In the Remand Order, the Commission again held that Internet-bound traffic "falls outside the scope of section 251(b)(5)." *Id.* As the Commission explained, Internet-bound traffic is a form of "information access" that is subject to section 251(g) of the Act, and "Congress excluded from the 'telecommunications' traffic subject to reciprocal compensation the traffic

identified in section 251(g), including traffic destined for ISPs.” *Id.*, see also Remand Order at paragraphs 30, 44.

Accordingly, the Commission’s Remand Order puts to rest *any* conceivable claim and makes clear that the expanded MFN condition does not allow carriers to adopt in other states the provisions of an interconnection agreement that address inter-carrier compensation for Internet-bound traffic. Even if the merger condition applied to matters covered by section 251(b), the Commission’s order conclusively establishes that the provision addressing Internet-bound traffic is not covered. For convenience, a copy of our prior submission addressing this issue (including a copy of paragraph 32 of the merger conditions) is attached.

In light of all of this, you and your staff asked whether there was any remaining dispute that the merger condition did not apply to compensation for Internet-bound traffic. Given the Commission’s unambiguous orders, there should not be. Nonetheless, some carriers continue to argue that the merger condition applies, and cite your letter of December 27, 2000 to Focal Communications for support. In addition, at least two state commissions have mistakenly interpreted the merger condition to permit provisions addressing Internet-bound traffic to be adopted across state lines. *Focal Communications of Washington v. Verizon Northwest*, Washington Utilities and Transportation Commission Dkt. No. UT-013019, ALJ Decision at & 50 (Oct. 17, 2001) (whatever doubt about exclusion of internet-bound traffic from the application of paragraph 32 of the merger conditions “was dispelled by the FCC Common Carrier Bureau’s December 27th letter.”); *ITC DeltaCom Petition For Approval of Election to Adopt Terms and Conditions of Previously Approved Interconnection Agreement*, Alabama Public Service Commission Informal Docket U-4320, Order at 4 (Sept. 14, 2001) (allowing adoption of reciprocal compensation provisions across state lines after petitioner cites 12/27 letter for support of that position). Copies of those decisions are attached.

For that reason, it continues to be important to grant our request to clarify the previous letter, at least with respect to treatment of compensation for Internet-bound traffic. At a time when FCC is trying to *decrease* this uneconomic arbitrage, states are mistakenly relying on the December 27th letter to expand the obligation to make such payments beyond the scope of the FCC Remand Order, directly contrary to FCC’s policy objectives as well as plain terms of the merger conditions. We therefore ask for quick action in clarifying the prior letter.

Please feel free to call me with any questions or comments.

Sincerely,



Attachments

c: A. Dale
M. Stone

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

Respectfully submitted,

Michael E. Glover
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Of Counsel

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1320 North Court House Road
Eighth Floor
Arlington, Virginia 22201
(703) 974-4862

Attorney for the Verizon
telephone companies

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.

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION

FOCAL COMMUNICATIONS)	
CORPORATION OF WASHINGTON)	DOCKET NO. UT-013019
)	
Petitioner,)	
)	
v.)	INITIAL ORDER REQUIRING
)	VERIZON TO MAKE
VERIZON NORTHWEST, INC.,)	AVAILABLE AN ENTIRE
)	INTERCONNECTION
Respondent.)	AGREEMENT AS REQUESTED
.....)	

I. SYNOPSIS

1 This Order determines that Verizon Northwest, Inc. (“Verizon”), must make available to Focal Communications Corporation of Washington (“Focal”) an entire interconnection agreement previously approved by the North Carolina Public Utilities Commission pursuant to the Federal Communications Commission’s (“FCC”) *Bell Atlantic/GTE Merger Order*,¹ except for state specific rates and performance measures, and relevant name changes.

II. BACKGROUND AND PROCEDURAL HISTORY

2 On July 28, 1998, Bell Atlantic Corporation (“Bell Atlantic”) and GTE Corporation (“GTE”) announced their plan of merger.² Based on the extensive breadth of the companies’ operations, the proposed merger required the review of several government agencies, including the FCC and the Washington Utilities and Transportation Commission (“Commission”).

3 Bell Atlantic and GTE filed with the FCC their initial applications for transfer of control on October 2, 1998. The companies renewed and supplemented their initial application by submitting a January 27, 2000 Supplemental Filing, which included a set of proposed merger conditions to which they voluntarily committed.

¹ See GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License, *Memorandum Opinion and Order*, 15 FCC Rcd 14032 (rel. June 16, 2000) (“*Bell Atlantic/GTE Merger Order*”). The FCC’s Order included *Merger Conditions* contained in Appendix D.

² The merged entity was later renamed “Verizon Communications, Incorporated.” GTE Northwest Incorporated was renamed “Verizon Northwest, Incorporated.”

4 The FCC subsequently determined that, absent conditions, the merger of Bell Atlantic and GTE would harm consumers of telecommunications services by (a) denying them the benefits of future probable competition between the merging firms; (b) undermining the ability of regulators and competitors to implement the pro-competitive, deregulatory framework for local telecommunications that was adopted by Congress in the 1996 Act; and (c) increasing the merged entity's incentives and ability to discriminate against entrants into the local markets of the merging firms. Moreover, the FCC found that the asserted public interest benefits of the proposed merger would not outweigh these public interest harms.

5 The FCC also found that the applicants' proposed conditions would alter the public interest balance.

These conditions are designed to mitigate the potential public interest harms of the Applicants' transaction, enhance competition in the local exchange and exchange access markets in which Bell Atlantic or GTE is the incumbent local exchange carrier, and strengthen the merged firm's incentives to expand competition outside of its territories.³

6 The *Merger Conditions* adopted by the FCC include most-favored nation provisions for out-of-region and in-region arrangements, dependent in part on whether the arrangement was voluntarily negotiated before or after the "Merger Closing Date" as defined. Under the *Merger Conditions*, the Merger Closing Date was June 30, 2000.

7 GTE South, Inc., and Time Warner Telecom voluntarily negotiated an entire interconnection agreement ("*GTE South/Time Warner Agreement*") in North Carolina and signed the agreement, respectively, on June 26, 2000, and June 21, 2000. Therefore, the *GTE South/Time Warner Agreement* is a "Pre-Merger" agreement subject to Paragraph 32 of the *Merger Conditions*.

8 Paragraph 32 provides that Bell Atlantic/GTE must make available "in the GTE 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) 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."

9 By letter dated October 4, 2000, Focal requested that Verizon make available the *GTE South/Time Warner Agreement* in its entirety for use in the state of Washington pursuant to the *Bell Atlantic/GTE Merger Order* and Section 252(i) of the

³ *Bell Atlantic/GTE Merger Order*, at para. 4.

Telecommunications Act of 1996.⁴ Verizon refused Focal's request, claiming that Verizon is not obligated to make all arrangements from the *GTE South/Time Warner Agreement* available to requesting carriers in other states.

10 On November 9, 2000, Focal submitted a letter to the FCC Common Carrier Bureau requesting an interpretation of the most-favored nation ("MFN") provisions in the *Bell Atlantic/GTE Merger Order*. Verizon filed its response to Focal's request on December 6, 2000. The FCC Common Carrier Bureau entered a letter ruling on December 27, 2000 ("December 27th Letter").⁵ As discussed in this Order, the December 27th Letter explained that the *Bell Atlantic/GTE Merger Order*'s MFN provisions apply to entire interconnection agreements.

11 Thereafter, Verizon continued to refuse to make the entire *GTE/Time Warner Agreement* available to Focal. On or about January 11, 2001, Verizon submitted a "Supplemental Agreement" to Focal, supplementing and revising the terms and conditions contained in the *GTE/Time Warner Agreement*.

12 Focal filed a petition on March 22, 2001, to enforce its rights under the *Bell Atlantic/GTE Merger Order* and Section 252(i) of the Telecom Act. Verizon filed its answer to Focal's petition on March 29, 2001. The Commission convened a prehearing conference and subsequently entered an order on April 26, 2001. The parties stated, and the Commission agreed, that there are only legal issues pending in this proceeding. The parties waived the opportunity for an evidentiary hearing.

13 The parties both filed opening briefs on June 22, 2001, and reply briefs on July 6, 2001. On July 23, 2001, Focal filed a motion to strike portions of Verizon's reply brief or to further respond. Verizon filed its opposition to Focal's motion on August 9, 2001.

III. PARTIES AND REPRESENTATIVES

14 Gregory J. Kopta, attorney, Seattle, represents Focal. Kimberly A. Newman, attorney, Washington D.C., represents Verizon.

IV. DISCUSSION

15 Discussion on the issues begins with Focal's motion to strike portions of Verizon's reply brief. The disputed issues in this case focus on the interpretation and implementation of the *Bell Atlantic/GTE Merger Order* and the *Merger Conditions*,

⁴ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. § 151 *et seq.* ("Telecom Act").

⁵ Letter from Carol Matthey, Deputy Chief, Common Carrier Bureau, FCC to Michael L. Shor, Swidler Berlin Shereff Friedman, LLP, CC Docket No. 98-184, DA 00-2890 (December 27, 2000).

47 U.S.C. § 251(c), the FCC Common Carrier Bureau December 27, 2000 letter, and 47 U.S.C. § 252(i). These authorities are discussed in turn (but not necessarily in that order). Finally, we discuss the preparation by Verizon of a Supplemental Agreement to the *GTE South/Time Warner Agreement*.

A. Focal's Motion to Strike Portions of Verizon's Reply Brief

- 16 Focal argues that Verizon unfairly raises new issues regarding the interpretation and enforcement of the *GTE South/Time Warner Agreement* in its Reply Brief. Consequently, Focal requests that the Commission strike portions of that brief or allow it further opportunity to respond. Verizon contends that all arguments in its briefs are properly presented and that no further response is necessary.
- 17 In its briefs Verizon asserts that “the main issue in this case really is compensation for Internet traffic,” and the Company argues at length that it is not obligated to pay reciprocal compensation for ISP-bound traffic as provided for in the *GTE South/Time Warner Agreement*. In spite of Focal's agreement with that assertion, the parties are mistaken. The main issue in this case is whether Paragraph 32 of the *Merger Conditions* to the FCC's *Bell Atlantic/GTE Merger Order* permits Focal to opt into the entirety of an agreement previously approved in another GTE Service Area consistent with Section 252(i) of the Telecom Act.
- 18 Issues regarding the interpretation and enforcement of specific terms and conditions in the *GTE South/Time Warner Agreement* (i.e., Article V, Section 3, *Transport and Termination of Traffic*) are not ripe prior to determining whether Focal's petition to adopt that agreement is approved, and those issues are not properly raised in this proceeding.⁶ Verizon's arguments regarding the interpretation of provisions in that agreement are not considered in this proceeding and Focal's motion to strike portions of Verizon's Reply Brief or to further respond is moot.⁷
- 19 Verizon also argues that the Commission should delay a decision in this matter until the FCC concludes a proceeding⁸ to consider whether the MFN merger conditions apply to provisions for reciprocal compensation for ISP-bound traffic and whether

⁶ Although this Order does not address the interpretation and enforceability of the reciprocal compensation provisions in the *GTE South/Time Warner Agreement*, the Commission notes that it previously ordered GTE Northwest and Electric Lightwave, Inc., to compensate each other for ISP-bound traffic originating on their respective networks. See *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between Electric Lightwave, Inc., and GTE Northwest Incorporated*, Docket No. UT-980370, Order Approving Negotiated and Arbitrated Interconnection Agreement (May 12, 1999), at para. 29-33.

⁷ Focal argued that Verizon's arguments regarding the interpretation and enforcement of the *GTE South/Time Warner Agreement* were raised as new issues in Verizon's Reply Brief.

⁸ FCC Public Notice, *Common Carrier Bureau Seeks Comment on Letters Filed by Verizon and Birch Regarding Most-Favored Nation Condition of SBC/Ameritech and Bell Atlantic/GTE Orders*, DA 01-722 (March 30, 2001).

there are grounds to waive or modify the MFN conditions. Focal responds that the MFN issue is presently settled by the *Bell Atlantic/GTE Merger Order* and the December 27th Letter, as a matter of law.

20 The FCC's notice, dated March 30, 2001, requires that all comments be filed by May 14, 2001. Although the Commission has not delayed its decision in this matter in response to Verizon's request, we note that the FCC has not taken action nearly five months after receiving comments. Further, there is no indication when, if ever, the FCC will act in this regard. Verizon does not contest the Commission's right to review this dispute pursuant to Paragraph 32 of the *Merger Conditions*, and our resolution of the disputed issues in this proceeding without further delay serves the public interest.

B. Paragraph 32 of the *Merger Conditions*

21 Paragraph 32 of the *Merger Conditions* states, in relevant part:

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) . . . 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 . . . *Exclusive of price and state-specific performance measures* and subject to the conditions specified in the 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)* . . . 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. . . . 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). . . . (Italics added.)

1. Section 251(c) of the Telecom Act

22 Verizon contends that Paragraph 32 only requires that it make available to Focal those interconnection arrangements, UNEs, and provisions of the *GTE South/Time Warner Agreement* that are the express subject of 47 U.S.C. § 251(c), and that it is under no obligation to make available those interconnection arrangements, UNEs, and

provisions that are the subject of 47 U.S.C. § 251(b).⁹ Focal responds that Section 251 (c) encompasses the duties set forth in subsection (b), and argues that the FCC makes clear that GTE must make available to Focal the entire *GTE South/Time Warner Agreement* as approved in North Carolina.

23 Verizon contends that if the FCC intended that it must make available terms in agreements that fulfill the obligations of both Section 251(b) and Section 251(c), then Paragraph 32 of the *Merger Conditions* would have expressly referenced both sections. Focal argues that Section 251(c) – which sets forth additional obligations that apply only to incumbent LECs – incorporates explicitly the obligations and duties of Section 251(b). Focal concludes thus it was not necessary for the FCC to specifically reference both sections in Paragraph 32 in order to effect the intent that Verizon make available interconnection agreements in their entirety.

24 Section 251(c) states, in relevant part:

ADDITIONAL OBLIGATIONS OF INCUMBENT LOCAL EXCHANGE CARRIERS: -- In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties:

(1) DUTY TO NEGOTIATE:-- The duty to negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection. . . .

25 We agree that the clause “In addition to the duties contained in subsection (b)” serves to incorporate the obligations set forth in subsection (b) into subsection (c). It would be surplusage to restate each of the subsection (b) duties in subsection (c). Further, Verizon’s argument that the reference to subsection (c) in Paragraph 32 requires an incumbent LEC to make available arrangements that comply with those additional duties, but does not require that arrangements complying with *the duties that they are additional to* be made available, is unreasonably narrow in concept and implementation. The reference to subsection (b) in subsection (c) establishes that an incumbent LEC’s duties under subsection (c) includes those explicitly set forth in subsection (b).

26 Section 251(c)(1) supports the conclusion that the preceding reference to subsection (b) duties operates to incorporate those duties into subsection (c). Verizon contends that while subsection (c)(1) may establish a duty to negotiate subsection (b) terms in good faith, once those terms are negotiated incumbent LECs are not required to make

⁹ Section 251(b) of the Telecom Act states obligations that apply to all local exchange carriers, including the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications. Section 251(c) establishes additional obligations of incumbent local exchange carriers in addition to the duties contained in Section 251(b).

them available to requesting carriers under Paragraph 32. Verizon's contention in this regard again is unreasonably narrow in perspective. The provision in subsection (c) that incumbent LECs negotiate terms and conditions to fulfill subsection (b) duties in good faith further supports Focal's argument that the reference to subsection (c) in Paragraph 32 also requires incumbent LECs to make subsection (b) arrangements available.

27 Interconnection agreements routinely include numerous terms and conditions that are necessary in order to make the agreement fully effective but are not directly linked to either Section 251(b) or subsection (c). Under Verizon's theory of the case, Verizon would not be required to make any of those negotiated terms available to requesting carriers either. As discussed below, this outcome is inconsistent with the intent of Section 252(i).

2. "Entire Agreement"

28 Focal further argues that parenthetical reference to an "entire agreement" in subparagraph (1) regarding the Bell Atlantic Service Area also applies to subpart (2) regarding the GTE Service Area, even though the phrase is not repeated in that subpart. According to Focal, Section 251(c) must be read to include the duties of subsection (b) in order to give effect to the requirement that Verizon make "entire agreements" available. Verizon argues that that it need only make available an entire agreement *subject to 47 U.S.C. § 251(c)*; in short, Verizon must make available an "entire 251(c) interconnection agreement."

29 Focal's argument is more persuasive. Paragraph 32 and Section 251(c) should be read to give full meaning to the phrase "an entire agreement." Verizon's invention of "an 'entire' 251(c) interconnection agreement" renders the phrase "an entire agreement" substantively less than the plain meaning of those words, and is inconsistent with 47 C.F.R. § 51.809¹⁰ and this Commission's implementation of Section 252(i) of the Telecom Act.¹¹

3. "Qualifying" Arrangements

30 The parties also disagree whether reference to "qualifying" interconnection arrangements in Paragraph 32 includes arrangements that comply with its Section 251(b) duties. Paragraph 32 places certain limits on Verizon's obligation to make arrangements available to requesting carriers; however, the reference to "qualifying" interconnection arrangements in Paragraph 32 is wholly consistent with the finding that Section 251(c) incorporates the duties enumerated in subsection (b).

¹⁰ The FCC's "MFN rule."

¹¹ See *In the Matter of Implementation of Section 252(i) of the Telecommunications Act of 1996*, Docket No. UT-990355, Interpretive and Policy Statement (First Revision) (April 12, 2000) ("Revised Interpretive and Policy Statement").

31 For example, Paragraph 32 provides that no interconnection arrangement in the Bell Atlantic Service Area can be extended into the GTE Service Area and vice versa. Further, Paragraph 32 only addresses arrangements that were voluntarily negotiated prior to the Merger Closing Date:

This Paragraph shall not impose 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).

32 Thus, Paragraph 32 employs GTE's willingness to agree voluntarily to arrangements in interconnection agreements as a self-regulating mechanism. The *Merger Conditions* presume that if GTE voluntarily agreed to provide an arrangement to any LEC anywhere in its service area, then it is fair, just, and reasonable that Verizon make that same arrangement (or an entire agreement) available to any other requesting carrier within that same expanded boundary. Other limitations to the availability of arrangements also exist;¹² however, the FCC essentially deferred to GTE's past business judgment to define the scope of its future obligation.

33 We reject Verizon's argument that only terms and conditions complying with its section 251(c)(2)-(6) duties constitute "qualifying" interconnection arrangements. Rather, section 251(c) incorporates the duties enumerated in Section 251(b), and qualifying interconnection arrangements are those that were voluntarily negotiated within the relevant service area and are not subject to the other express limitations stated in Paragraph 32.

C. The Bell Atlantic/GTE Merger Order

34 Focal avers that that the *Bell Atlantic/GTE Merger Order* further clarifies that the FCC intended that competitive carriers would have a choice between adopting an entire negotiated agreement or selected provisions from such agreements under Paragraph 32. Verizon responds by repeating its arguments that an entire interconnection agreement means "an 'entire' 251(c) interconnection agreement," and that section 251(b) provisions are not qualifying arrangements.

35 Most favored nation arrangements are discussed in the *Bell Atlantic/GTE Merger Order* beginning at Paragraph 300. MFN is "designed to facilitate market entry

¹² A qualifying interconnection arrangement also must be 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. Further, terms, conditions, and prices contained in tariffs cited in Bell Atlantic/GTE interconnection agreements and state-specific performance measures are not considered negotiated provisions.

throughout Bell Atlantic/GTE's region as well as the spread of best practices (as that term is understood by Bell Atlantic/GTE's competitors) . . ." Paragraph 300 goes on to describe the application of MFN in a different context than that raised in this case, but also provides guidance how the FCC defines the scope of an "interconnection arrangement."

[MFN] encompasses, both for out-of-region and in-region agreements, entire interconnection agreements or selected provisions from them.¹³

36 The *Bell Atlantic/GTE Merger Order*, Paragraph 305, explains that Paragraph 32 is structured to put Bell Atlantic/GTE on notice as to which procedures could become uniform across its region.

Moreover, under the conditions to this merger, *any voluntarily negotiated, in region interconnection arrangement or UNE* will be made available to requesting carriers in any other in-region service area of the particular legacy company whose interconnection arrangement or UNE is being extended. (*Emphasis added*).

37 Paragraph 305 is unequivocal regarding the class of arrangements that Verizon must make available under Paragraph 32. Further, this Commission has long recognized that an incumbent LEC must make available an existing agreement in its entirety to requesting carriers, even though neither section 252(i) nor FCC Rule 51.809 make specific reference to entire agreements.¹⁴ Verizon's arguments regarding the application of Paragraph 32 of the *Merger Conditions* conflict with the provisions of the FCC's *Bell Atlantic/GTE Merger Order* that the conditions append.

The FCC Common Carrier Bureau December 27, 2000 Letter

38 On December 27, 2000, Carol Matthey, Deputy Chief, FCC Common Carrier Bureau sent a letter to the parties concerning the MFN provisions contained in the *Merger Conditions*. The December 27th Letter explained that the *Bell Atlantic/GTE Merger Order's* MFN provisions apply to entire interconnection agreements, so that carriers may import interconnection agreements from one state into another state. Focal argues that the Bureau's December 27th Letter controls the Commission's decision in this case. Verizon argues that the Commission should not give any weight to the Bureau's December 27th Letter because it does not constitute a definitive ruling. Verizon has requested that the Common Carrier Bureau further clarify the issues addressed in the December 27th Letter.

¹³ *Bell Atlantic/GTE Merger Order*, Paragraph 300, footnote 686. Bell Atlantic and GTE's Service Areas are comprised of regions.

¹⁴ See Revised Interpretive and Policy Statement, at para. 14.

39 The FCC has delegated authority to its staff to act on matters that are “minor or routine or settled in nature and those in which immediate action may be necessary” under 47 C.F.R. § 0.5(c). Actions taken under delegated authority are subject to review by the FCC, and except for that possibility, those actions have the same force and effect as actions taken by the commission.

40 The FCC Common Carrier Bureau develops, recommends, and administers policies and programs for the regulation of services, facilities, and practices of subject common carriers. 47 C.F.R. § 0.91. Title 47 also broadly authorizes the Bureau to act for the FCC, and to advise the public, other government agencies, and industry groups on common carrier regulation and related matters. 47 C.F.R. § 0.91(a) and (c). FCC rules and regulations delegate authority to the Common Carrier Bureau Chief to “perform all functions of the Bureau.” 47 C.F.R. § 0.291. The December 27th Letter constitutes a non-hearing action taken under delegated authority by the Chief of the FCC’s Common Carrier Bureau, as indicated by the letter’s designation DA 00-2890.

41 Sections 1.102 through 1.120 set forth procedural rules governing reconsideration of actions taken pursuant to authority delegated under Section 5(c). Verizon, by letter dated February 20, 2001, to Dorothy Atwood, Chief, FCC Common Carrier Bureau, requested that the Bureau reconsider the December 27th Letter.¹⁵

42 It is noteworthy that the FCC did not exercise its discretion to stay the effectiveness of the December 27th Letter as permitted under 47 C.F.R. § 1.106(n). Pursuant to 47 C.F.R. § 1.102(b) non-hearing actions taken pursuant to delegated authority “shall be effective upon release of the document containing the full text of such action.” Section 1.106(n) further states:

Without special order of the Commission, the filing of a petition for reconsideration shall not excuse any person from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof.

43 Thus, under FCC rules and regulations the Common Carrier Bureau’s December 27th Letter has the same force and effect as actions taken by the FCC, and Verizon was clearly bound to comply with its findings as of the date it was written.

44 The December 27th Letter thoroughly rejects the same Verizon arguments that are advanced in this proceeding. According to the FCC, “the plain language of the *Merger Conditions* permit a CLEC to obtain an entire interconnection agreement under the MFN provisions,” so long as the agreement was voluntarily negotiated and

¹⁵ Requests for reconsideration of actions taken pursuant to delegated authority are acted upon by the same designated authority pursuant to 47 C.F.R. § 1.106(a)(1).

meets the other requirements specified in the conditions. The FCC also found that Section 251(b) is incorporated explicitly into Section 251(c).

45 The December 27th Letter describes the purpose of the MFN provisions:

In the *Bell Atlantic/GTE Merger Order*, the Commission adopted the MFN provisions to mitigate certain harms arising out of the merger. In particular, the Commission found that the MFN provisions address the harms of the merger by facilitating the market entry and spreading the use of best practices throughout Verizon's region. (*Footnote omitted.*)

46 Later in the letter, the FCC discusses the relationship between the MFN provisions and Section 252(i) of the Telecom Act:

Moreover, the *Merger Conditions* expressly state that the rules and requirements of section 252(i) apply to all requests for interconnection arrangements and UNEs under the MFN provisions of the *Merger Conditions*. The MFN provisions expand the section 252(i) opt-in rights of CLECs by allowing CLECs to import interconnection arrangements (including entire agreements) from one state into another.

47 Finally, the FCC noted that Verizon's view is not consistent with the underlying purpose of the MFN provisions, and that the intent of the *Merger Conditions* would be thwarted if a CLEC was forced to negotiate separately an interconnection agreement to obtain provisions relating to Section 251(b) duties.

D. Implementation of 47 U.S.C. § 252(i) and Focal's Request to Opt-in to the GTE South/Time Warner Agreement

48 By letter dated October 4, 2000, Focal requested to opt-in to the terms and conditions contained in the *GTE South/Time Warner Agreement*. As discussed above, Paragraph 32 of the *Merger Conditions* provides that Verizon must make available to Focal that entire agreement to the same extent and under the same rules that would apply to a request under 47 U.S.C. § 252(i). The Telecom Act and FCC rules are silent as to the effective date of requests under Section 252(i). Focal argues that its opt-in right to the *GTE South/Time Warner Agreement* was "fixed and intact" when Focal presented its request in October 2000. Although briefs filed by the parties did not squarely address what effective date to affix to Focal's request, this issue previously has been discussed by the Commission.

49 The Commission concluded in the Revised Interpretive and Policy Statement that a request under Section 252(i) by a CLEC with an existing agreement constitutes a request to revise, modify, or amend the agreement. Accordingly, the Commission further concluded that a Section 252(i) request is not self-executing and must be

submitted to the Commission for approval under 47 U.S.C. § 252(e)(1). Likewise, the Revised Interpretive and Policy Statement provides that a request by a carrier without an existing interconnection agreement also must be submitted to the Commission for approval.¹⁶ The Commission's policy that a Section 252(i) request is not self-effecting is also reflected by the expedited process for adoption of previously approved agreements in their entirety.¹⁷

50 Focal originally opted-in to the interconnection agreement between Verizon and AT&T Communications of the Pacific Northwest, Inc. However, Verizon terminated that agreement as of its September 24, 2000, expiration date. Although the parties maintain the services and facilities in existence as of that date under the terms and conditions of the expired agreement, Focal currently does not have an interconnection agreement with Verizon in Washington State.

51 The Commission may issue an interpretive and policy statement when necessary to end a controversy or to remove a substantial uncertainty about the application of statutes or rules. However, it is important that parties recognize that current interpretive and policy statements are advisory only, and they do not carry the same weight as statutes or rules.¹⁸ Because of Verizon's egregious conduct in this case, an exception must be made to the Commission's current policy statement that adoptions of agreements under Section 252(i) only become effective when approved.

52 Whatever legitimacy may be associated with Verizon's strained interpretation of the *Bell Atlantic/GTE Merger Order* and Paragraph 32 of the *Merger Conditions* was dispelled by the FCC Common Carrier Bureau's December 27th letter. To repeat from above, under FCC rules and regulations the December 27th Letter has the same force and effect as actions taken by the FCC, and Verizon was clearly bound to comply with its findings as of the date it was written. The FCC did not thereafter stay its decision, and Verizon should have fully complied with the *Merger Condition* terms by making the entire *GTE South/Time Warner Agreement* available to Focal while pursuing other relief.

53 Verizon's subsequent conduct unfairly deprived Focal of its rights under the *Bell Atlantic/GTE Merger Order*. Accordingly, it is reasonable and equitable, as well as consistent with the Telecom Act and FCC rules, that Focal's request to opt-in to the entire *GTE South/Time Warner Agreement* be made effective as of December 27, 2001.

¹⁶ See Revised Interpretive and Policy Statement, at paragraph 3.

¹⁷ Id., at Paragraph 31.

¹⁸ RCW 34.05.230(1). RCW 34.05.230 subsections were renumbered effective January 1, 2001; the text in the current subsection (1) followed subsection (8) in prior versions.

E. Supplemental Terms for State-Specific Prices and Performance Measures

54 Verizon argues that its proposed Supplemental Agreement contains numerous provisions that address rates specific to Washington State, and is consistent with its legal duty to make arrangements available to Focal. However, that Supplemental Agreement is part and parcel of Verizon's refusal to comply with FCC requirements that it make the entire *GTE South/Time Warner Agreement* available to Focal.

55 Focal previously filed the entire *GTE South/Time Warner Agreement* as Exhibit C attached to its Petition in this proceeding. Verizon must file a revised Supplemental Agreement that only states Washington-specific rates to replace North Carolina-specific rates that were originally made part of the *GTE South/Time Warner Agreement*, any relevant Washington-specific performance measures, and changes in the names of, and contact information for, the parties, the Commission, and the state no later than 10 days after this Order is entered.

V. FINDINGS OF FACT

56 The Washington Utilities and Transportation Commission is an agency of the state of Washington, vested by statute with authority to regulate rates, rules, regulations, practices, accounts, securities, and transfers of public service companies, including telecommunications companies.

57 Focal Communications Corporation of Washington ("Focal") and Verizon Northwest, Inc. ("Verizon"), are each engaged in the business of furnishing telecommunications service within the state of Washington as public service companies.

58 The interconnection agreement between GTE South, Inc., and Time Warner Telecom in North Carolina was voluntarily negotiated, and constitutes a "Pre-Merger" agreement subject to the *Bell Atlantic/GTE Merger Order*, Paragraph 32 of the *Merger Conditions*.

59 Focal requested that Verizon make available in Washington State the entire *GTE South/Time Warner Agreement*, except for state-specific rates and performance measures. Verizon denied Focal's request.

60 Focal filed a petition in this proceeding to enforce its rights under the *Bell Atlantic/GTE Merger Order*.

61 The FCC Common Carrier Bureau entered a letter ruling on December 27, 2000, explaining that the *Bell Atlantic/GTE Merger Order's* MFN provisions apply to entire interconnection agreements. That ruling has not been stayed.

62 Paragraph 32 of the *Merger Conditions* requires that Verizon make available entire
agreements that are voluntarily negotiated, including terms and conditions comprising
arrangements that comply with its duties under 47 U.S.C. § 251(b) and (c).

63 Arrangements that comply with incumbent local exchange carrier duties under 47
U.S.C. § 251(b) and (c) constitute qualifying arrangements pursuant to Paragraph 32
of the *Merger Conditions*.

64 The Commission's Revised Interpretive and Policy Statement implementing 47
U.S.C. § 252(i) states that a Section 252(i) request is not self-executing and must be
submitted to the Commission for approval under 47 U.S.C. § 252(e)(1).

65 Interpretive and Policy Statement issued by the Commission are advisory only, and
they do not carry the same weight as statutes or rules.

VI. CONCLUSIONS OF LAW

66 The Washington Utilities and Transportation Commission has jurisdiction over the
subject matter of this proceeding and all parties to this proceeding.

67 Section 251(c) of the Telecommunications Act of 1996 incorporates the provisions of
47 U.S.C. § 251(b).

68 Under FCC rules and regulations the Common Carrier Bureau's December 27th Letter
has the same force and effect as actions taken by the FCC.

69 Under FCC rules and regulations Verizon should have complied with the findings of
the Common Carrier Bureau's December 27th Letter as of the date it was written.

70 Verizon's failure to comply immediately with the Common Carrier Bureau's
December 27th Letter unfairly deprived Focal of its rights under the *Bell Atlantic/GTE
Merger Order*.

71 Verizon should make available in Washington State to Focal the entire *GTE
South/Time Warner Agreement*, except for state-specific rates and performance
measures.

72 Verizon should make available to Focal a supplemental agreement to the *GTE
South/Time Warner Agreement* that includes all relevant Washington state-specific
rates and performance measures.

73 It is reasonable and equitable, as well as consistent with the Telecom Act and FCC
rules, that Focal's request to opt-in to the entire *GTE South/Time Warner Agreement*
be made effective as of December 27, 2001.

VII. ORDER

IT IS ORDERED That:

- 74 Verizon must make available in Washington State to Focal the entire *GTE South/Time Warner Agreement*, except for state-specific rates and performance measures, effective December 27, 2000.
- 75 Verizon must file a revised Supplemental Agreement that only states Washington-specific prices to replace North Carolina-specific rates that were originally made part of the *GTE South/Time Warner Agreement*, any relevant Washington-specific performance measures, and changes in the names of, and contact information for, the parties, the Commission, and the state no later than 10 days after this Order is entered.
- 76 The Commission retains jurisdiction over all matters and the parties in this proceeding to effectuate the provisions of this Order.

DATED at Olympia, Washington and effective this 17th day of October, 2001.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

LAWRENCE J. BERG
Administrative Law Judge

NOTICE TO PARTIES:

This is an Initial Order. The action proposed in this Initial Order is not effective until entry of a final order by the Utilities and Transportation Commission. If you disagree with this Initial Order and want the Commission to consider your comments, you must take specific action within the time limits outlined below.

WAC 480-09-780(2) provides that any party to this proceeding has twenty (20) days after the service date of this Initial Order to file a *Petition for Administrative Review*. What must be included in any Petition and other requirements for a Petition are stated in WAC 480-09-780(3). Pursuant to WAC 480-09-780(4) the Commission designates that that an *Answer* to any Petition for review must be filed by any party within five (5) days after service of the Petition.

WAC 480-09-820(2) provides that before entry of a Final Order any party may file a *Petition To Reopen* a contested proceeding to permit receipt of evidence essential to a decision, but unavailable and not reasonably discoverable at the time of hearing, or for other good and sufficient cause. No Answer to a *Petition To Reopen* will be accepted for filing absent express notice by the Commission calling for such Answer.

One copy of any *Petition* or *Answer* filed must be served on each party of record, with proof of service as required by WAC 480-09-120(2).

An original and three copies of any *Petition* or *Answer* must be filed by mail delivery to:

**Office of the Secretary
Washington Utilities and Transportation Commission
P.O. Box 47250
Olympia, WA 98504-7250**

or, by hand delivery to:

**Office of the Secretary
Washington Utilities and Transportation Commission
1300 South Evergreen Park Drive, S.W.
Olympia, WA 9850**

Sent by: JetFax M910
Received: 0/18/01 18:03:
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STATE OF ALABAMA
ALABAMA PUBLIC SERVICE COMMISSION
P.O. BOX 991
MONTGOMERY, ALABAMA 36101-0991

JIM SULLIVAN, PRESIDENT
JAN COOK, ASSOCIATE COMMISSIONER
GEORGE C. WALLACE, JR., ASSOCIATE COMMISSIONER

WALTER L. THOMAS, JR.
SECRETARY

ITC DELTACOM COMMUNICATIONS,
INC., d/b/a ITC DELTACOM (ITC
DeltaCom),

Petitioner

IN RE: PETITION FOR APPROVAL OF
ELECTION TO ADOPT TERMS AND
CONDITIONS OF PREVIOUSLY
APPROVED INTERCONNECTION
AGREEMENT PURSUANT TO 47 U.S.C.
§252(i) AND THE FCC'S BELL
ATLANTIC/GTE MERGER CONDITIONS.

INFORMAL DOCKET U-4320

ORDER

BY THE COMMISSION:

I. Introduction and Background

By Order entered in this cause on May 27, 2001, the Commission granted the request of ITC DeltaCom Communications, Inc., d/b/a ITC DeltaCom ("ITC DeltaCom") to adopt the provisions of a North Carolina interconnection agreement between GTE South, Inc. ("GTE") and Time Warner Telecom (Time Warner) (the "GTE/Time Warner agreement"), including those related to intercarrier compensation for Internet-bound traffic. ITC DeltaCom's request and the Commission's approval thereof was predicated on the terms and conditions set forth in the Order of the Federal Communications Commission (FCC) which addressed the merger between Bell Atlantic and GTE (the "Merger Conditions").¹ Said Order requires that Verizon Communications, Inc., the named entity which resulted from the merger of GTE and Bell Atlantic, must make available to any requesting telecommunications carrier in the Bell Atlantic/GTE service areas any Bell Atlantic/GTE state interconnection agreement that was voluntarily negotiated by a Bell Atlantic/GTE Incumbent Local Exchange Carrier prior to the merger closing date.

On July 26, 2001, Verizon South, Inc. (Verizon), the operating subsidiary of Verizon Communications, Inc. which provides Local Exchange Telecommunications

¹ In re: Application of GTE Corporation and Bell Atlantic Corporation for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control, Memorandum and Order, CC Docket No. 98-184 (rel. June 16, 2000) (the FCC's Merger Order).

INFORMAL DOCKET U-4320 - #2

Services in Alabama, filed with the Commission an Application for Reconsideration of the Commission's May 27, 2001, Order approving ITC DeltaCom's request to adopt the entirety of the North Carolina GTE/Time Warner agreement including those provisions of the agreement which addressed reciprocal compensation for Internet-bound traffic (the "Verizon Application"). Verizon contended that the Commission's decision in that regard was, as a matter of law, in error.

Verizon argued in its July 26, 2001, pleading that the provisions of the North Carolina GTE/Time Warner agreement addressing intercarrier compensation for Internet-bound traffic were in fact not available for adoption due to the fact that paragraphs 30, 31(a), and 32 of the Merger Conditions imposed by the FCC limit interstate adoption to "any interconnection agreement, UNE, or provisions of an interconnection agreement (including an entire agreement) subject to 47 U.S.C. [sec.] 251(c)." According to Verizon, the qualifying language "subject to 47 U.S.C. [sec.] 251(c)" must be interpreted to mean that items such as reciprocal compensation that are subject to provisions other than §251(c) of the Telecommunications Act of 1996 cannot be adopted pursuant to the Merger Conditions.² As noted by Verizon, reciprocal compensation is in fact addressed by §251(b)(5).

Verizon further argued that the FCC had recently confirmed that Internet-bound traffic is not subject to the reciprocal compensation requirements of §251(b)(5) because such traffic is "interstate access", or more particularly "information access", which is governed by §251(g). Verizon further asserted that the FCC had concluded that it was Congress' intention to exclude §251(g) traffic from the reciprocal compensation requirements of §251(b)(5) altogether.³ Given the FCC's conclusion that Internet-bound traffic is outside the scope of both §§251(b)(5) and 251(c), Verizon argued that the Merger Conditions plainly do not allow for interstate adoptions of intercarrier compensation provisions relating to Internet-bound traffic.

² The Communications Act of 1934 as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (the "Act" or the "Telecommunications Act"). Hereinafter all citations to the Act are citations to 47 U.S.C.

³ *Intercarrier Compensation for ISP-bound Traffic, Order on Remand and Report and Order*, FCC 01-131 (April 27, 2001) (the *ISP Remand Order*) at ¶44.

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Verizon also maintained that the FCC's identification of Internet-bound traffic as interstate access rendered such traffic outside of the Most Favored Nation (MFN) provisions of §252(i). Verizon contended that by its terms, the scope of §252(i) parallels those matters that are subject to the core requirements of §251(c) -- namely "interconnection, services, or network elements." According to Verizon, §252(i) does not extend to matters such as interstate access.

Verizon further represented that any adoption of the North Carolina GTE/Time Warner agreement by ITC DeltaCom was untimely. As its first argument in support of that position, Verizon contended that the Merger Conditions at paragraph 32 state that the provisions in an agreement sought to be adopted may not be adopted after the "date that they are available in the underlying agreement." According to Verizon, the FCC initially determined that Internet-bound traffic is not subject to reciprocal compensation under §251(b)(5) in its February 26, 1999, *ISP Declaratory Ruling*.⁴ As such, Verizon contended that intercarrier compensation provisions governing Internet-bound traffic - including those in the North Carolina GTE/Time Warner agreement ITC DeltaCom was allowed to adopt - expired by their own terms once the FCC issued its *ISP Declaratory Ruling*.

Verizon argued as its second ground of untimeliness that the FCC's *ISP Remand Order* established that ITC DeltaCom's attempted adoption of the North Carolina GTE/Time Warner agreement was too late due to the FCC's notation therein that its regulations implementing the Most Favored Nation provisions of §252(i) require Incumbent Local Exchange Carriers to allow requesting telecommunications carriers to adopt agreements only "for a reasonable period of time."⁵ According to Verizon, the FCC then concluded that for purposes of adopting provisions related to the exchange of Internet-bound traffic, this reasonable period of time "expires upon the Commission's adoption in this Order of an intercarrier compensation mechanism for ISP-bound traffic."⁶ Verizon argued that the FCC adopted the *ISP Remand Order* on

⁴ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-bound Traffic*, Declaratory Ruling, 14 FCC Red. 3699 (1999) (the *ISP Declaratory Ruling*).

⁵ 47 C.F.R. 551.809(c).

⁶ *ISP Remand Order* at fn. 155.

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April 18, 2001, while ITC DeltaCom's requested adoption of the North Carolina GTE/Time Warner agreement came on May 7, 2001.

On July 16, 2001, ITC DeltaCom filed its Response and Opposition to Verizon's Application for Reconsideration (the "ITC DeltaCom Response"). In its Response, ITC DeltaCom contended that Verizon's representation that the express terms of the Merger Conditions established by the FCC excluded any right of interstate adoption of compensation terms for Internet-bound traffic was erroneous. ITC DeltaCom contended that Verizon's claims were based on a "tortured and disingenuous" misinterpretation of the language of the FCC's *Merger Order* that had already been squarely rejected by the FCC.⁷

According to ITC DeltaCom, the "subject to §251(c)" language in the Merger Conditions which was cited by Verizon modifies the term "interconnection agreement" and is clearly intended to limit the rights of requesting carriers to adopt interconnection agreements negotiated under the auspices of, and as a result of, Verizon's obligations pursuant to §251(c). Thus, only §251(c) interconnection agreements approved by the Commission pursuant to §252 or portions thereof are adoptable. In support of its contention in that regard, ITC DeltaCom attached correspondence from the Deputy Chief of the FCC's Common Carrier Bureau, Ms. Carol E. Matthey, addressing the language in question.⁸

ITC DeltaCom further argued that the Merger Conditions established by the FCC made quite clear the terms and conditions that were to be excluded from the opt-in rights established therein. ITC DeltaCom represented that since there was no such specific exclusion in the Merger Conditions for intercarrier compensation for the transport and termination of various types of traffic, such items were indeed available for adoption pursuant to the Merger Conditions and §252(i).

ITC DeltaCom also asserted that Verizon's claim that reciprocal compensation is unrelated to the core "interconnection" requirements of §251(c) was utterly without foundation. To the contrary, ITC DeltaCom represented that the reciprocal

⁷ ITC DeltaCom Response at p. 2.

⁸ Letter to Michael Shore from Carol Matthey, Deputy Chief FCC Common Carrier Bureau, DACO-2890 (December 27, 2000) (the "FCC letter").

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compensation provisions that Verizon sought to exclude from adoption were indeed part of an article of the North Carolina GTE/Time Warner agreement entitled "Interconnection and Transport and Termination of Traffic."

ITC DeltaCom maintained that even if Verizon's contention that the Merger Conditions were limited to §251(c) matters was correct, that contention would still not lead to the result that Verizon desired. ITC DeltaCom asserted that pursuant to §251(c), Verizon has "the duty to negotiate in good faith in accordance with §252 the particular terms and conditions of agreements to fulfill the duties described in paragraph (1) through (5) of subsection (b) and this subsection." Given the fact that reciprocal compensation falls under paragraph 5 of subsection (b) of §251, ITC DeltaCom represented that there was no way that the Merger Conditions could be read to extract the parts of the North Carolina GTE/Time Warner agreement that Verizon seeks to extract via its Application for Reconsideration.

ITC DeltaCom further maintained that Verizon's claim that the FCC's *ISP Remand Order* bars ITC DeltaCom's adoption of the intercarrier compensation provisions of the North Carolina GTE/Time Warner agreement was also unfounded. ITC DeltaCom argued that the FCC indeed made it clear that in spite of its assertion of jurisdiction over ISP-bound traffic, its *ISP Remand Order* did not alter existing contracts such as the North Carolina GTE/Time Warner interconnection agreement. ITC DeltaCom asserted that on a going forward basis, the FCC indicated that intercarrier compensation for ISP-bound traffic was to be handled in the context of §251(c) interconnection agreements and state commission approval and review of same pursuant to §252. ITC DeltaCom concluded that the FCC's *ISP Remand Order* communicated the FCC's intention that compensation for ISP-bound traffic was to be handled in the context of interconnection agreements negotiated, arbitrated or amended under §§251(c) and 252.

ITC DeltaCom also disputed Verizon's claim that the provisions in the North Carolina GTE/Time Warner agreement addressing intercarrier compensation for ISP-bound traffic were not subject to the Merger Conditions' expanded MFN provisions because such matters are not adoptable under §252(i). According to ITC DeltaCom,

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§252(i) contains no such restriction and in fact quite clearly states that Local Exchange Carriers such as Verizon "shall make available any interconnection, service, or network element provided under an agreement approved under this section."

With regard to Verizon's contentions that ITC DeltaCom's adoption of the North Carolina GTE/Time Warner interconnection agreement was untimely, ITC DeltaCom maintained that such contentions on Verizon's behalf were also without merit. ITC DeltaCom noted that the Merger Conditions indeed provide that the provisions in the underlying agreement may not be adopted beyond the last date they are available in the underlying agreement. Since the terms of the North Carolina GTE/Time Warner interconnection agreement do not expire until May 11, 2002, however, ITC DeltaCom contended that there was no question that the entirety of that agreement, including the intercarrier compensation provisions contested by Verizon, could be adopted in Alabama pursuant to the expanded MFN provisions contained in the Merger Conditions established by the FCC.

ITC DeltaCom phrased as "preposterous" Verizon's claim that the FCC's 1999 *ISP Declaratory Ruling* somehow caused the terms of the North Carolina GTE/Time Warner interconnection agreement to expire upon the issuance of said ruling.⁹ ITC DeltaCom pointed out that the North Carolina GTE/Time Warner interconnection agreement did not even become effective until July 12, 2000, a date more than a year after the FCC's February 26, 1999, *ISP Declaratory Ruling* was released and several months after the United States Court of Appeals for the District of Columbia Circuit vacated it on March 24, 2000.¹⁰

With regard to Verizon's arguments that the FCC's *ISP Remand Order* expunged the rights of requesting carriers to utilize §252(i) to opt-in to intercarrier compensation rates applicable to ISP-bound traffic as of the date it was adopted, ITC DeltaCom pointed to the text of paragraph 82 of said Order which states that "as of the date this Order is published in the Federal Register, carriers may no longer invoke §252(i) to opt-in to an existing interconnection agreement with regard to the rates paid for the

⁹ ITC DeltaCom Response at p. 7.
¹⁰ *Bell Atlantic v. FCC*, 205 F.3d 1 (DC Cir 2000).

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exchange of ISP-bound traffic. ITC DeltaCom further asserted that the ordering clause in paragraph 112 of the *ISP Remand Order* states that the §252(i) restriction will become effective "upon publication of this Order in the Federal Register". Since the FCC's Order was published in the Federal Register on May 15, 2001, and ITC DeltaCom exercised its §252(i) rights on May 7, 2001, ITC DeltaCom argued that its exercise of §252(i) was timely.

On August 9, 2001, Verizon submitted a Reply to ITC DeltaCom's Response (the "Verizon Reply"). In said Reply, Verizon reiterated its previous arguments and further asserted that even if ITC DeltaCom is somehow allowed to adopt the reciprocal compensation provisions of the North Carolina GTE/Time Warner interconnection agreement, those provisions would in no event give ITC DeltaCom a right to reciprocal compensation for Internet-bound traffic. In support of its claim in that regard, Verizon represented that the North Carolina Public Utilities Commission has never interpreted the GTE/Time Warner interconnection agreement to require payment for Internet-bound traffic nor has it issued any generic Order finding such traffic to be subject to the Telecommunications Act's reciprocal compensation obligations.

In further support of its claim that the GTE/Time Warner agreement in North Carolina does not provide the reciprocal compensation for ISP-bound traffic sought by ITC DeltaCom, Verizon represented that the provisions of said agreement relating to Internet-bound traffic constituted an interim bill-and-keep arrangement for such traffic until the FCC provided "governing law" resolving the issues concerning Internet-bound traffic. According to Verizon, that "governing law" was provided by the FCC in its *ISP Remand Order* wherein it concluded that Internet-bound traffic is interstate, non-local traffic and as such is not subject to reciprocal compensation provisions of §251(b)(5).

Verizon also addressed in its August 9, 2001, Reply ITC DeltaCom's contention that the FCC had "squarely rejected" the Verizon contention that the Most Favored Nation provisions of the Merger Conditions provide for the interstate adoption of only those core items set forth in §251(c). Verizon pointed out that ITC DeltaCom's claim in that regard was supported only by an informal FCC staffer's opinion letter which was sent to another Competitive Local Exchange Carrier. Verizon maintained that it was

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challenging that opinion letter and was awaiting a formal ruling by the FCC regarding same.

Verizon concluded in its August 9, 2001, Reply that the Commission should reverse its May 27, 2001, Order in this Docket and deny ITC DeltaCom's request to adopt the North Carolina GTE/Time Warner agreement in its entirety. Verizon recommended that the Commission should instead find that ITC DeltaCom cannot adopt those provisions pertaining to compensation for Internet-bound traffic and should direct the parties to develop a complete agreement through negotiation, or by importing those provisions of the North Carolina GTE/Time Warner agreement that are subject to §252(c) as envisioned by the Merger Conditions.

II. Discussion and Conclusions

The pleadings of the parties discussed above provide a rather exhaustive analysis of their respective positions concerning the FCC's Merger Conditions and the adoptability of the intercarrier compensation provisions of the North Carolina GTE/Time Warner agreement which address Internet-bound traffic. In order to resolve the question of whether the matters raised in Verizon's instant Application are sufficient to warrant reconsideration of our May 27, 2001, Order allowing for the adoption of the aforementioned provisions, there are three primary issues which must be addressed.

The paramount matter to be addressed is the identification of the provisions in the existing Bell Atlantic/GTE (Verizon) agreements which may be adopted pursuant to the Merger Conditions and §252(i). Verizon interprets the Merger Conditions at paragraphs 30, 31(a) and 32, as well as the provisions of §252(i), as prohibiting the adoption of matters outside §251(c). Verizon maintains that reciprocal compensation matters are generally governed by §251(b)(5) and are thus clearly outside the scope of §251(c). Given the fact that §252(i) is virtually identical in scope to §251(c), Verizon further argues that matters such as reciprocal compensation provisions which are outside the coverage of §251(c) may not be adopted pursuant to the terms of §252(i).

We first note that we do not concur with the notion that the "subject to 47 U.S.C. §251(c)" language in the Merger Conditions limits the adoptability of the provisions of existing Bell Atlantic/GTE interconnection agreements in the manner argued by

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Verizon. It is our belief that the language in question is intended as a general reference to interconnection agreements that are negotiated under the duties of §251(c) and approved by state commissions pursuant to §252. Nonetheless, we must evaluate the merits of Verizon's arguments to the contrary.

We begin our assessment of Verizon's arguments concerning the references in the Merger Conditions to §251(c) and §252(i) with a review of the specific provisions of §251(c). We need go no further than the first line of §251(c) to determine that the duties set forth in §251(b) are incorporated therein by specific reference. Moreover, §251(c)(1) establishes a duty upon Incumbent Local Exchange Carriers to in good faith negotiate "in accordance with §252 the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b)" of §251. Reciprocal compensation matters are addressed at §251(b)(5) and thus are undeniably incorporated into the legal obligations imposed on Incumbent Local Exchange Carriers by §251(c). We find Verizon's arguments to the contrary on this point unpersuasive.

Based on the above conclusion that reciprocal compensation matters are indeed incorporated into the duties established by §251(c), we also find untenable Verizon's argument that the reciprocal compensation provisions of the North Carolina GTE/Time Warner agreement addressing ISP-bound traffic may not be adopted pursuant to the provisions of §252(i). Verizon's argument in this regard is that reciprocal compensation matters are outside of the core "interconnection, service, or network element" requirements of §252(i) which parallel those of §251(c). As discussed in more detail below, our conclusion is that the reciprocal compensation provisions at issue herein are within the parameters of §252(i) as well as §251(c) for purposes of ITC DeltaCom's election.

The next issue to be addressed is Verizon's claim that even if the Commission incorrectly maintains its apparent position that §251(b)(5) reciprocal compensation provisions are adoptable pursuant to the Merger Conditions' §251(c) requirement and §252(i), recent rulings by the FCC make it clear that Internet-bound traffic is not subject to the reciprocal compensation provisions of §251(b)(5). According to Verizon, the FCC reaffirmed in its *ISP Remand Order* that ISP-bound traffic is "interstate access traffic"

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and more specifically "information access" which is clearly subject to the provisions of §251(g). Given the FCC's conclusion in that regard, Verizon reasons that Internet-bound traffic is outside the scope of both §251(b) and §251(c). Verizon thus maintains that the Merger Conditions plainly do not provide for interstate adoptions of intercarrier compensation provisions relating to Internet-bound traffic such as those at issue in this proceeding.

Verizon's arguments concerning the impact of the FCC's *ISP Remand Order* obviously hinge on the FCC's determination therein that Internet-bound traffic is not subject to the reciprocal compensation provisions of §251(b)(5) by virtue of being "information access" traffic subject to §251(g). While that is precisely the determination ultimately reached by the FCC, it is important to note that the FCC's conclusion in that regard represents a notable departure from its previous analysis¹¹ of Internet-bound traffic. A review of the FCC's *ISP Declaratory Ruling* and the other events which led to the findings promulgated in the FCC's *ISP Remand Order* is helpful in reviewing the arguments raised by Verizon.

In its *ISP Declaratory Ruling*, the FCC focused on the jurisdictional nature of Internet-bound calls and determined that such traffic was jurisdictionally mixed and largely interstate. For that reason, the FCC concluded in its *ISP Declaratory Ruling* that the reciprocal compensation obligations of §251(b)(5) did not apply to such traffic.¹¹ However, the absence of a federal rule governing intercarrier compensation for Internet-bound traffic at the time of that ruling prompted the FCC to hold that parties could voluntarily include ISP-bound traffic in their interconnection agreements under §§251 and 252 of the Act.¹²

The FCC also held that even though §251(b)(5) did not require reciprocal compensation for ISP-bound traffic, nothing in the *Telecommunications Act* or its rules prohibited state commissions from determining in their arbitrations that reciprocal compensation for such traffic was appropriate so long as there was no conflict with governing federal law.¹³ Pending the adoption of a federal rule, state commissions

¹¹ *ISP Declaratory Ruling*, 14 FCC Rcd. at 3690, 3695-3703.

¹² *ISP Declaratory Ruling*, 14 FCC Rcd. at 3703.

¹³ *ISP Declaratory Ruling*, 14 FCC Rcd. at 3705.

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were allowed to exercise their authority under §252 to arbitrate, interpret and enforce interconnection agreements thereby determining whether and how interconnecting carriers should be compensated for carrying ISP-bound traffic.¹⁴

On March 24, 2000, the United States Court of Appeals for the District of Columbia Circuit vacated certain provisions of the FCC's *ISP Declaratory Ruling* and remanded the matter to the FCC. One of the grounds cited by the court for its decision was that the FCC had not adequately explained why its jurisdictional analysis was dispositive of, or indeed relevant to, the question of whether a call to an ISP was subject to the reciprocal compensation requirements of §251(b)(5).¹⁵

In light of the ruling in *Bell Atlantic*, the FCC took an entirely different approach in its analysis of Internet-bound traffic in the *ISP Remand Order*. The FCC concluded therein that it had erroneously failed to include an analysis of §251(g) in its *ISP Declaratory Ruling* and thus had overlooked the interplay between §§251(b) and 251(g).¹⁶ More specifically, the FCC concluded that §251(g) is a limitation on the scope of §251(b)(5) and that Internet-bound traffic falls under one or more of the categories set forth in §251(g). The FCC, therefore, determined that such traffic is outside the realm of the reciprocal compensation requirements of §251(b)(5).¹⁷

Perhaps in recognition of its revised approach regarding the applicability of §251(g) to Internet-bound traffic, the FCC made clear that the interim compensation regime established in its *ISP Remand Order* for Internet-bound traffic applied as carriers renegotiated expired or expiring interconnection agreements. The FCC also made clear that its holding in the *ISP Remand Order* did not alter existing contractual obligations except to the extent that parties were entitled to invoke contractual change of law provisions.¹⁸

The FCC reasoned that because it had, in the *ISP Remand Order*, declared its intention to exercise its jurisdiction under §201 to determine the appropriate intercarrier compensation for ISP-bound traffic, state commissions would no longer have authority

¹⁴ *ISP Declaratory Ruling*, 14 FCC Red. at 3703-3705.

¹⁵ *Bell Atlantic*, 206 F.3d at 6-7.

¹⁶ *ISP Remand Order* at ¶45.

¹⁷ *ISP Remand Order* at ¶34.

¹⁸ *ISP Remand Order* at ¶32.

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to address that issue. For that same reason, the FCC determined that carriers could no longer invoke §252(i) to opt-in to an existing interconnection agreement with regard to the rates paid for the exchange of ISP-bound traffic as of the date its *ISP Remand Order* was published in the *Federal Register*.¹⁹ The FCC noted that §252(i) applies only to agreements arbitrated or approved by state commissions pursuant to §252 and has no application in the context of an intercarrier compensation regime set by the FCC pursuant to §201.²⁰

It is our determination from a review of the preceding that the conclusions reached by the FCC in its *ISP Remand Order* do not support, and in fact undermine, Verizon's argument that said Order conclusively establishes that intercarrier compensation provisions addressing Internet-bound traffic in the North Carolina GTE/Time Warner agreement are not adoptable because they are outside of §251(b)(5) and, therefore, §251(c). Verizon conveniently failed to give credence to the FCC's decision to continue to allow opt-ins to reciprocal compensation provisions in existing agreements pursuant to §252(i). Although there was a limitation placed on the adoptability of reciprocal compensation rates for Internet-bound traffic pursuant to §252(i), it appears that ITC DeltaCom's election in this matter met with the parameters established by the FCC in its *ISP Remand Order* for the limited adoption of reciprocal compensation rates in existing agreements.

We also find persuasive the FCC's threshold determination in its *ISP Remand Order* that reciprocal compensation provisions are indeed within the realm of matters that may be adopted pursuant to the provisions of §252(i). We find that the FCC's determination in that regard supplants Verizon's position that reciprocal compensation provisions addressing Internet-bound traffic are outside the scope of §251(c) and §252(i).

¹⁹ *Id.*
²⁰ *Id.*

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Our conclusion immediately above is largely based on the interplay between §251(c) and §252(i) which was recognized by Verizon in its pleadings before the Commission. More specifically, Verizon astutely noted in its Reply that the provisions of interconnection agreements dealing with "interconnection, unbundled access, and resale" are "at the heart of the local competition policies in §251(c) of the Act."²¹ Verizon also correctly observed in its Application for Reconsideration that by its very terms, §252(i) "parallels those matters that are the subject of the core requirements of §251 - - namely, "interconnection, service [for resale], or network element."²² As detailed below, this acknowledged interplay between §251(c) and §252(i) takes on great significance in light of the holdings of the FCC in its *ISP Remand Order*.

In the context of discussing its decision in the *ISP Remand Order* to allow carriers to continue to invoke §252(i) to opt-in to existing interconnection agreements with regard to the rates paid for the exchange of ISP-bound traffic, the FCC specifically recognized that its rule implementing §252(i) requires incumbent local exchange carriers to make available "[i]ndividual interconnection, service, or network element arrangements" to requesting telecommunications carriers.²³ Although the FCC determined that such opt-ins with regard to the rates paid for the exchange for Internet-bound traffic pursuant to §252(i) would cease upon the publication of its *ISP Remand Order* in the *Federal Register*, it is apparent that up until that point the FCC considered even the rates paid for the exchange of Internet-bound traffic as "interconnection, service, or network element arrangements" adoptable pursuant to §252(i). It further appears from the aforementioned discussions of the FCC that reciprocal compensation provisions other than those addressing the rates for the exchange of Internet-bound traffic may be adopted on an ongoing basis pursuant to §252(i).

Since by Verizon's own admission, the core requirements of §251(c) and §252(i) "parallel" each other, it appears that the aforementioned determinations of the FCC with regard to the right of carriers to opt-in to reciprocal compensation provisions pursuant to §252(i) fatally undermine Verizon's argument that §252(i) does not by its terms apply to

²¹ Verizon's Reply at p. 10.

²² Verizon's Application for Reconsideration at p. 5.

²³ See *ISP Remand Order* at n. 155 wherein 47 CFR §51.803(c) is discussed.

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matters such as Internet-bound traffic. The fact that the FCC has recognized that carriers have the right to opt-in to the reciprocal compensation provisions of existing interconnection agreements pursuant to §252(i) indicates that such matters are indeed within the core requirements of §251(c). It appears that the only §252(i) opt-in exclusion implemented by the FCC's *ISP Remand Order* upon its publication in the *Federal Register* applied to reciprocal compensation rates for Internet-bound traffic. Verizon's arguments that the FCC's *ISP Remand Order* make it clear that the §251(c) reference in the Merger Conditions and §252(i) preclude the adoption of reciprocal compensation provisions governing Internet-bound traffic are thus without merit.

The final issue raised by Verizon which we address herein concerns the timing of ITC DeltaCom's election to adopt the disputed provisions of the North Carolina GTE/Time Warner agreement. Verizon's first argument as to the untimeliness of ITC DeltaCom's election is that the conclusions reached by the FCC in its February 26, 1999, *ISP Declaratory Ruling* precluded such an election. More specifically, Verizon contends that since paragraph 32 of the Merger Conditions state that the provisions in underlying agreements may not be adopted after the "date that they are available in the underlying agreement," the FCC's determination in its *ISP Declaratory Ruling* that Internet-bound traffic is not subject to reciprocal compensation under §251(b)(5) precluded ITC DeltaCom's adoption of such provisions in the North Carolina GTE/Time Warner agreement.

In addressing this argument, we note that the North Carolina GTE/Time Warner interconnection agreement did not become effective until July 12, 2000. Further, the applicable provisions of the FCC's *ISP Declaratory Ruling* were vacated by the United States Court of Appeals for the District of Columbia Circuit on March 24, 2000. It thus cannot be argued that the FCC's determination regarding reciprocal compensation provisions governing Internet-bound traffic in its *ISP Declaratory Ruling* rendered such terms in the North Carolina GTE/Time Warner agreement unavailable for adoption.

Verizon's second argument with regard to the untimeliness of ITC DeltaCom's election to adopt the Internet-bound reciprocal compensation provisions of the North Carolina GTE/Time Warner agreement is that such an election was precluded by the

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FCC's *ISP Remand Order*. More specifically, Verizon argues that the FCC concluded at footnote 155 of its *ISP Remand Order* that carriers could no longer utilize §252(i) to opt-in to intercarrier compensation mechanisms for ISP-bound traffic as of the date its *ISP Remand Order* was adopted. Verizon argued that the FCC adopted its *ISP Remand Order* on April 18, 2001, while DeltaCom requested adoption of the North Carolina GTE/Time Warner agreement on May 7, 2001. Verizon accordingly argues that ITC DeltaCom's election was untimely.

Our review of the FCC's *ISP Remand Order* reveals that the provision thereof cited by Verizon could be interpreted in such a manner as to preclude §252(i) opt-ins to reciprocal compensations provisions addressing rates for the exchange of Internet-bound traffic upon the FCC's adoption of its *ISP Remand Order*. That interpretation is, however, trumped by paragraph 82 of the *ISP Remand Order* which clearly states that "as of the date this Order is published in the *Federal Register*, carriers may no longer invoke §252(i) to opt-in to an existing interconnection agreement with regard to the rates paid for the exchange of ISP-bound traffic" (emphasis added). Perhaps more importantly, the ordering clause at paragraph 112 of the *ISP Remand Order* states that the §252(i) restriction adopted by the FCC will become effective "immediately upon publication of this Order in the *Federal Register*" (emphasis added). The FCC's *ISP Remand Order* was published in the *Federal Register* on May 15, 2001, and ITC DeltaCom exercised its §252(i) rights on May 7, 2001. Verizon's second argument regarding the untimeliness of ITC DeltaCom's election is, therefore, also without merit.

For the foregoing reasons, we deny Verizon's *Application for Reconsideration* in all respects. We do, however, advise the parties to track any reciprocal compensation paid for the exchange of Internet-bound traffic in Alabama which may result from our holding herein. Such tracking will allow for the possibility of a true up in the event that the FCC again modifies its general approach to Internet-bound traffic or interprets the applicability of the Merger Conditions it established in a manner inconsistent with its findings in its *ISP Remand Order*.

We also note that Verizon's August 9, 2001, Reply raised numerous arguments concerning the interpretation and practical application of the provisions of the North

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Carolina GTE/Time Warner agreement governing reciprocal compensation for Internet-bound traffic. We note in response to those arguments that our objective in this cause was to determine whether ITC DeltaCom's election to adopt the North Carolina GTE/Time Warner agreement, including the provisions governing reciprocal compensation for the exchange of Internet-bound traffic, were appropriate pursuant to the Merger Conditions and the governing provisions of the Telecommunications Act. Having fulfilled that responsibility, we will not unduly expand this proceeding to matters that appear to be beyond its intended purpose.

IT IS, THEREFORE, ORDERED BY THE COMMISSION, That for the foregoing reasons, Verizon South, Inc.'s Application for Reconsideration of the Commission's May 27, 2001, Order in this cause is hereby denied.

IT IS FURTHER ORDERED, That jurisdiction in this cause is hereby retained for the issuance of any further order or orders as may appear to be just and reasonable in the premises.

IT IS FURTHER ORDERED, That this Order shall be effective as of the date hereof.

DONE at Montgomery, Alabama, this 14th day of September, 2001.

ALABAMA PUBLIC SERVICE COMMISSION


Jim Sullivan, President


Jan Cook, Commissioner


George C. Wallace, Jr., Commissioner

ATTEST: A True Copy


Walter L. Thomas, Jr., Secretary