



January 29, 2002

VIA ELECTRONIC FILING

Magalie Roman Salas, Esq.
Secretary
Federal Communications Commission
445 Twelfth Street, S.W., Room TWB204
Washington, D.C. 20554

Re: Notice of Ex Parte Meeting in CC Docket Nos. 98-141 and 98-184

Dear Ms. Salas:

Pursuant to Section 1.1206(b)(2) of the Commission's Rules, this letter is to provide notice in the above-captioned proceedings of an ex parte meeting. On January 28, 2002, the undersigned in person, and Matthew H. Berns and Jane Van Duzer, by teleconference, on behalf of Focal Communications Corporation of Washington, met with Anthony Dale and Mark Stone of the Accounting Safeguards Division of the Common Carrier Bureau.

At the meeting we discussed a pending proceeding at the Washington Utilities and Transportation Commission, *Focal Communications Corporation of Washington v. Verizon Northwest, Inc.*, Docket No. UT-013019 ("Washington Proceeding"), in which Verizon has contended that Focal should not be permitted to adopt across state lines the reciprocal compensation provisions of an interconnection agreement between Verizon and Time Warner. Focal discussed its position that Paragraph 32 of the Bell Atlantic/GTE merger conditions expands CLECs' 252(i) rights, thereby permitting CLECs to adopt "an entire agreement." Focal also discussed that, although the ISP Remand Order may have changed CLECs' ability to adopt reciprocal compensation provisions prospectively, the ISP Remand Order did not retroactively modify CLECs' MFN rights and Focal requested to adopt the agreement at issue well before the release of the Order. Focal also discussed the ALJ's Order in the Washington Proceeding and Verizon's Petition for Administrative Review, which are attached.

Very truly yours,

/s/ Pamela S. Arluk

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cc: Anthony Dale
Mark Stone

ATTACHMENTS

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**

1 Paragraph 32 is a “most favored nation” (MFN) provision. It requires Verizon
2 Northwest to make available in Washington “any interconnection arrangement, UNE, or
3 provisions of an interconnection agreement (including an entire agreement) subject to 47
4 U.S.C. Section 251(c)” that any GTE incumbent LEC voluntarily negotiated prior to the
5 Bell Atlantic/GTE merger. According to the FCC, this MFN provision “implements and
6 enforces the 1996 Act’s market-opening requirements.” (FCC Merger Order, para. 246;
7 see also *FCC Merger Conditions*, Section V).

8 This MFN provision encompasses only those arrangements that are “subject to”
9 Section 251(c) of the Telecommunications Act of 1996 (Act). The FCC focused on this
10 particular subsection – subsection (c) – because this particular portion of the statute spells
11 out the obligations that apply to incumbent LECs. By contrast, subsection (a) sets forth
12 the obligations of all telecommunications carriers, and subsection (b) sets forth the
13 obligations of all local exchange carriers (LECs), including new entrants such as Focal.
14 The subsection (c) obligations are much more extensive than the subsections (a) or (b)
15 obligations, and are intended to help open the local market to competition by opening up
16 the incumbent LECs’ networks. For example, subsection (c) requires incumbent LECs to
17 provide interconnection arrangements at any technically feasible point (251(c)(2)) and to
18 provide unbundled network elements (UNEs) (251(c)(3)).

19 The question presented here is whether a reciprocal compensation arrangement is
20 an arrangement that is “subject to Section 251(c)” and therefore is MFN-able under
21 paragraph 32 of the *Merger Conditions*. Clearly it is not. The duty to establish reciprocal
22 compensation arrangements is set forth in Section 251(b), not Section 251(c).² The ALJ,
23 therefore, erred in construing paragraph 32 to include Section 251(b) arrangements.

24 Even if the ALJ were correct in construing paragraph 32’s MFN provision to
25 include Section 251(b) reciprocal compensation arrangements, any arrangement
26 involving Internet-bound traffic still would not be MFN-able because, as a matter of
27 federal law, Internet-bound traffic is not subject to Section 251(b).³ The ALJ refused to

²Section 251 is reproduced in its entirety in Exhibit B to this Petition.

³*See Intercarrier Compensation for Internet-Bound Traffic, Order on Remand and Report and Order*, CC Docket Nos. 96-98 and 99-68, FCC 01-131 at ¶¶ 21, 29 (April 27, 2001) (“*Remand Order*”).

1 address this issue stating that it was not ripe, but Verizon respectfully disagrees. If the
2 time is ripe to construe paragraph 32, then the time is ripe to determine whether that
3 paragraph allows adoption of arrangements governing Internet-bound traffic.

4 The Commission, however, need not rule on the proper construction of paragraph
5 32 because this issue is squarely before the FCC. The Commission should await the
6 FCC's decision for at least two reasons. First, the FCC has the final word on what its
7 Merger Order requires, and therefore any decision rendered by this Commission could be
8 nullified by a subsequent FCC decision. Second, Focal is not harmed if this Commission
9 awaits the FCC's decision because (a) the North Carolina agreement contains a "bill and
10 keep" arrangement under which the parties do not receive intercarrier compensation for
11 any traffic and (b) Verizon and Focal have operated under a bill and keep arrangement
12 for several years and continue to do so today. Thus, maintaining the status quo in no way
13 harms Focal.

14 **II. STATEMENT OF FACTS AND PROCEDURAL HISTORY**

15 **A. The Verizon Northwest/Focal Negotiations**

16 In 1999, Focal opted into the GTE Northwest and AT&T Interconnection
17 Agreement (the "AT&T Agreement"). Pursuant to that agreement, the parties exchanged
18 traffic under a bill and keep arrangement.

19 On June 23, 2000, Verizon Northwest sent a notice of termination to Focal
20 explaining that the AT&T Agreement would expire on September 24, 2000. Focal did
21 not respond to this notice; therefore, Verizon Northwest followed up with a second notice
22 on July 28. Focal did not respond to this notice until October 4, ten days after the AT&T
23 Agreement expired. In its response, Focal asked to adopt the entire North Carolina
24 agreement between GTE South and Time Warner (the "GTE South/Time Warner
25 Agreement"), claiming that it had the right to do so under paragraph 32 of the *Merger*
26 *Conditions*.

27 Verizon Northwest explained that it was not obligated to make all arrangements
28 from the GTE South/Time Warner Agreement available to Focal. Specifically, Verizon
29 Northwest explained that only those arrangements that were "subject to Section 252(c)"

1 were MFN-able. Verizon Northwest did, however, make available to Focal most of the
2 GTE South/Time Warner Agreement, and also proffered a Supplemental Agreement that
3 addressed all Section 252(c) arrangements. The only arrangement Focal objected to was
4 Verizon Northwest's arrangement governing the transport and delivery of Internet-bound
5 traffic.⁴

6 In particular, Verizon Northwest proposed that "no compensation shall be paid for
7 Internet-bound traffic."⁵ As Verizon Northwest explained in its cover letter to Focal, this
8 arrangement reflected the FCC's initial order that Internet-bound traffic is not (and never
9 was) "local traffic" subject to the reciprocal compensation provisions of the Act.⁶ In
10 other words, Verizon Northwest proffered an arrangement that reflected the applicable
11 law.

12 Focal, however, demanded that it be allowed to adopt the reciprocal compensation
13 arrangement in the GTE South/Time Warner Agreement. This arrangement was
14 negotiated before the FCC completed its rulemaking on the treatment of Internet-bound
15 traffic, and provides that: (1) the parties do not agree on how such traffic should be
16 exchanged and what, if any, compensation is due; (2) the parties recognize that the FCC
17 has issued a notice of proposed rulemaking on this issue; therefore (3) until the FCC
18 resolved this issue, the parties shall exchange Internet-bound traffic but "no
19 compensation shall be paid for [such] traffic." The agreement also provides that when
20 the FCC resolves the Internet-bound traffic issue, the parties will conduct a "true up," if
21 one is needed, back to the effective date of the agreement.⁷

22 After the GTE South/Time Warner Agreement was negotiated, the FCC
23 completed its rulemaking and clarified in its *Remand Order* that Internet-bound traffic is
24 not (and never was) subject to the Act's reciprocal compensation arrangements. In

⁴Indeed, Focal admits that "the main issue in this case really is compensation for Internet-bound traffic." See Initial Order at 4, para. 17.

⁵This provision – Article V, Section 3.2.2.4 – is reproduced in Exhibit C.

⁶See Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-96 (rel. Feb. 26, 1999).

⁷This portion of the GTE South/Time Warner Agreement is reproduced in Exhibit D.

1 reaching this holding, the FCC recognized that the payment of reciprocal compensation
2 for Internet-bound traffic was nothing more than uneconomic “regulatory arbitrage.”

3 Given that the FCC resolved the Internet-bound traffic issue, the GTE South/Time
4 Warner Agreement’s “wait and see” provision has no ongoing usefulness. In fact, in light
5 of the FCC’s decision, that agreement’s reciprocal compensation arrangement can be
6 distilled to one sentence: “No reciprocal compensation shall apply to Internet-bound
7 traffic.” As noted above, the reciprocal compensation provision Verizon Northwest
8 offered to Focal is identical; indeed, the heading of this provision is entitled, “No
9 Reciprocal Compensation shall apply to Internet-bound Traffic.”⁸

10 In sum, Verizon Northwest offered Focal everything it wanted except for the now
11 moot GTE South/Time Warner Agreement’s reciprocal compensation provision, and
12 Verizon Northwest offered Focal a reciprocal compensation arrangement that is the
13 functional equivalent of the North Carolina provision.

14 **B. The Pending FCC Proceeding on the *Merger Conditions***

15 When Verizon Northwest did not make available the entire GTE South/Time
16 Warner Agreement, Focal made an informal request to the FCC Common Carrier Bureau
17 seeking an interpretation of the MFN provisions in the *Merger Conditions*. On December
18 22, 2000, an FCC staff member issued a letter (the *Mattey* letter) setting forth her opinion
19 that the MFN provisions apply to “entire” interconnection agreements.⁹

20 The *Mattey* letter is a staff opinion rendered on an issue that was presented
21 informally; the letter is neither an action by the FCC itself or by anyone with delegated
22 authority under the FCC’s rules. The letter contains no ordering clause, and nothing in
23 the letter indicates that it is binding on any carrier. Indeed, it could not be binding as a
24 matter of law because it was not put out for public comment as required by the
25 Administrative Procedures Act (APA).¹⁰ Other state commissions, including the New

⁸See Exhibit C, which sets forth Article V, Section 3.2.2.4 of the Supplemental Agreement.

⁹See Correspondence of Carol E. Mattey dated December 22, 2000 to Michael L. Shor, Swidler Berlin Shereff Friedman, LLP, CC Docket No. 98-184, DA 00-2890 (Exhibit D to Focal Petition).

¹⁰See 5 U.S.C. § 553(b)-(d) (requiring, among other things, a 30-day period for public comment).

1 Jersey Board of Public Utilities, have properly recognized that the *Mattey* letter is not an
2 authoritative statement of the FCC and, as such, is not binding on the parties or on state
3 commissions.

4 On February 20, 2001, Verizon Northwest sent a letter to the FCC Common
5 Carrier Bureau seeking clarification of the *Mattey* letter, and on March 1 Focal filed its
6 response. On April 20, 2001, the FCC issued a Notice of Inquiry on the precise issue
7 addressed in the *Mattey* letter. Verizon Northwest and Focal filed initial comments on
8 April 30, 2001 and reply comments on May 14. The parties are awaiting a formal FCC
9 ruling on this issue.

10 **C. The ALJ's Initial Order**

11 On October 17, 2001, the ALJ issued his Initial Order in this proceeding holding
12 that Focal was entitled to adopt the entire GTE South/Time Warner Agreement under
13 paragraph 32 of the *Merger Conditions*. The ALJ also held (incorrectly) that the *Mattey*
14 letter “has the same force and effect as actions taken by the FCC and Verizon was clearly
15 bound to comply with its findings as of the date it was written.”¹¹ Because Verizon
16 Northwest did not follow the *Mattey* letter, the ALJ concluded that Verizon Northwest
17 “unfairly deprived” Focal of its rights under the *Merger Conditions*.¹² Verizon
18 Northwest now seeks review of the ALJ's Initial Order.

19 **III. DISCUSSION**

20 **A. The ALJ Erred In Construing the FCC's *Merger Conditions*.**

21 This case turns on the proper construction of paragraph 32 of the *Merger*
22 *Conditions*. This paragraph requires Verizon Northwest to make available in Washington
23 “any interconnection arrangement, UNE, or provisions of an interconnection agreement
24 (including an entire agreement) subject to 47 U.S.C. Section 251(c)” that any other GTE
25 incumbent LEC voluntarily negotiated prior to the Bell Atlantic/GTE merger:

26 32. In-Region Pre-Merger Agreements. Subject to the
27 Conditions specified in this Paragraph, Bell Atlantic/GTE

¹¹Initial Order at 12, para. 52.

¹²*Id.*, para. 53.

1 shall make available: (1) in the Bell Atlantic Service Area
2 to any requesting telecommunications carrier any
3 interconnection arrangement, UNE, or provisions of an
4 interconnection agreement (including an entire agreement)
5 subject to 47 USC §251(c) and Paragraph 39 of these
6 Conditions that was voluntarily negotiated by a Bell
7 Atlantic incumbent LEC with a telecommunications carrier,
8 pursuant to 47 USC §252(a)(1), prior to the Merger Closing
9 Date and (2) in the GTE Service Area to any requesting
10 telecommunications carrier any interconnection
11 arrangement, UNE, or provisions of an interconnection
12 agreement subject to 47 U.S.C. § 251(c) that was
13 voluntarily negotiated by a GTE incumbent LEC with a
14 telecommunications carrier, pursuant to 47 U.S.C. §
15 252(a)(1), prior to the Merger Closing Date [S]ubject
16 to the Conditions specified in this Paragraph, qualifying
17 interconnection arrangements or UNEs shall be made
18 available to the same extent and under the same rules that
19 would apply to a request under 47 U.S.C. § 252(i)¹³

20 The ALJ held that this paragraph requires Verizon Northwest to make available
21 the reciprocal compensation arrangement in the GTE South/Time Warner Agreement
22 even though reciprocal compensation arrangements are subject to Section 251(b) of the
23 Act, not Section 251(c). The ALJ reasoned that the parenthetical “including an entire
24 agreement” negates the conditional phrase “subject to Section 251(c),” the specific
25 provision that only “*qualifying* interconnection arrangements or UNEs shall be made
26 available,” and the two explicit limiting uses of the phrase “Subject to the Conditions
27 specified in this Paragraph.”¹⁴ Thus, under the ALJ’s reasoning, if GTE South had
28 arranged to sell a portion of its truck fleet in North Carolina as part of its agreement there,

¹³Paragraph 32 is reproduced in Exhibit A (emphasis added).

¹⁴It would seem obvious that the ALJ’s conclusion cannot be correct, because if “an entire agreement” without the stated limitations were nonetheless MFN-able, then the twice repeated qualifier, “Subject to the Conditions specified in this Paragraph” would have no meaning.

1 even though that contractual provision is well outside of Section 251(c), Verizon
2 Northwest would have that same obligation in Washington.

3 The ALJ's interpretation is wrong for several reasons. First, the ALJ's
4 interpretation ignores the plain language and essential purpose of paragraph 32. Again,
5 this paragraph is part of the FCC's "market-opening" conditions that address the merger
6 of two incumbent LECs, and for this reason the paragraph focuses on the obligations
7 imposed upon incumbent LECs, namely, the Section 251(c) obligations. The obligations
8 set forth in subsections (a) and (b) apply to all companies, including non-incumbents such
9 as Focal. An MFN commitment is not needed for these obligations because the potential
10 harm to the market from the merger of two incumbents that the FCC sought to eliminate
11 in paragraph 32 is not present.

12 Second, the ALJ's interpretation violates well-settled rules of contract
13 interpretation by rendering the "subject to Section 251(c)" language and the other
14 qualifiers mere surplusage. If the ALJ were correct, then the FCC would not have needed
15 to include the repeated "subject to" limitation in paragraph 32 (which is also found in
16 paragraph 31); instead, it simply would have required Verizon to make available "any
17 interconnection agreement or portion thereof." *See, e.g., Marston Ball v. Stokely Foods*,
18 221 P.2d 832, 835 (1950) (Wash. Sup. Ct. 1950) (noting "familiar canon in the
19 interpretation of contracts that every word and phrase must be presumed to have been
20 employed with a purpose and must be given a meaning and effect whenever possible").

21 Third, the ALJ's interpretation nullifies other language in paragraph 32. For
22 example, in describing how the MFN-able arrangements would be made available,
23 paragraph 32 states that "qualifying interconnection arrangements or UNEs shall be made
24 available to the same extent and under the same rules that [apply] under 47 U.S.C.
25 Section 252(i)." Under the ALJ's construction, the phrase "qualifying interconnection

1 arrangements or UNEs” is meaningless because all arrangements would “qualify” for
2 adoption. Here, too, the ALJ’s construction ignores the plain language and intent of the
3 merger condition.

4 Fourth, the genesis of the “subject to Section 251(c)” language in paragraph 32
5 shows that it was intentionally inserted to limit the scope of MFN-able arrangements.
6 Paragraph 32 of the Bell Atlantic/GTE *Merger Conditions* was based on paragraph 43
7 of the SBC/Ameritech conditions. Paragraph 43 permits adoption of any
8 “interconnection arrangement or UNE.” This paragraph does not permit adoptions of
9 interconnection agreements, and therefore does not include a reference to Section 251(c).
10 (This is because interconnection arrangements and UNEs are governed by Sections
11 251(c)(2) and (c)(3), respectively, and therefore there was no need to add such a
12 reference to the SBC/Ameritech MFN language.) When Verizon made its first FCC
13 merger filing on January 27, 2000, it included a paragraph virtually identical to
14 SBC/Ameritech paragraph 43. This paragraph, however, was later amended to permit
15 adoption of interconnection agreements, not just interconnection arrangements and
16 UNEs, and at that time the reference to Section 251(c) was added. Clearly, this language
17 is not mere surplusage; it was intentionally inserted to ensure that only Section 251(c)
18 arrangements are MFN-able.

19 Finally, the first sentence in Section 251(c) states that, “In addition to the duties
20 contained in subsection (b), each incumbent local exchange carrier has the following
21 duties” The ALJ reasoned that the clause “In addition to the duties contained in
22 subsection (b)” incorporates the obligations of subsection (b) into subsection (c), and
23 therefore paragraph 32’s reference to Section 251(c) includes subsection (b) obligations
24 as well. The ALJ’s construction of the clause is wrong for at least two reasons.

1 First, the clause simply makes clear that incumbent LECs have obligations “in
2 addition to” the obligation imposed upon other LECs in subsection (b). Indeed, the
3 heading of subsection (c) is entitled “Additional Obligations of Incumbent Local
4 Exchange Carriers,” and the sentence that follows simply repeats the heading. This
5 sentence does not “incorporate by reference” the obligations of subsection (b) into
6 subsection (c); instead, they remain separate obligations contained in separate
7 subsections.

8 Second, the ALJ's interpretation leads to the illogical conclusion that subsection
9 (b) and (c) obligations are MFN-able but not subsection (a) obligations. This is because
10 subsection (c), according to the ALJ, “incorporates by reference” subsection (b);
11 however, neither subsection (b) nor (c) “incorporates by reference” subsection (a). Thus,
12 under the ALJ's analysis, Verizon must make available subsection (b) and (c)
13 arrangements but not subsection (a) arrangements. This result makes little sense. There
14 is no public policy reason for imposing MFN requirements on subsection (b) obligations
15 but not on subsection (a) obligations. There is, however, a strong public policy reason for
16 singling out subsection (c) obligations for special treatment, because only these
17 obligations apply to incumbents. These obligations are the proper focus of paragraph 32.

18 **B. The ALJ Erred In Refusing To Rule On Whether Arrangements Involving**
19 **Internet-bound Traffic Are MFN-able.**

20 Having ruled (erroneously) that arrangements subject to Section 251(b) are MFN-
21 able under the *Merger Conditions*, the ALJ erred in refusing to rule on whether
22 arrangements governing Internet-bound traffic are likewise MFN-able.

23 In its briefs, Focal argued to the ALJ that paragraph 32's MFN provisions apply
24 to reciprocal compensation arrangements governed by Section 251(b)(5). The ALJ
25 accepted this argument. Verizon Northwest, however, made a counter-argument: even if

1 Section 251(b)(5) reciprocal compensation arrangements are MFN-able despite the
2 qualifying language in the *Merger Conditions*, those arrangements related to
3 compensation for Internet-bound traffic are not MFN-able because the FCC has held as a
4 matter of federal law that Internet-bound traffic is not subject to Section 251(b)(5). The
5 ALJ refused to consider this argument, finding that it was not ripe.

6 The ALJ's ruling is erroneous. The North Carolina provision that Focal seeks to
7 adopt governs compensation for Internet-bound traffic and, by Focal's admission, that is
8 precisely the reason it has brought this dispute before the Commission. Therefore, the
9 ALJ should have decided whether paragraph 32's MFN provisions apply to such
10 arrangements. In other words, if the time was ripe to construe paragraph 32, then the
11 time was ripe to determine whether that paragraph allows adoption of arrangements
12 governing Internet-bound traffic.

13 If the ALJ had decided this issue, he would have rejected Focal's attempt to
14 import the North Carolina provisions. As noted earlier, FCC's *Remand Order* confirms
15 that Internet-bound traffic is not subject to the reciprocal compensation requirements of
16 Section 251(b)(5). Instead, such traffic is and always has been "information access"
17 traffic that is subject to Section 251(g). The FCC's ruling is binding upon this
18 Commission. Therefore, even if paragraph 32's MFN condition were somehow
19 construed (incorrectly) to apply to Section 251(b)(5) arrangements, the *Remand Order*
20 excludes Internet-bound traffic from Section 251(b)(5) and Focal would be denied the
21 relief it seeks.

22 **C. The ALJ Erred In Refusing to Await the FCC's Interpretation Of Its Own**
23 ***Merger Conditions.***

24 Verizon Northwest asked the ALJ to await the FCC's decision on the very issue
25 presented here. The ALJ refused, stating that a "resolution of the disputed issues in this
26 proceeding without further delay serves the public interest."¹⁵ Verizon Northwest

¹⁵See Initial Order at 5.

1 disagrees – awaiting the FCC’s decision will promote the public interest by ensuring
2 against the possibility of inconsistent state and federal decisions.

3 On April 10, 2001, the FCC issued a Notice of Inquiry on the adoption issue
4 presented here.¹⁶ Verizon Northwest and Focal have briefed the issue and are awaiting
5 the FCC’s decision. Given that the FCC is in the best position to determine the intent of
6 its *Merger Conditions*, the Commission should await its decision. Otherwise, if the
7 Commission rules one way and the FCC rules the other way, the FCC decision will
8 control and the parties will have to renegotiate (and perhaps relitigate) these or other
9 issues.

10 Furthermore, there is every reason to believe that the FCC will apply the plain
11 language of paragraph 32 and will not allow Focal to adopt the entire GTE South/Time
12 Warner Agreement. For example, in a recent New Jersey proceeding, the
13 arbitrator – former New Jersey Supreme Court Justice Daniel J. O’Hern – adopted
14 Verizon’s position in refusing to allow a carrier to adopt an entire agreement from
15 another state:

16 Arbitrator O’Hern has determined that Verizon’s Most
17 Favored Nation (MFN) obligations under the Bell
18 Atlantic/GTE Merger Conditions (“the Merger
19 Conditions”) and under 252(i) do not require the
20 importation of each elected provision of the Connecticut
21 Agreement. He will state his reasons more fully in his
22 decision on the merits of the remaining issues, but recites
23 his reasoning here in shorthand form and requests that
24 Verizon prepare an order acceptable in form to Cablevision
25 Lightpath in form suitable for his facsimile signature.
26 Arbitrator O’Hern will recommend to the Board that it find
27 the Mattey decision not to be binding in this arbitration.
28 That letter opinion was antecedent to a proceeding that
29 settled without adjudication. He will further recommend to

¹⁶See 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) at Exhibit E; Open Proceedings, Federal Communications Commission, 2001 FCC LEXIS 1977, *10 (April 10, 2001) at Exhibit F.

1 the Board that it find generally that only provisions of an
2 interconnection agreement governed by Section 251(c) are
3 importable . . . The 252(i) obligations of Verizon are
4 determined by statute and are not part of a carrier's 251(c)
5 obligations.¹⁷

6 This decision, of course, is not binding in Washington; nevertheless, its reasoning is
7 compelling, and it supports Verizon Northwest's position that the *Mattey* letter is not
8 binding and is erroneous.

9 Moreover, Focal will not be harmed if this Commission awaits the FCC's
10 decision. As explained above, Verizon Northwest and Focal have been exchanging
11 traffic under a bill and keep arrangement since 1999. Under this type of arrangement, the
12 parties do not pay any compensation for any traffic, including Internet-bound traffic.
13 Similarly, the parties do not pay any compensation for Internet-bound traffic under the
14 GTE South/Time Warner Agreement. Focal admits that the "main issue" in this
15 proceeding is compensation for Internet-bound traffic, and therefore Focal will not be
16 harmed by continuing with the present bill and keep arrangement until the FCC rules on
17 the adoption issue.¹⁸

18 **D. The ALJ Erred In Not Following The Commission's Policy Statement That**
19 **Adoptions Of Agreements Only Become Effective When Approved.**

20 The Commission's long-standing policy, as set forth in its Policy Statement of
21 April 12, 2000, provides that adoptions of agreements under the Act become effective
22 only when they are approved. The ALJ, however, did not follow the Commission's
23 policy; instead, he made Focal's adoption effective December 27, 2000, which is the date
24 he gave to the *Mattey* letter. The ALJ reasoned that the *Mattey* letter "has the same force
25 and effect as actions taken by the FCC and Verizon was clearly bound to comply with its
26 findings as of the date it was written." Because Verizon Northwest did not do so, the
27 ALJ concluded that Verizon Northwest "unfairly deprived" Focal of its rights under the
28 *Merger Conditions*.

¹⁷See *Arbitrator's Interim Decision on Verizon's Most-Favored-Nation Obligations Under Sec 251(i) and the Bell Atlantic/GTE Merger Conditions*, State of New Jersey Board of Public Utilities Docket No. TO01080498 (October 25, 2001) at Exhibit G.

¹⁸Again, given the fact that Verizon Northwest has offered Focal the functional equivalent of the GTE South/Time Warner Agreement, we do not understand why Focal insists on litigating this matter.

1 As discussed earlier, the *Mattey* letter is an informal FCC staff opinion that is not
2 binding on anybody,¹⁹ and Verizon Northwest simply exercised what it believes its rights
3 are under its own *Merger Conditions*. Accordingly, if the Commission allows Focal to
4 adopt the entire GTE South/Time Warner Agreement, then the adoption should become
5 effective on the date it is approved as provided for in the Commission's Policy Statement.
6 In accord with WAC 480-09-780(3), Verizon Northwest proposes the following changes
7 to the Interim Order's Findings of Fact and Conclusions of Law:

8 1. Replace Findings of Fact paragraph 60 with the following:

9 **Focal filed a petition in this proceeding to enforce what it believed are**
10 **its rights under the *Bell Atlantic/GTE Merger Order*.**

11 2. Replace Findings of Fact paragraph 61 with the following:

12 **An FCC staff member released a letter on December 22, 2000, setting**
13 **forth her opinion that the Bell Atlantic/GTE Merger Order's MFN**
14 **provisions apply to entire interconnection agreements, without**
15 **limitation to arrangements or agreements that are subject to Section**
16 **251(c).**

17 3. Replace Findings of Fact paragraphs 62 and 63 with the following:

18 **Paragraph 32 of the *Merger Conditions* does not require Verizon to**
19 **make available arrangements or agreements that are not subject to**
20 **Section 251(c); therefore Verizon is not required to make available**
21 **any reciprocal compensation arrangements or any arrangements**
22 **involving Internet-bound traffic.**

23 If, however, the Commission decides not to address this issue and instead awaits
24 the FCC's decision, then Findings of Fact paragraphs 62 and 63 should be replaced with
25 the following:

26 **The issue of whether paragraph 32 of the *Merger Conditions* requires**
27 **Verizon to make available the reciprocal compensation arrangements**
28 **Focal requests is pending in a formal FCC proceeding.**

¹⁹The New Jersey arbitration decision discussed earlier also recognizes that the *Mattey* letter is an informal opinion that is not binding.

1 4. Strike Conclusions of Law paragraphs 67-70 and replace with the following:
2 **The FCC staff letter of December 22, 2000 is an informal opinion that**
3 **is not binding on the parties or the Commission.**

4 5. Replace Conclusions of Law paragraphs 71-72 with the following:
5 **Verizon has made available to Focal most of the GTE South/Time**
6 **Warner Agreement as well as a Supplemental Agreement that reflects**
7 **the FCC's *Remand Order*. In doing so, Verizon has complied fully**
8 **with the *Merger Conditions*. Contrary to Focal's claim, Verizon was**
9 **not required to make available the entire the GTE South/Time**
10 **Warner Agreement under its *Merger Conditions*.**

11 If, however, the Commission decides not to address this issue and instead awaits
12 the FCC's decision, then Conclusions of Law paragraphs 71-72 should be replaced with
13 the following:

14 **Verizon has made available to Focal most of the GTE South/Time**
15 **Warner Agreement as well as a Supplemental Agreement that reflects**
16 **the FCC's *Remand Order*. The issue of whether Verizon is required to**
17 **make available the entire GTE South/Time Warner Agreement under**
18 **the *Merger Conditions* is pending in a formal FCC proceeding, and the**
19 **Commission will await the outcome of that proceeding. In the**
20 **meantime, the parties shall continue to exchange all traffic under a**
21 **bill and keep arrangement, and neither party shall receive**
22 **compensation for the transport and termination of Internet-bound**
23 **traffic.**

24 6. Strike Conclusions of Law paragraph 73.

25

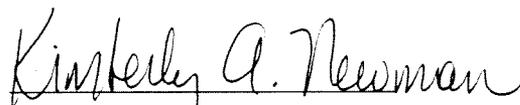
1 **V. CONCLUSION**

2 Under the plain language of the *Merger Conditions*, Focal is not entitled to adopt
3 the reciprocal compensation arrangement in the GTE South/Time Warner Agreement
4 because this arrangement is not “subject to Section 251(c)” of the Act. Therefore, the
5 Commission must deny Focal’s request. Alternatively, the Commission should await the
6 FCC’s decision on this precise issue and, until the FCC acts, require the parties to
7 continue exchanging traffic under a bill and keep arrangement.

8 DATED this 5th day of November, 2001.

9
10 Respectfully submitted,
11 **Verizon Northwest Inc.**

12 By Its Attorneys

13
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1 **I. ARGUMENT**

2 **A. The December 22, 2000 Matthey Opinion Letter Does Not Control This**
3 **Proceeding.**

4 Despite Focal's contrary assertions, Verizon Northwest's reliance upon 47 C.F.R.
5 §§ 553(b)-(d) for the proposition that the *Matthey* opinion letter does not control this
6 proceeding is entirely appropriate. Instead, it is Focal's reliance upon 47 C.F.R. § 0.5(c)
7 for the proposition that the *Matthey opinion* letter has the "force of law"² that is in error,
8 for three key reasons:

9 First, 47 C.F.R. § 0.5(c) delegates to the Common Carrier Bureau the authority to
10 act on matters that are "minor or routine or settled in nature and those in which
11 immediate action may be necessary." There is nothing minor, routine, or settled about
12 the scope of the *Merger Conditions* as they relate to Section 252(i). On the contrary, as
13 noted in Verizon Northwest's Petition, the issue of which provisions can be adopted from
14 an out-of-state interconnection agreement is the subject of ongoing Common Carrier
15 Bureau and FCC proceedings, both of which were initiated shortly after the issuance of
16 the *Matthey* letter.³ As these two proceedings demonstrate, the adoption issue is clearly
17 one of major importance given its impact not only upon Verizon Northwest's operations
18 but also upon Verizon's operations nationally. Indeed, both Verizon and Focal are
19 involved in the Common Carrier Bureau and FCC proceedings and are anticipating
20 rulings that will definitively resolve this issue.⁴ The existence of the present dispute
21 provides further illustration that the issue is neither minor nor routine nor settled. Under
22 these circumstances, there has been no final word from the FCC on this issue and clearly

²See Focal Answer at 6.

³See 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) at Exhibit E to Verizon Northwest's Petition; Open Proceedings, Federal Communications Commission, 2001 FCC LEXIS 1977, *10 (April 10, 2001) at Exhibit F to Verizon Northwest's Petition.

⁴See Verizon and Focal correspondence to Ms. Dorothy Attwood, Chief, Common Carrier Bureau dated February 20, 2001 and March 1, 2001, respectively, at Exhibits A and B.

1 no controlling delegation of authority to the Common Carrier Bureau under 47 C.F.R. §
2 0.5(c).

3 Second, the *Mattey* letter was not an “action” within the meaning of 47 C.F.R.
4 § 0.5(c). Instead, it was an informal opinion issued by a staff member in response to a
5 request from a member of the public. It had no ordering clause and did not otherwise
6 require any party to do anything. Indeed, an informal staff opinion is never binding, and
7 Focal has offered no authority showing otherwise. Had the FCC intended the *Mattey*
8 opinion letter to be binding, moreover, it would have taken the requisite steps to seek
9 public comment in order to make that intention clear. It never did.

10 When the FCC issues binding decisions, it must do so pursuant to the
11 Administrative Procedure Act (“APA”).⁵ The APA defines a “rule” as “the whole or part
12 of an agency statement of general or particular applicability and future effect designed to
13 implement, interpret, or prescribe law or policy”⁶ Since the FCC never placed the
14 *Mattey* opinion letter on public notice and never requested public comment on it,
15 however, it cannot be binding on any party, and particularly not on a third party who had
16 no opportunity to present its views on this issue.⁷ Consequently, Focal’s reliance upon
17 the *Mattey* opinion letter as controlling precedent in this proceeding is wholly misplaced.⁸
18 Indeed, even a request for declaratory ruling is routinely put out for comment, whether at
19 the Commission or staff level. In fact, when Verizon questioned the conclusions reached

⁵See 5 U.S.C. § 551, *et seq.*

⁶See 5 U.S.C. § 551(4).

⁷See 5 U.S.C. § 553(b)-(d) (requiring, among other things, a 30-day period for public comment). Likewise, if the letter had been issued in a binding adjudication (it was not), then the FCC first would have needed to serve it on the parties to be charged (i.e., Verizon) and then would have had to solicit public comment. See 5 U.S.C. § 554 (a)-(e).

⁸Even a request for a declaratory ruling is routinely put out for comment, whether at the Commission or staff level. The most relevant example of that process is that when Verizon questioned the conclusions reached in the *Mattey* opinion letter, the Common Carrier Bureau issued the above-described public notice requesting comment. See also, e.g., *Intercarrier Compensation for Internet-Bound Traffic, Order on Remand and Report and Order*, CC Docket Nos. 96-98 and 99-68, FCC 01-131 (rel. Apr. 27, 2001) (“*Order on Remand*”).

1 in the *Mattey* opinion letter, the Common Carrier Bureau issued the above-described
2 public notice requesting comment.

3 Third, Verizon's reliance upon the ALJ's decision in New Jersey on this issue is
4 hardly "puzzling," as Focal asserts.⁹ On the contrary, the New Jersey decision is directly
5 on point. Focal's whole premise is that pursuant to Section 252(i) and Paragraph 32 of
6 the *Merger Conditions*, it has a right to adopt the entire North Carolina Time Warner
7 Agreement in Washington without qualification. The New Jersey decision holds
8 otherwise, limiting the adoptable terms to those governed by Section 251(c):

9 Arbitrator O'Hern has determined that *Verizon's Most Favored Nation*
10 *(MFN) obligations under the Bell Atlantic/GTE Merger Conditions ("the*
11 *Merger Conditions") and under 252(i) do not require the importation of*
12 *each elected provision of the Connecticut Agreement.* He will state his
13 reasons more fully in his decision on the merits of the remaining issues,
14 but recites his reasoning here in shorthand form and requests that Verizon
15 prepare an order acceptable in form to Cablevision Lightpath in form
16 suitable for his facsimile signature. *Arbitrator O'Hern will recommend to*
17 *the Board that it find the Mattey decision not to be binding in this*
18 *arbitration. That letter opinion was antecedent to a proceeding that*
19 *settled without adjudication. He will further recommend to the Board that*
20 *it find generally that only provisions of an interconnection agreement*
21 *governed by Section 251(c) are importable . . . The 252(i) obligations of*
22 *Verizon are determined by statute and are not part of a carrier's 251(c)*
23 *obligations.*¹⁰

24 This is precisely Verizon Northwest's argument: only provisions of an interconnection
25 agreement governed by Section 251(c) are importable. Given the differing approaches of
26 both the New Jersey ALJ and the ALJ in this proceeding, the parties should await final
27 Common Carrier Bureau/FCC rulings on the scope of the *Merger Conditions* in order to

⁹See Focal Answer at 7.

¹⁰See *Arbitrator's Interim Decision on Verizon's Most-Favored-Nation Obligations Under Sec 251(i) and the Bell Atlantic/GTE Merger Conditions*, State of New Jersey Board of Public Utilities Docket No. TO01080498 (October 25, 2001) at Exhibit G to Verizon Northwest's Petition (emphasis added).

1 finally resolve this issue. In so doing, the parties will avoid the risk of costly, duplicative
2 litigation about what terms may and may not be adopted.

3 **B. Despite Its Protestations, Focal Did Agree to Bill and Keep in Its**
4 **Current Interconnection Agreement with Verizon.**

5 Focal next dismisses as “absolutely false” Verizon’s statement that Focal and
6 Verizon had agreed to exchange Internet-bound traffic on a bill and keep basis in its now
7 expired interconnection agreement.¹¹ Focal is wrong. That agreement never included
8 any language setting rates for reciprocal compensation for Internet-bound traffic.¹²
9 Instead, it provided solely for a bill-and-keep arrangement in this area:

10 Interconnection is comprised of transport and termination. Pricing for all
11 elements of interconnection shall be based on forward-looking economic
12 cost. The parties agree that compensation for transport and termination
13 shall be handled using the bill and keep method until further order of the
14 Commission. Upon such order, prices and terms for Interconnection
15 Services shall be specified in an amendment to this Agreement replacing
16 Appendix 4 to this Attachment 14.¹³

17 During the term of Focal’s adoption, Focal never requested to come out of bill
18 and keep or to amend or supplement the contract with inter-carrier compensation rates.
19 As a result, there has never been compensation paid to Focal for Internet-bound traffic at
20 any time. Notably, Focal has failed to support its contentions that Verizon’s
21 representations about the parties’ bill and keep arrangements are “gratuitous and
22 incorrect” with even a single shred of evidence.¹⁴ In short, the expired agreement speaks
23 for itself. Focal’s bald-faced assertions to the contrary are baseless and simply do not
24 create some antecedent right to reciprocal compensation for Internet-bound traffic that

¹¹See Focal Answer at 9.

¹²See AT&T Agreement, Attachment 14 at pages 4 and 15 at Exhibit D to Verizon Northwest’s
Petition.

¹³*Id.* at 4.

¹⁴See Focal Answer at 9.

1 predates the FCC’s *Remand Order*. This and other relevant points about the *Remand*
2 *Order* are discussed more fully below.

3 **C. The FCC’s *Remand Order* Clearly Bars the Adoption of the North**
4 **Carolina Time Warner Agreement’s Terms Governing Compensation**
5 **for Internet-Bound Traffic.**

6 Despite Focal’s attempt to show otherwise, the FCC’s *Remand Order* has direct
7 application to this case and bars the adoption of the Time Warner Agreement’s terms
8 governing compensation for Internet-bound traffic. This is true for three key reasons:

9 First, as noted in Verizon Northwest’s Petition, the MFN (“most favored nation”)
10 condition set forth in Paragraph 32 of the *Merger Conditions* gives the contract adoption
11 provisions of Section 252(i) of the Telecommunications Act (the “Act”) limited interstate
12 effect.¹⁵ While Paragraph 32 allows carriers to adopt negotiated provisions from other
13 states, it expressly limits those qualifying provisions to those that are “subject to
14 U.S.C. § 251(c).” Despite this express limitation, Focal rests its entire argument that it
15 should be able to adopt the Time Warner Agreement *in toto* on the proposition that the
16 scope of the MFN condition also extends to matters that are covered by a different part of
17 Section 251 – specifically, the reciprocal compensation requirement in Section 251(b)(5).
18 The *Remand Order*, however, makes Focal’s assertions beside the point.

19 In that Order, the FCC again confirmed that Internet-bound traffic is not subject to
20 the reciprocal compensation requirements of Section 251(b)(5).¹⁶ As the FCC explained,
21 it has “long held” that enhanced service provider traffic – which includes traffic bound
22 for ISPs – is interstate access traffic.¹⁷ The FCC further held that “the service provided
23 by LECs to deliver traffic to an ISP constitutes, at a minimum, ‘information access’ under
24 section 251(g).”¹⁸ Consequently, these services are excluded from the scope of the

¹⁵Verizon Northwest notes that both Verizon Northwest and Focal agree that Paragraph 32 of the
Merger Conditions governs the MFN adoption Focal seeks here. In other words, the parties agree that the
Time Warner Agreement is a Pre-Merger Agreement.

¹⁶*Order on Remand* at ¶¶ 21, 29.

¹⁷*Id.* at ¶ 28.

¹⁸*Id.* at ¶ 30. *See also, id.* at ¶ 44.

1 reciprocal compensation requirements of Section 251(b)(5).¹⁹ Therefore, even if the
2 *Merger Conditions* were somehow construed (incorrectly) to apply to matters subject to
3 Section 251(b)(5), the *Remand Order* conclusively establishes that the provision
4 addressing Internet-bound traffic still would not be covered. On the contrary, such
5 provisions fall within Section 251(g), which is outside the reciprocal compensation
6 provisions of Section 251(b)(5).²⁰ Indeed, Section 251(c) is devoid of any reference to
7 Section 251(g).

8 The FCC consequently has eliminated any lingering dispute, and there is no
9 question that provisions of interconnection agreements that address Internet-bound traffic
10 cannot be adopted in other states under any legitimate reading of Paragraph 32 of the
11 *Merger Conditions*. In short, the *Remand Order* makes clear that carriers cannot rely on
12 the terms of the *Merger Conditions* to expand into new states the very form of
13 “regulatory arbitrage” that, in the FCC’s words, “distorts the development of competitive
14 markets.”²¹

15 Second, Focal’s contrary assertion that the *Remand Order* has only “prospective”
16 application and does not disturb “existing contracts” (a claim clearly made to support
17 Focal’s misguided argument that it has the right to adopt the “entire” Time Warner
18 Agreement) completely misses the point.²² In support of its position, Focal cites the
19 following paragraph from the *Remand Order*:

20 82. *The interim compensation regime we establish here as carriers*
21 *renegotiate expired or expiring interconnection agreements. It does not*

¹⁹*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)”).

²⁰While Focal in its Initial Brief makes much of the fact that Section 251(c) references Section 251(b), Section 251(c) is devoid of any reference to Section 251(g). Indeed, as the *Order on Remand* makes clear, only the FCC has the authority to prescribe compensation rates for such “information access.” See *Order on Remand* at ¶¶ 52, 82. Moreover, Focal is not entitled to the declining compensation rates prescribed by the FCC, which are designed to move all carriers to bill-and-keep arrangements for Internet-bound traffic within thirty-six (36) months. This point also is discussed more fully below. *Id.* at ¶ 7.

²¹*Id.* at ¶¶ 21, 29.

²²See Focal Answer at 7.

1 alter existing contractual obligations, except to the extent that parties are
2 entitled to invoke contractual change-of-law provisions. This Order does
3 not preempt any state commission decision regarding compensation for
4 ISP-bound traffic for the period prior to the effective date of the interim
5 regime we adopt here.²³

6 As noted in Section B above, Verizon Northwest's agreement with Focal expired by its
7 terms on September 24, 2000. Even if it had not expired, however, it did not provide for
8 any compensation for Internet-bound traffic. Instead, it provided a bill and keep regime
9 for such traffic.

10 This particular detail about the expired agreement is critical. As this Commission
11 is aware, the FCC had adopted its interim compensation regime, a series of declining rate
12 caps, in order to *decrease* CLEC reliance upon pre-existing reciprocal compensation
13 arrangements and to move parties towards bill and keep arrangements for Internet-bound
14 traffic.²⁴ It was not designed to allow CLECs like Focal that had not previously received
15 reciprocal compensation for Internet-bound traffic to suddenly take advantage of such
16 payments. Specifically, the *Order on Remand* states:

17 For the year 2001, a LEC may receive compensation, pursuant to a
18 particular interconnection agreement, for ISP-bound minutes up to a
19 ceiling equal to, on an annualized basis, the number of ISP-bound minutes
20 ***for which that LEC was entitled to compensation under that agreement***
21 ***during the first quarter of 2001***, plus a ten percent growth factor. For
22 2002, a LEC may receive compensation, pursuant to a particular
23 interconnection agreement, for ISP-bound minutes up to a ceiling equal to
24 the minutes for which it was entitled to compensation under that
25 agreement in 2001, plus another ten percent growth factor. In 2003, a
26 LEC may receive compensation, pursuant to a particular interconnection
27 agreement, for ISP-bound minutes up to a ceiling equal to the 2002 ceiling
28 applicable to that agreement.²⁵

²³*Id.* (citing *Remand Order* at ¶ 82) (emphasis added).

²⁴*See Remand Order* at ¶ 7.

²⁵*Id.* at ¶ 78 (emphasis added).

1 Even if the expired agreement had remained in effect, it would not have provided for any
2 compensation for Internet-bound traffic in the first quarter of 2001 (i.e., it would have
3 provided only for bill and keep). Accordingly, Focal would not now qualify for any
4 compensation under the declining rate caps. Likewise, and as described at length in
5 Verizon Northwest's Petition, the Time Warner Agreement also established a bill and
6 keep regime for Internet-bound traffic. Even if Focal had been permitted to adopt it on
7 December 27, 2000, the Time Warner Agreement still would not have provided a right to
8 compensation for Internet-bound traffic during the first quarter of 2001. In short, Focal
9 would not have qualified for the declining rate caps under its expired agreement or the
10 Time Warner Agreement.

11 As the FCC's rationale provides, to allow Focal to avail itself of the FCC's
12 declining, interim rate caps at this point – when Focal (1) never received reciprocal
13 compensation for Internet-bound traffic in the past under its expired agreement, (2)
14 consequently never came to depend upon it as a source of revenue, and (3) would not
15 have received such compensation even if it had adopted the Time Warner
16 Agreement – would only perpetuate the regulatory arbitrage specifically criticized in the
17 *Remand Order*.²⁶ Indeed, it would turn that Order on its head.

18 In short, the present applicability of the *Remand Order* to this proceeding cannot
19 be ignored. For the reasons set forth above, the bill and keep arrangements in both the
20 current agreement and the Time Warner Agreement by their terms do not provide Focal
21 with a right to compensation under the FCC's interim compensation regime. As even
22 Focal acknowledges, that is precisely what Focal is after.²⁷

23 Third, under these circumstances, Verizon Northwest simply cannot fathom why
24 Focal continues to insist on adopting terms that cannot possibly confer upon it the “right”
25 it seeks. Notably, Washington courts have long recognized that the law does not require
26 performance of an idle or futile act – a policy this Commission and others have applied

²⁶See *Remand Order* at ¶¶ 21, 29, 82, n. 154.

²⁷See ALJ's Initial Order at ¶ 17.

1 when denying requests that would have provided only empty relief to an “aggrieved”
2 party.²⁸ Requiring Verizon Northwest to make this language available to Focal would
3 result in precisely the type of idle or futile act disfavored under Washington law and
4 public policy.
5

²⁸See *Kesner v. Inland Empire Land Co.*, 150 Wash. 1, 5, 272 P. 29, 31 (1928); *Music v. United Insurance Co.*, 59 Wash.2d 765, 768, 320 P.2d 603 (1962). See also *Washington Utilities and Transportation Commission v. U.S. West Communications, et al.*, Docket No. UT-941464, et al., 1995 Wash. UTC LEXIS 54, *47-48 (Dec. 27, 1995) (denying GTE’s request for damages after noting Public Counsel’s argument that while GTE might be entitled to a finding that competing carrier had improperly passed toll traffic to GTE without payment of GTE access charges, such a finding would be a “futile act” where GTE had failed to enumerate its alleged damages). See also *In the Matter of Southwestern Bell Communications Services, Inc., Filing to Introduce Block of Time: 300 Minutes and Make Miscellaneous Text Changes*, Docket No. 01-SBLC-693-TAR, 2001 Kan. PUC LEXIS 166 at ¶ 29 (April 23, 2001) (“Furthermore, the Commission should construe a statute to avoid rendering application of a statute impracticable or inconvenient, or to avoid requiring performance of a futile act.”); *Department of Public Utility Control Investigation Into Southern New England Telephone Company Insufficient Facilities and Installation Delays*, Docket No. 85-08-05, 1991 Conn. PUC LEXIS 25, *9 (March 13, 1991) (“Based on the evidence in this proceeding, the authority finds that the Company’s current accelerated modernization schedule cannot be accelerated further and that an order to that effect would be a futile act. . .”); *Investigation on the Commission’s Own Motion Into the Operations, Rates, and Practices of Russell V. Wilson*, OII No. 83-11-03, 1986 Cal. PUC LEXIS 727, *15 (Nov. 18, 1986) (holding it would be an “idle act” for the Commission to amend an OII or to give corporation (RWT) an additional opportunity to be heard where counsel had failed to make an offer of proof).

1 **V. CONCLUSION**

2 For the foregoing reasons and for the reasons stated in Verizon Northwest's
3 Petition, the Commission must deny Focal's request to adopt the Time Warner
4 Agreement *in toto*. Alternatively, the Commission should await the FCC's decision on
5 this precise issue and, until the FCC acts, require the parties to continue exchanging
6 traffic under a bill and keep arrangement.

7 DATED this 30th day of November, 2001.

8 Respectfully submitted,
9 **Verizon Northwest Inc.**

10 By Its Attorneys

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CERTIFICATE OF SERVICE

I hereby certify that I have served Verizon Northwest's Petition for Administrative Review upon Ms. Carole J. Washburn, Washington Utilities & Transportation Commission, 1300 S. Evergreen Park Drive SW, Olympia, WA 98504-7250 and Gregory J. Kopta, Davis Wright Tremaine LLP, 2600 Century Square, 1501 Fourth Avenue, Seattle, WA 98101-1688, via overnight delivery and electronic mail on November 30, 2001.

Kimberly A. Neuman

December 3, 2001

Gordon R. Evans
Vice President
Federal Regulatory



RECEIVED

FEB 20 2001

FEDERAL COMMUNICATIONS COMMISSION
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February 20, 2001

Ms. Dorothy Attwood, Chief
Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, N.W.
Washington, D.C. 20554

Re: Focal MFN Request

Dear Ms. Attwood:

By this letter, Verizon requests that you review and clarify the attached informal staff opinion letter, responding to a request by Focal Communications ("Focal Response"), which addressed the scope of the most-favored nation ("MFN") provisions of the *Bell Atlantic/GTE Merger Order*, FCC 00-221 (rel. June 16, 2000).

By way of context, Focal's letter argued that the expanded MFN provision in the merger conditions should be construed to allow it to adopt a provision in a 1998 agreement from another state that provided for the interim payment of inter-carrier compensation on Internet-bound traffic. That interim provision provided for the payment of compensation only until the date of an FCC order in the then-pending declaratory ruling proceeding. The Commission subsequently decided that case, holding that Internet traffic was not local. The issue here arises because, while Verizon has permitted Focal to adopt all of the other provisions of the agreement at issue, we did not agree that Focal could adopt the single provision that addressed compensation for Internet traffic. As we explained in our response to Focal's letter, we believe that the interim provision addressing compensation for Internet traffic is not subject to the expanded MFN conditions for several independent reasons.

The Focal Response addressed only one of the reasons that the disputed provision is not subject to the expanded MFN condition. Specifically, it addressed the issue of whether the expanded MFN condition allows a carrier to adopt those provisions of a negotiated interconnection agreement from another state that address only matters that are subject to section 251(c) – as the conditions expressly state – or whether the expanded MFN conditions also apply to matters subject to section 251(b). The Focal Response interpreted the condition broadly to apply to provisions that address matters covered by section 251(b). In reaching that conclusion, we believe that the Focal Response failed to consider the policy implications of interpreting the merger conditions in such a broad fashion and failed to take into account the specific language of the Bell Atlantic/GTE merger conditions.

Exhibit A-1

First, in terms of the broader policy implications, the sole issue in dispute between the parties was whether an interim provision that dealt with the issue of inter-carrier compensation on Internet traffic is subject to the expanded MFN condition. As you are aware, some states have ordered inter-carrier compensation payments for Internet-bound traffic, while other states have found that requiring such payments would inhibit the development of local competition and, therefore, have refused to order them. In light of the D.C. Circuit Court's remand, the Commission is currently considering the appropriate federal legal and policy response to the problems created when so-called "reciprocal compensation" obligations are imposed on the ever-growing volume of one-way calls to the Internet. As the Commission considers whether and how to remedy the significant market distortions that result from imposing reciprocal compensation obligations on such traffic, it makes no policy sense to exacerbate the problem by allowing a carrier to import into additional states an inter-carrier payment provision for Internet-bound traffic. This is particularly the case where the second state has found that imposing reciprocal compensation obligations on Internet-bound traffic results in uneconomic arbitrage that deters local competition and has refused to require reciprocal compensation payments on such traffic.

Second, from a legal standpoint, we believe that the Focal Response also failed to give effect to the express language of the merger conditions. Paragraph 30, 31(a), and 32 of those conditions each contains identical language allowing a carrier to adopt in another state "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 were negotiated after the closing date (emphasis added).

In construing the terms of the conditions, the Focal Response initially suggests that the parenthetical phrase might be read disconnected from the succeeding language that explicitly states that the adoption right extends only to obligations subject to section 251(c). As a result, it suggests that the parenthetical might be read separately from the rest of the sentence to expand the scope of the condition to cover all of the provisions of an interconnection agreement, including those that go beyond the matters addressed by section 251(c).

Of course, if that were true, there would be no logical stopping point. Indeed, if the parenthetical were read in a manner divorced from the rest of the sentence, it would mean that all of the provisions included in an interconnection agreement would be subject to the expanded MFN condition, even if individual provisions were entirely unrelated to the requirements of any provision of section 251.

As a result, the Focal Response itself appears to recognize that such an overbroad construction of the condition is untenable, and that the parenthetical – "(including an entire agreement)" – cannot reasonably be read disconnected from the reference to section 251(c). Instead, the Focal Response ultimately bases its conclusion on the notion that section 251(c) somehow incorporated 251(b) by reference, simply because section 251(b) is mentioned in section 251(c). Read in context, however, the statutory cross-reference to section 251(b) simply clarifies that the enumerated section 251(c) obligations imposed on incumbent local exchange carriers are in addition to, not in lieu of, those obligations imposed on all local exchange carriers in 251(b). Indeed, section 251(c) is entitled "*Additional Obligations of Incumbent Local Exchange Carriers*," and the text of the provision itself expressly states that the obligations imposed under that

section are "[i]n *addition* to the duties contained in subsection (b)" (emphasis added). Consequently, the fact that the merger conditions explicitly refer only to section 251(c) demonstrates that the expanded MFN condition applies to the additional substantive obligations imposed on incumbents under section 251(c), and not the separate obligations imposed on all carriers under section 251(b). Otherwise, the condition would have specified section 251(b) as well as (c).

Likewise, there is no basis in the language of the condition, or of the Commission's order adopting those conditions, for the Focal Response's conclusion that the reference to section 251(c) was merely to the "type of agreement" that is subject to that provision. If the Commission wanted to refer to the provision of the Act that describes the requirements for interconnection agreements, it would have cited section 252, which specifies the detailed requirements for such agreements, not section 251(c), which lists a number of discrete obligations imposed on incumbents.

In any event, even if the merger condition could be read to include the provisions of section 251(b), it still would not apply to provisions of agreements that address the payment of compensation for Internet traffic. As the Commission expressly has ruled, the "section 251(b)(5) reciprocal compensation obligations should apply only to traffic that originates and terminates within a *local* area." *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶ 1034 (1996) (emphasis added) ("Local Competition Order"); *see also* 47 C.F.R. § 51.703(a) ("Each [local exchange carrier] shall establish reciprocal compensation arrangements for transport and termination of *local* telecommunications traffic" (emphasis added)). In contrast, "the reciprocal compensation provisions of section 251(b)(5) . . . do not apply to the transport or termination of interstate or intrastate interexchange traffic." Local Competition Order at ¶ 1034. And the Commission expressly has held that "ISP-bound traffic is *non-local* interstate traffic" and "*the reciprocal compensation requirements of section 251(b)(5) of the Act and [the FCC's implementing] rules do not govern inter-carrier compensation for this traffic.*" *Inter-Carrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689, ¶ 26 n.87 (1999) (emphasis added). While that order was subsequently vacated and remanded for further explanation (which is under consideration by the Commission), the Commission's prior order remains its only previous decision addressing whether section 251(b)(5) applies to Internet traffic. And, as we have explained in the ongoing remand case, there is no reason for the Commission to reach a different conclusion now. Certainly the Focal Response could not have intended to preempt that finding or prejudice the results of the pending proceeding.

Of course, the single issue addressed by the Focal Response does not resolve the issue of whether the disputed provision can be adopted in other states. Verizon also has identified several other reasons why the interconnection agreement in question is not subject to adoption in another state. For example, we have previously explained that (1) the disputed provision expired by its own terms when the Commission released its Declaratory Ruling, and the merger conditions do not permit a carrier to adopt an expired agreement; (2) the expanded MFN conditions do not apply to provisions in agreements that are inconsistent with state laws and regulatory policies of the state in which the MFN request is made, as is the case here; and (3) the expanded MFN provision does not apply to state-specific pricing provisions, such as the provision in question. The Focal Response agreed that these issues needed to be resolved before the agreement could

Response agreed that these issues needed to be resolved before the agreement could be adopted, but, consistent with the express terms of the condition, it appropriately said that these issues were for the applicable state, not the Commission, to resolve.

Nonetheless, the Focal Response only further complicates an already complicated situation as the Commission considers how to resolve the broader issue of whether reciprocal compensation applies to Internet traffic, and it has the potential to further exacerbate an already difficult problem. Accordingly, Verizon asks that you review the Focal Response and clarify that the MFN provisions of the merger conditions apply only to obligations imposed on incumbent local exchange carriers under section 251(c), and do not, therefore, apply to provisions of an agreement that address inter-carrier compensation on Internet traffic.

Sincerely,

A handwritten signature in cursive script, appearing to read "G. Evans".

cc: Carol Matthey
Anthony Dale

December 3, 2001

Focal Communications Corporation
200 North LaSalle Street
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Chicago, Illinois 60601

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March 1, 2001

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VIA OVERNIGHT MAIL

FCC MAIL ROOM

Ms. Dorothy Attwood, Chief
Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: Clarification of Bell Atlantic/GTE Merger Conditions

Dear Ms. Attwood,

On behalf of Focal Communications Corporation ("Focal"), this letter responds to the February 20, 2001 letter ("Verizon's Letter") submitted by Verizon, Inc. ("Verizon") concerning the most-favored nation ("MFN") provisions of the *Bell Atlantic/GTE Merger Order*.¹ Verizon requests that you "review and clarify" the determination set forth in Carol Matthey's opinion letter ("Opinion Letter"), dated December 22, 2000, which explained that the MFN provisions apply to entire interconnection agreements, so that carriers may import interconnection agreements from one state into another state. For the reasons set forth below, Focal respectfully requests that you deny Verizon's request to change this determination, and, more importantly, given Verizon's conscious decision to ignore the Opinion Letter, Focal further requests that you require Verizon to abide by the express requirements of the MFN provisions.

The first argument raised in Verizon's Letter is that the Opinion Letter fails to consider the policy implications of interpreting the Merger Conditions in what Verizon contends is a "broad" fashion. On the contrary, the Opinion Letter sets forth a straight-forward and reasoned reading of the Merger Conditions. It is Verizon that fails utterly to explain what public policy goal could possibly be furthered by permitting a carrier to import only a portion of an interconnection agreement and then requiring that carrier to negotiate—or worse, to arbitrate—another separate agreement to cover resale, number portability, dialing parity, access to rights of way and reciprocal compensation.

¹ 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*, FCC 00-221 (rel. Jun. 16, 2000) ("*Bell Atlantic/GTE Merger Order*"). Appendix D (the "Merger Conditions"), ¶ 32. See also *Bell Atlantic/GTE Merger Order*, ¶¶ 300-05.

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Moreover, Verizon's argument misses the point. The explicit obligations of paragraph 32 of the Merger Conditions expand the state-specific adoption duties imposed on Verizon by section 252(i) of the Telecommunications Act of 1996 (the "Act") to encompass a region-wide duty. When the Commission decided to extend region-wide the benefit under 252(i) of avoiding the burden of negotiating (or arbitrating) an interconnection agreement, it did so to reduce a CLEC's risk and cost of entry, lower a CLEC's barriers to entry, and spread the use of best practices.² Certainly in deciding to implement the MFN requirement, the Commission weighed the policy implications that Verizon is now raising of allowing all interconnection provisions, including reciprocal compensation provisions, to be imported across state borders. The Commission obviously determined that it was in the public interest to enact such a requirement to address the increase in Verizon's competitive power that was going to result from the approval of the merger.

In the context of this argument, Verizon also inexplicably claims that the "sole issue in dispute between the parties" and the only contract provision at issue is the "single provision that addressed compensation for Internet traffic."³ This is simply untrue. Verizon's position has been that Focal cannot adopt *any* provisions of any negotiated agreement that address matters covered by section 251(b). In fact, as recently as January 11, 2001, Verizon tried to force Focal to negotiate a separate agreement to obtain provisions relating to section 251(b) duties and some unrelated matters in the context of another request by Focal to opt-in to a pre-merger negotiated agreement. By letters dated January 11, 2001, Verizon responded to Focal's October 4, 2000, request to adopt in the states of Washington and Virginia the negotiated, pre-merger interconnection agreement in North Carolina between GTE South Inc. and Time Warner Telecom.⁴ In addition to requesting Focal's signature on an adoption letter, Verizon sought Focal's signature on a 21 page Supplemental Agreement purporting to reflect Focal's and Verizon's "agreement" that the MFN provisions only apply to interconnection arrangements under Section 251(c) and setting forth a new set of terms and conditions drafted by Verizon that cover a variety of matters including zero reciprocal compensation for Internet traffic, traffic audits, and limitations on the prices Focal may charge for its services.

² *Id.* at ¶¶ 300-05, 352, 356, and 370.

³ Verizon's Letter at 1 and 2.

⁴ A copy of Verizon's Washington letter and attachments, which are substantively identical to Verizon's Virginia letter and attachments, is attached hereto.

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Verizon's Letter also restates the legal arguments from its December 6, 2000, letter to support its position that Verizon is only obligated to make available to Focal those provisions of an interconnection agreement that are delineated in section 251(c) of the Act. Verizon's position flies in the face of the express language of the Merger Conditions⁵ in the *Bell Atlantic/GTE Merger Order*⁶, which specifically allow Focal to adopt an "entire agreement." As noted above with respect to Focal's request to adopt certain GTE agreements, Verizon continues to assert its position even after Ms. Matthey issued the Opinion Letter. This illustrates Verizon's continued anticompetitive behavior in attempting to deny CLECs the exercise of their rights as defined by the Act and this Commission. Verizon's actions in defying the staff's interpretations of the Commission's own orders provides compelling evidence that the protections envisioned by the Commission in enacting the MFN requirement are sorely needed.⁷

Verizon may be annoyed that its interpretation of the MFN provision has been rejected, but that is not enough. Verizon has failed to articulate any reasoned basis for its strained interpretation. Under Verizon's theory that 251(b) obligations cannot be taken across state borders, no carrier could ever adopt an "entire agreement" across state borders, and the language in the MFN provisions and the *Bell Atlantic/GTE Merger Order* would be rendered meaningless. Yet, Section 251(c) incorporates by express reference, all of the duties of section 251(b). Indeed, the Opinion Letter simply states the obvious facts, based upon a plain reading of the Merger Conditions and the *Bell Atlantic/GTE Merger Order*, that all interconnection arrangements, including those set forth in section 251(b) and entire interconnection agreements, can be adopted across state borders. The Letter Opinion does not "further complicate an already complicated situation"⁸. There is nothing complicated about the plain language of the MFN provision. Verizon alone is responsible for complicating this issue by pursuing its ridiculous and anticompetitive interpretation of the Merger Conditions and failing to comply with staff's reasoned interpretation.

⁵ Merger Conditions at ¶ 32.

⁶ *Bell Atlantic/GTE Merger Order* at ¶ 300, n. 686.

⁷ Focal finds it curious that, while Verizon participated fully in the process which resulted in the Opinion Letter, Verizon has refused to abide by staff's interpretation. Indeed, since Verizon admits that the Opinion Letter is sufficiently binding that it requires a request for reconsideration, then there is no reasonable basis for Verizon to refuse to comply with the MFN provision as interpreted in the Opinion Letter.

⁸ Verizon's Letter at 4.

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For the reasons set forth herein and in Focal's November 9, 2000 letter, Focal respectfully requests that you deny Verizon's request to change the determinations set forth in the Letter Opinion and further affirm Verizon's obligation to comply with the express requirements of the MFN provisions.

Very truly yours,



Jane Van Duzer
Senior Counsel-Regulatory

cc: Carol Mattey (w/encl.)
Anthony Dale (w/encl.)
Pamela Arluk (w/encl.)
Gordon R. Evans (w/encl.)