ARBITRATION ISSUE 17: Unified Make-Ready Process for Pole Attachments - Should a revised and more efficient unified make-ready process for pole attachments be implemented.

Cavalier's Position: In Cavalier's experience with Verizon, there are inherent inefficiencies in Verizon's make ready processes, such as the requirement that each party attached to the poles perform its own separate engineering and construction work to make the poles ready for new attachments, and the delays in obtaining reasonable responses in a timely fashion. Verizon's processes cause unnecessary delays to Cavalier's ability to build its network.

Verizon's Alleged Position: Verizon does not believe a unified make-ready process for pole attachments is needed and has not provided any specific reason justifying this position.

Verizon's Actual Position and Proposed Resolution:

Cavalier's proposal is unwarranted. In this Commission's recent inquiry into Verizon's application to provide long distance service, Verizon showed that it was providing access to poles, ducts, conduit, and rights of way in compliance with all requirements of the Act. Specifically, it showed that it was providing more than 150,000 pole attachments to more than 50 telecommunications carriers, 130 cable television companies, and 20 other parties in Virginia.[111] Verizon also showed that it was providing CLECs with better service than it was providing to itself.[112]

In that proceeding, in which dozens of interveners attempted to pick apart Verizon's performance in every conceivable way, only Cavalier complained about pole attachments, and its claims about the purportedly burdensome process were belied by the fact that Cavalier had submitted only six applications for pole attachments in the past 18 months. Based on this record,

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[111] *Virginia Hearing Examiner Report* at 94.

[112] (Verizon completed make ready work for CLECs and others in an average of 94 days, while it completed its own make-ready work within an average of 217 days.) *See Virginia Hearing Examiner Report* at 93.

the Hearing Examiner concluded that Verizon was providing access to poles, ducts, conduit, and rights of way in compliance with the requirements of the Act.[113]

In spite of this excellent record, Cavalier now demands that Verizon institute a new "unified" process that would require the renegotiation of arrangements with every telecommunications carrier, cable company, power, or other company with which Verizon shares pole space anywhere in Virginia. This is overkill. The FCC has not required incumbents to permit third parties to work on their facilities. When Cavalier urged the FCC to impose a comparable process on Dominion Virginia Power, the FCC refused, *Cavalier Telephone, LLC v. Virginia Electric and Power Company*, Order and Request for Information, 15 FCC Rcd 9563, ¶ 19 (2000), and this Commission should as well.

[113] *Virginia Hearing Examiner Report* at 95.

ARBITRATION ISSUE 18: Local and Toll Billing Data - Should Verizon's processes and responsibilities for identifying local traffic and access traffic be improved?

Cavalier's Position: Cavalier has identified a problem in Verizon's processes for identifying traffic as either toll or local. This affects many of Cavalier's access bills to and from other carriers and is a problem that should be addressed in clearer responsibilities and procedures in the information that Verizon provides to Cavalier so that Cavalier is not overcharging or undercharging other carriers and vice versa.

Verizon's Alleged Position: Unknown.

Verizon's Actual Position and Proposed Resolution:

There is no problem in Verizon's processes for recording billing details for Cavalier's traffic and providing those billing details to Cavalier. Cavalier's concern involves calls between Cavalier and other CLECs that travel through a Verizon tandem switch. In this arrangement, Verizon bills the originating CLEC for transit services and it passes a billing record to the terminating CLEC so that it can bill the originating CLEC for the call termination. Cavalier complains that the rates it charges the originating CLEC depend on whether the call is local or toll, and the billing records provided by Verizon do not separate identify local calls from toll calls.

However, the billing details Verizon provides to Cavalier do include both the calling and called number, so Cavalier can determine for itself what calls are local and which ones are toll. Verizon cannot practically do this because it is not a party to contractual arrangements between Cavalier and other CLECs and therefore does not know which calls these parties have agreed to treat as "local" and which calls they have agreed to treat as "toll."

If Cavalier believes that improvements can be made in the billing information provided to the terminating carrier in this instance, there is a better forum than this arbitration to explain those views. A national standards organization, the Ordering and Billing Forum is currently considering this very issue. Certainly, it is far better to develop a consistent national solution in

a forum like the Ordering and Billing Forum, rather than to develop a series of potentially inconsistent solutions in carrier-by-carrier arbitrations. Cavalier's proposal should therefore be rejected.

ARBITRATION ISSUE 19: Network Rearrangement - Should Verizon be allowed to charge Cavalier for Verizon's network rearrangements?

Cavalier's Position: On occasion, Verizon will notify Cavalier that Verizon is undertaking network rearrangements, such as the moving of a tandem switch from one location to another location after Cavalier has interconnection arrangements with Verizon at the former location. This is occurring with Verizon's plans to rehome its tandem switching capabilities at its Tatnall Street, Wilmington location. Verizon then requests that Cavalier compensate Verizon in part for Verizon's network rearrangements that have little or nothing to do with Cavalier's use of the network. Cavalier believes that is unfair and discriminatory and that Verizon should bear its own costs for such rearrangements.

Verizon's Alleged Position: Verizon believes that CLECs should share these costs.

Verizon's Actual Position and Proposed Resolution:

Cavalier's petition erroneously suggests that Verizon has asked Cavalier to pay Verizon's costs associated with network rearrangements, but Cavalier's proposed contract language makes clear what Cavalier is really demanding. Cavalier wants Verizon to pay **Cavalier's** costs for rearranging **Cavalier's** network when those changes are somehow related to rearrangements that Verizon has made in its own network, for example to accommodate growth or technology change. This is just one more Cavalier demand that Verizon subsidize Cavalier's operations.

Network rearrangements are a cost of doing business. Verizon's longstanding arrangement with CLECs is that each carrier bears the cost of rearranging its own network. There is no reason for varying that standard industry practice to benefit Cavalier.

V. SUPPLEMENTAL ISSUES

ARBITRATION ISSUE 20: Adoption Of Verizon's Exhibit A - To The Extent That Cavalier Has Failed To Dispute Verizon's Positions And Proposed Contract Language, Should The Commission Order Inclusion Of That Language In The Resulting Interconnection Agreement?

Cavalier's Position: Cavalier alone should be permitted to define the appropriate scope of changes that should be made to the parties' existing interconnection agreement. Cavalier should not have to review Verizon's current contract proposal, analyze whether it is acceptable, or describe how it is objectionable.

Verizon's Actual Position and Proposed Resolution

As described in Section III detailing the parties' negotiations and in Verizon's response to Issue 1 relating to the "template" issue, Cavalier has eschewed its § 251(c)(1) duty to negotiate in good faith and its § 252(b)(2) responsibility as a petitioner. Despite the fact that Verizon provided Cavalier with its proposed contract language on numerous occasions during the course of the parties' negotiations, Cavalier simply refused to read it, analyze it, or respond to it in any meaningful way. Even with its Petition, Cavalier entirely failed to acknowledge, much less set forth, all unresolved issues and Verizon's position as to those unresolved issues and disputed contract language. It is Cavalier that chose to start the process of arbitration and to do so prior to a time when it had read, considered, and responded to Verizon's proposed contract. Simply by filing its Petition, Cavalier cannot shift to Verizon the duty to determine what Cavalier ***might*** object to if it actually bothered to read Verizon's proposed contract terms. Accordingly, Verizon has not attempted to do so.

Rather, Verizon has undertaken the monumental task of preparing its proposed agreement using the parties' existing agreement ***as amended*** as a starting point. To do so, Verizon started with the July 17, 1997 interconnection agreement between its predecessor, Bell Atlantic-

Virginia, Inc., and MCImetro Access Transmission Services of Virginia, Inc., as amended,[114] because Cavalier adopted that agreement effective January 13, 1999[115] for use in Virginia ("1999 Adopted Agreement"). Verizon and Cavalier twice agreed to amend the 1999 Adopted Agreement. Amendment No. 1, dated June 5, 2000, to the 1999 Adopted Agreement provided new terms for sub-loop, dark fiber, and collocation in remote terminals, among other things.[116] Amendment No. 2, dated October 24, 2000, to the 1999 Adopted Agreement provided new interconnection terms.[117] The appropriate starting point includes both amendments to the 1999 Adopted Agreement, neither of which had previously been integrated into a single document by either Verizon or Cavalier.

To the starting point document Verizon then adds its proposed contract language, which it previously provided Cavalier in the form of its model interconnection agreement Verizon went through the process of integrating its proposal into the parties' 1999 Adopted Agreement, as amended, in Virginia. Verizon's resulting proposed contract is attached at Exhibit A.

Because Cavalier responded neither to Verizon's model interconnection agreement or its modified template for New Jersey, Verizon has no reasonable basis to represent Cavalier's agreement or disagreement. Cavalier has again chosen to offer no explanation or analysis in its Petition. As a consequence of Cavalier's changing position in negotiations and inadequate Petition, Verizon is unable to project with any accuracy all of the disputed contract language. Furthermore, Verizon cannot project through the identification of supplemental issues all remaining areas of disputed issues. Nor should Verizon be held to such a standard, when

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[114] *See* Exhibit C.

[115] *See* Exhibit D.

[116] *See* Exhibit E.

[117] *See* Exhibit F.

Cavalier has repeatedly failed to provide Verizon any basis for doing so. Instead, in light of the circumstances of the parties' negotiations and Cavalier's inadequate Petition, the Commission should order the parties to include all contract language included at Exhibit A that Cavalier has failed to dispute.

To further assist both Cavalier and the Commission in evaluating the differences between the 1999 Adopted Agreement, as amended, and Verizon's current proposal (Exhibit A), which includes portions of its model interconnection agreement, Verizon highlights[118] below its revisions to the parties' existing agreement:

Part A (general terms):

- Used existing agreement as base.
- Term of agreement (§ 3): replaced with model agreement language (as discussed in connection with Issue 2)
- Charges and Assurance of Payment (§ 4): replaced with model agreement language (as discussed in connection with Issue 23)
- Insurance (§ 11A): added from model agreement language (as discussed in connection with Issue 21)
- Performance Standards (§ 34): added from model agreement language (as discussed in connection with Issue 24)

Part B (definitions):

- Used existing agreement as base, but modified various terms, reciprocal compensation proposal as discussed in connection with Issue 23.
- The following terms were modified: Exchange Access, Network Element, NID, POI, Reciprocal Compensation, Telecommunications Carrier, Telecommunication Services, Telephone Exchange Service;
- The Following terms were added: EMI, Extended Local Calling Scope Arrangement, FCC Internet Order, Information Access, Measured Internet Traffic, Rate Center Point, Rate Demarcation Point, Reciprocal Compensation Traffic, Routing Point, Toxic or Hazardous Substance, Traffic Factor 1 (PIU), Traffic Factor 2 (PLU);
- The following terms were deleted: AMA, ALI, ALI/DMS, Bell Atlantic, CABS, Common Transport, Conduit, Dedicated Transport, DA, DA-Database, DL, EMR, INP, Local Interconnection, Local Resale, Local Switching, Local Traffic, MCIm, Network

[118] Verizon does not purport to provide an exhaustive list.

Rate Demarcation Point, Non Discriminatory, PIU, PLU, Tandem Switching, Telecommunications.

Attachment I (price schedule):

- Current model agreement

Attachment II (resale):

- Used existing agreement

Attachment III (network elements):

- Used model agreement language as base
- Add language from Amendment No. 1, dated June 5, 2000, regarding Subloop, Dark Fiber (adding new language for Dark Fiber IOF language addressing intermediate offices and inquiry responses and also Parallel Provisioning as discussed in connection with Issue 9), and Collocation at remote terminals
- Added language from proposed DDL amendment (as discussed in connection with Issue 7)

Attachment IV (interconnection):

- Using existing agreement as base, replacing § 1 with language from Amendment No. 2, dated October 24, 2000 (but replacing § 2 with VGRIP language as discussed in connection with Issue 4)
- Integrated Verizon's reciprocal compensation proposal (as discussed in connection with Issue 23)

Attachment V (collocation):

- Replaced with model agreement language (as discussed in connection with Issue 21)

Attachment VI (rights of way):

- Used model agreement language (as discussed in connection with Issue 25)

Attachment VII (number portability):

- Deleted Interim Number Portability provisions

Attachment VIII (business process requirements):

- Deleted operator services § 6.1.4
- Section 2.2.3 now references updated language in Attachment III, § 3.3

- Added §§ 6.1.6.16 and 6.1.6.17 (Indemnification and Liabilities in Directory Listings General Requirements)

Attachment IX (security requirements):

- Used existing agreement

Attachment X (performance reporting):

- Deleted as discussed in connection with Issue 24

Notwithstanding Cavalier's failures, Verizon has not only attempted to put together a working document for negotiations, Verizon has either explained its positions in connection with the original issues and in supplemental issues, to the extent that it was able to reasonably project potential open issues with Cavalier. As Cavalier recognized in its Petition, page 8, with respect to the existing agreement, "there are several areas that need to change." Although Verizon has done no more in negotiations and in this Response than continue to advocate its view of what needs to "change," Cavalier seems to think that it alone should be permitted to define the appropriate scope of changes that should be made to the parties' existing interconnection agreement. There is no merit to this assertion. To negotiate in good faith, Cavalier must recognize that it has a duty to consider Verizon's proposed changes. Because Cavalier has failed to identify if it disputes a great bulk of Verizon's proposed contract, and if so, why, the Commission should order the parties to adopt Verizon's proposed Exhibit A in its entirety.

ARBITRATION ISSUE 21: Insurance And Indemnity - Should insurance levels be increased to commercially reasonable levels? Should indemnity provisions be clarified, inter alia, so that they cover the parties and their officers, directors, employees and affiliates?

(Verizon's Proposed Agreement at ¶ ¶ 21.1-21.7; 24.1-24.4.)

Cavalier's Position: Unknown.

Verizon's Actual Position and Proposed Resolution

Because Verizon is required to enter into interconnection agreements with CLECs, it is reasonable to require CLECs to obtain insurance in order to protect Verizon's network, personnel, and other assets in the event that a CLEC has insufficient financial resources. The FCC and numerous state commissions have recognized the reasonableness of such a requirement.[119] In particular, the FCC has concluded that "LECs are justified in requiring interconnectors to carry a reasonable amount of liability insurance coverage".[120]

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[119] *See, e.g., In the Matter of Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport, Second Report and Order,* FCC Docket No. 93-162, FCC 97-208, FCC Rcd. 18, 730 (1997), ¶¶ 343-55 ("*FCC Second Report*"). *See* M.D.T.E. Tariff 17, Part E, §§ 2, 2.3.4; *see also Petition of NEXTLINK Pennsylvania, L.L.P. for Arbitration of an Interconnection Agreement with Bell Atlantic-PA, Inc., Pursuant to the Telecommunications Act of 1996*, Docket No. A-310260F0002 (Interconnection Arbitration), Pennsylvania Public Utility Commission, 1998 Pa. PUC LEXIS 208, (May 22, 1998) (approving interconnection agreement containing provision requiring CLEC to maintain commercial general liability insurance, comprehensive automobile insurance, umbrella form excess liability insurance, statutory worker's compensation insurance and employer's liability insurance); *Petition of TCG Pittsburgh for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Bell Atlantic-Pennsylvania, Inc.*, Docket No. A-310213F0002 (Interconnection Arbitration), Pennsylvania Public Utility Commission, 1996 Pa. PUC LEXIS 119, *30, *60-61, (September 6, 1996) (requiring CLEC to incur expense to procure and maintain specific classes of insurance with a company having a BEST insurance rating of at least AA-12). *Accord Petition of AT&T Communications of New York, Inc. for Arbitration of an Interconnection Agreement with New York Telephone Company*, CASE 96-C-0723, New York Public Service Commission, 1997 N.Y. PUC LEXIS 360, (June 13, 1997) (approving an interconnection agreement requiring (1) comprehensive general liability insurance, (2) umbrella/excess liability insurance, (3) all risk property coverage, (4) statutory worker's compensation coverage, and (5) employer's liability coverage).

[120] *FCC Second Report* at ¶ 345.

> [D]ue to the unique circumstances posed by physical collocation, we find that it is not unreasonable for LECs to require interconnectors to maintain a reasonable amount of general liability and excess liability insurance coverage to protect against occurrences that may potentially arise out of the physical collocation arrangement. We disagree with Teleport's argument that the physical collocation arrangement is the equivalent of adding a few racks of multiplexing equipment and therefore poses no additional risk to a central office. We find that the presence of interconnectors in the LECs' central office adds additional risk to the LECs' property and operations because the LECs do not have control over the interconnectors' equipment or the personnel that operate the equipment. In the absence of such control, we find that it is not unreasonable for LECs to require general liability insurance to protect against property damage to the LECs' equipment, personal injury to the LECs' employees, and losses to the LECs' customers because of service interruptions caused by interconnectors.[121]

The dollar amount of insurance, said the FCC, "is not unreasonable as long as it does not exceed one standard deviation above the industry average,"[122] which the FCC calculated as $21.15 million (in 1997).[123] The aggregate amount of insurance Verizon seeks from Cavalier falls well below this threshold amount. The highlights of Verizon's insurance provisions include:

- A requirement to maintain appropriate insurance and/or bonds during the term of the interconnection agreement.
- Commercial general liability: $2,000,000.
- Commercial motor vehicle liability insurance: $2,000,000.
- Excess liability insurance (umbrella): $10,000,000.
- Worker's compensation insurance as required by law and employer's liability insurance: $2,000,000.
- All risk property insurance (full replacement cost) for Cavalier's real and personal property located at a collocation site or on Verizon premises, facilities, equipment or rights-of-way.
- Deductibles, self-insured retentions or loss limits must be disclosed to Verizon.

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[121] *Id.* at ¶ 345.

[122] *Id.* at ¶ 346.

[123] *Id.* at ¶ 348.

- Cavalier shall name Verizon as an additional insured.
- Cavalier shall provide proof of insurance and report changes in insurance periodically.
- Cavalier shall require contractors that will have access to Verizon premises or equipment to procure similar insurance.

Verizon and carriers like Cavalier operate in a highly volatile industry where CLEC insolvency has become commonplace. In addition, it is quite possible that Verizon could be held jointly and severally liable with Cavalier, for millions of dollars, because of the acts of Cavalier. Under these circumstances, the insurance levels sought by Verizon are reasonable.

Verizon also proposes changes to the agreement's indemnification provisions to clarify the kinds of claims that are subject to indemnification, the persons and entities covered by the indemnification provisions, and the process that the parties must follow in the event of a claim for which indemnification is warranted. The revised language clarifies, among other things, that indemnification extends not only to covered claims against one of the parties, but also to covered claims against officers, directors, employees, or affiliates of the parties. These terms are commercially reasonable and should be approved.

ARBITRATION ISSUE 22: Reciprocal Compensation/Intercarrier Compensation - Should The Interconnection Agreement Provide For Intercarrier Compensation Consistent With The Requirements Of Preemptive Federal Law, Including The FCC's *ISP Remand Order?* (Verizon's Proposed Agreements at Definitions §§ 1.26a, 1.31a, 1.40, 1.44a, 1.61a, 1.61b, 1.71, 1.71a, 1.71b, 1.74, 5.72, 5.7.3, 5.7.4, 5.8)

Cavalier's Position: In an ultimately futile effort to continue receiving windfall reciprocal compensation payments for as long as possible, Cavalier is trying to set up roadblocks to Verizon's implementation of the *ISP Remand Order*. Cavalier also demands that the agreement include terms and condition now rejected by the FCC.

Verizon's Actual Position and Proposed Resolution

The FCC's *ISP Remand Order* established a new compensation structure for Internet-bound calls that are passed from one local carrier (usually the incumbent, like Verizon) to another local carrier (often a CLEC, like Cavalier) on the way to an Internet Service Provider ("ISP") and on to a distant Web site on the World Wide Web. Because calls to the Internet are strictly one-way and occur in extremely high volumes for longer than average holding times. CLECs like Cavalier had a huge incentive to focus almost exclusively on serving ISPs as customers so they could receive very large monthly reciprocal compensation payments from incumbent carriers (who have most of the end-user customers making calls to ISPs). In the *ISP Remand Order,* the FCC found that requiring reciprocal compensation payments for Internet-bound traffic is contrary to sound public policy and has retarded the growth of true local telephone competition because "carriers have targeted ISPs as customers merely to take advantage of these intercarrier payments" and "compete, not on the basis of quality and efficiency, but on the basis of their ability to shift costs to other carriers."[124] As a result, the FCC decided to phase out payments for Internet-bound traffic.

[124] *In the Matter of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic,* CC Docket Nos. 96-98, 99-68, FCC No. 01-131 (rel.

(continued...)

The FCC also determined in its *ISP Remand Order* that Internet-bound traffic is not, and has never been, subject to the reciprocal compensation obligations of the Act.[125] To phase out CLEC reliance on this uneconomic arbitrage, payments under the FCC's new compensation regime decline over a 36-month period: $0.0015 per minute of use ("MOU") for the first six months after the effective date of the Order (June 14, 2001 - December 13, 2001); $0.0010 per MOU for the next 18 months (December 14, 2001 - June 13, 2003); and $0.0007 per MOU for the last 12 months (June 14, 2003 - June 13, 2004).[126] In ¶¶ 8 and 79 of the *ISP Remand Order*, the FCC further establishes the presumption that traffic above a 3:1 ratio of terminating to originating traffic is Internet-bound, while traffic below a 3:1 ratio is § 251(b)(5) traffic subject to reciprocal compensation. These are substantial reductions from the reciprocal compensation rate that most CLECs now receive.

Although the D.C. Circuit has remanded the *ISP Remand Order* to the FCC for further consideration of the legal basis of its rule, it "d[id] not vacate" the FCC's order.[127] Instead, finding it "plain[]" that there is "a non-trivial chance that the Commission has authority" to hold that, under federal law, carriers are not required to pay reciprocal compensation for Internet-bound traffic, the court left the *ISP Remand Order* in place and "simply remand[ed] the case to

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April 27, 2001) ("*ISP Remand Order*") ¶¶ 2, 4; *see also, e.g., id.* at ¶ 5 (CLEC "decisions are driven by regulatory opportunities that disconnect costs from end-user market decisions. . . . This result distorts competition by subsidizing one type of service at the expense of others") and ¶ 21 ("traffic to an ISP flows exclusively in one direction, creating an opportunity for regulatory arbitrage and leading to uneconomical results").

[125] *Id.* at ¶¶ 30, 39, 42-47.

[126] *Id.* ¶¶ 8, 85.

[127] *WorldCom, Inc. v. FCC*, 288 F.3d 429, 434 (D.C. Cir. 2002).

the Commission for further proceedings."[128] The D.C. Circuit's refusal to vacate the *ISP Remand Order* means that the order — including its holding that ***Internet-bound traffic is not subject to the reciprocal compensation requirement in § 251(b)(5)*** and its regulations implementing that holding — ***remains binding federal law***.[129]

Verizon's Intercarrier Compensation Proposal comports with the FCC's requirement that Internet Traffic is not subject to Reciprocal Compensation.

Measured Internet Traffic (Definitions § 1.44a). Both Internet Traffic and Measured Internet Traffic are excluded from compensation pursuant to § 251(b)(5) of the Act. Verizon's use of the two terms, however, distinguishes Internet traffic that is subject to the FCC's interim rate cap regime and traffic that is not. As used by Verizon, "Measured Internet Traffic" is that traffic that is locally rated and thus is subject to the FCC's interim rate cap regime. It is necessary to make this distinction for measurement and billing purposes because the FCC's *ISP Remand Order* only concerns locally rated Internet-bound traffic and does not displace the pre-existing toll and access regimes.[130] This distinction is also reflected in Verizon's definitions of "Toll Traffic,"[131] "Traffic Factor 1,"[132] and "Traffic Factor 2."[133]

Reciprocal Compensation Traffic (Definitions § 1.616). Verizon's closely-related definitions of both "Reciprocal Compensation"[134] and "Reciprocal Compensation Traffic" are

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[128] *Id.*

[129] *See, e.g., National Lime Ass'n v. EPA*, 233 F.3d 625, 635 (D.C. Cir. 2000) (regulations that are remanded but not vacated are "le[ft] . . . in place during remand"); *Sierra Club v. EPA*, 167 F.3d 658, 664 (D.C. Cir. 1999) (same).

[130] *See ISP Remand Order* ¶ 36 and n.66.

[131] Definition § 1.71.

[132] *Id.* at Definitions § 1.71a

[133] *Id.* at Definitions § 1.71b

[134] Verizon Definitions § 1.61a.

necessitated by the *ISP Remand Order*'s intercarrier compensation obligations as they relate to Internet traffic. Not only did the *ISP Remand Order* prescribe an intercarrier compensation rate regime with regard to the treatment of locally rated Internet traffic, it also amended the definition of traffic that is subject to reciprocal compensation.[135] Indeed, the FCC no longer utilizes the term "local" to identify traffic that is subject to reciprocal compensation. The regulations the FCC promulgated with the *ISP Remand Order* – regulations that the D.C. Circuit recently kept in place – removed the word "local" from the reciprocal compensation regulations the FCC promulgated in August 1996.[136] Under the FCC's existing regulations, to be eligible for reciprocal compensation, traffic now must meet two requirements. It must be:

(1) "Telecommunications traffic," which is defined as:

> Telecommunications traffic exchanged between a LEC and a telecommunications carrier other than a CMRS provider, except for telecommunications traffic that is interstate or intrastate exchange access, information access, or exchange services for such access (see, FCC 01-131, paras. 34, 36, 39, 42-43) . . . *See* 47 C.F.R. § 51.701(b)(1).

and

(2) the traffic must originate on the network of one carrier and terminate on the network of the other carrier.[137]

Verizon has proposed a definition of "Reciprocal Compensation Traffic" that is consistent with the FCC's ruling and captures these two key requirements for eligibility for reciprocal compensation:

> Telecommunications traffic originated by a Customer of one Party on that Party's network and terminated to a Customer of the other Party on that other Party's network, except for Telecommunications traffic that is interstate or intrastate

[135] *See* 47 C.F.R. § 51.701(e).

[136] *See ISP Remand Order* at ¶¶ 32, 34.

[137] *See* 47 C.F.R. § 51.701(e).

> Exchange Access, information access, or exchange services for Exchange Access or information access. The determination of whether Telecommunications traffic is Exchange Access or information access shall be based upon Verizon's local calling areas as defined by Verizon. Reciprocal Compensation Traffic does not include: (1) any Internet Traffic; (2) traffic that does not originate and terminate within the same Verizon local calling area as defined by Verizon; (3) Toll Traffic, including, but not limited to, calls originated on a 1+ presubscription basis, or on a casual dialed (10XXX/101XXXX) basis; (4) Optional Extended Local Calling Scope Arrangement Traffic; (5) special access, private line, Frame Relay, ATM, or any other traffic that is not switched by the terminating Party; (6) Tandem Transit Traffic; or, (7) Voice Information Service Traffic (as defined in Section 5 of the Additional Services Attachment). For the purposes of this definition, a Verizon local calling area includes a Verizon non-optional Extended Local Calling Scope Arrangement, but does not include a Verizon optional Extended Local Calling Scope Arrangement.

Verizon's definitions of "Reciprocal Compensation" and "Reciprocal Compensation Traffic" are necessary to clarify what traffic is subject to reciprocal compensation and what traffic is not.

Toll Traffic (Definition § 1.71). Verizon defines "Toll Traffic" as traffic that is not subject to (i) reciprocal compensation (*i.e.*, "Reciprocal Compensation Traffic") and (ii) the interim rate regime for Internet traffic (*i.e.*, "Measured Internet Traffic"). Verizon further clarifies that the toll traffic may be intraLATA toll or interLATA toll traffic depending on the originating and terminating points of the call. As discussed above, the use of these terms is consistent with the FCC's new intercarrier compensation rate regime.

Traffic Factor 1 and Traffic Factor 2 (Definitions §§ 1.71a, 1.71b). Verizon's Traffic Factors also implement the requirements of the *ISP Remand Order*. Verizon's proposed definitions for Traffic Factor 1 and Traffic Factor 2 describe billing factors that are used to separate traffic that is eligible for reciprocal compensation from traffic that is not for measurement and billing of traffic delivered over interconnection trunks.

Verizon's proposed language for § § 5.7.2 and 5.7.3 is necessary to make the agreement conform to the FCC's *ISP Remand Order*. Namely, these proposed terms define the boundary

between (i) traffic that is subject to reciprocal compensation under the FCC's regulations,[138] and (ii) other traffic, such as Internet traffic, which is not.[139]

Consistent with binding federal law, and Verizon's definition of "Reciprocal Compensation," Section 5.7.3.1 provides that traffic is not subject to reciprocal compensation if it is "interstate or intrastate Exchange Access, Information Access, or exchange services for Exchange Access or Information Access."[140] Sections 5.7.3.1 through 5.7.3.7 specifically list the traffic that is not subject to the parties' reciprocal compensation obligations. For example, § 5.7.3.3 provides that "Toll Traffic" is exempt from reciprocal compensation. As defined by Verizon, "Toll Traffic" (Definitions § 1.71) is traffic that originates from a customer of one party on that party's network and terminates to the customer of the other party on that party's network and is neither Reciprocal Compensation or Measured Internet Traffic.[141] That is, the traffic is "intraLATA Toll Traffic" as defined by the Commission, or "interLATA Toll Traffic" as defined by the Act.[142] Similarly, the remainder of Verizon's proposed § 7.3 also describes categories of traffic that are not subject to § 251(b)(5) in accordance with applicable law, including, Optional Extended Local Calling Area Traffic, special access traffic, Tandem Transit Traffic, and Voice Information Service Traffic.[143]

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[138] *See* Verizon's Proposed Agreement § 5.7.2

[139] *See* Verizon's Proposed Agreement § 5.7.3 *et seq.*

[140] Verizon's Proposed Agreement § 5.7.3.1. This is consistent with 42 C.F.R. § 51.701.

[141] *See* Definitions § 1.71.

[142] *See ISP Remand Order* ¶¶ 37-39. The *ISP Remand Order* again made clear that access traffic and services for access traffic are excluded from § 251(b)(5). *ISP Remand Order* ¶¶ 37-38. This would also include the intrastate access charge regime because it "would be incongruous to conclude that Congress was concerned about the effects of potential disruption to the interstate access charge system, but had no such concerns about the effects on analogous intrastate mechanisms." *Id.* at ¶ 37 n. 66 (quoting *Local Competition Order*, 11 F.C.C.R. at 15896).

[143] *See* Verizon's Proposed Agreement §§ 5.7.3.4 through 5.7.3.7.

Verizon's proposed § 5.7.4 states that the parties will charge one another symmetrical reciprocal compensation rates. This provision embodies the *ISP Remand Order*'s declaration that the interim regime "affects only the intercarrier *compensation* (*i.e.*, rates) applicable to the delivery of ISP-bound traffic. It does not alter carriers' other obligations under out Part 51 rules, 47 C.F.R. Part 51."[144] Accordingly, § 5.7.4 merely provides that both parties pay and receive the same rate for the same category of traffic in accordance with 47 C.F.R. § 51.711.

Verizon's proposed § 5.8.1 succinctly provides that binding federal law governs the parties' rights and obligations with respect to intercarrier compensation treatment of "Internet Traffic." These sections streamline the parties' agreement by referring to the applicable FCC orders and regulations that govern the treatment of "Internet Traffic" for intercarrier compensation purposes.

[144] *ISP Remand Order* ¶ 78 n. 149.

ARBITRATION ISSUE 23: Assurance of Payment - Should the Interconnection Agreement Include Language Requiring Adequate Assurance of Payment From CLECs for Amounts Due or to Become Due? (Verizon's proposed Part A, § 20)

Cavalier's Position: Cavalier has never responded to Verizon's proposal regarding assurance of payment, so Verizon does not know if Cavalier disputes its assurance of payment proposal, and if so, on what basis.

Verizon's Actual Position and Proposed Resolution

The agreement should include language demanding adequate assurance of payment in the event that a CLEC becomes financially unstable or unable to make payment. This language is akin to security payments which Verizon may require of its own end users under its retail tariffs, or the insurance Verizon requires from its vendors.

Under Verizon's assurance of payment proposal, Verizon may request assurance of payment from Cavalier if there has been a material change in Cavalier's creditworthiness, if Cavalier cannot demonstrate its creditworthiness, if Cavalier fails to pay a bill on a timely basis, or if Cavalier admits that it is unable to pay bills or commences a bankruptcy proceeding. Verizon's proposal is necessary to address its legitimate need for financial protection from non-creditworthy entities to which Verizon is required to provide service. The current volatile telecommunications environment makes Verizon's need more acute.

Verizon's recent arbitration with WorldCom provides a timely example. When Verizon provided its assurance of payment proposal to WorldCom in an arbitration before the FCC's Wireline Competition Bureau (the "Bureau"),[145] WorldCom claimed that Verizon's proposal was only necessary for "other, less financially-stable" CLECs.[146] WorldCom's recent

[145] *Virginia Arbitration Order*.

[146] *Id.* at ¶ 726.

bankruptcy makes abundantly clear that it cannot rely on apparent financial stability, past performance, or a carrier's claims of stability. The Bureau agreed with Verizon, stating that "Verizon has a legitimate business interest in receiving assurances of payment... from its [CLEC] customers."[147]

Verizon's proposal to ensure it has the right to seek assurance of payment from Cavalier is akin to Verizon's rights with respect to its retail customers pursuant to the terms of its retail tariffs. Specifically, Verizon may require an end user who is not creditworthy to provide assurance of payment in the form of a security deposit. Additionally, if the end user does not make timely payments, Verizon may suspend or terminate service. The Commission, like the Bureau, should provide Verizon equivalent protection from Cavalier when Verizon provides service to Cavalier.

[147] *Virginia Arbitration Opinion* at ¶ 727.

ARBITRATION ISSUE 24: Standards of Performance - Should the Interconnection Agreement Reference Currently Applicable Standards of Performance? (Verizon's proposed Part A, § 34)

Cavalier's Position: Although Cavalier has never responded to Verizon's proposal regarding standards of performance, Cavalier appears content to rely on a reference to standards of performance and associated requirements superseded by the *Virginia Collaborative.*[148]

Verizon's Actual Position and Proposed Resolution

The interconnection agreement should reference currently applicable standards of performance. In Virginia, those standards of performance result from the *Virginia Collaborative.* The performance standards set forth in the parties' existing agreement have been twice superseded, first by the *BA/GTE Merger Order*[149] and then by the Commission's order in the *Virginia Collaborative.* Accordingly, Verizon proposes to update the standards of performance section of the parties' agreement to reflect currently applicable law. Moreover, Verizon proposes to strike the specific requirements in the parties' existing agreement that differ from the requirements in effect as a result of the *Virginia Collaborative.*

Verizon's proposal ensures that the agreement remains up-to-date and consistent for all CLECs. Cavalier is not entitled to carve out a differing performance plan or "grandfather" an outdated plan applicable only as between itself and Verizon. The role of performance measurements or a performance incentive plan in providing appropriate incentives to ensure an open and competitive market is an inquiry much broader—and involving many more parties—than the inquiry into the rights and obligations of particular parties to an interconnection agreement. To ensure consistent and non-discriminatory treatment of all CLECs, Verizon should

[148] *See In Re Establishment of a Collaborative Committee to Investigate Market Opening Measures,* Case No. PUC000026 (the "*Virginia Collaborative*").

[149] *Merger Order* at ¶¶ 278-318 and Attachment A.

not be subjected to different performance plans in differing interconnection agreement. Verizon's proposal ensures consistent standards for all CLECs and ensures that Verizon is not burdened with differing plans for differing CLECs.

ARBITRATION ISSUE 25: Rights of Way - Should The Interconnection Agreement Contain Detailed Terms and Conditions Governing Cavalier's Access To Verizon's Poles, Ducts, Conduits and Rights of Way? (Verizon's proposed Attachment VI)

Cavalier's Position: All terms and conditions governing Cavalier's access to Verizon's poles, ducts, conduits and rights of way should be contained in the interconnection agreement.

Verizon's Actual Position and Proposed Resolution

The Parties generally agree on the terms and conditions governing Cavalier's access to Verizon's poles, ducts, conduits and rights of way. The controversy lies in where those terms and conditions should exist -- in a separate license agreement or in the Parties' interconnection agreement. Consistent with Verizon's nondiscrimination obligations under the Act and its practice with other CLECs, telecommunications providers and CATV providers in Virginia, such terms and conditions should continue to be placed in a separate license agreement.

Section 251(b)(4) imposes upon each LEC the "duty to afford access to ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224."[150] Section 224(f)(1) imposes upon ILECs the duty to "provide ... any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it."[151] Nothing in the Act, however, requires that those rates, terms and conditions be included in the Parties' interconnection agreement; rather, for the reasons described below, such rates, terms and conditions should be included in a separate licensing agreement that is, at most, referenced in the Parties' interconnection agreement.

[150] 47 U.S.C. § 251(b)(4).

[151] 47 U.S.C. §224(f)(1).

First, it is, and has been, common practice to include detailed interconnection terms and conditions in places other than the interconnection agreement. Interconnection terms and conditions obligating both ILECs and CLECs often have been the subject of collaboratives and industry forums, and often are contained in settlement agreements and separate license agreements. Numerous commissions have approved this practice by approving interconnection agreements that reference such other agreements as satisfactory under the Act. In that vein, Verizon satisfies its obligations under the Act by including in the interconnection agreement a reference to the separate license agreement in which the specific terms and conditions governing non-discriminatory access to Verizon's poles, ducts, conduits and rights of way are set forth in detail.

Indeed, Verizon and Cavalier have followed this practice since October 31, 1998. The parties current agreement does not terminate until notice is given in accordance with the provisions of that agreement – and Cavalier has not given notice that it intends to terminate the licensing agreement. If Cavalier wishes to negotiate a different licensing agreement, Verizon is more than willing to do so. Cavalier's attempt to "negotiate" through this arbitration should be rejected.

It is also more sensible to place these terms and conditions in separate licensing agreements. Generally, interconnection agreements address the sale of Verizon's network services and products, not the methods, procedures, timeframes and safety requirements that comprise a licensing agreement. Particularly because provisions for access to poles, ducts, conduits and rights of way generally have state-specific operating procedures, a separate license agreement referenced in the interconnection agreement is especially appropriate for terms and conditions governing such access. For example, under Verizon New England's standard

agreement, there is a limit of 200 poles per application, unit pricing is used to determine make-ready costs, reasonable efforts are made to complete make ready work in six months, and tri-party license agreements are formed with power companies. By contrast, under the agreement used in Virginia (as well as elsewhere in the Mid-Atlantic territory encompassing Washington D.C., New Jersey, Pennsylvania, Delaware, Maryland, Virginia and West Virginia), there is no pole limit per application, actual costs are used for billing for make-ready work, Verizon completes make ready work at parity with or better than it completes its own make ready work, and license agreements are formed only between Verizon and the attaching party. In addition, pole and conduit agreements are entered into separately in New England and New York. In Virginia, these are contained in one single agreement. In short, Verizon's standard agreements vary in their treatment of operating procedures, attachment fees, and pole limitations within a single Planning Manager Area. There are also several differences between the Virginia agreement and agreements used in New York and in the former GTE areas. Given these differences, such terms and conditions should not be included in interconnection agreements that are subject to being adopted in other states.

Furthermore, interconnection agreements are executed exclusively with CLEC entities and not CATV entities, which are entitled to the same rights of access as CLECs. Verizon must permit nondiscriminatory access to CLECs and CATV entities alike. Consequently, Verizon has established licensing agreements independent of interconnection agreements that are handled from start to finish by a separate group that must make absolutely certain that all poles attachees, including CLEC and CATV entities are treated in a non-discriminatory manner. Combining these processes will only result in inefficiencies and discriminatory treatment of attachees and occupants of Verizon's poles, ducts, conduits and rights of way.

Finally, the Commission must consider the respective burdens of the Parties. Verizon currently has approximately 130 agreements with CATV companies and at least 70 agreements with CLECs, independent telecommunications companies and other parties. Verizon has established processes in place to handle all requests for access to poles, ducts, conduit and rights of way from all of these companies. These processes have been administered by Verizon's Pole Conduit Licensing Center in Richmond, Virginia since 1998. Verizon VA ensures that it provides non-discriminatory access because its relationships with all parties within the state are governed by the same rates, terms, and conditions. If those terms and conditions were different, however, and included in each CLEC's separate interconnection agreement, it would be much more difficult to ensure that all were being treated fairly. Utilizing a separate agreement thus alleviates Verizon's administrative burden by not requiring it to keep track of different agreements and by not interfering with the current practice in Virginia. By contrast, Cavalier cannot claim to be burdened if the terms and conditions for access to rights of way are set forth in a separate agreement instead of the Interconnection Agreement.

Verizon's proposed language adequately addresses access to poles, ducts, conduits, and rights-of-way by appropriately referencing tariffs or existing licensing agreements between the Parties.

VI. CONCLUSION

For the foregoing reasons, the Commission should order the Parties to adopt Verizon's proposed language on the outstanding arbitration issues and should reject Cavalier's proposed alternate language.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 9th day of September 2002 served a true and correct copy of the foregoing Response of Verizon Virginia Inc. to Cavalier Telephone, LLC's Petition For Arbitration as follows:

BY HAND
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