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VIA ELECTRONIC FILING

Marlene R. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Intercarrier Compensation for ISP-Bound Traffic, CC Docket Nos. 99-68, 96-98
Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92

Dear Ms. Dortch:

On behalf of Pac-West Telecomm, Inc. ("Pac-West"), US LEC Corp ("US LEC"), and RCN Telecom Services, Inc. ("RCN"), I am writing in response to several *ex parte* filings regarding the use of "virtual FX" or "virtual NXX" arrangements.[1] As the Commission is aware, "Virtual FX" and "Virtual NXX" are terms used to describe Foreign Exchange-like arrangements provided by CLECs in which an end user obtains a local telephone number for a local exchange in which the end user has no physical presence. Certain ILECs are arguing that Virtual FX traffic is "interexchange" traffic that is subject to access charges.[2] As Pac-West, US LEC, and RCN show below,[3] this novel argument fails and the Commission should reject the ILECs' attempt to re-write both the Act and the *ISP Remand Order*. Virtual FX traffic to ISPs is subject to the terms of the FCC's interim rate plan, and non-ISP-bound Virtual FX traffic should be compensated as local traffic under Section 251(b)(5).

1 Verizon and BellSouth Sept. 27, 2004 ex parte; CenturyTel Sept. 27, 2004; John Staurulakis, Inc. December 3, 2004 ex parte; BellSouth December 6, 2004 ex parte; Verizon December 16, 2004 ex parte; Verizon January 7, 2005 ex parte.

2 Verizon and BellSouth Sept. 27, 2004 ex parte at 21; CenturyTel Sept. 27, 2004 ex parte at 2.

3 Pac-West, US LEC, and RCN have commented on this issue previously in this docket. *See, e.g.,* US LEC, RCN, Starpower, Focal and Pac-West October 28, 2003 ex parte; Comments of Focal Communications Corporation, Pac-West Telecomm, Inc, RCN Telecom Services, Inc., and US LEC Corp., CC Dkt 01-92 (Aug. 21, 2001), which are incorporated herein by reference.

As a threshold matter, as Verizon acknowledges, the vast majority of Virtual FX traffic is ISP-bound.[4] Thus, any analysis of the appropriate compensation due for the transport and termination of Virtual FX traffic must begin with the analysis of compensation due for the transport and termination of ISP-bound traffic. The small remainder of non-ISP-bound Virtual FX traffic carried by CLECs should be treated the same as ILEC-provided Foreign Exchange, which is subject to reciprocal compensation obligations.[5]

I. The *ISP Remand Order* Includes Virtual FX Traffic to ISPs in the FCC Compensation Regime

In its April 2001 *ISP Remand Order* the Commission asserted exclusive jurisdiction over compensation issues related to ISP-bound traffic.[6] Further, under the doctrine established by *Louisiana PSC v. FCC,*[7] the Commission held that state commissions no longer had jurisdiction to address the issue of intercarrier compensation for ISP-bound traffic.[8] Some ILECs contend that the Commission's *ISP Remand Order* applies only to traffic delivered to ISPs within the same local calling area as the calling party.[9] They are wrong because, as Verizon and BellSouth have admitted,[10] the Commission did not distinguish "local" ISP-bound traffic from "non-local" ISP-bound traffic.[11] In fact, the Commission repudiated its earlier distinction between "local" and "non-local" for all traffic:

4 Verizon December 16, 2004 ex parte at 2.

5 BellSouth asserts in its December 6, 2004, ex parte letter that it has implemented the systems necessary to ensure that reciprocal compensation is not charged for calls to BellSouth's FX customers. While BellSouth may choose when it will provide a transport and termination service for other carriers for free, its conduct with respect to its own FX traffic does not bind other carriers that transport and terminate FX traffic. Further, BellSouth apparently is alone in the industry for separately identifying, tracking, and refusing payment for the transport and termination of FX service.

6 *ISP Remand Order* at ¶ 46.

7 *Louisiana PSC v. FCC,* 476 U.S. 355, 106 S. Ct. 1890 (1986).

8 *ISP Remand Order* at ¶ 82.

9 CenturyTel Nov. 2, 2004 ex parte at 3; Verizon and BellSouth Sept. 27, 2004 ex parte at 20-21; JSI Oct. 27, 2004 ex parte at 10-12.

10 Verizon and BellSouth Sept. 27, 2004 ex parte at 20.

11 The ILECs rely upon statements in the *ISP Remand Order* that refer to ISPs establishing points of presence "in the same local calling area." These statements, however, appear only in the section of the Order discussing the "Background" of the dispute, and the statement is never repeated in the Commission's analysis of the issue. The ILECs place an importance on this description of ISP traffic that the Commission does not appear to share. Further, it may be entirely true that end users "typically" connect with ISP facilities in the same local calling area, but that fact adds little to whether Virtual FX ISP-bound traffic falls outside the federal intercarrier compensation regime. If the Commission had intended to distinguish Virtual FX ISP-bound traffic and exclude it from the federal regime, it would have made that intention explicit. Pac-West, RCN, and US LEC assert, however, that such an assertion would have been inherently contradictory since, as discussed above,

> This analysis differs from our analysis in the *Local Competition Order*, in which we attempted to describe the universe of traffic that falls within subsection [251](b)(5) as all "local" traffic. We also refrain from generally describing traffic as "local" traffic because the term "local," not being a statutorily defined category, is particularly susceptible to varying meanings, and significantly, is not a term used in section 251(b)(5) or section 251(g).[12]

The *ISP Remand Order* makes clear that the new federal regime applies to *all* ISP-bound traffic: "We conclude that this definition of 'information access' was meant to include *all access traffic* that was routed by a LEC 'to or from' providers of information services, of which ISPs are a subset."[13] Nowhere does the *Order* limit its regime to "local" ISP-bound traffic.[14]

This novel approach to the problem is important because it no longer relies on the physical location of a point of termination to determine the appropriate form of intercarrier compensation for a particular call. As the Commission is aware, prior to the *ISP Remand Order*, ILECs and CLECs thoroughly litigated the question whether calls to ISPs "terminate" at the ISP. The Commission first answered that question in the *ISP Declaratory Ruling* by ruling that calls to ISPs did not terminate with the ISP, but continued beyond the ISP to the location of the server hosting the information requested by the ISP customer accessing the ISP's Internet facilities. After the D.C. Circuit vacated and remanded the *ISP Declaratory Ruling*, the Commission abandoned the question of whether calls to ISPs terminated on a local basis, and adopted the approach that the *identity* of the called party as an ISP determined the appropriate intercarrier compensation mechanism: calls to information service providers were classified as information access, outside the scope of section 251(b)(5) by operation of section 251(g). It follows that the identity of the called party also applies in the context of Virtual FX traffic: calls to information service providers do not lose their designation as information access under the *ISP Remand Order* simply because the ISP's modem bank is not located in the same local calling area as the calling party.

Further, the Commission was aware that CLECs were using FX-like arrangements to serve ISPs long before the *ISP Remand Order* was released. Several carriers—both ILEC and

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the *ISP Remand* Order established the identity of the called party, not its location, as the principal factor for determining whether the federal intercarrier compensation regime for ISP-bound traffic is applicable.

Similarly, the ILECs are wrong to assert that the D.C. Circuit took a similar view and maintained that the *ISP Remand Order* was limited to calls to ISPs within the caller's local calling area. The language cited by Verizon and others, see Verizon Jan. 7 ex parte letter at 8, was dicta in the D.C. Circuit's decision. It had no bearing on the holding of the case and should be considered to have no legal effect.

12 *ISP Remand Order* at ¶ 34.

13 *ISP Remand Order* at ¶ 44 (emphasis added).

14 *See* note 20, *supra*.

CLEC—made clear that FX-like service was a key component of CLEC service offerings to ISPs.[15]

Several state commissions have recognized that the *ISP Remand Order* addressed all ISP-bound traffic, including traffic to ISPs using FX-like arrangements. This has been the approach adopted by the great majority of state commissions that have decided the issue. The Public Utilities Commission of Ohio stated, "[t]he Commission agrees . . . that all calls to FX/virtual NXX [numbers] that are also ISP-bound are subject to the inter-carrier compensation regime set forth in the ISP Remand Order."[16] Likewise, the Connecticut Department of Public Utility Control has ruled, also in the context of FX-like traffic to ISPs, "that intercarrier compensation for ISP-bound traffic is within the jurisdiction of the Commission and that on a going forward basis, the Department has been preempted from addressing the issue beyond the effective date of the ISP Order [June 14, 2001]."[17] Similarly, the Public Service Commission of Michigan ruled in a Section 252 arbitration proceeding that, with respect to virtual NXX traffic, the *ISP Remand Order* "takes care of ISP traffic."[18]

State commissions in Alabama, New Hampshire, and Wisconsin also have recognized the Commission's exclusive jurisdiction over intercarrier compensation for ISP-bound traffic to Virtual FX customers.[19] Oregon, Rhode Island, and Washington have also ruled that the federal intercarrier compensation regime applies to ISP-bound traffic using FX arrangements.[20] The

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15 *See* ex parte filings in CC Docket No. 99-68: Letter dated March 28, 2001 from Gary L. Phillips, SBC Telecommunications, Inc., to Dorothy Attwood, Chief, Common Carrier Bureau, Federal Communications Commission, at 3; Letter dated March 7, 2001 from Susanne Guyer, Verizon, to Dorothy Attwood, at 2-3; Letter dated December 13, 2000 from John T. Nakahata, Counsel to Level 3 Communications, to Magalie Roman Salas, Secretary, Federal Communications Commission, at 1.

16 *Allegiance Telecom of Ohio, Inc.'s Petition for Arbitration of Interconnection Rates, Terms, and Conditions, and Related Arrangements with Ameritech Ohio*, Case No. 01-724-TP-ARB, Arbitration Award (PUC Ohio Oct. 4, 2001) at 9. *See also, Petition of Global NAPs, Inc. for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with United Telephone Company of Ohio dba Sprint*, Case Nos. 01-2811-TP-ARB, 01-3096-TP-ARB (PUC Ohio May 9, 2002) (same result).

17 *DPUC Investigation of the Payment of Mutual Compensation for Local Calls Carried Over Foreign Exchange Service Facilities*, Dkt. No. 01-01-29 (Conn. DPUC Jan. 30, 2002) at 41-2.

18 *TDS Metrocom, Inc.*, Case No. U-12952, Opinion and Order (Mich. PSC Sept. 7, 2001).

19 *Investigation as to Whether Certain Calls are Local*, DT 00-223, *Independent Telephone Companies and Competitive Local Exchange Carriers – Local Calling Areas*, DT 00-054, Final Order, Order No. 24,080 (NH PUC Oct. 28, 2002); *Declaratory Ruling Concerning the Usage of Local Interconnection Services for the Provision of Virtual NXX Service*, Docket 28906, Declaratory Order (Ala. PSC Apr. 29, 2004). *Level 3 Communications, LLC Petition for Arbitration Pursuant to 47 U.S.C. Section 252 of Interconnection Rates, Terms and Conditions With CenturyTel of Wisconsin,* Docket 05-MA-130, Order Approving an Interconnection Agreement (WI PSC Feb. 13, 2003) at 8-9.

20 *Investigation into the Use of Virtual NPA/NXX Calling Patterns*, UM 1058, Order (Ore. PUC May 27, 2003), *rehearing denied*, Order (Ore. PUC Sep. 16, 2003); *Review of the Arbitrator's Decision in Global NAPS, Inc.'s Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon Rhode Island*, Docket No. 3437,

Florida Commission also issued a decision regarding intercarrier compensation and Virtual FX issues stating that "due to the Commission's recent *ISP Remand Order*, which removes ISP-bound traffic from state jurisdiction, this issue is limited to intercarrier compensation arrangements for traffic that is delivered to non-ISP customers."[21]

Further, ILECs' contention that the *ISP Remand Order* applies only to so-called "local" ISP-bound traffic contradicts everything they said on the issue of compensation for ISP-bound traffic prior to the *ISP Remand Order.* On innumerable occasions before the Commission, ILECs asserted that reciprocal compensation was not owed for ISP-bound traffic because the call to the ISP did not "terminate" at the ISP, even if the call was answered by the ISP's modem bank located within the same local calling area as the calling party.[22] Because the actual purpose of the call was to reach information on the server beyond the ISP's modem, according to the ILECs, a call to an ISP was an interstate, interexchange call for which reciprocal compensation did not apply.[23]

Now, however, ILECs seem ready to concede that a call to an ISP terminates at the ISP modem bank, <u>but only if the modem bank is located within the same local calling area as the calling party</u>.[24] While Pac-West, US LEC and RCN contend that reciprocal compensation has always been owed for ISP-bound traffic, it is fairly astonishing to see the ILECs now take the position that Pac-West and others advocated prior to the *ISP Remand Order*. Consistency

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Final Arbitration Decision and Order, Order No. 17350, 7 (R.I. PUC Jan. 24, 2003), *aff'd* Order Denying Verizon-Rhode Island's Motion for Reconsideration of the Final Arbitration Decision (May 21, 2003); *Petition for Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC and CenturyTel of Washington, Inc.*, Docket No. UT-023043, Seventh Supplemental Order: Affirming Arbitrator's Report and Decision (Wash. U.T.C. Feb. 27, 2003), at 2-4.

21 *Investigation into appropriate methods to compensate carriers for exchange of traffic subject to Section 251 of the Telecommunications Act of 1996*, Docket No. 000075-TP, Order on Reciprocal Compensation, Phases II and IIA, Order No. PSC-02-1248-FOF-TP (Fla. PSC Sept. 10, 2002), at 26.

22 *See* Verizon Comments, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket 96-98, *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket 99-68, p. 6 (July 21, 200) (arguing that calls to the Internet do not terminate within the local serving area); SBC Comments, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket 96-98, *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket 99-68, pp. 16 17, April 12, 1999 ("*SBC ISP Comments*") (arguing that Internet-bound calls do not terminate at the ISP's node); Qwest Comments, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket 96-98, *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket 99-68, p. 6 (July 21, 2000) ("*Qwest ISP Comments*") (arguing that ISP-Bound traffic is not local even if the call is answered locally at the ISP's modem bank because the ultimate destination of the call is a website and e-mail address that could be located anywhere in the world).

23 *See SBC ISP Comments* at 14, 17 (noting that ISP-bound calls do not terminate at the ISP, but rather at the originating caller's desired Internet website and until CLECs can prove that the call ends at the ISP's node, CLECs are not entitled to reciprocal compensation); *Qwest ISP Comments* at 6, 7 (arguing that the terminating end points of ISP-bound calls are distant web and e-mail servers).

24 CenturyTel Nov. 2, 2004 ex parte at 2; JSI Oct. 27, 2004 ex parte at 10.

matters little to the ILECs when they see another opportunity to try to deny paying CLECs for providing a transport and termination service for calls originated by the ILECs' end users. Regardless of the motivations for the curious reversal by the ILECs, the *ISP Remand Order* is perfectly clear that the federal compensation regime applies to all ISP-bound traffic, including ISP-bound traffic using Virtual FX arrangements.

II. <u>The Act Requires Virtual FX Traffic To Be Compensated As Section 251(b)(5) Traffic</u>

As discussed above, the vast majority of traffic terminated by CLECs using Virtual FX arrangements is ISP-bound traffic. For the sliver of non-ISP-bound traffic terminated by CLECs using Virtual FX arrangements, the Commission should recognize that it is subject to reciprocal compensation, just as ILEC Foreign Exchange traffic is subject to reciprocal compensation.

The Commission has found that, "[o]n its face," Section 251(b)(5) requires "local exchange carriers . . . to establish reciprocal compensation arrangements for the transport and termination of *all* 'telecommunications' they exchange with another telecommunications carrier, without exception."[25] The D.C. Circuit did *not*, on appeal, cast any doubt on the Commission's express finding that Section 251(b)(5) applies, "on its face," to *all* telecommunications traffic, whether local or otherwise. Of course, the Commission went on to find that Section 251(b)(5) *is* "subject to further limitation" – specifically, that certain types of traffic enumerated in Section 251(g) are "carve[d]-out" of Section 251(b)(5).

Section 251(g) preserves pre-1996 Act rules governing interstate and intrastate "exchange access," "information access," and "exchange services for such access." Notably, Section 251(g) does not carve out "interexchange" traffic from Section 251(b)(5) obligations. There are many examples of interexchange traffic that are not subject to access charges. For instance, a CMRS call that crosses exchange boundaries, but is in the same MTA, is subject to reciprocal compensation.[26] Similarly, in the Washington DC metropolitan area, a wireline call from the DC exchange to an exchange in Maryland is "interexchange," but access charges do not apply. The proper question is therefore whether an ILEC provides "exchange access" services during completion of a virtual FX call. As Pac-West US LEC, and RCN show below, the answer to that question is a resounding "no."

Virtual FX traffic must be compensated as Section 251(b)(5) traffic under current federal law for four reasons. First, virtual FX traffic does not qualify under the Act's definition of exchange access. The Act defines "exchange access" as "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll

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25 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, Order on Remand and Report and Order, 16 FCC Rcd 9151, 9165-66 (¶ 31) (2001) ("*ISP Remand Order*"), *remanded*, *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *cert. den.* 538 U.S. 1012 (2003) (emphasis in original).

26 47 C.F.R. § 51.701(b)(2).

services."[27] "Telephone toll service" is defined as "telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service."[28] The phrase "telephone service between stations in different exchange areas" encompasses the standard industry practice of rating a call based on NPA-NXX codes. "Stations" is not defined, but it is reasonable to conclude that stations is analogous to telephone numbers. Indeed, in the *Starpower Damages Order*, the Commission rejected the argument that station means physical location.[29] Therefore, a call between customers whose telephone numbers are associated with the same local calling area is between two stations in the same exchange area, and it is not telephone toll service.[30]

Second, as the ILECs admit,[31] when the calling party calls a FX or virtual FX number, that calling party is not billed for making a toll call. Therefore, there is no "separate charge not included in contracts with subscribers for exchange service," and calls to FX or virtual FX numbers cannot satisfy the definition of exchange access.

Third, the exchange access traffic described in Section 251(g) is limited to traffic exchange obligations that existed as of February 8, 1996. By Verizon's own admission, virtual FX traffic did not exist prior to the 1996 Act.[32] Therefore, it cannot qualify under the Commission's Section 251(g) limitation, as further limited by the D.C. Circuit. As the D.C. Circuit explained, Section 251(g) permits only "continued enforcement" of pre-1996 Act requirements. It does not grant the Commission independent authority to adopt new intercarrier compensation rules that are inconsistent with Section 251(b)(5).[33]

Fourth, the end-to-end test is not relevant to determining intercarrier compensation.[34] In general, where possible, Commission decisions require that the jurisdiction of traffic, *i.e.*, whether it is "interstate" or "intrastate," be determined by the origination and termination points of the call.[35] However, "interstate" or "intrastate" jurisdiction is not relevant to determining whether traffic is "exchange access," "information access" or "exchange services for such

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27 47 U.S.C. §153(16).

28 47 U.S.C. §153(48).

29 *Starpower Communications, LLC v. Verizon South, Inc.*, File No. EB-00-MD-19, FCC 03-278, Memorandum Opinion and Order, ¶ 15 (rel. Nov. 7, 2003) ("*Starpower Damages Order*").

30 Verizon and BellSouth claim that the Commission has already determined that interLATA FX is a toll service subject to access charges, but they do not cite any case to support their claim. Verizon and BellSouth Sept. 27, 2004 ex parte at 23.

31 Verizon and BellSouth Sept. 27, 2004 ex parte at 21.

32 Petition of US LEC of Maryland Inc. for Arbitration with Verizon-Maryland Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996, Case No. 8922. Verizon Brief at 46, Verizon Reply Memorandum on Appeal at 4 (MD PSC), available at http://webapp.psc.state.md.us/Intranet/Casenum/CaseForm.cfm.

33 47 U.S.C. § 251(g).

34 See CenturyTel Sept. 27, 2004 ex parte at 2.

35 *See, e.g.*, *NARUC v. FCC*, 746 F.2d 1492, 1499 (D.C. Cir. 1984).

access." For example, when the Commission relied on the traditional end-to-end jurisdictional analysis to conclude that ISP-bound traffic is not "local," the D.C. Circuit reversed and remanded that decision on the ground that the Commission had failed to explain why the end-to-end jurisdictional analysis was relevant to determining which intercarrier compensation mechanism (access or non-access) would apply.[36]

In short, the *ISP Remand Order* reconciled Sections 251(b)(5) and 251(g) in a straightforward manner: Traffic that does *not* fall within Section 251(g) is governed by Section 251(b)(5).[37] Because virtual FX traffic does not qualify as exchange access, and because there was no pre-1996 Act rule governing intercarrier compensation between LECs for the exchange of virtual FX traffic, the exchange of such traffic between CLECs and ILECs must be governed by the reciprocal compensation provisions of the Act and the Commission's rules.

III. Applying Reciprocal Compensation to Virtual FX Traffic Is Consistent with Industry Practice

The Commission should reject ILECs' proposal to impose originating access charges on virtual FX traffic for a number of reasons. First, the Commission should rule that reciprocal compensation is applicable to virtual FX traffic because, as far as the person calling such a virtual FX service number is concerned, the call is indistinguishable from any other local call. Second, from an ILEC's billing system's perspective, calls to virtual FX customers are indistinguishable from other local calls.[38] Third, a virtual FX call is handled and routed the same as any other local call. Fourth, ILECs have billed and collected reciprocal compensation from CLECs for calls from CLEC customers to ILECs' FX and FX-like customers. Indeed, since switching and billing systems cannot distinguish between calls to a "virtual NXX" and calls to a "physical NXX," rating codes have traditionally been used for intercarrier compensation purposes.[39]

Pac-West, US LEC, and RCN propose to maintain the industry standard practice of rating calls based on a comparison of the NPA-NXX numbers of the calling and called parties. After calls are identified in this manner, the appropriate compensation rate should be applied in accordance with Section 251(b)(5) or Section 251(g). Pac-West, US LEC, and RCN propose that Section 251(b)(5) reciprocal compensation should apply to all non-ISP-bound calls that are rated and billed as local to the calling party, regardless of the physical location of the ultimate called party. The decades-old custom and practice in the industry of routing and rating a call is based on the originating and terminating NPA/NXXs, and basing intercarrier compensation on those same factors should continue.

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[36] *Bell Atlantic v. FCC*, 206 F.3d 1, 5 (D.C Cir. 2000).

[37] *See ISP Remand Order* at ¶ 39.

[38] *See FCC Arbitration Order* at para. 300.

[39] BellSouth maintains in its December 6, 2004, ex parte letter that it has taken the steps necessary to make sure it does not bill other carriers reciprocal compensation for traffic to BellSouth's Foreign Exchange customers. BellSouth does not allege, however, that it is able to distinguish calls to customers of other carriers that are using Foreign Exchange arrangements.

The standard industry practice has been for ILECs to determine whether traffic is access or non-access, and then to apply the appropriate (*i.e.* interstate or intrastate) compensation rate according to the NXX codes of the calling and called parties. If the call is between two NXX codes assigned to the same local calling area, it is rated as "local" (*i.e.* non-access). The ILEC does not route the call to the customer's presubscribed toll carrier and does not bill access charges to the interconnecting carrier. ILECs, however, would have this Commission ignore industry practice and have a different definition of "local" call applied to virtual FX traffic.

The ILECs propose to change the historical rating and routing of calls based on NXX codes and ask the Commission to treat calls to virtual FX customers as toll calls, but *only* for the purpose of determining how CLECs and ILECs will compensate each other for transporting and terminating these calls. The ILECs do *not* propose to start billing its customers toll charges for these calls.[40] Under this unreasonable proposal, the CLEC would pay the ILEC an originating access charge, but since the ILEC does not bill its own customer (after all, to ILEC's customer, the call is local), the CLEC would not be paid any terminating access. This is hardly an equitable arrangement and it is one that the Commission should refuse to adopt.

The inequity of the ILECs' proposal is further complicated by the simple fact that, unlike the requirement in the Act that reciprocal compensation charges must be cost-based, originating and terminating access charges have no such statutory limitation and, as a result, are priced significantly above cost. There is plainly no sustainable basis to require CLECs to pay ILECs above-cost access charges, and to deny compensation to CLECs, when the ILEC incurs no additional costs to justify receipt of access charges, and the CLEC provides the same termination functions whether a customer's presence in a particular calling area is virtual or physical.

The Commission's Wireline Bureau has rejected similar efforts to change this standard industry practice. In the *FCC Arbitration Order*, the ILEC position was summarized as follows:

> Verizon objects to the petitioners' call rating regime because it allows them to provide a virtual foreign exchange ("virtual FX") service that obligates Verizon to pay reciprocal compensation, while denying it access revenues, for calls that go between Verizon's legacy rate centers. This virtual FX service also denies Verizon the toll revenues that it would have received if it had transported these calls entirely on its own network as intra-LATA toll traffic. Verizon argues simply that "toll" rating should be accomplished by comparing the geographical locations of the starting and ending points of a call.[41]

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[40] Verizon and BellSouth Sept. 27, 2004 ex parte at 21.

[41] *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc., and for Expedited Arbitration*, CC Docket No. 00-218, Memorandum Opinion and Order, ¶ 286 (Wireline Comp. Bureau, rel. July 17, 2002) ("*FCC Arbitration Order*").

Considering all the arguments made by the parties, the Wireline Bureau rejected Verizon's effort to change the way carriers compensate each other for exchanging FX traffic. The Wireline Bureau stated its conclusion as follows:

> ***We therefore accept the petitioners' proposed language and reject Verizon's language that would rate calls according to their geographical end points.*** Verizon concedes that NPA-NXX rating is the established compensation mechanism not only for itself, but industry-wide.[42] (emphasis added).

The Commission should maintain the standard industry practice by rating access and non-access traffic by comparing the NPA-NXXs of the calling and called parties.

IV. Imposing Access Charges Only on CLEC Virtual FX Service Would Be Discriminatory in Violation of Federal Law and Give ILECs, and Their Affiliated ISPs, a Competitive Advantage

The Commission may not impose access charges on virtual FX services provided by CLECs without imposing access charges on all FX services provided by ILECs.[43] Any other result would discriminate against CLECs in the provision of like services, regardless of whether the CLEC network is designed differently from the legacy network built by ILECs over a hundred years. Such discrimination would violate federal law.[44]

The New York Public Service Commission summarized this well in considering the same kind of disputes between independent LECs and CLECs with respect to ISP-bound FX-like calls. Specifically, the New York Commission found that FX service should not be defined by "call competition technology," but rather FX service should be defined "operationally, i.e., making local service possible in an exchange where the customer has no physical presence."[45] The New York commission further noted that an operational focus was more appropriate than a technological focus because "the architecture of new entrant network will differ from that of incumbents . . . CLECs need not replicate the incumbent's service offerings, rate centers, or customer remix."[46] Permitting ILECs to impose originating access charges on calls to CLEC virtual FX customers, while at the same time requiring CLECs to pay reciprocal compensation on calls to ILEC FX customers, would be anticompetitive. Adopting the ILEC position would

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42 *Id.* at ¶ 301.

43 Although it is not clearly stated, the ILECs' ex partes imply that access charges would apply to CLEC virtual FX traffic only, not ILEC FX traffic.

44 47 U.S.C.§ 202.

45 *Proceeding on Motion of the Commission Pursuant to Section 92(2) of the Public Service Law to Institute an Omnibus Proceeding to Investigate the Interconnection Arrangements between Telephone Companies,* Case 00-C-0789, Order Denying Petitions for Rehearing, Clarifying NXX Order, and Authorizing Permanent Rates, 4 (NY PSC Sept. 7, 2001) ("*September 2001 New York Order*").

46 *Id.*

give ILECs a huge competitive advantage in the market for the provision of FX-like services. The Commission should not adopt such a policy, as it would run afoul of the nondiscrimination and market-opening requirements of the Act.

Even if the ILECs' proposal were applied equally to FX and virtual FX services, it would still give ILECs a competitive advantage in the provision of service to FX-like customers. When both the calling party and the called party (using an FX-like service) are ILEC customers, the ILEC follows the "local model" which assumes that the ILEC recovers the costs of originating that traffic from its end user over the ILEC network to the called party through the ILEC's local service rates. But if that same customer switches its FX-like service to a CLEC, and that same ILEC end user wants to dial that customer, the ILECs propose to follow the "access model" and charge the CLEC per minute of use rates for the ILEC's origination costs. By imposing costs on the CLEC that the ILEC does not impose on the ILEC's customers, the ILEC gains a competitive advantage in providing local services.

In sum, adopting the ILECs' proposal would not only violate statutory nondiscrimination requirements, it would also violate the pro-competitive and market-opening policies of the 1996 Act. The Commission should adopt Pac-West's, RCN's, and US LEC's position, which furthers important policy goals, and should not sanction such anticompetitive conduct by ILECs.

V. <u>ILECs' Complaints About Transport Costs Are Not Unique to Virtual FX</u>

When the FX customer switches its service to a CLEC, the ILECs also complain about the additional facilities they have to deploy to transport traffic to the POI where it is exchanged with the CLEC.[47] As Pac-West, US LEC and others have pointed out, this is really a complaint about an ILEC's obligation to deliver its originating traffic to a POI, not about virtual FX. As such, this is a red herring that should not impact compensation for virtual FX traffic. Rather, any ILEC complaints about the cost of originating transport, for both physical and virtual NXX customers, should be decided in the context of the Commission's review of its single POI per LATA and originating transport rules.

Contrary to ILEC claims, the interoffice facilities ILECs must establish under the 1996 Act are not "toll facilities" for which they are entitled to access compensation.[48] Rather, these interoffice facilities are fundamental to opening local markets to competition. In *TSR Wireless*, the Commission explained that these interoffice facilities used to transport an ILEC's originating traffic to the POI with a CLEC are the financial responsibility of the ILEC.[49] The ILEC recovers the cost of these facilities through the rates it charges its own customers. The need for the facilities is driven by the policy of opening local markets to competition. These interoffice facilities will still be necessary <u>even if the CLEC's customer establishes a physical presence in</u>

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47 CenturyTel Sept. 27, 2004 ex parte at 1.

48 *Id.*

49 *TSR Wireless, LLC et al. v. U S West Communications, Inc., et al.*, File Nos. E-98-13, E-98-15, E-98-16, E-98-17, E-98-18, Memorandum Opinion and Order (rel. Jun. 21, 2000) ("*TSR Wireless*"), *aff'd, Qwest Corp. et al. v. FCC et al*, 252 F.3d 462 (D.C. Cir. 2001).

the local calling area. There are only two ways in which ILECs can avoid their obligation to establish and pay for these interoffice facilities: (1) negotiate a POI in the local calling area; or (2) compete for and win the FX customer's business.

VI. **Conclusion**

For the reasons stated herein, the Commission should affirm that all ISP-bound traffic, including ISP-bound traffic using Virtual FX arrangements, is subject to the intercarrier compensation established in the *ISP Remand Order*. Non-ISP-bound traffic using Virtual FX arrangements should be rated for purposes of intercarrier compensation by comparing the NPA-NXXs of the calling and called parties. Because imposing access charges on virtual NXX traffic would be discriminatory, anti-competitive, inconsistent with an ILEC's obligation to open its local markets to competition, and inconsistent with economic cost causation principles, the Commission should reject out-of-hand the ILECs' attempt to charge the status quo. The Commission should affirm that virtual FX traffic to ISPs is subject to the terms of the *ISP Remand Order.*

Sincerely,

/s/

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Michael W. Fleming

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