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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.

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 "R. Evans".

cc: Carol Matthey
Anthony Dale