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PUBLIC SERVICE COMMISSION

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September 12, 2008

VIA HAND DELIVERY
Hon. Stephanie Stumbo
Executive Director
Public Service Commission
211 Sower Blvd.
Frankfort, KY 40601

Re: ***In the Matter of: An Investigation in the Traffic Dispute Between Windstream Kentucky East, LLC, Brandenburg Telephone Company and MCIMetro Access Transmission Services, LLC d/b/a Verizon Access,***
Case No. 2008-00203

Dear Ms. Stumbo:

Enclosed for filing in the above-referenced case, please find one original and eleven (11) copies of the brief filed on behalf of Brandenburg Telephone Company in the above-referenced case. Please file-stamp one copy, and return it to our courier.

Thank you, and if you have any questions, please call me.

Sincerely,

Edward T. Depp

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Enclosures
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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

AN INVESTIGATION IN THE TRAFFIC DISPUTE BETWEEN WINDSTREAM KENTUCKY EAST, LLC, BRANDENBURG TELEPHONE COMPANY AND MCIMETRO ACCESS TRANSMISSION SERVICES, LLC D/B/A VERIZON ACCESS	))))))	**Case No. 2008-00203**

BRANDENBURG TELEPHONE COMPANY'S POST-HEARING BRIEF

Brandenburg Telephone Company ("Brandenburg"), by counsel, hereby submits its post-hearing brief in support of an order: (i) dismissing the damages claim of Windstream Kentucky East, LLC ("Windstream"); and (ii) requiring MCImetro Access Transmission Services LLC, d/b/a Verizon Access ("MCImetro") to immediately pı ıt of interface on Brandenburg's incumbent network a ıose facilities on a bill-and-keep basis.

I. Statement of Facts.

The Commission initiated this case to ac ıong Windstream, MCImetro, and Brandenburg. An ment arose in response to Windstream's unilateral dec ıming flow of traffic from Brandenburg to MCImetro.

For half a century or more, Brandenburg has exchanged extended area service ("EAS") traffic with Windstream and its predecessors-in-interest. (Test. of A. Willoughby, Transcript of Aug. 19, 2008 Hearing at 166:13-14.) This traffic has always been exchanged on a bill-and-keep basis; that is, neither party has paid the other for terminating its EAS traffic. (Direct Test. of A.

Willoughby at 10:16-18.) On November 14, 2005, MCImetro executed an interconnection agreement with Windstream, and it ultimately entered Windstream's Elizabethtown territory, where it began providing service to dial-up internet service providers ("ISPs") like America Online ("AOL"). (*See* Ex. 1 to Direct Test. of A. Willoughby at p. 4, para. 11 and p. 10, para. 51.) In order to provide that service to its ISP customers, MCImetro ported the ISP's existing telephone numbers (which were "contained" in Windstream's switch) and began providing service through its own switch located in Louisville. (*See* Direct Test. of D. Price at 3-4:55-83.)

Thus, when a Windstream customer dialed AOL, Windstream would deliver the call to MCImetro at a point of interface on Windstream's network, whereupon MCImetro would transport the call back to Louisville, for switching to modem banks located outside of Kentucky. (*See supra.*) So, even though the call was dialed on a non-toll basis, MCImetro actually delivered the call to a location well away from the geographic location associated with the telephone number dialed. (*See supra.*) When MCImetro ported those numbers, however, it undertook no effort to determine whether and how its actions might affect Kentucky residents that – although not served by Windstream – could also call the MCImetro telephone numbers on a local basis. (*See supra*; *see also* Test. of D. Price, Transcript of Aug. 19, 2008 Hearing at 131:13-25, 132:1-10.)

Brandenburg has EAS calling to Elizabethtown. (*See supra.*) So, when MCImetro ported its ISP numbers away from Windstream and into its Louisville switch, it unwittingly "pulled the rug out from under" Brandenburg's ability to deliver traffic to those numbers because Brandenburg had (and still has) no facilities connected to MCImetro's Louisville switch. (*See supra*; *see also* Direct Test. of A. Willoughby at 4:14-17 ("MCImetro had not established trunking facilities or a traffic exchange agreement with Brandenburg").) Brandenburg's customers were the first to notice this problem when their calls could not be completed as dialed. (*See id.* at 4:8-9.) So, Brandenburg researched

the issue, determined that the calls were destined for MCImetro and – rather than simply block the traffic – it utilized the only reasonable interim means of completing the call: routing the traffic across the Windstream EAS trunk groups so that Windstream (who had an interconnection agreement with MCImetro) could deliver the traffic on to MCImetro. (*See id.* at 4:8-17.)

Meanwhile, Brandenburg set about negotiating a traffic exchange agreement with MCImetro to resolve this issue. (*See id.* at 4:18-19.) Windstream became aware of how its network was being used to deliver this traffic to MCImetro on an interim basis, and it agreed to continue in its role as intermediary for the traffic in question. (*See id.* at 5:1-17 ("Windstream repeatedly indicated that it would continue to transit queried calls from Brandenburg to the appropriate third-party").)

In light of MCImetro's ongoing refusal to sign an appropriate traffic exchange agreement with Brandenburg, negotiations between Brandenburg and MCImetro intensified in late-May of 2008. (*See id.* at 6-7:12-22, 1-7.) The central topic of dispute concerned MCImetro's then-unexplained refusal to sign a traffic exchange agreement that was to be identical in substance to another agreement MCImetro had signed with a different Kentucky RLEC, South Central Rural Telephone Cooperative Corporation, Inc. ("SCRTC"). (*See id.*) Although MCImetro had agreed to do so with SCRTC, it was now refusing to: (i) provision facilities to a point of interface on the RLEC's network; and (ii) agree to a bill-and-keep arrangement for the exchange of the essentially non-local, dial-up ISP traffic at issue. (*See id.*) (Since the hearing, MCImetro now claims that its execution of the SCRTC traffic exchange agreement was a "mistake." (MCImetro Response to Brandenburg Hearing Data Request No. 1.) Given the state of the negotiations, Brandenburg began drafting a complaint for filing with the Commission. That complaint forms the basis of Case No. 2008-00238.

While Brandenburg was finalizing its complaint, Windstream took matters into its own hands and unilaterally blocked the longstanding Brandenburg-to-MCImetro traffic arrangement. (*See* Direct Test. of A. Willoughby at 7:3-7.) Windstream provided no advance notice of this intention. (*See id.*) Instead, the traffic simply stopped flowing. (*See id.*) Commission staff convened an emergency teleconference to discuss the matter with the parties, and after much resistance, Windstream ultimately decided to voluntarily cease its activity and return the status quo by once again delivering the traffic to MCImetro as it had been doing so long before. (*See* Order of July 1, 2008 in this matter at 2.)

While Brandenburg most certainly does not condone Windstream's decision to unilaterally (and without advance notice) block the traffic in question, it is not without sympathy to Windstream's plight in this matter. And while Windstream is not entitled to recover the untariffed damages it seeks from Brandenburg (although it may have some recourse against MCImetro), the real problem here lies with MCImetro. MCImetro currently receives approximately three million minutes of traffic monthly from Brandenburg. (*See supra.*) That is the equivalent to the volume of traffic carried by 28 DS-1's, (*see* Direct Test. of K. Smith at 8:5), and the current volume represents a decrease from its historical average volume of traffic. (*See* MCImetro Response to Brandenburg Initial Data Request No. 14 (showing traffic volumes as high as thirty million minutes per month).) Yet, to this date, MCimetro continues its refusal to abide by the fundamental obligation to exchange traffic with Brandenburg by provisioning dedicated trunking facilities to a point of interface on Brandenburg's network. If the Commission were to order MCImetro to immediately abide by that fundamental obligation, the operational emergency would be resolved, Windstream would be removed from its intermediary position, and it would then be free to pursue damages against MCImetro in the judicial forum that is appropriate for such relief.

II. Argument and Analysis.

This dispute can and should be resolved with a simple, two-part order. First, the Commission should dismiss Windstream's damages claims against Brandenburg, as damage claims are within the constitutional province of the Commonwealth's courts, and the Commission has no jurisdiction over that aspect of this dispute. Second, the Commission should order MCImetro to (at MCImetro's own expense) immediately provision dedicated facilities to a point of interface on Brandenburg's incumbent network and begin exchanging traffic with Brandenburg over those facilities on a bill-and-keep basis.

A. The Commission Should Dismiss Windstream's Claim for Damages.

Windstream's claim for damages should be dismissed for lack of jurisdiction, pursuant to KRS 278.260 and the rule against retroactive ratemaking.

Pursuant to KRS 278.260, the Public Service Commission (the "Commission") has "original jurisdiction over complaints as to rates or service of any utility." KRS 278.260(1). Services are "any practice or requirement in any way relating to the service of any utility, [such as] the quality [or] quantity of any commodity or product used or to be used for or in connection with the business of any utility." KRS 278.010(13). Rates are "any individual or joint . . . compensation for service rendered or to be rendered by any utility, and any rule, regulation, practice, act, requirement, or privilege in any way relating to such . . . compensation." KRS 278.010(12). Actions for damages, such as the case in question, do not meet this rate/service jurisdiction requirement and are therefore outside the Commission's jurisdiction. *See Carr v. Cincinnati Bell, Inc.*, 651 S.W.2d 126 (Ky. 1983).

In *Carr v. Cincinnati Bell, Inc.*, Kentucky's highest court held that the Commission has not been delegated the power to adjudicate damages claims, and that the Commission is not "empowered

or equipped to handle such claims consistent with constitutional requirement." *Id.* at 128 (citing Ky. Const. § 14). The Commission has repeatedly relied on *Carr* and Section 14 of the Kentucky Constitution (regarding the "[r]ight of judicial remedy for injury") to dismiss damages claims for lack of jurisdiction. *See, e.g., Strother v. AT&T Communications of the South Central States, Inc.*, Case No. 2007-00415, 2008 Ky. PUC LEXIS 263, at *5-6 (Ky. PSC, Feb. 28, 2008); *Stauffer v. Brandenburg Tel. Co.*, Case No. 2007-00399, 2007 Ky. PUC LEXIS 931, at *4-5 (Ky. PSC, Nov. 21, 2007); *Callihan v. Grayson Rural Elec. Coop. Corp.*, Case No. 2005-00280, 2005 Ky. PUC LEXIS 663, at *5-6 (Ky. PSC, Aug. 1, 2005); *Yarbrough v. Kentucky Utils. Co.*, Case No. 2004-00189, 2005 Ky. PUC LEXIS 609, at *5-6 (Ky. PSC, July 13, 2005). As the Commission wrote earlier this year:

> The Commission is . . . without jurisdiction to award compensatory and punitive damages. Pursuant to KRS 278.040, the Commission has jurisdiction of only the 'rates' and 'services' of utilities . . . Complainant's request for compensatory and punitive damages falls under neither category."

Strother v. AT&T Communications of the South Central States, Inc., 2008 Ky. PUC LEXIS 263, at *5-6 (Ky. PSC, Feb. 28, 2008).

Windstream's counsel has acknowledged that "the question of damages raises a jurisdictional issue," and so has attempted to avoid the unconstitutional nature of this claim by characterizing the requested remedy as "compensation based upon a proxy rate of a tariff that would have been in place, should have been in place. . ." (Objection of Mr. Clark, Transcript of August 19, 2008 Hearing at 11:4-10.) Put more directly, Windstream attempts to reframe its requested remedy as a "rate" subject to the Commission's jurisdiction under § 278.260.

Despite these attempts, it is clear the remedy requested is one of damages (including punitive damages and attorneys fees). Even in his clarification, Windstream's counsel characterizes the

remedy as "compensation." *See id.* Windstream Staff Manager Kerry Smith also uses variations on the word "compensate" eighteen separate times in his rebuttal testimony. (*See* Rebuttal Test. of K. Smith.) Mr. Smith further states that his attorneys have repeatedly questioned this Commission's jurisdiction because the action was "tantamount to a trespass or encroachment [action] rather than a provision of service." *Id.* at 11:15-16. Similarly, Mr. Smith states that compensation should be awarded "based on the benefits Verizon has derived from the use of Windstream's network." *Id.* at 11:23, 12:1.

The nature of the requested relief, as well as Windstream's consistent characterization of this relief as "compensation" based on benefits received, establish that Windstream is asking for damages in this case. Therefore, this Commission is without jurisdiction to award the requested relief under *Carr* and Section 14 of the Kentucky Constitution. *See Carr v. Cincinnati Bell, Inc.*, 651 S.W.2d 126 (Ky. 1983); *see also* Ky. Const. § 14.

Even if the money demanded by Windstream is determined to be a "rate," as defined in § 278.010 (12), the remedy requested is beyond the Commission's power to grant. The Commission has acknowledged the rule against retroactive ratemaking as "a generally accepted principle of public utility law." *Kentucky v. Atmos Energy Corp.*, Case No. 2005-00057, 2007 Ky. PUC LEXIS 109 at *4 (Order of Feb. 9, 2007). This rule stresses the prospective nature of the Commission's ratemaking power and prohibits the Commission from retroactively altering rates. *See id.*

As Windstream's semantic acrobatics suggest, requests for retroactive rate changes are, in effect, requests for damages. The rule against retroactive ratemaking prevents parties from dodging KRS 278.260's rate/service jurisdiction requirement by merely reframing their damages requests. In its attempt to dodge the jurisdictional ban on damages actions, Windstream explicitly stated it was seeking "recovery of compensation based upon a proxy rate of tariff that would have been in place,

should have been in place" at the time traffic was routed through Windstream's network. (Objection of Mr. Clark, Transcript of August 19, 2008 Hearing at 11:6-9.) Put more concisely, Windstream acknowledges its request that the Commission to establish a "rate" that "should have been in place" and apply it retroactively. A more straightforward request for retroactive ratemaking can hardly be *imagined*.

Therefore, if the Commission characterizes Windstream's requested remedy as damages, as it should, *this action is barred KRS 278.260's rate/service jurisdictional requirement.* If the Commission instead embraces the only other option and characterizes Windstream's requested remedy as a rate, this action is barred by the rule against retroactive ratemaking. Therefore, *this* action should be dismissed for lack of jurisdiction.[1]

B. MCImetro Should Immediately Establish Dedicated Trunking Facilities to a Point of Interface Located on Brandenburg's Incumbent Network and Exchange Traffic with Brandenburg on a Bill-and-Keep Basis.

Having dismissed Windstream's damages claim, the Commission is left to decide the operational issue of how Brandenburg and MCImetro should exchange traffic. As previously noted, KRS 278.260 grants the Commission "original jurisdiction over complaints as to rates or service of any utility." *Id.* Services are "any practice or requirement in any way relating to the service of any utility, [such as] the quality [or] quantity of any commodity or product used or to be used for or in connection with the business of any utility." KRS 278.010(13). The Commission's powers enable it

[1] Even if Windstream were to sue Brandenburg in court for the damages it seeks here, its claims would fail. As more fully discussed in subsection II.B. of this brief, a CLEC (MCImetro) is responsible for paying all costs incurred outside of an RLEC's (Brandenburg's) network. Likewise, if the Commission were inclined to misapply Windstream's existing transit tariff to Brandenburg, that approach would also fail because it would directly contravene this same basic principle that the CLEC is responsible for costs outside of the RLEC's network.

to ensure that every utility operating in this Commonwealth provides "adequate, efficient and reasonable service." KRS 278.030(2).

There is no dispute that the means by which Brandenburg and MCImetro exchange traffic constitute "services" within the scope of the Commission's jurisdiction. Indeed, the remaining issues in this matter relate directly to MCImetro's unreasonable practice of refusing to establish dedicated trunking facilities to receive dial-up traffic from the end-users of MCImetro's ISP customers like AOL. The Commission possesses the statutory power to address these purely service-related issues, and in the interest of ensuring that this traffic is not once again interrupted, it should order MCImetro to: (i) immediately provision dedicated trunking facilities to a point of interface located on Brandenburg's incumbent network; and (ii) exchange the traffic in question on a bill-and-keep basis.

1. MCImetro Should Provision Dedicated Trunking Facilities to a Point of Interface on Brandenburg's Incumbent Network.

The threshold issue in this matter asks whether MCImetro should be required to establish dedicated trunking facilities for the purpose of exchanging traffic with Brandenburg. The Commission has addressed this same issue in other proceedings, and the answer is clear: MCImetro should immediately establish dedicated trunking facilities to a point of interface located on Brandenburg's incumbent network.

The Commission has previously ruled that it is appropriate for a carrier to establish dedicated facilities for the exchange of traffic once the volume of traffic being exchanged exceeds a DS-1 volume of traffic. *See In the Matter of: Petition of Ballard Rural Telephone Cooperative Corporation, Inc. for Arbitration of Certain Terms and Condtions of Proposed Interconnection Agreement with American Cellular f/k/a ACC Kentucky License LLC, Pursuant to the Communications Act of 1934, as Amended by the Telecommunications Act of 1996*, Kentucky Public

Service Commission Case No. 2006-00215, 2007 Ky. PUC LEXIS 191, *17 (Order of March 19, 2007) (hereinafter *CMRS-RLEC Arbitrations*) ("a DS-1 would be an appropriate traffic level before dedicated facilities would be required"). A monthly volume of 300,000 minutes of use per month satisfies this DS-1 threshold. *Id.* (Order of November 9, 2007 at *16.) Even MCImetro recognizes that "direct connections [are] usually used when traffic volumes are very high...." (Test. of D. Price, Transcript of Aug. 19, 2008 Hearing at 160:1-4 ("I generally agree with that").)

The traffic at issue in this matter far exceeds this threshold. Here, MCImetro admits that it has typically received more than two million minutes of traffic from Brandenburg on a monthly basis. (*See* MCImetro Response to Brandenburg Initial Data Request No. 14; *see also* Direct Test. of A. Willoughby at 6:12-14 ("Then, in early 2008, Windstream informed Brandenburg ... that MCImetro was terminating more than three million minutes of traffic per month to its ISP customers"); *see also* Direct Test. of K. Smith at 8:1-7 (testifying that Brandenburg and MCImetro are currently exchanging approximately three million minutes of traffic monthly, the equivalent of twenty-eight DS-1's). The undisputed testimony also reflects that the establishment of dedicated traffic exchange facilities would resolve all prospective issues in this dispute. (*See* Direct Test. of A. Willoughby at 8:6-10 ("[I]t would solve any prospective issues Windstream has expressed with respect to its existing role in the delivery of this traffic. That is, Windstream would no longer be performing any action with respect to this traffic"); *see also* Rebuttal Test. of K. Smith at 4:15-17 ("I agree that the high volumes of traffic between Brandenburg and [MCImetro] support direct interconnection as the ultimate, appropriate course of action....").) Yet, although this course of action is acknowledged as both appropriate and ameliorative to Windstream's role in the dispute, MCImetro still refuses to provision dedicated trunking facilities to receive this traffic.

MCImetro's intransigence apparently stems from the mistaken belief that it has no obligation to provision facilities or "ferret out" the traffic exchange agreements it might need to receive non-toll calls in Elizabethtown. MCImetro claims that "it is disingenuous for Ms. Willoughby to suggest that MCI's decision to provide certain services in Elizabethtown imposed on MCI any obligations to carriers such as Brandenburg." (Direct Test. of D. Price at 3:55-57.) It also claims that because "100 percent of the disputed traffic involves calls originated by Brandenburg's end user customers[,]" *MCImetro's refusal to establish dedicated facilities to a point on Brandenburg's* network is somehow "completely appropriate under the circumstances." (*Id.* at 3:58-61.) According to MCImetro, "Brandenburg bears certain obligations to route calls originated by its end user customers so they can be completed." (*Id.* at 6:136-37; 7:138.)

> Mr. Price: Brandenburg Telephone Company is the entity whose customers are placing 100 percent of the calls that are at issue here These are not [MCImetro]'s customers that are placing calls. These are Brandenburg's customers, and they are using the same dialing plan that they've used for years. Now, as I said earlier, I believe in a response to a question from Mr. Pinney, when we negotiated our agreement with Windstream, we did so for purposes of establishing a presence in Elizabethtown for purposes offering services in Elizabethtown. I don't believe that it was incumbent on us in any way, shape, or form to try to ferret out every agreement that existed between Windstream and all of the other carriers in the area and what they did, and how they did it, and what the compensation was for that. That's not our business, and we don't offer any services in Brandenburg territory. So, you're ascribing this, you know, freeloading kind of characterization on something that's just not true.
>
> Mr. Selent: [MCImetro] gets paid for the delivery of this ISP-bound traffic to AOL, for example, doesn't it?
>
> Mr. Price: It does; yes.

(Test. of D. Price, Transcript of Aug. 19, 2008 Hearing at 131:13-25, 132:1-10.)

But, MCImetro completely misunderstands the law. While MCImetro is technically correct that "Brandenburg bears certain obligations," those obligations do not extend nearly as far as Mr. Price claims. As telecommunications carriers under the Communications Act of 1934, as Amended by the Telecommunications Act of 1996 (the "Act"), both MCImetro and Brandenburg are obligated "to interconnect directly or indirectly with the facilities and equipment" of each other. 47 U.S.C. 251(a)(1). As an ILEC, however, Brandenburg's obligations do have some important limitations that are inapplicable to CLEC's like MCImetro.

Specifically, "[t]he Act is careful to explain that an ILEC's obligation to interconnect ... extends only to a 'point within the carrier's network.'" *CMRS-RLEC Arbitrations* at *9-10 (Order of March 19, 2007). And while the Commission has encouraged carriers to interconnect their facilities in an efficient manner, it has also "recognize[d] that an RLEC, as an ILEC, cannot be required to establish interconnection points beyond its network." *Id.* at *24. Thus, while Brandenburg "bears certain obligations," those obligations are to connect with MCImetro at a "point within [Brandenburg's] network." *Id.* Thus, Brandenburg is <u>not</u> required to provision facilities to MCImetro in Elizabethtown or Louisville as has sometimes been suggested.

The Commission does not stand alone in having reached this result in the *CMRS-RLEC Arbitrations*. The New York Public Service Commission (the "New York Commission") reached the same result in a case remarkably similar to the present one: *Proceeding on Motion of the Commission Pursuant to Section 97(2) of the Public Service Law to Institute an Omnibus Proceeding to Investigate the Interconnection Arrangements Between Telephone Companies*, Case No. 00-C-0789 (hereinafter *CLEC Interconnection Proceeding*).[2] In its December 22, 2000 order

[2] Case No. 00-C-0789 was later consolidated with New York Public Service Commission Case No. 01-C-0181 (*Verizon New York, Inc. has filed tariff revisions to introduce rates and regulations*

addressing the *CLEC Interconnection Proceeding*, the New York Commission provided the following (notably similar) background summary of the matter in dispute.

> Department Staff (staff) investigated complaints by customers of independent telephone companies (Independents) regarding calls that failed to reach their destination or were unexpectedly billed at toll rates. Staff found that in nearly all of the situations examined, the calls in question had been made to an Internet service provider (ISP) served from a CLEC network. In all instances, both the CLEC switch and the ISP customer for whom the calls were destined were located outside the Independent's local service area. The CLEC used an NXX code within the Independent's established local calling area to provide locally-rated calling to customers located outside the geographic area associated with the assigned NXX code.
>
> Calls failed to reach their destination because no provision had been made for physical interconnection between CLECs and Independents. Toll charges were imposed when the Independent's only available transmission path for routing the call was the toll network. In all cases, Staff found that no interconnection arrangements/agreements had been made between the CLECs and the Independents to handle these calls, unlike the situation between Independents and Verizon New York, Inc. (Verizon) where transport arrangements are in place to handle calls to a customer outside the geographic area associated with the assigned NXX.

Interconnection Investigation, Ex. 1 (Order of December 22, 2000 at *1-2.)

Just as in this case, the New York Commission was investigating how best to address the problem of CLECs attempting to provide service without having first performed the necessary due diligence to ensure that all residents with non-toll dialing to the CLECs' new telephone numbers could actually call those numbers on a non-toll basis. *Id.*, Ex. 1 (Order of September 7, 2001 at *7

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for intraLATA local traffic between the company's meet point with an ITC and the company's point of interconnection with a CLEC). Copies of the four orders setting forth the New York Public Service Commission's decision in these matters are attached hereto in chronological order as Exhibit 1.

(stating that the goal of the proceeding was to 'ensure that these calls are handled correctly and that calls do not 'fall on the floor'").)

The New York Commission first addressed the proper rating of the calls from independents (like Brandenburg) to ISP customers served by CLECs (like MCImetro). Characterizing the CLECs' service as foreign exchange service,[3] and citing potential discriminatory dialing issues, the New York Commission ruled that calls from independents to ISP customers served by CLECs should be "rated as local for the purpose of customer billing." *Id.*, Ex. 1 (Order of December 22, 2000 at *10, para. 2.) The same result is appropriate here. Calls from Brandenburg's end-users to MCImetro's ISP customers are included within the scope of Brandenburg's tariffed EAS arrangements. (Direct Test. of A. Willoughby at 3-4:22-23, 1-2.) Brandenburg end-users place calls to Windstream telephone numbers with the same NPA-NXX on a non-toll basis, and they have every expectation that they should be able to continue doing so regardless of the identity of the underlying carrier.[4]

The New York Commission recognized, however, that "[r]ating these calls as local... will not by itself ensure completed calls and proper billing." *Id.*, Ex. 1 (Order of December 22, 2000 at *4.) "A fundamental network and service arrangement with Independents is an essential element in accomplishing that goal." *Id.* Consequently, the New York Commission further ordered that:

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[3] The New York Commission defined "foreign exchange service" as a service that "allows customers to obtain local service in an exchange where the customer has no physical presence." *Id.* (Order of December 22, 2000 at *4); *see also* (Order of September 7, 2001 at *4 (noting that its use of the term "foreign exchange service" is intended in the operational sense of "making local service possible in an exchange where the customer has no physical presence").

[4] This statement presumes that MCImetro actually establishes facilities over which to "pick up" this traffic from Brandenburg at a point of interface on Brandenburg's network, as is required by the Act and the Commission's previous interpretations of both the Act and Kentucky law. If MCImetro does not comply with its basic obligation to receive the traffic at the boundary of Brandenburg's network, the only remaining options are to: (i) return a "cannot be completed" message to the calling party; or (ii) try to route the traffic as toll.

> Prior to activating an NXX code that can be accessed on a local basis by an independent telephone company's customer, CLECs must enter into an arrangement establishing fundamental network and service arrangements. CLECs must make arrangements for interconnection facilities to a meet-point designated as the Independent Telephone Company boundary. Independent Telephone Companies are responsible for delivering traffic to their own service area borders.

Id. (Order of December 22, 2000 at *9, para. 1 (emphasis added).)[5]

It elaborated:

> *CLECs share in the obligation to allow efficient interconnection* to the Independents. As previously noted, Independents are currently responsible for bringing meet-point facilities to their borders only, the long-standing arrangement in place today for trunks used in the provision of local calling between the Independents and Verizon. Because Independent responsibility is limited to delivering traffic to its service area borders, CLECs must either provide their own interconnection facilities or lease facilities to the meet-point.

Id., Ex. 1 (Order of December 22, 2000 at *6 (emphasis added).)

Had MCImetro taken measures similar to those required in New York, this dispute likely would never have materialized. The underlying cause of this dispute is that MCImetro never made arrangements for the exchange of traffic with Brandenburg prior to opening numbers in Elizabethtown. And while MCImetro claims that Brandenburg should have taken the initiative to make those arrangements when MCImetro ported the numbers to its own switch in Louisville, it

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[5] In a subsequent order, the New York Commission explained:

> The Commission's concern from the outset of this proceeding has been ensuring that certain customer calls are completed. The Commission determined "that a service arrangement . . . is essential to ensure that these calls are handled correctly and that calls do not 'fall on the floor.'" To accomplish the goal of "completed calls and proper billing," the Commission required CLECs "to enter into an agreement establishing fundamental network and service arrangements prior to activating . . . [an NXX] code. . . ."

Id., Ex. 1 (Order of December 4, 2001 at *2 (emphasis original).)

overlooks the fact that (as discussed above) Brandenburg's obligation to deliver the traffic to MCImetro extends only to the boundaries of Brandenburg's incumbent network. So, even though Brandenburg attempted to implement traffic exchange arrangements with MCImetro as soon as it learned that MCImetro had opened numbers in Elizabethtown, (Direct Test. of A. Willoughby at 4:18-20), the problem would (and still does) exist until MCImetro complies with its obligation to provision trunking facilities to Brandenburg's network boundary. In short, without MCImetro's commitment (or a Commission order) to abide its basic obligations to provide trunking facilities to a point of interface on Brandenburg's network, nothing Brandenburg could do will matter. Accordingly, the Commission should order MCImetro to immediately provision dedicated trunking facilities to a point of interface on Brandenburg's network.

2. MCImetro Should Exchnge Traffic with Brandenburg on a Bill-and-Keep Basis.

Finally, MCImetro should exchange traffic with Brandenburg on a bill-and-keep basis. While it is not clear that the Commission has ever addressed the question of whether a rural ILEC can be forced to pay reciprocal compensation on EAS traffic destined for out-of-state ISPs served by a CLEC (MCImetro) located in Louisville, the New York Commission's *CLEC Interconnection Investigation* explains that such traffic is not subject to reciprocal compensation:

> The Independents and Verizon currently have a "bill and keep" arrangement for the exchange of local traffic. The calls at issue closely resemble those that are currently handled in local calling arrangements between the Independents and Verizon and, therefore, it is appropriate to handle these calls on the same "bill and keep" basis. In addition, since the CLEC is not located within the same geographic territory as the Independent and is not directly competing with the Independent for local customers, treatment of the call as local for the purpose of reciprocal compensation does not appear warranted.

Id., Ex. 1 (Order of December 22, 2000 at *8.) On rehearing, the New York Commission further emphasized that, in addition to these factors, the traffic in question "[does] not appear to terminate for reciprocal compensation purposes until [it] reach[es] the [CLEC]'s switch, which is outside the local calling area." *Id.* (Order of September 6, 2001 at *10.)

The same rationale applies here. The traffic being exchanged is EAS traffic. Brandenburg and Windstream (and Windstream's predecessors-in-interest) have exchanged this traffic on a bill-and-keep basis for years. (Direct Test. of A. Willoughby at 10:16-18.) MCImetro is not located in the Radcliff exchange (or other Brandenburg exchanges) where the traffic in question originates. (Rebuttal Test. of D. Price at 3:53-54 ("MCI does not offer local service in any Brandenburg exchanges").) MCImetro, likewise, does not compete for local customers in the Radcliff exchange or any other Brandenburg exchanges. *See id.* Instead, MCImetro competes with Windstream in Elizabethtown, through a switch located in Louisville, by serving ISP's with modems located outside of the Commonwealth. *See id.* at 2:36-37 ("MCI has offered dial-up service in Elizabethtown"); *see also* MCImetro Response to Brandenburg Initial Data Request No. 4 ("MCImetro states that dial-up traffic from Brandenburg Telephone end users to AOL is currently routed to MCImetro's interconnection point in Elizabethtown, then routed to modems outside of Kentucky"). And despite the fact that MCImetro competes with Windstream, its interconnection agreement with Windstream even provides for a bill-and-keep treatment of the traffic being exchanged. (*See* Ex. 1 to the Direct Test. of A. Willoughby at p. 10, para. 51 (citing Section 1.3 of Attachment 12 ("Compensation") of the November 14, 2005 interconnection agreement between Windstream and MCImetro.) MCImetro also acknowledges that EAS traffic is neither "toll" nor "local" for regulatory purposes, (*see* Test of D. Price, Transcript of Aug. 19, 2008 Hearing at 84:8-13) and that the regulatory treatment of ISP-Bound traffic remains unsettled at the federal level. (*See id.* at 85:2-9.) Taken together, these facts

hardly justify MCImetro's recovery of reciprocal compensation for the traffic it receives from Brandenburg.

In fact, MCImetro relies solely upon a patently invalid "transport and termination" tariff to support its claim for reciprocal compensation. Perhaps unbeknownst to MCImetro, the Sixth Circuit has expressly rejected (on federal preemption grounds) attempts to tariff charges of this nature. *See Verizon North v. Strand*, 367 F.3d 57, 584-85 (6th Cir. 2004) (holding that the tariffing of such charges is tantamount to a "fist slamming down on the scales" of negotiation required by the Act). Quite simply, there is absolutely no basis for MCImetro to be compensated for receiving dial-up ISP traffic from Radcliff, switching it through Louisville, and terminating it to modem banks located out-of-state. Thus, the Commission should order that MCImetro exchange the traffic in question on a bill-and-keep basis.

III. Conclusion.

This entire dispute has been caused by MCImetro's failure to implement appropriate arrangements with Brandenburg prior to providing service in Elizabethtown. And, just as simply as it was caused by MCImetro's actions, it can be cured if MCImetro will simply provision the facilities necessary to receive the traffic from Brandenburg at Brandenburg's network boundary.

For all of the foregoing reasons, the Commission should resolve this dispute with a simple two-part order. First, it should dismiss Windstream's damages claim against Brandenburg so that Windstream can seek the appropriate recourse from MCImetro in court. Second, it should order

MCImetro to immediately establish dedicated trunking facilities to a point of interface located on Brandenburg's incumbent network and exchange traffic with Brandenburg on a bill-and-keep basis.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify a true and accurate copy of the foregoing was served, by first-class United States mail, sufficient postage prepaid, on the following individuals this 12th day of September, 2008.

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STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on October 11, 2000

COMMISSIONERS PRESENT:

Maureen O. Helmer, Chairman
Thomas J. Dunleavy
James D. Bennett
Leonard A. Weiss
Neal N. Galvin

CASE 00-C-0789 - Proceeding on Motion of the Commission Pursuant to Section 97(2) of the Public Service Law to Institute an Omnibus Proceeding to Investigate the Interconnection Arrangements Between Telephone Companies

ORDER ESTABLISHING REQUIREMENTS FOR THE EXCHANGE OF LOCAL TRAFFIC

(Issued and Effective December 22, 2000)

BY THE COMMISSION:

This proceeding was initiated to resolve a dispute by carriers regarding treatment of competitive local exchange carrier (CLEC) telephone numbers assigned to a central office (NXX) code[1] within an established local calling area, but used by customers located beyond the local calling area of the designated NXX code.

BACKGROUND

Department Staff (staff) investigated complaints by customers of independent telephone companies (Independents)

[1] In a seven digit local phone number, the first three digits identify the specific telephone company central office which serves that number.

regarding calls that failed to reach their destination or were unexpectedly billed at toll rates. Staff found that in nearly all of the situations examined, the calls in question had been made to an Internet service provider (ISP) served from a CLEC network. In all instances, both the CLEC switch and the ISP customer for whom the calls were destined were located outside the Independent's local service area. The CLEC used an NXX code within the Independent's established local calling area to provide locally-rated calling to customers located outside the geographic area associated with the assigned NXX code.

Calls failed to reach their destination because no provision had been made for physical interconnection between CLECs and Independents. Toll charges were imposed when the Independent's only available transmission path for routing the call was the toll network. In all cases, Staff found that no interconnection arrangements/agreements had been made between the CLECs and the Independents to handle these calls, unlike the situation between Independents and Verizon New York, Inc. (Verizon) where transport arrangements are in place to handle calls to a customer outside the geographic area associated with the assigned NXX.

After Staff-facilitated negotiations between the Independents and CLECs reached impasse, this proceeding was begun and on May 16, 2000 a Notice Inviting Comments was issued. The Notice sought comments regarding these questions:

(1) How to treat calls from telephone exchanges to CLEC phone numbers within that company's local calling area?

(2) Whether there were any unique costs incurred by originating carriers who transported calls to a requesting CLEC?

(3) Whether there were any unique costs incurred when a third party transported calls between the originating carrier and the requesting CLEC and

if there were, how such costs should be compensated?

(4) What generic principles should be established as guidance for interconnection agreements and inter-carrier compensation?

Comments[2] and reply comments[3] were filed. A Petition for Clarification or Rehearing was also filed by the Independents' Small Company Group (Small Companies).[4] AT&T Communications of New York and ACC Corp. responded. A summary of comments submitted appears in Appendix D.

DISCUSSION

Rating of Calls

According to the Small Companies, a customer should not be considered "within" a local calling area if that customer is actually located in a different geographic area. Instead, the Small Companies recommended that CLECs be required to assign telephone numbers in a manner that makes it technically feasible to identify, switch, and deliver calls according to whether a call is inter-exchange or local. CLECs maintained that the calls at issue in this proceeding should be considered local.

No Commission or FCC rules or policies prohibit a CLEC from activating a telephone number in an exchange where it has no physical presence. A CLEC may obtain an NXX or central office code in any existing rate center in order to establish a presence or a "footprint." These number assignments are then listed in the Local Exchange Routing Guide (Routing Guide),

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[2] Parties who filed comments are listed in Appendix A.

[3] Parties who filed reply comments are listed in Appendix B.

[4] The member Independents comprising the Small Company Group are listed in Appendix C.

recognized by the industry as the source for instructions on how to route calls, and other industry databases.

Currently, Independents rate customer calls to Verizon NXX numbers that are within the Independent's defined local calling area as local calls, even if the called party is outside the geographic area. Treating similar calls to a CLEC NXX code within the Independent's established local calling area as toll calls would be problematic. Therefore, calls to an NXX code within an established local calling area, but used by customers located outside the local calling area of the designated NXX code, will be considered local for rating purposes. This treatment assumes that the CLEC has established the appropriate fundamental network and service arrangements with all incumbent carriers consistent with the requirements of this Order.

Foreign exchange service also allows customers to obtain local service in an exchange where the customer has no physical presence. Independents do not treat calls destined for foreign exchange service any differently than calls terminating within the physical boundaries of the rate center. This is precisely the service CLECs offer their ISP customers, i.e., telephone numbers that can be called on a local basis in exchanges where the ISP has no physical presence, and this approach of rating those calls as local is consistent with the way Independents treat foreign exchange service calls.

Rating these calls as local, however, will not by itself ensure completed calls and proper billing. A fundamental network and service arrangement with Independents is an essential element in accomplishing that goal. Therefore, CLECs will be required to enter into an agreement establishing fundamental network and service arrangements prior to activating a code that can be accessed on a local basis by an Independent's

customer.[5] The FCC's Numbering Resource Optimization Order (NRO Order)[6] requires code applicants to provide the North American Numbering Plan Administrator (NANPA) with appropriate evidence that it will be ready to provide service within 60 days of the activation date. Responsibility for defining the readiness of facilities has been delegated by the FCC to the state commissions[7] and a pre-existing network and service arrangement will be an element of facilities readiness. Staff will advise NANPA that no NXX codes should be issued until the requesting CLEC has documented that it has interconnection agreements in place with all incumbent carriers within the local calling area where the code is sought. This requirement also applies to carriers seeking thousand-blocks in areas where pooling has begun.

Unique Routing Costs Incurred By Independent Companies

Independent companies connect to other incumbent carriers such as Verizon via two methods: (1) local trunks between their central office and the adjacent incumbent's central office, or (2) toll trunks to Verizon's tandem. In either case, the Independent's responsibility is limited to bringing its facilities to its boundary with the adjacent

[5] The Central Office Code (NXX) Assignment Guidelines note that interconnection arrangements need to be in place prior to the activation of a code. Carriers may apply for a code six months prior to activation and may ask for an activation date no sooner than within sixty-six days of the request.

[6] Numbering Resource and Optimization Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 7545 (March 2000).

[7] Id., para.97; Common Carrier Bureau Responses to Questions in the Numbering Resource Optimization Proceeding, CC Docket No. 99-200 (July 2000)

incumbent. The incumbent's responsibility is to provide connecting facilities within its territory to the boundary.

If the CLEC has facilities built out to the Independent's end office or has a meet-point somewhere in the Independent's territory, costs associated with completing calls from Independent exchanges to CLEC numbers within the Independent's local calling area should be, based on comments received, inconsequential. Nonetheless, Independents argued that the costs of originating and transporting these calls should be subject to access charges assessed to the carrier to which the call is delivered. The Independents were concerned that facilities could become overloaded and additional costs would be incurred to reinforce the network. However, no facts were provided to substantiate these concerns.

CLECs share in the obligation to allow efficient interconnection to the Independents. As previously noted, Independents are currently responsible for bringing meet-point facilities to their borders only, the long-standing arrangement in place today for trunks used in the provision of local calling between the Independents and Verizon. Because Independent responsibility is limited to delivering traffic to its service area borders, CLECs must either provide their own interconnection facilities or lease facilities to the meet-point. With this obligation placed on CLECs, no unique costs would be incurred by the Independents in transporting calls to CLECs.

Third-Party Carriage of Independent-CLEC Calls

All parties agreed that a need exists for third-party transport of low volume calls between Independents and CLECs. CLECs stated that it would be inefficient for them to physically interconnect with Independents for the exchange of relatively

small amounts of traffic and proposed instead that calls between an Independent and a CLEC should be carried initially by an incumbent local exchange carrier (ILEC). Verizon, recognizing that it would most often be the third party involved in transporting such calls[8], offered to provide existing services for the exchange of Independent-CLEC traffic in return for reasonable compensation. Tandem switching rates are available in Verizon's 914 tariff but rates for traffic carried via shared common transport and using tandem switching are not tariffed and need to be developed. Verizon will be directed to file a tariff for delivery of traffic from the Independent's meet point to the Verizon tandem. Interested parties will have an opportunity to comment on the proposed rates.

If call volumes between an Independent and a CLEC go beyond the small volume level, the CLEC should be responsible for establishing direct trunking. The DS-1 or T-1 level (24 voice grade channels) recommended by both Verizon and Time-Warner is a reasonable standard for triggering dedicated transport since it represents a standard unit of network capacity, is an efficient network design, and is generally acceptable to most parties. Parties may, of course, decide a different level is appropriate in a negotiated agreement. Rates for dedicated transport facilities are available in Verizon's 900 tariff.

Fiber Tech proposed that Independents offer a service similar to Verizon's Competitive Alternative Transport Terminal which allows competitive fiber providers a means to interconnect with CLECs collocated in a central office. While recognizing

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[8] Other Independents could also be involved in transporting these calls.

the competitive benefits offered by competitive fiber providers, Fiber Tech's proposal is beyond the scope of this proceeding.

Inter-Carrier Compensation

The Independents and Verizon currently have a "bill and keep"[9] arrangement for the exchange of local traffic. The calls at issue closely resemble those that are currently handled in local calling arrangements between the Independents and Verizon and, therefore, it is appropriate to handle these calls on the same "bill and keep" basis. In addition, since the CLEC is not located within the same geographic territory as the Independent and is not directly competing with the Independent for local customers, treatment of the call as local for the purpose of reciprocal compensation does not appear warranted. It should also be recognized that if a third-party ILEC (e.g., Verizon) transports a call between the originating and terminating carriers, it should have no responsibility to pay for its completion.

Procedural Matters

The Small Company Group petitioned for clarification or in the alternative, rehearing, of the May 5 Order based on (1) potential displacement of long-standing legal requirements and regulatory policies; (2) possible prejudgment of issues; (3) a potential due process violation absent rehearing and modification of the May 5 Order; and (4) potential violations of Commission and federal policy based on the statement in the May 5 Order "that carriers are reminded of their legal obligation to complete customer calls regardless of disputes over intercarrer

[9] "Bill and keep" is a compensation method whereby each carrier is responsible for its own costs and recovers those costs from its end users.

compensation or call rating designations, and to bill such calls appropriately."

AT&T and ACC opposed the petition, arguing that there was no potential violation of Commission, federal, or public policy, and that the Commission's reminder of a carrier's legal obligation to compete calls was consistent with law.

The May 5 Order instituting this proceeding posited issues for comment which arose from previous discussions with Small Companies, AT&T, and ACC. A Notice Inviting Comment was issued on May 16, 2000 and parties were given the opportunity to submit initial and reply comments.

Clarification and/or rehearing is appropriate when ordered action is ambiguous or based on an error of fact or law. The Small Companies' petition was based not on Commission ordered action, but potential or possible action. At the time the Small Companies' petition was interposed, no action had been ordered. The statement regarding a common carrier's obligation to complete calls was merely a reminder of pre-existing duties. The Small Companies have failed to demonstrate any action that is ambiguous or erroneous. Therefore, the Small Companies' petition for clarification and/or rehearing was premature and is denied.

The Commission orders:

1. Prior to activating an NXX code that can be accessed on a local basis by an independent telephone company's customer, CLECs must enter into an arrangement establishing fundamental network and service arrangements. CLECs must make arrangements for interconnection facilities to a meet-point designated as the Independent Telephone Company boundary. Independent Telephone Companies are responsible for delivering traffic to their own service area borders.

2. Calls to an NXX code that is within an established local calling area and that is used by customers located beyond the local calling area shall be rated as local for the purpose of customer billing.

3. Verizon New York, Inc. shall file with the Secretary (5 copies) a tariff for shared transport, as discussed in this Order, within 30 days of issuance of this Order and also serve the proposed tariff on parties on the service list for this case.

4. Parties will have 20 days from Verizon New York, Inc.'s filing to submit comments. Comments shall be served on parties on the service list for this case.

5. The Petition for clarification and/or rehearing is denied.

6. This proceeding is continued.

By the Commission,

(SIGNED)

JANET HAND DEIXLER
Secretary

APPENDIX A

INITIAL COMMENTS

ACC Corp. (ACC)

AT&T Communications of New York, Inc. (AT&T)

Adelphia Business Solutions, Inc. (Adelphia)

Verizon-New York (Verizon, formerly Bell Atlantic)

CTSI, Inc. (CTSI)

Fiber Technologies, LLC (Fiber Tech)

Focal Communications Corp. of New York, Inc. (Focal)

Mid-Hudson Communications, Inc. (Mid-Hudson)

Northland Networks, Ltd. (Northland)

RCN Telecom Services of New York, Inc. (RCN)

Small Company Group (Small Companies)

TC Systems, Inc. (TC)

Time-Warner Telecom, Inc. (Time Warner)

WorldCom, Inc. (WorldCom)

APPENDIX B

REPLY COMMENTS

ACC Corp. (ACC)
AT&T Communications of New York, Inc. (AT&T)
Adelphia Business Solutions, Inc. (Adelphia)
Bell Atlantic-New York (BA-NY or Bell Atlantic)
CTSI, Inc. (CTSI)
Cablevision Lightpath, Inc.
Fiber Technologies, LLC (Fiber Tech)
Focal Communications Corp. of New York, Inc. (Focal)
Frontier Telephone of Rochester, Inc.
Mid-Hudson Communications, Inc. (Mid-Hudson)
Northland Networks, Ltd. (Northland)
RCN Telecom Service of New York, Inc. (RCN)
Small Company Group (Small Companies)
TC Systems, Inc. (TC)
Time-Warner Telecom, Inc. (Time-Warner)
WorldCom, Inc. (WorldCom)

APPENDIX C

SMALL COMPANY GROUP

Armstrong Telephone Company

Berkshire Telephone Company

Cassadaga Telephone Corporation

Champlain Telephone Company

Chautauqua & Erie Telephone Corporation

Chazy & Westport Telephone Corporation

Citizens Telephone Company of Hammond

Crown Point Telephone Corporation

Delhi Telephone Company

Dunkirk & Fredonia Telephone Company

Edwards Telephone Company

Empire Telephone Corporation

Fishers Island Telephone Company

Germantown Telephone Company

Hancock Telephone Company

Margaretville Telephone Company

Middleburgh Telephone Company

Newport Telephone Company

Nicholville Telephone Company

Ontario Telephone Company

Oriskany Falls Telephone Corporation

Pattersonville Telephone Company

Port Byron Telephone Company

State Telephone Company

TDS Telecom of Deposit

Township Telephone Company

Trumansburg Home Telephone Company

Vernon Telephone Company

SUMMARY OF COMMENTS RECEIVED

1. Treatment of calls between telephone company exchanges to CLEC numbers assigned to NXX code within that company's local calling area.

The positions of the parties are generally divided between the incumbents (small companies and Verizon) and the CLECs.

The Small Companies argue that assigning a number associated with one geographic area to a customer located in a different geographic area does not mean that the customer should be considered "within" the local calling area associated with the number. As such, the Small Companies request that the Commission require all LECs to divulge their NPA-NXX code assignment practices and the manner in which telephone numbers are assigned to actual customers premises and LEC-designated rate centers. These arbitrary number assignment practices are not in keeping with the point-to-point nature of calls, according to the Small Companies. The Small Companies state that CLECs fail to recognize the rights of its members and that other carriers cannot be forced to concede to these arbitrary practices. The Small Companies recommend that CLECs be required to deploy numbers in a manner that makes it technically feasible to identify, switch, and deliver calls according to whether a call is interexchange or local. Absent these practices, Small Companies state that calls to these numbers must be treated as interexchange/toll and subject to proper intrastate access changes. Finally, the Small Companies note that a continuation of the current practices will harm independent company customers.

Verizon posits that if a CLEC wants to have the call rated as a local call, the CLEC should either extend its

facilities into the local calling area or pay for transport of the call from the local area to its switch.[1]

CLEC respondents agree that the calls at issue in this proceeding should be considered local. Focal believes customer confusion would be encountered if these calls were treated as anything other than local. Likewise, Mid-Hudson and Northland, filing jointly, argue that independent customers, CLEC customers, and CLECs would all suffer severe and irreparable harm if the calls were not treated as local. AT&T states that there is no basis for discriminating between local and toll calls since independent companies make no distinction in routing and rating calls to incumbent customers (e.g., Verizon), some of which terminate to customers physically located outside of the local calling area, through the use of foreign exchange and remote call forwarding services.[2] Time-Warner concludes that the calls at issue are local; therefore, carriers should honor rate center assignments with their end-users. Worldcom states the physical location of the called party has no relevance on how a call is rated and billed. Worldcom also states that the location of calling and called parties is irrelevant and notes a California Commission ruling that determined the rating of calls is based on the NXX prefix of calling and called parties even if called party is located in different exchange.[3] RCN, CTSI, and Adelphia, filing jointly, state that there is no economic, technical or policy reason for different treatment to calls to the same rate center. RCN/CTSI/Adelphia note a Michigan PSC order rejecting the argument that an ISP did not have a physical presence in the exchange, that this was not a prerequisite under the tariff, and

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[1] A CLEC's switch may also be located some distance away from the exchange where the code is assigned.

[2] The Small Companies and Verizon have argued that foreign exchange calls are interexchange in nature and not an appropriate example.

[3] Order Instituting Rulemaking on the Commission's own Motion, Decision No. 99-09-029, Interim Opinion at 31-32 (California Public Utility Commission September 2, 1999).

that rating and routing need not be the same.[1,2] They also argue for FX service, claiming it is a time-honored service which allows businesses to expand their presence.

2. Unique Costs incurred by Independent companies

Almost all parties (with the exceptions of Verizon and the Small Companies) deem the costs associated with completing calls from independent exchanges to CLEC numbers within that company's local calling area to be inconsequential. This includes those calls that must be completed to an end user located outside of that local exchange.

However, Small Companies assert that these types of calls are interexchange calls, and that the costs of originating and transporting these calls should be subject to access charges which, in turn, should be assessed to the carrier to which the call is delivered. The Small Companies state that these calls are toll calls that will be converted to lower-priced local calls by not assessing an additional charge for these types of calls. The Small Companies argue that their local facilities may become overloaded as the demand for these types of calls increase, and that independent companies will incur additional costs to reinforce its system. The Small Companies argue that, while a CLEC can request interconnection, a CLEC cannot declare or demand that other carriers accommodate the CLEC's practices.

Verizon states that third party costs would occur if it were to carry traffic between an independent and a CLEC, and that Verizon would expect full recovery of any costs. Verizon argues that it should be compensated for the use of its network.

Time-Warner states that it is possible that some additional costs may be incurred by independent companies

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[1] In the Matter of the Complaint of Glenda Bierman against Centurytel of Michigan, Inc d/b/a/ CenturyTel, April 12, 1999.

[2] In reply comments, the Small Companies notes an order issued by the Maine Commission which reclaimed a CLEC's NXX codes that did not have facilities nor was serving customers in the exchange where the codes were assigned.

depending on 1) call volumes, 2) location of the interconnection points and 3) current capacity of the system. However, Time-Warner also states if the CLEC has built out to the independent's end office or has a meet-point somewhere in the Independent Carrier's territory, there should be few recurring costs.

WorldCom claims that each carrier has its own costs for originating telecommunications, and that generally the recovery of costs associated with originating calls are the responsibility of the originating carrier. RCN/CTSI/Adelphia believe that no additional costs would be incurred if traffic were routed the same way for both Verizon and CLEC customers.

Focal states that some costs to build out the network may be necessary, but that these costs should not be extraordinary. Mid-Hudson/Northland note that it makes no difference to the independent whether its customers dial the "phantom NXX" or any other NXX; the costs for handling each call are the same. All calls from the independent to the CLEC NXX code can be delivered in the same manner at the same cost to the independent. Accordingly, the charge to the caller should be the same.

3. Third-party carriage of independent-CLEC calls

AT&T, Focal, Mid-Hudson/Northland, RCN/CTSI/Adelphia, Time Warner, and Worldcom basically agree that it would be inefficient for them to physically interconnect with independents for the exchange of relatively small amounts of traffic immediately. Calls between an independent and a CLEC should, therefore, be initially carried by a third-party ILEC, most often Verizon. The parties offer comments on shared and dedicated transport, the costs incurred and reimbursement of the third-party carrier for those costs.

Verizon, recognizing that it would most often be the third party involved in such calls[1], offers to provide existing services and to develop new services for the exchange of

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[1] Other larger independents could be involved in these calls.

independent-CLEC traffic. Fiber Tech states that it intends to enter the market as a competitive fiber provider. AT&T holds that an Incumbent local exchange carrier (ILEC) must provide shared transport as an Unbundled Network Element (UNE) on its network between its meet point with a CLEC and its meet point on an independent-ILEC EAS trunk group[1]. Focal states that ILECs should act as aggregators of traffic and be prohibited from limiting use of interconnected trunks to independents. Mid-Hudson/Northland want ILECs to offer both shared and dedicated transport. RCN/CTSI/Adelphia feel that independent-CLEC traffic flow will be minimal and exchanged via ILEC facilities. Time-Warner and WorldCom both indicate it is more efficient for the ILEC to transit relatively low volumes of independent-CLEC traffic. The Small Companies state that calls terminating beyond the local calling area are actually interexchange and that "legitimate" local calling arrangements involving third-party carriers should remain subject to negotiation among the parties.

Some parties recommend or suggest that limits be placed on shared transport. Verizon and Time-Warner expect that dedicated facilities are appropriate for traffic requiring one DS-1 (T-1)[2]. Focal recommends that 200,000 minutes of use per month for two consecutive months should require a CLEC to establish its own direct trunk group connection with an independent. Focal also states that CLECs will evaluate whether or not to build direct trunks if ILECs are allowed to increase their shared transport rates for legitimate costs such as tandem additions. RCN/CTSI/Adelphia want the independent-CLEC traffic threshold triggering a direct connection to be set by the parties.

Verizon states that rates for the type of shared common transport used for independent-CLEC calls are not tariffed and

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[1] Verizon replies that EAS routes have been constructed to carry traffic between independent and ILEC end offices and do not extend to tandems.

[2] Verizon New York's rates for dedicated transport are available in its P.S.C. 900 Tariff.

would have to be developed[1]. Focal states that the compensation level should be at the ILEC's existing transit rates, adjustable for additional costs incurred to meet traffic requirements. AT&T, citing the FCC's UNE Remand Order[2], maintains that shared transport is a UNE and should be provided at total element long run incremental cost (TELRIC). Mid-Hudson/Northland recognize the need for tandem switching costs but do not address common transport. RCN/CTSI/Adelphia would compensate the ILEC at agreed-upon or Commission-approved rates provided the ILEC has demonstrated it has incurred incremental costs carrying independent-CLEC traffic. Time-Warner would compensate an ILEC with a network capable of exchanging traffic with an independent at that ILEC's established rate. If the independent does not subtend the ILEC's tandem, Time-Warner would have the Commission establish a default point of interconnection from which the CLEC could purchase transport from either the independent or ILEC for no greater than the ILEC's UNE price for interoffice transport. WorldCom would compensate the ILEC at its TELRIC-based transit charge. Cablevision urges that ILECs not be allowed to impose interexchange access fees or toll charges. The Small Companies would have the ILEC charge either for interexchange access or at a negotiated EAS rate.

AT&T, Focal, Time-Warner would have the CLEC pay the ILEC for transporting calls to it. Mid-Hudson/Northland would have the originating carrier pay the ILEC to deliver a call to the receiving carrier's point of interconnection with the ILEC. WorldCom would also have the originating carrier pay the ILEC's TELRIC-based charge. RCN/CTSI/Adelphia do not specify who should pay the ILEC, indicating only that, in the absence of an agreement, cost recovery over a de minimus amount should be in accordance with Commission guidelines. Verizon expects the party requesting dedicated transport to pay for it. Verizon stresses

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[1] Verizon New York's rates for tandem switching that do not include common transport are available in its P.S.C. 914 Tariff.

[2] CC Docket No. 96-98, FCC 99-238, Third Report and Order released November 5, 1999.

that it is not the originating carrier for independent-CLEC traffic and should not have to pay reciprocal compensation for its termination.

4. *Intercarrier compensation*

In its Notice Inviting Comments, the Commission asked what generic principles regarding compensation should be established as guidance for interconnection agreements between carriers. The independent companies and Verizon currently have a "bill and keep" arrangement for exchange of local traffic. CLECs and Verizon, on the other hand, have reciprocal compensation agreements in which each carrier pays the other to complete calls.

The Small Companies state that their member companies are willing to discuss terms and conditions for local calling if customers are physically located in neighboring exchanges but opine that most traffic discussed in this proceeding is not "local". The Small Companies also note that bilateral agreements between Verizon and CLECs cannot be forced on small company group members.[1] Rather, the calls in question are interexchange in nature and access charges should apply to these calls. Verizon is concerned that agreements should specify who is responsible for new and additional transport facilities and services in third-party circumstances. AT&T and Focal state that the Commission must make sure that compensation is not discriminatory for calls terminating in same exchange. Similarly, Worldcom and Mid-Hudson/Northland note that the provisions of the 1996 Telecom Act are the governing policy, which dictates that each party should pay to terminate calls; therefore, the traffic should be treated no differently than Verizon to CLEC traffic. Mid-Hudson/Northland also note that CLECs, to date, have refrained from collecting reciprocal compensation from independents even though CLECs are entitled to it under S251 (b) (5) of Act. Time-

[1] Verizon's interconnection agreements with CLECs allow for meet-point billing at Verizon's tandem within a LATA.

Warner is most concerned that disputes over compensation should not interfere with call completion. Several parties address the level of traffic and the need for compensation.
RCN/CTSI/Adelphia state that bill and keep should be used if traffic is balanced; otherwise, each carrier should bill the other for terminating traffic. However, if traffic is negligible, no payment should be required. Focal suggests that interconnection agreements not be require until the traffic reaches a threshold level, which it recommends to be 200,000 minutes per month for two consecutive months. Focal also notes that the independent company and CLEC should determine a technically feasible point of interconnection. Cablevision states that outcome of this proceeding should not limit CLEC's ability to design and operate an efficient network.

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on June 21, 2001

COMMISSIONERS PRESENT:

Maureen O. Helmer, Chairman
Thomas J. Dunleavy
James D. Bennett
Leonard A. Weiss
Neal N. Galvin

CASE 00-C-0789 - Proceeding on Motion of the Commission Pursuant to Section 97(2) of the Public Service Law to Institute an Omnibus Proceeding to Investigate the Interconnection Arrangements between Telephone Companies -- PETITIONS FOR REHEARING TO THE COMMISSION'S DECEMBER 22, 2000 ORDER FILED BY AT&T, CABLEVISION, RCN, ET. AL., AND THE SMALL COMPANY GROUP

CASE 01-C-0181 - Verizon New York Inc. has filed tariff revisions to introduce rates and regulations for intraLATA local traffic between the company's meet point with an ITC and the company's point of interconnection with a CLEC.

ORDER DENYING PETITIONS FOR REHEARING, CLARIFYING NXX ORDER, AND AUTHORIZING PERMANENT RATES

(Issued and Effective September 7, 2001)

BACKGROUND

Following a proceeding instituted in response to complaints by customers that certain calls either failed to reach their destination or were unexpectedly billed at toll rates, we issued an Order[1] (NXX Order) establishing requirements for the exchange of local traffic between independent telephone companies and (Independents) and competitive local exchange

[1] Case 00-C-0789 - Order Establishing Requirements for the Exchange of Local Traffic, (Issued December 22, 2000).

carriers (CLECs). We determined that calls terminating to customers located beyond the local calling area of the designated NXX code were local calls.

In addition to determining that the calls in question should be local for the purpose of customer billing, the NXX Order required that: (1) CLECs enter into agreements establishing fundamental network and service arrangements prior to activating an NXX code; (2) compensation arrangements for these calls should be on a bill-and-keep basis; and (3) Verizon file a tariff for delivery of traffic via shared common transport from the Independent's meet-point to the Verizon tandem.

Petitions for rehearing were filed by AT&T Communications of New York, Inc and its affiliates AT&T Wireless Services, Inc., TC Systems, Inc., and ACC Corp.(collectively AT&T); RCN Telecom of New York, Inc., Allegiance Telecom of New York, Inc. and Pac-West Telecom, Inc. (collectively RCN); and the Small Company Group.[2] In addition, Cablevision Lightpath, Inc. filed a Petition for Clarification. Reply comments in support of, or in opposition to, these petitions were filed by AT&T, Citizens Telecommunications of Company of New York, Inc., Frontier of Rochester, RCN, and Taconic Telephone Corp.

For the reasons set forth below, we deny the petitions for rehearing, clarify certain aspects of the NXX Order and find Verizon's rates for shared transport reasonable.

A. Treatment of calls as local

Position of parties

The Small Companies argued that the NXX Order was based on a false premise; namely, that central office codes assigned to exchanges in which no actual facilities or customers

[2] The member companies of the Small Company Group appear on Appendix A.

exist (virtual exchanges) are "precisely" the same service as foreign exchange service. According to the Small Companies, foreign exchange design aspects, network and service provisioning, service revenues, costs, and usage levels differ fundamentally from virtual exchange service. The Small Companies noted that while traditional foreign exchange service is provisioned by end-office facilities in the existing Extended Area Service (EAS) exchange, CLECs using virtual central office codes do not use end-office facilities. In addition, the Small Companies argued that the Commission did not adequately address the issue of costs to be imposed on Independents as a result of local call determination.

In support of the Small Companies' argument, Frontier asserted that the CLEC use of codes in virtual code situations is Local Exchange Routing Guide (LERG) instructions for other carriers to use to route traffic on the CLEC's behalf, not true foreign exchange service. Frontier claimed that the NXX Order established a regime that would allow CLECs to open codes without having any facilities in place. Taconic also supported the Small Companies' position.

In reply to the Small Companies' petition, AT&T stated that the Small Companies reargued issues previously rejected. Calls are already rated based on rate center assignments of NXX codes of originating and terminating numbers and Small Companies do not currently distinguish between calls bound for incumbent local exchange carriers (ILEC) customers that may or may not be within the boundaries of EAS exchanges. AT&T argued that while the Small Companies may determine which rate centers its customers may call on a local basis, they may not dictate which calls to these rate centers are local or toll. Finally, AT&T regarded the Small Companies' alternative proposal to use 800-

like services for ISP-bound traffic to be tantamount to a tax on the Internet.

Discussion

The Small Companies defined foreign exchange based on technology used to complete the call. This definition requires that the terminating carrier have a physical presence in the exchange, and provide "dial tone" from a switch physically located in the exchange. Small Companies detailed technical and rate structure differences between what the incumbent telephone industry has called foreign exchange service and the service now offered by the CLECs. However, the NXX Order does not so narrowly define foreign exchange service based on call competition technology. Instead, it defines foreign exchange service operationally, i.e. making local service possible in an exchange where the customer has no physical presence.

We have previously recognized that the architecture of new entrant networks will differ from that of incumbents and stated that CLECs need not replicate the incumbent's service offerings, rate centers, or customer mix. [3] The Small Companies' foreign exchange definition does not take into account that CLEC networks do not and are not expected to mirror networks of incumbent carriers. The only standard that must be met is that established in the LERG which requires calls to be rated based on the NPA-NXX of the called number, not the

[3] Case 94-C-0095 - Proceeding on Motion of the Commission to Examine Issues Related to the Continuing Provision of Universal Service and to Develop a Regulatory Framework for the Transition to Competition in the Local Exchange Market, Opinion and Order Adopting Regulatory Framework (Issued May 22, 1996).

customer's physical location.[4] Petitioners have not presented any error of law or fact to challenge the underlying principle adopted by the Commission; i.e., non-discriminatory treatment of calls from Independent customers to incumbent foreign exchange numbers vis-a-vis calls to CLEC numbers with virtual NXXs. The petitions for rehearing regarding this issued are denied.

The notice seeking comments in this proceeding asked whether any unique costs would be incurred by originating carriers (emphasis supplied). Certainly, it was anticipated that some costs would be incurred in order to connect with a CLEC at the meet point. These connection costs, however, are not unique. For instance, if an Internet Service Provider (ISP) were to enter a Verizon exchange where an Independent had local calling, the Independent would, in all likelihood, have to augment its facilities to carry the additional traffic. However, these are costs that have already been assumed in order to handle Internet traffic. The NXX Order notes that no facts were presented to support the Small Companies' claim. If an Independent determines that there is a need to seek cost recovery due to substantial costs imposed in meeting its common carrier obligations, traditional avenues for rate relief are available.

B. Connection requirements prior to activation of NXX code

Position of Parties

EAS arrangements allow customers of one ILEC to call customers of another ILEC on a local, rather than a toll, basis.

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[4] According to Telecordia, the LERG Routing Guide is primarily designed to be used for (1) routing of interLATA calls by interexchange carriers, (2) providing information on the local environment for the numerous carriers involved in the local arena, (emphasis added) and (3) any other company needing information about the network, numbering and other data in the product.

AT&T argued that these arrangements should be competitively neutral and economically efficient. AT&T claimed that the NXX Order did not address the possible anti-competitive consequences of ILEC refusal to allow CLEC participation in existing EAS arrangements. AT&T urged the Commission to require that EAS arrangements either be open to all carriers or be eliminated.

AT&T noted that while the NXX Order required CLECs to reach interconnection agreements with all incumbents, including Independents, before activating new NXX codes, no such restrictions were in place for incumbents requesting new codes. AT&T interpreted the NXX Order as not requiring Independents and major incumbents to negotiate interconnection agreements with CLECs. AT&T requested (1) an interim process that would allow CLECs to opt into existing calling arrangements, and (2) a default agreement for all CLECs already holding NXX codes in local calling areas.

RCN argued that the NXX Order could have a potentially detrimental effect on the development of local competition since it might be read as giving Independents veto power over when and where CLECs decide to compete by refusing to enter into an interconnection agreement with the CLEC. RCN claimed the NXX Order violated a CLEC's right to interconnect its network indirectly with an Independent's network. According to RCN, interconnections should be allowed based upon the most efficient economic and technical choices. RCN argued that the NXX Order denied CLECs their choice of interconnection by imposing a direct trunking requirement.

In reply, Verizon stated that interconnection is required as the result of CLECs not building facilities in the areas where they have NXX codes. Independents should not be required to extend their facilities beyond their service areas according to Verizon, and Independents should also not be

required to provide connecting facilities. Verizon maintained that CLECs should be responsible for deploying or leasing facilities that connect CLEC networks to the Independents.

Discussion

We previously determined that a service arrangement between Independents and CLECs is essential to ensure that these calls are handled correctly and that calls do not "fall on the floor". Independents' responsibility is limited to delivering traffic to their own service area borders, therefore, CLECs must assume the obligation of delivery beyond the Independent service area border in order to allow efficient interconnection to Independents. CLECs must either provide their own interconnection facilities or lease facilities to the meet point. Shared transport is permitted for low volume traffic (i.e., less than the T-1 level) and parties are free to negotiate a different level. Because CLECs are permitted to negotiate and choose whatever interconnection method is most technically and economically advantageous, the basis for RCN's petition is not valid and its petition for rehearing is denied.

AT&T's point that CLECs should be allowed to opt into any existing EAS agreement between two incumbent carriers (e.g., Verizon and an Independent) to the extent such agreements exist, is valid, however. The NXX Order should be clarified to reflect that and to underscore that opting into an existing EAS agreement does not obviate CLEC responsibility for facilities between its switch and the Independent. We clarify that the interconnection arrangement requirement can be satisfied by the carrier making representations to the Department that an arrangement is or will be in place that will permit calls to be handled on a local basis by an Independent's customers.

C. Bill-and-Keep Arrangements

Position of the Parties

AT&T and RCN petitioned for rehearing on the grounds that the decision to treat these calls under a "bill and keep" arrangement violated FCC rules and reversed Commission policy. RCN argued that the main rationale given for a bill-and-keep arrangement -- that CLECs are not located within the same geographic territory as an Independent and, therefore, there is no direct competition with the Independent for local customers and treatment of the call as local for the purpose of reciprocal compensation does not appear warranted -- does not comport with the requirements of the Telecommunications Act of 1996 and federal regulations. RCN claimed that under FCC rules, bill-and-keep is appropriate only if traffic exchanged is of equal volume and expected to remain so. RCN maintained that because there was no finding that the traffic between Independents and CLECs was roughly in balance, the Commission erred as a matter of law by imposing bill-and-keep on the Independents and CLECs.[5]

In addition, RCN stated that the Commission violated federal law and prior Commission rulings[6] by imposing bill-and-keep based on whether a CLEC is directly competing with an incumbent and/or has a physical presence in the "same territory." RCN argued that the FCC did not authorize these additional Commission criteria and under previous rulings local traffic was eligible for reciprocal compensation.

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[5] For its part, RCN noted that it currently exchanges traffic with Independents on a de facto bill-and-keep basis because RCN does not receive enough traffic to warrant other arrangements.

[6] Case 99-C-0529 - Proceeding on Motion of the Commission to Reexamine Reciprocal Compensation, (Issued February 1, 2001).

AT&T argued that the Commission made two substantial departures from the reciprocal compensation policy established in Opinion 99-10[7]; (1) calls, although rated as local, would not be treated as such for reciprocal compensation purposes, and (2) intermediary ILECs, such as Verizon, were absolved from paying for the completion of the calls. AT&T argued that the NXX Order disrupted policy established in Opinion 99-10, changed the default compensation scheme and removed a bargaining tool in negotiations with other carriers. AT&T concluded that no sound reason exists to disturb a policy that was intended to stimulate facilities-based competition with respect to CLEC-independent local traffic. AT&T argued that the Commission should not have revised the policy without giving all interested parties in the Reciprocal Compensation proceeding notice and opportunity to be heard.

In reply, the Small Companies stated that the Commission's decision was consistent with applicable FCC rulings and prior Commission decisions since FCC rules allow states to determine local service areas and consequently, when reciprocal compensation should apply. In addition, the Small Companies noted that the Commission's Reciprocal Compensation Order never addressed the geographic area within which the Act's reciprocal compensation construct would apply.

Verizon supported the finding in the NXX Order that it not be required to pay compensation for termination of calls where Verizon acts as third party transit service between an Independent and CLEC.

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[7] Case 99-C-0529 - Opinion and Order Concerning Reciprocal Compensation, (Issued August 26, 1999).

Discussion

The calls in question closely resemble those that are currently handled in local calling arrangements between the Independents and Verizon, arrangements handled on a bill-and-keep basis. In the NXX Order, the Commission directed carriers to enter into interconnection arrangements and indicated that bill-and-keep arrangements appear to best balance the interests at stake. The calls at issue do not appear to terminate for reciprocal compensation purposes until they reach the carrier's switch, which is outside the local area. However, if a different arrangement is presented as a result of the interconnection arrangement process, the Commission may consider the appropriateness of bill-and-keep for that situation.

We note that on April 27, 2001, the Federal Communications Commission (FCC) released a Notice of Proposed Rulemaking (NOPR) regarding development of a unified intercarrier compensation regime.[8] As part of the NOPR, the FCC sought comment regarding inappropriate use of NXX codes to collect reciprocal compensation. Although the NXX Order determined that no reciprocal compensation should apply to calls for traffic an ILEC transports outside the local calling area, the FCC also sought comment in the NOPR on: (1) CLEC entitlement to use NXX codes, (2) transport obligations of the originating LEC, and (3) NXX-deploying CLEC obligations to provide transport from central offices associated with NXX codes. In the event that federal rules are modified so that they conflict with Commission Orders, the determination regarding NXX codes and related transport obligations will be re-examined.

[8] In the Matter of Developing a Unified Intercarrier Compensation Regime, FCC 01-132, (rel. April 27, 2001).

D. Other issues

1. Applicability of NXX Order to existing interconnection agreements

Cablevision asked for clarification regarding the NXX Order's effect on existing interconnection agreements.

Disruption of existing interconnection agreements between CLECs and Verizon was never intended. Therefore, we grant Cablevision's request for clarification in this regard and state that the NXX Order has no effect on existing interconnection arrangements.

2. Discriminatory numbering assignment practices

AT&T and RCN both argued that restricting code assignments only to CLECs is a violation of FCC guidelines. They noted that Independents and others remain free to activate new NXX codes in rate centers with EAS calling without having to establish EAS calling arrangements with CLECs that also serve customers in the same areas.

Petitioners raise a valid issue. The genesis of requiring interconnection arrangements between Independents and CLECs before activating an NXX code was to ensure that calls would be properly completed before numbers were placed in service. A reciprocal policy applicable to all numbering resources is appropriate in order to be consistent with federal guidelines. Therefore, we broaden the application of the requirement that interconnection agreements be in place before code activation to all carriers, not just CLECs.

3. Time frames to complete interconnection agreements

No time frames for the completion of these agreements were specified in the NXX Order. This has had the unintended consequence of removing motivation to negotiate arrangements. In order to assure compliance with the NXX Order, interconnection agreements are required to be in place for

existing codes within 120 days from the release of this order and these agreements must be filed with the Secretary of the Commission. This requirement should address a concern expressed by CLECs regarding an Independent carrier's unwillingness to negotiate. We also clarify that a traffic exchange agreement is sufficient to satisfy the requirement of an interconnection arrangement.

4. Verizon Tariff for Shared Transport

Verizon was directed to file a tariff for shared transport to enable the delivery of traffic from the Independent's meet point to the Verizon tandem.[9] Verizon's tariff allows for call carriage between an Independent meet point and Verizon's point of interconnection with a CLEC. Calls will be carried only when the total monthly call volume does not exceed one DS1 level or 180,000 minutes of use per month. CLECs will be charged for completing these calls under the switched access service tariff, with various per minute and per mile charges applying.

AT&T noted, in the only substantive comments made,[10] that Verizon will charge CLECs a price equal to Verizon's own terminating access charge for delivering Independent-originating traffic to CLECs for termination. Further, AT&T noted that Verizon does not charge Independents for delivering calls between Independents and Verizon on EAS routes. Finally, AT&T stated that its existing interconnection agreement with Verizon offered more favorable treatment of these calls.

AT&T's comparison between Independent-CLEC traffic and existing Independent-Verizon arrangements failed to note that,

CLEC pays, (subj. to any existing ICA)

[9] Case 99-C-0529 - Opinion and Order Concerning Reciprocal Compensation, (Issued August 26, 1999).

[10] The Small Companies requested that action on the tariff be deferred pending resolution of the Petition for Rehearing.

in the Independent-CLEC traffic arrangements, Verizon would be acting as a third party, but in Independent-Verizon arrangements, Verizon would be terminating calls to its own customers. Therefore, a basis for different treatment exists. In addition, as previously discussed, it was not staff's intent to disturb existing interconnection agreements. If AT&T believes it is entitled to more favorable treatment, it should pursue this issue with Verizon.

The rates proposed by Verizon are reasonable and will go into effect on a permanent basis.

The Commission orders:

1. The petitions for rehearing are denied.

2. CLECs may opt into existing extended area service (EAS) arrangements offered between incumbent carriers.

3. Interconnection agreements for existing codes must be filed with the Secretary of the Commission within 120 days of the release of this order and thereafter all interconnection agreements must be filed with the Secretary of the Commission.

4. The tariff schedule previously filed by Verizon New York, Inc., shown on Appendix B, shall become effective on a permanent basis with issuance of this order.

5. These proceedings are continued.

By the Commission,

(SIGNED) JANET HAND DEIXLER
Secretary

Appendix A

SMALL COMPANY GROUP

Armstrong Telephone Company
Berkshire Telephone Company
Cassadaga Telephone Corporation
Champlain Telephone Company
Chautauqua & Erie Telephone Corporation
Chazy & Westport Telephone Corporation
Citizens Telephone Company of Hammond
Crown Point Telephone Corporation
Delhi Telephone Company
Dunkirk & Fredonia Telephone Company
Edwards Telephone Company
Empire Telephone Corporation
Fishers Island Telephone Company
Germantown Telephone Company
Hancock Telephone Company
Margaretville Telephone Company
Middleburgh Telephone Company
Newport Telephone Company
Nicholville Telephone Company
Ontario Telephone company
Oriskany Falls Telephone Corporation
Pattersonville Telephone Company
Port Byron Telephone Company
State Telephone Company
TDS Telecom of Deposit
Township Telephone Company
Trumansburg Home Telephone Company
Vernon Telephone Company

Appendix B

ADMINISTRATIVE DETAILS

Filed by: Verizon New, Inc.
Revisions to: P.S.C. NY No. 8 - Communications
Section 1
First Revised Page No. 4
Section 6
First Revised Page No. 5
Original Page No. 5.1
First Revised Page No. 6
Section 35
First Revised Page No. 9
Original Page No. 9.1

Issued: February 5, 2001 Effective: March 7, 2001

Revisions to: P.S.C. No. 8 - Communications
Section 1
Second Revised Page No. 4
Section 6
Second Revised Page No. 5
First Revised Page No. 5.1
Second Revised Page No. 6
Section 35
Second Revised Page No. 9
First Revised Page No. 9.1

Issued March 14, 2001 Effective: March 15, 2001.

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 00-C-0789 - Proceeding on Motion of the Commission pursuant to Section 97(2) of the Public Service Law to Institute an Omnibus Proceeding to Investigate the Interconnection Arrangements between Telephone Companies.

CASE 01-C-0181 - Verizon New York, Inc. has filed tariff revisions to introduce rates and regulations for intraLATA local traffic between the company's meet point with an ITC and the company's point of interconnection with a CLEC.

NOTICE INVITING COMMENTS

(Issued December 4, 2001)

By Order issued September 7, 2001, the Commission, *inter alia*, "broaden[ed] the application of the requirement that interconnection agreements be in place before code activation to all carriers, not just CLECs."[1]

Petitions for Reconsideration, Clarification, or Rehearing of the September Order were filed by AT&T Wireless Services, Inc. Nextel Partners, Inc. and Sprint Spectrum L.P. d/b/a Sprint PCS. These Petitions, *inter alia*, challenged the September Order's application to Commercial Mobile Radio Service (CMRS) providers, i.e. wireless carriers. In the Small Company Group's[2] Reply, filed October 31, 2001, it joined Petitioners' request that the Commission "address the extent to which the Order's requirements apply to CMRS providers."[3]

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[1] Case 00-C-0789 et ano. - Order Denying Petitions for Rehearing. Clarifying NXX Order, and Authorizing Permanent Rates, issued September 7, 2001) (September Order).

[2] *ID.* at 11.

[3] The Small Company Group in comprised of the following telephone companies: Armstrong, Berkshire, Cassadaga, Champlain, Chautauqua & Erie, Chazy & Westport, Citizens of Hammond, Crown Point, Delhi, Dunkirk & Fredonia, Edwards, Empire, Fishers Island, Germantown, Hancock, Margaretville, Middleburgh, Port Bryon, State, TDS Telecom of Deposit, Township, Trumansburg Home, and Vernon.

The Commission's concern from the outset of this proceeding has been ensuring that certain customer calls[4] are completed.[5] The Commission determined "that a service arrangement... is essential to ensure that these calls are handled correctly and that calls do not 'fall on the floor.'"[6] To accomplish the goal of "completed calls and proper billing,"[7] the Commission required CLECs "to enter into an agreement establishing fundamental network and service arrangements prior to activating...[an NXX] code... ..."[8] In the September Order, all NXX code applicants, not just CLECs, were required to document a pre-existing network and service arrangement to the Commission as an element of facilities readiness.[9]

Before issuing the September Order broadening the interconnection arrangement requirement to include wireless carriers, the Commission understood that an agreement between the Independent Companies and Verizon was already in place to allow for carriage of wireless carriers' calls. However, before a response to the Petitions is issued, parties will be given an opportunity to comment on the issue of whether all carriers should be required to have interconnection agreements in place prior to code activation.

Parties wishing to comment should file five (5) copies of their comments with Janet Hand Deixler, Secretary, New York State Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, by December 12, 2001. Comments

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[4] Reply at 2.

[5] Calls terminating to customers physically located beyond the local calling area of a designated NXX code.

[6] Case 00-C-0789 - Order Establishing Requirements for the Exchange of Local Traffic, (issued December 22, 2000). (Local Traffic Exchange Order).

[7] September Order at 7.

[8] Local Traffic Exchange Order at 4.

[9] *ID.* at 4.

should also be served on all active parties to Cases 98-C-0789 and 01-C-0181.

(SIGNED) JANET HAND DEIXLER
Secretary

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on March 20, 2002

COMMISSIONERS PRESENT:

Thomas J. Dunleavy, Presiding
James D. Bennett
Leonard A. Weiss
Neal N. Galvin

CASE 00-C-0789 - Proceeding on Motion of the Commission pursuant to Section 97(2) of the Public Service Law to Institute an Omnibus Proceeding to Investigate the Interconnection Arrangements between Telephone Companies.

CASE 01-C-0181 - Verizon New York Inc. has filed tariff revisions to introduce rates and regulations for intra-LATA local traffic between the company's meet point with and ITC and the company's point of interconnection with a CLEC.

ORDER GRANTING IN PART PETITIONS FOR RECONSIDERATION, CLARIFICATION OR REHEARING OF September 7, 2001 ORDER

(Issued and Effective August 16, 2002)

BY THE COMMISSION:

INTRODUCTION

This order lifts a requirement imposed in a prior Order (Rehearing Order)[1] that wireless carriers provide proof of completed interconnection arrangements with independent telephone companies prior to NXX code activation.

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[1] Case 00-C-0789, 01-C-0181 - Order Denying Petitions for Rehearing, Clarifying NXX Order, and Authorizing Permanent Rates, (issued September 7, 2001) (Rehearing Order).

BACKGROUND

Following a proceeding instituted in response to complaints by customers that certain calls either failed to reach their destination or were incorrectly billed at toll rates, we issued an Order[2] (NXX Order) establishing requirements for the exchange of local traffic between independent telephone companies (Independents) and competitive local exchange carriers (CLECs). The NXX Order's facilities readiness criteria required CLECs applying for numbering resources to provide proof of an interconnection arrangement with an independent telephone company establishing fundamental network and service provisions before activation of a requested NXX. Our Rehearing Order broadened the application of this facilities readiness criteria to all carriers obtaining numbering resources, not just CLECs.[3]

Petitions for Reconsideration, Rehearing or Clarification of the Rehearing Order were filed by: Sprint Spectrum L.P. d/b/a Sprint PCS (Sprint PCS); AT&T Wireless Services, Inc. (AT&T Wireless); and Nextel Partners, Inc. (Nextel). The Small Companies Group filed a response to these Petitions as well as comments in response to the Notice. Comments in response to the Notice were also filed by Sprint PCS and the New York State Telecommunications Association, Inc. (NYSTA). For the reasons discussed below, we now grant in part the Petitions for Reconsideration, Rehearing or Clarification of

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[2] Case 00-C-0789 - Order Establishing Requirements for the Exchange of Local Traffic, (issued December 22, 2000) (NXX Order).

[3] Because the Rehearing Order extended the interconnection arrangement requirement to parties not involved in the initial phase of this proceeding, we issued a Notice Inviting Comments (Notice) on December 4, 2001 regarding broadened application of the criteria.

the Rehearing Order to the extent the Rehearing Order applied the broadened facilities readiness criteria to wireless carriers.

DISCUSSION

Application of NXX and Rehearing Orders to Wireless Carriers

AT&T Wireless and Nextel objected to applying facilities readiness criteria to wireless carriers, as did NYSTA, claiming that application of the requirements to them violated due process since wireless carriers were not participants in these proceedings.[4] However, issuance of the Notice afforded all carriers an opportunity to comment on the application of the proposed readiness criteria, and therefore, cured any procedural defect which may have existed.

Nextel and AT&T Wireless argued that we lack jurisdiction over wireless carriers and for that reason cannot impose interconnection requirements on wireless carriers. The genesis of the interconnection requirement imposed on CLECs was ensuring completion of calls before activation of NXX codes. Requirements designed to effectively manage the exchange of traffic between carriers does not constitute regulation of cellular services. In applying this requirement to wireless carriers as well as CLECs, we considered a numbering resource parity objection interposed by AT&T and RCN.[5] Congress granted plenary jurisdiction to the FCC over numbering administration[6]

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[4] Although AT&T Wireless makes this argument, it was a party of record in this proceeding, as were its parent company and other affiliates.

[5] RCN Telecom of New York, Inc., Allegiance Telecom of New York, Inc. and Pac-West Telecom, Inc. (collectively known as RCN)

[6] Section 251(e)(1) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996.

and section 251(e)(1) allows the FCC to delegate to state commissions or other entities all or a portion of the FCC's numbering administrating jurisdiction. The grant of authority to state commissions extends to all carriers.[7]

Wireless Carriers Interconnection Arrangements

The Small Companies Group requested clarification as to whether the facilities readiness criteria, outlined in the NXX Order and clarified in the Rehearing Order, applied to wireless carriers. Nextel, AT&T Wireless and Sprint PCS characterized this criteria as a mandate that wireless carriers enter into interconnection agreements with independent telephone companies prior to obtaining assignment of an NXX code, and objected to applying it to wireless carriers. AT&T Wireless argued the facilities readiness requirement was burdensome, duplicative and unnecessary since AT&T Wireless will exchange little, if any, traffic with most carriers.[8] Both Sprint PCS and AT&T Wireless stated they would enter into local traffic exchange agreements where necessary and pointed out, as did NYSTA, that problems experienced by customers which caused the Commission to initiate this proceeding have not been experienced in connection with wireless services. Sprint also argued that such a requirement would be an administrative burden.

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[7] *See* Numbering Resource and Optimization Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 7545 (March 2000).

[8] The Rehearing Order applied the interconnection arrangement requirement to wireless carriers, in part because AT&T Communications New York, Inc. had argued earlier in this proceeding that "preconditions [on activation of new codes] must apply in all respects to all carriers in a defined market".

Throughout this proceeding, we have been concerned with ensuring that customer calls are completed. To accomplish this, the NXX order established a broadened facilities readiness criteria by requiring CLECs "to enter into an agreement establishing fundamental network and service arrangements prior to activating [an NXX] code".[9] Although the Rehearing Order extended the requirement to all carriers (including wireless carriers), it also clarified that "the interconnection arrangement requirement can be satisfied by the carrier making representations to the Department that an arrangement is or will be in place that will permit calls to be handled on a local basis by an Independent's customers."[10] As indicated in the Notice, not until after the Rehearing Order was issued did we became aware that an arrangement already existed between the independent telephone companies and Verizon for carrying and completing calls on a local billing basis to wireless carriers' customers. In addition, call completion is further ensured by formal interconnection agreements between wireless carriers and the LEC operating the tandem within the local calling area of the requested NXX.[11]

We reiterate: all carriers are responsible for traffic being carried from the Independents' service territory borders to the facilities used to provide their services. Confirmation provided to Department Staff regarding in place network and service arrangements with independent telephone companies in the local calling area of the rate center for the requested NXX

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[9] NXX Order at 4.

[10] Rehearing Order at 7.

[11] Documentation of these agreements is already required to be provided to NANPA and Department Staff prior to NXX assignment.

meets the interconnection requirement. Informal documentation of interconnection arrangements with each carrier operating in the local calling area meets our confirmation requirement, especially where the required arrangements already exist between wireless carriers and independent telephone companies. The petitions are granted to the extent our Rehearing Order required wireless carriers to provide proof of interconnection arrangements with all independent telephone companies for all rate centers in the local calling area of the rate center for a requested NXX.[12]

Transit Charges

Sprint PCS requested clarification as to whether Verizon's shared transport tariff charges apply to wireless carriers. Sprint PCS argued that when traffic volume does not justify direct interconnection, indirect interconnection via a transit provider is often the most efficient network design.

The Small Companies Group construed Sprint's argument regarding indirect interconnection as requiring its member companies to provide service beyond their certificated territory. The Small Companies Group maintained that the independent telephone companies are not required to characterize all calls to wireless carriers' customers within the wireless carrier's Major Trading Area (MTA) as local calls.

As noted above, an arrangement already exists between the independent telephone companies and Verizon for carrying and completing calls to wireless carriers' customers on a local billing basis. In addition, interconnection agreements between

[12] The requirement that wireless carriers provide documentation of an interconnection arrangement with the incumbent local exchange carrier in the rate center for the requested NXX is unchanged.

wireless carriers and the LEC operating the tandem within the local calling area of the requested NXX determine the terms and conditions of transit services, including pricing. These arrangements remain unaffected by the Orders in this proceeding, making clarification on this issue unnecessary. As to the Small Companies Group argument that independent telephone companies are not required to characterize calls to wireless carriers' customers as local, we restate that whether a call is treated as local depends on the local calling area of the service provider for the originating party, not that of the terminating party.

The Commission orders:

1. The petitions for reconsideration, clarification or rehearing of the September 7, 2001 Rehearing Order are granted to the extent discussed in the body of this Order.

2. These proceedings are continued.

By the Commission,

(SIGNED) JANET HAND DEIXLER
Secretary