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BEFORE THE ARIZONA CORPORATION COMMISSION

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 Chairman  
 WILLIAM A. MUNDELL  
 Commissioner  
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 Commissioner  
 MIKE GLEASON  
 Commissioner  
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 Commissioner

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IN THE MATTER OF THE FORMAL ) DOCKET NO. T-01051B-05-0495  
 COMPLAINT OF PAC-WEST TELECOMM ) T-03693~~B~~<sup>A</sup>-05-0495  
 SEEKING ENFORCEMENT OF THE )  
 INTERCONNECTION AGREEMENT ) PAC-WEST TELECOMM'S  
 BETWEEN PAC-WEST TELECOMM AND ) THIRD CITATION OF  
 QWEST CORPORATION ) SUPPLEMENTAL AUTHORITY  
 )

Pac-West Telecomm hereby files as a supplemental authority the following document: Proposed Order of Arbitration, Public Service Commission of Maryland, February 24, 2006, *In the Matter of the Petition for Arbitration of Interconnection Rates, Terms and Conditions with Core Communications, Inc.*, Case No. 9013 (*Proposed Order*). Due to the length of the arbitration order, Pac-West respectfully submits only the procedural history portion of the recommended order and that portion of the order that addresses intercarrier compensation for interexchange ISP bound traffic and VNXX compensation. *See Recommended Order pp. 24-28.* The full order may be easily accessed at the following url: <http://webapp.psc.state.md.us/Intranet/CaseNum/>

CaseForm.cfm; Case No. 9013; Docket Entry No. 68. This recommended order has been appealed to the Public Service Commission of Maryland.

Respectfully submitted this 5th day of April, 2006.

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IN THE MATTER OF THE PETITION FOR ARBI-  
TRATION OF INTERCONNECTION RATES, TERMS  
AND CONDITIONS WITH CORE COMMUNICATIONS,  
INC PURSUANT TO 47 U.S.C. SECTION 252(B).

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\* BEFORE THE  
PUBLIC SERVICE COMMISSION  
\* OF MARYLAND

\*  
\* CASE NO. 9013  
\* (CONSOLIDATED)  
\*

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**PROPOSED ORDER OF ARBITRATOR**

Before: Robert H. McGowan  
Hearing Examiner

Filed: February 24, 2006

TABLE OF CONTENTS

	<u>Page</u>
APPEARANCES .....	v
I. BACKGROUND AND PROCEDURAL HISTORY.....	1
II. SCOPE OF THIS CASE.....	2
III. GENERAL TERMS AND CONDITIONS.....	3
A. Tariffs .....	6
B. Discontinuation of Services .....	9
C. Discontinuance of Intercarrier Compensation Payments ..	10
D. Assurance of Payment .....	10
E. Default .....	13
F. Intellectual Property of Third Parties .....	14
G. Liability Issues .....	15
H. Network Reliability Management .....	15
I. Length of Initial Contract .....	16
J. Assignment .....	17
K. Audits .....	18
L. Payment Terms .....	19
M. References to Tariffs, Manuals, and Other Documents ...	20
IV. GLOSSARY ISSUES: DEFINITION OF APPLICABLE LAW.....	22
V. INTERCONNECTION ATTACHMENT - INTERCARRIER COMPENSATION...	24
A. Virtual NXX Traffic .....	24
B. ISP-Bound Traffic .....	27
C. Scope of Transitional Compensation Rules .....	27
D. Other Exempt Traffic .....	28
E. Intercarrier Compensation for VOIP Traffic .....	29
VI. INTERCONNECTION ATTACHMENT - NETWORK ARCHITECTURE.....	30
A. Interconnection According to Applicable Law .....	30
B. Point of Interconnection Issues .....	30
1. Point of Interconnection on Verizon's Network .....	30
2. Additional Dedicated Transport Charge .....	33
C. Network Management Proposals .....	34
1. Trunk Group Routing and Grooming; Mid-Span Fiber Traffic .....	34
2. Direct End-Office Trunking .....	36
3. Other Trunking Issues .....	38
D. Xspedius' Use of an AT&T Interconnection Schedule .....	40
E. Interconnection Mechanisms .....	41
F. Use of Dedicated Transport Facilities for Intercon- nection.....	43
G. Intra-building Interconnection.....	44

H. May Verizon Be Required to Interconnect With Core at a POI Located at Core's End of a Loop? May Core Demand That Verizon Interconnect With Core Via Loops Rather Than Dedicated Lines? .....	46
I. Should Core Be Required to Negotiate With Verizon Before Using Non-Standard Interfaces? .....	48
J. Interconnection Intervals .....	40
K. Should Core Be Required to Install a Signaling System 7 in Order for Verizon to Supply Core With Calling Party Number Information? Should the Parties Be Required to Provide DNIS to Each Other? .....	50
L. Traffic Measurement Proposals .....	52
1. Traffic Measurement and Billing .....	52
2. Should Core Be Entitled to Charge Terminating Intrastate Access Charges for All Traffic, Regardless of Type of Jurisdiction? .....	53
3. Access Toll Connecting Trunks .....	54
4. Should the ICA Provide that Verizon Must Comply With the Parity Requirement in § 251(c)(2) of the Act? .....	56
5. Meet-Point Billing Provisions: Compliance With Tariffs .....	55
6. Timely Usage Data .....	57
7. Tandem Transit Service .....	59
M. Recovery of Costs if CLEC Fails to Enter Into Direct Agreement .....	59
N. Cap on Transit Service .....	61
O. Should Core Use the Same Rate Centers as Verizon and Choose a Routing Point in Each LATA to Which Verizon Will Route Core's Calls? .....	62
P. Traffic Forecasts .....	63
Q. Incentive for Accurate and Updated Forecasts .....	64
R. Network Elements Attachment .....	66
S. Line Sharing .....	67
T. Subloop Feeder Facilities .....	67
U. Collocation at Remote Terminals .....	68
V. Proprietary Intelligent Network Services .....	68
W. Reservation of Rights .....	70
X. "Customer Not Ready" and "Misdirected Service Calls" ..	71
Y. Building New Facilities .....	71
Z. Coordinated Conversions - Cost of Recovery for Technician Dispatch and Other Issues .....	72
VII. SCHEDULING ISSUES .....	73
VIII. INSIDE WIRE .....	74

IX.	DARK FIBER ISSUES.....	75
	A. Dark Fiber Tariff.....	75
	B. Dark Fiber Inquiries.....	75
	C. Industry Standard Ordering Forms for Dark Fiber.....	77
	D. Information Concerning Verizon's Dark Fiber - Engi- neering Meetings.....	77
	E. Interval for Responding to Dark Fiber Information Requests.....	78
	F. Number of Central Offices in an Indirect Dark Fiber Route.....	79
	G. Collocation at Intermediate Offices on Dark Fiber Routes.....	80
	H. Dark Fiber That Has Already Been Assigned.....	81
	I. Use of Dark Fiber for Resale.....	81
	J. Third Party Assistance in Using Dark Fiber.....	82
	K. Limits on Dark Fiber Access Due to Verizon's Carrier of Last Resort Obligations.....	83
	L. Repair of Dark Fiber.....	84
X.	UNBUNDLED SIGNALING AND DATABASES.....	85
	A. Is Verizon Required to Provide Unbundled Access to Signaling and Database Services?.....	85
	B. Should Core Follow Verizon's Bona Fide Request ["BFR"] Process When Requesting UNEs That Are Not Currently Available?.....	86
XI.	COLLOCATION ATTACHMENT.....	86
XII.	PRICING ATTACHMENT.....	87
XIII.	RESALE ATTACHMENT.....	89
	ORDERED PARAGRAPHS.....	90

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## I. BACKGROUND AND PROCEDURAL HISTORY

This case addresses arbitration petitions filed pursuant to Section 252 of The Communications Act of 1934 ("the Act" or "the Telecommunications Act").<sup>1</sup> The Act provides that if an incumbent local exchange carrier ("ILEC") and one or more competitive local exchange carriers ("CLECs") cannot agree on the terms by which the CLECs will interconnect with the ILEC, state commissions are authorized to arbitrate those terms.

On July 14, 2004, Verizon Maryland, Inc. ("Verizon") filed a Petition for Arbitration of Interconnection Rates, Terms and Conditions with Core Communications, Inc. ("Core"). Xspedius Management Co. Switched Services, L.L.C. and Xspedius Management Co. of Maryland, L.L.C. (collectively "Xspedius") joined this case as a party in September 2004. Verizon is the ILEC in this proceeding, and Core and Xspedius are the CLECs.

A pre-hearing conference was held on October 2, 2004. On November 19, 2004, Verizon filed the direct panel testimony of Rosemary Clayton, Peter D'Amico, John Korman, Linda Lewis, Gary Librizzi, William Munsell, Carlo Peduto, Jonathan Smith and Timothy Wagner. Also on November 19, 2004, Xspedius filed the direct testimony of James C. Falvey, and Core filed the direct testimony of Christopher F. Van de Verg and Douglas A. Dawson. The parties filed reply testimony of their witnesses on December 20, 2004.

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<sup>1</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified throughout Title 47 of the U.S. Code.

On January 12, 2005, the Commission delegated Case Nos. 9011, 9012 and 9013 to the Hearing Examiner Division. On September 3, 2004, the Commission, having determined that the legal and factual questions in Case Nos. 9011, 9012 and 9013 overlapped, consolidated them into Case No. 9013. The Commission delegated Case No. 9013 to the Hearing Examiner Division on January 12, 2005. On March 1, 2005, this Arbitrator conducted an evidentiary hearing for cross-examination of pre-filed testimony. On March 23, 2005, the parties filed rebuttal testimony by their witnesses. No hearing was held after submission of rebuttal testimony. The parties filed briefs on June 9 and 10, 2005 and reply briefs on July 22, 2005.

## II. SCOPE OF THIS CASE

This case involves disputes about the specific terms and conditions of the Interconnection Agreement ("ICA") that will govern the commercial relationship between Verizon and Core and Verizon and Xspedius. Under provisions of the Act other CLECs may "opt in" to valid contracts between Verizon and Core or Xspedius. Thus other CLECs may opt in to the Verizon-Core-Xspedius ICA at issue in the present case. Disputes involving various attachments to the ICA, such as the Interconnection Attachment, are also addressed in this Proposed Order.

The parties submitted issue matrices organizing their positions on disputed matters. One matrix sets out the issues between Verizon and Xspedius, the other matrix sets out the

Verizon-Core disagreements. There are 47 issues between Verizon and Xspedius and 64 between Verizon and Core. (Numbers are according to Verizon's format.) The contested matters between Verizon and Xspedius include General Terms and Conditions, Additional Services, Interconnection and Pricing. Certain issues are the same between Verizon and Core and Verizon and Xspedius, several issues are highly interrelated, and certain issues were resolved between the parties between filing of the issue matrices on September 28, 2004 and close of the record on July 22, 2005.

### III. GENERAL TERMS AND CONDITIONS

Verizon notes that Core objects to all provisions addressing bankruptcy, termination of interconnection agreements, assurance of payment, discontinuance of service by Core, force majeure, customer fraud, insurance, limitations on liability, taxes, and technology (the "commercial framework" provisions). Core's reasons for objecting to this Commission's arbitration of these issues are as follows:

- The Act mandates that the parties negotiate certain issues that are specifically enumerated in the Act.
- General terms and conditions are not among those issues.
- The Act permits the parties to negotiate any other issues.
- Any issues voluntarily negotiated may be subject to compulsory state commission arbitration.

or handbooks." Verizon does not appear to have an automatic notification mechanism for changes to the latter or other documents.

This issue also arose under the tariff heading earlier in this Proposed Order. The decision there is incorporated into this section; the Arbitrator again notes that the party proposing a change has the burden of properly notifying other parties of impending significant changes to tariffs, third party guides, practices, handbooks, or any other document that may in turn materially affect that other party.

This ruling, applied to current facts, requires Verizon to inform CLECs whenever any document, whether or not it is subject to filing or administrative review or adjudication, would, if it becomes final, materially affect Verizon's ICA with Xspedius. Merely posting notice of the document on a website and counting on Xspedius to find and react to it is not sufficient. As Verizon must determine what alterations are material, it should consult with Xspedius on the issue of materiality and work out with Xspedius the mechanics of notification.

#### **IV. GLOSSARY ISSUES: DEFINITION OF APPLICABLE LAW**

Verizon and Xspedius agree that "applicable law," for purposes of the ICA, should be defined as "all effective laws, government regulations and government orders, applicable to each party's performance [under the ICA]." Core desires to limit the applicability of laws, etc., to those applicable "as of the effective date" of the ICA. Core maintains that Verizon will use its

proposed applicable law language "as a change of law provision permitting Verizon to immediately and unilaterally implement any new order or decision which, in Verizon's view, relieves Verizon of its unbundling obligations." In short, as in several instances in this proceeding, Core worries that Verizon will make instantaneous and automatic changes to the ICA that will adversely affect Core.

Verizon objects to Core's proposal on the grounds that under that proposal the legal rights of a CLEC would in part be determined by the date the CLEC finalized its ICA. Depending on the date ICAs were finalized, Verizon's unbundling obligation would vary from CLEC to CLEC. Further, freezing the ICA at a certain date could, Verizon states, prevent certain "binding federal or state laws or regulations" from taking effect. Verizon In. Br. at 25. For example, Verizon stated that if applicable law were to be frozen at a particular date, Core would argue that certain provisions in the FCC's TRRO<sup>3</sup> could not be implemented in Maryland. Verizon Rep. Br. at 21.

In reviewing this matter, it is unlikely that any private contract, such as an ICA, can prevent "binding" federal or state laws from applying to the contracting parties. It is, therefore, unclear to this Arbitrator if "freezing" ICAs at a date certain is either possible or desirable. Core's language is therefore rejected and the language acceptable to Verizon and Xspedius is approved. Core's interests will be protected by change of law

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<sup>3</sup> Order on Remand, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, FCC No. 04-290 (rel. Feb. 4, 2005).

provisions that normally govern the application of new or updated law to existing contractual relationships or procedures. If any party is dissatisfied with the notice provisions or other elements in the change of law section of the ICA, that party should seek to change those provisions.

## **V. INTERCONNECTION ATTACHMENT -- INTERCARRIER COMPENSATION**

### **A. Virtual NXX Traffic**

Virtual telephone numbers ("VNXX") "disguise a [receiving] customer's location to the originating carrier's switches and make the [receiving] customer appear to be in the same local calling area as the caller." Verizon In. Br. at 26. End users can legitimately purchase a CLEC's or Verizon's VNXX service to reduce the cost of their incoming and outgoing calls that would alternatively be long distance. *Id.* Virtual telephone numbers can indicate that a call that is long distance in terms of miles between the calling parties is actually a local call, based on the originating and terminating telephone numbers. Verizon maintains that it is the actual physical location of callers that should determine whether ILECs and CLECs pay for the use of each other's networks through access charges or through a reciprocal compensation regime.

As all VNXX calls are likely long distance in terms of miles spanned, and the access charge regime applies only to long distance calls, Verizon's proposal would subject all VNXX calls to access charges. As every VNXX call related to this dispute

requires use of Verizon's network, Verizon would be the chief beneficiary of bringing VNXX calls under an access charge regime. Under the reciprocal compensation regime, however, Verizon would have to pay CLECs for completing its calls, and vice versa. Put more simply, in an access charge regime, Verizon Maryland would receive originating access charges, while in a reciprocal compensation regime, Verizon would be responsible for payment flows to the terminating interconnected carrier.

Verizon maintains that FCC Rule 51.701(b)(1) exempts exchange access, information access, and exchange services for such access from reciprocal compensation treatment. Verizon argues that a LEC that originates a call to a second LEC's out-of-area virtual NXX is providing two types of exempt service: exchange access and exchange service for access. Verizon In. Br. at 26. Verizon therefore claims that FCC Rule 51.701(b)(1) would preclude adoption of a reciprocal compensation regime for VNXX calls.

As this Commission's *US LEC Order*<sup>4</sup> did not mention FCC Rule 51.701(b)(1) and relied on the FCC's *Starpower Damages Order*,<sup>5</sup> Verizon argues that the *US LEC Order* should not control here. While the *Starpower Damages Order* permitted reciprocal compensation for VNXX traffic, Verizon claims that it did so because the parties' contracts, which were adjudicated in *Starpower*, dated from 1996. Rule 51.701(b)(1), which Verizon claims prohibits reciprocal compensation for VNXX traffic, was adopted later, in 2001.

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<sup>4</sup> Order No. 79813, *Application of US LEC of Maryland, Inc. v. Verizon Maryland Inc.*, Case No. 8922 (Md. PSC Mar. 10, 2002).

<sup>5</sup> Memorandum Opinion and Order, *Starpower Communications, LLC v. Verizon South Inc.*, 17 FCC Rcd. 687 (2002).

Therefore, Verizon argues that neither *Starpower* nor *US LEC* addresses the current state of federal law relating to VNXX traffic. *Id.* The current law, according to Verizon, is embodied in Rule 51.701(b)(1) and precludes reciprocal compensation for VNXX traffic. This Commission's Order in Case No. 8882,<sup>6</sup> the AT&T arbitration, also supports this view, according to Verizon.

As Verizon itself admits, however, the FCC in *Starpower* stated that the case did "not address the legal and policy question of whether incumbent LECs have an affirmative obligation ... to pay reciprocal compensation for VNXX traffic." Until the FCC and, perhaps, the federal courts do rule on this issue, the matter remains unsettled. This Commission, having examined the law in *US LEC*, decided to permit reciprocal compensation for VNXX calls. Verizon states that the *US LEC* decision did not address the implications of FCC Rule 51.701(b)(1). Neither does the record in this proceeding contain a full explication of Rule 51.701(b)(1),<sup>7</sup> nor is there a case based on that rule that requires that the Commission's decision in *US LEC* be overturned. Therefore, that decision will be upheld in this Proposed Order.

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<sup>6</sup> *Re AT&T Communications of Maryland, Inc.*, 95 Md. PSC 159-60. The Commission held that "FX calls are local calls, not interexchange calls." *Id.* at 160.

<sup>7</sup> Verizon's interpretation of the regulation assumes what must be proven: that VNXX is interexchange traffic outside the reciprocal compensation regime. Even if Verizon's quotation of 47 C.F.R. § 51.701 is correct, the language does not unambiguously refer to the appropriate treatment of VNXX traffic. Verizon has also not shown why VNXX service should be treated differently than an ILEC-CLEC connection serving an ISP: such a connection is interexchange, but within the reciprocal compensation regime. While a different regime, such as "bill and keep" might be appropriate for VNXX traffic, such a change is beyond the scope and record of this proceeding.

## **B. ISP-Bound Traffic**

Core maintains that due to inaction by the FCC, the FCC's *ISP Remand Order*, establishing a transitional compensation regime to phase out payments between carriers for ISP-bound traffic, did not become effective. Core objected to the transitional compensation mechanism because it provided for lower compensation than the existing reciprocal compensation mechanism of § 251(b)(5) of The Telecommunications Act of 1996 ("the Act").

Verizon counters that this Commission cannot decide if the FCC violated its own procedures and that this matter must be left to the federal courts. This Arbitrator agrees that resolution of whether the FCC violated its own procedures, and whether the FCC's transitional compensation mechanism or the Act's § 251(b)(5) compensation mechanism is legally binding must wait for the resolution of Core's petition for a declaratory ruling, filed in the District of Columbia Circuit Court. Failing clear notice to the record that the FCC's transitional compensation rules are not in effect, this Proposed Order will treat them as valid.

## **C. Scope of Transitional Compensation Rules**

The issue here is whether interexchange ISP-bound traffic is eligible for transitional compensation. In Verizon's view, transitional compensation should only apply to calls made and received within a local calling area. Core and Xspedius would apply transitional compensation to interexchange ISP-bound calls.

Core opposes Verizon's position, claiming that the excerpts Verizon quotes from the FCC's *ISP Remand Order* are *dicta*

and not binding on the parties here. Core is correct that the language Verizon relies on "merely stated that many calls to ISPs originate and terminate within a local calling area -- not that all such calls do." The FCC's statements appear to be descriptive rather than prescriptive. There is nothing in the language upon which Verizon relies that limits transitional compensation to ISP calls sent and received within the same local calling area. Core therefore prevails on this issue.

#### **D. Other Exempt Traffic**

Verizon proposes a definition of reciprocal compensation traffic that it claims adheres to FCC orders and regulations. Verizon's definition would exclude from reciprocal compensation (§ 251(b)(5) of the Telecommunications Act) "traffic that is interstate or intrastate Exchange Access, Information Access, or Exchange Services for Exchange Access or Information Access. Verizon would also exclude Internet Traffic, traffic not originating or terminating in the same Verizon local calling area, Toll Traffic, Optional Extended Local Calling Area Traffic, Special Access, Private Line, traffic not switched by the terminating party, tandem Transit Traffic, Voice Information Service Traffic, and VNXX Traffic." Verizon In. Br. at 36.

This Proposed Order already has found that VNXX traffic is subject to reciprocal compensation. The record is simply not detailed enough to make the specific findings Verizon requests.

Therefore, no change will be made to the present treatment of the services Verizon enumerates.

**E. Intercarrier Compensation for VOIP Traffic**

Xspedius wishes the agreement between it and Verizon to include language stating that the parties disagree whether VOIP traffic should be subject to switched access charges or to reciprocal compensation. Xspedius wants the contract language to state that despite their disagreement, the parties will comply with applicable law.

Verizon's objections to Xspedius' position include Xspedius' failure to precisely define VOIP and uncertainty about this Commission's jurisdiction over intercarrier compensation for VOIP traffic, given that it is regulated by the FCC and the FCC "is not subject to the regulation of state public utility commissions." Verizon In. Br. at 39, citing FCC *Vonage Declaratory Ruling*, ¶¶ 1, 31-32. Verizon's essential complaint, however, is that Xspedius' proposed language is unnecessary, as the Interconnection Agreement between Verizon and Xspedius already requires the parties to follow applicable law.

Verizon is correct that this issue is regulated primarily at the Federal level. It is also unclear what Xspedius' proposed language adds to the legal obligations of either party. Furthermore, all parties are bound by applicable law in any case. Therefore, Xspedius' proposed language is stricken as superfluous.