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April 14, 2000

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FEDERAL COMMUNICATIONS COMMISSION
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VIA HAND DELIVERY

Magalie Roman Salas, Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

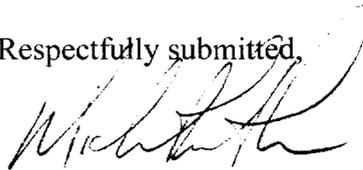
**RE: Petition of Starpower Communications, LLC Pursuant to
Section 252(e)(5) of the Communications Act (CC Docket No. 00-52)**

Dear Secretary Salas:

Enclosed for filing with the Commission are an original and eight (8) copies of the Response of Starpower Communications, LLC to various comments filed in the referenced docket pursuant to the Commission's Public Notice.

Please date stamp the extra copy of this filing and return to our messenger. Should you have any questions, please do not hesitate to contact me.

Respectfully submitted,


Michael L. Shor

cc: Service list, with enclosure
Mr. Joe Kahl
Deborah Royster, Esq.
Russell M. Blau, Esq.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
)
Petition of Starpower Communications, LLC)
Pursuant to Section 252(e)(5) of the)
Communications Act for Preemption of the)
Jurisdiction of the Virginia State Corporation)
Commission Regarding Interconnection)
Disputes with Bell Atlantic-Virginia, Inc.)
and GTE South, Incorporated)

CC Docket No. 00-52

RESPONSE OF STARPOWER COMMUNICATIONS, LLC

Starpower Communications, LLC ("Starpower"), by its undersigned counsel and in accordance with the Public Notice issued by the Commission in this matter, hereby responds to the Comments filed by in this docket by Bell Atlantic ("BA") and GTE, MCI WorldCom, Inc. ("WorldCom") and Cox Communications, Inc. ("Cox").

WorldCom supports Starpower's request for the Commission to preempt the jurisdiction of the Virginia State Corporation Commission ("Virginia Commission"), which failed to act when requested to resolve interconnection disputes between Starpower and BA and between Starpower and GTE.¹ Cox takes no position on Starpower's petition² and BA and GTE oppose the petition.³

¹ Starpower adopts and incorporates WorldCom's comments herein by reference.

² Cox urges the Commission to condition approval of the proposed BA/GTE merger on a requirement that both incumbents pay all outstanding amounts due for reciprocal compensation under existing interconnection agreements. While Cox's suggestion certainly has merit, it is beyond the scope of the issues raised by the pending petition.

³ Perhaps the most telling comment on the Petition, however, was one that was *not* filed - the Virginia Commission chose not to participate in this proceeding, reiterating the view expressed in its January 24, 2000, decision declining jurisdiction in the Starpower/GTE matter, that this Commission is the proper forum to resolve these disputes.

As set forth below, nothing in the BA/GTE comments changes the fundamental fact that the Virginia Commission refused to reach the merits of the interconnection disputes presented by Starpower's complaints. Instead, the Virginia Commission declined to assert jurisdiction over the disputes and dismissed both without prejudice. Under any conceivable view of the facts, the Virginia Commission "fail[ed] to act to carry out its responsibility" in a proceeding brought under section 252 of the Communications Act of 1934 (the "Act"). As such, this Commission is the only forum with jurisdiction to resolve those disputes and, absent preemption, Starpower will be left without any legal remedy to resolve its disputes with BA and GTE over the interpretation of their respective interconnection agreements.

WorldCom and BA/GTE both concede that the enforcement actions that Starpower had initiated before the Virginia Commission were "proceedings or other matter[s]" under Section 252 of the Act. (BA/GTE Comments at 2; WorldCom Comments at 4-5.) Thus, the only relevant issue before this Commission is whether the Virginia Commission's decision "to decline jurisdiction and allow the parties to present their cases to the FCC"⁴ constitutes a "fail[ure] to act to carry out its responsibility" under the Act. WorldCom agrees with Starpower that the decision to decline jurisdiction is a clear, unequivocal, "fail[ure] to act" (WorldCom Comments at 2-3.), and the Virginia Commission certainly does not appear to contend otherwise. BA/GTE disagrees. In BA/GTE's view, the Virginia Commission has, in fact, "acted by reviewing and denying Starpower's requests." (BA/GTE Comments at 2.) To reach this tortured conclusion, though, BA/GTE ignores

⁴ *Petition of Starpower Communications, LLC For Declaratory Judgment Interpreting Interconnection Agreement with GTE South, Inc.*, Case No. PUC990023, Final Order at 6 (Va. S.C.C., Jan. 24, 2000) ("*Starpower/GTE Decision*"). A copy of this decision was attached to Starpower's Petition as Exhibit 10.

entirely the ultimate conclusion ("we . . . decline jurisdiction"), in favor of a myopic focus on the academic discussion of jurisdictional and regulatory conflicts and dilemmas in which the Virginia Commission justified that result. (BA/GTE Comments at 2.)

Plainly, BA/GTE is wrong. The Virginia Commission most assuredly did not "deny[] Starpower's requests." (BA/GTE Comments at 2.) The most that can be said is the Virginia Commission articulated some jurisdictional, regulatory and economic concerns that led it to decline, rightly or wrongly, jurisdiction over Starpower's reciprocal compensation disputes.⁵ Just as a court will analyze the facts and issues of a particular case to determine whether it has jurisdiction over the parties or subject matter of an action, so too, the Virginia Commission analyzed the regulatory arena in which the reciprocal compensation dispute exists to conclude that it did not have – or did not want – jurisdiction over the dispute. That discussion no more constitutes action on the merits of Starpower's complaints than a court's decision dismissing a proceeding on the ground that it lacks jurisdiction gives rise to a right of appeal on the merits of the underlying dispute.

BA/GTE carries its faulty analysis to an illogical extreme in suggesting that Starpower should amend its pending appeal to the United States District Court for the Eastern District of Virginia (the "Eastern District") "to include interpretation of the agreements." (BA/GTE Comments at 3.) BA/GTE misconstrues the nature of Starpower's appeal, and its "suggestion" has no support whatever in appellate law or practice.

⁵ The propriety of the Virginia Commission's decision to decline jurisdiction is not at issue here; section 252(e)(5) merely speaks of a "failure to act" by a State commission, without regard to the reasons for that inaction.

To be sure, the Virginia Commission's decision is a "determination," albeit one that dealt only with the threshold matter of jurisdiction; and Starpower was "aggrieved" by that determination. In the absence of preemption by this Commission, the Eastern District could be an "appropriate federal district court" under section 252(e)(6) for the purposes of reviewing the Virginia Commission's "determination" to decline jurisdiction.⁶ Those facts, though, do not lead to the conclusion that the District Court has jurisdiction over the merits of the underlying dispute. Indeed, that Court already has held that it does *not* have original jurisdiction over a reciprocal compensation dispute. In *Bell Atlantic of Virginia, Inc. v. WorldCom Technologies of Virginia, Inc.*, 70 F. Supp.2d 620 (E.D. Va. 1999), the Eastern District dismissed a reciprocal compensation complaint filed by Bell Atlantic against WorldCom on the ground that its statutory jurisdiction was limited to appellate review, and therefore it was precluded from exercising original jurisdiction over the dispute – that lay with the Virginia Commission. The Court stated its conclusion as follows:

In this case, Bell Atlantic seeks to determine whether ISPs constitute reciprocal compensation under the terms of the parties' Agreement. [sic] Although this dispute does not involve terms arbitrated before the Virginia Commission, the Virginia Commission did make a determination regarding the agreement when it was approved. Thus,

⁶ BA/GTE makes far too much of the appeal that Starpower filed in order to preserve its rights pending a decision on the instant Petition. Under section 252(e)(6), if this Commission finds that the Virginia Commission "fail[ed] to act," then the proceeding by this Commission, and any judicial review thereof, is the "exclusive remedy" for that failure to act, and Starpower must dismiss its court appeal. On the other hand, if the Commission finds (contrary to the facts and law discussed herein) that the Virginia Commission did "act" and that preemption therefore is inapplicable, Starpower presumably would have the right to pursue its appeal of the Virginia Commission's "determination" to a district court under the second sentence of section 252(e)(6); and, as discussed in the text, the Eastern District has found that this appellate remedy also is "exclusive" in cases where it is available. Starpower finds itself in a jurisdictional minefield where it may have to pursue either of two "exclusive" remedies depending on this Commission's preliminary determination, and is at risk of being accused of waiving its claims if it does not pursue both paths in a timely manner. Therefore, Starpower filed an appeal with the Eastern District, to be pursued only in the hypothetical event that this Commission refuses to preempt the Virginia Commission as Starpower believes it should.

the Court finds that § 252 applies. However, the Virginia Commission did not make a determination regarding the interpretation of the claims. This Court finds that the Telecommunications Act was designed to allow the state commission to make the first determination. . . . Circumventing the state commission's initial review undermines the review process established by Congress in the Telecommunications Act. For those reasons, the Court holds that it lacks subject matter jurisdiction over this dispute until the Virginia Commission makes an initial determination.

70 F. Supp.2d at 626 (citation omitted).⁷

This decision prevents Starpower from amending its complaint to ask the Eastern District to interpret the agreements as a court of original jurisdiction while, at the same time, it is reviewing on appeal the Virginia Commission's jurisdictional decision. Nor is it possible to amend the complaint to ask the Eastern District to review the agreements on appeal because the Virginia Commission never reached the merits and, as such, there is no substantive decision for the Eastern District to review.

The simple conclusion is that the Virginia Commission did not resolve the disputes raised by Starpower's complaints and its decision to decline jurisdiction over those disputes is a complete, clear and total failure to act. As WorldCom aptly observed, this Commission has stated in briefs to Courts of Appeal for the Fourth and Eighth Circuits, "[a] state may choose whether to assume regulatory responsibility [over interconnection agreements]; if it elects not to do so, the FCC will perform that role under the statute."⁸

⁷ BA did not appeal that decision.

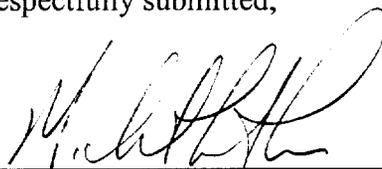
⁸ WorldCom Comments at 3, citing Brief for the United States as Intervenor-Appellant at 5, *Bell Atlantic-Maryland, Inc. v. MCI WorldCom, Inc.*, No. 99-2459 (4th Cir.); Brief for the United States and the Federal Communications Commission as Intervenor, at 5, *Southwestern Bell Telephone Co., v. Connecticut Communications Corp.*, No. 99-3952 (8th Cir.).

Here, the Virginia Commission has chosen not to make a determination regarding the interpretation and enforcement of interconnection agreements between Starpower, BA and GTE. It is time for the FCC to perform that role under the statute.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in its Petition, Starpower respectfully requests the FCC to preempt the jurisdiction of the Virginia Commission regarding the interconnection disputes between Starpower and BA and GTE; to conduct such proceedings as it deems necessary to determine the merits of the disputes; following such proceedings; to issue an order interpreting the reciprocal compensation provisions of the interconnection agreements between Starpower and BA and GTE and directing BA and GTE to pay Starpower reciprocal compensation for the transport and termination of traffic bound for ISPs, as contemplated by the agreements; and grant such other relief as the FCC may deem just and reasonable.

Respectfully submitted,



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Dated: April 14, 2000

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of April, 2000, true and correct copies of the foregoing Response of Starpower Communications, LLC were served via First Class Mail, postage, pre-paid (unless otherwise indicated) on:

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