

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
)  
Petition of WorldCom, Inc. )  
Pursuant to Section 252(e)(5) of the )  
Communications Act for Expedited )  
Preemption of the Jurisdiction of the )  
Virginia State Corporation Commission )  
Regarding Interconnection Disputes )  
With Verizon-Virginia, Inc. And for )  
Expeditious Arbitration )

CC Docket No. 00-218

**COMMENTS OF COX COMMUNICATIONS, INC.**

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November 13, 2000

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## SUMMARY

Cox generally supports the petition filed by WorldCom, Inc. seeking the FCC's preemption of the jurisdiction granted to the state commissions by the Act. Cox agrees that the Virginia State Corporation Commission has failed to carry out its responsibilities under Section 252 of the Act regarding WCOM's request to that commission for arbitration of its interconnection agreement with Verizon Virginia, Inc. Cox finds itself in a similar position since it also sought the VSCC's arbitration of its interconnection agreement with VZ-VA but was thwarted by that commission's unwillingness to arbitrate pursuant to federal law. Cox is an interested party in this proceeding because it intends shortly to file a similar petition with the FCC to seek such preemption, and is concerned that the procedures established in the present proceeding will be applied in handling Cox's preemption petition.

Hence, Cox's Comments are limited in scope to the procedures that should be adopted by the FCC in arbitrating interconnection agreements between local exchange service providers. Without taking a position on WCOM's request for expedited action, Cox suggests that the FCC proceed with due diligence and consider the comments submitted by interested parties, particularly as they relate to procedural concerns. Cox intends to request that the FCC consider its petition with that of WCOM's in a combined proceeding. It is thus willing to waive its rights, on a limited basis, to a separate proceeding exclusively involving Cox's interconnection agreement with VZ-VA. In a combined proceeding, of course, some issues presented by the parties will be in common while others will not, and some resolutions will be in common while others will not. Certain procedural safeguards accordingly will be needed to protect each petitioning

party's right to a separate decision on non-common issues and on resolutions not proposed in common. In particular, only common issues with similar proposed resolutions should be heard in the combined portion of the proceeding. The FCC should eschew any attempt to force the combined petitioning parties to address non-common issues jointly or to submit joint proposed resolutions. If there are expenses of FCC arbitration to be borne by the parties, Cox recommends that the total be shared by the participating parties according to a specific allocation formula.

Cox supports WCOM's recommendations concerning the general format of the proceedings and the time frames within which they are to be conducted. Cox agrees with the suggestion to form a three-member panel of arbitrators made up of FCC staff members from three FCC offices, and offers several suggestions for delegating the appropriate authority to the arbitrator to conduct proceedings that will be fair and impartial. However, Cox believes that the appointment of arbitrators from outside the FCC would not lead to resolutions that are either more timely or more in accordance with the Act and the due process rights of the parties.

Finally, as the basis for beginning FCC arbitration in its case, Cox supports using the contract language that reflects the current agreement between Cox and VZ-VA as to wording. Cox opposes using either the existing agreement between the parties or any other "template," both VZ-VA's and any other party's, for such purpose.

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**COMMENTS OF  
COX COMMUNICATIONS, INC.**

Cox Communications, Inc. ("Cox") submits these Comments in the above-referenced proceeding in accordance with the Public Notice, DA 00-2432, released October 27, 2000. This Public Notice sought comment from interested parties on the petition ("the Petition") filed on October 26, 2000, by WorldCom, Inc. ("WCOM") seeking the Federal Communications Commission's ("FCC's") preemption of the jurisdiction of the Virginia State Corporation Commission ("the VSCC").

The Petition was filed pursuant to Section 252(e)(5) of the Telecommunications Act of 1996, 47 USC § 151 *et seq.* ("the Act"), and Section 51.803 of the FCC's Rules, 47 CFR § 51.803. WCOM seeks FCC preemption for the purpose of arbitrating an interconnection agreement with Verizon Virginia, Inc. ("VZ-VA").<sup>1</sup> WCOM had earlier sought the VSCC's

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<sup>1</sup> The Certificates of Public Convenience and Necessity previously issued to Bell Atlantic-Virginia, Inc. were cancelled and reissued to Verizon Virginia, Inc. pursuant to the VSCC's Order of August 4, 2000, in Case No. PUC000217. This action followed the VSCC's approval of the merger of Bell Atlantic Corporation and GTE Corporation by the Order of November 29, 1999, in Case No. PUC990100.

arbitration of this agreement; however, on September 13, 2000, the VSCC issued an order denying WCOM's petition to arbitrate this agreement pursuant to federal law. In this ruling, the VSCC said it would not arbitrate solely under federal law since such action could be deemed a waiver of the immunity of the Commonwealth of Virginia. The VSCC offered WCOM the opportunity to arbitrate solely under state law; however, WCOM elected to exercise its federal rights instead by filing the Petition. The VSCC's express refusal to arbitrate the dispute between WCOM and VZ-VA under federal law constitutes a failure by the VSCC "to act to carry out its responsibility" under Section 252 of the Act, 47 U.S.C. § 252.

#### **I. COX IS AN INTERESTED PARTY**

Although this proceeding involves the FCC's adjudication of the contract rights of WCOM and VZ-VA, Cox is an interested party because of the later impact that the procedures adopted here might have on Cox. Cox has a direct interest in the procedures that will be used here as the FCC arbitrates this interconnection agreement between two other parties. Cox expects that the process followed by the FCC in this proceeding might be used when future parties bring similar petitions for resolution. And Cox anticipates bringing such an action to the FCC in the immediate future.

Just as WCOM did, Cox filed a petition with the VSCC for arbitration of an interconnection agreement with VZ-VA when intensive negotiations between the parties failed to result in an agreement on all issues. Cox, too, experienced the VSCC's dismissal of its petition for arbitration. The purpose of apprising the FCC in these Comments of the VSCC's dismissal is merely to establish Cox's status as an interested party in this proceeding. Cox's interest herein is exclusively with the procedures that the FCC will adopt in this case, since

that process might be employed later when Cox brings its case before the FCC.<sup>2</sup> Of course, Cox also has an interest in the outcome of common issues that it shares with WCOM, and Cox recommends below various procedural safeguards to protect the interests of both parties in the resolution of such issues.

## **II. SCOPE OF THESE COMMENTS**

These Comments are limited in scope to the procedures that should be adopted by the FCC in arbitrating interconnection agreements between local exchange service providers. However, Cox is mindful of the overarching importance of the FCC's decision in this arbitration proceeding brought by WCOM, which involves the first request for FCC arbitration of an interconnection agreement arising from the state level under the Act. Given the historical significance of the action to be taken by the FCC in this proceeding, these Comments are intended to assist the FCC in establishing a process for application here and in future proceedings that will lead to effective arbitration in a neutral manner and will ensure that each party has an adequate opportunity to present its case in a full evidentiary hearing. Following some general recommendations below, these Comments will address individually each subsection of the Petition found at Section V, pages 9 through 14.

## **III. GENERAL COMMENTS**

### **A. Expedited Treatment.**

Cox takes no position with respect to WCOM's request to expedite the FCC's arbitration of the interconnection agreement between WCOM and VZ-VA in this instance. If

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<sup>2</sup> These Comments are not intended to be the notice provided for in Section 252(e)(5) of the Act, 47 U.S.C. § 252(e)(5). Cox intends to comply fully with that statutory requirement by submitting the appropriate pleadings called for by the First Report and Order, 11 FCC Rcd 15499 (1996) ("the First Report and Order"), and Section 51.803 of the FCC's Rules, 47 C.F.R. § 51.801. Cox believes that its filing of such pleadings in the immediate future will constitute the notice contemplated by Section 252(e)(5) of the Act, which will trigger the 90-day deadline for the FCC's issuance of a preemption order.

the FCC is inclined to grant this request, then Cox is not opposed to that action. Nevertheless, Cox believes that the FCC should proceed with due diligence in setting up arbitration procedures that will govern its arbitration of future interconnection agreements arising from the state level. Accordingly, Cox suggests that the FCC solicit and review carefully comments from interested parties relating to the procedural issues presented in this proceeding as well as future interconnection agreement cases.

**B. Combined Proceeding.**

In a related matter, Cox intends to request the FCC to combine its handling of Cox's petition for arbitration, when it is filed shortly, with the Petition for adjudication of all common issues in a single proceeding. In Cox's view, the FCC would thus be able to achieve administrative efficiency in this initial arbitration where a handful of key substantive issues will most likely be resolved. Cox is concerned with the global implications of the manner in which the FCC resolves these issues, some of which may be of first impression.

Initially, Cox believes that the two parties to each arbitration, both the petitioner and the respondent, have individual rights to a separate hearing and a separate decision on the merits of the issues and arguments presented with respect to a specific interconnection agreement. This right has been acknowledged by the FCC in the First Report and Order, ¶ 1295, and is protected by Section 51.807(g) of the FCC's Rules, 47 CFR § 51.807(g).<sup>3</sup> However, Cox believes that these rights may be waived by a petitioning party, upon request. Such a requested waiver, in Cox's opinion, frees the FCC to combine more than one petition into a single proceeding if the FCC finds that doing so would serve the public interest.

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<sup>3</sup> This rule section provides: "Participation in the arbitration proceeding will be limited to the requesting telecommunications carrier and the incumbent LEC, except that the Commission will consider requests by third parties to file written pleadings."

But it is not Cox's intent to request an unlimited waiver of its rights. Rather, Cox intends to limit its waiver request to those interconnection agreement issues and proposed resolutions that are common to the petitioning parties in the combined proceeding. And this waiver is further limited in that Cox intends to put on its own case, with its own positions, pleadings and witnesses, for common issues and proposed resolutions. Moreover, Cox believes that all parties, including the original petitioner, all petitioners who seek a combined proceeding and respondents, retain their individual rights to a unique decision from the FCC on all of their specific issues. Our conclusion is based, in part, on the different status of each party. As a facilities-based local service provider, Cox has different needs than either a reseller or a provider who relies on unbundled network elements. Cox does not intend, through advocating a combined proceeding, to waive its right to a separate adjudication of its disputed issues that are not also presented by the other parties or of any common issues whose proposed resolution differs significantly from the resolution proposed by Cox.

In order to carry this out efficiently, Cox suggests that the FCC separate the issues into three categories: (1) common issues with common resolution ("Category 1"); (2) common issues with significantly different resolutions ("Category 2"); and (3) non-common issues ("Category 3"). An issue would fit into one of these three categories depending upon whether it is raised by all parties or only by one party or more but less than all, and whether or not the petitioners' proposed resolutions for a common issue differ significantly. Further, the determination as to whether or not the proposed resolution differs significantly among the petitioning parties should be made jointly by the petitioning parties. For example, if the issue of reciprocal compensation for traffic sent to Internet service providers is raised by all parties to a combined proceeding and if the petitioning parties agree that the resolutions proposed by

them are not significantly different, then that issue should be designated as falling within Category 1. Such an issue should be heard by the arbitrator in the joint portion of the combined hearing. On the other hand, if the petitioners agree that their proposed resolutions differ significantly or if only one party raises an issue, then the arbitrator should hear such Category 2 and Category 3 issues in separate portions of the combined hearing. Regarding the Category 1 issues, the arbitrator would prepare one recommended resolution and the Commission would issue one final arbitration decision binding all the negotiating parties in the combined arbitration. Regarding the latter two categories of issues, the arbitrator would prepare a separate recommended resolution per petitioner and the Commission would issue a separate final arbitration decision per petitioner. This procedure will protect each party's right to a decision on the Category 2 and Category 3 issues independent of the resolution of the Category 1 issues.

Moreover, our recommendation for a combined proceeding is fundamentally different than a proceeding in which an incumbent local service provider, on the one hand, is opposed by a number of different competitive local service providers, on the other hand, who are "shoe horned" into selecting one set of issues, one witness, one cross-examiner, one position on each common issue and one brief to represent their side in the dispute. Cox does not support any effort to consolidate arbitration petitions into a single proceeding in which parties are forced to: (1) agree to a single set of issues or common proposed resolutions; (2) file joint pleadings, such as testimony; (3) introduce joint witnesses, thus losing the ability to present their individual witnesses; (4) limit their cross-examination; (5) submit joint statements of positions on the issues; or (6) file either joint briefs or exceptions to the arbitrator's decision or both. Most importantly, no party should be compelled to join with another party in requesting one

particular resolution of an issue. Indeed, the parties should have the right to seek individual outcomes even if that entails opposing the outcome being sought by another party where the two parties are ostensibly on the same “side.” In short, arbitration of interconnection agreements does not lend itself to “one-size-fits-all” litigation. Accordingly, Cox’s recommendation should not be construed as acquiescence in forcing all competitive local service providers into the same mold, for arbitration purposes.

### **C. Shared Expenses.**

In the event that expenses are incurred in the course of arbitration that the parties are directed by the FCC to bear, Cox recommends allocation of the total of such expenses to the participating parties. The allocation to each participant should be as follows: fifty (50%) percent will be assessed to the respondent; and portions of the balance will be assessed to each combined petitioner based on the number of issues raised by that petitioner as compared to the total number of issues raised by all petitioners.

## **IV. SPECIFIC COMMENTS**

Cox will now address individually each subsection of the Petition found at Section V, pages 9 through 14. These comments are designed to add further substance to the “minimum, interim procedures”<sup>4</sup> set out in Section 51.807 of the FCC’s Rules, 47 C.F.R. § 51.807, and are based on Cox’s experience of arbitrating interconnection agreements in various state commissions throughout the country.

### **A. General Format.**

In general, Cox supports WCOM’s proposal regarding the general format of arbitration proceedings. Before the “final order” is made under Section 51.807, each party should have the

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<sup>4</sup> First Report and Order, ¶ 1284.

right to pre-file testimony from its witnesses, and pre-filing should be encouraged by the FCC as a means of expediting the process. The arbitrator should conduct full evidentiary hearings with an adequate opportunity for witnesses to testify and for them to be cross-examined. Although it is difficult to imagine how this could be accomplished in an informal proceeding, Cox is receptive to recommendations for a less formal format as long as the adequacy of witness testimony and cross-examination is not compromised. Each party should have the right to file a brief examining the evidence presented and recommending how the FCC should resolve the issues relevant to that party. Consistent with Cox's recommendation above that petitioning parties be permitted to waive their right to separate hearings and to participate in combined procedures, Cox believes that amicus briefs from third parties other than the petitioner and the respondent should be accepted and considered by the FCC.

Similarly, Cox generally supports WCOM's proposals regarding "final offer" arbitration. However, Cox recommends that the arbitrator be required to request revised final offers from the parties if the final offers on file do not comply with legal requirements, as opposed to adopting a result not submitted by any party. Parties should submit contract language in addition to raising unresolved issues. Cox also believes that parties should have the right to submit exceptions to the arbitrator's decision and that the FCC Commissioners should consider them before issuing a final decision. Upon the FCC's approval of a final agreement, a copy should be submitted to the state for informational purposes only.

**B. Time Frames.**

As pointed out above, Cox takes no position with regard to WCOM's suggested time frames for the arbitration of the Petition. Cox only recently received notice of the VSCC's dismissal of its arbitration petition and is moving with dispatch to prepare the requisite

pleadings for filing with the FCC. Since the 9-month statutory deadline provided by Section 252(b)(4)(c) of the Act is now less than a week away, this deadline would be impossible in Cox's case.<sup>5</sup> However, Cox supports WCOM's recommendation that the FCC complete its work in arbitrating interconnection agreements within 110 days of preemption, as if the petition had been filed at the last opportunity on the 160<sup>th</sup> day under the Act. In this regard, Cox requests that the FCC withhold its issuance of a preemption order addressing the Petition until Cox has had a few days to file the requisite pleadings seeking a combined proceeding. Cox anticipates filing its pleadings with the FCC by November 30, 2000. Further, Cox supports the 30-day periods suggested by WCOM for conforming the agreement to the FCC's final decision and for the FCC to approve the conformed agreement.

### **C. The Arbitrator.**

Cox supports WCOM's proposal for a three-member panel of arbitrators made up of FCC staff members from the three FCC offices. We disagree, however, with WCOM's opinion that independent arbitrators, who are presumed to be commercial arbitrators who are not employees of the FCC, could appropriately serve in this role. In Cox's view, it would be impossible to conduct an arbitration with independent arbitrators within the time frames recommended above, given the complexity of the issues dealt with in interconnection agreements and the highly specialized knowledge of the negotiation process mandated by the Act that would be needed by the arbitrators.

The FCC should delegate authority to the arbitrator for conducting the arbitration proceeding and submitting a recommended decision to the FCC in the following manner. The arbitrator should be delegated appropriate powers, be assigned duties and be directed to

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<sup>5</sup> Cox realizes that the FCC has decided that the timing requirements that Section 252(b)(4)(c) imposes on state commissions do not apply to the FCC. First Report and Order, ¶ 1291.

exercise those powers and carry out those duties as necessary to ensure the just, expeditious resolution of the case. These delegated powers should include the specific authority to:

- Conduct hearings and pre-hearing conferences, including the authority to impose time restrictions and limit the number of witnesses.
- Administer oaths and affirmations;
- Examine witnesses and allow parties to examine adverse parties or agents;
- Direct parties to serve verified statements and exhibits;
- Direct any person to produce witnesses or information relevant to an issue in the arbitration;
- Supervise discovery, including authority to set limits on the timing and amount of discovery;
- Rule on all matters that do not result in the final determination of the proceeding;
- Issue protective orders; and
- Issue a proposed decision on all the issues in the proceeding.

**D. The Basis for Beginning Arbitration.**

WCOM has requested that its existing interconnection agreement should serve as the basis for beginning its arbitration with VZ-VA by the FCC. Cox would not be in favor of this approach in its own arbitration with VZ-VA. The existing agreement between Cox and VZ-VA was entered into nearly four years ago, and Cox has spent well in excess of a year negotiating with VZ-VA for a replacement for that agreement. Cox has devoted too much time and effort to change horses in mid-stream and to start over with the existing agreement. It has no interest in seeing more than a year's effort wasted by returning to a position occupied nearly four years

ago. Thus, Cox does not wish to back away from the current understanding with VZ-VA on the vast majority of the terms and conditions for a replacement agreement.

With its petition to the VSCC seeking arbitration at the state level, Cox filed proposed contract language for the replacement interconnection agreement. As a basis for beginning its arbitration by the FCC, Cox will propose that same contract language, as amended to reflect the current status of negotiations. Cox and VZ-VA have continued negotiating throughout the pendency of the VSCC proceeding. These negotiations have borne fruit to the extent that some disputed and open issues have been closed through agreement of the parties as to the wording of the associated contractual provisions. In preparing its petition and supporting documentation for filing with the FCC, Cox intends to incorporate this later-agreed wording into the contractual language that was presented to the VSCC. This will afford the arbitrator and the parties the benefit of using the most current language that the parties have found acceptable as the basis for beginning the FCC arbitration.

Cox's revised language accordingly will consist of those provisions that have been agreed to by Cox and VZ-VA by the date of Cox's filing with the FCC, as well as the wording proposed by Cox for provisions that contain either open or disputed issues. With its response to Cox's arbitration petition, VZ-VA should be directed to submit its wording for those provisions that contain either open or disputed issues. The contrasting language on disputed and open issues thus proposed by the two parties to the proceeding would furnish the arbitrator with a side-by-side comparison of the parties' proposed resolution of these issues.

VZ-VA should be further directed to submit its response and pre-filed testimony within fourteen (14) days of the FCC's issuance of its preemption order addressing Cox's petition.<sup>6</sup> This amount of response time is adequate because VZ-VA has had nearly four months to study the petition and testimony filed with the VSCC by Cox. This petition and testimony should not differ appreciably from the pleadings that Cox intends to file with the FCC.

In the same manner that we would oppose using the existing agreement between Cox and VZ-VA as the starting point in our FCC arbitration with VZ-VA, Cox also would oppose using VZ-VA's "template" for that purpose. Cox is aware that VZ-VA continues to develop an interconnection agreement for the purpose of presenting the latest version, sometimes referred to as VZ-VA's "template," to competitive local service providers at the time they first seek such an agreement with VZ-VA. Cox agreed at the outset of negotiations to use an earlier version of the VZ-VA's "template" as the basis for negotiating. In the course of those negotiations, Cox has rejected proposals to move to later versions of VZ-VA's "template," and we have no wish to use one at this late date as the basis for beginning arbitration before the FCC. Cox urges the FCC to reject any proposal to permit any version of VZ-VA's or any other carrier's "template" to serve this purpose.

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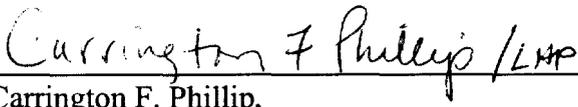
<sup>6</sup> VZ-VA chose not to reply to the issues raised in Cox's petition filed with the VSCC. In a letter to the VSCC, VZ-VA argued that it was not compelled to respond because Cox had sought state arbitration only on condition that it would be conducted in accordance with federal law.

**V. CONCLUSION**

For the reasons explained above, Cox supports the FCC's adoption of the procedures recommended in these Comments. These procedures will help ensure that the arbitration proceedings to be conducted by the FCC proceed without delay and protect each party's right to a fair and impartial decision on all issues.

Respectfully submitted,

COX COMMUNICATIONS, INC.

  
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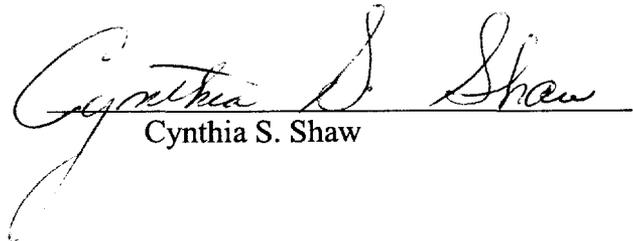
November 13, 2000

**CERTIFICATE OF SERVICE**

I, Cynthia Shaw, a secretary for Dow, Lohnes & Albertson, PLLC, do hereby certify that a copy of the foregoing "**COMMENTS OF COX COMMUNICATIONS, INC.,**" was sent via hand delivery this 13th day of November, 2000, to the following:

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