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

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of

Petition of Cox Virginia Telcom, Inc. 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 Verizon Virginia, Inc. and For Arbitration	)	CC Docket No. 00-249
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
Petition of AT&T Communications of Virginia, Inc., 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 Verizon Virginia, Inc.	)	CC Docket No. 00-251

RESPONSE OF COX VIRGINIA TELCOM, INC.
TO OPPOSITIONS OF VERIZON VIRGINIA, INC.
ON THE ISSUE OF COMBINATION OR CONSOLIDATION

Cox Virginia Telcom, Inc. ("Cox") respectfully submits this Response in the above-referenced proceedings in accordance with the Public Notice, DA 00-2824, released December 14, 2000. This Public Notice sought responses to oppositions filed by

interested parties in CC Docket No. 00-249. Verizon Virginia, Inc. ("VZ-VA") filed the following two pleadings: (1) Verizon Virginia, Inc.'s Comments on Preemption and Opposition to Motion for Combination of Arbitration Petitions for Hearing of Cox Virginia Telcom, Inc. filed exclusively in CC Docket No. 00-249 ("VZ-VA Comments"); and (2) the Opposition of Verizon Virginia, Inc. to Petition for Preemption and Motion for Consolidation of AT&T Corp. filed in the three dockets referenced above ("VZ-VA Opposition"). This Response addresses only VZ-VA's opposition to combining or consolidating the arbitration disputes contained in the VZ-VA Comments and those comments relating to Cox in the VZ-VA Opposition.[1]

I. BACKGROUND

On December 12, 2000, Cox filed a petition[2] ("Cox Petition") with the FCC pursuant to Section 252(b) of the Telecommunications Act of 1996. The Cox Petition seeks the FCC's preemption of the jurisdiction of the Virginia State Corporation Commission ("Virginia Commission"). The basis for Cox's request is the Virginia Commission's failure to act on Cox's request for state arbitration of disputes concerning the interconnection agreement between Cox and VZ-VA.[3] The Cox Petition further requests the FCC to arbitrate these disputes and identifies both the issues that divide Cox and VZ-VA and Cox's position on how these issues should be resolved. CC Docket No. 00-249 was established to consider the Cox Petition.

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[1] Being filed contemporaneously herewith is Cox's response to comments relating to the issue of preemption, which are contained in the VZ-VA Comments and in the Comments of WorldCom, Inc. filed December 29, 2000 in CC Dockets Nos. 00-249 and 00-251.

[2] Petition for Preemption and Arbitration of Cox Virginia Telcom, Inc. (12/12/00).

[3] By Order of Dismissal, dated November 1, 2000, in Case No. PUC000212 ("Virginia Order"), the Virginia Commission dismissed Cox's petition for state arbitration.

WorldCom, Inc. ("WCOM") had earlier filed a petition[4] seeking a similar FCC preemption on essentially the same grounds asserted in the Cox Petition. CC Docket No. 00-218 was opened to deal with WCOM's petition. On December 12, 2000, Cox filed a motion[5] ("Cox Motion") seeking the combination for hearing purposes of Cox's interconnection disputes with those that led WCOM to file a similar preemption request with the FCC.[6]

Shortly thereafter, on December 15, 2000, AT&T filed a similar preemption petition[7] relating to its interconnection disputes with VZ-VA, and CC Docket No. 00-251 was created to consider AT&T's petition. On that date, AT&T also filed a motion[8] ("AT&T Motion") in all three dockets[9] to consolidate for hearing its VZ-VA interconnection disputes with those of Cox and WCOM. On December 29, 2000, Cox filed comments in support of the AT&T Motion, urging the FCC to combine the VZ-VA disputes of the three petitioners for hearing in the manner recommended in the Cox Motion.

WCOM submitted comments[10] that addressed the Cox and AT&T Motions. In these comments, WCOM said:

> WorldCom agrees that both petitions make similar preemption and arbitration requests. While WorldCom does not oppose consolidation of the matters, WorldCom maintains the request that the [FCC] not unreasonably delay arbitration of WorldCom's interconnection dispute until it issues a decision on the Petitions.[11]

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[4] Petition of WorldCom, Inc. (10/26/00).
[5] Motion for Combination of Arbitration Petitions for Hearing of Cox Virginia Telcom, Inc. (12/12/00).
[6] Inadvertently, the Cox Motion was filed exclusively in the Cox docket, CC Docket No. 249. It should have also been filed in the WCOM docket, CC Docket No. 218.
[7] Petition of AT&T Corp. (12/15/00).
[8] AT&T's Motion to Consolidate (12/15/00).
[9] CC Dockets Nos. 00-218 (WCOM), 00-249 (Cox) and 00-251 (AT&T).
[10] Comments of WorldCom, Inc., filed December 29, 2000, in CC Dockets Nos. 00-249 (Cox) and 00-251 (AT&T).
[11] *Id.* at 2.

II. VZ-VA ARGUMENTS

A. ISSUES

The VZ-VA Comments claim that the joint arbitration with WCOM proposed by Cox is contrary to the Act because the FCC's review may not consider any issue not specifically raised in the arbitration petition. This argument ignores the fact that all of the issues reviewed by the FCC will be raised in the arbitration petitions of Cox, WCOM and AT&T. Only those issues that the petitioners have raised in common and for which they recommend the same resolution would be heard in the combined phase of the proceeding, under Cox's proposal.

In fact, nothing in the Act prohibits the FCC, or any state commission, from consolidating arbitration disputes for hearing. As the AT&T Motion points out, the Texas Public Utility Commission has conducted a "Mega-Arbitration" which consolidated the state arbitration petitions of competitive local exchange carriers ("CLECs"). AT&T asserts that a similar proceeding would afford the FCC the most efficient means of hearing these matters. AT&T views consolidation as a mechanism by which the FCC could conserve its limited resources through arbitrating common issues together.

Cox agrees with AT&T that significant economies can be achieved by the FCC through combining the arbitration disputes into a joint proceeding, so long as each party is able to participate individually and present its point of view. If the FCC adopts Cox's recommendations, each petitioner's ability to both raise non-common issues and propose

different resolutions for common issues may be preserved by having them considered in the separate phase of the combined proceeding.

B. FCC RULES

1. "Unprecedented." VZ-VA offers a series of objections that Cox's proposal for a combined proceeding would be inconsistent with the FCC Rules. VZ-VA first makes the undeniable point that a joint arbitration would be "unprecedented" at the FCC. Indeed, any arbitration by the FCC under Section 252(e)(5) of the Act will be unprecedented because this is the first opportunity presented to the FCC to implement this statutory provision. However, many state commissions have consolidated arbitrations under Section 252 of the Act. For example, in 1996, the Virginia Commission consolidated for hearing five separate arbitrations involving Bell Atlantic-Virginia, Inc. for the purpose of deciding issues of proxies for unbundled elements and interconnection and interim number portability.[12] Additionally, four separate arbitrations involving GTE South, Inc. were consolidated by the Virginia Commission in 1996 for the purpose of resolving rates for unbundled network elements and interconnection, wholesale discount for services available for resale and other matters.[13] The Virginia Commission then decided individual issues presented in these proceedings through the issuance of separate orders.

2. Limited Participation. VZ-VA next charges that a consolidated proceeding would be inconsistent with Section 51.807(g) of the FCC's Rules[14] because they would

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[12] Annual Report of the State Corporation Commission, 1996, pp. 221-222.
[13] *Id.* at 232-235.
[14] 47 C.F.R. § 51.807(g).

not be limited to "the requesting telecommunications carrier and the incumbent LEC." What is overlooked by this argument is that all of the three petitioners involved in the proposed combined arbitration proceeding would be requesting telecommunications carriers. Additionally, this argument fails to take into account the agreement of all three petitioners that a joint proceeding be conducted to hear their issues. In other words, there would be no "third parties" involved; only the incumbent LEC and requesting telecommunications carriers would participate. Since there would be no occasion for extraneous issues to be presented which might fall outside the relevancy of matters being properly addressed, this rule provision would not be violated.

The FCC has noted that its arbitration rules were not final and do not address all details of arbitration. The FCC stated in its *Local Competition Order* at ¶ 1284: "The rules we adopt herein are minimum, interim procedures."[15] Moreover, in discussing who may participate in arbitration proceedings, the FCC has been less restrictive than VZ-VA suggests. In its *Local Competition Order* at ¶ 1295, the FCC said: "We believe that the arbitration proceedings **generally should be** limited to the requesting carrier and the incumbent local exchange provider. This will allow for a more efficient process and minimize the amount of time needed to resolve disputed issues." (Emphasis Supplied.) The FCC has thus preserved considerable latitude for determining which parties should participate in such proceedings. In the case of common issues with common proposed resolutions, consolidated proceedings with all similarly-situated petitioners participating are clearly more efficient.

[15] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, FCC 96-325, CC Docket No. 96-98 (Released August 8, 1996), 11 FCC Rcd. 15499 (1996).

3. **Final Offer.** VZ-VA attempts to raise an issue concerning which CLEC final offer the arbitrator should consider. After evidentiary hearings are conducted on disputed issues, the arbitrator should consider the final offer of each petitioner as it applies to its respective individual interconnection agreement being negotiated with VZ-VA. There is no suggestion by any of the petitioners that one final offer should be adopted by the arbitrator to apply to all three interconnection agreements. Each petitioner will remain free to present its own final offer to the arbitrator, and each such final offer will be clearly identified as being applicable to that petitioner. VZ-VA, as well, will remain free to present its separate final offers for each interconnection agreement as long as they create no discrimination among the petitioners that would be contrary to the Act.

4. **Scope.** VZ-VA is concerned that the scope of the disputed issues that Verizon has with the three petitioners differs considerably, when one petitioner's issues are compared to another's. Cox advocates that only those "common" issues with common proposed resolutions should be adjudicated in the joint phase of the combined proceeding. Any separate issues would be resolved in the separate phase of the proceeding, thereby alleviating any concern by VZ-VA that the petitioners' issues may become confused between the parties.

5. **Efficiency.** VZ-VA claims that Cox has failed to suggest how a joint arbitration would enhance FCC efficiency. Actually, Cox has explained in detail how the FCC could proceed efficiently. *See, e.g., Cox Motion* at 3-17; and *Comments of Cox Communications, Inc.* in CC Docket No. 00-218 (WCOM) at 4-12. Efficiency is generated by hearing common issues with proposed common resolutions once and only once. This efficiency is not lost simply because separate phases of the combined proceeding must be

devoted to hearing non-common issues and common issues with non-common proposed resolutions.

6. **"Undoing Negotiated Resolutions."** VZ-VA also asserts that the FCC would risk "undoing" negotiated resolutions in one agreement if a party decides to take advantage of another party's litigation of the issue. Cox finds such a result highly unlikely because once parties to a negotiated agreement have agreed on a specific point, they are unlikely to go back and "undo it." However, even if a party would be inclined to do so, this would not delay the resolution of the issues because there would be litigation of the same issue anyway under the scenario described by VZ-VA. The use of a combined arbitration for "common" issues does not increase the likelihood of a party abandoning and disputing a previously agreed-to provision.

7. **Determining Common Issues.** VZ-VA believes the process of determining "common" issues would be time-consuming. However, the petitioners in a combined proceeding would be able to determine "common" issues without causing any delay in the FCC's proceeding. As soon as each petitioner and VZ-VA submits its written case, with supporting testimony, it will become apparent that the petitioners share common interests in some issues but not in others. Any question among the petitioners as to whether an issue is "common" probably would result in a conclusion among themselves that it is not. Such a decision can be reached without any delay, and the FCC may wish to adopt a requirement that the petitioners agree to a list of "common" issues and submit it at a preliminary stage in the combined proceeding.

8. **Individual cases.** Since Cox has reserved its right to "put on its own case," VZ-VA states that any consolidation would be of no advantage in saving time. But a

petitioner reserving its right to put on its own case as to "common" issues does not necessarily mean that it would, indeed, put on its own case as to each and every such issue. There may be sufficient agreement among the petitioners to support their election to limit their individual participation and to put on a joint case. However, even if all three petitioners did put on their own cases as to each "common" issue, there still would be an advantage to a combined proceeding because there would be only one proceeding, one trier of fact and one decision, rather than three proceedings, three triers of fact, and three (potentially different) decisions. Cox submits that such economies argue strongly in favor of a combined proceeding.

9. Arbitrator. VZ-VA's position is that these arbitration proceedings should not be conducted by a three-member panel made up of staff members from three FCC offices because the FCC Rules refer to a single "arbitrator." For the reasons explained in the Cox Motion, the use of a commercial arbitrator would be contrary to the FCC's rules.[16] As further explained in the Cox Motion, FCC representatives would be the best persons to conduct the arbitration.[17] Cox does not believe the FCC intended to foreclose its authority to appoint a panel of arbitrators when it adopted a rule referred to an arbitrator rather than to arbitrators. In Cox's view, the appointment of a three-member panel of qualified FCC employees is consistent with the intent of this rule.

III. CONCLUSION

For the reasons stated above, Cox respectfully requests the FCC to grant the Cox Motion and combine for hearing purposes the interconnection disputes of Cox, WCOM

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[16] Cox Motion, pp. 9-11.

[17] *Id.* at 11-14.

and AT&T with VZ-VA. Additionally, Cox respectfully urges the FCC to adopt the procedures to govern this combined proceeding that are recommended in the Cox Motion.

Respectfully submitted,

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January 10, 2001

CERTIFICATE OF SERVICE

I, Vicki Lynne Lyttle, hereby certify that a copy of the foregoing Response Of Cox Virginia Telcom, Inc. To Oppositions Of Verizon Virginia, Inc. On The Issue Of Combination Or Consolidation has been served this 10th day of January, 2001, via first class mail, postage prepaid or by hand delivery to the following:

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