

parties to the agreement.” Specifically, the state commission must: “(1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title.”

The Conditional Petition for Arbitration is being filed in compliance with 20 VAC 5-400-19.C.1, which adopts the deadlines contained in Section 252(b)(1) of the Act. Exhibit 1 to this petition is a copy of the letter sent via overnight delivery to BA by Cox on September 9, 1999, constituting Cox’s initial request for negotiations of the Renewal Agreement. Exhibit 2 to this petition is a copy of the letter sent via overnight delivery to BA by Cox on February 17, 2000, in which Cox reinitiated negotiations pursuant to *Armstrong Communications Inc.’s Petition for Reconsideration in DA 98-88*, 976 FCC 871 (1998). Reinitiation of negotiations became necessary when the parties failed to complete the Renewal Agreement within the deadline established through the September 9, 1999, request. In accordance with the February 17, 2000, request and BA’s receipt of it on February 18, 2000, the last day for filing a petition for arbitration with the Commission is July 27, 2000. Accordingly, the Conditional Petition for Arbitration is timely filed.

Pursuant to 20 VAC 5-400-190.C.1, Cox has negotiated with BA in good faith for the purpose of entering into a Renewal Agreement. Cox requests that the Commission conduct a hearing to resolve the Disputed Issues and any Open Issue that ripens into a Disputed Issue. In response to the requirements of 20 VAC 5-400-190.C.1, this Conditional Petition for Arbitration includes the following four exhibits:

1. A summary (the “Summary-Disputed Issues”) (Exhibit 3) setting forth a statement of each Disputed Issue about which the parties have thus far been unable to

negotiate agreed-upon wording. The positions of the parties on Disputed Issues appear to Cox to be so far apart as to suggest that no agreement can be reached absent Commission resolution. The Summary-Disputed Issues also sets forth the language proposed by each party to deal with the issue and the respective positions of each party, as understood by Cox at the time of filing this pleading.

2. BA's stand-alone Intercarrier Compensation Proposal (Exhibit 4) that has been rejected by Cox. It provides alternate language to the original proposal offered by BA that was also unacceptable to Cox. Both the original proposal and this alternative language raise Disputed Issues.

3. A table (the "Table-Open Issues") (Exhibit 5) setting forth the language proposed by each party to which the other party has not agreed. Although unresolved at the time of filing, Cox believes the parties can reach agreement on appropriate language.

4. The contract language (the "Cox Interconnection Agreement") (Exhibit 6) that represents those provisions that have been agreed to by the parties on the date of filing and the wording proposed by Cox for those provisions presenting either Open or Disputed Issues at this time.

5. The expert testimony of Professor Francis R. Collins, Ph.D., who supports the position of Cox on each of the Disputed Issues (Exhibit 7).

As the Cox Interconnection Agreement, the Summary-Disputed Issues and the Table-Open Issues make clear, the parties have reached agreement on a substantial number of issues. Cox will continue to negotiate with BA on the disputed and open provisions throughout the arbitration process. As a result, Cox is not requesting the Commission to take any action at this time with respect to Open Issues. In the event that

an open provision is not resolved by the parties, Cox would reserve the right to amend the Conditional Petition for Arbitration, to provide supporting information, and to seek Commission resolution of the disputed provision. Such supporting information may include supplementary expert testimony filed by Professor Collins.⁵

THE DISPUTED ISSUES

The Disputed Issues, contained in the Summary-Disputed Issues, are discussed below issue by issue. To the extent that categorization of the Disputed Issues is helpful, most of the issues can be assigned to one or more of four general problem areas. First, BA attempts in some instances to impose on Cox an obligation that is only imposed by the Act on an ILEC and may not be imposed on Cox by an ILEC or a state commission. Second, BA seeks in some instances to obtain Cox's waiver of a right afforded to a CLEC by the Act. Third, BA seeks to avoid in some instances obligations imposed on ILECs by the Act. Fourth, BA seeks in some instances to assume authority to dictate Cox's behavior that is not granted or permitted by the Act. While Cox has not attempted to place each of the Disputed Issues into one of these four categories below, these are themes that weave through the fabric of the issues.

1. **BA MAY NOT REQUIRE COX, IN ORDER TO ENTER INTO AN INTERCONNECTION AGREEMENT, TO CERTIFY OR ANTICIPATE THAT BA'S ADHERENCE TO THE AGREEMENT WILL SATISFY BA'S OBLIGATIONS UNDER SECTIONS 251 AND 271 OF THE ACT.**

BA demands that Cox agree to put language in the Renewal Agreement dealing with BA's requirements under Sections 251 and 271 of the Act. Such a provision is

⁵ Pursuant to 47 U.S.C. § 252(b)(2)(A)(1)(ii), the Summary-Disputed Issues and the Table-Open Issues contain Cox's representation as to the latest language proposed by

extraneous and does not belong in the Renewal Agreement. Additionally, such a provision might be confusing to any regulatory body if presented by BA in the context of either a defense of BA's acts under the Renewal Agreement or a request for authority to carry interLATA traffic pursuant to Section 271.

BA cannot bolster the appearance of having satisfied its obligations under Section 251 merely through the artifice of causing competitive local exchange carriers ("CLECs") to concede to the inclusion of such language saying that these requirements have been met just because BA entered into an agreement with them. Whether BA ultimately complies with its obligations under Section 251 is a matter for the Commission, other regulatory bodies and the courts to decide, based exclusively on BA's conduct.

Moreover, Cox cannot predict, while negotiating to renew the Initial Agreement, that BA's future adherence to the terms of the agreement will satisfy either its Section 251 or Section 271 requirements. As shown by the Disputed Issues contained in the Summary-Disputed Issues, some positions taken by BA in these negotiations do not comply with the Act's requirements. Thus, Cox is unable to agree that BA has satisfied or will satisfy all of obligations imposed by Sections 251 and 271, even if Cox were inclined to address these subjects in the Renewal Agreement. *See also*, Collins' Testimony (Exhibit 7), at pp.6-7.

Accordingly, Cox believes that the Commission should rule that this proposed statement is unnecessary for inclusion in an interconnection agreement, untrue in these circumstances, and an intrusion upon the fact-finding authority of this Commission and

each party to resolve each issue. Cox has made a good faith effort to accurately record the language proposed by BA on these points.

the FCC. The Commission should approve the contract language proposed by Cox at Section 1 of the Summary-Disputed Issues.

2. BA MAY NOT, THROUGH ITS DESIGNATIONS OF INTERCONNECTION POINTS OR BY DISCOUNTING THE COMPENSATION IT OWES COX, REQUIRE COX TO PAY FOR BA'S DELIVERY OF BA'S TRAFFIC TO COX'S NETWORK.

This Disputed Issue underscores the importance of utilizing the nationwide switched network in a manner designed to maximize effectiveness and efficiency for all carriers to the benefit of all customers rather than forcing competitors to build duplicative and wasteful facilities so that BA's costs alone are reduced. The "geographically relevant interconnection points" proposed by BA represent an attempt to limit the transportation costs BA would bear in delivering its traffic to Cox. Cox bears the costs of all the facilities used in the delivery of such traffic whereas BA proposes to limit its costs when delivering traffic to Cox.

As explained by paragraph 209 of the First Report & Order, "Section 251(c)(2) gives competing carriers the right to deliver traffic terminating on an incumbent LEC's network at any technically feasible point on that network, rather than obligating such carriers to transport traffic to less convenient or efficient interconnection points." Cox, while not required to do so, has agreed to establish multiple Interconnection Points ("IPs") at the BA switches where Cox interconnects, thus obligating Cox to hand off its traffic to BA at BA's doorstep. BA proposes to limit, by its imposition of "geographically relevant" interconnection points, its costs when delivering traffic to Cox, either by forcing Cox to permit BA to hand off its traffic to Cox somewhere well within BA's network, e.g., far from Cox's doorstep, or by forcing Cox to discount the

compensation rate that is owed by BA for such traffic. Cox bears the costs of all the facilities used in the door-to-door delivery of its traffic, and demands that BA do the same.

If adopted, BA's language would shift the expense of transporting traffic away from BA and toward Cox notwithstanding the preference under the Act for the terminating carrier to bear such expense and to be compensated by the originating carrier. A not too subtle distinction exists between the level of costs that would be borne by each party for transporting this traffic. The cost of such transport through BA's existing facilities is clearly less dear than the cost of Cox's constructing new facilities to handle this traffic.

If implemented, the BA proposal would constitute an unnecessary interference with Cox's ability to engineer its system for the purpose of minimizing Cox's costs of providing service to its customers. Cox's proposal, on the other hand, leaves each party free to engineer its own facilities to best serve its customers' needs at the lowest possible cost. It recognizes that sound engineering practice dictates that the parties cooperate, through bilateral discussion, in selecting interconnection points that are fair to both in view of each party's present facilities as well as those to be acquired in the near term. Moreover, each party is fairly compensated for the transport and termination of the traffic originated by the other. *See also*, Collins' Testimony (Exhibit 7), at pp. 7-9.

Cox urges the Commission to adopt its proposal to resolve this issue. The Commission should approve the contract language proposed by Cox at Section 2 of the Summary-Disputed Issues.

3. BA MAY NOT REQUIRE THAT COX ELIMINATE ITS MILEAGE-SENSITIVE RATE ELEMENT AS A COMPONENT OF ITS RATE ENTRANCE FACILITIES RATE.

This Disputed Issue is similar to the one set out above. It represents yet another attempt by BA to shift the cost of transporting traffic from BA to Cox. Under the BA proposal, Cox would be precluded from charging a mileage-sensitive rate element for entrance facilities.

In its First Report & Order at ¶ 553,⁶ the FCC states: “New entrants will request interconnection pursuant to section 251(c)(2) for the purpose of exchanging traffic with incumbent LECs. In these situations, the incumbent and the new entrant are co-carriers and each gains value from the interconnection arrangement. Under these circumstances, it is reasonable to require each party to bear a reasonable portion of the economic costs of the arrangement.” The proposal by BA to limit Cox’s charges for entrance facilities subverts the Act and the FCC’s rules. In addition to Cox’s paying all the costs to deliver traffic to all of BA’s IPs, BA proposes that Cox pay BA’s reasonable costs for BA’s transport to Cox’s IPs (by virtue of Cox providing a discount from its tariffed transport rates). BA attempts to defend its proposal under the “level-playing-field” rubric as being fair to BA, given the differences in the parties’ network architecture. Yet, the “playing field,” controlled almost entirely by BA, does not need to be made more “level” for BA. BA’s proposal actually tilts the relevant cost structures against Cox since it would create discrimination. BA should not be permitted to impose costs on Cox that it is not

⁶ *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).*

obligated to pay, thereby leading to a discriminatory result. *See also*, Collins' Testimony (Exhibit 7), at pp.9-10.

BA's unbalancing of the reasonable apportionment of costs should be rejected by the Commission. The Commission should approve the contract language proposed by Cox at Section 3 of the Summary-Disputed Issues.

4. 47 U.S.C. § 251(C)(6) AND 47 C.F.R. § 51.223(A) DO NOT PERMIT BA TO COMPEL COX TO FURNISH BA COLLOCATION AT COX FACILITIES IN THE SAME MANNER THAT BA, AS AN ILEC, IS COMPELLED TO FURNISH COX SUCH COLLOCATION AT BA FACILITIES.

The BA proposal underlying this Disputed Issue carries BA's "level-playing-field" argument to an extreme. Section 251(c)(6) of the Act imposes only upon ILECs the obligation to permit physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the LEC. As pointed out above in the Petition for Declaratory Judgment, Section 251(h) of the Act empowers the FCC to rule that a LEC is to be treated as an ILEC under certain circumstances, but the FCC has not done so in Cox's case. Also mentioned there, Section 51.223 of the FCC's rules, 47 CFR §51.223, states: "A state may not impose the obligations set forth in section 251(h)(1) of the Act, unless the [FCC] issues an order declaring that such LECs or classes or categories of LECs should be treated as incumbent LECs." There is no requirement under the Act that a CLEC comply with the physical collocation obligation imposed on ILECs by the Act.

Congress saw fit to grant a federal right to competitors, and only competitors, to gain physical collocation in the incumbents' facilities because of the necessity that competitors interconnect with the facilities of the incumbents.

Cox recognizes its general duty to interconnect, set out at Section 251(a)(1) of the Act, with the facilities or equipment of other carriers. Methods other than physical collocation are available by which such interconnection can be facilitated. Cox offers leased entrance facilities as a convenient means to accomplish such interconnection. Additionally, the parties have agreed to install mid-span meets as another method of interconnection. *See also*, Collins' Testimony (Exhibit 7), at pp. 10-12.

For these reasons, the Commission should reject BA's demand for reciprocity in physical collocation obligations. The Commission should approve the contract language proposed by Cox at Section 4 of the Summary-Disputed Issues.

5. SECTION 251(C)(2) OF THE ACT DOES NOT PERMIT BA TO DICTATE THE VOLUME OF TRAFFIC ON A TRUNK GROUP USED BY COX TO SEND TRAFFIC TO A BA TANDEM SWITCH FOR TERMINATION TO A BA END OFFICE.

Expressing concern about exhausting its tandem switching capability, BA has set out to limit the volumes of Cox's traffic routed to BA tandem switches. BA proposes that Cox be compelled to establish trunks directly to BA end offices at any time that such traffic exceeds certain modest levels. Section 251(c)(2) makes clear that Cox may choose its points of interconnection. Further, the FCC supports the CLEC's choosing (*First Report & Order, paragraph 209*) those points of interconnection (at the ILEC's tandem or end office) based on the CLEC's own efficiency. Cox does not agree with BA's assertion that Cox's traffic through BA's tandem switches contributes in any significant way to exhaust. Nonetheless, Cox has proposed a limitation of the amount of traffic it sends to BA end offices by way of a BA tandem.

Cox has offered, as an accommodation to BA's concerns regarding tandem utilization, a moderate threshold that is focused on the volume of three DS-1s (which equals 72 separate voice channels), above which Cox agrees to implement direct-end office trunking, while BA's exceedingly low threshold for such direct trunking is DS-1 (24 voice channels). If any threshold for direct-end office trunking is deemed necessary by the Commission, Cox advocates a higher trigger than proposed by BA because the economies generated by each company differ widely. BA generates huge economies of scale due to the magnitude of its facilities. On the other hand, Cox does not enjoy such economies because of the paucity of its facilities by comparison to those of BA. Consequently, Cox is unable to achieve the lower costs and efficiencies that attend BA's ubiquitous operations.

The trigger used internally by BA when deciding to put in direct-end office trunking within its own network should not apply to Cox because of the wide disparity in the two parties' costs. Any trigger applied to Cox must take into account the significantly higher cost experienced by Cox, when compared to BA's economy of scale, in building or acquiring facilities between its switches and BA's end offices. Since Cox and most carriers ordinarily construct or acquire facilities packaged at the DS-3 level (28 DS-1s or 672 voice channels) when the volume of traffic justifies engineering a direct end-office interconnection, it would prove highly wasteful to devote such facilities to only carrying one DS-1 level of traffic, as proposed by BA. *See also*, Collins' Testimony (Exhibit 7), at pp. 12-15.

Therefore, Cox requests that the Commission not override the Act and the FCC's First Report and Order by adopting BA's proposal. Instead, if the Commission perceives

a need for such a trigger, it should establish a minimum of three DS-1s as the threshold for compulsory direct end-office trunking. The Commission should approve the contract language proposed by Cox at Section 5 of the Summary-Disputed Issues.

6. BA MAY NOT COMPEL COX TO ENTER INTO INTERCONNECTION AGREEMENTS WITH EVERY THIRD-PARTY CARRIER; BA MAY NOT IMPOSE TERMS OF TRAFFIC EXCHANGE UPON NON-INCUMBENT CARRIERS WHO CONNECT VIA BA'S NETWORK; BA MAY NOT BLOCK TRANSMISSION OF COX'S TRAFFIC TO THIRD-PARTY CARRIERS.

BA again has sought to impose burdens upon a CLEC that the Act imposes only upon ILECs. Section 251(c) (2) of the Act requires ILECs to furnish interconnection. In negotiations, BA has argued in favor of an elaborate arrangement involving transit traffic, which is defined as traffic originated by one carrier and terminated by another with BA serving an intermediary role in switching the traffic between them. Also expressing concern here about exhausting its tandem switching capability, BA has advocated laborious obligations on Cox's transit traffic switched through a BA tandem switch.

Cox proposes that this matter be resolved by adoption of pertinent arrangements from the Bell Atlantic-Rhode Island/Cox (BA-RI/Cox) interconnection agreement, pursuant to paragraph 32 of the Bell Atlantic/GTE Merger Conditions. *See, Conditions for Bell Atlantic/GTE Merger, In re Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, Memorandum Opinion and Order, FCC 00-221, CC Docket No. 98-184 (released June 16, 2000).* The BA-RI/Cox agreement's "Tandem Transit Service," a provision of the BA-RI/Cox interconnection agreement, approved by the Rhode Island Public Utilities Commission on May 2, 1999, in Docket 2614, with a termination date of May 2, 2002, satisfies the requirements of paragraph 32 of the Merger Conditions in that it was voluntarily negotiated within the Bell Atlantic service area prior

to the merger closing date. Pursuant to the Merger Conditions and §252(i) of the Act, Cox wishes to adopt paragraphs 7.2.1 through 7.2.4 of the BA-RI/ Cox agreement. The corresponding language is shown in Section 6 of the Summary-Disputed Issues, under the Cox Language heading, as paragraphs 7.3.1-7.3.4 (renumbered here as 7.3.1 through 7.3.4 in Exhibits 3 and 6).

Adoption of paragraphs 7.2.1 through 7.2.4 of the BA-RI/ Cox agreement would also be a better result than what BA has been advocating. BA would compel Cox, as a condition of entering into the Renewal Agreement, to bear the § 251(c)(2) burden of entering into reciprocal traffic agreements with every other carrier (including wireless carriers, CLECs and ILECs) to which Cox sends traffic through a BA tandem switch. Then, BA seeks to impose the same compulsory trunking trigger set out above with respect to BA's end offices on Cox's transit traffic bound for other carriers. Upon passing this threshold, BA proposes to assess Cox with additional charges for a period of time and then advocates terminating transit service unless certain requirements are satisfied. One of these requirements involves Cox's filing of petitions with the Commission to establish reciprocal traffic arrangements with another carrier who fails to enter into one voluntarily. BA proposes to assess charges if all these inducements fail to achieve BA's desired result. Finally, BA's language permits BA, at its sole discretion, absent the interconnection requirements dictated by BA, to cancel its tandem transit service to Cox (i.e. to block Cox's traffic destined to a third carrier).

The FCC's First Report & Order, paragraph 997, explicitly found that "... indirect connection (e.g., two non-incumbent LECs interconnecting with an incumbent LEC's network) satisfies a telecommunications carrier's duty to interconnect pursuant to section

251(a).” Therefore, federal law compels BA to handle transit traffic between other carriers. Because the statute does not mandate direct interconnection between such carriers, there is no basis in law for BA’s attempt to compel Cox to do so as a condition of entering into the Renewal Agreement. Cox contends that BA’s threat to refuse carriage of transit traffic would result in a violation of BA’s obligation to interconnect as required by Section 251(a)(1).

Only ILECs are required to negotiate interconnection agreements upon such a request to do so. *See*, Section 251(c)(1). Therefore, the decision by Cox to enter into a direct trunking agreement with another carrier is Cox’s alone to make and not BA’s to compel. It is inappropriate for BA to force this decision on Cox, particularly as a condition of entering into an interconnection agreement with BA. In cases where only a de minimus amount of transit traffic will be exchanged between Cox and the other carrier, it makes no sense to devote the time and resources to negotiating agreements. Especially in such cases, BA’s demand is unnecessary, expensive and wasteful.

Since all three carriers, Cox, BA and the third party, are fully compensated for the transit traffic exchanged via BA’s tandem, BA is unable to point to any loss that it might incur without such an agreement being executed by Cox and the other carrier. Nevertheless, BA presses on: proposing that Cox either compel the other carrier to enter into such an agreement or drop the whole matter in the Commission’s lap. BA has yet to make a compelling case for why Cox should invoke the processes of the Commission to seek an order forcing another carrier to enter into an agreement which neither Cox nor the other carrier is required by law to do. In addition to the total lack of legal authority in support of BA’s position, there is no valid reason why Cox should have to bear the cost of

bringing such a case before the Commission nor why the Commission should devote its limited resources to hearing a matter of such dubious importance.

Additionally, Dr. Collins explains, at p.18 of his testimony (Exhibit 7), that BA wants Cox to forsake the non-incumbent interconnectivity assured by the Act and the FCC Rules and instead pursue an expensive regime of direct interconnections to each wireline and wireless carrier to whom Cox might deliver some small amount of traffic. An incumbent cannot presume to regulate the activity of a CLEC and require it to forfeit valuable transit rights by the process of renewing an interconnection agreement.

The Commission is urged to reject BA's plan and instead to adopt the pertinent BA-RI/Cox Tandem Transit Service language as set out in Section 6 of the Summary-Disputed Issues.

7. BA'S FUTURE INTERLATA TRAFFIC SHOULD NOT BE SENT TO COX ON TRAFFIC EXCHANGE TRUNKS.

In the event that BA is granted Section 271 relief in Virginia, Cox proposes to handle BA's interLATA toll traffic in the same manner that it handles such traffic for IXCs currently. Cox handles IXC traffic through direct Feature Group D trunks or through common meet point trunks and proposes to offer BA the same treatment. BA's proposal to deliver its future interLATA toll traffic over Traffic Exchange trunks would harm Cox's ability to bill BA for terminating 8XX traffic. It would further permit BA to avoid paying Cox's tariffed non-recurring charges for Feature Group D installations and work a competitive disadvantage to the IXCs who deliver their traffic over proper trunks. *See also*, Collins' Testimony (Exhibit 7), at p. 19.

BA has presumed authority over Cox to require Cox give it a competitive advantage not enjoyed by other IXCs. To avoid this distorted result, Cox requests the Commission approve Cox's proposal for such future traffic. The Commission should approve the contract language proposed by Cox at Section 7 of the Summary-Disputed Issues.

8. BA MAY NOT BE PERMITTED TO TREAT DIAL-UP CALLS TO INTERNET SERVICE PROVIDERS ("ISPs") AS NON-COMPENSABLE TRAFFIC FOR PURPOSES OF RECIPROCAL COMPENSATION; BA MAY NOT IMPOSE INFEASIBLE METHODS FOR DETERMINING TOLL VERSUS LOCAL TRAFFIC.

Dial-up calls to ISPs should be treated as local traffic for purposes of reciprocal compensation. The carrier to which such traffic is delivered still incurs the cost of routing such traffic through its network and terminating it to the ISP. All traffic handed-off between LECs must be compensated either as access or as local, yet BA asserts that it can assign this traffic to a third, non-compensable category. The Commission has previously ruled that ISP traffic is subject to reciprocal compensation in the proceeding brought by Cox against BA, VA SCC Case No. PUC970069, issued October 24, 1997. Additionally, in a decision released March 24, 2000, the U.S. Court of Appeals for the D.C. Circuit struck down the FCC's preliminary holding in its Declaratory Ruling issued February 26, 1999, that ISP was of mixed jurisdiction and possibly interstate in nature.

In a related issue, BA proposes that the parties use an infeasible method, i.e., a comparison is to be made between the originating and terminating "points" of the call to determine whether a given call exchanged between the parties is local or toll. Cox's proposal to compare the originating and terminating NXX codes remains the only means available, except for outright guessing, to determine the jurisdiction of calls for billing

purposes. As such, it is the standard means applied throughout the telecommunications industry. *See also*, Collins' Testimony (Exhibit 7), at pp. 19-20.

The Commission should affirm its earlier decision to treat ISPs' calls as local traffic for billing purposes. The Commission should approve the contract language proposed by Cox at Section 8 of the Summary-Disputed Issues.

9. BA MAY NOT REQUIRE THAT COX ENGINEER AND/OR FORECAST BA'S TRUNK GROUPS.

BA seeks to force Cox to forecast BA's outbound traffic, which would put Cox in the posture of projecting how much traffic originated by BA will be sent to Cox for termination. One party cannot shirk its responsibilities and unilaterally impose that burden upon the other. Traffic forecasting is a mutual process, but in negotiations, BA has steadfastly refused to forecast its own traffic that will be sent to Cox. Cox lacks the tools, *e.g.*, engineering data, to make this determination. BA has failed to furnish Cox with a compelling reason why Cox should assume BA's obligations to make such forecasts as well as assuming the additional expense of performing a duty better carried out by BA. In an attempt to resolve the problem created by BA's position, Cox has agreed to a less-than perfect accommodation to make BA's provision of its forecast to Cox optional.

Moreover, Cox notes the inconsistency of BA's proposal, which was not applied in GTE's case. Cox is aware of BA's past practice of forecasting such BA traffic bound for GTE in Virginia and of not requiring GTE to forecast such traffic. It remains a mystery to Cox why BA now eschews the position taken with regard to GTE and takes a

stance with regard to Cox that is at variance with industry practice. *See also*, Collins' Testimony (Exhibit 7), at pp. 20-23.

The Commission should not permit BA to impose this duty upon Cox. Rather, it should refuse to require Cox to provide a forecast of BA's own traffic. The Commission should approve the contract language proposed by Cox at Section 9 of the **Summary-Disputed Issues**.

10. **BA MAY NOT MONITOR OR AUDIT COX'S ACCESS TO AND USE OF CUSTOMER PROPRIETARY NETWORK INFORMATION MADE AVAILABLE TO COX THROUGH THE INTERCONNECTION AGREEMENT.**

As Cox understands BA's position on this Disputed Issue, BA seems concerned with its liability in a civil action arising from its grant to Cox of access, without monitoring and auditing Cox's activities, to customer proprietary network information ("CPNI") and wishes to limit this liability through such monitoring and auditing. Cox deems this to be a specious argument, which might be designed to cloak BA's proprietary interest in how Cox uses CPNI. The FCC and the Commission are the appropriate authorities to monitor and enforce CPNI protections. BA should not usurp their authority and act as Cox's regulator. BA's proposal begs the question of why BA is so committed to taking extra steps and bearing the additional expense of checking on Cox to make sure Cox is complying with its statutory and contractual obligations for the expressed purpose of affording BA greater legal security.

Cox has frequently pointed out to BA during negotiations that Cox is bound both by federal law and by the agreed terms of the Renewal Agreement to protect the confidentiality of CPNI. Cox would be liable for penalties under federal law for any violation of this confidentiality. Additionally, Cox has undertaken to indemnify BA for

any loss that it may incur due to Cox's failure to protect such information. It remains completely unclear to Cox why BA fears being drawn into a legal controversy over Cox's behavior and why BA deems indemnification an inadequate remedy in the unlikely event that BA is held accountable for the actions of Cox. *See also*, Collins' Testimony (Exhibit 7), at pp. 23-24.

The Commission is urged to accept Cox's proposal for resolving this Disputed Issue. The Commission should approve the contract language proposed by Cox at Section 10 of the Summary-Disputed Issues.

11. BA MAY NOT PLACE CAPS ON THE RATES AND CHARGES THAT COX MAY ASSESS FOR ITS SERVICES, FACILITIES AND ARRANGEMENTS.

This attempt by BA to place caps on the charges that Cox may assess is another instance of BA asserting authority over Cox contrary to that permitted by the Act. The two parties may mutually agree to cap rates and charges, but for BA to attempt it unilaterally is to usurp the authority of this Commission over rates and charges. Such a limitation on Cox's rates is not supported by the Act or by the Commission's rules or policies. *See also*, Collins' Testimony (Exhibit 7), at pp. 24-25.

The Commission should reject BA's proposal and approve the contract language proposed by Cox at Section 11.1 of the Summary-Disputed Issues.

12. BA MAY NOT LAWFULLY IMPOSE A STATEMENT OF GENERALLY AVAILABLE TERMS AND CONDITIONS AS A DEFAULT MECHANISM UPON THE TERMINATION OF THE RENEWAL AGREEMENT BEING NEGOTIATED BY THE PARTIES.

Section 252(f) of the Act establishes the Statement of Generally Available Terms ("SGAT") as a pre-fabricated, template agreement available for those CLECs who choose not to pursue negotiations and arbitrations. An SGAT is not to serve as a default

mechanism upon the termination of interconnection agreements. Rather, an SGAT is designed under the Act to serve as an interconnection agreement that is freely available to CLECs who, for whatever reason, do not wish to negotiate and arbitrate pursuant to the Act's procedures. If a CLEC finds an SGAT satisfactory in fulfilling its business needs, then that document can be adopted by the CLEC without expending the time and costs of negotiating and arbitrating a "custom-designed" interconnection agreement.

BA has not filed an SGAT in Virginia but rather proposes in its contract language that an SGAT may be filed with and approved by the Commission sometime in the future. BA appears to understand Cox's desire to enter into a "custom-designed" agreement. However, BA appears not to understand Cox's refusal to adopt, in advance, a future SGAT whose terms and conditions cannot be known by Cox today. This threat to apply a future SGAT in mid-stream at the termination of the Renewal Agreement seems intended by BA to force Cox into an unequal bargaining position during the next round of negotiations. Cox has agreed to act reasonably and with dispatch during the next negotiations and finds BA's threat of applying a future SGAT to be inappropriate. *See also, Collins' Testimony (Exhibit 7), at pp. 25-27.*

The Commission is urged to reject BA's strong-arm attempts to force Cox to adopt an unknown and un-negotiated sequel to its next agreement. The holdover provisions of the agreement should be spelled out clearly for the parties and not left open to chance. The Commission should approve the contract language proposed by Cox at Section 12.1 of the Summary-Disputed Issues.

13. BA MAY NOT SUMMARILY TERMINATE COX'S ACCESS TO OSS FOR COX'S FAILURE TO CURE ITS BREACH OF §§ 1.5 OR 1.6.

This Disputed Issue constitutes yet another example of a BA proposal that is overbroad and overreaching. It consists of the Draconian measure of terminating Cox's access to Operational Support Systems ("OSSs") for perceived abuses without regard to the negative impact on Cox's customers. Cox submits that it has sufficient motivation to protect BA's OSSs without BA's need to resort to such dire consequences. The agreed language in the Renewal Agreement is replete with adequate remedies, including § 9.3, for BA to employ in order to protect its OSSs from interference, impairment, or other harms. *See also*, Dr. Collins' Testimony (Exhibit 7), at p. 27, concerning the termination remedies of §22.5 of the Interconnection Agreement.

This resort to outrageously excessive punishment is another instance of BA asserting unilateral authority over a CLEC, which the Act does not permit. This power grab is misplaced and should be rejected by the Commission. The Commission should approve the contract language proposed by Cox at Section 13.1 of the Summary-Disputed Issues.

WHEREFORE, for the reasons set forth in the Conditional Petition for Arbitration, the supporting direct testimony of Professor Collins, and the other documentation filed in this docket, Cox respectfully requests the Commission to grant Cox the relief sought in the Conditional Petition for Arbitration and resolve the Disputed Issues, as well as any Open Issue that rises to the level of a Disputed Issue, in accordance with Cox's submissions in this case.

ALTERNATIVE PETITION FOR DISMISSAL

Cox will be unable to follow the preferred course of Commission arbitration unless the Commission rules that such arbitration will be conducted pursuant to the Act. Absent such a ruling, Cox would have no other choice but to seek FCC arbitration, which is not the preferred outcome, in order to protect its rights under the Act. To protect such rights, Cox seeks the Commission's grant of the Alternative Petition for *Dismissal* if the Commission either denies the Petition for Declaratory Judgment or issues a declaratory ruling that such arbitration shall not be conducted pursuant to the Act as requested by Cox. Cox also seeks dismissal if the Commission fails to respond to the Petition for Declaratory Judgment by November 18, 2000, which is the nine-month deadline for state action established by Section 252(b)(4)(C), or offers to arbitrate the Disputed Issues under Virginia law "and such other authority we may lawfully exercise without waiving the Commonwealth's immunity." In any such circumstance, Cox would request that the Commission expressly decline to take any action on Cox's Conditional Petition for Arbitration and explicitly state that it will not act to carry out the responsibilities of state commissions under 47 U.S.C. § 252. Cox would then request federal preemption of state authority under the Act.

* * * * *

ACCORDINGLY, Cox respectfully requests that the Commission issue a declaratory judgment that the Commission's arbitration of interconnection terms and conditions between Cox and BA proposed conditionally by Cox shall be conducted pursuant to Section 252 of the Act in order to render total and complete relief. Further, if, and only if, the Commission issues a declaratory judgment that such arbitration shall be

conducted pursuant to the Act as requested by Cox, Cox respectfully requests that the Commission: (1) accept Cox's Conditional Petition for Arbitration; (2) institute an arbitration proceeding in accordance with Section 252(b) and (c) of the Act and 20 VAC 5-400-190; (3) based upon the Conditional Petition for Arbitration and supporting direct testimony, and any legal briefs and other documentation that may be filed in such proceeding, grant Cox the relief sought in such petition and resolve the open issues in accordance with Cox's submissions in such proceeding; (4) set this matter for hearing before the full Commission to take evidence; and (5) grant such other relief as deemed necessary and proper.

Alternatively, Cox respectfully requests that the Commission grant the Alternative Petition for Dismissal upon the occurrence of any one of the following four conditions: (1) the Commission's denial of the Petition for Declaratory Judgment; (2) the Commission's issuance of a declaratory judgment that such arbitration shall not be conducted pursuant to the Act as requested by Cox; (3) any offer or act by the Commission to arbitrate the unresolved interconnection issues between Cox and BA under Virginia law "and such other authority we may lawfully exercise without waiving the Commonwealth's immunity"; or (4) the Commission's failure to respond to the Petition for Declaratory Judgment by November 18, 2000. In the event of such dismissal, Cox respectfully requests that the Commission expressly state that it takes no action on Cox's Conditional Petition for Arbitration and that it will not act to carry out the responsibilities of State commissions under 47 U.S.C. § 252.

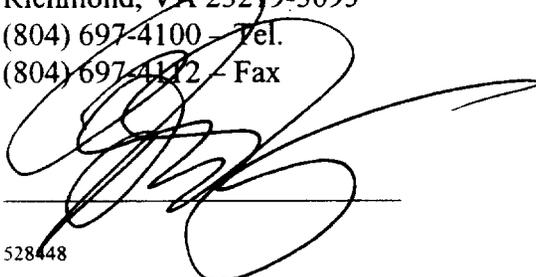
Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 27TH day of July, 2000, a copy of the Petition was served by hand upon each of the following:


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I hereby certify that on the 27TH day of July, 2000, a copy of the transmittal letter describing the Petition was served on the "interested parties" of Case No. PUC 960059 by first-class mail, postage pre-paid listed below:


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