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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 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 Expedited Arbitration	)	CC Docket No. 00-218
In the Matter of Petition of Cox Virginia Telecom, 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
In the Matter of 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 Corporation Commission Regarding Interconnection Disputes With Verizon Virginia Inc.	)	CC Docket No. 00-251

MOTION OF VERIZON TO DISMISS
OR, IN THE ALTERNATIVE, TO DEFER CONSIDERATION OF CERTAIN ISSUES

Verizon Virginia, Inc. ("Verizon") respectfully moves to narrow the issues in this arbitration by dismissing (or in the alternative, deferring consideration of) two groups of issues because they have been, or will be, resolved in other proceedings.

Petitioners AT&T Communications of Virginia, Inc. ("AT&T"), WorldCom, Inc. ("WorldCom"), and Cox Virginia Telecom, Inc. ("Cox") have asked the Commission to arbitrate

and resolve more than ***200 issues and subissues*** covering the whole gamut of Verizon's relationships with the Petitioners, ranging from the pricing of each UNE to resale to general terms and conditions. A number of these issues have already been decided, or will be decided, by the Commission in industrywide rulemakings or by the Virginia State Corporation Commission (the "Virginia SCC").

Both the parties and the Commission would benefit from narrowing the issues by eliminating those that have been or are being addressed elsewhere. This is a sprawling proceeding raising numerous complex issues for decision in an abbreviated time period. Dismissing those issues that have been or will be decided in other proceedings will avoid unnecessarily taxing the Commission's and the parties' time and resources and will permit them to concentrate on those issues that are properly part of this arbitration. As a result, the parties will be able to develop a more focused and comprehensive record for the Commission's consideration and attempt to resolve the relevant issues without the distraction of dealing with questions that have been or are the subject of other proceedings.

To that end, the Commission should dismiss, or at least defer, two categories of issues. First, certain issues raised by Petitioners ask the Commission to reconsider or alter decisions the Commission has already made in industrywide notice and comment rulemaking proceedings or to prejudge issues that are being actively considered by the Commission in pending rulemakings. Such a course would violate the fundamental tenet of administrative law that an agency may not abrogate, amend, or propound rules in the context of a restricted adjudicatory proceeding such as the present arbitration. Second, a group of issues raised by Petitioners is pending and will be decided in a proceeding before the *Virginia* SCC. The Commission has acted to step into the shoes of the Virginia SCC to the extent that the Virginia SCC has not assumed its

responsibilities. But to decide issues where the Virginia SCC is in the process of doing so would be unnecessary and inappropriate.

In order to maximize the benefits of narrowing the issues in this case, and because the parties' testimony is due to the Commission on July 19, 2001, Verizon respectfully requests that the Commission decide this motion as soon as practicable prior to the parties' July 10 status conference.

BACKGROUND

AT&T, WorldCom, and Cox each filed petitions with the Virginia SCC pursuant to section 252(b)(1) asking the Virginia SCC to arbitrate certain terms of their interconnection agreements with Verizon. The Virginia SCC determined that it would proceed with the arbitrations under state law, but, citing the uncertainty surrounding the availability of Eleventh Amendment immunity from federal court review under the Act, refused to arbitrate the parties' disagreements under federal law.[1/] AT&T, WorldCom, and Cox subsequently each filed petitions for preemption with this Commission under section 252(e)(5) of the Telecommunications Act of 1996. That section directs the Commission to preempt a state commission's jurisdiction in a proceeding in which that state commission "fails to act to carry out its responsibility under [section 252]" and to "assume the responsibility of the State commission under this section with respect to the proceeding . . . and act for the State

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1/ *Petition of MCI Metro Access Transmission Services of Virginia, Inc. and MCI WorldCom Communications of Virginia, Inc., for Arbitration of an Interconnection Agreement with Bell Atlantic-Virginia, Inc.*, Case No. PUC000225, Order at 3 (Sept. 13, 2000); *Petition of Cox Virginia Telcom, Inc.*, Case No. PUC000212, Order of Dismissal at 4-5 (Nov. 1, 2000); *Petition of AT&T Communications of Virginia, Inc.*, Case No. PUC000261, Order at 2 (Nov. 22, 2000).

commission." 47 U.S.C. § 252(e)(5). In three orders in January 2001, the Commission granted the preemption petitions of AT&T, WorldCom, and Cox.[2]

The Petitioners subsequently filed pleadings setting forth the "open issues" they desired the Commission to resolve.[3] These requests raise more than 200 wide-ranging issues and subissues involving complex pricing, technical, and operational issues that will require detailed studies and expert testimony. Indeed, the scope of the issues raised by the Petitioners is so broad that WorldCom essentially has asked the Commission to create an entire interconnection agreement from scratch.

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[2] *Petition of WorldCom, Inc. for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996 and for Arbitration of Interconnection Disputes with Verizon-Virginia, Inc.*, Memorandum Opinion and Order, CC Docket No. 00-218, FCC 01-20 (rel. Jan. 19, 2001); *Petition of AT&T Communications of Virginia, Inc. for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996 and for Arbitration of Interconnection Disputes with Verizon-Virginia, Inc.*, Memorandum Opinion and Order, CC Docket No. 00-251, DA 01-198 (Com. Car. Bur. rel. Jan. 26, 2001); *Petition of Cox Virginia Telcom, Inc. for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996 and for Arbitration of Interconnection Disputes with Verizon-Virginia, Inc.*, Memorandum Opinion and Order, CC Docket No. 00-249, DA 01-197 (Com. Car. Bur. rel. Jan. 26, 2001) (collectively, "*FCC Preemption Orders*").

[3] *WorldCom Request for Arbitration*, CC Docket No. 00-218 (FCC filed Apr. 23, 2001) ("WorldCom Petition"); *Petition of AT&T Communications of Virginia, Inc., TCG Virginia, Inc., ACC National Telecom Corp., MediaOne Telecommunications of Virginia, Inc. for Arbitration of an Interconnection Agreement with Verizon Virginia, Inc.*, CC Docket No. 00-251 (FCC Filed Apr. 23, 2001) ("AT&T Petition"); *Petition of Cox Virginia Telcom, Inc. for Arbitration*, CC Docket No. 00-251 (FCC Filed Apr. 23, 2001) ("Cox Petition").

ARGUMENT

I. THE COMMISSION SHOULD DISMISS FROM THIS ARBITRATION THOSE ISSUES THAT HAVE ALREADY BEEN DECIDED OR ARE PENDING IN COMMISSION RULEMAKING PROCEEDINGS.

A number of issues raised by one or more of the Petitioners have either been decided by this Commission in a prior rulemaking proceeding or are pending in an ongoing rulemaking proceeding. The Commission should decline Petitioners' invitation to revisit and amend or reverse rules it has already promulgated or to prejudge issues that are pending before this Commission. Doing so would be contrary to basic principles of administrative law and waste the time and resources of the Commission and the parties.

A restricted adjudication such as the present arbitration is not the appropriate context for the Commission to rewrite, amend, or propound new interconnection rules, especially when those new rules would contradict the agency's previously articulated rules and would have a significant impact throughout the industry on unrepresented parties. It is a bedrock principle of administrative law that substantive rules can only be rewritten through notice and comment rulemaking, and not in an isolated adjudication.[4/] As the D.C. Circuit has held, to reverse existing rules, the Commission "must use the notice and comment procedure of the Administrative Procedure Act. It may not bypass this procedure by rewriting its rules under the rubric of 'interpretation'" in an adjudication.[5/]

[4/] *See* 5 U.S.C. §§ 553(e); 551(5) (including "amending, or repealing a rule" in the rulemaking definition). *See, e.g.*, *C.F. Communications Corp. v. FCC*, 128 F.3d 735, 739 (D.C. Cir. 1997); *Indiana Michigan Power Co. v. Dept. of Energy*, 88 F.3d 1272, 1276 (D.C. Cir. 1996); *Pfaff v. Department of Housing and Urban Development*, 88 F.3d 739, 748 (9th Cir. 1996).

[5/] *C.F. Communications*, 128 F.3d at 739.

Accordingly, an agency's decisions in an adjudicatory proceeding must conform to the substantive rules it has promulgated pursuant to notice and comment proceedings. *See, e.g.*, *American Fed'n of Gov't Employees v. FLRA*, 777 F.2d 751, 759 (D.C. Cir. 1985) (reversing agency adjudicatory decision that was contrary to agency rule because "unless and until it amends or repeals a valid legislative rule or regulation, an agency is bound by such a rule or regulation"). The Commission itself has recognized these basic principles in numerous adjudicative proceedings.[6] Thus, the Commission should dismiss from this arbitration issues in which Petitioners are simply asking the Commission to ignore or reverse existing rules.

Similar principles require that the Commission not prejudge the outcomes of pending rulemakings in the context of this restricted adjudication. By initiating a rulemaking proceeding on certain issues, the Commission has already recognized that resolution of those issues will affect a variety of interested parties — and that both the Commission and the public interest will benefit from the input of those parties. Indeed, rulemaking proceedings produce better and more informed rules than adjudications precisely because the Commission has an opportunity to develop a complete record through the input of a wide array of interested parties, and thus to produce more well-informed, detailed rules.[7] As the Commission has explained, "issues [that]

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[6] *See, e.g.*, *Stockholders of Renaissance Communications Corp. and Tribune Co.*, Memorandum Opinion and Order, 12 FCC Rcd 11866, 11887-88 ¶ 50 (1997) (finding that a closed proceeding is not the proper forum to reexamine existing regulatory definitions); *Capital Cities/ABC, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 5841, 5888 ¶ 87 (1996) (noting that an adjudicatory proceeding is not the proper forum to reexamine geographic market definition); *Great Empire Broadcasting*, Memorandum Opinion and Order, 14 FCC Rcd 11145, 11148 ¶ 8 (1999) (refusing to entertain challenge to "the validity of the rules themselves" in adjudicatory proceeding).

[7] *See, e.g.*, *TerraStar, Inc. Request for Declaratory Ruling to Clarify Section 25.104*, 13 FCC Rcd 4192, 4200 ¶ 19 (1997) ("The rule-making procedure performs an important function . . . .Public discussion through rulemaking allows agencies to be more responsive to the public needs."); *Capital Cities/ABC, Inc.*, 11 FCC Rcd at 5888 ¶ 87 (emphasizing the importance of

have far-reaching implications . . . should be addressed in a rulemaking proceeding instead of in an adjudication or waiver proceeding."[8] Yet, if the Commission were to accept Petitioners' invitation to decide here issues that are the subject of ongoing rulemaking proceedings, it would have prejudged the outcomes of those rulemakings without the benefit of wide-ranging industry input and a complete record. The Petitioners' effort to make an end run around pending rulemakings in an adjudication with a handful of parties and limited information — and within the abbreviated timeframes of this arbitration — should be rejected.

The Commission itself has already reached the same conclusion in the context of reviewing Section 271 applications. In connection with Verizon's 271 application for New York, the Commission rejected AT&T's attempted collateral attack on existing Commission rules.[9] As the Commission explained on review in the D.C. Circuit, transforming "adjudications . . . into forums for the mandatory resolution of major industry-wide issues already pending in traditional notice-and-comment rulemaking proceedings" would be both impractical and

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third party participation in developing "full and well-counseled record"); Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. Rev. 1023, 1070-71 (1998) (noting that agencies develop more informed and detailed rules via the rulemaking process than through adjudications).

[8] *In the Matter of Nextel Communications, Inc.*, Order, 14 FCC Rcd 11,678, ¶ 31 (1999); *see also TerraStar, Inc.*, 13 FCC Rcd at 4192 (finding TerraStar Inc.'s new satellite earth station design is "not encompass[ed]" by the Commission's OTARD rule and deciding that whether the OTARD rule "should be extended to" arrangements similar to TerraStar's design should be left to a rulemaking proceeding); *Petitions for Reconsideration of the Denial of Applications for Waiver of the Commission's Common Carrier Point-to-Point Microwave Radio Services Rules*, 12 FCC Rcd 12,545, 12,705 ¶¶ 388-89 (1997); *Stockholders of Renaissance Communications Corp. and Tribune Co.*, 12 FCC Rcd 11866, 11887-88 ¶ 50 (1997).

[9] *See In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, Interlata Service in the State of New York*, 15 F.C.C.R. 3953 at 4080 ¶ 236 (1999) ("*New York 271 Order*").

improper.[10] The D.C. Circuit agreed, observing that AT&T's approach would unreasonably "change the nature of section 271 proceedings from an expedited process focused on an individual applicant's performance into a wide-ranging, industry-wide examination of telecommunications law and policy."[11] Petitioners' attempts here to have the Commission decide issues resolved or pending in rulemaking proceedings would have the same unlawful consequences.

Finally, the Act itself confirms that arbitrations under section 252 may not be used to rewrite or promulgate new interconnection regulations, but instead are to be governed by the Commission's substantive regulations adopted pursuant to section 251. The statute specifically provides that arbitrations under section 252 must be resolved in accordance with "the regulations prescribed by the Commission pursuant to section 251." 47 U.S.C. § 252(c)(1). The Commission has recognized that these same standards, including conformity with the Commission's regulations, apply fully to arbitrations conducted by the Commission.[12]

The present arbitration proceeding therefore should not be used to revisit existing Commission regulations or prejudge pending rulemaking proceedings, and the Commission should dismiss from this proceeding the following issues:[13]

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[10] *AT&T Corp. v. FCC*, 230 F.3d 607, 630 (D.C. Cir. 2000) (quoting FCC's Appellee Brief).

[11] *Id.* at 631.

[12] *In re Implementation of the Local Competition Provision in the Telecommunications Act of 1996*, First Report and Order, 11 F.C.C.R. 15499 ¶ 1291 (1996) (subsequent history omitted) ("*Local Competition Order*").

[13] As set forth in Verizon's Answer in this proceeding, prior Commission decisions and rules affect numerous other issues raised by Petitioners that are not the subject of this motion. Although those decisions and rules may not completely resolve such issues, they are of course binding for purposes of this arbitration proceeding.

1. Intercarrier Compensation for ISP-Bound Traffic

Each of the Petitioners has asked the Commission to rule that Verizon should be required to pay reciprocal compensation for ISP-bound traffic. *See* Issue I-5.[14] The Commission, however, has already determined in an industrywide rulemaking that "ISP-bound traffic is *not* subject to the reciprocal compensation obligations of section 251(b)."[15] Consequently, the Petitioners' would have the Commission engage in what would be tantamount to an unlawful "announcement[] of law by adjudication" that "departs radically from the agency's [and the public's] previous interpretation of the law."[16]

Resolution of any issues concerning ISP reciprocal compensation would be inappropriate here for a second reason. In the *ISP Remand Order*, the Commission found that § 201 gave it the authority to establish rules governing inter-carrier compensation for ISP-bound traffic and that, "state commissions will no longer have authority to address this issue" in section 252

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[14] The Petitioners state Issue I-5 as follows:

AT&T: Should AT&T receive reciprocal compensation for terminating traffic from Verizon end users to AT&T customers who are internet service providers ("ISPs")?

WorldCom: For purposes of reciprocal compensation, should local traffic include traffic to information service providers?

Cox: VZ-VA may not be permitted to treat dial-up calls to internet service providers ("ISPs") as non-compensable traffic for purposes of reciprocal compensation.

[15] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-carrier Compensation for ISP-Bound Traffic,* Order on Remand and Report and Order, CC Docket Nos. 96-98, 99-68, at ¶ 3 (rel. April 27, 2001) (emphasis added) ("*ISP Remand Order*").

[16] *Pfaff v. Department of Housing and Urban Development*, 88 F.3d 739, 748 (9th Cir. 1996).

arbitrations.[17] In the present arbitration proceeding, the Commission has simply stepped into the shoes of the Virginia state commission — it has "assume[d] the jurisdiction of the Virginia SCC over the interconnection arbitration proceeding."[18] That jurisdiction does not, under the Commission's *ISP Remand Order*, include issues concerning ISP reciprocal compensation.[19] The happenstance of the Commission having to assume jurisdiction because the state commission has declined to arbitrate in accordance with the Act should not and does not alter the substantive scope of the arbitration itself.

Thus, Issue I-5 should be dismissed from this proceeding.

2. *Combinations*

AT&T and WorldCom ask the Commission to revisit the rules concerning what combinations of network elements Verizon must provide. *See* Issue III-6.[20] However, the

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17/ *ISP Remand Order* at ¶¶ 52, 82.

18/ *FCC Preemption Orders*, *supra*, n.2.

19/ Indeed, in a proceeding before the Illinois Commerce Commission following release of the *ISP Remand Order*, AT&T and WorldCom both conceded that a state commission should not arbitrate this issue. *See Comments of Allegiance Telecom of Illinois, Inc., et al, Concerning Impact of FCC Order on Intercarrier Compensation for ISP-Bound Traffic*, Illinois Commerce Commission, Docket 00-055 (filed May 7, 2001).

20/ The Petitioners state Issue III-6 as follows:

AT&T: What types of UNE combinations must Verizon provide to AT&T and under what rates, terms and conditions must it provide them.

WorldCom: Should the Interconnection Agreement include provisions specifying that 1) Verizon shall offer each Network Element individually or as Technically Feasible combinations of network elements, including the combination of all network elements, also known as Network Element Platform; 2) Verizon shall not separate Network Elements that are already combined on Verizon's network unless requested by MCIm and that services provided through combinations of Network Elements or UNE-P will not be disconnected, interrupted, or otherwise modified in order for customers to migrate to MCIm; 3) Verizon's charge to MCIm for

current legal requirements concerning Verizon's obligations to provide combined elements are clear. There is no dispute that Verizon complies with the Commission's Rule 315 as now in effect by providing UNEs to CLECs so that they may combine them for service to their customers, as well as by not separating UNEs that are already combined in Verizon's network.[21]

AT&T and WorldCom seek language requiring that Verizon combine elements that are not already combined in Verizon's network. Although former Commission Rules 315(c)-(f) imposed such an obligation, those rules have been vacated by the Eighth Circuit.[22] AT&T (though not WorldCom) acknowledges as much, but asserts that "[t]hose rules will be vindicated upon the Supreme Court's review of the Eighth Circuit's decision refusing to re-institute them. In the meantime, the [Commission] should hold Verizon responsible for providing new combinations consistent with the [Commission's] findings and rulings concerning Rule 315 as originally adopted by the [Commission]." AT&T Petition at 107. Like their claims regarding ISP reciprocal compensation, Petitioners' request amounts to little more than asking the Commission to issue an unlawful order. The Commission has previously declined requests to

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any combination may not exceed the TELRIC price for the sum of Network Elements that comprise the combination; and 4) [a]t MCIm's request and where Technically Feasible, Verizon shall provide Combinations of Network Elements whether or not those Network Elements are currently combined in the Verizon's network.

[21] *See* 47 C.F.R. § 51.315(a) and (b); *see also New York 271 Order* at ¶¶ 231-33; *In the Matter of Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and Verizon Global Networks Inc., For Authorization to Provide In-Region, InterLATA Services in Massachusetts*, CC Docket No. 01-9, Memorandum and Order, FCC 01-130 at ¶¶ 117-19 (rel. April 16, 2001) ("*Mass. 271 Order*") (both finding that Verizon complies with FCC combination rules).

[22] *Iowa Utilities Board v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997), *rev'd in part, aff'd in part*, 525 U.S. 366 (1999); *Iowa Utilities Board v. FCC*, 219 F.3d 744, 759 (8th Cir. 2000), *cert. granted*, 121 S. Ct. 877 (2001).

reinstate these rules and instead indicated its intention to await the final outcome of judicial review.[23] Because the Supreme Court will definitively determine the validity of Rules 315(c) - (f), the only course for the Commission is to await that decision. This issue therefore should be dismissed from the current arbitration.

3. *Conversion of Services to UNEs*

Both AT&T and WorldCom raise issues concerning whether CLECs can convert existing tariffed services (such as special access) to UNEs using, for example, loop-transport combinations. *See* Issue III-7.[24] But, as AT&T concedes, the Commission has already taken a

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[23] *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 F.C.C.R. 3696, at ¶¶ 479, 481 (1999) ("*UNE Remand Order*").

[24] The Petitioners state Issue III-7 as follows:

AT&T: Does Verizon have the right to place use restrictions on UNEs or UNE Combinations that deny AT&T the ability [to] convert existing services (such as special access) to UNEs or UNE Combinations, to use UNEs and UNE Combinations to provide any service that is technically feasible, or to limit AT&T's ability to connect a UNE or UNE Combination to other services, such as the retail and wholesale offerings of Verizon?

Sub Issue III-7-A Where AT&T requests that existing services be replaced by UNEs and/or UNE Combinations, may Verizon physically disconnect, separate, alter or change in any other fashion the equipment or facilities that are used, without AT&T's consent?

Sub Issue III-7-B Must Verizon implement an ordering process that enables AT&T to place a bulk order for the conversion of services to UNEs or UNE Combinations?

Sub Issue III-7-C Should AT&T be bound by termination liability provisions in Verizon's contracts or tariffs if it converts a service purchased pursuant to such contract or tariff to UNEs or UNE Combinations?

WorldCom: Is WorldCom entitled to order combinations of the loop and transport unbundled network elements for the provision of telecommunications services? Can restrictions be placed on the use of unbundled network elements used in the provisions of telecommunications services?

"different legal view" than the Petitioners on this issue. AT&T Petition at 105 n.135. The Commission issued a *Supplemental Order* on November 24, 1999 that established limits on the availability of unbundled network elements to substitute for the ILECs' special access services.[25] In that Order the Commission allowed CLECs to convert special access services to UNE rates *only* if the CLEC provided a significant amount of local exchange service on the facility.

On June 2, 2000, the Commission issued its *Supplemental Order Clarification* that continued the general limitations on the availability of loop-transport combinations to displace special access services and adopted a three-part test for when a carrier is using the loop-transport combination to provide a significant amount of local service.[26] Most recently, the Commission issued a public notice requesting comments on the use of UNEs to provide exchange access services to finally resolve, among other things, the issues raised in the *Supplemental Order* and the *Supplemental Order Clarification*.[27]

Given the existing orders and the ongoing rulemaking proceeding on this very subject, the Petitioners' attempt to use this proceeding to circumvent or reverse the *Supplemental Order* and the *Supplemental Order Clarification*, in a compressed time frame and with only a few parties, clearly would be inappropriate.

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[25] *See In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order, CC Docket No. 96-98, 15 F.C.C.R. 1760 (1999).

[26] *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Supplemental Order Clarification, 15 F.C.C.R. 9587 (2000).

[27] *Comments Sought on the Use of Unbundled Network Elements*, Public Notice, CC Docket No. 96-98 (rel. Jan. 24, 2001).

4. Switching

AT&T and WorldCom also seek to have the Commission amend its rules concerning the scope of switching unbundling. *See* Issue III-9.[28] The Commission's *UNE Remand Order* created an exception to Verizon's switching unbundling obligations. The Commission found that "requesting carriers are not impaired without access to unbundled local circuit switching when they serve customers with four or more lines in Density Zone 1 in the top 50 metropolitan statistical areas (MSAs) . . . where incumbent LECs have provided nondiscriminatory, cost-based access to the enhanced extended link (EEL) throughout Density Zone 1."[29] The Commission's rationale for this finding was that "requesting carriers have deployed a large number of switches to serve medium and large business customers in the densest areas of the top 50 MSAs, and these medium and large business customers by and large, have a choice in their local service provider."[30]

AT&T and WorldCom seek to treat this arbitration proceeding as a forum to reverse the *UNE Remand Order* and request that the Commission qualify or limit the scope of the exception. *See* AT&T Petition at 140 (asserting that Commission should "modify" exception from four lines to "at minimum" eight lines). The Commission imposed no such limits in the rulemaking, and, as AT&T notes, *id.* at 136, the issue of the scope of the limitation on the availability of

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[28] The Petitioners state Issue III-9 as follows:

AT&T: In what circumstances can Verizon assert the "end user with four or more lines" exception to deny providing AT&T the local switching unbundled network element?

WorldCom: In what circumstances can Verizon assert the "end user with four or more lines" exception to deny providing WorldCom the local switching unbundled network element?

[29] *UNE Remand Order*, 15 F.C.C.R. at ¶ 278.

[30] *Id.* ¶ 299.

unbundled switching is the subject of an ongoing reconsideration proceeding.[31] Moreover, as the evidence submitted in that reconsideration proceeding abundantly demonstrates, the number of competitive voice and data switches has proliferated since the time of the Commission's initial order, and competitors are now using those switches to serve customers of all types.[32] Consequently, if the Commission were to address this issue in the context of the current proceeding, it would have to materially expand, rather than contract, the scope of the existing limitation on the availability of unbundled switching. Rather than resolve this issue here, Issue III-9 simply should be dismissed from this arbitration.

5. *Line Sharing and Line Splitting*

Both AT&T and WorldCom propose to use this arbitration proceeding to expand upon existing rules governing access to the high frequency portion of a loop (including where there is fiber in the loop) and line splitting. *See* Issue III-10.[33] AT&T further asks the Commission to determine in this proceeding the conditions under which loops using Next Generation Digital

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[31] *See, e.g.*, Ex Parte Letter from Gordon R. Evans, Vice President Federal Regulatory, Verizon to Dorothy Atwood, Chief of Common Carrier Bureau, FCC, CC Docket 96-98 (Mar. 12, 2001).

[32] For example, according to statistics provided by the CLECs' own trade association, more than 1,000 competitive voice switches and 2,000 competitive data switches have been deployed. And in just three of Verizon's states, competing carriers are using their own switches to serve some two and a quarter million lines, including some 300,000 known residential lines. *See id.*

[33] The Petitioners state Issue III-10 as follows:

AT&T: How and under what conditions must Verizon implement Line Splitting and Line Sharing?

WorldCom: Should the Interconnection Agreement contain language setting forth WorldCom's right to line sharing and also to self-provision or partner with a data carrier to provide voice and data service over the same line, via UNE-platform line splitting, and the Commission's future decisions regarding line splitting and the provision of advanced services?

Loop Carrier (NGDLC) architecture should be unbundled. *See* Issue V-6.[34] The Petitioners' proposals go beyond Commission requirements that currently govern the industry and prejudge the Commission's ongoing evaluation of many of the numerous and complex technical and operational issues surrounding their proposals in connection with the *Line Sharing Reconsideration Order.*[35]

Verizon's contract language provides access to the high frequency portion of a loop where fiber has been deployed: AT&T and WorldCom currently can access the high frequency portion of a loop served by DLC equipment by deploying a DSLAM at or near the FDI that connects Verizon's copper distribution to Verizon's DLC supported feeder, and have several options to transport their data signal back to the central office. AT&T and WorldCom may also use their own facilities or those of a third party to transport the data over a network separate from Verizon's. Thus, as the Commission has already found, Verizon's proposed language satisfies its requirements under Commission rules.[36] Similarly, the Commission has determined that

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[34] AT&T states Issue V-6 as follows: Under what terms and conditions must Verizon provide AT&T with access to local loops when Verizon deploys Next Generation Digital Loop Carrier (NGDLC) loop architecture?

[35] *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, and In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98*, Third Report and Order On Reconsideration in CC Docket No. 98-147, Fourth Report and Order On Reconsideration In CC Docket No. 96-98, Third Further Notice of Proposed Rulemaking in CC Docket No. 98-147, and Sixth Further Notice of Rulemaking in CC Docket No. 96-98, FCC 01-26 (rel. Jan. 19, 2001); *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147 and In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, Order on Reconsideration and Second Further Notice of Proposed Rulemaking in CC Docket No. 98-147 and Fifth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, 15 F.C.C.R. 17806 (2000) ("*Fifth Further NPRM*").

[36] *See Mass. 271 Order* at ¶ 165 (approving Verizon's arrangements for line sharing and line splitting); *see also Line Sharing Reconsideration Order* at ¶ 12 (clarifying that "where a

"Verizon demonstrates that it makes it possible for competing carriers to provide voice and data service over a single loop, *i.e.*, to engage in line splitting."[37/]

While the Commission has recognized that there are other ways in which line sharing and line splitting may be implemented, it has not mandated any particular means. Instead, the Commission has initiated further proceedings to address the difficult technical issues raised by the various potential methods by which CLECs have proposed to gain access to the unbundled high frequency portion of a loop using fiber-fed DLCs and to engage in line splitting.[38/] AT&T and WorldCom should not be permitted to short-circuit that rulemaking by litigating these complex issues here. Because their proposals would have an industrywide impact, principles of administrative law and judicial economy dictate that these issues be decided instead in the pending rulemaking proceedings.

6. Collocation of Advanced Services Equipment

WorldCom asks the Commission to determine whether it is entitled to collocate advanced services equipment in Verizon's premises. *See* Issue IV-28.[39/] However, that very issue is pending before the Commission in a rulemaking in the Advanced Services Docket.[40/] Indeed, on December 8, 2000, Verizon, WorldCom, AT&T and other CLECs entered into a Settlement

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competitive LEC has collocated a DSLAM at the remote terminal, an incumbent LEC must enable the competitive LEC to transit traffic from the remote terminal to the central office. The incumbent LEC can do this, at a minimum, by leasing access to the dark fiber element or by leasing access to the subloop element.").

37/ *Mass. 271 Order*, at ¶¶ 176-80.

38/ *See supra* n.35.

39/ **WorldCom:** Is WorldCom entitled to collocate advanced services equipment, such as DSLAMs, in Verizon's premises?

40/ *Fifth Further NPRM, supra*, n.35.

Agreement in Virginia in which they agreed to defer this issue pending the Commission's decision in that rulemaking.[41] As a party to the Settlement Agreement, WorldCom is bound by this Agreement, and Issue IV-28 should be dismissed from this arbitration.

II. THE COMMISSION SHOULD DISMISS ISSUES RELATING TO PERFORMANCE METRICS BECAUSE THE VIRGINIA SCC IS ALREADY CONDUCTING AN INDUSTRYWIDE COLLABORATIVE PROCEEDING THAT WILL SET SUCH METRICS IN VIRGINIA.

The Commission has preempted the Virginia SCC's jurisdiction of these arbitrations on the theory that the Virginia SCC has failed to act to carry out its responsibility under § 252 of the Act.[42] The Virginia SCC, however, *is* carrying out its responsibilities with respect to performance standards, measurements, and remedies in the form of an industry collaborative proceeding of the type that this Commission has previously endorsed. *See In re Establishment of a Collaborative Committee to Investigate Market Opening Measures*, Case No. PUC000026 (the "Virginia Collaborative"). Both AT&T and WorldCom are actively participating in this collaborative proceeding, which has made substantial progress toward setting performance measurements. Thus, the Commission has no cause to accept AT&T's and WorldCom's invitation to use this arbitration to establish performance metrics, as well as standards and financial penalties for any failure to comply with such metrics. *See* Issues III-14 and IV-130.[43]

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[41] A copy of that agreement is attached as part of Exhibit D to Verizon's Answer in this proceeding.

[42] *FCC Preemption Orders*, *supra*, n.2.

[43] The Petitioners state Issue III-14 as follows:

AT&T: What are the appropriate performance metrics and standards and financial remedies that should apply to Verizon's delivery of services under the Agreement, in the event that Verizon fails to meet the performance metrics adopted for Virginia?

In fact, doing so would be impractical and unfair to Verizon since it would subject Verizon to one set of metrics as to AT&T and WorldCom and another set as to all other CLECs in Virginia. The Commission should decline to arbitrate these issues in favor of the standards, measurements, or remedies that will be adopted by the Virginia SCC in the context of the Virginia Collaborative.[44]

Action by the Commission on these issues is particularly unnecessary because it already has considered and approved a carrier-to-carrier performance plan for Verizon in connection with its approval of the merger of GTE Corporation and Bell Atlantic Corporation.[45] In that proceeding, the Commission recognized the enormous amount of work that had been accomplished in industry collaboratives at which the Petitioners were represented and fully participated. Accordingly, rather than attempt to create new metrics, the Commission simply

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WorldCom: What are the appropriate financial remedies that should apply to Verizon's provision of services pursuant to the interconnection agreement?

WorldCom states Issue IV-130 as "What are the appropriate performance reports, standards and benchmarks that should apply to Verizon services provided pursuant to the interconnection agreement?"

[44] AT&T itself has suggested in a number of state arbitrations that issues concerning performance metrics be deferred or dismissed because they had been, or were going to be, addressed in separate state proceedings. *See, e.g.*, AT&T Petition for Arbitration at 7, *In re Applications of AT&T Comms. of Maryland, Inc.*, Case No. 8882 (Md. PSC Jan. 2001); AT&T Petition for Arbitration at 6, *In re: Applications of AT&T Comms. of Pennsylvania, Inc., et al.*, Nos. A-310125F0002, A-310213F0002, A-310258F0002 (Pa. PUC); AT&T Petition for Arbitration at 7, *In re: Applications of AT&T Comms. of NJ, L.P., et al.*, No. TO00110893 (NJ BPU Nov. 2000).

[45] *See In re Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, Memorandum Opinion and Order, CC Docket No. 98-184, FCC 00-221, ¶¶ 279-318 and Attachment A (rel. June 16, 2000).

conditioned approval of the merger on Verizon's compliance with certain metrics that had been created by industry collaboratives:

> The specific performance measures that Bell Atlantic/GTE will implement in the Bell Atlantic legacy service areas are based upon performance measures developed in a New York collaborative process involving Bell Atlantic's application for in-region, interLATA relief. The performance measures that Bell Atlantic/GTE will implement in the GTE legacy service areas are based primarily upon performance measures applicable to GTE that were developed in a collaborative process in California. *Rather than develop a new set of measures for this merger proceeding, we find that relying upon these performance measures and corresponding business rules, which may be modified over time, will achieve the goals of the Performance Plan and conserve time and resources.*[46]

The Commission specifically provided that Verizon would have to comply with certain performance metrics in each state in its service area until, for example, that state developed its own set of performance measures.[47] Thus, Verizon will be required to comply with these metrics in Virginia.

The Commission should likewise decline to establish performance standards in this arbitration proceeding. As the Commission is aware, development of performance metrics is a time-consuming and complex task that would distract considerably from the plethora of other significant issues that are already part of this arbitration. Such an expenditure of time and resources is entirely unnecessary. The Virginia SCC has already established a collaborative industry process to develop appropriate performance metrics for Virginia. As the Commission has recognized, such a collaborative process is well-suited to setting such performance standards.

Moreover, if the Commission were to attempt to establish performance standards in this arbitration proceeding, Verizon either would have to comply with two different sets of standards

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[46] *Id.* ¶ 281 (emphasis added and citations omitted).

[47] *Id.* ¶¶ 279-82.

(i.e., one for AT&T and WorldCom and another for all other CLECs) or the Commission's standards would be supplanted by those developed by the Virginia SCC. The former outcome would be impractical, wasteful, and manifestly unfair to Verizon. The latter outcome would render an arbitrated resolution of performance standard issues in this proceeding a waste of time and resources by both the Commission and the parties. Accordingly, the Commission should dismiss issue numbers III-14 and IV-130 from this arbitration proceeding.

CONCLUSION

Petitioners attempt to raise a number of issues that have been or more appropriately will be decided in other proceedings. This restricted adjudicatory proceeding is not, however, the appropriate forum to alter or promulgate rules. Moreover, dismissing these issues now will allow both the parties and the Commission to conserve time and resources and to focus their attention on the numerous complex issues that are properly part of this arbitration. In order to maximize these benefits, and in light of the impending deadline for the submission of testimony, this motion should be granted expeditiously, and the Commission should dismiss from this proceeding Issues I-5, III-6, III-7, III-9, III-10, III-14, IV-28, and IV-130. Alternatively, with respect to the issues that are pending in other proceedings, the Commission should direct the parties to defer submission of testimony, evidence, or argument as to those issues and order that such issues be resolved in accordance with the outcome of those other proceedings.

Respectfully submitted,

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Dated: June 27, 2001

CERTIFICATE OF SERVICE

I do hereby certify that the foregoing Motion of Verizon to Dismiss or, in the Alternative, to Defer Consideration of Certain Issues was served as follows this 27th day of June 2001:

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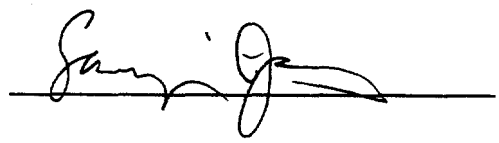
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