

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

MOTION TO STRIKE UNTIMELY RAISED ISSUES RELATED TO ISSUE I-5

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SUMMARY

Verizon, long after the deadlines set by the Commission, has introduced two new issues into its arbitration with Cox. These new issues, and all reference to them in Verizon filings, should be struck from this proceeding.

The first new issue concerns the definition of “Internet Traffic” and its usage under the parties’ agreement. Verizon has proposed to modify the previously agreed-to definition, which covered only ISP-bound traffic, to cover all traffic that ever touches the Internet. This change is unnecessary to implement the Commission’s *ISP-Bound Traffic Order* and, in fact, would have wide-ranging effects throughout the agreement. Among other things, it could prevent the parties from exchanging calls transmitted using phone-to-phone IP telephony (even if those calls originate and terminate on the public switched telephone network); raises questions about how to route certain calls; and creates uncertainty about how – or if – the parties would be compensated for carrying “Internet Traffic.” Because this issue neither was raised in the parties’ initial filings nor is within the scope of the Commission’s request for refinement of Issue I-5, it should be removed from this proceeding.

The second new issue relates to audits of reciprocal compensation billing. Verizon seeks a new provision in the agreement that would give it unlimited rights to audit Cox’s bills. Verizon has added this issue even though the parties already had agreed on an audit provision for their agreement and even though neither party raised an audit issue in their initial filings. This issue also is outside the scope of the request to refine Issue I-5. Consequently, Verizon should not be permitted to add it as a new issue at this late date.

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MOTION TO STRIKE UNTIMELY RAISED ISSUES RELATED TO ISSUE I-5

Cox Virginia Telcom, Inc. (“Cox”) hereby submits this Motion to Strike Untimely Raised Issues in the above-captioned proceeding.¹ Long after its Answer to Cox’s Petition for Arbitration was filed, Verizon Virginia, Inc. (“Verizon”) suddenly has attempted to inject two new issues into this proceeding related to Issue I-5. One new issue concerns the generic treatment of traffic that traverses the Internet, and the other proposes new contractual audit rights for Verizon.

These new issues were introduced by Verizon under the guise of furnishing Cox with contractual language to implement the Commission’s *ISP-Bound Traffic Order*;² however, neither issue is related to any directive found in that decision. These issues are beyond the scope of this arbitration as determined by the *Arbitration Procedures Notice* and the parties’

¹In the Matter of the 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 (filed April 23, 2001).

² Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Intercarrier Compensation for ISP-Bound Traffic, *Order on Remand and Report and Order*, 2001 Lexis 2340, FCC 01-131 (rel. April 27, 2001) (the “*ISP-Bound Traffic Order*”).

submissions in this matter.³ Moreover, Verizon has offered no explanation for its tardiness.

Therefore, all references to the issues described herein should be stricken from the record of this proceeding and be given no further consideration.

I. BACKGROUND

Under the procedures outlined in the *Arbitration Procedures Notice*, the Commission will consider only those issues “set forth in the Petition and in the Response, if any.”⁴ Cox raised Issue I-5 in its petition for arbitration filed April 23, 2001. More than two months passed before Verizon filed a motion to dismiss or defer consideration of various issues raised in this and two similar proceedings.⁵ The only Cox issue addressed by Verizon’s motion was Issue I-5, and Cox filed an opposition to Verizon’s motion as it related to this issue.

On July 11, 2001, the Commission issued a Letter Ruling urging the parties to negotiate these issues. If resolution could not be reached through such negotiations, the Commission directed the parties to submit “agreed statements of the issues that must still be arbitrated.” Cox’s negotiations with Verizon failed to resolve the subsidiary, implementation issues growing out of Issue I-5. Consequently, on July 27, 2001, the parties submitted agreed statements in the form of a revised joint decision point list (“JDPL-2”) of the issues that must still be arbitrated. It was not until the filing of JDPL-2 that Verizon submitted its proposed contractual language to the

³Procedures Established for Arbitration of Interconnection Agreements Between Verizon and AT&T, Cox, and Worldcom, *Public Notice*, DA 01-270 (rel. Feb. 1, 2001) (“*Arbitration Procedures Notice*”).

⁴*Arbitration Procedures Notice* at 5, Section A.5.

⁵ Verizon’s motion was filed in CC Docket Nos. 00-218 and 00-251, concerning petitions for arbitration filed by WorldCom, Inc. (“WorldCom”), and AT&T Communications of Virginia, Inc. (“AT&T”), respectively. Cox and AT&T requested that the Commission combine their petitions with that of WorldCom for hearing purposes; these requests remain pending.

Commission for adoption.⁶ This language introduced two new issues into this proceeding, concerning the treatment of traffic that traverses the Internet and additional audit rights for reciprocal compensation traffic. Because these issues were neither raised in the parties' initial filings nor relate to the implementation of the *ISP-Bound Traffic Order*, the Commission should strike those portions of that language, to prevent the addition of new and unrelated issues to this proceeding. Verizon may attempt to support its proposal as being designed to comply with the *ISP-Bound Traffic Order*. Any such effort must fail because these provisions go far beyond the scope of any directive adopted by the Commission in that order.

II. THE INTERNET TRAFFIC DEFINITION AND ITS USAGE

A. PROPOSED DEFINITION OF INTERNET TRAFFIC

The first new issue concerns Verizon's proposed definition and usage of the term "Internet Traffic." Cox understood that the parties long ago settled the question of how to define "Internet traffic." The following definition had been previously agreed to by the parties: "'Internet Traffic' means any traffic that is transmitted to or returned from an Internet Service Provider at any point during the duration of the transmission." It is important to note that the finite scope of this term's definition had been approved by Cox and Verizon prior to the release of the *ISP-Bound Traffic Order*, thereby underscoring that it was intended to be limited only to traffic to or from ISPs.

Both parties proposed modifying this term's definition to give effect to the Commission's directives in the *ISP-Bound Traffic Order*. In fact, Cox has proposed a definition of "Internet Traffic" that incorporates the term "ISP-Bound Traffic" exactly as it is used in the *ISP-Bound*

⁶ A comparison of the Issue I-5 contractual language proposed by Verizon in JDPL-2 to that language contained in Exhibit IC-2 to the Direct Testimony of Verizon witnesses Steven J. Pitterle and Pete D'Amico filed on July 31, 2001, raises an additional question. While the language of Exhibit IC-2 makes frequent use of the term "Internet Traffic," it does not contain a definition of that term; Cox assumes this is an oversight.

Traffic Order.⁷ Verizon, however, now proposes that the Commission adopt the following definition: “‘Internet Traffic’ means any traffic that is transmitted to or returned from the Internet at any point during the duration of the transmission.”⁸ Further, Verizon proposes to use this term in the following definition:

“Measured Internet Traffic” means dial-up, switched Internet Traffic originated by a Customer of one Party on that Party’s network at a point in a Verizon local calling area, and delivered to a Customer or an Internet Service Provider served by the other Party, on that other Party’s network at a point in the same Verizon local calling area. Verizon local calling areas shall be as defined in Verizon’s effective Customer Tariffs (including, but not limited to, to the extent applicable, Verizon Tariffs S.C.C.-Va.-Nos. 201 and 202). For the purposes of this definition, a Verizon local calling area includes a non-optional Extended Local Calling Scope Arrangement, but does not include an optional Extended Local Calling Scope Arrangement. Calls originated on a 1+ presubscription basis, or on a casual dialed (10XXX/101XXXX) basis, are not considered Measured Internet Traffic.⁹

Verizon’s proposed definition for Measured Internet Traffic — using Internet Traffic in this manner — is consistent with Cox’s understanding of “ISP-Bound Traffic” as that term is used in the *ISP-Bound Traffic Order*. As will be demonstrated below, however, Verizon’s definitions, when coupled with its usage of the newly defined terms, have significant effects on the meaning of other terms of the agreement.

Cox finds no compelling reason for adding two newly-defined terms to the interconnection agreement to implement the *ISP-Bound Traffic Order* when use of the Commission’s term “ISP-Bound Traffic” would promote a better understanding of the parties’ intent. Nevertheless, Cox would not be unalterably opposed to Verizon’s use of the term Internet Traffic in defining Measured Internet Traffic if the term Internet Traffic, as defined by Verizon,

⁷ Cox’s proposed language is as follows:

1.36 “Internet Traffic” shall have the same meaning, when used in this Agreement, as the term “ISP-bound traffic” is used in the FCC’s Order on Remand and Report and Order in CC Docket Nos. 96-98 & 99-68, FCC 01-131, released April 27, 2001. Generally speaking, “Internet Traffic” refers to telecommunications traffic delivered to Internet service providers.

⁸ JDPL-2, Issue I-5, Verizon proposed section 1.36.

⁹ *Id.*, Verizon proposed section 1.41a.

were not used in any other location. The new definition would, however, significantly affect the meaning of several elements of the agreement in ways that are unrelated to any changes required to implement the *ISP-Bound Traffic Order*.

B. THE USAGE OF NEWLY DEFINED TERMS

Cox's objections arise from Verizon's use of the newly defined term Internet Traffic in other provisions of the interconnection agreement. Although Cox might accept the use of that term in the definition of Measured Internet Traffic, Cox is unwilling to accept its use elsewhere. Specifically, Verizon proposes to use Internet Traffic in Sections 1.60(a), 4.2.1, 5.5, 5.7.2(d), 5.7.4, 5.7.7, and 7.1. In Cox's view, each such usage, at a minimum introduces uncertainty that could lead to future controversy and, in practice, significantly changes the meaning of these previously agreed-to provisions.

Verizon's proposed Section 1.60a states:

"Reciprocal Compensation Traffic" means Telecommunications traffic originated by a Customer of one Party on that Party's network and terminated to a Customer of the other Party on that other Party's network, except for Telecommunications traffic that is interstate or intrastate Exchange Access, Information Access, or exchange services for Exchange Access or Information Access. Reciprocal Compensation Traffic does not include: (1) any **Internet Traffic**; (2) Toll Traffic, including, but not limited to, calls originated on a 1+ presubscription basis, or on a casual dialed (10XXX/101XXX) basis; (3) Optional Extended Local Calling Arrangement Traffic; (4) special access, private line, Frame Relay, ATM, or any other traffic that is not switched by the terminating Party; or, (5) Tandem Transit Traffic.¹⁰

Verizon's redefinition of Internet Traffic significantly alters the meaning of this proposed definition of Reciprocal Compensation Traffic. Not only would it exclude Measured Internet Traffic from being subject to reciprocal compensation, which is acceptable to Cox, but it also excludes any other traffic that touches the Internet, which is unacceptable to Cox and is far beyond the scope of the *ISP-Bound Traffic Order*.

¹⁰ JDPL-2, Issue I-5, Verizon proposed section 1.60a (emphasis added).

Verizon's use of its proposed definition of Internet Traffic would expand the type of traffic covered by the definition to include, for example, phone-to-phone IP telephony.¹¹ It also would appear to exclude any traffic that uses the Internet as an intermediate link for transmission purposes.¹² When asked directly by Cox during negotiations, Verizon has steadfastly refused to explain what types of traffic it intends for the new, revised definition of Internet Traffic to cover. Indeed, Verizon's representatives merely confirmed that the term was being used as Verizon intended, without saying how it would affect the other terms of the agreement. In the absence of an explanation or additional contractual language to ensure that other, previously agreed-to provisions would be unaffected, Cox concludes that Verizon's intended use of this term, which differs significantly from the definition previously agreed to by the parties, indeed will affect the settled aspects of the interconnection agreement in myriad ways – none of which is linked to implementation of the *ISP-Bound Traffic Order*.

For example, Verizon's reliance on the more broadly-defined term Internet Traffic in defining Reciprocal Compensation Traffic suggests that a party may withhold reciprocal compensation for local traffic if such traffic is handled using phone-to-phone IP telephony. This possibility never has been discussed by the parties, and is entirely absent from Verizon's

¹¹ The Commission has discussed this term in the following way:

Specifically, when an IP telephony service provider deploys a gateway within the network to enable phone-to-phone service, it creates a virtual transmission path between points on the public switched telephone network over a packet-switched IP network. These providers typically purchase dial-up or dedicated circuits from carriers and use those circuits to originate or terminate Internet-based calls. From a functional standpoint, users of these services obtain only voice transmission, rather than information services such as access to stored files. The provider does not offer a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information. Thus, the record currently before us suggests that this type of IP telephony lacks the characteristics that would render them "information services" within the meaning of the statute, and instead bear the characteristics of "telecommunications services."

Federal-State Joint Board on Universal Service, *Report to Congress*, 13 FCC Rcd 11501,11544 (1998) (footnote omitted).

¹² For instance, in some implementations of IP-based telephony, a carrier might use the Internet to transmit local traffic to and from a centrally-located "soft switch."

Answer. If Verizon had maintained at any time in the negotiations leading up to the establishment of this proceeding that traffic associated with IP telephony should be excluded from reciprocal compensation, Cox would have included that issue in its petition for arbitration. Verizon also had the opportunity to raise that issue when it filed the Answer, but did not do so.

Similarly, Verizon's suggested use of the term Internet Traffic at Sections 4.2.1, 5.5, 5.7.2(d), 5.7.4, 5.7.7, and 7.1 changes the meaning of agreed-to terms of the agreement, and in some cases even creates conflicts among or gaps in provisions of the agreement. Section 4.2.1 is agreed-to contract language that deals with the type of traffic that can be transported over various types of trunks.¹³ Verizon's new definition of Internet Traffic broadens the range of traffic that would be carried over local trunks. Verizon's proposed Section 5.5 discusses the engineering of trunk groups used for various types of traffic, including "Internet Traffic," with the result that long distance traffic that is transmitted via the Internet may be required to use separate trunks from other long distance traffic.¹⁴ At Section 5.7.2(d), Verizon proposes that reciprocal

¹³ Section 4.2.1 states, in pertinent part:

Trunk Types. Section 4 describes the architecture for Interconnection of the Parties' facilities and equipment over which the Parties shall configure the following separate and distinct trunk groups:

Traffic Exchange Trunks for the transmission and routing of terminating Local Traffic, Tandem Transit Traffic, **Internet Traffic**, translated LEC IntraLATA toll free service access code (e.g. 800/888/877) traffic, IntraLATA Toll Traffic between their respective Telephone Exchange Service customers pursuant to Section 251 (c)(2) of the Act, in accordance with Section 5; (Emphasis added.)

¹⁴ Section 5.5 states:

Traffic Exchange trunk groups provided by either Party for Local, **Internet**, and IntraLATA Toll traffic will be engineered using a design blocking objective of B.01 (Blocking Level B.01 - high-day-network-busy-hour blocking standard). Where Interconnection for Local, **Internet**, and IntraLATA Toll traffic is provided via a Party's Tandem, all final trunk groups between that Party's Tandem switch and its End Office switches will be engineered using a design blocking objective of B.01. Access Toll Connecting trunk groups provided by the Parties for Exchange Access traffic will be engineered using a design blocking objective of B.005 (Blocking Level B.005 - high-day-network-busy-hour blocking standard). (Emphasis added.)

compensation not be paid for “Internet Traffic,”¹⁵ and would, therefore, exclude reciprocal compensation for certain traffic that is not subject to the *ISP-Bound Traffic Order*. Verizon’s proposed Section 5.7.4 uses the term “Internet Traffic” in discussing the application of the 3:1 ratio for separating ISP-bound traffic from other traffic, and does not distinguish ISP-bound Internet Traffic from other Internet Traffic.¹⁶ Verizon seeks to limit the amount of compensation that a party can receive for “Internet Traffic” in proposed Section 5.7.7.¹⁷ Section 7.1 contains agreed-to language regarding Information Services Traffic to which Verizon wishes to add a provision clarifying that such traffic does not include “Internet Traffic,” which could exclude any Internet-transmitted Information Services traffic from carriage under the agreement, **even if such traffic originates and terminates on the public switched network.**¹⁸ Indeed, one

¹⁵ Verizon’s proposed Section 5.7.2(d) is as follows:

Transport and termination of the following types of traffic shall not be subject to the Reciprocal Compensation arrangements set forth in this subsection 5.7, but instead shall be treated as described or referenced below:

...

No Reciprocal Compensation shall apply to *Internet Traffic*. (Emphasis added.)

¹⁶ Verizon’s proposed Section 5.7.4 is as follows:

The determination of whether traffic is Reciprocal Compensation Traffic or *Internet Traffic* shall be performed in accordance with Paragraphs 8 and 79, and other applicable provisions, of the FCC Internet Order (including, but not limited to, in accordance with the rebuttable presumption established by the FCC Internet Order that traffic delivered to a carrier that exceeds a 3:1 ratio of terminating to originating traffic is *Internet Traffic*, and in accordance with the process established by the FCC Internet Order for rebutting such presumption before the Commission). (Emphasis added.)

¹⁷ Verizon’s proposed Section 5.7.7 is as follows:

The Parties’ rights and obligations with respect to any intercarrier compensation that may be due in connection with their exchange of *Internet Traffic* shall be governed by the terms of the FCC Internet Order, and other applicable FCC orders and FCC Regulations. Notwithstanding any other provision of this Agreement or any Tariff, a Party shall not be obligated to pay any intercarrier compensation for *Internet Traffic* that is in excess of the intercarrier compensation for *Internet Traffic* that such Party is required to pay under the FCC Internet Order and other applicable FCC orders and FCC Regulations. (Emphasis added.)

¹⁸ The underlined portion below indicates the provision that Verizon wishes to add to the otherwise agreed-to language of Section 7.1:

The following provisions shall apply only to Cox-originated Information Services Traffic directed to an Information Services platform connected to Verizon’s network, should Cox elect to deliver such traffic to Verizon. At such time as Cox connects Information Services platforms to its network, the Parties shall agree upon a comparable arrangement for Verizon-originated Information Services Traffic. The Information Services Traffic subject to the following provisions is circuit switched voice traffic, delivered to information service

of the potential consequences of the Verizon proposal is that some or all Internet Traffic, including local traffic that happens to use IP as a transmission protocol, could be excluded from interconnection under the agreement. None of these changes is mandated, or even contemplated, by the *ISP-Bound Traffic Order* or the July 11 letter order. Thus, they exceed the scope of the issues defined in this proceeding by the parties' initial filings.

For these reasons, Cox requests that the Commission strike from the record of this proceeding either: (1) Verizon's proposed changes to the previously-agreed definition of the term "Internet Traffic" at Section 1.36; or (2) Verizon's usage of that term, as defined by Verizon, anywhere other than in the context of the definition of Measured Internet Traffic, including in the seven provisions discussed above: Sections 1.60(a), 4.2.1, 5.5, 5.7.2(d), 5.7.4, 5.7.7, and 7.1.

III. THE EXPANSION OF VERIZON'S CONTRACT AUDIT RIGHTS

The second issue concerns Verizon's new proposal to expand its audit rights under the prospective agreement. Verizon's proposed addition would give Verizon the right to conduct unlimited audits to determine whether Cox is billing reciprocal compensation traffic properly.¹⁹ These audit rights are in addition to the two audits per year already allowed to each party under terms to which Cox and Verizon previously agreed.²⁰ No audit issues were raised by Cox in its

providers who offer recorded announcement information or open discussion information programs to the general public. Information Services Traffic does not include *Internet Traffic*. (Emphasis added.)

¹⁹ Verizon's proposed language is as follows:

[Section 5.7.8] In addition to those audit rights provided in Section 5.7.5 above, Verizon may conduct audits of the traffic billed as Reciprocal Compensation Traffic to determine whether such traffic is Reciprocal Compensation Traffic and therefore subject to Reciprocal Compensation. If any such traffic is determined not to be Reciprocal Compensation Traffic, Verizon shall not pay Reciprocal Compensation for that portion which is determined not to be Reciprocal Compensation Traffic.

²⁰ The language of the agreed-upon provisions are as follows:

[Section 5.7.5] Each Party reserves the right to audit all Traffic, up to a maximum of two audits per calendar year, to ensure that rates are being applied appropriately; provided, however, that either Party shall have the right to conduct additional audit(s) if the preceding audit disclosed material errors or discrepancies. Each Party agrees to provide the necessary Traffic data in conjunction with any such audit in a timely manner.

Petition, or by Verizon in its Answer to Cox's petition. Indeed, Cox and Verizon have *agreed* to an audit provision. Therefore, pursuant to the procedures laid out in the *Arbitration Procedures Notice*, Verizon's new audit language is outside the scope of this arbitration, must be stricken from the record in this proceeding, and should be given no further consideration.

IV. CONCLUSION

This arbitration promises to be too long and intricate to allow the parties to continually raise additional issues. All parties were put on notice by the *Arbitration Procedures Notice* that they were required to raise all issues they wished to arbitrate at the outset of this proceeding. Verizon has provided no compelling reason (or any reason at all) why it should be permitted to raise new issues at this late point in the proceedings, nor has it sought leave to do so. Therefore, to preserve the integrity of this proceeding and to ensure that it proceeds promptly to an equitable conclusion, the Commission must issue an order striking the new issues raised by Verizon.

With regard to the Internet Traffic issue, the Commission should either strike: (1) Verizon's proposed definition of the term "Internet Traffic" at Section 1.36; or (2) Verizon's usage of that term, as defined by Verizon, anywhere other than in the context of the definition of Measured Internet Traffic, including in Sections 1.60(a), 4.2.1, 5.5, 5.7.2(d), 5.7.4, 5.7.7, and 7.1. Concerning the audit rights issue, the Commission should strike Verizon's proposal to adopt new Section 5.7.8 that would expand Verizon's audit rights unilaterally. The Commission also should strike any testimony or other materials filed by Verizon that relates to these issues.

Cox has been forced to contend with Verizon's efforts to introduce new issues very late in this proceeding. Cox has acted with dispatch to address these issues at this juncture. In the event the Commission is not inclined to take the action recommended by Cox herein, Cox respectfully requests an adequate opportunity to amend its petition for arbitration, to submit

additional discovery requests to Verizon, to file supplemental direct and rebuttal testimony and to otherwise supplement the record in this proceeding. Such latitude is necessary to permit Cox to address these newly-raised issues in an efficient and effective manner.

Respectfully submitted,

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August 7, 2001

CERTIFICATE OF SERVICE

I, Vicki Lynne Lyttle, a legal secretary at Dow, Lohnes & Albertson, PLLC do hereby certify that on this 7th day of August, 2001, copies of the foregoing Motion to Strike Untimely Raised Issues Related to Issue 1-5 were served as follows:

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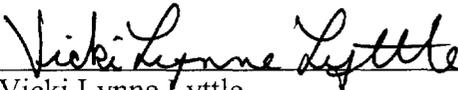
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