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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

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	)	CC Docket No. 00-218
Virginia State Corporation Commission	)	
Regarding Interconnection Disputes	)	
with Verizon-Virginia, Inc., and for	)	
Expedited Arbitration	)	

DIRECT TESTIMONY OF MATT HARTHUN

(Issues IV-120, IV-129, VI-1(P), VI-1(Q))

August 17, 2001

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INTRODUCTION

Q. Please state your name, title and business address.

A. My name is Matthew Harthun. I am Commercial Counsel in the Network and Facilities Legal group of WorldCom. My business address is 8521 Leesburg Pike, 6th Floor, Vienna, Virginia 22182.

Q. Please describe your education and relevant experience with WorldCom and in the telecommunications industry.

A. I joined WorldCom (then MCI) in late 1996. I have been involved with Verizon (both legacy GTE and Bell Atlantic) interconnection agreements since that time. Prior to joining WorldCom, I was a staff attorney with the Policy and Program Planning Division of the FCC's Common Carrier Bureau, where I worked in the areas of transport rate restructure, exchange access rate structures and price caps, local number portability, and the unbundling of basic telecommunications services. Prior to joining the FCC, I worked in private practice as a communications attorney. My primary responsibilities involved the negotiation of complex commercial agreements in the area of satellite digital transmission equipment, launch services, and transponder leases. I received a J.D. degree from the University of Michigan Law School in 1990. In 1985, I received a Bachelor of Science degree in Engineering from Trinity College in Hartford, Connecticut.

Q. Please describe your responsibilities as Commercial Counsel.

A. My duties as Commercial Counsel include supporting the negotiation, drafting and enforcement of WorldCom's interconnection agreements with Verizon under Sections 251 and 252 of the Communications Act of 1934, as amended.

Q. What is the purpose of your testimony?

A. The purpose of my testimony is to address WorldCom's position and rationale on several issues that, for the purposes of reaching agreement on the terms and conditions of interconnection, remain unresolved between WorldCom and Verizon. I will separate the topics with headings that identify the issue to which the subsequent portion of my testimony relates.

Issue IV-120

Should the Interconnection Agreement contain a provision governing available remedies stating that the remedies specified in the Interconnection Agreement are cumulative and are not intended to be exclusive of other remedies available to the injured Party at law or equity? Should the provision also state the Parties' agreement that the self-executing remedies for performance standards failures are not inconsistent with any other available remedy and are intended, as a financial incentive to meet performance standards, to stand separate from other available remedies? (Part A, Section 27.2)

Q. What is WorldCom's position?

A. The Interconnection Agreement should contain this provision because it is important for the parties to understand clearly which remedies are available to a party

1 injured by a breach of the Agreement. In this case, the proposed provision would make
2 clear that remedies specified in the Agreement are not exclusive; they are cumulative of
3 remedies that are otherwise available to the injured party at law and in equity. The
4 provision also would make clear that the self-executing remedies for Verizon's failure to
5 meet performance standards are separate but not inconsistent with all the other available
6 remedies.
7
8 **Q. What language has WorldCom proposed?**
9 A. In its proposed Section 27.2, WorldCom has proposed a remedies provision that
10 makes clear that the Interconnection Agreement's remedies are not exclusive, and that the
11 remedies for performance standards failures stand separate from other available remedies.
12 Specifically, WorldCom has proposed the following language:
13 27.2 Unless otherwise specifically provided under this Agreement, all remedies
14 prescribed in this Agreement, or otherwise available, are cumulative and are not
15 intended to be exclusive of other remedies to which the injured Party may be
16 entitled at law or equity.[1] The Parties acknowledge that the self executing
17 remedies for performance standards failures set forth in and incorporated into this
18 Agreement are not inconsistent with any other available remedy and are intended
19 only to provide Verizon with a financial incentive to meet performance standards.
20 Further, the Parties agree that Verizon's responsibility to pay these self-executing
21 remedies is independent of any other damages owed under this Agreement and
22 may not be used to mitigate any such damages.

1

2 **Q. What is Verizon's response?**

3 A. While Verizon has agreed to include the first sentence of WorldCom's proposed
4 provision, it has objected to the rest of Section 27.2.

5 In its Answer, Verizon makes two objections to including the proposed language
6 in the Agreement. First, it argues that, because the parties have not yet agreed on
7 performance standards, Verizon cannot agree to including a term that references them;
8 Verizon does not know if the adopted performance plan will be consistent with other
9 portions of the Agreement. Second, Verizon argues that the proposed language would
10 allow WorldCom to recover twice for a loss resulting from a "service deficiency." While
11 it agrees the financial incentives in a performance plan properly ensure that the standards
12 under the plan will be met, Verizon argues that WorldCom will benefit from a double
13 recovery if it is allowed to pursue other remedies available at law or in equity.

14

15 **Q. What is wrong with Verizon's first argument that it cannot agree to include**
16 **performance standards to which the parties have not yet agreed?**

17 A. Both parties agree that performance standards should exist. And, although
18 Verizon and WorldCom may not have agreed on particular performance standards yet,
19 the issue is being arbitrated before the FCC in these proceedings and is also being
20 considered under state collaboratives. Therefore, such a provision will become
21 necessary, and WorldCom requests that the Commission adopt language similar to what
22 WorldCom has proposed.

---

[1] Verizon has agreed to inclusion of this first sentence into the Interconnection Agreement.

1

2 **Q. What is wrong with Verizon's second argument that WorldCom will be able**
3 **to recover twice for a loss resulting from a service deficiency by Verizon?**

4 A. That WorldCom can recover penalties for Verizon's performance standard
5 violations and also obtain a remedy under the Agreement does not necessarily translate
6 into double recovery. The financial remedies obtained for failures to meet performance
7 standards are not always paid directly to WorldCom and other CLECs. Thus, if Verizon
8 paid performance penalties as well as standard damages, WorldCom would not have a
9 double recovery.

10 However, WorldCom acknowledges that in cases in which remedy penalties are
11 paid directly to WorldCom for a specific breach, Verizon should not be obligated to pay
12 full compensatory damages under the Agreement for that same breach. Therefore,
13 WorldCom agrees to modify the last sentence of its proposed language explaining that, in
14 the event that WorldCom receives payment under an incentive plan for an action that is a
15 breach, and also is entitled to damages for that same breach, the payment of incentive
16 plan penalties should be used to mitigate the amount of damage payments otherwise
17 recovered. The additional proposed language is as follows:

18 However, the Parties agree that, while Verizon's responsibility to pay these self-
19 executing remedies is independent of any other damages under this Agreement
20 they may be used to mitigate any such damages to the extent that they have been
21 paid directly to MCIm and arise out of the same breach of this Agreement.

1

2 **Q. What is WorldCom requesting of the Commission?**

3 A. WorldCom requests that the Commission approve inclusion of WorldCom's

4 proposed Section 27.2 with the modification described above.

5

6 **Issue IV-129**

7 *Should the Interconnection Agreement Contain a "Part B" that provides definitions of*

8 *certain capitalized terms and words used throughout the Interconnection Agreement?*

9

10 **Q. What is WorldCom's position?**

11 A. WorldCom has proposed that the Interconnection Agreement contain a section

12 that defines the terms that are used in the Agreement. Such a section would facilitate

13 reading of the Agreement and provide a reference to which the parties may consult to

14 obtain the meaning of a given term used in the Agreement.

15

16 **Q. What is Verizon's response?**

17 A. Verizon has objected to WorldCom's proposal. Although Verizon believes that a

18 definitions section should be included in the agreement, it asserts that there can be no

19 agreement on the definitions section until the other arbitration issues are resolved. In

20 addition, Verizon states that it disagrees with some of WorldCom's proposed definitions.

1

2 **Q. What is wrong with Verizon's position?**

3 A. The Commission can rule on the definitions when it issues its final ruling in this
4 case despite Verizon's suggestion that the definitions cannot be ruled on until after the
5 entire agreement has been approved. Several of WorldCom's proposed definitions are
6 not dependent on the Commission's resolution of disputed issues. For example, the
7 definition of "Federal Communications Commission" and "arbitration" are totally
8 independent of the result of the instant arbitration. Accordingly, Verizon's wholesale
9 objection to the substance of WorldCom's definitions section is difficult to understand.

10 To the extent that the definition of a term depends on the resolution of a dispute
11 between the parties, the Commission should simply define the terms in a manner that
12 complies with the decision it will issue or as that term may be defined by the Act, the
13 FCC's rules and orders, or the industry at large.

14 In the alternative, the term can simply be left out of the definitions section; in
15 which case its meaning will be drawn from the substantive provision addressing that
16 issue. However, that situation is rife with difficulties. One reason these negotiations and
17 arbitration proceedings are so time-consuming is the parties each believe that clarity and
18 certainty is critical. Definitions of key terms are an important part of ensuring such
19 clarity.

20 If the Commission were to defer ruling on the proposed definitions, the post-
21 arbitration contract formation process could stall indefinitely as the parties attempt to
22 negotiate and seek agreement on the definitions section at that stage. The definitions
23 section should not hold up the entire Agreement.

1

2 **Q. What does WorldCom request of the Commission?**

3 A. WorldCom requests that the Commission order the inclusion of WorldCom's

4 proposed Part B into the Interconnection Agreement.

5

6 **Issue VI-1(P) – Default**

7

8 **Q. What does Verizon's proposed Section 13 provide?**

9 A. Verizon has proposed that the Interconnection Agreement contain a provision –

10 Section 13.1 – that would require WorldCom to send specific written notice to Verizon,

11 the Commission, and WorldCom customers if WorldCom intends to discontinue service.

12 Section 13.2 would establish the terms and contents of the notice that WorldCom

13 provides to its customers. Section 13.3 would require WorldCom to provide billing,

14 subscription, and other customer information to Verizon for those customers whose

15 service would be discontinued. Along with these proposals, Verizon has also sought

16 inclusion of a provision (Section 13.4) which would preserve Verizon's right to suspend

17 or cancel services unilaterally.

18

19 **Q. What is WorldCom's position on this proposed language?**

20 A. Verizon' proposed Section 13 is objectionable for several reasons. First,

21 Verizon's proposed Section 13.1 produces anti-competitive results. Advance notice to

22 Verizon of WorldCom's intent to discontinue service translates into advance knowledge

23 that WorldCom subscribers are in the market for a new carrier. Such knowledge would

1 give Verizon a head start in soliciting former WorldCom subscribers who might
2 otherwise prefer to obtain services from another CLEC or independent carrier. By
3 attempting to reach these customers before other carriers are aware of the discontinuance
4 of their services, Verizon would have an opportunity to protect or attempt to recover its
5 monopoly market share. Such a result directly conflicts with the pro-competition
6 principle of the 1996 Act.

7 Similarly, Section 13.3's requirement that WorldCom give Verizon its customer
8 billing, service, and other information creates an unfair advantage for Verizon.
9 Ordinarily, a carrier obtains such information from the state of Virginia. Indeed, the
10 Virginia State Corporation Commission intends to put a procedure in place in the state
11 through which competing carriers are duly notified of discontinued service due to
12 bankruptcy.[2] If WorldCom is contractually obligated to provide Verizon with this
13 information upon discontinuation of a customer's service, Verizon would again find itself
14 in a superior market position to that of other competing carriers.

15 Furthermore, Verizon's proposed Sections 13.1 and 13.2 purport to define
16 WorldCom's obligations to WorldCom subscribers, and to establish procedures to be
17 taken upon discontinuation of its own service. That proposed language impermissibly
18 infringes upon the relationship between WorldCom and its customers. Those relations
19 are governed by WorldCom tariffs, Virginia law, and Virginia State Corporation
20 Commission regulations, and should not be established in an interconnection agreement
21 which only governs the carrier-to-carrier relationship between Verizon and WorldCom.

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[2] See In re Establishing Rule Governing the Discontinuance of Local Exchange Telecommunications Services Provided by Competitive Local Exchange Carriers, Order for Notice and Comment or Requests for Hearing, PUC010128 (Va. Corp. Comm'n June 20, 2001).

1 Therefore the Interconnection Agreement should not include any provisions defining
2 WorldCom's obligations to WorldCom subscribers.
3 Section 13.4, which attempts to preserve Verizon's right to suspend or cancel
4 services, is untenable because it would give Verizon the unfettered right to terminate its
5 service offerings unilaterally. As has been addressed elsewhere in these proceedings by
6 me and other witnesses,[3] the assumption that underlies a provision that allows one party
7 to unilaterally terminate the Agreement is contrary to the purpose of entering into an
8 agreement with WorldCom in the first place.
9
10 **Q. What does WorldCom request of the Commission?**
11 A. WorldCom requests that the Commission reject Verizon's proposed Section 13.
12
13 **Issue VI-1 (Q) – Insurance**
14
15 **Q. What does Verizon's proposed Section 21?**
16 A. Verizon has proposed that the Interconnection Agreement include a Section that
17 sets forth WorldCom's insurance obligations and sets the amounts for the liability
18 coverage that WorldCom must hold. Verizon's proposal requires WorldCom to carry
19 commercial general liability insurance, motor vehicle liability insurance, and employer's
20 liability insurance with limits of at least $2 million, Sections 21.1.1, 21.1.2 and 21.1.4,

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[3] See Issue IV-113 (Verizon's counter-proposal would allow it to discontinue providing a service or benefit if it unilaterally concluded that it is no longer required to do so under Applicable Law); see Issue VI-1(O) (Verizon's proposed language would allow it to suspend or terminate the Agreement and provision of the services under the Agreement unilaterally in the event WorldCom is in default for more than 30 days after written notice from Verizon); see generally Issues III-18 and IV-85 (Verizon's counter-proposal would require rates, terms and conditions of the Interconnection Agreement to be superceded by filed tariffs).

1 umbrella form excess liability with limits of at least $10 million, Section 21.1.3, and risk
2 property insurance on a replacement cost basis for WorldCom property located on
3 Verizon premises and facilities, Section 21.1.5. Verizon's proposal would also require
4 WorldCom to disclose deductibles, self-insured retentions or loss limits, name Verizon
5 and its affiliates as additional insureds, provide Verizon with proof of insurance, and
6 require WorldCom contractors to maintain insurance. Sections 21.2, 21.4 and 21.6.
7
8 **Q. What is wrong with Verizon's proposal?**
9 A. There are several problems with Verizon's proposal. First, Verizon's language
10 fails to create mutual insurance obligations. Because both Verizon and WorldCom will
11 be required to perform tasks that impact the other's equipment, sites, and facilities, each
12 carrier will need protection against any potential loss or damage. Therefore, if the
13 Interconnection Agreement is to contain a provision that sets forth a carrier's obligations
14 to carry insurance coverage, it should apply to both WorldCom <u>and</u> Verizon.
15 Moreover, several of the insurance coverage limits that Verizon has identified are
16 excessive. Section 21.1.1 of the proposed language should contain a $1 million per-
17 occurrence limit rather than a $2 million per-occurrence limit. This reduction would not
18 affect Verizon's recovery of amounts up to the $2 million limit that they propose because
19 general liability limits in excess of $1 million are covered by the umbrella policy. In
20 addition, the umbrella policy limit of $10 million proposed in Section 21.1.3 is unusually
21 high and should be reduced to $5 million, which is more in keeping with industry
22 standards.

1 Section 21.2's disclosure requirement is unwarranted. The nature and amount of
2 WorldCom's retentions is confidential business information that WorldCom does not
3 disclose, and Verizon has not provided any justification for requesting such information.
4 Because WorldCom does not carry self-insured retentions for its insurance coverage, the
5 existence or amount of a deductible would not impact payment of third party claims.
6 Section 21.4 should be amended to provide a thirty day time frame for WorldCom
7 to provide proof of insurance, as opposed to the 14 day requirement that Verizon has
8 proposed. A thirty day period is standard in the industry, and is also the term to which
9 insurance carriers agree.
10 Section 21.6 should be deleted because it impermissibly holds WorldCom
11 financially liable for the insurance needs of independent subcontractors. If such parties
12 fail to maintain insurance and Verizon purchases it, Verizon should seek reimbursement
13 from the subcontractors, and not from WorldCom.
14 Finally, although WorldCom does not object to the general concept of providing
15 notice of cancellation of insurance coverage, Verizon's proposed language is overly
16 broad. Specifically, the reference to a "material change" in WorldCom's insurance
17 would require WorldCom to notify Verizon of insurance matters that have no effect on
18 Verizon. For example, although Verizon may have an interest in knowing about
19 reductions in WorldCom's coverage, any <u>increases</u> in coverage would not impact Verizon
20 and thus Verizon has no need or right to be informed of them. Accordingly, WorldCom
21 proposes that this language be amended to provide for written notice of "cancellation of
22 insurance, or any reduction in coverage."

1

2 **Q. What language has WorldCom proposed?**

3 A. The amended contract language to which WorldCom would agree is as follows:

4 • Each Party shall maintain during the term of this Agreement insurance
5 and/or bonds required to satisfy its obligations under this Agreement and all
6 insurance and/or bonds required by Applicable Law. The insurance and/or bonds
7 shall be obtained from an insurer having an A.M. Best insurance rating of at least
8 A-, financial size category VII or greater. At a minimum and without limiting the
9 foregoing undertaking, Each Party shall maintain the following insurance:

10 • Commercial General Liability Insurance, on an occurrence basis,
11 including but not limited to, premises-operations, broad form property
12 damage, products/completed operations, contractual liability, independent
13 contractors, and personal injury, with limits of at least $2,000,000
14 aggregate/$1,000,000 per occurrence.

15 • Motor Vehicle Liability, Comprehensive Form, covering all
16 owned, hired and non-owned vehicles, with limits of at least $2,000,000
17 combined single limit for each occurrence.

18 • Excess Liability, in the umbrella form, with limits of at least
19 $5,000,000 combined single limit for each occurrence.

20 • Worker's Compensation Insurance as required by Applicable Law
21 and Employer's Liability Insurance with limits of not less than $2,000,000
22 per occurrence.

- All risk property insurance on a full replacement cost basis for all of real and personal property located at any Collocation site or otherwise located on or in any Verizon premises (whether owned, leased or otherwise occupied by Verizon), facility, equipment or right-of-way.
- Each Party shall name the other, the other's Affiliates and the directors, officers and employees of the other and the other's Affiliates, as additional insureds on the foregoing insurance.
- Each Party shall, within thirty (30) days after the Effective Date hereof, on a semi-annual basis thereafter, and at such other times as may be requested by the other Party furnish certificates or other proof of the foregoing insurance.
- Each Party shall require its contractors, if any, that may enter upon the premises or access the facilities or equipment of the other Party, or the other Party's affiliated companies or the Customers of the other Party to maintain insurance in accordance with Sections 17.1 through 17.3 and, if requested, to furnish Verizon certificates or other adequate proof of such insurance to the other Party.

Q. What does WorldCom request of the Commission?

A. WorldCom requests that the Commission reject Verizon's proposed insurance provisions, Sections 21, et seq., altogether, or, instead, order the inclusion of the language proposed by WorldCom to address the concerns raised here.

1 **Q. Does this conclude your testimony?**

2 A. Yes.

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with Verizon-Virginia, Inc., and for	)	
Expedited Arbitration	)	

AFFIDAVIT OF MATT HARTHUN

The undersigned, being of lawful age and duly sworn on oath, certifies the following:

I, Matt Harthun, declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Matt Harthun

Subscribed and Sworn to before me this
17th day of August, 2001.

Caroline E. Frazier

Notary Public

MY COMMISSION EXPIRES
JUNE 14, 2004