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

REBUTTAL TESTIMONY OF SHERRY LICHTENBERG

ON BEHALF OF WORLDCOM, INC.

(ISSUE I-8)

August 17, 2001

1 **INTRODUCTION**

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

3 A. My name is Sherry Lichtenberg. I am Senior Manager for Operations Support
4 Systems Interfaces and Facilities Testing and Development in the Mass Markets unit of
5 MCI WorldCom Communications, Inc ("WorldCom"). My business address is 701 S.
6 12th Street, Arlington, Virginia, 22202.

7 **Q. Please describe your responsibilities as Senior Manager for Operations**
8 **Support Systems Interfaces and Facilities Testing and Development.**

9 A. My duties include working with the incumbent local exchange companies
10 ("ILECs") and WorldCom's technical and IT organizations to establish commercially
11 viable Operations Support Systems ("OSS"). This includes participating in the design
12 and implementation of local service customer testing and in third party testing. I also
13 help design, manage, and implement WorldCom's local telecommunications services to
14 residential customers on a mass market basis nationwide.

15 **Q. Please describe your relevant experience with WorldCom and in the**
16 **telecommunications industry.**

17 A. I have nineteen years of experience in the telecommunications market, four years
18 with WorldCom and fifteen years with AT&T. Prior to joining WorldCom, I was Pricing
19 and Proposals Director for AT&T Government Markets, Executive Assistant to the
20 President, Staff Director for AT&T Government Markets, and Product Manager for a
21 variety of business and government products. My special expertise is in testing and
22 requirements analysis. My WorldCom experience includes conducting market entry
23 testing for New York, Texas, Pennsylvania, and other states, as well as representing

1 WorldCom and its subsidiary, MCImetro Access Transmission Services, Inc.
2 (hereinafter, "MCImetro"), in the Michigan, Illinois, Texas, New York, Pennsylvania,
3 Massachusetts, New Jersey, Virginia, Florida, and California third party Operations
4 Support Systems ("OSS") testing efforts. My AT&T experience includes working on the
5 development of the System 85 and System 75 (major Private Branch Exchanges
6 ("PBXs")), product marketing and product management in both the large business and
7 federal areas.

8 **Q. What is the purpose of your testimony?**

9 A. In this testimony I will respond to the points raised in the direct testimony of
10 Verizon witness MaryEllen Langstine, regarding the monitoring of WorldCom's use of
11 CPNI. As I explained in my direct testimony, WorldCom opposes the inclusion of
12 language that would allow Verizon to monitor WorldCom's CPNI usage. This testimony
13 corresponds to Issue I-8.

14 **Q. Please summarize the Verizon direct testimony to which you are responding.**

15 A. In her testimony, Ms. Langstine states that "electronic monitoring of the CLECs'
16 access to and use of OSS information is the only way that Verizon VA can safeguard
17 CPNI entrusted to it by customers and other third parties," and "the only way that
18 Verizon VA can protect against misuse or overuse of those systems." In addition, she
19 notes that by monitoring CPNI, Verizon can review usage levels in a manner that allows
20 it to maintain proper capacity.

21 **Q. Is electronic monitoring the only way that Verizon can safeguard CPNI?**

22 A. No. As I explained in my direct testimony, auditing procedures provide an
23 effective means of reviewing CPNI usage. In light of the serious risk of abuse that

1 accompanies real time monitoring of CPNI usage, the auditing alternative should be
2 employed.
3 Further, Verizon's position rests on a mistaken premise – that it can, and should,
4 serve as the "police" with respect to CPNI usage. WorldCom has a legal duty to adhere to
5 the laws governing CPNI usage. The appropriate body to police WorldCom's
6 compliance with these laws is a state agency or the relevant commission, and not a
7 competitor such as Verizon. If the agency believes there is grounds to suspect misuse,
8 and requests that WorldCom provide more detailed information regarding its CPNI
9 access and usage, WorldCom will certainly comply with that request for information.
10 However, as I explained in my direct testimony, information that reveals WorldCom's
11 marketing efforts and the identity of all of the Verizon customers that have expressed
12 interest in WorldCom services should not be disclosed to Verizon.
13 **Q. Is electronic monitoring of CPNI the only way Verizon can protect against**
14 **misuse and overuse of CPNI?**
15 A. No. As I explained in my direct testimony, WorldCom's access to CPNI is very
16 limited, and WorldCom's system prevents WorldCom from accessing CPNI absent
17 verified consent of the customer whose records are being accessed. Further, I explained
18 in my direct testimony that an auditing right could serve Verizon's interests without the
19 intrusiveness of this proposed monitoring right.
20 In addition, I have difficulty responding to this question because Verizon has
21 failed to define the terms "misuse" or "overuse." It is possible that Verizon might define
22 overuse as a certain number of requests within a given period of time or an increase in
23 requests. Indeed, in its testimony, Verizon indicates that "larger than normal pre-order

activity might indicate a CLEC is using the OSS to gather confidential marketing information for which it has not obtained the proper customer authorization." However, that type of increase might also indicate that WorldCom had recently completed a successful large-scale marketing campaign, or that a large number of customers were considering subscribing to WorldCom, or that a certain amount of CPNI was corrupted and therefore needed to be obtained a second time. Verizon might define overuse as several more requests than ultimate subscriptions. However, given the lack of a one-to-one ratio between inquiries from customers and subscriptions to WorldCom's services, a disproportionate ratio could be fully consistent with the proper use of CPNI. In sum, it is not clear what Verizon would deem "misuse" or "overuse," or that activity that Verizon deems suspicious would have anything to do with improper or unlawful access to, and use of, CPNI.

This lack of clarity extends to Verizon's entire request for electronic monitoring. It is not at all clear, from Verizon's direct testimony, what its proposed "electronic monitoring" would entail. For example, we do not know what types of records Verizon would maintain of WorldCom's CPNI usage, how specifically tied that information is to customer names and billing addresses, or the purposes for which the records are used. Verizon may well be obtaining this information for use in an effort to win back its customers. Given the serious potential for abuse and anti-competitive conduct, Verizon cannot be given such a vague and sweeping right to "monitor" WorldCom's contact with potential subscribers.

Q. Does electronic monitoring provide Verizon with a means of monitoring usage in order to ensure that they maintain adequate capacity?

1 A. Verizon may have a need for information regarding overall usage so that its
2 systems can maintain adequate capacity. However it does not follow that the type of
3 electronic monitoring that it has proposed is the only means, or a proper means, of
4 accomplishing that goal. For example, Verizon could generate a report of the total
5 number of requests from all CLECs without monitoring each CLEC's requests; those
6 numbers could be obtained after the fact, through audits or another mechanism, rather
7 than through the real-time monitoring that Verizon seems to envision. Further, there is
8 no reason for that type of data to correspond to particular customer names. However
9 Verizon's proposal for a broad right to electronically monitor CPNI usage does not
10 impose any limitations on the way in which Verizon could obtain this information.
11 Again, however, Verizon's failure to explain the details of its electronic monitoring
12 system makes it difficult for me to fully respond to its claims regarding the importance of
13 electronic monitoring
14 **Q. Does that conclude your testimony?**
15 A. Yes.

I, Sherry Lichtenberg, hereby certify under penalty of perjury that the foregoing is true and correct.

Executed on August 14th, 2001.

Sherry Lichtenberg

Sherry Lichtenberg

Commonwealth of Virginia
County of Arlington

Jo Anne Lady
Notary Public

My commission expires 3/31/2002

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 ROBERT PETERSON AND MATT HARTHUN

(Issues III-15, IV-107)

August 17, 2001

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1 **INTRODUCTION**

2

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

4 A. My name is Robert A. Peterson. I am a vice president and the Chief Technology

5 Counsel of WorldCom, Inc. My business address is 1133 19th Street, NW, Washington,

6 DC 20036.

7 A. My name is Matthew Harthun. I am Commercial Counsel in the Network and

8 Facilities Legal group of WorldCom. My business address is 8521 Leesburg Pike, 6th

9 Floor, Vienna, Virginia 22182.

10

11 **Q. Please describe your education and relevant experience with WorldCom and**

12 **in the telecommunications industry.**

13 A. Peterson. I have spent thirteen of my seventeen years as an attorney in this area

14 of the law. Prior to joining what was then MCI Communications Corporation in 1994, I

15 was with the firm of Cadwalader, Wickersham & Taft, MCI's outside counsel for

16 intellectual property matters. I am a graduate of Harvard College and Harvard Law

17 School. I also hold an M.B.A. degree from Columbia University's Graduate School of

18 Business.

19 A. Harthun. I joined WorldCom (then MCI) in late 1996. I have been involved with

20 Verizon (both legacy GTE and Bell Atlantic) interconnection agreements since that time.

21 Prior to joining WorldCom, I was a staff attorney with the Policy and Program Planning

22 Division of the FCC's Common Carrier Bureau, where I worked in the areas of transport

23 rate restructure, exchange access rate structures and price caps, local number portability,

1 and the unbundling of basic telecommunications services. Prior to joining the FCC, I
2 worked in private practice as a communications attorney. My primary responsibilities
3 involved the negotiation of complex commercial agreements in the area of satellite digital
4 transmission equipment, launch services, and transponder leases. I received a J.D. degree
5 from the University of Michigan Law School in 1990. In 1985, I received a Bachelor of
6 Science degree in Engineering from Trinity College in Hartford, Connecticut.
7
8 **Q. Please describe your responsibilities in your respective positions.**
9 A. Peterson. I am in charge of the Technology Law Group within the General
10 Counsel's organization. I oversee a group of attorneys whose primary function is to
11 acquire, protect and defend rights in trade secrets, copyrights, patents, trademarks and
12 other forms of intellectual property necessary or appropriate to the conduct of
13 WorldCom's business activities. This includes the negotiation and drafting of
14 agreements dealing with license rights to the use of software and hardware in a variety of
15 contexts.
16 A. Harthun. My duties as Commercial Counsel include supporting its negotiation,
17 drafting and enforcement of WorldCom's interconnection agreements with Verizon under
18 Sections 251 and 252 of the Communications Act of 1934, as amended.
19
20 **Q. What is the purpose of your testimony?**
21 A. The purpose of our testimony is twofold: (1) to describe and explain
22 WorldCom's position and proposed language on the question of whether, and the extent
23 to which, the Interconnection Agreement between WorldCom and Verizon should

1 contain a provision that addresses the use by WorldCom of intellectual property of third
2 parties that is embedded in Verizon's network, and (2) to describe and explain
3 WorldCom's position and proposed language on the limited scope of the parties'
4 respective rights to use each other's own intellectual property embedded in any facilities
5 or equipment used by the other party pursuant to the Interconnection Agreement.
6
7 **Issue III-15**
8 *Should the Interconnection Agreement contain a provision under which Verizon agrees to*
9 *use its best efforts to negotiate rights for MCIm to use Verizon's network under the same*
10 *licensing terms that Verizon receives from its vendors? Should that provision require*
11 *Verizon to indemnify WorldCom against third party intellectual property claims arising*
12 *out of WorldCom's use of Verizon's network, in the event that Verizon fails to use its best*
13 *efforts to negotiate such rights for MCIm? Should that provision also require Verizon to*
14 *warrant that it will seek to ensure in its licensing agreements with third parties that*
15 *WorldCom may use or interconnect with Verizon's network equipment or software?*
16 *Should the provision contain additional clauses relating to Verizon's obligation to*
17 *provide notice of third party intellectual property claims, Verizon's obligation to avoid*
18 *such claims where possible, and WorldCom's reservation of rights to pursue certain*
19 *remedies against Verizon?*
20
21 **Q. Please summarize WorldCom's position on this issue.**
22 A. The Interconnection Agreement should contain this provision because it would
23 define the rights and obligations of the Parties, avoid ambiguity, and provide WorldCom

1 with real assurances that Verizon will use its best efforts to provide access to its network,
2 equipment and software on a non-discriminatory basis.
3 The proposed language of WorldCom is intended to do three things. First, in
4 requiring Verizon to use its best efforts in negotiating and renegotiating license rights that
5 allow WorldCom to use third party intellectual property embedded in Verizon's network,
6 it memorializes the recent decisions of the FCC and the U.S. Court of Appeals for the
7 Fourth Circuit ("the Fourth Circuit"). Second, the proposed language enumerates the
8 consequences of Verizon's failure to use its best efforts. In any transaction document in
9 which rights of use of intellectual property are concerned, it is customary and prudent to
10 place the pro-active burden of obtaining license rights from third parties on the entity that
11 is in the best position to know what rights are at issue and that is in the best position to
12 negotiate with such third parties. It is similarly appropriate to define the consequences
13 for failure to use best efforts to meet that responsibility. Third, the language proposed by
14 WorldCom contains warranties that ensure that Verizon does not intentionally alter
15 existing licensing agreements in order to interfere with WorldCom's use of intellectual
16 property.
17
18 **Q. What language has WorldCom proposed?**
19 A. WorldCom has proposed the following language[1]:

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[1] During mediation, it became clear that Verizon found the language originally proposed in Section 20.2 confusing. Accordingly, WorldCom has modified its proposed Section 20.2 to make clear that the indemnity WorldCom seeks applies only if Verizon fails to use its best efforts in negotiating or renegotiating license rights to use intellectual property owned by third parties. This change is not substantive, but is merely designed to eliminate any possible ambiguity and confusion.

1 20.2 Verizon shall use its best efforts to negotiate or renegotiate any vendor or
2 licensing agreements with respect to equipment or software used in Verizon's
3 network so that such agreements permit MCIm to use such equipment or software
4 pursuant to the terms of this Agreement. In the event Verizon fails to use such
5 best efforts, Verizon shall indemnify MCIm against any loss, cost, expense or
6 liability arising out of or relating to MCIm's use, pursuant to the terms of this
7 Agreement, of such equipment or software or any intellectual property associated
8 therewith. Verizon also hereby warrants that it will not enter into any future
9 licensing agreements with respect to equipment or software used in Verizon's
10 network without using its best efforts to negotiate provisions that would permit
11 MCIm to use or interconnect with such equipment or software pursuant to the
12 terms of this Agreement. Verizon also warrants that it has not, and will not,
13 intentionally modify any existing licensing agreements for existing network
14 equipment or software in order to disqualify MCIm from using or interconnecting
15 with such network equipment or software pursuant to the terms of this
16 Agreement. To the extent that the providers of equipment or software used in
17 Verizon's network provide Verizon with indemnities covering intellectual
18 property liabilities and those indemnities allow a flow through of protection to
19 third parties, Verizon shall flow those indemnity protections through to MCIm.[2]
20 Verizon will inform MCIm of any pending or threatened intellectual property
21 claims relating to Verizon's network of which Verizon is aware and will update
22 that notification periodically as needed, so that MCIm receives maximum notice

[2] During mediation, Verizon agreed to include this sentence in the Interconnection Agreement.

of any intellectual property risks. Notwithstanding any part of this Section [20], MCIm retains the right to pursue legal remedies against Verizon if Verizon is at fault in causing intellectual property liability to MCIm.

20.2.1 For purposes of Section [20.2], Verizon's obligation to indemnify shall include the obligation to indemnify and hold MCIm harmless from and against any loss, cost, expense or liability arising out of a claim that MCIm's use, pursuant to the terms of this Agreement, of such Verizon network equipment or software infringes the intellectual property rights of a third party. Moreover, should any such network equipment or software or any portion thereof provided by Verizon hereunder become, or, in Verizon's reasonable opinion, be likely to become, the subject of a claim of infringement, or should MCIm's use thereof be finally enjoined, Verizon shall, at its immediate expense and at its choice:

20.2.1.1 Procure for MCIm the right to continue using such material; or

20.2.1.2 Replace or modify such material to make it non-infringing provided such replacement or modification is functionally equivalent.

Q. Why has WorldCom chosen this particular "best efforts" language?

A. WorldCom's language is to reflect the FCC's recent UNE Licensing Order[3] and the decision of the Fourth Circuit.[4] Based on those decisions, the new Agreement should include language that provides: (1) that Verizon will renegotiate its existing licenses and negotiate new licenses; and (2) that it use its "best efforts" to ensure that such

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[3] See In re Petition of MCI for Declaratory Ruling that New Entrants Need not Obtain Separate License or Right-to-Use Agreements before Purchasing Unbundled Elements, Memorandum Opinion and Order, 15 F.C.C.R. 13896 (2000) ("UNE Licensing Order").

1 negotiations result in WorldCom being able to use Verizon's network equipment or
2 software without intellectual property right infringement.
3
4 **Q. Please explain how the decisions of the FCC and the Fourth Circuit are**
5 **applicable to the issue here.**
6 A. In April 2000, the FCC adopted an Order enumerating the requirements of the Act
7 with respect to third-party intellectual property. It concluded that in negotiations for
8 licensing of third party's intellectual property, incumbent LECs must exercise their best
9 efforts to obtain licenses for CLECs on the terms that they have obtained for themselves.[5]
10 This Order was consistent with a prior decision of the Fourth Circuit addressing
11 the same issue. After the Act was passed, the parties submitted to the Virginia State
12 Corporation for arbitration the question of whether and how broadly Bell Atlantic should
13 indemnify WorldCom against third-party claims of infringement. More specifically, the
14 parties sought to resolve by arbitration whether indemnification should only be
15 prospective from the date of the Interconnection Agreement or whether such
16 indemnification should cover all of Verizon's existing plant. In arbitration, the state
17 commission agreed with Verizon's position and found that indemnification should only
18 be prospective. WorldCom (then-MCI) appealed the case to the federal courts.
19 Ultimately, in AT&T Communications of Virginia, Inc. v. Bell Atlantic-Virginia, Inc.,
20 the U.S. Court of Appeals for the Fourth Circuit reversed the Virginia Commission's

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[4] See AT&T Communications of Virginia, Inc., v. Bell Atlantic-Virginia, Inc., 197 F.3d 663 (4th Cir. 1999).

[5] See UNE Licensing Order ¶ 9 ("the "nondiscriminatory access" obligation in section 251(c)(3) requires incumbent LECs to use their best efforts to provide all features and functionalities of each unbundled network element they provide, including any associated intellectual property rights that are necessary for the requesting carrier to use the network element in the same manner as the incumbent LEC. In particular, incumbent LECs must exercise their best efforts to obtain co-extensive rights for competing carriers purchasing unbundled network elements.").

1 decision. The court held, consistent with a previous FCC Order on the question,[6] that the
2 Act requires ILECs like Verizon to renegotiate terms of intellectual property licenses
3 when necessary to cover use of Verizon's existing plant by MCI and satisfy the
4 infrastructure sharing requirements of the Act.[7]
5 These decisions of the Fourth Circuit and the FCC were never reduced to writing
6 and amended into the existing interconnection agreement between Verizon-Virginia and
7 WorldCom. The proposed language of WorldCom merely represents these recent
8 important developments.
9
10 **Q. In addition to the requirement that Verizon use its best efforts to negotiate**
11 **licenses covering your use of third party intellectual property, you have proposed**
12 **language involving indemnification if it does not use its best efforts when engaging**
13 **in such negotiation. You have also included warranty and notification clauses. Why**
14 **are these needed?**
15 A. WorldCom's proposed indemnification, warranty and notification clauses are
16 merely commercially reasonable means of implementing the decisions of the FCC and
17 Fourth Circuit in ways that are highly consistent with customary practices in this area. To
18 the extent one party is tasked with negotiating, under a best efforts test, certain license
19 terms, it is well within the norms of business and legal practice to require such party to
20 indemnify the other party against a failure to use its best efforts in negotiation. In this

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[6] See In re Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996, 12 F.C.C.R. 5470 ¶ 70 (1997).

[7] See Bell Atlantic-Virginia, 197 F.3d at 670 ("the [1996] Act requires Bell Atlantic to attempt to renegotiate its existing intellectual property licenses to cover use by MCI. ... In those negotiations, Bell Atlantic must exercise its best efforts to obtain licensing for CLECs on the terms that it has obtained for itself.").

1 context, these terms – and, in particular, the indemnification terms – are even more
2 critical than they would be in a standard commercial agreement.
3 To understand why, it is important to recognize that this is not a typical
4 commercial contract involving a willing buyer and willing seller. In such instances, the
5 seller is anxious to accommodate the seller to the extent possible. But that is not the case
6 here; Verizon's "customer" is a competitor, trying to make inroads into a market that was
7 previously dominated by Verizon. As the FCC has recognized, in this context, incumbent
8 LECs such as Verizon have every incentive to discriminate against their would-be
9 competitors. See, e.g., In the Matter of the Local Competition Provisions in the
10 Telecommunications Act of 1996, First Report and Order, 11 FCCR 15499 ¶ 307 (August
11 1, 1996) ("incumbent LECs have little incentive to facilitate the ability of new entrants,
12 including small entities, to compete against them and, thus, have little incentive to
13 provision unbundled elements in a manner that would provide efficient competitors with
14 a meaningful opportunity to compete. We are also cognizant of the fact that incumbent
15 LECs have the incentive and the ability to engage in many kinds of discrimination.").
16 The risk of discrimination is particularly great here, because new entrants such as
17 WorldCom are wholly reliant on the incumbent to negotiate on their behalf. When
18 Verizon and one of its third party vendors sit down to negotiate a license extension that
19 would cover WorldCom, WorldCom will not be at the negotiation table. In such
20 circumstances, the incumbent will have the incentive not to push its vendor too hard to
21 obtain the requested extension. Because WorldCom will not be present, it will be very
22 difficult for it to ensure that Verizon's "best efforts" are truly that.

1 The indemnification clause, therefore, seeks to provide Verizon with sufficient
2 incentive to genuinely attempt to negate something that is good for its competitor (and
3 therefore harmful for Verizon). Again, we want to emphasize that WorldCom seeks only
4 to render clear, unmistakable and unambiguous the consequences of any failure of
5 Verizon to meet the legal obligations imposed on it by the FCC's Order.[8] WorldCom is
6 not seeking an indemnity of the outcome of the negotiations; it is, instead, seeking an
7 indemnity from Verizon that it will, in fact, use its best efforts in negotiation not only
8 with existing vendors but prospectively with respect to all future vendors.
9 The warranty and notification language proposed by WorldCom are, we believe,
10 uncontroversial. Indeed, objecting to one of the warranty sentences is tantamount to
11 preserving Verizon's right to "intentionally" modify any existing licensing agreements in
12 order to disqualify MCIm from using or interconnection with Verizon's network
13 equipment and software. The notification language WorldCom seeks – a provision that
14 requires that it will be notified of any pending or threatened intellectual property claims
15 by third party licensors – is customary in agreements such as this, and implements the
16 FCC Order and Fourth Circuit's decision in a manner that is plainly sensible. Only
17 Verizon knows whether pending third-party claims implicate a Cloche's use of Verizon's
18 network, and only Verizon can provide its CLEC customers with notice that third-party
19 claims have been asserted or threatened.
20

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[8] Indeed, Verizon has itself proposed an indemnification clause elsewhere in these proceedings to buttress an obligation of CLECs generally. Verizon's counter-proposal in Issue IV-41 (Resale) provides as follows:

> In addition to any other actions taken by **CLEC to comply with this Section 2.2, **CLEC shall take those actions required by Applicable Law to determine the eligibility of **CLEC Customers to purchase a service, including, but not limited to, obtaining any proof or certification of eligibility to purchase Lifeline, Link Up

1 **Q. In seeking these implementing terms, are you asking the Commission to go**
2 **beyond what is currently required by law?**
3 A. Absolutely not. The duty imposed on Verizon by this language is to use its best
4 efforts to negotiate any necessary license extensions. That is exactly what the FCC's
5 Order and the Fourth Circuit's decisions require. The additional language merely
6 specifies how that duty will be implemented, and the consequences for failure to act in
7 conformity with existing legal requirements. As the FCC has recognized, it is entirely
8 appropriate for new entrants to seek the contract terms necessary to effectuate existing
9 legal requirements. Indeed, the 1996 Act expressly grants state commissions the authority
10 to "resolve each issue set forth in the petition [for arbitration of disputed issues]. . . by
11 imposing appropriate conditions as required to implement subsection (c) of this section."
12 47 U.S.C. § 252(b)(4)(C) (emphasis added). The FCC has recognized that this means
13 that state commissions will often be called upon to "define specific terms and conditions
14 governing access to unbundled elements," and make "critical decisions concerning a host
15 of issues." Local Competition Order ¶¶ 135, 137. We are merely seeking specific terms
16 and conditions that appropriately implement the duty Verizon already bears as a matter of
17 law.[9]
18

America, or other means-tested services, required by Applicable Law. **CLEC shall indemnify Verizon from any Claims resulting from **CLEC's failure to take such actions required by Applicable Law.

[9] Indeed, many of the disputed issues before the Commission will require the Commission to decide whether the goals of the Telecommunications Act will be best served by inclusion of certain contractual language, even where that language is not technically required by Applicable Law.

1 **Q. Has the use of third party intellectual property embedded in Verizon's**
2 **network ever been a problem?**
3 A. Not to date. But it is critical to recognize that even the threat of such a lawsuit
4 would be crippling to a new entrant. If WorldCom entered a market using Verizon's
5 network in some manner and, after beginning service to customers, learned that it was
6 going to be sued by a third-party vendor, the results would be disastrous. WorldCom
7 would either have to stop providing service – utterly destroying any goodwill it had built
8 up with new customers, or continue to provide service knowing that each day it did so, it
9 was increasing the damages it might have to pay in response to a lawsuit. The language
10 we have proposed is designed to provide Verizon the proper incentive to use its best
11 efforts to negotiate any needed license extensions, so that the risk of this happening is
12 minimized to the greatest extent possible.
13
14 **Q. What is Verizon's response?**
15 A. Verizon does not and could not contest its "best efforts" obligation to negotiate
16 rights for WorldCom to use Verizon's network under the same licensing terms that
17 Verizon receives from its vendors. Instead, it recites four obligations that it owes to
18 WorldCom and other CLECs: (1) Verizon must make UNEs available to CLECs; (2)
19 Verizon must inform CLECs of applicable restrictions, if any, contained in third party
20 licensing agreements, affecting CLECs' uses of UNEs provided by Verizon; (3) Verizon
21 must use "best efforts" to negotiate or renegotiate licenses to procure the relevant rights
22 and licenses for AT&T and WorldCom to use the intellectual property of third-party
23 vendors embedded in Verizon's network; and (4) Verizon may allocate any costs

1 associated with acquiring the necessary intellectual property rights among all requesting
2 carriers.
3 Verizon also complains that WorldCom's proposed provision would impose
4 "warranty or indemnification language that goes beyond the[] [best efforts] requirements,
5 . . . implying that if a certain result is not achieved, then Verizon must have failed to use
6 'best efforts.'" Verizon's Answer at 255. Verizon thus complains that WorldCom is
7 seeking to expand the "best efforts" standard to require Verizon to take measures that
8 "Applicable Law" does not require.
9
10 **Q. What is wrong with Verizon's position and proposed language?**
11 As explained above, Verizon is simply mistaken in arguing that WorldCom is
12 attempting to compel Verizon to go beyond its "best efforts" obligations imposed by law.
13 Nothing in Section 20.2 imposes an indemnification requirement if Verizon uses its best
14 efforts as it is required to do. Instead, as the text of Section 20.2 and the explanation
15 above make clear, the indemnification provisions are applicable only where Verizon fails
16 to meet its legally-imposed best efforts obligations. In other words, the indemnification
17 provision proposed by WorldCom is merely a remedial protection in the event Verizon
18 fails to satisfy its legal obligations; it does not apply in all circumstances, and it is not
19 triggered based on the outcome of negotiations.
20 Verizon's proposed language is also inadequate because, although it generally
21 provides that Verizon will notify WorldCom of any restrictions and use its best efforts to
22 procure licenses, it has failed to provide alternative language that allays the reasonable
23 concerns of WorldCom identified above. Moreover, its proposed language seems to

1 delay all negotiations over license rights, whether with present or future vendors, until the
2 breach is actually either pending or threatened. In other words, it seems to indicate that it
3 will not use its best efforts to negotiate any needed license extensions until legal action
4 by a third-party vendor is imminent. Nothing could be further from the letter and spirit of
5 the FCC's Order and the Fourth Circuit's opinion. Nor would this process be
6 commercially reasonable. Indeed, Verizon's position on this point is flatly inconsistent
7 with the manner in which intellectual property matters are customarily and prudently
8 dealt with in commercial agreements.
9
10 **Q. Thus, what is WorldCom requesting of the Commission?**
11 A. WorldCom requests that the Commission order the inclusion of WorldCom's
12 proposed Part A, Section 20.2 into the Interconnection Agreement.
13
14 **Issue IV-107**
15 *Should the Interconnection Agreement contain a provision regarding intellectual*
16 *property rights stating that (1) any intellectual property originating from or developed by*
17 *a Party remains in the exclusive ownership of that Party; and (2) the Interconnection*
18 *Agreement does not grant either Party any form of license in the other Party's*
19 *intellectual property (with the exception of certain limited use licenses)?*
20
21 **Q. What is WorldCom's position?**
22 A. The Interconnection Agreement should contain this provision because it defines
23 the rights and obligations of the parties and avoids ambiguity and further disputes.

1 Further, it makes clear that the Interconnection Agreement does not itself create or
2 modify the parties' intellectual property rights.
3 More specifically, the provision would give WorldCom an implied limited right to
4 use any of the intellectual property owned by Verizon that is embedded in Verizon's
5 network, and vice versa. The license to use such intellectual property extends no further.
6 In other words, when one party leases a portion of the network to deliver
7 telecommunication service to customers from the other party, it obtains an implied
8 license to use the intellectual property owned by the other party embedded in that part of
9 the network.
10 Such a provision is typical of agreements involving the use of technology and
11 serves to eliminate ambiguities of ownership or license rights that might otherwise arise
12 under general principles of law over the course of a technologically complex, multi-year
13 agreement. Among other things, it reduces the likelihood of later controversies over
14 whether a particular agreement completely stated the agreement of the parties with
15 respect to necessary intellectual property rights or whether separate negotiations and
16 separate consideration for the grant of such rights were contemplated.
17
18 **Q. What language has WorldCom proposed?**
19 A. WorldCom's proposed Section 20.1 provides as follows:
20 20.1 Any intellectual property which originates from or is developed by a Party
21 shall remain in the exclusive ownership of that Party. Except for a limited license
22 to use a Party's patents or copyrights to the extent necessary for the Parties to use
23 any facilities or equipment (including software) or to receive any service solely as

1 provided under this Agreement, no license in patent, copyright, trademark or trade
2 secret, or other proprietary or intellectual property right now or hereafter owned,
3 controlled or licensable by a Party, is granted to the other Party or shall be implied
4 or arise by estoppel.
5
6 **Q. What is Verizon's response?**
7 A. Verizon's only articulated objection to WorldCom's proposed intellectual
8 property provision relates to § 20.2 and the scope of Verizon's "best efforts" obligation to
9 negotiate rights for WorldCom to use Verizon's network under the same licensing terms
10 that Verizon receives from its vendors. That issue falls more properly under Issue III-15,
11 which speaks to the right to use third party intellectual property, and is fully addressed in
12 the testimony preceding this issue.
13 Although Verizon does not address this directly, its proposed Section 28.16 states
14 that there must be "a separate license agreement between the Parties granting such rights"
15 (28.16.1). This appears to suggest that, before accessing any part of Verizon's network
16 pursuant to the interconnection agreement, WorldCom must separately negotiate a license
17 agreement with Verizon in order to use any intellectual property belonging to Verizon
18 that is embedded in that portion of Verizon's network WorldCom is using. It is
19 completely contrary to our experience that in an agreement of this type the granting of
20 rights of use as between the parties of intellectual property necessary or appropriate to the
21 very carrying out of the transaction would be left to a separate negotiation or separate
22 document. It would also be inconsistent with the Act's mandate that access to a network
23 element include access to all features and functions of that element.

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	)	

AFFIDAVIT OF ROBERT A. PETERSON AND MATTHEW HARTHUN

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

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

Matthew Harthun

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

Caroline E. Frazier

Notary Public

MY COMMISSION EXPIRES
JUNE 14, 2004

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

AFFIDAVIT OF ROBERT A. PETERSON AND MATTHEW HARTHUN

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

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

Robert A. Peterson

Subscribed and Sworn to before me this
16th day of August, 2001.

Notary Public

LAUREL A. GILLIS
Notary Public, District of Columbia
My Commission Expires May 31, 2003