BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

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

DIRECT TESTIMONY OF JOHN TROFIMUK AND MATT HARTHUN AND LISA ROSCOE

(Issues III-18, IV-85, IV-88, IV-95, IV-97, IV-101, IV-106, IV-113, IV-121, VI-1(N), VI-1(O), VI-1(R), V-11)

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 Matthew Harthun. I am Commercial Counsel in the Network and

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

6 Floor, Vienna, Virginia 22182.

7 A. My name is John A. Trofimuk. I am Regional Executive for the Central Region

8 Telco and Line Cost Management group of WorldCom. My address is 205 North

9 Michigan Avenue, 11th Floor, Chicago, Illinois 60601.

10 A. Roscoe. My name is Lisa Roscoe. I am Associate Legal Counsel in the Law and

11 Public Policy group of WorldCom. My business address is 701 S. 12th Street, Arlington,

12 Virginia 22202.

13

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

15 **in the telecommunications industry.**

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

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

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

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

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

21 and the unbundling of basic telecommunications services. Prior to joining the FCC, I

22 worked in private practice as a communications attorney. My primary responsibilities

23 involved the negotiation of complex commercial agreements in the area of satellite digital

1 transmission equipment, launch services, and transponder leases. I received a J.D. degree
2 from the University of Michigan Law School in 1990. In 1985, I received a Bachelor of
3 Science degree in Engineering from Trinity College in Hartford, Connecticut.
4 A. Trofimuk. I joined WorldCom (then MCI) in 1997 as Director of Finance for the
5 Central region Telco and Line Cost Management Group. In October 1998, I assumed my
6 responsibilities as Regional Executive. Prior to joining WorldCom, I spent fourteen years
7 in various financial management positions with AT&T and five years as an outside
8 auditor with Arthur Andersen & Co. I received a Masters degree in Management from
9 Northwestern University in 1992, and a Bachelor of Science degree in Accounting from
10 Millikin University, Decatur, Illinois in 1978.
11 A. Roscoe. I joined WorldCom (then MCI) in 1994 as Litigation Counsel. Since
12 that time I have worked on resolving employment and commercial disputes within the
13 Litigation Group. I have worked extensively with the arbitral process over the last 4
14 years in initiating and defending the company in arbitrations. Additionally, I have been
15 the company representative in its involvement with CPR Institute of Dispute Resolution,
16 a nonprofit alliance of global corporations, major firms, academics, and judges interested
17 in installing alternative dispute resolution (ADR) mechanisms into the mainstream of the
18 law departments and firms. Prior to joining WorldCom, I worked in private practice as
19 an Employment attorney. I received a J.D. and B.B.A. from Southern Methodist
20 University in 1991 and 1979, respectively. Prior to law school, I worked in various
21 business management capacities.
22
23 **Q. Please describe your responsibilities in your respective positions.**

1 A. Harthun. My duties as Commercial Counsel include supporting the negotiation,
2 drafting and enforcement of WorldCom's interconnection agreements with Verizon under
3 Sections 251 and 252 of the Communications Act of 1934, as amended.
4 A. Trofimuk. My duties as Regional Executive include ensuring the implementation
5 of interconnection and other capabilities that WorldCom receives from local exchange
6 carriers in order to support WorldCom's local and long distance telecommunications
7 infrastructure. My group handles interconnection issues arising in various incumbent
8 LEC and independent telephone company service areas. In addition, my group includes
9 carrier management for incumbent LECs and independent telephone companies operating
10 in various territories, project management for OSS implementation for local service
11 interfaces with these telephone companies, and bill audit payment of nearly $2.5 billion,
12 annually, for interconnection, access and other services purchased from these telephone
13 companies.
14 A. Roscoe. My duties as Legal Counsel include advising on and coordinating
15 regulatory and public policy decisions pertaining to MCI. Additionally, I serve in an
16 advisory capacity in analyzing the feasibility of ADR opportunities for MCI and
17 WorldCom.
18
19 **Q. What is the purpose of your testimony?**
20 A. The purpose of our testimony is to describe and explain WorldCom's position and
21 language proposals as they relate to the General Terms and Conditions of the
22 Interconnection Agreement between WorldCom and Verizon. We will be addressing

1 several issues in this written testimony, and we will separate the topics with headings that
2 identify the issue to which the subsequent portion of my testimony relates.
3
4 **Choosing Between Tariffs and Interconnection Agreements**
5 **Issue III-18**
6 *Should tariffs supercede interconnection rate, terms and conditions? (Part A, Sections*
7 *1.3, 1.31-1.3.3).*
8 **Issue IV-85**
9 *Should the Interconnection Agreement contain a provision stating that, in the event of a*
10 *conflict between the rates and charges set forth in the Interconnection Agreement and*
11 *those set forth in a Tariff, the Interconnection Agreement should control? Should that*
12 *provision further provide that the Tariff and the Interconnection Agreement should be*
13 *construed to avoid any conflicts, and that changes or modifications to Tariffs filed by one*
14 *Party that materially and adversely alter the terms of the Interconnection Agreement*
15 *shall be effective against the other Party only upon that Party's written consent, or upon*
16 *an order of the Commission? (Part A, Sections 1.3, 1.31-1.3.3).*
17
18 **Q. Please summarize WorldCom's position on these issues.**
19 A. WorldCom has proposed that the Interconnection Agreement, as opposed to a
20 potentially conflicting tariff, govern the rates, terms and conditions applicable to services
21 and other items provided pursuant to the WorldCom-Verizon Interconnection Agreement.
22 Because Verizon has asserted that it can unilaterally change rates, terms and conditions of

1 an Interconnection Agreement by merely filing a conflicting tariff, it is critical that the
2 agreement contain a provision that establishes the relationship between the two.
3
4 **Q. What is a tariff, and how is it typically used?**
5 A. A tariff is a document filed by a common carrier with, in this case, a state
6 commission. Through the tariff, the common carrier offers services to the general public,
7 or to a certain class of customers, at the rates, terms and conditions contained in the tariff.
8 Tariffs do not have fixed terms. Instead, the common carrier can change the services it
9 offers, or the rates, terms and conditions upon which those services are offered, by filing
10 a revised tariff at the state commission.
11
12 **Q. How does a tariff differ from a commercial contract?**
13 A. A commercial contract is an agreement negotiated by the parties to the contract.
14 Because it is mutually negotiated, it is unlike a tariff in which the relevant terms and
15 conditions are dictated by the carrier. Moreover, unlike a tariff – which can be changed
16 unilaterally by the common carrier – a contract typically has terms and conditions that
17 remain fixed throughout the life of the contract.
18
19 **Q. How do the interconnection agreements contemplated by the Act fit into this**
20 **scheme?**
21 A. Interconnection agreements are contracts. They are agreements between two
22 commercial parties for the provision of services on certain rates, terms and conditions.

1 They are not, of course, identical to typical commercial contracts. Unlike other contracts,
2 the incumbent LECs are required by law to enter into such an agreement.
3
4 **Q. What is the fundamental dispute between the parties with respect to this**
5 **issue?**
6 A. In WorldCom's view, the Interconnection Agreement is the document that
7 controls the relationship between the parties. It cannot be superseded unilaterally
8 because Verizon files a contrary tariff. Verizon, however, believes that it can abrogate its
9 contractual obligations merely by filing a conflicting tariff.
10 Thus, in the absence of a provision clearly describing and defining the interplay
11 between the Interconnection Agreement and any tariffs, there is a significant risk that
12 Verizon would attempt to use a tariff to supersede or nullify provisions of the
13 Interconnection Agreement. Assume, for example, that Verizon and WorldCom enter
14 into an interconnection agreement that contains terms and conditions regarding trunking,
15 and that Verizon subsequently files a tariff that contains different and/or inconsistent
16 trunking terms. It would then be unclear which trunking terms should govern the parties'
17 dealings. Verizon could attempt to nullify the interconnection terms by invoking the
18 conflicting tariff provisions.
19
20 **Q. Would allowing Verizon to impose tariffs unilaterally be inconsistent with**
21 **the Act?**
22 A. Yes. The Act does not expressly discuss Verizon's tariffs or the interplay of
23 tariffs and interconnection agreements. When passing the Act, however, Congress was

1 well aware of the tariffing regime and its historical operation. Congress chose not to rely
2 on that regime, however, but instead set up an alternate, detailed contracting process.
3 Specifically, section 251(c)(1) of the Act requires the parties to "negotiate the particular
4 terms and conditions of agreements." Congress also recognized that these negotiations
5 would frequently be unsuccessful, and established an arbitration and approval process.
6 Finally, a specific review process was put in place to ensure that the resulting
7 interconnection agreement complied with all the requirements of federal law.
8 Verizon's assertion that a tariff can trump this careful process is plainly incorrect,
9 for several reasons. First, it would eviscerate the careful interconnection scheme
10 established by Congress. Under Verizon's theory, a new entrant could request
11 negotiation for an interconnection agreement with Verizon, engage in several months of
12 negotiation, petition for arbitration for all unresolved issues, go through a lengthy
13 arbitrating and hearing process, obtain a completed interconnection agreement, engage in
14 subsequent litigation over the legality of certain terms, and finally resolve those issues –
15 only to find that its interconnection agreement has been partially or entirely superceded
16 by a tariff filed by Verizon with a state commission. It is incomprehensible that
17 Congress intended such a result.
18 Allowing tariffs to be used to amend the parties' duties under the interconnection
19 agreement could also violate the substantive requirements of the Act. For example,
20 Verizon might file a tariff altering the rates carriers pay for access to unbundled network
21 elements or interconnection. Those rates may exceed the cost-based rates that the Act
22 requires. It would plainly violate the Act if a carrier used such a tariff to escape the

1 pricing obligations that the Act imposes, and that were incorporated into the
2 interconnection agreement's rates.
3 In addition, allowing tariffs to be used to amend interconnection agreements
4 would introduce a great deal of uncertainty into the agreement. If the agreement is
5 subject to such unilateral amendments, the parties have no assurance that the agreed-to or
6 arbitrated terms will apply for the duration of the agreement. No new entrant could
7 operate in such a business environment. New entrants need to know the rates and terms
8 to which they will be subject when deciding to enter a market. If such rates, terms and
9 conditions are unknown (because Verizon could alter them at any time through a tariff
10 filing) carriers could never put in place a meaningful business plan and could never,
11 therefore, decide whether to enter a market. The result would be an end to competition
12 before it began. That is not to say, of course, that interconnection agreements can never
13 change. It is to say, however, that unlike tariff amendments, modifications to the
14 Interconnection Agreement must be mutually discussed and agreed upon.
15
16 **Q. What language has WorldCom proposed?**
17 A. WorldCom proposes that the following language be included in the
18 Interconnection Agreement:
19 1.3.1 The rates and charges set forth in Attachment I shall remain fixed for the
20 term of this Agreement or until superseded by such rates as may be approved by
21 the Commission or FCC, notwithstanding that either of such rates may be
22 different from those set forth in any effective, pending or future Tariff of the
23 providing Party, (including any changes or modifications to any such Tariff--or

1 any new Tariff--filed after the Effective Date of this Agreement); provided,
2 however, this Section [1.3.1] shall remain subject to Section [1.3.3].
3 1.3.2 This Agreement and any applicable Tariffs of either Party shall be
4 construed whenever possible to avoid any conflict between them. The fact that a
5 condition, term, right or obligation appears in the Agreement and not in a Tariff,
6 or in a Tariff but not in the Agreement, shall not be interpreted as, or deemed
7 grounds for finding, a conflict for the purposes of this Section [1.3].[1]
8 1.3.3 Any change or modification to any Tariff (including any Tariff filed after
9 the Effective Date hereof) filed by either Party that materially and adversely
10 impacts the provision or receipt of services hereunder or which materially and
11 adversely alters the terms hereof shall only be effective against the other Party to
12 the extent permitted by: (i) that Party's written consent; or (ii) an affirmative
13 order of the Commission. Each Party shall file any required Tariff revisions,
14 modifications or amendments in order to comply with Applicable Law and to
15 continue performance of this Agreement in a lawful manner.
16
17 **Q. What is Verizon's response?**
18 A. Verizon has agreed to include WorldCom's proposed Part A, §1.3.2, but objects
19 to §1.3.1 and 1.3.3. It argues that, first, in Virginia, Verizon does not necessarily act
20 unilaterally when it makes an application for approval of a tariff from the state
21 commission because any interested party may participate in the state commission's
22 consideration of the application. Second, Verizon argues that CLECs should not be able

1 to "pick and choose" between the interconnection agreement rate and a lower
2 commission-approved tariff.
3
4 **Q. What is wrong with Verizon's position?**
5 A. Verizon's first response – that in filing a tariff it is not acting unilaterally – is
6 simply wrong. It is only Verizon that can change its tariff. And Verizon does not do so
7 in consultation with other carriers. The 1996 Act does not require that they do so, and
8 during the years that we have worked in the industry, we have never known incumbent
9 LECs to consult or negotiate with competing LECs when setting the terms of their tariffs.
10 Nor are these tariff terms necessarily subjected to state or federal commission
11 substantive review. Indeed, typically tariffs will be accepted unless another party
12 contests them or they are blatantly unreasonable or discriminatory. And the ability to
13 contest these tariff changes is certainly not an answer here. The burden should not be on
14 the new entrant to convince a state commission to reject a tariff change that purports to
15 alter an arbitrated interconnection term. The burden should be on the incumbent carrier
16 to demonstrate that such a change is warranted. And there is, of course, a mechanism for
17 doing so. Any necessary changes can be handled through the normal interconnection
18 agreement amendment process.
19 Finally, Verizon's assertion that CLECs should not be able to "pick and choose"
20 between an interconnection agreement rate, term or condition, and a lower tariffed rate,
21 term or condition is nonsensical. As discussed above, a new entrant should not be forced
22 to alter the rates, terms and conditions in an Interconnection Agreement any time Verizon

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[1] Verizon has agreed to the inclusion of this sub-section 1.3.2.

1 files a tariff revision. If Verizon, chooses, however, to offer to the general public a more
2 advantageous rate, term or condition via tariff, they could not refuse to give that same
3 rate, term and condition to a given new entrant. Incumbent LECs, for example, often file
4 special discount tariffs for marketing purposes. Prohibiting a new entrant from taking
5 advantage of such a public offering merely because the new entrant had obtained an
6 interconnection agreement pursuant to the Act's processes would be blatantly
7 discriminatory, in violation of the Act's clear requirements.
8
9 **Q. What does WorldCom request of the Commission?**
10 A. WorldCom requests that the Commission order the inclusion of WorldCom's
11 proposed Sections 1.3 et seq. into the Interconnection Agreement.
12
13 **Indemnification**
14 **Issue IV-106**
15 *Should the Interconnection Agreement contain a provision under which each Party*
16 *agrees to indemnify the other Party for certain specified liability arising from the*
17 *Interconnection Agreement that is legally caused by the indemnifying Party? Should the*
18 *provision also contain various procedures, including limiting conditions, regarding how*
19 *indemnification is obtained, including notice, authority to defend, authority to settle,*
20 *obligation to assert defenses in applicable Tariffs, and an obligation on the indemnified*
21 *Party to offer reasonable cooperation and assistance? (Part A, Sections 19.1, 19.2, 19.3,*
22 *19.3.1-19.3.5).*

1 **Issue V-11**

2 *Whether AT&T [and WorldCom] should be required to indemnify Verizon for errors in*
3 *or omissions of listings information caused by Verizon's gross negligence or willful*
4 *misconduct?*

5

6 **Q. Please summarize WorldCom's position on Issue IV-106.**

7 A. The Interconnection Agreement should contain WorldCom's proposed
8 indemnification provisions because they define the rights and obligations of the parties,
9 avoid ambiguity, and provide a clear legal framework for resolving liability between the
10 parties arising from third party claims. WorldCom has proposed that the parties
11 indemnify themselves from third party claims in two broad categories: first, for personal
12 injury and property damage and, second, for breach of contract.

13

14 **Q. What is indemnification?**

15 A. Indemnification, in this context, is a contractual arrangement under which the
16 contracting parties agree to allocate or shift the costs of third party claims from one party
17 that is only technically or passively at fault to the other that is primarily or actively
18 responsible.

19

20 **Q. Please describe, in general terms, why the parties should indemnify each**
21 **other in a contractual arrangement.**

22 A. Each party should be responsible for the damages that it causes, whether those
23 damages are to personal or real property, to persons themselves, financial or otherwise.

1 This reasonably puts the responsibility for avoiding the damages and liability in the first
2 place squarely on the party who (i) caused the damages and liability, and (ii) is in the best
3 position to avoid the damages and liability. It is unfair to require one party to be
4 financially responsible for damages caused by another unless that party has agreed to do
5 so. In addition, placing the financial responsibility on the party who is in the best
6 position to avoid the damages or liability is most efficient from an economic perspective.
7 The party in the best position to avoid the harm will typically face lower costs in avoiding
8 the damages or liability. Indemnification also has the practical effect of ensuring that the
9 parties have an incentive to perform their obligations under the agreement and thus avoid
10 third-party claims.
11 Finally, indemnification provisions such as these are equitable. They are not
12 overly burdensome on either party because they simply require each party to be
13 responsible for their actions under the agreement and for the damages that they might
14 cause either by breach of the Interconnection Agreement or to persons or real and
15 personal property.
16
17 **Q. Can you provide an example of a possible situation in which indemnification**
18 **would be necessary?**
19 A. Yes. A typical example might involve the handling of one of WorldCom's
20 customer's listings in a directory published by Verizon. It is WorldCom's responsibility
21 when it enlists a new customer to provide Verizon with an accurate listing and
22 description of how that customer's telephone listing should be presented in Verizon's
23 phone books. It is then Verizon's responsibility to enter that listing with the appropriate

1 enhancements and features so that WorldCom's customer is properly represented in
2 Verizon's phone books. As a result, WorldCom and Verizon share responsibility in this
3 situation. Continuing the example, if WorldCom performs its obligation – i.e., provides
4 Verizon with accurate and complete information for its customer – and Verizon
5 mistakenly processes or lists this information, WorldCom's customer may not appear
6 accurately in the appropriate phone books. In this circumstance, if the customer seeks
7 redress from WorldCom (the company to whom she provided her information),
8 WorldCom would be put in position to pay for the mistakes of Verizon.
9
10 **Q. Accordingly, what language has WorldCom proposed for Issue IV-106?**
11 A. WorldCom's proposed Section 19 provides the following:
12 19.1 Each Party agrees to release, indemnify, defend and hold harmless the
13 other Party from and against all losses, claims, demands, damages, expenses, suits
14 or other actions, or any liability whatsoever, including, but not limited to, costs,
15 and reasonable attorneys' fees and allocated in-house legal expenses (collectively,
16 a "Loss") incurred by the indemnified Party to the extent that such Loss is:
17 suffered, made, instituted, or asserted by any other person, relating to personal
18 injury to or death of any person, or for loss, damage to, or destruction of real
19 and/or personal property, whether or not owned by others, incurred during the
20 term of this Agreement and to the extent legally caused by the acts or omissions
21 of the indemnifying Party, regardless of the form of action. Notwithstanding the
22 foregoing indemnification, nothing in this Section [19] shall affect or limit any
23 claims, remedies, or other actions the indemnifying Party may have against the

indemnified Party under this Agreement, any other contract, or any applicable Tariff(s), regulations or laws.

19.2 Each Party agrees to release, indemnify, defend and hold harmless the other Party from and against all Loss incurred by the indemnified Party suffered, made, instituted, or asserted by any other person (regardless of the form of action) and to the extent such Loss is legally caused by the indemnifying Party through acts or omissions in breach of this Agreement. Notwithstanding the foregoing indemnification, nothing in this Section [19] shall affect or limit any claims, remedies, or other actions the indemnifying Party may have against the indemnified Party under this Agreement, any other contract, or any applicable Tariff(s), regulations or laws.

19.3 The indemnification provided herein shall be conditioned upon:

19.3.1 The indemnified Party shall promptly notify the indemnifying Party of any action taken against the indemnified Party relating to the indemnification, provided that failure to notify the indemnifying Party shall not relieve it of any liability it might otherwise have under this Section [19] to the extent it was not materially prejudiced by such failure of notification.

19.3.2 The indemnifying Party shall have sole authority to defend any such action, including the selection of legal counsel, and the indemnified Party may engage separate legal counsel only at its sole cost and expense. In the event the indemnifying Party does not accept the defense of any

1 such action, the indemnified Party shall have the right to employ counsel
2 for its own defense at the expense of the indemnifying Party.
3 19.3.3 In no event shall the indemnifying Party settle or consent to any
4 judgment pertaining to any such action without the prior written consent
5 of the indemnified Party, which consent shall not be unreasonably
6 withheld.
7 19.3.4 In any action for which indemnity is sought, the indemnified Party
8 shall assert any and all provisions in applicable Tariffs that limit liability
9 to third parties as a bar to any recovery by the third party claimant in
10 excess of applicable limitations of liability.
11 19.3.5 The indemnified Party shall offer the indemnifying Party all
12 reasonable cooperation and assistance in the defense of any such action.
13
14 **Q. What purpose does WorldCom's proposed Section 19.1 serve?**
15 A. This proposed section would require each party to indemnify the other for third
16 party claims that arise out of personal injuries or property damage. Put differently,
17 Section 19.1 requires each party to make good on any third party injuries or damage that
18 result from their acts or omissions.
19
20 **Q. What is Verizon's response to WorldCom's proposed Section 19.1?**
21 A. While Verizon purports to reject all of WorldCom's proposed indemnification
22 language, Verizon's proposed indemnification provision reveals that it is consistent with
23 WorldCom's proposed Section 19.1. Their proposal provides for reciprocal

1 indemnification for personal injury, death, and property damage. If that is the heart of
2 their provision, there is no disagreement between the parties with respect to Section 19.1.
3
4 **Q. What purpose does WorldCom's proposed Section 19.2 serve?**
5 A. This proposed section would require each party to indemnify the other for third
6 party claims that arise out of a breach of the Agreement. Put differently, Section 19.2
7 requires each party to make good on any third party damage that results from its breach
8 of the Agreement.
9
10 **Q. What is Verizon's response to WorldCom's proposed Section 19.2?**
11 A. Verizon objects to the inclusion of Section 19.2, which would require
12 indemnification for losses legally caused by the indemnifying party through acts or
13 omissions in breach of the Agreement. According to Verizon, this provision "would
14 effectively make Verizon a guarantor, by requiring Verizon to indemnify WorldCom for
15 any claim that WorldCom's customers make against WorldCom on account of Verizon's
16 provision of services to WorldCom." Verizon's Answer at 290.
17 In addition, Verizon argues for inclusion of a Section 19.1(b), under which each
18 party would agree to indemnify the other for losses "suffered, made, instituted, or
19 asserted by the indemnifying Party's own customers against the indemnified Party arising
20 out of the indemnified Party's provision of services to the indemnifying Party under this
21 Agreement, except to the extent the Loss arises from a breach of this Agreement by the
22 indemnified Party."

1 In sum, Verizon appears to be arguing that it is entitled to blanket immunity from
2 third party liability arising out of its own breach of the Interconnection Agreement.
3 Furthermore, Verizon flatly claims that under WorldCom's proposed Section 19.2,
4 Verizon would be a guarantor for WorldCom.
5
6 **Q. What is wrong with Verizon's argument that, under WorldCom's proposal,**
7 **Verizon would be the guarantor of WorldCom?**
8 A. WorldCom is not asking Verizon to be a guarantor for WorldCom. Section 19.2
9 is reciprocal. Thus, contrary to Verizon's interpretation, Section 19.2 applies to all losses
10 legally caused by the indemnifying party through breaches of the Agreement. Moreover,
11 a prerequisite for any indemnification under Section 19.2 is that one party has to breach
12 the Agreement. This is sensible – the breaching party should be responsible for the
13 breach. The other party has no control over the breaching party's acts or omissions. By
14 arguing for deletion of §19.2 in its entirety, Verizon would effectively grant itself
15 immunity from all third party claims arising out of its own breach of the Agreement.
16 There is obviously no justification for such a result.
17
18 **Q. What is wrong with Verizon's argument that it is entitled to blanket**
19 **immunity from third party liability arising out of its own breach of the**
20 **Interconnection Agreement?**
21 A. Even limited to the specific situation about which Verizon complains – requiring
22 indemnification by the breaching party for suits by the non-breaching party's customers
23 against the non-breaching Party – Verizon's position is meritless. Verizon complains that

1 such a requirement would be "commercially unreasonable," Verizon's Answer at 290,
2 but nowhere explains why it is in any way unreasonable to ask a party to bear the
3 financial costs of its own acts, especially where such acts constitute a breach of its
4 contractual obligations. As Verizon argues with respect to indemnification in the
5 directory assistance context, see Issue V-11 below, Verizon's position is that it can never
6 be forced to pay for its own actions when those actions adversely affect WorldCom's
7 customers. But again, the general principle is that it is most efficient, and most fair, to
8 place the costs of mistakes on the party best able to avoid those mistakes. There is no
9 reason to depart from that principle simply because the mistake adversely affects the
10 other party's customers. In practice, Verizon's position would be anti-competitive in that
11 it would penalize WorldCom for bringing new customers to the market.
12
13 **Q. What is wrong with Verizon's argument that it should be indemnified for**
14 **losses suffered by WorldCom's customers that arise from Verizon's provision of**
15 **services under the Agreement?**
16 To make matters worse, by arguing for inclusion of Section 19.1(b), Verizon asks
17 to be indemnified by WorldCom if WorldCom's customers sue Verizon for losses arising
18 out of Verizon's provision of services under the Agreement. Under Verizon's proposed
19 Section 19.1(b), Verizon seeks to impose liability based solely on whose customer raises
20 the third-party claim - not based on the underlying cause of the third-party claim.
21 Verizon seeks to divorce responsibility for third party claims from the cause of those
22 claims. Thus, under Verizon's proposed Section 19.1(b), if WorldCom's customers sued
23 Verizon directly for losses arising out of Verizon's breach of the Agreement, WorldCom

1 would be obligated to indemnify Verizon – not because WorldCom caused the harm or
2 could have prevented it, but because it is WorldCom's customer that seeks redress.
3 Requiring WorldCom to indemnify Verizon for claims asserted by WorldCom's
4 customers arising out Verizon's provision of services rests on the anti-competitive
5 principle that each party is responsible for the losses suffered by its own customers,
6 regardless of which party caused the loss. This is perfectly rationale behavior for a
7 vendor that no intention to perform its obligations under an agreement. Put differently,
8 the provision, as Verizon would have it, gives it no incentive to perform its obligations
9 under the Agreement. Indeed, the incentive operates in the opposite direction – by failing
10 to perform its obligations under the Agreement, Verizon is in a position to harm
11 WorldCom by failing to perform it obligations.
12 In sum, WorldCom's proposed indemnification provision should be included in
13 the Agreement because it requires each party to indemnify the other for third party
14 liability caused by the indemnifying party.
15
16 **Q. What is the purpose of Section 19.3?**
17 A. The purpose of Section 19.3 is to outline the procedural aspects of any
18 indemnification that might arise under the Agreement
19
20 **Q. What is Verizon's response to WorldCom's proposed Section 19.3?**
21 A. Although Verizon purports to reject all of WorldCom's proposed indemnification
22 process, a review of Verizon's proposed indemnification provision reveals that Verizon
23 actually agrees in principle with WorldCom's proposed Section 19.3. Their proposal,

1 like WorldCom's Section 19.3, conditions indemnification on the following: (1)
2 notification to the indemnifying party,[2] (2) the indemnifying party's sole authority to
3 defend against the third party claim,[3] (3) the inability of the indemnifying party to settle a
4 third party claim without the consent of the indemnified party,[4] (4) the obligation of the
5 indemnified party to assert its defenses against the third party claimants,[5] and (5) the
6 obligation of the indemnified party to offer reasonable cooperation and assistance in
7 defending in third party claims.[6] Verizon has not articulated any substantive
8 disagreements with WorldCom's proposed Section 19.3, et seq.
9
10 **Q. What does WorldCom request of the Commission with regards to Issue IV-**
11 **106?**
12 A. WorldCom requests that the Commission order the inclusion of Part A, Sections
13 19.1,19.2, and 19.3 into the Interconnection Agreement.
14
15 **Q. Are there any other aspects of indemnification that you wish to address?**
16 A. Yes. There are two: indemnification for Lifeline/Link-Up services and
17 indemnification with respect to the provision of directory listings.
18
19 **Q. Please describe the Lifeline/Link-Up program?**

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[2] Compare WorldCom's proposed Section 19.3.1 to Verizon's proposed Section 24.3(a).
[3] Compare WorldCom's proposed Section 19.3.2 to Verizon's proposed Section 24.3(b).
[4] Compare WorldCom's proposed Section 19.3.3 to Verizon's proposed Section 24.3(c).
[5] Compare WorldCom's proposed Section 19.3.4 to Verizon's proposed Section 24.3(d).
[6] Compare WorldCom's proposed Section 19.3.5 to Verizon's proposed Section 24.3(e).

1 A. Lifeline/Link-Up is a program of special discounts for qualified, low-income
2 residential telephone subscribers. Eligibility for the program tracks other means-based
3 federal and state government assistance programs.
4
5 **Q. Is Verizon seeking indemnification with regard to the Lifeline/Link-Up**
6 **program?**
7 A. Yes. In negotiating the Resale Attachment, Verizon sought indemnification from
8 WorldCom in the event of a third party claim resulting from the ineligibility of a
9 WorldCom customer for these specific types of services. In an attempt to finalize the
10 Resale Attachment, Verizon and WorldCom agreed to address under the general
11 indemnification provisions this specific type of indemnification. Both parties agree that
12 it is WorldCom's responsibility to check a WorldCom customer's eligibility for
13 Lifeline/Link-Up programs. As a means of ensuring that Verizon is not harmed by
14 WorldCom's breach of this obligation, Verizon seeks indemnification from WorldCom in
15 the event that a third-party (in Verizon's view a governmental agency) asserts a claim
16 against Verizon arising out of the ineligibility of a WorldCom customer under
17 Lifeline/Link-Up or other financial assistance programs.
18
19 **Q. What is WorldCom's response to Verizon's request?**
20 A. As a conceptual matter, WorldCom does not dispute this kind of indemnification.
21 In fact, this type of indemnification is already covered under WorldCom's proposed
22 Section 19.2 of Part A. Thus, a specific provision dealing with this indemnification

1 would be unnecessary. Verizon already has the protection it seeks under the broader
2 language of Section 19.2.
3
4 **Q. What is the question raised by Issue V-11?**
5 A. Issue V-11 concerns the indemnification of Verizon for third party claims arising
6 out of mistakes Verizon has made in listing WorldCom and AT&T's customers'
7 information in Directory Listings.
8
9 **Q. What is the current status of Issue V-11?**
10 A. The parties have come to agreement on inclusion of provisions regarding
11 Directory Listing and Directing Distribution in the Agreement, but remain unresolved on
12 the question of indemnification. The issue of indemnification as it relates to directory
13 assistance was originally an issue exclusive to AT&T. Verizon and WorldCom have
14 agreed to permit WorldCom to join AT&T on this issue.
15
16 **Q. What is WorldCom's position on Issue V-11?**
17 A. WorldCom's position on this particular indemnification issue is straightforward:
18 if Verizon makes a mistake (whether willful, grossly negligent, or negligent) in the
19 publication or dissemination of the listing information of one of WorldCom's customers,
20 thereby exposing WorldCom to liability to that customer, Verizon should indemnify
21 WorldCom to the extent of that liability. Such indemnification as it relates to directory
22 listings is consistent with WorldCom's proposed general indemnification provision, see

1 Issue IV-106, and the well-established principle that each party should be responsible for
2 the damage it causes while carrying out its contractual obligations.
3
4 **Q. What is Verizon's position on this issue?**
5 A. Verizon argues that it has "no relationship" with WorldCom's customers, and that
6 it therefore cannot be held liable for any harm suffered by those customers. Verizon's
7 Answer at 330. Verizon further asserts that the provision is necessary to "ensure what
8 actually reflects standard commercial practice – that a Party not involved in a commercial
9 transaction . . . be immune from any liability arising from that transaction." Id.
10
11 **Q. What language has Verizon accordingly proposed?**
12 A. Verizon seeks on the following language regarding indemnification of errors in
13 the directory listings:
14 [WorldCom] agrees to release, defend, hold harmless and indemnify Verizon
15 from and against any and all claims, losses, damages, suits, or other actions, or
16 any liability whatsoever, suffered, made, instituted, or asserted by any person
17 arising out of Verizon's publication or dissemination of the Listing Information as
18 provided by [WorldCom] hereunder. Verizon's Template Interconnection
19 Agreement, Additional Services Attachment, § 4.8.[7]

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[7] See also id. § 25.7 ("Each Party shall, in its tariffs and other contracts with its Customers, provide that in no case shall the other Party, the other Party's Affiliates, or the directors, officers or employees of the other Party or the other Party's Affiliates, be liable to such Customers or other third-persons for any special, indirect, incidental, consequential, reliance, exemplary, punitive or other damages, arising out of a Service Failure.").

1

2 **Q. What is wrong with Verizon's position and language on Issue V-11?**

3 A. Verizon's characterization of the relationship between the parties (and the parties'
4 customers) is plainly incorrect. It is true that WorldCom has a more direct relationship
5 with its customers than does Verizon. Thus, it is reasonable to expect that WorldCom
6 will be responsible for any errors it might make with respect to gathering directory listing
7 information from its customers, and transmitting that information to Verizon. But
8 beyond ensuring that the information transmitted to Verizon is correct, there is nothing
9 more that WorldCom can do to protect its customers from errors that Verizon makes
10 when publishing or disseminating that information. Rather, when Verizon, pursuant to its
11 contractual obligations under the Agreement, publishes or disseminates directory
12 information of one of WorldCom's customers, Verizon is the only party that can ensure
13 that the publication or dissemination is accurate.

14 As such, Verizon should be obligated to indemnify WorldCom from any liability
15 WorldCom faces from its (WorldCom's) own customers when that liability arises from a
16 mistake caused by Verizon in the publication or dissemination of directory assistance
17 information. WorldCom should not be the guarantor of Verizon's mistakes.

18 Verizon's contrary position is based on the notion that each party should pay for
19 losses suffered by its own customers, regardless of which party caused the loss. The
20 Commission should reject that position. It is inefficient because, as applied here, it
21 would place the cost of liability on the party least able to control the loss. Moreover,
22 Verizon's position is anti-competitive because it would effectively punish WorldCom for
23 bringing new customers to the market, even where Verizon is solely to blame for the

1 losses caused to those customers. Instead, the general indemnification principle that each
2 party should bear the costs of its own mistakes should apply in the directory listings
3 context.
4
5 **Q. As a practical matter, does WorldCom's suggested language require Verizon**
6 **to pay significant damages for even simple negligence?**
7 A. No. Carriers typically include limitations of liability for simple negligence in
8 their tariffs. Carriers are not entitled to limit their liability, however, for gross negligence
9 or willful misconduct. WorldCom will assert its tariff defenses in response to any
10 customer lawsuit. See Section 19.3.4 of WorldCom's proposed language. Thus,
11 Verizon's responsibility to indemnify WorldCom in the event of a third-party claim with
12 respect to directory listings would be limited to the amount WorldCom actually owes
13 after asserting its defenses. Verizon clearly should be responsible for the consequences
14 of such conduct.
15
16 **Q. What does WorldCom request of the Commission with regards to Issue V-**
17 **11?**
18 A. WorldCom requests that the Commission order the exclusion of the language
19 proposed by Verizon into the Interconnection Agreement and order the inclusion of
20 WorldCom's proposed Section 19.2 of Part A.
21