

Before the
Federal Communications Commission
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
Petition of WorldCom, Inc. Pursuant to)
Section 252(e)(5) of the)
Communications Act for Expedited)
Preemption of the Jurisdiction of the)
Virginia State Corporation Commission)
Regarding Interconnection Disputes)
with Verizon Virginia Inc., and for)
Expedited Arbitration)

CC Docket No. 00-218

In the Matter of)
Petition of Cox Virginia Telecom, Inc.)
Pursuant to Section 252(e)(5) of the)
Communications Act for Preemption of)
the Jurisdiction of the Virginia State)
Corporation Commission Regarding)
Interconnection Disputes with Verizon)
Virginia Inc., and for Arbitration)

CC Docket No. 00-249

In the Matter of)
Petition of AT&T Communications of)
Virginia Pursuant to Section 252(e)(5))
of the Communications Act for)
Preemption of the Jurisdiction of the)
Virginia State Corporation Commission)
Regarding Interconnection Disputes)
with Verizon Virginia Inc.)

CC Docket No. 00-251

**WORLDCOM'S RESPONSE IN OPPOSITION TO VERIZON VIRGINIA INC.'S
RENEWED MOTION TO DISMISS CONSIDERATION OF ISSUES RELATED
TO PERFORMANCE MEASURES AND ASSURANCE PLANS**

INTRODUCTION

On October 12, Verizon Virginia, Inc. ("Verizon") filed its Renewed Motion to Dismiss Consideration of Issues Related to Performance Measures and Assurance Plans ("Motion"). The arbitration issues in question are Issue Nos. III-14, IV-120, IV-121 and IV-130. Verizon's Motion should be denied.

Verizon presents its argument several different ways, but in reality Verizon has only one argument: the Virginia State Corporation Commission ("Virginia Commission") is addressing performance standards and remedies in generic proceedings under state law and therefore has not failed to act.

Verizon misconstrues and misinterprets the "failure to act" standard, and therefore its Motion must fail. What the Virginia Commission chooses to address in generic proceedings under state law is wholly irrelevant to the Virginia Commission's failure to act under federal law on the issues raised in WorldCom's Virginia arbitration petition. The Virginia Commission's refusal to act on those issues under federal law, including performance standards and remedies, caused the Federal Communications Commission ("Commission") to preempt the Virginia Commission's authority and to conduct this arbitration standing in the shoes of the Virginia Commission. Nothing material to that decision has changed. It is therefore appropriate to proceed with arbitrating these issues according to the schedule that the Commission has set forth.

ARGUMENT

A. The Virginia Commission Failed to Act on the Performance Standards and Remedies Issues Raised in WorldCom's Arbitration Petition

Verizon first argues that the Virginia Commission has not failed to carry out its Section 252 responsibilities on the arbitration issues in question and that therefore the issues are outside the scope of the Commission's jurisdiction.¹

Verizon is wrong. Its argument is based on a patently incorrect interpretation of the Commission's preemption authority. The Virginia Commission has without question

¹ Verizon Motion at 3-5.

“failed to act” on these arbitration issues as defined by the Telecommunications Act of 1996 (the “Act”).²

In the *WorldCom Preemption Order*, the Commission made clear that it was preempting the jurisdiction of the Virginia Commission because the Virginia Commission had “expressly refused to apply federal law” to resolve the issues WorldCom had raised in its arbitration petition.³ As the Commission stated, “by insisting upon arbitration pursuant to state law rather than the requirements of the Act, we find that the Virginia Commission has failed to carry out its responsibilities under Section 252.”⁴

Issues III-14, IV-120, IV-121 and IV-130, relating to performance measures and remedies, were quite clearly raised by WorldCom in its Virginia arbitration petition. The Virginia Commission failed to act on those issues. The Commission properly took jurisdiction over all arbitration issues, including standards and remedies, as the Virginia Commission had failed to act on all of them.

Under the Act, what the Virginia Commission chooses to do under state law in generic proceedings is irrelevant to the Commission's jurisdiction and to this proceeding in general. The purpose of this proceeding is to arbitrate the terms of the parties' interconnection agreement pursuant to the Act.⁵ Verizon argues that because the Virginia Commission has indicated that it will set performance standards in a generic collaborative proceeding, the Virginia Commission has “acted” for purposes of Section 252 and the Commission thus cannot assume jurisdiction over those issues. But Verizon's argument is fatally flawed.

² Pub. L. No. 104-104, 110 Stat. 56 (“Act”), codified at 47 U.S.C. §§ 151 *et seq.*

³ CC Docket No. 00-218, Memorandum Opinion and Order, FCC 01-20 (rel. Jan. 19, 2001) (“WorldCom Preemption Order”) at ¶4.

The Act gives WorldCom a right to have the issues that it raised in its arbitration petition addressed under federal law for purposes of its interconnection agreement with Verizon.⁶ This right is independent of any generic proceedings that the Virginia Commission may choose to conduct. Whether or not the Virginia Commission proceeds with a generic performance standards or remedies proceeding under state law is thus irrelevant to WorldCom's arbitration rights under the Act. We have a right to arbitrate the issues as between WorldCom and Verizon, and we have a right to have those issues resolved pursuant to the Act.

B. Principles of Comity Do Not Weigh Against The Commission Exercising its Jurisdiction

Verizon goes on to argue that even if the Commission were to assert jurisdiction over these issues, it should not exercise that jurisdiction as a matter of comity. Verizon argues that permitting WorldCom to arbitrate these issues would be to give WorldCom a second bite at the apple on metrics and remedies.⁷

Again, Verizon's arguments ring hollow. First, there is no telling when or even if the Virginia Commission will address, let alone resolve, performance standards and remedies in generic proceedings. In fact there is no current state proceeding on remedies at all. Without a state proceeding on remedies, the bare minimum requirements for Verizon to attempt to make a comity argument are lacking.

Furthermore, even if the Virginia Commission were to begin state proceedings on remedies, as discussed above, WorldCom has a right to have its issues decided in this arbitration. The status of any state proceeding under state law is irrelevant to this

⁴ *Id.* at ¶5.

⁵ 47 U.S.C. §§ 252(b)(4)(C), 252(c).

proceeding under federal law. WorldCom has a right to seek standards and remedies separate and apart from any statewide generic standards in its interconnection agreement.⁸

Verizon argues that “the Virginia Commission is uniquely positioned, in the circumstances of this case, to establish a single, statewide performance standard.”⁹ Whatever the merit (or lack thereof) of this statement, the same could be said for the Commission in the context of this entire arbitration. Indeed, the Commission in this arbitration will be defining the elements Verizon must provide (including all access to those elements), and the Commission will be establishing rates for those elements. Ultimately, the Commission will be overseeing Verizon's provision of elements via enforcement of the contract. It is only logical, therefore, for the Commission to also determine remedies under the contract in this arbitration.

A recent New York Public Service Commission (“New York Commission”) decision, and the history of performance standards and remedies in New York, illustrate this point. When Verizon sought 271 approval in New York, at the same time that it introduced its proposal for a Performance Assurance Plan, Verizon voluntarily committed to retain performance standards and remedies in existing interconnection agreements and to continue to offer those standards and remedies in subsequent negotiations.¹⁰ Thus

⁶ 47 U.S.C. §252(b)(1).

⁷ Verizon Motion at 5-10.

⁸ Indeed, as seen in the context of Pennsylvania, Verizon consistently argues that states do not have the authority under state law to impose penalties or otherwise order payments from Verizon to CLECs. Even if the Virginia Commission were to start a proceeding on remedies, there is no guarantee that the Virginia Commission would actually implement remedies, or if implemented, whether those remedies would withstand a potential Verizon appeal on state authority grounds.

⁹ *Id.* at 6.

¹⁰ New York Pub. Serv. Cmsn. Case 97-C-0271, In re: Petition of New York Telephone Co. for Approval of Its Statement of Generally Available Terms and Conditions Pursuant to Section 252 of the Telecommunications Act of 1996 and Draft Filing of Petition for InterLATA Entry Pursuant to Section

despite the generic New York state proceedings that produced New York's carrier-to-carrier guidelines and its Performance Assurance Plan, the standards and remedies included in CLECs' interconnection agreements remained in effect. Earlier this year, the New York Commission, in its *AT&T Arbitration Order*, rejected Verizon's argument that its new agreement with AT&T must conform to New York's generic performance standards and remedies.¹¹ Rather, the New York Commission found that the standards and remedies unique to AT&T's existing interconnection agreement should continue. Those contract standards and remedies provided AT&T additional protections above and beyond the generic standards and remedies, and the New York Commission found that AT&T was entitled to them. This recent example demonstrates that CLECs have a right to arbitrate standards and remedies issues regardless of the status of any generic proceedings, and that there is ample precedent for metrics and remedies in interconnection agreements that go beyond the generic measures.

At bottom, Verizon's comity argument is high comedy. The only way principles of comity could be invoked would be if the Virginia Commission had not failed to act under Section 252 to arbitrate these issues. Of course, they clearly have failed to act, as this Commission has found, and the Commission should proceed as scheduled to arbitrate and resolve these issues.

271 of the Telecommunications Act of 1996, *Pre-Filing Statement of Bell Atlantic-New York*, (Apr. 6, 1998) at 2.

¹¹ New York Pub. Serv. Cmsn. Case 01-C-0095, Joint Petition of AT&T Communications of New York, Inc., TCG New York Inc. and ACC Telecom Corp. Pursuant to Section 252(b) of the Telecommunications Act of 1996 for Arbitration to Establish an Interconnection Agreement with Verizon New York Inc., *Order Resolving Arbitration Issues* (July 30, 2001) ("AT&T Arbitration Order") at 16-17.

C. The Existence of the *BA/GTE Merger Order*'s Performance Plan Is Irrelevant to the Question of This Commission's Jurisdiction to Arbitrate Performance Standards and Remedies

Verizon's final argument – that the Commission's *BA/GTE Merger Order* established sufficient metrics – is equally hollow and raises no new issues.¹² Again, as a threshold matter, WorldCom has a right to have the issues in its arbitration petition addressed in this proceeding. The existence of the *BA/GTE* merger conditions is wholly irrelevant to that right.

Furthermore, Verizon's Motion ignores the plain language and meaning of the *BA/GTE Merger Order*. Verizon argues that the Commission "already has considered and approved a carrier-to-carrier performance plan for Verizon in connection with its approval of the merger of GTE Corporation and Bell Atlantic Corporation."¹³ But Verizon declines to mention that time and again in the *BA/GTE Merger Order*, this Commission emphasized that the Commission's merger conditions "are intended to be a floor and not a ceiling."¹⁴ Furthermore, the metrics adopted in the *BA/GTE Merger Order*, like all of the merger conditions, were intended to be limited to the context of the merger itself, and were not intended to relieve Verizon from any obligations arising out of decisions implementing the Act.¹⁵ And in any event, the performance plan *BA/GTE Merger Order*'s performance plan expires three years from the issuance of the merger order.¹⁶

¹² CC Docket No. 98-184, In re: Application of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License, Memorandum Opinion and Order, FCC 00-221 (rel. June 16, 2000) ("BA/GTE Merger Order").

¹³ Verizon Motion at 9.

¹⁴ *BA/GTE Merger Order* at ¶252.

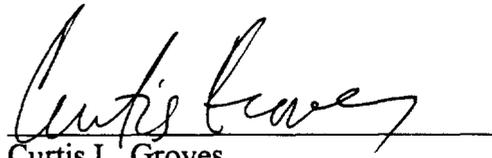
¹⁵ *Id.* at ¶283, Apdx. C n.2.

¹⁶ *Id.* at ¶255.

CONCLUSION

Verizon's arguments have no merit. Indeed, this Motion can be seen as yet another legal maneuver by Verizon in its never-ending attempt to delay resolution of this arbitration and delay the implementation of the Act in Virginia. Verizon's Motion should be denied.

Respectfully submitted,



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Certificate of Service

I, Lonzena Rogers, hereby certify, that on this thirty-first day of October, 2001, I have caused a true and correct copy of WorldCom, Inc.'s Response In Opposition to Verizon Virginia Inc.'s Renewed Motion To Dismiss Consideration of Issues Related To Performance Measures And Assurance Plans in the matter of CC Docket No. 00-218, CC Docket No. 00-249, and CC Docket No. 00-251 to be served by United States Postal Service first class mail, hand delivery and facsimile, on the following:

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