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

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In the Matter of)
Petition of AT&T Communications)
of Virginia, 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.)

CC Docket No. 00-251

**AT&T's OPPOSITION
TO VERIZON'S RENEWED MOTION
TO DISMISS CONSIDERATION OF ISSUES RELATED TO
PERFORMANCE MEASURES AND ASSURANCE PLANS**

The Commission should deny Verizon's Renewed Motion to Dismiss ("Motion"), which seeks dismissal of AT&T Issue III-14 on jurisdictional and "comity" grounds. This Issue (and similar WorldCom Issues IV-120, -121 and -130) pertains to performance metrics/standards and the contractual imposition of self-executing monetary remedies when Verizon's fails to meet the applicable performance metrics and standards.

First, Verizon's jurisdictional claim that the Commission did not preempt the Virginia State Corporation Commission ("SCC") as to metrics/standards and remedies is flat wrong, as is clear from the issues designated to the SCC and preempted by the Commission. Indeed, Verizon's Motion is nothing less than an untimely attempt to seek reconsideration of the Commission's *Preemption Order*, and therefore should be rejected out of hand.¹

¹ Memorandum Opinion and Order, adopted January 26, 2001 ("*Preemption Order*").

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Second, AT&T agrees that as a practical matter the Commission may defer to the SCC the final resolution of the **metrics/standards** issues, because it appears that the SCC is close to resolving those issues.

Third, however, the performance **remedies** issues should be arbitrated in this proceeding rather than remanded to the SCC. Verizon's "comity" argument goes much too far in suggesting that the Commission defer the performance remedies issues to the SCC. Verizon assumes, contrary to precedent in New York and other jurisdictions, that generic state remedies plans should be exclusive. It ignores the demonstrated need for an effective self-executing remedies regime to police Verizon's performance under the interconnection agreement, in addition to whatever generic remedies the SCC might eventually adopt. It is clear that self-executing remedy provisions are essential components of any interconnection agreement between Verizon and CLEC's seeking to compete with Verizon, because without such remedies Verizon has no incentive to comply with the applicable performance standards, and suffers no consequence when it does not do so. Moreover, Verizon grossly overstates the SCC's progress in resolving generic self-executing remedies issues. In fact, the Virginia Collaborative Committee has ceased to consider these issues and the SCC has only just begun to address them. Indeed, it may never adopt a self-executing remedies plan, if Verizon prevails on its position that the SCC has no power under Virginia law to impose self-executing remedies absent Verizon's consent.

I. The Commission has ample jurisdiction to arbitrate metrics/standards and remedies in this proceeding.

Verizon does not argue that the Commission lacks the power to arbitrate and resolve metrics/standards and remedies disputes in this arbitration. Thus, the

Commission's fundamental authority to impose self-executing remedies is unchallenged by Verizon. Rather, Verizon simply argues that the Commission's preemption of the SCC's jurisdiction under § 252(e)(5) of the Act did not include the metrics/standards and remedies issues. In Verizon's view, the SCC has "not failed to act with respect to performance standards and performance assurance plans," simply because the SCC has instituted a Collaborative Committee to consider these issues.² From this, Verizon leaps to the conclusion that the Commission did not preempt the SCC's jurisdiction to arbitrate metrics/standards and remedies for purposes of this interconnection agreement.

This line of argument ignores both the facts of the case and the Commission's rulings in its *Preemption Order*. All of these issues were explicitly included in AT&T's Arbitration Petition to the SCC, which the SCC refused to arbitrate under the Act.³ The basis for that refusal to act was the SCC's 11th Amendment concerns, and not the pendency of any other proceedings. Critically important here, nothing in that SCC Order in any way stated, or even implied, that the SCC was retaining jurisdiction to decide the

² Motion at 3.

³ *Application of AT&T Communications of Virginia, Inc., et al., for Arbitration of Interconnection Rates, Terms, and Conditions, and Related Arrangements with Verizon-Virginia Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Case No. PUC000282, AT&T Petition (October 20, 2000), Issues List, Issue 42 ("What are the appropriate performance reports, standards and benchmarks that should apply to Verizon services provided pursuant to the interconnection agreement?") and Issue 43 ("What are the appropriate financial remedies that should apply to Verizon's provision of services pursuant to the interconnection agreement?"). AT&T also filed its proposed Performance Incentive Plan ("PIP") with its Petition to the SCC, *see* Attachment B. On November 22, 2000, the SCC issued an order in that docket declining to arbitrate pursuant to federal law. That order may be accessed at the following link: <http://www.state.va.us/scc/caseinfo/puc/case/c000282.pdf>.

metrics/standards and remedies issues at issue in this arbitration.⁴ At the time that the SCC declined to arbitrate under federal law, the Collaborative Committee had not even begun to consider remedies issues. Indeed, the first meeting of the performance standards and remedies Subcommittee of the Collaborative Committee did not occur until three months after the SCC's November 22, 2000, Order.⁵ The remedies issues were not addressed by that Subcommittee until seven months after the SCC's Order.⁶

The metrics/standards and remedies issues were also explicitly included in AT&T's petition to the Commission to preempt the SCC.⁷ Verizon opposed AT&T's Petition generally, but at no point did it indicate that the Commission should stay its hand on any issues on account of proceedings before the Collaborative Committee.⁸ In considering AT&T's preemption request, the Commission made the required statutory finding "that the Virginia Commission failed to carry out its section 252 responsibilities in this case."⁹

Indisputably, the Commission's finding encompassed **all** of the issues that AT&T designated in its petitions to the SCC and the Commission, including performance

⁴ Thus, Verizon's citation to the *Indiana Bell* case is beside the point. *Indiana Bell Telephone Co., Inc. v. Smithville Telephone Co., Inc.*, 31 F. Supp. 2d 628 (S.D. Ind. 1998). In that case, the Indiana Commission explicitly consolidated the issues raised by petitions to arbitrate with a pending investigation that involved the same issues, and dismissed the petitions. The Court ruled that it lacked subject matter jurisdiction because there was not a final agency action. *Id.* at 644. In contrast, here the SCC did not claim to carve out the metrics/standards and revenues issues for decision elsewhere. Rather, it refused to arbitrate **any** of the issues designated by AT&T under federal law, not because of any pending related cases, but because of its concern that it did not have authority under the Virginia Constitution and statutes to waive Virginia's sovereign immunity from suit in federal court.

⁵ That meeting occurred on February 20, 2001, see Notice at the following link: <http://www.state.va.us/scc/division/puc/ccimomfiles/mtgdocs/ccmemo.pdf>.

⁶ AT&T first filed its proposed remedies plan on June 22, 2001, see following link: <http://www.state.va.us/scc/division/puc/ccdocuments.htm>.

⁷ Petition of AT&T Corp., dated December 15, 2000, Exhibit G.

⁸ Opposition of Verizon Virginia Inc. to Petition for Preemption and Motion to Consolidate of AT&T Corp., dated December 29, 2000.

metrics/standards and remedies. There is nothing in the Commission's *Preemption Order* that in any way states or implies that the Commission's finding did not encompass the metrics/standards and remedy issues. To the contrary, the Commission directed that "AT&T may now petition the Commission for arbitration of the interconnection disputes that were the subject of the Virginia Commission proceeding addressed herein."¹⁰ AT&T did so on April 23, 2001, and included in its Petition Issue III-14, which simply combines into one Issue the previous Issues 42 and 43 designated to the SCC.¹¹

It is thus clear that Verizon is wrong to claim that the Commission did not preempt the SCC on the metrics/standards and remedies issues. In effect, Verizon's Motion is nothing less than an untimely challenge to the Commission's rulings in the *Preemption Order*. Verizon did not seek reconsideration of that Order, and the time for any such challenge has long passed. Moreover, the Commission itself has ruled that "the Commission retains exclusive jurisdiction over any proceeding or matter over which it assumes responsibility under section 252(e)(5)."¹² The Act and the Commission's procedures do not provide a procedure for remanding an issue that was legitimately brought before the Commission for arbitration under § 252(e)(5) of the Act back to the

⁹ *Preemption Order* at 4, ¶ 5.

¹⁰ *Preemption Order* at 4, ¶ 7, emphasis supplied, footnote omitted.

¹¹ *Petition of AT&T Communications of Virginia, Inc., et al., For Arbitration of an Interconnection Agreement With Verizon Virginia, Inc.*, dated April 23, 2001, at 243 ("What are the appropriate metrics and standards and financial remedies that should apply to Verizon's delivery of services under the Agreement, in the event that Verizon fails to meet the performance metrics adopted for Virginia?").

¹² *Preemption Order* at 4, ¶ 7, emphasis supplied, footnote omitted.

state commission.¹³ Thus, there is no basis for the Commission to entertain Verizon's misbegotten procedural ploy.

II. The Commission may defer the metrics/standards issues to the SCC.

Notwithstanding the bankruptcy of Verizon's jurisdictional argument, as a practical matter AT&T is prepared to have the SCC continue its proceedings and finally resolve the metrics/standards issues, as AT&T has stated previously. This is because the Virginia Collaborative Committee, under the aegis of the SCC Staff, has almost closed the gap between AT&T (and other CLECs) and Verizon on performance measurements. The issues have been substantially narrowed and focused. The SCC Staff has recently filed a motion to the SCC that recommends adoption of a set of agreed metrics/standards, and presents for resolution by the SCC a decisional matrix of the seven remaining unresolved issues that the Collaborative Committee parties were unable to agree upon (out of the several hundred that were agreed upon).¹⁴

The SCC granted the Staff Motion by an Order adopted October 30, 2001.¹⁵ That Order calls for Comments by November 20th and Reply Comments by November 30th. Assuming that the SCC will in fact act with dispatch to resolve the few remaining open issues, AT&T agrees that there is no present need for the Commission to retrace the steps

¹³ "Therefore, once the proceeding is before the Commission, any and all further action regarding that proceeding or matter will be before the Commission. We note that there is no provision in the Act for returning jurisdiction to the state commission; moreover, the Commission, with significant knowledge of the issues at hand, would be in the best position efficiently to conclude the matter. Thus, as both a legal and policy matter, we believe that the Commission retains jurisdiction over any matter and proceeding for which it assumes responsibility under Section 252(e)(5)." *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 16129, ¶ 1289 (emphasis supplied).

¹⁴ *Commonwealth of Virginia, ex rel. State Corporation Commission Ex Parte: Establishment of Carrier Performance Standards for Verizon Virginia Inc.*, Case No. PUC 010206, Staff Motion to Establish Carrier Performance Standards for Verizon Virginia Inc. and for Order Prescribing Notice and Providing for Comment or Request Hearing, dated October 10, 2001 ("Staff Motion").

of the Virginia Collaborative and the SCC in regard to metrics/standards, and would not object were the Commission to defer the metrics/standards issues to the SCC.

III. “Comity” does not justify the elimination of remedies from the interconnection agreement.

In contrast to the resolution of the metrics and standards issues, AT&T does not agree that it would be proper to remand the issue of self-executing remedies back to the SCC, on several grounds.

First, there is no reasoned basis to assume, as Verizon evidently does, that a state's generic remedies regime should be the exclusive recourse available to CLECs for Verizon's noncompliance with performance metrics and standards. Quite the contrary. In the *New York 271 Order*, the Commission explicitly relied on a **combination** of industry-wide remedies from the NYPSC and remedies in individual interconnection agreements (as well as the Commission's power to impose additional penalties in response to complaints or on its own initiative, and antitrust deterrents). The remedies in the New York Performance Assurance Plan (“PAP”) are premised on the understanding that CLECs may separately receive compensation through their interconnection agreements, to the extent Verizon violates the agreements. It was this combination of remedies that persuaded the Commission to find that the total package of remedies was

¹⁵ The SCC's Order For Notice And Comment Or Requests For Hearing, Case No. PUC010206, may be accessed at the following link: <http://www.state.va.us/scc/caseinfo/puc/case/c010206.pdf>.

adequate to ensure non-discriminatory service from Verizon and to preclude backsliding once Verizon was granted 271 authority.¹⁶

Indeed, Verizon itself touted this very same combination of remedies that it now appears to oppose as a feature that justified its long distance entry in New York.¹⁷ It should not now be heard to argue the exact opposite. The Commission relied upon combinations of remedies in its other § 271 orders as well.¹⁸ And although Verizon recently asked the New York PSC to eliminate remedies from the AT&T/Verizon New York interconnection agreement, the New York Commission refused to do so.¹⁹ So

¹⁶ *In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region InterLATA Service in the State of New York*, FCC 99-295, Order dated December 22, 1999, CC Docket No. 99-295 (“*New York § 271 Order*”) at ¶¶ 430 (“[w]e also recognize that Bell Atlantic may be subject to payment of liquidated damages through many of its individual interconnection agreements with competitive carriers” (emphasis supplied, citations omitted)); and ¶ 435 (“[t]he performance plans adopted by the New York Commission do not represent the only means of ensuring that Bell Atlantic continues to provide nondiscriminatory service to competing carriers. In addition to the \$269 million at stake under this Plan, as noted above, Bell Atlantic faces other consequences if it fails to sustain a high level of service to competing carriers, including: “federal enforcement action pursuant to § 271(d)(6); liquidated damages under 32 interconnection agreements; and remedies associated with antitrust and other legal actions.” (emphasis supplied)).

¹⁷ Throughout its efforts to secure § 271 approval in New York, Verizon-NY stressed repeatedly that the PAP was superior to other proposed performance plans because the PAP penalties, unlike the other proposed plans, would not be “offset by those due under interconnection agreements.” *Petition of New York Telephone Company for Approval of a Performance Assurance Plan and Change Control Assurance Plan*, Cases 99-C-0949 and 97-C-0271, *Order Adopting the Amended Performance Assurance Plan and Amended Change Control Plan*, dated November 3, 1999, at 27.

¹⁸ See, for example, *Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization To Provide In-Region, InterLATA Services in Pennsylvania*, CC Docket 01-138 at ¶ 130 and cases cited therein (emphasis supplied, footnote omitted): “In response we note that, the PAP is not the only means of ensuring that Verizon continues to provide nondiscriminatory service to competing carriers. In addition to the monetary payments at stake under this plan, Verizon faces other consequences if it fails to sustain an acceptable level of service to competing carriers, including: enforcement provisions in interconnection agreements, federal enforcement action pursuant to section 271(d)(6) and remedies associated with antitrust and other legal actions.”

¹⁹ See *Joint Petition of AT&T Communications of New York, Inc. et al., Pursuant to Section 252(b) of the Telecommunications Act of 1996 for Arbitration to Establish an Interconnection Agreement with Verizon New York*, Order Resolving Arbitration Issues, Case No. 01-C-0095, July 30, 2001, at 20. The Commission found that “The metrics and remedy terms of the first agreement were in place before Verizon agreed to implement the PAP. Verizon was clearly aware of its potential financial obligations to AT&T (and tens of other competitors) when it consented to the PAP’s additional financial consequences.”

should this Commission. Clearly, state generic performance remedies can and should supplement remedies in interconnection agreements, not displace them.

Second, contractual self-executing remedies provisions are necessary to provide credible, effective and timely enforcement of the interconnection agreement between AT&T and Verizon, and to compensate AT&T, at least in part, for the harm it suffers when Verizon fails to comply with its performance standards. There can be no dispute that self-executing remedies provisions are part of the standard contract terms in commercial agreements. They are designed to provide some degree of compensation in cases where a party to an agreement breaches the agreement and where damages are otherwise difficult to quantify, as they would be when Verizon fails to comply with the applicable performance standards. Such interconnection agreement provisions are nothing out of the ordinary. Indeed, the only alternative would be a quagmire of monthly enforcement complaints and proceedings to litigate the extent of damages – clearly an uneconomic and anti-competitive result.

This aspect is especially pertinent in the context of an interconnection agreement between an ILEC and a CLEC. ILECs view interconnection agreements with competitors negatively and hostilely, and have no commercial incentive to meet their contractual obligations and keep their commitments.²⁰ As AT&T's supplier and competitor, Verizon has the motive, means and opportunity to discriminate, undeterred by ordinary commercial constraints. In such an environment, remedy provisions are

²⁰ An illustration of Verizon's mindset in performing its obligations under an interconnection agreement is its view that interconnection agreements are not "voluntary," but rather are contracts of compulsion. See, for example, *Petition of AT&T Communications of New York, Inc. and New York Telephone Company for Arbitration Pursuant to 47 U.S.C. § 252*, Cases 96-C-0723 and 96-C-0724, New York Telephone Company September 8, 1997, Brief in Support of Its Proposed Performance Standards and Associated Remedies, at 18.

essential components of any agreement between Verizon and AT&T, or any other CLECs seeking to compete with Verizon. Without a self-executing contractual compensation regime, Verizon lacks sufficient incentives to perform properly. Moreover, without such remedies AT&T will be subject to significant damages with little immediate recourse.

Third, the Commission should not grant Verizon's Motion to dismiss because there is no predicting when – or even if – the SCC will adopt a generic self-executing remedies plan. Verizon has previously taken the position that the SCC lacks authority under Virginia law to impose self-executing remedies absent Verizon's consent. Nowhere in its Motion does it indicate any retreat from that position. Thus, Verizon seeks to have remedies remanded from a forum with unquestioned authority – this Commission – to a forum that, it asserts, lacks such authority. If Verizon were to prevail on its Motion here and now, and later persuade the SCC to its view that the SCC lacks the requisite authority, then there would be **no** generic self-executing remedies plan for Virginia, so that AT&T would be left with no effective or timely remedies at all. This Verizon gambit alone is sufficient grounds to reject Verizon's Motion.

Moreover, the SCC has not made much progress on the remedies issues. Contrary to Verizon's assertions, the SCC has just begun to consider a performance remedies regime for Verizon Virginia. Verizon spends several pages of its Motion attempting to persuade the Commission that the SCC "has made substantial headway" and "significant progress" on those issues.²¹ But Verizon confuses the substantial progress on metrics/standards with the decided **lack** of progress on remedies. As the SCC Staff stated in its Motion to the SCC, the Virginia Collaborative has failed to achieve -- and is

²¹ Motion at 6 and 10, respectively.

unlikely to achieve -- any accommodation on remedies.²² For all intents and purposes, the Collaborative has collapsed with regard to performance remedies. For this reason, the SCC Staff has recommended that the SCC institute a separate, formal proceeding to consider a remedies plan.²³ By its order issued October 30, 2001, the SCC stated that it agreed with the Staff's recommendation, "and will initiate such a proceeding shortly."²⁴

Such a proceeding, when instituted, would likely involve testimony, hearings and briefs and will likely take significant time to play out.²⁵ And even if the SCC finds that it is empowered to impose a self-executing remedies plan, it may implement it to be effective only when and if Verizon obtains § 271 authority in Virginia, as Verizon has argued. The simple fact is there is no predicting when anything may happen, particularly given that Verizon seems to be aiming for a simultaneous group § 271 application for Virginia, Maryland and the District of Columbia. Further, the SCC might seek to channel all remedies payments to the Virginia treasury or to end-users, rather than to the CLECs that are most immediately hurt by Verizon's noncompliance with performance standards. Thus, if the Commission were to grant Verizon's Motion to dismiss remedies from this arbitration, there would either be no damages compensation at all for AT&T, or it would be much delayed.

²² Staff Motion at 5: "However, despite all the participants' considerable efforts, the Subcommittee recognizes that the differences in the proposed PAPs are significant and an agreement regarding a PAP is unlikely to be achieved through the collaborative process."

²³ Staff Motion at 5.

²⁴ Order For Notice And Comment Or Requests For Hearing at 4. See, <http://www.state.va.us/scc/caseinfo/puc/case/c010206.pdf>.

²⁵ Given that the SCC will need to start from scratch to consider remedies, Verizon is wrong that the SCC somehow is "uniquely positioned" or can draw upon superior "efforts and expertise" to fashion a remedies plan, as compared to the resources and expertise that the Commission can bring to bear on the issue. Motion at 6.

Verizon seeks to downplay the adverse consequences of a significant gap between the effective date of the interconnection agreement and any remedies plan that might eventually be adopted by the SCC, by pointing to the metrics imposed as part of the Bell Atlantic/GTE Merger conditions.²⁶ However, the Merger condition remedies are not an adequate solution. First, the Merger condition metrics and standards were intended to be transitional only and therefore are less than a complete set of metrics/standards. Second, the Merger condition remedies are quite low, providing no effective incentive for Verizon to fix performance problems if Verizon fails to meet those metrics in Virginia, because the cost of non-compliance could easily be less than the cost of compliance. As a consequence, Verizon could effectively ignore its interconnection agreement obligations with impunity for some indeterminate but potentially substantial period of time. And third, the payments under the Merger condition remedies go to the federal treasury, not to the CLECs who are most immediately harmed by Verizon's performance failures. Thus, the Merger condition remedies do not and cannot fulfill the role played by either individual or generic remedies, nor were they designed to do so.

Finally, Verizon is wrong that AT&T's position here is not consistent with the positions it took in the Maryland and New Jersey arbitrations.²⁷ Those proceedings were in a substantially different posture than this one.

In New Jersey, the metrics and remedies Technical Solutions Facilities Team ("TSFT") proceedings in Docket Nos. TX95120631 and TX98010010 were much further along by the summer of 2000 than the Virginia Collaborative Committee subcommittee on metrics and remedies. In Virginia, the Collaborative Committee kickoff meeting did

²⁶ Motion at 8-9.

²⁷ Motion at 7-8.

not occur until August 8, 2000, and consideration of remedies plans did not begin until June, 2001, after this proceeding was commenced.²⁸

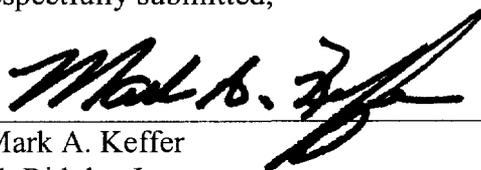
In Maryland, AT&T expected that the Maryland metrics/standards and remedies would follow the Virginia proceedings, either the generic state Collaborative Committee process in Case No. PUC 000026 or the AT&T/Verizon arbitration currently before the Commission. Thus, as a practical matter, AT&T did not designate metrics/standards and remedies as issues in the New Jersey and Maryland arbitrations. Moreover, at that time AT&T did not expect that the Virginia Collaborative Committee's consideration of self-executing remedies would be so delayed. In short, the proceedings in New Jersey and Maryland have no bearing on AT&T's position here that the Commission should decide remedies issues in this arbitration.

²⁸ The meeting schedule for the Virginia Collaborative Committee is displayed at the following link: <http://www.state.va.us/scc/division/puc/ccmeetings.htm>.

CONCLUSION

Verizon's Motion to dismiss should be denied. The Commission has jurisdiction to decide all of the issues that the Virginia Commission failed to arbitrate under federal law, including metrics/standards and remedies. The Commission may defer adoption of performance metrics and standards to the SCC, because they are near to resolution and the parties' disputes on the remaining issues are limited. However, the Commission should not remand to the SCC the development of appropriate contractual compensation in the form of self-executing performance remedies, because those issues have not yet been addressed and because Verizon has asserted that the SCC lacks jurisdiction to require it to accept such remedies without its consent.

Respectfully submitted,



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October 31, 2001