VIII. GENERAL TERMS AND CONDITIONS

Issue I-11 (Termination Of Access To OSS)

The interconnection agreement should not contain a provision that would allow Verizon to summarily and unilaterally terminate WorldCom's access to the operations support systems ("OSS") unbundled network element if it deems that certain abuses have occurred. The term "OSS" refers to "all of the systems, databases, business processes, and personnel needed to ensure that a local exchange carrier can satisfy the needs and expectations of its customers." WorldCom Exh. 2, Direct Test. of S. Lichtenberg at 7. Termination of access to these systems, databases, and processes is both unlawful and unreasonable, and "would put WorldCom out of business." Id. Verizon can, and should be required to, employ less drastic measures to ensure that WorldCom properly uses the OSS interface. See id. at 10-11. Accordingly, the Commission should reject Verizon's proposed contract language on this issue.

At the outset, Verizon's proposal is contrary to the Act and this Commission's implementing regulations and orders. OSS is a network element that Verizon is legally obligated to provide to competing carriers on an unbundled basis. See 47 C.F.R. § 51.319 (G). In addition, this Commission has repeatedly noted that providing CLECs nondiscriminatory access to OSS is critical to de-monopolizing the local markets. See LA II 271 Order ¶ 83 ("nondiscriminatory access to these systems, databases, and personnel is integral to the ability of competing carriers to enter the local exchange market and compete with the incumbent LECs"); NY 271 Order ¶ 83 ("without nondiscriminatory access to the BOC's OSS, a competing carrier 'will be severely disadvantaged, if not precluded altogether, from fairly competing in the local exchange market.'") (internal quotations omitted). The Commission reaffirmed the importance of providing access to OSS in the UNE Remand Order. See UNE Remand Order ¶¶ 421-437. Verizon has not explained, nor could it, how depriving CLECs of access to this network element can be reconciled with these clear legal requirements.

As a practical matter, Verizon's proposal is unreasonable because the termination right, if used, would force WorldCom out of business. See WorldCom Exh. 2, Direct Test. of S. Lichtenberg at 9. Without access to OSS, WorldCom could not complete commercially necessary tasks such as processing orders, billing customers, and conducting maintenance. Accordingly, "without OSS WorldCom would be unable to complete the processes necessary to compete as a carrier." Id. Indeed, Verizon has admitted that "OSS is critical to everyone's business." Tr. 10/18/01 at 2529 (Langstine, Verizon). While it would be unreasonable to grant any company the power to destroy WorldCom's ability to do business, it is particularly dangerous to grant such power to its competitor. See id. at 10. Indeed, "Verizon would have every incentive to impede WorldCom's ability to do business; and terminating access to OSS would be an effective weapon towards that end." Id.

Verizon's assertion that it would only use this termination right as a last resort, see Tr. 10/18/01 at 2570-2571, 2579, is of no import because the contract language that Verizon has proposed imposes no such limitations on Verizon's ability to terminate a carrier's access to OSS. Instead, Verizon's language, as drafted, would give Verizon broad discretion to determine when such a drastic remedy is warranted. See also Tr. 0/18/01 at 2540 (Langstine, Verizon) (admitting that Verizon alone would determine when abuse has occurred). Moreover, if Verizon determines that a CLEC has misused one subset of the OSS system, Verizon would have the power to terminate access to the entire OSS system. See Tr. 10/18/01 at 2566 (Langstine, Verizon).

Moreover, Verizon's assurances that such a drastic remedy would rarely be necessary undermine Verizon's claim that it needs to wield such an enormous weapon to protect itself against CLECs' abuse of the OSS system. Indeed, Verizon's witness could only identify a single occurrence of OSS abuse in the past. See 10/18/01 Tr. at 2535-36 (Langstine, Verizon). And although Verizon asserted in its testimony that the use of "robots" that access large quantities of customer record is another example of OSS abuse,[101] Verizon has admitted that it has only suspected two companies of engaging in such conduct. See id. at 2575-76 (Langstine, Verizon). And even when faced with a suspicion that robots were being used, Verizon did not choose to terminate the CLECs' access to OSS. See id. at 2578 (Langstine, Verizon).

Finally, Verizon's proposal should be rejected because Verizon can use more reasonable, and moderate, means of protecting its OSS against potential CLEC abuse. Disputes regarding a carrier's compliance with its contractual obligations regarding OSS are typically resolved by notifying the CLEC of the perceived offense, and conducting negotiations to try to identify a mutually acceptable solution to the parties' dispute. See WorldCom Exh. 2, Direct Test. of S. Lichtenberg at 10. If negotiations are unsuccessful, the carriers may seek review or enforcement from a state commission or the body that arbitrated the parties' agreement. See id. Such measures should be adequate to ensure

[101] Although this issue was addressed in the context of Verizon's testimony on OSS, at the hearings it was discussed in the context of the monitoring of access to CPNI, which is discussed in connection with Business Process, supra.

CLEC compliance with the contractual obligations, particularly given the CLECs' own interest in maintaining the integrity of the OSS. See id. at 11.

In sum, the Commission should reject Verizon's proposed language because it improperly and unlawfully gives Verizon a drastic and sweeping right to terminate WorldCom's access to OSS.

<u>Issue IV-45 (Fraud Prevention)</u>

The Interconnection Agreement should require each party to share technologies that would allow the other party to prevent fraud on the network, and should ensure that, in the event WorldCom purchases network facilities from Verizon or is interconnected with Verizon, WorldCom will not be required to shoulder the liabilities and costs arising from the malfeasance of third parties that perpetrate fraud against WorldCom or its customers by unlawfully using Verizon's unsecured service, facilities or network. <u>See</u> WorldCom Exh. 22, Direct Test. of R. Zimmermann at 2. Specifically, WorldCom's proposed language "makes clear that uncollectible or unbillable revenues from fraud and resulting from, but not confined to provisioning, maintenance, or signal network routing errors shall be the responsibility of the party causing the error, and provide[s] that neither party is liable to the other for any fraud incurred in connection with service offerings, but that each party must indemnify and hold each other harmless for any losses payable to IXC carriers caused by 'clip on' fraud incurred as a result of unauthorized access to an indemnifying party's Service Area Concept." <u>Id.</u> at 3. Although Verizon purports to be willing to cooperate with WorldCom to prevent fraud, it refuses to bear the costs of the losses caused by clip-on fraud. As explained below, Verizon's objections are meritless and WorldCom's proposed language should be adopted by the Commission.

WorldCom has proposed that Verizon be responsible for the types of fraud implicated by this issue because Verizon is in the best position to monitor and prevent such fraud. <u>See</u> WorldCom Exh. 22, Direct Test. of R. Zimmermann at 4-5. "Clip-on fraud," which occurs when an authorized party makes calls using a device it has "clip[ped]-on" to a line owned by a customer and charges for those calls show up on the customer's bill, generally occurs at non-public facilities such as the "closets" in the basement of large buildings. Id. at 4; Tr. 10/11/01 at 1925-26 (Zimmermann, WorldCom). Verizon controls these facilities, and is therefore the only party that can ensure that the facilities are protected against fraud, or even investigate the fraud. See WorldCom Exh. 22, Direct Test. of R. Zimmermann at 4-5; WorldCom Exh. 36, Rebuttal Test. of R. Zimmermann at 3 ("Verizon alone owns and controls access to its own network. WorldCom is simply unable to monitor the network and ensure that necessary security precautions are being taken."). Indeed, Verizon has failed to even provide WorldCom with access to its online fraud-detection system. See WorldCom Exh. 36, Rebuttal Test. of R. Zimmermann at 3. Because WorldCom cannot protect itself from such fraud, it should not be liable for the third party's fraudulent use of Verizon's network. See WorldCom Exh. 22, Direct Test. of R. Zimmermann at 5-6. As explained by Mr. Zimmermann, "it would be highly inequitable to require WorldCom to absorb the costs of this kind of fraud when it cannot enter Verizon's facilities to implement security measures to prevent (or even investigate) fraud committed by third parties." Id. at 5; see also Tr. 10/11/01 at 1831 (Zimmermann, WorldCom).

WorldCom's proposal is consistent with the provisions of the current interconnection agreement, as well as with Verizon's historic practice of investigating instances of fraud. See WorldCom Exh. 36, Rebuttal Test. of R. Zimmermann at 3-4. Indeed, in the long-distance context, Verizon holds WorldCom responsible for the costs of fraud committed against Verizon customers. For example, if a Verizon calling card number is stolen and used to place long-distance calls on WorldCom's network, and if it is later determined that the call was fraudulent, "Verizon recourses that amount against

WorldCom when settling the parties' accounts – even though the end-user customer is a Verizon customer, simply because the fraud was perpetrated on WorldCom's network." Id. at 4 (emphasis added); see also Tr. 10/11/01 at 1928 (Zimmermann, WorldCom).

In sum, Verizon is the proper party to monitor and protect against fraud on its network, and should therefore be required to bear the costs of clip-on fraud.

Issue IV-84 (Multiple Modes Of Entry Per Customer Arrangement; Offering Of DSL Services For Resale Over Local Loops Leased By Competitors)

In the Local Competition Order, the Commission identified three modes of entry that CLECs may use to enter the local marketplace – resale, unbundled network elements, and construct of new networks or self-provisioning. See Local Competition Order ¶ 12. Neither the Act nor the Commission's rules confines competing local carriers to provisioning individual customers exclusively under one of these modes on a per-customer basis. Verizon, however, has asserted that WorldCom may not provision services to an individual customer through a mixture of these three forms of entry. This position is incorrect, and presents particularly significant problems in connection with the resale of DSL services over local loops provided to CLECs on an unbundled basis.

As explained in more detail below, Verizon has an obligation to offer DSL services for resale over local loops leased by Competitors, and the Commission should therefore adopt WorldCom's proposed language regarding Issue IV-84. As an incumbent local exchange carrier ("LEC"), Verizon has a statutory obligation to offer digital subscriber line ("DSL") service for resale at wholesale rates to all competitors, including those that provide voice service over loops leased from Verizon. The Communications Act requires each incumbent LEC "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail" to end user customers. 47 U.S.C. § 251(c)(4) (emphasis added). It is well-established that DSL service is a "telecommunications service" within the meaning of the Communications Act, and it is undisputed that Verizon offers DSL service at retail to its end-user customers. Verizon's statutory obligation is unaffected by its decision to package DSL with voice service. There is no technical impediment preventing Verizon from providing DSL for resale over loops leased by competitors. Verizon maintains a measure of physical control over these loops, and, with the assent of the competitive carrier, can easily gain access to any facilities it needs to reach in order to provide or maintain wholesale DSL service. Competitive LECs should have the flexibility to provide services in the manner that best fits their entry strategy, such as by using a combination of UNEs and resale to serve their customers.

As discussed further below, Verizon may not escape this obligation simply by packaging DSL with one or more other telecommunications services. Specifically, Verizon's decision to sell retail DSL service only as part of a package of DSL and voice does not change the fact that DSL and voice are separate and legally distinct "telecommunications services" under the Act, each of which must be offered for resale at wholesale rates.

Section 251(c)(4) of the Act requires incumbent LECs "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." 47 U.S.C. § 251(c)(4)(A). Both the FCC and the courts have consistently found that DSL constitutes a "telecommunications service" within the meaning of the Act. See, e.g., Advanced Services Order IIA (1999); Association of Communications Enterprises v. FCC, 235 F.3d 662, 668 (D.C. Cir. 2001). Moreover, many incumbent LECs routinely provide DSL service to residential and business subscribers. Consequently, the FCC has found that advanced services offerings, such as DSL, are subject to the resale requirements of section 251(c)(4).[102] Advanced Services Order IIA (1999) ¶ 19 (finding that "DSL services designed for and sold to residential and business end-users are subject to the discounted resale obligations of section 254(c)(4)").

A. Retail DSL Is A Stand-Alone Service.

Prior to the Connecticut 271 Order, Verizon contended it was required to offer DSL for resale only on lines of customers that receive voice service from Verizon. NY 271 Order ¶ 31. The FCC rejected this argument in the Connecticut 271 Order, concluding that, at a minimum, Verizon's affiliate must permit a competitive LEC to resell Verizon's DSL service to customers to whom the competitive LEC resells Verizon's voice service.[103] Id. ¶ 33.

Although the Connecticut 271 Order clarified that an incumbent must resell DSL to carriers that resell the incumbent's voice service, it expressly left open the issue of whether the incumbent must resell DSL to carriers that provide voice over a local loop that is leased from an incumbent LEC.[104] Id. ¶ 33. The FCC should promptly resolve this issue in this arbitration by clarifying that DSL is a distinct retail telecommunications service.

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[102] As the FCC noted, "[t]his finding reinforces the resale requirement of the Act by ensuring that resellers are able to acquire advanced services at wholesale rates." Advanced Services Order IIA (1999) ¶ 3.

[103] As the FCC explained, "limiting resale of DSL services to situations where [the incumbent LEC] is the voice provider severely hinders the ability of other carriers to compete." Id. ¶ 32.

[104] The analysis presented in this memo applies equally to competitive LECs that purchase loops as individual UNEs, and those that obtain loops as part of the UNE platform.

B. There Are No Technical Impediments To The Resale Of DSL To Competitors Providing Voice Over UNE Loops.

Verizon has made no plausible argument that it is technically infeasible to provide its DSL service over a loop leased by a competitive LEC, or that incumbents lack sufficient control of the necessary facilities. In fact, on October 5, 2001, Verizon testified that its resold DSL offering is configured in the same manner as its retail DSL offering. See Tr. 10/5/01 at 925-26 (Clayton, Verizon).

Technical Feasibility. The FCC has promoted the sale of DSL separate from voice services by requiring incumbent LECs to unbundle the high frequency portion of the loop and provide it as a UNE. Line Sharing Order. This unbundling requirement has facilitated line sharing arrangements, which allow competitive LECs to provide DSL over lines on which an incumbent LEC provides the voice service, as well as "line-splitting" arrangements, which allow one competitive LEC to provide DSL while another competitive LEC provides the voice service. Requiring an incumbent LEC to provide its DSL for resale over a loop leased by a competitive LEC would simply reverse the typical line sharing arrangement.

In fact, at least one incumbent LEC has already provided DSL to an end user customer obtaining voice service from a competitive carrier using the UNE platform. According to an FCC filing made by AT&T, an SBC customer in Texas who had been using SBC's local voice and DSL service over a single loop switched his local voice service to AT&T, which used the UNE platform to provide local service. The customer then "proceeded to use AT&T local voice service and SBC data service on the same line. Subsequently, however, the customer was contacted by SBC and informed that his xDSL service must be disconnected unless he switched his voice service back to SBC." See

AT&T's Petition for Reconsideration of the FCC's Line Sharing Order at 6. It appears, therefore, that there are no technical impediments to the provision of DSL to end users receiving voice service over UNEs.

Control. Verizon may attempt to argue that it should not be obligated to provide DSL service over UNE loops because the facilities are not under their control. Such arguments are specious. First, Verizon retains at least some measure of physical control over UNE loops. For example, Verizon has physical control over the point at which the UNE loop connects to the main distribution frame in its central office. Similarly, when a customer experiences a loop-related technical problem, the competitive LEC may have to rely on the incumbent (Verizon) to correct the problem. Any legitimate concerns articulated by Verizon can easily be overcome by allowing Verizon to condition their wholesale DSL offering on its ability to obtain reasonable physical access to loop and other facilities that may be required to maintain service quality.

C. Verizon Must Make Their DSL Offerings Available For Resale Over Local Loops Leased From The Incumbent.

Verizon should be obliged to make their retail DSL services available at wholesale rates to all competitors, including those that provide voice service over loops leased from incumbent LECs. By its terms, section 251(c)(4) limits this obligation to circumstances in which the incumbent LEC offers the retail service. Thus, for example, Verizon need not make DSL available for resale over any leased loop that is located in a geographic region where it is not offering retail DSL service.

The FCC should clarify that section 251(c)(4) requires incumbents to offer DSL service for resale regardless of how it is packaged at retail. As noted above, the FCC has already determined that DSL constitutes a retail "telecommunications service" within the meaning of section 251(c)(4). Neither section 251(c)(4), nor any other provision of the Act, suggests that a telecommunications service ceases to be a telecommunications service when it is packaged with another telecommunications service. Moreover, the FCC has acknowledged that "the legislative history here suggests that the Commission should interpret section 251(c)(4) in such a way as to create affordable resale opportunities in order to stimulate the development of local competition." Advanced Services Order IIA (1999) ¶ 11. In light of this pro-competitive legislative intent, the FCC should clarify that retail DSL service is a "telecommunications service" regardless of how an incumbent LEC chooses to market it.

To hold otherwise would be to violate a fundamental tenet of administrative law. It is axiomatic that an administrative agency may not delegate authority provided to it by Congress to the very entities it regulates. E.g., City of Dallas v. FCC, 165 F.3d 341, 357-359 (5th Cir. 1999). Although the Association of Communications Enterprises ("ASCENT") recently made a similar argument, the DC Circuit refused to address it because it did not appear in ASCENT's initial brief, but only in its Reply brief. ASCENT v. FCC, 253 F.3d 29, n.1 (2001); ASCENT Reply Br. at 17, n.17 (Feb. 12, 2001). Indeed, the most "obnoxious form" of such delegation is to "private persons whose interests may and often are adverse to the interests of others in the same business." National Ass'n of Regulatory Utility Comm'rs v. FCC, 737 F.2d 1095, 1143-1144 (D.C. Cir. 1984) (citing Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936)); Sierra Club v. Sigler, 695 F.2d 957, 963 (5th Cir. 1983). Were the FCC to hold that an incumbent LEC may avoid, curtail, or otherwise manipulate its statutory resale obligation simply by combining two or more services into a single retail package, the FCC would effectively grant to each incumbent LEC the unilateral authority to determine the characteristics of specific service offerings that will be covered by, or exempted from, section 251(c)(4). Incumbent LECs could thus effectively manipulate the statutory meaning of "telecommunications service" in section 251(c)(4) to disadvantage their competitors. An incumbent LEC's attempt to limit its wholesale DSL offering to carriers reselling the incumbent LEC's own voice service would also run afoul of section 251(c)(4)(B)'s prohibition against imposing "unreasonable or discriminatory conditions or limitations on the resale" of a telecommunications service offered at retail to end users. 47 U.S.C. § 251(c)(4)(B).

Issue IV-91 (Branding)

The interconnection agreement should contain a provision that allows WorldCom to obtain branding of operator services and directory assistance ("OS/DA") outside of the resale context. Specifically, the Commission should adopt WorldCom's proposed language, which makes clear that WorldCom's ability to purchase branding is not limited to a single form of market entry.[105] As explained below, Verizon's proposed language fails to address WorldCom's concerns and the Commission should therefore order the inclusion of WorldCom's proposed section Part A 7.1.

As this Commission recognized in the Local Competition Order, branding is important for several reasons. Branding services with the name of the CLEC with whom the end-user has a subscription "minimize[s] customer confusion," and protects CLECs from the competitive disadvantage that results from having services branded under the name of their chief competitor. See Local Competition Order ¶ 971. Although those concerns were discussed in the context of resale, the same principles would apply in other contexts, and the means by which WorldCom provides service to its customers should not prevent it from obtaining branding for OS/DA.[106] See WorldCom Exh. 34, Rebuttal Test. of S. Lichtenberg at 8-9. Similarly, although 47 C.F.R. § 51.613(c) expressly references branding in the resale context, it does not state that ILECs should only provide

[105] WorldCom's proposed language appears in the current Virginia interconnection agreement between WorldCom and Verizon.

[106] In this respect, this issue is similar to Issue IV-84. In his direct and rebuttal testimony, WorldCom witness Argenbright explains that UNE-P customers, whose voice service needs are served through the UNE-Platform (a UNE) should be able to have their directory assistance needs served through OS/DA that WorldCom purchases as a resold service from Verizon. In such situations, the fact that the customers are also having some needs met through UNE-P should not prevent WorldCom from obtaining the branding as a resold service, and the rates applicable in that context would be resale rates.

unbranding or rebranding in the resale context. Accordingly, WorldCom's proposal is consistent with governing law.

Given the importance of branding, WorldCom has proposed that it be allowed to purchase branding of OS/DA, at the applicable rates, and use that purchased branding in conjunction with the UNE-P services that it uses to serve its customers' other needs. As explained in WorldCom's testimony, Verizon has allowed WorldCom to purchase OS/DA branding for use in conjunction with UNE-P in New York, Massachusetts, and Pennsylvania. See WorldCom Exh. 7, Direct Test. of S. Lichtenberg at 23. Verizon has not offered any arguments that suggest that branding is any less important to CLECs providing service to customers through other methods, such as UNE-P, and at the hearings Verizon's witness indicated that Verizon is willing to allow WorldCom to purchase branding in that context. See Tr. 10/12/01 at 2126-28 (Woodbury, Verizon).

Although Verizon's testimony and revised contract language appear to indicate that Verizon no longer objects to the provision of branding outside the resale context (particularly in connection with UNE-P), Verizon's proposed language fails to address WorldCom's concerns. Specifically, WorldCom objects to Verizon's proposal to include the phrase "To the extent required by applicable law" as a preface to the branding provisions. Verizon has indicated throughout these proceedings that it does not believe that applicable law requires it to provide branding for UNE-P, and Verizon could attempt to nullify its promise to provide branding by simply reaffirming this interpretation of the law. Thus, as discussed elsewhere in the brief, the "applicable law" language appears to give Verizon a means of escaping its contractual duties, and should be excluded from the interconnection agreement.

In sum, the Commission should order the inclusion of WorldCom's proposed language regarding branding. Although WorldCom strongly prefers its language, in the event that the Commission deems Verizon's language preferable, WorldCom would accept the Verizon language if the phrase "except as provided under applicable law" were removed.

Issue IV-95 (Costs Of Compliance)

The interconnection agreement should contain a provision making clear that each Party is responsible for costs and expenses incurred in complying with its obligations under the interconnection agreement, and requiring each party to undertake the technological measures necessary for such compliance. Verizon has not objected to WorldCom's proposal that the interconnection agreement contain language requiring the parties to bear their own costs, but has proposed to tack on a clause providing an exception to this obligation when "otherwise provided for under Applicable Law." See WorldCom Exh. 21, Direct Test. of Harthun, Trofimuk, and Roscoe at 31. Verizon's proposed modification is unnecessary and should be rejected, and the Commission should order inclusion of WorldCom's proposed part A, Section 8.2.

As explained by WorldCom's witnesses, changes in law are already addressed in the interconnection agreement's pricing attachment, which provides that the pricing attachment's rates will change if there is a change in the law governing those rates. See id. at 31; WorldCom Exh. 32, Rebuttal Test. of Harthun, Trofimuk, and Roscoe at 22. WorldCom is unaware of – and Verizon has failed to identify – any other provisions of applicable law that currently (or could be amended to) prevent the cost allocation outlined in WorldCom's proposed contract language. See id. Moreover, given the undefined nature and breadth of Verizon's "applicable law" clause, "WorldCom is concerned that Verizon will attempt to foist charges on it that WorldCom does not agree are required under any existing law." WorldCom Exh. 32, Rebuttal Test. of Harthun, Trofimuk, Roscoe at 22. If Verizon desires to change the rates to cover additional costs, it may seek an order from a state commission; in the absence of such an order, however, the parties should be required to bear their own costs and charge only those rates articulated in the pricing attachment. See id.

Issue IV-101 (Alternative Dispute Resolution)

Although WorldCom and Verizon have significantly narrowed the scope of Issue IV-101, two issues remain in dispute: whether the interconnection agreement's binding arbitration provisions should make clear that the arbitrator's award is final and binding on the parties, and whether WorldCom should be allowed to maintain its right to use the alternative dispute resolution process required of Verizon under Verizon's GTE/Bell Atlantic merger conditions. See WorldCom Exh. 32, Rebuttal Test. of Harthun, Trofimuk, and Roscoe at 26; Verizon Exh. 30, Rebuttal Test. General Terms and Conditions at 11. In addition, Verizon has argued that principles of "freedom of contract" deprive this Commission of authority to resolve the outstanding dispute resolution issues in WorldCom's favor. See Verizon Exh. 13, Direct Test. General Terms and Conditions at 25. For the reasons set forth below, all of Verizon's arguments lack merit, and WorldCom's proposed modifications to Verizon's dispute resolution language should be accepted by the Commission.

A. This Commission Has The Power To Resolve The Binding Arbitration Issue In WorldCom's Favor.

At the outset, this Commission plainly possesses the authority to order that the interconnection agreement's binding arbitration provisions be modified in the manner that WorldCom has proposed. The Act expressly grants commissions the authority to "resolve each issue set forth in the petition [for arbitration of disputed issues] ... by imposing appropriate conditions as required to implement subsection (c) of this section." 47 U.S.C. § 252(b)(4)(C). Indeed, "the only limitations that § 252(b)(4)(C) and (c) place upon any individual issue addressed by a state commission during arbitration are that the issue must be: (1) an open issue and (2) that resolution of the issue does not violate or conflict with § 251." U S West v. Minnesota Pub. Utils. Comm'n, 55 F. Supp. 2d 968, 986 (D. Minn. 1999); see also U S West v. Hix, 57 F. Supp. 2d 1112, 1120 (D. Col. 1999) (state commissions have broad authority to resolve open issues). That broad grant of power necessarily includes the authority to require the parties to perform some tasks that they would not have voluntarily undertaken; indeed that is the very point of the Act's arbitration process.

Verizon's references to the general principles preventing mandatory binding arbitration provisions are inapposite. It is of no import that parties to an ordinary commercial contract could not be compelled to accept a provision that has been designated for arbitration under the Act because, as explained by WorldCom's witnesses, interconnection agreements do not present "an ordinary contractual situation." WorldCom Exh. 21, Direct Test. of Harthun, Trofimuk, and Roscoe at 42. As the Ninth Circuit has recognized, the differences between interconnection agreements and ordinary contracts make it perfectly appropriate for a commission reviewing an interconnection agreement to order the inclusion of terms that would be unenforceable in a standard contract. See U S West v. MFS Intelenet, 193 F.3d 1112, 1125 & n.17 (9th Cir. 1999) (affirming state commission order requiring parties to enter into a future agreement despite general unenforceability of "agreements to agree"). Interconnection agreements created through the section 252 arbitration process contain several terms and conditions – regarding, for example, assignments and delegations, indemnification, or the term of the agreement – that ordinary contracting parties could not be compelled to accept. See WorldCom Exh. 21, Direct Test. of Harthun, Trofimuk, and Roscoe at 42. Indeed, section 252 itself is inconsistent with the general principle that parties cannot be required to enter into a contractual relationship. See id; 47 U.S.C. § 252.

B. The Commission Should Accept WorldCom's Modifications To Verizon's Proposed Dispute Resolution Provisions.

The Commission should reject the portion of Verizon's dispute resolution language that would make the enforceability of the arbitrator's decision contingent on the issuance of a Commission order within thirty days (or the expiration of that thirty day period). Under Verizon's proposal, the arbitrator's decision would not be considered final until sixty days after the issuance of the decision; given that arbitrations are generally completed in two weeks to sixty days, Verizon's proposed language effectively doubles the length of the arbitration process. See Tr. 10/12/01 at 2084-85. This "defeats, or at least significantly detracts, from the overall purpose behind an alternative dispute resolution process in the first place – that is, expedited and efficient dispute resolution." WorldCom Exh. 21, Direct Test. of Harthun, Trofimuk, and Roscoe at 49. To ensure that the resolution of disputes remains expedited and efficient, the arbitrator's findings should be effective immediately.[107] See id.

The interconnection agreement's dispute resolution provisions should not require WorldCom to waive its rights to use the alternative dispute resolution process required under the GTE/Bell Atlantic merger conditions. The merger conditions were "designed to mitigate the potential public interest harms of the Applicants' transaction, enhance competition in the local exchange and exchange access markets in which Bell Atlantic or

[107] Although WorldCom believes the arbitrator's award should be final when issued, WorldCom would be willing to accept a provision that provided some limited review – perhaps under an arbitrary and capricious standard – of the arbitrator's award. See Tr. 10/12/01 at 2087-88 (Roscoe, WorldCom).

GTE is the incumbent local exchange carrier (incumbent LEC), and strengthen the merged firm's incentives to expand competition outside of its territories." BA/GTE Merger Order ¶ 4. Indeed, Verizon's agreement to accept those conditions was essential to the Commission's approval of the proposed merger. See id. Contractually binding WorldCom to waive its rights under the Merger Order would frustrate the goals of the Merger Order, and Verizon has failed to provide any compelling reason that the WorldCom should be required to give up those rights in this context. See WorldCom Exh. 21, Direct Test. of Harthun, Trofimuk, and Roscoe at 50. Accordingly, that portion of Verizon's proposed contract language should not be included in the interconnection agreement. See id.

Issue IV-110 (Customer Migration)

The Commission should order the inclusion of WorldCom's proposed Part A section 22.1, which prevents Verizon from requiring WorldCom to obtain written customer authorization prior to processing an order from WorldCom. As explained more fully below, this provision accomplishes two closely related goals: It prevents Verizon from insisting on a written authorization in situations in which the law permits another type of proof of consent, for example, oral authorization verified by a third-party; and it prevents Verizon from written proof of the customer's consent in advance of processing the order, even though WorldCom has informed Verizon that it has obtained that consent in whichever form the law authorizes.

The law currently allows multiple forms of consent, and WorldCom's proposed language ensures that WorldCom may continue to use all of the forms of consent that the law allows. This Commission has recognized that oral consent, verified by a neutral third-party, is an acceptable means of ensuring that a customer has agreed to subscribe to services such as UNE-P residential services. See, e.g., Subscriber Carrier Selection Order. Consistent with these rules, WorldCom currently obtains electronic authorization to process orders; specifically, WorldCom obtains verification of the customer's consent from an independent third-party. See WorldCom Exh. 7, Direct Test. of S. Lichtenberg at 26-27. Verizon should not be given the right to insist upon a more stringent written authorization than the law requires. Imposing such a requirement would delay the provision of services to WorldCom's customers. See WorldCom Exh. 7, Direct Test. of S. Lichtenberg at 26.

WorldCom's proposal would not nullify the law's requirements that written authorization be obtained in certain circumstances. Verizon's concern that WorldCom's proposed language could be interpreted in such a manner could be alleviated by simply modifying WorldCom's language to allow written authorization only if such authorization is expressly required by law. To the extent that the law changes to require a written authorization in contexts for which oral or electronic consent currently suffices, WorldCom will, of course, comply with that law, and the contract can be amended to reflect that.

In sum, WorldCom's proposed language prevents Verizon from imposing burdensome and unnecessary requirements as a precondition to its fulfillment of its obligations under the Interconnection Agreement, and should be adopted by the Commission.

Issues IV-106 and V-11 (Indemnification)

The Commission should order the inclusion of WorldCom's proposed indemnification language, which requires the parties to indemnify each other from third party claims for personal injury and property damage and for breach of contract (Issue IV-106), and requires the parties to indemnify each other for third party claims arising out of in listing WorldCom's customers' information in Directory Listings (Issue V-11). Indemnification, as WorldCom has used the term, is a contractual arrangement under which the contracting parties agree to allocate or shift the costs of third party claims from one party that is only technically or passively at fault to the other that is primarily or actively responsible. See WorldCom Exh. 21, Direct Test. of Harthun, Trofimuk, and Roscoe at 12. As explained below, WorldCom's proposed language equitably allocates responsibility for damages and injury to the appropriate carrier, and prevents a carrier from being held financially responsible for costs and liabilities that are outside its control. See WorldCom Exh. 32, Rebuttal Test. of Harthun, Trofimuk, and Roscoe at 19. Verizon's proposal unfairly allocates those responsibilities, and Verizon's assertion that WorldCom's proposal makes it a "guarantor" for WorldCom is utterly without merit. Accordingly, the Commission should order the inclusion of Part A, Section 19 in the interconnection agreement.

As a general matter, each party should be responsible for the damages that it causes to personal or real property, to persons, or for purely financial damages. Such an arrangement "reasonably puts the responsibility for avoiding the damages and liability in the first place squarely on the party who (i) caused the damages and liability, and (ii) is in the best position to avoid the damages and liability." WorldCom Exh. 21, Direct

Testimony of Harthun, Trofimuk, and Roscoe at 13. Moreover, from an economic perspective, it is most efficient to place the financial responsibility on the party who is in the best position to avoid the damages or liability, because the party in the best position to avoid the harm will typically face lower costs in avoiding the damages or liability. See id. Further, indemnification gives the parties an incentive to perform their obligations under the agreement and thus avoid third-party claims. Finally, indemnification provisions such as these are equitable because "they simply require each party to be responsible for their actions under the agreement and for the damages that they might cause either by breach of the Interconnection Agreement or to persons or real and personal property." Id.

Issue IV-106

The contract language that WorldCom has proposed under Issue IV-106 effectively implements these principles. Section 19.1 of WorldCom's proposed contract language reasonably requires the parties to indemnify themselves from third party claims for personal injury and property damage caused by the indemnifying party. See id. at 16. WorldCom's proposed Section 19.2 would require each party to indemnify the other for third party claims that arise out of the indemnifying party's breach of the Agreement.[108] See id. at 17. Section 19.3 outlines the procedural aspects of any indemnification that might arise under the Agreement. See id. at 18.

Although Verizon suggests otherwise, this proposed language plainly does not make Verizon a "guarantor" for WorldCom. See Verizon's Answer at 290; see also Verizon Exh. 13, Direct Test. General Terms and Conditions at 27. WorldCom's proposed Section 19.1, like Verizon's proposed contract language, provides reciprocal indemnification for personal injury, death, and property damage. See WorldCom Exh.

[108] Verizon apparently does not oppose such indemnification in concept, particularly when WorldCom is responsible for the underlying obligation to which the indemnification relates. For, example, WorldCom's proposed Section 19.2 would encompass indemnification for third party claims resulting from the ineligibility of a WorldCom customer for Lifeline/Link-Up, which is a program of special discounts for qualified, low-income residential telephone subscribers whose eligibility tracks other means-based federal and state government assistance programs. See WorldCom Exh. 21, Direct Test. of Harthun, Trofimuk, and Roscoe at 22. Under the interconnection agreement, WorldCom is responsible for checking a WorldCom customer's eligibility for Lifeline/Link-Up programs, and Verizon has demanded indemnification from WorldCom in the event that a third-party (in Verizon's view a governmental agency) asserts a claim against Verizon arising out of the ineligibility of a WorldCom customer under Lifeline/Link-Up or other financial assistance programs. See id. As a result, this type of indemnification (for Lifeline/Link-Up eligibility) is already included in the Attachment II (Resale) of the interconnection agreement.

21, Direct Test. of Harthun, Trofimuk, and Roscoe at 17. Section 19.2 is also reciprocal, and applies to all losses legally caused by the indemnifying party through breaches of the Agreement. See id. at 18. Indeed, indemnification under Section 19.2 only occurs when a party has breached the agreement, and that section holds the breaching party responsible for the breach. See id. This in no way makes a party the guarantor of the other party's behavior; it simply makes the parties responsible for their own mistakes.

Verizon's proposal that the interconnection agreement contain a Section 19.1(b), pursuant to which each party would agree to indemnify the other for losses "suffered, made, instituted, or asserted by the indemnifying Party's own customers against the indemnified Party arising out of the indemnified Party's provision of services to the indemnifying Party under this Agreement, except to the extent the Loss arises from a breach of this Agreement by the indemnified Party" is an improper attempt to obtain immunity from all third party claims arising out of its own breach of the Agreement. Verizon's proposed language would apportion liability "based solely on whose customer raises the third-party claim, and not on which party was the cause of the harm," WorldCom Exh. 32, Rebuttal Test. of Harthun, Trofimuk, and Roscoe at 16, and thereby improperly "divorce[s] responsibility for third party claims from the cause of those claims." WorldCom Exh. 21, Direct Test. of Harthun, Trofimuk, and Roscoe at 19. As explained above, however, it is both fair and efficient to place costs of mistakes on the party that causes the mistakes. Moreover, allocating responsibility in the way that Verizon has proposed would give Verizon a disincentive to perform its obligations under the agreement because Verizon would know that WorldCom, its competitor, would be required to bear the costs of any customer claims that arose from Verizon's failure to perform its duties. See id. Such a result is not only unfair, it is anti-competitive. See id.

Verizon's proposal that WorldCom accept the language that AT&T and Verizon have agreed to is equally unacceptable. Although sections 24.2 and 24.3 (a) - (e) of that language would be acceptable to WorldCom, the remainder of that contract language fails to articulate the type of indemnification arrangement discussed above. In addition, Section 24.0 of the Verizon-AT&T language does not indemnify the parties from third-party losses arising from breaches of the interconnection agreement. See Tr. 10/12/01 at 2090. As discussed supra, such indemnification is both equitable and appropriate. Finally, Section 24.6 of the Verizon-AT&T language is both "ambiguous and confusing," and does not clearly articulate how indemnification applies. Id. at 2091.

Issue V-11

The principles discussed above apply equally to Issue V-11, in which WorldCom has proposed that if Verizon makes a mistake (regardless of Verizon's level of culpability – willful misconduct, gross negligence, etc.) when publishing or disseminating the listing information of one of WorldCom's customers, and thereby exposes WorldCom to liability to that customer, Verizon should indemnify WorldCom to the extent of that liability. Pursuant to the language that WorldCom proposed under Issue IV-106, if WorldCom gave Verizon an accurate directory listing and Verizon's actions caused the published listing to be inaccurate, Verizon would be required to indemnify WorldCom from liability to the customer whose listing was inaccurately reported. See Tr. 10/12/01 at 2096-97. Similarly, if WorldCom gave Verizon an inaccurate listing and Verizon received a third-party claim, WorldCom would indemnify Verizon because WorldCom caused the harm. See id. at 2096. WorldCom's proposal rests on the simple principle that if a party fails to "live up to its commitments in this Interconnection agreement," id. at 2098, that party should bear the costs that arise from third party claims arising from that breach. This principle and the situations described above all fully addressed by WorldCom's proposed Section 19.2 under Issue IV-106.

Verizon's assertion that it cannot be held liable for any harm to a CLEC's customers because it has "no relationship" with the CLEC customers, Verizon Exh. 13, Verizon Direct Test. General Terms and Conditions at 34, and its proposal that WorldCom should accept language that would hold Verizon harmless for any claims arising out of such harm, misses the point. Although WorldCom has a more direct relationship with its customers than does Verizon, that relationship only impacts the expectation that WorldCom will bear the responsibility for errors that WorldCom might make when gathering directory listing information from its customers. See WorldCom Exh. 21, Direct Test. of Harthun, Trofimuk, and Roscoe at 25. That relationship does not alter the fact that "beyond ensuring that the information transmitted to Verizon is correct, there is nothing more that WorldCom can do to protect its customers from errors that Verizon makes when publishing or disseminating that information." Id. Instead Verizon, as the party publishing and disseminating directory information, is the only party that can ensure that the publication or dissemination is accurate. See id.

WorldCom's proposal would not subject Verizon to any liability for damages beyond that which it should be expected to bear. Carriers' tariffs typically include limitations of liability for simple negligence in their tariffs, but cannot limit the carriers' liability for gross negligence or willful misconduct. See WorldCom Exh. 21, Direct Test. of Harthun, Trofimuk, and Roscoe at 26. Because WorldCom would assert its tariff defenses in response to any customer lawsuit (See Section 19.3.4 of WorldCom's proposed language), Verizon would only have to indemnify WorldCom for third-party claims that are not covered by the tariff defenses. See id.

In sum, Verizon should be obligated to indemnify WorldCom from any liability WorldCom faces from its (WorldCom's) own customers when that liability arises from personal injury and property damage caused by Verizon, and for breach of contract (including, a mistake in the publication or dissemination of directory listing information) caused by Verizon. WorldCom is willing to offer Verizon the reciprocal indemnification for harms caused by WorldCom. The costs of liability should be borne by the party most able to avoid the loss. See id. at 25. As WorldCom's witnesses succinctly stated, "WorldCom should not be the guarantor of Verizon's mistakes." Id.

Accordingly, the Commission should accept WorldCom's proposed Part A Sections 19.1 through 19.4, and should reject Verizon's proposed contract language.

Issue IV-113 (Changes In Law)

WorldCom has proposed that the Interconnection Agreement contain a provision indicating that the parties shall negotiate to amend the agreement if there are changes in law that materially affect the parties' obligations regarding the provision of services or other matters covered by the Agreement. Pursuant to WorldCom's proposed language, if the parties cannot reach agreement through good faith negotiation, the issue should be decided through a dispute resolution process. See WorldCom Exh. 16, Direct Test. of Harthun, Trofimuk, and Roscoe at 52. This is a critical issue because WorldCom and Verizon frequently cannot agree on the impact or implementation of court decisions or Commission orders. See id. Although Verizon has not disputed the necessity of a change-in-law provision,[109] it has proposed the addition of language that would give Verizon the right to discontinue providing service on short notice if Verizon believes that applicable law no longer requires it to provide that service. See Verizon Proposed Interconnection Agreement § 25.8. As set forth below, "[u]nder no circumstance should Verizon be able to simply impose its view of the effect of a given change of law in the face of a good faith dispute on that question." WorldCom Exh. 16, Direct Test. of Harthun, Trofimuk, and Roscoe at 52. Therefore, the Commission should adopt WorldCom's proposed change-in-law provision, which appears at section 25.2 of WorldCom's proposed interconnection agreement,[110] and reject Verizon's proposed language.

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[109] In fact, Verizon has implicitly agreed to WorldCom's proposed change-in-law provision (Section 25.2).

[110] To the best of WorldCom's knowledge, WorldCom has not arbitrated this issue with Verizon. WorldCom has not yet determined whether this issue has been arbitrated with another carrier, but will provide that information in the reply brief.

WorldCom's proposed change-in-law provision is consistent with this Commission's recognition in the Local Competition Order that interconnection agreements must be sufficiently flexible to accommodate changes in governing statutory or regulatory law. WorldCom's contract language provides "an orderly process for ensuring that such changes are properly incorporated into the agreement," WorldCom Exh. 21, Direct Test. of Harthun, Trofimuk, and Roscoe at 52, and allows the resulting amendments to be "mutually accomplished." Id. at 54-55. Given the parties' frequently divergent interpretations of changes in law, it is critical that both parties be involved in the amendment of the interconnection agreement. See id.

Verizon's proposed modification to WorldCom's language is unreasonable in several respects. At the outset, by granting Verizon a right to terminate a service if it believes that a change in law no longer requires it to provide that service, Verizon's provision effectively nullifies the change-in-law process established in the WorldCom proposal. See id. at 54. As explained by WorldCom's witnesses, Verizon's proposal gives WorldCom "no means of expressing its disagreement with Verizon's reading of the new applicable law, or of protecting its customers from the effects of an erroneous termination of service, short of rushing to a state commission and seeking some form of emergency stay." Id. at 54. Such a unilateral process is inconsistent with the very purpose of interconnection agreements, which is "to memorialize, with some specificity, both parties' views of their legal obligation." Id. Moreover, as discussed elsewhere in the brief, such a process is particularly inappropriate when Verizon's "remedy" for the perceived changes-in-law is as disruptive as the termination of service. See id. at 55.

Although Verizon suggests otherwise, WorldCom's proposed language neither denies Verizon the benefit of changes in law nor holds Verizon hostage to obsolete legal requirements. See Verizon Exh. 13, Direct Test. General Terms and Conditions at 30. WorldCom's proposed language simply protects against potential differences in the WorldCom and Verizon interpretation of changes in law by establishing a mutual process for addressing such changes. See WorldCom Exh. 21, Direct Test. Of Harthun, Trofimuk, and Roscoe at 55. As explained by WorldCom's witnesses, "[I]f a change in law clearly does allow Verizon to terminate certain services, WorldCom will agree and promptly amend the contract. If, however, the law is less clear, negotiation is the only fair way to resolve the dispute. If the parties are unable to agree during negotiation, they may seek commission review of the effect of the legal change whose meaning is disputed." Id.

Verizon's behavior in the aftermath of the Eighth Circuit decision regarding combinations also highlights the need for change-in-law provisions like those that WorldCom has proposed. See id. Verizon interpreted the Eighth Circuit's decision as allowing it to refuse to provide WorldCom with a combination of two or more elements that are regularly combined in its network if such elements were not already combined at the moment WorldCom placed the order. See id. Unsurprisingly, WorldCom strongly disagrees with Verizon's broad reading of the Eighth Circuit's decision. Allowing Verizon to unilaterally implement this interpretation would seriously harm competition. See id. "This is precisely the type of dispute that is not appropriate for the type of self-help termination that Verizon has proposed." Id.

Even if Verizon were allowed to terminate a service offering, neither the 30 nor

45 day periods that Verizon has proposed is workable. See id. These proposed time periods are too short to provide WorldCom with adequate time to seek commission review of Verizon's decision. See id. In addition, it would take considerably more than 30 or 45 days to take the necessary transitional steps to avoid interrupting existing customers' service.[111] See id. These periods are simply too short.

In sum, negotiation is "the only reasonable and fair way to resolve [] disputes" regarding changes in law, and the Commission should therefore order the inclusion of WorldCom's Part A Section 25.2, and reject Verizon's proposed language.

[111] For example, if the FCC were to decide that local switching is no longer required, and Verizon terminated the availability of local switching upon 30 days' notice, WorldCom's UNE-P customers would suffer severe interruptions of service. It would require significantly more than 30 days to transition those customers to WorldCom switches. WorldCom Exh. 21, Direct Test. of M. Harthun, J. Trofimuk and L. Roscoe at 52.