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December 14, 2001

File No: 46001.000278

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RECEIVED

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
Capitol Heights Facility
9300 East Hampton Drive
Capitol Heights, MD 20743

DEC 14 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

WorldCom, Cox, and AT&T ads. Verizon
CC Docket Nos. 00-218, 00-249, and 00-251

Dear Ms. Salas:

Enclosed please find four copies of Verizon VA's Opposition to Motion to Strike of WorldCom, Inc. Please do not hesitate to call me with any questions.

Sincerely,



Kelly L. Faglioni
Counsel for Verizon

KLF/ar

Enclosures

cc: Dorothy T. Attwood, Chief, Common Carrier Bureau (8 copies) (By Hand)
Jeffery Dygert (w/o enclosure) (by mail)
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December 14, 2001
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With enclosures, via email and UPS-Next Day:

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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

RECEIVED

DEC 14 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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 Inc., Pursuant to Section 252(e)(5))
of the Communications Act for Preemption)
of the Jurisdiction of the Virginia)
Corporation Commission Regarding)
Interconnection Disputes With Verizon)
Virginia Inc.)

CC Docket No. 00-251

**VERIZON VIRGINIA INC.'S OPPOSITION TO
MOTION TO STRIKE OF WORLDCOM, INC.**

The heart of WorldCom's Motion to Strike is a claim that "Verizon has suggested new contract provisions on over 30 issues" in a manner inconsistent with WorldCom's "notions of fundamental fairness." WorldCom Motion to Strike at 5. The complete record -- and not just the selective filings WorldCom chooses to review -- demonstrate that Verizon VA did *not* suggest "new contract provisions on over 30 issues" and that WorldCom has had a full and fair opportunity to rebut Verizon VA's substantive positions on the open issues. WorldCom's Motion highlights no substantive failing of Verizon VA, but only WorldCom's own strategic decision to

- prematurely file a Petition for Arbitration;
- articulate issues inappropriate for arbitration;
- ignore its duties as a Petitioner under § 252(b)(2) of the Act and the Commission's arbitration procedures; and finally,
- inappropriately attach preclusive significance to a demonstrative tool that maps the issues to the record evidence, the parties' arguments, and proposed contract language.

Accordingly, WorldCom's Motion to Strike should be denied.

I. VERIZON VA HAS NOT SUGGESTED "NEW CONTRACT PROVISIONS ON OVER 30 ISSUES."

During the course of the hearings, it became apparent that (i) WorldCom was giving more significance to the JDPL than to the pre-filed testimony of the witnesses¹ and (ii) the parties' respective JDPL entries did not always contain all contract language pertinent to an issue or the most updated contracted language in light of the pre-filed testimony, mediation, ongoing negotiations, or testimony at the hearing. Accordingly, the Commission directed the parties to

¹ See WorldCom Motion at 3, in which WorldCom admits its own strategic decision to focus only on the JDPL in filing its testimony and preparing cross-examination.

submit corrected and updated JDPLs on the *unresolved* issues.² Thus, it should be no surprise to WorldCom that Verizon VA's November JDPL entries differed from its September JDPL entries, as did the entries of other parties.³

Notwithstanding Verizon VA's edits to the September JDPL, WorldCom is simply incorrect in asserting that Verizon VA suggested "new contract provisions on over 30 issues." The nature of Verizon VA's edits to the September JDPL are consistent with the Commission's purpose in requesting the corrected and updated JDPL. That is, Verizon VA sought to ensure that the JDPL included (i) all contract language pertinent to an issue and (ii) contract language updated to reflect Verizon VA's most current substantive proposal on an issue.

Despite WorldCom's insistence that Verizon VA suggests "new contract provisions," the vast majority of Verizon VA's edits to the September JDPL merely inserted verbatim some additional relevant sections from previous JDPLs or from the contract Verizon VA (i) proposed to WorldCom prior to initiation of this arbitration and (ii) filed with Verizon VA's Answer on May 31, 2001. *See Exhibit C-1 to Verizon VA's Answer (Verizon VA's proposed interconnection agreement with WorldCom)*. For the Commission's convenience, **Exhibit B** reflects the edits derived from Verizon VA's previous JDPLs or originally filed, proposed interconnection agreement with WorldCom.⁴ That WorldCom seemingly never read or responded substantively

² *See, e.g.*, Tr. at 1319-20 (Verizon VA witness D'Amico clarified that Verizon VA's intent was that the CLEC would establish one IP per local calling area); Tr. at 1312, 1315 (Verizon VA informed the Commission Staff that it would update its contract proposals for WorldCom and Cox on Issue I-1 to reflect the AT&T proposal).

³ *See Exhibit A*, reflecting AT&T's and WorldCom's substantive edits to the September JDPL, resulting in the November JDPL (omitting minor edits and corrections).

⁴ Specifically, contrary to WorldCom's suggestion that the language is "new," Exhibit B shows in (i) bold all the language previously contained in the contract Verizon VA proposed to WorldCom (Exhibit C-1 to Verizon VA's Answer) and (ii) italic all the language that appeared in a previous JDPL. A quick

(continued...)

to Verizon VA's contract proposals was cited by Verizon VA in its (i) Motion to Dismiss WorldCom's Petition for Arbitration to the Virginia Commission, (ii) Opposition to WorldCom's Petition for Preemption of the Virginia Corporation Commission, (iii) Response to Pre-Filing Memorandum, (iv) Answer, and (v) Motion to Dismiss WorldCom's Petition for Arbitration to this Commission. WorldCom mischaracterizes language provided to it long before this arbitration and again in the context of this arbitration as "new contract provisions" because it did not appear in Verizon VA's September JDPL and apparently because it still refuses to read the contract Verizon VA proposed to it. Yet, the failure to transfer all language from the contract to the related issue in the JDPL is precisely why the Commission asked for the November JDPL.

Verizon VA's few remaining edits to the JDPL that are the subject of Worldcom's Motion reflect Verizon VA's efforts to (i) update its proposed contract language and JDPL entries to reflect Verizon VA's substantive proposal on a particular issue as set forth or clarified in testimony, either pre-filed or at the hearing, or (ii) to ensure consistency and correct mistakes (which WorldCom has claimed it would not complain about). **Exhibit C** identifies and explains these few remaining edits, including citations to the record, when appropriate, where Verizon VA set forth its substantive position on the open issue. Again, this is a task the Commission directed the parties to undertake in providing the updated November JDPL. Updating contract language to conform to testimony does not make the resulting contract language a "new proposal" as WorldCom claims when WorldCom was fully informed of, and presented with a full and fair opportunity to explore Verizon VA's substantive position as articulated in testimony on the open issues.

review of Exhibit B demonstrates that the vast majority of the language is italics or bold, and thus, not "new" as WorldCom asserts.

Like Cox in its Objection and Motion for Sanctions, WorldCom also takes a myopic view when it claims that Verizon VA's proposals are "new" because they were not in the JDPL for WorldCom prior to November. WorldCom fails to recognize that the JDPL does not define the parameters of the record for this proceeding. As Verizon VA pointed out with respect to Cox's Motion, the JDPL is only a tool reflecting a snapshot in time, and must be considered in the context of all the record evidence. That record evidence clearly contained Verizon VA's proposals referenced in Exhibit C to WorldCom. Moreover, the JDPL for all parties was an evolving document reflecting both the negotiations that continued prior to the hearing and events at the hearing.⁵ Each version of the JDPL, contained substantive revisions, and the November filing reflected all that had preceded it.

II. "NOTIONS OF FUNDAMENTAL FAIRNESS" REQUIRE DENIAL OF WORLDCOM'S MOTION TO STRIKE.

The Commission's request for the two categories of edits discussed above -- (1) mapping previously filed contract language into the JDPL and (2) updating or correcting proposed contract language to conform to testimony -- does not conflict with due process. To the contrary, striking Verizon VA's proposed contract language would be inconsistent with the decision-making process set forth in the Act, the Commission's Orders, and "notions of fundamental fairness."

⁵ See Tr. at 1311-13 (Assistant Chief Dygert noted that this proceeding is a "complicated process" but would like to see "everything" come to "rest" so the Commission Staff could conveniently compare contract language in the JDPL); Exhibit A, reflecting AT&T's and WorldCom's substantive edits to the September JDPL, resulting in the November JDPL.

A. Worldcom Had Notice Of, And Opportunity To Respond To, Verizon VA's Substantive Positions.

Due process is flexible and calls for such procedural protections as the particular situation demands. *Morrissey v. Brewer*, 408 U.S. 417, 481 (1972). The fundamental requirement of due process is the opportunity to be heard “at a meaningful time in a meaningful manner.”

Armstrong v. Manzo, 380 U.S. 545, 552 (1965). WorldCom has had just such a full and fair opportunity to rebut Verizon VA's substantive positions on the open issues. See **Exhibit C**. As discussed above, WorldCom had notice of the majority of the contract language about which it now complains even before it filed its Petition for Arbitration. Also as discussed above, with respect to a smaller subset of edits, Verizon VA's update of its contract language to conform to testimony does not equate to a “new proposal” as WorldCom incorrectly suggests. Thus, considering Verizon VA's edits to the JDPL, along with the other parties' edits to the JDPL, does not deny WorldCom procedural due process.⁶

B. Striking Verizon VA's Proposed Contract Language Would Be Inconsistent With The Decision-Making Process Set Forth In The Act And Commission's Orders.

In its Motion, WorldCom attaches preclusive significance to the JDPL that does not exist under the Act or the Commission's orders applicable to this arbitration. Specifically, § 252 of the Telecommunications Act of 1996 (“Act”) makes clear that the end-result of a § 252 arbitration will be an order resolving open *issues*. Pursuant to § 252(b), a party “may petition a State commission to arbitrate any open *issues*” (emphasis added). In doing so, § 252(b)(2) requires submission of all relevant documentation concerning “unresolved *issues*” (emphasis

⁶ Moreover, although WorldCom suggests that a “factual submission is . . . a critical component of pressing a claim,” WorldCom Motion at 7, n. 6, it fails to identify what facts it believes are critical to the Commission's consideration of the 30 issues of which it complains or why addressing the proposals in brief is insufficient.

added). Following arbitration the commission “shall resolve each *issue* set forth in the petition.” § 252(b)(4)(C) of the Act (emphasis added); *accord* § 252(c) (setting forth standards for resolving “open issues”).

With the focus of the § 252 arbitration on resolution of open *issues*, the Act then contemplates a second and distinct step: submission of an interconnection agreement for approval. Section 252(e) of the Act (“[a]ny interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission”); *accord* § 252(c)(3) (“[i]n resolving by arbitration . . . any open issues . . . a State commission shall . . . provide a schedule for implementation of the terms and conditions by the parties to the agreement.”). Following the arbitration of open issues, the parties to the arbitration must implement the arbitration order by drafting an interconnection agreement consistent with that order and submitting that agreement for approval. Thus, the Act’s statutory scheme contemplates an order on the substantive *issues* followed by implementation of the order -- that is, finalizing the interconnection agreement in a manner consistent with the order -- and, finally, submission of the agreement for approval.

Although the parties’ proposed contract language associated with an open issue is a primary and important tool for resolving open issues, the parties’ proposed contract language generally, and the JDPL specifically, do not have the preclusive effect WorldCom attempts to give them under the Commission’s procedural orders applicable to this arbitration. *See e.g.*, January 19, 2001 Order ¶¶ 4-6 (giving the arbitrator discretion to (i) require the parties to submit new final offers, or (ii) adopt a result not submitted by any party). In addition to the JDPL, which was admitted as a “demonstrative” exhibit only in this arbitration,⁷ the Commission provided for a Petition for Arbitration, an Answer, proposed contracts, other documentation, and

⁷ Tr. at 10.

testimony, both pre-filed and at the hearing. *See* February 1, 2001 Order at 2-5, 6-9. None of these aspects of the record should be disregarded in favor of the JDPL, particularly in light of the arbitrator’s discretion to require updates or adopt results not submitted by either party.

Moreover, as a practical matter, striking Verizon VA’s proposed contract language⁸ does not change the Commission’s ability to consider the substantive position Verizon VA explained in its pleadings and testimony and to order a result consistent with that position. Whether the contract language is in the JDPL or not, the Commission can “adopt results not submitted by either party.” January 19, 2001 Order ¶ 4. Based on Verizon’s pleadings and testimony, such a Commission decision would still be supported in the record. Accordingly, striking Verizon VA’s proposed contract language, while inconsistent with the decision-making process set forth in the Act and the Commission’s orders, would do little to change what the Commission can order at the end of this arbitration. This arbitration process has been aided by the parties’ focus and attention to contract language and how it reflects the substantive positions each has explained in testimony. However, it is WorldCom’s post-hearing insistence that the Commission should ignore all but the JDPL that is inconsistent with “notions of fundamental fairness.”

C. WorldCom Should Not Be Heard Now To Complain About Its Own Strategic Decisions Or A Process That Reflects Ongoing Negotiations.

WorldCom’s post-hearing complaint about “notions of fundamental fairness” associated with Verizon VA’s edits to the September JDPL rings hollow in light of WorldCom’s own strategic decisions to

- prematurely file a Petition for Arbitration;

⁸ *See* WorldCom Motion at 8-9 (it is important to note that WorldCom requests to strike contract language but makes no request to strike testimony).

- articulate issues inappropriate for arbitration;
- ignore its duties as a Petitioner under § 252(b)(2) of the Act and the Commission’s arbitration procedures; and finally,
- inappropriately attach preclusive significance to a demonstrative tool that maps the issues to the record evidence, the parties’ arguments, and proposed contract language.

WorldCom’s strategic decisions contributed to a fluid process that reflected the ongoing negotiations encouraged by the Commission and embraced by WorldCom.

1. WorldCom’s Premature Petition for Arbitration And Subsequent Filings Underlie Any Difficulty in Matching Up Contract Language With Issues.

Before the parties even resolved the threshold question of which document would provide the baseline for further negotiations, WorldCom prematurely filed a Petition for Arbitration with Virginia State Corporation Commission (“Virginia Commission”). That threshold “battle of the forms” question has continued to haunt the filings throughout this proceeding. Verizon VA challenged the fairness and appropriateness of conducting an arbitration of an interconnection agreement from this flawed starting point at every opportunity.

First in Verizon VA’s Motion to Dismiss WorldCom’s Petition for Arbitration to the Virginia Commission, Verizon VA explained the procedural history of the parties’ negotiations, including WorldCom’s unilateral decision to carve out the Virginia negotiations from the ongoing national negotiations so that it could prematurely pursue arbitration in Virginia.⁹ As Verizon VA explained therein, there had been no substantive negotiations between the parties, making WorldCom’s Petition for Arbitration premature and inconsistent with the requirements of §§ 251 and 252 of the Act. Verizon VA again voiced its concern about the lack of substantive

⁹ In addition, WorldCom’s opening briefs make it clear that it was never interested in negotiating an interconnection agreement with Verizon VA. See WorldCom opening brief at 2 (“[w]e must be able to rely on *our* agreement . . .”) (emphasis added). Instead of reaching an agreement *with* Verizon VA, WorldCom wants to force its agreement on Verizon VA for use on a nationwide basis.

negotiations or a starting point document when it opposed WorldCom's Petition for Preemption of the Virginia Commission.

Next, in Verizon VA's Response To Petitioners' Prefiling Memorandum, Verizon VA questioned how WorldCom could satisfy its duties as a Petitioner under § 252(b)(2) of the Act and the Commission's arbitration procedures:

Verizon agrees with the statement in the Prefiling Memorandum at page 3 that "no substantive discussions of issues ever took place between the parties [Verizon and WorldCom]." Given that there have been no substantive negotiations, Verizon remains perplexed as to how WorldCom will fulfill the requirements contained in the Arbitration Procedures for the Petitions for Arbitration, including:

- the requirement in Section 2.1(c) to list "every unresolved issue, categorized by subject matter, and the position of each of the parties on each issue (Statement of Unresolved Issues);"
- the requirement in Section 2.1(d) to list "the issues that have been resolved by the parties;" and
- the requirement in Section 2.1(e) to provide the "most current version of the interconnection agreement being negotiated by the parties, if any, containing both the agreed upon language and the disputed language each party proposes."¹⁰

Particularly problematic as to the latter is the fact that there is essentially no agreed upon language between Verizon and WorldCom. The arbitration process contemplated by the Act and the Commission's Arbitration Procedures is designed to resolve open issues – not to craft the entire interconnection agreement for the parties.

Verizon VA's Response to Prefiling Memorandum at 3-4.

After WorldCom filed its Petition for Arbitration before this Commission, Verizon VA remained unsatisfied that WorldCom had fulfilled its duties as a Petitioner under § 252(b)(2) of the Act and the Commission's arbitration procedures, noting the procedural deficiencies and

¹⁰ The Arbitration Procedures provide, at § 2, that "[f]ailure to comply with these requirements may result in dismissal of the Petition for Arbitration."

difficulties of proceeding. *See* Verizon VA Answer (noting that WorldCom (i) presented Verizon VA with a fourth new proposed contract at the time it filed its Petition for Arbitration with this Commission, (ii) failed to respond at all to the substance of Verizon VA's proposed agreement, (iii) failed to articulate issues appropriate for arbitration, (iv) rebutting WorldCom's false claim that it had not received or had the opportunity to review Verizon VA's substantive positions, and (v) explaining Verizon VA's proposed interconnection agreement to WorldCom).

Accordingly, in response to the Commission's invitation in its July 2, 2001 correspondence for the parties to raise any challenge to the appropriateness for arbitration of any issue listed in the Petitions for Arbitration, Verizon VA did just that in its July 9, 2001 correspondence. Verizon VA identified a number of issues for which WorldCom failed to meet its burden to identify and articulate the particular substantive issue in dispute. As Verizon VA explained at that time, WorldCom's tactic prejudiced Verizon VA, leaving it with the impossible task of preparing a case on unknown issues, pointing out that in most cases, WorldCom simply asked whether a topic should be addressed in the interconnection agreement and then proposed (often pages of) particular language, without providing either the Commission or Verizon VA notice as to the nature or substance of the alleged underlying dispute. *See* Verizon VA's July 9 correspondence.

In short, WorldCom set this arbitration prematurely in motion having failed to (i) conduct substantive negotiations on the merits of the issues, (ii) reach an agreement on a starting point document, (iii) review or respond to Verizon VA's proposed interconnection agreement, or (iv) articulate the nature or substance of the underlying dispute. Importantly, WorldCom failed to provide a redlined interconnection agreement reflecting "the most current version of the interconnection agreement being negotiated by the parties, if any, containing both the agreed

upon language and the disputed language each party proposes.” February 1, 2001 Order at 3 (§ 2.1(e)). WorldCom’s premature Petition for Arbitration, accompanied by its materially differing contract and lack of a redline, forced Verizon VA to play catch-up and keep up in a proceeding in which it was charged with responding to the Petitions, testimony, discovery requests, and other filings of three different Petitioners with three different contracts in generally the same time frames as applied to each of the Petitioners. Complicating the process further, it was WorldCom that first suggested Commission-supervised mediation as a way of addressing the concerns Verizon VA articulated about WorldCom’s defective Petition for Arbitration.

Although the parties’ mediation resulted in settlement of a significant number of open issues, the mediation did little to ameliorate the disconnect between the parties’ proposed interconnection agreements on the remaining open issues. Nevertheless, following WorldCom’s lead as Petitioner, Verizon VA filed its own proposed contract and generally attempted to work within the issues WorldCom had articulated to get to the heart of the parties’ substantive differences on the terms and conditions of interconnection. However, at the end of this process, WorldCom should not be heard to complain about Verizon VA’s difficulty in matching up the contract language it previously provided to WorldCom and filed with this Commission with the defective issues WorldCom articulated. If WorldCom is now surprised by contract language included in Verizon VA’s previous filings, it is because WorldCom chose not to read them, instead making the strategic decision to rely entirely on the JDPL over Verizon VA’s proposed contract and testimony.¹¹ This is not a reasonable basis to deny Verizon VA the opportunity to make the corrections the Commission invited.

¹¹ See WorldCom Motion at 3 (WorldCom decided to rely on the JDPL in preparing testimony and cross, instead of relying on Verizon VA’s pre-filed direct and rebuttal testimony).

2. *WorldCom Embraced And Actively Participated In Ongoing Negotiations.*

As discussed above, this arbitration has been a fluid, evolving process, with both WorldCom and Verizon VA actively participating in ongoing negotiations. But for the parties' continued efforts at formal and informal negotiations, there would be many more open issues requiring Commission resolution. The Commission has encouraged the parties to continue their efforts to resolve or at least narrow their differences on both a formal and informal basis.¹² On many issues, through the course of the testimony and negotiations, that is exactly what happened. Nothing about the ongoing development of the parties' substantive positions through testimony and negotiations results in a due process deprivation to WorldCom. As discussed herein, WorldCom's premature initiation of the arbitration process made ongoing post-petition negotiations more critical. Moreover, because WorldCom had notice of and an opportunity to respond to Verizon VA's substantive positions on the open issues, there is no fundamental unfairness in allowing Verizon VA to conform its contract language to its testimony as directed by the Commission.

III. CONCLUSION

The majority of Verizon VA's edits to the November JDPL about which WorldCom complains do not consist of "new contract language" as WorldCom mistakenly claims. For the few edits that do reflect new language, such edits do not reflect new *proposals* as WorldCom suggests. Despite the fact that WorldCom's own strategic decisions complicated the arbitration process and its movement toward resolution of open issues, WorldCom has had a full and fair

¹² See July 11, 2001 Letter from Jeffrey H. Dygert, Assistant Chief, Common Carrier Bureau, to all parties (establishing that the parties submit to Staff-supervised mediation on issues deemed appropriate for mediation by the parties).

opportunity to review and respond to Verizon VA's substantive proposals. The Commission acted well within the bounds of the Act and its orders in directing the parties to edit the JDPL to correct errors and provide updated contract proposals. Verizon VA has done no more. Accordingly, Verizon VA asks that the Commission deny WorldCom's Motion to Strike.¹³

Respectfully submitted,



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¹³ The Commission likewise should deny WorldCom's "me too" request for sanctions. *See* WorldCom Motion at 2 n.2. Verizon VA has no idea what WorldCom means when it says it "concurs" in Cox's objections. But, for the reasons explained herein for denying WorldCom's Motion to Strike and because WorldCom cannot be troubled to explain the merits of a request for sanctions, the Commission should not consider it, much less grant it.

CERTIFICATE OF SERVICE

I do hereby certify that the foregoing Verizon Virginia Inc.'s Opposition To Motion To Strike Of WorldCom, Inc. was sent as follows this 14th day of December, 2001 by e-mail and overnight, express delivery:

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