

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
Petition of WorldCom, Inc. Pursuant)
to Section 252(e)(5) of the) CC Docket No. 00-218
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)
)
In the Matter of) CC Docket No. 00-249
Petition of Cox Virginia Telecom, Inc., etc.)
)
)
In the Matter of) CC Docket No. 00-251
Petition of AT&T Communications of)
Virginia Inc., etc.)

VERIZON VIRGINIA INC.'S MOTION TO PERMIT PARTIES TO SUPPLEMENT THE RECORD

Verizon Virginia (“Verizon VA”) hereby moves the Commission to permit the parties to supplement the record with relevant evidence or arguments in light of the numerous legal and factual developments that have transpired in the approximately seventeen months since the cost studies were filed and the year since the hearings ended. The inclusion of this additional evidence and briefing would allow the Commission to make a more informed decision concerning the rates for unbundled network elements (“UNEs”) in Virginia. Further, if the Commission sets an expeditious and streamlined schedule with *strict* page limits, as Verizon proposes here, providing the parties a limited opportunity to supplement the record would not interfere with the Commission’s and all parties’ interest in a timely resolution of this proceeding.

The Commission opened this proceeding on January 19,2001. See Memorandum Opinion and Order, *Petition of WorldCom, Inc. for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996 and for Arbitration of Interconnection Disputes with Verizon-Virginia, Inc.*, 16FCC Rcd 6224 (2001). The parties submitted cost studies in July 2001. After the parties submitted written testimony, the Commission conducted live hearings between October 22,2001 and November 29, 2001, followed by briefing by the parties.

The record compiled by the Commission in this matter is of course extensive. However, since the cost studies were filed and the hearings occurred, the telecommunications market has undergone dramatic structural changes, the Commission itself has issued no fewer than eight section 271 orders (accounting for fourteen states. *including Virginia*) addressing various aspects of its requirements regarding UNE pricing, and the Supreme Court and D.C. Circuit have issued important guidance regarding the scope of carriers' unbundling obligations and the factors to be taken into account in determining the proper compensation for the provision of UNEs. Under the Commission's rules with respect to petitions for reconsideration filed not only after the record has closed, but after a *decision has issued*, the Commission will consider "facts not previously presented where, among other things, they "relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters." 47 C.F.R. § 1.106(b)(2)(i). It makes even more sense to apply that principle where the Commission has not yet issued a decision but is still considering the evidence, especially where the submission of new evidence will provide the Commission **with** information that **will** allow it to *make* a more informed (and lawful) decision. Indeed, in order to conserve agency resources, it is preferable that, to the extent possible, the Commission have before it the evidence that is the most relevant

and accurate when making its decision so that there will be no need, *after* the fact, to consider such evidence on a petition for reconsideration.

Commission consideration of the additional evidence and arguments would be consistent with the directives of the D.C. Circuit, which has made clear that “[t]he FCC retains discretion to . . . reopen the record, to ensure that it fully accounts for relevant factual and legal developments.” *Radio-Television News Dirs. Ass’n v. FCC*, 184F.3d 872, 888 (D.C. Cir. 1999). Indeed, the court has explained that supplementing the record is appropriate where — as here — failure to do so would raise serious doubts “about whether the agency chose properly from the various alternatives open to it.” *United Mine Workers of America v. Dole*, 870 F.2d 662, 673 (D.C. Cir. 1989).

In this case, refusal to consider evidence and briefing relating to the legal and factual developments since the cost studies were filed and the hearings occurred — or evidence that was simply unavailable at that time — would undermine the great care and attention the Commission and the parties have accorded this proceeding. In the interest of ensuring that the rates the Commission sets in this proceeding — rates that likely will remain in effect for several years or more — properly reflect relevant legal and market developments and the best current measure of the cost of provisioning UNEs in Virginia, Verizon respectfully requests that the Commission reopen the record to allow the parties a limited opportunity to submit new cost evidence. It is especially important not to rely on outdated or insufficient evidence that may grossly understate costs and result in rates that would artificially discourage facilities-based competition in favor of uneconomic UNE-based competition. As the D.C. Circuit explained just weeks ago, the Act “manifest[s] a preference for facilities-based competition” over “parasitic free-riding.” See *Competitive Telecommunications Ass’n v. FCC*, No. 00-1272, 2002 WL 31398290, at *8 (D.C.

Cir. Oct. **25,2002**). This goal can be achieved only if rates are set based on a record that fully reflects the relevant cost evidence.

In making its decision on this motion, the Commission should take into account the following considerations. First, during the course of this year, the Supreme Court, the D.C. Circuit, and this Commission have issued a plethora of decisions explaining the nature of the TELRIC pricing methodology. Almost none of the evidence presented during this proceeding accounted for these clarifications. The Supreme Court's opinion in *Verizon Communications Inc. v. FCC*, **122 S. Ct 1646** (2002), for example, highlights and clarifies the types of costs, adjustments, and other evidence that is of particular relevance and should be considered in a UNE rate proceeding. To pick just one example, the Supreme Court emphasized both that the **11.25%** baseline cost of capital set by the Commission was a "reasonable starting point" for return on equity calculations and that a state commission may adopt a *higher* cost of capital when the evidence before it demonstrates that this baseline is too low. *See id.* at **1678**. Because "TELRIC itself prescribes no fixed percentage rate as risk-adjusted capital costs," that figure should "be adjusted upward if the incumbents demonstrate the need." *Id.* at **1677**. Just weeks later, the D.C. Circuit emphasized the regulatory risks resulting from TELRIC pricing. *See United States Telecom Ass'n v. FCC*, 290 F.3d **415** (D.C. Cir. **2002**). There, the court emphasized the risk that TELRIC pricing "reduces the incentives for innovation and investment in facilities." *Id.* at **424**. As the court noted: "Some innovations pan out, others do not. If parties who have not shared the risks are able to come in as equal partners on the successes, and avoid payment for the losers, the incentive to invest plainly **declines.**" *Id.*

Likewise, the Commission itself has also commented extensively on UNE pricing over the course of the year as it has considered section **271** applications filed by Verizon and other

carriers. The pricing issues addressed in the resulting orders include many that were raised during the course of the Virginia arbitration; the Commission's consideration of these issues may warrant revisiting the relevance of the cost data previously submitted in supplemental briefs or the need to supplement the record to address these issues directly.

Second, in addition to the significant legal and regulatory developments, the market conditions under which Verizon has offered UNEs in Virginia and elsewhere have also changed dramatically over the course of the past year. Indeed, even AT&T agrees that market conditions have changed significantly in ways that affect costs, although it (erroneously) interprets these effects differently. **See** Opposition of AT&T Communications of Virginia LLC to Verizon Virginia Inc.'s Submission of Additional Record Evidence, CC Docket Nos. **00-218**, et al., at 9-11 (Sept. **27, 2002**) (arguing that cost of capital and switching costs should be reconsidered in light of market changes). As Verizon has explained before, **see** Verizon Virginia Inc.'s Submission of Additional Record Evidence, CC Docket Nos. **00-218**, et al. (Sept. **13, 2002**), the structure of the telecommunications industry is undergoing a fundamental change. Even as competition continues to develop rapidly, the industry is experiencing rising volatility. This restructuring represents a shift in the industry that is likely to continue for the foreseeable future. The increasing number of bankruptcy filings and other financial restructurings demonstrate that, while customers may not experience any service disruption, carriers are faced with significant disruption in the payment for and collection of UNE costs.

Similarly, developments in the marketplace have confirmed that competition continues to grow rapidly, further increasing the **risk** and cost of **providing UNEs**. **In particular, recent** experience has provided additional evidence concerning the risks of stranded investment as competition, especially from facilities-based competitors, takes hold. In fact, by the end of the

first six months of 2002, the number of lines served either wholly or partially over CLECs' own facilities (including in all cases their own local switches) had grown to between 17 and 25.4 million; CLECs also were serving an additional 141 million voice-grade equivalent circuits over their own networks as of that date. *See, e.g., UNE Rebuttal Report 2002*, Prepared for and Submitted by Verizon, et al. in CC Dockets 01-338, 96-98, 98-147 at 2-3 (filed October 2002). Cable telephony providers such as AT&T/Comcast and Cox now offer services to more than 10 percent of all U.S. homes (including in areas of Virginia); they actually serve more than 2 million lines; they are adding 100,000 new lines a month; and they have announced that they have achieved penetration rates as high as 30 or 40 percent in some markets. *Id.* There also is increasing internodal competition from wireless providers, which by the end of 2001 already had displaced some 10 million lines and even more minutes. *Id.* And non-traditional sources of competition such as e-mail, instant messaging, and emerging IP telephony services are displacing lines, minutes, and corresponding revenues. *Id.* These ongoing developments since the parties filed their cost studies more than a year ago, both in Virginia itself and in other areas where competitors focused most heavily initially, are directly relevant to, and serve to re-emphasize, the significant financial risks Verizon VA faces in providing UNEs.

UNE costs, of course, are closely linked to the risks inherent in the competitive and regulatory environments in which a carrier operates. As Verizon has explained, one consequence of this volatility has been a fourteen-fold increase in the magnitude of "uncollectible" CLEC payments for UNEs and wholesale services. Another consequence has been a significant increase in the opportunity costs associated with investing resources in the construction and provision of network elements used by competitors — that is, the cost of capital. And, as noted above, another consequence has been the increased risk (indeed, certainty)

that the combination of increasing facilities-based competition and the continued availability of at least some UNEs will lead to stranded investments and unrecovered costs. These are but a few aspects of UNE pricing that have been affected by dizzying change in the telecommunications market.

In these circumstances, the Commission would benefit from having the parties' views of the significance of the various legal developments and from having available to it the most up to date evidence of market developments that are directly relevant to the issues that must be decided in this proceeding. In contrast, the economic validity and lawfulness of the compensation provided by the Commission in this arbitration proceeding would be compromised if its decision were made without the benefit of evidence made available or relevant over the course of this year or to consider supplemental briefing evaluating the impact of such developments. Indeed, failure to consider these developments would increase significantly the appellate risk of any decision ultimately made by the Commission here, and produce continued uncertainty that benefits no one. Moreover, rates that are too low *even at the very moment they become effective* will fail to send proper pricing signals, and will therefore lead to continued investment disincentives and inefficient development of the Virginia local service market. And it is particularly important to get the rates right at the outset because, given the regulatory lag inherent in TELRIC recognized by the Supreme Court, *see Verizon v. FCC*, 122 S. Ct. at 1669 ("TELRIC rates in practice will differ from the products of a perfectly competitive market owing to built-in lags in price adjustments."), the rates that ultimately result from this proceeding likely will not be revisited for several years.

Verizon VA therefore respectfully requests that the Commission provide the parties a limited opportunity to supplement the record with additional evidence and arguments. In particular, Verizon VA proposes the following:

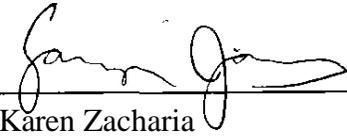
(1) Within a short period of a decision on this motion (say 2 weeks for illustrative purposes), the parties simultaneously file briefs (limited to **25** pages per side), written testimony (limited to 75 pages per side), and any supporting documentation.

(2) A short period thereafter (again, say 2 weeks for illustrative purposes), the parties file briefs (limited to **25** pages per side), responsive testimony (limited to **50** pages per side), and any documentation.

(3) **A** brief opportunity for a reply (say 1 week later).

These limited submissions will enable the Commission to issue a prompt decision based on an updated and complete record.

Respectfully **submitted,**



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Dated: November 22, 2002

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CERTIFICATE OF SERVICE

I do hereby certify that true **and** accurate copies of the foregoing Verizon Virginia Inc.'s Submission of Additional Record Evidence were served electronically and by overnight mail this 22nd day of November, 2002, to:

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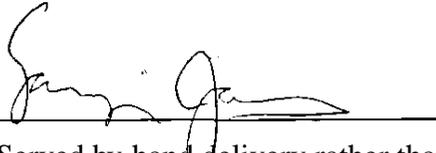
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A handwritten signature in black ink, appearing to read "J.G. Harrington", is written over a solid horizontal line.

* Served by hand delivery rather than overnight mail.