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July 2, 2002

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DELIVERY BY HAND

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

P-00021971

Re: Docket No. ~~A-310758F0002~~ A-310758F7008

Dear Secretary McNulty:

Enclosed please find an original and three (3) copies of the following documents: (1) the Motion of Verizon Pennsylvania Inc. to Dismiss the Petition of XO Pennsylvania, Inc., and (2) the Answer of Verizon Pennsylvania Inc. to the Petition of XO Pennsylvania, Inc.

Please do not hesitate to contact me if you have any questions.

Very truly yours,

Anthony E. Gay

Anthony E. Gay

AEG/mlc
Attachments

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ORIGINAL

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION
Harrisburg, Pennsylvania

Petition of XO Pennsylvania, Inc.	)	
for Resolution of Reciprocal	)	
Compensation Dispute Pursuant to	)	**Docket No. ~~A-310758F0002~~**
the Abbreviated Dispute Resolution	)	
Process	)	

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A-310758F700

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ANSWER OF VERIZON PENNSYLVANIA INC.
TO PETITION OF XO PENNSYLVANIA, INC.

Verizon Pennsylvania Inc. ("Verizon") hereby respectfully answers the petition filed by XO Pennsylvania, Inc. ("XO") on June 26, 2002.

XO's petition is meritless. XO claims that, from June 14, 2001 to the present, Verizon has unlawfully withheld reciprocal compensation payments for Internet-bound traffic. This Commission's May 29, 2002 order in docket A-310752F700[1/] reached precisely the opposite conclusion, however, and XO has presented nothing here to warrant overturning that decision. In its *May 29 Order*, the Commission construed *the very* agreement XO adopted – the agreement between MCImetro Access Transmission Services LLC and former Bell Atlantic - Pennsylvania, Inc. ("MCImetro Agreement") -- and found that a change-of-law provision in that agreement entitled Verizon to stop paying reciprocal compensation for Internet-bound traffic and start paying the FCC's lower rates, beginning June 14, 2001. Because XO also operates under the MCImetro Agreement, Verizon was entitled to discontinue reciprocal compensation payments to XO as of June 14, 2001. XO's petition must therefore be dismissed with prejudice.

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1/ Opinion and Order, *Petition of Verizon Pennsylvania Inc. for Resolution of Dispute Pursuant to the Dispute Resolution Process*, Docket A-310752F700 (Pa. P.U.C. May 29, 2002) ("*May 29 Order*").

As explained in more detail in Verizon's accompanying motion to dismiss, the Federal Communications Commission's ("FCC") *Order on Remand*[2] created a new intercarrier compensation regime for Internet-bound traffic. The *Order on Remand* specifically provided that the new intercarrier compensation regime could be implemented through change-of-law provisions in existing interconnection agreements.[3] In its *May 29 Order*, the Commission correctly held that a change-of-law provision in Section 1.1 of the Price Schedule (Attachment I) authorized Verizon to implement the FCC's new intercarrier compensation regime for Internet-bound traffic on June 14, 2001. Section 1.1 provides in relevant part:

> The rates or discounts set forth in Table 1 below may be subject to change and ***shall be replaced on a prospective basis (unless otherwise ordered by the FCC, the Commission, or the reviewing court(s)) by such revised rates or discounts as may be ordered[,] approved, or permitted to go into effect by the FCC, the Commission, or a court of applicable jurisdiction, as the case may be. Such new rates or discounts shall be effective immediately upon the legal effectiveness of the court, FCC, or Commission order requiring such new rates or discounts.***

(Attachment I, Section 1.1 (emphasis added).) The Commission correctly determined that Section 1.1 applied because the *Order on Remand's* new rates for Internet-bound traffic were "revised rates" that were "ordered, approved or permitted to go into effect by the FCC."[4] The Commission also correctly determined that, because Section 1.1 specified that such new rates are effective "immediately upon the effectiveness of the . . . FCC . . . order," the transition date from reciprocal compensation to the FCC's interim rates was June 14, 2001, the effective date of the *Order on Remand.*

2/ Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, FCC 01-131 (rel. April 27, 2001) ("*Order on Remand*").

3/ *Order on Remand* ¶ 82.

4/ *May 29 Order* at 13.

XO claims that the D.C. Circuit's recent decision remanding the *Order on Remand* to the FCC somehow undermines the Commission's ruling. This is incorrect. The D.C. Circuit did not vacate the *Order on Remand*. Instead, it left it very much in place and "simply remand[ed] the case to the [FCC] for further proceedings."[5/] As a result, the *Order on Remand* — including the FCC's "revised rates" for Internet-bound traffic that triggered the change-of-law provision in Section 1.1 — remains in force.[6/] Indeed, in addressing the effect of the D.C. Circuit decision, the FCC has declared that its "rules remain in effect" and has emphatically reaffirmed that "ISP-bound traffic is not subject to the reciprocal compensation provisions of section 251(b)(5)."[7/]

XO also incorrectly asserts that Verizon "represented to this Commission"[8/] that a decision like that of the D.C. Circuit would bar Verizon from invoking the change-of-law provision. This is nonsense: Verizon made no such representation. Moreover, the Commission has already resolved the issue of the effect of a remand by the D.C. Circuit in Verizon's favor: the ALJ *agreed* with Verizon that, in the event of a court decision concerning the *Order on Remand*, "[t]he agreement should be modified *only to the extent* of the court's stay, vacation, or modification,"[9/] and the Commission affirmed the ALJ's ruling. Because the *Order on Remand* was *not* vacated, and because the FCC's "revised rates" remain in effect, the D.C. Circuit's remand does not affect the Commission's *May 29 Order*.

5/ *WorldCom*, 288 F.3d at 434.

6/ *See, e.g., National Lime Ass'n v. EPA*, 233 F.3d 625, 635 (D.C. Cir. 2000) (regulations that are remanded but not vacated are "le[ft] . . . in place during remand"); *Sierra Club v. EPA*, 167 F.3d 658, 664 (D.C. Cir. 1999) (same).

7/ Memorandum Opinion and Order, *Joint Application by BellSouth Corp., et al., for Provision of In-Region, InterLATA Services In Georgia and Louisiana*, CC Docket No. 02-35, FCC 02-147 ¶ 272 (rel. May 15, 2002).

8/ XO Petition ¶ 28.

9/ Initial Decision Denying Petition Pursuant to the Abbreviated Dispute Process, *Petition of Verizon Pennsylvania Inc. for Resolution of Dispute Pursuant to the Dispute Resolution Process*, Docket A-310752F700 (Nov. 16 2001) at 13 (emphasis added).

VERIZON'S PARAGRAPH-BY-PARAGRAPH RESPONSE TO XO'S PETITION

Verizon responds to the numbered paragraphs in XO's petition as follows. All allegations not specifically admitted are hereby denied.

1. Verizon lacks sufficient information to admit or deny the allegations in paragraph

2. Verizon admits the allegations in paragraph 2.

3. Verizon agrees that this Commission has authority pursuant to section 252(e)(6) of the Telecommunications Act of 1996 to interpret previously-approved interconnection agreements, including the change-of-law provision in Section 1.1 of the Price Schedule of the MCImetro Agreement.

4. Verizon admits that the dispute concerning the implementation of the *Order on Remand* is an appropriate matter for resolution using the Commission's Abbreviated Dispute Resolution Procedures. Verizon denies that it violated the interconnection agreement between the parties.

5. Verizon admits that the parties have attempted to resolve the dispute concerning the implementation of the *Order on Remand* through negotiations for more than 30 calendar days and that this petition is ripe for review by the Commission.

6. Paragraph 6 attempts to characterize correspondence between the parties. This correspondence speaks for itself. Verizon admits that the parties have attempted to negotiate a resolution to the dispute concerning the implementation of the *Order on Remand* and have reached an impasse.

7. Verizon denies that it has categorically refused to pay late payment charges on any invoice amounts. Verizon also denies that the parties have attempted to negotiate a resolution to this dispute for more than 30 days, and therefore denies that this issue is ripe for resolution by the Commission. To Verizon's knowledge, XO has never raised this issue with Verizon's wholesale billing organization. In any event, because Verizon has already undertaken to pay XO the amount it demands, XO's claims are moot.

8. Verizon admits that XO adopted the MCImetro Agreement, and further admits the remaining allegations in paragraph 8.

9. Verizon admits that XO adopted the MCImetro Agreement, and that the MCImetro Agreement was effective September 3, 1997.

10. Verizon admits that XO has quoted accurately the provisions of the MCImetro Agreement. Verizon denies that these provisions encompass all pertinent reciprocal compensation terms.

11. Verizon denies the allegations in paragraph 11. In fact, the FCC recently confirmed in its Starpower decision that Internet-bound traffic is *not* "Local Traffic" under Virginia version of the MCImetro Agreement, which has identical definitions of "Local Traffic" and "Reciprocal Compensation,"[10/] and which also specifies that the FCC's traditional end-to-end jurisdictional analysis be used to determine whether traffic is local (or non local). Thus, the FCC found in its Starpower decision that the MCImetro Agreement does not and never did require payment of reciprocal compensation for Internet-bound traffic.

12. Verizon denies XO's characterization of provisions of the MCImetro Agreement. Those provisions speak for themselves. Moreover, Verizon believes the authoritative interpretation of the MCImetro Agreement by the FCC, the expert federal agency charged with interpreting the Act, carries more weight that XO's self-serving and erroneous assertions. The FCC has concluded that the MCImetro Agreement does not and never did require the payment of reciprocal compensation for Internet-bound traffic.

13. Verizon lacks sufficient information to admit or deny the allegations in paragraph

14. Verizon denies the allegations in paragraph 14. Verizon paid reciprocal compensation for Internet-bound traffic prior to June 14, 2001, the effective date of the *Order on*

10/ *Starpower Communications, LLC v. Verizon South Inc.*, File No. EB-00-MD-19, Mem. Op. and Order, FCC 02-105 (rel. Apr. 8, 2002).

Remand, only because, as acknowledged in XO's petition at paragraph 17, the Commission's *Global Order* required such payments as a policy matter, not because of any construction of the MCImetro Agreement.

15. Verizon denies the characterization of the prior rulings of the Commission in paragraph 15. Those rulings speak for themselves. Answering further, Verizon denies that the "Commission has comprehensively addressed the issue of reciprocal compensation for ISP traffic between CLECs and ILECs, and the standard that governs the interpretation of related provisions that are found in CLEC - ILEC interconnection agreements." The Commission determined in its *May 29 Order* that the change-of-law provision in Section 1.1 of the MCImetro Agreement – the same agreement at issue here – permitted Verizon to stop paying reciprocal compensation and to start paying the FCC's interim rates as of June 14, 2001, the effective date of the FCC's *Order on Remand.*

16. Verizon denies the allegations in paragraph 16. The Commission determined in its *May 29 Order* that the change-of-law provision in Section 1.1 of the MCImetro Agreement – the same agreement at issue here – permitted Verizon to stop paying reciprocal compensation and to start paying the FCC's interim rates as of June 14, 2001, the effective date of the FCC's *Order on Remand.*

17. Verizon denies the characterization of the Commission's *Global Order* in paragraph 17. That decision speaks for itself.

18. Verizon denies the characterization of the Commission's *Global Order* in paragraph 18. That decision speaks for itself.

19. Verizon lacks information to confirm or deny the allegations in paragraph 19. Verizon will continue to dispute amounts billed in excess of the FCC's interim rates. Verizon denies that these amounts are for "reciprocal compensation for local traffic." Internet-bound traffic is not "local traffic." The Commission determined in its *May 29 Order* that the change-of-law provision in Section 1.1 of the MCImetro Agreement – the same agreement at issue here –

permitted Verizon to stop paying reciprocal compensation and to start paying the FCC's interim rates as of June 14, 2001, the effective date of the FCC's *Order on Remand.*

20. Verizon denies the allegations in paragraph 20. As the Commission found in its *May 29 Order*, Verizon was contractually entitled to discontinue reciprocal compensation payments pursuant to a change-of-law provision in the Agreement, and to do so as of June 14, 2001.

21. Verizon denies the characterization of the *Order on Remand* in paragraph 21. That order speaks for itself.

22. Verizon denies the characterization of the *Order on Remand* in paragraph 22. That order speaks for itself.

23. Verizon denies that it "has chosen to unilaterally implement the terms of the" *Order on Remand* as of June 14, 2001. Rather, as the Commission found in its *May 29 Order*, Verizon was contractually entitled to discontinue reciprocal compensation payments pursuant to a change-of-law provision in the Agreement. Verizon admits that it has stopped paying reciprocal compensation for Internet-bound traffic. The FCC determined in its *Order on Remand* that all traffic that exceeds the 3:1 ratio is presumptively Internet bound.

24. Verizon admits that the effective date of the *Order on Remand* is June 14, 2001. Verizon denies the remainder of paragraph 24, which attempts to characterize the *Order on Remand.* That order speaks for itself.

25. Verizon denies the characterization of the D.C. Circuit's decision in *WorldCom, Inc. v. FCC* in paragraph 25.[11/] That decision speaks for itself. Verizon also denies that the D.C. Circuit's decision "invalidated" the "legality" of the *Order on Remand.* In fact, the D.C. Circuit expressly held that "we do not vacate the [*Order on Remand*]."[12/]

11/ 288 F.3d 429 (D.C. Cir. 2002).

12/ *Id.* at 434.

26. Verizon denies the characterization of *WorldCom v. FCC* in paragraph 26. That decision speaks for itself. The D.C. Circuit decision left in place the entirety of the *Order on Remand*, including paragraph 82, which expressly authorizes carriers such as Verizon to implement the FCC's new rates for Internet-bound traffic through change-of-law provisions in existing interconnection agreements. Verizon denies XO's baseless speculation in paragraph 26 about what the D.C. Circuit "expect[s]" or "evidently thought."

27. Verizon admits that the *May 29 Order* was adopted prior to the *WorldCom* decision. Verizon denies XO's allegation that the Commission's *May 29 Order* is not controlling here.

28. Verizon denies the allegations in paragraph 28. Verizon consistently maintained in the Verizon-WorldCom ADR proceeding that the effect of any court decision concerning the *Order on Remand* should depend on the outcome of that decision. Indeed, the ALJ *accepted* Verizon's position as to the effect of subsequent judicial decisions, and the Commission *affirmed* the ALJ's conclusion.

29. Verizon admits that it recently sent XO an amendment to the parties' interconnection agreement to memorialize the *Order on Remand*. Verizon denies that the *Order on Remand* has been "invalidated." The remaining allegations in paragraph 29 attempt to characterize correspondence between the parties. That correspondence speaks for itself.

30. Verizon denies the characterization of Section 2.2 of the MCImetro Agreement in paragraph 30. That provision speaks for itself. Verizon admits that XO has quoted accurately from Part A, Section 2.2 of the Agreement but notes that XO has failed to mention Section 1.1 of the Price Schedule – the change-of-law provision interpreted by this Commission in the Verizon-WorldCom ADR proceeding.

31. Verizon admits that the parties have been unable to reach agreement on an amendment. Verizon denies the final sentence in paragraph 31. The Commission determined in its *May 29 Order* that the change-of-law provision in Section 1.1 of the MCImetro Agreement – the same agreement at issue here -- permitted Verizon to stop paying reciprocal compensation

and start paying the FCC's interim rates as of June 14, 2001, the effective date of the FCC's *Order on Remand.*

32. Verizon denies the characterization of Section 1.1 of the MCImetro Agreement in paragraph 32. That provision speaks for itself. The Commission determined in its *May 29 Order* that the change-of-law provision in Section 1.1 of the MCImetro Agreement – the same agreement at issue here – permitted Verizon to stop paying reciprocal compensation and to start paying the FCC's interim rates as of June 14, 2001, the effective date of the FCC's *Order on Remand.*

33. Verizon denies the characterization of the *Order on Remand* in paragraph 33. That order speaks for itself. Answering further, Verizon denies that the Commission's prior rulings in the *TCG or Global* proceedings govern here: (1) the FCC in the *Order on Remand* gave carriers such as Verizon the federal law right to implement the interim rates for Internet-bound traffic through change-of-law provisions in existing agreements, and (2) the Commission determined in its *May 29 Order* that the change-of-law provision in Section 1.1 of the MCImetro Agreement – the same agreement at issue here – permitted Verizon to stop paying reciprocal compensation and to start paying the FCC's interim rates as of June 14, 2001, the effective date of the FCC's *Order on Remand.*

34. Verizon denies the allegations in paragraph 34.

35. Verizon denies the allegations in paragraph 35.

36. Verizon denies the allegations in paragraph 36.

37. Verizon lacks sufficient information to admit or deny the allegations in paragraph. In any event, because Verizon has undertaken to pay the amounts XO demands, XO's claim is moot.

REQUEST FOR RELIEF

Verizon denies that XO is entitled to any relief.

DATED: July 2, 2002

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Petition of XO Pennsylvania, Inc. for Resolution of Reciprocal Compensation Dispute Pursuant to the Abbreviated Dispute Resolution Process	)))))	**Docket No. A-310758F0002**

MOTION OF VERIZON PENNSYLVANIA INC. TO DISMISS THE PETITION OF XO PENNSYLVANIA, INC.

By its undersigned counsel, Verizon Pennsylvania Inc. ("Verizon") hereby respectfully moves to dismiss the petition filed by XO Pennsylvania, Inc. ("XO") on June 26, 2002. The Commission has already rejected XO's claim that, from June 14, 2001 to the present, Verizon has unlawfully withheld from XO reciprocal compensation payments for Internet-bound traffic. (XO Pet. ¶ 19.) In its May 29, 2002 Order in docket A-310752F700,[1/] the Commission construed the *very* agreement at issue here and found that the FCC's new rates for Internet-bound traffic went into effect on June 14, 2001 under the change-of-law provision in Section 1.1 of the Price Schedule of the Agreement.

Faced with this unequivocal ruling by the Commission, XO grasps at straws, arguing that this ruling is now somehow invalid in light of the D.C. Circuit's recent decision in *WorldCom, Inc. v. FCC*.[2/] The DC Circuit expressly declined to vacate the FCC's *Order on Remand*, however, and instead "simply remand[ed] the case to the [FCC] for further proceedings."[3/] As a result, the *Order on Remand* and this Commission's interpretation of that Order — including the finding that the FCC's "revised rates" for Internet-bound traffic triggered the change-of-law

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1/ Opinion and Order, *Petition of Verizon Pennsylvania Inc. for Resolution of Dispute Pursuant to the Dispute Resolution Process*, Docket A-310752F700 (Pa. P.U.C. May 29, 2002) ("*May 29 Order*").

2/ 288 F.3d 429 (D.C. Cir. 2002).

3/ *WorldCom*, 288 F.3d at 434.

provision in Section 1.1.of the Agreement — are still legally binding.[4/] XO's claim therefore is meritless, and should be dismissed with prejudice.

BACKGROUND

I. The FCC's *Order on Remand*

The FCC's *Order on Remand*, issued on April 27, 2001, established a new compensation structure for Internet-bound calls that are handed off from one local carrier (usually the incumbent, like Verizon) to another local carrier (often a CLEC), on the way to an Internet Service Provider ("ISP") and the World Wide Web. Before the *Order on Remand,* state commissions, including this Commission, had decided that, as a policy matter, Internet-bound traffic should be treated as if it were local traffic, subject to per-minute reciprocal compensation payments from the originating carrier to the carrier serving the ISP.[5/]

In place of the reciprocal compensation rates, the *Order on Remand* established a declining cap on rates for Internet-bound calls and adopted a schedule for the effective dates of those rates. During the transition to full "bill and keep," payments under the new compensation regime decline gradually over a 36 month period: $0.0015 per minute of use ("MOU") for the first six months after the effective date of the *Order on Remand*; $0.0010 per MOU for the next

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[4/] *See, e.g., National Lime Ass'n v. EPA*, 233 F.3d 625, 635 (D.C. Cir. 2000) (regulations that are remanded but not vacated are "le[ft] . . . in place during remand"); *Sierra Club v. EPA*, 167 F.3d 658, 664 (D.C. Cir. 1999) (same).

[5/] Notably, the FCC recently ruled that the Agreement between Verizon and Starpower, which contains the same definitions of local traffic found in the MCImetro Agreement, did not require Verizon to pay reciprocal compensation in ISP-bound traffic even *before* June 14, 2002. Memorandum Opinion and Order, *Starpower Communications, LLC v. Verizon South, Inc.*, (rel. April 8, 2002) File No. EB-00-MD-19, Mem. Op. and Order, FCC 02-105 (rel. Apr. 8, 2002) ("*Starpower*"). Thus, the FCC's recent decision demonstrates what Verizon has been saying all along – that it has been forced to pay CLECs many millions of dollars in reciprocal compensation payments contrary to the plain terms of the Agreement. *Starpower* at ¶ 30.

18 months; and $0.0007 per MOU for the last 12 months.[6] These rates are lower than the currently effective reciprocal compensation rates in Pennsylvania. The *Order on Remand* expressly provided that carriers such as Verizon could implement the FCC's new rates through change-of-law provisions in existing interconnection agreements.[7]

II. The MCImetro Agreement

XO's predecessor, Nextlink Pennsylvania, Inc., adopted the interconnection agreement between MCImetro Access Transmissions Services Inc. and Bell Atlantic-Pennsylvania ("MCImetro Agreement"). (XO Pet. ¶ 9.) The MCImetro Agreement contains a change-of-law provision at Section 1.1 of Attachment I (the Price Schedule). (*See* XO Pet. ¶ 32.) That provision provides in relevant part:

> The rates or discounts set forth in Table 1 below may be subject to change and ***shall be replaced on a prospective basis (unless otherwise ordered by the FCC, the Commission, or the reviewing court(s)) by such revised rates or discounts as may be ordered[,] approved, or permitted to go into effect by the FCC, the Commission, or a court of applicable jurisdiction, as the case may be. Such new rates or discounts shall be effective immediately upon the legal effectiveness of the court, FCC, or Commission order requiring such new rates or discounts.***

(Attachment I, Section 1.1 (emphasis added).)

III. The Commission's *May 29 Order* Interpreting the Change-Of-Law Clause in Section 1.1 of Attachment I MCImetro Agreement

On October 17, 2001, Verizon filed a petition against WorldCom, Inc. pursuant to the Commission's Abbreviated Dispute Resolution procedures. In that petition, Verizon argued that change-of-law provisions in its interconnection agreement with WorldCom permitted Verizon to implement the *Order on Remand* and discontinue reciprocal compensation payments for Internet-bound traffic as of June 14, 2001, the effective date of the FCC's order. Like XO,

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6/ *Order on Remand* ¶¶ 8, 85.

7/ *Order on Remand* ¶ 82.

WorldCom had adopted the MCIMetro Agreement.[8] In an Initial Decision dated November 19, 2001, the Administrative Law Judge denied Verizon's petition. In its *May 29 Order*, however, the Commission refused to adopt the ALJ's recommendation, correctly finding that the change-of-law language in Section 1.1 of the Price Schedule to the Agreement applied because the *Order on Remand's* new rates for Internet-bound traffic were "revised rates" that were "ordered, approved or permitted to go into effect by the FCC." (*May 29 Order* at 13.) The Commission also correctly determined that, because Section 1.1 specified that such new rates are effective "immediately upon the effectiveness of the . . . FCC . . . order," Verizon could cease paying reciprocal compensation on ISP-bound traffic and instead pay the new FCC rates beginning on June 14, 2001, the effective date of the *Order on Remand.*

WorldCom filed a petition for reconsideration on June 13, 2002. Verizon filed its answer to WorldCom's petition for reconsideration on June 24.

ARGUMENT

The Commission has already rejected the very claims XO raises in its petition. The Commission faced precisely the same issue, interpreted precisely the same contract, and correctly found in its *May 29 Order* that Verizon was contractually entitled to discontinue reciprocal compensation payments for Internet-bound traffic and to begin paying the FCC's new rates for such traffic on June 14, 2001.[9] XO's petition therefore must be dismissed.

XO's claim that the recent D.C. Circuit decision in the *WorldCom* case undermines the Commission's *May 29 Order* is incorrect as a matter of law. The D.C. Circuit decision expressly declined to vacate the *Order on Remand*, leaving in place the FCC's new rates for Internet-bound traffic — that is, the "revised rates" that the Commission concluded triggered the change-of-law

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[8] *See May 29 Order* at 4 n.5.

[9] *Id.* at 13.

provision in Section 1.1 – and "simply remand[ed] the case to the [FCC] for further proceedings."[10/] As a result, the Commission's finding that the new FCC rates for ISP-bound traffic apply as of June 14, 2001 is still legally binding.[11/] Indeed, in addressing the effect of the D.C. Circuit decision, the FCC has instructed that its "rules remain in effect" and emphatically reaffirmed that "ISP-bound traffic is not subject to the reciprocal compensation provisions of section 251(b)(5)."[12/]

Although conceding that the D.C. Circuit decision left in place the FCC's new rates for Internet-bound traffic (*see* XO Pet. ¶ 26), XO suggests that, had the D.C. Circuit actually understood the *Order on Remand*, it would have vacated the portion allowing carriers such as Verizon to implement the FCC's new rates through change-of-law provisions in their interconnection agreements. Specifically, XO claims that the "Court implicitly anticipated that there would not [be] a disruptive effect associated with the decision to remand, without vacating, the matter to the FCC since the Court evidently thought that [the *Order on Remand*] did not apply to existing agreements." (XO Pet. ¶ 26.) This argument is nonsense. XO's assertion that D.C. Circuit misunderstood the *Order on Remand* provides no basis for the Commission to overrule its *May 29 Order*. The D.C. Circuit did *not even address*, much less vacate, the FCC's finding in paragraph 82 of the *Order on Remand* that Verizon and other carriers could implement

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10/ *WorldCom*, 288 F.3d at 434.

11/ *See, e.g.*, *National Lime Ass'n v. EPA*, 233 F.3d 625, 635 (D.C. Cir. 2000) (regulations that are remanded but not vacated are "le[ft] . . . in place during remand"); *Sierra Club v. EPA*, 167 F.3d 658, 664 (D.C. Cir. 1999) (same). XO's suggestion in paragraph 25 that the "legality of the [*Order on Remand*] has been invalidated" is patently wrong.

12/ Memorandum Opinion and Order, *Joint Application by BellSouth Corp., et al., for Provision of In-Region, InterLATA Services In Georgia and Louisiana*, CC Docket No. 02-35, FCC 02-147 ¶ 272 (rel. May 15, 2002).

the FCC's new rates through change-of-law provisions in their interconnection agreements. Like the rest of the *Order on Remand*, paragraph 82 remains in full force.[13]

XO's last desperate claim — that Verizon somehow conceded at oral argument before the ALJ in the WorldCom proceeding that the FCC's new rates would not apply if the *Order on Remand* were remanded but not vacated — also is patently false. Verizon made no such concession. In fact, Verizon has consistently maintained — before, during, and after that oral argument — that the effect of any court decision concerning the *Order on Remand* would turn on the language of that decision. In fact, the ALJ in the WorldCom proceeding *accepted* Verizon's position as to the effect of subsequent judicial decisions. The ALJ found that the Agreement should be modified "*only* to the extent" the D.C. Circuit "stay[ed], vacat[ed], or modifi[ed]" the *Order on Remand*, recognizing that no such change to the amendment would be warranted if the court merely remanded the order without taking any such action."[14] The Commission adopted the ALJ's directive concerning the effect of the D.C. Circuit's review of the *Order on Remand*.[15]

In short, the D.C. Circuit's recent decision in no way affects or undermines the Commission's *May 29 Order*. The *May 29 Order* should therefore be followed here and XO's petition dismissed.

13/ For a more comprehensive discussion of this issue, see Verizon'sAnswer in opposition to WorldCom's motion for reconsideration in docket A-310752F700, which is attached as Exhibit 1.

14/ Initial Decision at 13 (emphasis added).

15/ *May 29 Order* at 17.

CONCLUSION

For the reasons set forth above, XO's Petition should be dismissed with the prejudice.

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Counsel for
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DATED: July 2, 2002

EXHIBIT 1

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Petition of Verizon Pennsylvania Inc. for Resolution of Dispute Pursuant to the Abbreviated Dispute Resolution Process	: : : :	**Docket No. A-310752F7000**

ANSWER OF VERIZON PENNSYLVANIA INC. TO WORLDCOM'S PETITION FOR RECONSIDERATION

INTRODUCTION

Verizon Pennsylvania Inc. hereby submits its Answer to WorldCom's Petition for Reconsideration of the Commission's May 29, 2002 Order. In that Order, the Commission correctly found that, under the plain terms of the change-of-law provision in the interconnection agreement between Verizon and WorldCom,[1] Verizon was entitled to implement the Federal Communications Commission's new intercarrier compensation regime for Internet-bound traffic.[2] The Commission also correctly held, based on that same change-of-law provision, that the FCC's new rates for such traffic were effective as of June 14, 2001.

In a last-ditch effort to escape the Commission's ruling, WorldCom claims that a recent D.C. Circuit decision[3] and two recent FCC orders[4] compel a different conclusion. None of these decisions has any bearing on the Commission's Order. Consequently, for

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[1] WorldCom, Inc. provides service in Pennsylvania through its affiliates, MCI WorldCom Communications, Inc. and MCImetro Access Transmission Services, LLC (collectively "WorldCom").

[2] *See* Order on Remand and Report and Order, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, FCC 01-131 (rel. April 27, 2001) ("*Order on Remand*").

[3] *WorldCom Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

[4] *Cox Virginia Telecom, Inc. v. Verizon South Inc.*, File No. EB-01-MD-006, Mem. Op. and Order, FCC 02-133 (rel. May 10, 2002) ("*Cox*"); *Starpower Communications, LLC v. Verizon South Inc.*, File No. EB-00-MD-19, Mem. Op. and Order, FCC 02-105 (rel. Apr. 8, 2002) ("*Starpower*").

the following reasons, WorldCom's bid for reconsideration is meritless and should be denied.

First, the D.C. Circuit's decision does not affect the Commission's ruling. The Commission found that the *Order on Remand* triggered the change-of-law provision in Section 1.1 of the Agreement because the *Order on Remand's* "revised rates" for Internet-bound traffic were "ordered[,] approved, or permitted to go into effect by the FCC" within the meaning of the parties' Agreement. (*See* Order at 13 (quoting Agreement, Attachment I, Section 1.1).) The D.C. Circuit decision merely remanded, *and did not vacate*, the *Order on Remand*. Thus, the "revised rates" in the *Order on Remand* are still legally binding and trigger the change-of-law provision just as they did before the D.C. Circuit decision.

Verizon certainly never "conceded" that a decision like that of the D.C. Circuit would bar Verizon from invoking the change-of-law provision. WorldCom's assertion that Verizon did so in the oral argument before the Administrative Law Judge is nonsense. Moreover, the Commission already has resolved this issue: the ALJ *agreed* with Verizon that, in the event of a court decision regarding the *Order on Remand*, "[t]he agreement should be modified *only to the extent* of the court's stay, vacation, or modification." (Initial Decision at 13 (emphasis added).) WorldCom did not except to that finding, and the Commission affirmed the ALJ's determination. (Order at 17.)

Second, the two recent FCC orders also are irrelevant to this proceeding. In *Cox*, the FCC did not even address the applicability of any change-of-law provisions.[5] In *Starpower*, the FCC found that an agreement — which WorldCom erroneously claims

[5] *Cox* ¶ 19 n.55.

has a "very similar change of law provision" to the Agreement here — does not and never did require payment of reciprocal compensation for Internet-bound traffic. Thus, the *Order on Remand* did not trigger the change-of-law provision in that agreement because that agreement did not require payment of reciprocal compensation for Internet-bound traffic in the first place. In contrast, the *Order on Remand* did trigger the change-of-law provision here because the Commission had required Verizon to pay reciprocal compensation for Internet-bound traffic.

BACKGROUND[6]

On October 17, 2001, Verizon filed a petition with the Commission pursuant to the Abbreviated Dispute Resolution process. Verizon sought to invoke change-of-law provisions in the Agreement to implement, effective June 14, 2001, the FCC's new intercarrier compensation regime for Internet-bound traffic.

ALJ Chestnut heard oral argument on November 13, 2001 and issued an Initial Decision denying Verizon's petition on November 16, 2001. On November 28, 2001, Verizon filed Exceptions to the Initial Decision.

On May 29, 2002, the Commission entered an order granting Verizon's exceptions. The Commission agreed with Verizon that the *Order on Remand* triggered the rate-specific change-of-law provision in the Agreement, Section 1.1 of the Price Schedule. That section provides in relevant part:

> The rates or discounts set forth in Table 1 below may be subject to change and ***shall be replaced on a prospective basis (unless otherwise ordered by the FCC, the Commission, or the reviewing court(s)) by such revised rates or discounts as may be ordered[,] approved, or***

[6] A more complete description of the background of this proceeding is provided in the Brief of Verizon Pennsylvania Inc., filed on November 9, 2001, and the Exceptions of Verizon Pennsylvania Inc., filed on November 28, 2001.

> ***permitted to go into effect by the FCC, the Commission, or a court of applicable jurisdiction, as the case may be. Such new rates or discounts shall be effective immediately upon the legal effectiveness of the court, FCC, or Commission order requiring such new rates or discounts.***

(Attachment I, Section 1.1 (emphasis added).) The Commission found that Section 1.1 applied because the *Order on Remand's* new rates for Internet-bound traffic were "revised rates" that were "ordered, approved or permitted to go into effect by the FCC." (Order at 13.) The Commission also determined that, because Section 1.1 specified that such new rates are effective "immediately upon the effectiveness of the . . . FCC . . . order," the effective date of the FCC's rates for Internet-bound traffic was June 14, 2001, the effective date of the *Order on Remand.*

WorldCom filed its Petition for Reconsideration on June 13, 2002.

ARGUMENT

WorldCom's Petition provides no justification for the Commission to reconsider its Order. To merit reconsideration, a petition must present "new and novel arguments, not previously heard, or considerations . . . overlooked or not addressed" that establish that the Commission's prior decision was in error.[7] The D.C. Circuit decision and two FCC orders offered by WorldCom in no way undermine the soundness of the Commission's Order that the change-of-law provision in the Agreement is applicable here.

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[7] *Duick v. Pennsylvania Gas & Water Co.*, 56 Pa. PUC 553, 559, 51 P.U.R. 4th 284, 289 (1982).

I. THE D.C. CIRCUIT DECISION DOES NOT AFFECT THE COMMISSION'S ORDER BECAUSE IT DID NOT VACATE THE FCC'S *ORDER ON REMAND* AND THUS LEFT UNDISTURBED THE FCC'S "REVISED RATES" FOR INTERNET-BOUND TRAFFIC.

The Commission correctly held that the *Order on Remand* triggered the rate-specific change-of-law provision in the parties' Agreement and that the FCC's new rate regime therefore was effective as of June 14, 2001, the effective date of the *Order on Remand*. The Commission found that the *Order on Remand* triggered Section 1.1 because the FCC's "revised rates" for Internet-bound traffic were "ordered, approved, or permitted to go into effect" within the meaning of the Agreement. (*See* Order at 13.)

The decision of the D.C. Circuit does not undermine this analysis. That decision left in place the FCC's new rates for Internet-bound traffic — the "revised rates" that triggered the change-of-law provision in Section 1.1. WorldCom itself admits that "the D.C. Circuit did not vacate the [*Order on Remand*], but only remanded it." (Petition at 9.) The court left the *Order on Remand* in place and "simply remand[ed] the case to the [FCC] for further proceedings."[8] As a result, the *Order on Remand* — including the FCC's new rates for Internet-bound traffic — is still legally binding.[9] Indeed, in addressing the effect of the D.C. Circuit decision, the FCC has noted that its "rules remain in effect" and emphatically reaffirmed that "ISP-bound traffic is not subject to the reciprocal compensation provisions of section 251(b)(5)."[10]

---

[8] *WorldCom*, 288 F.3d at 434.

[9] *See, e.g., National Lime Ass'n v. EPA*, 233 F.3d 625, 635 (D.C. Cir. 2000) (regulations that are remanded but not vacated are "le[ft] . . . in place during remand"); *Sierra Club v. EPA*, 167 F.3d 658, 664 (D.C. Cir. 1999) (same).

[10] Memorandum Opinion and Order, *Joint Application by BellSouth Corp., et al., for Provision of In-Region, InterLATA Services In Georgia and Louisiana*, CC Docket No. 02-35, FCC 02-147 ¶ 272 (rel. May 15, 2002).

WorldCom's assertion that "[t]he remand of the [*Order on Remand*] eliminates the basis for Verizon's claim and the Commission's Order" (Petition at 9) is groundless. The D.C. Circuit found only that "§ 251(g) does not provide a basis for the [FCC's] action."[11] But the Commission's Order does not in any way depend on whether the FCC's interpretation of § 251(g) is correct. Rather, as explained above, the Order depends only on whether the *Order on Remand's* new rates for Internet-bound traffic remain valid. They do.

Though WorldCom admits that the D.C. Circuit decision left in place the FCC's new rates for Internet-bound traffic, WorldCom suggests that the D.C. Circuit implicitly vacated the portion of the *Order on Remand* allowing carriers such as Verizon to implement the FCC's new rates through change-of-law provisions in their interconnection agreements. WorldCom claims that the D.C. Circuit "declined to vacate the compensation scheme announced by the FCC in the [*Order on Remand*] based on its conclusion that this scheme would not affect existing interconnection agreements." (Petition at 9-10.) WorldCom's claim is baseless. The court did *not even address*, much less vacate, the FCC's finding in paragraph 82 of the *Order on Remand* that Verizon and other carriers could implement the FCC's new rates through change-of-law provisions in their interconnection agreements. Like the rest of the *Order on Remand*, that provision remains in force.

WorldCom's claim — that Verizon somehow has conceded that the FCC's new rates would not apply if the *Order on Remand* were remanded but not vacated — also is patently false. Verizon made no such concession. WorldCom has seized on an isolated

[11] *WorldCom, Inc.*, 288 F.3d at 434.

quotation from the oral argument before the ALJ, ripped it from its context, and misrepresented it as a "concession."[12] In fact, as the record demonstrates, Verizon has consistently maintained — before, during, and after that oral argument — that the effect of any court decision concerning the *Order on Remand* should depend on the language of that decision. Moreover, as explained below, the ALJ *accepted* Verizon's position as to the effect of subsequent judicial decisions, WorldCom did not except to the ALJ's finding, and the Commission affirmed the ALJ's conclusion.

At the time Verizon filed its petition in this case, the parties had reached an impasse in negotiations for an amendment to their interconnection agreement to implement the *Order on Remand*. Two issues were in dispute: first, the effective date for the FCC's intercarrier compensation rates; and second, the language in the amendment to address the effect of a court decision regarding the *Order on Remand*. With respect to the second issue, WorldCom had taken the position that it should have the right to terminate the amendment implementing the *Order on Remand* if that *Order* were invalidated or modified *in any way* by a reviewing court. Verizon argued that the effect of any court decision with respect to the *Order on Remand* should depend on the language of that decision. (*See* Verizon Br. at 21.)

At oral argument, counsel for Verizon explained that WorldCom's position was unreasonable because it would permit WorldCom to terminate the amendment if a reviewing court modified the *Order on Remand* but left it in place. In the discussion quoted by WorldCom, Verizon is merely agreeing that the amendment should be terminated if the *Order on Remand* were *vacated in its entirety*.

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[12] In order for the Commission to appreciate the context of the comments quoted by WorldCom, Verizon attaches as Exhibit A *all* of the pages from the transcript regarding the impact of a court ruling

Verizon did *not* agree that any such amendment should be terminated if a reviewing court simply remanded the case because it disagreed with the FCC's legal reasoning but left in place the *Order on Remand* and its conclusion that reciprocal compensation is not payable for Internet-bound traffic. Indeed, counsel for Verizon expressly noted that WorldCom's proposed amendment was unacceptable because it would allow WorldCom to terminate the amendment in that very situation:

> If in fact the FCC has this regime out there and they didn't explain some or a substantial portion of it to the court's satisfaction and it is remanded for further findings not inconsistent with this decision -- the usual parlance -- and the FCC goes back to work, rolls up its sleeves and comes through with a clearer explanation of why its regime and why its findings that reciprocal compensation does not apply and never did apply to internet traffic is -- why it does not and has never applied -- there is no question that that will be taken back up to court, that second pass or maybe third pass or fourth pass. But at some point if a reviewing court decides that that's okay, thank you very much FCC, you have now explained your point, they have never declared the regime to be unlawful. In that case there is absolutely no reason why the reciprocal compensation money should have been paid back ab initio. There is no logic to it. Because the FCC's regime has not been knocked out, simply it's explanation has been found inadequate. The rates were not declared unlawful.
>
> What I am perfectly willing to agree to, if the reviewing court disagrees with the conclusion that reciprocal compensation should not have been paid, should not be paid, which is the essence of the FCC's findings, and finds that the rates that the FCC has put into place as the interim rates unlawful, then we owe the money.

(Tr. at 46-47.) Thus, at oral argument, counsel for Verizon was simply restating Verizon's position: that, in the event of a court decision affecting the *Order on Remand*, "the agreement should be modified only to the extent of the court's modification and the parties' obligations necessarily would depend on the terms of the court order staying, vacating or modifying the *Order on Remand*." (Tr. at 50.)

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affecting the *Order on Remand*.

In any event, the Commission already has adopted Verizon's decision on the effect of a subsequent court decision. The ALJ found that "[i]f [the parties] are unable to produce a negotiated result, then the approach contained in Verizon PA's Brief at 21 should be adopted: The agreement should be modified only to the extent of the court's stay, vacation or modification." (Initial Decision at 13.) WorldCom did not except to this finding, and the Commission expressly adopted the ALJ's directive. (Order at 17.) The D.C. Circuit's decision does not require the Agreement to be modified because it expressly left in place the *Order on Remand* and its "revised rates" for Internet-bound traffic. The Commission's Order is not affected by the D.C. Circuit's decision.

II. THE FCC'S *COX* AND *STARPOWER* ORDERS DO NOT UNDERMINE THE COMMISSION'S CONCLUSION THAT THE *ORDER ON REMAND* TRIGGERED THE CHANGE-OF-LAW PROVISION.

Similarly misguided is WorldCom's assertion that the FCC's *Cox* and *Starpower* orders support its claim that the change-of-law provision in the Verizon-WorldCom Agreement does not apply.

Cox is wholly irrelevant to this proceeding. There, the FCC expressly noted that "[n]either party argues that the interconnection agreement involved in the instant proceeding contains change of law provisions that would be triggered by the *Order on Remand*."[13] Thus, *Cox* simply has no bearing on whether the change-of-law provision in this Agreement (or in any other agreement) is triggered by the *Order on Remand*.[14]

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[13] *Cox* ¶ 19 n.55.

[14] WorldCom notes that in the *Cox* and *Starpower* orders, the FCC found "that the interpretation and enforcement of negotiated interconnection agreements is a matter of contract interpretation that requires the application of state contract law." But WorldCom does not explain, because it cannot, why this proposition is relevant to its claim for reconsideration of the Commission's determination here: that Verizon was entitled to invoke a change-of-law provision in its interconnection agreement.

Starpower also does not support WorldCom's claim that the change-of-law provision does not apply. The critical holding of *Starpower* is that an agreement with reciprocal compensation provisions identical to those in the Agreement here *never* required payment of reciprocal compensation for Internet-bound traffic;[15] therefore, the *Order on Remand* did not trigger the change-of-law provision in that agreement *because that agreement did not require payment of reciprocal compensation for Internet-bound traffic in the first place.*

In the *Starpower* proceeding, the FCC adjudicated claims by a CLEC that Verizon was required to pay reciprocal compensation for Internet-bound traffic under three interconnection agreements. WorldCom asserts that one of the agreements — the "Second Starpower Agreement" — "contains a provision very similar to the Section 1.1 of the parties' Agreement in this case" and then claims that the FCC "found" that change-of-law provision was not triggered by the *Order on Remand.* (*See* Petition at 11.) WorldCom fails to mention the more important fact: that the FCC found that Verizon *never* owed Starpower compensation for Internet-bound traffic, so that agreement was already consistent with the FCC's finding in the *Order on Remand* that reciprocal compensation is not owed for Internet-bound traffic — there was no "change" of law. Specifically, the FCC *denied* Starpower's claim for compensation, ruling that that agreement — which has reciprocal compensation provisions that are identical to those in the Verizon-WorldCom Agreement at issue here[16] — *unambiguously excluded Internet-*

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[15] The FCC held that an agreement between Starpower and Verizon South Inc. (f/ka/ GTE South) required payment of reciprocal compensation for Internet-bound traffic; that agreement contained no change-of-law provision comparable to the provision at issue here.

[16] As shown in Exhibit B, the Verizon-WorldCom Agreement here has the same definitions of "Local Traffic" and "Reciprocal Compensation" as the Second Starpower Agreement. The FCC relied on

bound traffic from the scope of the agreement's reciprocal compensation provisions in the first place.

Thus, the FCC's conclusion that the Second Starpower Agreement "do[es] not contain change-of-law provisions that would be triggered by the *Order on Remand*"[17] is irrelevant to whether the clause here does so. The change-of-law provision in the Second Starpower Agreement was not triggered, because nothing had changed — Verizon had *never* been obligated under that agreement to pay Starpower reciprocal compensation for Internet-bound traffic in Virginia.[18] In contrast, the *Order on Remand* did trigger the change-of-law provision here because the Commission previously had required payment of reciprocal compensation for Internet-bound traffic.

Moreover, even if *Starpower* had construed the change-of-law provisions the agreements there contained *different* change-of-law provisions. Section 1.1 of the Second Starpower Agreement is not the same as Section 1.1 of the Agreement here.[19] Thus, any FCC "finding" with respect to the applicability of change-of-law provisions in *Starpower* would have no force in determining whether Section 1.1 of *this* Agreement was triggered by the *Order on Remand*.

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these definitions to conclude that the Second Starpower Agreement did not require the payment of reciprocal compensation for Internet-bound traffic.

[17] *Id.*

[18] The Virginia Commission had never issued an order requiring payment of reciprocal compensation for Internet-bound traffic under all interconnection agreements generally or under the Second Starpower Agreement in particular. In contrast, the Commission here has previously required payment of reciprocal compensation for Internet-bound traffic, though it never construed the Agreement at issue here.

[19] For example, Section 1.1 of that agreement provides that "[t]he *interim* rates or discounts set forth in Table 1 below shall be replaced on a prospective basis . . . by permanent rates or discounts as may be established and ordered by the Commission." And unlike Section 1.1 of the Agreement here, Section 1.1 of the Second Starpower Agreement does not refer to rates "ordered[,] approved or permitted to go into effect by . . . the FCC." *See* WorldCom Petition, Exhibit D.

Finally, WorldCom's selective reliance on only part of *Starpower* proves too much. The fundamental holding of *Starpower* is that an agreement with definitions of "Local Traffic" and "Reciprocal Compensation" identical to those in the Verizon-WorldCom Agreement has ***never*** imposed an obligation to pay reciprocal compensation for Internet-bound traffic. If the Commission were to accept WorldCom's construction of *Starpower*, reverse itself, and conclude that the parties' change-of-law provision does not apply here, it logically follows that the Commission should likewise accept the FCC's far more significant determination in *Starpower*: that the terms of the Verizon-WorldCom Agreement unambiguously exclude Internet-bound traffic from the scope of the parties' reciprocal compensation obligations and Verizon is not and never has been required to pay reciprocal compensation to WorldCom under the Agreement.[20]

CONCLUSION

For the foregoing reasons, Verizon PA respectfully requests that the Commission deny WorldCom's Petition for Reconsideration.

Julia A. Conover, Esquire
Anthony E. Gay, Esquire
1717 Arch Street, 32NW
Philadelphia, PA 19103
(215) 963-6023

Counsel for
VERIZON PENNSYLVANIA INC.

Dated: June 24, 2002

[20] The FCC's determination on this point is entitled to substantial deference. *See Kansas Cities v. FERC*, 723 F.2d 82, 87 (D.C. Cir. 1983) (Scalia, J.). WorldCom's reliance on *Starpower* suggests that this Commission should order WorldCom to refund all reciprocal compensation payments it has received to date on account of Internet-bound traffic under the parties' existing agreement.

CERTIFICATE OF SERVICE

I, Anthony E. Gay, hereby certify that I have this day served a true copy of the Answer of Verizon Pennsylvania Inc. to Petition of XO Pennsylvania, Inc. for Resolution of Reciprocal Compensation Dispute Pursuant to the Abbreviated Dispute Resolution Process, Docket No. A-310758F0002, upon the parties listed below in accordance with the requirements of 52 Pa. Code Section 1.54 (related to service by a participant) and 1.55 (related to service upon attorneys).

Dated at Philadelphia, Pennsylvania, this 2nd day of July, 2002.

VIA UPS OVERNIGHT DELIVERY

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COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
Office Of Administrative Law Judge
P.O. Box 3265, Harrisburg, PA 17105-3265

IN REPLY PLEASE
REFER TO OUR FILE

July 3, 2002

F7600

In Re: A-310758~~F0002~~

(See attached list)

DOCKETED
JUL 11 2002

Petition of XO Pennsylvania, Inc.

For Resolution of Reciprocal Compensation Dispute pursuant to the Abbreviated Dispute Resolution Process.

Hearing Notice

This is to inform you that a hearing on the above-captioned case will be held as follows:

DOCUMENT

Type: **Initial Prehearing Conference**

Date: **Thursday, July 11, 2002**

Time: **10:00 a.m.**

Location: **Hearing Room 5**
Plaza Level
Commonwealth Keystone Building
400 North Street
Harrisburg, Pennsylvania

KJR

Presiding: **Administrative Law Judge Michael C. Schnierle**
P.O. Box 3265
Harrisburg, PA 17105-3265
Telephone: (717) 783-5452
Fax: (717) 787-0481

If you are a person with a disability, and you wish to attend the hearing, we may be able to make arrangements for your special needs. Please call the scheduling office at the Public Utility Commission:

- Scheduling Office: 717-787-1399.
- AT&T Relay Service number for persons who are deaf or hearing-impaired: 1-800-654-5988.

pc: Judge Schnierle
Steve Springer, Scheduling Officer
Beth Plantz
Docket Section
Calendar File

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COMMONWEALTH OF PENNSYLVANIA

DATE: July 8, 2002

SUBJECT: A-310758F7000

TO: Office of Administrative Law Judge

FROM: James J. McNulty, Secretary

XO Pennsylvania, Inc.

Attached is a copy of a Petition for Resolution of Reciprocal Compensation Dispute Pursuant to the Abbreviated Dispute Resolution Process with Verizon Pennsylvania Inc.,filed by XO Pennsylvania, Inc., replacing the Memo of July 3, 2002, docketed at P-00021971, in connection with the above docketed proceeding.

This matter is assigned to your Office for appropriate action.

Attachment

cc: FUS
OTS

DOCUMENT FOLDER

DOCKETED JUL 08 2002

was

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
Office Of Administrative Law Judge
P.O. Box 3265, Harrisburg, PA 17105-3265

IN REPLY PLEASE
REFER TO OUR FILE

REP

July 9, 2002

In Re: A-310758F0002 E7060

(See letter dated 07/03/2002)

DOCKETED
JUL 19 2002

Petition of XO Pennsylvania, Inc.

For Resolution of Reciprocal Compensation Dispute pursuant to the Abbreviated Dispute Resolution Process.

Hearing Cancellation/Reschedule Notice

This is to inform you that the Initial Prehearing Conference on the above-captioned case now scheduled to be held on Thursday, July 11, 2002 at 10:00 a.m. has been canceled and has been rescheduled as follows:

DOCUMENT

Type: **Initial Prehearing Conference**

Date: **Friday, July 19, 2002**

Time: **10:00 a.m.**

Location: **Hearing Room 2**
Plaza Level
Commonwealth Keystone Building
400 North Street
Harrisburg, Pennsylvania

Presiding: **Administrative Law Judge Michael C. Schnierle**
P.O. Box 3265
Harrisburg, PA 17105-3265
Telephone: (717) 783-5452
Fax: (717) 787-0481

Please change your records accordingly.

SECRETARY'S BUREAU
PA PUC

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If you are a person with a disability, and you wish to attend the hearing, we may be able to make arrangements for your special needs. Please call the scheduling office at the Public Utility Commission:

- Scheduling Office: 717-787-1399.
- AT&T Relay Service number for persons who are deaf or hearing-impaired: 1-800-654-5988.

pc: Judge Schnierle
Steve Springer, Scheduling Officer
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July 12, 2002

FILE NO.
5550/17

Re: Petition of XO Pennsylvania, Inc. for Resolution of Reciprocal Compensation Dispute Pursuant to the Abbreviated Dispute Resolution Process, Docket No. A-310758~~F0002~~ F7000

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, Pennsylvania 17120

DOCUMENT FOLDER

Dear Secretary McNulty:

Enclosed for filing in the above-captioned matter is an original and three copies of XO Pennsylvania, Inc.'s Answer to Motion to Dismiss of Verizon Pennsylvania Inc. Copies have been served on the presiding ALJ and parties as indicated on the enclosed Certificate of Service. Please contact me if you have any questions.

Very truly yours,

RHOADS & SINON LLP

By: Debra M. Kriete
Debra M. Kriete

cc: The Honorable Michael Schnierle (w/encl.)

RECEIVED
02 JUL 12 PM 4:02
PA.P.U.C.
SECRETARY'S BUREAU

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Before the
PENNSYLVANIA PUBLIC UTILITY COMMISSION
Harrisburg, Pennsylvania 17105-3265

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P.A.P.U.C.
SECRETARY'S BUREAU

Petition of XO Pennsylvania, Inc.	:	
for Resolution of Reciprocal	:	
Compensation Dispute Pursuant to	:	Docket No. A-310758~~F0002~~ F7000
the Abbreviated Dispute Resolution	:	
Process	:	

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XO PENNSYLVANIA, INC.'s ANSWER IN OPPOSITION TO VERIZON PENNSYLVANIA INC.'s MOTION TO DISMISS

Verizon Pennsylvania Inc. ("Verizon") incorrectly contends that the Commission's May 29, 2002 Order in the Verizon-MCI WorldCom, Inc. ("WorldCom") abbreviated dispute resolution ("prior ADR") proceeding[1] which is pending on reconsideration precludes XO's petition in this proceeding. Clearly, XO was not a party in the prior Verizon ADR proceeding and nothing in the Commission's May 29, 2002 Order states that XO is bound by that Order. Further, XO's Petition raises numerous issues that were not presented in the Verizon proceeding, and which are ripe for review and appropriately addressed in this ADR proceeding.

Verizon's Motion is essentially devoted to debating the merits of several of the new issues that arose *after* the Commission officially acted on April 11, 2002 regarding the Verizon ADR proceeding. Moreover, Verizon completely ignored XO's late payment charges claim in

[1] *Petition of Verizon Pennsylvania Inc. for Resolution of Dispute Pursuant to the Abbreviated Dispute Resolution Process*, Docket No. A-310752F7000,(May 29, 2002), *reconsideration pending, Order entered June 27, 2002.*

its Motion, and therefore failed to identify for this Commission one of the most obvious reasons why this matter is not appropriate for dismissal.

This Commission has recognized that "[a] Motion to Dismiss is an extraordinary remedy that should be granted only in unusual circumstances, where dismissal is clearly warranted and free from doubt." *William DeCenzo v. AT&T Communications of Pennsylvania, Inc.*, C-20016562 (April 30, 2002), adopting the Initial Decision Granting Motion to Dismiss (March 5, 2002). This case does not meet this stringent standard.

As Administrative Law Judge Marlane R. Chestnut succinctly explained in her Initial Decision in the DeCenzo proceeding,

> The Commission's Rules of Administrative Practice and Procedure permit the filing of preliminary motions. 52 Pa. Code §5.101. These motions are analogous to the preliminary objections authorized by the Pennsylvania Rules of Civil Procedure. With respect to preliminary objections seeking dismissal of a pleading, the Pennsylvania Supreme Court has held that such objections will be granted only where dismissal is warranted and free from doubt. Interstate Travelers Services, Inc. v. Pa. Dept. of Environmental Resources, 486 Pa. 536, 406 A.2d 1020 (1979). This standard has been adopted by the Commission. In U.S. Industrial Fabricators, Inc. v. Bell Tel. Co. of Pa., 65 Pa.P.U.C. 365 (1987), the Commission explained that complaints will be dismissed without hearing only "in rare instances, and on a case by case basis." Preliminary motions, since they seek an extraordinary remedy, are granted only in unusual circumstances, where dismissal is clearly warranted and free from doubt.

Id., Initial Decision at 4.

Verizon incorrectly argues that the Commission's decision in the Verizon-MCI Worldcom Abbreviated Dispute Resolution Proceeding is binding on XO and is dispositive of XO's claims. Essentially, Verizon claims that XO should be barred by principles of res judicata and/or collateral estoppel. No such case, however, can be made.

This Commission and the Pennsylvania appellate courts have made clear that res judicata (also known as claim preclusion) and collateral estoppel (also known as issue preclusion) can be invoked only if all specific prerequisites have been met.

Res judicata may be invoked only if four conditions are met: "1) identity of issues, 2) identify of causes of action, 3) identity of persons and parties to the action, 4) and identity of the quality or capacity of the parties suing or sued." *Safeguard Mutual Insurance Co. v. Williams*, 463 Pa. 567, 574, 345 A.2d 664, 668 (1975)(citation omitted); *see also Marie Jurena v. Verizon Pennsylvania Inc.*, C-00015001 (September 4, 2001) at 3. Res judicata clearly does not apply in this proceeding because there is no identity of "issues" or "parties". In this proceeding, XO raises issues not raised in the prior Verizon ADR and XO was not a party to the Verizon ADR proceeding.[2]

It is also well established that Collateral estoppel is applicable only if "1) the issue decided in the prior adjudication was identical with the one presented in the later action, 2) there was a final judgment on the merits, 3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication, and 4) the party against whom it is asserted has had a full and fair opportunity to litigate the issue in question in a prior action." *Safeguard*, 462 Pa. at 574, 345 A.2d at 668 (citation omitted); *see also Marie Jurena v. Verizon Pennsylvania Inc.*, September 4, 2001 *Opinion and Order* at 3. Clearly, XO is not collaterally estopped by the

[2] In fact, the rules governing abbreviated dispute resolution proceedings provide no such formal opportunity for third parties other than public advocates from participating in ADR proceeding. While the scope of parties that are permitted to intervene in an ADR proceeding remains a matter of discretion of the presiding ALJ (*see Abbreviated Dispute Resolution Process*, 30 Pa. Bulletin 3808), it is important to note that Verizon did not serve or otherwise notify XO of the filing of its ADR petition against MCI. The ADR rules prescribe that the petitioning party must serve its petition on the opposing party. ADR rules, no. 4. It is incongruous at best for Verizon to now assert that XO should be bound by the decision in that proceeding.

May 29, 2002 Verizon ADR Order from pursuing its claims in this proceeding. The "issues" raised in the XO petition were not decided in the Verizon ADR proceeding. Not having been "a party or in privity with a party to the prior adjudication", XO "did not have a full and fair opportunity to litigate the issues in question in the prior ADR action."

The Commission has not yet directly addressed the issues raised in XO's petition. While Verizon attempts to claim that the XO Petition addresses the very same "agreement" that the Commission was called upon to interpret in the earlier proceeding, that is simply not true. XO has adopted the MCI-Verizon Agreement; however, the XO-Verizon Agreement is a separate, stand-alone agreement with additional amendments, terms and provisions that are not a part of the MCI-Verizon Agreement. Moreover, the Commission has not decided whether the XO-Verizon Agreement provides Verizon with the unilateral right to retroactively modify reciprocal compensation payments to XO under the terms of that Agreement.

More importantly, XO's Petition raises an entirely unique issue that was neither raised or addressed in the prior Verizon ADR proceeding. XO alleges that Verizon has violated the terms of its interconnection agreement by failing to remit late payment charges due on undisputed charges to Verizon. Verizon seems to completely ignore XO's separate claim for late payment charges on the undisputed reciprocal compensation payments in its Motion.

In a clever attempt to remove this issue from this proceeding, on July 5, 2002, without explanation, Verizon made a partial payment to XO for the late payment charges claimed in this proceeding. A breakdown of XO's claimed late payment charges and Verizon's recent payment is as follows:

Date	XO Claim	Verizon Payment on 7/5/2002
12/10/01	5,850.07	-5,850.07
1/10/02	5,428.93	-5,428.93
2/10/02	1,673.72	-1,673.72
3/10/02	5,783.31	-5,783.31
4/10/02	5,430.17	0
5/10/02	19,261.95	-19,261.95
TOTAL	43,428.15	-37,997.98

Because Verizon has neither paid in full, nor offered an explanation for why they failed to pay the total amount claimed by XO in accordance with the requirements of the XO-Verizon interconnection agreement, this matter continues to require examination by the Commission in this proceeding and makes it clear that the XO Petition raises issues and matters that have not yet been addressed. Moreover, these issues alone demonstrate that the extraordinary remedy of dismissal is not "clearly warranted and free from doubt" and should result in denial of Verizon's Motion.

It is equally important to note that both the factual and substantive basis underlying the present Petition is separate and distinct from those presented in the prior Verizon-MCI WorldCom proceeding. As explained in XO's Petition, the recent decision of the United States Court of Appeals for the District of Columbia Circuit in WorldCom v. FCC invalidated the statutory basis for the FCC's interim intercarrier compensation scheme and remanded the proceeding to the FCC. This Order was issued after the PUC officially acted at its April 11, 2002 public meeting to adopt the final order in the Verizon ADR proceeding. The Commission, therefore, has not yet directly addressed the impact of the remand order of the Circuit Court of Appeals in this, or any other, proceeding, and whether the change of law provisions in the underlying MCI–Verizon interconnection agreement are in fact retroactively triggered under

these changed circumstances. Because the Commission has not yet addressed these issues, Verizon's Motion to Dismiss in this proceeding is inappropriate and should be denied.

Finally, XO notes that Verizon has completely ignored the legal effect of the pending MCI WorldCom Petition for Reconsideration in the priorVerizon ADR proceeding. In that proceeding, WorldCom has also raised new issues and arguments that could not, and have not, been earlier raised or addressed by the Commission. The Commission granted reconsideration pending review of the merits by Order entered June 27, 2002. Consequently, the Commission's reconsideration of its decision in that proceeding further demonstrates that the issues raised in this proceeding should not be dismissed at this stage of the proceeding because their final resolution is not free and clear from doubt.

CONCLUSION

For all of the reasons stated above, Verizon's Motion to Dismiss should be denied.

Respectfully submitted,

RHOADS & SINON LLP

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Attorneys for XO Pennsylvania, Inc.

Dated: July 12, 2002

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of July, 2002, a true and correct copy of the foregoing document, XO Pennsylvania, Inc.'s Answer to Motion to Dismiss of Verizon Pennsylvania Inc., was served upon the following persons in the manner indicated below, in accordance with the requirements of 52 Pa. Code §1.54 (relating to service by a participant):

Charles Hoffman, Esquire Chief Prosecutor Office of Trial Staff Pennsylvania Public Utility Commission P.O. Box 3265 Harrisburg, PA 17105-3265 (U.S. Mail)	Irwin Popowsky, Esquire Consumer Advocate 555 Walnut Street 5th Floor Forum Place Harrisburg, PA 17101-1923 (U.S. Mail)
Carol Pennington Acting Small Business Advocate Office of Small Business Advocate Suite 1102, Commerce Building 300 North Second Street Harrisburg, PA 17101 (U.S. Mail)	Julia A. Conover Vice President and General Counsel Anthony E. Gay Verizon Pennsylvania Inc. 1717 Arch Street, 32NW Philadelphia, PA 19103 (overnight mail)
The Honorable Michael C. Schnierle Administrative Law Judge Pennsylvania PUC P.O. Box 3265 Harrisburg, PA 17105-3265 (hand-delivery)	

Debra M. Kriete

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Anthony E. Gay
Regulatory Counsel
Law Department

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REP

July 19, 2002

RECEIVED

JUL 19 2002

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

VIA UPS OVERNIGHT DELIVERY

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

DOCUMENT FOLDER

Re: Petition of XO Pennsylvania, Inc. for Resolution of Reciprocal Compensation Dispute Pursuant to the Abbreviated Dispute Resolution Process
Docket No. A-310758F0002

F7000

Dear Mr. McNulty:

Enclosed please find an original and three (3) copies of Verizon Pennsylvania Inc.'s Prehearing Conference Memorandum handed up this day to the Honorable Michael Schnierle, in the above-named matter.

Please do not hesitate to contact me if you have any questions.

Very truly yours,

Anthony E. Gay/SLB

Anthony E. Gay

AEG/slb

cc: Honorable Michael Schnierle (cover letter only)
Debra Kriete, Esquire (cover letter only)
Attached Certificate of Service

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ORIGINAL

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Petition of XO Pennsylvania, Inc. for Resolution of Reciprocal Compensation Dispute Pursuant to the Abbreviated Dispute Resolution Process	)))))	**Docket No. A-310758F0002**

F7000

DOCUMENT FOLDER

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JUL 19 2002

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

DOCKETED

JUL 23 2002

VERIZON PENNSYLVANIA INC.'S
PREHEARING CONFERENCE MEMORANDUM

Verizon Pennsylvania Inc. ("Verizon PA") hereby submits this Prehearing Conference Memorandum to preliminarily address the matters for consideration at Prehearing Conferences as identified in 52 Pa. Code Section 5.222 (c).

I. Background Of The Proceeding

On June 25, 2002, XO Pennsylvania, Inc. ("XO") initiated this proceeding by filing a Petition for Resolution of Reciprocal Compensation Dispute Pursuant to the Abbreviated Dispute Resolution Process. Verizon Pennsylvania Inc. ("Verizon PA") timely filed both its Motion to Dismiss the Petition of XO and Answer to the Petition of XO on July 2, 2002. XO filed its Answer to Motion to Dismiss of Verizon PA on July 12, 2002.

The crux of this dispute is whether the FCC's new rates for Internet-bound traffic in its *Order on Remand*[1] went into effect on June 14, 2001 (the effective date of the order) pursuant to the change-of-law provision in Section 1.1 of the Price Schedule of the

[1] Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, FCC 01-131 (rel. April 27, 2001) ("*Order on Remand*").

parties' Interconnection Agreement. The Commission, in its May 29, 2002 Order in Docket A-310752F700,[2] interpreted the *very* agreement at issue in this proceeding and found that the change-of-law provision applied and thus the FCC's new rates for Internet-bound traffic went into effect on June 14, 2001.[3] As is more fully stated in Verizon PA's Motion to Dismiss, since the Commission has already rejected the very claims XO raises in its Petition when faced with the same issue and the same contract, XO's Petition should be dismissed.[4]

Verizon PA notes that in its Answer to Motion to Dismiss XO asserts that "Verizon has completely ignored the legal effect of the pending MCI WorldCom Petition for Reconsideration" of the Commission May 29 Order and "[c]onsequently, the Commission's reconsideration of its decision in that proceeding further demonstrates that the issues raised in this proceeding should not be dismissed at this stage . . . because their final resolution is not free and clear from doubt."[5] Considering the significant impact of the Commission's resolution of the Petition for Reconsideration will have on this matter,

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[2] Opinion and Order, *Petition of Verizon Pennsylvania Inc. for Resolution of Dispute Pursuant to the Dispute Resolution Process*, Docket A-310752F700 (Pa. P.U.C. May 29, 2002) ("*May 29 Order*").

[3] XO's predecessor, Nextlink Pennsylvania, Inc., adopted the interconnection agreement between MCImetro Access Transmissions Services Inc. and Bell Atlantic-Pennsylvania ("MCImetro Agreement"). The change-of-law provision at Section 1.1 of Attachment I is the same provision construed by the Commission in the May 29 Order.

[4] In its Petition, XO also alleges that Verizon PA's has failed to remit late payment charges due to XO. (XO Petition at 16.) Verizon PA has already undertaken to pay XO the amounts it demands and thus believes XO's claims are moot. Verizon PA was apprised by XO's Answer to Motion to Dismiss (*see* XO Answer to Motion at 5) that XO disagrees that Verizon PA has paid these amounts in full and is checking the basis for this claim.

[5] In its Petition, XO also alleges that Verizon PA's has failed to remit late payment charges due to XO. (XO Petition at 16.) Verizon PA has already undertaken to pay XO the amounts it demands and thus believes XO's claims are moot. Verizon PA was apprised by XO's Answer to Motion to Dismiss (*see* XO Answer to Motion at 5) that XO disagrees that Verizon PA has paid these amounts in full and is checking the basis for this claim.

which XO apparently recognizes, Verizon PA believes it would appropriate to stay this proceeding pending the Commission's decision on reconsideration.

II. Possibilities For Settlement Of The Proceeding

Verizon PA believes that XO's claim that Verizon has failed to remit certain late payments allegedly due has been (or, subject to further investigation, will be) resolved. Verizon PA does not believe that the parties' dispute over the effective date of the *Order on Remand* will be settled.

III. Amount Of Hearing Time Which Will Be Required To Dispose Of The Proceeding, Scheduling And The Arrangements For Submission Of Testimony.

Verizon PA does not believe a hearing in this matter is necessary since the issues presented in this proceeding are fundamentally legal issues. Verizon PA believes this matter can be decided after the issues are fully briefed and is willing to agree to any reasonable briefing schedule.

To the extent XO believes there are any factual issues which remain to be presented in this proceeding, Verizon PA believes that the parties will be able to address these issues via stipulations of fact.

IV. Other Matters That May Aid In Expediting The Orderly Conduct Of The Proceeding Including Stipulations Of Facts Not Remaining In Dispute.

Verizon PA does not believe formal discovery is necessary in this matter considering that the issues are primarily legal in nature. However, Verizon PA is willing to participate in reasonably tailored informal discovery.

Respectfully submitted,

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Dated: July 19, 2002

Counsel for Verizon
Pennsylvania Inc.

CERTIFICATE OF SERVICE

I, Anthony E. Gay, hereby certify that I have this day served a true copy of the Verizon Pennsylvania Inc.'s Prehearing Conference Memorandum upon the parties listed below in accordance with the requirements of 52 Pa. Code Section 1.54 (related to service by a participant) and 1.55 (related to service upon attorneys).

Dated at Philadelphia, Pennsylvania, this 19th day of July, 2002.

VIA UPS OVERNIGHT DELIVERY

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July 19, 2002

FILE NO.
5550/17

Re: Petition of XO Pennsylvania, Inc. for Resolution of Reciprocal Compensation Dispute Pursuant to the Abbreviated Dispute Resolution Process, Docket No. A-310758~~F0002~~ F7000

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, Pennsylvania 17120

DOCUMENT FOLDER

KUR

Dear Secretary McNulty:

Enclosed for filing in the above-captioned matter is an original and three copies of XO Pennsylvania, Inc.'s Prehearing Conference Memorandum. Copies have been served on the presiding ALJ and parties as indicated on the enclosed Certificate of Service. Please contact me if you have any questions.

Very truly yours,

RHOADS & SINON LLP

By: Debra M. Kriete
Debra M. Kriete

cc: The Honorable Michael Schnierle (w/encl.)

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Before the
PENNSYLVANIA PUBLIC UTILITY COMMISSION
Harrisburg, Pennsylvania 17105-3265

Petition of XO Pennsylvania, Inc. for Resolution of Reciprocal Compensation Dispute Pursuant to the Abbreviated Dispute Resolution Process	:	Docket No. A-310758~~F0002~~ F000

XO PENNSYLVANIA, INC.'s
PREHEARING CONFERENCE MEMORANDUM

XO Pennsylvania, Inc. ("XO)" submits this Memorandum, in accordance with 52 Pa. Code §5.222, to frame the issues and to address other preliminary matters in this proceeding.

I. Introduction

XO filed a petition on June 25, 2002, pursuant to the Abbreviated Dispute Resolution process, concerning Verizon Pennsylvania Inc.'s ("Verizon") failure to pay certain reciprocal compensation charges that XO has billed to Verizon under its interconnection agreement with Verizon, since June 14, 2001. The amount of payments that Verizon has unilaterally withheld through April 10, 2002 exceeds $ 800,000, and grows larger with each passing month. In addition, XO seeks payment of late payment charges on those invoiced amounts that Verizon did not dispute, but nonetheless failed to pay on a timely basis. Verizon's unlawful actions are in violation of the interconnection agreement governing the terms of such payments and other aspects of the business relationships between XO and Verizon.

On July 2, 2002, Verizon filed an Answer to the Petition and a Motion to Dismiss. XO timely filed an Answer in Opposition to the Motion to Dismiss, on July 12, 2002. Verizon's

Motion to Dismiss should be denied, because the parties, facts and issues in dispute in this proceeding are different from those in Verizon's ADR proceeding against MCI WorldCom and are appropriate for decision in this proceeding pursuant to the ADR process. Verizon has acknowledged that the parties unsuccessfully attempted to resolve this reciprocal compensation dispute for more than 30 days.

II. Issues

The central issues in this proceeding are:

(1) Does the XO-Verizon interconnection agreement require Verizon to continue making reciprocal compensation payments to XO under the terms specified therein, unless the parties mutually agree to execute an amendment to the agreement to modify the reciprocal compensation payments?

Yes. The existing XO-Verizon Agreement provides that Reciprocal Compensation for the exchange of Local Traffic shall be assessed on a per minute-of-use basis for the transport and termination of such traffic. Traffic terminated to Internet Service Provider ("ISP") customers of the Parties' respective local exchange services is "Local Traffic" under the XO-Verizon Agreement. The Parties have not executed any amendments, or agreed to amendments to these provisions of the existing XO-Verizon Agreement.

(2) Does the D.C. Circuit Court of Appeal's invalidation of the statutory basis underlying the *FCC's ISP Order*[1] and remand of that Order to the FCC, make it

[1] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 96-98 & 99-68, FCC 01-131, Report and Order on Remand ¶ 82 (rel. April 27, 2001), 16 FCC Rcd 9151 ("FCC ISP Order").

clear that the FCC's decision was never intended to apply or have any impact on existing agreements?

Yes. As discussed in XO's Petition, the D.C. Circuit Court of Appeals invalidated the statutory basis for the FCC's interim intercarrier compensation scheme and remanded the proceeding to the FCC. This Order was issued after the PA PUC officially acted at its April 11, 2002 public meeting to adopt the final order in the Verizon ADR proceeding. This Commission, therefore, has not yet directly addressed the impact of the remand order of the Circuit Court of Appeals in this, or any other, proceeding. XO asserts that the D.C. Circuit Court clearly conveyed its expectation that the FCC's decision would not have any impact while the appeal is pending. The Court clearly stated its belief that the FCC's decision did *not* apply to existing interconnection agreements.

Further, three separate petitions for rehearing of the Court' decision have since been filed, in which the parties assert that the Court mistakenly remanded the proceeding without also vacating it. Theses petitions urge the Court to either vacate the FCC's Order or stay the effective the Order while the remand is pending. More recently, on July 15, 2002, the D. C. Circuit Court issued an additional Order in this matter, directing the FCC to file a response to the petitions for rehearing by July 30, 2002. A copy of the Court's order is attached as Exhibit "A."

XO therefore asserts that this Commission should conclude that the FCC's decision was never intended to apply or have any impact on its existing agreement with Verizon.

(3) Is XO entitled to receive $818,074.66 in additional reciprocal compensation payments from June 2001 through May 2002 and for each month thereafter, as computed in accordance with the terms of the XO-Verizon interconnection agreement?

Yes. XO has provided Verizon with monthly invoices and Verizon has provided XO with monthly dispute letters reflecting the unpaid balances for reciprocal compensation payments.

(4) Pursuant to the XO/Verizon Agreement, is XO entitled to receive late payments fees on all undisputed reciprocal compensation payments that Verizon remitted more than 30 days after the date of the XO invoice?

Yes. Under the terms of the existing XO-Verizon Agreement, such payments are required. Final resolution of this issue may require development of the record on the amounts of the late payment charges invoiced and any such payments made by Verizon.

III. Development of the Record

XO proposes to develop the record in this proceeding through a limited exchange of documents, and/or hearing, to establish the disputed invoiced amounts and payments. XO proposes to present the testimony of witnesses, if necessary. Alternatively, XO is willing to work to develop a stipulation of facts with Verizon.

IV. Witnesses

XO intends to sponsor the testimony of Renardo Hicks, Vice President and Regulatory Counsel for XO Pennsylvania, Inc. XO reserves the right to present the testimony of other witnesses, as may be appropriate.

V. Discovery

XO proposes that discovery be pursued through informal means in light of the expedited nature of this proceeding.

VI. Schedule

XO anticipates that one day of hearings would be sufficient to present testimony and cross-examine witnesses. XO desires to proceed expeditiously, and also requests the opportunity to submit a main and reply brief in this matter.

Respectfully submitted,

RHOADS & SINON LLP

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(717) 233-5731

Attorneys for XO Pennsylvania, Inc.

Dated: July 19, 2002

Exhibit A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-1218 **September Term, 2001**

Filed On: July 15, 2002 [689304]

WorldCom Inc.,
Petitioner

v.

Federal Communications Commission and United States of America,
Respondents

Sprint Corporation, et al.,
Intervenors

Consolidated with 01-1229, 01-1243, 01-1255, 01-1256, 01-1257, 01-1267, 01-1274, 01-1310, 01-1311, 01-1313, 01-1319, 01-1321

ORDER

Upon consideration of the petition for rehearing and rehearing en banc filed by Pac-West Telecomm, Inc. and Focal Communications Corporations, it is

ORDERED, on the court's own motion, that within fifteen days of the date of this order, respondents file a response to the petition, not to exceed fifteen pages. The court will not accept a reply to the response.

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Deputy Clerk

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of July, 2002, a true and correct copy of the foregoing document, XO Pennsylvania, Inc.'s Prehearing Conference Memorandum, was served upon the following persons in the manner indicated below, in accordance with the requirements of 52 Pa. Code §1.54 (relating to service by a participant):

Charles Hoffman, Esquire Chief Prosecutor Office of Trial Staff Pennsylvania Public Utility Commission P.O. Box 3265 Harrisburg, PA 17105-3265 (U.S. Mail)	Irwin Popowsky, Esquire Consumer Advocate 555 Walnut Street 5th Floor Forum Place Harrisburg, PA 17101-1923 (U.S. Mail)
Carol Pennington Acting Small Business Advocate Office of Small Business Advocate Suite 1102, Commerce Building 300 North Second Street Harrisburg, PA 17101 (U.S. Mail)	Julia A. Conover Vice President and General Counsel Anthony E. Gay Verizon Pennsylvania Inc. 1717 Arch Street, 32NW Philadelphia, PA 19103 (overnight mail)
The Honorable Michael C. Schnierle Administrative Law Judge Pennsylvania PUC P.O. Box 3265 Harrisburg, PA 17105-3265 (hand-delivery)	

Debra M. Kriete

Debra M. Kriete