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December 30, 2002

BY HAND DELIVERY

Blanca Bayó
Director, Office of the Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399

Re: Docket No. 990649B-TP

Dear Ms. Bayó:

Enclosed for filing on behalf of AT&T Communications of the Southern States, LLC, Florida Digital Network, Inc., and WorldCom, Inc. on behalf of its Florida operating subsidiaries, MCI WorldCom Communications, Inc., MCImetro Access Transmission Services LLP, and Intermedia Communications, Inc., are the original and fifteen copies of:

1) Response in Opposition to Verizon's Motion for Stay 14089-02
2) Request for Oral Argument 14090-02

By copy of this letter, these documents have been served on the parties on the attached service list. If you have any questions regarding this filing, please give me a call at (850) 425-2313.

Very truly yours,

Richard D. Melson

RDM/mee
Enclosures
cc: Service List

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation Into Pricing of Unbundled Network Elements (Sprint/Verizon Track)	))))	Docket No. 990649B-TP Filed: December 30, 2002

RESPONSE OF AT&T, FDN AND WORLDCOM IN OPPOSITION TO VERIZON'S MOTION FOR STAY

AT&T Communications of the Southern States, LLC ("AT&T"), Florida Digital Network, Inc. ("FDN"), and WorldCom, Inc., on behalf of its Florida operating subsidiaries MCI WorldCom Communications, Inc., MCImetro Access Transmission Services LLP and Intermedia Communications, Inc. (collectively "WorldCom") hereby file this response in opposition to Verizon's Motion for Mandatory Stay Pending Judicial Review ("Motion"). For the reasons set forth below, the Commission must deny the requested stay.

APPEAL IS PREMATURE

Verizon seeks a stay based on its filing of a notice of appeal of Order No. PSC-02-1574-FOF-TP, issued by the Commission on November 15, 2002 ("UNE Pricing Order"). AT&T and WorldCom filed a timely Motion for Reconsideration of that Order which is currently pending before the Commission. That motion goes to the heart of the UNE Pricing Order and, if granted, would result in significant reductions in the rates established by that order. Under Florida Rules of Appellate Procedure 9.020(h), a final order is not deemed to be rendered for purposes of judicial review until the Commission has disposed of any timely motions for reconsideration. Thus the time for judicial review of the UNE Pricing Order has not arrived, Verizon's notice of appeal is premature, and its motion for stay is likewise premature. AT&T, FDN and WorldCom

will nevertheless respond to the merits of Verizon's motion, since Verizon will undoubtedly seek the same relief once a timely appeal is perfected.

VERIZON HAS NOT DEMONSTRATED ENTITLEMENT TO A STAY

Verizon has not demonstrated its entitlement to a stay under the provisions of Rule 25-22.061, Florida Administrative Code (the "stay rule"). First, the UNE Pricing Order does not involve a "refund of moneys to customers or a decrease in rates charged to customers" within the meaning of the mandatory stay provisions of subsection (1) of the stay rule.[1] Second, Verizon has made no attempt to show that it qualifies for a discretionary stay pursuant to subsection (2) of the stay rule.

No Decrease in Rates Charged to "Customers"

The *mandatory* stay provisions of subsection (1) of Rule 25-22.061 are triggered only when the order being appealed involves a ". . . decrease in rates charged to customers."[2] The only order in which the Commission has resolved a contested issue regarding the applicability of Rule 25-22.061(1) to an inter-carrier dispute is *In re: Complaint of WorldCom Technologies*, Order No. PSC-99-0758-FOF-TP, issued April 20, 1999 (the "BellSouth Stay Order"). In that case, the Commission articulated two independent reasons for denying BellSouth's motion for a mandatory stay of an order which required BellSouth to refund overcharges to competitive telecommunications carriers for the transportation and termination of ISP-bound traffic:

> This rule [25-22.061(1)(a)] does not apply to this case, because, contrary to BellSouth's assertion, [1] the complainants,

[1] Contrary to Verizon's blanket assertion, not all of the approved rates represent a rate decrease. For example, several wire centers that were zone 2 wire centers under the interim rate stipulation became zone 3 wire centers with the Commission's Final Order and therefore subject to higher UNE rates.

[2] Rule 25-22-061(1)(a) provides, "When the order being appealed involves the refund of moneys to customers or a decrease in rates charged to customers, the Commission shall, upon motion filed by the utility or company affected, grant a stay pending judicial proceedings. The stay shall be conditioned upon the posting of good and sufficient bond, or the posting of a corporate undertaking, and such other conditions as the Commission finds appropriate."

> competitive telecommunications carriers, are not "customers" for purposes of this rule. The rule is designed to apply to rate cases or other proceedings involving rates and charges to end use ratepayers or consumers, not to contract disputes between interconnecting telecommunications providers. [2] Furthermore, this case does not involve a "refund" or "decrease" in rates. It involves payment of money pursuant to contractual obligations.
>
> BellSouth Stay Order at 4-5.

Verizon attempts to distinguish the BellSouth Stay Order on the grounds that this UNE cost docket is not a contract dispute between particular carriers and that the Commission in this case has ordered rate decreases. (Motion, p. 4) This attempt to distinguish the BellSouth Stay Order does not, however, address the fundamental reason the Commission held that the mandatory stay is not triggered, namely that "competitive telecommunications carriers are not 'customers' for purposes of the rule."[3]

The Commission Has Uniformly Interpreted The Mandatory Stay Rule

In an effort to avoid the clear effect of this Commission interpretation of its own rule, Verizon argues that the Commission's interpretation is not supported by the plain meaning of the rule and that the Commission itself has not adhered to the interpretation it made in the BellSouth Stay Order. With regard to the second point, Verizon cites the case of *In re: Petition of BellSouth to Remove InterLATA Access Subsidy*, Docket No. 970808-TL. In that case, the Commission stayed Order No. PSC-98-1169-FOF-TL which had (i) permitted BellSouth to discontinue interLATA access subsidy payments to GTC, Inc. (formerly St. Joseph Telephone) and (ii) required BellSouth to offset the resulting windfall by reducing a specific (non access charge) rate of its own choosing that would benefit "all of BellSouth's ratepayers to the extent

[3] Moreover, new UNE rates remain largely contractual in character. When the Commission has approved new UNE rates in this docket, the Commission has expressed its desire for the parties to promptly incorporate those new rates into their interconnection agreements via change-of-law or other amendment mechanism.

possible." Order 98-1169, page 17.

The order granting a stay of both the subsidy discontinuance and rate reduction prongs of Order 98-1169 does not support Verizon's claim that the Commission has failed to adhere to its interpretation that "competitive telecommunications companies" are not customers within the meaning of Rule 25-22.061(1). First, no party in the GTC case contested the applicability of the mandatory stay rule. In fact, both GTC and BellSouth had cited that rule in requesting somewhat different versions of a stay. Thus the Commission was not presented with a contested issue regarding the meaning of the term "customer" as used in that rule. Second, the order granting GTC's version of the requested stay (Order No. PSC-98-1639-FOF-TL) predated the BellSouth Stay Order, and can in no way be characterized as "not adhering" to the later order. Third, and most importantly, the Commission's rationale for granting the stay was that unless the status quo was maintained, the Commission would "likely find it very difficult to make the parties whole again, particularly BellSouth" who, without the stay, would be reducing rates to end-use customers.

The thrust of the decision was thus founded on the exact concern that the mandatory stay provision was designed to address – the difficultly of recouping monies from end-use customers if a rate reduction is ultimately reversed on appeal. That decision does nothing to support the application of the mandatory stay rule in the current case. To the contrary, it supports the Commission's later explicit interpretation in the BellSouth Stay Order that the rule applies only when refunds or rate reductions involve end-use ratepayers or consumers.

The Commission's Interpretation of the Mandatory Stay Rule Is Reasonable

Verizon's statutory construction argument based on the so-called plain meaning of the term "customer" is equally unpersuasive. The Florida Supreme Court recently upheld the

Commission's construction of a statute against a claim that its construction departed from what the dissenting justices would have characterized as a plain reading of the statute. *Lee County Electric Cooperative, Inc. v. Jacobs*, 820 So.2d 297 (Fla. 2002). In that case, the Court affirmed a Commission order holding that the term "rate structure" as used in Chapter 366 applies to *retail* rate structures applicable to end-use customers, and not to rate schedules contained in contracts between two utilities. This is strikingly similar to the Commission's holding in the BellSouth Stay Order that a "refund of moneys to customers" as used in Rule 25-22.061(1) applies to refunds to *end-use* customers, and not to refunds from one carrier to other competitive telecommunications carriers.

Commission's Interpretation Consistent With Underlying Purpose of Rule

The reasonableness of the Commission's interpretation of the word "customer" as used in the mandatory stay rule is reinforced when one considers the underlying purpose of that rule and the regulatory context in which it was adopted. The rule was adopted in 1981, when all utilities in Florida were under rate of return regulation, and a decade and a half before competition was first introduced in the local telecommunications market. Under rate of return regulation, if a regulated company was delayed in implementing an authorized rate increase, or forced to implement a required rate decrease, before final disposition of any appeals, it was at severe risk of being unable to recover any shortfall from its general body of ratepayers. Thus the mirror provisions in subsections (1) and (3) of Rule 25-22.061 provide for a mandatory stay in the event of rate decreases, and mandatory vacation of any automatic stay in the event of rate increases, in order to provide the regulated utility with the opportunity to remain whole in the event a Commission rate order were reversed on appeal. At the time the rule was adopted, the Commission had no jurisdiction over inter-carrier rates or contracts, and hence the term

"customer" was necessarily limited in its application to "end-use customers." *See, e.g., United Telephone Company of Florida v. Public Service Commission*, 496 So.2d 116 (Fla. 1986).

Commission's Interpretation Reflects Sound Regulatory Policy

When presented for the first time with the question of whether the term "customer" was intended to include "competitive telecommunications carriers" in a post-1995 regulatory environment, the Commission appropriately held that it did not. (BellSouth Stay Order at 4-5) This decision reflects sound regulatory policy. The incumbent LECs, including Verizon, are no longer rate of return regulated and they have a new obligation under the Telecommunications Act of 1996 to sell UNEs to competitive telecommunications carriers at a cost-based price determined in compliance with federal law and FCC rules. Application of the mandatory stay rule in a situation involving a decrease in UNE rates paid by competitive carriers is not necessary to protect any regulated revenue requirement and would serve only to further delay the development of competition. As the Commission concluded in the BellSouth Stay Order:

> Harm to the development of competition is harm to the public interest.
>
> BellSouth Stay Order, page 8.

The Commission already recognized the competitive impacts in this case when, from the bench at Agenda, the Commissioners expressed the desire to have the new Verizon UNE rates implemented as quickly as possible.

In summary, the Commission's construction of its mandatory stay rule as inapplicable to situations involving competitive telecommunications carriers is a permissible construction of that rule. Under well established principles of statutory construction, the Commission's interpretation of a statute or rule it is responsible for enforcing is entitled to great deference and

cannot be overturned unless it is clearly erroneous. *See, e.g., Pan Am. World Airways, Inc. v. Florida Public Service Commission,* 427 So.2d 716, 719 (Fla. 1983).

Verizon has provided no compelling basis for the Commission to abandon the construction adopted in the BellSouth Stay Order, and its motion for a mandatory stay must therefore be denied.

No Basis For Discretionary Stay

Because Verizon erroneously argued that the mandatory stay provisions of Rule 25-22.061(1) apply in this case, it did not request a *discretionary* stay under subsection (2) of that rule. AT&T, FDN and WorldCom reserve the right to respond to any future motion that might be filed for a discretionary stay. They nevertheless note that before granting a such a stay, the Commission would be required to consider the likelihood that Verizon would prevail on appeal; whether Verizon is likely to suffer irreparable harm if the stay is not granted; and whether the delay will cause substantial harm or be contrary to the public interest. The same public interest considerations that support the Commission's narrow application of the mandatory stay rule in the inter-carrier environment would also support a decision to deny a discretionary stay.

CONDITIONS FOR STAY

In the event Verizon persuades the Commission to abandon its prior interpretation of the mandatory stay rule and to grant Verizon's motion for stay, AT&T, FDN and WorldCom urge the Commission to condition the stay on the posting of a bond that is sufficient to protect the competitive telecommunications carriers from the damages that would flow from a delay in the implementation of lower rates for UNEs.[4] So long as competitive carriers are forced to continue

[4] As shown by their pending motion for reconsideration of the UNE Order, AT&T and WorldCom believe that the rates established by the Commission in this docket do not comply with the FCC's TELRIC pricing rules, and are still well above an appropriate cost-based level. Thus, even immediate

to pay the overstated UNE rates currently in effect for Verizon, their ability to compete in the provision of local telephone service is severely impaired. A stay would force competitive carriers to face not only the incremental cost of higher UNE rates, but also the inability to fully compete and to build market share at a time when competition is in its infancy. The amount of security required as a condition to any stay should be some *multiple* of the amount calculated by comparing the existing UNE rates to the new rates ordered by the Commission, in order to reflect the damages that delay can cause to the competitive marketplace.

Further, Verizon should be required to provide such security in the form of a bond or a cash escrow, not a corporate undertaking. Unless Verizon is required to post substantial security in some form other than a mere corporate promise to pay, it has no incentive to refrain from pursuing an appeal whose effect, if not its purpose, is to frustrate the development of competition. Under Rule 25-22.061(1)(b), the Commission, in setting the amount and type of required security, is clearly authorized to consider "such factors as: 1. Terms that will discourage appeals where there is little possibility of success; . . . ." If a stay is granted, this is an appropriate case for the Commission to consider the whole range of competitive effects that will flow from further delay in the implementation of more reasonable UNE rates when it sets the conditions of the stay.

RESPECTFULLY SUBMITTED this 30th day of December, 2002.

Virginia Tate / ROM

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implementation of the Commission-ordered rates will not encourage the development of competition to the extent contemplated by Chapter 364 and the Telecommunications Act of 1996.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished to the following parties by U.S. Mail this 30th day of December, 2002.

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