BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Request for arbitration concerning complaint of XO Florida, Inc. against Verizon Florida Inc. (f/k/a GTE Florida Incorporated) regarding breach of interconnection agreement and request for expedited relief.	DOCKET NO. 011252-TP ORDER NO. PSC-01-2509-FOF-TP ISSUED: December 21, 2001

The following Commissioners participated in the disposition of this matter:

E. LEON JACOBS, JR., Chairman
J. TERRY DEASON
BRAULIO L. BAEZ

ORDER GRANTING MOTION TO DISMISS

BY THE COMMISSION:

Background

XO Florida, Inc., f/k/a NEXTLINK Florida, Inc. (XO), is an alternative local exchange carrier (ALEC) and interexchange carrier (IXC) operating in the state of Florida. On June 21, 1999, XO executed an interconnection agreement with Verizon Florida, Inc., f/k/a GTE Florida Incorporated (Verizon) to enable XO to provide local telecommunications services to customers in Tampa, where Verizon is the Incumbent Local Exchange Carrier (ILEC). That agreement was approved by us in Docket No. 990858-TP, Order No. PSC-99-1529-FOF-TP, issued on August 4, 1999. The Agreement sets forth the terms and conditions for the establishment of, and compensation for, interconnection facilities over which each party delivers telecommunications traffic from its end user customers to the other party for termination to its end user customers.

On July 24, 2000, XO filed an informal complaint with us, alleging that Verizon had failed to adhere to the terms of the interconnection agreement. Our staff worked with the parties in an effort to resolve the conflicts until July 24, 2001, when the informal complaint was closed. On September 25, 2001, XO filed its

formal complaint, alleging breach of the interconnection agreement by Verizon. Verizon filed its Motion to Dismiss on October 22, 2001, and XO filed its response on November 5, 2001.

Pursuant to Section 252(e) of the Act, we approved the agreement between Verizon and XO. As such, we have jurisdiction to resolve this dispute pursuant to Sections 251 and 252 of the Telecommunications Act of 1996. See Iowa Utilities Bd. V. FCC, 120 F. 3d 753, 804 (8th Cir 1997) (State commissions' authority under the Act to approve agreements carries with it the authority to enforce the agreements).

Analysis

The primary basis for Verizon's Motion to Dismiss is that the subject interconnection agreement contains a mandatory arbitration clause. In the Agreement, the parties agreed to use the specified "alternative dispute resolution procedures as their sole remedy with respect to any controversy or claim arising out of or relating to the interpretation of th[e] Agreement or its breach." The specified procedures require that, in the event of an alleged breach, each party first designate a representative to attempt a negotiated resolution of the disagreement. If negotiations fail, after 60 days "the dispute shall be submitted to binding arbitration by a single arbitrator pursuant to the Commercial Arbitration Rules of the American Arbitration Association."

In its Motion, Verizon asserts that none of those procedures were followed. Verizon states that the early efforts to resolve the dispute involved a unilateral effort by XO. Verizon did not seek our assistance, but cooperated with our staff's informal efforts to resolve the dispute. Verizon points out, however, that our involvement at that point was not consistent with any procedure prescribed by the Agreement. No designated representatives were appointed and our involvement was not tantamount to the negotiation provided for in the Agreement. Verizon urges that the Complaint must be dismissed because we have no jurisdiction.

In its Response to Verizon's Motion to Dismiss, XO urges that the inclusion of an alternative dispute resolution provision in the Agreement does not divest us of jurisdiction. XO asserts that the Agreement authorizes either party to seek Commission resolution of

disputes "over matters of public policy, or interpretation of, and compliance with, state or federal law." XO cites the following three cases in support of its position:

> MS Ivarans Rederi v. United States, 895 F.2d 1441, 1445 (D.C. Cir. 1990).
> Duke Power Co. v. F.E.R.C., 864 F.2d 823, 829 (D.C. Cir. 1989).
> Gulf Oil Corp. v. Federal Power Commission, 563 F.2d 588, 596-97 (3d Cir. 1977).

XO also alleges that Verizon acknowledged our jurisdiction when it participated in the "informal mediation" before our staff in earlier efforts to resolve the parties' dispute. XO believes that Verizon's participation in "protracted Commission-assisted mediation" was for the purpose of delay in the resolution of this matter. Only now does Verizon raise the issue of arbitration constituting the parties' sole remedy.

Verizon argues that we are preempted from consideration of this complaint by the exclusive arbitration clause contained within the agreement wherein the alleged breach occurred. Verizon contends that under both Florida and Federal law, private arbitration provisions are valid, binding and enforceable. Federal Arbitration Act, 9 U.S.C. §§ 1-14; Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 74 L.Ed.2d 765, 103 S.Ct. 927(1983); Fla. Stat. § 682.02; Cone Constructors, Inc. V. Drummon Community Bank, 754 So.2d 779(Fla. 1st DCA 2000); Old Dominion Insurance Co. V. Dependable Reinsurance., 472 So.2d 1365(Fla. 1st DCA 1985); Zac Smith & Co. V. Moonspinner Condominium Association, Inc., 472 So.2d 1324(Fla. 1st DCA 1985); Physicians Weight Loss Centers of America, Inc. V. Payne, 461 So.2d 977(Fla. 1st DCA 1984); Miller Construction Co. V. The American Insurance Co., 396 So2d 281(Fla. 1st DCA 1981).

We agree with XO that the exclusive arbitration clause did not divest this Commission of jurisdiction "over matters of public policy, or interpretation of, and compliance with, state or federal law." The cases cited by XO, however, do not apply in the instant dispute. The cited cases were instances where the agency was proceeding against a regulated company for violations for which the agency was directly responsible for enforcement. They were not

cases wherein there was a dispute between companies over the terms of the Agreement.

In Gulf Oil Corporation, for example, the Court held:

> By its terms, the arbitration clause of the contract applies only to disputes "arising between Seller and Buyer out of this Agreement," whereas the instant case is a dispute between Gulf and the FPC arising out of the certificate.

In Duke Power Company, Duke was in violation of its filed rate schedule and argued that the regulatory agency had no authority to enforce compliance with the schedule because of an arbitration clause. The Court held:

> Because the enforcement of filed rate schedules is a matter distinctly within the Commission's statutory mandate, the Commission has an independent regulatory duty to remedy a utility's violation of its filed rate schedule. We therefore hold that the Commission's acceptance for filing of an agreement that contains an arbitration clause does not legally disable the Commission from resolving disputes at the core of its enforcement mission.

A/A Ivarans Rederi was, again, a case where the regulatory agency was itself conducting an investigation for enforcement of matters within its statutory responsibility. The Court held:

> Since Congress clearly envisioned a role for the FMC to play in investigating and adjudicating possible violations of the Shipping Acts, we think it rather extreme to conclude that the FMC "waived" its statutory obligations simply by approving an arbitration clause.

Nevertheless, we do not believe that the dispute in this docket involves a matter of public policy or interpretation of, and compliance with, state or federal law. It is, rather, a difference in interpretation of a contract. In a very loose and general sense, every matter for which we are responsible falls under the umbrella of some state or federal law. That fact, however, does not diminish the right of parties to agree and contract regarding matters which do not rise to a level which requires intervention by us to protect a greater public interest. We find that the dispute which is the subject of this Docket does not rise to that level.

The parties agreed that the sole remedy in the event of unresolved disputes would be binding arbitration. We note that during the year since the informal complaint was made, neither party followed the provisions for dispute resolution set forth in the Agreement. However, now that a formal complaint has been made to us by XO, and a Motion to Dismiss has been filed by Verizon, we find that intervention by the Commission in this dispute would be contrary to the terms of the agreement in question, and inconsistent with the public interest by circumventing the parties' legal right to contract. We also note that we have consistently upheld alternative dispute resolution provisions in agreements. In the past, we have found the agreement arbitration clauses controlling in Docket Nos. 001305-TI, 001097-TP, and 981854-TP.

We have real and specific concerns that the FPSC's role and authority under the Act to resolve disputes be maintained, particularly in the event arbitration produces a result which we perceive as inconsistent with State or Federal law, or contrary to the public interest. That concern, however, does not dissuade us in this present matter from following our established precedent and honoring the right of the parties to choose in advance by contract the forum for settling any disputes which may arise over the terms of their agreement. Accordingly, Verizon's Motion to Dismiss is granted.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Verizon Florida, Inc.'s Motion to Dismiss is hereby granted. It is further

ORDERED that Docket No. 011252-TP shall be closed.

By ORDER of the Florida Public Service Commission this 21st Day of December, 2001.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records and Hearing
Services

(S E A L)

CLF

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15)

days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.