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verizon

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December 16, 2002

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COMMISSION CLERK

Ms. Blanca S. Bayo, Director
Division of the Commission Clerk
and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 990649B-TP
Investigation into Pricing of Unbundled Network Elements (Sprint/Verizon Track)

Dear Ms. Bayo:

Please find enclosed for filing in the above matter an original and 15 copies of Verizon Florida Inc.'s Motion for Mandatory Stay Pending Judicial Review. Service has been made as indicated on the Certificate of Service. If there are any questions regarding this matter, please contact me at 813-483-2617.

Sincerely,

Kimberly Caswell

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Enclosures

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into Pricing of Unbundled Network Elements (Sprint/Verizon Track)	)	Docket No. 990649B-TP Filed: December 16, 2002

VERIZON FLORIDA INC.'S MOTION FOR MANDATORY STAY PENDING JUDICIAL REVIEW

Today, Verizon Florida Inc. (Verizon) filed its notice of appeal to the Supreme Court of the Commission's Order PSC-02-1574-FOF-TP (*UNE Ratesetting Order*), issued in this Docket on November 15, 2002. In accordance with Florida Administrative Code Rule 25-22.061(1)(a), Verizon moves the Commission for a mandatory stay of its *UNE Ratesetting Order* pending completion of judicial proceedings. The Commission must grant the stay.

Rule 25-22.061(1)(a) states:

> 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.

This rule requires the Commission to grant a stay pending judicial proceedings if the order appealed reduces rates charged to customers. Under the Rule, the Commission's only task is to condition the stay upon Verizon's posting an appropriate bond or corporate undertaking, which Verizon is prepared to do as soon as the stay order issues. The bond amount will be sufficient to assure that, in the unlikely event Verizon loses the appeal, Verizon's UNE customers will receive rate true-ups for the UNEs they purchased during the pendency of the appeal.

The *UNE Ratesetting Order* clearly satisfies both of the rule's prerequisites for a stay: (1) it decreases Verizon's rates, in this case for unbundled network elements (UNEs); and (2) those rates are charged to Verizon customers, in this case alternative local exchange carriers (ALECs).

There can be no dispute that the order decreased Verizon's UNE rates. Nor can there be any dispute that the ALECs are Verizon customers. To the contrary, as the Order explains, the Commission allowed Verizon recovery of external relations and legal costs in UNE rates, because "it is typical for such costs to be recovered from a company's customers" and an ALEC is "a customer" when it purchases UNEs. (*UNE Ratesetting Order* at 180; *see also id.* at 150, noting that an ALEC is "a consumer" of Verizon's switch features.)

Indeed, as the Commission is well aware, telecommunications carriers routinely purchase services from one another and it is longstanding industry practice to refer to carriers as customers in these myriad instances.[1] This practice comports with the plain

[1] *See, e.g.*, Verizon/AT&T Interconnection, Resale and Unbundling Agreement (which has been adopted by 20 other ALECs) at ¶29.10.2 ("GTE shall recognize AT&T as the customer of record for all Local Service") and Attachment 4, ¶ 2.6 ("GTE will recognize AT&T as the customer of record of all Network Elements and Combinations ordered by AT&T"); Teligent/Verizon Interconnection Agreement at Art. II, ¶ 1.20 ("'Customer' may mean GTE or Teligent depending on the context and which Party is receiving the service from the other Party"); Art. III, ¶ 23.3 ("Provider makes no representations or warranties to customer concerning the specific quality of any services, unbundled network elements or facilities provided under this Agreement"); Art. IV, ¶ 1 ("the term 'Customer' contained in the GTE Retail Tariff shall be deemed to mean 'Teligent'); Art. V, ¶ 2.2 ("Provider shall render to Customer a bill for interconnection services"); Covad Comm. Co.'s Petition for Arbitration of Interconnection Terms, Conditions, and Prices from Verizon, filed Sept. 6, 2002 in Docket No. 020960-TP, at Att. B, Issue 22 ("Like any vendor, Verizon should be obligated to provide its customer (Covad) a commercially reasonable three-hour appointment window when it will deliver the product (the loop)"); *Petition by MCImetro Access Transmission Services LLC and MCI WorldCom Comm., Inc. for Arbitration*, 01 FPSC 3:528, Order No. PSC-01-0824-FOF-TP, at 257 (March 30, 2001) ("We agree with BellSouth that for purposes of interim number portability, WorldCom is the customer of record similar to a resale arrangement between WorldCom and BellSouth."); *Investigation into the Establishment of Operations Support Systems Permanent Performance Measures for Incumbent Local Exchange Telecommunications Companies*, Order No. PSC-01-1819-FOF-TP, at 9 (Sept. 10, 2001) ("BellSouth's Service Quality Measurements (SQMs) are designed to evaluate the quality of service delivered to BellSouth's wholesale and retail customers") and Order No. PSC-02-0187-FOF-TP, Att. A, at 5 ("The BellSouth Service Quality Measurement Plan (SQM)

and ordinary meaning of "customer"--that is, "[o]ne that buys goods or services." (American Heritage Collegiate Dictionary, 2002.)

Verizon is aware that, on one occasion, the Commission took the position that Rule 25-22.061(1)(a) applies only to orders reducing rates for retail end user customers, but that opinion does not control this request.

In an arbitration between BellSouth Telecommunications, Inc. (BellSouth) and four ALECs, the Commission denied BellSouth a mandatory stay of its Order requiring BellSouth to pay reciprocal compensation under its interconnection contracts with the respective ALECs. The Commission remarked that BellSouth was not entitled to a stay under section 25-22.061(1)(a) because "competitive telecommunications carriers" are not "customers" for purposes of the rule; and that the case involved "payment of money pursuant to contractual obligations," rather than a "refund" or "decrease" in rates. The Commission claimed (without any support or analysis) that the automatic stay rule "is designed to apply to rate cases or other proceedings involving rates and charges to end

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describes in detail the measurements produced to evaluate the quality of service delivered to BellSouth's customers both wholesale and retail."); *Consideration of BellSouth Telecomm., Inc.'s Entry into InterLATA Services*, Consultative Opinion Regarding BellSouth's Operations Support Systems, Order No. PSC-02-1305-FOF-TL, at 31 (Sept. 25, 2002) (Results of BellSouth's Performance Measurement Analysis Platform "are posted to a BellSouth internet-based Web site which allows regulators and BellSouth's ALEC customers to view and extract individual and statewide ALEC aggregate performance measurement reports") and Post-Workshop Comments on Behalf of AT&T Comm. of the Southern States, LLC, TCG South Florida, Inc. and AT&T Broadband Phone of Florida, LLC; Covad Communications; Florida Digital Network; ITC^DeltaCom, Inc.; KMC Telecom, Inc.; WorldCom, Inc.; and Network Telephone, at 13, filed March 18, 2002 ("BellSouth should offer its wholesale EDI customers a pre-order solution comparable to other ILECs") and Post-Hearing Statement of Issues and Positions, and Brief of KMC Telecom, Inc., filed Nov. 2001, at 11 (arguing that BellSouth should provide nondiscriminatory access to its facilities to both "retail customers and ALEC customers"); *Petitions by AT&T Comm. of the Southern States, Inc., et al. for Arbitration of Certain Terms and Conditions of a Proposed Agreement with GTE Florida Incorporated Concerning Interconnection and Resale Under the Telecomm. Act of 1996*, Order No. PSC-97-0064-FOF-TP, 97 FPSC 1:263 (1997) (repeatedly referring to ALECs as the ILEC's customers). In addition, Verizon's tariffs contain numerous references to other carriers, including ALECs, as "customers." *See, e.g.*, Verizon's Facilities for Intrastate Access Tariff, "Application of Tariff" and §§ 2.3.9, and 2.6; Verizon's Collocation Tariff, §§ 19.2.2 ("Each CLEC in a shared collocation arrangement is the Company's customer"), § 19.2.3 ("The CLEC and third party/parties [in a subleased collocation arrangement] are the Company's customers").

user ratepayers or consumers, not to contract disputes between interconnecting telecommunications providers." (*Complaints of WorldCom Tech., Inc. et al. Against BellSouth Telecomm., Inc. for Breach of Interconnection Agreements* (*BellSouth Arbitration Order*), 99 FPSC 4:460, Order No. PSC-99-0758-FOF-TP, at 6 (1999).)

This generic ratesetting docket, of course, differs from the BellSouth arbitration, because it is not a contract dispute between particular carriers and because the Commission in this case has ordered rate decreases. The Commission thus cannot rely on the same rationale it used to deny the stay in the BellSouth arbitration case. To the extent, however, that the Commission maintains that "customer" in section 25-22.061(1)(a) means only end user customers and excludes carrier customers, that construction would be erroneous.

The usual judicial deference to an agency's interpretation of its own rules "does not extend to a construction which contradicts the unambiguous language of a rule." *Arbor Health Care Co. v. State of Florida, et al.*, 654 So. 2d 1020, 1021 (Fla. 1st DCA 1995); *see also Legal Envt'l Assistance Foundation, Inc. v. Board of County Commissioners of Brevard County*, 642 So. 2d 1081, 1083 (Fla. 1994) (rejecting agency's rule interpretation that "conflict[ed] with the plain meaning of the regulation"); *Woodley v. Dep't of Health and Rehabilitative Services*, 505 So. 2d 676, 678 (Fla. 1st DCA 1987) (an agency construction that contradicts the unambiguous language of a rule "is clearly erroneous and cannot stand"). It is a basic rule of statutory construction that words in statutes and rules must be given their "plain and ordinary meaning." *See, e.g., Verizon Florida, Inc. v. Jacobs, et al.*, 810 So. 2d 906 (Fla. 2002); *Freedman v. State Board of Accountancy*, 370 So. 2d 1168, 1169 (Fla. 4th DCA 1979). "[T]he plain

and ordinary meaning of the word can be ascertained by reference to a dictionary." *Green v. Florida*, 604 So. 2d 471, 473 (Fla. 1992).

"There is no need to resort to other rules of statutory construction when the language of the statute is unambiguous and conveys a clear and ordinary meaning." *Verizon, supra*, 810 So. 2d at 908; *Zuckerman v. Alter*, 615 So. 2d 661, 663 (Fla. 1993). Exceptions will not be implied where the words of a statute are plain and clear. *See, e.g, Martin v. Johnston*, 79 So. 2d 419 (Fla. 1955). It is, moreover, impermissible to add words to a provision to "steer it to a meaning and a limitation which its plain wording does not supply." *James Talcott, Inc. v. Bank of Miami Beach*, 143 So. 2d 657, 659 (Fla. 3d DCA 1962).

There is nothing in the plain language of Rule 25-22.061(a) that suggests any ambiguity in the plain meaning of "customer" or otherwise allows the Commission to distinguish between orders decreasing rates for a company's retail end user customers and orders decreasing rates for its wholesale carrier customers. A construction based on this distinction would be erroneous because it implies an exception to or limitation on "customer" that has no basis in the words of the rule. The Commission is not permitted to alter the language of the rule by inserting the words "end user" or "retail" before "customer."

Aside from the fact that the plain language of the rule supplies no basis to distinguish between types of ratesetting proceedings, the Commission itself has not adhered to the arbitrary interpretation it made in the *BellSouth Arbitration Order*. For instance, in a 1998 Order, the Commission terminated an interLATA access subsidy funneled through BellSouth to GTC, another local exchange carrier. *Petition of*

BellSouth Telecomm., Inc. to Remove InterLATA Access Subsidy Received by St. Joseph Tel. & Tel. Co., Final Order, 98 FPSC 8:470 (1998). GTC argued that Rule 25-22.061(1)(a) entitled it to a stay of the Order, because the Commission's action was "the equivalent of an access rate decrease for GTC to its interexchange carrier (IXC) customers, which will deprive GTC of $1,223,000 a year." (*Petition of BellSouth Tel., Inc. to Remove InterLATA Access Subsidy Received by St. Joseph Tel. & Tel. Co.*, Order on Motions for Reconsideration and Granting Stay of Order No. PSC-98-1169-FOF-TL, 98 FPSC 12:119 (1998). The Commission issued the automatic stay pending reconsideration and appeal, without any discussion of the fact that the customer in that case was another telecommunications carrier customer, rather than an end user customer.

The Commission cannot deviate from the plain language of Rule 25-22.061 for policy or any other reasons. The rule requires a stay when Commission action reduces a regulated company's rates, whether they are retail or wholesale rates.

Because the language of Rule 25-22.061(1)(a) is unambiguous, there is no need to resort to statutory construction aids, such as legislative history. Even if there were, nothing in that history supports the Commission's conclusion in the *BellSouth Arbitration Order* that the automatic stay rule is intended to apply only to rate cases and like proceedings reducing rates to "end user ratepayers or consumers." (*BellSouth Arbitration Order* at 6.)

The Commission's Order proposing the Rule stated: "The purpose of the rule is to set forth the procedure to be followed by the Commission with respect to motions for stays or vacation of stays pending judicial review of Commission orders." (*Adoption of*

Rule 25-22.61, F.A.C., Stay Pending Judicial Review; Vacation of Stay Pending Judicial Review, Order No. 10318, at 1 (1981).) A Staff memorandum summarizing the proposed rule made clear that it was intended to "provide[s] the utility the option of postponing certain actions taken by the Commission. Where these actions take the form of refunding monies to customers or reducing rates, the utility may file motion for a stay, pending judicial review." (Memorandum to S. Clark, Assoc. Gen. Counsel, from Research and Management Studies Dept. in Docket No. 810355-PU, dated Oct. 19, 1981.)

Neither these documents nor anything else in the docket adopting the stay rule indicates any intention to limit mandatory stays only to particular types of rate proceedings. Rather, the legislative history confirms that the purpose of the rule is to allow a company to maintain the status quo pending appeal of a rate decrease. This purpose remains the same regardless of whether the rates reduced are those charged to end users or to other carriers. Furthermore, it makes no difference that certain customer segments--like the ALECs purchasing UNEs in this case and the IXCs purchasing access services in the GTC case--did not exist when the mandatory stay rule was adopted in 1982. "[W]hen a statute is expressed in general terms and in words of the present tense, it will generally be construed to apply not only to things and conditions existing at the time of its passage, but will also be given a prospective effect and made to apply to such as come into existence thereafter." *Florida v. City of Miami*, 101 Fla. 292, 294; 134 So. 608 (Fla. 1931).

Because the Order appealed involves a decrease in rates to Verizon's ALEC customers, and because Verizon is prepared to post an appropriate bond, all of the

conditions for a mandatory stay under Commission Rule 25-22.061 have been met. The Commission must thus grant the stay.

Respectfully submitted on December 16, 2002.

By: _____
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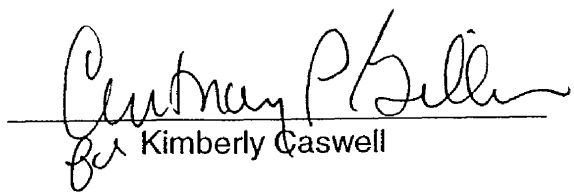
Attorney for Verizon Florida Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of Verizon Florida Inc.'s Motion for Mandatory Stay Pending Judicial Review in Docket No. 990649B-TP were sent via U.S. mail on December 16, 2002 to the parties on the attached list.



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