PUBLIC VERSION – CONFIDENTIAL MATERIAL REDACTED

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In Re:	)	
Petition of Verizon Florida Inc. (f/k/a GTE Florida Inc.) against Teleport Communications Group, Inc. and TCG South Florida, for review of a decision by The American Arbitration Association in accordance with Attachment 1 Section 11.2(a) of the Interconnection Agreement between GTE Florida Inc. and TCG South Florida	)	Docket No. 030643-TP Filed: September 5, 2003

APPENDIX B

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In Re:	)	
Petition of Verizon Florida Inc. (f/k/a GTE Florida Inc.) against Teleport Communications Group, Inc. and TCG South Florida, for review of a decision by The American Arbitration Association in accordance with Attachment 1 Section 11.2(a) of the Interconnection Agreement between GTE Florida Inc. and TCG South Florida	)	**PUBLIC VERSION** Docket No. 030643-TP Filed: September 5, 2003

OPPOSITION OF VERIZON FLORIDA INC. TO MOTION TO DISMISS OF TELEPORT COMMUNICATION GROUPS, INC. AND TCG SOUTH FLORIDA

Pursuant to Rule 28-106.204, Florida Administrative Code, Verizon Florida Inc. ("Verizon") hereby opposes the motion to dismiss ("TCG Mot.") filed by Teleport Communication Group, Inc. and TCG South Florida (collectively, "TCG").

SUMMARY

TCG's motion to dismiss Verizon's petition should be denied for three basic reasons. First, nothing in the parties' agreements forecloses the Commission from reviewing the arbitrator's decision below. To the contrary, the agreement specifically contemplates that the parties would be permitted to seek review from this Commission, and that is what Verizon has done. Second, no other law provides any obstacle to the Commission's adjudication of this dispute. To the contrary, Florida Statutes explicitly provide that this Commission "shall have the authority to arbitrate any dispute regarding interpretation of interconnection or resale prices and terms and conditions." § 364.162, Fla. Stat. Since this is a "dispute regarding interpretation

of interconnection . . . terms and conditions, the Commission has jurisdiction. (Whether the *standard of review* is de novo – as Verizon will argue – or not is irrelevant to the question of the Commission's *jurisdiction*.) Third, the Commission *should* exercise that jurisdiction, both because general principles of administrative law require it and because the arbitrator's decision was squarely based on his (mis)understanding of the Commission's prior decisions and industry custom and practice– both matters squarely within the Commission's expertise.

TCG's passing suggestion that Verizon's complaint is not timely is incorrect; although the arbitrator's decision was dated June 13, 2003, TCG fails to acknowledge that the American Arbitration Association ("AAA") issued the decision to the parties only on June 20, 2003. The date for challenging the order dates from issuance by the plain terms of the Agreement. Indeed, were the situation otherwise, the parties' time to challenge an arbitrator's order might elapse before the order was even received.

Finally, TCG's discussion of what court has jurisdiction to issue an order *enforcing* an award is simply beside the point here. Whether the parties chose to appoint a private arbitrator in Daytona, Dallas, or Dakar, the parties agreed that an appeal of the Arbitrator's not-yet-final and therefore not-yet-enforceable decision would be permitted to this Commission.

By separate pleading pursuant to Rule 25-22.058, Florida Administrative Code, Verizon is requesting oral argument on this motion.

BACKGROUND

This case arises out of a dispute between Verizon and TCG over the interpretation of the reciprocal compensation provisions of their interconnection agreement ("Agreement"). On approximately December 1, 2001, TCG filed a Demand for Arbitration with the AAA, seeking to recover reciprocal compensation from Verizon for Internet-bound traffic. Verizon filed its

Answer on January 3, 2002. Verizon also filed a counterclaim, seeking to recover any amounts that Verizon had unknowingly paid when TCG improperly billed it reciprocal compensation for "Virtual NXX" traffic. The Arbitrator ruled against Verizon on both issues; his final award, dated June 13, 2003, was issued to the parties by the American Arbitration Association on June 20, 2003.

In accordance with the terms of the parties' agreement, Verizon filed a petition before the Commission on July 18, 2003 (28 days after the award was issued) seeking review of the Arbitrator's decision.

ARGUMENT

THE COMMISSION HAS JURISDICTION OVER VERIZON'S PETITION PURSUANT TO THE TERMS OF THE AGREEMENT AND FLORIDA STATUTE

A. The Agreement Renders Private Arbitration Decisions Non-Final Pending Commission Review

TCG does not and cannot argue that the parties' Agreement forecloses Verizon's petition. Indeed, the Agreement specifically provides for the review by this Commission of private arbitration decisions concerning the interpretation and enforcement of the Agreement.

As TCG correctly notes, the Agreement between the parties provides for alternative dispute resolution. The parties have agreed to submit all disputes, first, to an Inter-Company Review Board (Agreement, Attach. 1, § 3.1) and then, if such negotiations are not fruitful after a specified period of time, to private commercial arbitration (*id.*, § 4). Although the arbitrator's decision is generally "final and binding" (*id.*, § 11.1), the Agreement specifically provides that "[a] decision of the Arbitrator *shall not be final*" if "a Party *appeals the decision to the Commission* [*i.e.*, the Public Service Commission of the State of Florida] or FCC, and the matter is within the jurisdiction of the Commission or FCC, provided that the agency agrees to hear the matter" (*id.*, § 11.2). *See also id.*, Attach. 11, at 3.

The only reasonable construction of this language – and TCG does not argue otherwise – is that the parties deliberately decided that appeals of private arbitration decisions to this Commission would be permitted. To be sure, "the matter" on which review is sought must be within the jurisdiction of this Commission, but, as discussed below, *this* matter – which concerns the interpretation and enforcement of the parties' interconnection agreement – unquestionably is.[1]

This does not mean that arbitration is "nothing more than a preliminary staging mechanism" for the "Commission's ultimate deliberation." TCG Mot. at 10. In many cases, the private arbitrators' resolution of an issue may be acceptable to both parties. Moreover, such proceedings may often narrow issues and eliminate the need for further discovery before the Commission. But it is absolutely correct that, under the agreement, private arbitration decision are *not* "final" when one party seeks review by the Commission: that is what the Agreement provides by its plain terms. If this means that proceedings may be more lengthy in some cases than if the parties had agreed to bring disputes to the Commission in the first instance (though presumably more expeditious in others), that is precisely what the parties bargained for.

In sum, the Agreement specifically contemplates that parties would be permitted to seek review of private arbitrator's interpretation of their agreement, and Verizon's petition is thus

[1] The original agreement that was the source of the agreement at issue here was negotiated in the fall of 1996, shortly after the passage of the Telecommunications Act of 1996 ("1996 Act"). At that time, the parties could not be sure that either this Commission or the FCC would have jurisdiction over the interpretation and enforcement of existing interconnection agreements; for that reason, the right of appeal is contingent on the availability of an appropriate agency forum. The Commission's jurisdiction over the interpretation and enforcement of interconnection agreements, however, is now firmly established.

entirely appropriate under that agreement.[2]

B. The Commission Has Jurisdiction Over This Matter

TCG's claim that the Commission lacks jurisdiction in this case is contrary to the explicit terms of Florida law as well as overwhelming and controlling federal court authority on point. Section 364.162 of the Florida Statutes provides that "[t]he Commission *shall have the authority* to arbitrate *any dispute regarding interpretation of interconnection* or resale *terms and conditions.*" (Emphasis added.) This broadly worded and explicit delegation of authority to the Commission to decide "any dispute" over "interconnection . . . terms and conditions" plainly reaches a dispute over the proper interpretation and enforcement of a 1996 Act interconnection agreement. Indeed, this Commission has adjudicated many such cases in the past.

Moreover, overwhelming federal judicial authority – including the controlling decision by the *en banc* Eleventh Circuit Court of Appeals – has determined that state commissions have such authority under federal law as well. Every circuit court to address the issue has agreed that the power to approve or reject interconnection agreements – authority explicitly delegated to state public utility commissions pursuant to section 252 – "carries with it the authority to interpret agreements that have already been approved." *BellSouth Telecomms. Inc. v. MCImetro Access Transmission Servs., Inc.*, 317 F.3d 1270, 1274 (11th Cir. 2003) (en banc); *see also*

[2] TCG's effort to secure dismissal of Verizon's petition on any basis *other than* its claim that the Commission lacks jurisdiction arguably violates its duty of good faith and fair dealing under the Agreement. *See Insurance Concepts and Design, Inc. v. Healthplan Servs., Inc.*, 785 So.2d 1232, 1234 (Fl. App. 2001) ("Florida contract law recognizes the implied covenant of good faith and fair dealing in every contract."). Precisely because the parties' agreed that appeals would be permitted in any case where "the agency agrees to hear the matter" (Agreement, Attach. 1, § 11.2), TCG's effort to persuade the Commission not to exercise its jurisdiction over this matter appears designed to deprive Verizon of a contractual remedy to which TCG agreed.

Michigan Bell Tel. Co. v. MCImetro Access Transmission Servs., Inc., 323 F.3d 348, 356 (6th Cir. 2003); *Southwestern Bell Tel. Co. v. Brooks Fiber Communications of Okla., Inc.*, 235 F.3d 493, 497 (10th Cir. 2000); *Southwestern Bell Tel. Co. v. Connect Communications Corp.*, 225 F.3d 942, 946 (8th Cir. 2000); *MCI Telecomms. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 337-38 (7th Cir. 2000); *Southwestern Bell Tel. Co. v. Public Util. Comm'n of Texas*, 208 F.3d 475, 479-80 (5th Cir. 2000).

That uniform circuit court authority is likewise in line with the FCC's authoritative construction of the statute. Under section 252(e)(5), "[i]f a State commission fails to act to carry out its responsibility *under [section 252]* in any proceeding or other matter under this section, then the [FCC] shall issue an order preempting the State commission's jurisdiction of that proceeding or matter." 47 U.S.C. § 252(e)(5) (emphasis added). The FCC was called upon to take action under section 252(e)(5) when the Virginia State Corporation Commission declined to rule in a dispute between a CLEC and Verizon concerning the same substantive issue presented in this case – the meaning of the reciprocal compensation provisions of the parties' interconnection agreement. *See Starpower Preemption Order*,[3] 15 FCC Rcd at 11278, ¶ 4 & n.7. The FCC granted the CLEC's petition for preemption, holding that "a dispute arising from interconnection agreements and seeking interpretation and enforcement of those agreements is within the states' 'responsibility' *under section 252*." *Id.* at 11279, ¶ 6 (emphasis added). The FCC's construction of its enabling statute is entitled to deference. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *BellSouth*, 317 F.3d at 1277.

[3] Memorandum Opinion and Order, *Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission*, 15 FCC Rcd 11277 (2000) ("*Starpower Preemption Order*").

TCG's claim that the Commission lacks jurisdiction is based solely on the fact that the Commission declined to hear TCG's petition to enforce a private arbitrator's *discovery order*, where that order had nothing to do with the interpretation or enforcement of any term of the parties' interconnection agreement. *See* TCG Mot. at 4-8 (discussing Order Granting Motion to Dismiss, *Petition for Expedited Enforcement of Interconnection Agreement with Verizon Florida Inc. by Teleport Communications Group, Inc. and TCG South Florida*, Order No. PSC-02-1705-FOF-TP, Docket No. 021006-TP (Fla. Pub. Serv. Comm'n Dec. 6, 2002) (TCG Mot., Attach. 5)). But, as Verizon explained at the time, TCG's complaint was inappropriate because this Commission has no general authority to enforce the orders of a private arbitrator, which is all that TCG's complaint sought. *See* TCG Mot., Attach. 3 at 1. Indeed, TCG made clear (and Verizon emphasized in its Motion to Dismiss) that its Complaint was solely directed at "enforcing the Arbitrator's Order." TCG Mot., Attach. 2, ¶ 17; *see id.*, Attach. 3, at 3. In moving to dismiss the complaint, Verizon made clear that *if* TCG's complaint had regarded the interpretation of interconnection or resale prices and terms and conditions, the Commission would have had jurisdiction under section 364.162. *Id.*

Given this context, the Commission's decision provides no support for the proposition that TCG would read into it. The Commission dismissed TCG's complaint because it "disagree[d] with TCG's analysis that the discovery orders are terms and conditions of a Commission approved interconnection agreement thereby invoking our jurisdiction." TCG Mot., Attach. 5, at 6. "Rather, the discovery orders are merely *a consequence of compliance* with the interconnection agreement." *Id.* (emphasis added). Thus, the explicit basis of the Commission's decision was that TCG's Complaint did not present any "dispute regarding interconnection . . . terms and conditions" and therefore did not invoke the Commission's statutory authority. This

case is plainly distinguishable because the "dispute" unquestionably does "regard interconnection . . . terms and conditions." Fla. Stat. § 364.162. Nor does Verizon merely seek enforcement of an arbitrator's order – rather, Verizon seeks review of the Arbitrator's construction of the parties' interconnection agreement: the very "matter" that section 364.162 squarely places within this Commission's jurisdiction.

The fact that the dispute has already been submitted to a private arbitrator and that the arbitrator has rendered a decision does not deprive the Commission of jurisdiction. To be sure, if the parties had *agreed* that the Arbitrator's decision would be final and that the parties would have no right to review, then the parties' agreement on that point would be enforceable and this Commission would have no jurisdiction over the dispute. *See* 47 U.S.C. § 252(a)(1). But, as discussed above, that is *not* the agreement that the parties reached here, and TCG does not and cannot argue that it is. To the contrary, the parties explicitly agreed that private arbitration decisions would *not* be final to the extent that either this Commission or the FCC was found to have jurisdiction over "matter[s]" of this type. Because Florida Statutes and federal law do grant the Commission that jurisdiction, there is absolutely no obstacle to its exercise in this case.

TCG also argues that Verizon is wrong that the *standard of review* in this proceeding is "de novo," but that issue is simply irrelevant to the question whether the Commission *has jurisdiction.* Because TCG has filed a motion to dismiss based on the Commission's lack of jurisdiction, the only question is whether this is a "dispute regarding interconnection . . . terms and conditions" within the meaning of section 364.162 and whether the Commission has jurisdiction over such disputes. Because the answer to both questions is plainly yes, TCG's motion to dismiss should be denied, and the parties can brief the appropriate standard of review at an appropriate time. In any event, because the arbitrator ruled on a legal question – the

obligations imposed by the parties' interconnection agreement – the Commission should review those legal determinations *de novo*. *See Merlot Communications, Inc. v. Shalev*, 840 So.2d 446, 447 (Fla. 3d DCA 2003) ("The interpretation of a contract is a question of law, reviewable *de novo*.").

C. The Commission Should Exercise Its Jurisdiction

TCG briefly argues that "[e]ven if the Commission ha[s] jurisdiction over this matter, . . . it could and should refuse to hear Verizon's petition." (TCG Mot. at 11). TCG is wrong.

First, TCG provides absolutely no *legal* basis for its request that the Commission decline to fulfill its statutory responsibility to decide this type of dispute. Nor is there any such authority. To the contrary, it is a basic principle of administrative law that when, as here, the legislature has delegated adjudicatory authority to an administrative agency, the agency does not have discretion to decline to exercise that authority. *See AT&T v. FCC*, 978 F.2d 727, 732 (D.C. Cir. 1992). There is no legal basis for the Commission to dismiss Verizon's petition simply because TCG asks it do so.

Second, TCG's *policy* arguments in favor of dismissal are entirely without merit. Although TCG argues that the prior proceedings involved "discovery" and "present[ation] of evidence," Mot. at 11, there is no reason that the factual record compiled in the prior proceeding should not be admitted into this proceeding wholesale. None of that discovery will be wasted, and none need be duplicated. And although TCG argues that allowing Verizon's petition to proceed would discourage parties' resort to private arbitration, precisely the opposite is true. The parties agreed to private arbitration only on the condition that review before this Commission (or the FCC) not be foreclosed. Whether the parties would have been willing to submit their dispute to private arbitration in the first instance without the possibility of review by an expert agency is

very much in doubt. In other words, to refuse to exercise review where contemplated by the parties' Agreement would discourage alternative dispute resolution efforts; it would not encourage them. Thus, in urging the Commission arbitrarily to decline to exercise its jurisdiction, TCG urges the Commission to turn its back on its announced policy of "encourag[ing] the continued use of arbitration and negotiation." TCG Mot., Attach. 6, at 7.

*

* But the

[4] Interim Award of Arbitrator, *TCG South Florida v. Verizon Florida Inc.*, No. 71 Y 181 00852 1 (AAA Dec. 30, 2002) *.

*

Arbitrator misunderstood this Commission's view: indeed, the Commission has made clear that it is the intent of the contracting parties that governs. Moreover, AT&T, at the time the original agreement was negotiated, had squarely argued that Internet-bound traffic is access traffic that should be treated like long-distance traffic, not local traffic, for purposes of compensation. The Arbitrator ignored this unrebutted evidence.

Accordingly, this decision cries out for the Commission's expert review, just as the parties intended.

D. The Petition Is Timely

TCG argues that the petition is out of time because Verizon supposedly failed to file its petition within the deadline established in the Agreement. That claim is incorrect. The Agreement provides that "any permitted appeal must be commenced within thirty (30) days after the Arbitrator's decision . . . *is issued*." Agreement, Attach. 1, § 11.3 (emphasis added). TCG states in its brief that the arbitrator's decision was issued on June 13, 2003, but TCG is mistaken. Although the Arbitrator *signed* the decision on June 13, he did not *issue* it on that date. Rather, the American Arbitration Association ("AAA") issued the decision on June 20, 2003. *

* The parties were not even aware of the decision until it was issued by the AAA. Indeed, the letter transmitting the decision provided a "reminder that there is to be no direct communication with the Arbitrator" and that such communication would go through the AAA. *Id.* at 1.

TCG's suggestion that the parties' time for appealing a decision could begin to run even before the decision was actually issued and made available to the parties is not only inconsistent with the explicit language of the contract, it is contrary to common sense and basic fairness. A party obviously cannot formulate a concrete challenge to a particular order until it has received

that order. Indeed, under TCG's theory, had the Arbitrator directed AAA to provide the order to the parties only on July 14, 2003, the parties would have had no opportunity to file an appeal – the time to do so would have expired even before the order was issued. That, of course, is not and could not be what the parties contemplated under the Agreement.

E. TCG's Arguments Concerning the Appropriate Forum for *Enforcement* of the Arbitrator's Order Are Irrelevant

TCG argues at some length that if Verizon wished to bring an action for enforcement of the arbitrator's award, it could do so in Texas state court. But the point of this argument is impossible to fathom. Verizon is not seeking to enforce a final arbitration award: by the plain terms of the Agreement, the arbitrator's award is *not* final – and hence not enforceable in *any* court – because Verizon has brought an action for review of the Arbitrator's decision before this Commission.

Even TCG does not argue that Verizon should have sought such review in any other state's tribunal; nor could it. By its plain terms, the Agreement contemplates that the arbitrator's decision may be "appeal[ed] . . . to the Commission." Agreement, Attach. 1, § 11.2. "Commission" is defined in the Agreement to mean "the Public Service Commission of the State of Florida." *Id.*, Attach. 11, at 3. Thus the parties specifically agreed that an appeal to this Commission would be permitted in accordance with the Agreement. That the private Arbitrator happened to be located in Dallas, rather than Daytona (or Dakar, Senegal for that matter), is simply beside the point. Verizon has followed the alternative dispute resolution procedures in the Agreement; those procedures specifically contemplate that Verizon would be permitted to pursue an action of this type before this Commission. What forum and what relief would have been available had the parties not agreed to permit such review are simply beside the point.

PUBLIC VERSION

CONCLUSION

The Commission should deny the motion to dismiss.

Respectfully submitted,

D. Bruce May
Florida Bar No. 354473
Holland & Knight LLP
Post Office Drawer 810
Tallahassee, Florida 32302
(850) 224-7000

Co-Counsel for Verizon Florida Inc.

Richard A. Chapkis
Verizon Florida Inc.
201 North Franklin Street
Tampa, Florida 33602
(813) 483-1256

Mary Coyne
Verizon Communications
1515 N. Courthouse Road
Suite 500
Arlington, VA 22201

Aaron M. Panner
David L. Schwarz
Kellogg, Huber, Hansen, Todd & Evans, PLLC
1615 M Street, N.W., Suite 400
Washington, D.C. 20036

September 5, 2003

PUBLIC VERSION – CONFIDENTIAL MATERIAL REDACTED

EXHIBIT A TO
OPPOSITION OF VERIZON FLORIDA INC. MOTION TO DISMISS OF TELEPORT COMMUNICATIONS GROUPS, INC. AND TCG SOUTH FLORIDA
REDACTED IN ITS ENTIRETY