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LAW OFFICES
Messer, Caparello & Self
A Professional Association

Post Office Box 1876
Tallahassee, Florida 32302-1876
Internet: www.lawfla.com

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January 14, 2004

BY HAND DELIVERY

Ms. Blanca Bayó, Director
Commission Clerk and Administrative Services
Room 110, Easley Building
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Re: Docket Nos. 981834-TP and 990321-TP

Dear Ms. Bayó:


Enclosed for filing on behalf of AT&T Communications of the Southern States, LLC, and MCImetro Access Transmission Services LLC and MCI WorldCom Communications Inc. are an original and fifteen copies of Response of AT&T and MCI to Verizon Florida's Motion to Clarify the Scope of the Proceeding.

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the same to me.

Thank you for your assistance with this filing.

Sincerely yours,

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E. Gary Early



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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Competitive Carriers)
for Commission action to support local)
competition in BellSouth)
Telecommunications, Inc.'s service)
territory)
_____)

Docket No. 981834-TP

In re: Petition of ACI Corp. d/b/a)
Accelerated Connections, Inc. for generic)
investigation to ensure that BellSouth)
Telecommunications, Inc., Sprint-Florida,)
Incorporated, and GTE Florida Incorporated)
comply with obligation to provide alternative)
local exchange carriers with flexible, timely,)
and cost-efficient physical collocation.)
_____)

Docket No. 990321-TP
Filed: January 14, 2004

**RESPONSE OF AT&T AND MCI TO VERIZON FLORIDA'S MOTION TO
CLARIFY THE SCOPE OF THE PROCEEDING**

AT&T Communications of the Southern States, LLC ("AT&T") and MCImetro Access Transmission Services LLC and MCI WorldCom Communications Inc. ("MCI"), pursuant to Rule 28-106.204, F.A.C., respond to Verizon Florida's ("Verizon") Motion to Clarify the Scope of the Proceeding in the above referenced docket filed with the Florida Public Service Commission ("Commission") on January 7, 2004.

1. On January 7, 2004, Verizon filed its Motion to Clarify the Scope of the Proceeding. Through that Motion, Verizon seeks to have the Commission "clarify" the scope of this proceeding so as to allow the option to bring a simple and expedited "trigger" proceeding prior to engaging in any analysis of operational and economic issues that may bear upon the issue of impairment.

2. Verizon has chosen to raise, as a point of "clarification," an issue that is identical to that raised by Verizon in its September 24, 2003 Response to Orders Establishing Procedure. A

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review of the September 24 “Response” and the January 7 “Motion” reveals that the issue presented and relief requested, though slightly reworded, are the same. Although the September 24 filing was styled as a Response, the prehearing officer essentially treated it as a motion. See Order No. PSC-03-1200-PCO-TP at 2.

3. Through his Order Denying Requests to Modify Procedural Schedule and Modifying Controlling Dates, Order No. PSC-03-1200-PCO-TP, the prehearing officer denied the Verizon “Response,” and by so doing, denied the Verizon request that an analysis to determine whether a “trigger” has been satisfied be conducted prior to any proceeding to determine operational and economic impairment issues.

4. Verizon did not file for reconsideration of the Order denying its “Response.”

**VERIZON’S MOTION IS NOTHING MORE THAN
AN UNAUTHORIZED MOTION FOR RECONSIDERATION**

5. Verizon has done nothing more than ask the Commission, at this late date, to acquiesce in Verizon’s request that this proceeding be bifurcated, with an initial “trigger” case being conducted prior to any further analysis of operational and economic impairment issues. That relief is no different than that requested on September 24, 2003, and denied on October 22, 2003.

6. In its September 24, 2003 Response, Verizon stated that:

. . . the Commission should analyze the “triggers” first. . . . Triggers have the potential to provide a simple solution to the Commission’s review: if a trigger is satisfied, then the Commission must make a finding of no impairment; if not, the Commission may then consider certain operational and economic issues identified by the FCC

Verizon Response to Order Establishing Procedure at pp.2-3. Compare that language to that in the *Verizon Motion to Clarify the Scope of the Proceeding*, in which Verizon states:

The economic and operational issues raised by the CLECs in their direct testimony have no bearing on whether Verizon must continue to unbundle mass market circuit switching Operational and economic impairment issues are not relevant where the mass market switching triggers are met.

Verizon Motion to Clarify the Scope of the Proceeding at p. 4. Based on the similarity in language and effect, the Verizon Motion serves the same function as a motion for reconsideration pursuant to Rule 25-22.0376, F.A.C.

7. A motion for reconsideration must be filed within 10 days of rendition of a non-final order. It has been far longer than 10 days since the entry of Order No. PSC-03-1200-PCO-TP. Therefore, Verizon has waived reconsideration of the issues raised in its September 24, 2003 Response.

8. Based on the foregoing, Verizon's Motion to Clarify the Scope of the Proceeding should be denied as being an unauthorized and untimely motion for reconsideration of the issues resolved by Order No. PSC-03-1200-PCO-TP.

**VERIZON HAS ADMITTED THAT THIS PROCEEDING MUST
EXTEND BEYOND A SIMPLE MATHEMATICAL TRIGGER ANALYSIS**

9. AT&T and MCI realize that Verizon has focused its case only on its narrowly construed "trigger" analysis, however AT&T and MCI disagree with how the analysis of the triggers should be conducted. AT&T and MCI do not agree with Verizon's characterization that the operational and economic considerations are irrelevant to the "trigger" analysis proceeding. AT&T's position is clearly stated in FCCA's Direct and Rebuttal Testimony of Joe Gillan and incorporated herein by reference.¹

¹ See, Direct and Rebuttal Testimony of Joe Gillan filed December 4, 2003 and January 7, 2004, respectively.

10. In its September 24, 2003 filing, Verizon admitted that the batch hot cut process must be reviewed by the Commission even if impairment is challenged, and suggested that the review take place in a parallel proceeding. Verizon stated that “[i]f any ILEC challenges the FCC’s impairment finding for unbundled switching in a particular market, the Commission will likely have to review that ILEC’s batch hot cut process.”² Verizon correctly stated that having BOTH proceedings - parallel and separate - will encourage workable uniformity “. . .regardless of the outcome of any impairment analysis.”³ Therefore, Verizon acknowledged that the hot cut analysis should proceed without any regard to any impairment analysis decisions that could be made by the Commission, including that of the triggers case.

11. The Commission has already ruled on the scope of this proceeding and parties have filed testimony accordingly. Any attempt to derail the process at this late date violates the spirit of the Commission’s Procedural orders in this case.

VERIZON’S MOTION IS SUBSTANTIVELY AND LEGALLY INCORRECT

12. Verizon’s Motion is predicated upon an erroneous, overly narrow interpretation of the *Triennial Review Order*⁴ (hereinafter TRO) “trigger” standards. Verizon would limit the Commission’s proceeding to a mathematical exercise, with no consideration of the factors identified by the FCC as part and parcel of a triggers investigation.⁵ Verizon’s Motion, if granted, would

² Verizon Response to Order Establishing Procedure dated September 24, 2003, filed in Docket No. 030851 –TP and 030852-TP, page 5.

³ *Id.*, at page 5.

⁴ *In the Matter of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Docket No. 01-338, *Implementation of Local Competition Provisions of the Telecommunications Act of 1996*, Docket No. 96-98, *Deployment of Wireline Service Offering Advanced Telecommunications Capacity*, Docket No. 98-147 (FCC 03-06) (“*Triennial Review Order*”), rel. August 21, 2003.

⁵ SBC Motion, at pp. 4-5.

deprive CLECs of the ability to present relevant evidence on the triggers issues envisioned by the TRO and to demonstrate the markets in which CLECs are impaired without access to UNE switching, loops and transport. Verizon's Motion - seeking to narrowly define the impairment analysis to be conducted by the Commission and thereby restrict the evidence that parties may present on impairment issues - is but Verizon's latest attempt to block not only the development of a complete record in this case, but also the development of a competitive local exchange service marketplace in Florida.

13. The trigger analysis cannot be conducted in a vacuum in the manner suggested by Verizon, because the trigger issues are intertwined with many issues, including issues of the market definition and the mass market/enterprise crossover point. Under the TRO, market definition must take into consideration "the locations of customers actually being served (if any) by competitors, the variation in factors affecting competitors' ability to serve each group of customers, and competitors' ability to target and serve specific markets economically and efficiently using currently available technologies."⁶ The FCC has made clear that its "trigger" analysis regarding impairment as to the local switching unbundled network element ("UNE") involves more than mere "head counting" of unaffiliated carriers that are using their own switches. In order to be counted for "trigger" analysis purposes, such a carrier "should be actively providing voice services to mass market customers in the market."⁷

14. The TRO makes clear that market definition issues are complex, and require analysis of a broad range of factors.

⁶ TRO, ¶495.

⁷ *Id.*, ¶499 (emphasis added).

[S]tate commissions must define each market on a granular level, and in doing so, they must take into consideration the locations of customers actually being served (if any) by competitors, the variation in factors affecting competitors' ability to serve each group of customers, and competitors' ability to target and serve specific markets economically and efficiently with available technologies.⁸

As part of their market definition and cross-over analysis, states may consider

how UNE loop rates vary across the state, how retail rates vary geographically, how the number of high-revenue customers varies geographically, how the cost of serving customers varies according to the size of the wire center and the location of the wire center, and variations in the capabilities of wire centers to provide adequate collocation space and handle large numbers of hot cuts.⁹

15. Importantly, the FCC has made clear that its trigger analysis for a reversal of the national finding of impairment as to unbundled local switching does not merely involve the identification of unaffiliated carriers that are using their own separate switches. In order to be counted for “trigger” analysis purposes, such a carrier “should be actively providing voice services to mass market customers in the market.”¹⁰

16. Verizon cites to carefully chosen excerpts from the TRO as support for the restraints it wishes to place on CLECs and the Commission. Some of the very paragraphs Verizon cites contain language that disproves Verizon's theory. For example, Verizon cites to paragraph 494 for the proposition that the Commission may do no more than count switches, yet it ignores the immediately preceding language in that paragraph directing the states to evaluate competitive deployment of switches in “a particular market to determine if the marketplace evidence of deployment of circuit

⁸ TRO at ¶495.

⁹ *Id.*, at ¶496.

¹⁰ *Id.*, ¶499 (emphasis added)

switches serving the mass market requires a finding of no impairment.”¹¹ Thus the TRO directs states to define an appropriate market within which to conduct a trigger analysis and to define what constitutes “the mass market.”

17. The FCC’s trigger test is a proxy for effective local competition, that is, whether there are barriers to entry for CLECs without access to UNE switching, loops and transport.¹² Simply counting whether a certain number of switch-based CLECs are present in a region of Florida is not sufficient. Rather, the TRO requires states to apply their expertise, knowledge of the local market and common sense to determine whether the switch-based CLECs can serve as real alternatives to the use of unbundled ILEC switching.¹³ The FCC specifically declined to hold that the existence CLEC facilities in a given market was dispositive proof of a lack of barriers to entry without more, stating:

For example, if the marketplace evidence shows that new entrants have deployed a certain type of facility, we will consider the facts as evidence that the barriers to entry in that market for that element are surmountable. In deciding what weight to give this evidence, we will consider how extensively carriers have been able to deploy such alternatives, to serve what extent of the market, and how mature and stable that market is. Thus, while we agree that such evidence may indicate a lack of impairment, we disagree with commenters that argue that such evidence is dispositive or creates a rebuttable presumption of no impairment.¹⁴

18. The FCC determined that the states are in the best position to conduct the trigger analysis because they have existing procedures in place to carry out evidentiary hearings, including

¹¹ *Id.*, at ¶494 (emphasis added).

¹² *See e.g.*, *TRO* at ¶94, 96.

¹³ *Id.*, at ¶493.

¹⁴ *Id.*, at ¶94.

“discovery, sworn testimony, and cross examination on the record – that are essential to reasoned fact-finding.”¹⁵ An evidentiary, fact finding proceeding would not be necessary if the FCC had intended for state commissions to simply count switches.

19. Any information that assists the Commission in conducting an analysis of these topics is clearly relevant to this proceeding. The Commission must consider whether a CLEC being evaluated under trigger analysis standards is actually providing local services to all mass market customers throughout a proposed geographic market, and whether or not impairments exist that would impede the entry of additional competitors.

20. The TRO requires that the trigger analysis include an examination of whether a CLEC switch is actively providing local service, and is likely to continue to do so. Thus operational difficulties encountered by a CLEC that affect its ability to serve the mass market at volume are relevant to this proceeding, in judging whether or not the carriers that Verizon claims satisfy the trigger test have any actual, objective experience.

21. At this stage of the proceeding, in light of existing deadlines, the Commission should, as a matter of regulatory policy, permit the evidence offered by the CLECs to be fully considered. Testimony relating to the type of evidence that the Commission should consider in determining whether a carrier should “count” toward the FCC “trigger” standards, mass market definition and geographic market definition, should be permitted to afford the Commission with a complete record on these issues.

22. Granting Verizon’s Motion would unfairly deprive the CLEC parties of their direct case on the trigger issues. Moreover, the Commission would be deprived of the complete and

¹⁵ *Id.*, at ¶488.

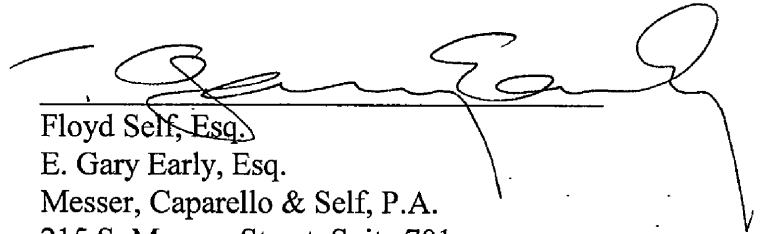
granular record on these issues required by the TRO. Denying Verizon's Motion, however, would allow Verizon to address the issues raised by the CLEC parties as they relate to the triggers portion of this investigation. If Verizon questions the accuracy or relevance of information in any CLEC's testimony, it may address those concerns in its reply testimony and/or during cross examination of the CLEC witnesses.

23. Denial of Verizon's Motion affords the Commission the opportunity to evaluate and determine, after consideration of a full evidentiary record, which construction of the TRO is the best means of carrying out the underlying policies of assuring that all consumers in a mass market have real local service alternatives. Given the critical importance of this proceeding, the Commission should rule on the side of inclusiveness at this preliminary stage of its investigation so that MCI, AT&T, and the other CLEC parties have a fair opportunity to respond to Verizon's position.

CONCLUSION

24. Given the importance of this proceeding and the novelty of the TRO's "trigger" analysis of impairment, the public interest would be best served by the Commission's conducting this proceeding upon a broader interpretation of the "trigger" analysis than Verizon advocates, and by permitting all parties to provide their views. Based on the procedural and substantive issues set forth herein, Verizon's Motion should be denied in its entirety.

Respectfully submitted, this 14th day of January, 2004.



Floyd Self, Esq.
E. Gary Early, Esq.
Messer, Caparello & Self, P.A.
215 S. Monroe Street, Suite 701
Tallahassee, FL 32302
Phone: (850) 222-0720
Fax: (850) 224-4359

and

Tracy W. Hatch, Esq.
AT&T Communications of the Southern
States, LLC
101 N. Monroe St., Suite 700
Tallahassee, FL 32301

Attorneys for AT&T Communications of the
Southern States, LLC

Donna McNulty, Esq.
MCI
1203 Governors Square Blvd, Suite 201
Tallahassee, FL 32301-2960

Attorneys for MCImetro Access Transmission
Services LLC and MCI WorldCom
Communications Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served on the following parties by Hand Delivery (*) and/or U. S. Mail this 14th day of January, 2004.

Beth Keating, Esq.*
Division of Legal Services, Room 370
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Ms. Lisa Riley
AT&T
1200 Peachtree St., Suite 8068
Atlanta, GA 30309

J. Philip Carver
Nancy B. White
c/o Nancy H. Sims
BellSouth Telecommunications, Inc.
150 South Monroe Street, Suite 400
Tallahassee, FL 32301

Jeffrey Whalen, Esq.
John Fons, Esq.
Ausley Law Firm
P.O. Box 391
Tallahassee, FL 32302

Mr. Terry Monroe
Ms. Genevieve Morelli
CompTel
1900 M Street, NW, Suite 800
Washington, DC 20036

Gene Watkins
William H. Weber
Senior Counsel
Covad Communications Company
1230 Peachtree Street, NE, 19th Floor
Atlanta, GA 30309

Mr. Robert Waldschmidt
Howell & Fisher
Court Square Building
300 James Robertson Parkway
Nashville, TN 37201-1107

Michael A. Gross
Vice President, Regulatory Affairs
& Regulatory Counsel
Florida Cable Telecommunications Assoc., Inc.
246 E. 6th Avenue
Tallahassee, FL 32301

Vicki Kaufman, Esq.
Joe McGlothlin, Esq.
McWhirter, Reeves, McGlothlin,
Davidson, Rief & Bakas, P.A.
117 S. Gadsden Street
Tallahassee, FL 32301

Susan S. Masterton, Esq.
Charles J. Rehwinkel, Esq.
Sprint Communications Company Limited
Partnership
P.O. Box 2214
MC: FLTLHO0107
Tallahassee, FL 32316-2214

Matthew Feil, Esq.
Florida Digital Network, Inc.
390 North Orange Avenue, Suite 2000
Orlando, Florida 32801

Mr. David Tobin
Tobin & Reyes
7251 West Palmetto Park Road, #205
Boca Raton, FL 33433-3487

Nanette S. Edwards, Esq.
ITC^DeltaCom
4092 South Memorial Parkway
Huntsville, AL 35802-4343

Donna McNulty, Esq.
MCI
1203 Governors Square Blvd, Suite 201
Tallahassee, FL 32301-2960

Mr. John D. McLaughlin, Jr.
KMC Telecom, Inc.
1755 North Brown Road
Lawrenceville, GA 30043-8119

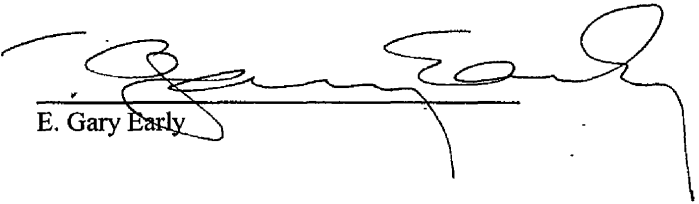
Ms. Deborah Eversole, General Counsel
Kentucky Public Service Commission
P.O. Box 615
Frankfort, KY 40602

Marilyn H. Ash
MGC Communications, Inc.
3301 North Buffalo Drive
Las Vegas, NV 89129

Mr. Don Sussman
Network Access Solutions Corporation
Three Dulles Tech Center
13650 Dulles Technology Drive
Herndon, VA 20171-4602

Tracy W. Hatch, Esq.
AT&T Communications of the Southern States, LLC
101 N. Monroe Street, Suite 701
Tallahassee, FL 32301

Kenneth A. Hoffman, Esq.
Rutledge Law Firm
P.O. Box 551
Tallahassee, FL 32302-0551



E. Gary Early

Rodney L. Joyce
Shook, Hardy & Bacon LLP
600 14th Street, NW, Suite 800
Washington, DC 20005-2004

Charles J. Rehwinkel
Sprint-Florida, Incorporated
MC FLTHO0107
P.O. Box 2214
Tallahassee, FL 32399-2214

Mark Buechele
Supra Telecom
1311 Executive Center Drive, Suite 200
Tallahassee, FL 32301

Andrew O. Isar
Miller Isar, Inc.
7901 Skansie Avenue, Suite 240
Gig Harbor, WA 98335

Carolyn Marek
Vice President of Regulatory Affairs
Southeast Region
Time Warner Communications
233 Bramerton Court
Franklin, TN 37069

Mr. David Christian
Verizon Florida, Inc.
106 East College Avenue, Suite 810
Tallahassee, FL 32301-7704

Richard Chapkis
Verizon Select Services
P.O. Box 110 (FLTC0007)
Tampa, FL 33601-0110

Daniel McCuaig, Esq.
Wilmer Cutler & Pickering
2445 M Street, N.W.
Washington, DC 20037-1420