

State of Florida



Public Service Commission

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COMMISSION
CLERK

DATE: JANUARY 22, 2004

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK &
ADMINISTRATIVE SERVICES (BAYÓ)

FROM: OFFICE OF THE GENERAL COUNSEL (BANKS, SUSAC) ^{PK} _{PPS} *[Signature]*
DIVISION OF COMPETITIVE MARKETS & ENFORCEMENT (PRUITT) *[Signature]*

RE: DOCKET NO. 030643-TP - PETITION OF VERIZON FLORIDA INC.
(F/K/A GTE FLORIDA INC.) AGAINST TELEPORT COMMUNICATIONS
GROUP, INC. AND TCG SOUTH FLORIDA, FOR REVIEW OF DECISION
BY THE AMERICAN ARBITRATION ASSOCIATION, IN ACCORDANCE
WITH ATTACHMENT 1 SECTION 11.2(A) OF INTERCONNECTION
AGREEMENT BETWEEN GTE FLORIDA INC. AND TCG SOUTH FLORIDA. *[Signature]*

AGENDA: 02/03/04 - REGULAR AGENDA - MOTION TO DISMISS - PARTIES
MAY PARTICIPATE/REQUEST FOR ORAL ARGUMENT

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\GCL\WP\030643R1.RCM

CASE BACKGROUND

The facts in this case have their genesis in a dispute that arose between the parties in an American Arbitration Association (AAA) decision issued on June 20, 2003.

On July 18, 1997, the Commission issued Order No. PSC-97-0864-FOF-TP, in which it approved a final interconnection agreement between AT&T Communications of the Southern States (AT&T) and GTE Florida Inc. n/k/a Verizon Florida Inc. (Verizon), as a result of an arbitration proceeding before the Commission in Docket No. 960847-TP. Teleport Communications Group, Inc. and TCG South Florida (collectively "TCG") adopted the agreement in full pursuant to 47 U.S.C. § 252(i) in March 1998.

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In compliance with the dispute resolution provision in the interconnection agreement, TCG filed a Petition for Arbitration before the AAA in December 2001, alleging that Verizon breached the agreement by failing to pay reciprocal compensation for termination of ISP-bound traffic. Verizon filed a counterclaim relating to virtual NXX traffic. The AAA docketed the matter as AAA Case No. 71 & 181 00852 1. The parties agreed upon the appointment of an Arbitrator and proceeded with the arbitration.

During the year-long course of arbitration, the parties engaged in extensive discovery and filing of direct and rebuttal testimony. Thereafter, a hearing was held before the Arbitrator in Dallas, Texas. The Arbitrator rendered a decision regarding the case on June 13, 2003, and an award memorializing that decision was issued on June 20, 2003.

On July 18, 2003, Verizon Florida, Inc. (Verizon) filed its confidential Petition against TCG seeking review of a decision by the AAA in accordance with Section 11.2(a) of the Interconnection Agreement between GTE Florida, Inc. and TCG South Florida. On August 6, 2003, TCG filed its confidential Motion to Dismiss Verizon's Petition.

Both parties filed their initial pleadings under confidential cover. Because staff believed that most of the information in the pleadings was not confidential, staff conducted a conference call on August 22, 2003, with the parties to discuss the nature of the pleadings. After agreeing that most of the information in the pleadings was not confidential, TCG and Verizon refiled their pleadings (public versions) on September 2, and September 5, 2003, respectively. By separate pleading, on August 25, 2003, Verizon filed a Motion for Oral Argument.

On November 18, 2003, TCG filed a Notice of Supplemental Authority, citing File No. EB-00-MD-19, FCC Memorandum and Opinion Order In the Matter of Starpower Communications, LLC v. Verizon South Inc. Verizon did not file a response.

This recommendation addresses TCG's Motion to Dismiss and Verizon's Response and Opposition to TCG's Motion to Dismiss.

The Commission is vested with jurisdiction pursuant to Section 252 of the Telecommunications Act of 1996 and Section 364.162, Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should Verizon Florida Inc.'s request for oral argument be granted?

RECOMMENDATION: Yes. Staff recommends that Verizon Florida Inc.'s request for oral argument be granted. If the Commission grants oral argument, staff recommends that each party be allowed ten minutes to present oral argument. **(BANKS)**

STAFF ANALYSIS: In its Motion for Oral Argument, Verizon requests that it be granted the opportunity to present oral argument on the Motion to Dismiss in this case. In support of its request, Verizon states that TCG's Motion to Dismiss raises significant issues that implicate the Commission's jurisdiction under Chapter 364, Florida Statutes. Verizon asserts that TCG's Motion to Dismiss also confuses the jurisdictional issues in this proceeding with the issues in a prior proceeding where the Commission declined to hear TCG's petition to enforce a private arbitrator's discovery order. Further, Verizon contends that oral argument would assist the Commission in clarifying the issues regarding the Motion to Dismiss.

Staff believes that it would be beneficial for the Commission to hear from the parties regarding TCG's Motion to Dismiss and the response thereto. Further, it appears to staff that this case raises an important issue regarding the Commission's jurisdiction. Thus, staff recommends that the Commission hear oral arguments from the parties. If the Commission grants oral argument, staff recommends that each party be allowed ten minutes to present oral argument.

ISSUE 2: Did Verizon timely file its appeal of the American Arbitration Association's award according to the parties' interconnection agreement?

RECOMMENDATION: Yes. Staff recommends that Verizon's filing of its appeal of the AAA order should be considered timely. **(BANKS)**

STAFF ANALYSIS: As indicated in the case background, on July 18, 2003, Verizon Florida, Inc. (Verizon) filed its confidential Petition against TCG seeking review of a decision by the AAA in accordance with Section 11.2(a) of the Interconnection Agreement between GTE Florida, Inc. and TCG South Florida.

TCG asserts that Verizon's petition was not timely filed. TCG states that the agreement provides that any permitted appeal must be commenced within thirty (30) days after the Arbitrator issues the award. TCG contends that the Arbitrator issued his Final Award on June 13, 2003; thus, TCG claims that Verizon's petition was filed 35 days after the issuance of the Final Award. On that basis, TCG believes that Verizon's failure to meet the filing deadline constitutes an independent ground for dismissal of Verizon's petition.

Verizon, however disagrees, contending that the arbitrator's decision was not issued on June 13, 2003. Verizon explains that the arbitrator signed the decision on June 13, 2003; however, the award memorializing the decision was not issued until June 20, 2003. Verizon states that TCG's suggestion that the parties' time for appealing a decision began to run before the decision was actually issued is not only inconsistent with the explicit language of the contract, but is also contrary to common sense and basic fairness. Therefore, Verizon concludes that the date the award was faxed to the parties is the "issuance" date for purposes of the parties' agreement.

Analysis

Attachment 1, Section 11.3 of the parties' interconnection agreement provides that:

Each party agrees that any permitted appeal must be commenced within thirty (30) days after the Arbitrator's decision in the arbitration proceedings is issued. In the

event of an appeal, a party must comply with the results of the arbitration process during the appeal process.

Essentially, the parties' dispute on this point boils down to what does the term "issued" mean. The American Arbitration Association rules offer little guidance on this point. Staff notes that it appears that the parties are in agreement as to the time frame for appealing the AAA decision and that the AAA award was faxed and received on June 20, 2003. As staff understands it, AAA has a long-established practice of transmitting awards via facsimile due to the highly confidential nature of the proceedings.

Because the AAA rules do not define the term "issued," it is appropriate to look to the parties' intent when they used that term in their agreement. In evaluating the interpretation of contracts, the Commission has delineated a number of factors that should be utilized in contract interpretation. In Order No. PSC-98-1216-FOF-TP, the Commission cited James v. Gulf Life Insurance Company, 66 So. 2d 62, 63 (Fla. 1953). In the James case, the Florida Supreme Court cited with favor Contracts, 12 Am. Jur. § 250, pages 791-93, as a general proposition concerning contract construction in pertinent part as follows:

Agreements must receive a reasonable interpretation, according to the intention of the parties at the time of executing them, if that intention can be ascertained from the language . . . Where the language of an agreement is contradictory, obscure, or ambiguous or where its meaning is doubtful, so that it is susceptible of two constructions, one of which makes it fair, customary, and such as prudent men would naturally execute, while the other makes it inequitable, unusual, or as such as reasonable men would not be likely to enter into, the interpretation which makes a rational and probable agreement must be preferred . . . An interpretation which is just to both parties will be preferred to one which is unjust.

In the construction of a contract, the circumstances in existence at the time the contract was made should be considered in ascertaining the parties' intentions. Triple E. Development Company v. Floridagold Citrus Corporation, 51 So 2d 435, 438, rhq. den. (Fla. 1951). Courts may look to the subsequent action of

parties to determine the interpretation that they themselves place on the contractual language. Brown v. Financial Service Corporation, International, 489 F.2d 144, 151 (5th Cir.) Citing Lalow v. Codomo, 101 So. 2d 390 (Fla. 1958).

It appears that the term "issued" is susceptible to more than one interpretation; thus, the interpretation that makes it fair, customary, and such as prudent men would naturally execute must be preferred. 12 Am. Jur. § 250, pages 791-793.

Because all of the AAA award decisions are published when they are faxed to the parties, staff believes this is the point at which the decision should be considered to be "issued." Staff further reasons that because AAA has a long-established practice of faxing its awards to parties, it would not be possible for a party to have a copy of the decision until the decision is faxed. Staff believes that it is unreasonable to allow the time for the appeal process to run before the parties have access to or a copy of the decision that is being appealed.

In Boehm vs. Foster, 670 F.2d 111, the Ninth Circuit of the United States Court of Appeals determined that the petition for review is required to be filed within 30 days after the date the petitioner receives notice of the arbitration award. (Emphasis added). Staff believes that the Boehm case lends further support to staff's position.

Based on the foregoing, staff recommends that Verizon's appeal of the AAA order should be considered as timely filed

ISSUE 3: Should TCG's Motion to Dismiss be granted?

RECOMMENDATION: No. TCG's Motion to Dismiss should be denied. As a general matter, the Commission has jurisdiction to resolve disputes arising under an approved interconnection agreement unless its role is restricted by a binding dispute resolution provision in the agreement. The agreement in this case expressly provides that an arbitrator's decision resolving an interconnection agreement dispute shall not be final if (1) a party appeals the decision to the Commission, (2) the matter is within the jurisdiction of the Commission, and (3) the agency agrees to hear the matter. The first two prongs of this provision are met, so it is not appropriate to dismiss for lack of jurisdiction.

The Motion and Response do not, however, provide sufficient information for staff to recommend whether the Commission should exercise its discretion to "agree" to hear an appeal under the third prong. Therefore, staff recommends that within 20 days of the issuance of the Order, Verizon should submit a memorandum that (a) identifies the specific factual, legal and policy issues for which review is sought, (b) addresses the reasons that the Commission should agree to review the arbitrator's decision on each issue identified, (c) specifies the type of proceeding that should be held on each issue (e.g., a de novo evidentiary hearing or appellate review based on the record in the arbitration proceeding) and (d) identifies the applicable standard of review for each issue. TCG should then be given 20 days to respond. Staff would subsequently file a recommendation on whether, and under what procedures, the Commission should agree to hear the appeal.
(BANKS)

STAFF ANALYSIS: As noted in the Case Background, TCG filed the public version of its Motion to Dismiss Verizon's Petition on September 2, 2003. Verizon filed its public version of its Opposition to the Motion to Dismiss on September 5, 2003. Staff notes that the references to TCG's Motion to Dismiss and Verizon's response refer to the public versions that have been filed.

TCG's Motion

In support of its Motion, TCG asserts that Verizon's petition should be dismissed because the Commission does not have jurisdiction to review the petition. TCG explains that Verizon

seeks review of a final order issued by an arbitrator appointed by the AAA in a private arbitration between TCG and Verizon.

As previously stated, the Commission issued Order No. PSC-97-0864-FOF-TP, in which it approved the final interconnection agreement between AT&T and GTE Florida Incorporated (n/k/a Verizon) pursuant to 47 U.S.C. § 252(i) in March 1998. TCG asserts that Attachment 1 of the agreement provides the "exclusive remedy" for all disputes:

2. Exclusive Remedy

2.1 Negotiation and arbitration under the procedures provided herein shall be the exclusive remedy for all disputes between [the parties] arising out of this Agreement or its breach. [The parties] agree not to resort to any court, agency, or private group with respect to such disputes in accordance with this Attachment.

(Motion, P. 2) In compliance with the Interconnection Agreement, TCG filed a Petition for Arbitration before the AAA in December 2001, alleging that Verizon breached the Agreement by failing to pay reciprocal compensation for termination of ISP-bound traffic. Verizon filed a counter-claim relating to virtual NXX traffic.

TCG states that during the year-long course of arbitration, the parties engaged in discovery and filed testimony. TCG asserts that the parties agreed that the Arbitrator would decide all issues with the exception of the amount of damages, which was to be resolved by the parties based on the Arbitrator's rulings. Thereafter, a hearing was held before the Arbitrator in Dallas, Texas.

TCG indicates that the standard of review for a Motion to Dismiss is if the petition fails to state a cause of action for which relief can be granted, it must be dismissed. Varnes v. Dawkins, 624 So.2d 349 (Fla. 1st DCA 1993). TCG contends that the Commission cannot look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, or consider any evidence likely to be produced by either side. Id. at 350. TCG states that Verizon's petition must be dismissed because it sets forth a claim that the Commission has no authority to hear and seeks a remedy that is not within its power to grant.

TCG asserts that the Commission has already determined that it lacks authority to review orders issued by private arbitrators. TCG relies on Docket No. 021006-TP, where it filed a confidential Petition for Expedited Enforcement of an Interconnection Agreement with Verizon Florida Inc. TCG asked the Commission to exercise its authority pursuant to 47 U.S.C. § 252 and Section 364.162, Florida Statutes, to enforce the Arbitrator's discovery order directing Verizon to produce a specified document. TCG reasoned that Verizon's refusal to comply with the Arbitrator's order constituted a breach of its contractual obligation to submit disputes to arbitration and comply with orders issued by the Arbitrator, thus triggering the Commission's authority to enforce the interconnection agreement pursuant to Section 364.162, Florida Statutes, which provides as follows:

The Commission shall have the authority to arbitrate any dispute regarding interpretation of interconnection or resale prices and terms and conditions.

In that case, Verizon moved to dismiss TCG's petition arguing that nothing in Section 364.162, Florida Statutes, gives the Commission the authority to enforce the type of private arbitration order at issue there. Verizon argued that the order was enforceable, if at all, in an appropriate court of general jurisdiction. In response, TCG urged a broader reading of the statute, arguing that it grants the Commission full authority to resolve any dispute regarding the interpretation of interconnection terms and conditions.

TCG contends that the Commission determined that it lacked subject matter jurisdiction over orders issued by a private arbitrator, and dismissed TCG's petition. The Commission stated:

We disagree with the analysis that the discovery orders are terms and conditions of a Commission approved interconnection agreement thereby invoking our jurisdiction. The private arbitrator discovery orders are not terms and conditions of the interconnection agreement. Rather, the discovery orders are merely a consequence of compliance with the terms and conditions of the interconnection agreement which requires private arbitration. The alleged act of non-compliance with the Arbitrator's order by a party does not confer this Commission with jurisdiction over the Arbitrator's orders.

(Order No. PSC-02-1705-FOF-TP, p. 6) TCG likens the discovery order at issue in Docket No. 021006-TP to the arbitrator's award in the case at hand. Like the discovery order, TCG asserts, the Arbitrator's Final Award does not constitute "terms or conditions of the interconnection agreement." Rather, TCG contends that both orders are merely a consequence of compliance with the terms and conditions of the interconnection agreement wherein the parties agreed to private arbitration. TCG states that Verizon argues that the ultimate relief it seeks is within the Commission's jurisdiction and therefore justifies its exercise of jurisdiction over the Arbitrator's final award. TCG contends that the Commission should reject this argument.

TCG asserts that the ultimate relief sought in Docket No. 021006-TP (an order requiring Verizon to produce a document) was squarely within the Commission's authority pursuant to Section 364.183, Florida Statutes. However, the Commission recognized that TCG did not seek relief in a vacuum, but instead sought to invoke the Commission's jurisdiction to enforce a private arbitration order over which it had no jurisdiction. By this same reasoning, TCG believes the Commission's authority to arbitrate interconnection disputes does not justify Verizon's demand that the Commission overturn an Arbitrator's order over which it has no jurisdiction.

Further, TCG states that Verizon fails to identify any statutory authority that would allow the Commission to review a private Arbitrator's order. TCG states that the Commission lacks inherent or implied authority to review or vacate private arbitration orders:

An agency has only such power as expressly or by necessary implication is granted by legislative enactment. An agency may not increase its own jurisdiction and, as a creature of statute, has no common law jurisdiction or inherent power such as might reside in, for example, a court of general jurisdiction.

East Central Regional Wastewater Facilities Operating Board v. City of West Palm Beach, 659 So.2d 402, 404 (Fla. 4th DCA 1995). See also Deltona Corp. v. Mayo, 342 So.2d 510 (Fla. 1977). TCG reasons that the Commission has no more authority to vacate an Arbitrator's order than it does to enforce it. Further, TCG states that even if the AAA decision is appealable, the appeal would be appropriate at

the Texas Commission or in the United States District Court for the Northern District of Texas, the state where the AAA decision was rendered.

TCG also argues that the interconnection agreement does not support Verizon's claim for a "de novo" review of the final award of the Arbitrator. The agreement requires that all interconnection disputes be submitted to formal binding arbitration. As previously stated, Attachment 1 to the parties' agreement, entitled "Alternative Dispute Resolution," specifies arbitration as the "exclusive remedy" for all interconnection disputes. This section further states that the results of such arbitration shall be binding upon the parties. (Attachment 1, Section 11.1) TCG argues that the agreement grants the Arbitrator all power and authority that would or could be exercised by a court. Attachment 1 also provides for judicial enforcement of the arbitration award, as well as limited opportunity for appeal:

11. Decision

11.1 Except as provided below, the Arbitrator's decision and award shall be final and binding, and shall be in writing and shall set forth the Arbitrator's reasons therefor for decision unless the parties mutually agree to waive the requirement of a written opinion. Judgement upon the award rendered by the Arbitrator may be entered in any court having jurisdiction thereof. Either party may apply to the United States District Court for the district in which the hearing occurred for an order enforcing the decision.

11.2 A decision of the Arbitrator shall not be final in the following situations:

- a) A party appeals the decision to the Commission or FCC, and the matter is within the jurisdiction of the Commission or FCC, provided that the agency agrees to hear the matter;

(Agreement, Attachment 1, Section 11) (Emphasis added) TCG asserts that nothing in the agreement authorizes Verizon's request for the Commission to second guess the Arbitrator, dissect the Final Award and ultimately discard it in favor of a de novo review. TCG claims that Attachment 1 of the agreement does not support Verizon's claim that any decision by the AAA-appointed arbitrator can be directly

appealed to the Commission. TCG contends that the agreement provides only a limited opportunity for appeal of matters that are within the jurisdiction of the Commission. Therefore, TCG requests that the Commission grant its Motion to Dismiss.

Verizon's Response

Verizon states that TCG's Motion to Dismiss should be denied for three basic reasons. First, Verizon asserts that nothing in the parties' agreement forecloses the Commission from reviewing the arbitrator's decision. Verizon contends that the agreement specifically contemplates that the parties would be permitted to seek review from this Commission. Second, Verizon argues that there is no law that provides any obstacle to the Commission's adjudication of this dispute. To the contrary, Verizon asserts that 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., and that since this is a dispute regarding interpretation of interconnection terms and conditions, the Commission has jurisdiction over the matter. Third, Verizon contends that the Commission should exercise its jurisdiction because general principles of administrative law require it and because the arbitrator's decision was squarely based on misapplication of the Commission's prior decisions.

Verizon argues that the Eleventh Circuit Court of Appeals has determined that the power to approve or reject interconnection agreements carries with it the authority to interpret agreements that have already been approved. BellSouth Telecommunications, Inc. vs. MCImetro Access Transmission Services, Inc., 317 F.3d 1270, 1274 (11th Cir. 2003).

Verizon further contends that under Section 252(e)(5) of the Telecommunications Act of 1996, "[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). Verizon refers to the Starpower Preemption Order, 15 FCC Rcd at 11278-279. Verizon argues that the FCC's construction of its enabling statute is entitled to deference. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)

Verizon also contends that TCG's claim that the Commission lacks jurisdiction is based solely on the fact that the Commission declined to hear TCG's prior petition to enforce a private arbitrator's discovery order, which is not relevant for purposes of determining the Commission's jurisdiction in the instant docket. Verizon explains that TCG's complaint filed in Docket No. 021006-TP was inappropriate because this Commission has no general authority to enforce the orders of a private arbitrator, which is what TCG sought to do. Verizon asserts that the Commission disagreed with TCG's analysis that the discovery orders are considered terms and conditions of a Commission-approved agreement. Verizon reiterates that the Commission determined discovery orders to be a consequence of compliance with the interconnection agreement. Thus, Verizon concludes that the issue in Docket No. 021006-TP did not present any disputes regarding interconnection terms and conditions. Further, Verizon contends that Docket No. 021006-TP is plainly distinguishable from the instant case because the reciprocal compensation "dispute" unquestionably relates to interconnection terms and conditions.

Verizon states that the Verizon/TCG agreement explicitly provides for an appeal to the Commission or the FCC. Verizon believes that if the parties had agreed that the arbitrator's decision would be final, then the parties would not have contemplated Section 11.2 of the agreement, providing for a right to appeal. Verizon also argues that because federal and Florida law grant the Commission jurisdiction, there is absolutely no obstacle that would prevent the Commission from exercising its jurisdiction in this case.

Verizon contends that the only consideration in this case is whether the Verizon/TCG dispute regarding reciprocal compensation concerns an interconnection term and condition within the meaning of Section 364.162, Florida Statutes. In the event that the Commission believes that the standard of review is important for moving forward with this case, Verizon states that the standard of review can be briefed when appropriate. However, Verizon asserts that the Commission should review obligations imposed by the parties' interconnection agreement de novo.

Further, Verizon argues that TCG's claim that the Texas Commission is the appropriate forum for enforcement of the arbitrator's award, is incorrect. Verizon opines that by the plain terms of the agreement, the arbitrator's award is not final and can

be appealed to this Commission or the FCC pursuant to Section 11.2 of the agreement. Verizon explains that the final award is not enforceable in any court because Verizon has timely appealed the award.

In short, Verizon believes that not only does the Commission have jurisdiction to review the final award of the arbitrator, but that public policy dictates that the Commission review this case because it has primary jurisdiction under federal and state law. Therefore, Verizon requests that the Commission deny TCG's Motion to Dismiss.

Staff Analysis

Under Florida law the purpose of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). In order to sustain a motion to dismiss, the moving party must demonstrate that, accepting all allegations in the petition as facially correct, the petition still fails to state a cause of action for which relief can be granted. In re Application for Amendment of Certificates Nos. 359-W and 290-S to Add Territory in Broward County by South Broward Utility, Inc., 95 FPSC 5:339 (1995); Varnes, 624 So. 2d at 350. When "determining the sufficiency of the complaint, the trial court may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side." Id. However, staff notes that TCG's Motion to Dismiss questions this Commission's authority to hear the subject matter. Thus, regardless of whether all of Verizon's allegations in its Complaint were facially correct, if the Commission were to determine that it lacks subject matter jurisdiction, the Complaint would have to be dismissed.

As noted by the parties, Verizon's petition arises from a private arbitration conducted in accordance with the parties' current interconnection agreement which was approved by the Commission. Essentially, Verizon requests that this Commission review the AAA decision which was issued by the private Arbitrator. Verizon states this Commission has authority to grant this relief based on Section 364.162, Florida Statutes, which authorizes the Commission to arbitrate disputes regarding terms and conditions of interconnection agreements. Further, Verizon asserts that the parties' interconnection agreement provides that the AAA decision

may be appealed to the FCC or Commission, provided that the agency agrees to hear the matter.

TCG responds that the Commission does not have authority to review Verizon's petition. Further, TCG asserts that the Commission has already determined that it lacks authority to review orders issued by private arbitrators.

Staff agrees with Verizon that this Commission has jurisdiction in this matter.

Staff rejects TCG's assertion that the Commission has previously decided that it does not have authority to review final awards of a private arbitrator. TCG's claim that the enforcement of the discovery order in Docket No. 021006-TP is synonymous with review of a final award is misplaced. In its Order, the Commission stated that the private arbitrator's discovery orders are not terms or conditions of an interconnection agreement. Rather, the discovery orders are merely a consequence of compliance with the terms and conditions of the interconnection agreement.

In the instant case, TCG asserts that Section 2.1 of the Agreement specifies arbitration as the "exclusive remedy." TCG concludes that the arbitrator's award is final and not susceptible to review. However, Verizon responds by citing the plain language of Section 11.2 of the Agreement, which clearly provides that the Commission may review a private arbitrator's decision in certain instances. Verizon explains that Section 11.2 of the Agreement states that the decision of the arbitrator shall not be final if a party appeals the decision to the Commission or FCC, provided that the agency agrees to hear the matter. (Emphasis added).

While the review of a final arbitration award presents a case of first impression before this Commission, staff believes that according to the agreement of the parties, which the Commission approved, the Commission has authority to review the final award. Further, in support, staff cites to Section 252 of the Act and Section 364.162, Florida Statutes, which provide that the Commission has jurisdiction to review disputes regarding terms and conditions of interconnection agreements.

Based on the arguments presented by the parties, staff recommends that TCG's Motion to Dismiss be denied. It is well established that the Commission has jurisdiction to resolve

disputes arising under an approved interconnection agreement unless its role is restricted by a binding dispute resolution provision in the agreement. The agreement in this case expressly provides that an arbitrator's decision resolving an interconnection agreement dispute shall not be final if (1) a party appeals the decision to the Commission, (2) the matter is within the jurisdiction of the Commission, and (3) the agency agrees to hear the matter. The first two prongs of this provision are met, so it is not appropriate to dismiss for lack of jurisdiction. While staff believes the plain language of Section 11.2 of the Agreement clearly provides that the arbitrator's decision may be appealed to the Commission or FCC, the language indicates that the appeal will proceed only if the agency agrees to hear the matter. Hence, the Commission has jurisdiction to hear the matter, but the appeal is not automatic.

On this question of first impression, the Motion and Response do not provide sufficient information for staff to recommend whether the Commission should exercise its discretion to "agree" to hear an appeal under the third prong. Therefore, staff recommends that within 20 days of the issuance of the Order, Verizon should submit a memorandum that (a) identifies the specific factual, legal and policy issues for which review is sought, (b) addresses the reasons that the Commission should agree to review the arbitrator's decision on each issue identified, (c) specifies the type of proceeding that should be held on each issue (e.g., a de novo evidentiary hearing or appellate review based on the record in the arbitration proceeding) and (d) identifies the applicable standard of review for each issue. TCG should then be given 20 days to respond. Staff would subsequently file a recommendation on whether, and under what procedures, the Commission should agree to hear the appeal.

DOCKET NO. 030643-TP
DATE: JANUARY 22, 2004

ISSUE 4: Should this docket be closed?

RECOMMENDATION: If the Commission denies staff's recommendation in Issue 3, this docket shall be closed as no further Commission action is required. If however, the Commission approves staff's recommendation in Issue 3, this docket should remain open pending the resolution of the issues in the docket. **(BANKS)**

STAFF ANALYSIS: If the Commission denies staff's recommendation in Issue 3, this docket shall be closed as no further Commission action is required. If however, the Commission approves staff's recommendation in Issue 3, this docket should remain open pending the resolution of the issues in the docket.