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June 6, 2004

VIA HAND DELIVERY

Ms. Blanca Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Betty Easley Conference Center, Room 110
Tallahassee, Florida 32399-0850

Re: TCG v. Verizon
Docket No. 030643-TP

Dear Ms. Bayo:

Enclosed for filing on behalf of Teleport Communications Group and TCG South Florida, Inc. are the original and fifteen copies each of TCG's Response to Verizon's Supplemental Brief and Clarification.

Please acknowledge this filing by date-stamping and returning the enclosed copy of this letter.

Thank you for your assistance with this filing.

Sincerely,

Suzanne Young

Suzanne Young, Assistant to
Marsha E. Rule, Esq.

CMP ____
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ECR ____
GCL ____
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RCA ____
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cc: All Counsel

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: June 4, 2004

TCG'S RESPONSE TO VERIZON'S SUPPLEMENTAL BRIEF AND CLARIFICATION

Pursuant to direction of the Commission on May 3, 2004, Teleport Communications Group and TCG South Florida, Inc. ("TCG") hereby respond to Verizon, Florida, Inc.'s ("Verizon") Supplemental Brief and Clarification.

SUMMARY

1. It is axiomatic that parties cannot confer jurisdiction upon the Commission. Jurisdiction can be conferred only by the Florida Constitution or (unless prohibited by the Constitution) the Florida Legislature. As an administrative agency created by the Legislature, "the Commission's power, duties and authority are those and only those that are conferred expressly or impliedly by statute of the State." *Rolling Oaks Utilities v. Florida PSC,* 533 So.2d 770, 773 (Fla. 1st DCA 1988). The Legislature has neither expressly nor impliedly granted the Commission authority to modify, vacate or otherwise review a private arbitration award, but instead has specifically reserved that authority to Florida's courts pursuant to Chapter 682, Florida Statutes. Nor has the Legislature authorized the Commission to hear appeals; that authority is reserved to Florida's courts by Article V of the Florida Constitution and therefore

cannot be delegated to the Commission. Section 364.162, Florida Statutes, permits the Commission to resolve interconnection disputes that are initially brought to the Commission; but where - as here - the parties' dispute has already been resolved through private arbitration, Section 364.162 gives the Commission no authority whatsoever over the result of that arbitration.

2. Even if the Commission had jurisdiction over this appeal – which it does not – it should decline to exercise it. Contrary to Verizon's representations, this case involves only issues of contract interpretation between two carriers, and raises no substantial questions of law and policy. The Arbitrator did not establish new interconnection obligations for the parties; rather he simply interpreted the terms of this particular 1996-era Agreement and determined that it specifically requires the parties to bill reciprocal compensation for traffic based on its originating and terminating NPA-NXXs, without exception for Internet Service Provider ("ISP") or Virtual Foreign Exchange ("VFX") traffic. He further found that that the Agreement contained no change of law provision that would incorporate the Commission's Order No. PSC-02-1248-FOF-TP or the FCC's *ISP Remand Order*. His decision is consistent with the terms of these orders, both of which specified that they shall not affect pre-existing contracts, as well as prior Commission orders regarding payment of reciprocal compensation for ISP-bound traffic. The Arbitrator's decision is not precedent and does not bind other parties. It applies only to TCG and Verizon, and even that applicability is limited because Verizon has terminated the Agreement. [1]

[1] Verizon has exercised its option under Section 2of the Agreement to terminate the Agreement effective July 31, 2004.

BACKGROUND

3. In March, 1998, TCG adopted in full a 1997 interconnection agreement (the "Agreement") between AT&T Communications of the Southern States, Inc. and GTE Florida Incorporated. As required by the Agreement, the parties initially exchanged local traffic on a bill-and-keep basis until traffic became out of balance. At that point, TCG began billing Verizon reciprocal compensation.

4. Approximately one year after TCG began billing Verizon reciprocal compensation, Verizon started to withhold payment of amounts it estimated were attributable to ISP-bound traffic. However, the Agreement, like many other early interconnection agreements, did not identify, define, or exempt ISP-bound traffic from the payment of reciprocal compensation. As required by the Agreement, TCG filed a Petition for Arbitration before the American Arbitration Association ("AAA") in December, 2001. Verizon filed a counter-claim, arguing that it was entitled to a refund for any reciprocal compensation billings for VFX traffic. The parties agreed upon the appointment of an Arbitrator and proceeded with the arbitration.

5. The arbitration process lasted well over a year, during which the parties engaged in extensive discovery and each party moved for summary judgment. Both parties prefiled direct, rebuttal, and supplemental testimony, along with exhibits thereto, after which a hearing was held before the Arbitrator in Dallas, Texas. Thereafter, the Arbitrator issued the *Interim Award of Arbitrator*, in which he determined that the Agreement does not identify, define, or exempt ISP-bound traffic or VFX traffic from the payment of reciprocal compensation, and in fact, specifically requires the parties to bill reciprocal compensation for traffic based on its originating and terminating NPA-NXXs, without exception for ISP or VFX traffic. He therefore found that TCG correctly billed Verizon reciprocal compensation for such traffic pursuant to the specific

terms of this particular Agreement. [2] Verizon "appealed" the Arbitrator's awards to this Commission on July 18, 2003.

ARGUMENT

I.

THE COMMISSION LACKS JURISDICTION TO HEAR VERIZON'S APPEAL OF AN ARBITRATOR'S FINAL AWARD

6. The Commission's jurisdiction exists, if at all, by virtue of statute and cannot be conferred by the parties. *State ex rel. Caraker v. Amidon*, 68 So.2d 403 (Fla. 1953) (jurisdiction is conferred upon a court by constitution or statute and not by agreement between parties); *Florida Power & Light Co. v. Canal Authority of State of Fla.*, 423 So.2d 421, 424 (Fla. 5th DCA 1982), ("the kind of jurisdiction referred to by rule that jurisdiction of subject matter cannot be conferred by acquiescence or consent of parties is the power conferred on court by sovereign--which means the Constitution or statute, or both--to take cognizance of subject matter of litigation and parties brought before it, and to hear and determine issues and render judgment upon issues joined . . . ."). By way of example, an agreement that the Commission will hold jury trials on interconnection disputes cannot confer jurisdiction for the Commission to do so. The Commission's jurisdiction over this matter therefore must be determined without regard to the contents of the Agreement.

7. As an administrative agency created by the Legislature, "the Commission's power, duties and authority are those and only those that are conferred expressly or impliedly by statute of the State." *Rolling Oaks Utilities v. Florida PSC,* 533 So.2d 770, 773 (Fla. 1st DCA 1988). *See also East Central Regional Wastewater Facilities Operating Bd. v. City of West Palm Beach,*

[2] Although the parties originally had intended to resolve the issue of damages based on the Arbitrator's liability rulings, ultimately they were unable to do so. The Arbitrator therefore resolved the issue based on evidence and argument submitted by the parties. In his *Final Award of Arbitrator,* he determined that TCG's billings were

659 So.2d 402, 404 (Fla. 4th DCA 1995), (agencies have "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.); *Deltona Corp. v. Mayo,* 342 So.2d 510 (Fla. 1977). The Commission therefore must look to its enabling statutes, not the parties' Agreement, to determine whether it has jurisdiction to exercise any review authority over private arbitration orders.

A. The Legislature has not authorized the Commission to review private arbitration orders.

8. Verizon argues that Section 364.162, Florida Statutes, grants the Commission express authority to hear its appeal. Under Verizon's theory, interconnection disputes remain within the Commission's jurisdiction even after they have been resolved by another tribunal or entity. Verizon is wrong. Verizon fails to identify any statutory authority for the Commission to review a private Arbitrator's order, let alone overturn that order and substitute a new decision in its place.

9. Section 364.162, Florida Statutes, provides in pertinent part that the Commission "shall have the authority to arbitrate any dispute regarding interpretation of interconnection or resale prices and terms and conditions." Verizon, however, is not calling upon the Commission to arbitrate an interconnection dispute. The interconnection dispute between TCG and Verizon has already been arbitrated and resolved. Rather, Verizon asks the Commission to assume appellate jurisdiction over a valid Arbitrator's order, and further, to exercise such jurisdiction to vacate or modify that order. Section 364.162 does not allow the Commission to do so.

10. Although Section 364.162 clearly provides the Commission with statutory authority

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correct, and ordered Verizon to pay TCG the amounts it had previously withheld, plus contractual late charges.

to resolve interconnection disputes filed with the Commission *in the first instance*, that authority does not extend to disputes that have been heard and resolved by a court or Arbitrator. Section 364.162 offers the Commission no ability to review, vacate, modify or otherwise sit in judgment on orders issued by the FCC, federal courts, state courts, or Arbitrators, simply because such orders happen to involve interconnection disputes. There are clearly-established statutory procedures for the review of all such orders, none of which involve the Commission. The Commission's statutory role under Section 364.162 clearly is limited to resolution of disputes that have not previously been brought before and resolved by another authority.

11. In Chapter 682, Florida Statutes, (the "Florida Arbitration Code"), the Legislature established an exclusive and comprehensive system for recognition, review and enforcement of arbitration orders, specifically reserving such authority to Florida's courts. Pursuant to the Florida Arbitration Code, Florida courts - not the Commission - have exclusive authority to "enter judgment on an award duly rendered in an arbitration . . . and to vacate, modify or correct an award . . . for such cause and in the manner provided in this law." Section 682.18, Florida Statutes.

12. As the Florida Supreme Court has explained, even the courts have very limited authority to review arbitration awards. The exclusive jurisdiction assigned to the courts by the Florida Arbitration Code does not include authority to engage in the broad review sought by Verizon herein:

> In Florida, arbitration is a favored means of dispute resolution and courts should indulge every reasonable presumption to uphold proceedings resulting in an award. *See Roe v. Amica Mut. Ins. Co.*, 533 So.2d 279, 281 (Fla.1988). Review of arbitration decisions is extremely limited. *See Boyhan v. Maguire,* 693 So.2d 659, 662 (Fla. 4th DCA 1997). A reviewing court may not comb the record of an arbitration hearing for errors of fact or law inherent in the decision-making process. *See id.* No provision in the Florida

> Arbitration Code authorizes trial judges to act as reviewing courts in the same way that a court of appeals reviews trial judges' legal decisions. *See J.J.F. of Palm Beach, Inc. v. State Farm Fire & Casualty Co.*, 634 So.2d 1089, 1090 (Fla. 4th DCA 1994).

Cassidy v. Merrill Lynch, Pierce Fenner & Smith, Inc., 751 So.2d 143, 150 (Fla. 1st DCA 2000). Similarly, there is no provision in Chapter 364 that authorizes the Commission to "act as a reviewing court in the same way that a court of appeals reviews a trial judge's legal decisions" as sought by Verizon. A finding that the Commission has authority to review an arbitrator's order would require a finding that the Legislature intended to create an exception to the carefully structured framework and express provisions of Chapter 682. There is no indication in either Chapter 364 or Chapter 682 that the Legislature intended any such result. The Commission must decline Verizon's invitation to usurp review authority that the Legislature clearly assigned to Florida's judiciary, and having usurped such authority, to conduct a type of review that the Legislature and courts have forbidden.[3]

B. The Legislature did not, and cannot, grant the Commission any type of appellate authority.

13. During the Commission's May 3, 2004 agenda conference, the Commission's general counsel advised that the Commission does not have appellate authority. TR. 50. This advice is consistent not only with statute, but with the Florida Constitution.

14. The Florida Constitution vests "judicial power" in the courts. Although state commissions may be granted "quasi-judicial power in matters connected with the functions of their offices," they may not be granted or exercise purely judicial power. Article V, Section 1, Florida Constitution. Appellate review is a purely judicial function specifically assigned and

[3] Verizon's analogy to a federal district court's review of the Commission's decisions under 47 U.S.C. § 252 is inapposite. Congress specifically granted federal district courts the authority to review state utility commission §252 decisions; Florida's Legislature has granted no analogous authority to the Commission. *See* 47 U.S. C. §252(e)(6).

reserved to the courts under Article V of the Florida Constitution. *See* Article V, Section 3 (b) (appellate jurisdiction of Supreme Court); Section 4(b) (appellate jurisdiction of District Courts of Appeal; and Section 5(b) (appellate jurisdiction of Circuit Courts). Having reserved appellate authority to the courts, the Constitution does not authorize the Legislature to assign appellate authority to an administrative agency. Any interpretation of Section 364.162, Florida Statutes, that grants such authority to the Commission is unconstitutional and void. *See State v. Gaines,* 770 So. 2d 1221 (Fla. 2000) (legislation purporting to grant authority to appeal certain orders is unconstitutional where the Florida Constitution assigns exclusive jurisdiction over the matter to the Florida Supreme Court).

C. Verizon misconstrues and misrepresents the terms of the Agreement

15. As explained above, the Commission has no express or implied statutory authority to review private arbitration orders, and such jurisdiction cannot be conferred by language in the parties' Agreement. Nevertheless, TCG believes it necessary to correct certain misrepresentations made by Verizon regarding the effect of the arbitration process.

16. Verizon incorrectly argues that that the parties "did not agree that private arbitration would be the exclusive remedy under the agreement", and "did not agree to be bound by private arbitration", but instead agreed to "submit disputes to this Commission after private arbitration." Verizon is wrong. The Agreement establishes arbitration as the "exclusive remedy" for all interconnection disputes:

> 2.1 Negotiation and arbitration under the procedures provided herein **shall be the exclusive remedy for all disputes** between GTE and AT&T arising out of this Agreement or its breach. GTE and AT&T agree not to resort to any court, agency or private group with respect to such disputes except in accordance with this Attachment.

Agreement, Attachment 1, §2.1, emphasis added.

17. The Agreement further specifies that **"the Arbitrator's decision and award shall be final and binding,"** subject only to the very limited possibility of "appeal" where a state commission has such authority and agrees to hear the case:

> 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;
>
> b) the dispute concerns the misappropriation or use of intellectual property rights of a party, including, but not limited to, the use of the trademark, tradename, trade dress or service mark of a Party, and the decision [is] **appealed** by a Party to a federal or state court with jurisdiction over the dispute.
>
> 11.3 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.

Agreement, Attachment 1, §§ 11.2, 11.3, emphasis added. In other words, arbitration is the exclusive remedy for the parties' dispute, and the arbitration award is final and binding unless (a) the Commission has statutory authority to hear an "appeal" and (b) having such authority, agrees to hear it. As demonstrated above, the Commission has no such authority, and it cannot be created by the parties. [4]

18. During the agenda conference, several Commissioners questioned why such a provision would be included in the Agreement if the Commission had no appellate authority.

[4] Verizon also suggests that the Agreement uses the term "appeal" casually, and that despite the repeated and consistent use of this term, they did not really mean "appeal" but instead intended a proceeding "that would resemble an appeal" in that the Arbitration Award "would be subject to review based on the record developed before the arbitrator." Verizon *Supplemental Brief*, pgs. 7-8. Of course, had the parties meant to use the more general term "review," they certainly would have done so. Regardless of the term used in the Agreement, however, the Commission lacks statutory authority to conduct any review whatsoever of an Arbitrator's order.

The answer to this question is found in the parties' intention to enter into a nationwide Agreement as well as the procedural uncertainty that surrounded early negotiations under the federal Telecommunications Act of 1996.

19. As Verizon admits, the negotiations that lead to this Agreement "were part of a nationwide dialogue between the two carriers, the purpose of which was to develop a template that could be used in all of the jurisdictions, including Florida, in which AT&T sought interconnection to former GTE's facilities." Verizon *Petition,* ¶8. When GTE and AT&T began negotiating this Agreement in 1996, the federal Telecommunications Act was new and competition was in its infancy. Although the Telecommunications Act specifies the process by which parties enter into interconnection agreements, it does not specify how such agreements will be enforced. At the time GTE and AT&T negotiated, and indeed, for some time thereafter, it was not clear whether federal courts, state courts, state utility commissions or all of them would have jurisdiction to interpret interconnection agreements and resolve disputes that arise under such agreements, let alone what avenues of review would be available following such determinations.

20. Given the then-prevailing uncertainly regarding post-contract enforcement procedures as well as the parties' intent to reach an Agreement that would be applicable in all jurisdictions, it was reasonable to agree that arbitration orders could be appealed to the applicable state Commission if – and only if – that Commission had jurisdiction to hear such an appeal. A review of the interconnection agreements entered into between GTE and AT&T entities as a result of this nationwide negotiation reveals that these provisions – unlike most others - are repeated verbatim. *See*, approved interconnection agreements for Florida, South Carolina, Pennsylvania, Indiana, Michigan, Illinois, Virginia, Wisconsin, Oregon, North

Carolina, Ohio, Iowa, Missouri, Washington, Minnesota, Texas, Nebraska, Hawaii, and California. Thus, Sections 11.2 and 11.3 were thus standard multi-state "boilerplate" provisions, which by their terms would be applicable only if a state utility commission had jurisdiction to entertain appeals of arbitration awards. This Commission has no such jurisdiction.

D. The Commission's authority over matters of public policy and enforcement of state law is not implicated herein.

21. The Commission has held that arbitration clauses do not divest this Commission of jurisdiction to proceed "against a regulated company for violations for which the agency was directly responsible for enforcement." Order No. PSC-01-2509-FOF-TP, issued December 21, 2001 in Docket No. 011252-TP, *In re: Request for arbitration concerning complaint of XO Florida Inc. against Verizon Florida Inc. (f/k/a GTE Florida Incorporated) regarding breach of interconnection agreement and request for expedited relief* (the "XO Order"). In that case, XO Florida Inc. asked the Commission to arbitrate an interconnection dispute with Verizon. Verizon moved to dismiss the complaint for lack of jurisdiction, arguing that the parties' interconnection agreement required private arbitration as the sole remedy. In response, XO argued that a specific provision in the parties' interconnection agreement permitted the Commission to take jurisdiction of its complaint. That provision stated:

> Nothing in this [agreement] however, shall divest the Commission, the FCC, or state or federal courts of any jurisdiction they otherwise have over matters of public policy or interpretation of, and compliance with, state or federal law, and either Party may seek redress from the Commission, the FCC, or state or federal court to resolve such matters.

22. Although the Commission agreed with XO that it retained jurisdiction "over matters of public policy, or interpretation of, and compliance with, state or federal law," it dismissed the complaint for lack of jurisdiction because XO's petition did not present any such issues. Noting

that "in a very loose and general sense, every matter for which we are responsible falls under the umbrella of some state or federal law," the Commission determined that XO's complaint did not trigger its jurisdiction because it presented no matters of public policy or compliance with state or federal law. Rather, the Commission dismissed XO's complaint for lack of jurisdiction because the dispute presented only "a difference in interpretation of a contract." *XO Order,* pg. 5. Likewise, Verizon's appeal herein presents nothing more than "a difference in interpretation of a contract" and should be dismissed.

23. The instant Agreement contains no reservation of authority to the Commission similar to that found in the XO agreement. However, even in the absence of such reservation, the Commission retains jurisdiction to enforce its statutes and orders. *Duke Power Company v. F.E.R.C.,* 864 F.2d 823, 829 (D.C.Cir. 1989) (federal agency retained authority to enforce its tariff requirements despite arbitration agreement because such enforcement is "a matter distinctly within the Commission's statutory mandate"). Verizon seeks no such enforcement. Verizon does not claim that TCG violated state or federal law, but complains instead that an Arbitrator incorrectly interpreted a contract. The Commission's retained jurisdiction over matters of public policy and state law has not been triggered and Verizon's appeal of the Arbitrator's Award should be dismissed.

II.

ASSUMING *ARGUENDO* THAT THE COMMISSION HAD STATUTORY AUTHORITY TO REVIEW AN ARBITRATOR'S AWARD, VERIZON HAS RAISED NO ISSUE THAT WOULD JUSTIFY SUCH A REVIEW AND THE COMMISSION SHOULD DECLINE TO HEAR VERIZON'S "APPEAL"

24. As explained above, approximately one year after TCG began billing reciprocal compensation to Verizon, Verizon started to withhold from its payments the amount of compensation it estimated may have been due to ISP-bound traffic that originated from

Verizon's customers and was transferred to and terminated by TCG. Verizon argued it had no obligation to compensate TCG for terminating such traffic because (a) the parties intended that the Agreement would track future reciprocal compensation rulings and regulations and (b) the FCC had determined that ISP-bound traffic was not local traffic subject to reciprocal compensation. [5] When TCG filed a Petition for Arbitration before the AAA to collect the unpaid reciprocal compensation, Verizon counterclaimed, demanding a refund of any monies it may have paid for termination of VFX traffic, arguing that it had no obligation to pay reciprocal compensation for such traffic because it was not "local." Verizon relied in large part upon the FCC's *ISP Remand Order* and the Commission's Order No. PSC-02-1248-FOF-TP, issued on September 10, 2002 in Docket No. 000075-TP, *Investigation into appropriate methods to compensate carriers for exchange of traffic subject to Section 251 of the Telecommunications Act of 1996* (the "*Order on Reciprocal Compensation*"), as well as its alleged subjective intent.

25. TCG argued that (a) neither the FCC's *ISP Remand Order* nor this Commission's *Order on Reciprocal Compensation* were applicable to the dispute because both orders specifically stated that they were to be applied exclusively on a prospective basis; (b) the Agreement had no change of law provision that incorporated future regulatory rulings such as the *ISP Remand Order* or the *Order on Reciprocal Compensation*; (c) Verizon's alleged subjective intent was irrelevant and inadmissible to vary the plain terms of the Agreement; and (d) the Agreement specifically required billing and payment of reciprocal compensation for **all** traffic with originating and terminating NPA-NXXs associated with the same LATA, without exception, which necessarily includes ISP and VFX traffic:

> The parties shall bill each other reciprocal compensation in

[5] Verizon also disputed its obligation to pay the tandem rate to TCG, but has not appealed that issue herein.

> accordance with the standards set forth in this Agreement for traffic terminated to the other Party's customer, where both such customers bear NPA-NXX designations associated with the same LATA or other authorized area.

Agreement, Attachment 6, Appendix C, Section 3.1.

26. The Arbitrator determined that the above-cited provision unambiguously required mutual compensation for all traffic exchanged between the parties where the both the originating and terminating NPA-NXXs were associated with LATA 952. This decision was reinforced by his finding that the Agreement requires the parties to bill reciprocal compensation based on EMR data, "which is blind to the physical location of the parties." *Interim Award,* pg. 6. The Arbitrator agreed with TCG that the Agreement had no change of law provision that would operate to incorporate the terms of the FCC's *ISP Remand Order* or the Commission's *Order on Reciprocal Compensation*, and they were therefore inapplicable to this Agreement – just as the orders themselves specified. In other words, the Arbitrator engaged in the task of contract interpretation. He did not make, change, or implement policy, and most certainly did not impose new obligations on either party. He simply defined the obligations the contract itself imposed upon the parties and determined that those obligations were not affected by certain post-contractual regulatory rulings. His ruling presents no issues that justify the Commission's review.

27. Verizon falsely asserts that the Arbitrator "ignored" the Commission's *Order on Reciprocal Compensation* and instead "relied on his purported personal knowledge of industry practice" when he ruled that "ISPs routinely provision dial-up internet service through FX and VFX telephone numbers and have done so as a standard practice long before the TCG-Verizon interconnection Agreement went into effect." *Verizon Supplemental Brief,* pgs.13-14. Contrary to Verizon's claims, this factual finding is based squarely on the unrebutted expert

testimony of TCG's witness Paul Cain, who explained as follows:

> ISPs do not open individual offices in each local calling area. Instead, they obtain VFX or FX telephone numbers so their customers can have local dial-up access. This is how large ISPs such as America Online can provide local dial-up numbers nationwide. TCG did not develop this idea -- ISPs routinely provisioned dial-up internet service through FX and VFX service long before the TCG – Verizon interconnection agreement went into effect.
>
> * * *
>
> As I explained above, ISPs routinely provision dial-up internet service through FX and VFX telephone numbers and have done so as a standard practice long before the TCG – Verizon interconnection agreement went into effect.

Supplemental Rebuttal Testimony of Paul Cain, pg. 9. The Arbitrator's reliance on unrebutted expert testimony presents no issue that justifies the Commission's review.

28. Nor did the Arbitrator "rel[y] on his understanding that the Commission's orders *require* payment of reciprocal compensation on Internet-bound traffic *even if* the parties clearly intended to exclude such traffic from the scope of their agreement," as Verizon erroneously claims. Verizon *Supplemental Brief*, pg. 14, emphasis in original. To the contrary, he determined that Verizon's alleged subjective intent at the time of the contract was irrelevant and would not be permitted to vary the plain terms of the Agreement, which required payment of reciprocal compensation for all traffic with originating and terminating NPA-NXXs in LATA 952. This ruling is the correct application of hornbook contract law, not an "error of law" as Verizon claims. [6] Again, this ruling presents no issues that justify Commission review.

29. Finally, the Award is consistent with the Commission's prior orders regarding reciprocal compensation obligations in existing Agreements. Specifically, the Award is

[6] Verizon's attack on the Arbitrator's experience is also misplaced; he is a retired appellate court judge with extensive arbitration experience, and he was mutually selected as Arbitrator by Verizon and TCG.

consistent with the Commission's *Order on Reciprocal Compensation;* the Commission specified that the treatment regarding VFX traffic announced therein applies on a prospective basis only, and thus is inapplicable to existing Agreements. The Award also is consistent with every single case in which the Commission has reviewed interconnection agreements that predate the FCC's *ISP Remand Order* to determine whether that *Order* affected the parties' contractual obligation to pay reciprocal compensation for ISP-bound traffic. In each of these cases, the Commission determined that reciprocal compensation was due for ISP-bound traffic absent a specific contractual attempt to distinguish between ISP-bound traffic and other types of local traffic. *See* Order No. PSC-98-1216-FOF-TP (Commission resolved four consolidated complaints against BellSouth by TCG, MCI, Intermedia and WorldCom for failure to make payment of reciprocal compensation for ISP-bound traffic and held that compensation was due because each agreement defined local traffic "in such a way that ISP traffic clearly fits the definition"); Order No. PSC-99-0658-FOF-TP (interconnection agreement between BellSouth and e.spire required payment of reciprocal compensation for ISP-bound traffic based on the plain language of the agreement, the effective law at the time the agreement was executed, and the post-contract actions of the parties); Order No. PSC-99-1477-FOF-TP (interconnection agreement between Intermedia and GTE required payment of reciprocal compensation for ISP-bound traffic based on the plain language of the contract and the parties' post-contract actions); Order No. PSC-00-0802-FOF-TP (interconnection agreement between BellSouth and Global NAPS required payment of reciprocal compensation for ISP-bound traffic based on the plain language of the contract); and Order No. PSC-00-1540-FOF-TP (interconnection agreement between ITC^DeltaCom and BellSouth required payment of reciprocal compensation for ISP-bound traffic based on the plain language of the contract).

30. The TCG-Verizon Agreement is a contemporary of the above-referenced agreements,

and like those agreements, fails to identify or carve out a compensation exception for ISP-bound traffic. As the Commission did in the above-referenced orders, the Arbitrator found this omission to be significant, noting that "it is important to the construction of the contract . . . that no exception for ISPs to be treated differently than other traffic is present in the Agreement." *Interim Award,* pg. 5. He reasoned that because the contract treated ISP-bound traffic as "indistinguishable from non-ISP bound traffic" and there was no change of law provision that would operate to incorporate post-contract regulatory rulings, the terms of the Agreement required Verizon to pay reciprocal compensation to TCG for all such traffic. This ruling likewise presents no issue that justifies Commission review.

31. The parties' Arbitration proceeding raises no issues that invite the Commission's review of the *Interim* or *Final Awards*. The Arbitrator's decision is not precedent and does not bind other parties. It applies only to TCG and Verizon, and even that applicability is limited because Verizon has terminated the Agreement. Even if the Commission had jurisdiction to review an Arbitrator's award, it should decline to do so.

III.

TCG'S RESPONSE TO VERIZON'S "CLARIFICATION" FILING

A. What are the specific factual, legal and policy issues for which review is sought?

32. There are no policy or factual issues for review. As noted above, the Arbitrator did not make, change, or implement policy, and most certainly did not impose new obligations on either party. He simply determined the obligations imposed upon the parties by the terms of the contract, and found that those existing obligations were unaffected by certain post-contractual regulatory rulings. The specific legal questions presented by Verizon's appeal are: (a) whether the Arbitrator incorrectly determined that the terms of the Agreement require payment of

reciprocal compensation for ISP and VFX traffic; and (b) whether the Agreement contains a change of law provision that incorporates post-contract regulatory rulings. The answer to both of these questions is "no".

33. If the Commission addresses the questions raised by Verizon, it must also address TCG's affirmative defense of estoppel to Verizon's VFX counterclaim. TCG demonstrated that Verizon provides a number of FX and FX-like services to its customers, that such services are indistinguishable from VFX services for purposes of reciprocal compensation, and that Verizon charges TCG reciprocal compensation for such traffic. Verizon's counterclaim thus must be barred by estoppel.

B. Why should the Commission agree to review the Arbitrator's decision on each issue identified?

34. As explained above, the Commission should not review any of the decisions identified by Verizon. Contrary to Verizon's representations, this is a matter of contract interpretation, and raises no substantial questions of law and policy. The Arbitrator did not establish new interconnection obligations for the parties; he merely interpreted the terms of this particular 1996-era Agreement and determined that it specifically requires the parties to bill reciprocal compensation for traffic based on its originating and terminating NPA-NXXs, without exception for ISP or VFX traffic. He further found that that the Agreement contained no change of law provision that would incorporate the Commission's Order No. PSC-02-1248-FOF-TP or the FCC's *ISP Remand Order*. His decision is consistent with the terms of these orders, both of which specified that they shall not affect pre-existing contracts, as well as prior Commission orders regarding payment of reciprocal compensation for ISP-bound traffic. The Arbitrator's decision is not precedent and does not bind other parties. It is only applicable between TCG and Verizon, and even that applicability is limited because Verizon has terminated the Agreement.

C. What type of proceeding should be held on each issue?

35. The Commission should hold no proceeding on any issue raised by Verizon herein. Neither a new evidentiary proceeding nor a proceeding in the nature of an appellate review is authorized by statute or appropriate.

36. Although Verizon argues that the Commission "should review the arbitrator's decision based on the record below," it fails to note that there is no such record. The AAA does not function as a records clerk and does not maintain a formal record of the proceeding as do the official clerks of courts and administrative agencies. In fact, parties are instructed not to provide the AAA Case Manager with copies of exhibits and attachments because such documents are neither sought nor retained by the AAA. [7] Of course, arbitration awards are not subject to the review sought by Verizon herein, and thus there is no reason for the AAA to maintain a formal record or retain such documents.

37. As noted in TCG's *Motion to Dismiss* herein, Verizon originally filed with its appeal a few of the pleadings and exhibits it believes support its claims. This collection of documents does not comprise the "record" and does not permit a review of the Arbitration Awards. Verizon's voluminous filing represents only a tiny portion of the thousands of pages of pleadings, testimony and exhibits presented to the Arbitrator. As the Arbitrator noted in his *Interim Award*, the parties provided the Arbitrator with "eleven three ring binders full of motions, briefs, depositions, regulatory decisions, regulations, arguments, pleadings and correspondence," followed by oral argument and post-hearing briefs. *Interim Award,* pg. 2.

38. Creation of a "record" where no official record exists presents certain practical and procedural problems. The parties cannot simply request verified copies of every filed document

[7] These documents are provided directly to the Arbitrator instead.

– because none exist - but would instead have to provide copies from their files. This process would necessitate detailed cross-checking of each document both parties to ensure that the Commission received a copy of each document, and that the version of each document was the same as that presented to the Arbitrator. Given the large volume of material presented in the arbitration, this would be no small task.

D. What standard of review would apply on each issue?

39. Arbitration awards enjoy a "high degree of conclusiveness" and the Legislature has established a deferential standard of review thereon. *Davenport v. Dimitrijevic,* 857 So. 2d 957 (2003), *State Dept. of Ins. v. First Floridian Auto and Home Ins. Co.,* 803 So.2d 771 (Fla. 1st DCA 2003). If the arbitration award is within the scope of the arbitration and the arbitrator is not guilty of misconduct pursuant to statue, an arbitration award "operates as a final and conclusive judgment." *Verzura Const. Inc. v. Surfside Ocean, Inc.*, 708 So.2d 1994 (Fla. 3rd DCA 1998). Pursuant to Section 682.12, an arbitration award must be confirmed unless there are specific statutory grounds for vacating, modifying or correcting the award:

> **682.12 Confirmation of an award.**--Upon application of a party to the arbitration, the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in ss. 682.13 and 682.14.

40. Section 682.13, Florida Statutes, provides five specific and limited reasons to vacate an arbitration award. As set forth therein, the award may be vacated only if it was procured by fraud, there was "evident partiality" or corruption by an arbitrator, the arbitrator exceeded his powers, the arbitrator prejudiced a party by refusing to postpone a hearing for good cause or to hear evidence, or the parties had no agreement to arbitrate, and one party objected to the arbitration:

682.13 Vacating an award.--

(1) Upon application of a party, the court shall vacate an award when:

(a) The award was procured by corruption, fraud or other undue means.

(b) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or umpire or misconduct prejudicing the rights of any party.

(c) The arbitrators or the umpire in the course of her or his jurisdiction exceeded their powers.

(d) The arbitrators or the umpire in the course of her or his jurisdiction refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of s. 682.06, as to prejudice substantially the rights of a party.

(e) There was no agreement or provision for arbitration subject to this law, unless the matter was determined in proceedings under s. 682.03 and unless the party participated in the arbitration hearing without raising the objection.

But the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

(2) An application under this section shall be made within 90 days after delivery of a copy of the award to the applicant, except that, if predicated upon corruption, fraud or other undue means, it shall be made within 90 days after such grounds are known or should have been known.

(3) In vacating the award on grounds other than those stated in paragraph (1)(e), the court may order a rehearing before new arbitrators chosen as provided in the agreement or provision for arbitration or by the court in accordance with s. 682.04, or, if the award is vacated on grounds set forth in paragraphs (1)(c) and (d), the court may order a rehearing before the arbitrators or umpire who made the award or their successors appointed in accordance with s. 682.04. The time within which the agreement or provision for arbitration requires the award to be made is applicable to the rehearing and commences from the date of the order therefor.

(4) If the application to vacate is denied and no motion to modify

or correct the award is pending, the court shall confirm the award.

41. As set forth above, an arbitration award may not be vacated because "the relief was such that it could not or would not be granted by a court of law or equity", nor are errors of fact or law sufficient grounds to vacate an arbitration award. The grounds set forth in Section 682.13 are the only grounds upon which an arbitration award may be challenged, and an award cannot be set aside for errors of law or fact. *Verzura Const. Inc., supra, State Dept. of Ins., supra. See* also *Lozano v. Maryland Cas. Co.,* 850 F.2d 1470 (11th C.A. Fla.) 1988, *cert.* denied 109 S.Ct. 1136, 480 U.S. 1018, 103 L.Ed. 2d 197 (arbitrator's alleged mistake of law does not permit vacation of arbitration award); *Schnurmacher Holding, Inc. v. Noriega,* 542 So.2d 1327 (Fla, 1989) (error of law is not one of the five grounds specified in Arbitration Code and therefore arbitration award may not be vacated even though it resulted from arbitrator's erroneous interpretation of statute).

42. Section 682.14, Florida Statutes, permits modification or correction of an arbitration award in only three instances: when necessary to correct a self-evident miscalculation or error in description, to correct a matter of form that does not affect the merits, or when the arbitrator has issued an award on a matter that was not submitted for determination (and even then, it may only be corrected if possible to do so without affecting the merits of decision that was properly submitted for determination):

> **682.14 Modification or correction of award.--**
>
> (1) Upon application made within 90 days after delivery of a copy of the award to the applicant, the court shall modify or correct the award when:
>
> (a) There is an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award.
>
> (b) The arbitrators or umpire have awarded upon a matter not submitted to them or him or her and the award may be corrected

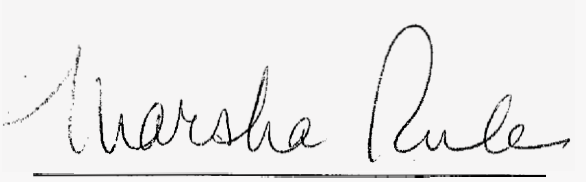
> without affecting the merits of the decision upon the issues submitted.
>
> (c) The award is imperfect as a matter of form, not affecting the merits of the controversy.
>
> (2) If the application is granted, the court shall modify and correct the award so as to effect its intent and shall confirm the award as so modified and corrected. Otherwise, the court shall confirm the award as made.
>
> (3) An application to modify or correct an award may be joined in the alternative with an application to vacate the award.

43. If the Commission decides to review the Award, it must apply the standards mandated in the Florida Arbitration Code. TCG notes that Verizon has alleged no statutory grounds to modify or vacate that Award.

CONCLUSION

The Florida Legislature has provided no authority for the Commission to conduct any review whatsoever of an Arbitrator's award, and Verizon has presented no issues of enforcement or policy that implicate the Commission's jurisdiction. Verizon's petition must be dismissed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a copy of the foregoing Notice and attachment was furnished by U.S. Mail or hand delivery (*) this 4th day of June, 2004, to the following:

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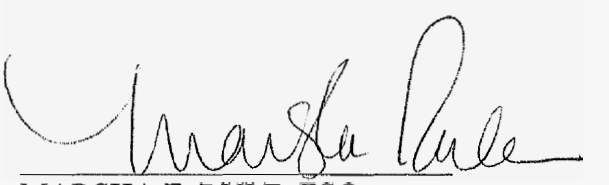

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