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July 2, 2004 – *VIA ELECTRONIC MAIL*

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

Re: Docket No. 040530-TP
Petition for expedited ruling requiring BellSouth Telecommunications, Inc. and Verizon Florida Inc. to file for review and approval any agreements with CLECs concerning resale, interconnection or unbundled network elements, by Florida Competitive Carriers Association, AT&T Communications of the Southern States, LLC d/b/a AT&T, MCImetro Access Transmissions Services LLC, and MCI WorldCom Communications, Inc.

Dear Ms. Bayó:

Enclosed is Verizon Florida Inc.'s Response in Opposition and Motion to Dismiss Petition for filing in the above matter. Service has been made as indicated on the Certificate of Service. If there are any questions regarding this filing, please contact me at 813-483-1256.

Sincerely,

s/ Richard A. Chapkis

Richard A. Chapkis

RAC:tas
Enclosures

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of Verizon Florida Inc.'s Response in Opposition and Motion to Dismiss Petition in Docket No. 040530-TP were sent via U.S. mail on July 2, 2004 to the parties on the attached list.

s/ Richard A. Chapkis

Richard A. Chapkis

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## BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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| In re: Petition for expedited ruling requiring BellSouth Telecommunications, Inc. and Verizon Florida Inc. to file for review and approval any agreements with CLECs concerning resale, interconnection or unbundled network elements, by Florida Competitive Carriers Association, AT&T Communications of the Southern States, LLC d/b/a AT&T, MCImetro Access Transmissions Services LLC, and MCI WorldCom Communications, Inc. | ) | Docket No. 040530-TP<br>Filed: July 2, 2004 |

**VERIZON FLORIDA INC.'S RESPONSE IN OPPOSITION AND MOTION TO DISMISS PETITION FOR EXPEDITED RULING REGARDING THE FILING, REVIEW AND APPROVAL OF COMMERCIAL AGREEMENTS**

Verizon Florida Inc. (Verizon) respectfully submits this Response in Opposition and Motion to Dismiss the Petition for Expedited Ruling filed by the Florida Competitive Carriers Association, AT&T Communications of Southern States, LLC, and MCImetro Access Transmission Service LLC and MCI WorldCom Communications, Inc. (collectively, Joint CLECs).

## I. INTRODUCTION

1. Joint CLECs' Petition seeks an order from this Commission requiring Verizon to file for review and approval any commercial agreement "concerning resale, interconnection or Unbundled Network Elements" that Verizon enters into with a CLEC. The Commission should dismiss Joint CLECs' petition for three reasons. First, commercial agreements having nothing to do with unbundling obligations under Section 251(c) are not subject to the filing and approval requirements of Section 252. Second, state law does not authorize the Commission to approve such agreements as a condition of their effectiveness, or otherwise to set different terms and conditions than those agreed upon by

the parties. Third, public policy favors giving ultimate control over such agreements to the parties, as opposed to state commissions.

## II. MANY PRIVATE COMMERCIAL AGREEMENTS ARE NOT SUBJECT TO THE FILING AND APPROVAL REQUIREMENTS OF SECTION 252.

2. The Joint CLECs contend that commercial agreements between Verizon and a CLEC "concerning resale, interconnection or Unbundled Network elements" are subject to the filing and approval requirements of Section 252.[1] This contention is flatly wrong. In *USTA II*,[2] the D.C. Circuit vacated the FCC's decision to unbundle certain network elements, including the mass-market switching element and high-capacity loops and transport. As a result, those network elements no longer have to be unbundled pursuant to Section 251(c). The 1996 Act specifically and expressly ties the requirements set out in Section 252 to the substantive requirements set out in Section 251(b) and (c). Where the parties negotiate terms for access to a facility that need *not* be unbundled under Section 251(c), it follows that the requirements in Section 252 do not apply. Accordingly, any agreements regarding wholesale offerings to replace elements or combinations of elements that no longer need to be unbundled under Section 251(c) are not subject to the filing and approval requirements of Section 252.[3]

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[1] Joint CLEC Petition at 1.

[2] *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*).

[3] It bears mention that the question of whether states have the authority under Section 271 to review non-251 agreements is not relevant to Verizon Florida. Verizon Florida is a former GTE company, as opposed to a former regional Bell operating company, and thus is not subject to the requirements of Section 271.

### A. *USTA II* Removes Certain Network Elements from the Scope of Mandatory Unbundling Under Section 251(c).

3. In the *Triennial Review Order*,[4] the FCC concluded that mass-market switching and high-capacity loops and transport must be unbundled on a nationwide basis. It did so on the basis of provisional nationwide impairment determinations for each of these network elements, coupled with delegations to state commissions to make the ultimate determination as to whether those elements should be unbundled. In *USTA II*, the D.C. Circuit vacated both the impairment determinations and the delegation. The decision to delegate unbundling determinations to the states, the court concluded, was inconsistent with the text of the 1996 Act and basic principles of administrative law.[5] And the provisional impairment determinations were unsupported in the record and in any event could not survive without the (unlawfully delegated) authority of the state commissions to narrow them.[6]

4. The upshot of *USTA II* is that mass-market switching and high-capacity loops and transport need not be unbundled pursuant to Section 251(c)(3). As both the FCC and the D.C. Circuit have stressed, a valid impairment finding is a statutory prerequisite to

[4] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) (*Triennial Review Order* or *TRO*).

[5] *See* 359 F.3d at 565-68, 573-74.

[6] *See id.* at 568-71, 574-77.

Section 251(c)(3) unbundling.[7] Without a lawful prior federal impairment finding, the "duty to provide . . . network elements on an unbundled basis" set forth in Section 251(c)(3) simply does not extend to mass-market switching and high-capacity loops and transport.

5. As discussed below, the fact that Verizon is no longer required to unbundle these facilities under Section 251(c) means that commercial agreements regarding replacements for these facilities are not subject to filing and approval under federal law.

**i. Commercial Agreements That Do Not Relate to Unbundling Obligations Under Section 251(c) Are Not Subject to the Requirements of Section 252.**

6. The requirements set out in Section 252 go hand-in-hand with the substantive obligations set out in Section 251. The converse, of course, is also true: the requirements set out in Section 252 do *not* apply to negotiations and agreements that do not relate to the substantive obligations in Section 251. Thus, when Verizon reaches agreement with a CLEC over the terms of wholesale offerings to replace elements or combinations of elements that no longer need to be unbundled pursuant to Section 251(c), that agreement is not subject to state commission review and approval under Section 252(e), nor is it subject to the pick-and-choose rules set forth in Section 252(i) and FCC rules.[8] Likewise, if Verizon and a CLEC find themselves unable to reach agreement over such terms, neither

[7] *See* Supplemental Order Clarification, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 9587, 9596, ¶ 16 (2000) (FCC must determine "impairment" "before imposing additional unbundling obligations on incumbent LECs" rather than "impos[ing] such obligations first and conduct[ing] [its] 'impair' inquiry afterwards"), *petitions for review denied*, *Competitive Telecomms. Ass'n v. FCC*, 309 F.3d 8 (D.C. Cir. 2002) (*CompTel*); *CompTel*, 309 F.3d at 14; *cf. USTA II*, 359 F.3d at 589 ("we see nothing unreasonable in the Commission's decision to confine" the pricing standard that applies to UNEs "to instances where it has found impairment").

[8] *See* 47 C.F.R. § 51.809.

party can invoke a state commission's authority to arbitrate "open issues" pursuant to Section 252(b).

7. The FCC has already squarely addressed this issue in the *Qwest Declaratory Ruling*.[9] There, the FCC addressed Qwest's argument that Section 252 did not apply to agreements pertaining to "network elements that have been removed from the national list of elements subject to mandatory unbundling."[10] The FCC endorsed that understanding, specifically rejecting the argument that *all* access agreements between ILECs and CLECs are subject to Section 252.[11] Section 252, the FCC explained, applies to "only those agreements that contain an ongoing obligation relating to section 251(b) or (c)."[12] As a result, "an agreement that creates an *ongoing* obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation" – *i.e.*, pertaining to the specific statutory obligations set forth in section 251(b) and (c) – "is an interconnection agreement that must be filed pursuant to section 252(a)(1)."[13] By the same token, an agreement that does *not* create an ongoing obligation pertaining to those duties – for example, an agreement for wholesale services that replace a network element or a combination of elements that is *not* required to be unbundled under section 251(c)(3) – is *not* subject to section 252. Any other

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[9] *See* Memorandum Opinion & Order, *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, 17 FCC Rcd 19337 (2002).

[10] 17 FCC Rcd at 19338-39, ¶ 3.

[11] *See id.* at 19341, ¶ 8 n.26.

[12] *Id.*

[13] *Id.* at 19341, ¶ 8.

result, the FCC stressed, would create "unnecessary regulatory impediments to commercial relations between incumbent and competitive LECs."[14]

8. That dispositive holding is compelled, moreover, by the text and structure of the 1996 Act. The statutory provision that determines the applicability of section 252 requirements is section 252(a)(1). That provision is triggered by "a request for interconnection, services, or network elements *pursuant to section 251*."[15] Upon receiving such a request, an ILEC "may negotiate and enter into a binding agreement with the requesting . . . carrier," and the resulting agreement "shall be submitted to the State commission" for review and approval and is then subject to pick-and-choose.[16] Likewise, where the parties are unable to reach agreement in response to such a request, either party may, within a certain time period, "petition a State commission to arbitrate any open issues."[17]

9. The core question, then, is whether commercial negotiations over wholesale services to replace elements or combinations of elements that need *not* be unbundled under section 251(c)(3) are nevertheless negotiations in response to a request made "pursuant to section 251." They plainly are not. On the contrary, such negotiations are undertaken pursuant to the parties' joint interest in establishing a workable, commercial arrangement *outside the scope of section 251*. Indeed, it would rob section 252(a)(1)'s "pursuant to" clause of all meaning to suggest that *any* negotiations regarding access to ILEC networks on a wholesale basis automatically trigger section 252, regardless of

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[14] *Id.*

[15] 47 U.S.C. § 252(a)(1) (emphasis added).

[16] *Id.*

[17] *Id.* § 252(b)(1).

whether those negotiations are intended to delineate the precise terms of access to elements or services that must be provided under section 251(b) or (c).

10. Section 251(c)(1) confirms that analysis. That provision mandates that ILECs negotiate and, if necessary, arbitrate – pursuant to the processes set out in section 252 – "the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection."[18] An ILEC's willingness to provide wholesale arrangements that need not be made available pursuant to section 251(b) or (c) plainly has nothing to do with its "fulfill[ment] [of] the duties described" in section 251(b) or (c). It follows that an agreement that results from that willingness to negotiate such wholesale arrangements voluntarily is likewise outside the scope of section 252.

11. This result is also supported by the *Triennial Review Order*'s determination that the substantive rules that apply to elements unbundled under section 251(c)(3) – including both the pricing rules and the combinations rules – do not apply to wholesale arrangements that are not required under section 251(c).[19] Those rules apply, the FCC stressed, only with respect to "network elements unbundled pursuant to section 251 *where impairment is found to exist*."[20] "Where there is no impairment under section 251 and a network element is no longer subject to unbundling," those standards therefore do not apply.[21]

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[18] *Id.* § 251(c)(1).

[19] *See* 18 FCC Rcd at 17386, ¶ 657.

[20] *Id.* at 17386, ¶ 656 (emphasis in original).

[21] *Id.*

12. That determination, which the D.C. Circuit expressly upheld in *USTA II*, applies equally here. Just as the substantive standards the FCC has applied to section 251(c)(3) unbundled network elements are out-of-place where impairment does not exist, so too is the section 252 framework that Congress intended to apply only in specifically delineated circumstances. Any other result would "gratuitously impose" on commercial agreements the same procedural requirements that the 1996 Act specifically applies only to agreements implementing section 251(b) and (c), in conflict with FCC precedent and the intent of Congress.[22]

13. Not only is the result reached in the *Qwest Declaratory Ruling* good law, it is sound policy. Application of section 252 to negotiations over wholesale arrangements that are not required under section 251(c) would interject regulatory uncertainty into the ongoing process of business-to-business discussions and would frustrate the commercial negotiations the Commission has attempted to jump-start.

14. Section 252, where it applies, authorizes state commissions to arbitrate open issues that the parties cannot resolve in negotiations. In addition, that provision requires parties to submit negotiated agreements to state commissions for review and approval. Both requirements, however, are wholly unsuited to commercial negotiations. If issues that cannot be resolved in negotiations will be submitted to state commissions for resolution, parties will be less likely to negotiate in the first place, as they recognize that the ultimate decision whether to accept particular terms will be largely out of their hands. Similarly, if state commissions can review and potentially modify voluntary commercial agreements, parties will inevitably attempt to use the regulatory process to improve further on the terms

[22] *Id.* at 17387, ¶ 659.

of a negotiated deal, thus diminishing the parties' ability to lock one another in at the bargaining table. Interjecting state commissions into negotiations in these ways would thus sharply circumscribe the parties' ability to retain control over the terms of their agreements, and accordingly promises to chill the very negotiations the Commission has sought to encourage.

15. In addition, under the FCC's current pick-and-choose rule,[23] even if a state commission does not pick apart a commercial agreement, competitors may attempt to do so. Under that rule, incumbent LECs must "permit third parties to obtain access . . . to any *individual* interconnection, service, or network element arrangement on the same terms and conditions as those contained in any agreement approved under section 252."[24] As a result, CLECs, rather than being required to opt-in to an agreement (if at all) in its entirety, can pick and choose "any provision in an approved interconnection agreement between another competitor and the incumbent LEC."[25] That means that an agreement that an ILEC finds acceptable only on a multistate basis may conceivably be made available to competitors on a state-by-state basis. Similarly, an arrangement that an ILEC finds acceptable only in connection with other aspects of an agreement may be divorced from those other aspects and made available to all comers on a stand-alone basis. In these circumstances – where CLECs can pick and choose isolated terms without accepting the trade-offs that were necessary to reach a balanced agreement – incumbent LECs will "seldom make significant concessions in return for some trade-off for fear that third parties

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[23] *See* 47 C.F.R. § 51.809.

[24] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16139, ¶¶ 1314-1315 (1996) (emphasis added) (subsequent history omitted).

[25] *Triennial Review Order*, 18 FCC Rcd at 17410, ¶ 715.

will obtain the equivalent benefits without making any trade-off at all."[26] In this way, too, section 252 would limit the willingness of parties to reach innovative, mutually acceptable wholesale terms outside of section 251. For the reasons explained above, nothing in the statute or Commission precedent requires, or even permits, that result.

16. Accordingly, the Joint CLECs' contention – that federal law requires Verizon to file its commercial agreements "concerning resale, interconnection or Unbundled Network elements" – is wrong as a matter of law *and* policy.

## III. VERIZON'S PRIVATE COMMERCIAL AGREEMENTS ARE NOT SUBJECT TO APPROVAL UNDER STATE LAW.

17. The Joint CLECs contend that commercial agreements between Verizon and a CLEC "concerning resale, interconnection or Unbundled Network elements" must be filed and approved under section 364.161(1), Florida Statutes. Contrary to the CLECs' contentions, such agreements are not subject to *approval* under state law, and, moreover, they should not be subject to approval as a matter of public policy.

18. Section 364.162(1), Florida statutes, provides that "[w]hether set by negotiation or by the commission, interconnection and resale prices, rates, terms and conditions shall be filed with the commission before their effective date." Because Verizon is not seeking to shield its commercial agreements from public inspection, Verizon Florida intends to file its private commercial agreements with the Commission as an informational filing to the extent that the FCC does not otherwise impose federal filing requirements that supersede or conflict with state filing requirements. (Of course, these agreements will likely be filed under seal because they may contain competitively sensitive business information.) It is important to stress, however, that this filing is informational only; nothing in the state

[26] *Id.* at 17413, ¶ 722.

statute authorizes the Commission to approve agreements filed pursuant to section 364.162(1) as a condition of their effectiveness or otherwise to set different terms and conditions than those agreed upon by the parties.

19. Moreover, as a policy matter, the Commission should not interfere with these commercially negotiated arrangements. As stated above, injecting the threat of regulatory intervention into the commercial negotiations process will interfere with the parties' ability to comply with the FCC's stated goal of resolving this issues surrounding the implementation of the *TRO* and *USTA II* through negotiated agreements. Consequently, in the wake of eight years of uncertainty, the Commission should allow the parties to establish a workable and sustainable wholesale framework by respecting their arms-length agreements.

## IV. CONCLUSION

20. For the foregoing reasons, the Commission should dismiss the Joint CLECs' Petition.

Respectfully submitted,

s/ Richard A. Chapkis

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