BEFORE THE PUBLIC SERVICE COMMISSION

In re: Petition for arbitration of amendment to interconnection agreements with certain competitive local exchange carriers and commercial mobile radio service providers in Florida by Verizon Florida Inc.	DOCKET NO. 040156-TP ORDER NO. PSC-05-0221-PCO-TP ISSUED: February 24, 2005

ORDER DENYING CLEC'S MOTION FOR MODIFICATION OF ORDER ESTABLISHING PROCEDURE; GRANTING IN PART AND DENYING IN PART VERIZON'S MOTION FOR MODIFICATION OF ORDER ESTABLISHING PROCEDURE; AND, SUA SPONTE, REVISING CERTAIN PROCEDURAL DATES

I. CASE BACKGROUND

On August 21, 2003, the Federal Communications Commission (FCC) released its *Triennial Review Order* (TRO), promulgating various rules governing the scope of incumbent telecommunications service providers' obligations to provide competitors access to unbundled network elements (UNEs). On February 20, 2004, Verizon Florida, Inc. (Verizon) filed its Petition for Arbitration of Amendment to Interconnection Agreements with Certain Competitive Local Exchange Companies (CLECs) and Commercial Mobile Radio Service Providers (CMRS) in Florida to implement changes resulting from the TRO.

On March 2, 2004, the D.C. Circuit Court of Appeals, in *United States Telecom Ass'n v. FCC (USTA II)*, vacated and remanded back to the FCC certain provisions of the TRO. Verizon filed its Update to Petition for Arbitration to reflect the *USTA II* decision on March 19, 2004. Subsequently, on June 16, 2004, the D.C. Circuit Court of Appeals issued its mandate.

On July 12, 2004, Order No. PSC-04-0671-FOF-TP was issued, granting Sprint's motions to dismiss, without prejudice. The FCC released an *Order and Notice of Proposed Rulemaking (Interim Order)*[1] on August 20, 2004 in response to *USTA II*, establishing interim unbundling requirements until the earlier of the effective date of the final FCC rules or six months after Federal Register publication of the *Interim Order*.

On September 9, 2004, Verizon filed its new Petition for Arbitration. Verizon proposed a schedule in this docket by which a decision would be rendered by mid-February 2005. Verizon asserted that all identified issues are legal, thus requiring only a briefing schedule. While the CLECs have not proposed a specific schedule, they have indicated that some issues will likely require testimony. The matter was set for an administrative evidentiary hearing, and a procedural schedule was established by the entry of the Order Establishing Procedure, Order No. PSC-04-1236-PCO-TP, on December 13, 2004.

[1] Order and Notice of Proposed Rulemaking, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, FCC 04-179 (rel. Aug. 20, 2004)("*Interim Order*").

On December 23, 2004, Verizon filed its Petition for Reconsideration of Order Establishing Procedure, and on January 4, 2005, AT&T, TCG South Florida, and the Competitive Carrier Group (hereafter "CLECs") filed their Joint Motion to Modify Procedural Schedule. On January 19, 2005, Verizon filed an Errata to change the title of its filing to Motion for Modification of Order Establishing Procedure.

On January 24, 2005, based upon the expectation that the FCC would release its Order on new unbundling rules soon, I had Commission staff notify the parties that direct testimony would not be due until 21 days following the release of that Order. On February 4, 2005, the FCC released its *Order on Remand* (hereafter "FCC Order"), setting forth the new unbundling rules. The new unbundling requirements are effective March 11, 2005.

On February 18, 2005, I conducted a telephonic conference with the parties to this Docket. In preparation for said conference, the parties were instructed to consider and discuss among themselves in advance certain information relating to Issue 17(e) of this proceeding. As a result of the telephonic conference, no party objected to deleting Issue 17(e) from consideration in this proceeding.

This Order addresses the parties' motions regarding modification of the procedural schedule and the proposed issues list as set forth in the Order Establishing Procedure. Additionally, this Order makes certain sua sponte adjustments to procedural dates.

II. CLECs' JOINT MOTION FOR MODIFICATION OF PROCEDURAL ORDER

A. CLECs' Argument

The CLECs note that the Order Establishing Procedure entered in this Docket requires that direct testimony be filed by January 28, 2005. However, the CLECs argue that by that date, the parties will not have had an opportunity to review the new permanent unbundling rules announced by the FCC on December 15, 2004. The CLECs state that the new rules will impact 15 of the current 26 issues and will materially affect the obligations of the parties and the contractual provisions that are the subject of this Docket.

They further urge that the parties need a reasonable time to review the FCC Order and negotiate any contractual language that may be impacted by the rules. This, according to the CLECs, should be done prior to the filing of the direct testimony. The movants propose that the new filing date for direct testimony be established as 45 days subsequent to the release of the FCC's Order and that all other dates on the current schedule be moved forward that same number of days. Adoption of that proposal, argue the CLECs, would avoid the need for additional supplemental filings addressing the rules and would permit the parties to provide the Commission a more complete record, representing actual disagreements, rather than speculative disagreements.

Movants also point to an identical proceeding in Texas where the Texas Commission has abated the action pending the release of the permanent rules. In its December 15, 2004 Order abating the action, the Texas arbitrators concluded, "This arbitration cannot be resolved with certainty until the FCC issues permanent unbundling rules." The CLECs argue that the same approach should apply in Florida. Sprint also filed a response agreeing with that position.

B. Verizon's response

Verizon first argues that the CLECs' Motion is procedurally defective because it is, in reality, a late, unauthorized, Motion for Reconsideration of the Order Establishing Procedure, which would be untimely filed on January 4, 2005. That, urges Verizon, would give the CLECs the unfair advantage of having seen Verizon's Petition for Reconsideration before filing their own.

Next, Verizon argues that the factual premise upon which the Motion is based is wrong. It is a flawed presumption that the FCC would eliminate virtually all unbundling obligations. Also, according to Verizon, the CLECs have mischaracterized Verizon's Petition for Arbitration as presuming a particular outcome of the FCC rulemaking in that regard. Verizon urges that its amendment would implement any changes in an orderly way, regardless of the degree of change indicated by the permanent rules. Accordingly, the FCC's decisions can be implemented under the interconnection agreements in this proceeding without any further delay.

Verizon argues that there is absolutely no basis for further delay in these proceedings for any reason and, in fact, the time for disposition should be shortened, as urged in its Petition for Reconsideration. Consistent with its Petition for Reconsideration, Verizon also urges that all issues which are clearly legal and do not require the presentation of evidence should be bifurcated and resolved rapidly based on submitted briefs. The remaining few issues could then be submitted to an expedited hearing process.

C. Decision

Having fully considered the arguments put forth, the CLECs' Joint Motion to Modify Procedural Schedule is denied. The schedules set forth in the Order Establishing Procedure were set in a manner to recognize the delicate balance of all parties' interests, including those of this Commission, under the unique circumstances of this specific Docket. However, subsequent to that Order being entered, it became evident that the FCC Order on Remand, establishing the new permanent unbundling rules, would indeed be entered no later than February 4, 2005. Recognizing that the certainty gained from a review of those rules would be of some advantage in the preparation of testimony, I find it appropriate to postpone the date for the filing of direct testimony to 21 days following the release of the FCC's Order. Thus, the new date for filing direct testimony will be Friday, February 25, 2005.

III. VERIZON'S MOTION FOR MODIFICATION OF PROCEDURAL ORDER

A. Verizon's argument

Verizon asks that two aspects of the Order Establishing Procedure be modified:

1. The briefing should be accelerated and the case decided without a hearing.

Verizon notes that the schedule calls for direct and rebuttal testimony on January 28 and March 11, respectively; a hearing from May 4 through 6; and briefs on June 20. No date is set for a final order, let alone execution of amendments reflecting the Commission's rulings. Verizon argues that, because this Commission apparently does not intend to consider conforming contract language until after it adopts an order resolving the issues that have been identified, amendments would not likely be approved sooner than the fall of 2005, two years after the TRO took effect. According to Verizon, this extreme delay in giving contractual effect to governing law is patently unreasonable, prejudices Verizon, and interferes with the federally-mandated move to facilities-based competition.

Verizon states that it initiated negotiation of a TRO Amendment on October 2, 2003, the effective date of the TRO. Although a number of CLECs have signed Verizon's TRO amendments, many others have done their best to avoid implementing binding federal law-despite the FCC's finding that even a months-long delay in implementing the TRO's rulings "will have an adverse impact on investment and sustainable competition in the telecommunications industry." TRO, ¶ 703, 705. Verizon urges that nearly 15 months after the TRO took effect, there has still been little progress toward execution of an amendment to reflect even the TRO rulings that were either upheld by the D.C. Circuit in its USTA II decision or not challenged in the first place. Verizon argues it should not have to wait any longer to implement these changes, which should have been reflected in contracts months ago.

More generally, argues Verizon, the FCC has emphasized the importance of making a "speedy transition'' to implement new unbundling rules. Verizon's amendment is designed to ensure that in the event of future changes in federal law, parties will not be obligated to negotiate and ultimately to litigate cumbersome changes to their agreements. Verizon notes that, as Chairman Powell has aptly observed, such clarity is something that "consumers demand . . . and competitors and incumbents alike need."

Verizon argues there is no need for a hearing at all, let alone the three days of hearings the Commission has scheduled. In its Petition for Arbitration and during the issues identification process, Verizon explained that this proceeding raises only legal issues, which may be resolved on the basis of briefs, without the need for prefiled testimony or a hearing. The CLECs' opposition to resolving the issues with only briefs is surprising, notes Verizon, because in other states they have agreed that there is no need for a hearing to decide the same issues arising from the same amendments. Verizon argues that the Commission should not automatically grant the CLECs a hearing in this case, but should require some compelling justification, in light of their

agreement to forego testimony and/or hearings elsewhere and the pressing need to quickly transition to TRO rulings now in effect. Also, this Commission should ask the CLECs to specify which issues they believe require factual testimony, and why.

If, after this process, the Commission remains reluctant to cancel the hearing and do away with prefiled testimony on all issues, Verizon urges one of two approaches. First, the Commission should bifurcate the proceeding, as Verizon proposed in its October 18, 2004 Reply to the CLEC Answers to Verizon's Petition for Arbitration. The Commission could thus place the Amendment 2 issues deemed to require testimony on a separate, hearing track and keep the issues relating to Verizon's Amendment 1 on a briefing-only track, with a final decision on the Amendment 1 issues to be rendered by the end of February.

A second option, according to Verizon, would permit litigation of both Amendment 1 and Amendment 2 issues on the same, accelerated track. Under this approach, the Commission would order the CLECs to identify which issues do not require testimony or a hearing and reserve those for briefing only. For issues the Commission concludes may require factual development, Verizon suggests scheduling direct testimony for January 14; rebuttal testimony and prehearing statements for February 14; a prehearing conference for February 18; discovery cutoff on March 1; a hearing (if the Commission deems one necessary after examination of the prefiled testimony) during the first week of March; posthearing briefs on March 14; a final decision on March 31; and approval of amendments during the first week of April. If the Commission wishes to schedule a hearing, it should reserve only one day, with the possibility of a continuance to a second (not necessarily consecutive) day. If hearing dates are not currently available during the first week of March, the Commission should consider moving other events on its calendar to different dates.

2. <u>The CLECs' proposed hot cut issue should be deleted from the proceeding.</u>

Second, Verizon urges that Issue 17(e), which addresses performance metrics for hot cut processes, should be eliminated from the tentative list of issues for resolution in this case. A "hot cut" refers to the process of transferring a working line from the ILEC's switch to the CLEC's switch. Batch hot cut or large job hot cut processes involve moving large volumes of customers' lines from the ILEC to the CLEC. The CLECs proposed this issue more than a year ago because the TRO directed state commissions to approve a batch hot cut process in conjunction with the impairment evaluations the FCC delegated to the commissions. However, argues Verizon, the D.C. Circuit invalidated the TRO's mass-market switching subdelegation scheme, including the batch hot cut requirement. In adopting its final rules, the FCC has unconditionally eliminated the requirement to unbundle mass market switching. According to Verizon, USTA II is clear that the decision-making regarding impairment is reserved for the FCC, not the states. Therefore, urges Verizon, state commissions have no authority to impose their own hot cut conditions before Verizon may cease providing UNE switching. It would, therefore, be improper, as well as a waste of time and resources, for the Commission to consider hot cut issues in this proceeding or to allow them to delay relief to which Verizon has been entitled for more than a year.

Issue 17(e) asks whether Verizon "should be subject to standard provisioning intervals or performance measurements and potential remedy payments, if any, in the underlying Agreement or elsewhere, in connection with its provision of batch hot cut, large job hot cut, individual hot cut processes. " Verizon argues that the purpose of this proceeding is to conform certain existing interconnection agreements to the law establishing Verizon's unbundling obligations - specifically, the TRO, USTA II, the FCC's Interim Order, and its final unbundling rules. According to Verizon, the parties agree that this arbitration should address only TRO-related issues. However, urges Verizon, the hot cut proposals the CLECs wish to litigate under Issue 17(e) have nothing to do with federal unbundling requirements. As AT&T explained in its Response to Verizon's original Petition, "AT&T's proposed language guarantees continued availability of unbundled mass market switching under the terms of the Agreement until such time as performance metrics and remedies are adopted and implemented with stable performance."

According to Verizon, the proceedings contemplated by the CLECs' hot cut proposals would be extraordinarily complex and resource-intensive, requiring the Commission to determine, among other things, the volume of loops to be included in batch and "large job" hot cuts and the specific processes to be used to perform a batch hot cut; to devise new performance measures and remedies relating to hot cut performance; to test hot cut performance; and to set rates for the batch hot cut activities the Commission approves. This entire inquiry - or certain aspects of it - may prove to be unnecessary. But even assuming a basis for such inquiry under binding federal law, it would be more appropriate to carry it out in a generic proceeding separate from this time-sensitive arbitration between Verizon and particular carriers.

B. CLECs' Response

1. Verizon's request to accelerate existing procedural schedule

The CLECs first argue that Verizon's Petition for Reconsideration should fail on procedural grounds. However, as a result of Verizon's Errata filed January 19, 2005, that argument is now moot and will not be further discussed here. However, the CLECs' Response continues further and discusses the merits of Verizon's request for modification, and that argument will be considered as a response to the Verizon pleading identified in the Errata.

The CLECs urge that Verizon seeks to accelerate the existing schedule so that the parties would have their Direct and Rebuttal case filed prior to the issuance of the FCC's Order containing new permanent unbundling rules and any opportunities to review those rules to determine where disagreements, if any, exist. According to the CLECs, Verizon's request for an acceleration of the procedural schedule appears to be based on its objection to the time that has passed since the TRO was released in August 2003. However, the CLECs note, Verizon's first Arbitration Petition, based on its view of the TRO, as well as its Amended Petition, based on its view of the effects of USTA II on the TRO, were dismissed by this Commission based on procedural flaws. Therefore, a portion of the delay about which Verizon complains is its own responsibility for failure to comply with the requirements for arbitration as specified in the federal Act.

Furthermore, the CLECs argue, Verizon's latest Arbitration Petition filed on September 9, 2004, was based on the "presumption" that it would be relieved of its unbundling obligations with regard to high capacity loops and transport. However, the CLECs argue, based on the FCC's December 15, 2004 decision, the "presumption" on which Verizon's current Arbitration Petition is based is erroneous, and if the Commission acts as expeditiously as Verizon has requested, it will have to refresh its record after the FCC Order establishing new permanent unbundling rules is released in order to have a proper basis for a sound decision in this case. Thus, urge the CLECs, while Verizon accuses the CLECs of having "done their best to avoid implementing binding federal law," the fact of the matter is that "binding federal law" has been in a continuing state of flux - soon to be clarified with the issuance of the FCC's Order codifying the new permanent unbundling rules announced on December 15, 2004. With the FCC's Order expected in January 2005, the parties would be faced with yet another proceeding to address changes in Verizon's federal unbundling obligations. But Verizon's desired procedural schedule would have the parties putting on their respective cases before there can be any opportunity to consider and evaluate or perhaps even see the impending final FCC rules. Nor can there be any question, according to the CLECs, that these final rules will alter the current interim rules.

2. Request to remove Issue 17(e) from consideration in this arbitration

Regarding this Verizon request, the CLECs merely urge that, notwithstanding Verizon's arguments at the issues identification phase, the issue regarding Verizon's performance of hot cut processes was included in the issues list. Thus, the issue has received proper consideration and need not be rehashed in this pleading.

C. Decision

Absent stipulation of the parties, I note that certain issues contained in this arbitration will likely require the filing of testimony and some discovery, as there is some merging and integration of fact and law in many of the issues. Thus far, it is apparent that Verizon and the CLECs would in no way agree as to which issues could be disposed of without testimony and discovery. Accordingly, litigating the differing opinions of the opposing parties would require considerable time and would tend to stall the resolution of these matters, making it impossible to achieve the schedule desired by Verizon in any event. There is also the concern over the fairness of proceeding expeditiously with certain issues while delaying others. The schedule in the Order Establishing Procedure was set in a manner to recognize the delicate balance of all parties' interests, including those of this Commission, under the unique circumstances of this specific Docket.

Regarding the Verizon request to remove Issue 17(e) from consideration in this Docket, I note with some surprise that no party discussed Docket No. 000121C-TP, a dispositive factor. Most of the parties in this proceeding are also parties in Docket No. 000121C-TP, which addresses both specific performance metrics for Verizon and the process for resolving issues relating to performance metrics. In the present Docket, Issue 17(e), which requests intervals, performance measurements, and potential remedy payments for batch hot cuts, was requested by the CLECs for inclusion in this arbitration. The issue was subsequently included in the Issues

List in the Order Establishing Procedure. Verizon filed its Motion for Modification of that Order and objected therein to the inclusion of Issue 17(e), but not for any reasons relating to Docket No. 000121C-TP.

This Commission's Order PSC-03-0761-PAA-TP, entered in Docket No. 000121C-TP, approved the Joint Motion to Approve Stipulation on a Performance Measure Plan for Verizon Florida, Inc. That plan applies uniformly for all CLECs that provide service in Verizon Florida's territory. The plan included a provision whereby the stipulating parties agreed to a "Procedure for California Changes" for performance measurements. This procedure requires that should the California Public Utilities Commission order additions, deletions, or modifications to the OSS Performance Measurement Plan, Verizon will submit those changes to the Florida Commission and the CLECs for review and possible adoption.

The Commission-approved stipulation further states, "For issues that have neither been raised nor resolved in the California process, any Stipulating Party can request, in writing, negotiation." Because of that stipulation, our staff contacted the California Commission and determined that a Joint Motion for Adoption of Amendments to Joint Partial Settlement Agreement Pursuant to Article 13.5 of the Commission Rules of Practice and Procedures had been filed and was pending Commission action. That Joint Motion appears to address the issue of batch hot cuts. Specifically, batch hot cuts appear as a level of disaggregation for several of the performance measurements. Additionally, Section IV of the Joint Motion includes a Reservation of Rights Regarding Performance Measure for Batch Hot Cuts. It is apparent that the batch hot cut issue has been "raised" in the California process. Accordingly, I would anticipate that Verizon Florida, Inc. would file any California-approved changes in Florida for consideration by this Commission.

Therefore, having fully considered the arguments put forth, Verizon's Petition to Modify Procedural Order, as refined by Verizon's Errata, is denied as to its request to modify the procedural dates and processes. Additionally, Verizon's Petition is granted as to its request to delete Issue 17(e) from the list of issues in this Docket, albeit not for the reasons set forth in its Petition.

All parties should resolve to make a concerted effort to negotiate in good faith regarding performance measures issues in the future, as specifically called for in the "Continuing Best Efforts" section of the stipulation. From the Commission's standpoint, such communication is expected before matters are escalated to the extent they have been in this proceeding. It should go without saying that good faith negotiations minimize the expenses of litigation on the Commission, the parties, and the consumers/taxpayers.

As a result of extending the date for the filing of direct testimony, minor adjustments to a few of the procedural dates contained in the Order Establishing Procedure are necessary. Accordingly, the Order Establishing Procedure is modified to reflect changes in the earlier established dates as follows:

Direct testimony and exhibits (all)	February 25, 2005
Rebuttal testimony and exhibits (all)	March 25, 2005
Exhibit List to staff	April 11, 2005
Objections to Exhibit List	April 14, 2005
Prehearing	April 18, 2005

Also, upon reflection, it appears prudent to expedite discovery responses beyond that provided in the original Order Establishing Procedure. Therefore, discovery responses shall be served within 15 calendar days (inclusive of mailing) of receipt of the discovery request and shall be followed by hard copy within 2 calendar days if served electronically.

Based upon the foregoing, it is

ORDERED by Commissioner Charles M. Davidson, as Prehearing Officer, that the Joint Motion for Modification of Order Establishing Procedure filed by the CLECs is hereby denied. It is further

ORDERED that the Motion for Modification of Order Establishing Procedure filed by Verizon Florida, Inc. is denied in part and granted in part as set forth in the body of this Order. It is further

ORDERED that Order No. PSC-04-1236-PCO-TP, issued December 13, 2004, is modified as set forth in the body of this Order. It is further

ORDERED that Order No. PSC-04-1236-PCO-TP is hereby reaffirmed in all other respects.

By ORDER of Commissioner Charles M. Davidson, as Prehearing Officer, this 24th day of February, 2005.

CHARLES M. DAVIDSON
Commissioner and Prehearing Officer

(SEAL)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.