BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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| In re: Investigation into pricing of unbundled network elements (Sprint/Verizon track). | DOCKET NO. 990649B-TP<br>ORDER NO. PSC-03-0896-PCO-TP<br>ISSUED: August 5, 2003 |

The following Commissioners participated in the disposition of this matter:

LILA A. JABER, Chairman
J. TERRY DEASON
BRAULIO L. BAEZ
RUDOLPH "RUDY" BRADLEY

ORDER GRANTING MOTION FOR STAY

BY THE COMMISSION:

The Federal Telecommunications Act of 1996 (Act) made sweeping changes to the regulation of telecommunications common carriers in this country. Of particular importance, it provided for the abolition nationwide of the incumbent local exchange carriers' monopolies over the provision of local exchange service. The Act envisioned three strategies for firms to enter the local exchange services market: (1) through resale of the incumbent's services; (2) via pure facilities-based offerings, thus only requiring a competitor to interconnect with the incumbent's network; and (3) through a hybrid involving the leasing of unbundled network elements (UNEs) of the incumbent's network facilities, typically in conjunction with network facilities owned by the entrant.

Our proceeding was initiated on December 10, 1998, when a group of carriers, collectively called the Competitive Carriers, filed their Petition for Commission Action to Support Local Competition in BellSouth's Service Territory. Among other matters, the Competitive Carriers' Petition asked that we set deaveraged unbundled network element (UNE) rates.

On August 18, 2000, Order No. PSC-00-1486-PCO-TP was issued granting Verizon Florida Inc.'s (formerly GTEFL) Motion to

Bifurcate and Suspend Proceedings, as well as Sprint's Motion to Bifurcate Proceedings, for a Continuance and Leave to Withdraw Cost Studies and Certain Testimony. By Order No. PSC-01-2132-PCO-TP, issued October 29, 2001, the issues were established and the Docket was divided into 990649A-TP, in which filings directed towards the BellSouth track would be placed, and 990649B-TP, in which filings directed towards the Sprint-Verizon track would be placed. An administrative hearing was held on April 29-30, 2002.

By Order No. PSC-02-1574-FOF-TP, issued November 15, 2002, we rendered our final decision regarding UNE rates for Verizon. On December 2, 2002, AT&T and MCI WorldCom filed a Motion for Reconsideration.[1] Shortly thereafter, on December 16, 2002, Verizon filed a Notice of Appeal to the Florida Supreme Court, as well as a Response in Opposition to the Motion for Reconsideration. Verizon also filed a Motion for Mandatory Stay Pending Judicial Review. On December 30, 2002, AT&T, MCI WorldCom, and FDN filed a joint Response in Opposition to the Motion for Stay, as well as a Request for Oral Argument.

On January 8, 2003, our staff filed a Motion to Dismiss or Abate with the Supreme Court, asking that the Court abate its proceedings regarding Verizon's appeal to allow us to address the pending Motion for Reconsideration. On January 23, 2003, Verizon filed its response with the Court, indicating that it did not oppose the request for abatement, as long as we were to grant its request for a mandatory stay pending appeal. On March 3, 2003, the Court granted the Motion to Dismiss or Abate. At our April 9, 2003, Agenda Conference, we granted AT&T, MCI WorldCom, and FDN's request for oral argument, but limited argument on this matter to 10 minutes per side. This Order addresses only the Motion for Stay, the associated responses.

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[1]The Motion for Reconsideration was withdrawn on May 16, 2003.

## I. ARGUMENTS

### A. Verizon

Verizon asks that we grant its request for a mandatory stay in accordance with the provisions of Rule 25-22.061(1)(a), Florida Administrative Code, which states:

> When the order being appealed involves the refund of moneys to customers or a decrease in rates charged to customers, the Commission shall, upon motion filed by the utility or company affected, grant a stay pending judicial proceedings. The stay shall be conditioned upon the posting of good and sufficient bond, or the posting of a corporate undertaking, and such other conditions as the Commission finds appropriate.

Verizon maintains that the Rule only requires us to see that Verizon posts a bond sufficient to cover rate true-ups should Verizon lose on appeal.

Verizon argues that our UNE Order clearly fits both prerequisites for a mandatory stay, those being that: 1) the Order decreases Verizon's rates; and 2) the rates are charged to Verizon customers. Verizon asserts that by the clear language of the rule, Verizon is entitled to a stay, because the UNE Order lowered Verizon's UNE rates that are charged to Verizon's CLEC customers.

Verizon acknowledges that on one previous occasion, this Commission took the opinion that the mandatory stay provisions in Rule 25-22.061(1)(a), Florida Administrative Code, apply only to orders reducing rates for retail end users.[2] However, Verizon contends that the previous decision is not controlling in this instance, because the previous decision was rendered in an arbitration case involving a contract dispute between carriers, not in a generic ratesetting proceeding.

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[2]*See* Complaint of WorldCom Technologies, Inc. Against BellSouth for Breach of Terms of Florida Partial Interconnection Agreement, Order No. PSC-99-0758-FOF-TP, issued April 20, 1999, in Docket No. 971478-TP.

Verizon further contends that if, however, we believe that our previous rationale is applicable, and that the reference to "customers" in Rule 25-22.061(1)(a), Florida Administrative Code, refers only to end users, that interpretation is incorrect and does not conform with the unambiguous language in the rule.[3] Verizon emphasizes that the courts will not imply a meaning or limitation that the plain language of the rule does not supply.[4] Verizon contends that nothing in Rule 25-22.061(1)(a), Florida Administrative Code, suggests that the meaning of "customer" should be limited.

Verizon also argues that we have not consistently interpreted the mandatory stay provision to apply only in cases involving decreases in rates to end use customers. Verizon contends that in Order No. PSC-98-1639-FOF-TP, issued December 7, 1998, in Docket No. 970808-TL, we granted GTC's request for a stay, pursuant to Rule 25-22.061(1)(a), Florida Administrative Code, of the requirements of an Order allowing BellSouth to terminate interLATA access subsidy payments to GTC. Verizon contends that we did not discuss the fact that the "customer" in the case was another carrier, not an end user.

Finally, Verizon adds that a memorandum prepared by our staff summarizing the rule when it was first proposed does not indicate

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[3]*Citing* Arbor Health Care Co. v. State of Florida, et al., 654 So. 2d 1020, 1021(Fla. 1st DCA 1995); Legal Environmental Asst. Foundation, Inc. v. Board of County Commissioners of Brevard County, 642 So. 2d 1081, 1083 (Fla. 1994)(rejecting agency's interpretation of rule that "conflict[ed] with the plain meaning of the regulation"); and Woodley v. Dept. of Health and Rehabilitative Services, 505 So. 2d 676, 678 (Fla. 1stDCA)(agen-cy construction of rule that contradicts unambiguous language is erroneous and cannot stand.)

[4]*Citing* Verizon Florida, Inc. v. Jacobs, 810 So. 2d 906 (Fla. 2002); Zuckerman v. Alter, 615 So. 2d 661, 663 (Fla. 1993); and James Talcott, Inc. v. Bank of Miami Beach, 143 So. 2d 657, 659(Fla. 3rd DCA 1962).

any intent to differentiate between retail end user customers and wholesale customers.[5]

For all these reasons, Verizon asks that its request for a mandatory stay be granted.

**B. AT&T, FDN, WorldCom (CLECs)**

1. Mandatory Stay Provision

In opposition to Verizon's request, the CLECs contend that Verizon's appeal of our decision is premature, because AT&T and WorldCom filed a timely Motion for Reconsideration, which is currently pending before this Commission. The CLECs contend that pursuant to Rule 9.020(h), Florida Rules of Appellate Procedure, a final order is not deemed rendered for purposes of appeal until we have disposed of all timely motions for reconsideration. Because the appeal is premature, according to the CLECs, so is the request for stay.

As to the merits of the request for stay, the CLECs argue that the mandatory stay provisions of Rule 25-22.061(1)(a), Florida Administrative Code, do not apply because the rate decrease at issue in our UNE Order does not involve rates to end use customers. Specifically, the CLECs maintain that Verizon has failed to adequately distinguish the decision in Docket No. 971478-TP, because Verizon did not address our fundamental reason for finding that the mandatory stay provisions were not applicable in that case - - that being that competitive carriers are not considered "customers" for purposes of the rule.

The CLECs further contend that we have been consistent in our interpretation of the applicability of the mandatory stay provisions, contrary to Verizon's assertions. The CLECs point out that in Order No. PSC-98-1639-FOF-TL, in which we granted GTC's request for stay of the Order allowing BellSouth to terminate access subsidy payments to GTC, we were not presented with a

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[5]*Citing* Memorandum to Susan Clark, Assoc. Gen. Counsel, from Research and Management Studies, Docket No. 810355-PU, Oct. 19, 1981.

contested interpretation of Rule 25-22.061(1)(a), Florida Administrative Code, because BellSouth had also requested a stay of our Order pursuant to the same rule provision. While GTC requested a stay due to our decision to terminate the subsidy mechanism and BellSouth's payments to GTC, BellSouth sought a stay of our decision to the extent that it required BellSouth to institute rate reductions to its end users to offset any windfall resulting from termination of the subsidy payments and the mechanism. The CLECs emphasize that in rendering our decision on the requests for stay, we stated that it was important to maintain the status quo in that case pending resolution of any appeal. We indicated that, otherwise, it would have difficulty making the parties whole, especially BellSouth, since BellSouth would be making rate reductions to end users. Thus, the CLECs contend that our rationale for granting the stay in that case pursuant to Rule 25-22.061(1)(a), Florida Administrative Code, was consistent with our subsequent interpretation of the Rule.

The CLECs also argue that our interpretation of the mandatory stay provision is reasonable. In support of this assessment, the CLECs refer to the Florida Supreme Court's decision in Lee County Electric Cooperative, Inc. v. Jacobs, 820 So. 2d 297 (Fla. 2002), wherein the Court affirmed a Commission decision that "rate structure" as used in Chapter 366, Florida Statutes, means "retail" rate structure, not rate schedules between utilities. The CLECs contend that, similarly, our previous interpretation that the references to "customers" in Rule 25-22.061(1)(a), Florida Administrative Code, means "end use" customers, not other carriers, is entirely reasonable and sustainable, and should be applied in this case as well.

The CLECs maintain that our prior interpretation of the mandatory stay provision is consistent with the purpose of the rule in the context in which it was adopted. The CLECs explain that the Rule was adopted in 1981 when all carriers were under rate of return regulation. In that environment, if a carrier were delayed in implementing a rate increase or required to make a rate decrease, the CLECs contend that the carrier would have been at great risk of being unable to recover its losses from the general body of ratepayers after final disposition of the appeal. Thus, the mandatory stay provision of Rule 25-22.061, Florida Administrative Code, was implemented to ensure that the carrier

remained whole in case our decision was reversed on appeal. The CLECs emphasize that at the time of the Rule's adoption, we had no jurisdiction over intercarrier rates; thus, the reference to "customers" contained therein could only have meant to "end use" customers.

In addition, the CLECs argue that our prior interpretation of the Rule reflects "sound regulatory policy." Opposition at p. 6. They argue that, "Application of the mandatory stay rule in a situation involving a decrease in UNE rates paid by competitive carriers is not necessary to protect any regulated revenue requirement and would serve only to further delay the development of competition." Id. They note that in Order No. PSC-99-0758-FOF-TP, we acknowledged that "Harm to the development of competition is harm to the public interest." Order at p. 8.

Based on the foregoing, the CLECs contend that the request for mandatory stay pursuant to Rule 25-22.061(1)(a), Florida Administrative Code, should be denied because the mandatory stay provision is not applicable to situations involving intercarrier rates.

2. Discretionary Stay

The CLECs also argue that Verizon should not be granted a discretionary stay pursuant to Rule 25-22.061(2), Florida Administrative Code, primarily because Verizon did not request a discretionary stay pursuant to that subsection of the Rule. They note that should Verizon seek a stay pursuant to this subsection at some later date, they reserve the right to respond to such a request. The CLECs note that pursuant to Rule 25-22.061(2), Florida Administrative Code, Verizon would have to demonstrate that it would likely prevail on appeal; that it would suffer irreparable harm should the UNE Order remain in effect; and that delay would cause substantial harm to the public interest. The CLECs note that the same considerations which they believe support denying a mandatory stay would also support denying any request for a discretionary stay.

3. Conditions for Stay

In the event that we do grant Verizon's request for a stay, the CLECs request that we require Verizon to post a bond sufficient to protect the competitive carriers from competitive damage resulting from the delayed implementation of the lower UNE rates. They note that they do not believe that the established rates are low enough to truly be considered appropriately cost-based; thus, even complete implementation of our UNE Order will not fully facilitate competition in the manner contemplated by Chapter 364 and the federal Telecommunications Act. Nevertheless, they believe that delay in implementing the somewhat lower rates established by this Commission will impair their ability to compete and obtain market share in an environment where competition is still developing. Should the stay be granted, they therefore believe that the amount of security established should be "some multiple of the amount calculated by comparing the existing UNE rates to the new rates ordered by the Commission. . . ." Opposition at 8. They add that the security should be provided in the form of a bond or cash escrow, not a corporate undertaking.

## II. Decision

While the CLECs argue that Verizon's Motion for Mandatory Stay is premature because Verizon's appeal is premature, staff notes that Verizon's appeal is nevertheless still pending before the Supreme Court. Thus, because the appeal is still pending before the Court and at some point will proceed whether abatement is granted or not, it is appropriate for this Commission to proceed to address the Motion for Stay.

Upon consideration of the foregoing, we find that the mandatory stay rule is applicable in this instance. Based upon a reading of its plain language, our rule in no way indicates that an CLEC is not a customer for purposes of applying the mandatory stay. In fact, in our proceedings, we regularly treat CLECs as customers of the ILEC. Furthermore, our rule does not differentiate between retail and wholesale customers. While in this case, we find the mandatory stay provisions applicable, we do not believe that this decision is in direct conflict with our decision in Order No. PSC-99-0758-FOF-TP. In particular, we believe that our previous decision was premised largely upon the facts of that case, which

was not a proceeding to set rates and charges for end use ratepayers or customers. Thus, we believe our decision in Order No. PSC-99-0758-FOF-TP may be distinguished.

At our Agenda Conference at which we considered this Motion for Mandatory Stay, the issue of the effective date of the rates was raised. In our original decision in this proceeding, we had determined that it would be appropriate for our approved rates to be deemed effective upon the filing of new or amended interconnection agreements incorporating the new rates. However, in view of the requested stay, there was concern regarding which rates would be deemed effective and on which date they would be deemed effective should Verizon not be successful in its appeal. Counsel for Verizon stated that, if we grant its Motion for Mandatory Stay, Verizon would stipulate that the UNE rates established by Order No. PSC-02-1574-FOF-TP should be deemed effective as of the date of the issuance of our Order granting the Motion. Verizon also indicated a desire that the CLECs be required to file a letter indicating that they would have sought implementation of the new rates. We agree that defining the date by which our approved rates would be deemed effective may eliminate some confusion should refunds be necessary.

Therefore, based on the foregoing, we hereby grant Verizon's Motion for Mandatory Stay Pending Judicial Review with the condition that should Verizon's appeal fail, our approved rates will be deemed effective as of the issuance date of this Order. To be eligible for the full aforementioned refund back to the date of this Order, a CLEC must, within 90 days of the issuance of this Order, file with the Commission and send to Verizon a letter stating that the CLEC would have sought implementation of the rates ordered in this proceeding, absent the stay. This condition recognizes the varying effect of the rates on individual CLECs. Any CLECs that submit the required letter after the 90 days will only be eligible for a refund back to the filing date of their letter.

Furthermore, Verizon shall be required to provide adequate security in the form of a corporate undertaking as a condition of the stay. The amount to be secured is the incremental UNE revenue. Verizon Communications and Verizon Florida have A+ bond ratings according to Standard and Poor's. Thus, it appears that Verizon

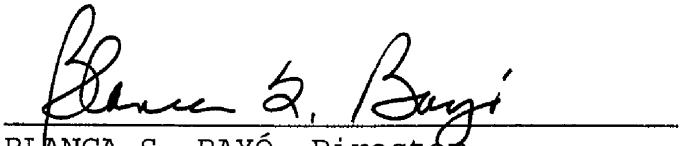
has sufficient financial capability to support a corporate undertaking.

It is therefore

ORDERED by the Florida Public Service Commission that Verizon Florida, Inc.'s Motion for Mandatory Stay Pending Judicial Review is granted under the conditions outlined in the body of this Order. It is further

ORDERED that this Docket shall remain open pending the outcome of appellate proceedings.

By ORDER of the Florida Public Service Commission this 5th Day of August, 2003.



BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

( S E A L )

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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.