

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Implementation of requirements arising from Federal Communications Commission's triennial UNE review: Location-Specific Review for DS1, DS3 and Dark Fiber Loops, and Route-Specific Review for DS1, DS3 and Dark Fiber Transport.

DOCKET NO. 030852-TP
ORDER NO. PSC-04-0160-PCO-TP
ISSUED: February 16, 2004

ORDER DENYING MOTION TO STRIKE

I. Case Background

In response to the Federal Communications Commission's (FCC) August 21, 2003, Triennial Review Order (TRO), this Commission opened two dockets to ascertain whether a requesting carrier is impaired by lack of access to certain incumbent local exchange companies' network elements.

On December 22, 2003, Verizon Florida, Inc. (Verizon) filed the joint direct testimony of Orville D. Fulp and John White, which was subsequently supplemented on January 9, 2004. On January 29, 2004, the Florida Competitive Carriers Association (FCCA) filed its Motion to Strike Verizon Testimony. On February 5, 2004, Verizon filed its response to FCCA's motion.

II. FCCA's Motion to Strike

FCCA asserts in its motion that with regard to challenging the FCC's impairment findings for loops and transport, witnesses Fulp and White have failed to provide route-specific evidence for each route and at each capacity for which Verizon challenges the FCC's finding of impairment. As such, FCCA asks that witnesses Fulp and White's testimony be stricken insofar as it claims that wholesale facilities are made available for dedicated transport.

FCCA contends the FCC has required that a wholesale transport route or customer location will be removed from availability as a UNE only when there are actual alternatives to ILEC services already in use on that route or to that customer location. FCCA argues that Verizon is, instead, asking the Commission to infer wholesale availability on all routes based on its own non-granular assertions that carriers offer some form of "wholesale." In support of its arguments, FCCA asserts witnesses Fulp and White's testimony fails to develop and present evidence that wholesale facilities are made available on the routes Verizon challenges and more specifically, the testimony includes evidence of wholesale availability that is irrelevant to the granular analysis required by the FCC.

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III. Verizon's Response in Opposition to FCCA's Motion to Strike Testimony

In its response, Verizon counters that FCCA's motion to strike is based on FCCA's assertion that Verizon has failed to fully prove its case under FCCA's interpretation of the law and therefore must be rejected for three reasons:

1. The evidence that FCCA seeks to strike is not only relevant, it is significant and highly probative – if not dispositive – of this issue.
2. Arguments over whether a party has met its burden of proof on a given issue are not proper basis of a motion to strike.
3. FCCA's arguments regarding why Verizon has not met its burden of proof are based on a misinterpretation of the TRO.

Furthermore, Verizon argues that if FCCA wishes to argue in its post-hearing briefs that Verizon has failed to provide the Commission with evidence that satisfies the FCC's transport triggers, it is free to do so. Rather, Verizon contends that FCCA's motion is an attempt to preclude the Commission from even considering Verizon's evidence contrary to Florida law.

IV. Analysis

Section 120.569(2)(g), Florida Statutes, states that "Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible whether or not such evidence would be admissible in a trial in the courts of Florida." Section 90.401, Florida Statutes, states that "Relevant evidence is evidence tending to prove or disprove a material fact." Additionally, Section 90.402, Florida Statutes, maintains that "all relevant evidence is admissible, except as provided by law." However, "Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issue, misleading the jury or needless presentation of cumulative evidence." Section 90.403, Florida Statutes.

V. Decision

Upon consideration of the above arguments, I find that a decision to preclude the pre-filed testimony filed by Verizon would be premature at this time. Further, I find that FCCA's motion fails to meet the standard for striking testimony as stated above. FCCA's motion addresses the sufficiency of witnesses Fulp and White's testimony rather than its relevancy in this proceeding. Both parties have made it clear in their filings that there is a significant difference in opinion as to what evidence constitutes satisfaction of the FCC's "triggers."

However, such questions will be addressed by this Commission in our final order and do not constitute the proper rationale for striking testimony in this proceeding.

Accordingly, I find that FCCA's Motion to Strike Portions of Verizon's prefiled direct testimony is denied.

Based upon the foregoing, it is

ORDERED by Commissioner Charles M. Davidson, Prehearing Officer, that the Florida Competitive Carriers Association's Motion to Strike Verizon Testimony is denied.

By ORDER of Commissioner Charles M. Davidson, as Prehearing Officer, this 16th day of February, 2004.



CHARLES M. DAVIDSON
Commissioner and Prehearing Officer

(SEAL)

AJT

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-

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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.