

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-04-0578-PCO-TP  
ISSUED: June 8, 2004

**ORDER ON MOTION TO HOLD PROCEEDING IN ABEYANCE**

I. BACKGROUND

On February 20, 2004, Verizon Florida, Inc. filed a Petition for Arbitration of Amendments to Interconnection Agreements with Certain Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Florida. By its Petition, Verizon sought to initiate a consolidated arbitration for the purpose of amending its interconnection agreements in light of the FCC's Triennial Review Order, FCC 03-36, released August 21, 2003; 18 FCC Rcd 16978 (2003) ("TRO"). Thereafter, on March 19, 2004, Verizon filed an Update to its Petition in Response to the D.C. Circuit's March 2, 2004, decision in United States Telecom Assoc. v. Federal Communications Commission and United States of America, 359 F.3d 554 (D.C. Cir. 2004), wherein the Court vacated, in part, and remanded, in part, the FCC's TRO.

To date, numerous responses, including several Motions to Dismiss, have been filed in response to both the initial and the updated Petitions.

On May 7, 2004, Verizon filed a Motion to Hold Proceeding in Abeyance until June 15, 2004. On May 14, 2004, Sprint filed a Response to Verizon's Motion. Subsequently, on May 17, 2004, counsel for the Competitive Carrier Coalition<sup>1</sup> (Coalition) submitted a letter in response to the Motion. Thereafter, on May 19, 2004, AT&T and the Competitive Carrier Group<sup>2</sup> (CCG) filed Responses to Verizon's Motion, and MCI filed a Response in Partial Opposition to the Motion. Verizon filed a Reply in Support of its Motion on May 21, 2004. Such a responsive pleading is not, however, contemplated by Commission rules.

This Order addresses the Motion to Hold Proceeding in Abeyance until June 15, 2004. The Motions to Dismiss will be handled separately by the Commission.

<sup>1</sup> ACN Communications Services, Inc., Adelphia Business Solutions Operations, Inc. d/b/a TelCove, Allegiance Telecom, Inc., DSLnet Communications, LLC; Florida Digital Network, Inc., PAETEC Communications, Inc., and ICG Telecom Group, Inc.

<sup>2</sup> Bullseye Telecom, Inc., Business Telecom, Inc., DIECA Communications d/b/a Covad Communications Company, ITC DeltaCom Communications, Inc., Global Crossing Local Services, Incorporated, IDT America Corp., KMC Data LLC, KMC Telecom III, LLC, KMC Telecom V Inc., NewSouth Communications Corporation, NOW Communications, Inc., The Ultimate Connection L.C., Winstar Communications LLC, XO Florida Inc., Xspedius Management Co. Switched Access Services LLC, and Xspedius Management Co. of Jacksonville LLC.

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## II. ARGUMENTS

### A. Verizon

Verizon asks that the proceeding be held in abeyance until June 15, 2004, the date the D.C. Circuit's mandate is currently scheduled to be issued in United States Telecom Assoc. v. Federal Communications Commission and United States of America, *supra* ("USTA II"). Verizon contends that an abeyance will avoid interference with the commercial negotiations that are ongoing as a result of the FCC's TRO and the D.C. Circuit's March 2, 2004, USTA II decision. While Verizon emphasizes that the TRO and the resulting appellate proceedings do not serve as a basis to delay arbitration of amendments to interconnection agreements, Verizon recognizes that parties have limited resources and that greater overall benefit will ultimately be derived if parties are able to focus their resources on the ongoing commercial negotiations. Verizon, therefore, asks that the proceedings be held in abeyance until June 15, 2004, and that, in the interim, the time for completing the arbitration under 47 U.S.C. § 252(b)(4)(C) be tolled.

### B. Sprint

At the outset, Sprint states it does not object to Verizon's request, subject to two conditions: (1) the Commission should rule on Sprint's Motions to Dismiss<sup>3</sup> prior to ruling on Verizon's Motion; and (2) the Commission should require Verizon to maintain the status quo at current rates for all UNEs while the proceeding is in abeyance.

Sprint contends that ruling on its Motions to Dismiss will also further the commercial negotiations by allowing the parties to devote themselves fully to the negotiations, instead of preparing for litigation. Sprint notes that if its Motions to Dismiss are granted, Verizon's Motion will be rendered moot.

Sprint notes that the Texas Public Utilities Commission recently held a similar proceeding in abeyance based, in part, on SBC's assurances that UNEs will continue to be offered under the current interconnection agreements.

### C. Coalition

The Coalition states that it does not oppose Verizon's Motion, but it too would like a commitment from Verizon that it will maintain the status quo regarding the availability of UNEs during the pendency of the stay and the arbitration proceeding.

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<sup>3</sup> Sprint has two Motions to Dismiss pending – one filed on March 16, 2004, and one filed on April 13, 2004.

D. MCI

MCI opposes Verizon's Motion, in part, to the extent that MCI believes that certain issues are ripe for arbitration regardless of the USTA II decision. MCI argues that while USTA II did remand certain issues to the FCC, and companies are currently trying to resolve some of those issues, the TRO did create certain rights and obligations that are not affected by the USTA II decision and should be implemented. In particular, MCI references the issues relating to the conversion of services to UNEs and commingling of access and UNE traffic.

MCI argues that delay on these issues is not warranted, since Verizon has declined to participate in open, mediated negotiations with MCI and other CLECs; thus, Verizon should have plenty of resources to channel towards the arbitration/litigation process. Furthermore, MCI notes that simultaneous litigation and negotiation has been the rule ever since implementation of the Telecommunications Act of 1996.

MCI agrees, however, that those issues that are impacted by the USTA II decision, namely the availability of switching and transport, should be held in abeyance. MCI emphasizes that the Commission should urge Verizon to maintain the status quo on all issues pending the resolution of the arbitration, specifically directing Verizon to continue to provide switching and transport UNEs until this proceeding is concluded.

MCI states that it will, nevertheless, withdraw its opposition to Verizon's Motion if Verizon will agree to either: (1) negotiate separately and file for approval agreement amendments that give immediate effect to the conversion and commingling provisions of the proposed TRO amendment; or (2) begin charging MCI UNE loop rates for special access circuits that are currently combined with special access multiplexers, as well as future orders for such arrangements.

E. CCG

CCG agrees to a great extent with MCI. CCG believes that the Commission should move forward with the arbitration on those issues that were not impacted by the USTA II decision, but agrees with Verizon that abeyance is proper for those issues that have been affected by the decision. CCG also argues that the Commission should order Verizon to comply with the FCC's current rules on commingling and routine network modifications, and as to the provision of UNEs, the status quo be maintained for the full duration of this arbitration. CCG notes that the South Carolina Commission has taken this approach recently in its Docket No. 2004-49-C.

F. AT&T

Similarly, AT&T states that it will agree to the abeyance, if Verizon is ordered: (1) to perform routine network modifications as required under current law; and (2) to refrain from

implementing its own interpretation of the interconnection agreements unilaterally. While AT&T agrees that negotiations between the parties will be mutually beneficial, AT&T alleges that Verizon has not responded in any meaningful way to AT&T's comments on Verizon's proposed TRO amendment.

AT&T further argues that Verizon has, thus far, failed to perform routine network modifications and to provide Enhanced Extended Loops (EELs) as mandated. AT&T contends that the law is unambiguous on this point, yet Verizon is demanding that CLECs sign the proposed agreement amendment before Verizon will fulfill its obligations. As such, if the proceeding is held in abeyance in its entirety, AT&T contends that it will be prejudiced by the delay in the arbitration.

AT&T adds that Verizon's obligations with regard to routine network modifications are current, ongoing obligations, and as recognized by the FCC in the TRO, refusal to perform such modifications constitutes a violation of existing law.<sup>4</sup> AT&T notes that decisions by an arbitrator in Rhode Island and a hearing examiner in Maine have already concluded that the FCC's clarification in the TRO on this issue does not constitute a change in law. AT&T emphasizes that if the Commission is inclined to hold these proceedings in abeyance, as requested by Verizon, then the Commission should also reach the same conclusion reached in Rhode Island and Maine, and should order Verizon to provide routine network modifications.

#### G. Verizon's Reply

As a procedural matter, Verizon asserts that its Reply to the responses to its Motion is appropriate, because the CLECs have essentially used their ability to respond to the Motion as a platform to seek additional affirmative relief not related to Verizon's initial request for relief.

Thereafter, Verizon argues that its Motion does not go to the period after June 15 when the Court's mandate is expected to issue. As such, Verizon contends that its Motion should not be used as a basis for imposing obligations that would continue for the duration of the proceeding. Furthermore, Verizon contends that any Order requiring Verizon to continue to provide anything that it is no longer otherwise legally obligated to provide would go beyond the Commission's authority and would constitute, essentially, a stay by this Commission of the USTA II decision.

In addition, Verizon argues that it cannot be forced to give up its lawful, contractual rights. Verizon adds that it is committed to maintaining the status quo of all its existing contracts, including any contractual rights that might allow it to stop provisioning certain UNEs and transition CLECs to other alternatives. Verizon further argues that state commissions are without authority to make general determinations that affect existing contract rights contrary to

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<sup>4</sup> Citing TRO at n. 1940.

the terms of such contracts.<sup>5</sup> States are also, argues Verizon, without authority to require unbundling of an element that the FCC specifically considered and rejected.<sup>6</sup> In further support of this argument, Verizon disagrees with CCG's interpretation of the action taken by the South Carolina Commission. Verizon contends that South Carolina did not decide to impose additional requirements on Verizon; instead that state commission decided that it was appropriate to maintain the status quo by requiring the terms of the current contracts to remain in effect for the duration of the arbitration proceeding. Verizon notes that this is precisely what it intends to do but emphasizes that the terms of the contracts apply to each party to the contract; thus, Verizon cannot be forced to move forward to implement changes resulting from the TRO without a contract amendment.

Finally, Verizon argues that Sprint's request to have its Motion to Dismiss ruled upon before Verizon's Motion for Abeyance should be rejected. Verizon contends that this proposal simply makes no sense for the following reasons: (1) Sprint's Motion to Dismiss largely addresses dismissal of only Sprint from this proceeding; (2) Verizon's Motion for Abeyance moots any arguments in the Motions to Dismiss about the "uncertain" state of the law; and (3) abeyance is more efficient than dismissal, because it will prevent inevitable redundancy in the process should Verizon be required to refile. Verizon adds that this process will likely prevent the Commission from being inundated with complaints by parties seeking to separately exercise their perceived rights under the TRO.

Based on the foregoing, Verizon asks that its Motion be granted without the additional requirements the CLECs ask the Commission to impose. Verizon notes that it would withdraw its Motion before agreeing with the conditions imposed by the CLECs.

### III. DECISION

At the outset, I note that while Verizon's May 21, 2004, Reply to the CLECs' Responses to its Motion is a pleading not generally contemplated by Commission rules, several of the CLECs have requested, via their Responses, affirmative relief beyond the scope of Verizon's initial Motion. It is appropriate, therefore, to allow Verizon the opportunity to respond to these new requests for relief. As such, Verizon's May 21, 2004, Reply is allowed, and I have considered the arguments therein.

Having considered the arguments presented, I hereby grant Verizon's Motion to Hold Proceedings in Abeyance Until June 15, 2004. The abeyance will allow the parties additional time to focus on their negotiations before we proceed with this arbitration. In granting this abeyance, it should go without saying that all of the parties are expected to participate in good faith in the negotiations for amendments to the current interconnection agreements. See also TRO at ¶ 706.

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<sup>5</sup> Citing Pacific Bell V. Pac-West Telecomm, Inc., 325 F.3d 1114, 1125-26 (9<sup>th</sup> Cir. 2004).

<sup>6</sup> Citing TRO at ¶ 195, and FCC's Brief in USTA II, at pp. 92-93 (D.C. Cir., filed Dec. 31, 2003).

As for the CLECs' requests for additional, affirmative relief to require Verizon to implement the FCC rules on commingling and routine network modifications, as well as to require Verizon to refrain from implementing its own interpretation of the interconnection agreements unilaterally, these requests are denied. Specifically, the request that Verizon should be required to immediately implement the rules on commingling and routine network modifications appears contrary to the basis upon which I have decided to grant the Motion to Hold Proceedings in Abeyance, that being that the parties should have time to focus their efforts on negotiating modifications to their current agreements. As to the request to require Verizon to maintain the status quo for the duration of the proceeding, Verizon has indicated that this is, in fact, its intent. Thus, it does not appear necessary at this time to affirmatively require Verizon to do so.

I also reject Sprint's request that its Motions to Dismiss be ruled upon prior to a ruling on Verizon's Motion. Sprint is correct that, if its Motions to Dismiss are granted, Verizon's Motion would be rendered moot. There is, however, no reason that Verizon's Motion cannot be dealt with first. In view of the number and complexity of the Motions to Dismiss currently pending, this is simply the most reasonable, timely course of action. The Motions to Dismiss are scheduled to be heard by the full Commission at an upcoming Agenda Conference.

Finally, I am persuaded by Verizon's argument that maintenance of the status quo should be applicable not only to the CLECs but also to Verizon. However, to the extent that any CLEC believes Verizon is not complying with a current, valid provision of its interconnection agreement with the CLEC, then that party is not precluded from filing a separate complaint seeking enforcement of the interconnection agreement provision if negotiations do not prove successful.

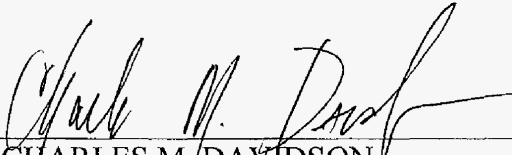
It is therefore

ORDERED by Commissioner Charles M. Davidson, as Prehearing Officer, that Verizon's Motion to Hold Proceedings in Abeyance is granted for the reasons set forth in the body of this Order.



ORDER NO. PSC-04-0578-PCO-TP  
DOCKET NO. 040156-TP  
PAGE 7

By ORDER of Commissioner Charles M. Davidson, as Prehearing Officer, this 8th  
day of June, 2004.

  
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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.