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October 22, 2001

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

RECEIVED-FPSC  
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COMMISSION  
CLERK

Re: Docket No. 011252-TP  
Request for arbitration concerning complaint of XO Florida, Inc. against  
Verizon Florida Inc. (f/k/a GTE Florida Incorporated) regarding breach of  
interconnection agreement and request for expedited relief

Dear Ms. Bayo:

Please find enclosed for filing the original and one copy of Verizon Florida Inc.'s Motion  
to Dismiss in the above matter. Service has been made as indicated on the Certificate  
of Service. If there are any questions regarding this matter, please contact me at 813-  
483-2617.

Sincerely,

*K. Caswell / tas*

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OTH \_\_\_\_\_  
Kimberly Caswell  
KC:tas  
Enclosures

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FPSC-COMMISSION CLERK

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Request for arbitration concerning complaint )  
of XO Florida, Inc. against Verizon Florida Inc. ) Docket No. 011252-TP  
(f/k/a GTE Florida Incorporated) regarding breach of ) Filed: October 22, 2001  
interconnection agreement and request for expedited )  
relief )  
\_\_\_\_\_ )

**VERIZON FLORIDA INC.'S MOTION TO DISMISS  
XO FLORIDA, INC.'S COMPLAINT FOR EXPEDITED RELIEF**

Verizon Florida Inc. (Verizon) asks the Commission to dismiss XO Florida, Inc.'s Complaint for Expedited Relief. The Commission has no jurisdiction to rule on the Complaint because the Interconnection Agreement between XO Florida, Inc. (XO) and Verizon specifies alternative dispute resolution, and not Commission proceedings, as the sole remedy for disputes arising from the Agreement. XO did not comply with the contract, and so the Commission must dismiss its Complaint.

XO complains that Verizon breached a number of the provisions in Article V ("Interconnection and Transport and Termination of Traffic") of the parties' Interconnection Agreement. Under that Agreement, XO and Verizon agreed to use the specified "alternative dispute resolution procedures as their sole remedy with respect to any controversy or claim arising out of or relating to the interpretation of th[e] Agreement or its breach." (Agreement at sec. 14.1.) (A copy of the Agreement's Dispute Resolution section is attached.) Those procedures require negotiation first, and then private arbitration if negotiations are unsuccessful. XO failed to comply with these procedures.

The contract requires a written request for negotiation of any dispute relating to the Agreement. Each party must then appoint a representative to meet and negotiate the dispute. If both parties agree, the representatives may use other alternative dispute resolution procedures, such as mediation, to assist in the negotiations. All discussions and

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correspondence in the context of negotiations are to be treated as confidential. (Agreement section 14.2.)

If negotiations do not resolve the dispute within sixty business days of the written request, “the dispute shall be submitted to binding arbitration by a single arbitrator pursuant to the Commercial arbitration Rules of the American Arbitration Association.” (Agreement section 14.3.) The Agreement also defines discovery parameters for the private arbitration. (*Id.*)

While Verizon worked diligently with XO to resolve their disputes over several months’ time, XO never served Verizon any written request for negotiation, as required by the contract, and the parties never formally designated representatives to negotiate. XO refers to “informal mediation” at the Commission, but mediation under the contract is only available by mutual agreement. Verizon never agreed to use mediation (by Commission Staff or any other entity) as an alternative means of resolving their dispute, and XO never asked Verizon to use such mediation. Instead, XO unilaterally involved Commission Staff in its dispute with Verizon by means of a letter to the Commission. The parties’ discussions and correspondence during the course of discussions with Commission Staff were not kept confidential, as they would be under the negotiation process prescribed by the Agreement. In short, Verizon’s attempts to cooperate with XO to resolve its issues were not negotiation or mediation as prescribed by the contract.

Even if the parties’ discussions were construed as negotiations under the contract, XO failed to submit the dispute to private arbitration when the parties were unable to informally resolve it. The contract requires claims for breach of the Agreement to be heard by a private arbitrator, under Commercial Arbitration Rules of the American Arbitration Association. (Agreement section 14.3.) There is no provision in the Agreement for resolution of alleged contract breaches through a Commission complaint.

The only reference to the state Commission in the dispute resolution section of the Agreement states that the section does not divest the Commission of any jurisdiction it

otherwise has over "matters of public policy or interpretation of, and compliance with, state or federal law," and that Parties may seek redress from the Commission to resolve such matters. (Agreement section 14.1.) While XO alleges certain violations of federal and Florida law, those allegations are subsidiary to the alleged contract breach claims. The same alleged conduct is the basis for both the contract breach allegations and the claimed violations of state and federal law. In practical terms, the Commission cannot consider the claimed legal violations without also considering the contract claims. Under the contract, the Commission does not have the authority to entertain the contract claims. XO's complaint must be dismissed, and XO must pursue its dispute through private arbitration.

Respectfully submitted on October 22, 2001.

By: *K. Caswell / tas*  
Kimberly Caswell  
P. O. Box 110, FLTC0007  
Tampa, FL 33601  
Tel: 813-483-2617  
Fax: 813-204-8870

Attorney for Verizon Florida Inc.

- 11.3 Exceptions. These obligations shall not apply to any Confidential Information that was legally in the recipient's possession prior to receipt from the Source, was received in good faith from a Third Party not subject to a confidential obligation to the Source, now is or later becomes publicly known through no breach of confidential obligation by the recipient, was developed by the recipient without the developing persons having access to any of the Confidential Information received in confidence from the Source, or that is required to be disclosed pursuant to subpoena or other process issued by a court or administrative agency having appropriate jurisdiction, provided, however, that the recipient shall give prior notice to the Source and shall reasonably cooperate if the Source deems it necessary to seek protective arrangements.
- 11.4 Survival. The obligation of confidentiality and use with respect to Confidential Information disclosed by one Party to the other shall survive any termination of this Agreement for a period of three (3) years from the date of the initial disclosure of the Confidential Information.
12. Consent. Where consent, approval, or mutual agreement is required of a Party, it shall not be unreasonably withheld or delayed.
13. Cooperation on Fraud Minimization. Each Party assumes responsibility for all fraud associated with its end user customers and accounts. Neither Party shall have responsibility for, or be required to investigate or make adjustments to the other Party's account in cases of fraud. The Parties agree that they shall cooperate with one another to resolve cases of fraud. The Parties' fraud minimization procedures are to be cost effective and implemented so as not to unduly burden or harm one Party as compared to the other.
14. Dispute Resolution.
- 14.1 Alternative to Litigation. Except as provided under Section 252 of the Act with respect to the approval of this Agreement by the Commission, the Parties desire to resolve disputes arising out of or relating to this Agreement without litigation. Accordingly, except for action seeking a temporary restraining order or an injunction related to the purposes of this Agreement, or suit to compel compliance with this dispute resolution process, the Parties agree to use the following alternative dispute resolution procedures as their sole remedy with respect to any controversy or claim arising out of or relating to the interpretation of this Agreement or its breach. Nothing in this subsection 14.1, however, shall divest the Commission, the FCC, or state or federal courts of any jurisdiction they otherwise have over matters of public policy or interpretation of, and compliance with, state or federal law, and

either Party may seek redress from the Commission, the FCC, or state or federal court to resolve such matters.

- 14.2 Negotiations. At the written request of a Party, each Party will appoint a knowledgeable, responsible representative to meet and negotiate in good faith to resolve any dispute arising out of or relating to this Agreement. The Parties intend that these negotiations be conducted by non-lawyer, business representatives. The location, format, frequency, duration, and conclusion of these discussions shall be left to the discretion of the representatives. Upon agreement, the representatives may utilize other alternative dispute resolution procedures such as mediation to assist in the negotiations. Discussions and correspondence among the representatives for purposes of these negotiations shall be treated as confidential information developed for purposes of settlement, exempt from discovery, and shall not be admissible in the arbitration described below or in any lawsuit without the concurrence of all Parties. Documents identified in or provided with such communications, which are not prepared for purposes of the negotiations, are not so exempted and may, if otherwise discoverable, be discovered or otherwise admissible, be admitted in evidence, in the arbitration or lawsuit.
- 14.3 Arbitration. If the negotiations do not resolve the dispute within sixty (60) Business Days of the initial written request, the dispute shall be submitted to binding arbitration by a single arbitrator pursuant to the Commercial Arbitration Rules of the American Arbitration Association except that the Parties may select an arbitrator outside American Arbitration Association rules upon mutual agreement. A Party may demand such arbitration in accordance with the procedures set out in those rules. Discovery shall be controlled by the arbitrator and shall be permitted to the extent set out in this section. Each Party may submit in writing to a Party, and that Party shall so respond to, a maximum of any combination of thirty-five (35) (none of which may have subparts) of the following: interrogatories, demands to produce documents, or requests for admission. Each Party is also entitled to take the oral deposition of one individual of another Party. Additional discovery may be permitted upon mutual agreement of the Parties. The arbitration hearing shall be commenced within sixty (60) Business Days of the demand for arbitration. The arbitration shall be held in a mutually agreeable city. The arbitrator shall control the scheduling so as to process the matter expeditiously. The Parties may submit written briefs. The arbitrator shall rule on the dispute by issuing a written opinion within thirty (30) Business Days after the close of hearings. The times specified in this section may be extended upon mutual agreement of the Parties or by the arbitrator upon a showing of good cause. Judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction.

- 14.4 Expedited Arbitration Procedures. If the issue to be resolved through the negotiations referenced in Section 14.2 directly and materially affects service to either Party's end user customers, then the period of resolution of the dispute through negotiations before the dispute is to be submitted to binding arbitration shall be five (5) Business Days. Once such a service affecting dispute is submitted to arbitration, the arbitration shall be conducted pursuant to the expedited procedures rules of the Commercial Arbitration Rules of the American Arbitration Association (i.e., rules 53 through 57).
- 14.5 Costs. Each Party shall bear its own costs of these procedures, including the costs of responding to reasonable discovery. If the arbitrator finds that a Party's discovery requests require the responding Party to undertake unreasonable or unnecessarily burdensome efforts or expense, the Party seeking discovery shall reimburse the responding Party the costs of production of documents in response to such requests (including search time and reproduction costs). The Parties shall equally split the fees of the arbitration and the arbitrator.
- 14.6 Continuous Service. The Parties shall continue providing services to each other during the pendency of any dispute resolution procedure, and the Parties shall continue to perform their obligations (including making payments in accordance with Article IV, Section 4) in accordance with this Agreement.
15. Entire Agreement. This Agreement constitutes the entire agreement of the Parties pertaining to the subject matter of this Agreement and supersedes all prior agreements, negotiations, proposals, and representations, whether written or oral, and all contemporaneous oral agreements, negotiations, proposals, and representations concerning such subject matter. No representations, understandings, agreements, or warranties, expressed or implied, have been made or relied upon in the making of this Agreement other than those specifically set forth herein.
16. Expenses. Except as specifically set out in this Agreement, each Party shall be solely responsible for its own expenses involved in all activities related to the subject of this Agreement.
17. Force Majeure. In the event performance of this Agreement, or any obligation hereunder, is either directly or indirectly prevented, restricted, or interfered with by reason of fire, flood, earthquake or like acts of God, wars, revolution, civil commotion, explosion, acts of public enemy, embargo, acts of the government in its sovereign capacity, labor difficulties, including without limitation, strikes, slowdowns, picketing, or boycotts, unavailability of equipment from vendor through no fault of the Party responsible for obtaining that equipment, changes requested by Customer, or any other circumstances beyond the reasonable control and without the fault or negligence of the

Party affected, the Party affected, upon giving prompt notice to the other party, shall be excused from such performance on a day-to-day basis to the extent of such prevention, restriction, or interference (and the other Party shall likewise be excused from performance of its obligations on a day-to-day basis until the delay, restriction or interference has ceased); *provided however*, that the Party so affected shall use diligent efforts to avoid or remove such causes of nonperformance and both Parties shall proceed whenever such causes are removed or cease.

18. Good Faith Performance. In the performance of their obligations under this Agreement, the Parties shall act in good faith. In situations in which notice, consent, approval or similar action by a Party is permitted or required by any provision of this Agreement, such action shall not be unreasonably delayed, withheld or conditioned. In addition, each Party shall be responsible for labor relations with its own employees. As soon as practicable, a Party experiencing labor difficulties with its employees that either directly or indirectly are delaying or otherwise interfering with that Party's timely performance under this Agreement shall notify the other Party and shall minimize impairment of service to the other Party to the same extent that the Party minimizes impairment of service to its own end-user customers, affiliates, and other carriers.
19. Governing Law. This Agreement shall be governed by and construed in accordance with the domestic laws of the state where the Services are provided or the facilities reside.
20. Standard Practices. The Parties acknowledge that GTE shall be adopting some industry standard approaches and/or establishing its own standard approaches to various requirements hereunder applicable to CLEC industry which may be added in the Guide. NEXTLINK agrees that GTE may implement such approaches to satisfy any GTE obligations under this Agreement, to the extent that these approaches are otherwise consistent with this Agreement and do not result in unlawful discrimination against NEXTLINK.
21. Headings. The headings in this Agreement are inserted for convenience and identification only and shall not be considered in the interpretation of this Agreement.
22. Independent Contractor Relationship. The persons who implement this Agreement on behalf of each Party shall be solely that Party's employees or contractors and shall be under the sole and exclusive direction and control of that Party. They shall not be considered employees or contractors of the other Party for any purpose. Each Party shall remain an independent contractor with respect to the other and shall be responsible for compliance



## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of Verizon Florida Inc.'s Motion to Dismiss in Docket No. 011252-TP were sent via overnight delivery(\*) on October 19, 2001 and via U.S. mail(\*\*) on October 22, 2001 to:

Staff Counsel(\*)  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

Dana Shaffer(\*\*)  
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Kimberly Caswell