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November 5, 2001

VIA HAND DELIVERY

Blanca S. Bayo, Director
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COMMISSION
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Re: Docket No.: 011252-TP

Dear Ms. Bayo:

On behalf of XO Florida, Inc. (XO), enclosed for filing and distribution are the original and 15 copies of the following:

- ▶ XO Florida, Inc.'s Response to Verizon Florida, Inc.'s Motion to Dismiss XO Florida, Inc.'s Complaint for Expedited Relief.

Please acknowledge receipt of the above on the extra copy of each and return the stamped copies to me. Thank you for your assistance.

Sincerely,

Vicki Gordon Kaufman

Vicki Gordon Kaufman

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: 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

Docket No. 011252-TP
Filed: November 5, 2001

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

XO Florida, Inc. (XO), pursuant to rule 28-106.204(1), Florida Administrative Code, files this response to Verizon Florida Inc.'s ("Verizon") motion to dismiss. XO states that Verizon's motion is without merit and should be denied. As grounds therefor, XO states:

INTRODUCTION

1. Verizon has moved to dismiss XO's Complaint because the Parties' Interconnection Agreement includes an alternative dispute resolution ("ADR") provision. The inclusion of such a provision, however, does not divest the Commission of jurisdiction; federal courts hold that an administrative agency retains jurisdiction over disputes between regulated parties even though such disputes arise out of an agency-approved agreement that contains an arbitration clause. Consistent with this principle, the dispute resolution provision in the Parties' Interconnection Agreement *specifically* authorizes either Party to seek Commission resolution of disputes concerning statutory violations and other matters of public interest, which form the basis of the claims that XO has alleged in its Complaint. The Parties have already resorted to Commission assistance in an unsuccessful attempt to resolve their dispute, and Verizon's sudden insistence on arbitration is inconsistent with its prior actions, as well as applicable law. Accordingly, Verizon's motion to dismiss is without merit and should be denied.

DISCUSSION

2. The District of Columbia Circuit – which hears the majority of appeals from federal government agencies – has decisively rejected the "remarkable contention" that an agency waives any right to enforce an approved agreement because the agreement has a mandatory arbitration clause. "Private regulated parties cannot agree to waive the subject matter jurisdiction of the agency charged with the statutory responsibility to insure that parties implement agreements as approved by and filed with that agency." *A/S Ivarans Rederi v. United States*, 895 F.2d 1441, 1445 (D.C. Cir. 1990). The court explained that because "Congress clearly envisioned a role for the [agency] to play in investigating and adjudicating possible violations of the [statute], we think it rather extreme to conclude that the [agency] 'waived' its statutory obligations simply by approving an arbitration clause." *Id.*; accord *Duke Power Co. v. F.E.R.C.*, 864 F.2d 823, 829 (D.C. Cir. 1989) ("the Commission's acceptance for filing of an agreement that contains an arbitration clause does not legally disable the Commission from resolving disputes at the core of its enforcement mission"); *Gulf Oil Corp. v. Federal Power Comm'n*, 563 F.2d 588, 596-97 (3d Cir. 1977) ("[t]he reciprocal promises between [the parties] to resolve their disputes by arbitration are inapplicable to the Commission's duty to enforce the certificate of public convenience" even though "in the performance of that duty, the Commission necessarily must resort to the terms of the contract" with the arbitration clause that is part of that certificate).

3. The federal Telecommunications Act of 1996 ("Federal Act") requires that the state Commission approve all agreements entered into pursuant to the Act to ensure either that the agreement is consistent with the Act, FCC rules, and state law (arbitrated agreements), or that the agreement is nondiscriminatory, consistent with the public interest, convenience, and

necessity, and compliant with state requirements (negotiated agreements). 47 U.S.C. § 252(e). The Eighth Circuit Court of Appeals interpreted the Federal Act to vest "primary authority" with the Commission "to enforce the substantive terms of the agreements made pursuant to sections 251 and 252" based on the Commission's "plenary authority to accept or reject these agreements." *Iowa Utils. Bd v. FCC*, 120 F.3d 753, 804 (8th Cir. 1997), *aff'd in part and rev'd in part on other grounds*, 119 S. Ct. 721 (1999). The existence of an ADR provision in the Parties' Interconnection Agreement, therefore, does not preclude the Commission from resolving disputes between the Parties that arise under that Agreement.¹

4. The Parties' Interconnection Agreement incorporates this concept, expressly reserving each Party's right to bring to the Commission disputes "over matters of public policy, or interpretation of, and compliance with, state or federal law."² Verizon concedes that XO's petition sets forth violations of both state and federal law but contends that those allegations are "collateral" to XO's contract claims.³ Contrary to Verizon's allegation, XO's public policy and statutory claims are *not* collateral, but are central to the Parties' dispute, as well as at the core of

¹ That is not to say that ADR provisions are meaningless or unenforceable. The federal courts have recognized two circumstances in which the Commission may enforce a mandatory arbitration clause: (1) when the dispute involves issues that are not at the core of the Commission's regulatory responsibilities, *i.e.*, when the Commission does not have an independent interest as a regulatory body in enforcing a particular obligation, *see Duke Power*, 864 F.2d at 829-31; or (2) as a prerequisite to Commission action, *i.e.*, as "an application of exhaustion-like principles, [when] the parties, with [agency] approval, have contractually arranged to have their disputes heard *in the first instance* by a private forum." *A/S Ivarans*, 895 F.2d at 1446 (emphasis in original). Neither of these circumstances, however, is present in this case.

² Interconnection Agreement at p. III-7,8, par. 14.1, attached to Verizon's Motion to Dismiss. This ADR provision thus is distinguishable from the mandatory arbitration provision the Commission enforced in *In re Request for Arbitration Concerning Complaint of BellSouth against Supra for Resolution of Billing Disputes*, Docket No. 001097-TP, Order No. PSC-00-2250-FOF-TP (Nov. 28, 2000). The ADR provision in that agreement did not include the language in the XO-Verizon Interconnection Agreement expressly preserving Commission jurisdiction to resolve issues over public policy and statutory interpretation. The Commission's decision in that case also is inapplicable to the circumstances here because the billing dispute in BellSouth's complaint did not raise any issues of public policy or statutory interpretation, unlike XO's Complaint against Verizon where such issues are at the heart of the Complaint, as well as at the core of the Commission's regulatory responsibilities.

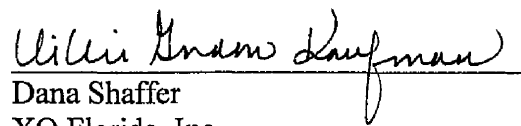
³ Verizon Motion at 3.

the Commission's enforcement obligations. XO has alleged that Verizon is in violation of its legal obligations to provide and share the costs of facilities used to exchange telecommunications traffic between the companies' customers. These obligations arise under the Federal Act, Florida statutes, and Commission rules and are included in the Parties' Interconnection Agreement only because Congress, the Florida legislature, and the Commission have so required. The applicable contract provisions cannot be interpreted outside of this context, and this Commission – not a private arbitrator – is the appropriate entity to resolve disputes over these issues under both the Interconnection Agreement and federal and state law.

5. Verizon, through its conduct in prior attempts to resolve the Parties' dispute, implicitly agreed with this interpretation. Verizon participated in informal mediation before Commission Staff for more than a year, and consistently indicated a clear intent to resolve this matter through such mediation. At no time did Verizon raise the issue of arbitration constituting the Parties' sole remedy. Even when the mediator issued a final determination indicating the need for a formal complaint, Verizon raised no objection to the Commission's exercise of authority over the matters at issue. Having successfully delayed resolution of the Parties' dispute through protracted Commission-assisted mediation, Verizon now suddenly objects to Commission involvement and would have the issues presented anew to, and resolved by, a third party arbitrator. Verizon's tactics should be seen for what they are – Verizon's attempts to further delay resolution of these issues, to continue its monopolization of its local markets in Florida, and to avoid full Commission review of the Parties' dispute in light of Commission Staff's conclusion that Verizon has acted in bad faith and inconsistently with its legal obligations to XO.

CONCLUSION

6. Federal law, the Interconnection Agreement, and the Parties' prior conduct consistently support the propriety of seeking Commission resolution of XO's Complaint. Accordingly, the Commission should deny Verizon's Motion and should order Verizon immediately to answer the allegations set forth in that Complaint.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing XO Florida, Inc.'s Response to Verizon's Motion to Dismiss has been furnished by (*) hand delivery or (**) US Mail on this 5th day of November, 2001 to the following:

(*) Lee Fordham
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

(**) Kimberly Caswell
Verizon Communications
201 North Franklin Street
Tampa, Florida 33601-0110


Vicki Gordon Kaufman