



Public Service Commission  
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TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK &  
ADMINISTRATIVE SERVICES (BAYÓ)

FROM: OFFICE OF THE GENERAL COUNSEL (FORDHAM; DODSON) *C.P.F.*  
DIVISION OF COMPETITIVE MARKETS & ENFORCEMENT (SCHULTZ) *TMS*

RE: DOCKET NO. 020355-TP - REQUEST FOR ARBITRATION CONCERNING  
COMPLAINT OF TIME WARNER TELECOM OF FLORIDA, L.P. AGAINST  
VERIZON FLORIDA INC. FOR ALLEGED BREACH OF TERMS OF  
INTERCONNECTION AGREEMENT.

AGENDA: 07/09/02 - REGULAR AGENDA - MOTION TO DISMISS - PARTIES  
MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\GCL\WP\020355.RCM

CASE BACKGROUND

On April 19, 2002, Time Warner Telecom of Florida, L.P. (Time Warner) filed a complaint against Verizon Florida Inc. (Verizon) seeking resolution of an alleged breach of terms of the parties' interconnection agreement. Time Warner and Verizon entered into an interconnection agreement approved by the Florida Public Service Commission (Commission or FPSC) in Order No. PSC-00-1772-FOF-TP issued on September 27, 2000, in Docket No. 000836-TP. Time Warner's complaint centers around an allegation that Verizon wrongfully withheld reciprocal compensation payments for ISP-bound traffic.

On May 14, 2002, Verizon filed a motion to dismiss contending this Commission lacks the authority to address this dispute or in the alternative to stay all proceedings pending the Supreme Court decision in Verizon Maryland, Inc. v. Public Service Commission of

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Maryland, 121 S.Ct. 2548 (No. 00-1531) (cert. granted 2001), 122 S.Ct. 679 (No. 00-878) (cert. granted 2002). On May 28, 2002, Time Warner filed a timely response in opposition to Verizon's motion. This recommendation addresses Verizon's motion and Time Warner's response.

### DISCUSSION OF ISSUES

**ISSUE 1:** Should the Commission grant Verizon's Motion to Dismiss for Lack of Subject Matter Jurisdiction, or, in the Alternative, Stay?

**RECOMMENDATION:** No. The Commission should deny Verizon's Motion to Dismiss for Lack of Subject Matter Jurisdiction, or, in the Alternative, Stay. **(FORDHAM)**

**STAFF ANALYSIS:** As stated above, on May 14, 2002, Verizon filed its Motion to Dismiss for Lack of Subject Matter Jurisdiction. On May 28, 2002, Time Warner filed its Response to Verizon's Motion.

#### Verizon's Motion

Verizon asserts that in BellSouth Telecommunications, Inc. v. MCI Metro Access Transmission Services, 278 F.3d 1223 (11th Cir. 2002) (BellSouth), the Eleventh Circuit held that state commissions lack the authority under section 252(e)(6) of the Act to adjudicate interconnection agreement disputes. According to the BellSouth court, section 252(e)(6), by its plain terms, grants state commissions "the power to approve or reject interconnection agreements, not to interpret or enforce them." 278 F.3d at 1232. Thus, according to Verizon, under the holding in BellSouth, there is no basis under section 252 (or any other provision of federal law) for this Commission's exercise of jurisdiction over Time Warner's breach of contract complaint, and it must be dismissed. Verizon states that it actually disagrees with the Eleventh Circuit's decision in BellSouth, and believes that the power expressly conferred on state commissions in section 252 to approve or reject interconnection agreements necessarily carries with it the authority to interpret and enforce the terms of such agreements. Nonetheless, it urges that this Commission and the

parties are bound by the Eleventh Circuit's contrary interpretation of federal law.

Even assuming this Commission could in fact proceed based on state law alone, Verizon believes none of the Florida law provisions cited by Time Warner provides the Commission with authority to adjudicate this post-interconnection agreement dispute. According to Verizon, section 364.01, Florida Statutes, simply declares "the legislative intent to give exclusive jurisdiction in all matters set forth in this chapter to the Florida Public Service Commission in regulating telecommunications companies," and provides the Commission with the "powers conferred by this chapter." Accordingly, Time Warner can invoke this provision only to the extent that it can point to some other affirmative grant of authority to the Commission. According to Verizon, neither Section 364.03 nor Section 364.285, Florida Statutes, meets that burden. The company maintains that Section 364.03 concerns dealings between telecommunications companies and end users, not between two telecommunications companies, and, in any event, does not confer on this Commission adjudicatory powers. Section 364.03(1) simply provides that: "All rates, tolls, contracts, and charges of, and all rules and regulations of, telecommunications companies for messages, conversations, services rendered, and equipment and facilities supplied, whether such message, conversation, or service is to be performed over one company or line or over or by two or more companies or lines, shall be fair, just, reasonable, and sufficient, and the service rendered to any person by any telecommunications company shall be rendered and performed in a prompt, expeditious, and efficient manner." Verizon also argues that Section 364.285 merely allows this Commission to penalize willful violations of "any lawful rule or order of the commission or any provision of this chapter," 364.285(1), or to commence proceedings for injunctive relief in courts, 364.285(2). In sum, Verizon claims this Commission has no authority to adjudicate this dispute and, therefore Time Warner's complaint must be dismissed.

Alternatively, Verizon states that Time Warner's action should be stayed, pending the decision of the United States Supreme Court in Verizon Maryland Inc. v. Public Service Commission of Maryland, 121 S.Ct. 2548 (No. 00-1531) (cert. granted 2001), 122 S.Ct. 679 (No. 00-878) (cert. granted 2002). Although the narrow issue ruled on by the Eleventh Circuit -- state commission jurisdiction to interpret and enforce interconnection agreements -- is not directly

before the Supreme Court, the Court is considering the ancillary question of whether the Maryland Commission's interpretation of an interconnection agreement may be challenged in federal court under section 252(e)(6). In support of federal court jurisdiction to review such state commission interpretive decisions, Verizon has argued that because an interpretation of an interconnection agreement is a "determination" under section 252, a federal district court has subject matter jurisdiction under section 252(e)(6) to review the decision. If the Court agrees with Verizon (and the Fifth, Seventh, Eighth, and Tenth Circuits) and concludes that a state commission's interpretation of an interconnection agreement is a "determination" for purposes of federal court jurisdiction under section 252(e)(6), that conclusion would effectively nullify the conclusion in BellSouth that state commissions lack authority to interpret interconnection agreements under section 252.

#### Time Warner's Response

Time Warner urges that Federal law confers jurisdiction upon this Commission. Section 252(e)(01) of the Telecommunications Act of 1996 grants state commissions authority to approve or reject an interconnection agreement. While the power to approve or reject interconnection agreements implicitly authorizes state commissions to interpret and enforce agreements, the statute is silent as to whether state commissions are specifically vested with such authority. However, Time Warner asserts that this issue was presented to the Supreme Court in the recent case of Verizon Maryland Inc. v. Public Service Commission of Maryland, 121 S.Ct. 2548 (No. 00-1531) (cert. granted 2001), 122 S.Ct. 679 (No. 00-878) (cert. granted 2002). In Verizon v. Public Service Commission of Maryland, the parties, including Verizon and the United States, agreed that a state commission's authority under §252(e) implicitly encompasses the authority to interpret and enforce interconnection agreements previously approved by a state commission. The Court, however, declined to answer the question as to whether state commissions have authority under federal law to interpret and enforce interconnection agreements, ruling instead that 28 U.S.C. §1331 confers jurisdiction on federal courts to review state commission rulings.

Time Warner notes that, to date, this issue has not been squarely addressed nor resolved in the Florida courts. Other courts have acknowledged, however, that federal law confers authority on state commissions to interpret and enforce interconnection agreements. For example, the Tenth Circuit concluded that state courts have authority to review state commission decisions interpreting and enforcing interconnection agreements under the Telecommunications Act. See U.S. West Communications, Inc. v. Sprint Communications Co., L.P., 275 F.3d 1241 (10th Cir. 2002). The Fourth Circuit appears to agree that state utilities commissions are authorized to interpret and enforce interconnection agreements as well. See Bellsouth Telecommunications, Inc. v. North Carolina Utilities Commission, 240 F.3d 270 (4<sup>th</sup> Cir. 2001). In fact, according to Time Warner, a number of District Courts have determined that state utilities commissions are vested with the power to interpret and enforce interconnection agreements. See Southwestern Bell Telephone Co. v. Connect Communications Corp., 225 F.3d 942 (8<sup>th</sup> Cir. 2000); Southwestern Bell Telephone Co. v. Public Utility Commission of Texas, 208 F.3d 475 (5<sup>th</sup> Cir. 2000); and Illinois Bell Telephone Co. v. WorldCom Techs Inc., 179 F.3d 566 (7<sup>th</sup> Cir. 1999). Other circuits have refused to rule on this issue. See Puerto Rico Telephone Co. v. Telecommunications Regulatory Bd. of Puerto Rico, 189 F.3d 1 (1st Cir. 1999). While this commission is not bound by the decisions from other circuit courts, these decisions may be persuasive authority.

If this Commission determines that federal law does not authorize the Commission to interpret and enforce interconnection agreements, Time Warner urges that Florida state law does. In finding that the Georgia Public Service Commission lacked such authority under Georgia state law, the 11<sup>th</sup> Circuit Court of Appeals concluded that the quasi-legislative body was not equipped with the expertise to adjudicate such issues. BellSouth at 1240. However, approximately one month after that decision, the Northern District of Florida expressly concluded that under Florida law this Commission is an administrative agency with proper authority and knowledge to adjudicate issues surrounding interconnection agreements. BellSouth Telecommunications, Inc. v. Vartec Telecom, Inc., 185 F.Supp.2d 1280,1283 (N.D. Florida 2002). Therefore, Time Warner argues, state law confers jurisdiction upon this Commission. The Court in Vartec further concluded that the Florida Legislature gave the Florida Public Service Commission authority to resolve disputes between carriers under §364.07, Florida Statutes (2001).

Id. at 1285 (stating that Georgia did not have a statutory counterpart to 364.07). The Florida legislature, the Court stated, specifically created an administrative remedy before decision makers who are experts in the field of telecommunications and such authority to hear and resolve telecommunications issues should rest with this Commission. Id. at 1284. The Court further acknowledged that to deny the Commission this authority "would be a bold and bizarre reading of the removal statute that attributed to Congress' an intent to foreclose a state from implementing such an administrative remedy whenever federal jurisdiction would exist over a civil action raising the same claim in court." Id. In the case at issue, Time Warner elected an administrative remedy before this commission, not a civil action in court. Such an election should not be denied because concurrent jurisdiction may exist in another forum.

Therefore, Time Warner argues, this Commission is authorized through federal and state law to interpret and enforce interconnection agreements that it approves or rejects, and Verizon's motion to dismiss should be denied.

#### Analysis

In its motion, Verizon argues that, as an alternative, the case should be stayed pending resolution of the Verizon v. Public Service Commission of Maryland case. This argument is now moot because the Supreme Court issued its decision on May 20, 2002. Accordingly, the docket will not be stayed.

Under Florida law the purpose of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). In order to sustain a motion to dismiss, the moving party must demonstrate that, accepting all allegations in the petition as facially correct, the petition still fails to state a cause of action for which relief can be granted. In re Application for Amendment of Certificates Nos. 359-W and 290-S to Add Territory in Broward County by South Broward Utility, Inc., 95 FPSC 5:339 (1995); Varnes, 624 So. 2d at 350. When "determining the sufficiency of the complaint, the trial court may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side." Id. However, staff notes that

Verizon's Motion to Dismiss questions this Commission's authority to hear the subject matter. Thus, regardless of whether all of Time Warner's allegations in its complaint were facially correct, if the Commission were to determine that it lacks subject matter jurisdiction, the complaint would have to be dismissed.

Verizon argues that the BellSouth decision, as a published opinion, is binding authority on all courts and judicial forums in the Eleventh Circuit. Staff notes that the U.S. District Court for the Northern District of Florida has issued Orders in several of its pending cases regarding disputes arising out of interconnection agreements recognizing the Eleventh Circuit's opinion in BellSouth. Nevertheless, the Court continues to stay (rather than dismiss) those proceedings, pending issuance of a mandate by the Eleventh Circuit and resolution of pending U.S. Supreme Court cases involving this and other issues. Further, staff notes that the Georgia Commission and MCI/Worldcom have requested a Rehearing en banc of the BellSouth decision. However, staff agrees that the BellSouth decision has precedential value.

Both parties agree the BellSouth decision clearly holds that the federal Act does not authorize state commissions to interpret or enforce the terms of an interconnection agreement. However, Time Warner and Verizon disagree as to the interpretation of BellSouth's effect on this Commission's authority pursuant to Florida state law to resolve disputes arising under a previously approved interconnection agreement.

Staff notes that after the Eleventh Circuit determination that the federal Act did not provide authority to state commissions to interpret or enforce interconnection agreements, the Court went on to analyze the Georgia Commission's authority pursuant to Georgia state law. Id. at 37-38. Similar to the Georgia Commission, Verizon argues that this Commission cannot cite to any explicit authority on which to base its jurisdiction to resolve disputes arising from a previously approved agreement. However, staff disagrees and cites to Section 364.162, Florida Statutes, as explicit state law authority to address such disputes. Section 364.162(2), Florida Statutes, provides:

Whether set by negotiation or by the commission, interconnection and resale prices, rates, terms, and conditions shall be filed with the commission before their effective date. The commission shall have the

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authority to arbitrate any dispute regarding interpretation of interconnection or resale prices and terms and conditions.

The federal Act is clear that parties have the ability to arrive at interconnection agreements either through negotiation or through arbitration with the Commission. Thereafter, such agreements must be approved by the state commission in accordance with Section 252(e) of the Act. Once approved, however, staff believes that the Eleventh Circuit's BellSouth decision is clear that the Commission is not authorized by the federal Act to resolve complaints arising out of that agreement, but may only do so pursuant to a grant of authority under state law. While the Eleventh Circuit Court found the Georgia PSC lacked an express grant of authority in Georgia statutes, the Eleventh Circuit has not made such a determination regarding Florida state law. Were the U.S. District Court for the Northern District of Florida given an opportunity for such consideration, staff believes that the Court would find such authority for the Florida PSC in the language of Section 364.162(1), Florida Statutes, which expressly confers upon the Commission the authority "to arbitrate any dispute regarding interpretation of interconnection or resale prices and terms and conditions." Staff believes that such language would survive the scrutiny of the federal courts and, indeed, this Commission has so ruled on at least two occasions since the Eleventh Circuit Court decision. Moreover, staff believes that the authority to resolve such disputes is clearly an assignment of quasi-judicial authority by the state legislature, a factor the Eleventh Circuit found lacking in Georgia. Staff further emphasizes that Section 364.162, Florida Statutes, does not limit or otherwise distinguish between the Commission's authority to resolve (1) disputes arising out of the initial establishment of an interconnection or resale agreement and (2) disputes arising out of previously approved agreements. Thus, the Florida Legislature apparently intended the Commission to act in this area.<sup>1</sup>

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<sup>1</sup>See Florida Public Service Commission v. Bryson, 569 So.2d 1253 (Fla. 1990) (PSC is authorized "to interpret statutes that empower it, including jurisdictional statutes, and to make rules and issue orders accordingly.")



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Thus, based on the reasons stated above, staff believes that the instant case is distinguishable from the BellSouth case. Unlike the Georgia state law, Section 364.162, Florida Statutes, provides explicit authority for the Commission "to arbitrate any dispute regarding interpretation of interconnection or resale prices and terms and conditions."

Finally, though the recent U.S. Supreme Court decision in the Verizon v. Public Service Commission of Maryland case does not specifically address the narrow question presented in this Docket, it does have value in the consideration of this question. By ruling that federal courts are not divested of their right to review state commission actions regarding agreements, the strong implication is that state commissions have the authority to take the action which precipitates the review.

For the foregoing reasons, staff recommends that the Commission deny Verizon's Motion to Dismiss for Lack of Subject Matter Jurisdiction. Staff notes that this recommendation is consistent with the Commission's decisions in Docket Nos. 001097-TP and 001305-TP.

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**ISSUE 2:** Should this docket be closed?

**RECOMMENDATION:** No. This docket should remain open pending resolution of the complaint. **(SCHULTZ, FORDHAM)**

**STAFF ANALYSIS:** This docket should remain open pending resolution of the complaint.