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December 30, 2002

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

Re: Docket No. 000075-TP (Phase IIA)
Investigation into appropriate methods to compensate carriers for exchange of
Traffic subject to Section 251 of the Telecommunications Act of 1996

Dear Ms. Bayo:

Please find enclosed an original and 15 copies of Verizon Florida Inc.'s Motion for
Reconsideration of Commission Vote for Procedural Impropriety and Verizon Florida
Inc.'s Motion for Oral Argument on Its Motion for Reconsideration of Commission Vote
for Procedural Impropriety for filing 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,

Kimberly Caswell

- AUS _____
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Enclosures

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of Verizon Florida Inc.'s Motion for Reconsideration of Commission Vote for Procedural Impropriety and Verizon Florida Inc.'s Motion for Oral Argument on Its Motion for Reconsideration of Commission Vote for Procedural Impropriety in Docket No. 000075-TP (Phase II) were sent via U. S. Mail on December 20, 2002 to the parties on the attached list.


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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into appropriate methods) Docket No. 000075-TP (Phase IIA)
to compensate carriers for exchange) Filed: December 30, 2002.
of traffic subject to Section 251 of the)
Telecommunications Act of 1996)
_____)

**VERIZON FLORIDA INC.'S MOTION FOR RECONSIDERATION
OF COMMISSION VOTE FOR PROCEDURAL IMPROPRIETY**

At its December 17, 2002 Agenda Conference, the Commission considered and voted on Staff's November 22, 2002 Recommendation ("Staff Rec.") on the Petitions for Reconsideration of certain Commission rulings in its September 10, 2002 Final Order (as amended by its September 12, 2002 Order) ("Order") in this proceeding. The Recommendation addressed, among other things, Verizon's and ALLTEL's Petition for Reconsideration of the Commission's decision on Issue 3. That decision adopted the originating carrier's retail local calling area as the default for determining reciprocal compensation obligations for traffic exchanged between local exchange carriers. Commission Staff recommended that the Commission reconsider this decision because it overlooked two points. First, it is inconsistent with the Commission's ruling, in the context of the "virtual NXX" issue, that the jurisdiction of a call (and thus, the intercarrier compensation for it) must be determined by its originating and terminating points. Instead of using originating and terminating points to determine compensation, the Commission's default local calling area ruling uses the originating carrier's retail local calling area. Staff's point is that both

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standards cannot govern compensation; it must be either the retail local calling area or the call's end points.

The second reason Staff cited to justify reconsideration was that the record is not sufficient to support implementation of the Commission's decision that the originating carrier's local calling area should govern reciprocal compensation obligations. (Staff Rec. at 38.)

Because of these legal deficiencies in its Order, the Staff advised the Commission not to establish a default local calling area definition.

The Commission rejected Staff's Recommendation. Before doing so, however, it asked for oral argument on Issue 3, even though no party had requested such oral argument. Because that oral argument was improper, Verizon asks the Commission to reconsider its vote on Issue 3 and to cure this procedural impropriety by holding a properly noticed oral argument on Issue 3.

As noted, Verizon and ALLTEL filed a Joint Motion seeking reconsideration of the Commission's decision on Issue 3 (and one other issue). By separate Petition, Sprint sought reconsideration of the same decision. Frontier Communications of the South, Inc., GTC, Inc., ITS Telecommunications Systems, Inc., Northeast Florida Telephone Company, Smart City Telecommunications LLC, and TDS Telecom/Quincy Telephone filed a response supporting Verizon's and ALLTEL's Motion for Reconsideration of Issue 3. None of the petitioning parties nor any other party in this docket requested oral argument on the Petitions for Reconsideration of Issue 3. Nevertheless, the Commission held oral argument, despite the fact that all parties who had filed for

or supported the Petitions for Reconsideration were not at the agenda. The decision to grant oral argument on Issue 3 under the circumstances was impermissible.

The Commission's inclination to learn more about the complex matters raised by Issue 3 was laudable and appropriate. However, the way in which it attempted to satisfy this need for more education about the Issue did not comply with the Florida Administrative Code, which contains specific rules on party participation in agenda conferences and post-hearing oral argument, including oral argument on motions for reconsideration. These provisions do not allow oral argument at agenda where there has been no request for such argument.

Rule 25-22.0021, "Agenda Conference Participation," appears in Part I, the General Provisions section of the Commission's Rules Governing Practice and Procedure. Subsection (2) of that Rule states:

When a recommendation is presented and considered in a proceeding where a hearing has been held, no person other than staff who did not testify at the hearing and the Commissioners may participate at the agenda conference. Oral or written presentation by any order person, whether by way of objection, comment, or otherwise, is not permitted, unless the Commission is considering new matters related to but not addressed at the hearing.

Part IV.D. of the Commission's procedural rules addresses "Post-Hearing Procedures" relative to "Decisions Determining Substantial Interests." Rule 25-22.058, "Oral Argument," states:

- (1) The Commission may grant oral argument upon request of any party to a section 120.57, F.S. formal hearing. A request for oral argument shall be contained on a separate document and must accompany the pleading upon which argument is requested. The request shall state with particularity why oral argument would aid the Commission in

comprehending and evaluating the issues before it. Failure to file a timely request for oral argument shall constitute waiver thereof.

- (2) If granted, oral argument shall be conducted at a time and place determined by the Commission. Unless otherwise specified in the notice, oral argument shall be limited to 15 minutes to each party. The staff attorney may participate in the argument.

Section 25-22.060, the “Motion for Reconsideration” rule, immediately follows the post-hearing oral argument rule. Subsection (f) of that rule addresses oral argument on petitions for reconsideration:

Oral argument on any pleading filed under this rule shall be granted solely at the discretion of the Commission. A party who fails to file a written response to a point on reconsideration is precluded from responding to that point during oral argument.

The rule on agenda conference participation is very clear and specific. When the Commission votes on a Staff recommendation after a hearing has been held, only the Commission and Staff may participate. To remove any possible doubt about the strictness of that prescription, the rule specifies that “[o]ral or written presentation by any other person, whether by way of objection, comment, or otherwise, is not permitted.” The only exception is where the Commission is considering “new matters related to but not addressed at the hearing,” which was not the case here. Rather, the Commission decided, during the agenda conference, that it wished to hear comments on Issue 3. Because there is no exception in the agenda conference participation rule to take comment or oral argument from parties at the Commission’s pleasure, the oral argument was impermissible. Exceptions will not be implied where the words of a provision are plain and clear. See, e.g., *Martin v. Johnston*, 79 So. 2d 419 (Fla. 1955.)

The Commission cannot circumvent the plain language of Rule 25-22.0021 simply by telling the parties it may act contrary to the Rule. Staff's recommendation correctly identified the agenda item as "Regular Agenda – Posthearing Decisions," but then indicated that the Commission might deviate from procedure for "Regular Agenda – Posthearing Decisions" by entertaining oral argument on Issues 1 through 4 of the Staff Recommendation. This attempted notice of possible oral argument does not supersede the rule that no party participation is permitted on a post-hearing agenda item. The Commission cannot do something the rule does not permit simply by telling parties that it may do so. Parties are entitled to rely on the rules, as written, without expecting that the Commission to try to modify those rules on an *ad hoc* basis.

The oral argument also violated the above-cited rules on post-hearing oral argument. Under Rule 25-22.058, a party must *request* oral argument in writing, explaining why it would help the Commission evaluate and comprehend the issues before it. Rule 25-22.060 makes clear that there is no right to oral argument on motions for reconsideration, but that oral argument on a reconsideration pleading may be *granted* at the Commission's discretion.

Words in statutes and rules must be given their "plain and ordinary meaning." See, e.g., *Verizon Florida, Inc. v. Jacobs, et al.*, 810 So. 2d 906 (Fla. 2002); *Freedman v. State Board of Accountancy*, 270 So. 2d 1168, 1169 (Fla. 4th DCA 1979). "Grant" is a transitive verb that means "to consent or carry out for a person: allow fulfillment of < *grant* a request >" (Merriam-Webster Dictionary, online edition, www.m-w.com, visited Dec. 23, 2002.) In this case, there was no

request for oral argument, so there was nothing to grant. Indeed, Staff likely recognized that Rule 25-22.060(1)(f) did not fit the situation, because it told the Commission that the rule allowed the Commission to “entertain,” rather than “grant,” oral argument. Avoiding the use of “grant” in the Recommendation, of course, does not change the plain language of the Rule, which only allows the Commission to *grant* oral argument on reconsideration upon a party’s request. An agency construction that contradicts the unambiguous language of a rule—as the Commission’s construction does here—is “clearly erroneous and cannot stand.” *Woodley v. Dep’t of Health and Rehabilitative Services*, 505 So. 2d 676, 678 (Fla. 1st DCA 1987).

Certainly, the Commission can, at any time during a proceeding, ask the parties to further educate it about particular issues. But it must do so in a properly noticed manner in accordance with the Rules—that is, outside of an agenda conference, at a designated time and place, and by specifying exactly what will be discussed—rather than simply indicating in the “Agenda” line of a Staff Recommendation that the Commission may or may not wish to hear oral argument on any one or all of a number of issues.

Indeed, if the Staff’s interpretation of Rule 25-22.060 is correct, then the Commission would have the right to “entertain” oral argument on any reconsideration pleading at agenda, with or without notifying the parties. All parties would thus have to appear for all agenda items concerning reconsideration pleadings and prepare to discuss all issues, lest the Commission decide it wants oral argument on any of them. This is an unreasonable result,

and an agency's rule interpretation that is unreasonable cannot stand. See, e.g., *Woodley, supra*, at 678.

At this point, it is impossible to completely remove the prejudice to Verizon and others of the Commission's inviting oral argument on a post-hearing agenda item, without all parties present. There are, however, measures the Commission can take to mitigate this prejudice. Specifically, it should delay issuance of the Order on Reconsideration in this proceeding until it can hold a properly scheduled and noticed oral argument on Issue 3.

No party will be prejudiced by this approach; to the contrary, it presents only advantages. All parties (including Verizon, ALLTEL, and the small companies supporting reconsideration) will have the opportunity to fully prepare argument on Issue 3 and the Commission will be able to assure itself it has a thorough understanding of all aspects of this Issue before it releases a final, appealable order on reconsideration. Furthermore, the Commission's substantive decision will not be vulnerable to challenge on procedural grounds, as it will be if the Commission does not correct the procedural impropriety.

If the Commission promptly schedules oral argument, there will be little or no delay in issuance of the order on reconsideration. Any delay will not, in any event, affect the effectiveness of the Commission's original Order, which has not been stayed.

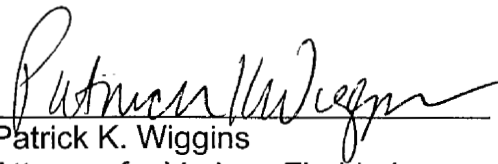
Appropriate resolution of Issue 3 is critical to the future of Florida's telecommunications markets. Even if the Commission does not agree with Verizon's interpretation of the governing rules, it should nevertheless err on the

side of caution and schedule oral argument to ensure that it has the most complete information possible before it issues its order on reconsideration. The Commission certainly did not receive a complete and balanced presentation before its vote on December 17. In addition, the Commissioners' comments at the agenda clearly demonstrate that the Commission overlooked or failed to consider critical legal and factual points when it rendered its decision.

Verizon emphasizes that this pleading is not a request for reconsideration of an order on reconsideration. Indeed, an order on reconsideration has not yet issued, so it would be impossible to argue about deficiencies in that yet-to-be-issued order. Rather, this is a request to put the parties back, to the extent possible, in the positions they were in before the impermissible oral argument occurred. This request is akin to a motion for reconsideration of the Commission's granting another party's motion for oral argument. That is, if another party had asked for oral argument on Issue 3 and the Commission had granted that request, Verizon would have the right to seek reconsideration of the decision granting the motion for oral argument. The fact that the Commission "entertained" oral argument without any party's request should not affect Verizon's right to challenge the decision to hold oral argument. Indeed, disallowing this filing would only compound the procedural impropriety.

For all these reasons, Verizon asks the Commission to delay issuance of its order on reconsideration and to schedule a properly noticed oral argument on Issue 3.

Respectfully submitted on December 30, 2002.

By: 

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