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January 28, 2004

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

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Re: Docket No. 030852-TP
Implementation of requirements arising from Federal Communications
Commission's Triennial UNE Review: Location-Specific Review for DS1, DS3,
and Dark Fiber Loops, and Route-Specific Review for DS1, DS3, and Dark Fiber
Transport

Dear Ms. Bayo:

Please find enclosed for filing an original and 15 copies of Verizon Florida Inc.'s
Response to DIECA Communications Inc. d/b/a Covad Communications Company's
Motion for Summary Final Order As To Issue Nos. 7-12 and 14-18 in the above matter.
Service has been made as indicated on the Certificate of Service. If there are any
questions regarding this filing, please contact me at 813-483-1256.

Sincerely,

Richard A. Chapkis

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of Verizon Florida Inc.'s Response to DIECA Communications Inc. d/b/a Covad Communications Company's Motion for Summary Final Order As To Issue Nos. 7-12 and 14-18 in Docket No. 030852-TP were sent via electronic mail and U.S. mail on January 28, 2004 to:

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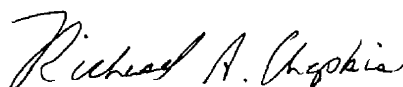
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Implementation Of Requirements Arising)
From Federal Communications Commission)
Triennial UNE Review: Location Specific-)
Review For DS1, DS3, And Dark Fiber Loops)
And Route-Specific Review For DS1, DS3,)
And Dark Fiber Transport)
_____)

Docket No. 030852-TP
Filed: January 28, 2004

**VERIZON FLORIDA INC.'S RESPONSE TO
DIECA COMMUNICATIONS INC., D/B/A/
COVAD COMMUNICATIONS COMPANY'S
MOTION FOR SUMMARY FINAL ORDER**

Pursuant to Rule 28-106.204(4), Florida Administrative Code, Verizon Florida Inc. (Verizon) submits this Response to DIECA Communications Inc., d/b/a Covad Communications Company's (Covad) Motion for Summary Final Order as to Issue Nos. 7 – 12 and 14 – 18 (Motion).

I. INTRODUCTION

1. The Florida Public Service Commission (Commission) should deny Covad's Motion because it fails to demonstrate – let alone conclusively demonstrate – that there exist no genuine issues of material fact regarding the dedicated transport triggers (Issue Nos. 7 – 12 and 14 – 18).

2. First, Covad argues that its backhaul facilities do not constitute dedicated transport for purposes of the dedicated transport triggers. However, Covad's reliance on this argument is misplaced; it contravenes both the logic and language of the FCC's Triennial Review Order (TRO).

3. Second, Covad contends that Verizon is the only party in this proceeding with a burden to produce evidence, and that Verizon bears the entire burden of persuasion with respect to such evidence. This assertion contradicts both the TRO and state law.

4. Third, Covad asserts that the evidence submitted by Verizon is based on nothing more than mere assumptions. This is flatly wrong. The evidence that Verizon submitted to demonstrate non-impairment under the dedicated transport triggers has been confirmed by a variety of sources, including the discovery responses of the CLECs themselves.

5. In view of the foregoing errors, Covad's Motion should be denied in its entirety.

II. DISCUSSION

A. Legal Standard Governing A Motion For Summary Final Order

6. A party may move for a final summary order whenever there is no genuine issue as to any material fact,¹ and the Commission may render a summary final order if it "determines from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists . . ."²

7. The movant bears the burden of demonstrating the absence of a genuine issue of material fact.³ The movant must make its showing "conclusively," and the Commission "must draw every possible inference in favor of [the respondent]."⁴ "If the record reflects the existence of any issue of material fact, possibility of an issue, or even raises the slightest doubt that an issue might exist, summary judgment is improper."⁵ Even

¹ Rule 28-106.204(4), Florida Administrative Code; Section 120.57(1)(h), Florida Statutes.

² Section 120.57(1)(h), Florida Statutes (emphasis added).

³ In re: Application for Transfer of Facilities and Certificates Nos. 353-W and 309-S, Docket No. 000277-WS, Order No. PSC-01-0360-PAA-WS (February 9, 2001), citing Christian v. Overstreet Paving Co., 679 So. 2d 839 (Fla. 2nd DCA 1996) and Snyder v. Cheezem Dev. Corp., 373 So. 2d 719 (Fla. 2nd DCA 1979).

⁴ Id., citing Moore v. Morris, 475 So. 2d 666, 668 (Fla. 1985), Green v. CSX Transportation, Inc., 626 So. 2d 974 (Fla. St. DCA 1993), and Wills v. Sears, Roebuck & Co., 351 So. 2d 29 (Fla. 1997).

⁵ Id.

if the facts are undisputed, a single issue regarding the interpretation of the facts may still preclude the Commission from rendering a summary final order.⁶

8. Because a summary final order brings a “sudden and drastic” conclusion to a proceeding – foreclosing parties from the right and benefit of a hearing on the merits – the Commission must exercise caution and carefully observe the procedural strictures inherent in Florida law when considering whether to render such an order.⁷ This is important because these strictures protect the parties’ constitutional rights to a hearing; they are not mere procedural niceties or technicalities.⁸

9. As demonstrated below, Covad has failed to demonstrate conclusively that there exist no genuine issues of material fact, and thus the Commission must deny Covad’s Motion.

B. Covad’s Backhaul Facilities Constitute Dedicated Transport Within The Meaning Of The FCC’s Trigger Tests

10. Covad does not dispute that it owns and operates extensive fiber facilities that provide connections between Verizon’s central offices, nor does it dispute that it is using these facilities to transport traffic between Verizon’s central offices. Rather, Covad claims that its transport facilities do not meet the FCC’s definition of “dedicated transport” because they are “backhaul facilities.”

11. Covad’s argument that its backhaul facilities are not dedicated transport for the trigger analysis is incorrect for several independent reasons.

⁶ Id., citing Franklin County v. Leisure Properties, Ltd., 430 So. 2d 475, 479 (Fla. 1st DCA 1983).

⁷ Id., citing Coastal Caribbean Corp. v. Rawlings, 361 So. 2d 719, 721 (Fla. 4th DCA 1978) and Page v. Staley, 226 So. 2d 129, 132 (Fla 4th DCA 1969).

⁸ Id.

12. First, it confuses the FCC’s definition of the “dedicated transport UNE” with the competitive transport facilities that are evaluated under the triggers. Covad and the other CLECs do not have UNE obligations. The FCC’s exclusion of backhaul facilities from the definition of the UNE – a purely regulatory construct – therefore has nothing to do with whether a UNE must be made available in the first place. Nor does it have anything to do with the fundamental purpose of the trigger analysis, which is to determine whether there are sufficient competitive transport facilities on a particular transport route to establish non-impairment.⁹

13. Second, the TRO explicitly recognizes that CLECs use their self-provisioned transport facilities for backhaul, and then expressly classifies that use as dedicated transport. For example, it provides that “[c]ompeting carriers generally use interoffice transport as a means to aggregate end-user traffic . . . by using dedicated transport to carry traffic from their end users’ loops, often terminating at incumbent LEC central offices, through other central offices to a point of aggregation.”¹⁰

14. Third, excluding transport backhaul facilities from the trigger tests would mean that huge amounts of competitive fiber that Covad and other CLECs have deployed would be ignored simply because competitive networks are not configured in precisely the same way as ILECs’ networks. This outcome would be contrary to the plain language of the TRO, which provides that the purpose of the transport trigger analysis is not to identify

⁹ Indeed, the TRO makes clear that the FCC excluded backhaul transport facilities from the ILEC UNE requirement precisely because backhaul facilities are the most competitive segment of the transport market. See TRO ¶ 367 n.1222 (“Competing carriers agree that the most competitive type of transport is the link between an incumbent LEC wire center and a competitor’s network.”).

¹⁰ TRO ¶ 361 (emphasis added); see also TRO ¶ 370.

CLEC transport that mirrors ILEC networks, but to “identify[] specific point-to-point routes where carriers have the ability to use alternatives to the incumbent LEC’s network.”¹¹

15. Fourth, the failure to include CLEC backhaul transport facilities in the trigger tests would yield absurd results. It would mean that, even if there were three or more competitors with competitive fiber in every ILEC wire center in the country, all of which were backhauling traffic to some central hub prior to termination at other ILEC wire centers, no transport competition would be deemed to exist.

16. In light of the foregoing, this Commission should find that Covad’s backhaul facilities constitute dedicated transport under the FCC’s trigger tests.

C. Covad Has Not Shown That There Are No Material Issues Of Disputed Fact

17. Covad claims that Verizon is the only party with any burden to produce evidence in this proceeding. This premise is directly contrary to the TRO and to Florida law regarding who must come forward with evidence. It also ignores the very substantial evidence that Verizon’s witnesses include in their analysis – some of which comes from the CLECs themselves.

18. Under the TRO, Verizon does not by itself bear either the burden of production or the burden of persuasion with respect to the trigger analysis. As the TRO makes clear, it is the obligation of each state commission to determine whether the dedicated transport triggers are satisfied, and to gather the factual evidence to make this determination.¹² The FCC gave the states this role based on its expectation that states

¹¹ TRO ¶ 360; see id. ¶ 400; see also id. ¶ 406 n. 1257 (“impairment analysis recognizes alternatives outside the incumbent LEC’s network”).

¹² See, e.g., TRO ¶ 385 (“[W]e delegate to the states the authority to collect and analyze more specific evidence of transport deployment”).

were better suited to conduct the “highly granular” impairment analysis that the FCC claims the D.C. Circuit has required.¹³

19. Under this framework, no one party bears the burden of producing evidence or the ultimate burden of proof. Rather, the TRO contemplates that this Commission will gather all relevant evidence, from all relevant parties, and weigh the reliability of that evidence on its merits. This is the only interpretation that gives meaning to the state commission’s role as fact finder, and to its responsibility to identify “specific point-to-point routes where carriers have the ability to use alternatives to the incumbent’s LEC networks.”¹⁴ It is also the only interpretation consistent with the fact that the FCC’s own factual record consisted of evidence from incumbents and competing carriers alike.¹⁵ Indeed, the FCC specifically held that in conducting its own unbundling analysis for specific UNEs in the TRO, “[w]e do not adopt a ‘burden of proof’ approach that places the onus on either the incumbent LECs or competitors.”¹⁶

20. Even if this were a traditional state law case in which the petitioner bears the ultimate burden of proof, however, Covad’s Motion is still contrary to Florida law regarding the burden of coming forward with evidence and incorrectly presumes that this burden remains solely with Verizon. While the burden of proof never shifts from the proponent of a claim, the burden of going forward with the evidence, sometimes called the burden of

¹³ TRO ¶¶ 360, 398 (finding that “the nature of transport facilities requires a “highly granular impairment analysis” and concluding that the record was “insufficiently detailed to make more precise findings regarding impairment”).

¹⁴ TRO ¶ 360.

¹⁵ See, e.g., TRO ¶¶ 378-379, 387.

¹⁶ TRO ¶ 92.

persuasion, properly shifts to that party best able to meet the burden after the proponent establishes a prima facie case.¹⁷

21. Verizon's direct and supplemental testimony regarding the dedicated transport triggers is more than sufficient to set out a prima facie case. Under the TRO, all parties have the "burden" of coming forward with all relevant evidence in their possession. Even in an ordinary state law case, however, at this point the burden of coming forward would have shifted to Covad and the other CLECs to produce evidence demonstrating that the triggers are not satisfied on a particular route or customer location identified by Verizon.

22. Contrary to Covad's portrayal, moreover, Verizon's evidence alone establishes, at a minimum, that there are disputed issues of fact. As described in its testimony, Verizon verified all dedicated transport routes included in its triggers case through detailed physical inspections of the CLEC collocation arrangements forming the route end points, checking to verify that there was powered equipment in place (i.e., it is operational), and that the collocating carrier had non-Verizon fiber optic cable that both terminated at its collocation facility and left the wire center. A collocation arrangement (i.e., one end of a route) was included in Verizon's triggers case only if, through this rigorous process of inspection and verification, it was found to be operational and to have non-Verizon fiber. Verizon then identified the carriers providing wholesale service over these transport routes with objective evidence, such as the carrier holding itself out as a wholesale provider on its website without limitation to particular routes, the carrier supplying transport facilities to Universal Access, Inc. (a broker of transport services), and

¹⁷ See Florida DOT v. J.W.C. Co., Inc., 396 So. 2d 778, 789 (Fla. 1st DCA 1981) (The burden of proof, in the sense of the duty of producing evidence, passes from party to party as the case progresses).

the carrier being listed in the New Paradigm CLEC Report 2003 as offering dedicated access transport.

23. Moreover, Verizon confirmed its testimony against information provided by the CLECs themselves. For example, FPL Fibernet identified itself as a wholesaler and responded to Commission Staff that it provides “access to on-net ILEC central offices, . . . carrier points of presence, and end customer premises . . . in the form of capacity, and or dark fiber.”¹⁸ Allegiance confirmed that it leases transport facilities from FPL, and identified the routes that connect to Verizon wire centers.¹⁹ FDN explained that “Verizon correctly did not identify FDN as a self-provider or a wholesale provider of transport.”²⁰

24. Verizon also modified its testimony in response to information provided by the CLECs, where appropriate. For example, in the Direct Testimony submitted on December 22, 2003, Verizon identified 29 self-provisioned transport routes.²¹ However, in the Supplemental Testimony submitted on January 9, 2004, Verizon reduced the number of self-provisioned routes to 25 after FPL Fibernet and Progress Telecom reported that they are strictly wholesalers.²²

25. Verizon served discovery on the CLEC parties going specifically to wholesale provision of dedicated transport, and answers were due on January 12. Particularly, Verizon asked the CLECs various questions regarding wholesale activity, both in making transport available to others and in leasing it from other carriers. Verizon is still in the process of obtaining full and complete answers to its discovery. Verizon should be

¹⁸ FPL's Redacted Response to Staff's TRO Data Request.

¹⁹ Allegiance's Response to Verizon's First Set of Interrogatories, Attachments 1 and 2.

²⁰ FDN Rebuttal Testimony at page 2.

²¹ Fulp/White Direct Testimony at page 12.

²² Fulp/White Supplemental Direct Testimony at page 2.

permitted to make use of these responses in future submissions (to the extent it has time to do so) and more importantly in cross examination at the hearings.

26. Covad would have the Commission bring a “sudden and drastic” conclusion to this proceeding – foreclosing Verizon from the right and benefit of a hearing on the merits – before the Commission even has the chance to consider the information produced in response to these requests. This attempt to exclude the entire issue and preclude the finder of fact from having the opportunity to consider the relevant evidence at hearings is directly contrary to the directions given this Commission by the FCC in TRO. The FCC specifically directed that “a state commission . . . has an affirmative obligation to review the relevant evidence associated with any route submitted by an interested party, and to apply the trigger and any other analysis specified in this Part to such evidence.”²³

27. Peremptorily excluding the entire issue of the wholesale triggers without allowing Verizon to develop a full record at hearings, particularly where much of the evidence on this issue is in the possession of the CLECs, would also violate Verizon’s due process rights. Fundamental to Verizon’s right to due process is the opportunity to prove its case not only through its own testimony, but also through discovery and cross-examination of the CLEC parties. To refuse to consider Verizon’s evidence on the wholesale triggers even before Verizon has had a chance to complete the record and cross-examine the CLECs on their own discovery responses would violate Verizon’s Constitutional rights.

28. In sum, if Covad wishes to argue in its briefs that the totality of the evidence before this Commission does not prove satisfaction of the transport triggers, it is free to do so. However, Covad’s attempt to put a “sudden and drastic end” to the transport triggers

²³ TRO ¶ 417, note 1289; see also ¶ 339, note 991.

issue – without affording Verizon an opportunity to a hearing on the merits – is improper because there are clearly disputed issues of material fact.

III. CONCLUSION

29. For the foregoing reasons, the Commission should deny Covad's Motion.

Respectfully submitted on January 28, 2004.

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