BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Re: Petition for Arbitration of Amendment to Interconnection Agreements With Certain Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Florida by Verizon Florida Inc.	)))))	Docket No. 040156-TP Filed: April 13, 2004

AT&T'S MOTION TO DISMISS OR STRIKE
VERIZON FLORIDA'S "UPDATE TO PETITION"

Introduction

AT&T Communications of the Southern States, LLC and TCG South Florida (collectively "AT&T") pursuant to Rule 28-106.204, Florida Administrative Code, move to dismiss or strike the "Update to Petition" filed March 19, 2004, by Verizon Florida, Inc. ("Verizon") in which Verizon improperly seeks to arbitrate alleged changes of law contained in the recent *USTA II* decision by the United States Circuit Court of Appeals for the District of Columbia.[1] The issues raised in Verizon's proposed "update" are not yet ripe for arbitration and may never be. *USTA II* has not yet taken effect but rather has been stayed by its own terms. Thus, there has been no change of law to arbitrate. In addition, Verizon has not complied with the change of law provision in its Interconnection Agreement with AT&T, nor can it begin that process until *USTA II* has taken effect.

[1] *United States Telecom Association v FCC*, No. 00-1012 (D.C.Cir. March 2, 2004).

Verizon's Updated Petition Should Be Dismissed

I. *USTA II* Is Not Yet Applicable Law.

By its terms the *USTA II* decision will not take effect until at least 60 days after issuance, and perhaps for much longer. The Court stayed the effect of its decision until the *later* of: (i) denial of any petition for rehearing or rehearing en banc; or (ii) 60 days from March 2, 2004. There is a strong likelihood that during this period the D.C. Circuit's decision may be stayed pending review by the United States Supreme Court, by a rehearing en banc in the D.C. Circuit or it may be changed by new action from the FCC.

The majority of FCC Commissioners who voted in favor of the TRO already have announced their intention to seek both a stay and Supreme Court review of the D.C. Circuit decision. AT&T and a number of other parties, including NARUC, wholeheartedly support the FCC majority's actions. AT&T is optimistic that the Supreme Court, which issued a very strong opinion in May 2002 in support of competition, *Verizon Communications, Inc. v. FCC*, 535 U.S. 467 (2002), will accept this case and affirm the FCC's findings and rules as well as the right of the states to implement rules critical to support telecommunications competition, especially (but not exclusively) for mass market consumers. AT&T is equally optimistic that the D.C. Circuit's decision will be stayed, in no small part because of the marketplace confusion and consumer harm that Verizon and other ILECs would likely attempt to create if the decision were allowed to become effective before the Supreme Court has the opportunity to review it.

Verizon, acknowledging the likelihood of a stay, attempts to address this contingency in its "updated petition" by including language in Section 6 of the amendment that would, in turn, stay the *USTA II* portions of its proposed ICA amendment. This Commission has enough work

to do to arbitrate the issues that are in fact ripe for review. It makes little sense to arbitrate issues that have not yet matured and may, in fact, never come to pass. The only reasonable course is to wait, as the ICA requires, for applicable law to actually change and for the parties attempt to negotiated amended language before initiating a dispute about what that law means and what effect it has on the rights of the parties.

Not only is this the most sensible course, it is also the course required under Verizon's ICA with AT&T. Verizon cannot invoke contractual provisions permitting renegotiation in the event of a material change in legal obligations, where the "change" upon which Verizon relies has not occurred. Until *USTA II* takes effect it cannot and does not materially affect anything.

II. VERIZON HAS FAILED TO COMPLY WITH THE CHANGE OF LAW PROVISION OF THE ICA BETWEEN AT&T AND VERIZON.

If *USTA II* does take effect after its self-imposed stay, Verizon will be required to adhere to the ICA's unambiguous process for implementing changes of law before initiating an arbitration proceeding.[2] That process, set forth in Section 1(B) of the First Amendment to Interim Interconnection Agreement between AT&T and Verizon, requires Verizon, if it seeks to modify terms based on a change of law, to request, by letter to AT&T, a renegotiation of the ICA. However, the request to renegotiate cannot be made before the action upon which the request is made has become legally binding and has become final and nonappealable. Verizon

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[2] As a threshold issue in any arbitration concerning *USTA II*, Verizon will bear the burden of establishing that *USTA II* constitutes a "change of law." *See Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 383 (1992) (party seeking to modify consent decree bears burden of demonstrating changed circumstances). .

has to date made no such request and indeed it could not because *USTA II* is not yet binding nor final and nonappealable. The "Update to Petition" itself is barren of any explanation or basis for the changes it makes but rather simply recites them. For example, without any support in (or even cite to) the *USTA II* decision, Verizon seeks to amend the ICA to make its obligation to provide mass market local switching "conditional." AT&T cannot meaningfully respond to this requested amendment without some understanding of Verizon's basis for creating a netherworld of "conditional" obligations.

As described above, the *USTA II* decision has not yet taken effect, and thus there is not even a conceivable "change of law." Verizon's "Update to Petition" is, as a result, grossly premature. By the plain terms of section 1(B), Verizon is not entitled even to request a renegotiation until, at the very earliest, the *USTA II* self-imposed stay has been lifted and no other stay (by the Supreme Court or the D.C. Circuit *en banc*) has issued. After Verizon's request for renegotiation has issued, the parties must in good faith attempt to negotiate and to agree upon revised contract language within ninety days from the after the notice of the request for renegotiation. Moreover, if negotiations fail, Section 1(B) requires that the dispute be referred to the Alternative Dispute Resolution procedures set forth in the underlying agreement which is the original ICA between AT&T and GTE Florida, Inc. Thus, at the very least, Verizon's "Update to Petition" is not ripe and should be dismissed until Verizon complies with Section 1(B) (which compliance cannot start until at least May 2, 2004).

Conclusion

For the reasons stated above, AT&T respectfully requests that the Commission dismiss or strike Verizon's "Update to Petition."

Respectfully filed this the 13th day of April 2004.

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