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May 19, 2004

HAND DELIVERY
Ms. Blanca Bayó, Director
Commission Clerk and Administrative Services
Room 110, Easley Building
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Re: Docket No. 040156-TP

Dear Ms. Bayó:

Enclosed for filing on behalf of Bullseye Telecom Inc., Business Telecom, Inc., DIECA Communications Inc. d/b/a Covad Communications Company, ITC^DeltaCom Communications Inc., Global Crossing Local Services Incorporated, IDT America Corp., KMC Data LLC, KMC Telecom III LLC, KMC Telecom V Inc., NewSouth Communications Corporation, NOW Communications Inc., The Ultimate Connection L.C., Winstar Communications LLC, XO Florida Inc., Xspedius Management Co. Switched Services LLC and Xspedius Management Co. of Jacksonville LLC, ("Competitive Carrier Group" or "CCG"), are an original and fifteen copies of the Response of Competitive Carrier Group to Verizon Motion to Hold Proceeding in Abeyance in the above referenced docket.

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the same to me in the enclosed self-addressed stamped envelope.

Thank you for your assistance with this filing.

Sincerely yours,

Norman H. Horton, Jr.

NHH/amb
Enclosures
cc: Parties of Record

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

PETITION OF VERIZON FLORIDA INC. FOR ARBITRATION OF AN AMENDMENT TO INTERCONNECTION AGREEMENTS WITH COMPETITIVE LOCAL EXCHANGE CARRIERS AND COMMERCIAL MOBILE RADIO SERVICE PROVIDERS IN FLORIDA PURSUANT TO SECTION 252 OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED, AND THE *TRIENNIAL REVIEW ORDER*	DOCKET NO. 040156-TP FILED: May 19, 2004

RESPONSE OF
COMPETITIVE CARRIER GROUP TO VERIZON MOTION
TO HOLD PROCEEDING IN ABEYANCE

BullsEye Telecom Inc., DIECA Communications Inc. d/b/a Covad Communications Company, ITC^DeltaCom Communications Inc., Global Crossing Local Services Incorporated, IDT America Corp., KMC Data LLC, KMC Telecom III LLC, KMC Telecom V Inc., Knology of Florida Inc., NewSouth Communications Corporation, NOW Communications Inc., The Ultimate Connection L.C., XO Florida Inc., Xspedius Management Co. Switched Services LLC and Xspedius Management Co. of Jacksonville LLC, ("Competitive Carrier Group" or "CCG"[1]), by their undersigned attorneys, respectfully submit this Response to

[1] The composition of the Competitive Carrier Group has changed slightly since the group's Answer was filed in this proceeding. *Cf.* Answer of BullsEye Telecom Inc., DIECA Communications Inc. d/b/a Covad Communications Company, ITC^DeltaCom Communications Inc., Global Crossing Local Services Incorporated, IDT America Corp., KMC Data LLC, KMC Telecom III LLC, KMC Telecom V Inc., Knology of Florida Inc., NewSouth Communications Corporation, NOW Communications Inc., The Ultimate Connection L.C., Winstar Communications LLC, XO Florida Inc., Xspedius Management Co. Switched Services LLC and Xspedius Management Co. of Jacksonville LLC, dated April 13, 2004.

Verizon Florida's motion to hold the above-captioned proceeding in abeyance until June 15, 2004.[2]

I. INTRODUCTION AND SUMMARY

The Competitive Carrier Group opposes Verizon's Motion to hold this proceeding in abeyance with regard to those issues that are not affected by the District of Columbia Circuit's decision in *United States Telecom Ass'n v. FCC*, Case No. 00-0012 (D.C. Cir. 2004) ("*USTA II*"). Rather, the Commission should move forward and arbitrate those issues raised in the Federal Communications Commission's ("FCC's") Triennial Review Order[3] that are not impacted by the *USTA II* decision. The Commission must specifically order Verizon to comply with the FCC's current rules with regard to commingling and routine network modifications. Such issues are vital to competitive carriers in Florida and their implementation should not be delayed, as requested by Verizon.

With regard to those arbitration issues that are affected by the *USTA II* decision, the Competitive Carrier Group agrees that this proceeding may be held in abeyance at least until June 15, with the express condition that Verizon maintain the *status quo*, pending resolution of the *USTA II* issues, and refrain from engaging in any unilateral action to modify the availability, terms, conditions and/or pricing of Unbundled Network Elements ("UNEs") under existing

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2 Verizon-Florida's Motion to Hold Proceeding in Abeyance Until June 15, 2004, filed May 7, 2004 ("Verizon Motion").

3 *Review of the section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 171 25-26, ¶ 242 (2003), *corrected by Errata*, 18 FCC Rcd 19020 (2003) (collectively "TRO"), *reversed and remanded, in part, United States Telecom Ass'n v. FCC*, D.C. Cir. No. 00-1012 (and consolidated cases) (decided March 2, 2004) ("Triennial Review Order").

interconnection agreements. The Competitive Carrier Group has already suggested that the Commission address *USTA II* issues in a separate phase of the proceeding, and therefore does not oppose a temporary abatement for those issues until at least June 15.[4] Nevertheless, it is imperative for the continued provision of competitive services in Florida that Verizon be expressly required to maintain the *status quo* while the Commission deliberate on these important issues during the pendency of this arbitration. Other State Commissions are already wisely adopting the approach outlined herein.[5]

II. THE COMMISSION SHOULD GO FORWARD ON THOSE ISSUES NOT AFFECTED BY *USTA II*

The Commission must require that Verizon comply with the requirements of the FCC for routine network modifications and the commingling of UNEs and services, as clarified by the FCC in the Triennial Review Order. Neither of these existing obligations require a change of law amendment to implement.

The FCC's clarification of the rates, terms and conditions pursuant to which competitors may commingle network elements and services did not create any new legal obligation applicable to Verizon. Significantly, the Triennial Review Order states that "a restriction on commingling would constitute an 'unjust and unreasonable practice' under section

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4 As discussed more fully in the Answer of the Competitive Carrier Group to Verizon's Amended Petition, the Commission must assert its authority, pursuant to sections 251, 252 and 271 of the Act and state law to determine in the arbitration the nature and scope of Verizon's ongoing obligation to provide access to network elements, as required by the Act and state law. Moreover, to the extent that the Commission may determine that the rates applicable to network elements provided by Verizon under section 271 of the Act and Florida state law differ from those rates already set under section 251(c)(3) of the Act, the Coalition urges the Commission to immediately establish a "just and reasonable" pricing standard applicable to network elements.

5 *See, e.g.,* South Carolina PSC Docket No. 2004-49-C, Vote May 18, 2004 (Order to be released).

201 of the Act" and an "undue and unreasonable prejudice or advantage" under section 202 of Act, and thus would violate the nondiscrimination requirement in section 251(c)(3) of the Act.[6] Moreover, the Triennial Review Order expressly requires that Verizon immediately effectuate rates, terms and conditions for commingling of network elements and services by modification of its interstate access tariffs.[7]

Similarly, the FCC simply clarified in the Triennial Review Order that ILECs need to continue to perform routine network modifications and specified what is encompassed in that rule.[8] In fact, the FCC's justification for issuing that clarification was to prevent incumbents from continuing to delay competitor access to facilities.[9] At least two state commission arbitrators have already concluded that the FCC's reiteration and clarification is ***not*** a change in law and is therefore an existing and ongoing obligation of Verizon.[10] State commissions have

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6 Triennial Review Order at ¶ 581.

7 *Id.* at ¶ 581 and fn. 1791.

8 *Id.* at ¶ 632 ("We require incumbent LECs to make routine network modifications to unbundled transmission facilities used by requesting carriers where the requested transmission facilities has already been constructed. By 'routine network modifications' we mean that incumbent LECs must perform those activities that incumbent LECs regularly undertake for their own customers.").

9 *See, e.g.*, TRO at ¶ 639, and footnote 1939, finding Verizon's current policy to be "discriminatory on its face."

10 Maine PSC, Docket No. 2004-135, *Examiner's Report*, dated May 6, 2004, at pages 12-13 (*Maine Decision*) ("Thus, Verizon must perform routine network modifications on behalf of CLECs in conformance with the FCC's rules." "Verizon may not require the CLEC to first sign an interconnection agreement amendment before performing the modifications."); Rhode Island PUC, Docket No. 3588, *Procedural Arbitration Decision*, dated April 9, 2004, at 10-11:

> The FCC did not impose a new obligation on VZ-RI to undertake routine network modifications for CLECs. It merely resolved the controversy as to whether VZ-RI had to perform routine network modifications for CLECs and then adopted rules to clarify exactly what constituted a routine network modification and associated obligations. If the TRO really did constitute a change of law and created a completely new legal obligation for VZ-RI, the question must be asked as to why, for so many years, did VZ-RI make routine network modifications at TELRIC rates?").

also rejected another Verizon delay tactic – the company's claim that it is entitled to some additional fees for doing work already built into existing rates.[11] The Commission must likewise act immediately to ensure compliance by Verizon with the FCC's existing requirements for commingling of UNEs and services and the performance of routine network modifications.

III. THE COMMISSION SHOULD REQUIRE THAT VERIZON MAINTAIN THE STATUS QUO AS A CONDITION TO GRANTING THE MOTION WITH REGARD TO *USTA II* ISSUES

The Competitive Carrier Group does not oppose Verizon's Motion to the extent it seeks to hold those issues affected by the *USTA II* decision in abeyance until June 15, the date the mandate in *USTA II* is scheduled to issue if no further stay is granted. The Competitive Carrier Group does, however, request that the Commission expressly order that Verizon maintain the *status quo* under its current interconnection agreements at least until June 15, during the pendency of this arbitration proceeding, as a condition to granting the Verizon Motion with regard to those issues affected by *USTA II*.

The members of the Competitive Carrier Group are properly concerned that Verizon may attempt to take unilateral action to modify the availability, terms, conditions and/or pricing of UNEs required by their interconnection agreements. To say that the parties must abide by their current interconnection agreements is not sufficient. Rather, Verizon must be specifically prohibited from modifying, in any way, UNEs or combinations of UNEs currently

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[11] Virginia SCC, Case No. PUC-2002-000887, Order dated January 28, 2004; *see also, Maine Decision* at page 13:

> Instead, we find that our existing TELRIC rates should be used until we approve any additional rates in the Wholesale Tariff case or future TELRIC proceeding. Our decision is consistent with the direction given by the FCC in the TRO. Specifically, in paragraph 640, the FCC noted that ILEC costs for routine modifications are often already recovered in non-recurring and recurring costs associated with the UNE.

provided pursuant to existing interconnection agreements, or increasing any rates set forth in or incorporated into those agreements while the current arbitration docket resolves the parties' respective rights.

- As discussed in the Competitive Carrier Group's Answer, the Commission should evaluate the necessary procedural schedule for addressing any remaining issues at the time the mandate of *USTA II* issues (if ever). If the *USTA II* mandate does, in fact, go into effect on June 15, this Commission should direct the parties to reach a negotiated agreement, with oversight by Commission Staff as appropriate, over a subsequent 135-day period. To the extent the parties cannot reach a negotiated agreement, the parties should submit to this Commission a jointly-developed issues list, that would trigger another phase of the arbitration proceeding to address unresolved *USTA II* issues.

Despite the procedural process necessary to resolve any *USTA II* issues, the Commission must expressly require Verizon to maintain the *status quo* on and after June 15, and during the pendency of this arbitration proceeding, in order to protect the contract rights of Florida ALECs from any unauthorized, unilateral action by Verizon.

IV. CONCLUSION

Consistent with the foregoing, the Commission should move forward with this proceeding and deny the Verizon Motion to hold the proceeding in abeyance until June 15 with respect to those issues not affected by the *USTA II* decision. With regard to those issues that are impacted by the *USTA II* decision, the Commission should expressly require that Verizon maintain the *status quo*, during the pendency of this proceeding, and refrain from engaging in any unilateral action to modify the availability, terms, conditions and/or prices of UNEs.

Respectfully submitted,

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Counsel to Competitive Carrier Group

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served on the following parties by Hand Delivery (*) and/or U.S. Mail on this 19th day of May, 2004.

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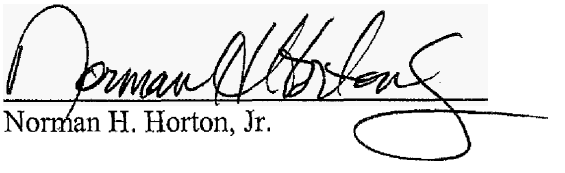

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