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May 21, 2004

Ms. Blanca S. Bayo, Director  
Division of the Commission Clerk  
and Administrative Services  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
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Re: Docket No. 040156-TP  
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.

Dear Ms. Bayo:

Please find enclosed for filing an original and 15 copies of Verizon Florida Inc.'s Reply In Support of Its Motion to Hold Proceeding in Abeyance 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

RAC:tas

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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

**VERIZON FLORIDA INC.'S REPLY IN SUPPORT OF ITS MOTION TO HOLD PROCEEDING IN ABEYANCE**

Verizon Florida Inc. (Verizon) submits this reply to the responses to its Motion to Hold the Proceeding in Abeyance filed by: (1) Sprint Communications Company Limited Partnership (Sprint); (2) ACN Communication Services, Inc.; Adelphia Business Solutions Operations, Inc. d/b/a TelCove; Allegiance Telecom, Inc.; DSLnet Communications, LLC; Florida Digital Network, Inc.; PAETEC Communications, Inc.; and ICG Telecom Group, Inc. (collectively, the Competitive Carrier Coalition "CCC"); (3) MCImetro Access Transmission Services, LLC, MCI WorldCom Communications, Inc., Metropolitan Fiber Systems of Florida, Inc., and Intermedia Communications Inc. (collectively, "MCI"); (4) AT&T Communications of the Southern States, LLC ("AT&T"); and (5) Bullseye Telecom Inc., Business Telecom, Inc., Covad Communications Company, ITC^DeltaCom Communications Inc., Global Crossing Local Services Incorporated, IDT America Corp., KMC Data LLC, KMC Communications Inc., The Ultimate Connection L.C., Winstar Communications LLC, XO Florida Inc. Xspedius

Management Co. Switched Service LLC and Expedius Management Co. of Jacksonville LLC (collectively, Competitive Carrier Group (“CCG”).<sup>1</sup>

Verizon filed its Motion to hold this proceeding in abeyance to facilitate commercial negotiations requested by the Federal Communications Commission (“FCC”) in anticipation of the issuance of the D.C. Circuit’s mandate in *United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (“*USTA II*”). The CLECs, however, have used Verizon’s Motion as a platform to press their arguments that Verizon should immediately implement the aspects of the *Triennial Review Order*<sup>2</sup> that benefit the CLECs, but should wait for an indefinite period to implement other aspects that favor Verizon. The CLECs’ efforts to use Verizon’s abatement request to obtain the ultimate relief they are seeking in this arbitration is exactly the sort of gamesmanship and bad faith tactics that the FCC condemned in its *Triennial Review Order*.<sup>3</sup> None of the CLECs has offered a valid objection to Verizon’s Motion, and the Commission should grant it without the unlawful conditions the CLECs suggest.

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<sup>1</sup> As explained below, the CLECs ask the Commission to condition the granting of Verizon’s abeyance motion on Verizon’s maintaining the availability of existing UNEs at current rates. This request is tantamount to a new motion, as opposed to a response, because it has nothing whatsoever to do with Verizon’s motion. Accordingly, it is appropriate for Verizon to file a reply because the CLECs’ responses raise new issues that are outside the scope of Verizon’s motion.

<sup>2</sup> Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) (“*Triennial Review Order*” or “*TRO*”), *vacated in part and remanded, United States Telecom Ass’n v. FCC*, Nos. 00-1012 *et al.*, 2004 WL 374262, 2004 U.S. App. LEXIS 3960 (D.C. Cir. Mar. 2, 2004) (“*USTA II*”).

<sup>3</sup> *Triennial Review Order*, at ¶ 706 (admonishing all parties “to avoid gamesmanship and behavior that may reasonably lead to a finding of bad faith” under section 251(c) of the Act and ruling that “parties may not refuse to negotiate any subset of the rules” adopted in the *TRO*.)

**I. THE COMMISSION CANNOT OVERRIDE VERIZON'S CONTRACT TERMS OR FEDERAL LAW TO FORCE VERIZON TO OFFER UNES THAT IT HAS NO LEGAL OBLIGATION TO PROVIDE.**

In their responses to Verizon's Motion, the CLECs ask the Commission to condition any abeyance on Verizon's maintaining, at least until the end of the arbitration, all existing UNE arrangements at existing prices. Sprint's Response at 2; CCC's Response at 1; CCG's Response at 5-6; AT&T's Response at 5-6; MCI's Response at 2. The Commission cannot impose this condition.

First, Verizon's Motion has nothing to do with the post-June 15<sup>th</sup> period and, therefore, it cannot serve as the basis for arbitrarily imposing open-ended conditions on Verizon, as the CLECs erroneously suggest.

Second, the CLECs' requests that Verizon maintain indefinitely all existing UNE arrangements, regardless of the D.C. Circuit's vacatur of the FCC's impairment rulings, are tantamount to asking the Department to stay an order of the U.S. Court of Appeals. To require that Verizon continue to provide, until the end of the arbitration, items that Verizon no longer has any legal obligation to provide is plainly beyond the Commission's jurisdiction.

Third, Verizon cannot be lawfully forced to forfeit its existing contractual rights for any period, either before or after June 15. Verizon is committed to maintaining the **true** *status quo* of existing contract rights and obligations, which include any rights Verizon may have to cease providing UNEs and to transition CLECs to alternatives to UNEs. Accordingly, the Commission should reject the CLECs' request to take the unlawful step of issuing a blanket determination that Verizon must continue to offer existing UNE arrangements, regardless of what particular contracts or the federal courts may say.

As the Ninth Circuit has held, state commissions cannot make generic determinations affecting existing contracts, in disregard of the terms of those contracts. *Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1125-26 (9th Cir. 2004) (holding that section 252 limits the power of state commissions to approving “new arbitrated interconnection agreements and to interpret existing ones *according to their terms*”) (emphasis added). That approach, which is just what the CLECs urge in this case, would be “contrary to the Act’s requirement that interconnection agreements are binding on the parties.” *Id.* In addition, the FCC has made clear that any state attempt to require unbundling where the FCC specifically considered and rejected unbundling would be preempted. *Triennial Review Order*, at ¶ 195; *see also* FCC’s Brief, *USTA v. FCC*, Nos. 00-0012, at 92-93 (D.C. Cir. filed Dec. 31, 2003).

The CCG cites a South Carolina Commission vote as the sole support for its suggestion that other State Commissions have expressly required Verizon to continue providing UNEs, regardless of the terms of Verizon’s interconnection agreements. (CCG Response at 3.) But that vote (no order has been issued yet) indicated just the opposite—that is, the Commission required Verizon to maintain the terms and conditions of its existing interconnection agreements until the end of the arbitration. This is exactly the course Verizon intends to follow. As Verizon explained, maintaining the status quo means that *all* parties – including Verizon – preserve their rights under existing interconnection agreements. The CLECs’ request for the Commission to rewrite the parties’ contracts is antithetical to preserving the *status quo* and should be rejected.

**II. VERIZON CANNOT BE FORCED TO IMPLEMENT, WITHOUT A CONTRACT AMENDMENT, ONLY THE PORTIONS OF THE TRO THAT FAVOR THE CLECS.**

The CLECs essentially seek a preliminary injunction immediately implementing only the terms of the *Triennial Review Order* that are favorable to them. In particular, they urge the Commission to require Verizon to implement immediately the *TRO* rules regarding network routine modifications, the commingling of UNEs with wholesale services, and/or the conversion of special access facilities to expanded extended loops (“EELs”), without first executing contract terms governing those items. AT&T’s Response, at 3-5; CCG’s Response, at 3-5.; MCI’s Response, at 4. The Commission must deny these unlawful requests.

As Verizon already explained in its Opposition to the CLECs’ Motions to Dismiss, filed April 26 (at 27-28), the requirement that incumbent local exchange carriers undertake routine network modifications to UNEs is a *new* legal requirement. Under the prior rule, Verizon was not required to perform those modifications *at all*, much less provide these services for free. The Commission cannot simply assume—without any evidence and contrary to logic—that existing loop rates already include the routine network modification costs associated with the new network modification rule. Contrary to the CLECs’ claims, interconnection agreements must be amended to incorporate terms, conditions and rates upon which Verizon MA will provide these new services. The same is true for the *new* commingling and conversion rules established in the *Triennial Review Order*. Until parties on both sides are contractually bound by terms, conditions, and rates, as the FCC contemplated, Verizon cannot be required to provide these services. Because the parties have not been able to agree on the terms, conditions, and rates for these new services, arbitration of these items is necessary.

Arbitrary imposition of the CLECs' suggested terms cannot simply be made a "condition" of granting the abatement, thus circumventing the arbitration process, as the CLECs urge.

In short, the CLECs essentially seek – as a condition to stay this proceeding for a month – preliminary injunctive relief implementing selected aspects of the *Triennial Review Order*. While AT&T alleges "injury" and "significant harm" because Verizon will not perform routine network modifications for free, (AT&T Response at 2-3, 5), neither it nor any other CLEC has alleged the risk of irreparable harm required to support a preliminary ruling in their favor. And AT&T has not, in any event, supported its vague claim of harm with any objective evidence.

The Commission should reject the CLECs' attempts to summarily implement only the terms of the *TRO* that benefit them, which is exactly what the FCC told carriers they could *not* try to do.<sup>4</sup>

### **III. THE COMMISSION SHOULD REJECT SPRINT'S ILLOGICAL REQUEST TO RULE ON ITS MOTION TO DISMISS INSTEAD OF VERIZON'S MOTION FOR ABEYANCE.**

Although Sprint states that it does not oppose Verizon's Motion, it nevertheless urges the Commission to dismiss Verizon's Petition instead of holding this arbitration in abeyance.

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<sup>4</sup> *Triennial Review Order*, at ¶706 ("parties may not refuse to negotiate any subset of the rules we adopt herein."). AT&T falsely alleges that Verizon has "failed to respond in any meaningful way to AT&T's detailed redline of Verizon's proposed TRO Amendment." AT&T Response, at 1. Verizon takes that to be an inadvertent misstatement by AT&T, given that Verizon and AT&T have engaged in regular and fruitful negotiations over the past several weeks concerning AT&T's redlined draft of the TRO Amendment. Verizon has also engaged in similar negotiations with MCI. Consequently, MCI's claim that "Verizon has to date declined to participate in open, mediated negotiation with MCI and other CLECs..." (MCI Response at 3) is accurate only in that Verizon has declined to use a mediator in its negotiations with MCI. There has been no need to inject a mediator into the parties' ongoing, productive negotiations, and Verizon expects and hopes that these negotiations with MCI will continue.

Sprint's request for dismissal, rather than abeyance, makes no sense. First, the arguments Sprint has raised for dismissal in this proceeding, for the most part, pertain only to Sprint. Thus, even if Sprint's arguments were correct (and they are not), they would not justify dismissal of Verizon's Petition as to *other* CLECs. Indeed, some CLECs (such as MCI and AT&T) do not want Verizon's Petition to be dismissed.

Second, some parties in this case have urged dismissal of Verizon's Petition, or at least the updates Verizon made to its Petition and Amendment on March 19, citing the "unsettled" state of the law in the wake of D.C. Circuit's *USTA II* decision, and/or arguing that no "change of law" will occur until the D.C. Circuit's mandate issues on June 15. In its previous filings, Verizon explained why dismissal is not warranted for these or any other reasons. The TRO rulings that were either not challenged or affirmed on appeal are binding law that must be promptly implemented. But to the extent parties have urged dismissal because of legal uncertainty, then Verizon's motion for abeyance largely moots those arguments, and there is no reason to consider them. Because an abeyance would remove one of the CLECs' principal arguments for dismissal, it makes no sense to rule on the motions to dismiss, rather than Verizon's motion for abeyance.

Third, abeyance is a much more efficient course than dismissal. If the Commission dismisses Verizon's Petition, Verizon will have to file it again because at least some interconnection agreements may require modification to reflect the results of the TRO. The parties, in turn, will have to respond to the Petition once again. Instead of wasting time and resources repeating this process, it would be more efficient to



reopen the proceeding after June 15. At that time, the parties will be able to definitively identify the issues for resolution in the docket and quickly move to briefing.<sup>5</sup>

Moreover, if the Commission orders dismissal, it can expect to be inundated with petitions and complaints, as parties attempt to exercise what they perceive to be their rights under the *Triennial Review Order*. As Verizon has explained, there are several elements of Verizon's network that it no longer has any obligation to unbundle under § 251(c)(3) of the Act, and as to which the FCC's prior rules requiring unbundling were twice vacated. The pleadings filed thus far demonstrate that Verizon and the CLECs disagree about the legal effect of these facts on their existing interconnection agreements; those disputes will not disappear with the dismissal of this proceeding.

\* \* \*

Verizon filed its motion for an abeyance in the hope of facilitating the FCC-requested commercial negotiations that the CLECs claim to support. But their attempt to impose unreasonable and unlawful conditions on Verizon's requested abeyance is directly contrary to the FCC's objective of relying on negotiation, rather than litigation, to resolve network access questions. Verizon would respectfully withdraw its motion before agreeing to the conditions proposed by the CLECs.

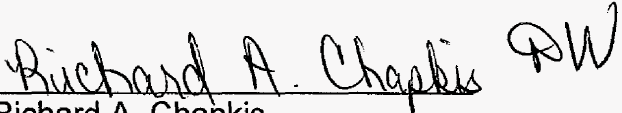
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<sup>5</sup> Verizon supports MCI's proposal that the Commission should schedule an issues identification meeting for mid-June. MCI Response at 4.

For the foregoing reasons, the Commission should grant Verizon's motion for abeyance without imposing the unlawful conditions urged by the CLECs.

Respectfully submitted,

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May 21, 2004

**CERTIFICATE OF SERVICE**

I hereby certify that copies of Verizon Florida Inc.'s Reply in Support of Its Motion to Hold Proceeding in Abeyance in Docket No. 040156-TP were sent via U.S. mail on May 21, 2004 to the parties on the attached list.

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