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Sent: Tuesday, June 29, 2004 4:56 PM
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2. In Re: Emergency Petition of FCCA, AT&T, and MCI to Require ILEC's to Continue to Honor Existing Interconnection Obligations.

3. Docket No.: 040520-TP

4. Parties on Whose Behalf the Pleading is Being Filed: AT&T, MCI and FCCA

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June 29, 2004

VIA ELECTRONIC FILING

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Re: Docket No.: 040520-TP

Dear Ms. Bayo:

The Florida Competitive Carriers Association (FCCA), AT&T Communications of the Southern States, L.L.C., MCI Metro Access Transmission Services, L.L.C. and MCI Worldcom Communications, Inc., hereby submit, for electronic filing, their response to Verizon's Suggestion of Dismissal in the above docket.

Thank you for your assistance.

Yours truly,
s/ Joseph A. McGlothlin

Enclosure

MCWHIRTER, REEVES, MCGLOTHLIN, DAVIDSON, KAUFMAN & ARNOLD, P.A.

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Emergency Petition of FCCA, AT&T, and MCI To Require ILECs To Continue to Honor Existing Interconnection Obligations	)	Docket No. 040520-TP
	)	Filed: June 29, 2004

RESPONSE OF FCCA, AT&T, AND MCI TO VERIZON'S SUGGESTION OF DISMISSAL

The Florida Competitive Carriers Association ("FCCA"), AT&T Communications of the Southern States, LLC ("AT&T"), and MCImetro Access Transmission Services, LLC and MCI WORLDCOM Communications, Inc. ("MCI"), file this Response to the suggestion for dismissal contained within the Response in Opposition to Emergency Petition filed by Verizon Florida Inc. ("Verizon") on June 17, 2004. For the reasons stated herein, to the extent the Commission regards a portion of Verizon's pleading as a Motion to Dismiss, it should be denied. However, based on the representations in Verizon's pleading, it appears that *immediate, emergency* action may not be required. Instead, in light of Verizon's stated position the Commission should enter an order holding this docket in abeyance and should be prepared to take action, pending developments. In support of this Response, Petitioners state:

BACKGROUND

1. On May 28, 2004, the FCCA, AT&T, and MCI jointly filed a petition which requested that the Commission issue an Order requiring BellSouth and Verizon to continue to abide by the requirements of their existing interconnection agreements, including the obligation to continue to provide unbundled network elements at TELRIC-based prices, until such contracts have been amended pursuant to the "change of law" provisions contained within those contracts. In support of their Petition, the Petitioners provided references to written and oral statements made by BellSouth and Verizon that ranged from vague to threatening with respect to their

intentions following the issuance of the mandate in *United States Telecom Assoc. v. FCC.*[1] Petitioners asserted that BellSouth and Verizon cannot unilaterally abrogate their obligations to provide CLECs with unbundled network elements ("UNEs") at Total Element Long Run Incremental Cost ("TELRIC") on the pretext that *USTAII* permits them to do so, and that they remain obligated under their existing interconnection agreements to continue making existing UNEs available at TELRIC prices unless and until those interconnection agreements are amended. Further, the Petitioners asserted that the Commission has the authority under federal and state law to ensure that BellSouth and Verizon comply with those contractual obligations. Based on the refusal of BellSouth and Verizon (at a time when the issuance of the mandate was only a few days away) to commit to do so voluntarily, and the impact of the resulting uncertainty on the ability of Petitioners to continue to plan to serve Florida customers, Petitioners asked the Commission to issue an order requiring BellSouth and Verizon to continue to abide by the terms of their interconnection agreements, including the "change of law" provisions.

2. On June 17, 2004, BellSouth filed a Motion to Dismiss in which BellSouth represented that it would continue to provide unbundled network elements at existing TELRIC prices until it had provided the required notice and otherwise complied with the "change of law" provisions of the interconnection agreements between BellSouth and individual CLECs. On June 24, 2004, Petitioners responded to BellSouth's Motion to Dismiss. In their Response, Petitioners opposed BellSouth's Motion to Dismiss, but agreed that, based on BellSouth's representations, an *emergency* action (as it relates to BellSouth) may not be warranted at this time.

[1] 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

3. On June 17, 2004, Verizon filed a pleading styled "Verizon's Response In Opposition to Emergency Petition." In its concluding paragraph, Verizon requests the Commission to deny the Petition. Accordingly, Verizon's pleading appears to be fundamentally in the nature of a Response or Answer to the Petition—a pleading in which Verizon "joins the issue." Within the pleading, Verizon commits to provide CLECs with at least 90 days' notice before taking any action "pursuant to applicable law and its interconnection agreements," and commits that it will not unilaterally increase the wholesale price it charges for UNE-P arrangements that are used to serve mass market consumers for 5 months.

4. While Verizon styled its 20 page (exclusive of attachments) pleading a "Response In Opposition to Emergency Petition," Section IV of its pleading is captioned, "The Petition Must be Dismissed Because It Does Not Allege Any Legal Violations And Is Based Solely On Unfounded Speculation." Even this section of the pleading concludes--not with a prayer for dismissal—but with the assertion that the Commission should *deny* the petition, indicating that in this section, too, Verizon's intent is to contest the merits of the Petition rather than seek its dismissal. In an abundance of caution, however, and to the extent the Commission decides to treat Section IV of Verizon's pleading as a Motion to Dismiss, FCCA, AT&T, and MCI hereby submit their response.

ARGUMENT

The Petition filed by FCCA, AT&T and MCI substantially complies with the requirements of Rules 28-106.201 and 25-22.036, Florida Administrative Code. Petitioners have alleged that BellSouth and Verizon have harmed consumers and affected Petitioners' substantial interests through their conduct. Furthermore, Verizon demonstrates in its Response that Petitioners' concerns are not "speculative." Therefore there is no basis for Verizon's suggestion of dismissal.

5. The essence of Verizon's argument is that Petitioners failed to identify factual disputes in their pleading, and that Petitioners base their request for relief on speculation. Neither assertion supports dismissal of the Petition.

6. Rule 25-22.036 states that a ". . .complaint is appropriate when a person complains of an act or omission by a person subject to Commission jurisdiction which affects the complainants' substantial interests and which is in violation of a statute enforced by the Commission. . ."

7. In the Petition, FCCA, AT&T and MCI alleged that BellSouth and Verizon are obligated, notwithstanding *USTA II*, to continue to honor their obligations under existing interconnection agreements unless and until those agreements are amended. Petitioners alleged that, based on oral and written statements made by BellSouth and Verizon immediately following *USTA II*, it was clear that they intended to act unilaterally to refuse to provide unbundled network elements at the TELRIC prices contained in their interconnection agreements; further, they had since refused to dispel the uncertainty created by their vague and conflicting statements. Petitioners attached to the Petition copies of the statements on which they based these assertions. Petitioners further asserted that the uncertainty created by BellSouth and Verizon and their refusal to state affirmatively that they would honor their contractual obligations were affecting the ability of the FCCA members, AT&T and MCI to formulate their business plans. Petitioners alleged that the uncertainty is harming consumers *now*. Petitioners also asserted that the Telecommunications Act of 1996, under which the Commission approves interconnection agreements and amendments to interconnection agreements, requires that BellSouth and Verizon continue to abide by the terms of those agreements until they have been properly amended. The Petition asserted that the Commission also has authority over the

Petition under Chapter 120, Florida Statutes and Section 364.01, Florida Statutes, which empower the Commission to regulate telecommunications companies so as to promote competition and prevent anticompetitive behavior. The allegations of the Petition regarding the conduct of BellSouth and Verizon are factual and accurate. As required by the rule, Petitioners identified the specific relief that they requested.

8. It is well settled that, for the purpose of ruling on a motion to dismiss, the decisionmaker must take all material factual allegations as true. *Varnes v. Dawkins*, 624 So.2d 349, 350 (Fla. 1st DCA 1993). Petitioners submit the above allegations are more than sufficient to meet the test of a motion to dismiss.

9. The sufficiency of the allegations in the Petition - - which the Commission must take as true - - is buttressed by Verizon's own pleading. Ironically, in the same pleading in which Verizon characterizes the CLECs' concerns as "speculative," Verizon *removes all doubt* regarding its intentions by asserting that nothing-- not the 1996 federal Act, or state law, or provisions of interconnection agreements-- stands between it and its ability to act unilaterally.[2] In its pleading *Verizon* makes the *Petitioners'* case. The only aspect of the Petition that Verizon's pleading affects is that of timing. In view of Verizon's representation that it will provide 90 days' notice and wait 5 months before attempting to change existing rates, perhaps there is less of a need now for the Commission to act on an *emergency* basis, but Verizon's lengthy exposition of its position and its clear intent to act unilaterally in the future serve to

[2] In its Response, Verizon presents many arguments—ranging from the economics of Petitioners' businesses, to the workings of Verizon's interconnection agreements, to the effect of federal law on Florida law—with which Petitioners take sharp issue. While for purposes of this response Petitioners focus on the portion of Verizon's pleading in which it raises the subject of dismissal, as opposed to the arguments of Verizon that serve simply to join the issues raised by the Petition, Petitioners wish to emphasize that their silence on the other aspects does not signify their acquiescence. Rather, Petitioners will address the merits—or, rather, the lack of merit—of these arguments at the appropriate time.

defeat its suggestion that the Commission should dismiss the Petition on the basis of "speculation."

10. Rule 28-106.201, "Initiation of Proceedings," contemplates that the Petitioners will provide ". . .a statement of all disputed issues of material fact. If there are none, the petition must so state. . ." The Petition sets forth definite actions and statements by BellSouth and Verizon that support Petitioners' allegation that their substantial interests have been affected and that consumers have been harmed by the uncertainty created by the actions of Verizon and BellSouth. These "facts" - - particularly in light of the position that Verizon states out in its Response - - are not fairly subject to dispute. While the Petition did not explicitly state that Petitioners are not aware of any disputed factual issues, the Petition "substantially complies" with the requirements of the Rule, and so is not subject to dismissal. *See* Rule 28-103.201(4), Florida Administrative Code.

CONCLUSION

Verizon has shown no grounds to support the dismissal of the Petition of FCCA, AT&T and MCI. The Commission should deny Verizon "suggestion" that the Petition be dismissed. The Petition of FCCA, AT&T and MCI should be held in abeyance and the instant docket should be held open pending any further proceedings.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response of FCCA, A&T, and MCI to Verizon's Suggestion of Dismissal has been furnished by U.S. Mail on this 29th day of June, 2004, to:

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