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From: terry.scobie@verizon.com
Sent: Friday, November 05, 2004 3:22 PM
To: Filings@psc.state.fl.us
Cc: Richard Chapkis; David Christian; demetria.c.watts@verizon.com; frank.app@verizon.com
Subject: Docket 030643-TP - Verizon Florida Inc.'s Notice of Appeal

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otice of Appe

The attached filing is submitted in Docket 030643-TP on behalf of Verizon Florida Inc. by

Richard A. Chapkis
201 N. Franklin Street, FLTC0007
Tampa, Florida 33602
(813) 483-1256
richard.chapkis@verizon.com

The attached .pdf document contains 11 pages - transmittal letter (1 page), certificate of service (1 page), and Notice of Appeal with copy of Final Order (9 pages).

(See attached file: 030643 VZ FL Notice of Appeal.pdf)

Terry Scobie
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verizon

Richard A. Chapkis
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November 5, 2004 – *VIA ELECTRONIC MAIL*

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

Re: Docket No. 030643-TP
Petition of Verizon Florida Inc. (f/k/a GTE Florida Inc.) Against Teleport Communications Group, Inc. and TCG South Florida For Review of Decision by the American Arbitration Association in Accordance with Attachment 1 Section 11.2(a) of Interconnection Agreement Between GTE Florida Inc. and TCG South Florida

Dear Ms. Bayo:

Enclosed is Verizon Florida Inc.'s Notice of Appeal for filing 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,

s/ Richard A. Chapkis

Richard Chapkis

RAC:tas

Enclosures

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of Verizon Florida Inc.'s Notice of Appeal in Docket No. 030643-TP were sent via U.S. mail on November 5, 2004 to:

Staff Counsel
Florida Public Service Commission
2540 Shumard Oak Boulevard
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s/ Richard A. Chapkis

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Verizon Florida Inc. (f/k/a GTE Florida Inc.) against Teleport Communications Group, Inc. and TCG South Florida, for review of a decision by The American Arbitration Association in accordance with Attachment 1 Section 11.2(a) of the Interconnection Agreement between GTE Florida Inc. and TCG South Florida	Docket No. 030643-TP Filed: November 5, 2004

NOTICE OF APPEAL

Notice is given that Verizon Florida Inc. (Verizon) appeals to the Florida Supreme Court the final order of this Commission, dated October 7, 2004, titled Order Dismissing Verizon's Petition To Review an Arbitral Award of the American Arbitration Association. This order was a final order dismissing a dispute between Verizon and Teleport Communications Group, Inc. and TCG South Florida concerning the parties' reciprocal compensation obligations under their interconnection agreements. A true and correct copy of said order is attached hereto.

Respectfully submitted this 5th day of November, 2004.

s/ Richard A. Chapkis

Richard A. Chapkis
201 North Franklin Street, FLTC0007
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Counsel for Verizon Florida Inc.

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Petition of Verizon Florida Inc. (f/k/a GTE Florida Inc.) against Teleport Communications Group, Inc. and TCG South Florida for review of decision by The American Arbitration Association, in accordance with Attachment 1 Section 11.2(a) of interconnection agreement between GTE Florida Inc. and TCG South Florida.	DOCKET NO. 030643-TP ORDER NO. PSC-04-0972-FOF-TP ISSUED: October 7, 2004

The following Commissioners participated in the disposition of this matter:

BRAULIO L. BAEZ, Chairman
J. TERRY DEASON
LILA A. JABER
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON

ORDER DISMISSING VERIZON'S PETITION TO REVIEW AN ARBITRAL AWARD OF THE AMERICAN ARBITRATION ASSOCIATION

BY THE COMMISSION:

I. Case Background

Verizon Florida Inc. ("Verizon"), by its petition filed herein, seeks this Commission's review of an arbitral award rendered in an American Arbitration Association (AAA) arbitration. For the reasons set forth herein, we deny that petition.

In their interconnection agreement, Verizon and Teleport Communications Group, Inc. and TCG South Florida (collectively "TCG") agreed that all disputes arising from that agreement would go before the AAA (Agreement, Attachment 2.2.1) and that a party may appeal that decision to the Commission or FCC, provided (i) the matter is within the jurisdiction of the Commission or FCC, and (ii) the agency agrees to hear the matter. Agreement, Attachment 1.11. In December 2001, TCG filed a Petition for Arbitration before the AAA, alleging that Verizon breached the agreement by failing to pay reciprocal compensation for termination of ISP-bound traffic. Verizon filed a counterclaim relating to virtual NXX traffic. Pursuant to the agreement, the parties took the dispute to the AAA for resolution. A hearing was held, and the Arbitrator issued his award on June 20, 2003.

On July 18, 2003, Verizon filed its confidential Petition against TCG seeking review of a decision by the AAA under the auspices of Section 11.2(a) of the adopted Interconnection Agreement between GTE Florida, Inc. n/k/a Verizon Florida Inc. and AT&T Communications of the Southern States. On August 6, 2003, TCG filed its confidential Motion to Dismiss Verizon's Petition.

After agreeing that most of the information in the pleadings was not confidential, TCG and Verizon refiled public versions of their pleadings on September 2, and September 5, 2003, respectively. By separate pleading, on August 25, 2003, Verizon filed a Motion for Oral Argument.

In its petition, Verizon is asking the Commission to review the AAA arbitrator's decision, asserting that the parties' agreement provides that an appeal may be filed with the Commission. In its response, TCG argues that Verizon's petition should be dismissed because the Commission lacks jurisdiction to review an arbitral award. Further, TCG asserts that Verizon failed to timely file its appeal pursuant to the parties' agreement.

At the agenda conference on May 3, 2004, we granted oral argument on TCG's Motion to Dismiss and Verizon's Response thereto.

At the conclusion of the oral arguments on May 3, 2004, the Commission voted to allow the parties to file briefs to address the threshold issue of whether we have jurisdiction to review an arbitral award. The Commission and also required the parties to: (a) identify the specific factual, legal and policy issues for which review is sought; (b) address the reasons why we should or should not agree to review the arbitrator's decision on each issue identified; (c) specify the type of proceeding that should be held on each issue (e.g., a de novo evidentiary hearing or appellate review based on the record in the arbitration proceeding); and (d) identify the applicable standard of review for each issue.

We address the arguments raised in the Motion to Dismiss as follows.

II. Timeliness of Appeal

A. Arguments and Analysis

Verizon filed its Petition seeking review of the arbitral award on July 18, 2003. TCG argues that Verizon's petition was not timely because the agreement provides that any permitted appeal must be commenced within thirty (30) days after the Arbitrator issues the award. TCG contends that the Arbitrator actually issued his Final Award on June 13, 2003, and therefore, that Verizon's petition was filed 5 days late. The parties agree that the AAA was faxed to, and received by the parties on June 20, 2003.

Verizon disagrees. Verizon argues that while the arbitrator signed the decision on June 13, 2003, the award memorializing the decision was not issued until June 20, 2003. Verizon contends that TCG's suggestion that the parties' time for appealing a decision began to run before the decision was actually issued to the parties is inconsistent with the explicit language of the contract, and is contrary to common sense and notions of basic fairness.

Attachment 1, Section 11.3 of the parties' interconnection agreement provides that:

> Each party agrees that any permitted appeal must be commenced within thirty (30) days after the Arbitrator's decision in the arbitration proceedings is issued. In the event of an appeal, a party must comply with the results of the arbitration process during the appeal process.

Neither the parties' agreement nor the AAA rules delineate when an award is considered issued. As such, the Commission must interpret the term. We have delineated a number of factors that should be utilized in contract interpretation. In Order No. PSC-98-1216-FOF-TP, we cited James v. Gulf Life Insurance Company, 66 So. 2d 62, 63 (Fla. 1953). In the James case, the Florida Supreme Court cited with favor Contracts, 12 Am. Jur. § 250, pages 791-93, as a general proposition concerning contract construction in pertinent part as follows:

> Agreements must receive a reasonable interpretation, according to the intention of the parties at the time of executing them, if that intention can be ascertained from the language . . . Where the language of an agreement is contradictory, obscure, or ambiguous or where its meaning is doubtful, so that it is susceptible of two constructions, one of which makes it fair, customary, and such as prudent men would naturally execute, while the other makes it inequitable, unusual, or as such as reasonable men would not be likely to enter into, the interpretation which makes a rational and probable agreement must be preferred . . . An interpretation which is just to both parties will be preferred to one which is unjust.

In this case, the term "issued" is susceptible to alternate interpretations. One interpretation is that the award was issued when arbitrator rendered his decision on June 13, 2004. Another interpretation is that the award was issued when it was sent to and received by the parties on June 20, 2004. The interpretation that makes it fair, customary, and such as prudent men would naturally execute must be preferred. 12 Am. Jur. § 250, pages 791-793.

B. Decision

Because all of the AAA award decisions are published when they are faxed to the parties, we find this is the point at which the decision shall be considered to be "issued." We further reason that because AAA has a long-established practice of faxing its awards to parties, it would not be possible for a party to have a copy of the decision until the decision is faxed.[1] We find that it is unreasonable to allow the time for the appeal process to run before the parties have access to or a copy of the decision that is being appealed. Therefore, Verizon's appeal of the AAA order shall be considered as timely filed.

III. Jurisdiction

A. Arguments and Analysis

Unless otherwise noted, any reference herein to briefs indicates the briefs filed with this Commission by Verizon and TCG on May 17, and June 4, 2004, respectively.

In its brief, Verizon states that the Commission has authority to hear or review a case rendered by the AAA. Verizon asserts that the interconnection agreement at issue in this case contains a distinctive dispute resolution provision that requires the parties to follow a series of steps before submitting any dispute to this Commission. Verizon explains that as a matter of state and federal law, where private parties agree to binding arbitration, the possible grounds for a challenge to a private arbitration decision are narrow. But the parties, Verizon contends, did not agree to final, binding arbitration in this instance. Rather, the parties specifically agreed that a decision of the arbitrator would not be binding if (i) a party appeals the decision to the Commission or FCC, (ii) the matter is within the jurisdiction of the Commission or FCC, and (iii) the agency agrees to hear the matter. Section 11.2, Interconnection agreement.

Verizon asserts that the Commission has authority, pursuant to Section 364.162, Florida Statutes, to arbitrate any dispute regarding interpretation of interconnection agreements. According to Verizon, the fact that the parties agreed to engage in private dispute resolution procedures before bringing the matter to this Commission does not mean that we are stripped of jurisdiction. Verizon does not dispute that in cases where parties agree to final, binding arbitration, the grounds for review of an arbitration are limited by both federal and state law. See 9 U.S.C. § 10, 11; Fla. Stat. Ann. § 682.13, 682.14. However, Verizon contends that the parties' agreement specifically provides that the arbitration of disputes arising under the agreement is not necessarily final. Specifically, Section 11.2 provides:

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[1] In Boehm v. Foster, 670 F.2d 111 (1982), the Ninth Circuit of the United States Court of Appeals determined that the petition for review in that case was required to be filed within 30 days after the date the petitioner *receives notice* of the arbitration award. (Emphasis added).

> 11.2 A decision of the Arbitrator shall not be final [if] . . .
>
> a) a party appeals the decision to the Commission or FCC, and the matter is within the jurisdiction of the Commission or FCC, provided the agency agrees to hear the matter . . .

Verizon notes that under the agreement, the "Commission" is defined as the Florida Public Service Commission.

Verizon emphasizes that Section 364.162, Florida Statutes, gives the Commission broad authority and discretion to arbitrate terms and conditions of an interconnection agreement. Verizon contends that Section 364.162 does not limit or otherwise distinguish between the Commission's authority to resolve disputes arising out of an interconnection or resale agreement or disputes arising out of previously approved agreements. In further support, Verizon cites to Florida Public Service Commission vs. Bryson, 569 So. 2d 1255 (Fla. 1990), where the Florida Supreme Court determined that the Commission must be allowed to act when it has at least a colorable claim that the matter falls within its exclusive jurisdiction as defined by the statute. Bryson at 1255. Hence, Verizon concludes that the Commission has jurisdiction to hear this case pursuant to Section 364.162, Florida Statutes.

TCG, however, states that the Commission lacks jurisdiction to review or hear the arbitrator's award in this case. TCG states that jurisdiction exists, if at all, by virtue of statute and cannot be conferred by the parties. State ex rel. Caraker vs. Amidon, 68 So. 2d 403 (Fla. 1953). TCG asserts that an agency may not increase its own jurisdiction and, as a creature of statute, has no common law jurisdiction or inherent power such as might reside in, for example, a court of general jurisdiction. Deltona Corp. vs. Mayo, 342 So. 2d 510 (Fla. 1977). TCG further explains that as an administrative agency created by the Legislature, "the Commission's power, duties and authority are only those that are conferred expressly or impliedly by statute. " Rolling Oaks Utilities vs. Florida Public Service Commission, 533 So. 2d 770, 773 (Fla.1st DCA 1988). TCG indicates that the Legislature has neither expressly nor impliedly granted the Commission authority to modify, vacate or otherwise review a private arbitration award, but instead has specifically reserved that authority to Florida's courts pursuant to Chapter 682, Florida Statutes (Florida Arbitration Code). Nor has the Legislature, contends TCG, authorized the Commission to hear appeals; that authority is reserved to Florida's courts by Article V of the Florida Constitution and therefore cannot be delegated to the Commission. TCG asserts that Section 364.162 permits the Commission to resolve interconnection disputes filed with the Commission in the first instance, but does not give us authority to review or hear a decision rendered by a private arbitrator, FCC, federal courts, or state courts.

TCG asserts that the Florida Arbitration Code establishes an exclusive and comprehensive system for recognition, review and enforcement of arbitration orders, specifically reserving such authority to Florida's courts. TCG argues that pursuant to the Florida Arbitration Code, Florida courts have exclusive authority to enter "judgment on an award duly rendered in arbitration. . . and to vacate, modify or correct an award . . . for such cause and in the manner provided in this law." Section 682.18, Florida Statutes. TCG emphasizes that the Florida Supreme Court has found even the courts have very limited authority to review arbitration awards. See Roe v. Amica Mut. Ins. Co., 533 So. 2d 279, 281 (Fla. 1988)

This case presents an issue of first impression regarding the Commission's jurisdiction to hear or review decisions rendered through private arbitration under the Federal Arbitration Act. Pursuant to Section 364.162(1), Florida Statutes, "[t]he commission shall have the authority to arbitrate any dispute regarding interpretation of interconnection or resale prices and terms and conditions." This statutory language plainly authorizes us to resolve disputes regarding the interpretation of interconnection agreements. Further, pursuant to Section 252 of the Telecommunications Act, state commissions have authority to arbitrate interconnection agreements. Courts have interpreted state commissions' authority regarding both arbitrated and negotiated interconnection agreements to extend to the resolution of disputes arising under the agreements approved by the state commissions. Iowa Utils. Bd. v. Federal Communications Commission, 120 F. 3d 753, 804 (8th Cir. 1997) and BellSouth Telecommunications, Inc. v. MCImetro Access Transmission Servs. Inc., 317 F. 3d 1270 (11th Cir. 2003).

In this case, however, the parties agreed to submit interconnection agreement disputes, in the first instance, to private, binding arbitration before the AAA, and an arbitral award was issued in June 2003. The question thus presented is whether the Commission can lawfully entertain an appeal of an arbitral award based on interconnection agreement language that purports to permit such appeals if "the matter is within the jurisdiction of the Commission."

B. Decision

We find that this matter is *not* within our jurisdiction. Neither the Florida Legislature nor the Florida Constitution has granted us authority to entertain appeals of arbitral awards. It is well established that the Commission's authority is not conferred by the parties but by statute. State ex rel. Caraker vs. Amidon, 68 So. 2d 403 (Fla. 1953).

As a general matter, we find that the Commission *has* primary jurisdiction to resolve disputes arising out of interconnection agreements pursuant to Section 364.162, Florida Statutes. We recognize, however, that parties may choose to have such disputes addressed through alternative dispute resolution processes such as mediation or binding arbitration. In fact, we encourage parties to pursue those alternatives when appropriate.

In this instance, the parties chose such an alternative by agreeing to arbitrate their dispute before the AAA. After a year-long arbitration, an arbitration award was issued in favor of TCG.

It has been established that arbitration should be the favored means of dispute resolution, and courts should indulge every reasonable presumption to uphold proceedings resulting in an award. See Roe v. Amica Mut. Ins. Co., 533 So. 279, 281 (Fla. 1988). Moreover, an arbitration award is final unless it states otherwise and may be vacated only upon the grounds specified in Section 682.13, Florida Statutes, none of which has been asserted in this instant case.

In concluding that we do not have authority to review the AAA award in this case, we emphasize that this decision is limited to the facts of this case and the specific interconnection agreement language we are called on to interpret. As such, we do not foreclose the possibility that parties could craft dispute resolution provisions that contain some mix of private dispute resolution and Commission participation. Because no further Commission action is necessary, this docket shall be closed.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the specific findings are hereby approved as set forth in the body of this Order. It is further

ORDERED that Verizon's Petition in this Docket is dismissed for lack of jurisdiction. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 7th day of October, 2004.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
And Administrative Services

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

(S E A L)

FRB

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.