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January 4, 2005

BY ELECTRONIC FILING
Ms. Blanca Bayó, Director
The 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:

Attached please find a Joint Motion to Modify Procedure Schedule on behalf of AT&T and Competitive Carrier Group in the above-referenced docket. Pursuant to the Commission's Electronic Filing Requirements, this version should be considered the official copy for purposes of the docket file. Copies of this document will be served on all parties via electronic and U.S. Mail.

Thank you for your assistance with this filing.

Sincerely yours,

s/ Tracy W. Hatch

Tracy W. Hatch

TWH/scd
Attachment
cc: Parties of Record

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served on the following parties by electronic mail and/or U.S. Mail on this 4th day of January, 2005.

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In 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: January 4, 2005

JOINT MOTION TO MODIFY PROCEDURAL SCHEDULE

COMES NOW, AT&T Communications of the Southern States, LLC and TCG South Florida Inc., and Competitive Carrier Group[1], (herinafter collectively "Joint Movants") and, pursuant to Rule 2-106.204, Florida Administrative Code[2], hereby moves that the Prehearing Officer modify the procedural schedule established in the Order Establishing Procedure (Order No. PSC-04-1236-PCO-TP, hereinafter "Procedural Order") issued in this Docket on December 13, 2004 to permit the parties to have an opportunity to review the new permanent unbundling rules, announced by the FCC on December 15, 2004, and to be contained in the FCC Order that is anticipated to be released in January 2005.

I. INTRODUCTION

1. In its Procedural Order issued on December 13, 2004, the Commission established various dates for the filing of testimony (Direct and Rebuttal), Pre-Hearing Statements and Post-Hearing Briefs, and the conduct of hearings in this case. The Procedural Order established January 28, 2005 as the date for the parties to file Direct testimony and Exhibits. However, the filing of Direct testimony on this date will not provide the parties with an opportunity to review the new permanent unbundling rules

[1] The Competitive Carrier Group includes NewSouth Communications Corporation, The Ultimate Connection d/b/a DayStar Communications, Xspedius Management Co. Switched Services, LLC and Xspedius Management Co. of Jacksonville, LLC.

[2] In accordance with Rule 28-106.203(3), AT&T has consulted with the other parties. Counsel for Verizon stated that Verizon opposes the instant request to modify the procedural schedule. MCI does not join the Joint Motion but agrees an extension is appropriate but the length of the extension should depend on the parties' respective contractual rights.

announced by the FCC on December 15, 2004, or have a period to negotiate contractual language to determine where, if at all, the parties have disagreements about such rules or contractual language to implement these new unbundling rules. The FCC's new permanent unbundling rules, based on the FCC's December 15, 2004 Press Release, will impact approximately 15 of the current 26 issues listed in the Tentative Issues List attached as Appendix A of the Procedural Order and will materially affect the obligations of the parties and the contractual provisions to be contained in the interconnection agreements that Verizon seeks to amend in this arbitration proceeding.

2. It is anticipated that the FCC Order establishing these new permanent unbundling rules will be released in January 2005. Therefore, in order to provide the parties a reasonable time to review FCC's Order and reflect their disagreements, if any, in their Direct testimony, Joint Movants request that the Commission modify the current procedural schedule so that the date for filing Direct testimony will be made 45 days after the release of the FCC's Order and that all other dates on the current schedule be moved back on an approximate day-for-day basis. Such a modification will allow the parties to review the FCC Order and have a brief 30-day negotiation period. After that 30-day negotiation period, Joint Movants' proposal would be to give the parties 15 days to file their Direct testimony. Adoption of Joint Movants' proposal will avoid the need for additional supplemental filings based on the FCC's Order that would be required under the current proposed procedural schedule, thus conserving the parties' and the Commission's resources. Furthermore, adoption of the Joint Movants' proposal will permit the parties to provide the Commission a complete record, representing the parties' actual disagreements regarding the new unbundling rules, for a decision in this proceeding.

II. BACKGROUND AND ARGUMENT

3. As the Commission is aware, Verizon Florida Inc. ("Verizon") initially filed its Petition for Arbitration of Amendment to Interconnection Agreements ("Arbitration Petition") against various CLECs on February 20, 2004. Along with its

Arbitration Petition, Verizon proffered its version of an amendment to its interconnection agreements (ICAs) that reflected its view of the FCC's Triennial Review Order (TRO),[3] which had been issued on August 21, 2003. Verizon's Arbitration Petition was filed at a time when this Commission, as well as other state Commissions throughout the country, were engaged in proceedings to implement the provisions of the TRO, as called for by the FCC. Before the parties with whom Verizon sought arbitration could file a response to the Arbitration Petition, Verizon amended that Petition on March 19, 2004, and proffered yet another amendment to its interconnection agreement reflecting its view of the effects of the D.C. Circuit Court of Appeals' March 2, 2004 decision in *United States Telecom Ass'n. v FCC ("USTA II")*[4] on the TRO. Recognizing that Verizon had not complied with the arbitration filing requirements of Section 252(b)(2) of the federal Telecommunications Act of 1996 ("federal Act") in its rush to impose its proposed ICA amendments on the CLECs, this Commission dismissed Verizon's Arbitration Petition on July 12, 2004.[5]

4. On August 20, 2004, the FCC released its Interim Rules Order.[6] The Interim Rules Order put in place rules that required Verizon continue to provide unbundled access to switching, enterprise market loops and dedicated transport (unless superceded by other actions) under the terms of interconnection agreements that existed as of June 15, 2004. Those obligations were to continue until the earlier of the effective date of final unbundling rules promulgated by the FCC or six months after publication of the Interim Rules Order in the Federal Register. The FCC further set forth a transitional pricing structure that would apply for the six months after the effective date of new permanent unbundling rules for those elements that would no longer be required to be unbundled under Section 251 of the federal Act. (*See*, generally, Interim Rules Order ¶¶16 and 29,). Finally, the Interim Rules Order included a Notice of Proposed Rulemaking in which the FCC invited comments on final permanent unbundling rules.

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[3] 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*, CC Dockets Nos. 01-338 (Aug. 21,2003)

[4] 359 F.3d 554 (D.C. Cir. 2004)

[5] FPSC Order No. PSC-04-0671-FOF-TP

[6] Order and Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* CC Dockets No. 01-338 (Aug. 20, 2004)

(*See*, generally, Interim Rules Order ¶¶ 8-15). The Interim Rules Order was issued in response to the *USTA II* mandate and, as described by the FCC, was intended "to avoid disruption in the telecommunications industry while [new permanent unbundling rules] are being written", which the FCC committed to do expeditiously.

5. On September 9, 2004, twenty days after the Interim Rules Order was issued, Verizon filed its latest Arbitration Petition naming various CLECs, which is the subject of this proceeding. With that Arbitration Petition, Verizon filed yet another version of its proposed amendment to its interconnection agreements – this one purportedly in compliance the FCC's Interim Rules Order. Citing a anomalous passage in Paragraph 22 of the FCC's Interim Rules Order that states,

> "In order to allow a speedy transition in the event we ultimately decline to unbundle switching, enterprise market loops or dedicated transport, we expressly preserve incumbent LECs' contractual prerogatives to initiate change of law proceedings to the extent consistent with their governing interconnection agreements. To that end, we do not restrict such change-of-law proceedings from presuming an ultimate Commission holding relieving incumbent LECs' of Section 251 unbundling obligations with respect to some or all of these elements, but under any such presumption, the results of such proceedings must reflect the transitional structure set forth [in the Interim Rules Order]" (emphasis added),

Verizon's September 9, 2004 Arbitration Petition urged the Commission to "move forward promptly and conclude by the six-month deadline the FCC has established for adoption of its final rules." (Verizon, September 9, 2004 Arbitration Petition, pg. 3) In other words, in its rush to impose its interconnection agreement amendments on the various CLECs, Verizon wanted the Commission to *conclude* this proceeding even *before* the FCC put in place permanent unbundling rules governing Verizon's obligations under the federal Act.

6. On December 15, 2004, the FCC announced its decision to establish new permanent unbundling rules. (See, Attachment 1, "FCC Adopts New Rules for Network Unbundling Obligations of Incumbent Local Phone Carriers", FCC News Release, December 15, 2004 ("Press Release")). The FCC's Press Release is not a formal ruling and has no binding effect. Moreover, the Press Release is very brief and does not state many of the specific details of the FCC's decisions. Nevertheless, the Press Release makes clear that, contrary to the "presumption" upon which Verizon's latest Arbitration Petition (the Petition on which this proceeding is based), the FCC did *not* relieve Verizon of its Section 251 unbundling obligations with respect to certain high capacity loops and dedicated transport.

7. Specifically, the Press Release makes clear that Verizon continues to have federal Act obligations to provide unbundled access to DS1 and DS3 high capacity loops and transport in many locations. The locations where these obligations remain are based on wire center-specific data concerning the number of business lines and the number of fiber-based collocators in Verizon wire centers. The Press Release did not include all of the details of the Commission's decision. In particular, *both* the criteria necessary to determine the areas where unbundled enterprise loops and transport will be available as UNEs *and* the data to which those criteria will be applied are not fully known. Moreover, the specifics of the unbundling criteria will not be available until the FCC's Order is released. However, it is clear that there are several Issues in this proceeding, as reflected in the Tentative Issues List listed in Attachment A to the Commission's Procedural Order ("Tentative Issues List"), that will be impacted by the FCC's Order on permanent unbundling rules for high capacity loops and transport, when it is released, as follows:

- Issue 2 dealing with the rates, terms and conditions implementing changes in Verizon's unbundling obligations;
- Issue 4 dealing with Verizon's obligations under federal law to provide unbundled access to DS1, DS3 and dark fiber loops;
- Issue 5 dealing with Verizon's obligations under federal law to provide unbundled access to DS1, DS3 and dark fiber transport; and

- Issue 22 dealing with Verizon's obligations to perform routine network modifications where Verizon is required to continue to provide unbundled access to high capacity loops, transport and dark fiber.

8. The FCC's Press Release also indicates that the definition of "qualifying services", a concept that was announced in the TRO but vacated in *USTA II*, has been "set aside." However, other than a statement that the FCC's decision will prohibit the use of UNEs for the provision of telecommunications services in the mobile wireless and long distance markets, the Press Release provides no further details. Thus, the parties must await the FCC's Order to determine what, if any, use restrictions may apply to EELs combinations or to various commingled uses of UNEs and tariffed services. Once the FCC Order is released, it will impact several Issues in the Tentative Issues List, as follows:

- Issue 12 dealing with how the ICA should be amended to address changes with respect to commingling of UNEs with wholesale services, EELs and other combinations;
- Issue 13 dealing with the conversion of wholesale services to UNEs/UNE combinations;
- Issue 21 (a) thru (c) dealing with the service eligibility criteria for conversion of existing circuits and new EEL orders; and
- Issue 25 dealing with how the ICA should be amended to implement the FCC's service criteria for combinations and commingled facilities and services.

9. The FCC's Press Release also identifies a different "transitional structure" than that provided for in the Interim Rules for CLECs that use UNEs that Verizon will no longer be obligated to provide under federal law. The Press Release states there will be a transition period of twelve months, identifies specific price increases that may be applied during that period, and states that the transition plan applies to the CLECs' embedded customer base. Many of the details of this transitional structure, however, remain unclear (e.g. may a CLEC continue to add circuits and UNE-based services for existing

customers). As a result, the parties must await the FCC's Order to determine what the specifics of this transitional structure will be. This will impact several Issues in the Tentative Issues List, as follows:

- Issue 6 dealing with the re-pricing of existing UNE arrangements which are no longer subject to unbundling under federal law;
- Issue 7 dealing with the provision of notice of discontinuance in advance of the effective date of the removal of unbundling requirements;
- Issue 8 dealing with the assessment of non-recurring charges for the disconnection of a UNE arrangement or the reconnection of service under an alternative arrangement;
- Issue 11 dealing with the implementation of rate increases and new charges established by the FCC in its final unbundling rules; and
- Issue 24 dealing with a process to address the potential effect on the CLECs's customers' services when a UNE is discontinued.

10. Finally, the FCC's Press Release did not address a number of subjects on which the FCC sought comments in its August 20, 2004 Notice of Proposed Rulemaking, including requirements for cut-overs (*i.e.*, hot cuts) (Interim Rules Order, ¶ 10); the authority of state commissions to require unbundling under state law and to establish just and reasonable rates for network elements required to be offered pursuant to Section 271 (Interim Order, ¶ 12); and requirements for the state filing and approval of commercial agreements (Interim Order, ¶ 13). To the extent these subjects are addressed in the FCC's Order on permanent unbundling rules, this will impact several Issues in the Tentative Issues List, as follows:

- Issue 1 dealing with whether the ICA should address Verizon's unbundling obligations which arise under state law; and
- Issue 17 (e) dealing with provisioning intervals for hot cuts.

11. Recently, an arbitration panel of the Texas Public Utility Commission abated the proceedings in a similar Verizon arbitration proceeding against multiple CLECs in order to await the conclusion of the FCC's determination of permanent unbundling rules. (See, Order No. 17, Abatement of Arbitration, PUCT Docket No. 29451, *Petition of Verizon Southwest for Arbitration of An Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Texas Pursuant to Section 252 of the Communications Act of 1934, As Amended, And the Triennial Review Order,* (December 15, 2004)) (hereinafter "Texas Abatement Order", attached hereto as Attachment 2). The Verizon arbitration proceeding in Texas had had a similar tortured procedural history as the case in this Docket. Verizon had filed its arbitration petition on March 10, 2004 after the issuance of the FCC's TRO and amended its petition on March 19, 2004 after the *USTA II* decision. As happened with Verizon's initial Arbitration Petition filed in this case, the Texas PUC found several procedural deficiencies and abated the proceeding on May 24, 2004, but permitted Verizon to cure the deficiencies and refile. After the issuance of the Interim Rules Order, as in Florida, Verizon filed its updated petition in Texas on September 10, 2004.

12. In its December 15, 2004 Order abating the Verizon Arbitration petition in Texas, the Arbitrators concluded, "this arbitration cannot be resolved with certainty until the FCC issues permanent unbundling rules". (Texas Abatement Order. pg. 5). After recounting the procedural history of the various Verizon petitions and amended petitions in Texas, the Arbitrators observed, "The Arbitrators do not fault Verizon for altering its petition. However, the Arbitrators find that it demonstrates Verizon's, and the parties', inability to foresee the future ramifications of FCC or court actions as they may affect unbundling obligations, which are at the heart of this proceeding. The Arbitrators find that further action would be wasteful until such time that the FCC issues its unbundling rules and therefore the Arbitrators conclude that it is proper to abate this arbitration until the FCC finalizes the UNE rules." (Texas Abatement Order, pg. 6).

III. CONCLUSION

13. Since the FCC has made its decision on new permanent unbundling rules, this Commission should await the FCC's issuance of its Order before proceeding further in this arbitration. Until the FCC's Order is issued and the parties have an opportunity to review it, many open questions remain about the exact nature of Verizon's unbundling obligations under the federal Act and the lawful transitional structure for UNEs no longer subject to federal Act unbundling. There are at least 15 of the 26 issues listed in the current Tentative Issues List attached to the Procedural Order that will be impacted by the FCC's Order, when it is released, concerning the new permanent unbundling rules. The Commission's current procedural schedule leaves no time for the parties to review the FCC's Order and formulate their positions before the scheduled date for filing Direct testimony. Furthermore, on the date currently scheduled for Direct Testimony, the parties will not have had any opportunity to negotiate to determine what, if any, disagreements exist between them – a prerequisite to any properly framed arbitration under the federal Act and this Commission's practice and procedure.

14. The Arbitration Petition filed by Verizon on September 9, 2004, which forms the basis for this proceeding is based on its view of its unbundling obligations as of the issuance of the FCC's Interim Rules Order on August 20, 2004 and the flawed presumption that the FCC would eliminate virtually all unbundling obligations, an event that did not occur. To proceed on the basis of that petition would be a waste of Commission's and the parties' resources, especially where there is an option to await the issuance of the FCC's Order on permanent unbundling rules.

15. The Commission should conclude, as the Texas Arbitrators did, that "this arbitration cannot be resolved with any degree of certainty until the FCC issues permanent unbundling rules" (Texas Abatement Order, pg. 5). Consequently, the Commission should modify the current procedural schedule as proposed above by the Joint Movants. .

WHEREFORE, base on the foregoing, Joint Movants request that Prehearing Officer modify the procedural schedule in the instant proceeding to provide that Direct testimony be filed forty-five (45) days after the release of the FCC's final order on unbundling obligations and that all other dates on the current schedule be extended on an approximate day-for-day basis.

RESPECTFULLY SUBMITTED this 4th day of January 2005.

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FOR IMMEDIATE RELEASE:
December 15, 2004

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FCC ADOPTS NEW RULES FOR NETWORK UNBUNDLING OBLIGATIONS OF INCUMBENT LOCAL PHONE CARRIERS

New Network Unbundling Rules Preserve Access to Incumbents' Networks by Facilities-Based Competitors Seeking to Enter the Local Telecommunications Market

Washington, D.C. – The Federal Communications Commission today adopted rules concerning incumbent local exchange carriers' (incumbent LECs') obligations to make elements of their network available to other carriers seeking to enter the local telecommunications market. The new framework builds on actions by the Commission to limit unbundling to provide incentives for both incumbent carriers and new entrants to invest in the telecommunications market in a way that best allows for innovation and sustainable competition.

The rules directly respond to the March 2004 decision by the U.S. Court of Appeals for the D.C. Circuit which overturned portions of the Commission's Unbundled Network Element (UNE) rules in its Triennial Review Order. We provide a brief summary of the key issues resolved in today's decision below.

- **Unbundling Framework.** We clarify the impairment standard adopted in the *Triennial Review Order* in one respect and modify its application in three respects. *First*, we clarify that we evaluate impairment with regard to the capabilities of a *reasonably efficient* competitor. *Second*, we set aside the *Triennial Review Order*'s "qualifying service" interpretation of section 251(d)(2), but prohibit the use of UNEs for the provision of telecommunications services in the mobile wireless and long-distance markets, which we previously have found to be competitive. *Third*, in applying our impairment test, we draw reasonable inferences regarding the prospects for competition in one geographic market based on the state of competition in other, similar markets. *Fourth*, we consider the appropriate role of tariffed incumbent LEC services in our unbundling framework, and determine that in the context of the local exchange markets, a general rule prohibiting access to UNEs whenever a requesting carrier is able to compete using an incumbent LEC's tariffed offering would be inappropriate.

- **Dedicated Interoffice Transport.** Competing carriers are impaired without access to DS1 transport except on routes connecting a pair of wire centers, where both wire centers contain at least four fiber-based collocators or at least 38,000 business access lines. Competing carriers are impaired without access to DS3 or dark fiber transport except on routes connecting a pair of wire centers, each of which contains at least three fiber-based collocators or at least 24,000 business lines. Finally, competing carriers are not impaired without access to entrance facilities connecting an incumbent LEC's network with a competitive LEC's

network in any instance. We adopt a 12-month plan for competing carriers to transition away from use of DS1- and DS3-capacity dedicated transport where they are not impaired, and an 18-month plan to govern transitions away from dark fiber transport. These transition plans apply only to the embedded customer base, and do not permit competitive LECs to add new dedicated transport UNEs in the absence of impairment. During the transition periods, competitive carriers will retain access to unbundled dedicated transport at a rate equal to the higher of (1) 115% of the rate the requesting carrier paid for the transport element on June 15, 2004, or (2) 115% of the rate the state commission has established or establishes, if any, between June 16, 2004 and the effective date of this Order.

- **High-Capacity Loops.** Competitive LECs are impaired without access to DS3-capacity loops except in any building within the service area of a wire center containing 38,000 or more business lines and 4 or more fiber-based collocators. Competitive LECs are impaired without access to DS1-capacity loops except in any building within the service area of a wire center containing 60,000 or more business lines and 4 or more fiber-based collocators. Competitive LECs are not impaired without access to dark fiber loops in any instance. We adopt a 12-month plan for competing carriers to transition away from use of DS1- and DS3-capacity loops where they are not impaired, and an 18-month plan to govern transitions away from dark fiber loops. These transition plans apply only to the embedded customer base, and do not permit competitive LECs to add new high-capacity loop UNEs in the absence of impairment. During the transition periods, competitive carriers will retain access to unbundled facilities at a rate equal to the higher of (1) 115% of the rate the requesting carrier paid for the transport element on June 15, 2004, or (2) 115% of the rate the state commission has established or establishes, if any, between June 16, 2004 and the effective date of this Order.

- **Mass Market Local Circuit Switching.** Incumbent LECs have no obligation to provide competitive LECs with unbundled access to mass market local circuit switching. We adopt a 12-month plan for competing carriers to transition away from use of unbundled mass market local circuit switching. This transition plan applies only to the embedded customer base, and does not permit competitive LECs to add new switching UNEs. During the transition period, competitive carriers will retain access to the UNE platform (*i.e.*, the combination of an unbundled loop, unbundled local circuit switching, and shared transport) at a rate equal to the higher of (1) the rate at which the requesting carrier leased that combination of elements on June 15, 2004, plus one dollar, or (2) the rate the state public utility commission establishes, if any, between June 16, 2004, and the effective date of this Order, for this combination of elements, plus one dollar.

Action by the Commission, December 15, 2004 by Order on Remand (FCC 04-290). Chairman Powell, Commissioners Abernathy and Martin, with Commissioners Copps and Adelstein dissenting. Chairman Powell, Commissioners Abernathy, Copps and Adelstein issuing separate statements.

Wireline Competition Bureau Staff Contact: Jeremy Miller, 418-1507; Email: jeremy.miller@fcc.gov

-FCC-

PUC DOCKET NO. 29451

PETITION OF VERIZON SOUTHWEST FOR ARBITRATION OF AN AMENDMENT TO INTERCONNECTION AGREEMENTS WITH COMPETITIVE LOCAL EXCHANGE CARRIERS AND COMMERCIAL MOBILE RADIO SERVICE PROVIDERS IN TEXAS PURSUANT TO SECTION 252 OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED, AND THE TRIENNIAL REVIEW ORDER	§	**PUBLIC UTILITY COMMISSION OF TEXAS**

ORDER NO. 17
ABATEMENT OF ARBITRATION

By this Order, this arbitration is abated pending the issuance of permanent UNE rules by the Federal Communications Commission (FCC). The Arbitrators conclude that the myriad issues affecting the interconnection agreements of all parties to this arbitration, which entail the outcomes of the Federal Communications Commission's ("FCC") Triennial Review Order ("TRO")[1], the DC Circuit Court's *United States Telecom Ass 'n v. FCC* ("USTA II") decision,[2] and the recent FCC *Interim Rules Order*[3] have not been fully developed in Verizon's amendment and await the conclusion of the FCC's determination of permanent unbundled network element (UNE) rules. Therefore, the Arbitrators conclude that the Commission's and parties' resources are best served by abatement at this time.

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[1] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket no. 98-147, *"Report and Order on Remand And Further Notice of proposed Rulemaking"*, No. FCC 03-36, (released August 21, 2003) (*TRO*).

[2] *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (DC Cir.2004) (*USTA II*), pets. for cert. filed, Nos. 04-12, 04-15, 04-18 (June 30, 2004).

[3] *Order and Notice of Proposed Rulemaking, In the Matter of Unbundled Access to Network Elements*, WC Docket No. 04-313, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338 (released August 20, 2004) (*Interim Rules Order*).

I. Background

On March 10, 2004, Verizon filed a petition for arbitration of an amendment to interconnection agreements with competitive local exchange carriers and commercial mobile radio service providers in Texas. In its petition, Verizon sought to implement perceived changes, as indicated by the FCC's TRO, to the network unbundling obligations of incumbent local exchange carriers. On March 19, 2004, Verizon filed an update to its petition noting that it had made additional changes in its interconnection agreements in light of *USTA II* decisions. In general, Verizon's petition identified the following issues as being decisively impacted by the TRO: High capacity loops, Fiber to the Home loops; Hybrid Loops; IDSL loops; Line Sharing; Circuit Switching; Signaling Databases; Interoffice Transport; and Combining and Co-mingling issues.

Numerous parties sought dismissal of Verizon's petition on the grounds that it was, among other things, premature and procedurally defective. Parties argued that they were not properly noticed and that good faith negotiations, as a precursor to arbitration, had not taken place.[4]

On May 4, 2004, Verizon filed a motion to hold this proceeding in abeyance until June 15, 2004, the date on which the related D.C. Circuit Court's mandate was issued.

On May 24, 2004, the Arbitrators issued Order No. 8. In that order, the Arbitrators found several deficiencies with Verizon's petition. The Arbitrators also noted that the procedural tenor of the case was complicated by the fact some parties were engaged in negotiations with Verizon, on matters which were the subject of this proceeding. The Arbitrators also found that the absence of a Decision Point List (DPL) rendered the petition deficient and that the posture of the case made it impossible to conclude under the FTA's nine month deadline.[5] The Arbitrators found merit in abating the proceeding to allow Verizon sufficient time to cure procedural issues and then refile

[4] See Order 3 for a discussion of the issues raised by various parties regarding Verizon's petition.
[5] *See* Order No. 8 at 7

its petition.[6] Order No. 8 outlined for Verizon specific deficiencies to address in its revised and re-filed petition. These included: the necessity of filing a DPL as required by P.U.C. PROC. R. 21.95(a)(5)(C); the necessity of sufficient contract language to discern each disputed issue; assurance and evidence that Verizon had engaged in good faith negotiations with the parties and instruction to Verizon to engage in such negotiations during the abatement of the docket; and, finally, that Verizon address the matter of improper notice raised by some of the parties to this proceeding. The Arbitrators expectation was that, after Verizon had satisfied its regulatory and procedural requirements in the re-filed and revised petition, the Arbitration would be able to proceed. Verizon was instructed to refile its petition between August 2 and August 26, 2004.

On August 25, 2004 Verizon moved to extend the filing deadline from August 26 to September 10, to provide additional time for the review of the FCC's interim rules released on August 20, 2004.[7] Verizon also filed a motion on August 25 to withdraw 121 competitive local exchange carriers and wireless providers from its petition to arbitrate leaving only thirty-one (31) CLECs.[8]

On August 27, 2004, Order No 12 was issued granting Verizon's request for an additional 30 days to negotiate with parties in light of the FCC's interim rules and September 10, 2004, was established as the deadline for a revised re-filed petition. The Arbitrators again noted in Order No. 12 that they expected Verizon to adequately demonstrate that its revised proposals were appropriately provided to all parties on a timely basis, that contract language reflecting parties' positions was exchanged and that good-faith negotiations were undertaken.

On September 10, 2004 Verizon filed its updated petition, seeking to revise the "change of law" provisions in existing interconnection agreements between Verizon and

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[6] *Id.* at 10.

[7] *See Verizon Southwest's Motion to Extend the Filing Date of its Amended TRO Petition* (Aug. 25, 2004).

[8] *See Verizon Southwest's Notice of Withdrawal of Petition for Arbitration as to Certain Parties* (Aug. 25, 2004).

certain CLECs. In the Arbitrators' opinion, this revised petition attempts to provide Verizon with the unilateral ability to cease providing access to unbundled network elements based upon Verizon's interpretation of the unbundling obligations under federal law – specifically, section 251(c)(3) of the Act, 47 C.F.R. Part 51, the FCC's *Interim Order* requirements (to the extent they are effective), and any future Orders issued by the FCC.[9] Additionally, the September 10, 2004, petition did not identify all of the parties originally identified in the March 19, 2004. Verizon moved to dismiss those parties that were no longer included in its revised petition from the arbitration proceeding.

On September 17, 2004, the Arbitrators issued Order No. 15 requiring parties who wished to file responses to Verizon's updated arbitration filing to do so by September 23, 2004, and established a September 27, 2004 pre-hearing conference to discuss responses filed by Verizon and the CLEC parties.

During the prehearing conference, Verizon clarified that its September 10,2004, petition had, in fact, wholly changed the original petition filed on March 19, 2004.

On October 12, 2004, AT&T filed its Motion to Abate arguing that Verizon's September 10 petition was, again, premature and simply constituted a new "change of law" provision. AT&T urged the Commission to conserve its resources and those of the parties and argued that the implementation of Verizon's proposed expedited change of law language within the current unstable legal landscape was irrational. Additionally, AT&T pointed out that action in Docket No. 28821 had abated Track 2 items dealing with TRO issues to allow time for firmer FCC guidance in these matters.[10]

Verizon's response to AT&T characterized AT&T's Motion to Abate as nothing more than a delay tactic. Verizon argued that the landscape is more certain today than it has been in the last eight years and that the Commission should proceed with its

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[9] *See Verizon Southwest's Updated Petition for Arbitration* at 2 (Nov. 18, 2004) (hereinafter *Verizon's Updated Petition).*

[10] *See AT&T Motion to Abate* at 4 (Oct. 12, 2004).

arbitration.[11] Verizon distinguished abeyance of Track 2 in Docket No. 28821 from the current proceeding by stating that Docket No. 28821 is developing an entirely new interconnection agreement whereas this proceeding is seeking to amend existing agreements which, in Verizon's view, is what the FCC explicitly provided for in the *Interim Rules Order.*[12]

On November 18, 2004, Verizon filed an Updated Petition for Arbitration. This update included an Amendment 2, a joint decision point list (DPL) for Amendments 1 and 2, and a proposed procedural schedule. Verizon explained that it was not offering its Amendment 2 affirmatively but in response to AT&T's criticism and other CLECs' requests to include such subject matter in this arbitration.[13] Verizon's Updated Petition requested bifurcation of the arbitration into two tracks dealing with the respective amendments. Specifically, Verizon urged that Amendment 1 review proceed separately from Amendment 2 review. Verizon argued that Amendment 2 concerns factual issues that would delay the proceeding of Amendment 1 which primarily addresses legal issues. Verizon suggested that Amendment 2 issues be taken up after the FCC has acted to define the ILEC's affirmative obligations for unbundling of high-capacity loops and transports.

II. Discussion

In the Arbitrators' opinions, this arbitration cannot be resolved with certainty until the FCC issues permanent unbundling rules. Verizon filed its original petition on March 19, 2004 and its last updated revision of that petition on September 10, 2004. Despite Verizon's earlier position that only small adjustments would be required upon FCC clarification of its TRO discussion, the September 10, 2004, petition bore no structural or

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[11] *See Verizon Southwest Opposition to AT&T's Motion to Abate and Notice of Filing of Amendment 2* at 5 (Oct. 19, 2004) (hereinafter *Verizon Opposition to AT&T's Motion to Abate)*.

[12] *Verizon Opposition to AT&T's Motion to Abate* at 9.

[13] Subject matter referenced is the requirements established by the TRO relating to routine network modifications, commingling, and conversions. *See Verizon's Updated Petition* at 3-4 and *Verizon Opposition to AT&T's Motion to Abate* at 10-11.

substantive similarity to its original petition of March 19, 2004.[14] The Arbitrators do not fault Verizon for altering its petition. However, the Arbitrators find that it demonstrates Verizon's, and the parties', inability to foresee the future ramifications of FCC or court actions as they may affect unbundling obligations which are at the heart of this proceeding. The Arbitrators find that further action will be wasteful until such time that the FCC issues its unbundling rules and therefore the Arbitrators conclude that it is proper to abate this arbitration until the FCC finalizes the UNE rules.

The Arbitrators find that Verizon's September 10 petition does not seek to implement anything of substance under the TRO in light of *USTA II*, or the FCC's interim rules. The September 10 petition is only a "change of law" provision which, as noted at the September 27 prehearing conference, already exists in all of the participating carriers current interconnection agreements.[15] Verizon stated that its September 10th amendment does not presume any particular outcome of the FCC's ongoing rulemaking.[16] Additionally, Verizon predicted that the FCC, which is taking up the unbundling issues this very day, is likely to adopt final unbundling rules by December 2004 or March 2005 at the latest.[17] To proceed now with the possibility that final rules may be issued prior to the Arbitrators reaching a decision is reason enough to abate this proceeding.

In addition, the Commission's decision in Docket No. 28821 determined that it is best to abate proceedings which implement TRO aspects in parties' agreements. Verizon argued in its Response to AT&T's Motion to Abate that the abatement of Docket No. 28821 has no precedential value here because SBC, in that case, is negotiating a new interconnection agreement whereas Verizon, in this case, is seeking to amend an existing interconnection agreement.[18] The Order Abating Track 2 in Docket No. 28821 did not state the reason for abating Track 2 as being in any way related to SBC's negotiation of a

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[14] "Verizon clarified that ***some revision*** of its TRO Amendment submitted on March 19 will likely be necessary in light of the FCC's interim rules." (emphasis added) *See* Order No. 12 at 2 (Aug. 27).

[15] Tr. at 14-20

[16] *Verizon Opposition to AT&T's Motion to Abate* at 9.

[17] *Verizon Opposition to AT&T's Motion to Abate* at 5.

[18] *See id* at 9.

new contract.[19] Reviewing this order, the Arbitrators find that the reason given for abatement in that case was that the FCC provided no guidance and the Arbitrators determined that until the FCC reached its conclusions it would be prudent to conserve the Commission's and the parties' resources.

In the absence of federal rules, which include the Commission's ability to make impairment findings regarding certain UNEs, the appropriate course of action is to abate any proceeding requiring the state's determination of such matters until federal guidance has been established. AT&T asserted that abatement furthers the FCC's *Interim Rules Order* objectives by maintaining the status quo and allowing parties the opportunity of a speedy transition at the conclusion of the FCC's permanent rules. The Arbitrators agree with AT&T's assertion that the existing "change of law" provisions in parties' interconnection agreements are adequate to accomplish the transition envisioned by the FCC. Therefore, the Arbitrators in this proceeding abate this arbitration pending the FCC's conclusion of final rules.

Verizon, in its August 25 filing, sought to withdraw 121 competitive local exchange carriers and wireless providers from its petition to arbitrate leaving only thirty-one (31) CLECs.[20] The Arbitrators refrain from ruling on dismissing any of the parties to this proceeding prior to the FCC issuing its final rules. The Arbitrators will be in a better position to rule on which parties are affected, and how, once the FCC issues its final rules.

After the FCC has issued its final rules, the Arbitrators will issue notice for a prehearing conference to determine how the parties shall proceed with any matters that are still regarded as unresolved by the parties in this arbitration.

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[19] See Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement Docket No. 28821 Order Abating Track 2 (Sept. 9, 2004).

[20] *See Verizon Southwest's Notice of Withdrawal of Petition for Arbitration as to Certain Parties* (Aug. 25, 2004).

SIGNED AT AUSTIN, TEXAS the 15th day of December, 2004.

Katherine Farrell
ARBITRATOR

Janis Ervin
ARBITRATOR

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