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January 11, 2005 – **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. 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:

Enclosed for filing is Verizon Florida Inc.'s Opposition to Joint Motion to Modify Procedural Schedule in the above matter. Service has been made as indicated on the Certificate of Service. If there are any questions concerning this filing, please contact me at 813-483-1256.

Sincerely,

/s/ Richard A. Chapkis

Richard A. Chapkis

RAC:tas
Enclosures

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of Verizon Florida Inc.'s Opposition to Joint Motion to Modify Procedural Schedule in Docket No. 040156-TP were sent via U.S. mail on January 11, 2005 to the parties on the attached list.

/s/ Richard A. Chapkis

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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 11, 2005

VERIZON FLORIDA INC.'S OPPOSITION TO
JOINT MOTION TO MODIFY PROCEDURAL SCHEDULE

Verizon Florida Inc. ("Verizon") asks the Commission to deny the "Joint Motion to Modify Procedural Schedule" ("Motion") filed by AT&T Communications of the Southern States, LLC and TCG South Florida Inc. ("AT&T") and the Competitive Carrier Group ("CCG")[1] on January 4, 2005. AT&T and CCG seek to substantially delay this proceeding by pushing the January 28 deadline for direct testimony out to 45 days after the FCC issues its Order on permanent unbundling rules, and extending all the other procedural dates in this case by an equivalent period. As Verizon explained in its Petition for Reconsideration of the Order Establishing Procedure ("Petition for Reconsideration"), this proceeding needs to be accelerated, not delayed.

With the 2003 *Triennial Review Order*,[2] the FCC finally began the process of placing meaningful limitations on incumbents' unbundling obligations under section 251(c)(3) of the Telecommunications Act of 1996 ("Act"). Implementation of those

[1] The CCG 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] 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"*), *aff'd in part, rev'd in part and remanded*, *USTA v. FCC*, 359 F.3d 554 (D.C. Cir.) ("*USTA II*"), *cert. denied*, 125 S. Ct. 313, 316, 345 (2004).

limitations is of critical public policy importance, as the FCC and the courts have affirmed repeatedly. Overbroad unbundling obligations have discouraged investment in innovative facilities and hindered meaningful competition. To the extent that any existing interconnection agreements perpetuate such obligations, those agreements must be brought up to date. Enforcement of the straightforward requirements of federal law should have been a relatively simple matter. But the pitched resistance of CLECs, intent on perpetuating unauthorized regulatory arbitrage at the expense of real competition, has instead turned this proceeding into an extended procedural battle.

The Motion is a particularly good example of the baseless and even duplicitous tactics AT&T and other CLECs are willing to adopt in their campaign to avoid complying with binding federal law. As Verizon explains below, the Motion misrepresents Verizon's Petition for Arbitration and its *TRO* Amendment, and contradicts the CLECs' own agreement to forgo testimony on a number of issues they now claim justify a delay in the testimony deadline. But there is no reason to even reach the substance of the Motion, because it is procedurally improper.

The CLECs' Motion to modify the schedule is a late, unauthorized motion for reconsideration. The schedule was established in the Order Establishing Procedure on December 13, 2004. Petitions for reconsideration of that Order were due on December 23, and Verizon's own challenge to the procedural schedule complied with that deadline. AT&T and CCG, however, waited until January 4 to file their Motion asking the Commission to reconsider the schedule. They offer no explanation for their untimely action, and there is none. The FCC Press Release the CLECs claim prompted their

Motion was issued on December 15,[3] over a week before reconsideration requests were due.

All parties, not just Verizon, should be expected to comply with the Commission's procedural rules, including the deadline for reconsideration, which was clearly stated in the Order (at 13). By filing late, AT&T and CCG were able to consider Verizon's request to modify the schedule before drafting their own, thus gaining an unfair advantage over Verizon. The Commission should reject the CLECs' Motion on this basis alone.

If, however, the Commission is inclined to consider the Motion on its merits, there are plenty of other reasons to deny it.

I. The Factual Premise of the Motion Is Wrong.

AT&T and CCG argue that moving forward with this arbitration would be a waste of resources because "[t]he 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." (Motion at 9.)

The CLECs have seriously mischaracterized Verizon's Petition for Arbitration. As Verizon explained in its Petition and at least twice since then in other filings, Verizon's *TRO* Amendment is not based on any particular view of Verizon's unbundling obligations, and does not presume any particular outcome of the FCC's rulemaking, let

[3] Press Release, *FCC Adopts New Rules for Network Unbundling Obligations of Incumbent Local Phone Carriers* (rel. Dec. 15, 2004), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-255344A1.pdf.

alone total elimination of unbundling obligations. As the Petition (and Verizon's Amendment) made clear, "[i]f the FCC decides to re-impose unbundling obligations for any UNE eliminated by the D.C. Circuit, Verizon's amendment will...accommodate that outcome, because it requires Verizon to provide unbundled access to the extent required by the FCC's rules implementing section 251(c)(3) of the Act." (Petition for Arbitration at 6.) In its Reply to Answers to its Petition for Arbitration, Verizon reiterated that:

> Verizon's Amendment does not assume any particular outcome of the FCC's rulemaking, so it is not necessary to await that outcome before moving forward. Verizon's Amendment is simply structured to link its unbundling obligations to federal law, as it may change from time to time. If the FCC ultimately requires continued unbundling of elements now subject to transitional unbundling obligations, then Verizon will keep providing them. If the FCC declines to re-impose the rules the D.C. Circuit vacated, Verizon's Amendment allows it to discontinue providing the relevant UNEs after the designated notice period. Either way, Verizon's Amendment will permit a smooth and prompt transition to the FCC's final rules, just as the FCC intended.

Reply to Answers to Verizon's Petition for Arbitration at 6.

Verizon made this point about the flexibility of its Amendment again after the FCC adopted its final rules, recognizing that "the FCC's permanent unbundling rules appear to impose substantial obligations on incumbents to provide unbundled access to high capacity lops and transport," but noting that if those obligations were later narrowed, Verizon's Amendment would implement such changes in an orderly way. (Petition for Reconsideration at 3-4.)

Given the clarity and consistency of Verizon's explanations of the plain language of Verizon's Amendment, it is difficult to conclude that the CLECs' mischaracterization of Verizon's Petition was anything but deliberate. But whether or not they meant to

mislead the Commission, the factual premise offered to support the Motion does not exist, so there is no basis for granting the Motion. Verizon's Amendment does *not* presume elimination of all unbundling obligations—or any other outcome of the FCC's rulemaking—so it would not be a waste of time to proceed now with arbitration of the Amendment.

Indeed, as Verizon explained in its Petition for Reconsideration, an expedited schedule is the only approach consistent with the FCC's objective of ensuring a "speedy transition" to the new unbundling rules. The CLECs are correct that Verizon wanted the Commission to conclude this proceeding before the FCC issued its final unbundling rules (Motion at 4), because that is just what the FCC intended. The FCC understood that, without provisions in place to govern the implementation of changes in unbundling regulations, a quick and orderly transition to new rules would be difficult to achieve.

The FCC *certainly* did not intend for parties to wait more than a year to amend their contracts to reflect binding federal law. On the contrary, it found that even a months-long delay in implementing the *TRO*'s rulings "will have an adverse impact on investment and sustainable competition in the telecommunications industry." *TRO*, ¶¶ 703, 705. Yet over 15 months after the TRO took effect, the CLECs have refused to implement even the numerous *TRO* rulings that are binding and legally effective today. These preemptive federal rulings, which were either upheld by the D.C. Circuit or not challenged in the first place, include, among others, the elimination of unbundling requirements for OCn loops, OCn transport, enterprise switching, the feeder portion of the loop on a stand-alone basis, signaling networks and virtually all call-related databases; and the determination that the broadband capabilities of hybrid copper-fiber

loops and fiber-to-the-premises facilities are not subject to unbundling. The FCC's permanent unbundling rules will not affect these rulings at all, and neither the Motion nor anything else the CLECs have filed offers any excuse for failing to reflect them in their contracts.

With regard to the UNEs affected by the *USTA II* remand, the FCC's December 15th decision declines to require any unbundling of mass-market switching and dark fiber loops, and eliminates unbundling for high-capacity loops and transport under defined circumstances. Verizon's proposed Amendment would remove any doubt that the FCC's decisions can be implemented under the interconnection agreements in this proceeding without any further delay. In fact, the most important issues presented in this proceeding do not relate to the particular rules governing unbundling, but instead concern the proper *mechanism* for incorporating new *limitations* on Verizon's unbundling obligations into existing agreements. By tying Verizon's obligations under its agreements to the obligations imposed under federal law, Verizon's Amendment provides for automatic implementation of any subsequent reductions in unbundling obligations without the wasteful and prolonged procedure that is underway here. When the FCC eliminates an unbundling obligation, that decision can and should be implemented through the parties' interconnection agreements as well, without the need for any amendment to the agreement's language (thereby precluding the need for proceedings such as this in the future).

In most instances, Verizon's contracts already contain specific terms allowing Verizon to cease providing de-listed UNEs without an amendment. Verizon seeks to include comparable language in the contracts of the 18 CLECs in this proceeding.

Contrary to the CLECs' claims, the propriety of such language is not affected in any way by the outcome of any particular FCC proceeding, so the Motion offers no reason to further delay this arbitration.[4]

In no event should the Commission allow an additional 30-day negotiation period (or any negotiation period at all) after the FCC releases its order, as the CLECs suggest. *See* Motion at 2. The CLECs' requests for negotiations are just another stall tactic. Verizon and the CLECs have had well over a year to negotiate provisions to implement changes in unbundling law, including, as noted, changes that are *already* binding and effective. Any further negotiations would be pointless, because it is abundantly clear that most CLECs do not intend to voluntarily implement any regulatory changes that restrict unbundled access to the ILECs' networks. Instead, as their amendments show, they will continue to advance frivolous arguments that states may re-impose unbundling obligations eliminated by the FCC or federal courts. Unless the CLECs commit to dropping this position, it is certain that the parties will remain just as polarized after the FCC issues its Order as they have been for the past year. Commission compulsion, not another negotiating period, is the only way to break this deadlock.

[4] The CLECs devote a page of their 10-page Motion to a Texas Arbitrators' Order abating Verizon's arbitration before the FCC adopted its new unbundling rules. (Motion at 8.) But they fail to bring to the Commission's attention a later Texas decision in SBC's analogous proceeding to implement changes in unbundling obligations in the wake of the *TRO*. The Commission had abated SBC's case before it abated Verizon's case. But after the FCC issued its December 15 Press Release summarizing its permanent unbundling rules, the Texas Commission authorized the Arbitrators in SBC's case to "unabate" that arbitration, and the Arbitrators did so. *Arbitration of Non-Costing Issues for Successor Interconnection Agreements*, Order No. 31 Unabating Track 2 (Tex. P.U.C. Dec. 17, 2004). The action in the SBC case was prompted by the FCC's press release, thus showing that the Commission did *not* believe it was necessary to wait for release of the actual order to lift the abeyance of the arbitration. There is no reason to expect that Verizon will be treated differently in its arbitration.

II. The Commission Should Eliminate, Rather than Extend, the Date for Filing Testimony.

AT&T and CCG argue that at least 15 of the 26 issues identified for resolution in this arbitration will be affected by the FCC's permanent rules, so they cannot be expected to file testimony on these issues before seeing the FCC's Order. As Verizon discussed above, there is no need to wait for the FCC's Order to consider Verizon's Amendment, because it will accommodate any outcome. But aside from that fact, the CLECs already agreed *not* to file testimony on some of the issues they identified as justifying an extension in the testimony date.

As the Order Establishing Procedure recognizes, the CLECs have taken the position that only "*some i*ssues will likely require testimony." (Order at 1 [emphasis added].) In this regard, Staff asked all active parties to specify which issues could be resolved on the basis of briefs alone, without prefiled testimony or a hearing. CCG agreed that over half of the issues (fourteen) would not require testimony (Issues 1-5, 9-10, 14-16, 19-20, 23, and 25).[5] AT&T identified nine issues that would not require testimony (Issues 1, 3-6, 10, 19-20, 23).[6] Now, however, both CCG and AT&T claim that they need to delay the testimony on issues for which one or both have agreed that *no testimony is necessary*. In addition to undermining their own arguments about the need to extend the procedural schedule, the CLECs' inconsistent statements demonstrate their lack of conviction as to any principle other than avoiding implementation of federal law.

[5] E-mail from CCG counsel, Brett Freedson (Kelley Drye & Warren), to Staff and the parties, Dec. 1, 2004 ("The following issues should be addressed by briefing only, and should not be subject to pre-filed or live testimony: 1, 2, 3, 4, 5, 9, 10, 14 (a)-(e) and (g)-(j), 15, 16, 19, 20, 23, 25.").

[6] E-mail from AT&T counsel, Tracy Hatch, to Staff and the parties, Dec. 1, 2004 ("Those issues that are legal only and can be briefed: 1, 3, 4, 5, 6, 10, 19, 20, 23.").

In fact, as Verizon pointed out in its Petition for Reconsideration of the procedural order, AT&T and the CLEC group represented by Kelley Drye & Warren elsewhere agreed that *no* testimony was necessary on *any* issues in the arbitration.[7] And just last week, the Massachusetts Department of Telecommunications & Energy set a procedural schedule that does not provide for testimony or a hearing on non-rate issues.[8]

In its Petition for Reconsideration, Verizon suggested that, if the Commission is reluctant to do away with the prefiled testimony and hearing dates at this point, then one option would be to place issues concerning Verizon's Amendment 2[9] on a separate, hearing track and keep issues relating to Verizon's Amendment 1 on a briefing-only track, with accelerated briefing and decision dates for the Amendment 1 issues. Five of the 12 issues remaining after disregarding those that either or both AT&T and the CCG identified as not requiring testimony are Amendment 2 issues: Issues 12 (commingling and combinations); 13 (conversion of wholesale services to UNEs); 17(e) (batch hot cuts)[10]; 21 (EELs); and 22 (routine network modifications). These issues were not part of Verizon's Petition for Arbitration, so Verizon has no objection to any Commission action extending the dates for litigation of these issues.

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[7] *See* Petition for Reconsideration, at 4-5, noting agreement of all parties in Verizon's consolidated *TRO* in Washington, including AT&T and the Kelley Drye CLEC group, that no hearing or prefiled testimony is necessary on any issues.

[8] Under the Massachusetts schedule, initial position statements/briefs are due on March 9, 2005.

[9] Amendment 2 addresses certain requirements established by the *TRO*, such as those relating to commingling and routine network modifications.

[10] Verizon explained in its Petition for Reconsideration that Issue 17(e), concerning hot cuts, does not belong in this proceeding at all, so Verizon has asked the Prehearing Officer to remove it from the issues list. *See* Petition for Reconsideration, at 7-10. The Commission has not considered, let alone denied, Verizon's challenge to inclusion of Issue 17(e) in this case, as the CLECs have falsely stated. *See* Joint Response of MCI, AT&T, and CCG to Verizon's Petition for Reconsideration at 4.

There is no reason why the remaining four issues the CLECs allege will be affected by the FCC's forthcoming order cannot be briefed without testimony, and without seeing the FCC's Order. These issues concern Verizon's right to provide notice of discontinuation of UNEs before the effective date of removal of unbundling requirements (Issue 7); Verizon's right to charge for discontinuation of UNE arrangements and reconnection of service under alternative arrangements (Issue 8); Verizon's right to implement rate increases and new charges established in the final FCC rules or elsewhere (Issue 11); and whether the Amendment should include a process to address the potential effect on CLECs' customers' services when a UNE is discontinued (Issue 24). These issues address the appropriate mechanism for implementing changes in federal law—not just changes associated with the FCC's permanent unbundling order—so they do not require review of that or any other decision. In fact, the issues, by their terms, are not limited to *just* the UNEs discontinued under the FCC's rules or *just* implementation of charges that may be established there, but are intended to address potential future changes that cannot be known even after the FCC issues its final rules.

As Verizon discussed in its Petition for Reconsideration, before allowing any testimony, let alone granting an extension for testimony, the CLECs should be compelled to explain why they believe *fact* testimony is required to present their positions on particular issues—particularly in light of their agreement to forgo testimony and/or hearings elsewhere. *See* Petition for Reconsideration, at 5.

III. Conclusion

The Commission should reject the CLECs' Motion as an untimely and unauthorized petition for reconsideration. If the Commission instead considers the Motion on its merits, it should be denied. It is time to stop wasting resources on the CLECs' baseless procedural challenges, which serve only their objective of avoiding implementation of federal law. The Commission should accelerate the schedule for this arbitration, not extend it.

Respectfully submitted,

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January 11, 2005