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March 7, 2005

Division of the Commission Clerk and Administrative Services  
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Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

2005 MAR -8 PM 2:12  
DIVISION OF  
COMPETITIVE SERVICES

050172-TP

**Re: Emergency Petition of Ganoco, Inc. d/b/a American Dial Tone, Inc.  
for a Commission Order Directing Verizon Florida, Inc. to Continue  
to Accept New Unbundled Network Element Orders**

Dear Sir or Madam:

On behalf of our client, Ganoco, Inc. d/b/a American Dial Tone, Inc., we submit an original and fifteen (15) copies of the enclosed "Emergency Petition of American Dial Tone, Inc."

Please date-stamp the "Receipt" copy of this filing and return it in the enclosed self-addressed, stamped envelope. Please contact the undersigned if you have any questions or concerns.

Sincerely,

Glenn Richards  
Jarrett Taubman  
Counsel for Ganoco, Inc. d/b/a  
American Dial Tone, Inc.

COMMISSION  
CLERK

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Washington, DC  
Northern Virginia  
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**BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION**

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In the Matter of )

Emergency Petition of )  
Ganoco Inc. d/b/a American Dial Tone, Inc. )  
For a Commission Order Directing Verizon )  
Florida, Inc. to Continue to Accept )  
New Unbundled Network Element Orders )

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Case No. \_\_\_\_\_

**EMERGENCY PETITION OF AMERICAN DIAL TONE, INC.**

Ganoco Inc. d/b/a American Dial Tone, Inc. (“American Dial Tone”), by and through its attorneys, hereby files the instant Emergency Petition for a Commission Order directing Verizon Florida, Inc. (“Verizon”) to continue to accept new unbundled network element orders until American Dial Tone and Verizon have completed the negotiations required by the “change of law” provisions of their interconnection agreement (“Agreement”)<sup>1</sup> in order to address the FCC’s recent *Triennial Review Remand Order* (“TRRO”).<sup>2</sup>

On February 10, 2005, Verizon informed American Dial Tone by letter of Verizon’s intent to discontinue its provision of certain unbundled network elements (“UNEs”) pursuant to Verizon’s unilateral interpretation of the TRRO. American Dial Tone understands Verizon’s letter to reflect the mistaken view that Verizon can unilaterally discontinue its provision of these UNEs, raise rates for existing services, and refuse to accept orders for new UNEs without first

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<sup>1</sup> The American Dial Tone-Verizon Interconnection Agreement, dated March 26, 1999, adopts the substantive terms of the AT&T-Verizon Interconnection Agreement dated June 5, 1997. Hereinafter, references to specific sections in the Agreement refer to the sections as enumerated in the original AT&T-Verizon agreement.

<sup>2</sup> *Triennial Review Remand Order, Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, FCC 04-290 (Feb. 4, 2005).

concluding good faith negotiations with American Dial Tone. In fact, the Agreement bars Verizon from taking any of these actions.

The existing Agreement between American Dial Tone and Verizon requires Verizon to engage in good faith negotiations with American Dial Tone before implementing any change of law that Verizon believes may have occurred. Section 3.3 provides that:<sup>3</sup>

In the event ... a final order [in the *TRO* proceeding] allows but does not require discontinuance [of a UNE], [Verizon] shall make a proposal for [American Dial Tone's] approval, and if the Parties are unable to agree, either Party may submit the matter to the Dispute resolution procedures described in Attachment 1. [Verizon] will not discontinue any Local Service or Combination of Local Services without providing 45 days advance written notice to [American Dial Tone].

Thus, to the extent that Verizon believes that the Applicable Law governing the Agreement has changed in a material way as a result of the *TRRO*, Section 3.3 of the Agreement requires Verizon to engage in good faith negotiations with American Dial Tone on a contractual amendment that reflects this purported change of law.

This duty is confirmed by Amendment No. 1 to the Agreement, which provides that if the FCC determines that Verizon is no longer required to provide any combination of UNEs to American Dial Tone, and American Dial Tone decides to purchase alternate services to replace that combination, Verizon must “reasonably cooperate with [American Dial Tone] to coordinate the termination of such [c]ombination and the installation of such services to minimize the interruption of services to Customers of [American Dial Tone].”<sup>4</sup> In other words, if Verizon believes the *TRRO* has eliminated its obligation to provide certain UNEs, Verizon has an

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<sup>3</sup> Agreement at § 3.3.

<sup>4</sup> See Combinations Amendment No. 1 to the Interconnection Agreement between Verizon Florida, Inc. and Ganoco, Inc. at § 1.5 (July 10, 2002).

affirmative obligation to engage in good faith negotiations with American Dial Tone in order to develop a reasonable and cooperative framework for the transition from the affected UNEs to alternative arrangements. Moreover, until such a framework is in place, Verizon must necessarily continue to provide the affected UNEs under existing contractual arrangements, so as not to interfere with American Dial Tone's ability to provide service to its customers. Thus, if Verizon were to unilaterally discontinue its provision of UNEs as specified in its letter to American Dial Tone, without engaging in the required negotiations, Verizon would be in breach of the Agreement.

Critically, the *TRRO* does not purport to abrogate the Agreement's "change of law" provisions. Rather, the *TRRO* confirms that the FCC expects that "incumbent LECs and competing carriers will implement the [FCC's] findings as directed by Section 252 of the Act" by "implement[ing] changes to their interconnection agreements consistent with [the FCC's] conclusions in this Order."<sup>5</sup> The FCC further establishes that parties "must negotiate in good faith regarding any rates, terms and conditions necessary to implement [the FCC's] rule changes," and threatens that "the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action."<sup>6</sup> The FCC also clearly states that the *TRRO* transition mechanisms are "simply a default process" that could be superceded by prior or subsequent contractual obligations.<sup>7</sup>

Thus, the *TRRO* does not permit Verizon to unilaterally circumvent the change of law process, but rather requires Verizon to engage in good faith negotiations with American Dial

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<sup>5</sup> *TRRO* at ¶ 233.

<sup>6</sup> *Id.*

<sup>7</sup> *TRRO* at ¶ 228.

Tone pursuant to the “change of law” provisions of the Agreement. Any contrary reading would not only conflict with the plain language of the *TRRO*, but would also render it null and void. Under the *Sierra-Mobile* doctrine, while federal agencies like the FCC may revise the terms of a private contract between two carriers concerning communications services, they may do so only when the contract's terms “adversely affect the public interest” to a degree that is “much higher than the threshold for demonstrating unreasonable conduct under sections 201(b) and 202(a) of the Act.”<sup>8</sup> Agencies must make a “particularized finding that the public interest requires modification.”<sup>9</sup> The threshold for this finding is “more exacting” than the ordinary public interest standard, and “is sufficiently more particularized and requires analysis of the manner in which the contract harms the public interest and of the extent to which abrogation or reformation mitigates the contract’s deleterious effect.”<sup>10</sup> The *TRRO* contains no such particularized showing, and as such cannot be interpreted to supercede the existing “change of law” provisions in the Agreement.<sup>11</sup>

Accordingly, American Dial Tone respectfully requests that the Commission (1) order Verizon to comply with the “change of law” provisions of the Agreement in order to implement the *TRRO*; and (2) order Verizon to continue to accept and process American Dial Tone’s orders

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<sup>8</sup> See, e.g., *IDB Mobile Communications, Inc. v. COMSAT Corporation*, 16 FCC Rcd 11474 at ¶¶ 14-16 (2001).

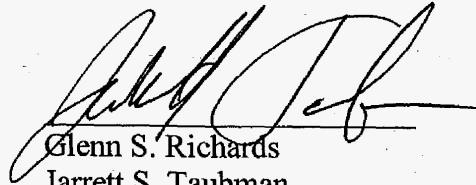
<sup>9</sup> See *Atlantic City Electric Company v. FERC*, 295 F.3d 1, 40-41 (2002).

<sup>10</sup> *Texaco Inc. v. FERC*, 148 F.3d 1091 (1998).

<sup>11</sup> This reasoning has been adopted in at least one other state to block an ILEC’s unilateral decision to discontinue its provision of these UNEs, raise rates for existing services, and refuse to accept orders for new UNEs without first concluding good faith negotiations with CLECs. See Georgia Public Service Commission, *Generic Proceeding to Examine Issues Related to BellSouth’s Obligation to Provide Unbundled Network Elements: Consideration of Staff’s Recommendation regarding MCI’s Motion for Emergency Relief Concerning UNE-P Orders*, Docket No. 19341-U (March 1, 2005).

for UNEs under the rates, terms, and conditions of the Agreement, until the parties complete the process envisioned by the “change of law” provisions of the Agreement.

Respectfully submitted,



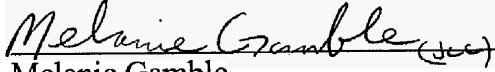
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Counsel for Ganoco Inc. d/b/a  
American Dial Tone, Inc.

**CERTIFICATE OF SERVICE**

I, Melanie Gamble, a secretary in the law firm of Shaw Pittman LLP, do hereby certify that a copy of the foregoing "Emergency Petition of American Dial Tone, Inc." was sent via U.S. mail, first-class or by hand-delivery, on this 7<sup>th</sup> day of March 2005, to the following:

Alan Ciamporcero  
President  
Verizon Florida, Inc.  
106 East College Avenue  
Tallahassee FL 32301-7748

  
Melanie Gamble