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June 5, 2006

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VIA HAND DELIVERY

Blanca S. Bayó, Director
Division of Commission Clerk and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 060365-TL - XO COMMUNICATIONS SERVICES, INC.'S COMPLAINT AND REQUEST FOR RELIEF REGARDING VERIZON'S DETERMINATION OF NON-IMPAIRED WIRE CENTERS UNDER THE TRRO

Dear Ms. Bayó:

CMP _____
COM _____
CTR _____
ECR _____
GCL _____
OPC _____
RCA _____
SCR _____
SGA _____
SEC 1
OTH Kimp.

Enclosed for filing on behalf of XO Communications Services, Inc. (XO) are the original and fifteen copies of XO's Response in opposition to Verizon Florida, Inc.'s Motion to Dismiss XO's Complaint and Request for Relief Regarding Verizon's Determination of Non-Impaired Wire Centers Under the TRRO.

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Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the copy to me. Thank you for your assistance with this filing.

Sincerely,

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Enclosures

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of:) Complaint of XO Communications Services,) Inc.'s Complaint and Request for) Relief regarding Verizon Florida, Inc.'s) Determination of Non-Impaired Wire) Centers under the Triennial Review Remand) Order)	Docket No. 060365-TL Filed: June 5, 2006

XO COMMUNICATIONS SERVICES, INC.'S RESPONSE TO VERIZON FLORIDA, INC.'S MOTION TO DISMISS XO'S COMPLAINT REGARDING VERIZON'S DETERMINATION OF NON-IMPAIRED WIRE CENTERS

Pursuant to Rule 28-106.204(1), Florida Administrative Code, XO Communications Services, Inc. (XO) hereby files this response to Verizon Florida, Inc.'s (Verizon) Motion to Dismiss. XO states that Verizon's Motion is baseless, does not reach the high standard for dismissal, and should be denied. As grounds therefor, XO states:

INTRODUCTION

1. Verizon has moved to dismiss XO's Complaint, claiming that: 1. XO has failed to meet the requirements for initiating a complaint; 2. the issues raised by XO have already been addressed by the Commission; and 3. the Complaint is improper because the Parties are bound by the Alternative Dispute Resolution (ADR) provision in their Interconnection Agreement. Verizon's arguments, in addition to being incorrect, clearly fail to meet the standard for dismissal.

2. In administrative proceedings, a Motion to Dismiss tests the sufficiency of the facts alleged in the complaint or petition. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). In determining the sufficiency of the complaint, the Commission must confine its consideration to the complaint itself, and the grounds asserted in the motion to

dismiss. See Flye v. Jeffords, 106 So. 2d 229 (Fla. 1st DCA 1958). The Commission must also construe all material facts and allegations in the light most favorable to XO in determining whether the allegations in the complaint are sufficient. See Matthews v. Matthews, 122 So. 2d 571 (Fla. 2nd DCA 1960).

DISCUSSION

3. Falling far short of the required standard, Verizon asks the Commission to dismiss XO's complaint simply because the procedures for wire center designations have been discussed and defined by the FCC and the Florida Public Service Commission (Commission) in a prior case. Verizon completely ignores the fact that XO is not questioning the past rulings of the Florida Commission or the FCC; rather, XO is disputing Verizon's current mode of implementing those rulings. Verizon disregards XO's contention that Verizon has violated Order No. PSC-05-1200-FOF-TP, which the Commission clearly has continuing jurisdiction to enforce. Rather, Verizon chooses to quibble about the choice of words used in the Complaint to allege a violation.[1]

4. To be clear, XO brings to the Commission's attention: 1. Verizon's failure to provide the existing, embedded base of high capacity facilities as unbundled network elements (UNEs) in wire centers where XO has self-certified impairment; 2. Verizon's failure to provide sufficient information underlying Verizon's wire center designations, including the names of carriers Verizon included in its count of fiber-based collocators, in spite of the fact that XO has entered into a non-disclosure agreement with Verizon; 3. Verizon's failure to bring disputes regarding XO's self-certifications to the Commission for resolution; and 4. Verizon's failure to properly apply the definition of a "fiber-based

[1] For instance, the Complaint clearly states at page 2 that Verizon's actions are "contrary" to Order No. PSC-05-1200-FOF-TP, and that Verizon has not properly implemented ¶ 234, which the Commission acknowledged and incorporated by reference in Order No. PSC-05-1200-FOF-TP.

collocator," resulting in the inaccurate calculation of "fiber-based collocators" in wire centers. XO contends that each of these failures rises to the level of a violation of Order No. PSC-05-1200-FOF-TP. Thus, contrary to Verizon's assertions, XO has specifically named a ". . .rule, order, or statute that has been violated" and "[t]he actions that constitute the violation" as required by Rule 25-22.036(3)(b)(1) and (2), Florida Administrative Code.

5. As set forth in the Complaint, XO believes that Verizon has violated Order No. PSC-05-1200-FOF-TP. The violations go to those portions of the Commission's Order that specifically incorporate FCC rules and provisions implementing the TRO and TRRO (particularly ¶ 234 of the TRRO and the interpretation of the definition of a fiber-based collocator), as well as those that contain the Commission's own findings interpreting the law.

6. Verizon misconstrues XO's complaint as a request for a generic review of Verizon's wire center designations. That is simply not the case. In its Order, the Commission stated that it did not need to "conduct a proceeding to verify wire center designations until and unless a dispute is brought" before it.[2] XO is doing exactly what the Commission stated is proper.

7. Furthermore, (and notwithstanding XO's contention that Verizon is not in compliance with the self-certification dispute provisions), Verizon's reliance upon Section 3.9.2.1 of the TRO Amendment is erroneous. Verizon relies on this provision for the argument that *only* Verizon can bring a dispute about a CLEC's self-certification in a particular wire center for resolution. However, the cited provision pertains to disputes over CLEC self-certification in individual wire centers, and does not limit a CLEC's ability to bring to the

[2] Order No. PSC-05-1200-FOF-TP at p. 37.

Commission's attention situations, such as this, in which Verizon has failed to comply with the Commission's underlying Order.[3]

8. Furthermore, XO is asking that Verizon provide the necessary confidential information underlying its wire center designations, which the Commission was led to believe Verizon was going to provide, and which was the stated reason that the Commission declined to specifically order Verizon to make its underlying wire center data available to CLECs. See Order No. PSC-05-1200-FOF-TP at p. 37. To the extent that the underlying data demonstrates that Verizon has improperly designated any wire centers as being impaired, then Verizon's wire center list must be revised. Verizon's misconstruction of XO's complaint cannot serve as an adequate basis for dismissal.

9. As for Verizon's contention that the Complaint should be dismissed because the Commission has already addressed the question of the applicability of the self-certification process set forth in ¶ 234 of the TRRO to the embedded base of high capacity facilities, this contention is entirely misleading and cannot serve as the basis for dismissal. XO agrees that the Commission has, in fact, relied upon and incorporated the procedures set forth in ¶ 234 into its Order regarding CLEC self-certification of non-impairment in wire centers and the dispute process set forth therein. However, the Commission's statements in Order No. PSC-05-1200-FOF-TP, contradict Verizon's conclusions as to the Commission's decision. In fact, the Commission stated that, ". . .[I]f a CLEC believes that, after a 'reasonably diligent inquiry,' it is entitled to unbundled dedicated transport or dark fiber transport between particular wire centers, the CLEC may

[3] Contrary to Verizon's assertions at page 16 of the Motion to Dismiss, XO believes Verizon has very little incentive to seek resolution of self-certification disputes. Because XO has been unable to obtain sufficient information to allow it to determine the bases for Verizon's non-impaired wire center designations, XO has ceased ordering high capacity UNEs in wire centers where Verizon disputes XO's self-certification of impairment. Thus, Verizon achieves its desired result without seeking formal resolution of the issue.

access the UNE until any dispute is resolved consistent with the directives of the TRRO." Order No. PSC-05-1200-FOF-TP at pgs. 36-37. The Commission went on to note that at ¶ 399 of the TRRO, the FCC recognized that " . . .some dedicated transport facilities not currently subject to the non-impairment thresholds established in the TRRO may meet those thresholds in the future. . . ." Notably, the reference is to "facilities," not wire centers, which demonstrates that the FCC itself recognized the applicability of the "impairment/non-impairment" test to the embedded base of provisioned facilities. Consequently, the self-certification process must also apply.

10. In addition, as referenced in the Complaint, the Commission stated at page 29 of the same Order that, ". . .Verizon is obligated **to continue to provide** such loops until the non-impairment requirements of the TRRO are met." [emphasis added]. The highlighted language can only be construed to include the embedded base by virtue of the phrase "to continue," which would include previously provisioned facilities, as well as those provisioned on a going-forward basis. Furthermore, the non-impairment requirements of the TRRO are not "met" in a wire center where a CLEC has self-certified until any dispute regarding that self-certification is resolved. Thus, whether the facility at issue is a new order or part of the embedded base, Verizon must maintain the status quo; i.e., Verizon must continue to provide it as a UNE in any wire center in which XO has self-certified. Again, Verizon's assertions that the Commission has already considered and rejected XO's arguments on this point are negated by the language in the Order itself and certainly do not provide a sufficient basis for dismissal.

11. Verizon also makes reference to various phrases in Section 3.6.1.1 of the Parties' TRO Amendment that it claims indicate that self-certification only applies to new orders.

(Motion at p. 9) However, Verizon's self-serving reading of the cited language ignores the fact that the language was intended to be applicable to all situations wherein a CLEC decides to self-certify impairment, both for new orders and the embedded base. Nothing in Section 3.6.1.1 of the TRO Amendment indicates otherwise. In fact, ¶ 234 of the TRRO, as implemented in Section 3.6.1.1 of the Amendment, requires that a CLEC must undertake a reasonably diligent inquiry "before" self-certifying in a wire center; in other words, whether it is requesting unbundled access for the first time, or continued unbundled access for the embedded base, the same language would be applicable.

12. Likewise, references to Verizon's ordering systems and processing are also construed much too narrowly by Verizon. The cited Amendment provision was intended to address the self-certification process for all situations in which it may be employed; thus, the references to ordering and provisioning are clearly necessary to the extent this provision also is applicable to new orders. Furthermore, to the extent that Verizon makes any modifications to its ordering data base or other operations support systems to reflect its own determinations that a wire center is no longer impaired, modifications may need to be made in those systems with regard to embedded accounts when a CLEC self-certifies impairment in that wire center.

13. Furthermore, to the best of XO's knowledge, Verizon is the only ILEC taking this "novel," and clearly incorrect, position with regard to the use of the self-certification process for the embedded base of high capacity facilities.

14. As it stands, XO has followed the required self-certification process for both its embedded base and for new orders of high capacity facilities, and Verizon has specifically rejected XO's attempts to use the self-certification process for the embedded

base. Verizon attempts to characterize this as just a dispute over the terms of the TRO Amendment itself, but that is simply not the case. XO is not just asking the Commission to resolve a dispute over the interpretation of Section 3.6.1.1 of the TRO Amendment; XO believes that provision is clear. Rather, XO is asking the Commission to enforce its underlying Order, Order No. PSC-05-1200-FOF-TP, which XO contends does not allow Verizon to limit the application of Section 3.6.1.1 to new orders only.[4]

15. Verizon's contention that XO's Complaint cannot be sustained on the basis of a dispute regarding Verizon's application of the definition of "fiber-based collocator," as set forth in Section 4.7.17 of the TRO Amendment is also insufficient to serve as the basis for dismissal. First, this contention is not, in fact, the sole basis for the complaint as set forth herein. Second, as with the question of the applicability of the self-certification provision, this does not merely entail Commission interpretation and enforcement of the provision in question. XO does not dispute the cited definition. Rather, XO asserts that Verizon has not implemented the specified provision as clearly contemplated by the Commission in Order No. PSC-05-1200-FOF-TP. As set forth at footnote 12 on page 36 of Order No. PSC-05-1200-FOF-TP, the Commission references MCI's support of the use of the "**two end-point fiber-based collocation test.**" Based upon the context of the

[4] XO acknowledges that there is very little direct discussion of this issue in the Commission's Order. Thus, XO suggests that, to the extent that there was no readily apparent dispute regarding this issue at the time of the hearing in Docket No. 040156-TL, and arguably, no discussion of the applicability of the self-certification process to the embedded base of high capacity facilities in the proceeding in Docket No. 040156-TP, XO emphasizes that it is possible the Commission may determine that it simply did not address the applicability of the self-certification process to the embedded base at all. If such is the case, XO submits that it is well within the Commission's authority to revisit and clarify or modify its decision based upon the newly discovered fact that Verizon will not allow CLECs to self-certify impairment for the embedded base of high capacity facilities, which is a fact that was not brought to light until CLECs actually began employing the self-certification process. See McCaw Communications of Florida, Inc. v. Susan F. Clark, 679 So. 2d 1177 (Fla. 1996)(upholding FPSC decision to revisit a prior decision based on changed circumstances). Furthermore, Section 4.5 of the Parties' TRO Amendment reserves the Parties' ability to seek modification of FCC or Commission orders that may affect either Parties' rights. In this instance, to the extent new information is available, modification of the Commission's Order is appropriate.

discussion, it is clear that the Commission intended and understood that this was what "fiber-based" collocation encompassed, which is not, XO's Complaint alleges, the reading that Verizon has been in applying. As such, construing the facts and allegations in XO's favor, as required, XO has stated a sufficient cause of action to survive Verizon's Motion to Dismiss.[5]

16. Verizon's contention that Section 3.6.1.2 of the Agreement allows Verizon to mask the identity of fiber-based collocators is also insufficient to serve as the basis for dismissal. Verizon ignores the fact that Section 3.6.1.2 assumes that Verizon is properly applying the definition of fiber-based collocator as the Commission clearly contemplated in its Order. Thus, the dispute encompasses more than just a definition in the agreement, but a more fundamental determination of whether the Commission's findings and decisions as set forth in its Order have been properly effectuated.

17. With regard to the ADR provision, Verizon's reference to Section 14.1 of the Parties' Interconnection Agreement is not appropriate in the context of a Motion to Dismiss, nor is it sufficient to meet the standard for a Motion to Dismiss. Construing the facts in XO's favor as required by law, Section 14.1 does not demonstrate that XO has failed to state a cause of action upon which relief may be requested. By its own terms, Section 14.1 does not divest the Commission of jurisdiction over every dispute between XO and Verizon. In addition, the reference to Section 14.1 requires the interpretation of a provision in a document that is beyond the "four corners" of the Complaint. See Flye v. Jeffords, 106

[5] Similar to the situation presented with regard to the applicability of the self-certification process to the embedded base of facilities, XO was not aware of Verizon's interpretation of the definition of "fiber-based collocator" until *after* the Commission had approved the definition in Docket No. 040156-TL; thus, XO was unable to raise the question of interpretation at that time. Furthermore, to the extent the Commission may decide that it did not specifically address this aspect of the definition, it is also well within the Commission's authority to revisit, modify, or clarify its decision on this point. See McCaw Communications of Florida, Inc. v. Clark, supra, footnote 4.

So. 2d 229 (Fla. st DCA 1958). Verizon's reliance upon this provision is more properly an affirmative defense, the resolution of which cannot be accomplished in proceedings to address a Motion to Dismiss.[6]

18. Furthermore, Verizon ignores the fact that this ADR provision does not prevent either party from bringing issues before the Commission when appropriate, which is precisely the case at hand. Section 14.1 expressly reserves to the Commission the authority to address matters involving public policy, or the interpretation of, or compliance with, state law. The matters about which XO complains are not merely matters pertaining to the interpretation of the Parties' Interconnection Agreement or the Triennial Review Order (TRO)[7] Amendment approved in Docket No. 040156-TL. Instead, XO's Complaint relates directly to the parties' fundamental understanding, interpretation, application, and implementation of the Commission's decisions regarding the TRRO.[8]

19. It is XO's contention that Verizon's interpretation of the Commission's ruling regarding ¶ 234 and the definition of "fiber-based collocator," its failure to provide sufficient information to XO that would alleviate concerns regarding its counting of "fiber-based

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[6] See Goodman v. Habif, 424 So. 2d 171 (Fla. 3rd DCA 1983), stating:

> On a motion to dismiss, the trial court's function is to determine whether the complaint states a cause of action. Hammonds v. Buckeye Cellulose Corp., 285 So.2d 7 (Fla. 1973). Unless affirmative defenses appear on the face of the complaint, they may not be considered. Vaswani v. Ganobsek, 402 So.2d 1350 (Fla. 4th DCA 1981). Estoppel is an affirmative defense which must be pleaded and proved before relief can be granted. Phoenix Insurance Co. v. McQueen, 286 So.2d 570 (Fla. 1st DCA 1973).

[7] Order No. FCC 03-36, rel'd August 21, 2003, CC Docket Nos. 01-338, 96-98, and 98-147, *In Re: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* and *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking (Triennial Review Order or TRO).

[8] "Private regulated parties cannot agree to waive the subject matter jurisdiction of the agency charged with the statutory responsibility to insure that parties implement agreements as approved by and filed with that agency." A/S Ivarans Rederi v. United States, 895 F.2d 1441, 1445 (D.C. Cir. 1990); accord Duke Power Co. v. F.E.R.C., 864 F.2d 823, 829 (D.C. Cir. 1989)(". . .the Commission's acceptance for filing of an agreement that contains an arbitration clause does not legally disable the Commission from resolving disputes at the core of its enforcement mission").

collocators," and its failure to elevate disputes regarding CLEC self-certification to the Commission for resolution are all contrary to (and thus, in violation of) the Commission's decisions in Order No. PSC-05-1200-FOF-TP. XO is not disputing the Florida Commission's underlying decisions in that Order, except to the extent that those decisions were based upon information or assumptions that have since changed or proven unreliable in the actual implementation phase, nor is XO merely disputing the terms of the parties' interconnection agreement, including the ADR provision. Instead, XO contends that the Commission relied upon certain information and made specific statements in Order Nos. PSC-05-1200-FOF-TP and PSC-06-0078-FOF-TP that clearly demonstrate how the Commission intended its findings to be implemented. XO contends that either the facts underlying some of those assumptions and decisions have changed, or Verizon is refusing to fully implement the TRO Amendment provisions as the Commission clearly and expressly intended in its Orders.

20. For instance, the Commission clearly understood and intended that Verizon would bring wire center disputes to the Commission for resolution, but Verizon has failed to do so.[9] The Commission clearly understood and intended that Verizon would include only those collocators that meet the FCC's definition of a "fiber-based collocator" in determining which wire centers were not impaired.[10] The Commission also clearly assumed and intended that CLECs would have enough information to make fact-based, well-reasoned decisions about whether or not to self-certify in a wire center or not, particularly in

[9] Order No. PSC-05-1200-FOF-TP at p. 36, as well as Order No. PSC-05-0492-FOF-TP, as incorporated by reference therein.
[10] Order No. PSC-05-1200-FOF-TP at pgs. 35 and 36.

situations where they had signed a non-disclosure agreement with Verizon.[11] The reality of actually implementing the TRO Amendment provisions has, however, demonstrated that either the Commission's underlying decisions on these points were based upon inaccurate information, or information that has since changed; or that Verizon is simply choosing to implement the TRO Amendment provisions as it sees fit, rather than as the Commission specifically stated that it understood and intended that they be implemented. Either way, this is a dispute that involves public policy and the interpretation of state law (i.e. the Commission's own Orders), and thus, as contemplated by Section 14.1 of the Parties' Interconnection Agreement, is within the range of issues for which either party may seek redress with the Commission.

21. The Commission should not be misled by Verizon's attempts to mischaracterize XO's Complaint as, essentially, an attempt to receive "a second bite at the apple." XO's Complaint, in fact, sets forth current, ongoing violations of the Commission's Orders. Verizon's assertions that the self-certification and dispute resolution processes contemplated by the Commission and implemented in the TRO Amendment are in place and working should not be given credence. As set forth in Order No. PSC-06-0078-FOF-TP at p. 12, Verizon has challenged XO's self-certification. . . in every Florida wire center in which XO self-certified. The Order also notes that Verizon sent XO a notice to initiate dispute resolution on July 1, 2005, and that ". . .the process the FCC established in paragraph 234 of the TRRO is working just as the FCC intended, and just as we expected it would." Id. It has now been nearly 11 months since Verizon issued its notice of dispute resolution and a full 4 months since the issuance of Order No. PSC-06-0078-

[11] Order No. PSC-05-1200-FOF-TP at p. 34 and fn 10; and p. 37. XO notes that, in spite of XO entering a non-disclosure agreement with Verizon, the information provided did not include the critical information of the name of the CLECs upon which Verizon relied in its wire center counts.

FOF-TP. Verizon claims that it is motivated, yet, Verizon has still not brought its disputes of XO's self-certifications in Florida wire centers to the Commission for resolution as required by Section 3.9.2.1 of the TRO Amendment. And, as explained in the Complaint, while XO waits for Verizon to escalate the disputes as required, it must decide whether to continue taking facilities at UNE rates in the disputed wire centers at the risk of a substantial true-up if Verizon's position is upheld. XO must make this decision based solely upon information it knows has been shown to be inaccurate in other states. This cannot be what the Commission intended. Thus, XO respectfully requests that Verizon's Motion to Dismiss be denied.

22. For all of the foregoing reasons, XO submits that Verizon has not met the standard for dismissal set forth in Varnes v. Dawkins and consistently relied upon by the Commission. As such, the Motion to Dismiss must be denied, and this matter should be set for hearing.

Respectfully submitted this 5th day of June, 2006.

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Docket No. 060365-TL
June 5, 2006

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via Electronic Mail and U.S. Mail First Class this **5th** day of June, 2006, to the persons listed below:

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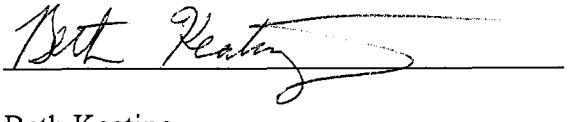
By: 

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