State of Florida

Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: June 17, 2004

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Office of the General Counsel (Fordham, Banks)
Division of Competitive Markets & Enforcement (Lee, Dowds)

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.

AGENDA: 06/29/04 – Regular Agenda – Motion to Dismiss
Issue 1 – Procedural – Issue 2 – Final – Parties May Participate

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\040156.RCM.DOC

Case Background

On August 21, 2003, the FCC released its Triennial Review Order (TRO), promulgating various rules governing the scope of incumbent telecommunications service providers' obligations to provide competitors access to unbundled network elements (UNEs). Verizon Florida, Inc. (Verizon) states that on October 2, 2003, it sent a letter to each competitive local exchange carrier (CLEC), initiating negotiations on a proposed draft amendment to implement the provisions of the FCC's TRO.

On February 20, 2004, Verizon filed its Petition for Arbitration of Amendment to Interconnection Agreements with Certain CLECs and Commercial Mobile Radio Service Providers (CMRS) in Florida. In that Petition, Verizon noted that it would be filing an update to its Petition when the Court ruled on the appeal pending in the United States Court of Appeals for the District of Columbia. The Court issued its ruling on March 2, 2004. On March 19, 2004, Verizon filed its Update to Petition for Arbitration. To date, seven motions to dismiss have been

filed in the proceeding by various carriers challenging the Petition for Arbitration and the Update to the Petition for Arbitration.

Of the approximately 110 companies identified by Verizon in its Certificate of Service, 18 have filed a response of some type. Some, most notably MCI, appear ready to proceed with the arbitration. Others, however, object to the Petition on a variety of grounds. Among those objecting, seven have requested either dismissal or some similar alternative relief.

This recommendation addresses the seven motions seeking dismissal or some alternative relief. The pertinent motions are listed below, along with the responses to the Motions.

March 16, 2004 – Eagle/Myatel filed its Response to Petition for Arbitration of Verizon, which included a Motion to Dismiss, or in the alternative, to Abate.

March 16, 2004 – Sprint filed its Motion to Dismiss Verizon's Petition for Arbitration.

March 19, 2004 – Verizon filed its Update to Petition for Arbitration.

March 29, 2004 – MCI filed its Opposition to Motions to Dismiss.

April 13, 2004 – Competitive Carrier Coalition (CCC), representing seven carriers in its Motion, filed its Motion to Dismiss and Response to Petition for Arbitration of Verizon.

April 13, 2004 – Time Warner filed its Motion to Dismiss Verizon's Petition for Arbitration.

April 13, 2004 – AT&T filed its Motion to Dismiss or Strike Verizon's Update to Petition.

April 13, 2004 – Sprint filed its Motion to Dismiss Verizon's Amended Petition for Arbitration.

April 14, 2004 – Z-Tel filed its Motion to Dismiss and Response

April 26, 2004 – MCI filed its Brief in Opposition to Motions to Dismiss.

April 26, 2004 – Verizon filed its Opposition to Motions to Dismiss.

Combining all of the challenges from each of the seven Motions to Dismiss, staff has identified nine reasons for the challenge to Verizon's Petition. The identified challenges are:

1. Verizon has failed to negotiate in good faith
   (Sprint; Eagle/Myatel)

2. Verizon's Petition is Procedurally Defective
   (Sprint; CCC; Z-Tel)

3. Verizon Failed to Follow the Change in Law Provisions in the Interconnection Agreements
(Sprint; CCC; Time Warner; Z-Tel; AT&T)

4. D. C. Circuit Court of Appeals Decision
(Sprint; Time Warner; AT&T)

5. Arbitration can only be opened by CLEC Petition
(Eagle/Myatel)

6. Arbitration is premature and a waste of time
(Eagle/Myatel; CCC; Time Warner)

7. Bell Atlantic/GTE Merger Conditions require Verizon to offer UNEs
(CCC; Sprint)

8. Verizon did not identify agreement status of each named CLEC
(Time Warner)

9. (As to Amended Petition) The Act does not provide for amendments to arbitration petitions outside the window of the 135th to the 160th day
(Sprint; Z-Tel)

Of these nine challenges, staff believes one is especially compelling. That challenge is the allegation that the Petition is procedurally defective.

It should be noted that MCI also filed a Response in Opposition to Sprint's Motions to Dismiss. In its response, MCI urges that other CLECs have no right to object to a Verizon/MCI arbitration. MCI asserts that it desires to conclude a contract amendment with Verizon and desires to have this Commission conduct this arbitration under Section 252 of the Act. MCI alleges that any procedural deficiencies can be cured quickly and that the pending appeals of the USTA II decision should not delay this proceeding. Accordingly, MCI urges that all Motions to Dismiss filed in this matter be denied. Staff also notes that on June 8, 2004, Order No. PSC-04-0578-PCO-TP was issued, granting Verizon's Motion to Hold Proceeding in Abeyance Until June 15, 2004.

At the outset, staff notes that the recommendation on Sprint's Motions is presented first, because staff believes that Sprint has accurately identified the procedural and filing flaws that are fatal to Verizon's Petition. As such, staff believes that approving staff's recommendation in Issue 1 would render the other pending Motions moot; thus, a decision on Issue 2 would not be necessary. However, though none of the challenges identified in Issue 2 should unilaterally be considered as an appropriate basis for the granting of a motion to dismiss, staff recommends that the challenges identified in Issue 2 be considered at this time so as to have these matters settled for purposes of future pleadings filed in this Docket.

Discussion of Issues

ISSUE 1: Should the Commission grant Sprint's Motions to Dismiss Verizon's Petition based on its procedural deficiencies?

RECOMMENDATION: Yes. Verizon has not complied with the procedural requirements of Section 252(b), nor has it identified specific parties and provided the essential information on the agreements with each of those parties at a level sufficient to enable this Commission to proceed with an arbitration. Therefore, Verizon's Petition is facially deficient. Accordingly, Verizon's Petition should be dismissed, without prejudice, for failure to meet the requirements set forth in Section 252 of the Act. Staff recommends that Verizon be granted leave to refile its corrected Petition(s) within 20 days of the Commission's vote. Additionally, if Verizon elects to refile, its petition(s) should contain, in addition to the requirements of Section 252(b), sufficient information to ease the logistical and administrative burdens of handling Verizon's Petition. That additional information should include, at a minimum, the following:

1. The name of each company with which arbitration is being requested.

2. The present agreement expiration date for each company with which Verizon has a current agreement.

3. The unresolved issues with each specific company.

4. The position of each of the parties with respect to those issues.

5. Whether the present agreement contains a change of law provision.

6. The nature of the change of law provision.

7. Whether the present agreement contains an alternative dispute resolution provision.

8. The type of alternative dispute resolution required.

Though a specific format should not be required, staff recommends that, in the event a future Verizon petition contains multiple companies, a matrix would be valuable for the purpose of organizing and setting forth the required information. (See Attachment A for example)

Staff further recommends that if Verizon elects to refile within the 20-day time frame, responses to the corrected Petition should be due within 20 days of service of Verizon's filing. If Verizon elects not to refile within the allotted time frame, and the time frame is not otherwise extended by the Commission, the Commission's Order should thereafter be deemed final for purposes of appeal. **(L. Fordham, Banks)**

STAFF ANALYSIS:

I. Standard of Review

Under Florida law, the purpose of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). In order to sustain a motion to dismiss, the moving party must demonstrate that, accepting all allegations in the petition as facially correct, the petition still fails to state a cause of action for which relief can be granted. In re Application for Amendment of Certificates Nos. 359-W and 290-S to Add Territory in Broward County by South Broward Utility, Inc., 95 FPSC 5:339 (1995); Varnes, 624 So. 2d at 350. When "determining the sufficiency of the complaint, the trial court may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side. " Id. See also Flye v. Jeffords, 106 So. 2d 229 (Fla. 1st DCA 1958)(consideration should be confined to the allegations in the petition and the motion). The moving party must specify the grounds for the motion to dismiss, and the Commission should construe all material allegations against the moving party in determining if the petitioner has stated the necessary allegations. Matthews v. Matthews, 122 So. 2d 571 (Fla. 2nd DCA 1960).

Florida courts have held that when a petition is dismissed without prejudice, the Order is deemed non-final and thus, not subject to appeal. A dismissal with prejudice or with the suggestion to seek another forum for relief is a final decision. Hollingsworth v. Brown, 788 So. 2d 1078 (Fla. 1st DCA 2001); citing Benton v. Department of Corrections, 782 So. 2d 981, 26 Fla. L. Weekly D 1013 (Fla. 1st DCA 2001); Eagle v. Eagle, 632 So. 2d 122 (Fla. 1st DCA 1994); Carlton v. Wal-Mart Stores, Inc., 621 So. 2d 451 (Fla. 1st DCA 1993). If the Petitioner is unable or unwilling to correct the defect that serves as the basis for dismissal without prejudice, the courts have indicated that the proper course of action is to notify the court, or in this case the Commission, so that the dismissal can be made final and, thereafter, subject to appeal. Benton v. Department of Corrections, 782 So. 2d 981, 26 Fla. L. Weekly D 1013 (Fla. 1st DCA 2001); citing Ponton v. Gross 576 So. 2d 910, 912 (Fla. 1st DCA 1991).

II. Arguments

Sprint notes that Verizon's Petition requests that this Commission initiate a consolidated arbitration proceeding to amend the interconnection agreements between Verizon and each of the CLECs in Florida with which Verizon has an agreement. Verizon purports to file its consolidated Petition under the authority of the Triennial Review Order (TRO). Sprint alleges that, in filing its Petition, Verizon has failed in every respect to comport with the principles established in the TRO and under the Telecommunications Act of 1934, as amended (Act). Sprint states that it did not receive prior notice of Verizon's intent to file the Petition, and only determined its existence after this Petition and some 14 others were filed in various states. Regarding Verizon's statement in the Petition that of those carriers who did not sign the draft amendment "virtually none provided a timely response," Sprint states that it did provide a timely response, which Verizon chose to ignore.

Sprint requests that this Commission dismiss Verizon's Petition because it is procedurally deficient and premature. In addition, Sprint requests that the Commission instruct Verizon to negotiate with Sprint in good faith toward a mutually acceptable amendment to the existing interconnection agreement.[1] Specifically, in its initial Motion to Dismiss, Sprint cites four reasons why Verizon's Petition should be dismissed. Subsequent to Verizon filing its Update to Petition for Arbitration, Sprint filed its Motion to Dismiss Verizon's Amended Petition for Arbitration. In that Motion Sprint additionally argues that: 1) the Act does not provide for amendments to arbitration petitions outside the stipulated arbitration window of the 135th to the 160th day after interconnection negotiations are commenced; 2) Verizon has failed to comply with the Act because the new language it is proposing in response to the DC Circuit Court decision vacating certain provisions of the TRO has never been presented to Sprint for negotiation; and 3) Verizon's obligations under the Merger Conditions support the dismissal of Verizon's Petition. Thus, Verizon's Amended Petition does nothing to correct the procedural deficiencies that are the basis for Sprint's initial Motion to Dismiss – instead, it compounds them.

Only Sprint's challenge based on procedural deficiencies is addressed in this issue; Sprint's other arguments are dealt with in Issue 2.

A. Sprint's Position

Aside from the refusal of Verizon to negotiate the amendment in good faith, the form of the Petition fails to comport to the express provisions of the Act, according to Sprint. Section 252 (b)(2) of the Act provides in pertinent part:

> (2) Duty of petitioner
>
> > (A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning-
> >
> > > (i) the unresolved issues;
> > >
> > > (ii) the position of each of the parties with respect to those issues; and
> > >
> > > (iii) any other issue discussed and resolved by the parties.
> >
> > (B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

Sprint urges that Verizon has failed to comply with each of these provisions of the Act, and therefore its Petition must be dismissed.

[1] Sprint notes that in addressing a similar petition filed by Verizon in North Carolina, the North Carolina Utilities Commission recently held that the proceeding should be continued indefinitely because of its interrelationship to the North Carolina proceeding to implement the TRO. The North Carolina Commission also found that Verizon had failed to comply with its procedural rules for filing an arbitration. In addition, the Maryland Commission recently rejected a similar petition filed by Verizon, stating that the petition was premature because of the uncertain status of the TRO.

Sprint notes that Verizon has not stated in its Petition any of the issues discussed between Verizon and Sprint. Sprint states that it expressed agreement with Verizon over various provisions in the proposed draft, and tried to focus the discussion to a narrow list of issues, which was completely ignored by Verizon. Sprint argues that Verizon's Petition does not contain a discussion of the positions of the parties as required by §252 (b)(2), nor does it reflect any identification of issues that have been discussed between the parties, what Sprint's position is, or which issues remain unresolved. Therefore, Sprint argues, the form of the Petition does not meet the requirements under the Act.

Sprint further alleges that Verizon failed to properly serve the Petition on Sprint in Florida. While the service list indicates that service was made to the contact person indicated in the Sprint/Verizon interconnection agreement for the purposes of notices under the interconnection agreement, the document was not served on Sprint's designated representative in Florida as set forth on the Florida Commission's website.

B. Verizon's Response

According to Verizon, the argument that its Petition fails to comply with Section 252(b) is without merit. As an initial matter, Verizon maintains the requirements that apply to a petition for arbitration under §252(b)(2) do not apply to Verizon's petition to amend existing agreements. To be sure, argues Verizon, the FCC has held that the "section 252(b) timetable" and negotiation process applies (TRO, 18 FCC Rcd at 17405-06, ¶ 703-704), but the FCC never held that a petition seeking resolution of disputes over amendments with respect to the TRO would have to comply with all of the formal requirements of a petition for arbitration of a brand new agreement.

Verizon urges that, even if the technical requirements of §252(b)(2) did apply, Verizon has complied with those requirements in light of the circumstances of this proceeding. Verizon has set forth in detail the issues presented by its draft amendment and has explained its position in detail. Indeed, Verizon argues that because it has received little in the way of response to its proposal, and because most of the responses that it has received did not represent serious efforts at negotiation and arrived very late in the process, Verizon was simply unable to set forth other parties' positions on the various issues. As this Commission is aware, argues Verizon, each of the parties - including Sprint - will have an opportunity in its response to Verizon's petition to set forth its own position on each of the issues in its own words. Verizon urges that it has, nevertheless, complied with the clear purpose behind §252(b)(2), which is to set forth clearly the disputed issues that the Commission may be called upon to resolve.

Verizon argues that, in light of the unique circumstances present here, the drastic remedy of dismissal would be an inappropriate response to any technical defects in Verizon's petition. The FCC has determined that "delay in the implementation of the new rules we adopt in [the TRO] will have an adverse impact on investment and sustainable competition in the telecommunications industry." (TRO, 18 FCC Rcd at 17405, ¶ 703). Verizon claims that its petition fully frames the issues presented to the Commission for resolution and provides all parties clear notice of Verizon's position and a fully adequate basis to respond. The appropriate

course, urges Verizon, is for the Commission to allow this proceeding to move forward with an eye towards achieving prompt and equitable results, not satisfying empty formalities.

III. Analysis and Recommendation

Upon consideration of the foregoing, staff recommends that Sprint's Motion to Dismiss be granted on the grounds that Verizon's Petition and Updated Petition are facially deficient. As noted earlier, Section 252 (b)(2) of the Act provides in pertinent part:

> (2) Duty of petitioner
>
> > (A) A party that petitions a State commission under paragraph (1) shall at the same time as it submits the petition, provide the State commission all relevant documentation concerning-
> >
> > (i) the unresolved issues;
> >
> > (ii) the position of each of the parties with respect to those issues;
> >
> > . . .

In the present case, this Commission is asked to divine such essential facts as: (1) who the parties to this arbitration are; (2) what the specific issues are; (3) which of the unknown parties agree or disagree with which of the positions of the Petitioner; (4) what each of the unknown party's response might be to each of the unknown issues; (5) whether the unidentified agreements contain a change of law provision; and (6) whether the unidentified agreements contain an alternative dispute resolution provision. As such, Verizon's Petition and Updated Petition do not even marginally comport with Section 252(b)(2). Furthermore, the required information is not of the type that can be easily obtained by the Commission on its own.

Accordingly, staff recommends that Verizon has failed to state a cause of action upon which relief can be granted by failing to comply with Section 252 (b)(2) at a sufficient level to sustain the action requested in its Petition. Staff believes this Commission would be severely impaired in its ability to perform its responsibilities without the information required by the above cited statute. Staff acknowledges, nevertheless, that those CLECs that have failed to respond to Verizon have contributed greatly to the lack of information available and have likely increased the burden on Verizon to meet the requirements of Section 252(b)(2).

IV. Conclusion

Based on the foregoing, staff recommends that Verizon's Petition be dismissed, without prejudice, for failure to meet the requirements set forth in Section 252 of the Act. Staff recommends that Verizon be granted leave to refile its corrected Petition within 20 days of the Commission's vote. In addition, if Verizon elects to refile, it should be directed to include in its petition, at a minimum, the information identified earlier in the Recommendation portion of this recommendation. This information is necessary to ease the logistical and administrative burdens of handling Verizon's Petition.

Staff further recommends that if Verizon elects to refile within the 20-day time frame, responses to the corrected Petition should be due within 20 days of Verizon's filing. If Verizon elects not to refile within the allotted time frame, and the time frame is not otherwise extended by the Commission, the Commission's Order should thereafter be deemed final for purposes of appeal.

ISSUE 2: Should the Motions to Dismiss filed by the Competitive Carrier Coalition, Time Warner, Eagle/Myatel, Z-Tel, and AT&T be granted?

RECOMMENDATION: If the Commission approves staff's recommendation on Issue 1, these Motions will technically be rendered moot. However, staff recommends that the Commission consider and vote on this issue so as to have these matters settled for purposes of future pleadings in this Docket. Staff recommends that the Commission make the following findings:

A. Dismissal should not be granted based on allegations of failure to negotiate in good faith, because this allegation does not demonstrate that Verizon has failed to state a cause of action upon which relief can be granted.

B. Dismissal should not be based on Verizon's alleged failure to follow the Change in Law provisions in its interconnection agreements. This may serve as the basis for denial or summary final order at a later date, but there is insufficient information at this time for this to serve as the basis for dismissal of the Petition in its entirety.

C. Dismissal should not be based upon allegations that the Petition is premature and a "waste of time" because of the uncertain status of the TRO and the D.C. Circuit's decision in United States Telecom Association v. Federal Communications Commission and United States of America, 359 F.3d 554 (D.C. Cir. 2004) (USTA II) Subject to the applicability of arguments regarding carriers' Change of Law provisions in interconnection agreements, Verizon appears to have otherwise complied with the arbitration filing time frames set forth in Section 252 of the Act. Furthermore, this allegation does not show that Verizon has failed to state a cause of action upon which relief can be granted.

D. Dismissal should not be based on allegations that the Act does not provide for amendments to arbitration petitions filed outside the arbitration "window" of the 135th and 160th day. While the Act does not provide for such amendments, it also does not preclude them. The Act does, however, limit consideration to issues in the Petition and the Response, which may arguably preclude any new issues raised subsequent to the initial pleading. This question need not be resolved at this time.

E. Dismissal should not be granted based on allegations that an arbitration can only be opened by a CLEC Petition. Section 252(b)(1) clearly states that ". . . the carrier or *any other party to the negotiation* may petition a State commission to arbitrate any open issues." (emphasis added)

F. Dismissal should not be based solely on Verizon's failure to identify the agreement status of each named CLEC. While this does appear to identify a flaw in Verizon's Petition, it does not appear to be a requirement for filing an arbitration under Section 252 and as such, does not appear to be a fatal flaw in

that it does not show Verizon has failed to state a cause of action upon which relief can be granted. As set forth in Issue 1, Verizon should, however, be directed to correct this flaw when and if it files an Amended Petition in order to ease the logistical and administrative burdens of handling Verizon's Petition.

G. Dismissal should not be based on the BellAtlantic/GTE merger conditions. Those conditions do not appear to remain in effect. Furthermore, while this allegation could serve as a basis for a summary final order or as a basis for denial of the Petition after hearing, this allegation does not show that Verizon has failed to state a cause of action upon which relief can be granted.

STAFF ANALYSIS:

I. Arguments

A. Verizon has failed to negotiate in good faith

1. Sprint and Eagle/Myatel Position

In its Petition, Verizon states that:

> Since Verizon sent its October 2, 2003 notice, some CLECS have signed Verizon's draft amendment without substantive changes. Of the remaining CLECs in Florida, virtually none provided a timely response to Verizon's October 2, 2003 notice and draft amendment. In fact, Verizon (and its affiliates that provide local exchange service in other jurisdictions) received the majority of the substantive responses to the draft amendment ----within the past two to four weeks - that is, more than three, and in some cases four, months after Verizon made the draft amendment available to CLECS.

Sprint states that this is a patently false assertion by Verizon, at least as it relates to Sprint.

Upon receipt of the notice and draft amendment, Sprint promptly contacted Verizon to discuss changes to the draft amendment. Mr. John S. Weyforth, a Sprint employee, provided an affidavit which sets forth in detail the efforts Sprint undertook to attempt to negotiate a satisfactory TRO amendment based on the Verizon proposal it received. Ms. Shelley Jones, a Sprint employee, provided to Mr. Stephen Hughes, one of the Verizon designated negotiators, an email, with a redlined draft, setting forth Sprint's proposed changes to the draft agreement. She also set forth Sprint's desire to resolve in an expeditious fashion the outstanding issues that Sprint sought to address with Verizon regarding the amendment. According to Sprint, Verizon has yet to accept or reject any of the proposed changes Sprint raised in that email.

Mr. Weyforth's affidavit also purports to set forth the chronology of the responses from Verizon in attempting to negotiate issues up to the point of Verizon filing the Petition. According to Sprint, it is clear that Verizon purposefully avoided any meaningful discussion with

Sprint to resolve outstanding issues. Sprint claims Verizon has yet to specifically accept or reject any proposed change Sprint has offered during the discussions that have taken place between the parties. Sprint emphasizes that Section 51.301(c)(7) of the FCC's rules provides that it is a breach of the Act's good faith requirement to refuse "throughout the negotiation process to designate a representative with authority to make binding representations, if such refusal significantly delays resolution of issues." Sprint asserts that Verizon has acted in bad faith in failing to respond to Sprint with definitive positions to resolve issues.

Eagle/Myatel notes that Section 252(b) specifically requires the incumbent provider to negotiate in good faith prior to filing for arbitration. Eagle/Myatel asserts that Verizon has not complied with that requirement as it relates to Eagle/Myatel prior to filing its Petition for Arbitration.

2. Verizon's Response

Verizon acknowledges that Sprint is one of the very few CLECs that responded to Verizon's Notice in a timely manner. However, Verizon states that it has not "purposely avoided any meaningful discussion" with respect to Sprint's proposals. For example, aside from numerous other contacts, on February 12, 2004, the parties' respective negotiating teams participated in a conference call to discuss, in detail, Sprint's desired revisions, so that Verizon could better understand the basis for Sprint's positions. Thus, Verizon claims there is no merit to Sprint's bad faith allegation. According to Verizon, Sprint's claim is, in effect, a complaint that Verizon did not agree to Sprint's changes to Verizon's amendment. As to Sprint's allegation that Verizon did not "specifically accept or reject" Sprint's proposals on the disputed issues, Verizon maintains that Sprint should have reached that conclusion on its own. Since Verizon did not specifically agree to Sprint's revisions, Verizon explains that they were rejected. Nevertheless, to remove any doubt about Verizon's stance on the issues, Verizon did send Sprint a point-by-point response to each of Sprint's proposals prior to the filing of Sprint's motion. Verizon claims it discussed those proposals with Sprint on a number of occasions and thoroughly considered, but ultimately rejected, Sprint's changes to Verizon's proposed TRO amendment. Verizon urges that its refusal to accept Sprint's proposals does not constitute bad faith negotiation.

Verizon states that Sprint's account of the communications between Sprint and Verizon, as reflected in Mr. Weyforth's affidavit, is also inaccurate and incomplete. For example, Mr. Weyforth's entry for "10/15, 16, 17/03" states that Sprint sent Verizon " . . . a series of emails to schedule a conference call to review the Verizon TRO amendment . . . [but] received no response." Verizon claims that is not true. On October 15, 2003, Verizon negotiator Stephen Hughes responded to Sprint's e-mail with an e-mail asking for the Sprint team's availability for that week and the next. After exchanging a few e-mails, the parties decided on a time and date for the call, and, on October 17, Sprint forwarded a call-in number, at Mr. Hughes' request. To take another example, contrary to Mr. Weyforth's entry for "3/02/04," Verizon did, in fact, provide Sprint, in a March 5 e-mail from Verizon's counsel to Sprint's counsel, electronic copies of the petitions for arbitration Verizon had filed in other states.

Verizon argues that it makes no sense for the Commission to dismiss the petition with regard to Sprint and order Verizon to re-initiate negotiations, just because Verizon and Sprint failed to reach agreement on an amendment. Dismissing Sprint from the proceeding would mean only that Verizon would have to file for individual arbitration against Sprint, raising the same issues as those presented in this consolidated arbitration. It is unlikely that, after conducting a consolidated arbitration, the Commission would make different decisions on the same issues in a Sprint-specific arbitration. That inefficient approach makes no sense, either for the Commission or the parties, according to Verizon.

3. Analysis and recommendation

Each party has put forth a strong argument for their respective position. However, this allegation does not demonstrate that Verizon has failed to state a cause of action upon which relief can be granted; rather, it appears to be the basis of a separate complaint. Accordingly, dismissal should not be granted based on allegations of failure to negotiate in good faith.

B. Verizon Failed to Follow the Change in Law Provisions in the Interconnection Agreement

1. Sprint, CCC, Time Warner, and Z-Tel Position

Verizon states that it filed this Petition pursuant to the arbitration window (February 14, 2004 to March 1, 2004) established by 47 U.S.C. §252 (b) (1) and the FCC's TRO. Sprint argues that Verizon's interpretation of Paragraph 703 of the TRO is, however, flawed. Sprint cites to Paragraph 703, which states in part:

> First, we require incumbent and competitive LECs to use section 252(b) as a default timetable for modification of interconnection agreements that are silent concerning change of law and/or transition timing.

According to Sprint, the interconnection agreements between Sprint and Verizon have change in law provisions in them; thus, Verizon would be required to follow those procedures to implement the provisions of the TRO. The specific provision contained in Sprint's Florida contract states as follows in Section 1.2:

> 1.2 Applicable Law/Changes in Law.
>
> Each Party shall comply with all federal, state, and local statutes, regulations, rules, ordinances, judicial decisions, and administrative rulings applicable to its performance under this Agreement. The terms and conditions of this Agreement were composed in order to effectuate the legal requirements in effect at the time this Agreement was produced, and shall be subject to any and all applicable statutes, regulations, rules, ordinances, judicial decisions, and administrative rulings that subsequently may be prescribed by any federal, state or local governmental authority having appropriate jurisdiction. Except as otherwise expressly provided herein, such subsequently prescribed statutes, regulations,

> rules, ordinances, judicial decisions, and administrative rulings will be deemed to automatically supersede any conflicting terms and conditions of this Agreement. In addition, subject to the requirements and limitations set forth in Section 1.3, to the extent required or reasonably necessary, the Parties shall modify, in writing, the affected term(s) and condition(s) of this Agreement to bring them into compliance with such statute, regulation, rule, ordinance, judicial decision or administrative ruling. Should the Parties fail to agree on appropriate modification arising out of a change in law, within sixty (60) calendar days of such change in law the dispute shall be governed by Section 3 of Article 11.

Sprint states that Verizon has made no attempt to discuss with Sprint the implications of the change in law provision as it affects the TRO. Sprint argues Verizon should be required to address the implications of this provision as part of the negotiation of the amendment to the interconnection agreement. CCC, Time Warner, and Z-Tel each argue all or some portion of Sprint's arguments. Therefore, those redundancies will not be repeated here.

2. Verizon's Response

Verizon counters that Sprint's and the other providers' claims are incorrect. As an initial matter, urges Verizon, while they allude to dispute resolution provisions in the parties' agreements, they fail to explain how Verizon has failed to comply with the requirements of those provisions. But even if they had done so, their arguments would still be inconsistent with (and trumped by) the FCC's ruling, according to Verizon. Verizon claims the FCC not only mandated the §252(b) timetable for those interconnection agreements without any change-of-law provision, it also made clear that the §252(b) timetable applies "in instances where a change of law provision exists." TRO 18 FCC Rcd at 17405, ¶ 704.

3. Analysis and recommendation

Verizon has not identified to this Commission which of its agreements contain a change of law provision, making it impossible for staff to determine the applicability of this challenge. Though this may serve as the basis for denial or summary final order at a later date, there is insufficient information at this time for this to serve as the basis for dismissal of the Petition in its entirety.[2] Accordingly, staff recommends that dismissal should not be based on Verizon's alleged failure to follow the Change in Law provisions in its interconnection agreements.

[2] Although staff recommends that insufficient information exists at this time for this argument to serve as the basis for dismissal, staff nevertheless specifically disagrees with Verizon's argument that the TRO overrides Change of Law provisions and provides that negotiations will be conducted pursuant to Section 252(b). See TRO ¶ 703. In ¶701 of the TRO, the FCC specifically recognized that, to the extent they exist, Change of Law contractual provisions should govern. Furthermore, while the FCC stated in ¶ 703 that the Section 252(b) process should apply when contracts do not include a change of law provision or something similar, it stated only that the Section 252(b) process should provide "guidance" when a Change of Law provision exists. TRO at ¶704. In that same paragraph, the FCC also seemingly recognizes that Change of Law provisions continue to apply, but emphasizes that the duty to negotiate in good

C. D. C. Circuit Court of Appeals Decision

1. Sprint, AT&T, and Z-Tel Position

The movants recount that on March 2, 2004, the United States Court of Appeals for the District of Columbia vacated in part and reversed in part the TRO. However, the Court issued a stay of that decision until May 2, 2004. That stay was subsequently extended until June 15, 2004. The implications of this are unclear at this time, they argue. Sprint noted that Verizon had reserved the right to modify its positions and revise its proposed amendment, based on the D.C. Circuit Court of Appeals decision. On Friday, March 19, 2004 Verizon filed its "Update to Petition for Arbitration," reflecting the March 2, 2004 decision by that Court. In addition, Verizon requested that parties be given 25 days from March 19, 2004, to respond to its petition and any amendments.

Sprint argues that since it has not had an opportunity to review or comment on these prospective revisions, this arbitration proceeding is premature and should be dismissed without prejudice to the parties' right to re-file such a petition within the proper time frames after the parties have attempted in good faith to negotiate an amendment. Sprint urges that its comments contained in its Motion to Dismiss do not take into consideration the effects of the D.C. Circuit Court decision. Due to time constraints and the complexity of the issues involved it was not possible to thoroughly review the Court's decision prior to preparing its initial Motion to Dismiss. If the Commission does not dismiss Verizon's Petition, Sprint reserves the right to respond to any revisions made by Verizon to reflect the D.C. Circuit Court decision. In its Motion to Dismiss Verizon's Updated Petition, Sprint changed its earlier position and requested that in the event Verizon's Petition was not dismissed in its entirety, Sprint be allowed to remain a litigant, inasmuch as any decision by this Commission regarding any other litigants would likely be equally binding on Sprint.

In addition to Sprint's position, Z-Tel urges that this Commission is without jurisdiction to include for consideration matters not raised by Petitioner or Respondent in their initial filings. Z-Tel states that Congress specifically limited the matters which this Commission may consider in Section 252 arbitration petitions, stating in Section 252(b)(4)(A) that a state commission "shall limit its consideration" of a Section 252 arbitration "to issues set forth in the petition and in the response."

AT&T's arguments on this point were mostly aimed at waiting until the U.S. Supreme had acted, so as to have more certainty before proceeding. AT&T indicated that the majority of the FCC commissioners had expressed a willingness to seek Supreme Court review of the lower Court's decision. However, the Supreme Court has subsequently refused to extend the stay and the United States Department of Justice, as well as the FCC, have declined to seek appellate review.

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faith is a continuing obligation on all parties and that these provisions should not be used for purposes of delay in implementing the FCC's decisions.

2. Verizon's Response

Verizon states that it specifically reserved its right to amend its Petition. Therefore, the CLECs were on notice that there would likely be changes to its original position. Additionally, Verizon argues nothing in the D.C. Circuit's decision in USTA II provides any basis for deferring or dismissing this proceeding. Verizon claims USTA II did not affect the process the FCC expected carriers to use to make appropriate changes to their interconnection agreements in response to the TRO. The FCC directed carriers to use the timeline established in §252(b), and the Commission has the responsibility, under binding federal law, to resolve disputed issues presented by Verizon's petition in accordance with that timeline. See TRO, 18 FCC Rcd at 17405-06, ¶703-704.

Thus, urges Verizon in its Update to Petition, although the D.C. Circuit vacated certain portions of the TRO, many of the FCC's rulings (and, in fact, all or almost all of the FCC's rulings "delisting" UNEs) were not overturned by the Court's decision, either because the Court upheld the relevant rules or because they were not challenged in the first place. Thus, according to Verizon, there is no need to wait for the outcome of the D.C. Circuit's decision before amending interconnection agreements to reflect these rulings, to the extent that they are not self-effectuating. Indeed, the FCC specifically anticipated that some parties might argue that the new rules contained in the TRO should not be implemented until all appellate challenges were exhausted, and rejected that argument.

In its Updated Petition, Verizon also urges that interconnection agreements should promptly be amended to reflect the TRO rulings that remain effective under USTA II. The fact that some other aspects of the TRO were vacated or remanded (e.g., those concerning mass-market switching and high-capacity facilities) is no reason to dismiss this arbitration. Verizon asserts that its proposed amendment, with the revisions reflected in Verizon's March 19, 2004 filing, accommodates any further legal developments, including those that may result from the D.C. Circuit's decision and possible subsequent appellate and FCC actions. Thus, argues Verizon, there is no need to delay this proceeding as to any aspect of Verizon's proposed amendment.

Verizon argues that, although Sprint refers to an order of the North Carolina Utilities Commission ("NCUC") holding in abeyance the proceeding that Verizon initiated in that state, and to an order of the Maryland PSC dismissing Verizon's proceeding in that state, the determinations of those two state commissions do not support the motions to dismiss. First, Verizon argues, Sprint fails to acknowledge that, in approximately two dozen other states, proceedings to amend existing interconnection agreements are underway and have not been dismissed. Second, according to Verizon, both the NCUC and the Maryland PSC acted as they did in large measure because they erroneously concluded that the D.C. Circuit's decision in USTA II, which vacated the TRO in part, warranted at least a delay in acting on Verizon's petition. Verizon states that its amendment seeks to memorialize the portions of the TRO that were upheld by the D.C. Circuit and to accommodate any further legal developments. Accordingly, it is asking the Commission to deny Sprint's motion to dismiss.

3. Analysis and recommendation

Staff does not believe that USTA II in any way alters the otherwise valid filing time frames. Therefore, subject to the applicability of arguments regarding carriers' Change of Law provisions in interconnection agreements (which, as noted in Section I.B. 3 of this recommendation, remain to be seen), Verizon appears to have otherwise complied with the arbitration filing time frames set forth in Section 252 of the Act. Accordingly, dismissal should not be based upon allegations that the Petition is premature and a "waste of time" because of the uncertain status of the TRO and the D.C. Circuit's decision in USTA II.

D. Amendments to arbitration petitions may not be filed outside the 135th and 160th day

1. Sprint and Z-Tel's Position

Subsequent to Verizon filing its Update to Petition for Arbitration, Sprint filed its Motion to Dismiss Verizon's Amended Petition for Arbitration. In that Motion, Sprint additionally argues that the Act does not provide for amendments to arbitration petitions outside the stated arbitration window of the 135th to the 160th day after interconnection negotiations are commenced. Sprint states that this Commission previously has recognized the jurisdictional nature of the Act's arbitration timeframes and has dismissed requests for arbitration filed outside this time frame. In re: Complaint and/or petition for arbitration against Sprint Florida, Incorporated by Wireless One Network, L.P. d/b/a Cellular One of Southwest Florida pursuant to Section 252 of the Telecommunications Act of 1996 and request for expedited hearing pursuant to Section 364.058, F.S., Docket No. 970788-TP; Order No. PSC-97-1043-PCO-TP.

Z-Tel again urges that this Commission is without jurisdiction to include for consideration matters not raised by Petitioner or Respondent in their initial filings. Z-Tel states that Congress specifically limited the matters which this Commission may consider in Section 252 arbitration petitions, stating in Section 252(b)(4)(A) that a state commission "shall limit its consideration" of a Section 252 arbitration "to issues set forth in the petition and in the response."

2. Verizon's response

Verizon makes little argument on this point, but does urge that it specifically reserved its right to amend in its original Petition. Therefore, according to Verizon, the CLECs were on notice that amendments would be forthcoming and should be allowed.

3. Analysis and recommendation

Staff notes that the Act does not specifically provide for amendments to petitions, but it also does not preclude them. The Act does, however, limit consideration to issues in the Petition and the Response, which may arguably preclude any new issues being raised subsequent to the initial pleading. However, staff believes this question need not be resolved at this time. Accordingly, dismissal should not be based on allegations that the Act does not provide for

amendments to arbitration petitions filed outside the arbitration "window" of the 135th and 160th day.

E. Arbitration can only be opened by a CLEC Petition

1. Eagle/Myatel's Position

Eagle/Myatel argue that the statutory predicate for arbitration under 47 U.S.C. § 252(b)(1) – the receipt by an incumbent local exchange carrier of a request for negotiation under § 252 – has not occurred. Therefore, there is no legal basis under the Act for arbitration at this point.

2. Verizon's response

Verizon argues that the FCC deemed October 2, 2003, as the date on which negotiations commenced, regardless of whether either party actually sent a request for negotiations. In any event, argues Verizon, its October 2 letter could not have been clearer that Verizon intended to amend its interconnection agreements to conform to the TRO.

3. Analysis and recommendation

Staff finds no support in the rules for this position. Section 252(b)(1) clearly states that ". . . the carrier or *any other party to the negotiation* may petition a State commission to arbitrate any open issues." (emphasis added) Accordingly, staff recommends that dismissal should not be granted based on allegations that an arbitration can only be initiated by a CLEC Petition.

F. Failure to identify the agreement status of each named CLEC

1. Time Warner's position

Time Warner argues that Verizon made no attempt to ascertain or describe the status of the interconnection agreements with the CLECs named in its Petition. Nor did it describe the status of negotiations that it had conducted with individual CLECs prior to and as of the date that the Petition was filed. Instead, urges Time Warner, Verizon's Petition on its face would lead the Commission to believe that Verizon presently has interconnection agreements in effect with every named CLEC and that active negotiations reached an impasse, thus requiring Verizon to file for arbitration. Time Warner states that is not correct. Indeed, Time Warner relates that it does not presently have an agreement with Verizon. In addition, Time Warner's parent company is presently in negotiations with Verizon regarding an agreement which would govern the business relationship between Verizon and all of the Time Warner local service provider entities in 12 states. Those negotiations include the TRO Amendment Verizon proposes to be arbitrated in this proceeding. Accordingly, Time Warner argues it should not be included in the present Verizon Petition.

2. Verizon's response

Verizon makes little argument on this point, but does insist that it acted responsibly in putting all CLECs on notice that they should begin negotiations with Verizon. Verizon simply does not specifically address whether there were CLECs included in its Petition that currently had no agreement with Verizon.

3. Analysis and recommendation

While this does appear to identify a flaw in Verizon's Petition, it does not appear to be a requirement for filing an arbitration under Section 252. As such, it does not appear to be a fatal flaw. As set forth in Issue 1, Verizon should, however, be directed to correct this flaw when and if it files an Amended Petition in order to ease the logistical and administrative burdens of handling Verizon's Petition. However, dismissal should not be based solely on Verizon's failure to identify the agreement status of each named CLEC.

G. Bell Atlantic/GTE Merger Conditions

1. Sprint and CCC's position

Sprint and CCC argue that Verizon's obligations under the Merger Conditions support the dismissal of Verizon's Petition. According to Sprint and CCC, Verizon is obligated to provide services under the UNE Remand Order and the Line Sharing Order pursuant to Paragraph 39 of the Merger conditions, which states:

> Bell Atlantic/GTE shall continue to make available to telecommunications carriers, in the Bell Atlantic/GTE Service Area within each of the Bell Atlantic/GTE States, the UNEs and UNE combinations required in Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order and Fourth Notice of Proposed Rulemaking, CC Docket No. 96-98, FCC 99-238 (rel. Nov. 5, 1999) (UNE Remand Order) and Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98 (rel. Dec. 9, 1999) (Line Sharing Order) in accordance with those Orders until the date of a final, non-appealable judicial decision providing that the UNE or combination of UNEs is not required to be provided by Bell Atlantic/GTE in the relevant geographic area. The provisions of this Paragraph shall become null and void and impose no further obligation on Bell Atlantic/GTE after the effective date of final and non-appealable Commission orders in the UNE Remand and Line Sharing proceedings, respectively.

Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 39.

Sprint and CCC argue that the Triennial Review proceeding was an extension and consolidation of the UNE Remand proceeding and the Line Sharing proceeding. As such, according to Sprint and CCC, there is no final non-appealable order as required by the Merger Conditions and Verizon is still obligated to offer these services, rendering Verizon's proposed amendments moot or, at best, premature.

2. Verizon's Response

According to Verizon, its obligation under the UNE Remand Order and the Line Sharing Order to provide UNEs was limited in two ways. First, the obligation lasted only until there was "a final, non-appealable judicial decision providing that the UNE or combination of UNEs is not required to be provided by [Verizon] in the relevant geographic area." BA/GTE Merger Order, 15 FCC Rcd at 14316 Second, argues Verizon, all of the merger conditions expired "36 months after the Merger Closing Date" except "where other termination dates are specifically established herein." Id., at 14331 Verizon notes that the merger closed in July 2000. Accordingly, the 36 month period expired on July 2003. Therefore, Verizon asserts that it has no obligation under the Merger Conditions to continue providing UNEs.

3. Analysis and recommendation

Staff is more persuaded by the argument put forth by Verizon. The Merger Order seems clear that there are two criteria which must be met in order to terminate Verizon's obligation to provide UNEs: (i) There must be "a final, non-appealable judicial decision providing that the UNE or combination of UNEs is not required to be provided by [Verizon] in the relevant geographic area," and (ii) The merger conditions expire "36 months after the Merger Closing Date." Both the UNE Remand Order and Line Sharing Order were vacated by the D.C. Circuit in the first USTA decision: United States Telecommunications Association v. FCC, 290 F.3d 415 (D.C. Cir. 2002), cert. denied, 538 U.S. 940 (2003) Accordingly, that decision constitutes a final and non-appealable judicial decision terminating Verizon's obligation to provide UNEs in accordance with the terms of the UNE Remand Order or Line Sharing Order. Additionally, pursuant to its own sunset clause, the pertinent merger condition expired of its own force in July 2003, 36 months after the Bell Atlantic-GTE merger closed. Therefore, both of those conditions have been fulfilled, and Verizon's obligation to provide UNEs under the Merger Conditions has expired and is no longer in effect. Accordingly, staff recommends that the Merger Conditions Order is not a factor in this proceeding.

II. Conclusion

Based on the above, staff recommends that none of the challenges identified in Issue 2 should unilaterally be considered as an appropriate basis for the granting of a motion to dismiss. However, it is recommended that the challenges identified in Issue 2 be considered at this time so as to have these matters settled for purposes of future pleadings filed in this Docket.

ISSUE 3: Should this Docket be closed?

RECOMMENDATION: No. **(L. Fordham, Banks)**

STAFF ANALYSIS: Regardless of the decision on the other issues, this Docket should remain open. If the Commission approves staff's recommendation in Issue 1, the docket should remain open for 20 days to allow the Petitioner an opportunity to file a Petition consistent with the guidelines set forth herein. In the event Petitioner does not file a new Petition within 20 days, this Docket should then be administratively closed. If the Commission does not approve staff's recommendation in Issue 1 or 2, the Docket should remain open and procedural dates should be established for the conduct of the hearing.