

State of Florida



Public Service Commission

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

DATE: June 24, 2004

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

FROM: Office of the General Counsel (Banks, Susac)
Division of Competitive Markets & Enforcement (Pruitt)

RE: Docket No. 030643-TP – Petition of Verizon Florida Inc. (f/k/a GTE Florida Inc.) against Teleport Communications Group, Inc. and TCG South Florida for review of decision by The American Arbitration Association, in accordance with Attachment 1 Section 11.2(a) of interconnection agreement between GTE Florida Inc. and TCG South Florida.

AGENDA: 07/06/04 – Regular Agenda – Motion to Dismiss – Parties May Participate

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\030643REC3.FRB.DOC

Case Background

The facts in this case have their genesis in a dispute that arose between the parties in an American Arbitration Association (AAA) decision.

In compliance with the dispute resolution provision in the interconnection agreement, Teleport Communications Group, Inc. and TCG South Florida (collectively “TCG”) filed a Petition for Arbitration before the AAA in December 2001, alleging that Verizon Florida Inc. (Verizon) breached the agreement by failing to pay reciprocal compensation for termination of ISP-bound traffic. Verizon filed a counterclaim relating to virtual NXX traffic.

Pursuant to the agreement, the parties took the dispute to the AAA for resolution. After a year-long course of arbitration, a hearing was held, an award memorializing that decision was issued on June 20, 2003.

On July 18, 2003, Verizon filed its confidential Petition against TCG seeking review of a decision by the AAA in accordance with Section 11.2(a) of the adopted Interconnection Agreement between GTE Florida, Inc. n/k/a Verizon Florida Inc. and AT&T Communications of the Southern States. On August 6, 2003, TCG filed its confidential Motion to Dismiss Verizon's Petition.

After agreeing that most of the information in the pleadings was not confidential, TCG and Verizon refiled their pleadings (public versions) on September 2, and September 5, 2003, respectively. By separate pleading, on August 25, 2003, Verizon filed a Motion for Oral Argument.

At the agenda conference on May 3, 2004, the Commission granted oral argument on TCG's Motion to Dismiss and Verizon's Response thereto. One of the issues in dispute was whether Verizon had timely filed its petition pursuant to its agreement. The Commission determined that Verizon's filing of its petition was timely pursuant the parties' interconnection agreement.

At the conclusion of the oral arguments, the Commission voted to allow parties to file briefs to address whether the Commission has jurisdiction to hear or review a decision rendered by AAA and also required parties to: (a) identify the specific factual, legal and policy issues for which review is sought; (b) address the reasons that the Commission should or should not agree to review the arbitrator's decision on each issue identified; (c) specify the type of proceeding that should be held on each issue (e.g., a de novo evidentiary hearing or appellate review based on the record in the arbitration proceeding); and (d) identify the applicable standard of review for each issue.

This recommendation addresses TCG's Motion to Dismiss and the briefs filed by the parties on the issues enumerated above.

The Commission is vested with jurisdiction pursuant to Section 252 of the Telecommunications Act of 1996 and Section 364.162, Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Does the Commission have jurisdiction to review the decision rendered by the AAA pursuant to the AT&T/GTE interconnection agreement adopted by TCG?

RECOMMENDATION: Yes. As a general matter, the Commission has jurisdiction to resolve disputes arising under an approved interconnection agreement unless its role is restricted by a binding dispute resolution provision in the agreement. Although staff believes that the Commission has jurisdiction to review the AAA decision in this case pursuant to Section 364.162, Florida Statutes, this conclusion should not be construed broadly and should be limited to the facts presented in this case. **(BANKS)**

STAFF ANALYSIS: As set forth in the Case Background, Verizon has filed a petition asking the Commission to review a decision rendered by the AAA. Unless otherwise noted, any references to briefs indicates the briefs filed by Verizon and TCG on May 17, and June 4, 2004, respectively.

I. Arguments

A. Verizon

In its brief, Verizon states that the Commission does have authority to hear or review a case rendered by the AAA. Verizon asserts that the interconnection agreement at issue in this case contains a distinctive dispute resolution provision that requires the parties to follow a series of steps before submitting any dispute to this Commission. Verizon explains that as a matter of state and federal law, where private parties agree to binding arbitration, the possible grounds for challenge to a private arbitration decision are narrow. But the parties, Verizon contends, did not agree to final, binding arbitration in this instance. Rather, the parties specifically agreed that a decision of the arbitrator would not be binding if a party appeals the decision to the Commission or FCC, the matter is within the jurisdiction of the Commission or FCC, and the agency agrees to hear the matter. Section 11.2, Interconnection agreement.

Verizon states that at the May 3, 2004, Agenda Conference, the Commission identified two threshold questions, reflecting the terms of the agreement. The first is whether this matter is within the Commission's jurisdiction. The second question is whether the Commission should agree to hear this case. Pursuant to Section 364.162, Florida Statutes, Verizon asserts that the Commission has authority to arbitrate any dispute regarding interpretation of interconnection agreements. Verizon contends the fact that the parties agreed to engage in private dispute resolution procedures before bringing the matter to the Commission does not mean that the Commission is stripped of jurisdiction. First, Verizon explains that the parties did not agree to be bound by private arbitration; instead, they agreed that either party would be able to appeal to this Commission. Second, Verizon indicates that although the parties' agreement provides that the arbitrator's decision may be appealed, the Commission or FCC would not truly be acting as an appellate tribunal if it were to accept the case. Verizon adds that even if the Commission were, in some sense, acting in an "appellate" capacity, this would not affect its jurisdiction under Section 364.162, Florida Statutes.

Verizon does not dispute that in cases where parties agree to final, binding arbitration, the grounds for review of an arbitration are limited by both federal and state law. See 9 U.S.C. § 10, 11; Fla. Stat. Ann. § 682.13, 682.14. However, the parties' agreement specifically provides that the arbitration of disputes arising under the agreement is not necessarily final. Verizon asserts that Section 11.2 provides:

11.2 A decision of the Arbitrator shall not be final [if] . . .

a) a party appeals the decision to the Commission or FCC, and the matter is within the jurisdiction of the Commission or FCC, provided the agency agrees to hear the matter . . .

Verizon states that under the agreement, the "Commission" is defined as the Florida Public Service Commission.

Verizon argues that the arbitrator's decision is not final in this case because the decision is being appealed pursuant to the interconnection agreement. Otherwise, Verizon agrees that were the decision truly a result of "binding" arbitration, the Commission would not have any jurisdiction to review it. Verizon indicates that at the time the parties' interconnection agreement was made it was unclear whether the state commissions would have any authority to resolve disputes over the interpretation of agreements. Therefore, according to Verizon, the parties included a provision in the agreement providing for Commission review.

Verizon emphasizes that Section 364.162 gives the Commission broad authority and discretion to arbitrate terms and conditions of an interconnection agreement. Verizon contends that Section 364.162 does not limit or otherwise distinguish between the Commission's authority to resolve disputes arising out of an interconnection or resale agreement or disputes arising out of previously approved agreements. In further support, Verizon cites to Florida Public Service Commission vs. Bryson, 569 So. 2d 1255 (Fla. 1990), where the Florida Supreme Court determined that the Commission must be allowed to act when it has at least a colorable claim that the matter falls within its exclusive jurisdiction as defined by the statute. Bryson at 1255. Hence, Verizon concludes that the Commission has jurisdiction to hear this case pursuant to Section 364.162, Florida Statutes.

B. TCG

TCG states that the Commission lacks jurisdiction to review or hear the arbitrator's award in this case. TCG states that jurisdiction exists, if at all, by virtue of statute and cannot be conferred by the parties. State ex rel. Caraker vs. Amidon, 68 So. 2d 403 (Fla. 1953). TCG asserts that an agency may not increase its own jurisdiction and, as a creature of statute, has no common law jurisdiction or inherent power such as might reside in, for example, a court of general jurisdiction. Deltona Corp. vs. Mayo, 342 So. 2d 510 (Fla. 1977). TCG explains that as an administrative agency created by the Legislature, "the Commission's power, duties and authority are only those that are conferred expressly or impliedly by statute." "Rolling Oaks Utilities vs. Florida Public Service Commission, 533 So. 2d 770, 773 (Fla. 1st DCA 1988). TCG indicates that the Legislature has neither expressly nor impliedly granted the Commission authority to modify, vacate or otherwise review a private arbitration award, but instead has

specifically reserved that authority to Florida's courts pursuant to Chapter 682, Florida Statutes (Florida Arbitration Code). Nor has the Legislature, contends TCG, authorized the Commission to hear appeals; that authority is reserved to Florida's courts by Article V of the Florida Constitution and therefore cannot be delegated to the Commission. TCG asserts that Section 364.162 permits the Commission to resolve interconnection disputes filed with the Commission in the first instance; but where the parties' dispute has already been resolved through private arbitration, Section 364.162 does not give the Commission authority to review or hear the decision rendered by a private arbitrator, FCC, federal courts, or state courts.

TCG asserts that the Florida Arbitration Code establishes an exclusive and comprehensive system for recognition, review and enforcement of arbitration orders, specifically reserving such authority to Florida's courts. TCG states that pursuant to the Florida Arbitration Code, Florida courts have exclusive authority to enter "judgment on an award duly rendered in arbitration. . . and to vacate, modify or correct an award . . . for such cause and in the manner provided in this law." Section 682.18, Florida Statutes. TCG states as the Florida Supreme Court has explained even the courts have very limited authority to review arbitration awards. See Roe v. Amica Mut. Ins. Co., 533 So. 2d 279, 281 (Fla. 1988)

TCG states that the Commission has held that arbitration clauses do not divest this Commission of jurisdiction to proceed "against a regulated company for violations for which the agency was directly responsible for enforcement." *See Order Granting Motion to Dismiss (XO Order)*, Order No. PSC-01-2509-FOF-TP, issued December 21, 2001, Docket No. 011252-TP). In the XO case, the Commission determined that it retains jurisdiction "over matters of public policy, or interpretation of, and compliance with, state or federal law." Id. at 3. TCG states that the Commission determined that XO's complaint did not trigger its jurisdiction because the complaint only presented "a difference in interpretation of a contract" and not a dispute regarding a term or condition. TCG asserts that the instant case is similar to the XO case and should be dismissed. Further, TCG asserts that Section 2.1 of parties' agreement provides that negotiation and arbitration shall be the exclusive remedy under the agreement.

Staff Analysis

The parties differ as to whether the arbitration provision under the agreement is final and binding. Verizon does not view the private arbitrator's decision as final but rather the first step of review in the dispute resolution process. However, TCG believes that the arbitration clause under the agreement provides that arbitration is the exclusive and final remedy. Staff agrees with Verizon on this point. Staff believes that generally, an arbitration award is final, subject to any specific provisions that the parties may have included regarding finality. In this case, the parties' agreement clearly provides that the arbitrator's decision is not final if a party appeals to the Commission. Thus, staff believes the arbitration at issue here was not, in fact, "binding"; but instead subject to some form of review.

Verizon next infers that because the agreement provides a review of the arbitrator's decision, it confers jurisdiction to this Commission. TCG responds that authority to the Commission is not created or conferred by parties but by statute. Staff agrees with TCG on this point. Staff believes that any authority given to the Commission must be granted by the Florida Legislature or the Florida Constitution. While the language of the parties' agreement clearly

provides that arbitrator's decision may be appealed, it is well established that the Commission's authority is not conferred by the parties but by statute. State ex rel. Caraker vs. Amidon, 68 So. 2d 403 (Fla. 1953). In this instance, however, staff believes the Commission's authority arises from the Florida Statutes.

This case presents an issue of first impression regarding the Commission's jurisdiction to hear or review decisions rendered through private arbitration under the Federal Arbitration Act.¹ However, pursuant to Section 364.162(1), Florida Statutes, "[t]he commission shall have the authority to arbitrate any dispute regarding interpretation of interconnection or resale prices and terms and conditions." (Emphasis added). Staff believes that this statutory language plainly authorizes the Commission to resolve complaints regarding the interpretation of interconnection agreements, which is the case herein. Pursuant to Section 252 of the Telecommunications Act, state commissions have authority to arbitrate interconnection agreements. Courts have interpreted state commissions' authority regarding both arbitrated and negotiated interconnection agreements to extend to the resolution of disputes arising under the agreements approved by the state commissions. Iowa Utils. Bd. v. Federal Communications Commission, 120 F. 3d 753, 804 (8th Cir. 1997) and BellSouth Telecommunications, Inc. v. MCImetro Access Transmission Servs., Inc. 317 F. 3d 1270 (11th Cir. 2003). Thus, staff is not persuaded by TCG's argument that only Florida courts would be able to hear or review a private arbitrator's decision.

While staff acknowledges that parties are free to predetermine a forum for alternative dispute resolution, staff emphasizes that the parties' agreement clearly provides that the arbitrator's decision may be reviewed. Thus, the parties' did not agree to "binding" arbitration by the clear terms of their agreement. Instead, the agreement left open the possibility that either party could ask for a "second bite at the apple" from the entity otherwise having primary jurisdiction to resolve the dispute -- the Commission. While staff emphasizes that the parties could not confer true "appellate" jurisdiction upon the Commission, staff believes that in this case parties never chose the alternative dispute resolution as their final forum.

Further, as a general matter, the Commission has jurisdiction to resolve disputes arising under an approved interconnection agreement unless its role is restricted by a binding dispute resolution provision in the agreement. Although staff believes that the Commission has jurisdiction to review the AAA decision in this case pursuant to Section 364.162, Florida Statutes, this conclusion should not be construed broadly and should be limited to the facts presented in this case.

¹ Staff notes that it is not aware of any instances in which other state commissions have addressed this issue directly. However, in a negotiated agreement between Crystal Communications, Inc. and GTE Minnesota, the Minnesota Public Utilities Commission determined that the arbitration provisions in the parties' agreement must provide that the arbitration award be subject to Commission review. Docket No. P-4121/#M-97-371. As a basis for its decision, the Minnesota Commission stated that the Commission is the agency with primary authority to enforce these agreements, and it would be inconsistent with public interest, convenience and necessity to cede this authority to a private arbitrator.

ISSUE 2: Should Commission agree to hear or review Verizon's petition against TCG?

RECOMMENDATION: No. Staff recommends that the Commission should not agree to hear or review this case and should dismiss Verizon's petition on its own motion because it does not present a compelling issue of public policy that the Commission needs to consider. **(BANKS)**

STAFF ANALYSIS: This issue addresses whether the Commission should agree to hear or review Verizon's petition. Pursuant to the parties' agreement, staff believes that the Commission's decision to hear this case is discretionary, and it should hear this case only if the Commission believes that there is a compelling public policy reason. Staff notes that if the Commission does not believe that it has jurisdiction to hear or review this case as set forth in Issue 1, this issue becomes moot.

I. Arguments

A. Verizon

In the instant case, Verizon states that TCG is seeking to recover reciprocal compensation for internet-bound traffic by Verizon's customers and delivered to the internet by ISPs serving TCG. Verizon asserts that even if internet-bound traffic were to be treated as conventional voice traffic under the agreement, much of the traffic delivered to TCG was virtual NXX (VNXX) traffic. Verizon states that the Commission has never required payment of reciprocal compensation on traffic that originates in one local calling area and is delivered to a telephone subscriber located in another local calling area. To the contrary, Verizon contends, this Commission has squarely ruled that "carriers shall not be obligated to pay reciprocal compensation for [VNXX] traffic." *Order on Reciprocal Compensation*, Order No. PSC-02-1248-FOF-TP, issued September 10, 2002. Verizon asserts that the Commission found that VNXX traffic is not subject to reciprocal compensation because it is not local traffic. Verizon explains further that the Commission determined that calls terminated to end users outside the local calling area in which their NPA/NXXs are homed are not local calls for purposes of intercarrier compensation. *Id.* at 33.

Verizon contends that the Commission retains jurisdiction over matters of public policy, or interpretation of, and compliance with, state or federal law. *See XO Order*. Verizon likens the instant case to the XO case. Verizon states that according to the *XO Order*, this Commission determined that it would retain jurisdiction to hear disputes over interconnection agreements even where parties included a provision designating arbitration as the exclusive remedy for disputes. In such cases, contends Verizon, the Commission retains jurisdiction "over matters of public policy, or interpretation of, and compliance with, state or federal law." *XO Order* at 3. Likewise, Verizon contends that it would be inappropriate for the Commission to apply a similar screening test because the parties did not agree that private arbitration would be the exclusive remedy under the agreement; rather they agreed to preserve a right to challenge any arbitration decision before this Commission.

Verizon asserts that it is a basic principle of administrative law that when, as here, the legislature has delegated quasi-judicial authority to an administrative agency, the agency does not have discretion to decline to exercise that authority. South Lake Worth Inlet Dist. Vs. Town

of Ocean Ridge, 633 So. 2d 79, 90 (Fla. Dist. Ct. App. 1994). (BR. 9). AT&T vs. FCC 978 F. 2d 727, 732 (D.C. Cir. 1992). Verizon states that the rationale behind this administrative law principle is that where a tribunal vested with the jurisdiction fails to exercise that jurisdiction, the aggrieved party may be deprived of all remedy.

Verizon states that even if the Commission has discretion over whether to exercise its jurisdiction in this instance, the Commission should exercise its jurisdiction. Verizon contends that a failure to exercise jurisdiction would discourage parties from engaging in private alternative dispute resolution in cases where they are unwilling to forgo entirely the possibility of Commission oversight. Verizon argues that this case raises matters of public policy, or interpretation of, and compliance with state or federal law. *See XO Order*.

Verizon emphasizes that the parties agreed to resolve disagreements through the alternative dispute resolution process. But the parties did not agree to forgo decision-making by the Commission altogether. Instead, contends Verizon, the parties agreed to submit disputes to a private arbitrator in the first instance and then to allow the losing party to seek Commission review.

Verizon states that by agreeing to a right to “appeal” arbitration decisions to this Commission, the parties agreed that the Commission would perform a function similar to that of a judicial tribunal undertaking administrative review, with the added benefit of Commission subject-matter expertise. During the year-long arbitration, the parties engaged in extensive discovery before the arbitrator, and it is on the basis of this record that Verizon seeks to pursue its claims that the arbitrator’s decision is contrary to policy established by this Commission. Verizon notes that if the Commission declines to hear this matter, it would then have to petition the FCC to review the case according to the parties’ agreement.

For the foregoing reasons, Verizon states that is imperative that the Commission hear or review this case.

B. TCG

Even if the Commission decides that it has jurisdiction in this case, it should decline to exercise it. TCG contends that this case involves only issues of contract interpretation between two carriers, and does not raise substantial questions of law and policy. TCG states that the arbitrator did not establish a new interconnection obligation for the parties; rather, he simply interpreted the terms of this particular agreement and determined that it specifically requires the parties to bill reciprocal compensation for traffic based on its originating and terminating NPA/NXXs, without exception for internet service provider (ISP) or virtual foreign exchange (VFX) traffic. TCG states that the arbitrator further found that the agreement contained no change of law provision that would incorporate the Commission’s *Order on Reciprocal Compensation*, Order No. PSC-02-1248-FOF-TP or the FCC’s *ISP Remand Order*². TCG argues that the arbitrator’s decision is consistent with the terms of these orders, both of which specified that they shall not affect pre-existing contracts, as well as prior Commission Orders regarding

² Implementation of the Local Compensation Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Intercarrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68, Order on Remand and Report and Order, FCC 01-131

payment of reciprocal compensation for ISP-bound traffic. TCG notes that the arbitrator's decision is not precedential and does not bind other parties. TCG states that parties' agreement establishes arbitration as the "exclusive remedy" for all interconnection disputes. TCG cites to Section 2.1 of the agreement, which provides:

Negotiation and arbitration under the procedures provided herein *shall be the exclusive remedy for all disputes* between GTE and AT&T arising out of this Agreement or its breach. GTE and AT&T agree not to resort to any court, agency or private group with respect to such disputes except in accordance with this Attachment.

(Emphasis added.) TCG contends that the agreement specifies that the arbitrator's decision and award shall be final and binding unless appealed where a state commission has such authority and agrees to hear the case:

11.2 A decision of the Arbitrator shall not be final in the following situations:

a) a party appeals the decision to the Commission or FCC, and the matter is within the jurisdiction of the Commission or the FCC, provided that the agency agrees to hear the matter;

TCG explains that the arbitration is the exclusive remedy for the parties' dispute, and the arbitration award is final and binding unless Section 11.2 of the parties' agreement is triggered. TCG indicates that this agreement was a part of a nationwide dialogue for similar agreements in other states. TCG explains that although the Act specifies the process by which parties enter into interconnection agreements, it does not specify how such agreements would be enforced. TCG contends that, at the time GTE and AT&T negotiated, it was not clear whether federal courts, state courts, state utility commissions or all of them would have jurisdiction to interpret interconnection agreements and resolve disputes that arise under such agreements. TCG points out that this national agreement was used as a template in 19 states. Thus, Sections 11.2 and 11.3 of the parties' agreement were standard multi-state "boilerplate" provisions, which by their terms would only be applicable if a state utility commission had jurisdiction to entertain appeals of arbitration awards. TCG notes that Verizon has exercised its option under Section 2 of the agreement to terminate the agreement effective July 31, 2004.

TCG argues that Verizon's reliance on the *FCC's ISP Remand Order* and the Commission's *Order on Reciprocal Compensation* is misplaced. TCG asserts that both of these orders specifically provide that they be applied on a prospective basis. TCG points out that the parties' agreement provides billing and payment of reciprocal compensation for all traffic with originating and terminating NPA/NXXs associated with the same LATA, without exception. Specifically, Section 3.1 of the agreement states:

The parties shall bill each other reciprocal compensation in accordance with the standards set forth in this Agreement for traffic terminated to the other Party's customer, where both such

customers bear NPA/NXX designations associated with the same LATA or other authorized area.

TCG states that pursuant to the parties' agreement the arbitrator correctly determined that mutual compensation for all traffic exchanged between parties is required where both the originating and terminating NPA/NXXs were associated with LATA 952.

TCG concludes that the Commission should not hear this case for several reasons. First, TCG states that the arbitrator's award is consistent with the *Order on Reciprocal Compensation* in which the Commission ruled that its decision would be applicable on a prospective basis, and thus, not applicable to existing agreements. Second, TCG states that the arbitrator, contrary to what Verizon asserts, has not rendered a decision contrary to policies established by the Commission. Third, TCG indicates that the Commission has established that the definition of "local traffic" in an agreement is controlling for purposes of resolving the dispute. Specifically, TCG states that in Order No. PSC-98-1216-FOF-TP, the Commission resolved four consolidated complaints against BellSouth by TCG, MCI, Intermedia and WorldCom for failure to make payment of reciprocal compensation for ISP-bound traffic and held that compensation was due because each agreement defined local traffic "in such a way that ISP traffic clearly fits the definition." In Order No. PSC-99-1477-FOF-TP, the Commission determined that the interconnection agreement between Intermedia and GTE required payment of reciprocal compensation for ISP-bound traffic based on the plain language of the contract, and this reasoning is applicable to the instant case. For these reasons, TCG believes that the Commission should decline to hear or review Verizon's petition and should dismiss its petition.

II. Staff Analysis

Verizon asserts that the Commission should agree to hear or review this case for several reasons. First, Verizon contends that this case presents a compelling public policy issue. Second, Verizon argues that the decision rendered by the arbitrator is inconsistent with policies established by the Commission. Third, Verizon asserts that the parties' agreement clearly provide that the private arbitrator's decision is final unless it is appealed by a party.

TCG responds that this case does not present a compelling public policy issue and that Section 2.1 of the parties' agreement provides that arbitration shall be the exclusive remedy under the agreement. Further, TCG states that the arbitrator's decision is consistent with the Commission's previous decisions.

Staff has identified four points as a basis for why the Commission should decline to hear or review this case. First, staff does not believe that this case presents a compelling public policy issue. As required by the agreement, the parties initially exchanged local traffic on a bill-and-keep basis until traffic became out of balance. At that point, TCG asserts, it began billing Verizon reciprocal compensation, and Verizon started to withhold payment of amounts it estimated were attributable to ISP-bound traffic. Staff notes that the agreement did not identify, define or exempt ISP-bound traffic from the payment of reciprocal compensation. Thus, TCG asserts that the Commission has already made its determination regarding reciprocal compensation and there is no change in law provision that would render a different result. Staff agrees with TCG on this point.

Second, staff believes that the Commission should decline to hear this case because Section 11.2 of the parties' agreement provides that the Commission's review of the arbitrator's decision is discretionary. The plain language of the agreement clearly provides that the Commission may decline to consider this case.

As to the third point, staff believes that the Commission should decline to hear this case because it is well established that an arbitration is a favored means of dispute resolution and courts should indulge every reasonable presumption to uphold proceedings resulting in an award. See Roe vs. Amica Mut. Ins. Co., 533 So. 279, 281 (Fla. 1988). Staff notes that during the year-long arbitration the parties invested a great amount of time and expense. Sensing the potential for additional costs that may be incurred with a review by this Commission, and the deference that should generally be given to arbitration decisions, staff believes it is appropriate for the Commission to decline to exercise its jurisdiction in this matter.

Fourth, because the arbitrator's decision appears to be consistent with Commission policy, staff believes that the Commission should not hear this case. The arbitrator determined that the agreement treated ISP-bound traffic as "indistinguishable from non-ISP bound traffic," and there was no change in law provision that would operate to incorporate post-contract regulatory rulings, thereby requiring Verizon to pay reciprocal compensation to TCG for all such traffic. Verizon argues that this decision is inconsistent with the decisions rendered in the *Order on Reciprocal Compensation* and the FCC's *ISP Remand Order*. TCG responds that both of these decisions are consistent with the Commission's policy in that they were not applied to agreements existing at the time but were applicable to agreements on a prospective basis. Staff agrees with TCG in that the *Order on Reciprocal Compensation* and the FCC's *ISP Remand Order* are not applicable in this instance.

Based on the foregoing, staff recommends that the Commission should not agree to hear or review this case and should dismiss Verizon's petition on its own motion because it does not present a compelling issue of public policy that the Commission needs to consider. If the Commission approves staff's recommendation on this issue, staff believes that TCG's Motion to Dismiss becomes moot.

Docket No. 030643-TP

Date: June 24, 2004

ISSUE 3: Should this docket be closed?

RECOMMENDATION: If the Commission denies staff's recommendation in Issue 1 or approves staff's recommendation in Issue 2, this docket should be closed as no further Commission action is required. If however, the Commission denies staff's recommendation in Issue 2, this docket should remain open pending the resolution of the issues in the docket.
(BANKS)

STAFF ANALYSIS: If the Commission denies staff's recommendation in Issue 1 or approves staff's recommendation in Issue 2, this docket should be closed as no further Commission action is required. If however, the Commission denies staff's recommendation in Issue 2, this docket should remain open pending the resolution of the issues in the docket.