State of Florida

Public Service Commission

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

DATE: February 23, 2006

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

FROM: Division of Competitive Markets & Enforcement (Lee, Dowds, K. Kennedy, King)
Office of the General Counsel (L. Fordham, Banks)

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: 03/07/06 – Regular Agenda – Posthearing Decision – Participation is Limited to Commissioners and Staff

COMMISSIONERS ASSIGNED: Edgar

PREHEARING OFFICER: Edgar

CRITICAL DATES: 03/10/06 - FCC's Transitional Deadline

SPECIAL INSTRUCTIONS: None

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

Case Background

On August 21, 2003, the FCC released its TRO, promulgating various rules governing the scope of incumbent telecommunications service providers' obligations to provide competitors access to UNEs; the Order became effective on October 2, 2003. On February 20, 2004, Verizon filed its Petition for Arbitration of Amendment to Interconnection Agreements with Certain Competitive Local Exchange Companies (CLECs) and Commercial Mobile Radio Service Providers (CMRS) in Florida to implement changes resulting from the TRO.

The TRO was subsequently appealed to the D.C. Circuit Court of Appeals. On March 2, 2004, the D.C. Circuit Court of Appeals, in USTA II, vacated and remanded certain provisions of

the TRO, specifically regarding the impairment findings relating to mass market switching, high-capacity loops, and dedicated transport. Verizon filed an Update to Petition for Arbitration to reflect the USTA II decision on March 19, 2004. Subsequently, on June 16, 2004, the D.C. Circuit Court of Appeals issued its mandate.

On February 4, 2005, the FCC released its TRRO, setting forth revisions to certain of its unbundling rules in response to USTA II. The TRRO unbundling requirements were effective March 11, 2005. In light of the TRRO release and its possible impact on this arbitration, the procedural schedule in this docket was modified by Order No. PSC-05-0221-PCO-TP, issued on February 24, 2005.

On December 5, 2005, Final Order No. PSC-05-1200-FOF-TP (Order) was issued, setting forth the Commission's specific findings on the issues established for this Docket. On December 20, 2005, several parties filed motions requesting reconsideration and/or clarification of the Order. On December 27, 2005, responses to the motions were filed. On February 3, 2006, the Commission issued Order No. PSC-06-0078-FOF-TP Denying Motions For Reconsideration and Granting Clarification of Certain Portions of Order No. PSC-05-1200-FOF-TP.

On February 8, 2006, Verizon filed a letter explaining that, in some instances, the parties were unable to agree on language to implement the Commission's rulings. With its letter Verizon included a copy of an interconnection agreement amendment that indicated where the parties agreed as well as identified the areas of disagreement. In addition, Verizon noted that to assist the Commission in determining which language should be adopted, Verizon and the CLEC parties agreed to file briefs on February 14, 2006.

On February 14, 2006, the CLEC parties and Verizon filed their briefs. In addition, Verizon filed an updated interconnection agreement amendment which indicated the areas of agreement and disagreement between the parties.

Issue 1 describes the various language disputes and sources of disagreement, and provides staff's recommendations on how to resolve the disputes, consistent with the Commission's post-hearing orders. Staff's specific recommended amendment is provided in Attachment A. Issue 2 addresses the appropriate effective date for the agreement amendment.

Discussion of Issues

Issue 1: What language should be adopted for inclusion in the interconnection agreement amendment to implement the Commission's rulings in Order Nos. PSC-05-1200-FOF-TP and PSC-06-0078-FOF-TP?

Recommendation: Staff recommends that the Commission adopt the amendment identified as Attachment A to implement the Commission's rulings in Order Nos. PSC-05-1200-FOF-TP and PSC-06-0078-FOF-TP. **(Lee, Dowds, K. Kennedy, King)**

Staff Analysis:

As noted in the Case Background, the parties have been unable to reach agreement on appropriate language to implement many of the Commission's decisions in this arbitration. Although there are numerous discrete provisions of the proposed amendment where disputed language occurs, on balance the underlying basis for the disagreements generally can be grouped into categories. Accordingly, staff's recommendation does not discuss, subsection by subsection, all of our discrete recommended changes; rather, to the extent possible we discuss our recommended changes by general type of change (although this was not always possible). Attachment A is staff's recommended amendment that incorporates all changes to the draft amendment submitted by Verizon on February 14, 2006.

I. References to a Pricing Attachment

Verizon has attached as Exhibit A to the amendment a pricing attachment that appears to contain various Commission-approved non-recurring charges but also lists numerous rate elements for which the price is noted as "TBD" (which we presume means To Be Determined, at some future date). References to this Pricing Attachment occur in many places throughout Verizon's version of the amendment (e.g., sections 1, 2.5.2, 3.1.1, 3.3.2, 3.2.4.1, 3.11.2.4). The CLEC Parties object to this pricing attachment, and references to it, because it would allow Verizon unilaterally to implement certain rates and charges approved by the Commission in the future, without executing a written amendment to existing agreements.

In a stipulation filed with the Commission in this proceeding on April 26, 2005, the parties agreed that Verizon would withdraw its request that certain new rates contained in a pricing attachment be adopted in this proceeding. However, Verizon reserved the right to initiate a proceeding asking the Commission to set rates for the items contained in the withdrawn pricing attachment. Moreover, the stipulation provides that it " . . .does not affect Verizon's right to continue to apply any rates the Commission has already established, including those adopted in Docket No. 990649B-TP, Order No. PSC-02-1574-TP, or where such order has not established a particular rate, the rates set forth in particular interconnection agreements." (Stipulation. p. 2)

Nowhere in the Stipulation or elsewhere in this proceeding did the CLEC Parties agree that Verizon would be able to unilaterally implement rates set in the future, without a formal amendment. In fact, Issue 2, in which Verizon had requested modifying the parties' existing change-of-law provisions to allow that any future changes to unbundling requirements would be effectuated without an amendment, was denied. Moreover, while Verizon is correct that the

Stipulation preserved Verizon's right to charge existing Commission-approved rates, neither the Stipulation nor the Commission's Orders provided that Verizon could unilaterally insert these rates into agreements which did not have them. Accordingly, staff recommends that the Pricing Attachment and all references to it should be excluded from the Amendment.

II. Section 4.4 and associated provisions and cross-references

In the Miscellaneous Provisions section of the amendment, the CLEC Parties propose adding the following language to Section 4.4:

> This Amendment does not alter, modify or revise any rights and obligations under applicable law contained in the Agreement, other than those Section 251 rights and obligations specifically addressed in this Amendment. Furthermore, ***CLEC Acronym TXT***'s execution of this Amendment shall not be construed as a waiver with respect to whether Verizon, prior to the Amendment Effective Date, was obligated under the Agreement to perform certain functions required by the TRO.

In various sections of the agreement the CLEC Parties cross-reference this provision as providing a caveat that potentially limits the applicability of TRO or TRRO unbundling provisions. For example, in the section dealing with fiber-to-the home (FTTH) and fiber-to-the-curb (FTTC) loops, Section 3.1.1, the CLEC Parties' proposed language reads:

> New Builds. Notwithstanding any other provision of the Amended Agreement, or any Verizon tariff (but subject to and without limiting Section 4.4 below) Verizon is not required to provide access to a FTTH or FTTC loop on an unbundled basis when Verizon deploys such a Loop to the customer premises of an end user that has not been served by any such loop facility.

Verizon objects to the inclusion of such language because, among other reasons, in the April 26, 2005 Stipulation, the CLEC Parties agreed that any unbundling obligations that arise outside of sections 251 and 252 will not be addressed in this proceeding. Verizon opines that the " . . . CLECs have proposed adding language to Section 4.4 of the Amendment – which addressed the Scope of the Amendment and its affect on pre-existing obligations under the parties' ICAs – that is at best confusing surplusage and at worst an attempt to undo the parties' stipulation and this Commission's holding concerning the scope of Verizon's obligations under the Amendment." (Verizon BR at 3)

Staff observes that the April 26, 2005 Stipulation provides:

> AT&T, MCI, FDN, and CCG agree that they will withdraw from this arbitration their request for this Commission to adopt in their arbitrated amendments rates, terms, and conditions that do not arise from federal unbundling regulations pursuant to 47 U.S.C. sections 251 and 252, including issues asserted to arise under state law or the Bell Atlantic/GTE merger conditions. This means that Issue 1 ("Should the Amendment include rates, terms, and conditions that do not arise from federal unbundling regulations pursuant to 47 U.S.C. sections 251 and

> 252, including issues asserted to arise under state law or the Bell Atlantic/GTE Merger Conditions?") will be deleted from the issues to be resolved in this proceeding. (Stipulation, p.2)

Staff believes that it is clear that the CLEC Parties agreed that the scope of the unbundling requirements to be addressed in the Amendment is limited to those arising under sections 251 and 252. To attempt to insert language in the Amendment that potentially goes beyond the stipulation is improper. Thus, staff recommends that the CLEC Parties' proposed addition to Section 4.4, and cross-references to it, be deleted.

III. Superfluous language, or where one party objects and neither the Commission Orders nor the FCC Rules and Orders supports its inclusion

There are numerous instances of disputed language where inclusion of the language adds little if anything in the way of clarity (and is often redundant), or for which support requiring its inclusion cannot be determined. Examples:

Section 2.1 Verizon's proposed language reads in part: " . . .Verizon shall not impose limitations, restrictions, or requirements on requests for, or the use of, unbundled network elements . . ." The CLEC Parties propose to insert "access to" after "for" and before "or the use of." Staff believes this is a distinction without a difference; staff recommends excluding the CLEC edit.

Section 2.2 Contained in the General Conditions section, this language essentially says that Verizon will provide UNEs, UNE combinations, and commingled arrangement to the extent required by the Federal Unbundling Rules; however, the CLEC Parties object to its inclusion. Since subsequent sections detail specific obligations and the parties cannot agree, staff recommends deleting it in its entirety.

Section 2.3 The CLEC Parties object, in part, to Verizon language that basically says that UNEs, UNE combinations and commingled arrangements may only be used for those purposes allowed for in the FCC's unbundling rules. This issue is not addressed in the Commission's Orders. Staff recommends excluding the disputed portion, while including the undisputed portion.

Section 3.1.2 Agreed upon language provides in part that " . . .Verizon is not required to provide access to an FTTH or FTTC Loop on an unbundled basis when Verizon has deployed such a loop parallel to, or in replacement of, an existing cooper loop facility, except that, in accordance with the Federal Unbundling Rules . . ." The CLEC Parties object to Verizon's inclusion of the phrase "but only to the extent required by" before the "Federal Unbundling Rules." Verizon objects to the CLEC Parties' inclusion "and the Arbitration Orders" after the "Federal Unbundling Rules." Neither is clearly required by the Commission Orders or the FCC rules or orders, and staff believes they are redundant; thus, we recommend excluding both.

Section 3.4.1 This section deals with DS1 loops; the CLEC Parties propose adding the modifier "Section 251(c)(3)" before "DS1 loop." (They propose analogous edits for other loop types.) Since this is a section 252 arbitration that is only dealing with elements provided pursuant to section 251, staff believes the modifier is superfluous and recommends it be deleted.

IV. Specific Edits to Certain Sections

Section 2.4.1 This section pertains to what rates can Verizon charge where it is permitted to cease providing a Discontinued Facility and a CLEC has not submitted a local service request (LSR) or access service request (ASR), as applicable, and Verizon chooses not to disconnect the existing facility. Unless the CLEC currently subscribes to a special access volume and term plan, Verizon proposes to charge the replacement offering based on month-to-month rates from its access tariff. In contrast the CLEC Parties' proposed language contends that Verizon may ". . . assess a rate that is not greater than the lowest rate the LEC could have otherwise obtained for an equivalent or substantially similar wholesale service . . ." Verizon objects to this language, claiming it would eliminate the CLECs' incentive to submit orders for replacement offerings for Discontinued Facilities. Verizon also proposes language that with respect to such replacement services or Discontinued Facility, it may immediately disconnect these offerings if the CLEC fails to pay when due. Staff notes that the Commission's Orders, as well as FCC rules and orders, are silent on these matters.

Staff believes that it is reasonable, absent an agreement between the parties to the contrary, for Verizon to assess month-to-month access charges in this instance (except where the CLEC has an access volume and term plan). Staff believes it is incumbent on the CLEC to select to which available replacement offering it wishes to migrate de-listed UNEs; Verizon has no obligation to determine for the CLEC which is the least cost option and perform the migration. However, with respect to a CLEC's nonpayment of such replacement offerings, staff does not believe it appropriate to establish in the agreement a new, special category regarding disconnection for nonpayment. We believe this is unnecessary because disconnection for nonpayment is a topic typically already provided for in interconnection agreements and Verizon's tariffs. Accordingly, staff recommends that the CLEC Parties' language regarding repricing Discontinued Facilities at the lowest rate available, as well as Verizon's proposed language concerning disconnection of replacement services or a Discontinued Facility for nonpayment, should be omitted.

Section 3.2.4.2 This section pertains to IDLC hybrid loops, and Verizon's obligations to unbundle them. Verizon proposes language that would afford it sole discretion as to how it would unbundle an IDLC hybrid loop. In contrast, the Commission's Orders and the CLEC Parties' language would require Verizon to "present" to the CLEC a technically feasible alternative unbundling method, other than one requiring construction of copper loops or UDLC systems. We recommend rejecting Verizon's proposed language and adopting the CLEC Parties' language, which is in accord with the Commission's decision.

Verizon also proposes to include language that describes the types of charges that Verizon contends the CLEC may be required to pay. Since nowhere in the Commission's Orders is there any discussion of pricing with respect to unbundling IDLC hybrid loops, staff recommends this language be omitted.

Section 3.4.1.1.2 In this subsection, which pertains to the application of the DS1 cap, Verizon proposes that a CLEC "and its affiliates" be restricted to a maximum of 10 DS1 loops to a single building. (Verizon proposes "and its affiliates" also be included in language for caps on DS3 loops, as well as DS1 and DS3 transport.) Staff notes that the Commission's Orders, as well as

FCC rules and orders, are silent on these matters. In particular, the FCC rule refers only to "a CLEC." Absent any support for this proposal, staff recommends that Verizon's "and its Affiliates" language be excluded.

Section 3.6.1 CLEC Certification and Related Provisions

This section pertains to the scope of the reasonably diligent inquiry that a CLEC is to conduct prior to self-certifying that it is entitled to order high-capacity loops and transport. There are two minor disputes. First, in Section 3.6.1.1, in addition to language that such an inquiry by a CLEC includes a review of Verizon's wire center lists and supporting data, Verizon wants to add "or is otherwise available to the CLEC," while the CLEC Parties propose adding "or that the CLEC otherwise possesses." Since neither the Commissions' Orders nor the FCC rules or orders address this matter, staff recommends omitting both proposals.

Second, in Section 3.6.1.2, the CLECs propose that Verizon be required to provide back-up supporting data for its wire center list within 10 business days if a non-disclosure agreement is in place between the parties covering such data; Verizon disagrees. Again, the Commission Orders and the FCC rules and orders are silent, so staff recommends excluding this language.

Section 3.6.2 Provision-then-Dispute Requirements

Two provisions are in dispute: Sections 3.6.2.2.2 and 3.6.1.2. In Section 3.6.2.2.2, the CLEC Parties propose that where Verizon intends to re-price a facility or service back to the date of provisioning if it prevails in a self-certification dispute, that Verizon must notify the CLEC that it disputes the self-certification within 30 days of its receipt. Further, if Verizon is allowed to re-price, "such re-pricing should be at rates no greater than the lowest rates that ***CLEC Acronym TXT*** could have obtained in the first instance (for the facility to be re-priced) had ***CLEC Acronym TXT*** not ordered such facility as a UNE." There are no terms and conditions concerning re-pricing of facilities in the Commission's Orders or the FCC rules and orders. Accordingly, staff recommends this language be omitted.

In Section 3.6.2.2, which cross-references in 3.6.2.2.2, Verizon proposes to insert language providing that any re-pricing is "applicable back to the date of provisioning (including, but not limited to, late payment charges for the unpaid difference between UNE and access tariff rates.)" Staff recommends exclusion of Verizon's language pertaining to late payment charges, as this Commission's Orders and the FCC rules and orders are silent on this issue. However, existing provisions in parties' interconnection agreements (e.g., dispute resolution provisions) may afford Verizon the right to assess late payment charges.

Section 3.9 Discontinuance of TRRO Embedded Base at the Close of Transition Period.

In varying degrees both parties propose language that does not track precisely the Commission's Orders. For example, Verizon's language appears to imply the transition pricing ends when a de-listed UNE has been converted, and that conversions must be completed during the transition period. Staff's recommends deleting the language proposed by both parties so that it tracks the Commission's Orders.

Section 3.10A Line Conditioning

Staff's recommended language strikes all of the CLEC Parties' proposed language, which we believe goes far beyond the Commission's decision and the FCC rules and orders. Similarly, Verizon's proposed language that went beyond the Commission's decision (e.g., attempts to impose provisioning intervals, pricing) was excluded. Staff's recommended language narrowly tracks the Commission's decision.

Section 3.11.2 Service Eligibility Criteria for Certain Combinations and Commingled Facilities and Services

Other than ripple effects of previously recommended edits, staff recommends changes to two subsections. First, in section 3.11.2.3, which pertains to how a CLEC certifies it satisfies the eligibility criteria, staff recommends excluding Verizon's proposed language that appears to require a CLEC to " . . . provide all specified supporting information on the ASR related to the circuit's eligibility, . . ." (emphasis added) As this appears to directly conflict with the Commission's Orders that allow for self-certification, staff recommends this language be deleted.

Second, in section 3.11.2.9, which pertains to the annual EELs audit, staff recommends making some relatively minor changes so that the language better tracks the Commission Orders and the FCC rules and orders.

Section 3.12.1.1 Routine Network Modifications: General Conditions

Staff's recommended language incorporates two changes. First, staff recommends adopting the CLEC Parties' language discussing the provision of routine network modifications (RNMs) at parity, but adding wording "for its customers excluding the installation of a new loop," to track the Commission's Orders. Second, the CLEC Parties proposed language that stated that there are no Commission-approved rates for RNMs. Staff recommends excluding this language because it is inconsistent with the Commission's Orders and the parties' stipulation, which provided that Verizon was entitled to charge any Commission-approved rates.

Section 4.7 Miscellaneous Provisions: Definitions

Staff recommends making changes to three definitions. First, staff recommends modifying section 4.7.3, Commingling, so that it tracks exactly the definition in the FCC's rules. Second, staff recommends modifying section 4.7.7, Discontinued Facility, to delete various superfluous words (many of which were discussed above), as well as the last clause in the definition as proposed by Verizon, because it is unnecessary since the preceding clauses constitute a complete list of Discontinued Facilities. Third, staff recommends deleting Verizon's proposed language that provides that any changes to Verizon's wire center list due to excluding MCI as a fiber-based collocator will not alter the de-listings findings made on March 11, 2005. Staff also recommends deleting the CLEC Parties' proposed language that would make the application of the updated wire center list that reflects exclusion of MCI, retroactive to March 11, 2005. Staff could locate no support for either proposal in the Commission Orders, the TRO and TRRO and implementing rules, or the Verizon/MCI merger order.

Issue 2: What should be the effective date of the amendment to the parties' agreement?

Recommendation: Staff believes the affected parties have had sufficient notice to plan for any eventualities which may flow from the Commission's findings in this matter. Therefore, if the Commission approves the recommendation of staff in Issue 1, and adopts the amendment identified as Attachment A attached thereto, it is appropriate that the effective date of that amendment be March 11, 2006. Further, the fully executed agreements should be filed with this Commission within 10 days of the vote of the Commission on this recommendation. (**L. Fordham**)

Staff Analysis: The TRRO established a one-year transition period for the purpose of implementing certain provisions contained therein. That transition period ends on March 10, 2006. Accordingly, those new provisions of the TRRO, which are the subject of this amendment, become effective as of March 11, 2006.

Staff believes the affected parties have had sufficient notice to plan for any eventualities which may flow from the Commission's findings in this matter. Therefore, if the Commission approves the recommendation of staff in Issue 1, and adopts the amendment identified as Attachment A attached thereto, it is appropriate that the effective date of that amendment be March 11, 2006. Further, the fully executed agreements should be filed with this Commission within 10 days of the vote of the Commission on this recommendation.

Issue 3: Should this docket be closed?

Recommendation: No. The docket should remain open for 45 days following the issuance of the final order to allow parties to file fully executed agreements and to address any other outstanding matters. After the 45 days have past, and there are no outstanding issues, this docket should be closed administratively. (**L. Fordham**)

Staff Analysis: The docket should remain open for 45 days following the issuance of the final order to allow parties to file fully executed agreements and to address any other outstanding matters. After the 45 days have past, and there are no outstanding issues, this docket should be closed administratively.