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: 12/05/2001

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK & ADMINISTRATIVE SERVICES (BAYÓ)

FROM: DIVISION OF LEGAL SERVICES (FORDHAM) C.S.F. 12/5
DIVISION OF COMPETITIVE SERVICES (FULWOOD)

RE: DOCKET NO. 011252-TP - REQUEST FOR ARBITRATION CONCERNING COMPLAINT OF XO FLORIDA, INC. AGAINST VERIZON FLORIDA INC. (F/K/A GTE FLORIDA INCORPORATED) REGARDING BREACH OF INTERCONNECTION AGREEMENT AND REQUEST FOR EXPEDITED RELIEF.

AGENDA: 12/17/01 - REGULAR AGENDA - MOTION TO DISMISS - ORAL ARGUMENT NOT REQUESTED - PARTIES MAY PARTICIPATE AT THE DISCRETION OF THE COMMISSION.

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\CMP\WP\011252.RCM

CASE BACKGROUND

XO Florida, Inc., f/k/a NEXTLINK Florida, Inc. (XO), is an alternative local exchange carrier (ALEC) and interexchange carrier (IXC) operating in the state of Florida. On June 21, 1999, XO executed an interconnection agreement with Verizon Florida, Inc., f/k/a GTE Florida Incorporated (Verizon) to enable XO to provide local telecommunications services to customers in Tampa, where Verizon is the ILEC. That agreement was approved by this Commission in Docket No. 990858-TP, Order No. PSC-99-1529-FOF-TP issued on August 4, 1999. The Agreement sets forth the terms and conditions for the establishment of, and compensation for, interconnection facilities over which each party delivers telecommunications traffic from its end user

customers to the other party for termination to its end user customers. A copy of the relevant portions of the agreement is attached hereto as ATTACHMENT A.

On July 24, 2000, XO filed an informal complaint with this Commission, alleging that Verizon had failed to adhere to the terms of the interconnection agreement. Commission staff worked with the parties in an effort to resolve the conflicts until July 24, 2001, when the informal complaint was closed. On September 25, 2001, XO filed its formal complaint, alleging breach of the interconnection agreement by Verizon. Verizon filed its Motion to Dismiss on October 22, 2001, and XO filed its response on November 5, 2001. Verizon's Motion to Dismiss is the subject of this Recommendation.

JURISDICTION

Pursuant to Section 252(e) of the Act, the Commission approved the agreement between Verizon and XO. As such, the Commission has jurisdiction to resolve this dispute pursuant to Sections 251 and 252 of the Telecommunications Act of 1996. See Iowa Utilities Bd. V. FCC, 120 F. 3d 753, 804 (8th Cir 1997) (State commissions' authority under the Act to approve agreements carries with it the authority to enforce the agreements).

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant Verizon's Motion to Dismiss?

RECOMMENDATION: Yes. The Commission should grant Verizon's Motion to Dismiss. **(FORDHAM, FULWOOD)**

STAFF ANALYSIS: The basis for Verizon's Motion to Dismiss, filed on October 22, 2001, is that the subject interconnection agreement contains a mandatory arbitration clause. In the Agreement, the parties agreed to use the specified "alternative dispute resolution procedures as their sole remedy with respect to any controversy or claim arising out of or relating to the interpretation of th[e]

Agreement or its breach." The specified procedures require that, in the event of an alleged breach, each party first designate a representative to attempt a negotiated resolution of the disagreement. If negotiations fail, after 60 days "the dispute shall be submitted to binding arbitration by a single arbitrator pursuant to the Commercial Arbitration Rules of the American Arbitration Association."

In its Motion, Verizon asserts that none of those procedures were followed. Verizon states that the early efforts to resolve the dispute involved a unilateral effort by XO. Verizon did not seek the assistance of the Commission, but cooperated with the Commission's informal efforts to resolve the dispute. Verizon points out, however, that the involvement of the Commission was not consistent with any procedure prescribed by the Agreement. No designated representatives were appointed and the Commission involvement was not tantamount to the negotiation provided for in the Agreement. Verizon urges that the Complaint must be dismissed because the Commission has no jurisdiction.

In its Response to Verizon's Motion to Dismiss, XO urges that the inclusion of an alternative dispute resolution provision in the Agreement does not divest the Commission of jurisdiction. XO asserts that the Agreement authorizes either party to seek Commission resolution of disputes "over matters of public policy, or interpretation of, and compliance with, state or federal law." XO cites the following three cases in support of its position:

MS Ivarans Rederi v. United States, 895 F.2d 1441, 1445 (D.C. Cir. 1990).
Duke Power Co. v. F.E.R.C., 864 F.2d 823, 829 (D.C. Cir. 1989).
Gulf Oil Corp. v. Federal Power Commission, 563 F.2d 588, 596-97 (3d Cir. 1977).

XO also alleges that Verizon has acknowledged the jurisdiction of the Commission when it participated in the "informal mediation" before Commission staff in earlier efforts to resolve the parties' dispute. XO believes that Verizon's participation in "protracted Commission-assisted mediation" was for the purpose of delay in the resolution of this matter. Only now does Verizon raise the issue of arbitration constituting the parties' sole remedy.

Verizon argues that this Commission is preempted from consideration of this complaint by the exclusive arbitration clause contained within the agreement wherein the alleged breach occurred. Verizon contends that under both Florida and Federal law, private arbitration provisions are valid, binding and enforceable. Federal Arbitration Act, 9 U.S.C. §§ 1-14; Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 74 L.Ed.2d 765, 103 S.Ct. 927(1983); Fla. Stat. § 682.02; Cone Constructors, Inc. V. Drummon Community Bank, 754 So.2d 779(Fla. 1st DCA 2000); Old Dominion Insurance Co. V. Dependable Reinsurance., 472 So.2d 1365(Fla. 1st DCA 1985); Zac Smith & Co. V. Moonspinner Condominium Association, Inc., 472 So.2d 1324(Fla. 1st DCA 1985); Physicians Weight Loss Centers of America, Inc. V. Payne, 461 So.2d 977(Fla. 1st DCA 1984); Miller Construction Co. V. The American Insurance Co., 396 So2d 281(Fla. 1st DCA 1981).

Staff agrees with XO that the exclusive arbitration clause did not divest this Commission of jurisdiction "over matters of public policy, or interpretation of, and compliance with, state or federal law." The cases cited by XO, however, do not apply in the instant dispute. The cited cases were instances where the agency was proceeding against a regulated company for violations for which the agency was directly responsible for enforcement. They were not cases wherein there was a dispute between companies over the terms of the Agreement.

In Gulf Oil Corporation, for example, the Court held:

> By its terms, the arbitration clause of the contract applies only to disputes "arising between Seller and Buyer out of this Agreement," whereas the instant case is a dispute between Gulf and the FPC arising out of the certificate.

In Duke Power Company, Duke was in violation of its filed rate schedule and argued that the regulatory agency had no authority to enforce compliance with the schedule because of an arbitration clause. The Court held:

> Because the enforcement of filed rate schedules is a matter distinctly within the Commission's statutory mandate, the Commission has an independent regulatory duty to remedy a

> utility's violation of its filed rate schedule. We therefore hold that the Commission's acceptance for filing of an agreement that contains an arbitration clause does not legally disable the Commission from resolving disputes at the core of its enforcement mission.

A/A Ivarans Rederi was, again, a case where the regulatory agency was itself conducting an investigation for enforcement of matters within its statutory responsibility. The Court held:

> Since Congress clearly envisioned a role for the FMC to play in investigating and adjudicating possible violations of the Shipping Acts, we think it rather extreme to conclude that the FMC "waived" its statutory obligations simply by approving an arbitration clause.

Nevertheless, staff does not believe that the dispute in this docket involves a matter of public policy or interpretation of, and compliance with, state or federal law. It is, rather, a difference in interpretation of a contract. In a very loose and general sense, every matter for which this Commission is responsible falls under the umbrella of some state or federal law. That fact, however, does not diminish the right of parties to agree and contract regarding matters which do not rise to a level which requires intervention by this Commission to protect a greater public interest. Staff believes the dispute which is the subject of this Docket does not rise to that level.

The parties agreed that the sole remedy in the event of unresolved disputes would be binding arbitration. Staff notes that during the year since the informal complaint was made, neither party followed the provisions for dispute resolution set forth in the Agreement. However, now that a formal complaint has been made to this Commission by XO, and a Motion to Dismiss has been filed by Verizon, staff believes that intervention by the Commission in this dispute would be contrary to the terms of the agreement in question, and inconsistent with the public interest by circumventing the parties' legal right to contract. Staff also notes that this Commission has consistently upheld alternative dispute resolution provisions in agreements. In the past, the

Commission has found the agreement arbitration clauses controlling in Docket Nos. 001305-TI, 001097-TP, and 981854-TP. Accordingly, staff recommends that Verizon's Motion to Dismiss be granted.

ISSUE 2: Should this Docket be closed?

RECOMMENDATION: Yes. If the Commission approves staff's recommendation in Issue 1, the Docket should be closed upon issuance of the order. **(FORDHAM)**

STAFF ANALYSIS: If the Commission approves staff's recommendation in Issue 1, there would be no further action required in this Docket and it should be closed upon issuance of the order.