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March 29, 2004

Ms. Blanca S. Bayo, Director
Division of the Commission Clerk
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Florida Public Service Commission
2540 Shumard Oak Boulevard
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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.

Dear Ms. Bayo:

Please find enclosed for filing an original and 15 copies of Verizon Florida Inc.'s Opposition to Motion to Dismiss of Sprint Communications Co., L.P. in the above matter. Service has been made as indicated on the Certificate of Service. If there are any questions regarding this filing, please contact me at 813-483-1256.

Sincerely,

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CERTIFICATE OF SERVICE

I hereby certify that copies of Verizon Florida Inc.'s Opposition to Motion to Dismiss of Sprint Communications Co., L.P. in Docket No. 040156-TP were sent via U.S. mail on March 29, 2004 to the parties on the attached list.

Richard A. Chapkis

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Verizon Florida Inc. for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Florida Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the *Triennial Review Order*	Docket No. 040156-TP Filed: March 29, 2004

OPPOSITION OF VERIZON FLORIDA INC. TO MOTION TO DISMISS OF SPRINT COMMUNICATIONS CO., L.P.

Verizon Florida Inc. ("Verizon") hereby opposes the motion to dismiss filed by Sprint Communications Co., L.P. ("Sprint"). Sprint argues first that Verizon failed to negotiate in good faith with Sprint, but, in fact, Verizon has negotiated in good faith; the parties simply have not reached agreement. Second, Sprint argues that Verizon has failed to comply with various procedural and formal requirements under 47 U.S.C. § 252. This, too, is incorrect. Verizon's petition conforms to all applicable formal requirements. Third, Sprint argues that Verizon has failed to comply with the procedures set out in the change-of-law provisions of the parties' interconnection agreement; but, not only does Sprint fail to explain how Verizon has failed to comply with its obligation under the contract, the *Triennial Review Order*[1] also makes clear that the timetable established in section 252(b)(2) applies even where parties' agreements do contain change of law language. Finally, Sprint argues that the Commission should not consider Verizon's

[1] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*" or "*TRO*"), *vacated in part and remanded, United States Telecom Ass'n v. FCC*, Nos. 00-1012 *et al.*, 2004 WL 374262 (D.C. Cir. Mar. 2, 2004) ("*USTA II*").

petition while the state of the law is unsettled. But the *TRO* was upheld by the D.C. Circuit in numerous respects, particularly insofar as it reduced prior federal unbundling requirements. And, Verizon's draft *TRO* amendment contains provisions designed to address the possibility of future legal developments with respect to the *TRO*. For these reasons, and as set forth in greater detail below, the motion should be denied.

DISCUSSION

I. Verizon Negotiated in Good Faith

In its petition, Verizon pointed out that "virtually none" of the CLECs provided a timely response to Verizon's October 2, 2003 notice initiating negotiations. Sprint is one of the very few that did. Contrary to Sprint's account, however, Verizon has not "purposefully avoided any meaningful discussion" with respect to Sprint's proposals. Sprint Motion at 5. For example, aside from numerous other contacts, on February 12, 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. Despite the parties' discussions, Sprint charges that Verizon acted in bad faith by allegedly failing to "specifically accept or reject any proposed change Sprint has offered." *Id.*

There is no merit to Sprint's bad faith allegation. 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, Sprint should have concluded that, because Verizon did not agree to Sprint's revisions, they were rejected. Nevertheless, to remove any doubt about Verizon's stance on the issues, Verizon did, in fact, send Sprint a point-by-point response

to each of Sprint's proposals prior to the filing of Sprint's motion. In short, it is not true that Verizon never responded to Sprint's proposals. Verizon discussed those proposals with Sprint on a number of occasions and thoughtfully considered, but ultimately rejected, Sprint's changes to Verizon's amendment. Verizon's refusal to accept Sprint's proposals does not constitute bad faith negotiation. *See, e.g., NLRB v. McClatchy Newspapers, Inc.*, 964 F.2d 1153, 1165 (D.C. Cir. 1992) (noting that the duty to bargain in good faith does not prohibit "adamant insistence" on one's own terms, and that "neither side is required to agree to a proposal or make concessions") (internal quotation marks omitted).[2]

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." Weyforth Aff. ¶ 6. 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 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" (*see id.*), Verizon did, in fact, provide Sprint, in a

[2] The FCC itself relied on labor law precedents when it defined the "good faith" requirement of § 251. *See* First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15577-78, ¶¶ 154-155 & nn.288, 292 (1996) (subsequent history omitted); *see also* First Report and Order, *Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, 15 FCC Rcd 5445, 5454, ¶ 22 n.42 (2000) (noting that "the good faith negotiation requirement of Section 251 . . . relies substantially on labor law precedent").

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. Aside from factual inaccuracies, Mr. Weyforth's chronology includes information that is not relevant to negotiation of a *TRO* amendment, such as Sprint's adoption of the AT&T Virginia agreement.

While Verizon disagrees with Sprint's account of the parties' discussions with respect to the *TRO* amendment, those kinds of arguments will not advance the process of promptly concluding the amendment process. 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 will 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.[3]

II. Verizon's Petition Complies with the Applicable Requirements of § 252

Sprint claims that Verizon failed to satisfy the elements of § 252(b)(2)(A), which require the petitioning party to "'provide the State commission all relevant documentation concerning – (i) the unresolved issues; (ii) the position of each of the

[3] Even if the Commission were to consider dismissing Verizon's petition as to Sprint (which it should not do), there is no basis for considering Sprint's suggestion that Verizon's petition should be dismissed as to all CLECs. Sprint's spurious bad faith allegations in any case pertain only to Sprint's dealings with Verizon, not to any other CLEC's dealings with Verizon. Even if Sprint's allegations had any merit (which they do not), they provide no basis for dismissing Verizon's petition as to all other CLECs.

parties with respect to those issues; and (iii) any other issue discussed and resolved by the parties.'" Sprint Motion at 9-10. This argument is without merit.

As an initial matter, 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, the FCC has held that the "section 252(b) *timetable*" and negotiation process applies. *Triennial Review Order*, 18 FCC Rcd at 17405-06, ¶¶ 703-704 (emphasis added). 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.

Even if the technical requirements of § 252(b)(2) did apply, however, 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, because Verizon has received little in the way of response to its proposal, and because most of the responses that Verizon has received did not represent serious efforts at negotiation and arrived very late in the process (*e.g.*, about four months after Verizon made its draft amendment available to CLECs on October 2, 2003 – and only a couple of weeks before Verizon filed its petition), Verizon was simply unable to set forth other parties' positions on the various issues. As this Commission is aware, however, 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 has thus 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.

In light of the unique circumstances present here – including the failure of most CLECs to negotiate or state any disagreement with the terms of Verizon's draft amendment – 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." *Triennial Review Order*, 18 FCC Rcd at 17405, ¶ 703. Verizon's 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, therefore, is for the Commission to allow this proceeding to move forward with an eye towards achieving prompt and equitable results, not satisfying empty formalities. *See also Virginia Order*,[4] 16 FCC Rcd at 6229, ¶ 9 (holding that, where a petition had failed to meet § 252's service requirement, a "draconian remedy, such as dismissing outright the preemption petition before us, would contravene the intent of section 252(b) – to ensure a forum for parties to bring interconnection disputes for timely resolution").[5]

III. The Terms of the Parties' Agreement Do Not Alter the Timetable Applicable to this Arbitration

Sprint also argues that Verizon's petition is premature because the section 252(b) timetable was intended by the FCC to apply only "'in the case of 'modification of

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[4] Memorandum Opinion and Order, *Petition of WorldCom, Inc. for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996 and for Arbitration of Interconnection Disputes with Verizon-Virginia, Inc.*, 16 FCC Rcd 6224 (2001) ("*Virginia Order*").

[5] Sprint also claims that it was not served with the petition in the manner that it apparently would have preferred (Sprint Motion at 6), but it does not contest that the petition *was* properly served on the contact person designated in the parties' interconnection agreement.

interconnection agreements that are silent concerning change of law and/or transition timing.'" Sprint Motion at 11 (quoting *Triennial Review Order*, 18 FCC Rcd at 17405, ¶ 703). Sprint's claim is incorrect.

As an initial matter, while Sprint alludes to dispute resolution provisions in the parties' agreement, it fails to explain how Verizon has failed to comply with the requirements of those provisions. But even if Sprint had done so, its argument would still be inconsistent with (and trumped by) the FCC's ruling. As explained above, 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." *Triennial Review Order*, 18 FCC Rcd at 17405, ¶ 704.

IV. The D.C. Circuit's Decision Does Not Alter This Commission's Responsibility to Undertake This Arbitration

Sprint states that its motion to dismiss did not "take into consideration the" D.C. Circuit's decision in *USTA II* — issued 10 days before it filed its motion — and purports to reserve its right to provide additional arguments based on the court's decision. Sprint Motion at 9. But nothing in the D.C. Circuit's decision in *USTA II* provides any basis for deferring or dismissing this proceeding. *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 Triennial Review Order*, 18 FCC Rcd at 17405-06, ¶¶ 703-704.

Thus, 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. There is thus 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. *See id.* at 17406, ¶ 705.

The *TRO* decisions that remain effective under *USTA II* are of critical importance. Those *TRO* decisions include those where the FCC:

- Determined that the broadband capabilities of hybrid copper-fiber loops and fiber-to-the-home facilities are not subject to unbundling.
- Eliminated the obligation to provide line sharing as a UNE and adopted transitional line-sharing rules.
- Eliminated unbundling requirements for OCn loops, OCn transport, entrance facilities, enterprise switching, and packet switching.
- Eliminated unbundling requirements for signaling networks and virtually all call-related databases, except when provisioned in conjunction with unbundled switching.
- Required ILECs to make routine network modifications to unbundled transmission facilities.
- Required ILECs to offer subloops necessary to access wiring in multi-tenant environments.
- Eliminated unbundled access to the feeder portion of the loop on a stand-alone basis.
- Required ILECs to offer unbundled access to the network interface device (NID) on a stand-alone basis.
- Found that the pricing and UNE combination rules in § 251 do not apply to portions of an incumbent's network that must be unbundled solely pursuant to § 271.

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's 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, there is no need to delay this proceeding as to any aspect of Verizon's proposed amendment.

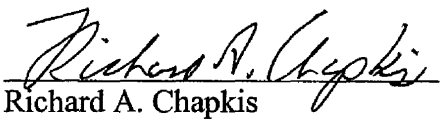
Although Sprint refers to an order of the North Carolina Utilities Commission ("NCUC") holding in abeyance the proceeding that Verizon initiated in that state, and to an order of the Maryland PSC dismissing Verizon's proceeding in that state (*see* Sprint Motion at 3), the determinations of those two state commissions do not support the motions to dismiss. First, 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, 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. As discussed above, however, the fact that certain aspects of the *TRO* (in particular, that state commissions would make impairment determinations) have been vacated provides no basis to postpone the task of amending interconnection agreements to reflect the *TRO*'s limitations on unbundling, which were upheld essentially in their entirety in *USTA II*. To be clear, through this amendment, Verizon seeks to memorialize the portions of the *TRO* that were *upheld* by the D.C. Circuit and to accommodate any

further legal developments. Verizon is therefore seeking reconsideration of the Maryland PSC's decision and asking to lift the NCUC's stay.

CONCLUSION

The Commission should deny Sprint's motion to dismiss.

Respectfully submitted,



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