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June 10, 2004

Ms. Blanca S. Bayó, Director
Division of the Commission Clerk
and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 040489-TP
Emergency complaint seeking order requiring BellSouth Telecommunications, Inc. and Verizon Florida Inc. to continue to honor existing interconnection obligations, by XO Florida, Inc. and Allegiance Telecom of Florida, Inc. (collectively, Joint CLECs)

Dear Ms. Bayó:

Please find enclosed an original and 15 copies of Verizon Florida Inc.'s Motion to Dismiss and Supporting Memorandum for filing in the above matter. Also enclosed are an original and 15 copies of a Request for Confidential Classification and Motion for Protective Order regarding certain information contained in the Motion to Dismiss.

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,

Richard A. Chapkis (RW)

Richard A. Chapkis

RAC:tas
Enclosures

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of Verizon Florida Inc.'s Motion to Dismiss and Supporting Memorandum and Request for Confidential Classification and Motion for Protective Order in Docket No. 040489-TP were sent via U.S. mail on June 10, 2004 to the parties on the attached list.

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Emergency Complaint Seeking Order Requiring BellSouth Telecommunications, Inc. and Verizon Florida Inc. to Continue to Honor Existing Interconnection Obligations, by XO Florida, Inc. and Allegiance Telecom of Florida, Inc. (collectively, Joint CLECs)	))))))	**Docket No. 040489-TP** **Filed: June 10, 2004**

VERIZON FLORIDA INC.'S MOTION TO DISMISS AND SUPPORTING MEMORANDUM

Verizon Florida Inc. (Verizon) moves the Commission to dismiss the "emergency" Complaint of XO Florida, Inc. (XO) and Allegiance Telecom of Florida, Inc. (Allegiance) (collectively, Joint CLECs) filed on May 21, 2004.

I. INTRODUCTION

1. The Joint CLECs claim to seek an order requiring Verizon (and BellSouth) "to continue to honor their existing obligations" in their Commission-approved interconnection agreements.[1] But the Complaint describes relief that would do just the opposite—that is, *override* Verizon's existing interconnection agreements, as well as federal law. The Joint CLECs apparently want the Commission to force Verizon to provide access to all existing UNEs at TELRIC rates until resolution of judicial review of the FCC's *Triennial Review Order* "and any resulting FCC action or additional Commission action," regardless of what their interconnection contracts say. The Commission should dismiss the Complaint for several reasons.

[1] Joint CLEC Complaint at 1.

2. *First*, the *same* request from the *same* carriers was already denied in Verizon's consolidated arbitration proceeding.[2] Allegiance and XO were among 27 CLECs that asked the Commission to maintain the availability of all existing UNE arrangements for an indefinite period,[3] just as they do here. The Order denied that request, based on the finding that Verizon intended to comply with its existing interconnection agreements. Nothing has changed since that Order was issued two days ago—Verizon will still adhere to its contracts, and there is still no lawful basis for the Commission to override those contracts—so there is no reason for the Commission to consider the same request again.

3. *Second*, the Joint CLECs have not alleged that Verizon has violated its interconnection agreements or any provision of law, but only that they fear that Verizon *might* not honor its obligations under its agreements and section 251 of the Act after the D.C. Circuit's mandate issues (currently scheduled for June 16, 2004). The Joint CLECs thus present no actual controversy that is ripe for consideration in a Complaint or other proceeding, let alone on an "emergency, expedited basis." Verizon has consistently made clear, in its consolidated arbitration and its communications with the CLECs, that it will comply with the terms of its interconnection agreements following the issuance of the mandate. There is thus no basis for the Joint CLECs' assertion that the lack of the UNEs at issue "would have a devastating impact" on them and their

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[2] *In re: 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.*, Order on Motion to Hold Proceeding in Abeyance, No. PSC-04-0578-PCO-TP (June 8, 2004).

[3] XO and Allegiance filed their requests as members of the Competitive Carrier Group and Competitive Carrier Coalition, respectively. MCI, Sprint, and AT&T also made "status quo" requests.

customers. To the contrary, the Joint CLECs buy from Verizon ** ** UNE-P ** other UNEs that would be affected by the issuance of the D.C. Circuit's mandate. In any event, Verizon will not disconnect any CLEC's services as a result of issuance of the D.C. Circuit's mandate, unless, of course, the CLEC chooses that option.

4. *Third,* this Commission has no authority—under federal or state law—to modify the terms of binding agreements that allow Verizon to cease providing access to UNEs once its legal obligation to do so has been eliminated. Nor can the Commission purport to do so under the guise of "interpreting" the agreements.

5. *Fourth*, the Commission has no authority —under federal or state law — to require unbundling in the absence of a valid finding of impairment by the FCC that is consistent with federal law. Unless and until the FCC makes such a finding, Commission decision requiring unbundling let alone re-imposing the statewide unbundling requirements that the D.C. Circuit vacated would be contrary to federal law and preempted. The CLECs' baseless, alarmist claims that "the ILECs' intent to disrupt service is imminent" provide no justification for interfering with the orderly implementation of the *USTA II* mandate. The Commission should dismiss the Complaint (and refuse to consider it on an expedited basis).

II. THE COMPLAINT MUST BE DISMISSED BECAUSE IT DOES NOT ALLEGE ANY LEGAL VIOLATIONS AND IS BASED SOLELY ON UNFOUNDED SPECULATION.

6. The Joint CLECs state that their Complaint is filed pursuant to rules 25-22.036 and 28-106.201, Florida Administrative Code.[4] The Complaint, however, does not meet the requirements necessary to initiate an action under either provision (or, for

[4] Joint CLEC Complaint at 1

that matter, any other Commission rule), let alone provide any basis for "emergency, expedited" action.

7. Under section 25-22.036, a complaint is only appropriate "when a person complains of an act or omission by a person subject to the Commission's jurisdiction which affects the complainant's substantial interests and which is a violation of a statute enforced by the Commission, or of any Commission rule or order." Section 28-106.201, which is used only to initiate evidentiary proceedings, likewise, requires the petitioning party to state the "specific rules or statutes" at issue, as well as the "disputed issues of material fact."

8. The Joint CLECs have not met any of these requirements. They have not alleged that Verizon has violated any statute, Commission rule or order, or even their interconnection agreements. They allege only that Verizon *might* not comply with its agreements when the D.C. Circuit's mandate issues. They have not cited any disputed issues of material fact; despite pleading under section 28-106.201, they do not appear to be seeking an evidentiary hearing, but rather, summary action without regard to any particular contract provisions.

9. The Joint CLECs' unfounded speculation about what might happen after the mandate issues is not sufficient to initiate any proceeding under the Commission's rules, let alone to obtain what amounts to injunctive relief. They seek this drastic (and, as explained below, unlawful) action against Verizon solely on the basis of the assertion that:

> Verizon has not represented that it will continue to honor its obligations to provide access to network elements pursuant to its § 251 obligations and its obligations under existing interconnection agreements, nor has Verizon represented

> that it will not seek to either have those agreements declared void ab initio or to amend those ICAs to eliminate switching, transport, and high capacity loop UNEs after June 15, 2004.[5]

10. As XO and Allegiance know, Verizon has, in fact, consistently represented that it will continue to honor its obligations to provide access to UNEs under section 251 and its interconnection agreements, and it has not indicated that it will seek to have those agreements declared invalid. Indeed, as explained above, Verizon's statement that it intends to continue to comply with its interconnection agreements was the basis for the Order denying XO, Allegiance and other CLECs the standstill order they requested in Verizon's consolidated arbitration (and that XO and Allegiance request again here). Moreover, because those agreements, in most cases, permit Verizon to cease providing UNEs once its legal obligation to do so has ended, Verizon need not amend them "to eliminate switching, transport, and high capacity loop UNEs after June 15, 2004," as the Joint CLECs seem to believe.[6]

11. That does *not* mean, however, that Verizon will discontinue any CLEC's service once the mandate issues, as the Joint CLECs speculate. It is *not* true, as the Joint CLECs contend, that "the ILECs' intent to disrupt service is imminent."[7] As

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[5] Joint CLEC Complaint at 5 (footnote omitted).

[6] The consolidated arbitration the Joint CLECs reference (Docket No. 040156-TP) does not and cannot affect Verizon's rights under its *existing* interconnection agreements, including, as explained, the right to cease providing certain UNEs when the mandate issues. The arbitration proceeding is, instead, necessary to *amend* agreements to reflect the rulings in the *Triennial Review Order* that were not self-effectuating.

[7] Joint CLEC Complaint at 1.

Verizon has previously made clear, after the mandate issues, Verizon's wholesale customers will have several options available to them.[8]

12. *First*, they will be able to provide service pursuant to commercially negotiated agreements. Verizon proposed a framework for negotiating commercial agreements called "Wholesale Advantage." This framework allows wholesale customers that currently use unbundled switching as part of the UNE-platform to continue to receive all the services and capabilities that they receive today, and to continue to use their current ordering systems, at a commercially reasonable rate.[9] Moreover, this framework allows wholesale customers to negotiate terms to obtain additional services that they may have requested but that are not currently available to them as part of the UNE-platform (*e.g.*, high speed digital subscriber line service, voicemail and inside wire).

13. *Second*, CLECs will be able to provide service on a resale basis under section 251(c)(4). If CLECs do not opt for commercially-negotiated agreements,

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[8] A more detailed description of Verizon's plans after the mandate issues is set forth in the Declaration of Virginia P. Ruesterholz, which was filed as an attachment to the Joint Opposition of ILECs to Motions to Stay the Mandate Pending the Filing of Petitions for a Writ of Certiorari, filed by the FCC and CLECs on June 1, 2004 before the D.C. Circuit. A copy of that declaration is attached as Exhibit A.

On June 4, 2004, the D.C. Circuit denied the motions to extend the stay of the mandate and ordered that it issue on June 16. The U.S. Solicitor General has declined to seek a further stay of the mandate from the Supreme Court and has indicated that he will not ask the Court to review the D.C. Circuit's *USTA II* decision. The FCC reportedly will not challenge *USTA II*, either. *See U.S. Sides With Bells in Battle Over Local Calling*, Wall St. J., June 10, 2004, at A1 (The article says that the FCC and Solicitor General's decisions not to seek a further stay mean that the unbundling rules "have little chance of remaining in effect." The article includes a quote from Michael D. Gallagher, head of the NTIA, that says the Solicitor General's decision would " 'help create regulatory stability in the telecommunications sector that will promote both competition and investment.' ")

[9] This rate is lower than the rate carriers would pay if the same services were purchased on a wholesale basis for resale under 47 U.S.C. section 251(c)(4).

Verizon will give them at least 90 days' notice that mass market switching will no longer will be available under 47 U.S.C. section 251(c)(3)—a longer notice period than Verizon's contracts typically require.[10] Verizon will also notify its wholesale customers that it will not terminate service at the end of the notice period, but instead will continue to make arrangements available at a different rate.[11] At the end of the notice period, in the absence of a commercial agreement, Verizon will apply a rate that is generally equivalent to the rate the carriers would pay if the services were purchased on a wholesale basis for resale, but above the current UNE-platform rates.[12]

14. Likewise, Verizon will give its wholesale customers at least 90 days' notice that loop and transport facilities will no longer be available under the existing unbundling regime, and will make clear that these service arrangements will continue at the end of the notice period at special access rates. At the end of the notice period, in the absence of a commercial agreement, Verizon will apply special access rates to the loop and transport facilities.

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[10] Indeed, by giving CLECs at least 90 days' notice and moving the CLECs to alternative serving arrangements instead of discontinuing their service, Verizon is forbearing from applying some of the terms of its interconnection agreements, which often require shorter notice or none at all and do not require Verizon to find alternative serving arrangements when a UNE is discontinued. In addition, wholesale customers will be invited to notify Verizon if they believe that their contract requires more notice than Verizon provides.

[11] The Company will also reiterate to its wholesale customers that it remains willing to negotiate mutually agreeable commercial terms.

[12] Verizon's Wholesale Advantage framework will remain available during and after the notification period for any wholesale customer that wants to negotiate a customized arrangement under that framework.

15. *Third*, the CLECs retain the option of increasing the extent to which they rely on their own or third-party facilities, instead of building their business cases solely on the repackaging of Verizon services.

16. Thus, any customers receiving service using the UNEs affected by the issuance of the D.C. Circuit's mandate could easily be transitioned to alternative, lawful arrangements, and any conceivable impact on the Joint CLECs' business would be *de minimis.* Indeed, it is demonstrably false that elimination of the affected UNEs will have "a devastating impact" on the Joint CLECs. ** ** purchases ** ** from Verizon today. In fact, the *only* UNEs XO takes from Verizon are ** **. And Allegiance serves customers mainly through ** ** which will not be affected by the issuance of the D.C. Circuit's mandate.

17. In sum, the service alternatives Verizon is making available, along with the generous notice periods, will ensure uninterrupted service to CLECs and their customers. *There is no emergency and no risk of imminent disruption* to any CLEC's customers when the mandate issues,[13] and the CLECs have not, in any event, alleged that Verizon is violating any interconnection agreements, laws, or regulations. The

[13] In any event, the CLECs should have planned for the eventuality that certain UNEs would be eliminated since the FCC first announced its Triennial Review decision over a year ago. The changes to the FCC's unbundling scheme were addressed in the February 2003 FCC press releases regarding its *Triennial Review Order,* and then made law when the Order was released on August 21, 2003. In addition, the D.C. Circuit's *USTA II* decision vacating the *TRO*'s requirements to unbundle mass-market switching and high capacity facilities was released three *months* ago, so parties that have declined to use the intervening stay to develop processes consistent with that decision have done so at their own peril. This is patently so, given that the *USTA II* holding, whose result was widely predicted even by lay analysts, *e.g., "Court Should Clear UNE-P Mess, Favor RBOCs,"* Lehman Brothers Telecom Services Wireline Industry Update (January 12, 2004), was the third time federal appellate courts have rejected the FCC's UNE rules as inconsistent with the Act and unlawful.

Commission should thus, reject, for the *second* time, the Joint CLECs' standstill request, for the same reason as it did the first time, and for the same reason the New York Commission just yesterday denied a similar "status quo" request:

> It is understandable that, as the June 15, 2004 deadline approaches, the CLECs are becoming increasingly nervous about a potential interruption in service from Verizon once the vacatur goes into effect. It appears that these fears, at least in the immediate term, are unfounded. Clearly, Verizon agrees...that its rights and obligations with respect to provision of UNEs are governed primarily by its interconnection agreements.
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> * * *
>
> At this time...no party has alleged facts, made claims, or sought relief on [the] basis [that Verizon has not complied with its contracts]. It would therefore be premature to make any ruling on the matter at this time.[14]

III. THE COMMISSION HAS NO AUTHORITY TO MODIFY THE TERMS OF BINDING AGREEMENTS

18. Despite seeking an order requiring Verizon to comply with its interconnection agreements, the relief the Joint CLECs describe in the body of the Complaint would violate the terms of those interconnection agreements. Like most, if not all, of Verizon's interconnection agreements, Verizon's agreements with XO and

[14] *Petition of Verizon New York Inc. for Consolidated Arbitration to Implement Changes in Unbundled Network Element Provisions in Light of the Triennial Review Order*, Ruling Granting Motions for Consolidation and to Hold Proceeding in Abeyance, Case 04-C-0314, at 7-8 (issued June 9, 2004); *see also Petition of Verizon New England, Inc. for Arbitration of an Amendment to Interconnection Agreements with CLECs and CMRS Providers in Vermont,* Order re: Motion to Hold Proceeding in Abeyance Until June 15, 2004, Docket No. 6932, at 3-4 (May 26, 2004) ("As to the potential that Verizon may unilaterally alter rates, terms, conditions, and availability of UNEs under existing interconnection agreements, I do not find that it is necessary that I adopt specific conditions limiting Verizon at this time. It is clear that, as a matter of law, Verizon has an obligation to continue to operate under the terms of approved interconnection agreements until this Board approves a change to those terms and conditions.")

Allegiance permit Verizon, either immediately or after a specified notice period, to discontinue UNEs that it is no longer legally required to provide:[15]

- Allegiance: "[Verizon] and [Allegiance]...agree that the terms and conditions of this Agreement were composed in order to effectuate the legal requirements in effect at the time the Agreement was produced. Any modifications to those requirements will be deemed to *automatically supersede* any terms and conditions of this Agreement.[16]

- XO: Without limiting Verizon's rights pursuant to Applicable Law or any other section of this Agreement to terminate its provision of a UNE or a Combination, if Verizon provides a UNE or Combination to [XO], and the Commission, the FCC, a court or other governmental body of appropriate jurisdiction determines or has determined that Verizon is not required by Applicable Law to provide such UNE or Combination, Verizon may terminate its provision of such UNE or Combination to [XO].[17]

19. These provisions expressly permit Verizon to cease providing unbundled access to the network elements affected by the D.C. Circuit's decision. Although the Joint CLECs may now wish they had not voluntarily agreed to these provisions, their current dissatisfaction with their interconnection agreements provides no basis for relieving them of the consequences of the choices they made.

20. Under federal law, an approved interconnection agreement is "binding." 47 U.S.C. § 252(a). This Commission has no authority to override the terms of any interconnection agreement by requiring Verizon to continue to provide access to UNEs

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[15] Because the FCC's attempts to expand unbundling beyond the reach of the statute have now been struck down by the federal courts three times, there have never been lawful section 251 unbundling rules binding the ILECs and obligating them to provide local mass market switching, high-capacity loops and transport, and dark fiber as UNEs. Accordingly, upon issuance of the mandate, there will not be a "change of law" to eliminate previously lawful rules requiring provision of UNEs, but merely an affirmation that there have never been lawful UNEs rules to change. Verizon does not waive this argument where it follows the administrative processes set forth in its interconnection agreement that apply to actual changes in law.

[16] Allegiance Agreement, Article III, § 35(emphasis added).

[17] XO Agreement, UNE Remand Amendment § 1.5 (in pertinent part).

in circumstances where the parties' interconnection agreements authorize Verizon to stop providing such access.

21. Moreover, a state commission decision purporting to interpret such an agreement that "effectively changes [its] terms" "contravenes the Act's mandate that interconnection agreements have the binding force of law." *Pacific Bell v. Pac West Telecomm, Inc.*, 325 F.3d 1114, 1127 (9th Cir. 2003). Thus, this Commission cannot, despite the Joint CLECs' request, order that the provisions requiring Verizon to provide UNEs remain effective after the issuance of the D.C. Circuit's mandate. Indeed, the Ninth Circuit has directly rejected that proposition, holding that a state commission that "promulgat[es] a generic order binding on existing interconnection agreements without reference to a specific agreement or agreements," "act[s] contrary to the [1996] Act's requirement that interconnection agreements are binding on the parties." *Pacific Bell*, 325 F.3d at 1125-26. As that court explained, "[t]o suggest that [a state commission] could interpret an agreement without reference to the agreement at issue is inconsistent with [its] weighty responsibilities of contract interpretation under § 252." *Id.* at 1128.

22. Nor could the Commission rely on a four-year old condition in the *Bell Atlantic/GTE Merger Order*[18] to find that Verizon must continue to provide access to UNEs under FCC regulations that were vacated more than fourteen months ago notwithstanding the change-of-law provisions of its interconnection agreements.[19]

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[18] Memorandum Opinion and Order, *Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control*, 15 FCC Rcd 14032 (2000) ("*Bell Atlantic/GTE Merger Order*").

[19] *See* Joint CLEC Complaint at ¶ 13(c).

23. As an initial matter, although the Joint CLECs' suggestion that this merger condition may require Verizon to continue providing delisted UNEs is incorrect, the Commission need not rule on that claim here (nor do the Joint CLECs ask it to). The merger conditions reflect "commitments of Bell Atlantic and GTE" and are "express conditions of [*the FCC's*] approval of the" merger. *Bell Atlantic/GTE Merger Order* ¶ 250 (emphasis added). Not only was this Commission not a party to those conditions, but also enforcement of the merger conditions is *the FCC's* responsibility, not this Commission's. The FCC made this clear, explaining that, "[i]f Bell Atlantic/GTE does not . . . perform each of the conditions, . . . *we must take action* to ensure that the merger remains beneficial to the public." *Id.* ¶ 256 (emphasis added). Other state commissions have likewise recognized that interpretation and enforcement of the merger conditions is a matter for the FCC. *See, e.g.*, Examiner's Report, *Verizon Maine Petition for Consolidated Arbitration*, Docket No. 2004-135, at 10-11 (Me. PUC filed May 6, 2004).

24. Nonetheless, if the Commission eventually addresses this issue, it should reject the CLECs' interpretation of the merger condition, as did a Hearing Examiner in Rhode Island (indeed, no state commission has accepted it). *See* Procedural Arbitration Decision, *Petition of Verizon Rhode Island*, Docket No. 3588, at 14-15 (R.I. PUC Apr. 9, 2004); *see also* Verizon Response to Motions to Dismiss, Docket No. UT-043013, at 12-17 (Wash. UTC filed Apr. 27, 2004). Under its plain terms, Verizon's obligation to provide access to UNEs pursuant to the rules promulgated in the *UNE Remand Order*[20] and *Line Sharing Order*[21] ended as of "the date of a final, non-

[20] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15

appealable judicial decision providing that th[ose] UNE[s] . . . [are] not required to be provided." *Bell Atlantic/GTE Merger Order* App. D, ¶ 39. The D.C. Circuit's decision in *USTA I*, which took effect in February 2003 and became final and non-appealable on March 24, 2003, was that decision: as the FCC itself found, when *USTA I* became "final and no longer subject to further review . . . the legal obligation [to provide UNEs] upon which the existing interconnection agreements are based *will no longer exist*." *Triennial Review Order* ¶ 705 (emphasis added).[22]

IV. THE COMMISSION HAS NO AUTHORITY TO RE-IMPOSE THE VACATED UNBUNDLING OBLIGATIONS.

25. The Joint CLECs assert that the Commission can require Verizon, pursuant to state law, to continue to provide mass market circuit switching, high-capacity loops and transport, and dark fiber as UNEs after issuance of the D.C. Circuit's mandate.[23] Any such authority, however, has been preempted by federal law and, in particular, by the D.C. Circuit's decision in *USTA II*.

FCC Rcd 3696 (1999) ("*UNE Remand Order*"), *vacated and remanded*, *United States Telecomm. Ass'n v. FCC*, 290 F. 3d 415 (D.C. Cir. 2002), *cert. denied*, 123 S. Ct. 1571 (2003).

[21] Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 20912, ¶¶ 158-160 (1999) ("*Line Sharing Order*"), *vacated and remanded*, *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied*, 123 S. Ct. 1571 (2003).

[22] In 2000, the Chief of the FCC's Common Carrier Bureau reached precisely the same interpretation of this very merger condition in analogous circumstances, finding that a final and non-appealable court of appeals decision vacating and remanding the FCC's TELRIC rules would eliminate Verizon's obligation under that condition to offer UNEs at TELRIC prices. *See* Letter to Verizon from Dorothy T. Attwood, Chief, Common Carrier Bureau, FCC, 15 FCC Rcd 18327 (2000).

[23] *See* Joint CLEC Complaint at ¶¶ 13(d), 16 (citing Section 364.161(1), Florida Statutes).

26. As an initial matter, courts of appeals have repeatedly found that the 1996 Act preempts state commission attempts to impose unbundling obligations outside of the section 252 process that Congress established. *See, e.g.*, *Wisconsin Bell, Inc. v. Bie*, 340 F.3d 441, 443 (7th Cir. 2003); *Pac West*, 325 F.3d at 1126-27; *Verizon North Inc. v. Strand*, 309 F.3d 935, 940 (6th Cir. 2002). In the face of existing, binding agreements that affirmatively eliminate certain unbundling obligations once the *USTA II* mandate issues, the Commission could not re-impose those unbundling requirements consistent with the section 252 process. And the Joint CLECs, in any event, provide no indication they are willing to follow that process—instead, they seek an immediate order requiring unbundling *before* the FCC has issued an order finding that unbundling is required consistent with binding judicial interpretations of the 1996 Act.

27. Such an order would violate not only the procedural requirements of the 1996 Act, but also its substantive standards. As both the Supreme Court and the D.C. Circuit made clear in vacating the FCC's first two attempts to issue UNE rules, Congress did not require "blanket access to incumbents' networks" or determine that "more unbundling is better." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 390 (1999); *USTA I*, 290 F.3d at 429. Instead, those cases make clear that "'impairment' [is] the touchstone" to any requirement of unbundling. *USTA I*, 290 F.3d at 429. Therefore, under federal law, there must be a valid finding of impairment under section 251(d)(2) *before* an incumbent may be ordered to provide access to a network element as a UNE, **at TELRIC rates.** And in *USTA II*, the D.C. Circuit held that this impairment determination must be made *by the FCC* and that the authority cannot be exercised by state commissions. *See* 345 F.3d at 565-68. Accordingly, in the absence of a lawful

FCC finding of impairment, any state commission order requiring unbundling would be fundamentally *inconsistent* with federal law by requiring unbundling where the 1996 Act, by its terms, does not.

28. Finally, notwithstanding the preemptive force of federal law, there is no basis to the Joint CLECs' assertion that state law permits the imposition of the unbundling requirements that they seek here. The "unbundling" provision the Joint CLECs quote (section 364.161) is actually a *resale* provision. As the Joint CLECs correctly point out, this section predates the federal Act.[24] They neglect to explain, however, that the Legislature's view of unbundling in 1995 was nothing like the FCC-style, TELRIC-priced unbundling implemented under section 251 of the Act. In this regard, the Joint CLECs deliberately omitted the end of the sentence they quoted, which makes clear that the Legislature required local exchange companies to "unbundle all of its features, functions, and capabilities...**for resale** to the extent technically and economically feasible."[25] Numerous other references in sections 364.161 and 364.162 make clear that the Legislature's view of "unbundling" was equivalent to a resale obligation.

29. As Verizon explained, it has already committed to making available end-to-end service for resale under section 251(c)(4) of the Act (and any inconsistent state resale obligation would, of course, be preempted). Nothing in section 364.161 or in the general legislative intent provisions the Joint CLECs cite provides any independent basis for re-imposing unbundling obligations the D.C. Circuit expressly eliminated.

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[24] Joint CLEC Complaint at 8.

[25] Fla. Stat. Ch. 364.161(1).

V. CONCLUSION

30. For the foregoing reasons, the Commission should dismiss the Joint CLECs' Complaint.

Respectfully submitted,

Richard A. Chapkis (DW)

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June 10, 2004

EXHIBIT A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 00-1012 *et al.*

UNITED STATES TELECOM ASSOCIATION, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

DECLARATION OF VIRGINIA P. RUESTERHOLZ

1 My name is Virginia P. Ruesterholz. My business address is 1095 Avenue of the Americas, 40th Floor, New York, New York. I am President – Wholesale Markets for Verizon Services Group. In that capacity, I am responsible among other things for wholesale sales, marketing and account management; CLEC ordering, provisioning, systems and support; special services ordering and installation; and for special access services provided to our wholesale carrier customers.

2. I have more than 20 years of experience in the telecommunications industry, in a variety of engineering and operations positions working for NYNEX, Bell Atlantic and now Verizon. My education background includes a B.S. in Chemical Engineering received in 1984 and a M.S. in Telecommunications Management received in 1991

3. The purpose of this declaration is to describe the actions that Verizon intends to take once the D.C. Circuit's mandate in *United States Telecom Association v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), issues on June 15, 2004.

4. Any claim that Verizon intends to "throw competitors off its network" once the FCC's current unbundling rules are vacated is not correct. There will be no immediate impact on existing service arrangements from the issuance of the Court's mandate. To the contrary, Verizon's goal is to have service to our wholesale customers remain uninterrupted even though the rules that required Verizon to provide certain elements are vacated.

5. Verizon has made clear that it is willing to negotiate with our wholesale customers after the rules are vacated. At this time, we are negotiating with approximately 50 wholesale customers, and have signed non-disclosure agreements with and provided information to many more.

6. In addition, Verizon announced on April 21 a proposed framework for commercial agreements with our wholesale customers, which we refer to as "Wholesale Advantage." The framework we proposed would allow our wholesale customers that currently use unbundled switching as part of the so-called UNE-platform to continue to receive all the services and capabilities that they receive today, as well as to continue to use their current ordering systems. The rates for these services would increase modestly from current TELRIC rates over a three year period. For example, a widely accepted independent analyst calculation of the average UNE-P rate in Verizon service areas is approximately $18.50 per line per month. Under the Wholesale Advantage framework, the corresponding rate in the first year of an agreement would generally range from $20 to $24 per line per month in the urban and suburban markets where most of the UNE-P lines are purchased. These rates generally are substantially lower than the rates carriers would pay if these services were purchased on a wholesale basis for resale under 47 U.S.C. § 251(c)(4). In addition, under Wholesale Advantage, wholesale customers can negotiate terms to obtain additional services that they have requested but that are not currently available to

them as part of their UNE-P arrangements, such as Verizon's high speed digital subscriber line service ("DSL") and voice mail and inside wire. Wholesale Advantage will remain available after the unbundling requirements are vacated.

7. Once the unbundling rules are vacated, Verizon plans to follow a process similar to what we have done for other elements that no longer have to be provided. For example, under the FCC's rules, we no longer are required to provide unbundled switching used to serve certain larger business or "enterprise" customers. Verizon has notified our wholesale customers of how we plan to give effect to that determination. While Verizon's interconnection agreements typically provide for notice to our wholesale customers in the event we plan to cease providing a particular network element under 47 U.S.C. § 251(c)(3), the length of the required notice varies by agreement and is as short as 30 days in many cases. With respect to enterprise switching, Verizon provided 90 days' notice even if our agreements permitted less. If a wholesale customer believes its contract requires more, we invited it to notify us of that fact. In addition, we notified our wholesale customers that we would not terminate service after the 90 day period, but instead would continue to provide service at the rate that would apply to the analogous service offering purchased on a wholesale basis for resale under 47 U.S.C. § 251(c)(4). And we made it clear that Verizon is prepared to enter into negotiations over wholesale arrangements to serve enterprise customers at mutually agreeable commercial rates. Indeed, we already have agreed to commercial terms with two carriers that previously used unbundled switching to serve enterprise customers.

8. We plan to follow a similar process in the event the requirement to provide mass market switching and therefore the UNE-platform is vacated. Specifically, we plan to provide our wholesale customers with 90 days' notice that mass market switching, and UNE-platform

arrangements that include this element, no longer will be available as an unbundled network element under 47 U.S.C. § 251(c)(3), again with an invitation to contact us if a carrier feels its agreement requires more. We also will notify our wholesale customers that we will not terminate service at the end of the 90 day notice period, but instead will continue to make the arrangements available at a different rate, and we will reiterate to our wholesale customers that we remain willing to negotiate mutually agreeable commercial terms. At the end of the 90 day period, in the absence of a commercial agreement, we would apply a rate that is generally lower than the rate the carriers would pay if the services were purchased on a wholesale basis for resale, but above the current UNE-P rates. And, of course, our Wholesale Advantage framework will remain available past the 90 day period for any wholesale customer that wants to negotiate a customized arrangement under that framework.

9. Likewise, with respect to high capacity loop and transport facilities, we also plan to provide 90 days' notice, and to make clear that existing service arrangements will continue at the end of that notice period but at a different rate. Indeed, the same high capacity facilities that wholesale carriers purchase as unbundled elements already can be purchased under tariff or pursuant to special contracts as wholesale special access services. Virtually all of our wholesale carriers already purchase some special access services from Verizon, and then use those services, either alone or in combination with their own facilities, to compete successfully with Verizon to serve end user customers. Our wholesale customers typically purchase these services under volume and term discount plans, either directly out of our tariffs or under contract arrangements that we are permitted to enter into in areas where the FCC has determined that the special access business is sufficiently competitive to grant us pricing flexibility for these services. The typical

discount that our wholesale customers receive under these plans is in the range of approximately 35 to 40 percent off the basic monthly rates for these services.

10. To put the wholesale rates that we have proposed in some context, it is useful to compare the current rates that carriers pay for the UNE-platform with the prices they charge their own customers. The attached table provides such a comparison. It sets out on a state-by-state basis the prices that AT&T, which is the largest user of UNE-platform arrangements, charges it own customers for the bundled service offering it markets using the UNE-platform. These prices were taken from AT&T's Web site. The table compares these rates to the average UNE-platform rate on a state-by-state basis. These rates are based on a widely used report compiled by the West Virginia consumer advocate, and have been computed with two different minute of use assumptions used by the author of the report (which is necessary because the rate for unbundled switching is normally set on a per minute of use basis). The first minute of use assumption is 1,000 minutes per month; the second minute of use assumption is 2,000 minutes per month, which is comparable to the figure the FCC previously has used to compare unbundled switching rates. The actual rate that a carrier would pay for the UNE-platform would be somewhat less than the average in urban and suburban areas where UNE-platform is used most heavily and somewhat higher in more rural areas.

11. This comparison shows two things that are relevant here. First, the gross margin between the current UNE-platform rates and the prices that AT&T charges to its own customers is substantial, typically in the range of $35 to $40 per line. To be sure, AT&T will incur marketing and other internal costs that would have to be deducted to determine the net margin for its retail services. AT&T has stated in public filings that its internal costs are on the order of $10 per line, but even if they were 50 to 100 percent higher, so that its internal costs were as

much as $20, AT&T would earn substantial net margins on these services. And that would still be true if the wholesale rates AT&T currently pays for the UNE-platform were subject to modest increases of the magnitude that we have proposed under the public offers described above.

12. Second, while AT&T charges its end user customers different rates in different parts of the country, those prices do not necessarily vary in with the wholesale rate that AT&T pays for the underlying UNE-P arrangement. For example, AT&T appears to charge its customers essentially the same rate in Washington and Wyoming, despite a difference of roughly $10 in the average UNE-P rates in those states ($17.90 compared to $27.87 in Washington and Wyoming respectively, each computed at 2,000 minutes of use).

I hereby declare under penalty of perjury under the laws of the United States that the forgoing is true and correct.

Virginia P. Ruesterholz

Virginia P. Ruesterholz

Dated: June 1, 2004

ATTACHMENT 1

AT&T's One Rate USA℠ Plan Availability

Includes unlimited local and long distance calling, choice of 4 calling features at one flat monthly rate.

(Grouped by Monthly Rate.)

	State	One Rate USA℠ Monthly Rate[A]	Monthly FCC Line Charge (1/04))[B]	Monthly Rate + Line Charge	UNE-P @1,000 MOU[C]	Margin (Rate-UNE-P @1000)	UNE-P @2,000 MOU[C]	Margin (Rate-UNE-P @ 2000)	Margin Difference b/w 2000 and 1000 MOU
1	Kentucky	$ 59.95	$ 6.50	$ 66.45	$ 19.61	$ 46.84	$ 20.81	$ 45.64	$ (1.20)
2	Mississippi	$ 59.95	$ 6.50	$ 66.45	$ 24.63	$ 41.82	$ 25.66	$ 40.79	$ (1.03)
3	Montana	$ 59.95	$ 6.50	$ 66.45	$ 26.87	$ 39.58	$ 28.44	$ 38.01	$ (1.57)
4	South Carolina	$ 59.95	$ 6.50	$ 66.45	$ 18.69	$ 47.76	$ 19.74	$ 46.71	$ (1.05)
5	Alabama	$ 54.95	$ 6.50	$ 61.45	$ 18.51	$ 42.94	$ 19.21	$ 42.24	$ (0.70)
6	Delaware	$ 54.95	$ 6.48	$ 61.43	$ 16.18	$ 45.25	$ 18.10	$ 43.33	$ (1.92)
7	Florida	$ 54.95	$ 6.50	$ 61.45	$ 15.89	$ 45.56	$ 16.66	$ 44.79	$ (0.77)
8	Louisiana	$ 54.95	$ 6.50	$ 61.45	$ 19.47	$ 41.98	$ 21.34	$ 40.11	$ (1.87)
9	Maine	$ 54.95	$ 6.45	$ 61.40	$ 18.81	$ 42.59	$ 20.49	$ 40.91	$ (1.68)
10	New Hampshire	$ 54.95	$ 6.45	$ 61.40	$ 19.36	$ 42.04	$ 21.80	$ 39.60	$ (2.44)
11	New York	$ 54.95	$ 6.45	$ 61.40	$ 15.19	$ 46.21	$ 16.32	$ 45.08	$ (1.13)
12	North Carolina	$ 54.95	$ 6.50	$ 61.45	$ 17.96	$ 43.49	$ 19.86	$ 41.59	$ (1.90)
13	Northern Nevada	$ 54.95	$ 5.39	$ 60.34	$ 23.07	$ 37.27	$ 24.68	$ 35.66	$ (1.61)
14	Rhode Island	$ 54.95	$ 6.45	$ 61.40	$ 17.07	$ 44.33	$ 18.35	$ 43.05	$ (1.28)
15	Tennessee	$ 54.95	$ 6.50	$ 61.45	$ 16.62	$ 44.83	$ 17.42	$ 44.03	$ (0.80)
16	Vermont	$ 54.95	$ 6.45	$ 61.40	$ 19.44	$ 41.96	$ 23.44	$ 37.96	$ (4.00)
17	West Virginia	$ 54.95	$ 6.50	$ 61.45	$ 24.56	$ 36.89	$ 27.11	$ 34.34	$ (2.55)
18	North Dakota	$ 53.95	$ 6.50	$ 60.45	$ 19.03	$ 41.42	$ 20.51	$ 39.94	$ (1.48)
19	Georgia	$ 49.95	$ 6.50	$ 56.45	$ 14.33	$ 42.12	$ 14.94	$ 41.51	$ (0.61)
20	Idaho	$ 49.95	$ 6.50	$ 56.45	$ 22.89	$ 33.56	$ 24.23	$ 32.22	$ (1.34)
21	Iowa	$ 49.95	$ 4.92	$ 54.87	$ 18.65	$ 36.22	$ 20.21	$ 34.66	$ (1.56)
22	Maryland	$ 49.95	$ 5.77	$ 55.72	$ 13.75	$ 41.97	$ 14.92	$ 40.80	$ (1.17)
23	Massachusetts	$ 49.95	$ 6.45	$ 56.40	$ 16.92	$ 39.48	$ 17.69	$ 38.71	$ (0.77)
24	Missouri	$ 49.95	$ 5.27	$ 55.22	$ 19.27	$ 35.95	$ 21.46	$ 33.76	$ (2.19)
25	Nebraska	$ 49.95	$ 5.07	$ 55.02	$ 17.77	$ 37.25	$ 27.25	$ 27.77	$ (9.48)
26	New Jersey	$ 49.95	$ 6.31	$ 56.26	$ 12.61	$ 43.65	$ 13.79	$ 42.47	$ (1.18)
27	New Mexico	$ 49.95	$ 6.50	$ 56.45	$ 21.01	$ 35.44	$ 25.44	$ 31.01	$ (4.43)
28	Oregon	$ 49.95	$ 6.50	$ 56.45	$ 17.47	$ 38.98	$ 18.80	$ 37.65	$ (1.33)
29	Pennsylvania	$ 49.95	$ 6.10	$ 56.05	$ 18.19	$ 37.86	$ 19.90	$ 36.15	$ (1.71)
30	South Dakota	$ 49.95	$ 6.50	$ 56.45	$ 21.38	$ 35.07	$ 22.08	$ 34.37	$ (0.70)
31	Utah	$ 49.95	$ 6.50	$ 56.45	$ 15.58	$ 40.87	$ 17.21	$ 39.24	$ (1.63)
32	Virginia	$ 49.95	$ 6.37	$ 56.32	$ 17.26	$ 39.06	$ 17.26	$ 39.06	$ -
33	Washington	$ 49.95	$ 6.10	$ 56.05	$ 16.72	$ 39.33	$ 17.90	$ 38.15	$ (1.18)
34	Wyoming	$ 49.95	$ 6.50	$ 56.45	$ 26.95	$ 29.50	$ 27.87	$ 28.58	$ (0.92)
35	Arkansas	$ 48.95	$ 5.27	$ 54.22	$ 16.54	$ 37.68	$ 18.38	$ 35.84	$ (1.84)
36	Illinois	$ 48.95	$ 4.50	$ 53.45	$ 11.99	$ 41.46	$ 11.99	$ 41.46	$ -
37	Indiana	$ 48.95	$ 5.53	$ 54.48	$ 15.10	$ 39.38	$ 15.10	$ 39.38	$ -
38	Kansas	$ 48.95	$ 5.27	$ 54.22	$ 17.49	$ 36.73	$ 19.33	$ 34.89	$ (1.84)
9	Michigan	$ 48.95	$ 5.35	$ 54.30	$ 13.36	$ 40.94	$ 13.88	$ 40.42	$ (0.52)
40	Ohio	$ 48.95	$ 5.39	$ 54.34	$ 12.46	$ 41.88	$ 13.30	$ 41.04	$ (0.84)
41	Oklahoma	$ 48.95	$ 5.27	$ 54.22	$ 19.35	$ 34.87	$ 21.61	$ 32.61	$ (2.26)
42	Texas	$ 48.95	$ 5.27	$ 54.22	$ 18.63	$ 35.59	$ 20.21	$ 34.01	$ (1.58)
43	Wisconsin	$ 48.95	$ 5.07	$ 54.02	$ 13.01	$ 41.01	$ 13.01	$ 41.01	$ -
44	Arizona	$ 43.95	$ 6.50	$ 50.45	$ 15.53	$ 34.92	$ 16.50	$ 33.95	$ (0.97)
45	Minnesota	$ 43.95	$ 5.05	$ 49.00	$ 15.98	$ 33.02	$ 15.98	$ 33.02	$ -
46	California	$ 41.95	$ 4.49	$ 46.44	$ 11.39	$ 35.05	$ 12.13	$ 34.31	$ (0.74)
47	Alaska[D]		$ 6.50		$ 25.79				
48	Colorado		$ 6.50		$ 18.61		$ 20.22		
49	Connecticut		$ 5.78		$ 19.38		$ 22.96		
50	DC		$ 3.87		$ 13.04		$ 16.04		
51	Hawaii[E]		$ 6.50						

A) Source: AT&T website. Updated rates as of 3/10/04

B) Source: B.J. Gregg Analysis, Appendix 2, January 2004

C) Source: B.J. Gregg Analysis, Appendix 3, page 1, as of January 2004.

D) B.J. Gregg analysis includes only 1000 mou.

E) No state wide average provided for Hawaii, only individual rates on three islands included

NOTE: Includes 11 additional states entered by AT&T as well as updated rate changes to One Rate USA

Revised 3-12-04