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June 17, 2004

VIA HAND DELIVERY

Blanca S. Bayo, Director
Division of Records and Reporting
Betty Easley Conference Center
4075 Esplanade Way
Tallahassee, Florida 32399-0870

Re: Docket No.: 040489-TP

Dear Ms. Bayo:

On behalf of XO Florida, Inc., and Allegiance Telecom of Florida, Inc., (collectively, Joint CLECs), enclosed for filing and distribution are the original and 15 copies of the following:

- Joint CLECs' Response to Motion to Dismiss.

Please acknowledge receipt of the above on the extra copy of each and return the stamped copies to me. Thank you for your assistance.

Sincerely,

Vicki Gordon Kaufman

CMP ____
COM ____
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SEC 1

VGK/mlb
Enclosures

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Proceeding to Address Actions Necessary to Respond to the Federal Communications Commission Triennial Review Order Released August 21, 2003

Docket No. 040489-TP
Filed: June 17, 2004

JOINT CLECS' RESPONSE TO MOTIONS TO DISMISS

XO Florida, Inc. (XO) and Allegiance Telecom of Florida, Inc. (Allegiance), (collectively, Joint CLECs), pursuant to rule 28-106.204, Florida Administrative Code, file their response to the Motions of BellSouth Telecommunications, Inc. (BellSouth) and Verizon Florida, Inc. (Verizon) (collectively, the ILECs) to dismiss the Joint CLECs' Complaint seeking an order requiring BellSouth and Verizon to continue to maintain the status quo regarding their obligations under existing Commission-approved interconnection agreements (ICAs) with any competing local exchange carrier (CLEC) or applicable Statement of Generally Available Terms (SGAT) pending resolution of judicial review of the Federal Communications Commission's (FCC) Triennial Review Order (*TRO*)[1] and any resulting FCC action or additional Commission action. For the reasons set forth below, such motions must be denied.

DISCUSSION

Standard for Ruling on a Motion to Dismiss

Before responding to the ILECs' arguments, a review of the standard applicable to a motion to dismiss is necessary. As many courts have held:

[t]he function of a motion to dismiss is to raise as a question of law the

[1] *In re Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, CC Docket Nos. 01-338, 96-98 & 98-147, Report and Order and Order on Remand (rel. Aug. 21, 2003).

> sufficiency of the facts alleged to state a cause of action . . . [T]he trial court may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side . . . . Significantly, all material factual allegations of the complaint must be taken as true.[2]

The application of this well-established standard to the ILECs' motions must lead to a denial of those motions.

The ILECs' Most Recent "Commitments"

The ILECs' posture in regard to what action they may or may not pursue has been changing and evolving since well before the filing of the Joint CLECs' Complaint. Their most recent "commitment" occurred late last week. On June 10, 2004, BellSouth sent a letter to FCC Chairman Michael Powell in which it stated that it:

> will not unilaterally increase the prices it charges for the mass market UNE Platform or high-capacity loop or transport UNEs before January 1, 2005 for those carriers with current interconnection agreements.[3]

As to BellSouth, Joint CLECs submit that BellSouth's "commitment" to not increase prices for all services for the next five months diminishes somewhat the emergency nature of the relief Joint CLECs have requested. Given BellSouth's "commitment", this docket can now proceed on an orderly basis with resolution before the expiration of BellSouth's "commitment."[4] However, BellSouth's "commitment" does not affect this Commission's authority to move forward with a generic docket, as requested by Joint CLECs, to resolve the issues raised in the Complaint. Nor does it affect this Commission's authority to order BellSouth to extend its "commitment" until such generic proceeding is concluded. Certainly, BellSouth's "commitment" is not a proper basis for dismissal of the Joint CLECs' Complaint.

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[2] *Varnes v. Dawkins*, 624 So.2d 349, 350 (Fla. 1st DCA 1993) (citations omitted).
[3] Letter from Duane Ackerman to Honorable Michael K. Powell, June 10, 2004. Attachment 1.
[4] It should be noted that BellSouth's "commitment" extends only until January 1, 2005. To the extent finality on the issues Joint CLECs have raised has not occurred by that time, it may be necessary for the Commission to require BellSouth to extend its "commitment."

Verizon makes a much more limited "commitment" in its letter to Chairman Powell. Verizon states that it will not increase prices for (mass market) UNE-P arrangements (those Verizon defines to be arrangements with fewer than four lines) for five months and will continue to provide access to its "narrowband" network, though it does not clearly define "narrowband network," nor does it indicate the price at which such access will be provided.[5] Verizon has not provided the commitment necessary to assure this Commission and competitive providers that there will not be market disruption due to unilateral price increases for high capacity loops, transport, and switching for customers with four lines or more. Thus, the Commission should require a broad commitment from Verizon to maintain the status quo, and move ahead with a generic proceeding as stated above. Most importantly, as explained above in reference to BellSouth, in no event does Verizon's "commitment" justify dismissal of the Joint CLECs petition. If anything, Verizon's lack of commitment underscores the need to grant the relief Joint CLECs request with regard to Verizon.

The Commission Should Reject the ILECs' Motions to Dismiss, Implement a "Status Quo" Order, And Proceed With a Generic Docket

BellSouth and Verizon oppose the Joint CLECs' Complaint on slightly different grounds; however, neither ILEC's position has merit. More importantly, the allegations set forth in each motion do not meet the burden of establishing that the Joint CLECs have failed to state a cause of action. Rather, as explained herein, the motions themselves raise substantive issues that are in dispute and that are appropriately considered in a thorough analysis of the impact of *USTA II*,[6] not in the context of a motion to dismiss.

BellSouth maintains that the Complaint lacks substance and any demonstration of

[5] Letter from Ivan G. Seidenberg to Honorable Michael K. Powell, June 11, 2004. Attachment 2.

[6] *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

necessity, based largely on BellSouth's claims to have provided adequate assurances of the continued availability of unbundled network elements (UNEs) or equivalent services through BellSouth's public statements and offers to negotiate commercial agreements. BellSouth also purports to deny the Commission's authority to grant the relief requested, but actually acknowledges the Commission's authority, arguing instead that the Commission should not take action on the Complaint at this time but rather should "address the issues for the industry as a whole rather than on a piecemeal basis."[7]

Verizon, on the other hand, bases its opposition largely on the Commission's lack of jurisdiction, procedural "unripeness," and the argument that the Complaint seeks to *override*, rather than enforce, the parties' interconnection agreements. In substance, however, both ILECs raise similar arguments regarding whether the Commission should entertain the Joint CLECs' Complaint. Neither BellSouth nor Verizon,[8] however, raise sufficient justification to dismiss the Complaint for failure to state a cause of action.

Verizon contends that CLECs are bound by their existing interconnection agreements, and has taken the position that such interconnection agreements are "self effectuating" with regard to the change of law embodied in *USTA II*.[9] The Joint CLECs dispute any contention that the agreements are self-effectuating and do not require negotiation of an amendment to effectuate any change of law. Verizon asserts that there is "no actual controversy,"[10] but Joint

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[7] BellSouth Motion at 2.

[8] Verizon also attempts to use as a basis for its Motion the argument that Joint CLECs do not buy a sufficient quantity of UNEs to be affected (though they do not define how many that would be). There is no argument that Joint CLECs do not purchase UNEs and are not entitled to do so going forward. More importantly, Verizon's claim is irrelevant to the standard for ruling on a motion to dismiss.

[9] Oddly, Verizon, in support of this contention, supplied the Commission with only excerpts of the parties' interconnection agreements, and failed to provide the language requiring any amendment or change to the agreement to be in writing, and the provision whereby the parties' agree to negotiate any amendment to the agreement. Verizon Motion at 10.

[10] Verizon Motion at 2.

CLECs' Complaint and the ILECs' Motions demonstrate otherwise. The disputes raised in these pleadings demonstrate the impropriety of a motion to dismiss.

Verizon also contends that the same request Joint CLECs make here was denied in its consolidated arbitration proceeding.[11] However, in that case, Verizon apparently agreed to maintain the status quo and thus no further order was necessary. The order states:

> As to the request to require Verizon to maintain the status quo for the duration of the proceeding, Verizon has indicated that this is, in fact, its intent. Thus, it does not appear necessary at this time to affirmatively require Verizon to do so.[12]

As noted above, Verizon has made a very narrow representation to Chairman Powell, which is insufficient to protect Florida consumers.

BellSouth, the other hand, contends that it will employ an "established legal procedure"[13] to effectuate the change of law, but will not commit that such procedure will require negotiation of an amendment to the parties' agreements.[14] Again, the Joint CLECs dispute any contention that BellSouth is entitled to utilize any procedure but negotiation of an amendment to effectuate any change of law.

More importantly, however, both BellSouth and Verizon's arguments with regard to *how* they might implement a change of law miss the point. The Joint CLECs take the position that the D.C. Circuit's decision in *USTA II* does not represent a change of law that requires amendment to the existing ICAs.[15] The Court vacated some of the rules that the FCC

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[11] *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.*, Docket No. 040156-TP, Order No. PSC-0578-PCO-TP.

[12] *Id.* at 6.

[13] May 28, 2004 letter from Nancy B. White to Blanca S. Bayo, Exhibit No. 2 to BellSouth's Motion.

[14] While BellSouth's letter to Chairman Powell addresses, at least temporarily, the status quo, it does not address any "procedure" which BellSouth may unilaterally decide to employ.

[15] BellSouth and Verizon erroneously claim that the Joint CLECs have requested that the Commission override FCC rules that are currently in effect and would not be affected by *USTA II*. The Joint CLECs' Complaint makes no such allegation. To the contrary, at least some of CLECs have already executed amendments to their ICAs to incorporate the provisions of the *TRO*, including the FCC rules that will remain in effect if the D.C. Circuit issues its mandate in *USTA II*.

established in the *TRO*, but that decision has no impact whatsoever on the requirements of the Telecommunications Act of 1996 (Act), including §§ 251 and 271, or on BellSouth and Verizon's obligations under Florida law. The Joint CLECs assert that the provisions of their existing ICAs, as well as BellSouth's SGAT, properly reflect those legal requirements, even in the absence of the FCC rules that the D.C. Circuit has vacated.

The Joint CLECs' position thus is fundamentally different than BellSouth's and Verizon's positions. The parties do not even agree on *whether* there has been a change of law that triggers the applicable provisions of the ICAs, much less on any substantive issues that might arise if the change of law process were applicable. Faced with this impasse, BellSouth and Verizon would most likely file petitions with the Commission (or potentially a private arbitrator) for enforcement of their ICAs with virtually all CLECs in Florida, leading to the very waste of Commission and party resources that gave rise to the Joint CLECs' Complaint. Contrary to the ILECs' contentions, the Joint CLECs do not request that the Commission abrogate any party's contractual rights, but would note that the ILECs are *not* the unilateral arbiters of such rights, where there are clearly disputes among the parties, as is the case in this instance. Rather, the Joint CLECs request only that the Commission maintain the status quo until it has determined, in a generic proceeding in which all interested parties may participate, whether, and to what extent, a change of law has occurred.

BellSouth and Verizon also claim that the relief that the Joint CLECs have requested is unnecessary because CLECs are not in jeopardy of losing access to UNEs to which they are "lawfully" entitled. The Joint CLECs find little solace in BellSouth's and Verizon's representations, particularly if the change of law provisions in their ICAs could be interpreted

to automatically incorporate changes of law into the agreements or are otherwise indefinite on the process and procedures applicable to changes of law.

BellSouth's and Verizon's offer to negotiate commercial arrangements for UNEs for which no FCC rule will apply does not assuage the Joint CLECs' concerns. The "market-based rates" that BellSouth and Verizon are offering are BellSouth's and Verizon's special access tariff rates,[16] which are substantially higher than the UNE prices that the Commission has established. The enormous price increases this represents would be just as disruptive to CLECs' ability to serve customers as BellSouth's and Verizon's immediate discontinuance of those UNEs. BellSouth's and Verizon's condition on this offer, that the commercial agreements not be filed with, or subject to approval by, the Commission raises its own issues, not the least of which are the likelihood of discrimination and the unavailability of any such agreements to other carriers under §252(i).[17]

Finally, BellSouth and Verizon argue that determinations as to the meaning of *USTA II* and BellSouth's and Verizon's obligations under state law are premature. Of course, BellSouth and Verizon then ignore their own argument by taking the position, instead, that any action on the part of the Commission to enforce state unbundling requirements[18] is preempted by federal law.[19] The Joint CLECs' discussion of Florida law addresses the Commission's authority to

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[16] Verizon Response at 6, n.9.

[17] On May 27, 2004, BellSouth filed two petitions with the FCC seeking a ruling that state Commissions lack authority to require such filings. *In the Matter of: BellSouth Telecommunications, Inc.'s Emergency Petition for Declaratory Ruling; In the Matter of: Petition for Forbearance under 47 U.S.C § 160(c) from enforcement of Section 252 with Respect to Non-251 Agreements.* On June 7, 2004, numerous carriers filed a petition seeking an order from this Commission requiring the ILECs to file their agreements in Florida. *In Re: Petition of Florida Competitive Carriers Association, AT&T and MCI for Expedited Ruling to Require the Filing, Public Review and Approval of Agreements for the Provision of Wholesale Local Facilities and Services Between ILECs and CLECs*, Docket No. 040530-TP.

[18] Verizon also claims its merger conditions are no longer applicable. Verizon Motion at 12. Joint CLECs raise this issue simply as another example of Verizon's continuing obligation to provide UNE access. Verizon misreads *USTA II* as eliminating *all* obligations to provide access to UNEs. What Joint CLECs have asked this Commission to do is to investigate the obligation of the ILECs, regardless of the vacatur of the FCC rules, to provide access to UNEs.

[19] It should be noted that the ILECs make bald statements regarding preemption but that no court has found the Florida Commission preempted from taking action under state law.

order the relief that the Joint CLECs' request, *i.e.*, to require all parties to ICAs to maintain the status quo until the Commission (or the FCC or the courts) has clarified BellSouth's and Verizon's unbundling obligations under the Act or Florida law. BellSouth's and Verizon's arguments, therefore, should be made as part of any newly-opened docket to more thoroughly examine these issues, not in the context of a motion to dismiss the Joint CLECs' Complaint for interim relief.[20]

It is important to note that, should the Commission fail to act to grant the Joint CLECs' request, the result would be to force each and every CLEC to file an individual complaint regarding the interpretation of similar language in its interconnection agreement. The judicially economic approach is the relief the Michigan Public Service Commission ordered:

> [the ILECs] must honor their commitments to maintain the status quo with respect to providing UNEs and the UNE-P to the CLECs until the parties appropriately amend their interconnection agreement or the Commission orders otherwise. [21]

The Commission should not allow BellSouth and Verizon to exclude it (or the CLECs) from this process based on hollow promises or the assertion that the Commission lacks the authority to step up to the plate to protect the consumers of Florida.

BellSouth, in requesting dismissal of the Joint CLECs Complaint, states that the Commission should "consolidate issues into a single [generic] proceeding."[22] Joint CLECs support this approach, so long as the emergency relief sought is granted in order to assure that there will be no unilateral rate increases during the pendency of such a proceeding. Clearly, if the Commission has the authority, as BellSouth admits, to undertake an examination of *USTA*

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[20] The same is true of the arguments that BellSouth makes in regard to § 271. While BellSouth must continue to comply with all requirements required for § 271 approval, the appropriate place for it to raise this argument is not in the context of an attempt to deny this Commission's jurisdiction but in the substantive proceeding.

[21] *In the matter of a request for declaratory ruling, or in the alternative, complaint of COMPTEL/ASCENT et. al against MICHIGAN BELL TELEPHONE COMPANY et. al,* Case No. U-14139, Order and Opinion, June 3, 2004 at 6.

[22] BellSouth Motion at 12.

II issues on a generic basis, there is no reason why the Commission cannot and should not order BellSouth and Verizon on a generic basis to maintain the status quo pending the outcome of that examination.

The Joint CLECs ask only that the Commission require all parties to maintain the status quo while the Commission undertakes the appropriate substantive inquiry and makes a final determination. CLECs should not be required to file individual complaints to obtain such relief. Nor should the Commission be trying to address the substantive issues surrounding *USTA II* while simultaneously dealing with multiple petitions for Commission action from BellSouth and Verizon or CLECs as a result of BellSouth's and Verizon's efforts to implement their own interpretations of *USTA II* and their ICAs.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the Joint CLECs' Complaint, the Commission should issue an order requiring BellSouth and Verizon to maintain the status quo regarding their obligations under existing Commission-approved ICAs with any CLEC or under BellSouth's SGAT pending resolution of judicial review of the *TRO* and any resulting FCC action or additional Commission action, and prohibiting any changes affecting UNE rates unless made pursuant to negotiated amendment to those ICAs or pursuant to further Commission order.

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JUN-10-04

BELLSOUTH

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F. Duane Ackerman
Chairman and
Chief Executive Officer

404 249-4020

June 10, 2004

The Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 12 Street, S. W.
Washington, DC 20554

Dear Chairman Powell:

I write to affirm our commitment to ensure an orderly transition for consumers and carriers away from the Commission rules scheduled to be vacated on June 15, 2004. Replacing those rules with an approach that recognizes the dynamism of today's telecommunications markets and technology will provide the greatest possible benefits to consumers and the economy. To ensure an orderly transition, BellSouth will not unilaterally increase the prices it charges for the mass market UNE-Platform or high-capacity loop or transport UNEs before January 1, 2005 for those carriers with current interconnection agreements.

BellSouth has already reached several agreements with carriers that provide for a UNE-Platform replacement with no price increase for the remainder of this year and modest staged increases over the next three years. We have also reached agreements with carriers to transition from high-capacity loop and transport UNEs to other arrangements. Over the next several months, we plan to intensify our efforts with other carriers to develop mutually beneficial commercial solutions to move the industry forward. We trust in your continued support for these efforts.

Sincerely,

Duane Ackerman

Copy to: Commissioner Kathleen Q. Abernathy
Commissioner Michael J. Copps
Commissioner Kevin J. Martin
Commissioner Jonathan S. Adelstein

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Chairman & CEO

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June 11, 2004

Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Chairman Powell:

The decisions of the Solicitor General and the FCC not to appeal the *USTA II* decision pave the way for a new telecommunications policy that reflects the market facts of today -- facts that have changed dramatically even since the last order. A new market-oriented policy will promote investment in new technologies and services, and provide enormous benefits to consumers.

Some carriers nevertheless claim that these decisions will produce immediate and drastic price increases for consumers. Their claims are misplaced.

First, their claims are out of touch with the business realities we have to contend with every day. The simple fact is that retail pricing strategies are determined by competition among wireline carriers, wireless carriers, cable providers and VOIP. This competition is here to stay.

Second, for our part, we will continue to provide wholesale access to our narrowband network after the rules are vacated, and will continue to make every effort to negotiate commercial agreements with wholesale customers. As we have consistently emphasized, negotiated commercial arrangements, rather than continued litigation and regulation, will provide certainty for all concerned, promote investment and help bring an end to the regulatory food fights that have plagued the industry.

Third, we also are committed to not unilaterally increase the wholesale price we charge for UNE-P arrangements that are used to serve mass market consumers (those with fewer than 4 lines) for 5 months, and we plan to give our wholesale customers at least 90 days notice of any future change. We will, of course, continue to pursue efforts to correct the wholesale prices that have been set by the states.

Fourth, we will continue to invest in new broadband technologies such as fiber optics and packet switching that will allow us to provide exciting new services to our customers. We have announced the initial sites where we are deploying these new technologies, and more will follow. The Commission's decision that these new technologies are not subject to unbundling helped pave the way for these investments, but more remains to be done to clarify the scope of that ruling and to adopt a clear and comprehensive national broadband policy. I urge you to promptly address these matters to facilitate the widespread broadband investment that you and the administration have wisely encouraged.

Sincerely,

Ivan Seidenberg

Ivan G. Seidenberg

Cc: Commissioner Kathleen Q. Abernathy
Commissioner Michael J. Copps
Commissioner Kevin J. Martin
Commissioner Jonathan S. Adelstein

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Joint CLECs' Response to Motions to Dismiss has been provided by (*) hand delivery or U.S. Mail this 17th day of June 2004 to:

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