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Subject: Docket No.: 040530-TP - Petitioners' Response to Verizon's Motion to Dismiss

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2. 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.

3. Docket No.: 040530-TP.

4. Parties on Whose Behalf the Pleading is Being Filed: Florida Competitive Carriers Association, AT&T and MCI.

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July 14, 2004

VIA ELECTRONIC FILING

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Re: Docket No.: 040530 - TP

Dear Ms. Bayo:

The Florida Competitive Carriers Association (FCCA), AT&T Communications of the Southern States, L.L.C., MCI Metro Access Transmission Services, L.L.C. and MCI Worldcom Communications, Inc., hereby submit, for electronic filing, their Response to Verizon's Motion to Dismiss in the above docket.

Thank you for your assistance.

Yours truly,
s/Joseph A. McGlothlin

Enclosure

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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 Filed: July 14, 2004

PETITIONERS' RESPONSE TO VERIZON'S MOTION TO DISMISS

The Florida Competitive Carriers Association ("FCCA"), AT&T Communications of the Southern States, LLC ("AT&T"), and MCImetro Access Transmission Services, LLC and MCI WORLDCOM Communications, Inc. (collectively "MCI") hereby respond to the "Response in Opposition and Motion to Dismiss"[1] filed on July 2, 2004 by Verizon Florida, Inc. ("Verizon"), and state:

BACKGROUND

On June 7, 2004, Petitioners filed their Petition for Expedited Ruling Regarding the Filing, Review and Approval of Wholesale Local Facilities and Services Agreements. Petitioners alleged that BellSouth and Verizon have announced that they have entered certain "wholesale agreements" with several competitive local exchange companies, and have also announced that they do not intend to file these agreements with the Commission. Petitioners asserted that the "wholesale agreements" are agreements for interconnection, resale, and access to unbundled elements, that fall within the purview of Section 252(a)(1) of the 1996 Telecommunications Act and Section 364.162, Florida Statutes. Accordingly, Petitioners assert that BellSouth and Verizon must file these agreements with the Commission for review and approval. Further, if approved the "commercial agreements" must become subject to adoption,

[1] FCCA, AT&T, and MCI respond to Verizon's pleading only insofar as the Commission treats it as a Motion to Dismiss.

pursuant to Section 252(i) of the federal Telecommunications Act of 1996 ("1996 Act"). Petitioners alleged that by refusing to submit the "commercial agreements" for approval, BellSouth and Verizon have violated the above statutory provisions, frustrated the Commission's ability to prohibit discrimination, harmed consumers, and affected Petitioners' substantial interests. Petitioners asserted there are no issues of material fact associated with the Petition. Petitioners requested that the Commission to rule on the Petition on an expedited basis.

On July 2, 2004, Verizon submitted its "Response In Opposition And Motion to Dismiss Petition for Expedited Ruling Regarding the Filing, Review and Approval of Commercial Agreements." In this Response, Petitioners will address Verizon's pleading *insofar as Verizon purports to request the Commission to dismiss the Petition.*

CRITERIA GOVERNING CONSIDERATION OF A MOTION TO DISMISS

As the Commission is well aware, the purpose of a motion to dismiss is to test the sufficiency of a complaint or petition to state a cause of action on which relief can be granted. For the purpose of this test, the Commission must take as true all factual allegations contained in the Petition, must limit its review to the four corners of the petition or complaint, and cannot take into consideration any affirmative defenses or evidence that may be presented by the moving party. *Varnes v. Dawkins,* 624 So.2d 349, 350 (Fla. 1st DCA 1993); Order No. PSC-03-1331-FOF-TL, Docket Nos. 030867-TL, 030868-TL, and 030869-TL (November 21, 2003).

Petitioners allege that BellSouth and Verizon have entered agreements relating to interconnection, unbundled elements, and/or resale and have refused to file them with the Commission. Petitioners assert that the "commercial agreements" meet the definition of agreements for interconnection, resale, and access to unbundled elements that must be filed with the Commission pursuant to federal and state law. Petitioners allege that the ILECs' refusal to

submit the "commercial agreements" for approval harm their substantial interests and those of consumers by circumventing Petitioners' legal right to adopt, if they elect to do so, some or all of the agreements pursuant to Section 252(i) of the 1996 Act, which Congress enacted to prevent discrimination and maximize competition. Petitioners state that there are no issues of fact and that Petitioners are entitled to a ruling in their favor as a matter of law. With respect to a motion to dismiss the Petition, the question confronting the Commission is: Taking these allegations to be true, are they sufficient to state a claim for which the Commission could fashion relief? As shown below, Verizon raises nothing in its pleading that even addresses this question, much less supports dismissal of the Petition.

ARGUMENT

Under the *Varnes* standard and analysis, it is clear that the Verizon pleading, to the extent it seeks dismissal of the Petition, should not be granted. Even a cursory review of Verizon's pleading demonstrates that the reference to a "Motion to Dismiss" in the heading is an afterthought—and a complete misnomer. Verizon's response is to the *merits* of the petition, not its sufficiency and thus irrelevant to the criteria governing a motion to dismiss. In its pleading Verizon argues, (1) commercial agreements have nothing to do with unbundling obligations under Section 251(c), therefore, are not subject to review under Section 252, (2) state law does not permit the Commission to approve such agreements, and (3) public policy favors that the parties negotiate without Commission interference. Again, Verizon contests the *merits* of the Petition, and its arguments do not relate to nor address the criteria governing a motion to dismiss.

Verizon asserts in Section II of its Response that "commercial agreements are not subject to the filing and approval requirements of Section 252." This contention is irrelevant under the *Varnes* criteria and analysis for the disposition of a motion to dismiss as it contests the *merits* of

the Petition, rather than its sufficiency to state a claim for relief. In their Petition, FCCA, AT&T, and MCI provided the legal claim and support for the proposition that these so-called "commercial agreements" are simply examples of—and in some instances *replacements for*—the agreements for interconnection, resale, and access to elements contemplated by Section 252 of the 1996 Act, and that Verizon is attempting to avoid its obligations under the 1996 Act through the expedient of calling the agreements by another name. Rather than reiterate those arguments here, as part of this Response Petitioners adopt and incorporate by reference the arguments made in the Petition. However, Petitioners cannot let pass without comment two of Verizon's assertions, which severely distort the plain meaning of the 1996 Act and prior FCC orders.

Verizon argues that only obligations set forth in 251 are subject to 252 review and that "commercial agreements" are not subject to Section 252 review. Verizon is simply wrong. Any agreement for interconnection and unbundled elements is one made under Section 251 and any agreement made relating to Section 251 is subject to Section 252 review. The clear and irrefutable language of Section 252(a)(1), states:

> (1) **"Voluntary negotiations**—Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers **without regard to the standards set forth in subsections (b) and (c) of section 251**. The agreement shall include a detailed schedule of itemized charges for interconnection **and each service or network element included in the agreement**. The agreement . . . shall be submitted to the State commission under subsection (e) of this section."

(Emphasis added.)

Thus, Section 252(a)(1) explicitly contemplates a voluntarily negotiated agreement that (1) is a request for elements under Section 251, (2) is not subject to the standards governing access to unbundled elements contained in Section 251(c)(3), which standards are applicable solely to a request for arbitration and thereby involve the application of the criterion of

"impairment", but (3) *nonetheless encompasses terms for access to and prices for unbundled elements*. Further, Section 252(e) explicitly provides that negotiated *and* arbitrated agreements are to be submitted for approval by the state commissions.[2] Similarly, Section 252(i), the statutory source of the ability of a CLEC to opt into part or all of an agreement, specifically encompasses *all* agreements approved by a state commission, without distinguishing between those negotiated voluntarily (such as the so-called "commercial agreements") and those that have been arbitrated by the state commission. Section 252(a)(1) clearly encompasses commercial agreements.

Like BellSouth, Verizon erroneously argues that the *Qwest ICA Order*[3] supports its position that it need not file "commercial agreements" for reviews under Section 252. Verizon's description of the *Qwest ICA Order* is misconstrued. The thrust of the FCC's decision in the *Qwest ICA* order was to *deny* Qwest's attempt to exclude from the filing requirement any agreement in the nature of a settlement agreement. Throughout the *Qwest ICA Order*, the FCC applied the filing/approval requirement to agreements that had not been the subject of arbitrations—thus undermining Verizon's entire argument. Verizon appears to argue that its "commercial agreements" are in lieu of agreements entered to fulfill the requirements of Section 251, and/or that the "commercial agreements" are not offered pursuant to Section 251. By melding its discussion of agreements to include negotiated and arbitrated agreements, the FCC in the *Qwest ICA Order* made clear that any agreement for interconnection and unbundled elements is one made under Section 251 and subject to Section 252 review. Indeed the FCC states, "we find that a settlement agreement that contains an ongoing obligation relating to Section 251(b) or (c) must be filed under Section 252(a)(1)." This is consistent with Section 252(a)(1): the only

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[3] Memorandum Opinion Order; 17 FCC Rcd. 19337

distinction the statute makes is between those agreements that are negotiated voluntarily and those that are arbitrated.[4] If either type of agreement relates to an "ongoing obligation" to provide unbundled elements, under the guidance of the *Qwest ICA Order,* it must be submitted to the state commission for approval. "This standard recognizes the statutory balance between the rights of competitive LECs to obtain interconnection terms pursuant to section 252(i) and removing unnecessary regulatory impediments to commercial relations between incumbent and competitive LECs."[5]

CONCLUSION

Verizon's arguments are irrelevant to the criteria that governs a motion to dismiss (and are misplaced besides). To the extent that the Commission treats Verizon's pleading as a motion to dismiss, it should be denied. The Commission should proceed expeditiously to rule on the Petition and require BellSouth and Verizon to submit for approval any and all "commercial agreements" that relate to an ongoing requirement to provide such matters as interconnection, resale, collocation, and/or access to unbundled elements.

s/ Joseph A. McGlothlin
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[4] In stating that an agreement that creates an ongoing obligation pertaining to interconnection, unbundled network elements, or collocation is an interconnection agreement that must be filed pursuant to section 252(a)(1)," the FCC observed that its interpretation ". . .directly flows from the language of the Act. . ."
[5] *Qwest ICA Order* at ¶ 8.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioners' Response to Verizon's Motion to Dismiss has been furnished by U.S. Mail this 14th day of July 2004, to:

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