BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint and petition for resolution of interconnection pricing dispute against Verizon Florida, LLC, by Bright House Networks Information Services, LLC.	DOCKET NO. 080110-TP ORDER NO. PSC-08-0391-FOF-TP ISSUED: June 11, 2008

The following Commissioners participated in the disposition of this matter:

MATTHEW M. CARTER II, Chairman
LISA POLAK EDGAR
KATRINA J. McMURRIAN
NANCY ARGENZIANO
NATHAN A. SKOP

ORDER GRANTING REQUEST FOR ORAL ARGUMENT AND GRANTING MOTION TO DISMISS COMPLAINT

BY THE COMMISSION:

I. Background

Bright House Networks Information Services (Florida), LLC ("Bright House") is a competitive local exchange carrier ("CLEC") operating in the state of Florida. Bright House adopted an existing interconnection agreement between Verizon Florida Inc. ("Verizon") and MCImetro Access Transmission Services LLC. This adoption was deemed approved and became effective as noted in Commission staff's April 7, 2006 memorandum filed in Docket No. 060015-TP.

On February 22, 2008, Bright House filed with the Commission its Complaint and petition for resolution of interconnection pricing dispute against Verizon ("Petition"). On March 13, 2008, Verizon filed its Motion to Dismiss Complaint ("Motion"). Verizon alleged that Bright House's Petition should be dismissed because it failed to state a claim for which relief can be granted.

On March 20, 2008, Bright House filed its Opposition to Motion to Dismiss ("Response"), as well as its Request for Oral Argument. Bright House argues that Verizon's Motion should be rejected because Bright House did state a claim for which relief can be granted.

Pursuant to Section 252(e) of the Telecommunications Act of 1996 ("Act"), we approved an Interconnection Agreement ("Agreement") between GTE Florida Incorporated (n/k/a Verizon) and AT&T. The Agreement was subsequently adopted by MCImetro Access Transmission Services LLC and later by Bright House. Accordingly, we have jurisdiction to

resolve this dispute pursuant to Sections 251 and 252 of the Act. *See, Iowa Utilities Bd. v. FCC*, 120 F. 3d 753, 804 (8th Cir. 1997) (holding that State commissions' authority under the Act to approve agreements carries with it the authority to enforce the agreements); *accord, BellSouth Communications, Inc. v. MCImetro Access Transmission Servs.*, 317 F. 3d (11th Cir. 2003).

II. Motion to Dismiss

On May 20, 2008, at our regularly scheduled Agenda Conference, we granted Bright House's request to hear oral argument from the parties concerning Verizon's Motion.

Verizon's Argument

Verizon asserts that Bright House's Petition should be dismissed because it has failed to state a claim for which relief can be granted. Verizon's primary argument is that the parties' Agreement, for which Bright House seeks dispute resolution, contains a mandatory arbitration clause. In the Agreement, the parties have agreed to use specified alternative dispute resolution procedures as their exclusive remedy with respect to all disputes arising under the Agreement or the breach thereof. Verizon cites to "the key provision" of the Agreement's Attachment 1, entitled "Alternative Dispute Resolution," which states:

> 2. **Exclusive Remedy**
>
> 2.1 Negotiation and arbitration under the procedures provided herein shall be the exclusive remedy for all disputes between [Verizon] and [Bright House] arising out of this agreement or its breach. [Verizon] and [Bright House] agree not to resort to any court, agency, or private group with respect to such disputes except in accordance with this Agreement.

The specified alternative dispute resolution procedures include pre-arbitration negotiation, American Arbitration Association commercial arbitration, and the opportunity to appeal the arbitrator's decision to this Commission, to the FCC, or to a state or federal court, as appropriate. Verizon points out that Bright House does not allege that it has complied with the alternative dispute resolution process; Bright House does not allege that any provision of the Agreement excuses its noncompliance; and Bright House, by filing its with the Commission, has breached the Agreement in violation of Section 2.1, above.

Verizon states that this Commission has consistently held that it will honor commercial arbitration clauses in interconnection agreements, citing to our orders. In one case involving BellSouth Telecommunications, Inc. and Supra Telecommunications and Information Systems, Inc., disputes arose between the parties under two different agreements - - one with, and the other without, an arbitration clause.[1] We held "that the dispute resolution provisions in each of the agreements should be strictly followed" and accordingly dismissed the portion of the Petition

[1] *In re: Request for arbitration concerning complaint of BellSouth Telecommunication, Inc. against Supra Telecommunications and Information Systems, Inc. for resolution of billing disputes*, Docket No. 001097-TP, Order No. PSC-00-2250-FOF-TP, pp. 4-5 (Nov. 28, 2000).

arising under the agreement which contained an arbitration clause. Likewise, we dismissed a complaint by XO Florida against Verizon, where the parties' interconnection agreement had a commercial arbitration clause.[2] We stated that we were "following our established precedent and honoring the right of the parties to choose in advance by contract the forum for settling any disputes which may arise over the terms of their agreement." Verizon states that we reached the same conclusion in a case in which Intermedia brought a complaint against GTE Florida, finding that because the parties' interconnection agreement had a commercial arbitration clause, "Intermedia has failed to state a cause of action upon which we can grant relief."[3]

Verizon asserts that the Federal Arbitration Act requires that commercial arbitration clauses be honored and that the Act establishes a national policy favoring arbitration when the parties contract for such method of dispute resolution. Verizon states that the Florida Arbitration Code, Chapter 682, F.S., similarly favors arbitration clauses as "valid, enforceable, and irrevocable without regard to the justiciable character of the controversy."

Verizon asserts that even though Bright House claims that this dispute concerns "competitive fairness" and is thus subject to our direct jurisdiction, Bright House points to no "competitive fairness" exception to alternative dispute resolution in the Agreement or in the law. Verizon states further that even if there were such a loophole in the Agreement, this case would not qualify because it involves a "garden variety" commercial dispute concerning the interpretation of a contract as it relates to the price of a service.

Bright House's Response

Bright House argues that while consideration of the parties' Agreement is necessary to understand the dispute at issue, the dispute in question is not fundamentally about the Agreement or how it is supposed to operate. Bright House argues that Verizon's Motion is "based on the fact that the parties' agreement contemplates a form of alternative dispute resolution." Bright House states that its Complaint frankly acknowledges this fact [of mandatory arbitration] but that the Complaint also explains why the alternative dispute resolution provision is not controlling here. Bright House argues that:

> The problem is that, while the agreement plainly says that Verizon will [insert Bright House's customer listings into Verizon's directory databases], for free, Verizon is brazenly claiming that somehow it is entitled to charge Bright House anyway. Despite months of private negotiations between the parties, Verizon has never explained how it can tie $4 million in charges to the actual language of the agreement. In these circumstances, it is fair to say that Verizon is not acting "under" the agreement. It is acting entirely outside the agreement . . . . This is

---

[2] *In re: Request for arbitration concerning complaint of XO Florida, Inc. against Verizon Florida Inc. (f/k/a GTE Florida Incorporated) regarding breach of interconnection agreement and request for expedited relief,* Docket No 011252-TP, Order No. PSC-01-2509-FOF-TP, pp. 8-9 (Dec. 21, 2001).

[3] *In re: Request for arbitration concerning complaint of Intermedia Communications, Inc. and petition for emergency relief against GTE Florida Incorporated regarding request for physical collocation in specific central offices,* Docket No. 981854-TP, Order No.PSC-99-0564-FOF-TP, p. 6 (March 26, 1999).

> simply an anticompetitive effort to impose added customer acquisition costs on Bright House, not any legitimate dispute under the agreement.

Bright House then asserts, however, that it is "seeking a ruling that the agreement **does not** permit Verizon to send bills; it is not seeking an interpretation or an enforcement of Verizon's obligation to do anything." (Emphasis in original)

Bright House asserts that while it notes the Agreement in its Complaint, it relies as well on Section 364.01(4)(g), Florida Statutes, which provides that this Commission shall "ensure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior." Bright House contends that its Complaint differs from the cases cited by Verizon in its Motion, as this case implicates important Commission policy issues independent of the Agreement, and that this fact brings the dispute under our jurisdiction, notwithstanding the Agreement. Additionally, Bright House argues that the cases cited by Verizon concerned interconnection agreements with "binding" arbitration procedures, whereas here the alternative dispute resolution procedures are neither final nor binding.[4] Bright House argues that, to the contrary, the relevant provisions here recognize that we may take jurisdiction of a dispute before private arbitration has occurred, and expressly state that arbitration results are not final, because the Agreement expressly permits an appeal to this Commission. Bright House argues that this dispute does not implicate the Federal Arbitration Act's policy regarding arbitration: a means to efficiently, fully and finally resolve disputes without the need to litigate. Thus, since the arbitration called for in the parties' Agreement is not final, the policies that "might normally impel the Commission to require strict adherence to these provisions [of the Agreement] simply do not apply."

Bright House claims alternatively that "if the Agreement somehow contemplates that Verizon could charge something" for the administrative work Verizon provides in uploading Bright House's directory listing information, then we must establish that charge, not a private arbitrator.

Finally, Bright House concludes that this case involves "important policy matters regarding how we will enable and encourage facilities-based competition." Given that the Agreement contemplates continued Commission involvement and arbitration is not exclusive or binding, we may, and should, exercise our own direct jurisdiction over this dispute to resolve it.

---

[4] We note that Bright House cites a federal case, on page 7 of its Response, apparently for the proposition that this Commission should not require private arbitration of the dispute here because "forcing this dispute into time-consuming, interlocutory private arbitration would run counter to the Commission's direct responsibilities for interpreting and enforcing interconnection agreements." *Verizon New York, Inc. v. Covad Communications Company, New York State Public Service Commission, et al*, 2006 U.S. Dist. LEXIS 7414.

Discussion

Standard of Review

Under Florida law the purpose of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action. *Varnes v. Dawkins*, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). In order to sustain a motion to dismiss, the moving party must demonstrate that, accepting all allegations in the petition as facially correct, the petition still fails to state a cause of action for which relief can be granted. *In re Application for Amendment of Certificates Nos. 359-W and 290-S to Add Territory in Broward County by South Broward Utility, Inc.*, 95 FPSC 5:339 (1995); *Varnes*, 624 So. 2d at 350. When "determining the sufficiency of the complaint, the 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." Id. The moving party must specify the grounds for the motion to dismiss, and all material allegations must be construed against the moving party in determining if the petitioner has stated the necessary allegations. *Matthews v. Matthews*, 122 So. 2d 571 (Fla. 2nd DCA 1960).

Bright House brought its petition before us explicitly stating that it was:

> A petition for dispute resolution against Verizon Florida, LLC ("Verizon") (a) for violation of the terms of the Parties' Interconnection Agreement ("Agreement") by imposing charges on Bright House not provided for in, and contrary to the terms of, that Agreement, and (b) for a determination regarding the scope and meaning of that Agreement as it relates to charges for and related to directory listings for Bright House customers.

This statement is unequivocal and the essence of it is echoed throughout Bright House's argument.

The primary basis for Verizon's Motion to Dismiss Bright House's Petition is that the parties' Agreement contains a mandatory arbitration clause with which Bright House did not comply. The parties agreed to use specified alternative dispute resolution procedures as their exclusive remedy with respect to all disputes arising under the Agreement or the breach thereof:

> 2. **Exclusive Remedy**
>
> 2.1 Negotiation and arbitration under the procedures provided herein shall be the exclusive remedy for all disputes between [Verizon] and [Bright House] arising out of this agreement or its breach. [Verizon] and [Bright House] agree not to resort to any court, agency, or private group with respect to such disputes except in accordance with this Agreement.

The specified alternative dispute resolution procedures include pre-arbitration negotiation, mandatory commercial arbitration, and possible appeal to this Commission or FCC of an arbitrator's decision. There is no provision to allow a party to bypass these procedures and

bring its case directly to us. The finality of the arbitrator's decision is addressed in Attachment 1, Section 11, of the Agreement:

> 11.1 Except as provided below, the Arbitrator's decision and award shall be final and binding, and shall be in writing and shall set forth the Arbitrator's reasons therefor for decision unless the Parties mutually agree to waive the requirement of a written opinion. Judgment upon the award rendered by the Arbitrator may be entered in any court having jurisdiction thereof. Either Party may apply to the United States District Court for the district in which the hearing occurred for an order enforcing the decision.
>
> 11.2 A decision of the Arbitrator shall not be final in the following situations:
>
> a) A Party appeals the decision to the Commission or FCC, and the matter is within the jurisdiction of the Commission or FCC, provided that the agency agrees to hear the matter.

Based on Section 11.2, our ultimate decision to hear this matter is discretionary - - but only if or when it is properly brought before us by appeal of an arbitrator's decision. Before that discretion comes into play, however, we must take into account the private contract (the Agreement) to which Bright House and Verizon are parties.

Bright House acknowledges that it has not complied with the Agreement's mandatory arbitration process but argues that it should not have to. Notwithstanding the unequivocal opening paragraph of its Petition, Bright House contends that its complaint is not really about the Agreement and that it is not asking us for an interpretation of the parties' Agreement. This contention, however, is belied by the facts alleged by Bright House itself. The dispute, as Bright House alleges it, is undeniably about the agreement and its terms. That is, the question at the heart of $4 million in charges that Bright House claims have been improperly billed by Verizon is "what are the terms of the Agreement that provide for Verizon to levy, or preclude Verizon from levying, these charges?" In order to answer this question, an interpretation of the Agreement is absolutely necessary.

Bright House argues that unlike our prior cases cited by Verizon, the mandatory arbitration required by this Agreement is not final and binding. A party may appeal an arbitrator's decision to this Commission. Consequently, arbitration, according to Bright House, is a waste of time and resources. Bright House, however, voluntarily adopted this Agreement and was aware of the alternative dispute resolution requirements when it did so. There is no allegation to the contrary. Neither is there a provision in the Agreement that allows a party to skip arbitration and bring its case directly to us.

Bright House asserts, nevertheless, that because the arbitration procedure permits an appeal of an arbitrator's decision, the Agreement "contemplates Commission involvement from the beginning." Indeed, Bright House argues that the Agreement in this case pointedly recognizes that we "may take jurisdiction of a dispute before a private arbitration has occurred." We disagree with this argument. The opportunity to appeal an arbitrator's decision, which

necessarily happens after arbitration takes place, does not mean that the Agreement contemplates our direct involvement from the beginning, or that we may take jurisdiction before arbitration has occurred. We believe that Bright House misreads the relevant Agreement provisions that it cites as providing for us to take jurisdiction before arbitration. We believe that Attachment 1, Section 2.1.2, provides just the opposite: That arbitration must come first and only then may a party appeal the arbitrator's decision pursuant to Section 11.2. Thus, the "result" in Section 2.1.2 is that there may be two rulings: "the agency ruling," as described in Section 2.1.2.1, and "[t]he arbitration ruling," as described in Section 2.1.2.2. Section 2.1.2 provides:

> 2.1.2 If, for any reason, the FCC or any other federal or state regulatory agency exercises jurisdiction over and decides any dispute related to this Agreement or to any [Verizon] Tariff and, as a result, a claim is adjudicated in both an agency proceeding and an arbitration proceeding under this Attachment 1, the following provisions apply:
>
> 2.1.2.1 To the extent required by law, the agency ruling shall be binding upon the parties for purposes of regulation within the jurisdiction and authority of such agency.
>
> 2.1.2.2 The arbitration ruling rendered pursuant to this Attachment 1 shall be binding upon the parties for purposes of establishing their respective contractual rights and obligations under this Agreement, and for all other purposes not expressly precluded by such agency ruling.

Bright House argues that this case, unlike our cases cited by Verizon, implicates important Commission policy issues independent of the Agreement. Bright House argues that, because of this distinction, our holdings in those cited cases, which honor the alternative dispute resolution provisions, would not apply here. Bright House argues further that the implication of these important policy issues brings this dispute under our jurisdiction, notwithstanding the Agreement. Bright House, however, cannot transform this matter, which it expressly brings before us as "a dispute over the terms of the parties' agreement," into a "competitive fairness" issue by simply referring to Section 364.01(4)(g), F.S.

Bright House contends that Verizon's imposition of the $4 million in charges flies "in the face of an agreement that says the relevant functions will be provided for free." Bright House argues that this is "anticompetitive behavior" that takes this dispute outside the agreement, rather than constituting "a dispute arising out of the agreement or its breach," pursuant to Section 2.1 of the Agreement. But as Bright House in the above quote reflects, the dispute over the $4 million in charges is inextricably intertwined with an alleged breach of the terms of the Agreement. Even Bright House's alternative claim that "if the Agreement somehow contemplates that Verizon could charge something" for the administrative work it provides in uploading Bright House's directory listing information, begs the question: does the Agreement contemplate that Verizon could charge something? And this question, as does the rest of Bright House's argument, requires an interpretation of the Agreement.

Conclusion

Taking all of the facts alleged by Bright House as true, we find that Bright House's Petition must be dismissed. As set forth in Attachment 1, Section 2.1, of the Agreement, the parties have agreed to utilize an alternative dispute resolution process, which includes mandatory arbitration, for the remedy of all disputes that may arise out of the Agreement or its breach. The dispute Bright House brings to us arises out of the Agreement or its breach. Bright House's reference to Verizon's "anticompetitive behavior" does not trigger our authority under Section 364.01(4)(g), F.S., to investigate this secondary allegation, especially not within the context of the essential allegation driving Bright House's Petition; that Verizon is violating the terms of the parties' Agreement by charging $4 million for Bright House customer listings. We acknowledged the Agreement between the original parties, and the adoption thereof by Bright House. Bright House did not comply with the alternative dispute resolution process before filing its Petition. Proceeding with this Petition would contravene the clear terms of the Agreement. We have consistently held that we will honor commercial arbitration clauses in parties' interconnection agreements, and we find no reason to deviate in this instance. Bright House has failed to state a cause of action upon which we can grant relief. Accordingly, we grant Verizon's Motion to Dismiss Bright House's Complaint.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Bright House's Request for Oral Argument is hereby granted. It is further

ORDERED that Verizon's Motion to Dismiss is hereby granted. It is further

ORDERED that upon expiration of the period for appeal this docket shall be closed.

By ORDER of the Florida Public Service Commission this 11th day of June, 2008.

Ann Cole

ANN COLE
Commission Clerk

(SEAL)

HFM

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Office of Commission Clerk, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.