Diamond Williams 090501-TP

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Sent: Monday, December 27, 2010 1:12 PM

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Subject: Docket No. 090501-TP - Verizon Florida LLC's Opposition to Motion for Reconsideration and Request for Oral Argument

Attachments: 090501 VZ Opposition to Motion for Recon 12-27-10.pdf

The attached is submitted for filing in Docket No. 090501-TP on behalf of Verizon Florida LLC by

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The attached document consists of a total of 15 pages - cover letter (1 page), Opposition (13 pages) and Certificate of Service (1 page).

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December 27, 2010

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Re: Docket No. 090501-TP
Petition for arbitration of certain terms and conditions of an interconnection agreement with Verizon Florida LLC by Bright House Networks Information Services (Florida), LLC

Dear Ms. Cole:

Enclosed for filing in the above matter is Verizon Florida LLC's Opposition to Motion for Reconsideration and Request for Oral Argument. Service has been made as indicated on the Certificate of Service. If there are any questions regarding this filing, please contact me at (678) 259-1657.

Sincerely,

s/ Dulaney L. O'Roark III

Dulaney L. O'Roark III

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Enclosures

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for arbitration of certain terms and conditions of an interconnection agreement with Verizon Florida LLC by Bright House Networks Information Services (Florida), LLC	)))))	Docket No. 090501-TP Filed: December 27, 2010

VERIZON FLORIDA LLC'S OPPOSITION TO
MOTION FOR RECONSIDERATION AND REQUEST FOR ORAL ARGUMENT

Through this arbitration, Bright House Networks Information Services (Florida), LLC ("Bright House") has advanced a variety of far-fetched, never-before-accepted legal theories – all aimed at shifting its costs onto its chief competitor, Verizon Florida LLC ("Verizon"), and obtaining other, unfair competitive advantages. The Commission rightly rejected those efforts, ruling in its December 3, 2010 Final Order ("Order") that, among other things, Bright House could not change the switched and special access regimes in Florida merely to suit its own financial interests. Bright House now argues that the Commission "misapprehended, or overlooked, relevant legal and factual considerations"[1] with respect to the key disputes concerning (1) the pricing of the special access facilities known as access toll connecting ("ATC") trunks; and (2) provisions for discontinuation of services Verizon does not have a legal obligation to provide.

But the Commission did no such thing. Indeed, the Order emphasized the very argument Bright House claims the Commission ignored with respect to its rulings on ATC trunks; and Bright House does little more than repeat the arguments that it already made with respect to contract provisions for discontinuation of services. Because the Commission already considered and rejected these arguments, there is nothing to

[1] Motion for Reconsideration ("Motion") at 1.

reconsider and nothing to be gained from oral argument on Bright House's Motion. The Commission, therefore, should deny that Motion, along with the request for oral argument.

I. RECONSIDERATION STANDARD.

Reconsideration will not be granted unless the petitioning party identifies a point of fact or law that the Commission overlooked or failed to consider in rendering its order. *See, e.g., Stewart Bonded Warehouse, Inc. v. Bevis*, 294 So. 2d 315 (Fla. 1974); *Diamond Cab Co. v. King*, 146 So. 2d 889 (Fla. 1962); and *Pingree v. Quaintance*, 394 So. 2d 162 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. *Sherwood v. State*, 111 So. 2d 96 (Fla. 3d DCA 1959), *citing State ex. rel. Jaytex Realty Co. v. Green*, 105 So. 2d 817 (Fla. 1st DCA 1958). Furthermore, a motion for reconsideration will not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." *Stewart Bonded Warehouse*, 294 So. 2d at 317.

II. BRIGHT HOUSE OFFERS NO GROUNDS FOR RECONSIDERATION OF THE COMMISSION'S RULING THAT VERIZON SHOULD BE PERMITTED TO CEASE PROVIDING SERVICES AND MAKING PAYMENTS WHEN IT IS NOT REQUIRED TO DO SO BY APPLICABLE LAW.

In connection with the dispute designated as "Issue 7," the Commission recognized that the parties' interconnection agreement "is not a mutual voluntary agreement." Order at 5. Rather, it is a product of regulation and, therefore, imposes certain legal obligations on Verizon that it never would agree to in a private contract. Accordingly, the Commission concluded that "Verizon shall be allowed to cease

performing duties provided for in this agreement that are not required by applicable law." *Id.*

Depending on the circumstances, that cessation will be handled pursuant to the existing "Change in Law" provisions the parties previously agreed upon (General Terms & Conditions ("GTC") § 4.6) or the new "Withdrawal of Services" provisions approved by the Commission (GTC § 50). *Id.* The former, "Change in Law" provisions apply where a change in law necessitates that the parties get together and negotiate modifications to the ICA to address the change. The latter, "Withdrawal of Services" provisions apply, *inter alia*, where Verizon's duty to provide service or make payment is eliminated altogether. In that situation, it is not necessary to go through the process of negotiating terms to accommodate the change. Indeed, there is nothing left to negotiate. Because the obligation does not exist, all that must be done is to stop providing or stop paying.

Bright House now moves the Commission to reconsider its approval of the new "Withdrawal of Services" provisions in GTC § 50. *See* Motion at 2-4. However, Bright House offers no valid basis for reconsideration, instead resorting to rearguing various points that the Commission already has considered.

For example, Bright House claims that the new "Withdrawal of Services" language will permit Verizon "to unilaterally determine" its own contractual obligations (*id.* at 2), lead to more disputes (*id.* at 2, 4), and result in "rushed filings and rulings, significant expense on attorneys, and a lack of certainty on the part of both Bright House and Verizon." *Id.* at 2. Bright House previously made those arguments in its witness testimony,[2] prehearing statement,[3] at hearing,[4] in its post-hearing brief[5] and its

[2] *See, e.g.*, Direct Testimony of Timothy J Gates on Behalf of Bright House Networks Information Services (Florida) LLC (March 26, 2010) ("Gates Direct Testimony") at Hearing Transcript ("T.") 58

post-hearing reply brief.[6] The Commission expressly considered those arguments. *See* Order at 2-3. And the Commission rejected them. *Id.* at 5. Accordingly, none of these arguments merits reconsideration. *See Sherwood*, *supra*, 111 So.2d 96 (mere reargument of matters that already have been considered is not a sufficient ground for reconsideration).

In an attempt to gin up a new contention that the Commission has not already addressed, Bright House repackages its argument and contends that the Commission "entirely overlooked the fact that, under the negotiated 'change in law' provision in the agreement, Verizon will be able to seek and obtain expedited relief from the Commission ...." Motion at 3. Of course, if the Commission has "overlooked" and not specifically addressed this argument, that is only because Bright House heretofore has not specifically raised it – which means that Bright House cannot raise it now as grounds for reconsideration.[7]

(arguing that the "Withdrawal of Services" provisions give Verizon the ability to walk away from contractual obligations whenever it "unilaterally decides"); Rebuttal Testimony of Timothy J. Gates on Behalf of Bright House Networks Information Services (Florida) LLC (April 16, 2010) at T.253 (claiming that the "Withdrawal of Services" language will "lead to numerous acrimonious disputes" and to uncertainty that "makes it impossible for Bright House to actually plan its business").

[3] *See, e.g.*, Prehearing Statement of Bright House Networks Information Services (Florida) LLC at 4 (alleging that the GTC § 50 language "would allow [Verizon] to unilaterally cease providing any and all of its contractual commitments").

[4] *See, e.g.*, T.421 (Ms. Johnson explaining Bright House's argument that, under the GTC § 50 language, Verizon would cease performing an obligation and the parties would return to the Commission for further proceedings).

[5] *See, e.g.*, Bright House Post-Hearing Br. at 44 (describing GTC § 50 language as allowing Verizon "to unilaterally decide that it can walk away from its duties"); *id.* (arguing that the "Withdrawal of Services" provisions would "trigger[] a storm of litigation and possibly serious disruption ..." and "precipitate immediate emergency litigation"); *id.* at 45 (referring to Verizon's "unilateral right" under GTC § 50).

[6] *See, e.g.*, Bright House Amended Post-Hearing Reply Br. at 17 (alleging that GTC § 50 leaves the scope of Verizon's ICA obligations to Verizon's "opinion").

[7] *See, e.g., In re: Request for Arbitration Concerning Complaint of American Communication Services of Jacksonville, Inc. d/b/a e.spire Communications, Inc., et al.*, Docket No. 981008-TP, Order No. PSC-99-1453-FOF-TP, 1999 Fla. PUC LEXIS 1143, *23 (July 26, 1999) (rejecting argument raised for the first time in motion for reconsideration; when issue is raised for first time on reconsideration, then Commission

In any event, this argument is nothing more than a variation of the claim Bright House has made throughout this proceeding – *i.e.*, that the agreed-upon "Change in Law" provisions in GTC § 4.6 are sufficient and the new "Withdrawal of Services" language in GTC § 50 is unnecessary.[8] In particular, Bright House argues that, in the event a Verizon legal obligation is eliminated, Verizon should proceed under the existing "Change in Law" language (GTC § 4.6), raise the issue with Bright House under the mandatory negotiation provisions in that section, and obtain Bright House's consent to stop providing the service or making the payment in question. Motion at 3. Bright House asserts that, "if there truly is nothing to negotiate, then Bright House will agree to termination of the service." *Id.* But, "[o]n the other hand, if ... Bright House disagrees," Verizon would have to seek relief from the Commission. *Id.* Bright House contends this is the appropriate way to proceed – rather than under the new "Withdrawal of Service" provision – because "Verizon has the ability to seek ... expedited relief under the agreed-to 'change of law' provision – an ability that seems not to have been considered by the Commission in any way." *Id.*

The Commission already rejected the version of this argument presented in Bright House's post-hearing brief. There, Bright House specifically argued that, pursuant to the "Change in Law" provisions of GTC § 4.6, "the parties have agreed that if applicable law changes, they will discuss the matter and amend the contract accordingly, with recourse to the Commission if they cannot agree on what the new

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did not overlook or fail to consider that issue in rendering its decision); *Devon-Aire Villas Homeowners Assoc. v. Americable Assocs., Ltd.*, 490 So.2d 60 (Fla. 3d DCA 1986) (declining to consider contention raised for the first time in motion for rehearing) (citing cases).

[8] *See, e.g.*, Gates Direct Testimony at T.60-61 (arguing that the situation addressed by the new GTC § 50 "is already covered by Section 4.6 of the General Terms").

legal regime requires." (Bright House Post-Hearing Br. at 44-45.) The Commission explicitly considered (Order at 2[9]) and rejected that argument. *Id.* at 5. Because Bright House failed to specifically raise (and, therefore, the Commission failed to specifically address) the point that such "recourse to the Commission" could be on an expedited basis means this twist on Bright House's argument cannot support reconsideration. But, in any event, the Commission ruled more broadly that Verizon did not have to pursue any recourse ***at all*** from the Commission. *Id.* Rather, the Commission held that, if Verizon does not have a legal obligation to provide a service or make a payment, it simply can stop providing the service or making the payment. *Id.* In that situation, there is no reason for Verizon to seek relief from the Commission and, therefore, no need for the Commission to consider whether Verizon could seek such relief on an expedited basis.

Accordingly, Bright House's Motion should be denied with respect to Issue 7.

III. THE COMMISSION CONSIDERED AND REJECTED BRIGHT HOUSE'S ARGUMENT THAT THE SECTION 251(C)(2) INTERCONNECTION REGIME APPLIES TO BRIGHT HOUSE'S EXCHANGE OF LONG-DISTANCE TRAFFIC WITH THIRD-PARTY INTEREXCHANGE CARRIERS.

Bright House asks the Commission to reconsider its decisions on Issues 24 and 36, which both involved Bright House's attempt to avoid paying the tariffed access charges that apply – and have always applied – to the transport facilities Bright House buys from Verizon to carry long-distance calls between Bright House and third-party interexchange carriers ("IXCs"). In the context of Issue 24, the Commission rejected Bright House's argument that it is entitled to obtain these ATC trunks at rates based on

[9] The Commission specifically noted Bright House's argument that the new "Withdrawal of Services" language in GTC § 50 "is unneeded in light of § 4.6 of the ICA, which establishes procedures to be followed by the parties in the event of changes in law." Order at 2.

total element long-run incremental cost ("TELRIC"), which would be much lower than the tariffed rates that Bright House and everyone else pays now for ATC trunks. With respect to Issue 36, the Commission denied Bright House's request for a unique exception to the industry rules requiring the parties to agree on the meet point for purposes of joint provision of access services to third parties; this exception would have forced Verizon to take on responsibility for transporting Bright House's IXC traffic.

The Commission rejected Bright House's novel, unprecedented theory that the ATC trunks Bright House buys to carry traffic between Bright House and IXCs are interconnection facilities for purposes of section 251(c)(2) of the Telecommunications Act (Order at 9-10); and the Commission correctly concluded that Bright House had confused the section 251(c)(2) local interconnection regime with the meet-point billing regime that applies to jointly provided access services. *Id.* at 14-15.

Bright House cites no point of law the Commission overlooked or failed to consider in rejecting Bright House's proposals -- nor could it, because there is no law supporting those proposals. There is no precedent for Bright House's conflation of meet-point billing arrangements with the Act's local interconnection regime; in fact, Bright House admitted that its proposal to unilaterally designate the meet point for joint provision of access services would, if adopted, be an exception to industry rules. *See* Bright House Prehearing Statement at 9; Gates Rebuttal Testimony, T. 230 n.29. And, as the Commission emphasized, Bright House could come up with no citations or references to any jurisdictions where its proposed TELRIC pricing scheme for ATC trunks is in place. Order at 7. Indeed, Bright House's proposal relies on an

interpretation of the FCC's rules that neither the FCC nor any state Commission has adopted in the Act's 14-year history. *See* Verizon Post-Hearing Br. at 15.

Bright House cites no facts the Commission overlooked or failed to consider, either. Instead, it asserts that the Commission ignored a Bright House argument, alleging that "there is no evidence in the Order that the Commission ever considered [the] central Bright House argument" that the traffic travelling over ATC trunks is "exchange access" within the meaning of section 251(c)(2). Motion at 5. Bright House insists that "there is no evidence from the face of the Order that our central statutory argument was ever considered by the Commission ***at all***." *Id.* at 6 (emphasis in original). Bright House claims further that the Commission did not cite section 251(c)(2) "and, indeed, never uses the key term 'exchange access' at all." *Id.* at 5.

None of this is true. The relevant portions of the Order repeatedly refer to "exchange access" (Order at 7, 11, 12, 14, 15) and repeatedly cite section 251(c)(2) (*id.* at 7, 9, 12, 15). And the Commission's recognition of Bright House's central argument could not have been more clearly stated:

> Integral to Bright House's argument regarding pricing for access toll connecting trunks is an assertion that the facilities are used to provide "exchange access." Bright House relies on 251(c)(2)(A) of the Act, which imposed on ILECs an interconnection obligation "for the transmission and routing of telephone exchange and exchange access."

Id. at 7.

The Order goes on to block quote Bright House's brief for its theory that because the ATC trunks are used to route third-party long-distance calls to or from Bright House's end users, these trunks "are provided in support of interconnection under

Section 251(c)(2)" and "are therefore subject to cost-based TELRIC pricing," instead of access charges. *Id.*

The Order, likewise, explicitly acknowledged Bright House's argument that section 251(c)(2) gives it the unilateral right to designate the meet point for exchange access traffic carried to and from third-party IXCs: "Bright House contends the statute does not make any distinction between 'exchange access' associated with a party's own toll traffic and exchange access associated with toll services provided to third-party IXCs." *Id.* at 12.

The Commission, therefore, plainly understood and considered Bright House's argument that if traffic transported over ATC trunks is "exchange access," section 251(c)(2)'s TELRIC pricing and other interconnection requirements apply to those trunks – and the Commission just as plainly rejected this novel theory. As the Commission pointed out, there is no dispute that "Verizon is obligated to interconnect its network with Bright House's network for the transmission and routing of telephone exchange service and exchange access at any technically feasible point within Verizon's network." *Id.* at 14. But there was no reason for the Commission to make any ruling about whether third-party access traffic sent over the ATC trunks fits the exchange access definition under section 251(c)(2), because it correctly found that these trunks are not used for section 251(c)(2) interconnection in the first place.

Under the Commission's analysis, the precise definition of the traffic travelling over the ATC trunks is not dispositive or even relevant. Bright House's theory on Issues 24 and 36 failed for the fundamental reason that provision of access service to a third party is part of the access regime, not part of the § 251(c)(2) interconnection regime. *Id.*

at 9-10, 14-15. If there is no exchange of traffic between Bright House and Verizon customers for purposes of section 251(c)(2) – and the Commission correctly determined that there is none in the case of the ATC trunks (*id.* at 10) – then it doesn't matter whether the traffic on those ATC trunks is exchange access or not. An ILEC's obligation under § 251(c)(2) is to link its network with the network of the requesting CLEC, so that their respective end users can call each other – that is, the mutual exchange of traffic between the CLEC and ILEC networks. *Id.* at 9; Verizon Post-Hearing Br. at 12-20. It is not to facilitate the CLEC's mutual exchange of traffic with a third-party long-distance carrier, which is and always has been the purpose of meet-point billing arrangements, rather than section 251(c)(2) interconnection arrangements. *See* Order at 15; Verizon Post-Hearing Br. at 32-37.

In short, the Commission clearly recognized the significance of Bright House's exchange access argument to Bright House's own analysis, but the Commission used a different (correct) analysis that did not rely on defining the traffic over the ATC trunks as exchange access or not. Bright House simply disagrees with the Commission's analysis, and Bright House's "feeling that a mistake may have been made" is not sufficient grounds for reconsideration. *See Stewart Bonded Warhouse, Inc.*, 294 So. 2d at 317. Bright House has cited no point of fact or law that the Commission overlooked or failed to consider, so its Motion must be denied.

IV. ORAL ARGUMENT ON BRIGHT HOUSE'S MOTION WOULD SERVE NO LEGITIMATE PURPOSE.

Bright House has offered no valid reason for the Commission to grant oral argument on its Motion. Contrary to Bright House's argument, the Motion raises no "nuanced and complex issues" that oral argument would help the Commission evaluate.

Bright House Amended Request for Oral Argument at 1. With respect to Issues 24 and 36, regarding ATC trunks, Bright House merely alleges that the Commission ignored Bright House's argument that the traffic travelling over ATC trunks is exchange access. As Verizon explained above, the Commission's consideration of that argument is plainly and repeatedly stated on the face of the Order; the Commission need only review the Order to verify whether Bright House is correct that the Commission overlooked its exchange access argument. There is nothing nuanced or complex about such a review.

With respect to Issue 7, concerning discontinuation of services Verizon is not required by law to provide, Verizon explained above that Bright House cited nothing in the record that the Commission overlooked; Bright House has, at most, merely repackaged an argument it made before and that the Commission rejected.

Once a party points out purported oversights – as Bright House has claimed it has in its Motion – all the Commission need do is review the Order and, if necessary, the record, to either correct that oversight or to confirm that it did not occur. Raising new arguments on reconsideration is improper, yet Bright House's request for oral argument suggests that is exactly what Bright House intends to do. Bright House claims that oral argument is necessary for the Commission to "deliberate on decisions with 'lasting impact on these companies, as well as broader implications on the market as a whole.'" *Id.* Bright House had ample opportunity to discuss the company and market impacts of the parties' proposals through hundreds of pages of testimony, a pre-hearing statement, a hearing, extensive discovery responses, and two post-hearing briefs – including the extraordinary filing of a reply brief. Whether Bright House intends to use oral argument to rehash that evidence and argument or raise new evidence or

argument, both tacks are impermissible on reconsideration. *See supra*, *Sherwood v. State*; *American Communication Services*; *Devon-Aire Villas*.

The Commission rulings Bright House challenges will, in any event, simply maintain the competitive and market balance that exists today – unlike Bright House's proposals, which would have tilted that balance sharply in Bright House's favor. The Commission declined to change the tariffed access pricing regime that has always applied to all carriers' purchases of ATC trunks – and that, in fact, Bright House itself applies to its own sale of such facilities. *See* Order at 9. As the Commission correctly concluded, "requiring TELRIC pricing for toll access connecting trunks would replace the current, balanced compensatory scheme with financial asymmetries that would benefit Bright House exclusively." *Id.* at 9.

The Commission's adoption of Verizon's "Withdrawal of Services" language in GTC § 50 of the parties' Interconnection Agreement is, likewise, a balanced solution that correctly recognizes that the interconnection agreement is not a voluntary contract, but that provides adequate protection to Bright House. *Id.* at 5. Further, this provision allowing Verizon to discontinue a service if the law eliminates Verizon's obligation to provide that service has no immediate impact on the companies – let alone "broader implications on the market as a whole" – and may, in fact, never be triggered at all.

The Commission should deny Bright House's Amended Request for Oral Argument, along with its Motion. Bright House gives no indication that it would do anything at oral argument other than re-argue points already in the record or try to introduce new evidence and argument into the record, both of which would be improper on reconsideration.

Respectfully submitted on December 27, 2010.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing were sent via electronic mail on December 27, 2010 to:

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